CURRENT LAW

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OF NEW LAW

VOLUME II.

FIRES TO WITNESSES

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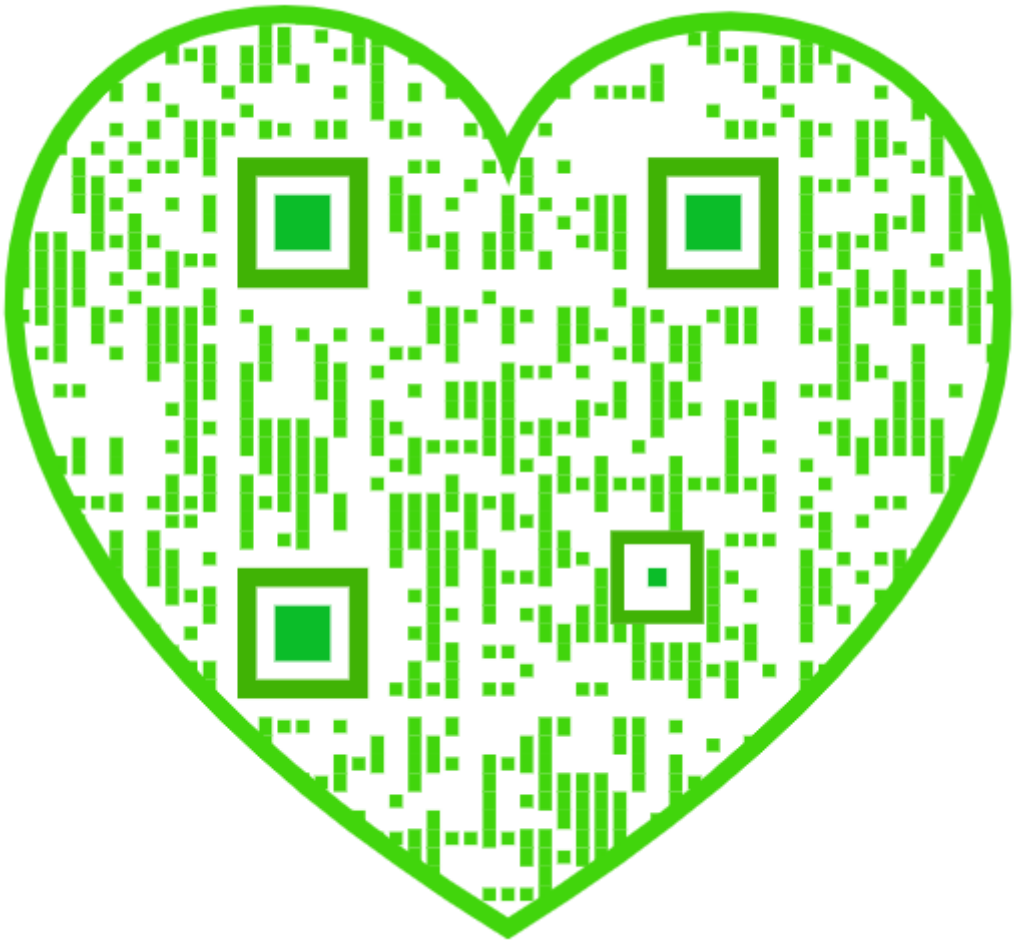

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CURRENT LAW.

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FIRES.[1]

§ 1. Liability for Loss (1).
§ 2. Who may Recover (3).
§ 3. Measure of Damages (3).
§ 4. Remedies and Procedure (3).

§ 1. *Liability for loss by fire; contributory negligence or assumption of risks.*[2] —Railroad companies are liable for fires started by locomotives unless they are properly equipped and operated;[3] or where property placed in their hands for carriage is negligently allowed to remain in danger of fire.[4] Negligence is not always necessary to make liability for railroad fires,[5] though a railroad company is not an insurer against fires occurring without negligence.[6] Failure of a train crew to leave their train to put out a fire in grass, started by the locomotive is not negligence.[7] Wrongful presence of property on railroad land is no defense to its willful destruction.[8] Where a fire was started in crops by a locomotive, and plaintiff, in trying to save property, was surrounded by fire and severely burned, defendant's negligence was not the proximate cause of such personal injuries.[9] An ordinance limiting speed of trains has no reference to duty of the railroad company regarding precautions against burning buildings near the track.[10] A private railroad com-

1. Fires feloniously set see Arson, 1 Curr. Law, p. 217.

2. Act June 25, 1836, amending charter of N. Y. P. & B. R. Co., and providing for liability for fires, covers all kinds of property burned. Spink v. N. Y., N. H. & H. R. Co. [R. I.] 54 Atl. 47.

A statute requiring railroad companies to keep their rights of way free of dry vegetation and undergrowth, violates neither the federal nor state constitution against taking private property for private use [Rev. St. 1889, § 2614, construed in light of 14th Amend. U. S. Const., and provision of Mo. Const.]. McFarland v. Miss. R. & B. T. R. Co., 175 Mo. 422.

3. White v. N. Y. Cent. & H. R. R. Co., 85 N. Y. Supp. 497; Louisville & N. R. Co. v. Sullivan Timber Co. [Ala.] 35 So. 327. Negligent operation of an engine, or operation of a defective engine is sufficient to show liability. Norfolk & W. R. Co. v. Perrow [Va.] 43 S. E. 614. Failure to use a certain kind of coal which lessened the danger of flying sparks was not negligence. Raleigh Hosiery Co. v. Raleigh & G. R. Co., 131 N. C. 238.

Evidence that the requirements of the statute had been complied with in equipping its locomotives and that they were properly operated, establishes a good defense. Lake Shore & M. S. R. Co. v. Wahlers, 24 Ohio Circ. R. 310.

The company need show only ordinary care in equipment of its engines with the most approved spark arrester in general use (St. Louis S. W. R. Co. v. Gentry [Tex. Civ. App.] 74 S. W. 607), and use of ordinary care to secure them and keep them in proper repair (St. Louis S. W. R. Co. v. Goodnight [Tex. Civ. App.] 74 S. W. 583; St. Louis S. W. R. Co. v. Gentry [Tex. Civ. App.] 74 S. W. 607), except in Kentucky, where the statute requires the best and most effectual spark arresters known and of practical use, properly adjusted [St. 1899, § 782] (Mills v. Louisville & N. R. Co. [Ky.] 76 S. W. 29). Where inflammable goods are placed near the track the company does not assume all risk from a properly equipped and operated engine. Texas & P. R. Co. v. Scottish U. N. I. Co. [Tex. Civ. App.] 73 S. W. 1088.

4. Allowing bales of cotton to stand on a platform near the track until the bagging came off, so that it was easily ignited by a passing engine, by reason of which a building burned, is negligence. Hamburg-Bremen F. Ins. Co. v. Atlantic Coast Line R. Co., 132 N. C. 75.

5. Under Rev. St. 1899, § 1111. Wabash R. Co. v. Ordelheide, 172 Mo. 436.

6. Creighton v. Chicago, etc., R. Co. [Neb.] 94 N. W. 527.

7. Galveston, etc., R. Co. v. Chittim [Tex. Civ. App.] 71 S. W. 294.

8. Norfolk & W. R. Co. v. Perrow [Va.] 43 S. E. 614.

9. Logan v. Wabash R. Co., 96 Mo. App. 461.

10. Louisville & N. R. Co. v. Sullivan Timber Co. [Ala.] 35 So. 327.

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pany is as liable for negligent fires as a public railroad company.[11] That a fire was caused by an engine of another company allowed to run on a railroad will not relieve the company owning the tracks.[12] Negligence is necessary to liability for fire resulting from sparks escaping from a saw mill.[13] Fires may be kindled on land for husbandry purposes, and no liability will result for damages in the absence of negligence.[14] Failure to keep, ready for use, appliances to extinguish fire is not negligence, where it is shown that the fire could not have been controlled with any equipment.[15]

A property owner may use his property in the ordinary and usual way without being charged with contributory negligence, and may assume that a railroad company will not be negligent;[16] but he must use "reasonable" diligence to reduce or prevent loss resulting from a fire negligently set.[17] He cannot be held guilty of contributory negligence because his buildings were easily inflammable or because he took no precautions in case of fire.[18] A shipper placing property near a railroad track,[19] under a custom allowed by the company, is not contributorily negligent;[20] but he is negligent if he, with knowledge of the circumstances, requests operations by the railroad resulting in fire.[21]

Contracts respecting liability.[22]—A contract between a railroad company and another, exempting the company from loss by fires, is not against public policy if the company does not contract as a public carrier;[23] nor is it unconstitutional.[24] Exemptions from liability from fires in a lease of a storage platform near a railroad will not bind one not in privity with the lessee storing goods thereon without knowledge of the exemptions.[25]

11. Timber road. Craft v. Albemarle Timber Co., 132 N. C. 151.

12. Jefferson v. Chicago & N. W. R. Co. [Wis.] 94 N. W. 289.

13. Gerrish v. Whitfield [N. H.] 55 Atl. 551.

14. The owner cannot be charged with negligence in not guarding against a whirlwind which carries the fire beyond control. Bock v. Grooms [Neb.] 92 N. W. 603.

15. Balding v. Andrews [N. D.] 96 N. W. 305.

16. He may use his property as though no railroad passed near to it. Cleveland, etc., R. Co. v. Tate, 104 Ill. App. 615. Mere failure of an owner of an inflammable structure on a street near a railroad to comply with an ordinance requiring the sidewalk to be swept without knowledge of plaintiff that engines were allowed to emit sparks in passing, will not prevent recovery from the railroad company for burning a building. Louisville & N. R. Co. v. Sullivan Timber Co. [Ala.] 35 So. 327.

17. Building destroyed by sparks from passing engine. Louisville & N. R. Co. v. Sullivan Timber Co. [Ala.] 35 So. 327. Need use only reasonable efforts to prevent loss and need not extinguish it as speedily as possible [sufficiency of instructions]. Indiana Clay Co. v. Baltimore, etc., R. Co. [Ind. App.] 67 N. E. 704. The owner of grain is not bound to guard against its destruction by fire from a defective threshing engine unless he knew or ought to have known the danger of fire from the defect (Civ. Code 1895, § 3830 applied). Mansfield v. Richardson [Ga.] 45 S. E. 269.

18. Pottery plant set on fire by locomotive. Indiana Clay Co. v. Baltimore, etc., R. Co. [Ind. App.] 67 N. E. 704.

19. Temporary storing of cotton, covered with tarpaulins, on lots adjoining a railroad, is not in law contributory negligence, where a watch is kept at all times and facilities provided for extinguishing fires. Ala. & V. R. Co. v. Sol Fried Co. [Miss.] 33 So. 74. Placing bales of cotton on an open platform 50 feet from the main track, is not such contributory negligence as will prevent recovery for its loss by fire. Louisville & N. R. Co. v. Short [Tenn.] 77 S. W. 936.

20. Where a railroad company had allowed growth of a custom of placing timber intended for shipment on the right of way, the owner was not guilty of contributory negligence in so placing it. San Antonio & A. P. R. Co. v. Home Ins. Co. [Tex. Civ. App.] 70 S. W. 999.

21. The fire resulted from plaintiff's negligence and failure to keep his contract respecting a side track. Mann v. Pere Marquette R. Co. [Mich.] 97 N. W. 721.

22. Under a contract for the sale of certain timber by a land owner giving the grantee the right to build railroads for its removal and use timber necessary for such work, the duty of protecting the property is upon the land owner, though the grantee had permitted brush and combustibles to accumulate on the road bed. Simpson v. Enfield Lumber Co., 131 N. C. 518.

23. Contract for construction of side track for shipper's convenience. Mann v. Pere Marquette R. Co. [Mich.] 97 N. W. 721. Contract for erection of building on right of way. Wabash R. Co. v. Ordelheide, 172 Mo. 436.

24. Wabash R. Co. v. Ordelheide, 172 Mo. 436.

25. Tex. & P. R. Co. v. Watson, 190 U. S. 287.

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§ 2. *Who may recover penalty or damages.*—Title in plaintiff is essential,[26] but an equitable title will support recovery,[27] Failure of a railroad company to comply with a statute requiring rights of way to be kept free from combustible material under pain of penalty is not an offense within a statute for recovery of penalties, and the state cannot sue for the penalty, but the landowner suffering injury may recover both penalty and damages.[28]

§ 3. *Measure of damages.*—The measure of damages for grass destroyed is its reasonable market value if it has one, if not, then its value for the purpose for which it was used; for a fence, the cost of labor and materials necessary to build an equally good fence;[29] for injury to soil or turf, the difference between the value of the land immediately before and after the burning;[30] to fruit trees and a hedge fence, the amount of damage, or the value of the trees or hedge destroyed, considered as a part of the realty;[31] for burning a meadow by a railroad engine, the cost of reseeding, and the rental value of land during unproductiveness for meadow purposes, as shown by productiveness of the remainder of the tract.[32] The amount plaintiff paid for his farm is immaterial.[33] Interest may be added to damages for fires set by railroads from date of the loss.[34]

§ 4. *Remedies and procedure. Pleading.*[35]—If the complaint alleges negligence it need not state the details thereof.[36] If it alleges negligence in permitting fire to escape to adjoining land and thence to plaintiff's land, it need not allege negligence in permitting escape from the adjoining land to land of plaintiff.[37] A complaint is not indefinite or uncertain as to the cause of action which charges negligent destruction of plaintiff's property by defendant's engine on a certain date.[38]

The evidence must conform to the allegations of the complaint.[39] Plaintiff

26. One employed to chop ties does not have title. Atlantic Coast Line R. Co. v. Baker [Ga.] 45 S. E. 673.

27. Possession by plaintiff of unindorsed warehouse receipts of cotton bought and paid for by his agent will vest title giving him right to sue for its destruction by a railroad company. Ala. G. S. R. Co. v. Clark, 136 Ala. 450.

28. Rev. St. 1889, § 2614 and Rev. St. 1899, § 2391. McFarland v. Miss. R. & B. T. R. Co., 175 Mo. 422.

29. Galveston, etc., R. Co. v. Chittim [Tex. Civ. App.] 71 S. W. 294.

30. Tex. Midland R. R. v. Moore [Tex. Civ. App.] 74 S. W. 942; Galveston, etc., R. Co. v. Chittim [Tex. Civ. App.] 71 S. W. 294.

31. Kan. City, etc., R. Co. v. Perry, 65 Kan. 792, 70 Pac. 876.

32. General rental values of lands in vicinity cannot be shown. Black v. Minneapolis & St. L. R. Co. [Iowa] 96 N. W. 984.

33. MacDonald v. N. Y., N. H. & H. R. Co., 25 R. I. 40.

34. Black v. Minneapolis & St. L. R. Co. [Iowa] 96 N. W. 984; Gulf, etc., R. Co. v. Sheperd [Tex. Civ. App.] 76 S. W. 800.

35. Sufficiency of special pleas of contributory negligence and assumption of risk under Code 1896, § 3286, in action for damages for burning of cotton stored in warehouse along defendant's right of way (Ala. G. S. R. Co. v. Clark, 136 Ala. 450); of plea of contributory negligence of plaintiff in not taking precautions to prevent burning of a building by a passing engine (Louisville & N. R. Co. v. Sullivan Timber Co. [Ala.] 35 So. 327).

Evidence that the fire department scattered a fire communicated by an engine, in attempting to extinguish it, does not require plaintiff suing the railroad company to show the particular part of the loss inflicted by the company. Ala. & V. R. Co. v. Sol Fried Co. [Miss.] 33 So. 74.

36. Pittsburgh, etc., R. Co. v. Wilson [Ind.] 66 N. E. 899. Damages for cotton burned in warehouse. Ala. G. S. R. Co. v. Clark, 136 Ala. 450.

37. Wabash R. Co. v. Lackey [Ind. App.] 67 N. E. 278.

38. Rev. Code 1899, §§ 5282, 5284. Johnson v. Great Northern R. Co. [N. D.] 97 N. W. 546.

39. Evidence of presence of combustible material on right of way inadmissible in absence of allegations of negligence in that regard. Noland v. Great Northern R. Co., 31 Wash. 430, 71 Pac. 1098. Evidence of previous fires and of conditions along a railroad conducive to fires may be shown on the issue of the cause, even including a burning over of the railroad land though the company could do as it pleased with the land. MacDonald v. N. Y., N. H. & H. R. Co., 25 R. I. 40. If the complaint raises no issue as to condition of appliances or as to the particular engine causing the fire, evidence, that other engines caused fires at other times than the one in issue, may be shown on the issue of cause. Noland v. Great Northern R. Co., 31 Wash. 430, 71 Pac. 1098. An allegation that defendant negligently operated its engine so as to allow the escape of sparks setting fire to timber on the right of way, is sufficient to allow proof of insufficient

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need only prove either of two acts of negligence charged, if such negligence was the proximate cause of loss.[40]

Presumptions and burden of proof; judicial notice.—Plaintiff has the burden of proving both the cause of the fire and defendant's negligence;[41] defendant, that his appliances were properly equipped and properly operated.[42] Where the evidence was conflicting as to the cause of a fire, that being the real issue, defendant need not show freedom from negligence.[43] Where fire is shown to have been started by a locomotive, negligence is presumed, and the railroad company has the burden of overthrowing the presumption.[44] If the inferences for and against a locomotive as the cause of a fire are equal in strength, no recovery can be had.[45] An engine operating on the tracks of a railroad company is presumably its property and being operated by it;[46] it may be properly concluded that a heavily loaded freight train passing up a grade will throw out sparks.[47] The unusually copious discharge of sparks is sufficient to warrant an assumption that the spark arrester was not in proper condition and that the company was negligent.[48] Judicial notice will be taken of the fact that a locomotive cannot be so constructed as to prevent entirely the escape of sparks.[49]

Admissibility of evidence; witnesses.[50]—Evidence of other fires in the vicinity at about the time of the fire in question, and from the same or a similar cause, may generally be shown,[51] unless the time is too remote.[52] Facts respecting opera-

consideration and equipment of the engine as well as of negligent operation. San Antonio & A. P. R. Co. v. Home Ins. Co. [Tex. Civ. App.] 70 S. W. 999.

40. Indiana Clay Co. v. Baltimore, etc., R. Co. [Ind. App.] 67 N. E. 704.

41. Balding v. Andrews [N. D.] 96 N. W. 305; Creighton v. Chicago, etc., R. Co. [Neb.] 94 N. W. 527. The burden is on plaintiff to show that fire resulted from absence of a proper spark arrester. White v. N. Y. Cent. & H. R. R. Co., 85 N. Y. Supp. 497.

42. Creighton v. Chicago, etc., R. Co. [Neb.] 94 N. W. 527.

43. Duckworth v. Ft. Worth & R. G. R. Co. [Tex. Civ. App.] 75 S. W. 913.

44. St. Louis S. W. R. Co. v. Goodnight [Tex. Civ. App.] 74 S. W. 583; Tex. Midland R. R. v. Moore [Tex. Civ. App.] 74 S. W. 942; Cleveland, etc., R. Co. v. Hornsby, 202 Ill. 138; Tex. S. R. Co. v. Hart [Tex. Civ. App.] 73 S. W. 833; Toledo, etc., R. Co. v. Needham, 105 Ill. App. 25; Rogers v. Kan. City & O. R. Co., 52 Neb. 86; Chicago, B. & Q. R. Co. v. Beal [Neb.] 94 N. W. 956; West Side Mut. F. Ins. Co. v. Chicago & N. W. R. Co. [Iowa] 95 N. W. 193; Raleigh Hosiery Co. v. Raleigh & G. R. Co., 131 N. C. 238; St. Louis, etc., R. Co. v. Lawrence [Ind. T.] 76 S. W. 254; Cleveland, etc., R. Co. v. Tate, 104 Ill. App. 615; Franey v. Ill. Cent. R. Co,. 104 Ill. App. 499.

Code, § 2056. Kennedy v. Iowa State Ins. Co. [Iowa] 91 N. W. 831.

45. Bates County Bank v. Mo. Pac. R. Co., 98 Mo. App. 330.

46, 47. Brooks v. Mo. Pac. R. Co., 98 Mo. App. 166.

48. Cincinnati, etc., R. Co. v. Caskey, 24 Ky. L. R. 2392, 74 S. W. 201.

49. The railroad company only becomes liable when it has negligently used an engine improperly equipped. White v. N. Y. Cent. & H. R. R. Co., 85 N. Y. Supp. 497.

50. Rulings as to admissibility of evidence. Chicago, B. & Q. R. Co. v. Beal [Neb.] 94 N. W. 956. Rules for employes excluded. Ala. G. S. R. Co. v. Clark, 136 Ala. 450.

Damages. Evidence of the amount plaintiff paid for his farm is immaterial. MacDonald v. N. Y., N. H. & H. R. Co., 25 R. I. 40.

51. If no direct proof appears as to origin of the fire. Galveston, etc., R. Co. v. Chittim [Tex. Civ. App.] 71 S. W. 294. Fires set by other engines similar in construction. Louisville & N. R. Co. v. Short [Tenn.] 77 S. W. 936. Where the particular locomotive alleged to have caused a fire is not identified, evidence of a similar fire set in the same place, shortly before, by a locomotive, is admissible. Cotton destroyed on platform of carrier for shipment. St. Louis, etc., R. Co. v. Lawrence [Ind. T.] 76 S. W. 254. Together with other evidence, it may be shown that another fire was set by sparks from a passing engine as far from the track as the house burned, on the issue whether the fire in question was caused in a similar manner. Mills v. Louisville & N. R. Co. [Ky.] 76 S. W. 29. Evidence that about the time of the fire and the passing of a locomotive alleged to have caused it, other fires appeared at points near by along the track, may be shown as tending to establish that the fire was caused by such locomotive and negligence in its construction and operation. Tex. & P. R. Co. v. Watson, 190 U. S. 287. Evidence that other like engines had been seen to throw sparks nearly as far as the hay stacks burned. Black v. Minneapolis & St. L. R. Co. [Iowa] 96 N. W. 984. Evidence as to other fires from the same engine at the same place, shortly after the fire in question in connection with evidence that other engines passed without causing fire, is admissible to rebut evidence that the engine blamed was in proper condition. Ala. G. S. R. Co. v. Clark, 136 Ala. 450. It may be shown that engines emitted great quantities of sparks and started many fires in the vicinity shortly before and dur-

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tion, or tending to show condition of a locomotive,[53] whether direct or circumstantial or both,[54] and opinions pointing to negligence as a cause may be heard.[55]

Title may be shown by warehouse receipts.[56]

Sufficiency of evidence.[57] *Instructions.*[58]—The court cannot charge as to con-

ing the time of the injuries sued for, and that cinders lay along the track and beyond the right of way, though the railroad employes testified that the engines which caused the fires were properly equipped. Ill. Cent. R. Co. v. Scheible, 24 Ky. L. R. 1708, 72 S. W. 325.

52. Evidence of defective condition of engine spark arresters during the winter before the fire is inadmissible. Toledo, etc., R. Co. v. Needham, 105 Ill. App. 25. Where a particular engine was identified as causing the fire, a witness cannot testify generally that defendant's engines threw out sparks on other occasions ten months before the fire. San Antonio & A. P. R. Co. v. Home Ins. Co. [Tex. Civ. App.] 70 S. W. 999.

53. Evidence of the volume and height of, sparks thrown from a locomotive while switching near a warehouse, is admissible in an action for burning cotton in the warehouse. In an action for damages from a fire caused by a passing engine, evidence that other engines at other times discharged an unjustifiable quantity or size of sparks may be shown to establish negligent construction of the particular engine. White v. N. Y. Cent. & H. R. R. Co., 85 N. Y. Supp. 497. Where it appears that sparks were thrown out by a passing engine and that the fire was caused thereby, and another fire as well in another field near by, and that the engine was using slack coal which was dangerous because of the dry weather and the season, there is sufficient to take the case to the jury. Glanz v. Chicago, etc., R. Co. [Iowa] 93 N. W. 575.

54. Pittsburgh, etc., R. Co. v. Wilson [Ind.] 66 N. E. 899. Evidence tending to show that such a mill as defendant's had thrown sparks as far as plaintiff's house was distant, must be given by plaintiff before resting. Under Court Rule 50 (56 N. H. 589) allowing only rebutting evidence to plaintiff after resting unless by permission of court. Gerrish v. Whitfield [N. H.] 55 Atl. 551. The defective condition of apparatus may be shown by witnesses who saw it at the time and place of the fire. Tex. & P. R. Co. v. Scottish U. N. I. Co. [Tex. Civ. App.] 73 S. W. 1083.

55. Expert testimony as to the liability of a locomotive, under certain circumstances, to throw out sparks and live cinders, there being evidence that the escape of sparks cannot be wholly prevented. Hypothetical state of facts based on the evidence. Tex. & P. R. Co. v. Watson, 190 U. S. 287, 47 Law. Ed. 1057.

Mere negative opinions as to the cause of the fire are rejected. Id.

56. Burned cotton. Ala. G. S. R. Co. v. Clark, 136 Ala. 450.

57. Sufficiency of evidence. Chicago, B. & Q. R. Co. v. Beal [Neb.] 94 N. W. 956; Rowan v. Wells, Fargo & Co., 80 App. Div. (N. Y.) 31. As to cause of fire. Bates County Bank v. Mo. Pac. R. Co. 98 Mo. App. 330; Black v. Minneapolis & St. L. R. Co. [Iowa] 96 N. W. 984; York v. Cleaves, 97 Me. 413; Peffer v. Mo. Pac. R. Co., 98 Mo. App. 291. To show that passing engine was cause of fire. Brooks v. Mo. Pac. R. Co., 98 Mo. App. 166; Ragsdale v. Southern R. Co., 121 Fed. 924; White v. N. Y. Cent. & H. R. R. Co., 85 N. Y. Supp. 497. To carry question of negligence to the jury. Craft v. Albemarle Timber Co., 132 N. C. 151; Balding v. Andrews [N. D.] 96 N. W. 305; Judd v. N. Y. & T. S. S. Co. (C. C. A.) 117 Fed. 206, rehearing granted, 118 Fed. 826; Carter v. Pa. R. Co. (C. C. A.) 120 Fed. 663; Brooks v. Mo. Pac. R. Co., 98 Mo. App. 166; Smith v. Long Island R. Co., 79 App. Div. (N. Y.) 171. To show that passing engine negligently fired timber deposited by plaintiff on defendant's right of way for shipment. San Antonio & A. P. R. Co. v. Home Ins. Co. [Tex. Civ. App.] 70 S. W. 999. As to proper appliances and skilful operation to rebut prima facie case for plaintiff requiring him to show negligence. Smith v. Mo., K. & T. R. Co. [Tex. Civ. App.] 73 S. W. 22. To raise issue as to condition and operation of engines. Norfolk & W. R. Co. v. Perrow [Va.] 43 S. E. 614. Plaintiff need only show the fire to have resulted from a spark from defendant's engine to establish negligence [3 Starr & C. Ann. St. (2d Ed.) p. 3294, c. 114, par. 123]. Cleveland, etc., R. Co. v. Hornsby, 202 Ill. 138. Proof of negligence in permitting emission of sparks from the locomotive is not alone sufficient. Indiana Clay Co. v. Baltimore, etc., R. Co. [Ind. App.] 67 N. E. 704. That railroad tracks and right of way were allowed to become covered with inflammable material, by which fire was carried through sparks from an engine to adjoining property, is sufficient evidence of negligence to carry the case to the jury. Livermon v. Roanoke & T. R. R. Co., 131 N. C. 527. Evidence of a train dispatcher that no train went out without orders, and that no order for a train appeared during the time when plaintiff's property was set on fire as shown by the records or the books of the conductor, is not conclusive evidence that no train was sent out. Brooks v. Mo. Pac. R. Co., 98 Mo. App. 166. That soon after an engine passed a fire started in a field covered with dry vegetation and ran before a high wind, will support a finding that the engine was the cause of the fire without a showing that live cinders were thrown out or that the engine was under more than ordinary strain. Kan. City, etc., R. Co. v. Perry, 65 Kan. 792, 70 Pac. 876. Where the particular engine causing a fire is not identified but there is sufficient evidence of defects as to particular engines to show responsibility of defendant, it cannot be said that there was no evidence of negligence as to such engines. St. Louis, etc., R. Co. v. Lawrence [Ind. T.] 76 S. W. 254.

58. **Sufficiency of particular instructions:** As to measure of damages for destruction of fences, grass and turf. Tex. Midland R. R. v. Moore [Tex. Civ. App.] 74 S. W. 942. As to plaintiff's care of property and precautions to prevent fire. Indiana Clay Co. v. Baltimore, etc., R. Co. [Ind. App.] 67 N. E. 704. Regarding finding as to condition of

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dition of appliances where the complaint charges no defects.[59] A charge that a prima facie case of liability for fire is made is not incorrect because a separate issue of contributory negligence was raised where it was properly submitted.[60] A charge under a special statute concerning liability for fires from engines, which properly limited recovery to damage from that source under the pleading and evidence, need not limit recovery to fires originating from sparks from the engine.[61]

Trial, findings and judgment.[62]—The manner of operation of engines alleged to have caused the fire, and the condition of spark arresters at the time, are questions for the jury, though witnesses for the company testified that the engines were examined the night of the fire, and the morning after, and found to be properly equipped and in proper condition.[63] An allegation of negligence of employes will not support a finding of use of defective apparatus.[64] A judgment against one of several defendants, after nonsuit as to the remainder, is conclusive as to the latter where they were parties to the record and defended.[65]

FISH AND GAME LAWS.

Legislation and regulations.[66]—The state has plenary power to regulate the kill-

defendant's appliances. Cleveland, etc., R. Co. v. Hornsby, 202 Ill. 138. As to negligence of property owner in failing to extinguish fire started on his land by a railroad locomotive. Franey v. Ill. Cent. R. Co., 104 Ill. App. 499. As to burden of proof in an action for damages from a fire set by sparks of a locomotive. Galveston, etc., R. Co. v. Chittim [Tex. Civ. App.] 71 S. W. 294. As to weight of evidence as disregarding the credibility of witnesses. Hutchins v. Mo. Pac. R. Co., 97 Mo. App. 548. As to character of spark arrester used on locomotive and its condition at time of the fire. Tex. & P. R. Co. v. Watson, 190 U. S. 287. As to liability of railroad company for failure to keep its right of way free from combustible materials resulting in burning of adjoining property. McFarland v. Miss. R. & B. T. R. Co., 175 Mo. 422. As to liability of railroad company for fires set by engines and as to assumption of risk by one placing property near the track. Tex. & P. R. Co. v. Watson, 190 U. S. 287, 47 Law. Ed. 1057. As to origin of fire alleged to have resulted from a locomotive as authorizing the jury to find for plaintiff if the locomotive caused the fire, without requiring a finding of negligence of defendant in regard to condition and operation of the locomotive and as shifting the burden of proof of the whole case to defendant. Mo., K. & T. R. Co. v. Florence [Tex. Civ. App.] 74 S. W. 802. Propriety and sufficiency of instructions under pleadings in action for damages from fire by sparks from passing engine. Louisville & N. R. Co. v. Sullivan Timber Co. [Ala.] 35 So. 327.

In an action for damages from a fire set by sparks from an engine the jury cannot be instructed to find for plaintiff if they find that sparks would not be thrown as far as they were thrown by the engine in question if properly constructed and operated, where there was evidence that at the time a high wind was blowing. Id.

An instruction that—if the jury find that the railroad company failed to cause the removal of inflammable material on its right of way, and that its agents or servants while operating a locomotive permitted fire to escape to such inflammable material near the road from which it escaped to adjoining premises and destroyed plaintiff's property, etc.,—is proper as requiring a finding that the fire began on the right of way and escaped to the adjoining property, and that the failure of the company to clear the right of way was the proximate cause of the fire. McFarland v. Miss. R. & B. T. R. Co., 175 Mo. 422.

An instruction that though the jury may believe from the evidence that the fire was caused by sparks from the locomotive, this will not show negligence of defendant unless it further appears that there was negligence in allowing the sparks to escape, is incorrect, since under the statute the fact that fire is set by a locomotive while on or passing a railroad, is prima facie evidence of negligence in the operation of such railroad. Franey v. Ill. Cent. R. Co., 104 Ill. App. 499.

59. Noland v. Great Northern R. Co., 31 Wash. 430, 71 Pac. 1098.

60. Tex. & P. R. Co. v. Scottish U. N. I. Co. [Tex. Civ. App.] 73 S. W. 1088.

61. Wilson v. Southern R. Co., 65 S. C. 421.

62. Sufficiency of answers by jury to interrogatories regarding defective appliances and negligent operation. Pittsburgh, etc., R. Co. v. Wilson [Ind.] 66 N. E. 899.

63. Ill. Cent. R. Co. v. Scheible, 24 Ky. L. R. 1708, 72 S. W. 325.

64. As against motion to make more definite. Mo., K. & T. R. Co. v. Garrison [Kan.] 72 Pac. 225.

65. Gerrish v. Whitfield [N. H.] 55 Atl. 551.

66. **Validity of statutes:** The California act is not void for plurality of subjects. Ah King v. Police Ct., 139 Cal. 718, 73 Pac. 587. The Illinois statute does not deny equal protection of the laws, nor does the provision giving half the fine to the informer invade the province of the executive. Meul v. People, 198 Ill. 258. The provision of the New Jersey act imposing a double penalty on a second conviction is inoperative because not expressed in the title. Hawkins v. American Copper Extraction Co. [N. J. Law] 54

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ing of game,[67] but concurrent jurisdiction over boundary waters does not allow either state to legislate as to fish in portion of such waters within the boundaries of the other.[68]

Offenses and prosecutions.[69]—The Illinois act includes not merely game birds but all birds ferae naturae.[70] Quail may not be killed out of season in Iowa even for scientific purposes.[71] A purchaser in good faith of deer and moose skins for tanning purposes acquires a valid title thereto, and in an action therefor against the game warden is not required to show that the animals were lawfully killed.[72] Occupancy of a tent in a yard temporarily by a hunter who other times slept on the porch of a crowded house, does not make him a camp hunter under the Arkansas laws.[73] It is no defense to a charge of killing a deer without horns under the Vermont laws that accused, intending to kill the animal, did not know that it was a deer without horns.[74] That fish were purchased during the open season is no defense to a prosecution for having possession of salmon during the closed season.[75] Justices of the peace have such jurisdiction as the statute gives.[76] An indictment is not objectionable by reason of omission of word "did" before the words "have in his possession" or the use of verbs in improper tense.[77] An information for hunting on enclosed and posted agricultural or grazing lands need not negative an exception in another section of the law applicable to enclosed and posted lands not used for grazing or agricultural purposes.[78] There must be proof that dynamite was used where explosion of dynamite as a means of catching fish is charged.[79] Cases as to quantum of proof are collected in footnote.[80] Cases relating to fines are collected in the note.[81]

The Michigan *laws authorizing confiscation* of nets in unlawful use contem-

Atl. 523. An act for the protection of "game" embracing quadrupeds and birds, especially song birds, is addressed to but one subject. McMahon v. State [Neb.] 97 N. W. 1035.

67. Equal protection of the laws is not denied by acts allowing the confiscation and sale of game illegally killed as the title of game is in the state [Hurd's Rev. St. 1899, p. 928]. Meul v. People, 198 Ill. 258. The pardoning power of the governor is not invaded by a provision giving the informer one-half the fines imposed as this power does not extend to the remission of vested interests of private persons in fines and penalties [Hurd's Rev. St. Ill. 1899, p. 925]. Id.

68. Roberts v. Fullerton [Wis.] 93 N. W. 1111.

69. Fish enclosed in a net or in any other enclosed place which is private property from which they may be taken at the pleasure of the owner are the subject of larceny. State v. Shaw, 67 Ohio St. 157, 60 L. R. A. 481.

70. Hurd's Rev. St. 1899, p. 922, and its title is not objectionable for plurality of subjects. Meul v. People, 198 Ill. 258.

71. Code, § 2561, prohibiting the killing of certain song birds and excepting cases of use of such birds for purposes of taxidermy does not authorize such killing. State v. Fields, 118 Iowa, 530.

72. Linden v. McCormick [Minn.] 96 N. W. 785.

73. Act Feb. 11, 1897, p. 26. Du Bose v. State [Ark.] 74 S. W. 292.

74. State v. Ward [Vt.] 56 Atl. 85.

75. People v. Haagen, 139 Cal. 115, 72 Pac. 836.

76. Justices of the peace have no jurisdiction of the violation of California laws punishing persons having possession of salmon during the closed season [Pen. Code, § 634]. People v. Haagen, 139 Cal. 115, 72 Pac. 836. In Texas a justice may not transfer to the county court a prosecution for unlawfully catching fish. Gill v. State [Tex. Cr. App.] 76 S. W. 575.

77. People v. Haagen, 139 Cal. 115, 72 Pac. 836.

78. Texas Acts 1899, p. 173, c. 102. Davis v. State [Tex. Cr. App.] 74 S. W. 909.

79. Gill v. State [Tex. Cr. App.] 76 S. W. 575.

80. **Under the Maryland Oyster Law** (Acts 1900, p. 652, c. 380, § 8) it is not necessary to cull over a whole cargo of oysters to find what per cent are below size. Dean v. State [Md.] 56 Atl. 481. Evidence that parties ordered quail and that a waiter stated that he would have to see about it, and after speaking to some one in the rear returned and served the order is not sufficient to show possession by defendant. People v. Dunston, 84 N. Y. Supp. 257. In a prosecution for taking certain birds for which there is no open season it must not only be shown that the birds are wild birds but are birds for which there is no open season. People v. Bootman, 40 Misc. (N. Y.) 27.

81. Five dollars fine for each prairie chicken in possession out of season not excessive. McMahon v. State [Neb.] 97 N. W. 1035. Commitment for non-payment of fine and costs upheld. Dean v. State [Md.] 56 Atl. 481. It is held in Maryland that a fine graded according to the amount of oysters unlawfully in possession may be imposed by the court on a general verdict which does not find the amount so possessed. Id.

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plate a trial of the action as to whether they have been taken in such use and whether they should be condemned.[82]

The New York game law allows a *civil action to recover penalty* in addition to criminal liability.[83]

Fishery rights.—An exclusive right of fishery on tide lands cannot be acquired by long use,[84] but in some states location of exclusive rights is provided for by statute,[85] and the owner of private waters has the exclusive right of fishery therein.[86] New Jersey provides for the establishment of free public fisheries in fresh water lakes on approval by the voters of the counties containing such lakes.[87] Damages are recoverable for forcible exclusion from public fishing grounds,[88] or for wrongful fishing in private grounds,[89] or negligent injury to nets;[90] but there can be no conviction for fishing in private waters unless state laws as to posting have been complied with.[91] In Maine a penalty is imposed for maintaining fish weirs upon another person's shore.[92]

Shooting rights.—The owner of land for the purpose of shooting has an interest in the soil and not a mere easement, and may maintain the action for unlawful shooting on such grounds.[93]

Oysters and clams.—The laws of Virginia allow a verbal application for an oyster planting location.[94] In Maryland there may be no private location of natural beds.[95] Private clam beds are authorized by the laws of North Carolina.[96]

82. Neal v. Morse [Mich.] 96 N. W. 14. Comp. Laws Mich. 1897, §§ 5754, 5755. A plea of guilty to the charge of illegal fishing will not warrant the order. Id.

83. Laws 1901, c. 91, § 39. People v. Bootman, 40 Misc. (N. Y.) 27. Not necessary that complaint in action for penalty should state that the case is not within the saving clauses of the act. Id. Not necessary to indorse a reference to the statute on the summons where complaint is served with summons, nor to recite or refer to statute in complaint, —it is sufficient if facts bringing the action within the statute are alleged. Id.

84. Pac. Steam Whaling Co. v. Alaska Packers' Ass'n, 138 Cal. 632, 72 Pac. 161.

85. A valid location cannot be made on ground occupied by another under a valid location. White Crest Canning Co. v. Sims, 30 Wash. 374, 70 Pac. 1003. An invalid location on such territory will not ripen into a valid location at the expiration of the prior license. Id.

86. The grantee of a pond without reservation has the exclusive right of fishery and may maintain trespass for an intrusion. Gibbs v. Sweet, 20 Pa. Super. Ct. 275. The owner of water in a non-navigable stream or pond or of the privileges therein has the exclusive right of fishery therein though the land thereunder belongs to another. Lee v. Mallard, 116 Ga. 18.

Note. Right to fish, whether public or private, the kinds of fisheries and the enjoyment and protection of such rights are exhaustively treated in a note to State v. Shaw [Ohio] 60 L. R. A. 481.

87. The title of the act (Laws 1901, p. 333) does not contain a plurality of subjects. Albright v. Sussex County L. & P. Commission, 68 N. J. Law, 523. Not local or special legislation within the constitutional inhibition. Id. Not essential that the question should be submitted at the next election after passage of the act, and the use being a public one, the exercise of the power of eminent domain is authorized. Id.

88. Loss of probable profits may be shown. Pac. Steam Whaling Co. v. Alaska Packers' Ass'n, 138 Cal. 632, 72 Pac. 161. Defendants may show a bona fide belief in title to fishery on question of punitive damages. Id. Plaintiff is not prevented from recovering punitive damages by reason of having committed a trespass at one time on defendant's lands above high water mark. Id. There is sufficient reason for plaintiffs desisting from further attempts to fish where they would be frustrated by force. Id.

89. Exemplary damages are recoverable under the New York laws for fishing in a private park, though stocked with fish procured from the state commission by another but without the owner's consent [Laws 1896, c. 319, p. 264]. Rockefeller v. Lamora, 85 App. Div. (N. Y.) 254.

90. One running a boat wantonly into fishing nets outside the regular channel having sufficient room for the boat is liable for damages. Hopkins v. Norfolk & S. R. Co., 131 N. C. 463.

91. A conviction for fishing on a private water way is not warranted where there has been a want of compliance with the law as to the number of notices to be posted and the prosecutor accepted part of the fish caught and furnished cooking necessaries to accused to cook fish retained. Valentine v. State [Miss.] 35 So. 170.

92. The Maine statute imposing a penalty for maintaining a fish weir below or beyond low water mark in front of the shore or flats of another allows the action where the weir is so near or is so situated with reference to complainant's shore that it injuriously affects his enjoyment of his rights as owner. The words "in front of the shore or flats of another" are not to be taken literally [Rev. St. Me. c. 3, § 63]. Dunton v. Parker, 97 Me. 461; Sawyer v. Beal, 97 Me. 356. The action is not to be defeated by the fact that a portion of the weir but not the larger portion is removed annually [Rev. St. Me. c. 3, § 63] Dunton v. Parker, 97 Me. 461.

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FIXTURES.

§ 1. *Definition.*—The word fixtures, though it would seem proper to apply it only to those chattels which have become part of the realty, is sometimes used in the opposite sense to signify those which may be removed.[97]

§ 2. *Annexation and intent. Requisites of the annexation.*—The intent with which an annexation is made is the test of the character of a chattel alleged to be a part of the realty.[98]

Indicia of intent.—The purpose, effect and manner of placing[99] the liability of serious injury to the realty from the removal of the chattel,[1] also whether the owner of the realty has at any time asserted a right to the chattel,[2] and whether the chattel sought to be held as realty could be used with equal efficiency in any establishment similar to that in which it is found,[3] and the nature of the occupancy of the land,[4] respectively show intent. It is immaterial, however, where the intent to annex is otherwise clear, whether the chattel would have to be taken apart in order to be removed and would necessarily suffer more or less damage in the process,[5] or whether the chattel, while annexed, was sold by the sheriff under execution sale as personal property.[6] So, also, proof of acts of the tenant after the annexation will not be admitted.[7]

Whether a chattel has become a part of the realty, or has remained personalty, is a mixed question of law and fact.[8]

93. Payne v. Sheets [Vt.] 55 Atl. 656.

94. Sinclair v. Quackenbush [Va.] 43 S. E. 354.

95. Code Pub. Gen. Laws Md. art. 72, § 46, allowing submission to a circuit court of question of appropriation of natural oyster beds only authorizes a summary decision as to existence of natural beds and the judge may not decide that a private location is void for any other reason. Travers v. Dean [Md.] 56 Atl. 388.

96. The beds must be laid off according to § 3391. State v. Goulding, 131 N. C. 715.

97. Cyc. Law Dict. "Fixtures," citing 40 N. Y. 287; 8 Iowa, 544.

98. Gunderson v. Kennedy, 104 Ill. App. 117; Jacoby v. Johnson (C. C. A.) 120 Fed. 487. In Friedly v. Giddings, 119 Fed. 438, a belt connecting the drive wheel with the main shafting, was held to be realty. In Page v. Urick, 31 Wash. 601, 72 Pac. 454, a house built on wooden shoes, resting on wooden blocks laid on the ground, the whole being in part on a city street and in part on an adjoining lot, was held personalty. Baker's tables, trays, etc., nailed to building held not leviable as personalty of grantor after conveyance. Taylor v. Plunkett [Del.] 56 Atl. 384. A chattel does not become a fixture unless (1) it is physically annexed, at least by juxtaposition, to the realty or some appurtenance thereof, (2) it is adapted to and usable with that part of the realty to which it is annexed, and (3) it was so annexed with the intention, on the part of the person making the annexation to make it a permanent accession to the realty. Hayford v. Wentworth, 97 Me. 347, and cases cited. See, further, Atl. Safe D. & T. Co. v. Atl. City Laundry Co., 64 N. J. Eq. 140; Bedford, etc., Stone Co. v. Oman (Ky.) 73 S. W. 1038.

99. Gunderson v. Kennedy, 104 Ill. App. 117. A bill to compel the restoration to plaintiff's land of a building removed therefrom by defendant, the builder, is demurrable if it fails to show the manner of the annexation. Bowie v. Smith [Md.] 55 Atl. 625. It is proper to consider whether the character of the annexation is such as to repel the presumption that it was intended to be merely temporary. Temple Co. v. Penn Mut. L. Ins. Co. [N. J. Law] 54 Atl. 295. An ordinary range attached to the house merely by stove pipes and water connections is not a fixture. Jennings v. Vahey, 183 Mass. 47. Compare In re Goldville Mfg. Co., 118 Fed. 892 and William Firth Co. v. S. C. L. & T. Co. (C. C. A.) 122 Fed. 569, where the court emphasizes the doctrine that where the intent to annex permanently is clear, the method of annexation is immaterial. Permanent stage appliances, opera chairs screwed fast, and a drop curtain placed in a theater by the controlling stockholder held fixtures. Murray v. Bender (C. C. A.) 125 Fed. 705. Mirrors spiked to wall held not fixtures though frames were painted to match room. Cranston v. Beck [N. J. Law] 56 Atl. 121.

1. Baker v. McClurg, 198 Ill. 28. Building addition is fixed when so attached that removal would injure main building and leave addition of little value. Holmes v. Standard Pub. Co. [N. J. Eq.] 55 Atl. 1107.

2. Conde v. Lee, 171 N. Y. 662.

3. Hillebrand v. Nelson (Neb.) 95 N. W. 1068.

4. Railroad structure on land of another is not fixture. Illinois Cent. R. Co. v. Hoskins, 80 Miss. 730, 92 Am. St. Rep. 612. Building is fixture when placed on land permanently and with intention of thereby adversely holding the land. Rotan Grocery Co. v. Dowlin [Tex. Civ. App.] 77 S. W. 430.

5. Baker v. McClurg, 198 Ill. 28.

6. Off v. Finkelstein, 200 Ill. 40.

7. Lord v. Detroit Sav. Bank [Mich.] 93 N. W. 1063.

8. Thomas v. Wagner [Mich.] 92 N. W. 106. Will not be disturbed by the appellate court. Ins. Co. of N. A. v. Buckstaff [Neb.] 92 N. W. 755. See, also, Swoop v. St. Martin, 110 La. 237.

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An agreement[9] *or an estoppel* as to the movable or fixed character of annexed chattels may arise against the landlord[10] or the tenant from the renewal of a lease without reservation.[11]

Third persons, though bona fide purchasers, do not become entitled to regard as fixtures that which by agreement is made a movable.[12]

§ 3. *A severance* does not result from the substitution of one for another annexed chattel.[13]

FOOD.[14]

The legislature has power to enact pure food regulations for the protection of the public.[15] The Department of Agriculture authorized to make regulations for sanitary inspection of oleomargarine cannot make such as are preventive of fraud.[16]

Offenses.[17]—Guilty knowledge is essential to the "willful" selling of bad food.[18] When a pure food statute adopts no purity standard, that of a standard book of formulae may be taken.[19] The sale of colored oleomargarine may be made unlawful, though it be sold for what it is.[20] The manufacture of a proscribed commodity is not legalized by an act licensing dealers and manufacturers.[21] Oleomargarine is not an "imitation" if the ingredients naturally produce a yellow color.[22] Vinegar may be an imitation, though made from apple products.[23] Corn

9. Silence of lease as to removal while authorizing construction of addition does not import a right of removal. Holmes v. Standard Pub. Co. [N. J. Eq.] 55 Atl. 1107. A boiler placed by a tenant in lieu of one which wore out and with a privilege of removal is not a fixture. Winner v. Williams [Miss.] 35 So. 308. Tenant forfeits right by accepting new lease which is silent. Champ Spring Co. v. Roth Tool Co. [Mo. App.] 77 S. W. 344; Nieland v. Mahnken, 85 N. Y. Supp. 809.

10. By acts or express agreements. A liberal construction will be given in favor of the tenant. Morrison v. Sohn, 90 Mo. App. 76; Peaks v. Hutchinson, 96 Me. 530; O'Brien v. Mueller, 96 Md. 134.

The fact that, by the removal of the chattel, the value of the realty would be seriously impaired, may be considered in determining the question of estoppel. Duntz v. Granger Brew. Co., 41 Misc. (N. Y.) 177.

11. Spencer v. Commercial Co., 30 Wash. 520, 71 Pac. 53.

12. Compare McCrillis v. Cole [R. I.] 55 Atl. 196. Peaks v. Hutchinson, 96 Me. 530. A transfer of the entire property by the owner of the land may in certain cases be deemed a conversion of the chattel. Smith v. Stoddard, 67 N. E. 980. The right of a party to remove a chattel apparently a part of the realty need not be recorded. Swoop v. St. Martin, 110 La. 237.

13. Richmond v. Freeman's Nat. Bank, 86 App. Div. (N. Y.) 152.

14. Consult the article Adulteration, ante, p. 27, as to the addition of foreign substances to food considered under the Pure Food Acts. Warranties of fitness of food for use, see Sales.

15. Beha v. State [Neb.] 93 N. W. 155. Norfolk City ordinance prescribing test for milk. Norfolk v. Flynn [Va.] 44 S. E. 717. An act (Ky. St. 1899, § 1724) prohibiting sale of milk of cows fed on still slop is valid though there is no proof that it is an unwholesome food for cows. Sanders v. Com. [Ky.] 77 S. W. 358. Ordinance for permit and inspection by board of health. Walton v. Toledo, 23 Ohio Circ. R. 547.

Subject of act held not double. State v. Great Western C. & T. Co., 171 Mo. 634. Penal laws held not repealed by act permitting licensing. Beha v. State [Neb.] 93 N. W. 155. An ordinance regulating "conveying" of milk for the purpose of selling same held not intended to operate beyond city limits and hence valid. Id. License fee used solely for purpose of maintaining inspection bureau held not a tax. Id. Law held not void for imposing a different test on milk offered by producer from that required in case of a mere vender. People v. Laesser, 79 App. Div. (N. Y.) 384.

16. It attempted to prohibit defacement of inspector's marks [Act May 9, 1902, construed]. U. S. v. Bohl, 125 Fed. 625.

17. Evidence sufficient to show that an "agent" for a foreign maker of oleomargarine was a "seller." Com. v. Leslie, 20 Pa. Super. Ct. 529. Addition of harmful preservatives, see Adulteration, ante, p. 28.

18. Veal less than four weeks old when killed. State v. Nussenholtz [Conn.] 55 Atl. 589.

19. E. g. The U. S. Pharmacopoeia. People v. Jennings [Mich.] 94 N. W. 216. Should not be construed to forbid the addition of matter intended to improve the product [Pure Food Law of 1895 construed]. People v. Jennings [Mich.] 94 N. W. 216.

20. People v. Meyer, 85 N. Y. Supp. 834.

21. Oleomargarine. People v. Meyer, 85 N. Y. Supp. 834.

22. Bennett v. Carr [Mich.] 96 N. W. 26. Perceptible shade of yellow makes it an imitation. People v. Phillips [Mich.] 91 N. W. 616.

23. Dried apple refuse soaked in water and colored. People v. Niagara Fruit Co. 75 App. Div. (N. Y.) 11.

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syrup offered as such with a little cane syrup added is "truly" and "appropriately" marked corn syrup, which is synonymous with glucose.[24]

Indictment and prosecution; Penalties.[25]—It need not be alleged that milk is an article of food.[26] When an increased punishment follows a second offense it must be pleaded.[27] Distinct sales, each bearing a penalty, must not be joined in one count, but be separately pleaded.[28]

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

§ 1. Civil Rights and Remedies.—A. Cause of Action (11). B. Procedure (12). § 2. Criminal Responsibility (14).

§ 1. *Civil rights and remedies. A. The cause of action.*—At common law, forcible entry "is the violently taking possession of lands and tenements with menaces, force and arms, and without authority of law."[29] It is quasi ex delicto in its nature.[30] The plaintiff must have had a right of possession at the time of the entry,[31] but it suffices if it be good only as against defendant.[32] Proof of force is necessary, and a merely unlawful but peaceable entry makes no case.[33] A tenant who after notice holds possession contrary to his lease is guilty,[34] likewise a sublessee holding without right,[35] or a purchaser at foreclosure sale who refuses a valid tender for redemption.[36] Unless it be concerted, a tenant is not liable who merely puts a stranger in at the end of the term.[37] Threats of force may work a "forcible ejection or exclusion."[38] An action of forcible entry and detainer cannot

24. Need not be marked "glucose." People v. Harris [Mich.] 97 N. W. 402.

25. Statute declaring sale of each package of milk to be separate offense does not mean that a single sale of several cans to one person shall be alleged as several sales [Agricultural Law, § 20]. People v. Buell, 85 App. Div. (N. Y.) 141. In Ohio trial is before justice without jury when no imprisonment follows. State v. Smith [Ohio] 68 N. E. 1044.

26, 27. State v. Smith [Ohio] 68 N. E. 1044.

28. Pleading which did not particularize each sale held bad. People v. Sheriff, 78 App. Div. (N. Y.) 46.

29. Griffin v. Griffin, 116 Ga. 754. One who enters under order of court makes no unlawful entry. Frantz v. Saylor [Okl.] 71 Pac. 217. Under California statute, forcible ejection relates back and vitiates a peaceable entry. Kerr v. O'Keefe, 138 Cal. 415, 71 Pac. 447.

30. Drew v. Mosbarger, 104 Ill. App. 635.

31. Frantz v. Saylor [Okl.] 71 Pac. 217. Not a mere pretense. Buck v. Endicott [Mo. App.] 77 S. W. 85.

32. A junior patentee, in possession, may maintain an action of unlawful detainer against one having no color of title, either by purchase or lease. Kirby v. Scott, 24 Ky. L. R. 2175, 73 S. W. 749; Bush v. Coomer, 24 Ky. L. R. 702, 69 S. W. 793. Right of plaintiff to possession before entry not in issue in Washington. Gore v. Altice [Wash.] 74 Pac. 556. It is sufficient if land is appropriated and used in such a way as to apprise the neighborhood that the land is in exclusive use and enjoyment of plaintiff. Eckert v. Wellmuenster, 103 Ill. App. 490.

33. Riley v. Catron [Ind. T.] 69 S. W. 908.

34. Lacrabere v. Wise [Cal.] 71 Pac. 175. Whether proper notice to quit has been given is for the jury to determine. Heller v. Beal, 23 Ohio Circ. R. 540. Under the California Code of Civ. Proc. (§ 1161, subd. 1) where an action is brought for unlawful detainer after the period of the lease has terminated, it is not necessary to the maintenance thereof that the statutory notice to quit necessary in cases of the termination of a tenancy at will shall have first been given. Earl Orchard Co. v. Fava, 138 Cal. 76, 70 Pac. 1073.

Notice served on wife is on "member of family over 16." Swanson v. Smith [Ky.] 77 S. W. 700. Purchaser from landlord need not exhibit deed to hold over tenant when demanding possession. The act requiring it when suing for rent does not apply. Tucker v. McClenny [Mo. App.] 77 S. W. 151. By failure to deny expiration of term right to notice to quit may be admitted away. Morris v. Healy Lumber Co. [Wash.] 74 Pac. 662. A statute dispensing with notice to perform covenants of a lease in order to fix a forfeiture does not dispense with statutory notice to quit [Code Civ. Proc. § 1161]. Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449.

35. Absence of consent to a subletting presumed from the fact that no authority to sublet was endorsed on a lease as provided by its terms. Berryhill v. Healey [Minn.] 95 N. W. 314. Holding is rightful under tenant who bought in at foreclosure sale against landlord. Moston v. Stow, 91 Mo. App. 554.

36. Demand on husband who is tenant in common with wife not good to cut off right to redeem. Harden v. Collins [Ala.] 35 So. 357. But he may show that he had made valuable improvements. Id.

37. St. Louis Brew. Ass'n v. Niederluecke [Mo. App.] 76 S. W. 645.

38. For which special damages are allowed. Wegner v. Lubenow [N. D.] 95 N. W. 442.

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be maintained where the object of the action is merely to recover rent alleged to be due by reason of the fact that the tenant has exercised his option to renew his term, and has entered upon such renewed term. The action should be to recover rent.[39]

The right to recover damages is sometimes given,[40] but in unlawful detainer only from the date of the demand for possession.[41] When, during the period of the lease, the lessor is guilty of forcible entry, damages therefor may be recovered by the tenant, even though, prior to the trial of the action, the lease has expired. Judgment for restitution in such case, however, will not, of course, be given.[42]

It is no defense that defendant is tenant under a void lease,[43] nor that a holdover tenant has begun adverse proceedings against the land.[44] As in other cases a tenant is estopped to deny his landlord's title,[45] but he may show that his detainer is lawful because the landlord has no right to possession.[46] The validity of an assignment of a lease is not material when the action is laid on a wrongful holding over after the term.[47]

B. Procedure. Practice.—The proceeding is expeditious and somewhat summary in its character.[48] It is within the discretion of the trial judge to grant separate trials to defendants.[49]

The action being legal in its nature,[50] the ultimate equitable rights of parties cannot be determined therein.[51] The question of title is not involved. The action may be maintained where the plaintiff can show that he was rightfully in possession.[52] A party may, however, prove his title in order to show that he was rightfully in possession, and the extent of such possession, the court properly instructing the jury with reference to the purpose for which the evidence was allowed.[53]

Parties.—The person entitled to possession at the time of the entry[54] or the

39. Brown v. Samuels, 24 Ky. L. R. 1216, 70 S. W. 1047.

40. Under Rev. St. Mo. § 3340 a judgment for twice the rental value of the premises for the period elapsing between the date when defendant should have vacated and the date of judgment, will be sustained. Hadley v. Bernero, 97 Mo. App. 314. Evidence of waste in removal of shafting, etc., for which recovery might be had. Champ Spring Co. v. Roth Tool Co. [Mo. App.] 77 S. W. 344.

41. Moston v. Stow, 91 Mo. App. 554.

42. Cutler v. Co-op. Brotherhood, 31 Wash. 680, 72 Pac. 464.

43. Lease for immoral purpose. King v. Wilson [Neb.] 95 N. W. 494.

44. Eminent domain. Morris v. Healy Lumber Co. [Wash.] 74 Pac. 662.

45. Ellis v. Fitzpatrick (C. C. A.) 118 Fed. 430. A purchase by the tenant of the title of the landlord at foreclosure sale, extinguishes the tenancy. In an action for unlawful detainer instituted thereafter, a subtenant may show such facts, and the execution of a lease from such purchasing tenant to himself. Moston v. Stow, 91 Mo. App. 554.

46. Defendant pleading fraud in a deed to plaintiff and in a lease back to defendant may show whole transaction and their relations; and need not sue to rescind. Simon Newman Co. v. Lassing [Cal.] 74 Pac. 761. Tenant may show that landlord's title became extinguished after entry so that detainer was lawful. Fry v. Boman [Kan.] 73 Pac. 61.

47. Armstrong v. Mayer [Neb.] 95 N. W. 483. Subleases without consent are no defense against lessor's grantee. Tucker v. McClenny [Mo. App.] 77 S. W. 151. Pleading defenses, see post, § 1 B.

48. Adkins v. Andrews [Neb.] 96 N. W. 228. In West Virginia action must be instituted within three years; after that action should be in ejectment. Billingsley v. Stutler, 52 W. Va. 92.

Statute allowing restitution before judgment on giving bond not lacking in "due process." Morris v. Healy Lumber Co. [Wash.] 74 Pac. 662.

Limitations: Action not barred by inaction of landlord for two years on tenant's default in payment of rent under lease from month to month indefinitely. Donahoe v. Mitchem [Okl.] 74 Pac. 903.

49. Levy v. David [R. I.] 52 Atl. 1080.

50. So in Indian Territory under Curtis Act and it cannot be transferred to equity side. Swinney v. Kelley [Ind. T.] 76 S. W. 303.

51. Anderson v. Ferguson [Okl.] 71 Pac. 225. Rents may be recovered in same action. Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440. Judgment is not bar to ejectment. Swanson v. Smith [Ky.] 77 S. W. 700.

52. Rosenberger v. Wabash R. Co., 96 Mo. App. 504; McGrew v. Lamb, 31 Wash. 485, 72 Pac. 100; Bush v. Coomer, 24 Ky. L. R. 702, 69 S. W. 793; Hill v. Watkins [Ind. T.] 69 S. W. 837; Kirby v. Scott, 24 Ky. L. R. 2175, 73 S. W. 749; Graham v. Conway, 91 Mo. App. 391.

53. Hewlett v. Hyden [Ind. T.] 69 S. W. 839.

54. Under the Code of Mississippi, an ac-

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forfeiture by a tenant[55] should sue. Parties under whom the tenant entered should be joined.[56]

Jurisdiction must be had according to the statute.[57]

Pleading.[58]—A complaint is sufficient if it recites the facts alleged to constitute the wrongful act in the language of the statute.[59] A mere allegation of ownership in fee by the plaintiff does not plead a possession.[60] Good pleading requires an allegation that the premises were unlawfully detained at the time of bringing action.[61] A description of the land, as in the deed of conveyance, and sufficiently definite to enable the officer, with the assistance of the plaintiff, to avoid mistake in regard thereto, will satisfy the requirements in an action of unlawful detainer.[62] Allegations of rent due at the time of bringing action go merely to the measure of the recovery and do not impair the complaint.[63]

After the criminal character of the action of unlawful detainer became somewhat modified by statute, the criminal prosecution and the civil remedy continued to be governed by the same rules.[64] It may still be requisite, therefore, under certain forms of statute, to allege facts sufficient to show that the case is one in which an action of that strict character may be brought.[65]

Under a statute which recognizes both the civil and the criminal character of an action in unlawful detainer and for restitution, an oral plea of not guilty will be deemed merely a denial of the general allegations of the complaint. In order to set up new matter by way of defense or in mitigation, the answer must be in writing.[66] Admission of plaintiff's possession will be implied from an answer which admits the making of the lease, and rests solely on the plaintiff's breach of certain covenants of the lease.[67]

The warrant should state the county in which are found the premises in controversy.[68] It does not change the cause of action to amend a writ by stating that plaintiff was in possession at the time of entry.[69]

tion of unlawful entry and detainer should be instituted by the tenant against a third party alleged to have unlawfully entered. It is at least clear, that if the action could be maintained by the owner of the land, the rightful tenant would have to be made a party. Hammel v. Atkinson [Miss.] 34 So. 225. By statute (Rev. St. 1899, §§ 3353, 3355) grantee may sue and prove his title. Id. Grantee who reserved right of possession. Tucker v. McClenny [Mo. App.] 77 S. W. 151.

55. Where a forfeiture is waived by the lessor, and the premises are subsequently conveyed, the grantee cannot maintain the action where alleged right so to do is based solely on such previous act of forfeiture. Small v. Clark, 97 Me. 304. The grantee of a lessor should sue when the tenant holds over. Drew v. Mosbarger, 104 Ill. App. 635.

56. Landlord who acquired title by tax sale is necessary party to action by owner claiming adversely. Cope v. Payne [Tenn.] 76 S. W. 820.

57. Filing answer to complaint before justice makes a "voluntary appearance." McAnish v. Grant [Or.] 74 Pac. 396.

58. Complaint sufficient under 2 Ball. Ann. Codes & St. § 5526. Gore v. Altice [Wash.] 74 Pac. 556. Allegation of ownership is needless [B. & C. Comp. § 5947]. Heiney v. Heiney [Or.] 73 Pac. 1038. Sufficient to plead a holding over [Rev. St. 1899, § 3321]. Tucker v. McClenny [Mo. App.] 77 S. W. 151.

59. Grosnameyer v. Coate [Okl.] 72 Pac. 377.

60. McGrew v. Lamb, 31 Wash. 485, 72 Pac. 100.

61. Champ Spring Co. v. Roth Tool Co., 96 Mo. App. 518.

62. Billingsley v. Stutler, 52 W. Va. 92. Amendment as to description is allowable. Evetts v. Johns [Tex. Civ. App.] 76 S. W. 778. Description sufficient. Id.

63. Ellis v. Fitzpatrick (C. C. A.) 118 Fed. 430. Where a statute authorizes a finding of the damages suffered by the plaintiff by reason of the detention, the court may, under a complaint praying for a specific amount of rent, the detainer having been after the default, ascertain in the same action the amount due in fact. Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440.

64. Griffin v. Griffin, 116 Ga. 754, where the court stated with reference to an action of this character that "the same rules as to the character of the force necessary should be applied to it as to the prosecution for the public wrong."

65. Eveleth v. Gill, 97 Me. 315, where the court held insufficient a general allegation that the estate of the tenant had been "determined" on a specified day.

66. Berryhill v. Healey [Minn.] 95 N. W. 314.

67. Malick v. Kellogg [Wis.] 95 N. W. 372.

68. Harmless error disregarded. Bush v. Coomer, 24 Ky. L. R. 702, 69 S. W. 793.

69. Hoffman v. Mann [Ky.] 75 S. W. 219.

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Enforcement of judgment.—In an action of unlawful detainer, plaintiff is entitled to execution under an alias writ where the officer failed to execute the first writ issued by reason of the inclemency of the weather and the physical condition of the wife of the defendant.[70] A tenant's right to pay into court the rent found due, and thereupon have restitution under the California Code, is confined to cases where action is based solely on breach of covenant to pay rent.[71]

A retention bond carries no liability in favor of the original plaintiff for a holding over after plaintiff conveyed all his interest.[72]

Objections to a notice to quit[73] or to legality of service of process may be waived if not seasonably taken.[74]

The right of new trial, appeal or other review and the practice thereon is usually specially defined.[75]

§ 2. *Criminal responsibility.*—At common law, an action of forcible entry and detainer was a criminal or quasi criminal process. It was permitted only where the entry and detainer were by the use of force.[76] Under the early English common law, forcible entry was an offense against the public.[77]

In an action constituting a mere prosecution for forcible entry, the description of the premises need not possess the particularity and definiteness requisite where the action is also for restitution.[78]

FORECLOSURE OF MORTGAGES ON LAND.

§ 1. By Scire Facias or Executory Process (14).
§ 2. Sale by Trustee under Deed or Power.—A. Right to Sell (15). B. Notice (15). C. Sale (16). D. Costs and Fees (17). E. Defective Foreclosures and Rights under Them (17).
§ 3. Strict Foreclosure (18).
§ 4. Foreclosure by Action and Sale.—A. Right of Action (18). B. Parties and Process (20). C. Pleading, Trial and Evidence (21). D. Decree or Judgment (24). E. Sale (26). F. Deficiency (31). G. Receivership (33). H. Distribution of Proceeds (35). I. Effect of Proceedings (36). J. Costs (37).
§ 5. Redemption (37). Right Time; Amount; Mode; Action to Redeem; Effect.

§ 1. *Foreclosure by scire facias or executory process.*—A notice of demand in a proceeding via executiva need not embody all the information contained in the petition for the writ of seizure.[79] The sheriff must sell in accord with the

70. Dieckman v. Weirich, 24 Ky. L. R. 2340, 73 S. W. 1119.

71. Does not exist where the action is for breach of other covenants. Bateman v. Superior Ct., 139 Cal. 140, 72 Pac. 922.

72. Brooks v. Buir [Ark.] 70 S. W. 464. Liability on appeal bond ceases only when defeated appellant makes restitution but amount recovered on a supersedeas bond may be deducted. Penny v. Richardson [Okl.] 71 Pac. 227. It is no defense to a bond by defendant in "summary proceedings" that plaintiff who recovered the judgment contemplated was not the real party in interest. Curtiss v. Curtiss, 182 Mass. 104.

73. Waived by failure to object below and standing on defense of an extension by parol. Snyder v. Porter [Neb.] 95 N. W. 1009.

74. Appearance and defense on the merits waives right to question service. Forsythe v. Huey [Ky.] 74 S. W. 1088.

75. In Nebraska, prior to 1901, appeal to the district court did not lie from a judgment rendered by a justice of the peace in forcible entry and detainer. Sullivan v. Haight [Neb.] 96 N. W. 487; Sullivan Transfer Co. v. Paska [Neb.] 96 N. W. 163. In Minnesota, an appeal to the supreme court in an action of unlawful detainer entered in the municipal court of the city of Stillwater, must proceed in harmony with the provisions of Gen. St. 1894, c. 86, determining the mode of appeal to said court. Watier v. Buth, 87 Minn. 205. Proceedings in District Court are reviewable only by certiorari. Johnson v. Booge [N. J. Law] 56 Atl. 238. Ten days' notice of appeal required. American Brass Mfg. Co. v. Philippi [Mo. App.] 77 S. W. 475. It should be speedily given and there is no conflict in the statutes between the statutory time for return of appeal and that for ten days' notice. Id. And for delay in prosecution (ten months) may be dismissed. Id.

New Trial. General statutes for new trial held inapplicable where the forcible entry act provides for a traverse of inquisition by aggrieved party. Swanson v. Smith [Ky.] 77 S. W. 700. Moving for relief from judgment not a waiver of right to assail it by moving for new trial. Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449.

76. Eveleth v. Gill, 97 Me. 315.

77. Griffin v. Griffin, 116 Ga. 754.

78. Peelle v. State [Ind.] 68 N. E. 682.

79. It is enough that the debtor be notified in the manner provided by law that a demand for the writ of seizure has been made for the satisfaction of a claim suffi-

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terms of the writ.[80] A judgment on scire facias is conclusive against all persons served either as defendants or terre-tenants.[81]

§ 2. *Sale by trustee in deed or under power. A. Right to sell.*—In certain states foreclosures by sale under power in the mortgage or by trustee in trust deeds are not recognized.[82] The rule differs as to the right to sell after the grantor's death,[83] or that of one assuming the mortgage.[84]

Negligence of recording officer in failing to record the power of sale will not invalidate a foreclosure by advertisement.[85] If a substitution of trustees must be recorded, it is necessary that a change in the trustee, who is such ex-officio as treasurer of a corporation, appear of record.[86] A default may consist in the nonpayment of interest or any part thereof when due if the mortgage so provides, though it is silent as to default in an instalment of principal.[87] Limitations of actions in personam do not bar the right to sell under a power,[88] nor do limitations applicable to mortgage foreclosures.[89]

Substitution of a trustee must rest on some failure of duty,[90] under the terms of the deed.[91]

In proceedings to enjoin the exercise of a power of sale, for the reason that it will constitute a cloud on title, it must be shown how they will so operate.[92] The power cannot be exercised after bill filed to protect equity of redemption by an accounting and redemption.[93]

A wife may execute an antenuptial power to foreclose without joinder of her husband.[94]

(§ 2) *B. Notice.*—Provision as to notice of sale under deeds of trust must

ciently described to identify it. Rogers v. St. Martin, 110 La. 80.

80. Sale may be enjoined if his advertisement offered to sell for cash alone and the writ commands him to sell for cash in part and on credit for the balance. Rogers v. St. Martin, 110 La. 80.

81. Terre-tenants cannot as against a purchaser assert a satisfaction of record. Saint v. Cornwall [Pa.] 56 Atl. 440.

82. Staunchfield v. Jenter [Neb.] 96 N. W. 642. An attempted sale in that way is in Nebraska absolutely void as between the parties and as to all persons having notice from the recitals of the instrument itself or by any other means of the purpose for which the instrument sought to be enforced was executed. Cullen v. Casey [Neb.] 95 N. W. 605.

83. May sell in Montana without reference to the administration of the grantor's estate [Code Civ. Proc. § 2603]. Muth v. Goddard [Mont.] 72 Pac. 621. In Texas even an express power is revoked by the death of the mortgagor so far as to prevent sale pending administration or while administration may be had. Tex. Loan Agency v. Dingee [Tex. Civ. App.] 75 S. W. 866.

84. Transfer by a husband to his wife of land subject to a purchase money mortgage, she assuming one-half the mortgage debt, causes the power of sale to be revoked on the wife's death, necessitating the land to be subjected to payment of the debt in the course of administration on her estate, and this though the debt being for purchase money has precedence over other debts. Whitmire v. May [Tex.] 72 S. W. 375.

85. Comp. Laws 1887, § 3272, provides that an instrument is deemed to be of record when deposited for record. Shelby v. Bowden [S. D.] 94 N. W. 416.

86. Under Laws 1896, p. 105, a change in a corporation's treasurer must be recorded to validate a sale under a deed of trust to the treasurer of a corporation, though the deed provides that upon any other person becoming treasurer, he shall by such fact become the trustee. Shipp v. New South Bldg. & Loan Ass'n [Miss.] 32 So. 904.

87. The provision respecting default in principal was erased. Dalton v. Eaves, 92 Mo. App. 72.

88. Menzel v. Hinton, 132 N. C. 660; Cone v. Hyatt, 132 N. C. 810.

89. Miller v. Coxe, 133 N. C. 578.

90. Request is prerequisite if terms require it and until trustee has failed to act on request there is no power to appoint a substitute and the acts of the substitute are void. Bemis v. Williams [Tex. Civ. App.] 74 S. W. 332.

91. **Soubstitution of a trustee** in case of "default, refusal or disqualification," is not authorized where default was at the request of the creditor, or the trustee failed to signify acceptance (creditor after such requested default appointed his brother as trustee who made sale). Bracken v. Bounds [Tex.] 71 S. W. 547.

92. Not sufficient to aver that the sale was being advertised in a newspaper not authorized for such purposes, without a showing of the character of the trust, the nature of the sale, or the manner in which it would affect plaintiff's title. Wilson v. Gray, 97 Mo. App. 632.

93. Nat. Bldg. & Loan Ass'n v. Cheatham, 137 Ala. 395.

94. Lide v. Park, 135 Ala. 131.

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be strictly followed.[95] The debtor's nonresident attorney in fact[96] or subsequent purchasers or encumbrancers are not entitled to notice.[97]

(§ 2) *C. Sale.*[98]—The sale must be honestly conducted so that the best price may be realized.[99] Sales are not vitiated by non-prejudicial defects.[1] Separate sales of distinct tracts under one mortgage,[2] or a sale of the property as a whole, where the trustee is given an alternative as to a sale in parcels or in gross, are not abuses of discretion.[3] The latter is merely voidable for good cause though one of several distinct tracts constituted a homestead.[4] Sale in the mortgagee's absence though at the time specified by his notice cannot be made at the mortgagor's instance,[5] and resale thereupon had is not invalidated by the fact that the mortgagor leaves the place of sale after the first sale, if there are no bidders who disperse before the second sale is made or who are deterred from bidding.[6] A sale properly made is not invalidated as to one mortgagor, by failure of another to perform acts which might have prevented foreclosure.[7]

The mortgagor,[8] or a corporation of which the trustees are stockholders and directors,[9] may purchase.

If the sale is made with the understanding that it is for cash it will not be invalidated by a subsequent agreement by the creditor to extend credit.[10] A mortgagee executing the power is not bound to protect subsequent incumbrancers' rights in any surplus.[11] The purchaser is not bound to see that the money is applied by the trustee to the debt.[12]

Setting aside sale.[13]—The status of one complaining of a trustee's sale under

95. Where three notices are required, it is not sufficient to post a notice at the courthouse door and on adjoining corners of the court-house square, since such notices are practically in the same place, and a sale for an inadequate price will be set aside. Nat. Loan & Inv. Co. v. Dorenblaser, 30 Tex. Civ. App. 148. Thirty days' notice previous to sale, satisfied by publication in a newspaper once a week during such period. Atkinson v. Wash. & J. College [W. Va.] 46 S. E. 253. The fact that a paper is not issued on Sunday does not prevent it from being a daily paper [Act 1902, p. 213, c. 92] (Wilson v. Petzold [Ky.] 76 S. W. 1093) though publication is to be for consecutive days (El Paso v. Ft. Dearborn Nat. Bank [Tex. Civ. App.] 71 S. W. 799.) Signature to notice of sale as "mortgagees" instead of assignees of the mortgage, is not fatal. Babcock v. Wells, 25 R. I. 23.

Evidence that the attorney in contracting for publication of trustee's notice of sale, said it could be put in any place and the fewer that saw it the better, does not render the sale illegal. Nations v. Pulse, 175 Mo. 86. Failure to post notice must be established to be a ground for setting aside. Atkinson v. Wash. & J. College [W. Va.] 46 S. E. 253.

96. 97. Atkinson v. Wash. & J. College [W. Va.] 46 S. E. 253.

98. See Frauds, Statute of, for necessity of written memorandum of sale.

99. Dwyer v. Rohan, 99 Mo. App. 120.

1. Failure to make report required by Code 1899, c. 87, § 3, is not fatal. Atkinson v. Wash. & J. College [W. Va.] 46 S. E. 253. Where a sale is opened before the expiration of the hour advertised, it is not invalidated by the fact that it was not completed within the hour by reason of a delay taken to notify the mortgagee's agent in order that he might be present. Simonton v. Conn. Mut. L. Ins. Co. [Minn.] 95 N. W. 451.

2. Babcock v. Wells, 25 R. I. 23.

3. Nat. Loan & Inv. Co. v. Dorenblaser, 30 Tex. Civ. App. 148.

4. Phelps v. Western Realty Co. [Minn.] 94 N. W. 1085.

5. A sale so made cannot be regarded as merely voidable where the mortgagee repudiates the acts of the sheriff. Simonton v. Conn. Mut. L. Ins. Co. [Minn.] 95 N. W. 451. Equitable relief cannot be granted a mortgagor who attempts to have such a foreclosure sale sustained in order that he may prevent the application of property to the mortgage debt on payment of the same percentage of its value. Id.

6. Simonton v. Conn. Mut. L. Ins. Co. [Minn.] 95 N. W. 451.

7. Nations v. Pulse, 175 Mo. 86.

8. Though the mortgagee is a trustee for him. Coleman v. McKee, 24 R. I. 596.

9. Especially where the corporation as holder of the debt secured, had by the express terms of the deed, the right to purchase. Herbert Kraft Co. v. Bryan [Cal.] 73 Pac. 745.

10. Atkinson v. Wash. & J. College [W. Va.] 46 S. E. 253.

11. Need not examine the record to ascertain such incumbrances, and assumpsit cannot be maintained against him by a judgment creditor of the mortgagor. Norman v. Hallsey, 132 N. C. 6.

12. Where the trust deed expressly makes such provision. Mosca Mill & Elev. Co. v. Murto [Colo. App.] 72 Pac. 287.

13. Evidence held to justify the setting aside of a trustee's sale on the ground of surprise, unfairness and undue advantage taken of the mortgagor. Elmslie v. Mayor [Miss.] 35 So. 201.

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a power is the same as that of one complaining of an unconfirmed judicial sale.[14] Inadequacy of price is not alone sufficient,[15] unless so great as to shock the conscience.[16] The maker of the deed may still insist that the trustee cannot purchase at the sale though the property has been transferred to one who assumed the debt.[17] Where the purchaser is not, by connection with the deed of trust, charged with any responsibility for the regularity of the trustee's proceedings, the burden of showing defects or irregularities of the sale is on the party asserting them.[18] The trustee's deed is admissible to show proper execution of the power, where it stipulates that its recitals shall be prima facie evidence of facts stated.[19]

Ratification.—The mortgagor may ratify a sale by recognizing its validity,[20] but he cannot affect the rights of his previous grantee.[21] An acceptance of the proceeds is a ratification.[22]

(§ 2) *D. Costs and attorney's fees.*—Counsel fees should not be allowed unless it is shown that they were necessary to the proper performance of the trustee's duties.[23] The trustee is not entitled to attorney's fees provided for in mortgage notes where he collects them by sale under the power.[24] Auctioneer's charges cannot be allowed a trustee unless arranged for in advance,[25] and it has been held that such fees must be paid by the trustee.[26] A statement of the principal and interest due does not estop the trustee from claiming an additional amount as commission.[27]

(§ 2) *E. Defective foreclosures and rights under them.*—Defective foreclosures under power may be validated by curative acts.[28] If the trust deed provides that a conveyance by the trustee shall be conclusive against the grantor, such a deed will be conclusive in an action involving only the legal title though perhaps the fairness of the sale might be inquired into in equity.[29]

A sale in accordance with law and the deed of trust vests in the purchaser an equitable title on payment of the purchase money, though the trustee is not qualified to execute a deed by reason of his authority not having been in writing.[30]

If the mortgagee purchase without authority he is bound to account only as a mortgagee in possession.[31] A purchaser under a deed of trust cannot be dispossessed by the mortgagors until payment of the debt secured.[32]

14. Atkinson v. Wash. & J. College [W. Va.] 46 S. E. 253.

15. In determining the question of fairness, if it is admitted that other property was received by the mortgagees in payment of the debt, the value of such property must be shown. Babcock v. Wells, 25 R. I. 23.

16. The bill must contain an offer to pay a larger price or guarantee that such price will be obtained on a resale. Atkinson v. Wash. & J. College [W. Va.] 46 S. E. 253. A sale of property for a nominal sum and a re-sale for forty times as much shows a wrongful appropriation of the security. Dwyer v. Rohan, 99 Mo. App. 120.

17. Dwyer v. Rohan, 99 Mo. App. 120.

18. Atkinson v. Wash. & J. College [W. Va.] 46 S. E. 253. Plaintiff seeking to set aside a trustee's deed on the strength of collateral facts must prove them. Mosca Mill. & Elev. Co. v. Murto [Colo. App.] 72 Pac. 287.

19. Recital that an application to the trustee for sale was made, places burden on the holder of the notes to show the contrary. Mosca Mill. & Elev. Co. v. Murto [Colo. App.] 72 Pac. 287.

20. Repurchasing. Phelps v. Western Realty Co. [Minn.] 94 N. W. 1085.

21. Bemis v. Williams [Tex. Civ. App.] 74 S. W. 332.

22. Though counsel advised otherwise and thereafter neither the mortgagor nor the creditor can urge that the trustee sold without request. Norwood v. Lassiter, 132 N. C. 52.

23. Duffy v. Smith, 132 N. C. 38.

24. The notes previously having been placed in the hands of a firm of attorneys of which the trustee was a member. Elkin v. Rives [Miss.] 35 So. 200.

25. Smith v. Olcott, 19 App. D. C. 61.

26, 27. Duffy v. Smith, 132 N. C. 38.

28. Foreclosure sale made in 1874 held validated by curative acts of 1883, 1889, Gen. St. 1894, §§ 6054, 6055. Johnson v. Peterson [Minn.] 97 N. W. 384.

29. Mersfelder v. Spring, 139 Cal. 593, 73 Pac. 452.

30. Daniel v. Garner [Ark.] 76 S. W. 1063.

31. Not chargeable with the rental value but only with the actual receipts or what should have been received under the exercise of reasonable diligence and should be credited with costs of sale. Nat. Mut. Bldg. & Loan Ass'n v. Houston [Minn.] 32 So. 911.

32. Daniel v. Garner [Ark.] 76 S. W. 1063; Chambers v. Bookman [S. C.] 46 S. E. 39.

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§ 3. *Strict foreclosure* cannot be had against the owner of the legal title to the mortgaged premises,[33] or of an equitable mortgage.[34]

§ 4. *Foreclosure by action and sale. A. Right of action.*—Though by statute foreclosure proceedings are provided which are adjudged to be an action at law, nevertheless a proceeding for foreclosure may be regarded as in equity where the questions presented are not such as may be adjudicated at law.[35]

Default must precede the bill.[36] Under some statutes, the mortgage need not express the right to foreclose for default in interest.[37] The provision may be made in a renewal note.[38] Acceptance of payment of a second coupon does not prejudice foreclosure begun on default in a first interest coupon.[39] Default in payment of a note given in payment of interest due warrants foreclosure.[40]

A mortgagee may be estopped to foreclose, where by his conduct he has led the mortgagor to believe that the time for payment of the debt was extended,[41] but extension does not remove the right to declare the entire debt due on failure to pay interest and taxes.[42]

Foreclosure may be had for breach of covenants to insure or repay expenditures for insurance and abstracts of title.[43]

An option to declare the entire debt due is removed by tender before its exercise,[44] by receipt of the overdue interest without objection.[45] Notice of election is waived by the mortgagor, if he absent himself from his usual residence, without making any provision by which he may be found, or notifying the mortgagee.[46] Filing the bill is sufficient exercise of the option.[47] A trustee may foreclose on default in interest without complying with other provisions in the deed relating to an election by a majority of the bond holders, to declare the principal sum due.[48]

Title of mortgagor necessary to suit.—Where a mortgage is executed jointly and one of the mortgagors is entitled to a homestead exemption, the interest of the other may be sold.[49] A mortgage may be foreclosed on a remainder, though there is a possibility that it may be devested before determination of the particular estate.[50]

Foreclosure may be had on cross bill in a suit to quiet title despite the uncertainty as to title in plaintiff.[51]

Suspension and stay.—Foreclosure proceedings are not within statutes for-

33. South Omaha Sav. Bank v. Levy [Neb.] 95 N. W. 603.

34. Conveyance absolute in form intended to secure a loan. McCaughey v. McDuffie [Cal.] 74 Pac. 751.

35. As where it is alleged that the corporate existence of the mortgagor had expired at the time of execution of the mortgage State v. Evans, 176 Mo. 310.

36. Taxes. Bradley v. Glenmary Co., 64 N. J. Eq. 77.

37. Under Burns' Rev. St. 1901, § 1116; Horner's Rev. St. 1897, § 1102. Foreclosure for default in interest may be had of a mortgage securing a note bearing interest payable annually. Perry v. Fisher, 30 Ind. App. 261.

38. First Nat. Bank v. Citizens' State Bank [Wyo.] 70 Pac. 726.

39. The mortgagor and mortgagee agreed that the conditions and equities were to remain unchanged and unaffected by the payments. Curran v. Houston, 201 Ill. 442.

40. Facts held to show a first mortgagee's action was not rendered premature by estoppel to assert that interest was unpaid. Priest v. Gumprecht, 81 App. Div. (N. Y.) 631.

41. Quasi estoppel may arise against a second mortgagee, where, after negotiations with the first and second mortgagees, the mortgagor pays a sum on the first under the belief that there is an agreement that the second mortgage is thereby to be extended. Bradley v. Glenmary Co., 64 N. J. Eq. 77.

42. Iowa L. & T. Co. v. Haller, 119 Iowa, 645.

43. Uedelhofen v. Mason, 201 Ill. 465.

44. Schieck v. Donohue, 77 App. Div. (N. Y.) 321.

45. Huston v. Fatka, 30 Ind. App. 693.

46. The requirement being equitable and not contractual. Julien v. Model Bldg., L. & I. Co., 116 Wis. 79.

47. Holdroff v. Remlee, 105 Ill. App. 671.

48. Long Island L. & T. Co. v. Long Island C. & N. R. Co., 82 N. Y. Supp. 644.

49. Lester v. Johnston, 137 Ala. 194.

50. Fields v. Gwynn, 19 App. D. C. 99.

51. But no costs or attorneys' fees should be allowed. Mock v. Chalstrom [Iowa] 96 N. W. 909.

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bidding actions against executors or administrators for a specified period after grant of letters or probate.[52] The decree is not for the payment of money within the meaning of statutes suspending for a time sales under such decree.[53]

Foreclosure may be enjoined until the determination of collateral questions of fact,[54] though not to protect a trifling right.[55]

Defenses.—Payment,[56] duress,[57] fraud,[58] or illegality of consideration,[59] may furnish good defenses. Collateral agreements may, if binding, afford a defense.[60]

Tender made before foreclosure was brought is sufficient to authorize dismissal,[61] but foreclosure for the entire amount begun on default in an instalment cannot be stayed by payment of the amount and expenses due to date.[62]

Other suits or actions pending.—An original bill cannot be maintained on an unrecorded mortgage pending suit on another mortgage.[63]

Foreclosure of a mortgage after foreclosure of a second mortgage on other property but as additional security for the original debt and advances is not within statutes against foreclosure pending action on the debt.[64] Under such statutes leave to sue on the bond pending foreclosure cannot be granted on the ground that the mortgage security is insufficient.[65] The question may be raised by interveners who have acquired the interests of the mortgagors, and the rule applies though the allegation is made in a cross petition by the holders of a second mortgage.[66] Failure to prove that no legal proceedings have been had simply authorizes dismissal.[67]

52. Though the executor is made trustee by a power to sell and take charge of the real estate, the action is not within P. L. 1898, p. 738, § 65. Ayres v. Shepherd, 64 N. J. Eq. 166.

53. Not within Rev. St. c. 77, § 39. Kronenberger v. Heinemann, 104 Ill. App. 156.

54. Against sureties may be enjoined until determination of an alleged extension discharging them. Smith v. Parker, 131 N. C. 470.

55. Enforcement of a mortgage securing $35,000 on 20,000 acres of land not enjoined on account of an abatement of $10.00 on account of failure of title to five acres of the land for the purchase price of which the mortgage was given, especially where the mortgagee offers to accord the right. Sidney L. & C. Co. v. Milner, etc., Lumber Co. [Ala.] 35 So. 43.

56. Evidence held to support a foreclosure over a contention that defendants discharged mortgage by services rendered the mortgagee. Smith v. Oster [Neb.] 95 N. W. 335.

57. An answer alleging that defendant was in no way indebted to complainant and that she was compelled to execute the mortgage by threats and blows presents a sufficient defense. Bosworth v. Sandlin [Fla.] 35 So. 66.

58. Where an assignment of a mortgage debt is secured by fraud for less than its actual value, the assignee can enforce the debt only for the amount actually paid. Security Sav. Soc. v. Cohalan, 31 Wash. 266, 71 Pac. 1020. Where the purchaser has placed it out of his power to restore the statu quo, he cannot plead fraud as against a purchase money mortgage. Jacobs v. Edelson, 88 App. Div. (N. Y.) 362.

59. It cannot be asserted in defense to foreclosure that a portion of the consideration was illegal, where the alleged illegal contracts have been settled and the mortgage is based on the settlement. Robbins v. Weiss [S. D.] 94 N. W. 399.

60. A collateral agreement between the mortgagee and assignee of the mortgage cannot be availed of by the mortgagor except he be in privity. Krimm v. Devlin [Pa.] 56 Atl. 23. Parol conditions made after delivery cannot be asserted (Rev. Codes 1899, § 3517). Sargent v. Cooley [N. D.] 94 N. W. 576.

An extension of a mortgage, given for the purpose of securing a similar extension of a second mortgage is without consideration, where such extension is not secured, and foreclosure of the second mortgage is proceeded with. At the time the extension was obtained, proceedings to foreclose the second mortgage had already begun, and the court held that the extension was too late to satisfy a provision of the second mortgage that it might be extended if an extension of the first was secured. Priest v. Gumprecht, 81 App. Div. (N. Y.) 631.

61. Williams v. Williams [Wis.] 94 N. W. 25.

62. Lincoln v. Corbett [Tex. Civ. App.] 72 S. W. 224.

63. In case the mortgagee wished to protect himself against other foreclosure proceedings, he must apply for permission to intervene under Chancery Act 1902, § 58 (Laws 1902, p. 531, c. 158). Sibell v. Weeks [N. J. Err. & App.] 55 Atl. 244.

64. Under Code Civ. Proc. §§ 1628, 1630, such a foreclosure may be begun if a deficiency remains after foreclosure of the second mortgage for which no payment was entered or execution issued. Reichert v. Stillwell, 172 N. Y. 88.

65. Code Civ. Proc. § 1628. In re Byrne, 81 App. Div. (N. Y.) 74.

66. Pratt v. Gallaway [Neb.] 95 N. W. 329.

67. It does not warrant a finding that the

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Bar by limitation.—The suit to foreclose may be maintained though action at law on the debt is barred.[68] Statutes barring foreclosure at the same time action on the mortgage debt is barred apply to mortgages executed before their passage.[69]

By impleading persons as defendants their right to plead the statute of limitations is admitted.[70]

Jurisdiction and venue.—Where personal service is had of the mortgagors, there may be a decree for the sale and conveyance of a portion of the premises outside of the state.[71] Defendants on cross petition seeking damages for fraudulent representations inducing execution of a mortgage cannot have a change of venue to their respective counties.[72]

(§ 4) *B. Parties and process. Who may use.*—Foreclosure must be brought by the person entitled to the security.[73] Where several parties are secured, one may bring the action in behalf of himself and the others in interest.[74] Nonconcurrence with respect to a discretion imposed in joint trustees to determine the advisability of foreclosure is a failure to sue which warrants the beneficiaries in suing for themselves.[75] Claimants of title adverse and paramount to both mortgagor and mortgagee are not ordinarily proper defendants,[76] but all persons in interest whose rights are sought to be concluded are necessary parties.[77]

The holder of an unmatured tax lien need not be made a party to foreclosure of a subsequent mortgage.[78] Contingent remaindermen must be joined where it is sought to impose an additional lien on their expectancies.[79] Executory devisees not in esse need not be made parties.[80]

mortgage is void and unenforceable. Goddard v. Clarke [Neb.] 96 N. W. 350.

68. Northrop v. Chase [Conn.] 56 Atl. 518.

69. But where the debt is already barred at the time of passage, foreclosure may be begun within a time fixed in the statute for the preservation of existing rights. Stanton v. Gibbins [Mo. App.] 77 S. W. 95.

70. Heirs joined in an action of foreclosure against the mortgagor's administrator. Gleason v. Hawkins [Wash.] 73 Pac. 533.

71. The mortgagors being residents. Mead v. Brockner, 82 App. Div. (N. Y.) 480.

72. Code, §§ 3493, 3547. Brown v. Holden [Iowa] 94 N. W. 482.

73. A mortgage intended for the payment of a certain sum to beneficiaries on their attaining their majority cannot be foreclosed by the person on whom the support of the beneficiaries devolves, though interest is payable to him. Hansen v. Mortensen [Neb.] 96 N. W. 216. The purchaser at foreclosure and not the mortgagee is entitled to bring a new action of foreclosure against the owner of equity of redemption who was not previously made a party. The sale passes all the interest of the mortgagee in the mortgage and the land. Green v. Mussey, 76 App. Div. (N. Y.) 174.

74. Distribution of the funds will be made by the court after sale. Mich. Trust Co. v. Red Cloud [Neb.] 92 N. W. 900.

75. Farmers' L. & T. Co. v. Lake St. El. R. Co. (C. C. A.) 122 Fed. 914.

76. Holder of a tax deed though he was also a tenant of the mortgaged premises at the time of acquiring the deed. Brown v. Atlanta Nat. B. & L. Ass'n [Fla.] 35 So. 403. The assignor of a leasehold to a corporation is not a necessary party to foreclosure of a mortgage on such leasehold, executed by the corporation, though the assignor remains liable for the rent on the original lease. Unity Co. v. Equitable Trust Co., 204 Ill. 595.

77. **Husband** of mortgagor. Garrison v. Parsons [Fla.] 33 So. 525. A wife who has joined in a mortgage on her husband's land, is not a necessary party, where her right of dower is by statute transferred to the surplus after sale [Ky. St. § 2135]. Morgan v. Wickliffe, 24 Ky. L. R. 2104, 72 S. W. 1122.

The grantor of a trust deed who has parted with all its interest in the property covered, is not a necessary party to foreclosure where personal judgment is not sought against him. De Cunto v. Johnson [Colo. App.] 70 Pac. 955. Where the mortgagee dies pending foreclosure the **heirs or devisees** must be joined as well as the executor. Stancill v. Spain, 133 N. C. 76.

Transferees of the equity of redemption. Stancill v. Spain, 133 N. C. 76. A vendee in possession under contract of sale. Titcomb v. Fonda, J. & G. R. Co., 38 Misc. (N. Y.) 630. Purchaser of the property subject to the mortgage. City which has purchased mortgaged water works. Centerville v. Fidelity T. & G. Co. (C. C. A.) 118 Fed. 332.

Grantees of a deed unrecorded at the time of the mortgage but recorded when foreclosure is begun. Goodwin v. Tyrrell [Ariz.] 71 Pac. 906. If there is a subsequent conveyance in trust, the beneficiaries as well as the trustee must be joined. Hodges v. Walker, 76 App. Div. (N. Y.) 305.

78. Western Land Co. v. Buckley [Neb.] 92 N. W. 1052.

79. The remaindermen must be made parties, where it is sought to set aside the satisfaction of certain mortgages, to re-establish them, and to foreclose them against property which had been devised subject to

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Where the mortgage and notes run to different persons, both should be joined.[81] Mere possession of the evidence of debt does not necessitate joinder.[82] A holder of the indebtedness who is also trustee need not, on suing to foreclose, join himself as trustee.[83]

Assignees of a mortgage who have given security for its payment may be joined for the purpose of securing a deficiency decree against them under statutory provisions providing for the joining of persons besides the grantor, whose obligations secure the mortgage debt.[84] In some states the assignee of a mortgage need not join his assignor.[85]

A subsequent judgment creditor entitled to any surplus may be admitted as a party defendant after sale.[86] The administrator with the will annexed is not ordinarily entitled to come in to deny the validity of the mortgage.[87]

Where a lis pendens has been filed, one purchasing at an execution sale need not be made a party to foreclosure.[88]

Process.—The original notice need not describe the land or cite the record, where the mortgage may be found in order to state the cause in general terms.[89] Errors which do not mislead or prejudice defendants are not fatal,[90] but where service is constructive, a variance in the initials of the party in the sheriff's return and decree is fatal.[91] Timeliness of publication of notice of foreclosure must appear from the record itself.[92] Notice by publication is sufficient to uphold the sale as against a subordinate lien holder who does not show good cause to set it aside.[93]

(§ 4) *C. Pleading, trial, and evidence. Bill, complaint, or petition.*[94]—The allegations must show the principal sum to be due,[95] or that an option has been exercised to so regard it, on account of a default in interest.[96] Mere mention of a writing does not declare on it.[97]

contingent remainders. New York S. & T. Co. v. Schoenberg, 87 App. Div. (N. Y.) 262.

80. Rutledge v. Fishburne, 66 S. C. 155.

81. Swenney v. Hill, 65 Kan. 826, 70 Pac. 868. If a mortgage is executed to the payees jointly to secure two distinct notes, their holders may be joined. Guthrie v. Treat [Neb.] 92 N. W. 595.

82. The president of a company is not by the possession of second mortgage bonds rendered a necessary party to foreclosure of first mortgage, in the absence of a showing that he is the owner thereof where possession appeared to be for the purpose of negotiating a loan for the company on the bonds as collateral security. Unity Co. v. Equitable Trust Co., 204 Ill. 595.

83. He being named as such in the trust deed. Dearlove v. Hatterman, 102 Ill. App. 329.

84. Miller v. McLaughlin [Mich.] 93 N. W. 435.

85. Comp. Laws, § 4880. Alexander v. Ransom [S. D.] 92 N. W. 418.

86. Code Civ. Proc. § 452. Bowers v. Denton, 41 Misc. (N. Y.) 133.

87. As having been given under a wrongful and mistaken exercise of a power given by the will. Boon v. Padgett [N. J. Eq.] 54 Atl. 859.

88. Johnson v. Friant [Cal.] 73 Pac. 993.

89. Code 1873, § 2599, provides that the original notice must state in general terms the cause or causes thereof. Fleming v. Hager [Iowa] 96 N. W. 752.

90. Giving the page of the record 53 instead of 458. and describing the land as in range 36 instead of 30. Fleming v. Hager [Iowa] 96 N. W. 752. Failure to file an affidavit for a notice by publication before commencing the publication may be a mere irregularity. Does not avoid judgment. [Laws 1893, p. 410, c. 127, § 9]. Tilton v. O'Shea, 31 Wash. 513, 72 Pac. 106.

91. Judgment against Wm. M. Thornily on notice by leaving copy for W. M. Thornily is not valid as against Willis H. Thornily. Thornily v. Prentice [Iowa] 96 N. W. 728.

92. The record cannot be amended to make such fact appear after the expiration of the time for record under Rev. St. c. 90, § 5. Stafford v. Morse, 97 Me. 222.

93. The lienholder did not show that he did not in fact have notice and did not allege the value of the premises, but merely the inadequacy of the price, and did not allege that he or any one else intended to bid on a resale. Frazier v. Swimm, 79 App. Div. (N. Y.) 53.

94. Prayer for general relief and for a deficiency judgment against the husband, does not render the bill obnoxious as praying for a personal judgment against a married woman. Skinner v. Southern Home B. & L Ass'n [Fla.] 35 So. 67.

95. Where the instrument set out shows that the principal sum is due, an express averment is not necessary. It being averred that no part of the principal mentioned has been paid. Luddy v. Pavkovich, 137 Cal. 284, 70 Pac. 177.

96. Foreclosure for principal sum should

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Averments of the nonpendency of action on the debt need not literally follow the statute.[98] Where the mortgagee has taken judgment, he need not, in the petition to foreclose, state the nonexistence of other proceedings to enforce the judgment.[1]

Answer and other responsive pleadings.—Alteration after execution and delivery must be pleaded and proved.[2] If the pendency of another action does not appear from the pleadings the objection is waived unless raised by answer.[3] Failure to set out the notes and mortgage or attach copies as exhibits is not ground for demurrer.[4] Failure to join a necessary party defendant is waived by absence of demurrer.[5] A party which is made a defendant on the ground that it possesses or claims a lien, the exact nature of which is unknown to complainant but is alleged to be inferior to his lien, cannot demur on the ground of limitations without disclosing the nature of its claim.[6] The question of usury cannot be raised by a demurrer directed to the bill as a whole, if the bill seeks foreclosure as to the principal sum secured as well as the interest.[7] Sufficiency of allegations of defense has been passed on in cases cited.[8]

Additional rights as to interests in the property cannot be set up in reply but must be urged by amendment.[9] A special reply is demurrable which contains matter provable under a general denial.[10]

A cross bill which is not in aid of any defense and brought to obtain permanent relief against co-defendants cannot be maintained.[11] If cancellation is sought

not be decreed where the prayer is only for interest due with attorney's fees and taxes. White v. Gracey [Fla.] 34 So. 223.

97. Writing executed as an extension, default for which foreclosure was sought, being alleged to be failure to pay the original note on demand. First Nat. Bank v. Citizens' State Bank [Wyo.] 70 Pac. 726.

98. Code Civ. Proc. §§ 850, 851, providing that foreclosure proceedings shall not be instituted after judgment in an action at law for the debt, unless it appeared that an execution on such judgment has been returned unsatisfied either in whole or part, it is sufficient to set out in the bill that a judgment has been obtained on which an execution has been returned "No property found." Mich. Trust Co. v. Red Cloud [Neb.] 92 N. W. 900. Sufficient to aver that no other action has been had for the recovery of the sum secured by the bond and mortgage, under Code Civ. Proc. § 1629, providing that it must be stated whether any other action has been brought to recover any part of the mortgage debt. Schieck v. Donohue, 77 App. Div. (N. Y.) 321.

1. It is sufficient that the judgment and return of execution be set out, and the return is sufficient without an allegation that the defendant was a resident of the county by the sheriff of which it was returned. Montpelier Sav. B. & T. Co. v. Follett [Neb.] 94 N. W. 635.

2. Hodge v. Scott [Neb.] 95 N. W. 837.

3. Code Civ. Proc. § 169. Kiddell v. Bristow [S. C.] 45 S. E. 174.

4. Jocelyn v. White, 201 Ill. 16.

5. Mortgagee in suit by trustee to foreclose a mortgage not assigned to him by indorsement thereon. Green v. McCord, 30 Ind. App. 470.

6. Action was brought more than five years after the note and mortgage matured, and Code § 18 provides that foreclosure must be begun within five years after the accrual of the cause of action. Lincoln M. & T. Co. v. Parker, 65 Kan. 819, 70 Pac. 892.

7. Petterson v. Berry (C. C. A.) 125 Fed. 902.

8. **Title:** An allegation that a fee was mortgaged is not denied by an averment that whatever interest the mortgagor had was encumbered, where such interest is not specified. Lockhaven T. & S. Deposit Co. v. U. S. M. & T. Co. [Colo. App.] 74 Pac. 793.

Payment: Allegations by an heir of the mortgagor that the mortgage was satisfied before foreclosure suit, and raising the presumption of payment, are sufficient. Garrison v. Parsons [Fla.] 33 So. 525.

To admit of amendment: An allegation in an answer by a second mortgagee that its lien was prior and superior to that of plaintiff, is not sufficient to amount to a pleading of the statute of limitations in order to furnish a basis for a subsequent amendment setting up such statute. First Nat. Bank v. Citizens State Bank [Wyo.] 70 Pac. 726.

9. Petition claiming a right to sell a homestead under a mortgage. Masillon E. & T. Co. v. Carr, 24 Ky. L. R. 1534, 71 S. W. 859.

10. Under a denial of a defense of limitations and adverse possession, a special reply is not necessary to show a payment by the mortgagor of a portion of the mortgage debt within 15 years or performance of acts recognizing the continued existence of the mortgage. Northrop v. Chase [Conn.] 56 Atl. 518.

11. A cross bill which expressly admits that defendant's mortgage is inferior to that of plaintiffs, and merely prays that the surplus of the proceeds be paid over to defendant without alleging that there is likely to be a surplus or that an adjudication in favor of the cross-complainant on the matter of the cross-bill would tend to increase the amount likely to be realized on the sale of the mortgaged property. Jackson v. Dutton [Fla.] 35 So. 74.

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by cross bill, facts constituting the fraud alleged as ground must be substantially alleged.[12] Where parties have submitted themselves to the jurisdiction of the court, they cannot complain of the lack of notice of the filing of a cross petition on which foreclosure is decreed.[13]

Issues and proof and variance.—In Nebraska, the petition must allege whether any proceedings at law have been had for the recovery of the debt or any part thereof, and where the answer is a general denial, there can be no recovery in the absence of proof sustaining such allegation of the petition.[14] Allegations of a claim of right do not admit its existence.[15] The execution of extension notes need not be proved where not denied.[16] If defendants are allowed to give evidence of a gift of the mortgage to them, plaintiff may introduce evidence that the gift was fraudulent, though it has not alleged such fact.[17] A tender of the amount due, except that sum claimed as costs and attorney's fees, is a waiver of variance as to ownership of the notes secured.[18] A discrepancy consisting only in additional matter of description is not variance.[19]

Trial.—Where the only issues are those arising on a counterclaim and reply thereto, they may be noticed for trial at a law term without their being settled.[20] Failure to introduce the mortgage cannot be objected to after judgment.[21]

Evidence and burden of proof.[22]—The complainant must establish his title to the mortgage.[23] The burden is on the alleging party to establish payment,[24] or an agreement not to foreclose,[25] or priority of a hostile lien,[26] or fraud which must be sustained with clear and cogent evidence.[27]

12. Mortimer v. McMullen, 102 Ill. App. 592.

13. Cross-petition filed while a demurrer was pending to plaintiff's petition, the demurrer being submitted on the same day the case was submitted on the petition, cross-petition and evidence. Sanford v. Anderson [Neb.] 96 N. W. 486.

14. Pratt v. Gallaway [Neb.] 95 N. W. 329; Alling v. Woodard [Neb.] 96 N. W. 127; Easton v. Lindego [Neb.] 92 N. W. 1000; Lancashire Ins. Co. v. Kierstead [Neb.] 95 N. W. 675; Holt v. Rust-Owen Lumber Co. [Neb.] 96 N. W. 613.

Evidence looking to a settlement held sufficient to show that no action has been begun to collect the mortgage debt. Klingenfeld v. Houghton [Neb.] 96 N. W. 76. On foreclosure of trust deeds given by bank stockholders to secure certificates of deposit issued by the bank, an allegation that plaintiff recovered a judgment at law against the bank and an execution was returned unsatisfied, does not take the place of the allegation required by Code Civ. Proc. 1901, § 850. Mich. Trust Co. v. Red Cloud [Neb.] 96 N. W. 140.

15. That defendants are alleged to have, or claim to have some right, title, interest or estate. Foster v. Bowles, 138 Cal. 449, 71 Pac. 495.

16. Bourke v. Hefter, 104 Ill. App. 126.

17. Livingston v. Eaton, 85 N. Y. Supp. 500.

18. Uedelhofen v. Mason, 201 Ill. 465.

19. The addition of the city and county in the description as set out though the mortgage mentions only the city. Crow v. Kellman [Tex. Civ. App.] 70 S. W. 564.

20. Issues arising on a counterclaim for breach of covenant against encumbrances in a proceeding to enforce a purchase money mortgage. Herb v. Metropolitan Hospital, 80 App. Div. (N. Y.) 145.

21. James v. Webb, 24 Ky. L. R. 1383, 71 S. W. 526.

22. A proper certificate of acknowledgment allows the introduction of the mortgage in evidence without further proof. McKenzie v. Beaumont [Neb.] 97 N. W. 225. See, also, Evidence, § 7a, 1 Curr. Law, p. 1154.

Held sufficient to establish mortgagor's half interest in the land mortgaged. Slusher v. First Nat. Bank [Ky.] 76 S. W. 1.

23. Trustee of a mortgagee suing as such. Green v. McCord, 30 Ind. App. 470.

24. Evidence held insufficient. Archibald v. Banks, 203 Ill. 380; Omaha L. & T. Co. v. Luellen [Neb.] 92 N. W. 734. Offer of the notes and mortgage is sufficient as against a plea of payment of which no evidence is introduced. Id. Where in defense to foreclosure of a trust deed it is alleged that the bonds secured have been satisfied by the execution of a new deed and bonds, the burden of proof of such fact is on defendant and if the agreement is alleged to have been between the president of the trust company which was acting as trustee and the president of the mortgagor company, the burden is on defendant to show that the president of the trustee had authority to represent the bond-holders, the bonds having passed into the hands of numerous parties by transfer. Unity Co. v. Equitable Trust Co., 204 Ill. 595.

25. Unity Co. v. Equitable Trust Co., 204 Ill. 595.

26. Allegation in answer setting up the prior lien of a judgment against the mortgagor's vendee. Foster v. Bowles, 138 Cal. 449, 71 Pac. 495. A senior mortgagee has the burden of proving the junior incumbrancer's knowledge of his unrecorded mortgage. Schoonover v. Foley [Iowa] 94 N. W. 492.

27. Evidence held insufficient to show fraud and duress in obtaining a mortgage.

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(§ 4) *D. Decree or judgment.*—The decree need not be signed by the presiding judge.[28] The findings must establish a trustee's right to sue.[29] It need not find the amount paid on each note secured when paid, etc.,[30] but must adequately describe the land[31] and identify the parcels if it direct a sale in parcels.[32] Relief must be confined to matters well pleaded,[33] and prayed,[34] and operate on parties before the court;[35] but incidental relief may lie in a general prayer.[36] Sale should not be decreed if the debt is paid pending suit.[37] The mortgagee may be given judgment for possession though foreclosure is denied on account of immaturity of the debt.[38] A money decree can be rendered for a deficiency only.[39] Interest and advances may be awarded.[40]

A judgment creditor may be entitled to relief as against other defendants in a suit brought against him to foreclose a prior lien.[41]

Instructions as to appraisement may be omitted.[42] Where the wife is a party to foreclosure against the husband as the holder of an encumbrance, a superfluous recital as to the wife's right to credit in case she became a purchaser at the sale is not fatal.[43]

The decree may adjudicate upon a contingent interest,[44] and should be so drawn as to protect an inchoate right of dower,[45] but the determination thereof may be reserved to be taken up on the disposition of the proceeds.[46]

Mortimer v. McMullen, 202 Ill. 413. Evidence held to sustain a finding that a mortgage was executed in reliance on false representations. Thomas v. Janesofsky [Neb.] 97 N. W. 332.

28. Gallentine v. Cummings [Neb.] 96 N. W. 178.

But a recital made by the clerk in order of sale is not sufficient to show that the decree was entered at a term legally convened and held. Phoenix Mut. L. Ins. Co. v. Sparks [Neb.] 96 N. W. 214.

29. Findings leaving the beneficiary, purpose, and terms of the trust undisclosed as well as all requisites necessary to create the trust which is merely referred to, are insufficient. Green v. McCord, 30 Ind. App. 470.

30. Wenke v. Hall [S. D.] 96 N. W. 103.

31. Decree held sufficient. Northern Counties Inv. Trust v. Wilson [Neb.] 95 N. W. 699.

32. Decree held insufficient which attempted to prescribe divisions of theretofore unsubdivided property. Lebus v. Slade, 24 Ky. L. R. 1325, 71 S. W. 510.

33. The merger of a note in judgment must be alleged in order to allow the note to be included in the decree. Mere reference to the note is not sufficient. Jocelyn v. White, 201 Ill. 16. Complainant cannot have judgment for taxes, where he does not allege their payment. Williams v. Williams [Wis.] 94 N. W. 25.

34. The court has no authority to make a judgment affecting the priorities as to a defaulting defendant alleged to hold a junior lien, but against whom no relief is asked. Shneider v. Mahl, 84 App. Div. (N. Y.) 1.

35. Where it is found that defendant was not competent to execute the mortgage sought to be foreclosed, the ordinary judgment would be for the defendant; but was not rendered where it appeared that plaintiff was led into an acceptance of the note and mortgage by the principal parties in interest, not made parties, and against whom plaintiff or defendant can assert their remedies if any. Jacks v. Estee, 139 Cal. 507, 73 Pac. 247.

36. A vendor's lien may be awarded under a prayer for general relief on attempted foreclosure of an invalid purchase money mortgage. Romanoff Min. Co. v. Cameron, 137 Ala. 214.

37. Facts held to show payment. Hall v. Metcalfe, 24 Ky. L. R. 1660, 72 S. W. 18.

38. Sperry v. Butler, 75 Conn. 369.

39. Where foreclosure by a pledgee for collateral security is denied on the ground that the pledgor had no authority to pledge, complainant is not entitled to a personal decree for the amount of the note. Bouton v. Cameron, 205 Ill. 50.

40. **Interest** at the contract rate from the date of the note to the rendition of the decree. Arneson v. Haldane, 105 Ill. App. 589.

For taxes. Douglass v. Miller, 102 Ill. App. 345. Not an amount paid after assignment of the mortgage. McKenzie v. Beaumont [Neb.] 97 N. W. 225. If a purchaser, at a sale under a senior mortgage, seeks foreclosure against the owner of the equity of redemption, who was not made a party, taxes paid by the holder of a junior lien may be allowed. Walsh v. Robinson [Mich.] 97 N. W. 55.

41. Hibernia S. & L. Soc. v. London & L. F. Ins. Co., 138 Cal. 257, 71 Pac. 334.

42. James v. Webb, 24 Ky. L. R. 1382, 71 S. W. 526.

43. Provision that the wife should have the right to credit her mortgage indebtedness on the purchase price after paying in a sum sufficient to discharge complainant's judgment. State Bank v. Backus, 160 Ind. 682.

44. Where the mortgage contains a covenant of title in fee simple, whereas the mortgagors had only a life estate with a possibility of a remainder, the decree properly covers their future interest. Rudd v. Travelers' Ins. Co., 24 Ky. L. R. 2141, 73 S. W. 759.

45. State Bank v. Backus, 160 Ind. 682.

46. Gifford v. McGuinness, 63 N. J. Eq. 834.

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Amendment, opening, or vacating.—A decree ordering that sale be made by the sheriff may be amended without notice to defendants by authorizing sale by a commissioner.[47] A junior lienor who took pending suit must move to set aside the decree within statutory time.[48] Ground for vacating or opening[49] must be well pleaded.[50] The decree may be opened but not set aside or a grantee of the purchaser dispossessed on account of the insufficiency of the affidavit for service by publication to give relief to a transferee subsequent to the mortgage.[51]

Supersedeas.—A motion for a new trial will not supersede a decree of sale.[52] Supersedeas bonds must be conditioned as provided by statute.[53] They must provide for the value of the use and occupation of the property.[54] Defendants, after obtaining a stay of judgment, are estopped from attacking such judgment in any manner.[55]

Appeal.—Reviewability depends on the statutes and the general rules of appellate procedure.[56] The same is true of the saving of questions,[57] and the grounds for reversal or affirmance.[58]

47. There being no showing of prejudice or that the property brought less than its full value. Code Civ. Proc. § 726, authorizes the appointment to be made by judgment or at any time after judgment. Granger v. Sheriff, 140 Cal. 190, 73 Pac. 816.

48. Three years as prescribed by Civ. Code Proc. § 518, § 344 for setting aside judgments. Hays v. Gilbert, 24 Ky. L. R. 1386, 71 S. W. 652.

49. Evidence held insufficient to authorize the vacation of a foreclosure decree on the ground that the mortgage had never been executed by defendant and that he had been improperly represented by his attorneys. Klabunde v. Byron-Reed Co. [Neb.] 95 N. W. 4.

50. An affidavit seeking to open a decree on the ground that the money was advanced by affiant, the mortgagor, to secure a loan to her husband to carry on a gambling business, is not sufficient if there is no allegation that the business was ever carried on. Hallowell v. Daly [N. J. Eq.] 56 Atl. 234.

51. Romig v. Gillett, 187 U. S. 111.

52. Walker v. Fitzgerald [Neb.] 95 N. W. 32.

53. Not conditioned for the payment of the value of the use and occupation of the property from the day of the undertaking until delivery of possession pursuant to the judgment. Gillespie v. Morsman [Neb.] 95 N. W. 1127.

54. Walker v. Fitzgerald [Neb.] 95 N. W. 32.

55. Gilbert v. Provident L. & T. Co. [Neb.] 95 N. W. 488.

56. In general see Appeal and Review, 1 Curr. Law. p. 85. A decree of sale is final and appealable. Kronenberger v. Heinemann, 104 Ill. App. 156. That part which awards a deficiency judgment may be appealed from. Executor may appeal from the entry of a deficiency judgment against him as executor, where the action is begun after the expiration of time for filing claims against the decedent's estate and no claim has been filed for the amount of the mortgage debt. Pereles v. Leiser [Wis.] 96 N. W. 799.

57. **Objections and exceptions** to a sale do not bring up for review errors or irregularities in the decree of foreclosure or prior thereto. Neb. L. & T. Co. v. Dickerson [Neb.] 95 N. W. 774; Stein v. Parrotte [Neb.] 96 N. W. 155. Foreclosure of railroad mortgage. Cent. Trust Co. v. Peoria D. & E. R. Co. (C. C. A.) 118 Fed. 30; Tichey v. Simecek [Neb.] 97 N. W. 323.

Not be reversed for matters not shown in the record: It will not be presumed that a renewal note increased the rate of interest, thus rendering a junior mortgage a prior lien. First Nat. Bank v. Citizens' State Bank [Wyo.] 70 Pac. 726. The question of whether an alias order of sale was irregularly issued cannot be reviewed where none of the proceedings in the case prior to the issuing of the order have been brought up. Nat. L. Ins. Co. v. Crandall [Neb.] 96 N. W. 624. **Or matters not urged below:** Right to render judgment for possession only. Sperry v. Butler, 75 Conn. 369.

58. Where an abstract of title has been admitted over objection showing complainant's right to foreclose, the court on appeal will not assume the abstract to be false in order to sustain the decree. Goddard v. Clarke [Neb.] 96 N. W. 350. Reversal of a judgment on the note will not affect the decision of an appeal from the decree. An erroneous decree refusing foreclosure of a mortgage by a husband and wife on the ground that the debt was barred as against the wife in whom was title to the property will be reversed though a personal judgment against the husband on the note has since also been reversed. Cooper v. Haythorn, 66 Kan. 91, 71 Pac. 277. **Not reversible for errors cured.** Civ. Code Proc. § 692, provides that other lien holders shall not have any of the proceeds of the sale until they have shown their right thereto by answer and cross petition. Held, that where mortgagees who had not answered, were given a personal judgment and the priorities of their mortgages established the error was cured by a subsequent order that they should not receive any of the proceeds until answer was filed, and that such order was properly made after the term. James v. Webb, 24 Ky. L. R. 1382, 71 S. W. 526. Occupancy and improvements by the purchaser pending hearing on appeal are not **grounds for a rehearing** of a reversal. Hunt v. Whitehead, 19 App. D. C. 116.

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Proceedings below after appeal.—If it is decided that the judgment is too large and the court below is directed to enter judgment accordingly, it cannot be done by modifying the previous judgment so as to preserve its vitality.[59] Where a commissioner is appointed to make sale under foreclosure but the writ of execution is returned without sale on account of an appeal from the decree and stay of execution, the court may, on affirmance of the decree, make an ex parte order reappointing the commission and ordering a sale.[60]

(§ 4) *E. Sale. Order of sale.*—A copy of the decree need not ordinarily be attached to the order of sale.[61] An assignment of the decree need not be shown.[62] The failure of the clerk to attach his seal to the order until after the sale has been held not fatal.[63]

A special execution on the decree when authorized should be executed and returned as such and not as a general execution.[64]

If the description in the mortgage is not sufficient without extrinsic evidence, the execution plaintiff, after foreclosure, has the burden of identification as against a claim interposed to a levy of the mortgage execution.[65]

Notice of sale unless so required by statute need not state the amount of the decree,[66] nor that the land is to be sold in separate tracts.[67] The date of the notice has been held not material, the other essentials being correct.[68] Description of the land may be sufficient though the county is omitted.[69] Proof of publication must be such as to satisfy the statute or the decree.[70]

The appraisement is to prevent sacrifice of the debtor's property,[71] and is to follow the statute providing for it.[72]

An appraiser may be a "free holder" though he has not yet received a deed.[73] He should be disinterested and impartial.[74]

59. Cowdery v. London & S. F. Bank, 139 Cal. 298, 73 Pac. 196.

60. The order is not invalidated by the fact that the clerk, although he has received the certificate of remittitur from the supreme court, has not attached the certificate on the judgment roll and entered a minute of the judgment on the docket against the original entry, as required by Code Civ. Proc. § 958. Granger v. Sheriff, 140 Cal. 190, 73 Pac. 816.

61. Gallentine v. Cummings [Neb.] 96 N. W. 178; Tootle v. Willy [Neb.] 96 N. W. 342.

62. McLagan v. Witte [Neb.] 96 N. W. 490.

63. Wheldon v. Cornett [Neb.] 94 N. W. 626.

64. For the return of general executions are not applicable. Norton v. Reardon [Kan.] 72 Pac. 861.

65. Johnson v. McKay [Ga.] 45 S. E. 992.

66. Gallentine v. Cummings [Neb.] 96 N. W. 178; Bourke v. Somers [Neb.] 92 N. W. 990.

67. There being nothing in the notice to induce the belief that the land is to be sold in a body but the tracts were separately described, though two of them lie in the same quarter section. Eldrige v. Wesierski [Neb.] 94 N. W. 961.

68. Pierce v. Reed [Neb.] 93 N. W. 154.

69. Land described by township and range. Phoenix Mut. L. Ins. Co. v. Sparks [Neb.] 96 N. W. 214.

70. Proof of publication may be by affidavit of the president of the company publishing the paper. Home Ins. Co. v. Clark [Neb.] 95 N. W. 1056. The publisher's affidavit is in the absence of a counter showing, sufficient to establish the legality of the paper. Affidavit that the paper was of general circulation in the county. Bourke v. Somers [Neb.] 92 N. W. 990. It may be filed the day after sale. Nash v. Wilkinson [Neb.] 96 N. W. 623.

71. Hartwick v. Woods [Neb.] 93 N. W. 415.

72. Defendants are not entitled to notice of time and place. Home Ins. Co. v. Clark [Neb.] 95 N. W. 1056; Doughty v. Hubbell [Neb.] 96 N. W. 632. The deputy sheriff may conduct it. Id. A return stating that the appraisers were sworn, signed in the sheriff's name by the deputy, does not indicate that the sheriff swore the parties and that the deputy certified that he did so. Nat. L. Ins. Co. v. Crandall [Neb.] 96 N. W. 624. It is sufficient to file copies of the original application for a certificate of liens and the certificate [Code Civ. Proc. § 491b]. Northern Counties Inv. Trust v. Wilson [Neb.] 95 N. W. 699.

73. Wheldon v. Cornett [Neb.] 94 N. W. 626.

74. Is qualified though he is a witness in the foreclosure proceedings and has made affidavit in support of an application for a receiver. Adler & Sons Clothing Co. v. Hellman [Neb.] 95 N. W. 467. Interest is not shown by former negotiations for purchase of the land. The appraiser had long previously inquired the price from the owner of the land and had asked the owner of the decree his price for the decree, but the negotiations were dropped. First Nat. Bank v. Tyler [Neb.] 93 N. W. 383.

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Non-prejudicial irregularities will not vitiate an appraisal.[75] There must be fraud or irregularity taking away the power of the appraisers to act or in some way affecting the substantial rights of defendants,[76] and that it is too low does not alone suffice.[77]

Failure to deduct incumbrances is cured by sale for more than the amount of the appraisement,[78] or for more than the statutory proportion of the gross valuation;[79] but in such case, if the result of a sale is for a price so low that to uphold it would be inequitable and against good conscience, it should be set aside.[80]

Deduction of a junior lien is not necessarily prejudicial,[81] but the appraisers have no right to treat a junior lien as senior.[82] The amount of taxes due may be deducted from the appraised value despite a finding that the mortgage is a first lien,[83] and though, as between other parties, similar taxes have been declared void.[84]

Objections to an appraisement must precede sale.[85] They must be specific.[86]

75. Union Sav. Bank v. Lincoln Normal University [Neb.] 93 N. W. 408. Such as no oath being returned, signature some four days after appraisement, no notice to defendants to be present, no examination of inside of houses, no venue on the sheriff's certificate to a copy of the appraisement, no certificate of liens. Provident L. & T. Co. v. Dennis [Neb.] 95 N. W. 361. Appraisal filed a day after the appraisement is deposited "forthwith." Wheldon v. Cornett [Neb.] 94 N. W. 626. A signature of the report of appraisement by initials is sufficient. Rieck v. Zoller [Neb.] 92 N. W. 728. Failure to appraise in smallest government subdivisions. Hartwick v. Woods [Neb.] 93 N. W. 415. Lots may be appraised together. Tichey v. Simecek [Neb.] 97 N. W. 323. The sheriff's certificate need not be stamped. Internal revenue stamp. Rieck v. Zoller [Neb.] 92 N. W. 728. The appraisers need not go on the land if they are familiar with it and acquainted with its value. Pierce v. Reed [Neb.] 93 N. W. 154. Not sufficient to show that one of the appraisers was a constable and the other a justice of the peace and did not reside in the immediate vicinity of the land. Durland v. McKibben [Neb.] 97 N. W. 228. Placing of "et al" after names of defendants whose title is appraised, if there are other defendants but such defendants do not claim title. Pierce v. Reed [Neb.] 93 N. W. 154. Where the original appraisal is sufficient, an immaterial defect in the copy will not vitiate it such as insertion of the names of the appraisers in the place where they are left blank in the original. Emory v. Boyer [Neb.] 95 N. W. 1061. The form of a certificate of taxes due, does not substantially affect the rights of the owners in premises. Objection cannot be made, that since a county or city treasurer has no official seal he cannot comply with the provision of the statute that the certificates from such officers shall be under their official seal. Mut. Ben. L. Ins. Co. v. Siefken [Neb.] 96 N. W. 603.

76. Adler & Sons Clothing Co. v. Hellman [Neb.] 95 N. W. 467.

77. Nat. L. Ins. Co. v. Crandall [Neb.] 96 N. W. 624.

Fraud must be present: Affidavit of the mortgagor that it was too low is not sufficient. Iowa L. & T. Co. v. Nehler [Neb.] 92 N. W. 729; Pearson v. Badger Lumber Co. [Neb.] 96 N. W. 493.

Too low a valuation may be evidence of fraud: Variation between appraised value and that fixed by the affidavits of 77 cents an acre is not sufficient. Durland v. McKibben [Neb.] 97 N. W. 228; Adler & Sons Clothing Co. v. Hellman [Neb.] 95 N. W. 467. Four affidavits asserting the value to be one-third more than that found by the appraisers not sufficient. Pierce v. Reed [Neb.] 93 N. W. 154.

But it is not inferred when there is a conflict as to the value. Provident L. & T. Co. v. Dennis [Neb.] 95 N. W. 361; Hartwick v. Woods [Neb.] 93 N. W. 415. A confirmation of sale will not be set aside for too low an appraisement, where the valuation was $10,000 and the witnesses range from $9,600 to $17,500. Doughty v. Hubbell [Neb.] 96 N. W. 632. Appraised value $4,000, seven witnesses fixing it at $4,800 and five at $3,200. First Nat. Bank v. Tyler [Neb.] 93 N. W. 388. Appraisement at $4,500 not set aside on six affidavits averaging $6,300. Bird v. McCreary [Neb.] 93 N. W. 684.

Or where there is a mistake in judgment producing too low a valuation. Green v. Doerwald [Neb.] 96 N. W. 634; Wolcott v. Henninger [Neb.] 96 N. W. 612; Home Ins. Co. v. Clark [Neb.] 95 N. W. 1056.

78. Keene Five Cent Sav. Bank v. Johnson [Neb.] 95 N. W. 504.

79. Failure of the record to show that the copies of the certificates of liens were deposited with the clerk of the district court. Clark v. Wolf [Neb.] 96 N. W. 495. Failure to find amount of prior lien. Tichey v. Simecek [Neb.] 97 N. W. 323. Improper deduction of lien. Sanford v. Anderson [Neb.] 96 N. W. 486.

80. Pearson v. Badger Lumber Co. [Neb.] 96 N. W. 493.

81. Hartwick v. Woods [Neb.] 93 N. W. 415.

82. Hart v. Beardsley [Neb.] 93 N. W. 423.

83. Mut. Ben. L. Ins. Co. v. Siefken [Neb.] 96 N. W. 603.

84. Adler & Sons Clothing Co. v. Hellman [Neb.] 95 N. W. 467.

85. Objections to the appraisement must be made before sale. Bourke v. Somers [Neb.] 92 N. W. 990; Union Sav. Bank v. Lincoln Normal University [Neb.] 93 N. W. 408; Neb. L. & T. Co. v. Dickerson [Neb.] 95 N. W. 774; Emory v. Boyer [Neb.] 95 N. W. 1061; Hartsuff v. Huss [Neb.] 95 N. W. 1070;

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Defendant cannot object that appraisers do not deduct liens from the appraisement.[87]

Affidavits attacking the amount of the appraisement must show the qualification of the affiants.[88]

The right to a reappraisement is restricted to occasions fixed by statute.[89]

Conduct of sale.—The sale must be made by the proper officer,[90] at the place and in the mode prescribed.[91] A sale made after the return day of a special execution may be cured by confirmation.[92]

Separate[93] parcels should be separately offered, but sale may be in gross if one parcel is insufficient.[94] The debtor cannot, as against the mortgagee, fix the order in which several properties shall be sold.[95]

Payment of bid and completion of purchase.—The court may prescribe reasonable rules as to deposits by the purchaser.[96] Satisfaction of the debt may be regarded as the same as a money payment,[97] but an assignee of the decree so buying in must prove the assignment before confirmation will be made.[98] Defects in title authorize a refusal to comply with bid,[99] but not matters of which he had knowledge.[1] On refusal of the purchaser to comply with his bid, the court has discretion as to whether it will order a new sale or compel the purchaser to go on.[2]

Resale.—A resale, after a defective one, may be permitted after the expiration of the time limited for payment of the debt.[3] Where a deed is not taken on an unconfirmed first sale, it cannot be urged against a second sale to the same purchaser if the court uses the date of the first sale as a basis for adjusting the rights of the parties.[4] Where a resale brings a greater price it obviates any objection as to the nonacceptance of the bid at the first sale.[5]

Stein v. Parrotte [Neb.] 96 N. W. 155; Sanford v. Anderson [Neb.] 96 N. W. 486. Alleged failure to appraise the interest of all the defendants having an estate in the land. Gray v. Eurich [Neb.] 96 N. W. 343; Gray v. Naiman [Neb.] 96 N. W. 343. Disqualifications of an appraiser known to the defendant at the time of appraisement cannot be urged as an objection to the confirmation of the sale. Union Cent. L. Ins. Co. v. Baker [Neb.] 96 N. W. 116.

86. Too general to object that appraisement is irregular and not in accordance with law. Bird v. McCreary [Neb.] 93 N. W. 684.

87. Pierce v. Reed [Neb.] 93 N. W. 154.

88. Bowman v. Bellows Falls Sav. Inst. [Neb.] 92 N. W. 204.

89. Under Code Civ. Proc. § 495, authorizing a new appraisement after two unsuccessful offers for sale, one offer does not necessitate a new appraisement. Wilson v. New [Neb.] 93 N. W. 941. The number is not limited where granted on account of inability to sell at the former appraisement. Code Civ. Proc. § 495, authorizes a new appraisement when two unsuccessful attempts to sell show that the valuation was too high. Logan v. Wittum [Neb.] 93 N. W. 146.

90. Deputy sheriff. Bell v. Omaha Sav. Bank [Neb.] 95 N. W. 486.

91. No objection that the sale is made at the south door of the court house in place of the court room. Iowa L. & T. Co. v. Nehler [Neb.] 92 N. W. 729.

92. Norton v. Reardon [Kan.] 72 Pac. 861.

93. Separate tracts must be separately sold though they are inclosed by one fence. Comp. Laws, § 11,139. The tracts were acquired by distinct deeds and improved by separate dwelling houses occupied by tenants. O'Connor v. Keenan [Mich.] 94 N. W. 186. A farm of 200 acres, consisting of separate government divisions worked together, may be sold as one parcel. Pierce v. Reed [Neb.] 93 N. W. 154.

94. Tichey v. Simecek [Neb.] 97 N. W. 323.

95. Mich. Trust Co. v. Red Cloud [Neb.] 92 N. W. 900.

96. Requirement of deposit of $50 with the sheriff or master is reasonable. Cummings v. Hart [Neb.] 93 N. W. 150.

97. McLagan v. Witte [Neb.] 96 N. W. 490.

98. An assignment purporting to be made by an administrator other than the administrator prosecuting the foreclosure proceedings is not sufficient. Guthrie v. Guthrie [Neb.] 93 N. W. 1131.

99. A purchaser may refuse to accept the title at a foreclosure sale for a community debt of property acquired with the wife's funds until her claim is removed. Neuhauser v. Barthe, 110 La. 825. The purchaser may be relieved from his purchase where there has been no reference as required where there is an infant defendant [Supreme Court Gen. R. of Practice 60]. Smith v. Warringer, 41 Misc. (N. Y.) 94.

1. On foreclosure sale of a leasehold, the purchaser may be compelled to complete his purchase, though an action to set aside an assignment of the lease has been begun if he had knowledge of such action. Dunlop v. Mulry, 85 App. Div. (N. Y.) 498.

2. Dunlop v. Mulry, 40 Misc. [N. Y.] 131.

3. Sale was attacked in partition. O'Connor v. Keenan [Mich.] 94 N. W. 186.

4. Charging the purchaser with the cost of the second sale allowed interest on the decree to the date thereof and a judgment

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Return.—An officer's return of sale will be regarded as true in the absence of a showing to the contrary.[6] An order of sale is not to be regarded as returnable as general execution.[7]

Confirmation or setting aside.—Though a foreclosure is regarded as not in equity, the court may, by its decree, provide that the sale and sheriff's deed shall pass title to the purchaser, and that he shall be given possession, and confirmation of the sale is unnecessary to pass title while the decree stands unreversed.[8] Allowance of a writ of assistance is equivalent to confirmation of the sale.[9] The jurisdiction to confirm a sale carries with it jurisdiction to overrule objections,[10] and making an order of confirmation overrules them without specific mention.[11] They must be promptly urged,[12] and must specifically state the grounds.[13] The hearing on them should be on affidavits unless it is necessary that they be referred to an examiner.[14]

Non-prejudicial irregularities will not authorize the setting aside of a sale.[15] Inadequacy of price is not a ground.[16] Great inadequacy together with slight circumstances of unfairness will raise a presumption of fraud,[17] unless so great as to shock the conscience.[18]

Objections to confirmation of sale must be presented below to be considered on appeal.[19] A bill in equity will not lie to set aside an order of confirmation which was entered into in open court by agreement of counsel for both parties.[20] Limitations of actions to recover real estate sold on execution apply to foreclosure sales in some jurisdictions.[21] On reversal of a decree of foreclosure, defendant is entitled to have the sale set aside.[22] A sale is not set aside by an order vacating the judgment as to the owner of the equity of redemption only.[23]

for the deficiency. Cutter v. Woodard [Neb.] 94 N. W. 971.

5. Vroom v. Lewis [Neb.] 92 N. W. 202.

6. It will not be held that there was no purchaser or that he was fictitious, where the return shows that a sale was made to a person named "assignee of the decree and mortgage." McLagan v. Witte [Neb.] 96 N. W. 490. A recital in the return that the publication of notice of sale has been made is sufficient, where there is no evidence to the contrary, though the return should properly have an affidavit of publication of notice by some person with knowledge. Shepherd v. Venuto [Neb.] 97 N. W. 226.

7. Sale need not be made within 60 days after issuance of the order. Hartsuff v. Huss [Neb.] 95 N. W. 1070. Not returnable in the time fixed for execution. Wilson v. New [Neb.] 93 N. W. 941.

8, 9. State v. Evans, 176 Mo. 310.

10. Hutchinson v. Smidt [Neb.] 96 N. W. 601.

11. Hartsuff v. Huss [Neb.] 95 N. W. 1070.

12. Laches to wait four years after sale of which the mortgagor has notice, until expiration of time for redemption and bar of the debt. Ayers v. McRae [Ark.] 72 S. W. 52.

13. Keene Five Cent Sav. Bank v. Johnson [Neb.] 95 N. W. 504.

14. Hunt v. Whitehead, 19 App. D. C. 116.

15. Jones v. Miller [Neb.] 92 N. W. 201. Record held insufficient to warrant reversal of an order affirming a sale. Kingsley v. Svoboda [Neb.] 96 N. W. 518. Imperfect or erroneous description. Hutchinson v. Smidt [Neb.] 96 N. W. 601. Recital in the notice that land had been "levied" on under a "judgment" rendered before the judge named. Gray v. Eurich [Neb.] 96 N. W. 343; Gray v. Naiman [Neb.] 96 N. W. 343. Violation of an injunction by the purchaser prior to sale not ground for refusing confirmation. Union Sav. Bank v. Lincoln Normal University [Neb.] 93 N. W. 408.

16. James v. Webb, 24 Ky. L. R. 1382, 71 S. W. 526; Barnard v. Jersey, 39 Misc. (N. Y.) 212. The highest bid will be regarded as a fair value of the property, where the sale is on proper notice and openly and fairly conducted. Nitro-Phosphate Syndicate v. Johnson, 100 Va. 774.

17. Defendant had arranged to pay $3,000 to the creditor, the prospective bidders did not attend the sale on account of information that it had been postponed, and defendant had been surprised by failure to obtain a loan of $3,000. Hunt v. Whitehead, 19 App. D. C. 116.

18. McDonnell v. De Soto S. & B. Ass'n, 175 Mo. 250. A sale will not be set aside on the grounds of inadequacy of price and negligence of plaintiff's attorney. Especially where such objections are raised in an independent action after having been raised before confirmation of the sale. Crebbin v. Powell [Kan.] 74 Pac. 621.

19. Walker v. Fitzgerald [Neb.] 95 N. W. 32. The fact that an appeal from a foreclosure decree is pending, cannot be for the first time urged on appeal from an order confirming the sale. Tichey v. Simecek [Neb.] 97 N. W. 323.

20. Phoenix Ins. Co. v. Boehl [Neb.] 96 N. W. 633.

21. Civ. Code, § 16. Mowry v. Howard, 65 Kan. 862, 70 Pac. 863.

22. Though the reversal is with directions to enter judgment in conformity and the only change ordered is the deduction of a sum from the sum declared due, leaving a bal-

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Rights of purchaser.[24]—A mortgagee who becomes purchaser is not vested with the legal title by the sale.[25] The purchaser acquires the title that was passed by the mortgage or deed of trust without any limitations that may be attempted to be put on such title by mere notice given at the foreclosure sale.[26] He acquires the entire interest of all parties unless the decree otherwise stipulates,[27] and is subrogated to the rights of the mortgagee.[28] An easement in favor of the premises, created after execution of a mortgage, passes.[29] Whether property is fixtures becomes immaterial where it is agreed that they shall not pass by the mortgage.[30]

The purchaser who enters under a void or reversible sale will be regarded as a mortgagee in possession.[31] He may be allowed for improvements.[32] Where a mortgagee by stifling bidding secures property at less than its value, profits derived from him on a resale soon after may be applied to the mortgage debt,[33] or if the appellee purchases and takes possession, the supreme court on reversal should authorize proper proceedings to be taken for an accounting as to rents and profits and for restitution.[34]

An omission of part of the premises from the foreclosure suit cannot be cured by a bill to amend the original bill by adding a proper description and for a deed in accordance.[35]

A sale on a judgment rendered on a void mortgage confers no title.[36]

The certificate of purchase conveys no title, only an equity.[37] It becomes void on failure to take a deed within the period prescribed by statute. It is immaterial that the purchaser be in possession,[38] and such possession will not work an estoppel as against a grantee of the mortgagor.[39]

Deed.—The purchaser does not, in some jurisdictions, acquire title until he takes a sheriff's deed.[40] He may quitclaim and his grantee receive the deed.[41]

ance larger than the purchase price of the land at the foreclosure sale. Cowdery v. London & S. F. Bank, 139 Cal. 298, 73 Pac. 196.

23. On the ground that the owner was not served. Green v. Mussey, 76 App. Div. (N. Y.) 174.

24. See Vendor and Purchaser for sufficiency of title under foreclosure to comply with contract of sale.

25. Hawkeye Ins. Co. v. Maxwell, 119 Iowa, 672.

26. Finley v. Babb, 173 Mo. 257. Where life-tenants mortgage with covenants of fee simple, purchasers at foreclosure do not take the interests of contingent remaindermen. Rudd v. Travelers' Ins. Co., 24 Ky. L. R. 2141, 73 S. W. 759.

27. Hart v. Beardsley [Neb.] 93 N. W. 423. On foreclosure of a mortgage on a remainder, the remainderman's interest is extinguished and he can convey no interest after death of the life tenant. Finley v. Babb, 173 Mo. 257.

28. Equitable Mortg. Co. v. Gray [Kan.] 74 Pac. 614.

29. Richmond v. Bennett, 205 Pa. 470.

30. Richards v. Gilbert, 116 Ga. 382.

31. Kelso v. Norton, 65 Kan. 778, 70 Pac. 896. A mortgagee in possession, under the decree may, on reversal of the decree, if the mortgage covers such rents and profits, apply them on the mortgage debt. Cowdery v. London & S. F. Bank, 139 Cal. 298, 73 Pac. 196.

32. In forcible entry against the purchaser by the mortgagor, defendant should be allowed to show the making of permanent improvements of value. Harden v. Collins [Ala.] 35 So. 357.

33. Huntzicker v. Dangers, 115 Wis. 570.

34. Maxwell v. Jacksonville L. & I. Co. [Fla.] 34 So. 255.

35. Such amendment would in effect be a foreclosure as to the omitted premises without advertising them for sale. Adams v. Reynolds [N. J. Eq.] 55 Atl. 1003.

36. The purchaser has no right to maintain forcible entry and detainer. Way v. Scott, 118 Iowa, 197. A purchaser at foreclosure sale who goes into the possession of land covered by the mortgage but not owned by the mortgagor must account to the true owner for rents and profits. Mortgage covered a house partially built on an adjoining owner's land. Rhodes v. Stone, 25 Ky. L. R. 921, 76 S. W. 533.

37. Bradley v. Lightcap, 202 Ill. 154. After a judicial sale the legal title remains in the mortgagor until the deed is executed to the purchaser or redemptioner, and the certificate of sale constitutes but a lien in the nature of an equitable estate. MacGregor v. Pierce [S. D.] 95 N. W. 281.

38. Bradley v. Lightcap, 202 Ill. 154. If the beneficiary is the purchaser, she cannot insist that she is in possession as an equitable mortgagee. Id.

39. Bradley v. Lightcap, 202 Ill. 154.

40. Such deed must in Illinois, be taken within five years after the period of redemption expires. Rev. St. c. 77, § 30. In this case neither the decree nor certificate of purchase purported to vest title in the purchaser. Bradley v. Lightcap, 201 Ill. 511.

41. McLean v. McCormick [Neb.] 93 N. W.

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The sheriff's deed under certain statutes may be made previous to an order of the court approving the sale.[42] Error in the recitals in the deed may be corrected by the sheriff where the proceedings are regular.[43]

Possession and restitution.—Where foreclosure is in equity, the court may issue a writ of assistance to put the purchaser into possession.[44] The writ will not issue from a judge at chambers.[45] In Florida it will not issue until the decree is signed and recorded.[46]

Invalidity of a mortgage cannot be asserted in defense to ejectment by the purchaser at foreclosure,[47] though irregularities in the sale may.[48]

In an action to recover possession, the purchaser is not entitled to a receiver of rents and profits as against a transferee of the owner of the equity of redemption, where the mortgage does not pledge the rents and profits and it does not appear that the mortgagor is insolvent or the property is insufficient security.[49]

An order of restitution of the property sold may be had only in a proceeding to which the purchaser is a party.[50]

Where the mortgagee becomes the purchaser, the mortgagor cannot bring ejectment, on the ground that the decree was defective for lack of a necessary party defendant, without paying the mortgage debt.[51]

(§ 4) *F. Deficiency and liability therefor.*[52] The repeal of a statute providing for the rendering of a deficiency judgment does not affect cases pending,[53] or rights existing under mortgages executed prior thereto.[54] If statutes provide that after foreclosure no proceedings on the mortgage debt may be had, such proceedings cannot be maintained in another state.[55] A maker of a note and mortgage may take it by assignment and obtain a deficiency judgment against his co-makers and against vendees who assumed the note and mortgage.[56]

Persons liable.—The original debtor[57] or his heirs,[58] or a promisor by collateral agreement,[59] e. g., an agreement to assume,[60] may be liable.

The mortgagor may relieve himself from liability for a deficiency resulting

697. During the period for redemption, the purchaser's title may be passed by a quitclaim deed which will become indefeasible after the expiration of the redemption period. Tuttle v. Boshart, 88 Minn. 284.

42. De Cunto v. Johnson [Colo. App.] 70 Pac. 955.

43. Code, § 139, allows amendments to correct any mistake or conform proceedings to the facts proven. Longworth v. Johnson, 66 Kan. 733, 71 Pac. 260.

44. State v. Evans, 176 Mo. 310.

45. Hartsuff v. Huss [Neb.] 95 N. W. 1070.

46. Being subject to Rev. St. § 1448, providing that no proceeding shall be had on any final decree until it is signed. Wilmott v. Equitable B. & L. Ass'n [Fla.] 33 So. 447.

47. Insufficiency of acknowledgment. Farmers' S. & B. & L. Ass'n v. Greenwood, 137 Ala. 257.

48. Robinson v. United Trust [Ark.] 72 S. W. 992.

49. Though the deed transferring the equity of redemption was recorded after foreclosure was begun but before a lis pendens was filed. Greenwood L. & G. Ass'n v. Childs [S. C.] 45 S. E. 167.

50. Schieck v. Donohue, 81 App. Div. (N. Y.) 168.

51. Equitable Mortg. Co. v. Gray [Kan.] 74 Pac. 614.

52. See Limitation of Actions for foreclosure as tolling statute of limitations as to action on notes secured.

53. Repeal of Code Civ. Proc. § 847, by Laws 1897, c. 95, § 1, p. 378. Wolcott v. Henninger [Neb.] 96 N. W. 612; Wolff v. Phelps [Neb.] 92 N. W. 143.

54. Burrows v. Vanderbergh [Neb.] 95 N. W. 57.

55. Foreclosure in Nebraska under Code Civ. Proc. § 848. Gates v. Tebbetts [Mo. App.] 75 S. W. 169.

56. Rev. St. 1898, § 3156. Fanning v. Murphy [Wis.] 94 N. W. 335.

57. A trust estate may be held for a deficiency resulting after sale under a mortgage executed by a trustee prior to Act 1897. Stitzer v. Whittaker [Neb.] 91 N. W. 713.

58. Children who are transferees of realty during the lifetime of the mortgagor are not liable as heirs at law for a deficiency judgment after the death of the mortgagor, unless the conveyance to them appears to be fraudulent. Matteson v. Palser, 173 N. Y. 404.

59. Executed by the owner of the fee to prevent foreclosure against a bankrupt mortgagor. German Sav. Bank v. Brodsky, 39 Misc. (N. Y.) 100.

60. An assumption of the mortgage debt by a subsequent grantee will not render him liable to the mortgagee for a deficiency if an intermediate grantee failed to assume. Williams v. Van Gelson, 76 App. Div. (N. Y.) 592.

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from waste of the property by a transferee by notice to the mortgagee to foreclose promptly.[61]

Defenses.—Representations to the maker that he was assuming no personal liability may be a defense,[62] also delay in proceeding against the estate of the deceased mortgagor,[63] and acts of the mortgagee to prevent redemption or a proper defense on foreclosure;[64] and if the makers no longer held the equity of redemption at the time of sale, they may show that an insufficient price was realized.[65] Only such defenses as accrue after entry of judgment on a note can be interposed against a deficiency judgment entered after the coming in of the report of sale of mortgaged premises.[66]

On cancellation of the mortgages on account of the mental incapacity of the mortgagor there being also a plea of fraud and failure of consideration, personal judgment should not be entered against the mortgagor's estate though the defense was not asserted by the administrator but only by the widow and heirs.[67] Waste by the mortgagee in possession may be counterclaimed.[68] *An application* by the assignee of a second mortgage *for leave to sue for a deficiency* will not be overcome by statements of the assignor that he had been informed that personal judgment would not be sought against him on foreclosure of the second mortgage and that he was released from his guaranty of such mortgage by failure to make him a party to foreclose the first mortgage.[69]

Sufficiency of process, pleadings, and decree.—Service of process on a trustee holding the legal title to the mortgaged property, while perhaps sufficient to authorize a decree of foreclosure binding the beneficiary, will not authorize a personal judgment against the beneficiary.[70] A defendant against whom a deficiency judgment has been rendered cannot complain of failure to serve a co-defendant.[71]

If a personal judgment is sought against a subsequent grantee, the facts showing his liability must be pleaded.[72] A prayer for a decree for the amount found due will authorize the court, on finding for defendant on a cross bill denying the validity of the mortgage, to render a personal judgment for the debt, and decree that the deed be set aside on payment.[73]

A decree finding that one of the defendants assumed and agreed to pay the mortgage debt is sufficient to support a deficiency judgment for him.[74] Where it

61. After transfer subject to a mortgage which the purchaser did not assume and notice by the mortgagor to foreclose, the mortgagee delayed and allowed interest, taxes and water rents to accrue, and it was held that such sums should be deducted from the deficiency judgment. Gottschalk v. Jungmann, 78 App. Div. (N. Y.) 171. But rents and profits after such notice cannot be deducted, especially where it does not appear that the mortgagee would have been entitled to the appointment of a receiver. Id.

62. Merchants' & F. Co. v. Cleland [Ky.] 77 S. W. 176.

63. Rev. St. 1898, § 3844. Pereles v. Leiser [Wis.] 96 N. W. 799.

64. Purchase for less than value and conveyance so as to prevent redemption. Hicks v. Beedle, 98 Mo. App. 223.

A deficiency judgment against a mortgagor's heirs will not be permitted where the mortgagee by release of portions of the mortgaged property and failure to join certain of the heirs on foreclosure causes them to neglect to protect their interests at foreclosure. An action by the executrix of the mortgagee cannot be begun without leave of court. Rowley v. Nellis, 41 Misc. (N. Y.) 315.

65. Boutelle v. Carpenter, 182 Mass. 417.

66. Carstens v. Eller [Neb.] 97 N. W. 631.

67. Farmers' Bank v. Normand [Neb.] 92 N. W. 723.

68. As where the mortgagee in possession under a sale under a power in a trust deed disposes of buildings on the property and permits them to be removed by the purchaser. Staunchfield v. Jeutter [Neb.] 96 N. W. 642.

69. McLaughlin v. Durr, 76 App. Div. (N. Y.) 75.

70. Thornily v. Prentice [Iowa] 96 N. W. 728.

71. Since the jurisdiction to render such a judgment depends only on the original summons prior to the repeal of Code Civ. Proc. § 847. Brand v. Garneau [Neb.] 93 N. W. 219.

72. Complaint held insufficient as pleading merely legal conclusions. Bush v. Louisville Trust Co., 24 Ky. L. R. 2182, 73 S. W. 775.

73. Bourke v. Hefter, 202 Ill. 321.

74. Crary v. Buck [Neb.] 95 N. W. 839.

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is sought to foreclose as against a grantee of the mortgaged property and to obtain a personal judgment, the deed of conveyance need not be reformed, though the grantee's name does not appear therein, if the grantee is otherwise sufficiently identified.[75]

Procedure after sale.—The liability of defendants to a deficiency judgment may be properly litigated after sale,[76] for any unsatisfied balance.[77] The right to a personal judgment may be fixed by the original decree and the amount left undetermined,[78] but in Nebraska, judgment may be rendered only after the mortgaged property has been exhausted, and entered only after the coming in of the report of sale and the affirmance thereof.[79] Where the master reports a deficiency, a decree may be entered therefor,[80] but judgment need not be rendered at once on the coming in of the report of sale.[81]

Application may, in some states, be by motion and notice and not by verified petition and service of process.[82] Where transferees of the premises have assumed two mortgages, their liability for a deficiency cannot be determined in an action by a second mortgagee to which the first is not made a party.[83]

The burden is on the mortgagee, seeking to establish a wife's liability for a deficiency, to establish her disputed execution of the mortgage with her husband.[84]

(§ 4) *G. Receivership in foreclosure.*—The appointment of a receiver is to be regarded as an equitable remedy and not a legal right.[85] It is not confined to a statutory right.[86] It is discretionary[87] where the rents and profits are pledged,[88] though the mortgage provide for appointment.[89] The appointment may be without regard to the mortgagor's solvency.[90]

Where rents and profits are not pledged, the premises must be shown to be inadequate security or the mortgagor to be insolvent,[91] unless the statute prescribes grounds.[92]

75. Bossingham v. Syck, 118 Iowa, 192.

76. Crary v. Buck [Neb.] 95 N. W. 839.

77. Herbert Kraft Co. v. Bryan, 140 Cal. 73, 73 Pac. 745.

78. Field v. Howry [Mich.] 94 N. W. 213.

79. Carnahan v. Brewster [Neb.] 96 N. W. 590. Code Civ. Proc. § 848, provided that after petition in foreclosure is filed and decree is rendered, no proceedings shall be taken at law for recovery of the debt unless ordered by the court. Wolff v. Phelps [Neb.] 92 N. W. 143.

80. Ball v. Marske, 202 Ill. 31.

81. Code Civ. Proc. § 847. Crary v. Buck [Neb.] 95 N. W. 839. Under the law as it formerly stood in Nebraska the judgment might be rendered at a term subsequent to that at which the sale was confirmed [Code Civ. Proc. § 847]. Sawyer v. Bender [Neb.] 93 N. W. 980.

82. Code Civ. Proc. § 572. Crary v. Buck [Neb.] 95 N. W. 839.

83. Rudolf v. Burton, 82 N. Y. Supp. 592.

84. Evidence held insufficient to authorize a deficiency judgment. Morris v. Linton [Neb.] 95 N. W. 11.

85. It is merely a collateral remedy against the rents and profits which are secondarily liable for a deficiency. Ortengren v. Rice, 104 Ill. App. 428.

86. A receiver may be appointed where the right appears though the application does not directly allege that the property is probably insufficient to discharge the debt, as required by Rev. St. 1895, art. 1465, § 2. De Berrera v. Frost [Tex. Civ. App.] 77 S. W. 637.

87. Held proper, where the value of the premises was about $205.10 and the amount of the mortgage debt $458.71. McKenzie v. Beaumont [Neb.] 97 N. W. 225.

88. Lechner v. Green, 104 Ill. App. 442; Ortengren v. Rice, 104 Ill. App. 428. Where the mortgage pledges rents and profits and authorizes the appointment of a receiver on default, the appointment is properly made where the mortgagor fails to keep up the insurance and allows interest to accumulate. Bagley v. Ill. T. & S. Bank, 199 Ill. 76. Where the mortgage provides that the mortgagee shall have the rents and profits after default. McLester v. Rose, 104 Ill. App. 433.

89. Order denying receivership will not be disturbed where the moving papers do not show the insufficiency of the security and the value thereof cannot be determined from the complaint. New York Bldg., L. & B. Co. v. Begly, 75 App. Div. (N. Y.) 308, 11 Ann. Cas. 473.

90. On a bill alleging that the premises were scant security. Ball v. Marske, 202 Ill. 31.

91. Default in payment is not a sufficient ground though an allowance of a tax sale may be. Ortengren v. Rice, 104 Ill. App. 428; McLester v. Rose, 104 Ill. App. 433.

92. Where the mortgaged property is in danger of being lost, removed, injured or is probably insufficient to discharge the mortgage debt [Code, § 266]. Johnson v. Young [Neb.] 95 N. W. 497.

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The mortgagee may have a receiver though there is a statutory provision for sequestration of the property.[93] The fact that a tenant is in possession under a void lease is no objection to the appointment of a receiver, nor the fact that under the mortgage the mortgagee may compel the tenants to pay their rents to him,[94] or that the wife's portion of the property is released, since the rents if pledged for the payment of the husband's debt, being community property, can be reached.[95]

Where the property is a homestead, a receiver will ordinarily not be appointed,[96] except as to separable parts not homestead.[97]

Custody.—The receiver may be allowed to remain in possession in the interim between the decree and the sale.[98] As against a receiver appointed pending an appeal from confirmation of a foreclosure sale, the mortgagor's tenant is entitled to growing crops.[99]

Effect of appointment.—By appearance and consent to the appointment of a receiver, the right of possession and to rents and profits is concluded.[1] The party securing the appointment of a receiver may be liable for a deficiency judgment in case the sale of the premises does not satisfy the expenses.[2]

Procedure.—An order for the appointment of a receiver can be made only in the county where the action is triable.[3] Appointment may be by a decree subsequent to the original one.[4] The petition need not propose the name of a person as receiver or names of persons as sureties for him or for the applicant.[5] An allegation of the insolvency of persons primarily liable to pay the debt and that the property described in the mortgage is probably insufficient to satisfy the debt is sufficient.[6]

The granting of a receiver before the applicant's bond has been filed and approved is cured by a subsequent acceptance and approval of the applicant's bond during the same term by the judge granting the order.[7] Objections to the form of an order appointing a receiver, to the amount or conditions of his bond, or to the approval of the bond by a judge, other than the one issuing the order, not made in the lower court, cannot be urged on appeal.[8]

Disposition of funds.—The mortgagee may be entitled to have the proceeds of the operation of the mortgaged property by the receiver applied to a deficiency without the rendition of a deficiency decree, where the fund in controversy is in court and the contestants appear.[9] Though a junior mortgagee secures appoint-

93. Under Rev. St. 1895, art. 4873, defendant might have remained in possession of the mortgaged premises by executing a bond in which case he would not be required to account for the rents. De Berrera v. Frost [Tex. Civ. App.] 77 S. W. 637.

94, 95. De Berrera v. Frost [Tex. Civ. App.] 77 S. W. 637.

96. Sanford v. Anderson [Neb.] 92 N. W. 152; Johnson v. Young [Neb.] 95 N. W. 497.

97. On appeal, a showing being made that the sale did not realize the amount of the mortgage and taxes are in arrears and accumulated. Sanford v. Anderson [Neb.] 95 N. W. 632.

98. Mortgage stipulated for a receiver "during the pendency of the suit." Bagley v. Ill. T. & S. Bank, 199 Ill. 76.

99. The supersedeas having been granted. Cassell v. Ashley [Neb.] 92 N. W. 1035.

1. Mortgagor concluded. Boyce v. Continental Wire Co. (C. C. A.) 125 Fed. 740. Creditors coming into the case after the appointment of a receiver and joining the mortgagor in a request that the receiver operate the property, it being a manufacturing plant, cannot claim the profits resulting therefrom as against the mortgagee, though the mortgagee has objected to the operation. Id.

2. If the court has retained jurisdiction until the settlement of the receiver's accounts it may render judgment at that time. Chapman v. Atlantic Trust Co. (C. C. A.) 119 Fed. 257.

3. Motion denied after demand for change of place of trial to county where mortgaged property is situated before expiration of the time for plaintiff's consent under Code Civ. Proc. § 986. Knickerbocker Trust Co. v. Oneonta, C. & R. S. R. Co., 41 Misc. (N. Y.) 204.

4. Ball v. Marske, 202 Ill. 31.

5, 6. Robertson v. Ostrom [Neb.] 95 N. W. 469.

7. There appeared to be no specific objection below to the procedure. Johnson v. Young [Neb.] 95 N. W. 497.

8. Robertson v. Ostrom [Neb.] 95 N. W. 469.

9. A deficiency decree under which by an execution the marshal may bring outside

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ment of receivership, he is not entitled to the funds resulting therefrom as against a senior mortgagee unless the order so stipulates;[10] but if the senior mortgagee became the purchaser, he is not entitled to have the receivership funds applied to the payment of taxes which were a lien at the time of his purchase,[11] and in any event, a purchaser at foreclosure is not entitled to have funds in the hands of the receiver applied to the payment of taxes due before the confirmation of the sale, where the sale is made subject to taxes.[12]

If the property sell for less than the debt, a statutory exemption cannot be claimed from the rents and profits during the period for redemption.[13]

(§ 4) *H. Distribution of proceeds and surplus.*—Assignees of a portion of the decree are entitled to priority over the portion retained by their assignor though not over a portion reassigned to him, but account should not be taken of expenses incurred by the assignees in protecting their interest by removing a tax title.[14] The beneficial owner of the equity of redemption takes the surplus,[15] and second mortgagee or junior lieners if made parties on foreclosure have a lien on it.[16] Contract creditors whose claims are established after the sale may share in the surplus moneys.[17]

A person seeking to recover, against the sureties of a sheriff, the proceeds of a foreclosure sale, must show that the sale was confirmed.[18] Surplus money on sale of the lands of a deceased mortgagor should be paid into the court from which letters testamentary have been issued, if issued within four years before sale.[19] A contract creditor may move for distribution[20] which should be on notice.[21] A lien holder may bring assumpsit.[22]

It need not be alleged that an agreement supporting the right to surplus was in writing.[23]

property into the court not being required. Boyce v. Continental Wire Co. (C. C. A.) 125 Fed. 740.

10. Appointment secured in foreclosure by the senior mortgagee. New Jersey T., G. & T. Co. v. Cone, 64 N. J. Eq. 45.

11. New Jersey T., G. & T. Co. v. Cone, 64 N. J. Eq. 45.

12. Adler & Sons Clothing Co. v. Hellman [Neb.] 95 N. W. 467.

13. Construing Burns' Rev. St. 1901, § 715. Russell v. Bruce, 159 Ind. 552.

14. Alden v. White [Ind. App.] 66 N. E. 509, 67 N. E. 949.

15. If the property has been bequeathed in trust, the beneficiary is entitled to the surplus after foreclosure. Simmons v. Morgan [R. I.] 55 Atl. 522.

16. Robertson v. Brooks [Neb.] 91 N. W. 709. It cannot be defeated by garnishment by an unsecured creditor (Jackson v. Coffman [Tenn.] 75 S. W. 718) but a second mortgagee who has no lien on the wife's property cannot reach a surplus resulting from its sale on foreclosure of a first mortgage. Wife was surety in the second mortgage but was discharged from liability by an extension of time of payment. White v. Smith, 174 Mo. 186. Where a cross petitioner holding a second mortgage secures the establishment of the lien of such a mortgage, he is entitled to be repaid from the proceeds of the sale, though the decree so far as it establishes a first mortgage is reversed. Pierce v. Atwood [Neb.] 93 N. W. 153.

A subordinate mechanic's lien attaches to the surplus. Knowles v. Sullivan, 182 Mass. 18.

Though the mortgage provides that it is to secure all money which may thereafter become due and owing, surplus money is not subject to the lien of a judgment rendered after the foreclosure decree, where the pleadings in foreclosure proceedings make no claim therefor. Pleadings held insufficient to cover a subsequent judgment. Powell v. Harrison, 85 N. Y. Supp. 452.

The statute of limitations does not run against a second mortgagee's right of action for the conversion of the surplus of sale on the first mortgage until the second mortgage is foreclosed. Robertson v. Brooks [Neb.] 91 N. W. 709.

17. Powell v. Harrison, 85 N. Y. Supp. 452.

18. Craw v. Abrams [Neb.] 97 N. W. 296.

19. Code Civ. Proc. §§ 2798, 2799. Powell v. Harrison, 85 N. Y. Supp. 452.

20. Since he has power to have the deceased's real estate disposed of to pay the amount due him, he has an interest in the proper application of the surplus moneys.

21. An order of distribution of surplus money made without notice to all the creditors, is properly modified by requiring the money to be paid into court to await further orders. Powell v. Harrison, 85 N. Y. Supp. 452.

In New York, where a surplus has been paid into the hands of the county treasurer, it is error to grant an ex parte order that it be paid into the Surrogate court at the instance of a creditor of the deceased mortgagor, if there are other actions pending to foreclose liens, the holders of which were parties to the action to foreclose. Wash. L. Ins. Co. v. Clark, 79 App. Div. (N. Y.) 160.

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(§ 4) *I. Effect of proceedings.*—The mortgage lien merges into the foreclosure decree,[24] when it becomes a finality[25] ordinarily as to the whole debt.[26] The lien of the decree on other property is not destroyed by a purchase and sale of a portion of the property for a portion of the amount.[27] If there is a redemption from a foreclosure for overdue interest, there may be subsequent foreclosure on default in other instalments.[28] Irregularity in foreclosing for interest must be availed of in direct proceedings.[29]

Persons not joined as parties.—A trustee seeking foreclosure in his representative capacity is barred as to individual rights inconsistent therewith.[30] As against necessary parties not joined, the purchaser stands in the position of an assignee of the mortgage.[31] The holder of an unrecorded mortgage is bound by a decree in foreclosure, though he is not a party.[32]

Prior liens.—A paramount lien cannot be cut off by foreclosure, though the holder is made a party defendant,[33] nor in any way affected unless the court adjudicates upon it.[34]

Junior liens are divested by confirmation of foreclosure sale though their amount has been wrongfully deducted in the appraisement,[35] and if their amounts and priorities are fixed by the decree, the junior lienors being cross petitioners, a sale is regarded as a complete satisfaction though the amount realized is not sufficient to pay all the liens.[36] Where a subsequent lien is not expressly adjudicated upon under proper issues, it is not affected by the decree as far as its validity or standing is concerned as between the parties.[37]

The mortgagee is bound to set up any junior liens which he may hold or he cannot assert them as against parties to the decree or their privies.[38]

Junior lienholders not concluded by a decree of foreclosure are not entitled to insist that the mortgage lien is merged in the title of the purchaser.[39]

Where a junior encumbrancer is not joined, the purchaser may bring an ac-

22. Money had and received to plaintiff's use. Knowles v. Sullivan, 182 Mass. 318.

23. Such is a matter of evidence. Throckmorton v. O'Reilly [N. J. Eq.] 55 Atl. 56.

24. After that there can be no action on the debt or second foreclosure. Dumont v. Taylor [Kan.] 74 Pac. 234.

25. So long as the mortgagor by resisting confirmation or by appellate proceedings, prevents the mortgagee from obtaining actual payment either in land or money, the foreclosure sale is not a cancellation or extinguishment of the debt. Salisbury v. Murphy [Neb.] 94 N. W. 960.

26. A foreclosure for interest due on an installment ordinarily exhausts the entire lien of the mortgage, if the whole debt is at the time due. Neb. L. & T. Co. v. Doman [Neb.] 93 N. W. 1022; Neb. L. & T. Co. v. Haskell [Neb.] 93 N. W. 1045. But if the decree expressly provides that a sale should be made subject to the mortgage lien of the principal, it cannot be pleaded as a bar to the second foreclosure. Neb. L. & T. Co. v. Doman [Neb.] 93 N. W. 1022. The lien of the mortgage is exhausted by sale under foreclosure decree, unless the decree makes provision for sums which are to become due under the mortgage. Powell v. Harrison, 85 N. Y. Supp. 452.

27. Lincoln v. Lincoln St. R. Co. [Neb.] 93 N. W. 766.

28, 29. Neb. L. & T. Co. v. Haskell [Neb.] 93 N. W. 1045.

30. Walsh v. Robinson [Mich.] 97 N. W. 55.

31. A vendor who has covenanted to convey free of encumbrances, cannot on purchasing at the sale, acquire a right to bring ejectment against his vendee in possession who was not made a party. Titcomb v. Fonda, J. & G. R. Co., 38 Misc. (N. Y.) 630.

32. Sibell v. Weeks [N. J. Err. & App.] 55 Atl. 244.

33. Tax lienor who made no appearance not being a proper or necessary party. Butler v. Copp [Neb.] 97 N. W. 634.

34. Though a prior mortgagee is made a defendant, a confessed decree of foreclosure in an action by the second mortgagee will not affect the lien of the prior mortgage where no reference is made thereto in the decree and the court's attention is not directed thereto. Dwinell v. Holt [Vt.] 56 Atl. 99.

35. Hart v. Beardsley [Neb.] 93 N. W. 423.

36. O'Brien v. Kluver [Neb.] 95 N. W. 595.

37. Gillian v. McDowell [Neb.] 92 N. W. 991.

38. Tax lien held by the mortgagee. Dixon v. Elkenberry [Ind.] 67 N. E. 915.

39. The purchaser may redeem from a first lien for paving assessments and be subrogated to the rights of the city as against a junior incumbrancer, though the city also has a third lien. Lincoln v. Lincoln St. R. Co. [Neb.] 97 N. W. 255.

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tion to foreclose his lien and compel him to redeem, and if the suit is by an assignee of the purchaser, the purchaser need not be joined.[40]

(§ 4) *J. Costs.*[41]—If the mortgage provides for counsel fees, a personal judgment may be rendered therefor,[42] but where a mortgage given under a specific state of circumstances is abrogated by a change in the condition of the parties, a provision for attorney's fees contained in it is no longer applicable.[43] A tender of the amount due less attorney's fees and costs is an admission of the right to foreclose carrying with it the right to costs provided by deed,[44] and plaintiff may be allowed costs though the action is dismissed on account of a tender having been made by defendants before suit was brought.[45] None should be allowed to a defendant foreclosing by cross bill in a suit to quiet title.[46] The solicitor's fee may be fixed by proof taken preceding the close of complainant's evidence in chief before a master.[47] If the mortgage provides for costs and attorney's fees, the holder of a note may have judgment including costs on proof of breach of the covenant to keep the property insured and repay the cost of procuring an abstract.[48]

Services in determining a question of ultra vires in the execution of a trust deed and the bonds secured thereby by the mortgagor, a corporation, may be considered in determining the amount of solicitor's fees.[49] Additional costs may be allowed in New York in foreclosure of a difficult or extraordinary nature.[50]

§ 5. *Redemption. Nature of right.*—In the absence of statute, the right to redeem terminates by sale to a stranger, and does not survive until the deed is made.[51] There is, in the absence of fraud, no right of redemption in equity after foreclosure by judgment,[52] the right prescribed in cases of foreclosure by exercise of a power of sale not being applicable. Partial redemption cannot be demanded,[53] but may become binding by consent,[54] and on redemption a party cannot repudiate one portion of the decree while claiming under another.[55] The owner of the equity of redemption may redeem,[56] but one acquiring a judgment lien pending

40. Kelley v. Houts, 30 Ind. App. 474.

41. See Costs for general questions.

42. Luddy v. Pavkovich, 137 Cal. 284, 70 Pac. 177.

43. On insolvency of an insurance company to which a mortgage has been given, without default on the part of mortgagor, attorney's fees cannot be included in determining the amount due from him. Union Trust Co. v. Shilling, 30 Ind. App. 542.

44. Motion to set aside a decree entered for failure of defendants to keep the property insured. Uedelhofen v. Mason, 201 Ill. 465.

45. Rev. St. 1898, § 2918, makes costs in equity discretionary. Williams v. Williams [Wis.] 94 N. W. 25.

46. Mock v. Chalstrom [Iowa] 96 N. W. 909.

47. Unity Co. v. Equitable Trust Co., 204 Ill. 595.

48. Uedelhofen v. Mason, 201 Ill. 465.

49. Though the defense of ultra vires was not raised by answer but by objection to evidence. Unity Co. v. Equitable Trust Co., 204 Ill. 595.

50. Code Civ. Proc. § 3253, as amended in 1898 allows more than $200.00 additional costs. Long Island L. & T. Co. v. Long Island C. & N. R. Co., 82 N. Y. Supp. 644. In New York city and county, the referee's fees on foreclosure sale are the same as in case of sale by the sheriff. He is entitled to the commissions provided by Code Civ. Proc. § 3297 but his entire compensation must not exceed $50.00 where the property sells for less than $10,000.00, and if the judgment is paid before sale, can have fees only for receipt of the order of sale, passing notices, and not more than three adjournments. On adjournment of the sale there is no provision for auctioneer's fees. Harrington v. Bayles, 40 Misc. (N. Y.) 388.

51. Sale to a stranger. Barnard v. Jersey, 39 Misc. (N. Y.) 212.

52. Rev. St. 1899, §§ 4342-4344. White v. Smith, 174 Mo. 186.

53. A tenant in common must redeem the whole and cannot compel the release of his interest alone on payment of part of the debt. Dougherty v. Kubat [Neb.] 93 N. W. 317.

54. Co-tenant may be allowed to redeem his interest merely and after his election the mortgagee may prevent the redemption of the entire premises. Dougherty v. Kubat [Neb.] 93 N. W. 317.

55. Neb. L. & T. Co. v. Haskell [Neb.] 93 N. W. 1045.

56. A purchaser on a sale under a junior judgment made after foreclosure sale, may redeem, without regard as to whether his statutory lien under the judgment is still alive. Hawkeye Ins. Co. v. Maxwell, 119 Iowa, 672. In some states a purchaser at execution sale cannot redeem as a judgment creditor but as successor in interest of the judgment debtor [Code Civ. Proc. § 701, subds. 1, 2]. Pollard v. Harlow, 138 Cal. 390, 71 Pac. 454, 648. A second mortgagee who

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foreclosure has no right of redemption save that provided by statute.[57] A junior mortgagee who is not a party has an absolute right of redemption,[58] and if made party and his lien adjudicated he may in proper cases redeem in order to work out his equities.[59]

The right of the judgment creditor to redeem from a mortgage is statutory and cannot be exercised under a judgment prior to the statute.[60] A demand made to cut off the right must be on all co-tenants.[61] The right may be controlled by agreement.[62] An incumbrancer who induces the mortgagor not to redeem may be held accountable for profits made by buying in and reselling.[63]

An equity of redemption is "assets,"[64] and is leviable in many states.[65]

Time.[66]—A right to redeem may be extended by the appellate court, where it expires pending an appeal.[67] Statutory time has been held not to be extended by the pendency of a controversy with the purchaser in possession as to the amount of rents applicable to the debt.[68] A premature redemption by a junior mortgagee may be waived by the purchaser under a senior mortgage in which case the title may vest in the junior incumbrancer on expiration of the time for redemption.[69]

Amount required.—Statutes in force at the time of sale govern.[70] Generally speaking, the amount of all adjudicated liens and charges prior to the redemptioner must be paid.[71]

A junior mortgagee seeking to redeem need pay only the amount of the incumbrance and interest,[72] but a redemptioner must pay the full amount of the mortgage lien though the land sold for less.[73]

bought in on foreclosure of the second mortgage and who had also acquired the first mortgage and discharged it should be protected in his right to redeem as against an outstanding third mortgage. Raymond v. Whitehouse, 119 Iowa, 132.

57. Cooney v. Coppock, 119 Iowa, 486.

58. Jones v. Dutch [Neb.] 92 N. W. 735.

59. Second mortgagees who have secured a decree of foreclosure need not sue out execution thereon and have it levied in order that they may be entitled to redeem from a first mortgage sale, where their decree does not provide for the issuance of an execution, except in the case of a deficiency after sale. In such case 2 Starr & C. Ann. St. 1896, 2nd edition, p. 2358, does not control. Morava v. Bonner, 205 Ill. 321.

60. Geddis v. Packwood, 30 Wash. 270, 70 Pac. 481.

61. Though the tenant on whom demand is made is the husband of the other. Harden v. Collins [Ala.] 35 So. 357.

62. Evidence held sufficient to show agreement to allow the mortgagor to redeem. Brown v. Johnson, 115 Wis. 430. Evidence held sufficient to show fraud warranting the compulsion of a purchaser at judicial sale to allow the mortgagor to redeem. Seeley v. Adams [N. J. Eq.] 55 Atl. 320.

Reservation to one co-tenant will not bar rights of others to redeem, where such is not the intention of the parties (deed executed by a husband and wife reserving the right of possession in the husband does not destroy wife's right after husband's death). Loughran v. Lemmon, 19 App. D. C. 141. Where several tracts are purchased under an agreement to allow redemption, the agreement cannot be enforced as to a portion. Tender of $1,395.00 and offer to complete redemption of one of three terraces sold for $8,795.00. Dayton v. Stahl [Mich.] 93 N. W. 878.

63. Advance Thresher Co. v. Rockafellow [S. D.] 93 N. W. 652.

64. In insolvency. Sowles v. Lewis, 75 Vt. 59.

65. In Iowa the right of possession during the period for redemption does not pass by execution sale of the equity of redemption (an execution purchaser is not entitled to bring forcible entry and detainer). Hartman Mfg. Co. v. Luse [Iowa] 96 N. W. 972.

In Kentucky the equity of redemption is made subject to levy and sale, but there is a further right of redemption from that sale not subject to the payment of debts and under Ky. St. § 2365, the debtor may transfer this personal right of redemption. Potter v. Skiles, 24 Ky. L. R. 910, 70 S. W. 301.

66. Where a subsequent deficiency judgment is rendered against the grantees of mortgaged premises, they are entitled to the same period in which to redeem from the entry of such judgment as is prescribed for redemption from the entry of the original judgment [Rev. St. 1898, § 3162]. Citizens' L. & T. Co. v. Witte [Wis.] 97 N. W. 161.

67. In action to quiet title. Raymond v. Whitehouse, 119 Iowa, 132.

68. Rev. Code, § 5549. Little v. Worner, 11 N. D. 382.

69. Finnegan v. Efferts [Minn.] 95 N. W. 762.

70. Hooker v. Burr, 137 Cal. 663, 70 Pac. 778.

71. The owner of the equity of redemption who is not made a party to a proceeding to foreclose a mortgage, is not entitled by the fact that the junior mortgagees are made parties and their mortgages barred, to discharge his property of all the liens by a tender of the amount due on the first mortgage. Walsh v. Robinson [Mich.] 97 N. W. 55.

72. He need not pay the cost of foreclo-

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The mortgagee is not entitled to compensation for improvements other than necessary to keep the premises in repair, on redemption, and the rule extends to the administrator of the mortgagee,[74] and it is held that one buying with notice of the rights of a junior mortgagee to redeem cannot claim compensation for improvements.[75]

A holder of a certificate of purchase at foreclosure who pays taxes does so as a volunteer, and cannot recover them from a redemptioner.[76]

The presumption is that a sum deposited for redemption is sufficient to cover a fee for the recording of the certificate of redemption.[77]

Mode of redemption.—The tender must be definite,[78] and the redemptive acts substantially regular.[79]

The certificate of redemption need not state in what capacity redemption was made.[80] After the lapse of many years the legality of the redemption may be established by the testimony of the sheriff issuing the certificate of redemption, together with that of the attorney for the redemptioner.[81]

Junior lienholders, who do not attempt to redeem from the foreclosure of a senior mortgage, are not in a position to challenge the regularity of a redemption by other junior encumbrancers,[82] nor are they prejudiced by the fact that the sheriff's deed is issued to the redemptioner who is a junior encumbrancer rather than to the purchaser at the sale.[83]

Action to redeem must be seasonable,[84] and a bill to redeem after the statutory time cannot be sustained where it discloses a fraudulent attempt on the part of complainants to defeat the claims of other creditors.[85] An action for redemption on the ground of a promise to allow such redemption is not for fraud.[86] An objection to the amount stated in the complaint as requisite to redemption by the junior encumbrancer cannot be raised by demurrer.[87]

Though a second mortgagee has obtained an assignment of the first, its lien is not extinguished by his purchase of the property for the amount due on the second mortgage, and the mortgages should be treated as separate in an action to compel an equitable redemption, though they were executed at the same time.[88]

sure if he is not a party. Jones v. Dutch [Neb.] 92 N. W. 735.

73. Dougherty v. Kubat [Neb.] 93 N. W. 317.

74. Whetstone v. McQueen, 137 Ala. 301.

75. He has a remedy in paying off the subsequent mortgage. Jones v. Dutch [Neb.] 92 N. W. 735.

76. Burns' Rev. St. 1901, § 3695. Government B. & L. Inst. v. Richards [Ind. App.] 62 N. E. 1039.

77. Especially where the question arises for the first time on appeal. Morava v. Bonner, 205 Ill. 321.

78. A tender of the amount paid together with the offer to leave the ascertainment of the value of permanent improvements to arbitration in case the occupant makes an allowance for rent, is not sufficient to a redemption. Harden v. Collins [Ala.] 35 So. 357.

79. Redemption may be by subagent of the agent of one entitled to redeem. Hooker v. Burr, 137 Cal. 663, 70 Pac. 778. May be by a check which is properly honored on presentation, though the judgment calls for payment in gold coin. Id. Where redemptioners have fulfilled the statutory requirements, their right of redemption is not defeated by a failure of the master to record the certificate of purchase. Morava v. Bonner, 205 Ill. 321.

80. Redemption by purchaser on execution sale. Pollard v. Harlow, 138 Cal. 390, 71 Pac. 454, 648.

81. Where the certificate of redemption recites that the redemptioner furnish all the proofs necessary to entitle him to redeem it. MacGregor v. Pierce [S. D.] 95 N. W. 281.

82, 83. MacGregor v. Pierce [S. D.] 95 N. W. 281.

84. Where foreclosure is permitted on reliance on a promise by the mortgagee to execute a declaration of trust in favor of the mortgagor, a bill to redeem is barred by laches where not brought for seven years. Snipes v. Kelleher, 31 Wash. 386, 72 Pac. 67. Under an agreement between the mortgagor and the purchaser that the mortgagor may redeem in a reasonable time, an action to redeem is not barred by laches, where brought in slightly more than a year and a short time after the mortgagor was able to raise the money. Brown v. Johnson, 115 Wis. 430.

85. Snipes v. Kelleher, 31 Wash. 386, 72 Pac. 67.

86. Brown v. Johnson, 115 Wis. 430.

87. Kelley v. Houts, 30 Ind. App. 474.

88. The second mortgage expressly pro-

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One tenant in common who brings an action to redeem is entitled to recover the entire balance found due on account of surplus rents and profits.[89]

Effect.—A mortgagee waives all legal defects in procedure by accepting and retaining the full amount of redemption money.[90] A mortgagor who redeems cannot question the validity of a provision that on foreclosure for an instalment, sale shall be subject to the principal remaining due.[91] In California, the grantee of a devisee of the mortgagor is not regarded as a redemptioner entitled to a deed without resale.[92]

A judgment creditor, party to foreclosure, cannot reach the premises by execution after redemption by a person other than the judgment debtor.[93]

Where a decree of foreclosure of a second lien is severable, a redemption by one of the decree creditors from a prior mortgage sale does not inure to the benefit of the rest.[94]

A junior judgment creditor who redeems from a prior mortgage foreclosure sale becomes subrogated to all the rights possessed by the prior mortgagee who was the purchaser, if no further redemptions are made within the statutory period.[95]

On redemption from a junior encumbrancer who has redeemed, the redemptioner is not bound by an agreement of which he has no knowledge, made by the junior encumbrancer to pay an intervening lien.[96]

FOREIGN CORPORATIONS.[1]

§ 1. Status and Regulation (40).
§ 2. Powers, Contracts, Stock Subscriptions and Assessments; Liability of Officers (43).
§ 3. Jurisdiction of Courts; Visitorial Power (44).
§ 4. Right to Sue and Be Sued (46).

§ 1. *Status and regulation.*—A corporation has no legal existence beyond the sovereignty where created.[2] The recognition of its contracts[3] and permission to it to carry on business in other states rest on the comity existing among the states which may be modified or withdrawn under statutes enacted in pursuance to the organic law unless the modification or withdrawal conflicts with the federal constitution.[4] Statutes conferring on foreign corporations the privileges conferred by general local laws do not make them local corporations.[5]

Right of residents to incorporate out of state.—A foreign incorporation by

vided that it was junior to the first. Raymond v. Whitehouse, 119 Iowa, 132.

89. Whetstone v. McQueen, 137 Ala. 301.

90. MacGregor v. Pierce [S. D.] 95 N. W. 281.

91. Neb. L. & T. Co. v. Haskell [Neb.] 93 N. W. 1045.

92. Code Civ. Proc. § 703. He is not in such redemption entitled to a decree requiring other devisees to pay their share of the sum required in 60 days. Warner Bros. Co. v. Freud [Cal.] 72 Pac. 345.

93. Redemption by one to whom a mortgagor had conveyed before foreclosure was begun but whose deed was not recorded until afterward. Williams v. Wilson, 42 Or. 299, 70 Pac. 1031.

94. Morava v. Bonner, 205 Ill. 321.

95. Comp. Laws 1887, §§ 5151-5154, 4339, 5421, 5423. MacGregor v. Pierce [S. D.] 95 N. W. 281.

96. MacGregor v. Pierce [S. D.] 95 N. W. 281.

1. All questions not arising from foreign incorporation are treated in article "Corporations." See Railroads; Building and Loan Associations; Insurance; for questions peculiar to foreign corporations of peculiar nature. For taxation of foreign corporations, see Taxation.

2. Chapman v. Hallwood Cash Register Co. [Tex. Civ. App.] 73 S. W. 969.

3. Which will not be extended where the powers of the corporation or their exercise are prejudicial to the interests or repugnant to the policy of the state. Chapman v. Hallwood Cash Register Co. [Tex. Civ. App.] 73 S. W. 969.

4. State v. Hammond Packing Co., 110 La. 180.

5. Especially where the act provides that it shall not limit the rights of the corporation under its charter of the foreign state, and does not intimate an intent to create a corporation, although it authorizes a consolidation with other corporations into a general corporation under a new name [Acts Ala. 1892-93, p. 454]. Goodloe v. Tenn. C., I. & R. Co., 117 Fed. 348.

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residents of the state to secure the benefit of more favorable laws can be complained of only by the state.[6]

Statutory provisions.—A statute prescribing the terms on which foreign corporations may do business is not invalidated by the fact that it also makes a possible invalid provision as to partnerships, if the provisions are clearly severable.[7] An act requiring the filing of articles of incorporation with the secretary of state does not repeal an act requiring the designation of a person for service of process as a condition to the maintenance or defense of an action in the state courts.[8] A statute conferring mechanic's liens on the property of foreign corporations is not repealed by a general revising act unless expressly referred to and comprehended within the title of the act.[9]

Constitutionality of statutes.[10]—Regulations of the doing of business must not conflict with interstate commerce,[11] though corporations engaged in such commerce may be regulated as to intra state acts.[12] Statutes may be saved from invalidity by local construction.[13]

Equal protection of laws is not denied by statutes imposing the conditions upon which corporations may do business within a state,[14] nor do they deny the privileges and immunities of citizens of the several states.[15]

The obligation of contracts is not impaired by statutes making contracts entered into by a foreign corporation before compliance with their provisions void, where sought to be enforced by the corporation, but valid against it.[16]

Retroactive effect of statutes.—Statutes prescribing the conditions on which foreign corporations shall do business are not applicable to contracts previously entered into,[17] but a prohibition of the doing of business after a statute goes into effect is not retroactive with regard to that business, though done in pursuance of an earlier contract.[18]

6. A foreign corporation is entitled to invoke the laws of the state for the protection of large property interests, though but one of its incorporators was a resident of the state of incorporation. Cumberland Tel. Co. v. Louisville Home Tel. Co., 24 Ky. L. R. 1676, 72 S. W. 4.

7. Rev. St. Wis. 1898, §§ 1770b, 4978, in so far as it requires a filing of a copy of the charter with the secretary of state. Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611.

8. Act March 8, 1901 (St. 1901, p. 108, c. 93) does not repeal act March 17, 1899 (St. 1899, p. 111, c. 94). Keystone Driller Co. v. Superior Ct., 138 Cal. 738, 72 Pac. 398.

9. Comp. Laws 1897, § 5472, is not repealed by Pub. Laws (Act 1877 No. 113) since the title thereof limits its effect to domestic corporations, it being "to revise the laws providing for the incorporation * * * and to fix the duties and liabilities of such corporations." Bullock Mfg. Co. v. Sunday Lake Iron Min. Co. [Mich.] 93 N. W. 611.

10. See Commerce for complete treatment of this question of interference with interstate commerce.

11. Foreign corporations lacking a permit to do business may be sued on a note for the price of machinery, if the transaction was one of interstate commerce. Lane & Bodley Co. v. City Elec. L. & W. W. Co. [Tex. Civ. App.] 72 S. W. 425. Rev. St. §§ 1025, 1026, requiring filing of a copy of the charter and obtaining of a certificate from the secretary of state, is not a regulation of interstate commerce. Fay Fruit Co. v. McKinney [Mo. App.] 77 S. W. 160.

12. License tax on the instruments of a non-resident telephone corporation used within the state. State v. Rocky Mountain Bell Tel. Co., 27 Mont. 394, 71 Pac. 311. License on telegraph poles and wires. Western Union Tel. Co. v. New Hope, 187 U. S. 419. The fact that business under a contract by a foreign corporation may extend beyond the limits of the state, does not relieve it from the operation of Rev. St. Wis. 1898, §§ 1770b, 4978, requiring the filing of a copy of the charter with the secretary of the state. Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611.

13. A franchise fee required of foreign corporations may be sustained if construed to have no application to foreign corporations whose business relates entirely to interstate commerce [Comp. Laws Mich. 1897, § 8574]. Oakland Sugar Mill Co. v. Fred W. Wolf Co. (C. C. A.) 118 Fed. 239.

14. Pollock v. German F. Ins. Co. [Mich.] 93 N. W. 436. License tax. State v. Hammond Packing Co., 110 La. 180.

15. State v. Hammond Packing Co., 110 La. 180.

16. Though the statute does not go into effect until after the contract is made, and especially where enacted before the making thereof. Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611.

17. Laws 1889, p. 68, c. 69. Keystone Mfg. Co. v. Howe [Minn.] 94 N. W. 723. Pub. Laws, c. 980, amending Gen. Laws, c. 253, § 36. MacLeod v. G. P. Putnam's Sons, 24 R. I. 500.

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Conditions.[19]—A judgment for tort is not a contract, enforcement of which is denied on failure to comply with regulations.[20] Congress has power to adjust the rates of foreign telephone corporations in the District of Columbia.[21] The corporation may be a "merchant" subject to license.[22] The question of whether a corporation is transacting or carrying on business within the state may be a question of fact.[23] Particular decisions are grouped in the notes.[24]

Effect of failure to comply with statutes.—Unless expressly provided by statute, failure to comply with conditions for doing business renders a corporation's contracts void.[25] Certain states hold that one contracting with a foreign corporation cannot assert such failure.[26] Notes payable to it may be enforced by a bona fide holder.[27]

Mandamus.—Compliance with a statute requiring foreign corporations maintaining an office in the state to keep a stock book open for stockholders' inspection

18. Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611.

19. In Tenn. Acts 1895, p. 123, c. 81, § 1, is regarded as superseding Acts 1891, p. 264, c. 122, § 2, and abstracts of charters are no longer required to be filed in each county in which the corporation desires to do business. Nichols, etc., Co. v. Loyd [Tenn.] 76 S. W. 911.

20. MacLeod v. G. P. Putnam's Sons, 24 R. I. 500.

21. Though entirely insufficient to meet the necessary expenses of the services to be performed. Manning v. Chesapeake & P. Tel. Co., 18 App. D. C. 191 (the Supreme Court of the United States reversing this decree on other grounds, expresses no opinion as to the constitutionality of such a regulation. Chesapeake & P. Tel. Co. v. Manning, 186 U. S. 238).

22. Corporation having an agent within the state in charge of goods used to fill contracts of sale made by its salesmen and other sales by the corporation itself. American S. & W. Co. v. Speed [Tenn.] 75 S. W. 1037.

23. Oakland Sugar Mill Co. v. The Fred W. Wolf Co. (C. C. A.) 118 Fed. 239.

24. **Transactions held within regulatory statutes:** The buying of timber and lumber within the state and shipping it out [Rev. St. 1899, § 1024]. Chicago M. & L. Co. v. Sims [Mo. App.] 74 S. W. 128. The entering into a contract to manage a factory within the state and to furnish a superintendent therefor [Rev. St. Wis. 1898, §§ 1770b, 4978]. Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611. Where before entering into a contract the corporation did not register for the service of process, it cannot enforce its contract [Act Apr. 22, 1874 (Pub. Laws 108)]. Delaware River Q. & C. Co. v. Bethlehem & N. Pass. R. Co., 204 Pa. 22. The making of a loan by a building and loan association and the taking of a note and mortgage is a doing of business within the state, necessitating the appointment of an agent for service of process, under Alabama Const. art. 14 and Alabama Code 1896, §§ 1316, 1318, 1319, though it is contended that the note and mortgage were drawn and payable in the state of incorporation, and only those acts which the borrower was required to do as a condition precedent to the loan were performed in Alabama. Chattanooga Nat. B. & L. Ass'n v. Denson, 189 U. S. 408, 47 Law. Ed. 870. An exception that a regulating statute shall not apply to drummers or traveling salesmen soliciting business within the state for foreign corporations which are entirely non-resident, is not applicable where the corporation maintains a general agent with an office in the state and ships its commodities into the state to itself, and they are exhibited and sold in the car by the agent. Fay Fruit Co. v. McKinney [Mo. App.] 77 S. W. 160.

Held not within statutes: A single transaction. Henry v. Simanton [N. J. Eq.] 54 Atl. 153. The making of a single contract does not entail payment of a franchise fee. Where not of a character to indicate a purpose to engage in business in the state, is not within the meaning of Comp. Laws Mich. 1897, § 8574. Oakland Sugar Mill Co. v. Fred W. Wolf Co. (C. C. A.) 118 Fed. 239. The acceptance of a stock subscription being incident to the erection of the corporation [Act Apr. 22, 1874]. Galena M. & S. Co. v. Frazier, 20 Pa. Super. Ct. 394.

Employment of men within a state to obtain orders for the corporation's publication, the orders being addressed to the corporation in another state where it had its books and offices requiring a certificate of incorporation for the maintenance of an action. Crocker v. Muller, 40 Misc. (N. Y.) 685. Soliciting orders by a traveling salesman, subject to approval at the home office [Laws 1901, p. 1826, c. 588]. Jones v. Keeler, 40 Misc. (N. Y.) 221. Employment of an agent to solicit orders, subject to acceptance at the domicile of the corporation and filled therefrom, the agent being paid by commission, (Gen. Corp. Law, § 15) nor the taking out of a fire insurance policy through brokers in the state. Cummer Lumber Co. v. Associated Mfrs. Mut. F. Ins. Corp., 173 N. Y. 633. A contract with a city for street lighting not invalidated on account of not having established a public office for the keeping of books and receipt of service and not having paid a license tax and fee as required by Rev. St. 1899, §§ 1024, 1025. Hogan v. St. Louis, 176 Mo. 149.

25. Blodgett v. Lanyon Zinc Co. (C. C. A.) 120 Fed. 893.

26. Failure to file a statement giving the location of its office and the name of an agent on whom process may be served [Ky. St. § 571]. Hallam v. Ashford, 24 Ky. L. R. 870, 70 S. W. 197.

27. Though not enforceable by the corporation on account of failure to pay fees imposed by Sess. Laws 1897, p. 157, c. 51. McMann v. Walker [Colo.] 72 Pac. 1055.

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may be enforced by mandamus if the corporation maintains in the state an office or a stock transfer agent.[28] Evasive answers to repeated demands for an inspection of a stock book may be equivalent to a refusal.[29]

§ 2. *Powers, contracts, stock subscriptions, and assessments; liability of officers.*—As a general rule foreign corporations are not allowed to transact business on conditions more favorable than those prescribed for domestic corporations.[30] The fact that charter powers permitted to a corporation by the laws of its incorporation are prohibited by the laws of the state in which it is doing business will not prevent it from therein exercising such powers as are sanctioned by the state laws.[31]

A foreign corporation, the operation of which is in the state of its domicile limited to particular counties, is not entitled to exercise the right of eminent domain in another state by general statute granting such right to foreign corporations.[32]

The courts of a corporation's domicile will presume in the absence of statutes or decisions of a foreign state to the contrary that the corporation may exercise the same powers in the foreign state that it may in the state of its incorporation.[33]

Contracts[34] of a foreign corporation are governed by the laws of the state in which it is doing business, though, where there is no restriction as to contract, it may make the law of the state of its incorporation applicable.[35]

Where not otherwise provided by statute, a foreign corporation may contract as to real estate in the same manner as in the state of its incorporation.[36]

Official capacity of a person signing the contract may be proved by his signature of a certificate designating persons to receive service of process.[37] Authority to contract may be shown by surrounding circumstances.[38]

28, 29. People v. Montreal & B. Copper Co., 40 Misc. (N. Y.) 282.

30. Under the Constitution and judicial decisions of Washington, a corporation cannot hold stock exercising the usual rights of stock-holders in a corporation in that state, and an attempt by a foreign corporation to do so may be restrained. Coler v. Tacoma R. & P. Co. [N. J. Err. & App.] 54 Atl. 413. Foreign corporations cannot transact business prohibited to domestic corporations whether doing business by comity or under express statute. State v. Cook, 171 Mo. 348. In states in which foreign corporations are subjected to the restrictions imposed on domestic corporations, they must comply with provisions limiting the duration of corporate charters and fixing the manner by which they may be extended. Hence, under Mills' Ann. St. §§ 473, 499; Sess. Laws 1899, p. 163, c. 89, a foreign corporation though chartered for 50 years must obtain an extension in Colorado if it does business therein for more than 20 years. Iron Silver Min. Co. v. Cowie [Colo.] 72 Pac. 1067. An English corporation cannot refuse the transfer of stock standing in the name of a decedent to his local executrix, though his estate is not administered on in England. London, P. & A. Bank v. Aronstein (C. C. A.) 117 Fed. 601. A requirement of legislative permission to enable a corporation to acquire or vote the stock of another corporation, is applicable to foreign corporations. Const. Wash. art. 12, § 7, provides that foreign corporations shall not be allowed more favorable terms than domestic corporations. Coler v. Tacoma R. & P. Co. [N. J. Err. & App.] 54 Atl. 413.

31. State v. New Orleans Warehouse Co., 109 La. 64.

32. Corporations authorized to construct telephone and telegraph lines, are not within the meaning of acts 1880, No. 124, which is applicable only to corporations authorized as far as they may be by the states creating them to carry on their business elsewhere. Southwestern Tel. Co. v. Kan. City, S. & G. R. Co., 108 La. 691.

33. New Jersey corporation will be presumed to have the power to own and vote shares of stock in a Washington corporation. Coler v. Tacoma R. & P. Co., 64 N. J. Eq. 117.

34. See Building and Loan Associations for contracts of foreign corporations of that nature.

35. Wheeler v. Mut. Reserve Fund L. Ass'n, 102 Ill. App. 48.

36. Blodgett v. Lanyon Zinc Co. (C. C. A.) 120 Fed. 893.

37. Owyhee L. & I. Co. v. Tautphas (C. C. A.) 121 Fed. 343.

38. Plaintiff may testify to a request to go to the corporation's office and to his presence at a meeting of the board of directors in the office of the person signing the contract sued on as president and evidence of occurrences at a meeting in the office of the alleged president, at which those purporting to be directors were present, together with the letters purporting to come from the company's office, and signed by the person transacting business there, is admissible. Owyhee L. & I. Co. v. Tautphas (C. C. A.) 121 Fed 343.

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Enforcement of obligations.—In order that a foreign corporation resulting from the merger of other foreign corporations be liable for the debts of an absorbed company, the merger and the law of the state in which it took place must be established.[39] Priority recognized in the state of the corporation's domicile will not be recognized in attachment against an insolvent foreign corporation, unless statutory.[40]

A debt due a foreign corporation by a foreign corporation within the state cannot be attached.[41]

Subscriptions to stock.—A subscriber to the stock of a foreign corporation subjects himself to the laws of its domicile as to corporate powers and obligations;[42] hence, an express promise need not be averred in an action to recover an assessment on the capital stock of an English corporation,[43] and the action may be maintained without sale or forfeiture of the stockholder's share though the articles provide a remedy by forfeiture.[44] The necessity of an assessment on capital stock will not be investigated in the absence of fraud.[45]

A stock subscription, induced by statements that the corporation had performed acts which by reason of its being a foreign corporation it was unable to do, cannot be enforced.[46]

Personal liability of officers.—A certificate precedent to doing business is within the statute imposing personal liabilities on corporate officers for falsity.[47] A creditor may enforce such liability, though not deceived by the certificate,[48] and though there was no intention to sell stock or obtain credit.[49]

§ 3. *Jurisdiction of the courts over the affairs of foreign corporations; visitorial power. Remedies of resident stockholders.*—An accounting as to an unauthorized issue of stock cannot be had against the corporation and certain of its directors unless the transaction was invalid in the state of incorporation.[50] Charges of conspiracy must be specific.[51]

Injunction.—On a suit for an accounting, an injunction may be awarded to prevent the directors from disposing of any of the property within the court's jurisdiction pendente lite, but the exercise of the charter powers will not be interfered with.[52]

39. Anderson v. War Eagle Consol. Min. Co. [Idaho] 72 Pac. 671.

40. Claim interposed by a creditor stockholder. Lamb v. Russel [Miss.] 32 So. 916.

41. Payment gives the debtor corporation no defense to an action on the debt by the receiver of the creditor. Allen v. United Cigar Stores Co., 39 Misc. (N. Y.) 500.

42. The articles of incorporation may provide that notice to non-resident shareholders who do not furnish their addresses may be posted in the registered office of the company and under such provision, posting of a notice of a call on the shareholders for a month before the call is due, and the forwarding of a printed notice to the shareholders, is sufficient. Nashua Sav. Bank v. Anglo L., M. & A. Co., 189 U. S. 221.

43. 25 & 26 Vict. c. 89. Nashua Sav. Bank v. Anglo L., M. & A. Co., 189 U. S. 221.

44, 45. Nashua Sav. Bank v. Anglo L., M. & A. Co., 189 U. S. 221.

46. Statements in prospectus that the corporation had purchased a site for an apartment house and was erecting a building thereon. Quaker City Apartment House Co. v. Matthews, 21 Pa. Super. Ct. 519.

47. A statement of the book value and not the actual or estimated value of an asset may be a falsification. (Statements, copyrights and privileges, $120,396, and fair market value not in excess of $10,000 in certificate under Rev. St. c. 126, §§ 13, 14, is falsification within c. 110, § 58). Heard v. Pictorial Press. 182 Mass. 530.

48. Heard v. Pictorial Press, 182 Mass. 530.

49. For falsity in making a certificate as a condition precedent to doing business within the state of the amount of capital stock, amount paid up, and assets and liabilities. Heard v. Pictorial Press, 182 Mass. 530.

50. An issuance of stock to directors in consideration of the transfer of patents worth less than the stock issued must be alleged to be invalid in state of domicile though void in New York. Ins. Press v. Montauk F. Detecting Wire Co., 83 App. Div. (N. Y.) 259.

51. Ins. Press v. Montauk F. Detecting Wire Co., 83 App. Div. (N. Y.) 259.

52. On a showing that access to the books had been denied, that the company had become insolvent since the last annual meeting, and that all the stock was not accounted for by the directors. Moneuse v. Riley, 40 Misc. (N. Y.) 110.

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Where there is reasonable doubt as to the authority to issue stock under the statute of state where incorporated, a stockholder in the state where the directors reside and the corporation maintains its principal place of business and in which all directors' meetings are held may in that state enjoin the issue though the annual stockholders' meeting is held in the state where incorporated.[53] A consolidation made by a corporation in a foreign state which is equivalent to a dissolution may be restrained in the courts of its domicile where it is not carried out by such proceedings which are prescribed by the statutes for dissolution.[54]

Receiverships.[55]—The fact that a foreign corporation is proposing to take its assets to its own domicile is not a ground for the appointment of a receiver in behalf of a resident stockholder.[56]

Where a receiver is appointed in a federal court in a district foreign to the corporation's domicile, the court making the appointment has primary jurisdiction,[57] and courts of other states making appointments though in entirely independent suits will treat their jurisdiction as ancillary.[58] The receiver so primarily appointed is entitled to possession of property in another state, also foreign to the corporate domicile, as against a receiver appointed by a state court therein, in a stockholder's suit instituted after the filing of petition and service in the federal court.[59] The receiver takes a qualified title to all of the corporation's property within the court's jurisdiction, together with a right of possession for purposes of administration.[60]

On an application by a foreign receiver for an appointment to sell property within the state, there should be a reference to establish the right.[61]

Enforcement of stockholder's liability.—Where the jurisdictional facts exist, a creditor may enforce a stockholder's liability for debt of an insolvent corporation imposed by statute in the federal court of another state,[62] but the liability cannot be enforced in a suit brought in equity outside of the state where the corporation resides on the ground that it is an ancillary or auxiliary proceeding to enforce an equitable decree of the court of that state, if such court had no jurisdiction of nonresident stockholders.[63] A receiver in an action brought by a judgment cred-

53. Kraft v. Griffon Co., 82 App. Div. (N. Y.) 29.

54. Bill by stockholder to restrain an arrangement between a New Jersey corporation and a Washington corporation, by which the first should transfer all its property and franchises except that of being a corporation, to the second, which should issue to the first a stipulated number of shares of fully paid stock at par value of $100.00 per share, and in case any stockholder in the New Jersey corporation refused to accept such stock in exchange for his own stock, share for share, then the second should pay $35.00 cash in lieu of each share so refused. Coler v. Tacoma R. & P. Co. [N. J. Err. & App.] 54 Atl. 413.

55. See generally article Receivers.

56. Pleadings held insufficient to warrant the taking of possession of the property of a foreign corporation by a receiver pendente lite, it not being shown that they were not in legal fraud, the matters set up as a reason for interfering with the judgment against plaintiff by defendant being such as could have been raised in the original action and there having been delay and laches. Reynolds & H. E. Mortg. Co. v. Martin, 116 Ga. 495.

57. Should be recognized as having such jurisdiction by the courts of the state of the corporation's domicile, especially where it conducts no business therein, has no property, and but the single stockholder necessitated by the local law, and the appointment is had in a district where it owns real and personal property. Lewis v. American Naval Stores Co., 119 Fed. 391.

58. For the purpose of economy and equality in the case of a corporation owning property and transacting business in different states and federal districts. Lewis v. American Naval Stores Co., 119 Fed. 391.

59, 60. Lewis v. American Naval Stores Co., 119 Fed. 391.

61. On application in New Jersey of a receiver of a foreign building and loan association, proof should be taken of the proceedings in which the receiver was appointed, of the order approving the contract of sale of the property, whether there were New Jersey creditors or shareholders, whether the corporation did business in New Jersey, apart from holding the property, and whether the required deposit was made with the secretary of state to secure New Jersey creditors. Silverstrow v. East Side Co-Op. B. & L. Ass'n [N. J. Eq.] 53 Atl. 823.

62. Atlantic Trust Co. v. Osgood, 116 Fed. 1019.

63. They were merely nominal parties. Hale v. Allinson, 188 U. S. 56.

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itor to enforce the stockholder's liability of a local corporation cannot, by virtue of a general appointment and direction to sue, maintain an action at law in a foreign jurisdiction against a nonresident stockholder,[64] nor can he sue in equity,[65] nor will equity take jurisdiction to prevent multiplicity of suits;[66] but it was held in one Federal court that it would retain jurisdiction of an action brought by the receiver of a foreign corporation to enforce a stockholder's liability *despite his want of title to sue for which reason an action* in the domicile would have failed.[67]

In Illinois, the courts will not take jurisdiction of a creditor's bill to fix liability of resident stockholders of an insolvent foreign corporation.[68]

The Federal courts will follow the decisions of the State courts as to the bar of actions to charge stockholders with liability for corporate debts.[69]

§ 4. *Right of foreign corporation to sue and liability to be sued. Procedure.* —*Compliance with statutes* may be essential to suit,[70] but statutes imposing conditions on the maintenance of actions do not apply to the defense thereof,[71] or to the appeal of judgments rendered in actions brought by other parties,[72] or to actions in Federal courts.[73] There is a variance of authority as to whether subsequent compliance with statutes confers a right to sue on contracts previously entered into.[74] Compliance is not requisite to the maintenance of an action on

64. Hilliker v. Hale (C. C. A.) 117 Fed. 220.

65. Where the courts of the state of his appointment have held that he cannot bring such an action in that state. Hale v. Allinson, 188 U. S. 56.

66. The full amount of the par value of the shares held by each defendant was demanded. Hale v. Allinson, 188 U. S. 56.

67. Action in Maine brought by receiver of a Minnesota corporation. Hale v. Coffin, 114 Fed. 567.

68. Parkhurst v. Mexican S. E. R. Co., 102 Ill. App. 507.

Note. "The courts are universally agreed that, where a liability imposed upon stockholders or corporate directors or officers is in its nature penal, the liability is to be deemed merely local, and will not be enforced by the courts of a foreign jurisdiction. So much is clear. When, however, investigation is made with reference to the enforcement of a statutory liability not penal, a wide difference of view is found. It may be said in general that no extraterritorial force can be given to the laws or judicial processes of a state. An attempt by a state to give force to a legislative enactment of its own in a foreign state would constitute an encroachment on the independence of such foreign state, and would be justly and properly resented. A state court has jurisdiction of all persons and property within its boundaries, however, and it would seem that the fact that the laws of one state have no force within the boundaries of another should not be deemed ground for a refusal by a state to enforce within its borders the liability of a person as a shareholder in a corporation created under the laws of another state, and a majority of the decisions in reference thereto so hold. Where, however, no judicial proceedings have been instituted, in the foreign state under the laws of which the corporation was created, to determine the liability of the parties sought to be charged, the courts of Massachusetts have declined to take jurisdiction of a suit instituted within that state for that purpose. Its declination does not rest upon the ground that an enforcement of such liability would constitute an enforcement of a penalty, nor on the ground that a suit of this character would be contrary to the policy of the commonwealth, but on the ground that such suit involves the relation between a foreign corporation and its members, and essential justice can be more fully worked out in the state to the laws of which the corporation owes its existence. Where the nature and degree of the liability imposed by constitutional provision is undetermined, this doctrine has special force, since it is the peculiar privilege of the court of highest jurisdiction of a state to interpret the organic laws of its state, and courts of other jurisdictions are reluctant to intermeddle therewith." Helliwell, Stock & Stockholders, 868.

69. The pendency of insolvency proceedings does not bar or toll an action to enforce statutory liability under Minn. Gen. St. 1894, c. 76, § 17. Hilliker v. Hale (C. C. A.) 117 Fed. 220.

70. A contract with a foreign building and loan association made after the passage of Pub. Acts 1895, p. 580, No. 269, requiring a filing of a certificate of incorporation as a condition to doing business and before compliance with such statute cannot be enforced by the corporation. Hoskins v. Rochester S. & L. Ass'n [Mich.] 95 N. W. 566. The designation of a person as representative for service of process and the maintenance of an office within the state [Hurd's Rev. St. c. 32, § 67b, d]. Union C. & S. Co. v. Carpenter, 102 Ill. App. 339.

71. Blodgett v. Lanyon Zinc Co. (C. C. A.) 120 Fed. 893. Laws 1901, p. 233, c. 125, § 3, requiring a certificate of the secretary of state of the filing of statements as to its condition. Swift & Co. v. Platte [Kan.] 72 Pac. 271.

72. Swift & Co. v. Platte [Kan.] 72 Pac. 271.

73. Blodgett v. Lanyon Zinc Co. (C. C. A.) 120 Fed. 893.

74. Filing of statements under Act Apr.

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a contract made in a foreign state,[75] and a foreign corporation which in the course of business in its home state becomes the assignee or trustee of a claim against a citizen may pursue any remedies against him in the state without compliance with the requirements of the statutes as to corporations desiring to become resident foreign corporations;[76] so it may maintain an action to secure possession of realty within the state.[77]

Substantial conformity with the law requiring reports to the secretary of state has been held sufficient to support procedure in the state courts.[78]

Pleading and proof of compliance with statutes.—The rule varies as to the duty of pleading or denying compliance with statutory provisions, and hence as to duty of proving such compliance.[79] A plaintiff corporation must be shown to be doing business before failure to comply with statutory conditions thereto may be urged against it.[80] The pleadings should state the time when the business was transacted, and its character.[81] Noncompliance with statutory provisions must appear from the record to be a ground for demurrer.[82] By statute, it may be provided that if a foreign corporation defendant desires to place the fact of its nonresidence in issue, it must make an affirmative verified allegation that it is not a corporation.[83]

The procedure generally applicable to nonresidents is applicable to foreign corporations.[84]

Jurisdiction and venue.[85]—Foreign corporations contracting with each other

23, 1874, Pub. Laws 108, after completion of the work, confers no right to sue for materials furnished during its performance. Delaware River Q. & C. Co. v. Bethlehem & N. Pass. R. Co., 204 Pa. 22. May sue after compliance with Rev. St. 1899, § 1024, et seq. Chicago M. & L. Co. v. Sims [Mo. App.] 74 S. W. 128.

75. Filing of certificate. MacMillan Co. v. Stewart [N. J. Law] 54 Atl. 240. Since the revision of 1896 of the act concerning corporations. Slaytor-Jennings Co. v. Specialty Paper Box Co. [N. J. Law] 54 Atl. 247.

76. May purchase real estate sold by the administrator of the debtor though it has not complied with Rev. St. 1899, §§ 1024-1026. Meddis v. Kenney, 176 Mo. 200.

77. Action of trespass to try title by foreign corporation as trustee. Eskridge v. Louisville Trust Co., 29 Tex. Civ. App. 571.

78. Foreclosure proceedings by a foreign mortgage company. De Camp v. Warren Mortg. Co., 65 Kan. 860, 70 Pac. 581.

79. Under Rev. St. arts. 745, 746, requiring the filing with the secretary of state of a certified copy of the articles of incorporation, a foreign corporation on bringing suit, must allege its compliance with the statutory requirements as to the maintenance of actions or bring itself within the exceptions of the statute. Chapman v. Hallwood Cash Register Co. [Tex. Civ. App.] 73 S. W. 969. Failure to state that a foreign corporation has procured a certificate requisite to enable it to sue is waived unless the question is raised by the pleadings. Lehigh & N. E. R. Co. v. American B. & T. Co., 40 Misc. (N. Y.) 698. A plaintiff foreign corporation need not establish its compliance with local statutes where not denied. Securing of a certificate under Laws 1892, c. 687, § 16, need not be proven where to an averment that plaintiff was a foreign corporation, defendant answers that he has no knowledge or information sufficient to form a belief. International Soc. v. Dennis, 76 App. Div. (N. Y.) 327. Defendant must show non-compliance with conditions by plaintiff. Failure to procure license under Gen. St. 1901, § 1260. Coppedge v. Goetz Brew. Co. [Kan.] 73 Pac. 908. Failure to procure a certificate under Laws 1892, c. 687, must be pleaded to be available as a defense. W. P. Fuller & Co. v. Schrenk, 171 N. Y. 671.

80. Failure to file statements with the secretary of state required by Gen. St. 1901, § 1283. Thomas v. Remington Paper Co. [Kan.] 73 Pac. 909.

81. Affidavit of defense to an action to recover stock assessments not sufficient which alleges merely that plaintiff maintained an office within the state where its business was carried on and the assessments were made, that all the business relative to the stock issued was conducted in Pennsylvania and act April 22, 1874, was not complied with. Galena M. & S. Co. v. Frazier, 20 Pa. Super. Ct. 394.

82. Otherwise it must be raised by answer. Northern Assur. Co. v. Borgelt [Neb.] 93 N. W. 226.

83. Such being the provision of Code Civ. Proc. § 1776, it is sufficient in attachment proceedings that the affiant state that his information as to the status of defendant as to a foreign corporation was obtained from the secretary of the state of defendant's organization and from two publications furnishing general information as to the status of corporations. Steele v. Gilmour Mfg. Co., 77 App. Div. (N. Y.) 199.

84. If a mortgage debtor, it may be proceeded against by appointment of an attorney to represent it, and the mortgage foreclosed via executive. Buck v. Massie, 109 La. 776.

85. Civ. Code 1895, §§ 4954, 1899, provides that a foreign corporation may be sued in the counties in which it maintains agencies.

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within the state may be subject to the jurisdiction of the state courts,[86] but there is no presumption, supporting such jurisdiction that their contract is so made or concerns property within the state.[87] The fact that a contract is entered into subject to approval at the home office of the corporation does not divest the courts of the place of contract of jurisdiction.[88] The situs of shares of stock in a domestic corporation held by a foreign corporation is regarded for the purpose of jurisdiction as the domicile of the domestic corporation.[89]

A stockholder of a foreign corporation may sue in the state courts on account of a questionable transfer of its assets to a domestic corporation,[90] and, by code provisions in certain states, a nonresident may sue a foreign corporation on a cause of action arising in the state.[91]

A corporation may, by appearance and plea to the merits, submit itself to the jurisdiction of a federal court for other than the district of its domicile.[92] A stockholder or creditor who appears by intervention, cannot thereafter object to the jurisdiction.[93] Where the statute of a state provides for the designation of agents for the service of process, and if none, for service on any officers, agent, or employe, an agent without authority to represent the company cannot, by acceptance of service, confer jurisdiction on a federal court.[94]

Jurisdiction to render a personal judgment against a foreign corporation cannot be acquired except where the corporation is doing business or has a business office or agency in the state where sued.[95]

Removal of causes.[96]—Where, on consolidation of corporations existing in separate states, the articles of the consolidated corporation are filed with the secretaries of state of each of such states, the consolidated corporation is a citizen of each of such states and cannot remove an action, against it in one of them, to the federal court on the ground of diverse citizenship.[97] A suit against a foreign corporation operating a railroad within the state as lessee may be removed to the federal court, since it will not be presumed that, since it has become entitled to do business within the state as a corporation, the stockholders are citizens thereof and no diversity of citizenship exists.[98] A proceeding against foreign corporations

or if none, in any county where they may be found, in the person of the agent. Equity L. Ass'n v. Gammon [Ga.] 46 S. E. 100.

86. Under Code Civ. Proc. § 1780, a New York court has jurisdiction of breach of a contract made by a foreign corporation receiving a deposit within the state to re-pay it to the depositor, another foreign corporation. Munger Vehicle Tire Co. v. Rubber Goods Mfg. Co., 39 Misc. (N. Y.) 817.

87. It is presumed to have been made in the state of the domicile of one or of the other, and jurisdiction is not conferred under Code Civ. Proc. § 1780. Snow, Church & Co. v. Snow-Church Surety Co., 80 App. Div. (N. Y.) 40.

88. Rev. St. art. 1194, subd. 25, provides that a foreign corporation may be sued in the county where the cause of action or a part thereof accrued. The contract was for sale of goods, f. o. b. Philadelphia, subject to approval of the corporation there. Westinghouse E. & M. Co. v. Troell [Tex. Civ. App.] 70 S. W. 324.

89. Action to cancel a transfer of stock to a foreign corporation having no place of business in the state. People's Nat. Bank v. Cleveland, 117 Ga. 908.

90. Where the foreign corporation could have sued in its own name and is made defendant because its officers and directors whose dealings are questioned are in control. Wilson v. American Palace Car Co. [N. J. Eq.] 54 Atl. 415.

91. Code, § 194 (2). Bryan v. Western Union Tel. Co., 133 N. C. 603.

92, 93. Lewis v. American Naval Stores Co., 119 Fed. 391.

94. Acceptance by a bookkeeper [Code Va. § 1105]. New River Mineral Co. v. Seeley (C. C. A.) 120 Fed. 193.

95. Zelnicker Supply Co. v. Miss. Cotton Oil Co. [Mo. App.] 77 S. W. 321. Jurisdiction of a petition for a receiver and other equitable relief against foreign corporations to render a personal judgment cannot be acquired with or without service by publication though the sheriff of the county in which the action is brought is joined as a nominal defendant, it not being alleged that either of the foreign corporations has any office, officer, agent or place of doing business with the state. Reynolds & H. E. Mortg. Co. v. Martin, 116 Ga. 495.

96. See generally, Removal of Causes.

97. Winn v. Wabash R. Co., 118 Fed. 55.

98. Const. Ky. § 11; Ky. St. 1899, § 841. Lewis v. Maysville & B. S. R. Co. [Ky.] 76 S. W. 526.

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in which a right of action is also asserted against directors, a portion of whom are residents of the same state as complainants, may be removed to the federal court on the ground of diverse citizenship if the controversy is separable.[1]

Service of process.[2]—In general, statutory regulations must be followed.[3] A foreign corporation may be served by publication in the manner of other nonresidents.[4] Constructive service provided as to corporations doing business within the state will not confer jurisdiction of one not doing business.[5] Where the corporation has not appointed an agent for service it is not entitled to protection of provisions for the service of nonresident defendants.[6] Service obtained on the president of a foreign corporation while within the state may be sufficient.[7] If the statute allows service on the president if it can be made personally within the state, it may be made while he is present on private business.[8] The managing officer within the state to attend a sale of land under a decree of the federal court is not exempt from service of process, as in attendance on a judicial proceeding though the corporation was a party to the action under which the sale was had, and the same is true of a nonresident attorney in the state to represent his clients.[9] Service on the president and vice-president may be at the office of another corporation at which they are settling up their affairs, preparatory to cessation of business.[10] Where the corporation has ceased to do business within the state and has designated no agent for the service of summons, jurisdiction cannot be acquired by service on resident directors.[11] The return of process must show the facts warranting the service and manner in which it was served.[12] A return that the secretary and general manager of a corporation was served is not sufficient if it does not state that defendant is an inhabitant of the district or has become subject to the jurisdiction of the court, and such facts do not appear from the

1. Complaint seeking to set aside a conveyance between the corporations for fraud and to prevent the directors of one corporation from making any further disposition of its property and also seeking that the directors be compelled to account as agents and trustees for their actions. Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 Law. Ed. 1122.

2. See Insurance, Railroads, etc., for service of process on foreign insurance, railroad or other particular classes of corporations.

3. Under Rev. Codes 1899, § 5252, service may be made on a railroad station agent authorized to sell passenger tickets, receive and deliver freight and collect for freight shipments. Brown v. Chicago, M. & St. P. R. Co. [N. D.] 95 N. W. 153. Local agent [Rev. St. art. 1223]. Westinghouse E. & M. Co. v. Troell [Tex. Civ. App.] 70 S. W. 324. In Georgia, service may be on a local agent. Barnes v. Western Union Tel. Co., 120 Fed. 550. Under a statute authorizing service on an agent or manager, a broker making sales may be regarded as an agent. Nelson, etc., Co. v. Rehkopf & Sons [Ky.] 75 S. W. 203. The superintendent of a branch office of a commission company. [Civ. Code, § 51, subsection 6.] The superintendent maintained an office and took orders for trades, the money received being deposited to the corporation's credit and the superintendent's share paid by the corporation's checks, the corporation maintaining a private wire to the superintendent's office. Boyd Commission Co. v. Coates, 24 Ky. L. R. 730, 69 S. W. 1090. The manager of a railroad traffic soliciting agency may be regarded as a managing agent. Fremont, E. & M. V. R. Co. v. N. Y., C. & St. L. R. Co. [Neb.] 92 N. W. 131, 59 L. R. A. 939.

4. Under Civ. Code, § 4976, service by publication may be had on a foreign corporation in an action to remove a cloud from the title of stock in a domestic corporation held by it. People's Nat. Bank v. Cleveland, 117 Ga. 908.

5. Cady v. Associated Colonies, 119 Fed. 420.

6. Code, § 874; Pub. Laws 1901, c. 5. Williams v. Iron Belt B. & L. Ass'n, 131 N. C. 267.

7. Mississippi contract to buy goods f. o. b. at New Orleans, and service on the president in New Orleans. Payne v. East Union Lumber Co., 109 La. 706.

8. Code, § 217, subs. 1. Jester v. Steam Packet Co., 131 N. C. 54.

9. Greenleaf v. People's Bank, 132 N. C. 292.

10. Code Civ. Proc. N. Y. § 432. American Locomotive Co. v. Dickson Mfg. Co., 117 Fed. 972.

11. Action on contract brought in the supreme court of New York by a citizen against defendant, a Virginia corporation. Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 Law. Ed. 1113; Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 Law Ed. 1122.

12. Under Rev. St. 1899, § 570, subd. 4, recital of delivery of copy of the summons to the president without showing the nonexistence of an office or place of business in the state, is not sufficient. Zelnicker Supply Co. v. Miss. Cotton Oil Co. [Mo. App.] 77 S. W. 321.

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record.[13] All of the facts required by statute to authorize service of summons on a business agent need not be set out in the return but may be shown in the record.[14] Insufficiency of return of service is not ground for abatement since amendable.[15]

Pleading.[16]—A managing director[17] or attorney of a foreign corporation may verify its pleading.[18]

A foreign corporation cannot demur to a complaint on the ground that it does not show that complainant is not a nonresident.[19]

Effect of dissolution.—If, pending an action, the foreign corporation is dissolved under the laws of the state of its domicile, supplementary proceedings cannot be begun against it on the judgment.[20]

FOREIGN JUDGMENTS.

§ 1. *Recognition and mode of proving.*—The clause of the constitution of the United States that full faith and credit shall be given in each state to the judicial proceedings in every other state,[21] requires recognition of judgments of state courts by federal courts,[22] and, vice versa, judgments of federal courts by state courts.[23] The clause applies to decrees for costs,[24] judgments in garnishment proceedings,[25] adjudication of matters affecting estates of decedents in a domiciliary court,[26] judgments entered by agreement of the parties,[27] and orders of federal courts in bankruptcy proceedings.[28] The clause applies only where the court rendering the judgment had jurisdiction of the parties and the subject-matter.[29]

There is a presumption of validity of foreign judgments,[30] and the courts will be presumed to possess the powers which they appear to have exercised unless the

13. Scott v. Stockholders' Oil Co., 122 Fed. 835.

14. Civ. Code Proc. § 51, subs. 6. Nelson, etc., Co. v. Rehkopf & Sons [Ky.] 75 S. W. 203.

15. On proper showing of facts. Zelnicker Supply Co. v. Miss. Cotton Oil Co. [Mo. App.] 77 S. W. 321.

16. Allegation that defendant, the Pacific Dredging Company, is a corporation organized and existing by virtue of law, and doing business in Lemhi County, Idaho, is a sufficient allegation of incorporation, though it is not alleged under the laws of what state it was incorporated. Jones v. Pac. Dredging Co. [Idaho] 72 Pac. 956. A complaint showing an allegation of incorporation in New Jersey and an answer denying plaintiff's organization in California is an admission of organization in New Jersey. Herring-Hall-Marvin Co. v. Smith [Or.] 72 Pac. 704.

17. Within Code, § 258. Best v. British & A. Mortg. Co., 131 N. C. 70.

18. Code Civ. Proc. § 525, subd. 3. American Audit Co. v. Industrial Federation, 84 App. Div. (N. Y.) 304.

19. Code Civ. Proc. § 1780, provides that an action may be maintained by a non-resident against a foreign corporation on a cause of action arising or concerning property within the state. Herbert v. Mont. Diamond Co., 81 App. Div. (N. Y.) 212.

20. In re Stewart, 39 Misc. (N. Y.) 275.

21. Const. U. S. art. 4, § 1.

22. Glencove Granite Co. v. City T., S. D. & S. Co. (C. C. A.) 118 Fed. 336; Gorham v. Broad River Tp. (C. C. A.) 118 Fed. 1016.

23. Seymour v. Richardson Fueling Co., 103 Ill. App. 625; Bracken v. Mitner, 99 Mo. App. 187. There must have been a trial. Foley v. Cudahy Packing Co., 119 Iowa, 246.

24. Davis v. Cohn [Mo. App.] 70 S. W. 727.

25. Williams v. St. Louis & S. W. R. Co., 109 La. 90.

26. Tunnicliffe v. Fox [Neb.] 94 N. W. 1032.

27. Sheehan v. Farwell [Mich.] 97 N. W. 728.

28. A copy of an order adjudicating one a bankrupt is a copy of a judgment within the laws. Rosenfeld v. Siegfried, 91 Mo. App. 169.

29. Jurisdiction lacking where there is a want of service or voluntary appearance of nonresident debtor. Boyle v. Musser, etc., Mfg. Co., 88 Minn. 456. And this is the case though the court rendering judgment did not construe contract according to the law of the state where made. Hudson, etc., Pub. Co. v. Young, 90 Mo. App. 505. Noncompliance with statutes governing service of process. Dunn v. Dilks [Ind. App.] 68 N. E. 1035. Where the decree of a state rendered after personal service on the husband and notice to appear or answer requires the husband to pay alimony in certain amounts, a judicial debt of record is established which may be enforced in the courts of another state. Moore v. Moore, 40 Misc. (N. Y.) 162.

30. Gottlieb v. Alton Grain Co., 87 App. Div. (N. Y.) 380. A complaint alleging the foreign court to be one of record and general jurisdiction, it will be presumed that it

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contrary is made to appear.[31] The presumption of jurisdiction does not arise where the record and pleadings show the facts on which jurisdiction depends.[32] The clause does not prevent an attack that could have been made upon the judgment in the state of rendition.[33] Fraud inducing its rendition,[34] as where defendant was decoyed into the state so that process could be served upon him,[35] or a fictitious domicile acquired in divorce proceedings[36] may be asserted. The clause is not infringed by limitations on the power to sue on judgments affecting foreign corporations,[37] nor by the refusal of a state court to give a strained construction to language of a foreign decree.[38] It is violated by laws barring maintenance of actions against residents on judgments of foreign courts, founded on causes barred by domestic laws, but not barred by the laws of the foreign state.[39] A foreign judgment is admissible to show fact of lien declared against property removed from the state of rendition.[40] The judgment of a court of a foreign nation, having jurisdiction of the subject-matter and the parties after a full hearing, is conclusive on the courts of this country.[41]

Deposition of a foreign justice as to the legal existence of his court is admissible on the question of the justice's jurisdiction, though not the best evidence.[42]

§ 2. *Matters adjudicated and concluded by foreign judgment.*—The doctrine of res judicata extends only to those facts which must necessarily be made to appear as a basis of the judgment, and without a showing of which the judgment could not have been rendered.[43] A foreign judgment is merely prima facie evidence of what it purports to decide.[44] A foreign court may not conclude domestic taxing officers acting under local revenue laws.[45] Whether a judgment, dis-

had jurisdiction of both the subject matter and the parties. Old Wayne Mut. L. Ass'n v. Flynn [Ind. App.] 68 N. E. 327.

31. Tunnicliffe v. Fox [Neb.] 94 N. W. 1032.

32. Old Wayne Mut. L. Ass'n v. Flynn [Ind. App.] 68 N. E. 327. Jurisdiction to render judgment against a foreign insurance company is not shown by record reciting service on a deputy insurance commissioner his authority to receive service being pleaded as a conclusion. Id.

33. Jaster v. Currie [Neb.] 94 N. W. 995. In this case the order of a Georgia probate court discharging an administrator and settling his account was disregarded by North Carolina courts, Code Ga. 1882, §§ 2608, 3828, 3594 allowing impeachment of invalid orders in administration proceedings.—Coleman v. Howell, 131 N. C. 125.

34. Jaster v. Currie [Neb.] 94 N. W. 995. One fraudulently induced to enter a foreign state to be served with process may ignore the judgment and is not required to attack it in the court rendering the judgment. Fraud vitiating a foreign judgment requires a fraudulent act tending to influence the action of the court. Hudson, etc., Pub. Co. v. Young, 90 Mo. App. 505.

35. Jaster v. Currie [Neb.] 94 N. W. 995.

36. The full faith and credit clause of the federal constitution is not violated by the refusal of a state to recognize a decree of another state by one who temporarily left his home and acquired a domicile in such state to obtain a divorce for an act which occurred in the former state which was not ground for a divorce there. Andrews v. Andrews, 188 U. S. 14, 47 Law. Ed. 366.

37. The states may restrict the use of the courts by foreign corporations. Anglo American Provision Co. v. Davis Provision Co., 24 Sup. Ct. 92, 48 Law. Ed. —. There is no denial of faith and credit to an Illinois judgment by a New York code provision construed by the courts of that state to prevent suits on judgments by one foreign corporation against another on a cause not arising within the state. Id. Full faith and credit is not denied to the judgment of a foreign state court against resident stockholders to enforce statutory liability by the judgment of the court of a sister state denying the right to enforce liability in such sister state where the laws of the foreign court as construed by the state court limit enforcement to suits in the state of incorporation. Finney v. Guy, 189 U. S. 335, 47 Law. Ed. 839. The clause is not infringed by the decision of a state court with reference to the effect of foreign corporate charters and the decisions of the courts of such state. Eastern B. & L. Ass'n v. Williamson, 189 U. S. 122, 47 Law. Ed. 735.

38. Commercial Pub. Co. v. Beckwith, 188 U. S. 567, 47 Law. Ed. 598.

39. Sess. Laws Colo. 1899, c. 113. Keyser v. Lowell (C. C. A.) 117 Fed. 400.

40. Bergman v. Inman, etc., Co. [Or.] 72 Pac. 1086.

41. Gloe v. Westervelt, 116 Fed. 1017; Coveney v. Phiscator [Mich.] 93 N. W. 619; Strauss v. Conried, 121 Fed. 199; Sheehan v. Farwell [Mich.] 97 N. W. 728.

42. Cal. Code Civ. Proc. § 1922 allows proof by copy of the judgment and oral examination of justice as a witness. Banister v. Campbell, 138 Cal. 455, 71 Pac. 504, 703.

43, 44. Tremblay v. Aetna L. Ins. Co., 97 Me. 547.

45. There is no infringement of a judgment of the courts of Illinois taxing the entire inheritance under the will of a resident

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missing an action on a note in one state, as barred by the statute of limitations of that state, determines the merits of the case and bars another action in a sister state, depends on the effect the courts of the former state would give such judgment.[46] One obtaining a divorce in a foreign court will not thereafter be heard to deny its validity, though in states not recognizing such divorces.[47] A limited divorce for desertion bars a subsequent action for same cause in another state.[48] The judgment of a sister state, giving faith and credit to a decree, is not res judicata so as to prevent parties from asking courts in the state of rendition to set the decree aside for fraud.[49]

§ 3. *Actions on foreign judgments.*—The foreign judgment will not become a lien without suit brought and judgment recovered thereon.[50] A defense going to the merits of the action in the sister state may not be interposed as a defense.[51] The jurisdiction of the court of rendition may be questioned notwithstanding the record.[52]

FORESTRY AND TIMBER.

§ 1. Protection and Regulation of Forests and Trees (52).
§ 2. Logs and Lumbering.—Logging Roads (53); Booms and Floating Logs (53); Flotage Rights (53); Lumbering Contracts (54); Liens (56).

§ 1. *Protection and regulation of forests and trees.*[53]—The authority given the secretary of the interior over forest reservations is not unconstitutional as a delegation of legislative authority.[54] A right of action in the people for cutting and taking away trees on the forest preserve exists in New York.[55]

Trespass in cutting timber.[56]—Four remedies will lie for cutting timber on land of another, viz., trespass quare clausum fregit, replevin, assumpsit, and trover, so that if the owner brings trover he waives the others.[57] An injunction against cutting timber will be denied where the abstract of title attached to the petition is not in statutory form because it fails to show a perfect paper title, and where no allegation appears that defendant is insolvent or showing damages to be irreparable.[58] For timber cut by a trespasser under belief of title, the measure of damages is the value at the cutting less the amount added to its value.[59]

of that state, by a tax imposed under the New York inheritance tax law on the transfer, under such will, of debts due the decedent by citizens of New York. Blackstone v. Miller, 188 U. S. 189, 47 Law. Ed. 439.

46. Brand v. Brand [Ky.] 76 S. W. 868.

47. In re Swales' Estate, 172 N. Y. 651; Starbuck v. Starbuck, 173 N. Y. 503.

48. Heins' Estate, 22 Pa. Super. Ct. 81.

49. Everett v. Everett, 75 App. Div. (N. Y.) 369.

50. Frye-Bruhn Co. v. Meyer (C. C. A.) 121 Fed. 533.

51. Banister v. Campbell, 138 Cal. 455, 71 Pac. 504, 703.

52. Old Wayne Mut. L. Ass'n v. Flynn [Ind. App.] 68 N. E. 327.

53. Cutting timber on government lands, see Public Lands. The forest commission of New York is not placed in such possession of lands by a special statute giving them control of the forest preserve, that it may be sued in ejectment by claimants [Laws 1885, p. 482, c. 283]. To allege that the lands in question are in possession of the commission must admit that the lands under the law belong to the state. Raquette Falls Land Co. v. Middleton, 41 Misc. (N. Y.) 461.

54. Act Cong. App. June 4, 1897 (30 Stat. 35). U. S. v. Dastervignes, 118 Fed. 199.

55. Laws 1896, c. 114 did not repeal the right given by Laws 1895, c. 395, § 280. People v. Francisco, 76 App. Div. (N. Y.) 262.

56. See Trespass. Ball. Ann. Codes & St. § 7141, punishing cutting or removing trees from land of another is exclusive, and repeals §§ 7108, 7109, defining grand and petit larceny. Tacoma Mill Co. v. Perry [Wash.] 73 Pac. 801.

57. Assumpsit under Comp. Laws, § 11207. Anderson v. Besser [Mich.] 91 N. W. 737.

58. Civ. Code, § 4927. Wiggins v. Middleton, 117 Ga. 162.

59. In trover. Anderson v. Besser [Mich.] 91 N. W. 737. The measure of damages for the willful or negligent taking of timber from land without right is the increased value of the property taken when finally converted to the trespasser's use but if the property is taken through mistake or in the honest belief that the trespasser is acting within his legal rights, the measure of damages is the value before taking; but as to one who acts on the advice of capable counsel as to his legal rights in cutting timber the measure of damages should be reduced

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§ 2. *Logs and lumbering; booms and flotage. Logging roads.*—A law authorizing county supervisors to lay out a temporary highway on petition of a certain number of timber landowners, to give them access to their timber, authorizes only such roads as shall be accessible to the public from another highway.[60]

Booms and floating logs.[61]—A boom company may select its location in good faith, and bad faith in such selection is not shown by the extension of its business farther down the river.[62]

The owner of logs lying on riparian lands for years does not forfeit title thereto under a statute regulating flotage, where part of the logs had never been afloat but remained on the rollway, and the landowner had not proceeded under the statute to obtain title.[63]

A boom operator under contract to boom logs must exercise ordinary care and diligence according to the usual methods of operation.[64] A previous implied contract with a boom operator for the handling of logs is merged in a subsequent express contract for the same purpose.[65]

Merely moving logs aside to allow plaintiff's logs to pass is not a breaking of a jam for which plaintiffs could recover expenses under a law regulating use of a river so as to prevent interference with logging operations of others.[66] Where a railroad company cut loose a raft which had broken from its moorings and was endangering a railroad bridge, and set the logs adrift in the river, it was not its duty to save the logs, if the means at hand were not sufficient to save both the bridge and the logs.[67] Where a boom used by defendants, located in a dam owned by plaintiff, broke, and on notice from defendants, plaintiff repaired it and sent the bill to defendants, who paid it, on a second break in a new place, it cannot be said that plaintiff assumed the responsibility of repair and maintenance.[68]

Remedies for protection of flotage rights.[69]—A demand is unnecessary before replevin to recover marked logs on riparian lands, as against a purchaser of the lands.[70] Moving defendant's logs aside to allow his own to float past did not

to the value of the property taken before cutting. U. S. v. Homestake Min. Co. (C. C. A.) 117 Fed. 481.

60. If the landowner has acquired control of both ends of the proposed road so that the public can acquire no rights therein, the condemnation will be refused. Wallman v. Connor Co., 115 Wis. 617.

61. Sess. Laws 1901, p. 266 (Bel. & C. Ann. Codes & St. § 4890, et seq.) providing for flotage of logs in streams, is unconstitutional under Const. art. 4, § 20 because embracing more than one subject. Spaulding Logging Co. v. Independence Imp. Co., 42 Or. 394, 71 Pac. 132. Exercise of right of eminent domain by boom company. Samish River Boom Co. v. Union Boom Co. [Wash.] 73 Pac. 670. Legal existence of boom company as corporation. C. Crane & Co. v. Fry (C. C. A.) 126 Fed. 278.

62. Ball. Ann. Codes & St. § 4379. Samish River Boom Co. v. Union Boom Co. [Wash.] 73 Pac. 670.

63. Comp. Laws § 5098. Log Owners' Booming Co. v. Hubbell [Mich.] 97 N. W. 157.

64. C. Crane & Co. v. Fry (C. C. A.) 126 Fed. 278.

65. Riedinger v. Diamond Match Co. (C. C. A.) 123 Fed. 244.

66. Comp. Laws, 1897, § 5075. Doyle v. Pelton [Mich.] 96 N. W. 483.

67. It is not required to anticipate the extraordinary conditions and keep sufficient boats to save the logs.—Taylor v. Norfolk & C. R. Co., 131 N. C. 50.

68. U. S. Leather Co. v. Aldrich, 75 App. Div. (N. Y.) 616.

69. Evidence admissible to explain booming contract. C. Crane & Co. v. Fry (C. C. A.) 126 Fed. 278.

Where plaintiff sues for expenses in running and driving defendant's logs in the river made necessary because of their interference with the driving of his own logs, he may show what part of the defendant's logs it was necessary to drive and may show that contrary to the custom, defendant put hard wood logs in the river early in the spring by reason of which they would not float rapidly. Bellows v. Crane Lumber Co. [Mich.] 92 N. W. 286.

Sufficiency of evidence in action to recover damages for the negligent management of reservoir dams by a log driving company so as to overflow plaintiff's land. Akin v. St. Croix Lumber Co., 88 Minn. 119. In an action against a railroad company for setting adrift logs of a raft which had broken from its moorings and was endangering a railroad bridge to carry to the jury the question of negligence of the company in failing to save the logs. Taylor v. Norfolk & C. R. Co., 131 N. C. 50.

Sufficiency of instructions in action to recover for loss resulting from negligent operation of boom. C. Crane & Co. v. Fry (C. C. A.) 126 Fed. 278.

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confer such a benefit on defendant as will enable plaintiff to recover expenses in assumpsit.[71] A federal court cannot restrain a boom company from obstructing a navigable stream for maintenance of a boom and occupying the boom site, which plaintiff claims as an appurtenance to his riparian lands, where defendant denies his title and claims ownership of the boom through purchase of the stream bed from the state as tide lands, and the right to maintain the boom by a state franchise.[72] An agreement between two parties that one should drive all the logs of both and should share the actual expense in proportion, did not make the latter a partner so as to be party plaintiff against a third owner of logs, to recover increased expense from handling the latter's logs in order to drive the logs under the agreement.[73] On an issue of ownership in replevin of logs alleged to have been abandoned on riparian lands, advice of an attorney to the landowner that he had acquired title cannot be shown by a subsequent purchaser of the lands.[74] Under an allegation of a contract to boom timbers and negligence through which they were lost, defendant's title to the boom was immaterial and it was liable whether operating as owner or lessee, for loss from negligence.[75] In an action for damages for destruction of a raft of logs by a railroad company, where it appears that the raft was broken loose by a freshet and the company through its employes broke up the raft and turned the logs adrift in the current so that they were lost, the complaint alleging wanton negligence on the part of the company, the only issues for the jury were those of negligence, and contributory negligence in not saving the logs after they were turned loose in the river.[76] The question of abandonment of logs on a rollway, or otherwise on riparian lands, is for the jury.[77] Expert testimony is admissible on the issue of negligence in handling log booms.[78]

Lumbering contracts.[79]—Under a sale of standing trees by written contract fixing no definite time for removal, covenant of title to the trees runs with the

70. Defendant knew the logs bore marks of third persons and that he could get title only by abandonment. Log Owners' Booming Co. v. Hubbell [Mich.] 97 N. W. 157.

71. Doyle v. Pelton [Mich.] 96 N. W. 483.

72. Plaintiff's relief depends upon his title which must be established at law. Lounsdale v. Gray's Harbor Boom Co., 117 Fed. 983.

73. Bellows v. Crane Lumber Co. [Mich.] 92 N. W. 286.

74. Log Owners' Booming Co. v. Hubbell [Mich.] 97 N. W. 157.

75. C. Crane & Co. v. Fry (C. C. A.) 126 Fed. 278.

76. Taylor v. Norfolk & C. R. Co., 131 N. C. 50.

77. Under evidence showing that the owners had allowed them to remain a long time in an abandoned condition but never ceased logging in the river. Log Owners' Booming Co. v. Hubbell [Mich.] 97 N. W. 157.

78. Proper management of a boom is a matter of expert knowledge. C. Crane & Co. v. Fry (C. C. A.) 126 Fed. 278.

79. Sufficiency of description of standing timber in a contract for its sale to pass title. Hays v. McLin, 24 Ky. L. R. 1827, 72 S. W. 339.

Application of general rules of interpretation to timber contracts: Evidence in support of allegations of fraud in the making of a contract for the sale of logs as objectionable on the ground that it alters the terms of the written contract. Hurlbert v. Kellogg L. & M. Co., 115 Wis. 225. Construction of contracts for cutting and loading logs as imposing on defendants the duty to obtain cars (O'Brien Lumber Co. v. Wilkinson [Wis.] 94 N. W. 337), of contract for sale of standing timber. Bunch v. Elizabeth City Lumber Co. [N. C.] 46 S. E. 24. Where a contract for the sale of saw logs in a river provided that they should be scaled by a certain officer at the port but not that the scale should be final, it was prima facie evidence only of correctness and could be impeached for mistake without regard to fraud or bad faith. Nelson v. Betcher Lumber Co., 88 Minn. 517. Where a contract did not fix the time for the delivery of logs and no custom is shown as to the period for delivery in order to avoid a deduction from the price for depreciation in the value, no such deduction can be made unless it is shown that delivery was not made within a reasonable time. Yellow Poplar Lumber Co. v. Stephens, 24 Ky. L. R. 621, 69 S. W. 715. A contract for the sale of timber and timber products with a certain time for removal, will be strictly construed as to such period; timber cut after the limit belongs to the owner of the land. Null v. Elliott, 52 W. Va. 229. One buying standing trees with notice from the owner of the land of a prior sale by a former owner, is not an innocent purchaser for value. Hogg v. Frazier, 24 Ky. L. R. 930, 70 S. W. 291. Where an honest difference of opinion arises as to the manner of measuring logs sold and in settlement the parties agree as to measurement, payment being accepted on that basis, the seller cannot thereafter complain of the measurement. Yellow Poplar Lumber Co. v. Stephens, 24

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land.[80] A parol license to remove timber from lands, without time or compensation, is revoked by failure to act within a reasonable time.[81] A contract for the sale of logs will not carry to the buyer a claim for the price of logs previously sold and delivered by the seller to another.[82] Where a general merchant sold a boom of logs, his agent grading, scaling and delivering them to the purchaser who inspected them, there is no implied warranty to pay for damages resulting to the purchaser's mill from iron imbedded in the logs.[83] On a contract to sell and deliver logs the buyer must be credited with money paid to the seller's receiver and used by him in getting the logs out for delivery.[84] A written instrument by which a landowner conveyed to another his interest in certain timber on certain land, with authority to enter and remove it for a certain period, conveys simply such interest as the grantor had in such property amounting to a license for its removal.[85] Under a contract for sale of timber allowing the buyer to build railroads for its removal, the duty of protecting the property remains on the landowner, so that the buyer is not liable for fires started by engines properly equipped and operated, though he had permitted brush and combustibles to accumulate on the roadbed.[86] A provision for forfeiture of timber uncut at a certain date cannot be enforced in favor of the party responsible for a delay.[87]

Ky. L. R. 621, 69 S. W. 715. After delivery, a contract for sale of uncut logs cannot be avoided by the purchaser because the subject-matter was not in esse at the time of contract. Ketchum v. Stetson, etc., Mill Co. [Wash.] 73 Pac. 1127. Consideration for a contract for sale of standing timber in Kentucky may be shown by parol. St. 1899, § 470. Strubbe v. Lewis [Ky.] 76 S. W. 150. Sufficiency to identify land. Id. Where a deed conveyed all timber down and standing except hemlock and the grantees cut all the trees except hemlock above a certain diameter, they were liable for cutting trees for chemical and pulp purposes, where there were no chemical factories in the county when the deed was executed and no chemical or pulp wood was cut by them until all the trees fit for timber had been cut and removed. Kaul v. Weed, 203 Pa. 586.

Measure of compensation: Where an agreement was made for the sale of a certain amount of logs at a certain boom in a certain year at the market price, and part of the logs were delivered but the seller unjustifiably refused to deliver the remainder, the contract price which was the market price for logs delivered, is the market price at the place of delivery in the months of the year of delivery which were selected as the time when the contract price was to be fixed; if there were no sales of logs at the boom at the time logs were delivered so as to establish a market price, the market price of logs at the nearest boom where logs were sold at that time, is the market price at the boom in question, to which is to be added the expense and loss in delivery at the particular boom. South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165.

Remedies on contracts: Injury to logs sold from exposure because of delay in delivery may properly be pleaded as a counterclaim in an action for the price; where servants of a buyer put into his rafts logs of the seller not included in the sale, every reasonable presumption must be indulged against the buyer as to the quantity of the timber in requiring him to account, where he had ample means to ascertain and keep an account of such timber improperly included. Yellow Poplar Lumber Co. v. Stephens, 24 Ky. L. R. 621, 69 S. W. 715.

80. Hogg v. Frazier, 24 Ky. L. R. 930, 70 S. W. 291.

81. Snyder v. East Bay Lumber Co. [Mich.] 97 N. W. 49.

82. Yellow Poplar Lumber Co. v. Stephens, 24 Ky. L. R. 621, 69 S. W. 715.

83. Ketchum v. Stetson, etc., Mill Co. [Wash.] 73 Pac. 1127.

84. Yellow Poplar Lumber Co. v. Stephens, 24 Ky. L. R. 621, 69 S. W. 715.

Interest: Where a purchaser of logs advanced a certain sum to the seller, part of which is an advance payment on logs delivered, he is entitled to interest from date of payment until delivery of the logs and the amount remaining due for logs delivered less any discount to which he was entitled for cash, may be charged against this balance with interest. South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165.

85. No interest in trees on lands not belonging to the licensor passes though they are described in the instrument. Caughie v. Brown, 88 Minn. 469.

86. Simpson v. Enfield Lumber Co., 131 N. C. 518.

87. Where plaintiff's testator had agreed to cut the pine standing on certain land by a certain time, and later purchased the cedar thereon under an agreement not to endanger the pine by fire by removal of the cedar, and sold the cedar to another by contract requiring it not to be cut ahead of the pine but should be cut before the time above specified and that all the timber left standing at that time should revert to the testator, his executrix could not enforce a forfeiture of the cedar standing among the uncut pine after that date, where the testator failed to cut the pine before that date. Small v. Robarge [Mich.] 93 N. W. 874.

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Logging or timber liens.—A logging lien cannot attach to logs cut for the federal government.[88] A parol contract for a lien on timber for purchase price and advances subsequent to a contract for the cutting is valid as to parties and purchasers with notice.[89] A sash and door factory is not a sawmill within the timber lien law of Georgia.[90] A lien on a sawmill and products for supplies furnished cannot apply to products of another mill.[91] The right to a lien on property passed out of possession depends on the statutes, applications whereof are shown below.[92] Contractors furnishing timber to a mill have a lien on its products to the amount of labor actually performed; a teamster employed, a lien to the value of his own labor and that of his team.[93] A lien given persons furnishing sawmills with timber or supplies is superior to all other liens not made prior by law.[94]

Enforcement of liens.—A holder of a logger's lien may enforce it, on transfer and removal from the state of the property, or bring a statutory action for the removal and destruction, at his election.[95] The six-years limitation applies to actions to enforce the logging lien of Washington.[96] The cause of a statutory action for removal of property from the state, which was covered by a logger's lien, accrues against the owner's assignee at time of removal, limitations beginning at that time.[97] A law for attachment of forest products in transit is not unconstitutional because no provision is made to pay the carrier for expense in keeping possession of the property.[98] An affidavit of foreclosure of a lien on a sawmill and products for supplies furnished must allege that timber levied on was the product of the mill for which supplies were furnished.[99] Under a law providing for attachment of forest products in transit, attachment may be made by service of the writ on such products, though they are not to be driven or sorted out, and in such case delivery of them is to be made immediately.[1] Evidence as to what property was

88. Gen. Laws 1899, p. 432, c. 342, cutting timber on White Earth Indian reservation. Rowley v. Conklin [Minn.] 94 N. W. 548.

89. Helfrech L. & M. Co. v. Honaker [Ky.] 76 S. W. 342.

90. Civ. Code 1895, § 2809. In re Gosch, 121 Fed. 604.

91. Code 1895, §§ 2809, 2816. Welchselbaum Co. v. Pope [Ga.] 45 S. E. 991 (sufficiency of evidence to show timber levied on to have been the product of the mill covered by the lien).

92. **Arkansas:** Laborers cutting and hauling timber to a mill for one under a contract to furnish it to the mill owner may have a lien on the product of the mill though not directly employed by the owner. Their labor contributed directly to the production and the limit of the lien was the compensation to be paid the contractor by the mill-owner [Sand. & H. Dig. § 4766]. Klondike Lumber Co. v. Williams Bros. [Ark.] 75 S. W. 854.

Maine: The statutory lien for labor on logs protects laborers only and not independent contractors. [Definition of statutory terms "whoever labors" and "laborer"; Rev. St., c. 91, § 38, amended by c. 183, p. 172, Pub. St. 1889.] Littlefield v. Morrill, 97 Me. 505.

New York. One who agrees with another to saw his logs into lumber, pile them in the yard and load them on cars on the latter's order, receiving part of his compensation when the sawing was done and the remainder when the lumber was loaded, has no lien on the lumber for the latter portion of the compensation after it is sawed and piled awaiting shipment. Rhodes v. Hinds, 79 App. Div. (N. Y.) 379.

Washington: One who has performed labor in getting out logs for another who manufactures them into lumber, may file a logger's lien thereon, while the lumber is still under the manufacturer's control [Ball. Ann. Codes & St. §§ 5930, 5931, as amended by Sess. Laws 1893, p. 19, and Sess. Laws 1895, p. 175, § 1]. Robins v. Paulson, 30 Wash. 459, 70 Pac. 1113.

93. Sand. & H. Dig. 4766. Klondike Lumber Co. v. Williams Bros [Ark.] 75 S. W. 854.

94. A purchase money mortgage is not a prior lien unless the other lienor had actual notice of it at creation of his debt [Civ. Code, § 2809]. Bradley v. Cassels, 117 Ga. 517.

95. Action under Hill's Ann. St. & Codes Wash. § 1694; failure to pursue the first remedy will not estop him as to the other. Bergman v. Inman, etc., Co. [Or.] 72 Pac. 1086.

96. It cannot be made to apply to logs removed from the state more than six years before action brought. Bergman v. Inman [Or.] 73 Pac. 341.

97. Hill's Ann. St. & Codes Wash. § 1694. Bergman v. Inman, etc., Co. [Or.] 72 Pac. 1086.

98. He is authorized by law to pay storage [Pub. Acts 1887, No. 229, § 6 (3 Comp. Laws 1897, § 10761 in connection with section 10769)]. Lake v. Pere Marquette R. Co. [Mich.] 93 N. W. 257.

99. Welchselbaum Co. v. Pope [Ga.] 45 S. E. 991.

1. Pub. Acts 1887, No. 229, § 6 (3 Comp.

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affected by a foreign decree in an action to enforce a logger's lien is immaterial in a statutory action for destruction, or concealment of identity of, the property covered by the lien; a judgment declaring a lien against logs when removed from the state may be shown for plaintiff in a statutory action for rendering impossible the identification of logs covered by the lien.[2]

FORGERY.[3]

Elements of offense.—Insertion of immaterial words is not forgery.[4] Uttering must be with intent to defraud.[5] The affixing of names of fictitious personages to national bank notes as president and cashier is forgery,[6] though the notes so signed, being genuine, are redeemable.[7] Decisions as to particular instruments being subjects of forgery are grouped in the notes.[8]

The making of a forged written instrument and the uttering of it by the

Laws 1897, § 10761). Lake v. Pere Marquette R. Co. [Mich.] 93 N. W. 257.

2. Hill's Ann. St. & Codes, Wash. § 1694. Bergman v. Inman, etc., Co. [Or.] 72 Pac. 1086.

3. See Negotiable Instruments, for rights of parties to forged paper or transferees by forged indorsements. See Banking and Finance, for liabilities of bank on payment of forged paper. See Military and Naval Law, for jurisdiction to punish an army officer accused of forging obligations of the United States.

4. Not a forgery to insert in a contract in place of "the explanation of this day's work," the words, "labor or material furnished." Turnipseed v. State [Fla.] 33 So. 851.

5. Intent must appear from facts reasonably calculated to show guilty purpose, which may be negatived by other evidence. State v. Bjornaas, 88 Minn. 301.

6. Rev. St. § 5415. Logan v. U. S. (C. C. A.) 123 Fed. 291.

7. Where genuine but unsigned national bank notes were stolen and are redeemable under Act July 28, 1892 (27 Stat. 322, c. 317) it cannot be contended that no one was defrauded. Logan v. U. S. (C. C. A.) 123 Fed. 291.

8. **Orders:** An instrument made in the following form: "Oct. 20 Mr. W. J. Claybrook, pleas pay to Joe Plemons eight dollars and fifty cents $8.50 fore I. A. Butler," is a basis of forgery. Plemons v. State [Tex. Cr. App.] 72 S. W. 854. The following instrument held subject of forgery without innuendo averments; "Mr. Bryant: Kind Sir: The guitar and case the boy has down there is all right. I am sick and in bed and want the money to get me some things I need. I want as much as $5.00 on it and the case. It is all right. Ella Laurence. (Col.) 405 San Jacinto St. P. S. Sign his or my name will do." Gray v. State [Tex. Cr. App.] 72 S. W. 858.

Bonds: A convict bond furnishing both a common-law and statutory obligation may be a subject of forgery. (Where it binds the principal and surety to pay the amount of a certain fine and to treat the convict humanely during his employment and furnish him sufficient food and clothing.) Crayton v. State [Tex. Cr. App.] 73 S. W. 1046.

Teacher's certificate: A teacher's license is a subject of forgery. Arnold v. State [Ark.] 74 S. W. 513. An attempt to pass as true a forged diploma or teacher's certificate, is a forgery [Pen. Code 1895, art. 540a, 542] (Brooks v. State [Tex. Cr. App.] 75 S. W. 507) and its uttering is not harmless where presented to the county treasurer with a warrant for wages as a teacher, because it is not the duty of the treasurer to investigate the license. 2 Sand. & H. Dig. §§ 7051, 7071, provides that any person teaching without a license shall not receive any compensation from the school fund. Arnold v. State [Ark.] 74 S. W. 513.

Writings not forgeable for lack of obligation: Order not binding either the drawer or drawee. West v. State [Fla.] 33 So. 854. A check drawn in the following manner: "El Paso, Texas, Nov. 5, 1902. First National Bank; pay to the order of Henry Albert, $15.00. H. A. Lockwood," is a subject of forgery as against a contention that it creates no legal obligation, being drawn on any First National Bank. Albert v. State [Tex. Cr. App.] 72 S. W. 846. A certificate for bounty for destruction of fish nets being illegally used, may be the subject of forgery though it does not contain the date of the destruction of the nets if in substantial compliance with the statute otherwise (Laws 1898, p. 1158, ch. 451) and it need not be uttered before the repeal of the statute providing for such bounty, and may be falsely signed by the town clerk after his term expires. People v. Filkin, 83 App. Div. (N. Y.) 589.

Miscellaneous writings which may be forgery: A writing on the back of a note stating the material which was to be given in payment, is a subject of forgery. State v. Donovan [Vt.] 55 Atl. 611. A writing which if true shows a waiver of a landlord's lien, is subject to forgery [Code 1892, § 1106]. France v. State [Miss.] 35 So. 313. An army pay-master's receipt for money deposited by an enlisted man is regarded as an obligation or security of the United States [Rev. St. §§ 1305, 5413, 5414]. Neall v. U. S. (C. C. A.) 118 Fed. 699. A prosecution for forgery of a railroad ticket in the alteration of a date stamp, will not lie where the ticket itself provides that any alteration shall render it void. Indictment charging that the date was obliterated and erased is insufficient. State v. Leonard, 171 Mo. 626.

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same person at the same time as one transaction is but one offense.[9] Keeping of two separate forged bank notes in possession with intent to pass them is not a single act,[10] but two convictions cannot be had, one for forging a bank note and one for forging signatures to it.[11]

Defenses.—Intent to pay at maturity is not a defense to a forged indorsement of a note,[12] nor is a belief that the act would be ratified,[13] nor an intent to collect a debt.[14] Reasonable grounds for defendant's belief of authority to alter a note is a question for the jury as well as the existence of an honest belief.[15]

The indictment must set up the forged instrument in haec verba or state that it is lost, destroyed or in possession of defendant, so that access cannot be had to it.[16]

If the instrument does not show on its face a complete obligation, extrinsic facts and circumstances essential should be shown by proper averments.[17] The fact that a forged check is indorsed in a name other than that of the payee does not change its character, so as to render an indictment charging its utterance in such form demurrable.[18] On forgery of an instrument signed by a person as possessing a particular capacity, it need not be alleged that the person actually possessed such capacity, where such fact is not essential to the fraud.[19] An indictment for forgery of a convict bond must allege approval of the bond by the county judge.[20]

Intent to defraud a particular person need not be alleged.[21] Intent to defraud parties in a different status may be alleged, where, from the nature of the offense, it cannot be specifically proved which of the parties it was the intent to defraud.[22]

Where there is no statute making the signing or uttering of a fictitious deed a specific offense, it is sufficient to set out a forged instrument in haec verba without alleging that it was fictitious.[23] "Falsely," though used in the statutory definition, need not be inserted in the indictment.[24] An information need not disclose how a note was passed, whether by delivery, indorsement or otherwise, since the precise manner of uttering is immaterial if accompanied by felonious intent.[25]

9. State v. Klugherz [Minn.] 98 N. W. 99.
10. Rev. St. § 5431. Logan v. U. S. (C. C. A.) 123 Fed. 291.
11. Logan v. U. S. (C. C. A.) 123 Fed. 291.
12, 13. People v. Weaver, 81 App. Div. (N. Y.) 567.
14. Signing debtor's name to an order. Plemons v. State [Tex. Cr. App.] 72 S. W. 854.
15. Towles v. U. S., 19 App. D. C. 471.
16. West v. State [Fla.] 33 So. 854. "To the tenor substantially as follows" is bad. Edgerton v. State [Tex. Cr. App.] 70 S. W. 90.
17. Indictment for uttering an instrument to secure a creditor's forbearance held insufficient. Wilson v. State [Tex. Cr. App.] 75 S. W. 504. Where the instrument forged is of uncertain meaning, the indictment must contain sufficient innuendo averments to make it plain. Head v. State [Tex. Cr. App.] 72 S. W. 394. A charge that a forged note was passed to M. with intent to defraud M., and that it purported to be signed by one V. and was passed to M. with the intent to defraud one V., is sufficient as against an objection that it fails to identify the persons alleged as intended to be defrauded, as being the same persons whose names were connected with the forgery. Selby v. State [Ind.] 69 N. E. 463. Where indictment is based on forgery of an instrument, waiving a landlord's lien, the fact of tenancy and the existence of the lien must be set out, if not appearing on the face of the instrument. France v. State [Miss.] 35 So. 313.
18. Brazil v. State, 117 Ga. 32.
19. Indictment for forgery of a certificate of deposit need not allege that the person whose name was signed as a lieutenant-colonel and deputy paymaster general of the United States army in fact held such position. Neall v. U. S. (C. C. A.) 118 Fed. 699.
20. Crayton v. State [Tex. Cr. App.] 73 S. W. 1046.
21. Brazil v. State, 117 Ga. 32.
22. Forgery of an army pay-master's receipt of an enlisted man's deposit may be alleged in the same count with intent to defraud the United States and the enlisted man. Neall v. U. S. (C. C. A.) 118 Fed. 699.
23. Prosecution for procuring another to sign the name of the fictitious grantor to a deed for real property rests on Penal Code, § 470, and not on section 476 defining the making, passing or uttering of fictitious bills, etc. People v. Chretien, 137 Cal. 450, 70 Pac. 305.
24. Forge and counterfeit is sufficient under Rev. St. § 2479. Turnipseed v. State [Fla.] 33 So. 851.
25. Selby v. State [Ind.] 69 N. E. 463.

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An allegation of alteration of a railroad ticket cannot be rejected as surplusage, though the instrument is set forth in haec verba, and the effect is to remove the elements of forgery:[26] in such case it is immaterial that the evidence as to alteration is conflicting.[27]

Counts for forgery of names idem sonans may be joined.[28] Forging and uttering may be charged as one transaction.[29]

Questions of variance are grouped in the notes.[30]

Presumptions.[31]—Possession of the forged instrument and claim thereunder raises a presumption of guilt.[32]

Admissibility of evidence.[33]—A witness who qualifies as to knowledge of defendant's writing, and as a handwriting expert, may testify that he wrote a signature contended to be forged.[34]

Sufficiency of evidence.[35]—A confession may be looked to where the corpus delicti is not sufficient to prove without it.[36] Testimony of two accomplices does not show the corroboration of the testimony of an accomplice requisite to a conviction.[37] Where defendant testifies that he has authority to sign a note, the question of

26, 27. State v. Leonard, 171 Mo. 626.

28. Names "Veike" and "Vieke," will be regarded as idem sonans and not improperly joined in the absence of proof. Selby v. State [Ind.] 69 N. E. 463.

29. An averment that defendant did feloniously and knowingly make, forge, etc., and pass as true and genuine, a certain false, forged and counterfeit note, etc., charges the forging and uttering as a single and continuous transaction and is not repugnant or inconsistent as charging forging a forged note. Selby v. State [Ind.] 69 N. E. 463.

30. Fatal variance in the signature of the instrument where it is alleged that it was the act of one person and proved to be his act with others. Crayton v. State [Tex. Cr. App.] 73 S. W. 1046. Between the word "labor" charged, and word of uncertain character resembling "labobor" but not labor. Edgerton v. State [Tex. Cr. App.] 70 S. W. 90.

No variance between an allegation that a forged check was sold and delivered to a certain person, and proof that the check while paid for with such person's money was delivered to his son. State v. Allen, 171 Mo. 562. Proof that only the signature of the deed is forged and indictment setting out the deed at large and alleging forgery of the entire instrument. People v. Chretien, 137 Cal. 450, 70 Pac. 305. Averment of a bond to pay the remainder of a judgment and proof of a bond to pay a judgment. Crayton v. State [Tex. Cr. App.] 73 S. W. 1046. Variance between instrument set out and instrument introduced, held immaterial where the indictment was amended at the close of the evidence to correspond with the instrument introduced, and the failure to set out the instrument correctly did not vary the proof necessary to be made by either party. State v. Donovan [Vt.] 55 Atl. 611. There is no variance where the note set out in the indictment does not show any indorsement and that offered in evidence bears an indorsement made after the execution of the note and not constituting a part thereof. Brady v. State [Tex. Cr. App.] 74 S. W. 771.

31. Intent to defraud is not conclusively presumed from the fact that defendant affixed the payee's signature to a check, and evidence explaining the act is admissible. State v. Bjornaas, 88 Minn. 301.

32. Instructions stating such facts are not objectionable as commenting on the evidence and need not state that defendant is not required to repudiate the presumption beyond a reasonable doubt. State v. Pyscher [Mo.] 77 S. W. 836.

33. On forgery of a deed, statements of a deceased heir of the grantor, that the grantor executed the deed to defendant, is hearsay. State v. Pyscher [Mo.] 77 S. W. 836. Grantor's indebtedness to defendant cannot be shown though witnesses for the state had testified that defendant stated that he had loaned money to the grantor and had no writing to show for it. Id. Where the charge is forgery of orders for certain goods, a person sent to verify the orders may be allowed to testify that he could not find defendant at his home or in the vicinity. State v. Prins, 117 Iowa, 505. Evidence is admissible to show that the instrument alleged to be a forgery is in defendant's writing. Richie v. Com., 24 Ky. L. R. 1077, 70 S. W. 629.

34. Neall v. U. S. (C. C. A.) 118 Fed. 699.

35. To show authority to sign, or reasonable grounds for believing in such authority. People v. Weaver, 81 App. Div. (N. Y.) 567. To show forgery of a bail bond. Richie v. Com., 24 Ky. L. R. 1077, 70 S. W. 629. To go to the jury on forgery of note. State v. Milligan, 170 Mo. 215. To sustain a conviction for alteration of notes as against a contention that the alteration was justified by a course of dealing between the parties. Towles v. U. S., 19 App. D. C. 471. To justify conviction of uttering and passing a note knowing that the names of sureties had been forged thereon. State v. Caudle, 174 Mo. 388. To sustain a conviction for forgery of a deed. State v. Pyscher [Mo.] 77 S. W. 836. Defendant's possession of the forged paper need not be shown. Richie v. Com., 24 Ky. L. R. 1077, 70 S. W. 629.

36. Evidence held sufficient to prove the corpus delicti independent of the confession. Gray v. State [Tex. Cr. App.] 72 S. W. 858.

37. Code Cr. Proc. § 399. People v. O'Farrell, 175 N. Y. 323.

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such authority or his good faith in signing it, believing that he had a right, should be submitted to the jury.[38]

Instructions.[39]—On forgery of a deed the jury may be allowed to consider the fact that the acknowledgment was forged, in determining whether the deed was forged, and such consideration need not be restricted to the question of intent on the part of defendant,[40] and where the necessity of an intent to injure or defraud is explained in a portion of the charge, it need not be repeated in a portion instructing that defendant is guilty, if he forged the instrument with intent to obtain the money therein specified.[41]

Verdict and findings.[42]—If the indictment contains a count for forgery and one for utterance of a forged instrument, judgment of guilty of the offense of forgery may on appeal be altered to conform to a verdict of guilty of uttering.[43]

Punishment.—A provision for the punishment of forgery of notes, checks or other instruments in writing for the payment of money or property, does not include the attaching of a fictitious grantor's signature to a deed.[44]

FORMER ADJUDICATION.

§ 1. **The Principle (60).**
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§ 1. *The principle.*—A judgment rendered by a court of competent jurisdiction, determining the rights of the litigants on a cause of action or defense, is an effectual bar against future litigation over the same right determined by such judgment, and is for all time, unless reversed or modified, binding on all the parties and their privies in estate or law.[45]

§ 2. *Adjudications operative as bar or estoppel. A. In general.*—The adjudication must be final,[46] that is, it must have been a complete disposition of the main

38. Knowles v. State [Tex. Cr. App.] 74 S. W. 767.

39. An instruction recognizing the duty of defendant to explain certain facts, need not inform the jury what facts would be an explanation. State v. Milligan, 170 Mo. 215.

40. Instruction that while defendant cannot be found guilty on proof of a forged acknowledgment, it may be considered with other facts and circumstances as not an assumption that the acknowledgment was forged. State v. Pyscher [Mo.] 77 S. W. 836.

41. Plemons v. State [Tex. Cr. App.] 72 S. W. 854.

42. A finding of guilt of forgery and of "uttering and attempting to pass," is sufficient. Lawrence v. State [Ark.] 71 S. W. 263.

43. Brady v. State [Tex. Cr. App.] 74 S. W. 771.

44. Such crime is not included in Pen. Code, § 476, but is covered by section 470, punishing forgery or counterfeiting of deeds. People v. Chretien, 137 Cal. 450, 70 Pac. 305. Where punishment is a maximum fine of $5,000.00 and imprisonment for not less than one and not more than fourteen years, the court does not abuse its discretion in sentencing one recommended to its mercy to pay a fine of $1.00 and be imprisoned for two years. State v. Newton, 29 Wash. 373, 70 Pac. 31.

45. State v. Broatch [Neb.] 94 N. W. 1016; Martin v. Columbian Paper Co. [Va.] 44 S. E. 918; Wood v. Carter [Neb.] 93 N. W. 158; Moores v. State, Id. 733.

46. Baker v. Watts, [Va.] 44 S. E. 929. Finality is lacking in a verdict without a judgment (Harris v. Gano, 117 Ga. 934, 44 S. E. 11), or decree vacated or annulled (Lydick v. Gill [Neb.] 94 N. W. 109; In re Smith's Estate, 54 A. 174, 204 Pa. 337; Spees v. Boggs, 54 A. 346, 204 Pa. 504), e. g. reversal of a judgment of confirmation of special assessments the objections thereto being sustained and the city given an opportunity to file a supplemental petition (City of Chicago v. Hulburt [Ill.] 68 N. E. 786). Order overruling motion to set aside a subpoena is final an appeal therefrom having been abandoned (In re Randall, 87 App. Div. [N. Y.] 245), and so with failure to take exception to pleadings and remedies at law not being available (Kelly v. Strouse, 116 Ga. 872), and reversal in part with order that the judgment as to certain parties be undisturbed (Stipe v. Shirley [Tex. Civ. App.] 76 S. W. 307), where cross writs of error from the same judgment a portion of which is reversed and the remainder affirmed remand the entire cause for a new

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thing or matter in controversy leaving nothing for the further determination of the court.[47] The principle has no application to pending proceedings,[48] or judgments suspended by appeal.[49] The judgment should be certain,[50] but it is not material which of several defenses was sustained in first action if no new determining matter is presented in the second.[51] The rule of conclusiveness does not bar a direct attack on the judgment, as for fraud,[52] but a fraudulent judgment is conclusive in a collateral proceeding.[53] A judgment is not rendered inconclusive by the fact of rendition on agreed facts.[54]

(§ 2) *B. Nature of tribunal.*—The adjudication must be that of a court having jurisdiction of the parties and subject-matter,[55] but within their jurisdiction, equal conclusiveness is attributed to the judgments of inferior courts, such as probate and orphans' courts,[56] county courts,[57] justice courts,[58] and the decisions of

trial and no portion of the judgment can be pleaded as a bar to another suit. Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co. [C. C. A.] 121 Fed. 973. An injunction having been issued and tried contradictorily with a corporation a second injunction will not issue when the grounds alleged could be presented on an appeal. Buck v. Massie, 109 La. 776. An interlocutory judgment of a trial judge on an equitable petition affirmed by the appellate court is not res judicata unless based solely on a question of law. If based on law and evidence it is not binding at the final trial unless the proof is then substantially the same as at the interlocutory hearing. Collins v. Carr, 116 Ga. 39.

47. Agnew v. Omaha Nat. Bank [Neb.] 96 N. W. 189.

48. Tampa Waterworks Co. v. City of Tampa [C. C. S. D.] 124 Fed. 932.

49. Hennessy v. Tacoma Smelting & Refining Co. [Wash.] 74 Pac. 584; Cline v. Hackbarth, 27 Tex. Civ. App. 391. Contra: In Florida a judgment is not rendered inadmissible in evidence when offered in evidence as an estoppel in another action between the same parties by the fact that when offered in evidence a writ of error therefrom with supersedeas was pending in the supreme court. Reese v. Damato [Fla.] 33 So. 462. A decree in chancery in proceedings to foreclose trust deed is admissible in ejectment founded on the deed notwithstanding a writ of error had been prosecuted and a supersedeas granted. Brown v. Schintz, 203 Ill. 136.

50. In replevin the right of possession of the property involved is not res judicata unless that question is tried and passed upon with certainty. Geiser Mfg. Co. v. Berry, [Okl.] 70 Pac. 202.

51. Aetna Life Ins. Co. v. Board of Com'rs of Hamilton County, Kansas [C. C. A.] 117 Fed. 82. A former judgment based upon a general finding for defendant which does not disclose which one of several defenses therein was sustained estops plaintiff therein from maintaining a second action between the same parties on different causes of action in which the same defenses are interposed and the same issues presented that were made in the earlier action. Aetna Life Ins. Co. v. Board of Com'rs of Hamilton County, Kansas [C. C. A.] 117 Fed. 82. In the absence of proof that an issue actually was tried and determined in arriving at a former judgment it is conclusive by way of estoppel only as to those facts which necessarily were involved and without proof of which it could not have been rendered. Waterhouse v. Levine, 182 Mass. 407. Where a judgment can be urged as res judicata on a particular issue only and could have been rendered on either of several issues and the record is silent on the particular issue the judgment is not conclusive of the issue in a subsequent suit. Budlong v. Budlong [Wash.] 73 Pac. 783.

52. Campbell v. Sherley [Ky.] 76 S. W. 540; Same v. Sherley's Adm'r, Id. Collusive action to deprive one of rights in action for wrongful death. De Garcia v. San Antonio & A. P. Ry. Co. [Tex. Civ. App.] 77 S. W. 275. A judgment in ejectment is not conclusive where entered wrongfully under an amicable action and confession. Buchanan v. Banks, 203 Pa. 599.

53. Plaintiff in an action may not treat the judgment therein as a nullity on account of fraud of defendant in procuring its rendition. Oster v. Broe [Ind.] 64 N. E. 918.

54. First Nat. Bank v. City Nat. Bank, 182 Mass 130.

55. Tremblay v. Aetna Life Ins. Co. [Me.] 55 A. 509; Miles v. Ballantine [Neb.] 93 N. W. 708; Russell v. McCarthy [Neb.] 97 N. W. 644; Logan County v. McKinley-Lanning Loan & Trust Co. [Neb.] 97 N. W. 642. Decision of priority by justice on foreclosure of mechanic's lien. Wilson v. Lubke [Mo.] 75 S. W. 602. Decree rendered on appearance by properly authorized attorney conclusive. Missouri, K. & T. Ry. Co. v. Allen [Kan.] 73 Pac. 98. Where a decree establishing a will is void for want of jurisdiction there is a sufficient controversy between the parties to support a subsequent compromise under laws allowing the supreme court to admit wills to probate under such compromises though the probate decree had not been set aside [Mass. Rev. Laws, c. 148, § 15]. Bartlett v. Slater, 65 N. E. 73, 182 Mass. 208.

56. May v. Boyd, 97 Me. 393; Wilson v. Smith, 117 Fed. 707; Snyder v. Murdock [Utah] 73 Pac. 22. The effect of a surrogate's decree on an accounting as to matters not litigated and questions not directly passed upon is not precisely the same as the effect of a judgment of a court of general jurisdiction and the fact that as to such matters and questions it was erroneous does not create a binding prece-

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officers and boards exercising judicial functions.[59] Conclusive effect will be given to the judgment of a court of another jurisdiction, as between state and federal courts,[60] courts of sister states,[61] and as between the courts of this country and courts of general jurisdiction in foreign lands.[62]

(§ 2) *C. Nature of proceeding or action.*—The doctrine applies to habeas corpus proceedings,[63] partition,[64] mandamus,[65] probate proceedings,[66] taxation of costs,[67] and as between legal and equitable remedies.[68] Findings in ex parte proceedings by insanity commissioners are not conclusive.[69] Where alternative remedies are given as in replevin, a party is not deprived of rights under both alternatives by reason of failure to immediately avail himself thereof.[70]

Where taxes were paid under protest, the action of county boards of equalization in refusing to strike the property from the tax rolls is not conclusive in an action under a statute allowing recovery of taxes illegally exacted, as failure to appeal to the board would have barred relief under the act.[71]

(§ 2) *D. Necessity that adjudication should have been on merits.*—The adjudication to be conclusive must have been on the merits,[72] mere nonsuits,[73] and

dent. In re Hunt's Estate, 41 Misc. (N. Y.) 72.

57. A county court in Illinois has jurisdiction of settlement in assignment proceedings and its action thereon is conclusive on creditors. Taylor v. Seiter, 199 Ill. 555.

58. A judgment of a justice of the peace for possession of chattels is a conclusive adjudication of the right of possession as found by the judgment. Edmonston v. Jones, 96 Mo. App. 83.

59. Conclusions of the land department in contest proceedings. Brett v. Meisterling, 117 Fed. 768; Jordan v. Smith [Okl.] 73 Pac. 308. Decisions of immigration officers in deportation proceedings. U. S. v. Lue Yee, 124 Fed. 303. Action of county commissioners in allowing claims and settling accounts with officers. Mitchell v. Clay County [Neb.] 96 N. W. 673. Orders of state board of tax commissioners reducing valuation of special franchises. People v. Priest, 85 N. Y. Supp. 235. Determination of commissioners apportioning liability for construction of a bridge. State v. Bangor [Me.] 56 Atl. 589. Action of county commissioners determining questions as to validity of warrants. Mitchelltree School Tp. v. Hall [Ind. App.] 68 N. E. 919. Findings of excise commissioners in Missouri. Cooper v. Hunt [Mo. App.] 77 S. W. 483. But not conclusions of law of federal departmental officer (Buffalo L. & E. Co. v. Strong [Minn.] 97 N. W. 575), nor mere opinions of superintendent of insurance as to rights of parties based on ex parte statements (Calandra v. Life Ass'n, 84 N. Y. Supp. 498), nor decisions of the land department as to rights of Indians under allotments (Sloan v. U. S., 118 Fed. 283).

60. Deposit Bank v. Board of Councilmen, 24 Sup. Ct. 154, 48 Law. Ed. —; Bracken v. Milner [Mo. App.] 73 S. W. 225; Commercial Pub. Co. v. Beckwith, 188 U. S. 567, 47 Law. Ed. 598; Eastern B. & L. Ass'n v. Williamson, 189 U. S. 122, 47 Law. Ed. 735. A judgment denying a debtor a discharge under a state insolvency law will not prevent his discharge from such debt in bankruptcy where there is no proof of the ground on which the state judgment was based. In re Bybee, 124 Fed. 1011.

61. Dunn v. Dilks [Ind. App.] 68 N. E. 1035; Tunnicliffe v. Fox [Neb.] 94 N. W. 1032.

62. Strauss v. Conried, 121 Fed. 199.

63. Gaster v. State [Wis.] 94 N. W. 787. Decree in habeas corpus giving possession of child to one parent not conclusive to present review of matter under changed circumstances (Everitt v. Everitt, 29 Ind. App. 508), which must be shown (In re Lederer, 38 Misc. [N. Y.] 668).

64. Curtis v. Zutavern [Neb.] 93 N. W. 400; Rice v. Donald [Md.] 55 Atl. 620. Particularly where the laws require the court to declare the titles and interests of the parties. Bartley v. Bartley, 172 Mo. 208.

65. State v. Hartford St. R. Co. [Conn.] 56 Atl. 506.

66. Validity of a claim (Robertson v. Robertson, 24 Ky. L. R. 2020, 72 S. W. 813), for counsel fees (Nash v. Wakefield, 30 Wash. 581, 71 Pac. 33).

67. Hadwin v. Southern R. Co. [S. C.] 45 S. E. 1019.

68. A judgment at law on the question of an estoppel is res judicata of that question when raised in a subsequent suit in equity. Condit v. Bigalow, 64 N. J. Eq. 504.

69. Finding of residence. Brown v. Lambe, 119 Iowa, 404. Finding of insanity is prima facie evidence of probable cause for the proceeding but not conclusive. Figg v. Hanger [Neb.] 96 N. W. 658.

70. Johnson v. Boehme, 66 Kan. 72, 71 Pac. 243.

71. Pol. Code Cal. § 3819. Columbia Sav. Bank v. Los Angeles County, 137 Cal. 467, 70 Pac. 308.

72. Gendron v. Hovey [Me.] 56 Atl. 583; Coleman v. Howell, 131 N. C. 125; Vankirk v. Patterson, 204 Pa. 317; Mullaney v. Mullaney [N. J. Err. & App.] 54 Atl. 1086; Williamson v. McCaldin Bros. Co. (C. C. A.) 122 Fed. 63; Randolph v. Hudson [Okl.] 71 Pac. 946; Waterhouse v. Levine, 182 Mass. 407; City of Anderson v. Fleming, 160 Ind. 597; Walsh v. Walsh [Neb.] 95 N. W. 1025; Hoover v. King [Or.] 72 Pac. 880; Willey v. Decker [Wyo.] 73 Pac. 210. Nonsuit not sufficient. Union Bank v. Nelson [Wash.] 73 Pac. 372; Willoughby v. Stevens, 132 N. C. 254; Shufflebarger v. Blanchard [Va.] 44 S. E. 951; Scott v. Black, 96 Mo. App. 472. A decree of inter-

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dismissals not touching the merits,[74] as for insufficiency of pleadings,[75] or affidavits,[76] want of jurisdiction,[77] defect of parties,[78] form of remedy,[79] or timeliness of action,[80] will not operate as a bar, and so generally as to dismissals without prejudice.[81] There is generally a want of determination on the merits in denial of motions,[82] the grant of provisional orders,[83] or the denial of relief for failure to com-

pleader will conclude a defendant thereto as to the fund in controversy though his right to sue at law is not enjoined. McMurray v. Sisters of Charity, 68 N. J. Law, 312. The denial of a prayer for support in a sister state on the ground that the parties had been divorced in the domestic court is not res judicata in a suit to set aside the decree of divorce because procured by fraud. Everett v. Everett, 75 App. Div. (N. Y.) 369. Where the question of homestead rights was passed upon in an action for the appointment of a receiver it could not be again raised on a motion to discharge the receiver. First Nat. Bank v. Ashley [Neb.] 93 N. W. 685. A general denial puts in issue the question whether rent under a lease was due under a yearly lease and that question being determined concludes lessor's assigns to recover rent for balance of year. Anhalt v. Lightstone, 39 Misc. (N. Y.) 822.

Dismissal on the merits. Schultz v. Schultz [Wis.] 95 N. W. 151; Larkins v. Lindsay [Pa.] 55 Atl. 184; Hirshbach v. Ketchum, 40 Misc. (N. Y.) 306; Day v. Mountin, 89 Minn. 297. A judgment dismissing a counterclaim on merits on evidence of plaintiff solely, the defendant failing to appear is res judicata. Groton B. & M. Co. v. Clark Pressed Brick Co., 126 Fed. 552. An order by a federal court dismissing a bill against members of a firm on the ground that some of the partners were citizens of the same state necessarily determined that they were necessary parties and prevented leave to amend by striking out such names and allowing suit to proceed against remaining defendants. Raphael v. Trask, 118 Fed. 678. A final judgment dismissing a complaint will not operate as a bar unless it expressly appears that it was rendered on the merits [Rev. Code Civ. Proc. N. Y. § 1209]. Glencoe Granite Co. v. City Trust, S. D. & S. Co. (C. C. A.) 118 Fed. 886.

73. Code N. C. §§ 144, 166. Prevatt v. Harrelson, 132 N. C. 250; Galletto v. Serafino, 40 Misc. (N. Y.) 671. An action by a receiver against a stockholder to enforce a compromise agreement for the settlement of the stockholder's liability in which a voluntary non-suit is entered will not bar a subsequent suit to recover the assessment, the stockholder having failed to carry out the compromise agreement. McClaine v. Rankin (C. C. A.) 119 Fed. 110. A nonsuit as to trespass on a portion of a tract of land will not bar action by transferees of plaintiff against transferees of defendant as to balance of land set out in former declaration. Cassidy v. Mudgett, 71 N. H. 491. A judgment on a counterclaim on defendant's failure to appear has the effect of a nonsuit as to the counterclaim and is not res judicata. Honsinger v. Union C. & G. Co., 175 N. Y. 229.

74. Fischbeck v. Mielenz [Wis.] 96 N. W. 426. Dismissal on demurrer. Clark v. Pence [Tenn.] 76 S. W. 885. Dismissal of counterclaim for failure of proof will not bar action by defendant on cause stated in counterclaim. Jarvis v. N. Y. House Wrecking Co., 84 N. Y. Supp. 191. Where individual sued with city for negligence was successful on his plea of limitations the judgment against the city would not be res judicata of the individual's negligence or of his liability over to the city in an action by the city against him. Richmond v. Sitterding [Va.] 43 S. E. 562. A consent decree in suit on mechanic's lien dismissing as to a wife and taking judgment against the husband alone will not bar subsequent proceedings in aid of execution or by creditor's bill. Brand v. Connery [Mich.] 92 N. W. 784.

75. Von Tobel v. Stetson, etc., Mill Co. [Wash.] 73 Pac. 788. A ruling of a district judge vacating a temporary injunction on the ground of insufficiency of petition does not preclude another judge when the cause comes before him on final hearing from rendering a decree according to the prayer of the petition. Commercial State Bank v. Ketchum [Neb.] 96 N. W. 614.

76. Lebanon v. Knott, 24 Ky. L. R. 1992, 72 S. W. 790.

77. Lake County Com'rs v. Schradsky [Colo.] 71 Pac. 1104.

78. Montgomery v. Delaware Ins. Co. [S. C.] 45 S. E. 934.

79. Donaldson v. Nealis, 108 Tenn. 638. A decree dismissing a bill for specific performance of a contract for sale of chattel because of selection of wrong remedy does not adjudicate the rights of the parties under the contract. McNamara v. Home L. & C. Co. (C. C. A.) 121 Fed. 797. A judgment that one may not recover against a county on contract made with an officer thereof does not prevent the party from pursuing a proper remedy for services rendered. Gibboney v. Board of Chosen Freeholders (C. C. A.) 122 Fed. 46.

80. Action prematurely brought and denial of relief on that ground. Barker v. Tenn. Pav. Brick Co., 24 Ky. L. R. 1524, 71 S. W. 877. Dismissal by probate court of creditors' petition for accounting on the ground that the proceeding was barred by limitations does not bar action by the creditors to compel the executor to sell real estate to pay the debt. Holly v. Gibbons [N. Y.] 68 N. E. 889.

81. Hibernia S. & L. Soc. v. Portener, 139 Cal. 90, 72 Pac. 716; Hawkins v. Mapes-Reeve Const. Co., 82 App. Div. (N. Y.) 72; Newberry v. Ruffin [Va.] 45 S. E. 733. Dismissal without prejudice by plaintiff after reversal of a decree in his favor will not bar a suit at law for the indebtedness. Kendall v. Selby [Neb.] 92 N. W. 178. The commencement of replevin and its dismissal without prejudice and delivery of property to defendant will not bar a subsequent action therefor. Cinfel v. Malena [Neb.] 93 N. W. 165.

82. Refusal of motion for a reference or an accounting. Gregory v. Perry [S. C.] 45 S. E. 4. Denial of a motion on the ground of timeliness. Allis v. Hall [Conn.] 56 Atl

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ply with precedent statutory requirements.[84] A decree sustaining a demurrer to a bill is res judicata only as to the precise point presented by the pleadings and determined by the ruling on the demurrer.[85] Rulings of an appellate court are not res judicata between the parties where the judgment is reversed and dismissed for want of prosecution by the trial court.[86]

§ 3. *Adjudication as bar. Identities between first and subsequent actions.*—To make plea effective there must be a concurrence of two things, identity of the subject-matter and identity of persons and parties.[87] The parties must be identical,[88] and must sue or be sued in identical capacities,[89] but need not in the subsequent action occupy the same relation as plaintiff and defendant,[90] and there must be identity of subject-matter and issues,[91] and the adjudication does not ap-

637. A judgment overruling a motion by a mortgagee to discharge attached property. Bishop v. Smith [Kan.] 72 Pac. 220. An order of a federal court denying a motion to set aside an assignee's sale of all the interest of the bankrupt in property is not res judicata on the question whether the bankrupt had any interest in the property. Cramer v. Wilson, 202 Ill. 83. A ruling on a motion for the removal of a receiver on the ground that he is a stockholder and hence not a suitable party to enforce stockholders' liability to creditors of bank does not adjudicate the question whether the corporation is a banking institution within the meaning of a constitutional provision. Hamilton Nat. Bank v. American L. & T. Co. [Neb.] 92 N. W. 189.

83. An order setting aside premises as a homestead during administration and granting monthly allowance is a provisional order and not res judicata on the question of homestead. Lloyd v. Lloyd [Wash.] 74 Pac. 1061.

84. Failure to pay costs of former suit. Sweeney v. Sweeney [Ga.] 46 S. E. 76. Failure of action of forcible entry and detainer for want of the statutory notice to quit will not bar action after service of notice. Burkholder v. Hollicheck [Neb.] 95 N. W. 860.

85. Dennison Mfg. Co. v. Scharf Tag, L. & B. Co. (C. C. A.) 121 Fed. 313. A judgment for defendant on plaintiff's electing to stand on his complaint on the court's sustaining a demurrer thereto for the recovery of money due under a statute is not res judicata where the complaint was fatally defective for failure to aver a demand for an accounting. Terre Haute & I. R. Co. v. State, 159 Ind. 438. The fact that a former action by the state against a railroad under a charter allowing the state to share in profits was brought under an agreement to submit the question of liability will not make a judgment for defendant on demurrer res judicata in a subsequent action for accounting, the agreement referring only to existing facts without reference to a demand for an accounting. Id.

86. Gilbert v. American Surety Co. (C. C. A.) 121 Fed. 499.

87. Lindauer Mercantile Co. v. Boyd [N. M.] 70 Pac. 568; Champ Spring Co. v. Roth Tool Co., 96 Mo. App. 518; Fiene v. Kirchoff [Mo.] 75 S. W. 608; Fricke v. Wood [Tex. Civ. App.] 71 S. W. 784; O'Connor v. Byrne, 83 N. Y. Supp. 665; Hartford F. Ins. Co. v. King [Tex. Civ. App.] 73 S. W. 71; Reed v. Provident S. L. Assur. Soc., 79 App. Div. (N. Y.) 163; Swennes v. Sprain [Wis.] 97 N. W. 511. Principle is applicable to prevent suit against bondsmen of official where bondsmen for his preceding term were sued for the same delinquency. Work v. Kinney [Idaho] 71 Pac. 477. Judgment in an action on an official bond will not bar another action on a different bond for another term, the parties and the cause being different. Brady v. Pinal County [Ariz.] 71 Pac. 910. To establish the defense of res judicata it should appear that the parties and the issues in the action were the same and that the question which it is proposed to litigate again was necessarily involved or decided by the former judgment. Muller v. Naumann, 85 App. Div. (N. Y.) 337.

88. Cutler-Hammer Mfg. Co. v. Hammer, 124 Fed. 222; Bliss v. Ward, 198 Ill. 104; Seabury v. Fidelity Ins., T. & S. D. Co., 205 Pa. 234. Persons injured by willful negligence are not precluded from recovering exemplary damages by the fact of the recovery in a prior action by another person injured in the same accident. Griffin v. Southern R., 65 S. C. 122. Where an action was brought for services, the fact that another action was pending between plaintiff and one of the parties to which action the other defendant was not a party will not operate as a bar. Linton v. Cathers [Neb.] 97 N. W. 800.

89. Trustee. Farmers' L. & T. Co. v. Essex, 66 Kan. 100, 71 Pac. 268.

90. Plaintiff and defendant were joint defendants in the prior action. Baldwin v. Hanecy, 204 Ill. 281.

91. Maynard v. Newton, 116 Ga. 195; Rosenthal v. Rudnick, 76 App. Div. (N. Y.) 624; Brown v. Missouri Pac. R. Co., 96 Mo. App. 164; Kelley & L. Milling Co. v. Adams [Ark.] 78 S. W. 49; Baker v. Bailey, 204 Pa. 524. Taxability of property—no change since decision affecting taxes for former years. N. J. Junction R. Co. v. Jersey City [N. J. Law] 56 Atl. 121; Defries v. McMeans [Iowa] 97 N. W. 65. Separation for desertion bars divorce for same cause by opposite party. In re Heins' Estate, 22 Pa. Super. Ct. 31. A second suit may not be maintained against a pledgee for the same relief by merely alleging a different source of title. Shinkle v. Vickery, 117 Fed. 916. Where the heirs at law of an estate have recovered against the administrator's judgments de bonis testatoris and de bonis propriis they cannot for the same cause recover another judgment de bonis propriis against the ad-

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ply to matters arising after the termination of the earlier suit,[92] as in actions for taxes,[93] or licenses for different years,[94] or successive elections.[95] So an action defeated on the ground of a breach of warranty will not prevent an action for the value of the article sold.[96] The invalidity of a municipal contract as exceeding the debt limit will not prevent recovery against property owners for work already done.[97] The estoppel exists, although the demand in the two cases is not the same, if the question upon which the recovery in the second case depends has been before decided under like conditions between the same parties or those in privity with

ministrators on their bond. Ross v. Battle [Ga.] 45 S. E. 252. Where subject-matter substantially identical and new matter could have been included a decree dismissing an intervening petition to establish a maritime lien will be res judicata. The New Brunswick, 125 Fed. 567.

Causes lacking identity: Settlement of replevin suit by entry of judgment for plaintiff and suit against officer for trespass in making levy. Steuer v. Maguire, 182 Mass. 575. Allowance of claims against decedent for excess in purchase price paid by cotenant and suit for partition and to enforce lien. Funk v. Seehorn [Mo. App.] 74 S. W. 445. Rent against tenant and purchaser of crop as garnishee and action against latter for balance unsatisfied by execution on judgment. Belshe v. Batdorf, 98 Mo. App. 627. Action on note and judgment referring to stocks withheld by defendant. Siebert v. Steinmeyer, 204 Pa. 419. Divorce and husband's liability to penalty for abandoning wife whom he married to avoid prosecution. State v. Lannoy, 30 Ind. App. 335. Decision as to right on ticket and qualification to hold office when elected. Fordyce v. State, 115 Wis. 608. Ejectment and claim of interest in common with plaintiffs under after acquired title. Carter v. White, 131 N. C. 14. Judgment against surety on note and action against plaintiff for conversion of property pledged to secure notes. Memphis City Bank v. Smith [Tenn.] 75 S. W. 1065. Recovery of damages for construction of road on street and action for damages for change of grade. Louisville & N. R. Co. v. Cumnock, 25 Ky. L. R. 1330, 77 S. W. 933. Denial of foreclosure for invalidity of mortgage and action on the note secured thereby. Curtin v. Salmon River H. G. M. & D. Co. [Cal.] 74 Pac. 851. Prosecutions under different ordinances. Boyd v. Board of Councilmen [Ky.] 77 S. W. 669. Forcible entry to recover possession and ejectment to recover land. Swanson v. Smith [Ky.] 77 S. W. 700. Decree denying divorce and action for separate support. Ingram v. Ingram [Vt.] 56 Atl. 5. Decree against the wife in proceedings for support and suit by the wife to cancel leases of her premises made by her husband, and to restrain him from interfering with her separate property. Dority v. Dority [Tex. Civ. App.] 70 S. W. 338. A judgment against defendant on question of ownership of a team and that it was bought as agent of another and counter claim by him for money of his own paid as part of the price. Clift v. Mercer, 79 App. Div. (N. Y.) 369. Mandamus directing election and contest of such election. People v. Knopf, 198 Ill. 340. Allowance of exemption from taxation not conclusive against assessment for public improvement. Kan. City Exp. Driving Park v. Kan. City [Mo.] 74 S. W. 979. A judgment entered to enforce an attorney's lien does not estop the defendant from suing for breach of a compromise agreement theretofore made that the action should be discontinued without further costs. Rosenthal v. Rudnick, 76 App. Div. (N. Y.) 624.

92. Tampa v. Tampa Waterworks Co. [Fla.] 34 So. 631. Recovery of commission by a broker for lease of premises will not bar action by broker's assignee for commissions on a sale that followed the lease of the premises, though the demands were not legitimately the subject of distinct actions and might have been combined. Goldshear v. Barron, 85 N. Y. Supp. 395. In a bill between partners for the settlement of accounts a former distribution of another fund raised from the partnership property, with notice to all interested parties was not res judicata in the distribution of a subsequent fund even as to parties to the first distribution. Stockdale v. Maginn [Pa.] 56 Atl. 440. An act allowing plaintiff in trespass to land of a continuing nature to recover to the time of trial on giving notice does not apply to other causes arising after the commencement of the action though of similar character. Pantall v. Rochester & P. C. & I. Co., 204 Pa. 158. An action for damage to property by obstruction of sewer is not barred by a prior judgment for injuries previous to those complained of. Houston, E. & W. T. R. Co. v. Charwaine [Tex. Civ. App.] 71 S. W. 401.

93. Yazoo & M. V. R. Co. v. Adams [Miss.] 32 So. 937; Woolley v. Louisville, 24 Ky. L. R. 1357, 71 S. W. 893. Conditions on which exemption granted having changed. In re Dille, 119 Iowa, 575.

94. State v. American Sugar Refining Co., 108 La. 603.

95. A judgment holding invalid an election attempted to be held the year of a general election is not res judicata as to the power to hold the election at a later general election. State v. Moores [Neb.] 96 N. W. 1011.

96. Manitowoc S. B. Works v. Manitowoc Glue Co. [Wis.] 97 N. W. 515; Cox v. Wiley, 183 Mass. 410. A judgment for defendant in an action on a special contract for machinery, the petition setting out the contract performance by plaintiff and nonpayment by defendant and answered by a general denial, did not prevent an action on the implied contract to pay the reasonable value of the machinery retained by defendant, the former judgment being res judicata only as to whether plaintiff performed the contract. Arthur Fritsch F. & M. Co. v. Goodwin Mfg. Co. [Mo. App.] 74 S. W. 136.

97. Davenport v. Allen, 120 Fed. 172.

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them.[98] A decree passing on the validity of an ordinance will not prevent contest of its validity on other grounds in another proceeding.[99]

Matters which might have been litigated.—The rule as to identity of issues is broad enough to conclude not only as to matters actually litigated but as to every ground which might have been presented and determined under the issues made,[1] and one may not urge a defense which he failed to make when he had an opportunity,[2] unless he had no knowledge of the existence of the defense.[3] The principle does not allow a defeated suitor to raise the same question, though later averred with more particularity;[4] or in a different form.[5] The rule is limited to such matters only as might have been used as a defense, and such matters as, if considered in the later action, would involve an inquiry into the merits of the former judgment,[6] and of course has no reference to matters that could not have been litigated,[7] as where the relief demanded could not have been granted in the first action or proceeding.[8] The rule prevents splitting entire demands,[9] as where

98. Penfield v. Potts & Co. (C. C. A.) 126 Fed. 475.

99. Mercer County Traction Co. v. United N. J. R. & C. Co., 64 N. J. Eq. 588.

1. Tinker v. Babcock, 204 Ill. 571; Downey v. People, 205 Ill. 230; Lee v. Smith [W. Va.] 46 S. E. 352; Riverside County Sup'rs v. Thompson (C. C. A.) 122 Fed. 860; N. Y. L. Ins. Co. v. Weaver's Adm'r, 24 Ky. L. R. 1086, 70 S. W. 628; Moran v. Vicroy [Ky.] 77 S. W. 668; Springer v. Darlington, 198 Ill. 121; In re Assessment of Property of N. W. University [Ill.] 69 N. E. 75; Hanley v. Beatty (C. C. A.) 117 Fed. 59; Aetna L. Ins. Co. v. Hamilton County Com'rs (C. C. A.) 117 Fed. 82; Anderson v. West Chicago St. R. Co., 200 Ill. 329; Hilgerson v. Hicks, 201 Ill. 374; Pennsylvania Co. v. Bond, 202 Ill. 95; Horton v. Simon [Neb.] 97 N. W. 604; Newman v. Gates [Ind. App.] 67 N. E. 468; Schlemme v. Omaha Gas Mfg. Co. [Neb.] 96 N. W. 644; Baird v. Connell [Iowa] 96 N. W. 863; Reynolds v. Lyon County [Iowa] 96 N. W. 1096; Dixon v. Caster, 65 Kan. 739, 70 Pac. 871; Lake County Com'rs v. Johnson [Colo.] 71 Pac. 1106; Rucker v. Langford, 138 Cal. 611, 71 Pac. 1123; Probate Ct. v. Potter [R. I.] 55 Atl. 524; Stroup v. Pepper [Kan.] 73 Pac. 896; Brand v. Garneau [Neb.] 93 N. W. 219; Jones v. Silver, 97 Mo. App. 231; Bond v. Carter [Tex. Civ. App.] 73 S. W. 45; Graves v. Currie, 132 N. C. 307; Sutton v. Hancock [Ga.] 45 S. E. 504; Torrence v. Shedd, 202 Ill. 498; Wood v. Wood, 134 Ala. 557. Applies to prevent recovery of portion of salary due at time of former action. Jenkins v. Scranton, 205 Pa. 598. Conclusive as to facts or matters which it was necessary to decide as grounds for the decision given by the verdict or judgment. Harper, etc., Co. v. Mountain Water Co. [N. J. Eq.] 56 Atl. 297.

2. Evans v. Piedmont Nat. B. & L. Ass'n, 117 Ga. 940; Cannon v. Castleman [Ind.] 69 N. E. 455; Paul v. Thorndike, 97 Me. 87; Mengert v. Brinkerhoff, 67 Ohio St. 472. A party to a suit failing to claim a defense based on usury is thereafter concluded as to such defense. Snyder v. Middle States L., B. & C. Co., 52 W. Va. 655.

3. A wife sued with her husband having no knowledge of facts releasing her from liability as surety on notes sued on may urge such release in a subsequent bill to restrain the enforcement of the judgment in ejectment and for the surplus arising from the sale of the mortgaged premises. White v. Smith, 174 Mo. 186.

4. The decision of an appellate court on appeal from a judgment denying a new trial for misconduct of a jury is res judicata on a subsequent motion on the same grounds on affidavits setting forth misconduct with more particularity. State v. Mortensen [Utah] 74 Pac. 120.

5. Where objections to jurisdiction have been made and overruled no second objection can be admitted however variant. Abbeville E. L. & P. Co. v. Western E. Supply Co., 66 S. C. 328.

6. Martin v. Abbott [Neb.] 95 N. W. 356.

7. Meyer v. Moss, 110 La. 132; Adams v. Church, 42 Or. 270, 70 Pac. 1037, 59 L. R. A. 782; In re Irvin, 84 N. Y. Supp. 707; Farmer v. Farmer & Son Type Founding Co., 83 App. Div. (N. Y.) 218; Middleworth v. Blackwell, 82 N. Y. Supp. 704. Failure of an assignee of a mortgage to ask a personal judgment against the assignor on a suit to foreclose does not bar a subsequent suit against the assignor for the deficiency, McLaughlin v. Durr, 76 App. Div. (N. Y.) 75. Denial of exoneretur is not res judicata of bail's general liability on the bond. People v. Hathaway [Ill.] 68 N. E. 1053.

8. A judgment in one county as to the location of a ferry will not bar action in another county by the same parties to establish the ferry at the same place if the commissioners could give relief not given by the commissioners of the first county. Robinson v. Lamb, 131 N. C. 229. Judgment in quo warranto is not res judicata in action for fees of office, the fees and emoluments of the office not being recoverable in such proceeding. McCall v. Zachary, 131 N. C. 466.

9. Mallory v. Dawson Cotton Oil Co. [Tex. Civ. App.] 74 S. W. 953; Hancock v. White Hall Tobacco Warehouse Co. [Va.] 46 S. E. 288. A recovery for a part of the goods wrongfully levied on by a sheriff bars a later action between the parties to recover for the remainder, although sold under other attachments. Burdge v. Kelchner, 66 Kan. 642, 72 Pac. 232. Foreclosure of lien for contract price of removal of buildings is not barred as splitting demands, where laborers have previously foreclosed a lien for amounts due them on account of their work

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the injury is of a permanent character,[10] otherwise where a nuisance is not of a permanent character.[11] A judgment on the first of a series of notes is not conclusive of the whole transaction, unless it appears that the defense extended to the entire subject-matter of the controversy.[12] The judgment in an action against a township on certain coupons is not binding as to the validity of the bonds in subsequent action on other coupons.[13] Equity will relieve a party from the effect of a bar caused by splitting a cause of action through an honest mistake by vacating the judgment urged as a bar to the prosecution.[14]

When the second suit is upon a different cause of action but between the same parties as the first, the judgment in the former action is an estoppel in the latter as to every point and question which was actually litigated and determined in the first action, but it is not conclusive as to other matters which might have been but were not litigated or decided.[15]

The doctrine of inclusion of matters within the scope of the litigation is a common law doctrine and does not obtain in Louisiana. In that state the statute limits the adjudication to the matter of the demand.[16]

Defenses and counter claims.—Right to sue upon a counter claim or set off is not lost by failure to set up same in action against defendant.[17]

§ 4. *Adjudication as estoppel. Persons entitled to claim.*—The estoppel may be urged only by parties or privies; it is not available to a stranger.[18]

Persons concluded.—The adjudication concludes the parties to the action,[19] and their privies in estate or interest.[20] Strangers are not bound.[21] One not

under the contract. Boucher v. Powers [Mont.] 74 Pac. 942. Judgment for breach of a contract allowing stipulated damages for each breach thereof will not preclude actions for subsequent breaches. Menges v. Milton Piano Co., 96 Mo. App. 611.

10. A judgment for damages for a continuing injury caused by the diversion of a stream by a railroad company bars a subsequent action for injuries accruing thereafter. Oliver v. Ill. Cent. R. Co. [Ky.] 74 S. W. 1078. In an action for a continued nuisance a former judgment is admissible to show an adjudication of question of nuisance. Bennett v. Marion, 119 Iowa, 473.

11. Southern R. Co. v. Cook, 117 Ga. 286. A recovery for damages to crops for one year against a sanitary district will not prevent suit for damages for the succeeding year from the same cause. Sanitary Dist. v. Ray, 199 Ill. 63.

12. Baltes L., S. & O. Co. v. Sutton, 30 Ind. App. 648. Judgment for plaintiff on default of answering defendant alleging invalidity of a portion of a series of bonds not conclusive as to their validity in an action on the remainder. Montpelier Sav. B. & T. Co. v. School Dist. No. 5, 115 Wis. 622.

13. Debnam v. Chitty, 131 N. C. 657.

14. Rockefeller v. St. Regis Paper Co., 39 Misc. (N. Y.) 746.

15. Aetna L. Ins. Co. v. Hamilton County Com'rs (C. C. A.) 117 Fed. 82.

16. Civ. Code La. art. 2286. Woodcock v. Baldwin, 110 La. 270.

17. Norton v. Wochler [Tex. Civ. App.] 73 S. W. 1025; Mauney v. Hamilton, 132 N. C. 303; Shankle v. Whitley, 131 N. C. 168.

18. Sickler v. Mannix [Neb.] 93 N. W. 1013.

19. Gerrish v. Whitfield [N. H.] 55 Atl. 561; Detroit v. Detroit R. [Mich.] 95 N. W. 992; Maxwell's Trustee v. England, 25 Ky. L. R. 143, 74 S. W. 1091; Henry v. Thomas [Tex. Civ. App.] 74 S. W. 599; Neb. L. & T. Co. v. Doman [Neb.] 93 N. W. 1022; Paul v. Thorndike, 97 Me. 87; Jones v. Hamm [Mo. App.] 74 S. W. 150; Carmody v. Hanick, 99 Mo. App. 357. Partitioners. Parish v. Parish, 175 N. Y. 181. Creditor in insolvency proceedings. Baker v. Williams Banking Co., 42 Or. 213, 70 Pac. 711. A mother bound by order of court of sister state appointing a third person guardian for her child on question of his fitness and her unfitness. Beardsley v. Thomas [Tex. Civ. App.] 72 S. W. 411. Where the receiver in supplementary proceedings sues to recover a note alleged to belong to debtor an adverse judgment is binding only on the creditor who carried on the proceeding for his own benefit. Southern L. & T. Co. v. Benbow, 131 N. C. 413.

20. Holland v. Cunliff, 96 Mo. App. 67; Austin v. Hoxsie [Fla.] 32 So. 878; Hermann v. Parsons [Ky.] 73 S. W. 125; Holford v. James [Ind. T.] 76 S. W. 261; Hibernia S. & L. Soc. v. London & L. F. Ins. Co., 138 Cal. 257, 71 Pac. 334; Hargrave v. Mouton, 109 La. 533; Hanlon v. Goodyear [Mo. App.] 77 S. W. 481. Fact of contribution to expenses of defense not sufficient. Hanks Dental Ass'n v. International Tooth Crown Co. (C. C. A.) 122 Fed. 74. Parties concluded are those who are directly interested in the suit, know of its pendency and have a right to control and direct or defend it. Courtney v. Knabe & Co. Mfg. Co. [Md.] 55 Atl. 614. A judgment against contestants of a local option election is conclusive on all persons in the territory affected. Locke v. Com., 24 Ky. L. R. 654, 69 S. W. 763. Where a will devised land to testator's son, if he should return within 10 years, a divorce decree vesting the son's interest in the land to the wife will not bar an action by the subse-

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originally a party is bound if he appears.[22] The adjudication, although conclusive between the adverse parties, is not conclusive as between numerous defendants, un-

quent takers after the 10 years. Connor v. Sheridan, 116 Wis. 666. Where the validity of a note given by directors of a bank to make good an impairment of assets is determined in an action brought by the receiver against the makers the judgment bars a petition filed by the directors to share in the assets of the insolvent in the hands of the receiver. Skordal v. Stanton [Minn.] 95 N. W. 449. A judgment against a receiver of a firm in an action brought by leave of court on a contract of the receiver in the management of the firm's business is conclusive against a surviving partner and creditors of the firm whether partners or not. Painter v. Painter, 138 Cal. 231, 71 Pac. 90. The creditors of an estate are bound by a decision as to the disposition of the estate by a competent court where the administrator was a party to the action. Moore v. Sloan [Ark.] 76 S. W. 1058. In an action by an endorser to recover the amount he was adjudged to pay in consequence of the forgery of the signature of a prior endorser and defendant having timely notice of the pendency of the suit and an opportunity to defend will be concluded as to the forgery. First Nat. Bank v. First Nat. Bank, 68 Ohio St. 43. A judgment vesting in plaintiffs all title of third persons is admissible as a muniment of title against persons not parties to the action. Ellis v. Le Bow [Tex.] 74 S. W. 528.

Vendor and vendee. Day & C. Lumber Co. v. Mack, 24 Ky. L. R. 640, 69 S. W. 712; Huber v. Ehlers, 76 App. Div. (N. Y.) 602.

Stockholders: A nonresident stockholder is bound by proceedings in courts of the corporation's domicile assessing stockholders' statutory liability though not a party thereto except as represented by the corporation. King v. Cochran [Vt.] 56 Atl. 667. Under the laws of Kansas a judgment against a bank adjudging it liable for an assessment as a stockholder in another bank is conclusive on its stockholders as to such liability. Martin v. Wilson (C. C. A.) 120 Fed. 202. Sustaining a plea of the statute of limitation by stockholders in an action against them on an assessment in a sister state makes the decree res judicata as to all stockholders whether parties or not as to the necessity of the call and its validity but the plea of limitations being a personal one cannot be availed of by stockholders not parties. Otter View Land Co.'s Receiver v. Bowling's Ex'x, 24 Ky. L. R. 1157, 70 S. W. 834.

Landlord and tenant: Where the action of unlawful entry and detainer was brought against the tenant the landlord not being a party is not concluded though he knew of the pendency of the action. Cope v. Payne [Tenn.] 76 S. W. 820. The judgment for a lessor railroad in an action on the merits precludes an action for the same negligence against a lessee railroad, the lessor being absolutely liable for negligence of lessee. Anderson v. West Chicago St. R. Co., 200 Ill. 329. A landlord notified and having an opportunity to defend an action against a tenant by a sub-tenant in which the landlord is ultimately liable is bound by a judgment against the tenant that the subtenant was not guilty of contributory negligence. Prescott v. Le Conte, 83 App. Div. (N. Y.) 482.

Citizens and municipality: Rate payers are bound by proceedings against a municipal corporation to enjoin an ordinance reducing rates as the corporation represents the rate payers. Spring Valley Waterworks v. San Francisco, 124 Fed. 574. A judgment effective against a property owner as a member of the general public of the city will not conclude such property owner as to matters in his individual capacity. Long v. Wilson, 119 Iowa, 267.

Husband and wife: A husband uniting with wife to set aside sale of homestead on execution is bound by the judgment. Lee v. Hughes, 25 Ky. L. R. 1201, 77 S. W. 386. A judgment in a joint action by husband and wife for injuries to the wife is res judicata on the issues therein, in an action by the husband for damages accruing to him from such injuries. Brown v. Missouri Pac. R. Co., 96 Mo. App. 164.

Sureties and indemnitors: Sureties on municipal contractors' bonds are bound by stipulation to be concluded by judgments against the city for negligence of their principal. Spokane v. Costello [Wash.] 74 Pac. 58. Where the issue whether a widow had accepted the provisions of her husband's will had been tried in an action between the widow and the executor and had been decided in the widow's favor the judgment on that issue was conclusive against the executor's sureties. Frazer v. Frazer, 25 Ky. L. R. 473, 76 S. W. 13. On the issue of the destruction of a certificate of deposit as determining liability of sureties the judgment is final, the merits having been passed upon. Cook v. Casler, 76 App. Div. (N. Y.) 279. A surety in a contract of indemnity against liens under a building contract notified of an action against the obligee and conducting the litigation is concluded as to the nature and extent of obligee's liability by a judgment entered therein. Great Northern R. Co. v. Akeley, 88 Minn. 237. A nonresident indemnitor having sufficient notice of a suit against the party indemnified is concluded thereby. South Bend Pulley Co. v. Fidelity & Deposit Co. [Ind. App.] 67 N. E. 269. Where attached property is taken possession of by defendant's sureties they are bound by the judgment against their principal. Parish v. Smith [S. C.] 45 S. E. 16.

Persons not in esse: Where in a suit for construction of a will it is decreed that remainders to grandchildren are contingent and the one living grandchild is a party to the suit, the decree is binding on afterborn grandchildren. Thompson v. Adams [Ill.] 69 N. E. 1. A decree reforming on the ground of mistake a deed conveying land to a trustee for sole use of a wife for life, with remainder over to her heirs so as to convey her the estate in fee, rendered in a suit by her against the sole heir and trustee in the deed, is conclusive and vests an estate in her as against unknown or possible heirs an estate in fee so that she

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less their rights were necessarily involved.[23] The judgment is binding on withdrawing parties,[24] but not parties dismissed from the action without prejudice.[25] A judgment against one of several jointly liable is conclusive only where satisfied.[26]

may convey a marketable title. Kendall v. Crawford, 25 Ky. L. R. 1224, 77 S. W. 364.

Trustee and beneficiaries: Beneficiaries of a testamentary trust are bound by judgments against the trustee. Johnson v. De Pauw University, 25 Ky. L. R. 950, 76 S. W. 851.

Guardian and ward: In re Turner, 79 App. Div. (N. Y.) 495. Conclusiveness is not affected by fact that infants defended by guardian ad litem. Fiene v. Kirchoff, 176 Mo. 516. Where rights of minor legatees are fully determined in proceedings brought by them and rights of all parties have been determined a guardian's action involving the questions is properly dismissed. Burkitt v. Burkitt [Miss.] 33 So. 417.

Parties to mechanic's lien: A judgment by a claimant against a contractor is not conclusive on the owner of the property. Taylor v. Wahl [N. J. Law] 55 Atl. 40. Assignees of mechanic's liens are concluded as to any point decided in a decree of foreclosure which concluded their assignor. Shryock v. Hensel, 95 Md. 614.

21. Katzenberger v. Weaver [Tenn.] 75 S. W. 937; Pardee v. Aldridge, 189 U. S. 429, 47 Law. Ed. 883; Ballard v. James, 117 Ga. 823; Dodd v. Hewitt, 24 Ky. L. R. 708, 69 S. W. 955; Ellis v. Le Bow [Tex. Civ. App.] 71 S. W. 576; Frye-Bruhn Co. v. Meyer (C. C. A.) 121 Fed. 533; Kinney v. Eastern T. & B. Co. (C. C. A.) 123 Fed. 297; Koch v. West, 118 Iowa, 468; Western Land Co. v. Buckley [Neb.] 92 N. W. 1052; Silk v. McDonald [Neb.] 93 N. W. 212; McPherson v. Julius [S. D.] 95 N. W. 428; Gilbert v. Garber [Neb.] 95 N. W. 1030; Keene Guaranty Sav. Bank v. Lawrence [Wash.] 73 Pac. 680; Southern R. Co. v. Gregg [Va.] 43 S. E. 570; Lochridge v. Corbett [Tex. Civ. App.] 73 S. W. 96; Kudner v. Bath [Mich.] 97 N. W. 685; Boles v. Walton [Tex. Civ. App.] 74 S. W. 81; Citizens' State Bank v. Porter [Neb.] 93 N. W. 391; Bancroft v. Wicomico County Com'rs, 121 Fed. 874. Orders of State Board of Tax Commissioners reducing valuation of special franchises in a city are not conclusive as to the city not a party to the proceedings. People v. Priest, 41 Misc. (N. Y.) 545. A judgment will not conclude one though a defendant in the action where he did not appear and his rights were not litigated and his cause of action would not have been a defense. Earle v. Earle, 173 N. Y. 480. Wife of defendant not a party to an action to have a conveyance to defendants set aside as in fraud of creditors is not concluded by the judgment entered in such suit. Finch v. Finch, 131 N. C. 271. A judgment dismissing a suit brought by mortgagees to annul a tax sale of the property mortgaged does not constitute res judicata as against the owner of the property, who had acquired from such mortgagees before the tax sale, and who was not a party to such judgment. McWilliams v. Gulf States L. & I. Co. [La.] 35 So. 514. A surety not summoned is not concluded as to defense by judgment against other sureties. Bath Gaslight Co. v. Rowland, 84 App. Div. (N. Y.) 563. A partnership is not bound by a judgment rendered against a member thereof in a suit to which it was not a party. Pate v. Geo. P. Wyly & Co. [Ga.] 45 S. E. 217. A judgment for trespass, against parties who had justified as township officers is not conclusive against the township, the township not being the real party in interest in the former suit. Turner Tp. v. Williams [S. D.] 97 N. W. 842. The judgment of a probate court ordering the sale of land for the payment of decedent's debts is not binding on one owning the equitable title of such land. Stacy v. Henke [Tex. Civ. App.] 74 S. W. 925. The beneficiary under a trust deed is not a necessary party on foreclosure of a mechanic's lien and is not bound by the judgment and may attack its validity by injunction suit. Fleming v. Prudential Ins. Co. [Colo. App.] 73 Pac. 752. The order of a county court for the incorporation of a town is a judgment though not conclusive in a proceeding by the state to test its legality, the state not being a party to the proceedings for incorporation. State v. Mansfield, 99 Mo. App. 146. A decree in a debtor's suit, to which creditors are not made parties, directing the payment of a certain fund to the attorney, by virtue of an assignment is no bar to a suit by a creditor attacking the appropriation of such fund by the attorney as made with intent to hinder, delay and defraud such creditors. Sibley v. Stacey, 53 W. Va. 292. A judgment against two joint obligors served with process is no bar to a subsequent judgment against a third obligor in the same suit who was not served with process or before the court at the time the first judgment was rendered. Armentrout v. Smith, 52 W. Va. 96. A default judgment against a tax collector in a suit by a tax payer to enjoin the collection of taxes in which the county is not a party is not binding on the county to prevent action for the collection of such taxes. Henderson County v. Henderson Bridge Co., 25 Ky. L. R. 421, 75 S. W. 239.

22. Elliott v. Haun, 25 Ky. L. R. 139, 74 S. W. 743; Freilsen v. Strader Cypress Co., 110 La. 877; Skelton v. Sharp [Ind.] 67 N. E. 535; Nash v. D'Arcy, 183 Mass. 30; Equitable Trust Co. v. Wilson, 200 Ill. 23; Penfield v. Potts (C. C. A.) 126 Fed. 475. The creditor of a bankrupt filing a claim and submitting to the jurisdiction of the bankruptcy court is bound by the decision disallowing his claim, it not being appealed from. Hargadine, etc., Co. v. Hudson (C. C. A.) 122 Fed. 232.

23. Jackson v. Lemler [Miss.] 35 So. 306; Huntress v. Portwood, 116 Ga. 351; Smith Bros. & Co. v. N. O. & N. E. R. Co., 109 La. 782; Fuller v. Venable (C. C. A.) 118 Fed. 543.

24. Poillon v. Poillon, 35 N. Y. Supp. 689.

25. Agnew v. Omaha Nat. Bank [Neb.] 96 N. W. 189.

26. Recovery of judgment against one of two joint wrong doers, so long as the judgment remains unsatisfied is not a defense to a separate action against the other. Cushing v. Hederman, 117 Iowa, 637. A

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Taking judgment against one partner on a joint claim bars action against the other.[27] A judgment of mortgage foreclosure and sale of premises will not bar a subsequent suit of mortgagor's widow to recover her dower interest, she not having joined in the mortgage.[28] Recognition and sanction will bind persons not parties.[29] The inchoate dower of a wife is not barred by suit to which she is a defaulting party.[30]

Matters concluded.—The judgment concludes as to all matters in issue,[31] and passed upon.[32] It is not conclusive as to matters without the issues,[33] as where

judgment against one of two joint and several obligors which has never been satisfied is no bar to a suit against the other. Booth v. Huff, 116 Ga. 8.

27. Tootle v. Otis [Neb.] 95 N. W. 681.

28. Beverly v. Waller, 24 Ky. L. R. 2505, 74 S. W. 264.

29. In a suit to remove trustees for breach of trust, records in prior suits settled by the deed of trust are admissible though plaintiff was not a party to such suits, he having expressly recognized the terms of the settlement. Belding v. Archer, 131 N. C. 287. Where a husband sues for injuries to the wife and the wife made no objection but testified at the trial, the judgment will be res judicata in an action by her for the same injuries. Harkness v. La. & N. W. R. Co., 110 La. 822.

30. Jewett v. Feldheiser [Ohio] 67 N. E. 1072.

31. Malone v. Garver [Neb.] 92 N. W. 726; Henderson v. Hall, 134 Ala. 455; Freeman v. Lavenue, 99 Mo. App. 173; Newcomb v. Lubrasky [N. J. Eq.] 55 Atl. 89; American Surety Co. v. U. S. [C. C. A.] 123 Fed. 287; Phelps v. Western Realty Co. [Minn.] 94 N. W. 1085.

Thus, authority to issue is concluded by judgment sustaining attachment (Hamilton v. Spalding, 25 Ky. L. R. 847, 76 S. W. 517); title by judgment in ejectment or trespass (Holcomb v. Combs, 25 Ky. L. R. 957, 76 S. W. 847); want of probable cause by judgment for defendant in attachment (Anvil Gold Min. Co. v. Hoxsie [C. C. A.] 125 Fed. 724); quantity and boundaries of land by partition decree (Norwood v. Gregg [S. C.] 45 S. E. 163); usury by decree in suit to sell under deed of trust (Best v. British-American Mortg. Co., 133 N. C. 20); validity of assessments for local improvements by judgment of sale on first instalment (Treat v. Chicago, 125 Fed. 644); absence of fault of colliding tug by dismissal of libel (Williamson v. McCaldin Bros. Co. [C. C. A.] 122 Fed. 63); insolvency of each partner by adjudication of insolvency of partnership on admission of parties (Gray v. Brunold [Cal.] 74 Pac. 303); necessity and amount of land needed by condemnation judgment (Dillon v. Kan. City, Ft. S. & M. R. Co. [Kan.] 74 Pac. 251); fact of possession by order of dispossession (Schrenkeisen v. Kroll, 85 N. Y. Supp. 1072); interest of parties by judgment in partition (Allen v. Foster [Tex. Civ. App.] 74 S. W. 800); claims for improvements by decree partitioning community property (Moor v. Moor [Tex. Civ. App.] 71 S. W. 794); right to exemption for succeeding years under unchanged conditions by judgment passing on right (Kan. City Exp. Driving Park v. Kan. City [Mo.] 74 S. W. 979); necessity for improvements by judgment allowing recovery of penalties for failure (Tenement House Department v. Moeschen, 41 Misc. [N. Y.] 446); sufficiency of petition by judgment granting liquor permit (McConkie v. Remley, 119 Iowa, 512); taxability in jurisdiction to exclusion of other jurisdiction by judgment in favor of state (Spalding v. O'Callaghan's Ex'r, 25 Ky. L. R. 629, 76 S. W. 189); fact of liability for damages but not of amount by mandamus compelling payment of warrants (State v. Adams [Mo. App.] 74 S. W. 497); marriage by proceeding finding an insane person a married woman in guardianship proceedings (Burgess v. Stribling [Mich.] 95 N. W. 1001).

A "right question or fact" distinctly put in issue and determined cannot be questioned in a subsequent suit between the parties or their privies though the second suit is for a different cause of action. State v. Broatch [Neb.] 94 N. W. 1016. The doctrine of res judicata extends only to those facts which must necessarily be made to appear as a basis of the judgment and without a showing of which the judgment could not have been rendered. Tremblay v. Aetna L. Ins. Co., 97 Me. 547. An action to determine priority rights in water and construing a deed from a common grantor precludes a later inquiry in another action as to rights prior to such deed. Horne v. Hutchins [N. H.] 54 Atl. 1024. A special finding of the jury on the question of duration of lease being a part of the verdict is conclusive on that issue in a later suit between the parties. Sowles v. Sartwell [Vt.] 56 Atl. 282. Where defendant in an action to quiet title answered setting up paramount title in himself and judgment was rendered on issue of title alone and found without merit he may not thereafter deny the right of plaintiff to maintain the action for the reason that plaintiff was not in possession of the realty in question. Mosier v. Momsen [Okl.] 74 Pac. 905. A petition on an agreement attempting to preserve an attorney's lien denied on the ground that consent to substitution of an attorney in petitioner's place terminated the lien is res judicata of the question of termination of lien. Randel v. Vanderbilt, 75 App. Div. (N. Y.) 313. The question as to whether an ordinance requiring removal of obstructions is necessary to entitle a city to maintain ejectment is a legal question on which a judgment for the city is conclusive. Hawkshurst v. Asbury Park [N. J. Eq.] 56 Atl. 697.

32. Dunsmuir v. Port Angeles Gas, W., L. & P. Co., 30 Wash. 586, 71 Pac. 9; Defries v. McMeans [Iowa] 97 N. W. 65. A matter expressly excluded from the earlier

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the complaint stated no cause of action against a party,[34] nor as to immaterial matters in the decree.[35] Adjudication of invalidity of contract sued on concludes all recovery under such contract.[36] A judgment against a city of which a lot owner has notice is conclusive on the latter as to the fact, cause, and extent of the injury, but not as to his responsibility for the cause.[37] A judgment by default is conclusive against the parties as to all matters properly pleaded in the declaration.[38] A judgment against land by default for delinquent taxes is not conclusive against the owner as to the legality of the taxes.[39]

§ 5. *Pleading and proof.*—The defense must be pleaded,[40] unless the facts appear on the face of the complaint or declaration, when the question may be raised by demurrer.[41] Where the fact of the former adjudication and satisfaction of the judgment are brought out on cross-examination of a witness, the matter will not be reinvestigated, though not pleaded in bar nor proven at the trial.[42] The plea should set out the pleadings, findings of fact, conclusions of law, and judgment in the former action,[43] and aver that the judgment had not been super-

case by admissions in the pleadings cannot be said to have been passed upon. Hodge v. U. S. Steel Corp., 64 N. J. Eq. 90. A judgment for plaintiff as to the validity of his patent in an action for royalties—invalidity being urged as a ground to defeat recovery—is conclusive. Wilcox, etc., Mach. Co. v. Sherborne (C. C. A.) 123 Fed. 875. Where the validity of the statute under which bonds were issued was not involved the judgment was not binding in an action to declare the bonds invalid on account of invalidity of statute. Debnam v. Chitty, 131 N. C. 657. A decree of foreclosure for the full amount of a mortgage debt is not conclusive on the right of a corporate director purchasing for the corporation with his own funds to receive such amount from the corporation as no question as to his capacity was presented or determined. Kroegher v. Calivada Colonization Co. (C. C. A.) 119 Fed. 641. Judgments in actions for settlement of executors' accounts in which certain provisions of the will were construed but not whether a provision created an invalid accumulation are not res judicata of that question. Thorn v. De Breteuil, 86 App. Div. (N. Y.) 405.

33. Patterson v. Mills, 138 Cal. 276, 71 Pac. 177; State v. O'Connor [Tex.] 74 S. W. 899; Aetna L. Ins. Co. v. Hamilton County Com'rs (C. C. A.) 117 Fed. 82. A judgment is not res adjudicata as to facts dependent on the theory not advanced on the trial as whether work and materials were extra work or contract work in mechanics' lien. Wear v. Schmelzer, 92 Mo. App. 314. Injunction against carrying on warehouse not conclusive on right to sell property used for warehouse purposes. State v. New Orleans Warehouse Co., 109 La. 64. Adjudication that a seller was not responsible for its conversion does not determine the liability of another for the conversion. Loetscher v. Dillon, 119 Iowa, 202. A judgment for defendants in an action to rescind a contract of sale for fraud exculpating them from the charge of fraud is conclusive of all matters at issue and prevents a subsequent action for damages for the alleged fraud. Gutheil v. Goodrich, 160 Ind. 92. Order of sale to pay debts does not pass on validity of debts paid from proceeds. Austin v. Austin, 132 N. C. 262. Dissolution of injunction does not determine that it was improvidently issued. Gray v. Bremer [Iowa] 97 N. W. 991.

34. A judgment in foreclosure is not res judicata of the right of the plaintiff to have a personal judgment against payee where the complaint stated no cause of action against the payee. Huston v. Fatka, 30 Ind. App. 693.

35. The provisions of a decree as to matters immaterial to the issues will not conclude the parties. Stokes v. Foote, 172 N. Y. 327.

36. Camp v. Jennings [Fla.] 32 So. 934; Hirshbach v. Ketchum, 84 App. Div. (N. Y.) 258.

37. Lincoln v. First Nat. Bank [Neb.] 93 N. W. 698.

38. Taylor v. Sledge [Tenn.] 75 S. W. 1074. Where judgment by default is rendered in a case in which the damages are not liquidated the defendant is concluded as to the truth of all the material allegations except as to the amount of the damages. Lenney v. Finley [Ga.] 45 S. E. 317.

39. Elmwood Cemetery Co. v. People, 204 Ill. 468.

40. Willis v. McKinnon, 79 App. Div. (N. Y.) 249; Turpen v. Turlock Irr. Dist. [Cal.] 74 Pac. 295; Interstate Nat. Bank v. Claxton [Tex. Civ. App.] 77 S. W. 44; E. J. Codd Co. v. Parker [Md.] 55 Atl. 623; Carnahan v. Brewster [Neb.] 96 N. W. 590; Bramlett v. Louisville & N. R. Co., 24 Ky. L. R. 976, 70 S. W. 410; Brutsche v. Bowers [Iowa] 97 N. W. 1076. Under the New York procedure an objection of res judicata in summary dispossession proceedings can be raised only by answer and not by motion to dismiss. Fritztuskie v. Wauroski, 83 App. Div. (N. Y.) 150.

41. Where defense appears on face of petition it may be raised by demurrer. Fricke v. Wood [Tex. Civ. App.] 71 S. W. 781; Keen v. Brown [Fla.] 35 So. 401.

42. Persons v. Persons [N. D.] 97 N. W. 551.

43. Dixon v. Caster, 65 Kan. 739, 70 Pac. 871. A plea in equity setting up a former judgment in bar must set forth so much of the pleadings or proceedings in the former suit as will show that the same point

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seded, reversed or appealed.[44] Where the court has general jurisdiction, that fact need not be pleaded.[45]

Where the matter is res judicata and the courts have prohibited the further litigation of the matter, the later action raising the same issue may be dismissed on motion as being impertinent, vexatious and contemptuous.[46]

Evidence is admissible to show the issues in the former suit,[47] unless there can be no dispute about the issues.[48] The judgment may be proved,[49] but not impeached.[50]

FORMS OF ACTION.[51]

This topic includes holdings of general application as to the distinctions between particular forms or kinds of actions; grounds for particular actions being excluded to the title appropriate to each action. The common-law forms of personal actions, now abolished in many states, will be found treated under appropriate heads.[52] But however sweeping the abolition, it goes only to the form of the action, and the ancient distinctions between the kinds of actions are in many respects important. Thus it is generally held that the essential distinction between legal and equitable actions is not destroyed by the codes,[53] and the determina-

was there in issue as in the pending suit. Keen v. Brown [Fla.] 35 So. 401. Plea of res judicata held sufficient where failing to aver an assignment by authority yet such fact was fairly inferable from other facts pleaded. Abilene v. Cornell University (C. C. A.) 118 Fed. 379. A plea is good in an action for damages for fraud averring a former judgment for defendant in an action to rescind for the same fraud though it does not state that no fraud was and might have been based on the special finding. Gutheil v. Goodrich, 160 Ind. 92. A general denial that the parties and issues are the same does not put in issue a plea of res judicata setting forth with particularity pleadings, issues and judgment as it leaves undenied all the allegations of fact set forth. Small v. Reeves, 25 Ky. L. R. 729, 76 S. W. 395.

44. Hornick v. Holtrup, 25 Ky. L. R. 1030, 76 S. W. 874. The plea is not demurrable for failure to show affirmatively that the former judgment has not been appealed from. Fenn v. Roach & Co. [Tex. Civ. App.] 75 S. W. 361.

45. Highway Com'rs v. Big Four Drainage Dist. [Ill.] 69 N. E. 576; Bailey v. Gleason [Vt.] 56 Atl. 537.

46. Kirby v. Pease [Wash.] 74 Pac. 665.

47. Monroe v. Fourakers, 117 Ga. 901; Cassidy v. Mudgett, 71 N. H. 491; Anhalt v. Lightstone, 39 Misc. (N. Y.) 822; O'Connor v. Byrne, 86 App. Div. (N. Y.) 627. The petition and answer in the former suit are admissible to establish plea. San Antonio & G. S. R. Co. v. San Antonio & G. R. Co. [Tex. Civ. App.] 76 S. W. 782. Parol evidence is admissible to show that a dismissal was not on merits. Burkholder v. Hollicheck [Neb.] 95 N. W. 860. The fact that a number of demands of a creditor against a corporation were merged in a single judgment before proceedings were commenced against a stockholder thereon does not preclude the creditor from showing that liability of the corporation on one of the demands was contingent only and the date when it became fixed to meet defense of limitations. Crissey v. Morrill [C. C. A.] 125 Fed. 878.

48. Where a judgment is rendered on sustaining a demurrer for insufficient facts evidence of judges in a subsequent action that the decision was on the merits and not on the form of the complaint is inadmissible. Terre Haute & I. R. Co. v. State, 159 Ind. 438.

49. The existence of a judgment may not be proved by memoranda thereof contained in the judgment docket. Red Cloud v. Farmers' & M. Banking Co. [Neb.] 92 N. W. 160. A mere abstract, not being a copy of a judgment does not prove the existence of the judgment if controverted. McGraw v. Roller, 53 W. Va. 75. A party may waive the production of the entire record. Clem v. Meserole [Fla.] 32 So. 815.

50. On plea of res judicata evidence is inadmissible to impeach the record. Rubel v. Title G. & T. Co., 199 Ill. 110. The recital of due service in the judgment by domestic courts raises the presumption of valid service and every presumption must be indulged in favor thereof. Ballard v. Way [Wash.] 74 Pac. 1067.

51. A purely statutory right requires a strictly statutory remedy. Recovery of landentry money. Hoffeld v. U. S., 36 Ct. Cl. 230.

52. See Assumpsit; Covenant, Action of; Trespass, etc.

53. State v. Evans, 176 Mo. 310. Whether a cause is to be judged an action at law or a suit in equity must depend on the facts of the case. Id. The mere fact that recovery of money only is demanded does not necessarily make the action one at law. Schulsinger v. Blau, 84 App. Div. (N. Y.) 390. In action on note where answer pleads want of consideration the action is only one at law. Boone v. Goodlett [Ark.] 76 S. W. 1059. Replevin is not a chancery action which can be invoked for the cancellation of a contract. Penton v. Hansen [Okl.] 73 Pac. 843. A motion for a judgment for money where a notice takes the place of the writ and declaration in an action at

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tion of the right to a jury trial[54] is but one illustration of its importance under the codes. In like manner the distinction between civil and criminal actions,[55] proceedings in rem and in personam,[56] and between actions ex contractu and ex delicto,[57] are of importance in respect to many matters of procedure. Thus causes of actions on contract and in tort cannot be joined,[58] and the measure of damages varies according to the form of the action.[59] The character of the action as in per-

law. Reed v. Gold [Va.] 45 S. E. 868. Where the pleadings presented a suit in equity in the lower court its character would not be changed because the decree in some respects took the form of a judgment at law. State v. Evans, 176 Mo. 310. The distinction between legal and equitable forms of action being abolished by the code a court may not dismiss a suit for damages for wrongful ejection of a tenant on the ground that relief could only be granted in equity. Browder v. Phinney, 30 Wash. 74, 70 Pac. 264. In Wisconsin one suing in equity in good faith may have legal relief where the evidence entitles him thereto but fails to establish facts entitling him to equitable relief (Gates v. Paul [Wis.] 94 N. W. 55), otherwise in federal courts (Jones v. Mut. Fidelity Co., 123 Fed. 506). The codes of some of the states allow the union in one action of all claims both legal and equitable so far as they are consistent with one another and affect the same parties. Tootle v. Kent [Okl.] 73 Pac. 310. Where the appellate court has decided an action to be equitable and not legal, the lower court must dismiss if plaintiff fails to establish a cause in equity and may not treat it as an action at law and render judgment accordingly. Porter v. International Bridge Co., 79 App. Div. (N. Y.) 358. An action for a money judgment by a partial assignee in his own name is one at law. Barto v. Seattle, etc., R. Co., 28 Wash. 179. 68 Pac. 442. And see Equity, ante, p. 1043.

54. Porter v. International Bridge Co., 79 App. Div. (N. Y.) 358; Maggs v. Morgan, 30 Wash. 604, 71 Pac. 188; Voss v. Smith, 84 N. Y. Supp. 471; New Harmony Lodge v. Kan. City, etc., R. Co. [Mo. App.] 74 S. W. 5.

55. Quo warranto to determine title to office is in the nature of a civil action. Fordyce v. State, 115 Wis. 608. Bastardy proceedings under the Washington statute are civil and not criminal (State v. Tieman [Wash.] 73 Pac. 375) and proof by a preponderance of the evidence is sufficient (Priel v. Adams [Neb.] 91 N. W. 536). An action for penalty for an offense is not a continuance of a prosecution under an indictment dismissed without an order for resubmission. Com. v. Elkins, 25 Ky. L. R. 485, 76 S. W. 25. Where a money penalty is recoverable for violation of an ordinance the proceeding therefor is civil but if punishment by imprisonment is authorized the proceeding is criminal. Unger v. Inhabitants of Fanwood Tp. [N. J. Law] 55 Atl. 42.

56. A proceeding for the destruction of gambling devices under Mills Ann. St. § 1242 is in rem. Kite v. People [Colo.] 74 Pac. 886.

57. The action is ex contractu against a carrier for damages to freight (Louisville & A. R. Co. v. Bennett, 25 Ky. L. R. 834, 76 S. W. 408); against a trustee for negligence in the expenditure of funds (Wallrath v. Bohnenkamp, 97 Mo. App. 242); against a broker by his principal for breach of duty (Morris v. Jamieson, 205 Ill. 87); against an agent by one injured by his unwarranted assumption of authority (Anderson v. Adams [Or.] 74 Pac. 215); against a telegraph company for failure to deliver (Manker v. Western Union Tel. Co., 137 Ala. 292). A petition to recover money spent by purchaser of machinery under a contract of warranty in installing it and in making alterations and repairs alleged to have been expended for the benefit of the seller at his request and for his use states an action on an implied assumpsit and not for damages for breach of warranty. Griffith v. Williams P. C. & P. Co. [Mo. App.] 77 S. W. 330. The action is ex delicto for damages for deceit (Francisco v. Hatch [Wis.] 93 N. W. 1118; Lambert v. Jones, 91 Mo. App. 288); for injuries to land caused by flooding caused by failure to fill lands according to agreement (Post v. Merritt, 85 App. Div. [N. Y.] 239); for damages for refusal to return securities on the performance of services according to contract (Scrivner v. Woodward, 139 Cal. 314, 73 Pac. 863). Liberality in the construction of pleadings will not allow one in an action based on fraud in the sale of an article to recover on proof of breach of warranty the tort not being waived. Postal v. Cohn, 83 App. Div. (N. Y.) 27. Where tried on the theory of an action on contract the case will be so regarded on appeal. Manker v. Western Union Tel. Co., 137 Ala. 292. Where the complaint for damages for breach of warranty sounds in tort an amendment setting up negligence of manufacturer may not be opposed as converting an action of contract into one of tort. Wood v. Anthony & Co., 79 App. Div. (N. Y.) 111. The nature of the action is determined from the facts alleged rather than the form of action adopted. Penoyer v. People, 105 Ill. App. 481. Where pleadings are ambiguous the intention of the pleader will be considered in determining the question. Southern Bell Tel. Co. v. Earle [Ga.] 45 S. E. 319. For breach of a contract to build a sufficient retaining wall an adjoining proprietor may be sued either for breach of the contract or in tort for the damages. Church of Holy Communion v. Paterson Extension R. Co., 68 N. J. Law, 399. In Missouri one whose lands are trespassed upon by cattle may waive the trespass and sue on an implied promise to pay rent. Gillespie v. Hendren, 98 Mo. App. 622.

58. Voss v. Bender [Wash.] 73 Pac. 697. Also, see, many cases pertinent to rules of joinder of causes cited in title Pleading.

59. Conversion. Moore v. Richardson, 68 N. J. Law, 305; Anderson v. Besser [Mich.] 91 N. W. 737.

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sonam or in rem is important in determining questions of jurisdiction and process,[60] and the right to a jury trial.[61]

The common-law distinction between real and personal actions is also important in some states principally as determining the extent of relief to be granted.[62] The principal forms of real actions are treated under appropriate heads.[63]

Where several forms of action are available, plaintiff is put to his election,[64] but after an action is commenced, the pleadings and proceedings may change the form thereof.[65]

FORNICATION.

Elements of offense.—Both parties must be shown to be unmarried.[66]

FRANCHISES.[67]

§ 1. Grant of Franchise and Regulation (74).
§ 2. Powers and Duties under Franchise (76).
§ 3. Duration and Extension (77).
§ 4. Transfer (77).
§ 5. Revocation and Forfeiture (78).

§ 1. *Grant of franchise and regulation of its exercise.*—The franchise must be within the power of the corporation to execute,[68] and within the power of the public body to grant,[69] and strict compliance with law is necessary to a valid

60. See Jurisdiction; Process.

61. Kite v. People [Colo.] 74 Pac. 886.

62. Where rents and profits are not sued for no allowance can be made for taxes paid by defendant. Milliken v. Houghton, 97 Me. 447.

Petitory actions under Louisiana practice: Defendant cannot urge rights between plaintiff and a third person. Leathem & S. Lbr. Co. v. Nalty, 109 La. 325. Plaintiff must recover on the strength of his own title (Wilson v. Ober, 109 La. 718; Slattery v. Heilperin, 110 La. 86) and must declare on all title held by him (Hargrave v. Mouton, 109 La. 533). Plaintiff must show some title in himself. Granger v. Sallier, 110 La. 250. Where defendant disclaims, the owner being brought in is the real defendant (Jewell v. De Blanc, 110 La. 810) and damages for timber removed by the disclaiming defendant being the subject of a personal action cannot be tried (Adams v. Drews, 110 La. 456).

63. See Ejectment; Waste; Forcible Entry and Detainer.

64. See Election of Remedies and Rights.

65. Where return in replevin shows a failure to take because of resistance of defendant the action may proceed as one for damages only. Fergus v. Gagnon [Neb.] 93 N. W. 146. A change from assumpsit to debt nullifies pleading not applicable to debt. Cent. Lumber Co. v. Kelter, 102 Ill. App. 333. Appearance and joinder of issue changes a divorce action from a proceeding in rem to one in personam. Gibbs v. Gibbs [Utah] 73 Pac. 641. Where, in ejectment defendant answers setting up an equitable defense but not as a cross bill and does not ask affirmative relief the case is not changed to an equitable case. Hall v. Small [Mo.] 77 S. W. 733. Where insurer paid loss into court to abide decision as to rights as between receiver of insured and assignee and receiver claimed a fraudulent assignment the action thereupon became a suit in equity. Voss v. Smith, 84 N. Y. Supp. 471. Where the defendant files a complaint in equity in an action at law and the code requires the suit thereafter to proceed as in equity and stays the proceeding at law the legal matters not being adjudicated therein and the decree preventing no obstacle the action at law for damages may be proceeded with [B. & C. Comp. (Or.) § 391]. Finney v. Egan [Or.] 72 Pac. 136.

66. Neil v. State, 117 Ga. 14.

67. **Definition:** A franchise is a special privilege conferred by governmental authority upon individuals and which does not belong to citizens of the country generally as a matter of common right. It is also to be regarded as a generic term covering all rights granted to a corporation by legislative act or statute. Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234. Corporate franchises in this country emanate from the government or sovereign power, owe their existence to a grant, or as at common law to prescription which presupposes a grant and are vested in individuals or a body politic. Cain v. City of Wyoming, 104 Ill. App. 538. A city ordinance granting the privilege of constructing and operating a system of water works is a license and not a franchise a municipal body having no power to grant a franchise that power belonging to the legislature. Id.

68. An ordinary railroad company may not, under the laws of Wisconsin, accept a street railroad franchise. State v. Milwaukee, B. & L. G. R. Co., 116 Wis. 142. An ordinance granting an ordinary railroad an elevated railroad franchise in streets many of which contain surface roads and limiting fares and requiring free transportation of city officials is an attempt to confer on such railway a street railway franchise. Id.

69. The laws of Illinois do not authorize county boards to grant franchises to individuals to operate street railways over county highways. Goddard v. Chicago & N.

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grant,[70] but long acquiescence presumes a compliance with conditions precedent;[71] and curative acts[72] or ratification by the granting power[73] may obviate defects. Exclusive franchises are not favored.[74] Interstate roads are exempted from provisions requiring sale of franchises.[75] In Kansas, a certified copy of the secretary of state's certificate of organization must be filed with the recorder of deeds of the county in which the corporation is located.[76] Acceptance is required,[77] and where accepted with conditions, the reasonableness of such conditions may not be questioned by the acceptor.[78] There may be an acceptance of a franchise with conditions by conduct without the formality of a written acceptance.[79] Franchises are contracts within the constitution,[80] and only such amendments are permissible as do

W. R. Co., 202 Ill. 362. Municipalities are generally given the power to grant franchises allowing use of streets and alleys by traction, lighting and water companies. A city owning the fee of its streets may authorize their use by electric light companies. McWethy v. Aurora Elec. L. & P. Co., 202 Ill. 218.

70. A provision in a statute regulating the grant of municipal franchises that they shall be granted on the conditions in the act provided and not otherwise is imperative and requires strict compliance. Act Cal. March 11, 1901, will not allow the acceptance of an oral bid, it being the duty of the council to award the franchise to the next highest bidder on default of the lowest bidder. Pac. Elec. Co. v. Los Angeles, 118 Fed. 746. Where an ordinance authorizing the advertisement and sale of an exclusive telephone franchise and another ordinance ratifying a sale to plaintiff under the first ordinance passed at the meeting at which they were introduced the franchise is void under an act applicable to franchises that a certain number of days shall elapse after the introduction of the ordinance before granting the franchise. Maraman v. Ohio Valley Tel. Co. (Ky.) 76 S. W. 398. The consents of abutting property owners necessary to the passage of an ordinance allowing construction of a street railway must be sealed [P. L. N. J. 1896, p. 329]. Mercer County Traction Co. v. United N. J. R. & C. Co., 64 N. J. Eq. 588. There may be no evasion of laws requiring subscription of certain amounts of stock per mile. Code N. C. §§ 1932, 1933, requiring subscription of $1,000 a mile with five per cent thereon paid in good faith is not complied with by subscription of $32,000 on a proposed road 60 miles in length. Kinston & C. R. Co. v. Stroud, 132 N. C. 413.

71. Long acquiescence in occupancy of streets for gas conduits may imply a compliance with conditions as to municipal consent thereto. People v. Cromwell, 89 App. Div. (N. Y.) 291.

72. The Tennessee laws validate charters defectively acknowledged. Tenn. Cent. R. Co. v. Campbell, 109 Tenn. 655.

73. The failure to give notice to a member of a meeting to grant a franchise may be cured by subsequent ratification. Territory v. De Wolfe [Okl.] 74 Pac. 98.

74. Under the laws of Illinois a municipal corporation cannot grant a street railroad company the right to the exclusive use of a street. Russell v. Chicago & M. Elec. R. Co., 205 Ill. 155. County commissioners in Florida have discretion as to grant of different ferry franchises for the same point. Green v. Ivey [Fla.] 33 So. 711. Cities in Oklahoma may not grant exclusive gas and electric franchises. Territory v. De Wolfe [Okl.] 74 Pac. 98.

75. Capdevielle v. New Orleans & S. F. R. Co., 110 La. 904. An interstate electric road is trunk railway within a constitutional provision exempting trunk railways from corporate franchises to be granted to the highest and best bidder. Diebold v. Ky. Traction Co. (Ky.) 77 S. W. 674.

76. Ryland v. Hollinger (C. C. A.) 117 Fed. 216.

77. The acceptance of an ordinance authorizing the construction of a telephone line and fixing rights as to transferees constitutes a contract between the grantee and the city. Mahan v. Mich. Tel. Co. [Mich.] 93 N. W. 629. A corporation incorporating under general laws accepts the provisions of the act as part of the charter. Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 59 L. R. A. 631.

78. Postal Tel. Cable Co. v. Newport (Ky.) 76 S. W. 159.

79. Postal Tel. Cable Co. v. Newport (Ky.) 76 S. W. 159. A prima facie case of assumption of power by user is shown by a certified copy of the act incorporating the company and acts amendatory thereof, a resolution to change the corporate name, the order of court allowing the change, acts of the company in the execution of a power of attorney under its name before change and after and the loan of money and taking of notes therefor. U. S. Mortg. Co. v. McClure, 42 Or. 190, 70 Pac. 543.

80. There is an impairment of a contract by an ordinance for the erection of electric or water works in competition with a company operating under a prior ordinance granting a franchise for a term of years (Southwest Mo. Light Co. v. Joplin, 113 Fed. 817; Potter County Water Co. v. Borough of Austin, 206 Pa. 297); if the franchise be accepted and used (Capital City L. & F. Co. v. Tallahassee, 168 U. S. 401, 46 Law. Ed. 1219; Underground R. v. New York, 116 Fed. 952). An unexercised option to buy such works is not impaired by constructing new works. Newburyport Water Co. v. Newburyport, 113 Fed. 677. Where a telephone company uses a street under permission of the city under a grant and has established a plant, it may not be required thereafter to pay for the use of the street as an additional condition. Sunset Tel. Co. v. Medford, 115 Fed. 202. An electric franchise accepted by a corporation on which large sums of money had been ex-

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not impair the obligation thereof.[81] Regulations in the exercise of the police power are valid.[82] Thus railroads may be required to construct[83] and maintain grade crossings,[84] to clean between its tracks[85] or to pave them,[86] and the rates that may be exacted under a charter may be regulated.[87]

§ 2. *Powers and duties under franchise.*—Under the laws of Pennsylvania, a company is invested with an exclusive privilege in the street though the act does not allow construction to commence for 30 days.[88] A corporation may not engage in a business not authorized by its charter.[89] A grant to a street railroad company to maintain a railroad on a certain street has no relation to its corporate franchise and may be abandoned on consent of property owners and the city without the consent of the state.[90] A franchise allowing use of streets for gas mains applies to streets laid out thereafter.[91] A franchise allowing the construction of an interurban railroad between certain termini does not allow the construction of a

pended in making improvements amounts to a contract which cannot be changed without the consent of the company and will prevent a demand for compensation for use of ground occupied by poles. Hot Springs Elec. Light Co. v. Hot Springs, 70 Ark. 300.

81. An amendment to a charter relieving a railroad company from the necessity of constructing a portion of a road and creating a corporation to construct such portion with powers and duties of the original corporation does not annul the original corporation. Terre Haute & I. R. Co. v. State, 159 Ind. 438. A city council may allow the removal of pipes from places where public necessity no longer requires them without impairing the original contract between the city and the company. Asher v. Hutchinson W., L. & P. Co., 66 Kan. 496, 71 Pac. 813. Where a street railroad company, incorporated under general statutes, has not obtained the consent of the city authorities, it may not object that there is an impairment of obligation of contract by the construction by the city of a railroad on streets selected for its lines. Underground R. v. New York, 116 Fed. 952.

82. A street railway grant to use streets may not be arbitrarily impaired or rejected, though it is subject to conditions imposed by statute and to the proper exercise of the police power of the municipality. Town of Mason v. Ohio River R. Co., 51 W. Va. 183; Springfield v. Springfield St. R. Co., 182 Mass. 41; Worcester v. Worcester Consol. St. R. Co., 182 Mass. 49. The fact that the Idaho statutes term water companies "private corporations" does not exempt them from public control. Boise City, etc., Water Co. v. Boise City (C. C. A.) 123 Fed. 232. A street car franchise is not rendered invalid by a reservation allowing change of location of tracks and poles on application of the company. Shepard v. East Orange (N. J. Law) 53 Atl. 1047. The legislature may revoke permission for the use of streets for electric wire conduits, the right being reserved by ordinance. Boston Elec. Light Co. v. Boston Terminal Co. [Mass.] 69 N. E. 346. A resolution allowing the construction of a surface road on condition that portion of street occupied and a certain distance on either side be kept in repair with a certain kind of stone does not prevent a later resolution changing the material for repairs. Binninger v. New York [N. Y.] 69 N. E. 390.

83. Code 1892, § 3555. Ill. Cent. R. Co. v. Copiah County [Miss.] 33 So. 502. Pub. Laws 1898, p. 110. Palmyra Tp. v. Pa. R. Co., 63 N. J. Eq. 799. An act allowing the making of contracts with railroads for the relief of city from obstruction of railroad crossings and grade under a plan adopted or to be adopted by commissioners to be appointed, giving commissioners power to adopt a general plan and change the same as to any detail, but denying them a right to adopt a general plan extending beyond the one heretofore adopted, or from extending the general plan adopted by them, does not amount to an impairment of the obligation of the contract. Lehigh Valley R. Co. v. Adam, 70 App. Div. (N. Y.) 427.

84. Vt. St. §§ 3844-3846. Town of Clarendon v. Rutland R. Co. [Vt.] 52 Atl. 1057.

85. Chicago v. Chicago Union Traction Co., 199 Ill. 259, 59 L. R. A. 666.

86. Asphalt instead of stone as prescribed by charter. Binninger v. New York, 80 App. Div. (N. Y.) 438. A surface road is relieved from a franchise requirement as to paving repairs by a municipal contract binding paving contractors to keep the same in repair, the company paying its proportion of the original cost. Binninger v. New York [N. Y.] 69 N. E. 390.

87. Kentucky municipalities have power to fix rates to be charged consumers of water [Ky. St. 1899, § 3290]. Owensboro v. Owensboro Waterworks Co., 24 Sup. Ct. 82, 48 Law. Ed. —. In Nebraska it is no objection to a gas franchise that the ordinance granting it does not reserve the power in the municipality to regulate rates. Ray v. Colby [Neb.] 97 N. W. 591. A city may on behalf of its inhabitants sue a gas company for violation of its contract with a city as to maximum prices to be charged consumers. Muncie Natural Gas Co. v. Muncie [Ind.] 66 N. E. 436. Injunction may be invoked against a gas company violating its charter as to the prices charged consumers. Id.

88. Com. v. Uwchlan St. R. Co., 203 Pa. 608.

89. Manufacture and sale of electrical supplies foreign to the business of vending electricity. Burke v. Mead, 159 Ind. 252.

90. Thompson v. Schenectady R. Co., 124 Fed. 274.

91. People v. Cromwell, 89 App. Div. (N. Y.) 291.

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branch road in one of the towns passed through.[92] Under the laws of Kentucky, the right of a turnpike company to collect tolls depends on whether the road is kept in good condition.[93]

§ 3. *Duration and extension of term.*[94]—Grants for unreasonably long periods are opposed to public policy.[95] An extension of a charter is not equivalent to the granting of a new charter.[96] An ordinance extending the time when a city might exercise an option to acquire a waterworks system violates a provision against extending public franchises without the approval of municipal electors.[97] An act legalizing an extension of a particular municipal franchise beyond the statutory time is invalid as a local or special law.[98] Under laws limiting the life of franchises, an ordinance giving a corporation powers after the expiration of such term is void as to such extension only.[99]

§ 4. *Transfer of franchise.*—Franchises may be sold,[1] or leased[2] so as to pass rights[3] and liabilities[4] of the original holder. Sale or lease to rival companies is allowed.[5] Entire franchises may not be severed and portions thereof assigned.[6] A franchise based on a compact between different states to be revocable only by the action of both states can be transferred only by consent of both states.[7]

92. Attorney General v. Derry & P. Elec. R. Co., 71 N. H. 513.

93. Columbia & C. C. Turnpike Co. v. Vivion [Mo. App.] 77 S. W. 89.

94. A telephone franchise granted by a Kansas town fixing no term will exist for 20 years and during such term may not be repealed by the grantor. Old Colony Trust Co. v. Wichita, 123 Fed. 762.

95. Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234. A grant to a railroad company to use certain tracks is not objectionable as a perpetual grant where the ordinance allows other roads to use the tracks without discrimination. Capdevielle v. New Orleans & S. F. R. Co., 110 La. 904.

96. State v. Bangor [Me.] 56 Atl. 589.

97. Poppleton v. Moores [Neb.] 93 N. W. 747.

98. Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250.

99. Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250. There is no implied waiver of rights of a city against a water company after the expiration of a franchise by the passage of an ordinance fixing water rates and accepting water service. Id. The failure of the state at the expiration of a franchise to institute quo warranto does not justify a water company in exercising powers nor prevent a collateral attack denying existence where such company seeks to enjoin the enforcement of ordinances fixing rates. Id.

1. Purchasers of a franchise taking possession of the property and using same are estopped to deny the authority of officers making the sale. Badger Tel. Co. v. Wolf River Tel. Co. [Wis.] 97 N. W. 907. An ordinance granting a franchise to a telephone company and its successors and assigns is assignable though the words successors and assigns do not appear in the title. Old Colony Trust Co. v. Wichita, 123 Fed. 762. Where a town exercises an option to purchase a waterworks plant the franchise passes to the town and the owners thereafter can do no act to forfeit same. Bristol v. Bristol & W. Waterworks [R. I.] 55 Atl. 710.

2. The laws of Georgia allow a leasing of franchises of connecting lines. Ga. R. & B. Co. v. Maddox, 116 Ga. 64. A traction company leasing the franchises of various railway companies exercises the franchise of a street railway. Philadelphia v. Philadelphia Traction Co. [Pa.] 55 Atl. 762. A lessee of a franchise terminable by either party on notice cannot maintain a suit to determine his lessor's rights under a contract between it and another party without making the lessor a party. Western Union Tel. Co. v. Pa. R. Co., 120 Fed. 362.

3. A traction company leasing the road of street railroad company succeeds to the lessor's right to use of the streets. Conshohocken Borough v. Conshohocken R. Co., 206 Pa. 75.

4. A motor company acquiring the franchise of an electric road operating along the same street and changing its power to electricity is regulated by the provisions of the electric railroad franchise. Snouffer v. Cedar Rapids & M. C. R. Co., 118 Iowa, 287. A street railroad company acquiring another company is bound by the charter of the company which it purchases as to street repairs and not by its original charter, the powers of which it had not exercised. Kent v. Common Council, 40 Misc. (N. Y.) 1.

5. The laws of Wisconsin allow the purchase of a telephone franchise by a rival company [Rev. St. 1898, §§ 1775, 1775a]. Badger Tel. Co. v. Wolf River Tel. Co. [Wis.] 97 N. W. 907. Water companies may sell or assign their franchises to similar corporations under the laws of Pennsylvania. Hey v. Springfield Water Co. [Pa.] 56 Atl. 265. A statute allowing the consolidation of gas companies in the same city having general application does not violate the constitutional inhibition against passage of local laws granting special privileges or franchises. People v. People's G. & C. Co., 205 Ill. 482.

6. A franchise for the operation of an electric railroad is entire and a right to operate an electric light plant cannot be detached therefrom and assigned. Carthage v. Carthage Light Co., 97 Mo. App. 20.

7. Pinnix v. Lake Drummond C. & W. Co. 132 N. C. 124.

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§ 5. *Revocation and forfeiture.*—A franchise may be forfeited for a substantial[8] failure to comply with the conditions on which it was granted,[9] as failure of water company to furnish pure water.[10] When not amounting to a contract,[11] a franchise may be annulled by the granting power.[12] It may be taken under condemnation proceedings,[13] declared invalid for unreasonableness,[14] or forfeited for insolvency of the corporation,[15] or sale of its franchises to a foreign corporation.[16]

Failure to comply with conditions will not affect a forfeiture ipso facto,[17] and a cause for forfeiture cannot be taken advantage of or enforced in a collateral proceeding,[18] but this rule will not prevent a defense by a city that the franchise of water company had expired where the company sought to restrain the enforcement of an ordinance fixing rates to be charged.[19]

8. A law making failure to equip a certain amount of right of way each year after incorporation until the whole line is completed work a forfeiture of corporate existence and a cessation of powers as to uncompleted line will not apply to failure to occupy a short portion necessary to connection with another line in a city—the line having been built into the city in due time. Dennison & S. R. Co. v. St. Louis S. W. R. Co. [Tex.] 72 S. W. 161. A failure to comply with requirements after organization for a brief time will not affect the corporate status. Ryland v. Hollinger (C. C. A.) 117 Fed. 216.

9. Failure of street railway company to obtain consent of authorities or property owners for its construction. Underground R. v. New York, 116 Fed. 952. Under the laws of Maryland making a failure to pay a bonus tax for two years work a forfeiture and denying right to exercise charter powers while in default, the charter of the defaulting company is suspended during the two years to be revived on payment during that time [Poe's Supp. Code, Pub. Gen. Laws, art. 81, §§ 88f, 88i]. Cleaveland v. Mullin, 96 Md. 598.

10. St. Cloud v. Water, L. & P. Co., 88 Minn. 329. Opinion of state board of health not condition precedent to suit. Id. No waiver by fact that impure water had been furnished for long time. Id.

11. See ante, § 1.

12. The franchises granted water companies in Maine are subject to legislative repeal. Kennebec Water Dist. v. Waterville, 97 Me. 185. A municipal grant to lay water pipes in city streets and fixing no term for the privilege confers merely a revocable license and the subsequent passage of an ordinance conferring the same rights on another company in accordance with the laws operates as such revocation. Boise City, etc., Water Co. v. Boise City (C. C. A.) 123 Fed. 232. A franchise granted by a township and accepted by an electric railway cannot be annulled by a borough afterwards formed from a part of the township. Jersey City, etc., R. Co. v. Garfield, 68 N. J. Law, 587.

13. In condemnation of a water plant under eminent domain proceedings compensation must be allowed for franchises taken. Kennebec Water Dist. v. Waterville, 97 Me. 185.

14. A village ordinance granting a lighting franchise for 30 years will be held invalid for unreasonableness where the charges are grossly excessive and the population of the village is sufficient to make the village a city to which a state law applies limiting the power to contract to 10 years. Le Feber v. Northwestern Heat, L. & P. Co. [Wis.] 97 N. W. 203. The fact that an ordinance granting a franchise has been approved by a majority of the electors of a municipality will not prevent an inquiry as to its reasonableness. Id.

15. Zeltner v. Zeltner Brew. Co., 174 N. Y. 247. Mere insolvency does not ipso facto dissolve a corporation. Ready v. Smith, 170 Mo. 163. In a bill for dissolution the insolvency of the corporation, non user of franchise, and the interest of plaintiffs must be pleaded explicitly. Polk v. Mut. R. F. Life Ass'n, 119 Fed. 491; Nicolai v. Md. A. & M. Ass'n, 96 Md. 323. See title Corporations for treatment of dissolution of corporations.

16. A transfer of all the property and franchises of a corporation to a foreign corporation except the franchise of being a domestic corporation dissolves the domestic corporation. Coler v. Tacoma R. & P. Co. [N. J. Err. & App.] 54 Atl. 413.

17. Failure of an agricultural society to hold fairs for a given time will not ipso facto work a forfeiture though the laws require conveyance to the state after such default. Nicolai v. Md. A. & M. Ass'n, 96 Md. 323.

18. Nicolai v. Md. A. & M. Ass'n, 96 Md. 323; San Diego Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295; Marion Bond Co. v. Mexican C. & R. Co., 160 Ind. 558; Bronson v. Albion Tel. Co. [Neb.] 93 N. W. 201, 60 L. R. A. 426. The validity of a franchise granted by a municipality cannot be collaterally attacked by a private party in a suit in equity because of irregularity in the exercise of the power by the municipality nor because of alleged failure of grantee to perform, nonperformance to work a forfeiture as these matters are to be determined by the granting. Cal. Reduction Co. v. Sanitary Reduction Works (C. C. A.) 126 Fed. 29. The right of a corporation to continued existence can be questioned only by the state in a direct proceeding. Ryland v. Hollinger (C. C. A.) 117 Fed. 216. A purchaser of goods from a corporation whose only failure was that its capital stock had not been fully paid in at the time though it was paid later may not question the legal existence of the corporation in an action for the price of the goods. Wells Co. v. Avon Mills, 118 Fed. 190. One suing a corporation as such may not deny its corporate existence and is bound by its terms as to

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Quo warranto is the remedy for usurpation or illegal user of a franchise;[20] mandamus, to compel discharge of corporate duties.[21]

§ 6. *Taxation.*—Franchises granted by the state are subject to taxation;[22] federal franchises are exempt.[23]

FRATERNAL AND MUTUAL BENEFIT ASSOCIATIONS.[24]

PART I. ORGANIZATION, POWERS, REGULATION, AND INTERNAL DISCIPLINE.

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§ 13. Procedure to Enforce Right to Benefits.—Form of Action and Alternative Remedies (100); Exhaustion of Remedies within Order (100); Time to Sue and Who May Sue (101); Pleading (101); Burden of Proof and Evidence (102).

Part. I. Organization, powers, regulation, and internal discipline of societies. § 1. *Nature, organization and powers.*[25] *Protection of ritual and individuality.*—A beneficiary society by permission to another society to use its ritual in a different field, and make large expenditures in reliance thereon, may estop itself from complaining against the use of its ritual in its own field.[26]

Status of local lodges and relation with supreme body.—Incorporation of the

its principal office. Etowah Mill Co. v. Crenshaw, 116 Ga. 406.

19. Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250.

20. State v. Toledo R. & L. Co., 23 Ohio C. Ct. R. 603. A street railway franchise is a franchise within the laws allowing quo warranto. State v. Milwaukee, B. & L. G. R. Co., 116 Wis. 142. A private corporation is a person within laws allowing action by attorney general in the name of the state for illegal holding or exercise of a franchise. Id. An equitable action will lie to annul a water franchise, the right of the city to forfeit not being limited to forfeiture provided by the ordinance or to an action of quo warranto by the state. St. Cloud v. Water, L. & P. Co., 88 Minn. 329. A city may maintain an action to test the legality of the occupancy of streets by parties claiming under a franchise. Ray v. Colby [Neb.] 97 N. W. 591.

21. Johnson v. Atlantic City G. & W. Co. (N. J. Eq.) 56 Atl. 550; State v. Bangor [Me.] 56 Atl. 589.

22. Paterson & P. G. & E. Co. v. State Board of Assessors (N. J. Law) 54 Atl. 246; People v. Knight, 174 N. Y. 475; Southwestern Tel. Co. v. San Antonio [Tex. Civ. App.] 73 S. W. 859; London & S. F. Bank v. Block, 117 Fed. 900; Spring Valley Waterworks v. San Francisco, 124 Fed. 574. An ordinance imposing a certain gross earnings tax for a specified number of years is not rendered invalid by a provision that the amount of such tax thereafter was to be determined by arbitration. Shepard v. East Orange [N. J. Law] 53 Atl. 1047. A franchise both at common law and by New York statute is real estate, classified as an incorporeal hereditament. Thompson v. Schenectady R. Co., 124 Fed. 274.

Notes on taxability of franchises will be found in 57 L. R. A. 33, 58 L. R. A. 540. On exemption of franchises 35 Am. St. Rep. 405. See generally the title Taxation.

23. Sufficiency of complaint for recovery of taxes. Western Union Tel. Co. v. San Joaquin Co. [Cal.] 74 Pac. 856.

24. Taxation of mutual benefit associations, see Taxation. See Trade Unions.

25. **Definitions and distinctions:** An association establishing a fixed table of rates similar to that of an old line insurance company, will not be regarded as to be classed with such companies where the monthly payments fixed are not made under the understanding that they are premiums, but to pay a benefit to the beneficiaries on death of members, and its certificates are not issued with a view to profit. Such an association is not by Rev. St. 1899, § 1408, deprived of the defense of suicide. Morton v. Royal Tribe of Joseph, 93 Mo. App. 78. A voluntary relief association established for a corporation's employes does not engage the corporation in an insurance business. State v. Pittsburgh, etc., R. Co., 68 Ohio St. 9.

26. Great Hive of Ladies of Maccabees v. Supreme Hive of Ladies of Maccabees [Mich.] 97 N. W. 779.

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supreme lodge will not prevent a local lodge from being regarded as an unincorporated association, if it has the sole management and control of its benefit fund.[27]

Where both the national and state governing bodies of a fraternal society are supported by taxes on the members, but neither have any power to enforce the tax, though the state body collects both its own and the national taxes, the national body cannot hold collections as a trust fund for its benefit without establishing that the moneys were collected expressly on a tax levied for its benefit;[28] but on establishment of such fact, the state officers cannot evade the liability on the ground that they have paid it out for other purposes of the order.[29] On withdrawal of a majority of the members of a local lodge from the grand lodge, the minority must act in good faith as a subordinate lodge in order to be entitled to the personal property.[30] After a local lodge has by resolution declared that it is no longer a member of the grand lodge, at a time when there is no dissent to such action, the grand lodge can no longer prescribe rules and regulations for it, so that those dissenting on a vote as to an adoption of such rules and regulations may claim to be the official subordinate lodge and entitled to its property.[31]

Ultra vires cannot be asserted against a certificate on the strength of which the member has in good faith paid dues.[32]

Consolidation of fraternal beneficiary associations must be based on statutory authorization.[33]

Suspension of business.—Suspension of business under the by-laws defeats a recovery by the beneficiaries.[34] The association may sell its property to pay debts, though an article of its regulations prohibits dissolution of the society and disposal of its funds so long as a certain number of members adhere to it;[35] but a sale to a syndicate representing a majority of the members is fraudulent as to a dissenting minority.[36]

By-laws.—Though directors are not authorized to make by-laws, they may be allowed to determine when they shall go into effect.[37] A formal adoption is not necessary if by-laws are in fact accepted and put in operation.[38]

Where the by-laws provide the manner in which amendments may be made, an amendment to such provisions must be in compliance with its requirements.[39] In the absence of by-laws, an amendment need not be published in order to give it effect, the members being charged with notice of its adoption.[40] Statutory pro-

27. Code Civ. Proc. § 1919. Boyd v. Gernant, 82 App. Div. (N. Y.) 456.

28, 29. Evidence held insufficient to establish such fact. Nat. Council of J. O. U. A. M. v. State Council, 64 N. J. Eq. 470.

30. Instruction embodying such condition held proper where some 260 members withdrew and carried out the purposes of the organization as to payment of benefits, meetings, etc., and the claimants, 8 in number, while insisting that they adhered to the grand lodge, did practically nothing that was required by the rules and provisions of the society. Union Benev. Soc. v. Martin, 25 Ky. L. R. 1039, 76 S. W. 1098.

31. Union Benev. Soc. v. Martin, 25 Ky. L. R. 1039, 76 S. W. 1098.

32. On the ground that an amendment under which it was issued was not made in the manner prescribed by the constitution. Wuerfler v. Wis. Order of Druids, 116 Wis. 19.

33. In Kansas no such authority exists. Bankers' Union v. Crawford [Kan.] 73 Pac. 79. Otherwise an agreement by one such association to pay accrued death losses of another, in consideration of a transfer of the membership and officers of such other, is ultra vires and void. And an estoppel to plead the ultra vires character of such act does not arise against the association by the fact that large numbers of the absorbed association were induced to become members of the first, or that by the resignation of the officers of the absorbed association it went into the hands of officers named by those managing the former. Id.

34. Where the association depends on assessments under the by-laws to provide for death losses. Bost v. Supreme Council Royal Arcanum, 87 Minn. 417.

35, 36. Blais v. Brazeau [R. I.] 56 Atl. 186.

37. By-laws passed by the association to become effective when board of directors deem it expedient, held valid. Evans v. Southern Tier M. R. Ass'n, 76 App. Div. (N. Y.] 151.

38. Evans v. Southern Tier M. R. Ass'n, 76 App. Div. (N. Y.) 151.

39. Subsequent amendments under the amended provision not complying with the original provision will not affect rights of members or beneficiaries under contracts already entered into. Deuble v. Grand Lodge, A. O. U. W., 172 N. Y. 665.

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visions requiring copies of amendments or alterations in the constitution or by-laws of beneficial societies to be filed with the state officer have been held not to impair the obligation of contracts, which reserve a power to alter or amend the by-laws.[41]

§ 2. *Foreign associations. Authorization to do business. Regulations.*—On compliance with local statutes it may become mandatory on the superintendent of insurance to issue to a foreign insurance company a certificate authorizing it to do business within the state.[42] A provision that insurance companies must specify the exact sum of money which they intend to pay is applicable to both foreign and local insurance companies.[43] Statutory provisions requiring copies of amendments or alterations in the constitution or by-laws of beneficial societies to be filed with the state officer apply also to foreign benefit associations.[44]

Privileges.—Foreign societies may be exempt from taxation,[45] or general insurance laws,[46] but they must have complied with conditions precedent to doing business.[47]

Process may under some statutes be served on any one of the associates where no officer is within the state.[48] One collecting premiums from a local branch and transmitting them to the central organization is not a managing agent for the service of the process.[49] Unauthorized service is not aided by the fact that there is a representative on whom service could properly have been made.[50]

Insolvency.—On insolvency of a foreign association, domestic beneficiaries are entitled to priority in payment out of funds within the state collected by an ancillary receiver before such funds are transferred to a domiciliary receiver.[51] Relief funds on deposit in a domestic bank, passing into the hands of a domiciliary receiver, remain in trust for the payment of claims for disabled and deceased members.[52] Resident creditors cannot acquire a preference by attachment of a domestic bank deposit,[53] but if there is a domestic receiver, domestic creditors may be protected by ordering the deposit paid over to him to be applied to the expense of his receivership and then turned over to the foreign receiver on his bond to distribute it in accordance with the local law.[54]

§ 3. *Officers, physicians, etc.*[55]—A society may regard its constitutional pro-

40. Eversberg v. Supreme Tent, K. M. W. [Tex. Civ. App.] 77 S. W. 246.

41. Comp. St. 1901, c. 43, § 112. Knights of Maccabees v. Nitsch [Neb.] 95 N. W. 626.

42. He is not authorized under Act April 27, 1896, (92 Ohio Laws, p. 364); Rev. St. § 3631-13 to enter into any inquiry in regard to a foreign fraternal beneficiary association applying to do business within the state, except in case the laws of such state, province or territory do not provide for any formal authorization to do business on the part of any association. State v. Vorys [Ohio] 68 N. E. 580.

43. Rev. St. 1899, § 7903. Goodson v. Nat. Masonic Acc. Ass'n, 91 Mo. App. 339.

44. Comp. St. 1901, c. 43, § 112. Knights of Maccabees v. Nitsch [Neb.] 95 N. W. 626.

45. The Ancient Order of United Workmen is a secret benevolent fraternal society exempt from payment of an earnings tax under Laws 1890, p. 139, c. 151, § 53 providing such a tax is a condition precedent to doing business within the state. Ancient Order of U. W. v. Shober [S. D.] 94 N. W. 405.

46. Rev. St. 1899, §§ 1408, 1410. Shotliff v. Modern Woodmen [Mo. App.] 73 S. W. 326; Hudnall v. Modern Woodmen [Mo. App.] 77 S. W. 84; McDermott v. Modern Woodmen, 97 Mo. App. 636, though see contra, as to a defense of suicide. Baltzell v. Modern Woodmen, 98 Mo. App. 153.

47. Statutes making suicide no defense unless contemplated at the time of the application, are applicable to insurance companies doing business within the state without compliance with its laws [Rev. St. 1899, § 7896]. Brassfield v. Knights of the Maccabees, 92 Mo. App. 102.

48. Gen. St. 1894, § 5177, makes such provision with regard to persons associated in any business under a common name. Taylor v. Order of Ry. Conductors [Minn.] 94 N. W. 684.

49, 50. Moore v. Monumental Mut. L. Ins. Co., 77 App. Div. (N. Y.) 209.

51. The certificates having matured by death of the members. Frowert v. Blank, 205 Pa. 299.

52. Nat. Park Bank v. Clark, 38 Misc. (N. Y.) 558.

53. Must be distributed pro rata among the disabled members and beneficiaries wherever resident, whose claims have been allowed at the time of the appointment of a receiver for the Order. Nat. Park Bank v. Clark, 38 Misc. (N. Y.) 558.

54. Nat. Park Bank v. Clark, 38 Misc. (N. Y.) 558.

55. Physicians: A published notice of resumption of practice is admissible to

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visions as to elections as not to be strictly followed,[56] and may become estopped to dispute the regularity of the election of an officer by directing his discharge and electing a successor for the remainder of the term.[57]

The treasurer of a lodge and the lodge will not be enjoined against payment of a bill, unless plaintiff avers that he has exhausted the remedies provided by the constitution and by-laws.[58]

Misappropriation of funds.[59]—The recording and financial secretary of a lodge cannot be convicted of embezzlement of its funds, if it is the duty of the permanent secretary to receive its money, since the fiduciary relation does not appear.[60]

§ 4. *Discipline of members.*—Provisions limiting membership of an order to a certain religious denomination and expelling a member who no longer keeps such religious connection do not impose a religious test.[61]

By-laws providing that a fine will be imposed on members failing to comply therewith are not self-executing.[62]

Members of mutual benefit associations cannot be expelled arbitrarily or without cause,[63] since rights of membership may be property rights,[64] though the internal policy of beneficial societies is not subject to judicial control.[65] Proceedings in accord with by-laws are due process of law.[66]

Members are entitled to notice and specification of charges against them,[67] but if the member has actual notice of the particular charge, it need not be formally stated.[68]

Charges may be heard and a member expelled on Sunday.[69] If he default, he may be expelled on evidence tending to establish his guilt.[70] A plea to the jurisdiction of a society tribunal waives objections not stated.[71]

A provision for an appeal to a superior body of an order by a member aggrieved by a decision will not deprive a court of jurisdiction of an action to reinstate a member expelled without notice or hearing.[72]

show that a physician elected by a society was physically competent to discharge his duties. McDermott v. St. Wilhelmina Benev. Aid Soc. [R. I.] 54 Atl. 58. In an action by a physician to recover compensation as medical officer, an instruction that an employe remaining in service of employer after expiration of time of his employment, is presumed to continue under the original contract, is pertinent to the issues where it appears that services were rendered at a certain rate based on the membership, and the issue was whether plaintiff had been duly elected. Id.

56. A valid election made by a plurality instead of a majority of the voters as required by the constitution to be binding on absent members. The same is true of a provision as to the time for holding elections which has been customarily disregarded. McDermott v. St. Wilhelmina Benev. Aid Soc. [R. I.] 54 Atl. 58.

57. Society physician. McDermott v. St. Wilhelmina Benev. Aid Soc. [R. I.] 54 Atl. 58.

58. Not sufficient to aver that plaintiff has done all he could on the floor of the lodge in a parliamentary way. Coss v. Mansfield Lodge, 24 Ohio Circ. R. 36.

59. Evidence held sufficient to warrant a directed verdict in an action against the treasurer of a mutual benefit association for misappropriation of its funds. Associazione Fraterna Italiana v. Gobbi, 82 App. Div. (N. Y.) 635.

60. Loving v. State [Tex. Cr. App.] 71 S. W. 277.

61. Const. art. 1, §§ 18, 19. Barry v. Order of Catholic Knights [Wis.] 96 N. W. 797.

62. Entry of amount of fine on books of financial secretary without affirmative action on part of the society or managing committee will not render a fine imposed for failure of members to go to religious services with the general body twice a year payable. Leahy v. Mooney, 39 Misc. (N. Y.) 829.

63. Pepin v. Societe St. Jean Baptiste [R. I.] 54 Atl. 47.

64. Where there is a provision for funeral benefits as to members and their wives. Froelich v. Musicians' Mut. Ben. Ass'n, 93 Mo. App. 383.

65. Such as discipline of members. Moore v. Nat. Council of K. & L., 65 Kan. 452, 70 Pac. 352.

66. Though resulting in the expulsion of members and forfeiture of property rights. Moore v. Nat. Council of K. & L., 65 Kan. 452, 70 Pac. 352.

67, 68. Pepin v. Societe St. Jean Baptiste [R. I.] 54 Atl. 47.

69. Such is not the exercise of a judicial power. Pepin v. Societe St. Jean Baptiste [R. I.] 54 Atl. 47.

70. Pepin v. Societe St. Jean Baptiste [R. I.] 54 Atl. 47.

71. Such as lack of time to prepare to meet charges or insufficiency of specification thereof. Moore v. Nat. Council of K. & L., 65 Kan. 452, 70 Pac. 352.

72. Such is not regarded as a decision within the meaning of the society constitution. Kohler v. Klein, 39 Misc. (N. Y.) 353.

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Part II. Benefits or insurance. § 5. *Membership securing benefits. A. Requisites. Necessity of certificate.*—Constitutional provisions for the obtaining of benefit certificates must be complied with.[73] Delivery of the certificate during life and good health of the applicant may be requisite,[74] or countersigning by the secretary and president of the local lodge.[75]

Necessity of initiation into order.—A benefit certificate cannot be rightfully issued before initiation into a local lodge.[76] Defective initiation is waived by treatment of a member as such and delivery of a certificate to him.[77] Requirements may be waived as to charter members.[78]

(§ 5) *B. Nature and construction of contract.*—By the issuance of a benefit certificate, a fraternal order assumes contractual obligations which are enforceable in the courts unaffected by the right to make rules for the internal discipline of its members.[79] The internal affairs of the corporation and the equities of its members among themselves do not affect such obligation.[80] Being a contract, the certificate can be changed only by consent of both parties.[81] Benevolent associations have been regarded as mutual life associations governed by the general rules applicable thereto, where their certificates are payable from a fund maintained by assessments.[82] In construing a contract embodied in a certificate and by-laws, it should be borne in mind that the predominant intention of the parties is indemnity.[83] The rule that members are charged with knowledge of by-laws does not prevent ambiguous clauses in the contract from being strictly construed against the insurer.[84]

What law governs.—In an action on a policy subject to the laws of a foreign state, if such laws are not pleaded, the liability of defendant must be determined according to the common law.[85]

(§ 5) *C. Charter and by-laws as part of contract.*—The certificate, constitution, and by-laws are regarded as constituting the contract,[86] though it is held also that by-laws must be made a part of the policy in order that they may affect its terms.[87] A provision that is not reasonable as a by-law may be good as a contract.[88]

73. Requirements of certificate from the Supreme Lodge not obviated by the fact that after the member's death a local lodge notifies the Supreme Lodge that he was entitled to death benefits. Pfeifer v. Supreme Lodge, B. S. B. Soc., 74 App. Div. (N. Y.) 630.

74. Roblee v. Masonic Life Ass'n, 38 Misc. (N. Y.) 481.

75. Not effective where signed after member's death. Hiatt v. Fraternal Home, 99 Mo. App. 105.

76. Hiatt v. Fraternal Home, 99 Mo. App. 105. Such requirement may be statutory. Rev. St. 1899, § 1408, has such effect through the requirement of a lodge system. Id.

77. Supreme Ruling, F. M. C. v. Crawford [Tex. Civ. App.] 75 S. W. 844.

78. Provisions for initiation of members which require payment of the first benefit assessment to an officer of the lodge and the signing of the benefit certificate before him are not applicable where on the organization of a new lodge, there being none but charter members, no such officer was elected. Tracy v. Supreme Court of Honor [Neb.] 93 N. W. 702.

79. Supreme Council, A. L. of H. v. Orcutt (C. C. A.) 119 Fed. 682.

80. Black v. Supreme Council, A. L. of H., 120 Fed. 530.

81. Russ v. Supreme Council, A. L. of H., 110 La. 588.

82. Modern Woodmen v. Colman [Neb.] 94 N. W. 814.

83. Supreme Lodge, O. M. P., v. Meister, 105 Ill. App. 471.

84. Brock v. Brotherhood Acc. Co. [Vt.] 54 Atl. 176.

85. Morton v. Supreme Council of Royal League [Mo. App.] 73 S. W. 259.

86. O'Brien v. Supreme Council, C. B. L., 81 App. Div. (N. Y.) 1. Provision that certificate is issued on the express condition that the member shall, in every particular comply with the laws, rules and regulations of the Order. Grand Lodge, A. O. U. W., v. Gandy, 63 N. J. Eq. 692.

87. Under Rev. St. 1899, § 7903, requiring a specification of the exact sum payable, the amount shown by the certificate cannot be changed by a by-law not set out in the policy. Goodson v. Nat. Masonic Acc. Ass'n, 91 Mo. App. 339. The fact that the certificate declares that it is subject to the by-laws of the Order, will not authorize a defense based on a by-law against suicide, unless the by-laws or a copy thereof are attached to the certificate [Ky. St. § 679]. Mooney v. Ancient Order, U. W., 24 Ky. L. R. 1787, 72 S. W. 288. Where the certificate embraces the statements in the application

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Retroactive by-laws.—A by-law not made expressly retroactive will not be so construed.[89] Where the member's rights to special benefits accrue according to the constitution and by-laws of the association, they cannot be subsequently affected by a change in such laws.[90] A beneficiary whose certificate is expressly excepted from the operation of changed by-laws cannot complain.[91] A change in by-laws will be deemed acquiesced in by a member who pays assessments until the time of his death in accordance with such change and without dissent.[92]

Reserved power to amend constitution or by-laws.—Unless express authority is reserved in the association, the contract rights of members cannot be altered by amendment of the constitution or adoption of by-laws.[93] The member may agree that he shall be bound by after-enacted by-laws or constitutional amendments.[94] Such a contract is binding on the beneficiary.[95] Where a member agrees to comply with laws and regulations "now in force or that may hereafter be enacted," by-laws may be retrospective except as to rights fixed by the terms of the original contract.[96] Provisions that the certificate is accepted subject to all future laws of the association, do not refer to laws impairing the contract of insurance, but only to laws for the conduct of the association, duties of the members, and the like;[97] hence

as part of the contract but not the by-laws, the by-laws become no part of the contract (Purdy v. Bankers' Life Ass'n [Mo. App.] 74 S. W. 486) unless to the holder's benefit. Certificate in form of a life policy entitles the member to the benefit of a section of the by-laws providing that if in good standing he might, on disability by reason of accident, be at his option paid one half the amount of the certificate in full satisfaction of all claims against the order. Monahan v. Supreme Lodge, O. C. K., 88 Minn. 224.

88. Purdy v. Bankers' Life Ass'n [Mo. App.] 74 S. W. 486.

89. Bottjer v. Supreme Council, Am. L. of H., 78 App. Div. (N. Y.) 546. Enactments requiring a statement from the member to whom death benefits are to be paid do not require the issuance of a certificate designating the beneficiary to one who was a member prior to its adoption. Pfeifer v. Supreme Lodge, B. S. B. Soc., 173 N. Y. 418. Though the application contains an agreement to abide by the regulations as they may thereafter be constitutionally changed, it is not subject to changes which indicate that they are to be applicable only to policies issued in the future. Knights Templars', etc., Indem. Co. v. Jarman, 187 U. S. 197.

90. Where a member of a pilot association is entitled to half pay on the loss of his license until re-instatement, his rights cannot be affected by an alteration in the by-laws classifying disabilities as temporary or permanent with different results in regard to benefits. Marshall v. Pilots' Ass'n, 206 Pa. 182.

91. Evans v. Southern Tier M. R. Ass'n, 76 App. Div. (N. Y.) 151.

92. Evans v. Southern Tier M. R. Ass'n, 76 App. Div. (N. Y.) 151. The question may become one for the jury. Pokrefky v. Detroit Firemen's Fund Ass'n [Mich.] 96 N. W. 1057.

93. Such right does not arise from an agreement to faithfully abide by the rules and regulations of the order, or from a condition that the insured will comply with the laws, rules and regulations thereof. Miller v. Tuttle [Kan.] 73 Pac. 88.

94. Ross v. Modern Brotherhood [Iowa] 95 N. W. 207. An agreement to be bound by by-laws in force or thereafter to be adopted, causes by-laws changed after the issuance of the certificate to become a part of the contract. Evans v. Southern Tier M. R. Ass'n, 76 App. Div. (N. Y.) 151. An acceptance of membership subject to provisions of the constitution which may thereafter be adopted, causes the member to be bound by a subsequent reasonable amendment. Hall v. Western Travelers' Acc. Ass'n [Neb.] 96 N. W. 170. Where an association has two classes of members, one participating in benefits and the others not, a by-law may be amended to authorize participating members to change to the non-participating class on payment of all assessments due and where many of the participating members were dissatisfied and withdrawing, such an amendment is reasonable. French v. N. Y. Mercantile Exch., 80 App. Div. (N. Y.) 131. The by-laws may be changed so as to provide that on the death of the beneficiary before the member, the administrator of the beneficiary instead of the administrator of the member shall be entitled to the proceeds. O'Brien v. Supreme Council, C. B. L., 81 App. Div. (N. Y.) 1.

95. Supreme Tent, K. M. W., v. Stensland, 105 Ill. App. 267. Where the beneficiary's rights are to be determined by the laws in force at the time the same is payable, a subsequently adopted by-law, providing that one-fourth of the face value at the time of death, must have been paid in assessments, or the deficit thereof must be deducted from the policy, is binding. Richmond v. Supreme Lodge, O. M. P. [Mo. App.] 71 S. W. 736.

96. Shipman v. Protected Home Circle, 174 N. Y. 398.

97. Campbell v. American B. C. Fraternity [Mo. App.] 73 S. W. 342. An amendment that if the member should die by suicide, his beneficiary would receive only half of the certificate is not included. Morton v. Supreme Council, R. L. [Mo. App.] 73 S. W. 259. Certificates of members engaged in the liquor business cannot be made void

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the amount payable on a benefit certificate cannot be reduced,[98] though the promise was only to pay an indefinite sum not exceeding the amount named in the certificate,[99] nor can the payments on disability be changed from a sum in gross to annual instalments.[1] Under a reserved power to amend by-laws, an amendment may be adopted against suicide,[2] though the contrary is also held.[3] The member may be bound by a subsequent specific definition of an injury, which is reasonable.[4] A by-law which is unfair and unreasonable does not affect a member, though the certificate is subject to by-laws existing or to be adopted.[5] Amendments are held unreasonable only where unfair and oppressive in their operation or in disturbance of vested rights.[6]

Rights of members on alteration of by-laws.—If the society arbitrarily reduces the amount payable on certificates, a nonassenting member may treat the contract as rescinded and recover the payments which he has made thereon,[7] or for the proportion representing the canceled insurance,[8] but in Massachusetts it has been held that such a provision being invalid there is no breach until refusal to pay on death of the member, and action for assessments paid or for the amount of the certificate cannot be maintained prior thereto.[9] Payment of assessments under

by amendment. Where payments have been made for six years by one engaged in selling liquors which he had a right to do under the laws of the order at the time he became a member. Deuble v. Grand Lodge, A. O. U. W., 172 N. Y. 665.

98. Supreme Council, A. L. of H., v. Jordan, 117 Ga. 808; Russ v. Supreme Council, A. L. of H., 110 La. 588; Langan v. Supreme Council, A. L. of H., 174 N. Y. 266. A member who has paid assessments on a $5.000 certificate has vested rights which cannot be reduced by an amendment providing that not more than $2,000 shall be paid on any benefit certificate. Williams v. Supreme Council, A. L. of H., 80 App. Div. (N. Y.) 402.

99. Makely v. Supreme Council, A. L. of H., 133 N. C. 367.

1. Under general power under statutes or the constitution of the society. Beach v. Supreme Tent, K. M. [N. Y.] 69 N. E. 281.

2. Forfeiture of benefits in case of a member taking his own life, whether sane or insane at the time, provided that in case of suicide twice the amount of all the assessments or monthly rates paid the supreme lodge by the member shall be paid back to the beneficiary. Eversberg v. Supreme Tent, K. M. [Tex. Civ. App.] 77 S. W. 246. Where the certificate is subject to the by-laws and constitution in force or thereafter to be adopted, a member and a beneficiary are bound by the acceptance of a statutory provision exempting liability in case of suicide, made prior to the death of the member. [Acceptance of Laws 1897, p. 122; Rev. St. 1899, § 1408.] Morton v. Royal Tribe of Joseph, 93 Mo. App. 78.

3. Rights under an original insurance against unintentional self-destruction after one year not forfeited by an amendment avoiding the policy for self-destruction while insane, within five years. Weber v. Supreme Tent, K. M., 172 N. Y. 490. If the contract does not make any provision for suicide while insane the association cannot divest itself of such risk by a subsequent amendment of the by-laws, though it may as to suicide while sane, since such regulation does not interfere with the vested right. Shipman v. Protected Home Circle, 174 N. Y. 398.

4. Definition of broken leg. Ross v. Modern Brotherhood [Iowa] 95 N. W. 207.

5. By-law limiting liability on death by suicide, sane or insane, of alcoholism or legal execution for crime is unreasonable. Bottjer v. Supreme Council, A. L. of H., 78 App. Div. (N. Y.) 546. An amendment forfeiting the certificate of members taking up prohibited occupations such as that of freight brakeman, is unreasonable and void, where it does not provide for notice of the change to existing members, though the applicant has agreed to be bound by rules to be enacted. Tebo v. Supreme Council of Royal Arcanum [Minn.] 93 N. W. 513. Not reasonable to provide that the beneficiary shall receive only such amount as the member has paid in assessments, where the member has paid assessments on the basis of a certificate calling for a stated sum. Wuerfler v. Wis. Order of Druids, 116 Wis. 19.

6. Amendments excepting injuries received as a result of vertigo from those for which benefits will be payable are reasonable. Hall v. Western Travelers' Acc. Ass'n [Neb.] 96 N. W. 170. It is reasonable to alter existing by-laws so as to provide that on the death of the beneficiary before the member, the beneficiary's administrator and not the administrator of the member shall receive the proceeds. O'Brien v. Supreme Council, C. B. L., 81 App, Div. (N. Y.) 1.

7. It is immaterial what use has been made of the money paid if the charter makes no provision for raising the funds to discharge the liabilities. Black v. Supreme Council, A. L. of H., 120 Fed. 580; Supreme Council, A. L. of H., v. Black (C. C. A.) 123 Fed. 650; Supreme Council, A. L. of H., v. Jordan, 117 Ga. 808.

8. He is not compelled to leave enforcement of the original contract to his beneficiary or to resort to a suit in equity to compel receipt of the premiums in the same manner as formerly. Makely v. Supreme Council, A. L. of H., 133 N. C. 367.

9. Porter v. American Legion of Honor, 183 Mass. 326.

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protest on the reduced basis, the full amount being tendered is not regarded as a waiver.[10] On learning of the reduction, the member may stop payment of a check previously sent in payment of an assessment.[11] The action for breach is not governed by a limitation as to time applicable to death claims.[12]

(§ 5) *D. Representations of organizers and agents.*—An organizer appointed by the Supreme Lodge cannot acquire powers in excess of those conferred on him by it, through an arrangement by the secretary of a local lodge.[13] Where those dealing with an agent know the extent of his powers as conferred by the by-laws or by provisions in the policy, he cannot bind the association in excess thereof.[14] Limitations in the certificate or the by-laws made part of the contract are notice to the insured and beneficiary of limitations on the powers of the agent.[15]

§ 6. *Application.*—Provisions that the application or charter or by-laws must be attached to be treated as a part of the policy[16] apply to fraternal orders.[17]

Misrepresentations.—Fraternal beneficial orders may be exempt from provisions applicable to life insurance companies, generally rendering false immaterial statements in applications harmless.[18] The policy may be avoided, if the representations are substantially untrue,[19] or if facts are fraudulently concealed, inducing the issuance of the certificate.[20] Answers as to present and past condition of health must be true, whether warranties or representations.[21] A statement of good health is construed to mean that the applicant is free from sensible disease and from any apparent derangement of the functions by which health may be tested.[22] Miscellaneous holdings as to falsifications are grouped in the notes.[23] It may be

10. Russ v. Supreme Council, A. L. of H., 110 La. 588; Makely v. Supreme Council, A. L. of H., 133 N. C. 367; Williams v. Supreme Council, A. L. of H., 80 App. Div. (N. Y.) 402.

11. Henderson v. Supreme Council, A. L. of H., 120 Fed. 585.

12. By-law was, no action at law or in equity in any court shall be brought or maintained on any cause or claim arising out of any membership or benefit certificate unless such action is brought within one year from the time when such action accrues, and such right of action shall accrue ninety days after all proofs called for, in case of a death of a member shall have been furnished. Supreme Council, A. L. of H. v. Jordan, 117 Ga. 808.

13. Deputy organizer without power under an appointment or contract with the Supfeme Lodge or under appointment by the local lodge to deliver certificates of insurance or to collect dues and assessments. —Hiatt v. Fraternal Home, 99 Mo. App. 105.

14. By contract, estoppel or waiver. Modern Woodmen v. Tevis (C. C. A.) 117 Fed. 369.

15. Modern Woodmen v. Tevis (C. C. A.) 117 Fed. 369.

16. In general in order that the application may be considered as a part of the contract, the fact must be shown from the language of the policy, application, constitution or by-laws of the company or by the pleadings. Supreme Lodge of Sons & Daughters of Protection v. Underwood [Neb.] 92 N. W. 1051.

17. Ky. St. § 679 applies to assessment co-operative companies doing business on the lodge plan. Supreme Commandery of the United Order of the Golden Cross v. Hughes, 24 Ky. L. R. 984, 70 S. W. 405.

18. Fraternal beneficial orders under Rev. Sts. § 3631-11 are exempt from the provision of section 3625. Grand Lodge of A. O. U. W. v. Bunkers, 23 Ohio Circ. R. 487.

19. Substantially true means without qualification in all respects material to the risk. Jeffrey v. United Order of Golden Cross, 97 Me. 176. Where the issuance of a certificate is secured through the reliance of the officers on a false representation that the beneficiary was one of a class for whose benefit the mortuary fund is established, the beneficiary's claim may be defeated on the ground of fraud. Koerts v. Grand Lodge of Wisconsin of Order of Hermann's Sons [Wis.] 97 N. W. 163.

20. Failure to state the death of brothers where such question is not directly asked is not to be regarded as a warranty. Callies v. Modern Woodmen of America, 98 Mo. App. 521.

21. Facts held to show falsity of statements that applicant had a light form of dyspepsia and no other disorder or weakness tending to impair her constitution. Jeffrey v. United Order of Golden Cross, 97 Me. 176.

22. Jeffrey v. United Order of Golden Cross, 97 Me. 176. A health certificate prepared by the insurer and signed by the insured will not be regarded as untrue by the adoption of a construction other than the common use and meaning of the promise implied, unless such construction is understood by the insured at the time of making the certificate; hence not falsified by pregnancy. American Order of Protection v. Stanley [Neb.] 97 N. W. 467.

23. An answer as to a present use of alcoholic stimulants is not falsified by previous use. Bacon v. New England Order of

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a question for the jury whether false answers were under misapprehension as to the question,[24] or whether statements in the application are false, but not whether they are material when such fact is determined by the contract.[25]

Warranties.—Unless the certificate of insurance refers to the application, the answers contained therein are not warranties.[26] If the statements are made warranties, it is not essential that they be material,[27] and good faith is then not controlling.[28] A warranty of answers, to be true and complete statements of all material facts within the applicant's knowledge, is not a warranty of knowledge.[29] The fact that insured is required to warrant the truthfulness of his statements does not make answers in an application and medical examination more than representations.[30] See foot notes for particular warranties.[31]

Waiver and estoppel as to application.—Provisions that laws relating to the substance of the contract for payment of benefits cannot be waived do not refer to the preparation and acceptance of applications.[32] There can be no waiver without knowledge.[33]

Protection, 123 Fed. 152. Insured may have been in a state of alcoholism from continuous use to excess without great intoxication at any time, thus not causing a negative answer to the question "Were you ever intoxicated?" to be necessarily a misrepresentation. Bacon v. New England Order of Protection, 123 Fed. 152. Failure to mention a small amount of other insurance carried will not vitiate a certificate in the absence of fraud, notwithstanding a clause in the application stating that if there were in any of the answers any untrue or evasive statements or concealments of fact, then all claims on the benefit fund should be forfeited. Robinson v. Supreme Commandery, United Order of the Golden Cross of the World, 77 App. Div. [N. Y.] 215. A misstatement as to membership in another insurance order will not invalidate the certificate where the insuring association is not misled, and its agent taking the application has knowledge of the facts. Membership in the other order was essential to membership in the insurance association. Delaney v. Modern Acc. Club [Iowa] 97 N. W. 91. A prior application will be deemed to be shown by an agreement to take insurance and examination by a physician and an information to the applicant that he could not pass. Jennings v. Supreme Council Loyal Additional Ben. Ass'n, 81 App. Div. [N. Y.] 76.

24. As where the applicant is a foreigner with an imperfect knowledge of English and may have understood a question as to applications for other insurance to refer to insurance other than in defendant's society. Dubcich v. Grand Lodge A. O. U. W. [Wash.] 74 Pac. 832.

25. Royal Neighbors of America v. Wallace [Neb.] 92 N. W. 897.

26. Though the application agreed that the answers and application should form the basis of the contract, and that untruth should vitiate it, untruth will not vitiate unless the answers are made fraudulently, or in bad faith, or are material to the risk. Alden v. Supreme Tent of Knights of Maccabees of the World, 78 App. Div. [N. Y.] 18.

27. As where the contract stipulates and warrants that the answers shall be literally true and that the contract shall be void if they are not so. Hoover v. Royal Neighbors of America, 65 Kan. 616, 70 Pac. 595.

28. Jennings v. Supreme Council Loyal Additional Ben. Ass'n, 87 App. Div. [N. Y.] 76.

29. Thompson v. Family Protective Union [S. C.] 45 S. E. 19.

30. Jennings v. Supreme Council Loyal Additional Ben. Ass'n, 81 App. Div. [N. Y.] 76.

31. A false statement that a physician had not been consulted during the preceding seven years avoids the certificate without regard to the nature of the ailment for which the physician was consulted. McDermott v. Modern Woodmen of America, 97 Mo. App. 636. An answer that applicant has never had any serious illness, being regarded as an expression of opinion, is not a warranty avoiding a policy, unless the applicant makes such answer with knowledge of its untruthfulness. Evidence held insufficient to show untruth of statements as to health, as against evidence that applicant was at the time suffering from tuberculosis and had pleuro-pneumonia. Supreme Ruling of the Fraternal Mystic Circle v. Crawford [Tex. Civ. App.] 75 S. W. 844. Statement that applicant was in sound mental and physical health not rendered false by the fact that insured had shortly before consulted a physician with regard to a pain in the stomach, indigestion and congestion of the liver, if such ailments were merely transient. McDermott v. Modern Woodmen of America, 97 Mo. App. 636.

32. Objection is waived where on applicant stating the facts as to insanity in his family was advised to answer "No" by the examining physician who was an agent and officer of the association and wrote the answer. Shotliff v. Modern Woodmen of America [Mo. App.] 73 S. W. 326. If the agent accepts an applicant on the understanding that he will subsequently comply with conditions as to eligibility, his noneligibility at the time of delivery of the certificate cannot be availed of by the association there having been a subsequent compliance. Delaney v. Modern Acc. Club [Iowa] 97 N. W. 91. Where a deputy organizer testifies that he examined an applicant himself through an arrangement

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§ 7. *Dues and assessments.*[34]—Members may be required to pay monthly assessments under constitutional provisions fixing the rates of assessment and requiring that they be paid monthly, provided twelve are required to meet death losses.[35]

Where the death benefit assessment may be fixed according to the age of the member, it may be governed by his age at the time of assessment and not that at the time of entry.[36] A notice of assessment and a call on the beneficiary funds of subordinate lodges may be approved and construed as one instrument.[37]

Notice of assessments.[38]—Service of notice of assessment by mail as provided by the by-laws is sufficient where the by-laws constitute part of the contract.[39]

If a certificate provides that annual dues are to be paid on a certain day and there are also provisions for death assessments, a promise made by the agent that insured should have a certain notice of anything to be paid under the policy, does not cover annual dues.[40]

Actions to collect assessments.—Where the member may be expelled on nonpayment of dues, an action at law cannot be maintained therefor.[41]

§ 8. *Forfeitures and suspensions; reinstatement.*—The enumeration of different means of forfeiture indicates an intent not to include one in the other.[42]

Change in habits of member.—Where the articles contemplate no forfeiture of a certificate for anything except for default in payments, it cannot be forfeited by a subsequently enacted by-law, on the ground that member's habits had become intemperate, though such fact might be a good defense to an action on the certificate.[43]

with the state deputy by which he was to examine his own applicants for membership, and have physicians of his own selection sign the reports, the examination may be sufficient though the laws require examinations to be by an examiner approved by the supreme medical director, such an examiner having in this case signed the organizer's report. Supreme Ruling of the Fraternal Mystic Circle v. Crawford [Tex. Civ. App.] 75 S. W. 844.

33. A waiver of forfeiture on account of the use of intoxicants after issuance of certificate is not a waiver of misrepresentations concerning such use in the application, if there is no evidence that the association had knowledge, nor does such waiver result from a reversal of action after trial for expulsion, until the member should be released from an asylum in which he was. Callies v. Modern Woodmen of America, 98 Mo. App. 521. Furnishing blank proofs of death does not amount to a waiver of misrepresentations in the application unless the association is shown to have had knowledge thereof. Id. The question of whether a society had knowledge of, or by the exercise of reasonable diligence should have known of statements in, an application for insurance which was previously rejected, is for the jury. Dubcich v. Grand Lodge A. O. U. W. [Wash.] 74 Pac. 832.

34. Under articles of incorporation providing that the benefit fund shall consist of all moneys collected for the payment of death losses, and shall be collected by a pro rata assessment levied on the guaranty fund of the association, and that the guaranty fund consists of deposits pledged for the payment of assessments by each member of the association, assessments must be passed, if there is money enough on hand, to pay mortuary benefits on hand. Purdy v. Bankers' Life Ass'n [Mo. App.] 74 S. W. 486.

35. Grand Lodge, A. O. U. W. v. Marshall [Ind. App.] 68 N. E. 605.

36. Crosby v. Mutual Reserve Fund Life Ass'n, 38 Misc. [N. Y.] 708.

37. Grand Lodge, A. O. U. W., v. Marshall [Ind. App.] 68 N. E. 605. Where the by-laws of an order provide that calls may be on subordinate lodges to forward beneficiary funds, which call shall contain a list of all deaths occurring since the last call, and shall constitute the making of an assessment, where the call and assessments are made in one instrument, signed by the secretary, the assessments being addressed to the members of the order and the call to the subordinate lodges, the list of deaths may be contained in the assessments. Id.

38. Under the provisions of the by-laws requiring notice of assessment to bear either the official stamp of the collector or the seal of the council, notice not so authenticated is void. Cronin v. Supreme Council, Royal League, 199 Ill. 228. Where payment is to be within 30 days of notice, default is governed by the time notice is received. Id.

39. Modern Woodmen of America v. Tevis [C. C. A.] 117 Fed. 369.

40. Riddick v. Farmers' Life Ass'n, 132 N. C. 118.

41. L'Union St. Jean Baptiste de Pawtucket v. Ostiguy [R. I.] 56 Atl. 681.

42. Loss of good standing, if enumerated, does not include suicide. Royal Circle v. Achterrath, 204 Ill. 549.

43. Purdy v. Bankers' Life Ass'n [Mo. App.] 74 S. W. 486.

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Failure to give notice of illness may forfeit benefits.[44]

Nonpayment of assessments.—Provision for prompt payment of assessments are of the substance and essence of the contract,[45] hence, failure to comply with by-laws in this regard may forfeit death benefits,[46] but penalties suspending the rights of members for a period after payment of arrears are regarded as unreasonable.[47] Nonpayment is not excused by the fact that a member is delirious at the time dues become payable,[48] or failure of an agent to pay, though the member has no knowledge thereof.[49]

Payment from local funds to prevent forfeiture.—The local council may, in the absence of a prohibition, keep up the payments of a delinquent member, preventing the supreme council from denying the member's standing.[50] By-laws providing for payment of assessments during sickness of members are mandatory.[51] Any one knowing the facts may give notice requiring such a payment.[52] The notice must state the member's inability if inability is a prerequisite.[53]

Duty to apply funds of member in hands of lodge to avoid forfeiture.—If the subordinate lodge has money in its possession belonging to a member, and the power to apply it, it must be applied to assessments due from the member to save a forfeiture of the contract though the member does not make an express direction,[54] but sums paid on account of lodge dues cannot be required to be paid out by the subordinate to the supreme lodge in satisfaction of assessments thereafter called.[55]

Status of local lodge or officers as agent.—Where the member is distinctly required to pay assessments to the financial officer of a local lodge, and there is no other method of payment, the local officer is the agent of the supreme lodge to receive and forward the payment.[56] The rules of the order may make the

44. Bost v. Supreme Council Royal Arcanum, 87 Minn. 417. Necessity of notice of commencement of illness accrues at the time the insured becomes incapacitated from his usual occupation. Where insured was ill twelve days before ceasing his occupation, a notice on the twelfth day is sufficient though it states that the illness began twelve days prior thereto, and the condition was for notice within ten days from beginning of illness. Grant v. North American Casualty Co., 88 Minn. 397.

45. Modern Woodmen of America v. Tevis [C. C. A.] 117 Fed. 369.

46. Payment of assessments. Bost v. Supreme Council Royal Arcanum, 87 Minn. 417. Where a benefit certificate is conditioned on compliance with the by-laws, it is void on failure to pay assessments required by the by-laws, though it itself specifies only assessments due the benefit fund. Supreme Council, American Legion of Honor v. Landers [Tex. Civ. App.] 72 S. W. 880. Certificate may be forfeited for failure to pay semi-annual per capita tax. Boyce v. Royal Circle [Mo. App.] 73 S. W. 300.

47. By-law providing that the members shall be debarred of all benefits until three months after payment of all arrears will not be recognized in an action on the certificate. Kennedy v. Local Union No. 726 of the United Brotherhood of Carpenters & Joiners of America, 75 App. Div. [N. Y.] 243.

48. Smith v. Sovereign Camp of Woodmen of the World [Mo.] 77 S. W. 862.

49. United Moderns v. Pike [Tex. Civ. App.] 76 S. W. 774.

50. Order of United Commercial Travelers of America v. McAdam [C. C. A.] 125 Fed. 358.

51. By-law providing for payment, where sickness did not originate from intemperance or vicious conduct. Bost v. Supreme Council Royal Arcanum, 87 Minn. 417.

52. Smith v. Sovereign Camp of Woodmen of the World [Mo.] 77 S. W. 862.

53. Where the notice does not contain such statement, the jury are not to be instructed to find as to its existence. Smith v. Sovereign Camp of Woodmen of the World [Mo.] 77 S. W. 862.

54. Supreme Lodge Order of Mut. Protection v. Meister, 105 Ill. App. 471. If the member has paid the local secretary more than sufficient to meet claims already accrued, the excess should be applied on subsequently accruing dues and assessments, and until such application, the member cannot be regarded as in default. Fraternal Aid Ass'n v. Powers [Kan.] 73 Pac. 65.

55, 56. Supreme Lodge Order of Mut. Protection v. Meister, 105 Ill. App. 471. A local secretary, authorized to collect dues and assessments, whose right to receive payments is recognized in the certificate of membership, is to be regarded as the agent of the association. Fraternal Aid Ass'n v. Powers [Kan.] 73 Pac. 65. A by-law forfeiting the insurance of members paying their dues as provided by their by-laws in case the officers receiving the money do not pay it over is unreasonable and will not be enforced. Brown v. Supreme Court I. O. F. [N. Y.] 68 N. E. 145. Where the insured leaves sums of money with the local financier for application on assessments when they fall due, insured is not responsible for his failure to apply the funds as directed, if the financier in so accepting money does not transgress a

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collector of a local lodge the agent of the assured and beneficiary,[57] though not when in contravention of by-laws establishing agency for the order.[58]

Notice and other proceedings to effectuate forfeiture.—By-laws or regulation forfeiting benefits or membership are not as a rule self-executing,[59] except when for nonpayment of an assessment,[60] or so provided in the contract.[61] Where the by-laws provide that the financial secretary shall notify members of arrears, a member's right cannot be forfeited for nonpayment of a fine, if he is not notified of its imposition.[62] The validity of a forfeiture depends rather on the association's compliance in good faith with the by-laws in attempting to notify the member, than on his timely receipt of the notice.[63]

The question of whether the by-laws of a benefit order conferred jurisdiction to try a member on notice to him, after he has become insane, is for the court, and in case such jurisdiction is not clearly given, an expulsion based on a notice which is merely addressed to the insane member and deposited in the post-office will not affect the right to benefits.[64]

Rights of member on unauthorized declaration of forfeiture.—Expulsion must be in the formal manner prescribed.[65] If wholly void and unauthorized, the member may treat it as such and does not waive rights by failure to tender his assessments.[66]

Recovery of assessments paid.—The beneficiary cannot, on the death of the member before reinstatement, recover assessments paid by him before suspension.[67]

Waiver of illegal expulsion.[68]—Failure for several months to make efforts for reinstatement is to be regarded as an acquiescence in expulsion,[69] but only where the member may seek reinstatement by appeal to some other tribunal of the order.[70]

positive law of the association. Grand Lodge A. O. U. W. v. Scott [Neb.] 97 N. W. 637.

57. In such case the beneficiary cannot take advantage of an erroneous acceptance of assessments due after the death of assured. Voelkel v. Supreme Tent of Knights of Maccabees of the World, 116 Wis. 202.

58. Where the by-laws provide that the clerk of the local camp shall collect and remit assessments to the head camp, he is the agent of the head camp in such collection, though there is another provision that he is the agent of the local camp and not of the head camp and that no act or omission by him should create any liability or waive any right of the society. Modern Woodmen of America v. Tevis [C. C. A.] 117 Fed. 369. If the by-laws require payment to a local secretary, he cannot be made the agent of the member. Ancient Order of Pyramids v. Drake, 66 Kan. 538, 72 Pac. 239.

59. A provision that a person engaged in the sale of intoxicating drinks cannot be admitted or retained as a member is not self executing. Steinert v. United Brotherhood of Carpenters & Joiners of America [Minn.] 97 N. W. 668. In the absence of a by-law or provision in a contract or application making false warranties in an application for reinstatement a forfeiture of the insurance contract, a forfeiture for a claimed breach of warranty, is not self-executing. Traders' Mut. Life Ins. Co. v. Johnson, 200 Ill. 359. A by-law requiring that members shall remain practical Catholics and communicants of the church is self-executing and the liability of the society ceased without an expulsion of the member where he excommunicates himself by being married by a Protestant minister. Barry v. Order of Catholic Knights of Wisconsin [Wis.] 96 N. W. 797.

60. Grand Lodge, A. O. U. W. v. Marshall [Ind. App.] 68 N. E. 605. If there is a provision that members in arrears to a certain amount shall not be entitled to death benefits, it is immaterial that he is not suspended or his name stricken from the rolls before his death, both being constitutional provisions. Phillips v. United States Grand Lodge of Independent Order Sons of Benjamin, 39 Misc. [N. Y.] 296.

61. Nonpayment of assessments. Jelly v. Muscatine City & County Mut. Aid Soc. [Iowa] 95 N. W. 197.

62. Leahy v. Mooney, 39 Misc. [N. Y.] 829.

63. Purdy v. Bankers' Life Ass'n [Mo. App.] 74 S. W. 486.

64. Dubcich v. Grand Lodge A. O. U. W. [Wash.] 74 Pac. 832.

65. Accord with constitution. Foxhever v. Order of Red Cross, 24 Ohio Circ. R. 56.

66. Supreme Council, A. L. of H. v. Orcutt (C. C. A.) 119 Fed. 682. Until a notice of change in the attitude of the order is given the member when he was notified that dues would no longer be accepted. Grand Lodge, A. O. U. W., v. Scott [Neb.] 97 N. W. 637. Where before time of payment of assessments, the society declares certificate void, seasonable payment is waived. Wuerfler v. Wis. Order of Druids, 116 Wis. 19.

67. McLaughlin v. Supreme Council, C. K. [Mass.] 68 N. E. 344.

68. Evidence held insufficient to show waiver of an illegal suspension. Grand Lodge, A. O. U. W., v. Scott [Neb.] 97 N. W. 637.

69. Foxhever v. Order of Red Cross, 24 Ohio Circ. R. 56.

70. Suspension of member while the association has money in its hands to discharge any assessments for which he is liable. Pur-

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Fraud prior thereto is waived by submission of proofs of death and a hearing before the trustees of the order.[71]

Waiver of forfeiture.—Officers of local lodges have no authority to waive constitutional restrictions,[72] or rules of the order forming a part of the contract of membership.[73] Acceptance of assessments with knowledge of a right of forfeiture is, in general, a waiver thereof.[74] Acceptance of a payment in ignorance of decease of applicant does not estop the lodge.[75]

The effect of the receipt of assessments after due as a waiver of timely payment is controlled by custom,[76] and the question of whether the local lodge or officer is to be regarded as the agent of the order,[77] or of whether such power is specifically denied.[78] A former habit of allowing delinquencies will not justify

dy v. Bankers' Life Ass'n [Mo. App.] 74 S. W. 486.

71. Hoag v. Supreme Lodge, I. C. [Mich.] 95 N. W. 996.

72. Bar of members engaged in the retailing of intoxicating liquors. Grand Lodge, A. O. U. W., v. Bunkers, 23 Ohio Circ. R. 487.

73. Royal Highlanders v. Scoville [Neb.] 92 N. W. 206.

74. Assessments were retained until after the death of the member. Modern Woodmen v. Colman [Neb.] 94 N. W. 814. Where a fraternal order maintains an insurance department, it is bound by rules which govern other insurance contracts and must act with reasonable promptness though by its laws it has the right to expel or suspend members. Supreme Lodge, K. P., v. Wellenvoss (C. C. A.) 119 Fed. 671. A waiver will result where the clerk of a local camp through an assistant, collects monthly assessments of dues and remits them to the head clerk with full knowledge of the circumstances for a period of three months, and until the death of insured (waives a forfeiture on the ground of failure to file a waiver of liability for death, as a direct result of engaging in a specified occupation). Modern Woodmen v. Colman [Neb.] 94 N. W. 814. Where a member has been suspended on account of disobedience to the rules of the order more than six years after the offense and at a time when by reason of his condition he is unable to obtain other insurance, the order cannot refuse payment, having accepted assessments during the entire six years. Supreme Lodge, K. P., v. Wellenvoss (C. C. A.) 119 Fed. 671. Payment of assessments by the beneficiary, under the advice of the regular officer of the lodge to whom dues are payable, may estop the lodge to claim fraud in that the certificate was issued to the beneficiary as the insured's lawful wife, which in fact she was not and which she disclosed to the financier at the time the advice was given. Alexander v. Grand Lodge, A. O. U. W., 119 Iowa, 519. After receipt of dues for a long time the association may be estopped to deny that the beneficiary is within a permitted clause, there being no deception or fraudulent misrepresentation pleaded. Tramblay v. Supreme Council, C. B. L., 85 N. Y. Supp. 613.

75. Money was tendered back as soon as fact was discovered. Hiatt v. Fraternal Home, 99 Mo. App. 105.

76. Courtney v. St. Louis Police Relief Ass'n [Mo. App.] 73 S. W. 878. Where there is an invariable custom of a local lodge to receive dues after they are payable, a member with knowledge of such custom is not suspended by mere failure in prompt payment; and this though the by-laws of the order make the clerk of a local camp the agent of such camp, and expressly provide that he shall not be the head camp agent, where other provisions in fact constitute him such an agent. Andre v. Modern Woodmen [Mo. App.] 76 S. W. 710. The fact that a local secretary allows payment of assessments when delinquent twice, does not establish a binding custom in the absence of knowledge of the superior officers. Fraternal Union v. Hurlock [Tex. Civ. App.] 75 S. W. 539. A forfeiture for non-payment of assessments may be waived where there is a custom to accept assessments after due by the subordinate lodge. Bell v. Supreme Lodge, K. of H., 80 App. Div. (N. Y.) 609. A custom to accept dues from members in good health after due, is not a waiver of forfeiture in case of a non-payment by a sick member. Smith v. Sovereign Camp of Woodmen [Mo.] 77 S. W. 862. Where a collector has advanced a monthly payment for a member without knowledge of the local or supreme council, it does not amount to a waiver of timely payments. Supreme Council of Royal Arcanum v. Taylor (C. C. A.) 121 Fed. 66.

77. If the contract is with the supreme lodge, a custom of the local officers to waive forfeiture for timely payment of dues, which is unknown to the supreme lodge, does not estop it (United Moderns v. Pike [Tex. Civ. App.] 76 S. W. 774), nor does a custom by the supreme lodge to accept reports from the local officer later than directed by the by-laws (Id.). In the absence of evidence of custom, a local secretary has no power to waive a forfeiture of a certificate by receiving subsequent assessments. Boyce v. Royal Circle, 99 Mo. App. 349. In the absence of notice or knowledge and acquiescence by the principal officers of the head camp, a clerk of a local camp cannot extend the time of payment of an assessment, waive default, or re-instate a suspended member without warranty of good health in contravention of the by-laws forming a part of the contract. Modern Woodmen v. Tevis (C. C. A.) 117 Fed. 369. A subordinate lodge may waive a forfeiture for non-payment of assessments, their relation to the grand lodge being that of agency. Grand Lodge, A. O. U. W., v. Lachmann, 199 Ill. 140.

78. Where it is expressly agreed in a contract that a local agent cannot waive a provision for forfeiture on non-payment of dues, his acceptance of dues after time will not

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further neglect in payment, where there has been a movement to secure strict compliance with the by-laws.[79]

Refusal to settle a claim on the ground that an assessment was not paid is a waiver of other known defenses.[80]

The doctrine of estoppel and waiver will not apply to a contract of membership, where the applicant dies before delivery of the certificate and hence never becomes a member.[81]

Reinstatement.—Where a member secures his reinstatement after the lapse of several months in which he has paid no assessments, he becomes a new member.[82] Where a certificate is forfeited ipso facto for nonpayment of an assessment, it cannot be renewed after the death of the insured,[83] nor will informal measures for reinstatement restore the rights of the beneficiary of a member who dies before the requirements are complied with,[84] and delay of a local branch in transmitting a certificate for reinstatement will not prevent the supreme branch from asserting noncompliance.[85] A receipt of reinstatement dues does not waive other conditions for reinstatement, where accompanied by express requirement of such conditions.[86] If a member may, under the rules, be reinstated only while in good health, there is no waiver through a receipt of reinstatement dues by the secretary of a subordinate lodge while the member was in his last illness.[87]

Where timely payment of dues is waived, thus preventing suspension, the member on payment of his dues is not required to make a warranty of health as in the case of reinstatement.[88] A health certificate does not, by general reference to the original application, amount to a reassertion of its statements as of the time of the certificate.[89] A request of the beneficiary to prepare and present proofs of death is a waiver of a breach of warranty as to health at time of a reinstatement if the facts are known.[90]

§ 9. *The beneficiary. Persons who may be beneficiaries.*—The beneficiary must bear to the member a relation provided for in the constitution or by-laws and within the provision of the statute under which incorporation is had.[91] See foot-

waive a forfeiture, but their retention by the head office of the society may constitute such waiver. Lord v. Nat. Protective Soc. [Mich.] 96 N. W. 443. By-laws requiring assessments to be paid to the collector of the council are not so binding that payment in another manner may not be ratified by the association preventing forfeiture on account of delay of an agent accustomed to receive and forward assessments. Supreme Council, A. L. of H., v. Orcutt (C. C. A.) 119 Fed. 682.

79. Bost v. Supreme Council Royal Arcanum, 87 Minn. 417.

80. Letter to plaintiff's attorney. Taylor v. Supreme Lodge, C. L. [Mich.] 97 N. W. 680.

81. Roblee v. Masonic L. Ass'n, 38 Misc. (N. Y.) 481.

82. Where the by-laws provide that in case of death within 183 days from admission the benefits should be merely nominal, the fact that the registration blank signed by insured on reinstatement contains the words "or if expelled, then from the day of re-instatement" in addition to the words "within 183 days from admission," does not change the effect of the by-law. O'Brien v. Brotherhood of the Union [Conn.] 55 Atl. 577.

83. Smith v. Sovereign Camp of Woodmen [Mo.] 77 S. W. 862.

84. A member submitted to a personal examination of the local medical examiner and delivered the report to the local branch, but died before it was approved by the supreme medical examiner, and the by-laws provided that the certificate must be on a certain form and transmitted by the local examiner sealed to the supreme medical examiner. McLaughlin v. Supreme Council, C. K. [Mass.] 68 N. E. 344.

85. Where the member instead of allowing the local examiner to transmit the certificate to the supreme examiner, takes it and gives it to the local branch. McLaughlin v. Supreme Council, C. K. [Mass.] 68 N. E. 344.

86. Receipt by financial officer of subordinate lodge. Adams v. Grand Lodge, A. O. U. W. [Neb.] 92 N. W. 588.

87. Royal Highlanders v. Scoville [Neb.] 92 N. W. 206.

88. Andre v. Modern Woodmen [Mo. App.] 76 S. W. 710.

89. American Order of Protection v. Stanley [Neb.] 97 N. W. 467.

90. Traders' Mut. L. Ins. Co. v. Johnson, 200 Ill. 359.

91. Kirkpatrick v. Modern Woodmen of America, 103 Ill. App. 468. In Kansas, fraternal beneficiary associations created under the statutes of the state may pay benefits only to members or beneficiaries named by them. Bankers' Union of the World v. Crawford [Kan.] 73 Pac. 79. Where a statute amends a former provision as to who may be beneficiaries and provides that foreign as-

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notes for interpretation of particular certificates payable to member's estate,[92] legal heirs,[93] survivors,[94] wife,[95] dependents.[96]

Where, after knowledge that a beneficiary is not qualified, the association receives the member and accepts his dues for several years, the person designated may take the benefits as against the member's next of kin.[97]

Status of beneficiary.—The beneficiary does not take a vested interest in the certificate or fund provided for payment until the decease of the member.[98] If benefits are payable in case of accidental death, the beneficiary acquires a vested interest at the time of death and not of the accident.[99] If the member has an absolute right to change the beneficiary, the beneficiary has no right, on his disappearance, to maintain an action to reinstate the policy.[1] The assignee in bankruptcy of the original beneficiary cannot reach the benefits, if she has transferred them to others in pursuance of a deathbed direction of the insured, though there has been no formal change of the beneficiary.[2]

Rights of persons advancing dues.—The member is not bound to make an appointment in favor of a person furnishing money to pay certain of the assessments, where the beneficiary has already been named.[3] Such payments are gratuitous in the absence of contract.[4] On change of beneficiary, though the former beneficiary has paid premiums without knowledge of the power to change the designation, she cannot recover them.[5]

Designation of beneficiary.—Other words of description may remove uncer-

sociations doing business in the state may continue, if they file annual reports and comply with similar regulations and may avail themselves of the amendment as to beneficiaries by amendments of their constitutions or articles or by re-incorporation, a foreign association which complies with the requirements for reports but does not amend its constitution is governed by laws as to beneficiaries previously existing. Father not a dependent cannot be a beneficiary—Rev. Sts. Mo. 1889, §§ 3821, 2823, allowing the aid of families, widows, orphans or other dependents and L. Mo. 1897, p. 132, § 1, permitting payments to blood relatives. Grimme v. Grimme, 198 Ill. 265. By-laws providing that beneficiaries must be members of the insured's family, as well as statutes providing that the status of beneficiaries shall be controlled by the law in effect at the time of the member's death, are not retroactive. A beneficiary who is a friend merely of a member who became such before the enactment of the by-laws may take. Roberts v. Cohen, 60 App. Div. [N. Y.] 259.

92. Proceeds will be distributed to the wife and children without regard to the question of whether the designation was legal or illegal, there being a provision that in case of failure of designation the benefits shall be distributed as an intestate distribution. Dale v. Brumbly, 96 Md. 674.

93. A provision in the by-laws that benefits shall be paid the member's legal heirs is regarded as meaning widow and children. Junda v. Bohemian Roman Catholic First Cent. Union, 71 App. Div. [N. Y.] 150.

94. Relatives of a member, members of his household or connections by marriage. Koerts v. Grand Lodge of Wisconsin of Order of Hermann's Sons [Wis.] 97 N. W. 163.

95. One designated as the beneficiary's wife, and who is in fact living with him under a mistake as to the fact of a divorce from her former husband, may take as the wife of the member. Supreme Tent of Knights of Maccabees of the World v. McAllister [Mich.] 92 N. W. 770. A divorced wife whom the member has promised to remarry if "he got into some kind of business where he could support" her is not an affianced wife or wife. Kirkpatrick v. Modern Woodmen of America, 103 Ill. App. 468.

96. A regulation requiring that the beneficiary be a dependent is not fulfilled by a household servant for agreed weekly wages. Grand Lodge, A. O. U. W., v. Gandy, 63 N. J. Eq. 692. Specification of dependents as one class of beneficiaries does not control specifically named eligible beneficiaries. Under by-laws making valid payments to "dependent, father, etc.," father may be beneficiary though not dependent. Earley v. Earley, 23 Ohio Circ. R. 618.

97. Coulson v. Flynn, 41 Misc. [N. Y.] 186.

98. Under the statutes of Illinois or similar statutes of other states. Kirkpatrick v. Modern Woodmen of America, 103 Ill. App. 468. Where there is a right reserved arbitrarily to change the beneficiary. Pollak v. Supreme Council of Royal Arcanum, 40 Misc. [N. Y.] 274; Spengler v. Spengler [N. J. Eq.] 55 Atl. 285; St. Louis Police Relief Ass'n v. Strode [Mo. App.] 77 S. W. 1091.

99. Woodmen Acc. Ass'n v. Hamilton [Neb.] 97 N. W. 1017.

1. In effect to test the validity of a by-law requiring the member to report to the council within six months after notice sent by registered mail to his last place of residence under penalty of suspension. Pollak v. Supreme Council of Royal Arcanum, 40 Misc. [N. Y.] 274.

2. Schomaker v. Schwebel, 204 Pa. 470.

3, 4. Leftwich v. Wells [Va.] 43 S. E. 364.

5. Spengler v. Spengler [N. J. Eq.] 55 Atl. 285.

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tainty in the name of the beneficiary.[6] Where the insured has a mere power of appointment of a beneficiary, the beneficiary may take title without delivery of the certificate to her, there being an indorsement exercising the power.[7]

Failure or death of beneficiaries.—If no persons exist to whom payment may be made, under the rules of the order, the fund reverts to the society free from the claims of creditors or estate of deceased member.[8] Where, on the death of the original beneficiary, a new appointment is ineffective, the proceeds are payable according to the provisions of the by-laws.[9] The relatives of the member take as against the representatives of the beneficiary, where the beneficiary and insured perish in the same disaster and there is no proof that the beneficiary was the survivor.[10]

Change of beneficiaries.[11]—By statute in some states, members may at any time, with the consent of the association, substitute beneficiaries.[12] A custom to change beneficiaries may do away with a failure of the by-laws to provide for such change.[13] A statute limiting persons to whom death benefits may be payable cannot be made retroactive, depriving a member of the right which he had before its passage to change the beneficiary.[14] As a general rule, the regulations of the association respecting a change of beneficiary should be followed, though exceptions exist, where the society waives strict compliance, where the insured is unable to comply literally or where death intervenes before the consummation of the change and after he has done all the acts imposed on him.[15] The former beneficiary need not have knowledge.[16] Where the only acts remaining to be done before the death of the member to effect a change of beneficiary are formal acts on the part of the association, the change will be considered to have been made;[17] but if the old certificate is in effect until a new one is delivered, a change which is not accepted before the death of the member because not in proper form as to

6. Georgia J. Rayne, also designated as the wife of the member, removes any uncertainty from not calling her Georgiana Jackson Rayne. Russ v. Supreme Council American Legion of Honor, 110 La. 588.

7. Leftwich v. Wells [Va.] 43 S. E. 364.

8. The administrator cannot recover on a certificate which under the by-laws, its own provisions and the statutes of organization provide for payment to only certain persons. Warner v. Modern Woodmen of America [Neb.] 93 N. W. 397.

9. On the death of the original beneficiary who was the member's wife, the proceeds are payable to his children under a regulation that where the beneficiary dies during the lifetime of the member the benefits should be paid first to the widow and then to the children. Grand Lodge, A. O. U. W., v. Gandy, 63 N. J. Eq. 692.

10. The representatives of the beneficiary have the burden of proof. Males v. Sovereign Camp, Woodmen of the World, 30 Tex. Civ. App. 184.

11. General rules as to substitution of beneficiary, see Insurance.

12. Woodmen Acc. Ass'n v. Hamilton [Neb.] 97 N. W. 1017.

13. Facts held sufficient to establish such custom rendering it binding on the association. Schmitt v. Braunfelser Unterstuetzungs Verein [Tex. Civ. App.] 78 S. W. 568.

14. Schoales v. Order of Sparta, 206 Pa. 11.

15. St. Louis Police Relief Ass'n v. Strode [Mo. App.] 77 S. W. 1091. Where on change of beneficiaries, the secretary of a local lodge is required to attach his signature as a witness, the application need not be signed before him. Donnelly v. Burnham, 86 App. Div. [N. Y.] 226. Where the association has not availed itself of the statutes prescribing the manner in which change of beneficiary may be effected, the member may change the beneficiary according to the custom prevailing in the association. Waldum v. Homstad [Wis.] 96 N. W. 806. Where the filling up of a blank form on the certificate is required, change cannot be effected by a separate affidavit where the grand lodge has not waived the requirement. Grand Lodge, A. O. U. W., v. Gandy, 63 N. J. Eq. 692. If a policeman, member of a police benefit association, who after retirement from the force, on rejoining the force, resumes his membership, his designation of his wife as beneficiary made during the earlier membership may be sufficient to show his intention that she should be again the beneficiary and its ratification by the member in some manner, formal or informal, acceptable to the association, is all that is required to preserve and continue the designation of the wife as payee. St. Louis Police Relief Ass'n v. Strode [Mo. App.] 77 S. W. 1091. Where an association does not question the rightfulness of a change of beneficiaries, one cannot, by virtue of mere relationship to the member, complain. Schoales v. Order of Sparta, 206 Pa. 11.

16. Earley v. Earley, 23 Ohio Circ. R. 618.

17. Waldum v. Homstad [Wis.] 96 N. W. 806; Donnelly v. Burnham, 86 App. Div. [N. Y.] 226.

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a portion of the fund, is not operative as to the part concerning which it is in form.[18] Where, on application for higher benefits, the supplementary applicant designates no beneficiary nor does the new certificate, there is no change of beneficiaries, though the new certificate is delivered to another who is declared to be his beneficiary by the member at the time.[19]

Competency of member to make change.—Where the beneficiary is changed by the principal while mentally incompetent, the original beneficiary may, after death of the insured, contest the validity.[20] Lack of mental capacity is not shown by the writing of a letter to effect a change of beneficiaries instead of filling blanks on the benefit certificate.[21] A letter substituting beneficiaries will be presumed to be voluntarily and consciously signed, the genuineness of the signature being proven.[22]

Surrender of original certificate.—Where the constitution provides that a new certificate may be issued where the benefit certificate is lost or beyond the control of the member, the member may secure a new certificate to be issued to a new beneficiary, though the former beneficiary having possession of the certificate refused to surrender it;[23] but the equities in favor of the former beneficiary may be so strong as to support his right to the fund, as where the wife of a member supported him and secured his reinstatement in the lodge, paying the assessments, and under a subsequently passed by-law, he attempted to make a change in favor of a sister, though his wife would not surrender the certificate.[24] Where the certificate must be surrendered on change of the beneficiary, except where lost or beyond the member's control, an affidavit stating that the member has no longer control of the certificate must be made by the member and without undue influence.[25] Equity will aid subsequent beneficiaries by regarding that as done which ought to have been done.[26] Where a duplicate certificate is issued, a substitution of beneficiaries may be effected by a surrender of such certificate, though the original is in existence.[27] The fact that the association accepts dues from the original beneficiary does not estop it from denying liability on the original certificate in favor of a substituted certificate in which the original beneficiary and another are made beneficiaries.[28]

Designation by will.—Where the by-law provides that the death benefits are payable to widows and children of deceased members, a minor child of a member is entitled thereto, though the member leaves his entire estate by will to a person whom he authorizes to collect from the association the sum payable on his death.[29]

Assignment of benefits.—A benefit certificate, though not assignable at law, may be transferred in equity as security.[30] If there are provisions in the consti-

18. Counsman v. Modern Woodmen of America [Neb.] 96 N. W. 672.

19. Mason v. Mason, 160 Ind. 191.

20. Grand Lodge, A. O. U. W., v. Frank [Mich.] 94 N. W. 731. Though the beneficiary may be changed at the will of the member. Grand Lodge, A. O. U. W., v. McGrath [Mich.] 95 N. W. 739.

21, 22. Waltz v. Grand Lodge of Iowa Workmen of State of Iowa, 118 Iowa, 216.

23. Spengler v. Spengler [N. J. Eq.] 55 Atl. 285; Lahey v. Lahey, 174 N. Y. 146. Especially where she ceases to pay assessments and the new beneficiary keeps up the payment. Grand Lodge, A. O. U. W., v. McGrath [Mich.] 95 N. W. 739. The society may waive such surrender. Allgemeiner Arbeiter Bund v. Adamson [Mich.] 92 N. W. 736.

24. Supreme Council Catholic Benev. Legion v. Murphy [N. J. Eq.] 55 Atl. 497.

25. Affidavit prepared by the beneficiary's sister who was to be the new beneficiary held insufficient, because obtained from the member when his mind had become weakened by liquor and falsely stating that he was no longer living with his wife. Supreme Council, Catholic Benev. Legion, v. Murphy [N. J. Eq.] 55 Atl. 497.

26. Lahey v. Lahey, 174 N. Y. 146.

27, 28. Fanning v. Supreme Council of Catholic Mutual Ben. Ass'n, 84 App. Div. [N. Y.] 205.

29. Hunter v. Firemen's Relief & Benev. Ass'n, 20 Pa. Super. Ct. 605.

30. Binkley v. Jarvis, 102 Ill. App. 59.

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tution and laws against making policies payable to creditors or assignable, a cr itor cannot obtain right to benefits of an assignment indorsed on the policy The same is true where by statute it is provided its certificates shall not be assig able save to certain persons, among whom are not included creditors.[32]

Exemption of benefits from debts.—In certain states moneys received as be fits are exempt from execution.[33] If payable to certain relatives, they are not be regarded as a part of the insured's estate.[34]

Statutes exempting benefits to be paid from garnishment or other process not a denial of the equal protection of the laws, where fraternal orders are se rately classed under the statutes,[35] but a statute which exempts from its pro sions as to benefit associations generally, certain designated orders which are shown to reasonably receive a different classification, is invalid, as discriminating and the section which deprives such orders of the privilege conferred on the oth cannot be disregarded, allowing the other sections to remain valid.[37]

§ 10. *Contingencies on which benefits accrue; amount. Essential durati of membership.*—Where an association of teachers of public schools provides annuity for members who have completed a term of school service of cert length, a public school teacher may be entitled to an annuity though a porti of her service was in a private school.[38] Where the members of an absorbed or are to be given the same standing which they held in their own organization, th membership in the order absorbed cannot be linked with membership in the sorbing order so as to entitle them to the greater benefits conferred as incident longer membership in this order.[39]

Incontestable clauses are to be construed against the insurer, but a consti tional provision that a certificate shall be incontestable if the member confo to the laws and rules does not comprehend agreements made independently a outside of the laws and rules of the association.[40]

Causes of death or injury.—Decisions as to whether a death or injury is for which the insurer is liable are grouped in the notes.[41]

31, 32. Dale v. Brumbly, 96 Md. 674.

33. Laws 1901, ch. 397. Ettenson v. Schwartz, 38 Misc. [N. Y.] 669.

34. Where one not a relative, to whom the certificate is made payable on the representation that insured had no relatives living, pays expenses incidental to the last illness and burial of insured, he cannot recover them out of the insurance. Voelker v. Grand Lodge of Brotherhood of Locomotive Firemen [Mo. App.] 77 S. W. 999. There is no trust in favor of the estate or creditors of the member. Warner v. Modern Woodmen of America [Neb.] 93 N. W. 397.

35. Supreme Lodge, United Benev. Ass'n, v. Johnson [Tex. Civ. App.] 77 S. W. 661.

36, 37. Supplement Sayle's Civ. St. 1899, 1900, tit. 49a. Supreme Lodge, United Benev. Ass'n, v. Johnson [Tex. Civ. App.] 77 S. W. 661.

38. Child v. Teachers' Annuity & A. Ass'n, 21 Pa. Super. Ct. 480.

39. Pfingsten v. Perkins, 82 N. Y. Supp. 899.

40. Such as an agreement in the application that there shall be no responsibility if the applicant die by suicide and agreement to conform to the constitution which also contains a provision for non-liability in case of suicide. Royal Circle v. Achterrath, 204 Ill. 549.

41. What are accidents: Death from blood poisoning resulting from an acciden cut is an accidental injury. Delaney v. M ern Acc. Club [Iowa] 97 N. W. 91. Bre ing of blood vessel while insured in attem ing to remove nightshirt over his head. accident. Smouse v. Iowa State T. M. As 118 Iowa, 436. Immediately refers to t not cause, as used in a provision for be fits in case of injury which shall immedia ly, wholly and continuously disable h Pepper v. Order of United Commercial Tr elers, 24 Ky. L. R. 723, 69 S. W. 956.

Excepted risks: Railway freight bra men as a prohibited class includes a distr freight brakeman employed within a limi territory. Snow v. Modern Woodmen, Ohio Circ. R. 142. Where death in a duel excepted, death in a combat is not includ unless shown to have been pre-arrang Davis v. Modern Woodmen [Mo. App.] 73 W. 923. Loss of a hand by discharge o gun while removing it from one room o house to another, is within the limitation to the amount of benefits in case of injury ceived while hunting or in any way using handling fire arms. Doody v. Nat. Maso Acc. Ass'n [Neb.] 92 N. W. 613, 60 L. R. 424. Voluntary or unnecessary exposure danger or obvious risk of injury, covers attempt to board a moving train of cars w merely to avoid missing the train, thou the injured is young, strong and active

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Suicide as a forfeiture of benefits is a question as to which the courts are widely variant.[42]

An incontestable clause may estop the association from claiming the benefit of a provision against suicide,[43] and where trial and conviction is provided to establish loss of good standing, suicide will not forfeit such standing.[44]

A member may be regarded as insane at the time of committing suicide if he was then without sufficient reason to know what he was doing or to distinguish right from wrong, or if he had not sufficient will power to govern his actions, by reason of some insane impulse which he could not control.[45] An illness need not be such as to confine the member to bed, to render the association liable for benefits on suicide in "delirium" resulting from illness.[46] A finding of the commission of suicide amounts to the determination that it was the intentional act of a sane man.[47]

Disability as a ground of recovery is generally defined as inability to pursue a customary employment.[48]

with experience in boarding and alighting, the train moving from eight to ten miles an hour. Small v. Travelers' Protective Ass'n [Ga.] 45 S. E. 706. An exception against accident or death, while insured is on a railroad bridge or a road bed violating laws or rules of a corporation, does not apply to an insured carefully crossing a railroad track at a point recognized as a thoroughfare to a depot. Payne v. Fraternal Acc. Ass'n, 119 Iowa, 342.

42. **Illinois:** Benefits are not forfeited by suicide on the ground that it is a death in violation of law, nor does it involve an attempt to commit suicide, which is a crime. Royal Circle v. Achterrath, 204 Ill. 549. A stipulation in a contract that benefits will not be paid on death by suicide, whether sane or insane, prevents a recovery, though the member by reason of his total insanity was incapable of forming an intent to take his life. Seitzinger v. Modern Woodmen, 204 Ill. 58. Where liability on account of death by suicidal act, sane or insane, is stipulated against, liability exists only where insured, on committing suicide, is in such a state of mind as to be unconscious of the physical nature of the act which caused his death and it is error to instruct that there could be a recovery unless insured at the time of his death was capable of forming a rational intent and he did with rational intent commit suicide. Supreme Lodge, O. M. P., v. Gelbke, 198 Ill. 365.

Kentucky: Though there is no stipulation as to suicide, benefits are not payable on suicide of the insured when sane, though otherwise if insane. Mooney v. Grand Lodge, A. O. U. W., 24 Ky. L. R. 1787, 72 S. W. 288. ground of public policy, where the contract provides for a limited liability on death in such manner. Morton v. Supreme Council of Royal League [Mo. App.] 73 S. W. 259.

Missouri: It cannot be contended that a certificate is invalidated by suicide on the

Nebraska: Where there is no such provision in the contract, suicide of the assured does not avoid the right to benefits. Supreme Lodge, S. & D. of P., v. Underwood [Neb.] 92 N. W. 1051.

New York: The beneficiary stands in the same position as the beneficiary of an ordinary life policy with regard to the wrongful act of the insured in taking his own life. Cannot recover where a subsequent by-law forfeits rights on suicide. Shipman v. Protected Home Circle, 174 N. Y. 398. Suicide is an illegal act within a restriction against death of insured by any illegal act of his own. Id.

Texas: It cannot be contended that rights of membership and rights of participation in the benefit fund are distinct, thus allowing the beneficiary to recover in case of a suicide, where the laws provide that self-destruction, whether sane or insane, will render the benefit certificate null and void. United Moderns v. Colligan [Tex. Civ. App.] 77 S. W. 1032.

43, 44. Royal Circle v. Achterrath, 204 Ill. 549.

45. Mooney v. Grand Lodge, A. O. U. W., 24 Ky. L. R. 1787, 72 S. W. 288.

46. Evidence held sufficient to warrant submission of the question to the jury. Supreme Lodge, K. of H., v. Lapp's Adm'x, 25 Ky. L. R. 74, 74 S. W. 656.

47. Pen. Code, § 172, defines suicide as the intentional taking of one's own life. Shipman v. Protected Home Circle, 174 N. Y. 398.

48. "Disability," is inability to perform the insured's ordinary duty in the employment in which he was engaged at the time of his injury. Chicago, B. & Q. R. Co. v. Olson [Neb.] 97 N. W. 831. Total and permanent disability to follow any occupation, is such as incapacitates the member from following his usual business and renders him unable to perform labor more than sufficient to pay his board. Monahan v. Supreme Lodge, O. C. K., 88 Minn. 224. Total incapacity to perform manual labor means total inability to perform manual labor to an extent necessary to entitle the member to receive earnings. Grand Lodge, L. F., v. Orrell [Ill.] 69 N. E. 68. A definition of "permanently" in relation to an injury as one that will exist throughout all time, cannot be complained of by the association. Id. Under by-laws providing for payment of benefits on disability, disabling the member to direct or perform the kind of business or labor which he has always followed, and by which alone he can thereafter earn a livelihood, a farmer who also operates a portable saw-mill is entitled to benefits where by an accident his arm is rendered useless, render-

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§ 11. *Proofs of death or right to benefits. Time.*—A provision for payment within ninety days of proof of death does not impose a forfeiture for failure to make proof within ninety days.[49]

Waiver of proofs.—Formal proofs of death are unnecessary where the association disclaims all liability, basing its refusal to pay on other grounds,[50] or where it has failed to furnish blanks on demand;[51] so of blanks for sick benefits.[52] A grand recorder may waive proofs of death.[53] Where the claimant presents his claim in a manner satisfactory to the subordinate lodge, which certifies them to the grand lodge, and the grand lodge receives and acts on them as having been properly presented, it cannot thereafter complain as to the manner of presentation of the claims.[54]

Conclusiveness and effect of proofs.—Where no equitable estoppel exists, statements in the proof of loss may be contradicted.[55] Such estoppel does not arise from negligence in not reading proofs of loss,[56] or where it does not appear that the insurer relied on the statements, or was in a serious condition on account thereof.[57]

Officers of local lodges furnishing death proofs may act as agent of the general body to such a degree as to render admissible statements and admissions against the society's interest made in filling out such proofs.[58]

Admissions of liability.—Liability cannot be imposed on grand lodge by acts of subordinate lodge officers if they have no authority over the payment of death benefits.[59] A death notice from the subordinate lodge to the supreme lodge reciting that the dues of the assured had been paid and that the beneficiary was entitled to the death benefits on which the supreme lodge acts and refuses an assessment is an admission of liability.[60] A statement by member of finance committee of grand lodge that a receipt for a last payment fixed the lodge's liability does

ing him unable to do any work at the farm or at the saw-mill. Beach v. Supreme Tent, K. M. [N. Y.] 69 N. E. 281.

49. Fraternal Aid Ass'n v. Powers [Kan.] 73 Pac. 65.

50. Supreme Lodge, O. M. P., v. Meister, 105 Ill. App. 471. By claiming and obtaining the affirmative of an issue of suicide defendant admits that all conditions precedent had been complied with. Meyer v. Supreme Lodge, K. of P., 82 App. Div. (N. Y.) 359. Letter to the beneficiary's attorney refusing payment on the ground of suspension without objection on account of failure to make proofs. Alexander v. Grand Lodge, A. O. U. W., 119 Iowa, 519. Letter circulated by a local lodge seeking aid for the beneficiary from the other lodges on the ground that she is unable to recover on the certificate because her husband has not paid an assessment. Supreme Lodge, O. M. P., v. Meister, 204 Ill. 527.

51. Ancient Order of Pyramids v. Drake, 66 Kan. 538, 72 Pac. 239.

52. Failure to file weekly certificates as a condition to payment of sick benefits is waived, where his physician has refused to make them out and the society's physician has refused to furnish the necessary blanks. Ramell v. Duffy, 82 App. Div. (N. Y.) 496.

53. Where the finance committee does not pass on proofs of death except when submitted to it with the signatures of the grand master and grand recorder. Alexander v. Grand Lodge, A. O. U. W., 119 Iowa, 519.

54. Grand Lodge, L. F., v. Orrell [Ill.] 69 N. E. 68.

55. Supreme Tent, K. M., v. Stensland [Ill.] 68 N. E. 1098. Nor does knowledge of death by strangulation estop the beneficiary from assigning a different cause of death at trial, where the statements in the proofs are mere opinions. Id.

56. Supreme Tent, K. M., v. Stensland [Ill.] 68 N. E. 1098.

57. Where some two months before trial, the insurer, by replication, had notice that suicide would be controverted, and there was also a special written notice to the same effect, evidence that death did not result from suicide, contradicting the statements in the proofs of loss, may be admitted. Supreme Tent, K. M., v. Stensland [Ill.] 68 N. E. 1098.

58. Where the by-laws of defendant society and the form for proof of death provided by it, imposed on the officers of the assembly, of which the deceased was a member, the duty of preparing, certifying to, and forwarding to the head office, proofs of death, and their opinions as to the validity of the claim, using blank forms furnished for that purpose by the supreme secretary. Patterson v. United Artisans [Or.] 72 Pac. 1095.

59. An invitation to the attorney of a beneficiary to lay his case before the grand lodge finance committee, is not a binding admission of liability where liability had been previously denied and payments to secure re-instatement tendered back. Adams v. Grand Lodge, A. O. U. W. [Neb.] 92 N. W. 588.

60. Action by administratrix. Pfeifer v. Supreme Lodge, B. S. B. Soc., 173 N. Y. 418.

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not waive forfeiture for failure to comply with other conditions.[61] If, on the suicide of a member, the association is liable for the assessments paid in, the association does not waive a defense of the suicide by allowing the beneficiary to furnish proof of death and conduct an appeal before tribunals of the order after her claim for full amount was rejected.[62]

§ 12. *Payment of benefits.*—A trustee appointed by the subordinate lodge of the society is the agent of the subordinate lodge and not of the beneficiary, so that the supreme council does not discharge itself by the payment of the amount of death benefits to him.[63]

Settlements and release of liability.—A release signed by the beneficiary under surprise and pressure for immediate action, without opportunity to seek legal advice or ascertain the facts, may be set aside in equity.[64] A receipt or release by the beneficiary given on payment of the amount for which the association concedes its liability is without consideration as to the difference between such amount and that actually due on the certificate.[65]

The fact that the association acknowledges that a certificate has been taken up by mistake on settlement of a claim for benefits and that it is reissued and premiums are accepted, does not waive the right to insist on a return of the amount paid under the settlement as a condition for a rescission thereof.[66]

Where a settlement of all claims which the holder had or might have against the association is pleaded, it will be construed not to cover a subsequent death of insured in the same accident and to be a defense only to the amount of payment alleged.[67]

Where an applicant for membership in a beneficiary society has released his mortuary benefits in another society and died before the consummation of transfer of membership, the beneficiary cannot claim benefits from both societies where he accepts those payable by the society of which decedent intended to become a member on an agreement to relinquish to it the sum which would have been due him from the prior society.[68]

Interpleader of claimants.—If the association pays the money into court and interpleads the claimants, its distribution may be awarded according to the equitable principles without regard to technical defenses which could be asserted by the association.[69]

Amount payable and funds which may be resorted to.—Where from the contract it is uncertain as to whether a fixed sum is to be paid or only the amount realized by an assessment on the members, the construction most favorable to the insured will be adopted and the fixed amount awarded.[70]

A proviso in a by-law that the face value of the benefit certificate shall be paid means the amount stated in the body of the certificate, though in another portion of the same by-law it states that a certain sum shall be the highest amount paid.[71]

A judgment cannot be rendered for the full amount of a policy where the

61. Adams v. Grand Lodge, A. O. U. W., [Neb.] 92 N. W. 588.

62. Voelkel v. Supreme Tent, K. M., 116 Wis. 202. 92 N. W. 1135.

63. Pfeifer v. Supreme Lodge, B. S. B. Soc., 173 N. Y. 418.

64. Facts held to justify such a setting aside. United Commercial Travelers v. McAdam (C. C. A.) 125 Fed. 358.

65. Supreme Council, A. L. of H., v. Storey [Tex. Civ. App.] 75 S. W. 901.

66. Slater v. U. S. H. & A. Ins. Co. [Mich.] 95 N. W. 89.

67. Woodmen Acc. Ass'n v. Hamilton [Neb.] 96 N. W. 989.

68. L'Union St. Jean Baptiste v. Couture [R. I.] 53 Atl. 42.

69. Supreme Council, C. B. L., v. Murphy [N. J. Eq.] 55 Atl. 497.

70. Laker v. Royal Fraternal Union, 95 Mo. App. 353.

71. Supreme Council, A. L. of H., v. Storey [Tex. Civ. App.] 75 S. W. 901.

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by-laws in force provide that one assessment is to be levied for each loss, whi is to go as far as it will toward paying the face of the certificate, and there no evidence as to the amount which would be raised by such an assessment oth than the amount raised by monthly assessments under by-laws which are declar void.[72]

The beneficiary is not entitled to resort to an equalization fund maintain to be resorted to when the death rate should necessitate more than a certain nur ber of assessments in a year, unless such death rate has existed.[73]

If the benefit certificate and constitution and by-laws show that assessmen are made to accumulate and replenish a fund for the payment of death losses ar not to pay particular losses, the representatives of a member are not the owne of any specific portion of the fund levied, for their particular and exclusive use

Interest and damages.—On recovery, plaintiff is entitled to interest from t time the policy is due.[75]

Where the defendant fails to show that it was a fraternal benefit associatio plaintiff may recover damages and attorney's fees.[76]

§ 13. *Procedure to enforce right to benefits. Form of action.*—Where the is a fixed promise to pay a certain sum, an action at law will lie,[77] though n where the agreement is that the beneficiaries are to receive from the benefit fun the amount of one assessment from each contributing member.[78]

Pursuit of alternative remedy.—An action for damages may amount to a wa ver of benefits under a relief department of the defendant,[79] but where the memb makes an application for relief benefits and on a misunderstanding brings a unsuccessful action at law, it will not prevent his enforcement of his right benefits.[80]

Exhaustion of remedies within order.—A right to benefits cannot be defeat on the ground that the decision of the association is a final adjudication,[81] b decisions of a tribunal established by the constitution to determine the extent an injury are binding on the members.[82] One who has become a member of benevolent order is entitled to appeal to the courts for redress only after adop

72. Evans v. Southern Tier M. R. Ass'n, 76 App. Div. (N. Y.) 151.

73. Rambousek v. Supreme Council, M. T., 119 Iowa, 263.

74. Reeves v. Supreme Lodge, P. of A., 65 Kan. 860, 70 Pac. 357.

75. Supreme Lodge, K. of H., v. Lapp's Adm'x, 25 Ky. L. R. 74, 74 S. W. 656. If the order denies liability, interest may be allowed in Iowa from 90 days after the insured's death though the beneficiary is a non-resident. Alexander v. Grand Lodge, A. O. U. W., 119 Iowa, 519. Where the certificate is for a specified sum of money as indemnity for total disability, interest may be allowed from the date of a refusal of payment after compliance with the by-laws as to the presentation of the claim. Grand Lodge, L. F., v. Orrell [Ill.] 69 N. E. 68.

76. Supreme Council, A. L. of H., v. Storey [Tex. Civ. App.] 75 S. W. 901.

77. Funeral and monument benefits. Sleight v. Supreme Council, M. T., [Iowa] 96 N. W. 1100.

78. Sleight v. Supreme Council, M. T., [Iowa] 96 N. W. 1100. The objection is not waived by failure to move to transfer the case to the proper docket, especially where for a portion of the benefit sought to be recovered, an action would lie at law. Id.

79. The regulations of the relief depar ment provided that in case of injury a mer ber might elect to accept benefits in purs ance of the regulation or to prosecute h claim at law against the company. Chicag B. & Q. R. Co. v. Olson [Neb.] 97 N. W. 8 If recovery of the full amount allowed statute has been had against the railro for the wrongful death of an employe, r covery cannot be had by the beneficiary the certificate of an aid department. Oyst v. Burlington Relief Department [Neb.] 91 W. 699, 59 L. R. A. 291.

80. Chicago, B. & Q. R. Co. v. Ols [Neb.] 97 N. W. 831.

81. Child v. Teachers' Annuity & A. Ass 21 Pa. Super. Ct. 480. An arbitrary reje tion of an application for transfer to a cla of membership carrying greater benefi cannot defeat the rights of the applicant, b it cannot be said that rejection is arbitrar where the examining physician refuses applicant for transfer who was of an a vanced age and whose pulse when sitti was 76 and when standing 80. Supre Lodge, K. P., v. Andrews [Ind. App.] 67 N. 1009.

82. Sanderson v. Brotherhood of R. Trai men, 204 Pa. 182.

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ing the procedure and exhausting the remedies prescribed by the constitution and by-laws of the order, provided such regulations and by-laws are not violative of the law,[83] but exhaustion of remedy by appeal within the order must be made obligatory by the laws of the society,[84] but before an order can hold a member to strict observance of its rules regulating procedure on appeal, it must show that in all matters touching his substantial rights, it has observed these regulations.[85] Non-action of the supreme lodge of an association, on an appeal on account of no appearance for complainant, does not affect the claim any more than in the case of a continuance to another term for default in not appearing and demanding trial.[86]

Provisions in the by-laws for arbitration before suit on disputed claims must be complied with by the beneficiary,[87] but are waived by an unqualified denial of liability,[88] or answer to the beneficiary's complaint.[89] Where the beneficiary has no alternative after expulsion of a member but to submit the matter to arbitration, the beneficiary may resort to the courts on a refusal of an offered arbitration, not having a right to appeal to the higher tribunals of the order.[90]

Failure for nine years to appeal to supreme lodge or the civil courts from rejection of an application for transfer will justify the order in believing that the member was satisfied with the result reached.[91]

Time to sue.—On a denial of liability on the ground that there has been no injury, the insured may sue without waiting the expiration of a period during which it is stipulated no action can be brought,[92] but see contra.[93]

Who may sue.—Where the benefits are payable to the heirs of the member, his administratrix may sue,[94] or where the widow and children are entitled, the widow may sue for benefits as administratrix.[95]

Pleading.—The beneficiary should plead facts showing his right to sue.[96] If benefits are to be the amount of an assessment, before an action at law for dam-

83. Schou v. Sotoyome Tribe, No. 12 [Cal.] 73 Pac. 996; Weigand v. Fraternities Acc. Order [Md.] 55 Atl. 530. An action on a benefit certificate may be defeated where the member has been suspended and has not appealed as provided by the by-laws of the association. Modern Woodmen v. Taylor [Kan.] 71 Pac. 806.

84. Supreme Lodge, K. P., v. Andrews [Ind. App.] 67 N. E. 1009.

85. Schou v. Sotoyome Tribe, No. 12 [Cal.] 73 Pac. 996. Where the society denies membership, a provision of its by-laws for application to the grand lodge before action in case of a difference between the member or his heirs and a subordinate lodge concerning benefits, is not applicable. Wuerfler v. Wis. Order of Druids, 116 Wis. 19. A member cannot be precluded from maintaining a suit for sick benefits, where she is expelled before bringing action for the reason that he had retained an attorney. Ramell v. Duffy, 82 App. Div. (N. Y.) 496. An appeal as provided by the by-laws is not rendered unnecessary by the fact that the member is told that he could appeal but that it would not benefit him, since the appeal would be heard by the same persons who had already disposed of his claim. Wick v. Fraternities Acc. Order, 21 Pa. Super. Ct. 507. An action for re-instatement may be prosecuted without appeal where the obstacles to an appeal are so great as to amount almost to a denial of justice, and it is apparent the appeal would afford no relief. Action for re-instatement where under its own laws defendant could not re-instate plaintiff without a medical certificate which it was impossible for him to secure. Brown v. Supreme Ct., I. O. F., [N. Y.] 68 N. E. 145.

86, 87. Hoag v. Supreme Lodge, L. C., [Mich.] 95 N. W. 996.

88, 89. Wuerfler v. Wis. Order of Druids, 116 Wis. 19.

90. Dubcich v. Grand Lodge, A. O. U. W., [Wash.] 74 Pac. 832.

91. Supreme Lodge, K. P., v. Andrews [Ind. App.] 67 N. E. 1009.

92. Evidence to such effect may be excluded. Modern Brotherhood v. Cummings [Neb.] 94 N. W. 144.

93. Where an amount for funeral and monument benefits is not payable for six months after proof of death, action cannot be brought prior to the lapse of such time though defendant refused to recognize any liability under the certificate. Sleight v. Supreme Council, M. T., [Iowa] 96 N. W. 1100.

94. Pfeifer v. Supreme Lodge, B. S. B. Soc., 173 N. Y. 418.

95. Janda v. Bohemian Roman Catholic First Cent. Union, 173 N. Y. 617.

96. Where funeral benefits are payable to the nearest of kin of deceased or the person having the burial of the member in charge, plaintiff must place himself in one of such classes. Sleight v. Supreme Council, M. T., [Iowa] 96 N. W. 1100.

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ages may be maintained, it must be alleged that the association has in its han money so collected which it is bound to pay over.[97] Where the certificate recit that it is issued subject to the laws of the order, which by express reference a made a part of the certificate, the beneficiary must aver full performance of the conditions imposed by the contract of insurance and laws of the order facts by which such conditions have been waived.[98] A circular which, while inducement to the making of a contract, is no part of it, is properly stricken fro a pleading in an action to recover the promised benefits.[99]

A subsequently enacted by-law, changing the contract, must be specially plead by defendant to be taken advantage of.[1] A defense of forfeiture for nonpayme of assessment cannot be made under the general issues.[2] Where the petition leges that defendant is a corporation engaged in the life insurance business, t defendant will be regarded as an ordinary life insurance company if it mere admits its incorporation and does not set up the kind of corporation that it i An answer merely setting up reliance on representations is demurrable on striki out the representations because made in the application which was not made part of the policy.[4] Matter avoiding forfeiture for nonpayment of dues may pleaded in a reply.[5]

Issues.—Under a stipulation submitting whether a supreme body had autho ity to enact and apply an amendment to an existing contract, it cannot be consi ered whether proper notice of the amendment was given.[6]

Burden of proof and presumptions.—A defense in abatement that defenda unincorporated lodge has too few members to be sued in the persons of its office must be proved.[7]

A presumption of payment of membership fees arises from the delivery the policy.[8] A prima facie case is established by proof of death and presentati of proofs thereof by plaintiff, where decedent's death is the only matter in issu In an action for sick benefits which have been discontinued, plaintiff must sho that their continuance is not optional with the lodge.[10]

Defendant has the burden of proof of fraud and bad faith in representatio in the application,[11] of termination of good standing,[12] of suicide,[13] and the bu

97. Sleight v. Supreme Council, M. T., [Iowa] 96 N. W. 1100.

98. It is not sufficient to aver that deceased was at the time of his death a member of the order and entitled to all the rights and privileges of such member. Grand Lodge, A. O. U. W., v. Hall [Ind. App.] 67 N. E. 272. An averment of prompt and punctual payment of all assessments demanded, is a sufficient averment that they were paid to the proper officer. Supreme Council, A. L. of H., v. Orcutt (C. C. A.) 119 Fed. 682.

99. Circular stating that in case of a member being unable to pay the benefits on account of sickness or disability, he will not be suspended if he notified the secretary of the lodge before becoming delinquent. Sleight v. Supreme Council, M. T. [Iowa] 96 N. W. 1100.

1. Supreme Council, A. L. of H., v. Storey [Tex. Civ. App.] 75 S. W. 901.

2. Prac. Act, § 126 (Gen. St. p. 2554) provides that on averment of performance of conditions precedent generally, defendant must specify the particular conditions precedent which he intends to deny. Van Alstyne v. Franklin Council No. 41 [N. J. Law] 54 Atl. 564.

3. Cauveren v. Ancient Order of Pyr mids, 98 Mo. App. 433.

4. Supreme Commandery, U. O. G. C., Hughes, 24 Ky. L. R. 984, 70 S. W. 405.

5. Where a suspension for non-payme of dues is alleged in an answer, a reply leging that notice of sickness had be given the order and it was its duty to p the dues, is not a departure. Smith v. So ereign Camp of Woodmen [Mo.] 77 S. W. 8

6. Eversberg v. Supreme Tent, K. [Tex. Civ. App.] 77 S. W. 246.

7. Boyd v. Gernant, 82 App. Div. (N. 456.

8. Where the certificate states that it issued in consideration of the membersh fee and this presumption is not overcome the treasurer of the local and of the gra lodges, that the fees have not been tran mitted or remitted to the grand lodge, whe the certificate is written by a solicit agent. Taylor v. Supreme Lodge, C. [Mich.] 97 N. W. 680.

9. Robinson v. Supreme Commandery, O. G. C., 77 App. Div. (N. Y.) 215.

10. Boyd v. Gernant, 82 App. Div. (N. 456.

11. Alden v. Supreme Tent, K. M., 78 Ap Div. (N. Y.) 18.

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den of proof of suicide does not shift during the trial.[14] The presumptions are in favor of sanity.[15]

Admissibility of evidence.[16]—Experts should not be allowed to testify as to suicidal intent.[17] An objection, that while experts may know the condition of a body in case of ordinary strangulation, they may not be experts in cases where the body was partially resting on the floor, is frivolous.[18]

Statements of the insured tending to falsify statements in his application, made some years before the date of the application, are inadmissible as against the vested right of the beneficiary.[19] The admissions of the insured that he shot himself are admissible only as part of the res gestae.[20]

A coroner's inquisition record is not in Oregon of sufficient judicial character to be admissible to show cause of death,[21] nor is it admissible, though attached to the proofs of death made by the beneficiary, if furnished by the subordinate lodge.[22]

Papers purporting to be receipts for assessments and dues cannot be admitted without identification.[23] Alterations in receipts for assessments must be explained.[24] Where plaintiff is also a member of the order, receipts showing payment of assessments by him are not admissible except as they may tend to explain disputed receipts claimed to have been given to deceased, in which case they may become material in rebuttal.[25]

On an issue of bad faith in an answer as to prior rejection, statements of the agent to insured to answer the way in which he did and a promise by the agent to explain the rejection to the company are admissible.[26]

Rulings on evidence.—A ruling that a letter written by deceased to the association does not show an acquiescence in the cancellation of his certificate of insur-

12. Where the certificate of membership introduced shows good standing at time of issuance. Monahan v. Supreme Lodge, O. C. K., 88 Minn. 224.

13. Cox v. Royal Tribe, 42 Or. 365, 71 Pac. 73; Supreme Tent, K. M., v. Stensland, 105 Ill. App. 267.

14. Though the proofs of death introduced by plaintiff state suicide as the cause. Supreme Tent, K. M., v. Stensland [Ill.] 68 N. E. 1098.

15. Defense of suicide. Royal Circle v. Achterrath, 204 Ill. 549.

16. A circular which is no part of the contract is not admissible in evidence as tending to vary it by inserting a provision for payment of delinquent dues by local lodges. Sleight v. Supreme Council, M. T., [Iowa] 96 N. W. 1100. Where proofs of death are required to contain affidavits of the president and secretary of the subordinate lodge as to decedent's record as a member, an unsigned affidavit which had been presented by the plaintiff to the officers and of which signature was refused on the ground that it was not correct, is inadmissible especially where accompanied by an affidavit of plaintiff that decedent had paid all assessments due at the time of his death. Rambousek v. Supreme Council, M. T., 119 Iowa, 263. Where notice under the laws of the order was to be made through a lodge paper an affidavit of the publication and mailing of the paper containing a call for assessments is admissible, payment of assessments being disputed. Id. A death certificate showing death from consumption is evidence of a breach of warranty that insured was free from consumption. Death within a year and certificate in conformity with St. Louis City Charter, art. 12, § 10. Ohmeyer v. Supreme Forest Woodmen Circle, 91 Mo. App. 189. Failure to deny charge of misrepresentation preferred by the presiding officer before the lodge may be regarded as an admission of its truth. Foxhever v. Order of Red Cross, 24 Ohio Circ. R. 56.

17. The words "suicidal intent" are properly stricken from the question "Could the death of this man have been caused by strangulation with suicidal intent?" Supreme Tent, K. M., v. Stensland [Ill.] 68 N. E. 1098.

18. Supreme Tent, K. M., v. Stensland [Ill.] 68 N. E. 1098.

19. Rawson v. Milwaukee Mut. L. Ins. Co., 115 Wis. 641.

20. Since the beneficiary claims in her own right and not through insured. Sutcliffe v. Iowa State Traveling Men's Ass'n, 119 Iowa, 220.

21. Bel. & C. Ann. Codes & St. §§ 1045. 1683-1690. Cox v. Royal Tribe, 42 Or. 365, 71 Pac. 73.

22. Not an admission of the beneficiary. Cox v. Royal Tribe, 42 Or. 365, 71 Pac. 73.

23. Sleight v. Supreme Council, M. T., [Iowa] 96 N. W. 1100.

24. Alterations in the name of the party to whom they were given. Rambousek v. Supreme Council, M. T., 119 Iowa, 263.

25. Rambousek v. Supreme Council, M. T., 119 Iowa, 263.

26. Alden v. Supreme Tent, K. M., 78 App. Div. (N. Y.) 18.

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ance, as bearing on the question of its admissibility in evidence, does not state effect as evidence.[27]

Sufficiency of evidence as to particular issues,[28] such as forfeiture,[29] or waive misrepresentation, etc.,[31] are grouped in the notes. Suicide need be established o by fair preponderance of evidence,[32] though a finding that insured did not com suicide will be sustained unless every reasonable hypothesis of accident is exclude

Instructions.—The rules as to instructions in other actions are applicabl Examples of particular instructions which have been criticised or approved grouped in the notes.[35]

FRAUD AND UNDUE INFLUENCE.

§ 1. Actual Fraud (105).
§ 2. Inferences from Intrinsic Nature and Subject of Transaction (107).
§ 3. Inferences from Circumstances a Condition of Parties (107).
§ 4. Remedies (108).

Scope of topic.—This topic is designed to treat only principles of gene application[36] as to fraud and undue influence in the execution of contracts a

27. Thompson v. Family Protective Union [S. C.] 45 S. E. 19.

28. To establish plaintiff's parental relation to insured. Voelker v. Grand Lodge, B. of L. F., [Mo. App.] 77 S. W. 999. A finding that insurance was not taken out is justified where there is no production of a certificate or evidence that it was taken out. Leftwich v. Wells [Va.] 43 S. E. 364. Where proof of amount of membership has been excluded as immaterial on defendant's objection, a verdict will not be set aside on the ground of absence of proof as to membership. Modern Brotherhood v. Cummings [Neb.] 94 N. W. 144.

29. To show forfeiture of rights. Grand Lodge, A. O. U. W., v. Scott [Neb.] 93 N. W. 190; Schou v. Sotoyome Tribe, No. 12, [Cal.] 73 Pac. 996.

30. To justify submission of question of the waiver of health certificate by agent on reinstatement. Cauveren v. Ancient Order of Pyramids, 98 Mo. App. 433.

31. To establish untruth as to the statements of last attendance of physician in application. Jennings v. Supreme Council, L. A. B. Ass'n, 81 App. Div. (N. Y.) 76.

32. Kerr v. Modern Woodmen (C. C. A.) 117 Fed. 593. To warrant an instructed verdict for defendant. Cox v. Royal Tribe, 42 Or. 365, 71 Pac. 73; Fletcher v. Sovereign Camp of Woodmen [Miss.] 32 So. 923. To support a finding that cause of death was suicide. Voelkel v. Supreme Tent, K. M., 116 Wis. 202, 92 N. W. 1135. To warrant submission of question of suicide, by hanging, to the jury. Supreme Tent, K. M., v. Stensland [Ill.] 68 N. E. 1098. To warrant submission of question of sanity at time of suicide. Mooney v. Grand Lodge, A. O. U. W., 24 Ky. L. R. 1787, 72 S. W. 288. To show intentional suicide by carbolic acid. Rumbold v. Supreme Council, Royal League, 103 Ill. App. 596.

33. Shotliff v. Modern Woodmen [Mo. App.] 73 S. W. 327.

34. See article Instructions.

35. An instruction comments on the evidence, where it calls the attention of the jury to specific facts and tells them that the only circumstance which may be taken i consideration is as to whether a notice w received by the clerk of the lodge, and th may from said facts, if they so find, in that the letter containing the notice was ceived by the clerk. Smith v. Soverei Camp of Woodmen [Mo.] 77 S. W. 862. I fendant is entitled to an instruction that provision excusing payment of assessme and dues is not applicable, where justified the evidence. Sleight v. Supreme Coun M. T., [Iowa] 96 N. W. 1100. Instructi that the duty is on plaintiff to show a instatement is properly amended to take i consideration the question of waiver, whe there is evidence thereof. Grand Lodge, O. U. W., v. Lachmann, 199 Ill. 140. An struction that there is a presumption of n ural death may be given where the body insured was found in the water but no o saw her enter it. Cox v. Royal Tribe, 42 365, 71 Pac. 73. An instruction as to a p sumption of natural or accidental death not error on account of the use of the wo "unexplainable causes" in the definition the presumption, though the cause of dea was explained. Id. An instruction is erroneous as charging on the facts, whi states that it is a question of fact whet when a policy of insurance is canceled a a premium returned with a notice of su cancellation, the assured acquiesces in t cancellation of the policy by retaining t premium. Thompson v. Family Protecti Union [S. C.] 45 S. E. 19. Definition of an a cidental cause as one that may happen chance is erroneous as suggesting th chance is not always essential. Smouse Iowa State Traveling Men's Ass'n, 118 Iov 436. "Involuntary" is not the equivalent undesigned or unintentional. Id.

36. See special subjects, Agency, Attac ment, Contracts, Corporations, Insuran Fraudulent Conveyances, Judgments, Vend and Purchaser, Sales; particular instrumen Deeds, Chattel Mortgages, Mortgages, Neg tiable Instruments, Releases, Wills, etc.; pa ticular relations, Husband and Wife, Gua dian and Ward, Parent and Child, Trus Principal and Surety, etc.

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conveyances[37] arising between the parties to the transaction.[38] The right of action for damages for fraud is also specifically treated elsewhere.[39]

§ 1. *Actual fraud.*—Good faith is always presumed in contractual relations where no fiduciary relations exist between the parties.[40] In order to constitute actual fraud, misrepresentations must be untrue and calculated to deceive;[41] must relate to existing and material facts;[42] not mere expressions of opinion;[43] and must be made with knowledge of their falsity, or recklessly in ignorance of their truth or falsity,[44] with intent to deceive.[45] The injured party must be entitled to rely,[46] and must rely upon the representations,[47] to his damage.[48] Silence or con-

37. Undue influence in execution of wills is treated in Wills.

38. See Fraudulent Conveyances; Negotiable Instruments as to rights of bona fide holders.

39. See exhaustive monograph on Deceit, ante, p. 873.

40. Crockett v. Miller [Neb.] 96 N. W. 491.

41. Warfield v. Clark, 118 Iowa, 69; Dudley v. Minor's Ex'r, 100 Va. 728. A statement by an insurance agent that insured had made sufficient proof of loss released her as to proof and was therefore true. Hart v. Waldo, 117 Ga. 590; Korbel v. Skocpol [Neb.] 96 N. W. 1022; Halliwell Cement Co. v. Stewart [Mo. App.] 77 S. W. 124; Summerour v. Pappa [Ga.] 45 S. E. 713; Sprigg v. Commonwealth T. I. & T. Co., 119 Fed. 434. A representation in an insurance application substantially true is not false. Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. [C. C. A.] 124 Fed. 25.

42. Dudley v. Minor's Ex'r, 100 Va. 728; Hutchinson v. Gorman [Ark.] 73 S. W. 793; Ley v. Metropolitan Life Ins. Co. [Iowa] 94 N. W. 568; Aetna Life Ins. Co. v. Rehlaender [Neb.] 94 N. W. 129; North American Acc. Ins. Co. v. Sickles, 23 Ohio Circ. R. 594; Mizell v. Upchurch (Fla.) 35 So. 9. Representations may be made material by acts of the parties in so treating them. Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. [C. C. A.] 124 Fed. 25. Generally a false promise must relate to an existing fact or a fact alleged to exist to amount to fraud; but if the intention not to perform is present at the time of making the promise, it is fraudulent. Wife induced dying husband to convey property under promise to distribute to his heirs. Pollard v. McKenney [Neb.] 96 N. W. 679. A false representation to a wife signing a mortgage, that the money secured would pay off all other incumbrances on the property amounts to fraud. Ristine v. Clements [Ind. App.] 66 N. E. 924.

43. Warfield v. Clark, 118 Iowa, 69; Dudley v. Minor's Ex'r, 100 Va. 728. Representations as to quality of land are expressions of opinion rather than statements of fact where the standing of the parties is equal. Tryce v. Dittus, 199 Ill. 189. A statement as to cash value of land made to one as to whom defendant sustains no confidential relation, and he has examined the property, is a mere statement of opinion. Bossingham v. Syck, 118 Iowa, 192. Statements that worthless territorial patents were of considerable value, giving figures, and highly meritorious as an investment, are of facts. Coulter v. Clark, 160 Ind. 311. An opinion of an insurance applicant in reply to a question is a representation not a warranty. Louis v. Connecticut Mut. Life Ins. Co., 58 App. Div. [N. Y.] 137. Statements as to condition of goods sold as expressions of opinion. Vodrey Pottery Co. v. H. E. Horne Co. [Wis.] 93 N. W. 823. A statement that a saloon is a good business stand to secure a purchase of fixtures is a mere expression of opinion, no fiduciary relation existing between the parties. Consumers' Brewing Co. v. Tobin, 19 App. D. C. 353.

Notes. Expressions of opinion as fraud—35 L. R. A. 417; 37 L. R. A. 604; 45 L. R. A. 814. Right to rely on representations—37 L. R. A. 593; representing things sold to be "good"—15 L. R. A. 795.

44. Live Stock Remedy Co. v. White, 90 Mo. App. 498; Warfield v. Clark, 118 Iowa, 69; Chase v. Rusk, 90 Mo. App. 25. A positive representation of fact may amount to fraud where relied upon by the other party if the maker did not know as to its truth or falsity but merely supposed it to be true. Johnson v. Cate, 75 Vt. 100. Sufficiency of evidence of previous knowledge of falsity of statements in sale of horse. Postal v. Cohn, 83 App. Div. [N. Y.] 27.

45. Summers v. Metropolitan Life Ins. Co., 90 Mo. App. 691; Warfield v. Clark, 118 Iowa, 69; Sprigg v. Commonwealth T. I. & T. Co., 119 Fed. 434; Hutchinson v. Gorman [Ark.] 73 S. W. 793; Ley v. Metropolitan Life Ins. Co. [Iowa] 94 N. W. 568; North Am. Acc. Ins. Co. v. Sickles, 23 Ohio Circ. R. 594; Mizell v. Upchurch [Fla.] 35 So. 9; Aetna Life Ins. Co. v. Rehlaender [Neb.] 94 N. W. 129; Live Stock Remedy Co. v. White, 90 Mo. App. 498. Falsity of a statement raises no presumption of intent to deceive, that arising only when knowledge of falsity is shown. Ley v. Metropolitan Life Ins. Co. [Iowa] 94 N. W. 568. The fraud may avoid the contract where injury resulted to the other party though the party making the misrepresentation did not intend to prejudice the rights of the other. Insurance policy avoided for fraud in application, the other elements of fraud being present, the law will presume the intent. Northwestern Mut. Life Ins. Co. v. Montgomery, 116 Ga. 799.

46. If a party is not incompetent, mere representations by the other party on which he was not entitled to rely do not amount to fraud. Burnham v. Burnham [Wis.] 97 N. W. 176. If a statement of mere matter of opinion was sufficient to put plaintiff on inquiry, he is not entitled to rely upon it. Wrenn v. Truitt, 116 Ga. 708. Statements by a third person that he bought at tax sale lots sold by defendant to plaintiff as his own, suffice to put plaintiff on inquiry. Grosjean v. Galloway, 82 App. Div. [N. Y.] 380. A false representation that the writing contains the intended contract of the parties will not amount to fraud (Johnston v.

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cealment of material facts peculiarly within his knowledge, knowing that the ot party acts as if no such facts existed, is as much fraud as misrepresentation fact.[49] It is immaterial whether fraud amounts to warranties or representatio Consummation of the contract will not estop an action for the fraud,[51] nor ra the transaction.[52] Fraud in execution of a note may extend to renewals th of.[53] Fraud of an agent in a transaction for the principal may be imputed the latter.[54] The peculiar circumstances of the case figure greatly in determin the presence of fraud.[55]

Covenant Mut. Life Ins. Co., 93 Mo. App. 580). especially where the other party being able to read does not read it but accepts the advice of a business man of experience in signing it (MaGee v. Verity, 97 Mo. App. 486); however, where such misrepresentations induce another to sign a contract without reading or knowing its contents, it may amount to fraud (Bostwick v. Mutual Life Ins. Co., 116 Wis. 392; New Omaha Thompson-Houston E. L. Co. v. Rombold [Neb.] 93 N. W. 966). Misreading an instrument to an illiterate, inducing him to believe it as read, is fraud. Layson v. Cooper [Mo.] 73 S. W. 472. A person buying stock in an insurance company may rely on statements of the secretary of the company so that if they are fraudulent relief will be granted. Code, §§ 1714, 1715, 1720, 1737, 125, 126. Warfield v. Clark, 118 Iowa, 69. The injured party may rely on statements as to matters the inquiry into which requires peculiar skill and knowledge. Value of territorial rights under patents. Coulter v. Clark, 160 Ind. 311. False representations as to a mortgage may be relied upon by plaintiff though the truth might have been ascertained by searching the records. Faust v. Hosford [Iowa] 93 N. W. 58. If defects in the subject-matter cannot be ascertained by inspection, false representations intended to prevent discovery amount to fraud. Burnett v. Hensley, 118 Iowa, 575. That the purchaser of a debt might have learned its amount from the mortgage will not prevent fraud of the grantor in misrepresenting such amount. Hutchinson v. Gorman [Ark.] 73 S. W. 793. Misrepresentation as to the legal effect of a release will not avoid it. Jackson v. Pennsylvania R. Co. [N. J. Sup.] 54 Atl. 532. If a bona fide purchaser of a note acts in good faith, that he has cause sufficient to put a prudent man on inquiry or is negligent will not affect his title (Wilson v. Riddler, 92 Mo. App. 335); however, circumstances of suspicion only may be sufficient to charge him with knowledge of invalidity (Brewer v. Slater, 18 App. D. C. 48); sufficiency of facts putting on inquiry (Citizens' State Bank v. Cowles, 39 Misc. [N. Y.] 571; Loftin v. Hill, 131 N. C. 105; Second Nat. Bank v. Weston, 172 N. Y. 250). Where a vendor is some distance from the land and ignorant of its condition and value, the sale will be set aside if he relies on the misrepresentations of the purchaser. Mountain v. Day [Minn.] 97 N. W. 883. An illiterate person without other means of knowledge may rely on statements of agent of the other party as to the contents of a release of damages. Indiana, D. & W. R. Co. v. Fowler, 201 Ill. 152. A representation to obtain credit in one sale may be relied on by the seller as to future sales. Goldsmith v. Stern, 84 N. Y. Supp. 869.

47. **Hale Elevator Co. v. Hale, 201 Ill. 131;** Dudley v. Minor's Ex'r, 100 Va. 728; Ac L. Ins. Co. v. Rehlaender [Neb.] 94 N. 129; North Am. Acc. Ins. Co. v. Sickles, Ohio Circ. R. 594; Hale Elevator Co. v. H 201 Ill. 131; Korbel v. Skocpol [Neb.] 9 W. 1022; Sullivan v. Pierce (C. C. A.) Fed. 104; Mizell v. Upchurch [Fla.] 35 So Burnett v. Hensley, 118 Iowa, 575. The fr must be a moving cause of consent with which it would not have been given [Code, §§ 1568, 1572]. Hartwig v. Cl [Cal.] 72 Pac. 149. False representati made after the contract is complete will affect it. Soule v. Harrington [Mich.] 97 W. 357; Willock v. Dilworth, 204 Pa. Bostwick v. Mut. L. Ins. Co., 116 Wis. Representation as to value of property fered as security for a loan will not amo to fraud where the other party examined property. McMullen v. Griggs, 23 Ohio C R. 417. Sufficiency of reliance on false rep sentations as an inducement to a contr Powell v. Linde Co., 171 N. Y. 675.

48. Nelson v. Grondahl [N. D.] 96 N. 299; Korbel v. Skocpol [Neb.] 96 N. W. 10 Mizell v. Upchurch [Fla.] 35 So. 9. Fa representations by a holder of two mo gages on foreclosure of the second as the amount due on the first, will not av the sale, as they estop the holder fr claiming more than the stated amount. derlied v. Honeywell, 84 N. Y. Supp. The fruits of the fraud need not be obtai immediately after the fraud. Obtain goods on credit six months after induc credit is sufficient. Levy v. Abramsohn, Misc. (N. Y.) 781.

49. Thomas v. Murphy, 87 Minn. 358. Th must be knowledge of the facts which fendant failed to state in order that conce ment may amount to fraud. Kirtley's Ad v. Shinkle, 24 Ky. L. R. 608, 69 S. W. 723.

50. Jeffrey v. United Order of Gol Cross, 97 Me. 176.

51. Acceptance of deed and assumption mortgage will not prevent suit for fraud stating the amount of the mortgage balar Hutchinson v. Gorman [Ark.] 73 S. W. 79

52. Payment before discovery of fra Coulter v. Clark, 160 Ind. 311.

53. Adams v. Ashman, 203 Pa. 536.

54. Thompson v. Barry [Mass.] 68 N. 674.

55. **Acts amounting to fraud:** Fa amounting to fraud (University of Va. Snyder, 100 Va. 567; Stewart v. Dunn, 77 A Div. [N. Y.] 631; Haynes v. Harriman [W 92 N. W. 1100; Fourth Nat. Bank v. Cr [Neb.] 96 N. W. 185; Donnelly v. Rees [C 74 Pac. 433) together with undue influe (Butler v. Carvin [Wash.] 74 Pac. 8 Marsh v. Marsh [Wash.] 73 Pac. 676; Know v. New York [N. Y.] 68 N. E. 860; Furbe Fogler, 97 Me. 585; Lewis v. Hoeldtke [T Civ. App.] 76 S. W. 309; Brown v. L

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§ 2. *Inferences from intrinsic nature and subject of the transaction.*—Contracts which because of their nature are calculated to induce fraud are void.[56]

§ 3. *Inferences from circumstances and condition of parties.*—Undue influence must be control which destroys the free agency of the other party and substitutes for his will that of another.[57] Dominance resulting from mere sympathy and affection does not amount to undue influence.[58] Transactions between persons in close relation by blood,[59] as parent and child,[60] husband and wife,[61] or of confidence, as spiritual advisers and their followers,[62] guardian and ward,[63] executor and those entitled to the estate,[64] co-partners,[65] attorney and client,[66] principal and agent,[67]

[Miss.] 33 So. 284; Nesbit v. Jencks, 81 App. Div. [N. Y.] 140; Brown v. Holden [Iowa] 94 N. W. 482; Hartwig v. Clark [Cal.] 72 Pac. 149; Hale Elevator Co. v. Hale, 201 Ill. 131). Sufficiency of false representations. Lee v. Tarplin, 183 Mass. 52. Misreading contract at execution. Ind., D. & W. R. Co. v. Fowler, 201 Ill. 152. Misrepresentations in insurance application. Parrish v. Rosebud Min. & Mill. Co. [Cal.] 74 Pac. 312. Fraud in sale of patents. Felt v. Bell, 205 Ill. 213. Representations by insurance agent to secure policy; absurdity. Webb v. Moseley [Tex. Civ. App.] 70 S. W. 349. Inadequacy of consideration as showing fraud., Davis v. Thornley, 204 Ill. 266. Misrepresentation to secure surety on bank cashier's bond. Ida County Sav. Bank v. Seidensticker [Iowa] 92 N. W. 893. Amount of untruth in insurance application to avoid policy; meaning of "substantially untrue." Jeffrey v. United Order of Golden Cross, 97 Me. 176. Invalidity of release given by son of a verdict against his father under representations that the latter would pay the son's counsel fees and employ him in business. Hearn v. Hearn, 24 R. I. 328. Mere concealment of insolvency will not always amount to fraud. Stein v. Hill [Mo. App.] 71 S. W. 1107; In re Lewis, 125 Fed. 143.

56. Contract between irrigation company and land office register whereby he was to receive remuneration for a decision regarding lands in dispute before the department. Wash. Irr. Co. v. Krutz (C. C. A.) 119 Fed. 279. Contract of employment with wife of school officer. Nuckols v. Lyle [Idaho] 70 Pac. 401. However see, also, Pungs v. American Brake-Beam Co., 200 Ill. 306; Second Nat. Bank v. Ferguson, 24 Ky. L. R. 1298, 71 S. W. 429, which was a contract with a bank clerk who was also to act as notary, regarding his fees in the latter capacity.

57. Prescott v. Johnson [Minn.] 97 N. W. 891.

58. Adair v. Craig, 135 Ala. 332.

59. Conveyances between brothers, the younger of whom implicitly trusted the other to his injury. Dashner v. Buffington, 170 Mo. 260. Fraud in inducing execution of bond as between uncle and nephew. Tatum v. Tatum's Adm'r [Va.] 43 S. E. 184.

60. Prescott v. Johnson [Minn.] 97 N. W. 891. Conduct of mother toward illegitimate daughter as amounting to undue influence. Bunel v. O'Day, 125 Fed. 303. Fraud by a son inducing an aged mother to convey property to him while she is seriously ill, will warrant setting aside. Becker v. Schwerdtle [Cal.] 74 Pac. 1029. Facts showing undue influence between father and daughter. Colston v. Olroyd, 204 Ill. 435. Sufficiency of evidence of undue influence by administrator and sons in execution of relinquishment of her rights by aged invalid widow. Evans' Adm'r v. Evans, 24 Ky. L. R. 2421, 74 S. W. 224.

61. The presumption of fraudulent conditions is one of fact not of law. Fishel v. Motta [Conn.] 56 Atl. 553; Harraway v. Harraway, 136 Ala. 499. Concealment of adultery by a wife who induces her husband to transfer property to her and then elopes, amounts to fraud. Evans v. Evans [Ga.] 45 S. E. 612. A promise by a wife to perform a certain act inducing her dying husband to convey property to her is fraudulent, where at the time she did not intend to keep her promise. Pollard v. McKenney [Neb.] 96 N. W. 679.

62. This though the influence to bring about the transfer of property was exerted by another than the transferee; conveyance by aged, feeble woman to Dowie. Dowie v. Driscoll, 203 Ill. 480.

63. Hart v. Cannon, 133 N. C. 10.

64. That an executor honestly believed such means to be the best method of protecting property of an estate will not relieve a constructive fraud by him in conveyance of property to the widow whose confidential advisor he was, under representations that she was receiving a fee instead of a life estate. Lampman v. Lampman, 118 Iowa, 140.

65. Confidential relations of partners, as affecting a fraud practiced by one on the other, continues after formation of a corporation to take over the firm property. Sullivan v. Pierce (C. C. A.) 125 Fed. 104.

66. Transactions between an attorney and client will be presumed fraudulent unless the attorney shows the utmost good faith. Young v. Murphy [Wis.] 97 N. W. 496; Goldberg v. Goldstein, 84 N. Y. Supp. 732; Myers v. Luzerne County, 124 Fed. 436. Conveyances between an attorney in fact of an insane person, appointed before insanity and a third person whereby the title to incompetent's land was vested in the attorney will be set aside for fraud. Clay v. Hammond, 199 Ill. 370.

67. Misrepresentations to his principal by an agent concerning the value of land whereby the latter profited under a secret agreement with a third person, amount to fraud. White v. Leech [Iowa] 96 N. W. 709. Fraud of a broker as to his principal forfeits his commissions. Whaples v. Fahys, 84 N. Y. Supp. 793. Where an agent of one of the parties is intrusted with the duty of making an agreed change in an award by arbitrators, his failure is a fraud on the other party whether he so intended or not. McCurdy v. Daniell [Mich.] 97 N. W. 52. A broker for sale of lands on learning that a more advantageous contract than the offer

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or corporate directors and stockholders,[68] will be carefully scrutinized by the courts to prevent fraud or undue influence. Though no particular relation exists between parties beyond that of great confidence, transactions will be set aside where one party is weak and ignorant and the other by superior knowledge or influence secures an undue advantage.[69] An owner retaining a balance for the general contractor is not under obligation to protect interests of a subcontractor who knows of a transfer to the owner by the general contractor, of all his property after insolvency, but does not act thereon.[70]

§ 4. *Remedies.*[71]—An action for fraud in concealing that stock sold was diseased is for deceit, and may be instituted in the county of the fraud.[72]

Pleading.—Plaintiff must prove the representation, its falsity, his reliance thereon, the intent to deceive, and damages suffered.[73] The circumstances of the fraud are properly averred where the fraud and damage sustain to each other the relation of cause and effect.[74]

Fraud as a defense should be raised by plea or answer.[75]

Evidence; questions of fact; verdict.[76]—Evidence that the injured person opened negotiations is admissible; also, evidence of a conversation between defendant and a witness before the transaction relating to another matter, was not prejudicial.[77] In an action for fraud, a verdict for defendant as to the issue of fraud, whether on the main issue or the plea of privilege denying the fraud, is a verdict for defendant on the merits.[78]

FRAUDS, STATUTE OF.

§ 1. Agreements not to be Performed within One Year (108).
§ 2. Promise to Answer for Another (109).
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§ 1. *Agreement not to be performed within one year.*—No action may be

of his principal may be made, perpetrates a fraud upon the latter in failing to inform him of that fact. Holmes v. Cathcart, 88 Minn. 213. A broker for the sale of lands is not guilty of fraud for failing to disclose the identity of a prospective purchaser where the vendors did not ask or attempt to learn his identity. Rank v. Garvey [Neb.] 92 N. W. 1025.

68. Concealment of facts by a corporate director, injuring a stockholder, is fraud because of the fiduciary relations of the parties. Oliver v. Oliver [Ga.] 45 S. E. 232.

69. Misrepresentations to secure the signature of an illiterate to a contract amount to fraud. Spelts v. Ward [Neb.] 96 N. W. 56. Conveyances of an aged, ignorant, destitute, negro woman made under influence of false representations of an intelligent white man in whom she had great confidence, will be set aside. Cannon v. Gilmer, 135 Ala. 302.

70. University of Va. v. Snyder, 100 Va. 567.

71. Limitations, see Limitation of Actions. Particular remedies, see Cancellation of Instruments; Equity; Injunction; Rescission of Contracts; Attachment; and titles relating to various instruments, Deeds; Wills; etc.

72. Not an action for breach of contract; within exception of Rev. St. 1895, art. 1194. Howe G. & M. Co. v. Galt [Tex. Civ. App.] 73 S. W. 828. Sufficiency of allegations of fraud. Warner v. Warner, 30 Ind. App. 578; Jones v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 73 S. W. 1082. Sufficiency of affidavit of defense on ground of fraudulent representations. Strouse v. Querns, 22 Pa. Super. Ct. 6.

73. Grosjean v. Galloway, 82 App. Div. (N. Y.) 380.

74. Northwestern Mut. L. Ins. Co. v. Breautigam [N. J. Law] 54 Atl. 228.

75. Fraud in inadequacy of consideration. Price's Adm'x v. Price's Adm'x, 23 Ky. L. R. 1911, 1947, 66 S. W. 529.

For additional cases see Pleading.

76. Sufficiency of evidence to carry question of fraud to jury. Perkins' Adm'x v. Embry, 24 Ky. L. R. 1990, 72 S. W. 788; Grosjean v. Galloway, 82 App. Div. (N. Y.) 380. Fraud in securing execution of a release for personal injuries is a question for jury.

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maintained on any contract not to be performed within a year,[79] but the statute of frauds has no application unless it can be shown that the agreement could not be performed within a year,[80] though in fact it is not performed within that time,[81] nor where it runs for an indefinite time,[82] nor where it might be terminated within the year by the death of one of the parties,[83] or of a third party,[84] or by mutual consent,[85] or by some external force,[86] or by some act of either party without violating its terms;[87] the test being whether performance was possible and not the expectation of the parties;[88] and where the payment of the consideration is the sole act not to be performed within the year it is not within the statute.[89] A subsequent oral acknowledgment will not validate a contract offending this requirement.[90]

§ 2. *Promise to answer for debt or default of another.*—A collateral agreement to answer for the debt, default or miscarriage[91] must be in writing,[92] but not where the promise is based on a new and substantial consideration,[93] or the promisor has money or property in his hands to pay another's debt,[94] or where the promise is not collateral,[95] or is a novation.[96]

Clayton v. Consolidated Traction Co., 204 Pa. 536. Sufficiency of instructions as to elements of fraud and burden of proof. Von Boeckmann v. Loepp [Tex. Civ. App.] 73 S. W. 849.

77. Perkins' Adm'x v. Embry, 24 Ky. L. R. 1990, 72 S. W. 788.

78. Von Boeckmann v. Loepp [Tex. Civ. App.] 73 S. W. 849.

79. Weber v. Weber [Ky.] 76 S. W. 507; Bastin Tel. Co. v. Richmond Tel. Co. [Ky.] 77 S. W. 702. Contract of employment for 10 years. Bethel v. A. Booth & Co., 24 Ky. L. R. 2024, 72 S. W. 803. Lease for 10 years. Charlton v. Columbia Seal Real Estate Co. [N. J. Eq.] 54 Atl. 444. "By its terms not to be performed," etc., in Ala., Ariz., Cal., Colo., Idaho, Mich., Minn., Mont., Neb., Nev., N. Y., N. D., Ore., S. D., Utah, Wash., Wisc., Wyo. A promise to assume a mortgage debt not due for over a year which might be paid at any time. Roberts v. Lamberton [Wis.] 94 N. W. 650.

80. President, etc., of G. W. Turnpike Co. v. Shafer, 57 App. Div. [N. Y.] 331; Devalinger v. Maxwell [Del.] 54 Atl. 684; In re Field's Estate [Wash.] 73 Pac. 768.

81. Dupignac v. Bernstrom, 76 App. Div. [N. Y.] 105; Drew v. Wiswall, 183 Mass. 554.

82. Drew v. Billings-Drew Co. [Mich.] 92 N. W. 774; Baldwin v. King, Id. Contract of employment. Biglane v. Hicks [Miss.] 33 So. 413. Contract of agency. Royal Remedy & Extract Co. v. Gregory Grocer Co., 90 Mo. App. 53.

83. Zanturjian v. Boornazian [R. I.] 55 Atl. 199. But see Chenoweth v. Pacific Exp. Co., 93 Mo. App. 185, citing Mo. cases; Fanger v. Caspary, 84 N. Y. Supp. 410.

84. Agreements to care for a child. Wynn v. Followill, 98 Mo. App. 463. But see Jones v. Comer [Ky.] 77 S. W. 184; Id., 76 S. W. 392, where point was not raised.

85. New York & T. Land Co. v. Dooley [Tex. Civ. App.] 77 S. W. 1030. But see Biest v. Versteeg Shoe Co., 97 Mo. App. 137.

86. Season of navigation. DeLand v. Hall [Mich.] 96 N. W. 449.

87. Standard Oil Co. v. Denton, 24 Ky. L. R. 906, 70 S. W. 282.

88. In re Field's Estate [Wash.] 73 Pac. 768.

It is sometimes held that contracts which are not intended to be performed within a year within the contemplation of the parties, though they might be completed within that time, are within the statute. May v. Moore, 99 Mo. App. 27; Biest v. Versteeg Shoe Co., 97 Mo. App. 137, exhaustively discussing the doctrine and citing many cases from the various jurisdictions. Chenoweth v. Pacific Exp. Co., 93 Mo. App. 185. And so Eikelman v. Perdew, 140 Cal. 687, 74 Pac. 291.

89. Reed & McCormick v. Gold [Va.] 45 S. E. 868. But see Weber v. Weber [Ky.] 76 S. W. 507.

90. Haslam v. Barge [Neb.] 96 N. W. 245.

91. "Misdoing" in Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, New York, Vermont, Virginia, Washington.

92. See Guaranty and cases cited, and also, Cerrusite Min. Co. v. Steele [Colo. App.] 70 Pac. 1091; Gansey v. Orr, 173 Mo. 532; Indiana Trust Co. v. Finitzer, 160 Ind. 647; Wulff v. Lindsay [Ariz.] 71 Pac. 963; Kesler v. Cheadle [Okl.] 72 Pac. 367; First Nat. Bank v. Gaddis, 31 Wash. 596, 72 Pac. 460; Burson v. Bogart [Colo. App.] 72 Pac. 605; Blumenthal v. Tibbits, 160 Ind. 70; Wood v. Atl. & N. C. R. Co., 131 N. C. 48; Flannery v. Chidgey [Tex. Civ. App.] 77 S. W. 1034; West v. Grainger [Fla.] 35 So. 91; Temple v. Bush [Conn.] 55 Atl. 557; Garrett-Williams Co. v. Hamill, 131 N. C. 57; Matteson v. Moone [R. I.] 54 Atl. 1058.

93. See Guaranty and cases therein cited. Pratt v. Fishwild [Iowa] 96 N. W. 1089; Smith v. Schneider, 84 N. Y. Supp. 238; McIntire v. Schiffer [Colo.] 72 Pac. 1056; Simpson v. Carr [Ky.] 76 S. W. 346.

94. Scherzer v. Muirhead, 84 N. Y. Supp. 159; Howes v. McCrea, 21 Pa. Super. Ct. 592.

95. Linam v. Jones, 134 Ala. 570; Marr v. Burlington, C. R. & N. R. Co. [Iowa] 96 N. W. 716; Manary v. Runyon [Or.] 73 Pac. 1028; Ford v. McLane [Mich.] 91 N. W. 617; Fosha v. Prosser [Wis.] 97 N. W. 924; Bradshaw v. Cochran, 91 Mo. App. 294.

96. Griffin v. Cunningham, 183 Mass. 505; Berg v. Spitz, 84 N. Y. Supp. 532; Stowell v. Gram [Mass.] 69 N. E. 342; Sargent v. Johns, 206 Pa. 386.

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§ 3. *Agreements in consideration of marriage.*—A parol promise to pay debts,[97] or the conveyance of land in consideration of marriage with the promisor is void.[98]

§ 4. *Representations as to character or credit of another.*—In some jurisdictions[99] representations as to the credit or character of another must be in writing to render the maker liable,[1] but representations made pursuant to a secret conspiracy to defraud are not within the statute.[2]

§ 5. *Agreements with real estate brokers.*—In some jurisdictions[3] a contract to pay commissions to a real estate broker must be in writing,[4] and this applies to any person acting as broker, though he may pursue some other vocation.[5] A written promise to pay a certain percentage complies with the statute, though the selling price is afterwards changed by parol.[6]

§ 6. *Agreements by executors or administrators.*—To charge an executor with personal liability to pay the debt of his testator, the promise must be in writing.[7]

§ 7. *Agreements respecting real property or an estate or interest therein.*—Other than leases for not more than one year,[8] no estate or interest in land or in any way relating thereto, may be created, granted, assigned, surrendered, or declared unless by act or operation of law or by deed or conveyance in writing subscribed by the parties thereto.[9] To be within the statute, the contract must be one which transfers or creates some interest in land and merely incidental collateral to a conveyance thereof.[10] Thus an agreement to look after land and pay taxes as they accrue,[11] or to divide profits derived from,[12] or to enter into a partnership to deal in, lands, is not within the statute,[13] and similarly the assumption of the mortgage debt by a purchaser from the mortgagor,[14] or a promise by mortgagee to accept a deed of the mortgaged premises in full satisfaction of the debt,[15] or to make a final payment on a land contract is not within the statute,[16] and a parol gift of a land contract is good where no voluntary act on part of the donor or donee remained to be performed.[17] The sale of all the capital stock of a corporation owning real estate does not transfer an "estate" or "interest" in the lands.[18] An oral agreement establishing a boundary line is good for it is assumed that the parties merely decide what is the true line,[19] but not a parol exchange where some interest in lands is transferred,[20] and similarly an agreement to construct works on the

97. Milner v. Harris [Neb.] 95 N. W. 682.
98. Greenly v. Shelmidine, 83 App. Div. [N. Y.] 559.
99. Ala., Cal., Colo., Idaho, Ind., Ky., La., Me., Mass., Mo., Mich., Okl., Or., S. C., Vt., Va., W. Va., Wyo.
1. St. John Nat. Bank v. Steel [Mich.] 97 N. W. 704.
2. Coulter v. Clark, 160 Ind. 311.
3. Tex., Ind., N. J., Neb., Cal., and a few others.
4. Spence v. Apley [Neb.] 94 N. W. 109; Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227; Beahler v. Clark [Ind. App.] 68 N. E. 613; Kent v. Phenix Art Metal Co. [N. J. Sup.] 55 Atl. 256; Stout v. Humphrey [N. J. Sup.] 55 Atl. 281.
5. Stout v. Humphrey [N. J. Sup.] 55 Atl. 281.
6. S. E. Crowley Co. v. Myers [N. J. Sup.] 55 Atl. 305.
7. Flannery v. Chidgey [Tex. Civ. App.] 77 S. W. 1034.
8. Two years in Fla. Three years in Ind., N. H., N. J., N. C., Pa., Tenn. Five years in Va., W. Va.
9. Where a deed must be acknowledged this does not apply to land contracts. Anderson v. Wallace Lumber & Mfg. Co., 36 Wash. 147, 70 Pac. 247.
10. An agreement to bid in at a foreclosure sale and convey on payment of a certain sum held to be a contract for conveyance of land. Foster v. Ross [Tex. Civ. App.] 77 S. W. 990.
11. New York & T. Land Co. v. Dooley [Tex. Civ. App.] 77 S. W. 1030.
12. McClintock v. Thweatt [Ark.] 73 S. W. 1093.
13. Eaton v. Graham, 104 Ill. App. 296.
14. Roberts v. Lamberton [Wis.] 94 N. W. 650.
15. Montpelier Sav. Bank & Trust Co. v. Follett [Neb.] 94 N. W. 635.
16. Devalinger v. Maxwell [Del.] 54 Atl. 684.
17. In re Huggins' Estate, 204 Pa. 167.
18. Otherwise if the sale were of a railroad bed and rolling stock. Cumberland, etc., R. Co. v. Shelbyville, etc., R. Co. [Ky.] 77 S. W. 690.
19. Sherman v. King [Ark.] 72 S. W. 571; Farr v. Woolfolk [Ga.] 45 S. E. 230; Dierssen v. Nelson, 138 Cal. 394, 71 Pac. 456.

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land of the promisor or another, such as digging an irrigating ditch[21] or a well,[22] or opening streets, is not within the statute.[23]

Except in a few jurisdictions in equity, an oral promise to enter into a written contract upon a subject governed by the statute of frauds is unenforceable.[24] Thus an agreement to lease for more than one year must be in writing,[25] but not an agreement for a future lease for less than a year,[26] and so an agreement to devise,[27] or an agreement to dedicate ways.[28] A sale of standing timber when its immediate conversion into personalty is not contemplated is treated as a sale of real estate,[29] as is a sale of growing grass,[30] or an agreement to extract minerals.[31]

The creation of an easement must be by a written instrument,[32] and a parol permission to use the land of another amounts to a mere license which may be revoked at any time.[33]

Agreements by heirs for the relinquishment of their interests,[34] or to treat conveyances as advancements,[35] or in the nature of a compromise of their claims,[36] are so related to estates or interests in lands as to come within the statute.

Generally an express trust of lands is not enforceable unless it is in writing,[37] but the statute does not apply to constructive or resulting trusts which are created by operation of law;[38] but the mere refusal to perform an oral trust will not create a resulting or constructive trust,[39] though courts will not permit a man to use the statute as an instrument to commit fraud.[40]

The surrender of a written instrument coupled with an intention to extinguish the interest of the holder is a surrender by operation of law and not within the statute.[41]

§ 8. *Sale of goods.*—The statute applies to a contract for the sale of goods wares and merchandise[42] above the value of $50,[43] except where the buyer shall

20. Laufer v. Powell, 30 Tex. Civ. App. 604; McCoy v. McCoy [Ind. App.] 69 N. E. 193.

21. Croke v. American Nat. Bank [Colo. App.] 70 Pac. 229.

22. Plunkett v. Meredith [Ark.] 77 S. W. 600.

23. Drew v. Wiswall, 183 Mass. 554.

24. Hammon on Contracts, § 281.

25. Brosius v. Evans [Minn.] 97 N. W. 373; Donovan v. P. Schoenhofen Brewing Co., 92 Mo. App. 341. Where a lease is invalid by the statute in many states the tenancy becomes a tenancy from year to year. Butts v. Fox, 96 Mo. App. 437. But in this case the tenant must have possession or the right thereto. Seymour v. Warren, 86 App. Div. [N. Y.] 403.

26. Donovan v. P. Schoenhofen Brewing Co., 92 Mo. App. 341. Contra Butts v. Fox, 96 Mo. App. 437; Brosius v. Evans [Minn.] 97 N. W. 373.

27. Venable & Bays v. Stamper [Va.] 45 S. E. 738; Teske v. Dittberner [Neb.] 98 N. W. 57; In re Sheldon's Estate [Wis.] 97 N. W. 524; Spencer v. Spencer [R. I.] 55 Atl. 637; Alerding v. Allison [Ind. App.] 68 N. E. 185.

28. On the ground that dedication may be by parol. Mann v. Bergmann, 203 Ill. 406.

29. Wiggins v. Jackson, 24 Ky. L. R. 2189, 73 S. W. 779; Strubbe v. Lewis, 25 Ky. L. R. 605, 76 S. W. 150; Drake v. Howell [N. C.] 45 S. E. 539; Kileen v. Kennedy [Minn.] 97 N. W. 126. But see Merchants' Coal Co. v. Billmeyer [W. Va.] 46 S. E. 121.

30. Kirkeby v. Erickson [Minn.] 96 N. W. 705.

31. McConathy v. Lanham, 25 Ky. L. R. 971, 76 S. W. 535. And an agreement to pay a royalty on ore extracted is construed as a lease. York v. Washburn, 118 Fed. 316.

32. Plunkett v. Meredith [Ark.] 77 S. W. 600. Remission of toll by a turnpike company construed not be an easement. President, etc., of G. W. Turnpike Co. v. Shafer, 57 App. Div. [N. Y.] 331; City of Kewanee v. Oatley [Ill.] 68 N. E. 388.

33. Fonda, etc., R. Co. v. Olmstead, 84 App. Div. [N. Y.] 127; Maupin v. Chicago, etc., R. Co., 171 Mo. 187; City of Kewanee v. Otley [Ill.] 68 N. E. 388.

34. Riddell v. Riddell [Neb.] 97 N. W. 609; Gary v. Newton, 201 Ill. 170.

35. Gary v. Newton, 201 Ill. 170.

36. Howton v. Gilpin, 24 Ky. L. R. 630, 69 S. W. 766.

37. Elder v. Webber [Neb.] 92 N. W. 126; Brown v. White [Ind. App.] 67 N. E. 273; Potter v. Clapp [Ill.] 68 N. E. 81; Spencer v. Spencer [R. I.] 55 Atl. 637; Marvel v. Marvel [Neb.] 97 N. W. 640; Rogers v. Richards [Kan.] 74 Pac. 255; Hall v. Small [Mo.] 77 S. W. 733. But see Hamilton v. McKinney, 52 W. Va. 317.

38. Brown v. White [Ind. App.] 67 N. E. 273; McClellan v. Grant, 83 App. Div. [N. Y.] 599.

39. McCloskey v. McCloskey, 205 Pa. 491.

40. See post, § 10.

41. Hogue v. Farmers' Mut. Fire Ins. Co., 116 Wis. 656; Wadge v. Kittleson [N. D.] 97 N. W. 356.

42. "Goods, wares and things in action" in some states.

43. $100 in Ariz.; $30 in Ark., Me., Mo., N

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accept part of the goods so sold and actually receive the same or give something in earnest in part payment to bind the bargain.[44] The memorandum is merely evidence of the sale, and is wholly distinct from the contract of sale itself.[45] The statute has to do with executory sales of property[46] and not contracts for work and labor,[47] or for the manufacture[48] or installation upon real property[49] of materials. The phrase "goods, wares and merchandise" is broad enough to cover all kinds of personal property,[50] such as certificates of stock,[51] choses in action,[52] but not the inchoate right to an unissued patent.[53] But where the contract does not contemplate the passing of title but merely the possession as security, it need not be in writing.[54] Unless so required by statute, a trust of personal property need not be in writing.[55]

§ 9. *What will satisfy the statute. A. Writing.*—The writing requisite to satisfy the statute as to a sale of goods should designate with reasonable certainty (1) the parties, (2) the subject-matter, (3) and in some states the price for which the goods sold.[56] It may be spelled out of one or more written documents,[57] but these must show that a contract was mutually agreed upon,[58] and be so connected, either by reference or otherwise, that no misunderstanding is possible.[59] The tender of an executed deed in performance of a land contract signed by the other party is held to be sufficient compliance with the statute,[60] but a check bearing on its face the statement that it is in "part payment for coal lands" is not sufficient to constitute a written acceptance of a contract for sale of lands,[61] nor an undelivered deed to evidence a land contract,[62] but an improperly executed will may be treated as a contract to devise.[63] The resolution of a corporation authorizing an officer to sell real estate cannot be construed as part of a contract for sale.[64] In the case of a sale of goods the writing need only be signed by the party to be charged, and parol acceptance by the other party brings it within the statute,[65] but where the entire contract must be in writing, the acceptance as well as the

J.; $200 in Cal., Idaho; $300 in Mont., Utah; $33 in N. H.; $40 in Vt.; all sales in Fla., Iowa; all sales of movables in La.

44. Hammon, Cont. p. 574.

45. Bowers v. Whitney, 88 Minn. 168.

46. Gross v. Heckert [Wis.] 97 N. W. 952.

47. Plunkett v. Meredith [Ark.] 77 S. W. 600; Bastin Tel. Co. v. Richmond Tel. Co. [Ky.] 77 S. W. 702; Hill Bros. v. Bank of Seneca [Mo. App.] 73 S. W. 307; Stowell v. Gram [Mass.] 69 N. E. 342; Champlain Const. Co. v. O'Brien, 117 Fed. 271; May v. Walker, 20 Pa. Super. Ct. 581; Boeff v. Rosenthal, 38 Misc. (N. Y.) 760.

48. Gross v. Heckert [Wis.] 97 N. W. 952.

49. Champlain Const. Co. v. O'Brien, 117 Fed. 271; Cox v. Halloran, 82 App. Div. (N. Y.) 639; Stowell v. Gram [Mass.] 69 N. E. 342; Boeff v. Rosenthal, 38 Misc. (N. Y.) 760; May v. Walker, 20 Pa. Super. Ct. 581; Underfeed Stoker Co. v. Detroit Salt Co. [Mich.] 97 N. W. 959.

50. French v. Schoonmaker [N. J. Law] 54 Atl. 225.

51. Nichols v. Clark, 40 Misc. (N. Y.) 107.

52. French v. Schoonmaker [N. J. Law] 54 Atl. 225; Greenberg v. Davidson, 39 Misc. (N. Y.) 796.

53. Cook v. Sterling Elec. Co., 118 Fed. 45. Assignment of a patent must be in writing. U. S. Rev. St. § 4898.

54. Helfrech L. & M. Co. v. Honaker [Ky.] 76 S. W. 342; Armstrong v. Owens [Miss.] 35 So. 320; Hall v. Cayot [Cal.] 74 Pac. 299.

55. Martin v. Martin [Or.] 72 Pac. 639; Stanley's Estate v. Pence, 160 Ind. 636; Maher v. Aldrich, 205 Ill. 242.

56. Peycke v. Ahrens, 98 Mo. App. 456.

57. Woodruff v. Butler [Conn.] 55 Atl. 167; Peycke v. Ahrens, 98 Mo. App. 456; Bristol v. Mente, 79 App. Div. [N. Y.] 67. Series of letters. Seacoast R. Co. v. Wood [N. J. Eq.] 56 Atl. 337.

58. Mathes v. Bell [Iowa] 96 N. W. 1093; Niles v. Hancock, 140 Cal. 157, 73 Pac. 840; Standard Wall Paper Co. v. Towns [N. H.] 56 Atl. 744; Slade v. Boutin, 63 App. Div. [N. Y.] 537; Leatherbee v. Bernier, 182 Mass. 507.

59. Devine v. Warner [Conn.] 56 Atl. 562.

60. Smith v. Frankfort, etc., R. Co., 24 Ky. L. R. 2040, 72 S. W. 1088.

61. Thompson v. New South Coal Co., 135 Ala. 630.

62. Schneider v. Vogler [Neb.] 97 N. W. 1018.

63. Shroyer v. Smith, 204 Pa. 310.

64. Cumberland, etc., R. Co. v. Shelbyville, etc. R. Co., 25 Ky. L. R. 1265, 77 S. W. 690.

65. Jones v. Wattles [Neb.] 92 N. W. 765; Merchants' Coal Co. v. Billmeyer [W. Va.] 46 S. E. 121; Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227; Burk v. Mead, 159 Ind. 252; Bristol v. Mente, 79 App. Div. [N. Y.] 67. Where written offer runs for a definite time and is not accepted, a subsequent parol acceptance will not be sufficient. Sivell v. Hogan [Ga.] 46 S. E. 67.

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offer must be written,[66] and when signed by one party only, it is unenforceable,[67] but it is treated as signed if the name of the party appears at the top, middle or end of the instrument,[68] and where purporting to be executed in duplicate, if one copy is properly made, it is sufficient.[69] An extension of a written lease must be in writing.[70] A telegram signed by the party is a sufficient memorandum to satisfy the statute as to a sale of goods.[71] Auction sales are within the terms of the statute, and to bind the parties the sale must be evidenced by some note or memorandum.[72] Written admissions to third persons of existence of a parol contract are not equivalent to the writing required,[73] but are strong evidence to show the existence of a parol contract when specific performance is sought.[74] The writing should also contain all the substantial terms of the agreement.[75] In some states the consideration must be so expressed as to render parol evidence thereof unnecessary,[76] but if it can be gathered from the entire contract it is sufficient,[77] and in some jurisdictions this requirement is made unnecessary by statute,[78] and even where the consideration must be expressed, the statute does not prevent inquiry as to the true consideration and recovery thereof.[79] The description of the subject-matter is an essential part of the writing,[80] but need only be such as to identify it with reasonable accuracy.[81] It cannot be identified by the words,—"lots to be subsequently picked out" by one of the parties.[82]

At common law the authority of an agent to execute an unsealed instrument need not be in writing,[83] but in many jurisdictions this is changed by statute or decision,[84] and this applies to the authority of a trustee to sell.[85] The statute has no application to the case of an undisclosed principal,[86] and the improperly authorized action of the agent may be ratified by the acts of the principal.[87]

The execution of a sold note by a broker acting for both buyer and seller is

66. Kileen v. Kennedy [Minn.] 97 N. W. 126; Spence v. Apley [Neb.] 94 N. W. 109.

67. Charlton v. Columbia Seal Real Estate Co., 64 N. J. Eq. 631; Love v. Atkinson, 131 N. C. 544. But see Harriman v. Tyndale [Mass.] 69 N. E. 353.

68. Anderson v. Wallace Lumber & Mfg. Co., 30 Wash. 147, 70 Pac. 247.

69. Equitable Mfg. Co. v. Allen [Vt.] 56 Atl. 87.

70. McConathy v. Lanham, 25 Ky. L. R. 971, 76 S. W. 535. Where a tenant for one year exercises his option to renew a written lease, according to a clause contained therein, the lease is treated as a lease for the entire time and hence the renewal need not be written. Caley v. Thornquist [Minn.] 94 N. W. 1084.

71. Jones v. Wattles [Neb.] 92 N. W. 765.

72. Auction sales. Seymour v. National B. & L. Ass'n, 116 Ga. 285; Atkinson v. Washington & Jefferson College [W. Va.] 46 S. E. 253.

73. Brunswick Grocery Co. v. Lamar, 116 Ga. 1; Allan v. Bemis [Iowa] 94 N. W. 560.

74. Conlon v. Mission of the Immaculate Virgin, 87 App. Div. [N. Y.] 165.

75. J. T. Stewart & Son v. Cook [Ga.] 45 S. E. 398; Saveland v. Wisconsin Western R. Co. [Wis.] 95 N. W. 120.

76. Chellis v. Grimes [N. H.] 56 Atl. 742.

77. Union Nat. Bank v. Leary, 77 App. Div. [N. Y.] 332, 12 N. Y. Ann. Cas. 257.

78. Strubbe v. Lewis, 25 Ky. L. R. 605, 76 S. W. 150; Ewing v. Stanley, 24 Ky. L. R. 633, 69 S. W. 724; Burk v. Mead, 159 Ind. 252; Finkelstein v. Kessler, 84 N. Y. Supp. 266.

79. Halvorsen v. Halvorsen [Wis.] 97 N. W. 494, and see Evidence, § 5.

80. Beckmann v. Mepham, 97 Mo. App. 161.

81. Biest v. Versteeg Shoe Co., 97 Mo. App. 137; Beckmann v. Mepham, 97 Mo. App. 161.

Illustrations: And so a description of a house and lot by its street and number (Tobin v. Larkin, 183 Mass. 389; Claphan v. Barber [N. J. Eq.] 56 Atl. 370) or of land by its common name (Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227). Land as "owned by A. B." when no ambiguity can arise is sufficient. Heyward v. Wilmarth, 78 N. Y. Supp. 347; Moayon v. Moayon, 24 Ky. L. R. 1641, 72 S. W. 33, 60 L. R. A. 415; Strubbe v. Lewis, 25 Ky. L. R. 605, 76 S. W. 150.

82. Chellis v. Grimes [N. H.] 56 Atl. 742.

83. Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805; Ober v. Stephens [W. Va.] 46 S. E. 195.

84. Seacoast R. Co. v. Wood [N. J. Eq.] 56 Atl. 337; Street v. Collier [Ga.] 45 S. E. 294; Thompson v. New South Coal Co., 135 Ala. 630; Brandrup v. Britten, 11 N. D. 376. Change of purchase price by parol does not render authority to convey invalid. Rank v. Garvey [Neb.] 92 N. W. 1025.

85. Daniel v. Garner [Ark.] 76 S. W. 1063.

86. Tobin v. Larkin, 183 Mass. 389; Seacoast R. Co. v. Wood [N. J. Eq.] 56 Atl. 337.

87. Kriz v. Peege [Wis.] 95 N. W. 108; Michigan Cent. R. Co. v. Chicago, etc., R. Co. [Mich.] 93 N. W. 882.

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sufficient to satisfy the statute,[88] and the memorandum of an auction sale may be executed by the auctioneer.[89]

(§ 9) *B. Delivery and acceptance.*—The delivery of the goods and acceptance by the purchaser is sufficient to satisfy the statute,[90] and this applies to the delivery of an assignment of a chose in action.[91] There must be manual delivery and acceptance and not merely that which would constitute a sale,[92] and the delivery must be with the assent of the vendor,[93] and where there is no change of custody there must be plain and unequivocal proof that there was an intention to vest possession in the vendee discharged of all liens and the vendee must accept the goods so purchased;[94] and placing the goods in an agreed place where they would still be in the possession and control of the seller,[95] or delivery to a common carrier,[96] or leaving with the vendor who is co-owner,[97] is insufficient.

(§ 9) *C. Part payment and earnest money.*—The part payment required by the statute must be for the specific goods sold and not on a running account,[98] but need not be made at the time of sale.[99]

§ 10. *Operation and effect of statute.*—Noncompliance with the statute of frauds, save in the case of sales of goods, does not make the transaction void but merely unenforceable;[1] nor where fully executed may it be set aside;[2] nor is the statute of frauds any bar to an action for a money consideration when the contract is otherwise fully executed,[3] nor to a suit on the common counts for the part fully executed;[4] but no recovery may be had on the executory part of the contract.[5] Moreover, a court of equity will not permit the statute to be used as an instrument for fraud, and in some cases where the parties have so altered their position that damages are inadequate and it would amount to gross fraud not to give relief, specific performance or a constructive trust will be decreed,[6] and some courts place their remedy on the ground of equitable estoppel,[7] but not every case where the nonperformance of a parol agreement whether through ignorance,[8] or otherwise,[9] will

88. Reid v. Alaska Packing Ass'n [Or.] 73 Pac. 337.
89. Atkinson v. Washington & Jefferson College [W. Va.] 46 S. E. 253.
90. Badger Tel. Co. v. Wolf River Tel. Co. [Wis.] 97 N. W. 907; Lathrop v. Humble [Wis.] 97 N. W. 905; Miss. Cotton Oil Co. v. Smith [Miss.] 33 So. 443.
91. Greenberg v. Davidson, 39 Misc. (N. Y.) 796.
92. Devine v. Warner, 75 Conn. 375; Brunswick Grocery Co. v. Lamar, 116 Ga. 1; Shelton v. Thompson, 96 Mo. App. 327.
93. Follett Wool Co. v. Utica T. & D. Co., 84 App. Div. (N. Y.) 151; Ankele v. Elder [Colo. App.] 75 Pac. 29.
94. Devine v. Warner [Conn.] 56 Atl. 562.
95. Shelton v. Thompson, 96 Mo. App. 327.
96. Dallavo v. Richardson [Mich.] 96 N. W. 20; Gatiss v. Cyr [Mich.] 96 N. W. 26.
97. Gerndt v. Conradt [Wis.] 93 N. W. 804.
98. Berwin v. Bolles, 183 Mass. 340.
99. Dallavo v. Richardson [Mich.] 96 N. W. 20.
1. Cammack v. Prather [Tex. Civ. App.] 74 S. W. 354; In re Field's Estate [Wash.] 73 Pac. 768; Conlon v. Mission of Immaculate Virgin, 87 App. Div. (N. Y.) 165; York v. Washburn, 118 Fed. 316; Riley v. Haworth, 30 Ind. App. 377; Throckmorton v. O'Reilly [N. J. Eq.] 55 Atl. 56. Unenforceable deed will give color of title. Street v. Collier [Ga.] 45 S. E. 294. A parol contract concerning lands good consideration for a note. Ballard v. Camplin [Ind.] 67 N. E. 505. And see Brown v. White [Ind. App.] 67 N. E. 273.
2. In re Field's Estate [Wash.] 73 Pac. 768; Maupin v. Chicago, R. I. & P. R. Co., 171 Mo. 187; Cammack v. Prather [Tex. Civ. App.] 74 S. W. 354.
3. Fernald v. Town of Gilman, 123 Fed. 797; Halvorsen v. Halvorsen [Wis.] 97 N. W. 494; McCoy v. McCoy [Ind. App.] 69 N. E. 193; Jones v. Comer [Ky.] 76 S. W. 392; Schlueter v. Leady, 103 Ill. App. 425; Chenoweth v. Pac. Exp. Co., 93 Mo. App. 185; Bethel v. A. Booth & Co., 24 Ky. L. R. 2024, 72 S. W. 803; Smith v. Davis, 90 Mo. App. 533; Eaton v. Graham, 104 Ill. App. 296; York v. Washburn, 118 Fed. 316. Statute of Frauds does not deal with executed contracts. Halvorsen v. Halvorsen [Wis.] 97 N. W. 494.
4. Van Arsdale v. Buck, 82 App. Div. (N. Y.) 383; Scheuer v. Monash, 40 Misc. (N. Y.) 668; Interstate Hotel Co. v. Woodward & B. Amusement Co. [Mo. App.] 77 S. W. 114; Jones v. Comer [Ky.] 77 S. W. 184; Weber v. Weber [Ky.] 76 S. W. 507. But see Beahler v. Clark [Ind. App.] 68 N. E. 613.
5. Weber v. Weber [Ky.] 76 S. W. 507; Seymour v. Warren, 86 App. Div. (N. Y.) 403.
6. Teske v. Dittberner [Neb.] 98 N. W. 57; Greenley v. Shelmidine, 83 App. Div. (N. Y.) 559; Allen v. Moore, 30 Colo. 307, 70 Pac. 682; McCoy v. McCoy [Ind. App.] 69 N. E. 193.
7. Union Cent. L. Ins. Co. v. Johnson's Adm'x [Ky.] 76 S. W. 335.
8. Smith v. Marsh [Mich.] 93 N. W. 1091.

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be construed as a constructive or resulting trust. Courts of equity will enforce specific performance of a parol contract on the ground of part performance when the agreement is certain and definite,[10] and not subject to a conflict of evidence;[11] the acts refer to and result from the agreement and are evidence thereof,[12] and the contract is so far executed that he cannot be compensated in damages.[13] In case of a parol conveyance or land contract there must be a change of the possession[14] which must be new, absolute, and yielded to by the other party and not a mere continuation of a former possession,[15] and valuable improvements,[16] with assent of grantor.[17] Payment of a money consideration by itself is insufficient.[18] Where the contract is entire and any part is within the statute, the whole must satisfy the statute.[19] Where the statute goes to the validity of the contract as in case of a sale of goods, the law of the state where the contract was made governs,[20] and similarly the law existing at the time the contract was made.[21] The exception of judicial sales from the operation of the statute does not apply to mortgage foreclosures under a power of sale.[22] The defense is personal to the parties, hence a stranger cannot avail of it to avoid the contract;[23] but he may do so to show that a sale of goods to a prior vendee was void.[24]

§ 11. *Pleading and proof.*—The complaint need not set up that the contract is in writing, for, till the contrary is shown, it is presumed to be enforceable;[25] but where the complaint shows that the contract is not in writing when so required

8. Hall v. Small [Mo.] 77 S. W. 733; McCloskey v. McCloskey, 205 Pa. 491.

10. Venable v. Stamper [Va.] 45 S. E. 738; Plunkett v. Bryant [Va.] 45 S. E. 742.

11. Mathes v. Bell [Iowa] 96 N. W. 1093; Stone v. Hill, 52 W. Va. 63; Seitman v. Seitman, 204 Ill. 504; Plunkett v. Bryant [Va.] 45 S. E. 742.

12. Riddell v. Riddell [Neb.] 97 N. W. 609; Teske v. Dittberner [Neb.] 98 N. W. 57; Seitman v. Seitman, 204 Ill. 504.

13. Plunkett v. Bryant [Va.] 45 S. E. 742; Venable v. Stamper [Va.] 45 S. E. 738.

Things for which money is not regarded as compensation: Moving on land and caring for testator. Caldwell v. Drummond [Iowa] 96 N. W. 1122. Moving from a distant state and paying money for improvements. Oberlender v. Butcher [Neb.] 93 N. W. 764. Christening a child with name of promisor. Daily v. Minnick, 117 Iowa, 563. Long and continued services. Teske v. Dittberner [Neb.] 98 N. W. 57. Marriage to promisor. Milner v. Harris [Neb.] 95 N. W. 682, and semble, Allen v. Moore, 30 Colo. 307, 70 Pac. 682. Possession for 2 mos. under 3-year lease. Browder v. Phinney, 30 Wash. 74, 70 Pac. 264. Giving up business and making long journey. Spencer v. Spencer [R. I.] 55 Atl. 637.

For what money is regarded as compensatory: Lease of lands. Henley v. Cottrell Real Estate, I. & L. Co. [Va.] 43 S. E. 191. Delivery of mail under contract for four months. Young v. Ledford, 99 Mo. App. 565. Giving of services. Conlon v. Mission of Immaculate Virgin, 39 Misc. [N. Y.] 215. Labor on farm. Venable v. Stamper [Va.] 45 S. E. 738.

14. McCarty v. May [Tex. Civ. App.] 74 S. W. 804; Conlon v. Mission of Immaculate Virgin, 39 Misc. (N. Y.) 215; Riley v. Haworth, 30 Ind. App. 377; Allan v. Bemis [Iowa] 94 N. W. 560; Oberlender v. Butcher [Neb.] 93 N. W. 764; Donovan v. Shoenhofen Brew. Co. [Mo. App.] 76 S. W. 715; Rowe v. Henderson [Ind. Ter.] 76 S. W. 250. But see Teske v. Dittberner [Neb.] 98 N. W. 57.

15. Riley v. Haworth, 30 Ind. App. 377; Allan v. Bemis [Iowa] 94 N. W. 560.

16. Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805; Pembroke v. Logan [Ark.] 74 S. W. 297; McCarty v. May [Tex. Civ. App.] 74 S. W. 804; Rowe v. Henderson [Ind. T.] 76 S. W. 250; Donovan v. P. Shoenhofen Brew. Co. [Mo. App.] 76 S. W. 715; Cauble v. Worsham [Tex.] 70 S. W. 737; Venable v. Stamper [Va.] 45 S. E. 738. Improvements of husband on wife's estate insufficient to sustain specific performance of her parol contract to convey. Plunkett v. Bryant [Va.] 45 S. E. 742; Pugh v. Spicknall [Or.] 73 Pac. 1020.

17. Burnell v. Bradbury [Kan.] 74 Pac. 279.

18. McCarty v. May [Tex. Civ. App.] 74 S. W. 804; Leis v. Potter [Kan.] 74 Pac. 622; Riley v. Haworth, 30 Ind. App. 377; Charlton v. Columbia Real Estate Co., 64 N. J. Eq. 631; Thompson v. New South Coal Co., 135 Ala. 630; Jones v. Nat. Cotton Oil Co. [Tex. Civ. App.] 72 S. W. 248; Riddell v. Riddell [Neb.] 97 N. W. 609; Merchants' State Bank v. Ruettell [N. D.] 97 N. W. 853. But see Mull v. Smith [Mich.] 94 N. W. 183.

19. Kent v. Phenix Art Metal Co. [N. J.] 55 Atl. 256; In re Sheldon's Estate [Wis.] 97 N. W. 524; Beckmann v. Mepham, 97 Mo. App. 161; Bastin Tel. Co. v. Richmond Tel. Co. [Ky.] 77 S. W. 702; Bruckman v. Hargadine, etc., Co., 91 Mo. App. 454.

20. Jones v. Nat. Cotton Oil Co. [Tex. Civ App.] 72 S. W. 248.

21. Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805.

22. Seymour v. Nat. B. & L. Ass'n, 116 Ga. 285.

23. Gary v. Newton, 201 Ill. 170; St. Louis, I. M. & S. R. Co. v. Hall [Ark.] 74 S. W. 293.

24. Shelton v. Thompson, 96 Mo. App. 327. Contra, Garcia v. U. S., 37 Ct. Cl. 243.

25. Matthews v. Wallace [Mo. App.] 78 S. W. 296; Cox v. Peltier, 159 Ind. 355; Walker

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by the statute, demurrer is the appropriate remedy,[26] and in some jurisdictions an answer setting up the statute of frauds against such a complaint will be held bad,[27] though where the fact that contract, unenforceable by the statute, appears for the first time at the trial, an objection to the admissibility of evidence will be sustained.[28] Generally, to take advantage of the statute of frauds it must be pleaded,[29] and that the contract was oral cannot be shown under a general denial,[30] but in some states this is permitted, where, by the terms of the statute, the contract is void,[31] and a general denial by a subsequent purchaser of goods to an allegation of ownership is sufficient to raise the question of the statute of frauds;[32] but where the question of the invalidity is not raised at the trial, it cannot be raised on appeal.[33] Written statements to others, not sufficient to constitute the writing required by the statute, are evidence of an oral promise.[34]

§ 12. *Question for court or jury.*—A question of fact, such as the authenticity of a signature,[35] or whether there was an acceptance of goods,[36] is a question for the jury.

§ 13. *Instructions.*—The court should explain to the jury the difference between the acceptance and delivery required by the statute of frauds and that requisite to pass title to a sale of goods,[37] and an instruction that where the contract was unenforceable the parol contract established the rate which the plaintiff was entitled to recover on quantum valebat was also held to be bad,[38] and also that an agreement settling a boundary must be in writing.[39]

FRAUDULENT CONVEYANCES.

§ 1. The Fraud and Its Elements.—A. In General (116). B. Consideration (117). C. Retention of Possession or Apparent Title (118). D. Reservation of Benefits and Resulting Trusts (120). E. Intent (120). F. Fraud of Grantee or Notice Affecting Him (121). G. Preferences to Creditors (122). H. Relationship of Parties (122).
§ 2. Validity and Effect (123).
§ 3. Who May Attack and Conditions Precedent (125).
§ 4. Rights and Liabilities of Persons Claiming under Fraudulent Grantee (126).
§ 5. Extent of Grantee's Liability (126).
§ 6. Remedies of Creditors (127).
§ 7. Priorities between Creditors on Setting Aside Conveyances, and Disposition of Proceeds (129).

§ 1. *The fraud and its elements. A. In general.*—As to the transfer of personalty, the law of the state of the making of the contract governs,[40] and a statute making sales in bulk "of stocks of merchandise" fraudulent, unless its provisions are complied with, has been held to be valid.[41] In the absence of fraud

v. Cooper, 97 Mo. App. 441. Contra, McCoy v. McCoy [Ind. App.] 69 N. E. 193.

26. Seamans v. Barentsen, 78 App. Div. (N. Y.) 36; Thompson v. New South Coal Co., 135 Ala. 630; Marr v. Burlington, etc., R. Co. [Iowa] 96 N. W. 716; Gary v. Newton, 201 Ill. 170.

27. Marr v. Burlington, etc., R. Co. [Iowa] 96 N. W. 716; Seamans v. Barentsen, 78 App. Div. (N. Y.) 36.

28. Fanger v. Caspary, 84 N. Y. Supp. 410. But not where it appears on the face of the complaint. Marr v. Burlington, etc., C. R. R. Co. [Iowa] 96 N. W. 716.

29. Davis v. Greenwood [Neb.] 96 N. W. 526; Beckmann v. Mepham, 97 Mo. App. 161; Young v. Ledford, 99 Mo. App. 565; Cerrusite Min. Co. v. Steele [Colo. App.] 70 Pac. 1091; Banta v. Banta, 84 App. Div. (N. Y.) 133.

30. Walker v. Cooper, 97 Mo. App. 441; Royal R. & E. Co. v. Gregory Grocer Co., 90 Mo. App. 53.

31. Riif v. Riibe [Neb.] 94 N. W. 517; Indiana Trust Co. v. Finitzer, 160 Ind. 647.

32. Shelton v. Thompson, 96 Mo. App. 327.

33. Hefferlin v. Karlman [Mont.] 74 Pac. 201.

34. Conlon v. Mission of the Immaculate Virgin, 87 App. Div. (N. Y.) 165.

35. Devine v. Warner [Conn.] 56 Atl. 562.

36. Standard Wall Paper Co. v. Towns [N. H.] 56 Atl. 744; Devine v. Warner, 75 Conn. 376.

37. The following held bad:—"If you find from all the language of the parties that there was such a meeting of minds of the parties that the vendee considered he had bought the tobacco and the vendor that he had sold it, there was a sale of tobacco and a constructive delivery." Devine v. Warner, 75 Conn. 375.

38. Riif v. Riibe [Neb.] 94 N. W. 517.

39. Farr v. Woolfolk [Ga.] 45 S. E. 230.

40. Arnold v. Eastin's Trustee [Ky.] 76 S. W. 355.

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a mortgage to secure future advances is valid,[42] but under the statute an unrecorded reservation of title in the seller, the purchaser to have possession or power of disposition, is void as to the latter's creditors.[43] Generally, fraud is never presumed,[44] and the burden of establishing it is on the party averring it,[45] by clear and convincing evidence.[46]

(§ 1) *B. Consideration.*—A voluntary conveyance is not per se fraudulent as to existing creditors;[47] to render it void it must appear that the grantor was insolvent at the time of the transfer,[48] which the creditor has the burden to prove,[49] and that the creditors[50] seeking relief[51] were prejudiced in the collection of their debts thereby, whether the grantee had notice of the grantor's fraud or not,[52] and a transfer of property exempted from the debts of the grantor[53] as a homestead, cannot be said to prejudice them,[54] unless the property is above the statutory limit in value.[55]

41. Tenn. Act 1901, c. 133. Neas v. Borchers, 109 Tenn. 398. Under Wis. Rev. St. 1898, § 2317b the failure of the purchaser of a stock of goods in bulk to notify the seller's creditors is not conclusive but only presumptive evidence of fraud. Evidence held sufficient to overcome the presumption. Fisher v. Herrmann [Wis.] 95 N. W. 392. Evidence held sufficient to show sale of goods in bulk fraudulent. Blossman & Co. v. Friske [Tex. Civ. App.] 76 S. W. 73.

42. Kirby v. Raynes [Ala.] 35 So. 118.

43. In re Carpenter, 125 Fed. 831.

44. Edwards v. Story, 105 Ill. App. 433; Eickstaedt v. Moses, 105 Ill. App. 634. The failure of debtor to produce his books of accounts when required raises a presumption of fraud. Nat. Bank of Republic v. Hobbs, 118 Fed. 626.

45. Metropolitan Bank v. Blaise, 109 La. 92; Rachofsky v. Benson [Colo. App.] 74 Pac. 655; Morgan v. Bostic, 132 N. C. 743; Edwards v. Anderson [Tex. Civ. App.] 71 S. W. 555; Thompson v. Zuckmayer [Iowa] 94 N. W. 476. A showing that the stock was transferred by indorsing the certificates in blank does not shift the burden of showing absence of fraud to the transferee. Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273.

46. Costello v. Friedman [Ariz.] 71 Pac. 935. Findings of fact of fraud held not based on the evidence. Aretz v. Kloos [Minn.] 95 N. W. 216. Held error for the court to take case from the jury. Moore v. Robinson [Tex. Civ. App.] 75 S. W. 890.

47. Clark v. Thias, 173 Mo. 628. The donor not owing any debts at the time of the transfer and contemplated owing none. Carter v. Carter, 63 N. J. Eq. 726. Husband and wife. Rose v. Campbell [Ky.] 76 S. W. 505. Transfer by husband to wife and a transfer of the same property to the son the husband joining in the conveyance held fraudulent as to the husband's creditors. Farmers' Bank v. First Nat. Bank, 30 Ind. App. 520.

48. Spear v. Spear, 97 Me. 498. Mortgage by insolvent wife to secure husband's debt. Schoonover v. Foley [Iowa] 94 N. W. 492. Under Ky. St. § 1907, a transfer in consideration of love and affection is void though the transferor had other property at the time sufficient to satisfy his then existing debts. Townsend v. Wilson, 24 Ky. L. R. 1276, 71 S. W. 440.

49. Lewis v. Boardman, 78 App. Div. (N. Y.) 394. Sufficiency of evidence to show insolvency of the debtor. O'Melia v. Hoffmeyer, 119 Iowa, 444; Holmes v. Sheridan [N. J. Err. & App.] 56 Atl. 308; Downs v. Miller, 95 Md. 602. The fact that after setting off the homestead no surplus was found is strong though not conclusive proof of insolvency at the time of the transfer. Mauney v. Hamilton, 132 N. C. 295. Evidence that the conveyance to the wife was voluntary is not evidence of insolvency of the husband. Lewis v. Boardman, 78 App. Div. (N. Y.) 394.

50. McCollum v. Crain [Mo. App.] 74 S. W. 650. Transfer of an equity of redemption held not fraudulent. Potter v. Skiles, 24 Ky. L. R. 910, 70 S. W. 301. The conveyance of land incumbered for more than its real value is not void as to creditors though made with an intent to defraud them. Aretz v. Kloos [Minn.] 95 N. W. 216, 769.

51. A subsequent purchaser from the husband, in an action to enforce the contract, cannot assert that the record title was placed in the wife's name to defraud the husband's creditors. Saunders v. King, 119 Iowa, 291. A voluntary conveyance without consideration is void irrespective of the value of the interest conveyed. Hancock v. Elmer, 63 N. J. Eq. 802. Under the evidence the court would not presume that the interest transferred was of no substantial value so as to make the transfer not actual fraud. Fryberger v. Berven, 88 Minn. 311.

52. Spear v. Spear, 97 Me. 498; Mallory v. Gallagher [Conn.] 55 Atl. 209. Admission of evidence of such knowledge therefore held not to injure the wife. Mallory v. Gallagher [Conn.] 55 Atl. 209. Oglesby v. Walton [Ga.] 44 S. E. 990. The petition to avoid the transfer need not therefore allege knowledge of the transferee. McKenzie v. Thomas [Ga.] 45 S. E. 610; Gustin v. Mathews, 25 Utah, 168, 70 Pac. 402.

53. Heisch v. Bell [N. M.] 70 Pac. 572. Transfer of rights under an insurance policy having no surrender value and exempt under the laws of the state held not fraudulent. Pulsifer v. Hussey, 97 Me. 434. Property purchased by the wife with exempt wages of the husband cannot be subjected. Furth v. March [Mo. App.] 74 S. W. 147. The use of funds while insolvent to purchase or remove liens on homestead is not fraudulent as to creditors. So held under the laws of California. In re Wilson (C. C. A.) 128 Fed. 20.

54. Richards v. Orr, 118 Iowa, 724; Roark v. Bach [Ky.] 76 S. W. 340; Kuhn's Adm'r v. Kuhn, 24 Ky. L. R. 787, 69 S. W. 1077; Balz

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A voluntary transfer may be void as to creditors, though made to a corporation.[56]

A pre-existing debt,[57] though barred by limitations, may constitute a valid consideration,[58] but a conveyance in consideration that the wife would discontinue divorce proceedings is invalid.[59] In the absence of a fraudulent intent that the grantor took in payment stock of the grantee corporation does not render the conveyance fraudulent.[60] A misstatement of the consideration is only presumptive evidence of fraud.[61]

(§ 1) *C. Retention of possession or apparent title.*—A sale of personalty must be followed by an immediate delivery to, and an actual and continued possession by, the purchaser.[62] The change of possession must be open, notorious, and

v. Nelson, 171 Mo. 682; Jayne v. Hymer [Neb.] 92 N. W. 1019; Scheel v. Lackner [Neb.] 93 N. W. 741; Durand v. Higgins [Kan.] 72 Pac. 567; Brown v. Campbell [Neb.] 93 N. W. 1007. Where the homestead is sold or exchanged the wife holds the property, title being taken in her name, as against the husband's creditors to the statutory limit. Richards v. Orr, 118 Iowa, 724; Scheel v. Lackner [Neb.] 93 N. W. 741. To prevent creditors from setting aside a sale to the wife on the ground that the land was a homestead it must appear that the homestead right existed at the time of the conveyance. Reeves v. Slade [Ark.] 77 S. W. 54. A voluntary conveyance of homestead property less than $1,000 in value by the husband to the wife is valid as against his creditors, though the property had not been exempted by court proceedings. Skinner v. Jennings, 137 Ala. 295. Where the non-exempt part of the land was of less value than the purchase money mortgage the conveyance is not fraudulent as to creditors since equity will first apply the non-exempt part to payment of the mortgage. Keith v. Albrecht [Minn.] 94 N. W. 677.

55. In such case the conveyance is void as to the excess. Brown v. Campbell [Neb.] 93 N. W. 1007.

56. Creation of a corporation and transfer to it of the assets of an insolvent firm held fraudulent. Colo. T. & T. Co. v. Acres Commission Co. [Colo. App.] 70 Pac. 954. Evidence held to sustain finding that incorporation and transfer to it of the property by the debtors was not fraudulent. McNerny v. Hubbard [Neb.] 93 N. W. 1123.

57. Beaman v. Stewart [Colo. App.] 74 Pac. 344. Sufficiency of evidence on question of consideration. Walker v. Harold [Or.] 74 Pac. 705. Transfers held based on a valid consideration. Denver Jobbers' Ass'n v. Rumsey [Colo. App.] 71 Pac. 1001; Fisher v. Herrmann [Wis.] 95 N. W. 392; Green v. Emens, 135 Ala. 563; Citizens' Bank v. Burrus [Mo.] 77 S. W. 748; Goodwin v. McMinn, 204 Pa. 162. Sufficiency of evidence to show want of consideration where the transfer was made to the wife through a third party. Citizens' State Bank v. Porter [Neb.] 93 N. W. 391. Consideration held not so inadequate as to subject the property to payment of creditors. Flook v. Armentrout's Adm'r, 100 Va. 638; Chamberlain v. Woolsey [Neb.] 92 N. W. 181. Evidence held sufficient to show a conveyance by mother to her children based on a consideration. Walker v. Houghteling (C. C. A.) 120 Fed. 928. The transfer of land purchased with money belonging to the wife which vested in the husband by virtue of the marriage, pursuant to an agreement that it should be so transferred is based on a valuable consideration; the husband being solvent at the time. Craig v. Conover, 24 Ky. L. R. 1682, 72 S. W. 2. Conveyance by husband to the wife of land purchased with money advanced by her is based on sufficient consideration. Jayne v. Hymer [Neb.] 92 N. W. 1019.

Evidence held to show insufficient consideration. Johnson v. Stebbins-Thompson Realty Co. [Mo.] 76 S. W. 1021; Bates County Bank v. Galley [Mo.] 75 S. W. 646; Omaha Brew. Ass'n v. Zeller [Neb.] 93 N. W. 762; Downs v. Miller, 95 Md. 602; O'Connor v. Williams [N. J. Eq.] 53 Atl. 550. Conveyance to son in consideration of money borrowed from the wife held void as to creditors. Chinn v. Curtis, 24 Ky. L. R. 1563, 71 S. W. 923.

58. Transfer to wife in payment of a barred debt. The debtor may waive the bar (Roberts v. Brothers, 119 Iowa, 309), but a mortgage given by the wife on property fraudulently conveyed to her by the husband to secure a barred claim by her father against the husband held invalid (Liver v. Thielke, 115 Wis. 389).

59. Oppenheimer v. Collins, 115 Wis. 293, 60 L. R. A. 406.

60. Homestead Min. Co. v. Reynolds, 30 Colo. 330, 70 Pac. 422.

61. Cottingham v. Greely-Barnham Grocery Co., 137 Ala. 149. A chattel mortgage held not a secret trust in favor of an undisclosed creditor because it included a small debt due another. Taylor v. Harle-Haas Drug Co. [Neb.] 96 N. W. 182. Merely that it was too large because by mistake a sum was included in securing preferred creditors does not render the transaction fraudulent. Trompen v. Yates [Neb.] 92 N. W. 647. If the deed of trust to the creditor made with intent to defraud other creditors was for a greater sum than was actually due the creditor it was void as a whole. Bates County Bank v. Galley [Mo.] 75 S. W. 646.

62. Mills' Ann. St. § 2027. Willis v. Roberts [Colo. App.] 70 Pac. 445. The seller cannot claim right of possession under an agreement with the purchaser, the transfer being void because of retention of possession. Young v. Evans, 118 Iowa, 144. The retention by a debtor in failing circumstances renders the transaction fraudulent as to creditors. Spencer v. Mugge [Fla.] 34 So. 271. The retention of possession by the debtor after a sale renders the transfer void.

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unequivocal so as to apprise others that the title to the goods has changed hands;[63] a presumption of fraud arises from the continued possession by the seller,[64] and the burden is on the purchaser to overcome this presumption[65] by proof of payment of a bona fide consideration,[66] and that the vendor's possession was consistent with the bill of sale or unavoidable or for the temporary convenience of the vendee.[67] What constitutes a sufficient change is to be determined from the facts in each particular case,[68] and is generally a question for the jury.[69]

If the transfer is void, notice of the sale will not affect the rights of the creditor.[70]

The mere retention of a stock of goods for a short time by the mortgagor is not of itself sufficient to establish fraud,[71] but if he is permitted to retain possession and dispose of the goods in the ordinary course of business[72] without accounting, the mortgagee renders the mortgage fraudulent as to creditors and subsequent purchasers,[73] and this whether the power is conferred by the terms of the mortgage or by a parol agreement.[74] A contrary rule however prevails in Indiana.[75] To render a chattel mortgage void as to creditors, it must appear that the failure to record was due to an agreement or that prejudice resulted to creditors therefrom.[76] Retention of chattel mortgage from record to avoid injuring mortgagor's credit.[77] The subsequent recording is ineffectual as to existing creditors.[78]

A failure to record the conveyance,[79] or a retention of possession of realty

able [Laws 1897, c. 417]. Skillen v. Endelman, 39 Misc. (N. Y.) 261.

63. Swartzburg v. Dickerson [Okl.] 73 Pac. 282.

64. White v. Gunn, 205 Pa. 229. Under Rev. St. 1898, § 2317b, providing that the purchaser of a stock of goods in bulk notify the creditors thereof the failure to give the notice is presumptive and conclusive evidence of fraud. Evidence held sufficient to rebut the presumption. Fisher v. Herrmann [Wis.] 95 N. W. 392.

65, 66. Griswold v. Nichols [Wis.] 94 N. W. 33.

67. Volusia County Bank v. Bertola [Fla.] 33 So. 448.

68. Simons v. Daly [Idaho] 72 Pac. 507. A control of the property by the purchaser which reasonably indicates a change of ownership will overcome the presumption, the transaction being in good faith. White v. Gunn, 205 Pa. 229. Under the evidence mortgagee held to have been in actual possession. Taylor v. Harle-Haas Drug Co. [Neb.] 96 N. W. 182. Under the evidence delivery held not made within a reasonable time as required by Rev. St. 1899, § 3410, so as to render the transfer valid. Bowles Live Stock Commission Co. v. Hunter, 91 Mo. App. 418. Delivery and possession of a stock of goods by the purchaser held sufficient. Fisher v. Herrmann [Wis.] 95 N. W. 392. Sufficiency of change of possession. Jones v. Mackenzie, etc., Paint Co. [Colo. App.] 73 Pac. 847; Simons v. Daly [Idaho] 72 Pac. 507; Beaman v. Stewart [Colo. App.] 74 Pac. 344; Fisher v. Herrmann [Wis.] 95 N. W. 392. Held under the laws of Illinois that there was an insufficient delivery and change of possession. In re Rodgers [C. A. A.] 125 Fed. 169.

69. Simons v. Daly [Idaho] 72 Pac. 507; Mazirоff v. Commercial Bank [Mich.] 97 N. W. 763; White v. Gunn, 205 Pa. 229. Whether there had been an actual and continued change of possession under the evidence held a question for the jury. Schidlower v. McCafferty, 85 App. Div. (N. Y.) 493.

70. Bowles Live Stock Commission Co. v. Hunter, 91 Mo. App. 418.

71. Davis v. Turner [C. C. A.] 120 Fed. 605. A statement by the attorney for the mortgagee to the tenant in possession that he took possession for the mortgagee and leaving the property with the tenant is insufficient. Under unrecorded chattel mortgage [3 Rev. St. (9th Ed.) p. 2013]. Wild v. Porter [N. Y.] 66 N. E. 1118.

72. Block v. Fuller [Neb.] 93 N. W. 1010; Bagley v. Harmon, 91 Mo. App. 22; Enck v. Gerding, 67 Ohio St. 245.

73. Extrinsic evidence is admissible to show actual conditions and dealings between the mortgagor and mortgagee. Stephens v. Curran [Mont.] 72 Pac. 753.

74. Brinker v. Ashenfelter [Neb.] 95 N. W. 1124.

75. Burford v. First Nat. Bank, 30 Ind. App. 384.

76. Under the laws of Iowa. Deland v. Miller, etc., Bank [Iowa] 93 N. W. 304.

77. Under the facts an unrecorded mortgage held not entitled to priority over subsequent debts of mortgagor. Clayton v. Exchange Bank [C. C. A.] 121 Fed. 630. A creditor whose claim was created after the recording of a chattel mortgage cannot avoid it on the ground that pursuant to an agreement it was withheld from record. News Pub. Co. v. Tyndale [Neb.] 96 N. W. 125.

78. Recording mortgage on vessel under U. S. Rev. St. §§ 4141, 4192, held insufficient to effect constructive notice to creditors. Arnold v. Eastin's Trustee, 25 Ky. L. R. 895, 76 S. W. 855.

79. State Bank v. Backus [Ind.] 67 N. E. 512. Evidence held insufficient to show change of possession without recorded conveyance so as to render the transfer valid as to creditors. Young v. Evans, 118 Iowa. 144. Burn's Ind. Rev. St. § 3350, applies only to subsequent purchasers, mortgagees and

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after conveyance while insolvent, while evidence of fraud,[80] is not of itself sufficient to show fraud.[81] If the grantor retains possession of the deed, a creditor whose claim was created between the time of execution and delivery of the deed may attack it as fraudulent.[82]

(§ 1) *D. Reservation of benefits and resulting trusts.*—Secret trusts generally are void as to creditors,[83] irrespective of the knowledge of insolvency on the part of the transferee,[84] as a reservation of rents to the grantor.[85] A transfer in consideration of a valid debt by an insolvent, with a reservation of a right to repurchase and a percentum of the rents during the life of the option, is not fraudulent as to other creditors.[86] If the purchaser of realty for a valuable consideration causes the title to be conveyed to a third person, the latter holds the property in trust for the creditors of the purchaser.[87]

(§ 1) *E. Intent.*—An intent to defraud creditors will be presumed from the facts of insolvency of the grantor, and from the lack of consideration,[88] irrespective of intent as to existing creditors.[89] The mere fact that a judgment to avoid which the conveyance had been made, had not been obtained, will not make the conveyance less frauduent as to creditors.[90]

As to subsequent creditors, it must appear that the conveyance was made with intent to defraud them;[91] such an intent need not be proven as an independent fact,[92] and fraudulent intent is shown where the transfer is made in anticipation of entering on a new business.[93]

The fraudulent intent need not be proven beyond a doubt.[94] The mere fact that the corporation gave stock in consideration is not proof of a fraudulent intent.[95]

lessees in good faith and for valuable consideration. State Bank v. Backus [Ind.] 67 N. E. 512.

80. Dennis v. Ball-Warren Commission Co. [Ark.] 77 S. W. 903; Anglin v. Conley, 24 Ky. L. R. 1551, 71 S. W. 926.

81. Willis v. Willis, 79 App. Div. (N. Y.) 9.

82. Owens v. Foley [Tex. Civ. App.] 69 S. W. 811.

83. As an agreement to bid in at an execution sale and hold in trust for an insolvent. Gibson v. Jenkins, 97 Mo. App. 27; Penney v. McCulloch, 134 Ala. 580. Evidence held sufficient to show that there was no secret reservation of interest. Sharood v. Jordan [Minn.] 95 N. W. 1108.

84. The petition need not therefore aver knowledge. McKenzie v. Thomas [Ga.] 45 S. E. 610.

85. Deposit Bank v. Caffee, 135 Ala. 208.

86. Glover v. Fitzpatrick [Ind. T.] 69 S. W. 856.

87. No legal or equitable estate however vests in the purchaser which would be subject to attachment or execution. Chantland v. Midland Nat. Bank, 66 Kan. 549, 72 Pac. 230. A share in land the deed to which was taken in the name of a copurchaser held liable to the debts of the other purchaser. Lewis v. Kash [Ky.] 77 S. W. 697; Hoffmann v. Ackermann, 110 La. 1070. A conveyance by the wife to the mother of the husband of a part of her general estate, to the use of which the husband was entitled, in consideration of his procuring a divorce and conveying to her the balance of her property is fraudulent as to existing creditors, and the land may be subjected to the payment of their claims [Ky. St. §§ 2353, 2354]. Deposit Bank v. Rose, 24 Ky. L. R. 732, 69 S. W. 967.

88. Gray v. Chase [Mass.] 68 N. E. 676. Civ. Code, § 3442 makes such a transfer void as to existing creditors. Gray v. Brunold, 140 Cal. 615, 74 Pac. 303.

89. Aldous v. Olverson [S. D.] 95 N. W. 917.

90. Spuck v. Logan [Md.] 54 Atl. 989.

91. Rose v. Campbell [Ky.] 76 S. W. 505; Loy v. Rorick [Mo. App.] 71 S. W. 842; Ayers v. Wolcott [Neb.] 92 N. W. 1036. There must therefore be an express finding of fraud by the court. State Bank v. Backus [Ind. App.] 66 N. E. 475. Where title was placed in a third person by the debtor who procured the execution of a mortgage thereon for a feigned consideration that the creditors were obliged to resort to equity to avoid the latter is sufficient proof of intention. Baltimore H. G. Brick Co. v. Amos, 95 Md. 571. Conveyance to wife while not embarrassed and before the debt was contracted or contemplated will not be set aside. Fla. L. & T. Co. v. Crabb [Fla.] 33 So. 523. To avoid a conveyance to the wife by a third person it must appear that plaintiff was a creditor of the husband at the time of the execution thereof or that it was executed in expectation of such indebtedness and with intent to hinder its collection. Jayne v. Hymer [Neb.] 92 N. W. 1019.

92. May be proven by circumstances. Baltimore H. G. Brick Co. v. Amos, 95 Md. 571.

93. Hildebrand v. Willig, 64 N. J. Eq. 249.

94. Vandervort v. Fouse, 52 W. Va. 214; Knight v. Nease, 53 W. Va. 50; Moore v. Gainer, 53 W. Va. 403. Evidence held sufficient to show fraudulent intent. Walworth Mfg. Co. v. Burton, 82 App. Div. (N. Y.) 637; Botts v. Botts, 25 Ky. L. R. 300, 74 S. W. 1093. Evidence held to show a deposit of money with a third person was

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(§ 1) *F. Fraud of grantee or notice to him of fraud.*—Irrespective of the question of solvency of the grantor[96] or the consideration paid, if the transfer was made with the intent to defraud creditors and the transferee had knowledge thereof and participated therein it is void as to the transferor's creditors.[97] If, however, the transfer is voluntary, notice to the transferee need not be shown.[98] Knowledge of facts sufficient to put a prudent man on inquiry is sufficient to charge the grantee,[99] though it is held that this is not equivalent to actual knowledge.[1] Whether the transferee had notice is generally a question for the jury.[2] The burden of proving notice is on the party seeking to avoid the conveyance,[3] and on the grantee of showing that he was a bona fide purchaser for a valuable consideration and without notice of the fraud.[4]

with the intent to defraud. Kerr v. Kennedy, 119 Iowa, 239. Finding that mortgage was fraudulent warranted by the evidence. Penney v. McCulloch, 134 Ala. 580. Evidence held insufficient to show intent to defraud. Anglin v. Conley, 24 Ky. L. R. 1551, 71 S. W. 926. Under the facts sale held tainted with fraud. Cafe Union v. Reordan, 84 N. Y. Supp. 994. Evidence held to show a deposit of money obtained in settlement of an action with a third person made to defraud the attorney of his fees. Kerr v. Kennedy, 119 Iowa, 239. Conveyance to son and son-in-law held made with intent to hinder, delay and defraud creditors of the grantor. Cincinnati T. W. Co. v. Matthews, 24 Ky. L. R. 2445, 74 S. W. 242. Proof held sufficient to show intent and participation therein by grantee Scandinavian Sveas Ben. Soc. v. Linquist [Mich.] 94 N. W. 592. Evidence held sufficient to show sale of vessel with fraudulent intent. Arnold v. Eastin's Trustee [Ky.] 76 S. W. 855.

95. Homestead Min. Co. v. Reynolds, 30 Colo. 330, 70 Pac. 422.

96. Schreck v. Hanlon [Neb.] 92 N. W. 625.

97. Salzenstein v. Hettrick, 105 Ill. App. 99. By assisting the debtor in the formation of a corporation and taking an interest in the latter the creditor held not entitled to protect himself as a preferred creditor. Colo. T. & T. Co. v. Acres Commission Co. [Colo. App.] 70 Pac. 954. Conveyance of realty between brothers held fraudulent (Hancock v. Elmer, 63 N. J. Eq. 802; Edwards v. Story, 105 Ill. App. 433; Thompson v. Zuckmayer [Iowa] 94 N. W. 476; Johnson v. Marx Levy, 109 La. 1036; Eickstaedt v. Moses, 105 Ill. App. 634; Spuck v. Logan [Md.] 54 Atl. 989; Foley v. Doyle [Neb.] 95 N. W. 1069) and irrespective of the fact that the vendor had transferred the note representing the consideration (Kurtz v. Voight [Mo.] 75 S. W. 386). Instruction to the effect approved. Marcus v. Leake [Neb.] 94 N. W. 100. Conveyance to attorneys for services performed and to be performed sustained. Farmers' & M. Nat. Bank v. Mosher [Neb.] 94 N. W. 1003.

98. Gray v. Chase [Mass.] 68 N. E. 676. It is therefore no defense that the creditor seeking to avoid it had assigned to the transferee a claim against the transferor greater in amount than the value of the property transferred. Nat. Bank of Republic v. Thurber, 39 Misc. (N. Y.) 13; Spear v. Spear, 97 Me. 498.

99. Timms v. Timms [W. Va.] 46 S. E. 141. If the purchaser executed a conveyance of land as consideration, to the wife of the seller of the chattels he had sufficient notice of the fraud of the seller to put him on inquiry. Blom-Collier Co. v. Martin, 98 Mo. App. 596. That the attorney who drew the deed for the grantee had knowledge is insufficient to charge the grantee. Hagadine, etc., Dry Goods Co. v. Krug [Neb.] 96 N. W. 286. Knowledge of the grantor's attorney of the conveyance is not chargeable to the grantor's assignee for benefit of creditors though he was also attorney for the assignee. Downer v. Porter [Ky.] 76 S. W. 135. To charge the beneficiary with knowledge it must appear that the trustee was authorized to act as agent in accepting the deed of trust. Deed of trust by son to father the mother being the beneficiary. M. A. Cooper & Co. v. Sawyer [Tex. Civ. App.] 73 S. W. 992. Grantee held to have such notice as would put prudent man on inquiry. McWilliams v. Thomas [Tex. Civ. App.] 74 S. W. 596. Facts held sufficient to put son on inquiry as to intent of father in transferring all his property to him. Norwood v. Wash., 136 Ala. 657. Merely because the grantee took a quitclaim deed would not give a mere general creditor a lien or equity in the land. Klay v. McKellar [Iowa] 97 N. W. 1091. Evidence held to show knowledge on the part of the grantee of an intent to make a gift of the consideration by the grantor. Norwood v. Wash., 136 Ala. 657. Evidence held to show knowledge on the part of the grantee and participation in the fraud. Bates County Bank v. Galley [Mo.] 75 S. W. 646; Coffield v. Parmenter [Neb.] 96 N. W. 283; Flook v. Armentrout's Adm'r, 100 Va. 638; Liver v. Thielke, 115 Wis. 389; Congleton v. Schreihofer [N. J. Eq.] 54 Atl. 144; Dornbrook v. Rumely Co. [Wis.] 97 N. W. 493; Barker v. Boyd, 24 Ky. L. R. 1389, 71 S. W. 528.

1. White v. Million [Mo. App.] 76 S. W. 733.

2. Greenwald v. Wales, 174 N. Y. 140; Edwards v. Anderson [Tex. Civ. App.] 71 S. W. 555.

3. On trial of a bill to remove cloud on title where plaintiff claims under a conveyance expressing a consideration of $1 and defendant having paid full value the defendant has the burden of showing want of notice of plaintiff's deed or if notice was given that plaintiff participated in the fraud [B. & C. Comp. §§ 5502, 5503]. McLeod v. Lloyd [Or.] 71 Pac. 795; Hartman v. Hosmer, 65 Kan. 595, 70 Pac. 598.

4. Cox v. Wall, 132 N. C. 730; Morgan v. Bostic, 132 N. C. 743. Conveyance to son

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(§ 1) *G. Preferences to creditors.*[5]—Generally a transfer to a creditor b way of preference is valid,[6] though the creditor had knowledge thereof,[7] and t the debtor's intent to hinder, delay, or defraud other creditors,[8] but it is otherwi if the creditor participated in the fraud.[9]

(§ 1) *H. Relationship of parties.*—While transfers between relatives wi be closely scrutinized,[10] yet there is no presumption of fraud from the fact of r lationship.[11] They are however prima facie fraudulent if at the time of tl transfer the transferror was insolvent.[12] If based on a valid consideration tl transfer is not void, regardless of the relation of the parties or the badges of fraud, and in case of conveyances between husband and wife, any presumption of wa of consideration is one of fact and not of law.[14] The husband's consent to h wife's testamentary disposition of her personalty is not a fraud as to his creditors.

and son-in-law. Cincinnati T. W. Co. v. Matthews, 24 Ky. L. R. 2445, 74 S. W. 242.

5. Transfers by corporations in contemplation of insolvency see Corporations. Transfers void under the Bankruptcy Act see Bankruptcy.

6. Moore v. Robinson [Tex. Civ. App.] 75 S. W. 890. Assignment of wages to grocer to apply on account and for family necessities of assignor and to prevent attachments by other creditors though the assignee had knowledge thereof held valid. Dole v. Farwell [N. H.] 55 Atl. 553. Mortgage by husband to wife held valid. State Bank v. Backus, 160 Ind. 682. A transfer by corporation to a creditor director made in contemplation of insolvency is constructively fraudulent because made to an officer under act April 21, 1896. Holmes v. Sheridan [N. J. Err. & App.] 56 Atl. 308. A corporation may give preferences. Beaman v. Stewart [Colo. App.] 74 Pac. 344. Instruction on this question held properly refused. Pope v. Kingman [Neb.] 96 N. W. 519. The giving of a chattel mortgage to secure a bona fide indebtedness by a husband who deserted his wife is not per se a fraud on the wife. Farmers' & Merchants' Bank v. Hoffmann [Neb.] 96 N. W. 1044. Under Civ. Code Cal. §§ 3442, 3451, that the transfer was made to a trustee instead of the creditor will not invalidate it. Heath v. Wilson, 139 Cal. 362, 73 Pac. 182. Merely because a conveyance in trust to sell for the benefit of creditors hinders and delays creditors will not render it invalid. 3 Mich. Comp. Laws, § 8839 permits such conveyances. Geer v. Traders' Bank [Mich.] 93 N. W. 437. Under Code 1899, c. 74, § 2, a preference by an insolvent debtor must be surrendered. Powers-Taylor Drug Co. v. Faulconer, 52 W. Va. 581; Moore v. Robinson [Tex. Civ. App.] 75 S. W. 890.

7. Parmenter v. Lomax [Kan.] 74 Pac. 634.

8. White v. Million [Mo. App.] 76 S. W. 733. A mere intent to prefer is insufficient to establish fraud. Powers-Taylor Drug Co. v. Faulconer, 52 W. Va. 581; Parmenter v. Lomax [Kan.] 74 Pac. 634.

9. Eickstaedt v. Moses, 105 Ill. App. 634; Johnson v. Marx, 109 La. 1036. As where the creditor advances the amount of exemptions to which the debtor is entitled including it in the amount secured by the mortgage; both parties intending to place that amount beyond the reach of creditors. Chamberlain Banking House v. Turner-Frazier Mercantile Co. [Neb.] 92 N. W. 17 As an agreement that attachments be pr cured before the debtor makes a gener assignment. Chestnut v. Russell, 24 K L. R. 704, 69 S. W. 965. It is therefore n defense to an action to avoid a transf that plaintiff had received a preference. N tional Bank of The Republic v. Thurbe 39 Misc. (N. Y.) 13. A collusive entry judgment for a larger sum than was a tually due the creditor is void as to oth creditors. Complaint to avoid held suf cient. Anderson v. Bank of Lassen Cou ty [Cal.] 74 Pac. 287. Under the facts tl court properly directed an accounting t the purchaser at an execution sale und fraudulent judgments pursuant to a co spiracy between the debtor, judgment cre itor and purchaser. French v. Commerci Nat. Bank, 199 Ill. 213.

10. Klay v. McKellar [Iowa] 97 N. W 1091; Rice v. Allen [Neb.] 95 N. W. 76 Lynch v. Englehardt, etc., Mercantile C [Neb.] 96 N. W. 524.

11. And the wife claiming the proper is not required to establish her title by ev dence different from that necessary whe coverture is not involved. Rachofsky Benson [Colo. App.] 74 Pac. 655; Parment v. Lomax [Kan.] 74 Pac. 634; Thompson Zuckmayer [Iowa] 94 N. W. 476; Walk v. Houghtelling [C. C. A.] 120 Fed. 92 Loy v. Rorick [Mo. App.] 71 S. W. 842; Sh v. Hynes [Minn.] 95 N. W. 214; Fishel Motta [Conn.] 56 Atl. 558; Aldous v. Olve son [S. D.] 95 N. W. 917. Instructions he proper. Dunning v. Bailey [Iowa] 95 W. 248.

12. Moore v. Gainer, 53 W. Va. 403. Whi may be rebutted by evidence of the sol ency of the grantor (Spear v. Spear, 97 M 498) between husband and wife (Multz Price, 82 App. Div. [N. Y.] 33). A gift the services of the debtor's horses and ser ices of his minor son to the son is void to the creditors for whom such services we rendered. Tuckey v. Lovell [Idaho] 71 Pa 122. Wages of minor son of an insolve held not subject to the father's debts. Wi ner v. Osborne [N. J. Eq.] 55 Atl. 51.

13. Instruction held erroneous. Cottin ham v. Greely-Barnham Grocery Co., 1 Ala. 149.

14. Fishel v. Motta [Conn.] 56 Atl. 55

15. Ky. St. 1899, § 1906 providing that a gift of property with intent, etc., is vo as to creditors includes only property own

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The transaction of the wife's business by the husband, whereby she acquires property in her own right, is not a fraud on the husband's creditors.[16] A presumption of fraud arises though, where a husband, while in debt or insolvent, purchases land, taking the title in the name of his wife.[17]

The creditor has the burden of proving that the transfer between relatives was made to hinder, delay and defraud,[18] and the transferee has the burden of proving bona fides[19] and consideration,[20] by clear and satisfactory evidence.[21]

§ 2. *Validity and effect.*—While the creditor must generally show that he was such at the time of the execution of the voluntary conveyance,[22] both prior

by the debtor. Louisville Nat. Bank v. Wooldridge, 25 Ky. L. R. 869, 76 S. W. 542.

16. Bank of Tipton v. Adair, 172 Mo. 156.

17. Facts held to rebut the presumption; the wife contributing a part of her separate property in payment of the consideration. Scott v. Holman [Wis.] 94 N. W. 30; Dennis v. Ball-Warren Commission Co. [Ark.] 77 S. W. 903; Florida Loan & Trust Co. v. Crabb [Fla.] 33 So. 523. Good faith in taking title in wife's name pending action against the husband held a question for the jury. Weber v. Ashbacker [Pa.] 55 Atl. 534. Notes payable to the wife held the property of the husband and subject to his debts. Dunning v. Bailey [Iowa] 95 N. W. 248. Taking title in wife's name held fraudulent as to husband's creditors. Reeves v. Slade [Ark.] 77 S. W. 54. Under the evidence held that the consideration for property conveyed to the wife moved from the husband. Kearney County Bank v. Dullenty [Neb.] 96 N. W. 169. Finding that conveyance to wife by a third person was based on a sufficient consideration sustained by the evidence. Blossom v. Negus, 182 Mass. 515. Husband held to have an equitable interest in land title to which he had taken in his wife's and brother's names. Shields v. Lewis, 24 Ky. L. R. 822, 70 S. W. 51. Under the evidence conveyance to wife through a third person held not fraudulent. Willis v. Willis, 79 App. Div. (N. Y.) 9.

18. Relationship and insolvency are but earmarks or badges of fraud. Shea v. Hynes [Minn.] 95 N. W. 214. Conveyance from father to son. Shea v. Hynes [Minn.] 95 N. W. 214. Conveyance to wife through third person. Fishel v. Motta [Conn.] 56 Atl. 558. The rule that conveyances between husband and wife will be closely scrutinized does not apply to conveyances to a wife by third persons, no showing being made that the husband purchased the property or that his funds were used in payment. Rice v. Allen [Neb.] 95 N. W. 704. Conveyance to father held in fraud of creditors. Dennis v. Ball-Warren Commission Co. [Ark.] 77 S. W. 903. Conveyance to brother-in-law held fraudulent. Timms v. Timms [W. Va.] 46 S. E. 141. Evidence held insufficient to show fraud. Combs v. Davis, 24 Ky. L. R. 648, 69 S. W. 765. Under the evidence a conveyance to son held fraudulent. Dufrene v. Anderson [Neb.] 93 N. W. 139. The creditor has the burden of showing that the husband's money was used in removing incumbrance on wife's property. Furth v. March [Mo. App.] 74 S. W. 147.

19. Ayers v. Wolcott [Neb.] 92 N. W. 1036; Marcus v. Leake [Neb.] 94 N. W. 100; Moore v. Gainer, 53 W. Va. 403; Lusk v. Riggs [Neb.] 97 N. W. 1033. Between husband and wife. Lynch v. Englehardt, etc., Mercantile Co. [Neb.] 96 N. W. 524. Transfer between husband and wife. Walker v. Harold [Or.] 74 Pac. 705; Norwood v. Washington, 136 Ala. 657; Clark v. Thias, 173 Mo. 628; Knudson v. Parker [Neb.] 91 N. W. 850. Transaction between husband and wife held valid. Carter v. Carter, 63 N. J. Eq. 726. Foreclosure of a chattel mortgage by the son of the mortgagor as assignee of the mortgage held fraudulent. Battey v. Knight, 66 S. C. 107. Insufficient findings of fact to sustain conclusion that conveyance to daughter was fraudulent. Zacharie v. Swanson [Tex. Civ. App.] 77 S. W. 627. Evidence held insufficient to show transfer to sister fraudulent. Nichols v. Nichols, 40 Misc. (N. Y.) 9

20. Walker v. Harold [Or.] 74 Pac. 705. Conveyance to father-in-law. Knight v. Nease, 53 W. Va. 50; Noble v. Gilliam, 136 Ala. 618. Evidence held sufficient to show consideration passing from the wife (Smith v. Curd, 24 Ky. L. R. 1960, 72 S. W. 744; Savits v. Speck, 21 Pa. Super. Ct. 608; Willis v. Willis, 79 App. Div. [N. Y.] 9; Budlong v. Budlong [Wash.] 73 Pac. 783); from daughter (Carson v. Murphy [Neb.] 96 N. W. 110); from father-in-law (Behrens v. Steidley, 198 Ill. 303). Insufficient to show consideration passing from the wife to the husband (Noble v. Gilliam, 136 Ala. 618; Williams v. Snyder [Iowa] 94 N. W. 845; Balz v. Nelson, 171 Mo. 682); from mother to daughter (Zimmerman v. McMasters, 25 Ky. L. R. 456, 76 S. W. 5; Kastl v. Arthur [Mich.] 97 N. W. 711); from brother (Charles v. Matney, 24 Ky. L. R. 1384, 71 S. W. 511; Sheldon v. Parker [Neb.] 92 N. W. 923; Greig v. Rice, 66 S. C. 171); from father-in-law (Jacobs v. Van Sickel, 123 Fed. 340). Conveyance to son who reconveyed to wife not based on valid consideration. Orchard v. Collier, 171 Mo. 390. Transfers between husband and wife and daughter held fraudulent. Adams v. Brusko [Mich.] 97 N. W. 766. Conveyance to wife held not a bona fide preference of a debt due her. Vietor v. Swisky, 200 Ill. 257. An accounting ordered to ascertain the amount of indebtedness of the husband to the wife. Lea v. Willis [Va.] 43 S. E. 354.

21. Transaction between husband and wife. Baker v. Watts [Va.] 44 S. E. 929.

22. Schmitt v. Dahl, 88 Minn. 506; Jayne v. Hymer [Neb.] 92 N. W. 1019. Promissory note representing different claims held to be a pre-existing indebtedness. Omaha Brew. Co. v. Zeller [Neb.] 93 N. W. 762. Claims for goods sold held continuous making the seller a pre-existing creditor entitled to attack the conveyance. Spuck v. Logan [Md.] 54 Atl. 989. Sufficiency of evidence to show existence of the debt at the time of the conveyance. Homestead Min.

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and subsequent creditors may avoid a conveyance made pursuant to an agreement between the parties for the purpose of defeating collection of a possible judgment against the grantor,[23] or where the debts were fraudulently contracted.[24] Constructive notice resulting from recording the instrument is not sufficient to bar subsequent creditors from impeaching the conveyance on the ground that it was made with intent to hinder and delay subsequent purchasers.[25]

As to subsequent purchasers from the grantor with knowledge of the fraudulent conveyance it is binding,[26] and the transferee of notes taken in payment of a fraudulent sale takes title thereto if he did not participate in the fraud.[27]

If the contract is executory, equity will leave the parties where their fraud left them;[28] if executed, no estate either legal or equitable, passes as against creditors,[29] but it is binding as between the parties to the contract[30]—though the grantee is the wife of the grantor and participated in the fraud and the grantor retained possession[31]—and their heirs,[32] and representatives except in so far as there is a deficiency of assets to pay debts.[33] On the question of whether the general assignee of the grantor can avoid fraudulent transfers, the decisions are conflicting; in California,[34] Kentucky,[35] Maine,[36] and Ohio,[37] he may, but the contrary rule

Co. v. Reynolds, 30 Colo. 330, 70 Pac. 422; Lesser v. Brown, 75 Conn. 491.

23. Spuck v. Logan [Md.] 54 Atl. 989.

24. Between husband and wife. Bracken v. Milner, 99 Mo. App. 187.

25. Baltimore H. G. Brick Co. v. Amos, 95 Md. 571. Evidence held insufficient to show actual notice. Id. Record notice held sufficient as against a subsequent creditor. Kuder v. Chadwick [Pa.] 56 Atl. 407.

26. Saunders v. King, 119 Iowa, 291. Under Wis. Rev. St. 1898, § 2313 an unrecorded purchase money mortgage is invalid as to a subsequent mortgage irrespective of the subsequent mortgagee's notice of the mortgage or knowledge of the mortgagor's intent to delay creditors. Dornbrook v. Rumely [Wis.] 97 N. W. 493. In Illinois on foreclosure it may be shown that the mortgage on realty was without consideration and given for the purpose of defrauding creditors. Ellwood v. Walter, 103 Ill. App. 219.

27. Kurtz v. Voight & Sons Co. [Mo.] 75 S. W. 386.

28. Where both parties participate in the fraud equity will not enforce the contract of sale. Lowther Oil Co. v. Miller-Sibley Oil Co [W. Va.] 44 S. E. 433. A promissory note secured by mortgage, given without consideration and to delay creditors of which the payee had knowledge will not be enforced between the parties. Baldwin v. Davis, 118 Iowa, 36. A subsequent grantee of a fraudulent grantor with knowledge that the grantee took under an agreement to reconvey to the grantor cannot enforce the contract against such grantee or those claiming under him. Bradt v. Hartson [Neb.] 96 N. W. 1008.

29. Foley v. Doyle [Neb.] 95 N. W. 1067.

30. Kirby v. Raynes [Ala.] 35 So. 118; McClenahan v. Stevenson, 118 Iowa, 106. Insolvency of vendor is not a defense to suit for specific performance of the contract of sale (Cone v. Cone, 118 Iowa, 458; Durand v. Higgins [Kan.] 72 Pac. 567; Bradt v. Hartson [Neb.] 96 N. W. 1008; Berg v. Frantz, 24 Ky. L. R. 689, 69 S. W. 801; Brasie v. Minneapolis Brew. Co., 87 Minn. 456; Rickards v. Rickards [Md.] 56 Atl. 397), but this rule does not prevent its avoidance on the ground of the grantor's mental incapacity (Tatum v. Tatum's Adm'r [Va.] 43 S. E. 184). Chattel mortgage permitting the mortgagor to retain possession and dispose of the property. Bagley v. Harmon, 91 Mo. App. 22. The fraudulent grantee may contest the validity of a mechanic's lien on the property. Toop v. Smith, 87 App. Div. (N. Y.) 241. In determining the amount of alimony it is proper to take into consideration property fraudulently transferred by the husband. Dougan v. Dougan [Minn.] 97 N. W. 122. Bill to recover property conveyed held not demurrable as showing that the conveyance was fraudulent. Stockwell v. Stockwell [N. H.] 54 Atl. 701. The giving of a mortgage by an officer of a corporation in fraud of its creditors is not binding on the corporation; the mortgagee participating in the fraud. Lamb v. McIntire, 183 Mass. 367. Instruction on effect of transfer between partners. Yoder v. Reynolds [Mont.] 72 Pac. 417.

31. The second wife cannot therefore claim homestead rights in the land. Hunter v. Magee [Tex. Civ. App.] 72 S. W. 230.

32. Foules v. Foules [Miss.] 33 So. 972; Hildebrand v. Willig, 64 N. J. Eq. 249. Equity will not therefore set aside the conveyance or enforce a secret trust for the benefit of the grantor or his wife and children. In re Simon's Estate, 20 Pa. Super. Ct. 450. A child by a second wife cannot avoid a transfer by the deceased father to a child by a former wife made to defeat the second wife's claim and creditors' claims, since they also represent the creditors of the deceased grantor. Mehan v. Mehan, 203 Ill. 180.

33. Bagley v. Harmon, 91 Mo. App. 22; Hemley v. Harmon [Mo. App.] 77 S. W. 136. And see Tyndale v. Stanwood, 182 Mass. 534. Creditors may sue without previously requesting the representative to sue (Nat. Bank of Republic v. Thurber, 39 Misc. [N. Y.] 13) and a refusal of foreign representatives of a non-resident decedent is equivalent to a refusal to sue to set aside a fraudulent transfer within the state. Complaint held sufficient. Montgomery v. Boyd, 78 App. Div. (N. Y.) 64.

34. Cooper v. Nolan, 138 Cal. 248, 71 Pac. 179.

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prevails in Illinois,[38] Montana,[39] and North Carolina.[40] It is, however, generally held that the trustee of the grantor in bankruptcy can avoid any fraudulent disposition of property by him.[41]

The transaction will be held valid only to the amount of the actual consideration,[42] and if the transfer is void as to one creditor of a particular class it is void as to all creditors of the same class.[43] Title is not restored to the transferee by adjudicating the transfer void as to creditors.[44] The creditors of the fraudulent grantee cannot avoid a reconveyance to the grantor prior to any attempt on their part to subject it.[45] The mere fact that a previous mortgage was withheld from record with fraudulent intent will not vitiate a subsequent bona fide mortgage.[46]

A creditor may be estopped from setting aside the transfer.[47]

§ 3. *Who may attack and conditions precedent.*—Only creditors holding due existing claims against the grantor can avoid the transfer.[48] All classes of claims, including actions ex delicto, are entitled to the benefit of the act,[49] and if the sale is void by reason of the mental incapacity of the seller, he is a creditor entitled to attack a fraudulent mortgage on the goods by the purchaser,[50] but the decisions on the question of whether the claim must first be reduced to judgment or some judicial lien acquired are conflicting.[51] The statutory remedies in aid of execution

35. Ky. St. 1899, § 84 vests in the assignee title to property fraudulently disposed of by the assignor, and he may recover the property such act not being superseded by the federal bankruptcy act. Downer v. Porter [Ky.] 76 S. W. 135.

36. To enable an assignee to avoid a transfer by one while insolvent he must prove the facts which bring the transaction within the statute. Dunn v. Train (C. C. A.) 125 Fed. 221.

37. The general assignee is the proper party to sue to avoid a fraudulent transfer and creditors can sue only when he refuses to sue. Cornell v. Suiter, 23 Ohio Circ. R. 384.

38. Ross v. Sayler, 104 Ill. App. 19.

39. Babcock v. Maxwell [Mont.] 74 Pac. 64.

40. Murray v. Williamson, 133 N. C. 318.

41. Arnold v. Eastin's Trustee [Ky.] 76 S. W. 855; Cox v. Wall, 132 N. C. 730; In re Carpenter, 125 Fed. 831. Title to personalty purchased under an unrecorded contract reserving title in the vendor passes to the trustee in bankruptcy of the purchaser under Neb. Comp. St. c. 32, § 26 and Banks Act, §§ 67, 70. Logan v. Neb. Moline Plow Co. [Neb.] 92 N. W. 129.

42. Mortgage. O'Connor v. Williams [N. J. Eq.] 52 Atl. 550. A gift of part of the consideration to the grantee renders the conveyance voluntary to that extent where the grantee had knowledge of the intended gift. Norwood v. Wash., 136 Ala. 657. A lien may properly be declared to the extent of the valid pecuniary consideration. Chinn v. Curtis, 24 Ky. L. R. 1563, 71 S. W. 923. The holder of a fund deposited with the intent to defraud creditors of the owner may be allowed a bona fide claim against the owner but not a claim which he holds against the owner's wife. Kerr v. Kennedy, 119 Iowa, 239. In case of a fraudulent trust the trustees will be subrogated to the rights of creditors whose claims they have paid. N. Y. Public Library v. Tilden, 39 Misc. (N. Y.) 169. Fraud in a part vitiates the entire transaction, as where the mortgage secured a greater sum than was actually due. Bates County Bank v. Galley [Mo.] 75 S. W. 646. The transferee held not entitled to interest on the amount of his valid claim against the transferor. Kerr v. Kennedy, 119 Iowa, 239.

43. Sibley v. Stacey, 53 W. Va. 292.

44. So that the transferor can claim exception since the transferee has any right there is to claim the exemption. Williamson v. Wilkinson [Miss.] 33 So. 282. The heirs of grantor cannot claim the property where the conveyance has been set aside and the grantee paid the creditors. Keeton v. Bandy [Ky.] 74 S. W. 1047.

45. Berg v. Frantz, 24 Ky. L. R. 689, 69 S. W. 801.

46. State Bank v. Backus, 160 Ind. 682.

47. Creditor held estopped to avoid the conveyance by having sued to recover the consideration and by accepting dividends from grantor's trustee in bankruptcy. McWilliams v. Thomas [Tex. Civ. App.] 74 S. W. 596. The consent of a creditor that the debtor mortgage his property will not estop him from avoiding the mortgage as fraudulent because the mortgagor was allowed to retain possession and dispose of the goods in the ordinary course of business. Brunker v. Ashenfelter [Neb.] 95 N. W. 1124. Decree held not a bar to a subsequent suit by creditors to attack the transfer as a fraud. Sibley v. Stacey, 53 W. Va. 292.

48. Daugherty v. Powell [Kan.] 72 Pac. 274; Minneapolis Threshing Mach. Co. v. Jones [Minn.] 94 N. W. 551; Frye v. Wiley [W. Va.] 46 S. E. 135.

49. McCollum v. Grain [Mo. App.] 74 S. W. 650; Anglin v. Conley, 24 Ky. L. R. 1551, 71 S. W. 926.

50. First Nat. Bank v. Calkins [S. D.] 93 N. W. 646.

51. A personal judgment against the debtor is not a necessary condition precedent to the action (Ky. St. § 1907a). Smith v. Curd, 24 Ky. L. R. 1960, 72 S. W. 744. A petition in an action brought before Ky. St. § 1907a took effect need not aver that execution had been returned nulla bona. Locheim v.

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need not be resorted to before resort can be had to property fraudulently transferred.[52] One who had a valid existing lien on the property cannot raise the question of fraud in the transfer thereof,[53] and if the claim is a secured obligation, the creditor must first exhaust the security.[54]

§ 4. *Rights and liabilities of persons claiming under fraudulent grantee.*—A bona fide purchaser from a fraudulent grantee takes good title,[55] but notice is chargeable against a purchaser from the grantee from the fact that he had prosecuted an action to avoid the conveyance to his grantor,[56] nor is a judgment creditor of the grantee a bona fide purchaser within the statute.[57]

§ 5. *Extent of grantee's liability.*—A bona fide transferee is entitled to be reimbursed the consideration.[58] For expenditures to preserve the property against existing liens,[59] such as taxes, the grantee should be reimbursed,[60] but if the payments to remove liens were made as a part of the fraudulent scheme they will not be allowed,[61] and if the transfer was without consideration, he may be charged with the rents and profits.[62] A fraudulent holder with knowledge cannot claim compensation as trustee of the property.[63] The grantee can be held liable only to the extent of the value of the property transferred to him,[64] and only the property transferred to him can be subjected. A personal judgment for the value thereof should not be rendered,[65] except where he had converted the property,[66] or where it has passed to a bona fide purchaser.[67]

Eversole, 24 Ky. L. R. 1031, 70 S. W. 661. In Wisconsin a simple contract creditor may subject property fraudulently transferred without a prior judgment or resort to legal remedies. In re H. G. Andrae Co., 117 Fed. 561. A subsequent bona fide purchaser may attack a mortgage as fraudulent without first procuring a legal lien. He had possession under the mortgagor who had retained possession after execution of the mortgage. Stephens v. Curran [Mont.] 72 Pac. 753. Only lien creditors can avoid the conveyance and a foreign judgment is not such a lien. Waite Co. v. Otto [N. J. Eq.] 54 Atl. 425. A conveyance while in debt for a mere nominal consideration is voluntary and void as to existing creditors. Whether their claims are reduced to judgment or not. Gustin v. Mathews, 25 Utah, 168, 70 Pac. 402. The creditor should generally first exhaust his legal remedies and the return of the sheriff of an execution nulla bona is conclusive that he has exhausted them. Coffield v. Parmenter [Neb.] 96 N. W. 283. A suit in the nature of a creditor's bill will lie to enforce a judgment against a non-resident based on service by publication. Parmenter v. Lomax [Kan.] 74 Pac. 634.

52. Chamberlain Banking House v. Turner-Frasier Mercantile Co. [Neb.] 92 N. W. 172.

53. Baum v. Corsicana Nat. Bank [Tex. Civ. App.] 75 S. W. 863; Anthes v. Schroeder [Neb.] 92 N. W. 196.

54. Before he can enforce a joint note against property fraudulently conveyed he must show that the co-obligors are insolvent. Geiser Mfg. Co. v. Lee [Ind. App.] 66 N. E. 701.

55. Boyer v. Weimer, 204 Pa. 295; White v. Million [Mo. App.] 76 S. W. 733. Instructions held improper. Yoder v. Reynolds [Mont.] 72 Pac. 417.

56. Farmers' Bank v. First Nat. Bank, 30 Ind. App. 520. Under the evidence a purchaser from the wife held to have had sufficient notice as to fraud in the transaction between the husband and wife. Monesson Nat. Bank v. Lichtenstein [Pa.] 56 Atl. 405.

57. Gen. St. p. 1605, § 15. Richardson v. Gerli [N. J. Eq.] 54 Atl. 438.

58. Nichols v. Nichols, 40 Misc. (N. Y.) 9; Varnum v. Bolton Shoe Co., 84 N. Y. S. 967. Purchaser held not to have had notice of the fraud such as would defeat this right. Botts v. Botts, 25 Ky. L. R. 300, 74 S. W. 1093.

59. If however after the transfer was declared fraudulent at the suit of the trustee in bankruptcy of the transferor the transferee surrendered the property to the trustee the state court had no longer jurisdiction to adjudicate such rights. Arnold v. Eastin's Trustee, 25 Ky. L. R. 895, 76 S. W. 855.

60. Lamb v. McIntire, 183 Mass. 367.

61. Morley Bros. v. Stringer [Mich.] 95 N. W. 978; Greig & Jones v. Rice, 66 S. C. 171.

62. Gray v. Chase (Mass.) 68 N. E. 676.

63. French v. Commercial Nat. Bank, 199 Ill. 218.

64. Morrison v. Houck [Iowa] 93 N. W. 593.

65. Sheldon v. Parker [Neb.] 92 N. W. 923. The judgment is a lien only on the interest transferred. Fryberger v. Berven, 88 Minn. 311. Decree held sufficient. Wolcott v. Tweddle [Mich.] 95 N. W. 419. Decree against fraudulent grantee and lessee held proper. Gray v. Chase [Mass.] 68 N. E. 676.

66. Penney v. McCulloch, 134 Ala. 580.

67. The fraudulent grantee being the wife of the grantor, a personal judgment may be granted against her it appearing that the proceeds of the sale were still in her hands. Sheldon v. Parker [Neb.] 95 N. W. 1015.

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§ 6. *Remedies of creditors.*—A creditor affected may proceed by attachment,[68] followed by judgment,[69] and execution thereon,[70] and after seizure of the property under execution, the creditor may recover possession at law or resort to equity to remove the cloud.[71] If, however, the legal title had never been in the debtor, as where he caused title to the property purchased to be taken in the name of a third person, the creditor cannot enforce by execution but must resort to equity,[72] and a creditor's bill will not lie where the property was fraudulently transferred after the judgment sought to be enforced had become a lien,[73] and though the property transferred is not subject to garnishment, the proceeds realized thereon by the transferee are.[74] The judgment creditor of the mortgagor may, in replevin by the mortgagee, impeach the mortgage on the ground that it was fraudulent.[75] Only judgment creditors can restrain an intended transfer by the debtor,[76] and an injunction to restrain the transferee from disposing of the property will not issue where a money judgment alone is asked.[77]

A receiver pending the action may be appointed.[78]

The creditor's remedy may be lost by reason of his laches,[79] or barred by limitations, and reference to the footnotes will show the time within which the remedy should be resorted to under the various statutes,[80] and the time of the accrual of the action.[81] Attornment by the tenant to the grantee is insufficient to set the statute in motion as to time within which to avoid the transfer.[82]

On the question of whether the grantor is a necessary party, the decisions are conflicting; in Nebraska he has been held a necessary party,[83] but he is not in Missouri[84] or Colorado, where, by the conveyance, he had parted with his interest.[85]

68. Colo. Trading, etc., Co. v. Acres Commission Co. [Colo. App.] 70 Pac. 954; Westervelt v. Baker [Neb.] 95 N. W. 793. The contrary prevailed in Iowa prior to Code, § 3899. Byers v. McEniry, 117 Iowa, 499.

69. Fletcher v. Tuttle, 97 Me. 491.

70. Fletcher v. Tuttle, 97 Me. 491.

71. Fletcher v. Tuttle, 97 Me. 491; Foley v. Doyle [Neb.] 95 N. W. 1067; Coulson v. Galtsman [Neb.] 96 N. W. 349. He cannot maintain ejectment instead of a suit to remove the cloud merely for the purpose of removing the bar of limitations against the relief. Brasie v. Minneapolis Brewing Co., 87 Minn. 456. A bill in equity will not lie by a purchaser under an execution sale, who is not in possession, to set aside a conveyance by debtor as in fraud of creditors, since the purchaser obtained the legal title if the conveyance was fraudulent and had an adequate remedy at law. Ropes v. Jenerson [Fla.] 34 So. 955.

72. Fletcher v. Tuttle, 97 Me. 491.

73. Newman Grove State Bank v. Linderholm [Neb.] 94 N. W. 616.

74. Cottingham v. Greely-Barnham Grocery Co., 137 Ala. 149.

75. Fraudulent transfers may be impeached both at law and in equity. Lobsenz v. Burton, 68 N. J. Law, 566.

76. Adams v. Miller [Neb.] 94 N. W. 711.

77. Veit v. Collins, 39 Misc. (N. Y.) 39.

78. An appointment held justified by the evidence. National Bank v. Hobbs, 118 Fed. 626.

79. Upton v. Dennis [Mich.] 94 N. W. 728.

80. In Minnesota suit must be brought within six years from the discovery of the fraud. Brasie v. Minneapolis Brew. Co., 87 Minn. 456. In Virginia the action is not barred by the five year statute (Code, § 2929). Flook v. Armentrout's Adm'r, 100 Va. 638. In Louisiana an action to avoid a preference to a creditor is barred after the lapse of one year. Meyer v. Moss [La.] 34 So. 332. Suit to avoid an undocketed justice's judgment confessed as a preference need not be brought within four months. Nuzum v. Herron, 52 W. Va. 499. In Kansas a delay of two years in reducing the claim to judgment will bar the action to avoid a conveyance by the debtor as in fraud of the creditor. Donaldson v. Jacobitz [Kan.] 72 Pac. 846.

81. The action does not accrue at the time of recording the instrument but at the time of the actual discovery of the fraud. Ohio Rev. St. 1892, § 4982 includes actions to avoid deeds constructively fraudulent. Stivens v. Summers, 68 Ohio St. 421. The statute begins to run from the time of recording the deed where the creditor knew of the purchase but supposed that the title was taken in the debtor's name, title having been taken in the wife's name. Donaldson v. Jacobitz [Kan.] 72 Pac. 846. It begins to run from the time of the sale, under the execution. Brasie v. Minneapolis Brewing Co., 87 Minn. 456. The limitation statute begins to run from the time of the return nulla bona. Blackwell v. Hatch [Okl.] 73 Pac. 933.

82. Downer v. Porter, 25 Ky. L. R. 571, 76 S. W. 135. The bar cannot be avoided by bringing an action in ejectment instead of a suit to remove the conveyance as a cloud. Brasie v. Minneapolis Brewing Co., 87 Minn. 456.

83. First Nat. Bank v. Gibson [Neb.] 94 N. W. 965.

84. Schneider v. Patton [Mo.] 75 S. W. 155.

85. Homestead Min. Co. v. Reynolds, 30 Colo. 330, 70 Pac. 422.

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The person through whom the fraudulent transaction was perpetrated, who merely conveyed by quitclaim, is not a necessary party.[86] To an action to declare property purchased, in the name of a third person, to be the property of the debtor, the real purchaser, the vendor is not a necessary party defendant.[87]

The judgment debtor may defend on the ground that the judgment creditor is indebted to him on contracts in a sum greater than the amount of the judgment.[88]

A cause of action to declare additions to the homestead fraudulent as to creditors may properly be joined.[89] A personal judgment cannot be had against the grantee unless so demanded in the petition.[90] In the footnotes are collected the cases construing particular petitions, complaints or bills.[91] The petition need not contain a detailed and accurate statement of the fraudulent act,[92] and answers,[93] the admissibility of evidence in particular instances,[94] and the sufficiency of instructions to the jury, and sufficiency of instructions generally.[95]

86. Hunt v. Dean [Minn.] 97 N. W. 574.

87. Hoffman v. Ackermann [La.] 35 So. 293.

88. Lashmett v. Prall [Neb.] 96 N. W. 152.

89. Hunt v. Dean [Minn.] 97 N. W. 574.

90. Petition as amended held not to charge defendant as fraudulent grantee liable to a personal judgment. Schneider v. Patton [Mo.] 75 S. W. 155.

91. Sufficiency of complaint. Smith v. Tate, 30 Ind. App. 367; Chamberlain Banking House v. Turner-Frazier Mercantile Co. [Neb.] 92 N. W. 172; Cooper v. Nolan, 138 Cal. 248, 71 Pac. 179; McKenzie v. Thomas [Ga.] 45 S. E. 610. Complaint in action to avoid a chattel mortgage held to state facts sufficient to constitute a cause of action. Welden-Judson Drug Co. v. Commercial Nat. Bank [Utah] 74 Pac. 195. Petition construed and held en declaration de simultation and not a revocatory action. The transaction being a purchase by a debtor the title taken in the name of a third party. Hoffmann v. Ackermann [La.] 35 So. 293. The petition by the administrator of the deceased grantor need not aver that the property had been fraudulently conveyed. Tyndale v. Stanwood, 182 Mass. 534. The objection of non-averment of issue and return of execution unsatisfied must be raised by answer or demurrer. Objection to such allegation on the bill held to be without merit. Bill and supplemental bill held sufficient. French v. Commercial Nat. Bank, 199 Ill. 213.

92. Allegation of fraud. Variance between pleading and proof as to the time of the conveyance is not fatal. Mallory v. Gallagher [Conn.] 55 Atl. 209. Variance between time of conveyance alleged and proved held not fatal. Id.

Allegation of intent: It is not necessary to aver an intent to defraud in a suit to set aside a voluntary conveyance. Civ. Code, § 3442, makes such a transfer void as to existing creditors. Gray v. Brunold, 140 Cal. 615, 74 Pac. 303. The defense of insolvency in an action to enforce a secret trust must be pleaded. Admissibility of evidence of insolvency in an action to recover property bid in at an execution sale under an agreement to hold same in trust for plaintiff. Gibson v. Jenkins, 97 Mo. App. 27. Allegation of fraudulent intent held insufficient. Hargadine-McKittrick Dry Goods Co. v. Bradley [Ind. T.] 69 S. W. 862; Gray v. Brunold, 140 Cal. 615, 74 Pac. 303.

Allegation of notice to grantee: Allegation held sufficient. French v. Commercial Nat. Bank, 199 Ill. 213.

Allegation of insolvency of grantor: Insolvency of grantor at the time of making the conveyance need not be pleaded. Aliter his financial condition at the time of the suit. Dufrene v. Anderson [Neb.] 93 N. W. 139. Complaint held to sufficiently charge insolvency of the debtor at the time of the transfer. Gray v. Brunold, 140 Cal. 615, 74 Pac. 303. Allegation that execution has been returned nulla bona by a constable insufficient allegation of insolvency in an action to avoid conveyance of realty. Stuckwisch v. Holmes, 29 Ind. App. 512.

Allegation of prior indebtedness: Complaint held to sufficiently allege existence of creditors at the time of the transfer. Gray v. Brunold, 140 Cal. 615, 74 Pac. 303. Allegation that indebtedness was created prior to the conveyance held sufficient. Chamberlain Banking House v. Turner-Frazier Mercantile Co. [Neb.] 92 N. W. 172.

93. Answer held responsive to bill. Ropes v. Jenerson [Fla.] 34 So. 955. Answer held sufficient after decree. Walker v. Harold [Or.] 74 Pac. 705. It is not necessary to plead that the property transferred was exempt and not subject to the transferor's debts. Furth v. March [Mo. App.] 74 S. W. 147. Where the property was the wife's property and the grantor the surviving husband held under the statute a homestead and curtesy right therein, he may amend his answer and have the value of the homestead set off to him (Cincinnati Tobacco Warehouse Co. v. Matthews, 24 Ky. L. R. 2445, 74 S. W. 242), but defense of payment of consideration must be pleaded (Noble v. Gilliam, 136 Ala. 618).

94. Volusia County Bank v. Bigelow [Fla.] 33 So. 704; Ritchey v. Seeley [Neb.] 93 N. W. 977; Fitzpatrick v. Fox, 80 App. Div. (N. Y.) 345; Moore v. Robinson [Tex. Civ. App.] 75 S. W. 890. Under a denial of plaintiff's title in replevin the defendants were entitled to show that they were judgment creditors of the plaintiff vendor at the time of the sale. Schidlower v. McCafferty. 85 App. Div. (N. Y.) 493. As to insolvency. Fryberger v. Berven, 88 Minn. 311. To show fraud. Meyer v. Baird [Iowa] 94 N. W. 1129; Goldstein v. Morgan [Iowa] 96 N. W. 897. As to intent. Freese v. Kemplay [C. C. A.] 118 Fed. 428; Meyer v. Baird [Iowa] 94 N. W. 1129. As to consideration and knowledge. Lesser

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§ 7. *Priorities between creditors on setting aside conveyances, and disposition of proceeds.*—The creditor who first institutes the suit to avoid the conveyance is entitled to priority of payment.[96] The judgment creditor of a fraudulent grantee acquires no rights by virtue of his execution on the property.[97]

GAMBLING CONTRACTS.[98]

§ 1. *What constitutes a wagering contract.*[99]—On contracts of sale for future delivery, the intention as to actual delivery is the test.[1] The name by which the parties have designated the transaction is immaterial.[2] A mere deposit of margins,[3] or an order to a broker to sell a certain number of shares of a certain stock,[4] will be presumed to be legal. An agreement on the part of a vendor to repurchase at par upon specified notice, does not make the sale a gambling transaction.[5]

A statute prohibiting any person other than the owner of a racing horse from having pecuniary interest in the prizes it wins does not render illegal a contract to train a horse for a specific sum and a percentage of the prize money.[6]

§ 2. *Rights and remedies of parties and their privies.*—A statute declaring void transactions in futures does not deprive a person of his property without due process of law.[7] Property rights in gambling devices will not be protected,[8] unless the device is capable of an innocent use,[9] nor can the purchase price of a gambling device be recovered.[10] Money held under a wagering contract may be recovered[11] in assumpsit.[12]

v. Brown, 75 Conn. 491; Cooper & Co. v. Sawyer [Tex. Civ. App.] 73 S. W. 992; Noble v. Gilliam, 136 Ala. 618. Of admissions of transferor. Bernard v. Guidry, 109 La. 451; Walker v. Harold [Or.] 74 Pac. 705; Moore v. Robinson [Tex. Civ. App.] 75 S. W. 890. Admissions of husband held not admissible against the wife. Aldous v. Olverson [S. D.] 95 N. W. 917.

95. Southern Loan & Trust Co. v. Benbow, 131 N. C. 413; Yoder v. Reynolds [Mont.] 72 Pac. 417; Oglesby v. Walton [Ga.] 44 S. E. 990; Merrill v. Merrill, 105 Ill. App. 5; Dunning v. Bailey [Iowa] 95 N. W. 248; Hewitt v. Price [Mo. App.] 74 S. W. 414. Instruction on question of indebtedness at the time of the conveyance held improper. Aldous v. Olverson [S. D.] 95 N. W. 917. Sufficiency of instruction on intent. Meyer v. Baird [Iowa] 94 N. W. 1129.

96. Geiser Mfg. Co. v. Chewning, 52 W. Va. 523. Judicial lien in favor of creditor on property belonging to the wife of debtor who had expended his own funds in making improvements held prior to a deed of trust on the land. Mylius v. Smith [W. Va.] 44 S. E. 542.

97. He is not a bona fide purchaser under Gen. St. p. 1605, § 15. Richardson v. Gerli [N. J. Eq.] 54 Atl. 438.

98. The offense of gaming and the recovery of statutory penalties and forfeitures therefor is treated in Betting and Gaming; the offense of maintaining a lottery in Lotteries.

99. In Louisiana, both a future crop and the hope of a future crop may be sold. Losecco v. Gregory, 108 La. 648.

1. Thompson v. Brady, 182 Mass. 321; Chicago Board of Trade v. Kinsey Co., 125 Fed. 72. Where the stocks were actually delivered it is not a wagering contract. Post v. Leland [Mass.] 69 N. E. 361. If the parties intend settlement on a basis of differences in price it is a wagering contract (Allen v. Fuller, 182 Mass. 202; Boyd Commission Co. v. Coates, 24 Ky. L. R. 730, 69 S. W. 1090), but the intent must be mutual (Jones v. Jones, 103 Ill. App. 382; Staninger v. Tabor, 103 Ill. App. 330).

A bucket shop is a place where provisions are bought and sold on margins, profits or losses to be determined by the rise or fall of prices, there being no intention that the commodities shall be delivered. Boyd Commission Co. v. Coates, 24 Ky. L. R. 730, 69 S. W. 1090; Lancaster v. McKinley [Ind. App.] 67 N. E. 947. Evidence as to keeping a bucket shop held sufficient. State v. Kentner [Mo.] 77 S. W. 522.

2. Sharp v. Stalker, 63 N. J. Eq. 596.

3. Hocker v. Western Union Tel. Co. [Fla.] 34 So. 901.

4. Boyle v. Henning, 121 Fed. 376.

5. Loeb v. Stern, 198 Ill. 371.

6. Brien v. Stone, 82 App. Div. (N. Y.) 450.

7. Otis v. Parker, 187 U. S. 606, 47 Law. Ed. 323.

8. Board of trade quotations. Chicago Board of Trade v. Kinsey Co., 125 Fed. 72; Christie G. & S. Co. v. Board of Trade (C. C. A.) 125 Fed. 161.

9. Slot machine not in actual use as gambling device. Edwards v. American Exp. Co. [Iowa] 96 N. W. 740.

10. Ohlson v. Wilson [Tex. Civ. App.] 71 S. W. 768.

11. Mendel v. Boyd [Neb.] 91 N. W. 860. That the money is held by one employed to gamble in futures, does not alter the rule. Munns v. Donovan Commission Co., 117 Iowa, 516. A statute rendering void a mere dealing in futures cannot be invoked to defeat an action to recover margins advanced under rules requiring actual delivery. Parker & Co. v. Moore, 125 Fed. 807.

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Statutes in many states allow the recovery back of money lost in gambling.[12] Where the action is in name of third person, defendant may show it is really in interest of loser,[14] and this may be shown under the general issue,[15] but it has been held that collusion between the loser and the person suing is no defense.[16] Action must be brought in county where loss occurred.[17] Giving of notes is not a payment which may be recovered back, nor is payment by sureties on supersedeas bond given on appeal from judgment on such notes.[18]

A medium between two parties to a gambling contract is *particeps criminis*.[19]

§ 3. *Effect of illegality on substituted or collateral contracts or securities.*[20]—A loan of money to pay a past gambling debt is not within the statutes,[21] but an advance of money to be used in gambling is,[22] and a judgment for a gambling debt is sometimes made unenforceable.[23] A subsequent promise to pay a note given for a gambling debt is ineffectual if the holder had notice of the defect,[24] but if he had not and was induced by the promise to take the note, it operates as an estoppel.[25] Illegality in a proposed corporate scheme of distribution of property by a drawing is not available to stockholders in defense of an action on the subscription.[26] Under a statute authorizing recovery of money deposited in stock gambling, foreclosure of a mortgage deposited as security may be enjoined.[27]

GARNISHMENT.[28]

§ 1. Definition and Nature of the Remedy in General (130).
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§ 18. Wrongful Garnishment (138).

§ 1. *Definition and nature of the remedy in general.*—Garnishment or trustee process is a species of attachment[29] in the nature of a proceeding in rem,[30] dif-

12. Van Pelt v. Schauble, 68 N. J. Law, 638.

13. Such statutes do not create a right which cannot be divested by a repeal after the cause of action accrues. Wilson v. Head [Mass.] 69 N. E. 317. St. 1901, c. 459 does not repeal St. 1890, c. 437 except so far as it is inconsistent therewith (Wilson v. Head [Mass.] 69 N. E. 317) and a declaration following the language of the amendment but stating a cause of action under the unrepealed portion of the original act is good (Loughlin v. Parkinson [Mass.] 69 N. E. 319).

A statute authorizing recovery of money lost in betting on an ordinary game does not authorize recovery of money lost in "bucket shop" dealings. Lancaster v. McKinley [Ind. App.] 67 N. E. 947.

14. The Illinois statute allows increased damages where a third person sues. Staninger v. Tabor, 103 Ill. App. 330; Kizer v. Walden, 198 Ill. 274.

15. Staninger v. Tabor, 103 Ill. App. 330.

16. Kizer v. Walden, 198 Ill. 274.

17. Staninger v. Tabor, 103 Ill. App. 330.

18. Jacob v. Clark, 24 Ky. L. R. 2120, 72 S. W. 1095.

19. Munns v. Donovan Commission Co., 117 Iowa, 516. A broker may act as principal with relation to a customer. If the broker actually buys or sells for the customer, the gambling element is lacking; otherwise, if the transactions are mere dealings in differences. Sharp v. Stalker, 63 N. J. Eq. 596.

20. The validity of the endorsement of a certificate of deposit to pay a gambling transaction is governed, as against an innocent purchaser for value, by the lex loci. Sullivan v. German Nat. Bank [Colo. App.] 70 Pac. 162.

21. Hurlburt v. Straub [W. Va.] 46 S. E. 163; Charleston State Bank v. Edman, 99 Ill. App. 235.

22. A check given for money advanced for gambling purposes is void in the hands of one winning it from the person to whom the advance was made. It is within Ball. Ann. Codes & St. § 7267 avoiding securities the consideration for which is money won at gambling. Ash v. Clark [Wash.] 73 Pac. 351.

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fering from attachment however in that no specific lien is acquired.[31] It arises wholly from the statutes and the requirements thereof are jurisdictional.[32]

§ 2. *Occasion and grounds for garnishment.*—Any legal debt,[33] including judgment debts,[34] may be enforced by garnishment, and issue of execution and return unsatisfied are not prerequisite.[35]

§ 3. *Choses and properties subject to garnishment.*—An indebtedness to be garnishable must be a legal obligation,[36] presently due,[37] without condition or contingency,[38] and unpaid,[39] and must have a situs within the jurisdiction of the court.[40]

23. Hurd's Rev. St. 1899, p. 590. Butler v. Nope, 98 Ill. App. 624.

24. Ash v. Clark [Wash.] 73 Pac. 351.

25. Hurlburt v. Straub [W. Va.] 46 S. E. 163.

26. Reed v. Gold [Va.] 45 S. E. 868.

27. Rice v. Winslow, 182 Mass. 273.

28. For a history of the garnishment statutes of Florida see Duval County v. Charleston L. & M. Co. [Fla.] 33 So. 531.

29. Westminster Bank v. Atherton, 24 R. I. 334.

30. Since its aim is to invest the plaintiff with the right and power to appropriate to the satisfaction of his claim against the defendant, property of the defendant in the garnishee's hands, or a debt due from the garnishee to the defendant. Penn. R. Co. v. Rogers, 52 W. Va. 450; Kan. & T. Coal Co. v. Adams, 99 Mo. App. 474.

31. Plaintiff in garnishment does not acquire a clear lien on specific property in possession of the garnishee, but acquires only such a lien as gives him the right to hold the garnishee personally liable for the property or its value. Benedict v. T. L. V. Land Co. [Neb.] 92 N. W. 210.

32. Penn. R. Co. v. Rogers, 52 W. Va. 450; Duval County v. Charleston L. M. Co. [Fla.] 33 So. 531. A creditor's right to subject his debtor's choses in action to payment of his claim may be enforced in equity when by reason of some impediment his legal remedy by garnishment is inadequate. Henderson v. Hall, 134 Ala. 455. Compare Farmers' & M. Nat. Bank v. Mosher [Neb.] 94 N. W. 1003.

33. In Iowa plaintiff must claim more than $5 to entitle him to the writ, and a recovery of less than that amount necessitates his payment of the costs [Code, § 4579]. Insel v. Kennedy [Iowa] 94 N. W. 456.

34. A money judgment against a plaintiff may be the basis for garnishment. Donohoe, etc., Banking Co. v. Southern Pac. Co., 138 Cal. 183, 71 Pac. 93.

35. Pope v. Kingman [Neb.] 96 N. W. 519.

36. Only such obligations as would sustain an action of debt. Jefferson County Sav. Bank v. Nathan [Ala.] 35 So. 355.

A promise by the garnishee that he would pay defendant a certain amount more than the contract price for work being done is a mere gratuity and does not create the relation of debtor and creditor. Willingham S. & D. Co. v. Drew, 117 Ga. 850.

A credit arising from an obligation given to a wife on a consideration moving from her husband may be garnished in a suit against him. Potter v. Skiles, 24 Ky. L. R. 910, 70 S. W. 301.

It is the proper remedy for a judgment creditor of a corporation to subject unpaid stock subscriptions to the payment of his claim (Henderson v. Hall, 134 Ala. 455), but is not the proper remedy to recover of a third party money which has been equitably assigned to plaintiff and deposited with such party by defendant (Kerr v. Kennedy, 119 Iowa, 239).

37. Funds to become due defendant for performance of public work for a municipality are not subject to garnishment. Building a sewer. Pringle v. Guild, 118 Fed. 655. An undetermined interest of an heir cannot be reached by fieri facias on attachment but the creditor must pursue his remedy in the orphans' court. Ellwanger v. Moore, 206 Pa. 234. A fund which at the time of service is not garnishable, but which becomes so before the garnishee's answer is taken may be held. Funds in executor's hands made payable by order of distribution. First Nat. Bank v. Manning [Neb.] 95 N. W. 1128. Building contract held substantially performed so as to make contract price garnishable. Allen v. Mayers [Mass.] 69 N. E. 220. Payments on building contract held not due and garnishable until completion of building. Mundt v. Shaborn [Wis.] 97 N. W. 897.

38. In some jurisdictions only a debt or liability absolutely owing as a money demand and free from conditions or contingencies is subject to garnishment. Reid v. Mercurio, 91 Mo. App. 673. A claim for unliquidated damages is not garnishable, even after verdict, if before judgment. Wilde v. Mahaney, 183 Mass. 455, 59 L. R. A. 353. A debt arising against an insurance company by virtue of a loss is not exempt from garnishment before adjustment as its amount may be ascertained. Sexton v. Phoenix Ins. Co., 132 N. C. 1.

Money due on a policy of fire insurance is subject to garnishment. Id. But the company may show there were no proofs of loss served on it by the assured, and plaintiff may show a waiver of such proofs. Reid v. Mercurio, 91 Mo. App. 673. But assured's interest in a tontine life insurance policy payable to his children is not garnishable, where at the expiration of the tontine period he elected to take one payable to his children at his death. Columbia Bank v. Equitable L. Assur. Soc., 79 App. Div. [N. Y.] 601. Compare Ellison v. Straw [Wis.] 97 N. W. 168. The claim under a fire insurance policy, after loss, is subject to garnishment. Meridian L. & I. Co. v. Ormond [Miss.] 35 So. 179. A public contractor has no garnishable interest until he has completed his contract and furnished releases of all claims for material, etc., as provided by his contract. Gastonia v. McEntee, etc., Engineering Co., 131 N. C. 359.

39. A purchaser in good faith who has

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A debt due a partnership cannot be garnished for the individual debt of a member of the firm.[41] Property held as security is not subject to garnishment.[42] By the statutes of most states, indebtedness evidenced by notes is not subject to garnishment,[43] and notes are not subject to garnishment as property.[44] Distributive shares in a decedent's estate are garnishable,[45] but not the proceeds of an unexecuted testamentary power to sell and distribute,[46] nor a fund in the interest from which a third person has a life estate.[47]

A landlord's interest in crops raised by a tenant on shares may be reached.[48]

Garnishment process cannot be used to interfere with interstate commerce.[49]

§ 4. *Persons liable to garnishment.*—Unless expressly provided by statute an executor is not garnishable for funds he holds as such,[50] nor is a town,[51] or a county.[52] A receiver,[53] or a sheriff or constable[54] may be.

given his check for the price has so far paid for the article bought that he is not subject to garnishment as the seller's debtor. Prewitt v. Brown [Mo. App.] 73 S. W. 897.

Payment in advance, before garnishment, on account of salary yet unearned will defeat garnishment as to wages yet to be earned. Where the garnishee before summons, had advanced defendant, its employe, money on salary account as yet unearned, it was not indebted to defendant and did not become so until the amount so advanced had been earned. Odum v. Macon & B. R. Co. [Ga.] 45 S. E. 619.

40. Boyle v. Musser, etc., L. & M. Co., 88 Minn. 456; Allen v. United Cigar Stores Co., 39 Misc. (N. Y.) 500. The situs of a debt is generally at the place where the creditor is domiciled. Where the defendant was a nonresident and the garnishee's answer did not state where the debt was payable, it was presumed to be at the domicile of defendant and hence without the jurisdiction of the court. Beasley v. Lennox-Haldeman Co., 116 Ga. 13; Pa. R. Co. v. Rogers, 52 W. Va. 450. A debt due from a New York insurance company for loss sustained in North Carolina has situs in New York. Sexton v. Phoenix Ins. Co., 132 N. C. 1. A debt due a nonresident from a citizen of a certain state may be garnished in that state. Dinkins v. Crunden, etc., Woodenware Co., 99 Mo. App. 310. A judgment of a court of one state cannot be subjected to garnishment in another. Boyle v. Musser, etc., L., L. & M. Co., 88 Minn. 456. Proceedings against a life insurance company domiciled in another state begun by service on its agent in the state of the forum are not so entirely without jurisdiction as to be void, but at most are only voidable. Metcalf v. Bockoven [Neb.] 96 N. W. 406.

Neither defendant nor the garnishee can plead that in the state where defendant resides the debt garnished is exempt from execution. Dinkins v. Crunden, etc., Woodenware Co., 99 Mo. App. 310; Sexton v. Phoenix Ins. Co., 132 N. C. 1; Pa. R. Co. v. Rogers, 52 W. Va. 450; Williams v. St. Louis & S. W. R. Co., 109 La. 90.

A nonresident, temporarily in the state, cannot be held in garnishment where his answer shows his nonresidence and that he has no property of the defendant in his possession in the state and is bound to pay him no debt within the state. Pa. R. Co. v. Rogers, 52 W. Va. 450. Foreign corporations and nonresident individuals stand upon the same footing as regards garnishment except that where a corporation has done business in a state other than its home to the extent of becoming domiciled there it may be garnished in such state. Id.

41. Raley v. Smith [Tex. Civ. App.] 73 S. W. 54.

42. Gregg v. First Nat. Bank [Mich.] 97 N. W. 713.

43. But a statute providing that garnishees shall not be liable on negotiable promissory notes does not avoid a judgment based on a disclosure by a garnishee that he owes defendant on notes not stating whether they are negotiable (Harwi Hardware Co. v. Klippert [Kan.] 74 Pac. 254) and where notes and accounts fraudulently acquired by a garnishee have been collected, the funds are subject to garnishment in his hands as property of the grantor (Cottingham v. Greely, etc., Grocery Co., 137 Ala. 149.

44. Being mere choses in action. Cottingham v. Greely, etc., Grocery Co., 137 Ala. 149).

45. A distributee's share in the estate of a deceased person may be reached by trustee process. Howe v. Howe, 97 Me. 422; First Nat. Bank v. Manning [Neb.] 95 N. W. 1128.

46. But the interest of a son in the estate of his father devised to executors to sell and divide the proceeds in a certain way is not garnishable. Harris v. Kittle [Ga.] 45 S. E. 729. But see In re Weeter's Estate, 21 Pa. Super. Ct. 241; cf. Ellwanger v. Moore, 206 Pa. 234.

47. Where a widow consents to a sale of lands set apart to her as dower and agrees to hold the proceeds in trust for the heirs having the interest thereon for her own use, such proceeds cannot be garnished as her property. Bank of Odessa v. Barnett, 98 Mo. App. 477.

48. Jolls v. Keegan [Del.] 55 Atl. 340.

49. A railway company having possession of cars of another company employed in interstate commerce is not subject to garnishment as to the cars on its line under contract between the two companies that they shall be unloaded, reloaded and returned to the owning company for delivery. Wall v. Norfolk & W. R. Co., 52 W. Va. 485.

50. Harris v. Kittle [Ga.] 45 S. E. 729.

51. Pringle v. Guild, 118 Fed. 655.

In North Carolina, an ordinary debt owing by a town may be garnished. Town of Gastonia v. McEntee-Peterson Engineering Co., 131 N. C. 359.

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§ 5. *Rights, defenses and liabilities between plaintiff and garnishee.*—The garnishee must maintain the status quo,[55] but plaintiff acquires no greater rights against garnishee than defendant has,[56] and cannot rightfully enforce any claim against him that will expose him to the liability to pay his debt twice.[57] Neither can he raise the question that an assignment to the trustee by defendant was fraudulent.[58]

An administrator, when garnished as debtor of a distributee of the estate, cannot set off money owing him in his individual capacity,[59] nor contest the judgment in the principal case on the ground that the account filed by the plaintiff was insufficient.[60]

After an attorney has obtained judgment for his services, the defense that the contract is void for champerty cannot be raised in garnishment proceedings to collect the judgment.[61]

The garnishee is interested only in the question whether he has funds of the debtor subject to execution; the solvency of the debtor and the evidence on that question do not concern him.[62]

§ 6. *Rights, defenses and liabilities between defendant and garnishee.*—Where a debt has been recovered of a debtor under the process of foreign attachment, fairly and not collusively, the recovery is a protection to the garnishee against his original creditor, and he may plead it in bar,[63] but the validity of the garnishment proceedings must be shown,[64] and payment by garnishee of a judgment, void for want of jurisdiction, is no defense to a subsequent suit by the debtor.[65]

Whether or not the garnishee may or should claim for his creditor the benefit of exemptions allowed by law is held differently in different states, some jurisdictions holding that he should.[66]

52. Duval County v. Charleston Lumber & Mfg. Co. [Fla.] 33 So. 531; Michigan Lumber & Mfg. Co. v. Duval County [Fla.] 34 So. 245. A default judgment taken against a county as garnishee is void. Id.

53. With leave of court. Yeiser v. Cathers [Neb.] 97 N. W. 840. Rents and profits of lands in the hands of a receiver cannot be garnished. Campau v. Detroit Driving Club [Mich.] 98 N. W. 267.

54. Pierce v. Commercial Inv. Co., 30 Wash. 272, 70 Pac. 496.

55. The garnishee must hold the property in the same condition it is in when he is garnished; failing in this he is guilty of conversion and will be liable to a money judgment; he cannot, after that, be discharged by delivery of the property to the sheriff. Dunning v. Bailey [Iowa] 95 N. W. 248. By turning over money on order of the principal debtor pending an equitable action to enforce payment from him he becomes liable to the creditor therefor. (Farmers' & Merchants' Nat. Bank v. Mosher [Neb.] 94 N. W. 1003), and a transfer of the property by the garnishee after service and before answer does not destroy plaintiff's right to try that question [Rev. St. 1895, art. 240] (Houston Drug Co. v. Kirchhain [Tex. Civ. App.] 71 S. W. 608).

In Missouri the lien attaches to all credits the garnishee has in his possession at the time of service and all that come into possession between that time and the time of filing his answer. Wages earned by a nonresident head of a family are thus bound (Rev. St. 1899, § 3436). Dinkins v. Crunden-Martin Woodenware Co., 99 Mo. App. 310. Where garnishee disposes of the property after service and before trial judgment may be entered against him. Dictum, the court holding that such judgment was at least good against collateral attack. Eidemiller v. Elder [Wash.] 73 Pac. 687.

56. Wall v. Norfolk R. Co., 52 W. Va. 485; Dole v. Farwell [N. H.] 55 Atl. 553; Town of Gastonia v. McEntee-Peterson Engineering Co., 131 N. C. 359; Fidelity Trust Co. v. New York Finance Co. [C. C. A.] 125 Fed. 275; Williams v. West Chicago St. R. Co., 199 Ill. 57; Reid v. Mercurio, 91 Mo. App. 673; Netter v. Stockle [Del.] 56 Atl. 604; Field v. Sammis [N. M.] 73 Pac. 617.

57. Streeter v. Gleason [Iowa] 95 N. W. 242.

Where a garnishee has legal title to the trust property and is charged with active duties in regard thereto he may set up any defense he might make against the defendant. Fidelity Trust Co. v. New York Finance Co. [C. C. A.] 125 Fed. 275.

58. Dole v. Farwell [N. H.] 55 Atl. 553.

59. Howe v. Howe, 97 Me. 422.

60. Reid v. Mercurio, 91 Mo. App. 673.

61. Kerr v. Kennedy, 119 Iowa, 239.

62. Bolton v. Bailey [Iowa] 93 N. W. 596.

63. Baltimore, etc., R. Co. v. Adams, 159 Ind. 688, 60 L. R. A. 936.

64. Affidavit lacking jurisdictional averments. Dutcher v. Grand Rapids Fire Ins. Co. [Mich.] 92 N. W. 345.

65. Allen v. United Cigar Stores Co., 39 Misc. (N. Y.) 500; Hedrix v. Chicago, etc., R. Co. [Mo. App.] 77 S. W. 495.

66. Rumbold v. Supreme Council Royal League [Ill.] 69 N. E. 590. That exemption

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Payment into court of the full amount of a garnishee's indebtedness to a debtor operates to fully discharge garnishee's debt.[67] Where a garnishee pays a judgment rendered on a claim sent out of the state in violation of the law, he will be protected, it not appearing that he failed to make all defenses known to him.[68]

The debtor cannot maintain a rule against the magistrate for money adjudged subject to garnishment, without first showing that the judgment has been set aside.[69]

§ 7. *Conflicting and hostile claims and liens.*—Obviously where a fund has been in good faith assigned by the defendant before garnishment, the garnishee is no longer the defendant's but another's debtor, and there is nothing to which the garnishment lien can attach.[70]

The lien of a purchaser or pledgee of stock is superior to that of a subsequent attachment, though the transfer has not been recorded on the books of the corporation.[71]

Plaintiff in garnishment can acquire no lien superior to that of a second mortgagee by garnishing a first mortgagee who has in his hands a surplus arising from a sale under the first mortgage.[72]

Where plaintiff takes a general judgment in the main case and promptly resorts to an equitable suit to enforce payment from garnishees, his lien extends through the equity suit.[73]

Garnishment is superseded by bankruptcy within four months.[74]

An amendment of a prior writ in a mere matter of form will not postpone its lien in favor of a subsequent writ.[75]

§ 8. *Jurisdiction and venue.*—Courts have no extraterritorial jurisdiction over either persons or property. To maintain a proceeding, there must be jurisdiction over one or the other, or both.[76] An order of garnishment has no effect to give a lien on property beyond the county in which it is granted.[77]

is a personal privilege of the debtor that cannot be asserted by a garnishee. Dinkins v. Crunden-Martin Woodenware Co., 99 Mo. App. 310.

67. Taney v. Vollenweider [Mont.] 72 Pac. 415.

68. As he is not obliged to gratuitously defend the main action, nor to appeal, where a true disclosure has been made. Baltimore, etc., R. Co. v. Adams, 159 Ind. 688, 60 L. R. A. 396.

69. Lampkin v. Northington, 115 Ga. 989.

70. That the garnishee had no notice of the assignment until after service of the writ is immaterial. Howe v. Howe, 97 Me. 422; Williams v. West Chicago St. R. Co., 199 Ill. 57. Assignment before suit of future wages is valid. Dole v. Farwell [N. H.] 55 Atl. 553. A bank which has received and accepted a check for a deposit and transferred the account to the person presenting the check is no longer the debtor of the original depositor and cannot be held as garnishee. Young v. Bank of Princeton, 97 Mo. App. 576. But a bank check given before but not presented until after service of garnishment summons on the bank, does not act as an equitable assignment pro tanto of the sum named therein. Donohoe-Kelly Banking Co. v. Southern Pac. Co., 138 Cal. 183, 71 Pac. 93. Assignment of a chose in action pending suit thereon defeats subsequent garnishment of the proceeds of the judgment. A personal injury case (Williams v. West Chicago R. Co., 199 Ill. 57), notwithstanding failure to give notice of assignment on the record (Westminster Bank v. Atherton, 24 R. I. 334). Lease assigned by the lessor in good faith before garnishment of the tenant. First Nat. Bank v. Stone [Iowa] 91 N. W. 1076. Though an assignment of property for benefit of creditors does not become effective until accepted by them so as to relieve it of liability to garnishment, where there is no showing as to whether there was an acceptance it will be presumed. South Tex. Nat. Bank v. Texas & L. L. Co. [Tex. Civ. App.] 70 S. W. 768.

71. Clews v. Friedman, 182 Mass. 555. Compare Mapleton Bank v. Standrod (Idaho) 71 Pac. 119.

72. Jackson v. Coffman [Tenn.] 75 S. W. 718.

73. Farmers' & Merchants' Nat. Bank v. Mosher [Neb.] 94 N. W. 1003.

74. In re Beaver Coal Co. (C. C. A.) 113 Fed. 889.

75. Brown v. Ellsworth [N. H.] 55 Atl. 356.

76. A railroad company operating no road in a certain state and having no office there except a joint agency with other roads for the solicitation of through business is not subject to garnishment there for a debt it owes an employe in another state for labor performed there. Pa. R. Co. v. Rogers, 52 W. Va. 450.

77. Benedict v. T. L. V. Land & Cattle Co. [Neb.] 92 N. W. 210.

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Several writs may issue to sheriffs of different counties in the same suit.[78]

Where a writ is made returnable to a wrong term and district it may be amended.[79]

§ 9. *Affidavit or application for writ.*—An affidavit showing the necessary statutory facts as ground for the issuance of the writ is essential.[80]

§ 10. *Bond for writ.*—The bond and affidavit for a writ in another county need not show the making of copies thereof and transmission to the county where the main case is pending.[81]

§ 11. *Writ or process to garnishee and return.*—It is essential that there be a valid writ.[82]

The writ may be amended notwithstanding subsequent attachments, and neither the defendant nor the trustee can object,[83] and the plaintiff in a subsequent action is not entitled to notice;[84] but where an amendment would necessitate further service of process and the same result is attainable by service of mesne process, the amendment is properly denied.[85]

The garnishee being a mere stakeholder cannot give the court jurisdiction of the debt due from him by voluntarily appearing when the attempted service on him was invalid.[86]

There must be a return showing a valid service,[87] but a writ is not invalidated by failure of the sheriff to make return in due season.[88]

78. Tyler v. Fidelity B. & L. Ass'n [Del.] 55 Atl. 714.

79. Brown v. Ellsworth [N. H.] 55 Atl. 356.

80. Garrett v. Murphy, 102 Ill. App. 65. The application for garnishment against an executor for a legacy due a nonresident must allege that plaintiff has some reason to apprehend loss unless garnishment issue. Harris v. Kittle [Ga.] 45 S. E. 729. It need not specifically state that the judgment in the main case was rendered against the party to whom the garnishee's debt is owing. Jeffries v. Smith [Tex. Civ. App.] 73 S. W. 48. The affidavit and bond for a writ in another county need not show the making of copies thereof and transmission to the county where the main case is pending. Carr & Co. v. Roney [Ga.] 45 S. E. 464.

81. Carr & Co. v. Roney [Ga.] 45 S. E. 464.

82. Kan. & T. Coal Co. v. Adams, 99 Mo. App. 474. In Indiana, where the statute authorizes the summoning of any employe of a railroad company to answer as to the amount of money coming into his hands for such company, it is held that the proceedings are void unless the writ to the employe actually issues though the company appears and defends. Chicago & S. E. R. Co. v. Witt, 160 Ind. 680. But a variance in the name of the judgment debtor will not invalidate the writ where the names are idem sonans, as Welch for Welsh. Donohoe-Kelly Banking Co. v. Southern Pac. Co., 138 Cal. 183, 71 Pac. 93. Neither will an error in the name of the garnishee be fatal where there is no question but that the proper party was served. Id. But an attachment against the John Hancock Life Insurance Company will not hold funds in the hands of the John Hancock Mutual Life Insurance Company. King v. McElroy [R. I.] 55 Atl. 638.

An unnecessary requirement in the writ that the party to whom it is directed appear and answer on a certain day will not invalidate it. Equitable attachment against a corporation to reach defendant's stock. Ladd v. Franklin L. & T. Co. [R. I.] 53 Atl. 59.

In Rhode Island an attachment in equity to reach shares of corporate stock owned by defendant is valid though the writ is not accompanied by the affidavit on which it is based. Id. A writ failing to require the answer to be in writing will not sustain a default judgment. Work Bros. & Co. v. Waggoner [Miss.] 35 So. 137.

83. Description of residence of defendant and designation of term to which returnable. Brown v. Ellsworth [N. H.] 55 Atl. 356.

84. Brown v. Ellsworth [N. H.] 55 Atl. 356.

85. King v. McElroy [R. I.] 55 Atl. 638.

86. Pa. R. Co. v. Rogers, 52 W. Va. 450. Service on legal holiday is void [Rev. St. 1899, § 4683]. Decker v. St. Louis & S. R. Co., 92 Mo. App. 50. Service on an insurance company doing business in the state is properly made on the Insurance Commissioner. Reid v. Mercurio, 91 Mo. App. 673. In Missouri one garnished on execution must be summoned to answer to the return term of the writ whether that be the first or second term after its date [Rev. St. 1899, § 388]. Dinkins v. Gottselig, 90 Mo. App. 639. Tender of an insufficient fee to garnishee will not deprive the justice of jurisdiction. McAnaney v. Quigley, 105 Ill. App. 611. By appearing and answering without objection a garnishee waives his right to prepayment of his witness fees. Pope v. Kingman & Co. [Neb.] 96 N. W. 519.

87. A return that the officer summoned the garnishee "to answer touching his indebtedness to defendant" is insufficient. Decker v. St. Louis & S. R. Co., 92 Mo. App. 50. Failure to show in the return that the agent of a foreign corporation, on whom

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§ 12. *Answer or disclosure and later pleadings or traverse.*—The answ should disclose all facts and circumstances necessary to a complete understandi of the garnishee's indebtedness.[89]

To charge a garnishee on his own answer, his liability must clearly appe and if there is any reasonable doubt of such liability he should be discharged.[90]

Plaintiff's right against garnishee is governed by what the disclosure its contains rather than by that portion of it specially called to the court's attention

In Rhode Island, the disclosure by an attachment defendant in equity is the discretion of the court.[92]

A garnishee is not interested in an issue between plaintiff and intervenc claiming assignment of the fund, and his answer setting up the same facts plead by intervenors is properly disregarded;[93] but he may defend on the ground th money in his hands belongs to a third person who has not intervened,[94] and whe a garnishee has notice of a claim by a third person on the fund in question a fails to bring it to the notice of the court, he may be charged by such third pers though he has suffered judgment to go against him and has paid it. The thi person is not required to intervene.[95]

A default taken against a trustee may be stricken off at any time before juc ment.[96]

A disclosure may be amended if made under mistake as to the person ow by defendant.[97]

An issue as to the truth of the disclosure is raised by filing an affidavit stati plaintiff's belief and reasons for believing it untrue.[98]

In Michigan, the plaintiff has thirty days after disclosure in which to su mon the garnishee to show cause why judgment shall not be rendered against hi To render judgment against the plaintiff discharging the garnishee on filing disclosure on the return day is error.[99]

Plaintiff's notice of issue to garnishee's original answer stands also as not to an amended answer subsequently filed.[1]

The plaintiff's contest of garnishee's answer is amendable.[2]

§ 13. *Claims or interventions.*—An intervening claimant may object th the fund due defendant is not garnishable.[3]

service was made, resides in the county in which he was served renders the service invalid. Pa. R. Co. v. Rogers, 52 W. Va. 450. In Missouri, if the return of the constable indorsed on the notice of garnishment fail to set forth that he declared to the debtor that he attached all debts due from him to defendant as required by Rev. St. 1899, § 388, subd. 5, it is void; but where there is also a return on the execution which contains the necessary averment the latter will govern. Kan. & T. Coal Co. v. Adams, 99 Mo. App. 474. A return showing service on "A. B. agent of C. D. company" shows service on the person only and not on the corporation. Burnett v. Cent. of Ga. R. Co., 117 Ga. 521. Return held to show that it was on a defective garnishment writ as well as an attachment issued at the same time. Work Bros. & Co. v. Waggoner [Miss.] 35 So. 338.

88. Guarantee T. & S. Deposit Co. v. Nebeker, 68 N. J. Law, 561.

89. Harwi Hardware Co. v. Klippert [Kan.] 74 Pac. 254. In foreign attachment to reach shares of stock held by defendant, a certificate of the president of the corporation that defendant held certain sha describing them is sufficient. Mann v. P [Del.] 55 Atl. 335.

90, 91. Streeter v. Gleason [Iowa] 95 W. 242.

92. Attachment of corporate stock [G Laws, c. 252]. Ladd v. Franklin L. & T. [R. I.] 53 Atl. 59.

93. O'Melia v. Hoffmeyer, 119 Iowa, 4

94. Curtis v. Parker, 136 Ala. 217.

95. Tarrant v. Burch, 102 Ill. App. 3

96. Sprague v. Auffmordt, 183 Mass. 7

97. Gerow v. Hyde [Mich.] 91 N. W. 61

98. McDaniels v. Connelly Shoe Co., Wash. 549, 71 Pac. 37. The affidavit c troverting the answer of the garnishee m be verified by attorney. Ferguson, etc., I Goods Co. v. First Nat. Bank [Tex. C App.] 78 S. W. 265. Where plaintiff conte the answer of the garnishee, he has burden of proof; he is entitled to the be fit of specific statements in the answer consistent with its denials. Jefferson Cou ty Sav. Bank v. Nathan [Ala.] 35 So. 355

99. Comp. Laws, § 997. Hyde v. Ch wick [Mich.] 93 N. W. 616.

1. Ellison v. Straw [Wis.] 97 N. W. 1

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Demurrer is the only remedy for a defective statement of claimant's claim[4] and a defective statement may be amended.[5]

After a garnishment has been abandoned, the garnishee interpleading as claimant of attached goods is not bound by the return but may show that he was in fact not served as stated therein.[6]

Trial of a claim is premature where no service has been had on the defendant and no publication has been made.[7]

Where no fund is found subject to trustee process, the claimant cannot have judgment for more than his costs.[8]

§ 14. *Dissolution of writ.*—Taking a general judgment and issuing execution thereon is not a waiver of the lien acquired by garnishment; neither is failure to take an order against the garnishee who does not admit liability.[9]

A petition in bankruptcy in which plaintiffs waive all liens and advantages created by prior garnishment proceedings does not amount to an abandonment of the garnishment. On refusal of the federal court to declare bankruptcy plaintiff may prosecute his garnishment.[10]

The giving by defendant of a bond to dissolve a garnishment does not convert the proceeding into a suit authorizing a judgment in personam against the debtor.[11]

A motion to dismiss on the ground that no debt has been seized is premature before the garnishee has answered.[12]

A bond to discharge the garnishee must follow the statute.[13]

Where the garnishee answers that he is indebted to one of two defendants, the other cannot procure the discharge of the writ on filing bond without showing his title to the fund.[14]

Where disclosure shows no funds in the hands of the trustee, he is properly discharged though a bond has been given to dissolve the attachment, and the defendant, being absent, has not been served.[15]

§ 15. *Effect of pendency of other proceedings; stay, etc.*—Where defendant was sued and his debtor garnished in one state, his subsequent suit and recovery of a judgment against his debtor in another, before the rendition of judgment in the garnishment proceeding, would not preclude payment of the garnishment judgment.[16]

§ 16. *Trial, verdict and judgments, costs and execution.*—The court must take judicial notice of the existence and provisions of the judgment.[17]

2. Failure to specify portion of answer not true. Curtis v. Parker, 136 Ala. 217.

3. Wilde v. Mahaney, 183 Mass. 455. A third person may intervene and set up legal or equitable rights to the fund. Field v. Sammis [N. M.] 73 Pac. 617.

4. Motion for judgment of non pros held bad. Barndollar v. Fogarty, 203 Pa. 617.

5. In Pennsylvania a claimant is required by act May 26, 1897, to file his bond and statement within two weeks from the time issue is awarded, but if he delays he may file it any time before plaintiff has asked for an order to proceed with the writ. Barndollar v. Fogarty, 203 Pa. 617.

6. Blom-Collier Co. v. Martin, 98 Mo. App. 596.

7. Lamb v. Russel [Miss.] 32 So. 916.

8. Wilde v. Mahaney, 183 Mass. 455.

9. Farmers' & M. Nat. Bank v. Mosher [Neb.] 94 N. W. 1003.

10. Sullivan v. King [Tex. Civ. App.] 72 S. W. 207. Compare In re Beaver Coal Co. (C. C. A.) 113 Fed. 889.

11. Henry v. Lennox-Haldeman Co., 116 Ga. 9; Beasley v. Same, 116 Ga. 13.

12. Henry v. Lennox-Haldeman Co., 116 Ga. 9.

13. Bond by one of joint defendants to perform award of court against himself. American Cigar Co. v. Mayer [Ohio] 67 N. E. 1063.

14. American Cigar Co. v. Mayer [Ohio] 67 N. E. 1063.

15. Sprague v. Auffmordt, 183 Mass. 7.

16. Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688, 60 L. R. A. 396. In Texas an admission of plaintiff's demand filed by garnishee to obtain the right to open and close admits defendant's indebtedness and garnishee's possession of funds belonging to him. Ferguson, etc., Dry Goods Co. v. City Nat. Bank [Tex. Civ. App.] 71 S. W. 604.

17. The garnishment proceeding being ancillary. Jeffries v. Smith [Tex. Civ. App.] 73 S. W. 48; Dinkins v. Crunden, etc., Woodenware Co., 99 Mo. App. 310.

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In a garnishment against an insurance company it must be shown that defendant owned the goods covered by the policy to hold the company.[18]

Where garnishee denies liability to defendant, the burden is on plaintiff to show such a relation between them that debt or indebitatus assumpsit would lie against the garnishee.[19]

A garnishee's admissions against interest may be shown by testimony of plaintiff's attorney.[20]

While ancillary to the main suit, a garnishment is a distinct cause of action between different parties requiring a separate and independent judgment.[21]

In Iowa, it is held that no judgment can be taken against the garnishee until proper notice has been served on the principal defendant;[22] while in Georgia, a judgment against the defendant is a pre-requisite to one against the garnishee.[23]

A judgment in favor of the garnishee in a case in which the defendant was not served and did not appear is not binding as between plaintiff and defendant,[24] but where defendant has notice and is in effect a party to the suit, a judgment against the garnishee binds him.[25] A garnishee may be charged with interest.[26]

Where the garnishee's indebtedness has been disputed and judgment rendered in his favor in the garnishment proceedings, such judgment is conclusive of his rights in a subsequent bill in equity to charge him as debtor of the same person.[27]

A judgment against a garnishee that he pay money into court can be set aside only as other judgments are.[28]

On appeal from a justice's judgment discharging garnishees, a final judgment against the garnishees in the first instance for failure to answer is error.[29]

A default judgment taken against a garnishee before expiration of the time in which he may answer is properly set aside.[30]

There is no provision in the law for the recording in one county of an order of garnishment taken in another.[31]

Where in Missouri the justice fails to note in his docket and on the back of the execution an account of the debt, fees, etc., as required by Rev. St. 1899, § 4037, the execution is void and creates no lien.[32]

§ 17. *Review.*—The return of the officer showing service cannot be impeached on certiorari.[33]

Where the principal defendant, being absent, is not served, an order discharging the trustees is final and appealable.[34]

§ 18. *Wrongful garnishment.*—Plaintiff is liable in reconvention for suing out a writ of garnishment in a suit against defendant on a ground that did not in fact exist though plaintiff's agent believed its existence.[35]

18. Reid v. Mercurio, 91 Mo. App. 673.
19. Curtis v. Parker, 136 Ala. 217. Judgment cannot be rendered on the answer of the garnishee unless it directly admits the debt. Jefferson County Sav. Bank v. Nathan [Ala.] 35 So. 355.
20. Jolls v. Keegan [Del.] 55 Atl. 340.
21. Whence a joint judgment against defendant and garnishee is void as to the latter. Dent v. Dent [Ga.] 45 S. E. 680.
22. Streeter v. Gleason [Iowa] 95 N. W. 242.
23. Americus Grocery Co. v. Link, 116 Ga. 813; Dent v. Dent [Ga.] 45 S. E. 680.
24. Hilliard v. Burlington Shoe Co. [Vt.] 56 Atl. 283.
25. Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688, 60 L. R. A. 396.
26. If a garnishee admitting his liability does not at once pay the money into court he is chargeable with interest. Stephens v. Pa. Casualty Co. [Mich.] 97 N. W. 686.
27. Henderson v. Hall, 134 Ala. 455.
28. Harwi Hardware Co. v. Klippert [Kan.] 74 Pac. 254.
29. O'Connor & Co. v. Levystein, 136 Ala. 440.
30. Heath v. Jordt [Tex. Civ. App.] 72 S. W. 1022.
31. Benedict v. T. L. V. Land & Cattle Co. [Neb.] 92 N. W. 210.
32. Kan. & T. Coal Co. v. Adams, 99 Mo. App. 474.
33. McAnaney v. Quigley, 105 Ill. App. 611.
34. Sprague v. Auffmordt, 183 Mass. 7.
35. Barr v. Cardiff [Tex. Civ. App.] 75 S. W. 341; Insel v. Kennedy [Iowa] 94 N. W. 456.

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Injunction is the proper remedy to prevent oppressive garnishments of debtor's exempt wages from month to month.[36]

Prohibition lies from the circuit court to a justice of the peace to restrain him from proceeding with garnishment suits oppressive in their nature and of which he has no jurisdiction though he has erroneously determined that he has.[37]

GAS.

§ 1. *Gas franchises.*[38]—A gas franchise is of a public nature, and the company has the power of eminent domain,[39] and is bound to supply gas to consumers on reasonable conditions on demand.[40] An ordinance relating to gas supply is to be strictly enforced when accepted.[41] Where a maximum rate is fixed by contract between a city and a gas company, a violation of the contract may be restrained by injunction.[42] A natural gas company has no incidental power to construct and maintain telegraph and telephone lines,[43] nor any right to lay pipes outside the territory granted,[44] and a franchise is void so far as it goes beyond the charter power of the corporation.[45] Consent of municipal authorities is essential to laying of mains in streets.[46]

§ 2. *Torts arising out of use or manufacture of gas.*—A gas company is not an insurer, but is liable for negligence;[47] and contributory negligence will bar

36. Siever v. Union Pac. R. Co. [Neb.] 93 N. W. 943. See, also, Pa. R. Co. v. Rogers, 52 W. Va. 450.

37. Pa. R. Co. v. Rogers, 52 W. Va. 450. See, also, Siever v. Union Pac. R. Co. [Neb.] 93 N. W. 943.

38. Hurd's Rev. St. 1901, p. 485, providing for the consolidation of gas companies is void because such subject is not expressed in the title. People v. People's G. & C. Co. [Ill.] 68 N. E. 950. Artificial gas company held not entitled to an injunction to prevent natural gas company from supplying gas. Circleville L. & P. Co. v. Buckeye Gas Co. [Ohio] 69 N. E. 436.

39. Charleston Natural Gas Co. v. Lowe, 52 W. Va. 662. Gas pipes in a country road laid under a license from a county are an additional servitude, and compensation must be made unless the county owns the fee in the road. Ward v. Triple State N. G. & O. Co., 25 Ky. L. R. 116, 74 S. W. 709. And the company is liable for damage done to adjacent property. Id.

40. Wherever its mains and service pipes are laid. Charleston N. G. Co. v. Lowe, 52 W. Va. 662; City of Buffalo v. Buffalo Gas Co., 81 App. Div. (N. Y.) 505; Miller v. Wilkesbarre Gas Co. [Pa.] 55 Atl. 974. Loss of profits as part of recovery for failure to supply. Id. Where there was a duty to furnish gas by statute (Act of May 29, 1885, P. L. 29 and May 11, 1897, P. L. 50) a mandatory injunction was granted. Corbet v. Oil City Fuel Supply Co., 21 Pa. Super. Ct. 80. Mandamus proper remedy. Johnson v. Atlantic City G. & W. Co. [N. J. Eq.] 56 Atl. 559.

41. And payment of more than the rate fixed therein, may be recovered back though made under contract. Logansport, etc., & W. V. Natural Gas Co. v. Ott, 30 Ind. App. 93. A statute prohibiting the charging of rent on gas meters is violated by charging a certain sum to consumers not using a given amount of gas per month. City of Buffalo v. Buffalo Gas Co., 81 App. Div. (N. Y.) 505.

42. Muncie N. G. Co. v. City of Muncie [Ind.] 66 N. E. 436.

43. Woods v. Greensboro N. G. Co., 204 Pa. 606.

44. Borough of Madison v. Morristown Gas Light Co. [N. J. Err. & App.] 54 Atl. 439.

45. People's Elec. L. & P. Co. v. Capital Gas & Elec. Light Co., 25 Ky. L. R. 327, 75 S. W. 280. A gas company having by charter no authority to furnish other light than gas, obtained from a city the exclusive right to supply gas or other light, and transferred its rights to a company with authority to furnish electricity. Held the latter company had not the exclusive right to furnish electricity. Id.

46. Consent of highway commissioners held to authorize laying of mains. Consent presumed from acquiescence. People v. Cromwell, 89 App. Div. (N. Y.) 291.

47. Triple-State N. G. & O. Co. v. Wellman, 24 Ky. L. R. 851, 70 S. W. 49. Evidence held to show negligence in controlling flow of gas into plaintiff's premises whereby explosion was produced. Citizens' G. & O. Min. Co. v. Whipple [Ind. App.] 69 N. E. 557. Evidence held sufficient to show that gas company failed to plug pipes leading into plaintiff's house. United Oil Co. v. Miller [Colo. App.] 73 Pac. 627. Broken gas pipe. People's Gas Light & Coke Co. v. Porter, 102 Ill. App. 461. Doctrine of "res ipsa loquitur" has no application in case of broken pipe. Id. Evidence merely that there was an escape of gas which caused an explosion held insufficient to show negligence. King v. Consolidated Gas Co., 90 App. Div. (N. Y.) 166. No duty imposed on gas company's servant when making repairs to see that all gas jets in house are turned off, if he notifies the person in charge. Skogland v. St. Paul Gaslight Co. [Minn.] 93 N. W. 668. Gas company owes

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recovery.[48] The measure of damages to property from explosion of gas is the reasonable cost of restoring the property to its former condition.[49]

§ 3. *Crimes and offenses.*—A statute imposing a penalty for escape of natural gas is constitutional as an exercise of police power.[50]

GIFTS.[51]

§ 1. *Definition and distinctions.*—The essential distinction between a gift and a contract transferring property is that the former is not and the latter must be founded upon a consideration.[52] The distinguishing feature of a gift causa mortis is that it be made in expectation of death, during the last illness of the donor or on an occasion of peril.[53] Gifts of this kind are on an implied condition that the donor die of such illness or peril and are revokable during his lifetime, while gifts inter vivos are absolute,[54] but subject thereto, it must go into immediate effect.[55]

§ 2. *Validity and requisites.*—To constitute a gift either causa mortis or inter vivos, there must be a clear intent to give;[56] a delivery which, as has been said, must be absolute in case of a gift inter vivos and conditional in case of a gift causa mortis;[57] and acceptance of such delivery.[58] Neither the gift nor the

no duty generally to inspect pipes in a private house, even though long out of use. Smith v. Pawtucket Gas Co. (R. I.) 52 Atl. 1078.

48. Sleeping in vicinity of escaping gas not contributory negligence. Apfelbach v. Consolidated Gas Co., 204 Pa. 570. Allowing a tenant to cause gas to be introduced into defective pipes is contributory negligence of the owner and the company is not liable to such owner. Smith v. Pawtucket Gas Co. (R. I.) 52 Atl. 1078. Standing near an inspector looking for a leak with a lighted match. Tipton L. H. & P. Co. v. Newcomer [Ind. App.] 67 N. E. 548. Looking for leak in pipe with lighted match held negligence. German-American Ins. Co. v. Standard Gaslight Co. [N. Y.] 66 N. E. 1109. Failure to inspect vacant house. Consolidated Gas Co. v. Getty, 96 Md. 683.

49. Consolidated Gas Co. v. Getty, 96 Md. 683.

50. Burns' Rev. St. 1901, §§ 7510, 7512. Given v. State [Ind.] 66 N. E. 750. And the words allowing escape "for more than two days" construed literally. Id.

The term "natural flow" within the meaning of statutes prohibiting its increase, means the entire volume of gas that will issue from the mouth of a well, when retarded only by the atmospheric pressure, and hence the "natural flow" is not increased by pumping, unless the back pressure is removed to such an extent as to cause suction. Richmond N. G. Co. v. Enterprise N. G. Co. [Ind. App.] 66 N. E. 782.

51. Validity as to creditors of grantor is treated in Fraudulent Conveyances.

52. Transfer of securities to satisfy debt. Martin v. Martin, 202 Ill. 382. Transfer pursuant to antenuptial agreement. In re Baker's Estate, 83 App. Div. (N. Y.) 530. A deed upon an immoral consideration cannot be sustained as a gift. Watkins v. Nugen [Ga.] 45 S. E. 262.

53. Blazo v. Cochrane, 71 N. H. 585; Johnson v. Colley [Va.] 44 S. E. 721; Calvin v. Free, 66 Kan. 466, 71 Pac 823; Hawn v. Stoler, 22 Pa. Super. Ct. 307; Rogers v. Richards [Kan.] 74 Pac. 255. One receiving a gift causa mortis for third persons will be presumed to take as trustee of the donee. Johnson v. Colley [Va.] 44 S. E. 721. In Louisiana capacity to take a gift causa mortis is judged as of the time of the donor's death. Succession of Vance [La.] 34 So. 767.

54. Snyder v. Snyder [Mich.] 92 N. W. 353; Blazo v. Cochrane, 71 N. H. 585.

55. Bruce v. Squires [Kan.] 74 Pac. 1102.

56. Accordingly, a deed on an immoral consideration cannot be sustained as a gift. Watkins v. Nugen [Ga.] 45 S. E. 262. Evidence held to show that money was a gift and not a payment on an account. Brightman v. Buffington [Mass.] 68 N. E. 828. The burden of proof is on the donee. Jones v. Falls [Mo. App.] 78 S. W. 903. Failure to indorse a note for transfer creates a presumption against an intent to give. Varick v. Hitt [N. J. Eq.] 55 Atl. 139. Where the gift was not asserted until after the death of the donor, the evidence must be very clear. Id.; Robinson v. Carpenter, 71 S. W. 869; Bray v. O'Rourke, 89 App. Div. (N. Y.) 400. Change of name in which deposit stood held to show not an intent to give but merely an intent to allow such person to draw money for the alleged donor. Green v. Sutherland, 40 Misc. (N. Y.) 559. Evidence of declaration by the donor held sufficient to go to the jury. Sparling v. Smeltzer [Mich.] 95 N. W. 571. Donee may show improvements made with knowledge of donor's executor. Walker v. Neil [Ga.] 45 S. E. 387. A purchase of real property by a husband in the name of his wife is presumed to be a gift to her. Solomon v. Solomon [Neb.] 92 N. W. 124; Lahey v. Broderick [N. H.] 55 Atl. 354.

57. Tyrrel v. Emigrant Industrial Sav. Bank, 77 App. Div. (N. Y.) 131; Fletcher v. Wakefield [Vt.] 54 Atl. 1012; Moross v. Moross [Mich.] 91 N. W. 631; Calvin v. Free, 66 Kan. 466, 71 Pac. 823; Ross v. Walker [Fla.] 32 So. 934; Chaddock v. Chaddock

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acceptance thereof need be in writing,[59] unless the gift be of land.[60] The delivery must deprive the donor of all control, but need only be such as the nature of the article given reasonably admits of.[61]

Delivery of a note of donor, being a mere promise, is not a completed gift.[62]

§ 3. *Fraud, undue influence, mistake or incapacity.*—To be valid, a gift must be free from fraud,[63] undue influence,[64] or mistake,[65] and the donor must be competent to contract.[66]

[Mich.] 95 N. W. 972; Bean v. Bean, 71 N. H. 538. A promise to pay money to a third person constitutes a gift in praesenti of an existing cause of action, rather than a gift in futuro. Ebel v. Piehl [Mich.] 95 N. W. 1004.

58. Goelz v. People's Sav. Bank [Ind.] 67 N. E. 232; Johnson v. Colley [Va.] 44 S. E. 721. Where the donee is of unsound mind acceptance will be presumed. Malone's Committee v. Lebus, 25 Ky. L. R. 1146, 77 S. W. 180.

59. Castle v. Persons [C. C. A.] 117 Fed. 835; Succession of Alexander [La.] 35 So. 273.

60. Putting a donee in possession of land held insufficient where the statute provides that the conveyance must be by deed or will. Nicholas v. Nicholas, 100 Va. 660. Gift of land must be followed by possession and improvements. Rowe v. Henderson [Ind. T.] 76 S. W. 250; Hadaway v. Smedley [Ga.] 46 S. E. 96.

61. Fritz v. Fernandez [Fla.] 34 So. 315. A mere writing evidencing the gift is an insufficient delivery. Rodemer v. Rettig, 24 Ky. L. R. 1474, 71 S. W. 869. Manual delivery of a life insurance policy without notice to the insurer held sufficient. Opitz v. Karel [Wis.] 95 N. W. 948; McGlynn v. Curry, 82 App. Div. [N. Y.] 431. Manual delivery of note of third person. Vaerick v. Hitt [N. J. Eq.] 55 Atl. 139; Jarrell v. Crow [Tex. Civ. App.] 71 S. W. 397; Brown v. Crafts [Me.], 56 Atl. 213; Hagemann v. Hagemann [Ill.] 68 N. E. 381. Delivery of corporate stocks. O'Donnell v. Gaffney, 22 Pa. Super. Ct. 316. Issue of stock certificates in name of donee and declarations of donor held sufficient. Crouse v. Judson, 41 Misc. (N. Y.) 338. Admissions held not conclusive, there having been no actual delivery. Owsley v. Owsley, 25 Ky. L. R. 1186, 77 S. W. 397. Marking of property with the name of the donee and giving written directions that it be given him, is insufficient, if neither the property nor the writing pass from the donor's control. Clay v. Layton [Mich.] 96 N. W. 458. After a gift inter vivos is complete subsequent acts of the donor cannot change it to an advancement. Owsley v. Owsley, 25 Ky. L. R. 1194, 77 S. W. 394. Subsequent conditional promise by donee to return the property does not impair an absolute delivery. Waite v. Grubbe [Or.] 73 Pac. 206. Recital in deed held to constitute gift of note though there was no delivery of such note. Malone's Committee v. Lebus, 25 Ky. L. R. 1146, 77 S. W. 180. Indication of hiding place of money accompanied by words of gift held sufficient. Waite v. Grubbe [Or.] 73 Pac. 206. A manifest mental reservation by the donor renders the delivery colorable. Brown v. Crafts [Me.] 56 Atl. 213. Giving of key to box in which bank book was kept and execution of writing held insufficient delivery of money in bank. Slee v. Kings County Sav. Inst., 78 App. Div. (N. Y.) 534. Delivery of bank pass book conditional on donor's return from a trip, held insufficient. Balling v. Manhattan Sav. Bank & Trust Co. [Tenn.] 75 S. W. 1051. Delivery of pass book followed by fifteen years' undisputed possession by donee held sufficient. Wickford Sav. Bank v. Corey [R. I.] 55 Atl. 684. Evidence of delivery of cattle which remain in the donor's pasture after the alleged gift, held sufficient. Gross v. Smith, 132 N. C. 604. Request by the donor of his debtor to pay the money to the donee is not a sufficient delivery until acceptance of the request by the debtor. Castle v. Persons [C. C. A.] 117 Fed. 835. The fact that the donor had shares of stock issued in the name of himself and wife jointly is not evidence of delivery, where he continued to vote the same. Bauernschmidt v. Bauernschmidt [Md.] 54 Atl. 637. Delivery of order to third person for donee held insufficient, control being subsequently assumed by the donor. Duryea v. Harvey [Mass.] 67 N. E. 351. Deposit of money in bank in name of donee held sufficient. Goelz v. People's Sav. Bank [Ind.] 67 N. E. 232; Merigan v. McGonigle, 205 Pa. 321. Deposit of money in donee's name followed by use thereof by him held sufficient. In re Holmes, 79 App. Div. (N. Y.) 264. Placing of name of donee on bank book opposite that of donor held insufficient. Burns v. Burns [Mich.] 93 N. W. 1077. Gift of due bills by creditor to debtor held not shown, they not having been destroyed nor having passed from the control of the creditor. Ross v. Walker [Fla.] 32 So. 934. Return of securities and destruction of the note held sufficient consummation of gift of debt to the debtor. Denunzio's Receiver v. Scholtz, 25 Ky. L. R. 1294, 77 S. W. 715. Indorsement in memorandum book that note was not to be paid held not a gift thereof to the payor. Burge v. Burge's Adm'r, 25 Ky. L. R. 979, 76 S. W. 873. Evidence that the payee of a note had not made a present of the amount payable thereon to the maker is deemed to exist, where it is shown that the note was in the possession of the payee at the time of his death. Oelke v. Theis [Neb.] 97 N. W. 588.

62. Shugart v. Shugart [Tenn.] 76 S. W. 821; DeGrange v. DeGrange, 96 Md. 609; Callender's Adm'r v. Callender, 24 Ky. L. R. 1145, 70 S. W. 844; Pullen v. Placer County Bank, 138 Cal. 169, 71 Pac. 83. But see Blazo v. Cochrane, 71 N. H. 585; Huber's Estate, 21 Pa. Super. Ct. 34.

63. Bishop v. Leonard, 123 Fed. 981. A gift of real or personal property by a husband to his wife, made in ignorance of the fact that she has had illicit relations with another man and contemplates the continuance of such relations, may be revoked by

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GOOD WILL.

Good will is property[67] subject to sale[68] or bequest,[69] and passes with the estate to a trustee in bankruptcy,[70] or to a surviving partner purchasing the interest of deceased;[71] and one who transfers it must not solicit orders of same character among old customers,[72] but may engage in the same business in the same locality.[73] Right to the use of a "firm" name passes under a sale of its good will.[74]

GRAND JURY.[75]

Terms or sessions.[76]—A county law and equity court created by special act with powers of circuit, chancery, and county courts, may organize a special grand jury.[77] Where the statute provides for discharge "on completion of its business," the authority of the court to excuse it temporarily is not limited.[78]

Selection.—Where the grand jury has been discharged by reason of the irregularities in summons, jurors may be summoned from the body of the county.[79] Exclusion of negroes, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a negro, is a denial of the equal protection of the laws.[80]

Qualifications of grand jurors.—A grand jury summoned before a statute becomes operative cannot be impaneled thereunder where previously existing re-

the husband upon the discovery of the facts. Evans v. Evans [Ga.] 45 S. E. 612.

64. The influence must have been such as to destroy free agency. Citizens' Loan & Trust Co. v. Holmes [Wis.] 93 N. W. 39; Prescott v. Johnson [Minn.] 97 N. W. 891. A married woman may make a valid gift to her husband. Where, therefore, a gift has been made by a wife to her husband, and the transaction is free from fraud, oppression, and all undue influence, it will be sustained. Fritz v. Fernandez [Fla.] 34 So. 315. Gift from parent to child will be closely scrutinized. Prescott v. Johnson [Minn.] 97 N. W. 891.

65. Crippen v. Adams [Mich.] 92 N. W. 496.

66. Neither old age, nor the fact of physical weakness nor disease, is sufficient to invalidate a gift. Meyer v. Jacobs, 123 Fed. 900. An alleged gift of land inter vivos will not be set aside on the ground of the mental incapacity of the donor, where the donor is, at the time, aware of the extent of the subject of the gift, its value, the persons made donees, and the manner of the distribution. Thorn v. Cosand [Ind.] 67 N. E. 257; Reeves v. Howard, 118 Iowa, 121; Polt v. Polt [Pa.] 54 Atl. 577. An executed gift procured while the donor was insane, or which is the result of fraud, is voidable only, and may be later affirmed and rendered valid. Bishop v. Leonard, 123 Fed. 981.

67. Millspaugh Laundry v. First Nat. Bank [Iowa] 94 N. W. 262.

68. A list of customers of a firm of insurance agents is not an asset capable of sale by itself. Whitney v. Whitney, 24 Ky. L. R. 2465, 74 S. W. 194.

69. In re Dun's Estate, 40 Misc. (N. Y.) 509.

70. Freeman v. Freeman, 86 App. Div. (N. Y.) 110.

71. Upon purchase of interest of deceased partner, survivor may continue the business in his own name, though contract of purchase did not include good will. Hutchinson v. Nay, 183 Mass. 355.

72. Zanturjian v. Boornazian [R. I.] 55 Atl. 199; Hutchinson v. Nay, 183 Mass. 355; Ranft v. Reimers, 200 Ill. 386, 60 L. R. A. 291.

A contract not to engage in sale of certain articles, is violated by engaging in sale of substantial part thereof. Love v. Stidham, 18 App. D. C. 306.

73. If there is nothing in the agreement except a bare sale of good will. Zanturjian v. Boornazian [R. I.] 55 Atl. 199.

74. Slater v. Slater, 175 N. Y. 143. Held, however, that sale of a business and its good will does not carry right to use vendor's personal name in absence of specific agreement to such effect. Ranft v. Reimers, 200 Ill. 386.

75. Indorsement and return of indictments and irregularities in proceedings as ground for quashal are treated in Indictment and Prosecution.

76. A grand jury may be summoned for the term of Superior Court held for New Hanover County on the fifth Monday after the first Monday in March, such term not being for the trial of civil cases only, since the enactment of Act 1903, p. 908, c. 533. State v. Lew, 133 N. C. 664.

77. Under Code, § 5000, Walker county Law & Equity court created by Act Dec. 5, 1900, has such power. Oakley v. State, 135 Ala. 15.

78. Code, § 5252. State v. Phillips, 119 Iowa, 652.

79. Acts 1899, p. 125, c. 4736. Davis v. State [Fla.] 35 So. 76.

80. Rogers v. Alabama, 48 Law. Ed. ——, 24 Sup. Ct. 257. Evidence held insufficient to show discrimination against negroes as members of grand jury. Thompson v. State [Tex. Cr. App.] 77 S. W. 449; Smith v. State [Tex. Cr. App.] 77 S. W. 452.

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quirements relating to selection and qualification are substantially different and are not continued in force until the new law becomes operative,[81] and a grand jury previously drawn impaneled after the statute takes effect and before the operation of a law enabling previously drawn juries to serve their terms is void.[82] Qualifications prescribed generally demand that the juror be an elector,[83] unbiased,[84] free from imputation of crime,[85] and, in certain states, taxpayers.[86]

Oath.—A recital in the indictment that the grand jurors aforesaid were duly sworn, is sufficient.[87]

Objections and challenges.—A statute applying provisions covering qualifications, exemptions, drawings, etc., of petit jurors, does not extend all the grounds of challenge to petit jurors to grand jurors.[88] Objections to the mode of summoning the grand jury may be taken only by challenge of the array or motion to quash.[89] Failure to challenge the array is not a waiver of discrimination in selection of the grand jury where defendant has had no opportunity to do so,[90] but failure to afford accused an opportunity to challenge the grand jury will not invalidate the indictment where none of the grounds of challenge exist.[91] Challenges to individual grand jurors based on the ground of prejudice or bias must be interposed before they are sworn though defendant had not previously been bound over to await the action of the grand jury.[92] Irregularities not affecting qualifications must be attacked by challenge for cause.[93] Irregularities in the drawing of the jury will not invalidate it where it affirmatively appears that no possible injury could accrue to the defendant.[94]

Secrecy of deliberations.—Members of the grand jury cannot be questioned for the purpose of impeaching the indictment,[95] and if the right is conceded it

81. Indictment found by grand jury summoned prior to taking effect of new Code, Jan. 1, 1902, is void. Clark v. U. S., 19 App. D. C. 295.

82. Act Cong. approved Jan. 8, 1902, does validate jury impaneled Jan. 8, 1902. Clark v. U. S., 19 App. D. C. 295. A provision in the District of Columbia Code 1902 providing that all acts of congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States shall remain in effect except where inconsistent does not save existing provisions for the selection and qualification of grand juries enacted by acts of Congress specially applicable to the district. Id.

83. The fact that a grand juror's name does not appear on the poll books, and has not voted, or that the sheriff does not succeed in locating him, or another man having a wide general acquaintance in the neighborhood has no knowledge of such person, does not show that he is disqualified as a grand juror as not being an elector. State v. Harris [Iowa] 97 N. W. 1093.

84. An opinion unfavorable to defendant based on evidence heard in a trial of a civil action, is a disqualification though the grand juror states under oath that he acted impartially and fairly, and Pen. Code, § 396, subd. 6, provides that in case of such oath no person shall be disqualified on account of an opinion founded on public rumor. People v. Landis, 139 Cal. 426, 73 Pac. 153.

85. Acts 1898, No. 135, § 1, providing that persons to be eligible must not be charged with any crime or offense or convicted at any time of any crime or offense punishable by hard labor, etc., does require the disqualifying charge to be of an offense punishable by hard labor. State v. Nicholas, 109 La. 84.

86. Failure to pay poll taxes under an after enacted statute is not a disqualification. Indictment was returned Jan. 15, 1903, and statute passed Nov., 1902, required payment of poll taxes before Feb. 1. Cubine v. State [Tex. Cr. App.] 73 S. W. 396.

87. Bruen v. People [Ill.] 69 N. E. 24.

88. Rev. St. 1892, § 2803, does not extend the grounds of challenge provided by § 2810. Peeples v. State [Fla.] 35 So. 223.

89. Bruen v. People [Ill.] 69 N. E. 24.

90. Smith v. State [Tex. Cr. App.] 77 S. W. 453.

91. Rev. St. 1899, §§ 2487, 2488. State v. Taylor, 171 Mo. 465.

92. Gen. St. 1894, § 7188. State v. Ames [Minn.] 96 N. W. 330.

93. Selecting and drawing. Lindsay v. State, 24 Ohio Circ. R. 1.

94. Plea in abatement is demurrable which alleges that after 13 of 14 grand jurors drawn were examined and found competent the venire was quashed and a new venire summoned on which were the thirteen and five others and only the five latter were examined as to qualification and none of the names of the jurors summoned under the special venire were placed in a box and drawn therefrom, since the judge, under Act 1899, c. 4736, § 1, may on quashal of the first venire summon the second from the body of the county. Ford v. State [Fla.] 33 So. 301.

95. Cannot be asked whether the indictment in the case was either read, presented to, or voted on by the grand jury, or whether in the return of such indictment

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cannot be exercised in another court to which the record has been removed.[96] return into court and entry on the minutes no part of presentments signed the grand jurors can be attacked on the ground that the grand jurors had participated.[97] The rule requiring secrecy of proceedings does not preve evidence of the grand jurors being received to impeach a witness,[98] or prev grand jury from compelling a witness to produce papers before them by m contempt proceedings based on a report to the court.[99]

Persons entitled to be present.—It is not a ground for quashing an ment that a member of the bar appointed by the court to assist the county a appeared before the grand jury and examined witnesses, though the appoi of an assistant to the county attorney is not authorized before trial.[1] A rapher for the solicitor for the state may be present at the proceedings of the jury for the purpose of transcribing evidence.[2]

Proceedings and return of indictment.—A special grand jury called o mission of an offense during a session of court and after discharge of the jury need not be limited by a description of the offense or designation of the accused in the order.[3] Where the court, after refusal of the jury to indict son, by a charge virtually directs them to do so, the indictment is void.[4] T sumption of existence of proper evidence is not overcome by the fact that th in his charge read affidavits tending to show commission of the crime for defendant was indicted.[5]

A witness cannot refuse to obey a subpoena to produce books and for the grand jury, on the ground that their contents are immaterial.[6]

Fees.—Federal grand jurors are entitled to mileage for four sing where after attendance on the first day of the term they are discharge a late day, when they attend and are dismissed.[7]

GUARANTY.

§ 1. What Constitutes (144).
§ 2. Form and Requisites of the Contract (145).
§ 3. Operation and Effect of Guaranty.—A. Interpretation in General (146). B. Fixing Default and Liability of Guarantor (146). C. Persons Benefited (147). D. Defer Discharge of Guaranty (147).
§ 4. Rights and Remedies betwee antor, Principal Debtor and Co-gua (147).
§ 5. Action on Guaranty (147).

§ 1. *What constitutes a guaranty.*—A guaranty is a collateral pron answer for the debt of another.[8] The promise must be collateral and the pr liable only on default of the principal debtor for otherwise if both primarily it is a contract of suretyship.[9] The liability must be personal to the pr

the grand jury, or he as one of them, has been deceived. Hooker v. State [Md.] 56 Atl. 390.

96. Hooker v. State [Md.] 56 Atl. 390.

97. Recommendation of adoption of alternative road law. Kerby v. Long, 116 Ga. 187.

98. Gibson v. State [Tex. Cr. App.] 77 S. W. 812.

99. In re Archer [Mich.] 96 N. W. 442. Nor is such proceeding prevented by statutory provisions relating to testimony of grand jurors on the trial [Comp. Laws, § 11887]. Id.

1. State v. Tyler [Iowa] 97 N. W. 983.

2. Acts 1900, 1901, p. 308. Thayer v. State [Ala.] 35 So. 406.

3. Code, § 5000. Oakley v. State, 135 Ala. 15.

4. Charge held improper. Blau [Miss.] 34 So. 153.

5. People v. Glen, 173 N. Y. 395.

6. He should produce his books request to exhibit them, raise the of materiality and have it determi the court if necessary. In re Archer 96 N. W. 442.

7. In re Grand Jurors' Mileage, 1 307.

8. Craig v. Seybt, 91 Mo. App. 24 teson v. Moone [R. I.] 54 Atl. 1058; Williams Co. v. Hamill, 131 N. C. 57.

9. Kesler v. Cheadle [Okl.] 72 P A contract of suretyship is often nated as an "absolute guaranty." Sewing Mach. Co. v. Powell, 25 Ky. L 74 S. W. 746; Bankers' Iowa State Mason Hand Lathe Co. [Iowa] 97 N.

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and not a pledge or mortgage of property for another's debt.[10] There must be a subsisting and contemplated debt or otherwise it is a contract of indemnity,[11] or a novation,[12] or an original promise.[13] The debt must be of another;[14] where a promise is founded on a consideration which subserves some interest or purpose of the promisor,[15] or is to pay from a fund placed in his hands for that purpose,[16] it is generally said to be an original promise and it is immaterial in either case that the debt of another also subsists and incidentally will be paid.[17] A promise as to quality, value, character, or worth, is properly a warranty,[18] though sometimes called a guaranty, but courts do not apply the principles of the law of guaranty to such promises.[19] And similarly where negotiable paper is transferred by indorsement the former owner is liable as an indorser but not as guarantor.[20] But the guaranty of payment or indorsement in blank on back of a note does not make the guarantor an indorser when he has no interest in the note;[21] but one may show by parol evidence what liability was intended to be assumed.[22]

§ 2. *Form and requisites of the contract.*—A promise to pay debts which may arise in the future is called a "continuing guaranty" and is in fact a standing offer of guaranty;[23] but unless the instrument admits of no other construction, this is not presumed.[24] To be binding on the promisor, an offer of guaranty must be accepted by the creditor within a reasonable time,[25] and this must be com-

The intention of the parties governs as to whether they are guarantors or sureties. Germania Bank v. Trapnell [Ga.] 45 S. E. 446.

10. Sather Bank. Co. v. Briggs Co. [Cal.] 72 Pac. 352; Bankers' Iowa State Bank v. Mason Hand Lathe Co. [Iowa] 97 N. W. 70.

11. Gansey v. Orr [Mo.] 73 S. W. 477.

12. Griffin v. Cunningham, 183 Mass. 505; Burson v. Bogart [Colo. App.] 72 Pac. 605; Biglane v. Hicks [Miss.] 33 So. 413; Smith v. Schneider, 84 N. Y. S. 238; Linam v. Jones, 134 Ala. 570.

13. Promises held to be guaranties. Indiana Trust Co. v. Finitxer, 160 Ind. 647; Burson v. Bogart [Colo. App.] 72 Pac. 605; Kesler v. Cheadle [Okl.] 72 Pac. 367; Matteson v. Moone [R. I.] 54 Atl. 1058; Garrett-Williams Co. v. Hamill, 131 N. C. 57; Crook v. Scott [N. Y.] 66 N. E. 1106; Beard v. Hoffman [Mich.] 95 N. W. 707; Craig v. Seybt, 91 Mo. App. 242.

Promises held to be original: Cox v. Peltier, 159 Ind. 355; Champlain Const. Co. v. O'Brien, 117 Fed. 271, 788. The giving of credit to promisor alone or with the other debtor is evidence of the character of the transaction (Burson v. Bogart [Colo. App.] 72 Pac. 605), but not conclusive (Kesler v. Cheadle [Okl.] 72 Pac. 367; Indiana Trust Co. v. Finitzer, 160 Ind. 647), and is a question for the jury (Kesler v. Cheadle [Okl.] 72 Pac. 367). Where goods are delivered to a third party at the request of another the debt will be presumed to be that of the party ordering and not of him to whom the goods are delivered (Cox v. Peltier, 159 Ind. 355), but the obtaining of a judgment against the debtor is conclusive that creditor did not regard the promisor as primarily liable (Beard v. Hoffman [Mich.] 95 N. W. 707).

14. Muth v. Goddard [Mont.] 72 Pac. 621; Smith v. Bank of New England [N. H.] 54 Atl. 385.

15. Swindells v. Dupont, 88 Minn. 9; May v. Walker, 20 Pa. Super. Ct. 581; Boeff v. Rosenthal, 38 Misc. (N. Y.) 760; Cox v. Halloran, 82 App. Div. (N. Y.) 639; Hill Bros. v. Bank of Seneca [Mo. App.] 73 S. W. 307; Linam v. Jones, 134 Ala. 570.

16. Wolff v. Alpena Nat. Bank [Mich.] 92 N. W. 287; Howes v. McCrea, 21 Pa. Super. Ct. 592; Cerrusite Min. Co. v. Steele [Colo. App.] 70 Pac. 1091; Bradshaw v. Cochran, 91 Mo. App. 294.

17. May v. Walker, 20 Pa. Super. Ct. 581; Boeff v. Rosenthal, 38 Misc. (N. Y.) 760; Hill Bros. v. Bank of Seneca [Mo. App.] 73 S. W. 307.

18. But see Hunt v. Northwestern Mortg. Trust Co. [S. D.] 92 N. W. 23.

19. Nelson v. Hinchman [C. C. A.] 118 Fed. 435; Alger v. Alger, 83 App. Div. (N. Y.) 168.

20. Negotiable instruments. Redden v. First Nat. Bank, 66 Kan. 747, 71 Pac. 578; Fegley v. Jennings [Fla.] 32 So. 873; Hunt v. Northwestern Mortg. Trust Co. [S. D.] 92 N. W. 23.

21. Lemmert v. Guthrie Bros. [Neb.] 95 N. W. 1046; Hill v. Combs, 92 Mo. App. 242; Parrish v. Rosebud Min. & Mill. Co. [Cal.] 71 Pac. 694; Loeff v. Laussig, 102 Ill. App. 398; Tinker v. Catlin, 102 Ill. App. 264.

22. Tinker v. Catlin, 102 Ill. App. 264; Parrish v. Rosebud Min. & Mill. Co. [Cal.] 71 Pac. 694; Loeff v. Taussig, 102 Ill. App. 398.

23. Tolman Co. v. Butt, 116 Wis. 597.

24. Nat. Bank of Commerce v. Garn, 23 Ohio Circ. R. 447. Guaranty of account which a certain person "may owe" to a certain amount held not to be continuing. Merchants' & F. Bank v. Calmes [Miss.] 35 So. 161.

25. Standard Sewing Mach. Co. v. Church, 11 N. D. 420; Peninsular Stove Co. v. Adams H. & F. Co., 93 Mo. App. 237. Evidence held sufficient to sustain finding that acceptance of guaranty was refused until another guarantor signed. Price v. Oatman [Tex. Civ. App.] 77 S. W. 258. Two years six months not a reasonable time. Peninsular Stove Co. v. Adams H. & F. Co., 93 Mo. App. 237.

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municated to the promisor;[26] but notice of acceptance may be waived.[27] There must be a new consideration for a promise to pay a pre-existing debt,[28] and if in fact there is no consideration, a provision of the Code that all contracts in writing import a consideration will not cure it;[29] but in New York where a written guaranty recites a valuable consideration for a promise to pay a pre-existing debt, that is sufficient,[30] and under the present amended New York Code, the consideration for a contract of guaranty need not be recited in the instrument.[31] Actual forbearance to sue for a reasonable time is sufficient consideration to support a contract of guaranty,[32] but not a promise of forbearance for an indefinite time.[33]

By the statute of frauds a guaranty must be in writing.[34]

§ 3. *Operation and effect of guaranty. A. Interpretation in general.*—A contract of guaranty must be interpreted according to the evident intention of the parties,[35] and as favorably to the creditor as any other written contract.[36]

(§ 3) *B. Fixing default and liability of guarantor.*—In the absence of objection at trial, the admissions of the principal as to the amount of the debt are binding on the guarantor.[37] A pre-requisite to liability of the guarantor is that there must be a demand of payment on a default by the principal debtor,[38] and generally this is sufficient to render the guarantor liable,[39] but in some jurisdictions the creditor must first exhaust all remedies against the solvent principal debtor;[40] but even then after the security for a debt is sold, the creditor can call on the guarantor for payment without first taking a deficiency judgment against the debtor.[41] Failure to notify the guarantor of default of the principal debtor within a reasonable time discharges the guarantor pro tanto,[42] but this notice may be waived.[43] Irrespective of fraud or knowledge of the creditor, a guarantor

Where the guaranty is contemporaneous with the transaction, notice of acceptance is not required. Closson v. Billman [Ind.] 69 N. E. 499. Notice of acceptance held unnecessary. Stewart v. Sharp County Bank [Ark.] 76 S. W. 1064.

26. Peninsular Stove Co. v. Adams H. & F. Co., 93 Mo. App. 237; Standard Sewing Mach. Co. v. Church, 11 N. D. 420. Actual acceptance and reliance by creditor thereon not sufficient. Promisor must have actual knowledge of the acceptance. Id.

27. Swisher v. Deering, 204 Ill. 203; Hughes v. Roberts, etc., Shoe Co., 24 Ky. L. R. 2003, 72 S. W. 799.

28. Wood v. Husted, 83 App. Div. (N. Y.) 174.

29. Iowa Code, § 3069. Lane v. Richards, 119 Iowa, 24.

30. Wood v. Husted, 83 App. Div. (N. Y.) 174.

31. Finkelstein v. Kessler, 84 N. Y. Supp. 266.

32. Union Nat. Bank v. Leary, 77 App. Div. (N. Y.) 332.

33. Blumenthal v. Tibbits, 160 Ind. 70.

34. Ind. Trust Co. v. Finitzer, 160 Ind. 647; Burson v. Bogart [Colo. App.] 72 Pac. 605; First Nat. Bank v. Gaddis, 31 Wash. 596, 72 Pac. 460; Wulff v. Lindsay [Ariz.] 71 Pac. 963; Matteson v. Moone [R. I.] 54 Atl. 1058; Garrett, etc., Co. v. Hamill, 131 N. C. 57. The fact that the promise is absolute does not take it out of the statute. West v. Grainger [Fla.] 35 So. 91. See Frauds, Statute of.

35. Haish v. Marshall Field & Co., 103 Ill. App. 90; Nat. Bank of Commerce v. Garn, 23 Ohio Circ. R. 447; Swisher v. Deering, 204 Ill. 203. Circumstances subsequent to the guaranty should not be considered. Nat. Bank of Commerce v. Garn, 23 Ohio Circ. R. 447. Ambiguous guaranty may be explained by antecedent dealings. Guaranty of "drafts with bill of lading attached." First Nat. Bank v. Bowers [Cal.] 74 Pac. 856. Indefinite guaranty is cured by execution. Leis v. Sinclair [Kan.] 74 Pac. 261.

36. Swisher v. Deering, 204 Ill. 203. Where a guaranty terminates on an event certain which the parties clearly contemplated, it is immaterial that the guarantor procured the happening of the event unless it was done by fraud to escape liability. Mason v. Standard D. & D. Co., 85 App. Div. (N. Y.) 520. "Where a guarantor promises payment of costs and attorney's fees in an action against himself or the principal they may be collected but only against himself in another action brought after the one on the principal debt for they have not accrued at the time the first suit was brought." Haish v. Marshall Field & Co., 103 Ill. App. 90.

37. Swisher v. Deering, 204 Ill. 203.

38. Germania Bank v. Trapnell [Ga.] 45 S. E. 446. Facts held to show no unreasonable delay in demanding payment and giving notice to guarantor. Mamerow v. Nat. Lead Co. [Ill.] 69 N. E. 504.

39. Hill v. Combs, 92 Mo. App. 242.

40. Pain v. Packard, 13 Johns. (N. Y.) 174; Moakley v. Riggs, 19 Johns. (N. Y.) 69, 10 Am. Dec. 196 (leading cases).

41. Shipman v. Niles, 75 App. Div. (N. Y.) 451.

42. Lemmert v. Guthrie [Neb.] 95 N. W. 1046; Swisher v. Deering, 204 Ill. 203. Eighteen months not a reasonable time. Lemmert v. Guthrie [Neb.] 95 N. W. 1046. Burden on guarantor to show loss. Swisher v. Deering, 204 Ill. 203.

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can recover from him the amount paid on the representation that the debtor was in default.[44]

(§ 3) *C. Persons benefited by guaranty.*—Where the guaranty is of a contract already made which is definite in extent and amount, unless the contrary appears to be the intention of the parties, it is assignable along with the principal debt.[45]

(§ 3) *D. Defenses and discharge of guaranty.*—The contract between the creditor and the guarantor may be set aside when fraudulently procured,[46] and where the guaranty is for an illegal purpose it is not enforceable.[47] Where there is a real or equitable defense to the principal debt, it is a defense to the contract of guaranty.[48] A release of the principal or co-guarantors discharges the other guarantors pro tanto,[49] and the extension of time of payment without his consent discharges the guarantor absolutely,[50] except in cases which leave no defense to the principal debtor to suit by the creditor at the time the guarantor's liability accrues.[51] The creditor if so instructed is bound to apply security he may have in his hands to payment of the principal debt before having recourse to the guarantor,[52] and unless the guaranty is continuing the creditor is bound to apply the first payments on a debt to the discharge of the guarantor.[53] That the principal has a personal defense against the creditor is no defense to the guarantor.[54]

§ 4. *Rights and remedies between guarantor, principal debtor, and co-guarantors.*—On default of the principal debtor and payment of the debt, a right to sue the principal for indemnity immediately accrues to the guarantor entirely independent of his right to be subrogated to the principal debt.[55] Where several persons are liable on the same guaranty, the presumption is they are liable to contribute equally but this may be rebutted; yet this presumption holds good even when some of the guarantors are sureties on the principal debt.[56] They may be sued jointly in one action even in states where the guarantor and principal must be sued separately.[57]

§ 5. *Action on guaranty.*—A guaranty must be specially declared on,[58] and performance of conditions by plaintiff must be specifically alleged.[59] Performance of the act guaranteed may be shown under a general denial.[60]

43. Swisher v. Deering, 204 Ill. 203; McKibben v. Ripley [Neb.] 95 N. W. 1046.

44. Johnson v. Cate, 75 Vt. 100.

45. American Bonding & Trust Co. v. Baltimore R. Co. [C. C. A.] 124 Fed. 866.

46. Strouse v. Querns, 22 Pa. Super. Ct. 6. That at time of contract debtor in default not per se a defense. Tolman Co. v. Butt [Wis.] 93 N. W. 548.

47. Glens Falls Nat. Bank v. Van Nostrand, 41 Misc. (N. Y.) 526.

48. Parrish v. Rosebud Min. & Mill. Co. [Cal.] 71 Pac. 694. Guarantor cannot be sued alone where the principal is a necessary party to the interpretation of the principal contract. Parrish v. Rosebud Min. & Mill. Co. [Cal.] 71 Pac. 694.

49. To operate as a discharge the release must be binding on the creditor. Commercial & Farmers' Nat. Bank v. McCormick [Md.] 55 Atl. 439.

50. Loeff v. Laussig, 102 Ill. App. 398. Extension must be specially pleaded; general denial insufficient. National Radiator Co. v. Hull, 79 App. Div. (N. Y.) 109. The renewal of notes on maturity when they are the subject of a continuing guaranty does not operate as a discharge. Bankers' Iowa State Bank v. Mason Hand Lathe Co. [Iowa] 97 N. W. 70.

51. Alger v. Alger, 83 App. Div. (N. Y.) 168.

52. Coxe Bros. & Co. v. Milbrath [Wis.] 92 N. W. 560. Guarantor not entitled to actual notice of sale of security. Shipman v. Niles, 75 App. Div. (N. Y.) 451.

53. Carson v. Reid, 137 Cal. 253, 70 Pac. 89. But see National Bank of Commerce v. Garn, 23 Ohio Cir. Ct. R. 447, in which application of payments was not demanded.

54. For his right to a remedy over is not affected. Seabury v. Sibley, 183 Mass. 105.

55. Seabury v. Sibley, 183 Mass. 105, citing many cases.

56. McDavid v. McLean, 202 Ill. 354.

57. Hill v. Combs, 92 Mo. App. 242.

58. The common counts are insufficient. West v. Grainger [Fla.] 35 So. 91.

59. Averment of compliance with condition of guaranty that judgment be not entered in a certain suit held not sufficient. Hall v. Little, 89 App. Div. (N. Y.) 524.

60. No formal plea of payment is necessary to admit evidence by a guarantor that the debtor has paid the debt. Bank of Wrightsville v. Merchants' & Farmers' Bank [Ga.] 46 S. E. 94.

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GUARDIANS AD LITEM AND NEXT FRIENDS.

§ 1. *Necessity or occasion for appointment.*—A guardian ad litem or next friend should be appointed whenever an infant[61] or incompetent[62] sues or is sued.[63]

§ 2. *Qualification and appointment.*—The person appointed should be impartial,[64] but need not be a resident of the state.[65] A guardian ad litem or next friend may be appointed to continue an action begun by a minor,[66] or one begun by a guardian who was not qualified.[67] The proceedings for appointment are within a general statute permitting amendments.[68]

§ 3. *Powers and duties.*—The guardian may assert rights on his own behalf in the same action,[69] and may, if he act in good faith, buy property of the ward.[70] Proceedings should be had in the name of the guardian,[71] but the minor is the real party in interest,[72] and the guardian cannot satisfy the judgment on part payment,[73] and his right to dismiss the action is not absolute,[74] while a ward who took an appeal may himself dismiss it.[75] A ward, upon approaching majority, may bind herself by acts inconsistent with advice of guardian ad litem.[76] In some states, the guardian ad litem is liable for costs,[77] and may sue in forma pauperis.[78] Where compensation is allowed the guardian, it should be moved for in the lower court.[79]

GUARDIANSHIP.[80]

§ 1. Appointment, Qualification, and Tenure of Guardians (148).
§ 2. Custody, Support and Education of Ward (150).
§ 3. Powers, Duties and Liabilities of Guardians (151).
§ 4. Sale of Realty (152).
§ 5. Presentment and Allowance of Claims (153).
§ 6. Actions By and Against Guardians (153).
§ 7. Accounting and Settlement (154).
§ 8. Compensation of Guardian (154).
§ 9. Liabilities on Guardianship Bonds and Actions Thereon (154).

§ 1. *Appointment, qualification and tenure of guardians.*—The probate court has exclusive jurisdiction to appoint a guardian for a minor.[81] The domicile of

61. An infant may sue for damages by guardian or next friend. Clasen v. Pruhs [Neb.] 95 N. W. 640.

62. Isle v. Cranby, 199 Ill. 39. Suit against one not discharged from adjudication of insanity cannot be maintained without appointment of guardian ad litem. Eakin v. Hawkins, 52 W. Va. 124. A person of unsound mind, though not adjudged insane, may sue by next friend. Isle v. Cranby, 199 Ill. 39.

63. Service of process should be made upon guardian ad litem, not upon ward. Ferrell v. Ferrell [W. Va.] 44 S. E. 187. Service on minor, though inoperative alone, will be rendered valid by appearance and answer of guardian. Bell v. Smith, 24 Ky. L. R. 1328, 71 S. W. 433. A judgment is not invalidated by reason of failure to appoint guardian ad litem for infants who have, during pendency of action, acquired rights in the property involved, the burden being on them to intervene. Shelby v. St. James' Orphan Asylum [Neb.] 92 N. W. 155.

64. Appointment of one connected in business with opposing counsel is improper. Parish v. Parish, 77 App. Div. (N. Y.) 267.

65. Pine v. Callahan [Idaho] 71 Pac. 473.

66. Howell v. American Bridge Co. [Del.] 53 Atl. 53.

67. St. Louis, etc., R. Co. v. Haist [Ark.] 72 S. W. 893.

68. Baumeister v. Demuth, 84 App. Div. (N. Y.) 394.

69, 70. Larrabee v. Larabee, 24 Ky. L. R. 1423, 71 S. W. 645.

71. Appeal by minor instead of guardian though improper is waived by failure to object before submission. Ramsey v. Keith's Adm'r, 25 Ky. L. R. 1302, 77 S. W. 693.

72. Fletcher v. Parker [W. Va.] 44 S. E. 422; St. Louis, etc., R. Co. [Ark.] 72 S. W. 893. Suit by father as next friend of minor child to recover earnings, annuls personal right of father thereto. Chicago Screw Co. v. Weiss [Ill.] 68 N. E. 54.

73. Fletcher v. Parker [W. Va.] 44 S. E. 422.

74. Isle v. Cranby, 199 Ill. 39.

75 In re Moss [Cal.] 74 Pac. 546.

76. Bunel v. O'Day, 125 Fed. 303.

77. Burbach v. Milwaukee Elec. Ry. & Light Co. [Wis.] 96 N. W. 829.

78. Perlmutter v. Stern, 87 App. Div. (N. Y.) 160.

79. Williams v. Williams, 24 Ky. L. R. 1753, 72 S. W. 271.

80. Matters relating to the representation of infants in actions, or of lunatics or of persons enfeebled by age or the use of

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the infant controls jurisdiction[82] and an infant abandoned by parents and committed to a public institution is a resident of the county wherein the institution is situate.[83] In the case of a non-resident infant situs of property controls and a simple contract obligation is not property within the state.[84]

By statute in some states a testamentary nomination may be made,[85] and infants above fourteen years of age may nominate their guardian.[86] As between several parties entitled to letters the selection is within the court's discretion,[87] the welfare of the infant being the primary consideration,[88] and except for sufficient reasons the surviving mother should be appointed,[89] even over a testamentary appointment by the deceased father.[90]

In Louisiana the under tutor may make the application.[91] The father of the infant is entitled to notice of application for the appointment.[92] It is proper to require a bond in double the amount of the inventory,[93] though the mere failure to require a bond will not invalidate the proceedings.[94] If the oath describes the appointee as guardian it need describe him as guardian of the person and estate of the minor.[95]

The order appointing a guardian is appealable,[96] and it is not subject to collateral attack,[97] for mere irregularities in the appointment.[98] It may, however, be collaterally attacked for want of jurisdiction[99] but the failure to require a bond is not a jurisdictional defect.[1]

intoxicants are treated elsewhere. Right of ward to follow funds in the hands of third persons, see "Trusts."

81. White v. Strong, 75 Conn. 308.

82. The probate court of the state wherein the minor is temporarily sojourning is without jurisdiction. The domicile of the parent is the domicile of the infant. Modern Woodmen of America v. Hester, 66 Kan. 129, 71 Pac. 279.

83. Louisville, etc., R. Co. v. Kimbrough, 24 Ky. L. R. 2409, 74 S. W. 229. The district court of the parish of the domicile of the mother is the proper one to confirm her as natural tutrix. Jewell v. De Blanc [La.] 34 So. 787.

84. Beneficiary certificate in fraternal insurance order. Modern Woodmen of America v. Hester, 66 Kan. 129, 71 Pac. 279.

85. A statute authorizing the father to make a testamentary appointment does not include authority in the mother to make such an appointment (Code 1880, § 2095). Edwards v. Kelly [Miss.] 35 So. 418. A person to whom the father had given custody of the minor cannot make a testamentary appointment of a guardian for him. Lamar v. Harris, 117 Ga. 993. Under the statute a ratification of a testamentary appointment by a father leaving the mother surviving is discretionary with the court. Refusal to ratify held proper (3 Comp. Laws, § 8706). Ohrus v. Woodward [Mich.] 96 N. W. 950. The mother does not waive her right to oppose the testamentary appointment by consenting to the probate of the will. Ohrns v. Woodward [Mich.] 96 N. W. 950. The failure of the testamentary guardian to qualify will not necessarily defeat the testamentary trust for the minor's benefit. Pfefferle v. Herr [N. J. Eq.] 55 Atl. 1103.

86. The court may appoint the nominee of nonresident infants (Ky. St. 1899, § 2022). McVaw v. Shelby, 25 Ky. L. R. 309, 75 S. W. 227. A written nomination is insufficient; it must be signed in the presence of the judge after privy examination (Ky. St. § 2023). Garth's Guardian v. Taylor, 24 Ky. L. R. 1963, 72 S. W. 777.

87. The court's decision having substantial evidence to support it will not be reviewed. In re Lewis, 137 Cal. 682, 70 Pac. 926. If no issues are made on the application findings of fact are not necessary. In re Lewis, 137 Cal. 682, 70 Pac. 926.

88. Application by father denied. In re Jacquet, 40 Misc. (N. Y.) 575.

89. In re Burdick, 41 Misc. (N. Y.) 346.

90. Modern Woodmen of America v. Hester, 66 Kan. 129, 71 Pac. 279.

91. An under tutor may be appointed though there is a vacancy in the office of tutor and where there is an under tutor it is error to appoint a tutor ad hoc to institute proceedings to appoint a tutor. Barbin v. Schwartzenberg [La.] 34 So. 606.

92. Appointment of an aunt without such notice will be vacated. In re Jacquet, 40 Misc. (N. Y.) 575. Notice of application held sufficient. In re Chin Mee Ho [Cal.] 73 Pac. 1002.

93. Greer v. Ford [Tex. Civ. App.] 72 S. W. 72.

94. In re Chin Mee Ho [Cal.] 73 Pac. 1002.

95. The proceedings for the appointment may be based on an application for both capacities. Greer v. Ford (Tex. Civ. App.) 72 S. W. 73.

96. Equity will not therefore enjoin the appointee because unfit and not properly appointed. White v. Strong, 75 Conn. 308.

97. Norris v. Baumgardner [Md.] 55 Atl. 619. In actions by guardians the sufficiency of their bonds cannot be questioned. Van Zandt v. Grant, 175 N. Y. 150.

98. Jewell v. De Blanc [La.] 34 So. 787.

99. Modern Woodmen of America v. Hester, 66 Kan. 129, 71 Pac. 279.

1. In re Chin Mee Ho [Cal.] 73 Pac. 1002

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Removal of an appointee is generally discretionary with the court[2] and if this management of the trust property is adverse to the interests the ward has he should be removed.[3] Change of residence by the guardian will not oust the appointing court of jurisdiction to remove him.[4] Before a successor can be appointed the original appointee should be removed.[5] Notice need not be given on appointing a successor to a removed guardian.[6]

The relationship is terminated by the majority of the ward,[7] and at common law by the marriage of the female ward.[8]

The existence of guardianship must be shown by record.[9]

§ 2. *Custody, support, and education of the ward.*—A mere application for letters does not confer on the applicant a present right to the custody of the infant.[10] In determining the right of the guardian to the custody of the person of the ward, the controlling consideration is the present and prospective welfare of the minor,[11] and the right of a foreign guardian to the custody of a resident minor is recognized only as a matter of comity.[12]

While expenditures for education and support of the ward should be made only after leave obtained, the court will, in proper cases, allow a credit therefor,[13] as where they were reasonable, and did not exceed the income of the estate,[14] and in computing income the expenditures for support and the income should run concurrently.[15] In case of rents as income which the guardian may expend for necessaries without leave of court, expenses for taxes, insurance, and repairs should first be deducted.[16] If the ward renders services for the guardian which fully compensate him for support, he will not be allowed therefor.[17] The allowance for board and clothing by the probate court is binding on the appellate court unless made through fraud and collusion on the part of the guardian.[18]

In the absence of a contract to pay therefor, the guardian cannot be held

2. Voliva v. Moffit, 30 Ind. App. 225, 65 N. E. 754. The court cannot be compelled by mandamus to authorize the under tutor to sue to remove the curator. State v. St. Paul [La.] 35 So. 261. The mere failure of the natural tutrix to have homologated the family meeting called to decide whether she shall retain the tutorship in view of her prospective remarriage or to have the evidence of the minor's mortgage against the prospective co-tutor recorded does not ipso facto forfeit her office. Barbin v. Schwartzenberg [La.] 34 So. 606; Jewell v. De Blanc [La.] 34 So. 787.

3. In re Mansfield's Estate [Pa.] 55 Atl. 764; Voliva v. Moffit, 30 Ind. App. 225.

4, 5. Estridge v. Estridge, 25 Ky. L. R. 1076, 76 S. W. 1101.

6. Brown v. Fidelity & Deposit Co. [Tex. Civ. App.] 76 S. W. 944.

7. Except as to the settlement of the estate. State v. Greer [Mo. App.] 74 S. W. 881. Neb. Comp. St. c. 34, § 32. Goble v. Simeral [Neb.] 93 N. W. 235.

8. Marriage took place in 1865. The husband became owner of the personalty and alone entitled to sue to recover. Fowler v. McLaughlin, 131 N. C. 209.

9. Statements that a certain person was guardian are not admissible. Ellis v. Le Bow [Tex. Civ. App.] 71 S. W. 576.

10. The pendency of an application for the appointment of a guardian will not affect the right of the parent to proceed to recover custody of the child from such applicant. Ring v. Weinman, 116 Ga. 798.

11. Admissibility of evidence in contest over right to custody. Hanrahan v. Sears [N. H.] 54 Atl. 702. The authority of the officers of the state public school over the custody of infants committed is superior to the rights of guardians appointed before or after the commitment. Armstrong v. Board of Control, 88 Minn. 382.

12. Hanrahan v. Sears [N. H.] 54 Atl. 702.

13. Mother as guardian in socage may allow such expenditures. Williams v. Clarke, 82 App. Div. (N. Y.) 199; In re Carter [Iowa] 94 N. W. 488; Hoga's Estate v. Look [Mich.] 96 N. W. 439. Pension money held properly applied towards support and education of the ward. Franklin v. Embry [Ky.] 76 S. W. 1086.

14. Hedges v. Hedges, 24 Ky. L. R. 2220, 73 S. W. 1112; De Cordova v. Rogers [Tex.] 75 S. W. 16; Freedman v. Vallie [Tex. Civ. App.] 75 S. W. 322; Duffy v. Williams, 133 N. C. 195.

15, 16. DeCordova v. Rogers [Tex.] 75 S. W. 16.

17. Guardian held fully compensated by services. Kenney v. Henning, 64 N. J. Eq. 65. As where the guardian is also the father, in the absence of any showing that he was unable to provide for their support. Hedges v. Hedges, 24 Ky. L. R. 2220, 73 S. W. 1112. Father as guardian held liable to contribute to support but allowed for education, clothing and medical bills. Harper v. Payne, 24 Ky. L. R. 2301, 73 S. W. 1123.

18. Evidence held to show fraud and collusion. In re Carter [Iowa] 94 N. W. 488.

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liable for necessaries furnished the ward by third persons,[19] and in case of a contract he is personally liable thereon.[20]

§ 3. *Powers, duties, and liabilities of guardians.*—Whether the property shall be surrendered to a foreign guardian depends on whether the removal would be for the best interests of the ward.[21] In respect to the ward's estate, the guardian has only a naked power not coupled with an interest.[22]

In the management of the property, a guardian is bound to exercise such care as a prudent man would in the conduct of his own business,[23] and for losses resulting from his negligence he will be personally charged.[24] Generally, the principal estate should be encroached upon for expenses only in cases of great necessity.[25] For advancements by the guardian to protect the property, he is entitled to a lien.[26]

A guardian cannot without leave of court bind the estate by contract,[27] even though made in the conduct of a general merchandise business authorized by the court;[28] he cannot therefore compromise a claim in favor of his ward,[29] or employ an agent to effect a sale of the realty,[30] or bind the estate for improvements made thereon,[31] or to mortgage[32] or lease the realty.[33] He will, however, be credited with expenditures which would have been allowed if application had been made.[34] The estate may be liable on contracts for services necessary for its preservation as with attorneys to defend or prosecute suits,[35] but not for expenses of an agent in the collection of rents where the property is not so situated as to justify the employment.[36] If the contract was such as the guardian could make, that he signed it in his individual as well as representative capacity will not make it a joint contract.[37]

Investments should be made only on authorization.[38] The guardian is chargeable with the funds loaned without leave of court,[39] or loaned on personal credit.[40]

19. Pinnell v. Hinkle [W. Va.] 46 S. E. 171.

20. Pinnell v. Hinkle [W. Va.] 46 S. E. 171. Liability of guardian on contract for necessaries. Murphy v. Holmes, 87 App. Div. (N. Y.) 366.

21. Admissibility of evidence in such proceeding. Blanchard v. Andrews, 90 Mo. App. 425.

22. Municipal Ct. of Providence v. Le Valley [R. I.] 55 Atl. 640.

23. Taylor v. Kellogg [Mo. App.] 77 S. W. 130.

24. As where he failed to make any attempt to collect rents under a contract of lease made by him. Taylor v. Kellogg [Mo. App.] 77 S. W. 130; In re Nowak, 38 Misc. (N. Y.) 713. Sufficiency of referee's finding on question whether estate was injured by reason of a private renting contra to Code, § 1590. Duffy v. Williams, 133 N. C. 195.

25. Griffith's Ex'r v. Bybee, 24 Ky. L. R. 666, 69 S. W. 767.

26. Under Wash. Ball. Code, § 1738, for payment of taxes. Burgert v. Caroline, 31 Wash. 62, 71 Pac. 724.

27. Account of goods sold to the guardian held a personal account. Moore v. Metz, 24 Ky. L. R. 1729, 72 S. W. 294; Lathrop v. Duffield [Mich.] 96 N. W. 577; De Armit v. Milnor, 20 Pa. Super. Ct. 369.

28. Harter v. Miller [Kan.] 73 Pac. 74.

29. Succession of Emonot, 109 La. 359. Instruction held erroneous. Davis v. Beall [Tex. Civ. App.] 74 S. W. 335.

30. De Armit v. Milnor, 20 Pa. Super. Ct. 369.

31. Hickey v. Dixon, 42 Misc. (N. Y.) 4.

32. And the probate court is without jurisdiction to authorize it. Davidson v. Wampler [Mont.] 74 Pac. 32.

33. Haskell v. Sutton, 53 W. Va. 206.

34. Expenditures for medicines and for things to furnish the home on marriage of the ward. Griffith's Ex'r v. Bybee, 24 Ky. L. R. 666, 69 S. W. 767.

35. McCoy v. Lane [Neb.] 92 N. W. 1010; In re Mason [Neb.] 94 N. W. 990. Allowance for attorneys' services held reasonable and proper. In re Mason [Neb.] 94 N. W. 990. Counsel fee of $25 allowed in defending exceptions to accounts. Clopton v. Simonds [Mo. App.] 77 S. W. 467. Allowance for counsel fees and services reduced. In re Steele's Estate, 97 Mo. App. 9. Allowance of attorneys' fees held to include allowance for fees as guardian ad litem of the ward. In re Mason [Neb.] 94 N. W. 990. If the guardian has converted the ward's estate he will not be allowed fees of counsel assisting him thereafter in making a settlement. Berkshire v. Hoover, 92 Mo. App. 349.

36. Guardian not allowed for expenses of agent in collecting rents. In re Binghamton Trust Co., 83 N. Y. Supp. 1068.

37. If by the express terms of the contract it is to be paid out of the ward's estate it alone is liable. McCoy v. Lane [Neb.] 92 N. W. 1010.

38. As a purchase of stock from ancestor's estate. Rogers v. Dickey, 117 Ga. 819.

39. Freedman v. Vallie [Tex. Civ. App.] 75 S. W. 322.

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On money he should have put at interest, he will be charged interest.[41] If he used the funds in his own business, he should be charged with the amount with interest,[42] or if he occupies premises belonging to the ward, he will be charged with the rental value.[43] For funds received by the guardian without authority, the estate cannot be charged.[44]

The guardian is liable for taxes accrued on the ward's property while in his possession.[45]

The guardian cannot make admissions against the interests of his ward.[46]

In case of guardianship of two or more wards, the estate of one cannot be charged with commissions on disbursements on account of the other,[47] and each guardian acting is liable for his own acts of maladministration.[48]

The unauthorized acts of the guardian may be validated by ratification by the ward after majority,[49] and a retainer of the articles purchased by the guardian without authority is a ratification.[50] Since dealings between the guardian and ward after the ward arrives at majority will be closely scrutinized, a transfer immediately after majority of a share of the estate in consideration of love and affection is invalid,[51] but in the absence of fraud, a settlement with the guardian after majority of the ward is binding.[52]

§ 4. *Sale of realty.*—The guardian is without authority to sell the ward's lands,[53] except on leave obtained,[54] nor can a foreign appointee make a valid conveyance of land within the state.[55] The lands can be ordered sold on the guardian's application only for their support and maintenance.[56] Proceedings instituted by a guardian for a sale of the ward's lands do not abate by his resignation.[57] Inadequacy of the amount bid is ground for ordering a resale.[58] That the order of sale did not mention the time and place of sale,[59] or the premature confirmation

40. Norris v. Norris, 85 App. Div. (N. Y.) 113.

41. De Cordova v. Rogers [Tex.] 75 S. W. 16; Freedman v. Vallie [Tex. Civ. App.] 75 S. W. 322. Where the guardian was not allowed for sums paid out which equaled the interest it is proper not to charge him with interest. Griffith's Ex'r v. Bybee, 24 Ky. L. R. 666, 69 S. W. 767.

42. Interest to be compounded annually. In re Hamilton's Estate, 139 Cal. 671, 73 Pac. 578.

43. Hedges v. Hedges, 24 Ky. L. R. 2220, 73 S. W. 1112.

44. When the guardian discounted purchase money notes the purchaser is not entitled as against the estate to a credit for such sum. Brown v. Fidelity & D. Co. [Tex. Civ. App.] 76 S. W. 944.

45. Kansas City v. Simpson, 90 Mo. App. 50.

46. Statements held not admissible. Stevens v. Continental Casualty Co. [N. D.] 97 N. W. 862.

47. Freedman v. Vallie [Tex. Civ. App.] 75 S. W. 322.

48. The under tutor is not necessarily liable for the maladministration of the tutor. Dismissal of action by dative tutor held res adjudicata as to under tutor. Succession of Lalmont, 110 La. 117.

49. Ward held to have ratified a misuse of his funds by his guardian. Manson v. Simplot, 119 Iowa, 94. As where the guardian had purchased household articles from the principal estate and the ward after majority took possession. Hedges v. Hedges, 24 Ky. L. R. 2220, 73 S. W. 1112; Shreeves v. Caldwell [Mich.] 97 N. W. 764; Rogers v. Dickey, 117 Ga. 819.

50. Griffith's Ex'r v. Bybee, 24 Ky. L. R. 666, 69 S. W. 767.

51. Williams v. Davison's Estate [Mich.] 94 N. W. 1048. Instruction on dealings between guardian and ward held proper. Hart v. Cannon, 133 N. C. 10.

52. The written settlement need not contain a seal. Norris v. Norris, 85 App. Div. (N. Y.) 113; Holscher's Heirs v. Gehrig [Iowa] 94 N. W. 486.

53. Bush v. Coomer, 24 Ky. L. R. 702, 69 S. W. 793. The power given by will to an executor to sell lands to provide for infant's support, etc., does not pass to the infant's guardian on death of the executor without exercising the power. Burroughs v. Cutter [Me.] 56 Atl. 649.

54. De Armit v. Milnor, 20 Pa. Super. Ct. 369.

55. Wren v. Howland [Tex. Civ. App.] 25 S. W. 894.

56. Leet v. Gratz, 92 Mo. App. 422.

57. McVaw v. Shelby, 25 Ky. L. R. 309, 75 S. W. 227.

58. A resale was properly ordered where the property sold for $705 and the prospective purchaser offered $950 and to deposit the excess in court. McCallum v. Chicago Title & Trust Co., 203 Ill. 142. Under Code Civ. Proc. § 2687 the district court sitting in probate can only order a resale on failure of the purchaser to complete bid and cannot direct the guardian to retake possession. State v. District Court, 27 Mont. 415, 71 Pac. 401.

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of the sale are mere irregularities not invalidating the sale;[60] but the sale is void if the court authorizing it was without jurisdiction,[61] or if it was made privately.[62] Where a part of the consideration for the sale was the satisfaction by the purchaser of a claim against the guardian, the sale is void,[63] but merely because, before applying for leave to sell, the guardian procured the obligation of an intending purchaser to bid an adequate price or because after the purchase he advanced the amount of the bid,[64] or because the guardian purchased by permission of the court, will not render the sale invalid.[65] The probate court may, on the guardian's application, authorize a conveyance to cure irregularities in proceedings.[66] A surrender at a discount of the purchase-money notes to the purchaser by the guardian will not relieve the purchaser from liability.[67]

§ 5. *Presentment and allowance of claims.*—Directing payment of a claim on an ex parte application is improper.[68] In Kansas, the probate court is without jurisdiction to allow claims arising on contracts with the guardian,[69] and in Rhode Island it cannot be allowed on petition, and can only be allowed on settlement of the final account with the consent of the guardian.[70] A claim under a contract by a guardian which is binding on the estate may be presented as an ordinary claim,[71] and the petition for the allowance need not aver that the contract was reasonable.[72] The issuance of a summons is not a prerequisite to allowance,[73] nor is the entry of the approval on the court's minutes necessary.[74] The allowance of a claim can be received only by appeals.[75]

§ 6. *Actions by and against guardians.*—The guardian may represent the wards in an action in which he has a personal interest.[76] A guardian cannot maintain an action for deceit by one purchasing the ward's property from him.[77] An action against the guardian will not lie on a debt of the ward.[78] An action,

59. Greer v. Ford [Tex. Civ. App.] 72 S. W. 73.

60. Greer v. Ford [Tex. Civ. App.] 72 S. W. 73. An order refusing to affirm a sale may be reviewed by writ of error. McCallum v. Chicago Title & Trust Co., 203 Ill. 142.

61. Under the Nebraska statute permitting sales a petition held insufficient to authorize a sale. Beezley v. Phillips [C. C. A.] 117 Fed. 105.

62. This though advised by a family meeting which was homologated by the judge. Blair v. Dwyer, 110 La. 332.

63. Rocques' Heirs v. Levecque's Heirs, 110 La. 306.

64. Hyatt v. Anderson [Neb.] 96 N. W. 620.

65. The proceedings being fair and regular and in the absence of fraud mere inadequacy of price is not alone ground for setting aside the sale. Larrabee v. Larrabee, 24 Ky. L. R. 1423, 71 S. W. 645.

66. Pending proceedings for rescission of the conveyance because of such irregularities, and though a new bond had been demanded from the guardian. Mock v. Chalstrom [Iowa] 96 N. W. 909. Reformation of guardian's deed on purchaser's application refused. Porter v. Kansas City & N. Connecting R. Co. [Mo. App.] 77 S. W. 532.

67. Brown v. Fidelity & Deposit Co. [Tex. Civ. App.] 76 S. W. 944.

68. In re White, 75 App. Div. (N. Y.) 619.

69. Under the statutes the creditor must pursue his remedy at common law. Harter v. Miller [Kan.] 73 Pac. 74.

70. Contract for attorneys' services. Lothrop v. Duffield [Mich.] 96 N. W. 577. Merely because the ward's estate consisted of realty alone a petition for the allowance of a claim on a contract with the guardian providing for payment out of the estate is not an action to declare a lien on realty so as to oust the county court of jurisdiction. McCoy v. Lane [Neb.] 92 N. W. 1010.

71. Filing the claim in the county court in Nebraska is proper; and it need not be litigated in a court of law. McCoy v. Lane [Neb.] 92 N. W. 1010.

72. That question being submitted when the contract was presented to the county court for approval. McCoy v. Lane [Neb.] 92 N. W. 1010.

73. McCoy v. Lane [Neb.] 92 N. W. 1010

74. Entry on claim docket is sufficient. De Cordova v. Rogers [Tex.] 75 S. W. 16.

75. Bill of review will not lie. De Cordova v. Rogers [Tex.] 25 S. W. 16.

76. In partition by a guardian co-tenant with the ward no other representation of the ward is necessary. Larrabee v. Larrabee, 24 Ky. L. R. 1423, 71 S. W. 645. Where the guardian is authorized to sue in determining diverse citizenship as affecting the jurisdiction of a federal court the guardian's residence will be considered. Mexican Cent. R. Co. v. Eckman, 187 U. S. 429, 47 L. Ed. 245.

77. This though after the action brought the ward died and the guardian was his sole heir. To maintain the action he must be damaged. Brock v. Rogers [Mass.] 69 N. E. 334.

78. Municipal Court v. Le Valley [R. I.] 55 Atl. 640.

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"A, guardian for C and D, infants," is a personal action against the guardian,[79] and a judgment against a guardian not describing him as such is a personal judgment against him.[80]

§ 7. *Accounting and settlement.*—The ward's right to sue for an accounting may be barred by limitations.[81] Delay in issuing the citation will not affect the court's jurisdiction if it is issued before publication is commenced.[82] The mere omission of the word "seal" in the copy citation published is immaterial.[83] Citation to "report" after majority of the ward means to render the final account.[84] Objections to account must be made in the probate court.[85] The order settling the particular items of account is conclusive,[86] but an annual settlement is not a judgment binding on the sureties.[87] In case of death of the guardian pending an appeal from a decree settling his accounts, there being no necessity for administration on his estate, his heirs may be made parties.[88] The giving of a note by the guardian for the balance due the ward does not discharge the liability.[89] The guardian may be required to deposit the funds in court.[90]

§ 8. *Compensation of guardian.*—Allowance for compensation is within the discretion of the court.[91] Negligent conduct whereby losses result to the estate will cause a forfeiture of commissions.[92]

§ 9. *Liabilities on guardianship bonds and actions thereon.*—To be released from liability as surety, the surety must pursue the statutory methods.[93] The sureties are not liable for any misapplication prior to the execution of the bond.[94] That the guardian loaned the funds without leave of court will not release his sureties.[95] They are liable for the ward's funds borrowed by the guardian,[96] and a conversion of the proceeds of a note is a breach of the bond which continues as to the second bond where the guardian carries over the note in his final accounts.[97] After death of the guardian, the surety is not liable for interest until after demand made on him,[98] and attorney's fees on accounting by the surety will not be allowed.[99] The sureties on the original bond and on the

79. Pinnell v. Hinkle [W. Va.] 46 S. E. 171; Municipal Court v. Le Valley [R. I.] 55 Atl. 640.

80. Municipal Court v. Le Valley [R. I.] 55 Atl. 640.

81. Six years after ward's majority. Code Civ. Proc. § 382, subd. 5, declaring a cause of action accrued at the time of the discovery of the fraud has no application. Libby v. Van Derzee, 80 App. Div. (N. Y.) 494. Ward's action for an accounting is not barred until 10 years after his majority under Shan. Code, § 4473. Jackson v. Crutchfield [Tenn.] 77 S. W. 776.

82, 83, 84. Heisen v. Smith, 138 Cal. 316, 71 Pac. 180.

85. Cannot be first raised on appeal. Clopton v. Simonds [Mo. App.] 77 S. W. 467. Final report not approved. In re Gray [Iowa] 94 N. W. 451.

86. In re Wells' Estate and Guardianship [Cal.] 73 Pac. 1065. Bill for relief dismissed on demurrer. Scoville v. Brock [Vt.] 54 Atl. 177. In New Jersey the orphans' court is without jurisdiction to determine charges by the guardian for ward's support and the account is not therefore prima facie evidence of its correctness. Keeney v. Henning, 64 N. J. Eq. 65.

87. Lincoln Trust Co. v. Wolff, 91 Mo. App. 133.

88. Magness v. Berry, 29 Tex. Civ. App. 567.

89. Berkshire v. Hoover, 92 Mo. App. 349.

90. And an order so directing at the time of the account of lis gestim is appealable. Such an order may be made in vacation. Succession of Wegmann, 110 La. 930.

91. Haga's Estate v. Look [Mich.] 96 N. W. 439. Guardian allowed commissions on rents collected though a co-tenant with the wards. Keeney v. Henning, 64 N. J. Eq. 65. For motherly services rendered a child in arms by the mother who was also the guardian of the child she will not be allowed compensation. Id. Father as guardian should be allowed not exceeding 5 per centum on receipts and disbursements. Hedges v. Hedges, 24 Ky. L. R. 2220, 73 S. W. 1112.

92. In re Nowak, 38 Misc. (N. Y.) 713.

93. The giving of a new bond on "request" of the surety held not to have released him but made him a co-obligor with the new surety. Barker v. Boyd, 24 Ky. L. R. 1389, 71 S. W. 528.

94. Freedman v. Vallie [Tex. Civ. App.] 75 S. W. 322. Code Civ. Proc. § 2596, provides that persons to whom letters are granted are liable for funds received prior to the grant. In re Guardianship of Fardette, 86 App. Div. (N. Y.) 50.

95, 96. Freedman v. Vallie [Tex. Civ. App.] 75 S. W. 322.

97. Lincoln Trust Co. v. Wolff, 91 Mo. App. 133.

98, 99. Freedman v. Vallie [Tex. Civ. App.] 75 S. W. 322.

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bond in proceedings for the sale of realty by the guardian are jointly liable for the proceeds of the sale.[1] If the ward's estate is being administered jointly, the guardian's sureties are liable to each of the wards for his share.[2] The sureties' liability continues until actual payment to the ward.[3] On payment by the surety he is entitled to be subrogated to the successor guardian against the parties knowingly participating in the original conversion.[4]

A settlement of the accounts is a condition precedent to suit on the bond,[5] but if it is impossible to procure an account, as where the guardian had absconded, an action may be brought on the bond.[6]

The action may be maintained by the ward after his majority,[7] or by the assignee of his judgment against the guardian,[8] and by creditors of the ward whose claims have been reduced to judgment.[9] The general guardian may maintain an action on the bond of his deceased predecessor.[10] The successor guardian may properly maintain a single action to recover for several conversions by his successor against the parties severally liable.[11] The limitation against actions on bonds begins to run from the time of the judicial ascertainment of the principal's liability,[12] or from the majority of the ward since that terminates the relationship,[13] and at common law, from the time of the marriage of the female ward.[14]

HABEAS CORPUS AND REPLEGIANDO.[15]

§ 1. Nature of the Remedy and Occasion and Propriety of It (155).
§ 2. Jurisdiction (157).
§ 3. Petition (157).
§ 4. Hearing on Petition and Issuance of Writ (158).
§ 5. The Writ; Service Thereof; Effect of Writ (158).
§ 6. Certiorari in Aid of Habeas Corpus (158).
§ 7. Hearing and Determination on Return; Judgment; Costs (158).
§ 8. Review (158).

§ 1. *Nature of the remedy and occasion and propriety of it.*—Habeas corpus, designed primarily to relieve against illegal imprisonment, is in modern practice used also to litigate the right to custody of a minor.[16] It is not an appellate

1. Barker v. Boyd, 24 Ky. L. R. 1389, 71 S. W. 528.
2. Freedman v. Vallie [Tex. Civ. App.] 75 S. W. 322.
3. State v. Greer [Mo. App.] 74 S. W. 881.
4. Brown v. Fidelity & Deposit Co. [Tex. Civ. App.] 76 S. W. 944.
5. Pinnell v. Hinkle [W. Va.] 46 S. E. 171. Before suit on the bond of a deceased guardian be brought it is not necessary that execution issue on the surrogate's decree finding the amount due on a compulsory accounting by the deceased representatives. Van Zandt v. Grant, 175 N. Y. 150; Succession of Lalmont, 110 La. 117; Wegner v. Wiltsie, 23 Ohio Cir. Ct. R. 302. Neither a demand on the representatives of a deceased guardian for a settlement nor a settlement by them is a necessary condition precedent to an action on his bond. Petition held sufficient. State v. Berger, 92 Mo. App. 631.
6. Kurz v. Hess, 86 App. Div. (N. Y.) 529.
7. The successor guardian cannot then sue on the bond of his predecessor. State v. Greer [Mo. App.] 74 S. W. 881.
8. Code Civ. Proc. § 367. Heisen v. Smith, 138 Cal. 216, 71 Pac. 180.
9. Rev. Laws, c. 149, §§ 20, 29. Long v. Copeland, 182 Mass. 332. Only creditors of the ward can inquire into the conduct of the guardian respecting his trust and to become such on a claim against the ward he should first sue him. Gen. Laws, R. I. 1896, c. 196, §§ 26, 29. Municipal Court v. Le Valley [R. I.] 55 Atl. 640.
10. Without the appointment of a guardian ad litem, the representatives of the deceased having failed to pay. Van Zandt v. Grant, 175 N. Y. 150.
11. Brown v. Fidelity & Deposit Co. [Tex. Civ. App.] 76 S. W. 944.
12. Bill against sureties eight years after guardian's death barred by laches. Presley v. Weakley, 135 Ala. 517.
13. Neb. Comp. St. c. 34, § 32. Goble v. Simeral [Neb.] 93 N. W. 235. In Texas suit is barred after the lapse of two years from the majority of the ward. Freedman v. Vallie [Tex. Civ. App.] 75 S. W. 322. Action by ward against the guardian's surety held barred by limitations. Bybee's Ex'r v. Poynter, 25 Ky. L. R. 1251, 77 S. W. 698.
14. The husband became the owner of her personalty in 1865, and limitations to sue on the guardian's bond began to run at the time of the marriage. Fowler v. McLaughlin, 131 N. C. 209.
15. Includes De Homine Replegiando and Modern Anologues of it.
16. Stickel v. Stickel, 18 App. D. C. 149; Monk v. McDaniel, 116 Ga. 108; Lamar v. Harris [Ga.] 44 S. E. 866. Best interests of child determine its custodian. Bullock v. Robertson, 160 Ind. 521 Choice of

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writ,[17] and does not lie to review mere errors and irregularities,[18] but only to relieve from imprisonment without jurisdiction;[19] but considerable liberality is usually exercised in deciding what are jurisdictional questions.[20]

In urgent cases, the federal courts grant summary relief by habeas corpus to persons imprisoned by state authorities for acts done under the federal laws or constitution.[21] The exercise of this jurisdiction is, however, a delicate matter and consistently restricted to extraordinary cases,[22] and in general, Federal courts interfere only to enforce Federal statutes or the guaranties of the Federal constitution.[23] The legality of proceedings for international extradition may be tried by habeas corpus in the Federal courts;[24] likewise the legality of the deportation of immigrants alleged to be unlawfully in the country.[25] A person held for interstate extradition may, upon habeas corpus, try the various issues determining the legality of his detention.[26] Commitments for trial by magistrates are reviewed by means of habeas corpus.[27]

child given weight in choosing custodian. Chunn v. Graham, 117 Ga. 551. Child given to stranger in preference to mother. McDonald v. Stitt, 118 Iowa, 199. Father allowed to choose custodian. Carter v. Brett, 116 Ga. 114. Evidence held to show no detention by respondent of petitioner's son. In re Christal [Cal.] 75 Pac. 103. Regularity of proceedings for appointment of guardian cannot be tried. In re Chin Mee Ho, 140 Cal. 263, 73 Pac. 1002.

17. Castner v. Pocohontas Collieries Co., 117 Fed. 184; Ex parte O'Neal, 125 Fed. 967; Palmer v. Colladay, 18 App. D. C. 426.

18. Kellar v. Davis [Neb.] 95 N. W. 1028. On habeas corpus by a person imprisoned for contempt, the court will not re-try the question of contempt but merely the jurisdiction of the court ordering the imprisonment. Ex parte Haggerty, 124 Fed. 441. On habeas corpus by one imprisoned for contemptuous nonpayment of alimony the division of property and award is not reviewable. In re Cave, 26 Wash. 213, 66 Pac. 425. If a prisoner, after being convicted of a crime is punished by the court when no punishment is provided by law, his remedy is not by habeas corpus but by an appellate writ. People v. Murphy, 202 Ill. 493.

19. U. S. v. Davis, 18 App. D. C. 280; U. S. v. Chambers, Id. 287; Palmer v. Thompson, 20 App. D. C. 273.

20. **Release allowed:** Imprisonment for violation of an injunction which had not been served on petitioner. Ex parte Stone [Tex. Cr. App.] 72 S. W. 1000. Injunction in case not within equitable jurisdiction. People v. Barrett, 203 Ill. 99. Arrest on execution in a case in which such execution is not allowed. People v. Gill, 85 App. Div. (N. Y.) 192. Violation of an unconstitutional statute. In re Jarvis, 66 Kan. 329, 71 Pac. 576. Void municipal ordinance. Ex parte Lewis [Tex. Cr. App.] 73 S. W. 811. Contempt consisting of an act allowed by the constitution. Newspaper comment on a case on trial. Ex parte Foster [Tex. Cr. App.] 71 S. W. 593. Indictment of soldier for homicide under order of officer. Com. v. Shortall, 206 Pa. 165. Erroneous verdict of jury. Ex parte Lapique, 139 Cal. xix, 72 Pac. 995; Kellar v. Davis [Neb.] 95 N. W. 1028. Defective mittimus. In re Rogers [Vt.] 55 Atl. 661. Contra, Marx v. People, 204 Ill. 248; In re Rogers [Vt.] 55 Atl. 661. Imprisonment for contempt by notary public. Ex parte Gfeller [Mo.] 77 S. W. 552. Sentence on acts not within terms of statute. Mackey v. Miller (C. C. A.) 126 Fed. 161.

Release not allowed: Failure to allow opportunity to claim right to give bond for good behavior and thereby obtain discharge is not ground for habeas corpus. Coleman v. Nelms [Ga.] 46 S. E. 451. Plea of former acquittal cannot be tried on habeas corpus. State v. Sistrunk [Ala.] 35 So. 39.

21. A United States army officer imprisoned by a subordinate state court for disobedience of an illegal order interfering with his duties may obtain his release from the federal court by habeas corpus without appealing to the highest state court. In re Turner, 119 Fed. 231.

22. Reid v. Jones, 187 U. S. 153, 47 Law. Ed. 116; Ex parte Rearick, 118 Fed. 928; In re Stone, 120 Fed. 101; In re Reeves, 123 Fed. 343; In re Matthews, 122 Fed. 248.

23. Whether an indictment in state court is sufficient will not be tried by a federal court. Howard v. Fleming, 24 Sup. Ct. 49, 48 Law. Ed. —. The federal court is concluded by the decision of a state court as to whether the facts charged are an offense against the state law. Id.

24. The legality of a mittimus issued by a United States commissioner in extradition proceedings. Grin v. Shine, 187 U. S. 181, 47 Law. Ed. 130; Stewart v. U. S. (C. C. A.) 119 Fed. 89.

25. Lavin v. Le Fevre (C. C. A.) 125 Fed. 693; In re Lea, 126 Fed. 231, 234. Contra, U. S. v. Williams, 126 Fed. 253. But habeas corpus does not lie to revise the decision of the immigration officer as to citizenship of a Chinaman claiming the right to enter the country. In re Moy Quong Shing, 125 Fed. 641.

26. Disputed questions of fact will not be reviewed. In re Strauss (C. C. A.) 126 Fed. 327. Whether he is a fugitive. In re Taylor, 118 Fed. 196; State v. Clough, 71 N. H. 594; Hyatt v. People, 188 U. S. 691, 47 Law. Ed. 657. Sufficiency of the indictment. Bruce v. Rayner (C. C. A.) 124 Fed. 481. Technical insufficiency of indictment no ground. State v. Clough, 71 N. H. 594. Federal courts will not intervene in interstate extradition unless the case is urgent. In re Strauss (C. C. A.) 126 Fed. 327.

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It is necessary for the issuance of the writ of habeas corpus that a person be held in custody,[28] but there may be constructive custody.[29] By the weight of authority one enlarged on bail is not constructively in custody.[30] Release on own recognizance and surrender for purpose of writ is insufficient.[31] Various kinds of custody which have been passed upon are given in the note.[32] The doctrine of res adjudicata applies to petitions for writs of habeas corpus and the dismissal of one petition ends the petitioner's rights unless new facts arise.[33] Persons held on an indictment which the court, in which it is pending has power to dismiss, should apply to that court before seeking relief on habeas corpus.[34]

§ 2. *Jurisdiction.*—The writ of habeas corpus may be issued by courts of general common-law jurisdiction without special statutory authorization.[35] The judge of an inferior court may, upon habeas corpus, discharge a person held under a void judgment of a superior court.[36] An application by the custodian of a child to the court of ordinary for letters of guardianship does not affect the father's right to sue out habeas corpus.[37] The place of detention fixes the jurisdiction of the habeas corpus judge without reference to the residence of the detaining person.[38] State courts cannot grant writs of habeas corpus to try the validity of restraint imposed by officers of the United States,[39] but Federal courts occasionally interpose to release persons held under state authority.[40]

§ 3. *Petition.*—A person applying for the writ should make a prima facie

27. Gaster v. State [Wis.] 94 N. W. 787; State v. Baeverstad [N. D.] 97 N. W. 548. But release has been refused where there was no evidence of guilt if the magistrate had not exceeded his powers. In re Nevitt (C. C. A.) 117 Fed. 448. Weight of evidence not reviewable. People v. Van De Carr, 84 N. Y. Supp. 461; Palmer v. Colladay, 18 App. D. C. 426. Illegal imposition of costs—order modified. State v. Foster, 109 La. 587. Defect in affidavit no ground. Cruthers v. Bray, 159 Ind. 685. Not where the commitment was by a de facto magistrate. Smith v. Sullivan [Wash.] 73 Pac. 793. Habeas corpus will not be granted for the informality of a commitment where the prisoner has waived a commitment trial. Manor v. Donahoo, 117 Ga. 804.

28. The mere fact that a girl of eighteen, emancipated and compelled to earn her own living, has entered into a contract of employment is no ground for a writ of habeas corpus against her employer. People v. Buffett, 75 App. Div. (N. Y.) 365. The court will not determine on habeas corpus the legality of the arrest of persons if they are at large although the state attorney has stipulated that the persons may be considered as imprisoned. In re Dykes [Okl.] 74 Pac. 506. In a case concerning the custody of a child it was held that the custodian could bring "habeas corpus" against one claiming the child. Lamar v. Harris [Ga.] 44 S. E. 866.

29. One arrested by a sheriff may sue out the writ although allowed the freedom of a city. Ex parte Foster [Tex. Cr. App.] 71 S. W. 593.

30. Ex parte Walton [Tex. Cr. App.] 74 S. W. 314; In re Dykes [Okl.] 74 Pac. 506. Contra, Costello v. Palmer, 20 App. D. C. 210.

31. In re Gow, 139 Cal. 242, 72 Pac. 145.

32. Detention in private corporation chain gang. Simmons v. Ga. L. & C. Co., 117 Ga. 805. Detention in the army. Thomas v. Winne (C. C. A.) 122 Fed. 895; Ex parte Reaves, 121 Fed. 848. Not allowed where a minor though otherwise entitled to discharge from the service is held to answer a charge of desertion. U. S. v. Reaves (C. C. A.) 126 Fed. 127. Person confined in insane hospital. In re Everett, 138 Cal. 490, 71 Pac. 566; In re Lee [N. J. Eq.] 55 Atl. 107.

33. In re Lederer, 38 Misc. (N. Y.) 668; Palmer v. Thompson, 20 App. D. C. 273; Gaster v. State [Wis.] 94 N. W. 787. It was otherwise under the common law proceeding, where there was no appeal. (See post, § 10). State v. Baeverstad [N. D.] 97 N. W. 548. The doctrine of res adjudicata applies to habeas corpus proceedings concerning the custody of a child (In re Hamilton, 66 Kan. 754, 71 Pac. 817) but will not prevent the court from reviewing the question again if the welfare of the child is at stake (In re King, 66 Kan. 695, 72 Pac. 263). A habeas corpus proceeding determining who is the proper custodian of a child does not operate as res adjudicata in a subsequent proceeding based upon subsequent events. Everitt v. Everitt, 29 Ind. App. 508. Held that one month after an habitual drunkard had been held by a jury unfit to be released from the custody of her committee she might be released on habeas corpus on the ground of subsequent reformation. In re Larner, 12 N. Y. Ann. Cas. 362.

34. In re Dykes [Okl.] 74 Pac. 506.

35. Simmons v. Georgia I. & C. Co., 117 Ga. 805.

36. Simmons v. Georgia Iron & Coal Co., 117 Ga. 805. Court commissioner has jurisdiction. Longstaff v. State [Wis.] 97 N. W. 900.

37. Ring v. Weinman, 116 Ga. 798.

38. Simmons v. Georgia Iron & Coal Co., 117 Ga. 805.

39. Commonwealth v. Butler, 19 Pa. Super. Ct. 626.

40. See § 1, Ante.

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case by affidavit in his application.[41] The applicant may be either the prisoner or another for his benefit.[42] When the petitioner is not the prisoner, the allegations in the petition may be upon information and belief.[43]

§ 4. *Hearing on petition and issuance of writ.*—Habeas corpus is a legal proceeding but not one triable to a jury.[44] No one has the right to appear and object to the issuance of the writ in cases of illegal imprisonment.[45] The writ of habeas corpus should be addressed to the individual having the actual physical custody of the person held or if this is impracticable to some one party to the detention, and not to a corporation although it be liable for the detention.[46] It is the duty of the judge to refuse to proceed to the hearing until the body of the person is produced or satisfactory excuse given.[47] If the prisoner is not produced, the court may issue an alias writ or attachment for contempt.[48]

§ 5. *The writ; service thereof; effect of writ.*—After the issue of the writ of habeas corpus, the prisoner is in the custody of the court issuing the writ and is not held under the original commitment.[49] An appeal from an order remanding petitioner upon habeas corpus proceedings which the prisoner had brought because of delay before his trial does not however necessitate a postponement of his trial for the crime.[50] If the custodian of a prisoner knowing that a writ of habeas corpus directed to him has been issued takes active steps to get the prisoner out of the state before service of the writ, he is guilty of contempt of court.[51] Under U. S. Comp. St. 1901, p. 1320, bail is not allowed to a Chinaman seeking to land in the United States and applying for a writ of habeas corpus.[52]

§ 6. *Certiorari in aid of habeas corpus.*—A person imprisoned as guilty of a crime may use certiorari as ancillary to habeas corpus to bring up the record of the proceedings leading to his imprisonment.[53] The combination of certiorari with habeas corpus does not bring up the evidence for review but leaves the issues the same, viz., the jurisdiction of the court and expiration of the sentence.[54]

§ 7. *Hearing and determination on return; judgment costs.*—After the writ has issued, the sufficiency of the petition cannot be tested by demurrer, but insufficient averments in the petition are sometimes held ground for motion to quash the writ. This practice is disapproved.[55] In habeas corpus proceedings, strictly speaking, no judgment is rendered against any one, but the judgment simply fixes the status of the imprisoned person.[56]

§ 8. *Review.*—At common law, there is no right of appeal in habeas corpus proceedings.[57] Under the modern practice, however, an appeal is generally provided for.[58] After indictment, the prisoner cannot prosecute an appeal from a

41. Simmons v. Georgia Iron & Coal Co., 117 Ga. 305. To obtain the review upon habeas corpus of a committal by a magistrate on the ground that there was no probable cause, the evidence must be set forth in the petition. Ex parte Lapique, 139 Cal. xix, 72 Pac. 995.

42. Simmons v. Georgia Iron & Coal Co., 117 Ga. 305. A person confined in an insane asylum may himself petition for a habeas corpus to effect his release. In re Everett, 138 Cal. 490, 71 Pac. 566.

43. Simmons v. Georgia Iron & Coal Co., 117 Ga. 305.

44. Sumner v. Sumner, 117 Ga. 229.

45, 46, 47, 48. Simmons v. Georgia Iron & Coal Co., 117 Ga. 305.

49. In re Wilkins, 71 N. H. 591.

50. State v. Fenton, 30 Wash. 325, 70 Pac. 741.

51. State v. District of Seventh Judicial Dist. [Mont.] 74 Pac. 412.

52. In re Ong Lung, 125 Fed. 813.

53. United States v. Davis, 18 App. D. C. 280.

54. People v. Van De Carr, 86 App. Div. (N. Y.) 9; Gaster v. State [Wis.] 94 N. W. 787.

55, 56. Simmons v. Georgia Iron & Coal Co., 117 Ga. 305.

57. Ex parte Cox [Fla.] 33 So. 509; State v. Berkstresser, 137 Ala. 109; Ex parte Magee [Tex. Cr. App.] 71 S. W. 286.

58. Ex parte Forney [Tex. Cr. App.] 76 S. W. 440. Appeal by custodian. Com. v. Butler, 19 Pa. Super. Ct. 626. When, in habeas corpus proceedings costs are illegally awarded against the detaining person, he may appeal from that part of the order. Magerstadt v. People, 105 Ill. App. 316. Ap-

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judgment upon his petition for habeas corpus for improper commitment.[59] Decision of court commissioner in habeas corpus should be reviewed by motion, not by certiorari.[60]

HABITUAL DRUNKARDS.

A commission should not be appointed without notice to the alleged incompetent.[61] Habeas corpus for release from custody of a committee may be brought on the ground of reformation.[62] Discharge is not prevented by statutory provisions for remand to custody if in habeas corpus it is found that relator is detained by final order of a competent tribunal in a special proceeding.[63] The committee cannot complain if the release is on probation.[64]

HARMLESS AND PREJUDICIAL ERROR.[65]

§ 1. The General Doctrine (159).
§ 2. Triviality Constituting Harmlessness (162).
§ 3. Errors Cured or Made Harmless by Other Matters (170).

§ 1. *The general doctrine.*—Generally speaking, a judgment will not be reversed or a verdict set aside or other proceeding overthrown because of error of which it can be said that no harm resulted to the complaining party,[66] even though

peal by petitioner. Gaster v. State [Wis.] 94 N. W. 787.

59. Ex parte Forney [Tex. Cr. App.] 76 S. W. 440. The same rule applies if the prisoner is held under a warrant. Ex parte Tripp [Tex. Cr. App.] 77 S. W. 222.

60. Longstaff v. State [Wis.] 97 N. W. 906.

61. In re Coffin, 41 Misc. (N. Y.) 181.

62. Though about a month previously in proceeding for supersedeas the jury found nonreformation and the verdict had been affirmed. In re Larner, 39 Misc. (N. Y.) 877.

63. Code Civ. Proc. § 2032. In re Larner, 39 Misc. (N. Y.) 877.

64. Code Civ. Proc. § 2031, provides in habeas corpus where no cause appears for detention a final order of discharge must be entered. In re Larner, 39 Misc. (N. Y.) 877.

65. It is not the province of this topic to discuss the question what is or is not error (see the topics treating of that to which the error relates), but only the question of its bad effect.

66. Albert Grocery Co. v. Grossman [Mo. App.] 73 S. W. 292; McCrea v. McGrew [Idaho] 75 Pac. 67; Gentry v. Singleton [Ind. T.] 69 S. W. 898; Quackenboss v. Globe & R. F. Ins. Co., 77 App. Div. [N. Y.] 168; Stirling v. Kelley, 77 App. Div. [N. Y.] 621; Ward v. Hoag, 78 App. Div. [N. Y.] 510; Moore v. Missouri, etc., R. Co. [Tex. Civ. App.] 69 S. W. 997; Kingsbury v. Waco State Bank [Tex. Civ. App.] 70 S. W. 551; Crow v. Kellman [Tex. Civ. App.] 70 S. W. 564; Cline v. Hackbarth [Tex. Civ. App.] 71 S. W. 48; Gulf, etc., R. Co. v. Harris [Tex. Civ. App.] 72 S. W. 71; W. F. Taylor Co. v. Baines Grocery Co. [Tex. Civ. App.] 72 S. W. 260; Jordan v. City of Seattle, 30 Wash. 116, 70 Pac. 743; Koepcke v. Wisconsin B. & I. Co. [Wis.] 92 N. W. 558; Spoonick v. Backus-Brooks Co. [Minn.] 94 N. W. 1079; Carmody v. Hanick [Mo. App.] 73 S. W. 344; Foster v. Bowles, 133 Cal. 446, 71 Pac. 495; Iroquois Furnace Co. v. Elphicke, 200 Ill. 411; Edmonston v. Jones [Mo. App.] 69 S. W. 741; Galveston, etc., R. Co. v. Holyfield [Tex. Civ. App.] 70 S. W. 221; Edwards v. Anderson [Tex. Civ. App.] 71 S. W. 555; Vradenburg v. Johnson [Neb.] 98 N. W. 54; Gray v. Washington, W. P. Co., 30 Wash. 665, 71 Pac. 206; Hannum v. Hill, 52 W. Va. 166; City of South Omaha v. Myers [Neb.] 92 N. W. 743. Receivership proceedings. McGarrah v. Bank of Southwestern Georgia [Ga.] 43 S. E. 987; Bank of Southwestern Georgia v. McGarrah, Id. Dismissal as to one principal impleaded with surety but proved on trial to be insolvent and nonresident. Geo. Scalfi & Co. v. State [Tex. Civ. App.] 73 S. W. 441. But error going to merits not disregarded in equitable appeals. Vollkommer v. Cody, 82 N. Y. Supp. 969; Fleer v. Same, Id.; Baird v. Same, Id.; Graham v. Heinrich [Okl.] 74 Pac. 328; Rusk v. Hill [Ga.] 45 S. E. 42. This rule will not cure a total lack of a material allegation. Stony Creek Lumber Co. v. Fields & Co. [Va.] 45 S. E. 797.

So provided by statute. Hedrick v. Robbins [Ind. App.] 66 N. E. 704; McCardle v. Aultman Co. [Ind. App.] 66 N. E. 507; Hall v. Small [Mo.] 77 S. W. 733. Immaterial variance. Ellison v. Dunlap [Ky.] 78 S. W. 155. Joint judgment. Johnson v. Bott [Colo. App.] 72 Pac. 612.

Right decision on wrong ground. Porter v. Plymouth Gold Min. Co. [Mont.] 74 Pac. 938; Yoder v. Reynolds, 28 Mont. 183, 72 Pac. 417; Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449; Pearson v. Great Northern R. Co. [Minn.] 95 N. W. 1113; Johnson v. Franklin Bank, 173 Mo. 171; Wolcott v. Tweddle [Mich.] 95 N. W. 419; Von Platen v. Winterbotham, 203 Ill. 198; Denny v. Stokes [Tex. Civ. App.] 72 S. W. 209; Ben Lomond Wine Co. v. Sladsky [Cal.] 71 Pac. 178; Sheafer v. Mitchell [Tenn.] 71 S. W. 86.

Review being restricted to the "record" and to properly saved objections therein, the appellate court will not go into the reasons for a decision unless considered by the trial court and properly saved for review.

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he has properly saved his objection and excepted to the ruling,[67] and has regularly preserved it in the "record."[68] The policy of courts is against so doing.[69]

The party must affirmatively show error apparent on the "record."[70] It must harm him rather than a co-party,[71] and must be one which he has not invited,[72] and which he can assail without inconsistency to his contentions made on the trial.[73]

Appeal and Review, vol. 1, pp. 127, 162, Saving Questions for Review.

Result reached was the only one sustainable. An error is harmless if by reason of an entire failure of proof or of the overwhelming character of the proof a result was reached upon which the error can have had no effect. People's Bank of Pratt v. Frick Co. [Okl.] 73 Pac. 949; Tootle, Hosea & Co. v. Otis [Neb.] 95 N. W. 681; Sloane v. Citizens' Nat. Bank [Neb.] 95 N. W. 480; Consumers' Paper Co. v. Eyer [Ind.] 66 N. E. 994; Harmon v. Western Union Tel. Co. [S. C.] 43 S. E. 959; Carlson v. Jordan [Neb.] 93 N. W. 1130; Cutshall v. McGowan [Mo. App.] 73 S. W. 933; Vinson v. Scott, 198 Ill. 542; Inhabitants of Winslow v. Inhabitants of Troy, 97 Me. 130; Houston Elect. St. R. Co. v. Elvis [Tex. Civ. App.] 72 S. W. 216; Farmers' Benev. Fire Ins. Ass'n v. Kinsey [Va.] 43 S. E. 338. But see contra, McNicol v. Collins, 30 Wash. 318, 70 Pac. 753.

Evidence leading up to fact not disputed. Dallas Consol. Elect. St. R. Co. v. Illo [Tex. Civ. App.] 73 S. W. 1076. Wrong instruction. Swisher v. Deering [Ill.] 68 N. E. 517. Refusal to charge. U. P. Steam Baking Co. v. Omaha St. R. Co. [Neb.] 94 N. W. 533; City of South Omaha v. Fennell [Neb.] 94 N. W. 632. See, also, post, § 2.

67. See Saving Questions for Review, as to necessity and mode of so doing. Error waived. Ewing v. Ewing [Ind.] 69 N. E. 156. See also Appeal and Review, 1 Curr. Law, p. 140; Saving Questions for Review.

Consented to judgment. Corby v. Abbott [Mont.] 73 Pac. 120. Failure to object to like errors. City of Denver v. Teeter [Colo.] 74 Pac. 459. Introduction of evidence after the court has refused to direct a verdict on motion waives the right to complain of the ruling on appeal. City of Greenfield v. Johnson [Ind. App.] 65 N. E. 542.

68. See Appeal and Review, § 9, 1 Curr. Law, p. 127 (perpetuation of proceedings for reviewing court).

69. 2 Enc. Pl. & Pr. 500, citing many cases.

70. The "record" must show the error: hence the party objecting must preserve therein enough to show it. See Appeal and Review, §§ 9, 13 E, 1 Curr. Law, pp. 127 et seq., 162 et seq. Cook v. Gallatin R. Co. [Mont.] 72 Pac. 678. Record must afford basis for finding prejudice. Wilson v. Brinker [Tex. Civ. App.] 76 S. W. 213; Berea College v. Powell [Ky.] 77 S. W. 382.

71. Benson v. Bunting [Cal.] 75 Pac. 59; Cudahy Packing Co. v. Dorsey [Tex. Civ. App.] 78 S. W. 20; Gamewell Fire-Alarm Tel. Co. v. Fire & Police Tel. Co. [Ky.] 76 S. W. 862; May v. Martin [Tex. Civ. App.] 73 S. W. 840; Cumberland Tel., etc., Co. v. Ware's Adm'x, 24 Ky. L. R. 2519, 74 S. W. 289; Lingle v. Lingle [Iowa] 96 S. W. 708. Rendering judgment for plaintiff's attorney under a contingent fee does not harm defendant. Gulf, etc., R. Co. v. Cooper [Tex. Civ. App.] 77 S. W. 263. That an instruction is harmless as to a co-defendant who is indisputably liable, but harmful to others in that it permits the jury to find a joint liability on proof against one only, see Standard Light & P. Co. v. Munsey [Tex. Civ. App.] 76 S. W. 931. He only may assign error who is injured by it. See Appeal and Review, vol. 1, p. 140.

72. Stoner v. Mau [Wyo.] 73 Pac. 548; Goldstein v. Morgan [Iowa] 96 N. W. 897; Ellyson v. International & G. N. R. Co. [Tex. Civ. App.] 75 S. W. 868; Sexton v. Union Stock Yard & Transfer Co., 200 Ill. 244; Rehm v. Halverson, 197 Ill. 378; Kaufman v. Simon, 80 Miss. 189; Hayes v. Bunch, 91 Mo. App. 467; Chicago, etc., R. Co. v. Schmelling, 197 Ill. 619; Summers v. Metropolitan Life Ins. Co., 90 Mo. App. 691; Pantall v. Rochester & P. Coal & Iron Co. [Pa.] 53 Atl. 751; Hicks v. Galveston, etc., R. Co. [Tex. Civ. App.] 71 S. W. 322; Heisch v. Bell [N. M.] 70 Pac. 572; Jaroszewski v. Allen [Iowa] 91 N. W. 941; Harp v. Harp, 136 Cal. 421, 69 Pac. 29; Sachs v. American Surety Co., 72 App. Div. [N. Y.] 60; McDonald v. People, 29 Colo. 503, 69 Pac. 703; MacDonald v. Littman [Mo. App.] 70 S. W. 502; Gregg v. Roaring Springs Land & Min. Co. [Mo. App.] 70 S. W. 920; Peacock v. Gleason [Iowa] 90 N. W. 610; O'Banion v. Missouri Pac. R. Co. [Kan.] 69 Pac. 353; Young v. Illinois Cent. R. Co., 24 Ky. L. R. 789; Murphy v. St. Louis Transit Co. [Mo. App.] 70 S. W. 159; Continental Nat. Bank v. First Nat. Bank [Tenn.] 68 S. W. 1902; Thompson v. Rosenstein [Tex. Civ. App.] 67 S. W. 439; Pope v. Anthony [Tex. Civ. App.] 68 S. W. 521; Houston & T. C. R. Co. v. Tramell [Tex. Civ. App.] 68 S. W. 716; Hardin v. Jones [Tex. Civ. App.] 68 S. W. 836; Allen v. Voje, 114 Wis. 1; Griffith v. Mosley, 70 Ark. 244; Dixon v. McDonnell, 92 Mo. App. 479; Farmers' Mut. Ins. Co. v. Cole [Neb.] 93 N. W. 730. Evidence brought out by complaining party on direct examination. Early's Adm'r v. Louisville, etc., R. Co., 24 Ky. L. R. 1807; Kent v. Richardson [Idaho] 71 Pac. 117; People v. Smith, 201 Ill. 454; Garretson v. Kinkead [Iowa] 92 N. W. 55; Marsden Co. v. Bullitt, 24 Ky. L. R. 1697; Tufts v. Morris, 92 Mo. App. 389; Shaefer v. Missouri Pac. R. Co. [Mo. App.] 72 S. W. 154. The record will not be reviewed to discover whether there is evidence to support the verdict where defendant failed to renew his motion to dismiss at the close of the case, since the failure amounted to an admission that there was a question of fact for the jury. Greenspan v. Newman, 37 Misc. [N. Y.] 784.

Instructions. Denver, etc., R. Co. v. Peterson [Colo.] 69 Pac. 578; Hunt v. Searcy, 167 Mo. 158; Ryans v. Hospes, 167 Mo. 342; Clapp v. Royer [Tex. Civ. App.] 67 S. W. 345; Missouri, etc., R. Co. v. Eyer [Tex.] 70 S. W. 529; Murphy v. Century Bldg. Co., 90 Mo. App. 621; Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co. [Colo.] 71 Pac. 389; Kansas City v. Madsen, 93 Mo. App. 143; Dady v. Condit, 104 Ill. App. 507; Republic

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The majority of courts presume prejudice from error once it is shown to exist and require the party defending against errors to show that no harm resulted.[74]

Iron & Steel Works v. Gregg, 24 Ky. L. R. 1627; Farmers' Mut. Ins. Co. v. Cole [Neb.] 93 N. W. 730; Standard Starch Co. v. McMullen, 100 Ill. App. 82; Stowers v. Singer, 24 Ky. L. R. 395; State v. Fidelity & Deposit Co. [Mo. App.] 67 S. W. 958; Galveston, etc., R. Co. v. Sherwood [Tex. Civ. App.] 67 S. W. 776; Gulf, etc., R. Co. v. Shelton [Tex. Civ. App.] 69 S. W. 359; Frost Mfg. Co. v. Smith, 98 Ill. App. 308; Rock Island Sash & Door Works v. Pohlman, 99 Ill. App. 670; Beaver v. City of Eagle Grove [Iowa] 89 N. W. 1100; Buck v. Hogeboom [Neb.] 90 N. W. 635; Galveston, etc., R. Co. v. Jenkins [Tex. Civ. App.] 69 S. W. 233; Sibley Warehouse & Storage Co. v. Durand & Kasper Co., 200 Ill. 354; Springfield Consol. R. Co. v. Puntenney, Id. 9; Slack v. Harris, Id. 96; West Chicago St. R. Co. v. Buckley, Id. 260; Missouri, etc., R. Co. v. Eyer [Tex. Civ. App.] 69 S. W. 453; Gulf, etc., R. Co. v. Sheldon [Tex. Civ. App.] 69 S. W. 653; Bishop v. People, 200 Ill. 33; Kregci v. Chicago & N. W. R. Co. [Iowa] 90 N. W. 708; Galveston etc., R. Co. v. Sherwood [Tex. Civ. App.] 67 S. W. 776; Kennard v. Grossman [Neb.] 89 N. W. 1025; Davidson v. Chicago & A. R. Co. [Mo. App.] 71 S. W. 1069; Strother v. De Witt [Mo. App.] 71 S. W. 1129; Chicago House Wrecking Co. v. Stewart Lumber Co. [Neb.] 92 N. W. 1009; Miles v. Walker [Neb.] 92 N. W. 1014; Parkins v. Missouri Pac. R. Co. [Neb.] 93 N. W. 197. But see Maxey v. Metropolitan St. R. Co. [Mo. App.] 68 S. W. 1063.

Verdict of a jury on questions submitted at request. St. Louis, etc., R. Co. v. Jacobs 70 Ark. 401; James Clark Distilling Co. v. City of Cumberland [Md.] 52 Atl. 661; Benton County Sav. Bank v. Boddicker [Iowa] 90 N. W. 822; Stephens v. Quigley [Ind. T.] 69 S. W. 820; Ward v. Bass, 69 S. W. [Ind Ter.] 179; Weigley v. Kneeland [N. Y.] 65 N. E. 1123; Hopkins v. Modern Woodmen of America, 94 Mo. App. 402; Padelford v. City of Eagle Grove [Iowa] 91 N. W. 899; Spicer v. City of Webster City [Iowa] 92 N. W 884; Eberly v. Chicago, etc., R. Co. [Mo App.] 70 S. W. 381; Roe v. Bank of Versailles, 167 Mo. 406. Special findings which he requested. Steele v. Johnson [Mo. App.] 69 S. W. 1065. No estoppel from trying wrong theory to say that proof was sufficient in law under the real issues made by pleadings. Marvin v. Hartz [Mich.] 89 N. W. 557. Evidence brought out by complaining party (Tarrell v. Crow [Tex. Civ. App.] 71 S. W. 397); or similar evidence (City of San Antonio v. Potter [Tex. Civ. App.] 71 S. W. 764; Galveston, H. & S. A. R. Co. v. Baumgarten [Tex. Civ. App.] 72 S. W. 78; Davis v. Streeter [Vt.] 54 Atl. 185). See also Appeal and Review, ante, p. —.

72. Harden v. Hodges [Tex. Civ. App.] 76 S. W. 217; Brown v. Carolina Midland R. Co. [S. C.] 46 S. E. 283; National Broadway Bank v. Sampson, 83 N. Y. Supp. 426; Union Pac. R. Co. v. Lotway [Neb.] 96 N. W. 527.

He cannot present a different theory from the one he urged below. Galligan v. Old Colony St. R. Co. [Mass.] 65 N. E. 48; Helena Creamery Co. v. Atkinson, 90 Mo. App. 399; Lyon v. Reichard, 19 Pa. Super. Ct. 635; Edmonston v. Jones [Mo. App.] 69 S. W. 741; William E. Peck Co. v. Kansas City Metal Roof & Corrugating Co. [Mo. App.] 70 S. W. 169; O'Neill v. Blase, 94 Mo. App. 648; Sappington v. Chicago & A. R. Co., 95 Ill. App. 387; Trustees of Christian University v. Hofman, Id. 488; Krup v. Corley, Id. 640; Hagey v. Schroeder [Ind. App.] 65 N. E. 598; Pittsburg, etc., R. Co. v. Town of Crothersville [Ind.] 64 N. E. 914; United States v. St. Louis, etc., Transp. Co., 184 U. S. 247; McHale v. Maloney [Neb.] 93 N. W. 677. Objector opened question. Ennis v. R. B. Little & Co. [R. I.] 55 Atl. 884. Inconsistent objections. Rogers v. United States Fidelity & Guarantee Co., 84 N. Y. Supp. 203. Giving of charge inconsistent with charge too favorable to objector. Denver Consol. Elect. Co. v. Lawrence [Colo.] 73 Pac. 39. Plaintiff cannot complain on appeal of the theory on which the case was tried below where such theory was the only one consistent with the introduction of certain evidence by him. Hollister v. Donahoe [S. D.] 92 N. W. 12. Where a petitioner in condemnation introduced evidence as to the value of certain classes of property damaged, he cannot complain that defendant was allowed to produce evidence as to the value of such property as a whole. Seattle & M. R. Co. v. Roeder [Wash.] 70 Pac. 498.

74. Treat v. Hughes [Neb.] 95 N. W. 851; Bank of Wrightsville v. Merchants' & Farmers' Bank [Ga.] 46 S. E. 94; Reed v. Reed [Mo. App.] 70 S. W. 505; Hanlon v. Ehrich, 80 App. Div. [N. Y.] 359; United States v. Gentry [C. C. A.] 119 Fed. 70; Gendron v. St. Pierre [N. H.] 56 Atl. 915; Baldinger v. Levine, 83 App. Div. [N. Y.] 130; Fireman's Fund Ins. Co. v. McGreevy [C. C. A.] 118 Fed. 415; McVey v. Barker, 92 Mo. App. 498; Holmes v. Farris, 97 Mo. App. 305; Royal Neighbors of America v. Wallace [Neb.] 92 N. W. 897; Rulofson v. Billings [Cal.] 74 Pac. 35; Rio Grande Western R. Co. v. Utah Nursery Co. [Utah] 70 Pac. 859; Johnson v. Cate, 75 Vt. 100; Richmond Passenger & Power Co. v. Allen [Va.] 43 S. E. 356; Chamberlin v. Loewenthal, 138 Cal. 47, 70 Pac. 932; Ward v. Brown [W. Va.] 44 S. E. 488; O'Fallon Coal Co. v. Laquet, 198 Ill. 125; Harrington v. Los Angeles R. Co. [Cal.] 74 Pac. 15; Flanigan v. Skelly, 85 N. Y. Supp. 4; Lawrence v. Westlake [Mont.] 73 Pac. 119. Irrelevant remarks as to party's other breaches of duty. Perry, Mathews-Buskirk Stone Co. v. Wilson [Ind.] 67 N. E. 183.

Unless court can clearly say verdict right. Borkenstein v. Schrack [Ind. App.] 67 N. E. 547; Citizens' St. R. Co. v. Jolly [Ind.] 67 N. E. 935. It suffices that the court can see this from the whole case. Bennett v. Donovan, 83 App. Div. [N. Y.] 95. Not presumed that evidence out of the record made error harmless. Lathrop v. Humble [Wis.] 97 N. W. 905. Especially where the trial court treated it as harmful. Hamilton v. City of Davenport [Iowa] 98 N. W. 135.

Prejudice not presumed from facts shown. —Mode of testifying to plaintiff's injuries

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Errors which favor the party objecting are of course not ground for reversal,[75] nor are such as may be corrected without resort to a new trial.[76]

§ 2. *Triviality constituting harmlessness.*—An error is harmless if too trivial in its nature or consequences to have substantially influenced the result.[77] The weakness of the evidence may augment,[78] or its strength diminish, the importance of error.[79]

Cases applying these principles to errors or irregularities in process or appearance,[80] parties,[81] pleadings and formation of issues,[82] provisional and interlocutory

not presumed prejudicial. Rice v. Wabash R. Co. [Mo. App.] 74 S. W. 428. Proof that majority of losing party's stock was owned by one individual not presumed in law to have affected jury's award. Peterson v. Wadley, etc., R. Co. [Ga.] 43 S. E. 718. Evidence that witness had previously been impeached. Hall v. United States Radiator Co., 76 App. Div. [N. Y.] 504, 12 N. Y. Ann. Cas. 109. Where award of damages indicates consideration of erroneous evidence. Ellis v. Thomas, 82 N. Y. Supp. 1064. Taking jury in eminent domain case from box to empanel them in another cause held censurable but not of itself reversible. Loloff v. Sterling [Colo.] 71 Pac. 1113. Postponement. Smith v. Bunch [Tex. Civ. App.] 73 S. W. 559. Improper cross-examination on trial to court. Colusa Parrot Mining & Smelting Co. v. Barnard [Mont.] 72 Pac. 45. Number of instructions. Omaha St. R. Co. v. Boeson [Neb.] 94 N. W. 619. Taking articles to jury room. Cudahy Packing Co. v. Skoumal [C. C. A.] 125 Fed. 470.

75. Galveston, etc., R. Co. v. Keen [Tex. Civ. App.] 73 S. W. 1074; Board of Councilmen of City of Frankfort v. Howard, 25 Ky. L. R. 111, 74 S. W. 703; Friedrich v. City of Milwaukee [Wis.] 95 N. W. 126; Brown v. Schintz, 98 Ill. App. 452; Garretson v. Kinkead [Iowa] 92 N. W. 55; Cook v. Gallatin R. Co. [Mont.] 72 Pac. 678; City of Colorado Springs v. Floyd [Colo. App.] 73 Pac. 1092; Southern R. Co. v. Morris [Ga.] 46 S. E. 85; Seattle Brewing & Malting Co. v. Donofrio [Wash.] 74 Pac. 823; Atlanta R. & Power Co. v. Monk [Ga.] 45 S. E. 494; Hoar v. Hennessy [Mont.] 74 Pac. 452; Trumbull v. Donahue [Colo. App.] 72 Pac. 684; Becklenberg v. Becklenberg, 102 Ill. App. 504; Hershberger v. Kerr, 159 Ind. 367; Chicago, etc., R. Co. v. Wysor Land Co. [Ind.] 69 N. E. 546; Sachra v. Town of Manilla [Iowa] 95 N. W. 198; Rice's Ex'rs v. Wyatt [Ky.] 76 S. W. 1087; Thruston's Adm'r v. Prather [Ky.] 77 S. W. 354; Bennett's Estate v. Taylor [Neb.] 96 N. W. 669; Lee v. Huron Indemnity Union [Mich.] 97 N. W. 709; St. Louis, S. W. R. Co. v. Brown [Tex. Civ. App.] 69 S. W. 1010; Tinsley v. McIlhenny [Tex. Civ. App.] 70 S. W. 793; San Antonio, etc., R. Co. v. Gonzales [Tex. Civ. App.] 72 S. W. 213; Meyer v. Milwaukee Elect. Ry. & Light Co. [Wis.] 93 N. W. 6; Masterson v. Bockel [Tex. Civ. App.] 75 S. W. 42; Clark v. Shannon & Mott Co., 117 Iowa, 645; Summers v. Metropolitan Life Ins. Co., 90 Mo. App. 691; Edmonston v. Jones [Mo. App.] 69 S. W. 741; Gibson v. Jenkins, 97 Mo. App. 27; Friedly v. Giddings, 119 Fed. 438; Southern R. Co. v. Crowder [Ala.] 33 So. 335; McClung v. Moore, 138 Cal. 181, 71 Pac. 98; Wall v. Brewer [Ga.] 42 S. E. 394; Same v. Mattox, Id. 403; West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607; Fehlhauer v. City of St. Louis [Mo.] 77 S. W. 843; Boetler v. Tumlinson [Tex. Civ. App.] 77 S. W. 824; Levett v. Polhemus, 84 N. Y. Supp. 1049; Sibley Warehouse & Storage Co. v. Durand & Kasper Co., 200 Ill. 354; Stein v. Hill [Mo. App.] 71 S. W. 1107; Jones v. Wattles [Neb.] 92 N. W. 765; Baty v. Elrod [Neb.] 92 N. W. 1032; May v. Ennis, 78 App. Div. [N. Y.] 552; Gordon v. Seaboard Air Line R. Co. [N. C.] 44 S. E. 25.

Giving fellow servant charge as against defendant employer. Northern Pac. R. Co. v. Mix [C. C. A.] 121 Fed. 476. Issue on damages not found as against defendant. Davis v. Shepherd [Colo.] 72 Pac. 57. Irrelevant but favorable charge on contributory negligence. Savannah, etc., R. Co. v. Grogan [Ga.] 43 S. E. 701. Erroneous adoption of party's construction of sprinkler policy. Wertheimer-Swarts Shoe Co. v. United States Casualty Co. [Mo.] 72 S. W. 635. Failure to rule on right to open in action on note favors defendant who pleaded away his right. First Nat. Bank v. Wells [Mo. App.] 73 S. W. 293. Granting new trial when party could not succeed. Hodges v. Metcalf County Court [Ky.] 78 S. W. 177. Refusal to admit adversary's evidence that objector had performed duty in other instances. Crawford v. City of New York [N. Y.] 66 N. E. 1106. Costs on other party. Second Nat. Bank v. Smith [Wis.] 94 N. W. 664. Exclusion of evidence. Grijalva v. Southern Pac. Co., 137 Cal. 569, 70 Pac. 622.

May complain of unsupported verdict in the face of evidence of larger damages. Myers v. Myers, 83 N. Y. Supp. 236. But see Galef v. Finkelstein, 84 N. Y. Supp. 856.

An error favoring a defendant primarily liable may, as between co-defendants, be raised by one secondarily liable, but not as against plaintiff. George v. St. Joseph [Mo. App.] 71 S. W. 110.

76. See Appeal and Review, § 15, 1 Curr. Law, p. 191.

77. Adams v. Elwood [N. Y.] 68 N. E. 126. Difference of one-third of a cent. Kittredge v. Chillicothe L. & B. Ass'n [Mo. App.] 77 S. W. 147. Error may be material though not misleading. Kipp v. N. Y. Cent., etc., R. Co., 85 N. Y. Supp. 855.

78. Remark of counsel. Harper v. Western Union Tel. Co., 92 Mo. App. 304. Failure to specially charge. Lancaster Cotton Oil Co. v. White [Tex. Civ. App.] 75 S. W. 339; Thompson v. Thompson [Ga.] 45 S. E. 439.

79. Thus the wrongful admission or exclusion of evidence relating to facts otherwise abundantly proven or the giving of charges on issues whereon the evidence was overwhelming. See post, this section.

See also post, § 3, as to cure of errors by findings, etc.

80. Linam v. Jones, 134 Ala. 570 Failure

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proceedings,[80] continuances, adjournments, dismissals before trial, and the like,[84] the trial and course and conduct of same,[85] formation and selection of jury,[86] are cited below.

to state nature of action in process with complaint attached. Geo. Scalfi & Co. v. State [Tex. Civ. App.] 73 S. W. 441. Too long time for return offset by unduly long time to answer. Lawton v. Nicholas [Okl.] 73 Pac. 262.

81. Hamilton v. McKinney, 52 W. Va. 317. Nonjoinder. Wood v. Wood, 134 Ala. 557; Glos v. Patterson [Ill.] 68 N. E. 443; George v. City of St. Joseph, 97 Mo. App. 56. Misjoinder. Daly v. Ruddell, 137 Cal. 671, 70 Pac. 784; Gulf, etc., R. Co. v. Weddington [Tex. Civ. App.] 71 S. W. 780; Galveston, etc., R. Co. v. Baumgarten [Tex. Civ. App.] 72 S. W. 78. Admitting intervener who made no new issue. H. Stern, Jr., & Bros. Co. v. Wing [Mich.] 97 N. W. 791.

82. Pecos & N. T. R. Co. v. Williams [Tex. Civ. App.] 78 S. W. 5; York v. Nash [Or.] 71 Pac. 59; Leonard v. Donoghue, 79 App. Div. [N. Y.] 632; White v. Whitney [Neb.] 94 N. W. 1012; Mallory v. Gallagher [Conn.] 55 Atl. 209. Ruling on unproved pleading. Harmon v. Western Union Tel. Co. [S. C.] 43 S. E. 959.

Uncertainty and insufficiency. Kerr v. O'Keefe, 138 Cal. 415, 71 Pac. 447; Jarvis v. Hitch [Ind. App.] 65 N. E. 608; Combs v. Thompson [Kan.] 74 Pac. 1127; Peterson Bros. v. Mineral King Fruit Co. [Cal.] 74 Pac. 162; Childs v. Ferguson [Neb.] 93 N. W. 409.

Splitting. Nowlin v. State [Ind. App.] 66 N. E. 54.

Variance. Ittner Brick Co. v. Killian [Neb.] 93 N. W. 951.

Overruling demurrers or sustaining pleadings. State v. Hindman, 159 Ind. 586. Overruling demurrer to plea not supported by evidence. Bullock-McCall-McDonnell Elect. Co. v. Coleman [Ala.] 33 So. 884. Refusal to strike disclaiming answer by successful defendant. McCardle v. Aultman Co. [Ind. App.] 67 N. E. 236. Overruling demurrer to count not proved. Southern Bell Telephone & Telegraph Co. v. McTyer [Ala.] 34 So. 1020. Bad pleas not proved. Tower v. Whip [W. Va.] 44 S. E. 179. Sustaining one bad count. Rawlinson v. Christian Press Ass'n Pub. Co. [Cal.] 73 Pac. 468. Overruling demurrer to pleading which raises no new issues. Pope v. Glens Falls Ins. Co. [Ala.] 34 So. 29; Chicago City R. Co. v. McMeen [Ill.] 68 N. E. 1093. Sustaining complaint which embraced items properly taxable as costs (poundage expenses of an attachment). Seaboard Air Line R. Co. v. Main [N. C.] 43 S. E. 930. Overruling demurrer for misjoinder [so by statute]. Board of Com'rs of Clay County v. Redifer [Ind. App.] 69 N. E. 305. Facts provable under other pleas. United States Fidelity & Guaranty Co. v. Dampskibsaktieselskabet Habil [Ala.] 35 So. 344; Southern R. Co. v. Wilson [Ala.] 35 So. 561. Sustaining insufficient answer which pleads only facts provable under the general denial. Goode v. Elwood Lodge No. 166, K. P. [Ind.] 66 N. E. 742. Sustaining answer argumentatively pleading facts but reducible to general denial. Id.

Sustaining demurrers or overruling pleadings. Harness v. Steele, 159 Ind. 286; Metropolitan Life Ins. Co. v. Brown [Ind.] 65 N. E. 908; Muncie Natural Gas Co. v. City of Muncie [Ind.] 66 N. E. 436; Payne v. Moore [Ind. App.] 66 N. E. 483. Provable under other counts or paragraphs. Field v. Campbell [Ind. App.] 67 N. E. 1040; Noah v. German American Bldg. Ass'n. [Ind. App.] 68 N. E. 615. Overruling original petition not error when trial was an amended one. San Antonio, etc., R. Co. v. San Antonio, etc., R. Co. [Tex. Civ. App.] 76 S. W. 782. Answers of facts provable under general denial. Hedrick v. Robbins [Ind. App.] 66 N. E. 704; Citizens' Gas & Oil Min. Co. v. Whipple [Ind. App.] 69 N. E. 557; Nowlin v. Hall [Tex. Civ. App.] 77 S. W. 419.

Leave to plead, striking and refiling.—Allowing unnecessary answer to petition to vacate judgment. Swanson v. Hoyle [Wash.] 72 Pac. 1011. Striking out. Chicago, etc., R. Co. v. Woodard, 159 Ind. 541. Leave to refile pleading stricken for want of leave. Diedrich v. Diedrich [Neb.] 94 N. W. 536.

Amendments. Colell v. Delaware, etc., R. Co., 80 App. Div. [N. Y.] 842; Southern Pine Lumber Co. v. Fries [Neb.] 96 N. W. 71. Allowing amendment after findings which set up no new issue. Ramlose v. Dollman [Mo. App.] 78 S. W. 917. Denial of amendments as to matters concluded in other proceedings. Curtis v. Parker & Co. [Ala.] 33 So. 935. Allowing immaterial amendments. Huse & Loomis Ice & Transp. Co. v. Wielar, 86 N. Y. Supp. 24.

Settling issues. Chappell v. Jasper County Oil & Gas Co. [Ind. App.] 66 N. E. 515.

Election. Zellars v. Missouri Water & Light Co., 92 Mo. App. 107.

Held prejudicial. Demurrer. Ohio Farmers' Ind. Co. v. Vogel [Ind. App.] 65 N. E. 1056. Sustaining special exception for misjoinder. Brooks v. Galveston City R. Co. [Tex. Civ. App.] 74 S. W. 330. Striking from files. Genau v. Abbott [Neb.] 93 N. W. 942. Overruling special plea of contract in bar of trespass. Montgomery Water Power Co. v. William A. Chapman & Co. [C. C. A.] 126 Fed. 68. Declaring in tort on cause of action ex contractu. Galveston, etc., R. Co. v. Hennigan [Tex. Civ. App.] 76 S. W. 452.

83. Failure to dissolve restraining order upon extending time to redeem from the enjoined sale. Bitzer v. Becke [Iowa] 94 N. W. 287. Failure to exact cost bond from successful plaintiff. Southern R. Co. v. Thompson [Tenn.] 71 S. W. 820. Refusal to require second examination of person. Sambuck v. Southern Pac. Co. [Cal.] 71 Pac. 174. Temporary injunction. Corscadden v. Haswell, 84 N. Y. Supp. 603. Temporary receivership for national bank. Cogswell v. Second Nat. Bank [Conn.] 56 Atl. 574. Revoking appointment of receiver unnecessary to protect property. Popp v. Daisy Gold Min. Co. [Utah] 74 Pac. 426.

84. Crabtree Coal Min. Co. v. Sample's Adm'r, 24 Ky. L. R. 1703, 72 S. W. 24; Woolley v. City of Louisville, 24 Ky. L. R. 1357, 71 S. W. 893. Going to trial in absence of witness to cumulate evidence. Abby v. Dexter [Colo. App.] 72 Pac. 892. Dis-

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The admission,[87] or exclusion,[88] of evidence which cannot have been efficient to the result, is harmless; for example, evidence which, though erroneously, ad-

missing counterclaim susceptible of proof in defense. Schwarz v. Hirshfield, 84 N. Y. Supp. 860.

85. Trial at law side (trial term) instead of equity side (special term) but in same mode. German-American Ins. Co. v. Standard Gaslight Co. [N. Y.] 66 N. E. 1109; Bohannon v. Tabbin [Ky.] 76 S. W. 46. Refusal to charge before argument. Travelers' Ins. Co. v. Rosch, 23 Ohio Circ. R. 491. Passing on untenable demurrer in wrong order. Deckert v. Chesapeake Western Co. [Va.] 45 S. E. 799. Discharging jury on wrong assumption that case was equitable. Hall v. Small [Mo.] 77 S. W. 733.

86. Remote relationship of juror. Rice's Ex'rs v. Wyatt [Ky.] 76 S. W. 1087.

Denial of challenges, peremptories not exhausted. St. Louis S. W. R. Co. v. Barnes [Tex. Civ. App.] 72 S. W. 1041; Yecker v. San Antonio Traction Co. [Tex. Civ. App.] 76 S. W. 780; Chicago, etc., R. Co. v. Krayenbuhl [Neb.] 98 N. W. 44; Connecticut Mut. Life Ins. Co. v. Hillmon, 188 U. S. 208. See, also, Jury. Excusing juror. Marande v. Texas & P. R. Co. [C. C. A.] 124 Fed. 42.

87. Irrelevant or incompetent evidence. McDowell v. McDowell's Estate [Vt.] 56 Atl. 98; Garr v. Cranney [Utah] 70 Pac. 853; Louisville & N. R. Co. v. Summers [C. C. A.] 125 Fed. 719; Baker v. Baker, 202 Ill. 595; Baltes Land, Stone & Oil Co. v. Sutton [Ind. App.] 69 N. E. 179; MacDonald v. New York, etc., R. Co., 25 R. I. 40; Ramlose v. Dollman [Mo. App.] 73 S. W. 917; Taylor v. Ingersoll [Colo. App.] 71 Pac. 398; Rice v. Williams [Colo. App.] 71 Pac. 433; American Nat. Bank v. Watkins [C. C. A.] 119 Fed. 545; McCormick Harvesting Mach. Co. v. Johnson [Neb.] 95 N. W. 612; National Bank of Rondout v. Byrnes, 82 N. Y. Supp. 497; Fletcher v. Wakefield [Vt.] 54 Atl. 1012; E. R. D. Dove & Co. v. J. T. Stewart & Son [Ga.] 45 S. E. 688; Morrison v. Northern Pac. R. Co. [Wash.] 74 Pac. 1064; Citizens' Gas etc., Co. v. Whipple [Ind. App.] 69 N. E. 557; Bryant v. Southern R. Co. [Ala.] 34 So. 562; Aikin v. Perry [Ga.] 46 S. E. 93; International & G. N. R. Co. v. Collins [Tex. Civ. App.] 75 S. W. 814; Western Union Tel. Co. v. Barefoot [Tex. Civ. App.] 74 S. W. 560; Montgomery v. Hanson [Iowa] 97 N. W. 1081; Union Cent. Life Ins. Co. v. Prigge [Minn.] 96 N. W. 917; Rogers v. Interurban St. R. Co., 84 N. Y. Supp. 974; Finnell v. Million [Mo. App.] 74 S. W. 419; Gulf, etc., R. Co. v. Mathews [Tex. Civ. App.] 76 S. W. 607; International, etc., R. Co. v. Thompson [Tex. Civ. App.] 77 S. W. 439; Marchman v. City Elect. R. Co. [Ga.] 44 S. E. 992; Lamb v. Littman [N. C.] 44 S. E. 646; Baker v. Pulitzer Pub. Co. [Mo. App.] 77 S. W. 585; Martin v. Johnson [Ga.] 45 S. E. 446; Stanley v. Evans [Tex. Civ. App.] 77 S. W. 17; Steele v. May [Ala.] 33 So. 30; Swift v. Occidental Mining & Petroleum Co. [Cal.] 70 Pac. 470; Rochat v. Gee, 137 Cal. 497, 70 Pac. 478; Tourtellotte v. Brown [Colo. App.] 71 Pac. 688; Younglove v. Knox [Fla.] 33 So. 427; Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co. [Colo.] 71 Pac. 389; Haller v. Gibson, 30 Ind. App. 10; Garretson v. Kinkead [Iowa] 92 N. W. 55; Sweet v. Henry, 175 N. Y. 268; Dyer v. Union R. Co. [R. I.] 55 Atl. 688; South Chicago City R. Co. v. Dufresne, 200 Ill. 456; Bradley v. Lightcap, 201 Ill. 511; Wright v. Patterson, 116 Ga. 784; Reed v. Travelers' Ins. Co., 117 Ga. 116; Bennett v. City of Marion [Iowa] 93 N. W. 558; Connell v. Connell [Iowa] 93 N. W. 582; Adam v. Sanger [Tex. Civ. App.] 77 S. W. 954; United Oil Co. v. Miller [Colo. App.] 73 Pac. 627; Stevens v. Nebraska Loan & Trust Co., 65 Kan. 859, 70 Pac. 368; Chandler v. Parker, 65 Kan. 860, 70 Pac. 368; Lindell v. Deere-Wells Co. [Neb.] 92 N. W. 164; City of South Omaha v. Meyers [Neb.] 92 N. W. 743; Phillips v. Postal Tel. Cable Co., 131 N. C. 225; Green v. Miller [Ariz.] 73 Pac. 399; Buedingen Mfg. Co. v. Royal Trust Co., 85 N. Y. Supp. 621; McIntire v. Schiffer [Colo.] 72 Pac. 1056; Rhodes v. Halverson [Wis.] 97 N. W. 514; Draper v. Tucker [Neb.] 95 N. W. 1026; Fallon v. Rapid City [S. D.] 97 N. W. 1009; Stiasny v. Metropolitan St. R. Co., 172 N. Y. 656; Markham v. Cover [Mo. App.] 72 S. W. 474; Triska v. Miller [Neb.] 91 N. W. 870; Torrance v. Winfield Nat. Bank [Kan.] 71 Pac. 235; Schroeder v. Wisconsin Cent. R. Co. [Wis.] 93 N. W. 837; Cline v. Hackbarth [Tex. Civ. App.] 71 S. W. 48; Houston, etc., R. Co. v. Charwaine [Tex. Civ. App.] 71 S. W. 401; City of San Antonio v. Potter [Tex. Civ. App.] 71 S. W. 764; Randall v. City of Hoquiam, 30 Wash. 435, 70 Pac. 1111; Hey v. Collman, 78 App. Div. [N. Y.] 584; Milwaukee Rice Mach. Co. v. Hamacek, 115 Wis. 422; Hopper v. Empire City Subway Co., 78 App. Div. [N. Y.] 637; Wolf v. Theresa Village Mut. Fire Ins. Co., 115 Wis. 402; Phoebus v. Webster, 80 App. Div. [N. Y.] 627; Belding v. Archer, 131 N. C. 287; Piche v. Robbins, 24 R. I. 325; Schnable v. Providence Public Market, 24 R. I. 477; Thompson v. Roberts [S. D.] 92 N. W. 1079; Boaz v. Powell [Tex.] 69 S. W. 976; Clarkson v. Reinhartz [Tex. Civ. App.] 70 S. W. 111; Union Traction Co. v. Barnett [Ind. App.] 67 N. E. 205; Consumers' Paper Co. v. Eyer [Ind.] 66 N. E. 994; Buckers Irr., Mill & Imp. Co. v. Farmers' Independent Ditch Co. [Colo.] 72 Pac. 49. Evidence which may be rejected on appeal and leave competent evidence to make a case. Funk v. Hensler [Wash.] 72 Pac. 102. Excluded evidence not connected with issues. McAyeal v. Gullett, 202 Ill. 214; William E. Peck & Co. v. Kansas City Metal Roofing & Corrugating Co., 96 Mo. App. 212; George v. City of St. Joseph, 97 Mo. App. 56; Walker v. Cooper, 97 Mo. App. 441; Williams v. Williams, 24 Ky. L. R. 1326, 71 S. W. 505; Columbia Finance & Trust Co. v. Mitchell's Adm'r, 24 Ky. L. R. 1844, 72 S. W. 350; Downs v. Miller, 95 Md. 602; Rettner v. Minnesota Cold-Storage Co. [Minn.] 93 N. W. 120; Alabama & V. R. Co. v. Sol Fried Co. [Miss.] 33 So. 74; Black v. Missouri Pac. R. Co., 172 Mo. 177.

Illustrations.—Secondary evidence of note not disputed. Galloway v. Bartholomew [Or.] 74 Pac. 467. Parol testimony correctly explaining written contracts. Chas. F. Orthwein's Sons v. Wichita Mill & Elevator Co. [Tex. Civ. App.] 75 S. W. 364. That expert was paid by surety company. Allen B. Wrisley Co. v. Burke, 203 Ill. 250. Secondary evidence of admitted letters. Border v. Isherwood [Iowa] 94 N.

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mitted merely added cumulative force to that which was otherwise well proved or admitted,[89] or the rejection of evidence of facts otherwise established.[90] Error

W. 1128. Admission against plaintiff's objection of petition as originally drawn. School Dist. of Omaha v. McDonald [Neb.] 94 N. W. 829. Admission of underlined transcript of evidence taken at a former proceeding. Voigt v. Anglo-American Provision Co., 202 Ill. 462. Admission of negotiations leading to undisputed contract. Rainey v. Potter [C. C. A.] 120 Fed. 651. Opinion as to time necessary to do work under forfeited contract. O'Connor v. City of New York [N. Y.] 66 N. E. 1113. Admission of opinion founded on a fact not proved. Hamilton v. Mendota Coal & Mining Co. [Iowa] 94 N. W. 282. On issue made by cross-examination by adversary. Brazil Block Coal Co. v. Gibson [Ind.] 66 N. E. 882. Impeaching evidence without proper foundation but specifically covered by the witness. Norton v. Webber [N. Y.] 66 N. E. 1112.

Failure to limit application of evidence. Ruble v. Bunting [Ind. App.] 68 N. E. 1041.

88. In re Rice's Will, 81 App. Div. [N. Y.] 223; Word v. Kennon [Tex. Civ. App.] 75 S. W. 334; Fidelity Mut. Fire Ins. Co. v. Lowe [Neb.] 93 N. W. 749; Harmon v. Western Union Tel. Co. [S. C.] 43 S. E. 959; McMillen v. Ferrum Min. Co. [Colo.] 74 Pac. 461; Fischer v. Giddings [Tex. Civ. App.] 74 S. W. 85. Exclusion of rebuttal to facts not material. Fisk v. Ley [Conn.] 56 Atl. 559. Rejection of contradiction on immaterial fact. Campion v. Lattimer [Neb.] 97 N. W. 290. Excluding evidence under irrelevant issues joined. Brown v. Schintz, 203 Ill. 136.

89. Union Life Ins. Co. v. Jameson [Ind. App.] 67 N. E. 199; Conner v. Standard Pub. Co. [Mass.] 67 N. E. 596; Allen B. Wrisley Co. v. Burke, 203 Ill. 250; Armstrong v. Mayer [Neb.] 95 N. W. 483; Lake Erie & W. R. Co. v. Charman [Ind.] 67 N. E. 923; James White Memorial Home v. Haeg [Ill.] 68 N. E. 568; Pickles v. City of Ansonia [Conn.] 56 Atl. 552; Standard Oil Co. v. Goodman Drug Co. [Neb.] 95 N. W. 667; Boston & A. Smelting & Reduction Co. v. Lewis [Ariz.] 73 Pac. 448; Eggett v. Allen [Wis.] 96 N. W. 803; Schmitz v. Kirchan [Wash.] 73 Pac. 678; Nicholson-Watson Shoe & Clothing Co. v. Urquhart [Tex. Civ. App.] 75 S. W. 45; Hutton v. Smith, 175 N. Y. 375; Matthews v. Wallace [Mo. App.] 78 S. W. 296; Chicago, etc., R. Co. v. Krayenbuhl [Neb.] 98 N. W. 44; Cahill v. Applegarth [Md.] 56 Atl. 794; Kilham v. Western Bank & Safe Deposit Co. [Colo.] 70 Pac. 409; Powell v. Hudson Val. R. Co., 84 N. Y. Supp. 337; Riker v. Clopton, 83 App. Div. [N. Y.] 310; Central of Georgia R. Co. v. Lancaster, 116 Ga. 747; Iroquois Furnace Co. v. Elphicke, 200 Ill. 411; Place v. Baugher, 159 Ind. 232; State v. Glucose Sugar Refining Co., 117 Iowa, 524; Ashley v. Sioux City [Iowa] 93 N. W. 303; Louisville Pub. Warehouse Co. v. James, 70 S. W. 1046, 24 Ky. L. R. 1266; Black v. First Nat. Bank, 96 Md. 399; Galveston, etc., R. Co. v. Walker [Tex. Civ. App.] 76 S. W. 228; Johnson v. Johnson [Colo. App.] 72 Pac. 604; Hesser v. Rowley [Cal.] 73 Pac. 156; Babcock v. Maxwell [Mont.] 74 Pac. 64; Peterson Bros. v. Mineral King Fruit Co. [Cal.] 74 Pac. 162; O'Neill v. City of Kansas City [Mo. Sup.] 77 S. W. 64; Hamilton v. Crowe [Mo.] 75 S. W. 349; La Rue v. St. Anthony & D. Elevator Co. [S. D.] 95 N. W. 292; Bell v. City of Spokane, 30 Wash. 508, 71 Pac. 31; Citizens' Loan & Trust Co. v. Holmes [Wis.] 93 N. W. 39; Michigan Mut. Life Ins. Co. v. Lester's Ex'r, 24 Ky. L. R. 2260, 73 S. W. 1106; May v. Ullrich [Mich.] 92 N. W. 493; Chambers v. Chester [Mo.] 72 S. W. 904; Love v. Love [Mo. App.] 73 S. W. 255; Fletcher v. Sovereign Camp Woodmen of the World [Miss.] 32 So. 923; Hankel v. Denison [Wash.] 74 Pac. 822; Farmers' & Merchants' Bank v. Robinson, 96 Mo. App. 385; Smith v. Bank of New England [N. H.] 54 Atl. 385; Ramell v. Duffy, 81 N. Y. Supp. 600; Gribble v. Everett [Mo. App.] 71 S. W. 1124; Jones v. Wattles [Neb.] 92 N. W. 765; Galveston, etc., R. Co. v. Puente [Tex. Civ. App.] 70 S. W. 362; Kingsbury v. Waco State Bank [Tex. Civ. App.] 70 S. W. 551; Flippen v. State Life Ins. Co. [Tex. Civ. App.] 70 S. W. 787; San Antonio, etc., R. Co. v. Home Ins. Co. [Tex. Civ. App.] 70 S. W. 999; Nye v. Daniels, 75 Vt. 81; International & G. N. R. Co. v. Startz [Tex.] 77 S. W. 1; Mechanics' Nat. Bank v. Comins [N. H.] 55 Atl. 191; Benjamin v. Huston [S. D.] 94 N. W. 584; St. Louis S. W. R. Co. v. Barnes [Tex. Civ. App.] 72 S. W. 1041; St. Louis S. W. R. Co. v. Hughes [Tex. Civ. App.] 73 S. W. 976. As to facts not disputed. Grant v. Humerick [Iowa] 94 N. W. 510; Calkins v. Farmers' & Mechanics' Bank [Mo. App.] 73 S. W. 1098; Miller v. Grunsky [Cal.] 75 Pac. 48; Ash v. Clark [Wash.] 73 Pac. 351.

Cumulative opinion. White v. Farmers' Mut. Fire Ins. Co. [Mo. App.] 71 S. W. 707; Shaefer v. Missouri Pac. R. Co. [Mo. App.] 72 S. W. 154; Braun v. Hothan, 84 N. Y. Supp. 8; Chicago, etc., R. Co. v. Holmes [Neb.] 94 N. W. 1007; Bradley v. City of Spickardsville, 90 Mo. App. 416. Receiving depositions to contradict other immaterial or cumulative ones. Ward v. Cameron [Tex. Civ. App.] 76 S. W. 240.

90. Curtis v. Parker & Co. [Ala.] 33 So. 935; Abernathy v. Reynolds [Ariz.] 71 Pac. 914; McHenry v. Bulifant [Pa.] 56 Atl. 226; Poling v. San Antonio, etc., R. Co. [Tex. Civ. App.] 75 S. W. 69; Wren v. Howland [Tex. Civ. App.] 75 S. W. 894; Luman v. Golden Ancient Channel Min. Co. [Cal.] 74 Pac. 307; In re Keegan's Estate [Cal.] 72 Pac. 828; Sachra v. Town of Manilla [Iowa] 95 N. W. 198; Cochran v. Seigfried [Tex. Civ. App.] 75 S. W. 542; Parmly v. Farrar [Ill.] 68 N. E. 438; Eppley v. Lovell [Neb.] 97 N. W. 1027; Powers v. Benson [Iowa] 94 N. W. 929; Hlasatel v. Hoffman [Ill.] 68 N. E. 400; Gentry v. Singleton [Ind. T.] 69 S. W. 898; Ashley v. Sioux City [Iowa] 93 N. W. 303; Thornton v. Louisville, etc., R. Co., 24 Ky. L. R. 854, 70 S. W. 53; Robinson v. City of St. Joseph, 97 Mo. App. 503; Taft v. Little, 78 App. Div. [N. Y.] 74; Gulf, etc., R. Co. v. Cornell [Tex. Civ. App.] 69 S. W. 980; McDowell v. McDowell, 24 Ky. L. R. 2270, 73 S. W. 1022; Love v. Love [Mo. App.] 73 S. W. 255; Texas State Fair v. Brittain [C. C. A.] 118 Fed. 713; Cox v. Cohn, 29 Ind. App. 559; Golibart v. Sullivan [Ind. App.] 66 N. E. 188; Lundy v. Lundy [Iowa] 92 N. W. 39; Young v. Evans [Iowa] 92 N. W. 111; Hill Bros. v. Bank of Seneca [Mo. App.] 73 S. W. 307; Gulf, etc., R. Co. v. Brooks [Tex. Civ. App.] 73 S. W. 571. Sketch to illustrate opinion. City of Chica-

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in evidence is innocuous in a trial of facts by the court as in equitable actions where it may be supposed he founded his decision solely on proper proofs.[91] An improper mode of questioning or an erroneous ruling on a proper question may be harmless because of the answer given,[92] or the lack of an answer.[93] Applications of these doctrines to cross-examination[94]—which is largely controlled by discretion of the court[95]—and to the order of taking proof,[96] and to the rulings on motions to strike evidence,[97] and the reception of affidavits and depositions,[98] are cited below. A few illustrative cases wherein errors respecting evidence have been held prejudicial are collected.[99]

go v. Le Moyne [C. C. A.] 119 Fed. 662. Further opinion. Illinois Steel Co. v. Sitar, 199 Ill. 116.

The court has discretion to reject cumulative evidence under proper circumstances. See Trial.

91. Equitable action or trial without jury. King v. Pony Gold Min. Co. [Mont.] 72 Pac. 309; Colusa Parrot Mining & Smelting Co. v. Barnard [Mont.] 72 Pac. 45; Terry v. State, 24 Ohio Circ. R. 111; Erwin v. Archenhold Co. [Tex. Civ. App.] 77 S. W. 823; Metcalf v. Bockoven [Neb.] 96 N. W. 406; Flanagan v. Mathieson [Neb.] 97 N. W. 287; Smith v. Bunch [Tex. Civ. App.] 73 S. W. 559; Palmer v. Crisle, 92 Mo. App. 510; Welch v. Tipperry [Neb.] 92 N. W. 582; Hey v. Collman, 78 App. Div. [N. Y.] 584; Davies v. Cheadle [Wash.] 71 Pac. 728; Hankel v. Denison [Wash.] 74 Pac. 822; Hopkins v. International Lumber Co. [Wash.] 73 Pac. 1113; Dowie v. Driscoll [Ill.] 68 N. E. 56; Hunter v. Guth [Colo. App.] 73 Pac. 1089; Newman v. Lee, 84 N. Y. Supp. 106; Vinson v. Scott, 198 Ill. 144; Hammond v. Doty, 103 Ill. App. 75; Johnston v. Miller, 103 Ill. App. 181; Dobbins v. Humphreys, 171 Mo. 198; Hornberger v. Giddings [Tex. Civ. App.] 71 S. W. 989; Wolf v. Theresa Village Mut. Fire Ins. Co., 115 Wis. 402; Bowman v. Wright [Neb.] 92 N. W. 580 [received subject to objection] In re Moore's Estate [Minn.] 93 N. W. 523; Hogan v. Vinje, Id.; Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805 [before referee] Walden v. City of Jamestown, 79 App. Div. [N. Y.] 433, 12 N. Y. Ann. Cas. 318; Sweet v. Henry [N. Y.] 67 N. E. 574.

Unless the court appears to have acted on it. Abernathy v. Reynolds [Ariz.] 71 Pac. 914; Byrnes v. Eley [Neb.] 97 N. W. 298; Van Vleet v. De Witt, 200 Ill. 153; People's Bldg., L. & Sav. Ass'n v. Marston [Tex. Civ. App.] 69 S. W. 1034.

But in trial of law appellate court must be convinced of harmlessness. Holmes v. Farris, 97 Mo. App. 305.

Where appeal is de novo on all the evidence. Tilden v. Gordon & Co. [Wash.] 74 Pac. 1016. The review being extended to the merits makes all such errors inconsequential. See Appeal and Review, § 13F, 1 Curr. Law, p. 185, and related matters elsewhere in same section.

92. As to undisputed facts. San Antonio Traction Co. v. Crawford [Tex. Civ. App.] 71 S. W. 306. Improper question not answered harmfully. Brown v. Johnson Bros. [Ala.] 33 So. 683; D. M. Osborne & Co. v. Ringland & Co. [Iowa] 98 N. W. 116; Hester v. Jacob Dold Packing Co., 95 Mo. App. 16; Schafstette v. St. Louis, etc., R. Co. [Mo.] 74 S. W. 826; Shaefer v. Missouri Pac. R. Co. [Mo. App.] 72 S. W. 154; State v. King, 88 Minn. 175; White v. Farmers' Mut. Fire Ins. Co., 97 Mo. App. 590; Farmers' Mut. Ins. Co. v. Cole [Neb.] 93 N. W. 730; San Antonio Traction Co. v. Bryant [Tex. Civ. App.] 70 S. W. 1015. Answered by proper testimony. Younglove v. Knox [Fla.] 33 So. 427; City of Rome v. Stewart, 116 Ga. 738. Ruling on question irresponsively answered and allowed to stand. Waterhouse v. Jos. Schlitz Brewing Co. [S. D.] 94 N. W. 587.

Improperly sustaining objection but allowing answer to stand. Budlong v. Budlong [Wash.] 71 Pac. 751.

Narrative testimony. Goldsmith v. Newhouse [Colo. App.] 72 Pac. 809.

93. Sustained but not answered. Stevens v. Nebraska Loan & Trust Co., 65 Kan. 859. 70 Pac. 368.

94. Spohr v. City of Chicago [Ill.] 69 N. E. 515; Allington & C. Mfg. Co. v. Detroit Red'n Co. [Mich.] 95 N. W. 562; Peterson Bros. v. Mineral King Fruit Co. [Cal.] 74 Pac. 162; McMullin v. McMullin [Cal.] 73 Pac. 808; People v. Sharp [Mich.] 94 N. W. 1074. As to value of expert opinions compared with attending physician's. Robinson v. St. Louis, etc., R. Co. [Mo. App.] 77 S. W. 493. As to matters otherwise covered. Shannon v. Castner, 21 Pa. Super. Ct. 294; Nunn v. Jordan [Wash.] 72 Pac. 124. Excluding question which of two versions was correct after witness opined that they were alike. Rowe v. Brooklyn Heights R. Co., 80 App. Div. [N. Y.] 477. As to matters not touched in direct. Sauntry v. United States [C. C. A.] 117 Fed. 132; Jones v. City of Chicago [Ill.] 69 N. E. 64. On competency to testify to immaterial facts. Lindell v. Deere-Wells Co. [Neb.] 92 N. W. 164.

95. See Examination of Witnesses, 1 Curr. Law, p. 1165.

96. Atchison, etc., R. Co. v. Phipps [C. C. A.] 125 Fed. 478; Walton v. Wild Goose Mining & Trading Co. [C. C. A.] 123 Fed. 209. Recalling witness to contradict testimony after objector had closed is harmless if he sought no continuance or further proof in rebuttal. American Bridge Co. v. Robinson [Wash.] 71 Pac. 1099.

97. Hubner v. Metropolitan St. R. Co., 77 App. Div. [N. Y.] 290; Butler v. Davis [Wis.] 96 N. W. 561. Striking irresponsive answer. Anderson v. Mammoth Min. Co. [Utah] 73 Pac. 412. Refusal to strike from an account submitted to jury a charge balanced by a corresponding credit. Stagg & Conrad v. St. Jean [Mont.] 74 Pac. 740. Refusal to strike slightly irresponsive answer. Southern Ind. R. Co. v. Davis [Ind. App.] 69 N. E. 550.

98. Omission of immaterial parts of deposition. Alexander v. Grand Lodge A. O. U. W. [Iowa] 93 N. W. 508. Affidavits improp-

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Improper argument or conduct of counsel or interference with the right to open and close may be disregarded if without material effect on the result.[1] The same is true of remarks by the court.[2]

Error in instructing the jury or refusing to do so is ground for reversal when the jury has been misled or it has been efficient to the result declared in the verdict.[3] If as in equitable issues the verdict is merely advisory, such error is presumably harmless.[4]

erly filed but not considered. Barnes v. Berendes [Cal.] 72 Pac. 406.

99. **Held prejudicial.**—Evidence of a favorable judgment to adversary in collateral proceeding involving same facts. Archibald v. Press Pub. Co., 81 N. Y. Supp. 889. Admission in creditor's suit against husband, of wife's examination on supplementary proceedings, that conveyance by her to husband was voluntary. Multz v. Price, 81 N. Y. Supp. 931. Evidence not shown to have been cumulative. Loloff v. Sterling [Colo.] 71 Pac. 1113. Declarations of third person. Mizell v. Travelers' Ind. Co. [Fla.] 33 So. 454. Opinion. Bliss v. United Traction Co., 75 App. Div. [N. Y.] 235. Conclusion. Indianapolis St. R. Co. v. Whitaker [Ind.] 66 N. E. 433. Self-serving. Louisville, etc., R. Co. v. Frazee, 24 Ky. L. R. 1273, 71 S. W. 437. Evidence of admitted fact. Fairbanks, Morse & Co. v. Baskett [Mo. App.] 71 S. W. 1113. Reading from books. McEvoy v. Lommel, 78 App. Div. [N. Y.] 324. Evidence of gross negligence followed verdict into which punitive damages may have entered. Rueping v. Chicago, etc., R. Co. [Wis.] 93 N. W. 843. Incompetent evidence without which there was not clear support for verdict. Kline v. Stein, 30 Wash. 189, 70 Pac. 235; Brown v. Warner [Wis.] 93 N. W. 17. Exclusion of evidence in partial defense. Shelby Iron Co. v. Ridley [Ala.] 33 So. 331. Ruling probably right but on wrong grounds. Pattee v. Whitcomb [N. H.] 56 Atl. 459. Exclusion of evidence. Lake Erie & W. R. Co. v. Shelley [Ind. App.] 67 N. E. 564. Admission of immaterial evidence which is also irrelevant and incompetent. M. Groh's Sons v. Groh [N. Y.] 68 N. E. 992. Hearsay on a vital issue. Broadstreet v. Hall [Ind. App.] 69 N. E. 415. Irrelevant cross-examination. Barton v. Bruley [Wis.] 96 N. W. 815. Admission of witness' memorandum. Gans v. Wormser, 83 App. Div. [N. Y.] 505. Before referee inducing finding. Havens v. Gilmour, 83 App. Div. [N. Y.] 84. Admission in malicious prosecution of testimony given on the prosecution admitted to have resulted for plaintiff. Tuffy v. Humphrey, 84 N. Y. Supp. 616. Admitting value of property not covered by policy when value of that covered was in dispute. American Fire Ins. Co. v. Bell [Tex. Civ. App.] 75 S. W. 819. Evidence as to number of children of plaintiff in personal injury case. Ft. Worth Iron Works v. Stokes [Tex. Civ. App.] 76 S. W. 231. Evidence which though cumulative tended to show willful negligence. Gotwald v. St. Louis Transit Co. [Mo. App.] 77 S. W. 125. Hearsay. Boone v. Oakland Transit Co. [Cal.] 73 Pac. 243. Admission of memorandum which is sole evidence. Peterson Bros. v. Mineral King Fruit Co. [Cal.] 74 Pac. 162. Impeachment without permitting explanation. Brown v. Gillett [Wash.] 74 Pac. 386.

1. Western Union Tel. Co. v. Cavin [Tex. Civ. App.] 70 S. W. 229; St. Louis, etc., R. Co. v. Boback [Ark.] 75 S. W. 473; Houston Elect. Co. v. Robinson [Tex. Civ. App.] 76 S. W. 209; City of Owensboro v. Knox's Adm'r [Ky.] 76 S. W. 191; Ledwith v. Campbell [Neb.] 95 N. W. 838. Suggesting findings. Consumers' Paper Co. v. Eyer [Ind.] 66 N. E. 994. Reading opinion. Gallagher v. Town of Buckley [Wash.] 72 Pac. 79. Calling attention to amendment of charge by interlining. Board Com'rs Clay County v. Redifer [Ind. App.] 69 N. E. 305. Statement that submitted questions were for purpose of entangling jury. Southern Indiana R. Co. v. Davis [Ind. App.] 69 N. E. 550.

In equitable actions. Collins v. Fidelity Trust Co. [Wash.] 73 Pac. 1121.

Opening and closing. Loy v. Rorick [Mo. App.] 71 S. W. 842; Bannon v. Insurance Co. of North America, 115 Wis. 250; Varty v. Messmore [Mich.] 93 N. W. 611; Pierce v. Brennan, 88 Minn. 50; City of Rome v. Stewart, 116 Ga. 738; West Chicago St. R. Co. v. Kean, 104 Ill. App. 147.

Held prejudicial.—Denial of right to open and close. Miller v. Myerhoff, 81 N. Y. Supp. 234.

2. Metcalfe v. Gordon, 83 N. Y. Supp. 808; Sosnofski v. Lake Shore, etc., R. Co. [Mich.] 95 N. W. 1077; Hillebrand v. Nelson [Neb.] 95 N. W. 1068; Robinson v. City of St. Joseph, 97 Mo. App. 503. Misstatement due to slip of the tongue. Berry v. Clark [Ga.] 44 S. E. 824.

Held prejudicial.—Colloquy with counsel. Lipschutz v. Ross, 84 N. Y. Supp. 632.

3. Avocato v. Dell 'Ara [Tex. Civ. App.] 77 S. W. 47; Economy Light & Power Co. v. Hiller [Ill.] 68 N. E. 72; Kaiser v. Nummerdor [Wis.] 97 N. W. 932; Campbell v. City of Stanberry [Mo. App.] 78 S. W. 292; Parker v. Atlantic Coast Line R. Co. [N. C.] 45 S. E. 658; Chicago, etc., R. Co. v. Sizer [Neb.] 95 N. W. 498; Chicago Hair & Bristle Co. v. Mueller [Ill.] 68 N. E. 51; Schroeder v. Wisconsin Cent. R. Co. [Wis.] 93 N. W. 837. Allusion to submitted evidence as "uncontradicted." Rhode v. Metropolitan Life Ins. Co. [Mich.] 93 N. W. 1076; Hoffmann v. Ackermann [La.] 35 So. 293; Doolin v. Omnibus Cable Co. [Cal.] 73 Pac. 1060; Shinkle v. McCullough [Ky.] 77 S. W. 196; Galveston, etc., R. Co. v. Fales [Tex. Civ. App.] 77 S. W. 234; San Antonio, etc., R. Co. v. Turney [Tex. Civ. App.] 78 S. W. 256; La Vie v. Crosby [Or.] 74 Pac. 220; City of Newnan v. Davis-ton [Ga.] 44 S. E. 861; Degel v. St. Louis Transit Co. [Mo. App.] 74 S. W. 156; Savage v. Bulger [Ky.] 77 S. W. 717; McDannald v. Washington, etc., R. Co. [Wash.] 72 Pac. 481; Central of Georgia R. Co. v. McKinney [Ga.] 45 S. E. 430; Reynolds v. Clowdus [Ind. T.] 76 S. W. 277; Septowsky v. St. Louis Transit Co. [Mo. App.] 76 S. W. 693; Clark v. Folkers [Neb.] 95 N. W. 328; Hannon v. St. Louis Transit Co. [Mo. App.] 77

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The fact that improper papers were before the jury while deliberating,[5] or that it was improperly recalled,[6] or that other irregularities occurred during the

S. W. 158; Southern Bell Telephone & Telegraph Co. v. Earle [Ga.] 45 S. E. 319; Southern Nevada Gold & Silver Min. Co. v. Holmes Min. Co. [Nev.] 73 Pac. 759; St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 77 S. W. 28; Black v. Rocky Mountain Bell Tel. Co. [Utah] 73 Pac. 514; Log Owners' Booming Co. v. Hubbell [Mich.] 97 N. W. 157; Allen v. McKay & Co. [Cal.] 72 Pac. 713; Pecos, etc., R. Co. v. Williams [Tex. Civ. App.] 78 S. W. 5; Chicago, etc., R. Co. v. Armes [Tex. Civ. App.] 74 S. W. 77; Selby v. Vancouver Waterworks Co. [Wash.] 73 Pac. 504; Thomas v. Brantley [Ga.] 45 S. E. 449; Standard Light & Power Co. v. Munsey [Tex. Civ. App.] 76 S. W. 931; Labarge v. Pere Marquette R. Co. [Mich.] 95 N. W. 1073; Modern Brotherhood of America v. Cummings [Neb.] 94 N. W. 144; Wampler v. House [Ind. App.] 66 N. E. 500; Hargadine-McKitrick Dry Goods Co. v. Bradley [Ind. T.] 69 S. W. 862; Atkins v. Ellis, 118 Iowa, 76, 91 N. W. 829; Wilson v. Onstott [Iowa] 96 N. W. 779; North Chicago St. R. Co. v. Wellner [Ill.] 69 N. E. 6; Eggleston v. City of Seattle [Wash.] 74 Pac. 806; 101 Live Stock Co. v. Kansas City, etc., R. Co. [Mo. App.] 75 S. W. 782; Guerguin v. Boone [Tex. Civ. App.] 77 S. W. 630; Von Tobel v. Stetson & Post Mill Co. [Wash.] 73 Pac. 788; Horton v. Forth Worth Packing & Provision Co. [Tex. Civ. App.] 76 S. W. 211; Ft. Worth, etc., R. Co. v. Greer [Tex. Civ. App.] 75 S. W. 552; Marshall v. Ferguson [Mo. App.] 74 S. W. 393; Chicago, etc., R. Co. v. Krayenbuhl [Neb.] 98 N. W. 44; Ebel v. Piehl [Mich.] 95 N. W. 1004; Louisville & N. R. Co. v. Pointer's Adm'r, 24 Ky. L. R. 772, 69 S. W. 1108; Butler v. Detroit, etc., R. Co. [Mich.] 92 N. W. 101; City of Beardstown v. Clark [Ill.] 68 N. E. 378; Lytle v. Newell, 25 Ky. L. R. 120, 74 S. W. 693; Greengard v. Burton [Minn.] 92 N. W. 931; King v. Hill [Tex. Civ. App.] 75 S. W. 550; Beauvais v. City of St. Louis, 169 Mo. 500; Bales v. Heer, 91 Mo. App. 426; Roseman v. Mahony, 83 N. Y. Supp. 749; Combs v. Georgia R. & Banking Co. [Ga.] 42 S. E. 383; Zellars v. Missouri Water & Light Co., 92 Mo. App. 107; Chicago & A. R. Co. v. Murphy, 198 Ill. 462; White v. Merchants' Ins. Co., 93 Mo. App. 282; Dyer v. St. Louis Trust Co., 97 Mo. App. 177; Robinson v. City of St. Joseph, 97 Mo. App. 503; Columbus State Bank v. Carrig [Neb.] 92 N. W. 324; Beer v. Dalton [Neb.] 92 N. W. 593; Friedly v. Giddings, 119 Fed. 438; Anderson v. Kannow [Neb.] 92 N. W. 630; Kitzberger v. Chicago, etc., R. Co. [Neb.] 93 N. W. 935; German Ins. Co. v. Shader [Neb.] 93 N. W. 972; Zimmerman v. Whiteley [Mich.] 95 N. W. 989; Brown v. Montgomery, 21 Pa. Super. Ct. 262; Reep v. Wagner, 21 Pa. Super. Ct. 268; Pincham v. Dick [Tex. Civ. App.] 70 S. W. 333; William Deering & Co. v. Walter [Neb.] 96 N. W. 517; Aetna Life Ins. Co. v. Sanford, 200 Ill. 126; Galveston, etc., R. Co. v. Puente [Tex. Civ. App.] 70 S. W. 362; City of San Antonio v. Potter [Tex. Civ. App.] 71 S. W. 764; Galveston, etc., R. Co. v. Jackson [Tex. Civ. App.] 71 S. W. 991; Germania Fire Ins. Co. v. Pitcher [Ind.] 64 N. E. 921; Griffin v. Bass Foundry & Machine Co., 135 Ala. 490; Baxter v. Lusher, 159 Ind. 381; Colorado Midland R. Co. v. Robbins [Colo.] 71 Pac. 371; Waugh v. Moan, 200 Ill. 298; Illinois Steel Co. v. Ryska, 200 Ill. 280; Hodgkins v. Smith, 104 Ill. App. 420; City of Beardstown v. Clark, 104 Ill. App. 568; Brock v. Bear [Va.] 42 S. E. 307; Stuck v. Yates [Ind. App.] 66 N. E. 177; Freeman v. Collins Park & B. R. Co., 117 Ga. 78; Knight v. Sadtler Lead & Zinc Co., 91 Mo. App. 574; Fox v. Jacob Dold Packing Co., 96 Mo. App. 173; Ruth v. St. Louis Transit Co. [Mo. App.] 71 S. W. 1055; Oates v. Erskine's Estate [Wis.] 93 N. W. 444; Chicago House Wrecking Co. v. Stewart Lumber Co. [Neb.] 92 N. W. 1009; Summers Bros. v. Bland, 24 Ky. L. R. 2049, 72 S. W. 798; Louisville, etc., R. Co. v. McCune, 24 Ky. L. R. 2119, 72 S. W. 756, 1094; Michigan Mut. Life Ins. Co. v. Lester's Ex'r, 24 Ky. L. R. 2260, 73 S. W. 1106; South Chicago City R. Co. v. Dufresne, 200 Ill. 456; City of South Omaha v. Fennell [Neb.] 94 N. W. 632; Lewis v. Norfolk & W. R. Co. [N. C.] 43 S. E. 919; McCowen v. Gulf, etc., R. Co. [Tex. Civ. App.] 73 S. W. 46; Over v. Missouri, etc., R. Co. [Tex. Civ. App.] 73 S. W. 535; Schmeckpepper v. Chicago, etc., R. Co. [Wis.] 93 N. W. 533. Instruction as to fact not well denied by objecting party. J. I. Porter Lumber Co. v. Hill [Ark.] 77 S. W. 905. Request refused for wrong reason. Kelly v. Palmer [Minn.] 97 N. W. 578. On credibility where evidence conflicted. Perkins v. Knisely [Ill.] 68 N. E. 486. Assumption of undisputed fact. Chicago Screw Co. v. Weiss [Ill.] 68 N. E. 54. On irrelevant issues. Nunn v. Jordan [Wash.] 72 Pac. 124. On issues not supported by evidence. Gilbertson v. Incorporated Town of Lake Mills [Iowa] 94 N. W. 481. Abstract charge. Chicago, etc., R. Co. v. Winfrey [Neb.] 93 N. W. 526. Change of theory. Geiser Mfg. Co. v. Yost [Minn.] 95 N. W. 584. Refused request on immaterial issue. Baltimore, etc., R. Co. v. Harbin [Ind.] 67 N. E. 109. Refusal to charge on facts not adduced. Gulf, etc., R. Co. v. Irvine & Woods [Tex. Civ. App.] 73 S. W. 540; Allen v. McKay & Co. [Cal.] 70 Pac. 8. Refusal to charge on evidence withheld from jury. Minter v. Bradstreet Co. [Mo.] 73 S. W. 668. On issue not made. Bovier v. McCarthy [Neb.] 94 N. W. 965. Instruction to reconcile irreconcilable evidence "if possible." Houston, etc., R. Co. v. Bell [Tex.] 75 S. W. 484. Instruction containing computation pursuant to preceding instruction. Joplin Waterworks Co. v. City of Joplin [Mo.] 76 S. W. 960. On facts not disputed or disputable. Dallas Consol. Elect. St. R. Co. v. Illo [Tex. Civ. App.] 73 S. W. 1076; Germania Fire Ins. Co. v. Pitcher [Ind.] 64 N. E. 921; Grant v. North American Casualty Co. [Minn.] 93 N. W. 312; Swearingen v. Inman, 198 Ill. 255; Goldthorpe v. Clark-Nickerson Lumber Co. [Wash.] 71 Pac. 1091; Louisville & N. R. Co. v. Harrod [Ky.] 75 S. W. 233; Indianapolis & G. Rapid Transit Co. v. Haines [Ind. App.] 69 N. E. 187; Grady v. St. Louis Transit Co. [Mo. App.] 76 S. W. 673. Incorrect allusions to facts. Hill Bros. v. Bank of Seneca [Mo. App.] 73 S. W. 307. Restriction of number of requests. Chicago City R. Co. v. Sandusky, 198 Ill. 400. Refusal of request stating converse of that

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trial, are not reversible if no harm resulted;[7] nor are defects and irregularities in the verdict, findings, and conclusions of law,[8] or in judgment and record[9] of which the like is true. Thus a wrong decision when no substantial right exists,[10] or substantially equivalent to a right decision,[11] or error respecting matters immaterial to the cause of action,[12] is harmless.

given. Schafstette v. St. Louis & M. R. R. Co., 175 Mo. 142.

Held prejudicial. Western & A. R. Co. v. Clark [Ga.] 44 S. E. 1; Central of Georgia R. Co. v. Goodman [Ga.] 45 S. E. 969; Axtell v. Northern Pac. R. Co. [Idaho] 74 Pac. 1075; Smith v. Stratton [Tex. Civ. App.] 78 S. W. 4; Danker v. Goodwin Mfg. Co. [Mo. App.] 77 S. W. 338; Romine v. San Antonio Traction Co. [Tex. Civ. App.] 77 S. W. 35; Anderson v. Bradford [Mo. App.] 76 S. W. 726; Garven v. Chicago, etc., R. Co. [Mo. App.] 75 S. W. 193; McKeon v. Louis Weber Bldg. Co., 84 N. Y. Supp. 913; Davidson v. Davidson [Neb.] 96 N. W. 409; Munroe v. Hartford St. R. Co. [Conn.] 56 Atl. 498. Failure to distinguish two correct charges on measure of damages. Hartgrove & Clegg v. Southern Cotton Oil Co. [Ark.] 77 S. W. 908. Harmful if the verdict may have been based on the erroneous charge. Curtis v. Curtis [Mich.] 96 N. W. 32. Inapplicable charge. Janouch v. Pence [Neb.] 93 N. W. 217; First Nat. Bank v. McDonald, 42 Or. 257, 70 Pac. 901. Failure to instruct. Royal Neighbors of America v. Wallace [Neb.] 92 N. W. 897. Burden on wrong party. Omaha St. R. Co. v. Boeson [Neb.] 94 N. W. 619. Erroneous charge on evidence which might have supported opposite verdict. Richmond Passenger & Power Co. v. Steger [Va.] 43 S. E. 612. Requiring "clear and satisfactory" evidence. Meyer v. Hafmeister [Wis.] 97 N. W. 165.

4. Palmer v. Crisle, 92 Mo. App. 510; Cook v. Gallatin R. Co. [Mont.] 72 Pac. 678; Collins v. Fidelity Trust Co. [Wash.] 73 Pac. 1121; Richardson-Roberts-Byrne Dry Goods Co. v. Hockaday [Okl.] 73 Pac. 957; Apland v. Pott [S. D.] 92 S. W. 19; Talbott v. Butte City Water Co. [Mont.] 73 Pac. 1111; King v. Pony Gold Min. Co. [Mont.] 72 Pac. 309.

5. Giving jury files including prejudicial papers with proper instructions. Palmer v. Smith [Conn.] 56 Atl. 516. Taking documents with them. Western Union Tel. Co. v. Shaw [Tex. Civ. App.] 77 S. W. 433. Reading pleadings and allowing jury to take them. Joy v. Liverpool, London & Globe Ins. Co. [Tex. Civ. App.] 74 S. W. 822.

6. In absence of parties. Cox v. Peltier, 159 Ind. 355.

7. West Chicago St. R. Co. v. Buckley, 102 Ill. App. 314. Passing by locus in quo during trial. Caldwell v. Town of Nashua [Iowa] 97 N. W. 1000.

8. Mason v. Jacobus, 84 N. Y. Supp. 589; Terre Haute & I. R. Co. v. State, 159 Ind. 438; Midland R. Co. v. Trissal, 30 Ind. App. 77; Exchange Real Estate & Building Co. v. Schuchman Realty Co. [Mo. App.] 78 S. W. 75; Keegan v. Smith, 172 N. Y. 624; Farmer v. St. Croix Power Co. [Wis.] 93 N. W. 830.

Where party could in no event succeed. Goon v. Proctor [Mont.] 71 Pac. 1003. Findings in ejectment where defendant was in possession under inferior title. Lochridge v. Corbett [Tex. Civ. App.] 73 S. W. 96. Sustainable on one good count. Baltimore, etc., R. Co. v. Roberts [Ind.] 67 N. E. 530. Want of findings which could not have affected result. John A. Roeblings' Sons Co. v. Gray [Cal.] 73 Pac. 422.

Unsupported but needless finding. Purcell v. Chicago, etc., R. Co., 117 Iowa, 667. Erroneous findings not affecting necessary result. Kratz v. Cook [Ind. App.] 68 N. E. 689. Erroneous findings as to admitted fact. Stanley v. Marshall [Ill.] 69 N. E. 58. Refusal to make findings on points covered by exceptions. Chicago Union Traction Co. v. City of Chicago, 202 Ill. 576. Failure to insert in submitted form of verdict the amount. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 95 N. W. 232. Unsupported finding of fact otherwise proved. Ambrose v. Drew [Cal.] 73 Pac. 543. Finding on question covered by stipulation. Turpen v. Turlock Irr. Dist. [Cal.] 74 Pac. 295.

Erroneous conclusion of law but correct findings and judgment. Rosso v. Milwaukee Harvester Co. [Neb.] 96 N. W. 213. Statements of law by court in case appealable de novo. American Zinc, Lead & Smelting Co. v. Markle Lead Works [Mo. App.] 76 S. W. 668.

Reports of commissioners, etc. Transposition of a figure in a report. Carpenter v. Stephens [Ky.] 76 S. W. 42. Failure to allow credit offset by omitted debit. Lee v. Grant County Deposit Bank [Ky.] 77 S. W. 374. Failure to pass on exceptions to commissioner's report. Bissell v. Hood [Va.] 44 S. E. 715.

Held prejudicial because contrary to charge. Ball v. Beaumont [Neb.] 92 N. W. 170.

9. Wood v. Casserleigh, 30 Colo. 287, 71 Pac. 360; Willis v. Sutton, 116 Ga. 283; Akerman v. Ford, 116 Ga. 473; Lile v. Gibson, 91 Mo. App. 480; Gulf, etc., R. Co. v. Weddington [Tex. Civ. App.] 71 S. W. 780; Owen v. Kuhn, Loeb & Co. [Tex. Civ. App.] 72 S. W. 432. Use of "verdict" for "suit." Staacke Bros. v. Walker & Chilcoat [Tex. Civ. App.] 73 S. W. 408. Judgment condemning attached property. Farmers' Mfg. Co. v. Steinmetz [N. C.] 45 S. E. 552. Amending decree to allow execution. Knotts v. Crossly [Neb.] 95 N. W. 848. Error in amount of judgment is harmless if offset by as great error in objector's favor. Mayer v. Nethersole, 75 N. Y. Supp. 987.

Delay in signing record until term after that shown in calendar. Percival v. Yousling [Iowa] 94 N. W. 913.

Ruling on motion in arrest. McGammon v. Millers' Nat. Ins. Co., 171 Mo. 143.

Judgment too small on face of record is reversible. Jackson v. Brockton [Mass.] 64 N. E. 418.

See, also, Judgment.

10. Refusal to allow nonsuit and new pleading on void contract. Troy Buggy Works Co. v. Fife & Miller [Tex. Civ. App.] 74 S. W. 956. Failure to allow nominal damages. Willets v. Ida Sav. Bank [Iowa] 90 N. W. 729. Judgment acting solely on prop-

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Erroneous proceedings after judgment,[13] or on new trial,[14] or preparatory to review,[15] or on an intermediate review,[16] are discussed in the note, all being governed by the rule that there will be no reversal if no prejudice.

§ 3. *Errors cured or made harmless by other matters.*—Error is also harmless if some subsequent condition has rectified it or averted the prejudicial effect of it.[17] This may be done by admission of evidence,[18] by striking out or excluding

erty never owned by defendant. Powers v. McKnight [Tex. Civ. App.] 73 S. W. 549.

11. Declaring ownership instead of decreeing reconveyance and cancellation of void deed. Jones v. Jones [Cal.] 74 Pac. 143. Joint judgment against defendants each severally liable. Johnson v. Bott [Colo. App.] 72 Pac. 612.

12. Failure of a decree to conform to evidence in the record but not admissible under the pleadings. Omaha Oil & Paint Co. v. Greater America Exposition Co. [Neb.] 93 N. W. 963.

Omission to take proof of fact not material to claims of objector. Chaffee v. Sehestedt [Neb.] 96 N. W. 161.

13. Order confirming sale. Gray v. Eurich [Neb.] 96 N. W. 343. Refusal to permit amendment of return to execution on void judgment is harmless. Faville v. State Trust Co. [Iowa] 96 N. W. 1109.

Held prejudicial. Levy. Bartlett v. Gilcreast [N. H.] 55 Atl. 189.

14. Want of notice of motion to amend statement of grounds for new trial of which amendments adversary knew. Swett v. Gray [Cal.] 74 Pac. 439.

15. Failure to serve case made on defaulting party. Johnson v. Ware [Kan.] 73 Pac. 99. Refusal to order a transcript when all material matter was in bill of exceptions. Allen v. Hazzard [Tex. Civ. App.] 77 S. W. 268. Rulings on validity of bond and appellate jurisdiction where appeal was not perfected by good bond. State Savings & Loan Ass'n v. Johnson [Neb.] 98 N. W. 32. Refusal to grant term time appeal. Baltimore & O. R. Co. v. Ryan [Ind. App.] 68 N. E. 923.

16. Refusal to consider an unmeritorious assignment of error. Chicago, etc., R. Co. v. Long [Tex.] 75 S. W. 483. Refusal to make more definite and certain. Bonebrake v. Tauer [Kan.] 72 Pac. 521. Error in refusing jurisdiction of appeal which must necessarily have resulted in affirmance. Tubman v. Baltimore & O. R. Co., 190 U. S. 38, 47 Law. Ed. 947.

17. Want of injunction bond cured by filing one after reversal of decree refusing injunction. Pennsylvania R. Co. v. Lilly Borough [Pa.] 56 Atl. 412. Overruling demurrer cured by inserting names of usees. Fidelity & Deposit Co. of Maryland v. Nisbet [Ga.] 46 S. E. 444. Refusal of continuance not cured by appearance some days on in trial. In re Townsend's Estate [Iowa] 97 N. W. 1108; Townsend v. Townsend, Id. A prompt and sharp rebuke will cure arguments outside the case. Brown v. Silver [Neb.] 96 N. W. 281. Overruling plea in abatement cured by pleading same in another right. Cammack v. Rogers [Tex. Civ. App.] 74 S. W. 945. The overruling of a demurrer to a count in contract in that it was joined with counts in tort will not be reviewed where all the other counts were withdrawn during the trial or the court directed that no recovery could be had on them. Kansas City, etc., R. Co. v. Foster [Ala.] 32 So. 773. Error in refusing to discharge a receiver or increase his bond may be cured by allowing his appointment to become conclusive through failure to appeal. Hereford v. Hereford [Ala.] 32 So. 651.

18. **Excluded evidence afterwards received.** Nelson v. Branford Lighting & Water Co. [Conn.] 54 Atl. 303; City of San Antonio v. Talerico [Tex. Civ. App.] 78 S. W. 28; Missouri, etc., R. Co. v. McCutcheon [Tex. Civ. App.] 77 S. W. 232; Russell v. Gay [Wash.] 73 Pac. 795; Meeker v. Metropolitan St. R. Co. [Mo.] 77 S. W. 58; Dallas Elect. Co. v. Mitchell [Tex. Civ. App.] 76 S. W. 935; Montgomery St. R. v. Hastings [Ala.] 35 So. 412; Southern Car & Foundry Co. v. Jennings [Ala.] 34 So. 1002; Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co. [Tex. Civ. App.] 77 S. W. 961; Summerlin v. Carolina, etc., R. Co. [N. C.] 45 S. E. 898; Ontario-Colorado Gold Min. Co. v. MacKenzie [Colo. App.] 74 Pac. 791; In re Daniels [Cal.] 73 Pac. 1053; Kahn v. Triest-Rosenberg Cap Co. [Cal.] 73 Pac. 164; In re Wickes' Estate [Cal.] 72 Pac. 902; Union State Bank v. Hutton [Neb.] 95 N. W. 1061; Brill v. Levin, 86 N. Y. Supp. 109; Draper v. Tucker [Neb.] 95 N. W. 1026; Strauss v. Brooklyn Heights R. Co., 82 N. Y. Supp. 767; Mowbray v. Gould, 83 App. Div. [N. Y.] 255; Fosha v. Prosser [Wis.] 97 N. W. 924; Cady v. Cady [Minn.] 97 N. W. 580; Lloyd v. Simons [Minn.] 95 N. W. 903; Fitzpatrick v. Union Traction Co. [Pa.] 55 Atl. 1050; Oldewurtel v. Wiesenfeld [Md.] 54 Atl. 969; Pittsburgh, etc., R. Co. v. McNeil [Ind. App.] 69 N. E. 471; Columbian Fire Proofing Co. v. Great Northern Paper Co. [Pa.] 56 Atl. 434; O'Brien v. Traynor [N. J.] 55 Atl. 307; Ley v. Metropolitan Life Ins. Co. [Iowa] 94 N. W. 568; Black v. City of Mishawaka, 30 Ind. App. 104; Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co. [Colo.] 71 Pac. 389; Illinois Steel Co. v. Ryska, 200 Ill. 280; Haney-Campbell Co. v. Preston Creamery Ass'n [Iowa] 93 N. W. 297; Maynard v. Newton, 116 Ga. 195; Newton v. Maynard, Id.; Duree v. Chicago, etc., R. Co. [Iowa] 92 N. W. 890; Summers v. Metropolitan Life Ins. Co., 90 Mo. App. 691; Red River Val. Nat. Bank v. Monson [N. D.] 92 N. W. 807; Hutchins v. Missouri Pac. R. Co., 97 Mo. App. 548; Redhing v. Central R. Co. [N. J.] 54 Atl. 431; Mauk v. Brundage, 68 Ohio St. 89.

Striking out cured by other testimony to same effect. Caskey v. City of La Belle [Mo. App.] 74 S. W. 113.

Admitted testimony cured by later evidence. Conclusion followed by facts on which it was based. Sparks v. Galena Nat. Bank [Kan.] 74 Pac. 619. Admission of copy cured by proof of original. Braun v. Hothan, 84 N. Y. Supp. 8. Foundation made by later evidence. Hinote v. Brigman [Fla.] 33 So. 303; Kenniff v. Caulfield [Cal.] 73 Pac. 803; Hedlun v. Holy Terror Min. Co. [S. D.]

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evidence,[19] by instructions,[20] by taking the case from the jury,[21] by other corrective

92 N. W. 31. Object introduced on former trial since changed,—cure by identification. Storrie v. Grand Trunk Elevator Co. [Mich.] 96 N. W. 569. Hypothetical question to one allowed to later state his opinion on facts. Hamilton v. Mendota Coal & Min. Co. [Iowa] 94 N. W. 282.

Admitting deposition cured by calling witness to explain. Texas & P. R. Co. v. Watson, 23 Sup. Ct. [U. S.] 681.

The later evidence must prove the same facts (Jennings v. Supreme Council Loyal Additional Ben. Ass'n, 81 App. Div. [N. Y.] 76), or nullify effect of earlier (Rankin v. Sharples [Ill.] 69 N. E. 9). Exclusion of evidence that title was in person not cured by his denial of ownership. Leis v. Potter [Kan.] 74 Pac. 622.

The admission of improper questions will not necessarily require a reversal where followed immediately by questions on the same subject in proper form, though the practice is to be condemned. Sullivan v. Chicago, etc., R. Co. [Iowa] 93 N. W. 367.

Denial of leave to amend bad answers in **a statutory examination** of defendant later covered by proof. Southern R. Co. v. Shelton [Ala.] 34 So. 194.

Curing rulings on pleadings. Overruling plea proved false by pleader's own evidence. Dwyer v. Rohan [Mo. App.] 73 S. W. 384. Curing denial of motion to plead more specifically. Currie Fertilizer Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268.

Refusal of continuance cured by proof by other witnesses. Louisville & N. R. Co. v. Voss [Tenn.] 72 S. W. 983.

18. Lyons v. Berlau [Kan.] 73 Pac. 52; Houston Biscuit Co. v. Dial [Ala.] 33 So. 268; Curd v. Wissler [Iowa] 95 N. W. 266; Schlageter v. Gude, 30 Colo. 310, 70 Pac. 428; Varty v. Messmore [Mich.] 93 N. W. 611; Mauney v. Hamilton [N. C.] 43 S. E. 901.

Withdrawal held curative. M. Groh's Sons v. Groh [N. Y.] 68 N. E. 992.

Erroneous answer corrected by counsel. Styles v. Village of Decatur [Mich.] 91 N. W. 622.

By striking and instructing. Southern Ind. R. Co. v. Davis [Ind. App.] 68 N. E. 191.

Not cured by tardy exclusion. Gattis v. Kilgo, 131 N. C. 199. Not if strong impression has been produced. State v. Hill, 52 W. Va. 296. Acquiescing in request but failing to strike not curative. M. Groh's Sons v. Groh [N. Y.] 68 N. E. 992.

20. San Antonio Traction Co. v. Bryant [Tex. Civ. App.] 70 S. W. 1015. Curing amendment. Ladd v. Witte [Wis.] 92 N. W. 365.

Curing erroneous evidence. Buckman v. Missouri, etc., R. Co. [Mo. App.] 73 S. W. 270; Allington & Curtis Mfg. Co. v. Detroit Reduction Co. [Mich.] 95 N. W. 562; Vickborn v. Pollock [Mich.] 95 N. W. 576; Bonebrake v. Tauer [Kan.] 72 Pac. 521; Leavitt v. New England Telephone & Telegraph Co. [N. H.] 56 Atl. 462; Stone v. Boston & M. R. R. [N. H.] 55 Atl. 359; Frizzell v. Omaha St. R. Co. [C. C. A.] 124 Fed. 176; Sanders v. North End B. & L. Ass'n [Mo.] 77 S. W. 833, Walker v. Guthrie [Mo. App.] 76 S. W. 675; Taussig v. Wind [Mo. App.] 71 S. W. 1095; McCoy v. Munro, 76 App. Div. [N. Y.] 435; Dudley v. Duval, 29 Wash. 528, 70 Pac. 68; Guertin v. Town of Hudson, 71 N. H. 505; Hedlum v. Holy Terror Min. Co. [S. D.] 92 N. W. 31; Gulf, etc., R. Co. v. Cornell [Tex. Civ. App.] 69 S. W. 980; Butler v. Detroit, etc., R. Co. [Mich.] 92 N. W. 101; Gulf, etc., R. Co. v. Brown [Tex. Civ. App.] 76 S. W. 794; Birmingham R. & Elect. Co. v. Jackson [Ala.] 34 So. 994; Chicago, etc., R. Co. v. Buie [Tex. Civ. App.] 73 S. W. 853; Louisville & N. Terminal Co. v. Jacobs [Tenn.] 72 S. W. 954; Crow v. Metropolitan St. R. Co. [N. Y.] 66 N. E. 1106; Dunford v. Interurban St. R. Co., 84 N. Y. Supp. 865; Washington Life Ins. Co. v. Berwald [Tex. Civ. App.] 72 S. W. 436; M. Groh's Sons v. Groh, 80 App. Div. [N. Y.] 85.

Facts found under instruction submitting defenses made in overruled plea. Home Life Ins. Co. v. Fisher, 188 U. S. 726. Instructions given after failure to renew motion to strike. Wynn v. City of Yonkers, 80 App. Div. [N. Y.] 277. Hypothetical question too broad. Thomas v. Dabblemont [Ind. App.] 67 N. E. 463; Tipton Light, Heat & Power Co. v. Newcomer [Ind. App.] 67 N. E. 548. Evidence not cured. Moravec v. Grell, 78 App. Div. [N. Y.] 146, 12 N. Y. Ann. Cas. 294; Gulf, etc., R. Co. v. Ryon [Tex. Civ. App.] 72 S. W. 72; Brunnemer v. Cook & Bernheimer Co., 85 N. Y. Supp. 954; Moore v. Palmer [N. C.] 44 S. E. 673.

Curing other parts of charge. Birmingham Southern R. Co. v. Powell [Ala.] 33 So. 875; Fitzpatrick v. Union Traction Co. [Pa.] 55 Atl. 1050; Lackland v. Chicago & A. R. Co. [Mo. App.] 74 S. W. 505; Chicago City R. Co. v. Mead [Ill.] 69 N. E. 19; City of Macon v. Holcomb [Ill.] 69 N. E. 79; Hale v. Knapp [Mich.] 96 N. W. 1060; City of Lincoln v. Miller [Neb.] 96 N. W. 484; National Cash Register Co. v. Bonneville [Wis.] 96 N. W. 558; Montgomery v. Delaware Ins. Co. [S. C.] 45 S. E. 934; Mosaic Tile Co. v. Chiera [Mich.] 95 N. W. 537; Jacoby v. Stark [Ill.] 68 N. E. 557.

See also Instructions for rule that charge will be sustained if correct as an entirety and not misleading.

Explanation of charge. Donovan v. Weed, 83 N. Y. Supp. 682. Not cured where court reaffirmed the earlier error. Kelly v. United Traction Co., 85 N. Y. Supp. 433.

Attention should be called to previous charge. Morris v. Warlick [Ga.] 45 S. E. 407.

Not cured by subsequent charge. Sears v. Daly [Or.] 73 Pac. 5.

Curing erroneous remarks. James Curran Mfg. Co. v. Aultman & Taylor Mach. Co., 172 N. Y. 623; Perry v. Cobb [Ind. T.] 76 S. W. 289; Connolly v. Brooklyn Heights R. Co., 83 N. Y. Supp. 833; Sebeck v. Plattdeutsche Volksfest Verein [C. C. A.] 124 Fed. 11.

21. Curing erroneous remarks by judge. Smith v. Hopkins [C. C. A.] 120 Fed. 921.

Curing evidence. Badger Tel. Co. v. Wolf River Tel. Co. [Wis.] 97 N. W. 907; Goldschmidt v. Maier [Cal.] 73 Pac. 984. Rulings on evidence and requests to charge. Kansas City, etc., R. Co. v. Weeks [Ala.] 34 So. 16.

Curing overruling of demurrer. Life Assur. Co. of America v. Haughton [Ind. App.] 67 N. E. 950.

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rulings or proceedings,[22] by verdict or findings,[23] or by judgment,[24] or by a remittitur of damages.[25]

22. Curing denial of continuance. Richard v. Mouton, 109 La. 465. Denial of right of cross-examination cured by recalling. Cahill v. Applegarth [Md.] 56 Atl. 794. Admission of depositions against new party who had no notice cured by leave to take further proof. Kosmerl v. Mueller [Minn.] 97 N. W. 660. Denial of leave to amend answers on examination cured by striking out and being otherwise proved. Southern R. Co. v. Shelton [Ala.] 34 So. 194. Overruling plea in abatement and motion to strike which had been erroneously sustained against demurrer. Wulff v. Lindsay [Ariz.] 71 Pac. 963. Preliminary examination as to knowledge of "supposed" scene of an accident, cured by condition imposed on admitting evidence on issues. Schaefer v. City of Ashland [Wis.] 94 N. W. 303. Remarks cured by rebuke and instructions. Witzel v. Zuel [Minn.] 96 N. W. 1124.

Rulings cured by grant of new trial. Rembt v. Roehr Pub. Co., 71 App. Div. [N. Y.] 459.

Setting aside referee's report not cured by retrial on different facts. Neeley v. Roberts [S. D.] 95 N. W. 921.

23. Walden v. City of Jamestown, 79 App. Div. [N. Y.] 433, 12 N. Y. Ann. Cas. 313. Cure by eliminating issue to which rulings pertained. Washburn-Crosby Co. v. William Johnston & Co. [C. C. A.] 125 Fed. 273; Farley v. Missouri, etc., R. Co. [Tex. Civ. App.] 77 S. W. 1040.

Cure of rulings on the pleadings. On demurrers. Northrop v. Chase [Conn.] 56 Atl. 518; Parkhurst v. Swift [Ind. App.] 68 N. E. 620; Joy v. Liverpool, L. & G. Ins. Co. [Tex. Civ. App.] 74 S. W. 822; Wood v. Wack [Ind. App.] 67 N. E. 562; Skinner v. Hale [Conn.] 56 Atl. 524; Romy v. State [Ind. App.] 67 N. E. 998; Consolidated Stone Co. v. Morgan [Ind.] 66 N. E. 696.

Refusal to strike counterclaim found against by court. Dwyer v. Rohan [Mo. App.] 73 S. W. 384.

Amendments. Clark v. Brooklyn Heights R. Co., 78 App. Div. [N. Y.] 478, 12 N. Y. Ann. Cas. 333.

Irrelevancy in pleadings cured. Missouri, etc., R. Co. v. McGehee [Tex. Civ. App.] 75 S. W. 841.

Curing exclusion of evidence. Union Traction Co. v. Barnett [Ind. App.] 67 N. E. 205; Riley v. Bell [Iowa] 95 N. W. 170; Hamilton v. Michigan Cent. R. Co. [Mich.] 97 N. W. 392; Union Casualty & Surety Co. v. Goddard [Ky.] 76 S. W. 832; Stevens v. Beardsley [Mich.] 96 N. W. 571; Morse, Williams & Co. v. Puffer, 182 Mass. 423; Deuterman v. Pollock, 172 N. Y. 595; Hart v. Tuite, 75 App. Div. [N. Y.] 323. Curing rejection of evidence by finding nonexistence of that to which it related. Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 27 Mont. 288, 70 Pac. 1114.

Admitted evidence cured. Garr v. Cranney [Utah] 70 Pac. 853; N. & M. Friedman Co. v. Atlas Assur. Co. [Mich.] 94 N. W. 757; O'Brien v. Kluver [Neb.] 94 N. W. 595; Mosher Mfg. Co. v. Texas Contract Co. [Tex. Civ. App.] 74 S. W. 597; Wisconsin Farm Land Co. v. Bullard [Wis.] 96 N. W. 833; South Covington, etc., R. Co. v. McHugh [Ky.] 77 S. W. 202; Harper v. Marion County [Tex. Civ. App.] 77 S. W. 1044; Staggenborg v. Staggenborg [Ky.] 77 S. W. 173. Evidence going to damages cured by nominal verdict. Shroyer v. Campbell [Ind. App.] 67 N. E. 193. Unqualified opinions as to value of services,—award too small to have been affected. Cunningham v. Hewitt, 81 N. Y. Supp. 1102. Evidence of limitations not entering into findings based solely on evidence of boundary. Brown v. Johnson [Tex. Civ. App.] 73 S. W. 49.

Curing personal inspection by jurors. Gans v. Metropolitan St. R. Co., 84 N. Y. Supp. 914.

Curing errors in charge. Pferdmenges, Preyer & Co. v. Butler, Stevens & Co. [Ga.] 43 S. E. 695; Ball v. Gussenhoven [Mont.] 74 Pac. 871; Central of Georgia R. Co. v. Stancel [Ga.] 44 S. E. 975; Joines v. Johnson [N. C.] 45 S. E. 828; Johnson v. Franklin [Tex. Civ. App.] 76 S. W. 611; Cabell v. McKinney [Ind. App.] 68 N. E. 601; Rankin v. Sharples [Ill.] 69 N. E. 9; Mountain v. Day [Minn.] 97 N. W. 883; Koch v. Bamford Bros. Silk Mfg. Co. [N. J.] 55 Atl. 271; Southern Indiana R. Co. v. Davis [Ind. App.] 68 N. E. 191; Petteway v. McIntyre, 131 N. C. 432; Jones v. Kansas City, etc., R. Co. [Mo.] 77 S. W. 890; Leidigh v. Keever [Neb.] 97 N. W. 801; Gatzmeyer v. Peterson [Neb.] 94 N. W. 974; Dornbrook v. M. Rumely Co. [Wis.] 97 N. W. 493; Blackwell v. Farmers' & Merchants' Nat. Bank [Tex. Civ. App.] 76 S. W. 454; Zimmerman v. Denver Consol. Tramway Co. [Colo. App.] 72 Pac. 607; New Omaha Thomson-Houston Elect. Light Co. v. Dent [Neb.] 94 N. W. 819; Meyer v. Baird [Iowa] 94 N. W. 1129; Crafts v. Carr, 24 R. I. 397, 60 L. R. A. 128; Kean v. Schoening [Mo. App.] 77 S. W. 335; Moore v. Lindell R. Co. [Mo.] 75 S. W. 672; Nelson v. Cal Hirsch & Sons' Iron & Rail Co. [Mo. App.] 77 S. W. 590; McDermott v. St. Wilhelmina Benev. Aid Soc. [R. I.] 54 Atl. 58; Denison & S. R. Co. v. Randell [Tex. Civ. App.] 69 S. W. 1013; Hurst v. Benson [Tex. Civ. App.] 71 S. W. 417; International, etc., R. Co. v. Lister [Tex. Civ. App.] 72 S. W. 107; Dale v. Southern R. Co. [N. C.] 44 S. E. 399; Johnston v. Kleinsmith [Tex. Civ. App.] 77 S. W. 36; In re Hathaway's Will [Vt.] 53 Atl. 996; Meyer v. Milwaukee Elect. R. & Light Co. [Wis.] 93 N. W. 6; Davis v. Huber Mfg. Co. [Iowa] 93 N. W. 78; Indianapolis St. R. Co. v. Hockett, 159 Ind. 677; Chicago, etc., R. Co. v. Linn, 30 Ind. App. 88; Purcell v. Chicago & N. W. R. Co., 117 Iowa, 667; Murphy v. St. Louis Transit Co. [Mo. App.] 70 S. W. 159; Krepp v. St. Louis, etc., R. Co. [Mo. App.] 72 S. W. 479; Crossen v. Grandy, 42 Or. 282, 70 Pac. 906; Wetzstein v. Largey, 27 Mont. 212, 70 Pac. 717; Gordon v. Sullivan [Wis.] 93 N. W. 457; Connecticut Fire Ins. Co. v. Clark, 24 Ohio Circ. R. 33; Peterson v. Wadley, etc., R. Co. [Ga.] 43 S. E. 713; Clear Creek Stone Co. v. Dearmin [Ind.] 66 N. E. 609; Kentucky Distilleries & Warehouse Co. v. Schreiber, 24 Ky. L. R. 2236, 73 S. W. 769; Louisville & N. R. Co. v. Crady, 24 Ky. L. R. 2339, 73 S. W. 1126; Love v. Love [Mo. App.] 73 S. W. 255; Noll v. St. Louis Transit Co. [Mo. App.] 73 S. W. 907. Verdict was expressly based on

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HEALTH.[26]

§ 1. Health and Sanitary Regulations (173). | § 2. Health Officers (176).

§ 1. *Health and sanitary regulations. Power to adopt measures for public health.*—Legislative regulation of the length of hours of labor in industries not considered healthful is justified under the police power,[27] as are provisions for the licensing of barbers,[28] or requiring locomotive firemen to prevent the escape of smoke from their locomotives.[29]

A city under a power to regulate the removal and disposition of garbage and refuse has power to grant an exclusive right for a term of years to those erecting a crematory.[30] A board of health cannot prohibit the collection of refuse from a sanitarium for consumptives, where it is not shown that such refuse is more dangerous to health than from hotels or other public houses.[31]

Precautions against contagious diseases.—A Christian Science healer is not regarded as a physician required to report contagious diseases.[32] Authority conferred by the state on local governments to adopt rules and regulations for preservation of health must be exercised in the manner prescribed.[33]

Vaccination.[34]—Laws requiring compulsory vaccination of school children are regarded as valid exercises of the police power.[35]

unobjectionable instructions. First Nat. Bank v. San Antonio, etc., R. Co. [Tex. Sup.] 77 S. W. 410. Wrong charge on burden of proof of issue found for objector. Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co. [C. C. A.] 121 Fed. 524; Indianapolis St. R. Co. v. Brown [Ind. App.] 69 N. E. 407. Disregard of erroneous charge. Stoner v. Mau [Wyo.] 72 Pac. 193.

Curing refusal to charge. Orient Ins. Co. v. Leonard [C. C. A.] 120 Fed. 808.

By adverse verdict on merits. Halley v. Tichenor [Iowa] 94 N. W. 472; Chicago, etc., R. Co. v. Lee [Kan.] 72 Pac. 266; Anderson v. McDonald [Wash.] 71 Pac. 1037.

Cure of refusal to take case from jury. National Revere Bank v. National Bank of Republic, 172 N. Y. 102; Northern Electrical Mfg. Co. v. H. M. Benjamin Coal Co. [Wis.] 92 N. W. 553.

General charge cured by verdict. Danner v. Crew [Ala.] 34 So. 822.

Curing special interrogatories not peremptory in requiring "yes" or "no." Chicago, etc., R. Co. v. Rains, 203 Ill. 417.

Curing other findings. Wagoner v. Silva [Cal.] 73 Pac. 433.

Refusal to transfer cause to equity cured by correct verdict. Darnall v. Jones' Ex'rs, 24 Ky. L. R. 2090, 72 S. W. 1108.

24. Bad instructions in equitable action, the verdict having been disregarded. Halstead v. Coen [Ind. App.] 67 N. E. 957; Dowie v. Driscoll [Ill.] 68 N. E. 56. Ruling or answer cured by accepting consent decree. Town of Bristol v. Bristol & Warren Waterworks [R. I.] 55 Atl. 710. Curing evidence. Price v. Oatman [Tex. Civ. App.] 77 S. W. 258. Refusal to require cost bond from successful plaintiff. Good Eye Min. Co. v. Robinson [Kan.] 73 Pac. 102. Delay in entering judgment cured short time to plead. Second Nat. Bank v. Ralphsnyder [W. Va.] 46 S. E. 206. Curing refusal to strike prayer for improper relief. Baum v. Corsicana Nat. Bank [Tex. Civ. App.] 75 S. W. 863. Statement that evidence was not considered is not curative. Robinson v. New York El. R. Co., 175 N. Y. 219.

25. White v. Glover [Tex. Civ. App.] 71 S. W. 319. The remittitur was necessitated for other reasons. Herpolsheimer v. Funke [Neb.] 95 N. W. 688. Voluntary remittitur. Gulf, etc., R. Co. v. O'Neill [Tex. Civ. App.] 74 S. W. 960. Error in failing to limit amount of recovery cured by remittitur. Missouri, etc., R. Co. v. Pawkett [Tex. Civ. App.] 68 S. W. 323.

26. See Medicine and Surgery; Cemeteries; Food.

27. Eight hours a day for all working men in mines, smelters and mills for the reduction of ores [Act Feb. 23, 1903, St. 1903, p. 33, c. 10] In re Boyce [Nev.] 75 Pac. 1.

28. Laws 1901, p. 349, c. 172. State v. Sharpless, 31 Wash. 191, 71 Pac. 737.

29. People v. Horton, 41 Misc. (N. Y.) 309.

30. Such right may be protected by injunction. California Reduction Co. v. Sanitary Reduction Works [C. C. A.] 126 Fed. 29.

31. People v. Van Fradenburgh, 81 App. Div. (N. Y.) 259.

32. Rev. St. 1899, §§ 8507, 8515, 8517, Kansas City Ordinance, § 95. Kansas City v. Baird, 92 Mo. App. 204. Evidence held insufficient to show knowledge of a Christian Scientist that a person he was treating suffered from a contagious disease which he was bound to report. Kansas City v. Baird, 92 Mo. App. 204.

33. A local board of health cannot enforce a quarantine in Iowa, without written notice of the existence of disease given by a physician. [Act 24, Gen. Assembly, c. 59, Code, § 2568]. State v. Kirby [Iowa] 94 N. W. 254. Where notice of quarantine is not given to the mayor, one who violates such quarantine cannot be convicted of a violation of the quarantine statute. Id.

34. In an action for refusal to suffer vaccination, medical history of individual cases of vaccination is inadmissible to show injurious effect. Commonwealth v. Pear

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Taking of property and compensation.—The owner of one-half of a double house cannot recover against the owner of the other half for loss of lateral support where such half is torn down by the other under order of the board of health.[36] In the absence of a statute imposing liability, a municipality is not liable for damages in enforcing health ordinances,[37] but the health officers personally may be,[38] as where they act under a void ordinance.[39] A board of health may abate a cause of sickness without hearing, though it necessitates the destruction of private property.[40]

Punishment and prevention of violation of regulations.[41]—Where statutes make separate provision against drainage into the stream, and against maintenance of structures producing such drainage, the penalty provided for one cannot be applied to the other.[42]

Care of contagion.—The establishment of a pest house within statutory limits from a city has been held the proximate cause of injuries sustained by one visiting a family resident near the pest house, and contracting smallpox from a member thereof who has been infected from the pest house.[43]

The fact that a board of health has assumed control of an infected railroad train, and the company has complied with the direction of the board, may relieve the company from liability for diseases communicated subsequently.[44] Where, by failure to appoint a successor to a county physician, the county necessitates an employer's furnishing supplies for medical attendance, etc., to his employes who have been quarantined, it becomes liable to him for the expense incurred.[45] A town is liable for services and expenses incurred at the direction of a town health officer in taking charge of quarantined premises in which are smallpox patients.[46]

By statute, the county may be liable to townships for necessary quarantine expenses and for medical treatment,[47] or to cities.[48] To render the county liable

[Mass.] 66 N. E. 719. Reasons dependent on defendant's personal opinion are irrelevant. Id.

35. Viemeister v. White, 84 N. Y. Supp. 712. Though compliance is made a condition for attendance on the public school, they do not infringe on individual rights or deny equal protection of the laws and the fact that the constitution provides for the maintenance of public schools does not confer a constitutional right of education which the legislature cannot regulate by requiring vaccination as a condition for attendance. Id. And see note, p. 176, post.

36. It will be presumed that the order was valid and the work need not have been done by the servant of the board of health. St. 1897, c. 219, providing for the destruction of buildings dangerous to health. McKenna v. Eaton, 182 Mass. 346.

37. Precautions against spread of smallpox. Village of Verdon v. Bowman [Neb.] 97 N. W. 229. A municipal corporation is not liable for property mistakenly destroyed by health officers. Lowe v. Conroy [Wis.] 97 N. W. 942.

38. Lowe v. Conroy [Wis.] 97 N. W. 942.

39. Evidence held sufficient to show destruction of property under authorization of health officer. Lowe v. Conroy [Wis.] 97 N. W. 942.

40. Hides and beef destroyed on the ground that it was infected with anthrax [Rev. St. 1898, §§ 1411, 1412, 1414]. Lowe v. Conroy [Wis.] 97 N. W. 942.

41. Jurisdiction of the municipal court of New York of an action for violation of orders of the health department is not divested by the fact that the action is not brought in the district where the violation occurred and a removal must be demanded on or before joinder of issues [Laws 1902, p. 1497, c. 580, § 25, subds. 4 and 5]. Department of Health of N. Y. v. Halpin, 40 Misc. (N. Y.) 243.

42. Under Act March 24, 1897, the only jurisdiction of the court of equity is to abate the structure complained of and a preliminary injunction against a flow of sewerage cannot be awarded. Board of Health of Paterson v. City of Summit [N. J. Eq.] 56 Atl. 125.

43. Evidence held to show that plaintiff was contributorily negligent. Henderson v. O'Haloran, 24 Ky. L. R. 995, 70 S. W. 662, 59 L. R. A. 718.

44. Smallpox contracted some six weeks after the assumption of control. Mason v. Ill. Cent. R. Co. [Ky.] 77 S. W. 375.

45. Sayles' Ann. Civ. St. art. 4340, provides that the county physician may be directed by the commissioners' court to declare and maintain a quarantine and furnish supplies to those confined at the expense of the county. King County v. Mitchell [Tex. Civ. App.] 71 S. W. 610.

46. Keefe v. Town of Union [Conn.] 56 Atl. 571.

47. Gen. St. § 7059. Town of Louriston v. Board of Com'rs [Minn.] 98 N. W. 1053. Provisions for re-payment to township board of health of expenses incurred as to contagious diseases, do not cover a voluntary donation to a physician for care of smallpox patient

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for persons employed by a city board of health in relation to a pest house, the county must have notice of employment.[49]

Statutes imposing liability on the county for village expenditures in controlling contagious diseases are not retroactive as to bills actually paid and adjusted before its enactment.[50] The county may be bound in the absence of statutes to the contrary, though the contract does not appear on the proceedings of the county board of health.[51]

Recovery is usually allowable only where not to be had against the individuals in whose care expenses are incurred.[52] Failure to pay quarantine expenses does not render the person quarantined a public charge in the sense that recovery over may be had from the county of his last settlement.[53]

Allowance and payment of claims.—A township board of health need not keep, in a book of its own, an account of items furnished each person, if it is able to render the itemized and separate statement required.[54] Statutes providing that the necessary expenses of town health officers shall be paid by the county treasurer on approval of their bill by the county health officer do not require that bills for services rendered at the direction of the health officer must be paid by him or that they should be paid only when approved by the county health officer.[55] In Oklahoma, the county board of health must audit and allow or reject, or modify and adjust, accounts against the county incurred in the discharge of its duty or of its members, and then certify them for payment to the board of county commissioners.[56] The commissioners can act only on the certification of the board of health, and not on certification by individual members, and the proceedings of the board cannot be shown by parol evidence where the record is not destroyed.[57] Where the county is made liable for expenses of quarantine, an allowance by a township board of health is binding on the board of supervisors of the county as to the character of the disease, the necessity and fitness of the articles furnished and rendered, as well as the fact that they were furnished.[58] An action against the county to recover expenditure in caring for quarantined

in addition to his charges. [Comp. Laws 1897, § 4424]. Village of Durand v. Board of Sup'rs [Mich.] 93 N. W. 1074.

48. Where the county physician refused to attend a person suffering with a contagious disease, expense incurred by a city health officer may be recovered against the county, or additional salary paid an inspector for extra services in locating and controlling contagion under Laws 1902, c. 29, § 29. Mankato v. Blue Earth County, 87 Minn. 425. The county is not liable for compensation of persons employed by a city health board to disinfect the premises and effects of persons quarantined for smallpox. [Code, §§ 1034, 1037, 1040, 1041]. Schmidt v. Muscatine County [Iowa] 94 N. W. 479. A statute conferring power on county boards of health to quarantine for contagious diseases, renders the county liable for expenses though the quarantine is ordered by the town council at the direction of the board. Bardstown v. Nelson County, 25 Ky. L. R. 1478, 78 S. W. 169.

49. Schmidt v. Muscatine County [Iowa] 94 N. W. 479.

50. Village of Lake Crystal v. Board of Com'rs [Minn.] 97 N. W. 888.

51. Bardstown v. Nelson County, 25 Ky. L. R. 1478, 78 S. W. 169.

52. A physician can recover against the county only for services rendered and furnished to indigent persons and for services and general supervision rendered by him necessary to quarantine, and keep smallpox under control, and for attention to persons quarantined. Hudgins v. Carter County, 24 Ky. L. R. 1980, 72 S. W. 730. A physician caring for a smallpox hospital at direction of the city board of health, cannot recover against the county unless it is shown that the patients or those liable for their support, were unable to pay. Walker v. Boone County [Iowa] 97 N. W. 1077. Allowance by the township board is conclusive as to the inability of the patient to pay. Cedar Creek Tp. v. Board of Sup'rs [Mich.] 97 N. W. 409.

53. Town of Louriston v. Board of Com'rs [Minn.] 93 N. W. 1053. Evidence held sufficient to authorize a recovery by a physician against an individual for services in a smallpox case as against a contention by defendant that he thought the city was assuming liability therefor. Smith v. Hobbs [Ga.] 45 S. E. 963.

54. Cedar Creek Tp. v. Board of Sup'rs [Mich.] 97 N. W. 409.

55. Gen. St. 1902, § 2522. Keefe v. Town of Union [Conn.] 56 Atl. 571.

56, 57. Cooke v. Board of Com'rs [Okl.] 73 Pac. 270.

58. Comp. Laws, § 4424. Cedar Creek Tp. v. Board of Sup'rs [Mich.] 97 N. W. 409.

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persons is not similar to actions on account in which the account cannot be controverted, unless denied in a previously filed affidavit.[59] Objection that the petition does not allege that articles furnished were absolutely essential must be taken by special exception.[60]

§ 2. *Health officers.*[61]—Under the Greater New York charter, the coroner may appoint a coroner's physician, whose term of office is identical with that of the coroner.[62] After the abolition of the coroner's office, the physician is not eligible to the civil service preferred list of suspended employes.[63] A statute substituting for town boards of health, a physician appointed by the judge of the superior court, does not abrogate previous statutes binding towns to take such measures as are necessary to prevent the spread of diseases.[64]

Sanitary inspectors, under the Greater New York charter, are officers entitled to salary, though temporarily prevented from performing their duty.[65] Where it is provided that the salary of a health officer is to be fixed by the board of supervisors, the officer cannot sue on a quantum meruit.[66]

The general rule which prohibits a member of a board or council from employing or contracting with one of the members does not apply to boards of health, and it is within the power of such board to employ a member, a physician, to care for persons affected with contagious diseases.[67] A board of health under authority to make necessary by-laws may enact a by-law authorizing its secretary to employ a physician for attendance on smallpox patients.[68] Such physician may recover reasonable compensation if there are no regulations as to charges, and such compensation is not affected by an attempt by the board of health to fix the amount after the services are rendered.[69] The amount previously paid others by the town for similar services cannot be shown.[70]

59. The county may be allowed to cross-examine as to items of expense [Rev. St. art. 2266]. King County v. Mitchell [Tex. Civ. App.] 71 S. W. 610.

60. King County v. Mitchell [Tex. Civ. App.] 71 S. W. 610.

61. Rev. St. §§ 2115, 2140, relative to the appointment of health officers, and for payment of expenses of board of health, are mandatory. State v. City of Massillon, 24 Ohio Cir. Ct. R. 249.

For the accomplishment of a public object such as the preservation of public health and preventing the spread of diseases, the legislature may itself appoint or direct the appointment of town health officers, and impose the necessary expenses of such officers incurred in the performance of their duties on the municipalities for which they are respectively appointed. Keefe v. Town of Union [Conn.] 56 Atl. 571.

62. Consol. Act, § 1769 (Laws 1882, c. 410) Greater New York, § 1571, as amended by Laws 1901, c. 466. People v. Goldenkranz, 38 Misc. (N. Y.) 682.

63. People v. Goldenkranz, 38 Misc. [N. Y.] 682.

64. Keefe v. Town of Union [Conn.] 56 Atl. 571.

65. A sanitary inspector of a village, at the time of consolidation, who was not assigned to service in any of the departments during a period of five months continued to hold his position during such time. Stoddard v. City of N. Y., 80 App. Div. (N. Y.) 254.

66. Yandell v. Madison County [Miss.] 32 So. 918.

67. Appeal of Board of Health [Minn.] 95 N. W. 221. The health officer may be allowed compensation for his services in attending patients, by the board of which he is a member and though he participates in its allowance. Cedar Creek Tp. v. Board of Sup'rs [Mich.] 97 N. W. 409.

68, 69, 70. Clement v. City of Lewiston, 97 Me. 95.

Note—Vaccination: A board of health may be empowered to require vaccination (State v. Hay, 126 N. C. 999, 78 Am. St. Rep. 691; State v. Board of Education, 21 Utah, 401; Matter of Rebenack, 62 Mo. App. 8), and may without express authority, require it as prerequisite to attendance at school (State v. Board of Education, 21 Utah, 401; but see State v. Burdge, 95 Wis. 390, 60 Am. St. Rep. 123), but only where there is an epidemic of smallpox in the city (Lawbaugh v. Board of Education, 177 Ill. 572; School Directors v. Breen, 60 Ill. App. 201; Potts v. Breen, 167 Ill. 67). A condition of health rendering vaccination dangerous is a defense to a prosecution for failure to obey a regulation requiring it. State v. Hay, 126 N. C. 999, 78 Am. St. Rep. 691. Only a person who is infected or has been exposed may be quarantined for refusal to be vaccinated. Matter of Smith, 146 N. Y. 68, 48 Am. St. Rep. 769. From note to Blue v. Beach, 80 Am. St. Rep. 195. The constitutionality of compulsory vaccination laws was first upheld in Morris v. City of Columbus, 42 L. R. A. 175. Regulations requiring vaccination of school children have also been upheld in Duffield v. School District, 162 Pa. 476, reported with note 25 L. R. A. 152, and State v. Zimmerman [Minn.] 90 N. W. 783. The doctrine that the existence of an epidemic is necessary to the validity of such a regulation was denied in Bissell v. Davison, 65 Conn. 183, 29 L. R. A. 251.

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HIGHWAYS AND STREETS.

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§ 1. *Definitions and classifications.*—In popular but not technical use, highways are rural and streets are urban thoroughfares,[71] and in some limited senses a private way may be included in the meaning.[72] Where a country road is taken into a city by annexation, it becomes a city street without formal action,[73] but the extension of the territorial limits of a city to include a turnpike will not deprive its owner of his rights therein.[74]

§ 2. *Establishment by dedication, prescription, or user.*—Dedication and acceptance by the public must concur,[75] though where a highway is established by the state no acceptance is necessary.[76]

No declaration, oral or written, is necessary to dedicate a street. Such an intention may be established in any way by which it may be made manifest. A survey and plat may be alone sufficient.[77] The intention must, however, clearly appear either from declarations or circumstances.[78]

71. The word "highway" or "road" in its popular sense includes all public traveled ways, whether county or town ways. Clark v. Hull [Mass.] 68 N. E. 60. In Texas a public road or highway is one to which the commissioner's court has assigned hands to work, and the hands so assigned have worked; and the public use as such. Torno v. State [Tex. Cr. App.] 75 S. W. 500.

A highway is a passage road or street which every citizen has a right to use (3 Yeates, 421; 16 Mass. 33). "Highway" is generic for all public ways, whether carriage ways, bridle ways, foot ways, bridges, railroads, canals, or navigable rivers. Cyc. Law Dict. "Highways."

A street is a public highway in a city or village. Cyc. Law Dict., "Street," citing 4 Serg. & R. [Pa.] 106; 11 Barb. [N. Y.] 399.

72. Whether or not a private way used by many people is a street within the meaning of an ordinance regulating the conduct of railways at street crossings was held to be a question for the jury. Pittsburg, etc., R. Co. v. Robson [Ill.] 68 N. E. 468. A street located on the campus of a university, and on ground owned and controlled by the university, the use of which by the public has not been inconsistent with the university's private ownership, is not a public street. Bolster v. Ithaca St. R. Co., 79 App. Div. [N. Y.] 239.

73. City of Louisville v. Brewer's Adm'r, 24 Ky. L. R. 1671, 72 S. W. 9.

74. Columbia & Cedar Creek Turnpike Co. v. Vivion [Mo. App.] 77 S. W. 89.

75. Use for statutory period by public makes no highway (Postal v. Martin [Neb.] 95 N. W. 8), though a map was made deliminating a street at such point, there having been no public work ever done and the strip having been fenced much of the time (Loughman v. Long Island R. Co., 83 App. Div. [N. Y.] 629). Mere acceptance of the plat and inclusion of the territory within the city limits is not an acceptance, and selling platted lots does not create a highway. Russell v. Chicago & M. Elect. R. Co., 205 Ill. 155. Compare Village of Lee v. Harris [Ill.] 69 N. E. 230.

76. Knowles v. Knowles [R. I.] 55 Atl. 755.

77. Village of Lee v. Harris [Ill.] 69 N. E. 230; Blennerhassett v. Town of Forest City, 117 Iowa, 680; Oregon City v. Oregon & C. R. Co. [Or.] 74 Pac. 924; Roberts v. Matthews, 137 Ala. 523; Wright v. Oberlin, 23 Ohio Circ. R. 509; Price v. Stratton [Fla.] 33 So. 644. Defects in plat held cured by Comp. St. art. 1, c. 14, § 115. Bellevue Imp. Co. v.

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An ordinance requiring that plats be submitted to the city engineer for approval before approval by the council is valid.[79]

The acceptance need not be express or formal.[80] It may be affirmed if defective,[81] and presumptively goes to the entire plat.[82] A dedication once accepted by the public cannot be retracted.[83]

To establish a highway by perscription, there must be user by the general public, under a claim of right, which is adverse to the occupancy of the owner of the land, of some particular or defined way or track uninterruptedly, without substantial change, for a period of time necessary to bar an action for the recovery of the land.[84] Such a use, it is said, confers a permanent easement on the public, and presumes a dedication;[85] but the use of a strip of land as a private road cannot convert it into a public highway[86] even if the owners allow the public to travel over it.[87] Nor

Kayser [Neb.] 95 N. W. 499. The grantee in a deed of a way "subject to a gate" has no such title as will empower him to dedicate the way to public use. Inhabitants of South Berwick v. York County Com'rs [Me.] 56 Atl. 623.

Statutory formalities necessary to recordation, proper execution and acknowledgment of dedicatory plats, see Dedication, 1 Curr. Law, p. 904.

78. Langan v. Whalen [Neb.] 93 N. W. 393; Guttery v. Glenn, 201 Ill. 275. Lacking which mere use by the public cannot supply a title or serve the basis of prescription. Lawson v. Shreveport Waterworks Co. [La.] 35 So. 390. Grantee's stipulation to keep open a road suffices. Id. Dedication of easement for toll road inferred from use by dedicators without charge. Halley v. Scott County Fiscal Court, 25 Ky. L. R. 1471, 78 S. W. 149. Platted "levee" held to have been dedicated for street use in view of absence of other access to abutting lots and connection with streets. McAlpine v. Chicago, G. W. R. Co. [Kan.] 75 Pac. 73. Evidence of dedication. City of Corsicana v. Anderson [Tex. Civ. App.] 78 S. W. 261.

79. Hillman v. City of Seattle [Wash.] 73 Pac. 791. But a proprietor is entitled to approval of his plat though he does not dedicate proposed streets to the public. Owen v. Moreland [Mich.] 93 N. W. 1068.

80. Such acts will estop the grantor and his successors in title from denying purchasers their easement therein (Corning & Co. v. Woolner [Ill.] 69 N. E. 53; Driscoll v. Smith [Mass.] 68 N. E. 210; Wright v. Williams, 25 Ky. L. R. 1377, 77 S. W. 1128), and use (Riley v. Buchanan, 25 Ky. L. R. 863, 76 S. W. 527), and improvement by the public are an acceptance (Oregon City v. Oregon & C. R. Co. [Or.] 74 Pac. 924; R. B. Park & Co. v. Orth, 24 Ky. L. R. 2209, 73 S. W. 1015). A stipulation in a deed that the grantee will keep open a certain road in use by the public is to be taken as for the public benefit, and the public assent to it is signified by its continuous use of the road. Lawson v. Shreveport Waterworks Co. [La.] 35 So. 390.

Evidence held sufficient to show acceptance of plat by city. Johnson v. City of St. Joseph, 96 Mo. App. 663.

81. Acceptance of streets platted by disseisor is affirmed by continuing to work streets after rightful owner regains possession and adopts dedication. City of Corsicana v. Anderson [Tex. Civ. App.] 78 S. W. 261.

82. Acceptance of some of the streets and alleys on a plat is an acceptance of the entire system unless an intention to limit the acceptance is shown. Village of Lee v. Harris [Ill.] 69 N. E. 230. Compare Russell v. Chicago, etc., R. Co., 205 Ill. 155.

83. Pence v. Bryant [W. Va.] 46 S. E. 275.

84. Gehris v. Fuhrman [Neb.] 94 N. W. 133; Horn v. Williamson [Neb.] 96 N. W. 178. Interrupted use not sufficient. Postal v. Martin [Neb.] 95 N. W. 8.

85. Riley v. Buchanan, 25 Ky. L. R. 863, 76 S. W. 527; City of Cedar Rapids v. Young, 119 Iowa, 552; Postal v. Martin [Neb.] 95 N. W. 8; Rhodes v. Halverson [Wis.] 97 N. W. 514; Hartley v. Vermillion [Cal.] 74 Pac. 987; Porter v. Clinton, 24 Ky. L. R. 2435, 74 S. W. 232. Evidence of existence of highway by prescription or dedication before St. 1846, p. 137, c. 203 held sufficient to go to jury. Clark v. Hall [Mass.] 68 N. E. 60. So if the land be a school section and owned by the state. Wallowa County v. Wade [Or.] 72 Pac. 793. A passageway leading to a spring and the spring itself having been used by a community for 75 years, and both repaired from time to time by the public, will be presumed to have been dedicated. Larkin v. Ryan, 25 Ky. L. R. 613, 76 S. W. 168. That a highway between two lines of fences was open for generations and used by the public is sufficient proof of user. Town of Smithtown v. Ely, 75 App. Div. [N. Y.] 309. Where the city had paved and repaved a certain way, and assessed the expense in part to the abutting owners, and the public had used it for more than 40 years, it was held to be a public street though no record, plat or express dedication of it could be shown. Donohugh v. Lister [Pa.] 55 Atl. 23. User extends to the full width of the highway as fenced. Town of Smithtown v. Ely, 75 App. Div. [N. Y.] 309, 11 Ann. Cas. 459.

86. 1 Rev. St. [9th Ed.] p. 704, § 100. Culver v. City of Yonkers, 80 App. Div. [N. Y.] 309.

87. Hamilton v. Village of Owego, 42 App. Div. [N. Y.] 312; Hartley v. Vermillion [Cal.] 70 Pac. 273. A private way to a private ferry. Stickley v. Sodus Tp. [Mich.] 91 N. W. 745, 59 L. R. A. 287. Where a railroad company in fulfilling its duty to one who owned land on both sides of its road built and maintained a planked crossing for him, the use thereof by the public generally

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will such use authorize the city to accept and lay it out as such as though it had been dedicated.[88] The passing over a part of an open common will not convert that part into a public highway.[89] Such acts as would establish a way by prescription over the lands of a private person are sufficient.[90]

Legislative dedication in the public domain.—The rule that a highway cannot be established by prescription as against the government has no application to any portion of the public domain within the act of congress giving a right of way for highways.[91] Such act is a present grant, which when accepted by the public establishes a highway.[92] A state statute declaring that in counties containing public lands, section lines shall be public highways, is an acceptance of the grant so that purchasers of such lands take them subject to the easement.[93]

§ 3. *Establishment by statutory proceedings.*[94]—The power of municipal officers to establish new roads must be found in the statutes.[95]

Occasion or necessity for road; objections.—To justify laying out a road, it must be shown to be necessary or at least useful to the public.[96]

A turnpike company has no standing to oppose the laying out of a necessary road merely because it parallels its road and will reduce its tolls.[97] A crop of timothy on the land is no ground for a perpetual injunction against laying out a road,[98] and that a proposed street crosses railroad tracks is not of itself sufficient to defeat the opening of the street and the appropriation of the company's land therefor.[99]

Location.—In many states, provision is made for highways along county and town lines.[1]

Though an application is necessary, the description therein does not ordinarily conclude the locating power which may lay out the road between the same termini over any other route,[2] and one who consents to the route as reported cannot object

would not make it a public way. Marino v. Central R. Co. of N. J. [N. J. Sup.] 56 Atl. 306.

88. Laws 1895, c. 635, tit. 7, § 26. Culver v. City of Yonkers, 80 App. Div. [N. Y.] 309.

89. McKay v. Town of Reading [Mass.] 68 N. E. 43. Whether or not a certain street crossed a public square shown on the plat was held to be a question of intent on the part of the original proprietor. Guttery v. Glenn, 201 Ill. 275.

90. Wallowa County v. Wade [Or.] 72 Pac. 793; Board of Com'rs of Weld County v. Ingram [Colo.] 73 Pac. 37.

91. 14 Stat. 253, c. 263; Rev. St. U. S., § 2477, U. S. Comp. St. 1901, p. 1567. Great Northern R. Co. v. Town of Viborg [S. D.] 97 N. W. 6. Highway by prescription over school section. Wallowa County v. Wade [Or.] 72 Pac. 793.

92, 93. Rev. St. U. S., § 2477; U. S. Comp. St. 1901, p. 1567. Tholl v. Koles, 65 Kan. 802, 70 Pac. 881.

94. See generally Eminent Domain, 1 Curr. Law, p. 1002.

95. The authority granted to the board of railroad commissioners in New Hampshire to change the location of highways to avoid railroad crossings does not authorize them to lay out a new road to a railway station made necessary by such change. Leighton v. Concord & M. R. R. [N. H.] 55 Atl. 938.

96. Evidence admissible on question of necessity and utility. Angell v. Hornbeck [Ind. App.] 67 N. E. 237. Necessity of road held supported by evidence. Johnson v. Hanson [Neb.] 95 N. W. 704.

97. In re Road in Greene & Guilford Tps., 21 Pa. Super. Ct. 418.

98. Seafield v. Bohne, 169 Mo. 537.

99. Pittsburgh, etc., R. Co. v. Town of Wolcott [Ind.] 69 N. E. 451. See, also, Great Northern R. Co. v. Town of Viborg [S. D.] 97 N. W. 6; In re Road in Greene & Guilford Tps., 21 Pa. Super. Ct. 418.

1. Burns' Rev. St. 1901, § 6792 et seq., providing for county line highways held not repealed by Id., § 6914 et seq. on the same subject. Sefton v. Board of Com'rs of Howard County [Ind.] 66 N. E. 891. The court of quarter sessions in Pennsylvania has no jurisdiction to lay out a public road on the boundary between two adjoining boroughs, a part lying in each borough. In re West Liberty & Knoxville Roads, 20 Pa. Super. Ct. 586.

2. Application for "section line" road. Kelley v. Honea [Tex. Civ. App.] 73 S. W. 846. A slight variation in laying out a public road due to the erection of houses by the prosecutors on the line described in the application for the road will not lead to the nullification of the proceedings by the surveyors. Whittingham v. Hopkins [N. J. Law] 54 Atl. 250. On a dispute between adjoining owners as to where a road to be built on the "half section line" should be located, it was held that the fence between them having been acquiesced in for 15 years would be regarded as the line. Nance County v. Russell [Neb.] 97 N. W. 320.

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to the variation.[3] A road to a point designated may be laid partly over the bed of a road already laid out and opened.[4]

The omission in the petition of the name of the township is not fatal where the termini of the road are precisely described,[5] nor is an allegation that provision is made for payment necessary.[6]

Notice conformable to the statute,[7] if any is required,[8] is essential. The notice may be waived.[9]

The order appointing commissioners need not affirmatively show that they are eligible,[10] though if such a statement were necessary an averment that they are "disinterested freeholders" is sufficient.[11]

The report of viewers or commissioners is analogous to the verdict of a jury in an action at law, and if defective in substance no valid judgment can be pronounced,[12] and if it is not their true judgment but is made under pressure from the public officers will not be confirmed.[13] That it does not set forth that notice was given to the landowners or how it was given does not render the proceedings invalid.[14] If not accepted or rejected within the statutory period, the proceeding is null.[15]

The order locating a road should define it with certainty,[16] and contain such findings as are necessary to support it,[17] but cannot be collaterally attacked for a mere irregularity.[18] Statutory procedure to vacate it must follow the statute as to timeliness.[19] An adjoining landowner failing to appeal cannot sue in equity to vacate the proceedings.[20]

Where a petition is dismissed on appeal for want of jurisdiction, the costs are properly taxed against the petitioners.[21]

3. McCown v. Hill [Tex. Civ. App.] 73 S. W. 850.

4. In re Road in Greene & Guilford Tps., 21 Pa. Super. Ct. 418.

5. In re Rostraver Tp. Road, 21 Pa. Super. Ct. 195.

6. City of Lidgerwood v. Michalek [N. D.] 97 N. W. 541.

7. Notice to the agent of a nonresident landowner is sufficient. Watkins v. Hopkins County [Tex. Civ. App.] 72 S. W. 872.

8. Notice to landowners of the laying out of a road is not required in Texas when the damages are not assessed at the time. Rev. St., art. 4691. Kelly v. Honea [Tex. Civ. App.] 73 S. W. 846. Notice to the "owner" of the lands does not include notice to his wife, though the lands are a homestead. Mathewson v. Skinner, 66 Kan. 809, 71 Pac. 580.

9. McCown v. Hill [Tex. Civ. App.] 73 S. W. 850.

10. Laws 1890, c. 568, § 84. In re Baker, 173 N. Y. 249.

Certiorari.—Where the record of proceedings to lay out a road are in proper form, they will not be set aside on certiorari because of relationship of one of the commissioners to the petitioners, where the application for certiorari discloses no reason for not raising that question in the court of commissions. Stevens v. Somerset County Com'rs, 97 Me. 121.

11. Seafield v. Bohne, 169 Mo. 537.

12. Lake Erie & W. R. Co. v. Shelley [Ind. App.] 67 N. E. 564.

13. In re City of New York, 83 N. Y. Supp. 1081.

14. In re Rostraver Tp. Road, 21 Pa. Super. Ct. 195.

15. Burns' Rev. St. 1901, § 4408. Town of Montgomery v. Baltimore, etc., R. Co., 29 Ind. App. 692.

16. An order from which the road marked out can be accurately and definitely located is not objectionable for uncertainty. Brown v. Sams [Ga.] 45 S. E. 719.

17. The record need not show an express finding that the road is necessary. Brabham v. Custer County [Neb.] 92 N. W. 989. So held where the petitioners paid the damages into the treasury. Seafield v. Bohne, 169 Mo. 537.

18. Failure to notify the owner to remove walls, fences and trees. Stowell v. Ashley [Mass.] 68 N. E. 675. Irregular assignment of hands to work, and failure to assess damages. State v. Yoder, 132 N. C. 1111. Failure of commissioners to give estimate of cost and assess damages. Seafield v. Bohne, 169 Mo. 537. The failure to record an order of highway commissioners laying out a highway in the town clerk's office as required by the statute does not invalidate the proceedings. Laws 1890, pp. 1192, 1193, c. 568, §§ 80, 81. People v. Vandewater, 83 App. Div. [N. Y.] 60. Failure to make provision for payment in the order entitles the landowner to enjoin opening the road. McCown v. Hill [Tex. Civ. App.] 73 S. W. 850.

19. The motion to vacate such an order must be made but need not be brought on for hearing within the 30 days allowed. Laws 1890, p. 1194, c. 568, § 89. In re Thomson, 85 App. Div. [N. Y.] 221. In Indiana county commissioners cannot, after a final order establishing a highway has been made and recorded, vacate or modify it. Robson v. Richey, 159 Ind. 660.

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Taking and compensation.—A land-owner cannot be required to surrender his land for a public road until his damages are first ascertained and either paid or proper provision made for their payment.[22] The damage to lands by the acquisition of a fee for street purposes of land in front thereof already dedicated to street uses is any depreciation in the market value of the lands caused thereby,[23] but a dedicator of platted streets is not damaged by their being laid out as a highway.[24] The expense of maintaining a railroad crossing is a proper element of damages.[25] The laying of local assessments is a wholly statutory proceeding.[26]

Filing a claim for damages which was never acted upon will not estop a land-owner from denying the existence of a highway attempted to be laid out over his lands,[27] or constitute a defense to an action by him to recover such damages.[28]

Property acquired.—Such an estate may be taken as the statute warrants.[29] A highway is presumed to be of the width provided by law though the survey states no width.[30]

An appeal or other review may, if allowed, be taken by a person entitled,[31] from such orders as are "final."[32] Owners of land over which the road is laid out are entitled to appeal, but certiorari will not lie where no defect in jurisdiction is shown and no reason appears why an appeal could not be taken,[33] nor to try facts.[34] An

20. Rev. St. 1899, § 9419. Searcy v. Clay County [Mo.] 75 S. W. 657.

21. Wilhite v. Wolfe, 90 Mo. App. 18.

22. Hogsett v. Harlan County [Neb.] 97 N. W. 316; Brown v. Sams [Ga.] 45 S. E. 719; McCown v. Hill [Tex. Civ. App.] 73 S. W. 850. But the complaint in proceedings to condemn land need not allege that the city has made provision to pay the award. City of Lidgerwood v. Michalek [N. D.] 97 N. W. 541.

23. In re City of New York, 89 App. Div. [N. Y.] 490.

24. Allaire v. City of Woonsocket [R. I.] 56 Atl. 262.

25. Expense of maintaining plankings where it is to be crossed by a proposed street. Baltimore & O. R. Co. v. City of Baltimore [Md.] 56 Atl. 790.

26. In Ohio it is only where the new road in a general sense runs parallel with one already existing that the taxing district may be less than one mile on each side of the road. The exception in the statute has no reference to roads crossing the new road. Rev. St., § 4786. Cornell v. Franklin County Com'rs, 67 Ohio St. 335. Under the charter of Greater New York, § 980, providing that commissioners in opening streets shall not assess benefits upon any lot for more than half its value, it is held that a report that states that the assessment does not exceed one half the value of the lot "as valued by us" is insufficient. In re Opening of Whitlock Ave., 85 N. Y. Supp. 650. Presentation of report of commissioners for confirmation by corporation counsel does not preclude him from opposing it. Greater New York Charter, § 984. In re City of New York, 89 App. Div. [N. Y.] 490. Commissioners of estimate and assessment in proceedings to acquire land for opening a street may alter or amend the plan of assessment therefor by extending the area of assessment. In re City of New York, 83 N. Y. Supp. 1081. Where directed to determine also the compensation to be paid owners of a discontinued street, they must make a separate report thereof. Laws 1895, p. 2051, c. 1006, § 14. In re City of New York, 87 App. Div. [N. Y.] 177.

See generally Public Works and Improvements.

27. Langan v. Whalen [Neb.] 93 N. W. 393.

28. Hogsett v. Harlan County [Neb.] 97 N. W. 316.

29. In Louisiana, where the owners of land object to the making of a road, the police jury must proceed under the statute authorizing them to impose a mere servitude of passage over the lands. Rev. St., § 3369. Fuselier v. Police Jury of Parish of Iberia, 109 La. 551.

30. McGarry v. Runkel [Wis.] 94 N. W. 662.

31. A taxpayer or citizen has no right of appeal from a decision of selectmen. Bennett v. Town of Tuftonborough [N. H.] 54 Atl. 700.

32. A decision of the county court confirming the decision of the county commissioner that the highway is necessary is final. Laws 1890, p. 1177, c. 568, § 89, as amended by Laws 1899, p. 1533, c. 703. In re Mitchell, 85 App. Div. [N. Y.] 277. Sufficiency of showing that record on appeal contains evidence taken before commissioners. Greater New York Charter, § 988. In re City of New York, 89 App. Div. [N. Y.] 490. Where the county board merely ascertains the amount of damages to a particular tract, but expressly declines to determine whether the claimant is the owner of the tract or entitled to the damages, the order is not final nor appealable. Jones v. Daul [Neb.] 97 N. W. 1029.

The time to apply for certiorari to review an order of highway commissioners laying out a highway does not begin to run until the order is recorded in the town clerk's office. People v. Vandewater, 83 App. Div. [N. Y.] 60.

33. Hegenbaumer v. Heckenkamp, 202 Ill. 621.

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appeal from an assessment of damages in proceedings to open a highway brings up no question but the damages,[35] and generally where there is no question of damages no appeal will lie.[36] Ordinary rules of review prevail.[37]

§ 4. *Ascertainment and resurvey; relocations.*—A resurvey of a highway is authorized in Vermont only when the highway has previously been laid out and surveyed, and the survey has not been properly recorded, or the record preserved, or its terminations and boundaries cannot be determined.[38] Prescriptive highways may be ascertained and declared in Indiana, under the present law, though less than 30 feet wide, and the burden of showing that none of an objector's land would be unconstitutionally taken thereby is on the petitioner.[39]

§ 5. *Alterations and extensions.*[40]—A highway established only by prescription may be changed as to location like any other.[41] An extension of a street may be effected by the actual prolongation of it by travel and use of it by the public for the requisite period and the acceptance by the village of the public way thus created as an extension of the street.[42] An alteration properly adopted[43] operates to discontinue the old road,[44] but when the route of a public road is changed, the old road continues a public highway until the new is laid out, opened, and made practicable.[45] On the hearing, matters relevant to the cost of the proposed change may be shown.[46] An assessment of damages and benefits in equal amount entitles one to apply for a review of the assessment.[47] Plaintiff cannot complain of the inequity of the assessment of another who does not complain.[48]

Where streets and navigable waters meet, the general public has the right of passage, and the highway is by operation of law extended over a wharf or bulkhead built at the end of a street.[49]

§ 6. *Change of grade.*—A change of the grade of a highway by a street railway company will be presumed to be made by consent of the public where it does

34. Certiorari will not lie to review the determination of the board of commissioners that the petition is signed by a majority of the property holders interested. Burns' Rev. St. 1894, §§ 6879-6889. Gifford v. Board of Com'rs of Jasper County [Ind.] 67 N. E. 509. Since a certiorari brings up nothing but the record, the question of the necessity of the road cannot be considered on its merits. In re Stowe Tp. Road, 20 Pa. Super. Ct. 404; In re West Donegal Tp. Road, 21 Pa. Super. Ct. 620.

35. McCall v. Marion County [Or.] 73 Pac. 1030.

36. Cummings v. Board of Com'rs of Noble County [Okl.] 73 Pac. 288.

37. On an appeal in a road case it cannot be objected to the report of viewers that it fails to set forth improvements on the land where no such objection was taken in the court below. In re Rostraver Tp. Road, 21 Pa. Super. Ct. 195; In re West Donegal Tp. Road, Id. 620. While the discretion of police juries in respect to the establishment of public roads is not an arbitrary one, the courts will not interfere with it unless it is clearly abused. Fuselier v. Police Jury of Parish of Iberia, 109 La. 551.

38. Chase v. Watson [Vt.] 56 Atl. 10.

39. Earlier law remains in force as to such. McCreery v. Fallis [Ind.] 67 N. E. 673.

40. A town board has authority to make an alteration in the location of the "New York and Albany post road." People v. Vandewater, 83 App. Div. [N. Y.] 54.

41. Burns' Rev. St. 1901, §§ 6762, 6774. Houlton v. Carpenter, 29 Ind. App. 643.

42. Village of Lee v. Harris [Ill.] 69 N. E. 230.

Highway is extended by operation of law over wharves which extent from the foot thereof into navigable stream. Knickerbocker Ice Co. v. Forty-second St., etc., Ferry Co. [N. Y.] 68 N. E. 864.

43. Where surveyors laid out a new road and vacated an old one and claimed the statutory fee for each service, its allowance, though possibly erroneous, is not ground for setting aside the return. Devine v. Olney, 68 N. J. Law, 284. In Massachusetts an order directing that the damages shall be paid by the towns through which the road passes is void, but its invalidity does not affect the remainder of the proceedings. Pub. St. c. 49, § 58. Ahearn v. Middlesex County, 182 Mass. 518.

44. Bare v. Williams [Va.] 45 S. E. 331.

45. Act June 13, 1836, § 24. Lawson v. Shreveport Waterworks Co. [La.] 35 So. 390.

46. Raab v. Roberts, 30 Ind. App. 6.

47, 48. Devine v. Olney, 68 N. J. Law, 284.

49. The city of New York holding title to submerged lands under the river, subject to the use of the river as a highway, cannot be supposed to have intended to cut off such right by granting privilege to build wharves thereon. Knickerbocker Ice Co. v. Forty-second St., etc., Ferry R. Co. [N. Y.] 68 N. E. 864.

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not object.[50] An abutting owner is entitled to damages arising from a change of grade of a street,[51] unless he purchased with knowledge of the order authorizing the change.[52] No damages are recoverable until the actual work of grading is begun; and where plaintiff has built with reference to it, and has paved the street at such grade, he has no claim.[53] A municipality may be responsible for the damages to property outside its boundary arising from a change of the grade of a street forming its boundary.[54] A petition for a change of the grade of a street waives damages only for the establishment of the grade and not for the act of grading.[55]

§ 7. *Improvement and repair.*[56]—"Improvement" may include extension,[57] but "repairs" do not include improvements.[58] Procedure for improvements,[59] the right to assess cost,[60] and the relative liability of co-terminous and co-extensive municipalities,[61] are governed by statute as illustrated by cases in the notes.

There is no remedy to control official discretion in ordering improvements,[62] but a resident taxpayer has a right to enjoin the wrongful application of funds raised for the improvement of roads,[63] and a contractor may recover against a city which has diverted into other channels money raised by special assessment for the work he contracted to do;[64] but the town board may change the details of the plans for the improvement of highways after bonds have been voted, so long as the character of the improvement is not changed or the authorized limit of expenditure exceeded.[65]

Since town trustees are not required to allow abutting owners the privilege of

50. Austin v. Detroit, etc., R. Co. [Mich.] 96 N. W. 35.

51. Held error to appoint commissioners under Laws 1903, c. 610, p. 1396, to award damages before deciding whether grade had been changed and petitioner was an abutting owner. In re Borup, 89 App. Div. [N. Y.] 183. Where one has, under permission of the city, graded a street and built a retaining wall therein as a part of the work, he has no interest in the wall or the street that will prevent the city from changing the grade and requiring him to remove the wall, or compel payment to him of damages therefor. South Highland Land & Imp. Co. v. Kansas City [Mo. App.] 75 S. W. 383.

52. Cost of grading lot is proper element. Pickles v. City of Ansonia [Conn.] 56 Atl. 552.

53. Devlin v. City of Philadelphia [Pa.] 56 Atl. 21.

54. Haggart v. Borough of California, 21 Pa. Super. Ct. 210.

55. Fairbanks v. City of St. Joseph [Mo. App.] 76 S. W. 718.

56. See, generally, Municipal Corporations; Counties; Public Works and Improvements; Sewers and Drains.

57. Extension by opening a new street. Act March 24, 1899, p. 283, c. 135, as amended by Act March 20, 1901, p. 145, c. 70, § 59. Rowe v. Commissioners of Assessments of East Orange [N. J. Law] 55 Atl. 649. Macadamizing a road is not "a bridge or other distinct and expensive work on the road" authorizing the issue of bonds therefor. Hurd's Rev. St. 1899, p. 1472, § 20. St. Louis, etc., R. Co. v. People, 200 Ill. 365.

58. Raising the grade of a roadway seven feet and protecting it by stone coping necessary to make it passable during the time of freshets. Appeal of Goodspeed, 75 Conn. 271. Restoring concrete base to an even surface and replacing it when necessary, then covering it with an entirely new asphalt wearing surface, is not a repair. Barber Asphalt Co. v. Muchenberger [Mo. App.] 78 S. W. 280.

59. A petition by property owners is not a prerequisite in Chicago to the widening of a street which has been designated as a pleasure driveway. Ill. Laws 1899, p. 83. City of Chicago v. Larned, 203 Ill. 290.

60. The charter of the city of Yonkers (Laws 1895, c. 635) does not authorize it to improve a private way and assess the cost on a restricted assessment district. Culver v. City of Yonkers, 80 App. Div. [N. Y.] 309.

61. The expense of maintaining a plank road in two counties, which has devolved upon the counties on the expiration of the franchise of the corporation building it, is to be divided between them in proportion to the benefit derived and not in proportion to its length. In re Newark Plank Road & Bridges, 63 N. J. Eq. 710.

In Kentucky, a bridge on a county road in a city of the sixth class, having no streets or sidewalks, is a part of the road which the county is bound to replace on its destruction. Leslie County v. Wooton, 25 Ky. L. R. 217, 75 S. W. 208.

62. General power to improve gives the council a discretion as to the propriety of improving which courts cannot control, except in case of fraud, excess of power or invasion of private right. City of Frostburg v. Wineland [Md.] 56 Atl. 811.

63. Miller v. Bowers, 30 Ind. App. 116.

64. Pine Tree Lumber Co. v. City of Fargo [N. D.] 96 N. W. 357.

65. Campau v. Highway Com'r of Grosse Pointe [Mich.] 93 N. W. 879; Compau v. Township Board of Grosse Pointe, Id.

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building their own sidewalks, they cannot object that the privilege granted was insufficient when required to pay for walks built by the town.[66]

A county is not liable to landowners for *damages caused by surface water* turned upon their lands by ditches constructed on or near the highway,[67] at least not where they have used due care and the improvements are usual and necessary.[68] Nor can an abutting owner enjoin the proper building of a necessary culvert across the highway though it may have the effect to divert surface drainage to his lands;[69] but if the alleged improvement is in fact made to serve personal ends and is not necessary, it may be enjoined.[70]

A person peculiarly injured by failure to repair may maintain an action therefor against a private corporation charged with repairing a bridge on a public way.[71]

An indictment for failure to perform a contract to repair a public road must allege that the law providing for contracts has been put in operation in the county,[72] that a valid contract has been made,[73] and show that defendants had time and opportunity to repair.[74] Where the supervisors of the county in adopting the "contract law" failed to comply with its essential provisions, no delinquency can arise.[75]

§ 8. *Abandonment and diminution.*—Where a highway is established, neither its character as a highway nor the right of the public to use it as such can be lost by nonuser,[76] nor can title be acquired to it by prescription.[77] Mere nonuser[78] or adverse possession by an abutter, however long continued, will not change its public character,[79] nor operate as an abandonment,[80] nor create an estoppel as against the public, though the abutter has paid taxes thereon.[81] Neither will occupation for buildings by the public itself,[82] or a grant of use to a railroad,[83] so operate. The contrary is held however in Illinois and Iowa, where it is said that the public right of occupancy may be lost by estoppel.[84]

An attempted vacation, though invalid, and subsequent adverse possession by an abutter, will amount to an abandonment of a platted street on which no public work has ever been put.[85]

66. Ky. St. 1899, § 3706. Eversole v. Walsh, 25 Ky. L. R. 784, 76 S. W. 358.

67. Stocker v. Nemaha County [Neb.] 93 N. W. 721.

In Texas a special statute provides otherwise. Rev. St. 1895, art. 4745. Voss v. Harris County [Tex. Civ. App.] 76 S. W. 600. Petition in action for constructing ditch to plaintiff's damage held to state no cause of action either against the county or its officers as individuals. Nussbaum v. Bell County [Tex.] 76 S. W. 430.

68. Embankment changing course of surface water. Kent County Com'rs v. Godwin [Md.] 56 Atl. 478; Daum v. Cooper, 103 Ill. App. 4.

69. Fokenga v. Churchill [Neb.] 96 N. W. 143.

70. Shanks v. Pearson, 66 Kan. 168, 71 Pac. 252.

71. Ryerson v. Morris Canal & Banking Co. [N. J. Law] 55 Atl. 98.

72. Const. 1890, § 85. Gilmore v. State [Miss.] 33 So. 171.

73. Burkett v. State [Miss.] 33 So. 221; McElmore v. State [Miss.] 33 So. 225.

74. Burkett v. State [Miss.] 33 So. 221; Cain v. State [Miss.] Id. 222; McElmore v. State [Miss.] Id. 225.

75. Laws 1900, p. 153. State v. Edwards [Miss.] 33 So. 172; McElmore v. State [Miss.] Id. 225.

76. Knowles v. Knowles [R. I.] 55 Atl. 755.

77. La. Acts 1831, p. 38, No. 18, and Acts 1858, p. 50, No. 78. Board of Control of New Basin Canal & Shell Road v. H. Weston Lumber Co., 109 La. 925. Not abandoned by allowing use by railroads, hence does not revert. McAlpine v. Chicago G. W. R. Co. [Kan.] 75 Pac. 73.

78. Bohne v. Blankenship, 25 Ky. L. R. 1645, 77 S. W. 919.

79. Village of Lee v. Harris [Ill.] 69 N. E. 230; Knowles v. Knowles [R. I.] 55 Atl. 755; Wright v. Oberlin, 23 Ohio Circ. R. 509; Langley v. City Council of Augusta [Ga.] 45 S. E. 486.

80. Healey v. Kelly, 24 R. I. 581.

81. Wright v. City of Doniphan, 169 Mo 601.

82. Without a vacation. Pettit v. Incorporated Town of Grand Junction, Greene County, 119 Iowa, 352.

83. County board orders granting use of any part of road to a railway and saving way for public travel held not abandonment of public highway rights. Turney v. Southern Pac. Co. [Or.] 75 Pac. 144.

84. Blennerhassett v. Town of Forest Grove, 117 Iowa, 680; Corey v. City of Ft. Dodge, 118 Iowa, 742. Delay in opening does not defeat right. Impson v. Sac County [Iowa] 98 N. W. 118. Occasion for such an estoppel defined. Village of Lee v. Harris [Ill.] 69 N. E. 230.

85. Weber v. Iowa City, 119 Iowa, 633.

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A landowner, by platting an addition to a town through which a state road runs, cannot reduce the width of such road.[86]

The commissioner is entitled to file a certificate of statutory abandonment only when the highway has not been worked for the prescribed period. The erection of bars and gates by abutting owners will not authorize it.[87]

§ 9. *Vacation.*—The public authorities may vacate a street in whole or in part for the public welfare, but not that the ground may be taken for private use.[88] A highway made highly dangerous to the traveling public by the legal occupancy and use thereof by a railroad may properly be discontinued.[89] The legislature may provide how and by whom such power may be exercised.[90] A highway laid by a superior governmental agency cannot be discontinued by an inferior one.[91] Under the authority to change the location of a highway to avoid or improve a railroad crossing, the persons given such power may discontinue a part of a road.[92]

Highways do not become vacant by inclusion within an incorporated town or city.[93] A road properly surveyed, but not traveled for the statutory period, is vacated by the express provisions of the statute in Nebraska.[94]

A variance between the notice and petition for vacation in stating the place of termination of the road is fatal.[95]

The commissioners to determine the uselessness of a highway must be disinterested freeholders at the time of their appointment.[96]

In Wisconsin failure to serve notice on all owners along a whole highway is fatal though those abutting on the part discontinued have waived notice,[97] but in Indiana, none but owners whose lands abut on that part of a street to be vacated have power to prohibit vacation by objection.[98] The owner on the opposite side may object to the narrowing of a street by vacating a strip.[99] Where the petition sets forth that the road has become "useless, inconvenient, and burdensome," and the report of viewers shows that it crosses a new double track railroad at grade, there is sufficient to move the court to vacate it.[1]

Compare Blennerhassett v. Town of Forest Grove, 117 Iowa, 680.

86. Wright v. City of Doniphan, 169 Mo. 601.

87. Six years. Laws 1890, p. 1198, c. 568, § 99. People v. Marlett, 41 Misc. [N. Y.] 151. A highway laid out but not opened and used held saved from abandonment by being afterward included within the limits of a city. Burns' Rev. St. 1894, § 6759. Lake Shore, etc., R. Co. v. Town of Whiting [Ind.] 67 N. E. 933; Baltimore, etc., R. Co. v. Town of Whiting, 30 Ind. App. 182.

88. Pence v. Bryant [W. Va.] 46 S. E. 275. Where lots shown on a plat have been sold, a street thereon cannot be vacated without consent of all lot owners. So by statute. Village of Lee v. Harris [Ill.] 69 N. E. 230.

89. Code 1899, c. 43, § 30. Armstrong v. Taylor County Court [W. Va.] 46 S. E. 131.

90. In re Vacation of Underwood's Second Addition to City of St. Paul [Minn.] 97 N. W. 977. The district court of Ramsey county has jurisdiction to vacate any part of the plat of the city of St. Paul, including streets and public squares, notwithstanding the city charter.

91. In Connecticut a highway laid out by the court or the general assembly cannot be discontinued by selectmen; this prohibition extends also to a road laid out by the railroad commissioners, they deriving their powers from the legislature. Gen. St. 1888, § 3489 (Gen. St. 1902, § 3713). Town of Meriden v. Bennett [Conn.] 55 Atl. 564.

92. Pub. St. 1891, c. 159, §§ 13, 14. Leighton v. Concord, etc., R. Co. [N. H.] 55 Atl. 938.

93. A section line highway is not vacated by the incorporation of a town according to a plat which shows a deviation from the line. Great Northern R. Co. v. Town of Viborg [S. D.] 97 N. W. 6.

94. Comp. St. 1901, c. 78, § 4510. Gehris v. Fuhrman [Neb.] 94 N. W. 133. The statute applies only to roads not traveled for a period of five years before its passage. Williams v. Smith [Neb.] 94 N. W. 150. The statute applies to 2 or 3 miles of a road over 30 miles long. Newsome v. Walker [Neb.] 95 N. W. 772.

95. Fisher v. Union County [Or.] 72 Pac. 797.

96. Highway Law of 1890, p. 1193, c. 568, § 84. Not sufficient that one had become freeholder before objection was made. In re Trask, 81 App. Div. [N. Y.] 318.

97. Rev. St. 1898, § 1267. Schroeder v. Klipp [Wis.] 97 N. W. 909.

98. Burns' Rev. St. 1901, §§ 3647, 3650. Hall v. City of Lebanon [Ind. App.] 67 N. E. 703.

99. Lowe v. Lawrenceburg Roller Mills Co. [Ind.] 69 N. E. 148.

1. In re West Donegal Tp. Road, 21 Pa. Super. Ct. 620.

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A vote of the town to "rescind the action of the selectmen" in regard to laying out a proposed road sufficiently states the purpose to discontinue it.[2]

Failure to award damages or secure a release thereof from all interested avoids the proceedings.[3]

Proceedings to vacate, though not strictly regular, may estop a municipality from thereafter claiming the vacated premises as a public street.[4] In the absence of evidence to the contrary, proceedings to vacate a road will be presumed, on collateral attack after ten years, to have been regular.[5] But where an order vacating a portion of a street is absolutely void, it is open to collateral attack by injunction.[6] Mere inconvenience to a property owner, such as will result to the general public, will not authorize injunctive relief,[7] though one so injured may appeal from the order of vacation.[8] No appeal lies in Pennsylvania from an ordinance vacating a street.[9] On an appeal from an order vacating a road, an objection that the report of viewers does not set forth the improvements on the land cannot be raised for the first time.[10]

Certiorari does not bring up the evidence, whence the appellate court cannot review questions of fact passed upon by the court below on depositions.[11]

§ 10. *Street and highway officers and districts.*[12]—The legislature has power to regulate and delegate control of local road matters,[13] and only such offices as are by it authorized can be created.[14]

Highway officers have no authority to bind their towns or counties by contract unless authorized by statute.[15]

A commissioner of a road district cannot sue to restrain a turnpike company from collecting tolls on the ground that its franchise has expired; the county alone has the right to institute such a suit.[16]

2. Brackett v. McIntire [N. H.] 54 Atl. 705.

3. Schroeder v. Klipp [Wis.] 97 N. W. 909.

4. Blennerhassett v. Town of Forest Grove, 117 Iowa, 680; Weber v. Iowa City, 119 Iowa, 633.

5. Wagner v. Mahrt [Wash.] 73 Pac. 675.

6. Lowe v. Lawrenceburg Roller Mills Co. [Ind.] 69 N. E. 148.

7. Hall v. City of Lebanon [Ind. App.] 67 N. E. 703.

8. Fisher v. Union County [Or.] 72 Pac. 797.

The party through whose land the road runs is a party aggrieved and entitled to appeal, though the inconvenience he suffers is of the same nature as that shared in common with the other inhabitants. Fisher v. Union County [Or.] 72 Pac. 797; Wendt v. Board of Sup'rs of Town of Minnetrista, 87 Minn. 403.

9. Act May 16, 1891 (P. L. 75). Daughters of American Revolution v. Schenley, 204 Pa. 572.

10. In re West Donegal Tp. Road, 21 Pa. Super. Ct. 620; In re Rostraver Tp. Road, Id. 195.

11. In re West Donegal Tp. Road, 21 Pa. Super. Ct. 620; In re Stowe Tp. Road, 20 Pa. Super. Ct. 404.

12. The provision of the Political Code of California, requiring the boards of supervisors to divide their counties into road districts for the purpose of taxation, is not inconsistent with the provision exempting cities from taxation for road purposes by the county authorities. Pol. Code, §§ 2641, 2654; Act 1883, § 2. Miller v. Kern County, 137 Cal. 516, 70 Pac. 549.

13. The New Jersey Act of April 24, 1894 (Gen. St. p. 2864), transferring the powers, duties, rights and authorities of all county road boards to the boards of chosen freeholders in the respective counties, is valid and effective as to the highways of a county having special powers. Bowman v. Board of Chosen Freeholders of Essex County [N. J. Law] 54 Atl. 818.

14. In Kentucky a county judge cannot be appointed supervisor of roads. Ky. St. 1899, §§ 4306-4339. Daviess County v. Goodwin, 25 Ky. L. R. 1081, 77 S. W. 185. Nor can justices in their respective magisterial districts be paid as assistants to him. Pulaski County v. Sears, 25 Ky. L. R. 1381.

15. People v. Board of Audit of Town of Oyster Bay, 175 N. Y. 394; Wormstead v. City of Lynn [Mass.] 68 N. E. 841. Where there is no money in the highway fund to pay with, they cannot obligate the town. Huston v. Sioux Falls Tp. [S. D.] 96 N. W. 88. A county court cannot bind the county by contract for cutting down a public road. Perry County v. Engle, 25 Ky. L. R. 813, 76 S. W. 382. A road overseer is not the agent of the county so as to render it liable in its corporate capacity for purchases of lumber made by him to repair highways. N. A. Matthews Lumber Co. v. Van Zandt County [Tex. Civ. App.] 77 S. W. 960.

One only of the two supervisors cannot bind his town by contract for the entire reconstruction of a road for a large sum of money; though the other does not object. Logan v. Rochester Tp., 21 Pa. Super. Ct. 113.

A road supervisor is the agent of the

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A town is not liable for the negligent individual act of its highway officer or employe while repairing highways,[17] nor for an act done by him on the land of a private person off the limits of the highway.[18]

Highway officers are not liable for injuries to persons employed by them, as such employment does not create the relation of master and servant.[19] If county commissioners take land for a highway without lawful authority they are individually liable for their wrongful act but are not liable in their official capacity.[20]

It is no defense to a prosecution under the Texas law for refusing to serve as a road overseer that defendant could not read or write.[21]

§ 11. *Fiscal affairs.*—Assessments for highway purposes, like those in ordinary tax proceedings, must conform to the statute authorizing them, and levies not so conforming are void.[22] The commissioners of a road district cannot levy an additional tax for road and ditch damages after having levied the full amount allowed for roads and bridges.[23] A tax levied at a date other than that provided by statute is void.[24] If funds are separated and localized, property in one district cannot be taxed for another.[25]

A license tax imposed for the use of the streets of a city cannot be imposed upon nonresidents of the state.[26]

One is liable to road duty only in the jurisdiction where he resides.[27] His default is not excused by reliance on another's promise to do the work.[28] The vote on the question whether "such roads" shall be constructed by general tax should be confined to a particular road and not to roads in general.[29] Certiorari will not lie at the suit of the commissioner of highways to review the action of the town board of auditors in auditing claims for work on the highways unauthorized by him.[30]

§ 12. *Control by public, and public regulations.*—A municipal corporation which is empowered by its charter to regulate its streets and to prescribe their use by any person or corporation has exclusive power to determine in the first instance how the space within the bounds of the highway shall be appropriated to the various uses of the highway.[31] If the municipality has so unreasonably appropriated the

county whence it may become liable for costs in proceeding by him to collect poll taxes in Washington. State v. Lamping [Wash.] 72 Pac. 476.

16. Ledbetter v. Clarksville & R. Turnpike Co. [Tenn.] 73 S. W. 117.

17. Tyler v. Town of Revere [Mass.] 66 N. E. 597; McFadden v. Incorporated Town of Jewell, 119 Iowa, 321.

18. Tyler v. Town of Revere [Mass.] 66 N. E. 597.

19. Bowden v. Derby [Me.] 55 Atl. 417.

20. Hitch v. Edgecombe County Com'rs, 132 N. C. 573.

21. Tex. Pen. Code 1901, art. 486. France v. State [Tex. Cr. App.] 77 S. W. 452.

22. Chicago, etc., R. Co. v. People, 200 Ill. 237; Chicago, etc., R. Co. v. People, 200 Ill. 141; Cincinnati, etc., R. Co. v. People [Ill.] 69 N. E. 40; People v. Chicago & A. R. Co. [Ill.] 69 N. E. 51; Cleveland, etc., R. Co. v. People [Ill.] 69 N. E. 89; Chicago & E. I. R. Co. v. People [Ill.] 69 N. E. 93; Dixon County v. Chicago, etc., R. Co. [Neb.] 95 N. W. 340; State v. Fulmore [Tex. Civ. App.] 71 S. W. 418. See. generally, Public Works and Improvements; Taxes.

23. 3 Starr & C. (2d Ed.), p. 3604; Act May 4, 1887. People v. Atchison, etc., R. Co., 201 Ill. 365.

24. 3 Starr & C. (2d Ed.) p. 3552, c. 121, § 13. Indiana, etc., R. Co. v. People, 201 Ill 351.

25. The Political Code of California provides in substance that cities and towns must maintain their own streets and alleys and exempts the property of their inhabitants from liability to taxation for the support of roads outside. Sections 2641, 2654, as reconstructed by Act 1883. Miller v. Kern County, 137 Cal. 516, 70 Pac. 549.

26. Dooley & Bayless v. City of Bristol [Va.] 46 S. E. 296.

27. State v. Hinton, 131 N. C. 770. Irregular summons held no defense to prosecution for failure to work. State v. Yoder, 132 N. C. 1111. County having adopted alternative road law. Howell v. Commissioners of Chattooga County [Ga.] 45 S. E. 241.

28. Fanning v. Board of Com'rs of Wilkes County [Ga.] 46 S. E. 410.

29. Rev. St. §§ 4763, 4766. Board of Com'rs of Gallia County v. State, 67 Ohio St. 412.

30. People v. Cross, 87 App. Div. [N. Y.] 56.

31. Budd v. Camden Horse R. Co., 61 N. J. Eq. 543. But a general ordinance prescribing the width of the sidewalk in avenues of a certain width is modified by a subsequent special ordinance making a different disposition of a particularly named avenue. Id. And an ordinance in general terms

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divisions of the highway as to work injury to the abutting owners, their remedy is not in equity but in the courts of law.[32]

A city has implied power to light its streets and public places.[33] It may prohibit awnings or projections from abutting buildings,[34] or the distribution of hand bills in the street.[35] A park board regulation prohibiting freight wagons on a boulevard is reasonable.[36] An ordinance requiring abutting owners to keep sidewalks free from snow and ice has been upheld against objections to its constitutionality.[37] But a city cannot grant privileges which impair the public easement.[38] The establishment of a public market in a portion of the street does not constitute a nuisance per se where it amounts only to a partial and temporary obstruction.[39] Where an ordinance confers power to issue permits to erect stands on the streets, one who receives one from a subordinate has no standing to recover his damages arising from its revocation by the superior.[40] A permit to move houses along the street will not authorize cutting branches of trees along the street though necessary to use the permit.[41] Works of construction in or beneath a highway can be made only under such regulations and conditions as may be prescribed.[42] Permission from the authorities to maintain a coal hole under the sidewalk will be presumed from several years' maintenance without objection.[43] One who has a grant of privileges may protect it at law against other claimants.[44]

A city may permit a telephone company to erect poles and maintain wires on

adopting a plat of an addition does not necessarily establish the sidewalk line on its streets as they are shown on the plat. Cox v. City of Lancaster, 24 Ohio Circ. R. 265. Under the charter of Greater New York the commissioner of water supply, gas, and electricity is the successor of the former board of commissioners of electrical subways, and can impose as a condition of granting permits for the building of such subways that the owners bear all reasonable expenses of inspection. People v. Monroe, 85 App. Div. [N. Y.] 542. May regulate use of telegraph poles, and an ordinance providing the mode of applying for and designating locations of poles does not take away the franchise. City of New Castle v. Central Dist. & Print. Tel. Co. [Pa.] 56 Atl. 931.

32. Budd v. Camden Horse R. Co., 61 N. J. Eq. 543.

33. Fawcett v. Town of Mt. Airy [N. C.] 45 S. E. 1029.

34. Stationary ornamental awning is within words "areas, steps, court yards or other projections." City of New York v. Otto Sarony Co., 86 N. Y. Supp. 27.

An ordinance prohibiting the erection of any sign or stationary awning shed over any portion of the sidewalk in certain districts of the city is valid and does not unlawfully discriminate or invade the rights of the abutting owner. Ivins v. Inhabitants of City of Trenton, 68 N. J. Law, 501.

35. Not an interference with liberty of the press. Anderson v. State [Neb.] 96 N. W. 149.

36. And not an improper delegation of power. Brodbine v. Inhabitants of Town of Revere, 182 Mass. 598.

37. State v. McMahon [Conn.] 55 Atl. 591.

38. Since a municipality cannot ordinarily, by permit or license, authorize any other use of the streets than such as is required for street purposes, it cannot in the absence of public necessity or convenience interfere with the regular traffic of the street by licensing hack stands at particular places therein. Odell v. Bretney, 38 Misc. [N. Y.] 603. Neither can it grant a street railway company the exclusive use of the street. Russell v. Chicago, etc., R. Co., 205 Ill. 155. Nor allow a chute for transporting ice to be laid across the street so as to constitute a constant menace and interference with public travel. Young v. Rothrock [Iowa] 96 N. W. 1105.

39. State v. Smith [Iowa] 96 N. W. 899.

40. Clothier v. Philadelphia, 22 Pa. Super. Ct. 608.

41. State v. Pratt [Minn.] 95 N. W. 589.

42. Under the charter of Greater New York, as amended, a vault in front of a tenement house is a voluntary structure and requires a permit from the commissioner of highways. City of New York v. Madison Ave. Real Estate Co., 85 N. Y. Supp. 1118. But after obtaining a permit to build, no further permit is necessary to repair. (Presumption of permit from lapse of time.) Deshong v. City of New York [N. Y.] 68 N. E. 880. Mere approval of plan showing location of poles does not constitute "supervision" by a city engineer of the location of poles. City of New Castle v. Central, etc., Tel. Co. [Pa.] 56 Atl. 931.

43. Schubkegel v. Butler, 76 App. Div. [N. Y.] 10.

44. A gas company having an exclusive franchise to furnish gas may maintain suit for an injunction to restrain another from setting up claim to an exclusive franchise to do the same thing, though plaintiff has not possession of the streets. People's Elect. Light & Power Co. v. Capital Gas & Elect. Light Co., 25 Ky. L. R. 327, 75 S. W. 280. Under laws 1848, p. 51, c. 37, a gas company which has used the streets of a town for 50 years may occupy new streets as a matter of law. People v. Cromwell, 89 App. Div. [N. Y.] 291.

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its streets.[45] The act of congress authorizing the erection of telegraph lines over post roads operates only to confer the rights of the federal government and does not give telegraph companies any rights in the streets and alleys of a municipal corporation. Neither is a foreign telegraph corporation engaged in interstate commerce entitled to use them without compensation.[46] Merely granting to a city general power over streets does not necessarily give to the city power to regulate and control the building of street railroads within the streets of the city,[47] and authority to grant rights to street railway corporations does not authorize a grant to an individual.[48]

A permit to individuals to lay spur or side tracks to their property is not void as a grant of the street to private use.[49] Where a company has upon proper authority erected works in the streets, it has a vested right to continue them and the municipality cannot revoke its license at its pleasure.[50] Such right cannot be impaired by another company by erecting its works in such a manner as to interfere with the prior use,[51] but the builder of an electric conduit on certain streets has no such vested right in the street as will invalidate a vacation of such street by the proper authority.[52] A railway company laying tracks in a city street under a limited franchise does not acquire a perpetual easement in the street,[53] and the public may remove tracks from its streets where the corporation laying them has forfeited its franchise by failure to complete its line within the prescribed period,[54] or where the franchise has expired by its own limitation.[55]

A special grand jury may recommend the adoption of the alternative road law by a county in Georgia.[56] Where the alternative road law has been adopted by popular vote, the recommendation of the grand jury is not necessary to put it into effect.[57]

§ 13. *Rights of public use—Law of the road.*—The right apart from franchise is a right of passage or travel.[58]

The custom of the road in America is for vehicles to go to the right on meeting and to the left on overtaking and passing,[59] and this rule applies as well to bicycles as to other vehicles.[60]

A public street is a passage open to all the citizens of the state to go and return,

45. Kirby v. Citizens' Tel. Co. [S. D.] 97 N. W. 3.

46. Act July 24, 1866; 14 Stat. 221. Postal Tel. Co. v. City of Newport, 25 Ky. L. R. 635, 76 S. W. 159.

47. Raynolds v. City of Cleveland, 24 Ohio Circ. R. 215.

48. Laws 1899, p. 331, § 1. Goddard v. Chicago, etc., R. Co., 202 Ill. 362.

49. People v. Blocki, 203 Ill. 363. Contra. Cereghino v. Oregon Short Line R. Co. [Utah] 73 Pac. 634.

50. Village of London Mills v. Fairview-London Tel. Circuit, 105 Ill. App. 146. City held estopped from insisting that a street railway company remove that part of its viaduct occupying more than 20 feet in width of a street. Village of Winnetka v. Chicago, etc., R. Co., 204 Ill. 297.

51. Northwestern Tel. Exch. Co. v. Twin City Tel. Co. [Minn.] 95 N. W. 460.

52. Boston Elect. Light Co. v. Boston Terminal Co. [Mass.] 69 N. E. 346.

53. Chicago Terminal Transf. R. Co. v. City of Chicago, 203 Ill. 576.

54. Minersville Borough v. Schuylkill Elect. R. Co., 205 Pa. 394.

55. Chicago Terminal Transfer Co. v. City of Chicago, 203 Ill. 576.

56. McGinnis v. Ragsdale, 116 Ga. 245.

57. Commissioners of Roads & Revenues of Grodon County v. Burns [Ga.] 44 S. E. 828.

58. Use of streets by conveyors of electricity is a franchise and not a general right. Purnell v. McLane [Md.] 56 Atl. 830.

59. This rule applies where the road is so wide that both may pass on the same side of the center of the road and Highway Law, § 157 (Laws 1890, p. 1205) is only declaratory of the common law providing a penalty for failure to observe it. Wright v. Fleischman, 41 Misc.]N. Y.] 533. Failure to keep to the right of the center of the road where there is room to pass on the left is not necessarily negligent. Neal v. Rendall [Me.] 56 Atl. 209. As to duty of teamster to keep to right at all times, see O'Brien v. Hudner, 182 Mass. 381. Whether defendant's being on the wrong side of the road was the proximate cause of plaintiff's injury from collision was held to be a question for the jury. Neal v. Rendall [Me.] 56 Atl. 209.

60. Pick v. Thurston, 25 R. I. 36.

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pass and repass at their pleasure. Subject to the law of the road, no one man or body of men has a superior right in the street as against the general public.[61]

Under the charter of Greater New York, fire apparatus on duty proceeding to a fire has the right of way over all vehicles except those carrying United States mail,[62] but a fire patrol is not thereby absolved from liability for negligence resulting in injury to pedestrians.[63]

A person on foot desiring to cross a city street has a right to cross wherever he pleases;[64] and one driving a horse[65] or propelling a street car[66] along the street is bound to be watchful at all points as well as at crossings, so as not to injure persons crossing. Whichever vehicle will at ordinary speed reach a street intersection first has the right of way and there is a warranted assumption that the driver of the other will regard such right.[67] There is a street crossing though the two ends of the intersecting street are not exactly opposite and co-incident.[68] A regulation giving the right of way to vehicles going in a northerly or southerly direction over those going in an easterly or westerly direction is material on the question of responsibility for a collision between a street car and other vehicle at a street crossing.[69]

It is the duty of persons propelling automobiles,[70] bicycles,[71] street cars,[72] or a locomotive,[73] or traction engines over public highways,[74] to act with due regard for the rights and safety of others traveling; failing in this they will be required to respond in damages; but a motorman is required to take no more care to avoid frightening horses on the highway than the drivers of other vehicles are.[75]

61. Collision between street car and ordinary traveler. Chicago Union Traction Co. v. Stanford, 104 Ill. App. 99; Union Traction Co. v. Vandercook [Ind. App.] 69 N. E. 486; South Covington, etc., R. Co. v. McHugh, 25 Ky. L. R. 1112, 77 S. W. 202. Failure of plaintiff, riding a bicycle, to turn out sufficiently to pass a street car employe alighting from the car was held to be the proximate cause of her injury. North Chicago St. R. Co. v. Cossar, 203 Ill. 608. While one in charge of a push cart on the street has the same right that a truck driver has, he is not entitled to act upon the presumption that the truck driver will turn out to avoid a collision with him, neither is he obliged to protect himself against the driver's negligence. Cohn v. Palmer, 78 App. Div. [N. Y.] 506. In such part of a street or public road as may comprise the bed of a railway, neither the railway company nor the public have any exclusive right of occupation, subject to the duty of being diligent in avoidance of probable danger,—a duty which, as between them, is reciprocal—the public has a right to use the whole of the highway and the company has the privilege of operating its trains. Southern R. Co. v. Crenshaw, 136 Ala. 573.

62. Collision between street car and fire truck. City of New York v. Metropolitan St. R. Co., 85 N. Y. Supp. 693; Adler v. Metropolitan St. R. Co., 84 N. Y. Supp. 877.

63. Laws 1895, p. 2064, c. 1016, § 2. Muhs v. Fire Ins. Salvage Corps, 89 App. Div. [N. Y.]. 389.

64. Not at crossings only. City of Louisville v. Johnson, 24 Ky. L. R. 685, 69 S. W. 803.

65. Rapid driving held negligent. Lahne v. Seaich, 83 App. Div. [N. Y.] 636; Rush v. Joseph H. Bauland Co., 82 App. Div. [N. Y.] 506. Child run down at crossing by horse vehicle. Kaufman v. Bush [N. J. Err. & App.] 56 Atl. 291.

66. Prince v. Third Ave. R. Co., 84 N. Y. Supp. 542.

67. Knickerbocker Ice Co. v. Benedix [Ill.] 69 N. E. 50.

68. Freeman v. Brooklyn Heights R. Co., 87 App. Div. [N. Y.] 127.

69. H. E. Taylor & Co. v. Metropolitan St. R. Co., 84 N. Y. Supp. 282.

70. Failure to stop on discovering frightened horse. Shinkle v. McCullough, 25 Ky. L. R. 1143, 77 S. W. 196.

71. Where defendant, riding a bicycle, suddenly left the cinder path and attempted to cross the roadway so close in front of plaintiff's horse as to frighten him and cause him to run away, whether he was negligent is for the jury. Shortsleeve v. Stebbins, 77 App. Div. [N. Y.] 588.

72. Failure to stop on discovering frightened horse. Knoxville Traction Co. v. Mullins [Tenn.] 76 S. W. 890. Car need not stop if wagon has time to pass. Chicago Union Traction Co. v. Browdy [Ill.] 69 N. E. 570. Evidence considered. Id. Duty of street car employes to child is same as to other pedestrians, must stop if possible. Negligence is for jury. Kube v. St. Louis Transit Co. [Mo. App.] 78 S. W. 55.

73. Railroad must use reasonable care respecting travelers at a crossing, though the road is not a legal one and a legal one might as well have been used. Pecos & N. T. R. Co. v. Bowman [Tex. Civ. App.] 78 S. W. 22.

74. Miller v. Addison, 96 Md. 731. Wis. Rev. St. 1898, § 1347b., as amended by Laws 1899, c. 197, applies only where the team is approaching the engine with a purpose of passing, and not to a team standing still. Cudd v. Larson [Wis.] 93 N. W. 810. Negligence of plaintiff driving on street being repaired by use of steam road roller was held to be a question for the jury. Haller v. City of St. Louis [Mo.] 75 S. W. 613.

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The owner of a manhole cover over a conduit built in the public street by lawful authority may maintain an action for injury thereto by negligently driving an excessive load over it.[76]

That a team is running away on a public street without a driver is prima facie negligence,[77] and a bicycle rider frightened into falling from her wheel by seeing an unattended horse coming towards her in the street may recover from the owner of the horse for her injury he having turned the horse loose to return to the stable as was his custom;[78] but a chaffeur is not required on leaving an automobile in the street temporarily to chain it to a post or otherwise fasten it so that it cannot be started by the act of another.[79]

To drive at an immoderate and dangerous speed upon a public street is negligence,[80] and generally, by statute, unlawful,[81] and for careless and reckless driving whether faster than lawful or not, one may be made to respond in damages.[82]

The question as to which of the parties to a collision between vehicles is responsible for the injury is generally one of fact,[83] and the issue of negligence vel non in this as in other cases is generally one of fact for the jury.[84]

The failure of a city to warn plaintiff of the presence of a steam road roller could not be the proximate cause of frightening his horse when he knew of its presence.[85]

The effect of contributory negligence on the part of one who is injured while traveling on a public way is the same as it is in other negligence cases, and the question whether such negligence exists is generally one of fact.[86] A child playing

75. Adsit v. Catskill Elect. R. Co., 84 N. Y. Supp. 393.

76. Missouri Edison Elect. Co. v. Weber [Mo. App.] 76 S. W. 736.

77. Gorsuch v. Swan [Tenn.] 69 S. W. 1113; Groom v. Kavanagh, 97 Mo. App. 362. Evidence held sufficient to authorize finding that defendant's horse and wagon was left unattended in street. Brand v. Borden's Condensed Milk Co., 89 App. Div. [N. Y.] 188.

78. Allen v. Hazzard [Tex. Civ. App.] 77 S. W. 268.

79. Berman v. Schultz, 84 N. Y. Supp. 292.

80. To drive at a fast trot through a city street full of school children without looking ahead is negligence. Wikberg v. Olson Co., 138 Cal. 479, 71 Pac. 511.

81. Laws 1903, p. 1418, c. 625, § 163, providing that no ordinance shall be adopted restricting the running of automobiles to less than certain speeds, neither fixes a rate at which they may be run nor authorizes any municipality to fix such a rate. People v. Ellis, 88 App. Div. [N. Y.] 471. One willfully and recklessly driving at a high speed through a street and injuring another's horse may be convicted of willful and malicious trespass on the property of another, under Code 1892, § 1315. Porter v. State [Miss.] 35 So. 218.

82. Driver of defendant's truck causing collision between plaintiff's and another's held negligent. Bush v. Murphy, 85 N. Y. Supp. 361. Defendant driving team held not liable for collision with plaintiff's saddle horse. Kayse v. Randle [Miss.] 35 So. 422. Driver held not negligent in running over child playing on street. Hoff v. Hahn, 24 Ky. L. R. 2267, 73 S. W. 1015. Where defendant drove so close to barrels and planks guarding an excavation as to knock them into it, it was held that if he knew or ought to have known that persons were at work in the excavation, he was negligent. Jones v. Swift & Co., 30 Wash. 462, 70 Pac. 1109.

83. Negligence of drivers of trucks at street crossing. Bachmann v. Paul Weidmann Brewing Co., 80 App. Div. [N. Y.] 634. Negligence of defendant based on driver's incompetence or negligence held supported by evidence. McGahie v. McClennen, 86 App. Div. [N. Y.] 263. Employment of driver prima facie proved by fact that vehicle bore defendant's name. Vonderhorst Brewing Co. v. Amrhine [Md.] 56 Atl. 833.

84. Where plaintiff stopped his buggy near the corner of an alley and defendant driving out collided with it, the negligence of the parties was for the jury. Morgan v. Pleshek [Wis.] 97 N. W. 916; Doherty v. Rice, 182 Mass. 182. Negligence of defendant driving into truck in street and injuring plaintiff workman therein. Norton v. Webber, 69 App. Div. [N. Y.] 180. Evidence sufficient to go to jury as whether motorman should have stopped for a runaway team. Thiel v. South Covington, etc., R. Co., 25 Ky. L. R. 1590, 78 S. W. 206. Evidence as to collision with street car not contradicted by facts. Baxter v. St. Louis Transit Co. [Mo. App.] 78 S. W. 70. Previous runaway from different cause not relevant to show unsafe horse. Vonderhorst Brew. Co. v. Amrhine [Md.] 56 Atl. 833. Evidence for jury. Rosenstock v. Metropolitan St. R. Co., 86 N. Y. Supp. 114. Evidence insufficient for plaintiff. O'Neill v. Interurban St. R. Co., 86 N. Y. Supp. 208. Sufficient to support verdict for defendant. Alexander v. Metropolitan St. R. Co., 86 N. Y. Supp. 212.

Instruction as to care used by driver must be addressed to time of accident (request refused for failing to do so). Vonderhorst Brew. Co. v. Amrhine [Md.] 56 Atl. 833.

85. Haller v. City of St. Louis [Mo.] 75 S. W. 613.

86. Negligence of plaintiff working in ex-

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in the street is not a trespasser so far as its right not to be run over by a traveler on the way is concerned,[87] and his parents are not negligent in allowing him to play there.[88]

A bicycle rider must use the same degree of care required of the drivers of other vehicles.[89]

The owner of a team and wagon left unattended and unhitched in the street in violation of a city ordinance cannot recover for their injury by a collision with a street car if such violation contributed to the injury.[90]

§ 14. *Rights of abutters—Ownership of fee.*—A purchaser of lands bounded by a street takes an easement in such street to its full length,[91] and his grantor is estopped to deny his right of passage.[92] Having an interest not shared in by the general public, he may maintain injunction against a private person,[93] or an action for damages against a city closing its terminus,[94] or grading down his sidewalk and so changing the surface of the street as to impair the value of his property.[95] He cannot reclaim submerged lands so as to destroy public access to the water to which the highway leads,[96] and he has no right to use the street fronting his house as a carriage stand for hire.[97]

An abutting owner has a property right in ornamental trees on the street opposite his premises, by whomsoever planted, and is entitled to have them protected against willful or negligent injury.[98] He has also a litigable right to the air, light, and access furnished by such street,[99] unless he has lost it by consent or laches,[1]

cavation guarded by unsecured barrels and planks, injured by having them thrown on him by collision with passing team. Jones v. Swift & Co., 30 Wash. 462, 70 Pac. 1109. Failure of a woman run over by a wagon to keep up a constant lookout held not negligent. Graham v. Evening Press Co. [Mich.] 97 N. W. 697. One leaving curb to board a street car has a right to presume that he will not be negligently run down by a vehicle. Stroub v. Meyer [Mich.] 92 N. W. 779. Where a partially deaf person listens before crossing a street and is prevented by a jog in the street from seeing an approaching runaway team, he is not negligent in attempting to cross. Groom v. Kavanagh, 97 Mo. App. 362. But a pedestrian injured by long iron trusses projecting from the rear of a wagon turning at a crowded street corner is negligent where he did not look at the load, though he saw the wagon. Dennison v. North Penn Iron Co., 22 Pa. Super. Ct. 219. Stopping team on track facing and within 200 feet of approaching car, while another person got into carriage, held contributory negligence overcoming motorman's negligence and his failure to stop as the law prescribed. Gettys v. St. Louis Transit Co. [Mo. App.] 78 S. W. 82.

Negligence of ice wagon driver held not **imputable** to boy helping to deliver. Baxter v. St. Louis Transit Co. [Mo. App.] 78 S. W. 70. It is not negligent to rely on a skillful driver who is better situated to see and avoid collisions; the driver's negligence is not imputed to a guest. United Rys. & Elect. Co. v. Biedler [Md.] 56 Atl. 813. Failure to stop held **supervening negligence** overcoming contributory acts and proximate cause. Baxter v. St. Louis Transit Co. [Mo. App.] 78 S. W. 70. Failure to sound bell held negligence. Id.

87. O'Brien v. Hudner, 182 Mass. 381. Child six years old run down by delivery wagon held not negligent. Wixberg v. Olson Co., 138 Cal. 479, 71 Pac. 511.

88. Imputed negligence in allowing child to play in street. O'Brien v. Hudner, 182 Mass. 381; Mellen v. Old Colony St. R. Co. [Mass.] 68 N. E. 679. Instruction on warning child not to go into street held improperly refused. Weintraub v. Guilfoyle, 89 App. Div. [N. Y.] 328.

89. North Chicago St. R. Co. v. Cossar, 203 Ill. 608. Rider injured while attempting to pass team. Holt v. Cutler [Mass.] 69 N. E. 333. Boy riding bicycle injured by collision with horse and cart, question for jury. Hubner v. Metropolitan St. R. Co., 77 App. Div. [N. Y.] 290.

90. Munroe v. Hartford St. R. Co. [Conn.] 56 Atl. 498.

91. Healey v. Kelly, 24 R. I. 581.

92. Driscoll v. Smith [Mass.] 68 N. E. 210; Corning & Co. v. Woolner [Ill.] 69 N. E. 53.

93. Bohne v. Blankenship, 25 Ky. L. R. 1645.

94. Dries v. City of St. Joseph [Mo. App.] 73 S. W. 723.

95. Where no legal grade has been established. Caldwell v. Town of Nashua [Iowa] 97 N. W. 1000.

96. Borough of Seabright v. Allgor [N. J. Sup.] 56 Atl. 287. The street becomes extended by operation of law over the reclaimed land. Knickerbocker Ice Co. v. Forty-second St., etc., Ferry Co. [N. Y.] 68 N. E. 864.

97. Odell v. Bretney, 38 Misc. [N. Y.] 603.

98. Injury to shade trees by leaking gas main. Donahue v. Keystone Gas Co., 85 N. Y. Supp. 478; Lovejoy v. Campbell [S. D.] 92 N. W. 24. See, also, Mayor of Frostburg v. Wineland [Md.] 56 Atl. 811, to the effect that public must not destroy such trees unnecessarily.

99. May sue a person disturbing it. Hindley v. Metropolitan El. R. Co., 85 N. Y. Supp.

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and the consent of his grantor will not bind him if he had no notice thereof.[2] His right in this respect extends to the center of the street, and is independent of the opposite abutters;[3] but he cannot sue to nullify a street railway franchise to use the street.[4] His right in the street is subordinate to that of the public to locate street railways or other public service franchises[5] provided the highway is one on which no additional servitude is thereby laid.[6]

An abutting owner has no common-law remedy for an interference with his use by any public improvement such as a viaduct, hence he cannot enjoin its building. His only remedy in such case is that given against the public by statute.[7]

An abutting owner attempting, on the ground of the ownership of the fee, to enjoin the construction of a driveway encroaching on the sidewalk in front of his lot, must allege his ownership or his complaint will be demurrable for want of facts.[8]

The ownership of the fee of a highway passes by a deed of the land through which it runs though expressly reserved therefrom,[9] and a deed reciting a street as a boundary will convey title to the center of the street, especially where the same grantor, in conveying lots on the opposite side of the street, conveyed to the center.[10] But the grantee of a municipality will take no right in a street designated on a plat and expressly reserved from his deed though it has never been legally laid out.[11]

561; Ackerman v. True, 175 N. Y. 353. Lessee. International, etc., R. Co. v. Capers [Tex. Civ. App.] 77 S. W. 39.

Building of a railroad therein. Zook v. Pennsylvania R. Co. [Pa.] 56 Atl. 82.

1. As where he failed to object until the second track was partly finished, though one track had been in use two years. Hinnershitz v. United Traction Co., 206 Pa. 91.

2. An unrecorded consent to the erection of an elevated railroad is not binding on the abutter's grantee without notice, etc. Shaw v. New York El. R. Co., 78 App. Div. [N. Y.] 290. A writing held not a grant of easement to an elevated railroad, but only an assent to make a more formal writing in the future. Id. Consent to the building of a horse railroad will not imply consent to a change of it into an electric system. Humphreys v. Ft. Smith Traction, Light & Power Co. [Ark.] 71 S. W. 662. A persumption that the abutting owners have consented to the construction of a single track railway in the street raises none that they have also consented to an additional switch. Stevens v. Skaneateles R. Co. 89 App. Div. [N. Y.] 145.

3. He cannot enjoin the building of a street railway along the opposite side of the street. North Pennsylvania R. Co. v. Inland Traction Co., 205 Pa. 579.

An abutting owner owning to the center of the street may bring ejectment against a railroad company operating a single track through the street where it improves a new switch on his half of the street. Stevens v. Skaneateles R. Co., 89 App. Div. [N. Y.] 145.

4. The company must however condemn or buy. Lange v. La Crosse & E. R. Co. [Wis.] 95 N. W. 952.

5. A trolley railway track laid in accordance with the directions of a special ordinance will not be enjoined from operation because its location works inconvenience and injury to abutting owners. Budd v. Camden Horse R. Co., 61 N. J. Eq. 543.

The provision in the railway law that nothing therein contained shall be deemed to authorize a street railroad corporation to acquire real property in a city by condemnation, does not relate to an abutter's property rights in the bed of the street. Laws 1890, p. 1108, c. 565, § 90, as amended by Laws 1895, p. 791, c. 933. Schenectady R. Co. v. Peck, 84 N. Y. Supp. 759.

6. The county court in Arkansas, though vested with general jurisdiction over public roads, cannot impose an additional servitude thereon by granting the right to construct a street car system. Humphreys v. Ft. Smith Traction Light & Power Co. [Ark.] 71 S. W. 662. In some states, however, a street railway is not regarded as an additional servitude (Georgetown & L. Traction Co. v. Mulholland, 25 Ky. L. R. 578, 76 S. W. 148) though the grade of the highway is, to accommodate it, so changed as to impair the value of the abutting property (Austin v. Detroit, etc., R. Co. [Mich.] 96 N. W. 35). Gas pipes in a country road are an additional servitude. Ward v. Triple State Nat. Gas Co., 25 Ky. L. R. 116, 74 S. W. 709.

7. Sauer v. City of New York, 85 N. Y. Supp. 636. Damages held inadequate, raising grade of street. Goetz v. State, 85 N. Y. Supp. 739.

Abutting owners are entitled to enjoin the construction of a telephone line where they have not been compensated, as such service amounts to an additional servitude. Gray v. New York State Tel. Co., 41 Misc. [N. Y.] 108. Contra. Kirby v. Citizens' Tel. Co. of Sioux Falls [S. D.] 97 N. W. 3. But where the fee is in the city, they must show that their injury is irreparable and cannot be compensated in damages; a mere allegation of unlawfulness is not sufficient. Aurora Elect. Light & Power Co. v. McWethy, 104 Ill. App. 479.

8. Kelley v. City of Marion [Ind.] 68 N. E. 594.

9. Myers v. Bell Tel. Co., 83 App. Div. [N. Y.] 623.

10. Healey v. Kelly, 24 R. I. 581.

11. Whitman v. City of New York, 85 App. Div. [N. Y.] 468.

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And the grantees of all the land on both sides of a platted street, on failure of the city to accept it, will not be permitted to lay claim to the fee thereof to the exclusion of the public.[12] The purchaser of a lot abutting on a platted alley takes only to the lot line and not to the center of the alley.[13]

The city of New York holds title in the lands of its public streets in trust for the public use.[14]

When stone flags are embedded in the soil with the intention of using them permanently as a walk on the street they become an appurtenance to the abutting land and the village laying them cannot remove them again merely because the lot owner will not pay for them;[15] but building a sidewalk will not give a mechanic a lien on the lot in the absence of an express statutory authority.[16]

An abutter is liable to a traveler for injuries due to negligent misuse of properties on the abutting land.[17]

§ 15. *Defective or unsafe streets or highways. A. Liability of municipalities in general.*—Where a municipal corporation has exclusive control and management of its highways with power to raise money for their construction and repair, a duty, though not expressly imposed by statute, arises to the public to keep them in a condition reasonably safe for public travel and it is liable for injuries resulting from a neglect to perform that duty.[18]

The duty of a municipality extends to the exercise of ordinary care in keeping its highways in a condition reasonably safe for public travel[19] by those who are in the exercise of reasonable care.[20]

A city is not an insurer against accidents,[21] and its duty does not extend to provision against extraordinary events.[22] The duty to repair extends only to streets under the control of the municipality,[23] but where a sidewalk or street causing injury is in actual control of the municipality and has been for so long a period that a highway by prescription has been established, it is no defense that no formal dedication, acceptance, or establishment can be shown.[24]

The duty extends to one on a hillside in the outskirts of the city,[25] to a "park-

12. Corning & Co. v. Woolner [Ill.] 69 N. E. 53.

13. Blennerhassett v. Town of Forest City, 117 Iowa, 680.

14. Knickerbocker Ice Co. v. Forty-second St., etc., Ferry R. Co. [N. Y.] 68 N. E. 864.

15. Platt v. Village of Oneonta, 84 N. Y. Supp. 699.

16. Fleming v. Prudential Ins. Co. of America [Colo. App.] 73 Pac. 752.

17. Abutter may blow out gas well near highway if care be used, though noise produced frightens horses. Snyder v. Philadelphia Co. [W. Va.] 46 S. E. 366. Travelers may assume that an abutter will not blow out a gas well without first giving warning or keeping a lookout. Id. Blowing off gas well which scared horses is the proximate cause of injury to the driver who was thrown out by the breaking of a weak line. Id.

18. Shearer v. Town of Buckley [Wash.] 72 Pac. 76; Carson v. City of Genesee [Idaho] 74 Pac. 862; Campbell v. City of Stanberry [Mo. App.] 78 S. W. 292. Police power of a city enables it to repair. Lentz v. City of Dallas [Tex.] 72 S. W. 59.

19. Finch v. Village of Bangor [Mich.] 94 N. W. 738; Meisner v. City of Dillon [Mont.] 74 Pac. 130; City of Louisville v. Johnson, 24 Ky. L. R. 685, 69 S. W. 803; Holitza v. Kansas City [Kan.] 74 Pac. 594; Wilkins v. City of Missouri Valley [Iowa] 96 N. W. 868; City of Dallas v. Moore [Tex. Civ. App.] 74 S. W. 95; Jerowitz v. Kansas City [Mo. App.] 77 S. W. 1088. Depression around telephone pole covered with ice. Kauffman v. City of Harrisburg, 204 Pa. 26.

20. City of Midway v. Lloyd, 24 Ky. L. R. 2448, 74 S. W. 195. See, also, post, § 15—Contributory negligence.

21. Gilson v. City of Cadillac [Mich.] 95 N. W. 1084; City of Colorado Springs v. Floyd, [Colo. App.] 73 Pac. 1092; Holitza v. Kansas City [Kan.] 74 Pac. 594.

22. Such as a flood. Schrunk v. Town of St. Joseph [Wis.] 97 N. W. 946.

23. Apportionment of highway between adjoining towns. Liability on change of boundary. Town of Schoepke v. Wolfgram [Wis.] 96 N. W. 556.

24. Johnson v. City of St. Joseph, 96 Mo. App. 663; City of Madisonville v. Pemberton's Adm'r, 25 Ky. L. R. 847, 75 S. W. 229; Town of Bromley v. Bodkin, 25 Ky. L. R. 1245, 77 S. W. 696; O'Malley v. City of Lexington [Mo. App.] 74 S. W. 890; City of Louisville v. Brewer's Adm'r, 24 Ky. L. R. 1671, 72 S. W. 9. Evidence held sufficient to show that a way was public. Kircher v. Incorporated Town of Larchwood [Iowa] 95 N. W. 184.

25. Wall v. City of Pittsburg, 205 Pa. 48.

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way" under the control of the park board,[26] and to a bicycle path which the city was under no obligation to construct,[27] but where a portion of a toll turnpike is included in the limits of a city, the city is not bound to keep it in repair.[28]

If the highway is in such a condition that an injury to an ordinarily prudent traveler thereon will be the natural and probable result thereof and ought reasonably to be foreseen by reasonably prudent officials, the town is liable and not otherwise.[29]

A road which is reasonably safe for travel of ordinary kinds is not defective merely because not fit for use with bicycles;[30] but where a bicycle path is constructed by the city it is liable for injuries to a bicycle rider resulting from defects in construction, though other portions of the street were safe.[31]

The public right to use a street extends to its entire width,[32] and where no part of the street has been set apart for sidewalks and teams are habitually driven over its entire width, it is not negligent to drive between fire hydrants and the property line.[33] The public is also liable for an injury arising from a defect near the boundary of a street and separated therefrom by no visible mark which may aid a traveler in keeping the public thoroughfare, but is under no duty to see that a path or driveway on private property made by the public in crossing the same is free from obstruction.[34]

It is liable to the driver of a patrol wagon for injury by being struck by the limb of a tree projecting into the street dangerously low,[35] and for an injury to a pedestrian by the falling branch of a tree.[36] An open gutter is not a defect,[37] and the question of the safety of a gutter[38] with reference to its width and depth is one of fact.[39] A city is liable for an injury resulting from a fallen electric wire where it did not cause it to be removed within a reasonable time.[40] A fire plug close to the traveled part of the street and concealed by weeds[41] and a gravel heater which the city has allowed to remain in the street over a week are actionable defects;[42] but to leave a water pipe at the edge of the sidewalk is not negligent, there being plenty of room for travelers.[43] A town is not liable for an injury to one riding on a street car by a tree standing near the track where it had authority neither over the building of the track nor to remove the tree.[44]

If authority to provide for lighting its streets is enabling but not mandatory there is no general duty devolved upon the city to light them,[45] but a city may be liable for an injury arising from a failure to properly light its streets at a point

26. Kleopfert v. City of Minneapolis [Minn.] 95 N. W. 908.
27. Prather v. City of Spokane, 29 Wash. 549, 70 Pac. 55, 59 L. R. A. 346.
28. Columbia & Cedar Creek Turnpike Co. v. Vivion [Mo. App.] 77 S. W. 89.
29. Fehrman v. Town of Pine River [Wis.] 95 N. W. 105.
30. Rust v. Inhabitants of Essex, 182 Mass. 313.
31. Prather v. City of Spokane, 29 Wash. 549, 70 Pac. 55, 59 L. R. A. 346.
32. Meisner v. City of Dillon [Mont.] 74 Pac. 130. Instruction so stating the law held not prejudicial in particular case. Gallagher v. Town of Buckley, 31 Wash. 380, 72 Pac. 79.
33. Burnes v. City of St. Joseph, 91 Mo. App. 489.
34. Sweet v. City of Poughkeepsie, 75 App. Div. [N. Y.] 274. See also Prather v. City of Spokane, 29 Wash. 549, 70 Pac. 55, 59 L. R. A. 346; Strait v. City of Eureka [S. D.] 96 N. W. 695.
35. City of Louisville v. Michels, 24 Ky. L. R. 1375, 71 S. W. 511.
36. McGarey v. City of New York, 89 App. Div. [N. Y.] 500.
37. Mason v. City of Philadelphia, 205 Pa. 177.
38. Injury by slipping of unfastened iron bridge over gutter. Elias v. City of Lancaster, 203 Pa. 638.
39. Holding v. City of St. Joseph, 92 Mo. App. 143.
40. City of Emporia v. Burns [Kan.] 73 Pac. 94; Colbourn v. City of Wilmington [Del.] 56 Atl. 605; Kansas City v. Gilbert, 65 Kan. 469, 70 Pac. 350.
41. Thunborg v. City of Pueblo [Colo. App.] 70 Pac. 148.
42. Griffin v. City of Boston, 182 Mass. 409.
43. Downey v. City of Boston [Mass.] 67 N. E. 638.
44. Hall v. Inhabitants of Town of Wakefield [Mass.] 68 N. E. 15.
45. City of Daytona v. Edson [Fla.] 34

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where contractors have placed building materials,[46] or are constructing a sewer,[47] though the contractors have failed to keep danger signals burning thereon, and the electric light company having the contract to light the streets has failed to comply with its contract.[48] Where a city owns and operates an electric light plant it is held to the same degree of care, to refrain from injuring travelers on its streets by means of fallen wires, that a private corporation would be.[49]

Lack of funds will not relieve a municipality of its duty to repair its highways,[50] though in Massachusetts it is held that the city may show its financial resources and street mileage on the question of its reasonable diligence in caring for its streets.[51]

In the Indian Territory, municipalities are not liable for injuries to individuals caused by defects in streets and highways, congress having adopted the municipal corporations law of Arkansas for the government of that territory, and the supreme court of Arkansas having given its law that construction.[52]

Since the liability of county commissioners for damages resulting from the defective condition of highways in their county arises wholly from the statute, an act that deprives them of almost all control of the highways takes away the basis of their liability.[53]

A city is not liable to a traveler for an injury caused by unlawful coasting since in preventing that the city acts as agent of the commonwealth.[54]

(§ 15) *B. Notice of defect.*—It must be shown that the municipality through its proper officers had notice of the defect,[55] or else that it has existed so long and is of such nature that its officers are presumed to know of it.[56] Actual notice as distinguished from constructive notice is not required.[57] Notice, however, or the circumstances from which it is presumed, must be proved. They are not open to inference.[58]

So. 954. Placing a light so that a pole throws a shadow over a hole in the walk left for drainage purposes may be negligent. Stone v. City of Seattle, 30 Wash. 65, 70 Pac. 249; Id. 74 Pac. 808.

46. Baltimore City v. Beck, 96 Md. 183.

47. Drake v. City of Seattle, 30 Wash. 81, 70 Pac. 231. Negligence of city in leaving ditch open across sidewalk held question for jury. City of San Antonio v. Chism [Tex. Civ. App.] 71 S. W. 606.

48. Baltimore City v. Beck, 96 Md. 183.

49. City of Owensboro v. Knox's Adm'r, 25 Ky. L. R. 680, 76 S. W. 191.

50. City of Dallas v. Strayer [Tex. Civ. App.] 73 S. W. 980.

51. O'Brien v. City of Woburn [Mass.] 69 N. E. 350.

52. Mansf. Dig., c. 29. Blaylock v. Incorporated Town of Muskogee [C. C. A.] 117 Fed. 125.

53. Code, Pub. Gen. Laws, art. 25, §§ 1, 2; Acts 1900, c. 685, §§ 188-199. Baltimore County Com'rs v. Wilson [Md.] 54 Atl. 71. Counties under the township organization act are not liable. Goes v. Gage County [Neb.] 93 N. W. 923. See, also, Nielson v. Cedar County [Neb.] 97 N. W. 826.

54. Dudley v. City of Flemingsburg, 24 Ky. L. R. 1804, 72 S. W. 327.

55. Northdruft v. City of Lincoln [Neb.] 92 N. W. 628, 96 N. W. 163; Holitza v. Kansas City [Kan.] 74 Pac. 594. An instruction purporting to state the elements of defendant's liability and omitting this is bad. City of South Omaha v. Hager [Neb.] 92 N. W. 1017; City of South Omaha v. Conroad [Neb.] 97 N. W. 796. Service of notice to abutter to repair shows notice of defect in sidewalk. Wilson v. City of Cedar Rapids [Iowa] 98 N. W. 119. Evidence insufficient to go to jury on injury due to billboard blown out of alley by wind on to street. City of Fremont v. Dunlap [Ohio] 69 N. E. 561. Telling road commissioner of rock eight inches high in traveled road held sufficient to show notice. Cowan v. Inhabitants of Bucksport [Me.] 56 Atl. 901. Notice to municipality not variant from proof of notice to road commissioner in absence of timely objection. Id. Notice to policeman whose duty it is to report defects. City of San Antonio v. Talerico [Tex. Civ. App.] 78 S. W. 28.

56. Jarrel v. City of Wilmington [Del.] 56 Atl. 379; City of Lincoln v. Miller [Neb.] 96 N. W. 484; Holitza v. Kansas City [Kan.] 74 Pac. 594; City of Streator v. O'Brien, 103 Ill. App. 85; City of Rome v. Stewart, 116 Ga. 738; Bell v. City of Henderson, 24 Ky. L. R. 2434, 74 S. W. 206; Shearer v. Town of Buckley, 31 Wash. 370, 72 Pac. 76; City of Linton v. Smith [Ind. App.] 68 N. E. 617; City of Madisonville v. Pemberton's Adm'r, 25 Ky. L. R. 347, 75 S. W. 229; Spicer v. Webster City, 118 Iowa, 561; Smith v. Sioux City, 119 Iowa, 50. Defect in coal hole cover must be such as could be discovered from street to charge city. Matthews v. City of New York, 78 App. Div. [N. Y.] 422. Hole in walk obvious on mere inspection. Padelford v. City of Eagle Grove, 117 Iowa, 616. A post in the side path existing 3 or 4 years. City of Louisville v. Brewer's Adm'r, 24 Ky. L. R. 1671, 72 S. W. 9.

57. City of Dallas v. Moore [Tex. Civ. App.] 74 S. W. 95.

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Notice of the particular defect causing the injury is not necessary;[59] and the general bad condition of the walk or road though not confined to the exact time or place of the accident may be shown,[60] but if the witness is unable to locate his observations as anywhere near the time of the accident, his testimony is inadmissible.[61]

The length of time necessary to charge municipal officers with constructive notice is generally one of fact;[62] but where from the evidence but one conclusion can be drawn, the question is one of law.[63] Merely that a wooden culvert has been built for twenty years will not charge a town with notice of its defective condition,[64] but obvious defects of which the city is charged with notice will presume notice of others not apparent which would have become so on investigation of the obvious ones.[65]

Where actual notice is required, the fact that one of its officers casually walked along the street on which the defect existed is not sufficient,[66] but actual personal knowledge is sufficient, there being no distinction between personal and official knowledge.[67]

No notice of a defect in the construction itself is necessary,[68] and a city is chargeable with notice of the fact that its employes place insecure temporary bridges over trenches in the streets dug in installing a sewer system;[69] but where the defect in

58. Northdruft v. City of Lincoln [Neb.] 96 N. W. 163; Strait v. City of Eureka [S. D.] 96 N. W. 695; Davis v. Common Council of Alexander City [Ala.] 33 So. 863; City of Sherman v. Greening [Tex. Civ. App.] 73 S. W. 424. That a gate leading from the street down to a sunken alley was occasionally left open cannot be shown, there being no showing that the city had notice of the fact. City of Carlisle v. Secrest, 25 Ky. L. R. 336, 75 S. W. 268.

59. Northdruft v. City of Lincoln [Neb.] 92 N. W. 628. Where mud was washed on the walk by every rain causing it to become slippery, notice of the condition of the walk after the last rain was unnecessary. Milledge v. Kansas City [Mo. App.] 74 S. W. 892.

60. Styles v. Village of Decatur [Mich.] 91 N. W. 622; Kircher v. Incorporated Town of Larchwood [Iowa] 95 N. W. 184; Randall v. City of Hoquiam, 30 Wash. 435, 70 Pac. 1111; Burt v. Utah Light & Power Co., 26 Utah, 157, 72 Pac. 497; Spicer v. Webster City, 118 Iowa, 561; Schaefer v. City of Ashland [Wis.] 94 N. W. 303; Bell v. City of Spokane, 30 Wash. 508, 71 Pac. 31; Shearer v. Town of Buckley, 31 Wash. 370, 72 Pac. 76; Huff v. City of Marshall, 97 Mo. App. 542; Styles v. Village of Decatur [Mich.] 91 N. W. 622; Spicer v. Webster City, 118 Iowa, 561; City of Elgin v. Nofs, 200 Ill. 252; Kircher v. Incorporated Town of Larchwood [Iowa] 95 N. W. 184. The passage of an ordinance requiring property owners along that street to repair their walks may be shown. City of Beardstown v. Clark, 204 Ill. 524.

61. Gordon v. Sullivan [Wis.] 93 N. W. 457.

62. Jarrell v. City of Wilmington [Del.] 56 Atl. 379; Ljundberg v. Village of North Mankato, 87 Minn. 484; Leonard v. City of Boston, 183 Mass. 68; Tracey v. South Haven Tp. [Mich.] 93 N. W. 1065; City of Madisonville v. Pemberton's Adm'r, 25 Ky. L. R. 347, 75 S. W. 229; Walden v. City of Jamestown, 79 App. Div. [N. Y.] 433; Holitza v. Kansas City [Kan.] 74 Pac. 594; Smith v. Sioux City, 119 Iowa, 50; Goodman v. City of Kahoka [Mo. App.] 73 S. W. 355; Reed v. City of Mexico [Mo. App.] 76 S. W. 53. The condition of a highway for a week or ten days previous to the accident may be shown. Burt v. Utah Light & Power Co. [Utah] 72 Pac. 497. Two or three weeks may be ample. Sweet v. City of Poughkeepsie, 75 App. Div. [N. Y.] 274. So may a month where an alderman lived within 75 feet of it. Clark v. City of Brookfield, 97 Mo. App. 16. Four or five months is sufficient. Town of Bromley v. Bodkin, 25 Ky. L. R. 1245, 77 S. W. 696. A year is sufficient. City of Denver v. Murray [Colo. App.] 70 Pac. 440. That a pile of wood had lain in the highway for weeks authorizes a finding that the commissioner of highways should have known of its presence. Hoffart v. Town of West Turin, 85 N. Y. Supp. 471.

63. Bell v. City of Henderson, 24 Ky. L. R. 2434, 74 S. W. 206. From noon on Sunday until before daylight Monday morning is not sufficient. Canfield v. City of Newport, 24 Ky. L. R. 2213, 73 S. W. 788. From Monday to Friday is not sufficient in case of ice. Corey v. City of Ann Arbor [Mich.] 96 N. W. 477. Contra. Reed v. Schuylkill Haven Borough, 22 Pa. Super. Ct. 27. Ten days will presume notice. Straub v. City of St. Louis [Mo.] 75 S. W. 100.

64. Miller v. City of North Adams, 182 Mass. 569.

65. City of Dallas v. Moore [Tex. Civ. App.] 74 S. W. 95. Disturbed condition of fire alarm system held sufficient notice of fallen electric wire. City of Emporia v. Burns [Kan.] 73 Pac. 94.

66. McManus v. City of Watertown, 84 N. Y. Supp. 638. City clerk and president of council. Corey v. City of Ann Arbor [Mich.] 96 N. W. 477.

67. Canfield v. East Stroudsburgh Borough, 19 Pa. Super. Ct. 649. It may be shown that workmen telephoned the city hall that the defect existed. City of Dallas v. Moore [Tex. Civ. App.] 74 S. W. 95.

68. City of Elwood v. Laughlin, 29 Ind. App. 667; Brake v. Kansas City [Mo.] 75 S. W. 191.

69. City of Jackson v. Carver [Miss.] 35 So. 157.

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the original construction contributed only remotely to the injury, notice of the want of repair is necessary.[70]

A defect in a sidewalk may be so slight as to justify a municipality in disregarding it in the first instance;[71] the city being required to use only reasonable care to keep its walks reasonably safe,[72] but the occurrence of numerous accidents will be sufficient to characterize it as dangerous and require its repair.[73] Where the action is predicated on the failure of the city to see that a public contractor guarded an excavation with danger signals the fact that the authorities learned of the lack of lights but a few minutes before the accident and took immediate steps to provide them is no defense,[74] since the period of existence of the excavation requiring signals and not the length of time the dangerous place was without signals at night governs the question of notice.[75]

Inspection, to relieve the city, must be such as ordinary care and prudence require,[76] and the duty to repair a street or walk is not discharged by merely sending a man to repair it.[77]

(§ 15) *C. Sidewalks.*—The entire width of the sidewalk must be made and kept reasonably safe, including the curb, and if any part of it is taken up by an open area or cellarway connecting adjoining premises, with or without a license, it is an obstruction, for negligently permitting which, to remain open or unguarded, the city[78] and the abutting owner are liable.[79] Reasonable safety includes all hours of the day and night.[80] Cellar doors in a sidewalk affording, when closed, a safe passage way for pedestrians, are not negligent per se;[81] and whether, by being raised above the general level of the walk, they constitute negligence, is for the jury.[82]

Defects in the original plan of construction as well as those arising from age and wear are actionable.[83] Where a portion of the sidewalk is elevated above the rest and causes injury, there is no presumption that the elevated portion was built on a general plan and therefore not a defect,[84] and whether an uneven sidewalk is negligent is for the jury.[85] Construction of a walk of poor material may be negligence.[86]

70. City of Houston v. Vatter [Tex. Civ. App.] 74 S. W. 806.

71. Corson v. City of New York, 78 App. Div. [N. Y.] 481; Schall v. City of New York, 84 N. Y. Supp. 737; Metzger v. City of Chicago, 103 Ill. App. 605; Hamilton v. City of Buffalo, 173 N. Y. 72. No evidence that hole in sidewalk was sufficient to suggest danger. Vandeskie v. City of New York, 85 N. Y. Supp. 836.

72. City of Beardstown v. Clark, 104 Ill. App. 568; Padelford v. City of Eagle Grove, 117 Iowa, 616.

73. Slight depression in walk. Evidence not sufficient to show prior accidents. Corson v. City of New York, 78 App. Div. [N. Y.] 481.

74. Drake v. City of Seattle, 30 Wash. 81, 70 Pac. 231.

75. Holitza v. Kansas City [Kan.] 74 Pac. 594.

76. Kennedy v. City of St. Cloud [Minn.] 97 N. W. 417.

77. Styles v. Village of Decatur [Mich.] 91 N. W. 622.

78. Negligence of parties where plaintiff fell into unguarded cellarway over coping held question for jury. Link v. City of New York, 82 App. Div. [N. Y.] 486.

79. Schneider v. City Council of Augusta [Ga.] 45 S. E. 459. Being a nuisance per se, long continuance cannot make it lawful. Powers v. Penn. Mut. Life Ins. Co., 91 Mo. App. 55. An opening in the walk provided with doors, forming a part of the walk when closed and a guard when open, does not violate an ordinance prohibiting the maintenance of unguarded areas. Morrison v. McAvoy, 137 Cal. XIX, 70 Pac. 626. See, also, Smith v. City of Seattle [Wash.] 74 Pac. 674.

80. Styles v. Village of Decatur [Mich.] 91 N. W. 622.

81. Fehlhauer v. City of St. Louis [Mo.] 77 S. W. 843.

82. Smith v. City of Seattle [Wash.] 74 Pac. 674.

83. Stone v. City of Seattle, 30 Wash. 65, 70 Pac. 249; Id. 74 Pac. 808; City of Rome v. Stewart, 116 Ga. 738.

84. Metz v. City of Butte [Mont.] 71 Pac. 761; Canfield v. Borough of East Stroudsburg, 19 Pa. Super. Ct. 649.

85. City of Carlisle v. Secrest, 25 Ky. L. R. 336, 75 S. W. 268. Subsequent photographs admitted on showing that condition was unchanged. City of San Antonio v. Talerico [Tex. Civ. App.] 78 S. W. 28. Photographs showing extent of repairs will prove size of hole. Id.

86. That the property owner constructed the walk of his own accord is no defense to the town, where it is in the inhabited part of the town and the authorities have control of the street and invite the public to use it.

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(§ 15) *D. Barriers, railings, and signals.*—Under the statutes imposing upon a town the duty of keeping its highways in repair it is held that they are liable for failure to properly guard bridges and embankments by rails.[87] The railing should be sufficient to meet all those incidental uses to which it would reasonably be put by persons crossing;[88] but the city is under no duty to place barriers along a path, not at a street intersection, where people are accustomed to cross the street.[89] Where there was no barrier and plaintiff's horse was frightened by an automobile, driven with due care, and plunged down the embankment, the town was held liable.[90]

The duty also extends to enclosing dangerous places.[91] A partial enclosure by barriers does not relieve the city where injury occurs from obstruction in the unenclosed part,[92] and where a long trench is guarded only by a light at each end, the question of negligence is for the jury.[93] The violation by defendant of its own ordinance requiring barriers and lights to be placed about excavations in streets does not establish its negligence as a matter of law.[94] Sharp turns may make barriers a necessary guard against running off the way.[95] A city is not bound to anticipate that the holder of a building permit will be negligent.[96]

Where work contracted for necessarily constitutes an obstruction or defect in the street of such nature as to render it dangerous or unsafe for public travel unless properly guarded, the city as well as the contractor is liable for any injury resulting from the acts which the contractor engaged to perform.[97] In Texas, however, it is held that if the person prosecuting the work violate a city ordinance by failure to guard his work he alone is liable, though he has permission from the city to make the excavation.[98]

(§ 15) *E. Snow and ice.*—A city or town is ordinarily not liable for injuries arising from ice on its walks or highways from natural causes,[99] but ice from

Town of Bromley v. Bodkin, 25 Ky. L. R. 1245, 77 S. W. 696.

87. Whether the town was negligent held a question for the jury. Seeton v. Town of Dunbarton [N. H.] 56 Atl. 197. See, also, Krause v. City of Merrill, 115 Wis. 526. Embankment 3 or 4 feet high held to require a railing. Upton v. Town of Windham, 75 Conn. 288.

88. Littebrant v. Town of Sidney, 77 App. Div. [N. Y.] 545. Held no evidence that boy lost his life by reason of breaking of railing. Eckert v. Town of Shawangunk, 77 App. Div. [N. Y.] 645. Statutory liability from failure to rail and guard embankment applies to bicycle riders, that mode of "travel" being included. Hendry v. Town of North Hampton [N. H.] 56 Atl. 922.

89. Holding v. City of St. Joseph, 92 Mo. App. 143.

90. Upton v. Town of Windham, 75 Conn. 288.

91. Wells v. Town of Remington [Wis.] 95 N. W. 1094. A ditch at the end of a sidewalk. Hutchison v. Town of Summerville [S. C.] 45 S. E. 8.

92. Leonard v. City of Boston, 183 Mass. 68.

93. Endicott v. Triple State Natural Gas & Oil Co., 25 Ky. L. R. 862, 76 S. W. 516.

Instruction calling for guards and also lights held harmless because neither was provided. Campbell v. City of Stanberry [Mo. App.] 78 S. W. 292. Instruction held not to call for absolute safety. Id.

94. Sterling v. City of Detroit [Mich.] 95 N. W. 986.

95. Where a bicycle path turned sharply to avoid a curb stone and gutter and no barrier was maintained, it was held that the city was liable for an injury to one riding against the curb, though it was beyond the limits of the path. Prather v. City of Spokane, 29 Wash. 549, 70 Pac. 55, 59 L. R. A. 346.

96. By granting a building permit the city does not render itself liable for the negligence of the builder nor impose upon itself the duty of warning pedestrians of the danger of passing along the walk in front of the building, not being bound to anticipate that the builder will be negligent and allow materials to fall on persons passing by. Copeland v. City of Seattle [Wash.] 74 Pac. 582.

97. City of Anderson v. Fleming [Ind.] 67 N. E. 443; Canfield v. Borough of East Stroudsburg, 19 Pa. Super. Ct. 649. For failure to guard an excavation or other dangerous place by proper lights, the city is liable, though the person prosecuting the work is charged primarily with that duty. Baltimore City v. Beck, 96 Md. 183; [Md.] Drake v. City of Seattle, 30 Wash. 81, 70 Pac. 231; Holitza v. Kansas City [Kan.] 74 Pac. 594. Negligence of city in failing to light ditch open across sidewalk held question for jury. City of San Antonio v. Chism [Tex. Civ. App.] 71 S. W. 606.

98. Browne v. Bachman [Tex. Civ. App.] 72 S. W. 622.

99. Wittman v. City of New York, 80 App. Div. [N. Y.] 585; Metzger v. City of Chicago, 103 Ill. App. 605; Crawford v. City of New York, 68 App. Div. [N. Y.] 107. Defendant's negligence in failing to place a barrier at

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artificial causes is ground for an action,[1] and where from natural causes it has existed so long as to charge the city with notice of its dangerous character, the duty arises to remove it and failing this the city is liable.[2]

One slipping on ice which he knew of and had previously avoided is not necessarily negligent,[3] and proof that plaintiff walked a part of the journey in the roadway and returned to the sidewalk only where it was covered by an awning is evidence of care.[4]

(§ 15) *F. Defects created or permitted by abutting owners and others—Joint and several liability.*—Where a city permits a structure on its streets which is liable to be used by pedestrians, it is bound to see that it is kept in good condition.[5] It is liable for an obstruction temporary in its nature left in the street by a private person,[6] such as a negligently constructed awning being thrown on plaintiff by the passing vehicle of another;[7] especially where the individual has been accustomed to make the same obstruction frequently for so long that the city must be deemed to have known of it,[8] or where it authorizes the maintenance of a structure which is a nuisance per se though such authorization was ultra vires.[9]

A town is not liable for injuries sustained by falling into a ditch dug across the street by a private person;[10] otherwise for an injury resulting from a defective street though another is primarily under the duty of maintaining it and is therefore also liable.[11]

In several states, the person who is primarily responsible for a defective sidewalk must be joined with the city in an action for an injury arising from such defect;[12] but the city cannot complain that it is not done as it is not thereby

the edge of an icy road on a side hill and plaintiff's negligence in attempting to use the road were held questions for the jury. Littebrant v. Town of Sidney, 77 App. Div. [N. Y.] 545.

1. City of Colorado Springs v. Floyd [Colo. App.] 73 Pac. 1092. Defective leader from roof held not proximate cause of ice on walk. Wittman v. City of New York, 80 App. Div. [N. Y.] 585.

2. Klaus v. City of Buffalo, 86 App. Div. [N. Y.] 221; Wright v. Lehman Tp., 19 Pa. Super. Ct. 653; Reno v. City of St. Joseph, 169 Mo. 642. Failure for 24 hours held not negligent. Crawford v. City of New York [N. Y.] 66 N. E. 1106. Three or four days held sufficient to charge borough with notice. Reed v. Schuylkill Haven Borough, 22 Pa. Super. Ct. 27. Contra. Corey v. City of Ann Arbor [Mich.] 96 Mo. 477. Injury occurring at 8 o'clock A. M. from ice formed during night. Village of Leipsic v. Gerdeman, 68 Ohio St. 1. Walking on an icy pavement is not negligence where ice would have been encountered by taking any other route. Evans v. City of Philadelphia, 205 Pa. 193.

3. Delaney v. City of Mount Vernon, 89 App. Div. [N. Y.] 209. Negligence of plaintiff for jury—Fall on ice. Brown v. White, 206 Pa. 106.

4. Reed v. Schuylkill Haven Borough, 22 Pa. Super. Ct. 27.

5. Bell v. City of Henderson, 24 Ky. L. R. 2434, 74 S. W. 206; Town of Bromley v. Bodkin, 25 Ky. L. R. 1245, 77 S. W. 696.

6. Old store counter left in street to injury of boy playing on it. Straub v. City of St. Louis [Mo.] 75 S. W. 100. Derrick kept standing in street. City of Denver v. Murray [Colo. App.] 70 Pac. 440. For failure to perform its duty to keep its streets free from unlawful obstructions, a city may be made to respond in damages. City of Richmond v. Smith [Va.] 43 S. E. 345. Town liable for injury from frightened horse caused by pile of wood on side of highway, but not where fright was caused by stick falling from pile. Hoffart v. Town of West Turin, 85 N. Y. Supp. 471.

7. Jarrell v. City of Wilmington [Del.] 56 Atl. 379.

8. Runway used by packing company to carry meat across street. Wynn v. City of Yonkers, 80 App. Div. [N. Y.] 277.

9. City of Richmond v. Smith [Va.] 43 S. E. 345.

10. Wilder v. City of Concord [N. H.] 56 Atl. 193.

11. Railway company under duty to maintain street crossings. Eskildsen v. City of Seattle, 29 Wash. 583, 70 Pac. 64. Abutting owner jointly liable for defect in sidewalk. City of Covington v. Johnson, 24 Ky. L. R. 602, 69 S. W. 703. The liability of a city for an injury caused by a defect in that portion of its street which lies between street car tracks is not affected by the fact that the street railway is required by law to keep that portion in repair, where the defect arises from the city's own negligence. Binninger v. City of New York, 80 App. Div. [N. Y.] 438. Authority by its charter to require abutting owners to construct and repair walks, and a provision that where it cannot compel by fixing a lien on the property it shall not be liable for any defect, will not excuse a city from liability for such minor defects as it is required and entitled by its general police powers to repair. City of Dallas v. Strayer [Tex. Civ. App.] 73 S. W. 980; Lentz v. City of Dallas [Tex.] 72 S. W. 59.

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precluded from pleading the owner's negligence as a joint tort feasor and so securing a dismissal for defect of parties.[13] In Georgia they are held not to be joint tort feasors so as to deprive the city of its remedy by claiming contribution.[14] If the statute requires plaintiff to exhaust his remedy against the lot owner, judgment cannot be taken against the city before judgment has been taken against the lot owner.[15]

For damages arising from ordinary want of repair of a sidewalk or street, the lot owner is not responsible in the absence of statute, but for any negligent act creating a dangerous defect or obstruction in the street or highway he may be made to respond in damages, as, for the maintenance of a drain across the walk;[16] digging a ditch in the highway;[17] leaving an opening in the sidewalk dangerous to pedestrians;[18, 19] failure to properly guard a licensed excavation[20] as required by ordinance, such failure being negligence per se;[21] piling lumber in the street,[22] though the lumber was not negligently stacked;[23] permitting a wire fence along a public highway to become dangerous;[24] leaving a heavy vault door in the street leaning against a building and so nearly on a balance that a slight push tips it over;[25] and obstructing a street in violation of a city ordinance.[26] Those doing business along streets may obstruct the sidewalks temporarily for the purpose of business.[27]

One who takes up an old bayou crossing and substitutes a bridge therefor in pursuance of his contract with his grantor of the land over which a road used by the public runs is charged with the duty of keeping the bridge in repair.[28]

An abutting owner is liable for injuries arising from the negligent construction of his buildings, though they are leased to tenants, if the defect existed at the time of surrender,[29] but not for the tenant's negligent use of properly constructed premises.[30]

12. Abutters. City of Denver v. Teeter [Colo.] 74 Pac. 459. Where a lessee is not liable in any event, failure to join him is not fatal on appeal. George v. City of St. Joseph, 97 Mo. App. 56. Rulings too favorable to abutting owner held not to entitle city to reversal of judgment in favor of plaintiff. George v. City of St. Joseph, 97 Mo. App. 56.

Street railway company charged with the duty of keeping in repair that portion of the street where an injury occurs must be joined with the city in an action for such injury. Lavigne v. City of New Haven [Conn.] 55 Atl. 569.

13. City of Denver v. Teeter [Colo.] 74 Pac. 459.

14. Schneider v. City Council of Augusta [Ga.] 45 S. E. 459.

15. Gordon v. Sullivan [Wis.] 93 N. W. 457.

16. Rupp v. Burgess [N. J. Law] 56 Atl. 166; Isham v. Broderick [Minn.] 95 N. W. 224. See, also, City of Covington v. Johnson, 24 Ky. L. R. 602, 69 S. W. 703.

17. Nelson v. Fehd, 104 Ill. App. 114.

18, 19. Schneider v. City Council of Augusta [Ga.] 45 S. E. 459; Queck-Berner v. Atlantic Trust Co., 80 App. Div. [N. Y.] 460; Wesner v. Green [N. J. Law] 56 Atl. 237. A coal hole is not negligence per se. Stoetzele v. Swearingen, 90 Mo. App. 588; Reynolds v. Garst, 25 R. I. 83. Property in possession of tenant. Stoetzele v. Swearingen, 90 Mo. App. 588; Matthews v. City of New York, 78 App. Div. [N. Y.] 422. When plaintiff was "scuffling" and fell in, recovery was denied. Schubkegel v. Butler, 76 App. Div. [N. Y.] 10. Unguarded excavation encroaching on the sidewalk made by independent contractor. Ann v. Herter, 79 App. Div. [N. Y.] 6.

20. Endicott v. Triple State Natural Gas & Oil Co., 25 Ky. L. R. 862, 76 S. W. 516.

21. Browne v. Bachman [Tex. Civ. App.] 72 S. W. 622. Evidence held sufficient to show that excavation encroached on sidewalk and should have been guarded. Ann v. Herter, 79 App. Div. [N. Y.] 6.

22. Kessler v. Berger, 205 Pa. 289; Selby v. Vancouver Waterworks Co. [Wash.] 73 Pac. 504.

23. Harper v. Kopp, 24 Ky. L. R. 2342, 73 S. W. 1127.

24. Brown v. Wabash R. Co., 90 Mo. App. 20. Fence held not proximate cause. Frightened horse. Anderson v. Schurke [Iowa] 96 N. W. 862.

25. Anderson v. Pierce [Kan.] 74 Pac. 638.

26. Stones in street causing injury to bicycle rider. Overhouser v. American Cereal Co., 118 Iowa, 417.

27. Defendant held not liable for injury claimed to have been caused by refuse vegetables from stand in front of his store. Kelly v. Otterstedt, 80 App. Div. [N. Y.] 398. Whether defendant liable for leaving sign in process of moving held question for jury. Cunningham v. Nilson, 84 N. Y. Supp. 668. Carpet and canopy across walk may be negligence. Morris v. Whipple, 183 Mass. 27.

28. Lawson v. Shreveport Waterworks Co. [La.] 35 So. 390.

29. Isham v. Broderick [Minn.] 95 N. W. 224; Stoetzele v. Swearingen, 90 Mo. App 588; Matthews v. City of New York, 78 App Div. [N. Y.] 422.

30. Fehlhauer v. City of St. Louis [Mo.]

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An elevated railway company is liable for an injury caused by ice formed in the street from the drip from its train where it knew of such drip and the resulting ice and could have prevented it.[31] A street railway company may be liable for an injury resulting from a defect in a street owned by a university with which it has contracted to keep the street in repair.[32] A railway company failing to restore a crossing to a condition of safety assumes the risk of injury to travelers.[33] Where a city has assumed to repair the whole of a street and has assessed a portion of the cost to the railway company, the company is no longer responsible for injuries occurring from defects in its portion of the pavement.[34]

A telephone company is liable for injuries caused by guy rope stretched across the street,[35] or the placing of poles in too close proximity to the traveled part of a highway.[36]

A water company is not liable for the city's neglect to properly guard a fire hydrant.[37]

(§ 15) *G. Persons entitled to protection.*—The protection of the law extends only to those who are properly using the highway for travel, and not to those who are engaged in some act not a necessary or usual incident to such travel,[38] but a pedestrian has a right to stop on the street for a reasonable time,[39] and a child of tender years is not negligent though playing in the street.[40] Those who travel at night as well as those who travel by day are protected,[41] and the fact that plaintiff's horse was in the act of running away when the injury occurred will not place him without the pale of protection if the injury would not have occurred but for the defect.[42]

(§ 15) *H. Remote and proximate cause of injury.*—The principle of proximate cause applies as well to injuries from defective highways as to other negligence cases though the liability is created by the statute;[43] the question of which of several efficient causes is responsible for an injury being generally one of fact,[44] though in cases where the evidence is undisputed or open to but one conclusion, it is a question of law.[45] The negligent,[46] but not the non-negligent act of another, may be such a

77 S. W. 843; Morrison v. McAvoy, 137 Cal. XIX, 70 Pac. 626.

31. White v. Manhattan R. Co., 82 App. Div. [N. Y.] 259.

32. Bolster v. Ithaca St. R. Co., 79 App. Div. [N. Y.] 239.

33. Chicago, etc., R. Co. v. Leachman [Ind.] 69 N. E. 253.

34. Binninger v. City of New York [N. Y.] 69 N. E. 390.

35. Mogk v. New York, etc., Tel. Co., 78 App. Div. [N. Y.] 560.

36. Alice, etc., Tel. Co. v. Billingsley [Tex. Civ. App.] 77 S. W. 255. Under the statute in Massachusetts the owner of a telegraph pole erected under license is liable for an injury to a traveler by collision with it, irrespective of the owner's negligence. Rev. Laws, c. 122, § 15. Riley v. New England Telegraph & Telephone Co. [Mass.] 68 N. E. 17.

37. Burnes v. City of St. Joseph, 91 Mo. App. 489.

38. Schubkegel v. Butler, 76 App. Div. [N. Y.] 10; Ann v. Herter, 79 App. Div. [N. Y.] 6.

39. Because of illness or other proper cause, but he must not so do it as to obstruct travel. Kessler v. Berger, 205 Pa. 289; Powers v. Penn. Mut. Life Ins. Co., 91 Mo. App. 55.

40. Caskey v. City of La Belle [Mo. App.] 74 S. W. 113; Straub v. City of St. Louis [Mo.] 75 S. W. 100.

41. Styles v. Village of Decatur [Mich.] 91 N. W. 622; Wright v. Lehman Tp., 19 Pa. Super. Ct. 653.

42. Meisner v. City of Dillon [Mont.] 74 Pac. 130; Thunborg v. City of Pueblo [Colo. App.] 70 Pac. 143.

43. Fehrman v. Town of Pine River [Wis.] 95 N. W. 105.

44. Jarrell v. City of Wilmington [Del.] 56 Atl. 379. Cause of death of one injured on a defective sidewalk. City of Madisonville v. Pemberton's Adm'r, 25 Ky. L. R. 347, 75 S. W. 229. Cause of death of one injured in a runaway caused by fright of horse by bicycle. Shortsleeve v. Slebbins, 77 App. Div. [N. Y.] 538.

45. Manhole cover in sidewalk held not shown to have caused plaintiff's fall. Helmken v. City of New York, 85 N. Y. Supp. 1048. Improper condition of leader from roof held not proximate cause of ice causing plaintiff's fall. Wittman v. City of New York, 80 App. Div. [N. Y.] 585.

46. Where a street car was stopped in a dangerous place and plaintiff was not assisted in alighting as she should have been by the carrier, the city's negligence in excavating the street at that point was not the proximate cause of her injury. Yecker

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concurring or intervening cause as to relieve a municipality from liability for an injury which would not have occurred but for a defect in its highway.[47] So also the question whether plaintiff's own acts so contribute to his injury as to relieve the municipality of its liability for the defect depends upon whether his act was negligent;[48] and where a frightened horse encounters a defect in the street which causes an injury that would not otherwise have occurred,[49] or where a defect causes fright in a horse which results in injury,[50] the defect is responsible for it.

(§ 15) *I. Contributory negligence of person injured.*—The negligence of the plaintiff in cases of injury from defects in the highway has the same effect that it has in other negligence cases, the question being, on a conflict of evidence, one for the jury.[51] The question is whether the plaintiff at the time of the injury was in the exercise of reasonable care, under all the circumstances.[52] Mere contributing negligence on the part of the plaintiff will not defeat him. His negligence must have been such that but for it the injury would not have occurred.[53]

A pedestrian is not confined to the foot-way crossing, but if ignorant of any danger may cross a street at any point that suits his convenience without imputa-

v. San Antonio Traction Co. [Tex. Civ. App.] 76 S. W. 780. Where a person was killed by a street car in plain view of the motorman, the negligence of the city in so obstructing its street as to make it necessary to walk on the track was not the proximate cause. Setter's Adm'r v. City of Maysville, 24 Ky. L. R. 828, 69 S. W. 1074.

47. Where a wagon ran over an iron plate covering a gutter, causing it to injure plaintiff, the negligence of the city in maintaining the plate in a defective condition was the proximate cause of the injury. City of Louisville v. Johnson, 24 Ky. L. R. 685, 69 S. W. 803. Where plaintiff is injured by a third person stepping on a loose board in the walk, the defect is the proximate cause of the injury. City of Elwood v. Laughlin [Ind. App.] 65 N. E. 18; Kennedy v. City of St. Cloud [Minn.] 97 N. W. 417. The negligence of a city in allowing a dangerous place in a railway crossing, where a child gets its foot caught and is run over by a passing train, is the proximate cause of the injury. Eskildsen v. City of Seattle, 29 Wash. 583, 70 Pac. 64.

48. Where plaintiff stepped near a hole in a walk and slipped into it, his slipping was not a proximate cause of injury so as to deprive him of recovery. Burrell v. City of Greenville [Mich.] 94 N. W. 732. Where plaintiff drove a blind horse in a bright moonlit night against an obstruction which he testified he could have seen had he looked, the obstruction was not the proximate cause of his injury. Whitman v. City of Lewiston [Me.] 55 Atl. 414. Where plaintiff, in voluntarily attempting to assist one driving cattle along the highway, rode his horse into a leaning barbed wire fence, the defective condition of the fence was the proximate cause of injury to the horse. Brown v. Wabash R. Co., 90 Mo. App. 20. Where plaintiff's horse shied against a fence eleven feet off the true line of the highway, the wrongful act in maintaining the fence was not the proximate cause of the resulting injury, there being nothing to show that plaintiff had not plenty of room to drive in the highway. Anderson v. Schurke [Iowa] 96 N. W. 862. A telephone pole placed in dangerous proximity to the traveled part of a highway is the proximate cause of an injury to plaintiff from collision with it, caused by his horse swaying his head sideways while passing it. Alice, etc., Tel. Co. v. Billingsley [Tex. Civ. App.] 77 S. W. 255. That plaintiff's horse was going at an immoderate speed would not be a defense unless plaintiff could control him. Thunborg v. City of Pueblo [Colo. App.] 70 Pac. 148. Injury due to riding bicycle into mud hole and being thereby thrown over unguarded bank held not in law attributable to mud hole rather than want of guard rail. Hendry v. Town of North Hampton [N. H.] 56 Atl. 922.

49. Meisner v. City of Dillon [Mont.] 74 Pac. 130; Thunborg v. City of Pueblo [Colo. App.] 70 Pac. 148. Horse frightened at a passing automobile and plunging down embankment lacking proper railing. Upton v. Town of Windham, 75 Conn. 288.

50. Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76; Gallagher v. Buckley, 31 Wash. 380, 72 Pac. 79; Quinlan v. City of Philadelphia, 205 Pa. 309.

51. Falling into hole left unguarded. Iseminger v. York Haven Water & Power Co. [Pa.] 56 Atl. 66; Wall v. City of Pittsburg, 205 Pa. 48. Falling into unguarded excavation encroaching on sidewalk. Ann v. Herter, 79 App. Div. [N. Y.] 6. City held liable for runaway caused by horse stepping into hole in street.—Negligence of driver. Quinlan v. City of Philadelphia, 205 Pa. 309. Driving over obstruction. Black v. City of Mishawaka, 30 Ind. App. 104.

52. Not whether such care could have averted danger. City of Herrin v. Newton, 103 Ill. App. 423. That the plaintiff, though negligent, could not have avoided injury had he not been negligent, will not authorize a recovery, as this is but another manner of stating the doctrine of comparative negligence which does not obtain as a rule in common law jurisdictions. City of Macon v. Holcomb [Ill.] 69 N. E. 79.

53. Harper v. Kopp, 24 Ky. L. R. 2212, 73 S. W. 1127. See also, ante, "Proximate Cause."

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tion of negligence;[54] hence one is not held to more than usual care in passing from the sidewalk to the paved part of the street in the business portion of a city,[55] but at night more care may be due.[56]

It is not negligence to step near a hole in the walk on a plank strong enough to support one's weight,[57] though from the slippery condition of the walk plaintiff slips into the hole and is hurt.[58]

To ride a bicycle on a paved street in daylight at the rate of seven miles an hour is not negligent as a matter of law.[59]

Everyone in passing over and along public streets has the right to assume that they are safe as long as there is no appearance suggesting the contrary;[60] but this does not authorize him to close his eyes to open and obvious dangers in the highway, or to pay no attention whatever to its condition.[61] Mere knowledge, however, of the defective or unsafe condition of a street or walk will not bar one injured of his right of recovery if under all the circumstances he was exercising due care at the time,[62] the question of negligence vel non in such case being for the jury.[63] It is

54. City of Louisville v. Johnson, 24 Ky. L. R. 685, 69 S. W. 803; Lahne v. Seaich, 83 App. Div. [N. Y.] 636; Rush v. Joseph H. Bauland Co., 82 App. Div. [N. Y.] 506; Prince v. Third Ave. R. Co., 84 N. Y. Supp. 542.

55. City of South Omaha v. Meyers [Neb.] 92 N. W. 743.

56. To attempt in the night to cross the street between street intersections, where the gutter is deep and no proper crossing has been made, is negligence, and the fact that persons have been accustomed to cross there will not imply a license or invitation on the part of the city so to do. Holding v. City of St. Joseph, 92 Mo. App. 143. And an attempt by a woman to jump a deep ditch in the night is negligence. Hobert v. City of Seattle [Wash.] 73 Pac. 383.

57. Shaffer v. Harmony Borough, 204 Pa. 339.

58. Burrell v. City of Greenville [Mich.] 94 N. W. 732.

59. Overhouser v. American Cereal Co., 118 Iowa, 417.

60. Gribben v. Metropolitan St. R. Co., 84 N. Y. Supp. 196. Injury by electric wire. Neal v. Wilmington, etc., Elect. R. Co., 3 Pen. [Del.] 467. Presumption that defect has been repaired. Bradley v. City of Spickardsville, 90 Mo. App. 416.

61. Bohn v. City of Racine [Wis.] 96 N. W. 813; Tracey v. South Haven Tp. [Mich.] 93 N. W. 1065. Plaintiff driving into a plainly visible hole in street held negligent. Knight v. City of Baltimore [Md.] 56 Atl. 388. Plaintiff driving blind horse ran into pile of earth. Whitman v. City of Lewiston [Me.] 55 Atl. 414. For plaintiff to attempt to drive his horse under a large flag suspended over the street is such negligence as will bar him of recovery for injuries resulting from the fright of his horse thereby. Town of Crown Point v. Thompson [Ind. App.] 65 N. E. 13. Plaintiff driving down unguarded embankment held negligent. Krause v. City of Merrill, 115 Wis. 526. Injury by rolling rail at crossing of street and railroad. Sosnofski v. Lake Shore, etc., R. Co. [Mich.] 95 N. W. 1077. To drive on top of a narrow fill 3 feet under water, the surrounding country being inundated to a depth of 9 feet or more, is negligent. Schrunk v. Town of St. Joseph [Wis.] 97 N. W. 946. Whether a rail extending over a crosswalk constitutes sufficient notice of danger to a pedestrian to make it his duty to avoid it is for the jury. Gribben v. Metropolitan St. R. Co., 84 N. Y. Supp. 196; City of Mishawaka v. Kirby [Ind. App.] 69 N. E. 481.

62. Littebrant v. Town of Sidney, 77 App. Div. [N. Y.] 545; Delaney v. City of Mt. Vernon, 89 App. Div. [N. Y.] 209; Brown v. White, 206 Pa. 106; Bradley v. City of Spickardsville, 90 Mo. App. 416; City of Fulton v. Green, 103 Ill. App. 96; Chicago, etc., R. Co. v. Leachman [Ind.] 69 N. E. 253; Styles v. Village of Decatur [Mich.] 91 N. W. 622; Burnes v. City of St. Joseph, 91 Mo. App. 489; Mosheuvel v. District of Columbia, 24 Sup. Ct. [U. S.] 57; Overhouser v. American Cereal Co., 118 Iowa, 417; Hoffman v. Village of North Milwaukee [Wis.] 95 N. W. 274; City of Lafayette v. Fitch [Ind. App.] 69 N. E. 414; Drake v. City of Seattle, 30 Wash. 81, 70 Pac. 231; Shearer v. Town of Buckley, 31 Wash. 370, 72 Pac. 76; Carson v. City of Genesee [Idaho] 74 Pac. 862; City of Colorado Springs v. Floyd [Colo. App.] 73 Pac. 1092; Browne v. Backman [Tex. Civ. App.] 72 S. W. 622; City of Mishawaka v. Kirby [Ind. App.] 69 N. E. 481; Collins v. City of Janesville [Wis.] 94 N. W. 309; Sachra v. Town of Manilla [Iowa] 95 N. W. 198; City of South Omaha v. Taylor [Neb.] 96 N. W. 209; City of Charlottesville v. Stratton's Adm'r [Va.] 45 S. E. 737; Beauvais v. City of St. Louis, 169 Mo. 500; Huff v. City of Marshall, 97 Mo. App. 542; City of Dallas v. Moore [Tex. Civ. App.] 74 S. W. 95. Boy running under derrick on way to school after warning of danger not negligent. City of Denver v. Murray [Colo. App.] 70 Pac. 440. Momentary forgetfulness at night on unlighted street. City of Louisville v. Brewer's Adm'r, 24 Ky. L. R. 1671, 72 S. W. 9.

63. City of Madisonville v. Pemberton's Adm'r, 25 Ky. L. R. 347, 75 S. W. 229; City of Carlisle v. Secrest, 25 Ky. L. R. 336, 75 S. W. 268.

Instructions considered. City of San Antonio v. Talerico [Tex. Civ. App.] 78 S. W. 28. Reference to "safe condition" held to mean "reasonably safe condition" because so qualified in other charges. Campbell v. City of Stanberry [Mo. App.] 78 S. W. 292. Instructions as to care by bicycle rider suffi-

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said however to raise a presumption of negligence that must be rebutted by evidence of circumstances showing a reasonable excuse for the lapse of memory resulting in the injury.[64] Where a traveler has no alternative but to pass the dangerous place, he is not required to forego his journey. In such case if he is injured while in the exercise of due care under the circumstances, he can recover.[65] So if all other routes to his destination are equally dangerous,[66] or if one is apparently no more dangerous than the other.[67] Neither is one obliged to take an indirect route which is safe, being entitled to travel upon the streets by the most direct route.[68]

The intoxication of plaintiff may be considered on the question of his care.[69]

A bodily infirmity may cast upon a traveler the duty to use greater care than would be required of an ordinary person.[70] And the condition of the weather and the time of night are proper circumstances to consider.[71] But the degree of care required, as a matter of law, is not changed by these circumstances, all persons traveling being required at all times to use such reasonable care as the circumstances demand.[72]

(§ 15) *J. Notice of claim for injury and intent to sue.*—It is frequently provided by statute that no action shall be brought to recover for injuries unless notice of claim for such injury shall have been seasonably served on the municipality liable.[73] These are statutes of repose,[74] and have been held constitutional;[75] but not applicable to an action by an abutting owner for injury by obstruction,[76] to an injury in a sewer to a workman,[77] to an action of trespass in going on plaintiff's property to lay out a highway,[78] nor to injuries sustained before their passage.[79]

It is generally provided that such a notice must be verified,[80] addressed to,[81] and served upon, some particular board or officer[82] within a certain period after injury.[83]

cient to cover request. Hendry v. Town of North Hampton [N. H.] 56 Atl. 922. Requested charge as to care by traveler covered by other charge. City of San Antonio v. Talerico [Tex. Civ. App.] 78 S. W. 28.

64. Petrich v. Town of Union [Wis.] 93 N. W. 819. Where plaintiff, knowing that a guard rail had been in place a week before, depended on it on a dark night without looking for it, and fell by reason of its having been removed in prosecution of repairs that he knew were going on, he was negligent. Decker v. Borough of East Washington, 21 Pa. Super. Ct. 211. One riding a bicycle at night parallel and on the same side of the street with an excavated trench is bound to exercise a greater degree of care than is necessary in using an unobstructed street. Walsh v. Central New York Telephone & Telegraph Co. [N. Y.] 68 N. E. 146. To pass a barrier and light at a point where the barrier does not obstruct the way is not negligence as a matter of law. Leonard v. City of Boston [Mass.] 66 N. E. 596.

65. Chicago, etc., R. Co. v. Leachman [Ind.] 69 N. E. 253; Reed v. Schuylkill Haven Borough, 22 Pa. Super. Ct. 27; McTiver v. Grant Tp. [Mich.] 91 N. W. 736. Driving into mud hole. Hunt v. Lincoln Tp. [Mich.] 92 N. W. 288.

66. Evans v. Philadelphia, 205 Pa. 193; Carter v. Town of Lineville, 117 Iowa, 532. Evidence of unsafe condition of walk on opposite side of street held admissible. Hoffman v. Village of North Milwaukee [Wis.] 95 N. W. 274.

67. Wells v. Town of Remington [Wis.] 95 N. W. 1094.

68. Jordan v. City of Seattle, 30 Wash. 116, 70 Pac. 743.

69. Plaintiff's intoxication held proper to be considered on question of his care. Guertin v. Town of Hudson, 71 N. H. 505.

70. Smart v. Kansas City, 91 Mo. App. 586. An aged person with defective sight, feeling his way with a cane over an elevated walk from which he knew the railing had been removed, held negligent. Garbanati v. City of Durango [Colo.] 70 Pac. 686.

71. Village of Atkinson v. Fisher [Neb.] 93 N. W. 211.

72. Johnson v. City of St. Joseph, 96 Mo. App. 663; Village of Atkinson v. Fisher [Neb.] 93 N. W. 211.

73. Ljundberg v. Village of North Mankato, 87 Minn. 484.

74. Once barred the cause being in tort cannot be revived. Van Auken v. City of Adrian [Mich.] 98 N. W. 15. Individual consent of councilmen to investigate and allow claim barred for lack of notice is not binding on city. Id.

75. Morrison v. City of Eau Claire, 115 Wis. 538; Goddard v. City of Lincoln [Neb.] 96 N. W. 273.

76. Knapp & Cowles Mfg. Co. v. New York, etc., R. Co. [Conn.] 56 Atl. 512.

77. McIntee v. City of Middletown, 80 App. Div. [N. Y.] 434.

78. Hathaway v. Osborne [R. I.] 55 Atl. 700.

79. Statute applies not to injuries sustained before its passage. Sehl v. City of Syracuse, 81 App. Div. [N. Y.] 543.

80. Undated jurat held sufficient. Reno v. City of St. Joseph, 169 Mo. 642. Date of jurat shown to be a month too early and before date of injury held not fatal. Bell v. City of Spokane, 30 Wash. 508, 71 Pac. 31.

81. Notice held sufficient though addressed

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Its sufficiency as to form is a question of law for the court, and it should state the place of injury,[84] describe the defect,[85] and the injury,[86] and in some states state an intent to sue.[87]

(§ 15) *K. Actions.*—The complaint need not expressly state that defendant's negligence was the proximate cause of plaintiff's injury,[88] or negative contributory negligence.[89] A complaint counting on a defect must either allege notice to the municipal authorities or facts from which notice may be inferred,[90] and a general averment of knowledge of the defect is proved by facts constituting constructive notice.[91] Service of the statutory notice of injury must be alleged.[92] Amendments are allowed in these as in other cases.[93] The place[94] and the defect, or other cause of injury,[95] must be substantially well pleaded and proved. One relying on a permit to open a trench across the sidewalk must plead it.[96]

No presumption of negligence arises against a municipal corporation upon proof

to wrong officer. Shaw v. City of New York, 83 App. Div. [N. Y.] 212.

82. The notice is properly served on the city council, though the injury occurred on a "parkway" under the control of the park board. Kleopfert v. City of Minneapolis [Minn.] 95 N. W. 908.

83. Notice of injury after statutory period held in time when served as soon as plaintiff was in a condition to transact business after injury. Walden v. City of Jamestown, 79 App. Div. [N. Y.] 433; Ehrhardt v. City of Seattle [Wash.] 74 Pac. 827. Contra Schmidt v. City of Fremont [Neb.] 97 N. W. 830. Objection to lack of proof of timeliness too late after verdict. Cowan v. Inhabitants of Bucksport [Me.] 56 Atl. 901.

84. Inaccurate statement of placé of injury sufficient where defendant not misled. Tobin v. Inhabitants of Brimfield, 182 Mass. 117; Kolb v. City of Fond du Lac [Wis.] 95 N. W. 149; Hoffman v. Village of North Milwaukee [Wis.] 95 N. W. 274. Insufficient statement of place of injury held fatal though defendant not misled. Rauber v. Village of Wellsville, 83 App. Div. [N. Y.] 581. Statement of place of injury held sufficiently definite. City of Lincoln v. Miller [Neb.] 96 N. W. 484. Amendment changing name of street after limitations have run. Sachra v. Town of Manilla [Iowa] 95 N. W. 198. Notice sustained as against general objection though slightly variant as to place. Cowan v. Inhabitants of Bucksport [Me.] 56 Atl. 901.

85. Description of defect and injuries held sufficient. Reno v. City of St. Joseph, 169 Mo. 642. A notice stating only that plaintiff "slipped and fell" is not a sufficient statement of what defect caused the injury. Stoors v. City of Denver [Colo. App.] 73 Pac. 1094. Variance between notice and proof as to cause of injury held immaterial. Bell v. City of Spokane, 30 Wash. 508, 71 Pac. 31. A notice alleging ice and snow as the defect will not support a recovery based on a hole in the walk with ice and snow as an incidental cause of injury. Olcott v. City of St. Paul [Minn.] 97 N. W. 879.

86. Description of injury held sufficient. City of Dallas v. Moore [Tex. Civ. App.] 74 S. W. 95. A second notice may be served within the statutory period enumerating additional injuries. George v. City of St. Joseph, 97 Mo. App. 56.

87. Notice held sufficient though not stating an intent to sue. Halpin v. City of New York, 82 App. Div. [N. Y.] 311; Shaw v. City of New York, 83 App. Div. [N. Y.] 212.

88. Falling through footbridge. City of Franklin v. Davenport [Ind. App.] 68 N. E. 907. A petition failing to allege negligence, but alleging facts from which it follows, is good where not objected to. Fairall v. City of Cameron, 97 Mo. App. 1.

89. The complaint need not allege due caution though the injury was received while crossing the street elsewhere than at a street intersection. Randall v. City of Hoquiam, 30 Wash. 435, 70 Pac. 1111. The driver of a patrol wagon need not allege ignorance of the condition of the street. City of Louisville v. Michels, 24 Ky. L. R. 1375, 71 S. W. 511.

90. City of Rome v. Suddeth, 116 Ga. 649; City of Daytonia v. Edson [Fla.] 34 So. 954. Allegation as to notice of defect causing injury held sufficient. Randall v. City of Hoquiam, 30 Wash. 435, 70 Pac. 1111.

91. City of Toledo v. Radbone, 23 Ohio Circ. R. 268.

92. Complaint must allege that statutory 30 days have elapsed after notice before bringing suit. Thrall v. Village of Cuba, 84 N. Y. Supp. 661.

93. Amendment of petition as to description of accident held proper. City of Newnan v. Daviston [Ga.] 44 S. E. 861.

94. Plaintiff should not be held to proof of the exact point of injury when it plainly appears that the walk was defective for its entire length. Caskey v. City of La Belle [Mo. App.] 74 S. W. 113. That plaintiff went a short distance after breaking her ankle is not inconsistent with her having been injured where she claimed. Collins v. City of Janesville [Wis.] 94 Mo. 309. That plaintiff was picked up with a broken leg eleven feet from where the defect in the walk was situated is not inconsistent with his having received his injury from the defect. City of Omaha v. Kranz [Neb.] 97 N. W. 1059.

95. A declaration counting on a fall into an unguarded excavation is not supported by proof of a fall down a flight of steps to a walk on a lower grade. Kane v. City of Joliet, 103 Ill. App. 195. A complaint for injuries from a defective sidewalk arising from failure to repair will not support a recovery for injuries arising from faulty construction. Gordon v. Sullivan [Wis.] 93 N. W. 457.

96. Hubbs v. Schwanefiugel, 84 N. Y. Supp. 560.

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of an injury caused by a defect in its streets, but negligence must be proved as charged in the petition.[97] Ordinarily, a traveler is presumed to be in the exercise of due care, and if the defendant claims he was not, defendant must prove it.[98]

Evidence of subsequent precautions cannot in general be shown,[99] but where such testimony is merely a part of the testimony of witnesses to the long continued general bad condition of the walk, it is not prejudicial.[1] Proof of other accidents subsequent to the one in question and the subsequent condition of the sidewalk or street is inadmissible.[2] Neither, in Missouri, can accidents to other persons caused by the same defect be shown;[3] but in Washington the fact that other persons at other times have slipped and fallen on the alleged obstruction is held admissible as tending to describe the condition of the walk.[4] Plaintiff cannot show that he has told of falling at other times.[5] Defendant's efforts to repair a break in a water conduit causing a dangerous place in the highway, and the difficulties and skill required in the original construction, are inadmissible.[6] A witness cannot state his opinion as to whether the walk was reasonably safe.[7] It may be shown that a walk is not level where the injury was from slipping on mud negligently allowed to remain on the walk, though the slope of the walk is not negligence in itself.[8] An ordinance specifying the details of sidewalks is admissible to show the extent of the duties of the municipal officers.[9] The cause of plaintiff's accident, where his wagon wheel slipped into a rut near the street car track,[10] and the question of the depth of a hole in a walk, were held questions for the jury.[11]

Instructions must submit all the issues clearly[12] and one that purports to state the elements of defendant's liability and fails to mention the necessity of notice of the defect causing the injury is bad.[13]

A city is not entitled to an interrogatory calling for a finding as to how it received notice of the defect in the walk.[14]

§ 16. *Injury to, obstruction of, or encroachment on, street or highway.*—A municipality has no power to authorize the obstruction of any of its highways by any structure preventing public travel.[15]

97. City of Atlanta v. Stewart, 117 Ga. 144; Davis v. Common Council of Alexander City [Ala.] 33 So. 863.

98. Holding v. City of St. Joseph, 92 Mo. App. 143.

99. Elias v. City of Lancaster, 203 Pa. 638.

1. Bell v. City of Spokane [Wash.] 71 Pac. 31.

2. City of Chicago v. Vesey, 105 Ill. App. 191; Davis v. Common Council of Alexander City [Ala.] 33 So. 863; City of Dallas v. Moore [Tex. Civ. App.] 74 S. W. 95. Admissibility of photographs of subsequent date. See Evidence, 1 Curr. Law, 1154.

3. Smart v. Kansas City, 91 Mo. App. 586.

4. Smith v. City of Seattle [Wash.] 74 Pac. 674.

5. Tenney v. Rapid City [S. D.] 96 N. W. 96.

6. Burt v. Utah Light & Power Co. [Utah] 72 Pac. 497.

7. Metz v. City of Butte [Mont.] 71 Pac. 761.

8. Milledge v. Kansas City [Mo. App.] 74 S. W. 892.

9. Reed v. City of Mexico [Mo. App.] 76 S. W. 53.

10. Cause of plaintiff's accident. Wagon wheel slipping into rut. Behl v. City of Philadelphia, 206 Pa. 329.

11. Hole in walk, depth contested. Wible v. City of Philadelphia, 21 Pa. Super. Ct. 486.

12. Instruction as to care required of plaintiff held sufficient. City of San Antonio v. Potter [Tex. Civ. App.] 71 S. W. 764. Instructions held confusing as to notice of defect. Clark v. City of Brookfield, 97 Mo. App. 16. Evidence as to washed out bridge and approach held not to require submission of question of act of God. City of San Antonio v. Potter [Tex. Civ. App.] 71 S. W. 764.

13. City of South Omaha v. Hager [Neb.] 92 N. W. 1017; City of South Omaha v. Conroad [Neb.] 97 N. W. 796.

14. Grapes v. Incorporated City of Sheldon [Iowa] 93 N. W. 57.

15. City of Richmond v. Smith [Va.] 43 S. E. 345. Extension of building into street. Ackerman v. True, 175 N. Y. 353; Pence v. Bryant [W. Va.] 46 S. E. 275; People v. Harris, 203 Ill. 272. Railroad company's occupancy by abutments of an overhead bridge. City of Elyria v. Lake Shore, etc., R. Co., 23 Ohio Circ. R. 482. A side track for private use. Cereghino v. Oregon Short Line R. Co. [Utah] 73 Pac. 634. Broken water conduit forming ice on highway. Burt v. Utah Light & Power Co. [Utah] 72 Pac. 497. A street leading to water cannot be obstructed by reclamation of abutting submerged lands. Borough of Seabright v. Allgor [N. J. Law] 56

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It is the duty of a city to protect its streets from unlawful occupancy and molestation,[16] and in the exercise of that duty, it may maintain an action to test the legality of their occupancy,[17] is entitled to a mandatory injunction requiring the removal of an encroachment,[18] or to restrain its erection;[19] and may maintain ejectment to regain possession of any part of a street or alley unlawfully withheld from it though it has not the legal title to such street or alley.[20]

It is the duty of selectmen to remove obstructions from the highway and in so doing they may use such force as is reasonably necessary for that purpose.[21]

A shade tree standing in the sidewalk may be an obstruction subject to removal by the authorities against the protest of the abutting owner.[22] The builder of a bridge may close traffic on the highway at that point for a reasonable time by removing the old bridge, without liability.[23] One who builds a bridge thereby obstructs a road running at right angles to the approach to such bridge, which road is in process of alteration not yet made effectual by the opening of the new road.[24] The obstruction of the public highway is an act which in law amounts to a public nuisance, and a person who sustains a private and peculiar injury from such an act may maintain an action to abate the nuisance and recover his special damages,[25] or enjoin its construction,[26] though a suit brought by the city for the removal of the obstruction is pending.[27] But a private person cannot enjoin the obstruction of a public way at a point where he is not an abutting owner, the injury to him differing only in degree and not in kind from that suffered by the public,[28] nor can he enjoin the occupancy of the street by gas mains under similar circumstances;[29] but one who will be specially injured thereby may enjoin the unauthorized building of a

Atl. 287. Nor by extension of wharf. Knickerbocker Ice Co. v. Forty-second, etc., St. Ferry Co. [N. Y.] 68 N. E. 864.

16. City of Richmond v. Smith [Va.] 43 S. E. 345.

17. Ray v. Colby [Neb.] 97 N. W. 591; City of Elyria v. Lake Shore, etc., R. Co., 23 Ohio Circ. R. 482.

18. Though it has not notified the wrongdoer to remove it. City of Wauwatosa v. Dreutzer [Wis.] 92 N. W. 551.

Notice to remove an obstruction from the highway is sufficient if it state a reasonable time; sixty days need not be allowed. Laws 1890, c. 568, § 105. Town of Smithtown v. Ely, 75 App. Div. [N. Y.] 309, 11 Ann. Cas. 459. Complaint to abate nuisance held not to state two causes of action. City of Albert Lea v. Knatvold [Minn.] 95 N. W. 309.

19. Finding that encroachment for area and steps was not unreasonable affirmed by divided court. Com. v. First Nat. Bank [Pa.] 56 Atl. 437. A temporary injunction restraining the completion of a building encroaching on the street will be denied when full justice can be done by final judgment and its issuance would work greater hardship on defendant than its refusal on plaintiff. City of New York v. Knickerbocker Trust Co., 41 Misc. [N. Y.] 17.

20. Village of Lee v. Harris [Ill.] 69 N. E. 230. A city need not order removal of obstructions before bringing ejectment for the street. Hawkshurst v. City of Asbury Park (N. J. Eq.) 56 Atl. 697.

21. Chase v. Watson [Vt.] 56 Atl. 10.

22. Hildrup v. Town of Windfall City, 29 Ind. App. 592. Shade trees are not a nuisance per se which a city can destroy if they are so situated that curbing and guttering can as well as not be carried around them. City of Frostburg v. Wineland [Md.] 56 Atl. 811.

23. Lund v. St. Paul, etc., R. Co., 31 Wash. 286, 71 Pac. 1032.

24. Act June 13, 1836, § 24. Mellick v. Pennsylvania R. R., 203 Pa. 457.

25. Encroachment on street by adjoining landowner. Ackerman v. True, 175 N. Y. 353. Obstruction by city by building town hall. Pettit v. Incorporated Town of Grand Junction, Greene County, 119 Iowa, 352. Obstruction of street by maintaining an ice chute across it, obliging abutting owner to go several blocks around it. Young v. Rothrock [Iowa] 96 N. W. 1105. Railroad side track for private use. Cereghino v. Oregon Short Line R. Co. [Utah] 73 Pac. 634. Maintenance of fence across highway at railway crossing. Savannah, etc., R. Co. v. Gill [Ga.] 45 S. E. 623. Maintenance of fence around public square. Bill held to sufficiently show interest of complainant. Roberts v. Matthews, 137 Ala. 523.

26. Pence v. Bryant [W. Va.] 46 S. E. 275. Fencing in alley adjoining plaintiff's lot by builder of base ball park. Alexander v. Tebeau, 24 Ky. L. R. 1305, 71 S. W. 427.

27. Bourbon Stockyard Co. v. Woolley, 25 Ky. L. R. 477, 76 S. W. 28.

28. Robinson v. Brown, 182 Mass. 266; Guttery v. Glenn, 201 Ill. 275; Wees v. Coal & Iron Ry. Co. [W. Va.] 46 S. E. 166; Wilkins v. Chicago, etc., R. Co. [Tenn.] 75 S. W. 1026. A private person cannot question the act of a city council in authorizing a telephone company to obstruct the streets by means of its wires and poles. Chicago Tel. Co. v. Northwestern Tel. Co., 199 Ill. 324.

29. Ray v. Colby & Tenney [Neb.] 97 N. W. 591.

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spur railway track across the street,[30] or the occupancy of a portion of the street by a building,[31] and where a spring and the approach thereto constitute the common water supply for a town, any citizen thereof may sue to restrain its enclosure, there having been no town government for many years.[32]

One leaving in the highway an obstruction of unusual appearance calculated to frighten horses is liable for injuries resulting therefrom.[33]

Where a highway has been obstructed or encroached upon, the commissioner may be compelled by mandamus to remove them,[34] and the relator is not obliged to show any special interest to entitle him to move in the matter.[35]

One who is himself obstructing a highway cannot maintain a suit to enjoin another from obstructing it.[36] An abutting owner is entitled to damages for injury by obstruction by a railroad company in changing the grade of a crossing though it might have obstructed the street in another manner without liability.[37] If plaintiff could have removed the obstruction complained of at trifling expense, such expense is the measure of his damages.[38]

The bounds of a street must be proved[39] by him who alleges them.[40]

An indictment will lie in some states for an obstruction of a public highway,[41] but not in Colorado for obstructing a highway by causing water to flow upon it, the statute having provided an exclusive remedy by action for damages.[42] An indictment must be certain as to place,[43] and as to mode or kind of obstruction. Evidence of distinct obstructions is inadmissible; prosecution must stand on one.[44]

HOLIDAYS.

Establishment.—By statute, the day following a legal holiday falling on Sunday may become a legal holiday.[45]

30. Southern Cotton Oil Co. v. Bull, 116 Ga. 776.

31. Pence v. Bryant [W. Va.] 46 S. E. 275.

32. Larkin v. Ryan, 25 Ky. L. R. 613, 76 S. W. 168.

33. Corn shredder. Galt v. Woliver, 103 Ill. App. 71. Building stone. Nye v. Dibley, 88 Minn. 465. A highway contractor is liable for an injury occurring by reason of his leaving his cart on the highway at night in such a position as to frighten horses. Nicholas v. Keeling, 21 Pa. Super. Ct. 181. That other horses of ordinary gentleness were frightened at an obstruction may be shown. Nye v. Dibley, 88 Minn. 465.

34. People v. Marlett, 41 Misc. [N. Y.] 151.

35. People v. Harris, 203 Ill. 272.

36. Both parties maintaining fences. Brutsche v. Bowers [Iowa] 97 N. W. 1076. Complainant building in street. Price v. Stratton [Fla.] 33 So. 644.

37. Knapp & Cowles Mfg. Co. v. New York, etc., R. Co. [Conn.] 56 Atl. 512.

38. Mellick v. Pennsylvania R. Co., 203 Pa. 457.

39. An action by the city for a penalty for an encroachment by steps and railings cannot be maintained without proof of the location of the street line, since the court cannot judicially notice that the street and house lines on a particular street are identical. City of New York v. Childs, 84 N. Y. Supp. 164.

40. Burden is on alleger of the fact that deeds covered street. Clifton v. Town of Weston [W. Va.] 46 S. E. 360.

41. Wees v. Coal & Iron R. Co. [W. Va.] 46 S. E. 166; Pence v. Bryant [W. Va.] Id. 275; Knuckols v. State, 136 Ala. 108. The question of freehold was held to be only incidental in a prosecution for obstructing a highway, and hence did not oust the justice of jurisdiction. Village of Dolton v. Dolton, 201 Ill. 155.

In Kentucky a justice of the peace has jurisdiction of prosecutions for obstructing public roads. Ky. St. 1899, §§ 1093, 1141, 4316, 4335. Cincinnati, etc., R. Co. v. Baughman, 25 Ky. L. R. 705, 76 S. W. 351. And an appeal will not lie, the penalty prescribed being less than the jurisdiction of the circuit court. Ky. St. 1899, §§ 4335, 4336. Com. v. Feriel, 25 Ky. L. R. 314, 75 S. W. 231. But see Louisville & N. R. Co. v. Com. [Ky.] 78 S. W. 124, holding that a circuit court has jurisdiction in cities of the fifth class. Ordinance penalizing the holding of trains on a crossing longer than ten minutes is in conflict with statute penalizing more than five minutes. Louisville & N. R. Co. v. Com. [Ky.] 78 S. W. 124.

42. Mills' Ann. St., § 3963. Eaton v. People, 30 Colo. 345, 70 Pac. 426. Indictment for permitting water gap to injure highway held insufficient. Com. v. Collier, 25 Ky. L. R. 312, 75 S. W. 236.

43. Louisville & N. R. Co. v. Com. [Ky.] 78 S. W. 124. Information for "obstructing highway" as distinguished from "maintenance of an obstruction in the highway" held sufficient. State v. Spurgeon [Mo. App.] 74 S. W. 453. Evidence held insufficient to support conviction. McMillan v. State [Tex. Cr App.] 77 S. W. 790.

44. Louisville & N. R. Co. v. Com. [Ky.] 78 S. W. 124.

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Holiday as dies non.—Contempt proceedings had on a legal holiday are void unless excepted from a general prohibition of judicial business,[46] and as objection on this ground goes to the jurisdiction, it may be raised for the first time on appeal.[47] In Nebraska, the continuance of an action to a legal holiday, the making of a summons returnable on that day, and a continuance of the cause to the day following, is not ground for restraining enforcement of a judgment entered in the action.[48] In Massachusetts, the jury may be instructed on a legal holiday.[49] In Georgia, a sheriff's sale on the 4th of July is valid.[50] In many states, service of process on a legal holiday is void.[51]

In determining the time for appearance under a summons, a holiday which is not the last day must be included.[52]

HOMESTEADS.

§ 1. The Right to Homestead in General (210).
§ 2. Persons Entitled (211).
§ 3. Properties and Estates in which Homestead May be Claimed.—As Dependent on Nature of Claimant's Title (212).
§ 4. Liabilities Superior or Inferior to Homestead (214).
§ 5. Alienation and Incumbrance (215).
§ 6. Loss or Relinquishment (218).
§ 7. Rights of Surviving Spouse, Children, Heirs, or Dependents (220).
§ 8. Exemption of Proceeds of Homestead or of Substituted Properties.—Voluntary Sales (221); Involuntary Sales (222).
§ 9. Remedies and Procedure.—Formal Selection (222); Remedies by Suit or Action (223); Remedies of Creditors as to Excess (223).

§ 1. *The right to homestead in general.*—Homestead is a statutory right,[53] and when once it vests cannot be destroyed by repealing acts.[54] To constitute property a homestead, there must be a concurrence of actual occupancy for homestead purposes,[55] and intention to make the property a home.[56]

45. Rev. Sts. 1898, § 1145. Davidson v. Munsey [Utah] 74 Pac. 431.

46. Rev. Sts. 1898, § 701. Davidson v. Munsey [Utah] 74 Pac. 431.

47. Davidson v. Munsey [Utah] 74 Pac. 431.

48. Defendant must appear on the first day thereafter on which the court may legally transact business. Strowbridge v. Miller [Neb.] 94 N. W. 525.

49. Rev. Laws c. 158, § 4, c. 166, § 5 permits the entering or continuance of cases and the instruction or discharge of the jury on such days. McCoy v. Jordan [Mass.] 69 N. E. 358.

50. Lumpkin v. Cureton [Ga.] 45 S. E. 729.

51. Writ of garnishment. Rev. St. 1899, § 4683. Decker v. St. Louis & S. R. Co., 92 Mo. App. 50.

52. Chicago, etc., R. Co. v. Nield [S. D.] 92 N. W. 1069.

53. An agreement by a married woman to convey all her "statutory rights" in and to certain land is a contract to convey her homestead rights. Cone v. Cone, 118 Iowa, 458.

54. In Washington it is regarded in the nature of a vested interest or species of estate. The homestead law of 1895; Ballinger's Ann. Code & Stat. § 5214 et seq. did not repeal the prior homestead law. Whitworth v. McKee [Wash.] 72 Pac. 1046.

55. Mere intention by the owner of land to establish a homestead thereon is not sufficient to give it the status of a homestead. Feurt v. Caster, 174 Mo. 289. Residence on land necessary to give homestead status. Delray Lumber Co. v. Keohane [Mich.] 92 N. W. 489. In Louisiana the exemption extends to lands "owned and occupied" by the debtor. Land adjoining the tract on which the debtor resides, but not "occupied as a homestead," is not exempt. Bank of Jeanerette v. Stansbury, 110 La. 301. Under Const. La. 1898, art. 244, where the owner of a lot which would otherwise be exempt and on which he resides, divides off and leases a part of it to others, the part so leased loses its character as homestead property, since no longer "occupied" by the debtor and can be subjected to his debts. Clausen v. Sanders, 109 La. 996.

In Texas, if there be a bona fide intention to occupy, actual occupancy is not indispensable. Thus where premises were purchased for the purpose and with the intention of being used as a home, they are exempt though not actually occupied by the debtor and his wife, where it appears that they moved in some furniture but were prevented from completing their occupation by reason of the illness of the wife, and during her illness rented the premises to the person from whom they purchased. Hardin v. Neal [Tex. Civ. App.] 74 S. W. 334. Especially where the land as to which the exemption is claimed is purchased with the proceeds of the sale of a former homestead and the claimant has no other land used as a home for himself and family. Schneider v. Dorsey [Tex. Civ. App.] 72 S. W. 1029.

56. Wilmoth v. Gossett [Ark.] 76 S. W. 1073; Long v. Long [Tex. Civ. App.] 70 S. W. 587. Thus where the owner of an undivided interest occupied land under a lease from the administrator of the ancestor under whom he held title, it was held that his

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Statutes authorizing homestead exemptions.—The right of homestead is to be determined by the statutes in force when the debt sought to be enforced against it was contracted.[57] Such statutes should be liberally construed in favor of the exemption,[58] and statutes lessening the exemption are not presumed to be retrospective.[59]

Constitutionality.—A statute increasing the amount of exemption does not as to previously incurred indebtedness impair the obligation of a contract,[60] but it is otherwise as to debts previously reduced to judgment.[61]

§ 2. *Persons entitled.*—A nonresident cannot have any homestead exemption.[62] In Washington either a husband or wife can select a homestead in community property while both are living.[63] In many jurisdictions, the statutes grant the exemption to the "head of a family."[64] The head of a family means one who has others living with him and dependent on him in whole[65] or in part[66] for support, and this dependence includes mental and moral training as well as food and clothing.[67]

occupancy was that of a tenant and not an owner and hence was without an intention to make the premises a homestead. Rank v. Garvey [Neb.] 92 N. W. 1025. The occupancy must be with a bona fide intention to make the premises a home for the family; a temporary residence on a debtor's land by his wife and children for the purpose of exempting it, he never in good faith living thereon, is insufficient. Clement Bane & Co. v. Kopietz [Neb.] 95 N. W. 1126.

57. Sloan v. Hunter, 65 S. C. 235. The South Dakota Homestead Law of 1890 expressly excepts from its operation debts contracted prior to its enactment, and the owner of premises occupied as a homestead is entitled to the exemption of the quantity of land which was exempt at the time of contracting the debt. Nichols & Shepard Co. v. Cunningham [S. D.] 94 N. W. 389.

58. Clark v. Thias, 173 Mo. 628; Roark v. Bach, 25 Ky. L. R. 699, 76 S. W. 340; Clement Bane & Co. v. Kopietz [Neb.] 95 N. W. 1126; Folsom v. Asper, 25 Utah, 299, 71 Pac. 315. In Nebraska a creditor of one who occupies land which exceeds in value or amount the amount exempt may, by complying with certain statutory requirements to secure an appraisement, have the land sold and the excess of the proceeds over the amount exempt subjected to the payment of his claim, but in order to make a valid sale, compliance with such statutory requirements is imperative. Van Doren v. Weideman [Neb.] 94 N. W. 124.

59. The amendment Const. Minnesota, adopted Nov. 8, 1888, providing that the homestead shall be liable for work done or material furnished in the construction, repair or improvement of the same, is not retrospective and hence the homestead is not, after its adoption, liable for debts contracted prior to its adoption and not then enforceable against it. Brown v. Hughes [Minn.] 94 N. W. 438.

60. If necessary to the general welfare of the state. In the absence of a showing to the contrary such necessity will be presumed to exist. Folsom v. Asper, 25 Utah, 299, 71 Pac. 315.

61. Thus where at the time a judgment was entered, it was a condition precedent to the right to have the land exempt that the claim of homestead should be registered, the enactment of a statute giving the right of exemption without registration and merely by virtue of the fact that the debtor is the head of a family and has no other property which is exempt, will not defeat the enforcement of the judgment against property which the debtor had not registered as a homestead and on which the judgment was a lien. Blouin v. Ledet, 109 La. 709.

62. Cope v. Snider [Mo. App.] 74 S. W. 10. Nor can any other person assert it for him. Thus one claiming under a conveyance from the debtor, executed subsequent to the levy, cannot claim that it was exempt as a homestead. Cope v. Snider [Mo. App.] 74 S. W. 10.

63. In re Feas' Estate, 30 Wash. 51, 70 Pac. 270.

64. Smalley v. Langenour, 30 Wash. 307, 70 Pac. 786; Folsom v. Asper, 25 Utah, 299, 71 Pac. 315.

65. A dependent daughter-in-law and grandchild residing with a claimant constitute a family. Ragsdale, Cooper & Co. v. Watkins, 25 Ky. L. R. 506, 76 S. W. 45. A mother and unmarried sister living with the debtor, and supported by him, give him the status of the head of a family. Baldwin v. Thomas [Ark.] 72 S. W. 53. Spinster caring for minor nephews and nieces is such. American Nat. Bank v. Cruger [Tex. Civ. App.] 71 S. W. 784.

66. Where children who have reached their majority live with their widowed mother on land owned by her and are in part supported by her, though they render services to her, the widow is the head of a family within the purview Fla. Const., art. 10, § 1, and her devise of the homestead to a part of her children to the exclusion of others is void. Caro v. Caro [Fla.] 34 So. 309.

Housekeeper with a family.—Where the owner of land, on which he lives with his wife and an infant child, induces a married daughter to live in the house and take care of them and pay the expense of maintaining it, he is a "housekeeper with a family" so as to entitle him to the homestead exemption of such land and hence it is not "any estate that could be subjected to a debt" within the purview of Ky. St., § 257, allowing the state hospital to recover for the care of an insane person having such an estate. Holburn v. Pfanmiller's Adm'r, 24 Ky. L. R. 1613, 71 S. W. 940.

67. American Nat. Bank v. Cruger [Tex. Civ. App.] 71 S. W. 784.

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In some states a married woman living with her husband[68] on her own land may have homestead exemption therein,[69] though the husband own other lands suitable for a home.[70]

An abandoned wife when free from fault is entitled, under many statutes, to the possession and use of premises which had been occupied as a homestead before the desertion,[71] though she may, by her disregard of her marital obligations and immoral conduct, forfeit such right.[72]

Adult children living at home as a part of the family may claim homestead in right of either parent.[73]

§ 3. *Properties and estates in which homestead may be claimed. As dependent on nature of claimant's title.*—It is not necessary that a debtor should own an assignable interest in land in order to assert homestead rights therein. Such right may be predicated on a bare right of possession,[74] an equitable title,[75] a life estate,[76] or an undivided interest in land, accompanied by the exclusive occupancy.[77] Crops growing on a homestead are exempt as a part thereof.[78]

As dependent on whether lands are rural or urban.—Whether lands are exempt as a rural or urban homestead depends on the conditions which exist at the time the adverse right is asserted.[79] Where the facts in regard to the situation

68. Not when she is not living on the land with her husband and family, since he has the right to select and abandon the family home at his will. Wilmouth v. Gossett [Ark.] 76 S. W. 1073. Unless she has been abandoned by her husband and thus entitled to select her own home. Lee v. Hughes, 25 Ky. L. R. 1201, 77 S. W. 386.

69. Herring v. Johnston, 24 Ky. L. R. 1940, 72 S. W. 793; Wilmouth v. Gossett [Ark.] 76 S. W. 1073.

70. Wapello County v. Brady, 118 Iowa, 482, 92 N. W. 717.

71. Evidence to show a parol partition and a dedication of a portion to one and his wife. Long v. Long [Tex. Civ. App.] 70 S. W. 587. The wife of an absconding debtor may maintain a suit in equity to remove a levy on a homestead, the title to which is in the debtor. Burkhardt v. James Walker & Son [Mich.] 92 N. W. 778. At least until such right is cut off by proper proceedings, and the fact that she is confined in an insane asylum does not deprive her of such right. Way v. Scott, 118 Iowa, 197.

72. Desertion of husband and living in adultery. Freeman v. Freeman [Tenn.] 76 S. W. 825.

73. Father had lost it but it remained in mother who was insane. Way v. Scott, 118 Iowa, 197.

74. Birdwell v. Burleson [Tex. Civ. App.] 72 S. W. 446. Where the owner of a homestead conveys the same, but continues in possession with his or her family the same as before the deed, an attachment against the grantor, levied subsequent to the execution of the deed but prior to its registration, is ineffectual to affect the title. The conveyance in such case did not constitute an abandonment of the grantor's homestead, since he had a possessory interest. American Nat. Bank v. Cruger [Tex. Civ. App.] 71 S. W. 784.

Possessory interest necessary.—In order that the occupant of land may claim that ungathered crops growing thereon are exempt as being on his homestead, the claimant must have a possessory interest in the land. The right of a mere cropper is not such a right as will support a claim of homestead. Webb v. Garrett [Tex. Civ. App.] 70 S. W. 992.

75. Hunter v. Griffith [Okl.] 72 Pac. 361. A homestead may be claimed in land of which the debtor is in possession under a contract to purchase. Keith v. Albrecht [Minn.] 94 N. W. 677.

76. McDowell v. Grubbs, 25 Ky. L. R. 1020, 76 S. W. 846; Downing v. Hartshorn [Neb.] 95 N. W. 801.

77. Clark v. Thias, 173 Mo. 628; Rank v. Garvey [Neb.] 92 N. W. 1025; Birdwell v. Burleson [Tex. Civ. App.] 72 S. W. 446. In Louisiana the right of homestead cannot exist with respect to lands held in indivision. Bank of Jeanerette v. Stansbury, 110 La. 301.

78. Hence, where a homestead is in the possession of one who is farming it on shares for the owner, the garnishment of the tenant while the crops are ungathered does not authorize their application by the tenant, after severance, to the satisfaction of the claim of the garnishee plaintiff. Staggs' Heirs v. Piland [Tex. Civ. App.] 71 S. W. 762.

79. Lauchheimer v. Saunders [Tex.] 76 S. W. 750.

Quantum of unplatted urban lands exempt.—Where a person is entitled to a homestead exemption in unplatted land lying within the corporate limits of a city, "it is probably true that the tract which could be claimed to be exempt would be limited to an area equal to two lots (the number exempt in platted city lands) in that portion of the city adjacent to the tract;" dictum in Rank v. Garvey [Neb.] 92 N. W. 1025. The right to claim land as a homestead may be lost by a change in the character of the same from rural to urban lands. The mere extension of the corporate limits of an adjacent town or city so as to include therein lands formerly rural will not deprive a rural homestead of its character. Land originally rural which by growth of adjacent town became surrounded on all but one side with dwellings, though it had not been platted, and

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and character of the land are undisputed, it is for the court to determine whether or not it is a homestead.[80] A rural condition at the commencement of the owner's occupancy is presumed to continue.[81] In Texas, a homestead cannot be asserted as to land in part rural and in part urban.[82]

As dependent on relative location or value of lands.—In some jurisdictions, occupation of land as a homestead draws to it and also exempts contiguous land used in connection with that on which the dwelling is situate, when the area or valve of the two tracts do not in the aggregate exceed the amount exempted.[83] In Utah, it is not necessary that the premises selected as a homestead should include the home place of the family.[84] Lands not contiguous to the dwelling but used in connection therewith may be selected to make up the amount.[85]

Amount exempt.—Where a life tenant claims exemption, the value of the fee is the basis on which to determine value,[86] but where the land is encumbered, the value of the equity of redemption alone is to be considered.[87] Where contiguous lots acquired at different times are claimed, the amount is computed by taking the value of the whole immediately after the last acquisition not the aggregate of the value of each lot at the time it was acquired.[88] If land exceeding in value the amount exempted is set aside as a homestead, the exemption is invalid and creditors can enforce their claims against the premises.[89]

which the owner returned for taxation as a part of the town, the owner voting at town elections and holding a town office, held to have lost its character as a rural homestead. Lauchheimer v. Saunders [Tex.] 76 S. W. 750.

80. Ryon v. George [Tex. Civ. App.] 75 S. W. 48.

81. Lauchheimer v. Saunders [Tex. Sup.] 76 S. W. 750.

82. Mikael v. Equitable Securities Co. [Tex. Civ. App.] 74 S. W. 67. Where a debtor lives on a tract of land situate within the limits of an incorporated village, he cannot claim a homestead in farm lands lying outside the corporate limits which he cultivates for the support of himself and family, though lying in close proximity to the urban lands and the latter are not worth the full amount allowed as exempt. Ryon v. George [Tex. Civ. App.] 75 S. W. 48. See, also, Lauchheimer v. Saunders [Tex.] 76 S. W. 750.

Loss of status as homestead by change from rural to urban character, see infra, § 6, Loss or Relinquishment.

What constitutes a village.—An assemblage of six or seven dwellings occupied by families, two stores, a blacksmith shop, a postoffice and a school house, the latter being used for church services, though unincorporated and not platted, held to be a village within purview of Texas constitution in regard to urban homesteads. Mikael v. Equitable Securities Co. [Tex. Civ. App.] 74 S. W. 67.

83. Clark v. Thias, 173 Mo. 628. Thus where a father, as natural guardian of his minor children, has possession of land belonging to one of them and occupied as a home for himself and children, which land adjoins land owned by the father which is used in connection with the minor's land, the land owned by the father is exempt. Birdwell v. Burleson [Tex. Civ. App.] 72 S. W. 446. But see Bank of Jeanerette v. Stansbury, 110 La. 301. In Illinois a homestead exemption cannot extend beyond the tract on which the dwelling is situate, if the value of such tract aggregates the amount allowed as a homestead exemption. Hopkins v. Cofoid, 103 Ill. App. 167.

84. Folsom v. Asper, 25 Utah, 299, 71 Pac. 315.

85. Such lands may be selected in the shape in which they already exist, but a claimant will not be allowed to make a selection which is irregular or fantastic in shape, totally disregarding surveys and made in a manner indicating that it is capricious and arbitrary. Slappy v. Hanners, 137 Ala. 199.

86. McDowell v. Grubbs, 25 Ky. L. R. 1020, 76 S. W. 846.

87. Where a man and his wife execute a mortgage on a part of a tract occupied by them as a homestead and on which the dwelling house stands, a sale under foreclosure of the part mortgaged does not destroy the widow's right to a homestead in the residue, where the value of the whole tract, after deducting the encumbrance, does not exceed $1,500. Houf v. Brown, 171 Mo. 207.

88. If the lot originally designated has, at the time of the acquisition of the other, enhanced in value so as to exceed the amount exempted, the debtor may claim all of the same as exempt, but in such case he is not entitled to exemption of any of the subsequently acquired lot or lots. Fitzhugh v. Connor [Tex. Civ. App.] 74 S. W. 83.

89. Evans v. Piedmont Nat. B. & L. Ass'n, 117 Ga. 940, 44 S. E. 2. One seeking to enforce a claim against premises constituting a homestead, to the extent the value thereof exceeds the amount exempt, must allege and prove the value in excess of the amount exempt. Masillon Engine & Thresher Co. v. Carr, 24 Ky. L. R. 1534, 71 S. W. 859. When the owner of a flat building or apartment house, situate on a single lot, occupies a flat or apartment therein which equals or exceeds in value the amount exempted, he can claim only so much thereof as exempt, and after his death his widow is

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§ 4. *Liabilities superior or inferior to homestead.*—In the absence of a contrary provision in the statute, the homestead right is superior to debts antedating the acquisition of the property,[90] though the debtor was insolvent at the time,[91] but in some states it is otherwise provided.[92] Under such statutes if the debtor has a homestead antedating the debt, he may sell it and invest the proceeds in another,[93] or abandon it and claim another in subsequently acquired lands.[94] In some states a debtor may, within a reasonable time after acquisition of land by descent or devise, claim it as a homestead, as against antecedent debts.[95]

A homestead cannot be claimed as against equities,[96] liens,[97] or incumbrances[98]

bound to account to his estate for rents received by her from other parts. Potter v. Clapp [Ill.] 68 N. E. 81.

90. In Nebraska a debtor may acquire a homestead and hold it exempt as against debts not reduced to judgment at the time of its acquisition, even if he exchange for it property which was not exempt. Jayne v. Hymer [Neb.] 92 N. W. 1019. In Utah a judgment debtor who is the head of a family may select his homestead from the lands which he owns at the time of a levy irrespective of whether the same were acquired before or after he entered into the contract or obligation upon which the judgment is based. Folsom v. Asper, 25 Utah, 299, 71 Pac. 315. If the homestead be sold pursuant to a judgment entered on a debt not contracted prior to the acquisition of the homestead, the sale will be set aside. Proof that the judgment was on a note dated subsequent to the attaching of the homestead right prima facie entitles the plaintiff to have the sale set aside; the burden of showing that the note was given for a debt which antedated the homestead rests on the judgment creditor. Walker v. Walker, 117 Iowa, 609.

91. Thus where a husband in contemplation of insolvency gave his wife money with which she paid off a mortgage on the homestead, the creditors of the husband could not enforce their claims against the homestead even to the extent of the funds given to the wife and so used by her. Gray v. Brunold, 140 Cal. 615, 74 Pac. 303. Such is the rule in Oklahoma, provided the non-exempt funds used are not the proceeds of non-exempt property which was the basis of the credit sought to be enforced or were themselves relied on as the basis of such credit, even though the debtor has the title to the land taken in the name of another for the purpose of removing it from the claims of creditors, if the object of the debtor was to provide a home for himself and family. Land purchased by widow with proceeds of insurance on life of husband, his death occurring after entry of judgment sought to be enforced, and used by her as a home for herself and family, held exempt. Hunter v. Griffith [Okl.] 72 Pac. 361.

92. Under Gen. St. Mo. 1865, p. 450, § 7, providing that the time of filing the deed shall be deemed the time of acquiring the homestead, land occupied as a homestead is subject to a debt contracted subsequent to the conveyance to the debtor but before the filing of the deed for record. Such statute is applicable to lands owned and occupied as a homestead at the time of its enactment. Clark v. Thias, 173 Mo. 628, 73 S. W. 616. On an adjudication of bankruptcy, the title to the debtor's homestead does not vest in the trustee, and where a single creditor has a right to subject the homestead to the payment of a debt because it was contracted prior to the acquisition of the homestead, the bankruptcy court has no jurisdiction to order the sale of the premises and application of the proceeds to the payment of such debt. The creditor must proceed in the state courts and the bankruptcy court will withhold the debtor's discharge a reasonable time for such proceeding. Ingram v. Wilson [C. C. A.] 125 Fed. 913.

93. Lee v. Hughes, 25 Ky. L. R. 1201, 77 S. W. 386.

94. In re Johnson, 118 Fed. 312.

95. Park v. Wright, 25 Ky. L. R. 128, 74 S. W. 712. Where an illegitimate son was given land by the widow and heirs of his putative father, he was held to have acquired it as an heir rather than a purchaser, and hence could hold it exempt as to debts contracted prior to his acquisition of title. Roark v. Bach, 25 Ky. L. R. 699, 76 S. W. 340. Laws Mo. 1887, p. 198 places homesteads acquired by descent or devise within the protection of the homestead statutes as to debts contracted subsequent to the acquisition of title. Clark v. Thias, 173 Mo. 628.

96. Bank of Jeanerette v. Stansbury, 110 La. 301; Cahill v. Dickson [Tex. Civ. App.] 77 S. W. 281.

97. A lien on a homestead, given as security for money borrowed for and used in discharging liens against it which had attached prior to its becoming a homestead, is enforceable against the homestead, notwithstanding a constitutional prohibition of the loaning of money on the security of the homestead. Johnston v. Arrendale [Tex. Civ. App.] 71 S. W. 45; Cahill v. Dickson [Tex. Civ. App.] 77 S. W. 281. No exemption can be asserted as against claims for the purchase price of the homestead. Boles v. Walton [Tex. Civ. App.] 74 S. W. 81. Hence where a married woman conveyed her homestead for a more valuable tract and gave vendor's lien notes for the additional value, she cannot claim the newly acquired property as a homestead, as against such lien, even to the extent of the value of the old homestead. Simpson's Guardian v. Miller, 24 Ky. L. R. 2378, 74 S. W. 213. A homestead is not exempt in the hands of the children of a deceased owner as to a debt owing for money loaned to decedent for the purpose of purchasing the homestead and so used by him. Weber v. Weber, 25 Ky. L. R. 908, 76 S. W. 507.

98. Where land, a part of which is exempt as a homestead, is mortgaged or encumbered by a vendor's lien, the owner of the homestead, as between himself and his general creditors, has a right to have the non-

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antedating the acquisition of the land or the husband's estate;[99] but a mortgage can be enforced only by foreclosure.[1] Where the court has power to award the homestead to the innocent party on granting a divorce, it may order its sale and alimony from the proceeds,[2] or make the alimony a lien on the homestead.[3] A homestead awarded to a wife as alimony retains its exempt character.[4] One taking a homestead by a will charging it with debts takes subject to such debts.[5] In Wisconsin, the statutes provide that no general direction in a will to pay debts out of the testator's property shall subject the homestead to the payment thereof.[6] A distinction is sometimes made in favor of debts arising ex delicto,[7] or by breach of trust.[8]

§ 5. *Alienation and incumbrance.*—A homestead cannot be the subject of a fraudulent conveyance,[9] or its alienability be obstructed by claims of creditors,[10]

exempt part of the tract first applied to the discharge of the incumbrance. This rule applies not only to instances where the technical relation of mortgagor and mortgagee exists, but to cases where the legal title is in a vendor and the equitable title in the debtor under a contract to purchase. Keith v. Albrecht [Minn.] 94 N. W. 677. Homestead assigned to widow and included with other lands in mortgage executed by her and her husband, held only secondarily liable for payment of mortgage debt. Bissell v. Bissell [Iowa] 94 N. W. 465. Where, in consideration of the sale of certain machinery to him, the purchaser agrees to give the seller a mortgage on the land on which the machinery is to be installed to secure the purchase price of such machinery, but which land the buyer does not own, the execution by him of a mortgage subsequent to his acquiring title to the land will be deemed to relate back to the time of his agreement to give the mortgage, so as to antedate any homestead claim to such land by the buyer, the seller not having any notice at the time the agreement was made that the land to be purchased was to adjoin a part of the buyer's homestead and become a part of it, and the sale having been made in reliance on such promised security. Ferguson v. Walter Connally & Co. [Tex. Civ. App.] 76 S. W. 609. While a debtor to whom lands have come by descent has a right, within a reasonable time, to enter on the same and claim a homestead therein as against pre-existing debts, if he contracts an indebtedness and executes a mortgage to secure it on lands so acquired, before he has occupied them as a homestead, his subsequent occupancy thereof as a home does not confer a right therein on the wife of the mortgagor, she not having joined in the execution of the mortgage which is superior to the right of the mortgagee. Park v. Wright, 25 Ky. L. R. 128, 74 S. W. 712.

99. Since a life tenant discharges incumbrances presumably for the benefit of his own estate and is subrogated to the incumbrancee's rights only for the purpose of reimbursement, the incumbrance is, so far as a wife's homestead in the life estate goes, extinguished when the husband pays it and takes an assignment and a new incumbrance is substituted which is inferior. Downing v. Hartshorn [Neb.] 95 N. W. 801.

1. Not by execution on money judgment. Baldwin v. Thomas [Ark.] 72 S. W. 53.

2. Comp. Laws S. D., § 2585. Harding v. Harding [S. D.] 92 N. W. 1080. The court has not however power to decree that the purchaser shall have immediate possession. The debtor has a year to redeem and during such time is entitled to possession. He cannot be deprived of his right to redeem. Id.

3. The fact that such decee is made on condition that the wife shall pay out of the money awarded as alimony, a joint judgment against herself and husband does not constitute an invasion of the husband's right to have his homestead exempted from the payment of his debts, since the award and lien can only be enforced by the wife. Johnson v. Johnson, 66 Kan. 546, 72 Pac. 267.

4. It cannot be subjected in bankruptcy to the payment of her debts. In re Le Claire, 124 Fed. 654.

5. Her election will not however affect the rights of minor children, and the homestead can be sold only to pay decedent's debts, subject to their right to occupancy during their minority. Kiesewetter v. Kress, 24 Ky. L. R. 1239, 70 S. W. 1065.

6. Testamentary provisions held not to constitute a charge on the homestead. Pym v. Pym [Wis.] 96 N. W. 429; Kuener v. Prohl [Wis.] 97 N. W. 201. Such statute does not prevent the testator from making a legacy a charge on the homestead; it relates only to the debts of the decedent. Kuener v. Prohl [Wis.] 97 N. W. 201.

7. A judgment for damages for breach of a covenant in a deed is a judgment in an action ex contractu, as to which the homestead is exempt, the statute exempting it as to debts contracted. Code Ala., § 2033; Const. Ala. 1875, art. 10, § 2. Knight v. Davis, 135 Ala. 139.

8. In Kentucky a sheriff's homestead is subject to a lien in common with any other real estate he may own for money collected by him for taxes and not paid over. Baker v. Fidelity & Deposit Co. of Maryland, 24 Ky. L. R. 2196, 73 S. W. 1025.

9. Scheel v. Lackner [Neb.] 93 N. W. 741; Brown v. Campbell [Neb.] 93 N. W. 1007; Jayne v. Hymer [Neb.] 92 N. W. 1019; Keith v. Albrecht [Minn.] 94 N. W. 677; Balz v. Nelson, 171 Mo. 682.

10. Richards v. Orr, 118 Iowa, 724; Hopkins v. Confold, 103 Ill. App. 167; Kuhn's Adm'r v. Kuhn, 24 Ky. L. R. 787, 69 S. W. 1077. He may exchange it for other property and give the latter to his wife who will hold it free of the claims of his creditors. Roark v. Bach, 25 Ky. L. R. 699, 76 S. W. 340. See

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nor can involuntary liens attach.[11] If, however, the land conveyed exceeds in value the amount exempted, it may be fraudulent as to such excess value.[12]

Power to incumber under statutes or constitutional provisions prohibiting the incumbrance of a homestead except for the purchase price.[13] A mortgage on an existing homestead for other debts has no validity to be called into force on the extinguishment of the homestead right,[14] nor can representations or recitals of the nonexistence of homestead estop the incumbrancer at least when variant from an actual occupancy,[15] nor will the fact that the mortgage contains an express waiver of the mortgagor's homestead rights.[16] Indirect modes of incumbering the land are equally impotent.[17]

A mortgagee of property bought with proceeds of a homestead, and impressed with its character, is inferior if he had notice, otherwise superior to the claim.[18] The same is true if vendor's lien notes, arising from a fictitious conveyance and reconveyance of the homestead, be transferred.[19]

Necessity of consent of wife to conveyance or joinder therein.—In many jurisdictions, a conveyance of homestead premises not executed by both the husband and wife is void.[20] The wife's joinder must be cotemporaneous with the execution of the conveyance by the husband.[21] A conveyance of part of the homestead[22] or of a future estate, which may by a contingency[23] abridge the wife's rights, requires her joinder. Joining is not necessary if no homestead rights have yet had their inception.[24] In Kentucky, a joining in execution of a deed must be coupled with

also, infra, "Exemption of proceeds of homestead or of substituted properties."

In Washington the surviving spouse takes title to a homestead selected from community property, and while occupied by him or her as a homestead may be conveyed free of the debts of the grantor as well as community debts. In re Feas' Estate, 30 Wash. 51, 70 Pac. 270.

11. Judgment lien. Mitchell v. West [Iowa] 93 N. W. 880.

12. Brown v. Campbell [Neb.] 93 N. W. 1007.

13. **Georgia.**—Since the adoption of Constitution of 1877, a homestead, though set apart under the Constitution of 1868, cannot be mortgaged. Such prohibition extends to a homestead set apart to a wife out of her husband's lands on her own application, he having refused to make the application, and continues as to such lands during her widowhood. Ach & Co. v. Milam [Ga.] 44 S. E. 870.

14. Abandonment. Letzerich v. Lidiak [Tex. Civ. App.] 70 S. W. 773.

15. Crebbin v. Moseley [Tex. Civ. App.] 74 S. W. 815. Representations to lender and to his attorney, who knew of the real occupancy, that homestead was elsewhere. Letzerich v. Lidiak [Tex. Civ. App.] 70 S. W. 773. Representations of ownership of adjacent tract, actually occupied by another made to show mortgagable excess. Sheckles v. Lewis [Tex. Civ. App.] 75 S. W. 836.

16. Ach & Co. v. Milan [Ga.] 44 S. E. 870.

17. Harbers v. Levy [Tex. Civ. App.] 77 S. W. 261.

18. Walden v. Brantley Co., 116 Ga. 298.

19. One who takes such notes as collateral, with knowledge that the obligor therein had during all the time of the conveyance and reconveyance transactions resided on the land, is not a bona fide holder and cannot enforce them against the widow of the obligor. Harbers v. Levy [Tex. Civ. App.] 77 S. W. 261. One who takes after maturity and for a pre-existing debt not a bona fide holder. Lybrand v. Fuller [Tex. Civ. App.] 69 S. W. 1005.

20. Norbury v. Harper [Neb.] 97 N. W. 438; Hubbard v. Sage Land & Imp. Co. [Miss.] 33 So. 413; Way v. Scott, 118 Iowa, 197; Davis v. Davis [Va.] 43 S. E. 858. No refinement of equity will be permitted to circumvent the express and salutary requirement that the wife must concur in the encumbrance of the homestead. Applied where the husband, a life-tenant, paid and took assignment of a mortgage and in turn assigned it without the wife's joining. Downing v. Hartshorn [Neb.] 95 N. W. 801.

In Kentucky a husband can sell and convey his homestead independent of his wife's right of homestead. Leamons v. Kidwell, 24 Ky. L. R. 890, 70 S. W. 185.

21. Mortgage. Hubbard v. Sage Land & Imp. Co. [Miss.] 33 So. 413.

22. Contract entered into by the husband alone and purporting to confer on another the right to appropriate and permanently use a part of homestead premises in such a manner as to curtail the beneficial use and enjoyment thereof by the owner and his family is void. Houston, etc., R. Co. v. Cluck [Tex. Civ. App.] 72 S. W. 83.

23. Deed reserving to husband the right of possession and the rents and profits of the land, though it does not deprive him of his homestead rights in the premises, might by reason of his predeceasing the wife, deprive her of her right during widowhood. Park v. Park [Ark.] 72 S. W. 993.

24. Before homestead has been selected and allotted he can convey by sole deed. Joyner v. Sugg, 132 N. C. 580. A lease of a part of a governmental subdivision which aggregates the quantity of land exempt as a homestead and on which the lessor's family

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apt words of grant from the wife.[25] If the wife has by her desertion and adultery forfeited her right, she need not be joined in a subsequent conveyance.[26]

A vested right to alienate lands without the wife's joinder cannot be retroactively taken away by a statute subsequent to the acquisition of such lands making her joining necessary.[27]

In Iowa, a husband can convey a homestead, the title to which is in him, directly to his wife and it is not necessary for her to join in the execution of the deed.[28] Survivorship rights in a community homestead in California cannot be divested by a deed from the husband alone to the wife.[29]

A conveyance defective in this particular may become effective by a subsequent extinguishment of the homestead right of the wife,[30] but not one which is for want of her joinder a nullity.[31]

The "joint consent of the husband and wife" need not be in writing unless so required by the statute, but they both must consent at the time the conveyance takes effect.[32]

An "abandonment of possession to the grantee" in order to alien homestead must be for that very purpose.[33]

A conveyance or mortgage in which she does not join may be valid as to the excess above the statutory exemption,[34] but not when it is for that reason a complete nullity,[35] or it may be color of title on which to predicate adverse possession though otherwise void.[36]

Acknowledgment of conveyance.—A conveyance of a homestead executed and acknowledged without the separate examination of the wife by the officer before

resides, no homestead having been selected or homestead declaration filed prior to or after the execution of the lease, is not a conveyance or incumbrance of a part of the homestead, requiring execution and acknowledgment by the lessor's wife, it appearing that the lessor had other contiguous land from which the full quantity exempt could be claimed. By so treating the land, the lessor in effect declared that the homestead thereafter to be selected should be carved out of the remaining land. Wegner v. Lubenow [N. D.] 95 N. W. 442.

25. Masillon Engine & Thresher Co. v. Carr, 24 Ky. L. R. 1534, 71 S. W. 859.

26. Freeman v. Freeman [Tenn.] 76 S. W. 825.

27. Prior to the statute of 1895, the husband could sell or encumber the land occupied as a home, subject to the wife's inchoate right of dower, without the joinder of the wife, except where the wife had filed a claim of homestead as provided by Rev. St. 1889, § 5435. As to land used as a homestead and not claimed by her, he had a vested right to convey, which the legislature could not impair. The right was no less a vested right by reason of the fact that the wife could defeat it by filing her claim of homestead. The act of 1895, prohibiting the conveyance of land occupied as a homestead without the joinder of the wife, was not a change in the procedure by which the wife was to protect her homestead right, since it did not require any action on her part. Gladney v. Sydnor, 172 Mo. 318.

28. Beedy v. Finney, 118 Iowa, 276.

29. Pryal v. Pryal [Cal.] 71 Pac. 802. As to rights of surviving spouse in homestead selected from community property, see post, § 7.

30. In Wisconsin the statutory disability of the husband goes only to such dealings as interfere with the use of the land as a homestead, and a deed executed by him alone will be construed as an executory contract to convey after the extinguishment of the homestead right, by the death of the wife or otherwise. Grantee of husband awarded specific performance against heirs of husband after death of wife. Jerdee v. Furbush, 115 Wis. 277. So too the husband may, after the death of his wife, or after the homestead character of the premises has ceased, estop himself to deny the validity of the deed. The fact that he did not know that the deed was ineffectual does not remove the estoppel. Hence where, after the death of the wife and his abandonment of the premises, he permits the grantee to expend money in improving the premises, he is estopped to deny the validity of the deed. Adams v. Gilbert [Kan.] 72 Pac. 769.

31. Lange v. Geiser [Cal.] 72 Pac. 843.

32. A finding that the wife, prior to the execution of a deed, expressed herself as willing to join in its execution and that after its execution by the husband alone, she expressed herself as satisfied with it, does not show such joint consent as will validate the deed. Durand v. Higgins [Kan.] 72 Pac. 567. Under such provision a deed executed by a husband and the guardian of his insane wife is ineffectual. Adams v. Gilbert [Kan.] 72 Pac. 769.

33. Hurd's Rev. St. Ill. 1899, p. 867, § 4. Strayer v. Dickerson, 205 Ill. 257.

34. Dinsmoor v. Rowse, 200 Ill. 555; Strayer v. Dickerson, 205 Ill. 257.

35. Mortgage not good even as to excess value. Edwards v. Simms [Ariz.] 71 Pac. 902.

36. Avera v. Williams [Miss.] 33 So. 501.

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whom the acknowledgment is made, as required by law, is void.[37] The statute not requiring that the certificate should show that the wife acknowledge the conveyance separate and apart from her husband, such fact may be shown by parol.[38]

Contracts to convey.—Specific performance of a contract to convey a homestead, not properly executed and acknowledged by the owner and his wife, should not be enforced at the suit of either party.[39] It is not necessary that the wife should sign the contract at the same time that the husband does. The subsequent execution by her of one of the copies of the contract and an offer to sign the other, renders it a binding and valid contract, entitling the vendor to specific performance.[40]

The personal representative of a deceased vendor may maintain a suit to compel the specific performance of a contract for sale of a homestead, making the heirs parties defendant.[41]

§ 6. *Loss or relinquishment.*—The homestead right is purely personal and may be waived or renounced,[42] but husband and wife must both participate,[43] and a waiver by a wife can only be made in the manner prescribed by statute.[44] An antenuptial agreement whereby the woman agrees to waive her homestead rights in the lands of the man will not be enforced if at the time of the death of the husband there are minor children living who are the issue of the subsequent marriage.[45] Failure to object to a sale is not a waiver,[46] but by failure of a husband to assert in a foreclosure suit want of acknowledgment by himself of his wife's mortgage, he may waive homestead.[47] The homestead right is not lost by his loss of

37. Slappy v. Hanners, 137 Ala. 199. Acknowledgment before officer, who is officer and stockholder of corporation for whose benefit mortgage is given is void and hence mortgage is void. First Nat. Bank v. Citizens' State Bank [Wyo.] 70 Pac. 726. Acknowledgment before officer having pecuniary interest in sale of no effect. Watkins v. Youll [Neb.] 96 N. W. 1042.

Acknowledgment essential to "execution" of conveyance.—Acknowledgment is essential to the "execution" of a conveyance of a homestead. Hence an admission in a pleading that a contract for sale of a homestead was "duly executed," in the absence of anything to restrict its meaning, is an admission that it was acknowledged. Solt v. Anderson [Neb.] 93 N. W. 205.

See also cases cited, ante, p. 18; note 30.

When, in a suit to foreclose a mortgage, the husband of the mortgagor fails to set up that he did not acknowledge it, he will be deemed to have waived his homestead rights and equity will not, after judgment of foreclosure and sale, enjoin the proceeding to confirm the sale. Gilbert v. Provident Life & Trust Co. [Neb.] 95 N. W. 488.

38. Adams v. Smith [Wyo.] 70 Pac. 1043.

39. Solt v. Anderson [Neb.] 93 N. W. 205; Watkins v. Youll [Neb.] 96 N. W. 1042.

40. Such signing by the wife at a later date is not an alteration of the instrument which will render it invalid. Epperly v. Ferguson, 118 Iowa, 47. If the wife's name does not appear in the body of the contract, any defect arising by reason of such fact is cured by her subsequent execution, within the time limited by the contract, with her husband of a valid deed of the premises. Id.

41. Solt v. Anderson [Neb.] 93 N. W. 205.

Admission in pleading by personal representative.—The proceeds of the sale of a homestead is exempt from debts and liabilities of the estate, and the heirs are the real parties in interest; hence an allegation in the pleadings of the personal representative adverse to their rights is not binding on them. Id.

42. Gilbert v. Provident Life & Trust Co. [Neb.] 95 N. W. 488.

43. The acceptance of the surplus, on an execution sale of a homestead, by the owner of the legal title, does not constitute a waiver of the homestead right so as to vest the execution purchaser with a title that will support ejectment. The fact that the sheriff in paying over the surplus required the husband to sign the receipt with the wife, she being the owner of the legal title, does not constitute a waiver by him, the order under which the money was paid over not requiring it. Van Doren v. Weideman [Neb.] 94 N. W. 124.

44. A mortgage purporting to be the deed of the husband only, but executed by the wife and containing a waiver of her right of dower, does not preclude her from claiming her homestead rights. Kiesewetter v. Kress, 24 Ky. L. R. 1239, 70 S. W. 1065. So a waiver by her in a mortgage, which purports to be only a waiver by her, is not a compliance with a constitutional provision that a person entitled to a homestead may waive the same by signing with his wife and recording a written waiver and does not affect the husband's rights. Bank of Jeanerette v. Stansbury, 110 La. 301.

45. Zachmann v. Zachmann, 201 Ill. 380.

46. Failure of widow to object to sale of land at instance of public administrator, and the fact that she bids for it at such sale, does not estop her to claim in ejectment by the purchaser, that the land was homestead, not subject to sale to pay decedent's debts. Houf v. Brown, 171 Mo. 207.

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status as the head of a family,[48] nor by a temporary removal animo revertendi,[49] but such intention must be definite and certain. An intention to return only on the eventuating of certain contingencies is insufficient,[50] and it is the intention entertained at the time it is sought to subject the land which governs.[51] Intent to abandon and actual removal from the premises must co-exist.[52] In Kentucky, the husband's life estate in the homestead of his deceased wife continues only during his occupation thereof,[53] but in some states receipt of rents and profits by a widow are by statute deemed equivalent to occupancy.[54] Where the owner of a business homestead disposes of all his stock of merchandise and ceases to do busi-

47. Foreclosure suit. Gilbert v. Provident L. & T. Co. [Neb.] 95 N. W. 488.

48. Ragsdale, Cooper & Co. v. Watkins, 25 Ky. L. R. 506, 76 S. W. 45. As where children of a widow leave home. Slattery v. Keefe, 201 Ill. 483. Death of all members of family. Baldwin v. Thomas [Ark.] 72 S. W. 52. Death of wife and incarceration of owner in asylum. Holburn v. Pfanmiller's Adm'r, 24 Ky. L. R. 1613, 71 S. W. 940. In Washington a husband may after his wife's death select a homestead from community property for the benefit of himself and family. The fact that the minor children attain their majority after the selection does not deprive the father of the right to claim it as a homestead. In re Feas' Estate, 30 Wash. 51, 70 Pac. 270. In Florida a contrary rule prevails, and the land loses its status as a homestead when the owner ceases to be the head of a family. Herrin v. Brown [Fla.] 33 So. 522.

49. Ragsdale, Cooper & Co. v. Watkins, 25 Ky. L. R. 506, 76 S. W. 45; Herring v. Johnston, 24 Ky. L. R. 1940, 72 S. W. 793; Birdwell v. Burleson [Tex. Civ. App.] 72 S. W. 446; Bank of Jeanerette v. Stansbury, 110 La. 301. Under such circumstances the land does not lose its status as a homestead so as to permit of its conveyance by the husband without the joinder of the wife. Collins v. Bounds [Miss.] 34 So. 355. A conveyance to a third person who immediately conveys to the wife of the debtor is not an abandonment. Burkhardt v. James Walker & Son [Mich.] 92 N. W. 778.

Presumptions.—The homestead character of premises being once shown to have existed, the burden of showing an abandonment is on the person seeking to subject it to execution. McCord, Brady Co. v. Tessier [Neb.] 96 N. W. 342.

Question of fact.—Whether or not a removal from a homestead constitutes an abandonment depends on the facts of each particular case. Wapello County v. Brady, 118 Iowa, 482. Hence it is error for the court to single out any particular circumstance and charge as to whether it does or does not show an abandonment. White v. Epperson [Tex. Civ. App.] 73 S. W. 851.

Evidence of abandonment.—The mere fact that the absence from the land claimed as a homestead is protracted is not conclusive of an intention to abandon. Six years. Omaha Brewing Ass'n v. Zeller [Neb.] 93 N. W. 762. Absence for eight years with other evidence held to show an abandonment. McCord, Brady Co. v. Tessier [Neb.] 96 N. W. 342. The renting of the premises is regarded as indicative of an intention to abandon, though not conclusive. Wapello County v. Brady, 118 Iowa, 482; Smith v. Kneer, 203 Ill. 264. So too evidence of the retention of a part of the premises and the storing of furniture therein is admissible as showing an intention to return. Ragsdale, Cooper & Co. v. Watkins, 25 Ky. L. R. 506, 76 S. W. 45; Wapello County v. Brady, 118 Iowa, 482; Collins v. Bounds [Miss.] 34 So. 355; Ball v. Ramsey, 25 Ky. L. R. 1268, 77 S. W. 692. Offers to sell after leaving are admissible to negative an intention to return. Wapello County v. Brady, 118 Iowa, 482. Declarations made by the owner after his removal, as to whether he intended to live on the land again, are admissible. White v. Epperson [Tex. Civ. App.] 73 S. W. 851. Loose declarations of a debtor, made subsequent to his removal from land occupied as a homestead, that he did not intend to live on it again, there being nothing in his conduct to show that such was his intention, will not alone be sufficient to show such an intention where he testified positively that he intended to return and live on the premises. Galloway v. Rowlett, 24 Ky. L. R. 2503, 74 S. W. 260.

50. Wapello County v. Brady, 118 Iowa, 482; In re Flannagan, 117 Fed. 695.

51. White v. Epperson [Tex. Civ. App.] 73 S. W. 851.

52. An intention to become a nonresident of the state, entertained at the time of a sale of premises, theretofore occupied as a homestead, where the intention is not carried into effect by actual removal, is insufficient to constitute an abandonment of the right to hold other property purchased with the proceeds of the sale of the homestead, exempt as to debts contracted prior to the reinvestment. Lee v. Hughes, 25 Ky. L. R. 1201, 77 S. W. 386.

53. Hence when he procures a sale thereof for partition, he is not entitled to a life estate in the proceeds of the partition sale. Clay's Guardian v. Wallace, 25 Ky. L. R. 820, 76 S. W. 388.

54. In Texas the homestead rights of a widow and minor children in land occupied as a home by the family before the husband's death is not lost by their removal from the state, provided the rents and profits are used for their support. Powell v. Naylor [Tex. Civ. App.] 74 S. W. 338. In Tennessee the surviving wife may sell or lease her life estate and the lessee or purchaser, if he be a resident of the state, may hold it during the life of the widow, but if she removes from the state she abandons her rights, and the life estate is terminated. This effect is not avoided by the fact that she intended to retain her homestead right and continued to receive the rents and profits for her support. Coile v. Hudgins, 109 Tenn. 217.

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ness, he thereby abandons his business homestead.[55] Though a judgment against the owner of land used by him as a homestead is not a lien on the land so long as it is used for homestead purposes, the lien attaches the moment it is abandoned as a homestead.[56]

§ 7. *Rights of surviving spouse, children, heirs, or dependents.*—The homestead laws generally continue the estate for the benefit of the widow or the widower or children of a homestead holder. Cases construing such statutes are cited in the note.[57] In Illinois it has been held that the homestead of a second wife is superior to dower of a divorced wife.[58] Where the statutes confer on minor children the right to occupy jointly, with the widow, the homestead of their deceased father, the widow cannot deprive them of such right.[59]

Such right may be barred by an election,[60] if it is inconsistent with some other claim.[61]

55. In re Flannagan, 117 Fed. 695. Hence, where a creditor of one owning a business homestead attaches it after the land constituting the homestead as well as the stock of goods with which the business was carried on have been sold, but before the recording of the deed, the attachment takes precedence of the deed, since at the time of attachment it had ceased to be a business homestead. R. E. Bell Hardware Co. v. Riddle [Tex. Civ. App.] 72 S. W. 613.

56. Smith v. Thompson, 169 Mo. 553. If the judgment is entered in the county where the land is situate, it is not necessary to the attachment of the lien of the judgment that the sheriff file a notice of levy, as is required by Rev. St. 1899, § 3178, in cases of a levy on land in a county other than that in which the judgment is entered. Id.

57. Under the **Missouri** law as it was in 1873, the widow of the owner of a homestead took immediately on his death the same estate which he himself had, and a conveyance made by her before the assignment thereof to her passed her title to her grantee. Johnson v. Johnson, 170 Mo. 34, 59 L. R. A. 748.

In Virginia the widow's right to occupy a homestead, which during the life of her deceased husband was set off to him, during her life or widowhood, which accrues when the husband dies leaving debts, cannot be defeated by the heirs buying up and discharging claims against the decedent's estate. Davis v. Davis [Va.] 43 S. E. 358.

In Nebraska a mortgagee of a homestead is not entitled to a receiver as against the widow of the mortgagor. Joslin v. Williams [Neb.] 93 N. W. 701.

Deserting wife.—Her right to occupy the homestead of which her husband died seized is not forfeited by the fact that she had prior to his death deserted him and lived in adultery with another. Nor does the fact that she lived in another state affect such right, since her legal domicile is that of her husband. Lyons v. Lyons [Mo. App.] 74 S. W. 467.

Rights of children. In Mississippi the homestead descends to the widow and children in equal parts. Hubbard v. Sage Land & Imp. Co. [Miss.] 33 So. 413. **In Washington** one or the other spouse must have selected a homestead in community lands. On the death of the father, no homestead having been selected in community lands, the land descended one-half to the widow as her separate estate and one-half to the children, adults as well as minors, subject to the right of the widow to select a homestead therefrom; but as she failed to exercise that right, the children's one-half vested in them in fee on her death. Stewin v. Thrift, 30 Wash. 36, 70 Pac. 116.

58. Potter v. Clapp, 203 Ill. 592.

59. Houf v. Brown, 171 Mo. 207; Phillips v. Presson, 172 Mo. 24. Thus her election to take under a will devising the homestead and other lands, subject to the testator's debts, will not deprive the children of their right to occupy the homestead during their minority, and it can be sold only to pay the testator's debts subject to their right. Kiesewetter v. Kress, 24 Ky. L. R. 1239, 70 S. W. 1065.

60. Where a married woman devises lands, including the homestead, to her husband, his election to take under the will rather than under the statute deprives the land in his hands of its homestead character. Where a married woman dies without carrying into effect a contract to convey land occupied as a homestead by herself and husband, and devises all her land to him and appoints him executor of her will, the fact that the husband after his wife's death contracts with the vendee, to qualify as executor and procure an order for the conveyance of the land to the vendee, does not constitute an election to take under the will so as to preclude his election to take a homestead right in the property, so as to exempt the proceeds from application in discharge of his debts. Milner v. Davis [Iowa] 94 N. W. 511.

61. She is entitled to a life estate in lands on which she was living with her deceased husband at the time of his death, though she owns lands on which they had formerly lived, but had abandoned as a homestead, and in which she had a right to acquire a homestead. Wilmoth v. Gossett [Ark.] 76 S. W. 1073.

In Kentucky a widow cannot have both dower and homestead rights in lands of her deceased husband. Hogg v. Potter, 25 Ky. L. R. 492, 76 S. W. 35.

In Georgia she is not entitled to a homestead and a year's support where the aggregate of the two provisions exceeds the amount which may be set apart as a homestead. If she has a year's support set apart to her out of the land already held as a homestead, the latter becomes extinguished, the lesser estate being merged in the greater. The mere fact that a widow's application

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If no homestead has been selected, a formal proceeding to set out one may be necessary where the statute does not designate it.[62]

Duty to pay taxes and make repairs.—Where the statutes give the surviving spouse a life estate in the homestead, or the minor children the right to occupy during minority, it is the duty of the owner of the particular estate to pay the general taxes and keep the premises in repair.[63]

Ordinarily the heirs take title, subject to the right of the surviving spouse, and the debts of the deceased owner.[64]

§ 8. *Exemption of proceeds of homestead or of substituted properties. Voluntary sales.*—In the absence of a statute, the proceeds of the voluntary sale of a homestead are not exempt,[65] unless the sale was for the purpose of reinvesting the proceeds in another home,[66] the burden of proving his intention being on the

for a year's support is granted, she not taking any steps to enforce it against the homestead, does not constitute an election to waive her homestead. Green v. Hambrick [Ga.] 45 S. E. 420.

62. **In Texas** the right of the surviving spouse to a homestead is secured independent of the action of any court and depends only on the use or occupancy thereof by such survivor. The right of the minor children to use and occupy the homestead of their deceased parent during their minority is dependent on their having secured through their guardian an order of court giving them permission to use and occupy it. Without such an order, the homestead is not established and may be partitioned at suit of any one owning a part of it. The approval of an inventory of the minor's property, in which it was stated that the minors were entitled to the use and occupancy of the premises as a homestead, does not take the place of the order contemplated by the constitution. Powell v. Naylor [Tex. Civ. App.] 74 S. W. 338.

In Alabama, where the owner of a homestead dies leaving no other real property, the title to the homestead vests in the widow and children without administration, and it is not necessary that they should have such homestead set apart to them. They become tenants in common. A grantee of a child who has reached his majority may maintain partition against the widow and minor children. Faircloth v. Carroll, 137 Ala. 243.

63. If the remainderman is compelled to pay the taxes he can recover the amount paid from the life tenant and have the same decreed a lien on the latter's interest in the land. Wells v. Sweeney [S. D.] 94 N. W. 394.

In Kentucky, where the income from the widow's homestead estate is insufficient for her support and also to make needed repairs, a court of equity may authorize the master commissioner to sell enough timber from the land to make the repairs, they being of such a character as to inure to the advantage of the remainderman. Flener v. Flener, 24 Ky. L. R. 725, 69 S. W. 954. But such rule as to taxes does not apply while the claimant of a homestead is in possession of a tract exceeding the amount exempt as a homestead, but not divisible, pending proceedings to establish the priority of judgment and attachment liens on the surplus. Baker v. Grand Island Banking Co. [Neb.] 93 N. W. 428.

64. Where the widow paid into the estate of decedent the amount of excess valuation of a tract over the statutory homestead, the whole tract is exempt until her death, and majority of children and their creditors can subject such proportion as the homestead bore to the appraised value. Groover v. Brown [Ga.] 45 S. E. 310. The reversion in homestead lands may be sold in course of administration to pay debts of the deceased husband. Derge v. Hill [Mo. App.] 77 S. W. 105.

In California the reversion in a homestead set out of the husband's separate lands may be reached by creditors. In re Tittels' Estate, 139 Cal. 149, 72 Pac. 909.

There can be no partition by the heirs during the continuance of the homestead life estate. McAnulty v. Ellison [Tex. Civ. App.] 71 S. W. 670. In South Carolina, the heirs can maintain partition of land which the widow has had set off to her as a homestead, where there are no minor children. Saunders v. Strobel, 64 S. C. 489. The surviving spouse may however abandon his homestead rights, if there are no minor children, and thereupon maintain partition as one of the heirs. Wells v. Sweeney [S. D.] 94 N. W. 394.

In Iowa the heir, where the deceased owner of a homestead leaves no surviving spouse, takes title to the homestead and may hold it exempt as against the debts of his ancestor or his own, except those contracted prior to its acquisition. A nonresident heir is entitled to hold his share exempt from his debts. Kinzer v. Stephens [Iowa] 96 N. W. 858.

65. Kinzer v. Stephens [Iowa] 96 N. W. 858. Where the owner of a homestead executes a voluntary conveyance thereof to another, the reconveyance by such other does not rehabilitate the first owner with the rights of a homestead in the land, she not being at the time of the reconveyance a person entitled to the exemption; nor can it be held as a homestead purchased with the proceeds of the sale of a homestead. Slattery v. Keefe, 201 Ill. 483.

66. Kinzer v. Stephens [Iowa] 96 N. W. 858. When the homestead is sold under a power of sale in a mortgage, the excess after paying the mortgage is exempt, if mortgagor intends to use such surplus to purchase another home. State v. Hull [Mo. App.] 74 S. W. 888. Where a debtor takes a note in part payment of the sale of two tracts of land, one of which is his homestead, and his trustee in bankruptcy, pur-

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debtor.[67] While the statute does not specify the time within which the reinvestment must be made, they will be exempt for a reasonable time,[68] or for so long a time as the intention to reinvest in another home continues.[69] The debtor may purchase another home and have it conveyed directly to his wife. Such conveyance is not fraudulent.[70] If the homestead sold is part of a tract larger than is exempt, he may hold the value of a tract of the size exempt.[71] If he invests in a new home, it is exempt only as to debts not enforceable against the one sold.[72] The land purchased acquires the homestead character eo instanti on the title passing to the debtor, he having no other home for his family, though he does not take possession immediately.[73] Lands taken in exchange for the homestead are exempt for the same period of time that the proceeds of a sale are.[74]

Involuntary sales.—If the sale is involuntary, the proceeds are exempt, at least for a reasonable time in which to reinvest them,[75] as are also damages for a tort to the property.[76] So too in case of an involuntary substitution of nonexempt property for the homestead, the substituted property will be exempt.[77]

§ 9. *Remedies and procedure. Formal selection.*[78]—When lands owned by a debtor are of no greater value than the prescribed limit and are used for the support of himself and family, they are exempt without any formal selection;[79] also where actual occupancy gives the land the status of a homestead.[80] Property claimed to be exempt as a homestead must be shown to have had that character at

suant to an agreement made by the debtor and in good faith, accepts less than the full amount of the notes in discharge thereof, the debtor is not entitled to receive from the trustee, as exempt, the full nominal sum for which the homestead was sold, but such nominal price should be reduced in the proportion which the whole discount bears to the nominal selling price of both tracts. In re Johnson, 118 Fed. 312.

67. State v. Hull [Mo. App.] 74 S. W. 888.

68. State v. Hull [Mo. App.] 74 S. W. 888; Richards v. Orr, 118 Iowa, 724.

69. Lee v. Hughes, 25 Ky. L. R. 1201, 77 S. W. 386.

70. Scheel v. Lackner [Neb.] 93 N. W. 741; Richards v. Orr, 118 Iowa, 724.

71. Richards v. Orr, 118 Iowa, 724.

72. In re Johnson, 118 Fed. 312.

73. Schneider v. Dorsey [Tex. Civ. App.] 72 S. W. 1029. Hence land purchased with the proceeds of a former homestead with intent to make it a home is not subject to the lien of a judgment against the purchaser docketed at the time he acquired title. Id.

74. Ellis v. Light [Tex. Civ. App.] 73 S. W. 551.

75. Where, in a divorce action, the court decrees that the defendant husband shall convey the homestead to the wife on the payment by her of a designated sum for his interest therein, the creditors of the husband are not entitled to satisfaction of their claims out of the proceeds of such forced sale. Canney v. Canney [Mich.] 91 N. W. 620. Where the homestead of a deceased person is sold pursuant to a decree in a suit for specific performance of a contract entered into by the decedent, the proceeds are exempt from the debts of the estate and belong to the heirs. Solt v. Anderson [Neb.] 93 N. W. 205.

76. Kinzer v. Stephens [Iowa] 96 N. W. 858. A creditor cannot offset against a judgment against him for injury to a homesteader's possession of a homestead, a judgment which he has against the owner of the homestead. Lewis v. Scott, 24 Ky. L. R. 2367, 73 S. W. 1131.

77. Kinzer v. Stephens [Iowa] 96 N. W. 858.

78. **Necessity of joinder of wife in selection.** Where a tract owned by a married man, and occupied and used as a home by him and his wife, exceeds in area the amount exempt as a homestead, a designation by the husband without the joinder of the wife, of a homestead in a part of the tract not covered by a mortgage executed by him alone, there being enough of the land unmortgaged to make up the full quantity exempt, is binding on them. Anderson v. Brin [Tex. Civ. App.] 73 S. W. 838.

Establishing copy of lost schedule and plat of homestead.—After a schedule and plat in homestead proceedings have been established and recorded, they, as muniments of title, can be established in the superior court by copies when the originals have been lost, under provisions Code Ga., § 4745. Paschal v. Turner, 116 Ga. 736.

79. Folsom v. Asper, 25 Utah, 299, 71 Pac. 315. In an action of ejectment brought by a purchaser at administrator's sale, where the defense is that the land was exempt from sale as a homestead and the value of the tract does not exceed the amount allowed by law as being exempt, there is no necessity for the appointment of commissioners to set off the homestead, under Rev. St. Mo. 1899, § 3624. Houf v. Brown, 171 Mo. 207.

Necessity of assignment to widow.—Where the land owned and occupied as a home at the time of the owner's death is worth less than the amount allowed as a homestead, it is not necessary that his widow should have the same assigned to her in order to give the property the status of a homestead and vest her with a life estate. Carver v. Maxwell [Tenn.] 71 S. W. 752.

80. Koch v. West, 118 Iowa, 468; Mitchell v. West [Iowa] 93 N. W. 380.

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the time of its seizure.[81] In Utah and Washington, the selection of the homestead may be made at any time before the execution sale.[82] It is the intent of the homestead law that a homestead in real estate in kind should be set aside whenever practicable.[83] Homestead may be set out in a tract without bounds relegating the widow and fee owners to partition if agreement proves impossible.[84] A judicial designation of homestead is conclusive of the debtor's right as against a creditor who failed to object,[85] and when recorded is notice to all the world of the existence of the homestead.[86]

Remedies by suit or action.—The wife may enforce her right in equity,[87] and it is not a proper subject for consideration in proceedings for the confirmation of an execution sale thereof.[88] The owner of a homestead may interpose his claim of exemption as a defense to an action of ejectment brought by the execution purchaser thereof.[89] He may plead and prove facts showing that the property was such that it was not subject to execution sale or he can plead and prove that the question had been adjudicated between the parties in a court of competent jurisdiction having the parties and the subject-matter before it.[90]

Remedies of creditors against excess.—A judgment, not being a lien on a homestead, cannot be enforced by execution against the land where the homestead character of the land continued up to the time of the debtor's death.[91] One seeking to subject excess value of a homestead has the burden of showing such value.[92]

HOMICIDE.[1]

§ 1. Elements of Crime in General and Parties Thereto (223).
§ 2. Murder (224).
§ 3. Manslaughter (225).
§ 4. Assault with Intent to Kill or do Great Bodily Harm (225).
§ 5. Justification and Excuse (226).
§ 6. Indictment or Information (227).
§ 7. Evidence (229).
A. Presumptions and Burden of Proof (229).
B. Admissibility in General (229).
C. Dying Declarations (235).
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§ 8. Trial and Punishment (238).
A. Conduct of Trial in General (238).
B. Instructions (238).
C. Verdict (246).
D. Punishment (246).

§ 1. *Elements of crime in general and parties thereto.*—One conspiring with,[2] instigating,[3] or aiding and abetting,[4] the person committing a homicide, is criminal-

81. Wapello County v. Brady, 118 Iowa, 482.

82. Folsom v. Asper, 25 Utah, 299, 71 Pac. 315; Smalley v. Langenour, 30 Wash. 307, 70 Pac. 786; In re Feas' Estate, 30 Wash. 51, 70 Pac. 270.

83. A bankrupt is entitled, where the land claimed by him as a homestead exceeds the value exempt, to pay to his trustee in bankruptcy the excess in value and retain the land as a homestead. In re Manning, 123 Fed. 180.

84. In re Quinn's Estate [Nev.] 74 Pac. 5.

85. Sloan v. Hunter, 65 S. C. 235, 43 S. E. 788.

86. Ach & Co. v. Milan [Ga.] 44 S. E. 870.

87. Suit to remove levy. Burkhardt v. James Walker & Son [Mich.] 92 N. W. 778.

88. The complainant's cause of action to remove a cloud on his title did not accrue until the deed was put on record, hence the statute of limitations as to such an action did not commence to run until the deed was recorded. Best v. Grist [Neb.] 95 N. W. 836. Where a debtor before sale of land under execution, properly interposes a claim of exemption as a homestead, the sheriff cannot, by returning the notice of claim, prejudice the claimant's rights, and a subsequent sale will be set aside and canceled. Knight v. Davis, 135 Ala. 139.

Evidence.—In an action to cancel a sheriff's sale of land on the ground that it was exempt from sale as a homestead, evidence of the debtor's residence on the land, just prior to and at the time of and subsequent to the filing of the declaration of homestead, is admissible to show that it was a bona fide residence. Smith v. Veysey, 30 Wash. 18, 70 Pac. 94.

89. Van Doren v. Weideman [Neb.] 94 N. W. 124.

90. Order of bankruptcy court setting property off to debtor as exempt. Smalley v. Langenour, 30 Wash. 307, 70 Pac. 786.

91. Dinsmoor v. Rowse, 200 Ill. 555; Sloan v. Hunter, 65 S. C. 235.

92. Fitzhugh v. Connor [Tex. Civ. App.] 74 S. W. 83.

1. Matters of substantive law (particularly insanity as a defense) and procedure common to all crimes are treated in Criminal Law and Indictment and Procedure.

2. Somers v. State, 116 Ga. 535; State v. Prater, 52 W. Va. 132.

3. Martin v. State [Tex. Cr. App.] 70 S. W. 973. One who advises the commission of a crime and is present, is a principal

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ly liable. The law of principals and accessories is specifically treated elsewhere.[5] Where two persons engage together in the commission of a felony, one is liable for a homicide committed by the other in the course thereof, though there was no conspiracy in respect to the homicide.[6]

§ 2. *Murder.*—To constitute murder there must be malice aforethought[7] and a premeditated[8] design to cause death,[9] but an intent to kill another than the person actually slain is sufficient.[10] But malice is implied from a wanton killing,[11] or one committed in the perpetration of a felony,[12] or in resistance to a lawful arrest,[13] and the offense is murder.

Degrees.—Murder is by statute in most states divided into degrees; the test of murder in the first degree being ordinarily premeditation and deliberation,[14] or in the commission of a crime.[15] Intoxication, while no defense,[16] may reduce the degree of the homicide by rendering defendant incapable of premeditation.[17]

Attempts.[18]—One firing into a room with intent to kill is guilty of an attempt to murder, though there was in fact no one in the room.[19]

though he did not aid or abet. Franklin v. State [Tex. Cr. App.] 76 S. W. 473. There may be an accessory before the fact to manslaughter. Mathis v. State [Fla.] 34 So. 287.

4. Greene v. State [Ark.] 70 S. W. 1038; Jahnke v. State [Neb.] 94 N. W. 158. Prisoners assaulting keeper to make escape. People v. Flanigan, 174 N. Y. 356. Evidence held sufficient to show that one present was aiding and abetting. Smith v. State, 136 Ala. 1. Evidence held sufficient to show aiding and abetting. People v. Morine, 138 Cal. 626, 72 Pac. 166. Evidence insufficient. Walker v. State [Ga.] 43 S. E. 856.

5. Criminal Law, ante, p. 829.

6. Starks v. State [Ala.] 34 So. 687.

7. Malice is an independent fact and not a mere inference from the killing. State v. Greenleaf, 71 N. H. 606. Malice need not be given express utterance. Roberson v. State [Fla.] 34 So. 294. Malice is implied from the use of a deadly weapon. State v. Cole, 132 N. C. 1069.

8. Arming before commission of burglary sufficient to show premeditation. People v. Sullivan, 173 N. Y. 122. Provoking altercation with intent to kill in course thereof. State v. Cobb, 65 S. C. 324. Premeditation is not implied from the use of a deadly weapon. State v. Cole, 132 N. C. 1069. No particular length of time is essential to premeditation. Id. Deliberation for a moment even, is sufficient to constitute homicide, murder in the first degree. Stewart v. State [Ala.] 34 So. 818. Under Public Laws 1893, p. 76, murder consists of the elements required by the common law with the additional one of premeditation and deliberation. State v. Cole, 132 N. C. 1069.

9. Immoderate chastisement of child held to show intent to kill. State v. Shaw, 64 S. C. 566.

10. State v. Brown [Del.] 53 Atl. 354. If one with premeditated design to kill one person, kills another, he is guilty of murder in the first degree if there is a legal connection between the original purpose and the result. State v. Cole, 132 N. C. 1069. Where one kills another than the person intended, his guilt depends on the same considerations as if the person intended had been killed. State v. Williams [Iowa] 97 N. W. 992; Sparks v. State [Tex. Cr. App.] 77 S. W. 811. Instruction that shooting of one person in an attempt to shoot another is murder in the second degree held erroneous, where the shooting of such other person would have been justifiable. Powell v. State [Tex. Cr. App.] 70 S. W. 218.

11. Where defendant was engaged in an altercation and on hearing a person approaching from behind, struck behind him with a knife without looking to see who it was, he was guilty of murder without regard to his intention. Harris v. State [Ga.] 45 S. E. 973.

12. Lindsay v. State, 24 Ohio Circ. R. 1.

13. Commonwealth v. Grether, 204 Pa. 203.

14. Premeditation the test. State v. Greenleaf, 71 N. H. 606; Olds v. State [Fla.] 33 So. 296. Evidence held sufficient to show murder in second degree—provocation by others than deceased. State v. John, 172 Mo. 220; White v. State [Tex. Cr. App.] 72 S. W. 173. Pursuit of a negro girl by deceased to recover money which he claimed she had taken from him, held not sufficient provocation to defendant who was not related to the girl, to reduce the homicide to murder in the second degree. State v. Gregory [Mo.] 76 S. W. 970. To constitute murder in the second degree the homicide must have been unlawful and with malice aforethought. Thomas v. State [Tex. Cr. App.] 74 S. W. 36. One causing the death of another by an act naturally calculated to effect that result is guilty of murder in the first degree if no justification or excuse appear. Cupps v. State [Wis.] 97 N. W. 210.

15. The killing must have occurred as the means or outcome of the attempted crime. State v. Greenleaf, 71 N. H. 606. But it is immaterial that the attempt was not far advanced. Id.

16. Wright v. Commonwealth, 24 Ky. L. R. 1838, 72 S. W. 340.

17. Commonwealth v. Dudash, 204 Pa. 124; State v. Davis, 52 W. Va. 224. See, also, Criminal Law, ante, p. 828.

18. The offense of mixing noxious substances with any food or drink (Pen. Code, art. 647) is complete, though not enough of such substances be intermixed to injure anyone. Runnels v. State [Tex. Cr. App.] 77 S. W. 458. The words "noxious potion or substance" in Pen. Code, art. 647, prohibiting the

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§ 3. *Manslaughter.*[20]—Manslaughter is variously defined by statute in the several states, the definitions embracing all forms of criminal homicide in which malice or intent to kill is absent. Thus it is manslaughter if the homicide is committed by gross negligence,[21] or in a cruel and unusual manner but without intent to kill,[22] or in sudden combat,[23] or in the heat of passion[24] produced by reasonable provocation,[25] and before the lapse of reasonable cooling time.[26]

§ 4. *Assault with intent to kill or do great bodily harm.*—In most states the offense consists of an assault with intent to murder or, sometimes, to do great bodily harm.[27] Under such statutes the prescribed intent is essential,[28] and the

mixing thereof with any food or drink, includes only some characters of poison. Id.

19. State v. Mitchell, 170 Mo. 633.

20. The distinction between murder and manslaughter was not abolished by Pub. St. c. 278, § 7. State v. Greenleaf, 71 N. H. 606.

21. Where defendant killed deceased by the reckless management of his team on a highway, the fact that when it was too late he tried to avert the accident is no defense. State v. Stentz [Wash.] 74 Pac. 588. Homicide caused by the negligent use of a pistol is manslaughter. State v. Gilliam [S. C.] 45 S. E. 6. Liability of officers of street railway company for accident causing death of passengers. State v. Young [N. J. Law] 56 Atl. 471. In this case it was held that the directors or officers of a street railway cannot be held guilty of manslaughter because of the omission of a device whose necessity is a mooted question, a reasonably safe device having been attached, nor by reason of having illegally laid their track across a railroad track at grade; that failure of employees to use an appliance furnished them, cannot be imputed to the directors of the company; that the system of operating cars at a railroad crossing was sufficient if faithfully executed by its employees and the directors accordingly are exonerated from criminal liability for accidents, and that the overcrowding of a car in accordance with the practice known by the directors did not contribute to a particular accident so as to render them criminally liable. Id.

22. Shooting with a pistol is not killing in a cruel and unusual manner. Tanks v. State [Ark.] 75 S. W. 851.

23. One who provokes altercation with intent to kill in the course thereof is guilty of murder. State v. Cobb, 65 S. C. 324. One who makes an assault with felonious intent is guilty of murder if he kills in self defense in the course of the altercation, but if the assault was without felonious intent, he is guilty of manslaughter only. People v. Filippelli, 178 N. Y. 509.

24. Evidence of altercation in which rocks were thrown by deceased held not to necessarily reduce the homicide to manslaughter. Foster v. State [Tex. Cr. App.] 74 S. W. 29.

25. State v. Hunter, 118 Iowa, 686. Adultery of defendant's wife. Finch v. State [Tex. Cr. App.] 70 S. W. 207. The provocation must proceed from deceased. Id. Though deceased threatened to arrest defendant and others, without right, and exhibited a pistol, it is murder if the killing was in furtherance of a previous conspiracy. Bruner v. U. S. [Ind. T.] 76 S. W. 244. An attempt by a father-in-law to take defendant's wife and children from him, is sufficient provocation to reduce the offense to manslaughter, though the killing was not necessary to prevent the taking of the wife. Cole v. State [Tex. Cr. App.] 75 S. W. 527. Provocation by words only is not sufficient to mitigate the degree. Jarvis v. State [Ala.] 34 So. 1025. The fact that an officer having the right to search defendant for concealed weapons, accosted him in insolent manner, is not sufficient provocation to reduce the offense to manslaughter. Keady v. People [Colo.] 74 Pac. 892. Under the Texas Statute making insults to a female relative adequate provocation it was held that the statute applies to insults to such relative by her husband; that it applies to relatives not living at the time of the homicide; that an attempt by deceased to forcibly administer poison to defendant's sister is provocation sufficient to reduce the degree; that the fact that defendant required his wife to submit to excessive sexual intercourse is not such an insult as will mitigate the killing of defendant by her brother, and that declarations by deceased adopting and boasting of insults to defendant's female relative by another, constitute adequate provocation within the statute. Willis v. State [Tex. Cr. App.] 75 S. W. 790.

26. Living with wife for several weeks after learning of adultery. McCarty v. Commonwealth, 24 Ky. Law Rep. 1427, 71 S. W. 656. Waiting fifteen hours after learning of insult to wife. State v. Powell, 109 La. 727. The fact that deceased had seduced defendant's sister does not mitigate a homicide committed by lying in wait. State v. Hicks [Mo.] 77 S. W. 539. Where defendant has known for weeks of adultery between deceased and defendant's wife and has assured deceased that he need fear no injury from him, there is no provocation reducing the offense to manslaughter. State v. Privitt, 175 Mo. 207. Sufficiency of cooling time is for the jury. White v. State [Ga.] 45 S. E. 595. Whether three-quarters of an hour is sufficient cooling time is for the jury. State v. Vinso, 171 Mo. 576.

27. The intent required by the Mississippi statute is to murder and the intent to kill or wound is not sufficient. Thames v. State [Miss.] 35 So. 171.

28. The intent to murder must be clearly shown. State v. Di Guglielmo [Del.] 55 Atl. 350. One too drunk to entertain an intent to kill cannot be convicted. State v. Pasnau, 118 Iowa, 501; State v. Di Guglielmo [Del.] 55 Atl. 350. A mere wanton act without specific intent (throwing stone into crowded street car) is not an assault with intent to kill. Bray v. State [Ga.] 45 S. E. 597. The pointing of a pistol in a threatening manner with intent to alarm only does not consti-

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assault must have been such that had death resulted it would have been murder.[29] The character of the weapon is immaterial where the offense is defined as an assault with intent to kill,[30] but some statutes require the use of a deadly weapon.[31]

§ 5. *Justification and excuse.*[32]—Homicide is justifiable as committed in self defense, where defendant, without having provoked the difficulty,[33] and without justification,[34] is assaulted in such manner that he in good faith believes[35] and has reasonable ground to believe,[36] that he is in imminent danger[37] of death or great

tute an assault with intent to murder. Wright v. State [Tex. Cr. App.] 77 S. W. 809. The nature and extent of the injury invoked may be sufficient to establish intent to murder. Starr v. State [Ind.] 67 N. E. 527. Where a firearm was used and a person wounded, testimony of defendant that he shot to frighten only is unavailing. State v. Hamilton, 170 Mo. 377. An intent to kill another than the person actually injured is sufficient. Bush v. State, 136 Ala. 85. Sending an infernal machine by mail addressed to the sender and accompanied with a letter calculated to arouse his wife's jealousy, shows an intent that she should be led to open the box and be killed thereby. State v. Hoot [Iowa] 94 N. W. 564. Malice may be inferred from want of provocation. Howard v. Commonwealth, 24 Ky. L. R. 1301, 71 S. W. 446.

29. State v. Williamson, 65 S. C. 242; State v. Di Guglielmo [Del.] 55 Atl. 350. Assault with intent to commit manslaughter is a crime in Florida. Bryan v. State [Fla.] 34 So. 243.

30. Gray v. State [Fla.] 33 So. 295; Drummer v. State [Fla.] 33 So. 1008; McDonald v. State [Fla.] 35 So. 72.

31. A deadly weapon is one calculated to produce death when used by a person of defendant's strength in the manner in which he used it. Cosby v. Commonwealth, 24 Ky. L. R. 2050, 72 S. W. 1089. An ordinary penknife is a deadly weapon if used in a manner likely to produce death. State v. Roan [Iowa] 97 N. W. 997. A gun fired only to frighten is not as a matter of law a deadly weapon. Angel v. State [Tex. Cr. App.] 74 S. W. 553. Whether an iron cigar cutter is a deadly weapon is for the jury. State v. Anderson, 30 Wash. 14, 70 Pac. 104.

32. The distinction, often overlooked, between justification and excuse is pointed out in 1 Clark & Marshall on Crimes, p. 592, and see Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733.

33. One who commits an assault is not entitled to kill in self defense in the course thereof. Henry v. People, 198 Ill. 162. One arming himself and seeking the quarrel (Reese v. State, 135 Ala. 13), or who after a quarrel arms himself and seeks to renew the same, is not entitled to urge self defense (People v. Filippelli, 173 N. Y. 509). One bringing on an altercation without felonious intent, may justify an assault with a deadly weapon in the course thereof. State v. Garrett, 170 Mo. 395. One who makes an assault with felonious intent is guilty of murder if he kills in self defense in course of the altercation, but if the assault was without felonious intent, he is guilty of manslaughter only. People v. Filippelli, 173 N. Y. 509.

The fault which will prevent defendant from claiming self defense, must be an act of aggression or immediate wrong doing bringing on the altercation. Bassett v. State [Fla.] 33 So. 262. Something said or done with intent to bring about the difficulty which would have rendered defendant criminally responsible. Vann v. State [Tex. Cr. App.] 77 S. W. 813. Previous slanderous statements by defendant are not such a provocation of a quarrel as will deprive him of the right of self defense against a murderous assault. State v. Bartlett, 170 Mo. 658, 59 L. R. A. 756.

Though defendant may have sought the quarrel with intent to kill, if he had abandoned the same and was seeking in good faith to retreat therefrom, he may justify a killing in self defense. Pulpus v. State [Miss.] 34 So. 2; State v. Gibson [Or.] 73 Pac. 333. Where deceased was shot in the back after he had been disabled, the fact that he brought on a difficulty shortly before the homicide is no justification. Hudson v. Commonwealth, 24 Ky. L. R. 785, 69 S. W. 1079.

34. One attacked by a policeman independent of an attempt to arrest has the same right of self defense as against a private person. Vann v. State [Tex. Cr. App.] 77 S. W. 813. One standing peaceably on the street at night is entitled to resist an effort by a policeman to strike him for failing to move on when ordered to do so. State v. Meyers, 174 Mo. 352. The owner of premises may call on bystanders to eject a trespasser and the latter has no greater right of resistance against them than he would have against the owner. State v. Roan [Iowa] 97 N. W. 997. If the owner use undue force in ejecting a trespasser the latter may defend himself. Thomas v. Com., 25 Ky. L. R. 201, 74 S. W. 1062. The right to eject a person from a saloon or gambling house is somewhat narrower than the right of ejection from a domicile. State v. Williams [La.] 35 So. 521. A clerk in a store has the same right as his employer to eject an intruder. State v. Hamilton, 170 Mo. 377. Slanderous words spoken of a decedent's brother do not justify an assault by him so as to debar defendant from self defense. State v. Bartlett, 170 Mo. 658, 59 L. R. A. 756.

35. A reasonable appearance of imminent peril is sufficient and it is not essential that the killing should be shown to have been necessary. State v. Barrett, 132 N. C. 1005; Alexander v. State [Tex. Cr. App.] 70 S. W. 748; Lane v. State [Fla.] 32 So. 896; Williams v. U. S. [Ind. T.] 69 S. W. 871; State v. Miller [Or.] 74 Pac. 658. So held where deceased put his hand in pocket as if to draw a weapon. Newman v. State [Tex. Cr. App.] 70 S. W. 951; Williams v. U. S. [Ind. T.] 69 S. W. 871.

36. State v. Smith [Or.] 71 Pac. 973; State v. Davis, 52 W. Va. 224; State v. McKenzie [Mo.] 76 S. W. 1015; State v. Allen [La.] 35

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bodily harm,[38] and that no safe means of avoiding the same is open to him except the killing of his assailant,[39] and under the same limitations the right is extended to the defense of others,[40] and to the defense of home or family if the force used is proportioned to the nature of the threatened wrong.[41] If defendant was acting in self defense when the fatal shot was fired, he is justified, though subsequent shots were fired in anger.[42]

Accidental homicide.—Homicide is excusable if committed by accident without negligence and while defendant is not engaged in an unlawful enterprise.[43]

Order of military superior.—Where martial law exists, a soldier is justified by the orders of his officer.[44]

§ 6. *Indictment or information.*[45]—Holdings as to the formal commencement

So. 495. The appearance of danger must be such as to lead a reasonably prudent man to deem himself in peril. State v. Brown [Del.] 53 Atl. 354; Lane v. State [Fla.] 32 So. 896. Threats not accompanied by any act of aggression are insufficient. State v. Smith [Or.] 71 Pac. 973; Morrell v. State, 136 Ala. 44. Whether defendant believed himself in danger and whether such belief was reasonable, are for the jury. Rowsey v. Commonwealth, 25 Ky. L. R. 841.

37. It is not necessary that deceased should have attacked defendant if he was about to do so. Nix v. State [Tex. Cr. App.] 74 S. W. 764. Where deceased has abandoned his attack and is fleeing when shot, self defense cannot be urged. Angling v. State, 137 Ala. 17. Previous felonious assault by decedent does not justify a homicide by lying in wait. State v. Rodman, 173 Mo. 681.

38. The right of self defense extends not only to danger of life but of great bodily harm. State v. Petteys, 65 Kan. 625, 70 Pac. 588. It is not necessary that the assault should have been made with a deadly weapon if the disparity in the strength of the parties is such that serious bodily injury might be apprehended. State v. Gray [Or.] 74 Pac. 927. One may use a weapon to defend himself from a public whipping by one much stronger than himself. State v. Bartlett, 170 Mo. 658, 59 L. R. A. 756. Though an arrest was not justified and defendant did not know the official character of the officer, a shooting to prevent such arrest is not justified. Keady v. People [Colo.] 74 Pac. 892. The relative size and strength of the parties is immaterial to the right of self defense where firearms were drawn by both parties. Vann v. State [Tex. Cr. App.] 77 S. W. 813.

39. One assailed without provocation and with a deadly weapon, in a place where he has a right to be, need not retreat. State v. Gibson [Or.] 73 Pac. 333; Hammond v. People, 199 Ill. 173; State v. Petteys, 65 Kan. 625, 70 Pac. 588; State v. Bartlett, 170 Mo. 658, 59 L. R. A. 756. Where the assault on defendant is without provocation and threatens imminent death, defendant need not retreat. State v. Gibson [Or.] 73 Pac. 333. In Texas, one assailed with a deadly weapon is not bound to retreat. Alexander v. State [Tex. Cr. App.] 70 S. W. 748. It is not enough to debar defendant from the right to kill in self-defense that there was a reasonably safe means of averting the danger; he is not required to abandon his right to self-defense, unless absolute safety is offered by the alternative means. Tompkins v. Commonwealth [Ky.] 77 S. W. 712.

40. One may defend a near relative from death or great bodily harm to the same extent that he may defend himself. State v. Prater, 52 W. Va. 132. To render homicide justifiable as in defense of defendant's wife, it is necessary that she be not in such fault as would preclude her from urging self defense and if she was it is immaterial that defendant did not know it. Sherrill v. State [Ala.] 35 So. 129.

41. One is justified in killing the father of his wife to prevent the father taking his wife and children from him. Cole v. State [Tex. Cr. App.] 75 S. W. 527. One may, after exhausting all other means of resistance, kill to prevent being forcibly driven from his own premises. Bearden v. State [Tex. Cr. App.] 73 S. W. 17.

42. State v. Linhoff [Iowa] 97 N. W. 77.

43. It is not necessarily true that defendant is excusable if the death was caused by the accidental discharge of a gun if he was at the time engaged in an assault or other unlawful act in the endeavor to obtain possession thereof, but on such facts he may be guilty of manslaughter. State v. Hall, 132 N. C. 1094.

44. Killing by a member of the militia called out to suppress disorder and acting under the orders of his superior officer, is justifiable unless so apparently unwarranted that a man of good understanding must have known that it was unauthorized. Commonwealth v. Shortall [Pa.] 55 Atl. 952.

45. An information that at a time and place specified, defendant did feloniously, willfully, deliberately, premeditately, and with malice aforethought, assault and kill a person named with a certain deadly weapon described, is good. State v. Reynolds, 171 Mo. 552. An indictment alleging that defendant at a time and place stated, feloniously and with premeditated malice, killed and murdered a person named, by shooting him with a deadly weapon called a revolver, of which wound he died, sufficiently describes the offense. Freese v. State, 159 Ind. 597. An indictment in the usual form giving dates, places and acts, is sufficient. Mathis v. State [Fla.] 34 So. 287. Under Mills Ann. St. § 1433, an indictment in the language of the statute is sufficient. Cremar v. People, 30 Colo. 363, 70 Pac. 415. Indictment under Ky. St. § 1166, for shooting and wounding held not to join a charge under § 1224 for shooting from ambush. Collins v. Com. [Ky.] 70 S. W. 187. An indictment describing one wound and alleging that deceased died from said "wounds" is not invalid. State v. Phillips, 118 Iowa, 660. An unnecessary aver-

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and conclusion of indictments,[46] the designation of the offense[47] or the degree thereof,[48] averment that deceased was a human being,[49] and averments as to intent and premeditation,[50] place of the offense,[51] nature of the weapon,[52] manner of committing the offense,[53] and the time of death,[54] are grouped in the footnotes.

ment that deceased was in the peace of the state, etc., does not vitiate the indictment. State v. Coleman [La.] 35 So. 560.

46. An indictment for murder must conclude "so the grand jurors upon their oath do say," etc. State v. Cook, 170 Mo. 210. An indictment commencing in the language of the constitution "In the name and by authority of the state," etc., is sufficient, though Code Crim. Proc. art. 439 requires the word "the" before "authority." Weaver v. State [Tex. Cr. App.] 76 S. W. 564. A conclusion that the grand jurors, upon their oath, say that defendant killed deceased "by the means aforesaid" instead of "in the manner and form aforesaid" is sufficient. State v. Gleason, 172 Mo. 259. An indictment showing an assault with intent to kill and concluding "whereby the accused is deemed to have committed" such crime, is sufficient. Gray v. State [Fla.] 33 So. 295; Brinkley v. Same [Fla.] Id. 296.

47. Under Code, § 5281, providing that the name of the offense, if it have any, shall be inserted, an indictment designating the offense as murder without stating the degree is sufficient. State v. Phillips, 118 Iowa, 660. An indictment alleging a shooting and wounding from ambush with intent to kill, charges an offense under statute, § 1166, prohibiting shooting and wounding with intent to kill, not under § 1224, prohibiting shooting from ambush without wounding. Collins v. Com., 24 Ky. L. R. 884, 70 S. W. 187.

48. Sts. 1899, p. 430, allowed presentation of indictments in terms for murder in the second degree, and such a provision is within the power of the legislature. Com. v. Ibrahim [Mass.] 68 N. E. 231. Public Laws 1893, p. 76, providing that nothing in the provision thereof dividing murder into degrees shall require a change in the existing form of indictments for murder, does not violate the constitutional requirement that every man be informed of the accusation against him. State v. Cole, 132 N. C. 1069.

49. An indictment for killing a certain person which neither alleges that deceased was a human being nor uses the word murder, is insufficient. People v. Lee Look, 137 Cal. 590, 70 Pac. 660. That deceased was a human being will be implied from the averment of his name. Cremar v. People, 30 Colo. 363, 70 Pac. 415.

50. An indictment for killing "with premeditation" is sufficient, and need not allege that the killing was "after premeditation." Green v. State [Ark.] 71 S. W. 665. Where it is alleged that the mortal wound was inflicted with premeditation and malice aforethought, it need not be expressly stated that the murder was so committed. State v. Phillips, 118 Iowa, 660. An indictment charging that on a certain day, defendant, with premeditated design and intent to kill a certain person, made an assault upon him, sufficiently alleges that the assault was made with such intent. Anderson v. State [Fla.] 33 So. 294. An indictment alleging that the killing was done unlawfully, feloniously and with premeditated design to effect death, need not also allege malice aforethought. Williams v. State [Fla.] 34 So. 279. Under Public Laws 1893, p. 76, providing that nothing therein shall require a change in the existing form of indictments for murder, an indictment for murder is sufficient though it does not allege the elements of premeditation and deliberation added by such statute. State v. Cole [N. C.] 44 S. E. 391. An information charging that the killing was felonious and with malice aforethought is sufficient though it does not allege that it was unlawful or willful. Carroll v. State [Ark.] 75 S. W. 471. Information not specifically charging intent to kill, held sufficient under Ball. Ann. Codes & Sts. § 6850, making an indictment sufficient if a person of common understanding would know what was intended. State v. Champoux [Wash.] 74 Pac. 557. Information held to attribute the intent to kill to the preparation of the weapon and not to the killing. State v. Linhoff [Iowa] 97 N. W. 77. Averment of deliberation, malice, etc., held sufficient. State v. Shuff [Idaho] 72 Pac. 664.

51. An indictment which alleges that the crime was committed in a certain house in the District of Columbia sufficiently states the place of the offense. Lanckton v. United States, 18 App. D. C. 348. The place where deceased died need not be stated. Mathis v. State [Fla.] 34 So. 287.

52. An indictment charging a shooting with a gun which the said defendant "then and there held in his hands, loaded with gunpowder and leaden bullets," is good, and does not charge that defendant's hands and not the gun was loaded. Green v. State [Ark.] 71 S. W. 665. Where it is charged that death resulted from a beating, it need not be alleged that the instrument used was a deadly weapon. Lee v. State [Tex. Cr. App.] 72 S. W. 195. It is not necessary that the indictment allege that the gun was loaded. Cook v. State [Ga.] 46 S. E. 64; McDonald v. State [Fla.] 35 So. 72. An indictment charging murder with "an iron instrument" held sufficient after verdict. State v. Anderson, 30 Wash. 14, 70 Pac. 104.

53. An indictment for shooting with a pistol, omitting the word "with" is sufficient, if the manner of the killing clearly appears. State v. Heinzman, 171 Mo. 629; State v. Gleason, 172 Mo. 259; State v. Wilson, 172 Mo. 420. An indictment for killing by unlawful beating need not allege that the same was cruel, brutal or inhuman. Lee v. State [Tex. Cr. App.] 72 S. W. 195. Under Code, § 4911, allowing different means to be alleged in the alternative in the same count, an indictment for killing with a certain instrument, or with some sharp instrument, to the grand jury unknown is sufficient. King v. State, 137 Ala. 47. Information held to sufficiently state the time, place and manner of giving a mortal wound. State v. Privitt, 175 Mo. 207.

54. Where the indictment alleged the day on which the wounds were inflicted and that deceased died therefrom, and the indictment itself is dated three days after the day so

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Slight variance as to the time,[55] or as to the weapon used,[56] is not fatal. Murder committed in an attempt to escape from prison may be shown under an indictment in the usual form.[57]

Included offenses.—A conviction may be had for a lesser degree than that charged or an offense included in the charge,[58] the usual practice being to always indict for murder in the first degree, though in Massachusetts a statute provides for indictments in form for murder in the second degree.[59]

§ 7. *Evidence.*[60] *A. Presumptions and burden of proof.*—Defendant is presumed to be innocent until his guilt is proved beyond a reasonable doubt,[61] and is entitled to the benefit of every reasonable doubt arising on the evidence as to the degree of crime;[62] but homicide, when proved, is presumptively murder in the second degree, where nothing appears to qualify the same,[63] malice being presumed from lack of provocation,[64] and intent to kill from use of a deadly weapon.[65] In Wisconsin it is held that homicide committed by an act naturally calculated to cause death is presumptively murder in the first degree.[66]

(§ 7) *B. Admissibility in general.*[67]—On a trial for assault, the seriousness

alleged, it sufficiently appears that death occurred within a year and a day. State v. Champoux [Wash.] 74 Pac. 557. Where the indictment alleged that deceased "then and there languished, and languishing died," the words "then and there" apply to the time when the wound was inflicted and qualify not only "languishing" but "died." State v. Champoux [Wash.] 74 Pac. 557.

55. Proof of assault on the 11th, and death on the 14th, is not fatally variant from an information charging an assault on the 12th, and death on the same day. State v. Anderson, 30 Wash. 14, 70 Pac. 104.

56. An indictment for shooting with a pistol may be supported by proof that it was with a gun (Drummer v. State [Fla.] 33 So. 1008), or one for shooting with a gun, by proof that it was with a pistol (Taylor v. State [Tex. Cr. App.] 72 S. W. 396). Evidence of a killing with any cutting instrument supports an indictment for homicide with a knife. Jones v. State, 137 Ala. 12.

57. People v. Flanigan, 174 N. Y. 356.

58. One charged with shooting with intent to kill may be convicted of the statutory crime of wounding, under circumstances which would have constituted manslaughter had death ensued. State v. Ryno [Kan.] 74 Pac. 1114. Under indictment for assault with intent to murder conviction may be had of assault with intent to do great bodily harm. Birker v. State [Wis.] 94 N. W. 643. Under indictment for assault with deadly weapon with intent to do great bodily harm, conviction of simple assault cannot be had. State v. Climie [N. D.] 94 N. W. 574. Under an indictment for murder by shooting, a conviction of the statutory offense of shooting at another may be had. Watson v. State, 116 Ga. 607. On indictment for assault with intent to kill, conviction of simple assault may be had. State v. Di Guglielmo [Del.] 55 Atl. 350. There cannot be a conviction of assault on indictment for murder, where it appears that the assault was the cause of death. People v. Wheeler, 79 App. Div. [N. Y.] 396, 12 N. Y. Ann. Cas. 285.

59. Stats. 1899, p. 430. Such a statute is valid. Com. v. Ibrahim [Mass.] 68 N. E. 231.

60. Many matters common to other offenses, particularly expert evidence and evidence of insanity are treated in Indictment and Prosecution.

61. See Indictment and Prosecution, § ——.

62. Ryan v. State, 115 Wis. 488; State v. Melvern [Wash.] 72 Pac. 489; Spivey v. State [Tex. Cr. App.] 77 S. W. 444; Arnold v. Com. [Ky.] 72 S. W. 753. Facts mitigating the degree of the crime need be proved only to the satisfaction of the jury and not beyond a reasonable doubt. State v. Barrett, 132 N. C. 1005. Where defendant claims that he killed deceased at the next meeting after an insult to defendant's wife, defendant is entitled to the benefit of the doubt as to whether the homicide occurred at the next meeting. McComas v. State [Tex. Cr. App.] 75 S. W. 533.

63. State v. Bishop, 131 N. C. 733; State v. McMullin, 170 Mo. 608; Trejo v. State [Tex. Cr. App.] 74 S. W. 546. Evidence of circumstances of killing held to show such circumstances in mitigation that the burden of showing the same did not devolve on defendant. Tanks v. State [Ark.] 75 S. W. 851.

64. State v. Di Guglielmo [Del.] 55 Atl. 350. A killing without an antecedent quarrel arising on a sudden difficulty is not murder in the first degree. Garner v. State [Tex. Cr. App.] 77 S. W. 797.

65. The statutory presumption of intent to murder from the use of a deadly weapon, is applicable only where no circumstances of mitigation or justification appear by the evidence. State v. Gibson [Or.] 73 Pac. 333. Firing off a gun at a person with fatal effect is not presumptive evidence of intent to kill. State v. Phillips, 118 Iowa, 660.

66. Cupps v. State [Wis.] 97 N. W. 210.

67. **Miscellaneous holding as to relevancy.**—Evidence of declarations of intended suicide three years before, held admissible. Exclusion of such declarations held harmless. People v. Conklin, 175 N. Y. 333. Evidence that defendant drank liquor is inadmissible, there being no evidence that he had been drinking at the time of the homicide. State v. Castle, 133 N. C. 769. The fact that the body of deceased was exhumed on the order of an unauthorized person does not invalidate evidence derived therefrom.

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and probable consequences of the injury may be shown,[68] particularly where defendant testifies that he fired only to scare.[69] The evidence at the inquest is inadmissible except for the purpose of impeachment.[70] Except where circumstantial evidence is resorted to, in which case a wide range is allowed,[71] the evidence is generally confined to matters which are part of the res gestae,[72] and except as to acts tending to show

Com. v. Grether, 204 Pa. 203. Evidence incidentally tending to impeach defendant as a witness, without a foundation, is proper where it is material as rebuttal. Keffer v. State [Wyo.] 73 Pac. 556. Any facts bringing the case within the provision of the statute are admissible. People v. Sullivan, 173 N. Y. 122. Where a witness testifies to having seen defendant, deceased and a third person together before the homicide, he may identify a co-defendant not on trial, as the third person. State v. Gartrell, 171 Mo. 489. Purchase of a revolver by defendant and delivery of it to the person who committed the homicide is admissible as evidence of the conspiracy. Collins v. State [Ala.] 34 So. 993. Admissibility of evidence to show conspiracy between defendant and the person who fired the fatal shot, discussed generally. Collins v. State [Ala.] 34 So. 993. Whether a witness was playing cards at the time of the homicide is immaterial. Goodlett v. State, 136 Ala. 39. The fact that defendant had been released on low bail is inadmissible. Greason v. State [Ga.] 45 S. E. 615. Evidence that defendant was at the time of the homicide, a convict, and that deceased was a guard at the prison, is admissible. Stone v. State, 137 Ala. 1. Evidence that the person assaulted was a police officer is admissible, though the information does not so charge. Keady v. People [Colo.] 74 Pac. 892. Evidence that accused owned a certain knife is admissible in connection with proof that deceased died of incised wounds, though there is no proof that defendant had the knife on the day of the homicide. Jones v. State, 137 Ala. 12. Where defendant, a police officer, claimed that he was endeavoring to arrest deceased for drunkenness and disorderly conduct, the exclusion of an ordinance forbidding persons being on the street after a certain hour at night is not error. Davis v. Com. [Ky.] 77 S. W. 1101.

Explanation of matters appearing in evidence.—Where it appears that a committee of neighbors had called on deceased in regard to the difficulty between him and defendant, the personnel of such committee is improper. State v. Rodman [Mo.] 73 S. W. 605. Where it appears that deceased interfered on behalf of certain negroes in a previous altercation with defendant, the state may show the nature of the difficulty. Rone v. Com., 24 Ky. L. R. 1174, 70 S. W. 1042. Where deceased went to the scene of a difficulty between defendant and another taking place in his view, evidence of the particulars of such difficulty are immaterial. Thacker v. Com., 24 Ky. L. R. 1584, 71 S. W. 931. Where defendant testifies that he was playing cards with deceased, a negro, at the latter's solicitation, his reputation for gambling with negroes may be shown. Rogers v. State [Tex. Cr. App.] 71 S. W. 18. Evidence of other crimes by defendant are not admissible to show why a witness was afraid of him. Black v. Com., 24 Ky. L. R. 1974, 72 S. W. 772.

68. Jowell v. State [Tex. Cr. App.] 71 S. W. 286.

69. State v. Hamilton, 170 Mo. 377.

70. Hall v. State, 137 Ala. 44; State v. Gilliam [S. C.] 45 S. E. 6.

71. Evidence of the movements of an accomplice in connection with the homicide and after the same is admissible. Jenkins v. State [Tex. Cr. App.] 75 S. W. 312. The exclusion of evidence that defendant had offered a team to be used in searching for the body of deceased is proper, the body having later been found in defendant's cistern. Dunn v. State [Ind.] 67 N. E. 940.

72. The conduct of both parties from the inception of the affray to the homicide is part of the res gestae. State v. Tighe, 27 Mont. 327, 71 Pac. 3; Robinson v. State [Ga.] 44 S. E. 985. Statements by defendant, and deceased in each other's presence, after the homicide and the arrest of defendant are admissible. State v. Dennis, 119 Iowa, 688. Where the killing grew out of an assault by defendant on a third person, a previous assault by him on such person is part of the res gestae. Thomas v. State [Tex. Cr. App.] 72 S. W. 178.

Acts and statements of accused.—Evidence of previous and subsequent conduct held part of the res gestae of a homicide committed in an attempt by a number of soldiers to rescue a companion from jail. Kipper v. State [Tex. Cr. App.] 77 S. W. 611. A declaration of defendant immediately after the homicide that he would kill any one who would try to pull him off his hack is admissible as part of the res gestae. Vann v. State [Tex. Cr. App.] 77 S. W. 813. Where accused poisoned her children and attempted suicide, her statements immediately on regaining consciousness are part of the res gestae. People v. Quimby [Mich.] 96 N. W. 1061. Explanations by defendant some time after the homicide, as to marks on his face, are no part of the res gestae. Dodson v. State [Tex. Cr. App.] 70 S. W. 969. Declaration of defendant that deceased was not hurt, made immediately after the homicide, is admissible where intent to kill is in issue. State v. Tighe, 27 Mont. 327, 71 Pac. 3. The appearance and expression of defendant after a quarrel with deceased and before the homicide held part of the res gestae. Hainsworth v. State, 136 Ala. 13. Statement of defendant to one whom he asked to go for a doctor held inadmissible. Holmes v. State, 136 Ala. 80. A remark of defendant "That was a good shot with my left hand" is admissible. State v. Utley, 132 N. C. 1022. Declaration by defendant after his arrest held not part of the res gestae, time in which to invent an explanation having elapsed. State v. McCann [Or.] 72 Pac. 137. Evidence of previous shooting by defendant held part of the res gestae. Terry v. State [Tex. Cr. App.] 76 S. W. 928. Where an assault was committed in an altercation with two persons, evidence of the cutting of one is admissible on

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intent, malice or motive,[73] or admissions and confessions of guilt,[74] evidence of

a prosecution for striking the other, as part of the res gestae. Starr v. State [Ind.] 67 N. E. 527. Statement made by defendant after the homicide held not part of the res gestae. Davis v. Com. [Ky.] 77 S. W. 1101.

Acts and statements of deceased.—Declaration of deceased just after the assault held part of res gestae. Starks v. State, 137 Ala. 9. Narration by deceased after the assault held not part of the res gestae. State v. Hendricks [Mo.] 73 S. W. 194. A statement by deceased that defendant was not to blame is hearsay. State v. Terry, 172 Mo. 213. Remark of deceased to third person just after the assault held part of the res gestae. Bliss v. State [Wis.] 94 N. W. 325. Statement of deceased a few minutes after the homicide as to who shot him is part of the res gestae. State v. Wilmbusse [Idaho] 70 Pac. 849. What deceased was doing just before the homicide is part of the res gestae. State v. Hunter, 118 Iowa, 686. A statement of deceased reported to defendant and which influenced his conduct is part of the res gestae. McCormick v. State [Neb.] 92 N. W. 606. An exclamation by deceased, "I am killed," is part of the res gestae. Howard v. Com., 24 Ky. L. R. 950, 70 S. W. 295.

Acts and statements of third persons.—Declaration of bystander held part of res gestae. Caddell v. State, 136 Ala. 9. Exclamations by decedent's wife immediately after the shooting are part of the res gestae. Collins v. Com., 24 Ky. L. R. 884, 70 S. W. 187. Remark of third person immediately after the homicide "You have killed him" held admissible. Clark v. State, 117 Ga. 254. Threats against deceased by third persons on the night of, but some time before, the homicide, are not part of the res gestae. Webb v. State, 135 Ala. 36. Evidence of tracks made by another than defendant fleeing from the scene of the crime, and the general incidents of such flight, are admissible as part of the res gestae. State v. Moore [Kan.] 73 Pac. 905. Declarations of a third person several hours after the homicide that he shot deceased are no part of the res gestae. Martin v. State [Tex. Cr. App.] 70 S. W. 973. A statement by defendant's wife after the altercation was over and defendant had left is no part of the res gestae. State v. Gallehugh [Minn.] 94 N. W. 723.

73. Provocation and evidence of animus generally.—Proof of previous insults to defendant's female relative is admissible. Willis v. State [Tex. Cr. App.] 75 S. W. 790. Remark by defendant referring to trouble between himself and deceased, that he was a pretty good marksman (Hudson v. State [Tex. Cr. App.] 70 S. W. 764), or that "he had friends" is admissible to show animus (Moore v. State [Tex. Cr. App.] 72 S. W. 595). A declaration by defendant that he would rather have a murder case against him than a prosecution for illegal selling of liquor is immaterial. Walker v. State [Tex. Cr. App.] 72 S. W. 997. Evidence tending to show that defendant feared that deceased intended to institute a prosecution against him for illegal sale of liquor, held inadmissible. Walker v. State [Tex. Cr. App.] 72 S. W. 997. A threat by defendant to divorce his wife held inadmissible on a prosecution for killing her. Raines v. State [Miss.] 33 So. 19. A declaration showing general malice, though not directed against any person (State v. Vance, 29 Wash. 435, 70 Pac. 34), generally belligerent conduct of defendant before the homicide (State v. Hamilton, 170 Mo. 377; Hutsell v. Com. [Ky.] 75 S. W. 225), or a declaration by defendant as to his willingness to kill negroes generally, is admissible (State v. Gallehugh [Minn.] 94 N. W. 723). Statements of a certain woman inciting defendant to kill deceased are admissible. People v. Gallagher, 75 App. Div. [N. Y.] 39, 11 N. Y. Ann. Cas. 348. Domestic troubles of defendant are inadmissible as bearing on his state of mind, where there is no other evidence of insanity. State v. Vance, 29 Wash. 435, 70 Pac. 34. That defendant had taken four or five drinks before the homicide. Jowell v. State [Tex. Cr. App.] 71 S. W. 286. Where defendant claims that he killed deceased because of insults to defendant's daughter, slanderous remarks by deceased concerning other women are inadmissible, but his general reputation for lewdness may be shown. McComas v. State [Tex. Cr. App.] 72 S. W. 189. Though the difficulty grew out of defendant's attention to the daughter of deceased, evidence of their engagement is inadmissible. State v. Rodman [Mo.] 73 S. W. 605. The defendant may state generally whether he entertained malice toward deceased or whether he feared him. State v. Crawford, 31 Wash. 260, 71 Pac. 1030. Declaration of defendant that witness might hear of his being in jail the next day for killing deceased is admissible. Ditmer v. State [Tex. Cr. App.] 74 S. W. 34. Whether defendant was a trespasser on the premises of deceased held material. Nix v. State [Tex. Cr. App.] 74 S. W. 764. Declarations of defendant showing anger and motive are admissible. Harris v. Com. [Ky.] 74 S. W. 1044. Though the killing was the result of a feud growing out of the previous murder of defendant's brother, the details of such previous killing are inadmissible. Poole v. State [Tex. Cr. App.] 76 S. W. 565. A statement by defendant showing that he apprehended difficulty with deceased, is admissible. Id. Evidence that defendant had been told by a third person that deceased had nothing against him is admissible as bearing on his state of mind. Rush v. State [Tex. Cr. App.] 76 S. W. 927. Evidence that deceased had been a witness against defendant in another case, held admissible. Terry v. State [Tex. Cr. App.] 76 S. W. 928. Where self-defense is alleged and the evidence is that deceased threw a knife at defendant, evidence that the railroad gang to which defendant and deceased belonged were in the habit of playfully throwing knives at each other is inadmissible. McCardell v. State [Tex. Cr. App.] 77 S. W. 446.

Previous assaults. Previous assaults by defendant are admissible to show animus. Henry v. People, 198 Ill. 162; Jahnke v. State [Neb.] 94 N. W. 158. Previous indictment for aggravated assault upon deceased may be shown. Powell v. State [Tex. Cr. App.] 70 S. W. 218. Previous ill treatment of a wife inadmissible in a prosecution for killing her. Raines v. State [Miss.] 33 So. 19. Previous disconnected difficulties are

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prior[75] or subsequent acts is generally inadmissible.[76] Evidence as to the movements of a third person whom defendant claims is the guilty party is generally

inadmissible. Hudson v. Com., 24 Ky. L. R. 785, 69 S. W. 1079.

Threats and arming. Previous threats by defendant against deceased are admissible. Porter v. State, 135 Ala. 51; People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014; Barnes v. Com., 24 Ky. L. R. 1143, 70 S. W. 827; Taylor v. State [Tex. Cr. App.] 72 S. W. 396; Jarvis v. State [Ala.] 34 So. 1025; Marchan v. State [Tex. Cr. App.] 75 S. W. 532. Threats by defendant are not rendered inadmissible by remoteness in point of time. Johns v. State [Fla.] 35 So. 71. Threats four or five years before the homicide are inadmissible. McMasters v. State [Miss.] 33 So. 2. Threats by defendant are admissible, though the person threatened was not named. Holloway v. State [Tex. Cr. App.] 77 S. W. 14; Starr v. State [Ind.] 67 N. E. 527. Threats made by defendant against deceased at a meeting of neighbors to discuss the trouble between them, held admissible. Baker v. State [Tex. Cr. App.] 77 S. W. 618. Statements by defendant that he was satisfied with a settlement with deceased do not render inadmissible threats of violence in case he was not satisfied. Hudson v. State [Tex. Cr. App.] 70 S. W. 764. Where one is charged as principal in the second degree, prior threats by him are admissible. State v. Prater, 52 W. Va. 132. Previous quarrels and accusation of crime between the parties are admissible to show motive. State v. Coleman [La.] 35 So. 560. Though the fact of previous quarrels between the parties is admissible, the merits thereof are not. Sylvester v. State [Fla.] 35 So. 142. Where the prosecution proves threats by defendant against his wife, evidence of a subsequent reconciliation should be received. Petty v. State [Miss.] 35 So. 213. Evidence that defendant sought to borrow a gun on the day of the homicide, that such gun was afterward taken from the possession of the owner and found later in the possession of a third person, who testified that he obtained it from defendant, is admissible. Webb v. State [Ala.] 34 So. 1011. Evidence of the borrowing of a pistol by defendant and threats by him against deceased ten months before the homicide, admissible in connection with proof of continued ill feeling. Rush v. State [Tex. Cr. App.] 76 S. W. 927. Defendant may explain why he had a gun with him at the time of the homicide. State v. Shuff [Idaho] 72 Pac. 664. Testimony that the person from whom defendant obtained the weapon got it from another in a clandestine manner is inadmissible where there is no evidence of collusion. Moore v. State [Tex. Cr. App.] 72 S. W. 595. A threat to shoot deceased if he caught him destroying a certain fence, held admissible. State v. Crawford, 31 Wash. 260, 71 Pac. 1030.

Evidence of motive. Receipt of insurance money under suspicious circumstances by deceased who was defendant's paramour and of efforts by defendant to obtain the same is admissible. Bess v. Com. [Ky.] 77 S. W. 349. Evidence that defendant stole money from the person of deceased is admissible to rebut a defense of insanity. Keffer v. State [Wyo.] 73 Pac. 556. Affectionate letters written to defendant by the decedent's wife, and letters from her to decedent, devoid of affectionate expressions, are admissible. Stokes v. State [Ark.] 71 S. W. 248. Insurance on decedent's life, payable to defendant's wife, cannot be shown without evidence that he knew of it before the homicide. State v. Felker, 27 Mont. 451, 71 Pac. 668. Where the contention of the state is that the murder was committed by defendant to conceal previous larceny by him, evidence tending to show that he did not commit such larceny is admissible. Goebel v. State [Tex. Cr. App.] 76 S. W. 460. Where the alleged motive was to obtain possession of evidence of indebtedness held by deceased, the state of defendant's bank account may be proved. State v. Mortensen [Utah] 73 Pac. 562. That defendant manifested jealousy of attentions to a certain woman is admissible. Jones v. State, 117 Ga. 324. Statements of deceased to a third person, overheard by defendant and by which his anger was aroused, are admissible. McCormick v. State [Neb.] 92 N. W. 606. Evidence that deceased had recently shot a relative of defendant is admissible. Lawrence v. State [Fla.] 34 So. 87. Evidence of improper relations between defendant and a woman is admissible, where he is charged with complicity in the murder of his wife by such woman. Caddell v. State, 136 Ala. 9. Evidence that shortly before the homicide a woman urged defendant to assault deceased is admissible. People v. Gallagher, 75 App. Div. [N. Y.] 39. Trespasses on defendant's land out of which the altercation grew are admissible. State v. Campbell, 25 Utah, 342, 71 Pac. 529.

74. See Indictment and Procedure. A general declaration of having killed a negro is admissible. Somers v. State, 116 Ga. 535. Evidence that an accomplice had changed certain money after the homicide and that other money was found where he confessed to having hidden it are admissible in corroboration of his confession. State v. Gallivan, 75 Conn. 326.

75. Evidence as to what was said and done between the parties several hours before is inadmissible. Starr v. State [Ind.] 67 N. E. 527. On a prosecution of a foreman for the killing of a man under him, evidence that such foreman had not sent the man sufficient dinner on that day is inadmissible. State v. Castle, 133 N. C. 769. Evidence of a previous accidental discharge of a gun by defendant near a witness, held immaterial. Goebel v. State [Tex. Cr. App.] 76 S. W. 460. Evidence that on a night previous to the homicide some one had knocked on the side of deceased's house and gone away when he came out is inadmissible where there is no evidence that deceased was decoyed from the house on the night of the homicide. Smith v. State, 137 Ala. 22. Statements by defendant to a third person before the homicide, as to his purpose in going to the place where the homicide occurred, are inadmissible. Carle v. People, 200 Ill. 494.

76. Statements after the homicide are not admissible against one charged as accessory before the fact (Powers v. Com., 24 Ky. L. R. 1007, 1186, 70 S. W. 644, 1050), nor is evidence of facts which would have made

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inadmissible.[77] Articles connected with the homicide, such as weapons with which it might have been committed belonging to defendant,[78] or found near the scene of the homicide,[79] clothing of deceased,[80] articles belonging to deceased, left by defendant with a third person after the homicide,[81] and appearances at the scene of the homicide,[82] are admissible. Photographs of deceased held inadmissible to show character and location of wounds.[83]

Justification.—Where self defense is urged, the reputation of deceased is in issue.[84] Threats by deceased are admissible,[85] if communicated to defendant,[86]

him an accessory after the fact, admissible against one charged as principal in the second degree (Harper v. State [Miss.] 35 So. 572). Deposit of money in bank the next day by defendant is admissible where he confessed to depositing money taken from deceased. Ransom v. State [Tex. Cr. App.] 70 S. W. 960. Flight immediately after homicide. State v. Vinso, 171 Mo. 576. Attempt to escape. Barnes v. Com. [Ky.] 70 S. W. 827; State v. Shipley, 171 Mo. 544; Anderson v. Com., 100 Va. 860. Evidence on a trial for wife murder that the manner of deceased indicated that she believed defendant guilty is inadmissible. People v. Smith, 172 N. Y. 210. That defendant appeared at the market place shortly after the homicide and admitted the shooting is sufficient to admit proof that one of the perpetrators of the crime fled in that direction. Deal v. State, 136 Ala. 52. The fact that defendant did not speak to his wife on being taken to see her before her death held inadmissible. People v. Smith, 172 N. Y. 210.

77. Where it appears in evidence that the person who committed the homicide ran past a certain street corner immediately afterwards, the state may show that the person whom defendant claims committed the homicide was not the person who ran past such corner. Cecil v. State [Tex. Cr. App.] 72 S. W. 197. Though it was claimed by defendant that a third person did the killing, the state cannot show the conduct of such person subsequent to the homicide. Cecil v. State [Tex. Cr. App.] 72 S. W. 197. That a third person left the neighborhood shortly after the homicide is irrelevant. Goodlett v. State, 136 Ala. 39.

78. A pistol belonging to defendant of the same calibre as that with which deceased was shot is admissible. Carr v. State [Fla.] 34 So. 892. Evidence of the finding at defendant's house of shells similar to those with which deceased was shot is admissible. Litton v. Com. [Va.] 44 S. E. 923. The frame and center pin of a revolver, and cartridges found on the premises of deceased are admissible. People v. Smith, 172 N. Y. 210. Finding of a cartridge which fitted defendant's gun at a point two miles from the scene of the homicide, held admissible, the country being sparsely settled. Horn v. State [Wyo.] 73 Pac. 705. Where the homicide was committed while resisting arrest for burglary, weapons and other articles on the person of defendant may be introduced. State v. Phillips, 118 Iowa, 660.

79. An ax found in the river near the body of deceased is admissible, where there is proof that the homicide was committed with such an instrument. State v. Gartrell, 171 Mo. 489. Evidence of the finding of an instrument such as might have committed the injury, near the scene of the homicide, held admissible. Yancy v. State [Tex. Cr. App.] 76 S. W. 571. Evidence of the finding of a club near the scene of the homicide is admissible where defendant claims that he was assaulted by defendant with such a weapon. State v. Cather [Iowa] 96 N. W. 722.

80. The clothing of deceased and vehicle in which he was riding showing bullet marks are admissible. Henry v. People, 198 Ill. 162. Clothing worn by deceased at the time of the homicide is admissible. Johnson v. State [Tex. Cr. App.] 71 S. W. 25.

81. State v. Gartrell, 171 Mo. 489.

82. The tracks in the snow near where the person committing the murder stood are admissible. Howard v. Com., 24 Ky. L. R. 950, 70 S. W. 295. Shot holes in the walls are immaterial if there is no evidence when they were made. Raines v. State [Miss.] 33 So. 19. Evidence of the finding of a bullet at the place of the homicide three months later, held inadmissible. Hickey v. State [Tex. Cr. App.] 76 S. W. 920.

83. State v. Miller [Or.] 74 Pac. 658.

84. Defendant on a plea of self defense may show the dangerous character of deceased. State v. Hunter, 118 Iowa, 686. Defendant may show that deceased was a dangerous man and habitually armed. Com. v. Booker [Ky.] 76 S. W. 838; State v. Crawford, 31 Wash. 260, 71 Pac. 1030. Defendant may show that deceased was usually armed and bore a nickname indicating his asserted readiness to use dangerous weapons. State v. Thompson, 109 La. 296. Evidence of the good reputation of deceased for peace is admissible, where self defense is alleged. People v. Adams, 137 Cal. 580, 70 Pac. 662. Evidence of general reputation of deceased for violence, is admissible but not specific acts. People v. Gaimari [N. Y.] 68 N. E. 112; Andrews v. State [Ga.] 43 S. E. 852. Evidence of the dangerous character of deceased is inadmissible where there is no evidence that he was the assailant. Carle v. People, 200 Ill. 494. The violent character of deceased cannot be shown where there is no evidence that the killing was in self defense. Morrell v. State, 136 Ala. 44. Where there is evidence that deceased made a gesture as if to draw a weapon, evidence of his general reputation in respect to resort to fire arms is admissible. State v. Ellis, 30 Wash. 369, 70 Pac. 963. Where there is evidence that deceased was quarrelsome and irritable, evidence of his good reputation is admissible for the state though defendant gave no general evidence of reputation. People v. Gallagher, 75 App. Div. [N. Y.] 39.

85. Evidence that at the time of making previous threats deceased had a knife in his hand is not admissible. State v. Parker [Mo.] 72 S. W. 650. Threatening remark of deceased held admissible though it was

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and if deceased had at the time of the homicide committed some overt act of violence,[87] as are previous assaults,[88] facts showing that deceased was in a belligerent state of mind,[89] and evidence as to whether deceased was armed.[90] Where at the time of the homicide deceased was accompanied by a third person, defendant may show that deceased and such third person were both angry with him in respect to the subject which was then being discussed.[91] Previous threats by defendant are admissible, the defense being justification.[92] That defendant had not filed a complaint to place deceased under peace bonds after hearing threats is improper.[93] Where defendant alleges that the homicide was committed in necessary defense of decedent's sister, evidence of improper relations between defendant and the sister is admissible.[94] Where defendant claimed justification in that deceased was trying to take defendant's wife from him, letters of the wife to defendant expressing affection are admissible.[95] An opinion of the sheriff that a hole in defendant's hat was caused by a bullet, held admissible.[96] Evidence that the brother of deceased was seen near defendant's house armed prior to the homicide is irrelevant.[97] Where defendant, urging self defense to an indictment for patricide, testifies that his mother told him of threats against her by deceased, evidence that the mother had, but not in defendant's presence, threatened to have deceased killed, is inadmissible.[98] Evidence that the position of the body of deceased indicated the absence of a struggle is admissible in rebuttal of evidence in self defense.[1] Where

doubtful whether it was addressed to defendant. Howard v. Com., 24 Ky. L. R. 612, 69 S. W. 721.

86. Evidence of threats by deceased not communicated to defendant, held inadmissible. Crockett v. State [Tex. Cr. App.] 77 S. W. 4. Where defendant testified the killing was in defense of his sister, prior threats by deceased against her are admissible, though not communicated to defendant. State v. Felker, 27 Mont. 451, 71 Pac. 668.

87. Evidence of threats is not admissible, unless there is some hostile demonstration. State v. Harrison [La.] 35 So. 560; State v. Tasby, 110 La. 121. Threats by deceased are admissible, though he made no effort to execute the same. Williams v. State [Tex. Cr. App.] 70 S. W. 756. Evidence of the dangerous character of deceased and threats by him is inadmissible where defendant was the aggressor. Morrison v. Com. [Ky.] 74 S. W. 277.

88. Evidence of former assaults by decedent are admissible. Williams v. State [Tex. Cr. App.] 70 S. W. 756; State v. Felker, 27 Mont. 451, 71 Pac. 668. Evidence of previous unconnected assaults by deceased held inadmissible. Connell v. State [Tex. Cr. App.] 75 S. W. 512. Who had been successful in previous disputes between the parties is immaterial. Bohlman v. State, 135 Ala. 45.

89. Defendant may show that some time before the homicide deceased manifested anger toward him. Com. v. Booker [Ky.] 76 S. W. 838. Evidence of decedent's condition of mind just before the homicide is admissible. State v. Hunter, 118 Iowa, 686. Evidence of belligerent conduct of deceased at a remote time not known to defendant is inadmissible. State v. Sale, 119 Iowa, 1. Where the evidence as to who was the aggressor is conflicting, evidence of acts of aggression by deceased on other persons shortly before is admissible, though it was not known to defendant. State v. Beird, 118 Iowa, 474. Evidence that deceased, a convict, had shortly before assaulting defendant said that he had served one term for murder, is admissible. Dodson v. State [Tex. Cr. App.] 70 S. W. 969. Use of abusive language by deceased immediately before the homicide is admissible. State v. McMullin, 170 Mo. 608.

90. The wife of the person assaulted may testify as to what firearms he owned and whether he had them with him, where self defense is urged. State v. Crawford, 31 Wash. 260, 71 Pac. 1030. The reputation of deceased for carrying weapons is admissible. Com. v. Booker [Ky.] 76 S. W. 838; State v. Crawford, 31 Wash. 260, 71 Pac. 1030; State v. Thompson, 109 La. 296. Evidence of previous arming by deceased is inadmissible where there is no evidence that the killing was in self defense. State v. Privitt, 175 Mo. 207. Testimony that a third person took a pistol away from deceased just before the homicide is admissible in rebuttal where defendant testified that deceased had a pistol at the time of the shooting. Thomas v. State [Tex. Cr. App.] 74 S. W. 36. Previous declarations by deceased known to defendant as to his being armed are admissible. People v. Adams, 137 Cal. 580, 70 Pac. 662. Evidence that deceased was in fact not armed is admissible. Id.

91. Com. v. Booker [Ky.] 76 S. W. 838.

92. People v. Galmari [N. Y.] 68 N. E. 112.

93. Newman v. State [Tex. Cr. App.] 70 S. W. 951.

94. Morrison v. Com. [Ky.] 74 S. W. 277.

95. Cole v. State [Tex. Cr. App.] 75 S. W. 527.

96. Hickey v. State [Tex. Cr. App.] 76 S. W. 920.

97. Green v. State [Ark.] 71 S. W. 665.

98. Owens v. State [Ga.] 45 S. E. 598.

1. Com. v. Conroy [Pa.] 56 Atl. 427.

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there was a conflict as to whether a third person was holding deceased at the time of the homicide, bloody clothing of the former is admissible to corroborate his statement that he was.[2]

Harmless error in the admission or exclusion of evidence is treated in the note.[3]

(§ 7) *C. Dying declarations.*—To admit declarations of deceased it must appear that they were made in expectation of imminent death and after hope of recovery has been abandoned,[4] though death did not occur at the time expected.[5] A dying declaration is admissible though there were eye-witnesses to the homicide.[6] One hearing a dying declaration may testify orally thereto,[7] and written

2. Thomas v. State [Tex. Cr. App.] 74 S. W. 36.

3. The striking out of evidence held to cure error in its admission. Bassett v. State [Fla.] 33 So. 262. Exclusion of evidence showing the inadmissibility of a dying declaration is cured by subsequent admission thereof. State v. Wilmbusse [Idaho] 70 Pac. 849. Error in admitting evidence is cured by its subsequent withdrawal. State v. McKnight, 119 Iowa, 79. Evidence of difficulties between other persons, held harmless. Cook v. Com., 24 Ky. L. R. 1409, 71 S. W. 522. Admission of evidence as to nature of wound is harmless where defendant admits the shooting. State v. Hamilton, 170 Mo. 377. Evidence of statements of defendant in the presence of deceased held prejudicial. People v. Smith, 172 N. Y. 210. Evidence that the weapon used by defendant was lost by a witness some time before when defendant was in his employ, held harmless. State v. Dixon, 131 N. C. 808. Evidence that a witness knew a man who was with deceased at the time of the difficulty is harmless. Cecil v. State [Tex. Cr. App.] 72 S. W. 197. The reception of improper evidence or the rejection of competent evidence is ground for reversal. People v. Smith, 172 N. Y. 210. The exclusion of expert opinion before proper foundation was laid is not error. Ryan v. State, 115 Wis. 488. Conviction of a lower degree as to which there was no evidence is not prejudicial. Glenn v. State [Ark.] 71 S. W. 254. Where previous assaults by defendant are proved by him to show insanity, evidence that he had been sent to the penitentiary for previous assaults is harmless. Black v. Com., 24 Ky. L. R. 1974, 72 S. W. 772.

4. Statements admissible if made with a realization of impending death. People v. Smith, 172 N. Y. 210; State v. Dixon, 131 N. C. 808. Dying declarations must have been made under the influence of impending dissolution. Fuqua v. Com., 24 Ky. L. R. 2204, 73 S. W. 782.

Admissibility of evidence to show expectation of death: Conversations by declarant as to his funeral arrangements admissible. State v. McMullin, 170 Mo. 608. Condition of declarant two days after making the declaration is inadmissible. State v. Wilmbusse [Idaho] 70 Pac. 849. What decedent said as to his hope of recovery is admissible. Id.

Sufficiency of showing. State v. Gray [Or.] 74 Pac. 927. Where deceased had been informed by his physician that he would not live, his dying declarations are admissible though he expressed no conviction of impending death. Where deceased declared that he was dying and gave instructions as to his funeral, dying declarations are admissible. Grant v. State [Ga.] 45 S. E. 603. A statement of deceased, "I am shot to death, I cannot live," is sufficient to admit dying declarations. Starks v. State, 137 Ala. 9. A statement "I can't stand it if this pain does not leave me soon," does not show expectation of death. State v. Phillips, 118 Iowa, 660. Statement by deceased that he would never get well, made while in fact in a very bad condition, renders his declaration admissible. State v. McKnight, 119 Iowa, 79. Statement by deceased that he did not expect to live, made on the day of his death, sufficient to admit his declaration. Arnett v. Com., 24 Ky. L. R. 1440, 71 S. W. 635. A statement by deceased that he did not expect to live until morning and wished to leave a statement of the facts, is a sufficient foundation for the admission of dying declarations. Smith v. State, 136 Ala. 1. Declarations made after deceased had been told by a physician that he would die, and had stated that he so believed, are admissible. People v. Dobbins, 138 Cal. 694, 72 Pac. 339; State v. Dennis, 119 Iowa, 688; Fuqua v. Com., 24 Ky. L. R. 2204, 73 S. W. 782. Where defendant stated that he was without hope of recovery and that the physicians had advised him that he could not live, his declaration is admissible though there is testimony by his wife that he did not believe he was going to die. State v. Parker, 172 Mo. 191; State v. Boggan, 133 N. C. 761. Declarations in articulo mortis held admissible. Anderson v. State, 117 Ga. 255. Evidence of spontaneous declaration, made a few moments after the homicide in which deceased said that he was going to die, held admissible as a dying declaration. Mathews v. State [Tex. Cr. App.] 77 S. W. 218. Statements of deceased that he had no hope of recovery, held to make his declarations admissible. Rowsey v. Com. [Ky.] 76 S. W. 409. Evidence that deceased declared that he was about to die and made his will and that he never thereafter expressed hope of recovery, is sufficient to admit dying declarations made two weeks later, though his condition improved in the meantime. Crockett v. State [Tex. Cr. App.] 77 S. W. 4. Testimony of a physician that he had informed deceased that he was dying, is sufficient to admit a dying declaration. Jarvis v. State [Ala.] 34 So. 1025.

5. State v. Hendricks, 172 Mo. 654. Declarations made in expectancy of death, admissible though declarant lived for eleven days thereafter. Burton v. Com., 24 Ky. L. R. 1162, 70 S. W. 831.

6, 7. Fuqua v. Com., 24 Ky. L. R. 2204, 73 S. W. 782.

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declarations are admissible if read to and signed by declarant, though written out of his presence,[8] but not the notes from which such statement was written,[9] nor a statement not signed by deceased or read over to him,[10] though it may be used by the witness to refresh his memory.[11] Statements by deceased at about the time of a written statement but not included therein are admissible.[12] Competency of the declarant must be shown,[13] as where he is a child of tender years.[14] The declaration must be confined to statements of fact[15] relating to the homicide.[16] Where objectionable matter in a dying declaration is so interwoven that it cannot be separated without destroying the sense, the whole is admissible.[17] Whether the declarations were in fact made,[18] whether they were made under a belief in impending death,[19] and their weight,[20] is for the jury. Evidence of circumstances under which declarations were made is admissible as affecting their weight.[21] Statements other than dying declarations are not admissible to corroborate the same.[22]

(§ 7) *D. Sufficiency.*—In the footnotes are grouped cases as to the sufficiency of evidence in general,[23] and its sufficiency to establish the corpus delicti,[24] malice

8. State v. Wilmbusse [Idaho] 70 Pac. 849; Hendrickson v. Com., 24 Ky. L. R. 2173, 73 S. W. 764.

9. Hendrickson v. Com., 24 Ky. L. R. 2173, 73 S. W. 764.

10. Foley v. State [Wyo.] 72 Pac. 627; Fuqua v. Com., 24 Ky. L. R. 2204, 73 S. W. 782.

11. Foley v. State [Wyo.] 72 Pac. 627.

12. Hendrickson v. Com., 24 Ky. L. R. 2173, 73 S. W. 764.

13. State v. Wilmbusse [Idaho] 70 Pac. 849.

14. Child ten years old. State v. Frazier, 109 La. 458.

15. A declaration by decedent that he was to blame, is a mere conclusion and not admissible. State v. Sale, 119 Iowa, 1. A declaration that one of two persons committed the crime is not a mere opinion. Henderson v. Com., 24 Ky. L. R. 1985, 72 S. W. 781.

16. Dying declarations as to previous quarrels between defendant and deceased are inadmissible. Foley v. State [Wyo.] 72 Pac. 627. Declarations as to occurrences not connected with the homicide, inadmissible. People v. Smith, 172 N. Y. 210. Statements that deceased had never made any threats against defendant and knew of no reason why defendant should shoot him, are inadmissible as referring to matters previous to the killing. State v. Parker, 172 Mo. 191. Statements that just previous to the killing he saw that defendant was mad and that he asked him what he was mad about are admissible. Id.

17. Bennett v. State [Tex. Cr. App.] 75 S. W. 314.

18. State v. Hendricks, 172 Mo. 654.

19. The preliminary question of admissibility is for the court, but the belief of declarant should be submitted to determine their weight. Smith v. State [Ga.] 44 S. E. 817. But see Tarver v. State, 137 Ala. 29.

20. The jury should be instructed that they are judges of the weight of a dying declaration. State v. Phillips, 118 Iowa, 660. An instruction that a dying declaration should be given such weight as the jury thought it should have in connection with the other evidence, is proper. State v. Parker, 172 Mo. 191. Dying declarations are not governed by the same rule of caution that applies to the testimony as to declarations generally. State v. Hendricks, 172 Mo. 654. It is error to instruct that they should be received with great caution. Tarver v. State, 137 Ala. 29.

21. State v. Crawford, 31 Wash. 260, 71 Pac. 1030.

22. State v. Hendricks, 172 Mo. 654.

23. Proof of motive is not indispensable. Keady v. People [Colo.] 74 Pac. 892; Cupps v. State [Wis.] 97 N. W. 210; State v. Dull [Kan.] 74 Pac. 235; State v. Gregory [Mo.] 76 S. W. 970; State v. Crabtree, 170 Mo. 642. The fact that one accused as principal in the second degree had a lawful purpose in going to the scene of the homicide is not conclusive in his favor. State v. Prater, 52 W. Va. 132. Evidence of murder by poisoning well, held sufficient. Lazenby v. State [Tex. Cr. App.] 73 S. W. 1051. Evidence held sufficient to show murder committed in the perpetration of robbery. State v. Wilson, 172 Mo. 420. Evidence corroborating accomplice held to sustain conviction of murder committed in the perpetration of robbery. State v. Nelson [Minn.] 97 N. W. 652. Evidence of murder by agreement for mutual suicide held insufficient. Burnett v. People [Ill.] 68 N. E. 505. Evidence of infanticide held sufficient. Johnson v. State [Tex. Cr. App.] 77 S. W. 15. Defendant must be identified beyond a reasonable doubt. Patton v. State, 117 Ga. 230. Identification only by the voice may be sufficient. Evidence held insufficient in particular cases, where voice was not peculiar and was heard at some distance by one slightly acquainted with the party. Id.

Circumstantial evidence: Evidence held sufficient to establish that defendant was the person who committed the crime,—confession corroborated by circumstances. People v. White [N. Y.] 68 N. E. 630. Evidence held sufficient to sustain conviction, the principal evidence being a confession which defendant admitted but claimed was made only as a joke in the course of a narration of alleged crimes between himself and the witness. Horn v. State [Wyo.] 73 Pac. 705. Evidence connecting defendant with crime

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and premeditation and as resulting therefrom the degree of the offense,[25] intent to kill.[26]

held insufficient to corroborate accomplice. Smith v. State [Tex. Cr. App.] 70 S. W. 545. Circumstantial evidence and confession held sufficient. Lawrence v. State [Fla.] 34 So. 87. Circumstantial evidence held sufficient to warrant conviction. State v. Gilliam [S. C.] 45 S. E. 6; State v. Boggan, 133 N. C. 761; McMasters v. State [Miss.] 35 So. 302; People v. Van Wormer, 175 N. Y. 188; Dunn v. State [Ind.] 67 N. E. 940; Brown v. Commonwealth, 24 Ky. L. R. 727, 69 S. W. 1098; Russell v. State [Neb.] 92 N. W. 751; State v. Ryno [Kan.] 74 Pac. 1114; McKinney v. State [Tex. Cr. App.] 71 S. W. 753. Circumstantial evidence held insufficient. State v. Crabtree, 170 Mo. 642; Hernandez v. State [Tex. Cr. App.] 72 S. W. 840. Evidence of identity held sufficient; confession, tracks and possession of weapon. Howard v. Commonwealth, 24 Ky. L. R. 950, 70 S. W. 295. Circumstantial evidence held sufficient to show murder of one whom defendant and his associates mistook for a laborer hired in their stead. State v. Dennis [Iowa] 94 N. W. 235. Circumstantial evidence held to sustain conviction of murder of defendant's paramour, the defense being that she committed suicide. State v. Lucas [Iowa] 97 N. W. 1003. Circumstantial evidence of wife murder by poisoning held sufficient. Wilkerson v. Commonwealth, 25 Ky. L. R. 780, 76 S. W. 359. Circumstantial evidence of murder in the perpetration of robbery held sufficient. State v. Tyler [Iowa] 97 N. W. 983; State v. Greenleaf, 71 N. H. 606. Evidence of conspiracy held sufficient. Martin v. State, 136 Ala. 32.

As against evidence of self-defense or other justification: Evidence held to show self defense and to be insufficient to sustain conviction. Chambless v. State [Tex. Cr. App.] 77 S. W. 2; State v. Moore [Neb.] 95 N. W. 334; State v. Bartlett, 170 Mo. 658, 59 L. R. A. 756; Newsome v. State [Tex. Cr. App.] 75 S. W. 296. Where assailant is cut by grasping a knife with which defendant sought to defend himself, justification or excuse is apparent. Bailey v. Commonwealth, 24 Ky. L. R. 1114, 70 S. W. 838. Evidence held sufficient to sustain a conviction notwithstanding a plea of self defense. State v. Felker, 27 Mont. 451, 71 Pac. 668; People v. Adams, 137 Cal. 580, 70 Pac. 662; Henry v. People, 198 Ill. 162; Bundren v. State, 109 Tenn. 225; State v. Rodman, 173 Mo. 681; People v. Gaimari [N. Y.] 68 N. E. 112; Mow v. People [Colo.] 72 Pac. 1069; State v. Gallehugh [Minn.] 94 N. W. 723; State v. Gregory [Mo.] 76 S. W. 970. Evidence held to show that a foreman killing a man under him in the course of an altercation in a lumber camp, was acting in self defense. State v. Castle, 133 N. C. 769. Evidence held to show that deceased though the aggressor, had sought to retire from the combat. White v. State [Ga.] 45 S. E. 595. Evidence that killing was justified as in defense of decedent's sister held insufficient. Morrison v. Commonwealth, 24 Ky. L. R. 2493, 74 S. W. 277. Evidence held not to show self defense. Deceased arose from his chair using abusive language but made no threatening movement. People v. Dobbins [Cal.] 72 Pac. 339. Evidence of excessive force used by an officer in overcoming resistance to an arrest, held sufficient. State v. Phillips [Iowa] 94 N. W. 229. Evidence held to show justification in that defendant discovered deceased with defendant's wife under circumstances creating a reasonable belief that adultery had been or was about to be committed. Dewberry v. State [Tex. Cr. App.] 74 S. W. 307. Evidence held to show that killing by militiaman was justifiable as committed under the orders of his superior officer. Commonwealth v. Shortall, 206 Pa. 165.

As against evidence of suicide: Evidence of murder held sufficient as against a defense of suicide. State v. Wilcox, 132 N. C. 1120; State v. Melvern [Wash.] 72 Pac. 489. Evidence of wife murder held sufficient, the defense being suicide. People v. Conklin, 175 N. Y. 333.

As against evidence of insanity: Evidence of wife murder held sufficient to sustain conviction, the defense being insanity. People v. Ennis [N. Y.] 68 N. E. 357. Evidence of murder held sufficient as against defense of insanity. People v. Tobin [N. Y.] 68 N. E. 359; Jackson v. State [Ind.] 67 N. E. 690; People v. Egnor, 175 N. Y. 419; Hoover v. State [Ind.] 68 N. E. 591; State v. Dunn [Mo.] 77 S. W. 848.

24. Evidence of corpus delicti held sufficient, the body having been partially burned. Paulson v. State [Wis.] 94 N. W. 771. It is not necessary that the body of deceased should show that the death was by criminal means. Dunn v. State [Ind.] 67 N. E. 940. Conviction of poisoning a well cannot be had on an uncorroborated confession without proof of the corpus delicti. Stanley v. State [Miss.] 34 So. 360. Finding a body bearing marks of violence held sufficient evidence of corpus delicti. Hunt v. State, 135 Ala. 1.

25. Circumstances showing a sedate, deliberate purpose and formed design, prove express malice. State v. Di Guglielmo [Del.] 55 Atl. 350. Evidence held insufficient to show premeditation. State v. Cole, 132 N. C. 1069. Malice and deliberation may be shown by circumstantial evidence. State v. Greenleaf, 71 N. H. 606. The striking of one blow with a razor during a quarrel does not show express malice. Rogers v. State [Tex. Cr. App.] 71 S. W. 18. Evidence held sufficient to show deliberation. State v. Vinso, 171 Mo. 576. Evidence held insufficient to show deliberation. State v. Bishop, 131 N. C. 733. Arming and previous threats held sufficient to show deliberation. Commonwealth v. Kilpatrick, 204 Pa. 218. Malice and deliberation must be shown beyond a reasonable doubt. State v. Greenleaf, 71 N. H. 606. That defendant was in an out of the way place on an intensely cold night, armed with a deadly weapon, and followed deceased and killed him without warning, shows premeditation and deliberation. State v. Dennis [Iowa] 94 N. W. 235. Evidence of threats and declarations manifesting extreme jealousy, held to show malice. Rowsey v. Commonwealth, 25 Ky. L. R. 841, 76 S. W. 409.

Murder in first degree: Evidence held sufficient for the jury as to murder in the first degree. State v. Barrett, 132 N. C. 1005; Fugett v. State [Tex. Cr. App.] 77 S.

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(§ 8) *Trial and punishment. A. Conduct of trial in general.*[27]—Where defendant poisoned her two children at the same time, evidence of both poisonings is admissible on the trial for the murder of one child.[28] The weapon with which the homicide was committed may be exhibited to the jury.[29]

(§ 8) *B. Instructions.*—Instructions need not be given on matters as to which there is no evidence.[30] Such included offenses as might be found under the evidence must be submitted,[31] and in some states an instruction that defendant must

W. 461; Carle v. People, 200 Ill. 494; Reynolds v. Commonwealth, 24 Ky. L. R. 1742, 72 S. W. 277; State v. Lambert, 97 Me. 51; State v. Dunn, 170 Mo. 25; People v. Filippelli, 173 N. Y. 509; Commonwealth v. Dudash, 204 Pa. 124; State v. Gurley, 170 Mo. 429; Commonwealth v. West, 204 Pa. 68; Mitchell v. State [Fla.] 33 So. 1009; State v. May, 172 Mo. 630; Jahnke v. State [Neb.] 94 N. W. 158; Hainsworth v. State, 136 Ala. 13; Cohen v. State [Ga.] 44 S. E. 801 (syllabus decision).

Murder in second degree: Evidence held sufficient to sustain conviction of murder in the second degree. State v. Roan [Iowa] 97 N. W. 997; State v. Steffen, 174 Mo. 628; State v. Sale, 119 Iowa, 1; State v. Ashcraft, 170 Mo. 409; Wilson v. State, 109 Tenn. 167; White v. State [Tex. Cr. App.] 72 S. W. 173. Defendant went to the house of deceased and killed him without provocation. Burrows v. State [Tex. Cr. App.] 72 S. W. 848.

Murder in third degree: Evidence held to show murder in the third degree. Mathis v. State [Fla.] 34 So. 287.

Manslaughter: Evidence of firing at persons creating disturbance near defendant's house held to warrant conviction of manslaughter. Allen v. State [Tex. Cr. App.] 77 S. W. 218. Evidence showing the discharge of a pistol by accident while deceased was attempting to take the same from defendant's pocket held to show nothing more than manslaghter. Tanks v. State [Ark.] 75 S. W. 851. Evidence of manslaughter by mis-treatment of a child, held sufficient to go to the jury. State v. Goode, 132 N. C. 982. Evidence held sufficient to show manslaughter in the third degree. Bliss v. State [Wis.] 94 N. W. 325. Evidence on prosecution for killing police officer held to show a legal arrest by him. Commonwealth v. Carter [Mass.] 66 N. E. 716. Evidence held sufficient to sustain conviction of manslaughter. People v. Cebulla, 137 Cal. 314, 70 Pac. 181; Hatcher v. State, 116 Ga. 617; Bohannan v. Commonwealth, 24 Ky. L. R. 1814, 72 S. W. 322.

26. Evidence of murder held sufficient notwithstanding plea of accidental shooting. Teel v. State [Tex. Cr. App.] 73 S. W. 11; Cubine v. State [Tex. Cr. App.] 74 S. W. 39. Evidence of intent to kill held to warrant conviction. Middlebrooks v. State [Ga.] 45 S. E. 607; People v. O'Connor, 82 App. Div. (N. Y.) 55. Severity of wound held sufficient to show intent to kill. Thomas v. State [Tex. Cr. App.] 72 S. W. 178; Drummer v. State [Fla.] 33 So. 1008. Evidence held sufficient to show assault with intent to commit manslaughter. Bryan v. State [Fla.] 34 So. 243. Evidence of wantonly throwing a stone into a street car, held not to warrant a conviction of assault with intent to murder. Bray v. State [Ga.] 45 S. E. 597. The fact that the wounds inflicted on the person assailed were incise and confined him to the house for three or four days and at one time threatened his life, is of itself insufficient to show that the weapon used was deadly. Cage v. State [Tex. Cr. App.] 77 S. W. 806. Evidence of an assault with a razor held sufficient to sustain a conviction of assault with intent to kill. Bell v. State [Tex. Cr. App.] 77 S. W. 787. Effect of inviting conflict and firing and wounding an unarmed man, held to justify a conviction of assault with intent to kill. Freeman v. State [Tex. Cr. App.] 77 S. W. 17. Evidence held insufficient to show intent to kill—altercation but no wound though defendant might easily have produced injury had he so intended. Sloan v. State [Tex. Cr. App.] 76 S. W. 922.

27. Most questions relating to conduct of trial are common to all crimes and are treated in Indictment and Procedure.

28. People v. Quimby [Mich.] 96 N. W. 1061.

29. State v. Tucker, 52 W. Va. 420. Prejudice does not necessarily result from the fact that the jury had the weapon with which it was alleged the crime was committed during their deliberations. State v. Dixon, 131 N. C. 808. The court may admit a partially identified weapon on promise to subsequently complete the identification. Worrill v. State, 116 Ga. 853.

30. Whether deceased died within a year and a day when the evidence was that he died in five minutes. Early v. Com., 24 Ky. L. R. 1181, 70 S. W. 1061. Evidence held to require an instruction as to casual connection between shooting and death. Garner v. State [Tex. Cr. App.] 77 S. W. 797. Charge as to the law of accessories is properly refused where the evidence showed that defendant was present aiding and abetting. Johnson v. State [Tex. Cr. App.] 77 S. W. 15. In a prosecution under Ky. St. 1899, § 1166, for cutting, striking or stabbing with deadly weapon with intent to kill, the evidence showing that the offense was committed by striking, it is error to give an instruction under section 1242 relating to cutting, thrusting or stabbing in heat of passion, which section does not contain the word "strike." Honaker v. Com. [Ky.] 76 S. W. 154. Evidence held insufficient to warrant instruction as to common intent of persons resisting an officer. State v. Meyers, 174 Mo. 352. Evidence held not to justify an instruction that homicide committed in flight after a burglary, was not in the perpetration of the burglary within the statute. People v. Wardrip [Cal.] 74 Pac. 744.

31. Although the evidence tended strictly to show that the homicide was committed in the perpetration of another crime and was accordingly murder in the first degree, submission of lesser degrees is not error. State v. Howard [Wash.] 74 Pac. 382. Instruction on lower degree error where no evidence to

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be convicted, if at all, of the degree charged, is held error.[32] Defenses should be submitted when, and only when, there is evidence supporting the same.[33]

justify it. Jordan v. State, 117 Ga. 405. Included offenses should not be charged where under the evidence defendant must be guilty of that charged or not guilty. State v. Hoot [Iowa] 94 N. W. 564. The court may exclude from consideration a degree of the crime as to which there is no evidence. Carr v. State [Fla.] 34 So. 892. Evidence held not to require instruction on lesser degrees. Jahnke v. State [Neb.] 94 N. W. 158. Instruction as to first degree only is proper where the killing was from ambush. State v. Dixon, 131 N. C. 808. Evidence held not to justify instruction as to acts eminently dangerous and evincing a depraved mind. Strickland v. State [Miss.] 32 So. 921; Wood v. State [Miss.] 33 So. 285. Evidence of subsequent unfeeling remarks of defendant held to justify submitting murder in the first degree. State v. Sale, 119 Iowa, 1.

Murder in second degree: Evidence that after an altercation defendant returned and shot deceased without further provocation, warrants an instruction on murder in the second degree. State v. Gleason, 172 Mo. 259. Instruction as to second degree held proper though the evidence showed premeditation. State v. Schaeffer, 172 Mo. 335. Instruction should be given as to second degree, where the jury might find the same. State v. McMullin, 170 Mo. 608. An instruction as to murder in the second degree and manslaughter properly refused where defendant after threatening a woman pursued and stabbed her. State v. Gurley, 170 Mo. 429. It is proper for the court to instruct on both degrees of murder. Jackson v. State, 136 Ala. 22. Where the evidence is circumstantial and capable of an interpretation, excluding premeditation, an instruction as to murder in the second degree should be given. State v. Moore [Kan.] 73 Pac. 905. Evidence disclosing practically nothing of the circumstances of the killing held to require charge on murder in the second degree. Tiejo v. State [Tex. Cr. App.] 74 S. W. 546. Evidence as to homicide in an attempt to rescue a person from jail held not to require an instruction as to murder in the second degree. Kipper v. State [Tex. Cr. App.] 77 S. W. 611.

Manslaughter: Evidence held not to require instruction as to manslaughter. Prior v. State [Ga.] 45 S. E. 598 (syllabus decision); Mow v. People [Colo.] 72 Pac. 1069; State v. Utley, 132 N. C. 1022; Cox v. Com., 24 Ky. L. R. 680, 69 S. W. 799; New v. Territory [Okl.] 70 Pac. 198; Dean v. State, 116 Ga. 534; Hunt v. State, 135 Ala. 1; Jordan v. State, 117 Ga. 405. Defendant's pistol accidentally discharged while being used in self defense. Teel v. State [Tex. Cr. App.] 73 S. W. 11. Discharge of a pistol which deceased was trying to take from defendant either wrongfully or to prevent defendant from shooting him. Williams v. State [Tex. Cr. App.] 75 S. W. 859. No provocation except abusive language. State v. May, 172 Mo. 630; State v. Gartrell, 171 Mo. 489; State v. Spivey, 132 N. C. 989. Deceased approached defendant in threatening attitude. State v. Diller, 170 Mo. 1; State v. Gartrell, 171 Mo. 489; State v. Ashcraft, 170 Mo. 409. Defendant shot one walking toward him without demonstration. Pollard v. State [Tex. Cr. App.] 73 S. W. 953. Evidence of long antecedent provocation. State v. Privitt, 175 Mo. 207. Evidence of either murder or accidental shooting. Com. v. Sutton, 205 Pa. 605. An instruction as to mutual combat need not be given in connection with one on self defense unless the evidence justifies the same. Jordan v. State, 117 Ga. 405. Evidence held not to justify an instruction as to sudden quarrel. State v. Castle, 133 N. C. 769. An instruction submitting the question of cooling time to the jury, is properly refused where the original provocation was as a matter of law inadequate (Jarvis v. State [Ala.] 34 So. 1025) or where defendant had made previous threats and had armed himself, though only five minutes elapsed between an altercation and the killing (State v. Spivey, 132 N. C. 989). Evidence held not to justify an instruction as to fighting by agreement with deadly weapon. Rogers v. State [Miss.] 34 So. 320. Evidence held not to warrant instruction as to neglect of child after inflicting injuries. Lee v. State [Tex. Cr. App.] 72 S. W. 195. Where the evidence shows wanton shooting into a crowd (Clark v. State, 117 Ga. 254), or where an intent to kill is obvious from the evidence, an instruction as to involuntary manslaughter need not be given (State v. Vinso, 171 Mo. 576).

Evidence held to require instructions as to manslaughter. State v. Buffington, 66 Kan. 706, 72 Pac. 213; Bliss v. State [Wis.] 94 N. W. 325; State v. McKenzie [Mo.] 76 S. W. 1015; Whatley v. State, 116 Ga. 86; Cavaness v. State [Tex. Cr. App.] 74 S. W. 908; Aldredge v. State [Tex. Cr. App.] 72 S. W. 843. Mutual combat. Smith v. State [Ga.] 44 S. E. 817. Provocation by slander of defendant's wife. McComas v. State [Tex. Cr. App.] 75 S. W. 533. Abusive language and assault. Gardner v. State [Tex. Cr. App.] 73 S. W. 13. Defendant was intoxicated and there was no proof of motive. Henderson v. Com., 24 Ky. L. R. 1985, 72 S. W. 781. Weapons drawn by both parties. Hatcher v. State, 116 Ga. 617. Several persons without warrant sought to arrest defendant. Strickland v. State [Miss.] 32 So. 921. Where the evidence showed that deceased assaulted defendant and struck him just before the killing, it is error to refuse to charge on manslaughter in the fourth degree which includes every homicide not justifiable or excusable or specifically covered by the higher degrees of homicide. State v. Weakly [Mo.] 77 S. W. 525. Evidence held to require charge on negligent homicide. Morton v. State [Tex. Cr. App.] 71 S. W. 281. Evidence of accidental shooting held to require an instruction on involuntary manslaughter. Messer v. Com. [Ky.] 76 S. W. 331.

Assault with intent to kill: Where the killing actually occurred in pursuance of a conspiracy to rescue a person from jail, an instruction as to assault with intent to kill, is not required. Kipper v. State [Tex. Cr. App.] 77 S. W. 611.

Aggravated assault: Evidence of killing of child held to require instruction on ag-

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In the footnote are grouped holdings as to the correctness of instructions relating to causal connection between injury and death,[84] participation by defend-

gravated assault. Lee v. State [Tex. Cr. App.] 72 S. W. 195. Aggravated assault need not be submitted where the evidence shows either manslaughter or self defense (Estep v. State [Tex. Cr. App.] 70 S. W. 966), or shows either a murderous assault or self defense (Duval v. State [Tex. Cr. App.] 70 S. W. 543). The fact that defendant did not hit the person fired at though close to him, is sufficient evidence of lack of intent to kill to require instruction on aggravated assault. Cubine v. State [Tex. Cr. App.] 73 S. W. 396. Evidence that defendant fired only to frighten held not to require an instruction on aggravated assault. Bouldin v. State [Tex. Cr. App.] 74 S. W. 907. Evidence on a prosecution for assault with intent to kill, that defendant shot his wife because she refused to return to him, does not require a charge on aggravated assault. Wilson v. State [Tex. Cr. App.] 73 S. W. 964. Evidence that shot was fired only to frighten held to require charge on aggravated assault. Angel v. State [Tex. Cr. App.] 74 S. W. 553. Evidence of homicide with a small pocket knife in the course of an altercation held to require an instruction on aggravated assault. Newsome v. State [Tex. Cr. App.] 75 S. W. 296. Evidence of altercation held to require instruction as to aggravated assault on prosecution for assault with intent to murder. Carlisle v. State [Tex. Cr. App.] 77 S. W. 213; Morris v. State [Tex. Cr. App.] 76 S. W. 472; Evans v. State [Tex. Cr. App.] 76 S. W. 467; Spiller v. State [Tex. Cr. App.] 77 S. W. 809.

Assault and battery: Evidence on trial for assault with intent to murder held to show accidental shooting so as to require an instruction on simple assault. Catling v. State [Tex. Cr. App.] 72 S. W. 853. Evidence held not to require the submission of assault and battery on an indictment for assault with intent to kill. Robinson v. State [Ga.] 44 S. E. 804.

32. An instruction that defendant was guilty of murder or nothing, is on the weight of the evidence. Collins v. State [Ala.] 34 So. 993. An instruction peremptorily requiring the jury to convict to a certain degree or acquit, is improper in Ohio. Lindsey v. State, 24 Ohio Circ. R. 1. In North Carolina, an instruction that if the jury believed the evidence, they should return a verdict of manslaughter was sustained, where there was no evidence of self defense. State v. Hagan, 131 N. C. 802.

33. Self defense: Evidence held not to require an instruction as to self defense. Bruner v. U. S. [Ind. T.] 76 S. W. 244; Lewis v. State [Tex. Cr. App.] 75 S. W. 788; Deal v. State, 136 Ala. 52; Sparks v. State [Tex. Cr. App.] 77 S. W. 811. Assault without a weapon. Thayer v. State [Ala.] 35 So. 406. Deceased shot while fleeing. Willis v. State [Tex. Cr. App.] 74 S. W. 543. Evidence held insufficient to require instruction as to defense of property. Hudson v. State [Tex. Cr. App.] 70 S. W. 764. Evidence held to require instruction as to the right to resist wrongful seizure of property. Weaver v. State [Tex. Cr. App.] 76 S. W. 564. Evidence of sudden assault held not to require an instruction as to the duty to retreat. Connell v. State [Tex. Cr. App.] 75 S. W. 512. Instructions on self defense held properly refused because the evidence showed that the defendant was the aggressor. Jackson v. State, 136 Ala. 96. Evidence held to support an instruction as to the right of one provoking a difficulty to urge self defense. Henry v. People, 198 Ill. 162; Wallace v. U. S., 18 App. D. C. 152; Monson v. State [Tex. Cr. App.] 76 S. W. 570; Starr v. State, 160 Ind. 661. Evidence held not to support instructions as to provoking of difficulty by defendant. Pollard v. State [Tex. Cr. App.] 73 S. W. 953; Pulpus v. State [Miss.] 34 So. 2. Evidence held not to require instruction as to provoking a conflict without intent to kill. State v. Hicks [Mo.] 77 S. W. 539. Instruction as to retreat and subsequent renewal of combat, held not justified by the evidence. State v. Miller [Or.] 74 Pac. 658. Evidence of defendant's freedom from fault held sufficient to entitle him to instructions as to self defense. Deal v. State, 136 Ala. 52. No evidence to show that defendant sought to withdraw from combat. Canada v. Ter. [Okl.] 72 Pac. 375. Instruction as to assault provoked by slanderous statements by defendant, held not justified by the evidence. State v. Bartlett, 170 Mo. 658, 59 L. R. A. 756. Evidence held not to justify an instruction as to the rights of one assaulted in his place of business. Stevens v. State [Ala.] 35 So. 122. Evidence held to warrant a charge as to attempt by deceased to eject defendant from premises at the owner's request. State v. Roan [Iowa] 97 N. W. 997. Where defendant and deceased were passing along the road together, and defendant dropped back and fired on deceased from behind, an instruction as to defendant being forced into a dangerous position is not justified by the evidence. Juley v. State [Tex. Cr. App.] 76 S. W. 468. Evidence held to require an instruction on self defense. Newsome v. State [Tex. Cr. App.] 75 S. W. 296; Terry v. State [Tex. Cr. App.] 76 S. W. 928. Deceased drew pistol and made threats. Orta v. State [Tex. Cr. App.] 71 S. W. 755. Person assaulted had thrown a knife at defendant and was in the act of picking up such knife with apparent intent to throw it again. McCardell v. State [Tex. Cr. App.] 77 S. W. 446. No instruction as to rights of officer is required when it appears that defendant was not acting in his official capacity. Philpot v. Com., 24 Ky. L. R. 757, 69 S. W. 959; People v. O'Connor, 82 App. Div. (N. Y.) 55.

Accident: Where defendant testified fully to a killing in self defense but stated also that the killing was accidental, no instruction as to accident is necessary. Dunn v. State, 116 Ga. 515. Evidence of accidental firing of a gun raised in self defense requires instruction as to accidental shooting. It is a lawful act by lawful means with ordinary and usual caution within Rev. St. § 4367. Ryan v. State, 115 Wis. 488.

34. Instructions as to causal connection between wound and death held sufficient. Gardner v. State [Tex. Cr. App.] 73 S. W. 13; Lauckton v. U. S., 18 App. D. C. 348. Where a wound was inflicted by deceased which might have been mortal and one by

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ant in the crime,[35] weight and effect of evidence,[36] degree and included offenses,[37]

another person which was certainly mortal and which caused the death, an instruction that defendant might be convicted though there was no conspiracy between the parties, is error. Walker v. State, 116 Ga. 537.

35. An instruction that if a jury entertained a doubt as to whether a certain third person killed deceased, they should acquit "him" is erroneous. Giles v. State [Tex. Cr. App.] 71 S. W. 961. Instruction as to aiding and abetting held sufficient as to intent and deliberation in connection with other instructions. People v. Morine, 138 Cal. 626, 72 Pac. 166. Instruction as to aiding and abetting held erroneous for not excluding conspiracy. Martin v. State, 136 Ala. 32. An instruction that one aiding and abetting is equally guilty without requiring him to participate in the intent or premeditation, is error. State v. Phillips, 118 Iowa, 660. An instruction that if defendant and another made a similar assault on deceased and the other person without defendant's knowledge killed deceased, defendant was not guilty, should be given when required by the evidence. Cecil v. State [Tex. Cr. App.] 72 S. W. 197. Where defendant's guilt arises from his participation in a conspiracy to do an unlawful act, an instruction as to what constitutes an unlawful act should be given. Powers v. Com., 24 Ky. L. R. 1007, 1186, 70 S. W. 644, 1050. Instructions as to malice in one aiding and abetting, held correct. State v. White [S. C.] 45 S. E. 210. Instruction as to guilt of one aiding and abetting held erroneous in not requiring malice and premeditation. Harper v. State [Miss.] 35 So. 572. Instruction as to aiding and abetting making defendant guilty in case of the approval of the crime, held erroneous. Id. An instruction that though defendant told another to kill deceased, if the killing was because of a subsequent quarrel and not because of what defendant said, he was not guilty, is improperly refused. Owens v. State [Miss.] 33 So. 718. Instruction as to guilt of one aiding and abetting held erroneous because not allowing defendant the benefit of justification to one firing the shot. Harper v. State [Miss.] 35 So. 572.

36. Instructions withdrawing evidence from jury held properly refused. Self defense. Deal v. State, 136 Ala. 52. Sufficiency to convict. Jackson v. State, 136 Ala. 22; Hainsworth v. State, 136 Ala. 13. Instruction held to indicate opinion on weight of evidence. State v. Barry, 11 N. D. 428. Assumption that defendant made assault held to invade province of jury. State v. Marsh, 171 Mo. 523. Assumption that deceased died of blood poisoning held not an invasion of province of jury. State v. McKnight, 119 Iowa, 79. An instruction that the jury are the judges of the weight "if any" of a dying declaration is properly modified by striking out the words quoted. State v. Hendricks, 172 Mo. 654. An instruction referring to the jury the question whether a dying declaration was made under a conviction of impending death, is erroneous. Tarver v. State, 137 Ala. 29. Instruction submitting to jury sufficiency of preliminary proof of dying declarations held correct. Smith v. State [Ga.] 44 S. E. 817. An instruction that dying declarations are to be received with great caution, is properly refused. Tarver v. State, 137 Ala. 29. Instruction as to consideration to be given evidence which tended to show defendant guilty of another crime held so ambiguous as to be error. Bess v. Com., 25 Ky. L. R. 1091, 77 S. W. 349. An instruction that previous assaults on deceased were to be considered only in determining the state of defendant's mind and not in fixing the punishment, held sufficiently favorable. McCarty v. Com., 24 Ky. L. R. 1427, 71 S. W. 656. The court should instruct that the evidence of the state may be looked to in establishing self defense. State v. Cottrill, 52 W. Va. 363. Instruction enumerating previous threats by deceased held to give undue prominence thereto. Reynolds v. Com., 24 Ky. L. R. 1742, 72 S. W. 277. There should be an instruction that prior declarations of defendant are to be considered only as bearing on intent or motive. Thacker v. Commonwealth, 24 Ky. L. R. 1584, 71 S. W. 931. An instruction that the evidence tends to show mutual combat, is on the weight of the evidence. Stephens v. State [Ga.] 45 S. E. 619.

37. Instruction as to presumption and burden of proof as between the different degrees of crime held not to throw the burden of proving innocence on the defendant. State v. Melvern [Wash.] 72 Pac. 489. An instruction as to degree which does not give defendant the benefit of the doubt as between two degrees, is error. Spivey v. State [Tex. Cr. App.] 77 S. W. 444. It is error not to instruct that if the jury doubt of which of two degrees defendant is guilty, he can be convicted only of the lower. Arnold v. Com., 24 Ky. L. R. 1921, 72 S. W. 753. Instruction as to murder in the second degree held correct though it failed to require the killing to have been intentional or willful. State v. Marsh, 171 Mo. 522. Merely giving the statutory definitions of degrees of murder is inadequate. State v. Felker, 27 Mont. 451, 71 Pac. 668. Using the word "murder" in referring to murder in the second degree, is not misleading, where the degrees are explained. State v. Gruff, 68 N. J. Law, 287. An instruction requiring defendant to be found guilty as charged under certain circumstances is not error, where the degrees of crime are properly explained in other instructions. State v. Prater, 52 W. Va. 132. Instruction distinguishing murder in the first and second degrees, held correct. Downing v. State [Wyo.] 70 Pac. 833. An instruction that defendant should be convicted as charged unless the jury believe him guilty of manslaughter, is erroneous as precluding an acquittal. Woods v. State [Miss.] 32 So. 998. Instruction as to finding of the lower of two grades as to which the jury were in doubt held not to preclude an acquittal in case of doubt. Ryan v. State, 115 Wis. 488. In connection with an instruction that the burden of mitigating the degree is on defendant, the jury should be told that mitigating circumstances may be found in the state's evidence. State v. Castle, 133 N. C. 769. An instruction that the jury may convict of either one of several enumerated degrees without giving the elements of each degree, is properly refused. Sherrill v. State [Ala.] 35 So. 129.

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motive,[38] malice and premeditation,[39] intent to kill,[40] manslaughter,[41] assault with

38. An instruction as to absence of motive is improper, where defendant testified that the killing was in self defense. State v. Lynn, 169 Mo. 664. An instruction that motive need not be proved though its absence is a circumstance in favor of defendant, is proper. Lanckton v. United States, 18 App. D. C. 348.

39. Failure to define "feloniously" is not error. Hutsell v. Com., 25 Ky. L. R. 262, 75 S. W. 225. Definition of "felonious" held correct. Hocker v. Com., 24 Ky. L. R. 936, 70 S. W. 291. Premeditated murder and unintentional murder in the perpetration of felony held properly submitted. People v. Sullivan, 173 N. Y. 122. Instructions as to premeditation and deliberation, held correct. State v. Zdanowicz [N. J. Err. & App.] 55 Atl. 743. An indictment charging malice aforethought authorizes an instruction on express malice. Johnson v. State [Tex. Cr. App.] 71 S. W. 25. The use of the word "anger" as one of the synonyms of malice held not erroneous. State v. Hunter, 118 Iowa, 686. Instruction that the fact that deceased died of the wounds, is not evidence of malice invades the province of the jury. Thayer v. State [Ala.] 35 So. 406. An instruction that if the intent to kill was formed in defendant's mind and there was time for premeditation, the conclusion of premeditation follows as a matter of law, is error, as invading the province of the jury. State v. Phillips, 118 Iowa, 660. Instruction as to intent and deliberation, held correct. State v. Martin [Mont.] 74 Pac. 725. Instruction that deliberation means in a cool state of blood, is misleading. Thayer v. State [Ala.] 35 So. 406. An instruction defining deliberation as the absence of passion is sufficient, where there is no evidence that the killing was a deed of passion. State v. Taylor, 171 Mo. 465. Instruction as to effect of anger on premeditation held correct. Olds v. State [Fla.] 33 So. 296. Instruction as to malice held misleading. Bush v. State, 136 Ala. 85. Instruction as to premeditation and malice aforethought held sufficient. State v. Parker, 172 Mo. 191. An instruction as to malice in the language of the Penal Code is sufficient. People v. Glaze, 139 Cal. 154, 72 Pac. 965. An instruction that malice may be inferred from the use of a deadly weapon, is proper where defendant denies the killing and no circumstances of extenuation appear (State v. Dull [Kan.] 74 Pac. 235), but not where there is evidence that the killing was accidental (Raines v. State [Miss.] 33 So. 19), or justifiable (Hammond v. People, 199 Ill. 173). Instruction as to implication of malice from use of deadly weapon, held correct. State v. Foster [S. C.] 45 S. E. 1.

40. An instruction that there is no presumption of intent to cause death, where the instrument used was one not likely to produce death, though abstractly correct, should not be given where the killing is admitted and the defense is insanity. Spivey v. State [Tex. Cr. App.] 77 S. W. 444. Where an express instruction was given that intent to kill is necessary, an instruction as to a lower degree mentioning also intent to do great bodily harm, is not misleading. Valles v. State [Tex. Cr. App.] 71 S. W. 596. An instruction as to intent to kill on a prosecution for assault held not erroneous for failing to charge that such intent must have been specific. Mosely v. State [Tex. Cr. App.] 70 S. W. 546. Instruction that intent to kill need not exist for any definite time held correct. State v. Spivey, 132 N. C. 989. Where previous threats by defendant are shown, an instruction that the jury should determine whether such threats manifested a present intention to kill, is improper. Henry v. People, 198 Ill. 162. Instruction that defendant could not be convicted unless he intended to kill deceased, had time to think of the consequences of his act and designed to take life before firing, properly refused. Webb v. State, 135 Ala. 36. Instruction as to intent to kill held erroneous as ignoring the issue of self defense. Hammond v. People, 199 Ill. 173. An instruction that an assault with intent to commit a murder must have been made under such circumstances that it would have been murder had death resulted, is proper. Id. An instruction as to defendant's state of mind at the time of the homicide, held not objectionable as singling out particular facts. Clark v. State [Tex. Cr. App.] 76 S. W. 573. An instruction as to cutting and wounding which does not include an intent to kill, is erroneous, though such intent is required by another instruction. Bailey v. Commonwealth, 24 Ky. L. R. 1114, 70 S. W. 838. Where the second of two shots fired by defendant was fatal, instructions should be based upon his intent at the time of firing that shot. Bearden v. State [Tex. Cr. App.] 73 S. W. 17. Instruction held not to make intent to kill follow result as a matter of law from the killing. Lowe v. State [Wis.] 96 N. W. 417. An instruction as to the effect of drunkenness to prevent formation of a specific intent, held not covered by the general charge. State v. Pasnau, 118 Iowa, 501. Though great bodily harm was in fact inflicted, if defendant was too drunk to form a specific intent to inflict the same, he cannot be convicted. Id. Where several assaults with specific intent are included in the charge, instruction as to the effect of intoxication should be applied to each. Id. Instruction as to intoxication held erroneous because not covering included crimes. State v. Cather [Iowa] 96 N. W. 722.

41. Where case was tried on theory of homicide by abortion, it is error to instruct as to manslaughter by negligent medical practice. People v. Huntington, 138 Cal. 261, 70 Pac. 284. Instruction defining manslaughter as a blow given from a heart full of passion, etc., held correct. State v. Bowers, 65 S. C. 207. A definition of heat of passion as that obscuring of the reason which will induce ordinary men of fair average disposition to lose control of themselves, is not erroneous. Ryan v. State, 115 Wis. 488. Instruction as to reckless shooting held misleading. Bush v. State, 136 Ala. 85. Intent to kill not being an essential to manslaughter, an instruction requiring such intent is properly refused. Thayer v. State [Ala.] 35 So. 406. Instruction as to manslaughter in resistance to the wrongful taking of money from defendant by deceased, held erroneous. Andrews v. State [Tex. Cr. App.] 76 S. W. 918. An instruction as to mutual combat on

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deadly weapon,[42] self defense,[43] defense of property or habitation,[44] defense of another,[45] making or resisting arrest,[46] accident,[47] punishment.[48]

equal terms is misleading where defendant alone was armed. State v. Vance, 29 Wash. 485, 70 Pac. 34. Instruction as to effect of sudden passion to mitigate the degree held confusing and erroneous. Spivey v. State [Tex. Cr. App.] 77 S. W. 444. An instruction that though defendant has failed to establish self defense, he should not necessarily be convicted of murder but may be guilty of manslaughter only, is a mere argument and properly refused. Stevens v. State [Ala.] 35 So. 122. Instruction as to manslaughter held sufficient. State v. Foster [S. C.] 45 S. E. 1. Where an instruction is given under Penal Code, art. 653, that one failing to call necessary medical assistance after inflicting an injury shall be deemed guilty as though such injury had been necessarily fatal, an instruction should also be given under art. 717 allowing the instrument with which the injury is inflicted to be considered as to the question of intent and also (Lee v. State [Tex. Cr. App.] 73 S. W. 195) under art. 720 relating to manslaughter with instruments not designed to cause death.

Provocation: An instruction on provocation should require the same to be viewed in the light of all that transpired between the parties. Nix v. State [Tex. Cr. App.] 74 S. W. 764. Evidence showing only extreme provocation an instruction that slight provocation does not reduce the degree is error. State v. Castle, 133 N. C. 769. An instruction that a killing in a sudden transport of rage is murder in the second degree, without requiring that the rage be unprovoked is erroneous. Thomas v. State [Tex. Cr. App.] 74 S. W. 36. What is adequate cause for the passion which will reduce homicide to manslaughter, should be defined. Pollard v. State [Tex. Cr. App.] 73 S. W. 953. It is not necessary to define the assault and battery which will reduce homicide to manslaughter. Bearden v. State [Tex. Cr. App.] 73 S. W. 17. Instruction limiting provocation to insult to defendant's daughter, held correct though there was evidence of insulting language by deceased concerning defendant's wife. McComas v. State [Tex. Cr. App.] 72 S. W. 189. An instruction on manslaughter stating that the provocation must be reasonably calculated to excite ungovernable passion sufficiently states the nature of the provocation. Cook v. Commonwealth, 24 Ky. L. R. 1731, 72 S. W. 283. It is proper for the court to charge in the language of Penal Code, § 65, that provocation by words is in no case sufficient. Robinson v. State [Ga.] 44 S. E. 985. An instruction which adds to the language of Ky. Sts. § 1166 relating to manslaughter, an additional requirement of provocation, is error. Hardin v. Commonwealth, 24 Ky. L. R. 1540, 71 S. W. 862. The statute declaring that an assault and battery shall constitute adequate provocation, an instruction that it might constitute such provocation, is error. Connell v. State [Tex. Cr. App.] 75 S. W. 512. Instruction as to manslaughter stating as provocation facts which in law amounted to justification, held error. State v. Halliday [La.] 35 So. 380. An instruction that if deceased made remarks derogatory to defendant's wife and defendant slew deceased on the first meeting, in the heat of passion, it was manslaughter, is sufficiently full. Allen v. State [Tex. Cr. App.] 70 S. W. 85. Instructions as to adultery of deceased with defendant's wife as provocation, held correct. Brown v. State [Tex. Cr. App.] 75 S. W. 33. An instruction that an assault causing pain and bloodshed was sufficient provocation to reduce the degree, is error, where there is no evidence that any blood was shed in the assault on defendant. Garner v. State [Tex. Cr. App.] 77 S. W. 797. An instruction that provocation involves either an assault and battery or some indignity calculated to throw an average man into a sudden passion, is correct. State v. Gilliam [S. C.] 45 S. E. 6. An instruction that the provocation must arise at the time of the homicide to reduce it to manslaughter, is not erroneous when coupled with one that the provocation urged by defendant, is an exception to such rule. Gossett v. State [Tex. Cr. App.] 70 S. W. 319. Instruction as to cooling time held correct. Jarvis v. State [Ala.] 34 So. 1025.

42. An instruction as to assault with a deadly weapon defining such weapon as one with which death could be produced, and without referring to the manner in which it was used by defendant, is error. Honaker v. Com., 25 Ky. L. R. 675, 76 S. W. 154. An instruction defining a deadly weapon as a gun used as a fire arm within carrying distance, held correct where there was no other evidence as to the weapon. Juley v. State [Tex. Cr. App.] 76 S. W. 468.

43. An instruction referring to a "claim" of self defense, is not prejudicial. People v. Glover [Cal.] 74 Pac. 745. The court should not instruct that the jury should consider the disparity in size between the parties. Alexander v. State [Ga.] 44 S. E. 851. An instruction as to self defense by one charged with aiding and abetting held correct. Benge v. Com., 24 Ky. L. R. 1466, 71 S. W. 648. Instruction as to self defense where deceased was shot while going to his house to get a gun held sufficiently favorable. Ditmer v. State [Tex. Cr. App.] 74 S. W. 34. An instruction that the plea of self defense admits that the killing was intentional, is error. Foley v. State [Wyo.] 72 Pac. 627. Instruction that if defendant acted in self defense subsequent taking of property of deceased did not make him guilty of murder held sufficient. State v. Gartrell, 171 Mo. 489. An instruction that one accused of patricide is not deprived of any of his legal rights of self defense, is sufficient, though it does not extend the caution as to his rights in respect to provocation reducing the degree. Connell v. State [Tex. Cr. App.] 75 S. W. 512. An instruction allowing instead of requiring an acquittal if self defense be found, is improper. State v. Nelson, 65 Kan. 689, 70 Pac. 632. An instruction that if defendant was intoxicated he might be more likely to deem himself in danger and that his condition was to be considered in that connection is properly refused. State v. Roan [Iowa] 97 N. W. 997. Instruction as to self defense against assault by several held erroneous as excluding the right to defend against assault by deceased alone.

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Harmless error.—Erroneous instructions as to matters having no bearing on

Garner v. State [Tex. Cr. App.] 77 S. W. 797. An instruction that defendant should be acquitted if he fired in self defense, without stating the elements of self defense, is properly refused. Tarver v. State, 137 Ala. 29. An instruction that if defendant armed himself and provoked the difficulty, he was guilty of murder, is erroneous as excluding self defense. Rogers v. State [Miss.] 34 So. 320. An instruction as to self defense, speaking of the use of a weapon by deceased when the evidence showed that he merely made a motion as if to draw one. Andrews v. State [Tex. Cr. App.] 76 S. W. 918. Instruction on self defense qualifying defendant's right by reference to the knowledge of the character and disposition of deceased, held error. Hickey v. State [Tex. Cr. App.] 76 S. W. 920; Andrews v. State [Tex. Cr. App.] 76 S. W. 918. Instruction as to self defense held erroneous as imposing the burden of proof on defendant. Vann v. State [Tex. Cr. App.] 77 S. W. 813. An instruction requiring self defense to be established beyond a reasonable doubt, is error. Thacker v. Com., 24 Ky. L. R. 1584, 71 S. W. 931. Justification need to be proven only by a preponderance of evidence, and an instruction requiring the jury to be satisfied thereof, is error. Foley v. State [Wyo.] 72 Pac. 627; Lane v. State [Fla.] 32 So. 896. General instruction as to self defense held correct. Early v. Com., 24 Ky. L. R. 1181, 70 S. W. 1061; Howard v. Commonwealth, 24 Ky. L. R. 612, 69 S. W. 721; State v. Bowers, 65 S. C. 207; Gatling v. State [Tex. Cr. App.] 76 S. W. 471.

Real or apparent necessity of killing: Instructions as to apparent danger held conflicting. State v. Barrett, 132 N. C. 1005. The addition to an instruction of a clause that the jury and not the prisoner were to judge of the force necessary, held erroneous. State v. Castle, 133 N. C. 769. An instruction as to self defense allowing killing under circumstances leading a reasonable man to believe in the existence of danger, is erroneous, if it does not require that defendant so believe. Sylvester v. State [Fla.] 35 So. 142. Instruction as to self defense held properly modified by adding clause referring to the reasonableness of defendant's belief. People v. Glover [Cal.] 74 Pac. 745. Where the evidence showed that deceased made a motion to draw a pistol, the jury should have been distinctly instructed that defendant need not wait an actual attack. Poole v. State [Tex. Cr. App.] 76 S. W. 565. An instruction that defendant was justified if deceased was attempting to strike him with a certain implement, is properly modified by adding that such implement must be found to be a deadly weapon and the killing must appear reasonably necessary. Fulcher v. State [Miss.] 35 So. 170. An instruction as to apparent danger which does not require reasonable cause for the apprehension, is properly refused. State v. Allen [La.] 35 So. 495. The jury should be instructed as to self defense against danger reasonably apprehended where there is evidence warranting such instruction. Stephens v. State [Ga.] 45 S. E. 619. An instruction on self defense requiring defendant to "in good faith believe" in the impending danger, is not erroneous. Hutsell v. Com., 25 Ky. L. R. 263, 75 S. W. 225. Instruction as to overt acts which will justify an apprehension of danger held proper. Williams v. U. S. [Ind. T.] 69 S. W. 871. An instruction that the killing must have been necessary or apparently necessary, is proper. Henry v. People, 198 Ill. 162. It is proper to instruct that defendant's belief of danger must have been reasonable. Olds v. State [Fla.] 32 So. 296. An instruction that if defendant did not know the danger had ceased, he should be acquitted should be given. Jones v. State [Tex. Cr. App.] 71 S. W. 962. An instruction requiring "just and reasonable" grounds for believing in the existence of danger, is correct. Francis v. State [Tex. Cr. App.] 70 S. W. 751. An instruction that the circumstances must have justified the fears of a "reasonable man," is not error though defendant is a woman. Anderson v. State, 117 Ga. 255. Instruction that the danger need not have been real but only apparent, held properly refused because not embracing all the elements of self defense. Mathews v. State, 136 Ala. 47. Instruction as to self defense held erroneous because omitting the necessity of belief by defendant in the peril. Id. An instruction as to justification in making an arrest held erroneous as not covering apparent necessity. State v. Phillips, 119 Iowa, 652. An instruction on self defense must base defendant's belief on the acts of deceased. Peoples v. State [Miss.] 33 So. 289. An instruction confining defendant's ground of apprehension to what occurred at the immediate time, held erroneous. Wood v. State [Miss.] 33 So. 285. Instruction held to properly submit doctrine of apparent necessity. Benge v. Com., 24 Ky. L. R. 1466, 71 S. W. 648; Teel v. State [Tex. Cr. App.] 73 S. W. 11; Ryan v. State, 115 Wis. 488; Reynolds v. Com., 24 Ky. L. R. 1742, 72 S. W. 277; Rowsey v. Com., 25 Ky. L. R. 841, 76 S. W. 409; Crockett v. State [Tex. Cr. App.] 77 S. W. 4; State v. Foster [S. C.] 45 S. E. 1; Freeman v. State [Tex. Cr. App.] 72 S. W. 185. Instruction held erroneous as requiring real danger. State v. Ellis, 30 Wash. 369, 70 Pac. 963. An instruction that a killing in self defense must have been necessary, is error. Palmour v. State, 116 Ga. 269. An instruction that if deceased attacked the defendant and defendant struck him with a pistol which was accidentally discharged, defendant was not guilty, is erroneous as ignoring apparent danger and the duty to retreat. Stewart v. State, 137 Ala. 33. Error in an instruction in confining self defense to actual danger, is not cured by a disconnected charge presenting the doctrine of apparent danger. State v. Miller [Or.] 74 Pac. 658. Instruction as to the duty to use no more force than was necessary, held erroneous as ignoring the doctrine of apparent necessity. State v. Castle, 133 N. C. 769.

Threats by decedent: An instruction that if no overt act was committed by deceased, threats by him are not to be considered, is improper. Lane v. State [Fla.] 32 So. 896. An instruction as to previous threats in the language of the statute is inadequate. Cline v. State [Tex. Cr. App.] 71 S. W. 23. An instruction that the conduct of deceased must be viewed from defendant's standpoint suffi-

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the offense of which defendant was convicted are harmless.[49] The charge is to be construed as a whole, and error in one instruction may be corrected by another.[50]

ciently covers the consideration of previous threats by deceased. Newman v. State [Tex. Cr. App.] 70 S. W. 951.

Nature of apprehended peril: Where the weapon used by defendant was not necessarily deadly, an instruction that he must have feared death or serious bodily harm, is erroneous. Crawford v. State [Tex. Cr. App.] 70 S. W. 548. An instruction that defendant must have believed he was in "great serious bodily danger" is erroneous. Jones v. State [Tex. Cr. App.] 71 S. W. 962. An instruction as to self defense requiring that defendant must have believed his life to be in danger, is erroneous, as belief in danger of great bodily harm would be sufficient. State v. Singleton [Kan.] 74 Pac. 243. An instruction as to self defense omitting "imminent" before the word danger, is properly refused. State v. Smith [Or.] 71 Pac. 973.

Aggression by defendant: An instruction qualifying the right of self defense with a charge as to provocation of a difficulty by defendant, is error, where defendant's evidence was that deceased was the aggressor. Drake v. State [Tex. Cr. App.] 77 S. W. 7. An instruction on self defense should contain the qualification that defendant was not the aggressor, where there is evidence justifying the same. Sylvester v. State [Fla.] 85 So. 142. Instruction as to self defense held erroneous as not referring to the commencement of the altercation by defendant. Thayer v. State [Ala.] 35 So. 406. An instruction not qualified by the doctrine of provoking the difficulty should be given where there is evidence that deceased was the aggressor. Vann v. State [Tex. Cr. App.] 77 S. W. 813. Instruction as to the provocation of the difficulty by defendant should define what constitutes provoking the difficulty. Id. An instruction that an assault without intent to kill does not deprive defendant of the right of self defense is improper, where his assault was committed with a deadly weapon. Bassett v. State [Fla.] 33 So. 262. An instruction as to self defense ignoring the question of defendant's fault, is erroneous. Jarvis v. State [Ala.] 34 So. 1025. Instruction held erroneous because ignoring the question of who was the aggressor. Peoples v. State [Miss.] 33 So. 289.

Duty to retreat: An instruction that the burden is on defendant to prove that he had no other means of avoiding danger than by killing in self defense, is proper. State v. Hutto [S. C.] 45 S. E. 13. Instruction as to self defense in altercation with two persons, held not erroneous as requiring defendant to withdraw from the combat with both before he could defend himself. Starr v. State, 160 Ind. 661. An instruction that defendant is not entitled to urge self defense if there was reasonably safe means of escape, is error, since only an absolutely safe means will debar him from his right of self defense. Tompkins v. Com., 25 Ky. L. R. 1254, 77 S. W. 712. An instruction on self defense should require that there be no other apparently safe means of escape. Thacker v. Com., 24 Ky. L. R. 1584, 71 S. W. 931. An instruction that under specified circumstances defendant was not required to retreat to the wall, held correct. State v. Castle, 133 N. C. 769. An instruction that there must appear to be no other safe means of "avoiding" the danger, is not erroneous. Cook v. Com., 24 Ky. L. R. 1731, 72 S. W. 283.

44. An instruction as to right of deceased to eject defendant from his premises is not erroneous because it requires only that defendant "fail" instead of "refuse" to leave on request. Thomas v. Com., 25 Ky. L. R. 201, 74 S. W. 1062. Instruction as to defense of habitation held not erroneous. Benge v. Commonwealth, 24 Ky. L. R. 1466, 71 S. W. 648. An instruction that the existence of a dispute as to ownership of property did not deprive defendant of the right to defend his property, is properly refused, where there was no evidence of any such dispute. Jones v. State [Tex. Cr. App.] 77 S. W. 803.

45. Instruction on self defense only improper where there is evidence of defense of defendant's son. Thacker v. Com., 24 Ky. L. R. 1584, 71 S. W. 931. Instruction as to right of parent to defend his child held correct. Alexander v. State [Ga.] 44 S. E. 851. An instruction referring to the right to defend a relative as self defense is not misleading. State v. Prater, 52 W. Va. 132.

46. Instruction as to right to resist arrest for offense not in officer's presence held not justified by the evidence. State v. Davis, 52 W. Va. 224. Where an officer of another county sought to arrest for a misdemeanor, an instruction as to self defense should set out defendant's right to resist such arrest. Bailey v. Com., 24 Ky. L. R. 1114, 70 S. W. 838. An instruction as to the resistance of arrest is erroneous if it does not require the jury to find that defendant knew or should have known that his arrest was sought by lawful authority. State v. Phillips, 118 Iowa, 660. Instruction that if homicide was committed in the course of a struggle to avoid arrest but without circumstances arousing fear of injury, it is manslaughter, is erroneous. Commonwealth v. Grether, 204 Pa. 203. Instruction as to right of officer to kill to prevent escape held sufficient. Com. v. Carter [Mass.] 66 N. E. 716.

47. Where the theory of defendant is that deceased was accidentally shot by a third person, an instruction open to the interpretation that to acquit defendant, it must appear that such person fired at deceased, is error. Bennett v. State [Tex. Cr. App.] 75 S. W. 314. An instruction that if defendant struck deceased with a pistol which accidentally discharged, he should be acquitted, is erroneous as the offense may be manslaughter. Stewart v. State, 137 Ala. 33. An instruction as to the accidental discharge of a gun raised in self defense, held correct. Lankster v. State [Tex. Cr. App.] 72 S. W. 388. Instruction as to injury caused by police officer firing without intent to kill to attract attention, held erroneous. People v. O'Connor, 82 App. Div. (N. Y.) 55.

48. The court may at the jury's request inform them as to the statutory penalties. State v. Yourex, 30 Wash. 611, 71 Pac. 203. Instruction as to extent of punishment for attempted murder held correct. State v. Mitchell, 170 Mo. 633. Instructions held not to sufficiently present a right of the jury

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(§ 8) *C. Verdict.*—Verdict without caption or title held sufficient.[51] Verdict not naming the defendant held sufficient where there is but one.[52] The verdict must declare the degree.[53] The punishment for murder in the first degree being fixed by statute, the jury need not fix the penalty when they find that degree.[54] A verdict of guilty of assault with a deadly weapon is not sufficient to authorize sentence for assault with a deadly weapon with intent to inflict bodily injury, but is a conviction of simple assault only.[55]

(§ 8) *D. Punishment.*—The punishment for assault with intent to kill is not mitigated by the fact that no injury was in fact inflicted.[56] Evidence of homicide for the purpose of robbery held to justify the death penalty.[57] The recommendation of the jury that defendant should be punished as for a misdemeanor, is not binding on the court.[58]

HUSBAND AND WIFE.[59]

§ 1. Disabilities of Coverture in General; Statutory Relaxations (246).
§ 2. Mutual Duties, Obligations, and Privileges (248).
A. Inherent in the Relationship (248).
B. Contracts or Other Dealings (248).
§ 3. Property Rights Inter Se (251).
A. In General (252).
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D. Estates in Common, Jointly and as an Entirety (254).
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§ 5. Liability for Necessaries (264).
§ 6. Contract Rights and Liabilities of Husband as to Third Persons (265).
§ 7. Contract and Property Rights and Liabilities of Wife as to Third Persons (266).
§ 8. Torts by Husband or Wife or Both (274).
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§ 10. Remedies and Procedure Generally as Affected by Coverture (279).
§ 11. Proceedings to Compel Support of Wife (Civil and Criminal) (283).
§ 12. Crimes and Criminal Responsibility (285).

§ 1. *Disabilities of coverture in general; statutory relaxations.*[60]—The disabilities of coverture have been removed by statute in most states so that married

to recommend life imprisonment. Cohen v. State, 116 Ga. 573. Where the jury do not fix the punishment they should not be informed of the penalties for the various degrees of homicide. Bliss v. State [Wis.] 94 N. W. 325.

49. Erroneous instructions as to murder in the first degree are harmless where defendant was convicted in the second degree. Burrows v. State [Tex. Cr. App.] 72 S. W. 848. Erroneous instructions as to manslaughter are harmless where defendant was convicted of murder. Canada v. Territory [Okl.] 72 Pac. 375. Contradictory instructions as to manslaughter are prejudicial where defendant was convicted of murder in the second degree. State v. Utley, 132 N. C. 1022. Where defendant was convicted of voluntary manslaughter, instructions as to involuntary manslaughter are harmless. Henderson v. Com., 24 Ky. L. R. 1985, 72 S. W. 781. Instructions as to provocation are harmless where there was no evidence of adequate provocation. Jowell v. State [Tex. Cr. App.] 71 S. W. 286. Instructions as to murder in the first degree are harmless where the conviction was in the second degree. White v. State [Tex. Cr. App.] 72 S. W. 173; Downing v. State [Wyo.] 70 Pac. 833. Where the evidence showed clearly murder in the perpetration of robbery, error in instructions as to implied malice is harmless. Johnson v. State [Tex. Cr. App.] 71 S. W. 25. Error in an instruction as to reasonable doubt held harmless where the evidence of guilt was clear. Wilson v. State, 109 Tenn. 167. An instruction not defining a term in the definition of manslaughter is harmless where the conviction was of murder. State v. Schaeffer, 172 Mo. 335. Error in an instruction as to manslaughter in the fourth degree is immaterial where defendant was convicted of murder in the second degree. State v. McMullin, 170 Mo. 608. Failure to define sufficient provocation is harmless whe e the conviction was of manslaughter. Cook v. Com., 24 Ky. L. R. 1731, 72 S. W. 283. Inaccurate instruction as to self defense held harmless where conviction was for manslaughter. Rone v. Com., 24 Ky. L. R. 1174, 70 S. W. 1042. Failure to instruct as to effect of intoxication is harmless where the conviction was of manslaughter. Lanckton v. United States, 18 App. D. C. 348. Instructions as to a degree higher than that of which defendant was convicted, are harmless. State v. Ashcraft, 170 Mo. 409. Failure to instruct as to concert between deceased and another held harmless, verdict and evidence negativing self defense. Thomas v. Com., 25 Ky. L. R. 201, 74 S. W. 1062. Where defendant both shot and struck deceased, instructions as to homicide by striking are not prejudicial though the evidence is that he was dead from the shooting when struck. Burrows v. State [Tex. Cr. App.] 72 S. W. 848.

50. Ignoring self defense. Henry v. People, 198 Ill. 162. Definition of malice. Downing v. State [Wyo.] 70 Pac. 833.

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women may contract, sue, or be sued, especially with regard to their separate property, as if unmarried; however, many restrictions with regard to contract with the husband or as security for his debts still exist. General provisions will be found in the footnote and particular provisions in their proper places in this article.[61]

Contracts of wife with third persons.[62]—Coverture relates to status, hence is

51. Williams v. State [Fla.] 34 So. 279.

52. Roberson v. State [Fla.] 24 So. 294; Williams v. State [Fla.] 34 So. 279.

53. Russell v. State [Neb.] 92 N. W. 751. A verdict of guilty of manslaughter without designating it to be voluntary or involuntary as required by Mills Ann. St. § 1181, is void. Mahany v. People [Colo.] 73 Pac. 26. General verdict of guilty held sufficient. Lowe v. State [Wis.] 96 N. W. 417. A verdict of "murder" on hearing to fix the degree after a plea of guilty, is insufficient. Lancaster v. State [Ark.] 71 S. W. 251.

54. State v. May, 172 Mo. 630. A verdict finding defendant guilty of murder in the first degree and fixing his punishment at death, is sufficient under a statute providing the death penalty for "willful murder." Hocker v. Com., 24 Ky. L. R. 936, 70 S. W. 291. A verdict fixing the penalty at "a term" in the penitentiary without fixing the length thereof, is insufficient. Owens v. State [Miss.] 33 So. 718.

55. State v. Snider [Wash.] 73 Pac. 355.

56. Parker v. State [Neb.] 93 N. W. 1037.

57. Johnson v. State [Tex. Cr. App.] 71 S. W. 25.

58. Daniel v. State [Ga.] 43 S. E. 861; Mack v. State [Ga.] 45 S. E. 603.

59. See Marriage, Divorce, Breach of Marriage Promise. Pauper settlement of married woman, see Paupers. Competency of husband or wife as witness, see Witnesses; confidential communications, see Evidence, Witnesses.

60. Capacity of married woman to make will, see Wills.

61. Power of husband and wife to contract with each other, see post § 2B; of husband to contract with third persons, see post, § 5; rights and liabilities of wife on contracts with third persons, see post, § 6.

General powers of married women. Construction of Married Woman's Act, June 8, 1893 (P. L. 344) as to general powers to contract. Peter Adams Paper Co. v. Cassard, 206 Pa. 179. In California a wife whose husband has deserted her may sue alone. Code Civ. Proc. § 320, subd. 3. Muller v. Hale, 138 Cal. 163, 71 Pac. 81. Under the constitution and statutes of Florida, no change is made in the status of married women, unless they have been made free dealers, and they cannot bind themselves either at law or in equity so as to authorize personal judgment against them. First Nat. Bank v. Hirschkowitz [Fla.] 35 So. 22. The wife's common-law disability to contract is only partially relieved by statute in Nebraska. Farmers' Bank v. Boyd [Neb.] 93 N. W. 676. Limitations will not run against a married woman during coverture in Texas (Crouch v. Crouch [Tex. Civ. App.] 70 S. W. 595; Estes v. Turner [Tex. Civ. App.] 70 S. W. 1007); the Virginia Married Woman's Act of 1900 § 2, giving them power to contract as if single, does not repeal by implication Code, § 2502 (Augusta Nat. Bank v. Beard's Ex'r, 100 Va. 687). Statutes in Louisiana, regulating privileges and disabilities of married women, are "personal," and purely domiciliary in character, and will not operate to the benefit of married women domiciled elsewhere. Marks v. Germania Sav. Bank, 110 La. 659. She may sue in equity to set aside levy and sale of a homestead. Burkhardt v. James Walker & Son [Mich.] 92 N. W. 778.

Contracts between husband and wife. Before 1874 husband and wife could not contract with each other in Illinois. Strayer v. Dickerson, 205 Ill. 257. She may contract with her husband in Missouri. Rev. St. 1899, § 4335. Rice v. Sally [Mo.] 75 S. W. 398. In Iowa she may enter a business partnership with her husband. Code, §§ 3153, 3164. Hoaglin v. Henderson & Co., 119 Iowa, 720. Under Maine St. 1866, c. 52 (Rev. St. c. 61), husband and wife may contract regarding their property. Peaks v. Hutchinson, 96 Me. 530, 59 L. R. A. 279. In Texas she cannot agree to submit property rights of herself and husband to arbitration. Crouch v. Crouch [Tex. Civ. App.] 70 S. W. 595. In Oregon husband and wife cannot contract with each other regarding their dower and curtesy in property. B. & C. Comp., § 5234. Potter v. Potter [Or.] 72 Pac. 702.

62. In Vermont a married woman may contract with any person other than her husband and sue and be sued as to contracts made by him. V. S. § 2644. Buck v. Troy Aqueduct Co. [Vt.] 56 Atl. 285. In Georgia she may contract, obligating herself to render services to be performed by her husband. Orr v. Cooledge, 117 Ga. 195. In Kentucky she may sell her separate or trust estate, her husband joining in the conveyance; Gen. Sts. c. 52, art. 4, § 17 (Johnson v. Mutual Life Ins. Co., 24 Ky. L. R. 668, 69 S. W. 751); or contract concerning her separate estate (Robertson v. Robertson, 24 Ky. L. R. 2020, 72 S. W. 813), and may contract for building of a house on her land without his concurrence [St. § 2128] (Ware v. Long, 24 Ky. L. R. 696, 69 S. W. 797); if in business for herself she may buy land and bind her estate therefor, though her husband disapprove [St. § 2128] (King v. Ballou, 24 Ky. L. R. 1946, 72 S. W. 771). In Michigan she may pledge her property for her husband's debt (Just v. State Sav. Bank [Mich.] 94 N. W. 200), but she cannot contract to pay board for her sister without reference to her separate estate (June v. Labadie [Mich.] 92 N. W. 937). Her deed conveying her common-law estate is valid in Missouri. Moston v. Stow, 91 Mo. App. 554. Acts North Carolina, 1901, p. 859, c. 617, subjecting her property to a lien for improvements, and making liens enforceable before a justice when less than a certain amount, does not change the general law that she is not liable on her contracts and cannot be sued before a justice to charge her separate estate therefor. Harvey v. Johnson, 133 N. C. 352. Registering herself as a free trader during coverture will not

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governed by the law of the domicile not of the place of contract.[63] The contract of a married woman, if valid at place of execution and performance, is valid everywhere, unless her domicile is in a state where the law renders married women incapable of contracting.[64]

§ 2. *Mutual duties, obligations, and privileges. A. Inherent in the relationship.*—It is the husband's duty to support the wife; hence, she may bind him by her purchases of necessaries,[65] and in some states his failure or neglect is a criminal or quasi-criminal act.[66] Within certain limits the matrimonial relations may be the subject of binding mutual agreement.[67]

(§ 2) *B. Contracts or other dealings.*[68]—No common-law right of contract existed between husband and wife; certain statutory rights have been given in the various states but they must only be exercised in the manner prescribed and cannot be enlarged;[69] yet equity will recognize her rights as his creditor or the creditor of a firm of which he is a member and enforce them.[70]

A sale of goods by a husband to a third person and then by such third person to the wife will convey title to her where both bills of sale are given to the wife, though not actually delivered to the third person.[71]

Gifts.—Acts of the husband importing a gift will raise a presumption thereof.[72] The right of a wife to make a gift to her husband will be recognized in

bar her from benefit of an exception preventing the running of limitations against her during coverture. Code, § 1827. Wilkes v. Allen, 131 N. C. 279. Her contract releasing a prior indorser in purchase of a note on which she is accommodation indorser is binding in New Jersey if the consideration is sufficient. Married Woman's Act, § 26 (2 Gen. St. p. 2017). Headley v. Leavitt [N. J. Err. & App.] 55 Atl. 731. A judgment confessed by a wife in Pennsylvania which does not appear on its face to be affected by statutory limitations of her power, is prima facie valid. Act June 8, 1893. Good Hope Bldg. Ass'n v. Amweg, 22 Pa. Super. Ct. 143. Wisconsin Rev. St. 1898, §§ 2342, 2343, removing common-law disabilities of married women, must be liberally construed; she may acquire property of any kind in any way, and dispose of it as though unmarried. Kriz v. Peege [Wis.] 95 N. W. 108. It is essential to her contract that she must have separate property and intends to charge it; and her capacity to bind herself for a debt for property acquired by her does not depend upon the purposes to which she intends to devote the property, or whether she has a separate property or business. Id. Even without separate property she may purchase land from a stranger and assume the payment of a mortgage therefor. Citizens' Loan & Trust Co. v. Witte [Wis.] 92 N. W. 443.

63. First Nat. Bank v. Shaw, 109 Tenn. 237, 59 L. R. A. 498.

See exhaustive note to Union Nat. Bank v. Chapman, 169 N. Y. 538, 57 L. R. A. 513.

64. Young v. Hart [Va.] 44 S. E. 703. Coverture is a defense in an action on a note in Tennessee, though the contract of another state, valid and enforceable there. First Nat. Bank v. Shaw, 109 Tenn. 237, 59 L. R. A. 498.

65. See post, § 5. Remedies and procedure for recovery of necessaries, see post, § 9.

66. See post, § 10.

67. See post, this section, "Agreements for separation."

68. Contracts in general.—1 Ball. Ann. Codes & Sts. § 4492 (Pierce's Code, § 3883), providing agreements between spouses for separate property in survivor of the community for life, did not repeal L. 1854, p. 314, § 11, 1 Ball. Ann. Codes & Sts., § 4601, as to construction of wills. McKnight v. McDonald [Wash.] 74 Pac. 1060.

Sufficiency of evidence to show a contract between husband and wife, whereby she was to take stock of a corporation of which she was an officer in part payment of land sold the corporation, through him as its agent. Harter v. Capital City Brewing Co., 64 N. J. Eq. 155.

69. Fritz v. Fernandez [Fla.] 34 So. 315. The wife may contract with her husband in Missouri, and such contract is enforceable at law. Rev. St. 1899, § 4335. Rice v. Sally [Mo.] 75 S. W. 398. She cannot agree to submit to arbitrators the rights of herself and husband to property in Texas. Crouch v. Crouch [Tex. Civ. App.] 70 S. W. 595. Husband and wife may contract in Maine that a building put up by him on her land shall remain his property. St. 1866, c. 52 (Rev. St. c. 61), giving married women the right of separate contract. Peaks v. Hutchinson, 96 Me. 530, 59 L. R. A. 279.

70. Fritz v. Fernandez [Fla.] 34 So. 315.

71. Kulin v. Heller [N. J. Law] 54 Atl. 519.

72. Money or property delivered to a wife by her husband is presumed to be a gift. Horner v. Huffman, 52 W. Va. 40. Deposit of money by a husband to the credit of his wife, delivery of the bank book to her, and her acceptance by drawing checks to the account, amounts to an absolute and irrevocable gift. In re Holmes, 79 App. Div. [N. Y.] 264. It is presumed that a husband intended a gift to his wife where he pays the price of land and takes title in her name. Solomon v. Solomon [Neb.] 92 N. W. 124. Sufficiency of facts to show that money deposited by a husband in a bank was an executed gift to his wife. Slee v. Kings County Sav. Inst., 78 App. Div. [N. Y.] 534, 12 Ann. Cas. 351.

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equity, where fair and reasonable, and free from fraud, duress, or undue influence,[73] the burden of showing which is on the husband, or those claiming under him.[74] His gift to her of the proceeds of her property makes them her separate property.[75] A gift by a husband to his wife without knowledge of her previous adultery may be revoked by him on discovery of her misconduct; or when she subsequently elopes in execution of her plan formed when the gift was made.[76]

Antenuptial contracts between husband and wife[77] must be founded on a sufficient consideration.[78] Such a contract regarding her property is rescinded pro tanto by their joint conveyance of part of the property.[79] A limitation of support of the wife to widowhood only is not a condition subsequent, rendering an antenuptial contract valid as a jointure.[80] Such an agreement, providing that at the husband's death the wife should receive as her full dower a child's part, sharing with children of a former wife, contemplated an interest accruing only on his death and conferred an equitable jointure which was forfeited under a statute providing that her voluntary desertion and subsequent adultery shall bar her jointure or dower, or if it be deemed that the statute applies only to legal jointures on general equitable principles, her dower right terminated under other statutes forfeiting the rights of the guilty party in case of divorce.[81]

Agreements for separation and separate support.[82]—A separation agreement is void as against public policy when made in contemplation of future separation.[83] If the agreement is partially valid because of execution, the wife generally must

73. It must be consummated by delivery of the object, and a loan by her to her husband or a firm of which he is a member, notes being given in return, which she keeps in her possession until her death, does not amount to a gift of the notes to the husband and they are assets of her estate. Fritz v. Fernandez [Fla.] 34 So. 315.

74. Hovorka v. Havlik [Neb.] 93 N. W. 990.

75. Dority v. Dority [Tex.] 71 S. W. 950.

76. Evans v. Evans [Ga.] 45 S. E. 612.

77. Construction of antenuptial contract as to rights of wife in estate of husband under his will, made in view of the contract, where she took out letters testamentary. Bowman v. Knorr, 206 Pa. 270. Where a husband and wife made an antenuptial contract in order to secure to her full control of her property for life and the right to dispose of it at death, agreeing that she should hold it as if single and that at her death, all remaining should descend to the children she should then have, according to her share, she could incumber or sell the property, and the remainder at her death was subject to her debts. Stevenson v. Renardet [Miss.] 35 So. 576.

78. Sufficiency of consideration for antenuptial contract to bar the dower rights of the wife in the land of the husband. Rev. St. 1899, § 5246. Moran v. Stewart, 173 Mo. 207. A debt for money advanced before marriage to pay a loan on land of one of the parties, secured by mortgage executed on the land after marriage, is extinguished by marriage so that the mortgage, as against the owner of the land, is void for want of consideration. Dillon v. Dillon, 24 Ky. L. R. 781, 69 S. W. 1099. An antenuptial contract, made when title to the wife's estate did not vest in the husband on marriage and giving the wife full ownership and control of her separate property and barring her from claim on his estate as dower or otherwise, is void for want of consideration, and will not bar her statutory allowance as widow for support, nor her additional allowance out of his personal estate given by Rev. St. 1899, §§ 105-107, 109. Coulter v. Lyda [Mo. App.] 76 S. W. 720.

79. It may be rescinded at their joint pleasure. Stevenson v. Renardet [Miss.] 35 So. 576.

80. It operates only on an estate already vested. Moran v. Stewart, 173 Mo. 207.

81. Rev. St. 1899, §§ 2950-2952, construed in connection with §§ 2953, 2929 and 2947. Leavy v. Cook, 171 Mo. 292.

82. The validity of contracts made in effecting a compromise or settlement of a divorce suit is exhaustively discussed and the authorities collected in a note to Oppenheimer v. Collins [Wis.] 115 Wis. 283, 60 L. R. A. 406. An agreement between husband and wife after his abandonment of her not amounting to a deed of separation, made at her suggestion, binding him to pay her a certain sum each month until revocation of the agreement by mutual consent, will prevent a divorce from bed and board by her for desertion after breach of the agreement by him, where payments were made thereunder for over seven years. Barclay v. Barclay [Md.] 56 Atl. 804.

83. Contract between a husband and wife and a third person, whereby the latter was to indemnify the husband against debts of the wife, and husband and wife were to separate during the remainder of their lives, reciting that before such separation he had agreed to pay her during life, a certain amount to support herself and children, and that in consideration thereof he would consent to the consideration and would not interfere with her or disturb any one harboring her. Edic v. Horn, 42 Misc. [N. Y.] 26.

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return consideration received before asking rescission,[84] unless fraud appears and she is unable to repay money given her to induce her agreement.[85] An agreement to separate, whereby the husband was to pay the wife a certain amount for support of herself and children, she to have custody of them and defendant to visit them once a week, was violated so as to prevent her recovery by her taking the children to Europe for six months.[86]

Agreements for resumption of marital relations.[87]—A contract whereby husband and wife agree to live together again and that if he shall desert, or fail to support her, she shall become vested with dower interest in his realty, is in harmony with public policy, and possesses mutuality, though if she thereafter leaves him he is remediless to compel a resumption of the relation.[88] It does not violate a statute preventing her contract for dissolution of marriage or to relieve him from support. Her discontinuance of an action for separation in which she might have had temporary or permanent alimony and counsel fees is sufficient consideration. She takes a life interest so that her executor may recover income after breach by the husband only until her death. Her failure to discharge her marital obligations will prevent her recovery; and, in any event, she has no right of action for breach as against his co-tenant.[89]

Conveyances; mortgages; contracts to convey.[90]—Husband and wife cannot contract with each other as to dower and curtesy rights in Oregon;[91] otherwise in Pennsylvania.[92] Transactions between them must have a sufficient consideration,[93]

84. An agreement of separation whereby a husband purchases his wife's interest in lands constituting their property and pays her consideration therefor is valid to the extent that it is executed so as to prevent rescission by the wife without a return of the consideration, though the agreement is void as relating to the interest each had in the property of the other, and though it was rescinded by a resumption of marital relations. Baird v. Connell [Iowa] 96 N. W. 863.

85. Where a wife sues to set aside a contract for separation and settlement of property rights between herself and husband, alleging that the contract was procured by fraud of the husband and his agent in representing that the husband intended to live with and support the wife, and that the contract was for the purpose of reconciliation, a demurrer to the bill will be overruled, where it appears therefrom that she is not able to repay the money given her by her husband to induce her to execute the contract. Cheuvront v. Cheuvront [W. Va.] 46 S. E. 233.

86. Muth v. Wuest, 76 App. Div. [N. Y.] 332.

87. The validity of such agreements is generally upheld. See cases hereunder and also exhaustive note to Oppenheimer v. Collins, 115 Wis. 283, 60 L. R. A. 406, 409.

88. If she actually resumed, he cannot avoid specific performance. Moayon v. Moayon, 24 Ky. L. R. 1641, 60 L. R. A. 415, 72 S. W. 33.

89. Domestic Relations Law, § 21 (Laws 1896, p. 220, c. 272). Sommer v. Sommer, 84 N. Y. Supp. 444.

90. **Sufficiency of evidence** to show that a deed from husband to wife absolute on its face was intended as a mortgage. In re Holmes, 79 App. Div. [N. Y.] 264. Of evidence to show that a moral obligation by a husband to repay moneys received from his wife, before their power to contract with respect to it was recognized by statute, was regarded by him as consideration for a deed to her in a suit by her to correct the description in the deed. Strayer v. Dickerson, 205 Ill. 257. To set aside a conveyance by a husband to his wife in pursuance of an agreement for permanent separation on refusal of the wife to give a bond with sureties to protect him against her future support. Holihan v. Holihan, 79 App. Div. [N. Y.] 475.

91. Execution of papers by him for the purpose of making land owned in fee by him exclusively his and that owned by her exclusively hers. B. & C. Comp. § 5234. Potter v. Potter [Or.] 72 Pac. 702.

92. A postnuptial agreement between husband and wife, releasing her inchoate right of dower for an adequate consideration, will bind her, though there is no intention to suspend the marital relation. Act June 8, 1893; Pub. L. 344. In re Fennell's Estate [Pa.] 56 Atl. 875.

93. Equity will not give relief in the absence of showing of valuable consideration in a suit by a wife to correct the description in a deed from her husband. Strayer v. Dickerson, 205 Ill. 257. Love and affection will support a deed from husband to wife if rights of third persons do not intervene. Paulus v. Reed [Iowa] 96 N. W. 757. Where a couple were married in 1849 and moneys received by him from her before 1861 having been his absolute property and that received from her between 1861 and 1874 not having been the subject of the contract between them, since their power to contract before 1874 was not recognized by statute, the receipt of the latter money created no suspended legal obligation to repay, out of which a moral obligation sufficient as a consideration for a deed to the wife could arise. Strayer v. Dickerson, 205 Ill. 257. A deed of land by a hus-

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are voidable for fraud[94] or undue influence,[95] and may be equitably enforced where reasonable and good at law, if made by him with a trustee for her.[96] A conveyance ordinarily passes title into the wife's separate estate.[97] Where the husband's common-law rights had not been abrogated, a wife cannot recover from his heirs, rents and profits though he had held under a mortgage from her; nor can they be allowed for taxes paid or improvements.[98] An agreement for the husband to receive all rents and profits from an entirety in consideration of paying the wife a certain amount per month, will not prevent partition by him where he seeks no relief against such agreement and a decree of divorce had changed their estate to a tenancy in common.[99] An original contract between a husband and wife for transfer of his lands to her, on which she was to borrow money and pay a note of his, was not within the statute of frauds whether or not he remained liable on the note.[1] A right to cancel an agreement fixing property rights may be so waived by acquiescence in an unwarranted exercise of possession as to bind heirs.[2]

A contract under which, on payment of a certain sum, the husband agrees to convey land to his wife on her execution of a paper releasing her dower interest in his land and his release of curtesy in her land, is entire, so that it cannot be specifically enforced as to the first part because of the invalidity of the latter,[3] but he cannot complain in such a suit that there is no mutuality of remedy whereby he might have compelled her to live with him according to her promise if she had broken it.[4]

§ 3. *Property rights inter se.*[5]—This section is confined to the property rights of husband and wife in states under the common law or statutory modifications thereof; rights in states having the community system will be found in the succeeding section.[6]

band to his wife, in which she joined, providing that the property conveyed should be in lieu of her interest as widow in his land, an instrument expressly referring to the deed executed between the two, releasing the interest of each as survivor in the other's land, should be construed as one instrument, so that there is consideration for his agreement. James v. Hanks, 202 Ill. 114. Where husband and wife are living apart because of grounds of divorce in her favor, and she has drawn a petition for divorce, an agreement by him to convey property to her children is sufficiently supported as to consideration by her forgiveness and return to live with him. Moayon v. Moayon, 24 Ky. L. R. 1641, 72 S. W. 33, 60 L. R. A. 415. Where the consideration for a deed from husband to wife is questioned, it is presumed that it was a gift or advancement and the grantee has the burden of showing otherwise. Strayer v. Dickerson, 205 Ill. 257.

94. The husband must show, in a suit against him by his wife to cancel a contract or deed between them because of fraud of himself and agent in its procurement, that she was fully informed as to the effect of the transaction and its fairness. Cheuvront v. Cheuvront [W. Va.] 46 S. E. 233.

95. In a suit between the guardian of an old husband mentally weak and illiterate, and the father of his wife, who claimed an interest in lands conveyed to her by her husband under the statute of descent, an implied trust will be declared in favor of the husband preventing the father from claiming any equities in the property, where it appears that the wife was a young, strong woman with great influence over her husband and that she controlled the property after its conveyance, in such a manner as to deprive him of all interest or benefit. Paulus v. Reed [Iowa] 96 N. W. 757.

96. Moayon v. Moayon, 24 Ky. L. R. 1641, 72 S. W. 33, 60 L. R. A. 415.

97. A conveyance of land from husband to wife in consideration of an antenuptial contract in the usual form, and reciting a consideration of love and affection, passes title to the wife and vests a separate estate in her, though no words therein show an intent to create such separate estate. Barnum v. Le Master [Tenn.] 75 S. W. 1045.

98. He was entitled to possession and rents and profits. Dillon v. Dillon, 24 Ky. L. R. 781, 69 S. W. 1099.

99. Buttlar v. Buttlar [N. J. Eq.] 56 Atl. 722.

1. McIntire v. Schiffer [Colo.] 72 Pac. 1056.

2. Husband, after her suit to cancel, allowed his wife to have the use of property to which she was not entitled under an agreement releasing their interest of survivorship as to each other. He thereby waived his right to cancel such agreement and to claim any interest in her property, though surviving her, so that his action will bind his heirs. James v. Hanks, 202 Ill. 114.

3. Potter v. Potter [Or.] 72 Pac. 702.

4. Moayon v. Moayon, 24 Ky. L. R. 1641, 72 S. W. 33, 60 L. R. A. 415.

5. Particular rights, see Dower, Curtesy, Homestead, Exemptions, Estates of Decedents.

6. Homestead rights, see Homestead. Con-

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(§ 3) *A. In general.*—Statutes intended to free the ownership of husband or wife from marital rights of the other do not prohibit them from acquiring adverse claims.[7] In the absence of evidence,[8] it is presumed that gains made by husband and wife in pursuing a business are his.[9]

(§ 3) *B. Of husband in wife's property.*—At common law, now largely abrogated, he might reduce all his wife's property to possession taking personalty absolutely,[10] and by the curtesy he held a life estate in her lands of inheritance.[11] Though he may reduce her choses in action to possession, he is not required to do so, and may allow them to remain so as to be impressed with the character of her separate estate.[12] Estates by curtesy have been abolished in some jurisdictions,[13] but laws changing his rights do not retroact on his vested rights.[14] His right to possession of her property will be barred by limitations if not asserted,[15] but the

struction of antenuptial contracts between husband and wife as affecting their property rights, see ante, § 2. Assignment of life or accident policy by husband or wife, see Insurance.

7. Code, § 3154, providing that when property is owned by the husband or wife, the other has no interest which can be the subject of a contract between them nor which will make the same liable for contracts or liabilities of the one not the owner, relates to the interest which husband or wife has in lands of the other because of marital relations, and does not apply to interests either may have in land of the other resulting from contracts with third persons. Baird v. Connell [Iowa] 96 N. W. 863.

8. Sufficiency of evidence to show that stock on a farm belonged to the husband. Van Horn v. Nelson [Iowa] 97 N. W. 1105. Evidence in an action by a husband for damages to cotton grown and ginned on his wife's land, that he claimed it because of an oral understanding between them, will not show title in him. Code 1892, § 2294. Williams v. Yazoo, etc., R. Co. [Miss.] 35 So. 169.

9. Profits from keeping boarders by husband and wife, the wife taking charge of the house, belong to the husband in New York, regardless of statutes concerning married women's estates. Briggs v. Devoe, 84 N. Y. Supp. 1063. See post, § 4, as to the "Community" system.

10. Unless land of the wife was acquired by gift, bequest, inheritance or purchased with separate means, the husband is entitled to possession. He may sue in ejectment without joining her. Rev. St. 1899, § 4340. Black v. Slaton, 92 Mo. App. 662. In Rhode Island he is entitled to rents and profits of her realty to his own use until she terminates such right as provided by law. Digest 1844, p. 270, §§ 1, 7. Cranston v. Cranston [R. I.] 53 Atl. 44. Where a married woman buys a home on her own account and keeps boarders to earn money for herself, her earnings are not subject to her husband's debts. Rev. St. 1899, § 4340. Furth v. March [Mo. App.] 74 S. W. 147. Proceeds of her property, sold after marriage in Kansas, are held by him in trust for her use and benefit, her property rights remaining the same, though the proceeds are taken by him into another state and are subject to its laws. Gen. St. Kan. 1889, § 3752. Brown v. Daugherty, 120 Fed. 526.

11. See Curtesy, 1 Curr. Law, p. 830.

Curtesy in a wife's separate estate vests for the first time in her husband at her death. McNeeley v. South Penn Oil Co., 52 W. Va. 616.

12. Hayner & Co. v. McKee, 24 Ky. L. R. 1871, 72 S. W. 347.

13. He cannot sue after her death to redeem her lands from a sale during her lifetime for a ditch assessment. Burns' Rev. St. 1901, § 2639, abolished estates by curtesy and no later statute gives him any inchoate interest in her lands alienated voluntarily or by judicial sales before her death. Turner v. Heinberg, 30 Ind. App. 615. The wife holds her real estate in Maryland by a fixed, vested title, subject merely to her husband's expectant interest and not to his right of possession. Code, art. 45. Harris v. Whiteley [Md.] 56 Atl. 823.

It exists in Missouri. Propes v. Propes, 171 Mo. 407.

14. The husband's right to possession of his wife's realty, before passage of an act giving her the right to sue for such possession, arose from the marital relation and was vested so that it could not be taken away by the married woman's act. Act 1889 (Rev. St. 1899, § 4340). Vanata v. Johnson, 170 Mo. 269. The statute providing that realty of a wife before marriage shall be absolutely her separate property is not retroactive so as to take away the husband's vested estate previously acquired by marriage, and his right to rents and profits until she has terminated such right as provided by law. Gen. Sts. c. 152, construed in connection with Dig. 1844, p. 270. Cranston v. Cranston [R. I.] 53 Atl. 44. The common law as to estates by entirety in personal property has been changed as to married women's property, so as to take away the husband's common-law right to the wife's personalty and choses in action, except as to such property as to which he had a vested right to reduce to possession before passage of the Married Woman's Act. Johnston v. Johnston, 173 Mo. 91.

Acts 1898, p. 1083, c. 457 construed with Code, art. 45, § 7, providing that a husband by virtue of marriage shall acquire a one-third life estate in his wife's land, will not operate retroactively as to such lands to disturb her vested rights under a former statute giving her a vested title in her realty subject to his expectant life interest, which became consummated only on her death intestate and his survival. Harris v. Whiteley [Md.] 56 Atl. 823.

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wife's possession is not adverse to a claim which he may have against her land.[16] Her rights in property are not changed by his taking it into another state.[17] If they are living together, he can, it seems, obtain no title to her land by adverse possession.[18]

His rights may be terminated by judicial proceedings if he is a party,[19] as by divorce,[20] or statutory remedies provided for the event of separation or neglect.[21]

The effect of appropriation of her money,[22] or power to draw from her bank account[23] is to create ownership or not according to the intent and the circumstances. Payments benefiting her estate do not of themselves raise equities on his behalf.[24] Purchase by the husband of a mortgage given by the wife on her separate estate will not merge it in any legal estate held by him when it was given.[25] A deed by a husband made while he had the right of possession, purporting to convey the wife's land constitutes color of title though he had not reduced it to possession.[26] He cannot claim a homestead by right of survivorship as against her creditors in land devised to him by her.[27]

(§ 3) *C. Of wife in husband's property.*—Apart from contract or conveyance, she has only such rights as dower in his realty.[28] A widow paying for improvements without misrepresentations or undue influence under the idea that she was entitled to dower in an estate per autre vie, owned by her husband, cannot recover therefor in equity.[29] Desertion by a husband, and his leaving the state, will not transfer title to his exempt property to his wife nor deprive him of the right to create a lien thereon; nor will an appraisement after attachment by his

15. Limitations will run against the right of a husband to the possession of his wife's realty, the right existing before Act 1889 (Rev. Sts. 1899, § 4340), giving her a right to sue for possession. Vanata v. Johnson, 170 Mo. 269. Where a guardian's possession of his ward's choses in action was transferred to her husband so that he could maintain an action to recover them or their value if converted, limitations will run against him as to an action on the guardian's bond from the date of marriage which occurred in 1865. Fowler v. McLaughlin, 131 N. C. 209.

16. Where he buys a mortgage by her on her separate estate, no adverse possession in her favor will cause limitations to run during their possession and enjoyment of the profits of the estate in common, where she does not deny his rights under the mortgage. Skinner v. Hale [Conn.] 56 Atl. 524.

17. Brown v. Daugherty, 120 Fed. 526.

18. Hovorka v. Havlik [Neb.] 93 N. W. 990.

19. Where he did not join in a mortgage of her land and was not joined in an action for foreclosure, the judgment did not bar his rights. Deusch v. Questa, 25 Ky. L. R. 707, 76 S. W. 329.

20. Separate property occupied as a homestead during marriage. Cizek v. Cizek [Neb.] 96 N. W. 657.

21. In Missouri if he has compelled her to live apart from him by ill usage, she may have decreed to her sole use and benefit her lands and all rents against her husband from commencement of suit. Rev. St. 1739, § 3292. Propes v. Propes, 171 Mo. 407.

22. Mere receipt and appropriation of money received from estates of her deceased relatives will not make him her debtor unless he has promised to repay or secure it. Downs v. Miller, 95 Md. 602.

23. That she gave him authority to draw against her bank account while she was in feeble health and living at a considerable distance will not constitute them owners in common of the fund. In re Holmes, 79 App. Div. [N. Y.] 264.

24. A lien on land conveyed to his wife to the extent of the purchase money paid by the husband cannot be established for his benefit, where he had received rent and money from the wife, sufficient to repay such purchase money. Clay v. Clay's Guardian, 24 Ky. L. R. 2016, 72 S. W. 810. That he paid the debt alone after joinder in a mortgage of land of which she held the legal title will give him and his heirs no right in the land as against her. Joyner v. Sugg, 132 N. C. 580. Where a married woman and others, holding land in common as heirs, made partition deeds, she and her husband receiving more than her share and executing a note to another heir for the surplus, on which he made a payment, he had no interest in the land, but must be considered as making the payment as her surety with a right to credit therefor with interest against her. Propes v. Propes, 171 Mo. 407.

25. Skinner v. Hale [Conn.] 56 Atl. 524.

26. Act Dec. 13, 1866, p. 146. Street v. Collier [Ga.] 45 S. E. 294.

27. He had taken under the will. Dearing v. Moran, 25 Ky. L. R. 1545, 78 S. W. 217.

28. See Dower; Homestead (statutory rights of survivorship or upon desertion). These can be barred only by her joinder in or acknowledgment of a conveyance. See Acknowledgments; Dower; Homestead.

29. Olney v. Weaver, 24 R. I. 408.

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debtor, filing of her inventory and claim of exemptions, and dismissal of the attachment, have that effect.[30] Conveyances by him to defraud her may be set aside by her in a proper case.[31] The husband's purchase of a mortgage given by his wife on her sole property does not merge in her estate,[32] nor has she any but contract or statutory rights in his personalty.[33] The wife must join in the execution of a chattel mortgage on chattels exempt from execution or no lien follows,[34] and the rule applies to exempt personalty belonging to the head of the family.[35] Money given by an insolvent to his wife used by her in good faith for living expenses before he was adjudged a bankrupt, and only such as was reasonably necessary to support the family for three months, cannot be recovered by the trustee in bankruptcy.[36]

(§ 3) *D. Estates in common, jointly and as an entirety.*—In a tenancy by entirety, the husband and wife hold as one person or unity;[37] hence, a husband cannot by his sole deed bar his wife's interest in an entirety,[38] nor is it subject to sale under execution against one of the spouses.[39] A tenancy by entirety in personalty may exist where such estates are recognized and the husband's common-law right to his wife's goods is abrogated.[40] They have generally been abolished by statute,[41] but such a statute is not retroactive.[42] A constitutional provision that property of a married woman shall be her separate estate, to be disposed of by her as sole, will not prevent creation of an estate by entirety.[43] A title taken in

30. Farmers' & Merchants' Bank v. Hoffman [Neb.] 96 N. W. 1044. That a third person, with knowledge of the facts, took a chattel mortgage and bill of sale on the property from the husband to secure a pre-existing debt and an additional loan made at the time, was not per se a fraud on the wife. Id.

31. A deed from husband to son, to defraud his wife of dower rights in certain property, is binding against every one except his wife, where he participated in the fraud. Willis v. Robertson [Iowa] 96 N. W. 900. Sufficiency of facts to show fraud or collusion between husband and daughters to enable his widow to set aside deeds of his property to his daughters as fraudulent against her. Phillips v. Phillips, 30 Colo. 516, 71 Pac. 363. Where a son receiving a conveyance of land from his father paid the father's wife for signing the deed, she could not set the deed aside after her husband's death and recover her distributive share of the land because the deed was in fraud of her rights in his property, the consideration received by her from the grantee being in fact property of her husband. Willis v. Robertson [Iowa] 96 N. W. 900.

32. Skinner v. Hale [Conn.] 56 Atl. 524.

33. See ante, § 2B; Exemptions (right of wife).

34. Act Feb. 16, 1899. Kindall v. Lincoln Hardware & Imp. Co. [Idaho] 70 Pac. 1056. The signature of the wife to such instrument must be witnessed according to statute. Rev. Sts. 1898, § 2313. Lashua v. Myhre [Wis.] 93 N. W. 811.

35. Alexander v. Logan, 65 Kan. 505, 70 Pac. 339.

36. Gray v. Brunold [Cal.] 74 Pac. 303.

37. Conveyance to husband and wife by limitation in the granting clause to "their heirs and assigns forever," and in the habendum clause to them "their heirs and assigns to and for their sole use and benefit forever," carries an estate by entirety; the Married Woman's Act has not abolished the common-law estate by entirety. Laughran v. Lemmon, 19 App. D. C. 141. Deed in friendly partition defective as to wife's acknowledgment as making husband and wife tenants by entirety. Snyder v. Elliott, 171 Mo. 362.

38. St. 1885, c. 237, declared conveyances to husband and wife as creating estates in common, but prior to that time such conveyances were expressly excepted from statutes abolishing joint tenancies and at common law created an estate in entirety. Pease v. Inhabitants of Whitman, 182 Mass. 363.

39. An estate by entirety was created. Ray v. Long, 132 N. C. 891.

40. Johnston v. Johnston, 173 Mo. 91.

41. St. 1885, c. 237. Pease v. Inhabitants of Whitman, 182 Mass. 363. The abolition of survivorship in estate by entirety by act July 1, 1850, in Virginia, § 18, c. 116, Code of 1849, was continued in the West Virginia Code of 1868, c. 71, § 18. McNeeley v. South Penn. Oil Co., 52 W. Va. 616. Conveyance of land to husband and wife after April 1, 1869, in West Virginia, created a joint tenancy, making her interest a separate estate, and not an estate by entirety. The effect of Code, § 18, c. 71, abolishing survivorship in estate by entirety, and c. 66, Code 1868, relating to separate estates of married women, is to abolish the estate by entirety and give curtesy to the husband in her half interest after her death, but does not entitle him to sole possession during coverture. Id. Husband and wife may hold property as co-tenants in California. Civ. Code, § 161. Wagoner v. Silva, 139 Cal. 559.

42. Her right as tenant by entirety is not changed by a statute, after conveyance to herself and husband, changing such estates to tenancies in common. Pease v. Inhabitants of Whitman, 182 Mass. 363.

43. Ray v. Long, 132 N. C. 891.

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the name of husband and wife on a consideration of which each gave part is joint and not entire,[44] unless in some states where the parts were equal.[45]

Possession of a purchaser under the husband's executory contract of sale of land owned in joint tenancy by a husband and wife is not adverse to the latter.[46]

(§ 3) *E. Wife's separate property.*[47]—Abolition by statute of the distinction between the general and separate estates of a married woman is retroactive where it merely enlarges her powers and does not affect the title,[48] and the Married Women's Act does not necessarily free her separate estate from a trust for her benefit.[49] Statutes have generally extended the right to property coming to the wife during marriage from various sources. Cases are cited below.[50] The separate estate is free from the husband's claims, thus he cannot

44. An investment by him of part of her separate estate with his own money in a note secured by deed of trust on realty, payable to them jointly, with her knowledge and consent, will not constitute an estate by entirety, with right of survivorship in the husband, but he is entitled to a proportionate share. Johnston v. Johnston, 173 Mo. 91.

45. Land purchased by husband and wife, each providing half of the purchase money, becomes an estate by entirety and not a joint estate in North Carolina. Ray v. Long, 132 N. C. 891.

46. McNeeley v. South Penn Oil Co., 52 W. Va. 616.

47. Charges on and conveyances of separate estate, see post, § 6.

48. Act 1894. Morrison v. Morrison, 24 Ky. L. R. 786, 69 S. W. 1102.

49. Married Women's Act (Laws 1886, p. 146) did not extinguish the power of sale in a deed previously executed, conveying a life estate to a trustee for the benefit of a married woman, with power to the trustee to sell the fee with her consent and for her benefit, where the instrument showed the grantor's intent to keep the power alive for her benefit, to be exercised in her discretion and that of the trustee. Heath v. Miller, 117 Ga. 854.

50. Contributions given a wife on the birth of her children (Stats. §§ 2127, 2128). Lyon v. Lyon, 24 Ky. L. R. 2100, 72 S. W. 1102. Merchandise bought by a married woman carrying on business in her own name. First Nat. Bank v. Hirschkowitz [Fla.] 35 So. 22. Her interest under a deed to herself and husband jointly in Wisconsin (She may mortgage it for the purchase price. Rev. Sts. 1878, § 2340, amending Rev. Sts. 1858, c. 95, § 1, Rev. Sts. 1878, § 2342, amending Rev. Sts. 1858, c. 95, § 3). Citizens' Loan & Trust Co. v. Witte, 116 Wis. 60. Real estate bought by her, title being taken in her name, with the income from a business accruing after marriage, where the business was hers before marriage and the proceeds were handled by her as her own after marriage, constitute her separate property free from claims of her husband's creditors. Carson v. Carson, 204 Pa. 466.

A note executed to a feme sole will not become void on her marriage with the maker; she retains all rights respecting it except the right to sue, and may validly transfer it for collection. V. S. §§ 2644-2647. Spencer v. Stockwell [Vt.] 56 Atl. 661. An insurance policy on any life for the benefit of a married woman vests a contingent interest in the proceeds in her as her separate property beyond control of her husband or reach of any creditors, where no restrictions are made as to who shall become the beneficiary in case of her failure to survive. (Rev. Sts. 1898, § 2347). Ellison v. Straw, 116 Wis. 207. Where money received from a sale of his wife's property and business in her own name is invested by the husband in other property in her name, and afterward reinvested in a farm, title being taken in her name, the proceeds of the farm are the property of the wife on sale, though received by him, where she never gave him written authority to dispose of her property (Rev. St. 1889, § 6869). Brown v. Daugherty, 120 Fed. 526. Where a husband became owner of a note payable to bearer, as heir of an estate divided without administration, and transferred the note to his wife as collateral for an old debt and a new loan beyond its face, and she was not paid but held the note in her exclusive possession and he was not a party to the note or bound thereon, she was the lawful holder. Buck v. Troy Aqueduct Co. [Vt.] 56 Atl. 285. A defense cannot be made in an action by a married woman in Indiana on a note given her in Illinois for money acquired by her while living there with her husband that under the common law presumed to be in force in the latter state, such money was his property for which he could not sue without allegations to that effect, since it is presumed under the statute giving the wife power to sue alone concerning her separate property that the note was her separate property. Winklebleck v. Winklebleck [Ind.] 67 N. E. 451. That a wife had a small bank account and purchased a small business establishment and ran the business together with her husband, and that her husband was successful in his business so that their deposits to their joint account were large and that she added thereto certain sums received by her from outside sources, and that he later placed property in her hands to hinder creditors, will not support her claim after divorce that she was the equitable owner of all of a valuable estate held by them thereafter as tenants in common on the ground that it was purchased with funds she had at time of marriage, together with funds afterward received by her from her parent's estate. Buttlar v. Buttlar [N. J. Eq.] 56 Atl. 722. Where a married woman owns separate property under the statute and is permitted to manage and control it by her husband, and it does not appear that he exercised

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set off support and necessaries furnished as against liability to account for her separate property.[51] His creditors have no claim whatever on her separate property,[52] even though his money went into it unless he defrauds them,[53] or it would be a fraud to deny their claims.[54] It is not lost by mere failure to intervene in a proceeding against it as his.[55]

The wife must prove her separate property not only by payment but also by showing the source of the money,[56] but the same amount and kind of evidence will avail as would to establish other ownership.[57] A trust is not implied against money

any improper influence over her in its disposal or management, and she loans money to him or to a firm of which he is a member, disclaiming all interest in the business, except that of creditor of the husband or firm, her relations being distinctly understood between them, and notes are given to her or to a trustee for her for such loan, and she dies, leaving a will naming an executor, and after her death the notes are delivered to the executor by the bank in which she deposited them, a decree cannot be rendered on a bill filed by the executor, declaring the business and property in which the loan had been invested to be her business and property. Fritz v. Fernandez [Fla.] 34 So. 315. Where board is furnished in a household, it is presumed, in the absence of agreement or understanding otherwise, that the husband is to receive compensation therefor; and where it appears that a mother furnished support to a daughter after the latter had separated from her husband and was living with the mother in order that the latter may collect from the husband, it must be shown that the board was furnished out of her own estate or that her husband supplied it under an agreement that she was to receive compensation as her own money. Cory v. Cook, 24 R. I. 421. Where certain money was regarded as belonging to the husband when a separation agreement was made by them, unless mistake or fraud occurs at the time, the wife cannot afterward claim such money as her property because received by the husband as proceeds from land conveyed to her formally by him in fraud of his creditors. Baird v. Connell [Iowa] 96 N. W. 863. Acts 1884, p. 119, No. 140, giving a married woman the right to hold separate personal property acquired before or during coverture, excepting property acquired by her personal industry or gift from her husband, does not impliedly prohibit her from holding personal property given her by him, but leaves her rights therein as they were under the common law, whereby she could hold personalty coming as a gift from her husband as against creditors of the husband subsequent to the gift. Fletcher v. Wakefield [Vt.] 54 Atl. 1012.

51. Money expended by the husband for medical services and traveling expenses of his wife cannot be offset against rent received by him from her land and money received from her. Clay v. Clay's Guardian, 24 Ky. L. R. 2016, 72 S. W. 810. A husband receiving a large amount of money from his wife's separate estate as her agent cannot on accounting charge sums deposited to her credit in her bank account, used entirely for payment of family expenses, in the absence of evidence that she had agreed to support the family. Young v. Valentine, 78 App. Div. [N. Y.] 633.

52. However binding an obligation of a husband to pay a debt to his brothers and sisters, his wife is not required to allow it to be paid from her separate estate. Stewart v. Stewart [Pa.] 56 Atl. 323. Where a husband managed a business in which the separate property of his wife was invested, receiving a salary for his services, and the business having greatly increased in value, other property was bought with the profits, it not appearing certainly as to what was the value of the whole property and there being considerable debts against it and the salary appearing to be as much as his services were worth, his creditors cannot subject the property or any part of it to his debts. Hayner & Co. v. McKee, 24 Ky. L. R. 1871, 72 S. W. 347. A deed of trust on an equitable separate estate of the wife, created by a deed of settlement executed by husband and wife to secure payment of their joint note, is void. She cannot bind such separate estate for payment of her debts or those of her husband. Fields v. Gwynn, 19 App. D. C. 99.

53. A husband, by contributing from his salary, which is exempt from creditors, to pay an incumbrance on his wife's land, does not commit a fraud as to creditors so as to subject the land to their claims. Rev. St. 1899, § 3162. Furth v. March [Mo. App.] 74 S. W. 147.

54. Where a solvent husband with his wife's consent spends all his money in improving her property, increasing its value many times, creditors for materials furnished believing the property to be his can follow the improvements to her premises. Brand v. Connery [Mich.] 92 N. W. 784.

55. The wife may recover her personalty taken in foreclosure as that of her husband, though she did not file an inventory. The failure merely subjected her to the burden of proving her ownership; Comp. Laws, § 2593, merely providing that such should be prima facie of her ownership. Anderson v. Medbery [S. D.] 92 N. W. 1089.

56. In a suit by creditors to charge land with the husband's debts, the wife must prove not only that she paid for the land, but that it was bought with the funds of her separate estate. Harr v. Shaffer, 52 W. Va. 207.

57. A married woman suing in replevin to recover property seized under a judgment against her husband need not establish her title by stronger evidence than would be required of a feme sole, and she need not show the precise facts of her claim of title or disprove fraud. Mills' Ann. Sts. §§ 3019-3021. Rachofsky & Co. v. Benson [Colo. App.] 74 Pac. 655. Where notes payable to

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received by the husband from the wife at a time when she had no statutory separate estate therein.[58]

§ 4. *Property rights under the community system.*[59] *What law governs.*—Marital rights in property are governed by the law of the state from which the property came,[60] except when realty is concerned;[61] but the domicile must be definitely acquired.[62]

Separate estate of wife.[63]—Only positive fraud, concealment or suppression, equivalent to fraud, will estop a married woman from asserting her claim to realty.[64] A gift from her husband,[65] unliquidated damages for her personal injury before mar-

a husband are transferred by him to secure a joint debt of himself and wife, without revealing that they were made to him by mistake and belong to his wife, he can show such fact after they have been seized by his other creditors by the same amount of proof as is necessary to establish her ownership in any other kind of property. Sallinger v. J. W. Perry & Co. [N. C.] 45 S. E. 360. In an action by the wife to recover for board furnished to one living in their home, statements of the husband concerning an agreement between himself and wife, that she should receive the compensation, may be given. Briggs v. Devoe, 84 N. Y. Supp. 1063. Evidence that a piano was insured in the wife's name with knowledge and acquiescence of her husband is admissible on the question of her ownership. Fletcher v. Wakefield [Vt.] 54 Atl. 1012.

Sufficiency of evidence to show that money contributed by the wife to a loan by herself and husband to another belonged to her and not to her husband. Johnston v. Johnston, 173 Mo. 71. To show that property was purchased with money received by the wife in gifts from third persons. Lyon v. Lyon, 24 Ky. L. R. 2100, 72 S. W. 1102. To show that wife was entitled to compensation for board furnished the family because supplied from her separate estate. Cory v. Cook, 24 R. I. 421. In attachment of property of husband, in which the wife interpleaded to recover her separate property, to show transfer of possession so as to affect the rights of plaintiff attaching the goods a few days after execution of a mortgage by the wife, which was unrecorded with notice of the wife's claim. Rice, Stix & Co. v. Sally [Mo.] 75 S. W. 398.

58. Where he bought land with her money from her father's estate before passage of the Married Woman's Act, 1876-77, it is presumed that he received the money because of his marital rights. Jesser v. Armentrout's Ex'r, 100 Va. 666.

59. Husband and wife may hold lands as cotenants in California [Civ. Code § 161]. Wagoner v. Silva [Cal.] 73 Pac. 433.

60. Lands in Texas purchased by a husband after removing there, with money earned in another state as a citizen thereof, are not community property where the money constituted his separate property in the former state. Blethen v. Bonner, 30 Tex. Civ. App. 585.

61. The capacity of husband and wife to deal with each other as to immovable property in Louisiana, must be determined by laws of that state. Rush v. Landers, 107 La. 549, 57 L. R. A. 353.

62. One removing to a state remained several years, then to another state residing there for twenty years without intent to live anywhere else, though thinking he might return to the former state, does not thereby obtain a domicile in the latter state, so as to be temporarily absent during that time, and render the marital rights as to property in the second state governed by the laws of the first. Blethen v. Bonner, 30 Tex. Civ. App. 585.

63. **Evidence as to separate estate.** A contract to purchase by a wife does not presumptively vest title in her as her separate property; Civ. Code, § 164, raises the presumption as to title to property conveyed to her by an instrument in writing. Peiser v. Bradbury [Cal.] 72 Pac. 165. Where plaintiff in trespass to try title claimed under a deed from a married woman, evidence by her that the land was always recognized by her husband as her separate property, and that when the land was conveyed to her by her husband the grantor understood that title was to vest in her as her individual property was admissible on the question whether it was her separate property and whether she had the right to convey. Wren v. Howland [Tex. Civ. App.] 75 S. W. 894.

Sufficiency of evidence in an action by a surviving husband against his daughter to recover realty devised to the daughter by the wife to show that the land was the separate property of the wife and not community (Arkle v. Beedle [Cal.] 74 Pac. 1033); to show that property taken in execution against the husband was the property of his wife (Richey v. Haley, 138 Cal. 441, 71 Pac. 499); of facts to show that money on deposit in a bank was the wife's separate property (Freese v. Hibernia Sav. & Loan Soc. [Cal.] 73 Pac. 172).

64. Williamson v. Gore [Tex. Civ. App.] 73 S. W. 563.

65. A gift by a husband to his wife of proceeds of her dairy will make property purchased with such proceeds her separate property. Dority v. Dority [Tex.] 71 S. W. 950. Where a husband insured his life in favor of his wife and on settlement of the policy gave her the most thereof and afterward the firm of which he was a member borrowed the money from her, executing a note and deeds to her for certain land, the husband testifying without contradiction that the money was the separate property of his wife and was used to buy the land and at the time of the loan he and the firm were solvent, the land was not community property and was not subject to his debts. Hall v. Levy [Tex. Cr. App.] 72 S. W. 263.

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riage,[66] interests in public lands acquired by her,[67] or in a homestead where she completed the rights after his death,[68] and land conveyed to her by an instrument declaring it to be her property, is her separate property,[69] but a deed from husband to wife will vest title in her without a recital that the property is to become her separate property or proof of payment from her separate estate.[70] A mere loan of her separate funds to her husband, without specific arrangement as to its application, will not vest in the wife title to property purchased with the loan by the husband as to which title would otherwise vest in him.[71]

Where a conveyance to a married woman shows that property was vested in her as her separate estate, one claiming through a deed from her husband alone is not an innocent purchaser.[72] Issue and profit arising from investment of the wife's separate property cannot be taken in execution against her husband.[73]

In Texas, the husband may manage her separate estate while they are living together,[74] but she may be granted the right to manage and control her separate realty, and he will be restrained from interference where they are living apart, and he contributes nothing for her support while using the entire income from her separate realty for his own benefit without paying the taxes.[75] On conveyance of his homestead to her for a consideration from her separate estate, his possession is not thereafter adverse to her,[76] nor upon declaration of a homestead from her separate estate in California.[77]

Husband and wife must join in conveyance, mortgage or lease of her property, except as to yearly leases in Texas.[78] If they are living separately and he is con-

66. Rev. St. 1895, art. 2967, making the property owned by her before marriage her separate property after marriage, includes unliquidated damages against a carrier for suffered indignities. St. Louis S. W. R. Co. v. Wright [Tex. Civ. App.] 75 S. W. 565.

67. Any interest acquired by the wife in a land certificate issued to heirs of her former husband, remains her separate estate, so that her last husband does not acquire any interest in the certificate or the land; [Act of Congress of Tex. Jan. 29th, 1840, especially section 3]. Laufer v. Powell, 30 Tex. Civ. App. 604.

68. Where a homesteader had not been in possession of property five years before his death, but his widow remained in possession five years after his death and proved the homestead, entered in her own name and obtained the patent, the property became hers. The community was dissolved at the date of the husband's death, at which time the property still remained in the government, and title was acquired by her after dissolution of the community. Richard v. Moore, 110 La. 435.

69. A deed to a married woman containing a clause giving her the right of disposal, use and benefit at will, makes such land her separate property. Laufer v. Powell, 30 Tex. Civ. App. 604. A husband is estopped from denying that property purchased during marriage belongs to his wife where title is taken in her name and he declares in the authentic act of purchase that it was paid for from her paraphernal funds. Westmore v. Harz [La.] 35 So. 578.

70. Watts v. Bruce [Tex. Civ. App.] 72 S. W. 258.

71. Blethen v. Bonner, 30 Tex. Civ. App. 585.

72. Laufer v. Powell, 30 Tex. Civ. App. 604.

73. Section 4479, Rev. St. 1887. Evans v. Kroutinger [Idaho] 72 Pac. 882.

74. Where a lessee paid rents to a husband for the wife's separate property leased by the husband while husband and wife were living together and he is in apparent rightful custody of her separate property, the wife cannot recover such rents from the lessee. Dority v. Dority [Tex.] 71 S. W. 950. Where a judgment debtor owning stock in a corporation transferred certificates to another for payment of debts due to the latter's wife and child, but no transfer of the stock was made on the books and a creditor afterward sued out a garnishment against the corporation, the consent of the husband was binding on the wife, because of his statutory right to management of her estate. South Texas Nat. Bank v. Texas & L. Lumber Co., 30 Tex. Civ. App. 412.

75. After a permanent separation, he will not be permitted to exercise the marital right of management of his wife's separate property. The right depends upon their living together and his proper exercise of the trust. Dority v. Dority [Tex.] 71 S. W. 950.

76. Hunter v. Magee [Tex. Civ. App.] 72 S. W. 230.

77. Civ. Code, § 1239. Arkle v. Beedle [Cal.] 74 Pac. 1033.

78. A married woman living with her husband cannot without his joining, give a valid power of attorney to a third person to sell her separate realty. Nolan v. Moore [Tex.] 72 S. W. 583. Sole management of her property during marriage, given to him by statute, will not authorize him to lease her realty for longer than a year without her signature. [Rev. St. arts. 624, 628, 635, 2967]. Dority v. Dority [Tex.] 71 S. W. 950. Foreclosure cannot be had of a chattel mortgage given by a husband on separate prop-

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tributing nothing to her support, she is entitled to sue him and a lessee to cancel a lease made by him of her separate property without her knowledge, and to recover rents appropriated by him to his own use.[79] She cannot convey her separate estate by deed to her husband.[80] With authorization of her husband she may sell her paraphernal property and use the proceeds as she thinks best, though she turns them over to him, providing a method for her own security, and it does not matter that she announces such purposes in advance.[81] A surviving husband cannot sell property belonging to the separate estate of his wife to pay her debts or for any purpose.[82] A decree of partition of the community property is conclusive of claims made in the suit of a part of the property as separate.[83]

Separate estate of husband.—Where husband and wife were in possession of land under a railroad grant and conveyance from the company, and she died before the grant was forfeited and he purchased the land from the government, it was his separate property.[84] The community cannot charge him with the amount of rents of his paraphernal property which he applied during his second marriage to payment of an interest bearing mortgage debt on the property at the time of his marriage.[85] On a sale and reinvestment of his separate property, in order that he may claim the newly purchased property, the sale and purchase need not be contemporaneous, but it must appear that the funds before being separately reinvested had not been used in purchase of community property.[86] She cannot acquire title to his land by adverse possession during the marriage relation, though he abandoned her without cause. He cannot recover from her heirs for any of the rental value of his property before her death, though he may be entitled to rent for his part of the premises thereafter, where she took possession of his land, improved it and paid taxes upon it with community funds until her death. His land is liable to her heirs for half the cost of improvements and taxes on his separate property for which she used community funds, after abandonment.[87]

Community property.—All property, real and personal, acquired during marriage, is presumed to be community property, unless it is shown to have been purchased with proceeds of separate property or with intent to make it separate.[88]

erty of his wife. Parish v. Austin [Tex. Civ. App.] 76 S. W. 583.

79. Dority v. Dority [Tex.] 71 S. W. 950.

80. Hughey v. Mosby [Tex. Civ. App.] 71 S. W. 395. A deed from wife to husband of land from her separate estate carries no title though made in exchange for community land which she conveyed with his joinder to another designated by her as a gift. Jarrell v. Crow, 30 Tex. Civ. App. 629.

81. Caldwell v. Trezevant [La.] 35 So. 619.

82. Laufer v. Powell, 30 Tex. Civ. App. 604.

83. Where in partition of community property it was decreed that each should have an undivided half, and that the community was liable for certain sums, and the husband urged, without pleading on the trial, that a certain amount was a charge in his favor against the community estate as the amount of his separate property, from which the community property was derived, the character of the claim was such that the decree was conclusive as to it, on motion for a new trial and on appeal where error was assigned in rejecting claim. Moor v. Moor [Tex. Civ. App.] 71 S. W. 794.

84. Under Forfeiture Act (Act Cong. Sept. 29, 1890, c. 1040, 26 Stat. 496). Carratt v. Carratt [Wash.] 73 Pac. 481.

85. Civ. Code, art. 2402. Sharp v. Zeller, 110 La. 61.

86. Sharp v. Zeller, 110 La. 61.

87. Rev. St. 1895, art. 2968. Cervantes v. Cervantes [Tex. Civ. App.] 76 S. W. 790.

88. The burden is on the administrator of a deceased husband to prove the latter's right to reimbursement out of the community estate for his separate estate. Allardyce v. Hambleton [Tex.] 70 S. W. 76. Lands or personalty acquired in Texas during marriage are presumed to be community property. Thayer v. Clarke [Tex. Civ. App.] 77 S. W. 1050. Land conveyed to a married woman during her husband's life is presumably community property, where the deed shows no recital making it her separate estate. Flannery v. Chidgey [Tex. Civ. App.] 77 S. W. 1034. The presumption that property in possession of either husband or wife is community property, may be overcome by evidence such as under the circumstances will ordinarily convince an unprejudiced mind that it is separate property of one. Freese v. Hibernia Sav. & Loan Soc. [Cal.] 73 Pac. 172. Where evidence is shown that property was bought, possession taken and payment made before marriage of the purchaser, testimony of one who said that she did not know when the wife moved on the property, but that she saw a woman soon

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Property claimed as separate if mingled with the community so that its separate character cannot be identified,[89] or land which a husband entered as a homestead during his wife's life, but as to which he made final proof and obtained a patent after her death, is community property.[90] One locating a mining claim has no such title or interest therein after conveyance and abandonment that the community interest of the wife attaches.[91] Rents of a married woman's separate estate are community property in Texas.[92] A deserted wife left in possession of property claimed as a homestead may show that she gave no cause for abandonment so as to forfeit her marital rights in the property which the husband now seeks to recover.[93]

Powers as to community property.[94]—Neither husband nor wife alone can dispose of community property,[95] but the separate right of each to use water from a lake on their lands may be granted.[96] A deed by them must be executed by the wife according to the statute.[97] Assent to a contract by both express or presumed is necessary to warrant specific performance in behalf of a purchaser.[98] That her husband had permanently abandoned her, and without her fault, and had left the state, will authorize the wife to sue for the community property.[99]

after the purchase of part of the property bought first, is insufficient to rebut the former evidence as to the issue of payment before marriage. Gilbert v. Edwards [Tex. Civ. App.] 74 S. W. 959. Where lands in Texas were conveyed to a husband residing with his wife in New York, and it appears that under the laws of New York, during coverture, all property acquired by the joint efforts of husband and wife, is the husband's separate property as well as all his real estate in which the wife has merely a right of dower, and it does not appear by what title he held the money with which the land was bought, the presumption that it was community property is rebutted. Thayer v. Clarke [Tex. Civ. App.] 77 S. W. 1050.

Property purchased by him during community will not be his separate estate unless in the purchase he declares that it is bought with the proceeds of his individual property and for his individual account to replace property which he sold. Sharp v. Zeller, 110 La. 61. Where land was deeded to a wife as consideration of transfer of certain community property to herself and husband without a recital that it was intended to be her separate property, and husband and wife afterward sold the land, taking vendors' lien notes, which the husband transferred as collateral for a debt due to a bank, and on the latter requiring personal security for the debt, plaintiffs became surety under an agreement that the notes and other collateral should inure to their benefit, without notice of the wife's claim that the land was her separate property, but exercised due diligence in collecting and accounting for the collateral, in an action to recover on the notes and foreclosure of the vendor's lien, it could not be said as against them, that the wife's claim of the land as her separate property was valid, preventing her husband from pledging the notes. Ramey v. Eskridge [Tex. Civ. App.] 76 S. W. 763.

89. Brown v. Lockhart [N. M.] 71 Pac. 1086.

90. In determining the character of property laws of the state will apply. Ahern v. Ahern, 31 Wash. 334, 71 Pac. 1023.

91. McAlister v. Hutchinson [N. M.] 75 Pac. 41.

92. Giving an extension to husband does not discharge a joint pledge of them as security. De Berrera v. Frost [Tex. Civ. App.] 77 S. W. 637.

93. Long v. Long, 30 Tex. Civ. App. 368.

94. **Amendment and repeal of statutes.** A law providing for agreements between husband and wife as to community property and allowing them to make such property during life the separate property of the survivor is germane to an act entitled "An act relating to and defining the property rights of husband and wife," being a part thereof [1 Ball. Ann. Codes & St. § 4492 (Pierce's Code, § 3883) did not repeal Laws 1854, p. 314, § 11 (1 Ball. Ann. Codes & St. § 4601) concerning the construction of wills]. McKnight v. McDonald [Wash.] 74 Pac. 1060.

95. A wife's separate mortgage and foreclosure thereof as to land constituting community property are invalid. Humphries v. Sorenson [Wash.] 74 Pac. 690. A husband cannot sell community property at will to pay a community debt to himself and reinvest the proceeds in separate property. Sharp v. Zeller, 110 La. 61.

96. A conveyance by the husband alone would give the grantee right to take water from a lake as co-tenant of the wife. Gulf, C. & S. F. Ry. Co. v. Fenn [Tex. Civ. App.] 76 S. W. 597.

97. While the acknowledgment of a married woman to a deed in proper form is conclusive between the parties in the absence of fraud, where the facts stated in the certificate of acknowledgment are traversed by answer and the answer also alleged that plaintiff acquired the deed with notice that the certificate was false, but the answer failed to allege that the certificate was obtained by fraud, the acknowledgment will be held valid. Brand v. Colorado Salt Co., 30 Tex. Civ. App. 458.

98. Where one purchasing real estate consisting of community property by oral contract of the husband, enters possession and pays the price, it will be presumed that both husband and wife agreed to the sale and in the absence of other showing, the purchaser is entitled to specific performance. O'Connor v. Jackson [Wash.] 74 Pac. 372.

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Community debts.[1]—Debts created during coverture are presumed to be community debts.[2] They attach to the property and follow it into the hands of third persons.[3] They constitute a property right totally distinct from the right of a minor heir against his tutor,[4] and are prior to the right of ownership of a surviving spouse at dissolution of the community,[5] or rights of separate creditors of the spouse as to community property,[6] and the creditor of the community cannot be deprived of such priority by any action of the surviving spouse in his own name or as tutor, or of the heirs, whether of age or not.[7] Where minor heirs inherit a paraphernal claim against the community from the mother, and the father qualifies as tutor, the legal mortgage in their favor does not absorb their claim as community creditors, nor alter its character from one due by the community to a debt due by the tutor.[8] Registry of a claim is unnecessary to its enforcement against persons subsequently acquiring rights in the property.[9] There is no legal duty on minors at the time of sale of their interest to put at issue their right to sell the husband's interest in community property or their own claim as community creditors.[10] A voluntary expenditure by the husband after divorce, to support and educate a minor daughter, cannot be charged against the wife's part of the community estate.[11] After dissolution of the community by death of the wife, her heirs may enforce a paraphernal claim of hers descended to them against the community as an ordinary community debt.[12] Property of dissolved but unsettled community continues community property, liable to community debts, regardless of successive sales to purchasers in good faith without knowledge of such debts.[13]

Dissolution of community, survivorship, and distribution.[14]—Where the com-

9a. Word v. Kennon [Tex. Civ. App.] 75 S. W. 334.

1. **Statute construed:** A claim by a separate creditor of the husband seeking to enforce execution against an equity of redemption in community lands that "real property" was broader in meaning than "real estate" and included interests sought to be reached, while "real estate" which the husband could not alienate without joinder of the wife included only title in fee, is untenable. Ball. Ann. Codes & St. § 4491, as to power of the husband over community property construed in view of the interchangeable use of same terms in other statutes. Ross v. Howard, 31 Wash. 393, 72 Pac. 74.

Effect of partition: Where a decree in partition of a community estate adjudged the taxes in a certain year a community debt on the estate determines the aggregate on the community debts, a decree that each one interested should recover of the other, half of the community property, and that the half interest allotted to one should be liable for half the debts, and that each should have a lien on the part of the other for reimbursement for any payment in excess of the charge, the husband could not recover for payments of interest on community debts from the wife's portion, though it appears that she had paid one half the community debts charged to her, and he had not paid his half, since interest was not within the purview of the decree. Moor v. Moor [Tex. Civ. App.] 71 S. W. 794. In an action by a creditor to subject community property to a note, the wife cannot maintain a cross-action asking that the title of the community lands be divested and title be given to her, such being an attempt to secure partition of the community property with which plaintiff was not concerned, and which defendants could not litigate against his objection. Teague v. Lindsey [Tex. Civ. App.] 71 S. W. 573.

2. The burden of proof is on one claiming separate property to show otherwise. Brown v. Lockhart [N. M.] 71 Pac. 1086.

3. Thompson v. Vance, 110 La. 26. Where in an action on a note, the plaintiff sought to subject certain lands in the state to the note, which were subject to the homestead rights of defendant's wife who answered that before the note was given, defendant had abandoned her permanently, and gone without the state, taking away cattle which were community property beyond the amount remaining, including the lands involved, the title to the lands was not thereby divested out of the community estate, and was subject to community debts. Teague v. Lindsey [Tex. Civ. App.] 71 S. W. 573.

4, 5, 6, 7, 8, 9. His right is to be preferred in the proceeds of the sale of community property, since it is secured neither by privilege nor mortgage. Thompson v. Vance, 110 La. 26.

10. Their rights as community creditors cannot be affected by sale of the father's interest in the community. Thompson v. Vance, 110 La. 26.

11. Moor v. Moor [Tex. Civ. App.] 71 S. W. 794.

12, 13. Thompson v. Vance. 110 La. 26.

14. **Validity of oral contract by surviving husband** with third person to clear the title of the community property under the statute of frauds, where the husband alone had an interest in the estate and there were no debts. In re Field's Estate [Wash.] 73 Pac. 768.

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munity is dissolved by death of one of the spouses, the property falls into moieties, one of which belongs to the survivor, the other to the heirs of the deceased spouse, community debts first having been paid.[15] That the survivor qualified will not change the interest of heirs of the deceased spouse.[16] Where a husband dies intestate, leaving no issue of marriage with the survivor, she is entitled to the usufruct of so much of the deceased's interest in the community as would be inherited by children;[17] such right is personal and independent and will not shield her from the necessity of accepting or renouncing the community when called upon to elect.[18] Her interest in the community property cannot be affected adversely by a sale of such property under a power in the husband's will.[19]

The community survivor has only a residuary interest and can transfer no greater right.[20] A wife as survivor cannot sell community realty of her husband except to pay community debts.[21] A surviving husband who qualifies in time[22] and takes under a decree regular on its face[23] is not liable to collateral attack on his title, and a purchaser from him for full value, acquires title as against her heirs, without notice that the property was her separate estate.[24] Where there are community debts and the husband surviving sells community lands, the purchaser is not required to see that the proceeds are applied to the debts, nor is his interest affected by a subsequent declaration of the husband that he transferred the property for another purpose.[25] A widow and executrix is liable for her husband's debts and debts of

15. The surviving spouse and heirs take title absolutely which continues subject to be divested by the creditors with power in them to alienate it to one taking it to the extent of a transferor's interest. Thompson v. Vance, 110 La. 26. On death of a husband his half interest in the community property vests directly in his heirs; and on death of a child holding an interest in the community estate of his deceased father and surviving mother, his interest in the father's estate vests directly in his lawful heirs. McAnulty v. Ellison [Tex. Civ. App.] 71 S. W. 670. Nieces of a deceased husband at death of his widow leaving no next of kin, are entitled to property which she described in her inventory as his executrix as common property. [Civ. Code, § 1386, subd. 9]. In re McCauley's Estate, 138 Cal. 432, 71 Pac. 512. Where a wife, the heir of a father and pre-deceased brother donated in her testament all her property to her husband, it became his property subject to the usufruct since that is not changed by change of ownership. Reems v. Dielmann [La.] 35 So. 473. Common property referred to by a law providing that, if a decedent was a widow and left no kindred, and the estate, or part thereof, was community property of her and her deceased spouse while he was living, such property shall go to the lawful issue of any deceased brother or sister of her spouse by representation, was such property as remains undisposed of by the spouse at his or her death, and did not include property which might have been community property during the husband's life, but which during that time he conveyed to his wife. [Civ. Code, § 1386, subd. 9]. In re McCauley's Estate, 138 Cal. 432, 71 Pac. 512. Where a testator devised his residuary estate to be divided equally between his wife and children, excepting one son, as to whom he stated that he had advanced a certain sum to be in full of the son's interest, and the sum advanced was in excess of the son's pro rata share of one half the community property, but considerably less than his share of the whole of the community property, and no intention was shown to discriminate against him, it was not the intention of the father to dispose of all the community property, but only his share, and the widow's right to take under the will was not inconsistent with her right to half the community property and a renunciation by her of her interest in the community property, on the theory that she could not otherwise take under the will. In re Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076.

16. The surviving wife, in Texas, by qualifying as survivor, does not become owner in her own right of all community property, making the husband's children her creditors to the extent of their interest in the estate. [Rev. St. arts. 1696, 2238, 2237]. Faris v. Simpson, 30 Tex. Civ. App. 103.

17, 18. Reems v. Dielmann [La.] 35 So. 473.

19. In re Wickersham's Estate [Cal.] 70 Pac. 1079.

20. Thompson v. Vance, 110 La. 26.

21. McAnulty v. Ellison [Tex. Civ. App.] 71 S. W. 670.

22. The time within which a husband may qualify as survivor of the community estate in Texas was not limited to four years from death of his wife under the Probate Law of 1876. Alexander v. Barton [Tex. Civ. App.] 71 S. W. 71.

23. An order approving his bonds, inventory and appraisement as survivor is conclusive as against collateral attack as to the death of the wife and as to all steps necessary to jurisdiction, where nothing appears on the face of the probate court decree showing want of jurisdiction. Alexander v. Barton [Tex. Civ. App.] 71 S. W. 71.

24. Alexander v. Barton [Tex. Civ. App.] 71 S. W. 71.

25. Cruse v. Barclay, 30 Tex. Civ. App. 211.

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the community to the extent of his separate property and community property received by her.[26] Where only the minors' interest in property held in indivision is sold, they do not become warrantors of the title so as to prevent them from afterward urging claims against their co-owner's interest in the property.[27] Where the surviving community partner sells his interest and, as natural tutor under authority of a family meeting, conveys at private sale to his vendee the interest of minor heirs, the heirs, on seeking to subject the part of the community property coming to their father to the payment of debts due them from the community, are not estopped by failure to set up the defeasible character of their father's interest or to urge their claims as community creditors in proceeds for the sale of their interest.[28] A conveyance by a surviving wife of a part of community land equal to a portion to which the daughter was entitled in the estate of the deceased husband and of the mother in satisfaction thereof, with the acquiescence of all parties in interest, passes title to the daughter and does not operate as a partition of the estate.[29]

If a surviving widow takes possession of community property beyond her share, she owes the value of her husband's share to his succession or heirs, and not personally by direct action against her to any particular creditor.[30]

Debts incurred by a surviving wife who qualified as administrator of community property, but did not act in that capacity for benefit of the estate, but for her personal advantage, and for which she gave ample security, are not liens on the entire estate including the interest of her husband's children.[31] A husband who executed certain notes after his wife's death, in renewal of notes executed by him during her life for their joint debt, was not liable thereon as executor of her estate or as survivor.[32] Where the husband alone was interested in community property after the death of his wife, and there were no debts, a contract by him for the purpose of clearing title that another should act as administrator for a certain compensation, his duties being formal only, not giving him right to interfere in management of the property, is valid.[33]

Authority of the survivor to sell,[34] or that a sale was made to pay community debts, will be presumed after great lapse of time.[35] A return by the executor of sale of community property under a power in the husband's will must show that it was sold to pay debts, though it appears that it was sold under the power.[36]

The court a qua has jurisdiction of the acceptance or rejection of the community.[37] In dissolution proceedings, those interested cannot be represented by persons adverse in interest, and should be made parties,[38] heirs being entitled to appeal from

26. Flannery v. Chidgey [Tex. Civ. App.] 77 S. W. 1034.

27, 28. Thompson v. Vance, 110 La. 26.

29. McAnulty v. Ellison [Tex. Civ. App.] 71 S. W. 670.

30. Martin Davie & Co. v. Carville, 110 La. 862.

31. Faris v. Simpson, 30 Tex. Civ. App. 103.

32. Death dissolved the community and the entire estate became subject to administration. Bank of Montreal v. Buchanan [Wash.] 73 Pac. 482.

33. In re Field's Estate [Wash.] 73 Pac. 768.

34. Where a surviving husband conveyed community land, it will be presumed, in a suit by the children to recover the property twenty years after, that the husband had authority to sell because of community debts, though the vendee claiming the land, had not been in actual possession. Cruse v. Barclay, 30 Tex. Civ. App. 211.

35. Lapse of thirty-eight years after sale of community property by the husband's survivor will raise the presumption that the sale was made to pay community debts. Stipe v. Shirley [Tex. Civ. App.] 76 S. W. 307.

36. In re Wickersham's Estate [Cal.] 71 Pac. 1079.

37. Reems v. Dielmann [La.] 35 So. 473.

38. The executor of the husband cannot represent the wife's estate on appeal from an order of sale of community property by them under a power in his will on the ground that her interest was erroneously included, since their interest is adverse to her. In re Wickersham's Estate [Cal.] 71 Pac. 1079. In a petitory action by one as heir and administrator of the succession of his mother, not professing to act for creditors or for his co-heirs who accepted the succession by an extra judicial partition, but who did not authorize the suit which attacked the title, to which the plaintiff's father, then living in

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an order of sale.[39] A petition to recover property belonging to an estate as community property of plaintiff and her deceased husband must show whether administration had issued on the estate or that there were no debts and no necessity for administration.[40] As against a widow who accepts the community unconditionally, her husband's promise to pay a barred claim is void if not in writing as enacted.[41] A partition in parts for the husband who is administrator and for heirs of the wife leaves the heirs' part subject to administration.[42] In unconditionally accepting the community she becomes liable only for one half the debt of her husband except as to property which she has taken on which a privilege or mortgage subsists.[43]

§ 5. *Liability for necessaries. Liability of husband.*—The husband is liable for necessaries of his wife and family,[44] for which she has presumed authority to bind him,[45] unless furnished her on her personal credit;[46] but if he provides for her she cannot bind him by her contracts unless with his authority or assent.[47] Though he and his wife are separated, he is liable unless an agreement or decree exists relieving him,[48] or unless he has provided for support,[49] or unless she has voluntarily

community with his mother, was a party, the plaintiff has no standing, except to the extent of his interest as an heir to recover property which belonged to such community. Wilson v. Ober, 109 La. 718.

39. Heirs of a deceased person being entitled to all actions and defenses, necessary to protection of their property, except those depending on the sight of possession, the heirs of a deceased wife may procure an appeal from an order secured by executors of the husband for sale of community property under a power in his will [Code Civ. Proc. § 1452]. In re Wickersham's Estate [Cal.] 70 Pac. 1079.

40. Rylie v. Stammire [Tex. Civ. App.] 77 S. W. 626.

41. Weil v. Jacobs' Estate [La.] 35 So. 599.

42. Bevil v. Moulton [Tex. Civ. App.] 75 S. W. 60.

43. She so accepts by failing to open the succession or otherwise protect herself and by paying debts and continuing his business. Martin Davie & Co. v. Carville, 110 La. 862.

44. The legislation relating to married women in New York has not changed the common law duty of the husband to support his family, and he is liable for necessaries furnished, unless the wife, by express agreement, charges herself personally. Grandy v. Hadcock, 85 App. Div. [N. Y.] 173. Where a wife died leaving land subject to a mortgage of herself and husband to secure a loan used to pay living expenses and for her medical services and other family necessaries, notes for which were not signed by the husband but which the mortgage expressly bound the mortgagor to pay, the debts thus secured were those of the husband and his one-third interest in the land after her death should be first applied to the debt as between a purchaser from him and his wife's administrator. Herbert v. Rupertus [Ind. App.] 68 N. E. 598. He cannot set off medical and traveling expenses paid for her as against her moneys in his hands. Clay v. Clay's Guardian, 24 Ky. L. R. 2016, 72 S. W. 810. If he receives money from her separate estate as her agent, he cannot charge, on accounting, sums deposited to her credit in bank and used for family expenses, unless she has agreed to support the family. Young v. Valentine, 78 App. Div. [N. Y.] 633.

45. While a husband and wife are living together, she is presumed to be authorized to bind him for necessaries suitable to his estate and station, and the burden is on him to show otherwise. Bonney v. Perham, 102 Ill. App. 634.

46. Martin v. Oakes, 42 Misc. [N. Y.] 201. A letter by a wife holding a large separate estate while living in a house owned by her father, to her husband who acted as her agent, agreeing that if he would allow her a certain amount per month, she would pay the tuition of the children, does not amount to an agreement by her to support the family in the future so as to exempt him from liability for support. Young v. Valentine, 78 App. Div. [N. Y.] 633.

47. Bonney v. Perham, 102 Ill. App. 634. That a husband allowed his wife to hire an equipage from a stable, did not show his implied consent to supply materials necessary to its use and maintenance, where it was not shown that her allowance for personal expenses was not reasonably sufficient. Martin v. Oakes, 42 Misc. [N. Y.] 201.

48. Constable v. Rosener, 82 App. Div. [N. Y.] 155. If a husband has made no adequate provision for necessaries for his wife, he is liable for medical services furnished her though living separate from him and though he informed the physician prior to the services that he would not be responsible therefor. Button v. Weaver, 87 App. Div. [N. Y.] 224. That he had assigned a certain mortgage to his wife on leaving his family, to support herself and children, and that she realized sufficient thereon for her support, will not excuse him where it is not shown whether the wife gave a consideration therefor or whether it was a mere gift. Cory v. Cook, 24 R. I. 421.

49. Necessaries for children purchased by wife after husband had left the family. Cory v. Cook, 24 R. I. 421. Breach of an agreement with his wife after abandonment, amounting to a deed of separation binding him to pay a certain amount monthly for her support, will revive his liability for her maintenance. Barclay v. Barclay [Md.] 56 Atl. 804.

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left him without sufficient cause and against his will.[50] That necessaries were furnished under a void contract with the wife will not prevent his implied liability.[51] If they are living apart, there is no implied agency binding the husband for her necessaries.[52] Abandonment of the wife by the husband, or turning her away without reasonable cause, or compelling her to leave because of ill usage, will render him liable for necessaries suitable to his station and estate and others may credit her to that extent.[53] Attorney's services to the wife for separation may constitute necessaries.[54]

Liability of wife.—Generally the wife or her separate estate is not liable for family necessaries,[55] while residing with the husband,[56] except by her separate agreement,[57] binding her separate estate;[58] even as to expenses made by her for him, her separate estate is not always liable.[59]

§ 6. *Contract rights and liabilities of husband as to third persons.*—A mere promise to remit when told of the claim, without any consideration for such promise, will not bind a husband to pay a debt of his wife.[60] A mortgage by an insolvent debtor to his wife, assigned for value by her to third persons knowing of his embarrassment and that she never had any separate business, on their payment of one-fourth of its face value, is invalid as against his creditors.[61] A contract between a husband and a railway company for safe carriage of his wife will not be implied by mere purchase of an ordinary ticket by him for her, any implied contract for that purpose being in favor of the wife only.[62] The husband is not liable for unauthorized purchases by the wife of other than necessaries.[63]

50. She cannot bind him for maintenance elsewhere. Bonney v. Perham, 102 Ill. App. 634. Where a husband whose wife had left him with insufficient reason and against his protest, supported her until his efforts for her return proved fruitless, he was not liable for necessaries subsequently furnished her. Constable v. Rosener, 82 App. Div. [N. Y.] 155.

51. Rev. St. 1895, art. 2543, §§ 1, 2. Flannery v. Chidgey [Tex. Civ. App.] 77 S. W. 1034.

52. Constable v. Rosener, 82 App. Div. [N. Y.] 155. Where a husband and wife are living apart permanently and voluntarily, no authority is presumed on her part to bind him for necessaries, and the burden is on the dealer to show that they were necessaries, that the husband failed to supply her, that she was not at fault or that he authorized or agreed to the sale. Bonney v. Perham, 102 Ill. App. 634.

53. Bonney v. Perham, 102 Ill. App. 634.

54. The attorney may sue the husband's executors therefor. Kellogg v. Stoddard, 40 Misc. Rep. [N. Y.] 92.

55. Herbert v. Rupertus [Ind. App.] 68 N. E. 598. A wife is not compelled to use her separate personal property to support her husband nor to pay the expenses of his last sickness and funeral. Robinson v. Foust [Ind. App.] 68 N. E. 182. A voluntary expenditure by the husband after divorce for support and education of a minor daughter cannot be charged against the wife's part of the community estate. Moor v. Moor [Tex. Civ. App.] 71 S. W. 794.

A law of Illinois making both husband and wife liable for family expenses, though applying to citizens of other states temporarily residing there, will not impose any liability on the wife to be enforced by the courts of Massachusetts for purchases of the husband without her knowledge while they were temporarily in Illinois. Mandell v. Fogg, 182 Mass. 582.

But in Nebraska medical attendance of the husband while living with his family is a family necessary for which the property of the wife is liable; where afterward the family removed to another state, a judgment against the husband in the latter state and a return of execution unsatisfied is sufficient to render the separate property of the wife liable for the debt [Comp. St. c. 53, § 1]. Leake v. Lucas [Neb.] 93 N. W. 1019.

56. Where she resides with him in a house occupied by them as a home, she is not liable for rent or value of use and occupation. Grandy v. Hadcock, 85 App. Div. [N. Y.] 173.

57. A wife may make a separate contract for her nursing and care in her last illness. Dearing v. Moran [Ky.] 78 S. W. 217. She is not personally liable for medical services for herself and children, at her request, without a special agreement [Laws 1896, p. 220, c. 272]. Richards v. Young, 84 N. Y. Supp. 265.

58. Medical services for her husband or family. Hazard v. Potts, 40 Misc. [N. Y.] 365. That a husband is liable for necessaries of his wife will not prevent her from contracting for services as a companion or nurse to be paid out of her own estate. Bonebrake v. Tauer [Kan.] 72 Pac. 521.

59. Expenses for nursing husband [Rev. St. 1895, art. 2970]. Flannery v. Chidgey [Tex. Civ. App.] 77 S. W. 1034.

60. McBride v. Adams, 84 N. Y. Supp. 1060.

61. Monessen Nat. Bank v. Lichtenstein [Pa.] 56 Atl. 405.

62. Aiken v. Southern R. Co. [Ga.] 44 S. E. 828.

63. If a husband furnished his wife with

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Agency of wife for husband.—The wife's agency for the husband is always a question of fact arising either from his failure to supply her with necessaries or from his express or implied authority to be inferred from the circumstances.[64] One attempting to hold the husband must show such agency.[65]

§ 7. *Contract and property rights and liabilities of wife as to third persons.*[66]—Contracts of married women are governed by the law of the state where made,[67] unless they concern realty, when usually the law of the situs of the property will govern.[68]

Agency of husband for wife.—A husband cannot create a leasehold interest in land of his wife as her agent in Minnesota.[69] Clear and unequivocal evidence is necessary to bind the wife by acts of her husband as her agent.[70] If his agency for

necessaries suitable to her position, and means with which to pay therefor, he is not liable for other goods sold to her, unless prior authority or subsequent ratification is shown. Wanamaker v. Weaver [N. Y.] 68 N. E. 135. His mere failure to give notice of a separation will not render him liable to a dealer without notice of the separation, where no previous course of dealing would authorize the seller to believe that the husband approved the purchase. Sanger v. Bernay [Tex. Civ. App.] 71 S. W. 605.

64. Martin v. Oakes, 42 Misc. [N. Y.] 201. Sufficiency of instructions regarding her authority to act for him, charging that proof of marriage is not conclusive evidence of agency, and that no presumption lies of the agency. Brown v. Woodward, 75 Conn. 254. Express authority must be shown to hold him liable for articles ordered by her which are not necessaries or of such character as to raise an implied agency for him; purchase of jewelry. McBride v. Adams, 84 N. Y. Supp. 1060. Testimony of a third person that he acted as broker for the wife in procuring a loan for her husband may be considered after proof from other evidence that she acted as agent for the husband in that transaction. Brown v. Woodward, 75 Conn. 254. That two persons are husband and wife living together, when she secures a loan on a note signed by him, is evidence to be considered, though not conclusive, in determining whether he obtained the money through her as his agent; her acts will more readily be supposed to be performed with his consent than those of a stranger. Id. Where it did not appear that the wife had any authority to make an agreement for her husband for work or that she had ever acted as his agent except to keep accounts and collect bills a statement by her to defendant for whom the husband performed services on receiving part payment that the husband would complete the contract, would not bind him. Butler v. Davis [Wis.] 96 N. W. 561.

65. Jewelry purchased by wife. McBride v. Adams, 84 N. Y. Supp. 1060.

66. Property rights which depend on the mutual rights of spouses are also treated ante, § 2.

Construction of Civ. Code provision, § 164, providing that title to **property conveyed to a married** woman by an instrument in writing is presumptively vested in her as her separate estate, as to purchasers or incumbrancers in good faith and for valuable consideration. Peiser v. Bradbury [Cal.] 72 Pac. 165.

67. A note signed by a wife living with her husband in Tennessee, delivered and consummated in Ohio and payable there, is an Ohio contract. Coverture is a defense in an action on the note in Tennessee, though valid and enforceable in Ohio. First Nat. Bank v. Shaw, 109 Tenn. 237, 59 L. R. A. 498.

If the law of another state as to power of a married woman to contract is not proven it **will be presumed** to be the same as that of the forum. In a suit on contract made in the other **state**. Peter Adams Paper Co. v. Cassard, 206 Pa. 179.

See further, Conflict of Laws, 1 Curr. Law, 559.

68. A covenant of warranty in a deed by a married woman in South Carolina conveying land in North Carolina, must be governed by the laws of the latter state as to validity in determining whether an estoppel is created against the covenantor to claim; where the covenant of warranty violates the law of South Carolina, she is not estopped from recovering the land. Smith v. Ingram, 132 N. C. 959.

69. Gen. St. 1894, § 5534. Van Brunt v. Wallace, 88 Minn. 116.

70. Brown v. Daugherty, 120 Fed. 526. Sufficiency of facts showing husband's authority to contract for sale of her land (Saunders v. King, 119 Iowa, 291); to show that he had special authority to sign her name to a certain note, or general authority to sign her name to notes (Bank of Ravenna v. Dobbins, 96 Mo. App. 693). The mere fact of the marriage relation will not raise a presumption that he acts as her agent in management of her interest in lands held by them as co-tenants [Civ. Code, § 172]. Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433. His mere statement that he has authority to pledge her property for his debt, is insufficient evidence of such authority. Just v. State Sav. Bank [Mich.] 94 N. W. 200. Her denial of his authority to contract for sale of her land, as asserted by the purchaser attempting to enforce the contract, will show lack of such authority, plaintiff having the burden to establish the agency. Saunders v. King, 119 Iowa, 291. That she allowed him to manage land conveyed by him to her, sell the products and handle the proceeds, will not show his authority to sell the land. Id. Where a married woman was building on a lot owned by her and the contract for materials for that purpose was made by her

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her is known, she may extend her liability through him by allowing him to contract for her as to other matters,[71] but her ratification of his acts will not raise a presumption of continuance of his agency.[72] Declarations of the husband to a stranger regarding the wife's liability will not bind her unless his agency for her is shown,[73] or unless she afterward ratifies them.[74] The third person attempting to hold the wife liable for her husband's acts must show the agency.[75]

Contracts in general.[76]—Generally the wife may contract as if single, where she binds her separate estate,[77] and the debt appears necessary to her separate estate

husband, in an action against her to recover therefor on the ground of his agency, evidence may be shown as to his purchase of articles to be used for the property without special instructions from her. Rahm v. Newton, 87 Minn. 415.

71. After buying goods for her, he may bind her for supplies for her plantation which he manages as her agent [Code 1892, § 2293]. Johnson v. Jones [Miss.] 34 So. 83.

72. Though the act of a husband making his wife joint purchaser of a patent right is ratified by her joinder in a note therefor, it will not be presumed that his agency continues so that she will be estopped to claim that the note is void as against an assignee because not indorsed "peddler's note" as required by St. 1899, § 4223, for the reason that he asserted to the assignee on the purchase of the note, that there was no defense against it. Hays v. Walker [Ky.] 76 S. W. 1099.

73. Recognition by husband of broker's right to commissions from her. Winans v. Demarest, 84 N. Y. Supp. 504. The wife is not bound by false statements and representations of her husband to induce a sale of her land. Lewis v. Hoeldtke [Tex. Civ. App.] 76 S. W. 309. In a suit by a wife to recover stock belonging to the community after abandonment by her husband, a conversation between defendant and the husband, from whom it is claimed the horses were bought, is inadmissible, and where no sale is shown to have been pleaded an admission of evidence by the wife as to a mortgage by her on the horses was not prejudicial. Word v. Kennon [Tex. Civ. App.] 75 S. W. 365. Where one became a tenant at will of premises of the wife, entering without authority and paying rent, false representations of the husband as to the condition of the premises, as agent of his wife, cannot be shown in defense, in an action by the wife for rent. Van Brunt v. Wallace, 88 Minn. 116. Declarations of a husband to a stranger while in possession of his wife's land as her agent regarding its boundaries are not admissible against her. Perkins v. Brinkley, 133 N. C. 348.

74. A declaration of a husband to a plaintiff in a suit against his wife on a note executed by him, which it was alleged she had agreed to pay, concerning his conveyance of property to her to enable her to make a loan to pay the note, could be shown where it was communicated to the wife and she admitted that such an arrangement was made. McIntire v. Schiffer [Colo.] 72 Pac. 1056. Where a husband made a contract with a broker to exchange real estate, a later contract by his wife for the same purpose with full knowledge of the facts, is a ratification of the broker's acts in securing the contract. Charles v. Cook, 84 N. Y. Supp. 867. Where a wife knew that a tenant dealt with her husband as the real owner of premises and took part in negotiations, was present when the lease was signed, received rents and receipted in her husband's name and had knowledge that the tenant was improving the property relying on the lease, she is estopped to dispute the title and authority of her husband as against the tenant. Western N. Y. & P. R. Co. v. Rea, 83 App. Div. [N. Y.] 576.

75. Saunders v. King, 119 Iowa, 291.

76. Sufficiency of instruction in action for recovery for supplies furnished a wife through her husband for her separate business on question whether plaintiff was entitled to believe and did in good faith believe that she was the purchaser. Seavy Co. v. Campbell, 115 Wis. 603. Where in trespass as to land belonging to husband and wife as tenants in common a settlement was claimed to have been made with their agent, a deed by them after such settlement and tendered to defendant by the alleged agent does not show that the wife was a party to the agency in the settlement. Wagoner v. Silva [Cal.] 73 Pac. 433. Acts 1901, p. 859, c. 617, subjecting the property of a married woman to a lien for improvements and making liens enforceable before a justice of the peace when less than a certain amount, does not change the general law that she is not liable on her contracts and cannot be sued before a justice to charge her separate estate therefor. Harvey, Blair & Co. v. Johnson, 133 N. C. 352. Evidence in an action against a wife on a note executed by her husband, which it is alleged she had agreed to pay, in return for his conveyance of property to her to enable her to make the loan, that at the time she admitted that such arrangement had been made between them, plaintiff intended to attach the husband's property if she did not agree to pay the note, was not prejudicial to her. McIntire v. Schiffer [Colo.] 72 Pac. 1056.

77. Sufficiency of recitals in note signed by husband and wife to bind her separate personal estate. Harvey, Blair & Co. v. Johnson, 133 N. C. 352. That a husband is liable for necessaries of his wife will not prevent her from contracting for services as a companion or nurse to be paid out of her own estate. Bonebrake v. Tauer [Kan.] 72 Pac. 521. A contract by a wife to pay board of an adult sister and her child is void under the married woman's act since it has no reference to her separate estate. June v. Labadie [Mich.] 92 N. W. 937. Separate property belonging to a married woman carrying on business in her own name and having property in such business and purchasing goods on her own credit for that purpose may be subjected in equity to the

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and business;[78] however, in New York, she is liable for goods purchased on her individual credit, though engaged in no separate business and without separate property.[79] The consideration for her contract must be sufficient.[80]

She may contract for a division of property as between herself and husband on one side and her adult children on the other.[81] She may obligate herself for services to a partnership to be performed by her husband as traveling salesman.[82] A note of a husband and wife without her privy examination cannot be enforced against her separate realty.[83] The contract of release of a prior indorser, made by a married woman in purchase of a note on which she is accommodation indorser, is binding.[84]

That part of a debt for which her note has been given is affected by usury, and another part is that of her husband, will not prevent her liability for the part which she owes.[85] Where a husband agreed with his wife to transfer his land to her if she would borrow money and discharge his note then due, commencement of action against the husband on the note did not waive the right to sue the wife.[86] A wife making a payment in good faith after her husband's death, on a note given by them, void because of coverture, believing it valid as to her, cannot recover, the mistake being one of law;[87] but her recognition of the debt after his death, by making a partial payment and promise to pay the remainder without a new consideration,

claims of such creditors. First Nat. Bank v. Hirschkowitz [Fla.] 35 So. 22. A lease of realty to a married woman and her husband, gives her as separate property, an undivided half interest in the estate, as though she were a feme sole, making her liable for payment of rent though she intends in the transaction to aid her husband in securing a place of business. It is essential, that at the time of contract, she have separate property and intends to charge it; but this will not apply to a debt for property acquired by her, as to which, the purpose to which she intends to devote the property, or her possession of separate property need not appear. Kriz v. Peege [Wis.] 95 N. W. 108. The holder of a note signed by a married woman has the burden of proving that she intended thereby to bind her separate estate. Farmers' Bank v. Boyd [Neb.] 93 N. W. 676; Farmers' Bank v. Normand [Neb.] 92 N. W. 723. A parol promise by an executrix to pay for nursing of her testator husband is void under the statute of frauds, whether made as executrix or widow [Rev. St. 1895, art. 2543, §§ 1, 2]. Flannery v. Chidgey [Tex. Civ. App.] 77 S. W. 1034. That a married woman, when acquiring property and pledging credit therefor, intends to devote it to the benefit of her husband, and that the creditor knew of this fact, thereby being induced to extend credit to her, will not prevent legality of her promise to pay. If no obligation exists in the transaction that she should so devote the use of the property. Kriz v. Peege [Wis.] 95 N. W. 108.

78. That the note of a husband and wife bears a statement below the signature made by the wife to the effect that the note is for benefit of her separate estate, which she makes liable for its payment, will not warrant recovery against her on the note, unless it appears that the loan was necessary for her separate estate or to carry on her separate business, or with regard to her personal services. Ritter v. Bruss, 116 Wis. 55.

79. Minners v. Smith, 40 Misc. [N. Y.] 648.

80. Release of a subsisting valid lien is sufficient. Field v. Campbell [Ind. App.] 67 N. E. 1040. A note for a loan is on sufficient consideration. Purchase of a promissory note is on a valid consideration since note is property. Crampton v. Newton's Estate [Mich.] 93 N. W. 250. The consideration is sufficient if it passes to a third person at her request; contract for release of prior indorser in purchase by her of note on which she is accommodation indorser [2 Gen. St. p. 2017]. Headley v. Leavitt [N. J. Err. & App.] 55 Atl. 731. Where a wife gave her note for her husband's debt to prevent suit against him on the note, there is a sufficient consideration. King v. Hansing 88 Minn. 401. A mortgage given by a married woman on her separate estate merely to secure a prior debt of her husband or of a third person without present consideration is void. Conkling v. Levie [Neb.] 94 N. W. 987. A note by a lessee and his wife for past due rent, is supported by a sufficient consideration where the time for payment was extended, forfeiture of the lease waived, and the lessee allowed to remain in possession. Emery v. Lowe [Cal.] 73 Pac. 981. The validity of her contract pledging her credit for property, whether in form of money or any other value, requires only that the equivalent for the credit shall actually pass to and invest in her without regard to any obligation preventing her from enjoying it as her separate property. Kriz v. Peege [Wis.] 95 N. W. 108.

81. Crouch v. Crouch, 30 Tex. Civ. App. 288.

82. Orr v. Cooledge, 117 Ga. 195.

83. Harvey, Blair & Co. v. Johnson, 133 N. C. 352.

84. If the consideration is sufficient [Married Woman's Act, § 26 (2 Gen. St. p. 2017)]. Headley v. Leavitt [N. J. Err. & App.] 55 Atl. 731.

85. Lanier v. Olliff, 117 Ga. 397.

86. McIntire v. Schiffer [Colo.] 72 Pac. 1056.

87, 88. Ruppel v. Kissel, 24 Ky. L. R. 2371, 74 S. W. 220.

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does not amount to a ratification.[88] An equitable lien on the estate of a married woman will exist in favor of one furnishing money for benefit of her estate,[89] and the creditor who first moves has priority.[90]

One in possession of money belonging to a married woman is liable as for money due and received to her use, where, without her knowledge or consent, it is used by a firm of which he is a member, on her husband's order and credited to him.[91]

Contracts of suretyship.[92]—Unauthorized married women cannot become sureties in Louisiana.[93] A mortgage given by a married woman to secure the debt of a third person cannot be avoided by her when it was made at the time she took title to the premises and as a part of the transaction which vested her with title.[94]

The wife cannot become surety for debts of her husband,[95] except in states providing for such contracts by constitutional provisions or statutes which must be strictly followed;[96] and generally there must appear a clear intention to bind her separate estate.[97]

89. Fletcher v. Brainerd [Vt.] 55 Atl. 608.

90. Filing a bill to subject separate statutory property of a married woman to her debts and for the appointment of a receiver to take possession of such property, gives a creditor a prior lien over other creditors as to the funds in the hands of the receiver, if the suit is successfully brought to final decree. The decree takes effect by relation to the appointment of a receiver. First Nat. Bank v. Hirschkowitz [Fla.] 35 So. 22.

91. The firm or its members did not part with anything of value in return for the money and the wife did nothing to change the condition of the partner nor did she fail to disclose her interest nor was she responsible for any impression of the partner that the money was the property of the husband or that he had the right to dispose of it as her property. Comer v. Hayworth, 30 Ind. App. 144.

92. Sufficiency of statement in affidavit by a wife on application to open a decree foreclosing her mortgage to secure her husband's debt to show that the **money was advanced** to prepare the premises for an **illegal purpose.** Hallowell v. Daly [N. J. Eq.] 56 Atl. 234.

Where one loaning money to a husband took the note of the husband and wife without negotiations with her, he cannot set up an **estoppel against her** to prevent her assertion that she was a mere surety. Ritter v. Bruss, 116 Wis. 55.

In an action on a note of husband and wife, a law providing that transactions between the trustee and beneficiary are **presumed to be without sufficient consideration** as to the latter and under undue influence, **will not apply** where the wife contends that she signed as a mere surety under undue influence of her husband [Civ. Code § 158, construed in connection with § 2235]. Farmers' & Merchants' Bank v. De Shorb, 137 Cal. 685, 70 Pac. 771.

93. State ex rel. Mt. Calvary M. E. Church v. St. Paul [La.] 35 So. 389.

94. Conkling v. Levie [Neb.] 94 N. W. 987.

95. Transactions by which it is intended that a wife should bind herself or property for debts of her husband, cannot be sustained as between the parties, whatever their form, nor can the wife be estopped in attacking them by her own admissions or conduct, nor is she confined in cases of authentic acts, to counter-letters or interrogatories, but may resort to parol evidence. Caldwell v. Trezevant [La.] 35 So. 619. No personal liability as to a married woman arises from her signing her husband's note as surety. Magoffin v. Boyle Nat. Bank, 24 Ky. L. R. 585, 69 S. W. 702. Where a contractor borrowed money to complete a building, giving a note and mortgage on realty from himself and wife, the land being held by them as tenants by entirety, and the owner was unable to pay the contractor and assigned to him a contract for purchase of the land, which land was afterward conveyed to the wife, the conveyance did not render her a principal instead of a surety on the notes and mortgage. Guy v. Liberenz, 160 Ind. 524.

96. Though the wife's name appeared first on notes of herself and husband, which are in substance an assumption by her of his debt, she is not liable unless she binds her separate estate as required by statute by mortgage or other conveyance [St. 1899, § 2127]. Planters' Bank & Trust Co. v. Major, 25 Ky. L. R. 702, 76 S. W. 331. A married woman's consent that her separate property shall be liable for her husband's debts must be in writing and executed according to the statute regulating conveyances by married women of the class of property to which the consent relates [Express provision of Const. 1885, art. 11, § 1]. Springfield Co. v. Ely [Fla.] 32 So. 892. Written authority given by a wife to her husband to deposit certain stock certificates from her separate property as collateral security for his debt, together with a mutual agreement between the wife and creditor after her divorce from her husband, substituting other stock certificates in the place of those deposited by the husband, will entitle the creditor to subject the latter certificates to his debt; the wife's consent to the original pledge was sufficient under Constitution 1885, art. 11, § 1. Id. The mortgage of a married woman to secure her husband's debt is valid if made according to statutory requirements. Hallowell v. Daly [N. J. Eq.] 56 Atl. 234. A mortgage executed by a wife on her separate estate to indemnify her husband's sureties, is voidable merely and she must avoid it by some affirmative action of herself or her privies (Burns' Rev. St. 1901, § 6964]. Field v. Campbell

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Whether a married woman is surety or principal is to be determined from whether she received in person or as to her separate estate, the consideration of the contract and not from its form.[98] Her action in signing a note and mortgage on realty, held by herself and husband as tenants by entirety, in securing a statutory deduction, will not estop her from asserting that she was a mere surety, if it does not appear that the mortgagee had been misled to his prejudice.[99]

[Ind. App.] 68 N. E. 911; former opinion, 67 N. E. 1040. The wife cannot become her husband's surety in Louisiana, but she may become the surety of a partner to secure advances to the partnership, though her husband is a member thereof, the partnership being a distinct personality from the individuals who compose it. Stothart v. Hardie & Co., 110 La. 696. A mortgage executed by a married woman on her separate property, to secure a debt of her husband, is valid, though the whole consideration went to him. Wilson v. Neu [Neb.] 95 N. W. 502.

97. Where husband and wife joined in a deed with covenants of general warranty, conveying his lands in trust to secure debts owed by him to her, she is not bound by covenants of warranty in a subsequent similar deed in which she joined with the husband, conveying the same land to another, where the first deed was not postponed to the second nor was there any reference to her separate estate [Code, § 2502 (Amended Act March 6, 1890)]. Augusta Nat. Bank v. Beard's Ex'r, 100 Va. 687. Where a husband and wife joined in a deed with covenants of warranty, conveying his land in trust for her to secure his debt to her, a second similar conveyance of the same land by them, to secure debts of his to a third person, will not amount to a release of her interest as required by the first deed where no such purpose is disclosed by the second deed. Id. A mere covenant of warranty in a deed by husband and wife, conveying land which had been previously conveyed by both of them with covenants of general warranty to a trustee to secure debts owed by the husband to the wife, will raise no implied promise to charge her separate estate [Code, § 2502]. Id. Signing a note will create no presumption of consideration or of intent of a married woman to bind her separate estate. Farmers' Bank v. Boyd [Neb.] 93 N. W. 676. Where it appears that a married woman had signed a judgment note as surety for her husband who was a builder, and had purchased materials from plaintiffs to a certain amount, part of which had gone into the wife's houses, and it did not appear whether two sums paid upon the debt was the money of the husband or the wife, the judgment should be opened as to the wife as to the amount in access of the value of materials put into her houses, less the first payment made, when the materials for her benefit constituted the only indebtedness to plaintiffs. Hill v. Garrison, 20 Pa. Super. Ct. 440.

98. Where it appears that an indorsement by a married woman of a note was solely for her husband's benefit and she received no benefit from the consideration, she was surety of her husband and not liable on the note [Burns' Rev. St. 1901, § 6964]. John C. Groub Co. v. Smith [Ind. App.] 68 N. E. 1030. Where the consideration for a note of husband and wife secured by their mortgage on realty held by them as tenants by entirety, was used entirely to pay the husband's individual debts, the wife was a surety only. Guy v. Liberenz, 160 Ind. 524. As to the note of a husband and wife secured by a mortgage on land held by them as tenants by entirety, no presumption exists that the consideration was not used for the benefit of such land or that she is surety, the burden being on her to allege and prove such fact. Id. Where after execution of a mortgage by a husband and wife including her separate estate to indemnify his sureties, she subsequently obtains a loan on other separate property to relieve her land from the mortgage which has become a valid lien by her election not to defend against it, she cannot defend against the later mortgage on the ground that it was made to secure her husband's debt, since the consideration was the release of a subsisting lien. Field v. Campbell [Ind. App.] 68 N. E. 911; former opinion 67 N. E. 1040. Where it appeared that at the time a husband and wife executed notes to a bank, his account was overdrawn and the bank held a note for such overdraft against him, and when he negotiated the note executed by himself and wife its proceeds were applied to such indebtedness, and the balance placed to his credit, the wife having nothing to do with the transaction, it sufficiently appeared that she signed as a surety merely, so that recovery could not be had against her, though her name appeared first on the notes. Planters' Bank & Trust Co. v. Major, 25 Ky. L. R. 702, 76 S. W. 331. Where property is sold to the wife after refusal to sell to the husband because of his inability to give security, and title is conveyed to her with her knowledge, she executing a mortgage to secure the purchase money, she is liable as principal and purchaser and not as a surety on the debt of her husband, so as to render her not liable on the purchase notes. McDonald v. Bluthenthal, 117 Ga. 120. Where a husband borrowed money executing mortgages on his separate property and no part of the loan was applied to the benefit of the wife's separate estate and after maturity of the mortgages, the husband and wife gave a deed of trust as additional security on city lots, a part interest of which belonged to the wife, with knowledge by the beneficiaries that the deed was given to secure his debt and that she had received no benefit of the money, she and her property were merely surety for his debt. White v. Smith, 174 Mo. 186. Where a husband in debt to a bank of which he is president borrows money to pay the debt and his wife, under no liability therefor, gives her individual note with bank stock as collateral and her bond secured by mortgage in which her husband joins, she is surety only for his debt. Stewart v. Stewart [Pa.] 56 Atl. 323.

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A subsequent creditor of the husband cannot require the holder of a former mortgage, given by the wife on her land to secure his debt, to proceed against her property first nor claim subrogation to the mortgagee's security against her.[1] A wife executing a mortgage on her property to secure her husband's debt does not stand as his surety, so that her property is released by a novation which would release a mere surety.[2] A pledge of a promissory note of a wife to secure a debt part hers and part that of her husband, the separate interests being readily ascertained, is valid as to the part of the debt due from the wife, and the pledgee may recover against her on maturity.[3] Where husband and wife gave a mortgage on realty owned as tenants in entirety, to secure their note, the wife acting merely as surety, her subsequent joinder with him to secure a deduction under the statute is not an election by her to treat the note and mortgage as binding her.[4] Appointment of a receiver for an indefinite time for rent of a married woman's separate property, which was mortgaged to secure her husband's debt, she joining in the assignment of the rent, was not a deprivation of her property without her consent and due process of law.[5] Where husband and wife conveyed property of her separate estate to a third person, who immediately reconveyed to the husband, both conveyances reciting a cash consideration, a subsequent purchaser from him cannot be charged with notice that the transaction was only colorable and made to evade a provision of the instrument creating her separate estate, by which she was prohibited from selling or encumbering it for debts of her husband.[6]

Conveyances; mortgages; contracts to convey; powers.—Statutes permitting married women to convey their property must be strictly construed.[7] A married woman's deed conveying her common-law estate is valid and enforceable in Missouri.[8] A wife must acknowledge privily her conveyance of her separate estate[9] or her contract to convey,[10] and it must appear that she signed willingly.[11] The husband generally must join in her conveyance or mortgage,[12] but if she executed a deed without

99. Guy v. Liberenz, 160 Ind. 524.

1. Stewart v. Stewart [Pa.] 56 Atl. 323.

2. Magoffin v. Boyle Nat. Bank, 24 Ky. L. R. 585, 69 S. W. 702.

3. Johnston v. Gulledge, 115 Ga. 981.

4. Burns' Rev. St. 1901, § 8417a. Guy v. Liberenz, 160 Ind. 524.

5. De Berrera v. Frost [Tex. Civ. App.] 77 S. W. 637.

6. Johnson v. Mutual Life Ins. Co., 24 Ky. L. R. 668, 69 S. W. 751.

7. Acts 1869-70, p. 113, c. 99, providing that married women over twenty-one, owning land, shall have the power of disposal as if single, but that such provision shall only apply to women who have abandoned their husbands or have been abandoned by their husbands, or whose husbands are insane, does not render the deed of a married woman valid, who does not come within such classes by which she conveyed her land to her husband without his joinder, though she was privily examined. Worrell v. Drake [Tenn.] 75 S. W. 1015.

8. Statute relating to married women. Moston v. Stow, 91 Mo. App. 554.

9. Pub. Laws 1898, p. 685, § 39, provides that "no interest" of hers shall pass without it. Schwarz v. Regan, 64 N. J. Eq. 139. Sufficiency of evidence to impeach certificate of acknowledgment of execution of deed by husband and wife relinquishing her dower, where she is the principal attacking witness and did not assert her claim until 33 years after execution, and after the death of the husband and the acknowledging officer. Swett v. Large [Iowa] 97 N. W. 1104. Sufficiency of contents of acknowledgment by wife of deed of wife and husband to wife's separate property, under Pasch, Dig. art. 1003. Estes v. Turner, 30 Tex. Civ. App. 365. A purchaser under a contract by a married woman, unenforceable for failure of proper statutory acknowledgment by her, cannot compel a conveyance by her subsequent grantee who took with notice of the contract [Pub. Laws 1898, p. 670, § 39]. Ten Eyck v. Saville, 64 N. J. Eq. 611. Act 1891, p. 89, c. 91, requiring a privy examination of a married woman as to the conveyance of house furniture by chattel mortgage or otherwise applies only to like conveyances creating liens and not to a note signed by herself and husband binding her separate estate for moneys received for its benefit. Harvey, Blair & Co. v. Johnson, 133 N. C. 352.

10. Pub. Laws 1898, p. 685, § 39. Schwarz v. Regan, 64 N. J. Eq. 139.

11. If the officer's certificate of acknowledgment of a married woman's deed fails to state that he knew her or that she signed willingly, the deed is void. McAnulty v. Ellison [Tex. Civ. App.] 71 S. W. 670. Sufficiency of evidence in an action on a note and mortgage of husband and wife to show that she executed them freely and voluntarily. Farmers' & Merchants' Bank v. De Shorb, 137 Cal. 685, 70 Pac. 771.

See, also, Acknowledgment, 1 Curr. Law 17.

12. An individual contract of a married

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his joinder and afterward becoming a party, while a feme sole trader, to a partition proceeding in which the land conveyed by her is concerned, she will be deemed to have ratified her deed if she does not repudiate it.[13] She may execute a power given before marriage without his joinder in Alabama.[14]

That consideration for a deed of a husband and wife was largely an old account due from her husband to the grantee is insufficient to avoid the conveyance.[15] She is bound by covenants in her deeds referring to her separate property.[16] She cannot deny the recital of her deed conveying her separate property as a consideration, as against a subsequent innocent purchaser.[17] A sale of realty by the wife will not be held a mortgage merely because she believed it to be such.[18] One entering land of a married woman under her void contract for its sale is liable only for rent.[19] That she permits a grantee and his subsequent grantees to take possession of land and improve it under a void deed from her will not estop her from its recovery.[20] An invalid power of attorney, given by a wife to sell her separate realty, and in which her husband did not join, and a deed from the attorney, may be shown as a basis for a claim for improvements in good faith by the grantee.[21] Threats by the husband to leave his wife, by which he procured her signature and acknowledgment to sale of a homestead, will not prevent specific performance where the vendee is entirely innocent.[22] Indorsement by a notary on the back of a contract by the husband and wife for the sale of her land, whereby an extension of time is given for the first payment, made without authority of the wife, will not avoid the contract nor warrant her repudiation.[23]

The wife may, as to an innocent person without notice, lose her rights in property,[24] but her husband's grantee of lands which they own jointly can have no ad-

woman for sale of her lands and to execute a bond given for a deed is void and furnishes no consideration for notes for purchase money [Burns' Rev. St. 1901, § 6961]. Shirk v. Stafford [Ind. App.] 67 N. E. 542. Mortgage [St. § 2128]. Deusch v. Questa, 25 Ky. L. R. 707, 76 S. W. 329. Where a husband and wife accepted an offer for purchase of her real estate and executed a joint deed, which the purchaser refused on tender of the contract so executed as to her, the purchaser could not object that it was invalid because of the husband's failure to join therein, nor because of want of mutuality. Hoffman v. Colgan, 25 Ky. L. R. 98, 74 S. W. 724. Where a grant is made to husband and wife as such, the husband's consent is not necesary to her conveyance of her interest to a third party and it will convey an interest to him as tenant in common with the husband of the fee as well as the rents and profits during her life [Rev. St. 1878, §§ 2067-2069, 2340, 2342]. Wallace v. St. John [Wis.] 97 N. W. 197. A deed of a wife's land, signed and acknowledged by herself and husband referring throughout to the grantors as parties and in the plural number, which the husband acknowledged to have signed as his free act and relating to property as to which neither husband nor wife made a claim during their life, was a joint deed, though the husband's name did not explicitly appear in the introductory clause [Rev. St. 1879, § 669]. Peter v. Byrne, 175 Mo. 233.

13. In re Simon's Estate, 20 Pa. Super. Ct. 450.

14. Power of foreclosure of mortgage. Lide v. Park, 135 Ala. 131. A deed of her land in Texas may be executed by her husband and another acting under a power of attorney from the wife, privily acknowledged by her [Rev. St. art. 635]. Nolan v. Moore [Tex.] 72 S. W. 583.

15. Pratt Land & Imp. Co. v. McClain, 135 Ala. 452.

16. McGuigan v. Gaines [Ark.] 77 S. W. 52.

17. Johnson v. Mutual Life Ins. Co., 24 Ky. L. R. 668, 69 S. W. 751.

18. Where a wife duly authorized, executes an instrument, in form a sale of land, and takes a counter-letter securing a right to redeem within a year, and it is not alleged or proved that her purpose was to pay her husband's debts, and the price was sufficient, and the purchaser holds possession as owner for six years in good faith, that she intended to execute, and believed that she had executed a mortgage, is no ground for holding the transaction to be other than a sale. Caldwell v. Trezevant [La.] 35 So. 619.

19. Shirk v. Stafford [Ind. App.] 67 N. E. 542.

20. Smith v. Ingram, 132 N. C. 959.

21. Nolan v. Moore [Tex.] 72 S. W. 583.

22. Johnson v. Weber [Neb.] 97 N. W. 585.

23. Johnson v. Weber [Neb.] 97 N. W. 585.

24. Where a husband and wife owning land in entirety, conveyed it to a third person who negotiated a loan for benefit of the husband, to whom the third person reconveyed the property, the deeds being absolute in form, and it was agreed between husband and wife that when the loan was made the land should be reconveyed, the renter at time of loan knowing nothing of such agreement or conveying of title, except as shown

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verse possession until the husband's death.[25] Knowledge of a married woman that her husband is negotiating an exchange of a whole tract of land owned by her and him together in his own name, or has exchanged it as his own land, or her casual expression of satisfaction with such an exchange, or her silence, will not bar her right by an estoppel in pais.[26] Joinder with her husband in a suit for cancellation of his sole contract for the sale of land in which they each owned an undivided half, and for forfeiture of all payments by the vendee under such contract, amounts to an acceptance and ratification of the contract by the wife.[27]

Where a grandfather agreed to bequeath property to his grandson's wife, if she survive him, in return for maintenance and comfort to her husband during life and payment for medical services, and funeral expenses of the grandson at his death, she was entitled to enforce the contract against the grandfather's estate, where she expended her property, relying on the promise.[28] A parol gift of realty from her father and taking possession with her husband will not estop a wife from setting up an equitable title therein, by an agreement for consideration, that a purchaser shall take a deed directly from the father and by surrendering possession under such agreement.[29] Where a mother borrowed money from her daughter, executing notes therefor, to the amount of which, after the daughter's marriage, the latter would have been entitled on an equitable settlement between herself and husband, whether the husband had reduced it to possession or not, the mother was not entitled to set off a claim against the husband against the notes.[30] An agreement between a mortgagor and mortgagees whereby, for a certain consideration and payment of the costs of a foreclosure sale, the mortgagees, without the wife's knowledge, allowed the sale to be made as advertised and arranged not to advertise the property under the mortgage until later, amounted to a suspension of the right to foreclose, discharging the wife from liability.[31] Where a husband gives another a warranty deed of land and with the proceeds buys land, taking title by entireties in himself and wife, such land is not bought with the money of the third person so as to subject it to his execution as land held in trust, though he obtains a judgment against the husband for breach of the covenant of warranty.[32] A married woman in Kentucky can contract for the building of a house on her land without concurrence of her husband,[33] and may sell her separate estate or trust estate, conveyed or devised to her, on any terms satisfactory to her, or convey by deed of gift, if her husband joins.[34]

A deed to her passes the legal title to her as her separate estate.[35]

by the abstract he had the right to rely on such apparent title of the husband to the property, and was not put on inquiry as to the secret agreement between husband and wife, by the fact that she transferred her interest just before the loan was made, or that the consideration in the deed was nominal [Burns' Rev. St. 1901, § 6964]. Webb v. Hancock Mut. Life Ins. Co. [Ind. App.] 66 N. E. 470.

25. Grantee holds the life estate by the curtesy. McNeeley v. South Penn Oil Co., 52 W. Va. 616.

26. McNeeley v. South Penn Oil Co., 52 W. Va. 616.

27. Whiting v. Doughton, 31 Wash. 327, 71 Pac. 1026.

28. Robinson v. Foust [Ind. App.] 68 N. E. 182.

29. Cauble v. Worsham [Tex.] 70 S. W. 737.

30. Terry v. Warder, 25 Ky. L. R. 1486, 78 S. W. 154.

31. White v. Smith, 174 Mo. 186.

32. Burns' Rev. St. 1901, §§ 3396-3398. Mercer v. Coomler [Ind. App.] 69 N. E. 202.

33. St. § 2128. Ware v. Long, 24 Ky. L. R. 696, 69 S. W. 797.

34. Gen. St. c. 52, art. 4, § 17, providing for sale of property and trust estates of married women. Johnson v. Mutual Life Ins. Co., 24 Ky. L. R. 668, 69 S. W. 751.

35. A deed by an execution purchaser to a married woman passes the legal title as her separate estate or as the community estate of herself and husband, and vests the real and beneficial interest, either in her as her separate property or in herself and husband as community property, unless the legal title was for the use and benefit of another. Williamson v. Gore [Tex. Civ. App.] 73 S. W. 563.

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Fraudulent conveyances.[36]—Transactions between husband and wife in prejudice of creditors will be carefully scrutinized, but there is a presumption of their good faith which must be overcome by affirmative proof.[37] Money or property delivered by a wife to her husband is presumed to be a gift as between her and his creditors, and the burden is on her to show that it is a loan.[38]

§ 8. *Torts by husband or wife or both.*—A minor cannot recover damages from his father and step-mother for personal injuries inflicted by the step-mother.[39] Where misrepresentations regarding a wife's land sold by herself and husband were made by both, he was equally liable with her therefor, though he acted as her agent; and though, in assuming to make such statements, he was merely mistaken.[40] Where a husband and wife executed a deed containing a false statement as to the amount of incumbrance on property assumed by the grantee, the husband was liable for the amount the grantee was compelled to pay because of the deceit.[41] A hus-

36. See article Fraudulent Conveyances, for full treatment of rights of creditors in property transferred between husband and wife.

37. Lynch v. Englehardt, etc., Co. [Neb.] 96 N. W. 524. The burden is on one endeavoring to foreclose a judgment lien against land for a debt of a husband where he had conveyed the land to a third person and the third person had conveyed to the wife, to show fraud and want of consideration. Fishel v. Motta [Conn.] 56 Atl. 558. Creditors seeking to subject a wife's land to debts of her husband because he used part of his salary exempt from their claims, to pay off an incumbrance thereon, she not pleading the exemption, must show that the money so used was subject to their claims. Furth v. March [Mo. App.] 74 S. W. 147. Where a creditor sues to set aside a conveyance by an insolvent to his wife, she must show that she is an innocent purchaser for a valuable consideration. Walker v. Harold [Or.] 74 Pac. 705. Fraudulent conveyance as between husband and wife and preferenoe of debts owed by husband to the wife. Vietor v. Swisky, 200 Ill. 257; Chinn v. Curtis, 24 Ky. L. R. 1563, 71 S. W. 923; Craig v. Conover, 24 Ky. L. R. 1682, 72 S. W. 2; Balz v. Nelson, 171 Mo. 682; Jayne v. Hymer [Neb.] 92 N. W. 1019; Omaha Brew. Ass'n v. Zeller [Neb.] 93 N. W. 762; Willis v. Willis, 79 App. Div. [N. Y.] 9; Gustin v. Mathews, 25 Utah, 168, 70 Pac. 402; Oppenheimer v. Collins, 115 Wis. 283, 60 L. R. A. 406; Farmers' Bank v. First Nat. Bank, 30 Ind. App. 520; Roberts v. Brothers, 119 Iowa, 309; Liver v. Thielke, 115 Wis. 389; Behrens v. Steidley, 198 Ill. 303; Shields v. Lewis, 24 Ky. L. R. 822, 70 S. W. 51; Florida L. & T. Co. v. Crabb [Fla.] 33 So. 523; Blossom v. Negus, 182 Mass. 515. Sufficiency of proof of fraud, either actual or constructive in the transfer of property by a husband to a third person and by third person to the wife (Fishel v. Motta [Conn.] 56 Atl. 558); of evidence in an action by creditors to subject property given by the husband to his wife before they became creditors to his debts to show delivery of the property to her (Fletcher v. Wakefield [Vt.] 54 Atl. 1012). Any presumption of want of consideration is of fact and not of law. Fishel v. Motta [Conn.] 56 Atl. 558. To maintain a suit to set aside a conveyance made by a third person to a wife, a creditor must show a debt due him from the husband at time of conveyance or that the conveyance was made in expectation of contracting such debt and to prevent its collection. Jayne v. Hymer [Neb.] 92 N. W. 1019. A voluntary conveyance between husband and wife cannot be set aside at the suit of a judgment creditor without showing insolvency of the debtor or that sufficient property was not retained to pay existing indebtedness. Multz v. Price, 82 App. Div. [N. Y.] 339. Where it appears, in an action to set aside the deed of a third person to a wife as in fraud of husband's creditors that the grantor, holding the land as security for a debt of the husband, conveyed it as a gift to the wife with the husband's consent, and as a part of the same transaction cancelled the debt, the conveyance will not be set aside. Blossom v. Negus, 182 Mass. 515. The value of land in possession of a wife, conveyed to her by her husband's fraudulent grantee, is subject to the grantor's debts, to the extent at least of all excess of the amount actually due the grantee from the husband in absence of homestead rights. Omaha Brew. Ass'n v. Zeller [Neb.] 93 N. W. 762. Realty bought by a debtor in his wife's name, or paid for with his money, is subject, in equity, to his debts contracted prior to conveyance to the wife. Florida L. & T. Co. v. Crabb [Fla.] 33 So. 523. Where a solvent husband, with his wife's consent, expends all his money in improving her property greatly increasing its value, creditors for materials, who believed the property to belong to him, may follow the improvements to the land. Brand v. Connery [Mich.] 92 N. W. 784.

38. Where evidence appears that a gift was intended, and that he dealt with the property as his own, parol evidence of a private understanding between them that the transaction was a loan to the husband by the wife will not rebut the presumption of gift as against creditors of the insolvent husband. Horner v. Huffman, 52 W. Va. 40.

39. McKelvey v. McKelvey [Tenn.] 77 S. W. 664.

40. Where plaintiff in an action against her for falsely representing the amount of her land in a sale to him, testified as to such false representations, a further statement by her as to the amount of the land made after the transaction was closed could be admitted as corroborating the claim of misrepresentation. Lewis v. Hoeldtke [Tex. Civ. App.] 76 S. W. 309.

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band is liable for an assault by his wife only when she is coerced by him, though he is present.[42] Her plea to an action to charge her with individual liability for tort, that he was present and participated, is insufficient, as merely raising a prima facie presumption of his coercion, which is an essential ingredient of her defense.[43] His liability for her tort which is not committed with any reference to her separate property is not affected by her statutory right of separate estate and its management.[44] He is not liable for her negligent act, not committed in his presence or by his direction, while driving his team as his wife and not as his servant.[45] She is not liable for deceit for joining with him in a deed falsely stating the amount of incumbrance on property assumed by the grantee, where the property is not hers.[46] That a judgment has been recovered against her for making the same slanderous accusation independent of him was no bar to an action for slander against him.[47]

§ 9. *Torts against husband or wife or both. Wrongs to property.*—Husband and wife may sue jointly for trespass on lands held in common.[48] He may sue for injury resulting in a past reduction of the value of rents and profits of her lands without joining her as plaintiff.[49] If he is in possession of her land with her consent and puts in a crop, furnishing materials under an arrangement whereby he is to have the entire proceeds, he may sue in his own name for a tort as to the unsevered crop, without regard to the form of the contract with his wife.[50]

Wrongs to the person.—The liquor laws usually provide a redress for injuries resulting from sale of liquors to the husband.[51]

Death or personal injuries.—The statutory right of action for the negligent killing of the husband is sometimes invested in the wife, to the exclusion of other dependents,[52] or the administrator.[53] A wife freed from disability to sue may recover for expense, notwithstanding she might have looked to her husband who was liable.[54] In California a deserted wife may sue a third person for wrongful death of a child.[55] The husband may recover for loss of his wife's services and her companionship, though her earnings are separate and her right of action is sole.[56] Husband and wife cannot recover damages separate to each in their

41. Interest from commencement of suit where the date of payment was not shown. Brunnell v. Carr [Vt.] 56 Atl. 660.

42. Edwards v. Wessinger, 65 S. C. 161.

43. Gen. Laws, c. 194, § 14. McElroy v. Capron [R. I.] 54 Atl. 44.

44. Henley v. Wilson, 137 Cal. 273, 70 Pac. 21, 58 L. R. A. 941.

45. Burns' Rev. St. 1901, §§ 6965, 6966. Radke v. Schlundt, 30 Ind. App. 218.

46. The deed does not come within the Married Woman's Act and her common law liability does not extend to torts based on contract. Brunnell v. Carr [Vt.] 56 Atl. 660.

47. Cushing v. Hederman, 117 Iowa, 637.

48. Code Civ. Proc. § 384. Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433.

49. He is entitled to such rents and profits. Jones v. Ducktown S., C. & I. Co., 109 Tenn. 375.

50. Chorman v. Queen Anne's R. Co. [Del.] 54 Atl. 687.

51. See Intoxicating Liquors.

52. Section 33, Act April 18, 1899, relating to mines. Willis C. & M. Co. v. Grizzell, 198 Ill. 313. Even though the husband is a minor and his father is alive [Rev. St. 1899, §§ 8820, 2865, 2866 (miner's death). Poor v. Watson, 92 Mo. App. 89. Only the widow of one killed by negligence of another can sue for his death, though he left children [Act April 26, 1855 (Pub. Laws, 309)]. Marsh v. Western N. Y. & P. R. Co., 204 Pa. 229.

See Death by Wrongful Act, 1 Curr. Law, 865.

53. Right of action for death of an employe in a coal mine is personal to his widow and children and cannot be maintained by his administrator. Act March 2, 1891, § 13 (Burns' Rev. St. 1876, §§ 74, 73; Horner's Rev. St. 1897, § 5480a). Dickason Coal Co. v. Unverferth, 30 Ind. App. 546.

54. Where a wife makes a debt for medical attendance because of assault by a third person, she may recover for such attendance though her husband was liable therefor [Rev. St. 1899, § 4335, authorizing her to sue without joinder of her husband]. Hickey v. Welch, 91 Mo. App. 4.

55. Where a husband threatened the life of his wife and drove her and her infant child from home, so that she was compelled to seek a divorce, and after divorce did not contribute to the support of either, his acts amounted to a desertion of his family [Code Civ. Proc. § 376]. Delatour v. Mackay, 131 Cal. 621, 73 Pac. 454.

56. Southern R. Co. v. Crowder, 135 Ala. 417.

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joint action.[57] Where husband and wife joined in an action for personal injuries to her, the cause being barred unless coverture saved her the right to sue, the action being essentially the wife's under the statute and he being merely a formal party, coverture suspended the limitation, though on recovery the husband could reduce the judgment to possession, subject to her equity.[58] A suit in Louisiana under the community regime, to recover damages for personal injuries of a married woman, must be brought by her in her own name for her separate use and benefit, with authorization of her husband or the court.[59] In Texas, the wife is neither a necessary nor a proper party to a suit by the husband for injuries to her from defendant's negligence,[60] but joinder of him as plaintiff in an action begun by her before marriage is not misjoinder.[61]

Judgment in a joint action by husband and wife for personal injuries to the latter is res judicata as to all issues therein determined in an action by the husband for damages for the same injuries;[62] but a judgment in favor of a wife in an action by her cannot be admitted as evidence in an action by the husband for loss of her services and expense of medical treatment.[63] Where he sues for injuries to her in his own name, under pleadings showing his object to be recovery of damages for her personal injuries, and his want of capacity to sue is not raised seasonably, judgment for damages may be given, which will become the property of the wife;[64] and she having appeared and testified and actively assisted in prosecution, the judgment is res judicata as against her.[65]

Damages for personal injuries to the wife may include compensation for pain and suffering past and future and permanent injuries,[66] physician's services,[67] damages to the community, permanent and temporary, mental anguish, cost of nursing and loss of her household services;[68] the husband may recover services in nursing her, but not loss of salary while so engaged.[69] In an action for personal injuries, she cannot recover for inability to perform manual labor,[70] nor for loss of earnings or diminished capacity to earn, if she has never had a separate estate, or does not expect to hold one, or is not engaged in separate business.[71]

57. Joint action to recover separate damages to each for trespass to their joint leasehold, the wife seeking damages for nervous shock preventing her from carrying on her business and the husband damages for loss of time and expenses in attendance on his wife. Stewart v. Alvis, 30 Ind. App. 237.

58. Thompson v. Cincinnati, N. O. & T. P. R. Co., 109 Tenn. 268.

59. After amendment of Civ. Code, art. 2402 by Act No. 68, p. 95, 1902. Harkness v. Louisiana & N. W. R. Co., 110 La. 822.

60. The damages recovered became community property. Galveston, H. & S. A. R. Co. v. Baumgarten [Tex. Civ. App.] 72 S. W. 78.

61. Rev. St. 1895, art. 1252, action for damages against carrier for indignities suffered by the wife. St. Louis S. W. R. Co. v. Wright [Tex. Civ. App.] 75 S. W. 565.

62. Brown v. Missouri Pac. R. Co., 96 Mo. App. 164.

63. Hatfield v. McGinniss, 40 Misc. [N. Y.] 675.

64. After amendment of Civ. Code, art. 2402 by act No. 68, p. 95, 1902. Harkness v. Louisiana & N. W. R. Co., 110 La. 822.

65. Harkness v. Louisiana & N. W. R. Co., 110 La. 822.

66. Suit by both. Jarrell v. Wilmington [Del.] 56 Atl. 379; Galveston, H. & S. A. R. Co. v. Baumgarten [Tex. Civ. App.] 72 S. W. 78.

67. In action by wife though already paid by husband. Oliver v. Columbia, N. & L. R. Co., 65 S. C. 1; Galveston, H. & S. A. R. Co. v. Baumgarten [Tex. Civ. App.] 72 S. W. 78.

68. Galveston, H. & S. A. R. Co. v. Baumgarten [Tex. Civ. App.] 72 S. W. 78. Sufficiency of instructions as to assessment of husband's damages for loss of services of wife, because of personal injuries. Tandy v. St. Louis Transit Co. [Mo.] 77 S. W. 994. Verdict for $600 as excessive in action by husband for expense of medical attendance and loss of wife's services. Id. Construction of a petition in action by husband against carrier for injuries to his wife, traveling on an ordinary ticket purchased by him for her, as most strongly against the pleader. Aiken v. Southern R. Co. [Ga.] 44 S. E. 828.

69. Southern R. Co. v. Crowder, 135 Ala. 417.

70. An instruction that a married woman suing for personal injuries may recover for inability to perform manual labor, is incorrect, where there was no evidence as to her

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Criminal conversation and alienation of affections.—Under the common law, the wife had no property right in performance of the husband's marital duties, and a law enabling her to sue in her own name for injury to her personal character will not confer a right of action for enticing away her husband.[72] The Married Woman's Act of New Jersey has not changed the common law.[73] An agreement between husband and wife on separation, giving her personal property which she brought with her at the time of marriage or made while with him, and money, in lieu of right of dower and homestead, will not bar her right to sue a third person for alienation of his affections.[74] Intentional enticement of a husband to separate from his wife is alone a wrongful and illegal act in Missouri; parents are liable for enticing away their minor son, though he married without their consent and against their wishes.[75] If the husband had no affection for her when the alleged enticement occurred, because of previous alienation or otherwise, the wife cannot recover.[76] Plaintiff's neglect and indifference is not provable against her unless it appears that such was without his consent or that it affected him.[77] The act of sexual intercourse is not necessary to liability.[78] That the husband seduced defendant is no defense to the wife's action.[79]

Pleading and proof.—An allegation that defendant wrongfully, wickedly and unlawfully sought and courted the husband, sufficiently charges malice in the act.[80] A complaint stating that defendant by words and conduct did alienate his affections, and that such was his purpose in words and acts, sufficiently states the intent and accomplishment of the alienation.[81] A demurrer to a paragraph of the answer, alleging that the separation was caused by plaintiff's fault, is properly sustained.[82] The wife suing cannot be allowed to state on cross-examination a single act of defendant which caused separation, where she relied on a series of acts and circumstances covering a considerable period.[83] The husband cannot show, in an action against his mother-in-law, the amount of money left defendant by her husband, and that it had never been divided between her and the wife, where he did not allege any damage by deprivation of benefit of his wife's property.[84] An admission by general denial that whatever relations defendant had with the wife were with plaintiff's knowledge and consent is not of fact for purposes of trial, but only for purposes of pleading; nor is it an admission of sexual intercourse with the wife.[85]

Plaintiff may be required to file a bill of particulars giving the particular place, time and date of each act of criminal conversation of which she intends

earnings from other labor than the performance of household duties [Mills Ann. St. §§ 3009, 3012, 3020]. Denver & R. G. R. Co. v. Young, 30 Colo. 349, 70 Pac. 688.

71. Central City v. Engle [Neb.] 91 N. W. 849.

72. Rev. St. 1898, § 2345. Lonstorf v. Lonstorf [Wis.] 95 N. W. 961.

73. Gen. St. p. 2012; § 24 of the Practice Act; Gen. St. p. 2536 does not confer the right. Hodge v. Wetzler [N. J. Law] 55 Atl. 49.

74. Jenkins v. Chism, 25 Ky. L. R. 736, 76 S. W. 405.

75. Love v. Love, 98 Mo. App. 562.

76. Servis v. Servis, 172 N. Y. 438.

77. Frequent absences leaving her husband alone. Jenkins v. Chism, 25 Ky. L. R. 736, 76 S. W. 405.

78. Rudd v. Dewey [Iowa] 96 N. W. 973.

79. Hart v. Knapp [Conn.] 55 Atl. 1021.

80. Sickler v. Mannix [Neb.] 93 N. W. 1018.

81. Particular words and acts of deliberate misrepresentations and wrongful advice or other inducements need not be alleged. Jenkins v. Chism, 25 Ky. L. R. 736, 76 S. W. 405. Sufficiency of complaint for alienation of wife's affections containing an allegation of criminal conversation regardless of whether such charge was substantiated. Weston v. Weston, 86 App. Div. [N. Y.] 159.

82. The matter if competent, being admissible under the general denial. Jenkins v. Chism, 25 Ky. L. R. 736, 76 S. W. 405.

83. Stanley v. Stanley [Wash.] 73 Pac. 596.

84. Zimmerman v. Whiteley [Mich.] 95 N. W. 989.

85. Rudd v. Dewey [Iowa] 96 N. W. 973.

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to give evidence, where her declaration specifies particular acts without thus identifying them.[86]

Evidence.[87]—Declarations showing the feelings of parties,[88] but not causes of alienation from a former wife,[89] are admissible.

Financial condition of defendants may be shown.[90] A letter of defendant relating solely to proposition to settle "our affair," could not be shown in evidence as offer of compromise, where it contained no admissions of fact, though it stated as a conclusion that plaintiff should be paid, without a statement for what he should be paid.[91] In an action by a husband against his mother-in-law, she may offer the wife as a witness without previously ascertaining whether the husband will permit her to testify, where he had previously stated in his testimony what his wife had said in various interviews.[92] Where the wife denied illicit intercourse with defendant, a copy of a letter to defendant in her handwriting, admitting the wrong, could be admitted to contradict her where plaintiff testified that she wrote the letter in his presence and he mailed it to defendant.[93] Where defendant testified on direct examination that, though both husband and wife consented to an arrangement whereby he was to sustain improper relations with the wife, she concurring if she could have her own room, he never occupied any but his own room, he could not be asked on cross-examination whether he had sexual intercourse with her.[94]

Damages.—The husband can recover for only natural and probable consequences of alienation of his wife's affections by her father.[95] He may show the value of his wife's services per year; and the disposition of his children on breaking up his family because of the wife's conduct.[96] Where, in an action by a wife, there was no evidence as to the value of her support, the jury may nevertheless be instructed to consider it as an element of damage where circumstances of the parties have been fully given.[97]

Instructions.[98]—Whether resumption of marital relations after an act com-

86. Gary v. Eaton Circuit Judge [Mich.] 92 N. W. 774.

87. Sufficiency of evidence in action for maliciously causing the husband of plaintiff's intestate to desert her (Strode v. Abbott [Mo. App.] 76 S. W. 644); in action for alienation of husband's affections to show affection and alienation by defendants (Love v. Love, 98 Mo. App. 562); to show conduct on part of defendant designed to effect alienation of wife's affection or accomplishment of such result by him (Maloney v. Phillips, 118 Iowa, 9).

88. In an action by a husband for alienation of his wife's affection, evidence of her declarations to a third person before the alienation are admissible as disclosing the state of her feelings toward both parties. Roesner v. Darrah, 65 Kan. 599, 70 Pac. 597. A mother-in-law, sued for alienation of her daughter's affections from her husband, may show that before the marriage he inquired as to her wealth and that of her daughter, and attempted to obtain her property from her after the marriage, as tending to show mercenary motives. Zimmerman v. Whiteley [Mich.] 95 N. W. 989. Plaintiff may be permitted to read to the jury the complaint in action for divorce brought against her, where the attorney who drew it testified that the facts were given him by defendant and that he instituted the action at defendant's request. It is admissible as defendant's declaration. Stanley v. Stanley [Wash.] 73 Pac. 596.

89. Evidence that intestate participated in causing her husband to leave his first wife, is immaterial in an action by the administrator of her estate for maliciously causing her husband to desert her. Strode v. Abbott [Mo. App.] 76 S. W. 644.

90. Love v. Love, 98 Mo. App. 562.

91. Rudd v. Dewey [Iowa] 96 N. W. 973.

92. Zimmerman v. Whiteley [Mich.] 95 N. W. 989.

93. It was not a privileged communication under Code Civ. Proc. § 831; that it was retained by plaintiff did not make it such. Weston v. Weston, 86 App. Div. [N. Y.] 159.

94. Rudd v. Dewey [Iowa] 96 N. W. 973.

95. Lane v. Spence [Neb.] 97 N. W. 299. Verdict for alienation of husband's affections as excessive. Love v. Love, 98 Mo. App. 562.

96. Rudd v. Dewey [Iowa] 96 N. W. 973.

97. Stanley v. Stanley [Wash.] 73 Pac. 596.

98. Sufficiency of instructions with regard to the malice of a mother-in-law, and as to the preponderance of evidence, in an action against her by her daughter's husband for alienation of the daughter's affections (Zimmerman v. Whiteley [Mich.] 95 N. W. 989); of instructions as to connivance in action by wife for alienation of husband's affections (Hart v. Knapp [Conn.] 55 Atl. 1021).

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plained of as criminal conversation shows collusion or connivance is a question for the jury, and the court cannot so instruct as to take away that question.[99]

§ 10. *Remedies and procedure generally as affected by coverture.*[1] *Right of action; joint or separate; parties.*[2]—A husband must sue alone for support of a third person in his household, though the services were largely the personal attendance of his wife.[3] But in New York she must sue when it was under agreement between them that she alone should receive the compensation.[4] Expenses resulting from breach of contract respecting the wife may be recovered by the husband though she was not a party and did not assign the claim to him,[5] but an action for services rendered almost entirely by the wife should be brought by her alone if she has capacity to sue.[6] As to possession of land acquired by descent before passage of the law giving the right to sue in her own name, the wife cannot sue a third person during her husband's life.[7] She may sue in equity to set aside a levy and sale of a homestead,[8] and may interplead in attachment against her husband to recover her separate property, whether acquired from him or from third persons.[9] Where land is conveyed to a wife during coverture and it does not appear that the consideration was her separate means, she cannot sue in her own name to recover possession after being ejected on process against the husband.[10] A wife whose husband has deserted her may, under enabling laws, sue alone.[11] Title to homestead may be quieted in the district court in one of the spouses without concurrence of the other.[12]

Where a widow after her husband's death was paid in full for her first year's support and her interest in his estate, she could not sue to set aside a deed of his property to his son to recover her distributive share, on the ground that it was made to defraud her of her interest, without a tender of return of money received from the son for her signature to the deed.[13] To set aside a deed of husband and wife for his fraud, it must appear that the grantees participated in it or gave consideration with notice of it.[14] An action may be maintained to charge the

Where it appears in an action by a wife against her husband's parents for alienating his affections, and inducing him to abandon her, that his affections were alienated before their acts charged to have caused such result, an instruction should have been given that if when the husband abandoned her he had no affection for her or if his affection had been previously alienated, she could not recover. Servis v. Servis, 172 N. Y. 438.

Instruction in action for criminal conversation as taking from consideration of the jury the relations of the parties after the act as bearing on the question of damages. Ball v. Marquis [Iowa] 92 N. W. 691.

99. Shannon v. Swanson, 104 Ill. App. 465.

1. Actions for tort, see ante, §§ 7, 8.

Jurisdiction. In alimony see Alimony 1 Curr. Law, 70; Baldwin v. Baldwin, 116 Ga. 471. Action to charge separate estate in equity though for a sum within justice's jurisdiction. Harvey v. Johnson, 133 N. C. 352.

2. St. 1899, § 2506, providing that if at the time the right of any person to an action to recover real property accrued, such person was a married woman, she can bring an action within three years after the disability is removed, though the period of fifteen years has expired, is not repealed by § 2128, giving her the right to take and hold property, make contracts, sue and be sued as if single. Higgins v. Stokes, 25 Ky. L. R. 919, 76 S. W. 834.

3. Peterson v. Christianson [N. J. Err. & App.] 56 Atl. 288.

4. Briggs v. Devoe, 84 N. Y. Supp. 1063.

5. Where a husband contracted for transportation of himself and wife and the carrier broke the contract by compelling them to wait at an intermediate point for several hours, and the husband arranged for immediate transportation for the balance of the trip by another carrier, he could recover for his wife's transportation from the intermediate point to her destination. Miller v. Baltimore & O. R. Co., 89 App. Div. [N. Y.] 457.

6. Rev. St. §§ 689, 684. Lillard v. Wilson [Mo.] 77 S. W. 74.

7. Rev. St. 1899, § 4340. Vanata v. Johnson, 170 Mo. 269.

8. Burkhardt v. Walker [Mich.] 92 N. W. 778.

9. Rice v. Sally, 176 Mo. 107.

10. Rev. St. 1899, § 4339. Black v. Slaton, 92 Mo. App. 662.

11. Code Civ. Proc. § 320, subd. 3. Muller v. Hale, 138 Cal. 163, 71 Pac. 81.

12. Cizek v. Cizek [Neb.] 96 N. W. 657.

13. Willis v. Robertson [Iowa] 96 N. W. 900.

14. Pratt L. & L. Co. v. McClain, 135 Ala. 452.

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wife's separate personal estate, though it does not exceed the exemption allowed by law, since that exemption is to be allowed when execution is issued.[15]

An action in form of a common count in assumpsit for goods sold and delivered is the proper remedy for recovery from a husband for necessaries furnished his wife while living apart from him through his fault.[16]

The husband is a proper party defendant in a suit against the wife to set aside a deed to her,[17] notwithstanding a statute providing that she may sue and be sued alone;[18] or in an action against her seeking to charge her personal estate,[19] or to a suit by the wife to protect her lands, but he must be made a defendant in the latter suit.[20] That he joined her as co-defendant in a suit to avoid judgment of a foreign court which declared her to be equally entitled with complainant to share in a trust fund, and to recover from her and her curator the real and personal property obtained under the alleged fraudulent judgment, will not require his joinder with her in a compromise agreement or in an answer confessing the bill.[21] He is a necessary defendant in a suit to foreclose a mortgage against her property.[22] The wife of the vendee in an executory contract for conveyance of land on payment of the price is not a necessary party to a foreclosure by the vendor of the vendee's equity in the land.[23] Improper joinder of wife as plaintiff with her husband can be raised only by notice of misjoinder under the proper statute.[24]

Limitations.[25]—Limitations will not run against a married woman during coverture.[26] One in actual adverse possession, under color of title, of land of a married woman, for seven years before death of her husband, has a good title as against her heirs, where she did not seasonably bring an action to recover after her husband's death.[27] Registering herself as a free trader during coverture will not bar a married woman from benefit of an exception preventing the running

15. Code, § 443. Harvey v. Johnson, 133 N. C. 352.

16. Rariden v. Mason, 30 Ind. App. 425.

17. His power of veto over her conveyance of her own land, empowers him to retain in her name the title to lands as to which she was seized in coverture, so that if she dies seized of an estate of inheritance and a child has been born of the marriage, an estate of curtesy vests in him. Decker v. Panz [N. J. Eq.] 54 Atl. 137. In an action to cancel a deed to her for fraud and to obtain re-conveyance of the property he may be joined in the reconveyance, even though if the deed were set aside, he would take no interest as tenant by curtesy. Under the law providing that rights of her separate property as to real estate shall not impair his interest as tenant by curtesy, he is prima facie vested with such title initiate in land conveyed to her and is a proper party defendant. Gorman v. McHale [R. I.] 52 Atl. 1083.

18. That statute simply removing the requirement of another statute that she join with her husband in all actions relating to her property [Gen. Laws, c. 194, § 16 construed in connection with Pub. St. c. 166, § 16]. Gorman v. McHale [R. I.] 52 Atl. 1083.

19. Code, § 178. Harvey v. Johnson, 133 N. C. 352.

20. He has an equity in such lands and power by refusing to join to prevent her conveyance, and if a child is born during coverture and the husband survives, he takes an estate by curtesy in lands as to which she died seized of an estate of inheritance; if she desires to make her husband a party to a suit to protect her lands, she must sue by her next friend and make him defendant [2 Gen. St. p. 2014, § 11, and mode of procedure before adoption of such section]. Bristol v. Skerry, 64 N. J. Eq. 624.

21. Rev. St. 1899, § 4335. Bunel v. O'Day, 125 Fed. 303.

22. Garrison v. Parsons [Fla.] 33 So. 525.

23. Schaefer v. Purviance, 160 Ind. 63.

24. Section 37 of Prac. Act; Gen. St. p. 2539. Peterson v. Christianson [N. J. Err. & App.] 56 Atl. 288.

25. Voluntary payments to prevent limitations against action on wife's note. Fletcher v. Brainerd [Vt.] 55 Atl. 608. Facts sufficient to show that dividends, on corporate stock deposited as collateral on note of a married woman, were paid to the payee and indorsed as payments on the note with the wife's consent, making them voluntary payments preventing the running of the statute of limitations. Id.

26. Crouch v. Crouch, 30 Tex. Civ. App. 288. Limitation will not begin to run in favor of defendants in trespass to try title until termination of the coverture, where they went into possession and continued therein during coverture of the owner. Wren v. Howland [Tex. Civ. App.] 75 S. W. 894.

Limitations will not avail against one who has been a married woman until within less than three years before the action. Estes v. Turner, 30 Tex. Civ. App. 365.

27. Swift v. Dixon, 131 N. C. 42.

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of limitations against a married woman during coverture.[28] That a wife seeking cancellation of a deed by herself and husband for his coercion, waited three years before suing, will not prevent relief.[29]

Appointment of a receiver to take the wife's separate property into the custody of the court is an equitable attachment making a lien on the property in favor of the creditor as a levy of an execution or an attachment at law.[30]

Pleading and proof. Issues.[31]—Where a married woman may contract and sue as if unmarried, it need not be alleged in a suit on a contract with regard to her separate estate, that she owned such separate estate, and that the contract was made with reference thereto.[32] Plaintiff seeking to recover for necessaries supplied at the wife's request need not negative facts which the husband may set up as a defense.[33] An allegation in a bill to cancel a deed of husband and wife for duress and undue influence, that the grantee knew the character of the husband well enough to put him on notice of the coercion, will not show constructive notice;[34] allegations as to duress mingled with allegations as to promises of benefits are insufficient.[35]

Coverture relied upon as a defense must be pleaded.[36] In an action on a note by husband and wife, the answer must allege the facts constituting undue influence or duress.[37] In an action by a married woman on a note for money acquired by her while living with her husband in another state, a plea of no consideration will not raise the question of her inability to sue.[38] If a petition to recover for necessaries furnished a wife and child at her request does not show that the child was under 21, defendant must raise such omission by plea and not by special demurrer after appearance term.[39] Where in ejectment by a husband and wife, they claimed that the land, which had been sold under execution against him, had been bought by them, the money being furnished equally by each, the submission of an issue as to the equal furnishing of such money to procure a home was sufficient in form and substance to present the controlling issue in the case.[40] Where a wife as co-defendant in an action on a promissory note pleaded coverture and that it was for her husband's debt and proved coverture, but failed to show the consideration, an affirmative charge with hypothesis for plaintiff on the plea of coverture was proper.[41] Where a wife defends, in an action on a note given by herself and husband, on the ground that she was a mere surety, she must show knowledge of that relation by the payee and his con-

28. Code, § 1827. Wilkes v. Allen, 131 N. C. 279.

29. Pratt L. & I. Co. v. McClain, 135 Ala. 452.

30. The suit is like one at law against a person sui juris and is not an ordinary creditor's bill or analogous thereto. First Nat. Bank v. Hirschkowitz [Fla.] 35 So. 22.

31. Sufficiency of petition to recover personal judgment against a wife on stipulations in a chattel mortgage given by herself and husband to secure his note to which she was not a party, notwithstanding the petition fails to state that the wife intended or the mortgagee expected that her signature to the mortgage should make her personally liable for payment of the debt (Henley v. Wheatley [Kan.] 74 Pac. 1125); in action to recover for necessaries supplied a wife and daughter at the wife's request as to allegations of the failure of the husband to furnish them under Civ. Code 1895, §§ 2477, 2469 (Humphreys v. Bush [Ga.] 45 S. E. 911).

32. Young v. Hart [Va.] 44 S. E. 703.

33. Civ. Code 1895, § 2478. Humphreys v. Bush [Ga.] 45 S. E. 911.

34, 35. Misconduct without the promises might not have induced execution. Pratt L. & I. Co. v. McClain, 135 Ala. 452.

36. Linton v. Jansen [Neb.] 95 N. W. 675. A wife cannot avail herself of her defense of coverture as against an action for goods, on the ground that they were necessaries ordered for the family for which her husband is liable, under a general denial of a complaint that the goods were sold and delivered to her. Minners v. Smith, 40 Misc. [N. Y.] 648.

37. Emery v. Lowe, 140 Cal. 379, 73 Pac. 981.

38. Winklebleck v. Winklebleck, 160 Ind. 570.

39. Humphreys v. Bush [Ga.] 45 S. E 911.

40. Ray v. Long, 132 N. C. 891.

41. Englehart v. Richter, 136 Ala. 562.

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sent to such arrangement.[42] Where she pleaded the general issue in an action on a note made by her and indorsed by her husband, giving notice of the marriage and that the note was for money for his use, plaintiff made a prima facie case by introducing the note, and she is not relieved from proving facts preventing her liability by the notice.[43]

Evidence; questions of fact.[44]—The burden of proof is on a lessee to show that a wife is bound by a lease of her property under seal not purporting to be executed by her or in her behalf, but in fact executed by her husband.[45] In ejectment by husband and wife for land which had been purchased by them, each furnishing funds, the purposes for which money was furnished by her and her accompanying directions may be shown.[46] Evidence of business relations between defendants, and the amount of property and extent of business of each other, is admissible in an action against the husband and wife on a note made by her and indorsed by him which they claim was for money for his use.[47] The burden of proving necessaries is on plaintiff.[48] Whether there was evidence tending to show that goods were furnished the wife on her own personal credit is a question for the court in an action to recover from the husband;[49] the jury cannot determine whether his allowance for her personal expenses was enough unless evidence appears as to his means or his usual manner of keeping his family.[50] Whether a loan was obtained by a wife on a note made by her and indorsed by her husband under representations that it was for her separate estate is a question for the jury, where it appears that she stated that she did not like to request him to sign, which she did not deny but merely claimed that the money was for his use.[51] In an action by a wife, the owner of an hotel, to recover for board, where plaintiff seeks to set off a debt due from the husband, the question whether the husband had so taken part in the business as to lead defendant to believe that he was the owner was for the jury, where it appears that both were engaged in the business, that the contract was made by the husband, and that he had been allowed by her to act as agent.[52] Where in an action against a married woman by a physician to recover for professional services, it appears that she has a separate estate and plaintiff testifies that she agreed to become responsible for such services before they were rendered while she pleads and testifies that no such special contract was made, the question is for the jury.[53]

Judgment or decree; allowance of fees.—A judgment against husband and wife need not state specifically that her separate property is liable therefor.[54] Judgment cannot be rendered against him merely because he is joined as defendant with her in an action seeking to charge her personal estate.[55] Where both sued for breach of covenant in their deed of right of way to a railroad company,

42. Civ. Code, § 2832. Farmers' & M. Bank v. DeShorb, 137 Cal. 685, 70 Pac. 771.
43. Nat. Lumberman's Bank v. Miller [Mich.] 91 N. W. 1024.
44. Sufficiency of evidence in action for separation to sustain motion of defendant to dismiss on the ground that plaintiff had a husband living at the time of her marriage with defendant (Taylor v. Taylor, 173 N. Y. 266); to establish that a running account against a husband was to be applied upon a bond due the wife (White Hall Co. v. Hall [Va.] 46 S. E. 290).
45. Western N. Y. & P. R. Co. v. Rea, 83 App. Div. [N. Y.] 576.
46. Ray v. Long, 132 N. C. 891.
47. Nat. Lumberman's Bank v. Miller [Mich.] 91 N. W. 1024.
48. The burden is on one seeking to recover for necessaries furnished a wife while living apart from her husband to show that he did not suitably provide for the family. Constable v. Rosener, 82 App. Div. [N. Y.] 155.
49, 50. Martin v. Oakes, 42 Misc. [N. Y.] 201.
51. Nat. Lumberman's Bank v. Miller [Mich.] 91 N. W. 1024.
52. Watson v. Beck, 21 Pa. Super. Ct. 511.
53. Trentham v. Waldrop [Ga.] 45 S. E. 988.
54. Smith v. Ridley, 30 Tex. Civ. App. 158.
55. Harvey v. Johnson, 133 N. C. 352.

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and it appeared that she had no interest except her right of dower, no issue being made as to her right to recover as joint plaintiff, judgment was properly entered on verdict in favor of them jointly.[56] A judgment against her alone in foreclosure of a mortgage of her land, executed without his joinder, binds her and her heirs.[57] If she fails to plead her suretyship for him when sued, she is estopped by a judgment against her so that execution sale of her land cannot be set aside because of suretyship.[58] A judgment in ejectment for one holding paper title against one claiming by adverse possession is not binding on the latter's wife, not a party, in a later action by her to protect her homestead rights, where the adverse possession had ripened into a title in fee before the first action was brought.[59] Where a declaration in tort by husband and wife allege joint damage and in the same court special damage to the husband alone, a verdict for a single sum and judgment for "said damages" is for the joint damage only.[60] Where a divorce petition, answer, and reply submitted the property rights, the decree settling her property rights is conclusive in a pending suit for recovery of the land.[61] Where a decree of the circuit court in an action by a wife for separate maintenance fixed her solicitor's fees and pending an appeal by the husband from the decree and from a judgment of contempt for disregarding its terms, the wife petitioned the circuit court for solicitor's fees in defense of the appeals and the circuit court on remand of the original suit expressly reserved by the decree the future settlement of such fees, it had jurisdiction to allow the wife solicitor's fees for services rendered subsequent to the original decree.[62]

§ 11. *Proceedings to compel support of wife (civil and criminal). Right of action; prosecution.*—The constitution does not prevent the general assembly from making desertion of the wife without just cause, or willful neglect to provide for support of a family who are destitute, a misdemeanor.[63]

To convict a husband of abandonment under Greater New York Charter, it must appear that the wife is in danger of becoming a public charge.[64] His infidelity is insufficient to constitute statutory abandonment amounting to disorderly conduct.[65] He is not guilty if he offered to give her a place to live and she refused.[66]

"Abandonment" in a law rendering one liable for leaving a wife whom he has married to escape prosecution for seduction or bastardy, means physical and not constructive abandonment.[67] A divorce obtained by a wife, whose husband had married her to escape prosecution for bastardy or seduction, after his desertion and before bringing suit for a statutory penalty for desertion and failure to provide, is no defense in such suit.[68] That both parties to a marriage consented to execution of a false marriage certificate to conceal illegitimacy of a child born before marriage actually occurred will not affect validity of the marriage in a criminal action by the wife for nonsupport.[69]

56. Silver Springs, O. & G. R. Co. v. Van Ness [Fla.] 34 So. 884.
57. St. § 2128. Deusch v. Questa, 25 Ky. L. R. 707, 76 S. W. 329.
58. Act 1894, St. §§ 2127, 2128. Herring v. Johnston, 24 Ky. L. R. 1940, 72 S. W. 793.
59. Silk v. McDonald [Neb.] 93 N. W. 212.
60. Karnuff v. Kelch [N. J. Law] 55 Atl. 163.
61. Baird v. Connell [Iowa] 96 N. W. 863.
62. Harding v. Harding, 205 Ill. 105.
63. State v. Cucullu, 110 La. 1087.
64. Greater N. Y. Charter, § 685. People v. Dershem, 78 App. Div. [N. Y.] 626.
65. People v. Neyer, 79 N. Y. Supp. 867.
66. Where a wife testified on a trial for her abandonment, that the husband had offered to give her a flat up town, but she did not take it and was unwilling to live with him, there is insufficient evidence to sustain a conviction. People v. Dershem, 78 App. Div. [N. Y.] 626.
67. Burns' Rev. St. 1901, § 7298a. Milbourne v. State [Ind.] 68 N. E. 684.
68. Burns' Rev. St. 1901, §§ 7298a, 7298b, 7298d. State v. Lannoy, 30 Ind. App. 335.
69. State v. Tillinghast [R. I.] 56 Atl. 181.

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In Minnesota a wife living apart from her husband for justifiable cause can bring an equitable action for separate support independent of an action for divorce.[70]

In a proceeding to compel support, he may show that she has a former husband still living from whom she was never divorced.[71]

Pleading and issues; information or indictment.—A petition alleging that plaintiff and defendant were husband and wife, that she properly deported herself and treated him with kindness and affection, but that he wilfully abandoned and refused to support her, is sufficient on appeal to authorize the inference that he abandoned her without due cause.[72] An unnecessary allegation in a petition by a wife for support, that she is living apart from her husband does not require a further allegation of justifiable cause and statement thereof.[73]

An indictment for abandonment must charge failure to support.[74] If an information for abandonment charges that he wilfully and without cause left her, it need not charge that he left against her will.[75] An information alleging that he abused her so that she was compelled to leave, and refused to contribute to her support, will be sustained as substantially alleging desertion.[76]

Evidence.[77]—Proof beyond a reasonable doubt is not dispensed with by statutes allowing proof of the marriage by a preponderance.[78] In an action to recover a penalty for abandonment, evidence tending to show her treatment of him may be considered with other evidence in determining the relations between them as showing whether he had sufficient cause for leaving her.[79] A marriage certificate marked "copy" made by a justice, though never recorded, is admissible to show marriage in a criminal action for nonsupport, though the husband testified that it was fraudulent and made merely because the parties were parents of an illegitimate child;[80] that he held her out as his wife, recognized their children as his own, supported the family, and treated her in every way as his lawful wife, may be shown in corroboration of other evidence of marriage where he denies the marriage and declares a marriage certificate introduced to be void.[81] A finding, in a prior suit for divorce by the husband, that the wife was not guilty of willful desertion, is immaterial in a suit by her for support.[82]

Verdicts and findings; judgment or decree.[83]—Temporary alimony may be allowed in an action for separate maintenance though the husband sets up a cross

70. Baier v. Baier [Minn.] 97 N. W. 671.

71. Under Act April 13, 1867 (Pub. Laws 78). Com. v. White, 22 Pa. Super. Ct. 67.

72. Munchow v. Munchow, 96 Mo. App. 553.

73. V. S. 2701. Ingram v. Ingram [Vt.] 56 Atl. 5.

74. Under Code, § 970. State v. May, 132 N. C. 1020.

75. State v. Fleming, 90 Mo. App. 241.

76. Com. v. Dean, 21 Pa. Super. Ct. 641.

77. Sufficiency of evidence in abandonment proceedings to show that she followed him after abandonment and was ready to live with him, and demanded support, and that he refused to comply with her request, as supporting charge of abandonment (People v. Crouse, 86 App. Div. [N. Y.] 352); to show that a wife or children were likely to become a charge on the public because of abandonment by the husband, authorizing arrest and proceedings against him under Greater N. Y. Charter, Laws 1901, p. 279, c. 466, § 685 (People v. Crouse, 86 App. Div. [N. Y.] 352). Sufficiency of evidence of lawful marriage in a criminal action by the wife for nonsupport. State v. Tillinghast [R. I.] 56 Atl. 181.

78. Hurd's Rev. St. 1901, c. 38, § 491, providing that in prosecution for abandonment no other evidence shall be required to prove the marriage, than would be required in a civil action and that husband and wife are competent to testify to relevant matters including the fact of such marriage does not change the rule as to quantum of evidence necessary to conviction in criminal cases but applies merely to the quality of such proof. Stanley v. People, 104 Ill. App. 294.

79. Sufficiency of instructions—Burns' Rev. St. 1901, § 7298a. Milbourne v. State [Ind.] 68 N. E. 684.

80, 81. State v. Tillinghast [R. I.] 56 Atl. 181.

82. V. S. 2701. Ingram v. Ingram [Vt.] 56 Atl. 5.

83. Construction of Act No. 34, p. 42, 1902 regarding minimum and maximum penalty for desertion of wife and children. State v. Cucullu, 110 La. 1087.

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complaint alleging grounds sufficient for divorce.[84] Where the information avers that he was lawfully married to her, instead of giving her name, and she verified the information, there is no such defect as will authorize reversal on an attack against the information after verdict by motion in arrest.[85] A decree in proceedings for separate maintenance may be enforced by contempt proceedings.[86]

§ 12. *Crimes and criminal responsibility.*[87]—The court, in its discretion, may impose either a whipping, or fine and imprisonment, for wife beating.[88] Husband and wife are equally guilty in keeping a house of ill fame on property occupied and used by both.[89]

IMPLIED CONTRACTS.

§ 1. Definitions and Distinctions (285).
§ 2. Work and Labor or Services and Materials Furnished (286).
§ 3. Moneys Had and Received and Money Paid (290).
§ 4. Use and Occupation (293).
§ 5. Torts Which May be Waived and Sued as Implied Contracts (293).
§ 6. Remedies and Procedure (294).

This article treats only of the so-called quasi contracts, or contracts implied in law.[90] Contracts implied in fact are treated elsewhere.[91]

§ 1. *Definitions and distinctions.*—A contract implied in law is an obligation which grows out of certain relations between persons, whereby they become bound to each other without regard to their consent, by duties similar to those arising from contract.[92] It is in fact not a true contract and differs from a contract in that there is no concurrence of agreement and obligation. But by reason of the fact that the law imposes an obligation and permits it to be enforced by remedies applicable to contracts, it is commonly called a contract implied in law.[93]

84. Cupples v. Cupples [Colo.] 72 Pac. 1056. An award of $125.00 counsel fees and temporary alimony of $25 a month, in an action for separate maintenance, was not an abuse of discretion where defendant testified that he earned $95 a month and had property worth $3,000.00 and there was other evidence that its value was greater. Id.

85. State v. Fleming, 90 Mo. App. 241.

86. Construction of Pub. St. 1882, c. 147, § 33; Rev. Laws, c. 162, §§ 9, 16, 18, 19, 23, as amended by St. 1887, p. 954, c. 332, and Pub. St. 1882, c. 156, §§ 12, 13, 17, as amended by Rev. Laws, c. 162, §§ 9, 16, 18, 19, 23, giving the superior court power to enforce its decree on appeal from the probate court in separate maintenance proceedings by contempt proceedings. Smith v. Smith [Mass.] 68 N. E. 846.

87. See Bigamy.

88. 22 Laws, p. 493, c. 204. State v. Finley [Del.] 55 Atl. 1010.

89. She is not presumed to act under his coercion. State v. Jones, 53 W. Va. 613.

90. Where the term "implied contract" is used in this article it will be used in that sense.

91. See title Contracts.

92. See Hammon, Cont. 23.

93. Hammon, Cont. 23. A quasi contract is not an implied contract within the meaning of the Municipal Court Act of New York, Laws 1902, p. 1487, c. 580, tit. 1, § 1, subd. 1. Pache v. Oppenheim, 84 N. Y. Supp. 926.

Note. The doctrine of contracts implied as a fact, that is, that a real contract may have existed though not declared in express terms, is limited by the following propositions:

(a) None will be implied where the conduct of the parties does not show an actual agreement;

(b) nor where the matter in question is fully covered by an express contract;

(c) nor where the law requires a contract upon the subject to be in writing.

Thus there is no implied agreement to pay for benefits conferred without knowledge or consent or where the parties stand in such relations, like that of parent and child, as that a gratuity may have been expected. These rules are rebuttable presumptions of fact. Furthermore if the transaction amounts to a tort no contract can from the nature of things be inferred.

The existence of an express contract precludes any supposition that the parties made a different unexpressed agreement relating to the same matter. Again when the law makes an agreement void because not in writing it will not imply an unwritten agreement to take the place of the void one.

Neither the law of actual agreement nor the existence of an express contract, nor the invalidity of a contract because unwritten will prevent the "implication in law" of an obligation in favor of one who confers benefits upon another.

A contract implied in fact is a real contract based on assent, while one implied in law is an obligation regardless of assent. Hammon, Cont. §§ 53, 57, wherein the subject is fully discussed and the cases collected.

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§ 2. *Work and labor or services and materials furnished.*—A contract implied in law will arise to pay for work and labor done or materials furnished at the request of another,[94] or by his permission,[95] under circumstances warranting an expectation to receive payment therefor. But not for work done in an inferior manner,[96] nor for materials furnished under circumstances not constituting a sale,[97] nor for benefits conferred upon the United States without its authority.[98] The fact that one forbears from asserting his claim for services rendered in the expectation that they would be paid for does not prevent him from suing therefor.[99]

Obligation of a husband[1] or parent[2] for necessaries furnishes another instance of an implied contract.

Services rendered without a request, and under circumstances not showing an intention to receive pay therefor, do not raise an implied promise for their payment.[3] Whether services rendered were intended to be gratuitous is a question for the jury.[4]

94. Wilson v. Freedley, 125 Fed. 962; Cox v. Peltier, 159 Ind. 355; Wright v. Sheldon, 24 R. I. 336; Garr v. Cranney, 25 Utah, 193, 70 Pac. 853; Lonabaugh v. Morrow [Wyo.] 70 Pac. 724. Steam heat. Boston Clothing Co. v. Garland [Minn.] 97 N. W. 433. Medical services rendered to a sick soldier at the request of his captain raises an implied contract on the part of the United States to pay therefor. Davis v. U. S., 120 Fed. 190. A referee may recover for services, which have not been paid for by the parties to a suit. Goldzier v. Rosebault, 84 N. Y. Supp. 240. A supervising engineer may recover for extra services rendered though he is a member of a construction committee acting for several parties in compliance with a city ordinance; but not unless both he and the defendant understood or ought to have understood that the services were to be charged for. Wagner v. Edison Elec. Illuminating Co. [Mo.] 75 S. W. 966. The estate of a decedent is liable on an implied promise for services rendered in nursing him. Flannery v. Chidgey [Tex. Civ. App.] 77 S. W. 1034.

Board and lodging: Under Ky. St. § 2178, an implied contract does not arise to pay for board furnished by one other than the keeper of a tavern or house of private entertainment, in the absence of an understanding to that effect. Hancock v. Hancock's Adm'r, 24 Ky. L. R. 664, 69 S. W. 757. Under this statute a claim for keeping her son cannot be recovered against a decedent's estate, in the absence of an agreement to pay or evidence showing the plaintiff to be an innkeeper. Ramsey v. Keith's Adm'r, 25 Ky. L. R. 582, 76 S. W. 142. But an implied promise does not arise to pay for board furnished to a relative visiting the plaintiff at his wife's request. Harrison v. McMillan, 109 Tenn. 77.

Evidence: Subsequent assent to a beneficial act is sufficient evidence of a previous request for such act; and knowledge and acquiescence will show assent. Strother v. De Witt, 98 Mo. App. 293.

Services by an engineer directed to take charge of abandoned public work. Such are not within a provision as to advertisement and competitive bidding. City of Newport News v. Potter [C. C. A.] 122 Fed. 321.

95. Crane v. Ganung, 89 App. Div. [N. Y.] 398. Continuing in employment after expiration of contract. McDermott v. St. Wilhelmina Benev. Aid Soc., 24 R. I. 527. Personal services, board and lodging. Winfield v. Bowen [N. J. Eq.] 56 Atl. 728. Stenographer's services in proceedings before a referee, the latter not causing them to be rendered at his own expense. McReynolds v. Manger, 84 N. Y. Supp. 982. Services rendered under a contract to pay for services by a public officer, outside of his service as such officer, under statutory provisions for the appointment of such officers and the fixing of their salaries by the city council, where the city council fails to fix a salary for the services rendered. Cook v. City of Springfield [Mass.] 68 N. E. 201.

96. Where it has not been accepted. Gwinnup v. Shies [Ind.] 69 N. E. 158.

97. Provisions furnished to back a son engaged with others in a mining venture does not raise an implied promise on the part of the son's associates to pay therefor. Snow v. Mastic, 138 Cal. xix, 71 Pac. 165.

98. A contract cannot be implied against the United States for unauthorized changes ordered by an architect though the defendant has been benefited thereby (McLaughlin v. U. S., 37 Ct. Cl. 150), nor from the use of an invention by the subordinates of a chief of engineers who had expressly refused to purchase the patented device (Sprague v. U. S., 37 Ct. Cl. 447).

99. As under the expectation that the defendant would appoint him his executor, and he would thereby be compensated by fees and commissions. Crane v. Ganung, 89 App. Div. [N. Y.] 398.

1. See title Husband and Wife.

2. See title Parent and Child.

3. Services rendered gratuitously without any intention or understanding that they should be paid for. Strother v. De Witt, 98 Mo. App. 293. Services rendered by a physician to a smallpox patient who made no request therefor and who acted upon the assumption that since the city authorities had sent the physician they intended to provide for all the expenses incident to the treatment of the disease. Smith v. Hobbs [Ga.] 45 S. E. 963.

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Under express contracts.—Services rendered and materials furnished under an express contract cannot be recovered for on an implied contract,[5] unless they fail to comply with the contract and are accepted and used by the defendant,[6] or unless the contract by mistake fails to contain certain specifications;[7] and except under rules of practice, where the proof fails to establish an express contract.[8] Additional services rendered under an express contract cannot be recovered for on a quantum meruit,[9] unless accepted by the employer.[10]

An implied contract will not result for services rendered and materials furnished under an express contract void in law,[11] though it is otherwise where the

of an owner of property to pay for improvements made thereon without his knowledge or consent by one who entered as a purchaser from the owner's agent to rent only. Topliff v. Shadwell [Kan.] 74 Pac. 1120.

4. Strother v. De Witt, 98 Mo. App. 293; Wagner v. Edison Elec. Illuminating Co. [Mo.] 75 S. W. 966.

5. Compensation for supporting a mother will be disallowed in a partition suit where there has been an express contract giving compensation therefor. Clark v. Clark [Mich.] 96 N. W. 924. Medical services by a health officer for which a salary is to be fixed. Yandell v. Madison County [Miss.] 32 So. 918. A recovery on a quantum meruit cannot be had for goods sold to a township under a contract not made in conformity with a statute, where the goods can be taken back. Union Nat. Bank v. Franklin School Tp. [Ind. App.] 68 N. E. 328. Recovery on a quantum valebat for goods furnished under an invalid contract cannot be had after the contract price is received, on the ground that the goods had increased in price. St. Louis Hay & Grain Co. v. U. S., 191 U. S. 159. But the statement by defendant that "he would pay her for all she had ever done or would do for him" and "would make out a will for her and her children" does not prove an express contract so as to exclude an implied one. Garr v. Cranney, 25 Utah, 193, 70 Pac. 853.

6. Where materials furnished under an express contract fail to comply therewith in a material respect, but are retained and used, recovery therefor may be had on a quantum valebat to the amount of benefit conferred on the purchaser. Manitowoc Steam Boiler Works v. Manitowoc Glue Co. [Wis.] 97 N. W. 515. But it is held that one cannot recover for services in action to foreclose a lien on materials furnished, upon failure to prove a substantial compliance with his contract, even though the defendant has been benefited by such services. Hawkins v. Chambliss, 116 Ga. 813.

7. One performing work under a contract which by mistake omits certain particulars as to the work, may recover the value of his work as done. Voss v. Schebeck, 25 Ky. L. R. 481, 76 S. W. 21.

8. Shmilovitz v. Bares, 75 Conn. 714.

9. Working overtime. U. S. v. Moses [C. C. A.] 126 Fed. 58.

10. Teakle v. Moore [Mich.] 91 N. W. 636.

11. Services rendered for a municipality under a contract void by statute. Moss v. Sugar Ridge Tp. [Ind.] 68 N. E. 896. But one rendering services in consideration of a devise, void under the statute of frauds, may recover the reasonable value of his services. In re Sheldon's Estate [Wis.] 97 N. W. 524.

Note. Recovery quasi ex contractu on contract offensive to Statute of Frauds: "While a party who has performed his part of an agreement falling within the statute of frauds may not enforce the oral promise of the other party, yet the law allows him to recover as upon an implied promise arising from the benefits received by the other from the part performance. The recovery in this case is quasi ex contractu and it is allowed upon the theory that the defendant has received benefits from the part performance for which he ought in justice to pay. This being the ground of recovery, it follows that, to entitle the plaintiff to recover, he must do more than prove that he has suffered damage in consequence of the defendant's breach of the agreement. He must show that the defendant will, unless a recovery is allowed, unjustly enrich himself at the plaintiff's expense. And the measure of recovery is not the contract price, but the value of the benefit conferred upon the defendant by the plaintiff's performance; and this is true, whether the value is less or more than the price."

Defendant in default—Recovery for benefits allowed: "If an oral contract falling within the scope of the statute has been performed by the plaintiff, either in whole or in part, and the defendant refuses to carry out the agreement, the plaintiff is entitled to compensation for such benefits as the defendant has received from the performance, whether by way of money paid to him, or goods delivered to him, or labor or services performed for him, under the oral contract. Thus, payments made by a purchaser in a parol contract for the purchase of land may be recovered back if the vendor refuses or renders himself unable to convey the premises; and a recovery may be had, notwithstanding the purchaser has occupied the land under the contract, or is still in possession of it. The rule allowing a recovery for benefits conferred under an oral contract falling within the statute of frauds, where the defendant refuses to perform the agreement, prevails in favor of a purchaser who has rendered services on the faith of an oral contract to convey real estate, and also in favor of a person who has made improvements on another's land relying upon a verbal promise of a lease, a devise or a conveyance of the premises.

"A vendor, on the other hand, may recover for use and occupation against a purchaser who has been in possession of real estate under an oral agreement for a conveyance,

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contract is merely unenforceable, as not binding on the other party.[12] Services rendered under a unilateral contract, which therefore cannot be sued on by the one so contracting, raise an implied promise on the part of the person for whom the services are performed to pay therefor.[13]

Under unfinished contract.—An implied contract also arises to pay for services rendered under an express contract, where it is unavoidably terminated and further performance thereby prevented;[14] or where further performance is prevented or excused by a breach of contract by the defendant,[15] and in such case the plaintiff's failure to perform will not be a defense to his action for services rendered,[16] nor can the defendant recover, by way of a counterclaim, damages for delays after the suit was begun.[17] The same rule applies to goods furnished under an express contract.[18]

where the purchaser refuses to carry out the contract.

"Upon the same principle, a plaintiff who has rendered services under an oral contract not to be performed within a year may recover the value of the services so rendered, if the defendant refuses to perform the contract."

Defendant not in default—Recovery not allowed: "Either party being at liberty to perform an oral contract falling within the statute of frauds, and it not being the policy of the statute to discourage the performance of such contracts, it is generally held that there can be no recovery against a defendant not in default for benefits received by him from the plaintiff's part performance of the contract. To justify a recovery, the promisor must refuse to perform. If he stands ready to keep his oral promise, the other party cannot recover as upon an implied contract to pay for the benefits received. Accordingly, money paid under an oral agreement cannot be recovered back merely because the agreement is within the statute of frauds, and hence unenforceable. A purchaser, for instance, cannot recover back a deposit paid on an oral agreement for the sale of real estate, if the vendor is able, ready, and willing to complete the contract. Not only may the one party keep money actually paid to him by another, but, if money is delivered to a third person, to pay over to him upon the oral agreement he may recover it as money received to his use.

"For the same reason, a vendor who has refused to execute a conveyance of real estate cannot recover for use and occupation against a purchaser who has occupied the same under an oral agreement for the purchase thereof, if the purchaser is able and willing to perform the contract.

"Again, one who has paid money or rendered services under an oral contract not to be performed within a year, and who refuses to perform further, cannot recover for the benefit conferred on the defendant, if the latter is not in default. To justify a recovery for services rendered under an informal agreement within the statute of frauds, the plaintiff must have been willing to carry out the agreement in full. If he refuses to go on with the work, he cannot recover for what he did as upon an implied contract.

"Even in those jurisdictions where a noncompliance with the statute of frauds renders the contract, not voidable, but void, it would, in reason, seem that the plaintiff should not be allowed to recover against a defendant not in default; yet the contrary has been held." Hammon on Contracts, § 313, and the cases cited thereto.

12. Labor and materials furnished and accepted by a city under a contract not binding on it. City of Chicago v. McKechney [Ill.] 68 N. E. 954.

13. Harrison v. Wilson Lumber Co. [Ga.] 45 S. E. 730.

14. Teakle v. Moore [Mich.] 91 N. W. 636. Subject-matter ceasing to exist. Krause v. Board of School Trustees [Ind. App.] 66 N. E. 1010.

15. In such a case the plaintiff may abandon the contract or treat it as rescinded and recover on a quantum meruit for services rendered to the time of the breach. Jenson v. Lee [Kan.] 73 Pac. 72; Boyd v. Vale, 84 App. Div. [N. Y.] 414; Newhall Engineering Co. v. Daly, 116 Wis. 256. Failure of defendant to make part payment for hauling ties as provided for by contract. Cook v. Gallatin R. Co. [Mont.] 73 Pac. 131. Servant may waive breach and sue on quantum meruit and partial payment is no obstacle to so doing. Brown v. Woodbury [Mass.] 67 N. E. 327. A contractor prevented by the owner from completing the erection of a building. Day v. Eisele, 76 App. Div. [N. Y.] 304. Attorney and client. Yuells v. Hyman, 84 N. Y. Supp. 460. One rendering services under a contract providing for extra services without extra pay may, upon breach of the contract by the defendant, recover the value of his services rendered, including extra work. Posner v. Seder [Mass.] 68 N. E. 335. One rendering services under a special contract which she is compelled by the defendant to abandon may recover on an implied contract for services performed at defendant's request. Davis v. Streeter [Vt.] 54 Atl. 185. A coal-dealer may recover on an implied contract for coal delivered for which the purchaser refuses to pay. Purcell v. Sage, 200 Ill. 342.

16. Turney v. Baker [Mo. App.] 77 S. W. 479. A defaulting contractor may recover the value of materials if they were of benefit to the owner less any damages from nonperformance. Decker v. School Dist. No. 2 [Mo. App.] 74 S. W. 390.

17. Cook v. Gallatin R. Co. [Mont.] 73 Pac. 131.

18. Where a contract for the sale and delivery of fruit is broken by the purchaser, the seller may rescind the contract and recover for fruit delivered. Minaker v. Cali-

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Though contrary to the rule in some cases,[19] it is held in some jurisdictions that where one abandons or fails to comply with his contract of employment after part performance, without a justifiable cause, he may recover on a quantum meruit the value of his services rendered, less any damage sustained by the employer by reason of such breach of contract.[20] But the plaintiff must show that the work done and materials furnished were beneficial to the defendant and were accepted by him.[21]

Services by member of family.—Where services are rendered between persons occupying the family relation, and living together as one household, the presumption is that the services are intended to be gratuitous, and in order to recover therefor one must rebut this presumption by showing an express or implied agreement for compensation;[22] but this does not apply to persons not living together as one household, though members of the same family and though living in the same house.[23] This rule is true although there has been a request and promise to pay where the circumstances negative an intention to receive pay.[24] But in order that such relation may be set up as a defense it must be specially pleaded.[25] Whether in a given case services rendered by one member of a family for another were intended to be gratuitous or on an implied contract is a question for the jury.[26]

Amount of recovery.—If the circumstances of the case show that the work was to be done for a certain price, that would be the amount of recovery.[27] And where one continues to render services after the expiration of a contract of employment, without a new agreement, it is presumed to be at the original rate of compensation.[28] But in the absence of such circumstances, the one doing the work could recover only the reasonable value of his services.[29] It is inadmissible

fornia Canneries Co., 138 Cal. 239, 71 Pac. 110.

19. One rendering services as a barber under a contract that such services shall be in part payment of a tombstone cannot recover therefor where he fails to select the tombstone. Day v. Farley, 100 Mo. App. 633.

20. Murphy v. Sampson [Neb.] 96 N. W. 494; Orr v. Cooledge, 117 Ga. 195; McKnight v. Bertram Heating & Plumbing Co., 65 Kan. 859, 70 Pac. 345.

21. Roskilly v. Steigers, 96 Mo. App. 576.

22. Galloway's Adm'r v. Galloway, 24 Ky. L. R. 857, 70 S. W. 48. Niece for an uncle. Sloan v. Dale, 90 Mo. App. 87. Nephew and uncle. Hicks v. Barnes, 132 N. C. 146. Daughter rendering services for mother; nor could the mother in such case recover for board furnished to the daughter, in the absence of express contract. Terry v. Warder, 25 Ky. L. R. 1486, 78 S. W. 154. A grandfather raising an infant grandchild. In re De Freest's Estate, 41 Misc. [N. Y.] 535. Child living with a family as a member thereof. Blivin v. Wheeler [R. I.] 55 Atl. 760. Near relative acting as housekeeper, nurse, and companion to one aged and infirm. Platt v. Hollands, 85 App. Div. [N. Y.] 231. A son working for a number of years for his father without making a claim for services, and dividing the crops without deducting for his claim, cannot recover for such services from his father's estate without clearly proving by disinterested parties a contract therefor. Duckworth v. Duckworth [Md.] 56 Atl. 490.

23. The fact that plaintiff, his wife and several children resided for a year at a hotel belonging to his mother and operated by another son as her agent, and that plaintiff and his children did not live in the family of the mother or render her any services and that an allowance was made for the services of his wife to the mother, will raise no presumption that board was furnished them gratuitously, but a contract to pay will be implied. Weitnauer v. Weitnauer, 117 Iowa, 578.

24. A sister living with a brother at his request and upon his promise to pay cannot recover for her services, where she testified that she did not come and live with him for service, but to stay with him the balance of her life, and there appeared no intention to charge for her services. McBride v. McGinley, 71 Wash. 573, 72 Pac. 105.

25. Schroeder v. Schroeder, 119 Iowa, 67.

26. Where a son and daughter-in-law nurse parents living in the same house under an arrangement. Lillard v. Wilson [Mo.] 77 S. W. 74.

27. Bryan v. Brown, 3 Pennewill [Del.] 504. Contract price is evidence of value. Boyd v. Vale, 84 App. Div. [N. Y.] 414.

28. But not where there was no original agreement as to rate of compensation. Leidigh v. Keever [Neb.] 97 N. W. 801. Services rendered by a bank cashier in collecting dividends for a long time for a large stockholder and depositor, without an agreement for payment, will be presumed to be gratuitous. Wright v. Sheldon, 24 R. I. 336.

29. Bryan v. Brown, 3 Pennewill [Del.] 504. A thousand dollars held not excessive

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to show the value of the services to a third person at a time subsequent to their rendition,[29] or to show that all the services required by a broken contract had not been performed.[31] Nor can a void contract be shown for the purpose of measuring the value of services rendered.[32] But testimony as to the length of time plaintiff worked, and that work could not have been done in less time, is competent.[33]

§ 3. *Moneys had and received and money paid.*—A contract implied in law arises for the repayment of money received or obtained by one which in equity and good conscience belongs to another;[34] but this rule does not apply to money in which the plaintiff has no interest or to which he has no right.[35] Again an implied contract arises on the part of one to repay another paying money at his request,[36] or for his use, from which his estate derives a benefit;[37] or through his fraud or misrepresentation;[38] or where it was paid on a consideration which has wholly failed.[39] But not for money paid on a judgment subsequently vacated, under circumstances not constituting a reversal;[40] nor against one person for money expended at the request of another who is in no way authorized to represent such person;[41] nor for money paid for furthering a fraudulent purpose of

for eight years' service as man servant and untrained nurse. Cunningham v. Hewitt, 84 App. Div. [N. Y.] 114. Five dollars a day held to be a reasonable charge for board and lodging and for rendering services as an untrained nurse to one having a loathsome disease and bodily and mental afflictions. Succession of Alexander, 110 La. 1027. The question to be determined in action of assumpsit on the quantum meruit count is what is the value of the services rendered not what benefits have been derived therefrom. Rothstein v. Siegel, Cooper & Co., 102 Ill. App. 600.

30. Connelly v. Cover, 102 Ill. App. 426.

31. Cook v. Gallatin R. Co. [Mont.] 73 Pac. 131.

32. But it may be shown to rebut the presumption that the services were to be gratuitous. In re Sheldon's Estate [Wis.] 97 N. W. 524.

33. Shmilovitz v. Bares, 75 Conn. 714.

34. Law v. Uhrlaub, 104 Ill. App. 263; Columbus State Bank v. Carrig [Neb.] 92 N. W. 324; McCormick Harvesting Mach. Co. v. Stires [Neb.] 94 N. W. 629; Alexander v. Von Koehring [Tex. Civ. App.] 77 S. W. 629. Money paid on an execution sale subsequently set aside on account of invalidity of the judgment. Carpenter v. Anderson [Tex. Civ. App.] 77 S. W. 291. The beneficiary of a decedent may recover from a beneficiary association money received by it on account of the decedent's death while a member in good standing. Littleton v. Wells & McComas Council, No. 14 [Md.] 56 Atl. 798. A purchaser of property, a part of which is on another's land, receiving rents for the whole must pay over to such other a proportionate share of the rents, less proper disbursements. Rhodes v. Stone, 25 Ky. L. R. 921, 76 S. W. 533. On failure to complete purchase of land party is accountable for rents which he was to keep if he purchased. Ridgeway v. Jewell [Iowa] 95 N. W. 410.

Evidence not sufficient to allow recovery. Spear v. American Service Union, 76 App. Div. [N. Y.] 624.

In an action to recover money retained for services an express promise to pay does not preclude recovery where the amount agreed to be paid or the value of the services is not shown to be equal to the amount retained. Reed v. Hayward, 82 App. Div. [N. Y.] 416. Receiving check to buy goods which prospective seller refused to sell, applying check to debt of the one who had received it. Quarles v. Hall [Mo. App.] 74 S. W. 883.

35. As where one in a joint sale, by a secret agreement with the purchaser obtains more for his own property than the others obtained. Cummings v. Synnott [C. C. A.] 120 Fed. 84.

36. Powers Mercantile Co. v. Blethen [Minn.] 97 N. W. 1056.

37. An implied contract arises to reimburse a husband out of his wife's estate for the reasonable cost of her sepulture paid for by him. Pache v. Oppenheim, 84 N. Y. Supp. 926.

38. In re Filer, 125 Fed. 261; Elliott v. United States, 37 Ct. Cl. 136. Bank paying check under forged indorsement. Second Nat. Bank v. Guarantee Trust & Safe Deposit Co., 206 Pa. 616.

39. Warder, Bushnell & Glessner Co. v. Myers [Neb.] 96 N. W. 992. Money paid for property to be unencumbered, but which proves to be encumbered may be recovered. Jensen v. McCornick, 26 Utah, 142, 72 Pac. 630. But a purchaser cannot recover a part of the purchase money paid for defective articles if he has knowledge of such defects, at the time he makes the payments unless it is expressly agreed at the time that the defects shall be fixed, which the seller fails to do. National Computing Scale Co. v. Eaves, 116 Ga. 511.

40. An order vacating a judgment for alimony, but not constituting a reversal thereof, does not entitle the husband to recover the amount paid or to have it credited on a judgment for permanent alimony. Mercer v. Mercer [Colo.] 73 Pac. 662.

41. Little Bros. Fertilizer & Phosphate Co. v. Wilmott [Fla.] 32 So. 808. The mere fact that letters and telegrams from a drawer of a draft telling the drawee to

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the payor;[42] nor in favor of one joint wrongdoer against another, for money which the former has been compelled to pay by reason of the wrong;[43] nor for profits arising out of an enterprise in which the demandant was formerly interested, but which he had abandoned before the profits were realized.[44]

Voluntary payments.—An implied contract does not arise in favor of one voluntarily paying money for another without the latter's request,[45] or on an invalid claim with a full knowledge of all the facts.[46] Money paid for another, which the latter was under no obligation to pay, does not raise an implied contract for its repayment.[47]

By mistake.—Money paid under a mistake of fact raises an implied contract for its repayment,[48] but, in the absence of fraud, not when paid under mistake of law,[49] unless the payment is for matters which have already been paid for.[50]

On contract subsequently broken.—Where money is paid under a contract which is subsequently broken or rescinded by the defendant, the law implies a promise to refund it.[51] And the fact that the contract was ultra vires or void under the statute of frauds is no defense in such a case, for money expended before the contract is repudiated.[52]

Under illegal contracts.—Money paid under an illegal contract which is merely malum prohibitum may be recovered back on an implied promise for its re-

charge the amount thereof to a third person does not make the latter liable for money paid at his request. Allen v. Bobo [Miss.] 33 So. 288.

42. Money to an innocent person in furtherance of an unlawful conspiracy to defraud the latter. Bauer v. Sawyer & Britsch Land Co. [Minn.] 97 N. W. 428.

43. There can be no contribution between wrongdoers. First Nat. Bank v. Avery Planter Co. [Neb.] 95 N. W. 622. And see title Contribution, 1 Curr. Law, 704.

44. Where an agreement between several parties to engage in a certain business and divide the profits is abandoned, and one of the parties thereafter continues the enterprise making use of efforts made by the other parties, an implied promise does not arise to account for and divide the profits therefrom. Parks v. Gates, 84 App. Div. [N. Y.] 534.

45. Elliott v. U. S., 37 Ct. Cl. 136; Contoocook F. Precinct v. Hopkinton, 71 N. H. 574. An implied contract does not arise on the part of a guest to pay a hostess for money paid for expenses on a trip on which the guest was invited. Zane v. De Ohativia, 139 Cal. 328, 73 Pac. 856.

46. New Orleans & N. E. R. Co. v. Louisiana, C. & I. Co., 109 La. 13. Even though the payor protests against his liability. Anderson v. Cameron [Iowa] 97 N. W. 1085. Where an attorney having checks payable to his client procures their indorsement by him under threats of having them returned and under the belief that the amount thereof would be finally lost, it is not such a voluntary payment to the attorney as to preclude the client from recovering the amount thereof from him. Reed v. Hayward, 82 App. Div. [N. Y.] 416.

47. Money paid by a city for an injury to a person from a nuisance on property to which the defendant held the deed, cannot be recovered from the latter where he had not obtained possession and had no notice of the nuisance. Lincoln v. First Nat. Bank [Neb.] 93 N. W. 698.

48. First Nat. Bank v. City Nat. Bank, 182 Mass. 130. Moneys paid, under a contract void by a state statute, on account of an innocent party may be recovered in assumpsit. Jones v. Mut. Fidelity Co., 123 Fed. 506. Overdue taxes paid by an owner of land in ignorance of a sale may be recovered from the tax purchaser, and be declared a lien on the property. Rothchild v. Rollinger [Wash.] 73 Pac. 367. A defense that payment was not made under duress and was voluntary in action for money paid under mutual mistake is frivolous. Jaeger v. New York, 39 Misc. [N. Y.] 543. The remedy is for deceit where money is paid under misrepresentations for valueless stock. Anderson Carriage Co. v. Pungs [Mich.] 95 N. W. 985.

49. Money loaned under a void statute. Newburgh Sav. Bank v. Woodbury, 173 N. Y. 55.

This rule applies to municipal corporations as well as to individuals. Morgan Park v. Knopf, 199 Ill. 444.

50. A county may maintain an action as for money had and received against a former officer of the county for money illegally received by him for compensation under a mistake of law, for services for which he already has received a salary. Douglas County v. Sommer [Wis.] 98 N. W. 249.

51. Interstate Hotel Co. v. Woodward & B. Amusement Co. [Mo. App.] 77 S. W. 114. Money deposited as earnest money to bind the performance of an agreement which is broken by the defendant preventing performance may be recovered. Wright v. Levy, 84 N. Y. Supp. 885. Breach of conditional sale by seller after payment of part of purchase price. Wood v. Kaufman [Mich.] 97 N. W. 47.

52. Interstate Hotel Co. v. Woodward & B. Amusement Co. [Mo. App.] 77 S. W. 114.

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payment;[53] but it is otherwise where the contract is in respect to a matter malum per se.[54]

53. One having paid rents and taxes under a contract to take charge of property, may recover the amount so expended though the contract is void under the statute of frauds. Seymour v. Warren, 86 App. Div. [N. Y.] 403. Statutory recovery for money paid on wagers. Moulton v. Westchester Racing Ass'n, 84 N. Y. Supp. 871.

54. Money paid under a contract contrary to public policy cannot be recovered; as money advanced to pay campaign expenses. Ward v. Hartley [Mo.] 77 S. W. 302.

Note. Recovery of money paid or property delivered under illegal agreements: "As a rule, money paid or property delivered under an unlawful agreement may not be recovered back, either at law or in equity. In other words, where an agreement has been executed, though upon an illegal consideration or for an unlawful purpose, neither party may recover back what he has parted with in carrying the compact into effect. This, as has been said, is an application of the maxim, In pari delicto potior est conditio defendentis et possidentis. To illustrate: If a man pays money or delivers property under an agreement entered into on Sunday in violation of law, he cannot recover it back; and the same is true of property pledged to secure the payment of an illegal demand, and of money lent to be used in an unlawful manner. Money lent to make or to pay bets might be recovered at common law; but in those jurisdictions where a wager is illegal, money lent to a man in order to enable him to make a wager cannot be recovered; and the same is true as to recovering back money placed in the hands of a broker for unlawful speculation, and used by him therein. Money paid or property delivered under a wager may usually be recovered back by virtue of statute, but, in the absence of statute, it cannot be recovered back in those jurisdictions where a wager is illegal. In several states, if a greater rate of interest is paid than is allowed by law, the debtor may recover it back or set it off against the principal debt and, in a few states, by way of penalty, the creditor is subjected to liability for two or three times the sum exacted by him in excess of the legal rate. The rule precluding a recovery of money or property parted with under an illegal agreement applies also where the consideration for the payment or delivery has been performed only in part, and not in toto. Thus, if A. pays $100 to B. on the latter's promise to murder C. and D., A. cannot recover back the payment after B. has murdered C., although he has not murdered D."

Locus poenitentiae. "If a party to an illegal agreement repents of his unlawful design before it is carried into effect, the law allows him to rescind the agreement, and recover back whatever he has paid or delivered under it. The period during which an unlawful agreement remains executory is accordingly termed 'locus poenitentiae.' This right of rescission is allowed mainly for the purpose of encouraging the abandonment of illegal designs. However, the repentant party gets the direct benefit of it. A common illustration of the rule occurs in the case of agency. If an agent receives money to be paid out for an unlawful purpose, the principal may recover it back at any time before it is so expended. Upon this principle, money placed in the hands of a person as stakeholder to abide the event of a wager is recoverable from the stakeholder either before or after the determination of the wager, and even after the money has been paid to the winner, if the authority to pay was withdrawn by the plaintiff before payment, and in this latter event, if the loser does not choose to hold the stakeholder, he may recover the money from the winner. However, as we have seen in another connection, if the party delivering the goods or paying the money waits until the illegal purpose is accomplished, so that the transaction becomes executed, he cannot recover."

Par delictum. "All that has been said in reference to the inability of a man to obtain relief from an illegal agreement to which he is a party presupposes a guilty party. It may happen, however, that only one of the parties to an agreement entertains an unlawful intent. In this case, the innocent party may recover what he has parted with upon the faith of the agreement before he learned of the illegality. Again, the law admits degrees of guilt, and, even though both parties contemplated an unlawful act, yet, under some circumstances, if one is more excusable than the other, he may recover what he has paid or delivered in performing the illegal agreement. The rule may be stated thus: Where the parties to an illegal agreement are not in pari delicto, and where public policy is considered as advanced by allowing either, or at least the more excusable, to sue for relief against the transaction, relief is given him, either at law or in equity, by way of allowing him to recover back money or property paid or delivered pursuant to the terms of the agreement; and this is true, even though the agreement is fully executed. Accordingly, if a man is induced to enter into an agreement by fraud or imposition, or by coercion, whether by duress, oppression, threats, or undue influence, he may avoid it, and recover what he has conveyed or delivered or paid thereunder, even though the object of the agreement is illegal. Thus, if a creditor refuses to assent to a composition unless the debtor secretly and in fraud of the other creditors pays him an additional sum, which is done, the debtor may recover back the extra payment as being unlawful and brought about by compulsion. The parties are not regarded as being in pari delicto where the illegality consists in a violation of a statute which was intended for the constraint of one party only, or for the protection of the other. Thus, a bank issuing bills contrary to law might be compelled to reimburse the holder in an action for money received, even though the bills were void, if the receiving of the bills was not expressly prohibited. The bank is deemed more guilty than the members of the community who receive the unlawful currency. The latter are regarded

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Money paid under duress may be recovered back upon an implied promise for its repayment;[55] but not where he voluntarily pays without protest;[56] and even where one pays under protest, if he has other means of immediate relief at hand than by making payment, he cannot recover.[57] The duress, however, must be illegal, unjust, or oppressive.[58] It is not duress to institute or threaten to institute civil suits, or take proceedings in court, or for any person to declare that he intends to use the courts wherein to insist upon what he believes to be his legal rights.[59]

Money lent.—Where one lends money to or for another, in the absence of an express contract, there is an implied contract on such other to repay it,[60] as where it was loaned through the agency of another.[61] Money loaned under a mistake of fact may be recovered,[62] but not where the mistake is one of law.[63]

§ 4. *Use and occupation.*—One may also be held on an implied contract for using and occupying another's property; but in order that an action of assumpsit may be maintained in such case, the relation of landlord and tenant must be shown to have existed between the parties at the time.[64] It will not lie against one in possession claiming under an adverse title;[65] nor against one entering under an executory contract to purchase;[66] nor against a mere trespasser;[67] but a former tenant is not liable for use and occupation for leaving property on the premises, where he plainly abandons such property.[68] The measure of recovery for use and occupation is the reasonable value of the use of the land, not the amount of profit derived therefrom.[69]

§ 5. *Torts which may be waived and sued as implied contracts.*—Where one commits a tort by which he enriches himself at the expense of another, the latter

as the persons intended to be protected by the law."—Hammon, Cont. §§ 257-259 and exhaustive collection of cases cited thereto.

55. Anderson v. Cameron [Iowa] 97 N. W. 1085; State v. Slayback, 90 Mo. App. 300. Money paid for a permit to reconstruct a vault under a sidewalk under threat of arrest and by taking possession of property may be recovered. Deshong v. New York, 176 N. Y. 475. Payment of a fine, illegally imposed, to procure a release from custody is a payment under duress. Houtz v. Uinta County Com'rs [Wyo.] 70 Pac. 840. Where the parties were not on equal terms; where the payer had no choice; where the only alternative was to submit to an illegal exaction or discontinue business—these and other like circumstances evidence pressure or duress under which money or other value parted with may be recovered back. New Orleans & N. E. R. Co. v. La. C. & I. Co., 109 La. 13.

56. Money paid to satisfy process cannot be recovered on the ground of duress, where he has an opportunity to stop collection but does not accept it. State v. Stonestreet, 92 Mo. App. 214. Payment of an illegal fine, not to procure a release from custody, but merely to avoid further inconvenience in court is voluntary. Houtz v. Uinta County Com'rs [Wyo.] 70 Pac. 840.

57. Such payment is voluntary. New Orleans & N. E. R. Co. v. La. C. & I. Co., 109 La. 13.

58. Deshong v. New York, 176 N. Y. 475.

59. New Orleans & N. E. R. Co. v. La. C. & I. Co., 109 La. 13.

60. Tague v. John Caplice Co. [Mont.] 72 Pac. 297.

61. The fact that defendant signed the note upon which the loan was made was a circumstance tending to show that he participated in a loan made by his wife. Brown v. Woodward, 75 Conn. 254.

62. One in good faith lending money on bonds void for want of power to issue them may recover in an action for money had and received. Fernald v. Gilman, 123 Fed. 797.

63. Newburgh Sav. Bank v. Woodbury, 173 N. Y. 55.

64. Hill v. Coal Valley Min. Co., 103 Ill. App. 41; Janouch v. Pence [Neb.] 93 N. W. 217; Ettlinger v. Degnon, etc., Co., 85 N. Y. Supp. 394. It will not lie where there is no privity between the plaintiff and the person in possession. Fender v. Rogers, 97 Ill. App. 280.

65. And no contract relation existed between the parties. Adsit v. Kaufman [C. C. A.] 121 Fed. 355; Fender v. Rogers, 97 Ill. App. 280.

66. Though a contract is afterwards rescinded. Belger v. Sanchez, 137 Cal. 614, 70 Pac. 738.

67. Janouch v. Pence [Neb.] 93 N. W. 217; Ettlinger v. Degnon, etc., Co., 85 N. Y. Supp. 394. A city is not liable for the use and occupation of land by a public artesian well where it had no knowledge that the property belonged to the plaintiff. Wilson v. Mitchell [S. D.] 97 N. W. 741.

68. Lessees surrendering possession, which surrender the lessor accepts, cannot be held liable for use and occupation because they leave certain machinery on the premises. Beeston v. Yale, 75 App. Div. [N. Y.] 78, 11 Ann. Cas. 475.

69. Boland v. Tiernay, 118 Iowa, 59. From the date of the termination of the lease. Conger v. Ensler, 85 App. Div. [N. Y.] 564.

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may elect to waive the tort and treat it as an implied contract on which he may sue to recover the value of that which has been taken or used.[70] One may waive the tort and sue on an implied contract, where another has obtained his money through fraud,[71] or has converted[72] or stolen or embezzled his property.[73]

§ 6. *Remedies and procedure.*—An implied contract is properly enforced by an action of general assumpsit[74] for money had and received,[75] or for money paid for the defendant's use;[76] though in some cases a petition in the form of a common count may be maintained.[77] In states having Code procedure, the remedy for money had and received or money paid, depends upon the statutes.[78]

In an action of assumpsit for money had and received, the origin and character of the fund must be pleaded.[79] But it is unnecessary in an action on the common counts to allege that the defendant promised to pay,[80] or that he had converted the property or money.[81] Nonpayment should be alleged.[82] In an action for work and labor, the defense that services were rendered by one as a member of a family must be pleaded.[83] If the action is brought on an express contract, recovery cannot be had on a quantum meruit unless it is pleaded.[84] The fact that

70. Moore v. Richardson, 68 N. J. Law, 305. Where one wrongfully uses the property of another under a claim of right under the terms of an express contract, he is liable on an implied contract to such other for the reasonable value of such use. Champlain Const. Co. v. O'Brien, 117 Fed. 271, 788.

71. A bankrupt procuring his employers to purchase stocks on false and fictitious orders may be held liable for money paid to his use, and the debt be provable in bankruptcy. In re Filer, 125 Fed. 261. And see cases cited supra, note 70.

72. The measure of damages being the value of the property at the time of its conversion. Moore v. Richardson, 68 N. J. Law, 305. One wrongfully compromising and releasing a mortgage and appropriating the proceeds is liable for the debt and interest. Persons v. Persons [N. D.] 97 N. W. 551. The amount of a check deposited by a prospective lessee may be recovered in an action for money had and received upon refusal of the lessor to complete the lease, though an action of trover might have been maintained. Silver v. Krellman, 89 App. Div. [N. Y.] 363. An agent of a loan company misappropriating money sent to him to close a loan. Guernsey v. Davis [Kan.] 73 Pac. 101.

73. And in such action the plaintiff may sue out an attachment against a nonresident defendant. Lipscomb v. Citizens' Bank, 66 Kan. 243, 71 Pac. 583.

74. Guilford v. Mason, 24 R. I. 386.

75. Jones v. Mut. Fidelity Co., 123 Fed. 506; Fernald v. Gilman, 123 Fed. 797; In re Filer, 125 Fed. 261. An action of assumpsit for money had and received may be maintained where one has received or obtained possession of money which in equity and good conscience he should pay to another. It is a liberal action in which the plaintiff waives all tort and claims only the money which the defendant has actually received. Law v. Uhrlaub, 104 Ill. App. 263. See title "Assumpsit."

76. The proper remedy for money paid on notes at the request of another is an action of assumpsit for money paid for the defendant's use, not an action on the notes. Powers Mercantile Co. v. Blethen [Minn.] 97 N. W. 1056.

77. The value of services rendered under a contract broken by the employer and abandoned by the employe may be recovered under a petition in the form of a common count, if no objection is made to the pleading. Jenson v. Lee [Kan.] 73 Pac. 72.

78. In New York money paid on wagers may be recovered in a civil action [Laws 1895, p. 377, c. 570, § 17]. Moulton v. Westchester Racing Ass'n, 84 N. Y. Supp. 871. In suing in assumpsit for fraud and deceit under a statute, the statute or equivalent facts must be pleaded. Anderson Carriage Co. v. Pungs [Mich.] 95 N. W. 985.

79. Where one suing for money had and received fails to plead its origin and character he cannot claim that it was received under circumstances preventing the defendant from retaining it for services rendered. Dobbs v. Campbell, 66 Kan. 805, 72 Pac. 273.

80. It is sufficient to state facts showing the duty, from which the law implies the promise. Boston Clothing Co. v. Garland [Minn.] 97 N. W. 433. An allegation that defendant had received a certain sum of money for the use and benefit of the plaintiff is sufficient. Waite v. Willis, 42 Or. 288, 70 Pac. 1034. It is no defense to an action for the price of goods sold and delivered that the defendant did not promise or agree to pay therefor. Guenther v. American Steel Hoop Co., 25 Ky. L. R. 795, 76 S. W. 419.

81. The action will lie whether or not trover could be maintained. Antonelli v. Basile, 93 Mo. App. 138.

82. Plaintiff in work and labor must allege nonpayment. Bacon v. Chapman, 85 App. Div. [N. Y.] 309.

83. Schroeder v. Schroeder, 119 Iowa, 67.

84. Felton v. Tally [Tex. Civ. App.] 72 S. W. 614; McDonnell v. Stephenson [Mo. App.] 77 S. W. 766. Recovery may be had for services as on implied contract though declaration purports to be on a contract attached which in reality is only an account or memorandum. Noyes Carriage Co. v. Robbins [Ind. App.] 67 N. E. 959. Election to rely on count based on disaffirmance and recovery of quantum meruit may be at close of

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plaintiff, in an action on a quantum meruit, in his replication admits the existence of a written contract, but denies that it contains the entire agreement, or that defendant had performed his part of the contract, and alleges a separate contract for extra compensation, does not entitle the defendant to judgment on the pleadings.[85]

An action for services rendered matures upon the completion of the services, and must be brought within the period limited by the statute from that time.[86] In an action for money had and received for a conversion, the statute begins to run from the time the plaintiff has knowledge of the wrongful act.[87]

INCEST.[88]

Statutes declaring the crime must be certain and definite.[89] Consent of the woman is not necessary to make out the crime against the man.[90] But if she willingly submits, though with a different mind from him, she is an accomplice to be corroborated.[91] On trial of the man, the fact that the woman was jointly indicted does not prevent disproof by the state of her consent.[92] Prior acts between the parties may be shown,[93] but not acts of prosecutrix with other men,[94] nor her character for chastity.[95] Where there is positive testimony of the intercourse, an instruction on the law of circumstantial evidence is harmless, though erroneous.[96]

INCOMPETENCY.[97]

§ 1. Mental Weakness Sufficient to Constitute Incompetency (295).
§ 2. Effect of Incompetency on Contracts (296).
§ 3. Remedies and Procedure (297).

§ 1. *Mental weakness sufficient to constitute incompetency.*—The test of capacity to contract is the possession of sufficient reason and understanding at the time to know the nature of the contract and to appreciate its probable results.[98] Mere weakness of mind or sickness in body,[99] unaccompanied by fraud or undue influence,[1] will not render one incompetent. Old age and physical infirmity merely,[2] or old age, and weakness of mind resulting from trouble,[3] or from physical weakness, debility or disease of body,[4] will not amount to incom-

evidence. Brown v. Woodbury, 183 Mass. 279.

85. Cook v. Gallatin R. Co. [Mont.] 73 Pac. 131.

86. In re Sheldon's Estate [Wis.] 97 N. W. 524.

87. Guernsey v. Davis [Kan.] 73 Pac. 101.

88. Incestuous rape, see Rape; as to rules of consanguinity, see Marriage.

89. Sufficiency of Acts 1888, No. 78, as prohibiting and defining incest and as embracing more than one subject as expressed in its title. State v. De Hart, 109 La. 570. **Sufficiency of evidence** (David v. People, 204 Ill. 479); of evidence to show that another was an accomplice (Ingram v. State [Tex. Cr. App.] 75 S. W. 304). **Argument of counsel** on evidence as legitimate. Ingram v. State [Tex. Cr. App.] 75 S. W. 304.

90. Hurd's Rev. St. 1901, c. 131, § 1. David v. People, 204 Ill. 479.

91. Tate v. State [Tex. Cr. App.] 77 S. W. 793. Sufficiency of evidence of voluntary submission. Id.

92. Tate v. State [Tex. Cr. App.] 77 S. W. 793.

93. State v. De Hart, 109 La. 570; evidence given by prosecutrix. State v. Wood [Wash.] 74 Pac. 880.

94. State v. De Hart, 109 La. 570.

95. Richardson v. State [Tex. Cr. App.] 70 S. W. 320.

96. Gibson v. State [Tex. Cr. App.] 77 S. W. 812.

97. See Fraud and Undue Influence; capacity to make will or testament, see Wills; cancellation of instruments for fraud, undue influence, or incapacity, see Cancellation of Instruments. Sufficiency of incompetency to warrant appointment of guardian, see Guardian and Ward.

98. Deed. Stringfellow v. Hanson, 25 Utah, 480, 71 Pac. 1052.

99. Reeves v. Howard, 118 Iowa, 121.

1. Paulus v. Reed [Iowa] 96 N. W. 757.

2. Chadd v. Moser, 25 Utah, 369, 71 Pac. 870.

3. Stringfellow v. Hanson, 25 Utah, 480, 71 Pac. 1052.

4. Meyer v. Jacobs, 123 Fed. 900. That one making a deed was subject to spells of deafness and dizziness due to old age is insufficient to show incompetency where it

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petency to contract, if sufficient intelligence remains to comprehend the transaction and its probable effect;[5] or old age with mere failure of memory,[6] or accompanied by illiteracy and unfamiliarity with English and terms used in conveyances.[7] Mental incapacity to set aside a conveyance need not amount to idiocy or insanity; a mental deficiency precluding deliberate judgment being sufficient.[8]

One who uses intoxicants habitually and excessively may still contract and convey property, unless actual intoxication had dethroned reason or impaired understanding so that he was mentally unsound at the time of the act;[9] but if his condition was verging on delirium tremens when he executed a deed, he is incompetent.[10]

Evidence.[11]—Opinions of nonexpert witnesses, who have been in close relations with one who has made a contract, may be given as to his competency to contract.[12] The alleged incompetent's declarations as to why he so acted[13] and other statements by him at the time of the transaction in question are admissible.[14] Proof of old age and ill health, and of disregard of his children's interests, will not show mental incapacity of a grantor so as to shift the burden to the grantee.[15]

§ 2. *Effect of incompetency on contracts.*—The deed or gift of an insane person who has never been adjudged insane is voidable, and is in full force until such election is exercised by him,[16] or possibly by his executor after his death.[17] Ratification on return of reason makes the deed good.[18] Intoxication at time of contract, though caused by the other party, renders the contract voidable, not void.[19]

does not appear that the conveyance was made during one of such spells. Jacobsen v. Nealand [Iowa] 98 N. W. 158. To make gift. Meyer v. Jacobs, 123 Fed. 900.

5. Especially where the grantor was able to keep the facts in mind long enough to complete the transaction without aid. Hayman v. Wakeham [Mich.] 94 N. W. 1062. An aged woman possessing sufficient intelligence without prompting to remember those entitled to her bounty, to comprehend the extent of her estate, and to realize that a deed made to a son would deprive other children of equal shares is competent. Dean v. Dean, 42 Or. 290, 70 Pac. 1039. One who understands the value and extent of his property, remembers the property concerned in a gift and the persons who are the objects of his bounty, and the manner in which he is distributing it, is mentally competent. Thorne v. Cosand, 160 Ind. 566. Disregard of his children's interests will not change the rule as to an aged grantor. Hayman v. Wakeham [Mich.] 94 N. W. 1062.

6. Mere failure of memory as to recent events by woman of 73. Dean v. Dean, 42 Or. 290, 70 Pac. 1039.

7. Hoffman v. Colgan, 25 Ky. L. R. 98, 74 S. W. 724.

8. Paulus v. Reed [Iowa] 96 N. W. 757.

9. Burnham v. Burnham [Wis.] 97 N. W. 176.

10. Hardy v. Dyas, 203 Ill. 211.

11. Admissibility of testimony as to competency of injured person to execute a release of damages. Galloway v. San Antonio & G. R. Co. [Tex. Civ. App.] 78 S. W. 32.

Sufficiency of evidence of competency (Colston v. Olroyd, 204 Ill. 435), to make deed (Bodelsen v. Swensen [Ill.] 68 N. E. 1074; Vinson v. Scott, 198 Ill. 144), as affected by habitual intoxication (Hardy v. Dyas, 203 Ill. 211; Burnham v. Burnham [Wis.] 97 N. W. 176); to execute mortgage (Farmers' Bank v. Normand [Neb.] 92 N. W. 723; Tatum v. Tatum's Adm'r [Va.] 43 S. E. 184) because of old age (Thorp v. Smith [N. J. Err. & App.] 54 Atl. 412); incompetency because of intoxication and mental disease (Davis v. Thornley, 204 Ill. 266); transfer of property by check to his son by father of 80 (Polt v. Polt, 205 Pa. 139); of sanity of one injured in head and who signed a release of damages (Shook v. Ill. Cent. R. Co. [C. C. A.] 115 Fed. 57); to carry to the jury the question of incompetency to draw a check (Central G. T. & S. D. Co. v. White [Pa.] 56 Atl. 76).

12. Grimshaw v. Kent [Kan.] 73 Pac. 92. The wife of one injured may give her opinion as to his capacity to execute a release of damages in connection with the facts from which her opinion is drawn. Galloway v. San Antonio & G. R. Co. [Tex. Civ. App.] 78 S. W. 32.

13. Reasons given by a wife for conveying land to her son by her first husband, with knowledge that he would at once convey it to her husband, may be shown on the question of mental capacity. Thorne v. Cosand, 160 Ind. 566.

14. An attorney drawing a contract for a deceased person may testify as to a conversation when the contract was executed as showing competency to contract, the relation of attorney and client not existing between them. Grimshaw v. Kent [Kan.] 73 Pac. 92.

15. Hayman v. Wakeham [Mich.] 94 N. W. 1062.

16. Blinn v. Schwarz [N. Y.] 69 N. E. 542.

17. Bishop v. Leonard, 123 Fed. 981.

18. Blinn v. Schwarz [N. Y.] 69 N. E. 542.

19. Strickland v. Parlin & O. Co. [Ga.] 44 S. E. 997.

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§ 3. *Remedies and procedure.*—On making a deed after restoration to sanity, the grantee therein may sue to avoid the one made while insane.[20] A void deed will not be set aside in equity for insanity of the grantor, there being a remedy at law.[21] One seeking to avoid a contract for mental incapacity must prove it.[22] One claiming under a deed made by an adjudged lunatic must show that the instrument was made during a lucid interval.[23] A finding of incompetency suffices if substantially like a statute defining it.[24]

INDECENCY, LEWDNESS, AND OBSCENITY.[25]

Lewd and lascivious cohabitation, as a statutory offense, is not shown by a single act, or occasional acts, but by such cohabitation as that of husband and wife. The relation of master and servant may co-exist with such cohabitation.[26] In an indictment for the statutory crime of taking indecent liberties with the person of a female child under the age of consent, it is not necessary to allege the particular acts, though it should be alleged that such acts do not amount to a rape, or an assault or attempt to commit a rape.[27]

Using obscene or indecent "language"[28] has been held to exclude written communications.[29] "Woman" is equivalent to "female" in averring the utterance in her presence.[30] In such a prosecution, a witness may give his opinion whether the females could have heard the language,[31] and may state the language used, though he cannot say whether it was abusive and insulting.[32]

Mailing obscene letters.—Deposit in the mails of a sealed letter containing matter offensive to a sense of chastity and calculated to excite impure thoughts in the mind of the addressee is an offense, if not written in proper exercise of professional duty or legitimate calling, rendering such language necessary.[33] Mailing a private sealed letter, containing indecent charges against the writer's mother, to her, is not the offense of mailing a letter containing obscene, lewd and lascivious matter; the letter sent must tend to corrupt the morals of the addressee, there being no presumption that it is intended for, or will be read by, others.[34] An indictment for mailing an obscene letter, setting it out and showing an address, need not allege its inclosure in an addressed envelope or wrapper.[35]

Public indecency and lewdness.—A "notorious act of public indecency" must be committed when and where it can be seen by more than one person.[36] An in-

20. Clay v. Hammond, 199 Ill. 370.
21. Boddie v. Bush, 136 Ala. 560.
22. Tuite v. Hart, 71 App. Div. [N. Y.] 619.
23. Gingrich v. Rogers [Neb.] 96 N. W. 156.
24. A finding, in effect, that an aged person because of infirmity was unable to comprehend the transaction in which she executed a note and mortgage, is a finding that she was "without understanding" and so could not consent. Jacks v. Estee, 139 Cal. 507, 73 Pac. 247.
25. See Rape; Adultery; Fornication; Disorderly Houses; Profanity and Blasphemy.
26. State v. Cassida [Kan.] 72 Pac. 522.
27. Gen. St. 1894, § 6534. State v. Kunz [Minn.] 97 N. W. 131.
Sufficiency of indictment for taking indecent liberties with person of a female under the age of consent under Gen. St. 1894, § 6534. State v. Kunz [Minn.] 97 N. W. 131.
28. Sufficiency of complaint. Sims v. State, 137 Ala. 79.
Instructions. Rollings v. State, 136 Ala. 126.
29. Pen. Code, § 396, making the use of vulgar or profane language in the presence of a female an offense does not include written communications but spoken words only. Williams v. State, 117 Ga. 13.
30. Jackson v. State, 137 Ala. 80.
31. Rollings v. State, 136 Ala. 126.
32. Jackson v. State, 137 Ala. 80.
33. Rev. St. U. S. § 3893 as amended by act July 12, 1876, c. 186 (19 Stat. 90) and act June 18, 1888 (25 Stat. 496). U. S. v. Wyatt, 122 Fed. 316.
34. The tendency is dependent on circumstances, import and presumed motive, and not upon its mere terms. Rev. St. U. S. § 3893, as amended by 25 Stat. 496. U. S. v. Wroblenski, 118 Fed. 495.
35. Rev. St. § 3893, as amended Act July 12, 1876, c. 186 (19 Stat. 90), and Act June 18, 1888 (25 Stat. 496). U. S. v. Harris, 122 Fed. 551.
36. An indictment failing to so charge

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dictment for willful and lewd exposure must charge that it was "lewdly" made.[37] Omission of statutory words "tending to debauch the morals" in an accusation for a notorious act of public indecency cannot be reached by an oral motion to quash.[38] Instructions as to willful lewd exposure as a statutory offense must be confined to acts both willful and lewd.[39] The indecent exposure being shown on trial to have been willful, evidence of previous similar acts is inadmissible.[40]

INDEMNITY.

§ 1. Definition and Distinctions (298).
§ 2. The Contract—Requisites and Validity (298).
A. Oral or Written (298).
B. Consideration (298).
C. Legality of Object (299).
§ 3. Interpretation and Effect of Contract (299).
§ 4. Defenses (300).
§ 5. Measure of Recovery (302).
§ 6. Securities by Way of Indemnity (303).

§ 1. *Definition and distinctions.*—Indemnity may be defined as a contract to save harmless whereby one party agrees to secure another against an anticipated loss or damage.[1] Where the indemnity is given against a class of casualties or for protection of specific property, it is generally called insurance.[2] Indemnity is to protect the promisee from liability for loss arising out of the act of another to him or from his acts to a third person while guaranty or suretyship is to protect the promisee from loss on the liability of another to him.[3] It is an independent and not a collateral undertaking, and so evidence of the principal contract against loss on which the promisee was indemnified may be immaterial.[4] A contract of indemnity is distinguished from a contract to pay a certain sum of money or to do a certain act in that the cause of action does not arise on default, but when the person indemnified against is damaged.[5] Courts are now inclined to construe bonds and contracts as contracts of indemnity only, and will attach more importance to the general purpose of the contract than the precise form of words employed,[6] or the terms by which the parties refer to it,[7] and so a promise to "pay for" goods loaned if they are damaged is regarded as a promise of indemnity and not of purchase.[8] A contract of indemnity is implied in favor of one co-obligor who pays an entire sum for which the other ought in equity to be solely liable.[9] These implied contracts will be treated later under the title Suretyship.[10]

§ 2. *The contract—Requisites and validity. A. Oral or written.*—In nearly all states a contract of indemnity is not within the statute of frauds and need not be in writing,[11] it being generally referred to as "an original promise."[12]

(§ 2) *B. Consideration.*—Like any other contract, the promise of the in-

should be quashed on demurrer [Pen. Code, § 390]. Lockhart v. State, 116 Ga. 557. Sufficiency of evidence of notorious act of public indecency under Pen. Code, 1895, § 390. Gilmore v. State [Ga.] 45 S. E. 226.

37. Code, § 1218. Stark v. State [Miss.] 33 So. 175.

38. Pen. Code, 1895, § 390. Gilmore v. State [Ga.] 45 S. E. 226.

39. Code, § 1218. Stark v. State [Miss.] 33 So. 175.

40. State v. Vance, 119 Iowa, 685.

1. Cyc. Law Dict. "Indemnity."

2. See Insurance. Stephens v. Pa. Casualty Co. [Mich.] 97 N. W. 686.

3. Contract to pay one for expenses he incurs is one of indemnity and not guaranty. Manary v. Runyon [Or.] 73 Pac. 1028.

4. Manary v. Runyon [Or.] 73 Pac. 1028; Leonard v. Leonard, 138 Cal. xix, 70 Pac. 1071.

5. Northern Assur. Co. v. Borgelt [Neb.] 93 N. W. 226; O'Connor v. Aetna Life Ins. Co. [Neb.] 93 N. W. 137; Leonard v. Leonard, 138 Cal. xix, 70 Pac. 1071.

6. Northern Assur. Co. v. Borgelt [Neb.] 93 N. W. 226; McDaniels v. Gowey, 30 Wash. 412, 71 Pac. 12; Lane v. Richards, 119 Iowa, 24.

7. Jenckes v. Rice, 119 Iowa, 451.

8. Brown v. Cuozzo, 85 N. Y. Supp. 759.

9. Lincoln v. First Nat. Bank [Neb.] 93 N. W. 698; Schneider v. City Council of Augusta [Ga.] 45 S. E. 459; St. Louis, etc., R. Co. v. Arnold [Tex. Civ. App.] 74 S. W. 819.

10. See Suretyship.

11. Leonard v. Leonard, 138 Cal. xix, 70 Pac. 1071; Manary v. Runyon [Or.] 73 Pac. 1028; Smith v. Schneider, 84 N. Y. Supp. 238.

12. Manary v. Runyon [Or.] 73 Pac. 1028.

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demnitor must be supported by a good and valuable consideration. A release from foreclosure proceedings,[13] or a mortgage indemnity for further security,[14] or a promise of another,[15] is sufficient consideration to bind the promisor. And where an indemnity bond is issued and delivered to the person indemnified against, and by him delivered to the indemnitee, the indemnitor cannot set up as a defense that there was no consideration to the contract,[16] nor can the promisor set up as a defense that there was no legal obligation on his part to give the indemnity bond.[17]

(§ 2) *C. Legality of object.*—It is not fraudulent towards co-sureties for a principal before the execution of the contract to stipulate as to separate indemnity with a surety,[18] and it has been held not to be against public policy for a carrier to make a contract with a shipper whereby the latter was to indemnify it against all losses occurring from its negligence or otherwise.[19]

§ 3. *Interpretation and effect of contract.*—The construction and interpretation of contracts of indemnity is for the court.[20] The court will construe the instrument freely, taking into consideration the positions of the respective parties to determine their intent.[21] Unless the contrary affirmatively appears,[22] it will be presumed that a contractor's promise to indemnify his principal covers only losses arising out of his own or his servant's negligence and not from that of the principal.[23] But in a fidelity bond any ambiguity is to be construed most strongly against the indemnitor.[24] A renewal bond guaranteeing fidelity of employe for following year, where there is a recital that it is subject to the conditions of the first bond, amounts in effect to but one bond with one penalty;[25] but renewals of a surety bond for successive periods cover losses sustained during the current periods only,[26] and the fact that it is stipulated that on the issuance of any subsequent bond all responsibility under the bond first issued should cease operates merely to protect against double responsibility, and does not prevent a recovery for a loss discovered after the expiration of the first bond but within the period insured against.[27] The indemnitor is liable only to the indemnitee and not for losses to those who stand in privity with him;[28] but where the indemnity bond runs to the assignee of the contract in-

13. Cliff v. Dawkins [Ala.] 35 So. 41.
14. Barker v. Boyd, 24 Ky. L. R. 1389, 71 S. W. 528.
15. Sweeney v. Aetna Indemnity Co. [Wash.] 74 Pac. 1057.
16. Pacific Nat. Bank v. Aetna Indemnity Co. [Wash.] 74 Pac. 590.
17. Giving sheriff bond where not required by statute. Matheson v. Johnson [S. D.] 92 N. W. 1083. Diverting water when promisor had a right to do so. Roberts v. Crafts [Cal.] 74 Pac. 281.
18. McDowell County Com'rs v. Nichols, 131 N. C. 501.
19. Circus train. Seaboard Air Line R. Co. v. Main, 132 N. C. 445.
20. Tinsley v. McIlhenny, 30 Tex. Civ. App. 352.
21. Northern Assur. Co. v. Borgelt [Neb.] 93 N. W. 226. A bond conditioned against such loss as an employer might sustain by any act of fraud or dishonesty amounting to larceny or embezzlement committed by a designated employee in his duty as "bookkeeper or in such other office as he might fill in their employ" covered his raising checks which it was his duty to fill out irrespective of whether such duty pertained to his office of bookkeeper or any other capacity in his employer's service. Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co., 25 Ky. L. R. 239, 75 S. W. 197. Such proof as necessary for criminal conviction unnecessary for recovery, where the contract is to indemnify against any act of fraud or dishonesty amounting to larceny or embezzlement. Id.
22. Seaboard Air Line R. Co. v. Main, 132 N. C. 445.
23. Mitchell v. Southern R. Co., 24 Ky. L. R. 2388, 74 S. W. 216; Morton v. Union Traction Co., 20 Pa. Super. Ct. 325. Includes negligence of sub-contractors. Zane v. Citizens' Trust & Surety Co. [C. C. A.] 117 Fed. 814.
24. Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co., 24 Ky. L. R. 239, 75 S. W. 197.
25. First Nat. Bank v. U. S. Fidelity & Guaranty Co. [Tenn.] 75 S. W. 1076.
26. Though the agreement is to make good any losses occurring during the continuance of the bond or any renewal thereof on a discovery during such continuance or within six months thereafter. Proctor Coal Co. v. U. S. Fidelity & Guaranty Co., 124 Fed. 424.
27. Proctor Coal Co. v. U. S. Fidelity & Guaranty Co., 124 Fed. 424.
28. Indemnity against losses from infringement suits. Not liable for suits brought against vendees of indemnitee. Rankin v. Sharples [Ill.] 69 N. E. 9.

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demnified against he may recover.[29] The breach of a contract of indemnity does not arise till loss or damage occurs to the promisee,[30] and generally till the amount of the loss is paid,[31] though in some instances entry of judgment without payment is sufficient to fix the liability.[32] The liability becomes fixed when the final judgment is entered after appeal.[33] The payment must be involuntary.[34] The burden of proving loss is on the person seeking to be indemnified.[35] If the loss is occasioned by the act of a third party, even if so provided in the contract, there is no duty to sue if he is insolvent.[36] Where there is a covenant of indemnity as to quiet possession of land, a cause of action arises only on ejectment and a complaint failing in such an allegation is demurrable,[37] and the surrender of possession before judgment gives rise to no right of action.[38] In the absence of any provision in the contract, the indemnitor is not entitled to any notice to come in and defend;[39] but where by the terms of the contract the indemnitor may come in and defend in the absence of notice, he cannot be held liable.[40] The principal and sureties of an indemnity bond may always defend a suit against the indemnitee on account of which they would have to reimburse him,[41] and even where they do not assume the defense, the judgment or recovery would seem to be conclusive as to them,[42] except where, by the terms of the verdict, the question is still left open,[43] or where it is a collateral judgment which does not involve the same point.[44] Where there is nothing in a contract of indemnity to indicate that the parties intended the contrary, it is presumed that it terminates with the death of a party.[45] Liability on a bond continues for the period of limitations after the expiration of the time for which a bond runs,[46] but it would seem that the loss must not be too remote from the act complained of.[47] The liability may be terminated by a decree of the court, in which case the persons who might be liable are necessary parties.[48]

§ 4. *Defenses.*—Any material misrepresentation as to the nature of the liability against which the indemnitor holds himself liable, or any variation of the risk, is a complete defense to the contract. These statements are frequently termed and classed as warranties.[49] Thus it is a defense to a policy insuring an employe's fidelity that the employe had duties other than those mentioned in the statement which involved the receipt and expenditure of money;[50] but the statement that the employe had no authority to sign checks is not necessarily false, where the employe

29. Zane v. Citizens' Trust & Surety Co. [C. C. A.] 117 Fed. 814.
30. Prouty v. Adams [Cal.] 74 Pac. 845; Sherman v. Spalding [Mich.] 93 N. W. 613.
31. Leonard v. Leonard, 138 Cal. xix, 70 Pac. 1071.
32. Tinsley v. McIlhenny, 30 Tex. Civ. App. 352. Judgment against sheriff. Dunn v. National Surety Co., 80 App. Div. [N. Y.] 605.
33. Stephens v. Pa. Casualty Co. [Mich.] 97 N. W. 686.
34. Delivery under a threat of immediate seizure of goods sold on void execution. State v. Slayback, 90 Mo. App. 300.
35. Jenckes v. Rice, 119 Iowa, 451.
36. Scott v. Conn, 75 App. Div. [N. Y.] 561; Pittsburg, etc., R. Co. v. Dodd, 24 Ky. L. R. 2057, 72 S. W. 822.
37. Taylor v. New Jersey Title Guarantee & Trust Co. [N. J. Law] 56 Atl. 152.
38. Sherman v. Spalding [Mich.] 93 N. W. 613.
39. Prescott v. Le Conte, 83 App. Div. [N. Y.] 482; Schenk v. Forrester [Mo. App.] 77 S. W. 332. See, also, post, Measure of Damages, § 5.
40. Borgfeldt v. O'Neill, 38 Misc. [N. Y.] 498.
41. Robb v. Security Trust Co. [C. C. A.] 121 Fed. 460; Rickards v. Bemis [Tex. Civ. App.] 78 S. W. 239.
42. Spokane v. Costello [Wash.] 74 Pac. 58.
43. Boston & M. R. R. v. Brackett, 71 N. H. 494.
44. Parrish v. Rosebud Min. & Mill. Co., 140 Cal. 635, 74 Pac. 312.
45. Lane v. Richards, 119 Iowa, 24.
46. Shea v. Fidelity & Casualty Co., 39 Misc. [N. Y.] 107.
47. Five years. Gilberton Borough v. Schuylkill Traction Co., 22 Pa. Super. Ct. 279.
48. Cook v. Casler, 76 App. Div. [N. Y.] 279.
49. U. S. Fidelity & Guaranty Co. v. Ridley [Neb.] 97 N. W. 836; Warren Deposit Bank v. Fidelity & Deposit Co., 25 Ky. L. R. 289, 74 S. W. 1111; Young v. Pacific Surety Co., 137 Cal. 596, 70 Pac. 660; Dime Sav. Inst. v. American Surety Co., 68 N. J. Law, 440.
50. Issaquah Coal Co. v. U. S. Fidelity & Guaranty Co. [C. C. A.] 126 Fed. 89.

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had only authority to fill in blank checks.[51] To render statements concerning an employe's habits material, it must be shown what was the nature of the habits referred to.[52] The statements of the person indemnified must appear on the face of the agreement to become warranties,[53] and those made by the employer in support of the employe's application for a fidelity bond are binding upon him.[54] False answers as to an application by the employe to an indemnity company, made with knowledge of the party for whose benefit the bond is required, invalidate it;[55] but a surety is not relieved from liability on the bond of an employe, by a statement of one of the corporate officers that the employe's accounts were correct, where such statement is that of the officer personally and on knowledge and belief, though the auditing committee of the corporation knew of the existence of a mistake.[56] Whether the statements are true is a question for the jury.[57] Where there is an endeavor to show false representations by an officer of insured as to the qualifications of an employe, he cannot be asked as to the employe's failure to make a certain report, unless the duty to make such report is established.[58] Where in the application for an indemnity bond there is a statement that the insured will use certain checks to audit the employe's accounts or require certain reports, a failure to comply is a complete defense;[59] but where the insurer knows of the alteration of the risk and continues with the policy, it is estopped to set up the defense which it is deemed to have waived,[60] and so where one is indemnified against loss by failure of a contractor, the indemnitor is not discharged when he knew of an unauthorized change in the contract and did not notify the indemnitee.[61] In Kentucky, by statute, no representation of warranty made in application for insurance policy defeats the same, unless made with the actual intent to deceive or unless it increases the risk. This applies to fidelity bonds,[62] but this does not alter the effect of representations which are not material made with intention of deceiving,[63] and it is a question for the jury as to whether at the time of the execution of the policy the insurer knew the employe was short in his accounts,[64] or was engaged in hazardous speculation.[65] The receipt of renewal premiums, with the knowledge that the employe whose fidelity is insured has not signed the bond, is a waiver of such signature,[66] nor does the handing over to the employe of such bond for delivery to the insured give him any authority to waive such signature;[67] but the insurer cannot set up as a defense that the local agent had not signed at the time of the liability where he had previously promised to sign.[68] If a master discovers any act of dishonesty on part of the

51. Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co., 25 Ky. L. R. 239, 75 S. W. 197.

52. Perpetual Bldg. & Loan Ass'n v. U. S. Fidelity & Guaranty Co., 118 Iowa, 729.

53. Dime Sav. Inst. v. American Surety Co., 68 N. J. Law, 440.

54. U. S. Fidelity & Guaranty Co. v. Ridgley [Neb.] 97 N. W. 836.

55. Imperial Bldg. & Loan Co. v. U. S. Fidelity & Guaranty Co., 23 Ohio Circ. R. 243.

56. Perpetual Bldg. & Loan Ass'n v. U. S. Fidelity & Guaranty Co., 118 Iowa, 729.

57. First Nat. Bank v. U. S. Fidelity & Guaranty Co. [Tenn.] 75 S. W. 1076.

58. Perpetual Bldg. & Loan Ass'n v. U. S. Fidelity & Guaranty Co., 118 Iowa, 729.

59. Warren Deposit Bank v. Fidelity & Deposit Co., 25 Ky. L. R. 289, 74 S. W. 1111. Where it is stated that an employe's cash, securities and stock are to be compared and verified with his accounts and vouchers twice a week, failure to comply prevents recovery on fidelity insurance policy. Wieder v. Union Surety & Guaranty Co., 86 N. Y. Supp. 105. Statement that accounts will be audited daily; failure for four days relieves the insurer from liability [Civ. Code § 2608]. Young v. Pacific Surety Co., 137 Cal. 596, 70 Pac. 660.

60. U. S. Fidelity & Guaranty Co. v. Ridgley [Neb.] 97 N. W. 836.

61. Sweeney v. Aetna Indemnity Co. [Wash.] 74 Pac. 1057.

62. First Nat. Bank v. U. S. Fidelity & Guaranty Co. [Tenn.] 75 S. W. 1076; Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co., 25 Ky. L. R. 239, 75 S. W. 197.

63. Warren Deposit Bank v. Fidelity & Deposit Co., 25 Ky. L. R. 289, 74 S. W. 1111.

64, 65. U. S. Fidelity & Guaranty Co. v. Blackly, 25 Ky. L. R. 1271, 77 S. W. 709.

66. Proctor Coal Co. v. U. S. Fidelity & Guaranty Co., 124 Fed. 424.

67. U. S. Fidelity & Guaranty Co. v. Ridgley [Neb.] 97 N. W. 836.

68. Cullinan v. Bowker, 40 Misc. [N. Y.] 439.

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employe, his failure to notify the indemnitor immediately is a good defense to its liability.[69] But a short delay in notifying a surety company of an employe's wrongdoing is not, as a matter of law, a violation of a condition for immediate notice,[70] and the necessity of this notice may be waived by implication,[71] and so may be the failure to perform any condition subsequent to the contract;[72] but in the absence of waiver, these conditions will be rigidly enforced.[73] Where the promise is to save harmless from actions a long delay in giving notice does not conclusively amount to a discharge of the indemnitor.[74] The fact that a responsible third party is responsible to the indemnitee for the loss caused by the person indemnified against is no defense to the indemnitor,[75] nor is the giving of security by the wrongdoer to cover a loss arising prior to the contract of indemnity.[76] The statute of limitations runs in favor of the promisor from the time of the breach, which is when the indemnitee suffers damage,[77] and not from the happening of the event against which he promised to hold the promisee harmless,[78] or in some jurisdictions from the time of final judgment.[79]

§ 5. *Measure of recovery.*—After breach of a contract of indemnity, the promisee can recover damages equal to the amount of the loss he has sustained,[80] together with interest from time of payment thereof.[81] The amount of judgment with costs may be recovered,[82] whether or not an opportunity was given to defend;[83] but not where the judgment is obtained by the negligence of the indemnitee.[84] Whether he may recover his attorney's fees depends upon the intent of the parties as expressed by the contract.[85] That an attorney indemnified joins with others does not as a matter of law give him right to attorney's fees,[86] and there would seem to be no question of this liability when the indemnitor fails to defend when he has had

69. Union Cent. Life Ins. Co. v. Prigge [Minn.] 96 N. W. 917.

70. Delay of six or eight days. Perpetual Bldg. & Loan Ass'n v. U. S. Fidelity & Guaranty Co., 118 Iowa, 729.

71. Employment by a surety company's inspector of an expert accountant to examine the employe's books, is a waiver of immediate notice at least until the examination is completed. Perpetual Bldg. & Loan Ass'n v. U. S. Fidelity & Guaranty Co., 118 Iowa, 729. A prohibition in the contract does not prevent the inspector of a surety company from waiving notice of the employe's peculations. Id.

72. Where the insured was bound to furnish such reasonable particulars and proofs of correctness of claim as might be required, failure to furnish the names of customers from whom a defaulting employe has collected money, also the dates of such collections which were not turned in and the date of discovery of the shortage as requested, prevents recovery, unless waived. Wieder v. Union Surety & Guaranty Co., 86 N. Y. Supp. 105. Where the employer is bound to furnish the insurer every description of aid for the prosecution of the employe, failure to inform the insurer of certain confessions will prevent a recovery. Hough v. American Surety Co., 90 Mo. App. 475.

73. Refusal to sign appeal papers. Robb v. Security Trust Co. [C. C. A.] 121 Fed. 460.

74. Notice 17 months after commencement of suit and 11 days before trial. Spokane v. Costello [Wash.] 74 Pac. 58.

75. Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co., 25 Ky. L. R. 239, 75 S. W. 197.

76. A surety company is not released from liability on the bond of a corporate officer, by his conveyance of property to the corporation to be applied on the first items of his indebtedness. Perpetual Bldg. & Loan Ass'n v. U. S. Fidelity & Guaranty Co., 118 Iowa, 729.

77. Northern Assur. Co. v. Borgelt [Neb.] 93 N. W. 226; O'Connor v. Aetna Life Ins. Co. [Neb.] 93 N. W. 137; Leonard v. Leonard, 138 Cal. xix, 70 Pac. 1071; Sherman v. Spalding [Mich.] 93 N. W. 613.

78. See ante, § 1. Northern Assur. Co. v. Borgett [Neb.] 93 N. W. 226.

79. Stephens v. Pa. Casualty Co. [Mich.] 97 N. W. 686.

80. McDaniels v. Gowey, 30 Wash. 412, 71 Pac. 12; Price v. Crozier [Va.] 44 S. E. 890.

81. American Surety Co. v. Venner, 183 Mass. 329.

82. Manny v. National Surety Co. [Mo. App.] 78 S. W. 69.

83. Prescott v. Le Conte, 83 App. Div. [N. Y.] 482.

84. Gorman v. Williams, 117 Iowa, 560; Teague v. Collins [N. C.] 45 S. E. 1035.

85. Recovery of attorney's fees allowed: "Any and all costs, charges and expenses incurred * * * in resisting the plaintiff's claim." Cameron v. Barcus [Tex. Civ. App.] 71 S. W. 423. "Will save purchaser harmless." Cassidy v. Taylor Brewing & Malting Co., 79 App. Div. [N. Y.] 242. Special provision for payment of counsel fees. U. S. Fidelity & Guaranty Co. v. Hittle [Iowa] 96 N. W. 782. In absence of bad faith. Id.

86. Where indemnitee is one of the attorneys. Smith v. Rogers [Mo. App.] 73 S. W. 243.

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due notice of the suit,[87] especially where he has promised to assume the defense.[88] Unless made in bad faith,[89] on due notice the indemnitor is bound by the settlement of any liability made by the indemnitee.[90] Where the indemnitor has control of the defense, a judgment against the indemnitee is conclusive and binds him absolutely as to the amount,[91] and he is liable for the costs in case he appeals.[92] The same presumption is true of a default judgment where the indemnitor has been notified but fails to defend;[93] but if the indemnitor refuses to defend, it is presumptive evidence against him and the burden is on him to rebut.[94] Declarations of an employe made after an alleged embezzlement are not binding upon the insurer;[95] but those of the indemnitee would seem to be binding as to the amount of liability of the indemnitor,[96] and generally the judgment roll in the principal action is admissible in evidence in an action brought by the indemnitor against the indemnitee.[97] In an action on a fidelity insurance bond, the complaint need not set out the several items of loss and the evidence in support, where it is alleged that a statement and proof of the losses have been furnished the defendant.[98]

§ 6. *Securities by way of indemnity.*—Where there has been a deposit of money to indemnify the surety of a bond in case loss should occur, there can be no recovery of this money till the expiration of the statutory period, after which any liability may arise on the bond.[99]

INDEPENDENT CONTRACTORS.

An independent contractor as distinguished from a servant undertakes to perform work according to his own discretion and control, being answerable, generally speaking, only for the result.[1] He may be such though hired by the day.[2]

The employer of an independent contractor is liable for the acts of the contractor or servants only when some duty of the employer to afford protection against such act exists,[3] as where he exercises a direction or control,[4] or furnishes defective plans[5] or facilities.[6]

87. Lincoln v. First Nat. Bank [Neb.] 93 N. W. 698.

88. Butte v. Cook [Mont.] 74 Pac. 67.

89. A question for jury. New York v. Baird, 176 N. Y. 269.

90. Dunn v. National Surety Co., 80 App. Div. [N. Y.] 605; New York v. Baird, 176 N. Y. 269. An allegation that the indemnitee paid the claim out of court after the indemnitor refused to defend which amount was less than the actual damages and less than a jury would have given is good against demurrer. Seaboard Air Line R. Co. v. Main, 132 N. C. 445.

91. Stephens v. Pa. Casualty Co. [Mich.] 97 N. W. 686; Great Northern R. Co. v. Akeley, 88 Minn. 237; Butte v. Cook [Mont.] 74 Pac. 67.

92. Stephens v. Pa. Casualty Co. [Mich.] 97 N. W. 686.

93. Teague v. Collins [N. C.] 45 S. E. 1035.

94. Construing sec. 3586 of Mont. Civ. Code. Butte v. Cook [Mont.] 74 Pac. 67.

95. Fidelity insurance. Wieder v. Union Surety & Guaranty Co., 86 N. Y. Supp. 105.

96. Dunn v. National Surety Co., 80 App. Div. [N. Y.] 605; Union Cent. Life Ins. Co. v. Prigge [Minn.] 96 N. W. 917. Certificate of auditor of a corporation held admissible in an action on a policy insuring the fidelity of an employe of the corporation, though the certificate was unauthorized by the official business of the auditor, if execution thereof was known to the general manager. Issaquah Coal Co. v. U. S. Fidelity & Guaranty Co. [C. C. A.] 126 Fed. 89.

97. Butte v. Cook [Mont.] 74 Pac. 67.

98. Construing Code Procedure of South Carolina. Bank of Timmonsville v. Fidelity & Casualty Co., 120 Fed. 315.

99. Shea v. Fidelity & Casualty Co., 39 Misc. [N. Y.] 107.

1. Brick mason employed by a carpenter to furnish labor and do all the brick work on carpenter's own house. Richmond v. Sitterding [Va.] 43 S. E. 562. Contractor for elevator. Parkhurst v. Swift [Ind. App.] 68 N. E. 620. Trustees of the realty of a corporation for the purpose of custody and management. Falardeau v. Boston Art Students' Ass'n, 182 Mass. 405. Even though not authorized to hold the property in question the interest being only chattel real. Id. See, also, definition and supporting cases. 16 Am. & Eng. Enc. Law [2nd Ed.] 187.

2. Karl v. Juniata County, 206 Pa. 633.

3. Not liable for injury due to cleats left on stairway in public building. Louthan v. Hewes, 138 Cal. 116, 70 Pac. 1065. Unnecessary acts done by contractor. Chattahoochee, etc., R. Co. v. Behrman [Ala.] 35 So. 132. Owner not liable for negligence of repair contractor in piling materials in hallways. Boss v. Jarmulowsky, 81 App. Div. [N. Y.] 577.

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INDIANS.

§ 1. Who are Indians and What is Their Legal Status (304).
§ 2. Federal and State Government of Indians and Their Habitat (304).
§ 3. Tribal Government Subject to Federal Dominion (304).
§ 4. Indian Lands and Properties (305).
§ 5. Rights and Liabilities of Other Persons in Indian Country Dealing with Indians (306).
§ 6. Crimes and Offenses by or Relating to Indians (307).

§ 1. *Who are Indians and what is their legal status.*—Indians include all persons of full Indian blood, or of the half or mixed blood living with their tribe on the reservation,[7] and congress may maintain its jurisdiction over persons of Indian descent even after they have left the reservation and are living with whites and holding lands in severalty.[8] The status of Indians is that of members of "domestic dependent nations," and they are said to be "in a state of tutelage," and are often described as "wards of the nation."[9]

§ 2. *Federal and state government of Indians and their habitat.*—Where Indians have taken lands in severalty and adopt the habits of civilized life, they are subject to the criminal laws of the state in which they reside, whether the crime is committed on the reservation or not,[10] and the Federal criminal law no longer applies.[11] State or Indian courts will not take judicial notice of the statutes of Indian nations, and in the absence of their being pleaded, the law will be presumed to be that of the forum.[12]

§ 3. *Tribal government subject to Federal dominion.*—The power of congress to legislate concerning Indians is absolute,[13] and is superior to any pre-existing treaty[14] or tribal constitution,[15] or laws,[16] and congress can put into effect as laws the code of a neighboring state;[17] but a treaty with an Indian nation takes precedence over prior acts of congress.[18] Such legislation is void if it conflicts with the Federal constitution.[19] Courts will not consider the question of whether a treaty with Indians was executed under duress.[20] Congress may prescribe who

nuisance or directly productive in itself of injury. Salliotte v. King Bridge Co. [C. C. A.] 122 Fed. 378.

Employer bound to protect contractor's servant from injury from elevator of which he kept control. Appel v. Eaton, 97 Mo. App. 428.

Unguarded trench in street makes employer liable. Thomas v. Harrington, 72 N. H. 45. Failure to guard or warn pedestrians of excavation beside sidewalk. Ann v. Herter, 79 App. Div. [N. Y.] 6.

Building operations abutting a street do not call for protective measures from the owner. Richmond v. Sitterding [Va.] 43 S. E. 562. Contra as to excavations impairing lateral support. Davis v. Summerfield, 133 N. C. 325.

4. Possession of building not a responsible control of work. Louthan v. Hewes, 138 Cal. 116, 70 Pac. 1065. Negligent dredging of a riparian owner's bank under control of employer's engineer makes employer liable. Salliotte v. King Bridge Co. [C. C. A.] 122 Fed. 378.

5. Mining operations. Rice v. Smith, 171 Mo. 331. Owner but not contractor is liable for fault in a retaining wall due to plans. Church of Holy Communion v. Paterson Extension R. Co., 68 N. J. Law, 399.

6. Servant of contractor hurt by dangerous machine furnished. Jacobs v. Fuller & H. Co., 67 Ohio St. 70. The defect (in a derrick) must be inherent or employer negligent. Southern Oil Co. v. Church [Tex. Civ. App.] 74 S. W. 797.

7. State v. Howard [Wash.] 74 Pac. 382; Sloan v. U. S., 118 Fed. 283.

8. Mulligan v. U. S. [C. C. A.] 120 Fed. 98.

9. U. S. v. Kiya, 126 Fed. 879; Dukes v. McKenna [Ind. T.] 69 S. W. 832.

10. State v. Howard [Wash.] 74 Pac. 382.

11. U. S. v. Kiya, 126 Fed. 879.

12. Ricknor v. Clabber [Ind. T.] 76 S. W. 271; Rowe v. Henderson [Ind. T.] 76 S. W. 250; Engleman v. Cable [Ind. T.] 69 S. W. 894.

13. Dukes v. McKenna [Ind. T.] 69 S. W. 832; Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 Law. Ed. 183.

14. Lone Wolf v. Hitchcock, 187 U. S. 553, 47 Law. Ed. 299.

15. Ashely v. Ainsworth [Ind. T.] 69 S. W. 884.

16. Engleman v. Cable [Ind. T.] 69 S. W. 894.

17. Simon v. U. S. [Ind. T.] 76 S. W. 280.

18. Joines v. Robinson [Ind. T.] 76 S. W. 107.

19. Deprivation of trial by jury where more than $20 in controversy. Missouri, etc., R. Co. v. Phelps [Ind. T.] 76 S. W. 285. Changing law of descent can not affect vested interests. Nivens v. Nivens [Ind. T.] 76 S. W. 114. Destruction of toll-bridge rights not unconstitutional since ultimate ownership is in the United States. Dukes v. McKenna [Ind. T.] 69 S. W. 832.

20. Ansley v. Ainsworth [Ind. T.] 69 S. W. 884.

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are members of tribes or Indian nations, though this differs from the existing laws of the tribe.[21]

§ 4. *Indian lands and properties.*—Except among the five civilized nations, the fee to the Indian lands is in the United States, but the right of possession is in the individual Indians,[22] and is such an interest in land as to be within the statute of frauds;[23] but the United States has such interest in the land allotted to Indians as to authorize it to maintain a bill in equity to restrain the collection of an invalid tax.[24] In New York, the state legislature may authorize the individual Indians to acquire the fee of their holdings.[25] Congress may authorize the Secretary of Interior to lease oil or mineral lands for the benefit of the tribes residing thereon, even when the fee is owned by the tribe.[26] Under the Dawes Act, certain tracts of Indian lands are allotted to the individual members of the tribes. The United States holds the fee in trust for twenty-five years and then issues a patent to the allottee or his heirs. The act applies to all Indians of mixed blood living on the reservations with their tribes,[27] and it is immaterial whether father or mother was an Indian;[28] but a full blood temporarily absent does not forfeit his right to an allotment.[29] Pending the issuance of the patent, the lands are not alienable and all leases thereof must be approved by the secretary of the interior. No rights are acquired under a lease not so approved,[30] nor by an unauthorized sub-tenant of an approved lessee.[31] In a suit for possession by an Indian under a void lease, the tenant cannot deny the landlord's title,[32] but the Indian lessor is not so estopped as to his lessee.[33] The title of the allottee is that of the equitable owner and descends according to the law of the state in which the land is situated,[34] or if in the Indian Territory, according to the law then in force,[35] and the heirs cannot be divested of their rights by a will executed by the allottee.[36] As the fee of land allotted under the Dawes Act remains in the United States, the land is not subject to state or local taxation.[37] By the terms of the act in case any Indian regards himself aggrieved by the allotment, he may bring an action in circuit court. This statute operates as an act of the United States, giving its consent to be sued and it is bound thereby,[38] and in these cases the court is not bound on questions of either law or fact by prior decisions of the interior department.[39] Where half breed script is issued, it is by its terms not assignable, but an irrevocable power of attorney to locate land may be granted, and the land once located may be conveyed.[40] Under the Curtis Act[41] it was provided that all leases of Indian lands among the five civilized nations, where the lessee was not an Indian citizen by birth or adoption, should terminate July 1, 1900, and where the tenant had made valuable improvements, he should either be compensated therefor or after an appraisement of the improvements and the rental value of the land, he should continue in possession

21. Ilrard v. Minter [Ind. T.] 69 S. W. 852
22. Dukes v. McKenna [Ind. T.] 69 S. W. 832.
23. Rowe v. Henderson [Ind. T.] 76 S. W. 250; Reynolds v. Clowdus [Ind. T.] 76 S. W. 277.
24. U. S. v. Rickert, 188 U. S. 438, 47 Law. Ed. 532.
25. Jimeson v. Pierce, 78 App. Div. [N. Y.] 9.
26. Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 Law. Ed. 183.
27, 28. Sloan v. U. S., 118 Fed. 283.
29. Hy-Yu-Tse-Mil-Kin v. Smith [C. C. A.] 119 Fed. 114.
30. Reservation State Bank v. Holst [S. D.] 95 N. W. 931.
31. Megreedy v. Macklin [Okl.] 73 Pac. 293.
32. Ellis v. Fitzpatrick [C. C. A.] 118 Fed. 430.
33. Megreedy v. Macklin [Okl.] 73 Pac. 293; U. S. v. Lewis [Ind. T.] 76 S. W. 299.
34. McCauley v. Tyndall [Neb.] 94 N. W. 813; Sloan v. U. S., 118 Fed. 283.
35. Finley v. Abner [Ind. T.] 69 S. W. 911.
36. U. S. v. Zane [Ind. T.] 69 S. W. 842.
37. U. S. v. Rickert, 188 U. S. 432, 47 Law. Ed. 532.
38. Act Aug. 15, 1894 (28 Stat. 305). Hy-Yu-Tse-Mil-Kin v. Smith [C. C. A.] 119 Fed. 114.
39. Sloan v. U. S., 118 Fed. 283.
40. Buffalo Land & Exploration Co. v Strong [Minn.] 97 N. W. 575.
41. Act of June 28, 1898 (30 Stat. 501).

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till the value of the accrued rental equaled the value of the improvements, and on tender of the value of the improvements, the right of the lessee to the land instantly terminated.[42] An Indian court has the power to decree that a lease shall terminate at a certain future date when the appraised value of the improvements shall equal the accumulated rents.[43] The Curtis Act in no way affects the title of United States citizens who obtained conveyances of town lots prior to its passage.[44] While the sale of land in the Indian Territory to others than Indians is prohibited, this does not render a mortgage thereof void, but on foreclosure the land must be sold to an Indian.[45] The provision, that after executions of other than Indian courts are returned nulla bona execution may be had against the improvements on Indian land, does not apply to Indians by blood.[46] Where, prior to the Curtis Act, there was a provision that the value of improvements on Indian lands should be paid for if the land is put in the hands of a receiver and the plaintiff could establish no title, the money was turned back to the intruder.[47] Possession may be recovered by suit by the Indian nation in which the land was located, and if the governor or chief failed to bring suit on request, any individual citizen could sue, and while citizenship is a prerequisite to suit, it need not be alleged in the complaint.[48] It was not the intention of congress under this act that a white man could hold the land till he was reimbursed for his improvements,[49] but that all such leases were void, and in the absence of valuable improvements should terminate at the time set,[50] and a white claiming under a deed or anything else than a lease could be ousted at any time.[51] The Indian grantee or lessee of a white purchaser or lessee acquired no rights, since the first deed or grant was void.[52] Where an action is brought under this act for the possession of leased land by an individual Indian citizen, there must be an allegation that the governor and chiefs failed to sue;[53] but an allegation that a request was made is unnecessary.[54] When a suit is brought in which any of the five nations are interested, both the Curtis Act and the Atoka Agreement provide that that nation shall be made a party. But in an action for unlawful detainer for holding over on a lease, the nation is not a necessary party, for it is merely a matter of contract.[55] So where there is a claimant to land, he may be joined in an action of ejectment before the state court.[56] Where an Indian nation attempts to enjoin the secretary of interior from executing a lease of their lands, the proposed lessees are not necessary parties.[57]

§ 5. *Rights and liabilities of other persons in Indian country dealing with Indians.*—Every one in the Indian country not a member of a tribe is subject to the rules of the Secretary of the Interior.[58] Under an act of congress[59] an Indian agent may remove from the Indian country any person not an Indian by birth or adoption,[60] though this has been modified as to persons in lawful possession of land

42. Fraer v. Washington [Ind. T.] 69 S. W. 835.
43. Barton v. Hulsey [Ind. T.] 69 S. W. 868.
44. Williams v. Works [Ind. T.] 76 S. W. 246.
45. Crowell v. Young [Ind. T.] 69 S. W. 829.
46. Hampton v. Mays [Ind. T.] 69 S. W. 1115.
47. Donohoo v. Howard [Ind. T.] 69 S. W. 927.
48. Ikard v. Minter [Ind. T.] 69 S. W. 852.
49. Fraer v. Washington [C. C. A.] 125 Fed. 280.
50. Swinney v. Kelley [Ind. T.] 76 S. W. 303.
51. Holford v. James [Ind. T.] 76 S. W. 261.
52. Turner v. Gilliland [Ind. T.] 76 S. W. 253.
53. Daniels v. Miller [Ind. T.] 69 S. W. 925.
54. Brought v. Cherokee Nation [Ind. T.] 69 S. W. 937.
55. Thompson v. Morgan [Ind. T.] 69 S. W. 920.
56. Hargrove v. Cherokee Nation [Ind. T.] 69 S. W. 823.
57. Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 Law. Ed. 183.
58. Ex parte Carter [Ind. T.] 76 S. W. 102.
59. U. S. Rev. St. §§ 2147, 2149, 2150.
60. Buster v. Wright [Ind. T.] 69 S. W.

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under lease;[61] but this does not invest the agent with judicial power to determine the lawfulness of the possession.[62] The penalty of a thousand dollar fine for returning after once removed is not in the nature of a criminal prosecution, but a penal sum to be recovered in a civil action.[63] By the Indian Intercourse Act,[64] a citizen of the United States may recover from the government for losses caused by Indian depredations off the reservations by Indians with whom the United States was then at peace. The claimant must be a citizen of the United States,[65] and this only includes those portions of the United States to which it specially referred, or to which it has since been extended.[66] It includes depredations by all Indians who are wards of the United States, even where they are temporarily present in Mexico and make incursions from there.[67] Where the United States by treaty promises to compensate Indian tribes for the destruction of their property on reservations by white men, this does not permit recovery by individuals for their individual losses.[68]

§ 6. *Crimes and offenses by or relating to Indians.*—Under the Dawes Act, Indians who have adopted the habits of civilized life and have been allotted land in severalty become subject to the civil and criminal laws of the state in which they reside, and may be punished in state courts for crimes committed on a reservation,[69] and they are no longer subject to the Federal law.[70] They are still Indians within the meaning of the act which prohibits the sale of liquor to Indians;[71] but the statute making it a felony to assault with deadly weapons any person authorized to make seizures of contraband goods applies to revenue officers and not to Indian agents searching for liquor.[72] An act of congress provides that where a citizen of the five civilized nations is charged with a crime in a court of one of the nations, he may file an affidavit of prejudice and have the cause removed to the Federal courts. His citizenship must be proved by evidence other than his affidavit.[73] Indians gathering in communities without attempting to incorporate do not come under the clause of the Curtis Act which makes it a penal offense to plat townsites in the Indian Territory.[74]

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65, 66. De Baca v. U. S., 37 Ct. Cl. 482.
67. Lowe v. U. S., 37 Ct. Cl. 413.
68. Blackfeather v. U. S., 37 Ct. Cl. 233.
69. State v. Howard [Wash.] 74 Pac. 382.
70. U. S. v. Kiya, 126 Fed. 879.
71. Act of Jan. 30, 1897 (29 Stat. c. 109. p. 506). Mulligan v. U. S. [C. C. A.] 120 Fed. 98.
72. Mackey v. Miller [C. C. A.] 126 Fed. 161.
73. Bruner v. U. S. [Ind. T.] 76 S. W. 244.
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Scope of topic.—This topic includes general criminal procedure from indictment to final judgment. The substantive law of crimes[75] and procedure before indictment[76] are elsewhere treated, and matters of procedure peculiar to particular crimes are treated under the titles of such crimes.

§ 1. *Limitation of time to institute.*[77]—Limitations imposed by statute[78] bar prosecutions not commenced within the time limited.[79] A crime consisting in receiving money survives from the last payment and not from the date of a writing of indebtedness, itself unlawful.[80]

§ 2. *Jurisdiction.*—Statutes usually restrict the jurisdiction of inferior courts with reference to the grade of the offense or the extent of the penalty,[81] and to certain localities.[82] If the court has jurisdiction of the offense charged it does not lose jurisdiction because the proof shows only a lesser included offense.[83] Only the state or nation where a crime was committed has jurisdiction to punish the same,[84] but murder may be prosecuted where the mortal wound was given.[85] An offense relating to certain premises is of that location and not the violator's habitation.[86] Offenses on Federal territory or against Federal laws[87] are within the jurisdiction

75. See Criminal Law.
76. See Arrest and Binding Over.
77. Dismissal for want of speedy prosecution after indictment. See post, § 8.
78. Seduction is a misdemeanor barred in one year. People v. Gray, 137 Cal. 267, 70 Pac. 20.
79. Hammock v. State, 116 Ga. 595. Desertion of wife is not a continuing offense and limitations run from the time of leaving. State v. Langdon, 159 Ind. 377.
80. U. S. v. Driggs, 125 Fed. 520.
81. Justice has no jurisdiction under Rev. St. § 2091 relating to bringing sheep into state without notifying sheep commissioner. Houtz v. Uinta County Com'rs [Wyo.] 70 Pac. 840. Exclusive jurisdiction of misdemeanors being conferred on the court of special sessions, a magistrate has no jurisdiction of an information for loitering. People v. Warden of Kings County Penitentiary, 39 Misc. [N. Y.] 700. The court of Special Sessions in New York has exclusive jurisdiction of misdemeanors under Laws 1901, p. 499, c. 466, § 1172. People v. Horton, 84 N. Y. Supp. 942. The circuit court in Kentucky has jurisdiction of the common-law offense of obstructing a highway. Louisville & N. R. Co. v. Com. [Ky.] 78 S. W. 124. It is the penalty authorized and not that actually imposed which governs. State v. Wiseman, 131 N. C. 795. Character of offenses as felonies or misdemeanors and extent of punishment authorized is treated in Criminal Law.
82. Mayor has no jurisdiction of violation of oleomargarine law outside of his city or village. State v. Peters, 67 Ohio St. 494. Circuit court in Kentucky has jurisdiction to punish for nuisances on highways in cities of the fifth class. Louisville & N. R. Co. v. Com. [Ky.] 78 S. W. 124. Police judges in cities of the sixth class are given exclusive jurisdiction to enforce all ordinances, and concurrent jurisdiction with other courts in the enforcement of general laws within the territorial limits prescribed by statute [Const. § 143]. Moren v. Com. [Ky.] 76 S. W. 1090.
83. State v. Fritz [N. C.] 45 S. E. 957.
84. Cuba was, while under the United States military governor, a foreign country. U. S. v. Assia, 118 Fed. 915. The offense of wife abandonment is committed in the state where the final abandonment took place. State v. Shuey [Mo. App.] 74 S. W. 369.
85. Though death occurred in another state. Davis v. State [Fla.] 32 So. 822.
86. State v. Marmouget [La.] 34 So. 408.
87. Under the Federal constitution either consent to a Federal purchase or an express cession of jurisdiction is operative. U. S. v. Tucker, 122 Fed. 518. Locks and dams acquired by consent are Federal though ac-

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of Federal courts, though there may be a concurrent jurisdiction,[88] and Federal courts have exclusive jurisdiction of offenses by Indians.[89] A warrant is not essential to jurisdiction of the person.[90] Where jurisdiction is concurrent, that court, which having jurisdiction of the subject-matter and in good faith begins the prosecution, obtains jurisdiction.[91]

Transfer to a court of co-ordinate jurisdiction is often provided for by statute.[92] A case remitted from the Federal district to the next "session" of the circuit means the next sitting (even in the same term) and not the next term.[93] Though change of venue is mandatory, denial does not divest jurisdiction,[94] nor does continuance by consent after order for trial.[95]

§ 3. *Place of prosecution and change of venue.*—Prosecution may be had in the county in which the offense is consummated,[96] or in the county where it was initiated, if a complete offense was there committed.[97] Larceny may be prosecuted in a county to which the stolen property was taken by the thief.[98] A statute allowing prosecution to be had in a county for offenses within 400 yards of its boundary applies, though the boundary is a river.[99]

Change of venue.—In some jurisdictions change of venue is of right on filing the prescribed affidavit,[1] in others the question of fact is in the discretion of the court.[2] On a prerogative writ of certiorari to remove the record and for a change

quisition preceded consent by the state. Id.

88. The offense of extortion by threat to prosecute under federal revenue law may be punished as a violation of a state law, though it also offends against U. S. Rev. St. § 5484; section 5328 saving concurrent state jurisdiction. Sexton v. Cal., 189 U. S. 319, 47 Law. Ed. 833. Perjury in naturalization proceedings in state courts is a state crime and by statute is also a Federal crime [U. S. Rev. St. 1875, § 5395]. The court is a state court though acting under Federal laws. U. S. v. Severino, 125 Fed. 949.

89. Act Cong. Mch. 3, 1885, c. 341, § 9 (23 Stat. 385), conferring exclusive jurisdiction on United States courts for crimes committed by Indians on Indian reservations, refers only to Indians sustaining tribal relations, and does not deprive state courts of jurisdiction where the tribal relation has never been sustained or has been severed. State v. Howard [Wash.] 74 Pac. 382. The jurisdiction of a state court to try an Indian who had not severed his tribal relation for a crime committed on an Indian reservation may be questioned for the first time on appeal. Id.

90. The accused being in custody of the court. State v. Melvern [Wash.] 72 Pac. 489.

91. Moren v. Com. [Ky.] 76 S. W. 1090.

92. Markee v. People, 103 Ill. App. 347. Trial shall be at the bar of the county and not of the supreme court unless that court for the interests of the state otherwise orders (manslaughter) [Gen. St. p. 2570, § 229]. State v. Young [N. J. Law] 55 Atl. 91. A transfer from district to circuit court may be at the term of the former at which the presentment was made (Racer v. State [Tex. Cr. App.] 73 S. W. 968) and objection that the transfer was made before the beginning of the term of the district court must be taken before the trial (Palmer v. State [Tex. Cr. App.] 70 S. W. 206) and is cured by a subsequent order (Id.). The affidavit of defendant that he is a member of the Chickasaw tribe is not conclusive but he must submit proof thereof. Bruner v. U. S. [Ind. T.] 76 S. W. 244. In Texas a justice of the peace has no authority to transfer to the county court a case in which he has authority to sit as a trial court. Under Code Cr. Proc. 1895, art. 611, a justice of the peace before whom a prosecution for unlawfully catching fish is instituted under L. 1901, p. 21, c. 18, cannot transfer it to the county court. Gill v. State [Tex. Cr. App.] 76 S. W. 575.

93. U. S. v. Dietrich, 126 Fed. 659.

94. In re Justus, 65 Kan. 547, 70 Pac. 354.

95. Lowe v. State [Wis.] 96 N. W. 417.

96. Illegal sale in county where goods were sold and delivered to buyer's agent, though buyer resided elsewhere and sent the order from his residence. Hopson v. State, 116 Ga. 90. The place of venue for obtaining goods under false pretenses is properly laid in the county where the goods were delivered. In re Stephenson [Kan.] 73 Pac. 62. Pollution of waters in any county where water was rendered impure though the pollution was introduced in another. State v. Glucose Sugar Refining Co., 117 Iowa, 524.

97. In a prosecution for taking away a female for purposes of prostitution jurisdiction is in the county where the defendant's intention of using the abducted female for purposes of prostitution arose. People v. Lewis [Cal.] 75 Pac. 189. The venue of a criminal "publication" of liquor advertisements is in the county where a newspaper is printed and not where it circulates. State v. Bass [Me.] 54 Atl. 1113.

98. Morton v. State [Ga.] 45 S. E. 395; State v. De Wolfe [Mont.] 74 Pac. 1084.

99. Hackney v. State [Tex. Cr. App.] 74 S. W. 554.

1. Territory v. Taylor [N. M.] 71 Pac. 489.

2. Jahnke v. State [Neb.] 94 N. W. 158; State v. Nelson [Minn.] 97 N. W. 652. Reasonable ground to believe that defendant cannot have a fair trial must be shown. Goldsberry v. State [Neb.] 92 N. W. 906; Jahnke v. State [Neb.] 94 N. W. 158. Denial of

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of venue, the supreme court will follow its own judgment on the facts.[3] Bias of the judge[4] and existence of local prejudice[5] are the principal grounds. The venue may be changed as to one joint defendant alone.[6] The motion may be oral in New Mexico.[7] It must be promptly made.[8] Refusal to direct an issue of subpoenas to witnesses to testify on a motion for a change of venue is not an abuse of discretion.[9] The papers transferred should be certified,[10] but defects in the certificate are not jurisdictional.[11] The change is not operative until the papers and the prisoner have been transferred,[12] but when made divests the court of jurisdiction, not only of the indictment transferred, but of a subsequent one for the same offense.[13] Where a cause is improperly returned to the original court by the court to which it was transferred, it may be tried in the former court if no objection is made.[14]

§ 4. *Indictment and information. A. Necessity of indictment.*—Prosecution by information, for all or nearly all offenses, has by statute in many states quite superseded indictments. In such states as still retain the form of procedure by indictment, it is as a rule only infamous crimes or felonies that are necessarily so prosecuted,[15] the right to prosecution by indictment not extending to misdemeanors.[16] Under the constitution of Missouri, however, indictment and information are concurrent remedies for felony,[17] and in New York violations of the liquor tax law, from the penalties imposed, partake of the nature of felonies and should be prosecuted by indictment.[18] One in custody under an information is not entitled to have the grand jury inquire into his case.[19]

change on conflicting affidavits of local prejudice sustained. Bohannan v. Com., 24 Ky. L. R. 1814, 72 S. W. 322; Peoples v. State [Miss.] 33 So. 289; Goldsberry v. State [Neb.] 92 N. W. 906; State v. Humphreys [Or.] 70 Pac. 824. Change held improperly refused—prejudice admitted as to related prosecution. Owens v. State [Miss.] 33 So. 722. Review of such discretion see post § 17 H.

3. Com. v. Ronemus, 205 Pa. 420.

4. State v. Morrison [Kan.] 72 Pac. 554.

5. A change of venue is not warranted by the fact that crime is rampant at the place of the crime, and that the newspapers were laden with sensational reports of sensational crimes, whereby the public mind was so inflamed that one charged with a heinous crime could not obtain justice. State v. Champoux [Wash.] 74 Pac. 557. It is not reversible error to refuse a change of venue for prejudice of the inhabitants of the county, based on newspaper articles where the record does not show that the jurors had read or heard discussed such articles. Pen. Code Mont. § 2051. State v. Martin [Mont.] 74 Pac. 725. It is not an abuse of discretion for the court to refuse a change of venue for prejudice of the inhabitants in the part of a county where the crime was committed, where the prejudice did not extend to the entire county, and a jury is obtained from the regular panel and a special venire. State v. Armstrong [Or.] 73 Pac. 1022. Though all witnesses testify that an impartial jury may be secured, a change of venue should be granted where it is apparent that all concede that an effort would be necessary to secure such a jury on account of frequent trials of the action and the prominence of the race question. Smith v. State [Tex. Cr. App.] 77 S. W. 453. It is not an abuse of discretion to refuse a change of venue where twenty-seven persons testified that prejudice existed against the accused and twenty-two that he could have a fair trial. Connell v. State [Tex. Cr. App.] 75 S. W. 512.

6. Terry v. State [Tex. Cr. App.] 76 S. W. 928.

7. Ter. v. Taylor [N. M.] 71 Pac. 489.

8. Notice the day before the trial and five days after the facts were known held too late. State v. Blitz, 171 Mo. 530. An application for change of venue for bias of the judge made after the jury had been selected and not showing when such bias was discovered shows no diligence. State v. Caudle [Mo.] 74 S. W. 621.

9. State v. Champoux [Wash.] 74 Pac. 557.

10. Certificate that "foregoing is a true, full and complete transcript" without stating of what is sufficient. State v. Rodman [Mo.] 73 S. W. 605.

11. State v. Rodman [Mo.] 73 S. W. 605.

12. Until then it may be modified or rescinded. State v. Gray, 109 La. 127.

13. Johnston v. State [Ga.] 45 S. E. 381.

14. State v. Ledford [N. C.] 45 S. E. 944.

15. Larceny, being an infamous crime, may be prosecuted in the Indian Territory only by indictment. Williams v. U. S. [Ind. T.] 69 S. W. 849.

16. Larceny from a dwelling house. Green v. State [Ga.] 45 S. E. 990. An indictment is unnecessary on an appeal and trial de novo from a conviction before a justice of the peace. Ex parte Morris [Fla.] 34 So. 89. Prosecutions for violations of town by-laws in Massachusetts can be maintained only on complaint of the town treasurer and not by indictment [Rev. Laws, c. 25, § 23]. Com. v. Rawson [Mass.] 67 N. E. 605.

17. Const. art. 2, § 12. State v. Vinso, 171 Mo. 576.

18. People v. Gantz, 85 N. Y. Supp. 79.

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(§ 4) *B. Finding and filing and formal requisites. Indictments.*—In some states, in the absence of some pressing and adequate necessity, it is improper for the district attorney to send an indictment before the grand jury without a preliminary hearing or the sanction of the court.[20] In Arkansas, where the facts warrant an indictment for a greater degree, the court can before trial suspend proceedings under an indictment for an inferior degree of crime and order the case resubmitted to another grand jury.[21] When an indictment is lost, the prosecution may proceed to trial on a substituted copy, if exact, and the proof of it conclusive;[22] but there must be a hearing at which defendant is represented.[23] Although one convicted of manslaughter on indictment for murder and granted a new trial cannot be convicted of a higher degree, no new information is necessary.[24] It is often required that the name of the prosecutor be endorsed,[25] or that the evidence be returned with the indictment.[26]

Commencement "In the name and by authority of the state" is sufficient.[27] A count failing to conclude against the peace and dignity of the state is bad,[28] but absence of other formal words has been dispensed with.[29] An averment in the charging part that the grand jurors of the "county of Lyon" accuse defendant is equivalent to "Lyon county," the words used in the statute creating the county.[30]

The pendency of another indictment for the same offense,[31] or for another offense growing out of the same acts, cannot be pleaded either in abatement or in bar of the indictment upon which the case was tried;[32] but the court will in its discretion quash one of them.[33]

Failure to endorse the names of all the witnesses is ground for a motion to set aside.[34] An indictment need not be signed by the foreman of the grand jury.[35] An indictment is not invalidated by an irregularity of the county board in designating the place of holding court.[36] Indictments returned by a grand jury after the expiration of the term to which it was summoned are not void.[37] An indictment returned against a negro by a grand jury from which negroes were excluded

19. 2 Ballinger Ann. Codes & St. § 6813. State v. Croney [Wash.] 71 Pac. 783.

20. Com. v. Sheppard, 20 Pa. Super. Ct. 417. Preliminary complaint and hearing do not precede indictment of a corporation. U. S. v. Correspondence Institute, 125 Fed. 94.

21. Murder. Ex parte Johnson [Ark.] 70 S. W. 467.

22. Roberson v. State [Fla.] 34 So. 294.

23. White's Ann. Code Cr. Proc. art. 470. Bowers v. State [Tex. Cr. App.] 75 S. W. 299.

24. People v. McFarlane, 138 Cal. 481, 71 Pac. 568.

25. It is only where an indictment for a trespass against the person is found on the evidence of a grand juror that the endorsement of the prosecutor's name can be dispensed with. State v. Jacobs [Mo. App.] 72 S. W. 482.

26. Evidence taken in short hand and subsequently extended must be filed with the indictment. State v. Hasty [Iowa] 96 N. W. 1115. The omission of immaterial testimony given at the examination or failure to endorse the names of witnesses giving same is not ground to set aside the indictment. Id.

27. Const. art. 5, § 12. As against objection that "the" should be inserted before "authority." Weaver v. State [Tex. Cr. App.] 76 S. W. 564; Brown v. State [Tex. Cr. App.] 77 S. W. 12.

28. State v. Ulrich, 96 Mo. App. 689.

29. The omission of the words "contrary to the form of the statute in such case made and provided" does not vitiate. State v. Culbreath [Ark.] 71 S. W. 254. A complaint on a city ordinance need not conclude "contrary to the statute." State v. Gill [Minn.] 95 N. W. 449. In Arkansas the style of the cause and the conclusion "against the peace and dignity of the state" are the only formal requirements which may be regarded as essential to be observed [Const. 1874, art. 7, § 49]. State v. Culbreath [Ark.] 71 S. W. 254.

30. State v. Buralli [Nev.] 71 Pac. 532.

31. State v. Vinso, 171 Mo. 576; Irwin v. State [Ga.] 45 S. E. 48; State v. Michel [La.] 35 So. 629.

32. Aggravated assault and assault with intent to rape. Carter v. State [Tex. Cr. App.] 70 S. W. 971.

33. State v. Michel [La.] 35 So. 629. A motion to quash on the ground that two indictments are pending for the same offense is not supported by a record showing an indictment for a crime and another for an attempt to commit the same crime. State v. Michel [La.] 35 So. 629.

34. State v. Hasty [Iowa] 96 N. W. 1115.

35. State v. Shutts [N. J.] 54 Atl. 235.

36. Cook v. State [Ga.] 46 S. E. 64.

37. People v. Morgan [Mich.] 95 N. W. 542.

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by reason of their race or color is void,[38] but unlawful discrimination in this respect will not be presumed; it must be proved.[39]

The failure of the clerk to properly note the presentation and filing of the indictment may be corrected by nunc pro tunc order.[40]

Informations.—The facts necessary to authorize the filing of an information need not be set up in the information itself.[41] It is not necessary that an information filed in place of one lost shall be a copy of the lost one.[42]

Information in courts of record may be filed only by the proper prosecuting officers, deputies and regular and special assistants, being generally held to be authorized;[43] but in Missouri an information before a justice of the peace need not be made on the personal knowledge nor verified on the oath of the prosecuting attorney, but may be exhibited on the written complaint of any citizen having personal knowledge of the offense.[44]

An information must be signed or indorsed by the prosecuting officer,[45] or witness,[46] and in most states verified by the public prosecutor under oath,[47] or accompanied by the affidavit of some competent witness having knowledge of the facts.[48] As is the case with indictments, it is generally provided that the names of the witnesses be indorsed thereon.[49]

38. State v. Peoples, 131 N. C. 784. Motion to quash because no negroes were summoned on grand jury held properly overruled. Jackson v. State [Tex. Cr. App.] 71 S. W. 280.

39. Affidavits annexed to motion to quash held insufficient. Tarrance v. State, 188 U. S. 519, 47 Law. Ed. 572.

40. West v. State [Ark.] 71 S. W. 483; Price v. State [Ark.] 71 S. W. 948. Objection on motion in arrest and for new trial comes too late. Taylor v. State [Tex. Cr. App.] 72 S. W. 181.

41. No grand jury in session, and commission of accused by magistrate. State v. Lewis [Wash.] 72 Pac. 121; State v. Melvern [Wash.] 72 Pac. 489.

42. Goodman v. State [Ind.] 69 N. E. 442.

43. Assistant prosecuting attorney. State v. Ittner [Mo. App.] 73 S. W. 289. The deputy prosecuting attorney may sign informations. State v. Riddell [Wash.] 74 Pac. 477. An information may be filed by a county attorney pro tem. [Tex. Code Cr. Proc. 1895, art. 38]. Daniels v. State [Tex. Cr. App.] 77 S. W. 215.

44. State v. Blands [Mo. App.] 74 S. W. 3.

45. Since the name of the county attorney is not necessarily set forth in the information, a variance between his name in the commencement and his signature is not a defect. Williams v. State [Tex. Cr. App.] 70 S. W. 213. An indorsement, "A true information" and a printed signature by the district attorney is sufficient authentication. State v. Belding [Or.] 71 Pac. 330. An information signed by the deputy prosecuting attorney is sufficient. Under 2 Ball. Ann. Codes & St. Wash. 1890, § 6832, providing that it shall be signed by the prosecuting attorney, and 1891, § 4756, giving a deputy prosecuting attorney the powers of his principal. State v. Riddell [Wash.] 74 Pac. 477.

46. The name of the prosecuting witness must be indorsed on an information for assault and battery where it is verified by the prosecuting attorney on information and belief. State v. Jacobs [Mo. App.] 72 S. W. 482. Where a complaint was in form prepared for signature by a person who could not write, the fact that no cross is to be found in the space prepared for it is no objection to the complaint in the absence of a showing that the affiant did not write the name therein. Taylor v. State [Tex. Cr. App.] 72 S. W. 181.

47. Information not verified held bad. State v. Balch [Mo.] 77 S. W. 547. An information for a felony need not be under oath the official oath of the prosecuting attorney being sufficient. State v. Pohl, 170 Mo. 422.

Verification by prosecuting attorney by oath before clerk of court (State v. Hicks [Mo.] 77 S. W. 539) on information and belief is sufficient (State v. Gregory [Mo.] 76 S. W. 970).

48. State v. Bonner [Mo.] 77 S. W. 463. Where an information is sworn to positively, the county attorney is not required to file evidence on which it is founded [Kan. Gen. St. 1901, § 2743]. State v. Peak [Kan.] 72 Pac. 237. Verification on information and belief by the prosecuting attorney makes the supporting affidavit of the complaining witness unnecessary. State v. Jacobs [Mo. App.] 72 S. W. 482. An information filed by the assistant prosecuting attorney of the St. Louis court of criminal correction, and verified by the affidavit of the prosecuting witness is sufficient. State v. Ittner [Mo. App.] 73 S. W. 289. A statement that affiant has good reason to believe that the offense has been committed is insufficient, the statute providing that he must state that he does believe. Smith v. State [Tex. Cr. App.] 76 S. W. 436. That an information properly verified by the prosecuting attorney is also verified by the prosecuting witness is not a defect, such second verification being mere surplusage. State v. Shanks [Mo. App.] 71 S. W. 1065. An information founded on the oath of a person named is not such a nullity that it can be avoided on habeas corpus though not accompanied by an affidavit of a prosecuting witness. U. S. v. Davis, 18 App. D. C. 280; U. S. v. Chambers, 18 App. D. C. 287. Defendant cannot attack a duly verified information by counter affidavits of

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It must generally be preceded by a sufficient preliminary complaint and examination,[50] and be filed within a certain time thereafter,[51] though in Oregon the preliminary examination is not necessary,[52] and technical exactness is never required in the complaint.[53]

(§ 4) *C. Requisites and sufficiency of the accusation. General rules.*—The indictment for any offense must charge every act made by the law essential to the punishment thereof[54] in positive terms,[55] and statutory forms must meet constitutional requirements of certainty,[56] but if this be done, an information conforming substantially to the statutory forms is sufficient.[57]

Certainty.—In all prosecutions for felonies everything constituting the offense must be pleaded with certainty and clearness and nothing left to implication;[58]

the one who verified it that it was filed without personal knowledge of the facts (Vickers v. People [Colo.] 73 Pac. 845), nor on the ground that the affidavit accompanying it was made by one who appeared at the trial to have had no personal knowledge of the facts (Barr v. People [Colo.] 71 Pac. 392). A duly verified information filed cannot be attacked by counter affidavits of the person verifying it that it was not verified by a person having personal knowledge of the facts. Vickers v. People [Colo.] 73 Pac. 845.

49. Indorsement of the names of witnesses after commencement of the trial is not reversible error. State v. Lewis [Wash.] 72 Pac. 121. Furnishing defendant with a list of the witnesses in lieu of endorsing their names on the information is sufficient. State v. Belding [Or.] 71 Pac. 330.

50. A complaint on which an information is based is sufficient if it state merely that complainant has good reason to believe. Tompkins v. State [Tex. Cr. App.] 77 S. W. 800. It is no ground for setting aside an information, that the preliminary examination was postponed by the examining magistrate without the defendant's consent, contrary to Pen. Code Cal. § 861. People v. Boren [Cal.] 72 Pac. 899.

Leave to file an information for murder without a preliminary examination where necessary will not be granted as of course but rests in the sound discretion of the court. State v. Martin [Mont.] 74 Pac. 725. The application need not show the facts, it being sufficient that reasons satisfactory to the court were presented without regard to the manner of presentation. Id. The mark of a complaining witness is a sufficient signing of a sworn complaint before a magistrate where the latter signs the jurat and certifies that the affidavit was subscribed before him. Under Pen. Code Cal. § 7, providing that where a person cannot write, signature includes mark. People v. McDaniels [Cal.] 74 Pac. 773.

51. An information will not be dismissed for failure to file it within 30 days, where the district attorney was misled as to one day by an error in the stenographer's notes and defendant was tried within 60 days from the commission of the offense [Cal. Pen. Code, § 1382]. People v. Farrington [Cal.] 74 Pac. 288.

52. Ballinger & C. Ann. Codes & St. § 1260. State v. Belding. [Or.] 71 Pac. 330.

53. Duplicity in the preliminary complaint is no objection to the information based thereon. Sothman v. State [Neb.] 92 N. W. 303. An affidavit on which is based a prosecution for a violation of a town ordinance which states the evidence itself but does not explicitly charge the offense is sufficient though such a charge would not constitute a valid indictment. State v. Thompson [La.] 35 So. 582. An information is not subject to dismissal on the ground that the offense charged therein was not set out in the complaint and warrant on which defendant was arrested. People v. Karste [Mich.] 93 N. W. 1081. Substantial conformity is sufficient. Van Syoc v. State [Neb.] 96 N. W. 266.

54. Breaking jail under Pen. Code Cal. §§ 950, 606. People v. Boren [Cal.] 72 Pac. 899. But an indictment for taking indecent liberties with a female child need not specify the acts. State v. Kunz [Minn.] 97 N. W. 131. An indictment of the president of a turnpike company for failing to make a report required of the president and directors of a corporation is bad if it does not negative the making by the directors [Ky. St. 1899, §§ 4718, 4719]. Com. v. Lyons [Ky.] 76 S. W. 33. An indictment against a physician for failure to keep a registry of births and deaths is bad if it fail to charge that he ever attended at any birth or death [Ky. Acts 1873, 1874, p. 13, c. 134]. Com. v. McConnell [Ky.] 76 S. W. 41. An indictment for failure to provide medical attendance for a child must aver facts showing that the case was one that required a physician. People v. Pierson, 80 App. Div. [N. Y.] 415. The fact of a former sentence must be charged in the indictment, where a second conviction would affect the grade of the offense or require the imposition of a different penalty. McWhorter v. State [Ga.] 44 S. E. 873. An indictment charging a second offense need not charge the prior offense as explicitly as would be required to hold defendant to trial on it. People v. Matuszewski, 138 Cal. 533, 71 Pac. 701. Indictment for perjury sustained. State v. Booth [Iowa] 97 N. W. 74.

55. Averment on information and belief held insufficient. Sothman v. State [Neb.] 92 N. W. 303.

56. Brass v. State [Fla.] 34 So. 807.

57. Under Pen. Code Mont. §§ 1830, 1833, 1841, 1842. State v. Stickney [Mont.] 75 Pac. 201. In Massachusetts, an indictment may be found for murder in the second degree by the express provision of the statute [Rev. Laws 1899, c. 218, § 67]. Com. v. Ibrahim [Mass.] 68 N. E. 231.

58. Violation of law by election officers. State v. Gassard [Mo. App.] 77 S. W. 473.

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but it is sufficient if it sets forth the act charged so as to enable a person of common understanding to know what was intended.[59] Thus, where one is charged with a crime that can be committed only by certain officers or members of certain professions, it must clearly appear that defendant is one of the class to which the statute applies.[60] Where a statute enumerates several means or modes of committing an offense connecting them by the disjunctive, and such connected words are not synonymous, a count charging the commission of the offense by such means in the disjunctive is bad for uncertainty,[61] except in those jurisdictions where by special statute it is provided otherwise.[62] An information which, after charging a felony in the usual form, alleges that defendant aided, abetted and procured another to commit it, is not demurrable on the ground that it states a mere legal conclusion.[63] Where several are jointly indicted, all having been present at the commission of the offense, it is not necessary to charge the act upon any one of them.[64]

Bad spelling and ungrammatical construction will not vitiate an indictment,[65] and an interlineation is not a defect.[66]

Intent or knowledge.—Where guilty knowledge is not an essential ingredient of the offense or where a statement of the act itself necessarily includes a knowledge of the illegality of the act, no averment of knowledge is necessary;[67] but an indictment for murder must charge with certainty that the assault was made with intent to kill.[68]

Venue.—An indictment must be direct and certain as regards the jurisdiction in which the offense was committed,[69] though no particular form of words is necessary,[70] and it need not specify a particular place within the county.[71] Where lar-

Violation of beer inspection act. State v. Broeder, 90 Mo. App. 156. False pretenses. Moline v. State [Neb.] 93 N. W. 228. Unlawful cohabitation by polygamist, marriage in another state. State v. Durphy [Or.] 71 Pac. 63. An averment that "A acting for himself and in conjunction with B" made fraudulent use of the mails sufficiently charges B with the offense. Hume v. U. S., 118 Fed. 689. The averment of the truth in an indictment for perjury is positive notwithstanding the use of the introductory word "whereas." People v. Ennis, 137 Cal. 263, 70 Pac. 84.

59. State v. Champoux [Wash.] 74 Pac. 557.

60. An averment that defendant "is a physician" speaks of the time of finding the indictment and is not a sufficient charge that he was a physician during the year then ended. Com. v. McConnell [Ky.] 76 S. W. 41. An indictment against a sheriff for allowing an escape but not averring what county he was sheriff of is bad. State v. Daniels, 65 Kan. 861, 70 Pac. 635. An indictment of defendant for embezzlement as borough treasurer when his official title was "collector" he being in fact treasurer is good. State v. Bartholomew [N. J. Law] 54 Atl. 231. In an indictment against a city attorney for accepting a bribe contrary to a statute punishing executive and judicial officers, an averment that he is a judicial officer will not render it defective, since if it is erroneous it is corrected by the statement of his office. People v. Salisbury [Mich.] 96 N. W. 936.

61. State v. Seeger, 65 Kan. 711, 70 Pac. 599; State v. Humphreys [Or.] 70 Pac. 824.

62. Ala. Code, § 4913. Sims v. State, 133 Ala. 61.

63. Lamb v. State [Neb.] 95 N. W. 1050.

64. Lindsay v. State, 24 Ohio Circ. R. 1.

65. U. S. v. Hume [C. C. A.] 118 Fed. 689. "Shorting" for "shooting" in a count for murder. Francis v. State [Tex. Cr. App.] 70 S. W. 751. Omission of plural in averment that "statement" were false in indictment for perjury. Freeman v. State [Tex. Cr. App.] 72 S. W. 1001. Omission of "did" and wrong tense of verbs in prosecution for violation of fish law. People v. Haagen [Cal.] 72 Pac. 836.

66. Cook v. State [Ga.] 46 S. E. 64.

67. Intercourse with female while she is insensible from drug. Com. v. Lowe [Ky.] 76 S. W. 119. Driving sheep in from another state. State v. Keller [Idaho] 70 Pac. 1051. Where an intent is not in specific words made a part of the definition of a crime in the statute, but such intent is left to be inferred from the legal name of the crime, the intent need not be specifically averred. State v. Patterson [Kan.] 71 Pac. 860. Larceny. Territory v. Garcia [N. M.] 75 Pac. 34.

68. State v. Linhoff [Iowa] 97 N. W. 77.

69. U. S. v. Marx, 122 Fed. 964. Ky. Cr. Code § 124, subs. 3. Bailey v. Com., 24 Ky. L. R. 1419, 71 S. W. 632; State v. Perry [Iowa] 91 N. W. 765. Living together in adultery. McKinnie v. State [Fla.] 32 So. 786. An indictment for aiding and abetting a crime in another state must show that the acts of defendant in the state where the indictment was had amount to a public offense. Cruthers v. State [Ind.] 67 N. E. 930.

70. Omission of abbreviation "ss." Seay v. Shrader [Neb.] 95 N. W. 690. The omission of the words "then and there being found" from an information for larceny com-

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ceny was committed without the county and is triable therein by reason of the stolen goods being brought into the county, the place of committing the offense may be alleged as in the county where the trial is had.[72]

Surplusage.—If an indictment on a statute covers in allegation all the statutory terms, thus showing a complete offense, it will not be ill should it add something by way of making the offense appear more enormous.[73]

Time.—It is not necessary to allege the precise date of the commission of an offense, except when the date is a material ingredient of the offense,[74] or to show that limitations have not run against the prosecution,[75] or as determining whether a statute existed under which it could be punished;[76] but where the crime is alleged to have been committed at a time subsequent to an amendment of the law punishing it,[77] or at a time so remote that limitations have run against it, the date is material and must be taken as true.[78]

Avoiding statute of limitations.[79]—An indictment showing on its face that limitations have run against the crime is bad,[80] and the indictment must show suspension of the statute if it is relied on.[81]

Repugnancy.—The necessary allegations of an indictment must not be inconsistent with each other,[82] but a count conjunctively uniting all the disjunctive elements of forgery as described in the statute is not repugnant or inconsistent.[83]

Designation and characterization of offense.—The offense need not be designated as a felony or misdemeanor,[84] and since the name of a crime is controlled by the specific acts charged, an erroneous name will not vitiate the indictment.[85] The word "feloniously" is not necessary in a count charging all the essential elements of a felony,[86] but an indictment for a statutory offense, not alleging it to have been done "willfully" and "unlawfully," is bad, though the word "feloniously" is used,[87] though "malicious" may be used in lieu of willful.[88] In an allegation that defendant did "unlawfully sell, give away, or otherwise dispose of" intoxicating liquors, the word "unlawfully" applies to each of the acts alternatively stated, and it cannot be objected that the acts are not charged to have been done unlawfully.[89]

mitted in a certain county is not fatal. Baldwin v. State [Fla.] 35 So. 220.

71. Lauckton v. U. S., 18 App. D. C. 348; Davis v. U. S., Id. 468.

72. State v. De Wolfe [Mont.] 74 Pac. 1084.

73. State v. Murphy [Mo. App.] 77 S. W. 157; U. S. v. Clark [D. C.] 125 Fed. 92.

74. Hume v. U. S. [C. C. A.] 118 Fed. 689; Webb City v. Parker [Mo. App.] 77 S. W. 119; People v. Miller, 137 Cal. 642, 70 Pac. 735. "On or about" is sufficient. State v. Perry, 117 Iowa, 463. **Contra,** Tipton v. State [Ga.] 46 S. E. 436.

75. Tipton v. State [Ga.] 46 S. E. 436.

76. Battle v. Marietta [Ga.] 44 S. E. 994.

77. Whatley v. State [Fla.] 35 So. 80.

78. Rouse v. State [Fla.] 32 So. 784.

79. Rouse v. State [Fla.] 32 So. 784; Tipton v. State [Ga.] 46 S. E. 436.

80. Indictment setting out forged instrument. Hickman v. State [Tex. Civ. App.] 72 S. W. 587. Assault with intent to kill. Rouse v. State [Fla.] 32 So. 784.

81. Rouse v. State [Fla.] 32 So. 784. Averment that defendant had been nonresident held sufficient. State v. Soper, 118 Iowa, 1.

82. A variance in an indictment for forgery between the name H. A. L. in the purport clause and H. C. L. in the tenor clause is immaterial. Albert v. State [Tex. Cr. App.] 72 S. W. 846. Where an indictment charges that a forgery was committed in 1902 and the instrument as set out in the indictment bears date 1892 the repugnancy is fatal. Hickman v. State [Tex. Cr. App.] 72 S. W. 587. An indictment for perjury before the grand jury is not repugnant because it appears therefrom that the fact defendant testified about had been sworn to by others, since the jury have the right to procure corroborative evidence. State v. Faulkner [Mo.] 75 S. W. 116.

83. Selby v. State [Ind.] 69 N. E. 463.

84. As a felony or misdemeanor. People v. Boren [Cal.] 72 Pac. 899.

85. Malicious mischief. State v. Culbreath [Ark.] 71 S. W. 254. Indecent liberties with female child. State v. Kunz [Minn.] 97 N. W. 131. Incest. State v. DeHart, 109 La. 570.

86. Richards v. State [Neb.] 91 N. W. 878; Reno v. State [Neb.] 95 N. W. 1042; State v. Smith [Wash.] 71 Pac. 767; Territory v. Garcia [N. M.] 75 Pac. 34; Baldwin v. State [Fla.] 35 So. 220. **Contra,** false pretenses. State v. Taylor, 131 N. C. 711.

87. Del. Rev. Code, p. 940, § 1, breaking and entering. State v. Boggs [Del.] 53 Atl. 360.

88. Glover v. People [Ill.] 68 N. E. 464.

89. Sims v. State, 133 Ala. 61.

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Statutory crimes.—An indictment in the language of the statute is sufficient in those cases in which all the facts that constitute the offense are set forth in the statute,[90] but if the description does not contain all the particulars essential to constitute the offense,[91] or when the statute punishes an offense by its legal designation, without enumerating the acts which constitute it, then it is necessary to use the terms which technically charge the offense.[92] The statutory language need not be used, however, nor need the statute be referred to if the indictment in fact adequately charges the offense set forth.[93]

Exceptions and provisos.—Where there are exceptions in the act itself, part and parcel of the offense, they must be negatived before there can be a valid indictment under the statute,[94] but it is otherwise where the exception is not a part of the definition of the crime, whether placed close to or remote from such enacting clause.[95]

Setting forth written or printed matter.—The pasting of an instrument, instead of setting it forth in writing according to its tenor, is, if a defect, cured by the statute of jeofails,[96] and an averment of "probable cause to believe" when required must be direct.[97]

Principals and accessories.—An indictment charging accused with being an accessory to a felony after the fact should allege facts constituting the felony with the same degree of certainty required if the principal were alone indicted.[98]

Designation of accused.—Where an error occurs in the name of the accused, the indictment is not vitiated thereby, but on the true name appearing an entry should be made on the minutes, stating his name and the fact of his having been indicted by the name mentioned in the indictment,[99] and where he corrects it on

90. Malicious mischief. State v. Culbreath [Ark.] 71 S. W. 254. Assault. State v. Murphy [Mo. App.] 77 S. W. 157. Embezzlement by public officer. State v. Bartholomew [N. J. Law] 54 Atl. 231. Impersonating officer. U. S. v. Ballard, 118 Fed. 757. Extortion by threats to kill. Glover v. People [Ill.] 68 N. E. 464. Keeping bucket shop. State v. Kentner [Mo.] 77 S. W. 522. Assault with dangerous weapon. State v. Climie [N. D.] 94 N. W. 576. Pool selling. People v. Corbalis, 83 N. Y. Supp. 782. Violation of quarantine law—driving sheep. State v. Keller [Idaho] 70 Pac. 1051. Murder. Cremar v. People [Colo.] 70 Pac. 415. Attempt to ravish. State v. Evans [Utah] 73 Pac. 1047. Practicing medicine without license. Com. v. Campbell, 22 Pa. Super. Ct. 98. For having possession of policy papers, as against a defendant alleging that he did not know of the character of the papers nor intend to use them for an unlawful purpose. People v. Adams, 83 N. Y. Supp. 481.

91. Conspiracy to defraud. U. S. v. Marx, 122 Fed. 964.

92. Bribery. State v. Meysenberg, 171 Mo. 1.

93. Practicing medicine without license. State v. Flanagan [R. I.] 55 Atl. 876.

94. Unlawfully practicing medicine [Tex. Acts 27th Leg. 1901, §§ 8, 13, pp. 14, 15]. Salter v. State [Tex. Cr. App.] 73 S. W. 395. Indecent liberties not amounting to rape. State v. Kunz [Minn.] 97 N. W. 131. Labor on Sunday not work of charity [Sand. & H. Dig. § 1887]. Halliburton v. State [Ark.] 75 S. W. 929. Unlawful dealing in drugs. State v. Mahoney, 24 R. I. 338. Polygamy—negation in statutory terms held sufficient. State v. Damon, 97 Me. 323; Potts v. State [Tex. Cr. App.] 74 S. W. 81.

95. State v. Broerder, 90 Mo. App. 156. Intoxicating liquors—proviso permitting use in certain cases. Lehman v. District of Columbia, 19 App. D. C. 217; Sims v. State, 133 Ala. 61, 33 So. 162; Wells v. State [Ga.] 45 S. E. 443. Exception introduced by later statute. Tigner v. State [Ga.] 45 S. E. 1001. Practicing medicine without license. State v. Flanagan [R. I.] 55 Atl. 876. Indictment for abduction need not aver chastity of female [Shannon's Code, § 6462]. Griffin v. State [Tenn.] 70 S. W. 61. Carrying pistol in election precinct. Kitchens v. State, 116 Ga. 847.

96. Counterfeiting union label. State v. Niesmann [Mo. App.] 74 S. W. 638.

97. "Has reason to believe and does believe" does not aver probable cause to believe. Monroe v. State [Ala.] 34 So. 382; Streater v. State [Ala.] 34 So. 396; Sims v. State [Ala.] 34 So. 400.

98. State v. King, 88 Minn. 175. An accessory may be indicted separately from the principal either before or after the latter's conviction. If before the indictment must aver the principal's guilt; if after it may allege either his guilt or his conviction. Daughtrey v. State [Fla.] 35 So. 397. An indictment against an accessory failing to allege the principal's guilt, must allege a judgment of conviction. Alleging a conviction by verdict is not sufficient. Id.

99. Ky. Cr. Code, § 125. Wrong person bearing name alleged first arrested. Com. v. Jenkins, 24 Ky. L. R. 1881, 72 S. W. 363; State v. Pipes, 65 Kan. 543, 70 Pac. 363.

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arraignment, the cause may proceed as if his true name had been first recited in the indictment,[1] but at the common law such a defect is ground for a plea in abatement.[2] Where defendant is designated under an alias surname, it is not necessary to repeat his Christian name before such alias.[3] The omission of defendant's middle initial is not material,[4] and an indictment of "one Morgan whose given name is to the grand jury unknown" is sufficient.[5] That defendant's given name is so illegibly written that it may be read either correctly or incorrectly is no objection.[6] Where defendant's name is properly set out in the first instance, it is not rendered insensible by subsequently referring to him as "the said," giving him a wrong name.[7]

The statute of 1 Hen. V., ch. 5 (A. D. 1413), providing that defendant's degree or mystery, and the town, hamlet, place or county in which he was conversant must be set out, is no longer of force in the District of Columbia.[8]

Designation of third persons.—Where ownership is laid in a corporation, a specific averment of incorporation is not necessary, nor need there be an allegation of the correct name of the corporation where it is designated by the name by which it is generally known.[9] An averment that property was the personal property of certain persons "as trustees" of a certain church is not bad for failure to state the corporate name of the church, where it is not alleged that it was ever incorporated.[10] The designation of a married woman by her husband's Christian name is proper.[11] The statute in Kentucky provides that an indictment otherwise sufficient shall not be bad for an incorrect designation of the person injured.[12] In Alabama, by provision of the statute, an indictment for illegal sale of liquor need not state the name of the purchaser.[13]

Description of money.—Descriptions of money in larceny and kindred offenses need not be exact.[14] Whence an allegation as to a certain amount in "money of the United States, the further description of which is to the grand jury unknown" is a sufficient description of anything current as money.[15] Under an indictment for larceny of "United States Currency," evidence of treasury notes, national bank notes or gold or silver certificates is admissible.[16] An amount of the embezzlement of "about" a certain amount is sufficiently definite as to amount.[17] While under the statute in New Jersey, it is sufficient to charge the embezzlement to be of money without specifying any particluar coin or valuable security.[18]

Ownership of property may be averred in a certain estate,[19] and the statute in Texas expressly permits an indictment to allege ownership of property in the

1. Clark v. State [Tex. Cr. App.] 76 S. W. 573.
2. Initials held not sufficient as Christian names. Hewlett v. State, 135 Ala. 59.
3. Viberg v. State [Ala.] 35 So. 53.
4. Veal v. State, 116 Ga. 589.
5. Morgan v. State [Tex. Cr. App.] 73 S. W. 968.
6. Niemann v. State [Tex. Cr. App.] 74 S. W. 558.
7. Chessley v. State [Tex. Cr. App.] 74 S. W. 548. A correct designation of accused as R. D. E. is not rendered bad by a later reference to him as R. H. E. Eddison v. State [Tex. Cr. App.] 73 S. W. 397.
8. Lauckton v. U. S., 18 App. D. C. 348; Davis v. U. S., Id. 468.
9. State v. Rollo [Del.] 54 Atl. 683; Bingle v. State [Ind.] 68 N. E. 645; Territory v. Garcia [N. M.] 75 Pac. 34; Mattox v. State, 115 Ga. 212. It is insufficient in an indictment for burglary to state that the building was the depot of a railroad company, without alleging that the owner was a corporation or an individual. State v. Horned [Mo.] 76 S. W. 953.
10. Bingle v. State [Ind.] 68 N. E. 645.
11. Weaver v. State, 116 Ga. 550.
12. Taylor v. Com. [Ky.] 75 S. W. 244.
13. Code 1896, § 5077. Jones v. State [Ala.] 34 So. 236.
14. Seven dollars and fifty cents current money of the United States of America is sufficient. Parrent v. State [Tex. Cr. App.] 76 S. W. 474; Wilson v. State [Tex. Cr. App.] 72 S. W. 862. "Seventeen dollars in money each of the value of one dollar" is sufficient. Fay v. State [Tex. Cr. App.] 70 S. W. 744.
15. Verberg v. State [Ala.] 34 So. 848; Davis v. U. S., 18 App. D. C. 468.
16. Dennis v. State [Tex. Cr. App.] 74 S. W. 559.
17. Willis v. State, 134 Ala. 429.
18. Code Proc. Act, § 47. State v. Bartholomew [N. J. Law] 54 Atl. 231.
19. State v. Sherman [Ark.] 74 S. W. 293.

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person in possession thereof, though the actual title is in another.[20] The statute in Kentucky provides that an indictment otherwise sufficient is not bad for an incorrect statement of ownership of property.[21]

(§ 4) *D. Issues, proof and variance.*—All necessary averments in an indictment must be proved as laid,[22] and if a necessary allegation is made unnecessarily minute in description, the proof must satisfy the descriptive as well as main part, since the one is essential to the identity of the other;[23] but where the allegation itself is unnecessary, not essential by way of identification, and can be omitted without affecting the charge, it is mere surplusage and may be disregarded.[24] Unnecessary averments negativing exceptions to the statute creating the offense, therefore, need not be proved,[25] but wherever such an averment must be introduced to bring defendant within the statute, it is material and must be proved as laid.[26] An allegation, after a full description of money stolen, that the grand jury are unable to give a more particular one, need not be proved,[27] and an averment that the description of money stolen was to the grand jurors unknown and evidence that its owner was before the grand jury is no variance.[28] Where an indictment for an offense under a statute that has been repealed contains, after striking out the statutory matter, a sufficient charge of a common law offense, the indictment is good, since the statutory matter is mere surplusage unnecessary to be proved.[29]

A videlicet will not have the effect to relieve the pleader from proof of any fact necessary to the description or the identity of that which it is connected.[30]

If the indictment professes to set out a writing by its tenor, whether in the particular case this exactness of averment is necessary or not, the proof must conform thereto with almost the minutest precision.[31]

An averment in the conjunctive of the several modes of committing the offense recited in the statute in the disjunctive will not hold the prosecution to proof of all the conjunctive averments,[32] and a proof of any one of them will support a conviction.[33]

A conspiracy to commit the offense charged[34] and proof of other offenses in themselves constituent parts of the offense charged may be shown, though not specifically alleged;[35] so also, an indictment for a constituent offense is supported

20. Tex. Code Cr. Proc. art. 445. Bell v. State [Tex. Cr. App.] 71 S. W. 24.

21. Cr. Code § 128. Taylor v. Com. [Ky.] 75 S. W. 244.

22. An averment of the payment of money is not supported by proof of the giving of a check. Bribery. State v. Meysenberg, 171 Mo. 1. An information charging an assault on A is not supported by an assault on A. B. and C. State v. Moore [Mo.] 77 S. W. 522. An indictment charging that defendant did "grant, bargain and sell" certain property is not supported by proof that he mortgaged it. State v. Sequin [Me.] 56 Atl. 840. An averment that a turkey was raffled for and proof that it was the dead body of a dressed turkey are not variant. Com. v. Coleman [Mass.] 68 N. E. 220.

23. Averment of express agreement in bribery case. State v. Meysenburg, 171 Mo. 1. Averment that money stolen was "money of the United States." Marshall v. State [Ark.] 75 S. W. 584.

24. Street number of house violating smoke ordinance. Sinclair v. D. C., 20 App. D. C. 344. Description of stolen horse. Goldsberry v. State [Neb.] 92 N. W. 906.

25. Violation of liquor law. Tigner v. State [Ga.] 45 S. E. 1001.

26. Discharging fire arms. Rumph v. State [Ga.] 45 S. E. 1002.

27. United States paper money currency. Wilson v. State [Tex. Cr. App.] 72 S. W. 862.

28. Viverg v. State [Ala.] 34 So. 848; Davis v. U. S., 18 App. D. C. 468.

29. Assault on election officer—indictment sustained for assault. State v. Murphy [Mo. App.] 77 S. W. 157.

30. Sinclair v. D. C., 20 App. D. C. 344, but when the particular allegation is not so essential, its statement under videlicet clearly indicates that the pleader has not undertaken to prove the precise facts and circumstances so alleged and he will not be held to them. Id.

31. Forgery: Variances held immaterial. State v. Donovan [Vt.] 55 Atl. 611.

32. "Demand or Obtain" money by impersonating officer. U. S. v. Ballard, 118 Fed. 757.

33. Cody v. State [Ga.] 45 S. E. 622.

34. Murder. State v. Kennedy [Mo.] 75 S. W. 979.

35. Charge of keeping saloon open—proof of sales. Knox v. State [Tex. Cr. App.] 77 S. W. 13.

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by proof of the offense of which the one described is a constituent,[36] whence an indictment for an attempt to commit an offense is supported by proof of the actual commission of the offense;[37] but an indictment as accessory before the fact to a felony is not supported by proof that defendant committed the crime.[38] Neither may one indicted for murder as a principal be convicted as an accessory after the fact;[39] but where the distinction between principal and accessory is abolished, there is no variance between indictment as principal and proof of aiding and abetting.[40] Evidence of the receiving of stolen goods will not support a conviction of larceny,[41] and a conviction of receiving stolen goods cannot be had on an indictment for larceny.[42]

The venue must be proved as laid,[43] but the date is not material as a rule except as showing that limitations have not run against the offense;[44] though where the date is laid subsequent to a change in the law punishing the offense, proof of the commission of the crime before the change in the law is fatal.[45] Ordinarily when a month is referred to in testimony it will be understood to be of the current year, unless from the connection it appears that another is intended.[46] It is generally not necessary to prove that the offense was committed on the very day alleged in the indictment,[47] and circumstantial evidence thereof is sufficient.[48]

Name or other description of accused or third person.—An error in spelling defendant's name is not material,[49] and where a party is commonly known by one name, and that name is alleged in the indictment, the fact that the evidence shows that he is also commonly known by some other name or names will not defeat the prosecution.[50] An averment that defendant was employed by a certain company and evidence that he was acting in its interests under orders of its president are not variant.[51] Where ownership is alleged in different counts in different persons, proof of ownership in either supports a conviction.[52] In an indictment for seducing "Mary Ellen," evidence of the seduction of "Nellie" is no variance, though there is no proof that the same person is meant;[53] but a charge of ravishing Rosa Lee Nelson is not supported by evidence of ravishing Rosa Lee Ann.[54] Description of injured person as "Ed. H." and proof that his name is "Edmund Green H." and that he is always called "Green H." is a fatal variance.[55] Indictment alleging offense in "Guadlupe" instead of "Guadalupe" County is good.[56]

36. Indictment for larceny from a dwelling house, proof of burglary and larceny. Green v. State [Ga.] 45 S. E. 990. Larceny after trust, proof of fraudulent intent in inducing trust. Walker v. State [Ga.] 43 S. E. 701; Cunnegin v. State [Ga.] 44 S. E. 846. Indictment for simple larceny—proof of larceny from dwelling. Mattox v. State, 115 Ga. 212.

37. Attempted burglary. State v. Mahoney [Iowa] 97 N. W. 1089.

38. Larceny. Riggins v. State, 116 Ga. 592.

39. Harper v. State [Miss.] 35 So. 572.

40. State v. Berger [Iowa] 96 N. W. 1094.

41, 42. Watts v. People [Ill.] 68 N. E. 563.

43. McKinnie v. State [Fla.] 32 So. 786. "Guadlupe" and "Guadalupe" county are idem sonans. Reys v. State [Tex. Cr. App.] 76 S. W. 457.

44. Hume v. U. S. [C. C. A.] 118 Fed. 689. It is not a material variance in an indictment alleging an offense at a certain time on a certain day that it is proved at that time on another day, if the essentials of the offense on that day are established. People v. Shannon, 83 N. Y. Supp. 1061.

45. Whatley v. State [Fla.] 35 So. 80.

46. Tipton v. State [Ga.] 46 S. E. 436. Cf. State v. Knolle, 90 Mo. App. 238.

47. Tomlinson v. People, 102 Ill. App. 542; People v. Shannon, 83 N. Y. Supp. 1061; State v. Anderson, 30 Wash. 14, 70 Pac. 104. An indictment for receiving stolen property on the 22nd is supported by proof of its receipt on the 19th. State v. Freedman [Del.] 53 Atl. 356. Keeping tippling shop. State v. Stover [La.] 35 So. 405. A charge of liquor selling on a certain Sunday is proved by showing a sale on any Sunday within a year before the finding of the indictment. Webb City v. Parker [Mo. App.] 77 S. W. 119.

48. Tipton v. State [Ga.] 46 S. E. 436.

49. "Witt" and "Wid" are idem sonans. Veal v. State, 116 Ga. 589.

50. Luna v. State [Tex. Cr. App.] 70 S. W. 89.

51. State v. Faulkner [Mo.] 75 S. W. 117.

52. Roberts v. State [Tex. Cr. App.] 70 S. W. 423.

53. State v. Burns [Iowa] 94 N. W. 238.

54. Jacobs v. State [Fla.] 35 So. 65.

55. Irwin v. State [Ga.] 45 S. E. 59.

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(§ 4) *E. Defects, defenses and objections.*—An indictment may be quashed on oral motion only for defects for which the judgment on it should be arrested,[57] and exceptions which go merely to the form of an indictment must be made by demurrer or motion to quash before pleading to the merits,[58] since by pleading defendant waives his right to demur or move to quash,[59] and admits that he is charged by his right name,[60] and in the absence of a demurrer pointing out its defects, an indictment will in general be sustained;[61] but a plea of guilty to a defective count does not preclude the defendant from attacking such count on the ground that it charges no offense,[62] and such objection may be taken under a plea of not guilty, or may be raised by demurrer or motion in arrest of judgment;[63] hence, the sufficiency of an indictment to support a conviction may be questioned for the first time in the supreme court.[64] Since the insufficiency of an indictment may be first raised on appeal or error in any case where the defect would have been available on motion in arrest,[65] even though no demurrer or motion to quash was filed below, the refusal to permit it to be filed after issue joined is of no moment on appeal.[66] A statutory enumeration of grounds has been held exclusive.[67] Where certain counts in an indictment are good and others are bad, the court may quash the bad counts and leave the good counts stand,[68] and a conviction based on several counts will not be reversed if any count is good.[69]

That a negro is indicted by a grand jury composed exclusively of white men, negroes having been excluded because of race, color or previous condition of servitude,[70] that defendant was compelled to go before the grand jury and testify as to matters connected with the charge in the indictment,[71] and that an unauthorized person was present during the deliberations of the grand jury, are grounds for motion to quash;[72] but neither a regularly appointed special assistant prosecutor,[73] nor a legally qualified and appointed stenographer,[74] is an unauthorized person. In some states a motion to set aside may be entertained on the ground

56. Reys v. State [Tex. Cr. App.] 76 S. W. 457.

57. Omission of words "tending to debauch the morals" is not such a defect in an indictment for indecent exposure. Gilmore v. State [Ga.] 45 S. E. 226.

58. Gilmore v. State [Ga.] 45 S. E. 226; Sanders v. State [Ga.] 45 S. E. 365; State v. Ledford [N. C.] 45 S. E. 944. Failure to sufficiently describe property stolen. King v. State, 117 Ga. 39. Objection that blank counts are not filled out. State v. Norris [S. C.] 43 S. E. 791. That there is no file mark on the information cannot be objected to on motion in arrest or for new trial. Taylor v. State [Tex. Cr. App.] 72 S. W. 181. By appearing and pleading to an information, and submitting to be tried thereon without objection defendant waives his right to object that it was not properly verified. Latney v. U. S., 18 App. D. C. 265. Alleging in a prosecution for rape that the prosecutrix was of the age of 16 years at the time of the offense instead of 18 the age of consent. State v. Fetterly [Wash.] 74 Pac. 810.

59. Oakley v. State, 135 Ala. 15. Iowa Code, § 5319. State v. Tyler [Iowa] 97 N. W. 983. That an indictment was not properly "found," "indorsed," or "presented" by the grand jury may be tested by motion to set it aside before plea and unless so presented cannot be afterwards raised. Shivers v. Ter. [Okl.] 74 Pac. 899.

60. Verberg v. State [Ala.] 34 So. 848. Where defendant pleads to an indictment it is immaterial that because of bad handwriting his name as charged therein might be read differently; "Nill" or "Vill" for "Will." Neimann v. State [Tex. Cr. App.] 74 S. W. 558.

61. Davis v. State, 116 Ga. 87.

62. State v. Ulrich, 96 Mo. App. 689.

63. People v. Pierson, 80 App. Div. [N. Y.] 415.

64. Shivers v. Ter. [Okl.] 74 Pac. 899.

65. Statutory bribery—insufficient statement of offense. State v. Meysenburg, 171 Mo. 1.

66. State v. Gregory [Mo.] 76 S. W. 970.

67. Rev. Codes 1899, § 8082. State v. Tough [N. D.] 96 N. W. 1025. But see Code Cr. Proc. § 313. People v. Glen, 173 N. Y. 395.

68. Com. v. Gouger, 21 Pa. Super. Ct. 217.

69. Milby v. U. S., 120 Fed. 1; McElroy v. People, 202 Ill. 473; State v. Holder [N. C.] 45 S. E. 862; People v. Mills, 86 N. Y. Supp. 529.

70. Discrimination held not shown by evidence. Thompson v. State [Tex. Cr. App.] 74 S. W. 914; Binyon v. U. S. [Ind. T.] 76 S. W. 265; State v. Peoples, 131 N. C. 784; Jackson v. State [Tex. Cr. App.] 71 S. W. 280.

71. State v. Gardiner, 88 Minn. 130. Contra, Lindsay v. State, 24 Ohio Circ. R. 1.

72. Special assistant Attorney General. U. S. v. Rosenthal, 121 Fed. 862.

73. State v. Tyler [Iowa] 97 N. W. 983.

74. Thayer v. State [Ala.] 35 So. 406.

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that one of the grand jurors was disqualified,[75] but the contrary rule prevails.[76] Irregularity in summoning grand jury may be raised by motion to quash the indictment,[77] but not prejudice of individual grand jurors.[78] That defendant was not given an opportunity to challenge grand jurors,[79] and that an indictment was returned by the grand jury after the expiration of the term to which it was summoned, do not vitiate it.[80] Since the statute in Michigan expressly provides on what grounds a challenge to the array of a grand jury may be made, an indictment found by a de facto grand jury may not be set aside by such challenge on any other ground,[81] as that it was returned by the grand jury after the expiration of the term to which it was summoned.[82] In Florida, objections to the panels of grand juries not appearing of record must be taken by plea in abatement and not by motion to quash.[83]

Courts have the power to set aside indictments whenever it appears they have been found without evidence or upon illegal and incompetent testimony,[84] and an indictment sent before the grand jury without a preliminary hearing or the sanction of the court may be quashed.[85] That the information on which an indictment is founded does not contain as full and specific a statement of the offense as the indictment contains is no ground to quash,[86] and a demurrer on the ground that the indictment was not properly filed is properly overruled, since such omission may be corrected nunc pro tunc.[87] An error in the caption of the indictment as to the term at which it was found is not ground for a motion to quash, since the record shows the time and the caption is amendable by it.[88]

An objection that an indictment charges several petit larcenies rather than one grand larceny goes to the jurisdiction of the court and can be raised by an objection to the introduction of any evidence and motion to compel an election.[89] In Minnesota, duplicity may be objected to only by demurrer and not by objection to the introduction of evidence after plea.[90]

A general motion to quash an indictment need not set out the reasons relied on,[91] but a motion to quash for incorrect designation of accused is properly overruled where his correct name is not suggested therein.[92] A demurrer for misjoinder of offenses must specify the offenses joined.[93] A single demurrer or plea to two or more separate indictments is irregular and should be stricken out.[94] Where the accused believes that he is insufficiently advised by the indictment as to the particular facts that will be proved against him, his remedy is not by demurrer but by notice for a bill of particulars.[95] A motion to instruct the jury to

75. State v. Harris [Iowa] 97 N. W. 1093. A grand juror having an opinion unfavorable to the defendant is disqualified, and motion to set aside the indictment should be granted, though he states under oath that he acted fairly and impartially. People v. Landis [Cal.] 73 Pac. 153.

76. Cubine v. State [Tex. Cr. App.] 73 S. W. 396; State v. Ames [Minn.] 96 N. W. 330.

77. Bruen v. People [Ill.] 69 N. E. 24.

78. The objection can be made only before the grand jury is sworn. State v. Ames [Minn.] 96 N. W. 330.

79. Iowa Code, § 5319. State v. Phillips [Iowa] 94 N. W. 229.

80. People v. Morgan [Mich.] 95 N. W. 542.

81. Comp. Laws 1897, §§ 11881, 11882. People v. Salsbury [Mich.] 96 N. W. 936.

82. People v. Morgan [Mich.] 95 N. W. 542.

83. Tarrance v. Fla., 188 U. S. 519, 47 Law. Ed. 572.

84. People v. Glenn, 173 N. Y. 395. Presumption of regularity held not overcome. People v. Martin, 84 N. Y. Supp. 823.

85. Com. v. Sheppard, 20 Pa. Super. Ct. 417.

86. Com. v. Gouger, 21 Pa. Super. Ct. 217; Com. v. Campbell, 22 Pa. Super. Ct. 98.

87. Price v. State [Ark.] 71 S. W. 948; West v. State [Ark.] 71 S. W. 483.

88. U. S. v. Clark, 125 Fed. 92.

89. State v. Mjelde [Mont.] 75 Pac. 87.

90. Gen. St. 1894, §§ 7293, 7301. State v. Kunz [Minn.] 97 N. W. 131.

91. State v. McDaniel [Del.] 54 Atl. 1056.

92. Eddison v. State [Tex. Cr. App.] 73 S. W. 397.

93. Wells v. State [Ga.] 45 S. E. 443.

94. State v. Bartholomew [N. J. Law] 54 Atl. 231.

95. Pool selling. People v. Corbalis, 86 App. Div. [N. Y.] 782.

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find the defendant not guilty before the introduction of any evidence is in effect a demurrer to the indictment;[96] but objection to the introduction of any evidence under an information is not a proper method of assailing its sufficiency.[97] An indictment not absolutely void cannot be collaterally attacked by the sureties in the recognizance,[98] nor on habeas corpus in another jurisdiction.[99]

On demurrer to an indictment and bill of particulars, the court considered the indictment as though it contained a recital of all facts set forth in the bill.[1] On demurrer it is proper to allow the state to withdraw the indictment and present the matter to the grand jury anew, notwithstanding the statute providing that the court must give judgment on the demurrer.[2] After removal of cause, indictment is of record and not impeachable by evidence.[3] Grand jurors cannot testify to lack of majority.[4]

(§ 4) *F. Joinder and separation of counts and election. Joinder of parties.*—Two persons cannot be severally charged in a single count with committing different offenses;[5] but principals in the first and second degree and accessories before and after the fact may all be joined.[6] A joint indictment of two for murder is not bad for charging that "each of his malice aforethought" did kill deceased.[7]

Joinder of counts.—The joinder of different offenses in the same indictment in separate counts is not necessarily fatal to the pleading itself, as ground of demurrer or arrest of judgment,[8] but the court may in its discretion quash the indictment or compel the prosecutor to elect,[9] and two or more distinct misdemeanors of the same nature may always be joined.[10] Where an act may constitute one or more of several distinct crimes, each of such crimes may be charged in a separate count to meet the different phases of the proof,[11] and an offense and a conspiracy to commit such offense may be joined.[12] Two or more counts relating to the same transaction, but charging offenses under different statutes to meet different phases of the evidence, are properly joined.[13] Counts charging the forgery of a name by different spellings are proper, the different versions being idem sonans.[14] An indictment is not double because several defendants are jointly accused in the first count and in the other counts each defendant is accused of committing the offense and the others of aiding and abetting therein.[15]

Duplicity.—A count that charges two separate and distinct offenses is bad and should be quashed on motion;[16] but where a statute makes two or more dis-

96. State v. Sherman [Ark.] 74 S. W. 293.
97. State v. Gregory [Mo.] 76 S. W. 970.
98. Williams v. Candler [Ga.] 45 S. E. 989.
99. In the Supreme Court of the United States. Howard v. Fleming, 24 Sup. Ct. 49, 48 Law. Ed. ——.
1. U. S. v. Adams Exp. Co., 119 Fed. 240.
2. Comp. Laws, § 7295. State v. Ford [S. D.] 92 N. W. 18. N. Y. Code Cr. Proc. § 325. People v. Bissert, 172 N. Y. 643.
3. Hooker v. State [Md.] 56 Atl. 390.
4. Hooker v. State [Md.] 56 Atl. 390.
5. Giving and receiving bribe. U. S. v. Dietrich, 126 Fed. 664. Persons not playing together should not be prosecuted together for playing cards in a public place (Townsend v. State [Ala.] 34 So. 382) and an indictment charging a number of defendants with individual offenses is bad (Howard v. State [Miss.] 35 So. 653).
6. Bishop v. State [Ga.] 45 S. E. 614.
7. Woods v. State [Miss.] 32 So. 998.
8. Violation of election law. Com. v. Gouger, 21 Pa. Super. Ct. 217.
9. Violation of liquor law. State v. Blakeney [Md.] 54 Atl. 614.
10. Gambling and keeping gaming house. State v. Morgan [N. C.] 45 S. E. 1033.
11. Larceny and embezzlement (Davis v. U. S., 18 App. D. C. 468); forgery and uttering a forged instrument [Sand. & H. Dig. § 2078, subd. 7]. (Lawrence v. State [Ark.] 71 S. W. 263. Compare Burgess v. State [Miss.] 33 So. 499); nighttime burglary, nighttime burglary of a private residence, and burglary by force and threats (Jackson v. State [Tex. Cr. App.] 71 S. W. 280).
12. Use of mails to defraud. U. S. v. Clark, 125 Fed. 92.
13. Rape of imbecile and female under age of consent. State v. Trusty [Iowa] 97 N. W. 989.
14. "Veike" and "Vieke." Selby v. State [Ind.] 69 N. E. 463.
15. Shooting with intent to kill. Collins v. Com., 24 Ky. L. R. 884, 70 S. W. 187.
16. Maintaining liquor nuisances in two separate buildings. State v. Wester [Kan.] 74 Pac. 239.

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tinct acts connected with the same transaction indictable, each one of which may be considered as representing a phase of the same offense, they may be coupled in the same count,[17] and there is no misjoinder of offenses in a count that charges a statutory offense and includes therewith descriptive language used in a statute describing another crime,[18] or language charging an inferior degree or offense included in the crime charged;[19] but where the language used is in fact comprehensive enough to include two offenses, a demurrer should be sustained unless the prosecution elects to prosecute for one of them only.[20] A count charging that defendant did the unlawful act with two or more intents named in the statute,[21] or that defendant intended to consummate his unlawful purpose by two different means,[22] or that alleges a felonious taking as usual and that such taking was with the felonious intent to convert the property to defendant's use, is not double,[23] neither is a count charging that defendant embezzled property belonging to a certain company and divers persons unknown who had intrusted it to the company,[24] since taking by one act the property of several is a single offense.[25] The conjunctive averment of the different means or modes of committing an offense set out disjunctively in the statute is proper,[26] and the indictment may by statute allege the modes and means in the alternative.[27] By the express provisions of the act of congress, but three offenses committed within the same six calendar months can be joined in one count.[28] Where an indictment for murder in charging the assault describes but one wound, the averment that the person assaulted died "of said mortal wounds" will not render it double.[29] A charge that defendant, on a certain date and "on divers dates and days from thence continuously" to another date, converted funds to his own use, is not double, since it charges a continuous offense.[30] A charge of a bigamous marriage in another state and unlawful cohabitation in the state where the prosecution is had is not double, since the marriage is no crime in the state where the prosecution is had.[31] An indictment charging two as principals and one of the two as present aiding and procuring the felony is not double, since both are principals.[32]

Election.—Where more than one count is inserted in the indictment to meet the probable state of facts provable at the trial, it is not necessary for the state to elect,[33] but it is otherwise where several distinct offenses are charged,[34] though

17. Embezzlement of "money, property and securities" (State v. Bartholomew [N. J. Law] 54 Atl. 231); embezzlement by warehouseman (State v. Humphreys [Or.] 70 Pac. 824). Permitting turkey to be raffled for and won. Com. v. Coleman [Mass.] 68 N. E. 220. Vagrancy. Cody v. State [Ga.] 45 S. E. 622. Forgery. State v. Newton, 29 Wash. 373, 70 Pac. 31; People v. McGlade [Cal.] 72 Pac. 600; Brazil v. State, 117 Ga. 32. Larceny from person and pockets. State v. Dunn [Kan.] 71 Pac. 811. Violation of election law. Com. v. Hafer, 22 Pa. Super. Ct. 107. Burglary while armed with deadly weapon and committing assault on occupant. Davis v. State [Fla.] 35 So. 76.

18. Shooting with intent to kill [Ky. St. §§ 1166, 1224]. Collins v. Com., 24 Ky. L. R. 884, 70 S. W. 187. Felonious assault, resisting an officer. State v. Appleby [Kan.] 71 Pac. 847.

19. State v. Climie [N. D.] 94 N. W. 574.

20. Hawkins v. Com., 24 Ky. L. R. 1034, 70 S. W. 640.

21. Assault with intent to carnally know, and abuse. State v. Kunz [Minn.] 97 N. W. 131. Taking female for the purpose of prostitution and concubinage. Griffin v. State [Tenn.] 70 S. W. 61.

22. Use of mails to defraud. Kellogg v. U. S. [C. C. A.] 126 Fed. 323.

23. Van Syre v. State [Neb.] 96 N. W. 266.

24. Taylor v. Com. [Ky.] 75 S. W. 244.

25. State v. Mjelde [Mont.] 75 Pac. 87.

26. State v. Bartholomew [N. J. Law] 54 Atl. 231; People v. Corbalis, 86 App. Div. [N. Y.] 531. "Sell, give away and dispose of" intoxicating liquors. Crandr v. Albany [Or.] 71 Pac. 1042.

27. Ky. Cr. Code, § 126. Intercourse with female while she was insensible or incapable of exercising her will. Com. v. Lowe [Ky.] 76 S. W. 119.

28. Act Mch. 2, 1889, c. 393, 25 Stat. 873, U. S. Comp. St. 1901, p. 3696. Fraudulent use of mails. U. S. v. Clark, 125 Fed. 92.

29. State v. Phillips [Iowa] 92 N. W. 876.

30. State v. Dix [Wash.] 74 Pac. 570.

31. State v. Durphy [Or.] 71 Pac. 63.

32. Perjury. People v. Martin, 77 App. Div. [N. Y.] 396.

33. Theft and receiving stolen property. Bynum v. State [Tex. Cr. App.] 72 S. W. 844.

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no election between counts can be required in cases of misdemeanor.[35] Where an offense is charged as committed in the several ways in which it is described in the statute, the state cannot be required to elect on which act it will rely.[36] Where an indictment charges an offense on a certain date and evidence is introduced of prior attempts to commit the same offense, there is nothing requiring the state to elect;[37] but if there is evidence of several offenses, an election must be made.[38] Where an indictment assigns several statements as perjury, all growing out of the same testimony, the state cannot be compelled to elect.[39] Where one is charged both as agent and attorney of another, an election to rely on the relation of principal and agent is sufficient.[40] If proof of but one act be offered, that is a sufficient election.[41] Where several offenses are shown, the remedy is by motion to require an election, not by request for an instruction confining the jury to one.[42]

Consolidation.—In Louisiana, two indictments against two defendants for rape, each upon a separate female occurring the same day, were by consent of counsel consolidated and tried together, the supreme court remarking, however, that the practice was not to be commended.[43] By requesting that two indictments for misdemeanor and one for felony growing out of the same transaction be consolidated, defendant precludes himself from objecting to the consolidation, the waiver of separate trials going only to the misdemeanor.[44]

(§ 4) *G. Amendments. Indictments.*—An indictment cannot in general be amended as to matters of substance except by the grand jury of the county or district in which the crime occurred,[45] though the ancient rule has been somewhat relaxed in some states by statute,[46] but formal matters can be amended by the court in all cases where not unfair to the defendant.[47]

Informations.—The prosecuting attorney being, unlike the grand jury, always in court, an information is always amendable, as to matters of form[48] or sub-

Unlawful sale of liquor. Henry v. State [Ark.] 76 S. W. 1071. Delivering material to illicit distillery. Terry v. U. S. [C. C. A.] 120 Fed. 483. Rape of child under 15 and rape of imbecile. State v. Trusty [Iowa] 97 N. W. 989. Rape and rape under age of consent. Bigcraft v. People, 30 Colo. 298, 70 Pac. 417; Walker v. State [Ga.] 45 S. E. 621. Different assignments of perjury in an indictment where the same testimony supports them all. McLeod v. State [Tex. Cr. App.] 75 S. W. 522.

34. State v. Blakeney [Md.] 54 Atl. 614. Making and uttering counterfeit coin. Burgess v. State [Miss.] 33 So. 499.

35. Daniels v. State [Tex. Cr. App.] 77 S. W. 215.

36. Cody v. State [Ga.] 45 S. E. 622.

37. State v. Scott [Mo.] 72 S. W. 897.

38. State v. King, 117 Iowa, 404. Where defendants prosecuted for adultery were shown to have lived together several months an election as to a particular act is not necessary (State v. Higgins [Iowa] 95 N. W. 244) nor where but one act is shown by direct evidence (State v. Hasty [Iowa] 96 N. W. 1115). Where the evidence shows two altercations about fifteen minutes apart, it is error on trial of one charged with inciting a party thereto, not to require an election. Williams v. State [Tex. Cr. App.] 70 S. W. 957; State v. Norris [Iowa] 97 N. W. 999.

39. McLeod v. State [Tex. Cr. App.] 75 S. W. 522.

40. State v. Lewis [Wash.] 71 Pac. 778.

41. Going into proof of an act of sexual intercourse held an election on that act on an indictment for seduction. Pope v. State [Ala.] 34 So. 840.

42. David v. People [Ill.] 68 N. E. 540.

43. State v. Michel [La.] 35 So. 629.

44. Price v. State [Ark.] 71 S. W. 948.

45. An indictment which charges no offense cannot be amended by the court under statutes permitting amendments as to formal matters. Changing averment of age of child. People v. Trank, 85 N. Y. Supp. 55. Since the grand jury of one county cannot find an indictment for a crime committed in another, an indictment can be amended after a change of venue is had only by the grand jury of the original county finding a new indictment. State v. Bartlett, 170 Mo. 658, 59 L. R. A. 756.

46. Amendment as to paper set out by tenor in forgery case held proper [Vt. St. § 1912]. State v. Donovan [Vt.] 55 Atl. 611. An amendment on the trial of an indictment for larceny of a "gold" instead of a "silver" watch allowed. Meehan v. State [Wis.] 97 N. W. 173.

47. The caption of an indictment is amendable by the record. U. S. v. Clark, 125 Fed. 92. Where an indictment shows that it was returned at an impossible term of court it is proper to amend it so as to show its return at the term when it was in fact found. Reys v. State [Tex. Cr. App.] 76 S. W. 457. A clerical misprision as to defendant's name in one of the counts is amendable. Orr v. State [Miss.] 32 So. 998.

48. State v. Bugg [Kan.] 72 Pac. 236. A new information in which the several counts

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stance[49] at the same or a succeeding term[50] or during the trial,[51] within the discretion of the court.[52] The number of amended informations which may be filed rests in the discretion of the court.[53] An entirely new cause of action cannot be introduced, however,[54] though in New Hampshire it has been held that a petition for the abatement of a liquor nuisance may be so amended as to convert it into an information for a violation of the liquor law.[55]

An information may, by leave of court, be amended by the successor in office of the state's attorney filing the original,[56] but not in the county in which the criminal case is pending after a change of venue has been granted.[57]

On quashing an information, the court may permit a new one to be filed immediately, but defendant is then entitled to the statutory two days for preparation.[58]

(§ 4) *H. Conviction of lesser degrees and included offenses.*—Upon the trial of an indictment charging an offense consisting of different degrees, the jury may acquit the defendant of the degree charged and convict him of any of the inferior degrees.[59] Or if the offense charged includes minor constituent offenses, the conviction may be for one of those,[60] as for an attempt to commit the offense[61] or for an assault with intent to commit the offense;[62] and it is immaterial in most American states that the minor offense is only a misdemeanor while the offense charged is a felony.[63]

Several states have statutes providing that a conviction of an assault or attempt cannot be had where the evidence shows that the crime intended or attempted was actually committed in pursuance of such attempt.[64] And in the ab-

have proper commencements may properly be filed as an amendment to one deficient in such respects. Fortenberry v. State [Tex. Cr. App.] 72 S. W. 593. At common law and under Rev. St. 1899, § 2481. State v. Pyscher [Mo.] 77 S. W. 836.

49. An information for felony may be amended, as informations could be at common law, though at the common law prosecution by information was limited to misdemeanors. Secor v. State [Wis.] 95 N. W. 942.

50. Where one has been arraigned on an information for murder and the cause continued, the prosecuting attorney at the next term may file a new information charging the same crime on which the defendant may be arraigned and tried. State v. Vinso, 171 Mo. 576.

51. An information may be amended in matter of form at the trial, and when so amended need not be verified, nor is defendant entitled to a rearraignment. State v. Bugg [Kan.] 72 Pac. 236. Under the statute of Wisconsin, the description of anything in an information may be amended so as to avoid a variance, when the variance is not material to the merits [Rev. St. 1898, § 4703]. Description of watch stolen. Meehan v. State [Wis.] 97 N. W. 173. Where proof of the character of money embezzled is lacking the information may be amended after the state's case is closed by striking out the averment that it was "good and lawful money of the United States." Secor v. State [Wis.] 95 N. W. 942.

52. State v. Pyscher [Mo.] 77 S. W. 836.

53. The appellate court should not interfere with the action of the trial court unless it clearly appears that defendant has been deprived of a constitutional or other substantial privilege or right which would operate prejudicially to him in the trial of the cause. State v. Pyscher [Mo.] 77 S. W. 836.

54. State v. Jenkins, 92 Mo. App. 439.

55. State v. Lynch [N. H.] 55 Atl. 553.

56. State v. Barrell [Vt.] 54 Atl. 183.

57. State v. Bartlett, 170 Mo. 658, 59 L. R. A. 756.

58. White's Ann. Code Cr. Proc. art. 567, § 577. Whitesides v. State [Tex. Cr. App.] 71 S. W. 969.

59. Murder. Russell v. State [Neb.] 92 N. W. 751; State v. Cole [N. C.] 44 S. E. 391. Assault with dangerous weapon, and simple assault. State v. Climie [N. D.] 94 N. W. 574. Assault with intent to murder,—intent to do great bodily harm. Birker v. State [Wis.] 94 N. W. 643. Shooting with intent to kill, and wounding under circumstances that would have amounted to manslaughter had death ensued. State v. Ryno [Kan.] 74 Pac. 1114.

60. Breaking and entering with intent to steal—entering with intent to steal. State v. Tough [N. D.] 96 N. W. 1025. Murder and shooting at another. Watson v. State, 116 Ga. 607. Murder and manslaughter. U. S. v. Densmore [N. M.] 75 Pac. 31. Indictment for assault with intent to murder supports conviction of assault. State v. Di Guglielmo [Del.] 55 Atl. 350. Where there is no proof of the intent in a prosecution for assault with intent to rape, the court has jurisdiction to submit the issues of assault and aggravated assault. Caddell v. State [Tex. Cr. App.] 72 S. W. 1015. Indictment for challenging to duel—conviction of affray. State v. Fritz [N. C.] 45 S. E. 957.

61. Selling liquor to Indian. Ex parte Finnegan [Nev.] 71 Pac. 642.

62. Rape. Duggan v. State, 116 Ga. 846.

63. Watson v. State, 116 Ga. 607.

64. Mo. Rev. St. 1899, § 2361. Rape. State v. Scott [Mo.] 72 S. W. 897.

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sence of such a statute where in rape the prosecutrix was under age and consented, no conviction of lesser degrees can be had.[65] But an indictment for common-law rape includes an assault with intent to rape, assault and battery, and simple assault, and it is error not to so instruct.[66]

One indicted for larceny cannot, on failure of proof of felonious intent, be convicted of the statutory misdemeanor of taking possession of the property of another without his consent but not feloniously.[67] And where a count charges a greater as well as a lesser offense, the defendant may be placed on trial for the lesser offense.[68]

§ 5. *Arraignment and plea. Arraignment.*—In most jurisdictions a formal arraignment is not necessary if the substantial rights of accused are preserved.[69] Defendant may waive formal arraignment.[70] Defendant is not entitled to a new arraignment where the information is amended at the trial,[71] or where a new information is filed in lieu of one lost.[72] Persons jointly indicted may be arraigned either jointly or separately.[73] A defendant may appear by counsel and refuse to plead to a misdemeanor.[74]

Time to plead is in most states allowed by statute.[75]

General pleas.—The court after setting aside verdict for first degree may at same term accept plea of guilty for included offense over prosecutor's objection.[76] Withdrawal of a general plea is in the discretion of the court.[77] Where the indictment specifically sets out the value of the stolen property the court need not on plea of guilty take testimony as to value.[78] A statute imposing on the court the duty of determining the degree of a crime where the defendant pleads guilty is not unconstitutional.[79]

Pleas in abatement and special pleas.—A plea in abatement is necessary to raise the objection that there was no preliminary examination[80] or that defendant is being tried for an offense different from that for which he was extradited.[81] Mere irregularities in drawing the grand jury are no ground for abatement.[82] After information it is no ground of abatement that defendant has not been arrested.[83] Pleas in abatement should be separately tried[84] and must be made at

65. State v. King, 117 Iowa, 404.
66. State v. Trusty [Iowa] 92 N. W. 677.
67. Del. Rev. Code, p. 944. State v. Palmer [Del.] 53 Atl. 359.
68. Larceny from the person, simple larceny. People v. Stein, 80 App. Div. [N. Y.] 357.
69. Record held to show that defendant was informed of his right to have counsel (People v. Miller, 137 Cal. 642, 70 Pac. 735) and that he was asked as to his plea (Id.).
70. Hudson v. State [Ga.] 45 S. E. 66; Shivers v. Ter. [Okl.] 74 Pac. 899. Waived by pleading. Bassett v. State [Fla.] 33 So. 262.
71. State v. Bugg [Kan.] 72 Pac. 236.
72. Goodman v. State [Ind.] 69 N. E. 442.
73. Moore v. State [Fla.] 32 So. 795.
74. But he cannot thus plead guilty under Code Cr. Proc. (N. Y.) § 335. People v. Welsh, 84 N. Y. Supp. 703.
75. It is only in capital cases that 24 hours after service of indictment is allowed. State v. Hunter, 171 Mo. 435. Where a substituted information is filed the full time is allowed from such filing. Whitesides v. State [Tex. Cr. App.] 71 S. W. 969; McFadin v. State [Tex. Cr. App.] 72 S. W. 172.
76. U. S. v. Linnier, 125 Fed. 83.
77. Oakley v. State [Ala.] 33 So. 23; Morrell v. State [Ala.] 34 So. 208. Refusal to permit withdrawal of plea to merits and plead misnomer is in discretion. Verberg v. State [Ala.] 34 So. 848. A statute that the court "may" permit a plea of guilty to be withdrawn at any time before judgment, is mandatory. State v. Hortman [Iowa] 97 N. W. 981. Where after an inquest to determine punishment on plea of guilty the court announced its decision but fixed a future day to pronounce sentence, the plea may be withdrawn, under Code, § 5337 allowing withdrawal "before judgment." State v. Hortman [Iowa] 97 N. W. 981.
78. Marx v. People [Ill.] 68 N. E. 436.
79. As against the provision that trial of crimes shall be by jury [Pen. Code Cal. § 1192, supplemented by Code Civ. Proc. § 187 (as to means of carrying its jurisdiction into effect)]. People v. Chew Lan Ong [Cal.] 75 Pac. 186.
80. Jahnke v. State [Neb.] 94 N. W. 158; Reed v. State [Neb.] 92 N. W. 321. Plea of no preliminary examination held to state a mere conclusion. State v. Patterson [Kan.] 71 Pac. 860.
81. State v. Roller, 30 Wash. 692, 71 Pac. 718.
82. Lindsay v. State, 24 Ohio Circ. R. 1.

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arraignment.[85] A plea of irregularity in drawing the grand jury[86] or in its proceedings[87] must be certain to every intent.[88] Demurrer to a plea in abatement that "the facts stated are not sufficient to constitute a plea in abatement" is bad.[89] A plea of *present insanity* must show incapacity to proceed to trial.[90] The burden is on defendant to establish his plea if it is denied,[91] and a verdict thereon may be set aside as against the weight of evidence.[92] A special plea in bar[93] or a plea in abatement is not to be taken as true because not traversed.[94]

A plea of former acquittal or conviction must allege that defendant was either acquitted or convicted.[95] Where a plea of former conviction is sustained after verdict of guilty, the proper practice is to sustain the plea as on demurrer, not to enter a judgment of acquittal on the verdict.[96]

§ 6. *Preparation for, and matters preliminary to, trial.*—It is generally provided by statute that defendant be served with a copy of the indictment or information,[97] the jury list,[98] and sometimes with a list of the witnesses.[99] Allowance of a bill of particulars is generally discretionary.[1]

83. Sothman v. State [Neb.] 92 N. W. 303.
84. Davis v. State [Ala.] 33 So. 818.
85. Morrell v. State [Ala.] 34 So. 208.
86. Kelly v. State [Fla.] 33 So. 235; Ford v. State [Fla.] 33 So. 301. Plea of race discrimination in drawing grand jury held insufficient. Kelly v. State [Fla.] 33 So. 235.
87. Plea that defendant was required to testify before grand jury held insufficient. Lindsay v. State, 24 Ohio Circ. R. 1.
88. Plea in abatement that defendant was compelled to testify before grand jury, which does not state how he was compelled to testify or that he stated anything material, is not good. Lindsey v. State [Ohio] 69 N. E. 126.
89. The proper form is that "it does not state facts sufficient to quash the indictment or abate the action." State v. Katzman [Ind.] 69 N. E. 157.
90. State v. Spivey [N. C.] 43 S. E. 475.
91. Everson v. State [Neb.] 93 N. W. 394; Oakley v. State [Ala.] 33 So. 693.
92. The proceeding to try such plea being civil. State v. Ellsworth, 131 N. C. 773.
93. Former jeopardy. State v. Lewis [Wash.] 71 Pac. 778.
94. Wells v. State [Ga.] 45 S. E. 443.
95. Code Cr. Proc. § 334. People v. Smith, 172 N. Y. 210. A plea of former acquittal is sufficient if it shows on its face that such acquittal was for the same criminal act which is the basis of the second indictment. State v. Klugherz [Minn.] 98 N. W. 99.
96. State v. Taylor [N. C.] 46 S. E. 5.
97. The Code provision that defendant be served with a certified copy of the indictment is mandatory [Code Cr. Proc. arts. 540, 541]. Holden v. State [Tex. Cr. App.] 71 S. W. 600. Under a statute requiring a copy of the information to be given to the defendant a true copy is meant. State v. De Wolfe [Mont.] 74 Pac. 1084. Where the copy of an information delivered to the accused is not a true copy and the court sustains his objection thereto and orders a true copy to be furnished to him, a refusal to allow him the statutory time to plead thereafter is reversible error. Id. Where the statute requires that defendant shall be served with a true copy of the indictment, he may object to going to trial where there is a variance in the copy served as to a material allegation. Variance in the copy in alleging the crime to have been committed on a day subsequent to the trial is fatal under Bill of Rights, § 10, Code Cr. Proc. 1895, arts. 540-542, 567-569. Lightfoot v. State [Tex. Cr. App.] 77 S. W. 792. A demand for a copy of the indictment is properly refused when demanded for the first time after the state announces itself ready for trial on a new trial after a prior conviction [Code Cr. Proc. 1895, art. 540, requires a copy to be furnished]. Scoville v. State [Tex. Cr. App.] 77 S. W. 792. Filing of a new information in place of one which is lost entitles defendant to the time of service provided by statute. There was no attempt at substitution. Stepp v. State [Tex. Cr. App.] 77 S. W. 787.
98. In a prosecution for perjury the defendant is entitled only to a list of the jurors before trial if requested, under Rev. St. Mo. 1899, § 2619. State v. Faulkner [Mo.] 75 S. W. 116. The provision requiring the residence of the jurors to be given is directory only. White v. State [Ala.] 34 So. 177. An order for the service of the panel as "drawn" is complied with by the service of a list covering not only those drawn from the box, but the talesmen. Smith v. State [Ala.] 34 So. 168. Service on the defendant's counsel of a list of special jurors by the clerk is sufficient; it need not be served by the sheriff. State v. Faulkner [Mo.] 75 S. W. 116. Rev. St. Mo. 1899, § 2619, providing the time for delivering a list of special jurors to the defendant, and § 6566 providing for the drawing of special jurors in certain cities are not in conflict. Id.
99. The list of witnesses may be served on defendant's attorney if defendant cannot be found by diligent search (Code, § 5373) though he is in the county. State v. Hasty [Iowa] 96 N. W. 1115. Omission of residence of witness is not prejudicial where his residence was known to defendant's attorney. State v. Greenleaf, 71 N. H. 606. Since the adoption of the Arkansas Criminal Procedure for the Indian Territory, defendant is not entitled to a list of all the witnesses to be produced at the trial who have not been examined before the grand jury [Rev. St. § 1033 is superseded by Mansf. Dig. § 2103; Ind. T. Ann. St. 1899, § 1446]. Binyon v. U. S. [Ind. T.] 76 S. W. 265. Designation of a divorced woman by her maiden name by which she has gone since her divorce is not

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§ 7. *Postponement of trial.*[2]—The court may disregard its own rules as to continuance.[3] Applications for postponement are addressed to the discretion of the court.[4] Postponement should be granted for lack of opportunity for preparation,[5] as where the requirements as to service of list of witnesses were not complied with,[6] or absence of counsel,[7] but diligence must be shown,[8] and one who fled after arraignment is for that reason not entitled to a continuance.[9] Continuance should be granted for the absence of a witness,[10] but it must appear that his testimony is competent and material,[11] credible,[12] not merely cumulative or im-

misleading. Bird v. U. S., 187 U. S. 118, 47 Law. Ed. 100.

1. Bill of particulars is discretionary, but in embezzlement, nuisance, conspiracy to cheat, and like crimes chargeable in general terms should on a proper motion and showing be allowed. Mathis v. State [Fla.] 34 So. 287. Brass v. State [Fla.] 34 So. 307. A bill of particulars of an indictment for obtaining money by means of the confidence game need not be furnished. DuBois v. People [Ill.] 65 N. E. 658. Where the evidence at the preliminary examination fully apprised defendant of the charge a bill of particulars may be refused. Secor v. State [Wis.] 95 N. W. 942. A bill of particulars setting forth the failure to account for certain sums received at various times does not show more than one offense to be proved. State v. Dix [Wash.] 74 Pac. 570. Motion for bill of particulars should specify wherein particularity is wanting and what is needful. Mathis v. State [Fla.] 34 So. 287. After plea to merits bill of particulars is wholly within discretion. Id.

2. The practice of filing away indictments and discharging defendant from custody, he insisting on trial, is improper. Jones v. Com., 24 Ky. L. R. 1434, 71 S. W. 643. Grand jury cannot continue a presentment. State v. Graham [Ala.] 33 So. 826.

3. Loose v. State [Wis.] 97 N. W. 526.

4. Simmons v. State, 116 Ga. 583; Shoun v. State [Tenn.] 78 S. W. 91; Hardy v. State, 117 Ga. 40; State v. Croney [Wash.] 71 Pac. 783. A continuance at the first term is equally within the discretion of the trial judge as if made at a subsequent term. Shoun v. State [Tenn.] 78 S. W. 91.

5. Where the jail was quarantined for small pox down to the day of trial, it is error to refuse a continuance. Mays v. Com. [Ky.] 76 S. W. 162. Denial of continuance for want of preparation held error where defendant was put on trial four days after the crime and on the day of indictment. Hensley v. Com., 25 Ky. L. R. 48, 74 S. W. 677.

6. A statute allowing defendant a continuance where the state obtains leave to examine witnesses not testifying before the grand jury without giving four days' notice, is satisfied by a continuance of more than four days. Continuance over the term is not required. State v. Snider [Iowa] 91 N. W. 762. Indorsement of names on indictment after trial has begun is ground for continuance. State v. Lewis [Wash.] 72 Pac. 121.

7. Refusal of a continuance on the ground of absence of counsel is not error where injury is not shown and defendant is represented by the counsel. Thompson v. State [Tex. Cr. App.] 77 S. W. 449; State v. Murray, 111 La. ——, 35 So. 786; Marchan v. State [Tex. Cr. App.] 75 S. W. 532.

8. 18 days elapsed after it was known that counsel could not attend. Bunn v. People, 103 Ill. App. 336.

9. Hubbard v. State [Neb.] 91 N. W. 869.

10. Dean v. State [Tex. Cr. App.] 77 S. W. 803. Torno v. State [Tex. Cr. App.] 75 S. W. 500. Error to require deposition of witness temporarily ill to be taken. Price v. State [Ark.] 71 S. W. 948. Where trial was the day after indictment refusal of continuance for absence of witness who did not appear on subpoena held error. Fooshee v. State [Miss.] 34 So. 148. An unsupported assertion that a material witness is being held under indictment as an accomplice to deprive defendant of the full value of his testimony is not ground for continuance. Moore v. State [Tex. Cr. App.] 72 S. W. 595. Witness corroborating defendant on disputed point. Hendrickson v. Com., 24 Ky. L. R. 2173, 73 S. W. 764. That a codefendant was a fugitive is not ground for continuance. Godwin v. State [Tex. Cr. App.] 73 S. W. 804. Trial should await return of subpoenas to witnesses in foreign counties, they having been seasonably procured. State v. Scott [La.] 34 So. 479. Showing for continuance is not necessary in such case until after reasonable time. Id. A continuance should be granted on account of the absence of a witness in a homicide case who will testify that deceased made the first hostile demonstration. Poole v. State [Tex. Cr. App.] 76 S. W. 565. Absence because of sickness of an eye witness to crime held ground for continuance. Swan v. State [Tex. Cr. App.] 76 S. W. 464. Refusal of continuance for absence of witness to testify that he was owner of alleged stolen property and had authorized defendant to take it held error. Bain v. State [Tex. Cr. App.] 74 S. W. 542. It is error to deny a motion for a new trial where the affidavit of an absent witness shows absolutely that he would have testified to the material facts on which the application for continuance is based. Freeman v. State [Tex. Cr. App.] 75 S. W. 505. Denial of continuance for absence of witness to prove declaration of deceased to facts amounting to justification held error. Dewberry v. State [Tex. Cr. App.] 74 S. W. 307. Refusal of continuance for absence of witness to testify that she heard prosecutor authorize defendant to sign alleged forged note held error. Knowles v. State [Tex. Cr. App.] 74 S. W. 767.

11. Evidence immaterial. Hubbard v. State [Neb.] 91 N. W. 869; Bowers v. State [Tex. Cr. App.] 71 S. W. 284; Ray v. State [Tex. Cr. App.] 75 S. W. 798; Atkins v. State [Tex. Cr. App.] 70 S. W. 744. Evidence as to inadmissible declarations of deceased.

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peaching,[13] and that diligence was exercised to procure the attendance of the proposed witnesses.[14] Unless otherwise provided by statute,[15] an admission that the

Moore v. State [Tex. Cr. App.] 70 S. W. 89. Evidence of insanity which was not made an issue. Merrell v. State [Tex. Cr. App.] 70 S. W. 979. Evidence as to age of victim of rape held material. Brock v. State [Tex. Cr. App.] 17 S. W. 20, 60 L. R. A. 465. Evidence tending to show conspiracy against defendant by accomplices testifying for state held material. Truelove v. State [Tex. Cr. App.] 71 S. W. 601. Alibi evidence indefinite as to time. McCoy v. State [Tex. Cr. App.] 73 S. W. 1057. A continuance to obtain a witness to show that the accused and the deceased were in the habit of using rough language to each other without animus, is properly refused, the witness not being present at the time of the crime. Connell v. State [Tex. Cr. App.] 75 S. W. 512. Continuance for absence of witness to testify to his ownership of certain property not identified as that alleged to be stolen properly refused. Ivey v. State [Tex. Cr. App.] 74 S. W. 549. Absence of a witness by whom defendant expected to prove that the family of prosecutrix had made other accusations as to the crime, is not ground for a continuance where it is not shown that an attempt was made to shift the offense to the persons thus accused. Thompson v. State [Tex. Cr. App.] 77 S. W. 449.

12. Evidence probably false. Roberts v. State [Tex. Cr. App.] 70 S. W. 423; Dodd v. State [Tex. Cr. App.] 72 S. W. 1015. Evidence at trial showed probable falsity. Landreth v. State [Tex. Cr. App.] 70 S. W. 758; Godwin v. State [Tex. Cr. App.] 73 S. W. 804; Hays v. State [Tex. Cr. App.] 72 S. W. 598.

13. Crow v. State [Tex. Cr. App.] 72 S. W. 392; State v. Phillips [S. D.] 98 N. W. 171; Trim v. State [Miss.] 33 So. 718; Knowles v. State [Tex. Cr. App.] 72 S. W. 398; Kelly v. State [Tex. Cr. App.] 71 S. W. 756; Bearden v. State [Tex. Cr. App.] 73 S. W. 17; Wilson v. State [Tex. Cr. App.] 73 S. W. 964; Lively v. State [Tex. Cr. App.] 73 S. W. 1048; McLeod v. State [Tex. Cr. App.] 75 S. W. 522; Cogdell v. State [Tex. Cr. App.] 74 S. W. 311; Gaines v. State [Tex. Cr. App.] 77 S. W. 10. A continuance will not be granted in behalf of defendants on account of the absence of the prosecuting witness by whose evidence defendant expects to prove that witness was the aggressor. It appeared that the witness had made a contrary statement at a previous trial and the affidavits attached to the motion for continuance were as to matters which could not be used save in impeachment of such evidence. Gatling v. State [Tex. Cr. App.] 76 S. W. 471; Thompson v. State [Tex. Cr. App.] 77 S. W. 449; Kipper v. State [Tex. Cr. App.] 77 S. W. 611. Absence of a witness as to character not ground for continuance where there were other witnesses thereto though not as many as the state produced in rebuttal. Salmons v. State [Ga.] 45 S. E. 611. Continuance held proper to obtain letter impeaching state's principal witness. Bismarck v. State [Tex. Cr. App.] 73 S. W. 965.

14. Jones v. State [Fla.] 32 So. 793; Hubbard v. State [Neb.] 91 N. W. 869; State v. Morgan [Utah] 74 Pac. 526; Harter v. People [Ill.] 68 N. E. 447. Where process for a witness is not called for until months after the return of the indictment and but a few days before trial, a continuance on account of his absence cannot be granted. Ford v. State [Tex. Cr. App.] 77 S. W. 800. Continuance properly refused for absence of witness where it appears that process for the witness was not issued until after publication in daily papers that he had removed from the city, and he had not been summoned at a previous trial. Wash. v. State [Tex. Cr. App.] 77 S. W. 810. Announcing ready for trial and not asking compulsory process. Philpot v. Com., 24 Ky. L. R. 757, 69 S. W. 959. Defendant knew that witness was going in time to have taken deposition. State v. Williams, 170 Mo. 204. Subpoena served on wrong person no showing as to when mistake was discovered. State v. Lynn, 169 Mo. 664. Doctor's certificate of illness of witness but no subpoena issued. Kelly v. State [Tex. Cr. App.] 71 S. W. 756. No subpoena issued for one witness and no showing as to what was done under attachment for another. Id. No effort to discover residence of witness. Atkins v. State [Tex. Cr. App.] 70 S. W. 744. New subpoenas not issued after continuance. Francis v. State [Tex. Cr. App.] 70 S. W. 751. Diligence held sufficient. Subpoena and attachment issued. Bismarck v. State [Tex. Cr. App.] 73 S. W. 965. Service of process on sick witness the day before the trial is sufficient diligence. Martin v. State [Tex. Cr. App.] 72 S. W. 386. Witness at place of trial and whereabouts known to defendant. Berry v. State [Tex. Cr. App.] 72 S. W. 170. Subpoena not issued until long after indictment. Merrell v. State [Tex. Cr. App.] 70 S. W. 979. Diligence held sufficient where subpoena was issued and witness not found; it appearing that on the next day he was at his residence. Truelove v. State [Tex. Cr. App.] 71 S. W. 601. Where the testimony was very important it was held error to refuse a continuance though due diligence did not appear. Ball v. State [Tex. Cr. App.] 72 S. W. 384. Continuance to obtain witnesses will not be granted where there had been a previous continuance to obtain the depositions of such witnesses, and no effort to do so had been made, and subpoenas to two of the witnesses had been returned, and one of them was ill. Keffer v. State [Wyo.] 73 Pac. 556. Refusal of continuance proper where for two months defendant took no steps to secure attendance of his witnesses. State v. Box, 66 S. C. 402. Obtaining the promises of witnesses to attend without subpoenaing them is not sufficient diligence. State v. Phillips [S. D.] 98 N. W. 171. Application for a second continuance for an absent witness is properly refused where the defendant does not show that he used due diligence to obtain the witness or his deposition. Hutsell v. Com. [Ky.] 75 S. W. 225. A continuance to obtain an absent witness is properly refused where due diligence has not been used to obtain him. Carroll v. State [Ark.] 75 S. W. 471. One who fails to have his witnesses arrested and put under bond to appear is not entitled to a continuance if they fail to appear on subpoena. State v. Hutto [S. C.] 45 S. E. 13. Diligence to secure depositions of ab-

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witness will testify as stated will not avoid a continuance.[16] The cases are conflicting as to whether an opportunity to take the deposition of a witness bars a continuance because of his absence.[17] Disqualification of regular jury panel is no ground for continuance.[18] Refusal to delay trial to bring in venireman whom the court is informed is a Federal officer is proper.[19] A postponement of a trial until after that of a co-defendant will be refused where by reason of a change of venue it would work a continuance.[20] Trial not postponed to admit amendment of immaterial variances.[21] The application[22] must be in writing,[23] and must state that defendant believes that the alleged testimony of the absent witness was true.[24] The papers must show due diligence,[25] that there were no other witnesses by whom the facts could be as well proved,[26] that the witness is unable to appear,[27] that he is not absent by defendant's consent or procurement,[28] is necessary,[29] will be able to attend if a continuance is granted,[30] and show what his testimony will be.[31] Counter affidavits may be heard,[32] but facts controverting the facts ex-

sent witnesses must be displayed to warrant a continuance. Rush v. State [Tex. Cr. App.] 76 S. W. 927. A continuance on the ground of absence of witnesses may be denied where there is no showing of diligence. Witness to show that property alleged to have been stolen from a certain locality had in fact in a different locality long previous to the crime. Thompson v. State [Tex. Cr. App.] 76 S. W. 561. Failure to ask for attachment or take deposition. Cogdell v. State [Tex. Cr. App.] 74 S. W. 311. Where defendant made no application to have a witness summoned until after the state rested and the witness was then 50 miles distant though he had been present during part of the trial the application will be denied. People v. Hossler [Mich.] 97 N. W. 754. Not sufficient to show that a deposition was forwarded to the place where the witness resided without a statement that funds were forwarded therewith, it being merely stated that defendant's friends provided the necessary funds to pay the expense of taking the depositions, and want of diligence in summoning the witness before a second indictment was presented excused only by the fact that the witness who was a soldier had been discharged at about that time and his locality had remained undisclosed until the depositions were sent. Kipper v. State [Tex. Cr. App.] 77 S. W. 611. It is proper diligence, authorizing a continunace, for a subpoena to be issued and placed in the hands of the sheriff for witnesses residing within a mile of the place of trial three days before the date of trial. O'Rear v. Com. [Ky.] 78 S. W. 407.

15. Leger v. Com., 25 Ky. L. R. 4, 74 S. W. 704; Watson v. State [Ga.] 44 S. E. 803; State v. Hutto [S. C.] 45 S. E. 13; Stevens v. State [Ala.] 35 So. 122. Second continuance. Howard v. Com., 24 Ky. L. R. 612, 69 S. W. 721. Act May, 1886, allowing affidavit to be admitted to avoid continuance is constitutional. Howard v. Com., 24 Ky. L. R. 950, 70 S. W. 295; Davis v. Com. [Ky.] 77 S. W. 1101; Powers v. Com., 24 Ky. L. R. 1007, 70 S. W. 644; Id., 24 Ky. L. R. 1186, 70 S. W. 1050. Defendant may thus avoid application by state. State v. Lewis [Wash.] 71 Pac. 778.

16. Watson v. State [Miss.] 33 So. 491.

17. That it does not. Price v. State [Ark.] 71 S. W. 948. That it does. State v. Williams, 170 Mo. 204. And see Powers v. Com. [Ky.] 70 S. W. 644, and Collins v. Com. [Ky.] 70 S. W. 187, where the use of depositions cured denial of continuance.

18. Grant v. State [Tex. Cr. App.] 70 S. W. 954.

19. Tarver v. State [Ala.] 34 So. 627.

20. Under Code Cr. Proc. Tex. 1895, art. 707, authorizing a postponement until after a codefendant is tried provided it does work a continuance. Locklin v. State [Tex. Cr. App.] 75 S. W. 305.

21. State v. Donovan [Vt.] 55 Atl. 611.

22. A motion and affidavit for a continuance not setting forth the names and residence of the witnesses, the facts which they are expected to prove, their materiality to the case, and why their presence cannot be had, is properly overruled. State v. Leary [La.] 35 So. 559.

23. Hathaway v. State [Tex. Cr. App.] 70 S. W. 88. A motion is required and a mere statement of counsel is insufficient. Adams v. State [Ga.] 43 S. E. 703.

24. State v. Blitz, 171 Mo. 530.

25. Not a mere conclusion. Puckett v. State [Ark.] 70 S. W. 1041. An affidavit that attachments had been issued but not stating that they had been placed in the hands of an officer is insufficient. Harris v. Com. [Ky.] 74 S. W. 1044.

26. Bunn v. People, 103 Ill. App. 336.

27. It is not error to refuse a motion for a continuance where it is not made to appear that any of the witnesses are absent or that the defendant will be prejudiced by going to trial on the day set. State v. Michel, 111 La. ——, 35 So. 629. The mere fact that the husband of a witness is sick does not establish her inability to attend. State v. Hasty [Iowa] 96 N. W. 1115. When trial comes on at second term state can have continuance only by showing name of witness, materiality and expectation of attendance. State v. McDaniel [Del.] 54 Atl. 1056.

28. Arnett v. Com., 24 Ky. L. R. 1440, 71 S. W. 635.

29. State v. Fay [Minn.] 92 N. W. 978.

30. Kelly v. State [Tex. Cr. App.] 71 S. W. 756. The application should show the residence of the witness and a probability that he can be produced at the next term. Ditmer v. State [Tex. Cr. App.] 74 S. W. 34. At the next term of court, of witnesses residing without the state. Keffer v. State [Wyo.] 73 Pac. 556.

31. State v. Newton, 29 Wash. 373, 70 Pac.

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pected to be shown by an absent witness are not admissible to avoid a continuance.[33] Where time to discover evidence is sought there must be a showing as to its probable existence.[34]

§ 8. *Dismissal or nolle prosequi before trial.*—It is provided by statute in many states that if defendant is not indicted within a certain time,[35] or if after indictment he is not brought to trial within a prescribed time,[36] he is entitled to a dismissal. Lapse of a term after commitment for trial without convention of the court does not work a discontinuance.[37] An agreement of counsel as to the punishment on one indictment and for a dismissal of others is not binding.[38]

31; Fox v. State [Tenn.] 76 S. W. 815. Affidavit should fully state proposed testimony —statement that witness would testify to improper familiarity with prosecutrix, no time or place being given, insufficient. Merrell v. State [Tex. Cr. App.] 70 S. W. 979. It must appear that the witness knew of his own knowledge the facts stated. Lively v. State [Tex. Cr. App.] 73 S. W. 1048. Not sufficient to state that it was expected to prove by a witness in a prosecution for sale of intoxicating liquors that witness was living with defendant at the time of the offense, intimately connected with his business and actions, and during such time and at the time alleged in the indictment defendant never sold or was interested in the sale of intoxicating liquors. Ford v. State [Tex. Cr. App.] 77 S. W. 800. The trial court may compel defendant to disclose what he expects to prove by an absent witness. State v. Jones [W. Va.] 45 S. E. 916. Continuance of prosecution for hunting on posted lands properly denied where affidavit as to absent witness to testify that one gate was unposted failed to show which gate. Davis v. State [Tex. Cr. App.] 74 S. W. 909. A continuance is properly refused where sought on account of absence of witnesses shown by defendant's evidence not to have knowledge of the facts he seeks to establish. Alibi. Leach v. State [Tex. Cr. App.] 77 S. W. 220. Absence of a witness by whom defendant intended to prove that statements made by a witness for the state were procured through intimidation, should disclose what such statements were. Thompson v. State [Tex. Cr. App.] 77 S. W. 449. A motion for a continuance on account of the absence of a witness by whom defendant intends to prove an alibi, should be specific as to the place at which defendant was. Thompson v. State [Tex. Cr. App.] 77 S. W. 449.

32. It is proper practice within proper limits to allow the introduction of counter affidavits on a motion for a continuance at the sound discretion of the trial judge, but the affidavits should not be allowed to go to the extent of trying a case on its merits on the preliminary question of a continuance. Shoun v. State [Tenn.] 78 S. W. 91. Where the ground for an application for a continuance for absent witnesses is controverted the court may refuse to hear evidence on the controversy. Where the applicant claimed to have been misled as to the time of the trial, which fact was controverted by the prosecuting attorney. Nelson v. State [Tex. Cr. App.] 75 S. W. 502. A motion for a continuance on the ground of absent witnesses, is properly denied where the statement as to what the witnesses would testify, is controverted by affidavits of the witnesses themselves and other persons. Rush v. State [Tex. Cr. App.] 76 S. W. 927. The motion for continuance is properly denied where the state produces the affidavit of the absent witness denying the facts which the motion states he will testify to. Gaines v. State [Tex. Cr. App.] 77 S. W. 10; Wilson v. State [Tex. Cr. App.] 72 S. W. 862; Ransom v. State [Tex. Cr. App.] 70 S. W. 960. Proposed evidence contradicted by several affidavits. Johnson v. State [Tex. Cr. App.] 71 S. W. 25.

33. Wilburn v. State [Tex. Cr. App.] 77 S. W. 3.

34. Affidavit of insufficient time for preparation held insufficient. No showing of witness who might have been procured. State v. Vance, 29 Wash. 435, 70 Pac. 84; Webb v. State [Ala.] 33 So. 487; Simmons v. State, 116 Ga. 583.

35. Under a statute requiring a dismissal if an information is not filed within a certain time after the defendant was held to answer unless good cause to the contrary is shown, an error of one day in the stenographer's notes will warrant a refusal to dismiss, where the trial is had within sixty days from the commission of the offense [Pen. Code Cal. § 1382]. People v. Farrington [Cal.] 74 Pac. 288.

36. The four months within which a defendant must be brought to trial runs from the magistrate's commitment, not from indictment [Cr. Code par. 623]. Guthman v. People, 203 Ill. 260. "Admitted to bail" in a statute requiring speedy trial of persons not so admitted means released on bail. State v. Larson [N. D.] 97 N. W. 537. Where the delay was on application of defendant, he is not entitled to release. Id. Second continuance at request of state after reversal and remand held denial of right to speedy trial. Ex parte Wells [Tex. Cr. App.] 74 S. W. 541. The fact that defendant was released on bail for a few hours only and then confined in jail does not affect such right. Holden v. State [Tex. Cr. App.] 71 S. W. 600. A statutory provision giving a defendant a right to discharge, in case he is not brought to trial, before the end of the second term, after the indictment is returned, does not authorize his discharge in case of mistrial occasioning a continuance to a subsequent term, at which an amended information is filed. First information filed Sept. 21, 1901, and after mistrial continued to March term, 1902, does not bring the case within [Rev. St. 1899, § 2641]. State v. Pyscher [Mo.] 77 S. W. 836. A subsequent trial and conviction is not prevented by the fact that the accused fails to secure a speedy trial and the prosecuting officer, for insufficient rea-

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§ 9. *Evidence.—Judicial notice* will be taken of the nature[39] and intoxicating character of liquors,[40] and that a glass of whisky sold for ten cents is a quantity less than three gallons.[41] The political divisions of the state will be judicially noticed.[42]

Presumptions and burden of proof.—The presumption of innocence[43] casts on the state the burden of proving every essential fact, including the venue,[44] and the guilty intent,[45] but the burden of proving insanity is usually held to be on defendant,[46] and where insanity of a temporary kind is shown, there is no presumption of its continuance.[47] Though the state must show the capacity of an infant under fourteen years,[48] accused over fourteen has the burden of proving incapacity.[49] After evidence of insanity has been introduced, the prosecution must prove sanity beyond a reasonable doubt.[50] Inferences from facts arise against a defendant.[51]

Relevancy and competency in general.—Any fact is relevant which alone or in connection with other facts warrants an inference as to the issue on trial.[52] A presentment against defendant's tenant for keeping a gaming house is admissible to show defendant's knowledge of the purpose for which the building was used.[53] Where part of conversation is admitted, defendant is entitled to the remainder which explains statements in the part introduced.[54] Evidence that defendant had been released on low bail is irrelevant.[55] Flight or other conduct of defendant after the offense tending to show a consciousness of guilt,[56] or attempt to

sons fails to set it for trial within a reasonable time. State v. Banks [La.] 35 So. 370.

37. Farr v. State, 135 Ala. 71.

38. Spalding v. Hill, 24 Ky. L. R. 1802, 72 S. W. 307.

39. That whisky is spirituous. Hodge v. State, 116 Ga. 852. That beer is a malt liquor. Pedigo v. Com., 24 Ky. L. R. 1029, 70 S. W. 659. That "beer" means lager beer rather than root beer or ginger beer. Locke v. Com., 25 Ky. L. R. 76, 74 S. W. 654.

40. That beer is an intoxicant. Sothman v. State [Neb.] 92 N. W. 303.

41. State v. Blands [Mo. App.] 74 S. W. 3.

42. Of the corporate capacity of a city. State v. Nolle [Mo. App.] 70 S. W. 504. The location of a county seat fixed by statute. State v. Buralli [Nev.] 71 Pac. 532. Not of the county in which a point a certain distance from a village was located. Anderson v. Com. [Va.] 42 S. E. 865.

43. State v. Fahey [Del.] 54 Atl. 690; State v. Tighe, 27 Mont. 327, 71 Pac. 3.

44. McKinnie v. State [Fla.] 32 So. 786; Territory v. Padilla [N. M.] 71 Pac. 1084; Anderson v. Com. [Va.] 42 S. E. 865.

45. The presumption that defendant intended the reasonable consequences of his own acts does not cast the burden on him to rebut such presumption beyond a reasonable doubt. German v. U. S. [C. C. A.] 120 Fed. 666.

46. Davis v. State [Fla.] 32 So. 822; Gray v. State [Tex. Cr. App.] 74 S. W. 552; State v. Thiele [Iowa] 94 N. W. 256; Com. v. Kilpatrick, 204 Pa. 218.

47. Porter v. State [Ala.] 33 So. 694. That temporary delirium existed at the very time of the act. State v. Kavanaugh [Del.] 53 Atl. 335.

48. State v. George [Del.] 54 Atl. 745. The conduct of defendant in connection with the crime may be sufficient to show capacity. Id.

49. State v. Di Guglielmo [Del.] 55 Atl. 350.

50. People v. Egnor, 175 N. Y. 419.

51. Suppression of evidence. Hubbard v. State [Neb.] 91 N. W. 869.

52. Stone v. State [Ga.] 45 S. E. 630. The fact that testimony given in support of an information was not in the mind of the prosecuting attorney when it was filed is not material. State v. Davis [Kan.] 73 Pac. 87. Why a witness went to a place where he learned material facts is inadmissible. Hill v. State [Ala.] 34 So. 406.

Motive: Evidence of motive on the part of others than the defendant to do injury to or perhaps take the life of some of the decedent's family is incompetent. In a prosecution for homicide where it is claimed that a bad feeling existed between the deceased and his family and other persons. Horn v. State [Wyo.] 73 Pac. 705. Evidence of an examination of the circumstances of a crime and the connection therewith of the accused's friends is competent to show the accused's motive in removing from a public office indictments against such friend. People v. Mills, 86 N. Y. Supp. 529.

53. Rivers v. State [Ga.] 44 S. E. 859.

54. Paulson v. State [Wis.] 94 N. W. 771; Fields v. State [Fla.] 35 So. 185.

55. Greason v. State [Ga.] 45 S. E. 615.

56. Williams v. State [Neb.] 95 N. W. 1014. The conduct of defendant during flight in assuming false names, carrying weapons, etc., is admissible. Paulson v. State [Wis.] 94 N. W. 771. That defendant procured weapon while in jail. Barnes v. Com., 24 Ky. L. R. 1143, 70 S. W. 827. Forfeiture of bail. State v. Blitz, 171 Mo. 530. Flight from officer immediately after offense. State v. Shipley, 171 Mo. 544. Flight of the defendant on meeting the prosecuting witness. McFarland v. State [Tex. Cr. App.] 75 S. W. 788. Declaration of defendant as to plan to

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suppress evidence is admissible;[57] but that defendant refused opportunities to escape from jail is not.[58] Refusal to go before the grand jury is not.[59] Defendant's mental condition before and after the offense is relevant,[60] but reputed insanity of an ancestor is not.[61] To rebut such defense, defendant's normal business habits may be shown,[62] as may his good physical condition shortly after an alleged attack of insanity,[63] or that defendant was intoxicated at the time of the acts alleged to be insane,[64] or that the accused was guilty of larceny from the deceased at the time.[65] Evidence rebutting an alibi is admissible, though it does not tend to show defendant's presence at the time of the crime.[66] The cases[67] sanction the reception of evidence of the trailing by bloodhounds when a proper foundation is laid,[68] but in Nebraska, evidence of this kind is rejected.[69]

Other offenses, convictions or acquittals.[70]—Proof of other offenses distinct from that charged is inadmissible,[71] except for the purpose of showing guilty

escape held admissible. Bines v. State [Ga.] 45 S. E. 376. Evasion, flight, concealment, resistance to arrest may show guilty conscience. Carr v. State [Fla.] 34 So. 892. Exhibition of arms used in resistance proper in corroboration of testimony to such matter. Id. Attempt to break jail. Anderson v. Com. [Va.] 42 S. E. 865. Where defendant's flight is used as evidence against him, he has the right to explain such flight. Evans v. State [Tex. Cr. App.] 76 S. W. 467. Flight may not be explained by a later declaration of accused unless it is part of res gestae. Sherrill v. State [Ala.] 35 So. 129.

57. Suppression of evidence. Hubbard v. State [Neb.] 91 N. W. 869. Endeavor to bribe witness to leave state. Ezell v. State [Tex. Cr. App.] 71 S. W. 283. But see Hankins v. State [Tex. Cr. App.] 75 S. W. 787.

58. State v. Wilcox [N. C.] 44 S. E. 625; State v. Bickle [W. Va.] 45 S. E. 917.

59. Rogers v. State [Tex. Cr. App.] 71 S. W. 18.

60. Queenan v. Territory, 11 Okl. 261, 71 Pac. 218. That a co-defendant was confined in an insane asylum at the time of trial, three years after the murder, is irrelevant. Caddell v. State [Ala.] 34 So. 191. The acts and conduct of defendant between the time of an injury and the date of the crime are admissible as to his insanity. People v. Manoogian [Cal.] 75 Pac. 177. A deed executed four days after a crime may be admitted to show sanity at the time of the crime. State v. Privitt [Tex. Cr. App.] 75 S. W. 457.

61. Wright v. Com., 24 Ky. L. R. 1838, 72 S. W. 340. Family tree with names of insane ancestors indicated excluded. Id.

62. Wright v. Com., 24 Ky. L. R. 1838, 72 S. W. 340.

63. Miller v. State [Tex. Cr. App.] 71 S. W. 20.

64. Porter v. State [Ala.] 33 So. 694; Hoovers v. State [Ind.] 68 N. E. 591.

65. Homicide in insane frenzy was claimed. Keffer v. State [Wyo.] 73 Pac. 556.

66. State v. Manning [Vt.] 54 Atl. 181. Where defendant in support of an alibi testified to making a trip on a certain locomotive, testimony of a brakeman that no locomotive of the type described was used on that road is admissible. Paulson v. State [Wis.] 94 N. W. 771.

67. See Pedigo v. Com. [Ky.] 42 L. R. A. 432 and note thereto.

68. Action of dogs in following criminal's trail is admissible on proof of such breed, training and qualities as to warrant reliance on their accuracy. Davis v. State [Fla.] 35 So. 76.

69. Brott v. State [Neb.] 97 N. W. 593.

70. Evidence of other offenses is admissible if it discloses motive, criminal intent or guilty knowledge, if it identifies defendant or is part of a common plan embracing the several crimes. State v. Ames [Minn.] 96 N. W. 330. Evidence of extraneous offenses may be admissible to establish the res gestae, prove a relative or competent fact, the circumstance connecting defendant with the crime charged, to explain his intent or make out his guilt by circumstances, and may also be admissible when they tend to show system. Glenn v. State [Tex. Cr. App.] 76 S. W. 757.

71. U. S. v. Densmore [N. M.] 75 Pac. 31; State v. Berger [Iowa] 96 N. W. 1094; People v. Romano, 82 N. Y. Supp. 749; State v. Hendrick [N. J. Law] 56 Atl. 247; Nix v. State [Tex. Cr. App.] 74 S. W. 764. Rape. Smith v. State [Tex. Cr. App.] 74 S. W. 556. Receiving bribes. State v. Fitchette, 88 Minn. 145. Other acts of indecent exposure. State v. Vance [Iowa] 94 N. W. 204. Larceny of clothing after rape; evidence not necessary to identification. Dabney v. State [Miss.] 33 So. 973. Another burglary on preceding night. McAnally v. State [Tex. Cr. App.] 73 S. W. 404. Another burglary on same night. Hill v. State [Tex. Cr. App.] 73 S. W. 9. Plea of guilty to similar offense several months before. Lee v. State [Tex. Cr. App.] 73 S. W. 407. Prior rape on same woman. Barnett v. State [Tex. Cr. App.] 73 S. W. 399. Prior acts of intercourse in prosecution for rape. Bigcraft v. People, 30 Colo. 298, 70 Pac. 417. Previous attempts to rape same woman admissible. State v. Scott [Mo.] 72 S. W. 897. Subsequent acts of intercourse have been admitted. State v. King, 117 Iowa, 484. But see Smith v. State [Tex. Cr. App.] 73 S. W. 401. Other assaults. Kessinger v. State [Tex. Cr. App.] 71 S. W. 597; Connell v. State [Tex. Cr. App.] 75 S. W. 512. Arson. State v. McCall, 131 N. C. 798. Previous beating of daughter not admissible on trial for incestuous rape. Ball v. State [Tex. Cr. App.] 72 S. W. 384. Other sales of intoxicating liquor. Walker v. State [Tex. Cr. App.] 72 S. W. 401, 861. Other sales of liquor on Sunday. Allen v. State [Tex. Cr. App.] 73 S. W. 397. Evidence that other articles than those charged were taken

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knowledge,[72] intent or malice,[73] as where the offense charged is part of a system.[74] Relevant evidence is not to be excluded because it also tends to show another crime,[75] and other offenses part of the res gestae may be shown.[76] Evidence of previous conviction of another independent crime is inadmissible except for impeachment.[77] Where admissible, other offenses cannot be proved by the admission of defendant;[78] there must be pertinent testimony tending to show that defendant was guilty of the extraneous offense,[79] and it is only on cross-examination of defendant that parol proof of a former conviction is admissible.[80]

Character and reputation.—Defendant is entitled to show his good character[81] in respect to the traits of character involved in the accusation[82] unless it is admitted to be good[83] and such evidence is to be considered in connection with the other proof.[84] Relevant evidence is not to be excluded because it also tends to impeach defendant's character.[85] Proof of defendant's vagrant habits is not admissible.[86]

Hearsay—Admissions and declarations.—Declarations by defendant are admissible if of an incriminating tendency[87] and testimony on preliminary hearing is

at a burglary is not within the rule. People v. Loomis, 76 App. Div. [N. Y.] 243.

72. Receiving stolen goods. Goldsberry v. State [Neb.] 92 N. W. 906; People v. Doty, 175 N. Y. 164. Confidence game. Du Bois v. People, 200 Ill. 157. It is immaterial that there was also direct evidence of knowledge. Goldsberry v. State [Neb.] 92 N. W. 906. Selling liquor to other minors at same time. Gray v. State [Tex. Cr. App.] 72 S. W. 169.

73. State v. Williams [La.] 35 So. 505; People v. McGlade [Cal.] 72 Pac. 600; People v. Putnam, 85 N. Y. Supp. 1056. Other forgeries. Wright v. State [Ala.] 34 So. 1009. Previous assaults. Henry v. People, 198 Ill. 162; Robbery a few minutes before the assault on trial. State v. Ward [Iowa] 91 N. W. 898; O'Brien v. Com., 24 Ky. L. R. 2511, 74 S. W. 666. But see State v. Spray [Mo.] 74 S. W. 846. Not admissible where specific intent is not essential. State v. Roscum [Iowa] 93 N. W. 295. Nature of alleged sale of intoxicants if the transaction was disguised and defendant denies that there was a sale. Hollar v. State [Tex. Cr. App.] 73 S. W. 961.

74. Confidence game. Du Bois v. People, 200 Ill. 157. Obtaining goods under false pretences. Com. v. Lubinsky, 182 Mass. 142. False pretences. State v. Soper, 118 Iowa, 1. Not of receiving reward for procuring appointment to office. State v. Fitchette, 88 Minn. 145. Arson. State v. Jones, 171 Mo. 401. Other sales in violation of local option law. Efird v. State [Tex. Cr. App.] 71 S. W. 957; Peterson v. State [Tex. Cr. App.] 70 S. W. 978.

75. False statement to bank examiner admissible to show knowledge of insolvency on prosecution for receiving deposit with such knowledge. State v. Stevens [S. D.] 92 N. W. 420. Admissions of crime to rebut a statement that defendant did not remember certain facts. People v. Doody, 172 N. Y. 165. On trial for abortion an acquittal of seduction may be proved to fix time but not on question of guilt. State v. Carey [Conn.] 56 Atl. 632.

76. Starr v. State [Ind.] 67 N. E. 527; Glover v. State [Tex. Cr. App.] 76 S. W. 465; Gray v. State [Tex. Cr. App.] 72 S. W. 169; Thomas v. State [Tex. Cr. App.] 72 S. W. 178; State v. Halpin [S. D.] 91 N. W. 605; Oakley v. State [Ala.] 33 So. 23. On a prosecution for homicide committed during an attempted rescue from jail, it may be shown as a part of the res gestae for what offense such person had been arrested. Kipper v. State [Tex. Cr. App.] 77 S. W. 611. Where confession of one burglar disclosed the hiding place of certain property, evidence of other burglaries at which such property was stolen is admissible to connect his accomplices with the crime on trial. O'Brien v. Com. [Ky.] 74 S. W. 666. That defendant on being arrested for another burglary disclosed the hiding place of the property then taken and that with it was found property taken at the burglary on trial is admissible. Bright v. State [Tex. Cr. App.] 74 S. W. 912.

77. Paulson v. State [Wis.] 94 N. W. 771.

78. State v. Snyder [Iowa] 91 N. W. 765.

79. Glenn v. State [Tex. Cr. App.] 76 S. W. 757.

80. Paulson v. State [Wis.] 94 N. W. 771.

81. State v. Cather [Iowa] 96 N. W. 722; State v. Anslinger, 171 Mo. 600. General reputation. State v. Thoemke [N. D.] 92 N. W. 480. In Texas evidence of defendant's good character is admissible only where he has been impeached or is a stranger. Goebel v. State [Tex. Cr. App.] 76 S. W. 460.

82. State v. Anslinger, 171 Mo. 600.

83. Beard v. State [Tex. Cr. App.] 71 S. W. 960.

84. Brazil v. State, 117 Ga. 32. Ineffectual as against clear proof of guilt. State v. Pipes, 65 Kan. 543, 70 Pac. 363.

85. Russell v. State [Neb.] 92 N. W. 751.

86. State v. Berger [Iowa] 96 N. W. 1094.

87. State v. Carpenter [Wash.] 73 Pac. 357. Statements as to engagement in prosecution for seduction. Merrell v. State [Tex. Cr. App.] 70 S. W. 979. Declaration showing animus, made after the crime is admissible. Jones v. State [Fla.] 32 So. 793. On a joint trial admissions of one are admissible, it being properly confined by instructions. Collins v. State, 115 Wis. 596. Letter from defendant to his first wife is admissible on trial for bigamy though written long before second marriage. Crow v. State [Tex. Cr. App.] 72 S. W. 392. Petition for divorce

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admissible as judicial admission,[88] but declarations which make in his favor are not.[89] Declarations of third persons[90] or of the person injured by the crime[91] are hearsay unless made in the presence of defendant,[92] and assented to by him[93] or not denied.[94] Witness who heard only part may testify to that.[95]

Confessions.—A confession is admissible[96] if it be voluntary without threat or inducement.[97] In some states it is required by statute that defendant be

from first wife admissible. Crow v. State [Tex. Cr. App.] 72 S. W. 392. Offer of compromise admissible. Collins v. State, 115 Wis. 596. Threats of violence after commission of larceny. Ezell v. State [Tex. Cr. App.] 71 S. W. 283. Request for time to consult an attorney on payment being demanded. Meadows v. State [Ala.] 34 So. 183. Statements by defendant in the course of a pretended search by him for the criminal. Cowan v. State [Ala.] 34 So. 193. Declarations admissible to show motive though falsifying other declarations. Hooker v. State [Md.] 56 Atl. 390. Prejudicial statements of the accused while drunk, but conscious of the meaning and effect of his words are admissible. People v. Farrington [Cal.] 74 Pac. 238. Admissions of guilt of an offense are irrelevant to an offense under a later law which magnified the offense. State v. Wenzel [N. H.] 56 Atl. 918. A druggist's reports of liquor sold by him in a local option district are admissible against him. People v. Robinson [Mich.] 98 N. W. 12.

Statements before examining magistrate: Statements made by one as a witness against another before an examining magistrate are not within a statute providing that before a prisoner may be examined he must be informed of the charge and allowed counsel. State v. Simpson [N. C.] 45 S. E. 567. Plea of guilty before magistrate held induced by threats. McMaster v. State [Miss.] 34 So. 156. Testimony on other proceedings though it has been reduced to narrative form. Ferrell v. State [Fla.] 34 So. 220.

88. Angling v. State [Ala.] 34 So. 846. Admissions freely made on arrest and on preliminary hearing. Jones v. State [Ala.] 34 So. 681. Testimony of defendant on a former trial may be introduced though he does not testify on the second trial. Smith v. State [Tex. Cr. App.] 73 S. W. 401. Reading the testimony from official stenographer's notes. McMasters v. State [Miss.] 35 So. 302. An objection, to the reading of such testimony, on the ground that it is in the nature of a confession is not maintainable. Id.

89. Dixon v. State, 116 Ga. 186; State v. Blitz, 171 Mo. 530. Declaration before meeting deceased showing innocent purpose in going to place of homicide. Carle v. People, 200 Ill. 494. Where defendant said he was going before the assault. Goodlett v. State [Ala.] 33 So. 892. Declarations of defendant on going for a doctor for deceased. Holmes v. State [Ala.] 34 So. 180. Declaration of defendant on reaching home as to the hour. Thornton v. State [Wis.] 93 N. W. 1107. Application by accused to peace officer for protection against deceased held self serving. Fields v. State [Fla.] 35 So. 185.

90. People v. Landis [Cal.] 73 Pac. 153; Feinstein v. State [Tex. Cr. App.] 73 S. W. 1052. Admission of guilt by third person. State v. Levy, 90 Mo. App. 643. Declarations must be connected with accused. Dolan v. U. S. [C. C. A.] 123 Fed. 52; Collins v. State [Ala.] 34 So. 403. Evidence held not to show efforts on the part of a third person to procure perjured evidence against defendant so as to entitle him to show conversations between such persons and a witness. Hackney v. State [Tex. Cr. App.] 74 S. W. 554.

91. Declaration by victim of larceny as to his ownership. Long v. State [Fla.] 32 So. 870; State v. Deal [Or.] 70 Pac. 534. Declaration by deceased that a third person had threatened his life. Goodlett v. State [Ala.] 33 So. 892. Declarations by victim of seduction. People v. Elco [Mich.] 91 N. W. 755. Declaration of deceased that he was to blame. State v. Terry, 172 Mo. 213. Recognition of photograph of defendant. State v. Houghton [Or.] 71 Pac. 982. Statements by deceased charging defendant with the crime made in the absence of defendant, are inadmissible. Wilburn v. State [Tex. Cr. App.] 77 S. W. 3.

92. People v. Philbon, 138 Cal. 530, 71 Pac. 650; Martin v. State [Tex. Cr. App.] 72 S. W. 380. Narrative of events held to sufficiently show that defendant was present when a statement was made. Bliss v. State [Wis.] 94 N. W. 325.

93. Anthony v. State [Fla.] 32 So. 818.

94. Com. v. Coughlin, 182 Mass. 558. Silence in the presence of an accusation of guilt is admissible in evidence as tending to show guilt. State v. Mortensen [Utah] 73 Pac. 562. Conduct of deceased, defendant's wife; evidencing belief in defendant's guilt not admissible where her condition was such that he could not protest. People v. Smith, 172 N. Y. 210. Not clear that defendant heard statement. People v. Bissert, 172 N. Y. 643. Remark of bystander "You have shot him." Clark v. State [Ga.] 43 S. E. 853. Charge by accomplice at preliminary examination denied on following day inadmissible. Com. v. Zorambo, 205 Pa. 109. Silence under arrest raises no inference especially in case of incapacity from sickness. State v. Epstein [R. I.] 55 Atl. 204. It is only where the circumstances require defendant to speak that his silence is an implied admission. Graham v. State [Ga.] 45 S. E. 616. Failure to become a witness in a civil action to deny statements made in testimony therein is not an implied admission. Com. v. Burton [Mass.] 67 N. E. 419. Silence at judicial inquiry not to be considered an admission. Lee v. State [Tex. Cr. App.] 72 S. W. 1005.

95. Sylvester v. State [Fla.] 35 So. 142. A witness testifying that he heard all that the defendant said, except one word, in a conversation between the defendant and deceased may testify to the fact of a threat made by the defendant in such conversation. State v. Allen [La.] 35 So. 495.

96. Green v. State, 96 Md. 384; Mathews v. State [Ala.] 33 So. 838.

97. State v. Michel [La.] 35 So. 629; Thayer v. State [Ala.] 35 So. 406; State v. Robertson [La.] 35 So. 875. That person receiving confession was friend of defendant raises no

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warned that what he may say will be used against him.[98] If a statement was involuntary it is inadmissible, though it was designed as an exculpation rather than

presumption of influence. Wilson v. State [Tex. Cr. App.] 71 S. W. 970. On conflicting evidence, defendant against officers, confession held admissible. State v. Jones, 171 Mo. 401. Confessions voluntarily made to a coroner and others while in a hospital are admissible. The fact that he was under the influence of a drug at the time affects only their weight. People v. Kent, 83 N. Y. Supp. 948. Confession made in conversation with private person after arrest held admissible. Ginn v. State [Ind.] 68 N. E. 294.

Confessions by persons in custody: Mere fact that defendant is in prison does not raise presumption of duress. State v. Hernia [N. J. Err. & App.] 53 Atl. 85. Confession is not involuntary because made to officer under arrest and while frightened despite reassurances by officer. Stevens v. State [Ala.] 35 So. 122. That a confession was made to the jailor does not render it inadmissible. People v. Egnor [N. Y.] 67 N. E. 906. Evidence showing confession to officer while under arrest to have been persuaded and not voluntary. State v. Nagle [R. I.] 54 Atl. 1063. Evidence of statements made to a jailor, who testified that no inducements were held out to the defendant to make the statements is admissible. State v. Carpenter [Wash.] 73 Pac. 357.

Threats or inducements: A statement by a detective to defendant that he was in a bad fix and that the truth would not hurt him does not exclude confessions made as a witness on the trial of a codefendant several days later. Whitney v. Com. [Ky.] 74 S. W. 257. Where the private person arresting defendant said that he must state the facts to the officers and he would be released a confession is inadmissible. State v. Force [Neb.] 95 N. W. 42. Confession obtained by furnishing defendant with liquor and questioning him held inadmissible. McNutt v. State [Neb.] 94 N. W. 143. Confession induced by statement that accomplice is going to turn state's evidence inadmissible. State v. Wilson [Mo.] 72 S. W. 696. Confession to a deputy sheriff on promise by him to help defendant held involuntary. McMaster v. State [Miss.] 34 So. 156. That an officer obtained a confession by pretending friendship to defendant does not exclude it. People v. White [N. Y.] 68 N. E. 630. That the person aggrieved offered to settle on payment of his loss does not render a confession to him involuntary. Meadows v. State [Ala.] 34 So. 183. That defendant was untruthfully told that an accomplice had confessed does not exclude a confession. McNutt v. State [Neb.] 94 N. W. 143. Statement by a private person to defendant that he would get off easier does not exclude a confession made after warning by an officer. Johnson v. State [Tex. Cr. App.] 71 S. W. 25. Small gifts by officers to defendant after confession held not to make confession inadmissible. Com. v. Corcoran, 182 Mass. 465. Promise to protect defendant from vengeance of his accomplices does not render confession inadmissible. Hunt v. State [Ala.] 33 So. 329. It is no objection to a confession that the officer stated to the defendant that the deceased's relations with the defendant's wife might help him. Brown v. State [Tex. Cr. App.] 75 S. W. 33. An affidavit secured from defendant by the acting county attorney under the guise of using it as evidence against the unknown perpetrators of the crime, is not admissible. Tines v. Com. [Ky.] 77 S. W. 363.

Repetition of confession: Subsequent confession must be clearly shown to be free from influences which induced former involuntary one. McNish v. State [Fla.] 34 So. 219. McMaster v. State [Miss.] 34 So. 156. Confessions subsequent to an involuntary one must be so remote in time and circumstances from the first confession as to avoid the presumption that the same influences operated to produce it. State v. Force [Neb.] 95 N. W. 42. Second and different confession made some time after one on inducements held admissible. Dixon v. State, 116 Ga. 186.

98. Warning the day before the confession held sufficient. Richardson v. State [Tex. Cr. App.] 70 S. W. 320; Yancy v. State [Tex. Cr. App.] 76 S. W. 571. It is not necessary that defendant be told that he has a legal right to refuse to answer. Hill v. State [Tex. Cr. App.] 70 S. W. 754. Confession after warning held admissible. Ransom v. State [Tex. Cr. App.] 70 S. W. 960. Testimony of defendant at preliminary examination held inadmissible because there was no showing that he was duly cautioned. State v. Parker [N. C.] 43 S. E. 830. Confession to private person after warning by officer held sufficient. Wilson v. State [Tex. Cr. App.] 71 S. W. 970. One who has surrendered himself is within the statute though there was no formal arrest. Jones v. State [Tex. Cr. App.] 71 S. W. 962. Where some time elapses between warning and confession it must be shown that the confession was in view of the warning. Gray v. State [Tex. Cr. App.] 858. An officer of a society for the prevention of vice may testify as to a conversation had at his office with the accused, though the latter is not informed of the purpose of the conversation, or that it might be used against him. People v. Bushnell, 83 N. Y. Supp. 403. Taking measurement of defendant's feet to compare with tracks is not a confession so as to require warning. Thompson v. State [Tex. Cr. App.] 74 S. W. 914. A warning that what defendant said might be used "for" or against him is insufficient. Glover v. State [Tex. Cr. App.] 76 S. W. 465. Incriminating declarations by defendant several hours after crime, inadmissible as declarations against interest because he was not warned, are not part of the res gestae. Smotherman v. State [Tex. Cr. App.] 74 S. W. 540.

What is arrest or restraint: Statements of accused while not formally under arrest though he would not have been permitted to depart, and while he was not conscious of being under restraint are admissible against him. Connell v. State [Tex. Cr. App.] 75 S. W. 512. Statements by one thinking himself under arrest are inadmissible unless he has been warned. Bain v. State [Tex. Cr. App.] 74 S. W. 542. Facts held to show that in making statement to sheriff defendant deemed himself under restraint, so that warning was necessary. Id.; Patrick v. State [Tex. Cr. App.] 74 S. W. 550. Statements made by defendant to the sheriff in-

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a confession.[99] Evidence discovered through an involuntary confession is admissible,[1] and it has been held that where such evidence is disclosed the confession is admissible, though made without the statutory warning.[2] There should be preliminary evidence of the voluntary character of the confession,[3] a general statement that no inducement was offered or threat made being generally sufficient.[4] The preliminary question of admissibility is for the court.[5] One may testify to a confession, though he is able to state only the substance thereof.[6]

Acts and declarations of co-conspirators.—Acts and declarations of a conspirator in furtherance of the common object are admissible against his co-conspirators,[7] but not acts and declarations after such object has been accomplished,[8] nor narration of past occurrences.[9] Evidences of guilt found on one of two persons committing a crime by conspiracy are admissible against the other defendant.[10] The fact that others than the conspirators participated in the actions shown is no objection.[11] There must be preliminary proof of the fact of conspiracy,[12] though the order of proof is discretionary.[13]

vestigating the case are admissible where there is nothing indicating that he was under arrest or believed him so to be. Norsworthy v. State [Tex. Cr. App.] 77 S. W. 803. The testimony of one before a grand jury who thought that it was he they were after and not a third person, and who was not warned, is not admissible against him in a prosecution for perjury. Twiggs v. State [Tex. Cr. App.] 75 S. W. 531.

99. State v. Alexander, 109 La. 557.

1. Whitney v. Com., 24 Ky. L. R. 2524, 74 S. W. 257. Existence of venereal disease in defendant. State v. Height, 117 Iowa, 650, 59 L. R. A. 437.

2. Johnson v. State [Tex. Cr. App.] 71 S. W. 25.

3. But see State v. Hernia [N. J. Err. & App.] 53 Atl. 85; Bush v. State [Ala.] 33 So. 878. Tentative reception of confession to determine from its character whether it was voluntary approved. State v. Gruff [N. J. Law] 53 Atl. 88.

4. State v. Newton, 29 Wash. 373, 70 Pac. 31. A statement that the confession was voluntary is not sufficient. Hunt v. State [Ala.] 33 So. 329.

5. Kirby v. State [Fla.] 32 So. 836; State v. Hernia [N. J. Err. & App.] 53 Atl. 85.

6. Green v. State, 96 Md. 384.

7. Crittenden v. State, 134 Ala. 145; State v. Dunn, 116 Iowa, 219; Com. v. Rogers, 181 Mass. 184; Nelson v. State [Tex. Cr. App.] 67 S. W. 320; Barber v. State [Tex. Cr. App.] 69 S. W. 515; Chapman v. State [Tex. Cr. App.] 76 S. W. 477; Lamb v. State [Neb.] 95 N. W. 1050; Deal v. State [Ala.] 34 So. 23; People v. Putnam, 85 N. Y. Supp. 1056; Porter v. People [Colo.] 74 Pac. 879; State v. De Wolfe [Mont.] 74 Pac. 1084; Hudson v. State [Ala.] 34 So. 854; Collins v. State [Ala.] 34 So. 993. Where several were arrested for burglary it may be shown on the trial of one that part of stolen property was found in the possession of each. People v. Wilson [Mich.] 95 N. W. 536. Operation to produce abortion in absence of one defendant but at his instance. State v. Carey [Conn.] 56 Atl. 632. It is only declarations in furtherance of the conspiracy which are admissible. State v. Crofford [Iowa] 96 N. W. 889. Declarations of a thief in the defendant's absence are inadmissible in a prosecution for receiving stolen goods. Richardson v. State [Tex. Cr. App.] 75 S. W. 505.

8. State v. Soper, 118 Iowa, 1; Com. v. Rogers, 181 Mass. 184; State v. Aiken, 41 Or. 294, 69 Pac. 683; Steed v. State [Tex. Cr. App.] 67 S. W. 328. Where the act though subsequent to the crime was pursuant to the conspiracy it is admissible. Powell v. Com., 24 Ky. L. R. 1007, 70 S. W. 644; Frazier v. Com. [Ky.] 76 S. W. 28. That a codefendant had forfeited his bail is not admissible. Pulpus v. State [Miss.] 34 So. 2. A conspiracy to steal and sell cattle does not end until the sale is completed. Lamb v. State [Neb.] 95 N. W. 1050. Acts of conspirators some time after the date of the crime charged are admissible in evidence if they are part of the general conspiracy. Baldwin v. State [Fla.] 35 So. 220. While the act or declaration of a co-defendant made after the commission of the offense and when defendant was not present cannot be used against him, still where the evidence has connected them in the perpetration of the crime any fact or circumstance which would tend to prove the guilt of the co-defendant not on trial is admissible against the defendant on trial. Evidence of finding of a portion of the skin of a stolen calf at the house of a person shown to have been with defendant helping him to drive the animal on the night that it was stolen is admissible. Norsworthy v. State [Tex. Cr. App.] 77 S. W. 803.

9. People v. Gonzales, 136 Cal. 666, 69 Pac. 487.

10. Lewis v. State [Tex. Cr. App.] 75 S. W. 788.

11. People v. Salsbury [Mich.] 96 N. W. 936.

12. Young v. State [Tex. Cr. App.] 69 S. W. 153. Admissibility and sufficiency of such proof. State v. Dunn, 116 Iowa, 219; Com. v. Rogers, 181 Mass. 184; Young v. State [Tex. Cr. App.] 69 S. W. 153; Freese v. State, 159 Ind. 597; Chadwell v. Commonwealth, 24 Ky. L. R. 818, 69 S. W. 1082; Powers v. Commonwealth, 24 Ky. L. R. 1007, 1186, 70 S. W. 644, 1050; State v. Prater, 52 W. Va. 132; Williams v. State [Tex. Cr. App.] 75 S. W. 509; Smith v. State [Ala.] 34 So. 168; State v. Dennis [Iowa] 94 N. W. 235. Conspiracy is provable directly or by circumstance. Collins v. State [Ala.] 34 So. 993.

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Res gestae.—The res gestae covers the entire period of the fatal affray,[14] acts and declarations of defendant immediately after the offense and connected therewith,[15] even though it involves evidence of another crime,[16] subsequent acts and declarations of person injured,[17] and acts and declarations of third persons.[18]

Expert and opinion evidence.—As a general rule it is improper for a wit-

13. State v. Bolden, 109 La. 484; State v. Prater, 52 W. Va. 132.

14. State v. Tighe, 27 Mont. 327, 71 Pac. 3. Facts, declarations or exclamations to be admissible as res gestae must be so intimately interwoven that the principal fact or event which it characterizes has to be regarded as a part of the transaction itself. Statements made by defendant after calling certain persons to the scene of the homicide, having gone for a physician, returned to the scene, and then gone to his office, are not admissible. Davis v. Com. [Ky.] 77 S. W. 1101. The motives of both parties to an altercation and their conduct at the time. Robinson v. State [Ga.] 44 S. E. 985.

15. Flight and the incidents of the capture. State v. Phillips [Iowa] 92 N. W. 876. Resistance of arrest. State v. Vinso, 171 Mo. 576. Statement by defendant to his wife on giving her the alleged stolen money which he claimed that he had found. Martin v. State [Tex. Cr. App.] 72 S. W. 386. Conduct of defendant on being brought before his alleged victim. State v. Dennis [Iowa] 94 N. W. 235. Expression of defendant's face during an interval between a quarrel and the homicide. Hainsworth v. State [Ala.] 34 So. 203. Not explanations by defendant of wounds on his face. Dodson v. State [Tex. Cr. App.] 70 S. W. 969. Declaration of defendant to officer on arriving at police station is not. State v. Smith [Or.] 71 Pac. 973. Not statements after the offense by one charged as accessory before the fact. Powers v. Com., 24 Ky. L. R. 1007, 70 S. W. 644; Id., 24 Ky. L. R. 1186, 70 S. W. 1050. Statements made in conversation between accused and prosecutor on the way to the crime. Viberg v. State [Ala.] 35 So. 53. Where defendant attempted suicide immediately after the alleged crime, his declarations on regaining consciousness are part of the res gestae. People v. Quimby [Mich.] 96 N. W. 1061.

16. Assault on one coming to rescue of victim of rape. Oakley v. State [Ala.] 33 So. 23. Larceny of articles used in crime. State v. Halpin [S. D.] 91 N. W. 605. Previous assault on third person, from a renewal of which the fatal affray resulted. Thomas v. State [Tex. Cr. App.] 72 S. W. 178. Selling liquor to another minor at the same time. Gray v. State [Tex. Cr. App.] 72 S. W. 169. Where defendant was found in possession of other stolen property and was identified with reference thereto, the other thefts are part of the res gestae. Glover v. State [Tex. Cr. App.] 76 S. W. 465. Where two persons were assaulted and injured by defendant at the same time the entire transaction is part of the res gestae. Starr v. State [Ind.] 67 N. E. 527.

17. Statement of deceased as to who shot him, made just after the shooting. State v. Wilmbusse [Idaho] 70 Pac. 849. Statement by victim of attempted rape, on arriving home in exhausted condition after flight. Berry v. State [Tex. Cr. App.] 72 S. W. 170. What deceased was doing just before the altercation. State v. Hunter [Iowa] 92 N. W. 872. Not statement by victim of rape made in response to questions. Carter v. State [Tex. Cr. App.] 76 S. W. 971. Narrative by deceased on reaching home after the assault is not. State v. Hendricks [Mo.] 73 S. W. 194; State v. McCann [Or.] 72 Pac. 137. Statements by deceased to third person which were repeated to defendant and by which his anger was aroused. McCormick v. State [Neb.] 92 N. W. 606. Exclamation "I am killed." Howard v. Com., 24 Ky. L. R. 950, 70 S. W. 295; Stevens v. State [Ala.] 35 So. 122. Exclamation by person assaulted immediately afterward "See what he has done now." Bliss v. State [Wis.] 94 N. W. 325. Victim's statements after crime made through an interpreter to witness held hearsay. State v. Epstein [R. I.] 55 Atl. 204. Statement that accused struck declarant held res gestae. Id. Evidence of statements made by decedent to his wife that he was going to defendant's to collect some money is admissible as to his intent. State v. Martensen [Utah] 73 Pac. 562. Declarations of prosecutrix at the time money was paid to her by defendant as to the purpose of the payment is part of the res gestae. State v. Mulch [S. D.] 96 N. W. 101.

18. Not threats against deceased by third person several hours before. Webb v. State [Ala.] 33 So. 487. Statements of thief on delivering goods to one charged with receiving stolen property. Anthony v. State [Fla.] 32 So. 818. Not declaration of third person several hours after crime that he committed same. Martin v. State [Tex. Cr. App.] 70 S. W. 973. Exclamation of bystander immediately after homicide. Caddell v. State [Ala.] 34 So. 191. Exclamations of relatives of deceased immediately after the shooting. Collins v. Com., 24 Ky. L. R. 884, 70 S. W. 187. Evidence of remarks of others made in the same room in the defendant's hearing is admissible to show the character of business being done. In a prosecution for pool selling. People v. McCue, 83 N. Y. Supp. 1088. Remarks of by-standers not heard by the participants in the difficulty are not res gestae. Baker v. State [Tex. Cr. App.] 77 S. W. 618. A witness testifying to having heard a shot from a distance cannot state as part of the res gestae that on hearing the report he said that somebody was trying his "pop," it being a question as to who was the aggressing party, one party being armed with pistols and the other with shot guns. Id. Conversations and acts occurring between the parties at the time of finding a bullet at the scene of homicide, several months thereafter, and those leading up to their going to the place for the purpose of investigation, are inadmissible. Hickey v. State [Tex. Cr. App.] 76 S. W. 920. Statement of bystander to officer after homicide that deceased was armed not part of the res gestae. State v. Gallehugh [Minn.] 94 N. W. 723. Acts and declarations of third persons after the crime are inadmissible. Hampton v. State [Ind.] 67 N. E. 442.

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ness to state a mere conclusion, whether of law or by way of inference from facts;[18] but where the nature of the fact makes its detailed statement impossible, a conclusion may be given,[20] and where defendant's intent or belief is material, he may testify directly thereto.[21] As to matters which are the subject of expert testimony, the opinions of nonexperts are not admissible;[22] but such matters as age,[23] or mental condition,[24] whether certain liquor was alcohol,[25] distance and time,[26] and similarity of footprints,[27] are deemed within common knowledge, so that any

18. Ter. v. Claypool [N. M.] 71 Pac. 463; State v. Terry, 172 Mo. 213; Jones v. State [Fla.] 32 So. 793.

Statements held conclusions: As to who fired a shot. Terry v. State [Tex. Cr. App.] 72 S. W. 382. Whether defendant and others appeared to be acting together. State v. Pasnau [Iowa] 92 N. W. 682. Whether there was an apparent cause for an altercation. Wright v. Com., 24 Ky. L. R. 1838, 72 S. W. 340. Whether conduct seemed natural and genuine. People v. Smith, 172 N. Y. 210. That a bank was insolvent. State v. Stevens [S. D.] 92 N. W. 420. What witness understood by an expression. State v. Anderson, 30 Wash. 14, 70 Pac. 104. Cause of a miscarriage. Stanley v. State [Tex. Cr. App.] 73 S. W. 400. Why defendant had a pistol. Holmes v. State [Ala.] 34 So. 180. Whether shooting could have been accidental. Barnard v. State [Tex. Cr. App.] 73 S. W. 957. Whether alleged keeper of disorderly house was excusable in receiving disreputable persons because of relationship to them. State v. Babcock [R. I.] 55 Atl. 685. Did he "try to kill" calls for a conclusion. Hill v. State [Ala.] 34 So. 406. Defendant cannot be asked whether he was guilty of the offense on trial. Com. v. Burton [Mass.] 67 N. E. 419.

Statements held of fact: Evidence as to "opinion" of witness as to identity of defendant as person seen by him held sufficiently definite to be admissible. Paulson v. State [Wis.] 94 N. W. 771. An answer by a prosecutor, in a larceny case, that the money found on the defendant was the same that was taken from him is a mere statement of opinion. State v. Clark [Utah] 74 Pac. 119. Existence of tracks, their direction and appearance of walking or running is fact not opinion. Smith v. State [Ala.] 34 So. 396. Defendant's appearance between the time of an injury and the date of the crime, for the purpose of showing his insanity, is a statement of fact. People v. Manoogian [Cal.] 75 Pac. 177. Whether a shipment was C. O. D. held a statement of fact. Davidson v. State [Tex. Cr. App.] 73 S. W. 808. Who was in possession of premises is a statement of fact. Wright v. State [Ala.] 34 So. 233. That a person was unarmed is a statement of fact. Jowell v. State [Tex. Cr. App.] 71 S. W. 286. Who occupied a certain part of a house is a statement of fact. State v. Brundidge, 118 Iowa, 92. Whether anything was done to cause a disturbance is a statement of fact. Jowell v. State [Tex. Cr. App.] 71 S. W. 286. That no inducements were offered to elicit a confession is a statement of fact. People v. Jackson, 138 Cal. 462, 71 Pac. 566.

20. Russell v. State [Neb.] 92 N. W. 751. That deceased seemed to be frightened. State v. Tighe, 27 Mont. 327, 71 Pac. 3. That one seemed surprised. Jackson v. State [Tex. Cr. App.] 70 S. W. 760. That deceased appeared to be despondent. State v. McKnight [Iowa] 93 N. W. 63. That defendant acted as if he was mad. State v. Utley [N. C.] 43 S. E. 820. The "manner" of a person is fact and not opinion. Sylvester v. State [Fla.] 35 So. 142. Where defendant contends that his statements were made in a jesting manner witnesses who overheard the statements may testify as to his manner at the time to show whether he appeared to be joshing or was sincere. Horn v. State [Wyo.] 73 Pac. 705.

21. State v. Lowe [Kan.] 72 Pac. 524; Alexander v. State [Ga.] 44 S. E. 851. Belief in actuality of threatened danger. Lane v. State [Fla.] 32 So. 896.

22. Not as to time a person had been dead. White v. State [Ala.] 34 So. 177. The position in which the pistol must have been held to produce a certain wound. Jones v. State [Fla.] 32 So. 793; Cavaness v. State [Tex. Cr. App.] 74 S. W. 908. A non expert may testify to an opinion that from the nature of the wound, which he described, the gun was held within a few feet of deceased. Thomas v. State [Tex. Cr. App.] 74 S. W. 36. A witness who has traveled a certain route may be asked whether in his opinion another had had time to go over it and back. Woods v. State [Tex. Cr. App.] 75 S. W. 37.

23. Danley v. State [Tex. Cr. App.] 71 S. W. 958; Earl v. State [Tex. Cr. App.] 72 S. W. 175; McCollum v. State [Ga.] 46 S. E. 413; Loose v. State [Wis.] 97 N. W. 526.

24. Wright v. Com., 24 Ky. L. R. 1838, 72 S. W. 340; State v. Barry [N. D.] 92 N. W. 809; Queenan v. Ter., 11 Okl. 261, 71 Pac. 218. Physical or mental condition or appearance of a person is for nonexperts to state from observation. Fields v. State [Fla.] 35 So. 185. It is within the discretion of the trial court to decide whether a witness is an intimate acquaintance of the defendant and qualified to express an opinion as to his sanity. People v. Monoogian [Cal.] 75 Pac. 177. Nonexperts may testify as to appearance of insanity after stating facts. Com. v. Gearhardt, 205 Pa. 387. A witness, not an expert, cannot give his opinion formed since the commission of a crime, as to accused's sanity at the time of the crime. Queennan v. Okl., 190 U. S. 548, 47 Law. Ed. 1175. A witness may state that defendant acted as usual and in his opinion was able to distinguish right from wrong. McCormick v. State [Neb.] 92 N. W. 606. Nonexpert witnesses acquainted with the defendant may express an opinion as to sanity. Lowe v. State [Wis.] 96 N. W. 417.

25. Sebastian v. State [Tex. Cr. App.] 72 S. W. 849.

26. Kipper v. State [Tex. Cr. App.] 77 S. W. 611.

27. A witness who has measured tracks found at the scene of the crime or noticed some peculiarity between such tracks and those shown to have been made by defend-

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person may express an opinion thereon. A nonexpert witness must be required to state the facts on which his opinion is based.[28] A qualified expert may testify from comparison of handwritings.[29] Expert testimony is admissible as to matters of skill or science, which an ordinarily intelligent man is not equally able to understand.[30] The preliminary question of competency is in the discretion of the court.[31] As a general rule, a physician is competent as to all matters of medical science,[32] though he has never seen a case like the one in question.[33] One familiar with the handwriting of the party,[34] or skilled in the comparison of hands, is competent as to handwriting.[35] One who has dealt in property of a certain kind is competent as to its value,[36] and one experienced in the care of horses may testify that the condition of certain horses showed lack of proper care.[37] Examination is usually on hypothetical questions,[38] but an opinion may be based on testimony heard by the expert.[39] An expert may be cross-examined as to the reasons for his opinion.[40] The weight of the evidence is for the jury.[41] An expert in handwriting may illustrate his testimony and opinions, and reasons

ant, may testify as to similarity. Thompson v. State [Tex. Cr. App.] 77 S. W. 449.

28. Intoxication. State v. Cather [Iowa] 96 N. W. 722.

29. Neall v. U. S., 118 Fed. 699; State v. Ryno [Kan.] 74 Pac. 1114. Whether writings offered as standards of comparison have been sufficiently proved to be genuine must be determined by the court in the first place, but the weight and effect of the evidence by comparison, including the genuineness of the standards is for the jury. Id.

30. Effect of a stagnant pool on health of community. West v. State [Ark.] 71 S. W. 483. Cause of fracture of skull and probable number of blows producing it. State v. Greenleaf, 71 N. H. 606. Course of bullet and relative position of parties. State v. Buralli [Nev.] 71 Pac. 532. To what extent shot from a shot gun will scatter. Bearden v. State [Tex. Cr. App.] 73 S. W. 17. Not whether victim of rape had will power sufficient to resist. Fredericson v. State [Tex. Cr. App.] 70 S. W. 754. The cause of the death and the instrument with which it was produced are proper subjects of expert evidence. State v. Wilcox [N. C.] 44 S. E. 625. Evidence of a physician who performed an autopsy on the deceased's remains is admissible as expert testimony as to length of time intervening between the time the deceased had eaten his supper and his death. State v. Mortensen [Utah] 73 Pac. 562.

31. State v. Barry [N. D.] 92 N. W. 809; Davis v. State [Fla.] 32 So. 822. Witness held not qualified as to the extent to which shot would scatter. Bearden v. State [Tex. Cr. App.] 73 S. W. 17.

32. A physician is competent as to sanity though he has been practicing but 18 months. The statute prescribing qualifications of examiners in lunacy has no application. Lowe v. State [Wis.] 96 N. W. 417.

33. State v. Wilcox [N. C.] 44 S. E. 625.

34. One familiar with defendant's handwriting is not competent as to whether he wrote a certain signature imitating the writing of another. Neall v. U. S., 118 Fed. 699.

35. A witness employed as bookkeeper and exchange teller in a bank, part of whose duty it was to study signatures on depositor's cards and who had seen the accused's signature made in his presence, which he produced on one of such cards, is properly qualified to testify as to the handwriting of the accused. State v. Burns [Nev.] 74 Pac. 983.

36. A jeweler is competent to testify as to the value of jewelry having a market value though not acquainted with the particular articles. Baden v. State [Tex. Cr. App.] 74 S. W. 769; State v. Montgomery [S. D.] 97 N. W. 716.

37. State v. Cook, 75 Conn. 267.

38. Opinion as to sanity on whole evidence excluded as invading province of jury. Porter v. State [Ala.] 33 So. 694. The question may be based on any reasonable theory of the evidence. Williams v. State [Fla.] 34 So. 279. In a prosecution for a violation of the local option law testimony of an expert chemist as to the contents of certain bottles is inadmissible where it is not shown where or whom they came from or that they contained liquor of the kind charged to have been sold by the defendant. Parker v. State [Tex. Cr. App.] 75 S. W. 30. A hypothetical question of an expert witness need not be based on all the testimony on the question, and it is not improper if it does not include all the facts in evidence. State v. Privitt [Mo.] 75 S. W. 457. An expert cannot be asked his opinion on a hypothesis having no foundation in the evidence. State v. Dunn [Mo.] 77 S. W. 848. Facts which the defendant has testified to may be incorporated in a hypothetical question asked an expert witness for a defendant. State v. Dunn [Mo.] 77 S. W. 848. No injury results from the substitution of the words "that the men were close personal friends" for the words "that there was no motive for the killing," in a hypothetical question on insanity. Id.

39. If there is no conflict in the testimony. State v. Privitt [Mo.] 75 S. W. 457. As bearing on insanity a physician cannot testify that prior to the crime defendant told him he believed he was going crazy. State v. Dunn [Mo.] 77 S. W. 848.

40. An expert may be asked what is the test of a delusion. Williams v. State [Fla.] 34 So. 279. Cross-examination as to standing and repute of opposing expert is proper. State v. Greenleaf, 71 N. H. 606.

41. State v. Johnson [S. C.] 44 S. E. 58.

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therefor, to the jury, by blackboard illustrations.[42] A physician examining accused as to his sanity may testify as to his statements as furnishing a basis of his opinion as to his sanity.[43]

Best and secondary evidence—Parol evidence to vary writing.—The rule as to best and secondary evidence applies to criminal cases,[44] as does the rule excluding parol evidence to vary a writing;[45] but in New York, it is otherwise held.[46]

Documentary evidence,[47] including official[48] and judicial proceedings,[49] book entries,[50] medical books,[51] photographs,[52] and maps or diagrams,[53] are admissible

42. State v. Ryno [Kan.] 74 Pac. 1114.

43. Such statements not excluded on the ground that they are self serving. Spivey v. State [Tex. Cr. App.] 77 S. W. 444.

44. Evidence as to changes in transcript on change of venue is admissible. State v. Rodman [Mo.] 73 S. W. 605. To prove a record the clerk cannot tell what is the custom in copying into the record. Bynum v. State [Fla.] 35 So. 65. Where writing is destroyed secondary evidence is admissible. People v. Hammond [Mich.] 93 N. W. 1084. Parol evidence of report of junk dealer admitted. Neifeld v. State, 23 Ohio Circ. R. 246. Parol evidence of indebtedness of bank held secondary. State v. Stevens [S. D.] 92 N. W. 420. Record is best evidence of legality of road. Knuckols v. State, 136 Ala. 108. Facts stated as deduced from witness' knowledge of his sales book are not objectionable as secondary evidence. Hudson v. State [Ala.] 34 So. 854. Witness may state that a certain name was written on a paper not produced. Webb v. State [Ala.] 34 So. 1011. Parol evidence of dying declaration taken down but not signed or sanctioned is not secondary. Jarvis v. State [Ala.] 34 So. 1025. Provision for the proof of the existence of a corporation does not exclude other proof thereof. State v. Pittam [Wash.] 72 Pac. 1042. Oral testimony of the contents of books of account is inadmissible. Donner v. State [Neb.] 95 N. W. 40. Notice to produce incriminating document while unnecessary to parol proof is harmless when not made in jury's presence nor failure to produce called to their notice. McKnight v. U. S., 122 Fed. 926.

45. Parol proof of affidavit on which former trial was had. Peoples v. State [Miss.] 33 So. 289. Ownership of saloon should be proved in license. Earl v. State [Tex. Cr. App.] 72 S. W. 376. Unambiguous expressions in letter cannot be explained, but it may be shown that apparently unambiguous expressions were part of a cipher code. Powers v. Com., 24 Ky. L. R. 1007, 70 S. W. 644; Id., 24 Ky. L. R. 1186, 70 S. W. 1050.

46. Parol evidence is admissible to vary or contradict a written instrument in criminal cases. People v. Walker, 83 N. Y. Supp. 372.

47. Bill of sale of alleged stolen horse must be proved by attesting witness. Godwin v. State [Tex. Cr. App.] 73 S. W. 804. A letter by defendant may be admitted against him where identified as being in his handwriting and signed and posted by him on the day of its date. Mathews v. State [Tex. Cr. App.] 77 S. W. 218. Possessing or having in charge "policy" papers is competent evidence in a prosecution for the statutory offense of knowingly having in possession such papers. People v. Adams, 83 N. Y. Supp. 481. Private papers relating to the game may also be admitted. Id. And the fact that such papers were illegally seized does not render them incompetent. Id. A police journal containing defendant's picture is admissible where after the crime he at first denied but later admitted that it was his picture. People v. McDonald [Mich.] 94 N. W. 1064. The court may exclude irrelevant portions of a writing. Com. v. Burton, 183 Mass. 461. It is no objection to a document that it was not before the grand jury. State v. Harris [Iowa] 97 N. W. 1093.

48. Corporate existence of a defendant cannot be shown by the report of the secretary of state for a certain year. Such report is hearsay. Sanderfur-Julian Co. v. State [Ark.] 77 S. W. 596. In a prosecution for perjury the defendant's application, license and liquor dealer's bond are admissible to show his connection with the suit on the bond in which the perjury was committed. McLeod v. State [Tex. Cr. App.] 75 S. W. 522. Original marriage license as well as certified copy is admissible. Ferrell v. State [Fla.] 34 So. 220.

49. A previous indictment for the same offense is not admissible. Cecil v. State [Tex. Cr. App.] 72 S. W. 197. The order holding defendant for examination is not admissible. Kirby v. State [Fla.] 32 So. 836. An adjudication of insanity is not admissible in a criminal case [Laws 1895, c. 4357, so provides]. Davis v. State [Fla.] 32 So. 822. The record of the proceedings of a special jury to try the sanity of the accused, is admissible in evidence where the defense of insanity is pleaded, though such record is not conclusive. State v. Champoux [Wash.] 74 Pac. 557. A transcript of a stenographer's notes at a preliminary hearing filed as required by statute is not thereby evidence per se nor does the trial depend upon its filing [Rev. St. Utah 1898, § 4670, subd. 5]. State v. Morgan [Utah] 74 Pac. 526.

50. Books of a party are not admissible in his own favor. State v. Lewis [Wash.] 71 Pac. 778. Entry by defendant's bookkeeper not known to defendant inadmissible on trial for embezzlement. State v. Ames [Iowa] 94 N. W. 231. Stub book of clerk issuing licenses is inadmissible. Earl v. State [Tex. Cr. App.] 72 S. W. 376. Book entries by clerks of defendant. Indictment of bank manager for defrauding bank. Wait v. Com., 24 Ky. L. R. 604, 69 S. W. 697.

51. Oakley v. State [Ala.] 33 So. 693. Books for the keeping of which defendant was responsible are admissible against him though not in his handwriting. Secor v. State [Wis.] 95 N. W. 942.

52. Identification of defendant by photograph. State v. Fulkerson, 97 Mo. App. 599. Condition of animals, on trial for cruelty.

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under the same rules as in civil cases. Memoranda are inadmissible except to refresh memory.[54] Incriminating papers taken from defendant's premises by search without a warrant are admissible.[55] Depositions and affidavits are inadmissible.[56]

Accomplice testimony.—The testimony of an accomplice is admissible,[57] though he has been promised immunity.[58]

Demonstrative evidence and experiments.[59]—Alleged demonstrative evidence must be identified.[60] The weapon with which the crime was committed may be exhibited to the jury.[61] Experiments are in the discretion of the court.[62]

Evidence at preliminary examination or former trial.[63]—Evidence at the preliminary examination or at a former trial is not admissible except where the witness is dead[64] or absent.[65] Irregularities in the preliminary examination do not affect such right where defendant cross-examined the witness.[66] There must be preliminary proof of absence[67] or death.[68] Statement of testimony certified by stenographer and magistrate is admissible,[69] as are stenographer's notes;[70] but not

State v. Cook, 75 Conn. 267. If photographs are identified as bearing on a condition in issue, the question of such identification being for the court. Id. Photographs of the deceased are inadmissible to show the number and character of the wounds, especially where it is shown that they do not correctly show the character of the wounds. State v. Miller [Or.] 74 Pac. 658. Photographs of the scene are admissible though they also show neighboring houses from which witnesses testified they observed certain acts of defendant. Commonwealth v. Fielding [Mass.] 69 N. E. 216. Photographs of the scene of the crime are admissible. Paulson v. State [Wis.] 94 N. W. 771. Photographs by which defendant was identified are admissible without a showing of when or where taken. Lamb v. State [Neb.] 95 N. W. 1050.

53. Plat of premises where burglary was committed is admissible. Ragland v. State [Ark.] 70 S. W. 1039. Location of objects on diagram of scene of crime must be proved. State v. Smith [N. J. Err & App.] 54 Atl. 411. A correct map may be admitted though made by state's solicitor. Jarvis v. State [Ala.] 34 So. 1025.

54. A written memorandum is inadmissible where the witness remembers the facts. State v. Menard [La.] 35 So. 360. Memorandum of birth by father is not admissible. Stone v. State [Tex. Cr. App.] 73 S. W. 956; Twiggs v. State [Tex. Cr. App.] 75 S. W. 531; Loose v. State [Wis.] 97 N. W. 527. But see Simpson v. State [Tex. Cr. App.] 77 S. W. 819.

55. People v. Adams [N. Y.] 68 N. E. 636. Property found in the possession of a party accused of crime, is legitimate evidence though taken from him while he was under arrest and had not been warned. Johnson v. State [Tex. Cr. App.] 76 S. W. 925.

56. Com. v. Zorambo, 205 Pa. 109.

57. Barr v. People [Colo.] 71 Pac. 392; State v. De Hart, 109 La. 570.

58. Barr v. People [Colo.] 71 Pac. 392.

59. A footprint found on the ground at the scene of a crime showing peculiarities similar to accused's shoe is competent evidence. Jenkins v. State [Tex. Cr. App.] 75 S. W. 312.

60. Contents of bottle which had been for some time in possession of one not a witness. State v. Phillips [Iowa] 92 N. W. 876. Article used in crime (iron bar) admissible though not in same condition as when used. People v. Flanigan, 174 N. Y. 356. On trial for larceny of cattle the hides are admissible. Lamb v. State [Neb.] 95 N. W. 1050.

61. State v. Tucker [W. Va.] 44 S. E. 427.

62. Firing at cloth similar to clothing of deceased excluded. People v. Fitzgerald, 138 Cal. 39. Effect of discharge to produce powder burns on pasteboard excluded. Morton v. State [Tex. Cr. App.] 71 S. W. 281. Experiment as to possibility of hearing certain sounds excluded because comparative keenness of hearing of persons was not shown. Lawrence v. State [Fla.] 34 So. 87. Experiments with similar revolver to ascertain as to powder burns admitted. State v. Nagle [R. I.] 54 Atl. 1063. Experiments producing like effect must be based on proved similarity of conditions. Hooker v. State [Md.] 56 Atl. 390.

63. Evidence of defendant introduced for incriminating statements is treated as an admission. Johnson v. Com., 24 Ky. L. R. 842, 70 S. W. 44.

64. Statute allowing such evidence in "actions" is applicable to criminal prosecutions. People v. Elliott, 172 N. Y. 146, 60 L. R. A. 318. Competent for one defendant that his codefendant objects thereto. State v. Milam [S. C.] 43 S. E. 677.

65. Search held not to show sufficient diligence. People v. McFarlane, 138 Cal. 481, 71 Pac. 568.

66. State v. Kline, 109 La. 603.

67. Evidence of nonresidence and of being seen to board train held sufficient. State v. Bolden, 109 La. 484. Sending subpoenas to every county in state and return of not found on each sufficient. People v. Witty [Cal.] 72 Pac. 177.

68. Reference in testimony to a witness as "the deceased" insufficient proof of death. Johnson v. Com., 24 Ky. L. R. 842, 70 S. W. 44.

69. State v. Bolden, 109 La. 484.

70. Smith v. State [Tex. Cr. App.] 73 S. W. 401. Where the record shows that the notes from which the defendant's testimony on a former trial is read, is the official stenographer's notes; shows the time, the place, and the circumstances under which they were taken; and is certified by the official stenog-

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one which the magistrate cannot positively verify.[71] Recollection of magistrate is not admissible.[72]

Quantity required and probative effect.—The proof of guilt must be beyond all reasonable doubt,[73] and this includes the corpus delicti,[74] the venue,[75] jurisdiction,[76] and the time of the offense.[77] Testimony of a prosecuting witness to all the essential elements of a crime is sufficient to convict without corroboration.[78] Circumstantial evidence may be sufficient.[79] The rule varies as to the degree of proof of insanity.[80]

Though the testimony of an accomplice is viewed with suspicion, it may be sufficient to convict,[81] unless corroboration is required by statute.[82] To be an ac-

rapher as a true transcript it is sufficient for their introduction. McMaster v. State [Miss.] 35 So. 302. Interpolated words in transcript, stricken out on object, do not exclude the transcript. People v. Witty [Cal.] 72 Pac. 177.

71. Gamblin v. State [Miss.] 33 So. 724.

72. Long v. State [Miss.] 33 So. 224.

73. Stanley v. People, 104 Ill. App. 294; State v. Felker, 27 Mont. 451, 71 Pac. 668; Goldman v. Com. [Va.] 42 S. E. 923; Patton v. State, 117 Ga. 230. Abiding conviction to a moral certainty. State v. Fahey [Del.] 54 Atl. 690. Evidence is sufficient to establish guilt beyond a reasonable doubt if the facts and circumstances shown by it are absolutely incompatible upon any reasonable hypothesis with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis or rational conclusion other than that of guilt. State v. Levy [Idaho] 75 Pac. 227. The convincing effect that follows from positive does not necessarily follow from circumstantial evidence, although circumstantial evidence is often the most satisfactory and convincing that can be produced Id.

74. Evidence of killing of horse insufficient. Johnson v. State [Tex. Cr. App.] 70 S. W. 83. Finding of body bearing marks of violence held sufficient. Hunt v. State [Ala.] 33 So. 329. Bones partly consumed by fire held sufficient to show corpus delicti. Paulson v. State [Wis.] 94 N. W. 771. Corpus delicti. Dunn v. State [Ind.] 67 N. E. 940.

75. General statement of place of offense held sufficient. People v. Monroe, 138 Cal. 97, 70 Pac. 1072; Smith v. State [Ga.] 44 S. E. 827. Statement that it was "in this county" sufficient. Malone v. State, 116 Ga. 272. Testimony that a certain crime was committed in a certain city is sufficient proof of venue, as the court will take judicial notice that such city is in a certain county in a certain state. State v. Fetterly [Wash.] 74 Pac. 810. Proof that an offense was committed in a certain town is insufficient to show the venue in the absence of proof of the county and state in which the town is located. State v. Hottle [Mo. App.] 78 S. W. 311. Evidence showing offense near certain place in a city held sufficient. State v. Knolle, 90 Mo. App. 238. Testimony referring to map in evidence held sufficient. Kraimer v. State [Wis.] 93 N. W. 1097. Evidence held to show venue. State v. Hardee [Mont.] 72 Pac. 39. Need not be proved beyond reasonable doubt. McKinnie v. State [Fla.] 32 So. 786; State v. Nolle [Mo. App.] 70 S. W. 504. Evidence held insufficient. Guiles v. State [Tex. Cr. App.] 72 S. W. 187.

76. Wright v. State [Tex. Cr. App.] 77 S. W. 809.

77. Evidence not showing year held insufficient. State v. Knolle, 90 Mo. App. 238.

78. In a prosecution for rape. State v. Fetterly [Wash.] 74 Pac. 810.

79. Duffel v. State, 116 Ga. 92. Each fact must be proved beyond a reasonable doubt. State v. Crabtree, 170 Mo. 642. Though it does not to a moral certainty exclude every hypothesis except guilt. Oakley v. State [Ala.] 33 So. 693. But see Andrews v. State, 116 Ga. 83; Kelley v. State [Tex. Cr. App.] 70 S. W. 20; State v. Lambert, 97 Me. 51. As to venue. State v. Dent, 170 Mo. 398. Conspiracy may be proved by circumstantial evidence. Caddell v. State [Ala.] 34 So. 191; Martin v. State [Ala.] 34 So. 205.

80. Evidence that defendant did not know what he was doing insufficient. Lee v. State, 116 Ga. 563. Evidence insufficient. Freese v. State, 159 Ind. 597. Insanity must be proved to satisfaction of jury. Wright v. Com., 24 Ky. L. R. 1838, 72 S. W. 340. If all the evidence raises a doubt of defendant's sanity he is entitled to an acquittal. German v. U. S. [C. C. A.] 120 Fed. 666. Probability of insanity requires an acquittal. State v. Thiele [Iowa] 94 N. W. 256.

81. Com. v. Sayars, 21 Pa. Super. Ct. 75; State v. Freedman [Del.] 53 Atl. 356. There is no rule of law forbidding a conviction on the testimony of an accomplice. Stone v. State [Ga.] 45 S. E. 630. A conviction may be had on the uncorroborated evidence of an accomplice. State v. Register [N. C.] 46 S. E. 21. The weight of an accomplice's testimony is for the jury to determine. State v. Michel [La.] 35 So. 629.

82. That the person accused of giving a bribe drew the amount from the bank is insufficient to corroborate his testimony. People v. Bissert, 172 N. Y. 643. Evidence of larceny held insufficient to corroborate accomplice. People v. Hoagland, 71 Pac. 359, 138 Cal. 338. The corroborating evidence required by Pen. Code, § 1111, must tend to connect defendant with the crime. People v. Hoagland, 138 Cal. 338, 71 Pac. 359. Similarity of tracks held insufficient corroboration. Barber v. State [Tex. Cr. App.] 70 S. W. 210. The corroborating testimony need not be in itself sufficient to sustain a conviction. Dixon v. State, 116 Ga. 186. Evidence of larceny held sufficient to corroborate accomplice. State v. Blain [Iowa] 92 N. W. 650. Corroboration held sufficient on prosecution for aiding and abetting a prize fight. People v. Finucan, 80 App. Div. [N. Y.] 407. Corroboration held insufficient on charge of receiving stolen goods. Bismarck v. State

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complice one must have been guilty of criminal participation[82] in the particular crime.[84] Evidence of another accomplice is not sufficient corroboration.[85]

A confession is not sufficient without proof of the corpus delicti,[86] but such proof need not be independently sufficient.[87] Confession and proof of corpus delicti will usually sustain a conviction,[88] though in some states corroboration is required.[89] The weight to be given to a confession is for the jury.[90]

§ 10. *Trial. A. Conduct of trial in general.*—Separate trials of persons jointly indicted is in the discretion of the court[91] and must be asked before trial.[92] By statute in some states, one jointly indicted may have his co-defendant tried first in order to secure the benefit of his evidence.[93] Consolidating indictments is same as charging several crimes in one, within provision against cumulating sen-

[Tex. Cr. App.] 73 S. W. 965. A state statute requiring corroboration of accomplices does not control in federal court. Hanley v. U. S. [C. C. A.] 123 Fed. 849. It is sufficient if he is corroborated as to the main facts, though not as to some of the details. Locklin v. State [Tex. Cr. App.] 75 S. W. 305. Testimony of an accomplice clearly corroborated by circumstances is sufficient to support a verdict of guilty. Stiles v. State [Tex. Cr. App.] 75 S. W. 511. Acts, statements or declarations of an accomplice are not corroborative of her testimony. Seduction. Barnard v. State [Tex. Cr. App.] 76 S. W. 475.

83. Mere nondisclosure does not make one an accomplice. Bird v. U. S., 187 U. S. 118, 47 Law. Ed. 100; Cruse v. State [Tex. Cr. App.] 77 S. W. 818; Martin v. State [Tex. Cr. App.] 70 S. W. 973. A woman under age of consent is not an accomplice though she consents to the intercourse. Smith v. State [Tex. Cr. App.] 73 S. W. 401. That one was jointly indicted does not make him an accomplice if there was no evidence of his guilt. Walker v. State [Ga.] 45 S. E. 608. Testimony of a sister, in a prosecution for incest, as to fact of seeing defendant sitting on the bed in which she and her sister, upon whom the incest was committed, held not to constitute her an accomplice. Ingram v. State [Tex. Cr. App.] 75 S. W. 304. The prosecuting witness in local option cases is not an accomplice. So provided by statute. Smith v. State [Tex. Cr. App.] 77 S. W. 801.

84. Thief is not an accomplice of one receiving stolen goods. State v. Rachman [N. J. Law] 53 Atl. 1046. The person paying a bribe is an accomplice of the person who receives it. People v. Bissert, 172 N. Y. 643. Consenting woman on whom abortion is practiced is not technically accomplice of one attempting to produce it. State v. Carey [Conn.] 56 Atl. 632. An accessory after the fact is not an accomplice. State v. Phillips [S. D.] 98 N. W. 171. The test of whether a witness is an accomplice is whether he could have been indicted for the offense. Suborner is not accomplice of perjurer. Stone v. State [Ga.] 45 S. E. 630. That a witness was an accomplice in a homicide does not make him an accomplice in perjury committed by defendant at the inquest. Stanley v. State [Tex. Cr. App.] 74 S. W. 320.

85. Frazier v. Com. [Ky.] 76 S. W. 28; People v. O'Farrell [N. Y.] 67 N. E. 588.

86. Bines v. State [Ga.] 45 S. E. 376; Anthony v. State [Fla.] 32 So. 818; State v. Keller [Idaho] 70 Pac. 1051. Finding of body bearing marks of violence held sufficient. Hunt v. State [Ala.] 33 So. 329.

87. The corpus delicti need not be proven independently of the confession, but it is sufficient if there be evidence corroborating the confession in respect thereto. State v. Coats [Mo.] 74 S. W. 864. Confession may be considered with other evidence to establish corpus delicti. Gray v. State [Tex. Cr. App.] 73 S. W. 858.

88. Owen v. State [Ga.] 46 S. E. 433. Conviction on confession and proof of corpus delicti sustained. Mitchell v. State [Fla.] 33 So. 1009.

89. Condition of injured person immediately afterward and declarations by her part of the res gestae sufficient to corroborate confession. Joinder v. State [Ga.] 46 S. E. 412. Proof of corpus delicti and presence of defendant alone near scene of crime is sufficient to corroborate a confesson. Sanders v. State [Ga.] 45 S. E. 365.

90. It should be considered as a whole. Kirby v. State [Fla.] 32 So. 836.

91. Henry v. People, 198 Ill. 162; State v. Prater, 52 W. Va. 132. In a trial for misdemeanor. State v. Davis [Kan.] 73 Pac. 87. An affidavit by a defendant stating that there is evidence admissible against co-defendants not admissible against him does not entitle him to a severance, where the evidence does not relate to reputation, under Laws Colo. 1891, p. 132. Moore v. People [Colo.] 73 Pac. 30. On an indictment for conspiracy a defendant is not entitled to a severance where the evidence, consisting of acts of his co-conspirators, is admissible against him when the conspiracy is proved. Id. Where two are indicted for the same transaction made up of two different killings, there may be a severance [Code Cr. Proc. 1895, art. 707]. Terry v. State [Tex. Cr. App.] 76 S. W. 928.

92. Motion for severance cannot be made after jury is impaneled. Crawford v. State [Tex. Cr. App.] 74 S. W. 552. Severance is discretionary when claimed after court sets trial day as provided by rule 32. Severance asked on trial day refused. Hudson v. State [Ala.] 34 So. 854.

93. Under Code Cr. Proc. art. 707, where a defendant makes affidavit that the evidence of the other party is material to his defense and believes that there is not sufficient evidence to convict him, it is error to dismiss as to such defendant and not require him to be first tried, thus permitting him on the trial of affiant to refuse to testify on the ground that his evidence might incriminate him. Manor v. State [Tex. Cr. App.] 77 S. W. 785

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tences.[94] It is reversible error to refuse a separate jury trial of the issue of insanity.[95]

Appointment of counsel.—The court has power to appoint private counsel to assist in the prosecution.[96] An indigent defendant is entitled to have counsel appointed to defend him.[97] The court may refuse to permit the defendant's attorney to withdraw after a continuance has been denied and a jury has been called.[98]

Names of witnesses may be indorsed at any time before the jury is sworn.[99] Witnesses whose names are not indorsed on the indictment may be admitted.[1] Giving of list of witnesses has been held a substitute for indorsement on the information.[2]

The state need not call all the eye-witnesses,[3] nor all the witnesses whose names are indorsed on the indictment.[4] Allowance of time to consult with a witness is discretionary.[5] Even temporary *absence of the judge* from the court-room is fatal,[6] but the court may, during the argument, occupy himself in drawing instructions.[7]

Defendant must be present in court during the whole of a trial for felony,[8] but cannot be compelled to be present at a view.[9]

It is discretionary to put witnesses under the rule,[10] or to send the jury out

94. U. S. Rev. St. § 5480. Hanley v. United States [C. C. A.] 123 Fed. 849.

95. Rev. St. § 7240. Rosselot v. State, 23 Ohio Circ. R. 370. The procedure prescribed by Bates' Ann. St. § 7240, for trial of a plea of insanity must be strictly followed. State v. Roselot [Ohio] 68 N. E. 825. An application for a commission to try sanity is properly denied where defendant has been examined by experts appointed by the court who concur in pronouncing him sane. People v. Tobin [N. Y.] 68 N. E. 359.

96. Hinsdale County Com'rs v. Crump [Colo. App.] 70 Pac. 159. Though he is paid by private persons. State v. Tighe, 27 Mont. 327, 71 Pac. 3. By the express provision of Rev. St. § 4504, the law partner of the district attorney may assist him. Kraimer v. State [Wis.] 93 N. W. 1097.

97. State v. Bridges, 109 La. 530. Mills' Ann. St. Colo. § 1025. Lake County Com'rs v. Glynn [Colo. App.] 74 Pac. 339. His rights are fully preserved where an inexperienced attorney is appointed before trial, and one of experience to conduct the trial. Simmons v. State, 116 Ga. 583. The appointment of counsel for indigent persons arraigned without counsel must be made at their request or desire under Code Cr. Proc. N. Y. § 308. People v. Grout, 84 N. Y. Supp. 97. The court's authority to make such appointment is not limited to the arraignment but may be made at any time before or at the trial. Id.

98. State v. Fuller [La.] 35 So. 395.

99. State v. Lewis [Wash.] 72 Pac. 121. Or by leave of court during the trial. Laws 1899, p. 125, provides for indorsement at such time "before trial" as the court may direct. State v. Wilmbusse [Idaho] 70 Pac. 849.

1. People v. Hammond [Mich.] 93 N. W. 1084. Allowing witnesses to testify on rebuttal although their names are not indorsed on the information is not error. State v. Champoux [Wash.] 74 Pac. 557.

2. State v. Belding [Or.] 71 Pac. 330.

3. State v. Tighe, 27 Mont. 327, 71 Pac. 3. If the corpus delicti is admitted, the state cannot after it has rested on circumstantial evidence be compelled to call an eye witness, unfriendly to it, and who has previously admitted that his intoxication at the time was such that he knew nothing about the facts. Holloway v. State [Tex. Cr. App.] 77 S. W. 14. The state cannot be compelled to call defendant's wife though she was the only eye witness and defendant waived his objection to her testifying. People v. Hossler [Mich.] 97 N. W. 754.

4. Carle v. People, 200 Ill. 494.

5. Allowance of five minutes only held not an abuse of discretion. Hudson v. State [Tex. Cr. App.] 70 S. W. 764. The court has discretion to refuse an opportunity to privately consult a witness already called. Hudson v. State [Ala.] 34 So. 854.

6. Stokes v. State [Ark.] 71 S. W. 248.

7. State v. Burns [Iowa] 94 N. W. 238.

8. Giving additional instructions in defendant's absence error. Bailey v. Com., 24 Ky. L. R. 1419, 71 S. W. 632; Hopson v. State, 116 Ga. 90. Examination of witness in defendant's absence requires a mistrial though the witness was afterward re-examined. Booker v. State [Miss.] 33 So. 221. The giving by the jurymen of their initials to the clerk for insertion in the record, after rendition of verdict and discharge of the jury is no part of the trial. Swan v. State [Miss.] 33 So. 223. Defendant need not be present on motion for new trial. State v. Mortensen [Utah] 73 Pac. 562.

9. As this would be compelling him to give evidence against himself. State v. Mortensen [Utah] 73 Pac. 562. Failure of the court to compel the accused to be present in person at a view of premises, upon desire of his counsel not to do so is not in violation of the accused's constitutional right to be confronted with witnesses. Id.

10. Putting of witnesses under the rule, and allowing witnesses to testify after violation of the rule is discretionary. Loose v. State [Wis.] 97 N. W. 526. That one summoned but not examined remained in court is not error. Sylvester v. State [Fla.] 35 So. 142. Instructing witnesses not to converse with other persons and allowing witnesses

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during an argument on the admissibility of confessions.[11] The right of defendant to confront the witnesses[12] may be waived,[13] and is not infringed by the reading of testimony at a former trial.[14] The making of a supplemental statement by defendant is not a matter of right.[15] He cannot be cross-examined on such statement.[16] The court may in its discretion suspend the trial for a short time.[17] Allowance of time for consultation is discretionary.[18] The court may on reversible error being committed order a mistrial,[19] and may of its own motion stop acts which might cause a mistrial,[20] or strike answers to bad questions.[21] The court may examine a witness.[22] Defendant may be required to stand up to be identified in court.[23] Physical examination of state's witnesses cannot be compelled.[24] The accused on a proper motion has a right to the inspection of public documents.[25] The order of proof is in the discretion of the court,[26] as is the reopening of the case for further evidence.[27] Ad-

who have testified to return to the room with the other witnesses is discretionary. Kelly v. State [Ga.] 45 S. E. 413. It is not ground to set aside a verdict that the court permits expert witnesses to remain in the court room during the trial. State v. Forbes [La.] 35 So. 710.

11. People v. Kent, 83 N. Y. Supp. 948.

12. Certificate of clerk that he found no record of a certain marriage held inadmissible. People v. Goodrode [Mich.] 94 N. W. 14. School census held admissible. McAnally v. State [Tex. Cr. App.] 73 S. W. 404. Prosecutions in state courts are not within amendment six, constitution of the United States, entitling the accused to be confronted by the witnesses against him. People v. Welsh, 84 N. Y. Supp. 703.

13. Odell v. State [Tex. Cr. App.] 70 S. W. 964. The right of defendant to be confronted by the witnesses against him may be waived by counsel. And a trial for misdemeanor may be had in the absence of the defendant if he appear by counsel under Code Cr. Proc. N. Y. § 356. People v. Welsh, 84 N. Y. Supp. 703. A stipulation in open court by the defendant admitting that if a certain witness were present he would testify to certain facts and agreeing that it should be submitted to the jury is not in violation of the constitutional right to be confronted by witnesses against him. State v. Mortensen [Utah] 73 Pac. 562.

14. Defendant having had the opportunity there to confront the witnesses. State v. Kline, 109 La. 603; State v. Banks [La.] 35 So. 370; People v. Elliott, 172 N. Y. 146.

15. Dixon v. State, 116 Ga. 186.

16. Even as to a matter which he referred to in response to a suggestion of his counsel. Walker v. State, 116 Ga. 537.

17. Walker v. State, 116 Ga. 537; Perry v. State, 116 Ga. 850; Clark v. State [Ga.] 43 S. E. 853. The court may temporarily suspend the trial to investigate a charge of bribery of witnesses. People v. Salisbury [Mich.] 96 N. W. 936.

18. A request by the state after it had closed its case to withdraw one of the defendants from the stand to consult with him before testifying as a witness of the defendant is properly granted. State v. Gosey, 111 La. ——, 35 So. 786. A request by defendant's counsel, on a trial of two, to withdraw the other defendant from the stand to interview him before testifying is properly refused. Id.

19. Oliveros v. State [Ga.] 45 S. E. 596.

20. Patton v. State, 117 Ga. 230.

21. Jarvis v. State [Ala.] 34 So. 1025.

22. If questions are not put in a prejudicial form. People v. Hackett, 82 App. Div. [N. Y.] 86; Beal v. State [Ala.] 35 So. 58.

23. Coles v. State, 23 Ohio Circ. R. 313.

24. A physical examination cannot be compelled in a prosecution for slander to support the accused's statements. Bowers v. State [Tex. Cr. App.] 75 S. W. 299.

25. As a record of proceedings before a justice which is in the hands of the state. Jenkins v. State [Tex. Cr. App.] 75 S. W. 312.

26. Admission of evidence not relevant until connected held not error. People v. Monroe, 138 Cal. 97, 70 Pac. 1072. Communication of threats may be excluded until it is shown that the threats were made by deceased. Hudson v. Com., 24 Ky. L. R. 785, 69 S. W. 1079. Admission of evidence in rebuttal which belongs to the state's case in chief. State v. Hunter [Iowa] 92 N. W. 872; Bryan v. State [Fla.] 34 So. 243; Davis v. State [Fla.] 32 So. 822. But see Mosley v. Com., 24 Ky. L. R. 1811, 72 S. W. 344. The admission of evidence in rebuttal which should have been introduced in chief is not error of which the defendant can complain unless the trial court's discretion was abused to his prejudice. Porter v. People [Colo.] 74 Pac. 879. It is within the discretion of the court to permit counsel for the state to introduce evidence of which he learns after the state rests in chief. State v. Dunn [Mo.] 77 S. W. 848. Where one witness fixed the time of the offense as October and another stated generally that it was in the fall, and defendant proved an alibi for the month of October, it was not error to admit testimony in rebuttal fixing the time in September. Turpin v. Com., 25 Ky. L. R. 90, 74 S. W. 734. Where the clothes of a prosecuting witness have been previously identified, they may be exhibited to the jury after the state has closed its case. State v. Thornhill [Mo.] 76 S. W. 948. It is a matter of discretion with the court to reopen an examination of witnesses. State v. Robertson [La.] 35 So. 375.

27. Anthony v. State [Fla.] 32 So. 818; Duggan v. State, 116 Ga. 846; Dodson v. State [Tex. Cr. App.] 70 S. W. 969; Kelly v. State [Tex. Cr. App.] 71 S. W. 756; Ferrell v. State [Fla.] 34 So. 220. Refusal to allow defendant to be recalled after argument had commenced held error. Lewandowski v. State [Tex. Cr. App.] 72 S. W. 594. Reopen-

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mission of evidence on promise to connect it is error, where both the court and the district attorney knew that such connection could not be made.[28] The district attorney cannot be required to make a statement of what the state will undertake to prove before introducing evidence.[29] It is not error to exclude repetition[30] or cumulative evidence,[31] or evidence on a point covered by an admission.[32] Statutes sometimes permit the court in its discretion to allow a view.[33]

Remarks of the court are not ground for reversal unless both improper and harmful.[34] Private conference between court and counsel is to be avoided.[35]

Demonstrations by the spectators are highly improper, but are not always deemed prejudicial.[36]

ing for additional evidence is discretionary. Green v. State [Ga.] 45 S. E. 990. Refusal to reopen the case to allow statement by defendant held proper. Dunwoody v. State [Ga.] 45 S. E. 412. Under Rev. St. Wyo. 1899, § 5371, prescribing the order of proceedings in criminal cases it is not an abuse of discretion for the court to refuse to permit the defendant to explain certain statements alleged to have been made by him, after the evidence is concluded. Keffer v. State [Wyo.] 73 Pac. 556. By statute in some states evidence of material character may be introduced at any time before the closing of the argument. Fugett v. State [Tex. Cr. App.] 77 S. W. 461.

28. Tijerina v. State [Tex. Cr. App.] 74 S. W. 913.

29. Poole v. State [Tex. Cr. App.] 76 S. W. 565.

30. State v. Rodman [Mo.] 73 S. W. 605. Exclusion of question calling for repetition of "exact words" not error and not harmful. Mathis v. State [Fla.] 34 So. 287. Exclusion of question on cross-examination calling for repetition sustained. State v. Donovan [Vt.] 55 Atl. 611. Questioning a witness directly as to a certain matter after his denial thereof is not prejudicial error. Asking him whether he had not made a certain memorandum after his denial that it was in his handwriting. People v. Dowell [Cal.] 75 Pac. 45.

31. State v. Johnson [S. C.] 44 S. E. 58; Lockland v. State [Tex. Cr. App.] 73 S. W. 1054.

32. Character of defendant. Wilson v. State [Tex. Cr. App.] 72 S. W. 862.

33. Litton v. Com. [Va.] 44 S. E. 923. A statute authorizing the trial judge to permit the jury to view the place of the offense limits the inspection to inanimate objects [Pen. Code Mont. § 2097]. State v. Landry [Mont.] 74 Pac. 418.

34. Perry v. State, 116 Ga. 850. Remark that question was about an immaterial matter harmless. State v. May [Mo.] 72 S. W. 918. It is not prejudicial error for the court to remark in excluding testimony that he had ruled on a similar question before, and he desired the ruling of the court respected. Willis v. State [Tex. Cr. App.] 75 S. W. 790. Addressing prosecutrix as "my girl" harmless. State v. Burns [Iowa] 94 N. W. 238. Remark allowing comment by prosecuting attorney on occurrences in the court room held not to show bias. Clark v. State [Ga.] 43 S. E. 853. Remark that it was immaterial what defendant was doing several years before held not to belittle evidence of his good character. Wilson v. State [Tex. Cr. App.] 72 S. W. 862. Remark on plat being offered and objected to "Tie a piece of red tape around it and go ahead with the case" is harmless. Ragland v. State [Ark.] 70 S. W. 1039. Reproaching jury in similar case for verdict of acquittal received during the trial not ground for reversal. Lehman v. D. C., 19 App. D. C. 217. Remark that delay was caused by request that charge be put in writing is harmless. Hodge v. State, 116 Ga. 852. Asking accused if he objects to the jury separating for meals is harmless. State v. Regard, 65 Kan. 716, 70 Pac. 634. Remark that examination of witness had been unusually protracted is harmless. Com. v. Coughlin, 182 Mass. 558. Remarks on evidence, which the jury are told to disregard is harmless. State v. Gatlin, 170 Mo. 354; State v. Humphreys [Or.] 70 Pac. 824. Remark that evidence was not part of res gestae but might be considered as corroboration held error. Bradshaw v. State [Tex. Cr. App.] 70 S. W. 215. Where defendant's statement is rambling and irrelevant the court may admonish him to come to the issue. Long v. State [Ga.] 45 S. E. 416. Remark in admitting evidence that it was material, held not error. Cogdell v. State [Tex. Cr. App.] 74 S. W. 311. Remark which might be construed as approving the explanation given by a witness of a mistaken statement held error. Potter v. State [Ga.] 45 S. E. 37. It is error for the court to ask an expert who had testified to defendant's insanity his opinion as to the sanity of the persons who had recently burned a negro accused of crime. Lowe v. State [Wis.] 96 N. W. 417. Telling counsel his "head is full of cobwebs" is indiscreet but not necessarily error. Mathis v. State [Fla.] 34 So. 287. The court's remark in overruling a motion to open the case to admit other evidence that "it is no issue in this case, and the jury will disregard from their deliberations the matter suggested" is not a comment on the evidence and objectionable. State of Eubank [Wash.] 74 Pac. 378. The court should use no language within hearing of the jury tending to comment on the evidence. State v. Shuff [Idaho] 72 Pac. 664. The court should be careful in admonishing counsel either for state or defendant lest in so doing the influence of counsel may be improperly weakened or disparaged with the jury. Remarks of the trial judge in ruling on the admissibility of evidence held erroneous. Poole v. State [Tex. Cr. App.] 76 S. W. 565.

35. Matters arising for decision should not be the subject of private conference between court and counsel. They should be heard and decided in presence of opposing counsel. Peaden v. State [Fla.] 35 So. 204.

36. Applauding of prosecuting attorney's

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(§ 10) *B. Arguments and conduct of counsel.*[37]—In the absence of statute, the number[38] and order of the arguments,[39] and the length of time allowed,[40] is in the discretion of the court, though it is sometimes held that in a capital case any limitation of time is error.[41] It is the duty of the prosecuting attorney to see that defendant has a fair trial, and he should abstain from artifice and insinuation,[42] such as unfair conduct in offering evidence and examining witnesses[43] or jurors.[44] He may in his opening state any facts which he has a right to prove,[45] and argue the effect thereof.[46] He may in argument refer to his own lack of interest in the result,[47] to the necessity of enforcing the laws,[48] to the infrequency with which capital punishment has been inflicted in that locality,[49] to the manner of defendant during the trial,[50] and may discuss the evidence to the same extent as in a civil case,[51] and assert conclusions therefrom,[52] may make a dia-

argument held not prejudicial. State v. Cartrell, 171 Mo. 489. Concerted leaving of court room during argument of defendant's attorney held ground for reversal. State v. Wilcox, 131 N. C. 707.

37. Curing misconduct by withdrawal or admonition, see post, § 16.

38. Under the express provisions of Comp. St. § 2899, defendant has a right to be heard by two attorneys. Territory v. Sheron [N. M.] 70 Pac. 562. Where the statute gives a right to two arguments on each side the state may make two though defendant's counsel declined to argue the case. Wilson v. State [Tex. Cr. App.] 72 S. W. 862.

39. Where documentary evidence has been introduced by defendant he is not entitled to open and close as having introduced no "testimony" [Pen. Code, § 1029]. Hargrove v. State [Ga.] 45 S. E. 58.

40. Allowing defendant's counsel 30 minutes where 15 witnesses were examined sustained. Barr v. People [Colo.] 71 Pac. 392. Allowance of 20 minutes sustained. Wright v. U. S. [Ind. T.] 69 S. W. 819. Limitation to two hours on each side sustained in homicide case. Harris v. Com. [Ky.] 74 S. W. 1044.

41. State v. Tighe, 27 Mont. 327, 71 Pac. 3.

42. State v. Irwin [Idaho] 71 Pac. 608.

43. Repetition of questions as to past misconduct of defendant after ruling against the same. People v. Derbert, 138 Cal. 467; State v. Irwin [Idaho] 71 Pac. 608. Offering evidence which had been excluded on a former trial held not error. Barr v. People [Colo.] 71 Pac. 392. A statement that the state will not call a certain witness because it will not vouch for his credibility held not improper. Carle v. People, 200 Ill. 494. Questions designed only to create prejudice. Tijerina v. State [Tex. Cr. App.] 74 S. W. 913. A state's attorney's remark: "Yes, it was an injustice not to let you testify in French" to a state's witness is without prejudice to the accused and no ground for setting aside the verdict. State v. Halliday [La.] 35 So. 380. Where a prosecuting attorney abandons a line of examination, to which objection is sustained, it is not misconduct in asking questions thereon. People v. Glaze [Cal.] 72 Pac. 965. An attempt by the prosecuting attorney to introduce the record of a previous conviction for larceny, is prejudicial. A justice of the peace was called, the fact that he had been justice of the peace established, and the prosecuting attorney then said: "I wish you would turn to your docket, State of Missouri v. John Rose, for larceny." State v. Rose [Mo.] 76 S. W. 1003. It is prejudicial error to place the defendant's wife, whom he had married the day before the trial, on the stand and compel him to object to her testimony against him. Moore v. State [Tex. Cr. App.] 75 S. W. 497.

44. Error to ask jurors if they knew certain other persons under indictment for the same offense. State v. Meysenburg, 170 Mo. 1.

45. That before the crime defendant was shabbily dressed and without means of support. State v. Gartrell, 171 Mo. 489. Facts tending to show conspiracy. People v. Gorsline [Mich.] 94 N. W. 16. Where counsel in good faith stated his intention to prove incompetent matters but desisted promptly on intimation from the court that such proof was inadmissible there is no error. State v. Trusty [Iowa] 97 N. W. 989. Statements in opening not supported by evidence improper. Paulson v. State [Wis.] 94 N. W. 771. Highly prejudicial comments on the defendant's character by the prosecuting attorney in his opening statement are grounds for reversal. Marshall v. State [Ark.] 75 S. W. 584.

46. A statement that defendant must show what he did with certain bloody clothing is not objectionable as a statement that defendant must testify. State v. Greenleaf, 71 N. H. 606. A statement that the jury could act on their common knowledge that houses of prostitution could not run without the aid of the police is improper. People v. Bissert, 172 N. Y. 643.

47. Webb v. State [Ala.] 33 So. 487.

48. State v. John [Iowa] 93 N. W. 61. An appeal for conviction based only on the evidence is not improper. Parker v. State [Neb.] 93 N. W. 1037. A statement that an acquittal would make the jury particeps criminis is ground for reversal. People v. Bissert, 172 N. Y. 643. Statement that the community having refrained from lynching defendant expected the jury to impose capital punishment is improper. Fredericson v. State [Tex. Cr. App.] 70 S. W. 754. Remarks on tendency and dangers of lynching held proper where defendant was accused of murder by lynching. Jackson v. State [Ala.] 34 So. 188.

49. Moore v. State [Tex. Cr. App.] 70 S. W. 89.

50. State v. Gatlin, 170 Mo. 354.

51. People v. Doody, 172 N. Y. 165. A statement that defendant offers no contradiction but his own testimony is proper if

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gram to illustrate his argument,[53] or use a plat not in evidence which has been referred to by defendant's counsel,[54] may read the statute under which the prosecution was had,[55] and where the jury are judges of the law, may read reported decisions.[56] He should not refer to matters outside the issues[57] or not sustained by the evidence,[58] nor state his personal belief of defendant's guilt.[59] He cannot argue that objections made to testimony show a desire to avoid disclosure of the facts[60] or that requesting a charge on mitigation was an admission of guilt;[61] nor can he comment on failure of defendant to offer evidence of his good character.[62] Defendant's failure to call his wife as a witness,[63] or to call a witness who testified on a former trial,[64] is a proper subject of comment; but his own failure to testify cannot be referred to.[65] Where defendant goes on the stand, the de-

true. Hawkins v. State [Tex. Cr. App.] 71 S. W. 756. Refusal to interfere with illogical or baseless argument not error. Suggestion that witnesses who had come from a distance were all untrustworthy because one was proven so. Sylvester v. State [Fla.] 35 So. 142. Statement that a certain saloonkeeper "and his gang" tried to prove an alibi for defendant when he was arrested held a proper comment on the evidence. Hawkins v. State [Tex. Cr. App.] 71 S. W. 756. Difference in conduct of policemen after they discovered that accused was an officer may be commented on. People v. O'Connor, 82 App. Div. [N. Y.] 55. Statement that if all but one were shown innocent the remaining one must be guilty and that he dared defendant to arraign the other men in the neighborhood held not misconduct. Alderson v. Com. [Ky.] 74 S. W. 679. Remark of prosecuting attorney as to the manner in which confession was made held not ground for reversal. State v. Nelson [Minn.] 97 N. W. 652. So long as counsel is within the issues and evidence the manner of making his argument is within the discretion of the trial court. People v. Conklin, 175 N. Y. 333. Argument based on the evidence that another crime was the motive for the one in issue is admissible. Binyon v. U. S. [Ind. T.] 76 S. W. 265. Where the evidence shows that defendant had been in the penitentiary, the prosecuting attorney may allude thereto in argument. May state that defendant's name is written on the walls of the penitentiary. State v. Boyd [Mo.] 76 S. W. 979. Remarks of prosecuting attorney in commenting on evidence held to be a legitimate argument. Ingram v. State [Tex. Cr. App.] 75 S. W. 304. It is not error for the prosecuting attorney to state to the jury in his arguments, facts intended only as an illustration, not intending them to be used as facts in the case or to become factors in the formation of the verdict. Dennis v. State [Ala.] 35 So. 651.

52. The assertion of a conclusion fairly inferable from the evidence is not error. Sims v. State [Ga.] 45 S. E. 621.

53. Russell v. State [Neb.] 92 N. W. 751.

54. Crawford v. State [Ga.] 43 S. E. 762.

55. The prosecution was for seduction and the statute read contained a provision that if defendant marry the woman after conviction it barred the penalty. State v. Dent, 170 Mo. 398.

56. Counsel may read judicial opinions with so much of the facts therein as are proper to the understanding thereof. Cribb v. State [Ga.] 45 S. E. 396.

57. Statement that defendant's counsel was employed only in desperate cases held improper but harmless. Johnson v. Com., 24 Ky. L. R. 842, 70 S. W. 44. Statement that defendant intended to commit also a crime not charged is improper. Long v. State [Miss.] 33 So. 224. On prosecution under liquor laws, a reference to a murder growing from violation thereof is improper. State v. Tuten, 131 N. C. 701. Statement that had defendant married prosecutrix his parents would have had no cause to mourn held not error. State v. Burns [Iowa] 94 N. W. 238. Refusal to permit argument on excluded issue is proper. Jarvis v. State [Ala.] 34 So. 1025.

58. Reference to unproven statement of state's witness corroborating his testimony improper. State v. Greenleaf, 71 N. H. 606. Statement that certain witnesses not called were subpoenaed by defendant improper. State v. Goode [N. C.] 43 S. E. 502. The mere fact that a club was found near the scene of the murder does not support a theory that the crime was committed therewith, and it is error to allow argument based thereon. People v. Montgomery [N. Y.] 68 N. E. 258. In arguing on motive it is not error for counsel to state that "there was some mysterious feeling of jealousy between defendant and deceased, which under the law the state was not permitted to show." State v. Dunn [Mo.] 77 S. W. 848.

59. Reed v. State [Neb.] 92 N. W. 321.

60. Com. v. Coughlin, 182 Mass. 558.

61. White v. State [Ala.] 34 So. 177.

62. Failure of defendant to put his reputation in issue cannot be referred to. Cline v. State [Tex. Cr. App.] 71 S. W. 23. Urging inferences from the failure of defendant to offer evidence of his good character is improper. State v. Williams [Iowa] 97 N. W. 992. Except where defendant's counsel in argument asked why the state did not attack it. Jones v. State [Tex. Cr. App.] 71 S. W. 962. Comment on failure of defendant to bring witnesses as to his character is not justified by argument for defendant commenting on failure to attack character. State v. Shipley [Mo.] 74 S. W. 612.

63. Richardson v. State [Tex. Cr. App.] 70 S. W. 320; Locklin v. State [Tex. Cr. App.] 75 S. W. 305.

64. State v. Parker [Mo.] 72 S. W. 650.

65. State v. Stoffels [Minn.] 94 N. W. 675. Statement that certain evidence is not contradicted is not such a reference though defendant was the only one who could contradict it. State v. Snider [Iowa] 91 N. W. 762; State v. Hasty [Iowa] 96 N. W. 1115.

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cisions are in conflict as to right to comment on his failure to testify as to certain matters.[66] The character and conduct of defendant as they appear in the evidence may be referred to,[67] but abusive language is improper.[68] Explanations of procedure and in anticipation of the charge are of doubtful propriety.[69] A statement as to what was done during the deliberations of a jury at a former trial is not regarded as a reference to a former conviction within a statutory prohibition.[70]

Argument by defendant's counsel.[71]—Counsel may be stopped from arguing before the jury a proposition of law contrary to the well established law of the state.[72] If counsel for defendant is permitted to go outside the record in argument, the state may do likewise in answering it.[73]

People v. Hammond [Mich.] 93 N. W. 1084. A statement that only defendant and prosecutrix knew the facts; that prosecutrix had told her story and there was nothing to prove it untrue, is a reference to defendant's failure to testify. People v. Payne [Mich.] 91 N. W. 739. Statement that when defendant's counsel said that the witnesses for the prosecution were the only persons who knew certain facts he forgot his client is not improper. People v. Hammond [Mich.] 93 N. W. 1084. Though the reference be made by way of disclaimer of intent to urge any inference therefrom it is reversible error. Jackson v. State [Fla.] 34 So. 243. Discussion of defendant's failure to testify is ground for reversal though the jurors concurred in saying that it did not influence them. Fine v. State [Tex. Cr. App.] 77 S. W. 806. An allusion to defendant's failure to testify need not be direct in order to justify a reversal. In alluding to an absence of proof, the prosecuting attorney pointed his finger at defendant, and the court cautioned and directed the jury to disregard his remarks in such connection and also reprimanded the attorney. Washington v. State [Tex. Cr. App.] 77 S. W. 810. A remark of the prosecuting attorney in his argument that "there sits as guilty a man as was ever tried for stealing a horse, and why is there not some one here to deny these things?" is not improper as calling the jury's attention to the fact that the defendant did not testify. Wingo v. State [Tex. Cr. App.] 75 S. W. 29.

66. Where defendant goes on the stand his failure to testify as to certain matters cannot be commented on. State v. Guinn [Mo.] 74 S. W. 614. Prosecuting attorney may comment on the accused's testimony failing to deny statements made by other witnesses. People v. Wong Bin [Cal.] 72 Pac. 505.

67. Statement that it would be best for defendant's father if defendant were convicted sustained. Puckett v. State [Ark.] 70 S. W. 1041. Statement that defendant had been arrested so often that he could not remember how often held proper. Williams v. U. S. [Ind. T.] 69 S. W. 871. Severe arraignment of defendant sustained. Howard v. Com., 24 Ky. L. R. 950, 70 S. W. 295. Statement that after the crime everybody went to see about defendant held error. State v. Greenleaf, 71 N. H. 606. Remark that certain conduct was appropriate for the stage but should not be permitted in real life held harmless. People v. O'Connor, 82 App. Div. [N. Y.] 55. It is not cause for reversal of a conviction of manslaughter that the prosecuting attorney in his argument referred to the accused as a murderer and the crime as the most tragic ever committed in the county. Carroll v. State [Ark.] 75 S. W. 471.

68. Statement that the defense was "brutal, cowardly and contemptible," and that had prosecutrix had male relatives no trial would be needed is improper. People v. Payne [Mich.] 91 N. W. 739. That defendant was a bad man held not improper. People v. McDonald [Mich.] 94 N. W. 1064. Reference to defendant as a "brute" held not misconduct where the evidence showed rape with circumstances of aggravation. State v. Allen [Mo.] 74 S. W. 839. Reference to defendant as an "assassin" and a "snake" held not improper. State v. Gartrell, 171 Mo. 489. Reference to the crime as one of the worst ever committed in the county held not ground for reversal. Fredericson v. State [Tex. Cr. App.] 70 S. W. 754.

69. Reference to right of appeal and to the pardoning power held not ground for reversal. State v. Rodman [Mo.] 73 S. W. 605. Remark that case was moved pending an election because of strenuous efforts by defendant to delay it held not ground for new trial. People v. O'Connor, 82 App. Div. [N. Y.] 55. Argument and illustration that however weak the evidence the court was bound to submit an issue approved. Hudson v. State [Tex. Cr. App.] 70 S. W. 764.

70. Code Crim. Proc. 1895, art. 823. Gaines v. State [Tex. Cr. App.] 77 S. W. 10. An accidental reference to defendant's former trial as a conviction is not reversible error where the prosecuting attorney corrected the mistake in his argument on his attention being called to it, and the court instructed the jury to disregard the remark. Dina v. State [Tex. Cr. App.] 78 S. W. 229.

71. Where it appears that the principal witness for the state appeared also against other persons who were acquitted, defendant's attorney is entitled to comment thereon. State v. Hall [N. C.] 44 S. E. 553. Counsel for the accused cannot make statements in the presence of the jury making admissions against him, and it is error to instruct the jury that they may consider such statements. State v. Shuff [Idaho] 72 Pac. 664. Comment on defendant's refusal to answer questions of police after arrest as indicating guilt held not improper. People v. McDonald [Mich.] 94 N. W. 1064.

72. As that a verbal agreement of the accused and his victim to take each other for man and wife constitutes marriage.

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(§ 10) *C. Questions of law and fact.*—Questions of fact in criminal cases are peculiarly within the province of the jury.[74] Among such questions are the place where the offense was committed,[75] the credibility of witnesses,[76] sufficiency of evidence,[77] even where it is uncontradicted.[78] Whether defendant was extradited for the offense on trial,[79] or whether the warrant is valid,[80] are questions of law. The right of counsel to appear is a question of law for the court.[81]

(§ 10) *D. Taking case from jury.*—In some states peremptory directions for acquittal are not allowed,[82] and even when proper, the giving thereof is discretionary.[83] If matter of absolute defense is admitted in the prosecutor's opening statement, the court may on its own or counsel's motion direct an acquittal.[84] Where there is evidence to support a conviction, the case should not be withdrawn from the jury.[85] In passing on a demurrer to evidence, every part of it should be considered.[86] A motion to exclude the evidence from the jury because it is insufficient to convict is not equivalent to a demurrer to the evidence.[87]

(§ 10) *E. Instructions. Necessity and duty of charging—Requests.* Even where the jury are judges of the law, the court may give instructions.[88] The jury should be instructed as to the issues,[89] the theories of the prosecution and defendant,[90] the elements of the offense charged,[91] and the defense urged,[92] and as

State v. Menard [La.] 35 So. 360. The jury are judges of the law subject only to the supervision of the court and the court is not bound to sit by and let wrong propositions of the law be argued to them. Id.

73. Gipson v. State [Tex. Cr. App.] 77 S. W. 216. Not error to allude to convictions in another county of other persons in answer to an argument by defendant's counsel that he had never heard of such a case. Gaines v. State [Tex. Cr. App.] 77 S. W. 10.

74. Goldsberry v. State [Neb.] 92 N. W. 906.

75. State v. Kline, 109 La. 603.

76. Parker v. State [Neb.] 93 N. W. 1037. Defendant. Carle v. People, 200 Ill. 494. Credibility of uncontradicted witnesses is for jury. Townsend v. State [Ala.] 34 So. 382.

77. Barr v. People [Colo.] 71 Pac. 392; Powers v. Com., 24 Ky. L. R. 1007, 70 S. W. 644. Conspiracy is not a jury question until a prima facie case is made. Collins v. State [Ala.] 34 So. 993. Where there is any evidence tending to connect defendant with the crime, its sufficiency to corroborate an accomplice is for the jury; but if there is no evidence the question is one of law. People v. O'Farrell, 175 N. Y. 323.

78. State v. Barry [N. D.] 92 N. W. 809.

79. State v. Roller, 30 Wash. 692, 71 Pac. 718.

80. State v. Yourex, 30 Wash. 611, 71 Pac. 203.

81. State v. De Wolfe [Mont.] 74 Pac. 1084.

82. The statute allowing direction of verdict applies only to civil cases. McCray v. State [Fla.] 34 So. 5.

83. Even where the evidence justifies a peremptory instruction for acquittal the giving thereof is discretionary. McCray v. State [Fla.] 34 So. 5.

84. U. S. v. Dietrich, 126 Fed. 676.

85. Ter. v. Padilla [N. M.] 71 Pac. 1084; Jackson v. State [Ala.] 34 So. 188; State v. Eubank [Wash.] 74 Pac. 378.

86. Goldman v. Com. [Va.] 42 S. E. 923.

87. Hainsworth v. State [Ala.] 34 So. 203.

88. Guy v. State [Md.] 54 Atl. 879.

89. Not as to a count which has been dismissed. Oakley v. State [Ala.] 33 So. 693. Where prosecution has elected between several acts, the jury should be confined to that on which it has elected to stand. Price v. State [Tex. Cr. App.] 70 S. W. 966. Premeditated murder and killing in perpetration of burglary are not so inconsistent as to preclude submission of both. People v. Sullivan, 173 N. Y. 122. The law of the case should be charged though not requested. Ter. v. Baca [N. M.] 71 Pac. 460.

90. Ter. v. Baca [N. M.] 71 Pac. 460. Defendant's theory as to his possession of stolen goods should be presented. State v. Brady [Iowa] 91 N. W. 801. A theory arising only from the statement of defendant need not be charged. Walker v. State [Ga.] 43 S. E. 737. Instruction held to sufficiently present theory of defendant that prosecution was result of a conspiracy against him. People v. Rich [Mich.] 94 N. W. 375. Failure to charge on one of two theories of defense not error in absence of request. Smith v. State [Ga.] 43 S. E. 703. But see Feinstein v. State [Tex. Cr. App.] 73 S. W. 1052.

91. All essentials must be given in an instruction purporting to state them. Goldsberry v. State [Neb.] 92 N. W. 906. It is error to refer the jury to the indictment for the elements of the crime. Ter. v. Baca [N. M.] 71 Pac. 460. A charge as to acts in pursuance of a conspiracy to do an unlawful act should define an unlawful act. Powers v. Com., 24 Ky. L. R. 1007, 70 S. W. 644; Id., 24 Ky. L. R. 1186, 70 S. W. 1050. Where other offenses are shown to prove guilty knowledge, it is not necessary to instruct fully as to the elements thereof. Goldsberry v. State [Neb.] 92 N. W. 906. Degree of care required of physician on trial for negligent homicide. People v. Huntington, 138 Cal. 261, 70 Pac. 294. Where all the elements of the crime are stated failure to define it is not error. State v. Douette [Wash.] 71 Pac. 556. Where deceased was knocked down with an ax and robbed an instruction as to murder in perpetration of

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to the burden of proof.[93] Where the jury do not fix the penalty, they need not be instructed as to the legal extent thereof.[94] Technical terms used in the instructions should be defined.[95] Where evidence is admissible only for a particular purpose, there should be an instruction limiting its effect.[96] The authorities are in conflict as to the propriety of instructing, even on request, that no inference is to be drawn from defendant's failure to testify.[97]

Aside from the definition of the issues, defendant cannot complain of failure to instruct unless he has requested an instruction.[98] The time for making re-

robbery need not define robbery. Ransom v. State [Tex. Cr. App.] 70 S. W. 960.

92. Charge as to limitations should be given where the evidence would sustain it. State v. Kunhl [Iowa] 93 N. W. 342. Instruction as to defense shown only by statement of defendant must be specially requested. Walker v. State [Ga.] 45 S. E. 608; Murphy v. State [Ga.] 45 S. E. 609.

93. Instruction as to burden of proof should be given. State v. Hardelein, 169 Mo. 579. An instruction that the evidence must be so convincing as to lead the minds of the jury to a conclusion of guilt should be given. Willis v. State, 134 Ala. 429. Instructions held adequate in the absence of request. Cremar v. People [Colo.] 70 Pac. 415. It is not error for the court to refuse to define "reasonable doubt," telling the jury that he deems the phrase sufficiently intelligible. Meehan v. State [Wis.] 97 N. W. 173. Error to refuse to define "reasonable doubt." Davis v. State [Fla.] 35 So. 76.

94. Edwards v. State [Neb.] 95 N. W. 1038.

95. "Falsely" and "fraudulently" need not be defined. State v. Gregory, 170 Mo. 598. Failure of an instruction to define the terms "right" and "fraudulently" in a prosecution for appropriating funds fraudulently and without right, is error. State v. Com. [Ky.] 75 S. W. 244. Definitions of words used in the instructions must be specially requested. State v. Atkins [Iowa] 97 N. W. 996.

96. When prior acts and declarations of co-conspirators are admitted in evidence the jury should be instructed that the separate and individual acts of other conspirators should not be considered against defendant for the purpose of establishing a conspiracy as to defendant. Chapman v. State [Tex. Cr. App.] 76 S. W. 477. Where extraneous agreements are introduced on cross-examination of defendant as a witness for the purpose of affecting his credibility, it is error for the court to fail to limit the effect of such testimony to such purpose. Scoville v. State [Tex. Cr. App.] 77 S. W. 792. A charge on the acts and conduct of other conspirators in the absence of defendant need not be given where the evidence is positive that defendant was present. Kipper v. State [Tex. Cr. App.] 77 S. W. 611. Where evidence is admitted to corroborate a witness after an attempt has been made to impeach him, the jury need not be instructed as to the effect thereof where there is no danger that it will be appropriated by the jury for any other purpose. Id. It is the duty of the court where extraneous crimes are introduced on a controverted question of intent to limit the same to that purpose. Terry v. State [Tex. Cr. App.] 76 S. W. 928. Proof of inconsistent statements should be limited to effect on credibility of witness. Mosley v. Com., 24 Ky. L. R. 1811, 72 S. W. 344; Terry v. State [Tex. Cr. App.] 72 S. W. 382; Olds v. State [Fla.] 33 So. 296; Fuqua v. Com., 24 Ky. L. R. 2204, 73 S. W. 782. Instruction as to the weight to be given an admission that an absent witness would testify as stated in an application for continuance approved. McCormick v. State [Neb.] 92 N. W. 606. It is error to fail to limit evidence of conspiracy introduced on a trial for murder. Howard v. Com., 24 Ky. L. R. 1225, 70 S. W. 1055. Evidence of other offenses should be limited by instructions. Grant v. State [Tex. Cr. App.] 70 S. W. 954; Peterson v. State [Tex. Cr. App.] 70 S. W. 978. Where a previous conviction of another crime has been shown by defendant in aid of his defense, it is not error to fail to instruct that previous conviction is to be considered only as to defendant's credibility. Turpin v. Com. [Ky.] 74 S. W. 734.

97. Under statutory provisions that the failure of accused to testify shall not be commented upon, it is not to be alluded to even in a cautionary instruction apparently beneficial to accused [Cr. Code, § 223, subs. 1]. Tines v. Com. [Ky.] 77 S. W. 363. An instruction that defendant's failure to testify is not to be considered against him is proper. Grant v. State [Tex. Cr. App.] 70 S. W. 954. If the court charge on the subject of defendant's failure to testify, there must be an instruction to the jury not to discuss or consider such failure. Fine v. State [Tex. Cr. App.] 77 S. W. 806. That the "statute expressly declares that defendant's neglect to testify shall not create any presumption against him," under 2 Ballinger, Ann. Codes & St. Wash. § 6941, approved. State v. Mitchell [Wash.] 72 Pac. 707.

98. Cupps v. State [Wis.] 97 N. W. 210; Carr v. State [Fla.] 34 So. 892; Woods v. State [Tex. Cr. App.] 75 S. W. 37; People v. Hinshaw [Mich.] 97 N. W. 758; Hankins v. State [Tex. Cr. App.] 75 S. W. 787; Martin v. State [Neb.] 93 N. W. 161; Allen v. State [Tex. Cr. App.] 70 S. W. 85; Nicholson v. State [Tex. Cr. App.] 71 S. W. 969. Form of verdict. Kelly v. State [Fla.] 33 So. 235. Separate verdict on trial of two defendants. Welborn v. State, 116 Ga. 522. Instruction defining reasonable doubt must be specially requested. State v. Mahoney [Iowa] 97 N. W. 1089. An instruction that the presumption of good character continues throughout the case though proper is not necessary. Howard v. Com., 24 Ky. L. R. 1225, 70 S. W. 1055. Restriction of evidence. People v. Monroe, 138 Cal. 97, 70 Pac. 1072; State v. Gatlin, 170 Mo. 354. Instruction as to impeachment. Hodge v. State, 116 Ga. 929; Anderson v. State [Ga.] 43 S. E. 835; Paulson v. State [Wis.] 94 N. W. 771; Hatcher v. State, 116 Ga. 617. Positive and negative evidence. Scott v. State, 117 Ga. 14. Man-

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quests[99] and the form in which they shall be presented[1] is usually regulated by rule. An instruction need not be given unless there is evidence on which to predicate it,[2] nor should mere abstract propositions of law be given.[3] Defendant is entitled

ner of acquiring possession of stolen goods. State v. Meldrum, 41 Or. 380, 70 Pac. 526. Accomplice evidence. Garner v. State [Tex. Cr. App.] 70 S. W. 213. Limitation of jury to particular act charged. Efird v. State [Tex. Cr. App.] 71 S. W. 957. Effect of verdict in case at which alleged perjury was committed. State v. Douette [Wash.] 71 Pac. 556. Self defense, the court having charged in the language of the Code. People v. Dobbins [Cal.] 72 Pac. 339. Insulting language as justification for assault. Shaw v. State [Tex. Cr. App.] 73 S. W. 1046. Confessions. Clark v. State [Ga.] 43 S. E. 853; Walker v. State [Ga.] 44 S. E. 850. Rules for weighing testimony. People v. O'Connor, 82 App. Div [N. Y.] 55; Green v. State [Ga.] 45 S. E. 598. Credibility of accomplices. State v. Carey [Conn.] 56 Atl. 632. Necessity of corroborating prosecutrix. Edwards v. State [Neb.] 95 N. W. 1038. Effect to be given attempt to escape. Williams v. State [Neb.] 95 N. W. 1014. What is done with one acquitted for insanity. Copenhaver v. State [Ind.] 67 N. E. 453.

99. Requests should be allowed after charge and before jury retire. State v. Barry [N. D.] 92 N. W. 809. It is too late to request a written charge after the court has commenced his charge and the case has been submitted to the jury. State v. Forbes, 111 La. ——, 35 So. 710.

1. By White's Ann. Code Proc. art. 719 requests must be in writing. Bush v. State [Tex. Cr. App.] 70 S. W. 550. A mere verbal request to charge on a certain point is insufficient. Cupps v. State [Wis.] 97 N. W. 210; State v. Carey [Conn.] 56 Atl. 632. Where it is required that requests be signed by counsel, unsigned requests may be disregarded. Starr v. State [Ind.] 67 N. E. 527.

2. Davis v. State [Fla.] 35 So. 76; State v. Smith [Or.] 71 Pac. 973; People v. Morine [Cal.] 72 Pac. 166; Lyman v. People, 198 Ill. 544; Thomas v. State [Tex. Cr. App.] 70 S. W. 93; Bird v. U. S., 187 U. S. 118, 47 Law. Ed. 100; Kelly v. State [Fla.] 33 So. 235; Dixon v. State, 116 Ga. 186; Philpot v. Com., 24 Ky. L. R. 757, 69 S. W. 959; State v. Tighe, 27 Mont. 327, 71 Pac. 3; Reed v. State [Neb.] 92 N. W. 321; Ter. v. Claypool [N. M.] 71 Pac. 463; Cook v. State [Fla.] 35 So. 665; State v. Evans [Utah] 73 Pac. 1047; People v. Stevens [Cal.] 75 Pac. 62; State v. Miller [Or.] 74 Pac. 658; People v. Glover [Cal.] 74 Pac. 745; New v. Ter. [Okl.] 70 Pac. 198; Stokes v. State [Tex. Cr. App.] 70 S. W. 95; State v. Bonner [Mo.] 77 S. W. 463; Galloway v. State [Tex. Cr. App.] 70 S. W. 211; Burns v. State [Tex. Cr. App.] 71 S. W. 965; Turner v. State [Tex. Cr. App.] 72 S. W. 187; Lee v. State [Tex. Cr. App.] 72 S. W. 195; State v. Halliday [La.] 35 So. 380; State v. Allen [La.] 35 So. 495; Willis v. State, 134 Ala. 429; Hunt v. State [Ala.] 33 So. 329; State v. Powell, 109 La. 727; State v. Rose [Mo.] 76 S. W. 1003. Where witnesses testifying in chief contradict each other as to a fact, special instructions as to impeachment are not necessary. Kipper v. State [Tex. Cr. App.] 77 S. W. 611. An omission, in the charge, to confine the venue to the county in which the crime was alleged to have been committed is not erroneous where there is no question as to the proof of venue. Cook v. State [Fla.] 35 So. 665. Evidence that defendant was the principal offender held not to require submission of question whether he was only an accessory. Early v. Com., 24 Ky. L. R. 1181, 70 S. W. 1061. Charge on responsibility of accessory warranted (abortion). State v. Carey [Conn.] 56 Atl. 632. Sham character of alleged first marriage on trial for bigamy. People v. Goodrode [Mich.] 94 N. W. 14.

Circumstantial evidence. Trejo v. State [Tex. Cr. App.] 74 S. W. 546; Stewart v. State [Tex. Cr. App.] 77 S. W. 791. Evidence held not to require instruction on circumstantial evidence. Cowan v. State [Ala.] 34 So. 193; People v. Rich [Mich.] 94 N. W. 375. Where circumstantial evidence is corroborative of direct testimony it is not error to refuse instructions assuming the case to be one of circumstantial evidence. People v. Lonnen [Cal.] 73 Pac. 586. A charge on circumstantial evidence need not be given where there is direct testimony. Dying declarations and testimony of eye witnesses in homicide. Cruse v. State [Tex. Cr. App.] 77 S. W. 818. Instruction as to circumstantial evidence held not required. State v. Gartrell, 171 Mo. 489. A charge made to circumstantial evidence need not be given where there is testimony of eye witnesses to the crime. Jones v. State [Tex. Cr. App.] 77 S. W. 802. Where the evidence of larceny is possession of the stolen goods, a charge on circumstantial evidence should be given. Cortez v. State [Tex. Cr. App.] 74 S. W. 907; Davis v. State [Tex. Cr. App.] 74 S. W. 544; Carano v. State, 24 Ohio Circ. R. 93; Roberts v. State [Tex. Cr. App.] 70 S. W. 423.

Alibi: Evidence held not to require instruction as to alibi. State v. Gatlin, 170 Mo. 354. Where defendant is first connected with stolen cattle at the time of an alleged purchase, a charge on alibi should be given though there is no direct evidence thereof, the state being compelled to rely on circumstantial evidence to overcome the defense of purchase. Sapp v. State [Tex. Cr. App.] 77 S. W. 456.

Character of defendant. State v. Gartrell, 171 Mo. 489. Rev. St. § 2627 providing for an instruction on character "whenever necessary" requires such an instruction whenever there is evidence on which to base it. State v. Anslinger, 171 Mo. 600. Evidence of good character as to traits not involved in the charge does not require a charge on character. State v. Anslinger, 171 Mo. 600.

Accomplice testimony. Melton v. State, 116 Ga. 582; State v. Meysenburg, 171 Mo. 1; Truelove v. State [Tex. Cr. App.] 71 S. W. 601; State v. Burns [Nev.] 74 Pac. 983. Where the evidence in incest shows the woman an accomplice the jury should be instructed that submission without objection renders her an accomplice if resistance or objection would have prevented the act though she is not actuated by the same intent as defendant. Tate v. State [Tex. Cr.

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to an instruction based on his own testimony.[4] Matters once covered by the charge need not be repeated.[5] Instructions need not be given in the language of

App.] 77 S. W. 793. Failure to charge on accomplice testimony is not error, there being no evidence that any of the witnesses were accomplices. Reyna v. State [Tex. Cr. App.] 75 S. W. 25. Though one receiving stolen goods ought from the circumstances to have known that they were stolen, in the absence of evidence that he did, a charge on accomplice testimony need not be given. Short v. Com. [Ky.] 76 S. W. 11.

Confession. Simmons v. State, 116 Ga. 583. A statement by defendant at the time of arrest that two others should be arrested on the same charge is not a confession requiring the jury to be instructed as to confessions out of court [Cr. Code, § 240]. Tipton v. Com. [Ky.] 78 S. W. 174.

Insanity: Where there is no evidence of insane delusions, an instruction as to their effect as a defense is properly refused. Binyon v. U. S. [Ind. T.] 76 S. W. 265. A charge of insanity is not justified by evidence merely going to show that defendant was not strong minded. Griffith v. State [Tex. Cr. App.] 78 S. W. 347. Evidence held not to show any permanent condition of insanity authorizing an instruction as to the presumption that such insanity continues when once established. Binyon v. U. S. [Ind. T.] 76 S. W. 265.

Submission of included offenses: Charge that any of certain grades or degrees may be found without defining each held bad. Sherrill v. State [Ala.] 35 So. 129. It is not error to refuse to instruct as to a lesser grade of an offense, where under the evidence the defendant is guilty of a higher grade if guilty at all. State v. Ryno [Kan.] 74 Pac. 1114. Although the evidence tends to show one guilty of the highest degree of an offense it is not error for the court to instruct that the charge included a lesser degree of the offense. State v. Howard [Wash.] 74 Pac. 382. Where the commission of an offense is admitted, the only question in issue being the degree of guilt, an instruction cannot charge an included offense upon which a conviction cannot be had under the evidence. Assault and battery not submitted in an indictment for mayhem where the loss of a member is admitted. Carpenter v. People [Wash.] 72 Pac. 1072. An instruction taking from the jury's consideration any question of a less grade of a crime than the highest, is not erroneous where the evidence shows that he is guilty of the highest grade or not at all. State v. Privitt [Tex. Cr. App.] 75 S. W. 457. It is not reversible error to instruct as to a less degree of crime not in issue, where the court has instructed that the accused under the evidence was either guilty of the highest degree or not at all. Id. See, also, such titles as Homicide.

3. State v. Prater, 52 W. Va. 132. Instruction as to probative effect of specified facts which the evidence did not show is error. Echols v. State [Ga.] 46 S. E. 409. Where no evidence of good character is introduced, a charge that character is always an issue in a trial for a criminal offense, and a refusal to charge otherwise is error. Such error held not cured by subsequent remarks as to presumption of good character. People v. Slauson, 83 N. Y. Supp. 107. Instruction as to the presumption arising from the nature of the instrument with which a homicide is committed as to intent should not be given where the entire defense is insanity. Spivey v. State [Tex. Cr. App.] 77 S. W. 444. A charge on a plea of insanity should be applied to the particular offense for which defendant is to be tried. An abstract definition of insanity is not sufficient. Stewart v. State [Tex. Cr. App.] 77 S. W. 791.

4. State v. Tough [N. D.] 96 N. W. 1025. An instruction as to a defense shown only by the statement of defendant must be specially requested. Walker v. State [Ga.] 45 S. E. 608; Murphy v. State [Ga.] 45 S. E. 609.

5. State v. Callian, 109 La. 346; State v. Dent, 170 Mo. 398; Hartley v. State [Tex. Cr. App.] 71 S. W. 603; Davis v. State [Fla.] 35 So. 76; Brown v. State [Fla.] 35 So. 82; Sylvester v. State [Fla.] 35 So. 142; State v. Lindgrind [Wash.] 74 Pac. 565; Rollings v. State [Ala.] 34 So. 349; State v. Morgan [Utah] 74 Pac. 526; State v. Burns [Nev.] 74 Pac. 983; Horn v. State [Wyo.] 73 Pac. 705; State v. Martin [Mont.] 74 Pac. 725; People v. Wardrip [Cal.] 74 Pac. 744; People v. McCue, 83 N. Y. Supp. 1088; Baldwin v. State [Fla.] 35 So. 220; Peaden v. State [Fla.] 35 So. 204; State v. Hicks [Mo.] 77 S. W. 539; State v. Faulkner [Mo.] 75 S. W. 116; Franklin v. State [Tex. Cr. App.] 76 S. W. 473; State v. Brown [La.] 35 So. 501; Harper v. State [Miss.] 35 So. 572; Cook v. State [Fla.] 35 So. 665; Com. v. Carter [Mass.] 66 N. E. 716; State v. Hoot [Iowa] 94 N. W. 564; West v. State [Tex. Cr. App.] 71 S. W. 967; Hainsworth v. State [Ala.] 34 So. 203; State v. Parker [Mo.] 72 S. W. 650; Bynum v. State [Tex. Cr. App.] 72 S. W. 844; Griffin v. State [Tenn.] 70 S. W. 61; State v. Ashcraft, 170 Mo. 409; State v. Marsh, 171 Mo. 522; State v. Anslinger, 171 Mo. 600; McCormick v. State [Neb.] 92 N. W. 606; Lee v. State, 116 Ga. 563; Bassett v. State [Fla.] 33 So. 262; Reeves v. State, 117 Ga. 38; State v. Taylor, 171 Mo. 465; State v. Buralli [Nev.] 71 Pac. 532; Ter. v. Taylor [N. M.] 71 Pac. 489; Queenan v. Ter., 11 Okl. 261, 71 Pac. 218; Burns v. State [Tex. Cr. App.] 71 S. W. 965; State v. Cottrill, 52 W. Va. 363; Gunter v. State, 116 Ga. 273; State v. Maxwell, 117 Iowa, 482; State v. Doper, 118 Iowa, 1; State v. Sally, 41 Or. 366, 70 Pac. 396; State v. Vance, 29 Wash. 435, 70 Pac. 34; Willis v. State, 134 Ala. 429; State v. Prater, 52 W. Va. 132. Instruction on circumstantial evidence held covered by general charge. State v. Hendricks [Mo.] 73 S. W. 194. Burden of proof. People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014. Malice. Id. Burden of proof. Barr v. People [Colo.] 71 Pac. 392. Cause of death. Lanckton v. U. S., 18 App. D. C. 348. Intent to steal. Golding v. State, 116 Ga. 526. Self defense. State v. Gartrell, 171 Mo. 489. Burden of proof. People v. Glennon, 78 App. Div. [N. Y.] 271. Homicide in resisting officer. Com. v. Carter [Mass.] 66 N. E. 716. Right to arrest without warrant. State v. Hendricks [Mo.] 73 S. W. 194. Caution against prejudice from heinous nature of charge. State

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the request,[6] and the request may be modified,[7] though it is proper to refuse a whole instruction where part is bad.[8] It has been held, however, that when an incorrect request is made the court should correctly instruct on that subject if it has not done so.[9]

Submission of charge.—The manner in which instructions shall be submitted is usually in the discretion of the court,[10] though statutes in some states require that instructions be in writing.[11]

Form of instructions in general.—Instructions should not be argumentative in form.[12] No one matter should be given undue prominence,[13] as by repetition.[14]

v. Mehaffey [N. C.] 44 S. E. 107. Instruction for acquittal if evidence including that of good character raised reasonable doubt, held covered by general charge. Christie v. People [Ill.] 69 N. E. 33.

6. State v. Anderson, 30 Wash. 14, 70 Pac. 104; People v. Quimby [Mich.] 96 N. W. 1061; State v. Wilcox [N. C.] 44 S. E. 625.

7. Modification of request as to voluntary character of confessions held correct. Meul v. People, 198 Ill. 258. Request as to weight "if any" of dying declaration held properly modified by striking out words quoted. State v. Hendricks [Mo.] 73 S. W. 194. Modification held to classify charge as to considering conduct of parties. Id. Substitution of "beyond a reasonable doubt" for "clearly and conclusively" held proper. Id.

8. State v. Burns [Nev.] 74 Pac. 983. Request for "following * * * Nos. 1, 2, 3" is for an entire charge and will be refused if any is bad. Verberg v. State [Ala.] 34 So. 848.

9. Admissions. State v. Hendricks [Mo.] 73 S. W. 194.

10. Giving to the jury written instructions signed by counsel is not good practice. State v. McDonald, 27 Mont. 230, 70 Pac. 724. Statutes requiring specially requested instructions to be in writing and signed by the party or his attorney is for the purpose of identification only and it is not reversible error for the court to permit the county attorney to sign with his official title instructions requested by him, and given to the jury [under Act Mont. Feb. 15, 1901, and Sess. Laws 1901, p. 173]. State v. Martin [Mont.] 74 Pac. 725. It is proper for the court, under a statute requiring written instructions, to take the instructions submitted by the state and by the defendant, giving such instructions from each as he thought properly stated the law, and marking those portions rejected with a lead pencil. State v. Champoux [Wash.] 74 Pac. 557.

11. An oral statement of the penalty is not a violation of such a statute. Bush v. State [Tex. Cr. App.] 70 S. W. 550. Nor is a mere statement "I will now read you the instructions for the state." State v. Gatlin, 170 Mo. 354. Statement that an instruction is given in connection with the general charge is not a violation. Holmes v. State [Ala.] 34 So. 180. Instruction may be orally explained. Jackson v. State [Ala.] 34 So. 188. Directions as to form of verdict given when it is returned are not within the statute. Mathis v. State [Fla.] 34 So. 287. Oral statement as to the hour at which the court will return to receive a verdict are not. Williams v. State [Neb.] 95 N. W. 1014. Oral instruction as to character evidence held a violation of the statute though given to correct improper argument of the prosecuting attorney. State v. Shipley [Tex. Cr. App.] 74 S. W. 612. Under a statute requiring instructions to be written the calling in of the jury after they had retired and asking them as to the possibility of their agreeing upon a verdict are not such instructions. U. S. v. Densmore [N. M.] 75 Pac. 31. Mere directions as to form after verdict in capital case is found for lesser degree need not be in writing. Mathis v. State [Fla.] 34 So. 287; explaining Hubbard v. State, 37 Fla. 156 and statutes.

12. State v. Buralli [Nev.] 71 Pac. 532; State v. Stentz [Wash.] 74 Pac. 588. The court may refuse an instruction charging the jury that they might consider that innocent men had been convicted and the danger of convicting an innocent man. People v. Lonnen [Cal.] 73 Pac. 586. Reference to "humane provision of the law." Bohlman v. State [Ala.] 33 So. 44. Charges as to what might be the effect of a verdict on the moral elevation or degradation of the negro race held argumentative. Pope v. State [Ala.] 34 So. 840. Charge to receive dying declarations with caution because not highest evidence is argumentative. Tarver v. State [Ala.] 34 So. 627. On degree of certainty of proof held argumentative. Smith v. State [Ala.] 34 So. 396. Instructions as to circumstantial evidence of embezzlement held argumentative. Willis v. State, 134 Ala. 429. Instruction as to self defense held argumentative. Deal v. State [Ala.] 34 So. 23. Suggestions as to motives of defendant held argumentative. Jackson v. State [Ala.] 34 So. 188. Instruction as to circumstantial evidence held argumentative. Deal v. State [Ala.] 34 So. 23. That contradictory statements by a certain witness might raise a doubt is argumentative. Jackson v. State [Ala.] 34 So. 188. It is not prejudicial error for the court to state in an instruction, where self-defense is pleaded, that the court would give a number of instructions based on this "claim." People v. Glover [Cal.] 74 Pac. 745.

13. State v. Buralli [Nev.] 71 Pac. 532. Singling out certain facts. State v. Dodds [W. Va.] 46 S. E. 228. Singling out certain testimony as raising reasonable doubt. Bird v. U. S., 187 U. S. 118, 47 Law. Ed. 100; Wallace v. U. S., 18 App. D. C. 152. Instructions invading the province of the jury, singling out and emphasizing specific parts of the testimony to be considered without reference to the other parts. Baldwin v. State [Fla.] 35 So. 220. An instruction laying special stress upon a single phase of the evidence is properly denied. Thayer v. State [Ala.]

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The charge is to be construed as a whole, and deficiencies in one part may be cured by other parts,[15] and withdrawal of an erroneous charge will cure the error;[16] but other independent instructions will not suffice.[17] Introductory remarks as to the gravity of the offense are not improper.[18]

Invading province of jury or charging on facts.—Instructions must not invade the province of the jury,[19] withdraw issues as to which there is evidence,[20] or assume the existence of facts[21] not admitted or undisputed.[22] In many states the

35 So. 406. An instruction which groups and duly accentuates certain facts, is erroneous. Tines v. Com. [Ky.] 77 S. W. 363.

14. Lee v. State [Tex. Cr. App.] 72 S. W. 195. Particular mention of previous conviction of defendant in addition to general instruction on credibility held not error. Keating v. State [Neb.] 93 N. W. 980.

15. People v. Glover [Cal.] 74 Pac. 745; Porter v. People [Colo.] 74 Pac. 879. The appellate court will not base an error upon a single instruction. Territory v. Garcia [N. M.] 75 Pac. 34; Keady v. People [Colo.] 74 Pac. 892; U. S. v. Densmore [N. M.] 75 Pac. 31; Mathis v. State [Fla.] 34 So. 287; People v. O'Connor, 82 App. Div. [N. Y.] 55; State v. Prater, 52 W. Va. 132; State v. Cottrill, 52 W. Va. 363; State v. Dodds [W. Va.] 46 S. E. 228; Early v. Com., 24 Ky. L. R. 1181, 70 S. W. 1061; Lehman v. District of Columbia, 19 App. D. C. 217. Burden of proof. State v. Gallivan, 75 Conn. 326; State v. Phillips [Iowa] 92 N. W. 876. Reasonable doubt. Ryan v. State, 115 Wis. 488; Henry v. People, 198 Ill. 162. Self defense. Id.; State v. Crawford [Wash.] 71 Pac. 1030. Manslaughter. Henry v. People, 198 Ill. 162. What constitutes burglarious breaking. Scott v. Com., 24 Ky. L. R. 889, 70 S. W. 281. Promise of marriage. State v. Dent, 170 Mo. 398. Possession of stolen goods. Roberts v. State [Wyo.] 70 Pac. 803. Malice. Downing v. State [Wyo.] 70 Pac. 833. Burden of proof. People v. O'Connor, 82 App. Div. [N. Y.] 55. It is not error that an instruction taken alone is subject to exceptions; if taken together with adjoining instructions it is sufficient. Baldwin v. State [Fla.] 35 So. 220. An incorrectly stated abstract proposition of law in an instruction is harmless error if taking the instruction together with the other instructions no harm is done. Harper v. State [Miss.] 35 So. 572. But an instruction making an incorrect concrete application of the law to facts not sustaining it cannot be cured by other instructions. Directing a verdict on facts not sufficient to sustain it. Harper v. State [Miss.] 35 So. 572. Omission promptly supplied on request no ground of exception. Reeves v. State, 117 Ga. 38.

16. Ching v. U. S. [C. C. A.] 118 Fed. 538; Reed v. State [Neb.] 92 N. W. 321.

17. People v. Ford, 138 Cal. 140, 70 Pac. 1075; State v. Brundidge, 118 Iowa, 92; State v. Barry [N. D.] 92 N. W. 809; Crawford v. State [Ga.] 43 S. E. 762; People v. Goodrode [Mich.] 94 N. W. 14.

18. Secor v. State [Wis.] 95 N. W. 942.

19. Thayer v. State [Ala.] 35 So. 406. An instruction telling the jury what presumptions arise from certain stated facts, invades the province of the jury. Tines v. Com. [Ky.] 77 S. W. 363. That an admission in previous testimony was voluntary does not. State v. Burrell, 27 Mont. 282, 70 Pac. 982. That evidence of detectives should be weighed with greater care than in other cases but should not be disregarded does not. Everson v. State [Neb.] 93 N. W. 394. That interest of defendant may be considered does not. Territory v. Taylor [N. M.] 71 Pac. 489. Instructions in hypothetical form are not. Monceveis v. State [Tex. Cr. App.] 70 S. W. 94. Classification of witnesses as to credibility held improper. State v. Tuttle, 67 Ohio St. 440. That the guilt of defendant depends on the testimony of a certain witness is improper. Jackson v. State [Ala.] 34 So. 188. The province of the jury in assessing the fine cannot be invaded by an instruction that the maximum fine would not be excessive. Rollings v. State [Ala.] 34 So. 349. Charge not to disregard testimony of defendant simply because he is defendant invades province of jury. Stevens v. State [Ala.] 35 So. 122.

20. As to whether accomplices of defendant aided him in aggression. Deal v. State [Ala.] 34 So. 23. An instruction cannot be given so as to take from the jury the importance of the facts given in evidence. Instruction held not to do so. People v. Lagroppo, 86 N. Y. Supp. 116. That there was no evidence to show conspiracy is error. Martin v. State [Ala.] 34 So. 205.

21. Sherrill v. State [Ala.] 35 So. 129; Dolan v. U. S. [C. C. A.] 123 Fed. 52; State v. Buralli [Nev.] 71 Pac. 532; Hodge v. State [Ga.] 43 S. E. 370. An instruction charging the jury if they found the defendant had fled they should consider the fact of flight as a circumstance in establishing his guilt is not erroneous as assuming that the defendant had fled. State v. Stentz [Wash.] 74 Pac. 588. Error to assume ownership of embezzled property. State v. Bonner [Mo.] 77 S. W. 463. Where the fact of a conversation is controverted, the jury should not be instructed that evidence thereto should be considered only on the credibility of the witnesses. Spivey v. State, [Tex. Cr. App.] 77 S. W. 444. An assumption of a contradiction between witnesses of defendant is erroneous. Dina v. State [Tex. Cr. App.] 78 S. W. 229. An instruction cannot assume as an admitted fact any essential element of the crime, in the absence of such an admission by the defendant. Cook v. State [Fla.] 35 So. 665. Instruction that "if the proof of the alibi," etc., assumes that was such proof. Bohlman v. State [Ala.] 33 So. 44. Instruction as to aiding and abetting not adding "if he did kill" deceased does not assume facts if the jury have been instructed that they must find that the principal killed deceased. Fuqua v. Com., 24 Ky. L. R. 2204, 73 S. W. 782. Assuming existence of good faith in alleged embezzlement. Willis v. State, 134 Ala. 429. Assumption that defendant was aggressor. Hammond v. People, 199 Ill. 173. That cer-

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court is forbidden to charge on the weight of the evidence[23] or intimate its opinion on the facts.[24]

Form and propriety of particular charges.—Holdings as to the form and

tain facts would not justify defendant in killing deceased assumes that he did. State v. Marsh, 171 Mo. 522. Charge held not to assume that if defendant used premises where liquor was found the liquor was in his possession. State v. Stevens [Iowa] 94 N. W. 241. An instruction that it was conceded that deceased died "under the circumstances" stated refers to the time, etc., of death and not to defendant's agency therein and hence does not assume disputed facts. Bliss v. State [Wis.] 94 N. W. 325. A charge that "statements" of the accused are immaterial does not assume that they were made. State v. Riddell [Wash.] 74 Pac. 477. An instruction that defendant cannot be convicted on the testimony of an accomplice unless it is corroborated assumes the truth of such testimony. Jones v. State [Tex. Cr. App.] 72 S. W. 845.

22. Cupps v. State [Wis.] 97 N. W. 210. Where the question in issue was the defendant's participation. Koners v. People [Colo.] 73 Pac. 25; State v. Johnson [S. C.] 44 S. E. 58; Beard v. State [Tex. Cr. App.] 71 S. W. 960; State v. Nickels, 65 S. C. 169; State v. McKnight [Iowa] 93 N. W. 63. Assumption of affray proper where killing is undisputed. Henry v. People, 198 Ill. 162. Assumption of fact conclusively shown. State v. Evans [Iowa] 97 N. W. 1008. Not error to refer to a thing as fact which testimony of both sides showed. Sherrill v. State [Ala.] 35 So. 129.

23. Crawford v. State [Ga.] 43 S. E. 762; State v. Barry [N. D.] 92 N. W. 809. Const. Wash. art. 4, § 16. State v. Mitchell [Wash.] 72 Pac. 707. Code Civ. Proc. Cal. § 2061 providing for the jury to be charged that they should view with distrust the testimony of an accomplice, and the oral admissions of a party with caution is unconstitutional as repugnant to the injunction against charges on matters of fact. People v. Wardrip [Cal.] 74 Pac. 744.

Held to be on weight of evidence: Instruction as to the effect of evidence brought out on cross-examination of witnesses as to character, that defendant had been in the penitentiary, held erroneous as on the weight of the evidence and singling out that particular fact. Holloway v. State [Tex. Cr. App.] 77 S. W. 14. Instruction held on the weight of the evidence which states that if recently stolen property was found in possession of defendant, and that when first challenged he gave an explanation of his possession, which was reasonable, etc., then it devolved on the state to show the falsity of such explanation. Dyer v. State [Tex. Cr. App.] 77 S. W. 456. Calling attention to other crimes as probative of intent is on the weight of evidence. Glenn v. State [Tex. Cr. App.] 76 S. W. 757. An instruction which tells the jury that impeaching evidence is for the sole purpose of aiding the jury in passing on the credibility of the witnesses and in determining the weight to be attached to their evidence is not a charge on the weight of the testimony. Kipper v. State [Tex. Cr. App.] 77 S. W. 611. The statement that possession and claim of title under a forged instrument, raised a presumption of forgery, is not a comment on the evidence. State v. Pyscher [Mo.] 77 S. W. 836. That possession of stolen goods could be taken as a circumstance against defendant. McCulloh v. State [Tex. Cr. App.] 71 S. W. 278. That certain acts are symptoms of insanity. Porter v. State [Ala.] 33 So. 694. That negative evidence is of less value than positive. Sumpter v. State [Fla.] 33 So. 981. Statement that certain evidence "can only be considered as tending to show." Reese v. State [Tex. Cr. App.] 70 S. W. 424. That certain facts are sufficient to raise a reasonable doubt. State v. Vance, 29 Wash. 435, 70 Pac. 34. That the testimony of prosecutrix should be carefully considered. Knowles v. State [Tex. Cr. App.] 72 S. W. 398. That possession of stolen goods is a "strong criminating circumstance." Roberts v. State [Wyo.] 70 Pac. 803. A statement that evidence had been introduced "tending to show" certain facts. Hollar v. State [Tex. Cr. App.] 73 S. W. 961; Cortez v. State [Tex. Cr. App.] 74 S. W. 907; Cavaness v. State [Tex. Cr. App.] 74 S. W. 908. But see People v. Walker, 83 N. Y. Supp. 372. An instruction that the question is not whether defendant was a person of strong or weak mind. Angel v. State [Tex. Cr. App.] 74 S. W. 553. A statement that the evidence tends to show mutual combat. Stephens v. State [Ga.] 45 S. E. 619. "Murder or nothing." Collins v. State [Ala.] 34 So. 993. A peremptory instruction for conviction. Potts v. State [Tex. Cr. App.] 74 S. W. 31.

Held not on weight of evidence: A statement of the issues and of all the evidence relied on is not forbidden by a constitutional prohibition of charges on matters of fact. State v. Johnson [S. C.] 44 S. E. 58. An instruction as to a fact judicially known (that alcohol is an intoxicant). Sebastian v. State [Tex. Cr. App.] 72 S. W. 849. Instruction that to convict the jury must be satisfied of certain facts. State v. Douette [Wash.] 71 Pac. 556. Instruction that circumstantial evidence shall receive the same weight as other evidence. State v. Johnson [S. C.] 44 S. E. 58. An instruction that good character was a circumstance but not convincing. State v. Newton, 29 Wash. 373, 70 Pac. 31. An instruction that all evidence is real evidence. State v. Manning [Vt.] 54 Atl. 181. An instruction that if defendant committed certain acts constituting the crime he should be convicted. Valles v. State [Tex. Cr. App.] 71 S. W. 598; State v. Fenton, 30 Wash. 325, 70 Pac. 741. That a certain witness was an accomplice not improper where the evidence conclusively shows it. Winfield v. State [Tex. Cr. App.] 72 S. W. 182.

24. State v. Barry [N. D.] 92 N. W. 809; Mathis v. State [Fla.] 34 So. 287; Dozier v. State, 116 Ga. 583; Ashford v. State [Miss.] 33 So. 174. An instruction that the jury are to determine whether an alleged purchase was sham does not intimate an opinion that it was. Bowers v. State [Tex. Cr. App.] 71 S. W. 284. Charge calling attention pointedly to facts impairing the credit of testimony held to intimate an opinion. People v. Goodrode [Mich.] 94 N. W. 14.

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sufficiency of instructions as to burden and degree of proof,[25] definitions of rea-

25. Instruction that jury should not disbelieve as jurors if they believe as men held proper. Reed v. State [Neb.] 92 N. W. 321. An instruction that the presumption of innocence remains with defendant until overcome by evidence is proper. Hodge v. State, 116 Ga. 929. Instruction to acquit if evidence cannot be reconciled with innocence is error. Ter. v. Baca [N. M.] 71 Pac. 460. An instruction that certain proof raises a presumption of guilt is error. State v. Brady [Iowa] 91 N. W. 801. An instruction defining preponderance of evidence is improper. State v. Felker, 27 Mont. 451, 71 Pac. 668. That accused is to be acquitted if the jury "determine he is not guilty beyond a reasonable doubt" is open to misunderstanding and erroneous. Williams v. State, 116 Ga. 525. An instruction to acquit if there was evidence supporting any theory of innocence is improper. Reed v. State [Neb.] 92 N. W. 321. Instruction held not to require defendant to explain his possession of stolen goods beyond a reasonable doubt. Landreth v. State [Tex. Cr. App.] 70 S. W. 758. An instruction may not charge the jury that the burden is on the accused to prove himself not guilty of a specific degree of a proven crime. Instruction held not to so charge. State v. Melvern [Wash.] 72 Pac. 489. An instruction that if the jury did not believe defendant committed the crime they should acquit is misleading. McNish v. State [Fla.] 34 So. 219. An instruction for acquittal in case of a reasonable doubt arising from any part of the evidence is error. Holmes v. State [Ala.] 34 So. 180. Instruction for acquittal if jury doubted evidence of a certain witness properly refused. Id. An instruction that if the jury have a doubt as to the identity of defendant they should acquit is sufficient without saying that they should be convinced by the evidence. Ellison v. State [Tex. Cr. App.] 72 S. W. 188. An instruction that defendant should be acquitted unless the jury are satisfied of his guilt beyond reasonable doubt is adequate. Loose v. State [Wis.] 97 N. W. 526. An instruction that the presumption of innocence remains with defendant until his guilt is established beyond a reasonable doubt does not shift the burden of proof. Van Syoc v. State [Neb.] 96 N. W. 266. Definition sustained as against objection that it tended to lead jury to believe that they should start with an assumption of guilt and convict unless a reasonable doubt was proved. Secor v. State [Wis.] 95 N. W. 942. That the presumption of innocence continues until the material allegations are established by evidence excluding all reasonable doubt is correct. Edwards v. State [Neb.] 95 N. W. 1038. An instruction that the finding of stolen goods in defendant's possession casts on him the burden of explaining such possession is not erroneous. State v. King [Iowa] 96 N. W. 712. A general instruction for conviction in case guilt is proved beyond a reasonable doubt need not state the facts necessary to guilt but may refer to the indictment therefor. Christie v. People [Ill.] 69 N. E. 33. It is proper to refuse a charge that the jury are to take and consider all the evidence in the case in the light of their experience as reasonable, fair-minded men, and upon such consideration to doubt defendant's guilt means to acquit him. Thayer v. State [Ala.] 35 So. 406. An instruction that if the jury have a doubt, arising from the evidence or lack of evidence, as to all the material allegations of the indictment, they will find the defendant guilty of such degree of crime as they believe, beyond a reasonable doubt, him to be guilty of, and, if guilty of no crime, then acquit, is confusing and misleading. Cook v. State [Fla.] 35 So. 665. Instruction that unless jury are satisfied of guilt beyond a reasonable doubt they should acquit is sufficient without saying that they should acquit if they had a doubt of guilt. Winfield v. State [Tex. Cr. App.] 72 S. W. 182; State v. Taylor, 171 Mo. 465. But see, as to the necessity of charging the alternative. Davidson v. State [Tex. Cr. App.] 73 S. W. 808.

Degree in general: Should lead to conclusion that accused "cannot be innocent"—requires too much proof. Sherrill v. State [Ala.] 35 So. 129. Instruction for acquittal in case of a "doubt" properly refused. State v. May [Mo.] 72 S. W. 918. An instruction for acquittal in case of the "slightest" reasonable doubt is properly refused. Goodlett v. State [Ala.] 33 So. 892. That defendant should be acquitted "if there was a possibility" that the witness against him was mistaken, properly refused. Wilson v. State [Miss.] 33 So. 171. An instruction that if the jury is not entirely satisfied of the defendant's guilt, they should acquit him exacts too high a degree of proof. Thayer v. State [Ala.] 35 So. 406. As does also an instruction defining "beyond a reasonable doubt" as to be wholly satisfied or satisfied to a moral certainty. Id. It is not error to refuse to instruct for an acquittal if from the evidence there is a possibility of innocence, where the court has defined reasonable doubt in its charge. Cook v. State [Fla.] 35 So. 665. An instruction for acquittal in case of "any one fact" raising a reasonable doubt is properly refused. Deal v. State [Ala.] 34 So. 23.

Repetition in respect to particular issues: Reasonable doubt need not be repeated with each special charge. Sylvester v. State [Fla.] 35 So. 142. An instruction on presumptive innocence until the contrary is proved is not erroneous for not having "beyond a reasonable doubt" after the word "proved" where the court has properly defined reasonable doubt. State v. Martin [Mont.] 74 Pac. 725. The clause on reasonable doubt need not be repeated in connection with every charge. Price v. State [Tex. Cr. App.] 70 S. W. 966. A general instruction on reasonable doubt is sufficient and need not be repeated in connection with each item of evidence. State v. Pyscher [Mo.] 77 S. W. 836. Reasonable doubt as applied to a particular defense may be treated in another part of the charge than that relating to such defense. State v. Hutto [S. C.] 45 S. E. 13.

As to defenses: Where insanity must be proved by a preponderance of the evidence, an instruction that if on all the evidence the jury entertain a doubt they must acquit is misleading. Porter v. State [Ala.] 33 So. 694. An instruction that the jury must be satisfied of insanity held proper. Com. v. Kilpatrick, 204 Pa. 218.

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sonable doubt,[26] insanity,[27] intoxication,[28] alibi,[29] the purpose and effect of par-

26. Approved charge set out. Com. v. Conroy [Pa.] 56 Atl. 427. Reasonable doubt held argumentative. Jarvis v. State [Ala.] 34 So. 1025. "A doubt for which a reason may be given" sustained. State v. Patton [Kan.] 71 Pac. 840. Reasonable doubt from "any part" of evidence held erroneous as pretermitting all consideration of whole evidence. Jarvis v. State [Ala.] 34 So. 1025; Snath v. State, 137 Ala. 22. Instruction for conviction if a full consideration of the evidence produces a conviction of guilt which satisfies the mind to a reasonable certainty is correct. State v. Allen [Ohio] 67 N. E. 1053. It is not error to refuse an instruction defining moral certainty where the court has properly defined reasonable doubt. State v. Martin [Mont.] 74 Pac. 725. An instruction defining moral certainty is not prejudicial by use of the word "impression." People v. Lew Fook [Cal.] 75 Pac. 188. An instruction defining reasonable doubt as such a doubt as a man of reasonable intelligence can give some good reason for entertaining if he is called on to do so is proper. People v. Lagrappo, 86 N. Y. Supp. 116. Reasonable doubt—"Such real and substantial doubt as intelligent men may reasonably entertain on a careful consideration" etc. (Given as instruction.) State v. De Guglielmo [Del.] 55 Atl. 350. Reasonable doubt defined. State v. Walls [Del.] 56 Atl. 111. "Moral and not mathematical certainty required" is not error. Jackson v. State [Ga.] 45 S. E. 604. That moral certainty is the degree of proof which the law requires of moral evidence is confusing. People v. Huntington, 138 Cal. 261, 70 Pac. 284. "A doubt arising out of the evidence for which the jury can give a reason" held imperfect but not ground for reversal. Caddell v. State, 136 Ala. 9. "Abiding conviction to a moral certainty" sustained. State v. Patton [Kan.] 71 Pac. 840. "Fully satisfied, satisfied to a moral certainty" held correct. State v. Wilcox [N. C.] 44 S. E. 625. "A doubt of guilt reasonably arising from all the evidence or want of evidence in the case" approved. Baker v. State [Wis.] 97 N. W. 566. It is not necessary to charge that a reasonable doubt may arise from the defendant's statement. Walker v. State [Ga.] 44 S. E. 850. Reasonable doubt may be defined in a series of instructions if correct as a whole. Johnson v. People, 202 Ill. 53. An instruction that the doubt must be actual and substantial not a mere possible doubt is correct. Jackson v. State [Ala.] 34 So. 188. An instruction that a possibility of innocence will not acquit is proper. Id. It is not error to refuse to instruct that the evidence must be such that the jury would be willing to act on it in matters of the highest concern to themselves. Goodlett v. State [Ala.] 33 So. 892. That mathematical certainty is not required is proper. Hodge v. State, 116 Ga. 929. Definition of moral certainty as an impression produced by facts in which a reasonable mind feels coercion or necessity to act in accordance therewith held correct. People v. Burns, 138 Cal. 159, 70 Pac. 1087, 60 L. R. A. 270. That the doubt must be one arising on the whole evidence and not on any part thereof. Henry v. People, 198 Ill. 162. Doubt which in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause is correct. Martin v. State [Neb.] 93 N. W. 161. Requiring acquittal in case of reasonable doubt of guilt instead of reasonable doubt of material facts necessary to establish guilt is correct. Benge v. Com., 24 Ky. L. R. 1466, 71 S. W. 648. "Reasonable, well founded doubt" not improper. State v. Mahoney [Iowa] 97 N. W. 1089. Charge on reasonable doubt held sufficient. State v. Pyscher [Mo.] 77 S. W. 836. A refusal to give a charge defining reasonable doubt as one that excludes every reasonable hypothesis except that of guilt, and only when no other supposition will reasonably account for all the conditions of the case can the conclusion of guilt be legitimately adopted is proper. Thayer v. State [Ala.] 35 So. 406. The term "reasonable doubt" means a "fair" doubt growing out of the testimony in the case, based upon reason and common sense; and not a mere imaginary, captious, or possible doubt. State v. Levy [Idaho] 75 Pac. 227.

27. General instruction that defendant was to be acquitted if found to be insane at the time of the offense held sufficient. Miller v. State [Tex. Cr. App.] 71 S. W. 20. An instruction that if defendant was insane to any degree he should be acquitted is incorrect. Copenhaver v. State [Ind.] 67 N. E. 453. An instruction that the defense of insanity is offered is error where evidence of insanity was introduced only to affect the weight of a confession. State v. Coats [Mo.] 74 S. W. 864. Instruction as to irresistible impulse sustained. People v. Quimby [Mich.] 96 N. W. 1061. Reading of part of a supreme court opinion in a will case as to insanity is improper. Lowe v. State [Wis.] 96 N. W. 417. That insanity is such a perverted and deranged condition of mental and moral faculties as renders a person incapable of distinguishing between right and wrong or not conscious at the time of the nature of the act which he is committing or where though conscious and able to distinguish between right and wrong yet his will has been otherwise than voluntarily destroyed so that his actions are not subject to it but are beyond his control is correct. Id. Instruction as to insanity held not to belittle the offense. Hoover v. State [Ind.] 68 N. E. 591. An instruction to find the defendant not guilty if the jury should find that he was unable to know that his acts were wrongful, or to comprehend the consequences of such acts, is not objectionable if the same instruction makes it condition of his guilt that it should be found beyond a reasonable doubt that he knew his acts were wrong and was able to comprehend the consequences of his acts. Queenan v. Okl., 190 U. S. 548, 47 Law. Ed. 1175. A refusal to instruct that a verdict of a special jury as to insanity of the accused was only presumptive evidence, and should have no bearing on the question of sanity at the time of the offense, is proper. State v. Champoux [Wash.] 74 Pac. 557. An instruction cautioning the jury against being imposed upon by an "ingenious counterfeit of insanity" is not prejudicially erroneous. People v. Manooglan [Cal.] 75 Pac. 177.

28. An instruction that intoxication does not excuse or palliate crime is not error. State v. May [Mo.] 72 S. W. 918. An instruction that intoxication might be considered

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ticular evidence,[30] rules for considering evidence in general,[31] and of particular kinds of evidence, such as circumstantial evidence,[32] accomplice testimony,[33] evi-

in determining the degree of a crime is not a prejudicial error where the defense is that the defendant did not commit or aid in committing the crime. In a prosecution for burglary. People v. Dowell [Cal.] 75 Pac. 45.

29. Where the proof fairly raises the defense of an alibi, the jury should be instructed that if this proof in connection with other proof in the case, raises a reasonable doubt as to whether the accused was at the place of the crime or at a different place, the defendant should be acquitted. Instruction held insufficient. Legere v. State [Tenn.] 77 S. W. 1059. Awkwardly worded instruction held sufficient. Winfield v. State [Tex. Cr. App.] 72 S. W. 182. Instruction that alibi must cover whole time held not error. Barr v. People [Colo.] 71 Pac. 392. An instruction that an alibi is easy to prove and hard to disprove and that evidence thereof is to be carefully scrutinized is not erroneous. People v. Portenga [Mich.] 96 N. W. 17.

30. Instruction that evidence of other crimes was only to affect defendant's credibility held sufficient. Roberts v. State [Tex. Cr. App.] 70 S. W. 423. An instruction in a prosecution for rape authorizing the jury to consider previous acts of intercourse between the parties is proper to show the defendant's adulterous tendency and the probability of the offense. People v. Edwards [Cal.] 73 Pac. 416. An instruction authorizing the jury to consider the defendant's presence and acts on previous days in determining his guilt on a specified day, without proof that he was present on the latter day, is unjustified in a prosecution for pool selling. People v. Shannon, 83 N. Y. Supp. 1061. Where the acts of co-conspirators are shown, the charge must state not only that such acts may be considered if conspiracy is proved but the reverse proposition. Kees v. State [Tex. Cr. App.] 72 S. W. 855. Where inconsistent statements could not be considered for any purpose other than as affecting credibility an instruction limiting the same need not be given. Newman v. State [Tex. Cr. App.] 70 S. W. 951. Instruction as to the weight to be given certain statements of third persons in defendant's absence held not misleading. Franklin v. State [Tex. Cr. App.] 76 S. W. 473. Instruction as to the duty of the jury to disregard evidence tending to prove other crimes, held misleading, indefinite and ambiguous. Bess v. Com. [Ky.] 77 S. W. 349. The jury should be instructed that in case they have a reasonable doubt as to the establishment of a conspiracy between defendant and alleged co-conspirators they must reject all of the individual acts and declarations of such persons. Chapman v. State [Tex. Cr. App.] 76 S. W. 477.

31. An instruction that public belief in defendant's guilt may be considered is error. State v. Whitehead [N. J. Law] 54 Atl. 229. Instruction that jury should consider all the evidence held not to deprive them of right to question its truth. Bird v. U. S., 187 U. S. 118, 47 Law. Ed. 100. An instruction that the jury should inquire whether there was any direct evidence of a theory advanced by defendant is error. State v. Gallivan, 75 Conn. 326.

32. Must not only conduce to establish defendant's guilt to a moral certainty, but must also be strong enough to exclude every other reasonable hypothesis consistent with his innocence. Gaines v. State [Tex. Cr. App.] 77 S. W. 10. An instruction that circumstances consistent with a theory of innocence are not to be given any weight against defendant is too favorable. State v. Gallivan, 75 Conn. 326. "On exclusion of every reasonable supposition" held proper. Sherrill v. State [Ala.] 35 So. 129. If there can be any "reasonable hypothesis consistent with innocence" is obscure and misleading. Tarver v. State [Ala.] 34 So. 627. Where the evidence is circumstantial only an instruction that the proof must be absolutely incompatible with the innocence of the accused is erroneous. Horn v. State [Wyo.] 73 Pac. 705. Where the evidence is not entirely circumstantial it is not error for the court to charge that facts and circumstances surrounding the testimony as to the main element of the crime need not be proved beyond a reasonable doubt. Id. Erroneous for not using "reasonable" with "hypothesis." Jarvis v. State [Ala.] 34 So. 1025. An instruction need not require that defendant "alone" committed the crime. Bell v. State [Tex. Cr. App.] 71 S. W. 24. An instruction that "all the circumstances" instead of "each circumstance" must be inconsistent with innocence is not erroneous. Galloway v. State [Tex. Cr. App.] 70 S. W. 211. Instruction held correct. Id. An instruction that the proof "must be inconsistent with any other rational supposition" than guilt is inadequate. State v. Brady [Iowa] 91 N. W. 801. That every circumstance must be proved beyond a reasonable doubt is improper. State v. Gallivan, 75 Conn. 326. That the evidence is all circumstantial is a mere statement of fact and should not be charged. Hainsworth v. State [Ala.] 34 So. 203. That the evidence must be inconsistent with instead of "must exclude" every reasonable hypothesis, etc., is sufficient. McCoy v. State [Tex. Cr. App.] 73 S. W. 1057. An instruction that circumstantial evidence must be inconsistent with every reasonable theory of innocence and so convince the jury that each would be willing to act on it in the matters of highest concern is error. Goodlett v. State [Ala.] 33 So. 892. Instruction using the phrase "each link in the chain of circumstances" held not misleading. State v. Lucas [Iowa] 97 N. W. 1003. Instruction of circumstantial evidence held correct and complete. Lamb v. State [Neb.] 95 N. W. 1050. An instruction that "the proof of guilt must be inconsistent with any other rational supposition" is inadequate where the evidence is entirely circumstantial. State v. Brady [Iowa] 97 N. W. 62. The instruction must state not only the certainty with which circumstances must appear, but that they must be inconsistent with innocence. State v. Hudson, 66 S. C. 394. That circumstantial evidence must be clear, convincing and conclusive, excluding all rational doubt of guilt, and that every material circumstance must be established beyond a reasonable doubt, is correct. State v. Wilcox [N. C.] 44 S. E. 625. A refusal to instruct the jury that it is their duty to adopt a reasonable hypothesis

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dence of character of defendant,[34] testimony of defendant,[35] admissions and confessions,[36] and as to the credibility of the witnesses,[37] as to the form of the ver-

of innocence, even though the hypothesis of guilt be the more probable, and to reconcile the proven facts and circumstances with the theory of innocence, if such can reasonably be done; that there is no presumption of guilt permitted by the law, and that a reasonable doubt can arise from a want of evidence as well as from the evidence itself, is reversible error. Thompson v. State [Miss.] 35 So. 689. An instruction that if any other reasonable hypothesis may be taken from circumstantial evidence, guilt should not be found is proper. Petty v. State [Miss.] 35 So. 213.

33. The giving of cautionary instructions is to a great extent discretionary. State v. De Hart, 109 La. 570. The facts of each particular case must determine the necessity or advisability of the form of charge in regard to accomplice as witness. If there is an issue as to whether a witness is an accomplice, that question and the necessary corroboration may be submitted as an issue of fact. McAlister v. State [Tex. Cr. App.] 76 S. W. 760. Where the question whether a witness is an accomplice is submitted, what constitutes an accomplice should be stated. Thomas v. State [Tex. Cr. App.] 73 S. W. 1045. The better practice is to instruct that a witness is an accomplice where the proof so shows, though it is not error to submit it to the jury. Swan v. State. [Tex. Cr. App.] 76 S. W. 464. The jury should be instructed that the evidence of an accomplice should be received with great caution, but the court need not further call attention to the weight of such testimony. Anthony v. State [Fla.] 32 So. 818. Where the jury are told that a certain witness is an accomplice, a definition of accomplice need not be given. Winfield v. State [Tex. Cr. App.] 72 S. W. 182. Instruction that accomplice must be corroborated by other evidence sufficient without specifically stating that his own evidence on other points could not corroborate him. Ezell v. State [Tex. Cr. App.] 71 S. W. 283. Where an attempt is made to show that one was a particeps criminis with the defendant, an instruction defining an accomplice is proper. Porter v. People [Colo.] 74 Pac. 879. Instruction to give accomplice credit only if corroborated and to give it careful consideration approved. Hanley v. U. S. [C. C. A.] 123 Fed. 849.

34. Charge that good character may generate doubt though none would have existed but for such evidence, is erroneous. Jarvis v. State [Ala.] 34 So. 1025. A request for an instruction that a finding of a good reputation of the defendant is sufficient to raise a reasonable doubt on which to base an acquittal is properly refused. State v. Stentz [Wash.] 74 Pac. 588. An instruction that the good character of the defendant is available as a defense unless he should be found guilty beyond a reasonable doubt is proper. Id. That evidence of good character may raise reasonable doubt held properly refused. Bohlman v. State [Ala.] 33 So. 44. Instruction that if evidence of character raises a reasonable doubt defendant should be acquitted is error, the proper instruction being that he should be acquitted if such evidence considered in connection with all the other evidence raises such doubt. Olds v. State [Fla.] 33 So. 296. Instruction that evidence of good character should be considered "in a doubtful case" is error. Com. v. Sayars, 21 Pa. Super. Ct. 75. An instruction charging the jury to consider the character of the accused with other circumstances so far as proved is not erroneous where there is no evidence of his character. People v. Farrington [Cal.] 74 Pac. 288. An instruction that evidence of good character "might be sufficient in a doubtful case" is error. State v. Birkby [Iowa] 97 N. W. 980. An instruction that evidence of defendant's good character is competent is sufficient without stating that the jury should consider. State v. Ames [Minn.] 96 N. W. 330. That evidence of good character does not amount to much on a prosecution for gaming is error. Turner v. State [Ga.] 45 S. E. 598.

35. That defendant's interest in the result may be considered is not error. Keating v. State [Neb.] 93 N. W. 980; People v. Rich [Mich.] 94 N. W. 375; State v. Melvern [Wash.] 72 Pac. 489. That jury are not bound to believe defendant further than he is corroborated is error. State v. Hunter [Iowa] 92 N. W. 872. An instruction that defendant's testimony is to be given such weight as the jury think it entitled to and that his interest in the result should be considered held correct. Henry v. People, 198 Ill. 162. An instruction charging the jury in considering the defendant's testimony to consider his manner, relative situation, the consequences of the result of the trial to him, and his inducements and temptations, taken together with another instruction that they were not entitled to disregard his testimony because he was defendant, and that the law presumed him innocent, and allowed him to testify, and that they should consider his testimony impartially and fairly, is not erroneous. Younger v. State [Wyo.] 73 Pac. 551. Where the effect of contradicting evidence is mentioned, attention should also be called to the corroborating evidence. McElroy v. People, 202 Ill. 473. An instruction that the testimony of defendant is to be given "only" such weight as the jury think it deserves is not error. Palmer v. State [Neb.] 97 N. W. 235. That defendant's testimony should be given such weight as the jury deems it entitled to, bearing in mind his vital interest in the event, is correct. State v. Ames [Minn.] 96 N. W. 330. It is not prejudicial error to instruct that though the defendant may testify in his own defense he is not obliged to do so, and that his neglect to do so shall not create a presumption against him, where he has not testified. State v. Ryno [Kan.] 74 Pac. 1114; State v. Levy [Idaho] 75 Pac. 227. It is error to charge that testimony of defendant should be carefully scrutinized without stating that if he was deemed credible his evidence should be given the same weight as that of other witnesses. State v. Graham [N. C.] 45 S. E. 514.

36. Instruction held erroneous. Davis v. U. S., 18 App. D. C. 468. An instruction that the jury should receive all testimony or oral admissions of the defendant against himself with caution is not ground for a reversal.

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dict,[38] and as to the duty of jurors in arriving at a decision,[39] are collected in the notes.

People v. Wardrip [Cal.] 74 Pac. 744. Instruction as to determining whether confession was voluntary held sufficient. People v. Rich [Mich.] 94 N. W. 375. An instruction that statements by defendant out of court may be believed or disbelieved and are to be given such weight as the jury deem proper is not on the weight of the evidence. State v. Coats [Mo.] 74 S. W. 864. That confession "is of the highest order of testimony" is error. Calvin v. State [Ga.] 44 S. E. 848. Where the confession of the accused is made before arrest, and before accusation of the crime, admitting the commission of the crime, but he contends it was made while intoxicated, it is not error for the court to refuse to charge that it was a doubtful species of evidence, to be acted upon with caution. Horn v. State [Wyo.] 73 Pac. 705. Instructions are bad which submit credibility of involuntary confessions offered solely for impeachment. Smith v. State [Ala.] 34 So. 396.

37. Charge on credibility of woman consenting to abortion approved. State v. Carey [Conn.] 56 Atl. 632. An instruction that the jury is not bound to believe the uncontroverted statement of a witness or to take the testimony of any witness as true must not be specially directed against one side of the case. People v. Lonnen [Cal.] 73 Pac. 586. It is not error to charge the jury that if they believed a witness was a hired witness they were at liberty to disregard his testimony, unless corroborated, where they were also charged that the credibility of witnesses was a question exclusively for the jury, and could consider their interest in the result. Porter v. People [Colo.] 74 Pac. 879. An instruction to distrust the testimony of a false witness must state that he was willfully false. State v. Burns [Nev.] 74 Pac. 983. To distrust the evidence of a witness who had willfully sworn falsely as to a material matter. People v. Stevens [Cal.] 75 Pac. 62. An instruction charging the jury to disregard any or all of the testimony of a witness who has willfully and intentionally testified falsely is erroneous, under Code Civ. Proc. Mont. § 3390, requiring the court to charge that a witness false in one part of his testimony may be disregarded in others. State v. De Wolfe [Mont.] 74 Pac. 1084. An instruction charging the jury that in determining the weight of the evidence of certain witnesses they may consider among other things their relationship to the parties is not erroneous (State v. Morgan [Utah] 74 Pac. 526); and if they believe that he has sworn falsely may disregard his testimony except in so far as corroborated by other evidence (State v. Melvern [Wash.] 72 Pac. 489). An instruction in reference to impeaching testimony that it was admitted to affect the witness' credibility, and not to show the guilt of the accused guards its admission sufficiently. Connell v. State [Tex. Cr. App.] 75 S. W. 512. A statement that some one had willfully falsified is not improper where the testimony is in absolute conflict. People v. O'Connor, 82 App. Div. [N. Y.] 55. An instruction in the language of Code Civ. Proc. § 2061, that a witness testifying falsely is to be distrusted is not error though not to be commended. People v. Dobbins [Cal.] 72 Pac. 339. An instruction that the testimony of a witness who has willfully testified falsely may be disregarded except as it is corroborated is proper. Trimble v. Ter. [Ariz.] 71 Pac. 932. Instruction that prior conviction should be considered only as bearing on defendant's credibility held correct. Thornton v. State [Wis.] 93 N. W. 1107. That the animus of prosecution may be considered is argumentative. Holmes v. State [Ala.] 34 So. 180. An instruction as to an impeachment but failing to include the testimony of all witnesses thereon is erroneous. Bennett v. State [Tex. Cr. App.] 75 S. W. 314. A charge which limits the effect of impeaching evidence to the sole purpose of enabling the jury to waive the testimony of the witnesses impeached is too restrictive, since the jury may entirely discard and disbelieve such witnesses. Dean v. State [Tex. Cr. App.] 77 S. W. 803. An instruction that the experience of courts warns them to scan with caution the evidence of abandoned women, etc., held error. State v. Tuttle, 67 Ohio St. 440. An instruction that the jury may believe one witness and discard all the others is error as permitting them to do so capriciously. Shepherd v. State [Ala.] 33 So. 266. Instruction that evidence of detectives should be considered in the same manner as other evidence held error. Frudie v. State [Neb.] 92 N. W. 320. That witness who has testified falsely is to be distrusted, proper. People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014. Instruction that inconsistent statement as to material facts is to be considered on question of credibility is not erroneous as leaving the jury to decide what facts are material. State v. Dent, 170 Mo. 398. Cautionary instruction as to evidence of detectives should be given. State v. Fullerton, 90 Mo. App. 411. A cautionary instruction should be given on trial for receiving stolen goods as to testimony of the thief. State v. Rachman [N. J. Law] 53 Atl. 1046. Instruction as to effect of prior conviction of witness held proper. Keating v. State [Neb.] 93 N. W. 980. Instruction as to false testimony held sufficient. State v. Fenton, 30 Wash. 325, 70 Pac. 741. An instruction that the jury may disregard all the testimony of a witness who has willfully testified falsely is properly refused. Jackson v. State [Ala.] 34 So. 188. Instructions directed to the credibility of particular testimony are as a general rule improper. Loose v. State [Wis.] 97 N. W. 526. An instruction on credibility singling out a particular witness is properly refused. State v. Pollard [Mo.] 74 S. W. 969. Instruction referring to witness as "a perjurer, an abortionist, a thief and a prostitute" is properly refused. Dunn v. State [Ind.] 67 N. E. 940.

38. Instruction held not to clearly state the duty of the jury to return a special verdict as required by statute in case they found defendant insane. Porter v. State [Ala.] 33 So. 694.

39. That a doubt by one juror requires a mistrial is improper. Oakley v. State [Ala.] 33 So. 693. That the case was not

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(§ 10) *F. Custody of jury, conduct and deliberations.*—The jury may be kept under the charge of an officer during the trial,[40] but must be allowed food, etc.,[41] and while the officer should not speak to them[42] or allow them to separate,[43] so doing is not ground for reversal in the absence of other circumstances, and the same liberality is applied in respect to other irregularities in the custody of the jury.[44] It is error to allow the jury to be kept at the house of decedent's uncle.[45] Ability of jury to see from jury room into jail where accused was playing cards

to be decided according to the eloquence of counsel is not improper. State v. Evans [Minn.] 92 N. W. 976. That the jury are to arrive at their verdict from the evidence and not by lot is proper. Lankster v. State [Tex. Cr. App.] 72 S. W. 388. That it was the duty of a juror not to give up his fixed convictions is error. Holmes v. State [Ala.] 34 So. 180. An instruction that the jury may ignore the instructions is properly refused. State v. Powell, 109 La. 727. Instruction in approved form as to duty of jury to try to reach an agreement is not rendered erroneous because of a reference to the names of judges who have given and approved it. Secor v. State [Wis.] 95 N. W. 942. Instruction to base verdict solely on evidence and not be influenced by the fact that defendant had been a long time in jail is not error. Foskey v. State [Ga.] 45 S. E. 967. An instruction that the jury are not to "comment on" the failure of defendant to testify is improper. Lamb v. State [Neb.] 95 N. W. 1050. An instruction objectionable in that it tends to drive the jurors apart, rather than to get them together may be refused. As "if from the testimony in this cause there arises in your minds, or in the mind of either of you, a reasonable doubt as to defendants' guilt, you cannot find such defendants guilty." Baldwin v. State [Fla.] 35 So. 220. An instruction that before the jury can convict each juror must be convinced of guilt beyond a reasonable doubt; and if a single juror has a reasonable doubt, from any part of the evidence, the jury cannot convict is properly refused. Cook v. State [Fla.] 35 So. 665. The rule that each juror might act upon his own judgment, and each should be satisfied beyond a reasonable doubt that every element of the offense had been proven, need not be applied to every feature and branch of the offense. State v. Ryno [Kan.] 74 Pac. 1114.

40. State v. Burton, 65 Kan. 704, 70 Pac. 640. Whether the jury should be allowed to separate during the trial is discretionary. State v. Nelson [Minn.] 97 N. W. 652. The fact that the deputy who had charge of the jury was a witness is not error. Van Syoc v. State [Neb.] 96 N. W. 266.

41. The ancient practice in this respect was never in force in Nebraska. Russell v. State [Neb.] 92 N. W. 751. At least an ordinary chair and blankets for the night if the weather require should be provided for jurors. State v. Riggs [La.] 34 So. 655.

42. Casual remark held harmless. State v. Shipley, 171 Mo. 544. Presence of bailiff in jury room at times when jury was not consulting and only to attend to wants of the jury held not error. Shular v. State [Ind.] 66 N. E. 746. Improper remark of sheriff not shown to have been heard by jury held not ground for new trial. Alderson v. Com. [Ky.] 74 S. W. 679. In a prosecution for homicide, it is not prejudicial misconduct of an officer in charge of the jury, when viewing the premises, to point out certain places connected with the crime and to repeat words used by the defendant at one of the places on a former occasion. State v. Mortensen [Utah] 74 Pac. 350.

43. Gamble v. State [Fla.] 33 So. 471. Going into adjoining empty room. State v. Callian, 109 La. 346. Separation after retiring to deliberate held harmless. State v. Schaeffer, 172 Mo. 335. Walking in single file through court room harmless though last one is several feet behind others. State v. Shipley, 171 Mo. 544. Taking of jury into bowling alley held harmless. State v. Cottrill, 52 W. Va. 363. A court is warranted in setting aside a verdict on account of the separation of the jury without leave of court only where such separation prejudices the rights of the defendants. Shivers v. Ter. [Okl.] 74 Pac. 899. Taking jurors to a theater in the custody of a sworn officer, the play having no reference to the trial, is not ground for a new trial. State v. Levy [Idaho] 75 Pac. 227.

44. Evidence of visit by juror to jail held to show no misconduct. People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014. Jurors' drinking whisky while deliberating is not ground for a new trial if none of them were intoxicated or the drinking was not to excess. Brown v. State [Tex. Cr. App.] 75 S. W. 33. That sheriff who was disqualified by relation to prosecutrix unlocked and lighted the jury room for the elisor, held harmless. State v. Shipley, 171 Mo. 544. Taking jury in body to answer call of nature. Id. That a juror was asked by a stranger if he knew that he was a fourth cousin of defendant's wife held not prejudicial misconduct. State v. Hasty [Iowa] 96 N. W. 1115. It is not misconduct of jurors, at a view of premises, to pace off distances between points referred to in the testimony. State v. Mortensen [Utah] 73 Pac. 562. Not error for juror to go to barber shop in custody. Com. v. Gearhardt, 205 Pa. 387. Misconduct of third persons, affecting the jury, but not affecting the verdict, is not ground for a new trial. Horn v. State [Wyo.] 73 Pac. 705. A verdict may be impeached by evidence of intimidation by an overt criminal act; not if the intimidating act was otherwise. State v. Riggs, 110 La. —, 34 So. 655. Matter to show that some jurors decided before all evidence was in impeaches their verdict. Id. Actions of bystanders during an inspection by a jury may be ground for a new trial. Actions indicating that a colt belonged to the prosecuting witness and not to the defendant. State v. Landry [Mont.] 74 Pac. 418.

45. Hensley v. Com. [Ky.] 74 S. W. 677.

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held not error, though dangerous.[46] Conduct of the jurymen in deliberation will sometimes be deemed ground for reversal.[47] How long the jury shall be kept in deliberation is in the discretion of the court.[48] The jury may be allowed to take out exhibits.[49] Testimony may be read to them at their request.[50] The judge should hold no communication with the jury except in open court,[51] nor should he in any manner coerce an agreement.[52]

(§ 10) *G. Verdict.*—In polling the jury it is not necessary to call each juror by name.[53] A conditional answer by a juror on being polled does not invalidate the verdict.[54] Refusal to receive a verdict of acquittal because defendant is voluntarily absent from the court room is error.[55] The verdict must be certain and definite,[56] but clerical errors may be disregarded.[57] It must state on which count it was given,[58] must find the degree,[59] and must pass on special pleas.[60] Where

46. Com. v. Zillafrow [Pa.] 56 Atl. 539.

47. Discussion of irrelevant matters is not. Russell v. State [Neb.] 92 N. W. 751. Discussion of previous conviction of defendant is forbidden by statute in Texas. Hughes v. State [Tex. Cr. App.] 70 S. W. 746; Hefner v. State [Tex. Cr. App.] 71 S. W. 964. Statement by juror of facts in his personal knowledge held ground for new trial. State v. Burton, 65 Kan. 704, 70 Pac. 640; Sims v. State [Tex. Cr. App.] 70 S. W. 90. The fact that the jury casually learned that defendant had been previously convicted held not ground for new trial. State v. Thompson, 109 La. 296. Statement by juror that if a short sentence was given, defendant would be released from the penitentiary before he was as old as his father had been when he was released, together with a reference to criminal acts of the father since his release. McDaniel v. State [Tex. Cr. App.] 77 S. W. 802. Examination of copy of Code by juror held ground for new trial. Henson v. State [Tenn.] 72 S W. 960. Punishment assessed after a discussion of the votes of the different jurors held not fixed by lot. Burrows v. State [Tex. Cr. App.] 72 S. W. 848. Discussion of failure of jury to testify is ground for new trial. Doulton v. State [Tex. Cr. App.] 73 S. W. 395. That a juror agreed to a verdict under a misunderstanding of what a witness testified to is not ground for new trial. Blackwell v. State [Tex. Cr. App.] 73 S. W. 960. That a juror suggested that defendant if convicted had the right to appeal is not ground for reversal. State v. Lucas [Iowa] 97 N. W. 1003. That the jury were out only five minutes is no ground for setting aside verdict. Turner v. State [Tex. Cr. App.] 74 S. W. 777.

48. Russell v. State [Neb.] 92 N. W. 751; Jahnke v. State [Neb.] 94 N. W. 158. Discharge of jury for disagreement is discretionary. U. S. v. Jim Lee, 123 Fed. 741.

49. But not depositions. Russell v. State [Neb.] 92 N. W. 751. The jury may take with them into the jury room the record of a special proceeding to try the insanity of the accused. State v. Champoux [Wash.] 74 Pac. 557. In a prosecution for violating a local option law the jury should not be permitted to handle and smell liquor introduced in evidence but not shown to be the same as that sold on the date charged. Parker v. State [Tex. Cr. App.] 75 S. W. 30.

50. It is not error to refuse to read the cross examination when the jury requests only the direct. State v. Manning [Vt.] 54 Atl. 181.

51. Answering communication from jury as to recommendation to mercy held error. State v. Kiefer [S. D.] 91 N. W. 1117.

52. Request to agree before bedtime if possible held not prejudicial. Wilson v. State [Tenn.] 70 S. W. 57. The court may inquire of individual jurors as to the likelihood of reaching an agreement. Jones v. State [Ga.] 44 S. E. 877. It is not error for the court to say that he does not wish to force a verdict but will stay with the jury for another day. Id. Statement to jury that court would be in session a week so that they would have ample time to agree is not coercion. Brady v. State [Tex. Cr. App.] 74 S. W. 771.

53. Swan v. State [Miss.] 33 So. 223.

54. That he agreed on condition that the jury ask clemency. Bliss v. State [Wis.] 94 N. W. 325.

55. Hill v. State [Ga.] 44 S. E. 820.

56. "Guilty of misdemeanor" insufficient. Wells v. State, 116 Ga. 87. Verdict of guilty without designation of crime is sufficient. Lowe v. State [Wis.] 96 N. W. 417. Where the language of a verdict fails to convict the accused of the specific offense charged he may be found guilty of a lesser included offense. State v. Snider [Wash.] 73 Pac. 355. A verdict purporting to find the accused guilty of a particular offense must specify the particular offense; must find him guilty of all the ingredients of the offense. A partial verdict is not sufficient. Id.

57. "Gunlty." McMillan v. State [Tex. Cr. App.] 71 S. W. 279. Conviction of "Harry" instead of "Henry" held sufficient. Albert v. State [Tex. Cr. App.] 72 S. W. 846. "Wee" for we is trifling. Johns v. State [Fla.] 35 So. 71. "Gulity" for guilty is self corrective. Webb v. State [Ala.] 34 So. 1011. Misspelling of the word penitentiary in the verdict is not error. Gaines v. State [Tex. Cr. App.] 77 S. W. 10.

58. Verdict finding defendant guilty of the specific crime charged in each count and fixing punishment separately need not specify the counts by number or say "as charged in the indictment" after the word guilty. Lawrence v. State [Ark.] 71 S. W. 263. Need not find on counts dismissed at trial. State v. Maurer, 96 Mo. App. 347; State v. Hesterly [Mo.] 76 S. W. 985. A general verdict will be imputed to the count charging the offense sustained by the evidence. Indictment in two counts charging night

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pleas of former jeopardy and not guilty are tried together, a general verdict is insufficient[61] and must find as to all the defendants on trial.[62] Verdict need not find facts on which penalty is to be computed by court.[63] After the jury have dispersed, the verdict cannot be correct,[64] but before dispersal, they may be sent back to correct a verdict.[65] It is only legal defects however which the court may order corrected.[66]

§ 11. *New trial and arrest of judgment. Writ of error coram nobis.*—The harmful effect of error is elsewhere discussed.[67]

The grounds for new trial are usually regulated by statute.[68] Accident or surprise is ground for new trial only where diligence was exercised.[69] A new trial is sometimes granted because of the discovery that a juror was prejudiced against defendant or had expressed an opinion as to his guilt.[71]

and day burglary both of which were submitted and the evidence justified finding day burglary. Miller v. State [Tex. Cr. App.] 77 S. W. 800. A conviction on one count implies an acquittal on others not mentioned. Bigcraft v. People, 30 Colo. 298, 70 Pac. 417.

59. Pen. Code, § 972, so providing. McLane v. Ter. [Ariz.] 71 Pac. 938. Where only the offense charged was submitted, a general verdict is sufficient. Heinen v. State [Tex. Cr. App.] 74 S. W. 776; Mahany v. People [Colo.] 73 Pac. 26.

60. General verdict on pleas of not guilty and misnomer. Davis v. State [Ala.] 33 So. 818.

61. State v. Kieffer [S. D.] 95 N. W. 289. Defendant by requesting an instruction for general verdict on general and special pleas, waives the right to separate verdicts. State v. Spurgeon [Mo. App.] 74 S. W. 453.

62. Verdict finding "both guilty" sufficient. State v. Williamson [S. C.] 43 S. E. 671.

63. Dean v. State [Md.] 56 Atl. 481. Failure of the jury to find whether defendant is over 16 is not error where there is no evidence of his age. Boone v. State [Ind.] 67 N. E. 518.

64. Wells v. State, 116 Ga. 87.

65. Verdict finding defendant guilty of nonexistent crime—"assault and battery with intent to stab." State v. Gonneion [N. J. Law] 53 Atl. 701. The court may have a general verdict corrected by applying it to the only count on which conviction was asked without sending the jury out again. State v. Norris [S. C.] 43 S. E. 791. Where the verdict fails to find on both counts the jury may be sent back to put the same in proper form. Secor v. State [Wis.] 95 N. W. 942.

66. Court must accept verdict though for less degree than proof seems to him to warrant. Goolsby v. State [Miss.] 35 So. 212.

67. See § 15, post.

68. Disqualification of some grand jurors for failure to pay poll tax not ground for new trial. Cubine v. State [Tex. Cr. App.] 74 S. W. 39. Intoxication of defendant's counsel during the trial held not ground for new trial, there being no showing of prejudice. O'Brien v. Com. [Ky.] 74 S. W. 666. The receiving by a witness of part of a reward offered for conviction is not of itself grounds for a new trial. State v. Levy [Idaho] 75 Pac. 227.

In Georgia excessiveness of sentence (Sturkey v. State, 116 Ga. 526; Bellinger v. State, 116 Ga. 545), irregularity therein (Chapman v. State [Ga.] 44 S. E. 814), overruling demurrer to indictment (Veal v. State, 116 Ga. 589; Long v. State [Ga.] 45 S. E. 416), insufficiency of indictment (Sanders v. State [Ga.] 45 S. E. 365), overruling motion to quash the warrant (Bellinger v. State, 116 Ga. 545), empannelling of a juror whose name was not on the jury list (Somers v. State, 116 Ga. 535) and disqualification of the judge (Berry v. State, 117 Ga. 15) are not grounds for new trial.

70. State v. Fay [Minn.] 92 N. W. 978. Failure to subpoena a witness under mistake as to where he was not ground for new trial. McFadden v. State [Tex. Cr. App.] 71 S. W. 972. Surprise at testimony of prosecuting witness is not ground for new trial. Curry v. Com. [Ky.] 74 S. W. 1077.

71. Declaration by juror held insufficient. Trimble v. Ter. [Ariz.] 71 Pac. 932. Previous expressions of opinion by juror, denied on his voir dire. State v. Mickle [Utah] 70 Pac. 856. That juror who knew defendant remained silent when the jury was asked if any one did is presumptively harmless. Dodd v. State [Tex. Cr. App.] 72 S. W. 1015. Statements of jurors showing prejudice against the defendant, which facts were not known to defendant before trial, is misconduct sufficient for a reversal. Williams v. State [Tex. Cr. App.] 75 S. W. 509. Evidence held not to show prejudicial expressions by juror. State v. Mickle [Utah] 70 Pac. 856. A new trial may be allowed for misconduct of the jury unless shown that defendant suffered no prejudice therefrom. A juror stating to his associates of his own personal knowledge facts, not in the testimony, prejudicial to defendant. State v. Lowe [Kan.] 72 Pac. 524. Knowledge of facts by juror held not ground for a new trial; he not being examined on voir dire and it appearing that he was the last to agree to conviction. Lazenby v. State [Tex. Cr. App.] 73 S. W. 1051. Disqualification of a juror for prejudice against the defendant which fact he had concealed on his examination is ground for a new trial. State v. Mott [Mont.] 74 Pac. 728. A motion for a new trial on the ground of prejudice of a juror is properly denied where he stated that all he had heard of the case was from newspaper reports and hearsay, and that he had no prejudice, and no attempt is made to impeach his competency. Id. It is not sufficient grounds for a new trial that a juror is proven to have stated after verdict that everybody knew the defendant, on trial for gaming, was a gambler, which statement he

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Newly discovered evidence to be ground for a new trial[72] must be competent[73] and material,[74] credible,[75] not cumulative or merely for impeachment,[76] and such as to probably affect the result,[77] and it must appear that it could not in the exercise of due diligence have been produced at the trial.[78]

denied. Fuller v. State [Miss.] 35 So. 214. Affidavits of statements of jurors controverted by the jurors themselves, examined and held insufficient to authorize a new trial. Cruse v. State [Tex. Cr. App.] 77 S. W. 818.

72. Statement of all the requirements. Ter. v. Claypool [N. M.] 71 Pac. 463. Grant of new trial for newly discovered evidence and prejudice of a juror discretionary. Jones v. State [Ga.] 44 S. E. 877; State v. Nelson [Minn.] 97 N. W. 652.

73. Self serving declaration by defendant. Brown v. State [Tex. Cr. App.] 70 S. W. 21.

74. Golding v. State, 116 Ga. 526. In determining whether a new trial will be allowed the court may consider evidence relating to a degree of crime as to which defendant was acquitted. State v. Prater, 52 W. Va. 132. Newly-discovered evidence as to who fired the first shot in a former altercation held immaterial. State v. Reynolds, 171 Mo. 552.

75. Evidence of codefendant then under sentence for same crime insufficient. Ross v. State [Tex. Cr. App.] 70 S. W. 424. Affidavits of statements by prosecutrix insufficient where they were inconsistent with each other in circumstance, and the affiants did not disclose their alleged information until after two trials. State v. Manning [Vt.] 54 Atl. 181. Subsequent affidavit of witness denying some of the facts in the first. Id. After recollection of witness who had testified. Gannon v. State, 75 Conn. 576. Character of proposed witnesses should be shown. Miller v. State [Ga.] 43 S. E. 851. Affidavit by prosecuting witness denying his testimony at trial held insufficient. State v. Blanchard, 88 Minn. 82; Hall v. State [Ga.] 43 S. E. 718. Newly discovered evidence held apparently fabricated and not ground for a new trial. People v. Sullivan, 40 Misc. [N. Y.] 308.

76. Sturkey v. State, 116 Ga. 526; Somers v. State, 116 Ga. 535; Ray v. State [Tex. Cr. App.] 75 S. W. 798; State v. Blain [Iowa] 92 N. W. 650; State v. Albert, 109 La. 201; State v. Allen, 171 Mo. 562; Hodge v. State, 116 Ga. 929; Hardy v. State, 117 Ga. 40; State v. Hardee [Mont.] 72 Pac. 39; People v. Sullivan, 40 Misc. [N. Y.] 308; Black v. Com., 24 Ky. L. R. 1974, 72 S. W. 772; Rountree v. State [Ga.] 45 S. E. 623; Thompson v. State [Tex. Cr. App.] 76 S. W. 561. Defendants' insanity. Mathews v. State [Tex. Cr. App.] 77 S. W. 218; State v. McKenzie [Mo.] 76 S. W. 1015; Jinks v. State [Ga.] 44 S. E. 814; Curry v. Com. [Ky.] 74 S. W. 1077. Proof of the falsity of the statement of accomplice that he had never been convicted, is not ground for a new trial. People v. Sullivan, 40 Misc. [N. Y.] 308. Newly discovered evidence of finding of revolver not ground for a new trial, there having been evidence of its use. Henry v. People, 198 Ill. 162; Watson v. State [Ga.] 44 S. E. 824; Clayton v. State [Ga.] 45 S. E. 597; Teal v. State [Ga.] 45 S. E. 964. That defendant's sister had been adjudged insane since the trial is not ground for new trial where there was evidence on the trial of insanity of relatives (People v. Quimby [Mich.] 96 N. W. 1061) and was not such as would probably change the result (State v. Haworth [Utah] 73 Pac. 413; Cousins v. State [Miss.] 34 So. 323).

77. Evidence of three witnesses to statement by person aggrieved that another than defendant committed the crime ground for new trial. Bates v. State [Miss.] 32 So. 915; State v. Nelson [Minn.] 97 N. W. 652; People v. Sullivan, 40 Misc. [N. Y.] 308; State v. Terrio [Me.] 56 Atl. 217; McFadden v. State [Tex. Cr. App.] 71 S. W. 972. Inconclusive evidence as to alibi. McFadden v. State [Tex. Cr. App.] 71 S. W. 972. A motion for a new trial on the ground of an absent witness may be denied where the testimony of the witness would be consistent with defendant's guilt. Durham v. State [Tex. Cr. App.] 76 S. W. 563. Evidence of witnesses knowing of birth of prosecutrix who was alleged to be under age of consent held ground for new trial. Brock v. State [Tex. Cr. App.] 71 S. W. 20, 60 L. R. A. 465. Newly discovered evidence of threats by deceased not ground for new trial. Hatcher v. State, 116 Ga. 617. Newly discovered evidence as to the time of the homicide held ground for new trial where the evidence upon an alibi and the evidence of guilt was unsatisfactory. Buckner v. State [Miss.] 32 So. 920. Negative evidence. Simmons v. State [Tex. Cr. App.] 72 S. W. 586. Newly discovered evidence of self defense held ground for new trial where the evidence was conflicting. State v. Campbell, 25 Utah, 342, 71 Pac. 529. New evidence of the defendant's good character is not ground for a new trial. On a conviction of grand larceny. People v. Walker, 40 Misc. [N. Y.] 521. A new trial is warranted in a murder case on the ground of newly discovered evidence, by the affidavits of two principal witnesses that they were mistaken in the identity of the accused and were convinced from photographs of another that he was the person they saw, and on the affidavit of accused's co-defendant that accused was not connected with the killing. State v. King [Utah] 73 Pac. 1045. Affidavits of the complaining witness reversing his former testimony is not ground for a new trial. Nine months after the trial. People v. Cameron, 85 N. Y. Supp. 63. New trial on affidavit of witness for state retracting her testimony held properly denied. Harter v. People [Ill.] 68 N. E. 447.

78. Winn v. State [Tex. Cr. App.] 73 S. W. 807; Duncan v. State [Tex. Cr. App.] 77 S. W. 13; Prim v. State [Tex. Cr. App.] 70 S. W. 545. Subpoenas issued during the trial; no request for postponement when they were not served. State v. Albert, 109 La. 201. Names of witnesses known to other witnesses for defendant; only three of 25 eye witnesses produced. Mosely v. State [Tex. Cr. App.] 70 S. W. 546. Employes at place where acts in question took place. State v. Vance, 29 Wash. 435, 70 Pac. 34; Haley v. State [Tex. Cr. App.] 74 S. W. 38. Witnesses called but not examined. Hall v. State [Ga.] 43 S. E. 718. Matters known to defendant during the trial. Newberry v. State [Tex.

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A motion in arrest of judgment lies only to a material defect[79] apparent on the face of the record,[80] and the objection must of course be one which is not required to be made at the trial.[81]

A writ of error coram nobis will not lie to review errors or matters which may be corrected on motion in the trial court or upon appeal to a higher court,[82] and only to errors of fact.[83]

Practice on motion.—The time within which the motion must be made is regulated by statute.[84] The grounds of the motion must be stated,[85] and the existence thereof shown,[86] as must the timeliness of the motion.[87] Affidavit of juror will not be received to impeach verdict,[88] but may be received to sustain it.[89] Defendant has no constitutional right to be present at the hearing.[90] Oral testimony cannot ordinarily be introduced in support of a motion for a new trial,[91] and there is no error in refusing a motion to be allowed to introduce such testi-

Cr. App.] 74 S. W. 774. New evidence is not ground for a new trial if it was available at the original trial. Affidavits tending to prove an alibi nine months after trial. People v. Cameron, 85 N. Y. Supp. 63. Facts found out from a witness after trial cannot be set up as newly discovered evidence, where the witness is not examined as to the facts at the trial. Ray v. State [Tex. Cr. App.] 75 S. W. 798. Newly discovered evidence of self defense held ground for new trial notwithstanding lack of diligence. Cline v. State [Tex. Cr. App.] 71 S. W. 23.

79. Not that information did not state on what day it was filed. Hollar v. State [Tex. Cr. App.] 73 S. W. 961. Not to slight defect in indictment (Markee v. People, 103 Ill. App. 347), such as variance between recital and signature of information as to given name of prosecuting attorney (Williams v. State [Tex. Cr. App.] 70 S. W. 213). Omission of word "defendant" in verdict not ground for arrest of judgment. State v. Norris [S. C.] 43 S. E. 791. Inconsistency of counts in an indictment is not ground for a motion in arrest where there was an election to rely on one of the counts at the trial and the other was not submitted to the jury. Thomas v. State [Tex. Cr. App.] 77 S. W. 801. Motion in arrest will not reach wrong verdict. McDonald v. State [Fla.] 35 So. 72. Failure to allege that woman was married. State v. Bisbee [Vt.] 54 Atl. 1081. Will not reach vagueness or mere indefiniteness of indictment. Mathis v. State [Fla.] 34 So. 287.

80. State v. Brown [La.] 35 So. 501; State v. Kline, 109 La. 603. Sufficiency of information and jurisdiction of court. Smith v. State [Neb.] 94 N. W. 106; People v. Pierson, 80 App. Div. [N. Y.] 415. Not to insufficiency of evidence. Mathis v. State [Fla.] 34 So. 287.

81. See post, § 15.

82. Hamlin v. State [Kan.] 74 Pac. 242. It will not lie from a decision holding jurors to be qualified, though they made false statements as to their qualifications, and defendant did not know of their prejudice until after a motion for a new trial had been overruled. Id.

83. Not to obtain an extension of time to appeal. Collins v. State [Kan.] 71 Pac. 251.

84. The motion cannot be made in vacation. Johnson v. State, 116 Ga. 535; Gardner v. State, 116 Ga. 537. To be entitled to enter a motion more than two days after the trial defendant must show that he has not previously moved for new trial or in arrest. Hines v. State [Tex. Cr. App.] 70 S. W. 955. Motion for new trial after plea of guilty must be made at the sitting (term) at which sentence was passed. Com. v. Soderquest [Mass.] 66 N. E. 801. The year after "trial" within which motion must be made does not run from plea. The trial judge has discretion to set aside a grant of an appeal and allow time for the preparation of affidavits for a motion for a new trial. Motion made on the same morning that a verdict of guilty was returned for him, of which knowledge had just come to counsel with regard to the misconduct of the jury. Legere v. State [Tenn.] 77 S. W. 1059.

85. State v. Shipley, 171 Mo. 544. Under statutes providing that application for a new trial shall be on notice of motion, and the motion when made in certain cases shall be based on an affidavit otherwise on a bill of exceptions, the notice need state only the grounds of the motion. State v. Landry [Mont.] 74 Pac. 418.

86. What the alleged erroneous evidence was. Scott v. State, 117 Ga. 14. Defendant must make affidavit in person that he did not know of the facts before the trial. Malone v. State, 116 Ga. 272. That witnesses refuse to make affidavit for fear of incriminating themselves does not make defendant's statement of their expected testimony sufficient. State v. McCullough, 171 Mo. 571. Oath of defendant alone insufficient. Shutt v. State [Tex. Cr. App.] 71 S. W. 18. Character of proposed witnesses must be shown in Georgia. Hatcher v. State, 116 Ga. 617. Residence of witnesses should be stated. State v. Fay [Minn.] 92 N. W. 978. Affidavits to obtain a new trial on the ground that jurors had expressed opinions as to the guilt of the accused, must show that such expressions of opinion would have been sufficient to challenge for cause at the impanelling of the jury; and that the accused or his counsel had no knowledge of such facts at the time. State v. Morrison [Kan.] 72 Pac. 554.

87. The motion was required to be made within thirty days after discovery of the facts. State v. Mickle [Utah] 70 Pac. 856.

88. State v. Smith [Or.] 71 Pac. 973; Blackwell v. State [Tex. Cr. App.] 73 S. W. 960; State v. Kiefer [S. D.] 91 N. W. 1117.

89, 90. Howard v. Com., 24 Ky. L. R. 612, 69 S. W. 721.

91. In a prosecution for homicide. State v. Mortensen [Utah] 73 Pac. 562.

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mony,[92] and when allowed, the burden is on defendant to produce his witnesses at the hearing.[93] Irregularities in affidavits for a new trial are waived by counter affidavits controverting matter alleged in the first.[94] The order denying the motion may be vacated to allow the prosecutor to strengthen his case and the motion then denied.[95] If the motion cannot be sustained as presented, it may be denied.[96]

§ 12. *Sentence and judgment.*—In sentencing on a plea of guilty, the court may take evidence as to the degree.[97] In cases not capital, it is generally held not reversible error to fail to ask defendant if he has anything to say,[98] but a statute requiring such procedure is held mandatory.[99] A verdict assessing the punishment of both defendants together authorizes the court to sentence as on failure of the jury to assess.[1] Sentence under an indeterminate sentence act is not bad for uncertainty.[2] The sentence must follow the verdict.[3] Sentences for different terms of different co-defendants is not a denial of equal protection to all.[4] It is not error of which a convicted defendant can complain that the court failed to add a term of imprisonment if the fine was not paid.[5] Sentences imposed at the same time will run concurrently unless otherwise expressly stated.[6] The court has no power to suspend sentence indefinitely,[7] and defendant's consent gives no such power.[8] The court may at the same term modify a sentence.[9] A petition alleging insanity in bar of execution of death sentence must allege that it arose after sentence.[10] Judgment cannot be entered nunc pro tunc at a subsequent term where there are no docket entries.[11]

§ 13. *Record or minutes and commitment.*—The record is conclusive,[12] but may be amended by the court,[13] but only on record evidence.[14] Erroneous entry in minutes does not control the indictment.[15] A mere recital of the proceedings including verdict is not a judgment.[16] A record entry that a "jury" came controls

92. As to misconduct of the jury while taking a view. State v. Mortensen [Utah] 73 Pac. 633.

93. State v. Albert, 109 La. 201.

94. State v. Landry [Mont.] 74 Pac. 418.

95. Ransom v. State [Tex. Cr. App.] 70 S. W. 960.

96. Reed v. State [Neb.] 92 N. W. 321.

97. As to whether burglary was committed in the night time. People v. Miller, 137 Cal. 642, 70 Pac. 735.

98. State v. Sally, 41 Or. 366, 70 Pac. 396.

99. McCormick v. State [Neb.] 92 N. W. 606.

1. State v. Thornhill [Mo.] 74 S. W. 832.

2. People v. Warden of Sing Sing Prison, 39 Misc. [N. Y.] 113.

3. If verdict is for too high a degree court may sentence for lesser degree included and proved. U. S. v. Linnier, 125 Fed. 83. Sentence for a particular offense, of which the language of the verdict fails to find the accused guilty, is reversible error. State v. Snider [Wash.] 73 Pac. 355.

4. Howard v. Fleming, 24 Sup. Ct. 49.

5. Fuller v. State [Miss.] 35 So. 214.

6. Fortson v. Elbert County, 117 Ga. 149.

7. By so doing it loses jurisdiction. In re Flint [Utah] 71 Pac. 531; People v. Barrett, 202 Ill. 287. Suspension of sentence of which the judge has lost jurisdiction is not compellable. Pending review. Cribb v. Parker [Ga.] 46 S. E. 110.

8. People v. Barrett, 202 Ill. 287.

9. Sentence to wrong institution. In re Graves, 117 Fed. 798. An excessive sentence may be sustained so far as it is legal and separable from the illegal part. In re Welty, 122 Fed. 122.

10. Lee v. State [Ga.] 43 S. E. 994. Petition supported only by witness who testified at the trial to insanity properly overruled. Williams v. State [Fla.] 34 So. 279. Since the act of Aug. 17, 1903, the court has no power to grant inquisition of sanity after sentence, and the saving clause as to pending cases applies only to cases where application for an inquisition was pending. Cribb v. Parker [Ga.] 46 S. E. 110. On trial of a plea of insanity arising after conviction, the test is whether defendant comprehends the difference between right and wrong and would understand for what he was being punished. Lee v. State [Ga.] 45 S. E. 628.

11. Mimms v. State [Tex. Cr. App.] 74 S. W. 906.

12. As to arraignment. State v. Taylor, 171 Mo. 465. Refusal to enter a judgment which it was claimed was rendered but never entered is conclusive against the rendition of such judgment. Gustie v. State [Tex. Cr. App.] 70 S. W. 751. Affidavits impeaching record of plea, tendered after verdict, are properly rejected. State v. Tucker [W. Va.] 44 S. E. 427.

13. Entry of formal judgment nunc pro tunc. Marks v. State, 135 Ala. 69. Defect in omitting provision for hard labor may be amended nunc pro tunc if actually part of sentence as pronounced. In re Welty, 123 Fed. 122.

14. Affidavit by clerk inadmissible. Davis v. State [Ala.] 33 So. 817. But see People v. Flanigan, 174 N. Y. 356, where a copy of a lost exhibit was supplied on affidavit supported by the recollection of the judge.

15. As to crime charged. State v. De Hart, 109 La. 570.

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a subsequent statement of only eleven names and shows a legal jury.[17] The record must show every jurisdictional fact.[18]

A commitment need not specify the statute under which conviction is had,[19] but must definitely state the finding.[20] Not only must an objection be taken, but the ruling thereon must be excepted to,[21] and this rule is sometimes held to require an exception to the denial of a new trial.[22]

§ 14. *Saving questions for review. Necessity of objection, motion or exception.*—Aside from objections to the jurisdiction,[24] the sufficiency of the indictment,[25] or to the competency of a witness,[26] there must have been a prompt objection in the trial court, and this rule has been applied to failure to serve copy of indictment[27] or jury list,[28] arraignment and plea,[29] manner of drawing jury,[30] disqualification of

16. Herbert v. State [Tex. Cr. App.] 72 S. W. 587.

17. Davis v. State [Ala.] 33 So. 817.

18. Record of plea held sufficient. Bassett v. State [Fla.] 33 So. 262. Record of arraignment held sufficient. People v. Miller, 137 Cal. 642, 70 Pac. 735. The evidence of defendant's age justifying a reformatory sentence need not be preserved in the record. Marx v. People [Ill.] 68 N. E. 436. Statement of impannelling of grand jury held sufficient. State v. Tucker [W. Va.] 44 S. E. 427. Entries held to sufficiently show return of indictment in open court. State v. Ledford [N. C.] 45 S. E. 944. The authority of a special judge to preside must appear in all criminal cases and should not be left to presumption in any case. Low v. State [Tenn.] 78 S. W. 110. Recital that "the grand jurors aforesaid were duly sworn" is sufficient. Bruen v. People [Ill.] 69 N. E. 24.

19. People v. Van De Carr, 83 N. Y. Supp. 245.

20. Mittimus defective for not reciting that accused was "found" intoxicated. In re Rogers [Vt.] 55 Atl. 661.

21. Bellinger v. State, 116 Ga. 545; State v. Back [Mo. App.] 72 S. W. 466. Not necessary where indictment does not charge a crime. People v. Pierson, 80 App. Div. [N. Y.] 415. Surprise. Latham v. State [Tex. Cr. App.] 72 S. W. 182. Change of venue. State v. Lynn, 169 Mo. 664. Overruling challenge to array. Valles v. State [Tex. Cr. App.] 71 S. W. 598. Refusal of postponement. Foster v. State [Tex. Cr. App.] 71 S. W. 971; Cubine v. State [Tex. Cr. App.] 74 S. W. 39. Admission of evidence. State v. Catlin, 170 Mo. 354. Refusal to allow time to plead. State v. Hunter, 171 Mo. 435. Competency of witness. Fay v. State [Tex. Cr. App.] 70 S. W. 744. Admission of evidence. Hill v. State [Tex. Cr. App.] 70 S. W. 754; Broomfield v. State [Tex. Cr. App.] 74 S. W. 915; Ill. Cent. R. Co. v. Com. [Ky.] 74 S. W. 1097. Refusal to strike out testimony. People v. Lagrappo, 86 N. Y. Supp. 116. Misconduct of counsel. Scott v. Com., 24 Ky. L. R. 889, 70 S. W. 281. Improper argument of counsel. State v. Sale [Iowa] 92 N. W. 680; State v. Tyson [N. C.] 45 S. E. 838; Gossett v. State [Tex. Cr. App.] 70 S. W. 319; Tackaberry v. State [Tex. Cr. App.] 72 S. W. 384; State v. Bailey [Wash.] 71 Pac. 715. Instructions. State v. Gregory, 170 Mo. 598; Carr v. State [Fla.] 34 So. 892; State v. Mitchell [Wash.] 72 Pac. 707; State v. McMullin, 170 Mo. 608; State v. Vinso, 171 Mo. 576; Webb v. State [Tex. Cr. App.] 70 S. W. 954.

22. State v. Hall, 109 La. 290; State v. Irvin, 171 Mo. 558; Barrows v. State [Ind.] 69 N. E. 253; State v. Dunham [Mo.] 76 S. W. 1008.

24. Ter. v. Taylor [N. M.] 71 Pac. 489.

25. State v. Gregory [Mo.] 76 S. W. 970; State v. Marsh [N. C.] 43 S. E. 828; State v. Meysenburg, 171 Mo. 1. Insufficiency of indictment to charge an offense may be urged under a plea of not guilty. People v. Pierson, 80 App. Div. [N. Y.] 415. The sufficiency of an indictment to support a judgment of conviction, and jurisdiction over the subject matter may be raised at any time in the supreme court. Shivers v. Territory [Okl.] 74 Pac. 899. The objection that an indictment was not properly found, indorsed or presented cannot be raised for the first time on appeal. The proper remedy is by motion to set it aside before plea. Shivers v. Territory [Okl.] 74 Pac. 899. A plea of guilty does not waive insufficiency of indictment to charge an offense. Smith v. State [Neb.] 94 N. W. 106. After pleading guilty defendant may appeal and assail the sufficiency of the indictment to charge an offense. Hogue v. State, 23 Ohio Cir. Ct. 567. Duplicity of information cannot be objected to for the first time on appeal. State v. Snider [Wash.] 73 Pac. 355. Failure of record to show that the indictment was returned in open court cannot be first raised on motion to quash. State v. Ledford [N. C.] 45 S. E. 444. Objection for repugnancy must be raised below. Sims v. U. S., 121 Fed. 515.

26. Wife allowed to testify against her husband. Brock v. State [Tex. Cr. App.] 71 S. W. 20, 60 L. R. A. 465. Competency of expert cannot be objected to for the first time on appeal. Com. v. Burton, 183 Mass. 461. Competency of witness cannot be objected to for the first time on appeal. Barber v. People [Ill.] 68 N. E. 93.

27. Burrows v. State [Tex. Cr. App.] 72 S. W. 848; Coleman v. State [Tex. Cr. App.] 74 S. W. 769.

28. Webb v. State [Ala.] 34 So. 1011.

29. Issue not formally made. Reed v. State [Neb.] 92 N. W. 321. Striking out pleas. Wilson v. State [Ala.] 33 So. 831. A defendant, arraigned and case fixed for trial on the same day on which the indictment is returned has no ground of complaint where he fails to avail himself of the right, reserved on the arraignment, to make any objection which he might have by greater delay. State v. Allen [La.] 35 So. 495. Going to trial without objection to want of arraignment is a waiver. Hudson v. State [Ga.] 45 S. E. 66. Special exception is necessary to save want of arraignment. Motion

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jurors,[31] or of the judge,[32] selection of jury,[33] denial of right to be heard by counsel,[34] bar of prosecution by limitations,[35] failure to prove venue,[36] examination of witness,[37] misconduct of a witness while testifying,[38] admission or exclusion of evidence,[39] absence of defendant during view,[40] action of officer in pointing out objects during view,[41] argument or conduct of counsel,[42] remarks of court,[43] variance

in arrest will not. Short v. State [Miss.] 34 So. 353.

30. Should be taken by challenge to array on motion to quash panel. State v. Parker [N. C.] 43 S. E. 830. And see State v. Johnson [S. C.] 44 S. E. 58. Objection to drawing too many jurors from one locality must not be deferred until after verdict but taken by challenge to array. Sylvester v. State [Fla.] 35 So. 142. Mode of summoning the jury must be raised by challenge to the array or motion to quash the indictment. Bruen v. People [Ill.] 69 N. E. 24.

31. Cubine v. State [Tex. Cr. App.] 73 S. W. 396. It was suggested at the trial as a privilege but not urged as a disqualification. State v. Lewis [Wash.] 71 Pac. 778. Objection on motion for new trial too late. State v. Catlin, 170 Mo. 354; State v. Keziah [La.] 34 So. 107; People v. McFarlane, 138 Cal. 481; Cubine v. State [Tex. Cr. App.] 74 S. W. 39; Queenan v. Territory, 190 U. S. 548, 47 Law. Ed. 1175. Crim. Code, § 281. Woodruff v. Com. [Ky.] 77 S. W. 922.

32. Berry v. State, 117 Ga. 15.

33. No objection being made to any juror on a panel shows that the defendant was not prejudiced. State v. Faulkner [Mo.] 75 S. W. 116. Objection to an irregularity of the court in calling in wrong jurors may be made before the jurors are sworn in and the names put in the jury box. A challenge to a panel irregularly called in a department other than the one in which they were drawn will constitute such an objection. People v. Wong Bin [Cal.] 72 Pac. 505. Where defendant waived one of his peremptory challenges a challenge for cause cannot be reviewed. State v. Tyler [Iowa] 97 N. W. 983.

34. Where defendant is offered an attorney but has his defense conducted by a layman he cannot complain after verdict that he was deprived of counsel. State v. Bridges, 109 La. 530.

35. State v. Holder [N. C.] 45 S. E. 862.

36. Failure to prove venue cannot be objected to for the first time on appeal. State v. Holder [N. C.] 45 S. E. 862. In Texas an issue must be made by bill of exceptions in the lower court to entitle appellant to insist that the venue was not proven. Statutory. Washington v. State [Tex. Cr. App.] 77 S. W. 810.

37. Leading question. Bryan v. State [Fla.] 34 So. 243. To save an objection that part of an answer is not responsive, objection must be made on that ground. State v. Clark [Utah] 74 Pac. 119.

38. Allowing mother of deceased to indulge in crying, moaning, and giving other evidence of her grief. Turner v. Com. [Ky.] 76 S. W. 853.

39. Sylvester v. State [Fla.] 35 So. 142; Wright v. State [Miss.] 34 So. 4; Ferrell v. State [Fla.] 34 So. 220; State v. Green [La.] 35 So. 396; Lowe v. State [Wis.] 96 N. W. 417. It is too late to object to testimony relating to a privileged communication where no objection is made thereto on examination and cross examination. State v. Lehman [Mo.] 75 S. W. 139; State v. Robertson [La.] 35 So. 375; State v. Green [La.] 35 So. 396; People v. Cole [Cal.] 74 Pac. 547; Com. v. Foster, 182 Mass. 276; State v. Blitz, 171 Mo. 530; Ragland v. State [Ark.] 70 S. W. 1039; White v. State, 116 Ga. 573; Andrews v. State [Ga.] 43 S. E. 852. Warrant with incompetent indorsement on back. State v. Yourex, 30 Wash. 611, 71 Pac. 203. Questions not objected to cannot be complained of on appeal. State v. Champoux [Wash.] 74 Pac. 557. Objection to a ruling admitting testimony must be made at the time. State v. Melvern [Wash.] 72 Pac. 489. Where no objection is made to the reading of testimony of the defendant in his own behalf at a former trial at the time of its introduction on the ground of insufficient authentication, and such ground is not specifically assigned as error, objection thereto cannot be made on motion for a new trial. McMasters v. State [Miss.] 35 So. 302. Where a witness in testifying as to a certain conversation of the accused refers to the commission of crimes similar to the one on trial, in order to object to such part of the conversation the accused should have requested an instruction to the witness to state only the part of the conversation relating to the crime on trial, or move to strike out the other part of the conversation and have the jury charged to disregard it. People v. Bushnell, 83 N. Y. Supp. 403.

40. Failure of defendant to be present in person when a view of premises is taken by the jury, is not ground for a new trial, where he is at liberty to accompany them but fails to do so and his attorneys do not notify the judge of that fact or make an objection until after verdict. People v. Edwards [Cal.] 73 Pac. 416.

41. People v. Fitzgerald, 137 Cal. 546, 70 Pac. 554.

42. State v. Gartrell, 171 Mo. 489. Objection to the prosecuting attorney's manner in questioning a witness cannot be made for the first time on appeal. People v. Farrington [Cal.] 74 Pac. 288; Hoyle v. State [Tex. Cr. App.] 70 S. W. 94; Smith v. State [Ga.] 46 S. E. 79; State v. Fenton, 30 Wash. 325, 70 Pac. 741; Reed v. State [Neb.] 92 N. W. 321. In the absence of a request to charge with respect to an erroneous argument save by a bill of exceptions, there will be no reversal for language in argument unless it is obviously necessary. Dina v. State [Tex. Cr. App.] 78 S. W. 229; Parker v. State [Neb.] 93 N. W. 1037. Reference by attorney to defendant's failure to testify may be raised for the first time on motion for new trial. State v. Snider [Iowa] 91 N. W. 762. The failure of defendant's attorney to except to the state's version of the testimony of a certain witness is a concession of its substantial correctness. Johnson v. State [Tex. Cr. App.] 75 S. W. 34. Special charge must be requested. McAnally v. State [Tex. Cr. App.] 72 S. W. 842; Dodd v. State [Tex. Cr. App.] 72 S. W. 1015. Error of the trial court in refusing to allow accused's counsel to com-

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as to name of prosecutor,[44] instructions,[45] misconduct of juror,[46] reception of verdict.[47] It is sometimes required that the objection be first presented to the trial court by motion for new trial,[48] and where such rule prevails, only the sufficiency of the indictment is presented where no motion was made.[49]

Waiver of objection.—Though an objection has been duly made, it may be waived by subsequent conduct,[50] and an exception against invited error is unavailing.[51] An exception to a ruling of the court in excluding a question may be waived by the attorney withdrawing the exception.[52]

ment on the state's failure to call certain witnesses may be waived. By counsel's failure to point out a portion of the record showing the materiality of such witnesses and the possibility of producing them. People v. Glaze [Cal.] 72 Pac. 965. In order that misconduct of counsel in making improper statements to the jury in his argument may be reviewed it must be objected to at the time. Horn v. State [Wyo.] 73 Pac. 705; Coleman v. State [Tex. Cr. App.] 74 S. W. 769. Error in referring in argument to the deliberations of a jury in a former trial, is not fatal where there is no request taking such matter from the consideration of the jury. Gaines v. State [Tex. Cr. App.] 77 S. W. 10. That the offending counsel raised his voice so as to prevent the objection being heard is no excuse. Gilstrap v. People, 30 Colo. 265, 70 Pac. 325.

43. Territory v. Taylor [N. M.] 71 Pac. 489; Lawrence v. State [Fla.] 34 So. 87.

44. Dennis v. State [Tex. Cr. App.] 74 S. W. 559.

45. People v. Flanigan, 174 N. Y. 356; Pittman v. State [Fla.] 34 So. 88; Moore v. State [Tex. Cr. App.] 70 S. W. 89; State v. Woodward, 171 Mo. 593; Windom v. State [Tex. Cr. App.] 72 S. W. 193; State v. John [La.] 34 So. 98. Exception to charge cannot be taken after verdict. State v. Vance, 29 Wash. 435, 70 Pac. 34. Where an instruction is ambiguous an instruction to remove the ambiguity should be requested. Starr v. State, 160 Ind. 661. Motion for new trial will not save error in refusing requests [Rev. St. § 1092]. Mathis v. State [Fla.] 34 So. 287; An error in giving an instruction will not be considered on appeal unless objection or exception is made to the error at the time the instruction was given. Keady v. People [Colo.] 74 Pac. 892. Charges must be excepted to. Peaden v. State [Fla.] 35 So. 204. Necessity of requesting additional instructions is treated in § 10E.

46. State v. Gleason [Mo.] 72 S. W. 676.

47. Peoples v. State [Miss.] 33 So. 289. Failure to object to the form or reception of a verdict is not a waiver of an objection that the sentence is not supported by the verdict. State v. Snider [Wash.] 73 Pac. 355.

48. State v. Gatlin, 170 Mo. 354. Error of law at the trial cannot be reviewed unless there was a motion for a new trial. Toozer v. State [Neb.] 97 N. W. 584. In the absence of a bill of exceptions to omissions in the charge of the court or to an erroneous charge or exception in the motion for new trial, reversal cannot be had for supposed errors [Since Code Cr. Proc. art. 723]. Monson v. State [Tex. Cr. App.] 76 S. W. 570. Prejudicial remarks by the prosecuting attorney must be raised in the motion for a new trial or they cannot be reviewed. State v. Kyle [Mo.] 76 S. W. 1014. Error in the making of improper statements to the jury in respect to affidavits of defendant for a continuance in a civil case, will not be reviewed where not presented in a motion for a new trial. State v. Pyscher [Mo.] 77 S. W. 836. That jury was not put in charge of officer. Markee v. People, 103 Ill. App. 347. Undue limitation of statement by accused. Hunt v. State, 116 Ga. 615. Exclusion of evidence. State v. Terry, 172 Mo. 213. Objection to the sufficiency of evidence cannot be made for the first time on appeal. Younger v. State [Wyo.] 73 Pac. 551. The action of the trial court in refusing application for change of venue, will not be reviewed where not complained of in the motion for a new trial nor the attention of the court called to any error in respect to its ruling. State v. Boyd [Mo.] 76 S. W. 979. Sufficiency of evidence to be questioned on appeal should be made a ground of motion for a new trial. Komrs v. People [Colo.] 73 Pac. 25. Refusal to provide counsel should be saved by motion for new trial. State v. Bell [La.] 34 So. 721.

49. Philpot v. Com., 24 Ky. L. R. 757, 69 S. W. 959.

50. Failure to move to strike out evidence admitted over objection does not waive the objection. Barnard v. State [Tex. Cr. App.] 73 S. W. 957. That counsel argued a theory only as an assumption and disclaimed belief therein does not waive failure to charge thereon. State v. Gallivan, 75 Conn. 326. Where application for a continuance was overruled by a disqualified judge, it is waived if not renewed before the judge called in to try the case. State v. Blitz, 171 Mo. 530. Where a ruling excludes a certain line of evidence as incompetent, failure to offer it after laying a proper foundation does not waive the objection. State v. Beird [Iowa] 92 N. W. 694; State v. Hunter [Iowa] 92 N. W. 872. Introduction of evidence curing a defect of proof waives the overruling of a demurrer to the evidence. State v. Hagan, 131 N. C. 802. Passing a peremptory challenge is not a waiver thereof as to jurors subsequently called. Moore v. People [Colo.] 73 Pac. 30. An objection to testimony being overruled, but no further like testimony introduced and no motion to strike it out being made, is unavailable on appeal. State v. Pittam [Wash.] 72 Pac. 1042.

51. A request for a similar instruction may not prevent the assertion of error in a given instruction which is not substantially the same. A request in a prosecution for selling intoxicating liquors without a license that defendant should not be convicted unless he "solicited and got others to make orders through him directly or indirectly" does not prevent the assertion of error in an instruction that if defendant procured the sale of intoxicating liquors for others by taking orders therefor, and by purchasing

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Sufficiency of objections.—The objection must be specific,[53] and a general objection is sufficient only if the evidence is palpably inadmissible,[54] but not otherwise.[55] The objection must be to the question, not to the answer.[56] Where evidence is admitted out of order on promise to connect it, defendant must move to strike it out if the promise be not kept.[57] If evidence is admissible in part,[58] or for any purpose, a general objection is insufficient,[59] or a general motion to strike out denied.[60] Exclusion of an answer cannot be reviewed unless there was an offer of proof.[61] A motion to strike out evidence introduced on promise to connect it is premature if made before conclusion of the state's evidence.[62] That consent of owner of stolen goods was not negatived,[63] or that the offense proved was under another section of the statute,[64] is not raised by a general objection to the sufficiency of the evidence. A general objection to a charge does not raise a question as to its adequacy.[65] The remedy for improper remarks by the prosecuting attorney is by motion that the court withdraw the same, not by motion to set aside the submission.[66]

Sufficiency of exceptions.—Exception must be specific,[67] and if it covers sev-

the liquor and distributing it among them according to their orders, he would be guilty of making an unlawful sale of liquors to those parties. Whitmore v. State [Ark.] 77 S. W. 598. It is not error for the court to refuse the defendant's motion to strike out and to charge the jury not to consider evidence brought out by defendant's counsel on cross-examination of a state witness, such evidence not being referred to in the direct examination. State v. Mortensen [Utah] 73 Pac. 562. Where defendant has requested instructions referring the jury to the indictment, he cannot object that others of the same kind were given. Christie v. People [Ill.] 69 N. E. 33. Consent to consolidation of charges for trial. Price v. State [Ark.] 71 S. W. 948. Instruction given at defendant's request. State v. Pohl, 170 Mo. 422.

52. People v. Childs, 84 N. Y. Supp. 853.

53. Assignments of error are restricted to grounds of objection. State v. Carey [Conn.] 56 Atl. 632. Objection as leading does not raise competency. State v. Shipley, 171 Mo. 544.

54. Kirby v. State [Fla.] 32 So. 836; Elmore v. State [Ala.] 35 So. 25; Miller v. State [Tex. Cr. App.] 71 S. W. 20. Objection to evidence as immaterial is too general. Kipper v. State [Tex. Cr. App.] 77 S. W. 611; Martin v. State [Tex. Cr. App.] 70 S. W. 973. Sufficient to evidence of slanders of decedent's brother by defendant offered to excuse assault on defendant by decedent. State v. Bartlett, 170 Mo. 658, 59 L. R. A. 756. An objection that evidence is immaterial and irrelevant, does not raise the question whether it was hearsay. Rush v. State [Tex. Cr. App.] 76 S. W. 927. Objection to evidence as not responsive does not raise question as to its competency. Cupps v. State [Wis.] 97 N. W. 210. Objection for lack of foundation will not save right to impeach own witness. Brown v. State [Fla.] 35 So. 82.

55. Williams v. State [Fla.] 34 So. 279; State v. McMullin, 170 Mo. 608. Objection to cross examination of defendant. State v. Dent, 170 Mo. 398. Reason for objection must be assigned. Clark v. State [Tex. Cr. App.] 72 S. W. 591; Hudson v. State [Tex. Cr. App.] 70 S. W. 764; State v. Ellis, 30 Wash. 369, 70 Pac. 963. It does not raise the objection that no foundation is laid. McCormick v. State [Neb.] 92 N. W. 606.

56. Hudson v. State [Ala.] 34 So. 854; Jarvis v. State [Ala.] 34 So. 1025. Objections to a question must be made before it is answered. Ginn v. State [Ind.] 68 N. E. 294.

57. Stone v. State [Ga.] 45 S. E. 630.

58. Caddell v. State [Ala.] 34 So. 191; Wright v. State [Ala.] 34 So. 233; State v. Douette [Wash.] 71 Pac. 556; Gully v. State, 116 Ga. 527; Anthony v. State [Fla.] 32 So. 818. Where counsel insist that all of a statement be read if any part is, objections going to a part are waived. State v. Dennis [Iowa] 94 N. W. 235. Objection to a dying declaration as a whole is insufficient to raise any question as to an affidavit which is a part thereof. State v. McMullin, 170 Mo. 608.

59. Objection to competency insufficient as against evidence of former conviction which does affect competency of witness but is admissible as to credibility. Castleberry v. State [Ala.] 33 So. 431.

60. Motion to strike should not be so broad as to include proper evidence. Fields v. State [Fla.] 35 So. 185; Johns v. State [Fla.] 35 So. 71; Baldwin v. State [Fla.] 35 So. 220; Cook v. State [Fla.] 35 So. 665.

61. Knowles v. State [Tex. Cr. App.] 72 S. W. 398; Hunt v. State, 116 Ga. 615.

62. Freese v. State, 159 Ind. 597.

63. State v. Sally, 41 Or. 366, 70 Pac. 396.

64. Hodges v. State [Tex. Cr. App.] 72 S. W. 179.

65. Hudson v. State [Tex. Cr. App.] 70 S. W. 764.

66. Copenhaver v. State [Ind.] 67 N. E. 453.

67. People v. Tobin [N. Y.] 68 N. E. 359; State v. Campbell [Utah] 71 Pac. 529. General exception to indictment for forgery covers variance between purport and tenor clauses. Crayton v. State [Tex. Cr. App.] 73 S. W. 1046. "That the court erred in its charge" and "in failing to instruct all the law applicable to the case" are too general exceptions. Shankles v. State [Tex. Cr. App.] 78 S. W. 234. An exception is good if the record shows that the court knew the ground of objection which however was not stated. State v. Hendrick [N. J. Law] 56

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eral rulings, is insufficient if any one was good;[68] but if the error is palpable, a general exception will suffice.[69] The time of taking is usually regulated by statute or rule.[70]

§ 15. *Harmless or prejudicial error. Trivial or immaterial error.*—To be ground for reversal, error must be harmful[71] to defendant,[72] though prejudice is usually presumed from error.[73] Improper use of evidence in argument does not make its admission error,[74] but the admission of immaterial evidence may become prejudicial error from the use made of it in argument.[75] The rule that there will be no reversal for error which did not prejudicially affect the rights of defendant has been applied to proceedings of grand jury,[76] denial of continuance,[77] grant of mistrial,[78] proceedings on change of venue,[79] ruling on pleas,[80] selection of jury,[81]

Atl. 247. No question is raised on appeal by an exception to an instruction that it contained an improper and inaccurate statement of the law, without showing wherein it was inaccurate. State v. Clark [Utah] 74 Pac. 119.

68. Exception to several instructions. Jones v. State [Fla.] 32 So. 793; Smith v. State [Ga.] 46 S. E. 79; State v. Hall [N. C.] 44 S. E. 553. General exception is bad to evidence if it is in anywise good. State v. Hendrick [N. J. Law] 56 Atl. 247.

69. Misstatement by counsel. State v. Greenleaf, 71 N. H. 606.

70. Exceptions to giving of instructions may be made on motion for new trial but exceptions to refusal must be taken at the trial. Mathis v. State [Fla.] 34 So. 287. Laws 1903, c. 286 which allows exceptions to instructions to be taken at any time during the term does not apply to cases tried before its passage. Secor v. State [Wis.] 95 N. W. 942. A bill of exceptions to the overruling of a demurrer to the indictment must be presented within twenty days. Irwin v. State [Ga.] 45 S. E. 59. May be taken pendente lite or by bill within 20 days. Long v. State [Ga.] 45 S. E. 416. A bill of exceptions to the failure of the court to exclude certain evidence and to the charges given, prepared and allowed after the trial of the case is too late. Franklin v. State [Tex. Cr. App.] 76 S. W. 473.

71. Wright v. Com., 24 Ky. L. R. 1838, 72 S. W. 340; Wilson v. State [Tenn.] 70 S. W. 57. An error not bearing upon the verdict is not material. State v. Williams [La.] 35 So. 521. Where there was no material error and defendant appears to have had a fair trial, the appellate court will not reverse. New v. Ter. [Okl.] 70 Pac. 198. A new trial should be granted only where it appears that substantial rights of defendant have been violated so that a fair trial was not had. State v. Nelson [Minn.] 97 N. W. 652. An error during the progress of a prosecution to warrant the setting aside of the verdict must be of such import as to give rise to the belief that if it had not been for the error a different verdict would have been given. Error in not stopping intemperate argument not sufficient for a reversal. State v. Forbes, 111 La. ——, 35 So. 710. Correct ruling on wrong ground will not be reversed. State v. Blitz, 171 Mo. 530.

72. Failure to caution a co-defendant as to his privilege is not prejudicial. Weber v. Com., 24 Ky. L. R. 1726, 72 S. W. 30.

73. Error in instructions. Lane v. State [Fla.] 32 So. 896. Failure to submit charge in writing presumed prejudicial. Arnold v. State [Ark.] 74 S. W. 513. Use of intoxicants by jury. Gamble v. State [Fla.] 33 So. 471. Separation of jury. Id. Refusal of peremptory challenge. State v. Hunter [Iowa] 92 N. W. 872. But see State v. Buralli [Nev.] 71 Pac. 532. Admission of evidence. People v. Smith, 172 N. Y. 210. Prejudice from error in impaneling jury must be affirmatively shown. Queenan v. Ter., 11 Okl. 261, 71 Pac. 218.

74. Martin v. State [Tex. Cr. App.] 70 S. W. 973.

75. State v. Williams [Iowa] 97 N. W. 992.

76. That the grand jury heard evidence as to a matter of defense after finding the indictment is harmless. Copenhaver v. State [Ind.] 67 N. E. 453.

77. Testimony of absent witness was cumulative. Hathaway v. State [Tex. Cr. App.] 70 S. W. 88. Refusal of continuance for evidence which would have operated against defendant. Godwin v. State [Tex. Cr. App.] 73 S. W. 804.

78. The discharge of a jury on continuance of a case for some time and impaneling them anew at the trial is not prejudicial to the defendant. Moore v. People [Colo.] 73 Pac. 30.

79. Filing original papers in court to which venue was changed. State v. Rodman [Mo.] 73 S. W. 605.

80. It is harmless error for the court not to dispose of a plea of former acquittal by a record judgment where the plea upon its face offered no legal defense and would not have authorized a reversal. Richardson v. State [Tex. Cr. App.] 75 S. W. 505. Striking out instead of overruling a plea is harmless. Wells v. State [Ga.] 45 S. E. 443. Overruling special plea provable under general plea. Peelle v. State [Ind.] 68 N. E. 682.

81. Error in impaneling which could not work prejudice. Ford v. State [Fla.] 33 So. 301. Overruling challenge for cause when peremptory challenges are not exhausted. Taylor v. State [Tex. Cr. App.] 72 S. W. 396; Mathis v. State [Fla.] 34 So. 287; Ter. v. Padilla [N. M.] 71 Pac. 1084; State v. Tyler [Iowa] 97 N. W. 983; Binyon v. U. S. [Ind. T.] 76 S. W. 265; State v. Champoux [Wash.] 74 Pac. 557. Excusing juror. Williams v. State [Fla.] 34 So. 279. Excusing venireman presumptively harmless. State v. Taylor, 171 Mo. 465. Where peremptory challenges are exhausted it need not be shown that an objectionable jury was forced on defendant (State v. McCoy, 109 La. 682) though the peremptory challenges were not exhausted until after the ruling complained of (State v. Stentz, 30 Wash. 134, 70 Pac. 241). In the absense of a showing that a juror was unfair

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conduct of trial,[82] rulings on indictment,[83] rulings on demurrer to evidence,[84] examination of witnesses,[85] admission[86] or exclusion of evidence,[88] conduct or remarks

and impartial, a refusal to allow defendant to challenge the juror for cause or peremptorily after the jury is impaneled on the ground of a mistaken answer as to acquaintance with accused, is not error. Andrews v. State [Tex. Cr. App.] 76 S. W. 918. Exhaustion of peremptory challenges is not enough to establish reversible error in overruling a challenge for cause, but appellant must show that he was compelled to take an unfair juror. Mancillas v. State [Tex. Cr. App.] 76 S. W. 469. A ruling as to the acceptance of a juror subject to challenge for cause cannot be urged by defendant whose peremptory challenges were not exhausted at the time, and it is not shown that the juror was not fair and impartial or that defendant was compelled to take him. Norsworthy v. State [Tex. Cr. App.] 77 S. W. 803. An error in not sustaining challenges for cause to a juror is not prejudicial, where they are afterwards removed by peremptory challenges. State v. Champoux [Wash.] 74 Pac. 557. Acceptance of juror over challenge and afterwards excused on peremptory when peremptories are not shown to have been exhausted. Peaden v. State [Fla.] 35 So. 204. Excusing a juror from serving, for a good cause, is not grounds for setting aside a verdict, where it does not appear that the accused's defense was thereby prejudiced. State v. Michel, 111 La. ——, 35 So. 629. It is not grounds for a reversal that the defendant's challenge for cause to a juror is overruled whereby he is compelled to exhaust his peremptory challenges, where it does not appear that a disqualified juror is forced on him. Connell v. State [Tex. Cr. App.] 75 S. W. 512. A defendant is not prejudiced in that a talesman not sworn entered a jury box and began a conversation with one who had been accepted and sworn, where he immediately left upon being told that the box was the jurymen's and that they had been accepted (Stiles v. State [Tex. Cr. App.] 75 S. W. 511) nor because a juryman was related to the prosecuting attorney in the case which fact was unknown to the accused and counsel until after trial under Pen. Code, § 1181. People v. Boren [Cal.] 72 Pac. 899. The fact that the trial judge of his own motion examined and excused a juror is not grounds for a reversal, it not appearing that the defendant did have a fair and impartial trial, nor that the panel was depleted. Keady v. People [Colo.] 74 Pac. 892. Drawing grand and petit venires in reverse order no bad purpose or injury being shown. Com. v. Zillafrow [Pa.] 56 Atl. 539.

82. The retiring of the jury while defendant's attorney replies to an argument of the district attorney about admissibility of certain evidence is not prejudicial though the jury was allowed to remain during the previous argument. Poole v. State [Tex. Cr. App.] 76 S. W. 565. Refusal to appoint a stenographer in the absence of the regular stenographer. The bills of exceptions presented by appellant were approved by the judge and counsel for state and defendant agreed on the statement of facts which was approved by the judge. Andrews v. State [Tex. Cr. App.] 76 S. W. 918. It is immaterial that a witness of the accused failed to answer when called if an opportunity to have him heard was given. State v. Forbes, 111 La. ——, 35 So. 710. The admission in evidence of a stipulation that if a certain witness were present he would testify to certain facts is harmless error. State v. Mortensen [Utah] 73 Pac. 562. Notice to produce incriminating document not made in jury's presence. McKnight v. U. S., 122 Fed. 926. Refusal to exhibit to jury writings which accused had previous chance to exhibit. State v. Donovan [Vt.] 55 Atl. 611. Refusal to compel delivery of writings to defendant who had had benefit of them when offered by state. Id. Prompting of witness as to collateral matter held harmless. Copenhaven v. State [Ind.] 67 N. E. 453. Remark by widow of deceased not shown to have been heard by jury not ground for new trial. State v. Gray [Mo.] 72 S. W. 698. Unauthorized examination of exhibit during deliberations held harmless. People v. Gallagher, 75 App. Div. [N. Y.] 39, 11 Ann. Cas. 348; People v. Gallagher [N. Y.] 66 N. E. 1113. Inspection by the jury of other things than those provided in the order for inspection may be grounds for a new trial. State v. Landry [Mont.] 74 Pac. 418.

83. Overruling objections to bad counts where good one is proved. Parks v. State, 159 Ind. 211, 59 L. R. A. 190. Overruling demurrer to count subsequently nolled. Oakley v. State [Ala.] 33 So. 693. Overruling demurrer to one count where trial was had solely on another. Hawkins v. Com., 24 Ky. L. R. 1034, 70 S. W. 640.

Held prejudicial: Overruling motion to compel election at beginning of trial, where evidence irrelevant to count on which prosecution subsequently elected to stand was introduced. Burgess v. State [Miss.] 33 So. 499.

84. Refusal to consider demurrer harmless where defendant was thereafter permitted to introduce evidence. Lowe v. State [Fla.] 32 So. 956.

85. Refusal of inspection of letter by which witness refreshed memory held harmless where cross-examination developed that there was nothing material in it. People v. Panyko, 171 N. Y. 669. Allowing cross-examination of defendants for impeachment as to declarations which were admissible as original evidence. State v. Deal [Or.] 70 Pac. 534. Allowing question as to inadmissible conversation where witness denied that it took place. Kelly v. State [Tex. Cr. App.] 71 S. W. 756. Overruling objection to questions where no prejudicial evidence resulted. McComas v. State [Tex. Cr. App.] 72 S. W. 189. The asking of certain witnesses on cross-examination whether they knew defendant's handwriting cannot be prejudicial where they answer that they do not. Binyon v. U. S. [Ind. T.] 76 S. W. 265. Where a witness answers a question as to whether he has attempted to procure others to lie concerning defendant's case in the negative, there is no prejudice. Kipper v. State [Tex. Cr. App.] 77 S. W. 611. Allowing cross-examination on immaterial matter. State v. Bickle [W. Va.] 45 S. E. 917. It is not grounds for a reversal that a witness was asked a certain question unless resulting injury is shown. State v. Allen [La.] 35 So. 495.

86. Evidence as to a circumstance which defendant admitted and sought to explain.

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of court[89] or counsel,[90] instructions[91] or failure to instruct,[92] misconduct of juror,[93]

People v. Rich [Mich.] 94 N. W. 375. Inadmissible confession harmless where same confession had previously been made after warning. Godwin v. State [Tex. Cr. App.] 73 S. W. 804. Improper evidence of admission where there is undisputed evidence that defendant made the same admission on another occasion. McNutt v. State [Neb.] 94 N. W. 143. Hearsay as to fact abundantly proved. Com. v. Jacobson [Mass.] 66 N. E. 719. Testimony that bullet wounds in a particular direction in the arm could not have been made while aiming a pistol goes to a physical fact well known to jury and is harmless. Stevens v. State [Ala.] 35 So. 122. Evidence having no bearing on the case is not prejudicial to the defendant. People v. Glover [Cal.] 74 Pac. 745. An error in admitting evidence of the weight of a witness is not prejudicial if the jury saw the witness. Id. Admission of doubtful evidence harmless where the proof of guilt was clear. Vickers v. State [Ga.] 45 S. E. 618. Evidence that defendant was compelled to make a footprint is harmless where there was no evidence of any comparison therewith. Dunwoody v. State [Ga.] 45 S. E. 412. It is harmless error to admit in evidence testimony that an accomplice, turning state's evidence, was not induced to do so by promise of immunity from another offense. Lochlin v. State [Tex. Cr. App.] 75 S. W. 305. That an examination as to defendant's sanity was ordered to be had in the presence of the jailor is harmless. Copenhaven v. State [Ind.] 67 N. E. 453. Admitting secondary evidence as to document which is in evidence. State v. Roller, 30 Wash. 692, 71 Pac. 718. Evidence of purchase of knife after homicide. People v. Morine [Cal.] 72 Pac. 166. Evidence as to facts which defendant admitted. Johnson v. People, 202 Ill. 53. That defendant was the successor of a certain company. State v. Glucose Sugar Refining Co., 117 Iowa, 524. Erroneous evidence favorable to defendant. Barr v. People [Colo.] 71 Pac. 392. Harmless where the evidence of guilt was overwhelming. Johnson v. People, 202 Ill. 53. Evidence of another attempted burglary without anything to connect it with defendant. Ragland v. State [Ark.] 70 S. W. 1039. Improper admission of certificate of preliminary examination where it was previously proved by competent testimony. Campbell v. State [Miss.] 33 So. 224. Opinion evidence as to weapon with which wound was inflicted when direct evidence was uncontradicted. People v. Morine [Cal.] 72 Pac. 166. Immaterial evidence. Jones v. State [Ga.] 43 S. E. 715; People v. Glennon, 175 N. Y. 45. In a prosecution for homicide, a question eliciting the opinion of defendant as to whether he thought it was a violation of law to fire his pistol in the public road is not regarded as prejudicial to him. Montgomery v. State [Tex. Cr. App.] 77 S. W. 788. Evidence not pertinent, not in answer to any question and not prejudicial is not a fatal error. State v. Brown [La.] 35 So. 501. Improper evidence when accused was clearly guilty on his own evidence and admissions. Angling v. State [Ala.] 34 So. 846.

Held prejudicial: Evidence tending to show that defendant's photograph was in the rogues' gallery. State v. Houghton [Or.] 71 Pac. 982. Proof of physician's examination of victim of abduction too remote from crime. People v. Swasey, 77 App. Div. [N. Y.] 185. Rebuttal that accused who had testified had been unchaste after time when she claimed to have been married to testator of defrauded heirs. Hooker v. State [Md.] 56 Atl. 390. Where an alibi is contended, declarations of prosecutrix that accused did the crime and when and where. Anderson v. State [Miss.] 35 So. 202. It is grounds for a reversal if one of the accused's witnesses is improperly impeached whereby his credibility is prejudiced. Jenkins v. State [Tex. Cr. App.] 75 S. W. 312.

88. Exclusion of evidence as to fact otherwise well proved. Ingram v. Com., 24 Ky. L. R. 1531, 71 S. W. 908. Evidence insufficient to authorize a finding. Com. v. Pear [Mass.] 66 N. E. 719. Corroboration of uncontradicted statement of defendant. People v. Goodrode [Mich.] 94 N. W. 14. **Held prejudicial:** Exclusion of evidence of reputation of deceased as to use of deadly weapons, though there was other evidence of his quarrelsome disposition. State v. Ellis, 30 Wash. 369, 70 Pac. 963.

89. Reference to murder of President McKinley to illustrate the right of defendant to fair trial. People v. Flanigan, 174 N. Y. 356. "I suppose that line of questioning would be objected to some time"—held not harmful, it having been made after witness was passed and no objection having been made. State v. Riddle [Mo.] 78 S. W. 606. Improper remark of court in excusing jury. Howard v. Com., 24 Ky. L. R. 612, 69 S. W. 721. An intimation that testimony introduced by defendant was inadmissible, without telling the jury to disregard it is harmless. Com. v. Burton [Mass.] 67 N. E. 419. A new trial will not be required by reason of a written communication between the judge and jury as to the form of the verdict, after the cause is submitted, if no prejudice results to the defendant. State v. Borchert [Kan.] 74 Pac. 1108. A conviction will not be reversed on account of an improper discussion of the facts by the judge on overruling a motion for a new trial. Franklin v. State [Tex. Cr. App.] 76 S. W. 473. See, also, ante, § 10A.

90. Asking improper question. Reed v. State [Neb.] 92 N. W. 321. Expression of belief in defendant's guilt held harmless. Hawkins v. State [Tex. Cr. App.] 71 S. W. 756. Improper remarks held harmless where proof of guilt was clear. Brown v. State [Miss.] 33 So. 170. Where evidence as to a certain fact is stricken out, refusal to also direct the jury to disregard reference thereto in his opening will be held harmless. People v. Hackett, 82 App. Div. [N. Y.] 86. Argument of state's counsel held not to be so prejudicial as to require a reversal, in the absence of a requested charge on the subject, and a bill of exceptions taken to the refusal to give the same. Locklin v. State [Tex. Cr. App.] 75 S. W. 305. Counsel had been rebuked for commenting on character of accused. He then said—I am not permitted to "but if I were I could"—and checked himself. The court holds it improper but not reversible error. Sylvester v. State [Fla.] 35 So. 142. Improper reference to testimony on former trial harmless where fact involved was not in issue. Lee v. State, 116 Ga. 563. Remark that he thought wit-

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sentence,[94] refusal of stay.[95] One cannot complain of an indictment and conviction of an attempt to commit a crime when he might have been convicted of the prin-

ness had made clear a matter which had just been ruled out held not ground for new trial. State v. Greenleaf, 71 N. H. 606. Reference to remarks of defendant's counsel as a "stump speech" held harmless. Id.

Held prejudicial: Repeated efforts to introduce proof of other offenses. State v. Roscum [Iowa] 93 N. W. 295.

91. Error in charging on the law of circumstantial evidence is harmless where there is positive evidence. Gibson v. State [Tex. Cr. App.] 77 S. W. 812. Defendant cannot complain that the jury ignored an instruction directing them to attach an increased penalty to his offense, on the ground of a former conviction. State v. Boyd [Mo.] 76 S. W. 979. Defendant cannot object to a charge on the weight of the evidence which is favorable to him. Tate v. State [Tex. Cr. App.] 77 S. W. 793. Instruction that good character of defendant is to be considered in reconciling conflicts in the testimony is if erroneous, too favorable to defendant. Maddox v. State [Ga.] 44 S. E. 822. Erroneous instruction not ground for reversal where no verdict except conviction was possible. Monahan v. State [Ga.] 44 S. E. 816. Instructions on exception to statute held harmless because of admitted facts. Com. v. McGrath [Mass.] 69 N. E. 340. Refusal to give a special charge as to the lower grades of petit larceny is not grounds for a new trial, where the jury found the accused guilty of robbery. State v. Pastor, 111 La. ——, 35 So. 839. An instruction that circumstantial evidence must be "consistent" instead of "inconsistent" with every hypothesis except guilt is prejudicial. Hampton v. State [Ind.] 67 N. E. 442. An instruction restricting the jury in its determination cannot be complained of by the defendant where the restriction is favorable to him. People v. Glover [Cal.] 74 Pac. 745. It is not prejudicial error for the court to charge the jury on the theory of lower degree of an offense, where the evidence might have justified a conviction of a higher degree. People v. Lagroppo, 86 N. Y. Supp. 116. Mere verbal inaccuracies not misleading in character will be ignored. Absence of conjunction between two adjectives. McCormick v. State [Neb.] 92 N. W. 606. Singular instead of plural form on joint trial. Moncla v. State [Tex. Cr. App.] 70 S. W. 548. The court's failure to reduce an additional charge to writing and file it with the clerk, as is required by statute to be done upon the demand of either party, and which was done with the original instructions, is a technical error merely not justifying a reversal under B. & C. Comp. §§ 132, 1484. State v. Armstrong [Or.] 73 Pac. 1022. Failure of the court to number and sign instructions as required by statute is without prejudice where it does not appear that any of the instructions were lost or others got in. Keffer v. State [Wyo.] 73 Pac. 556. An instruction that certain impeaching evidence was proper is harmless where no such evidence had been offered. Jones v. State [Ga.] 43 S. E. 715. Inadvertent statement as to crime charged. Thomas v. State [Tex. Cr. App.] 73 S. W. 1045. Instruction on insanity not justified by evidence. Wilson v. State [Tex. Cr. App.] 73 S. W. 964. That if one of two defendants was not guilty both should be acquitted is not prejudicial. Marx v. State [Tex. Cr. App.] 72 S. W. 590. Instruction that a certain witness was an accomplice. Winfield v. State [Tex. Cr. App.] 72 S. W. 182. Failure to instruct as to rights of deceased as an officer is harmless. Philpot v. Com., 24 Ky. L. R. 757, 69 S. W. 959. Error in instructing as to constructive knowledge where there was proof of actual knowledge. Ross v. State [Tex. Cr. App.] 70 S. W. 543. Mistaken reference to color of stolen horse, not material to identity. State v. Deal [Or.] 70 Pac. 534. Reference to defendant's right to testify where he exercised such right. State v. Terry, 172 Mo. 213. Instruction that conspiracy may be "inferred" held harmless. Wait v. Com., 24 Ky. L. R. 604, 69 S. W. 697. Instructing as matter of law as to undisputed fact. Milby v. U. S., 120 Fed. 1. Erroneous instructions as to defense of which there was no evidence. State v. Pohl, 170 Mo. 422. Submitting to jury question which should have been decided as a matter of law against defendant. State v. Douette [Wash.] 71 Pac. 556. Instruction incorrect in abstract but not misleading as applied to evidence. People v. Jackson, 138 Cal. 462, 71 Pac. 566. Erroneous instruction as to omissions harmless where other proof of guilt is clear. Meul v. People, 198 Ill. 258. That but one offense was charged by four counts. State v. Cook, 75 Conn. 267. Instruction too favorable to defendant. State v. Ashcraft, 170 Mo. 409; Olds v. State [Fla.] 33 So. 296; State v. Sally, 41 Or. 366, 70 Pac. 396. Reference to defendant as lessee of a disorderly house though the proof was clear that he was owner and keeper. Ross v. State [Tex. Cr. App.] 70 S. W. 543; Bearden v. State [Tex. Cr. App.] 73 S. W. 17; State v. Prater, 52 W. Va. 132.

Held prejudicial: Failure to submit included offenses. State v. Trusty [Iowa] 92 N. W. 677. Instruction that a mistake in acquitting can never be corrected. State v. Hunter [Iowa] 92 N. W. 872.

92. Refusal of proper instructions harmless where the jury must necessarily convict on the evidence. Lyman v. People, 198 Ill. 544. Failure to instruct as to the purpose of declarations admitted to impeach a witness. Cox v. Com., 24 Ky. L. R. 680, 69 S. W. 799. Failure to submit exception in statute on gaming as to play at a residence is harmless where the evidence is all that the play was in an open field. Nicholson v. State [Tex. Cr. App.] 71 S. W. 969.

93. Conversation between juror and witness held harmless. Bearden v. State [Tex. Cr. App.] 73 S. W. 17.

94. Failure of court, before pronouncing sentence, to inform defendant of the verdict, and ask him whether he had anything to say why judgment should not be pronounced against him, is without prejudice, where the defendant is recalled, informed of the verdict, and the statutory interrogative propounded. Keffer v. State [Wyo.] 73 Pac. 556.

95. Where a stay of execution is granted by the appellate court, an error of the trial court in refusing to suspend the execution of sentence on application and notice of intention to appeal is without prejudice. Id.

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cipal crime.[96] An order directing the removal of defendant to another place of confinement, to protect him from threatened lynchings, is not an error of which he could justly complain.[97] That the jury convicted of murder in the second degree when a conviction in the first degree was required by the evidence is no ground for reversal.[98]

Cure of error.—Error, though of a nature to be prejudicial, may be cured by the action of the court in withdrawing from consideration evidence improperly admitted,[99] or admitting evidence improperly excluded[1] by competent evidence to the same point as that erroneously admitted or excluded,[2] or by the admission of evidence making competent evidence received out of order,[3] or by a verdict on an issue to which the error did not relate.[4] Improper statements by counsel are usually deemed cured by prompt withdrawal,[5] or a direction by the court to disregard them,[6]

96. People v. Mills, 86 N. Y. Supp. 529.
97. State v. Armstrong [Or.] 73 Pac. 1022.
98. Russell v. State, 92 N. W. 751.
99. Admission of erroneous evidence cured by striking out. McCormick v. State [Neb.] 92 N. W. 606; People v. Hackett, 82 App. Div. [N. Y.] 86; People v. Glennon, 175 N. Y. 45. Instruction not to consider evidence improperly admitted. Smith v. State [Tex. Cr. App.] 70 S. W. 84. Illegal testimony withdrawn by the court and the jury instructed to disregard it is harmless. Wingo v. State [Tex. Cr. App.] 75 S. W. 29. Objections to withdrawn testimony cannot be considered on appeal. State v. Melvern [Wash.] 72 Pac 489. Where the rejection of evidence is ordered after it has gone to the jury, the jury should be admonished in explicit language as to what evidence is excluded which should be specified in detail and it is proper to name the witnesses from whom it was elicited unless the evidence is admitted for a specific purpose, though otherwise incompetent, in which case, without giving it undue prominence the court should inform the jury as to the purpose for which it is to be considered. Instruction held insufficient. Bess v. Com. [Ky.] 77 S. W. 349.

1. Subsequently allowing witness to answer question excluded. State v. Roller, 30 Wash. 692, 71 Pac. 718. Error in ruling that an expert for defendant cannot answer a hypothetical question based partly on facts to which defendant has testified, is cured by allowing him to answer a question substantially stating all the facts to which defendant has testified. State v. Dunn [Mo.] 77 S. W. 848. It is harmless error to sustain an objection to a question asked if practically the same question is subsequently asked and answered without objection. State v. Armstrong [Or.] 73 Pac. 1022. Exclusion cured by subsequent answer. Sylvester v. State [Fla.] 35 So. 142; Edwards v. State [Neb.] 95 N. W. 1038. Cured by court's asking excluded question after counsel refused to renew it on permission given. Elmore v. State [Ala.] 35 So. 25.

2. Admission or declaration harmless where declarant testified to the same facts. State v. Gatlin, 170 Mo. 354. But see State v. Levy, 90 Mo. App. 643. Evidence corroborating other evidence admitted without objection, the whole being subsequently stricken out. State v. Gregory, 170 Mo. 598. Oral evidence as to brand on cow; hide subsequently produced in court. State v. Sally, 41 Or. 366, 70 Pac. 396. Admission of secondary evidence cured by subsequent proof that the writing was destroyed. Alderson v. Com. [Ky.] 74 S. W. 679. An inaccuracy in an instruction as to what carrying away constitutes larceny, is immaterial, where the evidence shows the carrying away and the defense admits the taking under a claim of right. Williams v. State [Fla.] 35 So. 335. Curing admission by subsequent proof of facts showing competency. Collins v. State [Ala.] 34 So. 993; Jarvis v. State [Ala.] 34 So. 1025. Where a fact was proved by witnesses for both defendant and the state, refusal to allow a particular witness to testify thereto is harmless. Robinson v. State [Ga.] 44 S. E. 985. Improper admission of parol evidence of former conviction is not rendered harmless by the fact that defendant subsequently testified so that he might have been cross-examined thereon. Paulson v. State [Wis.] 94 N. W. 771. Introduction of evidence on promise in bad faith to connect it is not cured by withdrawal. Tijerina v. State [Tex. Cr. App.] 74 S. W. 913.

3. It is harmless error to allow proof of declarations of a co-conspirator before the conspiracy is proved, if the existence of the conspiracy at the time of the declarations is subsequently proved. People v. Putnam, 85 N. Y. Supp. 1056.

4. Refusal to submit included offense where defendant was notwithstanding convicted thereof. Morton v. State [Tex. Cr. App.] 70 S. W. 93. Objection that the indictment alleges previous offenses for the purpose of authorizing an increased penalty cannot be raised where the punishment assessed does not exceed that authorized for a first offense. Kinney v. State [Tex. Cr. App.] 78 S. W. 225. Error in instructions as to a degree higher than that of which defendant was convicted is harmless. State v. Cather [Iowa] 96 N. W. 722; Mathis v. State [Fla.] 34 So. 287. Allowing the information to be amended is harmless where defendant was acquitted on the count amended. Meehan v. State [Wis.] 97 N. W. 173. Improper evidence to which it appears the jury gave no weight. Litton v. Com. [Va.] 44 S. E. 923. Conviction for murder in the second degree shows harmlessness in error on charge on express malice. Sparks v. State [Tex. Cr. App.] 77 S. W. 811. Refusal of charge on higher degree than verdict. Jarvis v. State [Ala.] 34 So. 1025.

5. Bryant v. State [Miss.] 33 So. 225.

6. People v. Edwards [Cal.] 73 Pac. 416; Dimmick v. United States [C. C. A.] 121 Fed. 638; Whitney v. Com. [Ky.] 74 S. W. 257; State v. Greenleaf, 71 N. H. 606; State v.

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especially where defendant asks no further action by the court.[7] If it appear at the trial that no harm resulted from the denial of the continuance, it will not be ground for reversal.[8] Error in permitting plea of guilty without appointing counsel is cured by appointment of counsel on whose advice plea is withdrawn.[9] Failure to ask defendant if he had anything to say before sentence is cured by recalling him for that purpose.[10] The doctrine that the charge is to be considered as a whole is elsewhere treated.[11]

§ 16. *Stay of proceedings after conviction.*—Statutes usually provide for a stay of execution of sentence pending appeal.[12] In some states a certificate of reasonable doubt is necessary to stay proceedings.[13] Mandamus will not issue to compel the judge to suspend a sentence of which he has lost jurisdiction.[14]

§ 17. *Appeal and review. A. Right of review.*[15]—Statutes sometimes allow an appeal by the prosecutions from orders other than a judgment of acquittal.[16] Such

Thompson, 109 La. 296; Henry v. People, 198 Ill. 162; Gilstrap v. People, 30 Colo. 265, 70 Pac. 325; Com. v. Greason, 204 Pa. 64; Dunn v. State [Wis.] 94 N. W. 646; Webb v. State [Tex. Cr. App.] 70 S. W. 954; McMillan v. State [Tex. Cr. App.] 71 S. W. 279. Error in argument may be cured by an oral direction to disregard the objectionable remarks followed by an instruction to the same effect. Statements by prosecuting attorney that defendant's counsel could have asked defendant about his wife cutting him in former difficulties but he failed to do so. Fugett v. State [Tex. Cr. App.] 77 S. W. 461. An allusion to the date at which an indictment was returned, which the jury is instructed to disregard, is not error. Objected to on the ground that it was not in evidence and had calculated to prejudice and inflame the minds of the jury. Washington v. State [Tex. Cr. App.] 77 S. W. 810. Reference to other crimes by defendant held not cured. People v. Derbert, 138 Cal. 467, 71 Pac. 564. Reference to lynching in neighboring county as to which there was much excitement at the place of trial is not cured by admonition to be governed only by the evidence. Powell v. State [Tex. Cr. App.] 70 S. W. 218. Comment on failure of defendant to offer evidence of his good character held not cured by admonition. State v. Shipley [Tex. Cr. App.] 74 S. W. 612. Prompt statement by court that certain argument was improper cures the error. People v. McDonald [Mich.] 94 N. W. 1064. Merely saying that a remark by the prosecuting attorney referring to defendant as an ex-convict was "improper" is not sufficient. State v. King [Mo.] 74 S. W. 627. Erroneous offer of former plea of guilty in evidence cured by admonition. State v. Allen [Mo.] 74 S. W. 839.

7. State v. Gartrell, 171 Mo. 489; State v. Hernia [N. J. Err. & App.] 53 Atl. 85; State v. McMullin, 170 Mo. 608. Though the conduct of counsel warrants a mistrial if defendant asks only a rebuke which is granted the error is deemed cured. Patton v. State, 117 Ga. 230.

8. State v. Morgan [Utah] 74 Pac. 526. Refusal of a continuance, if error, is cured where on the trial it appears that evidence sought to be obtained was incompetent, irrelevant or was supplied by other witnesses in attendance, or for any other reason the applicant has not been prejudiced. Fox v. State [Tenn.] 76 S. W. 815. Absent witness—evidence at trial showed probable falsity. Landreth v. State [Tex. Cr. App.] 70 S. W. 758. Alleged illness of witness who testified at trial. Howard v. Com., 24 Ky. L. R. 612, 69 S. W. 721. Absence of counsel or refusal to act; defendant represented by competent counsel. Rone v. Com., 24 Ky. L. R. 1174, 70 S. W. 1042; Howard v. Com., 24 Ky. L. R. 950, 70 S. W. 295; Cook v. Com., 24 Ky. L. R. 1409, 71 S. W. 522; Moore v. State [Tex. Cr. App.] 70 S. W. 89. Testimony of absent witnesses at former trial read. Collins v. Com., 24 Ky. L. R. 884, 70 S. W. 187. Witness actually appeared. Teal v. State [Ga.] 45 S. E. 964. Where facts to be proved by absent witness were admitted by state's witness. Francis v. State [Tex. Cr. App.] 70 S. W. 751.

9. State v. Allen [Mo.] 74 S. W. 839.

10. Keffer v. State [Wyo.] 73 Pac. 556.

11. See ante, § 10E.

12. Where defendant has been lodged in the penitentiary after issuance of supersedeas but before its service he is not under Hills Ann. Laws, § 1440, entitled to be returned to the county jail. Ex parte Lawrence [Ark.] 70 S. W. 470.

13. Such certificate cannot be granted by a supreme court judge until the bill of exceptions is settled. Ex parte Warren, 41 Or. 309, 71 Pac. 644. Instruction that disagreement would result in great waste of public money and calling on each juror separately to state if he desired any information is ground for a certificate. People v. Young, 40 Misc. [N. Y.] 256. Charge as a matter of fact that defendant was engaged in burglary at time of homicide held ground for certificate. Id. A certificate of reasonable doubt will be granted to one convicted of larceny for obtaining goods under false representations where the representations were not in writing [under Pen. Code N. Y. § 544]. People v. Rothstein, 85 N. Y. Supp. 1076.

14. Suspension was sought pending review. Cribb v. Parker [Ga.] 46 S. E. 110.

15. Record must show arrest or conviction or complaining party is not aggrieved. Unger v. Fanwood Tp. [N. J. Law] 55 Atl. 42.

16. State has no appeal from quashal of indictment where death or imprisonment at hard labor can not result. State v. Kalone [La.] 34 So. 475; State v. Normand [La.] 34 So. 476. Not from an order quashing the information. State v. Rozelle [Mo. App.] 71 S. W. 1070. But see Com. v. Gouger, 21 Pa. Super Ct. 217. Nor from an order reversing a conviction without granting a new trial. State v. Finstad [S. D.] 93 N. W. 640. Nor

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right is strictly limited by the terms of the act.[17] A plea of guilty does not waive the right of appeal.[18]

(§ 17) *B. The remedy for obtaining review.*[19]—Error or "appeal" if appropriate are the ordinary remedies.[20] Questions of law may in some jurisdictions be reported or certified[21] from specified courts,[22] but not the whole case.[23] The supreme court will not, under its supervisory powers, review the guilt or innocence of the accused.[24] Certiorari or prohibition may issue, though an appeal has been taken and abandoned;[25] but where an appeal has been abandoned by an escape, another cannot be brought.[26]

One on bail is not entitled to bring certiorari, so called, to inquire into the cause of his imprisonment.[27]

(§ 17) *C. Adjudications which may be reviewed.*—The judgment must be a finality in the trial court.[28] Decisions not final on special pleas[29] and intermediate orders generally are not reviewable,[30] nor is refusal to settle a bill of exceptions.[31] The filing away of an indictment subject to future reinstatement is final and appealable,[32] likewise the quashing of indictment.[33] The further appealability of judgments of courts of review rests in statute.[34] State decisions are reviewable by the Federal supreme court only when some constitutionally guaranteed right has been infringed.[35]

from a dismissal before information was filed. State v. Murrey, 30 Wash. 383, 70 Pac. 971.

Authority to appeal for state held sufficiently shown. State v. Long, 66 S. C. 398.

17. An appeal or writ of error by the state lies only from the quashing of an indictment, not from the quashing of an information. State v. Beagles [Mo.] 74 S. W. 851; State v. Rozelle [Mo.] 74 S. W. 852.

18. Hogue v. State, 23 Ohio Circ. R. 567.

19. Error coram nobis see ante, § 9.

20. Appeal will not lie to refusal to settle a bill. People v. Jackson, 138 Cal. 32, 70 Pac. 918.

21. Law questions on indictment for felony may be reported. State v. Seguin [Me.] 56 Atl. 840. A motion by the prosecuting attorney to quash the jury list may be reserved for the supreme court. State v. Bollin [Wyo.] 70 Pac. 1. A question of law arising on a motion for new trial cannot be reported to the supreme court until after the motion has been denied. Statute says on trial of one "convicted." Com. v. Burton [Mass.] 67 N. E. 419.

22. The municipal court of Dane County has power to report a question to the supreme court for decision. State v. Knight [Wis.] 95 N. W. 390.

23. Whether an error is prejudicial is not a proper question for certification as it can be answered only on the entire record. State v. Knight [Wis.] 95 N. W. 390.

24. State v. Thompson [La.] 35 So. 582.

25. State v. Pettigrew, 109 La. 132.

26. Hines v. State [Tex. Cr. App.] 70 S. W. 955.

27. Code Civ. Proc. § 2015 allowing the remedy to one "restrained of his liberty." People v. Pool, 77 App. Div. [N. Y.] 148.

28. There must be a judgment on the verdict. Hayden v. State [Miss.] 32 So. 922. The verdict is not appealable. People v. Lonnen [Cal.] 73 Pac. 586.

A report of questions on a trial of one "convicted" can be had only on denial of his motion for new trial. Com. v. Burton [Mass.] 67 N. E. 419. In Kentucky the commonwealth may appeal for the review of rulings of the lower court on questions of law while the case is still undetermined [Cr. Code, § 335]. Com. v. Schlitzbaum [Ky.] 76 S. W. 835.

29. Overruling demurrer to plea of former acquittal is not. Ter. v. Pratt [N. M.] 70 Pac. 562. Granting new trial after verdict sustaining plea of former acquittal is not. State v. Ellsworth, 131 N. C. 773.

30. Gen. St. 1901, § 5019, does not apply to criminal cases. State v. Coffelt [Kan.] 71 Pac. 588. Motion for discharge because defendant was illegally brought into jurisdiction is not. Id. Denial of motion to quash indictment for alleging a general conclusion instead of a fact is not. It is not a question of the construction of a statute within Acts 1901, p. 565, § 7. Deane v. State, 159 Ind. 313. Denial of motion to strike out counts is not. State v. Jones [Del.] 53 Atl. 858. An order denying defendant's motion in arrest of judgment is not appealable. People v. Lonnen [Cal.] 73 Pac. 586; People v. Ford, 138 Cal. 140, 70 Pac. 1075.

31. People v. Jackson, 138 Cal. 32, 70 Pac. 918.

32. Jones v. Com., 24 Ky. L. R. 1434, 71 S. W. 643.

33. Com. v. Gouger, 21 Pa. Super. Ct. 217.

34. No further appeal lies from county court to criminal appeals where fine of less than $100 is imposed. Conner v. State [Tex. Cr. App.] 73 S. W. 15; Wilson v. State [Tex. Cr. App.] 78 S. W. 235. The judgment of the court of appeals of the District of Columbia cannot be reviewed in a criminal case on error in the supreme court of the United States [Act of Congress March 3, 1901, § 233 (31 Stat. 1189, c. 854) held applicable to civil cases only]. Sinclair v. D. C., 24 Sup. Ct. 212.

35. The supreme court of the United States will not interfere with a sentence of a state court unless it is cruel or unusual. In habeas corpus proceedings. Howard v. Fleming, 24 Sup. Ct. 49. An instruction in a state trial omitting any reference to the pre-

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(§ 17) *D. Courts of review and their jurisdiction.*—As between two courts, the question is usually decided by the existence of certain jurisdictional conditions.[36] Jurisdiction is limited by an enumeration of cognizable cases[37] or provisions founded on the amount of punishment, but if a case is of the class reviewable, the court has jurisdiction for all purposes.[38] Where a trial court had no jurisdiction, the reviewing court acquires none by appeal.[39]

(§ 17) *E. Procedure to bring up the cause.*—The appeal must be taken within the time limited by the statute,[40] and upon such service or notice as the practice prescribes.[41] Where the transcript is not filed in time, jurisdiction cannot be conferred by agreement between the parties, nor can appeal be granted at later term so as to cure it.[42]

A recognizance on appeal must be in substantial compliance with the law,[43] and seasonably filed.[44] In Texas, it must show the offense and conviction,[45] the punishment imposed[46] or judgment appealed from,[47] must state the names of the sureties,[48] must bind appellant to appear as the statute requires,[49] and abide the judgment.[50] A recognizance binding the principal in a certain sum and each surety in such sum substantially complies with the requirement that the sureties be severally

sumption of innocence is not a denial of due process of law. Where the highest state court has decided that such omission does not invalidate the proceedings. Id.

36. See ante, § 17C. Also see civil cases instructive by analogy in Appeal and Review, § 4, 1 Curr. Law, 103.

37. The supreme court has no appellate jurisdiction in misdemeanor except in the cases enumerated by Act March 12, 1901, § 9. Russell v. State [Ind.] 68 N. E. 1019.

38. Misdemeanor cases in supreme court. Russell v. State [Ind.] 68 N. E. 1019.

39. Appeal from justice to superior. State v. Wiseman, 131 N. C. 795.

40. Proceedings in error to vacate a judgment must be brought strictly within the time prescribed by statute. To give the supreme court jurisdiction under Rev. St. Wyo. 1899, § 5422, as amended by Sess. Laws 1901, § 1, c. 63, p. 65. Caldwell v. State [Wyo.] 74 Pac. 496. The time running from judgment, it is suspended by pendency of motion for new trial. Com. v. Tarvin, 24 Ky. L. R. 1663, 72 S. W. 13. An appeal after an order directing entry of judgment nunc pro tunc as of a date more than a year before the taking of such appeal is too late. People v. Ward [Cal.] 72 Pac. 343.

41. Proceedings in error are not commenced by service of summons on the attorney general alone. Under Rev. St. Wyo. 1899, § 5423, as amended by Sess. Laws 1901, § 2, c. 63, p. 65, requiring such service on the attorney general and the prosecuting officer of the county. Caldwell v. State [Wyo.] 74 Pac. 496.

42. In felony court. Com. v. Schlitzbaum [Ky.] 76 S. W. 835.

43. Franklin v. State [Tex. Cr. App.] 76 S. W. 759.

44. Not after term. Doyle v. State [Tex. Cr. App.] 78 S. W. 347 (two cases).

45. Denomination of the offense—"And who has been convicted in this court and fined," is insufficient. Cater v. State [Tex. Cr. App.] 77 S. W. 12.

46. Greer v. State [Tex. Cr. App.] 70 S. W. 23; Hogue v. State [Tex. Cr. App.] 70 S. W. 217; Sprading v. State [Tex. Cr. App.] 71 S. W. 17; Lee v. State [Tex. Cr. App.] 72 S. W. 186; Doran v. State [Tex. Cr. App.] 72 S. W. 585; Floyd v. State [Tex. Cr. App.] 73 S. W. 969; Bean v. State [Tex. Cr. App.] 76 S. W. 759; Bourland v. State [Tex. Cr. App.] 77 S. W. 455. Variance between the punishment found in the judgment and that recited in the recognizance, is ground for dismissal of the appeal. Hargrove v. State [Tex. Cr. App.] 76 S. W. 926.

47. On an appeal from a dismissal of an appeal from a justice to the county court, the recognizance must distinctly state that the appeal is procured from such dismissal. Not proper to state that defendant was convicted in the county court. Buck v. State [Tex. Cr. App.] 77 S. W. 12.

48. Herbert v. State [Tex. Cr. App.] 72 S. W. 587.

49. Where the statute requires a recognizance on appeal to bind a defendant to appear before the court at which the conviction was obtained from day to day and from term to term, it is not sufficient that the recognizance requires defendant to appear at the next term. Anderson v. State [Tex. Cr. App.] 76 S. W. 470. Nor is it sufficient to require defendant to appear at the next regular term and there remain from day to day and from term to term [Code Cr. Proc. 1895, art. 887]. Franklin v. State [Tex. Cr. App.] 76 S. W. 470.

50. Obligation to abide judgment of court of criminal appeals without adding "in this case" is bad. Fortenberry v. State [Tex. Cr. App.] 72 S. W. 586, 588; Herbert v. State [Tex. Cr. App.] 72 S. W. 587; Brock v. State [Tex. Cr. App.] 72 S. W. 599; Adams v. State [Tex. Cr. App.] 72 S. W. 588; Armstrong v. State [Tex. Cr. App.] 77 S. W. 446; Franklin v. State [Tex. Cr. App.] 76 S. W. 759; Mason v. State [Tex. Cr. App.] 74 S. W. 25; Heinen v. State [Tex. Cr. App.] 74 S. W. 776; Pigford v. State [Tex. Cr. App.] 74 S. W. 323; Meeks v. State [Tex. Cr. App.] 74 S. W. 910. Else the court will not have jurisdiction. Parker v. State [Tex. Cr. App.] 75 S. W. 30. Obligation to abide judgment of "Criminal Court of Appeals" is bad. Adams v. State [Tex. Cr. App.] 72 S. W. 588.

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bound.[51] A recognizance "before the court in session" sufficiently shows that it was taken "in open court."[52]

(§ 17) *F. Perpetuation of proceedings in the "record." What must appear, and whether by record proper or bill of exceptions.*—What must appear to authorize a review of particular errors is elsewhere treated.[53] To sustain the appeal, the record must show jurisdictional facts, such as the indictment or information,[54] arraignment,[55] that accused was present in court,[56] a final judgment,[57] or such aggrieving action as entitles appellant,[58] and that the appeal is by authority,[59] and the procedure essential to transfer the jurisdiction;[60] but on a second appeal, the court will take judicial notice of the filing of its former mandate below, though the record does not show it.[61] In Texas, there must be either a certificate that appellant is confined pending the appeal or a recognizance in the record.[62] Those matters which belong to the record proper must appear thereby,[63] and such matters need not be and cannot be otherwise shown,[64] but all matters not part of the record proper must appear by bill of exceptions or its equivalent,[65] and if there be none, only the record

51. Haley v. State [Tex. Cr. App.] 74 S. W. 38.

52. Haley v. State, 74 S. W. 38.

53. See post this section.

54. Dawson v. State [Tex. Cr. App.] 74 S. W. 912.

55. State v. Wood [Mo. App.] 71 S. W. 724.

56. Kraimer v. State [Wis.] 93 N. W. 1097. The defendant's presence in court on a certain day of the trial is sufficiently shown on appeal by a supplemental record introduced by the state showing that he was present in person and by counsel on that day. State v. Howard [Wash.] 74 Pac. 382. But this rule is not general. Griffin v. State [Tenn.] 70 S. W. 61.

57. Jackson v. State [Fla.] 32 So. 926.

58. Unless accused brings up his arrest or conviction he shows no right on certiorari to attack the validity of an ordinance. Unger v. Fanwood Tp. [N. J. Law] 55 Atl. 42.

59. Appeal by attorneys other than the solicitor held to show sufficient authority to act for the state. State v. Long, 66 S. C. 398.

60. The record must disclose the fact that notice of appeal was given and entered of record in the trial court [Code Cr. Proc. 1895, art. 883]. Beck v. State [Tex. Cr. App.] 76 S. W. 923.

61. Roberson v. State [Fla.] 34 So. 294.

62. Code Cr. Proc. art. 887. Jones v. State [Tex. Cr. App.] 78 S. W. 226, 227; De Vies v. State [Tex. Cr. App.] 71 S. W. 965; Crawford v. State [Tex. Cr. App.] 77 S. W. 8. Code Civ. Proc. 1895, art. 886, 887. Green v. State [Tex. Cr. App.] 76 S. W. 926.

63. Motion to quash indictment. Olds v. State [Fla.] 33 So. 296. Judgment on indictment and plea. Wright v. State [Ala.] 34 So. 233. Motion in arrest. Kelly v. State [Fla.] 33 So. 235; Pittman v. State [Fla.] 34 So. 88.

64. Motions in arrest belong to the record where alone they may be considered and not in exceptions where they will be ignored. Peaden v. State [Fla.] 35 So. 204. The ruling of the trial court on a demurrer to evidence where shown only by bill of exceptions is not subject to revision in the appellate court. Thayer v. State [Ala.] 35 So. 406.

65. State v. Wood [Wash.] 74 Pac. 880; State v. Finn, 170 Mo. 29; State v. Wilson, 109 La. 74; Krueschel v. State [Tex. Cr. App.] 70 S. W. 81; Jamison v. State [Tex. Cr. App.] 70 S. W. 24.

Illustrations: Application for a continuance. Jones v. State [Tex. Cr. App.] 77 S. W. 802. Refusal of continuance. Jackson v. State [Tex. Cr. App.] 71 S. W. 972.

Motion to quash must be in bill though also in transcript to reach ruling on demurrer to motion. [Made in city court on appeal from recorder.] The motion is not a pleading. Jones v. Anniston [Ala.] 35 So. 112.

Abandoned pleadings: An original and amended information, sustained demurrers, motion to dismiss and order overruling it, not embodied in a bill of exceptions, are not a part of the appeal record when trial was on second amended information under Pen. Code Mont. § 2229. State v. Stickney [Mont.] 75 Pac. 201.

Error in allowing a prejudiced juror to sit. Mathews v. State [Tex. Cr. App.] 77 S. W. 218.

Motion for election. Brooks v. State [Tex. Cr. App.] 75 S. W. 507.

Evidence. State v. Hall, 109 La. 290; Byars v. State [Tex. Cr. App.] 76 S. W. 435; McCasland v. State [Tex. Cr. App.] 70 S. W. 547; Harkey v. State [Tex. Cr. App.] 71 S. W. 754; State v. Hendricks [Mo.] 78 S. W. 194. Admission of evidence. Redd v. State [Tex. Cr. App.] 77 S. W. 214; Mathews v. State [Tex. Cr. App.] 77 S. W. 218. Excluding evidence. Brooks v. State [Tex. Cr. App.] 75 S. W. 507.

Admission of an affidavit by defendant for a continuance must be incorporated in the bill of exceptions. State v. Hicks [Mo.] 77 S. W. 539. And in most jurisdictions affidavits generally (State v. Callian, 109 La. 346; Martin v. State [Neb.] 93 N. W. 161; Merrell v. State [Tex. Cr. App.] 70 S. W. 979; People v. Philbon, 138 Cal. 530, 71 Pac. 650) are no part of the record. But an affidavit referred to in a journal entry is of record. State v. Vance, 29 Wash. 435, 70 Pac. 34.

Remarks of counsel. McCarty v. Com., 24 Ky. L. R. 1427, 71 S. W. 656.

Instructions. Lankster v. State [Tex. Cr. App.] 72 S. W. 388; People v. Glen, 173 N. Y. 395.

Objection to allowing jury to take out papers. Richardson v. State [Tex. Cr. App.] 70 S. W. 320.

Separation of jury. Dodd v. State [Tex. Cr. App.] 72 S. W. 1015; McFarland v. State [Tex. Cr. App.] 75 S. W. 788.

Remarks of the court in imposing sen-

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proper will be reviewed.[66] The omission of such matters is commonly not cured by inclusion in the motion for a new trial,[67] which does not carry with it into the record the proceedings and evidence had on hearing of it.[68] Where both bill of exceptions and statement of facts are required, the former cannot be looked to in aid of the latter,[69] nor can gratuitous recitals in the record supply a material omission from the exceptions.[70] A bill of exceptions referred to in the motion for new trial may be looked to to ascertain the nature of the objection, though the bill was refused by the trial court because the objection was not made in time.[71] Record made on former appeal cannot be used.[72] Where the practice is not to preserve evidence by question and answer, the proper showing must be made to procure it to be done.[73]

Making, settling and approving.—The bill of exceptions or like memorial of the proceedings must be approved by the trial judge[74] within the time limited,[75] and show such facts.[76] A disavowal by him of recollection has been held not a disapproval,[77] nor yet an admission of the particular facts in question.[78] The certificate

tence form no part of the appeal record. People v. Childs, 84 N. Y. Supp. 853.

Motion for new trial. Call v. People, 201 Ill. 499. Motion for new trial on weight and sufficiency of evidence to support verdict must be in bill of exceptions with exception to ruling on it. McDonald v. State [Fla.] 35 So. 72.

Proceedings on selection of jury are part of record. State v. Vance, 29 Wash. 435, 70 Pac. 34. Written challenge to jury entered in journal is part of the record. Id.

66. In the absence of a bill of exception nothing will be reviewed but the record proper. State v. Horned [Mo.] 76 S. W. 953; State v. Cayce [Mo.] 77 S. W. 525; State v. Farr [Mo.] 74 S. W. 834.

67. Affidavit on motion for new trial does not present objections to argument. Miller v. Com. [Ky.] 77 S. W. 682. A motion to quash an indictment and the evidence in support of it are not sufficiently presented for review by incorporation in a motion for a new trial made a part of the bill of exceptions. Binyon v. U. S. [Ind. T.] 76 S. W. 265. Objections to the overruling of challenges for cause cannot be reviewed where shown in the record only on a motion for new trial. Binyon v. U. S. [Ind. T.] 76 S. W. 265.

68. Evidence offered on a motion for a new trial, which is refused, cannot be considered on appeal unless brought up by bill of exceptions (State v. Michel, 111 La. ——, 35 So. 629); unless made part of the bill of exceptions testimony taken and objections made at the hearing of an application for a new trial, will not be considered on appeal, though copied in the transcript (State v. Com., 111 La. ——, 35 So. 839).

69. Lively v. State [Tex. Cr. App.] 72 S. W. 393.

70. The necessity for a bill of exceptions is not relieved by a note made, of the exceptions taken and reversed, by the clerk of the court. State v. Carr, 111 La. ——, 35 So. 839. The taking of exceptions. Bruen v. People [Ill.] 69 N. E. 24. Remarks are not preserved by motion for new trial asserting that they were made. Finlayson v. State [Fla.] 35 So. 203. An appellant cannot eke out the recitals of his bill of exceptions through those contained in his application for a new trial. State v. Brown [La.] 35 So. 818. An explanation by the judge irregularly made is foreign to the record and will be ignored. State v. Riggs [La.] 34 So. 655. Matter assigned for error in the specification is no part of the record though specifications are included in bill of exceptions, the brief being the proper place. Binyon v. U. S. [Ind. T.] 76 S. W. 265.

71. Allen v. State [Tex. Cr. App.] 76 S. W. 458.

72. Abstract of evidence. State v. Wolf [Iowa] 92 N. W. 673.

73. A defendant cannot by a claim of prejudice, have an examination set out in an appeal record by question and answer, unless such prejudice is made to appear by affidavit under general rules of practice (N. Y.) No. 34. People v. Childs, 84 N. Y. Supp. 853.

74. Signed by county attorney but not by judge a nullity. Tackaberry v. State [Tex. Cr. App.] 72 S. W. 384. Entry in stenographer's notes insufficient. Com. v. Dorman, 22 Pa. Super. Ct. 20. Affidavits and matter contained in a transcript of files and journal entries made in the course of trial and certified by the clerk instead of judge are not before it. State v. Wood [Wash.] 74 Pac. 880.

75. Wright v. State [Ala.] 34 So. 187. Bill within 60 days after motion in arrest was overruled held in time. Dunn v. State [Ind.] 67 N. E. 940.

76. Bill must show that it was tendered in time. Harris v. State, 117 Ga. 13. But if it so states the statement is conclusive. Anderson v. Com. [Va.] 42 S. E. 865. A bill of exceptions will not be considered on appeal where the record does not affirmatively show that the statutory notice for its settlement was given to the county attorney [under Pen. Code Mont. § 2171]. State v. Stickney [Mont.] 75 Pac. 201.

77. Statement of trial judge appended to bill that he had no recollection of certain matters therein held not a disapproval. Fredericson v. State [Tex. Cr. App.] 70 S. W. 754.

78. Where the trial judge states that the reserving of any bill or the facts therein recited has entirely escaped his memory, and there is no evidence that exception was made and bill reserved, his signature to the bill cannot be construed as an admission of the truth of its recitals. His statement on the other hand is a negative which would have justified him in refusing to affix his signature to the bill. State v. Murray [La.] 35 So. 814.

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must state that all the record is sent up or it will not be so assumed.[79] It must be legally[80] and seasonably[81] filed in court.

It is counsel's duty to see to the making and settlement of exceptions.[82] The remedy for refusal to settle a bill is by petition, not by appeal.[83]

Amendments, additions and corrections.—New exceptions cannot be supplied by amendment after the term,[84] and the supreme court cannot amend the brief of evidence or order it amended,[85] but a subsequent correction of a defect in form has been allowed in a capital case.[86] A motion in the court below is the proper remedy to secure a correction of the record,[87] and notice thereof is properly served on defendant's attorney.[88] A repeated statement of exceptions in an appeal record may be stricken out.[89] The "extraordinary motion or case" which will authorize a second bill of exceptions after affirmance must be something out of the ordinary range of experience, and does not include newly discovered evidence which is impeaching only, nor the existence of excitement at the time of trial.[90]

The statement of facts must be approved[91] or agreed on,[92] unless failure to do so was not at the fault of parties,[93] and its correctness settled,[94] and must be filed within the time required.[95] The statement must be complete when settled.[96] An un-

79. Entire record will not be reviewed (P. L. 1898, p. 915) unless there is a certificate of the trial judge that entire record is returned with writ of error. State v. Hendrick [N. J. Law] 56 Atl. 247.

80. Indorsement of filing by ex clerk a nullity. Brundren v. State [Tenn.] 70 S. W. 368.

81. Within term. Galloway v. State [Tex. Cr. App.] 70 S. W. 211. Consent of prosecuting attorney cannot cure failure to file in time. Pollard v. State [Tex. Cr. App.] 73 S. W. 953. Bill of exceptions filed after the time limited will not be considered. State v. Penn [Mo.] 74 S. W. 616. A bill of exceptions allowed and signed on a certain day to which it was extended as provided by statute is sufficient [under Gen. St. Kan. 1901, § 4753]. State v. Bradbury [Kan.] 74 Pac. 231. Consent of a county attorney is not necessary to the extension of time for settling a bill of exceptions, under Pen. Code Mont. § 2171, requiring a person desiring a bill of exceptions, to prepare and present a draft, on notice to the county attorney, to the judge for settlement within a specified time unless an extension of time is granted. State v. Landry [Mont.] 74 Pac. 418.

82. Counsel and not the clerk must present bills of exception and have them signed promptly. State v. Artus [La.] 34 So. 596.

83. People v. Jackson, 138 Cal. 32, 70 Pac. 918.

84. State v. Gartrell, 171 Mo. 489.

85. Smith v. State [Ga.] 44 S. E. 827.

86. State v. Wilson, 109 La. 74.

87, 88. Reno v. State [Neb.] 95 N. W. 1042.

89. People v. Childs, 84 N. Y. Supp. 853.

90. Harris v. Roan [Ga.] 46 S. E. 433.

91. Ex parte Arthur [Tex. Cr. App.] 70 S. W. 750; Peterson v. State [Tex. Cr. App.] 70 S. W. 977.

92. A statement of facts which is not signed by the attorneys or approved by the trial judge cannot be considered. Mullins v. State [Tex. Cr. App.] 76 S. W. 560.

93. Facts stated in a motion held insufficient to show that a failure of the trial judge to approve the statement of facts was the fault of the judge. Walls v. State [Tex. Cr. App.] 77 S. W. 8. The failure of the record to show proof of the statement of facts by the trial judge is due to an error of the clerk in making the record may authorize its consideration. Mullins v. State [Tex. Cr. App.] 76 S. W. 560. Diligence excusing a timely filing of a statement of facts is not shown where there is no explanation of the failure of defendant's attorney to make an effort to have the statement approved before the last day of the time allowed him, on which day it was presented to the trial judge then holding court in another county, approved and mailed to the proper county, where it was filed on the following day and where it could have been filed on the day previous had the counsel carried it there himself. Spurlock v. State [Tex. Cr. App.] 77 S. W. 447. Diligence excusing a failure to incorporate a statement of facts in the record is not shown by a disagreement between counsel as to the statement prepared after which no order was taken for time to file a statement and no order presented during term time to the trial judge. Orosco v. State [Tex. Cr. App.] 76 S. W. 470.

94. The statement of facts cannot be approved by the judge in advance of the agreement of the attorneys representing the state and defendant that it is correct. Walls v. State [Tex. Cr. App.] 77 S. W. 8.

95. In Texas, before adjournment unless a ten day order is made. Johnson v. State [Tex. Cr. App.] 70 S. W. 85; Henderson v. State [Tex. Cr. App.] 70 S. W. 88; Morton v. State [Tex. Cr. App.] 70 S. W. 93; Stuart v. State [Tex. Cr. App.] 73 S. W. 963. Expressing statement of facts to judge one day before time expired, held not sufficient. Ashman v. State [Tex. Cr. App.] 74 S. W. 317. Statement of facts more than ten days after adjournment too late. Espanosa v. State [Tex. Cr. App.] 76 S. W. 461. Expressing statement of facts to a third person who failed to deliver it to the judge in time, held insufficient. Hickman v. State [Tex. Cr. App.] 74 S. W. 317.

96. A statement of facts is not sufficient which when presented to the trial judge for approval instead of setting out the orders of the court, contains the words, "the clerk will insert the order here," though the orders are

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signed bill cannot be cured by a later signing ex parte.[97] The trial court must certify that the record contains "all" the material evidence in the case, else reversal on the facts cannot be had.[98]

Under the Georgia practice, the motion for a new trial must be approved by the judge or the objections therein made will not be preserved, though the motion itself belongs to the record and not to the bill,[99] and so must amendments to the motion.[1] A motion for new trial on the admission of evidence must show the evidence objected to.[2]

Limitation of review to matters in record.—Except as to those jurisdictional matters which the record is in most states required to show,[3] every reasonable presumption is in favor of the correctness of the proceedings below, and unless the record affirmatively shows error, this presumption will prevail,[4] and the certified record is conclusive as to matters contained therein.[5] It must be presumed that the record expresses the judgment rendered.[6]

inserted by the clerk in making up the transcript [Rule 72a]. Hargrove v. State [Tex. Cr. App.] 76 S. W. 922.

97. After transcript has gone up with unsigned bills of exceptions defendant can not procure a signing ex parte and make a new case by bringing it up in a supplemental transcript. State v. Artus [La.] 34 So. 596.

98. State v. Pittan [Wash.] 72 Pac. 1042.

99. Grounds for new trial not approved by the trial judge will not be considered. Bird v. State [Ga.] 45 S. E. 593.

1. Jackson v. State, 116 Ga. 834. Indorsement on amendment to motion for new trial that it is "allowed' and ordered filed sufficiently verifies the grounds stated. Stephens v. State [Ga.] 45 S. E. 619.

2. Thompson v. State [Ga.] 45 S. E. 410.

3. See ante this section, "The Record."

4. People v. Jackson, 138 Cal. 462, 71 Pac. 566; State v. Patten, 159 Ind. 232; Taylor v. Sandersville [Ga.] 44 S. E. 845; Carr v. State [Fla.] 34 So. 892.

Proceedings before indictment as to which record was silent. Lanckton v. U. S., 18 App. D. C. 348. Commitment presumed regular. Jones v. State [Fla.] 32 So. 793. That the examination was for the offense charged in the warrant and authorized the information. People v. Stockwell [Mich.] 97 N. W. 765.

That information bearing name of complainant with word "mark" over it, but no mark inserted, was signed by complainant. Taylor v. State [Tex. Cr. App.] 72 S. W. 181. That names of witnesses are not indorsed on indictment held not to overcome presumption that it was found on evidence. People v. Glen, 173 N. Y. 395. That indictment signed by substituted foreman was found during absence of regular foreman. Ferrell v. State [Fla.] 34 So. 220.

That clerk swore sheriff who summoned jurors. State v. Riddle [Mo.] 78 S. W. 606.

That the jury list contained less than a thousand names while the tax rolls showed five thousand does not overcome the presumption of regularity where testimony before the court on objection to the list is not in the record. State v. Vance, 29 Wash. 435, 70 Pac. 34.

That application for a continuance was a second one. Hathaway v. State [Tex. Cr. App.] 70 S. W. 88.

Holding night sessions when state of docket does not appear. Powers v. Com., 24 Ky. L. R. 1007, 70 S. W. 644; Id., 24 Ky. L. R. 1186, 70 S. W. 1050.

It will be presumed that an attorney who assisted the district attorney was rightfully appointed. State v. Tough [N. D.] 96 N. W. 1025.

It will be presumed that the court charged on the law as was its duty. Stewart v. State [Ala.] 34 So. 818. That instruction complained of was requested by defendant. People v. Cebulla, 137 Cal. 314, 70 Pac. 181.

Propriety of questions by court not set out in detail. Price v. State [Ark.] 71 S. W. 948.

That the defendant was present in court at all stages of the trial, though the certified record does not show that fact. State v. Howard [Wash.] 74 Pac. 382. On a record which shows that there was counsel for accused when arraigned and on motions for new trial and in arrest it will be presumed he was represented by counsel on trial. State v. Bell [La.] 34 So. 721.

That verdict was on the count to which the evidence was restricted. State v. May [N. C.] 43 S. E. 819.

That there was an ordinance authorizing the taxation of costs against accused. Cranor v. Albany [Or.] 71 Pac. 1042.

Where the record shows that the court heard testimony on a plea of guilty it will be presumed that the evidence was as to defendant's age and that it justified the reformatory sentence imposed. Marx v. People [Ill.] 68 N. E. 436.

Where defendant was sentenced in less than three days after verdict, it will be presumed that the statutory exception as to adjournment within such time existed. State v. Roan [Iowa] 97 N. W. 997.

That a bill of exceptions was signed before it was filed where signing and filing were on the same day. Dunn v. State [Ind.] 67 N. E. 940.

5. Where the appellant's case showed that the recorder had asked a number of questions of witnesses, but the recorder certified that he had asked only one. People v. Childs, 84 N. Y. Supp. 853. An undated bill reciting a timely signing will be presumed to be so signed. Tarver v. State, 137 Ala. 29. Facts not shown to be inaccurate must be taken as certified by the trial judge. State v. Williams [La.] 35 So. 521.

6. State v. Hesterly [Mo.] 76 S. W. 985.

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A transcript containing a formal indictment duly filed in open court in regular term raises a presumption of regularity in all the proceedings prior thereto.[7] The record need not affirmatively show the existence of conditions under which an information may be filed.[8] Accordingly, to entitle appellant to review a ruling, it must affirmatively appear that such ruling was made,[9] or the proceeding had[10] of which complaint is made, and such facts as show that it was error,[11] or explain the objec-

7. Lanckton v. United States, 18 App. D. C. 348. Record of court and indorsement and recitals of an indictment held to show that it was found and returned by the grand jury, in open court. Peeples v. State [Fla.] 35 So. 223; State v. Ledford [N. C.] 45 S. E. 944. Caption held sufficient against objection that it did not describe the court, nor state where it was sitting. Territory v. Claypool [N. M.] 71 Pac. 463. That the grand jury was held and its indictments found within the county held sufficiently shown by recitals in the caption. State v. Bartholomew [N. J. Law] 54 Atl. 231. A defective description of the grand jury in the body of an indictment may be cured by the title and preamble. State v. Buralli [Nev.] 71 Pac. 532.

8. State v. Melvern [Wash.] 72 Pac. 489. On appeal, in the absence of a certified statement, it is fair to presume that the trial court was aware of the circumstances and did not hastily and arbitrarily force the accused to trial. State v. Michel [La.] 35 So. 629.

9. Ruling as to right of challenge. People v. Cebulla, 137 Cal. 314, 70 Pac. 181. Application for continuance not in bill. State v. Gatlin, 170 Mo. 354. Exclusion of evidence. Peoples v. State [Miss.] 33 So. 289. Admission of evidence. Kelly v. State [Tex. Cr. App.] 71 S. W. 756. A statement that the state offered to prove is not sufficient in a bill where it does not affirmatively appear that the state did prove the facts set out. Simpson v. State [Tex. Cr. App.] 77 S. W. 819. A bill of exceptions to the receipt of evidence of a witness is defective where it does not show that the witness testified to anything. Cruse v. State [Tex. Cr. App.] 77 S. W. 818. Denial of motion which is not in bill of exceptions. Oakley v. State [Ala.] 33 So. 23; Greene v. State [Tex. Cr. App.] 71 S. W. 599.

10. Furnishing of incorrect list of witnesses. Regopoulas v. State, 116 Ga. 596. Bill of exceptions stating testimony of witness as part of same sentence with objection thereto held to show that the testimony was given. Fredericson v. State [Tex. Cr. App.] 70 S. W. 754. Where order excluding witnesses from court room is not in record, permitting witness to testify after alleged violation cannot be reviewed. State v. Woodward, 171 Mo. 593. Question to which objection was sustained. State v. Ashcraft, 170 Mo. 409.

In order to question error in allowing the consideration of an affidavit introduced in evidence, the record must show that the affidavit was introduced. State v. Hicks [Mo.] 7 S. W. 539.

Instructions not in record. Call v. People, 201 Ill. 499. Manner of giving instruction. Lawrence v. State [Fla.] 34 So. 87. Objection to a charge made by the court of its own motion cannot be considered on appeal where it does not appear from the record that it was presented and given under Comp. Laws Nev. 1900, § 4391, providing that the questions presented in a written charge presented and given or refused need not be excepted to or embodied in a bill of exceptions. State v. Burns [Nev.] 74 Pac. 983.

Argument complained of must be in record. State v. Gatlin, 170 Mo. 354; State v. Woodward, 171 Mo. 593; People v. Loomis, 76 App. Div. [N. Y.] 243; Kelley v. State [Tex. Cr. App.] 70 S. W. 20; Shutt v. State [Tex. Cr. App.] 71 S. W. 18; Stanley v. State [Tex. Cr. App.] 73 S. W. 400. Refusal to give an instruction in reference to an argument of counsel, objected to but no certificate that such argument was made. McLeod v. State [Tex. Cr. App.] 75 S. W. 522.

11. Failure to put a witness under the rule. It must be shown what evidence he heard before testifying. Dennis v. State [Tex. Cr. App.] 74 S. W. 559. Ruling on competency of witness will not be reviewed unless the record shows that he gave material testimony against defendant. Reys v. State [Tex. Cr. App.] 76 S. W. 457.

Motion to quash panel must be accompanied by evidence. Trim v. State [Miss.] 33 So. 718. An assignment of error of the court in overruling the defendant's motion to quash an array of talesmen summoned and in compelling him to select jurors from the list cannot be reviewed where the grounds have not been shown as facts. Willis v. State [Tex. Cr. App.] 75 S. W. 790. On exception to the calling of talesmen because there was no complete call of the venire nor any record of those excused, the clerk must under the court's direction take down all the facts (Act No. 113 of 1896, p. 162); hence the judge's explanation that some of the jury were engaged is ignored on review. State v. Riggs [La.] 34 So. 655. Various modes of showing that talesmen were properly called shown. Id.

Rejected evidence or questions: What testimony was excluded by ruling must appear. Martin v. State [Tex. Cr. App.] 70 S. W. 973; Weaver v. State, 116 Ga. 550; Greene v. State [Tex. Cr. App.] 71 S. W. 599; Carter v. State [Tex. Cr. App.] 76 S. W. 437; Smith v. State [Ga.] 46 S. E. 79; Peoples v. State [Miss.] 33 So. 289. A bill of exceptions does not show reversible error in excluding evidence of communications by defendant's sister to a witness in reference to acts of cruelty practiced on her by her husband, where it does not show when defendant was informed of the witness' knowledge. Willis v. State [Tex. Cr. App.] 75 S. W. 790. The object and purpose of the evidence must be shown in the bill of exceptions. Id. Error in overruling an objection to a question cannot be reviewed where the answer is not in the record. Dunn v. State [Ind.] 67 N. E. 940. Refusal to permit the defendant to explain certain statements alleged to have been made by him, cannot be questioned on appeal where the bill of excep-

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tion,[12] and the objection and exception must be shown[13] with the grounds.[14] A mere statement of grounds urged is not a certificate by the trial judge that they are facts.[15]

Setting out evidence or statements of facts.—A statement of facts or other showing of the evidence is necessary to a review of the sufficiency of the evidence,[16] giving or refusal of instructions,[17] denial of a new trial,[18] or of motion to set aside a ver-

tions did not show what the testimony would have been, or its materiality. Keffer v. State [Wyo.] 73 Pac. 556. The record must show an offer of proof. Green v. State [Ga.] 45 S. E. 76. Where evidence is asserted to be res gestae, the bill of exceptions must show the time elapsing. Freeman v. State [Tex Cr. App.] 77 S. W. 17. Bill held not to show that witness testified to conversation as to which defendant claimed right to cross examine. Martin v. State [Tex. Cr. App.] 70 S. W. 973.

Admission of evidence will not be reviewed unless the evidence is in the record Foskey v. State [Ga.] 45 S. E. 967. A bill of exceptions to the admissibility of evidence of acts of a third person must contain sufficient recitals to preclude the idea that the testimony was relevant and connected defendant with the transaction. Glenn v. State [Tex. Cr. App.] 76 S. W. 757. The introduction of documentary evidence cannot be reviewed where its contents are not disclosed in the bill of exceptions. Norsworthy v. State [Tex. Cr. App.] 77 S. W. 803. Objection to evidence of the finding of skin of a stolen calf in the possession of others, on the ground that the privity of defendant with such persons is not shown, is not presented by a bill of exceptions merely stating the objection to the evidence on such ground, and not setting up the evidence showing that such connection was not made. Norsworthy v. State [Tex. Cr. App.] 77 S. W. 803. Admission of conversation, record not showing that defendant was not present. Martin v. State [Tex. Cr. App.] 72 S. W. 380. Where all the evidence supporting a dying declaration is not brought up, it will be presumed that the foundation was sufficient. State v. Frazier, 109 La. 458. The state of the evidence must appear to review ruling on propriety of question to expert witness. Baldridge v. State [Tex. Cr. App.] 74 S. W. 916. Where argument of prosecuting attorney is complained of argument for defendant must be in record. State v. Sale [Iowa] 92 N. W. 680.

Instructions: Unless the whole charge is in the record refusals on the ground that they were covered will be sustained. Finlayson v. State [Fla.] 35 So. 203. If evidence which is in the bill does not sustain a request its refusal will be sustained. Brown v. State [Fla.] 35 So. 82.

Motion for new trial for modification of requests to charge will not be reviewed if the requests are not in the motion. Foskey v. State [Ga.] 45 S. E. 967. A statement in a motion for new trial that defendant excepted to the overruling of a motion to quash an information is not sufficient to present the question for review. Centralia v. Smith [Mo. App.] 77 S. W. 488.

12. A bill of exceptions should be sufficiently definite in its statements of facts to place the matter to which exceptions are reserved before the court for intelligent review. Grounds of objections are not statements of fact. Orosco v. State [Tex. Cr. App.] 76 S. W. 470.

13. State v. Hicks [Mo.] 77 S. W. 539; State v. Burns [Nev.] 74 Pac. 983; Butts v. State [Ga.] 45 S. E. 593; Bruen v. People [Ill.] 69 N. E. 24. To denial of new trial. McDonald v. State [Fla.] 35 So. 72. Exception to remark of counsel. Com. v. Dorman, 22 Pa. Super. Ct. 20. Testimony admissible in part and scope of objection not shown. Jowell v. State [Tex. Cr. App.] 71 S. W. 286. Exception. State v. Rigall, 169 Mo. 559. Ruling on motion for new trial for insufficiency of evidence. McDonald v. State [Fla.] 35 So. 72.

14. Objection to an offer of a calendar to establish the day of the week, is not sufficient, being merely "it was a leading question, irrelevant, tended to prove no issue in the case, and calculated to mislead the minds of the jury." Mathews v. State [Tex. Cr. App.] 77 S. W. 218.

15. Wilson v. State [Tex. Cr. App.] 78 S. W. 232. Existence of grounds resting in fact must be directly stated. Sinclair v. State [Tex. Cr. App.] 77 S. W. 621.

16. McFarland v. State [Tex. Cr. App.] 70 S. W. 21; McDaniel v. State [Tex. Cr. App.] 77 S. W. 802; Bray v. State [Tex. Cr. App.] 78 S. W. 345; Hightower v. State [Tex. Cr. App.] 74 S. W. 913; Wright v. State [Tex. Cr. App.] 72 S. W. 847; State v. Hensley [Mo. App.] 73 S. W. 1007, 1008; Lawrence v. State [Ark.] 71 S. W. 263; Staling v. State [Tex. Cr. App.] 73 S. W. 962; Denton v. State [Tex. Cr. App.] 70 S. W. 217; Chapman v. State [Tex. Cr. App.] 70 S. W. 544; Scott v. State, [Tex. Cr. App.] 70 S. W. 744; Page v. State, [Tex. Cr. App.] 71 S. W. 286; Foster v. State, [Tex. Cr. App.] 71 S. W. 971; Stuart v. State, [Tex. Cr. App.] 73 S. W. 963; Cornett v. State, [Tex. Cr. App.] 71 S. W. 598; Gray v. State [Tex. Cr. App.] 74 S. W. 552.

17. Foster v. State [Tex. Cr. App.] 71 S. W. 971; Crawford v. State [Tex. Cr. App.] 74 S. W. 552; McDaniel v. State [Tex. Cr. App.] 77 S. W. 802; Brooks v. State [Tex. Cr. App.] 75 S. W. 507; Sparks v. State [Tex. Cr. App.] 74 S. W. 24; Williams v. State [Tex. Cr. App.] 77 S. W. 447; Spurlock v. State [Tex. Cr. App.] 77 S. W. 447; Deal v. State [Ala.] 34 So. 23; Johnson v. State [Tex. Cr. App.] 70 S. W. 85; State v. Callian, 109 La. 346; Kitchens v. State [Tex. Cr. App.] 70 S. W. 95; Morton v. State [Tex. Cr. App.] 70 S. W. 93; Coleman v. State [Tex. Cr. App.] 70 S. W. 19; Ablowich v. State [Tex. Cr. App.] 71 S. W. 598; Shutt v. State [Tex. Cr. App.] 71 S. W. 18; Denton v. State [Tex. Cr. App.] 70 S. W. 217; Page v. State [Tex. Cr. App.] 71 S. W. 286; Mosely v. State [Tex. Cr. App.] 70 S. W. 546; Fay v. State [Tex. Cr. App.] 70 S. W. 744; Valles v. State [Tex. Cr. App.] 71 S. W. 598; Jackson v. State [Tex. Cr. App.] 71 S. W. 972; Chitwood v. State [Tex. Cr. App.] 71 S. W. 973; Sausier v. State [Tex. Cr. App.] 71 S. W. 597; Com. v. Barton, 20 Pa. Super. Ct. 447.

18. Henderson v. State [Tex. Cr. App.] 70

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dict,[19] admission of evidence,[20] refusal to strike out evidence,[21] refusal of a continuance,[22] argument of prosecuting attorney,[23] denial of bail,[24] acceptance of juror,[25] variance,[26] excessiveness of sentence,[27] overruling of demurrer to special plea.[28]

(§ 17) *G. Practice and procedure in reviewing court.*—The transcript and bill of exceptions must be filed at the time prescribed.[29]

Assignments, abstracts, briefs, etc.—It is generally required that all errors to be urged be assigned[30] separately[31] and specifically.[32] Unless a brief of the argument and authorities relied on is presented, only errors apparent on the face of the record will be reviewed.[33] Errors not argued will be deemed to be abandoned.[34] Failure to assign errors or join in co-defendant's assignments abandons a joint writ of error as to that one.[35] The argument must follow the assignment.[36] A pro forma

S. W. 88; Calhoun v. State [Tex. Cr. App.] 74 S. W. 29; Martin v. State [Neb.] 93 N. W. 161; Desmond v. State [Tex. Cr. App.] 70 S. W. 21; Chitwood v. State [Tex. Cr. App.] 71 S. W. 973; Pollard v. State [Tex. Cr. App.] 70 S. W. 549. A motion for a new trial on the ground of insufficiency of evidence, will not be reviewed where the record contains neither statement of facts nor bill of exceptions. Kimble v. State [Tex. Cr. App.] 77 S. W. 17.

19. The denial of a motion to set aside a verdict will not be reviewed unless the affidavits supporting the motion are included in the judgment roll, or in the record by bill of exceptions or otherwise authenticated. By Supreme Court rule 29. People v. Lonnen [Cal.] 73 Pac. 586.

20. Garner v. State [Tex. Cr. App.] 70 S. W. 213; Elgin v. State [Tex. Cr. App.] 77 S. W. 225; Jones v. State [Tex. Cr. App.] 70 S. W. 215; Denton v. State [Tex. Cr. App.] 70 S. W. 217; McMillan v. State [Tex. Cr. App.] 71 S. W. 279; McAnally v. State [Tex. Cr. App.] 72 S. W. 842. But see, in case of flagrant and obvious error, Peterson v. State [Tex. Cr. App.] 70 S. W. 978.

21. Caddell v. State [Tex. Cr. App.] 72 S. W. 1015.

22. Kitchens v. State [Tex. Cr. App.] 70 S. W. 95; Valles v. State [Tex. Cr. App.] 71 S. W. 598; Orosco v. State [Tex. Cr. App.] 76 S. W. 470; Elgin v. State [Tex. Cr. App.] 77 S. W. 225; Cubine v. State [Tex. Cr. App.] 73 S. W. 396; Trim v. State [Miss.] 33 So. 718; McAnally v. State [Tex. Cr. App.] 72 S. W. 842; Chitwood v. State [Tex. Cr. App.] 71 S. W. 973.

23. McAnally v. State [Tex. Cr. App.] 72 S. W. 842. Remarks must be in bill and not in motion for new trial. Finlayson v. State [Fla.] 35 So. 203. Argument alleged to be beyond the evidence. McCoy v. State [Tex. Cr. App.] 73 S. W. 1057.

24. Ex parte Arthur [Tex. Cr. App.] 70 S. W. 750.

25. Shutt v. State [Tex. Cr. App.] 71 S. W. 18.

26. Fay v. State [Tex. Cr. App.] 70 S. W. 744; Beal v. State [Ala.] 35 So. 58; Teague v. State [Tex. Cr. App.] 76 S. W. 574.

27. Chapman v. State [Tex. Cr. App.] 70 S. W. 544.

28. Johnson v. State [Tex. Cr. App.] 73 S. W. 15.

29. One appealing from a judgment in a criminal case is entitled to three judicial days beyond the return day within which to file his transcript. State v. Gosey, 111 La. ——, 35 So. 786. If the return day is the last day the reviewing court is in session prior to adjournment, filing the transcript during vacation is in due time. Id. Failure to file a transcript of record in time whereby appellate jurisdiction was lost cannot be cured by a second order at a subsequent term of the trial court again granting an appeal from the same judgment. Com. v. Schlitzbaum [Ky.] 76 S. W. 835.

30. Error not assigned will not be considered. Lawrence v. State [Fla.] 34 So. 87; State v. Shutts [N. J. Law] 54 Atl. 235. Rulings not alleged in the petition in error will not be reviewed. Reed v. State [Neb.] 92 N. W. 321.

31. Assignment of error in two rulings will not be considered if either is correct. Pittman v. State [Fla.] 34 So. 88; Williams v. State [Fla.] 34 So. 279; Kirby v. State [Fla.] 32 So. 836. Same applied to two instructions. Ginn v. State [Ind.] 68 N. E. 294. A specification of error in overruling objections to questions asked defendant is too general where it refers to all of the questions objected to. Binyon v. U. S. [Ind. T.] 76 S. W. 265.

32. Assignment that verdict is contrary to law does not assign error in the admission of evidence. Anthony v. State [Fla.] 32 So. 818. Must specify ground of objection to evidence. Somers v. State, 116 Ga. 535. Assignment of exclusion of letters does not present a question as to refusal to allow crossexamination in respect thereto. Com. v. Greason, 204 Pa. 64. Assignments of error must set out erroneous portions of a charge excepted to generally. "Because the whole charge was contrary to law" etc., is bad. State v. MacQueen [N. J. Law] 55 Atl. 45.

33. People v. Poggi, 137 Cal. xix., 70 Pac. 292. Mere statement that the evidence of justification is clear is not enough. People v. Cebulla, 137 Cal. 314, 70 Pac. 181.

34. People v. Monroe, 138 Cal. 97, 70 Pac. 1072; Hoover v. State [Ind.] 68 N. E. 591; Call v. People, 201 Ill. 499; State v. Campbell [Utah] 71 Pac. 529; Williams v. State [Fla.] 34 So. 279; Mathis v. State [Fla.] 34 So. 287; McDonald v. State [Fla.] 35 So. 72. Apparent errors not jurisdictional will be ignored. Sylvester v. State [Fla.] 35 So. 142. Errors assigned must be argued. Mathis v. State [Fla.] 34 So. 287. Errors not set out in the brief will be deemed abandoned. State v. Register [N. C.] 46 S. E. 21; Meehan v. State [Wis.] 97 N. W. 173.

35. Fields v. State [Fla.] 35 So. 185.

36. On same grounds. Mathis v. State [Fla.] 34 So. 287.

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affirmance may result.[37] The brief should refer to the portion of the record where error lies.[38]

Dismissal will be granted for failure to properly bring up the case,[39] or where it is a second appeal on the same matters,[40] or where appellant dies,[41] or escapes,[42] pending the appeal. A pro forma affirmance may be rendered for failure to prosecute an appeal.[43] The writ of error will not be dismissed because some of the questions are prematurely brought up.[44]

Rehearing may be allowed at discretion during term, though not expressly authorized by statute,[45] but not for matters already fully gone into.[46] Inadvertent failure to present an error has been held ground sufficient.[47] Technical formality of the application will not be exacted.[48] The absence of a judgment on which the supreme court would be authorized to act may be called to its attention for the first time by a motion for a rehearing;[49] but under the Texas practice, matters entirely new will not be examined.[50]

Interlocutory and provisional proceedings.—Relief by the trial court will not be ordered after jurisdiction is passed from it.[51] The North Carolina practice does not allow a motion in the supreme court for a new trial for newly-discovered evidence.[52]

(§ 17) *H. Scope of review.*[53]—Review is confined to matters made of record[54] and properly assigned and argued,[55] and which have been preserved by necessary and proper objection and exception,[56] but some statutes have relaxed the requirements by requiring a review of apparent error.[57] Where no bill of exceptions is filed, nothing will be reviewed except the record proper.[58] A writ of error runs only to the judgment, and insufficiency of the commitment cannot be reviewed thereon.[59]

37. Under Pen. Code Cal. § 1253, a judgment of conviction can be affirmed only where the accused failed to file a brief, made no appearance, and "submitted on the record" the appeal without argument. People v. Gehrig [Cal.] 72 Pac. 717.

38. Brief did not refer to record where error appeared. Keffer v. State [Wyo.] 73 Pac. 556.

39. Nothing to show that an appeal was taken. State v. Rasberry, 109 La. 265; State v. Clemons [Iowa] 94 N. W. 229. No notice of appeal shown. Cartwright v. State [Tex. Cr. App.] 70 S. W. 954. Not granted where there was a bona fide effort to bring up a proper record. Pullen v. State, 116 Ga. 555. Long delay in printing record. Com. v. Hasse, 21 Pa. Super. Ct. 291. Where a certified copy of the recognizance shows that the defect thereof shown by the copy in the record did not exist the case will be reinstated. Sprading v. State [Tex. Cr. App.] 71 S. W. 17. Two years' delay in presenting appeal held ground for dismissal. People v. Triola, 174 N. Y. 324. An appeal will be dismissed where recognizance is defective (Bourland v. State [Tex. Cr. App.] 77 S. W. 455) or is filed after term time (Doyle v. State [Tex. Cr. App.] 78 S. W. 347).

40. Louisville v. Wehmhoff [Ky.] 76 S. W. 876.

41. Hudson v. State [Tex. Cr. App.] 70 S. W. 82. Appeal should be dismissed where defendant died and no revivor has been asked within the year. Hale v. Com., 24 Ky. L. R. 1573, 71 S. W. 902.

42. Isom v. State [Tex. Cr. App.] 70 S. W. 23. An appeal will not be dismissed on the ground of an alleged escape where on account of the unhealthful condition of the jail the sheriff has treated appellant as a trusty and he has made no attempt to escape from custody. Stewart v. State [Tex. Cr. App.] 77 S. W. 791.

43. People v. Gehrig [Cal.] 72 Pac. 717.

44. Hill v. State [Ga.] 44 S. E. 820.

45. Powers v. Com., 24 Ky. L. R. 1350, 71 S. W. 494.

46. Twice decided. State v. Mortensen [Utah] 74 Pac. 350.

47. State v. Phillips [Iowa] 94 N. W. 229.

48. Petition for rehearing allowed though not in form when showing new evidence calling for inquiry. In re Greason [Pa.] 55 Atl. 788.

49. State v. Hesterly [Mo.] 76 S. W. 935; White v. State [Tex. Cr. App.] 72 S. W. 173.

50. Insufficiency of the evidence to show cause of death cannot be urged for the first time on a rehearing.

51. Cribb v. Parker [Ga.] 46 S. E. 110.

52. That practice is wholly civil. State v. Register [N. C.] 46 S. E. 21.

53. The scope of review in habeas corpus, mandamus, and the like, belongs properly to the titles so named and is relegated to them; but the remedy as between them and error or appeal is treated ante, § 17A.

54. See ante, § 17 F.

55. See ante, § 17 G. Matters not jurisdictional and not assigned though apparent will be ignored. Sylvester v. State [Fla.] 35 So. 142.

56. See ante, § 14, Saving Questions for Review.

57. Though no bill of exceptions, brief or assignment of errors is filed, the record proper will be examined and its correctness or incorrectness determined. State v. Horned [Mo.] 76 S. W. 953. Entire record not reviewed unless certified to be complete. State v. Hendrick [N. J. Law] 56 Atl. 247.

58. State v. Cayce [Mo.] 77 S. W. 525. See, also, ante, § 17 F.

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Overruling a demurrer to the indictment may be reviewed on appeal from the final judgment.[60] Gratuitous questions will not be decided nor general rules laid down.[61] Thus, where the indictment is in any event insufficient, the constitutionality of the statute on which it is brought will not be decided.[62]

Rulings on matters within the discretion of the trial court will be reversed only in case of manifest abuse of that discretion,[63] and on questions of fact, the verdict will be sustained,[64] as where it is based on conflicting evidence[65] or depends on the credibility of witnesses,[66] even against a preponderance,[67] unless it so preponderates

59. Marx v. People [Ill.] 68 N. E. 436.

60. Brown v. State, 116 Ga. 559.

61. On exceptions by the state, the court will confine itself strictly to the record and will not lay down general rules. State v. Moore [Neb.] 95 N. W. 334.

62. State v. Wright, 159 Ind. 394.

63. Denial of change of venue. State v. Powell, 109 La. 727; Lindsay v. State, 24 Ohio Circ. R. 1; State v. May [Mo.] 72 S. W. 918; Goldsberry v. State [Neb.] 92 N. W. 906. Denial of continuance. Jones v. State [Fla.] 32 So. 793; State v. Murray, 111 La. ——, 35 So. 814; Ter. v. Padilla [N. M.] 71 Pac. 1084; State v. Williams, 170 Mo. 204; Com. v. Scouton, 20 Pa. Super. Ct. 503. Allowing time for preparing a defense. State v. Leary, 111 La. ——, 35 So. 559. Refusal of postponement for preparation will be reversed only for gross mistake. Harris v. State [Ga.] 45 S. E. 973.

Refusal to allow plea of insanity not made at arraignment. Morrell v. State [Ala.] 34 So. 208.

Mode of exercising peremptory challenges. Nicholson v. People [Colo.] 71 Pac. 377. Excusing juror. Peaden v. State [Fla.] 35 So. 204.

Ruling on qualification of juror. Jarvis v. State [Ala.] 34 So. 1025.

Examination of witnesses. Fields v. State [Fla.] 35 So. 185.

Permitting witness to testify after violating rule. Jarvis v. State [Ala.] 34 So. 1025.

Rulings as to argument of counsel. State v. Williamson [S. C.] 43 S. E. 671.

Adjournment after argument before instructing jury. Green v. State [Ark.] 71 S. W. 665.

The grant of a mistrial will not be reviewed. Oliveros v. State [Ga.] 45 S. E. 596.

Denial of motion for new trial on general grounds (Wynn v. State, 116 Ga. 514; Middlebrooks v. State [Ga.] 45 S. E. 607; Ware v. State [Ga.] 45 S. E. 615; Rawls v. State, 116 Ga. 617) or for newly discovered evidence (State v. Callian, 109 La. 346; State v. Morgan, 96 Mo. App. 343).

In Kentucky by the express provision of Cr. Code Proc. § 281, decisions on challenges to the panel (Powers v. Com., 24 Ky. L. R. 1007, 70 S. W. 644; Id., 24 Ky. L. R. 1186, 70 S. W. 1050) or the qualification of jurors cannot be reviewed (Alderson v. Com., 25 Ky. L. R. 32, 74 S. W. 679) nor can orders on motions for new trial [for newly discovered evidence] (Cook v. Com., 24 Ky. L. R. 1731, 72 S. W. 283; Black v. Com., 24 Ky. L. R. 1974, 72 S. W. 772; Curry v. Com. [Ky.] 74 S. W. 1077; (receipt of evidence by the jury out of court). Turner v. Com. [Ky.] 76 S. W. 853). This rule prevents review of the denial of a new trial because of previous errors at the trial. Expression of opinion by juror. Barnes v. Com., 24 Ky. L. R. 1143, 70 S. W. 827. Matters first brought to the attention of the trial court by motion for new trial are not subject to review. O'Brien v. Com. [Ky.] 74 S. W. 666. Improper conduct of prosecuting attorney first urged as ground for new trial cannot be reviewed. King v. Com. [Ky.] 76 S. W. 341. An affidavit on motion for new trial is not sufficient to present objections to the argument of counsel. Miller v. Com. [Ky.] 77 S. W. 682.

64. State v. John [La.] 34 So. 98; State v. Acebal [La.] 34 So. 303; State v. Green [La.] 35 So. 396; Ashman v. State [Tex. Cr. App.] 74 S. W. 317. Not where the evidence is sufficient to justify the finding of the jury. Ruffin v. State [Ark.] 70 S. W. 1038; Jackson v. State, 116 Ga. 834; State v. Lambert, 97 Me. 51. Where the evidence is sufficient to justify the finding of the jury, the verdict will not be set aside. Id. Not where there is any substantial evidence. State v. Woodward, 171 Mo. 593; State v. Buralli [Nev.] 71 Pac. 532; State v. Sayman [Mo. App.] 77 S. W. 337.

Only where there is no evidence to support the conviction. People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014; Patton v. State, 117 Ga. 230; State v. Shaw, 64 S. C. 566; People v. Halwig, 34 N. Y. Supp. 221. Unless there is no evidence in the record to support it. State v. Clark [Utah] 74 Pac. 119. Only where as a matter of law there is no evidence. Shular v. State [Ind.] 66 N. E. 746.

In Kentucky a judgment of conviction will not be reversed on the sole ground that there was not sufficient evidence before the jury conducing to show the guilt of the accused if there was any evidence [Cr. Code, § 340]. Tipton v. Com. [Ky.] 78 S. W. 174; Davis v. Com. [Ky.] 77 S. W. 1101; Howard v. Com., 24 Ky. L. R. 612, 69 S. W. 721; Brown v. Com., 24 Ky. L. R. 727, 69 S. W. 1098; Richie v. Com., 24 Ky. L. R. 1077, 70 S. W. 629; Wright v. Com., 24 Ky. L. R. 1838, 72 S. W. 340; Ky. D. & W. Co. v. Com., 24 Ky. L. R. 2154, 73 S. W. 746; Woodruff v. Com. [Ky.] 77 S. W. 922; Turner v. Com. [Ky.] 76 S. W. 853; Rowsey v. Com. [Ky.] 76 S. W. 409; Wilkerson v. Com. [Ky.] 76 S. W. 359.

65. Watkins v. State [Miss.] 34 So. 150; State v. Gleason [Mo.] 72 S. W. 676; Snead v. State [Ga.] 43 S. E. 695; Russell v. State [Neb.] 92 N. W. 751; Everson v. State [Neb.] 93 N. W. 394; Scott v. Com., 24 Ky. L. R. 889, 70 S. W. 281; State v. McCullough, 171 Mo. 571; Parker v. State [Neb.] 93 N. W. 1037; Patton v. State, 117 Ga. 230; Neifeld v. State, 23 Ohio Circ. R. 246; Windom v. State [Tex. Cr. App.] 72 S. W. 193; Williams v. State [Fla.] 34 So. 279; Petty v. State [Ga.] 43 S. E. 696; Ill. Cent. R. Co. v. Com., 25 Ky. L. R. 297, 74 S. W. 1097.

Only in extreme cases. People v. Glover [Cal.] 74 Pac. 745.

66. State v. Nolle [Mo. App.] 70 S. W. 504;

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in favor of defendant as to raise grave doubt of his guilt.[68] Where circumstantial evidence does not exclude a reasonable hypothesis of innocence, a new trial should be granted.[69] A conviction will be reversed where the corpus delicti is not shown.[70] By like rules the decisions of the court on facts will be upheld.[71]

(§ 17) *I. Decision and judgment of the reviewing court.*[72]—Though opinion is ordinarily given, a reversal of refusal to admit to bail in a murder case should be without discussion.[73] Where the court is evenly divided in opinion, there must be an affirmance.[74]

Remand for a new trial is not necessary if the error is one that requires no retrial of the facts. Thus the judgment may be conformed to the verdict,[75] or erroneous insertion of a sentence of infamy in the judgment,[76] or an excessive sentence.[77] A statutory provision that the appellate court may reduce the sentence is valid.[78] If there has been no judgment below, the cause will be remanded therefor.[79] Accused should be discharged if the case is reversed without a new trial,[80] or if the information is so defective that there was no jurisdiction.[81]

(§ 17) *J. Proceedings after reversal and remand.*—Though there is no authority for filing the mandate before the term of the court below, the case will stand for trial at the next term after the filing if defendant has reasonable time for preparation.[82] A judgment on exceptions by the prosecuting attorney does not affect the judgment below, but only settles the law.[83] If the verdict still stands below after reversal of an erroneous judgment, there may be a new judgment without a new trial.[84]

Patton v. State, 117 Ga. 230; State v. Snider [Iowa] 91 N. W. 762; State v. Shanks [Mo. App.] 71 S. W. 1065; State v. Hullen [N. C.] 45 S. E. 513. Conviction will not be reversed because greater number of witnesses testified for defendant. Dennis v. State [Tex. Cr. App.] 74 S. W. 559.

67. McMillan v. State [Tex. Cr. App.] 71 S. W. 279; State v. Blitz, 171 Mo. 530.

68. Keller v. People [Ill.] 68 N. E. 512.

69. Watson v. State, 44 S. E. 803. And see Smith v. State, 116 Ga. 929.

70. Gaither v. State [Ga.] 45 S. E. 973.

71. Decision as trier of bias of juror. Allen v. State [Tex. Cr. App.] 70 S. W. 85; State v. Vick [N. C.] 43 S. E. 626; State v. Williamson [S. C.] 43 S. E. 671; Bliss v. State [Wis.] 94 N. W. 325; State v. Register [N. C.] 46 S. E. 21; Buchanan v. State [Ga.] 45 S. E. 607; State v. Armstrong [Ore.] 73 Pac. 1022. Finding on conflicting affidavits as to fairness of jury. Allen v. State [Tex. Cr. App.] 70 S. W. 85; State v. May [Mo.] 72 S. W. 918. A finding on the impartiality of a juror will be sustained unless all the facts and answers show that it was manifestly wrong. Jarvis v. State [Ala.] 34 So. 1025. Refusal of a continuance on a question of fact. State v. Fuller [La.] 35 So. 395.

Determination of competency of child as witness. State v. Finger, 131 N. C. 781. The decision of the trial court as to the competency of an expert will not be reviewed if there is any evidence to support it. State v. Wilcox [N. C.] 44 S. E. 625. Conflicting affidavits as to misconduct of juror. State v. Soper, 118 Iowa, 1. Denial of new trial on conflicting affidavits as to prejudice of juror sustained. State v. Gallehugh [Minn.] 94 N. W. 723.

The finding of the trial court on motion for new trial for prejudice of a juror will not be disturbed except for abuse of discretion. Perry v. State [Ga.] 45 S. E. 77. Finding of trial court that jury were not influenced by being kept at a hotel where they could see the scene of the crime sustained. State v. Boggan [N. C.] 46 S. E. 111.

72. Dismissal and the grounds thereof see ante, § 17 G.

73. Ex parte Smith [Tex. Cr. App.] 76 S. W. 917.

74. Brand v. State [Ga.] 45 S. E. 432; Burns v. State [Ga.] 45 S. E. 698; Morrow v. State [Ga.] 45 S. E. 972.

75. Conviction of uttering and sentence for forgery. Brady v. State [Tex. Cr. App.] 74 S. W. 771.

76. Griffin v. State [Tenn.] 70 S. W. 61.

77. McCollum v. State [Ga.] 46 S. E. 413. Circuit Court of Appeals may without disturbing conviction correct excess by reversing and remanding with directions to modify. Hanley v. U. S., 123 Fed. 849.

78. It does not confer legislative power on the courts. Palmer v. State [Neb.] 97 N. W. 235.

79. State v. Gullic, 170 Mo. 334. Where a verdict is in due form but a judgment is rendered in conflict with it, the cause will be remanded with directions to the trial court to sentence defendant and render judgment on the verdict as returned by the jury. State v. Hesterly [Mo.] 76 S. W. 985.

80. Under Pen. Code Cal. § 1262 should be discharged by upper court. People v. Elphis [Cal.] 72 Pac. 838.

81. People v. Miller, 81 App. Div. [N. Y.] 255.

82. Powers v. Com., 24 Ky. L. R. 1007, 70 S. W. 644.

83. State v. De Wolfe [Neb.] 93 N. W. 746.

84. Where judgment of acquittal is entered on a verdict of guilty because a plea of former conviction was sustained, on reversal of the decision on such plea judgment

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Questions of law determined on a former appeal become the law of the case and are conclusive in subsequent proceedings,[85] but an erroneous ruling of the trial court does not establish the law of the case.[86] If a showing be held sufficient in law, a new one is needless.[87] On a reversal and remand of a conviction for a lesser degree of a crime charged in an indictment, the accused may again be tried for the highest degree or any lesser degree charged.[88]

§ 18. *Summary prosecutions and review thereof.*—There is no limitation on prosecutions in police court.[89] Summary prosecutions are ordinarily founded on a complaint less formal than an indictment.[90] It must be verified unless made on affidavit,[91] and certification must precede the trial.[92] A jury trial is ordinarily unnecessary.[93] The evidence must be clear that the offense was committed after the passage of the ordinance under which the prosecution was had.[94] A mayor's court may during the same term modify its sentence.[95] Motion for new trial is not necessary to have error in impaneling jury or admitting testimony reviewed in circuit court.[96] Cost bills must be regularly certified.[97]

The record must show the accusation,[98] the grounds of a demurrer to it,[99] but need not show a warrant where defendant appeared and pleaded.[100]

Review.—One pleading guilty may appeal.[101] The amount of the bond must comply with the statute,[102] and it must be properly executed at the time of perfecting the appeal.[103] A justice must designate the place of sitting to which the appeal shall go if no election is given to accused.[104] In Ohio, defendant is entitled to ten days to prepare a bill of exceptions where the justice's decision is final on the facts.[105] The

of conviction may be entered on the verdict. State v. Taylor [N. C.] 46 S. E. 5.

85. Later appeal. State v. Morrison [Kan.] 72 Pac. 554. On a subsequent application for a new trial for misconduct of jury, the same ground of former appeal, though affidavits state the misconduct more in detail than formerly. State v. Mortensen [Utah] 74 Pac. 120. Where an appeal from the dismissal of an appeal from a police court is dismissed on the ground of a clerical error in the style of the appeal, and a second judgment of dismissal is entered in the intermediate court after correction of the error, an appeal from such judgment will not be dismissed as being the same appeal formerly dismissed. Louisville v. Wehmhoff [Ky.] 76 S. W. 876.

86. In the appellate court. People v. Glaze [Cal.] 72 Pac. 965.

87. Where it is held on appeal that the trial judge erred in not vacating the bench on the showing made, he must do so on a new trial without a new showing. Com. v. Cantrill, 25 Ky. L. R. 20, 74 S. W. 691.

88. State v. Morrison [Kan.] 72 Pac. 554.

89. Battle v. Marietta [Ga.] 44 S. E. 994.

90. An affidavit, in a prosecution for violating a town ordinance, informing of the charge against him and of the ordinance violated is sufficient. Before a mayor's court. State v. Thompson [La.] 35 So. 582. Affidavits before recorders need be only so far formal as to acquaint accused of the offense charged. State v. Marmouget [La.] 34 So. 408. Complaint stating that complainant "has good reason to believe" the offense was committed is insufficient. Smith v. State [Tex. Cr. App.] 76 S. W. 436; Justice v. State [Tex. Cr. App.] 76 S. W. 437.

91. An information before a justice may be exhibited on written complaint of a third person and need not be verified by the prosecuting attorney. State v. Blands [Mo. App.] 74 S. W. 3. Clerk of circuit court is ex officio clerk of county court and may take affidavits. Dillard v. State [Ala.] 34 So. 851.

92. State v. Durein, 65 Kan. 700.

93. Unger v. Fanwood [N. J. Law] 55 Atl. 42. State v. Smith [Ohio] 68 N. E. 1044. See, also, "Jury."

94. Battle v. Marietta [Ga.] 44 S. E. 994.

95. Lewis v. Forehand [Ga.] 45 S. E. 68.

96. State v. Langenstroer, 67 Ohio St. 7.

97. Construing Shannon's Code §§ 7601-7604, 7593. Musgrove v. Hamilton County [Tenn.] 77 S. W. 779.

98. The record must show precisely what was accused. Asbury Park v. Layton [N. J. Law] 55 Atl. 86. Ordinance attached to record by request is presumed to be only one germane but record may be corrected if defective. State v. Marmouget [La.] 34 So. 408.

99. McQueen v. State [Ala.] 35 So. 39.

100. Dillard v. State [Ala.] 34 So. 851.

101. State v. Hedges [Kan.] 72 Pac. 528.

102. Under Acts 27th Legislature, p. 291, art. 889, a bond for $40.00 is insufficient on appeal from a city corporation court to the county court. Xydias v. State [Tex. Cr. App.] 76 S. W. 761.

103. Defendant is not entitled to permission to execute a new bond thereafter. Xydias v. State [Tex. Cr. App.] 76 S. W. 761.

104. Appellant's election in Cherokee County is in civil cases only. State v. Regard, 65 Kan. 716.

105. Rev. St. 6565, applies to criminal as well as civil cases. State v. Langenstroer, 67 Ohio St. 7.

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charge may be amended in the circuit court,[106] but not by making it broader.[107] Appeals from appeals are governed by the rules governing appeals in felony cases.[108]

On certiorari,[109] or habeas corpus,[110] mere errors cannot ordinarily be reviewed.[111]

INFANTS.

§ 1. Domicile and Status (392).
§ 2. Custody, Protection, Support, and Earnings (392).
§ 3. Statutes for Protection of Infants (393).
§ 4. Property and Conveyances (393).
§ 5. Contracts (394).
§ 6. Torts (394).
§ 7. Crimes (395).
§ 8. Actions By and Against (395).

§ 1. *Domicile and status.*—The domicile of an infant is that of its father, and on the latter's death, follows that of the mother, unless emancipated. It is not changed by the mother's removal to another state, unless such removal is made animo manendi.[1] A child cannot change its own domicile, not being sui juris.[2]

§ 2. *Custody, protection, support, and earnings.*—The custody of a child is a matter of discretion with the court;[3] but a parent's claim to custody is ordinarily superior to that of any other person.[4] In the case of an infant of tender years, especially if a daughter, the court will generally award the custody to the mother.[5] The obligation to support, maintain and educate the infant rests upon the father when he is of sufficient ability. When the parents are not living, this duty devolves upon the general guardian.[6] The father is entitled to the earnings of his minor children, unless he consents to their using them;[7] but he may relinquish the right to such earnings and that he has done so may be inferred from his conduct.[8] A parent or one *in loco parentis* is liable for immoderately correcting a child.[9]

106. Brown v. State [Miss.] 32 So. 952.
107. Glass v. State [Ga.] 46 S. E. 435.
108. See § 17, ante.
109. The decision of a committing magistrate cannot be reviewed on a writ of certiorari. People v. Van De Carr, 83 N. Y. Supp. 245. Certiorari to inquire into the detention of the relator extends only to cases where the production of the body is unnecessary to the decision of the question. Id. Certiorari will not reach bias of judge on a record showing only objection and refusal to appoint triors. State v. De Maio [N. J. Law] 55 Atl. 644. The sufficiency of evidence, before a criminal court judge as to the identity of a person arrested charged with being a fugitive from justice, cannot be reviewed on a writ of certiorari. State v. Aucoin [La.] 35 So. 381.
110. Habeas corpus is limited to matters of jurisdiction. People v. Van De Carr, 83 N. Y. Supp. 245.
111. See also "Certiorari;" "Habeas Corpus."
1. In re Russell's Estate, 64 N. J. Eq. 313. Domicile changed to Mo., where the mother moved to, even though the children remained in Kan. Modern Woodmen of America v. Hester, 66 Kan. 129, 71 Pac. 279.
2. Modern Woodmen of America v. Hester, 66 Kan. 129, 71 Pac. 279. The status of an infant, born in a foreign country and brought by his father to the United States, is that of his father, if the latter has become naturalized. Rexroth v. Schein [Ill.] 69 N. E. 240.
3. People v. Cooper, 75 App. Div. [N. Y.] 620.
4. Ward v. Ward [Tex. Civ. App.] 77 S. W. 829. An aunt, without means, refused custody. People v. Cooper, 75 App. Div. [N. Y.] 620. Custody of child given to mother as against father on habeas corpus proceedings. Stickel v. Stickel, 18 App. D. C. 149. Where the contest for custody was between the mother and the paternal grandfather, evidence of the mother's reputation for chastity, truth, veracity and honesty is admissible. Ward v. Ward [Tex. Civ. App.] 77 S. W. 829.
5. Rossell v. Rossell, 64 N. J. Eq. 21.
6. Murphy v. Holmes, 87 App. Div. [N. Y.] 366. On a contract by a third person to rear a minor child, the infant's leaving voluntarily is a defense to an action on the contract. Jones v. Comer, 25 Ky. L. R. 1104, 77 S. W. 184. Where an infant sues under a statute for the pecuniary damages resulting from the death of the father from negligence, the jury may take into consideration such care, support, sustenance and benefits by way of training and education as the infant would have received from the father, if his death had not occurred. St. Louis, I. M. & S. Ry. Co. v. Haist [Ark.] 72 S. W. 893. See, also, Death by Wrongful Act, 1 Curr. Law, 833.
7. Crowley v. Crowley [N. H.] 56 Atl. 190.
8. Chicago Screw Co. v. Weiss [Ill.] 68 N. E. 54. A suit in the infant's name by the father as next friend for recovery of the infant's earnings is a relinquishment by the father of the right to collect them in his own name. Chicago Screw Co. v. Weiss [Ill.] 68 N. E. 54. Where an infant 20 years of age sued by next friend for personal injuries and the pleadings raised no question as to his right to recover for his loss of earning capacity, and the pleadings did not show he had a father or mother, and there was evidence that he was working for himself, a request for an instruction allowing him nothing for loss of earning capacity was proper-

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§ 3. *Statutes for protection of infants.*—All the elements of a statutory offense must be set out and proved[10] according to the statute existing at the time of indictment.[11] Upon an indictment under a statute punishing the failure to furnish medical attendance to a minor child, the question is what would an ordinarily prudent person, solicitous for the welfare of his child, and anxious to promote his recovery, do under the circumstances.[12] Medicine is not sustenance within such a statute.[13]

§ 4. *Property and conveyances.*—The superintendence over infants and their property is a branch of the general chancery jurisdiction, and the protection of the rights of infants is one of the duties of such courts.[14] Such a court has power to authorize the compromise of a suit to which a minor is a party.[15] The power to decree the sale of the land of an infant is statutory, and can be exercised only in the manner pointed out by the statute.[16] An infant's causes of action are not at the disposal of his next friend,[17] nor his property at the guardian's disposal,[18] nor can a guardian gain an adverse interest.[19] An infant's conveyance of land cannot be disaffirmed because of nonage until his majority,[20] when his executing a deed inconsistent with the former one has that effect.[21] Disaffirmance may become barred by limitations.[22] An infant's acts after reaching his

ly refused. Chesapeake & O. Ry. Co. v. Wilder, 24 Ky. Law Rep. 1821, 72 S. W. 853. The father's right to earnings of infant is not relinquished where infant works for a creditor of the father, unless the creditor knows of such relinquishment to the infant. Tuckey v. Lovell [Idaho] 71 Pac. 122. Where the infant sues by his father as next friend for personal injuries, it is reversible error to charge that he may recover for his decreased earning capacity, unless it clearly appears that recovery for such loss is sought in his behalf. Galveston, H. & S. A. R. Co. v. Jackson [Tex. Civ. App.] 71 S. W. 991.

9. The question of moderation is for the jury. Clasen v. Pruhs [Neb.] 95 N. W. 640.

10. On an indictment for "cruelly, unreasonably and maliciously" beating a child, all three elements must be proved. Gary v. State [Ga.] 44 S. E. 817.

11. An indictment charging the defendant with the abandonment of a child under fourteen will not warrant a conviction, if when the indictment was brought the statute punished for abandoning a child under six, though subsequently amended. People v. Trank, 88 App. Div. [N. Y.] 294.

12. People v. Pierson [N. Y.] 68 N. E. 243. Cases collected in dissenting opinion of Goodrich, P. J. "Medical attendance" within the meaning of such statutes means attendance by a physician regularly licensed. People v. Pierson [N. Y.] 68 N. E. 243.

13. Depriving a child of "sustenance." Justice v. State, 116 Ga. 605, 59 L. R. A. 601.

14. Williams v. Williams [Ill.] 68 N. E. 449. A court should protect the interest of a minor by upholding a contract made in his behalf by his natural guardian and which clearly appears to be for his interest and benefit. South Tex. Nat. Bank v. Tex. & L. Lumber Co., 30 Tex. Civ. App. 412.

15. Suit by a minor to set aside a will. Williams v. Williams [Ill.] 68 N. E. 449; Bunel v. O'Day, 125 Fed. 803.

16. Murray v. Rodman, 25 Ky. L. R. 978, 76 S. W. 854. No title is divested unless there is a strict compliance with the statute. Bullock v. Gudgell, 25 Ky. L. R. 1413, 77 S. W. 1126; Liter v. Fishback, 25 Ky. L. R. 260, 75 S. W. 232. Contingent remainders of infants may be sold under directions of the court. In re Asch, 75 App. Div. [N. Y.] 486.

17. A next friend of an infant cannot compromise a judgment nor discharge a cause of action out of court. Compromising a judgment of $750 in the infant's favor for $200. Fletcher v. Parker [W. Va.] 44 S. E. 422.

18. A guardian has no power to encumber the estate of his ward, or to bind the ward personally upon any undertaking entered into in the ward's behalf. Davidson v. Wampler [Mont.] 74 Pac. 82.

19. A purchase by a guardian ad litem of the property of his wards is voidable at their election. Purchase at foreclosure sale. Dugan v. Sharkey, 89 App. Div. [N. Y.] 161. The court will look keenly into the acts of a guardian who becomes the purchaser of his ward's estate. (Purchase affirmed where guardian had permission from the chancellor.) Larrabee v. Larrabee, 24 Ky. L. R. 1423, 71 S. W. 645.

20. Shroyer v. Pittenger [Ind. App.] 67 N. E. 475; Shreeves v. Caldwell [Mich.] 97 N. W. 764; Blair v. Whitaker [Ind. App.] 69 N. E. 182. Contra, Beickler v. Guenther [Iowa] 96 N. W. 895.

21. Blair v. Whitaker [Ind. App.] 69 N. E. 182. A quitclaim deed is not a disaffirmance of a mortgage given during infancy, nor is a guardian's deed during minority a disaffirmance of such mortgage. Shreeves v. Caldwell [Mich.] 97 N. W. 764. Where an infant takes a deed of land from his father, and afterwards conveys it back, and upon reaching his majority renounces the deed to his father and conveys to a third person, the latter is allowed to hold. Estep v. Estep, 24 Ky. L. R. 2198, 73 S. W. 777. Where a father trades land and money for land of his infant daughter, and she disaffirms on reaching her majority, he cannot compel her to disaffirm a conveyance to a third person of the land which she obtained from him, as a condition of disaffirming the sale to him. Ison v. Cornett, 25 Ky. L. R. 366, 75 S. W. 204.

22. Must be exercised before limitation

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majority may amount to an affirmance of a conveyance.[23] A sale by the state to a minor has been held absolutely void.[24]

The compensation of the guardian of a minor is in the discretion of the court.[25]

§ 5. *Contracts.*—An infant's contracts are voidable, not void,[26] except contracts for necessaries,[27] and he may disaffirm them at his option.[28] But necessaries furnished to an infant upon the credit of the parent, or under contract with the parent or guardian, create no liability in the infant, even though he may have a separate estate.[29] On the rescinding of a contract made with an infant, the latter may recover back the consideration paid.[30] Affirmance of a contract by an infant must go to the whole contract.[31] The appointment by an infant of an agent to contract for him is void,[32] but an agent may act in making a disaffirmance.[33]

§ 6. *Torts.*—A minor is liable generally for his torts.[34]

has run. Shroyer v. Pittenger [Ind. App.] 67 N. E. 475.

23. Reacknowledging a deed made during minority is an affirmance. Blair v. Whitaker [Ind. App.] 69 N. E. 182. An infant grantee of land, who acquiesces in the conveyance for three or four years after reaching his majority, will be deemed to have accepted the conveyance, especially after his creditors have intervened by attachment. Locknane v. Hoskins, 24 Ky. L. R. 639, 69 S. W. 719. Where an infant daughter conveyed real estate to her father and upon reaching her majority acquiesced in expenditures made by him on the premises and allowed him to occupy them during his life, without claiming them, it was held that these circumstances did not constitute a ratification, and that it was a question for the jury. Eagan v. Scully, 173 N. Y. 581.

24. In Texas the sale of Orphan Asylum land to a minor is void, and not merely voidable, and can form no basis for title, either as against the state or any other claimant. Dupree v. Duke, 30 Tex. Civ. App. 360.

25. Hoga's Estate v. Look [Mich.] 96 N. W. 439. Expenditures by guardian of minor allowed which could not be afforded by the father [Mich. St.]. Id.

26. Koerner v. Wilkinson, 96 Mo. App. 510; Shroyer v. Pittenger [Ind. App.] 67 N. E. 475. Contra, a sale by the state to an infant. Dupree v. Duke, 30 Tex. Civ. App. 360.

27. Shroyer v. Pittenger [Ind. App.] 67 N. E. 475. Counsel fees. Crafts v. Carr, 24 R. I. 397, 60 L. R. A. 128. Board and tuition are necessaries. Murphy v. Holmes, 87 App. Div. [N. Y.] 366. A contract to take life insurance is not a contract for necessaries. Simpson v. Prudential Ins. Co. [Mass.] 68 N. E. 673.

28. Koerner v. Wilkinson, 96 Mo. App. 510.

29. Murphy v. Holmes, 87 App. Div. [N. Y.] 366. To charge an infant for necessaries the plaintiff must show that the obligation to support and maintain has not been discharged by the person on whom the duty devolved. Id. The reasonableness and prudence of an infant's contract are material only in contracts which as a matter of law are binding on the infant. Drude v. Curtis, 183 Mass. 317. Where an infant makes a note, and upon his majority directs his debtor to pay the debt to the holder of the note, thinking that the holder had agreed to look to the debtor for payment, such direction and a payment by the debtor to the holder do not constitute a ratification by part payment. Snyder v. Gericke [Mo. App.] 74 S. W. 377.

30. Vanatter v. Marquardt [Mich.] 95 N. W. 977; Johnson v. Shreveport W. W. Co., 109 La. 268. In Mass. an infant, in order to avoid a contract, need not put the other party in statu quo. Simpson v. Prudential Ins. Co. [Mass.] 68 N. E. 673. An infant, on avoiding a policy of insurance, may recover the premium paid, with no deduction for the cost of keeping the policy in force. Id. Where an infant plaintiff bought goods of an infant defendant and afterwards sought to avoid the contract and recover the money paid, it was held that the defendant relying on his infancy as a defense and having spent the money, was not liable either in contract or tort. Drude v. Curtis, 183 Mass. 317.

31. Employment contract debts due the employer from the infant deducted from the amount due the infant in accordance with the terms of the contract and it was held immaterial whether the infant's debt was for necessaries or not. Pecararo v. Pecararo, 84 N. Y. Supp. 581. Ratification by "disposal" of property construed to mean alienation, as by sale or gift, and not to exercise control over. Koerner v. Wilkinson, 96 Mo. App. 510. Using property for 9 months after majority and promising to pay a note given in payment therefor held a ratification. Luce v. Jestrab [N. D.] 97 N. W. 848.

32. The infant appointed the defendant his agent to make an exchange of horses. The defendant exchanged the infant's horse for two others, paying $15 besides. He delivered one of them to the infant, who tendered him $15 and demanded the other. Held the infant had no cause of action. Poston v. Williams, 99 Mo. App. 513.

33. An infant may rescind by notice and demand by attorney, the appointment of the attorney being at the most voidable. Simpson v. Prudential Ins. Co. [Mass.] 68 N. E. 673.

34. Plaintiff a minor was injured by the accidental discharge of a revolver with which he and the defendant another minor were playing. The defendant was violating the statutes prohibiting the carrying of dangerous weapons or pointing a gun or pistol at another person. Horton v. Wylie, 116 Wis. 505.

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§ 7. *Crimes.*—An infant between the ages of 7 and 12 is presumed to be incapable of crime. This presumption can be removed only by affirmative proof that he had the capacity to understand the act complained of and to know its wrongfulness.[35] The disability to contract for other than necessaries does not disable an infant to commit false pretense except as to such.[36] He cannot be a vagrant unless his parents are unable to support him.[37] Reform School Acts and Juvenile Court Acts, for the benefit of neglected and delinquent children, have been generally upheld by the courts.[38]

§ 8. *Actions by and against.*—Infants' suits are ordinarily by next friend and their appearance and defense by guardian ad litem.[39] Courts have power to appoint a guardian ad litem for an infant, even though there is a general guardian.[40] Suggestion of minority should precede judgment.[41] The acts of the guardian or next friend are binding on the infant, unless against his interest and the facts are not disclosed to the court.[42] An infant plaintiff who fails in a suit must pay costs.[43] He may sue as a poor person, though his guardian have means;[44] hence he should not be dismissed for want of security.[45] In an action by an infant for personal injuries from negligence, the negligence of the parent in allowing the infant to be at large will not defeat a recovery, if the child in fact exer-

35. Boy of 11 wrongly convicted of manslaughter. People v. Squazza, 40 Misc. [N. Y.] 71.

36. Lively v. State [Tex. Cr. App.] 74 S. W. 321.

37. Braswell v. State [Ga.] 45 S. E. 963.

38. Ex parte Loving [Mo.] 77 S. W. 508; In re Peterson [Cal.] 71 Pac. 690. Juvenile court act held constitutional. In re Mansfield, 22 Pa. Super. Ct. 224. Juvenile vagrant law, committing children to charitable institutions until they reach eighteen held constitutional. State v. Marmouget [La.] 35 So. 529. A statute providing that a minor under 16 convicted of a misdemeanor may be committed to a reformatory held constitutional. People v. N. Y. Catholic Protectory, 38 Misc. [N. Y.] 660. A statute authorizing the commitment of a minor to one of certain reformatories gives no authority to commit to any other, though similar in name and purpose. People v. N. Y. Magdalen Benev. Soc., 39 Misc. [N. Y.] 588.

39. The latter term is often used in both senses. [Editor.] Infants may sue by guardian or next friend in contract or for damages to their person or property from the tortious act of another. Clasen v. Pruhs [Neb.] 95 N. W. 640. An infant may, on petition, prosecute an action by his next friend, after the commencement of the action. Howell v. American Bridge Co. [Del.] 53 Atl. 53. Where an infant brings suit by a foreign guardian, an amendment substituting someone as next friend is proper. St. Louis, I. M. & S. R. Co. v. Haist [Ark.] 72 S. W. 893. Where an infant sues by guardian ad litem he must appeal by guardian ad litem. An appeal by the infant in his own name is matter for special demurrer. Ramsey v. Keith's Adm'r, 25 Ky. L. R. 1302, 77 S. W. 693. It has even been held, an infant defendant cannot appear in a suit by next friend, but should appear by his guardian or guardian ad litem. Mitchell v. Spaulding, 206 Pa. 220. A guardian ad litem who is appointed in the lower court, should bring his petition for allowance of services in that court. Williams v. Williams, 24 Ky. L. R. 1753, 72 S. W. 271. A merely formal answer by a guardian ad litem for an infant need not be under oath. Eakin v. Hawkins, 52 W. Va. 124.

40. And it is no objection to such appointment that he is a non-resident. Pine v. Callahan [Idaho] 71 Pac. 473.

41. Johnson v. Shreveport W. W. Co., 109 La. 268.

42. In an action to set aside an execution sale, where the parties agreed that judgment should be entered for the infant for the recovery of the land, and for the defendant for twice his bid at the sale which was to be a lien on the land, the court set aside the judgment. Day v. Johnson [Tex. Civ. App.] 72 S. W. 426.

43. The guardian ad litem is responsible for costs in some jurisdictions by statute. Burbach v. Milwaukee E. R. & L. Co. [Wis.] 96 N. W. 829. When the answer of an infant defendant raises an issue, the resulting inquiry is a trial for the purpose of costs to the infant, though the witnesses were not cross-examined in the infant's behalf. Wandell v. Hirschfeld, 40 Misc. [N. Y.] 527.

44. In New York an infant may sue as a poor person even though he has a responsible guardian, if such guardian is not the parent. Muller v. Bammann, 77 App. Div. [N. Y.] 212. The same has been decided, even though the father, who is guardian ad litem, is responsible. Gallagher v. Geneva, W., S. F. & C. L. T. Co., 39 Misc. [N. Y.] 637. Where the father is appointed guardian ad litem for an infant, and his circumstances have changed so that he is not worth $250 so as to give security for costs, the infant may, in the discretion of the court be allowed to sue as a poor person. Perlmutter v. Stern, 87 App. Div. [N. Y.] 160.

45. It is error to dismiss for want of security for costs a suit of a minor suing by next friend who is unable to furnish security. Northup v. Peacedale Mfg. Co. [R. I.] 56 Atl. 685.

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cises a degree of care such as would permit a recovery by an adult, even though the child is not sui juris.[46] Where a statute gives an infant a right of action upon reaching his majority, such action is barred if the infant has sued by a guardian during his infancy for the same cause of action.[47] The statute of limitations does not run against an infant,[48] except as to such rights as are in the protection of a legal representative who can sue;[49] nor is an infant bound by his admissions.[50] A judgment rendered against an infant is not binding unless a guardian ad litem has been appointed,[51] and it may be vacated in a direct proceeding for that purpose, irrespective of the merits.[52] Service must be had on the infant or the guardian or parent for him.[53] A minor's consent is of no effect in legal proceedings.[54] The fact of infancy as a defense is for the jury.[55]

46. But contributory negligence will bar a recovery by an infant who is sui juris. In such case the question of contributory negligence must be determined with reference to his age and the degree of care expected to be exercised by one of his years. Lafferty v. Third Ave. R. Co., 85 App. Div. [N. Y.] 592. An infant is not a necessary party within the meaning of a statute giving the widow or next of kin a right of action. Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890.

47. Bohannon v. Tarbin, 25 Ky. L. R. 515, 76 S. W. 46.

48. Gibson v. Draffin, 25 Ky. L. R. 1332, 77 S. W. 928. Under the N. Y. Code. In re Pond's Estate, 40 Misc. [N. Y.] 66. Adverse possession. Albers v. Kozeluh [Neb.] 97 N. W. 646. Redemption by minor from tax sale. Bemis v. Plato, 119 Iowa, 127. It does run against minors in Louisiana, under the Code, limiting the time within which suit may be brought for the father's death from negligence. Goodwin v. Bodcaw Lumber Co., 109 La. 1050.

49. It has been held that minor heirs are barred by the statute of limitations to real actions, if the administrator of the estate is barred, but they have a right of action against an administrator who neglects to bring suit. Dignan v. Nelson [Utah] 72 Pac. 936.

50. Murphy v. Holmes, 87 App. Div. [N. Y.] 366.

51. Ramsey v. Keith's Adm'r, 25 Ky. L. R. 582, 76 S. W. 142; Turner v. Barraud [Va.] 46 S. E. 318; Eakin v. Hawkins, 52 W. Va. 124; White v. Kilmartin, 205 Ill. 525. But failure to appoint a guardian ad litem for an infant who has, pending the suit, acquired an interest therein will not invalidate the judgment. Shelby v. St. James Orphan Asylum [Neb.] 92 N. W. 155. Decree affirmed, even though the infant was not made a party to the suit, if his guardian had knowledge of it and was consulted with reference to it. Buchanan v. Ammerman, 21 Pa. Super. Ct. 439.

A guardian ad litem is connected in business with the attorney of the adverse party, if he is a clerk in his office. Parish v. Parish, 77 App. Div. [N. Y.] 267, 12 Ann. Cas. 208. N. Y. statute providing that a guardian ad litem of an infant may not receive money or property of the infant, till he has given security construed. Wileman v. Metropolitan St. R. Co., 80 App. Div. [N. Y.] 53. See, also, Guardians ad Litem and Next Friends, 2 Curr. Law, 148.

52. Weiss v. Coudrey [Mo. App.] 76 S. W. 730. Nor does knowledge of a suit preclude an infant from attacking a judgment rendered therein. Stephens v. Hewitt [Tex. Civ. App.] 77 S. W. 229. In some jurisdictions such judgment is voidable not void. Rook v. Dickinson, 38 Misc. [N. Y.] 690, 11 Ann. Cas. 454.

53. A decree against an infant is void unless process has been served upon the father, mother or guardian. Gibson v. Currier [Miss.] 35 So. 315.

If service upon the infant is irregular but a guardian ad litem is appointed and appears in the suit, such irregularity will not go to the jurisdiction (O'Donoghue v. Smith, 85 App. Div. [N. Y.] 324); such irregularity may be cured (Pearsall v. Rosebrook, 85 N. Y. Supp. 526). Where a statute requires service upon the parent or guardian of an infant defendant under the age of 14, the want of such service is cured by the subsequent appearance of the parent or guardian in the suit. Bell v. Smith, 24 Ky. L. R. 1328, 71 S. W. 433. Code 1899, c. 125, § 13. No service need be made on an infant, the appointment of a guardian ad litem taking its place. Ferrell v. Ferrell, 53 W. Va. 515.

54. Consenting to the deduction of a legacy by a minor legatee. Clasen v. Pruhs [Neb.] 95 N. W. 640. On a bill for partition it appeared that the adult heirs had bought out the widow and sought to be reimbursed from the estate of the minor heirs for their share. Held, that although this could be done by consent, no one could consent for the minors, yet as it was advantageous for them, the plaintiffs should have an equitable charge on the infants' land. Case v. Case, 103 Ill. App. 177. An agreement by an infant legatee to accept a deduction of a legacy by the amount of a note which he owed to the testator does not bind him. In re Cummings' Estate [Iowa] 94 N. W. 1117. In an action against an infant it is error to render a consent decree without an examination of the merits, to determine whether the decree is for the infant's benefit. Rankin v. Schofield [Ark.] 70 S. W. 306.

55. And it is error to dismiss an action on the uncorroborated testimony of an infant as to his nonage. Waterman v. Waterman, 85 N. Y. Supp. 377.

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INJUNCTION.

§ 1. Nature of Remedy and Grounds Therefor (397).
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§ 1. *Nature of remedy and grounds therefor.*—The right to the remedy must be clear.[56] It would not lie where it would be futile,[57] nor where complainant acquiesced in the acts sought to be restrained or so acted as to estop his objection,[58] nor where he was guilty of laches,[59] or of acts similar to those complained of,[60, 61]

56. Hallenborg v. Cobre Grande Copper Co. [Ariz.] 74 Pac. 1052; Richmond v. Bennett, 205 Pa. 470; Munyon v. Filmore [Ind. T.] 76 S. W. 257; Lownsdale v. Gray's Harbor Boom Co., 117 Fed. 983; Tomasini v. Taylor, 42 Or. 576, 72 Pac. 324; Merchants' Coal Co. v. Billmeyer, [W. Va.] 46 S. E. 121; Mitchell v. Colorado F. & I. Co., 117 Fed. 723; Everett v. Tabor [Ga.] 46 S. E. 72; Schmidt v. Bitzer, 138 Cal. xix, 71 Pac. 563; School Dist. No. 112 v. Goodpasture [Okl.] 74 Pac. 501. Infringement of patent. Armat Moving Picture Co. v. Edison Mfg. Co. [C. C. A.] 125 Fed. 939; Newhall v. McCabe Hanger Mfg. Co. [C. C. A.] 125 Fed. 919. Taking property without compensation. Hey v. Springfield Water Co. [Pa.] 56 Atl. 265. Imitation of trade labels and packages. Schenker v. Auerbach, 85 N. Y. Supp. 129. Substantial doubt as to validity of unadjudicated patent will prevent restraint of infringement. Bradley v. Eccles, 120 Fed. 947. Operation of mine alleged to be nuisance. Amelia Mill. Co. v. Tennessee Coal, I. & R. Co., 123 Fed. 811. Restraining interference with mining property. Maloney v. King, 27 Mont. 428, 71 Pac. 469. Unfair competition will not be restrained where the evidence is conflicting. C. O. Burns Co. v. W. F. Burns Co., 118 Fed. 944. Cutting timber on land as to which plaintiff does not show good title. Wiggins v. Middleton, 117 Ga. 162. Entry of premises by claimant will not be prevented where both possession and right of possession are in doubt. Stone v. Snell [Neb.] 94 N. W. 525. The remedy will not lie when sought merely for effect it will have on contract relations between complainant and third persons. National Phonograph Co. v. Schlegel, 117 Fed. 624. Re-entry by railroad company of part of right of way occupied by telegraph company will not be restrained where the title of the latter is in question. Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 862.

57. Nat. Tube Co. v. Eastern Tube Co., 23 Ohio Circ. R. 468; Daugherty v. Curtis [Iowa] 97 N. W. 67. To prevent acts already committed. Hienl v. Terre Haute [Ind.] 66 N. E. 450. Preliminary injunction against infringing expired patent. Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co., 121 Fed. 136.

58. Obstruction over alley. St. Louis S. D. & Sav. Bank v. Kennett Estate [Mo. App.] 74 S. W. 474. Building over alley to which complainant consented. Dobleman v. Gately & Hurley Co., 64 N. J. Eq. 223. Use of street by city. Bigelow v. Los Angeles [Cal.] 75 Pac. 111. Sale of property to enforce assessment for street improvements. Cummings v. Kearney [Cal.] 75 Pac. 759. The remedy will not issue where all conditions complained of existed when complainant gave defendant a license to use the property and no additional danger or inconvenience is threatened. Chicago, I. & E. R. Co. v. Indiana Nat. Gas & Oil Co. [Ind.] 68 N. E. 1008.

59. **Conduct amounting to laches:** Delay during 24 years. Mantle v. Speculator Min. Co., 27 Mont. 473, 71 Pac. 665. Remaining silent with full knowledge of rights to defendant's great injury. Holt v. Parsons [Ga.] 45 S. E. 690. Allowing the other party to make great expenditures may constitute laches. Holt v. Parsons [Ga.] 45 S. E. 690. Suit to restrain sale of stock advertised for 50 days, brought 5 days before sale. Edwards v. Mercantile Trust Co., 121 Fed. 203. Construction of pipe line over railroad right of way nearly completed at time of suit. Consumers' Gas Trust Co. v. American Plate Glass Co. [Ind.] 68 N. E. 1020. Long delay in seeking restraint of diversion of water from canal where defendant's acts were of benefit to the canal. Stewart Wire Co. v. Lehigh Coal & N. Co., 203 Pa. 479. Unfair competition in trade will not be restrained where complainant with knowledge delayed over a year. C. O. Burns Co. v. W. F. Burns Co., 118 Fed. 944. Bill filed by stockholder to prevent payment of dividend 25 days after public notice for payment is too late. Schoenfeld v. American Can Co. [N. J. Eq.] 55 Atl. 1044. Delay of three months by abutting owners to restrain damage by railroad company in streets during which time the company had expended large amounts. Keeling v. Pittsburg, V. & C. R. Co., 205 Pa. 31. A bill filed five months after appointment of a committee by a city council to

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nor where public benefit resulting from the acts will outweigh private inconvenience[62] and the value of the right is trifling,[63] nor where injury to defendant from the injunction would be far greater than would result to complainant from its refusal,[64] nor where there is an adequate remedy at law,[65] unless the remedy by injunction is more

purchase land for a city building on the ground that the council could not delegate its authority, was barred by laches where the only objection was as to the mode of procedure. Parker v. Concord, 71 N. H. 468.

A mere threat to take legal proceedings will not prevent the effect of laches. Holt v. Parsons [Ga.] 45 S. E. 690.

Conduct not amounting to laches: Mere delay is insufficient where defendant is not thereby damaged. St. Louis S. D. & Sav. Bank v. Kennett Estate [Mo. App.] 74 S. W. 474. Six years' delay, with knowledge of facts, will not prevent injunction where the right is clear, though recovery of past damages may be prevented. Bissell Chilled Plow Works v. Bissell Plow Co., 121 Fed. 357. Delay by landowner during encroachment on public highway will not prevent relief if not long enough to raise presumption of a grant. Ackerman v. True, 175 N. Y. 353. Where a steam railway company built a track in a street without authority from an adjoining landowner and without compensating him for injury, that he delayed for a few months after its construction before suing, to enjoin its use will not amount to laches where the track was not used as a main track by the company for two months after suit begun. Rock Island & P. R. Co. v. Johnson, 204 Ill. 488. Where complainants did nothing to induce construction of a sewer complained of as polluting a stream, that they did not seek relief until some time after the sewer was constructed will not bar relief for laches, some time being necessary to determine that the water was unfit for use. West Arlington Imp. Co. v. Mount Hope Retreat [Md.] 54 Atl. 982.

If one entitled to compensation for construction of a street railroad is guilty of laches in permitting such construction without compensation so that he cannot restrain the continuance of the road, he may still have an injunction as an alternative remedy should the company fail to pay the compensation fixed by the court. Benjamin v. Brooklyn Union El. R. Co., 120 Fed. 428.

60, 61. Post v. Hudson R. Tel. Co., 76 App. Div. [N. Y.] 621.

62. Wees v. Coal & I. R. Co. [W. Va.] 46 S. E. 166. Construction of tunnel by New York rapid transit commissioners. Barney v. Board of Rapid Transit Com'rs, 38 Misc. [N. Y.] 549.

63. To prevent a change in school text books at suit of a parent whose immediate outlay for his children because of the change would amount to $3.55. Tanner v. Nelson, 25 Utah, 226, 70 Pac. 984. Trifling damage by combination. Stewart Wire Co. v. Lehigh Coal & N. Co., 203 Pa. 479. Small injury resulting from survey of lands by Federal land department. Kirwan v. Murphy, 189 U. S. 35.

64. Operation of mine alleged to be nuisance. Amelia Milling Co. v. Tennessee Coal, I. & R. Co., 123 Fed. 811.

65. **Remedy at law adequate.**

Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207; Budd v. Camden H. R. Co., 63 N. J. Eq. 804; Sharpe v. Hodges, 116 Ga. 795; Armour Packing Co. v. Lovell [Ga.] 44 S. E. 990. Strike or boycott. Atkins v. Fletcher [N. J. Eq.] 55 Atl. 1074. Damage by solvent persons. Marshall v. Homier [Okl.] 74 Pac. 368. Damming of surface water. Porter v. Armstrong, 132 N. C. 66. Mere oral assertion of title to personalty by solvent person. Ganow v. Denney [Neb.] 94 N. W. 959. Sales of goods fraudulent as to seller's creditors will not give right to enjoin fraudulent transferee in common law action against debtor for money only [Laws 1902, c. 528, § 1]. Veit v. Collins, 39 Misc. [N. Y.] 39. Burns' Rev. St. 1901, § 1162, giving injunction in certain cases cannot be construed to allow it where damage is measurable at law. Wabash R. Co. v. Engleman, 160 Ind. 329.

Trespass; waste: Mere insolvency of trespasser insufficient. Moore v. Halliday [Or.] 72 Pac. 801. Construction of fence across lot a mere trespass. Giller v. West [Ind.] 69 N. E. 548. Wrongful use of private alley. Burns' Rev. St. 1901, §§ 5746, 5747 gives remedy. Hart v. Hildebrandt, 30 Ind. App. 415. Trespass by railroad company measurable in damages. Wabash R. Co. v. Engleman, 160 Ind. 329. Cutting timber on land by one not alleged to be insolvent. Wiggins v. Middleton, 117 Ga. 162. Trespass on mining claim small in damage by one not shown insolvent. Harley v. Mont. Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407. Construction of gas pipe line over railroad right of way causing small injury. Consumers' Gas Trust Co. v. American Plate Glass Co. [Ind.] 68 N. E. 1020. Entry of premises by claimant where both possession and right of possession are in doubt. Stone v. Snell [Neb.] 94 N. W. 525. Many actions for injury to realty will not be restrained for purposes of discovery where statutory discovery may be had at law [Shannon's Code, § 5684]. Ducktown S. C. & I. Co. v. Fain, 109 Tenn. 56. Trespass where locus in quo was alleged to be a public highway and the object of the suit was to determine whether it passed over the tract. Tomasini v. Taylor, 42 Or. 576, 72 Pac. 324. sinking a mine shaft not a wasting of estate. King v. Mullins, 27 Mont. 364, 71 Pac. 155. Removal of timber by insolvent persons purchasing from owners of land will be restrained at suit of the mortgagee. Terry v. Robbins, 122 Fed. 725.

Acts of municipalities or officers: Collection of personal property tax. Nye v. Washburn, 125 Fed. 817. Collection of taxes. Ind. Mfg. Co. v. Koehne, 188 U. S. 681. Certiorari is the remedy to prevent collection of taxes over assessed by mistake. Lanning v. Mercer County Chosen Freeholders, 64 N. J. Eq. 161. Transmission of special sewer assessment to county auditor will not be restrained [Gen. Laws 1901, c. 167 & Gen. St. 1894, § 1584]. Fajder v. Aitkin, 87 Minn. 445. Mere errors in taxation remediable at law will not suffice to restrain collection. Cochise County v. Copper Queen Consol. Min. Co. [Ariz.] 71 Pac. 946. Collection of liquor tax will be restrained where the taxpayer has no other re-

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practicable and efficient,[68] or unless merely to preserve property pending settle-

dress. Pyle v. Brenneman [C. C. A.] 122 Fed. 787. Transmission by village authorities to county auditor of statement of special sewer assessment cannot be restrained by property owner [Gen. Laws 1901, c. 167, construed with Gen. St. 1894, § 1584]. Kerr v. Waseca, 88 Minn. 191. Taking of pier by city. Knickerbocker Ice Co. v. Forty Second St. & G. St. Ferry R. Co., 85 App. Div. [N. Y.] 530. Laying out or construction of drain by commissioners [Comp. Laws, §§ 4320, 4323, 4345, 4346]. Strack v. Miller [Mich.] 96 N. W. 452. Use of street by city. Bigelow v. Los Angeles [Cal.] 75 Pac. 111. Establishment of drainage district. Stone v. Little Yellow Drainage Dist. [Wis.] 95 N. W. 405. Quo warranto is the proper remedy to test legality of organization of a school district (School Dist. No. 4 v. Smith, 90 Mo. App. 215), and to prevent unauthorized delegation of power by city council (Parker v. Concord, 71 N. H. 468). Continuing nuisance by pollution of watercourse with city sewage. Sammons v. Gloversville, 81 App. Div. [N. Y.] 332. Enforcement of traffic rates will not be restrained pending hearing before commission. Lift v. Southern R. Co., 123 Fed. 789. Mandamus not injunction is the remedy to prevent dock commissioners of Greater New York from unauthorized use of land for street. Coleman v. New York [N. Y.] 66 N. E. 1106. Taxpayer may prevent use of worthless material in municipal contract, action for damages on bond being inadequate. Miller v. Bowers, 30 Ind. App. 116. Certiorari is the remedy to test validity of dram shop license issued by excise commissioner. Cooper v. Hunt [Mo. App.] 77 S. W. 483. A grantee of a franchise or privilege for garbage cremation from a city amounting to a contract, will not be restrained in a private suit for illegality or forfeiture since the remedy is to have such matters determined by the granting authority. California Reduction Co. v. Sanitary Reduction Works [C. C. A.] 126 Fed. 29.

Actions or proceedings. Forman v. Healey, 11 N. D. 563. Sale of lands under execution. Brown v. Ikard [Tex. Civ. App.] 77 S. W. 967. Discovery may be had at law. Ducktown, S. C. & I. Co. v. Fain, 109 Tenn. 56. Execution sale of land will not be restrained there being legal remedy to protect title. Hahn v. Willis [Tex. Civ. App.] 73 S. W. 1084. Execution will not be restrained where appeal lies. Crook v. Lipscomb, 30 Tex. Civ. App. 567. Execution on void judgment. Howlett v. Turner, 93 Mo. App. 20. Collection of judgment. Hess v. Lell [Neb.] 94 N. W. 975. Enforcement of taxes wrongfully assessed. Ind. Mfg. Co. v. Koehne, 188 U. S. 681. Summary proceedings to dispossess tenant. Weber v. Rogers, 41 Misc. [N. Y.] 662. Action for rent will not be restrained for invalidity of lease the remedy being defense to the action. Slater v. Schwegler [N. J. Eq.] 54 Atl. 937. Suit against attorneys to recover money held as fees will not be restrained. German v. Browne, 137 Ala. 429. Appeal lies from probate order approving appointment of guardian. White v. Strong, 75 Conn. 308. Sale of property to enforce street assessment of one who did not appeal. Cummings v. Kearney [Cal.] 74 Pac. 759. Erroneous rule applied in condemnation will not suffice to restrain petitioner the remedy being appeal. Boyd v. Logansport, R. & N. Traction Co. [Ind.] 69 N. E. 398. Abutting owners cannot restrain construction of street railway because of danger of access to other lines, obstruction of streets, noise, dust or vibration. Baker v. Selma St. & S. R. Co., 135 Ala. 552. Ejectment by grantee of homestead from husband after separation cannot be restrained by wife for insanity of husband, such defense being possible in the ejectment. Larson v. Larson [Miss.] 33 So. 717.

Acts of quasi-public corporations: To compel railroad company to restore crossing. Louisville & N. R. Co. v. Smith, 25 Ky. L. R. 1459, 78 S. W. 160. Compelling furnishing of gas by lighting company. Johnson v. Atlantic City Gas & Water Co. [N. J. Eq.] 56 Atl. 550. Building railroad at unapproved grade over city street will be restrained at suit of city. Bolivar v. Pittsburg, S. & N. R. Co., 84 N. Y. Supp. 678. Unlawful operation of street railway at suit of abutting owners. Younkin v. Milwaukee L., H. & T. Co. [Wis.] 98 N. W. 215. Erection of structures on land by railroad company and use of property without authority. Providence, F. R. & U. S. Co. v. Fall River [Mass.] 67 N. E. 647. Operation of trolley track laid under special ordinance will not be restrained at suit of abutting owners, their remedy being at law against the municipality. Budd v. Camden H. R. Co., 63 N. J. Eq. 804.

Acts of corporations or associations: Restraining payment of unearned dividend where directors are solvent [P. L. 1896, p. 287, § 3]. Schoenfeld v. American Can Co. [N. J. Eq.] 55 Atl. 1044. Payment of debt by lodge will not be prevented unless all remedies of its constitution or by-laws have been exhausted. Cass v. Mansfield Lodge, 24 Ohio Circ. R. 9, 36.

Right to office: Quo warranto is the remedy (Little v. Bessemer [Ala.] 35 So. 64) to prevent acts by de facto officer (Deemar v. Boyne, 103 Ill. App. 464). Impeachment and removal of mayor by aldermen and council will not be restrained. Riggins v. Thompson, 30 Tex. Civ. App. 242.

Breach of contract. Schmidt v. Bitzer, 138 Cal. xix, 71 Pac. 563. To prevent discharge of employe. Boyer v. W. U. Tel. Co., 124 Fed. 246. Sale of goods to third persons in breach of contract. Mundy v. Brooks, 204 Pa. 232. Restraining substitution of text book in violation of contract with school board. Attorney General v. Board of Education [Mich.] 95 N. W. 746. Contract for sale and delivery of goods where no immeasurable damage appears. New Hartford Canning Co. v. Bulifant, 78 App. Div. [N. Y.] 6.

Licenses; patents: Certiorari is the remedy to test validity of liquor license. Cooper v. Hunt [Mo. App.] 77 S. W. 483. Ability of defendant to respond in damages will prevent restraint of infringment of unadjudicated patent. Bradley v. Eccles, 120 Fed. 947.

Enforcement of laws or ordinances: Invalid ordinance for impounding cattle. Orange City v. Thayer [Fla.] 34 So. 573.

Remedy at law inadequate.

Removal or disposal of property by insolv-

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ment of legal rights.[67] Failure to obtain the remedy at law will not give the right to substitute injunction.[68] Where the right to relief depends upon deter-

ent tenant owing rent. Gray v. Bremer [Iowa] 97 N. W. 991. Diversion of stream to overflow adjoining lands by solvent owner [Rev. St. 1895, art. 2089]. Sullivan v. Dooley [Tex. Civ. App.] 73 S. W. 82. Removal of goods by solvent tenant may be restrained to protect landlord's lien the rent not being due. Wallin v. Murphy, 117 Iowa, 640.

Trespass; waste: Repeated entries on game lands. Simpson v. Moorhead [N. J. Eq.] 56 Atl. 887. By solvent person on personalty. Ganow v. Denney [Neb.] 94 N. W. 959. Repeated and threatened trespasses by solvent defendant. Lynch v. Egan [Neb.] 93 N. W. 775. Injury to growing crops producing great waste and immeasurable in damages [Rev. St. § 4288]. Wilson v. Eagleson [Idaho] 71 Pac. 613. Continued trespasses including cutting of timber and further threatened trespasses [Rev. St. 1899, § 3649]. Palmer v. Crisle, 92 Mo. App. 510. Past, continued, and threatened trespasses by insolvent, or which cannot be measured in damages. Alden Coal Co. v. Challis, 103 Ill. App. 52. Trespass by solvent person who injures property and excludes owner from possession. Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828. Licensee for removal of ore from land under license revocable only for violation of terms may restrain trespass [Rev. St. 1899]. Lytle v. James, 98 Mo. App. 337. Continued acts preventing entry of premises by rightful owner will be restrained though trespasser is solvent [Rev. St. 1899, § 3649]. Metropolitan Land Co. v. Manning, 98 Mo. App. 248.

Abatement of nuisance. Reese v. Wright [Md.] 56 Atl. 976.

Actions or proceedings: Restraining prosecution by insolvent. Davis v. Butters Lumber Co., 132 N. C. 233. Collection of judgment by insolvent creditor (Commercial State Bank v. Ketchum [Neb.] 96 N. W. 614) against one unable to make defense (Strowbridge v. Miller [Neb.] 94 N. W. 825). One suit having been brought, another by defendant in which complainant cannot obtain adequate relief will be restrained. Monumental Sav. Ass'n v. Fentress, 125 Fed. 812. Receiver of corporation appointed in foreign state may restrain resident creditor from suing corporation. Davis v. Butters Lumber Co., 132 N. C. 233.

Breach of Contract. Inducing others to break contracts. American Law Book Co. v. Edward Thompson Co., 41 Misc. [N. Y.] 396.

Interference by lessor of coal mine with construction of switch track by lessee necessary to the mine. Ingle v. Bottoms, 160 Ind. 73. Sufficiency of evidence to show that a corporation under contract with coal companies for delivery of coal to it has no such adequate remedy at law as will prevent interference with the contract by persons interfering with the operation of the mines belonging to the other party. Chesapeake & O. Coal Agency Co. v. Fire Creek C. & C. Co., 119 Fed. 942. Where a son, to whom his mother had conveyed property in consideration of an agreement by him to support her, failed to support her, conveyed his property to his wife without consideration, in fraud of the mother's rights and left the state leaving no property except money in the hands of one who was bailee for him in a suit by the mother wherein he had been arrested as an absconding debtor, the mother, being without means of support, could restrain the bail from paying such money to the son pending reasonable time for prosecution of the judgment against the son. Hanks v. Hanks [Vt.] 54 Atl. 959.

Acts of municipalities or officers: Erection of viaduct by city in street. Sauer v. New York, 85 N. Y. Supp. 636. To prevent completion of municipal contract awarded to other than lowest bidder. Akron v. France, 24 Ohio Circ. R. 63. Performance of illegal contract for public improvement. Inge v. Board of Public Works, 135 Ala. 187. Payment of illegal award by county board may be restrained by taxpayer. Kircher v. Pederson [Wis.] 93 N. W. 813. Enforcement by city of revocation of permit to remove building within fire limits. Lerch v. Duluth, 88 Minn. 295. Pollution of stream by city sewage (Kewanee v. Otley, 204 Ill. 402) may be restrained by board of health [Act March 24, 1897, §§ 1, 2, 7; Pub. Laws, p. 99] (Board of Health v. City of Summit [N. J. Eq.] 56 Atl. 125). Unlawful taxation by state of improvements and personalty on Indian lands may be restrained by United States. U. S. v. Rickert, 188 U. S. 432. Extension of taxes as to which county board of review could not entertain appeal [Acts 1891, p. 199, and Burns' Rev. St. 1901, § 8532]. Stephens v. Smith, 30 Ind. App. 120. Road assessment beyond statutory limit (Acts 1899, p. 26 construed with Burns' Rev. St. 1901, § 7859) by county commissioners. Owen County Com'rs v. Spangler, 159 Ind. 575. Where a land owner cannot inspect the conduits laid by the state to conduct water from a stream to a public institution through which it was entitled to take only a certain amount of water, he may restrain the taking of more than the prescribed amount. Salem Flouring Mills Co. v. Lord, 42 Or. 82, 70 Pac. 832.

66. Interference with unexpired lease of oil lands by attempts to bore for oil. Chappell v. Jasper County O. & G. Co. [Ind. App.] 66 N. E. 515. Remedy at law against interference with the right of passage over a certain street is not as efficient as injunction. Driscoll v. Smith [Mass.] 68 N. E. 210. Permanent injunction against infringement of patent will lie though defendant may respond in damages, since the owner is entitled to exclusive use. General Elec. Co. v. Wise, 119 Fed. 922. Where the circuit court has assumed jurisdiction to restrain an order of the probate court allowing attorney's fees against a ward's estate without jurisdiction, relief may be granted though adequate relief might have been obtained by law, where defendant has pleaded to the merits. Lothrop v. Duffield [Mich.] 96 N. W. 577.

67. Haskell v. Sutton, 53 W. Va. 206. One in possession of land under a claim of title not merely colorable may sue for an injunction to protect such possession until a superior title is established in an appropriate

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mination of property rights of the parties at law, complainant will be left to his legal remedy,[69] unless the evidence is such that a court of law would establish the legal right.[70] Where enforcement of a decree already rendered will give relief, the remedy will not be applied.[71]

There must be a showing of irreparable injury,[72] of which the danger is imminent,[73] or of danger of a multiplicity of suits.[74] Cessation of the act com-

action. Pittsburg, S. & W. R. Co. v. Fiske [C. C. A.] 123 Fed. 760.

68. Kyle v. Richardson [Tex. Civ. App.] 71 S. W. 399. Failure to present claim for damages to city council will not prevent landowner from restraining pollution of stream by city sewage. Sammons v. Gloversville, 175 N. Y. 346.

69. Entry of premises will not be prevented where both possession and right of possession are in doubt (Stone v. Snell [Neb.] 94 N. W. 525) nor trespass where it is not determined whether the locus in quo is a public highway (Tomasini v. Taylor, 42 Or. 576, 72 Pac. 324). Trespass will not be restrained where defendants are in possession under color of title and plaintiff's right to possession is disputed (Munyos v. Filmore [Ind. T.] 76 S. W. 257) nor where the rights are founded on unsettled questions of law and the allegations of damage are fully denied (Merchants' Coal Co. v. Billmeyer [W. Va.] 46 S. E. 121). Interference with mining property will not be restrained where complainant's rights are still undetermined on appeal from a suit in which defendants were adjudged owners of the property. Maloney v. King, 27 Mont. 428, 71 Pac. 469. Mandatory injunction will not issue pending settlement of disputed legal rights. Budd v. Camden H. R. Co., 63 N. J. Eq. 804. General creditor must reduce his claim to judgment before restraining transfer of property by debtor. Adams v. Miller [Neb.] 94 N. W. 711. Boom company will not be prevented from operating in a navigable stream where it claims under a franchise and complainant's title is disputed. Lownsdale v. Gray's Harbor Boom Co., 117 Fed. 983. Sale of personalty title to which is in dispute. Crossland v. Crossland, 53 W. Va. 108. Where it is doubtful whether a structure or its use constitutes a nuisance its character must first be established as a nuisance at law. Flood v. Consumers' Co., 105 Ill. App. 559. A judgment in an action between the city and an owner of a tenement for civil penalties for violation of the tenement house act, is a final adjudication of issues afterward raised in a suit to enjoin maintenance of a nuisance by the owner so that an order of injunction may issue. Tenement House Department v. Moeschen, 41 Misc. [N. Y.] 446. Removal of an existing nuisance and restraint of continuance will not be decreed until infringement of rights and existence of the nuisance have been established at law, unless because of irreparable injury, multiplicity of suits or other equitable reason the legal remedy is inadequate. Sterling v. Littlefield, 97 Me. 479.

70. On a bill to restrain obstruction of an easement, relief will be granted though title has not been determined at law where evidence of plaintiff's title is such that a judge at law would direct a verdict for him. Richmond v. Bennett, 205 Pa. 470.

71. Where a decree had given the owner of a mining claim certain rights and prevented trespasses by adjoining owners, his remedy thereafter for such trespasses was to enforce the decree and not to secure a temporary injunction. Mont. Ore Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co., 27 Mont. 410, 71 Pac. 403.

72. **Acts constituting irreparable injury:** Nuisance. Reese v. Wright [Md.] 56 Atl. 976. Cutting timber. Cotten v. Christen, 110 La. 444; Chicago, I. & E. R. Co. v. Ind. Nat. G. & O. Co. [Ind.] 68 N. E. 1008. To preserve status quo. Leigh v. Nat. Hollow Brake Beam Co., 104 Ill. App. 438. Cutting of timber. Wiggins v. Middleton, 117 Ga. 162. Discharge of sewage by city. Vickers v. Durham, 132 N. C. 880. Injury to irrigation works by third persons irreparable. Hayois v. Salt River Valley Canal Co. [Ariz.] 71 Pac. 944. Injury from trespass on mining lands as irreparable. Negaunee Iron Co. v. Iron Cliffs Co. [Mich.] 96 N. W. 468. Continued and threatened trespasses irreparable. Lynch v. Egan [Neb.] 93 N. W. 775. Continued trespasses preventing entry of rightful owner of premises are irreparable though trespasser is solvent. Metropolitan Land Co. v. Manning, 98 Mo. App. 248. Diversion of stream to overflow adjoining lands by solvent owner will be restrained [Rev. St. 1895, art. 2089]. Sullivan v. Dooley [Tex. Civ. App.] 73 S. W. 82. Destruction of telegraph line on right of way by railroad company will be restrained pending condemnation by the telegraph company. W. U. Tel. Co. v. Pa. R. Co., 120 Fed. 981.

Acts not constituting irreparable injury: General injury to cultivation of farm. Merriner v. Merriner [W. Va.] 46 S. E. 118. Restraint of mere trespass. Rogers v. Brand [Ga.] 45 S. E. 305. Enforcement of invalid ordinance. Orange City v. Thayer [Fla.] 34 So. 573. Strike or boycott. Atkins v. W. & A. Fletcher Co. [N. J. Eq.] 55 Atl. 1074. Trespass insufficient. Moore v. Halliday [Or.] 72 Pac. 801. Trespass on mining claim insufficient. Harley v. Mont. Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407. Sinking mine shaft on forty acre tract used only for brick making not irreparable. King v. Mullins, 27 Mont. 364, 71 Pac. 155. Breach of contract for sale of goods shows no irreparable injury. New Hartford Canning Co. v. Bullfant, 78 App. Div. [N. Y.] 6. Construction of dam in stream not damaging complainant. Union L. & P. Co. v. Lichty, 42 Or. 563, 71 Pac. 1044. Survey of lands by federal land department as public lands will not be restrained at suit of claimant where no damage will result. Kirwan v. Murphy, 189 U. S. 35.

73. Vickers v. Durham, 132 N. C. 880. Merely a possible contingent danger is insufficient; drilling of gas well on adjoining land near another well because of danger of ignition of gas by fires used in drilling. Pope v. Bridgewater Gas Co., 52 W. Va. 252. Wrongful use of private alley as presenting

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plained of will not always prevent injunction,[75] but generally, the remedy will not lie when the acts complained of have ceased before commencement of suit and resumption is not intended.[76] Completion of the act will not prevent the remedy where the effect is continuing.[77]

While complainant must be free from inequitable conduct, unconscious fault will not prevent relief where he is willing to do equity.[78] Similar acts by other persons is no cause to deny the remedy,[79] nor are improper motives material, where the right to relief is based on invasion of equitable property rights;[80] nor the fact that complainant has acted unlawfully.[81] Defects in defendant's title are immaterial where complainant has no equity.[82] A stipulation between the parties for injunction will not influence the court.[83] A restraining order, the essential nature of which is to prevent certain acts, may be granted, though de-

danger of defendant's acquiring easement. Hart v. Hildebrandt, 30 Ind. App. 415. Remote danger of breaking telephone wires by placing one line above another. Chicago Tel. Co. v. Northwestern Tel. Co., 199 Ill. 324.

74. Diversion of waters of nonnavigable stream. Chestatee Pyrites Co. v. Cavender's Creek Gold Min. Co. [Ga.] 45 S. E. 267. Nuisance. Reese v. Wright [Md.] 56 Atl. 976. Enforcement of ordinance which will result in many prosecutions may be restrained. Joseph Schlitz Brew. Co. v. Superior [Wis.] 93 N. W. 1120. Many garnishment suits against exempt wages of employes. Siever v. Union Pac. R. Co. [Neb.] 93 N. W. 943. Erection of structures on land by railroad company and threatened use of land without authority will cause multiplicity of suits (Providence, F. R. & N. S. Co. v. Fall River [Mass.] 67 N. E. 647); likewise continuing pollution of watercourse by city (Sammons v. Gloversville, 81 App. Div. [N. Y.] 332). Though an action for rent will not be restrained because of invalidity of the lease, the remedy being by defense to the action, further actions for installments of rent will be prevented. Slater v. Schwegler [N. J. Eq.] 54 Atl. 937.

It will be refused where complainant can control the number of suits brought. Attorney General v. Board of Education [Mich.] 95 N. W. 746. Collection of illegal taxes presents no danger of multiplicity of suits. Ind. Mfg. Co. v. Koehne, 188 U. S. 681. Many suits for injury to realty will not be restrained for discovery where it lies at law [Shannon's Code, § 5684]. Ducktown S. C. & I. Co. v. Fain, 109 Tenn. 56. Survey of lands claimed by complainant by Federal land department as public lands will not be restrained where parties are few and assert separate and independent claims. Kirwan v. Murphy, 189 U. S. 35. Burns' Rev. St. 1901, § 1162, giving injunction in certain cases cannot be construed to allow it where no multiplicity of suits or other equitable ground appears. Wabash R. Co. v. Engleman, 160 Ind. 329. Judgment of dispossession against tenant will not be restrained merely because former monthly suits by the lessor had been restrained as vexatious litigation pending appeal by the tenant from the judgment in an action for back rent. Featherston v. Carr [N. C.] 46 S. E. 15. A bill alleging that 21 owners of realty adjoining plaintiff's factory had made champertous agreements with attorneys to prosecute separate suits for injuries to their land, on the ground that the factory was a nuisance, shows no such community of interest in the subject matter, right or title as will authorize injunction to prevent a multiplicity of suits. Ducktown S. C. & I. Co. v. Fain, 109 Tenn. 56.

75. Infringement of patent. Edison Gen. Elec. Co. v. New England Elec. Mfg. Co., 121 Fed. 125.

76. General Elec. Co. v. New England Elec. Mfg. Co., 123 Fed. 310. An injunction against maintenance of a liquor nuisance by a druggist because of his failure to make statutory returns of sales to the auditor, will be denied where it appears that at time of trial he had sold his business and was not then engaged, and did not intend to engage in the future, in such business in the county. Redley v. Greiner, 117 Iowa, 679. Past acts in building a dam were not injurious and no threatened acts are shown. Union L. & P. Co. v. Lichty, 42 Or. 563, 71 Pac. 1044. Use of patterns by manufacturer will not be restrained where no further use is intended. Nat. Tube Co. v. Eastern Tube Co., 23 Ohio Circ. R. 468.

77. Completion of an obstruction by a landlord before service of an injunction by tenant will not avail the former. Stevens v. Salomon, 39 Misc. [N. Y.] 159.

78. One seeking to restrain pollution of a water course will not be refused relief because pollution had flowed from his land into the same stream where he was ignorant of such condition before suit and expressed an intention to remove the cause immediately. West Arlington Imp. Co. v. Mt. Hope Retreat [Md.] 54 Atl. 982.

79. Pittsburg, C. C. & St. L. R. Co. v. Crothersville, 159 Ind. 330. That others than defendant contributed to the pollution of a stream is no defense to injunction. West Arlington Imp. Co. v. Mt. Hope Retreat [Md.] 54 Atl. 982.

80. Hodge v. U. S. Steel Corp., 64 N. J. Eq. 111.

81. That he is a member of an unlawful trust combination will not prevent his restraining infringement of his patent. General Elec. Co. v. Wise, 119 Fed. 922. Misconduct of complainant will not prevent relief unless it relates to the subject matter of his suit. Kinner v. Lake Shore & M. S. R. Co. [Ohio] 69 N. E. 614.

82. Dobleman v. Gately, 64 N. J. Eq. 223.

83. Nat. Phonograph Co. v. Schlegel, 117 Fed. 624.

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fendant may thereby incidentally be compelled to perform some act, and though a mandatory injunction cannot be granted.[84] Rights under invalid contracts will not be protected.[85]

Grant or refusal of the application rests in the sound discretion of the court,[86] and a second application after refusal of the first must be made on newly discovered grounds which could not have been ascertained by diligence.[87] A second injunction based on one previously granted will not be allowed on petition of one who claims succession to complainant's rights.[88]

§ 2. *Who and what may be enjoined. A. In general.*[89]—Injunction will not lie to enforce a forfeiture.[90] All persons connected with the act complained of are properly included in the injunction.[91] A mandatory injunction will issue to remove an obstruction from a public highway or street.[92] An injunction will not lie against maintenance of a dram shop, where the grounds for relief are of record before the excise commissioner, and may be reviewed on certiorari and are such that his finding prevents further review.[93] A preliminary injunction will lie at the suit of the United States to restrain pasturage of sheep on a forest reservation in violation of regulations prescribed by the interior department, where pasturage will result in irreparable injury.[94]

(§ 2) *B. Actions or proceedings.*—Where one court has properly acquired jurisdiction, proceedings in another court interfering with such jurisdiction may be restrained.[95] An executory order of a federal court cannot be enforced by any

84. Macon, D. & S. R. Co. v. Graham, 117 Ga. 555.

85. Dealings in board of trade options. Board of Trade v. Donovan Commission Co., 121 Fed. 1012. Protection of quotations for dealing in options. Board of Trade v. Kinsey, 125 Fed. 72; Christie G. & S. Co. v. Board of Trade [C. C. A.] 125 Fed. 661.

86. Maloney v. King, 27 Mont. 428, 71 Pac. 469; Whitson v. Columbia Phonograph Co., 18 App. D. C. 565; Kewanee v. Otley, 204 Ill. 402. Where the facts are in issue. O'Neill Mfg. Co. v. Woodley [Ga.] 45 S. E. 684. Preliminary or provisional injunction. Mitchell v. Colo. F. & I. Co., 117 Fed. 723. A temporary injunction may be granted though equities alleged are denied. Fuller v. Schutz, 88 Minn. 372. Removal and abatement of nuisance. Shroyer v. Campbell [Ind. App.] 67 N. E. 193. On conflicting evidence it may be refused (Leath v. Hinson, 117 Ga. 589; Chickering v. Chickering [C. C. A.] 120 Fed. 69) as to material questions (Blats v. Blats, 117 Ga. 165). A law providing that injunction "must" issue in certain cases will still allow discretion in other instances [Code Prac. art. 298]. Buck v. Massie, 109 La. 776.

87. Conwell v. Neal [Ga.] 45 S. E. 910.

88. Leverich v. Mobile, 122 Fed. 549.

Cf. Former Adjudication, 2 Curr. Law, 60.

89. **Construction of statutes:** A statute allowing an injunction in certain cases cannot be construed to mean that it will be given where injury can be fully compensated for in damages and no multiplicity of suits will result [Burns' Rev. St. 1901, § 1162]. Wabash R. Co. v. Engleman, 160 Ind. 329.

90. Hodges v. Buell [Mich.] 95 N. W. 1078.

91. Nat. Mech. Directory Co. v. Polk [C. C. A.] 121 Fed. 742.

92. Clifton v. Weston [W. Va.] 46 S. E. 360. **At suit of a municipal corporation** to compel removal of an obstruction of a public street without opportunity being given for its removal, after an order has been made (Rev. St. 1898, § 1330) and served upon him requiring its removal. Wauwatosa v. Dreutzer, 116 Wis. 117.

93. Cooper v. Hunt [Mo. App.] 77 S. W. 483.

94. By destruction of undergrowth, timber, grass and water supply. Dastervignes v. United States [C. C. A.] 122 Fed. 30.

95. **Federal and state courts:** A federal court may enjoin proceedings in a state court to protect its own previously acquired jurisdiction [Rev. St. U. S. § 720]. Stewart v. Wis. Cent. R. Co., 117 Fed. 782; Union L. Ins. Co. v. Riggs, 123 Fed. 312. A court of bankruptcy may enjoin sale of part of bankrupt's estate, conveyed to another creditor under a deed amounting in equity to a mortgage, pending an adjudication of the question whether such transfer is usurious [Code Ga. § 2878]. In re Miller, 118 Fed. 360. Pending bankruptcy proceedings, the bankruptcy court may restrain sale of merchandise under a mortgage by the bankrupt more than four months before bankruptcy, where its value exceeds greatly the amount of the mortgages and where their effect, though valid, as to covering old and new goods may be questioned. In re Ball, 118 Fed. 672. Sufficiency of evidence to entitle creditors in involuntary bankruptcy proceedings to restrain the attaching creditor, the sheriff and the purchaser from selling or disposing of attached property pending the bankruptcy proceeding. In re Goldberg, 117 Fed. 692. Where an injunction restraining plaintiff in a suit in the federal courts for infringement of a patent from assigning or releasing his claim, was secured in a state court by a party to the suit, a counter injunction asked by plaintiff in the federal court will be refused because of comity between the courts and confusion from conflicting decrees. Green v. Porter, 123 Fed. 351.

Equity and law courts: Where equity ap-

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other court by restraining its violation.[96] Prejudice or bias of the tribunal before which an action or proceeding is pending is insufficient.[97] A justice will not be restrained from doing a certain thing as to which he has jurisdiction.[98]

An action or proceeding will not be restrained where an adequate remedy is afforded by appeal or writ of error,[99] or by defense in the action or proceeding,[1]

pears in the petition and equity has taken jurisdiction, the trial of a case at law between the same parties relating to the same realty will be restrained so that the whole matter may be tried in one proceeding in equity. Goodwynne v. Bellerby, 116 Ga. 901.

Courts of different states: Where it appears that a suit brought in one state was probably for the purpose of depriving plaintiff of the use of certain evidence in a prior suit against him by the same person in another state and that such act would injure his rights, injunction will issue in the state of the first suit to restrain prosecution of the latter suit pending determination in the first suit, especially where plaintiff is required to give a bond to pay any judgment recovered in the first suit. Locomobile Co. v. American Bridge Co., 80 App. Div. [N. Y.] 44.

96. Order by federal district court in condemnation of right of way for government canal across a highway is executory, until the bridge has been constructed under plans and specifications given. Woods v. Root [C. C. A.] 123 Fed. 402.

97. Injunction will not lie to restrain prosecution of plaintiff's employes for an alleged trespass, on allegations charging defendant, a justice, with conspiring to unlawfully issue warrants of arrest. Louisville & N. R. Co. v. Barrall [Ky.] 77 S. W. 1117. Summary proceedings against a tenant will not be restrained on allegations that defendants have elected justices friendly to themselves and have summoned jurors of the same sort, so that complainant believes he cannot have a fair trial. Denny v. Fronheiser [Pa.] 56 Atl. 406.

98. Klinesmith v. Van Bramer, 104 Ill. App. 384.

99. Conclusions of the court after obtaining jurisdiction, however erroneous, will not authorize an injunction restraining a proceeding under the order for creation of a drainage district, there being a remedy by appeal. Stone v. Little Yellow Drainage Dist. [Wis.] 95 N. W. 405. There being a remedy by appeal from an order of the probate court approving an appointment of a guardian will not be restrained. White v. Strong, 75 Conn. 308. An injunction at suit of certain defendants in a justice's judgment, and certain sureties on an appeal bond, on the ground that plaintiff by written agreement outside the record had covenanted not to levy execution against them if they would not defend in the action, should not be denied because they had an adequate remedy by defense on appeal. Crook v. Lipscomb, 30 Tex. Civ. App. 567. Collection of a default judgment will not be restrained because the pleadings show the action to have been barred by limitations, since such objection may be raised on appeal or writ of error. Patterson v. Yancey, 97 Mo. App. 681. An injunction will not lie on the ground that damages have been established from an improper basis. Jager v. New York, 75 App. Div. [N. Y.] 258. The enforcement of an order restraining maintenance of a nuisance by a house owner under the tenement house act, will be stayed pending the hearing of an appeal taken from the determination of the constitutionality of the act [Laws 1901, p. 889, c. 334]. Tenement House Department v. Moeschen, 41 Misc. [N. Y.] 446.

1. Summary proceedings before a justice to dispossess a tenant on the ground that his permit had expired, will not be restrained because the tenant denies such expiration and claims a renewal of the lease, since he may raise such question on the trial. Weber v. Rogers, 41 Misc. [N. Y.] 662. An action for rent will not be restrained because of invalidity of the lease in that the property is used for gambling purposes though the lease is under seal, the remedy being by defense to the action. Slater v. Schwegler [N. J. Eq.] 54 Atl. 937. Where an action at law was brought against attorneys in a prior suit to recover moneys retained by them as fees, they were not entitled to restrain the suit and have their fees ascertained in equity, since there was an adequate remedy at law in the action sought to be enjoined. German v. Browne, 137 Ala. 429. Where a controversy between the parties concerning rates of common carriers is pending before the interstate commerce commission and no danger of irreparable injury appears, the enforcement of the rates will not be restrained in advance of the action of the commission. Tift v. Southern R. Co., 123 Fed. 789. A railroad company will not be restrained from prosecuting proceedings to condemn land for a right of way. Holly Shelter R. Co. v. Newton, 133 N. C. 132, 136. That a tenant relied upon the landlord's promise to extend the lease and had not given the written notice required by it and that the landlord had broken his promise, will not warrant an injunction against summary proceedings to eject the tenant under act March 21, 1772. Denny v. Fronheiser [Pa.] 56 Atl. 406. An injunction will not issue to restrain a corporation from building on land which it is proceeding to condemn since its right to exercise the power of eminent domain must be determined in the condemnation proceedings. Boyd v. Logansport R. & N. T. Co. [Ind.] 69 N. E. 398. Where a grantee of a homestead from a husband after he had left his wife, by a deed in which the wife did not join, brought ejectment the wife cannot restrain the action because of insanity of husband when the deed was made, since she may make that defense in the ejectment. Larson v. Larson [Miss.] 33 So. 717. The supreme court cannot grant an injunction before entry of final order in summary proceedings for dispossession by a landlord staying the proceedings pending a suit in that court for an accounting of rents where the denial of rent due because of payments of interest and water rent liens on the property as authorized by the lease were properly pleaded as a de-

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or by another action or proceeding,[2] or where complainant already has adequate relief.[3] Failure of complainant to avail himself of his proper legal remedy by appeal or defense will prevent relief,[4] unless such failure is excused by proper circumstances.[5] It must clearly appear that the action or proceeding has been, or will be, brought.[6]

fense in the proceedings and the tenant asked an accounting [Code Civ. Proc. §§ 2244, 2265]. Natkins v. Wetterer, 76 App. Div. [N. Y.] 93.

2. Execution issued on a void judgment will not be restrained. Howlett v. Turner, 93 Mo. App. 20. Execution sale of land will not be restrained where there is an adequate legal remedy to protect title. Hahn v. Willis [Tex. Civ. App.] 73 S. W. 1084. Injunction will not lie to restrain an execution sale to enforce a pending assessment, there being a complete statutory remedy by an affidavit of illegality. Rice v. Macon, 117 Ga. 401. Where discovery is allowed by statute in suits at law prosecution of several actions for injury to realty will not be restrained because defendant will require discovery as to the title and interest of each complainant [Shannon's Code, § 5684]. Ducktown S., C. & I. Co. v. Fain, 109 Tenn. 56. If ordinary condemnation proceedings and payment of damages in advance will not sufficiently compensate an owner for property taken for public use, he will be left to his remedy at law and cannot restrain the proceedings unless insolvency or some other special circumstance appears. Bronson v. Albion Tel. Co. [Neb.] 93 N. W. 201, 60 L. R. A. 426. Where defendant in a suit alleges no facts other than a demand for money judgment, so as to entitle him to an injunction and the motion papers impute no act which if done pending the action would affect his judgment, the injunction is improperly granted though he is entitled to such a remedy in civil action for purpose of a counter-claim. Forman v. Healey, 11 N. D. 563. An injunction will not lie to restrain the sale of lands under execution against an agent of plaintiffs, where the alleged title by limitations founded on his possession, which if adverse to them would have invested him with title, and such allegations are contradicted by other allegations of the petitioner showing that they were minors until less than four years before beginning the suit, their remedy being trespass to try title against the purchaser. Brown v. Ikard [Tex. Civ. App.] 77 S. W. 967. Where it is alleged in a bill for injunction that many plaintiffs in as many original suits unlawfully combined under an agreement to institute such suits which were begun at about the same time for the purpose of harassing complainant, agreeing with attorneys for contingent fees, the particular terms of such agreements being unknown to complainant so that it could not prove them except by discovery of the defendants founded on the right to relieve on discovery and not the unlawful combination so that the bill was insufficient, there being a legal remedy for discovery. Ducktown S., C. & I. Co. v. Fain, 109 Tenn. 56. Service of a writ of ouster of ejectment will not be restrained when it appears from the face of the petition for injunction, that petitioners as defendants in the ejectment are claiming under condemnation proceedings, brought after the final ejectment judgment, which were void under the statute for failure of notice to the land owner. Board of Education v. Aldredge [Okl.] 73 Pac. 1104.

3. Where suits which stock holders are seeking to enjoin a corporation from dismissing, are either dismissed at the time or are enjoined by the court in which they are pending from being dismissed, or have been decided favorably to plaintiffs, and officers sought to be removed have resigned, the injunction is properly refused. Hallenborg v. Cobre Grande Copper Co. [Ariz.] 74 Pac. 1052.

4. Execution of a judgment of dispossession of a tenant will not be restrained where the latter has not appealed. Featherston v. Carr [N. C.] 46 S. E. 15. Collection of a judgment will not be restrained because of a defense which might have been made at the trial, unless complainant shows that he was prevented from making such defense by threat or accident and could not accomplish it by reasonable care or diligence. Klinesmith v. Van Bramer, 104 Ill. App. 384. Inability of a party and his attorney to be present at trial to make defense, because of the prevalence of smallpox, and refusal of the other party with knowledge thereof to postpone, will not entitle the first to an injunction against the judgment, since another attorney should have been procured to attend and ask for a continuance, if the testimony of the absent party was necessary, and on failure thereof to request a new trial and this being refused to take an appeal. Aultman, Miller & Co. v. Higbee [Tex. Civ. App.] 74 S. W. 955.

5. Where a judgment defendant first learns of the defense to the action after trial, collection of the judgment will be restrained. Polarek v. Gordon, 102 Ill. App. 356. Where a judgment was rendered by a justice against a non-resident plaintiff who had neither an office nor agent in the state, without service of process other than statutory notice to a non-resident defendant, it may be restrained at suit of plaintiff without his showing a valid defense to the action. August Kern Barber Supply Co. v. Freeze [Tex.] 74 S. W. 303. Where defendant was absent from home when summons was served upon him by leaving a copy at his usual place of residence and did not return for more than a month after such service and fails to find the copy of the writ and has no notice of the pendency of the action or that judgment has been rendered against him until too late to make a defense, he is not guilty of laches so as to prevent an injunction against the judgment. Strowbridge v. Miller [Neb.] 94 N. W. 825.

6. Equitable owners of title to land whose trustees stand ready to convey and threaten no breach of trust, cannot restrain the sale of the trust property under an execution against a stranger to the paper title though their title rests in parol. Brown v. Ikard [Tex. Civ. App.] 77 S. W. 967. An agreement by the holder of a note that he will

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Complainant must show such equitable rights or legal title as will warrant protection.[7] Peculiar equitable grounds, such as irreparable injury,[8] multiplicity of suits,[9] fraud,[10] or insolvency of the other party,[11] or inadequacy of the allow-

release certain parties from liability thereon or on a judgment rendered against them, and that no execution shall issue against their property, will not warrant injunction against the judgment and execution until levy is actually made on the property. Crook v. Lipscomb, 30 Tex. Civ. App. 567.

7. That the judgment debtor was not served with summons will not be ground for restraining execution where he fails to allege or prove a defense or other equity. Foust v. Warren [Tex. Civ. App.] 72 S. W. 404. A mere threat to take legal proceedings, is not sufficient to prevent application of the rule that laches will deprive complainant of his right to an injunction. Holt v. Parsons [Ga.] 45 S. E. 690. Foreclosure of a mortgage by sureties will be restrained on an allegation that time of payment was extended without their consent thereby discharging them until the question of such extension is determined. Smith v. Parker, 131 N. C. 470. An action by the payee of a note will not be restrained at instance of the maker, because the payee on being tendered the amount of the note with condition that the maker should deliver a bond for title in which the note was described, failed to execute and deliver such conveyance as was called for in the bond. Morris v. Continental Ins. Co., 116 Ga. 53. An injunction sought by an administrator against interference of another in a sale of personalty, will not be granted on a prayer asking that the sale be allowed to proceed and protection be given to the officers of the sale and the bidders in taking the property bought, where it appears from the bill itself that the title of the property is in question. Crossland v. Crossland, 53 W. Va. 108. A petition by a tenant to enjoin execution of a warrant of dispossession, will not lie where it alleges merely that plaintiff was unable to give the bond and security required by the statute, and that she was not a tenant but the owner of the premises, where uncontradicted evidence shows a contract of tenancy. Johnson v. Thrower, 117 Ga. 1007. Where an order appointing a receiver and directing him to take possession of the property of a corporation at once was affirmed on appeal, his authority being suspended only until final determination of such appeal, the appellate court will not restrain him from taking possession pending appeal by the corporation from judgment in the main action, it not being essential to the appeal [Burns' Rev. St. 1901, § 1295]. Chicago & S. E. R. Co. v. Kenney [Ind. App.] 68 N. E. 20.

8. Where a criminal prosecution is threatened to prevent the exercise of civil rights conferred by law, injunction will lie to prevent injury to property or business endangered. Ga. R. & B. Co. v. Atlanta [Ga.] 45 S. E. 256. Summary proceedings before a justice to dispossess a tenant on the ground that his permit had expired, will be restrained where the tenant claims a renewal of the lease and it appears by the complaint and affidavits that his life would be endangered by removal from the premises. Weber v. Rogers, 41 Misc. [N. Y.] 662. An injunction will lie to restrain execution of a removal warrant against a lessee where jurisdiction was not acquired because of defective pleadings and it appeared that the term had not expired and that irreparable injury would result to the lessee [Code Civ. Proc. § 2265]. Kazis v. Loft, 81 App. Div. [N. Y.] 636. A party to a contract to buy securities on margin, who has reasonable cause to believe that the other party has no intention to perform by actual receipt of securities and payment, may have jurisdiction to restrain foreclosure of a mortgage given and compel surrender of note given as incidental to his remedy by action to recover payments made or value delivered [Sts. 1890, c. 437, § 2]. Rice v. Winslow, 182 Mass. 273.

9. Wright v. Superior Ct. of Santa Clara County, 139 Cal. 469, 73 Pac. 145. A judgment creditor will be restrained from bringing a multiplicity of garnishment proceedings against the wages of laborers, mechanics and clerks absolutely exempt by law from process. Siever v. Union Pac. R. Co. [Neb.] 93 N. W. 943. Where plaintiffs had recovered judgment before a justice for possession of leased premises and for rents, and on appeal to the superior court it clearly appears from the record that all matters in dispute can be settled in the pending action, an injunction is properly granted restraining plaintiffs from prosecuting monthly suits for rent where plaintiff will not be injured by such injunction, defendants having given a bond securing rents and damages. Featherstone v. Carr, 132 N. C. 800. An injunction to restrain execution on a judgment in an action by a lessor, a married woman, to recover the premises from an assignee of the lessee at the end of a two-year term, though privilege of renewal to five years was given, on ground of invalidity of the lease for failure of the husband to execute as required by statute, will not lie within the rule of a former injunction secured by the assignee to restrain her monthly suits for rent pending his appeal in an action by her for back rent as vexatious litigation where he had given sufficient statutory bond for her protection on the appeal. Featherston v. Carr [N. C.] 46 S. E. 15.

10. An order of the probate court directing sale of realty obtained by fraud and without notice to the aggrieved party, will be restrained in execution. Demaris v. Barker [Wash.] 74 Pac. 362.

11. Collection of judgment will be restrained in order to enforce set-off where judgment creditor is insolvent (Commercial State Bank v. Ketchum [Neb.] 96 N. W. 614) or to establish a counterclaim (Norton v. Wochler [Tex. Civ. App.] 72 S. W. 1025). Where a bank was hopelessly insolvent when it received drafts as a collecting agent, an action by the receiver of the bank to restrain the prosecution of an action in the court of another state whereby the collection of assets of the bank which passed to him as receiver is prevented or interfered with, is well founded. Davis v. Butters Lumber Co., 132 N. C. 233.

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able legal remedy,[12] are sufficient. Plaintiff's failure to pay costs on voluntary nonsuit will not give the right to restrain his subsequent suit.[13] Proceedings to reach property exempt by law,[14] or in another state to reach property or credits exempt by laws of the debtor's domicile, will be restrained.[15] Enforcement of expired liens will be prevented.[16] Application of the principles to certain particular cases will be found in the footnotes.[17]

Persons not parties to an action cannot restrain it,[18] nor will injunction issue

12. Where a receiver seeks an injunction to prevent a resident creditor from suing the corporation, for which the receiver had been appointed in a foreign state, there is no adequate remedy at law. Davis v. Butters Lumber Co., 132 N. C. 233. A suit having been commenced to cancel complainant's stock subscription and to recover the amount paid thereon, an action at law in another federal court subsequently brought on a subscription, where a full and adequate remedy to complainant cannot be afforded, will be restrained, though a third suit is pending in the state court to wind up the corporate affairs. Monumental Sav. Ass'n v. Fentress, 125 Fed. 812. The collection of a liquor tax may be restrained, where no adequate remedy at law exists in favor of the tax payer and he is compelled under the laws of a certain state to submit to the decision of a special tribunal from which there is no appeal and can only recover back his taxes after payment under protest by separate actions against the municipalities among whom it has been distributed and as to the state is entirely without remedy. Pyle v. Brenneman [C. C. A.] 122 Fed. 787. Where it appears in an equitable proceeding that the sheriff is about to sell land of great value in bulk under a mortgage and general execution in favor of the same plaintiff, and that it will not bring its full value, thus leaving unsecured creditors without means of realizing on their claims, and that it might be sold separately without damage to plaintiff and to the benefit of such creditors, an injunction may be issued at their suit to restrain the sale. Reynolds, etc., Mortg. Co. v. Kingsberry [Ga.] 45 S. E. 235. Since scire facias on forfeited recognizance is to be regarded as original process in a special proceeding, the validity of the proceedings for forfeiture of bail of a non-resident of one state indicted for conspiracy in the federal district court of another state, is sufficiently doubtful, where the scire facias issuing on the bail bond was never personally served on the debtor to justify the federal circuit court in another state from restraining, pendente lite, its marshal from enforcing execution on the bail against property located within the district. Kirk v. U. S., 124 Fed. 324.

13. Where a non-suit was taken by plaintiff, costs being given to defendant, and afterward plaintiff commenced another action for the same purpose in another county, the court in which the latter action was pending could stay further proceedings until the costs in the first action were paid by plaintiff so that injunction would not lie in the court of the first action to restrain the second action without the payment of such costs. Wabash R. Co. v. Sweet [Mo. App.] 77 S. W. 123.

14. Foreclosure of a chattel crop mortgage executed by the husband alone on the property belonging to him and exempt from execution will be restrained. Kindall v. Lincoln H. & I. Co. [Idaho] 70 Pac. 1056.

15. A creditor living in the same state with his debtor will be restrained from prosecuting an action in another state to evade exemption laws of the first state. Biggs v. Colby [Ind. T.] 69 S. W. 910; Margarum v. Moon, 63 N. J. Eq. 586. An employe may restrain his creditor who has assigned his claim to a non-resident to enable attachment of wages in a foreign jurisdiction from prosecution of suit in such jurisdiction. Galbraith v. Rutter, 20 Pa. Super. Ct. 554.

16. Sale under a decree foreclosing a mechanic's lien, may be restrained at the suit of mortgagees of the property who were not made parties to the action to enforce the lien, where the statutory period for enforcement has expired. Martin v. Berry, 159 Ind. 566.

17. Enforcement of a common law judgment may be enjoined (Brooks v. Twitchell, 182 Mass. 443) and summary proceedings to eject a lessee—Act March 21, 1772 (Denny v. Fronheiser [Pa.] 56 Atl. 406). An injunction will not lie to restrain an action against a corporation where the court had no authority to appoint a receiver for the corporation. Zeltner v. Henry Zeltner Brew. Co., 79 App. Div. [N. Y.] 136. In an action for rescission of an executed contract for the sale of certain goods, plaintiff cannot, by admitting in his complaint liability for other goods, restrain an independent action by defendant to recover for the latter. Kerngood v. Pond, 84 App. Div. [N. Y.] 227. An execution of a warrant of dispossession in summary proceedings by a landlord will be restrained where before issuance he refused the tender of rent and costs made according to statute by the tenant. Asbyll v. Haims, 38 Misc. [N. Y.] 578. Advertisement and preparation for sale under a power in a security deed is not a pending proceeding which may be restrained by the superior court of the county where the land is and the sale is to be made where the grantee resides in another county [Civ. Code 1895, § 4950]. Meeks v. Roan, 117 Ga. 865. Where attorneys claiming fees from non-resident clients omitted to demand them by bill of items or otherwise before bringing a foreign attachment against the clients and to notify the clients of such attachment in which they made no defense, the clients are entitled to restrain sale or other proceedings under attachment judgment until opportunity is given to defend on the merits. Truitt v. Darnell [N. J. Eq.] 55 Atl. 692.

18. Complainants not parties to a suit to recover possession of land which they had sold to defendants in the suit, were not entitled to restrain plaintiff in such suit from

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against persons whose interest in the proceeding sought to be restrained has ceased.[19] A bill to restrain a judgment will not be viewed so strictly where defendant is an administrator, without personal knowledge of the matter in litigation.[20]

(§ 2) *C. Acts of public or municipal bodies or officers.*—Acts merely ministerial in character will not be enjoined.[21] An individual cannot ask restraint to protect public rights unless he shows special injury to himself.[22] Protection of public rights regardless of personal motive is sufficient ground for restraint of corporate acts by a taxpayer.[23] A railroad company may restrain enforcement of a proposed tariff schedule where it appears that the returns thereof would result in taking company property without due process of law.[24]

Organization or alteration of municipalities.—Organization of a drainage district will not be prevented where complainant could have defended in the proceedings,[25] but otherwise as to arbitrary attempts to alter a school district by county superintendent.[26] It must appear, in such a case, that restraint is necessary to preserve rights.[27]

Exercise of police power; acts of police officers.—Enforcement by a city under a void revocation of a permit to remove a building within fire limits,[28] or wrongful interference by city officers with repair of a building originally lawfully constructed and damaged by fire, will be prevented.[29] Where the removal of water mains and fire hydrants by a city was determined to be for the public welfare, one private consumer will not be entitled to injunction, though his property is

prosecuting or enforcing a judgment for his possession. Hooper v. Birchfield [Ala.] 35 So. 351.

19. An injunction will not issue in favor of the debtor to restrain his creditor residing in the same state from attaching credits due in another by the laws of the state where they live, where it appears that the creditor had assigned the claim to the plaintiff in the foreign proceedings, since the creditor thereby lost control of such proceedings. Margarum v. Moon, 63 N. J. Eq. 586.

20. Polarek v. Gordon, 102 Ill. App. 356.

21. Selection of newspaper to publish result of local option election. Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766. Publication by secretary of state of proposed constitutional amendments. People v. Mills, 30 Colo. 262, 70 Pac. 322. Act of county commissioner's court in declaring and publishing result of election is ministerial and cannot be restrained by federal court [U. S. Rev. St. § 720]. August Busch & Co. v. Webb, 122 Fed. 655. Letting contracts. Tanner v. Nelson, 25 Utah, 226, 70 Pac. 984.

22. Attempt to restrain persons from acting as common council until right to so act is determined. Landes v. Walls, 160 Ind. 216. Allowance of municipal contracts. Rand, etc., Co. v. Hartranft, 29 Wash. 591, 70 Pac. 77; Wilkins v. Chicago, etc., R. Co. [Tenn.] 75 S. W. 1026. Use of public auditorium. Amusement Syndicate Co. v. Topeka [Kan.] 74 Pac. 606. A bill to restrain city authorities from changing the use of a building from an English German school to a colored high school, filed by complainants as tax payers and alleging injury to all property in the city by the change, but failing to allege that complainant's property was in the immediate vicinity of the building or would suffer special injury by the change shows no such special interest distinct from that of the general public. Davidson v. City Council of Baltimore, 96 Md. 509.

23. Rev. St. § 1778. Raynolds v. Cleveland, 24 Ohio Circ. R. 215.

24. Reduction of earnings below amount of operating expenses. Wallace v. Ark. Cent. R. Co. [C. C. A.] 118 Fed. 422. A railroad company whose rates are reasonable and not discriminative, is entitled to a preliminary injunction against enforcement of a reduction of rates on a prima facie showing that for many years it has earned much less than the legal rate of interest in the locality where its road is situated and has given a bond to indemnify all persons injured by the issuance of the injunction. Louisville & N. R. Co. v. Brown, 123 Fed. 946.

25. Where property owners had notice of a proceeding for establishment and opportunity to appear to try the questions involved therein, there was due process of law. Stone v. Little Yellow Drainage Dist. [Wis.] 95 N. W. 405.

26. School Dist. No. 44 v. Turner [Okl.] 73 Pac. 952.

27. A tax payer and resident of the part of a certain school district which was afterward excluded from the district by subsequent statute, cannot enjoin the old board of education from transferring school property of such part to the new board, and the new board from performing their duties as to such property, because of the unconstitutionality of the later law, where no irreparable injury appears and the injunction is not necessary to preserve the status of the parties [Laws 1863, c. 360, modified by Laws 1902, c. 494]. Johnson v. Kingston Board of Education, 38 Misc. [N. Y.] 593.

28. Lerch v. Duluth, 88 Minn. 295.

29. Roanoke v. Bolling [Va.] 43 S. E. 343.

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thereby rendered practically valueless.[30] The police department will not be restrained from exhibiting or publishing the photograph of a person supposed to have committed a crime on the ground that a trespass was committed against him in compelling him to sit for the photograph; nor will a mandatory injunction issue to compel destruction or surrender of the negative and records of his Bertillon measurements.[31]

Exercise of eminent domain.—The taking of private property for public purposes without compensation,[32] grant or proper proceedings,[33] or interference in property rights,[34] will be restrained, but not if complainant had or has proper redress at law,[35] or has acquiesced in the use.[36] The owner of superior rights to waters of a stream in Nebraska, as against one appropriating them, cannot restrain diversion of storm or flood waters for a use decreed beneficial by statute, no injury being shown.[37]

Issuance of municipal bonds.—Issuance and collection of taxes for payment of municipal bonds may be restrained because they exceed the statutory limit of indebtedness,[38] but issuance will not be prevented because of irregular appointment of bond trustees.[39] Where all municipal bonds issued under statutes must be executed and sealed in a certain manner, an innocent holder may restrain a

30. Asher v. Hutchinson W., L. & P. Co., 66 Kan. 496, 71 Pac. 813.

31. Owen v. Partridge, 40 Misc. [N. Y.] 415.

32. Though there is a controversy as to the title or boundary of the land. Foley v. Doddridge County Ct. [W. Va.] 46 S. E. 246. One in exclusive possession of land under a contract to purchase who has paid a considerable portion of the price may restrain a city and its contractor from taking such land for a public street until proper proceedings are had and damages paid or tendered. Olson v. Seattle, 30 Wash. 687, 71 Pac. 201. Where several years after conveyance of streets and alleys in a certain addition by the county to a city for public use, which included land occupied adversely by plaintiff's predecessors in title, the city requested an owner to recognize its right to the land and he refused asserting title in himself and erected valuable buildings on the land, the city making no claim until years later the opening of an alley by the city requiring the destruction of such building, is properly enjoined. Crigler v. New Mexico [Mo. App.] 74 S. W. 384. An estate by curtesy will entitle plaintiff to restrain opening of streets through lands. Schooling v. Harrisburg, 42 Or. 494, 71 Pac. 605.

33. A city may be restrained from taking a strip of land belonging to a private owner of a public street without prescription, dedication, or condemnation. Baya v. Lake City [Fla.] 33 So. 400. That equity will not interfere with the enforcement of criminal laws and neither aid nor obstruct criminal courts in the exercise of their jurisdiction, will not deprive it of power to restrain a continuing injury to property or business by taking property for public use without dedication or other grant or compensation. Ga. R. & B. Co. v. Atlanta [Ga.] 45 S. E. 256.

34. An owner of property abutting on a space designated in a plat duly recorded as "public space," may have an injunction against interference with his interest in such space, though he is not entitled to a title in fee. Lunkenheimer Co. v. Cincinnati, 23 Ohio Circ. R. 617.

35. Injunction will not lie to restrain dock commissioners of Greater New York from unauthorized use of land taken for a street, until after construction of the street is begun, where they had unreasonably delayed such construction, the remedy for such neglect being mandamus to compel the laying out. Coleman v. New York, 173 N. Y. 612. Where a grantor or his assigns may recover at law the value of any rights of property or otherwise because of the taking of possession of a pier by a city for public use, injunction will not lie. Knickerbocker Ice Co. v. New York, 85 App. Div. [N. Y.] 530. The city will not be prevented from acquiring an easement in a creek, where the complainant was a party to the appraisal in condemnation proceedings to acquire such easement and made no objection to jurisdiction or the rights of the city as to the easement, or as to legality of laws or ordinances under which it proceeded [Code Civ. Proc. § 1357 and Rochester City Charter]. Hooker v. Rochester, 172 N. Y. 665.

36. An injunction will not issue to restrain a city from using a street until passage of an ordinance vacating an alley which is alleged to be part of the consideration for permission to take plaintiff's land for the street, where the judgment condemning the land for the street became final with his consent, and after commencement of the suit and for eight years before trial the street had been opened and used and plaintiff made no effort to prevent such use but paid improvement assessments thereon. Bigelow v. Los Angeles [Cal.] 75 Pac. 111.

37. Crawford Co. v. Hathaway [Neb.] 93 N. W. 781.

38. By county commissioners to pay for construction of the highway in a township, their action not being judicial in character [Acts 1899, p. 26]. Owen County Com'rs v. Spangler, 159 Ind. 575.

39. Givens v. Hillsborough County [Fla.] 35 So. 88.

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city issuing bonds as to which a mistake was made by officers in the use of the corporate seal, from setting up absence of its corporate seal as defense to an action on the bonds.[40]

Allowance of municipal claims or awards.[41]—A taxpayer may restrain payment of illegal municipal claims without a showing of special injury.[42] A school superintendent is not authorized by statute in Indiana to restrain township trustees from paying a teacher for services from school revenue.[43] A complaint by a taxpayer to restrain payment of an award by the county board against the county on certain conditions was not insufficient for failure to state a cause of action against the claimant in that she would reject the award.[44]

Granting licenses or franchises.—Invalidity of a privilege or franchise by a municipality, amounting to a contract, cannot be ground to restrain the grantee from acting because of lack of power in the municipality or forfeiture by the grantee by noncompliance with conditions,[45] but the holders of a franchise may restrain interference by the city with their rights thereunder.[46] Certiorari, not injunction, is the proper method to test validity of a dram-shop license, where the facts necessary to such determination appear of record, unless there is fraud.[47] Mandatory injunction will not issue to compel a board of pharmacy to reject the application of one seeking registration as a pharmacist.[48] A promise by an applicant for a liquor license to plaintiff, to withdraw the license, will not entitle plaintiff to restrain the excise commissioners in granting the license, where plaintiff was not led thereby to neglect to take any proceedings against its allowance.[49]

Assessment or collection of taxes.—Proceedings for assessment or collection of taxes will not generally be restrained at suit of a taxpayer in absence of fraud or spoliation,[50] or of jurisdiction of the taxing authorities,[51] or excess of statu-

40. Defiance v. Schmidt [C. C. A.] 123 Fed. 1.

41. **Sufficiency of facts to show fraudulent collusion** on the part of municipal officers in allowing invalid claims against the municipality to be prosecuted to judgment to justify taxpayers in seeking restraint of collection of the judgment. Balch v. Beach [Wis.] 95 N. W. 132.

42. Misappropriation of public funds or abuse of corporate powers by a municipality. Inge v. Public Works of Mobile, 135 Ala. 187. Payment of alleged illegal claims by a county. Rogers v. Westchester County Sup'rs, 77 App. Div. [N. Y.] 501. Any taxpayer of a school district may seek restraint of payment under a void contract by the board of school trustees. Nuckols v. Lyle [Idaho] 70 Pac. 401. Payment of an illegal award by a county board may be restrained at suit of a taxpayer, since after payment he would have no remedy by suit against the grantor and county treasurer. Kircher v. Pederson [Wis.] 93 N. W. 813. Where public officers by fraudulent collusion neglect their duties respecting taking of a judgment against the municipality for invalid claims, tax-payers acting seasonably may restrain collection of the judgment. Balch v. Beach [Wis.] 95 N. W. 132.

43. Burns' Rev. St. 1901, §§ 5903, 2911. McGregor v. State [Ind. App.] 68 N. E. 315.

44. The action was not against her but the county officers. Kircher v. Pederson [Wis.] 93 N. W. 813.

45. Contract with city for garbage cremation. Cal. Reduction Co. v. Sanitary Reduction Works [C. C. A.] 126 Fed. 29.

46. Where a city, after granting a telephone franchise for the use of the streets and construction and operation of the plant had begun, attempted to compel the removal of the poles and wires without lawful authority and during the life of the franchise, by an ordinance prohibiting extension or maintenance unless a franchise should be obtained by the company under penalty of a fine and by resolution requiring removal of the poles and wires and directing removal by the marshal after a certain day, the trustees in the trust deed from the company covering all the property and franchise may sue to protect the property by restraining unlawful interference by the city, they being entitled to assume that the directions of the city would be carried out. Old Colony Trust Co. v. Wichita, 123 Fed. 762.

47. Injunction against maintenance of dram shop. Cooper v. Hunt [Mo. App.] 77 S. W. 483.

48. The duties imposed on the board by Acts 1902, p. 276, c. 179, § 8, are discretionary and no fraud appeared. Henkel v. Millard [Md.] 54 Atl. 657.

49. Cooper v. Hunt [Mo. App.] 77 S. W. 483.

50. Because of excessiveness. Covington v. Shinkle, 25 Ky. L. R. 73, 74 S. W. 652. Where a board of equalization exercised discretion and judgment in the assessment of taxes though the judgment is erroneous. Cochise County v. Copper Queen Consol. Min. Co. [Ariz.] 71 Pac. 946.

51. Special assessment by village board. Bemis v. McCloud [Neb.] 97 N. W. 828;

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tory limit,[52] or overvaluation of property,[53] or exemption of property taxed.[54] Generally there is a remedy by objection or review in the proceedings,[55] or by payment and action for recovery,[56] or other proceeding.[57] Acquiescence in the proceedings will prevent relief.[58] One is estopped by the conduct of a predecessor in title which would result in a fraud if disregarded.[59] Collection of a tax will not be enjoined if all taxes sought to be enjoined are not invalid,[60] unless the valid portions are separable.[61] It must appear that the officer is threatening or seeking to levy.[62] A remedy given by the Ohio statute to enjoin illegal levy of tax assessment or collection may be enforced by the federal courts on their equity side.[63] Collection of taxes on national bank stock will not be restrained because no notice was given of assessment or because of over-assessment, before payment or at least tender of taxes due under complainant's own theory;[64] nor because of its assessment at actual value while realty is assessed at less value, though no other remedy exists.[65]

Matters pertaining to municipal contracts.[66]—Generally a private person must show special injury to prevent letting or execution of municipal contracts,[67] but

Wright v. Louisville & N. R. Co. [C. C. A.] 117 Fed. 1007. The federal government has no efficient remedy at law such as will prevent the restraint of unlawful taxation by a state of permanent improvements and personal property used in the cultivation of Indian lands. U. S. v. Rickert, 188 U. S. 432, 47 Law. Ed. 532.

52. Where county commissioners exceed the statutory limit of taxes by assessment for road construction, a person injured has no appeal under law giving a right of appeal from the commissioners' decisions where they are judicial in their nature since such decision is a matter of ministerial character [Acts 1899, p. 26, construed with Burns' Rev. St. 1901, § 7859]. Owen County Com'rs v. Spangler, 159 Ind. 575.

53. Arbitrary and oppressive over-valuation of property by board of equalization. Cochise County v. Copper Queen Consol. Min. Co. [Ariz.] 71 Pac. 946. A complaint asking restraint of extension of taxes is not demurrable for failing to state that relief had been sought from the county board of review where the question was primary valuation of property which was not within the statutory powers of the board [Acts 1891, p. 199 and Burns' Rev. St. 1901, § 8532]. Stephens v. Smith, 30 Ind. App. 120.

54. Levy of a tax on property donated and used solely for educational purposes. Linton v. Lucy Cobb Inst., 117 Ga. 678.

55. Where there is a remedy under statutes for review of tax assessment and for its recovery after payment, there is no danger of a multiplicity of suits. Ind. Mfg. Co. v. Koehne, 188 U. S. 681, 47 Law. Ed. 651. Collection of excess of taxes assessed against land for a public road which resulted from a mistake of the officers as to its extent, will not be restrained, the remedy being by correction of the mistake on certiorari. Lanning v. Chosen Freeholders of Mercer County, 64 N. J. Eq. 161. Transmission of a special assessment for a sewer to the county auditor, where the owner has ample remedy at law, if the assessment is illegal, by filing objections and trial at law in proceedings to collect the assessment [Gen. Laws 1901, c. 167, and Gen. St. 1894, § 1584]. Fajder v. Aitkin, 87 Minn. 445.

56. Fraud is insufficient to warrant injunction against collection of a personal property tax by a town. Nye v. Washburn, 125 Fed. 817.

57. A property owner cannot restrain village authorities from transmitting to the County Auditor a statement of the amount of a special assessment for sewer construction where he has an adequate remedy at law, if the assessment is equal in proceeds to enforce the improvements which have already been begun [Gen. Laws 1901, c. 167 construed with Gen. St. 1894, § 1584]. Kerr v. Waseca, 88 Minn. 191. Mere errors or excess in the valuation of property for taxation, or statutory injustice is capable of remedy at law. Cochise County v. Copper Queen Consol. Min. Co. [Ariz.] 71 Pac. 946.

58. A lot owner cannot restrain sale of her property for the amount due on a bond for street improvements where it appears that the property belonged to her husband during preliminary proceedings regarding the improvement and issuance of the bond, that the improvements were made at his request, that he made no appeal to the city council and did not object at any step of the proceedings but requested that certain of them be taken. Cummings v. Kearney [Cal.] 74 Pac. 759.

59. Cummings v. Kearney [Cal.] 74 Pac. 759.

60. Parkinson v. Jasper County Tel. Co. [Ind. App.] 67 N. E. 471.

61. A void increase in taxes is separable from the original assessment so that its extension may be enjoined. Cox v. Hawkins, 199 Ill. 68.

62. Smith v. Smith, 159 Ind. 388.

63. Lander v. Mercantile Nat. Bank [C. C. A.] 118 Fed. 785.

64. People's Nat. Bank v. Marye, 191 U. S. 272.

65. It will be presumed that the officers acted fairly where the valuation in the class is uniform. Mercantile Nat. Bank v. New York, 172 N. Y. 35.

66. Injunction protecting rights under contract for construction of Manhattan subway. McCabe v. Hunt, 40 Misc. [N. Y.] 466.

67. Property owners who have no property abutting on a street about to be closed under a contract with the city, have no such peculiar interest as will authorize them to restrain execution of the contract on the ground that it is not properly limited as to

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taxpayers may restrain the making or completion of such contracts for irregularity which will result in misapplication of public funds,[68] especially where the ground is protection of such funds,[69] but complainant must act seasonably,[70] and the acts must not be judicial in character,[71] and a showing of regularity will prevent restraint.[72] A contract will not be restrained where a popular vote is necessary to its validity.[73]

Matters pertaining to office and elections.—Injunction will not lie to prevent holding a public election authorized by law,[74] or the declaring and publishing of

time. Wilkins v. Chicago, etc., R. Co. [Tenn.] 75 S. W. 1026.

Publishing contracts: An injunction will not lie to restrain a county board from rejecting books adopted by the state board under contract with a certain publisher, in certain grades of schools, where it is not shown that the failure to use such books resulted in damage to the publisher. Rand, McNally & Co. v. Hartranft, 29 Wash. 591, 70 Pac. 77. A publisher is not entitled to restrain breach of a contract with the board of education by substitution of another text book, there being an adequate remedy at law. Attorney General v. Board of Education [Mich.] 95 N. W. 746.

68. Improper award of contract: Award of printing contract to newspaper whose bid was larger than that of another resulting from arbitrary will of the city council [Charter City of Seattle, § 31]. Puget Sound Pub. Co. v. Times Printing Co. [Wash.] 74 Pac. 802. Sufficiency of evidence to show favoritism in award of a municipal contract for sewers to warrant restricting levy and collection of special tax therefor. Grunewald v. Cedar Rapids, 118 Iowa, 222. Signing and delivering of a contract for street lighting may be restrained at suit of a tax payer because the proper course provided by charter has not been followed in awarding the contract, without waiting for performance in material respects. Schiffman v. St. Paul, 88 Minn. 43. Where work has begun under a contract awarded to one other than the lowest bidder when suit is commenced, injunction against further proceeding in the work is the only remedy, so that the contract may be set aside and referred back to the officials for proper proceedings [Rev. St. § 794]. Akron v. France, 24 Ohio Circ. R. 63.

Irregularities in performance: Where a municipal improvement is not being constructed according to the ordinance providing for it. Wells v. People, 201 Ill. 435. Performance of an illegal contract for a public improvement by a city may be restrained by a tax payer. Inge v. Board of Public Works, 135 Ala. 187. A tax payer may restrain the use of worthless materials by a contractor who had agreed with the board of supervisors to use certain materials in macadamizing a road, since its right to sue for damages on his bond was inadequate. Miller v. Bowers, 30 Ind. App. 116. Where an ordinance authorizing a corporation to furnish water to a city and its inhabitants is invalid because pledging the tax payer to sustain a private enterprise, the city may be restrained from receiving water and making payment from its revenues. Scott v. La Porte [Ind.] 68 N. E. 278. Unwarranted departures from a paving contract by which a city will be defrauded, will authorize issuance of injunction at suit of tax payers though the city is not bound to accept the work unless in accordance with the specifications, regardless of the fact that no objection was made by the city inspector. Central Bitulithic Pav. Co. v. Manistee Cir. Judge [Mich.] 92 N. W. 938. Since any substantial and material departure from specifications in a contract entered into with the lowest bidder will render it void, though it appears that only one bid was presented, the municipal authorities may be restrained by tax-payers from entering a contract so proposed to be modified without showing or alleging fraud or collusion or a prevention of bidding because of the terms in the specifications or the destruction of fair competition. Le Tourneau v. Hugo [Minn.] 97 N. W. 115.

69. A suit to prevent contractors from using worthless materials in constructing a road, where the contract called for a certain grade of material, and to prevent the supervisors from paying for such work improperly done, was for the purpose of preventing violation of the law and protecting public funds, rather than enforcement of a contract. Miller v. Bowers, 30 Ind. App. 116.

70. Where a contract between a city and a railroad company authorized by ordinance for the construction of elevated tracks, retaining walls, and bridges, and for the vacation of streets, to accommodate the railroad, was made and work begun thereunder, nearly three months before a suit was brought by abutting owners to restrain damage, because of the invalidity of the ordinance, there was such laches as to prevent relief, the railroad having bought land on the faith of the contract and incurred great expense in the construction of the improvements. Keeling v. Pittsburg, B. & C. R. Co., 205 Pa. 31.

71. A convention of school officers for the purpose of adopting text books for the state for a certain period, and the letting of contracts for furnishing such books, is not judicial in character; hence a person injured by its acts is entitled to restrain execution thereof and is not relegated to certiorari [Rev. St. §§ 1854, 1855, 1859]. Tanner v. Nelson, 25 Utah, 226, 70 Pac. 984.

72. A tax payer cannot restrain a park board from awarding a pavement contract on the ground that it was prohibited by law, where a resolution of the board of estimate set forth competition between different kinds of pavement, fixed the specifications as to each and authorized the park board to advertise for proposals under the same general conditions for all bidders. Barber Asphalt Pav. Co. v. Willcox, 41 Misc. [N. Y.] 574.

73. Contract by a city for street lighting where an election to ratify such contract is necessary to its validity. Tampa Gas Co. v. Tampa [Fla.] 33 So. 465.

74. Morgan v. County Court, 53 W. Va.

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the result,[75] or to restrain ballot commissioners from putting on ballots to be used at a general election, the question of relocation of the county seat.[76] Inspectors will not be restrained at suit of a private person from acting in precincts irregularly established if the irregularities will not render the election absolutely void.[77] The supreme court cannot enjoin the secretary of state from publishing proposed constitutional amendments before they are voted upon, though they would be invalid if adopted.[78] Unconstitutionality of the statute under which a local option election was held, and that enforcement would destroy the lawful business of liquor selling of complainant to his irreparable injury, and render him liable to prosecution and arrest, is sufficient cause for injunction.[79]

Exercise of official duties by de facto officers,[80] impeachment or removal of an officer,[81] or appointment by a city council of a committee to buy lands for city buildings,[82] will not be enjoined. A city official cannot restrain private persons, nominated as members of the board of public works but who had not taken up their duties, from threats to remove him when they assume their duties.[83] Laws providing that a taxpayer may be sued to prevent waste of municipal property or its unlawful appropriation by payment of salary will not authorize restraint of such payment by a taxpayer as to public officers holding appointments in the civil service, because the appointments valid in form are invalid in effect.[84]

Location, construction and regulation of municipal buildings and works.— Mere technical informalities in proceedings to locate and construct a public building,[85] or public works,[86] or failure to obtain private rights, where greater

372. Holding of a primary election where called according to statute. Meacham v. Young, 24 Ky. L. R. 2141, 72 S. W. 1094.

75. The action of the county commissioners' court in Texas in declaring and publishing the result of an election, is ministerial and not judicial so that it may be restrained by a federal court [U. S. Rev. St. § 720]. August Busch & Co. v. Webb, 122 Fed. 655. Selection of a newspaper for publication of an order declaring result of a local option election for the last issue of the required publication, is a ministerial and not a legislative act which may be restrained. Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766. A petition by liquor dealers to restrain publication of an order declaring the result of a local option election, is insufficient where it does not allege that they were lawfully engaged in the liquor business though it alleged that they were threatened with arrest and prosecution, and that their right to continue in the business had a certain value. Eppstein v. Webb [Tex. Civ. App.] 75 S. W. 337.

76. The county court had made an order submitting the question to vote. Morgan v. County Court, 53 W. Va. 372.

77. State v. Wilcox, 11 N. D. 329.

78. In voting a legislative function is exercised. People v. Mills, 30 Colo. 262, 70 Pac. 322.

79. Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766.

80. Pending trial of title to the office. State v. Rice [S. C.] 45 S. E. 153. Quo warranto is the remedy (Deemar v. Boyne, 103 Ill. App. 464; Little v. Bessemer [Ala.] 35 So. 64), and not injunction to restrain payment of the salary (Greene v. Knox, 175 N. Y. 432).

81. Though the removal is unjustly made. Marshall v. Board of Managers, 201 Ill. 9. Impeachment and removal of a mayor by the board of aldermen and city council; there is adequate remedy at law by vindication of his title to the office. Riggins v. Thompson, 30 Tex. Civ. App. 242. Proceedings to remove the superintendent of a penitentiary under an unconstitutional statute cannot be restrained, he being a statutory officer who can be removed only for cause. It will not be presumed that the commission would act beyond their statutory powers in reducing his salary under statutory authority so as to amount to a virtual expulsion before expiration of his term. Corscadden v. Haswell, 84 N. Y. Supp. 597. Action of mayor and city council in removing city attorney for misconduct will not be reviewed by injunction nor will they be restrained from recognizing his elected successor. Howe v. Dunlap [Okl.] 72 Pac. 365.

82. Quo warranto is remedy to try right of council to delegate authority. Parker v. Concord, 71 N. H. 468.

83. Though no injury could result to defendants. Parsons v. Weller, 24 Ky. L. R. 1770, 72 S. W. 273.

84. Code Civ. Proc. § 1925; Laws 1892, p. 620, c. 301 and Laws 1899, p. 812, c. 370, § 27. Defiance Water Co. v. Defiance [Ohio] 67 N. E. 1052.

85. Members of a board of education will not be restrained from buying a site and building a school building merely because technical legal formalities had not been strictly followed, no bad faith or public injury being shown. Lawson v. Lincoln, 86 App. Div. [N. Y.] 217.

86. Where one seeking to restrain a city from discharging sewerage on premises, did not question that the city had power to take realty to establish a sewerage plant, and objected merely as to the method of assessing damages as illegal and unconstitutional,

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injury will result to the public than to complainant,[87] will not give the right to restrain the public authorities; but public expenditures at unauthorized places or for unauthorized purposes,[88] or outside the exercise of eminent domain,[89] or construction of public works in streets,[90] unless the fee is in the public,[91] or of public wharves and docks,[92] or diversion of waters from streams,[93] resulting in injury to private owners, will be prevented; likewise regulation of public works, whereby a citizen without fault will suffer injury.[94] A private citizen cannot restrain city officers from permitting use of the city auditorium for entertainments for private profit, even though wrongful.[95]

Discharge of city sewage on private lands,[96] or into watercourses,[97] may be

there was no ground for restraining the city from constructing a plant on the land; a remedy to determine damages was given. Vickers v. Durham, 132 N. C. 880. A bill to restrain drain commissioners from laying out or constructing a drain on lands, failing to allege any act of trespass or that the commissioners had done more than to examine the proposed improvement and make a preliminary order, is insufficient, since there is an adequate remedy by statute to determine all questions of jurisdiction and regularity [Comp. Laws, §§ 4320, 4323, 4325, 4345, 4346]. Strack v. Miller [Mich.] 96 N. W. 452. Where a tax-payer sued for an injunction to prevent the rapid transit commissioners of New York from constructing a tunnel by departure from the routes and general plan of construction adopted by them as required by statute, pending a suit against them, the injunction will be denied where it appears from the condition of the work that it will cost no more for the city to complete the tunnel than to fill it up on abandonment of the work, and that abandonment would necessitate construction of another, causing enormous loss to the taxpayers. Barney v. Rapid Transit R. Com'rs, 38 Misc. [N. Y.] 549.

87. A temporary injunction against work on the rapid transit tunnel in New York, will not issue for failure to obtain consent of abutting owners to a change in its location, where such relief was not asked until nearly all the work was completed at great cost, and the delay will be of no advantage to the land owners while of injury to public interests. The abutting owner will be given a bond indemnifying him against all possible loss. Barney v. New York, 39 Misc. [N. Y.] 719.

88. By district court sitting in equity. Board of Education v. Ter. [Okl.] 70 Pac. 792. Repairs of a road over sewer will be restrained where bad faith appears, in that they were made to serve private and personal ends and special injury will result to certain land owners. Shanks v. Pearson, 66 Kan. 168, 71 Pac. 252. Injunction is the proper remedy for a tax payer to prevent a school district from contracting for or constructing school houses at unauthorized places and contracting district liabilities therefor. Kellogg v. School Dist. No. 10 [Okl.] 74 Pac. 110.

89. County may be enjoined from building a levee or dam across a stream to the injury of complainants, unless the construction is in exercise of the right of eminent domain. Leflore County Sup'rs v. Cannon [Miss.] 33 So. 81.

90. In a suit by an abutting property owner against a city to restrain erection of a viaduct in the street in front of his property, whether a law will effectually compensate him therefor is immaterial. Sauer v. New York, 85 N. Y. Supp. 636.

91. Construction of a viaduct in a street to facilitate public travel, under statutory authority by a city, will not be restrained at suit of an abutting property owner where the fee of the street is in the city in trust for public highway purposes. Sauer v. New York, 85 N. Y. Supp. 636.

92. Where the owner of lands abutting on the Mobile river was authorized by the commission of that river to build docks and wharves in the river opposite his land, he may restrain a city from recovering the shores occupied by such works, where the city had acquiesced in the occupation for a number of years. Sullivan Timber Co. v. Mobile, 124 Fed. 644.

93. Where the state by means of under current conduits tapped a creek for the purposes of a penitentiary and pumped water into its cistern, where under terms of a deed from a landowner through whose premises the creek ran, it was entitled only to divert a much smaller amount of water than was taken, the landowner's only remedy was an injunction against the taking of more than the amount to which the state was entitled, since he could not in any manner inspect the appliances or determine the amount of water taken. Salem Mills Co. v. Lord, 42 Or. 82, 69 Pac. 1033, 70 Pac. 832.

94. **Regulation of city water supply:** To prevent unauthorized action by municipal authorities, under color of office, whereby the interests of a tax payer and user of city water are injured, for which there is no direct remedy at law. Poppleton v. Moores [Neb.] 93 N. W. 747. To restrain a city from invading premises to replace a water meter taken out for repair and from cutting off the water supply for failure of the customer to reinstate the meter. Powell v. Duluth [Minn.] 97 N. W. 450. Removal of a water meter by a city will be restrained at suit of the lessee, where it was in perfect condition when installed and had been inspected repeatedly before discovery of a defect, whereby it registered less water than had been actually used and there is no evidence that plaintiff ever tampered with the meter. Healy v. New York, 41 Misc. [N. Y.] 27.

95. His damage is not special though he owns an opera house and his profits are thereby lessened. Amusement Syndicate Co. v. Topeka [Kan.] 74 Pac. 606.

96. Sufficiency of evidence in a suit to restrain a city from discharging sewerage on

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prevented by a landowner if his injury will be real and irreparable and the danger is imminent.[98] If pollution can only be prevented by abatement of the flowage, a temporary injunction will not issue against a city at suit of a board of health.[99] A city which had afterward directed its sewage to tile laid across land by a manufacturing company, with the owner's consent, cannot defend in a suit by the owner to restrain passage of such sewage on the statutory ground that it has a right, as a person interested, to connect with the drain as established by adjoining landowners for mutual benefit.[1]

Federal authorities or officers.—A survey by the federal land department of public lands, claimed by a citizen, will not be restrained at his suit.[2] The unauthorized determination of the postmaster general that mail addressed to a certain corporation should be refused delivery is not so conclusive on the federal courts as to preclude an injunction by the corporation to prevent such action.[3] An army officer acting under orders of the secretary of war and under an act of congress providing for an army post will not be restrained by a federal court, at suit of a lower proprietor, from constructing a sewer on lands which the government has acquired, because of pollution, whether the act amounts to the taking of the land for public use or to a tort only.[4] Though the interior department before passage of a certain law had power to remove any white man from Indian territory where he did not pay the tax imposed on his business by the Indian nation where he located, a threat by officers and agents of such department and of the nation, that if a tax was not paid by certain plaintiffs by a certain time that their places of business would be closed and steps would be taken before the department for their removal if they attempted to reopen, will be ground for an injunction, since they amount to a threat of unlawful interference with plaintiff's rights.[5]

(§ 2) *D. Enforcement of statutes or ordinances.*—Passage or enforcement of alleged invalid city orders or ordinances,[6] or statutes,[7] will be prevented only when irreparable damage is threatened, or a multiplicity of suits will result.[8]

premises, to show a probability that nuisance will result. Vickers v. Durham, 132 N. C. 880.

97. Into running stream so as to pollute the waters and endanger health of those living on the banks. Todd v. York [Neb.] 92 N. W. 1040. Into canal by city, where there is substantially no interference with city plans for drainage, and great public mischief results. Warren v. Gloversville, 81 App. Div. [N. Y.] 291. Where it is found to constitute a nuisance to plaintiff, which is continually increasing and will be permanent unless restrained, and will result in a multiplicity of suits. Sammons v. Gloversville. 81 App. Div. [N. Y.] 332. Pollution of a stream will be restrained without compelling the owner to bring an action at law; that other sources than that of the city contributed to the pollution is no defense. A judgment in trespass on the case against a city for polluting the stream or the owner's oral consent to the placing of a tile across his land to carry such sewage which afterwards became inadequate (Kewanee v. Otley, 204 Ill. 402), or his failure to present his claim to the common council according to the provisions of the city charter, will not prevent the injunction (Sammons v. Gloversville, 175 N. Y. 346).

98. Vickers v. Durham, 132 N. C. 880.

99. Where Act March 24, 1897, §§ 1, 2, 7, P. L. p. 99, provides that sewage from certain structures shall not be discharged into certain parts of a certain stream and that no such structures shall be maintained within a certain distance of the stream so as to render drainage into it liable and provides that boards of health may enjoin any violation of its provisions in a suit by the board of health under such law. Paterson Board of Health v. Summit [N. J. Eq.] 56 Atl. 125.

1. Act July 1, 1889 (Starr & C. Ann. St. 1896 [2d Ed.] p. 42, §§ 228-231). Kewanee v. Otley, 204 Ill. 402.

2. There is no danger of multiplicity of suits or irreparable injury, as ground to restrain a survey by federal land department, of lands as to which complainants assert title and which are claimed as public lands of the United States, where persons directly interested are not made parties, are not numerous, and have separate and independent claims and the survey can be made without injury to soil or timber. Kirwan v. Murphy, 189 U. S. 35, 47 Law. Ed. 698.

3. American School of Magnetic Healing v. McAnnulty, 187 U. S. 94.

4. Sheriff v. Turner, 119 Fed. 782.

5. Buster v. Wright [Ind. T.] 69 S. W. 882.

6. **Orders or ordinances restrained:** Enforcement of a void order of the city coun-

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(§ 2) *E. Acts of quasi public corporations or their officers.*—One corporation may restrain interference by another corporation with its property properly acquired.[9] Rights under a lease by such a corporation will be protected, but extension of such rights will not be compelled.[10] One corporation may restrain interference with its occupancy of land of another at termination of a lease pending condemnation proceedings to take the land for its purposes.[11] Use of

cil vacating part of the city at suit of adjacent property owners will be prevented. Lowe v. Lawrenceburg Roller Mills Co. [Ind.] 69 N. E. 148. Enforcement of an illegal ordinance imposing a license tax will be restrained where it appears that complainant will be compelled to defend many criminal prosecutions and will suffer irreparable injury in business. Hutchinson v. Beckhan [C. C. A.] 118 Fed. 399. Enforcement of an ordinance will be restrained, where it is alleged that violation by plaintiff's employes will result in many threatened prosecutions, large fines and the destruction of plaintiff's business, though none of the threatened prosecutions have been commenced. Schlitz Brewing Co. v. Superior [Wis.] 93 N. W. 1120. An injunction will lie to restrain the enforcement of a city ordinance establishing maximum water rates pending a suit where the bill and affidavits of plaintiff corporation show that the rates fixed were so low that it would be barely able to pay operating expenses under them. Tampa Waterworks Co. v. City of Tampa, 124 Fed. 932.

Orders or ordinances not restrained: Passage of an ordinance fixing an assessment for a local improvement will not be restrained though void because of failure to comply with charter provisions. Kadderly v. City of Portland [Or.] 74 Pac. 710. Passage and approval of an ordinance cannot be restrained merely on the ground that it would not conserve best public interest. Wright v. People [Colo.] 73 Pac. 869. In a suit to restrain enforcement of an ordinance concerning additions to the city, it cannot be assumed that discretion thereby vested in the council will be abused. Hillman v. Seattle [Wash.] 73 Pac. 791. Enforcement of ordinance for impounding cattle running at large will not be restrained, unless irreparable injury or other equitable ground appears, since complainant has an adequate remedy at law to test its validity. Orange City v. Thayer [Fla.] 34 So. 573. Where a sub-contractor who has contracted to build gas works on premises, alleges that municipal ordinances prohibiting erection or maintenance of structures within certain limits, infringe the obligation of the contract of the landowner with the municipality under prior ordinances, an injunction will not lie to prevent enforcement thereof by criminal proceedings against his employes, his remedy being by action against the sub-contractor, who is presumed to be able to respond in damages for all injuries suffered by him from interruption of his contract. Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 Law. Ed. 778. Enforcement of a municipal ordinance which will result in a mere trespass for which adequate remedy exists at law will not be restrained, though the ordinance is void. Orange City v. Thayer [Fla.] 34 So. 573. The only questions which can be considered in a suit in a federal court by a non-resident of a state, to restrain enforcement of an ordinance in a local option district of the state against the sale of liquors except for certain purposes, are those which affect complainant's rights against the federal constitution and laws, he having no legal interest in the validity or effect of the law or the regularity of the election except as such rights are affected. Busch v. Webb, 122 Fed. 655.

7. Enforcement of a state or local law may be restrained on the ground that thereby complainant will be deprived of his rights under the federal constitution and laws. Busch v. Webb, 122 Fed. 655. Either a state or federal equity court may restrain enforcement of an invalid law which would result in irreparable injury by loss and hardship to complainant. Greenwich Ins. Co. v. Carroll, 125 Fed. 121.

8. Where an ordinance affects many people, one may bring an injunction to prevent enforcement. Boyd v. Board of Councilmen, 25 Ky. L. R. 1311, 77 S. W. 669.

9. Where a railroad company built a line on land as to which it had title, partly by deed and partly by condemnation, and was in actual or constructive possession of all of the land for railroad purposes, it may restrain another company afterward chartered, which attempts to eject it by force, claiming title under a deed from the grantor of the first company. Pennsylvania Co. v. Ohio River J. R. Co., 204 Pa. 356.

10. A temporary injunction will issue to restrain an electric company from interfering with the occupancy by another electric company of ducts in a sub-way, which has continued for several years under a paid rental from the defendant until the trial; and to prevent the latter from interfering with connection of additional customers with the system already located, though an effort is being made to terminate the lease; but a mandatory injunction will not issue pending the suit at instance of the occupying company to compel the other to assign additional space to it. West Side Elec. Co. v. Consolidated Tel. & Elec. Subway Co., 84 N. Y. Supp. 1052.

11. A railroad company in occupation of a railroad under a lease may restrain the lessors for a reasonable time, from dispossessing it in order that it may bring proper proceedings to condemn the land for its purposes. Winslow v. Baltimore & O. R. Co., 188 U. S. 646, 47 L. Ed. 635. Where a telegraph company acting under Act July 24, 1866 (14 Stat. 221) and Rev. St. § 3964 (23 Stat. 3), which allowed it to build and operate its lines over military and post roads of the United States, had built and maintained a line for many years along a railroad, under a contract with the road, and had been directed by the company to remove the line in accordance with such contract, the telegraph company may have an injunction to prevent interference or destruction of the

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a railroad terminal way will not be restrained unless there is evidence sufficiently clear to enable the court to specify acts as unnecessary or unlawful.[12] Construction of bridges for a turnpike road across a bay, with approval of the federal authorities, will not be restrained because it will delay movements of high tide to a certain extent, unless such delay will damage property on or underneath the bay.[13] Extortionate charges and unjust discriminations by common carriers will be restrained, jurisdiction depending upon the fact that the subject-matter is a right asserted under the act of congress,[14] but prior to the act of congress, Feb. 19, 1903, the United States could not sue at request of the interstate commerce commission.[15] A gas company cannot be compelled to furnish gas to a prospective customer.[16]

There must be a showing of damage,[17] and a clear showing of title,[18] and complainant must act promptly,[19] and the acts must be shown to be those of the corporation.[20]

Exercise of power of eminent domain in general.—Unauthorized taking of private property,[21] by a corporation which has no such power,[22] will be prevented; but a temporary injunction will not issue to restrain the taking of land on the ground that no right to condemn exists, since such order would amount to a practical disposition of the case without a hearing on the merits.[23] That an

land by the railroad company during pendency of condemnation proceedings by the telegraph company to take a right of way along the railroad, where the retention of the line would not cause material damage to the railroad company, and destruction thereof would result in irreparable damage to the telegraph company. Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 981.

12. Georgia R. & Banking Co. v. Maddox, 116 Ga. 64.

13. Carvalho v. Brooklyn & J. B. Turnpike Co., 173 N. Y. 586.

14. Tift v. Southern R. Co., 123 Fed. 789.

15. Missouri Pac. R. Co. v. U. S., 189 U. S. 275.

16. Mandamus is the proper remedy. Johnson v. Atlantic City Gas & Water Co. [N. J. Eq.] 56 Atl. 550.

17. A cross-complaint in an action to compel a railroad company to allow a natural gas company to lay a pipe line under its right of way, sought to restrain the laying alleging that the gas company was using artificial means to increase the flow of gas through its pipes in violation of statute will not entitle defendant to injunction where it failed to show that any damage to it resulted from such acts. Chicago, I. & E. R. Co. v. Indiana Natural Gas & Oil Co. [Ind.] 68 N. E. 1008.

18. A preliminary injunction will not be granted to restrain a railroad company from re-entering and taking possession of a part of its right of way occupied by a telegraph company under a lease which had expired because absolute title to such right of way was vested in the telegraph company by a contract prior to the lease, where it appears by the bill that the railroad company has been in open possession of the right of way through its tenant for a longer term than necessary by law to give it title by adverse possession under the rule that where the right to an injunction depends on title, it must be clearly shown. Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362.

19. Construction of a pipe line within the limits of the right of way of a railroad, over land leased to another giving it the exclusive right to draw gas from the tract will not be restrained when too large an amount had been spent in constructing the line and it was nearly completed when the suit was brought and the damage to the lessee was small since there would be an adequate remedy to recover the damages at law. Consumers' Gas Trust Co. v. American Plate Glass Co. [Ind.] 68 N. E. 1020.

20. An injunction will not issue to restrain a railroad company from constructing a fence on certain land claimed by plaintiff, where the complaint therefor alleged that the company's employes were ready to build the fence but did not allege that they were acting under the company's instructions. Wabash R. Co. v. Engleman, 160 Ind. 329.

21. St. Louis & S. F. R. Co. v. Southwestern Tel. & Tel. Co. [C. C. A.] 121 Fed. 276. Entry of lands by a suburban electric railway company without an attempt to exercise the power of eminent domain. Freud v. Detroit & P. R. Co. [Mich.] 95 N. W. 559. One railroad company will be restrained from crossing the tracks of another railroad company without acquiring the right. Atlantic & B. R. Co. v. Seaboard Air-Line R. Co., 116 Ga. 413. Taking of private property by railroad company not covered by its condemnation proceedings. Shipley v. Western Md. Tidewater R. Co. [Md.] 56 Atl. 968. Where a railroad company built and maintained certain structures on the land of another without statutory authority in their work of abolishing grade crossings and were threatening to use his property without authority, he was entitled to an injunction restraining trespass since his only other remedy was by a multiplicity of suits, the expenses of which would be greater than the damages. Providence, F. R. & N. Steamboat Co. v. Fall River [Mass.] 67 N. E. 647.

22. Sufficiency of legal remedy to prevent injunction. Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co. [Ga.] 46 S. E. 422.

23. By railroad company. Riley v. Charleston Union Station Co. [S. C.] 45 S. E. 149.

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erroneous rule is made in condemnation proceedings will not entitle defendant to an injunction, the remedy being appeal.[24] On a prima facie showing by plaintiffs to restrain condemnation of land, the injunction should issue until the right to bring the proceedings under the statute can be determined.[25]

Occupation of public ways.—The unauthorized occupation of public ways will be prevented at suit of a property owner who suffers injury differing from that sustained by the general public,[26] unless the owner has acquiesced in the occupation,[27] or unless there is an appropriate remedy at law.[28] Consent of the proper

24. Condemnation by railroad company. Boyd v. Logansport R. & N. Traction Co. [Ind.] 69 N. E. 398.

25. Taking land for union station. Riley v. Charleston Union Station Co. [S. C.] 45 S. E. 149.

26. Occupation restrained: Property owners along a street must show a nuisance in fact or that they will suffer special injury, different from that of the general public, to restrain construction of an electric railway. Baker v. Selma St. & S. R. Co., 135 Ala. 552. Operation of a railroad across a public street resulting in nuisance to a property owner and damage to the property, the road being built without express legislative authority or assent of the city council. Southern Cotton Oil Co. v. Bull, 116 Ga. 776. If a railroad track in a street will interfere with the easement of an abutting owner, injunction will lie to prevent construction until his rights of property have been obtained. Cleveland Burial Case Co. v. Erie R. Co., 24 Ohio Circ. R. 107. An abutting owner holding fee to the center of a street may restrain the building or operation of a railroad therein where the company has not acquired his property rights. Paige v. Schenectady R. Co., 77 App. Div. [N. Y.] 571. That the company has expended considerable means in building its track in a street will not prevent restraint. Id. Trespass by a railroad company building switches and sidings in a highway without condemnation, or permission of abutting owners, under authority only to maintain a single track therein. Stephens v. New York, O. & W. R. Co., 175 N. Y. 72. An injunction will issue to prevent a railroad company from laying a siding on the grade of a street different from the established grade where it appears that the access to plaintiff's property would be seriously interfered with, that surface water would be thrown on his land and that the construction was proceeding without municipal authority. Zook v. Pennsylvania R. Co., 206 Pa. 603. An abutting owner may have an injunction to protect his land to the middle of the street from occupation by a street railway, though his opposite neighbors have consented to such occupation. North Pennsylvania R. Co. v. Inland Traction Co., 205 Pa. 579. Where a railroad track is about to be laid across a street and sidewalk without legal authority and in such a way as to make a public and private nuisance, a private citizen suffering special damage may restrain the construction independently of, as well as under a law for the abatement of nuisances [Rev. St. 1898, § 3506]. Cereghino v. Oregon Short Line R. Co. [Utah] 73 Pac. 634. Unauthorized operation of street cars so close to the curb in front of premises that vehicles must stand on the track, while halting, is an actual and peculiar damage to the premises for which an injunction will lie at suit of the abutting owner though the apparent occupying of the street without authority is also a trespass constituting a public nuisance. Henning v. Hudson Valley R. Co., 85 N. Y. Supp. 1111. Under laws prior to Laws 1901, p. 686, c. 465, a street railway had no right to condemn land in streets of a city so that the remedy of abutting owners to prevent unlawful operation of a street railway was injunction and not by the institution of condemnation proceedings. Younkin v. Milwaukee Light, H. & T. Co. [Wis.] 98 N. W. 215. Where a railroad company lays a second track in a street without compensating or providing for compensating an abutting owner who owns the fee in the street, he may restrain the use of the second track until the right is acquired by grant or condemnation. Rock Island & P. R. Co. v. Johnson, 204 Ill. 488. If a property owner entitled to compensation for construction of a street railroad is guilty of laches in permitting such construction without compensation, so that he cannot restrain the continuance of the road, he may still have an injunction as an alternative remedy should the company fail to pay the compensation fixed by the court but the commencement of such a suit in the federal court will not give exclusive jurisdiction to authorize that court to restrain proceedings afterwards commenced in a state court by the company to condemn the easement under the state power of eminent domain, since thereby the court is not deprived of the power to award past damages. Benjamin v. Brooklyn Union El. R. Co., 120 Fed. 428.

27. One who cut down a telephone pole after it had stood twelve years, during five years of which he held title to the adjoining lot, was not entitled to an injunction pendente lite to prevent the replacing of the pole on the ground that he was seeking the status quo, since he himself had destroyed it. Post v. Hudson River Tel. Co., 76 App. Div. [N. Y.] 621. Where plaintiffs sought to compel restoration of a crossing over railroad tracks by injunction, without alleging or proving irreparable injury, and admitted that during the process of double tracking the road they interviewed the representatives of the company and acquiesced in the plans for doing away with the crossing, upon which acquiescence the company acted and destroyed the crossing, and it appears that the danger of accidents would be very great were the crossing restored, plaintiffs are estopped to ask a mandatory injunction. Louisville & N. R. Co. v. Smith, 25 Ky. L. R. 1459, 78 S. W. 160.

28. Injunction will not lie to compel a railroad company to restore a crossing over its tracks, there being an adequate remedy

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authorities will prevent the remedy.[29] A city may restrain unauthorized occupation of a street by a railroad company.[30] One corporation cannot prevent another from use of a public way without a showing of injury to its rights or franchises.[31]

(§ 2) *F. Acts of private corporations or associations.*—Injunction will lie to prevent a corporation from including in its name the surname of an inventor already adopted and used by another corporation.[32] That two corporations are in different communities will not prevent restraint of use by one of the other's corporate name, where their business and markets are the same.[33]

Corporate management and dealings.[34]—Injunction will not lie to prevent payment of a dividend,[35] or sale of a franchise by the corporation,[36] or of corporate stock,[37] or consummation of an agreement for substitution of stock,[38] where no

at law for any damage sustained by reason of an injury complained of. Louisville & N. R. Co. v. Smith, 25 Ky. L. R. 1459, 78 S. W. 160. Abutting owners cannot restrain the construction of an electric railway in a street, because of threatened danger to access to other lines or of obstruction of the street or of noise, dust or vibration, since they have a remedy at law. Baker v. Selma St. & S. R. Co., 135 Ala. 552.

29. Where a street railway company obtains consent of a turnpike company and of township authorities and of abutting owners on one side of a turnpike to use it, an owner on the other side who did not consent and whose property was not touched could not restrain construction. North Pa. R. Co. v. Inland Traction Co., 205 Pa. 579. Operation of a trolley railway track laid in accordance with a special ordinance will not be restrained because of injury and inconvenience to abutting owners, their remedy being at law for unreasonable appropriation of the highway by the municipality. Budd v. Camden H. R. Co., 63 N. J. Eq. 804.

30. No adequate remedy at law lies to prevent construction of a railroad over the main street of a village at grade without approval of the railroad commissioners, to prevent the city from having an injunction, where a fourth of the expense of changing the road would fall on the city when it applied to the commissioners for such change. Bolivar v. Pittsburg, S. & N. R. Co., 84 N. Y. Supp. 678.

31. The placing of telephone wires in streets under direction of a city, will not be restrained at suit of a prior occupying company, unless complainant is oppressed by abuse of the power of the city; the danger of wires breaking after being placed above the wires of complainant is too remote. Chicago Tel. Co. v. Northwestern Tel. Co., 199 Ill. 324. Construction of street railway on a public road crossing a railroad track and on which land owned by the railroad company abuts cannot be restrained by the railroad company if none of its rights or franchises are injured [Act June 19, 1871 P. L. 1360]. North Pa. R. Co. v. Inland Traction Co., 205 Pa. 579. A railroad company whose tracks are crossed with an overhead bridge cannot restrain the construction of a street railway where the street railway company offers to rebuild the bridge strong enough for the passage of its cars, though the land on which the foundations rest belongs to the railroad company. Id. A street railway company asking restraint of another company from using a certain street cannot object to the latter's defense that because of the first company's failure to procure consent of the village authorities it is not entitled to use such street on the ground that the defense can only be urged by the public authorities. Rochester & E. R. R. Co. v. Monroe County Elec. Belt Line Co., 78 App. Div. [N. Y.] 33.

Interest or danger sufficient: A street railroad company will not be restrained from building across a public road at suit of a railroad company which had located but not constructed a road across the way pending settlement of crossing rights. Ohio River J. R. Co. v. Freedom & C. E. St. R. Co., 204 Pa. 127. An injunction will issue to prevent interference with erection of poles in a street by a telephone company under a proper permit, by the action of another company in changing its own poles as soon as the new company had located poles of a certain height to correspond with such height, in order to prevent the new company from proceeding. Cumberland Tel. & Tel. Co. v. Louisville Home Tel. Co., 24 Ky. L. R. 1676, 72 S. W. 4.

32. It will not be refused because no wrong appears to have been done or no danger of complainant's injury, since he must act promptly before the rights of innocent stockholders in the defendant corporation have become involved. Edison Storage Battery Co. v. Edison Automobile Co. [N. J. Ch.] 56 Atl. 861.

33. Bissell Chilled Plow Works v. Bissell Plow Co., 121 Fed. 357.

34. Where a sale of stock was advertised for fifty days before the day of sale, an injunction will be refused because of laches, where sought only five days before the sale, no excuse for delay being shown. Edwards v. Mercantile Trust Co., 121 Fed. 203.

35. On preferred stock because it had not been earned, where the directors are not shown to be insolvent, there being a statutory remedy for an enforcement of their liability. Under P. L. 1896, p. 287, § 3 where public notice of the payment was given 25 days before a bill was filed by a stockholder to restrain such payment, the bill was too late. Schoenfeld v. American Can Co. [N. J. Eq.] 55 Atl. 1044.

36. An allegation by a stockholder that he has good reason to fear and does fear that the directors will sell a franchise, will not warrant a temporary injunction, where no threats to sell are alleged. Quin v. Havenor [Wis.] 94 N. W. 642.

37. A temporary injunction will not issue

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danger of injury is shown. The purchaser of stock not fully paid up may compel issuance of the stock after payment of the balance.[39] A stockholder cannot restrain payment for benefits received by the corporation under contracts increasing corporate debts beyond the amount of capital stock.[40] A plaintiff who shows a prima facie right to five per cent. of the corporate dividends may restrain payment of more than 95 per cent. of earnings and surplus set aside for dividends.[41] Mere noncompliance with a statutory regulation will not warrant restraint of a corporate election.[42] Holders of corporate certificates, based on the assets, and secured by pledge of stock and securities, may sue to restrain fraudulent exercise of the corporate franchise.[43] A suit to restrain private persons from selling railroad stock is not ancillary to foreclosure against company property to which stockholders are not parties.[44] Title to corporate office will not be determined by injunction, though the purpose of the application is to require a claimant in possession to deliver property belonging to the office to the president.[45] The directors of a board of trade will not be interfered with in investigation of charges by a member according to by-laws, unless it is alleged that the proceeding is irregular.[46] A stockholder may restrain the issue of stock to be given as a bonus on sale of corporate bonds for par value, though the capital stock is impaired and the par value of the bonds is all that they, together with the stock as a bonus, are worth.[47]

Acts of associations.[48]—A proceeding by a Masonic order to try a member will not be restrained on the ground that it will take from him property without due process of law.[49] A lodge and its treasurer will not be restrained from allowing and paying a bill, unless all remedies afforded by the constitution and by-laws or by parliamentary procedure have been exhausted.[50] A labor union will be temporarily

to restrain the sale of two shares of corporate stock by one entitled to seven and one-half shares where it appears that there are fifteen unsold shares. Quin v. Havenor [Wis.] 94 N. W. 642.

38. A non-assenting holder of preferred stock given for a temporary injunction restraining the corporation from carrying out an agreement with another for substitution of non-accumulative for accumulative dividend paying preferred stock, and the refund of all dividends in arrears, providing also that the corporation should issue to each assenting holder of preferred stock, a funding certificate for arrears, carrying interest at a certain rate payable exclusively out of net profits for the year in priority to any dividends on the capital stock, since no irreparable injury will result to such holder, and if when the agreement is accomplished an attempt is made to pay dividends to assenting holders in preference to him he may assert his rights by a proceeding in court; the plan works for the benefit of the parties to the agreement in that it accelerates their chances of participation in dividends. Willcox v. Trenton Potteries Co., 64 N. J. Eq. 173.

39. Though the original subscriber had instructed the corporation not to issue to the purchaser. Scherk v. Montgomery [Miss.] 33 So. 507.

40. Rankin v. S. W. B. & I. Co. [N. M.] 73 Pac. 612.

41. Dupignac v. Bernstrom, 86 App. Div. [N. Y.] 625.

42. A preliminary injunction at suit of certain stockholders will not be allowed to restrain a corporation from making a decision except in accordance with a majority vote of stockholders as shown by a list of such holders certified by a certain trust company as transfer agents and by a certain other trust company as registrar on the ground that the corporation had failed to keep a book required by statute containing the names of stockholders and the number of shares held by each [Mills' Ann. St. § 481; Act April 14, 1893]. Mitchell v. Colo. F. & I. Co., 117 Fed. 723.

43. Where a corporation has pledged its stocks and securities to a trust company to secure issuance of certificates based on its assets, agreeing to pay a certain sum every six months to the trust company for distribution among the certificate holders, such holders are creditors of the corporation entitled to an injunction against the exercise of its franchises to prevent fraud [Insolvent Incorporation Act 1829]. Gallagher v. Asphalt Co. [N. J. Eq.] 55 Atl. 259.

44. Raphael v. Trask, 118 Fed. 777.

45. Standard Gold Min. Co. v. Byers, 31 Wash. 100, 71 Pac. 766.

46. Board of Trade v. Weare, 105 Ill. App. 289.

47. New Jersey Stock Corporation Law, §§ 48, 49, (Pub. Laws 1896, p. 293). Kraft v. Griffon Co., 82 App. Div. [N. Y.] 29.

48. Sufficiency of evidence to restrain a fraternity from trying a member indicted for the same charges before trial on the ground of bias and intent to prejudice the criminal trial. Franklin v. Burnham, 40 Misc. [N. Y.] 566.

49. He has no severable interest in the property. Franklin v. Burnham, 40 Misc. [N. Y.] 566.

50. Coss v. Mansfield Lodge, 24 Ohio Circ. R. 36.

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restrained from refusing full membership, and a union card to a member expelled contrary to rules for being a member of the national guard, unless such member had never received full membership nor any other than an apprentice's card.[51] The right of a voluntary association to engage in support of a strike or to freedom in the labor market, by which it employs pickets or other agents to carry on its measures, cannot be invaded.[52] An incorporated association of master mechanics may restrain a voluntary association of journeymen from acts of violence, either in its corporate capacity or by its individual members against members of the plaintiff association or their employes, or by interference with its property.[53] Members of an incorporated labor union may seek protection from threats of members of an unincorporated union to compel them to join its ranks, by injunction.[54] Where, thirty years after location of a college in a certain borough, certain citizens sued for removal to another town because they, with others, had donated funds with which land was bought and given to the trustees for building purposes, and the trustees had permanently located the college in the borough, removal will be restrained until final hearing.[55] Under a law providing that a domestic corporation shall forfeit its franchise and a foreign corporation shall lose its right to do business within the state if terms of the law are violated as to sale of its certificates, and that an injunction may issue on application of the commissioner of corporations, the attorney general is not authorized to restrain, on information in equity, individuals who act as co-partners in the sale of such obligations.[56]

(§ 2) *G. Transfer of property.*—A general creditor cannot restrain a transfer of his property by a debtor without reducing his claim to judgment.[57] A law making sales of merchandise in bulk, fraudulent as to the seller's creditors, will not give a right to an injunction against a fraudulent transferee in an action at common law against the debtor for money only.[58] A court or judge cannot transfer possession of realty from one party to another by provisional or preliminary injunction.[59]

(§ 2) *H. Breach or enforcement of contract.*—An ordinary breach of contract, for which an action for damages will lie, will not be restrained;[60] nor will breach be restrained to avoid a multiplicity of suits, where complainant has entire control of the number of suits which may be brought,[61] or where he acquiesced in the violation.[62] It is otherwise if complainant cannot have redress at law,[63] or

51. On a showing of lack of full membership the writ will be vacated. Potter v. Sheffer, 40 Misc. [N. Y.] 46.

52. Atkins v. Fletcher [N. J. Eq.] 55 Atl. 1074.

53. Master Horseshoers' Protective Ass'n v. Quinlivan, 83 App. Div. [N. Y.] 459.

54. Erdman v. Mitchell [Pa.] 56 Atl. 327.

55. Packard v. Thiel College [Pa.] 56 Atl. 869.

56. Attorney General v. Pitcher, 183 Mass. 513.

57. Adams v. Miller [Neb.] 94 N. W. 711.

58. Laws 1902, c. 528, § 1. Veit v. Collins, 39 Misc. [N. Y.] 39.

59. State v. Graves [Neb.] 92 N. W. 144; Dickson v. Dows, 11 N. D. 404.

60. To prevent a discharge from employment, the remedy being at law for breach of contract. Boyer v. Western Union Tel. Co., 124 Fed. 246. A party to a contract for sale of goods will not be restrained from selling to other persons, there being an adequate remedy at law for breach. Mundy v. Brooks, 204 Pa. 232. One who agreed to sell and deliver goods cannot be restrained from selling to another where there is conflict as to the amount required by the contract to be delivered, though the purchaser alleges irreparable injury, no facts appearing to show damage which cannot be measured at law. New Hartford Canning Co. v. Bullfant, 78 App. Div. [N. Y.] 6. Where a complaint alleged that plaintiffs and defendants were in the butcher business and had agreed not to give premiums, trading-stamps or vegetables as inducements to draw trade from each other, but that defendants did do so to the irreparable injury of plaintiffs asking an injunction, it will not lie where it is not alleged that defendants were giving stamps to draw trade or to persons trading with the parties or that defendants were insolvent or that the damages could not be measured. Schmidt v. Bitzer, 138 Cal. xix, 71 Pac. 563.

61. Attorney General v. Board of Education [Mich.] 95 N. W. 746.

62. He acquiesced in violation of a covenant in a deed restricting building of hotels

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rights are in danger pending settlement at law,[64] but mere uncertainty of the measure of damages at law is insufficient.[65] The contract must be valid,[66] and unambiguous.[67] The real party in interest must be in contractual relations with defendant.[68] The adequacy of the consideration will not be considered if a legal consideration appears.[69] A conspiracy to prevent fulfillment of contracts in order to compel payment of a royalty where no such right existed will be prevented where defendants are insolvent.[70] Where land was conveyed under a restriction that a house of certain specifications only shall be built in a certain locality, that other land in the same tract was conveyed without restriction, will not prevent restraint of violation of the restriction, where the grantees of the latter land observed the restriction, thus maintaining the general scheme.[71] Third persons will be restrained from inducing a party to a contract to break it, where no adequate relief can be afforded the other party at law,[72] especially where the act is offensive to

on lands, and allowed the expenditure of money. Hemsley v. Marlborough Hotel Co., 63 N. J. Eq. 804.

63. American Law Book Co. v. Edward Thompson Co., 41 Misc. [N. Y.] 396. Injunction is the proper remedy to prevent breach of a contract restraining the practice of medicine conforming to Wilson's Rev. & Ann. St. 1903, §§ 819-821. Hulen v. Earel [Okl.] 73 Pac. 927. Where a contract between adjoining property owners for maintenance of a private alley, precluded one of the parties from maintaining projections on buildings into the alley which would cause continual damage to the other party not capable of measurement in money, he could restrain maintenance of such obstructions as a continuing breach of his contract rights. St. Louis S. D. & S. Bank v. Kennett Estate [Mo. App.] 74 S. W. 474. Where a mutual benefit society issued a certificate to pay the wife of the holder a sum not exceeding a certain amount at his death on condition that he comply with the regulations of the association, an amended by-law subsequently passed limiting the highest amount payable on the certificates to $2000, will not deprive the holder of vested rights so that there was no breach of contract in the company's refusal to receive assessments and advertise on the old basis or to recognize his contract as originally made, so as to entitle him to sue for damages, and equity will intervene to compel performance of the contract by the society. Langan v. Supreme Council, A. L. of H., 174 N. Y. 266.

64. Where the lessee of premises for banking purposes after carrying on business for a time without the lessor's consent, sublet to a restaurant keeper in another building and cut arches through the intervening wall to connect the two buildings, an injunction will lie to prevent further cutting of the walls and use of the premises as a restaurant until the rights of the parties can be determined on trial, where the lessor claims a breach of the covenant in the lease and the lessee defended on the ground that the clause was merely a restriction creating only a condition which had been dispensed with by the lessor. Orvis v. Nat. Commercial Bank, 81 App. Div. [N. Y.] 631. Where one of two partners sells his interest to the other under an agreement that the latter may use the partnership name on condition that he will not make any new liabilities thereunder, and afterwards the purchasing partner buys large bills of goods in the name of the old firm and is insolvent, the selling partner may restrain him from altering the condition of the assets of the business until the same can be disposed of under the orders of the court. Joselove v. Bohrman [Ga.] 45 S. E. 982.

65. Attorney General v. Board of Education [Mich.] 95 N. W. 746.

66. Kinner v. Lake Shore & M. S. R. Co., 23 Ohio Circ. R. 294. A contract by a physician not to practice medicine in a certain territory on legal consideration is valid and enforceable if the limits are reasonable. Ryan v. Hamilton, 205 Ill. 191. Where the exclusive licensees for sale of phonographs, blanks and records covered by patents belonging to the licensor, required purchasers, whether wholesale or retail dealers, to agree not to sell the instruments at less than list prices furnished, an injunction will not lie to restrain a purchaser from breaking such contract. Nat. Phonograph Co. v. Schlegel, 117 Fed. 624.

67. Sufficiency of evidence to warrant injunction to restrain rescission of a contract for manufacture of machines providing a royalty or commission of net profits. Bates Mach. Co. v. Cookson, 202 Ill. 248. Enforcement of an ambiguous contract will not be restrained unless the instrument is first reformed under appropriate pleadings. Perkins Lumber Co. v. Wilkinson, 117 Ga. 394.

68. Atlantic & B. R. Co. v. Southern Pine Co., 116 Ga. 224.

69. Contract by physician not to practice medicine in certain territory. Ryan v. Hamilton, 205 Ill. 191.

70. Kelly v. Churchill [Ind. T.] 69 S. W. 817.

71. Frink v. Hughes [Mich.] 94 N. W. 601.

72. Ticket brokers will be restrained from inducing persons to buy non-transferable reduced rate tickets, issued by a passenger association of railway companies, where use of such tickets by others than original purchaser can only be accomplished by fraudulent representations. Kinner v. Lake Shore & M. S. R. Co., 23 Ohio Circ. R. 294. An injunction will lie to prevent a competing publisher from inducing subscribers to the publications of another publisher to break their contracts in order to divert trade tc its own by misrepresentations as to the publications of the other publisher and by an agreement to indemnify subscribers against damages from breach of such contracts or

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equity and amounts to crime;[73] and whether the other parties were actually led by the misrepresentations of defendant to break their particular contracts is not material.[74]

Enforcement of usurious contracts will be restrained.[75] A contract permitting a gas company to use streets of a city to distribute gas to consumers may be enforced by the city.[76] Enforcement of an illegal boycott agreement will be restrained where it prevents a third person from completing his contracts.[77]

(§ 2) *I. Interference with property, business or comfort of private persons. Protection of enjoyment or possession of property in general.*—Enjoyment of an easement,[78] or lease,[79] or possession of premises,[80] or the separate property of a wife,[81] will be protected unless there is laches,[82] or the right is doubtful and trifling in value.[83] A lessor cannot restrain a lessee from enjoying his rights in the property.[84]

Erection or maintenance of structures interfering with enjoyment of premises will be prevented,[85] though made without knowledge of the owner's rights,[86] or

litigation arising thereon, though defendant had discontinued the practice of offering indemnity agreements. American Law Book Co. v. Edward Thompson Co., 41 Misc. [N. Y.] 396. A bill by a company engaged in selling products of coal mines to restrain violence and intimidation by miners or others at the mines to prevent their operation by the owners who were under contract with the corporation for the furnishing of coal, shows such an interest in plaintiff as will entitle it to maintain suit in its own right independently of the owners of the coal mines, where the latter were not liable for failure to furnish coal because of strikes under the contract though they might be made parties defendant, it being impossible to make them parties complainant, where their interests, while not adverse, are based on different rights and jurisdiction of the court might therefore be defeated. Carroll v. Chesapeake & O. C. A. Co. [C. C. A.] 124 Fed. 305.

73. Kinner v. Lake Shore & M. S. R. Co., 23 Ohio Circ. R. 294.

74. American Law Book Co. v. Edward Thompson Co., 41 Misc. [N. Y.] 396.

75. Prohibited securities are utterly void as concerns enforcement by the usurer. Bell v. Mulholland, 90 Mo. App. 612.

76. Muncie Natural Gas Co. v. Muncie, 160 Ind. 97.

77. Contract between plumbing association and dealers restricting sales. Walsh v. Association of Master Plumbers, 97 Mo. App. 280.

78. Anderson v. Southworth, 25 Ky. L. R. 776, 76 S. W. 391; Keplinger v. Woolsey [Neb.] 93 N. W. 1008.

79. An injunction will lie to prevent the lessor of a coal mine from interfering with construction of a switch track by the lessee reasonably necessary to the purposes of the mine, there being no adequate remedy at law. Ingle v. Bottoms, 160 Ind. 73. A lessee holding a lease giving it the exclusive right to draw gas from a certain tract over which a railroad had its right of way may restrain the sinking of gas wells on the right of way thereby diminishing the flow of gas from its own well, though it cannot enter the right of way to sink wells as long as the railroad is in possession. Consumers' Gas Trust Co. v. American Plate Glass Co. [Ind.] 68 N. E. 1020.

80. The keeping of men on watch to prevent the entry of a rightful owner to premises, and their trespass on the premises from time to time, and the arrest of the owner's servants in charge, amounts to such continuous trespass as will warrant injunction though the trespasser is solvent [Rev. St. 1899, § 3649]. Metropolitan Land Co. v. Manning, 98 Mo. App. 248.

81. A husband will be restrained from interfering with the separate realty of the wife where he had for years contributed nothing to her support while living separately and had used the entire income for her separate realty for his own benefit without even paying taxes. Dority v. Dority [Tex.] 71 S. W. 950.

82. Where defendants went into possession of a mining claim owned by plaintiff and another, title being taken in the latter's name, who developed and improved the claim for 15 years, and for 9 years after the third person refused to convey to plaintiff his portion of the claim, an injunction will not lie by him to restrain their operation of the mine because of laches. Mantle v. Speculator Min. Co., 27 Mont. 473, 71 Pac. 665.

83. One of the claimants to realty will not be restrained from entering the premises where both possession and right of possession are involved in doubt, the remedy being at law. Stone v. Snell [Neb.] 94 N. W. 525. Where it clearly appears in an action to settle the ownership of ore beds on one side of a particular line that plaintiffs owned the surface of the claim on that side of the line, thereby making them prima facie owners of all ore within the claims of its boundaries, defendant cannot restrain them from working veins pending an appeal from a judgment in their favor, on proof that the amount of ore amounted to considerable in value which plaintiffs denied, showing that it was practically worthless, and that the only work was merely exploration necessary to prepare for trial of another case. Maloney v. King, 27 Mont. 423, 71 Pac. 469.

84. Lessor cannot restrain interference with the use of the leased property in hands of the lessee, where the latter has the duty of repair. Coney v. Brunswick & F. S. Co., 116 Ga. 222.

85. Continued maintenance of a structure projecting over adjoining lands may be restrained by owner of the latter. Norwalk

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though completed before service of the writ,[87] or though complainant claims title under conveyance from a trustee,[88] unless the act amounts merely to a trespass,[89] or complainant acquiesced in the act.[90] The amount of injury is immaterial except as affecting the right to the remedy.[91] Delay by complainant will not bar relief, where he was doubtful as to his rights and defendant suffered no damage.[92] That the line fence of an adjacent owner is partly on plaintiff's land will not entitle him to restrain its maintenance.[93]

Obstructions of access to property,[94] by easement,[95] or of public ways,[96] will be relieved as to a subsequent purchaser on a platted highway,[97] except, as to public ways, when the injury is not special to complainant,[98] and irreparable.[99] Delay, to prevent relief, must suffice to raise presumption of a grant.[1]

Heating & Lighting Co. v. Vernam, 75 Conn. 662. Removal of structures erected by a trespasser on a wall situated on property of another without claim of right will be compelled. Bright v. Allan, 203 Pa. 394. Opening of a ball park adjoining plaintiff's residence by fencing in an alley which is one of the boundaries of his lot and dedicated to public use. Alexander v. Tebeau, 24 Ky. L. R. 1305, 71 S. W. 427. Sufficiency of evidence to show that a building, the construction of which was sought to be restrained by a street railway company, did not encroach upon the public street so that the injunction should be denied. Savannah Elec. Co. v. Pedrick, 116 Ga. 320. Where a landlord builds an extension to a leased building cutting off light and air from the tenant's premises, during the extension of the lease a mandatory injunction will issue to compel him to remove as much of the extension as obstructs the windows of the tenant's premises. Stevens v. Salomon, 39 Misc. [N. Y.] 159.

86. That an adjoining land owner built a structure extending over but not touching plaintiff's premises without knowledge of his rights and to bring about a determination of such rights at law, will not prevent plaintiff's right to restraint of continued maintenance. Norwalk Heating & Lighting Co. v. Vernam, 75 Conn. 662.

87. Where a tenant objected to obstruction of light and air by the landlord and gave notice of an intention to sue to prevent such obstruction, that the landlord completed the obstruction before the service of the injunction cannot avail him. Stevens v. Salomon, 39 Misc. [N. Y.] 159.

88. It is immaterial in whom the legal title is. Fisk v. Ley [Conn.] 56 Atl. 559.

89. That an adjacent land owner was about to construct a fence across the end of plaintiff's lot will not entitle him to an injunction, the act merely amounting to a trespass. Giller v. West [Ind.] 69 N. E. 548.

90. A preliminary injunction to restrain a building over an alley will be denied, where complainant with knowledge of the intended structure signed a writing giving up all claim to the alley and waited several weeks while the building was being erected before repudiating the writing and filed the bill without disclosing the facts. Dobleman v. Gately, 64 N. J. Eq. 223.

91. That benefits to a lot owner who has an easement in a lawn and beach, from construction of a sea-wall on a line which will diminish the beach line is greater or less than his injury will not affect his right to have the beach and lawn remain unchanged except as to the influence it may have in determining his right to an injunction. Fisk v. Ley [Conn.] 56 Atl. 559.

92. Where one of the parties to a contract for maintenance of a private alley, proceeded to construct an obstruction extending over the alley between their lands, and on objection of the other examined the contract and concluded that they could proceed regardless of the objections, and the other party though not convinced of such right was not aware of his legal right to restrain the construction until some time afterward, and could not determine the injury which would result from it until after it was completed, he was not barred from restraining the maintenance of the obstruction either because of acquiescence or because the other party was misled by his acts. St. Louis Safe Deposit & Sav. Bank v. Kennett Estate [Mo. App.] 74 S. W. 474

93. Giller v. West [Ind.] 69 N. E. 548.

94. Sufficiency of evidence to enjoin obstruction of an alley (Weed v. McKeg, 79 App. Div. [N. Y.] 218), or street (Marietta Chair Co. v. Henderson [Ga.] 45 S. E. 725).

95. Where an owner of land and his purchasers in title have used a pass way across land of which it was formerly a part to a turnpike continuously for thirty years, injunction will issue to prevent interference with such use by the owner of the servient estate, though the land owner has permissive use of another way to the turnpike. Anderson v. Southworth, 25 Ky. L. R. 776, 76 S. W. 391.

96. Removal of an obstruction in a street at suit of abutting owner who is compelled thereby to go several blocks out of his way to reach his premises. Young v. Rothrock [Iowa] 96 N. W. 1105. Injunction will issue to prevent obstruction of a public street not only by suit of the county or municipality but by suit of an abutting owner whose lot is materially injured. Pence v. Bryant [W. Va.] 46 S. E. 275. Where there is substantial loss resulting to a land owner from encroachment on the public highway without statutory authority by an adjoining land owner he is entitled to relief by mandatory injunction. Ackerman v. True, 175 N. Y. 353.

97. Where a land owner divides his land into lots and dedicates part of it as a highway, a subsequent purchaser of a lot adjacent to the highway has such an interest in its unobstructed use that he may bring injunction. Bohne v. Blankenship, 25 Ky. L. R. 1645, 77 S. W. 919.

98. Guttery v. Glenn, 201 Ill. 275. Ob-

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Obstruction or diversion of waters or watercourses,[2] or pollution of waters,[3] will be prevented—especially pending settlement of rights at law[4]—if the injury is sufficient and the right promptly asserted,[5] unless the legal title is disputed,[6] or there is a remedy at law.[7]

struction of a highway found to be public and where the obstruction was not on the part adjoining plaintiff's land, his injury not being different from that of the general public. Robinson v. Brown, 182 Mass. 266. Mere inconvenience in going from a street in front of property to a particular part of the city will not constitute such special damage. Guttery v. Glenn, 201 Ill. 275.

99. Obstruction or occupation of a street cannot be enjoined by a private citizen unless injury to his private rights is probable which is irreparable. McWethy v. Aurora Elec. Light & Power Co., 202 Ill. 218.

1. Obstruction in highway by adjoining landowner. Ackerman v. True, 175 N. Y. 353.

2. Restraining waste of water from an artesian well as lessening the flow in well of adjoining owner. Huber v. Merkel [Wis.] 94 N. W. 354. Protection of rights of a riparian owner to enjoyment of the natural state of a stream. Webster v. Harris [Tenn.] 69 S. W. 782, 59 L. R. A. 324. Diversion of percolating waters injuring a stream and wasting its water. Stillwater Water Co. v. Farmer, 89 Minn. 58. Building of dam in a river at such a height as to throw water back on adjoining lands belonging to another owner. Brown v. Ontario Talc. Co., 81 App. Div. [N. Y.] 273. An owner of land adjacent to a street, may be restrained from filling in low places on his land and building a levee, so as to cause the stream to overflow lands on the other side, though he is solvent. Rev. St. 1895, art. 2089, requiring the restraining of acts which are prejudicial to the applicant. Sullivan v. Dooley [Tex. Civ. App.] 73 S. W. 82. Where a lower riparian owner secures a judgment at law determining that the abstraction of water from a stream from an upper owner was a nuisance, he is entitled, as of course, to an injunction restraining continuance of the nuisance where it works substantial and permanent injury to his property. Harper v. Mountain Water Co. [N. J. Eq.] 56 Atl. 297. Where a lower riparian owner files a petition for an interlocutory injunction against an upper owner who threatens to interfere with his rights by diverting part of the waters of a non-navigable stream flowing through his land, and it appears from the record that defendant a nonresident, admits the contemplated trespass and defends merely on the ground that no material damage will result to plaintiff, the injunction should not be denied since the diversion will constitute an injury to plaintiff's property rights, and the injunction will prevent a multiplicity of suits and will restrain acts which might in time become the foundation of an adverse claim. Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co. [Ga.] 45 S. E. 267.

Sufficiency of evidence in action to restrain diversion of waters from stream as infringing water rights (Britt v. Reid, 42 Or. 76, 70 Pac. 1029); to restrain taking of water from wells to support a finding that plaintiff was not deprived of water which he had theretofore appropriated (Whitmore v. Utah Fuel Co. [Utah] 73 Pac. 764); to entitle a land owner to restrain discharge of water used in a placer mine into an artificial creek flowing through plaintiff's farm resulting in damage by soaking the soil and deposit of debris on the land (McCann v. Wallace, 117 Fed. 936); to show that the breaking of head gates in an irrigation canal by persons not stockholders or water right owners, or in contractual relation with the company, and possessing no right to the canal or its waters, in order to divert the property to their own use, as resulting in irreparable injury, entitling the company to injunction (Hayois v. Salt River Valley Canal Co. [Ariz.] 71 Pac. 944).

3. Pollution of a stream used for hospital purposes by the sewer of an improvement company will be restrained where the hospital was a lower riparian owner and the stream was not navigable. West Arlington Imp. Co. v. Mount Hope Retreat [Md.] 54 Atl. 982. Where a company holding a water privilege on a stream contracted to supply water for a village to the extent of about one-fourth of one per cent of the supply of the stream for a year, lower riparian owners operating dams and water powers may restrain such unlawful diversion, though trifling in injury to them. Penrhyn Slate Co. v. Granville Electric Light & Power Co., 84 App. Div. [N. Y.] 92.

4. Where purely legal questions are concerned in a pending suit regarding the right to discharge water over land, injunction will lie to restrain the discharge of water sufficient to injure the premises until such questions are determined at law. Colonial Woolen Co. v. Trenton Water Power Co. [N. J. Eq.] 55 Atl. 993.

5. Diversion of canal waters will not be prevented after great delay where the injury was small if any and the improvement was beneficial to the canal. Stewart Wire Co. v. Lehigh Coal & Nav. Co., 203 Pa. 479. Construction of a dam in a stream will not be restrained where plaintiff's needs for water were sufficiently supplied and there was no apparent probability that a recurrence of past injury would result. Union Light & Power Co. v. Lichty, 42 Or. 563, 71 Pac. 1044. A bill to restrain appropriation of the waters of a stream without compensation to riparian owners will be dismissed where it is not shown that such appropriation will be made or that it will be done without compensation and where a resolution of the directors shows that the company intends to proceed according to law. Hey v. Springfield Water Co. [Pa.] 56 Atl. 265.

6. A federal court cannot enjoin a boom company from obstructing a navigable stream by a log boom, and from continuing to occupy the boom site which plaintiff claims as appurtenant to his riparian lands, where defendant denies his title and that the site is an appurtenance and claims ownership through purchase of the bed of the stream from the state as public lands, and the right to maintain the boom, under a statutory

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Nuisances will be abated where private property rights are invaded,[8] in the court's discretion,[9] unless the right is uncertain and greater injury would result from abatement than from the nuisance.[10] Similar acts by other persons cannot be shown either by way of proof or justification.[11] Injunction will not lie in Kansas to abate a nuisance in the sale of liquors,[12] but otherwise in Maine.[13]

Trespass,[14] *or waste,*[15] will not call for relief unless the legal remedy is in-

franchise from the state. Lownsdale v. Gray's Harbor Boom Co., 117 Fed. 983.

7. The blocking up of a natural depression into which water naturally drains, will not be restrained though the depression is on plaintiff's land there being a remedy at law for damages or a statutory remedy providing for drainage. Porter v. Armstrong, 132 N. C. 66.

8. Marrs v. Fiddler, 24 Ky. L. R. 722, 69 S. W. 953; Finkelstein v. Huner, 77 App. Div. [N. Y.] 424. As against a charitable institution even though it is not liable to a suit at law. Deaconess Home & Hospital v. Bontjes, 104 Ill. App. 484. Operation of a railroad across a public street amounting to a nuisance as to a property owner, built without legislative or municipal consent. Southern Cotton Oil Co. v. Bull, 116 Ga. 776. Where plaintiffs and defendants own adjoining lots and are entitled to the use in common of alleys between houses on the lots, plaintiffs may restrain a nuisance maintained by defendants in such alleys. Reese v. Wright [Md.] 56 Atl. 976. That the existence of a nuisance had been established at law and damages recovered from defendants, that they had been notified thereafter to abate the nuisance, but had refused, and that unless injunction issued for its abatement plaintiffs would be liable to a multiplicity of suits and would be deprived of the use and enjoyment of their property to their irreparable injury which could not be measured at law is sufficient ground for abatement. Id.

9. Mandatory injunction for removal and abatement of a nuisance is largely in discretion of the court. Shroyer v. Campbell [Ind. App.] 67 N. E. 193.

10. Erection of a building by an owner on his own property will not be restrained unless it is clear that the business to be carried on will be a nuisance and cannot be conducted so as not to amount to a nuisance. Flood v. Consumers Co., 105 Ill. App. 559. A preliminary injunction will not issue to prevent the use by defendant of certain appliances alleged to be nuisances, where the result would be to stop the operation of iron mines in which large amounts of money have been invested, where the matter of right is uncertain and the injury resulting to defendant from the injunction would be far greater than that to plaintiff from the continuance of the work. Amelia Mill. Co. v. Tennessee C., I. & R. Co., 123 Fed. 811.

11. Pittsburgh, C., C. & St. L. R. Co. v. Crothersville, 159 Ind. 330.

12. Gen. St. 1901, § 2463, providing for punishment of common nuisances under the prohibitory law was repealed by Gen. St. 1901, § 2493, so that an injunction will not lie. State v. Estep, 66 Kan. 416, 71 Pac. 857.

13. Under Pub. Laws 1891, c. 98, authorizing abatement of a liquor nuisance by injunction, a judgment at law need not first be obtained. Davis v. Auld, 96 Me. 559.

14. Constitutionality of Rev. St. § 1469 conferring jurisdiction in chancery to restrain mere trespass on timber lands without color of right or authority. McMillan v. Wiley [Fla.] 33 So. 993.

Remedy at law adequate: To restrain one solvent from trespass on personal property or from mere oral assertion of title to it. Ganow v. Denney [Neb.] 94 N. W. 959. Where the bill does not show threatened irreparable injury, insolvency of defendants or other equitable grounds. Rogers v. Brand [Ga.] 45 S. E. 305. Sinking a mining shaft on forty acres of land used to manufacture brick and the throwing of dirt on the surface is not a trespass wasting the estate or amounting to irreparable injury. King v. Mullins, 27 Mont. 364, 71 Pac. 155. Trespass on realty will not be restrained where it appears that the locus in quo was a public highway acquired by prescription and the object of the suit was to determine whether it existed over the property. Tomasini v. Taylor, 42 Or. 576, 72 Pac. 324. Wrongful use of a private alley will not be restricted on the ground that if continued, defendant will acquire an easement, since the threatened injury is remote and contingent, and plaintiff has a remedy by serving statutory notice to prevent the injury; Burns' Rev. St. 1901, §§ 5746, 5747, giving the right by service of notice to interrupt adverse possession. Hart v. Hildebrandt, 30 Ind. App. 415. Entry by a mining prospector on the property of another which is held under application for a patent as a mining claim and the beginning of mining operations will not require issuance of an injunction to restrict the trespass where the prospector is not shown to be insolvent and his operations do not materially injure the property. Harley v. Mont. Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407. Where plaintiff claimed title to land used by railroad company as a gravel pit under adverse possession, and the company proceeded to take possession so as to deprive him thereof, but no fence had been built upon the land or other trespass except acts of a surveyor in driving stakes, there was an adequate remedy at law for injury resulting from any threatened trespass. Wabash R. Co. v. Engleman, 160 Ind. 329. That defendant at various times opened plaintiff's premises and cut hay and grain and pastured cattle and horses thereon, under a claim of right, and threatened to continue such conduct, having resulted and being calculated to result in the destruction of crops and shrubbery, is not ground for injunction against further trespasses since it did not show irreparable injury to the estate. Moore v. Halliday [Or.] 72 Pac. 801.

Remedy at law inadequate: One without authority will be restrained from crossing an irrigation canal with a lateral to carry water to his land from another canal. Castle Rock Irr. C. & W. P. Co. v. Jurisch [Neb.] 93 N. W. 690. Threatened destruction of

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adequate, or legal rights should be protected pending settlement at law.[16] Insolvency of a trespasser will not alone warrant relief.[17] Continued or threatened repeated trespasses can generally be prevented only by injunction.[18] Complainant's title must be shown.[19] One out of possession cannot bring injunction for trespass to realty.[20] That a lot owner having an easement in a beach and lawn was the

timber on land which has been conveyed to another with the exception of the timber. Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171. A trespasser will be enjoined though solvent, where he enters forcibly on a claim of right, digs up the soil and builds a brick wall, thereby excluding the owner from possession. Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828. Where lands overflowed by the tide can be used only for the shooting of game, trespass day by day by hunters thereon will be restrained. Simpson v. Moorhead [N. J. Eq.] 56 Atl. 887. To restrain the owner of an undivided half interest in timber lands from cutting the timber without the consent of his co-owner because of the danger of irreparable injury. Cotten v. Christen, 110 La. 444. The owner of a license for removal of ore from land for a certain period, which was revocable only for violation of its terms, may have an injunction against the trespasser since he has no remedy at law by an action for damages [Rev. St. 1899, § 3649]. Lytle v. James, 98 Mo. App. 337. Where an entry upon land containing a mine owned by complainants in possession was threatened by one claiming under a lease and complainants allege that the lease was forfeited and that irreparable injury would result from the threatened acts. Negaunee Iron Co. v. Iron Cliffs Co. [Mich.] 96 N. W. 468. Where land was sold and bonds taken for the purchase secured by mortgage on the land and the grantee and his wife conveyed it to their daughter and afterward all three sold the timber thereon to a lumber company and pending action at law on the bonds, a large amount remaining unpaid, the timber, the principal value of the land, was being removed, an injunction will issue to restrain its removal, defendants being insolvent. Terry v. Robbins, 122 Fed. 725.

15. Wiggins v. Middleton, 117 Ga. 162. A mortgagee may restrain removal from a brewery of a refrigerating plant which will prevent its operation and damage the business. Schmaltz v. York Mfg. Co., 204 Pa. 1, 59 L. R. A. 907. Where defendant mortgaged a large tract of timber land and the timber on a smaller tract to plaintiff, and the principal value of the latter tract was the timber, and afterward defendant placed valuable improvements on the land to manufacture timber into lumber and commenced active operation, plaintiff could restrain further operation though ten years would be necessary to remove all the timber and not more than one-tenth of it would be removed when the debt had matured. Beaver F. & L. Co. v. Eccles [Or.] 73 Pac. 201.

16. **Trespass.** Entry upon land under a void lease and the drilling of oil wells and taking of oil therefrom and threats to continue in such operations, will warrant an injunction restraining further operations until the determination of all the matters at issue between the parties though plaintiff may have a remedy at law for the trespass. Haskell v. Sutton, 53 W. Va. 206.

Waste: Where it appears in an action to determine conflicting claims to public land that the claims of both parties to the timber on the land were made in good faith and on colorable ground, and that one of the parties proposed to remove the timber, the removal may be restrained until a patent is issued by the United States, though because of the absence of such patent, the court is without jurisdiction to determine the adverse claims. Northern Lumber Co. v. O'Brien, 124 Fed. 819. Where the title of land is in dispute and irreparable injury is threatened to the substance of the estate, an injunction will issue to prevent trespass and preserve the property pending settlement of the title at law though no action for that purpose has been brought if plaintiff intends to bring one immediately. Freer v. Davis, 52 W. Va. 1, 59 L. R. A. 556. To prevent injury to growing crops where it appears that continuance of the injury during suit will produce great waste and that the damages can not be justly estimated [Rev. St. § 4288]. Wilson v. Eagleson [Idaho] 71 Pac. 613.

17. Moore v. Halliday [Or.] 72 Pac. 801; Pittsburg, S. & W. R. Co. v. Fiske [C. C. A.] 123 Fed. 760.

18. Various petty trespasses on another's property. Fonda, J. & G. R. Co. v. Olmstead, 84 App. Div. [N. Y.] 127. Against a trespasser though he is solvent where he has destroyed a fence and threatens to destroy it as often as it may be replaced. Lynch v. Eagan [Neb.] 93 N. W. 775. Continuous trespasses by the cutting of timber and further threatened trespasses greatly reducing the value of land [Rev. St. 1899, § 3649]. Palmer v. Crisle, 92 Mo. App. 510. Where trespass has already been committed and it appears to be defendant's purpose to repeat the acts which can not be justly compensated by damages, or where such damage is merely nominal and if defendant is insolvent an additional reason for the injunction exists. Alden Coal Co. v. Challis, 103 Ill. App. 52.

19. Tomasini v. Taylor, 42 Or. 576, 72 Pac. 324. Repeated trespasses will be restrained where plaintiff has established his legal title to the premises. Thomas v. Robinson [Iowa] 92 N. W. 70. It will not lie where defendants are in possession under color of title and plaintiff's right to possession is disputed (Munyos v. Filmore [Ind. T.] 76 S. W. 257), nor where the rights are founded on unsettled questions of law and fact and the allegations of irreparable damage in the bill are fully negatived (Merchants' Coal Co. v. Billmeyer [W. Va.] 46 S. E. 121). Cutting of timber on land will not be restrained where the abstract of title attached to the petition fails to show that plaintiff has a perfect paper title, capable of record. Wiggins v. Middleton, 117 Ga. 162. A grantor of land who brought an equitable suit to set aside a deed for fraud and failed, had no right to an injunction against the grantees to prevent trespassing on the property, since the question of title had been settled in the former suit. Tifel v. Jenkins, 95 Md. 665.

20. Gildersleeve v. Overstolz, 97 Mo. App.

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only one interested who was dissatisfied with the change in the beach resulting from construction of a sea-wall will not prevent his right to restrain such construction.[21] The right to restrain trespass depending on statute must be strictly construed.[22]

Casting of a cloud on title causing danger of a multiplicity of suits will be enjoined.[23]

Privacy and comfort at home will be protected,[24] but one suspected of a crime cannot enjoin exhibition of his photograph by the police on the ground that his right of privacy is invaded.[25]

Liens or securities for debts will be protected where the debts are not due and there is no legal remedy,[26] but payment of money to other than the alleged creditor will not be prevented where his contract rights are not shown,[27] or no benefit would result from the writ.[28]

Protection of business or franchise in general.—The acts of injury threatened pending an action must be present and continuing or consist in threats of such conduct.[29] Infringement of licensed rights will be prevented.[30] Competing deal-

303. Sufficiency of evidence in suit for injunction to restrain trespass to show that plaintiff was in possession at time of the alleged trespass. Metropolitan Land Co. v. Manning, 98 Mo. App. 248.

21. Fisk v. Ley [Conn.] 56 Atl. 559.

22. Right to restrain trespass on realty given by Rev. Sts. 1892, § 1469, does not accrue to one claiming to own only turpentine in the trees on land with the privilege of collecting it (McDonald v. Padgett [Fla.] 35 So. 336); nor to an owner of timber on land; he is not an owner of timber lands within the meaning of that statute giving the right to an injunction to restrain the cutting of trees or removing of logs from timber lands, though the timber constitutes the chief value of land on which it stands (Doke v. Peek [Fla.] 34 So. 896).

23. Where it appears that one who had obtained leases on oil lands under a representation that former leases granted by the owners had been forfeited, and was attempting to obtain more of such leases, he was thereby casting a cloud on the title of leases formerly given so as to cause the owner thereof a multiplicity of suits, the grantors of the different leases being separate owners. Allen v. New Domain Oil & Gas Co., 24 Ky. L. R. 2169, 73 S. W. 747.

24. Acts offensive to adjoining dwellers and destructive of their comfort will be restrained. Froelicher v. Oswald Iron Works [La.] 35 So. 821. Noise at Sunday ball games will be enjoined at the suit of individuals in the neighborhood, where it disturbs their rest and quiet. Gilbough v. West Side Amusement Co., 64 N. J. Eq. 27. See, also, supra, this section, "Nuisance."

25. Owen v. Partridge, 40 Misc. [N. Y.] 415.

26. Where land had been sold on the crop payment plan and the vendor alleges default in turning over a share of the crops and in payment of taxes and that a certain sum is due him, he may restrain the occupant from seeding the premises and from interfering with his occupation thereof. Dickson v. Dows, 11 N. D. 404.

Absence of legal remedy: A landlord may restrain removal of goods by a tenant to the prejudice of his lien for rent, though the tenant was not insolvent, where he had no remedy at law because the rent was not due. Wallin v. Murphy, 117 Iowa, 640. Where a vendor had sold land on the crop payment plan a preliminary injunction will not issue to restrain the purchaser from seeding the premises and interfering with the occupation of the purchaser on a mere allegation of default in turning over a share of the crops and in payment of taxes. Dickson v. Dows, 11 N. D. 404. That rent was not due from his tenant, but that the tenant was insolvent and was removing crops and stock from the premises and mortgaging such products to others, so that sufficient property would not be left to satisfy the rent when due, is sufficient for an injunction restraining the tenant from selling or disposing of crops subject to the landlord's lien. Gray v. Bremer [Iowa] 97 N. W. 991.

27. No restraining order will be issued in a suit to reform a contract for the sale of land to prevent payment of any part of the price by the purchaser to the grantor's agent and to prevent the latter from receiving it, where before the trial the agency had ceased and the entire contract was changed to require payment to the grantor. Daugherty v. Curtis [Iowa] 97 N. W. 67.

28. Where a creditor residing in one state assigned his claim against his debtor in the same state to one in another state who attached a credit due the debtor there exempt from execution under the laws of the former state, injunction will not issue to restrain the creditor from receiving any of the money collected since its effect would be to leave the money in the hands of the assignee so that the debtor would receive no benefit therefrom. Margarum v. Moon, 63 N. J. Eq. 586.

29. An injunction will not be granted under Code Civ. Proc. § 604, authorizing one pendente lite to restrain the violation of rights during the pendency of an action, where plaintiff's affidavits merely showed attempts within three months previous by defendant to interfere and defendant's uncontradicted affidavit showed that a month thereafter the parties agreed not to interfere with each other's business. Sanford Dairy Co. v. Sanford, 82 App. Div. [N. Y.] 641.

30. Establishment of another ferry without license near licensed ferry. Green v. Ivey [Fla.] 33 So. 711.

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ers will not be prevented from watching the business places of competitors.[31] A contract in restraint of trade will be restrained where it affects business rights of third persons.[32] Secrecy of stock or market quotations by a board of trade will not be protected where it does not appear that they were genuine or that the public had not discovered them,[33] or where they are being furnished from another source,[34] but use of genuine exchange quotations will be protected as against unfair use by patrons or others.[35] Complainant must move promptly,[36] and show sufficient injury.[37]

Infringement of patents,[38] *and use of trade marks, names,*[39] *and devices,*[40] by unauthorized persons, will be restrained. An adequate remedy at law for in-

31. Members of a wholesale druggist's association will not be prevented by injunction from watching the business place of wholesale dealers to determine what druggists furnished them with articles violating their contract with manufacturers. Park v. National Wholesale Druggists' Ass'n, 175 N. Y. 1.

32. An illegal agreement between a plumbers' association and dealers and manufacturers, the latter not to sell to others than members of the association, the former to refuse to buy from any dealer found selling to a non-member will be dissolved by injunction and its enforcement restrained as against one who was unable to complete his work because of its operation. Walsh v. Association of Master Plumbers' Ass'n, 97 Mo. App. 280.

33. Surreptitious procurement of continuous quotations. Board of Trade v. Consolidated Stock Exch., 121 Fed. 433. A preliminary injunction will not issue to restrain the use of board of trade quotations, where defendants deny such use and show that they obtained the same quotations from another source and issues can repeatedly be made by complainant so as to procure a speedy final hearing. Board of Trade v. Ellis, 122 Fed. 319. Where it appeared that nearly all the transactions carried on at the pits of a board of trade were gambling transactions which the parties intended to settle by payment of differences in the subsequent price of the articles dealt in before maturity of the options, dissemination of quotations so obtained will not be restrained at suit of the board of trade since they were of no legitimate value as tending to promote the business of the county. Board of Trade v. Donovan Commission Co., 121 Fed. 1012. The Board of Trade of Chicago has no right to an injunction to protect its quotations of price, where it appears that about 95% of the contracts for sales made thereunder are for future delivery and are settled immediately after the transaction by payment of differences between the members under its rules and with its knowledge and consent. Board of Trade v. Kinsey, 125 Fed. 72; Christie Grain & Stock Co. v. Board of Trade [C. C. A.] 125 Fed. 161.

34. A preliminary injunction will not issue on the ground that defendant receives quotations from an open board of trade, which are practically identical with those of complainant board of trade. Board of Trade of Chicago, Ill. v. Ellis, 122 Fed. 319.

35. Use of exchange quotations by one without complying with reasonable regulations established by a board of trade as a condition of receipt and use by others may be restrained at suit of the board of trade. Board of Trade v. Christie Grain & Stock Co., 116 Fed. 944.

36. A preliminary injunction against unfair competition will not be allowed on conflicting evidence where complainant knew of the acts of defendant for over a year before suit, during which time they were in active competition. C. O. Burns Co. v. W. F. Burns Co., 118 Fed. 944. Where it appears that plaintiff's business had been destroyed by certain combination, but he had long delayed in asserting his right, an injunction will not lie to restrain one having the right to use water of a certain canal, from diverting such water, where it appears that he made improvements very greatly increasing the capacity of the canal, but plaintiff will be left to his remedy at law. Stewart Wire Co. v. Lehigh Coal & Nav. Co., 203 Pa. 479.

37. Stewart Wire Co. v. Lehigh Coal & Nav. Co., 203 Pa. 479. A general allegation that defendant is interfering with the cultivation of a farm on which plaintiff resides, will not show such irreparable damage as will warrant an injunction. Merriner v. Merriner [W. Va.] 46 S. E. 118.

38. Discretion of court as to preliminary injunction against infringement of patent granted near close of lease for manufacture by patentee. Adam v. Folger [C. C. A.] 120 Fed. 260. That complainant is a member of an unlawful trust combination will not give third person the right to infringe his patent nor prevent him from restraining such infringement. General Elec. Co. v. Wise, 119 Fed. 922. An employe who, as patentee, assigned a patent to his employer, may be enjoined also by a decree against his employer for infringement no damages being assessed against him. Regent Mfg. Co. v. Penn. E. & M. Co. [C. C. A.] 121 Fed. 80. An injunction will issue at the suit of an exclusive licensee for sale of patented articles within a certain territory to restrain a third person from conspiring with the licensor with knowledge of the license to violate its rights by selling such articles within the territory. N. Y. Phonograph Co. v. Jones, 123 Fed. 197.

39. Sufficiency of evidence for temporary injunction against infringement of trade mark. General Elec. Co. v. Re-New Lamp Co., 121 Fed. 164. An intention to continue infringement must appear, else an action for damages is sufficient. Globe-Wernicke Co. v. Brown [C. C. A.] 121 Fed. 90. Imitation of trade names, emblems and colors in design long applied to products of a certain manufacturer will be restrained whether they are trade marks or not. Id. A merchant who fills customers' orders with a different and inferior article in place of an article adver-

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fringement will not always prevent injunction.[41] The patent must be adjudicated or sufficient interest shown otherwise.[42] Neither nonuse nor misuse of a patent will deprive the owner of right to enjoin infringement.[43] The right to exclusive use of a trade label or package must be clear.[44] Notice of claims to a patent sent in bad faith to alleged infringers will be restrained where the claimant does not intend to assert his rights.[45]

Disclosure of trade secrets,[46] by persons under contract to secrecy,[47] or in confidential relations,[48] or employes,[49] will be prevented if the information is of a character not easily obtainable,[50] and resulted from efforts of complainant.[51] Dis-

tised by the manufacturer and well known by its trade name may be restrained at suit of the manufacturer because of unfair trade. N. K. Fairbanks Co. v. Dunn, 126 Fed. 227. Where a person doing business under a certain name sold it and covenanted not to engage in that business for a certain time within a certain territory, but afterward made arrangements to do so, and when notified by the purchaser, desisted saying that he did not intend to begin business himself, but allowed his wife and her brother to take up the property and conduct the business in the same name in which it was formerly conducted, injunction will issue to restrain him from violating the covenant even though the wife declares that the name used was hers and that she had a right to use it. Fleckenstein v. Fleckenstein [N. J. Eq.] 53 Atl. 1043.

40. It need not be shown by specific proof that the purchasers have been actually deceived, where the imitation was established. Manitowoc Malting Co. v. Milwaukee Malting Co. [Wis.] 97 N. W. 389. An injunction may be granted against the use of a label where defendant delivers goods previously sold bearing the label after being informed of the counterfeit [Code, § 5050]. Beebe v. Tolerton, 117 Iowa, 593.

41. A permanent injunction against infringement of a patent will not be refused because defendant is able to respond in damages since the owner has a lawful right to exclusive use. General Elec. Co. v. Wise, 119 Fed. 922.

42. Sufficiency of interest to entitle the assignee of an unadjudicated patent to a preliminary injunction against infringement by the patentee. Continental Wire Fence Co. v. Pendergast, 126 Fed. 381. Substantial doubt as to validity of an unadjudicated patent and ability of defendant to respond in damages will prevent a preliminary injunction against infringement. Bradley v. Eccles, 120 Fed. 947. An injunction against infringement of a patent will not be allowed before final hearing, where defendant sets up a license and the evidence is contradictory as to the validity of the license. Armat Moving Picture Co. v. Edison Mfg. Co. [C. C. A.] 125 Fed. 939. A preliminary injunction will not be granted against the infringement of a patent unadjudicated without proof of public acquiescence, where there appears a question as to the genuineness of the patent. Newhall v. McCabe Hanger Mfg. Co. [C. C. A.] 125 Fed. 919.

43. Fuller v. Berger [C. C. A.] 120 Fed. 274.

44. The denial of a temporary injunction pendente lite is not an abuse of discretion in a suit to restrain imitation of trade labels and packages, where the right to exclusive use is not clearly shown and the charges of bad faith and misleading of purchasers are denied. Schenker v. Awerbach, 85 N. Y. Supp. 129.

45. While the owner of a patent is entitled to notify infringers of his claim and to threaten them with litigation if they disregard such claim and to notify the customers of such persons in good faith that his claims are valid and to attempt to protect them from invasion, he will be restrained from issuing such notice in bad faith without intending to bring the threatened suits and merely to injure the business of the other party, such being a fraudulent invasion of property rights. Adriance v. Nat. Harrow Co. [C. C. A.] 121 Fed. 827.

46. Definition of trade secret as entitling one to injunction against its revelation by an employe. Nat. Tube Co. v. Eastern Tube Co., 23 Ohio Circ. R. 468.

47. One under an express contract or contract implied from confidential relations not to disclose a trade secret, may be restrained from such disclosure. Stone v. Goss [N. J. Err. & App.] 55 Atl. 736.

48. Outside of patent rights, one who discovers a medical preparation has a property right therein so that he may keep it a secret and may restrain those who gain possession of his secret through confidential relations with him from divulging it so as to make use of it to his injury. Stewart v. Hook [Ga.] 45 S. E. 369.

49. The use of patterns belonging to one manufacturer, will be restrained where they were secretly taken by an employee of the former in charge and carried to the latter while in his employ, if brought in time, but if no further use of the patterns is intended at time of suit the injunction will be useless. Nat. Tube Co. v. Eastern Tube Co., 23 Ohio Circ. R. 468.

50. Though there is a certain individuality in the construction of patterns and casts in a tube mill, and some care is taken to preserve the knowledge of their construction from the public, if they are such as are in general use in such mills so that artisans in that line have full knowledge of the character of the machinery and patterns used, and can readily and approximately reproduce them, they are not trade secrets, the use of which by other than the originators will be restrained. Nat. Tube Co. v. Eastern Tube Co., 23 Ohio Circ. R. 468.

51. One under a contract of employment with another will not be restrained from entering employment of a third person because of the danger to his first employer of divulgence of valuable trade secrets, where the employe shows that before entering the

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closure necessarily made to the court will not prevent complainants from restraining disclosure by others.[52] Persons inducing others to disclose such secrets will be prevented from using the information.[53]

Boycotts,[54] *strikes and intimidation of employes,*[55] resulting in damage to property or business, or violation of labor contracts,[56] will be restrained, especially where interstate traffic is prevented by such acts,[57] unless the employer has a sufficient remedy at law.[58] Mere counselling or ordering a strike,[59] or mere picketing

first employment, he had learned the secrets in his possession and that the employes in such first employment were as familiar with such secrets as he, which statements his first employer did not disprove. Chain Belt Co. v. Von Spreckelsen [Wis.] 94 N. W. 78. Where an employer who has discovered a trade secret and is using it secretly, reveals it to an employe so that the latter may be better able to discharge his duties, such employe will not be entitled to sell the secret in the market nor to sell his services with the added value of the secret, but if the employe himself discovered the secret or brought his knowledge to his employer, the latter can claim only the product of the skill, industry and intelligence of the workman and not the property in the idea so as to restrain its revelation to another by the employe. Nat. Tube Co. v. Eastern Tube Co., 23 Ohio Circ. R. 468.

52. Stone v. Goss [N. J. Err. & App.] 55 Atl. 736.

53. Persons who induce another under an express or implied contract not to disclose a trade secret, to disclose such secret knowing that it constitutes a violation of confidence, will be restrained from using such information, though they might have attained the same result by their own efforts. Stone v. Goss [N. J. Err. & App.] 55 Atl. 736.

54. Where it amounts to an unlawful conspiracy. Gray v. Bldg. Trades Council [Minn.] 97 N. W. 663. Interference with trade or customers within a store, or obstruction of access to it by any physical means or threats, violence or intimidation, to prevent entry of intending customers on the part of sympathizers with labor unions, will be restrained by injunction. Foster v. Retail Clerks' I. P. Ass'n, 39 Misc. [N. Y.] 48.

55. An injunction will issue to restrain workmen engaged in a strike from picketing establishments of their employer and gathering in the vicinity thereof, and calling his employes "scabs" and other bad names and threatening them with personal violence. Beaton v. Tarrant, 102 Ill. App. 124. Where third persons interfere with others willing to enter the employment of a manufacturer and coerce them into refraining, he may have an injunction to restrain their interference, it being an invasion of the right of employers that labor should flow freely to them. Jersey City Print. Co. v. Cassidy, 63 N. J. Eq. 759. The action of pickets of a labor organization engaged in a strike in preventing by violent means other persons from entering the employ of their employer invades both his property rights and the personal rights of the workmen so that no adequate remedy at law will lie, and injunction will issue to prevent such action. Union Pac. R. Co. v. Ruef, 120 Fed. 102. Where it appeared from affidavits in a suit to restrain strikers from intimidating employes that defendants and others assembled about complainant's factory and used vile language to such employes, threatened them and in some cases personally assaulted them, and defendants denied merely the acts of violence failing to deny that they were present when such acts were committed, a preliminary injunction will issue and will be continued until the case is heard on its merits. Gulf Bag Co. v. Suttner, 124 Fed. 467.

56. Where employes are induced by threats or persuasions to break their contract of service, the employer may restrain third persons from so interfering with his business. Jersey City Print. Co. v. Cassidy, 63 N. J. Eq. 759. An injunction will lie to restrain continuance of acts by a labor organization whereby persons contracting with plaintiff were maliciously induced to violate such contracts and a strike of plaintiff's workmen was caused merely because he refused to recognize the union or the walking delegate and that acts of the same sort were threatened in the future. Beattie v. Callanan, 82 App. Div. [N. Y.] 7.

57. Interference with the transportation of property as a subject of interstate commerce by employes who have quit their employment by threats or intimidation against other employes or persons contemplating employment with their former employer will be restrained by the federal court. Knudsen v. Benn, 123 Fed. 636. A bill by a railroad company against labor union officers alleging malicious conspiracy on the part of the latter to interfere with the carriage of the mails by the former and to restrain interstate commerce by inducing and compelling the employes operating trains to strike in violation of their contracts, though without grievances and satisfied with their wages and work and to prevent the interchange of traffic with connecting carriers in order to compel complainant to recognize the labor unions and refuse to employ non-union men, is sufficient to authorize a temporary restraining order by a federal court preventing the ordering or causing of such strike or the interference with interstate traffic until hearing on the motion for a preliminary injunction. Wabash R. Co. v. Hannahan, 121 Fed. 563.

58. Injunction will not lie in strike or boycott cases unless a substantial pecuniary loss as to property or business results to the complainant for which there is no adequate remedy at law or unless he shows that he has been deprived of his right to make a living. Atkins v. Fletcher [N. J. Eq.] 55 Atl. 1074.

59. The officers or committees of a labor organization cannot be restrained from counselling or ordering a strike by the members in exercise of the authority given them by laws sanctioned by a majority of the members. Wabash R. Co. v. Hannahan, 121 Fed. 563.

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by strikers, is insufficient.[60] Temporary injunction will not issue if the danger of injury is not immediate.[61] All persons engaged in the unlawful acts may be affected by the writ.[62] A conspiracy by several persons to deprive another of the right to work because he does not join a particular labor union, by means of threats and strikes, will be restrained.[63]

(§ 2) *J. Publications.*—Publication of a libel,[64] or of constitutional amendments by the secretary of state to be voted upon,[65] or selection of a newspaper to publish the result of a local option election,[66] will not be restrained.

(§ 2) *K. Crimes.*—Injunction will not lie to suppress crime[67] in aid of criminal courts, unless public civil rights or public property is in danger,[68] or at suit of a

60. Proprietors of a store cannot restrain sympathizers with labor unions from picketing the store and circulating in the vicinity cards asking union men to keep away from the store and endeavoring to deprive the store of its patrons by mere persuasions and peaceable means. Foster v. Retail Clerks' I. P. Ass'n, 39 Misc. [N. Y.] 48. Though injunction will lie to prevent the picketing of strikers to intimidate others seeking employment, if such means are used merely to obtain information or to persuade others by peaceable means from seeking employment and no existing contract is sought to be broken, injunction will not lie. Fletcher v. International Ass'n of Machinists [N. J. Eq.] 55 Atl. 1077. While a strike is in progress, a labor organization may properly picket the works of an employer if no violence, coercion or intimidation is used to prevent others from entering or remaining in his service, but where such conditions exist, that the acts are liable to punishment under the criminal laws will not prevent an injunction necessary to protect the employer's property and business from civil injury. Union Pac. R. Co. v. Ruef, 120 Fed. 102.

61. Sufficiency of conspiracy to interfere with interstate commerce or to prevent carrying of mails by complainant in violation of the federal laws or to show that defendants as officers of a labor union in ordering a strike of complainant's employes acted without due authority from the latter or beyond lawful purposes to enforce peaceable demands, as to wages and rules of work, so as to authorize a preliminary injunction. Wabash R. Co. v. Hannahan, 121 Fed. 563. Where the only showing of defendants on an order to show cause why an injunction should not issue against picketing and illegal interference with plaintiff's employes by strikers and labor unions pending a suit for permanent relief, was a large number of affidavits on printed blank forms, the balance being filled with the names of particular defendants merely denying the allegations of the bill as that a strike was in progress or that there was any unlawful interference with complainant's business it did not appear that defendants would suffer by the granting of the injunction until final hearing. George Jonas Glass Co. v. Glass Blowers' Ass'n, 64 N. J. Eq. 640.

62. That a number of persons outside a labor organization co-operated in the picketing of a store and in dissuading the public from patronage of the same will not make their acts illegal. Foster v. Retail Clerks' I. P. Ass'n, 39 Misc. [N. Y.] 48. Persons who were not in complainant's employ and are not shown to have aided or counseled unlawful acts by pickets of a labor organization during a strike will not be included in a decree of injunction against unlawful acts of the pickets, but while the suit as to them will be dismissed they will be held chargeable with knowledge of the injunction, and will be bound by its terms; and all members of a labor organization who participate in the establishment and maintenance of a picket around the work of a former employer which results in acts of violence and abusiveness toward his employes, thereby intimidating them from continuing in his employment, are chargeable with the results of the violence as well as those who personally participate therein, especially where officers and members of the organization know that such unlawful acts are committed and take no steps to punish the offenders or to suppress the violence, and such persons will be included in an injunction against the unlawful acts. Union Pac. R. Co. v. Ruef, 120 Fed. 102.

63. Erdman v. Mitchell [Pa.] 56 Atl. 327.

64. The remedy at law is adequate. Owen v. Partridge, 40 Misc. [N. Y.] 415.

65. The voting is a legislative act. People v. Mills, 30 Colo. 262, 70 Pac. 322.

66. It is a ministerial act. Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766.

67. The Minnesota anti-trust law contains no provision for restraining or enjoining violation and a court of equity has no jurisdiction without statutory authority to enjoin an act constituting a criminal offense [Laws 1899, p. 487, c. 359]. Minn. v. Northern Securities Co., 123 Fed. 692.

68. Ga. R. & B. Co. v. Atlanta [Ga.] 45 S. E. 256. A law giving the supreme court jurisdiction to restrain a liquor nuisance on proper petition by injunction is constitutional. Davis v. Auld, 96 Me. 559. The statutory abatement of a blind tiger as a public nuisance by injunction will lie though other complete adequate remedies exist [Act Dec. 19, 1899]. Legg v. Anderson, 116 Ga. 401. A public nuisance will not be restrained at the suit of a state attorney on the ground that the criminal laws as administered, will not afford a remedy, unless it is shown that injury results to public civil rights or public property. People v. Condon, 102 Ill. App. 449. A statute making it the duty of judges of courts, to suppress prize fights, will authorize a court of equity at suit of the commonwealth to restrain one from allowing a prize fight to be held on his premises as a public nuisance, though it cannot proceed against the parties or their associates because of sufficient regulations under the criminal laws. Com. v. McGovern,

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business competitor.[69] One who seeks to avail himself of a crime to deprive another of his property will be restrained, whether he or another committed the crime.[70] The presence of criminal laws providing punishment and abatement of a nuisance will not prevent the legislature from authorizing the state to proceed by injunction.[71] Violation of liquor laws may be restrained in Maine.[72]

§ 3. *Suits or actions for injunction. Jurisdiction and courts.*[73]—Generally, execution of a judgment can be restrained only in the court that rendered the judgment,[74] though under certain conditions the rule is relaxed.[75] A court which has rendered a default judgment on its law side may not only enjoin an action on the judgment on its equity side, but may decree vacation of the judgment allowing an answer to be filed, and order the action to proceed to trial.[76] Joint wrongdoers residing in different counties, who threaten to commit trespass and are insolvent, may be restrained in one petition brought in the county of the residence of one of them.[77]

Injury to property may be restrained in the jurisdiction where the property is situate.[78] A court of general jurisdiction at the place of domicile of the corpora-

25 Ky. L. R. 411, 75 S. W. 261. A federal court may extend to and against successors of the attorney general of a state, properly substituted provisions of an order restraining enforcement of an unconstitutional statute of the state fixing railroad fares by a board of which such an officer is a member, and is not prevented on the ground that such injunction seeks to restrain the enforcement of the state criminal laws. Prout v. Starr, 188 U. S. 537, 47 Law. Ed. 584.

69. A mere desire to restrain competition of a business rival will not entitle a barber to an injunction against another barber to keep him from keeping his shop open on Sunday though a criminal law is violated thereby [Pen. Code, art. 196]. York v. Yzaguairre [Tex. Civ. App.] 71 S. W. 563.

70. Bank of Montreal v. Waite, 105 Ill. App. 373; Alton Grain Co. v. Norton, 105 Ill. App. 385.

71. Davis v. Auld, 96 Me. 559.

72. An injunction against a liquor nuisance under P. L. 1891, c. 98, is merely to prevent further continuance of an existing continuous nuisance. Davis v. Auld, 96 Me. 559.

73. **Conflict of laws:** Where a citizen of Pennsylvania furnished a refrigerating plant to a New York brewery under an agreement that title was to remain in the seller until payment, but the agreement was not recorded in New York as required by its laws, and the plant was attached as a fixture, and afterward the brewery was mortgaged, the mortgage being assigned to a citizen of Pennsylvania, the court of the latter state had jurisdiction at suit of the assignee to restrain the seller from taking away the plant. Schmaltz v. York Mfg. Co., 204 Pa. 1, 59 L. R. A. 907.

74. A county court in one county cannot restrain execution of the judgment of the county court of another county. Aultman v. Higbee [Tex. Civ. App.] 74 S. W. 955. An injunction to stay proceedings on a judgment or final order of a court will not be granted in an action, brought in another court from that which rendered the judgment, though defendant in the injunction appears and pleads. Hampton v. Mays [Ind. T.] 69 S. W. 1115.

75. **Federal courts** may restrain plaintiff holding an unconscionable judgment rendered by a state court from using it to extort money from the judgment defendant without violating Rev. St. U. S. § 720. National Surety Co. v. State Bank [C. C. A.] 120 Fed. 593. Where proceedings in the federal district court of one state on which execution was founded were void, the circuit court for the district of another state may restrain the marshal of its district from enforcing judgment against property of the debtor located therein. Kirk v. U. S., 124 Fed. 324.

State courts: The superior court of Washington has jurisdiction of an injunction suit to restrain execution sale for invalidity of a judgment rendered in another superior court. Noerdlinger v. Huff, 31 Wash. 360, 72 Pac. 73. A district court of one county in Colorado has jurisdiction to restrain the sheriff of another county from executing a deed to property within the county sold under special execution on a judgment of the district court of another county. Ohio Colo. Min. & Mill. Co. v. Wiley [Colo. App.] 71 Pac. 1001. A justice court cannot issue a writ of injunction against a judgment even though the statute requires writs for such purpose to be made returnable to and triable by the court rendering the judgment. Foust v. Warren [Tex. Civ. App.] 72 S. W. 404. A suit in the circuit court of Kentucky to restrain collection of the tax of a graded school district, is not in violation of a statute providing that a judgment can be restrained only in the court of its rendition as an attack on the judgment of the county court decreeing an election concerning the tax. Waring v. Bertram, 25 Ky. L. R. 307, 75 S. W. 222.

76. Brooks v. Twitchell, 182 Mass. 443.

77. Wall v. Mercer [Ga.] 46 S. E. 420.

78. The district court of Wyoming has jurisdiction to restrain diversion of water from a stream to the injury of prior appropriation for irrigation by means of a ditch constructed in Montana, carrying the water to land in Wyoming, since the place of injury is in that state where the ditch and lands of the owner are situated. Willey v. Decker [Wyo.] 73 Pac. 210.

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tion is the proper tribunal for injunction against its directors to restrain disposal of corporate products and receipt of debts due the corporation, or the carrying on of its business.[79] A court with jurisdiction in personam may restrain the prosecution of a subsequent suit in another county, which will take from the court first obtaining jurisdiction part of the subject-matter of the suit.[80] A ruling of one district judge vacating a temporary injunction for failure of petition to state cause of action will not prevent another judge of the court subsequently on final hearing from giving a decree on the petition according to its prayer.[81] An adverse decision by the board of control which is affirmed by the district court on appeal will not prevent jurisdiction of that court of a suit by the losing party before the board of control to enjoin diversion of waters from a stream.[82] Jurisdiction of federal courts,[83] and of particular state courts has been passed on in cases cited.[84]

§ 4. *Preliminary injunction. A. Issuance.*—A statutory provisional injunction is allowable only within the terms of the law.[85] Preliminary or interlocutory injunction will lie when necessary to preserve the status quo,[86] but not as to one

79. Moneuse v. Riley, 40 Misc. [N. Y.] 110.

80. State v. Fredlock, 52 W. Va. 232.

81. Commercial State Bank v. Ketchum [Neb.] 96 N. W. 614.

82. Willey v. Decker [Wyo.] 73 Pac. 210.

83. Jurisdiction of a court of bankruptcy to enjoin further proceedings under a judgment of the state court in judgment creditor's action commenced before passage of bankruptcy act. Metcalf v. Barker, 187 U. S. 165, 47 Law. Ed. 122. Act of complainant in a suit by a judgment creditor in a state court to set aside a deed as fraudulent in proving up her judgment as a preferred debt, before a referee in bankruptcy, as consent to jurisdiction of the bankruptcy court to restrain further proceedings in the state court. Pickens v. Roy, 187 U. S. 177, 47 Law. Ed. 128. A suit to restrain unfair trade competition sounds in tort and a federal court cannot entertain it, where it is based on acts done without the country though jurisdiction of the parties is obtained. Vacuum Oil Co. v. Eagle Oil Co., 122 Fed. 105. A federal court cannot restrain proceedings in a state court sought to be removed to it where such proceedings are removable, because regarded by the state court as merely supplemental and as a continuation of an action already prosecuted to judgment and in aid of execution thereunder. Mutual Reserve Fund Life Ass'n v. Phelps, 23 S. Ct. 707, 190 U. S. 147, 47 Law. Ed. 987. A suit to restrain federal officers engaged in the construction of a government canal from changing the location of a highway bridge over it in alleged violation of a district court decree in condemnation proceedings to take a right of way across the highway, may be removed to the federal court, since it is one arising under the federal laws. Woods v. Root [C. C. A.] 123 Fed. 402.

84. County and court in which a suit for injunction must be brought. Gregory v. Howell, 118 Iowa, 26. Statutory power of courts regarding the issuance of an injunction by a court in aid of its own jurisdiction under Code 1899, c. 133, §§ 4, 6, 9. State v. Fredlock, 52 W. Va. 232. While the California Constitution gives superior courts jurisdiction in equity, their power as to injunctions may be regulated by the legislature. Wright v. Superior Court, 139 Cal. 469, 73 Pac. 145. The circuit court of Michigan may restrain an order on the probate court in a proceeding without jurisdiction to allow attorney's fees against the ward's estate. Lothrop v. Duffield [Mich.] 96 N. W. 577. Where the main purpose of a suit to restrain a judgment of a police court under an ordinance alleged to be unconstitutional, is to attack the ordinance, the circuit court in Kentucky has jurisdiction. Boyd v. Board of Councilmen, 25 Ky. L. R. 1311, 77 S. W. 669. Where an action is pending in one superior court of California another superior court cannot entertain a bill to enjoin proceedings in the first action except to prevent a multiplicity of suits. Wright v. Superior Court, 139 Cal. 469, 73 Pac. 145. Where land owners in Wyoming appropriated the right to irrigate their land from a certain stream by means of a dam and ditch located in the state, the district court of that state had jurisdiction not only to restrain another from diverting waters by a ditch within the state, but to determine their relative rights to use of the water. Willey v. Decker [Wyo.] 73 Pac. 210. Where the transcript of a justice's judgment in Iowa has been filed with the clerk of the district court in the county of its rendition, an action to restrain enforcement can only be brought there [Code, §§ 4364, 4538]. Brunk v. Moulton Bank [Iowa] 95 N. W. 238. That the judgment was unenforceable because of the discharge of the judgment debtor in bankruptcy after rendition will not make it possible to restrain its collection in another county. Id.

85. Defendant in a civil action cannot have a provisional injunction. The remedy is given only to plaintiff by the statute. Forman v. Healey, 11 N. D. 563.

86. Denver & R. G. R. Co. v. U. S. [C. C. A.] 124 Fed. 156. Where irreparable injury is threatened. Leigh v. National Hollow Brake Beam Co., 104 Ill. App. 438. Where the court finds that the status of the parties should be preserved by injunction, neither party will be allowed to change such status by giving a bond. Wells v. Rountree, 117 Ga. 839. Sufficiency of particular circumstances disclosed on hearing of motion for preliminary injunction to warrant its issuance to preserve the status quo without

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who has himself destroyed it,[87] or where it would be futile,[88] or allowance will work greater hardship than refusal,[89] or the injury can be measured in damages,[90] or issuance will settle the merits before trial,[91] or complainant can frame issues so as to procure a speedy final hearing.[92] It is allowable when abatement of a nuisance is the only relief.[93]

Its allowance is discretionary.[94] Final determination of the suit in favor of complainant must be reasonably probable.[95] Cessation of the act complained of

expression of opinion or decision on the merits. Western Union Tel. Co. v. Philadelphia, B. & W. R. Co., 124 Fed. 974. Though in an action to restrain defendant from selling a patent the answer denies the equities alleged in the complaint, a temporary injunction may be granted in the discretion of the court. Fuller v. Schultz, 88 Minn. 372. A denial by defendant of facts set up in a petition for an interlocutory injunction, or a mere conflict in the evidence, will not necessarily require a denial of the injunction. Everett v. Tabor [Ga.] 46 S. E. 72. An interlocutory injunction will issue only to preserve rights or to prevent irreparable injury, complainant being required to establish the existence of the fraud or fact on which such right is based. Id. Though the cause has been heard and submitted on the merits if the proof is clear, a temporary injunction may be granted against infringement of a patent. Cimiotti Unhairing Co. v. American Fur Refining Co., 117 Fed. 623. Whenever questions of law or fact to be determined are difficult and injury to the moving party will be certain, immediate and great, if denied, and loss or inconvenience to the other party will be comparatively small. Denver & R. G. R. Co. v. U. S. [C. C. A.] 124 Fed. 156. Where the validity of a patent is undoubted and infringement clear, the patentee should not be deprived of his rights by refusal of preliminary injunction because the term of his patent will soon expire or because of defendant's offer to give a bond for damages. Electric Storage Battery Co. v. Buffalo Elec. Carriage Co., 117 Fed. 314. Where the evidence is conflicting and it appears that if the writ is granted it will not operate oppressively on defendant, but if denied complainant will be practically without remedy should he afterward establish his case, there is strong reason why the chancellor should preserve rights by granting an interlocutory injunction. Everett v. Tabor [Ga.] 46 S. E. 72. A temporary injunction to prevent cutting off plaintiff's connection with a sewer by a sewerage company, is special in its nature and may continue until the trial, where in the court's opinion it is reasonably necessary to protect plaintiff's rights. Solomon v. Wilmington Sewerage Co. [N. C.] 45 S. E. 536. A temporary injunction should be granted as a matter of right if the complaint shows a probability of recovery by plaintiff which will not afford him the full measure of redress which the suit should furnish unless defendant pending final determination is restrained from acts prejudicial to plaintiff's rights, and if without the restraint irreparable damage to plaintiff will result regardless of final results, which cannot be adequately prevented by the giving of a bond. Bartlett v. Bartlett, 116 Wis. 450.

87. Post v. Hudson R. Tel. Co., 76 App. Div. [N. Y.] 621.

88. Infringement of expired patent. Huntington D. P. Co. v. Virginia-Carolina Chem. Co., 121 Fed. 136.

89. A temporary injunction will not issue to compel removal of part of a building in the course of construction because encroaching on the street at the suit of the city, where defendant claims that it was built in conformity to the plans and approved by the city authorities and the building is partially completed. New York v. Knickerbocker Trust Co., 41 Misc. [N. Y.] 17.

90. Marshall v. Homier [Okl.] 74 Pac. 368.

91. An order by a jurge in chambers transferring possession of realty from one litigant to another without a hearing, by means of a preliminary injunction, is absolutely void. State v. Graves [Neb.] 92 N. W. 144. In action to try the right to possession of land an interlocutory order on affidavit ejecting plaintiff and restraining his re-entry is void. Forman v. Healey, 11 N. D. 563.

92. Board of Trade v. Ellis, 122 Fed. 319. Where directors of corporations are authorized to make by-laws necessary for management of the corporation if their certificate so provide and the directors of a certain corporation under such a certificate made a by-law appearing on its face as a provision merely for orderly conduct of the shareholders' meetings and a bill alleges that such by-law was made to pack a shareholders' meeting so as to enable small shareholders to out-vote complainants which allegations were denied, the by-law will not be declared void on a motion for a preliminary injunction. Mitchell v. Colorado Fuel & Iron Co., 117 Fed. 723.

93. Board of Health v. Summit [N. J. Eq.] 56 Atl. 125.

94. Fuller v. Schultz, 88 Minn. 372; Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co. [C. C. A.] 121 Fed. 973. Sufficiency of evidence to sustain an interlocutory order granting a preliminary injunction under the rule that the order will not be reversed, unless an abuse of discretion was shown. Rahley v. Columbia Phonograph Co. [C. C. A.] 122 Fed. 623. A motion for a preliminary or provisional injunction is addressed to the discretion of the court to be allowed only in clear cases without decision at such stage of the case to decide doubtful or difficult questions of law or disputed questions of fact. Mitchell v. Colorado Fuel & Iron Co., 117 Fed. 723.

95. Mitchell v. Colorado Fuel & Iron Co., 117 Fed. 723. Where proofs are conflicting and a full hearing is necessary to determine questions at issue, a preliminary injunction will not be granted against infringement of a patent comparatively recent and which

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will not always prevent injunction, but a preliminary injunction will not issue where defendant desisted in good faith before suit and intends not to resume.[96]

A new cause for temporary injunction cannot be urged after the original cause is denied.[97] Where the application depends on the nature of the action, the issues on the motion are limited to those raised by the complaint, the supporting affidavits and the answering affidavits.[98] Demurrers to a petition can be considered on the interlocutory hearing for injunction only, as showing cause why an interlocutory injunction should not be granted, and the demurrers cannot be overruled or sustained by the judge at chambers before appearance term.[99] Where a district court of the same federal circuit has refused an injunction against the use of board of trade quotations by bucket shops because the concerns are too nearly similar, a preliminary injunction for the same purpose will not be granted until the ruling has been reviewed by the circuit court of appeals.[1] Where a temporary injunction issues without bond, it is presumed that good cause was shown to the judge in absence of the contrary showing.[2] Where a petition for injunction is allowed by the county judge in the absence of a district or supreme court judge, and petition and order are immediately filed in the district court, the injunction is valid, though made before beginning the action under a law providing for issuance at commencement of action or at any time before judgment after commencement.[3] A decision denying a preliminary injunction is not res judicata as to sufficiency of the complaint on subsequent filing of demurrer.[4] Where, after injunction against condemnation proceedings, there is a discontinuance on notice and no further action is taken as to the injunction and no appeal, such injunction will not apply to a second condemnation commenced.[5] Defendant enjoined from building a photograph gallery on premises against restrictions of his deed is sufficiently protected by a decree which provides expressly for modification on application of either party when change of conditions require.[6] In Montana, allowance of "all costs" to defendant, on refusal of motion for an injunction pendente lite, is erroneous.[7]

(§ 4) *B. Dissolution, modification or continuance; reinstatement. Dissolution.*—A special master, on reference to inquire and report damages, if any, resulting to defendants from the issuance of a restraining order if improvidently issued, cannot determine such improvident issuance.[8]

Dissolution or vacation of a preliminary injunction is discretionary.[9] A show-

has not been adjudicated. Pennsylvania Globe Gaslight Co. v. American Lighting Co., 117 Fed. 324. While a federal court will not dispose of the question of jurisdiction summarily on motion for a preliminary injunction complainant has the burden of showing thereon that there is reasonable probability of final success on that question as well as on the merits. Huntington v. New York, 118 Fed. 683. Where a suit is brought to restrain the use of a name by a corporation and is heard on order to show cause on bill, affidavits and exhibits, relief should not be denied until final hearing, where it appears highly probable that complainant will finally succeed. Edison Storage Battery Co. v. Edison Automobile Co. [N. J. Eq.] 56 Atl. 861.

96. Infringement of patent. Edison Gen. Elec. Co. v. New England Elec. Mfg. Co., 121 Fed. 125.

97. On return of an order to show cause why a temporary injunction should not be granted on a complaint alleging trespass plaintiff cannot set up a new cause of complaint, the original one being denied, by claiming that defendant's acts will destroy the easement over defendant's lot [Code Civ. Proc. § 603]. Le Roy v. Chesebrough, 39 Misc. [N. Y.] 285.

98. Code Civ. Proc. § 603. Le Roy v. Chesebrough, 39 Misc. [N. Y.] 285.

99. Reynolds & H. Estate Mortg. Co. v. Kingsberry [Ga.] 45 S. E. 235.

1. Board of Trade v. Ellis, 122 Fed. 319.

2. Rev. St. c. 69, § 9. Deemar v. Boyne, 103 Ill. App. 464.

3. Code Civ. Proc. § 252. Commercial State Bank v. Ketcham [Neb.] 92 N. W. 998.

4. Rogers v. Week Lumber Co. [Wis.] 93 N. W. 821.

5. South Carolina & G. R. Co. v. American Tel. & Tel. Co., 65 S. C. 459.

6. Frink v. Hughes [Mich.] 94 N. W. 601.

7. Code Civ. Proc. §§ 1851, 1853, 1861, and 880. Colusa Parrott Min. & Smelting Co. v. Barnard [Mont.] 72 Pac. 45.

8. Terry v. Robbins, 122 Fed. 725.

9. Dickson v. Dows, 11 N. D. 404; Rochester & E. R. R. Co. v. Monroe County Elec. Belt Line Co., 78 App. Div. [N. Y.] 38; Rich-

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ing of legal remedy,[10] lack of equity,[11] failure of the pending suit at law,[12] or adequate denial of material allegations of the bill by the answer,[13] is proper ground for a motion to dissolve, but the latter ground is insufficient where, in the discretion of the court, continuance is necessary to prevent irreparable injury.[14] Unless radical defects appear in the proceedings, dissolution will not follow, if good cause for issuance appears from the record.[15] A mere informality in the bond is insufficient.[16] Where sufficient equity appears to support the original allowance, dissolution will be denied.[17] A bond will sometimes be required on dissolution.[18] The right to dissolution in particular instances appears in the note.[19]

ardson v. Kittlewell [Fla.] 33 So. 984; Schmidt v. Bitzer, 138 Cal. xix, 71 Pac. 563.

10. Marshall v. Homier [Okl.] 74 Pac. 368.

11. Null v. Elliott, 52 W. Va. 229. A temporary injunction against prosecution of a replevin suit will be dissolved and the bill for injunction dismissed where plaintiff with consent or acquiescence of defendant has parted with possession of the article and defendant is not proceeding with the prosecution, it being unreasonable to presume that the article will no longer be of use to him. Gibson v. Powell, 96 Mo. App. 681. A temporary restraining order granted on filing of a bill by the maker of a note, to enjoin execution against him by holders by indorsement from the payee, on the ground that it was procured from the payee by fraud, of which the holders had notice or knowledge, but stating no facts either on knowledge or information, showing such fraud, will be dissolved where defendants by answer denied any fraud on their part or knowledge of fraud. Magruder v. Schley, 18 App. D. C. 288. Where commissioners of the District of Columbia order a railroad company to remove a switch and appliances located by defendant at the intersection of certain streets without permission for such location and the company obtained a temporary injunction against the execution of such order on appeal from an order over-ruling a motion for dissolution of such temporary injunction it will be dissolved where it does not appear that the officers had exceeded their powers or abused their discretion on acting oppressively in ordering removal. Macfarland v. Wash. etc., R. Co., 18 App. D. C. 456.

12. Where a grantor of land who had failed in a suit to set aside his deed for fraud, sued to enjoin the grantees from trespassing on the property in his possession disclosing nothing in his bill as to the conveyance or prior suit, the injunction order is properly rescinded where the facts of such conveyance and suit come to the knowledge of the court. Tifel v. Jenkins, 95 Md. 665.

13. Sidney Land & Colony Co. v. Milner, C. & F. Lumber Co. [Ala.] 35 So. 48. Where the sworn answer of defendant sets up a right in himself to perform the acts complained of and denies the trespass or injury alleged in the bill and his own insolvency, a temporary injunction previously issued is properly dissolved. Simonson v. Cain [Ala.] 34 So. 1019.

14. Chain Belt Co. v. Von Spreckelsen [Wis.] 94 N. W. 78.

15. Cotten v. Christen, 110 La. 444.

16. That an injunction bond is made payable to the clerk of court instead of defendant is an informality rather than a defect in the bond and where it appears that plaintiff would be immediately entitled to another order of injunction were the present one dissolved on this account, dissolution will not follow but an order for a new bond and new rights should be given. Cotten v. Christen, 110 La. 444.

17. Injunction granted on a verified complaint. Schmidt v. Bitzer, 138 Cal. xix, 71 Pac. 563. Though an order, making new parties complainant to a bill, requires that right to continuance of a temporary injunction shall depend on right of the original complainant, it will not be dissolved if the new parties would have had a right thereto if they had been made original parties, the original complainant's want of equity affecting the costs only. Warren v. Pim [N. J. Eq.] 55 Atl. 66.

18. An injunction by an ad interim treasurer to prevent his successor from taking office because of irregularity in the election, will be dissolved on bond. State v. Ellis [La.] 35 So. 471. An injunction restraining the owner of an undivided half interest in timber land from cutting timber without the consent of his co-owner, cannot be dissolved on bond. Cotten v. Christen, 110 La. 444. Where the rights to certain timber lands can be determined only after a full hearing in equity but complainant shows a strong case and defendants have erected saw mills to cut the timber, an injunction against such cutting pending final hearing will not be dissolved without a sufficient bond to protect complainant's rights. Kilgore v. Norman, 119 Fed. 1006.

19. An injunctional order granted on a bill for injunction against interference with employes by former employes of plaintiff or with his prospective employes will not be set aside on a motion or ex parte affidavits, but will be continued until final hearing. Jersey City Print. Co. v. Cassidy, 63 N. J. Eq. 759. Where it appears on motion to dissolve an injunction, before answer by an employe, by the real party in interest, that the damage resulting will not be compensated by the undertaking, the motion will be denied since he has a remedy for damages against his employer. Smith v. Alberta & B. C. Exploration or Reclamation Co. [Idaho] 74 Pac. 1071. A restraining order issued in foreclosure of a mortgage on a wife's land to secure her husband's debt, which was extended without her consent, should not be dissolved after answer alleging that the debt was the joint debt of the husband and wife and denying that she failed to consent to the extension. Harrington v. Rawls, 131 N. C. 39. A preliminary injunction restraining a union and its mem-

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Suspension, modification, continuance or reinstatement.—Operation of the injunction may be suspended to allow defendant to proceed at law.[20] An associate justice of the supreme court may suspend operation of a restraining order pending appeal from it.[21] Modification cannot be had where complainant's rights would be invaded,[22] but will be allowed to decrease injury or inconvenience to one or more of the litigants if danger of loss or injury to their opponent is not thereby increased.[23] Allegations of irreparable injury are sufficient for continuance of the restraining order pending suit.[24] A temporary order against trespass on timber is properly continued until trial, under a law providing that no orders shall be made pending an action to determine title in such a case, preventing the cutting of timber except by consent until such title is determined.[25] That a switch and appliance built by a railroad company without municipal authority as required by law are located for use in emergency only, and no danger can result from a temporary injunction against its removal by its authorities, will not justify continuance of a temporary restraining order against such removal until proof is taken.[26] A temporary injunction, restraining the heirs of a deceased administrator from converting to their own use or removing from the state, assets in their possession which the administrator had converted before obtaining his discharge in any state through fraud on the probate court and the heirs at law, is properly continued until hearing of the cause, where the property had been brought within the state.[27] A general creditor bringing an action to recover money only on allegations that the debtor has fraudulently disposed of merchandise to delay his creditors, and that his co-defendant purchased with the same intent, and that the debtor left the state and cannot be found, cannot have continuance of a temporary injunction under a law allowing an injunction restraining the transferee of a debtor from disposing of property transferred.[28] On motion, a decree for temporary injunction, contingent on payment of a certain amount and costs by plaintiff in a certain action, should be made absolute, where it appeared that he had complied, except as to a small item which he neglected through oversight, but which he afterwards tendered.[29] An ex parte temporary restraining order issued by the clerk is not an injunction after dissolution by the court, so that it may be reinstated under a law allowing reinstatement of an injunction on motion after dissolution.[30]

bers from interfering with the business of an employer or keeping away employes or customers by threats and force, will not be vacated, where a strike was ordered against the employer merely because of a refusal to agree to employ only union men and not on the question of wages. Davis Mach. Co. v. Robinson, 41 Misc. [N. Y.] 329.

20. At the same time when an injunction is granted at the suit of the lower riparian owners to prevent diversion of waters by a private corporation to supply a village, the court may in its discretion, suspend operation until the village by reasonable diligence could purchase or condemn the riparian rights from plaintiff. Penrhyn Slate Co. v. Granville Elec. L. & P. Co., 84 App. Div. [N. Y.] 92. Where a city maintained a nuisance resulting in substantial damages an injunction may be awarded where its operation is suspended to allow the city to obtain legislative relief or to abate the nuisance. Sammons v. Gloversville, 175 N. Y. 346.

21. State v. Rice [S. C.] 45 S. E. 153.

22. An injunction pending trial, restraining a landlord from removing parts of a building occupied by a tenant in order to construct another building near it, thereby leaving the premises exposed and interfering with the tenant's peaceable possession, cannot be modified so as to permit removal of part of the building on condition that the landlord should construct facilities for use of tenant and protect him from injury, and that unreasonable interference with the right to quiet enjoyment should not be made. Benedict v. International Banking Corp., 88 App. Div. [N. Y.] 488.

23. Denver & R. G. R. Co. v. U. S. [C. C. A.] 124 Fed. 156.

24. U. S. v. Dastervignes, 118 Fed. 199.

25. Acts 1901, c. 666, § 1. Alleghany Co. v. East Coast Lumber Co., 131 N. C. 6.

26. Macfarland v. Wash., etc., R. Co., 18 App. D. C. 456.

27. Coleman v. Howell, 131 N. C. 125.

28. Code Civ. Proc. § 603. Veit v. Collins, 39 Misc. [N. Y.] 39.

29. Commercial State Bank v. Ketcham [Neb.] 92 N. W. 998.

30. Civ. Code, § 296. Jones v. Walter, 24 Ky. L. R. 878, 70 S. W. 191.

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Time for application and notice.—Where a stipulation was voluntarily made by the parties that a restraining order should be continued until final determination, a motion to vacate is properly denied before that time.[31] After the validity of a patent has been determined several times and sustained by the circuit court of appeals, a motion to vacate a preliminary injunction against infringement founded on parts of the evidence taken by defendant will not be entertained until time for complainant to take proofs in rebuttal has expired.[32] An injunction cannot be dissolved on pleadings and testimony and findings of a master on the day of the filing of his report without notice of hearing on the application for dissolution and without an opportunity of the parties to except to the report.[33] On motion by the adverse party to dissolve a temporary injunction on papers on which it was granted, no notice is necessary to the party to whom it was granted, but if a counter-showing is made by the adverse party, notice of hearing must be given and the other party allowed to present counter-affidavits for consideration.[34]

Motion and other pleadings; issues.[35]—A motion to dissolve an injunction because of insufficiency of the bill admits no more than a demurrer to the bill.[36] Plaintiff on an application to dissolve, made on the complaint alone without affidavits, cannot file an affidavit in support of his pleading.[37] A law allowing complainant to support his bill and defendant to support his answer as to an injunction by affidavits filed, to be read in evidence on the hearing of the motion to dissolve, is not limited to cases where a sworn answer is filed.[38] Where the case has been submitted for a decree on motion to dissolve on a sworn answer denying the bill, a motion to strike the answer filed after submission cannot be treated as a part of the pleadings thereon.[39] Where amendments to a bill, filed after a sworn answer, set up no additional facts requiring answer, the denials of the answer are applicable to the amendments and available on motion to dissolve without further oath or verification.[40] A suit for injunction against an execution sale is properly dismissed on dissolution of a temporary restraining order, where the recitals of the motion are equivalent to a demurrer for want of equity and no request is made to amend the complaint.[41] Where, in an action to try title to timber lands there was a bona fide claim of evidence as to the location of the head of the river on which plaintiff's grant rested, and he showed a prima facie case, the issue should be submitted to a jury and could not be determined on motion to continue an order restraining cutting of the timber.[42] A prayer for injunction will support a preliminary injunction.[43]

Order of dissolution or dismissal of cause.—Dismissal of a complaint under

31. Maggs v. Morgan, 30 Wash. 604, 71 Pac. 183.

32. Timolat v. Philadelphia Pneumatic Tool Co., 123 Fed. 899.

33. McAdow v. Wachob [Fla.] 33 So. 702.

34. Rev. St. 1887, § 4295. Thayer v. Bellamy [Idaho] 71 Pac. 544.

35. **Sufficiency of pleadings** on which to grant an order refusing to dissolve a temporary injunction and continuing it until trial. Solomon v. Wilmington Sewerage Co., 133 N. C. 144.

A motion for dissolution of a temporary injunction stating that on defendant's answer and affidavit of another party and all papers, records and files of the court in the former proceedings referred to in the answer, defendant will move to dissolve the temporary injunction, **sufficiently states the ground** of the motion. It need not include a copy of such findings and orders, where they were made in proceedings in which the parties to the injunction were parties and were of record in the same county in custody of the clerk of the court in which injunction was asked. [Comp. Laws 1887, § 4991]. Howell v. Dinneen [S. D.] 94 N. W. 698.

36. Board of Trade v. Weare, 105 Ill. App. 239.

37. Code Civ. Proc. § 878. Campbell v. Flannery [Mont.] 74 Pac. 450.

38. Rev. St. c. 69, § 17. Freeport Com'rs of Highways v. Goddard, 103 Ill. App. 36.

39. Howle v. Scarbrough [Ala.] 35 So. 113.

40. Simonson v. Cain [Ala.] 34 So. 1019.

41. Noerdlinger v. Huff, 31 Wash. 360, 72 Pac. 73.

42. Alleghany Co. v. East Coast Lumber Co., 131 N. C. 6.

43. Shipley v. Western Md. Tidewater R. Co. [Md.] 56 Atl. 968.

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which the injunction issued carries with it dissolution of the injunction.[44] An order of dissolution for want of equity, apparent on the face of the bill which seeks injunction only, is an order finally disposing of the case, and the bill may be dismissed.[45] Dissolution by dismissal of the main action by plaintiffs, followed by judgment of dismissal, amounts to the final determination that the writ wrongfully issued.[46] The bill cannot be dismissed on motion to dissolve on bill, answer and affidavit submitted before expiration of the time to take testimony, unless the bill makes a case not proper for equitable relief, even though such injunction should be dissolved on the pleadings.[47] Where a bill to restrain unlawful detainer was entertained without requiring complainant to confess judgment in the action, the chancellor on dissolution could not dismiss the law action still pending.[48] Dismissal of the bill seeking injunction and dissolution of the injunction are conclusive as to its wrongful issuance.[49] A decision that the temporary injunction should be dissolved and the petition dismissed on the merits is a dissolution of the injunction without entry of formal decree.[50] Final decree makes a temporary order inoperative.[51]

(§ 4) *C. Damages on dissolution.*—Damages on dissolution must be limited to the amount of the bond in the absence of malice,[51a] and to expenses necessarily incurred in securing dissolution.[52] Where plaintiff acted in good faith and issues tendered by defendant were not sufficient to be the basis of a judgment holding plaintiff liable for damages, defendant cannot recover damages on dissolution.[53] Damages by injury from suspension of a business may be allowed, and profits for a reasonable period next preceding the time of injury may be taken as a basis of estimate.[54] The question of damages may be referred.[55]

44. Lewis v. Jones, 65 S. C. 157. Where on dismissal of a case in which temporary injunction had been granted an order was granted that since the judgment had been rendered for defendants, and the damages sustained by them because of the injunction remained to be settled that reference should be made to a certain attorney of the court to ascertain and report such damages if any, the question of the dissolution of the injunction is not left open but only the question of damages. Lewis v. Jones, 65 S. C. 157.

45. Goddard v. Chicago & N. W. R. Co., 202 Ill. 362.

46. Nielsen v. Albert Lea, 87 Minn. 285.

47. Baya v. Lake City [Fla.] 33 So. 400; Baird v. Ellsworth Trust Co. [Fla.] 34 So. 565; Richardson v. Kittlewell [Fla.] 33 So. 984.

48. Henley v. Cottrell R. E., I. & L. Co. [Va.] 43 S. E. 191.

49. Landis v. Wolf [Ill.] 69 N. E. 103.

50. Coffey v. Gamble, 117 Iowa, 545.

51. After final entry of a decree a temporary injunction ceases to be effective. Sweeney v. Hanley [C. C. A.] 126 Fed. 97.

51a. Terry v. Robbins, 122 Fed. 725.

52. Church v. Baker [Colo. App.] 71 Pac. 888. Defendants cannot claim attorney's fees on dissolution where no motion to dismiss was tried, but dissolution came after trial on the merits. Caillouet v. Coguenhem [La.] 35 So. 385. Counsel fees for trial of a cause will not be allowed as damages for wrongful issuance where the injunction proceedings were ancillary to the main case. Barr's Estate v. Post [Neb.] 93 N. W. 144. Counsel fees necessarily incurred in procuring dissolution of an injunction may be allowed as damages but those resulting from defense of the suit to which the injunction is ancillary cannot be allowed. The agreed compensation of attorneys employed by defendant to secure the dissolution cannot be allowed as damages on the theory that they were employed for that purpose. Landis v. Wolf [Ill.] 69 N. E. 103. Where a preliminary injunction wrongfully issued and on filing of answer was modified and continued and on final hearing a permanent injunction was refused and decree entered for defendant but no motion was ever made for dissolution of the preliminary injunction, complainant was not liable for attorney's fees on account of the latter. Hocking Valley Coal Co. v. Climie [Iowa] 92 N. W. 77. Where a suit was discontinued on defendant's motion for lack of prosecution after a temporary injunction had been granted with conditions with which plaintiff had failed to comply, defendant was entitled to recover expenses in getting rid of the injunction, since the dismissal was a final determination against plaintiff as to the right to an injunction. Madison v. Brower, 81 App. Div. [N. Y.] 116.

53. Caillouet v. Coguenhem [La.] 35 So. 385.

54. Landis v. Wolf [Ill.] 69 N. E. 103.

55. On dismissal of a complaint under which a temporary injunction issued. Lewis v. Jones, 65 S. C. 157. Where plaintiff was given leave over defendant's objection to discontinue a suit for injunction on its call for trial because determination of the merits was unnecessary. Perlman v. Bernstein, 83 App. Div. [N. Y.] 203.

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Time of bringing action or suit.—Prompt action should be taken so as to avoid laches.[56] One week's delay after giving direct notice of violation of rights in the erection of a wall before bringing suit for injunction is not unreasonable.[57]

Original suit or petition or motion.—Where plaintiffs recovered judgment before a justice for possession of leased premises and rents, and defendants appealed to the superior court, a motion for injunction to restrain the prosecution of monthly suits for rent by plaintiffs was properly made by defendants in the case then pending in the superior court and not by a new action for that purpose.[58]

Conditions precedent; bond.—The proper practice where an action at law is sought to be restrained is for the chancellor to require complainant to confess judgment at law, the judgment to remain under control of the chancellor pending decision on the injunction.[59] A judgment in an action between the city and an owner of a tenement for civil penalties for violation of the tenement house act is a final adjudication of issues afterward raised in a suit to enjoin maintenance of a nuisance by the owner so that an order of injunction may issue.[60]

The necessity of a bond for injunction is a matter of discretion,[61] apart from statutes prescribing it.[62] The public may sue to suppress a public nuisance without a bond.[63] Where defendant objects on appeal from a decree refusing an injunction that no bond was first filed by complainant, the defect can be remedied on reversal of the decree before issuance of the injunction.[64] The bond is sufficient though the sureties do not justify that they are householders or freeholders of the county, the justification being no part of the undertaking.[65] That the bond was payable to the clerk instead of defendant is an informality rather than a fatal defect.[66]

Process and notice.—Notice of an application for injunction must be given unless it clearly appears that its issuance without notice is necessary.[67] It is a matter in the sound discretion of the court or judge in vacation.[68] An objection cannot be made that an injunction order was entered without notice where defendant had a hearing on the motion to dissolve.[69] Sufficiency of notice is treated in the note.[70]

56. See Equity, 1 Curr. Law, 1063, and cases there cited.
57. Fisk v. Ley [Conn.] 56 Atl. 559.
58. Featherstone v. Carr, 132 N. C. 800.
59. Henley v. Cottrell R. E., L. & L. Co. [Va.] 43 S. E. 191.
60. Tenement House Dep't v. Moeschen, 41 Misc. [N. Y.] 446.
61. A bond as a condition precedent to a preliminary injunction is within the discretion of the circuit court. Briggs v. Neal [C. C. A.] 120 Fed. 224.
62. It is requisite to an injunction to restrain sale or transfer of a judgment or execution or any other steps for its collection in Illinois [Rev. St. c. 69, § 8]. American Fine Art Co. v. Voigt, 103 Ill. App. 659. An order allowing the filing of an intervention and designating the intervenor as a defendant followed by judgment on a rule nisi ordering injunction to issue on a bond furnished by plaintiff in favor of the original defendant and the intervenor, is without authority as to the requirement of a bond in favor of the latter so that he has no right of action on the bond. St. Charles St. R. Co. v. Fidelity & Deposit Co., 109 La. 491.
63. Suit by territory at instance of county attorney or attorney general. Reaves v. Ter. [Okl.] 74 Pac. 951.
64. Penn. R. Co. v. Lilly Borough [Pa.] 56 Atl. 412.
65. Rev. St. § 4934. Wilson v. Eagleson [Idaho] 71 Pac. 613.
66. Cotten v. Christen, 110 La. 444.
67. Sprague v. Monarch Book Co., 105 Ill. App. 530. Notice of application for an injunction to restrain a judicial sale by a sheriff on an advertised day, cannot be dispensed with merely on an affidavit that such notice will accelerate the apprehended injury. Richardson v. Kittlewell [Fla.] 33 So. 984.
68. Code 1899, c. 133, § 3. Kalbitzer v. Goodhue, 52 W. Va. 435.
69. Board of Trade v. Weare, 105 Ill. App. 289.
70. Notice to workmen who are engaged in building a structure in violation of plaintiff's rights that he would apply for an injunction is sufficient and he need not inquire for and notify the employers. Fisk v. Ley [Conn.] 56 Atl. 559. An injunction against diversion of the waters of a stream to the injury of a prior appropriation for irrigation purposes, operates in personam, so that after service with process in the suit and submission to the jurisdiction by answer to the merits, the court had jurisdiction. Willey v. Decker [Wyo.] 73 Pac. 210. In a suit to enjoin prosecution of many garnishment proceedings to subject exempt wages

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Parties.—A bill to restrain proceedings at law must be filed in the name of the interested party.[71] A private individual injured by obstruction of the public road cannot sue on behalf of himself and of others similarly situated to restrain the obstruction as a public nuisance.[72] In a suit by one of the parties to a contract to restrain acts of third persons interfering with its performance by the other which would result in irreparable injury to plaintiff, the latter and not the other party to the contract is the real party in interest.[73] The United States by its law officers, at request of the interstate commerce commission, could not sue to restrain discrimination between localities by a common carrier, in violation of the act to regulate commerce, before the Act of Congress, Feb. 19, 1903, expressly authorizing such suits.[74] Where one entitled to sue for restraint of breach of a contract joins with him persons having no privity of contract with defendant regarding the subject-matter and no interest in the final result of the suit, there is a misjoinder of plaintiffs.[75] Necessary and proper parties in particular suits for injunction are treated in the footnote.[76]

of laborers to payment of a judgment in which their employers from whom the wages were due were made parties, summons afterwards issued to the sheriff of the county where the judgment creditor resides and properly served on him gives jurisdiction of all parties [Code Civ. Proc. § 65]. Siever v. Union Pac. R. Co. [Neb.] 93 N. W. 943.

71. Hooper v. Birchfield [Ala.] 35 So. 351.

72. Wees v. Coal & Iron R. Co. [W. Va.] 46 S. E. 166.

73. Carroll v. Chesapeake & O. C. Agency Co. [C. C. A.] 124 Fed. 305.

74. Mo. Pac. R. Co. v. U. S., 189 U. S. 274, 47 Law. Ed. 811.

75. Atl. & B. R. Co. v. Southern Pine Co., 116 Ga. 224.

76. **Suits against corporations:** The seller of corporate stock may be made defendant with the company in injunction by the purchaser to restrain interference with its transfer and to compel the company to make such transfer. Thornton v. Martin, 116 Ga. 115. A stockholder must always be made a party to restrain the voting of his stock at the shareholders' meeting to elect directors. Representation by a corporation to its stockholders in defense of suits cannot be applied to such suit, though the holder is another corporation owning a majority of the stock and though the same persons are a majority of directors in both corporations. The court cannot grant or continue a temporary restraining order for the same purpose until complainant can implead the stockholder in a court having jurisdiction as to him. Taylor v. Southern Pac. Co., 122 Fed. 147. Where a corporation in the business of selling coal had contracts with certain coal companies to take all their product at the mines, transport and sell it at prices fixed by the companies, at a certain price per ton for services, the coal companies not being liable for a failure to furnish coal resulting from strikes and the selling corporation had made contracts for sale of large amounts of coal and had provided means for transportation, the coal companies were proper parties defendant to a suit by the selling corporation to restrain wrongful and illegal acts of third persons in conducting a strike at the mines and preventing others from working therein by threats and intimidation, but though such coal companies might not be unfavorable to the relief asked the court is not authorized to make them defendants where jurisdiction would be defeated since the selling corporation does not sue in their right but in its own. Chesapeake & O. C. Agency Co. v. Fire Creek C. & C. Co., 119 Fed. 942.

Suits against municipalities or officers: A tax payer may restrain payment of an illegal warrant of a school district without making the holder a party. Kellogg v. School Dist. No. 10 [Okl.] 74 Pac. 110. A person or corporation with whom a contract is made by a city which will create a debt beyond the constitutional limit of the city, is not an indispensable defendant to a suit for injunction by a tax payer to prevent performance of the contract. City Water Supply Co. v. Ottumwa, 120 Fed. 309. One endeavoring to equip a state building with plumbing without filing the required papers with the superintendent of buildings and securing his approval, is a proper defendant in an action to enjoin construction. New York v. Burleson Hardware Co., 89 App. Div. [N. Y.] 222. Where a county board awarded a claim against the county on condition that claimant's attorney should file agreement not to receive more than a certain sum for his services, the claimant but not the attorney was a necessary party to a suit by a tax payer to restrain payment of the money. Kircher v. Pederson [Wis.] 93 N. W. 813. Where a county clerk is sought to be restrained from changing the boundary of the school district and transferring the tax of a tax payer from one district to another and changing the enumeration of school children on the ground that the proceedings on which his actions are based are void, final injunction can not be granted without joining the school district directly interested. School Dist. No. 4 v. Smith, 90 Mo. App. 215.

Suits to protect private property or business: In an action to restrain enforcement of a judgment against land owned by the debtor at time of rendition, a subsequent transferee of such land is a proper party. Frankel v. Garrard, 160 Ind. 209. In an action by one judgment debtor to restrain the sale of land owned by him on execution, on the ground that it is not liable to execution, his co-judgment debtors are not necessary

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Bill, petition or complaint.—The bill must be frank in its statement of facts,[77] and not multifarious.[78] The absence of an adequate remedy at law,[79] the danger of irreparable damage,[80] and the specific facts constituting it,[81] must be asserted. A demurrer will lie to a petition where it appears on its face that plaintiffs had an adequate remedy at law, and failure to employ it is not excused.[82] All facts

parties. McGill v. Sutton [Kan.] 72 Pac. 853. In a suit to restrain a judgment creditor from prosecuting a multiplicity of garnishment suits to subject exempt wages to the judgment, the employer of those to whom the wages are due and who is garnishee, is a proper and necessary party. Siever v. Union Pac. R. Co. [Neb.] 93 N. W. 943. A bill will lie to restrain a person who learned certain trade secrets while in the course of complainant's employment from divulging them to competitors without joining the latter. Sanitas Nut Food Co. v. Cemer [Mich.] 96 N. W. 454. Persons having an actual, though not an equal interest in the use of trade-marks and labels, are properly joined as plaintiffs in a suit to prevent infringement. Jewish Colonization Ass'n v. Solomon, 125 Fed. 994. In a suit by an exclusive licensee for the sale of patents in a certain territory to restrain a conspiracy between a third person with knowledge of the license and the licensor for the sale of such goods in the territory, neither the licensor nor the co-conspirator is a necessary party, the suit being based upon the tort and not the contract relation. N. Y. Phonograph Co. v. Jones, 123 Fed. 197. Conclusions of law concerning rights under a lease of oil lands between the lessor and the assignee of the lease on which an injunction was granted conditionally if certain acts were performed by the assignee are erroneous where the lessor was not a party. Chappell v. Jasper County O. & G. Co. [Ind. App.] 66 N. E. 515. In a suit by a mortgagee to restrain intimidation of employes of the mortgagor preventing it from transacting its business, so as to pay interest on bonds according to the contract and mortgage, the mortgagor was not a necessary party. Ex parte Haggerty, 124 Fed. 441. In a suit in the federal courts for injunction against strikers, a person interested in the subject need not be made a party where his joinder would oust jurisdiction, if a final decree consistent with equity and good conscience can be made against the parties before the court. Id. Where a bill to restrain trespass on mining land alleged that the company holding a lease under which defendants claimed was not real, and that defendants owned and controlled all its property and affairs and that its charter had expired by limitation and the company had never been re-organized, no objection could be made for failure to make such company a party defendant. Negaunee Iron Co. v. Iron Cliffs Co. [Mich.] 96 N. W. 468.

77. The bill must make full and candid disclosure of all facts relied upon for relief. Moffat v. Calvert County Com'rs [Md.] 54 Atl. 960. A bill by an inventor and a corporation which used his name to enjoin the use of such name by another corporation alleging that its use had been enjoined by a foreign court in a suit by the inventor's son, is not open to the objection that the failure to allege that such injunction was dissolved was a suppression and a want of frankness, since such fact was alleged only to show that the son had revoked his authority to use the name and that the father was not a party to the suit and since the present suit did not call for restraint in the interim to which the rule of frankness peculiarly applies. Edison Storage Battery Co. v. Edison Automobile Co. [N. J. Eq.] 56 Atl. 861.

78. A complaint for an injunction against the sale of tickets by sixty brokers is multifarious where they have no connection with each other. N. Y. Cent. & H. R. R. Co. v. Reeves, 41 Misc. [N. Y.] 490. A bill by the United States to restrain a number of defendants from pasturing sheep on a forest reservation, is not subject to the objection of misjoinder and multifariousness for alleging that two bands of sheep are pastured on the reservation, where it does not appear that there are any separate or distinct rights or interests between the several defendants. Dastervignes v. U. S. [C. C. A.] 122 Fed. 30. A bill to restrain the passage of defendant over an oyster bed because of damage by pressing the oysters into the mud, asking alternative relief in that a way be marked out across the bed and defendant be restrained from passing without such way, is not liable to demurrer for multifariousness. Simonson v. Cain [Ala.] 34 So. 1019.

79. Chicago & S. E. R. Co. v. Kenney [Ind. App.] 68 N. E. 20. An allegation in a suit to restrain collection of a personal property tax by a town that the board of review including the assessors wrongfully, fraudulently and unlawfully colluded and connived to injure plaintiff by placing his property on the assessment roll, is insufficient. Nye v. Washburn, 125 Fed. 817.

80. An allegation of great injury is insufficient if it does not state that it will be irreparable. Chappell v. Jasper County O. & G. Co. [Ind. App.] 66 N. E. 515. The complaint must allege that violation of plaintiff's rights will be threatened with substantial and serious damage. Hart v. Hildebrandt, 30 Ind. App. 415. A complaint for injunction is insufficient which fails to allege defendant's insolvency or his inability to respond in damages. Porter v. Armstrong, 132 N. C. 66. A bill for removal of an existing alleged nuisance and restraint of its continuance must allege that existence of a nuisance has been determined at law or that good equitable reason exists for relief without such determination. Sterling v. Littlefield, 97 Me. 479.

81. Orange City v. Thayer [Fla.] 34 So. 573; Wabash R. Co. v. Engleman, 160 Ind. 329; Porter v. Armstrong, 132 N. C. 66. Preliminary injunction to prevent diversion of waters from stream so as to deprive complainant of his irrigation rights, will not issue on a general allegation of irreparable injury. Morris v. Bean, 123 Fed. 618.

82. Sharpe v. Hodges, 116 Ga. 795.

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necessary must be alleged positively, not merely on information and belief.[83] Where a verified complaint instead of an affidavit is used on motion for an injunction, only the positive allegations and those on information and belief, where the sources of information and the grounds of belief are stated, can be taken as true.[84] Possession or ownership of property must be alleged,[85] unless a statute allows relief without possession.[86] Where a cause for injunction is submitted for final decision on demurrer to one paragraph of the bill, and another paragraph alleges material injury which is not denied, the writ will issue.[87] The bill must pray injunction in the prayer for process as well as in the prayer for relief.[88] A prayer for injunction is sufficient for issuance of a preliminary injunction.[89] An amended petition must not depart from the original petition.[90] The sufficiency of bills, complaints or petitions in particular suits or actions is treated in the cases cited.[91]

83. Infringement of trade mark. Gaines v. Sroufe, 117 Fed. 965.

84. Foster v. Retail Clerks' International Protective Ass'n, 39 Misc. [N. Y.] 48.

85. One attempting to restrain the construction of a driveway by a city across a sidewalk in front of his lot on the ground of his ownership of the fee to the center of the street must allege such ownership. Kelley v. Marion [Ind.] 68 N. E. 594.

86. Where St. § 2361 allows an owner of land to restrain trespass though not in actual possession at the time of the commission, his petition need not allege such actual possession. Wiggins v. Jackson, 24 Ky. L. R. 2189, 73 S. W. 779.

87. Wallace v. Ark. Cent. R. Co. [C. C. A.] 118 Fed. 422.

88. American Fine Art Co. v. Voigt, 103 Ill. App. 659.

89. Shipley v. Western Md. Tidewater R. Co. [Md.] 56 Atl. 968.

90. Where a petition alleges ownership of timber lands and that defendants were wrongfully cutting such timber which constituted the principal value, that they were insolvent and if not restrained, plaintiff would have no adequate remedy at law, an amended petition alleging that timber of a certain value had been removed containing another paragraph alleging damage generally, without stating the sum, nor praying judgment, was not a departure from the original petition, so as to be subject to a motion to strike. Houck v. Patty [Mo. App.] 73 S. W. 389.

91. Sufficiency of bill to enjoin an action on a judgment (Brooks v. Twitchell, 182 Mass. 443); for injunction against infringement of patent (Murjahn v. Hall, 119 Fed. 186); by one owning timber on lands to restrain its removal under Rev. St. 1892, § 1469 (Doke v. Peek [Fla.] 34 So. 896); to enjoin pollution of a stream by sewage of a city at the suit of a lower land proprietor (Kewanee v. Otley, 204 Ill. 402); against collection of property taxes to show that no adequate remedy at law exists; construction of Burns' Rev. St. 1894, §§ 7915, 7916 (Ind. Mfg. Co. v. Koehne, 188 U. S. 681, 47 Law. Ed. 651); to restrain payment on a paving contract because of the arbitrary award of the contract by the city as showing failure of the board of public works to comply with the statute (Inge v. Mobile Public Works, 135 Ala. 187); by members of labor union for injunction against unlawful combination by employers to destroy the union by preventing and intimidating persons from joining and securing the discharge of those belonging to the union (Boyer v. W. U. Tel. Co., 124 Fed. 246); to show such contract rights in plaintiff corporation to entitle it to an injunction to prevent wrong and illegal acts of defendants who were obstructing the work of the other parties to a contract with the corporation so as to prevent its fulfillment of such contract (Chesapeake & O. C. Agency Co. v. Fire Creek C. & C. Co., 119 Fed. 942). A bill for injunction against the use of secret processes and methods of manufacture by defendant in violation of a contract sufficiently shows their character, where it alleges that they were not generally known or understood by other manufacturers or the public and that defendant gained knowledge of them while an employe of plaintiff's establishment and that he agreed not to disclose such processes or methods to others. S. Jarvis Adams Co. v. Knapp [C. C. A.] 121 Fed. 34. Sufficiency of description in application for injunction in bankruptcy, to show where the bankruptcy proceeding was pending. In re Goldberg, 117 Fed. 692.

Sufficiency of complaint in suit to restrain the sale of realty as the property of decedent for debts on demurrer (Demaris v. Barker [Wash.] 74 Pac. 362); to warrant the temporary injunction to protect plaintiff's right to the use of the bed of a creek which he had reclaimed for agricultural purposes (Campbell v. Flannery [Mont.] 74 Pac. 450); for injunction against the collection of a tax, alleging overvaluation by the county board, especially with regard to fraud on its part (Cochise County v. Copper Queen Consol. Min. Co. [Ariz.] 71 Pac. 946); to entitle the receiver of a corporation to restrain foreclosure proceedings against the corporation as to certain mortgaged chattels under 2 Ballinger's Ann. Codes & St. § 5876 (Kidder v. Beavers [Wash.] 74 Pac. 819). A complaint for an injunction pendente lite must show a right to such relief and the prayer must ask it even though the application is under a law providing for injunction on affidavits after issue joined, showing that the acts threatened would render judgment ineffectual [Rev. Code, § 5344, sub-div. 23]. Forman v. Healey, 11 N. D. 563.

Allegations of conspiracy must state in what the conspiracy consists. N. Y. Cent. & H. R. R. Co. v. Reeves, 41 Misc. [N. Y.] 490. A petition for injunction against a sale under a power in a mortgage, is insufficient if it does not show the character of trust in the instrument which is apparently unrecorded or the nature of the advertisement for

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Answer and other pleadings.—The defense of an adequate legal remedy must be raised before hearing on the merits;[92] it must be raised by answer, if it does not appear on the face of the complaint.[93] An answer in a suit to restrain the cutting of timber, alleging that on a certain day plaintiffs conveyed to another all their interest in the timber described, will avail only to limit plaintiff's recovery as a partial defense.[94]

A supplemental answer will be allowed where it raises issues which may be settled on hearing.[95] Where defendant before serving of the original answer asked leave to plead facts existing and entirely changing the issues, by a supplemental answer, he can be permitted to serve the answer only on payment of costs to date and on condition that plaintiff may discontinue without costs if so advised.[96]

Acts of complainant in which defendant has acquiesced cannot be raised by cross complaint.[97] A cross bill cannot be filed to prevent complainant from exercising the rights he seeks to establish by the bill, where they must necessarily be determined in deciding the issues on bill and answer.[98]

Issues and proof.—Under special circumstances courts will settle the question of damages incidental to injunctive relief.[99] Petitioners must show clearly legal authority to prosecute the action and their right to relief when such is in issue.[1] The right, authority, or purpose of quasi-public corporations to construct improvements will not be determined.[2] Where it is alleged in a suit to restrain cutting of timber on land that deeds under which the defendant claimed were shams man-

the sale or how such sale would affect plaintiff's title. Wilson v. Gray, 97 Mo. App. 632. A suit on petition of several individuals as "mayor and councilmen" to restrain the maintenance of a blind tiger is a suit of the individuals named and the descriptive words may be stricken out as surplusage. Legg v. Anderson, 116 Ga. 401. A petition in a suit to recover money received by plaintiff's attorneys which they claimed to hold for fees from proceeds of a prior action, filed to restrain plaintiff's action at law to recover such money which shows that a prior suit was not pending, but that a final decree had been rendered and funds distributed, is liable to demurrer, the court's jurisdiction over the former suit having terminated. German v. Browne, 137 Ala. 429.

92. Where defendant proceeds to hearing on the merits before a master without objection that there was an adequate remedy at law and that the bill did not state a cause for equitable relief, he has waived such objection in his answer. Driscoll v. Smith [Mass.] 68 N. E. 210.

93. Corscadden v. Haswell, 84 N. Y. Supp. 597.

94. Houck v. Patty [Mo. App.] 73 S. W. 389.

95, 96. Where plaintiff sued a company and its employe to restrain the company from violating trade marks and to restrain the employe from continuing in the employ of the company because he had broken his contract not to work for a competitor of plaintiff within a certain time after discharge from plaintiff's employ and the company was not served but the employe answered and applied for leave to file a supplemental answer alleging that the trade marks sought to be protected contained false and fraudulent statements, an order allowing him to serve such answer will not be reversed, though the facts alleged could be no defense as against him, since the validity of the defense could be determined on the trial. Preservaline Mfg. Co. v. Selling, 75 App. Div. [N. Y.] 474.

97. Where a railroad company gave a license to a natural gas company to maintain certain pipe lines under and across its right of way, it can not urge by cross-complaint in an action by the gas company to compel it to allow the laying of another pipe line across the right of way that dangers and inconvenience had been increased by acts of the gas company so as to secure an injunction against such additional lines where all such danger and inconvenience existed when the license was granted. Chicago, I. & E. R. Co. v. Ind. N. G. & O. Co. [Ind.] 68 N. E. 1003.

98. Sunset Tel. Co. v. Eureka, 122 Fed. 960.

99. Reese v. Wright [Md.] 56 Atl. 976.

1. School Dist. No. 112 v. Goodpasture [Okl.] 74 Pac. 501.

2. Where a city has granted a franchise for a telephone plant to a company organized under the state laws and it has built its plant, the validity of the incorporation of the company cannot be questioned by the city in a suit to restrain interference by the city with the exercise of rights under the franchise. Old Colony Trust Co. v. Wichita, 123 Fed. 762. The question of municipal power to give permission to lay a railroad siding in a street on other than the established grade cannot be considered in a suit to restrain such siding by the railroad company. Zook v. Penn. R. Co. [Pa.] 56 Atl. 82. Where a railroad company is entitled to build its road through a borough, its purpose in building a telegraph line is immaterial in a suit by which to restrain interference by the borough with construction of the line. Penn. R. Co. v. Lilly Borough [Pa.] 56 Atl. 412.

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ufactured to defeat criminal prosecutions for taking timber, facts invalidating the conveyance can be shown on trial.[3] The court is entitled to consider all the circumstances and is not bound by denial of an intention to violate the covenant, breach of which is to be enjoined.[4] Where a petition to restrain enforcement of a judgment by execution against the judgment debtor by a member of a firm, against which the debtor had suits pending, was for the purpose of obtaining an equitable set-off, he could show on petition for a permanent injunction that he expected to move for a new trial.[5]

Affidavit for bill.—An injunction cannot be founded on equities appearing in supporting affidavits, where the complaint fails to state a cause for equity.[6] An affidavit to a bill for injunction, on information and belief, is insufficient where it does not state the source of information or what knowledge affiant has relating to matters for relief.[7] That affidavits opposing an injunction against the use of a corporate name in violation of complainant's rights show no intention on the part of defendant to manufacture anything manufactured by complainants is immaterial, where defendant's charter gives it power to do so.[8]

Presumptions of burden of proof.—Official acts will be presumed to have been regularly done.[9] In a suit to restrain an upper proprietor from diverting water from a stream, defendant must show the amount returned to the stream, where he claims that such return is made.[10] Where the bill in a suit to restrain violation of a contract whereby a physician agrees not to practice medicine within a certain territory, unless forced to resume such practice by unforeseen circumstances, alleged that such circumstances had not arisen, plaintiff was not required to prove such allegation, it being negative in nature so that proof lay in the special knowledge of defendant.[11]

Evidence.—Proof of defendant's insolvency on hearing for injunction must be direct and positive and not on information and belief.[12] Evidence which is sufficient to authorize a preliminary injunction or its denial will not necessarily authorize a like decision at final trial on the merits.[13] Sufficiency and admissibility of evidence in particular cases will be found in the note.[14]

3. Houck v. Patty [Mo. App.] 73 S. W. 889.

4. Covenant in partial restraint of trade. Fleckenstein v. Fleckenstein [N. J. Eq.] 53 Atl. 1043.

5. Harris v. Gano, 117 Ga. 934.

6. Landes v. Walls, 160 Ind. 216.

7. By one not a party. Moffat v. Calvert County Com'rs [Md.] 54 Atl. 960. Where it appears in a suit by a stockholder to restrain payment of a dividend on preferred stock that an affidavit was filed by plaintiff in support of a preliminary injunction and one by his counsel which failed to show the circumstances bringing him in relation with the injuries so that he could speak from personal knowledge and respecting admissions made by the president of the corporation only, the affidavits were insufficient to warrant a preliminary injunction. Schoenfeld v. American Can Co. [N. J. Eq.] 55 Atl. 1044.

8. Edison Storage Battery Co. v. Edison Automobile Co. [N. J. Eq.] 56 Atl. 861.

9. One seeking to enjoin payment of a city warrant drawn on a specific fund must prove allegations that no estimate of the cost or appropriation was made for its payment and must overcome the presumption of official regularity. Kelley v. Broadwell [Neb.] 92 N. W. 643. In proceedings to restrain the maintenance of a dram shop it must be presumed that the excise commissioner properly granted the license for such dram shop on a petition of eligible subscribers whether he made any investigation or not. Cooper v. Hunt [Mo. App.] 77 S. W. 483.

10. Lonsdale Co. v. Woonsocket [R. I.] 56 Atl. 448.

11. Ryan v. Hamilton, 205 Ill. 191.

12. Doke v. Peek [Fla.] 34 So. 896.

13. Colusa Parrot M. & S. Co. v. Barnard [Mont.] 72 Pac. 45.

14. **Sufficiency of evidence** to show adequate remedy at law which petitioner neglected to pursue in a suit to restrain collection of judgment (Hess v. Lell [Neb.] 94 N. W. 975]; of bad faith on the part of the holder of a patent in sending notice to alleged infringers and their customers notifying them of his claims and threatening suits, in a suit for injunction on the part of the alleged infringers to restrain such notice (Adriance v. Nat. Harrow Co. [C. C. A.] 121 Fed. 827); to establish an unlawful conspiracy on the part of members of a labor organization which is picketing the works of an employer during a strike and engaging in acts of violence to prevent others from entering the employment of the manufacturer so as to entitle him to an injunction against the institution and maintenance of such pickets

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Hearing and determination; dismissal; trial by jury.[15]—On hearing of an order to show cause why injunction should not issue, defendant's evidence cannot be rejected and the injunction issued merely because he was in contempt for violating a restraining order.[16] A bill for injunction should not be dismissed on reversal of an order granting a preliminary injunction, where complainants had no opportunity before hearing below to inspect or rebut defendants' affidavits.[17] A jury is not a matter of right in a suit for injunction, though the court may order trial of issues by a jury for its information.[18]

Costs.—In proceedings to restrain a commission from removing an officer under unconstitutional laws, the members of the commission are personally chargeable with costs, since they acted of their own wrong, but the sheriff to whom the custody of the office was given is not liable for costs, he being given no authority under the law and having made no threats to act.[19]

§ 5. *Decree, judgment or order for permanent injunction.*—The decree or judgment must not be broader than is necessary to protect complainant's rights nor invade defendant's rights;[20] and must conform to the pleadings.[21] Less than the

and others who may be shown to have taken part in the violence or intimidation (Union Pac. R. Co. v. Ruef, 120 Fed. 102); to warrant issuance of a temporary injunction against boycott (Gray v. Bldg. Trades Council [Minn.] 97 N. W. 663).

Admissibility: In an action for injunction to restrain the city and the council from proceeding under an award of printing to a newspaper, evidence of the average price paid in the city for printing of that character showing the bid accepted to be reasonable, is immaterial where the ground was that the bid of the successful paper greatly exceeded that of another. Puget Sound Pub. Co. v. Times Printing Co. [Wash.] 74 Pac. 802. In a suit by one having an easement in a lawn and beach to restrain construction of a sea-wall which will diminish the beach, testimony that beneficiaries of the trustee holding title to the lots when platted and under whom plaintiff claimed, never knew or consented to a conveyance of the lots by the trustee to plaintiff, is not admissible unless it is shown that the terms of the trust required any such knowledge or consent. Testimony that beneficiaries of the trustee holding title to the lots when platted paid for the lots is properly excluded as not tending to show that such trustees could not convey an absolute title as far as defendants are concerned to plaintiff who holds the paper title. Testimony that the beneficiaries of a trustee did not consent to the bringing of the suit is properly excluded. But testimony of complainant in support of his claim under a deed was harmless if immaterial. So is the exclusion of testimony that a certain deed made to plaintiff by the trustees was without consent of the beneficiaries therein named where he sued as individual proprietor and not to enforce any rights as trustee. Fisk v. Ley [Conn.] 56 Atl. 559.

15. Dismissal of petition for an injunction to restrain an order of sale on a decree and judgment. Jones v. Smith [Neb.] 97 N. W. 304.

16. Code Civ. Proc. § 2179. Harley v. Mont. Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407.

17. Brill v. Peckham M. T. & W. Co., 189 U. S. 57, 47 Law. Ed. 706.

18. Burns' Rev. St. 1901, § 412. Shroyer v. Campbell [Ind. App.] 67 N. E. 193. Trial by jury is not required in a suit for an injunction to abate a public nuisance. Reaves v. Ter. [Okl.] 74 Pac. 951.

19. Corscadden v. Haswell, 84 N. Y. Supp. 597.

20. Where it appears in an action to restrain the shutting off of waters from certain creek from plaintiff's premises, that a certain amount of water has been dedicated to public use, a decree in favor of plaintiff must limit his rights to use of the surface waters. Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 Pac. 395. Where complainant in a suit to restrain a city from opening an alley through his property, was given relief on the ground that he had obtained title by adverse possession and had made valuable improvements, a decree was too broad which restrained the city forever from entering on the land. Crigler v. Mexico [Mo. App.] 74 S. W. 384. An injunction forbidding a commission from acting in any way under a statute giving it power to reduce the salary of an officer or to remove him, is too broad, where the provisions of the statute as to the first power are valid but void as to the second. Corscadden v. Haswell, 84 N. Y. Supp. 597. If the use of a dam by retaining the water during the day and discharging it at night is the only cause which results in injury to owners of prior water rights, an injunction will not lie against the maintenance of the dam, restraint of the injurious practice being sufficient. Lone Tree Ditch Co. v. Rapid City E. & G. Co. [S. D.] 93 N. W. 650. Where plaintiff showed perfect title to land and his petition admitted a lease of timber to defendant, and the evidence showed that the latter was cutting much timber which did not come within the lease, which defendant denied, the injunction granted should not restrain him from cutting timber but merely from cutting timber not included in the lease [Civ. Code 1895, § 4927]. Simmons v. McPhaul, 117 Ga. 751. A decree restraining the infringement of a trade name and prohibiting defendant from "making use of the word" in any manner in connection with goods made for the same purpose as complainant's must

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relief asked by the prayer may be given.[22] Should defendant be prejudiced he should move for correction.[23] A judgment perpetually enjoining the commission of a certain act is sufficient without any further adjudication, where the findings of fact and conclusions of law are full and specific.[24] Generally, legal rights will not be settled,[25] but pecuniary damages may be awarded complainant where injunctive relief is denied, rather than remit him to an action at law.[26] Persons restrained from erecting a sea-wall on a different line from the place where it formerly stood cannot complain that the order restrained only a circumstantial change from the former line instead of any change; the exact line where such wall could be erected need not be defined.[27] Where trespass is restrained to prevent circuity of actions and a multiplicity of suits, all parties to such action should be enjoined.[28] Where suit was brought against certain defendants to construe a law under which

be construed with reference to the proceeding and its purpose and cannot prohibit the use of words on packages of goods in a statement that such product is not so named, but is better, purchasers not thereby being deceived. Enoch Morgan's Sons Co. v. Gibson [C. C. A.] 122 Fed. 420. An injunction against breach of contract by an actress for a season of a play pending suit or until further order of court is too broad and should not be made to continue beyond the close of the season which commencing in May could in no event extend beyond June 1st of the following year. Shubert v. Angeles, 80 App. Div. [N. Y.] 625. Since a decree granting an injunction must be construed in connection with the matters complained of in the bill, one restraining a city from removing or interfering with the poles, wires or appliances of a telephone company is not open to objection as interfering with the police powers of the city to be exercised in cutting down poles or wires in case of fire or other public necessity where the prayer of the bill is based entirely on allegations as to unlawful interference by the city in order to obstruct the lawful operation of the telephone system. Duluth v. Abbott [C. C. A.] 117 Fed. 137.

21. Where plaintiff is not entitled under the proof, to an injunction, a new trial will not be granted to enable him to recover damages where the issue as to damages is not raised by the pleadings. Bigelow v. Los Angeles [Cal.] 75 Pac. 111. A petition alleging that a judgment had been satisfied and asking that an injunction against its enforcement be perpetual and for general relief, will justify a decree restraining execution. Deleshaw v. Edelen [Tex. Civ. App.] 72 S. W. 413. Where a cross-bill against the city and a company was filed in a suit by the city to enjoin a street railway company from laying tracks in streets for the purpose of restraining the laying of tracks by the second company, and on an adjournment of the hearing on the motion for preliminary injunctions on both bill and cross-bill, an order in two paragraphs was entered, the first continuing the restraining order entered on the original bill and the second restraining both defendants and complainant in the cross-bill from laying tracks until further orders and before further hearing the original bill was dismissed and the cross-bill dismissed by complainant as to the city, since the controversy on the cross-bill is between the two companies claiming conflicting rights—the second paragraph relates merely to such controversy and properly restrained any change in the status by either party and remained in force. Consolidated Traction Co. v. Crawfordsville, 125 Fed. 247.

22. Where an abutting owner sought to restrain operation of a street railway in a street and it appears that the operation of the road was legal except for casting an additional burden on the fee because of the operation of an interurban service, the plaintiffs were entitled to an abatement of the additional servitude by injunction, though they had asked for abatement of the entire road. Younkin v. Milwaukee L., H. & T. Co. [Wis.] 98 N. W. 215.

23. Where evidence in an action for trespass showed that defendant trespassed upon only a part of the entire tract described in the complaint but the court through inadvertence included the whole tract in the injunction restraining further trespass, thus including places where defendant might have a lawful right to go, the prejudiced party should request a proper correction before demanding a reversal of the order denying a new trial. Arndt v. Thomas [Minn.] 96 N. W. 1125.

24. Walker v. McGinness [Idaho] 72 Pac. 885.

25. Damage for past acts as to which the right to recover is complete when the bill is filed and may be enforced by a single action at law, cannot be recovered in a suit to enjoin future acts. Stevenson v. Morgan, 64 N. J. Eq. 219. Where chancery before adoption of the constitution had jurisdiction in a case regardless of the statute but had no inherent jurisdiction to enjoin a mere trespass, though such power may be conferred by statute, the power to settle the damages of the trespass cannot at the same time be conferred. McMillan v. Wiley [Fla.] 33 So. 993.

Where a decree restraining collection of a judgment and allowing a set-off against it requires as a condition for the injunction that a sum more than sufficient to satisfy an attorney's lien on the judgment should be paid into court, the relative priorities of the set-off and the lien need not be considered. Commercial State Bank v. Ketchum [Neb.] 96 N. W. 614.

26. Lane v. Mich. Traction Co. [Mich.] 97 N. W. 354.

27. Fisk v. Ley [Conn.] 56 Atl. 559.

28. Civ. Code, § 4916. Wells v. Rountree, 117 Ga. 839.

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they claimed as legatees, and it was determined that some of them took no interest under the law, all the legatees will not be restrained from suing the executors to recover legacies.[29]

Effect and enforcement.—A formal order for injunction relates back to the date of the decision granting it.[30] An injunction by one court to stay proceedings of another affects the parties only and not the jurisdiction of the other court.[31] An order restraining defendant from using premises for other than a certain business "during the pendency of this action" is one pendente lite.[32] Mere refusal to render judgment on a petition, where the court offers to hear the case on the merits and plaintiffs dismiss the suit, is not a denial of the right to amend the petition.[33] An order to prevent defendants and their associates from congregating about plaintiff's premises to induce employes to quit work and from interfering with the employes on the premises or with those who wish to enter the employment, and to prevent interference with the employes while passing to and from their work, meant that defendants and all persons subject to the order were prevented from personal violence or intimidation, though such acts were not performed on the premises.[34] Where an instrument is not negotiable under the statute and is subject to the same defenses in the hands of a bona fide purchaser as in the hands of original buyer, a perpetual injunction after full hearing between the original parties restraining its collection is a complete defense to a suit brought by such purchaser before maturity and without notice.[35] Where an abutting landowner sought to restrain a railroad from using a street, and after recovery the railroad's lessor sued to condemn his rights, and the verdict in condemnation allowed interest on the award from date of filing of the petition, but was set aside, such award of interest will not estop the landowner from enforcing the first decree restraining the use of the street.[36] Where it was determined that title to a river front in a state was in individuals and not in the city, and the city was restrained from interfering with possession, use or enjoyment of the wharf property belonging to plaintiffs, one who was a stranger to the suit may enforce the injunction to prevent ejectment by the city for recovery of property on the river front, only when he shows that the property in question was the identical property in the former state and to which the injunction related, it not being sufficient to show that he obtained title from the original plaintiffs.[37]

§ 6. *Violation and punishment.*—One violating an injunction with knowledge of it is liable for contempt, though not a party to the suit, or if a party, where he is not served with process in it.[38] That defendant acted in good faith,[39] or that the

29. Tiffany v. Emmet, 24 R. I. 411.

30. Rochester & L. O. Water Co. v. Rochester, 84 App. Div. [N. Y.] 71.

31. State v. Fredlock, 52 W. Va. 232.

32. Orvis v. Nat. Commercial Bank, 81 App. Div. [N. Y.] 631.

33. Eppstein v. Webb [Tex. Civ. App.] 75 S. W. 337.

34. Ex parte Richards, 117 Fed. 658.

35. Randolph v. Hudson [Okl.] 74 Pac. 946.

36. Bond v. Pa. Co. [C. C. A.] 126 Fed. 749.

37. Leverich v. Mobile, 122 Fed. 549.

38. Rev. St. 1899, § 3643. In re Coggshall [Mo. App.] 75 S. W. 183; Ex parte Richards, 117 Fed. 658. Injunction forbidding interference with business. People v. Marr, 84 N. Y. Supp. 965. A writ of injunction need not be served upon one to make him guilty of contempt in its violation, if he knows actually of its existence. Ex parte Stone [Tex. Crim. App.] 72 S. W. 1000. Attorneys who deliberately advise a defendant in an injunction suit after an order restraining him from interfering with the use of, or access to a dock leased by plaintiff, to resist the plaintiff on the ground that it was the latter's duty to keep part of the dock in repair, though such duty was not included in the order which gave plaintiff the right to use the other half when necessary, were guilty of contempt where they were familiar with all the facts. Stolts v. Tuska, 82 App. Div. [N. Y.] 81. A person not a party to the suit, nor an agent or servant of a party, nor in privity with any party, may be guilty of contempt in wilfully doing an act which he knows to be prohibited by injunction, not by being technically guilty of a violation of the order but by disrespect to the court, disregarding its decree, and may be punished without reference to the

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judge who issued the injunction stated that defendant might obtain permission of the city council to act without violation of the injunction,[40] or that at time of violation he had filed a motion to modify it,[41] or that he acted on advice of counsel,[42] is no defense, though such facts may be shown in mitigation.[43] It may be shown in mitigation in proceedings for contempt that the judge stated that the injunction was dissolved, that no formal decree was necessary, and that defendants might proceed.[44] Disobedience of a void order is not contempt.[45] Defendant is not liable for violation by others.[46] There can be no violation by one ignorant of the injunction.[47] That disobedience of a statutory injunction is a criminal offense will not exempt defendant from punishment for contempt.[48] Acts amounting to violation of particular injunctions will be found in the footnote.[49]

effect thereof on the rights of the actual parties. Chisolm v. Caines, 121 Fed. 397.

39, 40, 41. Young v. Rothrock [Iowa] 96 N. W. 1105.

42. Stolts v. Tuska, 82 App. Div. [N. Y.] 81; In re Granz, 78 App. Div. [N. Y.] 399. One enjoined from infringing a patent is not excused from contempt in violation of the injunction because the subsequent infringement was not obvious and was done under advice of counsel where he proceeded with notice in assuming the risk of violation. Paxton v. Brinton, 126 Fed. 542.

43. Coffey v. Gamble, 117 Iowa, 545; Stolts v. Tuska, 82 App. Div. [N. Y.] 81.

44. Coffey v. Gamble, 117 Iowa, 545.

45. Disobedience of an order restraining de facto officers from exercising functions of their office, issued without jurisdiction. State v. Rice [S. C.] 45 S. E. 153. Disobedience of an injunction against passage and approval of an ordinance merely on the ground that it will not conserve best public interests is not contempt, the injunction being void. Wright v. People [Colo.] 73 Pac. 869.

46. One restrained from causing or negligently permitting obstruction of a culvert. Corwin v. Erie R. Co., 84 App. Div. [N. Y.] 555. One restrained from diverting water from a lake and ordered to fill up the ditch by which they were diverted is not liable for contempt because the dams he had built were removed by others without his knowledge. Stock v. Jefferson Tp. [Mich.] 92 N. W. 769. Damage to one party by acts of another alleged to have been in violation of an injunction, cannot be recovered by a proceeding for contempt. Dowagiac Mfg. Co. v. Minn. Moline Plow Co. [C. C. A.] 124 Fed. 735, 736.

47. Defendant in a suit for infringement of a patent having given a bond to respond in damages on recovery by complainant is not liable criminally for contempt of court for offering to sell the infringed article after the issuance of a mandate from the appellate court directing a decree restraining such sale, where the decree has not been entered and defendant has no actual notice of its direction. Dowagiac Mfg. Co. v. Minn. Moline Plow Co. [C. C. A.] 124 Fed. 735, 736. That one of several ticket brokers filed an answer in a suit against them to prevent their dealing in certain tickets, will not show his knowledge of the issuance of an injunction so as to render it binding upon him, making him liable to punishment for violation, where it appears that he had no knowledge of the suit and that attorneys were retained by other brokers who authorized them to represent all defendants. Ex parte Stone [Tex. Cr. App.] 72 S. W. 1000.

48. Abatement of liquor nuisance. Davis v. Auld, 96 Me. 559.

49. Sufficiency of evidence to show violation of an injunction against intimidation or interference with employes (Ex parte Richards, 117 Fed. 658); to show violation of an injunction against intimidation of plaintiff's employes and congregating for the purpose of intimidating persons seeking his employment (Jonas Glass Co. v. Glass Blowers' Ass'n, 64 N. J. Eq. 644); to show defendants in contempt for violation of an injunction in that they acted as confederates and associates of defendants in the bill (Ex parte Richards, 117 Fed. 658).

Violation of order restraining building of railroad tracks. Consolidated Traction Co. v. Crawfordsville, 125 Fed. 247. One enjoined from manufacturing and using a machine invented by the employe of another cannot avoid the effect of the restraint by organizing a corporation for making and using machines which he controls. Westervelt v. Nat. Mfg. Co. [Ind. App.] 69 N. E. 169. Where defendants were enjoined from obstructing in any manner, plaintiff's access to a dock or the use thereof, which he had leased, their act in afterward building a fence so as to prevent plaintiff's access was a clear violation of the order. Stolts v. Tuska, 82 App. Div. [N. Y.] 81. An order restraining the sale of liquor under a void license will not restrain procurement of a license according to law and the sale of liquor under such license when issued will not violate the injunction. Wray v. Harrison, 116 Ga. 93. Entry on a mining claim to post notices of discovery of mineral lodes with the intention to locate, will not violate a restraining order against continuation of trespass by sinking shafts. Harley v. Mont. Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407. Workmen who threatened another workman with death if he went to work in a certain shop and took part in an assault on a second workman, are guilty of criminal contempt after issuance of a preliminary injunction prohibiting acts of violence. Stearns v. Marr, 41 Misc. [N. Y.] 252. Defendants restrained from the use of a system of numbers devised by plaintiffs or similar numbers based thereon, may be punished for contempt for telling customers to order by a system the same as the old except for insertion of a figure in front of each of the old numbers. Brown v. Braunstein, 86 App. Div. [N. Y.] 499. Issuance of circulars by

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Asking a second injunction for a new cause will not bar the right to petition for punishment of violation of the first.[50] Application to the federal district court to restrain the state court from punishing a bankrupt for contempt in failing to appear before a referee for examination may be treated as an application for stay of the proceeding, where no fine has been imposed and it appears that no actual contempt was intended.[51] Whether a preliminary injunction applied to a particular contract is a question which the court will not determine on a motion to punish for contempt, but only after hearing on the merits.[52] An affidavit for warrant of arrest for contempt, in violation of the order against interference with work by intimidation, may be made by any one knowing the facts, though not a party to the suit.[53] Facts constituting contempt of an order must be shown by affidavit, but an affidavit will not authorize contempt proceedings against one as to an injunction restraining defendants and their agents and employes, where he does not appear

one advertising for sale articles adjudged to be infringements of a patent, is not a breach of an injunction which has been ordered against the sale of such articles. Dowagiac Mfg. Co. v. Minn. Moline Plow Co. [C. C. A.] 124 Fed. 735, 736. An injunction restraining operation of an ice chute in a street after a certain day and directing its removal, is violated by operation after such date, though the method of construction is so changed as not to interfere with public travel but not to obviate entirely dangers from its use. Young v. Rothrock [Iowa] 96 N. W. 1105. A corporation restrained from making or selling a patented article must take such precautions as will insure compliance of its employees with the injunction, and the officers will be liable to fine for contempt where the order is violated by the employees through their carelessness though without intention on their part. Westinghouse Air Brake Co. v. Christensen Engineering Co., 121 Fed. 562. Where pending suit the supreme court restrained an owner and his contractor from tearing down the lease-hold of tenants, the fact that the owner afterwards recovered the property in the municipal court by dispossession proceedings will not authorize him to proceed with such work, and if he and the contractor do so, they are guilty of criminal contempt for disobedience of the injunction [Code Civ. Proc. § 8, subd. 3]. In re Granz, 78 App. Div. [N. Y.] 399. An order restraining interference with the conduct of persons is not violated by showing that defendants attacked complainant's employee, while returning from a place in the evening where he had gone after the close of business for defendants, where it also appears that they previously had a quarrel with such employee in complainant's store; nor by evidence that defendants boarded a train bringing employes to the works and by talking to them induced them not to go, even though by misrepresentations that complainant would not allow them to go outside the works. Jonas Glass Co. v. Glass Bottle Blowers' Ass'n, [N. J. Eq.] 53 Atl. 138. A decision filed in a suit by an abutting owner to restrain work by a town on a street, that the temporary injunction should be dissolved and the petition dismissed on the merits, is a dissolution of the injunction without entry of formal decree pursuant to the decision so that town officers working on the street after such decision filed but before entry of the formal decree, were not guilty of contempt for violating the injunction. Coffey v. Gamble, 117 Iowa, 545. Where an injunction was issued against the sale of certain property and thereafter dissolved but kept in force by the bond and within the time allowed for filing the bond defendants made the sale in contempt of the temporary injunction the sale accruing between parties to the suit and the property remaining in possession of the purchaser, a finding was unwarranted on final hearing that defendants were unable to comply with the decree and turned over the property to plaintiff. Commercial State Bank v. Ketcham [Neb.] 92 N. W. 998. Where attorneys for a judgment creditor of a bankrupt after entry of an order in the bankruptcy court restraining them and their client from proceeding further in supplemental proceedings to collect the judgment already instituted in a state court applied for and obtained an order from the state court adjudging the bankrupt in contempt for failure to obey an order made before the bankruptcy and requiring him to pay them a fine equal to judgment and costs, such application was a continuation of the supplemental proceedings plainly violating the injunction and they were guilty of contempt of the bankruptcy court. In re Fortunato, 123 Fed. 622.

50. Where an abutting owner brought suit to restrain threatened trespass in a street by a railroad company on the ground that he owned the fee, and before final decree the railroad took possession and laid tracks in the street, after which a city ordinance was passed requiring it to elevate its tracks, and the abutting owner sought to restrain such act, the suit being removed to the federal courts, and also a subsequent suit by the railroad's lessor to condemn his rights in the street, the filing of his second complaint to restrain the second trespass was not a waiver of his rights under the first decree so as to prevent his petition to punish the railroad officers for its violation. Bond v. Pa. Co. [C. C. A.] 126 Fed. 749.

51. In re William E. De Lany & Co., 124 Fed. 280.

52. International Reg. Co. v. Recording Fare Reg. Co., 125 Fed. 790.

53. The acts themselves are offenses. Castner v. Pocahontas Collieries Co., 117 Fed. 184.

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by the affidavit to be one of such persons.[54] Doubtful questions are not to be resolved against respondent.[55] Circumstantial evidence will not warrant a judgment of guilty of contempt involving imprisonment, though his denial is of such a character as to create a strong impression of violation.[56] Where evidence is given in an action for damages for violation of an injunction restraining manufacture and use of a machine, that plaintiff's business has suffered by diminished sales, testimony is admissible to show cost of manufacture of the article which the machine was intended to produce.[57] Where defendant was sufficiently informed of the misconduct charged against him in contempt proceedings for violation, a variance in the evidence admitted under the relator's affidavit is immaterial.[58] An error in the description of land in an opinion affirming an injunction, restraining his interference with waters of a creek, will not avail him in contempt proceedings for violation of such order.[59] Where the court took no notice of violation when it dissolved the injunction as improvidently granted without jurisdiction, such violation could not be raised in a subsequent collateral proceeding as a defense to an alleged violation of law.[60] Where an order is issued restraining interference with plaintiff's business, a reference may be ordered to take testimony as to an alleged violation.[61] Violation of a preliminary injunction cannot be punished by instructing that defendant's testimony in his own behalf is not to be considered,[62] nor can obedience be rewarded by instructing that he is entitled to a verdict.[63] One who violated an order against interference with access to a dock was guilty of a contempt of court calling for a fine and damages and expenses of plaintiff which may be proved, and imprisonment until he shows a willingness to comply fairly with the order.[64] Contempt in violating an injunction in a suit by an individual for the public is criminal, and the supreme court may review the punishment.[65] Operation of an order punishing defendant for contempt in violation of an injunction granted by an interlocutory decree will not be suspended until final hearing.[66]

§ 7. *Liability on injunction bond.*—Recovery cannot be had against the sureties on an injunction bond until they have had their day in court. A telephone company having no rights in streets, because of failure to obtain municipal consent before commencing to build its lines, was not injured by an injunction restraining construction, and could not recover damages on the injunction bond for illegal issuance.[67] Where plaintiff in an action on a bond made all the proceedings and record in the injunction suit a part of his petition, a demurrer thereto will be properly sustained where such petition conclusively shows the injunction to have been rightfully issued.[68] No recovery can be had on a bond given on issuance

54. State v. Peterson, 29 Wash. 571, 70 Pac. 71.

55. Schlicht H., L. & P. Co. v. Aeolipyle Co., 121 Fed. 137.

56. Cimiotti Unhairing Co. v. Frolloehr, 121 Fed. 561.

57. Westervelt v. Nat. Mfg. Co. [Ind. App.] 69 N. E. 169.

58, 59. State v. Gray, 42 Or. 261, 70 Pac. 904, 71 Pac. 978.

60. An injunction restraining further publication of an order of a local option in effect and declaring the result of an election in proceedings for the establishment of a local option in a county. Lively v. State [Tex. Cr. App.] 73 S. W. 1048.

61. People v. Marr, 84 N. Y. Supp. 965.

62. Lake v. Copeland [Tex. Civ. App.] 72 S. W. 99. Rejection of defendant's evidence and issuance of an injunction on the hearing of an order to show cause why injunction should not issue because defendant was guilty of contempt in filing a restraining order, is a denial of due process of law. Harley v. Mont. Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407.

63. Lake v. Copeland [Tex. Civ. App.] 72 S. W. 99.

64. Stolts v. Tuska, 82 App. Div. [N. Y.] 81.

65. To restrain passage and approval of city ordinance. Wright v. People [Colo.] 73 Pac. 869.

66. Westinghouse Air Brake Co. v. Christiansen Engineering Co., 123 Fed. 632.

67. Const. § 163. East Tenn. Tel. Co. v. Anderson County Tel. Co., 24 Ky. L. R. 2358, 74 S. W. 218.

68. Gray v. Bremer [Iowa] 97 N. W. 991.

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of a temporary injunction, where there are grounds for its issuance though stated for the first time in an amended petition and though the injunction is dissolved because of condemnation proceedings begun after the writ was granted.[69] Where an injunction is ancillary only to the principal relief, evidence as to the value of services on a motion to dissolve and on demurrer to the bill will not authorize a recovery for attorney's services on the injunction bond.[70] Where an injunction restrains a tenant from disposing of crops subject to the landlord's lien and the tenant admitted the petition, but denied that the rent was due and set up as a defense a breach of the lease and defendant after judgment filed a stay bond, whereupon the injunction was dissolved, the order of dissolution was not a determination that the injunction had been improvidently granted so as to sustain an action on the injunction bond.[71] Damages from the issuance of a restraining order must be limited to the amount of the bond required of the one who obtains the order, unless he acted maliciously.[72] Counsel fees and necessary expenses, in an unsuccessful effort to dissolve and in conducting the main action, may be recovered on final dissolution in a suit on the statutory bond on a preliminary injunction to restrain a certain action.[73]

§ 8. *Liability for wrongful injunction.*—That defendant, pending the injunction, sued out attachment against complainant and caused a levy on goods, will not bar a recovery of damages for wrongful issuance of the injunction, since such act is not in violation.[74]

INNS, RESTAURANTS, AND LODGING HOUSES.

Who are innkeepers.—One holding himself out to the public as an innkeeper will be bound thereby.[1]

Public regulation and inspection.—The lessee, and not the lessor, has been held to be under the duty of constructing fire escapes.[2] A building is "enlarged" by raising its walls and flattening the roof so as to make a new story, though its height is not increased.[3]

Rights, duties and liabilities.—All losses of property of guests by fire at a public inn or hotel are prima facie due to negligence of proprietor, subject to rebuttal, by showing that the accident happened by irresistible force or unavoidable accident.[4]

A restaurant keeper has fulfilled his duties where he has placarded his place with warnings enjoining care, disclaimed on bills of fare, liability for goods not checked, employed a watchman to protect property, and provided a sufficient checking system.[5]

Saloon keepers are required to use reasonable care to protect guests from injury at the hands of persons permitted to frequent their places of business.[6]

The liability of an innkeeper caring for property of a guest after his departure

69. Scott v. Frank [Iowa] 96 N. W. 764.
70. Church v. Baker [Colo. App.] 71 Pac. 988.
71. Gray v. Bremer [Iowa] 97 N. W. 991.
72. Terry v. Robbins, 122 Fed. 725.
73. Nielsen v. Albert Lea, 87 Minn. 285.
74. Landis v. Wolf [Ill.] 69 N. E. 103.

1. One holding himself out as an innkeeper and advertising a cafe in connection therewith is bound thereby and cannot avoid liability as an innkeeper by showing that the cafe was owned by another and he was without voice in its management. Johnson v. Chadbourn Finance Co., 89 Minn. 310.

2. Johnson v. Snow [Mo. App.] 76 S. W. 675.

3. Statute required "enlarged" hotels to be of first class construction. Murdock v. Swasey, 183 Mass. 573.

4. Johnson v. Chadbourn Finance Co., 89 Minn. 310.

5. Harris v. Childs' Unique Dairy Co., 84 N. Y. Supp. 260.

6. Injury to sleeping patron by a third person pouring alcohol on his feet and setting same on fire. Curran v. Olson, 88 Minn. 307.

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is that of a gratuitous bailee,[7] and he is not guilty of negligence in delivering the property on a forged order to one who had dined with the guest and had been seen in his company a number of times.[8] The clerk may bind the proprietor by an agreement to forward packages addressed to departing guests and received after departure,[9] and the innkeeper failing therein is liable as an ordinary bailee.[10] The patronage of the guest is a sufficient consideration to support the agreement.[11]

Liens.—The laws of New York, giving innkeepers and lodging house keepers a lien on the property of guests,[12] cannot be invoked by a landlord against his tenant,[13] nor enforced against property, the title and right of possession of which is in another.[14]

Damages are recoverable by guest for wrongful exclusion from room to which he has been assigned,[15] and for sickness caused by eating impure food.[16] A lodging house keeper is not required to relet rooms she has let for a definite term on the roomer's departure before the expiration thereof, where he has requested that the rooms be reserved for him or some tenant he would procure.[17]

INQUEST OF DEATH.[18]

The verdict of a coroner's jury as to the cause of death is simply evidence not conclusive, to be considered with other evidence in a civil case.[19] The testimony and verdict received by him has no judicial character, so as to be admissible in an action to show the cause of death.[20]

On a prosecution for murder, questions as to evidence and witnesses at the inquest cannot be asked of the coroner as a witness,[21] except for purposes of impeachment.[22] In Louisiana, the inquest is admitted in a prosecution for murder.[23]

INSANE PERSONS.[24]

§ 1. Existence and Effect of Insanity in General (454).
§ 2. Inquisitions (455).
§ 3. Guardianship and Support (456).
§ 4. Commitment to Asylums (457).
§ 5. Property and Debts (457).
§ 6. Contracts and Conveyances (457).
§ 7. Torts (458).
§ 8. Actions By or Against (458).

§ 1. *Existence and effect of insanity in general.*—All persons are presumed sane till the contrary is made to appear.[25] Mental incompetency other than in-

7, 8. Hoffman v. Roessle, 39 Misc. [N. Y.] 787.

9. Baehr v. Downey [Mich.] 94 N. W. 750.

10. Sufficiency of evidence to support recovery. Baehr v. Downey [Mich.] 94 N. W. 750. Persons sending packages to departed guests are not guilty of contributory negligence for its loss by failure to mark its value on the package where its value was not such as to require extraordinary precautions. Id.

11. Baehr v. Downey [Mich.] 94 N. W. 750.

12. Laws 1897, c. 118, § 71.

13. Shearman v. Iroquois H. & A Co., 85 N. Y. Supp. 365.

14. Laws 1897, c. 118, § 71. Barnett v. Walker, 39 Misc. [N. Y.] 323.

15. May recover for loss of reputation and credit and anguish resulting from humiliation. Malin v. McCrutcheon [Tex. Civ. App.] 76 S. W. 586.

16. Sufficiency of evidence that party was served with coffee containing deleterious substances causing illness and during such sickness was frightened by insults of waiters. Stringfellow v. Grunewald, 109 La. 187.

17. Sonneborn v. Steinan, 85 N. Y. Supp. 334.

18. Fees of coroners at taking of inquest and duties of coroners generally see Coroners, 1 Curr. Law, 709.

19. Action on insurance policy. Rumbold v. Supreme Council Royal League [Ill.] 69 N. E. 590.

20. Action on benefit certificate [Bel. & C. Ann. Codes & St. § 1045]. Cox v. Royal Tribe, 42 Or. 365, 71 Pac. 73.

21. Hall v. State, 137 Ala. 44.

22. To impeach one jointly indicted who testified. State v. Gatlin, 170 Mo. 354.

For such purpose it is immaterial that the coroner acted without authority. State v. Dixon, 131 N. C. 808.

23. State v. Baptiste, 108 La. 234.

24. Essentials of mental competency to contract, see Incompetency.

Criminal responsibility see Criminal Law, 1 Curr. Law, 827.

25. Dinkelspiel v. Cent. Ky. Asylum, 24 Ky. L. R. 2240, 73 S. W. 771. A previous action against a person without anything on the record to show the defendant is insane

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sanity, while sometimes deemed sufficient at common law to warrant taking custody of property, is now often made so by statute.[26] Such statutes are constitutional.[27] A probability that a person will in future act without discretion in his business affairs will not justify taking control of his property by guardianship,[28] nor does mere eccentricity,[29] nor feeble health.[30]

On an inquest of insanity under a statute providing for the reprieve of prisoners who become insane after sentence, the test is ability to distinguish right and wrong as in criminal cases.[31]

§ 2. *Inquisitions.*—The common law method of adjudicating insanity by an inquest of a jury is still most commonly followed.[32] An adjudication without notice to the alleged lunatic or giving him an opportunity to be heard should be allowed to be traversed, though the evidence justified a finding of incompetency.[33] Notice to relatives of an inquest of lunacy is not for their benefit but for that of the public. Hence it is jurisdictional and cannot be waived.[34] A false information of insanity in good faith is not actionable.[35] No appeal lies from a finding that a person is not of unsound mind.[36] The party aggrieved by the finding of the inquisition can have a remedy only by traverse,[37] though the proceedings may be reviewed as upon certiorari.[38] Where there was reasonable doubt of the propriety of the result of an inquisition, a traverse should be allowed if the alleged lunatic intelligently desires it.[39] The inquisition and finding of the sheriff's jury are ad-

is prima facie evidence against that plaintiff of the sanity of the defendant at that time. Clay v. Hammond, 199 Ill. 370.

Evidence held to justify finding of insanity. Brooks v. Pratt [C. C. A.] 118 Fed. 725. On a proceeding for the appointment of a conservator the testimony of the competent is admissible. Appeal of Wentz [Conn.] 56 Atl. 625.

26. Such mental incapacity, however, should be substantially total (second childhood). In re Streiff [Wis.] 97 N. W. 189. A finding of "weakness of mind" is not lunacy within a statutory definition that lunacy includes every kind of unsoundness of mind. Laws 1892, p. 1487, c. 677. In re Clark, 175 N. Y. 139. Unsoundness of mind justifying appointment of a guardian under § 3219 of the Code relates to the capacity of the person affected to transact business. Schick v. Stuhr [Iowa] 94 N. W. 915. Allegations that one was incompetent to manage himself or his affairs and was of weak mind and easily worked upon by persons obtaining a controlling influence give jurisdiction under Code Civ. Proc. §§ 340, 2327. In re Clark, 175 N. Y. 139.

27. In re Anderson, 132 N. C. 243. Constitutionality of a statute defining "mentally incompetent" raised but not considered. In re Daniels, 140 Cal. 335, 73 Pac. 1053.

28. Sexual perversion. Schick v. Stuhr [Iowa] 94 N. W. 915. Violent temper rendering damage suits likely. Id.

29. Hardy v. Berger, 76 App. Div. [N. Y.] 393, 12 Ann. Cas. 118.

30. The person must be duly adjudged an idiot, of unsound mind or an habitual drunkard and incapable of managing his affairs. Martin v. Stewart [Kan.] 73 Pac. 107.

31. Lee v. State [Ga.] 45 S. E. 628. The act of August 17, 1903 (Act 1903, p. 77) abolished inquisitions after conviction as to the sanity of persons convicted of capital offenses. Cribb v. Parker [Ga.] 46 S. E. 110.

32. A clerk cannot adjudge lunacy without an inquest by a jury. In re Anderson, 132 N. C. 243.

Commissioners of inquest must each take the oath prescribed by law though a majority ordinarily may act, otherwise all proceedings are void. In re Bischoff, 30 App. Div. [N. Y.] 326.

A jury of 12 instead of 24 is not required by Act of 23 March 1887 (2 Gen. St. p. 1709). Constables may be such jurors. In re Comfort, 63 N. J. Eq. 377.

City or police courts have statutory jurisdiction to hold inquests in lunacy proceedings when no circuit court is in session. Dinklespiel v. Cent. Ky. Asylum, 24 Ky. L. R. 2240, 73 S. W. 771.

33. In re Sweeney, 81 App. Div. [N. Y.] 231.

34. Yeomans v. Williams, 117 Ga. 800.

35. Made in order that the same may be inquired of judicially is not liable for false arrest. Dougherty v. Snyder, 97 Mo. App. 495.

36. Hence no mandate will issue to compel a ruling on a motion for a new trial. State v. Branyan, 30 Ind. App. 502. An order taxing costs cannot be reviewed on a finding that a person is not of unsound mind under Burns' Rev. St. 1901, § 2718. Id.

37. Since there is no provision for bringing the evidence upon the record. Com. v. Harrold, 204 Pa. 154. But after traverse and trial upon the merits, the court will not look further into the inquisition than is necessary to see that it is clear of substantial irregularities or defect of jurisdiction. Id. A wife the validity of whose marriage is affected by an inquisition in lunacy is a person aggrieved within the meaning of the act of May 8, 1874 (P. L. 122) and has a standing to traverse the finding. Com. v. Pitcairn, 204 Pa. 514. After a verdict of insanity the insane party cannot discontinue. In re Larner, 75 App. Div. [N. Y.] 509.

38. Com. v. Harrold, 204 Pa. 154.

39. In re Comfort, 63 N. J. Eq. 377.

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missible at the trial of the traverse as prima facie evidence only.[40] In collateral proceedings a decree upon inquisition of lunacy is conclusive evidence of the insanity of the party from the time when it is found[41] till revoked, even pending a traverse;[42] but it is only presumptive evidence of his incapacity during all the previous time referred to in the findings.[43]

§ 3. *Guardianship and support.*—The power to appoint a guardian generally in modern times depends upon the construction of statutes.[44] Such statutes must be strictly complied with to give jurisdiction.[45] A right of action is property for jurisdictional purposes.[46] Neither consent of the insane person[47] nor of his wife[48] can give jurisdiction. Proceedings for the appointment of a guardian of an insane person are in personam and not in rem.[49] The domicile of the incompetent is primarily the proper forum,[50] even when the same issue is pending in another jurisdiction.[51] Appeals from appointment will be dismissed if not perfected,[52] and the incompetent may dismiss when appeal is in his name.[53]

Expenses and accounts.—A guardian's expenses are allowed out of the estate.[54]

40. Com. v. Harrold, 204 Pa. 154.

41. Hardy v. Berger, 76 App. Div. [N. Y.] 393, 12 Ann. Cas. 118.

42. Hence the court may decree a sale of real estate but only on due notice to next of kin. If the latter is a minor some one competent to represent him must be appointed. Mitchell v. Spaulding, 20 Pa. Super. Ct. 296. An allowance of an account of a sale allowed pending a traverse cannot be attacked collaterally after the finding of the inquisition is reversed. Spaulding v. Bullock, 20 Pa. Super. Ct. 301. Held only prima facie evidence against third parties. Blandy v. Blandy, 20 App. D. C. 535.

43. Hardy v. Berger, 76 App. Div. [N. Y.] 393, 12 Ann. Cas. 118.

44. In re Streiff [Wis.] 97 N. W. 189. A statute authorizing a justice of the peace to appoint some one to take charge of and confine insane persons does not confer ministerial powers on a judicial officer in violation of the constitutional provision separating executive, legislative and judicial functions. Madison County Com'rs v. Moore [Ind.] 68 N. E. 905.

45. Winslow v. Troy, 97 Me. 130; In re Clark, 175 N. Y. 139. Where the petition must be verified by an affidavit that the facts alleged are true it is not enough if all are alleged on information and belief. In re Bischoff, 80 App. Div. [N. Y.] 326. A statute requiring the presence of the alleged lunatic before the jury unless a certificate of physicians is presented, that certificate must comply strictly with the words of the statute. Kelly v. Gardner, 25 Ky. L. R. 924, 76 S. W. 531.

46. Even where the rights must be enforced in another state. Appeal of Wentz [Conn.] 56 Atl. 625.

47. Failure to give notice of application. Winslow v. Troy, 97 Me. 130.

48. In re Bischoff, 80 App. Div. [N. Y.] 326.

49. At least under Code 1897, § 3219 which makes certain the adversary character of the proceedings. Brown v. Lambe, 119 Iowa, 404.

50. Appeal of Wentz [Conn.] 56 Atl. 625; In re Bigelow [S. D.] 96 N. W. 698; Moody County v. Minnehaha County [S. D.] 96 N. W. 698. The legal settlement of an insane person within Comp. St. 1901, c. 40, § 26, is the county which would be primarily liable for his support as a pauper. Clay County v. Adams County [Neb.] 95 N. W. 58. The finding of county commissioners that a person is insane under Code 1897, § 2270 is ex parte and not conclusive of residence. Brown v. Lambe, 119 Iowa, 404. Code 1897, § 3219 providing for guardianship of any "inhabitant" is not limited to legal residents and a guardian is not estopped by good faith due the court to deny the residence of his ward. Id. A county in taking steps to collect a tax against an insane person as a resident has not acted to its legal prejudice so as to set up estoppel against the guardian who was appointed on a petition averring residence. Id. A settlement having been fixed by judicial decision it could not be changed during confinement in an asylum. Juniata County v. Overseers of Poor, 22 Pa. Super. Ct. 187.

51. The appointment of a conservator under Gen. St. 1902, § 237 for an incapable domiciled in the state is not affected by the pendency of proceedings in another state to inquire into his mental condition. The relative making application need not belong to the class liable for his support. Appeal of Wentz [Conn.] 56 Atl. 625.

52. An appeal by a guardian ad litem from an order appointing a guardian of the person and estate will be dismissed on failure to file a bill of exceptions and statement on appeal and to request and file a transcript of the record on appeal. In re Moss [Cal.] 74 Pac. 546.

53. Where an appeal in a proceeding to appoint a guardian for an incompetent tried by his guardian ad litem was taken by the incompetent himself it was subject to dismissal on his application on notice to his attorneys. In re Moss [Cal.] 74 Pac. 546.

54. A committee opposing an application by a lunatic for restoration of liberty and also habeas corpus proceedings may be allowed reasonable disbursements and counsel fees out of the estate. In re Larner, 39 Misc. [N. Y.] 377. A statute providing for the administration of the estate of a deceased lunatic in the ordinary way does not prevent awarding disbursements to the committee. The executor must be a party to pending settlements of accounts. In re Ferris, 86 App. Div. [N. Y.] 559.

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Equity has jurisdiction to vacate a decree discharging the guardian of an insane person where obtained by fraud.[55]

Support.—Provisions for the support of pauper insane are commonly made by statute.[56]

§ 4. *Commitment to asylums.*—The control and discipline in, as well as admittance to, asylums is elsewhere treated.[57]

§ 5. *Property and debts.*—Sales of the property of a lunatic should be under the direction of a court.[58] Subsequent ratification by a court of a sale of property of a lunatic by his committee makes it valid.[59] Such orders of court may be attacked if obtained by fraud extrinsic to the matters determined in that hearing.[60] The rights of next of kin in his property are frequently recognized.[61]

The estate of an insane person cannot be charged with attorney's fees for services rendered the guardian unless it affirmatively appears that the services were necessary and beneficial.[62]

§ 6. *Contracts and conveyances.*—An assignment by a lunatic to one taking advantage of his infirmity is wholly void,[63] and his committee appointed in proceedings which determine the existence of insanity at the time of the conveyance may sue in trover for the value of the property.[64] A grantee, on being restored to sanity, may sue to cancel a deed made by him while insane, regardless of the value of the consideration received by him.[65] A vendee receiving title after the restoration to sanity may also sue.[66] A marriage contract with a person of unsound mind is void ab inito.[67] If the estate has had the benefit and does not offer to restore a

55. Silva v. Santos, 138 Cal. 536, 71 Pac. 703. Examination of annual accounts of the committee under Code Civ. Proc. § 2342 by the presiding justice of the appellate division being ex parte are not a bar to proceedings for the removal of the committee for unauthorized charges and disbursements under § 2339 but an intermediate accounting should first be had. In re Arnold, 76 App. Div. [N. Y.] 126, 12 Ann. Cas. 168.

56. To charge a county with the support of an inmate of the California home for the care and training of feeble minded children, it must affirmatively appear that such person had been committed by a proper order by the judge of the superior court providing for the expense. State v. Sonoma County, 139 Cal. 264, 72 Pac. 1003. Under Rev. St. 1899, §§ 4867, 4874 the expenses of an insane convict at an asylum are chargeable to a county only in case he resided there at the time of conviction. Indictment, trial and sentence in a county is not prima facie proof of residence there. Thomas v. Macon County, 175 Mo. 68. Under Burns' Rev. St. 1901, § 5594 m 1 a person caring for an insane person by appointment under a prior statute cannot recover compensation. Harrison County Com'rs v. Hunter [Ind.] 68 N. E. 1022. A statute charging the expense of maintaining criminal insane on those liable therefor under the general law is not a special law and is constitutional. Napa State Hospital v. Yuba County, 138 Cal. 378, 71 Pac. 450.

57. Charitable, etc., Institutions, 1 Curr. Law, 507.

Labor of inmates of asylums see Charitable, etc., Institutions, 1 Curr. Law, 508.

Liability of public for maintenance see Charitable, etc., Institutions, 1 Curr. Law, 509; Paupers.

58. The record of a county court showing an application to be appointed guardian of a non-resident insane person and an order for sale of land and sale confirmed but not showing that the application was ever acted upon such sale is void. Kelsey v. Trisler [Tex. Civ. App.] 74 S. W. 64. Filing a transcript of foreign guardianship proceedings does not give a court jurisdiction to order a sale of land by one not appointed his guardian. Id.

59. Spaulding v. Bullock, 206 Pa. 224.

60. Payne v. Payne [Md.] 55 Atl. 368.

61. Under Act June 13, 1836, § 13 (P. L. 595) giving jurisdiction to order a sale of real estate of an alleged lunatic after notice to the next of kin or some one representing him if he be a minor, notice to the father of the next of kin who is not guardian is insufficient. Mitchell v. Spaulding, 206 Pa. 220.

62. Grove v. Reynolds [Mo. App.] 71 S. W. 1103. The proceeds of a pension granted to a former soldier discharged for insanity occurring after enlistment cannot be charged with payment of board and medical service received by him while in confinement in the Government Hospital for the Insane after his discharge from the army. U. S. v. Frizzell, 19 App. D. C. 48.

63. Sander v. Savage, 75 App. Div. [N. Y.] 333, 11 Ann. Cas. 433. An assignment of property obtained by an attorney from incompetent clients is invalid. Brooks v. Pratt [C. C. A.] 118 Fed. 725.

64. Sander v. Savage, 75 App. Div. [N. Y.] 333. 11 Ann. Cas. 433.

65, 66. Clay v. Hammond, 199 Ill. 370.

67. Winslow v. Troy, 97 Me. 130. By Code, § 1750 any relative may maintain an action to annul such a marriage but the insane person is a necessary party. Coddington v. Larner, 75 App. Div. [N. Y.] 532.

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loan made without grounds of suspicion of insanity, a mortgage securing it will not be ordered canceled.[68] Acceptance of a gift inter vivos will be presumed where the donee is of unsound mind.[69] Until a committee is appointed, there is a legal presumption of sanity, and a purchaser for value without notice will be protected.[70] Lack of business capacity will not rebut it if it appears that the grantor had sufficient intellect to know he was parting with property.[71] Mere weakness of mind not amounting to practical imbecility will not invalidate a conveyance not tainted with fraud or undue influence,[72] but if mental deficiency is so marked that the party has not exercised deliberate judgment, a contract lacks the vital element of a meeting of minds.[73] After a judicial declaration of insanity and until it is superseded, there is a presumption of insanity, and all contracts are wholly void;[74] but a conveyance by a lunatic, after an inquisition in lunacy is shown by the record to have been set aside, is valid.[75]

§ 7. *Torts* by inmates of asylums are not chargeable to officers in charge unless they were negligent.[76]

§ 8. *Actions by or against.*—If a person of unsound mind has not been so adjudged or has no conservator appointed for him, the suit or proceeding is brought in the name of the incompetent by some responsible party to be appointed to represent him as his next friend.[77] If the alleged lunatic appears and asks that the suit by his next friend be dismissed, the court in which the proceedings are pending has jurisdiction to determine the question by investigating the mental condition of the complainant.[78] Only the curator of an interdict can represent him in court.[79] The statutory grant of a year after the end of disability by insanity within which to prosecute an action is not like an ordinary statute of limitation, and actual service must be completed within the year. Merely handing to an officer is not enough.[80]

Insane persons are wards of the state, and may be sued and their estates charged in such manner as is authorized by statute,[81] but no valid decree can be had against one adjudged insane without the appointment of a guardian ad litem.[82]

68. Hardy v. Berger, 76 App. Div. [N. Y.] 393.

69. Malone's Committee v. Lebus [Ky.] 77 S. W. 180.

70. Wurster v. Armfield, 175 N. Y. 256. The burden of proving insanity is on the party alleging it. Paulus v. Reed [Iowa] 96 N. W. 757. Circumstances which should have put a purchaser on inquiry as to the sanity of a grantor justify proceedings by his guardian later to set aside the conveyance. Furry v. Bartling [Iowa] 94 N. W. 471. But see Sander v. Savage, 75 App. Div. [N. Y.] 333, 11 Ann. Cas. 433.

71. Eakin v. Hawkins, 52 W. Va. 124.

72, 73. Paulus v. Reed [Iowa] 96 N. W. 757.

74. Sander v. Savage, 75 App. Div. [N. Y.] 333, 11 Ann. Cas. 433. Hence he cannot ratify them though actually of sufficient mental capacity. Gingrich v. Rogers [Neb.] 96 N. W. 156. Neither a guardian nor a county court nor both together ratify a conveyance made while insane by electing to receive the proceeds. Id. The burden of proving that a conveyance was made by an insane person during a lucid interval is on the party claiming under it. Id.

75. Though the inquisition is subsequently reinstated. Mitchell v. Spaulding, 206 Pa. 220.

76. Tort by patient allowed outside grounds on physician's sanction. Clough v. Worsham [Tex. Civ. App.] 74 S. W. 350.

77. Isle v. Cranby, 199 Ill. 39; Hughey v. Mosby [Tex. Civ. App.] 71 S. W. 395.

Bastardy proceedings cannot be instituted if the complainant is incompetent and cannot testify since they are of a penal nature and founded on an affidavit of the prosecuting witness. State v. Jehlik, 66 Kan. 301, 71 Pac. 572.

78. Isle v. Cranby, 199 Ill. 39.

79. Wife and children have no standing to do so. Byrnes v. Byrnes' Minors [La.] 35 So. 617.

80. Hawley v. Griffin [Iowa] 97 N. W. 86.

81. Gen. St. p. 1995, § 83 applies to married women and is not limited to paupers. Board of Chosen Freeholders v. Ritson, 68 N. J. Law, 666. A lunatic is not a necessary party to a suit against his committee to enforce the statutory right of his wife and family to property exempt by law from his creditors and necessary to their maintenance. Riddle v. Fannin, 24 Ky. L. R. 1737, 72 S. W. 290. The Code does not require service on the physician in charge of a lunatic unless he certify that personal service would be injurious. Dinklespiel v. Cent. Ky. Asylum, 24 Ky. L. R. 2240, 73 S. W. 771.

82. Eakin v. Hawkins, 52 W. Va. 124. An attachment of the property of a nonresident lunatic may be enforced in the

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The duty of a court to protect incompetent persons extends to all cases where the fact of incompetency exists.[83] There is a common law right of action for necessaries furnished an insane person.[84]

INSOLVENCY.[85]

§ 1. Effect of Federal Bankruptcy Act on State Insolvency Laws (459).
§ 2. Procedure and Parties to Adjudicate Insolvency (459).
§ 3. Property Passing to the Assignee (459).
§ 4. Administration of Insolvent Estate (460).
§ 5. Rights and Liabilities Affected by Insolvency and Discharge of Insolvent (460).

§ 1. *Effect of federal bankruptcy act on state insolvency laws.*—The passage of the federal bankrupt act suspended the operation of the state insolvency laws,[86] except as to persons and cases not within the purview of that act,[87] and a state statute relating to insolvent mining corporations,[88] or permitting proceedings against a farmer, are not superseded.[89] Pending proceedings under the state laws were not barred by the passage of the federal act.[90] A voluntary assignment for the benefit of creditors is a pending proceeding.[91]

§ 2. *Procedure and parties to adjudicate insolvency.*—A foreign corporation is not entitled to the benefit of the act as a voluntary insolvent.[92] When an assignment is made to the court, the seal of the court or judge need not be affixed to it.[93] In all cases, the petition in voluntary insolvency must state the county of the residence of the insolvent and the term of residence.[94]

§ 3. *Property passing to the assignee.*—The insolvent's equity of redemption in mortgaged land passes to his assignee in insolvency.[95] Many analogous cases of value will be found in kindred titles.[96]

court appointing his committee without first obtaining permission to sue the committee. Carter v. Burrall, 80 App. Div. [N. Y.] 395.

83. Whether a committee had been appointed or not. Wurster v. Armfield, 175 N. Y. 256. A statute providing for the defense of a person judicially declared insane and that such declaration shall be conclusive of his insanity does not prevent a court from taking cognizance of the fact of insanity of one not declared insane. Judgment by default where insanity exists but does not appear on the record involves error within Code 1873, § 3154. Hawley v. Griffin [Iowa] 92 N. W. 113. A statute providing that a guardian of an insane person upon oath that he has no property of his ward out of which to pay expenses need give no security for costs applies to an appeal bond (Alexander v. Morris, 109 Tenn. 724); though Code Civ. Proc. § 3271 provides that in actions by the committee of an incompetent the court may require the plaintiff to give security for costs, it does not allow security to be required of a plaintiff in an action against such committee (Kelly v. Kelly, 77 App. Div. [N. Y.] 519).

84. This is not taken away by a statute providing for the presentation of claims against the estate in the probate court within a period of limitation. St. Louis v. Hollrah, 175 Mo. 79.

85. The winding up of insolvent corporations or banks under acts affecting only such bodies. See Corporations, 1 Curr. Law, 736, 783; Banking and Finance, 1 Curr. Law, 295, 298, 310; Building, etc., Ass'ns, 1 Curr. Law, 402.

86. Carling v. Seymour Lumber Co. [C. C. A.] 113 Fed. 483; In re Storck Lumber Co., 114 Fed. 360; Herron Co. v. Superior Ct., 136 Cal. 279, 68 Pac. 814; Littlefield v. Gay, 96 Me. 422; Rosenfeld v. Siegfried, 91 Mo. App. 169; Keystone Driller Co. v. Superior Ct., 138 Cal. 738, 72 Pac. 398. See, also, Bankruptcy, 1 Curr. Law, 311.

87. Herron Co. v. Superior Ct., 136 Cal. 279, 68 Pac. 814; Littlefield v. Gay, 96 Me 422; Old Town Bank v. McCormick, 96 Md. 341; Rosenfeld v. Siegfried, 91 Mo. App. 169; In re Wilmington Hosiery Co., 120 Fed. 180.

88. Herron Co. v. Superior Ct., 136 Cal. 279, 68 Pac. 814; Littlefield v. Gay, 96 Me. 422.

89. Old Town Bank v. McCormick, 96 Md. 341.

90. Hood v. Blair State Bank [Neb.] 91 N. W. 701, 706. And a voluntary assignment is a commencement of such proceedings. Osborn v. Fender, 88 Minn. 309. And the subsequent adjudication of the insolvent a bankrupt will not oust a state court of jurisdiction of action by the assignee. Id.

91. Osborn v. Fender, 88 Minn. 309.

92. St. 1895, p. 131, c. 143, § 2 requires the petition to be filed in the county of the residence of the petitioner. Keystone Driller Co. v. Superior Ct., 138 Cal. 738, 72 Pac. 398.

93. Rev. St. 1883, c. 70, § 33. Milliken v. Houghton, 97 Me. 447.

94. Applies to corporations. Keystone Driller Co. v. Superior Ct., 138 Cal. 738, 72 Pac. 398.

95. Sowles v. Lewis, 75 Vt. 59.

96. See Assignments for Benefit of Creditors, 1 Curr. Law, 227; Bankruptcy, 1 Curr. Law, 311.

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§ 4. *Administration of insolvent estate.*—The assignee of the insolvent member of a firm is the proper party to avoid a preference made with individual fund, and not the assignee of the firm.[97] The burden of proving a case of preferential transfer within the statute is on the trustee.[98] The assignee affirms a mortgage as a valid incumbrance by the insolvent, by bringing an action to recover the value of the property on the theory that the mortgage constitutes a preference.[99]

A claim is seasonably presented if presented before the order for the final dividend.[1] Payments by a surety of the insolvent, after the petition filed, are provable claims.[2] A creditor of an insolvent firm may prove his debt for the full amount, though he holds partial security on the property of one of the partners.[3] Preference is given to claims for trust funds.[4] The services of the assignee and general expenses of his administration are to be passed upon by the court of insolvency.[5]

A referee cannot review the act of the court authorizing the assignee to compromise a claim,[6] nor can he determine the right of the assignee to purchase at his own sale.[7]

The insolvent cannot question a compromise of a claim by the assignee authorized by the court,[8] and his remedy to avoid a purchase by the assignee at his own sale is in equity.[9]

§ 5. *Rights and liabilities affected by insolvency and discharge of insolvent.*—Compliance with statutory conditions is essential to procure discharge.[10] Under the statute of California, a debt created in a fiduciary capacity is not affected by the insolvent's discharge.[11] An appeal lies from the denial of a motion for a new trial of the petition for a discharge.[12]

INSPECTION LAWS.

The legislature has power to pass reasonable inspection laws,[13] subject to limitations of the "commerce clause,"[14] and other federal restrictions.[15] Licenses may

97. Jaquith v. Winnisimmet Nat. Bank, 182 Mass. 53.

98. Must establish the facts which bring the transfer within the state insolvency statute. Dunn v. Train [C. C. A.] 125 Fed. 221.

99. Sowles v. Lewis, 75 Vt. 59.

1. A declaration of a dividend held not an order. Needham v. Long's Estate, 75 Vt. 117.

2. Sowles v. Lewis, 75 Vt. 59.

Allowance by referee and court of an item not included in the assignee's specification held not error. Sowles v. Lewis, 75 Vt. 59.

3. Particularly where the security is homestead; in any event such security is not within St. 1895, p. 146, § 48. In re Levin Bros.' Estate, 139 Cal. 350, 73 Pac. 159. Objection that creditor had realized on collateral and had proved his entire claim held to be without merit. Sowles v. Lewis, 75 Vt. 59.

4. Facts held sufficient to show that funds paid to his principal by an agent were paid by him as agent for another to whom he should have remitted, and consequently, that they constituted a trust fund in the hands of him to whom they were paid so that, on his insolvency, the owner was entitled to be preferred to his creditors. Sherman v. Sherman & Lyon Co., 64 N. J. Eq. 57.

5. Vt. St. § 2148 applies and not § 2145 providing for the appointment of commissioners to hear disputed claims. Sowles v. Lewis, 75 Vt. 59.

6. Sowles v. Lewis, 75 Vt. 59.

7. Sowles v. Lewis, 75 Vt. 59. Findings of referee construed. Id.

8, 9. Sowles v. Lewis, 75 Vt. 59.

10. Merchant held not to have kept proper books of account within the act so as to be entitled to a discharge. Sullivan v. Washburn & M. Mfg. Co., 139 Cal. 257, 72 Pac. 992.

11. Code Civ. Proc. § 56. Where the wife received trust funds from the husband, with knowledge, a right of action therefor against her is not affected by the husband's discharge. Citizens' Bank v. Rucker, 138 Cal. 606, 72 Pac. 46.

12. The time for appeal begins to run from the time of the entry of the formal order on the decision. Sullivan v. Washburn & M. Mfg. Co., 139 Cal. 257, 72 Pac. 992.

13. Milk inspection. Norfolk v. Flynn, 101 Va. 473. Exemption of dairymen milking less than five cows is reasonable and not class legislation. State v. McKinney [Mont.] 74 Pac. 1095. Act held single in its title. Id. That no person shall sell milk without permit from board of health of New York is reasonable. People v. Vandecarr, 175 N. Y. 440.

14. Pabst Brew. Co. v. Crenshaw, 120 Fed. 144. See Commerce, 1 Curr. Law, 538. New York City regulation held not applicable to steam boilers on scows temporarily anchored in river by government contractor resident of New Jersey. People v. Prillen, 173 N. Y. 67.

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be imposed for purposes of inspection,[16] but not in amount so greatly disproportionate to the cost as to be an illegal attempt at taxation.[17] Except as specially enacted, the tenure and qualifications of inspection officers[18] is governed by the general law of officers.[19]

Indictments for selling commodities without an inspection certificate must aver directly and with certainty that it was lacking.[20] An exception as to export commodities need not be negatived.[21]

INSTRUCTIONS.[22]

§ 1. Province of Court and Jury (461).
§ 2. Assumption of Facts (462).
§ 3. Charging with Respect to Matters of Fact, or Commenting on Weight of Evidence (463).
§ 4. Form of Instruction (464).
§ 5. Relation of Instructions to Pleadings and Evidence (467).
§ 6. Stating Issues to Jury (469).
§ 7. Ignoring Material Matters (469).
§ 8. Giving Undue Prominence to Evidence, Issues and Theories (470).
§ 9. Definition of Terms Used (471).
§ 10. Rules of Evidence; Proof, Credibility and Conflicts (471).
§ 11. Admonitory and Cautionary Instructions (473).
§ 12. Necessity of Instructing in Writing (473).
§ 13. Requests for Instructions (474).
§ 14. Presentation of Instructions (476).
§ 15. Additional Instructions After Retirement (476).
§ 16. Review (477).

§ 1. *Province of court and jury.*—Questions of fact on conflicting evidence are for the jury;[23] otherwise where the facts are admitted or conclusively established, in which case the court should refuse to submit them.[24] Where the evidence is insufficient to support a verdict for one party, the court may direct a verdict for the other.[25] A verdict should not be directed where there is some evidence to sustain plaintiff's claim.[26] The test of the sufficiency of evidence to

15. See Constitutional Law, 1 Curr. Law, 569.

16. See Licenses.

17. State v. Eby, 170 Mo. 497.

18. In Kentucky deputies appointed by tobacco warehousemen under the statute need not be warehousemen and one deputy may hold under several warehousemen. Bailey v. Wood, 24 Ky. L. R. 801, 69 S. W. 1103. Under Act May 15, 1886, p. 114, c. 1150 oil inspector's term is four years and delayed appointment does not extend it. Tansey v. Stringer, 25 Ky. L. R. 916, 76 S. W. 537.

19. See Officers and Public Employes.

20. Not sufficient to say that it was not on when sold (beer inspection). State v. Broeder, 90 Mo. App. 156. Nor can such deficiency be cured by regarding "then and there" as surplusage. Id.

21. State v. Broeder, 90 Mo. App. 156.

22. This article is confined to the general law of instructions. The sufficiency of charges in particular actions or upon particular issues and the propriety of a charge in a given case partakes more of the substantive law of the matter in question than of the law of instructions. Hence instructions pertaining to a particular subject matter will be treated in the title relating to such subject matter. See Damages; Highways, etc., and like titles. Requests for special interrogatories and submission to jury see Verdict and Findings.

23. Wilkins v. Missouri Valley [Iowa] 96 N. W. 868. Negligence and contributory negligence. Economy L. & P. Co. v. Hiller, 203 Ill. 518. In an action for frightening team by careless running of train at crossing a requested instruction that defendant had a right to run its train at the place in question and thereby create the usual and customary noise, smoke and steam invades the province of the jury. Pittsburg, C., C. & St. L. R. Co. v. Robson, 204 Ill. 254.

See, also, many cases cited in title Questions of Law and Fact in a forthcoming number.

24. Bank of Callaway v. Henry [Neb.] 92 N. W. 631; Miles v. Walker [Neb.] 92 N. W. 1014; Denver v. Murray [Colo. App.] 70 Pac. 440; Luckel v. Century Bldg. Co. [Mo.] 76 S. W. 1035; Brockenbrow v. Stafford [Tex. Civ. App.] 76 S. W. 576; Oelke v. Theis [Neb.] 97 N. W. 588; Jessen v. Donahue [Neb.] 96 N. W. 639; Williams v. Iowa Cent. R. Co. [Iowa] 96 N. W. 774; Beauvais v. St. Louis, 169 Mo. 500; Lemon v. De Wolf, 89 Minn. 465. Where there is no controversy as to the capacity in which a city operates a waterworks the court may properly treat that fact as established for purpose of the instructions. Henderson v. Kansas City [Mo.] 76 S. W. 1045. Instruction is needless on a proposition held as matter of law to be in party's favor. Korbel v. Skocpol [Neb.] 96 N. W. 1022.

25. Truskett v. Bronaugh [Ind. T.] 76 S. W. 294. An instruction for defendant should be given in an action for injuries caused by collision with a trolley car where all the evidence shows that everything possible was done to stop the car and these efforts were nullified by the slippery condition of the track. Ellermann v. St. Louis Transit Co. [Mo. App.] 76 S. W. 661. See title Directing Verdict, etc., 1 Curr. Law, 925 for fuller discussion and cases.

26. McCrystal v. O'Neill, 86 N. Y. Supp. 81

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sustain an item of damages should be presented to the court by a request that the jury be directed to disregard the particular item of damages.[27]

The construction of instruments is for the court and may not be submitted.[28] One may not demand instructions as to the constitutionality of statutes unless they affect his case.[29] It is error to instruct as to invalid law on the theory of validity.[30]

§ 2. *Assumption of facts.*—The province of the jury is invaded by instructions assuming the existence of material facts in dispute between the parties.[31] The court may assume the existence of admitted facts,[32] and facts supported by strong and uncontradicted evidence.[33] The question of the making of a contract with a deceased person should be submitted to the jury, whether the evidence is contradictory or not.[34] Erroneous assumption may be cured by other instructions.[35]

27. Nokken v. Avery Mfg. Co., 11 N. D. 399.

28. Glover v. Gasque [S. C.] 45 S. E. 113. A court is not prevented from construing a contract by erroneously allowing the admission of parol evidence to vary its terms. Pitcairn v. Philip Hiss Co. [C. C. A.] 125 Fed. 110.

29. Lufkin v. Lufkin, 182 Mass. 476.

30. Where the law allowing return of verdict by a number of jurors less than the entire body is invalid it is error to instruct that such less number may return a verdict. Clough v. McKay [Colo.] 73 Pac. 80.

31. Dodd v. Guiseffi [Mo. App.] 73 S. W. 304; Dobson v. Southern R. Co., 132 N. C. 909; Wilson v. Huguenin, 117 Ga. 546; Birmingham R., L. & P. Co. v. Mullen [Ala.] 35 So. 701; Lewis v. Scharbauer [Tex. Civ. App.] 76 S. W. 225; Choctaw, O. & G. R. Co. v. Deperade [Okl.] 71 Pac. 629; Rogers v. Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348; Selensky v. Chicago G. W. R. Co. [Iowa] 94 N. W. 272; Lydick v. Gill [Neb.] 94 N. W. 109; Northern Ohio R. Co. v. Rigby [Ohio] 68 N. E. 1046; Chicago, B. & Q. R. Co. v. Johnston [Neb.] 95 N. W. 614; McHenry v. Bulifant [Pa.] 56 Atl. 226; Karl v. Juniata County [Pa.] 56 Atl. 78; Nabours v. McCord [Tex. Civ. App.] 75 S. W. 827; Riser v. Southern R. Co. [S. C.] 46 S. E. 47; Lawrence v. Westlake [Mont.] 73 Pac. 119; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164; South Omaha v. Wrzensinski [Neb.] 92 N. W. 1045; McEldon v. Patton [Neb.] 93 N. W. 928; New Omaha Thomson-Houston Elec. L. Co. v. Rombold [Neb.] 97 N. W. 1030.

Assumptions of facts: Assuming fact of temporary absence on question of abandonment of homestead. White v. Epperson [Tex. Civ. App.] 73 S. W. 851. Assumption of fact of train becoming separated and collision afterward occurred causing injury. Bumgardner v. Southern R. Co., 132 N. C 438. Assuming that plaintiff was placed in a perilous position by defendant's negligence. Tex. & P. R. Co. v. Berry [Tex. Civ. App.] 72 S. W. 423. Assumption of fact of ownership of land in dispute in trespass. Lake v. Copeland [Tex.] 72 S. W. 99. Assumption of negligence causing fire. St. Louis S. W. R. Co. v. Gentry [Tex. Civ. App.] 74 S. W. 607. The province of the jury is invaded where the court states that there was some evidence to sustain a contention. Kinyon v. Chicago & N. W. R. Co., 118 Iowa, 349.

Facts not assumed. Richmond Traction Co. v. Wilkinson [Va.] 43 S. E. 622; Mallen v. Waldowski, 203 Ill. 87. There is no invasion of the jury's province by an instruction that plaintiff's claim is that certain persons were acquainted with certain facts. Jarman v. Rea, 137 Cal. 339, 70 Pac. 216. An instruction that if the jury believe that plaintiff attempted to alight after the car had stopped—does not assume that the car had stopped when he attempted to alight. San Antonio Traction Co. v. Welter [Tex. Civ. App.] 77 S. W. 414. That mental anguish was proven is not assumed by instructions allowing recovery therefor as an element of damages. W. U. Tel. Co. v. Chambers [Tex. Civ. App.] 77 S. W. 273. Instruction in action by broker held not objectionable as assuming existence of contract claimed by plaintiff. Blake v. Austin [Tex. Civ. App.] 75 S. W. 571. An instruction that "if, from the evidence, you believe that sparks or cinders escaped from defendant's engine and got into plaintiff's eyes, which caused plaintiff's injuries" does not assume injury to the eyes by sparks that escaped from the engine. St. Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 73 S. W. 439. An instruction allowing recovery if the jury believe party was injured "by negligence of defendant or its agents" does not assume defendant's negligence. Chicago & A. R. Co. v. Gore, 202 Ill. 188. An instruction that if the jury did not find negligence the proximate cause of the injury or if they found that decedent was guilty of contributory negligence—does not assume defendant's negligence. Galveston, H. & S. A. R. Co. v. Karrer [Tex. Civ. App.] 70 S. W. 328.

32. Parks v. St. Louis & S. R. Co. [Mo.] 77 S. W. 70; McLean v. Kansas City [Mo. App.] 75 S. W. 173; Louisville & N. R. Co. v. Harrod, 25 Ky. L. R. 250, 75 S. W. 233; Williams v. Galveston, etc., R. Co. [Tex. Civ. App.] 78 S. W. 45; Gayle v. Mo. C. & F. Co. [Mo.] 76 S. W. 987; Brown v. Johnson [Tex. Civ. App.] 73 S. W. 49; McAyeal v. Gullett, 202 Ill. 214.

33. Thayer County Bank v. Huddleson [Neb.] 95 N. W. 471; Emrich v. Gilbert Mfg. Co. [Ala.] 35 So. 322; Vogeler v. Devries [Md.] 56 Atl. 782; Word v. Kennon [Tex. Civ. App.] 75 S. W. 334; Black v. Rocky Mountain Bell Tel. Co. [Utah] 73 Pac. 514; McCullough v. Armstrong [Ga.] 45 S. E. 379. Where the only testimony as to the amount was that of an unimpeached witness who testified that it exceeded the penalty in the bond there was no error in charging that if the jury found for plaintiff they should find for the

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§ 3. *Charging with respect to matters of fact, or commenting on weight of evidence.*—In some jurisdictions it is allowed the court to charge as to the weight of evidence, but such charge must fully advise the jury that they are not bound thereby and must decide on the facts on their own responsibility.[36] In most states, the court may not comment on the evidence or express an opinion as to its weight,[37] and it is error to instruct that evidence is clear as to a certain issue.[38]

entire amount sued for. Foster v. Franklin L. Ins. Co. [Tex. Civ. App.] 72 S. W. 91.

34. Speck v. Berliner, 85 N. Y. Supp. 370.

35. Nat. Cash Register Co. v. Bonneville [Wis.] 96 N. W. 558. An instruction bad because assuming a disregard of a statute to be willful is cured by other instruction that the only question was willfulness and that fact must be proved by plaintiff by preponderance of evidence. Donk Bros. C. & C. Co. v. Stroff, 200 Ill. 483. It is not reversible error that the trial court in an instruction on the measure of damages, directed the jury to award damages for plaintiff's injuries "caused by the wrongful conduct of the defendant as set out in other instructions" when the jury were told in other instructions that they must find the defendant's conduct was wrongful in the respects charged before they could find a verdict against it. Murphy v. St. Louis Transit Co., 96 Mo. App. 272.

36. In commenting on the evidence the court may use the phrases "the evidence tends to show" and "evidence tending to show." Lewis v. Norfolk & W. R. Co., 132 N. C. 382. A court may rightfully comment on possible deception of photographs as to distances. McLean v. Erie R. Co. [N. J. Law] 54 Atl. 238.

Federal courts. Nome Beach L. & T. Co. v. Munich Assur. Co., 123 Fed. 820; Treece v. American Ass'n [C. C. A.] 122 Fed. 598; Kerr v. Modern Woodmen [C. C. A.] 117 Fed. 593; Freese v. Kemplay [C. C. A.] 118 Fed. 428.

37. Continental Tobacco Co. v. Knoop, 24 Ky. L. R. 1268, 71 S. W. 8; Cent. of Ga. R. Co. v. McKinney [Ga.] 45 S. E. 430; Potter v. State, 117 Ga. 693. Ala. Code, § 3326. Gaynor v. Louisville & N. R. Co., 136 Ala. 244; Ward v. Brown, 53 W. Va. 227; Fuller v. N. Y. F. Ins. Co. [Mass.] 67 N. E. 879; Griffin v. Southern R., 66 S. C. 77; Hord v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 76 S. W. 227; Galveston, H. & S. A. R. Co. v. Karrer [Tex. Civ. App.] 70 S. W. 328.

Examples of violation: Where in an action for commissions, experts having testified as to reasonable commissions, the court tells the jury that if plaintiff is entitled to recover he is entitled to the rate testified to. Johnson v. Kahn, 97 Mo. App. 628. Instruction telling the jury that it is not necessary to constitute one an actual settler for him to have his wife and family on the land, if he has in fact established himself thereon in good faith with the purpose of making his home on it. Allen v. Frost [Tex. Civ. App.] 71 S. W. 767. In an action for delay in delivery of telegram by an instruction that by the term "reasonable diligence" was not meant the speed of lightning except in the transmission over the wires on the one hand, "nor the proverbial slowness of the messenger boy on the other." Meadows v. W. U. Tel. Co., 131 N. C. 73. That a street railway company was not an insurer of the safety of its passengers and the mere fact that the car collided with the wagon did not of itself establish liability for injury to the passenger. Houston Elec. Co. v. Nelson (Tex. Civ. App.) 77 S. W. 978. In an action for deceit against an officer of a corporation for false representations by an instruction that if the jury found a substantial difference between the actual and reported matters they should find that defendant intended to deceive and defraud. Warfield v. Clark, 118 Iowa, 69. Instruction which calls attention to the evidence that the clerk of a local lodge received his mail at a certain office and that a notice was addressed to him at that office and that these circumstances may be taken into consideration to determine whether the notice was received and if the jury so find may infer that the notice was received. Smith v. Sovereign Camp of Woodmen [Mo.] 77 S. W. 862. An instruction that if the jury find for plaintiff they will assess the damages at the reasonable value of the stock not exceeding a named amount and that plaintiff claims a stated sum as such reasonable value. Page v. Roberts, etc., Shoe Co. [Mo. App.] 78 S. W. 52. Instruction that co-employes operating the hand car which caused the injuries were entitled to act on the presumption that plaintiff would leave the track in time to avoid injury unless he did or said something to indicate that he would not get out of the way. Chicago, R. I. & T. R. Co. v. Long [Tex.] 74 S. W. 59. On claim of breach of warranty of mules an instruction that if defendant had the animals caught and examined one by one it was a circumstance that might be considered in determining whether the mules were in fact sound. Swink v. Anthony, 96 Mo. App. 420. A charge that weakness of mind arising from advanced age, in connection with causes suggested in the case, is progressive and permanent in character. White v. McPherson, 183 Mass. 533. Request assuming a sender's failure to give a better address for a telegram was negligence. W. U. Tel. Co. v. Bowen [Tex. Civ. App.] 76 S. W. 613. An instruction that if plaintiff had reached a place of safety and if she had remained there would have escaped injury, and if she turned back on the approach of a train and her act was that of an ordinarily prudent person, the fact that she stepped in the wrong direction, and suddenly placed herself in peril would not defeat recovery, if her doing so was caused by defendant's negligence. Tex. & P. R. Co. v. Berry [Tex. Civ. App.] 72 S. W. 428. An instruction in an action for trespass allowing damages in excess of the actual injury if the trespass was wanton and "what I have stated as a punishment for his evident disregard of plaintiff's rights." Percifull v. Coleman, 24 Ky. L. R. 1685, 72 S. W. 29.

Rule not violated: An instruction that if the verdict should be for plaintiff they could

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The rule is not violated by an instruction that testimony in rebuttal is only to be considered on the question of credibility of a witness,[39] nor by an instruction construing the legal effect of an instrument in evidence.[40] It is not an expression of opinion for the court to state his recollection of the testimony.[41] An instruction may point out the legal consequence of certain facts of which there is evidence, if the jury find them to be established.[42]

§ 4. *Form of instruction.*—It is not required that each instruction should cover the entire case.[43] Where the instruction assumes to define the whole law of

not exceed the amount of the demand in the declaration is not an expression of an opinion that plaintiff's injuries were such that his damages could be limited only by the prayer. Goldthorpe v. Clark-Nickerson Lumber Co., 31 Wash. 467, 71 Pac. 1091. An instruction allowing a recovery up to the amount sued for on a quantum meruit is not objectionable as indicating the existence of evidence justifying an allowance of any amount within the sum indicated while in fact there was no evidence to support any finding less than half that amount. Ladd v. Witte [Wis.] 92 N. W. 365. A mere statement by the court in response to a motion to strike out certain evidence in an action against a municipality for injuries on a sidewalk that a sidewalk did not generally become dilapidated in a day or two was not an expression of opinion as to the condition of the walk. Wissler v. Atlantic [Iowa] 98 N. W. 131. Where there was evidence of special aptitude of a boy for a certain line of work, an instruction that such fact did not establish that he would be able through such work to earn large sums was not an invasion of the province of the jury. Snyder v. Lake Shore & M. S. R. Co. [Mich.] 91 N. W. 643. In an action on a policy by a wife where the policy was made out to the husband an instruction that if an agent by mistake insures the property in the wrong name the rightful party cannot sue without reformation of the contract "but I think you will not have any difficulty about going into a court of equity about reformation of the contract" is not a charge on the weight of the evidence. Montgomery v. Del. Ins. Co. [S. C.] 45 S. E. 934. An instruction that a carrier giving a check for baggage took the burden of care in its transportation and delivery is not on the facts. Harzburg v. Southern R. Co., 65 S. C. 539. An instruction is not open to the objection of an expression of opinion that plaintiff was entitled to recover which tells the jury if they find plaintiff entitled to recover, the amount was to be determined from the facts, the court stating that the jury could not of course fix the exact amount in dollars and cents, but to weigh the testimony without fear or favor and allow an amount that would reasonably compensate her. Bell v. Spokane, 30 Wash. 508, 71 Pac. 31. A statement that much evidence had been admitted concerning an old contract to enable the jury to understand the entire relations of the parties when the old contract was said to have been abrogated by the new does not comment on the evidence where the jury are cautioned that his reference to facts was not intended as an intimation of an opinion, but the jury were the sole judges of the facts. Anderson v. McDonald, 31 Wash. 274, 71 Pac. 1037. An instruction that the jury may not consider precautions of defendant after the injury is not objectionable as a charge on the facts. Gallinan v. Union Hardwood Mfg. Co., 65 S. C. 192. An instruction held not on weight of evidence by charging prima facie negligence in fires set out by locomotives unless defendant shows proper equipment of smokestack. Mo., K. & T. R. Co. v. Florence [Tex. Civ. App.] 74 S. W. 802. A charge that the failure to give signals required by statute is negligence is not on the weight of the evidence, the statute making the company liable for injuries caused by failure of signals. Mo., K. & T. R. Co. v. Taff [Tex. Civ. App.] 74 S. W. 89. Instruction not on weight of evidence as assuming that a failure to provide a stool to assist passengers in alighting would constitute negligence. Mo., K. & T. R. Co. v. Sherrill [Tex. Civ. App.] 72 S. W. 429. An instruction that if prior to the accident, in which a conductor was injured, it was the custom of conductors to sleep in cabooses as plaintiff was doing when injured, and that such caboose was run into and plaintiff injured by defendant's negligence and that such negligence was the proximate cause of the injury and plaintiff was free from contributory negligence then the jury should find for plaintiff is not an instruction on the weight of the evidence. St. Louis S. W. R. Co. v. McDowell [Tex. Civ. App.] 73 S. W. 974. A charge that if the jury did not find negligence the proximate cause or if decedent was guilty of contributory negligence then verdict should be for defendant, was not on weight of evidence. Galveston, H. & S. A. R. Co. v. Karrer [Tex. Civ. App.] 70 S. W. 328. An instruction that if the jury believed defendant's testimony they must find for him does not suggest that this is the only evidence tending to that result. Bruska v. Neugent [Wis.] 93 N. W. 454.

38. Ray v. Long, 132 N. C. 891.

39. Houston & T. C. R. Co. v. Harris [Tex. Civ. App.] 70 S. W. 335.

40. Tinsley v. McIlhenny, 30 Tex. Civ. App. 352.

41. Coombs v. Mason, 97 Me. 270. Instructions are not objectionable as commenting on the evidence because the court states the claim of the party as shown by the evidence and his response to a juryman as to his recollection of the evidence qualified by the statement that they should determine the matter from the evidence. Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. 25.

42. Schmuck v. Hill [Neb.] 96 N. W. 158.

43. Hedlum v. Holy Terror Min. Co. [S. D.] 92 N. W. 31; Johnson v. Gehbauer, 159 Ind. 271; Atlanta Consol. St. R. Co. v. Jones, 116 Ga. 369. An instruction in an action against

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the case and omits a material element from the definition, the case will be reversed.[44] The facts essential to recovery by plaintiff may be grouped in one instruction when not tending to mislead or indicate an opinion.[45] The court may not present the case of one of the parties fully and with great particularity and the case of the other party only in general terms.[46] The court is not bound to repeat its instructions.[47]

Verbal inelegancies and inaccuracies will not cause a reversal[48] unless prejudice results.[49] It is not an objection that a charge could have been separated into somewhat shorter and more compact paragraphs.[50] Where there is nothing prejudicial in the charge, it will not be condemned because not neatly phrased.[51] Several acts of negligence should not be charged conjunctively, where either would have permitted a recovery.[52] It is no objection that the instruction states negatively circumstances warranting verdict for defendant in action for negligence.[53]

Instructions should be certain,[54] and free from ambiguity.[55] Indefiniteness of

a municipality for defect in street that the city is not liable unless certain things are proved is not erroneous for failure to state that the city would not be liable for failure to prove notice. South Omaha v. Conroad [Neb.] 97 N. W. 796. The court need not state defendant's claim in an instruction devoted to plaintiff's claim where such claim is covered by another instruction. Chase v. Ainsworth [Mich.] 97 N. W. 404. It is not necessary to restate in each instruction the elements of an adverse holding; matter fully covered in a preceding instruction. Williams v. Shepherdson [Neb.] 95 N. W. 827. Where the rules of evidence are correctly stated in one paragraph the rule need not be repeated, but may be referred to in apt terms in the following instructions. Jensen v. Steiber [Neb.] 93 N. W. 697. Defenses of assumption of risks and contributory negligence may be covered by succeeding paragraphs of the charge where the court instructs the jury in a previous paragraph to return a verdict for plaintiff if defendant was guilty of negligence. Chicago, R. I. & T. R. Co. v. Oldridge [Tex. Civ. App.] 76 S. W. 581. A correct charge is not to be characterized as incorrect simply because of an omission to also charge in the same connection an additional pertinent legal proposition. Holston v. Southern R. Co., 116 Ga. 656. Where the instruction covered the rule governing recovery for negligence causing injury to one alighting from a moving train it was not necessary to repeat the rule as to the finding in the instruction as to contributory negligence. Gordon v. Seaboard Air Line R. Co., 132 N. C. 565. An instruction bearing on one phase of the case and correctly stating the law applicable thereto, is not erroneous because not coupled with a correct statement, relating to a distinct though somewhat related phase of the same matter. Stull v. Stull [Neb.] 96 N. W. 196.

44. South Omaha v. Hager [Neb.] 95 N. W. 13.

45. St. Louis, S. W. R. Co. v. Byers [Tex. Civ. App.] 70 S. W. 558.

46. In re Townsend's Estate [Iowa] 97 N. W. 1108.

47. Ward v. Brown, 53 W. Va. 227.

48. The use of the singular to describe numerous parties. Schumpert v. Southern R. Co., 65 S. C. 332; Citizens' G. & O. Min. Co. v. Whipple [Ind. App.] 69 N. E. 557.

49. An instruction that where a transaction will admit "either" of an honest or a dishonest construction it is the duty of the jury to accept the former being erroneous it is not important that the insertion of the word "either" for "equally" was a clerical error. Detroit Elec. L. & P. Co. v. Applebaum [Mich.] 94 N. W. 12.

50. Smith v. Sioux City [Iowa] 93 N. W. 81.

51. Stull v. Stull [Neb.] 96 N. W. 196.

52. Crow v. Citizens' R. Co. [Tex. Civ. App.] 78 S. W. 13.

53. Galveston, etc., R. Co. v. Karrer [Tex. Civ. App.] 70 S. W. 328.

54. Fleming v. Southern R. Co., 132 N. C. 714. Instruction in action for wrongful death held indefinite. Merchants' & Planters' Oil Co. v. Burns [Tex.] 74 S. W. 758. An instruction in assumpsit to which was pleaded settlement of account, that all items then due will be presumed to be included is misleading where there is evidence showing one item not to be due. Beebe v. Smith, 194 Ill. 634. An instruction that the jury might look to the size and shape of the evidence of injury on plaintiff's shoulder is confusing, evidence being measured by its weight and not by "size and shape." Southern Bell Tel. & Tel. Co. v. Mayo, 134 Ala. 641.

55. Confusing and misleading as allowing the construction that officers of town should have known of defect in bridge. Bredlau v. Town of York, 115 Wis. 554. An instruction does not tend to mislead which tells the jury to find for plaintiff if they find the facts to be as stated in a certain prayer given for plaintiff unless they find the additional facts stated in another prayer given for defendant. Sellman v. Wheeler, 95 Md. 751. In an action against a city by a father for injuries to son an instruction that the verdict should be for the city if the father or son failed in ordinary care, required that both should have used such care and was misleading. San Antonio v. Talerico [Tex. Civ. App.] 78 S. W. 28. An instruction is not objectionable as confusing by telling the jury that "in considering any one instruction, you must construe it in the light of and in harmony with every other instruction given, and so considering and so construing apply the principles in it enunciated to all the evidence admitted upon the trial." Lampman v. Bruning

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an instruction will not cause a reversal unless the jury would have been misled thereby.[56]

Argumentative instructions should not be given.[57] An instruction is not rendered argumentative by the fact that it states that the genuineness of certain letters was not disputed.[58]

Illustrative charge.—The court may state a hypothetical case to illustrate gross negligence amounting to willfulness.[59]

The instructions should be consistent.[60]—The error in giving an erroneous instruction is not cured by giving a correct instruction, as it will be impossible to say which instruction the jury followed.[61] Instructions are not conflicting where the office of one is to make the other more definite and certain.[62] The giving of two correct rules as to measure of damages is erroneous unless they are carefully distinguished.[63]

The instruction should be predicated on belief from the evidence,[64] and

[Iowa] 94 N. W. 562. Instruction objected to as misleading as requiring the jury to determine in which one of three ways an accident happened as a condition to a verdict for plaintiff. Saucier v. New Hampshire Spinning Mills [N. H.] 56 Atl. 545. A judgment will be reversed where the court gave three different rules on measure of damages and it was impossible to determine which was followed by the jury. Arnett v. Huggins [Colo. App.] 70 Pac. 765. In an action where there are several defendants all defending on distinct and different grounds an instruction in general terms which can apply to the defense made by only one of them should be refused. Lydick v. Gill [Neb.] 94 N. W. 109. Example of ambiguous instruction as to the credibility of witness but error in giving same not reversible error. Black v. Rocky Mountain Bell Tel. Co. [Utah] 73 Pac. 514. Example in street railway collision where term "careless rate of speed" could refer to either driver or car. Holden v. Missouri R. Co. [Mo.] 76 S. W. 973. Example of misleading instruction in action for personal injury to servant. Northern Ohio R. Co. v. Rigby (Ohio) 68 N. E. 1046.

56. Germania F. Ins. Co. v. Pitcher, 160 Ind. 392.

57. Missouri, K. & T. R. Co. v. Owens [Tex. Civ. App.] 75 S. W. 579; Pittsburg, C., C. & St. L. R. Co. v. Banfill [Ill.] 69 N. E. 499. An instruction that a brakeman has no right to go to a place of obvious danger and when he does so he is himself to blame; that the position of plaintiff in sitting on the car with his legs hanging over the sides was voluntarily assumed and that but for sitting in such place of hazard he would not have been injured is argumentative. Southern R. Co. v. Howell [Ala.] 34 So. 6. In an action on a policy where the defense was suicide and the coroner's verdict in evidence an instruction that the coroner was a public officer acting under oath and that his inquisition was competent evidence of the cause of death to be considered with other evidence, although not conclusive, is misleading and argumentative. Rumbold v. Supreme Council Royal League [Ill.] 69 N. E. 590.

58. Stull v. Stull [Neb.] 96 N. W. 196.

59. Floyd v. Blue Ridge R. Co., 65 S. C. 326.

60. Omaha St. R. Co. v. Boeson [Neb.] 94 N. W. 619; Tower v. Whip, 53 W. Va. 158; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164. Example of inconsistent instruction in action against carrier for consignment destroyed by fire. Missouri, K. & T. R. Co. of Texas v. Beard [Tex. Civ. App.] 78 S. W. 253.

61. Roberts, Johnson & Rand Shoe Co. v. Coulson, 96 Mo. App. 698; Samuelson v. Gale Mfg. Co. [Neb.] 95 N. W. 809; Elliott v. Kansas City, 174 Mo. 554; Gulf. C. & S. F. Ry. Co. v. Garren [Tex.] 74 S. W. 897; Chicago, R. I. & P. R. Co. v. Sporer [Neb.] 94 N. W. 991; Chicago, B. & Q. R. Co. v. Johnston [Neb.] 95 N. W. 614; Pritchett v. Johnson [Neb.] 97 N. W. 223; Chicago & M. Elec. R. Co. v. Mawman [Ill.] 69 N. E. 66; Morris v. Warlick [Ga.] 45 S. E. 407; McAfee v. Meadows [Tex. Civ. App.] 75 S. W. 813; Spencer v. Terry's Estate [Mich.] 94 N. W. 372; Rudd v. Dewey [Iowa] 96 N. W. 973; Parkins v. Missouri Pac. R. Co. [Neb.] 96 N. W. 683; Reed v. Western Union Tel. Co. [Tex. Civ. App.] 71 S. W. 389; Stuck v. Yates, 30 Ind. App. 441; Standard Life & Acc. Ins. Co. v. Sale [C. C. A.] 121 Fed. 664; Western & A. R. Co. v. Clark, 117 Ga. 548; In re Calef's Estate, 139 Cal. 673, 73 Pac. 539; Sparks v. Villa Rosa Land Co., 99 Mo. App. 489. Error in stating in one paragraph that the evidence as to a point was undisputed is not cured by other instructions submitting the point as in dispute. Missouri, K. & T. R. Co. of Texas v. Meek [Tex. Civ. App.] 75 S. W. 317. Where an instruction in a personal injury case was erroneous in eliminating the question of plaintiff's knowledge of defects it can only be cured by withdrawal and not by giving another instruction correctly stating the law. Indiana Natural Gas & Oil Co. v. Vauble [Ind. App.] 68 N. E. 195.

62. Gray v. Washington Water Power Co., 30 Wash. 665, 71 Pac. 206. An instruction which is only a logical deduction from a previous instruction relative to the subject to which no exception was received is not erroneous. Williamson v. North Pac. Lumber Co. [Or.] 73 Pac. 7.

63. Hartgrove v. Southern Cotton Oil Co. [Ark.] 77 S. W. 908.

64. Chicago City R. Co. v. Carroll [Ill.] 68 N. E. 1037. An instruction that the jury could assess such damages as they saw fit

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repetition of the admonition with each clause of the instructions is not required.[65] They are not erroneous for using the word "think" instead of "believe" or "find" with reference to the evidence.[66]

§ 5. *Relation of instructions to pleadings and evidence.*—Instructions should be predicated upon the pleadings and the evidence in the case,[67] and instructions stating abstract principles of the law inapplicable to the pleadings and evidence should not be given, and may properly be refused.[68] The fact that they are given will not generally work a reversal.[69] The instructions should be limited strictly to the issues made by the pleadings.[70] Issues about which there is no competent evidence should be withdrawn from the jury.[71]

They should be limited to and applicable to the evidence adduced.[72] Requests

under the instruction is erroneous, they being bound to assess according to the evidence. Yazoo & M. V. R. Co. v. Smith [Miss.] 35 So. 168. An instruction that the jury might "find any fact to be proved which they think may be rightfully and reasonably inferred from the evidence" did not authorize illogical inferences. North Chicago St. R. Co. v. Rodert, 203 Ill. 413. A jury should not be instructed that if they "believe from the evidence" certain facts certain consequences will follow, as a mere belief is not sufficient to support a verdict. Sossamon v. Cruse, 133 N. C. 470.

65. Slack v. Harris, 200 Ill. 96.

66. Ilges v. St. Louis Transit Co. [Mo. App.] 77 S. W. 93.

67. Shelton v. Northern Tex. Traction Co. [Tex. Civ. App.] 75 S. W. 338; Von Diest v. San Antonio Traction Co. [Tex. Civ. App.] 77 S. W. 632; Sweeney v. Rejto [Neb.] 95 N. W. 669; Miller v. Newport News [Va.] 44 S. E. 712; Sears v. Daly [Or.] 73 Pac. 5; South Omaha v. Wrzensinski [Neb.] 92 N. W. 1045; Honick v. Metropolitan St. R. Co., 66 Kan. 124, 71 Pac. 265; Gandy v. Bissell's Estate [Neb.] 97 N. W. 632; Galveston, H. & S. A. R. Co. v. Courtney, 30 Tex. Civ. App. 544; Griffin v. Henderson, 117 Ga. 382; Gulf, C. & S. F. R. Co. v. Dunman [Tex. Civ. App.] 76 S. W. 588; Goodspeed v. Hildebrand [Mich.] 91 N. W. 610; Clark v. Great Northern R. Co., 31 Wash. 658, 72 Pac. 477; Frizzell v. Omaha St. Ry. Co. [C. C. A.] 124 Fed. 176; Harwell v. Southern Furniture Co. [Tex. Civ. App.] 75 S. W. 52.

Instructions inapplicable to any issue should not be given. Davis v. Shepherd [Colo.] 72 Pac. 57; Cahill v. Applegarth [Md.] 56 Atl. 794; La Grande Inv. Co. v. Shaw [Or.] 74 Pac. 919; Hammond v. King [Neb.] 92 N. W. 1031; Texas & P. R. Co. v. Gray [Tex. Civ. App.] 71 S. W. 316; Rankin v. Chase Nat. Bank, 188 U. S. 557, 47 Law. Ed. 594; Russell v. Huntsville R., L. & P. Co., 137 Ala. 627; Holmes v. Weinheimer [S. C.] 44 S. E. 82; Edd v. Union Pac. Coal Co., 25 Utah, 293, 71 Pac. 215. Permanency of injuries after statement of party that there was no claim of permanency. Kircher v. Incorporated Town of Larchwood [Iowa] 95 N. W. 184; Figg v. Donahoo [Neb.] 95 N. W. 1020.

Where an affirmative defense is pleaded and evidence in support given at the trial the court should call attention to that phase of the case by proper instructions. Contributory negligence should be submitted where raised by pleadings and evidence. Yecker v. San Antonio Traction Co. [Tex. Civ. App.] 76 S. W. 780.

Where there was no evidence of a corporate officer's **actual authority** and **conflicting evidence** as to his **apparent authority** it was reversible error to refuse to instruct the jury as to what constituted apparent authority. Saveland v. Wisconsin Western R. Co. [Wis.] 95 N. W. 130.

68. McCall Co. v. Jennings [Utah] 73 Pac. 639; Harzburg v. Southern R. Co., 65 S. C. 539; Frizzell v. Omaha St. R. Co. [C. C. A.] 124 Fed. 176; Brockenbrow v. Stafford [Tex. Civ. App.] 76 S. W. 576; Tower v. Whip, 53 W. Va. 158; Hewitt v. Price, 99 Mo. App. 666; Smith v. Bank of New England [N. H.] 54 Atl. 385; Rarden v. Cunningham, 136 Ala. 263; Leidigh v. Keever [Neb.] 97 N. W. 801; Union El. R. Co. v. Nixon, 199 Ill. 235; Meyer v. Reimer, 65 Kan. 822, 70 Pac. 869; Chicago, B. & Q. R. Co. v. Camper, 199 Ill. 569; La Plante v. La Zear [Ind. App.] 68 N. E. 312.

69. Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562; Moore v. Nashville, C. & St. L. R., 137 Ala. 495.

70. Tower v. McFarland [Neb.] 96 N. W. 172; Joplin Waterworks Co. v. Joplin [Mo.] 76 S. W. 960; Russell v. Huntsville R., L. & P. Co., 137 Ala. 627; Edwards v. Sun Ins. Co. [Mo. App.] 73 S. W. 886. Reply setting up matter which is a departure from the original cause of action. Merrill v. Suing [Neb.] 92 N. W. 618. Rescission not pleaded; request as to right to rescind properly refused. Steiger v. Fronhofer [Or.] 72 Pac. 693. On an issue on the contract liability of one who placed animals in an enclosure, the law of enclosures is not material. Ward v. Bass [Ind. T.] 69 S. W. 879. Where defense of contributory negligence is eliminated by demurrer an instruction on such defense should not be given. City Delivery Co. v. Henry [Ala.] 34 So. 389.

71. Morgan v. Stone [Neb.] 93 N. W. 743.

72. Inman v. Crawford, 116 Ga. 63; Lee v. Huron Indemnity Union [Mich.] 97 N. W. 709; Southern R. Co. v. Chitwood [Ga.] 45 S. E. 706; Scott v. Seaboard Air Line R. Co. [S. C.] 45 S. E. 129; Miller v. Newport News [Va.] 44 S. E. 712; Nebraska Land & Feeding Co. v. Trauerman [Neb.] 98 N. W. 37; Galveston, H. & S. A. R. Co. v. Puente, 30 Tex. Civ. App. 246; In re Calef's Estate, 139 Cal. 673, 73 Pac. 539; McEldon v. Patton [Neb.] 93 N. W. 938; Jones v. Wattles [Neb.] 92 N. W. 765; June v. Labadie [Mich.] 92 N. W. 937; Parker v. Wells [Neb.] 94 N. W. 717; Richmond P. & P. Co. v. Allen (Va.) 43 S. E. 356; Hayes v. Metropolitan St. R. Co., 84 N. Y. Supp. 271; Pittsburg, C. C. & St. L. R. Co. v. Banfill [Ill.] 69 N. E. 499. Evidence sufficient to authorize instruction on

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affected with the vice of inapplicability should be refused.[73] The instruction is supported by sufficient evidence where there is any evidence of the fact, however slight.[74] A court is not justified in refusing to submit an issue by the fact that the evidence relating thereto is misleading.[75] The instruction may not be given where there is an entire absence of evidence.[76] The court may not instruct where the evidence on the issue is stricken[77] or erroneously admitted.[78] Where evidence not admissible under the pleadings is received without objection, the court may instruct as to the legal effect of such evidence.[79]

There should be a concrete application of the law to the facts.[80] This does not authorize the court to group facts and circumstances in the case and instruct as to

improper conduct of others on question of undue influence inducing execution of will. England v. Fawbush, 204 Ill. 384. Evidence that car started before stopping entirely renders inapplicable an instruction as to duty toward party alighting from stationary car. Boone v. Oakland Transit Co., 139 Cal. 490, 73 Pac. 243. A charge that defendant admits, etc., is supported by evidence to that effect by defendant's witnesses though he is not at the trial. Morin v. Robarge [Mich.] 93 N. W. 886.

73. Bank of Darlington v. Bowers [Mo. App.] 76 S. W. 732; Ft. Worth & D. C. R. Co. v. Kelley [Tex. Civ. App.] 76 S. W. 942; McMillen v. Ferrum Min. Co. [Colo.] 74 Pac. 461; Mo., K. & T. R. Co. v. Schilling [Tex. Civ. App.] 75 S. W. 64; Chicago G. W. R. Co. v. Bailey, 66 Kan. 115, 71 Pac. 246; Winter v. Supreme Lodge, K. P., [Mo. App.] 73 S. W. 877; Galveston, H. & S. A. R. Co. v. Pendleton, 30 Tex. Civ. App. 431; Hanlon v. Milwaukee Elec. R. & L. Co. [Wis.] 95 N. W. 100; Broyhill v. Norton, 175 Mo. 190; Henderson v. Raymond Syndicate, 183 Mass. 443; Perry v. Cobb [Ind. T.] 76 S. W. 289; Long v. State [Fla.] 32 So. 870; Smith v. Seattle [Wash.] 74 Pac. 674; Towle v. Stinson Mill Co. [Wash.] 74 Pac. 471; Davis v. Summerfield, 133 N. C. 325; Richmond v. Gallego Mills Co. [Va.] 45 S. E. 877; Darrow Inv. Co. v. Breyman [Wash.] 73 Pac. 363; Mitchell v. Wabash R. Co. [Mo. App.] 76 S. W. 647; Allen v. Fuller, 182 Mass. 202; Coombs v. Mason, 97 Me. 270; Lincoln v. Felt [Mich.] 92 N. W. 780. Mental capacity to execute will. White Memorial Home v. Haeg, 204 Ill. 422. Changes in construction of smoke stack after fire caused thereby is not evidence of former faulty construction justifying a charge to that effect. Wager v. Lamont [Mich.] 98 N. W. 1.

74. Richmond P. & P. Co. v. Allen [Va.] 43 S. E. 356; Carter v. Kaufman [S. C.] 45 S. E. 1017; Stoll v. Loving [C. C. A.] 120 Fed. 805. Where there was conflicting evidence as to whether a deed had been delivered to a third person in escrow or to the grantee himself, it was necessary to charge as to the effect of a delivery to the grantee even without a request. Mays v. Shields, 117 Ga. 814. Where witnesses have given corroborative testimony and also material substantive testimony the court may not limit their testimony to the corroborative testimony only. Edwards v. Atl. Coast Line R. Co., 132 N. C. 99.

75. Chicago Union Traction Co. v. Browdy [Ill.] 69 N. E. 570.

76. El Paso & N. W. R. Co. v. McComas [Tex. Civ. App.] 72 S. W. 629; St. Louis, I. M. & S. R. Co. v. Philpot [Ark.] 77 S. W. 901; N. Y. & T. Land Co. v. Dooley [Tex. Civ. App.] 77 S. W. 1030; Bullard v. Brewer [Ga.] 45 S. E. 711; Campbell v. Stanberry [Mo. App.] 78 S. W. 292; 101 Live Stock Co. v. Kan. City, etc., R. Co. [Mo. App.] 75 S. W. 782; Bullard v. Smith [Mont.] 72 Pac. 761; Denver & R. G. R. Co. v. Young, 30 Colo. 349, 70 Pac. 688; Scott v. Boyd [Va.] 42 S. E. 918; Williams v. Avery, 131 N. C. 188; Hinson v. Postal Tel. Cable Co., 132 N. C. 460; Gaines v. Hindman [Tex. Civ. App.] 74 S. W. 582; Burton v. Rosemary Mfg. Co., 132 N. C. 17.

Punitive damages. Ga. R. & B. Co. v. Benton, 117 Ga. 785. Allowing recovery for medical attendance where no evidence. Waldopfel v. St. Louis Transit Co. [Mo. App.] 77 S. W. 128. Instructions as to the rights of creditors to rely on corporate reports should not be given where there is no evidence that the creditors had knowledge of or relied on any report. Crossette v. Jordan [Mich.] 92 N. W. 782. An instruction that a sale of all property when one is largely in debt is unwarranted where there was no evidence that he was largely indebted. Aldous v. Olverson [S. D.] 95 N. W. 917. Instructions as to interest of witness may not be given in the absence of evidence making it appropriate to give such instruction. Volusia County Bank v. Bertola [Fla.] 32 So. 448. Where it is shown that a person is affected by a serious constitutional disease or a tendency thereto it is error to submit to the jury the question of his expectancy of life in the absence of evidence bearing on that question. Cent. City v. Engle [Neb.] 91 N. W. 849.

77. Honigstein v. Hollingsworth, 85 N. Y. Supp. 818; Sheffield v. Eveleth [S. D.] 97 N. W. 367.

78. Instruction on hypothesis that parol to vary written contract was admissible. American Harrow Co. v. Dolvin [Ga.] 45 S. E. 983.

79. Franklin v. Mo., K. & T. R. Co., 97 Mo. App. 473. Exemplary damages may be charged, evidence thereof having been admitted though they were not specifically prayed. Southern R. Co. v. Phillips [Ga.] 45 S. E. 967. An instruction that a certain fact must not be considered as a confession of negligence sufficiently withdraws the evidence from the consideration of the jury. Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164.

80. The fact that an instruction required of plaintiff the exercise of ordinary care will not justify refusal of an instruction applying the principle to the facts in issue. Mallen v. Waldowski, 203 Ill. 87.

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what they prove,[81] nor declare as a matter of law what would constitute a preponderance of evidence,[82] but simply to frame the instructions so as to indicate on whom the burden lies.[83] The court may read the sections of the statute applicable to the action,[84] and in charging different sections of the statutes should explain each and not read them without explanation.[85]

§ 6. *Stating issues to jury.*—It is the duty of the court to instruct the jury as to the issues to be tried,[86] and the court may not shirk this duty by referring them to the pleadings.[87] Thus the court may not tell the jury that a party has the burden of proving the material allegations of his pleading, unless these material allegations are stated.[88] Such an instruction is harmless where other instructions inform them what facts must be proved to warrant recovery.[89] A party prejudiced by a reference of the pleadings to the jury should request more specific instructions.[90] The language of the pleadings may be followed,[91] but a summary and brief statement of the issues is the better practice.[92] A statement of a claim, the basis of an instruction and largely incorporated in it, may be sent out with the instructions.[93] Where one count of the declaration was withdrawn in the presence of the jury, an instruction as to the case as made by the declaration will not be held to have misled jury.[94]

§ 7. *Ignoring material matters.*—Instructions which ignore material evidence are erroneous.[95]

81. Ordinarily the question of negligence is for the jury to be determined from all the facts and circumstances shown in the evidence and it is error for the court to group certain facts in evidence together and instruct that they constitute negligence. Chicago, B. & Q. R. Co. v. Krayenbuhl [Neb.] 91 N. W. 880, 59 L. R. A. 920. An instruction which states what facts would constitute negligence of defendant in an action for injuries is properly refused. Bodie v. Charleston & W. C. R. Co., 66 S. C. 302.

82. Suse v. Metropolitan St. R. Co., 80 App. Div. [N. Y.] 24.

83. Mills v. Louisville & N. R. Co., 25 Ky. L. R. 488, 76 S. W. 29.

84. Statute governing allowance of punitive damages. McNatt v. McRae, 117 Ga. 898. Reading of inapplicable part of statute will not work reversal in absence of showing of prejudice. Eagle & P. Mills v. Herron [Ga.] 46 S. E. 405. It is error to do so if the law is invalid. Clough v. McKay [Colo.] 73 Pac. 80.

85. Savannah, F. & W. R. Co. v. Hatcher [Ga.] 45 S. E. 239.

86. Stevens v. Maxwell, 65 Kan. 835, 70 Pac. 873; Ferris v. Marshall [Neb.] 96 N. W. 602.

87. Houston Elec. Co. v. Nelson [Tex. Civ. App.] 77 S. W. 978; Kan. City, Ft. S. & M. R. Co. v. Dalton, 66 Kan. 799, 72 Pac. 209. Where plaintiff in action for personal injuries alleged inconsistent causes of action in different counts of his complaint the court could not submit the case on a single issue as to whether he was injured as alleged in the complaint. Griffin v. Atl. C. L. R. Co. [N. C.] 46 S. E. 7.

88. McCormick Harvesting Mach. Co. v. Hiatt [Neb.] 95 N. W. 627; Parkins v. Mo. Pac. R. Co. [Neb.] 96 N. W. 683; Williams v. Iowa Cent. R. Co. [Iowa] 96 N. W. 774; Baker v. Summers, 201 Ill. 52.

89. Chicago Terminal Transfer Co. v. Schmelling, 197 Ill. 619. A reference to the pleadings will not work a reversal where no question of law is thus submitted and the several counts in the declaration contain a sufficient statement of a cause of action. Pittsburgh, C. C. & St. L. R. Co. v. Kinnare, 208 Ill. 388. It is no objection to an instruction to charge that if the jury believe certain specific facts constituting negligence had been proved and that plaintiff was injured in the "manner charged in the declaration" then verdict should be for plaintiff. Malott v. Hood, 201 Ill. 202. An instruction is not objectionable as allowing the jury to determine the issues which charges that if defendant was guilty "as charged in the declaration" and the negligence was the proximate cause plaintiff should recover if free from contributory negligence. Ill. Cent. R. Co. v. Jernigan, 198 Ill. 297.

90. St. Louis S. W. R. Co. v. Harrison [Tex. Civ. App.] 73 S. W. 38.

91. A party is not prejudiced by the inclusion of pleadings though long and verbose where the exact matters in dispute were clearly stated in other portions. Livingston v. Stevens [Iowa] 94 N. W. 925. The language of the petition in its enumeration of acts of negligence may be followed where there is no exception to the petition or objection to the evidence. Ft. Worth & D. C. R. Co. v. Linthicum [Tex. Civ. App.] 77 S. W. 40.

92. Shebek v. Nat. Cracker Co. [Iowa] 94 N. W. 930.

93. The Pennsylvania practice allows a large discretion in the matter of sending out papers. Tridell v. Munhall, 124 Fed. 802.

94. West Chicago St. R. Co. v. Buckley, 102 Ill. App. 314.

95. Grafeman Dairy Co. v. St. Louis Dairy Co., 96 Mo. App. 495; Pa. Co. v. Reidy, 198 Ill. 9. Where there was some evidence of notice by municipal officers of a defect an instruction that there was no evidence of actual knowledge was erroneous. Clark v. Brookfield, 97 Mo. App. 16. An instruction covering only a portion of the evidence

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Ignoring issues, theories and defenses.—Instructions must conform to theory on which case is tried,[96] and the court may not ignore or exclude from the jury any of the issues, theories or defenses presented by the pleadings and the evidence,[97] unless the omitted facts are not controlling circumstances.[98] Where a trial court in a charge undertakes to concisely sum up and formulate the law which is to govern the jury in its deliberation, it is its duty to cover every legal question involved.[99] A submission on the theory of the petition is not erroneous because it ignores a defense set up as a counterclaim.[1] An instruction in an action for assault is not erroneous as ignoring right of self defense claimed by answer, where other instructions covered that matter.[2] A defendant may not complain of the court's action in stating plaintiff's theory, where a correct statement of defendant's theory was given.[3] The jury having been correctly instructed, it may not be objected that the charge did not contain another appropriate principle.[4]

§ 8. *Giving undue prominence to evidence, issues and theories.*—Contentions of either party must not be emphasized.[5] The rule is violated by instructions calling attention to and unduly emphasizing portions of the evidence,[6] as where the count charges that certain testimony is "strong evidence" or "a circumstance of great weight" or "entitled to strong consideration."[7] If an instruction is proper in other respects, it is not vitiated by merely naming the witness to whose testimony it is applicable.[8]

should not be given where the issue is to be determined on all the evidence. Lufkin v. Lufkin, 182 Mass. 476.

96. La Grande Inv. Co. v. Shaw [Or.] 72 Pac. 795. Where in the progress of a trial there has been an apparent waiver by counsel of the submission of certain propositions of law and a submission upon certain other propositions the court may submit the cause to the jury in accordance with the position of counsel unless it is manifest that the counsel acted through inadvertence or mistake. Hansen v. St. Paul Gaslight Co., 88 Minn. 86.

97. Lansing v. Wessell [Neb.] 97 N. W. 815; Rourke v. New York, 77 App. Div. [N. Y.] 72; Borden v. Falk Co., 97 Mo. App. 566; Spelts v. Ward [Neb.] 96 N. W. 56; Russell v. Gunn [Neb.] 96 N. W. 341. Ignoring fact of obedience to orders of superior in action of servant for injuries. Ill. Steel Co. v. Wierzbicky [Ill.] 68 N. E. 1101. Instruction omitting issue of deceit pleaded in an action for price of animals. Swink v. Anthony, 96 Mo. App. 420. An instruction that plaintiff cannot recover if defendant was free from negligence makes unnecessary an instruction that he cannot recover if the negligence causing the injury was that of a third person. Muller v. Hale, 138 Cal. 163, 71 Pac. 81. The failure of the court to submit to the jury a question of fact in issue by the pleadings and not abandoned is error and under the Minnesota code requests and exceptions for refusal are not required [Laws Minn. 1901, c. 113]. Robertson v. Burton, 88 Minn. 151. Defendant in personal injury suit is entitled to instruction fully presenting question of contributory negligence. Schwartz v. Metropolitan St. R. Co., 38 Misc. [N. Y.] 795. While a party cannot complain of the failure of the court to give in the charge to the jury a request not in writing, he can complain, without any request having been made at all, of the fact that the court has not presented with reasonable fullness and clearness a material and substantial contention made by him. Whelchel v. Gainesville & D. Elec. R. Co., 116 Ga. 431.

98. Ill. Cent. R. Co. v. Byrne, 205 Ill. 9.

99. Kurstelska v. Jackson, 89 Minn. 95.

1. Turney v. Baker [Mo. App.] 77 S. W. 479.

2. Sonnen v. St. Louis Transit Co. [Mo. App.] 76 S. W. 691.

3. Memphis St. R. Co. v. Shaw [Tenn.] 75 S. W. 713.

4. Jenkins v. Nat. Union [Ga.] 45 S. E. 449.

5. Atlanta Consol. St. R. Co. v. Jones, 116 Ga. 369.

6. Martens v. Pittock [Neb.] 92 N. W. 1038; Haney v. Breeden, 100 Va. 781; South Omaha v. Wrzensinski [Neb.] 92 N. W. 1045. Singling out important facts and telling jury that they did not constitute abandonment of homestead. White v. Epperson [Tex. Civ. App.] 73 S. W. 851. An instruction that the jury in determining the cause of an injury might look to the evidence thereof on plaintiff's shoulder unduly emphasizes one phase of the evidence in that regard. Southern Bell Tel. & Tel. Co. v. Mayo, 134 Ala. 641. There is a difference between issue and evidence and the requirement that the judge shall instruct as to all the issues raised does not require him to single out particular portions of the evidence and charge thereon. Wrightsville & T. R. Co. v. Lattimore [Ga.] 45 S. E. 453. A court may not lay hold of some particular piece of evidence and point out its probative relation to a number of collateral circumstances and incidental questions not primarily in issue, but bearing only on the ultimate issues of fact. Stull v. Stull [Neb.] 96 N. W. 196.

7. Stull v. Stull [Neb.] 96 N. W. 196.

8. Ward v. Brown, 53 W. Va. 227. An instruction does not give undue prominence to the testimony of a witness testifying that his signature to an instrument was forged by telling the jury that such testimony was not conclusive but to be considered with all

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Repetition of instructions on phases of the case may amount to undue emphasis,[9] but is not always prejudicial.[10] There is no undue repetition by a statement of a doctrine in one instruction and its application to the facts in another case.[11] Instructions should not single out certain issues and theories of a case to the exclusion of other aspects allowing a recovery.[12] Undue prominence is not given by compliance with the request of the jury for a new instruction on contributory negligence.[13]

Underscoring words "bona fide" is not prejudicial to one alleging fraud.[14]

§ 9. *Definition of terms used.*—Legal and technical terms should be explained.[15] It is not necessary that the explanation of terms should immediately follow their use; it is sufficient if their meaning is made plain in any part of the charge,[16] and if fully defined in one instruction, a term may thereafter be used in other instructions without further explanation.[17] Failure to define will not work reversal in the absence of a request for definition.[18]

§ 10. *Rules of evidence; proof, credibility and conflicts.*—They should be instructed as to the parties to which evidence is applicable, where incompetent as to some.[19]

A charge that plaintiff must make out his case by a preponderance does not require him to prove immaterial facts,[20] but it is not proper to require him to make out his case by a "clear" preponderance of the evidence.[21]

the evidence. Sanders v. North End B. & L. Ass'n [Mo.] 77 S. W. 833.

9. Reiteration of principles of contributory negligence. Kroeger v. Tex. & P. R. Co., 30 Tex. Civ. App. 87; Pelfrey v. Tex. Cent. R. Co. [Tex. Civ. App.] 73 S. W. 411.

10. Gandy v. Bissell's Estate [Neb.] 97 N. W. 632; Ill. Steel Co. v. Ryska, 102 Ill. App. 347. As where court gives instructions along lines of requested instruction already given. Rawlings v. Anheuser-Busch Brew. Ass'n [Neb.] 95 N. W. 792. A jury is not misled by repetition of instructions as to the preponderance of evidence. Sonka v. Sonka [Tex. Civ. App.] 75 S. W. 325. Undue emphasis but insufficient to work reversal that court at the end of instructions repeated instruction as to burden of proof. Lewis v. Norfolk & W. R. Co., 132 N. C. 382. There can be no review of an objection that the manner of the court in giving the charge was prejudicial where the record merely shows a repetition of an instruction as to the preponderance of evidence. Klipstein v. Raschein [Wis.] 94 N. W. 63.

11. Andrews v. Jefferson C. O. & R. Co. [Tex. Civ. App.] 74 S. W. 342.

12. Slack v. Harris, 200 Ill. 96. An instruction allowing recovery for physical and mental pain and future suffering for permanent injuries if any and loss of earning capacity does not give undue prominence to items of damage. Cameron M. & E. Co. v. Anderson [Tex. Civ. App.] 78 S. W. 8. Where one instruction in an action to set aside a will deals with inequality of distribution and another with undue influence and others refer to other circumstances such separate instructions are not open to the objection of singling out and giving undue prominence to one set of facts. England v. Fawbush, 204 Ill. 384.

13. Lumsden v. Chicago, R. I. & T. R. Co. [Tex. Civ. App.] 73 S. W. 428.

14. Crockett v. Miller [Neb.] 96 N. W. 491.

15. The term "preponderance of testimony" is properly defined as meaning the greater weight of evidence. Western Union Tel. Co. v. James [Tex. Civ. App.] 73 S. W. 79. Error to direct to find acceptance without stating what would amount to an acceptance. Courtney v. William Knabe & Co. Mfg. Co. [Md.] 55 Atl. 614. In an action for death of child an instruction that negligence should be measured by the conduct of ordinarily cautious, careful and prudent persons under the same circumstances should be made more explicit having in mind the difference between adults and children. Quill v. Southern Pac. Co., 140 Cal. 268, 73 Pac. 991.

16. Day v. Union R. Co., 84 N. Y. Supp. 560. Charge as a whole. Tunnicliffe v. Fox [Neb.] 94 N. W. 1032; Ilges v. St. Louis Transit Co. [Mo.] 77 S. W. 93. Definition of plaintiff's care need not be given in the instruction as to defendant's liability qualified by the abstract statement that it would be defeated if plaintiff was guilty of contributory negligence. Glaze v. Mills [Ga.] 46 S. E. 99.

17. Louisville & N. R. Co. v. Logsdon, 24 Ky. L. R. 1566, 71 S. W. 905.

18. Priesmeyer v. St. Louis Transit Co. [Mo. App.] 77 S. W. 313; Pierce v. Arnold Print Works, 182 Mass. 260; Western U. Tel. Co. v. James [Tex.] 73 S. W. 79. "Negligence" and "contributory negligence." International & G. N. R. Co. v. Clark [Tex. Civ. App.] 71 S. W. 587. "Interstate commerce." Malott v. Hood, 201 Ill. 202. "Plea in avoidance." Texas & N. O. R. Co. v. Scott, 30 Tex. Civ. App. 496.

19. In an action for damages for unlawful combination if there is a lack of evidence against some of the defendants the court should be requested to instruct that the evidence can only be considered against those whose acts and declarations were proved. Cleland v. Anderson [Neb.] 92 N. W. 306. Where a deposition is not competent against one of the parties to the action the instruction should limit it to the party

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The court may refuse to instruct as to inferences from failure to produce a witness[22] or instrument.[23]

Credibility of witnesses.—The matter of credibility of witnesses is for the jury,[24] and their province may not be invaded by instructions as to the relative weight to be attached to their testimony.[25, 26] It is not error to charge that positive testimony is rather to be believed than negative, with the qualification that "other things being equal, and the witnesses of equal credibility."[27]

The jury may be instructed that preponderance of evidence is not determined by the number of witnesses, but also by their knowledge and opportunity for knowledge and their interest.[28]

The court may charge as to the weight of testimony of impeached witnesses.[29]

Before an instruction as to "falsus in uno, falsus in omnibus" can be given, there must be a sufficient basis in the testimony therefor.[30] Mere difference and conflict in the testimony of witnesses is not sufficient.[31] The instruction should limit maxim to falsity in some material issue or matter in regard to which witness cannot be presumed liable to mistake,[32] and the testimony must have been given willfully and knowingly.[33] The instruction may be given where testimony of a party is contradictory of written evidence.[34] There is no error in failing to charge as to credibility, where there was no request for such charge.[35]

against whom it is competent. Black v. Marsh [Ind. App.] 67 N. E. 201.

20. Collins v. Clark [Tex. Civ. App.] 72 S. W. 97.

21. Nelson v. Fehd, 203 Ill. 120.

22. It not appearing that witness was amenable to subpoena. Levine v. Metropolitan St. R. Co., 78 App. Div. [N. Y.] 426.

23. Neither party had produced an alleged deed or accounted for the failure to produce same. Cauble v. Worsham [Tex.] 70 S. W. 737.

24. Glasscock v. Swofford Bros. Dry Goods Co. [Mo. App.] 74 S. W. 1039.

25. Winklebleck v. Winklebleck [Ind.] 67 N. E. 451. Court may not tell the jury that "evidence as to the genuineness of handwriting is generally regarded as of a weak and unsatisfactory character." Davis v. Lambert [Neb.] 95 N. W. 592. Where questions of negligence and contributory negligence under the evidence is for the jury the court may not charge as a matter of law that if the jury believed the testimony of a particular witness to a particular fact they should find for defendant. Wagner v. Metropolitan St. R. Co., 79 App. Div. [N. Y.] 591.

26. As where they are told that while the testimony of experts is proper evidence it is not of as high grade as the testimony of credible eyewitnesses. Nelson v. McLellan, 31 Wash. 208, 71 Pac. 747.

27. Southern R. Co. v. O'Bryan [Ga.] 45 S. E. 1000.

28. An instruction that the preponderance of evidence is not determined by the number of witnesses but the jury may take into consideration the opportunity of the witnesses for seeing and knowing the things about which they testify, their conduct and demeanor, interest or lack of interest, probability or improbability of their statements in view of all the other facts and circumstances, though unskilfully drawn and inaccurate is not so far calculated to mislead as to justify reversal. Illinois Steel Co. v. Wierzbicky [Ill.] 68 N. E. 1101. The jury may be instructed to consider the personal interest of any witness in the result of the suit and endeavor to reconcile conflicting evidence. Oliver v. Columbia, N. & L. R. Co., 65 S. C. 1. It is not error to refuse an instruction that preponderance is determined by the number of witnesses testifying on each side. Fritzinger v. State [Ind. App.] 67 N. E. 1006. The court properly refused an instruction to the effect that the jury in passing upon the testimony of a party may take into consideration his situation and interest in the result of the verdict and all the circumstances surrounding him, and give to it only such weight as they may deem it fairly entitled to, when a witness against him is deeply interested in a moral sense, and no such direction as to his testimony is included. Tompkins v. Pacific Mut. Life Ins. Co. [W. Va.] 44 S. E. 439.

29. The court should not charge on the subject of impeachment of witnesses by proof of general bad character where there was no attempt made to so impeach. Southern R. Co. v. O'Bryan [Ga.] 45 S. E. 1000. Omission to charge on weight of testimony of impeached witness is not error where there was no request for explicit instruction. Halley v. Tichenor [Iowa] 94 N. W. 472.

30. Brazis v. St. Louis Transit Co. [Mo. App.] 76 S. W. 708; Boyle v. Columbian Fireproofing Co., 182 Mass. 93.

31. Reed v. Mexico [Mo. App.] 76 S. W. 53.

32. Holdredge v. Watson [Neb.] 96 N. W. 67; Richardson v. Babcock [Wis.] 96 N. W. 554. An instruction that the jury are not bound to believe everything testified to by a witness whom they believe to have been mistaken or who has wilfully falsified is misleading in that it allows rejection of his testimony as to other matters. Id.

33. Perkins v. Knisely [Ill.] 68 N. E. 486; Rio Grande Western R. Co. v. Utah Nursery Co., 25 Utah. 187, 70 Pac. 859; Gehl v. Milwaukee Produce Co., 116 Wis. 263.

34. Hale Elevator Co. v. Hale, 201 Ill. 131.

35. Childs v. Ponder, 117 Ga. 553.

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An instruction as to credibility being warranted, the court should tell the jury that it is their "duty" to consider such facts and not that they are "at liberty" to do so.[36]

Conflicts in testimony.—The jury should be allowed to harmonize conflicts in testimony.[37] In Texas, it is held that courts should not instruct juries that they must reconcile conflicts in testimony.[38] An instruction suggesting theories on which difference in the testimony may be accounted for on the ground of honest mistake invades the province of the jury.[39]

An instruction that if the jury were in doubt the verdict should be for defendant should not be given, the mere existence of a doubt not being sufficient to authorize a verdict for defendant.[40]

§ 11. *Admonitory and cautionary instructions.*—The jury should be instructed that it is their duty to follow instructions given by the court.[41] They may be told that they act as arbitrators to arbitrate the differences between the litigants,[42] and may be reminded of the special care required in the case.[43] Where an issue is withdrawn from the jury by an instruction, it is not necessary to state further that the evidence on the subject is also withdrawn.[44]

The jury may not be instructed to disregard the arguments of counsel,[45] unless such arguments tend to inflame their passions against a party to the suit.[46]

§ 12. *Necessity of instructing in writing.*—The Arkansas constitution requires trial judges to reduce instructions to writing when requested by either party and is mandatory.[47] Laws requiring written instructions without oral explanation are not violated by an oral answer to question asked by jury after their retirement, no prejudice having resulted, since laws are to be reasonably construed with reference to the purpose to be secured.[48] It is not important that some of the instructions are written and some typewritten.[49] Nor under the Iowa code that the judge failed to sign them.[50] A demand for a written charge is too late where made after the court has commenced to deliver charge orally.[51]

36. Stanley v. Cedar Rapids & M. C. R. Co., 119 Iowa, 526.

37. Beers v. Metropolitan St. R. Co., 84 N. Y. Supp. 785. The court may instruct that "If there is a conflict in the testimony you must reconcile it if you can; if not you may believe or disbelieve any witness or witnesses, according as you may or may not think them entitled to credit" where there is an irreconcilable conflict. Houston & T. C. R. Co. v. Bell [Tex. Civ. App.] 73 S. W. 56. The court may instruct the jury that they should reconcile any and all apparently conflicting statements of the witnesses and if possible to adduce from the evidence any theory of the case which will harmonize the testimony of all the witnesses and that it would be their duty to adopt that theory rather than one which would require them to reject any of the testimony as intentionally false. Hirschberg Optical Co. v. Michaelson [Neb.] 95 N. W. 461.

38. Houston & T. C. R. Co. v. Bell [Tex.] 75 S. W. 484.

39. Petrich v. Town of Union [Wis.] 93 N. W. 819.

40. Kennealy v. Westchester Elec. R. Co., 86 App. Div. [N. Y.] 293.

41. An instruction that it is the duty of the jury to determine the facts from the evidence and having done so to apply to such facts the law as given in the charge does not lead the jury to believe that they are independent of the instructions and need to consider them only after they have made their findings on the facts. North Chicago St. R. Co. v. Wellner [Ill.] 69 N. E. 6.

42. Schuspert v. Southern R. Co., 65 S. C. 332.

43. Not error to say that case at bar requires "finer judgment" and "keener intelligence." Prescott v. Johnson [Minn.] 97 N. W. 891.

44. Kirsher v. Kirsher [Iowa] 94 N. W. 846.

45. North Chicago St. R. Co. v. Wellner [Ill.] 69 N. E. 6. The court cannot be required to instruct the jury upon the province of counsel in arguing the cause in advance of the argument. Parrish v. Parrish [Kan.] 72 Pac. 844.

46. Tex. Cent. R. Co. v. Parker [Tex. Civ. App.] 77 S. W. 42.

47. Arkansas Const. art. 7, § 23. Arnold v. State [Ark.] 74 S. W. 513.

48. Code Alaska, § 137, subsec. 6. Walton v. Wild Goose M. & T. Co. [C. C. A.] 123 Fed. 209.

49. Kinyon v. Chicago & N. W. R. Co., 118 Iowa, 349.

50. Halley v. Tichenor [Iowa] 94 N. W. 472.

51. State v. Forbes [La.] 35 So. 710.

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In Ohio, the jury may take the written instructions given at the request of the parties to the jury room.[52]

§ 13. *Requests for instructions. Necessity of request as foundation for error.*—If the instructions given correctly state the law, one may not complain of their insufficiency arising from omissions, failure to define terms, want of clearness, etc., unless he has called the attention of the court thereto by requests covering the alleged defects.[53]

Time of making request.—In federal courts, the practice of presenting requests after the charge has been given is condemned.[54] Under superior court rules in Massachusetts, requests must be made before closing arguments and will not be granted after instructions are given.[55]

Form and sufficiency of requests.—In most states the request should be in writing.[56] The rules governing the form and requisites of instructions are stated in other portions of this topic and apply to requested instructions. It may be stated in this connection that a request incorrectly stating the law should be refused,[57] and this is the case where it is erroneous only in part,[58] and where they mistake the facts as to other instructions,[59] or would encourage a disagreement,[60] or are wholly

52. Rev. St. 1892, § 5190, subds. 5, 7. Cone v. Bright [Ohio] 68 N. E. 3.

53. Thorne v. Cosand, 160 Ind. 566; St. Louis S. W. R. Co. v. Hughes [Tex. Civ. App.] 73 S. W. 976; El Paso Electric St. R. Co. v. Ballinger [Tex. Civ. App.] 72 S. W. 612; Crosette v. Jordan [Mich.] 92 N. W. 782; Copeland v. Ferris, 118 Iowa, 554; Stauning v. Great Northern R. Co., 88 Minn. 480; Parkins v. Mo. Pac. R. Co. [Neb.] 93 N. W. 197; Seaboard Air Line R. v. Phillips, 117 Ga. 98; Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co., 30 Colo. 431, 71 Pac. 389; George v. St. Joseph, 97 Mo. App. 56; First Nat. Bank v. Ragsdale, 171 Mo. 168; Berry v. Clark, 117 Ga. 964; Newman v. Davlston [Ga.] 44 S. E. 861; Kirsher v. Kirsher [Iowa] 94 N. W. 846; Young v. Illinois Cent. R. Co., 24 Ky. L. R. 789, 69 S. W. 1093; Kircher v. Incorporated Town of Larchwood [Iowa] 95 N. W. 184; Wickham v. Wolcott [Neb.] 95 N. W. 366; International & G. N. R. Co. v. Collins [Tex. Civ. App.] 75 S. W. 814; Ellis v. Kirkpatrick [Tex. Civ. App.] 74 S. W. 57; Parsons B. C. & S. Feeder Co. v. Gadeke [Neb.] 95 N. W. 850; W. U. Tel. Co. v. Crawford [Tex. Civ. App.] 75 S. W. 843; Palmer v. Smith [Conn.] 56 Atl. 516; Stewart v. N. Y. & C. Gas Coal Co. [Pa.] 56 Atl. 435; Lafferty v. Third Ave. R. Co., 85 App. Div. [N. Y.] 592; Schmitt v. Murray, 87 Minn. 250; Williamson v. Gore [Tex. Civ. App.] 73 S. W. 563; Cameron v. New England Tel. & Tel. Co., 182 Mass. 310; Hodge v. Chicago & A. R. Co. [C. C. A.] 121 Fed. 48; Southern R. Co. v. O'Bryan [Ga.] 45 S. E. 1000; Bowder v. Tiffany, 118 Iowa, 130; Fagan v. Interurban St. R. Co., 85 N. Y. Supp. 340; Boettler v. Tumlinson [Tex. Civ. App.] 77 S. W. 824; Fosha v. Prosser [Wis.] 97 N. W. 924; Justice v. Gallert, 131 N. C. 393; Lahr v. Kraemer [Minn.] 97 N. W. 418. Failure to submit issues within pleadings. Strong v. Knutson [Minn.] 97 N. W. 659; Frizzell v. Omaha St. R. Co. [C. C. A.] 124 Fed. 176; Harness v. Steele, 159 Ind. 286; Redmond v. Mo., K. & T. R. Co. [Mo. App.] 77 S. W. 768. Failure to instruct as to burden of proof. Osborne v. Ringland [Iowa] 98 N. W. 116. Omission to charge an element of damages pleaded. Knauff v. San Antonio Traction Co. [Tex. Civ. App.] 70 S. W. 1011. Charge having tendency to mislead. Moore v. Nashville, C. & St. L. R., 137 Ala. 495; Gilliland v. Dunn, 136 Ala. 327. Abstract instructions. Heer v. Warren-Scharf Asphalt Pav. Co. [Wis.] 91 N. W. 789. Ambiguity. Riley v. Mo. Pac. R. Co. [Neb.] 95 N. W. 20. The failure of the court to construe a contract the subject of a suit must be called to the attention of the court by a request. McCormick Harvesting Mach. Co. v. Carpenter [Neb.] 95 N. W. 617. Parties may not contend that documentary evidence was given a scope beyond that intended by statute allowing its use unless they request instructions properly limiting the evidence. Clark v. Hull [Mass.] 68 N. E. 60. Failure to define term "want of ordinary care." Taylor v. Sell [Wis.] 97 N. W. 498. Failure to instruct jury to disregard evidence erroneously admitted. Ill. Cent. R. Co. v. Atwell, 198 Ill. 200.

54. Chicago v. Le Moyne [C. C. A.] 119 Fed. 662.

55. Root v. Boston El. R. Co., 183 Mass. 418.

56. Ala. Code 1896, § 3328. Henderson v. State, 137 Ala. 83; Johnston v. Gulledge, 115 Ga. 981.

57. Texas & Ft. S. R. Co. v. Hartnett [Tex. Civ. App.] 75 S. W. 809; Deutschmann v. Third Ave. R. Co., 87 App. Div. [N. Y.] 503; Murphy v. Hood [Okl.] 73 Pac. 261; Gulf, C. & S. F. R. Co. v. Carter [Tex. Civ. App.] 71 S. W. 73.

58. Harris v. Atl. C. L. R. Co., 132 N. C. 160; Percival v. Chase, 182 Mass. 371; Seifred v. Pa. R. Co., 206 Pa. 399. One alternative of a request being bad the whole may be disregarded. Terrill v. Tillison [Vt.] 54 Atl. 187. Requested instructions though proper on one issue may be refused where they embrace instructions on other subjects which are improper. Cranfill v. Hayden [Tex. Civ. App.] 75 S. W. 573.

59. It is not error to refuse instructions erroneously referring to instructions as having been given at the request of the other party. Golden v. Heman Const. Co. [Mo. App.] 71 S. W. 1093.

60. Chicago & E. I. R. Co. v. Rains, 203 Ill. 417.

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unnecessary.[61] It is not the duty of the court to put erroneous requests in correct form.[62] Where a contention is stated affirmatively, a party is entitled to a negative presentation and vice versa.[63] The request may not be refused solely because of a memorandum of authorities on the margin; if proper it should be given with the memorandum erased.[64] Requests, though not in all respects correct, if sufficient to call attention of the court to omissions in the main charge, require a submission of such issues in a proper charge.[65]

Disposition of requests.—Requests should be either given or specifically refused.[66]

The court may give the request in his own language,[67] and may modify the request tendered to conform to the issues,[68] but not so as to take away its effect.[69] It is the duty of the court to give instructions covering omissions in the main charge.[70] The failure to write the word "Given" on an instruction signed by the judge and read to the jury and delivered with the other instructions will not work a reversal.[71] It is not error to refuse instructions already covered by those given.[72]

61. Williamson v. North Pac. Lumber Co. [Or.] 73 Pac. 7.

62. Nelson v. Fehd, 203 Ill. 120.

63. Tex. & P. R. Co. v. Dawson [Tex. Civ. App.] 78 S. W. 235; Bruce v. Wolfe [Mo. App.] 76 S. W. 723.

64. South Omaha v. Fennell [Neb.] 94 N. W. 632.

65. Sherman v. Greening [Tex. Civ. App.] 73 S. W. 424. Where party requests an instruction as to an omitted point and it is refused for defects of form or substance it is the duty of the court to give a correct instruction covering the point. Louisville & N. R. Co. v. Harrod [Ky.] 75 S. W. 233.

66. Jones v. Seaboard Air Line R. Co. [S. C.] 45 S. E. 188. Requests are practically refused where the court commenting on them says: "I charge you these as good law except as I may hereinafter modify them in my general charge" and the general charge was inconsistent with the requests. Hutchison v. Summerville [S. C.] 45 S. E. 8.

67. Davenport v. Johnson, 182 Mass. 269; Post v. Leland [Mass.] 69 N. E. 361; Harris v. Atlantic Coast Line R. Co., 132 N. C. 160; Edwards v. Wessinger, 65 S. C. 161.

68. Pittman v. Weeks, 132 N. C. 81. Interest of witness. Fitzpatrick v. Graham [C. C. A.] 122 Fed. 401. Modification to bring out point that findings must be based on evidence. Chicago Union Traction Co. v. Fortier, 205 Ill. 305. The court may modify a requested instruction so as to take away its entire effect so that nothing prejudicial to the party's case was added. Harrington v. Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15. Where a requested charge is erroneous as invading the province of the jury a modification by the court not erroneous in itself will not work a reversal. Southern R. Co. v. Howell [Ala.] 34 So. 6.

69. A requested instruction may not be modified so as to withdraw from the jury the party's theory of the case. Richmond Traction Co. v. Martin's Adm'x [Va.] 45 S. E. 886. When a proper instruction is asked and given it is error to give another improper instruction which modifies its effect or obscures its meaning. Ward v. Brown, 53 W. Va. 227.

70. Evans Laundry Co. v. Crawford [Neb.] 93 N. W. 177; Omaha St. R. Co. v. Boeson [Neb.] 94 N. W. 619; Bronk v. Binghamton R. Co., 79 App. Div. [N. Y.] 269; Southern Car & Foundry Co. v. Jennings, 137 Ala. 247; Campbell v. St. Louis & S. R. Co., 175 Mo. 161. Charge as to effect of non-production of documents. Werr v. Kohles, 86 App. Div. [N. Y.] 122.

71. Clasen v. Pruhs [Neb.] 95 N. W. 640.

72. American Hide & Leather Co. v. Chalkley [Va.] 44 S. E. 705; Fritzinger v. State [Ind. App.] 67 N. E. 1006; Citizens' St. R. Co. v. Jolly [Ind.] 67 N. E. 935; Curtis v. McNair, 173 Mo. 270; Fritz v. Western Union Tel. Co., 25 Utah, 263, 71 Pac. 209; Parsons B. C. & S. Co. v. Gadeke [Neb.] 95 N. W. 850; Bell v. Clarion [Iowa] 94 N. W. 907; D'Arcy v. Mooshkin, 183 Mass. 382; La Grande Inv. Co. v. Shaw [Or.] 72 Pac. 795; Louisiana & N. W. R. Co. v. Crumpler [C. C. A.] 122 Fed. 425; Buckman v. Missouri, K. & T. R. Co. [Mo. App.] 73 S. W. 270; Tex. Fruit Co. v. Lane [Mo. App.] 74 S. W. 400; Texas & N. O. R. Co. v. Lee [Tex. Civ. App.] 74 S. W. 345; Chicago, etc., R. Co. v. Armes [Tex. Civ. App.] 74 S. W. 77; Kircher v. Larchwood [Iowa] 95 N. W. 184; Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562; Beringer v. Dubuque St. R. Co., 118 Iowa, 135; Texas & P. R. Co. v. Watson, 190 U. S. 287, 47 Law. Ed. 1057; Schafstette v. St. Louis & M. R. R. Co., 175 Mo. 142; International & G. N. R. Co. v. Clark [Tex. Civ. App.] 71 S. W. 587; San Antonio v. Chism [Tex. Civ. App.] 71 S. W. 606; Koelling v. August Gast B. N. & I. Co., 97 Mo. App. 664; Central of Georgia R. Co. v. Duffy, 116 Ga. 346; Belding v. Archer, 131 N. C. 287; Ratliff v. Ratliff, 131 N. C. 425; West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607; Chicago City R. Co. v. Fennimore, 199 Ill. 9; Pittsburg, etc., R. Co. v. Hewitt, 102 Ill. App. 428; Boyce v. Wilbur Lumber Co. [Wis.] 97 N. W. 563; Snyder v. East Bay Lumber Co. [Mich.] 97 N. W. 49; Gill v. Donovan, 96 Md. 518; Gulf, etc., C. & S. F. R. Co. v. Carter [Tex. Civ. App.] 71 S. W. 73; Groom v. Kavanagh, 97 Mo. App. 362; Robinson v. St. Joseph, 97 Mo. App. 503; Hutchins v. Missouri Pac. R. Co., 97 Mo. App. 548; Collins v. Chicago, etc., R. Co. [Iowa] 97 N. W. 1103; Kidman v. Garrison [Iowa] 97 N. W. 1078; Davis v. Hall [Neb.] 97 N. W. 1023; Graf v. Laev [Wis.] 97 N. W. 898; Gulf, etc., R. Co. v. Roane [Tex. Civ. App.] 75 S. W. 845; Macon v. Holcomb [Ill.] 69 N. E. 79; Southern Indiana R. Co. v. Davis [Ind. App.]

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The practice of telling the jury that certain instructions are given on request of a particular party is not commended.[73] The matter of giving explanatory instructions rests in the discretion of the court.[74]

§ 14. *Presentation of instructions.*[75]—Where the conditions surrounding the giving of the charge were such as to confuse the jury, a new trial should be granted.[76]

§ 15. *Additional instructions after retirement.*—Instructions may be given after the jury has retired.[77] Mississippi requires a written request of one of the parties.[78] In Nebraska the trial court on its own motion may recall the jury and

69 N. E. 550; Joines v. Johnson [N. C.] 45 S. E. 828; Atlanta R. & P. Co. v. Monk [Ga.] 45 S. E. 494; Guerguin v. Boone [Tex. Civ. App.] 77 S. W. 630; Turney v. Baker [Mo. App.] 77 S. W. 479; Cahill v. Dickson [Tex. Civ. App.] 77 S. W. 281; St. Louis S. W. R. Co. v. Duck [Tex. Civ. App.] 69 S. W. 1027; Texas & P. R. Co. v. Knox [Tex. Civ. App.] 75 S. W. 543; Haller v. St. Louis [Mo.] 75 S. W. 613; Texas & Ft. S. R. Co. v. Hartnett [Tex. Civ. App.] 75 S. W. 809; Missouri, K. & T. R. Co. v. McFarland [Tex. Civ. App.] 75 S. W. 811; Richmond v. Martin, 25 Ky. L. R. 1516, 78 S. W. 219; Thayer v. Smoky Hollow Coal Co. [Iowa] 96 N. W. 718; England v. Fawbush, 204 Ill. 384; Hargadine-McKitrick Dry Goods Co. v. Bradley [Ind. T.] 69 S. W. 862; Harrington v. Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15; Towle v. Stimson Mill Co. [Wash.] 74 Pac. 471; Morrison v. Northern Pac. R. Co. [Wash.] 74 Pac. 1064; Atchison, etc., R. Co. v. Phipps [C. C. A.] 125 Fed. 478; Richmond Traction Co. v. Williams [Va.] 46 S. E. 292; Baxter v. St. Louis Transit Co. [Mo. App.] 78 S. W. 70; Pecos & N. T. R. Co. v. Bowman [Tex. Civ. App.] 78 S. W. 22; Salem Iron Co. v. Commonwealth Iron Co. [C. C. A.] 119 Fed. 593; Denver Consol. Elec. Co. v. Lawrence [Colo.] 73 Pac. 39; Wilson v. Ontstott [Iowa] 96 N. W. 779; Catlin Consol. Canal Co. v. Euster [Colo. App.] 73 Pac. 846; Frieden v. Conkling [Neb.] 96 N. W. 615; Western Union Tel. Co. v. Bowen [Tex. Civ. App.] 76 S. W. 613; Denver Consol. Tramway Co. v. Rush [Colo. App.] 73 Pac. 664; Van Tobel v. Stetson & Post Mill Co. [Wash.] 73 Pac. 788; Gulf, etc., R. Co. v. Brown [Tex. Civ. App.] 76 S. W. 794; Ft. Worth, etc., R. Co. v. Partin [Tex. Civ. App.] 76 S. W. 236; Republic I. & S. Co. v. Ohler [Ind.] 68 N. E. 901; Huber Mfg. Co. v. Gotchall [Neb.] 96 N. W. 611; South Omaha v. Taylor [Neb.] 96 N. W. 209; Texas & P. R. Co. v. Daugherty [Tex. Civ. App.] 76 S. W. 605; Western Union Tel. Co. v. Bowles [Tex. Civ. App.] 76 S. W. 456; Pittsburg, etc., R. Co. v. Hewitt, 202 Ill. 28; Copeland v. Hewett, 96 Me. 525; Lewis v. Hoeldtke [Tex. Civ. App.] 76 S. W. 309; Richmond Traction Co. v. Wilkinson [Va.] 43 S. E. 622; Galveston, etc., R. Co. v. Holyfield [Tex. Civ. App.] 70 S. W. 221; San Antonio & A. P. R. Co. v. Jones, 30 Tex. Civ. App. 316; Gulf, etc., R. Co. v. Holt, 30 Tex. Civ. App. 330; St. Louis S. W. R. Co. v. Smith, 30 Tex. Civ. App. 336; Texas & P. R. Co. v. Gray [Tex. Civ. App.] 71 S. W. 316; Southern Car & Foundry Co. v. Jennings, 137 Ala. 247; West Virginia Cent. & P. R. Co. v. State, 96 Md. 652; Sellman v. Wheeler, 95 Md. 751; Foster v. Pacific Clipper Line, 30 Wash. 515, 71 Pac. 48; Crossen v. Grandy, 42 Or. 282, 70 Pac. 906; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498; Coombs v. Mason, 97 Me. 270; Roberts v. Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111; Davis v. Shepherd [Colo.] 72 Pac. 57; Hill v. Bank of Seneca [Mo. App.] 73 S. W. 307; Gulf, etc., R. Co. v. Irvine [Tex. Civ. App.] 73 S. W. 540; Golibart v. Sullivan, 30 Ind. App. 428; Percival v. Chase, 182 Mass. 371; Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602. Refusal of request and matter covered. Chicago Terminal Transfer Co. v. Kotoski, 199 Ill. 383; Emory Mfg. Co. v. Rood, 182 Mass. 166; Southern Elec. R. Co. v. Hageman [C. C. A.] 121 Fed. 262; MacDonald v. New York R. Co., 25 R. I. 40; Warner v. Chicago & N. W. R. Co. [Iowa] 94 N. W. 490; Defrieze v. Illinois Cent. R. Co. [Iowa] 94 N. W. 505; Waterhouse v. Jos. Schlitz Brewing Co. [S. D.] 94 N. W. 587; Southern I. R. Co. v. Harrell [Ind. App.] 66 N. E. 1016; Chicago Terminal Transfer R. Co. v. Gruss, 200 Ill. 195; Continental Nat. Bank v. Tradesmen's Nat. Bank, 173 N. Y. 272; Edwards v. Wessinger, 65 S. C. 161; Mefford v. Sell [Neb.] 92 N. W. 148; Muncie Natural Gas Co. v. Allison [Ind. App.] 67 N. E. 111; Grapes v. Sheldon, 119 Iowa, 112; Marcus v. Leake [Neb.] 94 N. W. 100; Brier v. Davis [Iowa] 96 N. W. 983; Doolin v. Omnibus Cable Co., 140 Cal. 369, 73 Pac. 1060; Southern Indiana R. Co. v. Davis [Ind. App.] 68 N. E. 191; Stuart v. Mitchum, 135 Ala. 546; O'Brien v. State [Neb.] 96 N. W. 649; Ehlen v. O'Donnell, 205 Ill. 38; Carlson v. Holm [Neb.] 95 N. W. 1125; McGarrity v. New York R. Co. [R. I.] 55 Atl. 718; Texas & P. R. Co. v. Smissen [Tex. Civ. App.] 73 S. W. 42; Holland v. Oregon Short Line R. Co. [Utah] 72 Pac. 940; Wallrath v. Bohnenkamp, 97 Mo. App. 242; Texas & P. R. Co. v. Hall [Tex. Civ. App.] 72 S. W. 1052; Gorman's Adm'r v. Louisville R. Co., 24 Ky. L. R. 1938, 72 S. W. 760; Givens v. Louisville R. Co., 24 Ky. L. R. 1796, 72 S. W. 320; Crabtree Coal Min. Co. v. Sample's Adm'r, 24 Ky. L. R. 1703, 72 S. W. 24; Gulf, C. & S. F. R. Co. v. Holt [Tex. Civ. App.] 70 S. W. 591; St. Louis S. W. R. Co. v. Byers [Tex. Civ. App.] 70 S. W. 558; San Antonio, etc., R. Co. v. Jones, 30 Tex. Civ. App. 316; New Omaha T. H. Elec. Light Co. v. Johnson [Neb.] 93 N. W. 778.

73. Meyer v. Milwaukee Elec. R. & Light Co., 116 Wis. 326.

74. Wunderlich v. Palatine Ins. Co., 115 Wis. 509.

75. See ante, § 10, as to necessity of writing. See, also, post, § 13, as to additional charge after retirement.

76. Colloquies between counsel and court and discussion and modification of instruction at the time. Stuart v. Press Pub. Co., 83 App. Div. [N. Y.] 467.

77. Page v. Roberts, J. & R. Shoe Co. [Mo. App.] 78 S. W. 52.

78. Clarke v. Pierce [Miss.] 34 So. 4.

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give additional instructions.[79] After retirement of the jury, the court may answer their request as to whether he instructed in a certain manner, and he may refuse to give an instruction asked by counsel at such time, for the functions of the attorney with reference to instructions and when the jury retires.[80] Such instructions should be given in open court,[81] and in the presence of the parties or their attorneys.[82]

§ 16. *Review.*—It is not the purpose of this article to more than refer to some general questions of review applicable to instructions, leaving their adequate treatment to topics specially referring to appeal and review.[83]

Objections and exceptions below.—Specific objections and exceptions should be made in the lower court,[84] and should point out the error complained of,[85] and should be made before the case is given to the jury.[86] An exception attributing language to the judge not contained in instruction is bad.[87] The New York code expressly requires that exceptions to the charge should be taken before verdict is given.[88] Rights of counsel to except to instructions given in their absence is secured by court rules in Massachusetts.[89] Exceptions to the charge as a whole are ineffectual if any of the instructions are correct.[90] A party having excepted to the refusal to give a certain instruction need not repeat the exception where the contrary of the request was given in the general charge.[91] An objection that the court referred to a copy of an instrument as a "purported" copy is frivolous.[92] Refusal of requests not argued on appeal will be regarded as waived.[93] In the absence of a request to withdraw an issue, a party cannot complain of instructions submitting such issue.[94]

Record on appeal.—The case settled should state that the judge charged as

79. Jessen v. Donahue [Neb.] 96 N. W. 639.

80. Marande v. Tex. & P. R. Co. [C. C. A.] 124 Fed. 42.

81. Joplin Waterworks Co. v. Joplin [Mo.] 76 S. W. 960.

82. Benton v. Hunter [Ga.] 46 S. E. 414.

83. Appeal and Review; Harmless Error; Saving Questions, etc.

84. Finkbinder v. Ernst [Mich.] 97 N. W. 684; Hayden v. Fair Haven & W. R. Co. [Conn.] 56 Atl. 613; American B. & T. Co. v. Baltimore & O. S. W. R. Co. [C. C. A.] 124 Fed. 866; Chicago & N. W. R. Co. v. De Clow [C. C. A.] 124 Fed. 142; Oliver v. Columbia, N. & L. R. Co., 65 S. C. 1; Parkins v. Mo. Pac. R. Co. [Neb.] 93 N. W. 197. Exceptions to rulings on prayers offered at the close of plaintiff's testimony are waived by his proceeding with his testimony. Medairy v. McAllister [Md.] 55 Atl. 461. A party admitting a fact to be true by his answer and failing to specifically call attention of the court to the impropriety of allowing the jury to consider the fact may not raise that question on appeal. Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972.

85. Joines v. Johnson, 133 N. C. 487; Vonderhorst Brew. Co. v. Amrhine [Md.] 56 Atl. 323; Fitzpatrick v. Union Traction Co., 206 Pa. 335; Carter v. Kaufman [S. C.] 45 S. E. 1017; Libby v. Deake, 97 Me. 377; Copeland v. Metropolitan St. R. Co., 78 App. Div. [N. Y.] 418; McDonald v. Metropolitan St. R. Co., 75 App. Div. [N. Y.] 559; Hedlun v. Holy Terror Min. Co. [S. D.] 92 N. W. 31; Gallman v. Union Hardwood Mfg. Co., 65 S. C. 192. Must point out the particulars in which a modification of a request was erroneous. Thompson v. Family Protective Union [S. C.] 45 S. E. 19. The refusal cannot be regarded as error unless the appellant points out the testimony to which it is applicable. Davis v. Shepherd [Colo.] 72 Pac. 57. Matters of form should be taken advantage of by a specific objection or a requested instruction correcting the error. A general objection is insufficient. St. Louis, I. M. & S. R. Co. v. Norton [Ark.] 73 S. W. 1095.

86. Southern Pac. Co. v. Arnett [C. C. A.] 126 Fed. 75.

87. Anderson v. Harper, 30 Wash. 378, 70 Pac. 965.

88. Code, § 995. Broadway Trust Co. v. Fry, 40 Misc. [N. Y.] 680.

89. McCoy v. Jordan [Mass.] 69 N. E. 358.

90. Glaser v. Glaser [Okl.] 74 Pac. 944; D'Arcy v. Mooshkin 182 Mass. 382. A joint exception to refusal of numerous instructions is not available if any one of the instructions was correctly refused. Rastetter v. Reynolds, 160 Ind. 133. General exceptions to the charge of the court allowed by the Ohio Code do not bring up omission or failure to give further proper instructions. They cover only errors in the charge as given [Rev. St. Ohio, § 5298]. Columbus R. Co. v. Ritter, 67 Ohio St. 53. Objection that entire charge was argumentative not sustained where entire charge not open to that objection. Guertin v. Hudson, 71 N. H. 505.

91. Conn. M. L. Ins. Co. v. Hillmon, 188 U. S. 208, 47 Law. Ed. 446.

92. Thayer County Bank v. Huddleson [Neb.] 95 N. W. 471.

93. Henderson v. Raymond Syndicate, 183 Mass. 443.

94. Galveston, H. & S. A. R. Co. v. Pendleton, 30 Tex. Civ. App. 431.

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recited in the exceptions.[95] Under laws making instructions part of the record when numbered and signed by the judge and so marked as to show which were given, refused or modified, the instructions not objected to will be considered on appeal without being embodied in the bill of exceptions.[96]

Assignment of errors and argument.—An assignment of error is sufficient which recites in substance that the court erred in giving certain instructions designated by number, including the one considered, because each of such instructions was either erroneous in law or not supported by the issues and the evidence.[97] A refusal to charge will not be reviewed unless the brief states or refers to the evidence presenting the issue referred to therein.[98]

Invited error.—One may not complain of error in instructions given at his request,[99] nor for error in instructions where his tendered instruction contained a similar error,[1] nor may he complain of an instruction expressly recognized by him as correct when given.[2]

Harmless error.—The error to work reversal must be prejudicial.[3] Under the rule, one may not complain of an error favorable to him.[4] There will be no reversal for giving requested instructions, where the instructions given for the other party neutralized the error if any.[5] Where the error is cured by another instruction, it will not be regarded as harmless, when the matter was prominently called to the court's attention in time and he refused to correct the erroneous instruction.[6] A failure to submit instructions when requested is prejudicial, unless it is shown that the failure was harmless.[7] Whenever a correct instruction is refused,

95. Hart v Cannon, 133 N. C. 10.

96. Rev. St. 1899, § 3644, par. 7. Stoner v. Mau [Wyo.] 73 Pac. 548.

97. Denver & R. G. R. Co. v. Young, 30 Colo. 349, 70 Pac. 688.

98. Davidson v. Jefferson [Tex. Civ. App.] 76 S. W. 765.

99. Chicago, B. & Q. R. Co. v. Johnston [Neb.] 95 N. W. 614; McCrary v. Mo., K. & T. R. Co., 99 Mo. App. 518; Ward v. Bass [Ind. T.] 69 S. W. 879; Stoner v. Mau [Wyo.] 73 Pac 548; Padelford v. Eagle Grove, 117 Iowa, 616; Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co., 30 Colo. 431, 71 Pac. 389. One may not complain that binding instructions should have been given where the question was submitted in accordance with the party's request. Jordan v. Philadelphia, 125 Fed. 825.

1. Frank v. St. Louis Transit Co., 99 Mo. App. 323; Collier v. Gavin [Neb.] 95 N. W. 842; West Chicago St. R. Co. v. Buckley, 200 Ill. 260; Septowsky v. St. Louis Transit Co. [Mo. App.] 76 S. W. 693; Springfield Consol. R. Co. v. Puntenney, 200 Ill. 9; England v. Fawbush, 204 Ill. 384; Sibley W. & S. Co. v. Durand, 200 Ill. 354; West Chicago St. R. Co. v. Buckley, 200 Ill. 260; Union League Club v. Blymyer Ice Mach. Co., 204 Ill. 117; Harden v. Hodges [Tex. Civ. App.] 76 S. W. 217; Ill. Cent. R. Co. v. Byrne, 205 Ill. 9.

2. Wiley v. Lindley [Tex. Civ. App.] 76 S. W. 208.

3. Copeland v. Hewett [Me.] 53 Atl. 36; Richmond P. & P. Co. v. Allen [Va.] 43 S. E. 356; Reynolds v. Clowdus [Ind. T.] 76 S. W. 277. Error in charging principal with after acquired knowledge of attorney cured by finding that fact of which knowledge was charged was acquired by party while acting as attorney. Cabell v. McKinney [Ind. App.] 68 N. E. 601 The giving of an erroneous instruction is not error where it is apparent that the instruction was not considered by the jury in arriving at their verdict. Leidigh v. Keever [Neb.] 97 N. W. 801. Erroneous instruction authorized exemplary damages but none were given. Sonnen v. St. Louis Transit Co. [Mo. App.] 76 S. W. 691. Instruction placing burden of proof on the wrong party. Omaha St. R. Co. v. Boeson [Neb.] 94 N. W. 619.

4. Lindell v. Deere-Wells Co. [Neb.] 92 N. W. 164. One may not complain of an instruction adopting his interpretation of an instrument. Perpetual B. & L. Ass'n v. U. S. F. & G. Co., 118 Iowa, 729. Where the instructions given on request are more favorable than the party was entitled to he may not claim that an instruction correctly stating the law was inconsistent with those given. Denver Consol. Elec. Co. v. Lawrence [Colo.] 73 Pac. 39. Where plaintiff recovers damages he may not complain of an erroneous charge touching his right to recover. Peterson v. Wadley & Mt. V. R. Co., 117 Ga. 390. Where all defensive issues are submitted a defendant cannot complain of a charge excluding issues as to negligence relied on by plaintiff. Boettler v. Tumlinson [Tex. Civ. App.] 77 S. W. 824. Where the court referred to certain issues as "some of the most important allegations on the part of the plaintiff" and as "some of the most important points at issue" special injury must be shown by party complaining as remarks operated against both parties. Von Tobel v. Stetson & P. Mill Co. [Wash.] 73 Pac. 788.

5. Heagy v. Irondale Lead Co. [Mo. App.] 73 S. W. 1006.

6. Kelly v. United Traction Co., 88 App. Div. [N. Y.] 234.

7. Arnold v. State [Ark.] 74 S. W. 513.

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the judgment will be reversed unless the appellate court can see from the record that even under the instruction a different verdict could not have been rightly found.[8]

Construction of charge as a whole.—The instructions are to be construed as a whole,[9] and not by excerpts isolated from their context.[10] Mere insufficiency of an instruction, correct as far as it goes, may be cured by other instructions,[11] and so with instructions objectionable for generality.[12]

INSURANCE.

DONALD J. KISER.

§ 1. **Regulation and Governmental Control (480).**—Taxation (480).

§ 2. **Insurance Companies.**—A. In General (481); Definitions; Creation and Conditions of Doing Business; Ultra Vires; Management; Investments and Loans; Dividends; Actions; Insolvency. B. Foreign Companies (483); Licenses; Effect of Non-compliance with Statute; Service of Process.

§ 3. **Agents (484).**—Licenses; Penalties; Contracts of Agency; Contracts to Procure Insurance; Agency for Insurer or Insured; Powers; Ratification; Liability for Agent's Negligence; Personal Liability; Bonds and Undertakings.

§ 4. **Formation and Validity of Contract (488).**—Contents of Policy; Inception of Risk; Open Policies; Termination of Risk.

§ 5. **Insurable Interests (490).**—Property; Human Life; Assignees of Life Policy.

§ 6. **The Premium.**—Necessity of Payment (491); Amount (491); Assessments in Mutual Companies (491); What is Payment; Right to Forfeit for Non-payment (493); Waiver of Forfeiture (494); Application of Net Value or Reserve to Prevent Forfeiture (496); Recovery Back of Premiums (498).

§ 7. **Interpretation and Effect of Contract (500).**—Nature of Insurance; General Rules; Conflict of Laws; Standard Policies; Extrinsic Writings; Severability.

§ 8. **Modification and Rescission (502).**

8. Ward v. Brown, 53 W. Va. 227.

9. Pledger v. Chicago, B. & Q. R. Co. [Neb.] 95 N. W. 1057; Miller v. Newport News [Va.] 44 S. E. 712; Williams v. Shepherdson [Neb.] 95 N. W. 827; Faust v. Hosford, 119 Iowa, 97. Failure of specific instruction as to burden of proof is cured where instructions as whole sufficiently placed burden. American Cotton Co. v. Collier, 30 Tex. Civ. App. 105; South Omaha v. Meyers [Neb.] 92 N. W. 743; Wampler v. House, 30 Ind. App. 513; Baker v. Baker, 202 Ill. 595; England v. Fawbush, 204 Ill. 384; Gagnier v. Fargo [N. D.] 96 N. W. 841; Davis v. Shepherd [Colo.] 72 Pac. 57; South Omaha v. Burke [Neb.] 94 N. W. 528; Eggett v. Allen. [Wis.] 96 N. W. 803; Fitzpatrick v. Union Traction Co., 206 Pa. 335; Jerowitz v. Kan. City [Mo. App.] 77 S. W. 1088; International & G. N. R. Co. v. Anchonda [Tex. Civ. App.] 75 S. W. 557. The error in an instruction taking from the jury the question of employe's assumed risk with reference to known conditions cured by instruction that if plaintiff knew of the conditions and remained in defendant's service he could not recover. Houston Elec. Co. v. Robinson [Tex. Civ. App.] 76 S. W. 209. Use of word forgery to describe an alteration not criminal will not work reversal where charge as a whole shows no prejudice from use of word. Swindells v. Dupont, 88 Minn. 9. Error in refusing to charge that the jury were not bound by the evidence of experts as to charges for services is harmless where the court instructs the jury that they should find such sum as considering all the circumstances was the reasonable value of the services. Brownrigg v. Massengale, 97 Mo. App. 190.

10. Miller v. Newport News [Va.] 44 S. E. 712; Redhing v. Cent. R. Co., 68 N. J. Law, 641; Denver v. Porter [C. C. A.] 126 Fed. 288; Karl v. Juniata County, 206 Pa. 633; Choctaw, O. & G. R. Co. v. Tenn., 191 U. S. 326; Southern I. R. Co. v. Harrell [Ind. App.] 66 N. E. 1016; Clear Creek Stone Co. v. Dearmin, 160 Ind. 162; Morgan v. Mammoth Min. Co. [Utah] 72 Pac. 688; Linton v. Smith [Ind. App.] 68 N. E. 617.

11. Louisville, H. & St. L. R. Co. v. Chandler's Adm'r, 24 Ky. L. R. 2035, 72 S. W. 805; Linton v. Smith [Ind. App.] 68 N. E. 617; Sun Life Assur. Co. v. Bailey [Va.] 44 S. E. 692; Louisville R. Co. v. Meglemery [Ky.] 78 S. W. 217; International & G. N. R. Co. v. Mills [Tex. Civ. App.] 78 S. W. 11; Aspy v. Botkins, 160 Ind. 170; Ill. Cent. R. Co. v. Hopkins, 200 Ill. 122; Fairall v. Cameron, 97 Mo. App. 1; Burton v. American G. F. M. F. Ins. Co., 96 Mo. App. 204; Fruit Dispatch Co. v. Murray [Minn.] 96 N. W. 83; Mathew v. Wabash R. Co. [Mo. App.] 78 S. W. 271; Chicago City R. Co. v. Mead [Ill.] 69 N. E. 19; Sanitary Dairy Co. v. St. Louis Transit Co., 98 Mo. App. 20; Galveston, H. & S. A. R. Co. v. Appel [Tex. Civ. App.] 77 S. W. 635. Failure to instruct on assumed risk in one instruction is cured where the court expressly refers the jury to that phase in instructions thereafter to be given. Galveston, H. & S. A. R. Co. v. Walker [Tex. Civ. App.] 76 S. W. 228. The use of the word "slowly" to describe the speed of car causing injury to one alighting therefrom is not erroneous where other instructions fully and correctly submitted the issue of contributory negligence. Dawson v. St. Louis Transit Co. [Mo. App.] 76 S. W. 689. Omissions in plaintiff's instructions may be supplied by those given for defendant. Squiers v. Kan. City [Mo. App.] 75 S. W. 194. Failure to caution against vindictive damages is cured where the jury are instructed to allow such damages as "under all the evidence would be a just compensation for the injury." Whiting v. Carpenter [Neb.] 93 N. W. 926.

12. Johnson v. St. Louis & S. R. Co., 173 Mo. 307; Twelkemeyer v. St. Louis Transit Co. [Mo. App.] 76 S. W. 682. Vagueness as to negligence authorizing a recovery is cured by other explicit instructions. Buckman v. Mo., K. & T. R. Co. [Mo. App.] 73 S. W. 270.

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§ 9. **Cancellation (502).**—Right; Notice; Return of Premium.

§ 10. **Assignments and Transfers (503).**—Gifts; Sufficiency and Validity; Operation and Effect; Assignments by Beneficiary.

§ 11. **Reinsurance (505).**

§ 12. **Avoidance of Policy by Misrepresentations, Breach of Warranty, or Condition.**—A. Definitions, Distinctions and Effect, Warranties (506); Statutory Provisions (506); Representations (507); Incontestable Clauses (507); Rights of Mortgagee (508).—B. Operation of Particular Representations; Warranties and Conditions, Other Insurance (508); Location of Risk (508); Ownership and Title (508); Change of Title (509); Legal Proceedings (510); Iron Safe Clauses (510); Increase of Risk (510); Keeping of Explosives (511); Watchmen (511); Release of Claims for Negligence (511); Protection from Further Damage (511); Condition of Health (511); Attendance of Physicians (512); Miscellaneous Statements as to Life and Accident Insurance (512).—C. Waiver or Estoppel as to Misrepresentations; Breaches of Warranty or Conditions Subsequent—Conditions in Policy (512); False Statements by Agent (514); Examiner's Certificates (515); Delivery of Policy (515); Acceptance of Premiums (515); Delay (515); Admission of Liability (515); Proofs of Loss (516); Reliance on Other Defenses (516).

§ 13. **The Risk Assumed.—Loss and Causes of Loss (516).**—Life Insurance; Accident Insurance; Health; Fire; Plate Glass; Casualty; Boiler; Employers' and Contractors' Liability; Title.

§ 14. **Extent of Loss and Liability Therefor (520).**—Accident Insurance; Health; Fire; Employers' Liability; Effect of Concurrent Insurance.

§ 15. **Notice and Proof of Loss.**—A. Necessity and Sufficiency (521); Time of Notice; Form and Contents; Conclusiveness and Effect. B. Waiver and Estoppel to Claim (523); Denial of Liability; Acceptance and Retention; Proceedings for Settlement; Stipulations Avoiding Labor.

§ 16. **Adjustment of Loss (525).**—Arbitration; Necessity of Arbitration; Contractual Provisions; Waiver; Procedure; Effect; Setting Aside.

§ 17. **Right to Proceeds (527).**—Employers' Liability Insurance; Particular Designations of Beneficiaries; Vested Rights; Change of Beneficiaries; Rights of Assignees; Persons Paying Premiums; Creditors; Trustee in Bankruptcy; Interpleader and Deposit in Court.

§ 18. **Settlements and Policy Loans (531).**

§ 19. **Payment and Discharge (531).**—Subrogation of Insurer; Releases; Other Actions by Insured.

§ 20. **Actions on Policies.**—A. Right of Action, Venue, Parties (532); Tender; Venue; Time of Action; Parties. B. Pleading (535); Averments of Performance; Waiver; Ownership and Interest; Negativing Defenses; Plea or Answer; General Issue; Replication; Departure; Variance. C. Evidence (539); Presumptions and Burden of Proof; Admissibility of Evidence; Sufficiency of Evidence. D. Questions for the Jury; Instructions; Findings (544). E. Judgment and Enforcement (546); Attorneys' Fees.

§ 1. *Regulation and governmental control.*[1]—Laws regulating insurance apply to partnerships or individuals as well as corporations.[2]

Laws preventing insurance companies from entering into agreements as to the amount of commissions allowed agents, or as to the manner of transacting fire insurance business, are constitutional.[3] Both foreign and local companies may be required to specify the exact amount which will be paid on the happening of any contingency insured against.[4] Valued policy laws are applicable to mutual insurance companies.[5]

Taxation.[6]—Where a tax is imposed on the gross receipts, unearned premium returned on cancellation of the policy are not to be included,[7] though the tax is to be based on all premiums and not merely on first year premiums.[8] A tax on gross receipts is not in lieu of taxes on real estate or other property taxable.[9] An attempt to make it so violates a constitutional inhibition against relinquishment of power to tax corporate property.[10] A provision for the payment of an earnings tax by foreign insurance companies in lieu of all other taxes does not repeal an act authorizing cities to collect license taxes on certain occu-

1. Application of local laws to foreign mutual benefit associations, see Fraternal and Mutual Benefit Associations. Licenses of agents, see post, § 3.

2. Insurance Act of 1895. State v. Beardsley, 88 Minn. 20.

3. Iowa Code, §§ 1754, 1755, does not deny equal protection of laws. Greenwich Ins. Co. v. Carroll, 125 Fed. 121.

4. Rev. St. 1899, § 7903. Goodson v. Nat. Masonic Acc. Ass'n, 91 Mo. App. 339.

5. Comp. St. 1899, c. 43, § 43, does not conflict with Laws 1891, c. 33. Farmers' M. Ins. Co. v. Cole [Neb.] 93 N. W. 730.

6. See article Taxes for questions arising under general statutes and not peculiar to Insurance.

7. Sess. Laws 1903, c. 73, § 58. State v. Fleming [Neb.] 97 N. W. 1063.

8. Tax Laws, § 187, as amended by Laws 1901, p. 297, c. 118. People v. Miller, 88 App. Div. [N. Y.] 218.

9. State v. Fleming [Neb.] 97 N. W. 1063.

10. Such portion of Civ. Code, § 681, held to be unconstitutional, but its invalidity not to affect the remainder of the section. N. W. M. L. Ins. Co. v. Lewis & Clarke County [Mont.] 72 Pac. 982.

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pations including insurance companies.[11] A foreign mutual life insurance company is subject to a general tax imposed on excess of premiums over ordinary expenses.[12]

Local taxes imposed on premiums within the state are not to be exacted where the applications are made, policies issued and premiums collected in the state of the corporation's domicile. But a voluntary payment of the tax cannot be recovered, though under protest and in fear of a heavy penalty imposed.[13]

An annual tax on the gross amount of premiums received in a calendar year imposed in return for the privilege of exercising a corporate franchise is to be regarded as a franchise and not a property tax, and a first tax payable under the statute is not for the entire preceding year.[14]

§ 2. *Insurance companies. A. In general. Definitions.*—The character of the contract and not its wording is controlling on whether it is a policy of insurance within the meaning of statutory regulations.[15] An employe's relief association maintained by a corporation is not an insurance company, nor does its operation cause the corporation to be regarded as transacting an insurance business.[16] Statutes in certain states define assessment insurance as that in which the benefit secured is in any manner or degree dependent on the collection of any assessment from any person holding a similar contract.[17]

Creation and conditions to doing business.—Payments for insurance to a specified extent may be exacted as a condition to incorporation.[18] Promoters of a mutual company cannot bind the subsequent corporation.[19]

By statute, the filing of a copy of the by-laws of a co-operative insurance company with the clerk of a county in which it purposes doing business may be required.[20]

11. Act March 20, 1895, does not repeal the La Mar City Charter, Act April 11, 1895, § 84. La Mar v. Adams, 90 Mo. App. 35.

12. Civ. Code, § 681, held to be uniform in its operation, not in conflict with interstate commerce and not repealed by Act March 4, 1897, imposing a general license as a condition to doing business. N. W. M. L. Ins. Co. v. Lewis & Clarke County [Mont.] 72 Pac. 982.

13. Laws 1903, p. 1199, c. 530. Boston M. M. F. Ins. Co. v. Hendricks, 41 Misc. [N. Y.] 479.

14. Laws 1896, p. 859, c. 908, as amended by Laws 1901, p. 297, c. 118, § 1, taking effect Oct. 1, 1901, and requiring a tax payable annually not later than June 1st based on a report not later than the preceding March 1st, and stating the premiums received on business during the year ending with the preceding Dec. 31st, is not a retroactive tax in the sense that a tax required on June 1, 1902, is a tax on business done before it took effect. People v. Miller, 88 App. Div. [N. Y.] 218.

15. A contract to furnish funds for the construction of a house, such funds to be re-paid by monthly installments which are to cease on the death or total disability of the borrower, is a contract of insurance within a definition that such a contract is an agreement to do some act of value to insured on the destruction or injury of something in which the insured has an interest [Insurance Act 1895 (Gen. Laws 1895, c. 175, § 3)]. State v. Beardsley, 88 Minn. 20.

See articles Fraternal and Mutual Benefit Associations; Marine Insurance.

16. State v. Pittsburgh, C., C. & St. L. R. Co., 68 Ohio State, 9.

17. Rev. St. 1899, § 7901. Policy held to constitute assessment insurance where it provided that from a level premium a certain sum should be set aside for an emergency fund from which mortalities in excess of the American Tables should be paid, and if they were in deficiency the policy should be liable therefor and deemed assessed on the determination thereof. Williams v. St. Louis L. Ins. Co., 97 Mo. App. 449.

18. Where it is required that a certain amount must have been paid a mutual insurance company for insurance before incorporation may be allowed, such requirement cannot be satisfied by the deposit of a note and mortgage for the amount with the state treasurer, the statutory provision being that the receipts shall have been invested in securities and deposited with the state treasurer in trust for the contract holders for the corporation [Act March 19, 1891 (St. 1891, p. 126, c. 116)]. Stevens v. Reeves, 138 Cal. 678, 72 Pac. 346.

19. Promoters of mutual companies though authorized and required to take applications for a certain amount of insurance before the company can be organized, have no power to bind the company before it is authorized to do business hence a policy signed by president and secretary of a corporation and delivered to an applicant for membership before the corporation came into existence, is not enforceable. Montgomery v. Whitbeck [N. D.] 96 N. W. 327.

20. Patrons of I. F. Ins. Co. v. Plum, 84 App. Div. [N. Y.] 96. A duly certified copy of

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A change of the corporate name of a mutual insurance company by statute has no legal effect, except such change.[21]

Officers of a mutual insurance company have no right to establish their own compensation unless authorized by the charter.[22]

Ultra vires.—Applicants for membership and members of mutual companies must take notice of the enabling statutes.[23] The policies of a mutual company are avoided by failure to observe the statutory requirements, and assessments cannot be made for losses thereunder.[24] Where the contract of an insurer is prohibited by statute, one contracting with the company is not estopped to assert its invalidity.[25] Any member may assert the ultra vires character of the business of a mutual insurance company, where all the policy holders are on the same footing, and none with equities superior to his associates growing out of the business done in defiance of the statutory requirements.[26]

In New Jersey, insurance companies cannot subscribe for new stock of other corporations.[27]

Management.—A plan by which the management of an insurance corporation is to be perpetually transferred to a trust company is ultra vires,[28] and injurious to minority stockholders.[29] Directors who are to be personally benefited by the scheme cannot finally adopt it,[30] the burden being on them to show that the scheme is advantageous,[31] and it may be enjoined, though not actually yet put in operation.[32]

Investments and loans.—The fact that a general incorporation act allows any corporation to purchase the stock, or evidences of debt of other corporations, does not repeal limitations on the power of insurance companies as to investments created by their charters and laws relating specifically to insurance companies.[33] The fact that by purchase of stock of another corporation an insurance company buys the controlling interest therein does not make the purchase unlawful if in good faith and as an investment.[34] A limitation of investments to stock in companies which have regularly paid dividends for five years preceding the time of purchase does not require stock issues to have been outstanding five years at the time of purchase.[35]

a certificate and statement filed in the office of the secretary of state required as a condition for the doing of business in a county by a mutual insurance company is not furnished by a statement certified merely by the notary public [Laws 1892, p. 2036, c. 690, § 278]. Id.

21. S. C. M. Ins. Co. v. Price, 67 S. C. 207.

22. Quintance v. Farmers' Mut. Aid Ass'n [Ky.] 77 S. W. 1121.

23. Such statutes, the articles of incorporation, by-laws, application for insurance and the policy, are parts of the contract. Montgomery v. Whitbeck [N. D.] 96 N. W. 327.

24. Failure to comply with statutes requiring the full mutual premium in cash or notes absolutely payable to be charged and collected, that the company in its by-laws should fix the contingent mutual liability of its members for the payment of losses and expenses not provided for by its cash funds and that such contingent liability of each member should not be less in amount and should be in addition to the cash premium written into the policy and that total liability of a policy holder should be legibly stated on the back of each policy. Montgomery v. Whitbeck [N. D.] 96 N. W. 327.

25. Contract by mutual fire insurance company which has not complied with conditions precedent to doing business in a particular county. Anibal v. Ins. Co. of N. A., 84 App. Div. [N. Y.] 634.

26. There is no estoppel. Montgomery v. Whitbeck [N. D.] 96 N. W. 327.

27, 28, 29, 30, 31. Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673, construing Laws 1896, p. 129; Laws 1902, p. 415.

32. Action by dissenting stockholders. Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673.

33. New Jersey Corp. Act, § 51. The Prudential Insurance Company is within the operation of Laws 1896, p. 129; Laws 1902, p. 415, prescribing the investments which insurance companies organized under special charters may make. Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673.

34. Facts held not to show good faith in the acquisition of a majority of stock of a trust company which was to effectuate a scheme of corporate control. Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673.

35. Laws 1896, p. 129; Laws 1902, p. 415. Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673.

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Directors are personally liable for a loan unauthorized by statute, though made on advice of counsel,[36] and a receiver on insolvency may bring an action in tort against any part or all of the directors therefor,[37] without tender of the security if worthless.[38]

Dividends declared from surplus earnings cannot be restricted to policies kept in force by payment of an ensuing premium.[39] Statutes providing that mutual life insurance companies or those in which the members are entitled to share in surplus funds may make distribution of accumulated surplus at certain designated periods do not apply to insurance companies operating on the tontine savings fund plan.[40]

Actions.—Statutory provisions as to the venue of actions against insurance companies are not restricted to actions for loss.[41]

Insolvency and dissolution.—Directors cannot escape personal liability where they have misrepresented the character of the corporation.[42] Assessments paid before insolvency cannot be offset against an assessment by a receiver under order of court.[43] An accounting by the receiver of a fire insurance company is governed by a statute enacted pending the receivership.[44]

(§ 2) *B. Foreign companies.*—In Illinois, a foreign insurance company doing business by comity under a general statute need not comply with provisions as to the establishment of a surplus or guaranty fund applicable to local corporations.[45]

Licenses.—A license fee, payable annually in a certain month and also made a condition precedent to doing business, may be paid and license issued at any time during the year.[46]

Effect of noncompliance with statutes.[47]—A foreign insurance company which has not complied with the statutory provisions precedent to the transaction of business may recover from agents premiums which they have collected in the state and converted.[48] Where it is provided that foreign insurance companies

36, 37. Loan on unseaworthy vessel and second mortgages on realty. New Haven Trust Co. v. Doherty, 75 Conn. 555.

38. The court will not divide the loan and treat the security taken as security for a part thereof in determining the damages recoverable (New Haven Trust Co. v. Doherty, 75 Conn. 555) and the value of the security at the time of the loan need not be shown where the receiver proves a total loss (Id.)

39. Mut. Ben. L. Ins. Co. v. Davis, 24 Ky. L. R. 2291, 73 S. W. 1020.

40. Romer v. Equitable L. Assur. Co., 102 Ill. App. 621.

41. Under Code, § 3499, an indivisible contract involving the taking out of a policy of insurance on plaintiff's life and sale thereof by the defendant company on the one hand and the payment to the defendant company of certain shares of stock on the other may be sued on in the county where the contract was made. Cameron v. Mut. L. & T. Co. [Iowa] 96 N. W. 961.

42. Where the directors in charge of an insurance company represent that their subscriptions are in the nature of paid up capital stock or security stock and that they are doing business as a stock company and not on a mutual plan, they cannot avert their liability to persons relying on such misrepresentations by the fact that the subscriptions were taken under a provision for the incorporation of a mutual company. Dwinnell v. Minneapolis F. & M. M. Ins. Co. [Minn.] 97 N. W. 110.

43. The policy holder cannot set-off an amount which he paid under a former assessment by the officers of the company, nor can he show a settlement unless he establishes the authority of the person with whom the settlement was made or question the necessity for the assessment, as by showing that it included extravagant expenditures and debts not properly chargeable to his policy. Snader v. Bomberger, 21 Pa. Super. Ct. 629.

44. May pay previously appointed counsel without order of court subject to approval on final settlement [Laws 1902, c. 60]. People v. Manhattan F. Ins. Co., 77 App. Div. [N. Y.] 517.

45. Need not comply with Laws 1883, p. 107, § 8. Wheeler v. Mut. R. F. Life Ass'n, 102 Ill. App. 48.

46. Code 1886, §§ 1199, 1204. Ga. H. Ins. Co. v. Boykin, 137 Ala. 350.

47. Laws Mo. 1887, p. 199 must be complied with before a foreign assessment company is relieved from Rev. St. Mo. 1879, § 5982, prohibiting a defense of suicide. Knights Templars' & M. L. I. Co. v. Jarman, 187 U. S. 197.

48. Code 1889, §§ 1199, 1204. Ga. H. Ins. Co. v. Boykin, 137 Ala. 350.

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must do business through resident agents, a contract made by a nonresident agent cannot be enforced.[49]

Agents for service of process.—An insurance company merely making investments within the state need not appoint an agent for service of process.[50]

Statutes providing that an insurance commissioner shall not be a director, officer or agent or directly or indirectly interested in any insurance company except the insured prevent a person holding such office from being the agent of a foreign insurance corporation for the receipt of service of process.[51]

Where no stipulation as to service of process is filed before transacting business, service may be on the insurance commissioner.[52]

Under a provision for service on the person soliciting insurance, such service is sufficient, though the person is no longer in the employ of the company.[53] One receiving payment of a premium for the convenience of insured is not an agent.[54] If the statute provides for service on the insurance commissioner, it cannot be made on the deputy at the commissioner's office.[55]

If the agent appointed absents himself from the state, the insurance commissioner may appoint a successor to him, and such power continues as long as there is any necessity of suits for breach of contract made within the state.[56]

Cancellation of the appointment of an agent designated as appointed for service of process and revocation of the authority of all agents will not withdraw a foreign corporation from the jurisdiction of a state as to suit by the holders of its policies;[57] but an appointment may be revoked as to one who has not parted with value on the strength thereof.[58]

§ 3. *Agents. Licenses.*[59]—An agent of a foreign insurance company who has already violated the insurance laws by soliciting insurance without license and offering to rebate premiums may be refused a license at the discretion of the superintendent of insurance.[60] A foreign corporation, issuing so called certificates

49. St. 1894, c. 522, § 3, §§ 77, 78, 84. Baldwin v. Conn. M. L. Ins. Co., 182 Mass. 289.

50. Not a taking of risks or transacting of the business of insurance within the meaning of Comp. St. 1891, c. 48, § 23. O'Connor v. Aetna L. Ins. Co. [Neb.] 92 N. W. 137.

51. Act Del. March 24, 1879, § 1 as amended March 17th, 1881, 16 Del. Laws, 354. Equitable L. Assur. Soc. v. Fowler, 125 Fed. 88.

52. Unless it is averred that the stipulation has been filed, it will be inferred that it has not been. Action against a foreign insurance company on a judgment rendered against it in a foreign state. Old Wayne M. Life Ass'n v. Flynn [Ind. App.] 66 N. E. 57. Return of service held sufficient under Act April 3, 1902 (P. L. p. 407, c. 134) to show leaving of copy in office of Commissioner of Banking and Insurance. U. S. v. Griefen [N. J. Law] 56 Atl. 120.

53. Code, c. 65, §§ 2323, 2327. Pervangher v. Union C. & S. Co., 81 Miss. 32.

54. Where accident insurance is negotiated by a foreign company by correspondence, if the negotiation is regarded as doing of business within the state, the fact that the policies are held in the state and renewal premiums on one of them collected for the accommodation of a policy holder through a local bank does not constitute a continuation of the business, rendering the company subject to jurisdiction of the state courts and in such case, the officer of the local bank is not an agent of the company for service of process, especially where the holder of the policy induces the company to send the collection within the state in order to make the bank officer an agent [Rev. St. Wis. 1898, §§ 2637, 1977]. Frawley v. Pa. Casualty Co., 124 Fed. 259.

55. Old Wayne M. Life Ass'n v. Flynn [Ind. App.] 66 N. E. 57.

56. Equity Life Ass'n v. Gammon [Ga.] 46 S. E. 100.

57. Sanders' & Hill's Dig. Ark. § 4137. Collier v. Mut. R. F. Life Ass'n, 119 Fed. 617. A stipulation that legal process may be served on the state insurance commissioner is irrevocable as to liabilities contracted on policies made while it is in force. Magoffin v. Mut. R. F. Life Ass'n, 87 Minn. 260. Where a power of attorney to accept service in favor of the secretary of state provides that he may do so though the company shall have retired from the state, a company withdrawing before the statute making such provision is repealed, may be served by process on the secretary of state. D'Arcy v. Mut. L. Ins. Co., 108 Tenn. 567.

58. Woodward v. Mut. R. L. Ins. Co., 84 App. Div. [N. Y.] 324. Under Act N. C. March 6, 1899, providing that the power to receive service shall continue as long as a liability of the company remains outstanding in the state, a policy holder becoming such before the passage of the act mentioned cannot enforce a judgment obtained by him on service after revocation of the appointment. Id.

59. See Licenses for occupation taxes generally.

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of membership amounting to life insurance contracts without initiation of the insured, is not a fraternal association outside the operation of a statute requiring licenses of agents for foreign insurance companies.[61]

Under a power to impose a tax on insurance companies to a certain amount, a city has no power to impose an additional tax on agents representing companies which have already paid the full amount.[62]

Penalties.—State laws prescribing penalties upon agents acting for foreign insurance companies which have not complied with the laws of the state are not unconstitutional and in violation of the commerce clause of the Federal constitution or the 14th amendment.[63] Where an agent is acting without authority in soliciting insurance and also in negotiating it by delivering the contract shortly afterward, the two transactions being related, the state is not bound to elect as to which offense it will proceed on.[64]

Contracts of employment and commissions.[65]—If an agency is for a fixed term, the insurance company becomes liable for damages if by a transfer of its business to another company it terminates the employment.[66] A local agent has a cause of action for breach of an agreement that in case the company should retire from business, the agent might either reinsure the business or cancel the policies at pro rata rates.[67]

Under a contract to allow commissions during the continuance of the agency, the agent cannot, after resignation, recover premiums on insurance previously written.[68] A subagent claiming a share in the commissions of a co-subagent is not affected by rules of the company of which he has no knowledge;[69] but where two subagents have the same territory, one cannot recover against the general agent for commissions paid the other subagent without knowledge of plaintiff's claims.[70] Though an agent cannot act for a foreign company which has not complied with conditions precedent to doing business, failure of the agent to allege compliance by the company does not render his petition in a suit for services demurrable.[71] On failure of defendant to produce policies after notice, it is proper for an agent of plaintiff, suing to recover premiums advanced, to state their contents.[72]

Contracts to procure insurance.[73]—On breach of a contract to insure, the

60. Rev. St. § 3631-7 authorizes the superintendent to revoke licenses of agents. Vorys v. State, 67 Ohio St. 15.

61. Ky. St. §§ 641, 664, 633. Sims v. Com., 24 Ky. L. R. 1591, 71 S. W. 929.

62. Rev. St. 1899, § 8048. Kan. City v. Oppenheimer [Mo. App.] 75 S. W. 174.

63. Adler-Weinberger S. S. Co. v. Rothschild, 123 Fed. 145.

64. State v. Beardsley, 88 Minn. 20.

65. A contract with an insolvent insurance company examined and held to constitute a loan and not a transfer of premium rights. Betts v. Conn. L. Ins. Co. [Conn.] 56 Atl. 617.

Complaint in an action for breach of contract appointing plaintiff as agent, held sufficient as against a motion to strike. Boyer v. U. S. H. & A. Ins. Co., 125 Fed. 623.

Evidence held sufficient to show termination of an agency. Andrews v. Travelers' Ins. Co., 24 Ky. L. R. 844, 70 S. W. 42.

66. Facts held to show an implied agreement that the agency should continue a specified term. Macgregor v. Union L. Ins. Co. [C. C. A.] 121 Fed. 493.

67. Appelman v. Broadway Ins. Co. [Colo. App.] 70 Pac. 451.

68. King v. Raleigh [Mo. App.] 70 S. W. 251.

69. Rule that where agents claim a division of commissions there should be a joint request for payment. Lane v. Raney, 131 N. C. 375.

70. The agent to whom payment was made had witnessed and forwarded the application for the policy. Lane v. Raney, 131 N. C. 375.

71. Insurance law (Laws 1892, p. 1954, c. 690, § 50). Crichton v. Columbia Ins. Co., 81 App. Div. [N. Y.] 514.

72. Hess-Mott Co. v. Brown, 34 N. Y. Supp. 168.

73. Where the hirer of property agrees to pay insurance, the duty devolves on the owner to effect the insurance for the premium for which the hirer then becomes liable. Detroit v. Grummond [C. C. A.] 121 Fed. 963. Contract construed and held not to authorize agents to renew insurance after insured had ceased business. Tanenbaum v. Eiseman, 83 App. Div. [N. Y.] 639. Under a contract to obtain a good policy of fire insurance in a very good company, a policy from a company able and willing to pay in case of loss must be procured and where the

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measure of damages is the value of the property destroyed up to the amount for which it is agreed that insurance should be procured.[74] A contract by which an insurance broker is to procure not less than a certain amount of insurance obligates the acceptance of such insurance without regard to whether it is needed.[75] The damages from breach of such a contract are sufficiently certain to be recoverable.[76] Where damages are sought to be recovered against defendants on account of failure to allow plaintiff to insure their buildings and stock, plaintiff is entitled to at least nominal damages on failure to insure the use and occupancy, but that does not include profits of business or salaries of salesmen.[77] A counterclaim cannot be interposed for the difference in the amount of rebates at the contract rate and on the lowest rate paid by the broker and named in the policy.[78]

Authority to procure insurance does not imply authority to surrender insurance and leave the principal uninsured.[79]

Existence and evidence of agency.—The agent cannot be such for both the insurer and the insured,[80] but the fact that an insurance agent is acting for the insurer and a mortgagee of the property does not avoid the policy as against insured.[81] The authority of an agent cannot be established by his own acts and declarations.[82] Newspaper advertisements are admissible.[83] Canvassers appointed by a general manager under his authority, and paid by him, are agents of the insurer.[84]

Agency for insurer or insured.[85]—The status of the agent as acting for insurer or insured is defined by statute in certain of the states.[86] Express contracts that the agent of the company shall be deemed the agent of the insured does not render a policy binding on the insured which differs from the application and which he has no opportunity to investigate.[87] The insurer is not bound by knowledge of the insured's agent.[88] A firm of insurance agents taking charge of the placing of insurance will not be regarded as special agents for the insured, where they place the insurance in companies represented by themselves and other companies, deducting their compensation for the latter services from the premiums paid by insured before turning the premiums over to the agents of the latter com-

contract is in New York to obtain insurance on Pennsylvania property, the policy must be enforceable in either state. Landusky v. Beirne, 80 App. Div. [N. Y.] 272.

74. Limitation of an action for such breach begins at the expiration of a reasonable time for the issuance of the policy and not at the time the fire occurred, notwithstanding the party to whom the policy should be issued did not know that the contract had been violated. Everett v. O'Leary [Minn.] 95 N. W. 901.

75. Tanenbaum v. Freundlich, 39 Misc. [N. Y.] 819.

76. Evidence of defendant's net yearly profits is not admissible though defendant agreed to take insurance to the market value of the use and occupancy of certain property. Tanenbaum v. Freundlich, 39 Misc. [N. Y.] 819.

77, 78. Tanenbaum v. Simon, 40 Misc. [N. Y.] 174.

79. Birnstein v. Stuyvesant Ins. Co., 39 Misc. [N. Y.] 808.

80, 81. Fiske v. Royal Exch. Assur. Co. [Mo. App.] 75 S. W. 382.

82. Baldwin v. Conn. M. L. Ins. Co., 182 Mass. 389.

83. Prosecution for failure to comply with Gen. Laws 1895, c. 175. State v. Beardsley, 88 Minn. 20.

84. Acts within their apparent authority are binding. Otte v. Hartford L. Ins. Co., 88 Minn. 423. One whom a district manager employs to solicit policies is regarded as an agent whose knowledge of falsity in applications is binding on the company. North American Acc. Ins. Co. v. Sickles, 23 Ohio Circ. R. 594.

85. See post, § 6, for authority to waive forfeiture for nonpayment of premiums; § 12 C for acts of agent preventing denial of liability on account of misrepresentations or breach of condition.

86. Under Comp. Laws, § 7346, a firm of insurance agents who being unable to carry all the insurance desired by the insured in the companies they represent, secure agents of other companies to write such additional insurance and then deliver the policies to insured, become agents for such other companies. Bliss v. Potomac F. Ins. Co. [Mich.] 95 N. W. 1083.

87. Robinson v. U. S. Ben. Ass'n [Mich.] 94 N. W. 211.

88. Not affected by knowledge of the respective rights as between a trustee and syndicate where a member of a syndicate takes insurance in the name of the trustee. Bradley v. German-American Ins. Co., 90 Mo. App. 369.

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pany.[89] During the negotiations for insurance, the agent of a mutual company is on the same basis as the agent of a stock company.[90]

Powers.—There is no presumption that insurance agents of foreign companies have greater powers than other agents.[91] Miscellaneous decisions as to extent of the agent's powers are grouped in the notes.[92]

Ratification.—After a contract has been made with an agent of the company, letters from the corporation's president, recognizing the agent's authority to act for the company, amount to a ratification of the contract.[93] A custom of agents to issue more than one policy to the same person for a single period is not sufficient to establish insurer's knowledge of such issuance and a ratification of the agent's acts.[94]

Liability for agent's negligence.—Where an accident policy authorizes an examination of insured with respect to the injury, the insurer is liable for any negligence or misconduct of its agent in making the examination, and though the insured consent to the examination in a particular manner, he does not thereby waive his claim for negligence.[95]

Personal liability.—Where a policy is not enforceable, the agent is responsible in damages, and the insurer need not be insolvent.[96] Independent of statute a conspiracy to defraud by procuring an insurance policy in a company unauthorized to do the business within the state renders the agent liable for actual and exemplary damages.[97]

Where personal liability on the contract is imposed on the agent negotiating insurance contracts for a foreign corporation which has not complied with state laws, an action to enforce such liability is not governed by a limitation as to the time of action contained in the policy.[98]

An insurance company which has been induced to issue a policy by fraud is not entitled to affirm the transaction by payment to the beneficiary and recover damages as against a wrongdoing agent.[99]

89. Rev. St. 1899, § 7997 provides that persons negotiating contracts of insurance or placing risks for persons other than themselves are to be deemed insurance brokers if not the appointed agents or officers of the insurer. Edwards v. Home Ins. Co. [Mo. App.] 73 S. W. 881.

90. The insured does not become a member of the company until the policy is issued. Fidelity M. F. Ins. Co. v. Lowe [Neb.] 93 N. W. 749.

91. Baldwin v. Conn. M. L. Ins. Co., 182 Mass. 389.

92. An agent with authority to issue policies may enter a written consent on the policy on sale of the insured property. Scottish U. & N. Ins. Co. v. Brown, 24 Ohio Circ. R. 52. A parol contract of insurance cannot be made without authority. Keystone M. & S. Bed Co. v. Pittsburg Underwriters, 21 Pa. Super. Ct. 38. The corporation may be liable for the act of an agent in rebating a premium though the act is not authorized or ratified by it. Accepting less than the full first premium on a life policy [Hurd's Rev. St. 1899, p. 978, §§ 1-3]. Franklin L. Ins. Co. v. People, 200 Ill. 594. An agent without authority to pass on applications or to issue policies is not entitled to agree to a rate lower than that stipulated in the policy. Employer's liability policy declaring that its provisions should not be waived or altered except by written consent of the general manager of the company for the United States. London G. & A. Co. v. Mo. & I. Coal Co. [Mo. App.] 78 S. W. 306. An insurance agent has authority to agree that a policy shall not be canceled until another of equal value is issued. Edwards v. Sun Ins. Co. [Mo. App.] 78 S. W. 886. A policy may, by oral agreement between the agents, be made inoperative until the risk is accepted by the company, though the policy restricts the right of agents to alter its terms and requires additional conditions to be in writing thereon. Hartford F. Ins. Co. v. Wilson, 187 U. S. 467.

93. Cameron v. Mut. L. & T. Co. [Iowa] 96 N. W. 961.

94. Wilkinson v. Travelers' Ins. Co. [Tex. Civ. App.] 72 S. W. 1016.

95. Insurer held liable for negligence of its agent in removing a plaster cast around a sprained foot. Tompkins v. Pac. M. L. Ins. Co., 53 W. Va. 479.

96. Contract in New York to obtain fire insurance on Pennsylvania property on which the company refused to pay on proof of loss. Landusky v. Beirne, 80 App. Div. [N. Y.] 272.

97. Without reference to Rev. St. arts. 3093, 3095, rendering the agent for an unauthorized fire insurance company personally liable for any loss. Price v. Garvin [Tex. Civ. App.] 69 S. W. 985.

98. Act May 1st, 1876 (P. L. 53, 66, § 48).

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Bonds and undertakings.—Liability on agent's bonds is governed by the rules applicable to other fidelity undertakings; in the notes are cases illustrating the construction of such bonds,[1] defenses,[2] and pleading in actions thereon.[3]

§ 4. *Formation and validity of contract.*—A life insurance contract may rest in parol.[4] An agreement not to cancel a policy before new insurance is procured is not an oral contract of insurance.[5] A policy of temporary insurance is not affected by the invalidity of a policy with which it is agreed it shall be replaced.[6]

The by-laws and constitution of a mutual company, requiring the personal signature of the applicant, will not invalidate insurance issued on application of the insured's brother, the insured submitting to medical examination and ratifying the brother's action.[7]

The remainder of the contract may be sustained, though tontine provisions are void.[8]

Receipt of policy without opportunity for examination is not binding on insured.[9]

Contents of policy.—The name of the insured and terms of insurance need not appear on the face of the contract, where indorsed on the back and duly signed.[10] The policy of a mutual company, though omitting notice of the time and place of holding of an annual meeting as required by statute, may be validated

Adler-Weinberger S. S. Co. v. Rothschild, 123 Fed. 145.

99. New York L. Ins. Co. v. Hord [Ky.] 78 S. W. 207.

1. A bond conditioned upon faithful performance of a duty as agent, is broken when he fails to pay a loss occasioned the company through his failure to cancel a policy as directed. Limitations run from such time. Northern Assur. Co. v. Borgelt [Neb.] 93 N. W. 226. Liability may exist on a bond for premiums collected by sub-agents in the agent's name, though the bond does not bind the agent to perform duties or collect premiums but rather that if he did those things, he would do them faithfully. Norwich U. F. Ins. Ass'n v. Buchalter [Mo. App.] 76 S. W. 484. A bond conditioned for the repayment of all advances made to the agent by the company or to special or sub-agents appointed by him, covers dealings with sub-agents appointed by him as district manager under a subsequent contract. Foster v. Franklin L. Ins. Co. [Tex. Civ. App.] 72 S. W. 91.

2. To avoid liability on his bond, an insurance agent cannot show that premiums arising from business connected with his agency were collected by agents resident in another state who were in fact transacting the business of the company in contravention of statute, and such statute does not invalidate a bond to a resident agent executed on the understanding that non-resident sub-agents should be employed. Norwich U. F. Ins. Ass'n v. Buchalter [Mo. App.] 76 S. W. 484. It is no defense to an action on the bond of a sub-agent, that the agent appointing him is also responsible for funds embezzled or that the agent was appointed a district manager where it is not shown that any of the losses were occasioned through his position as such a manager, and where the bond is not executed until after the appointment as district manager, the sureties cannot escape liability on the ground of altered circumstances where there is no showing that they were misled. Foster v. Franklin L. Ins. Co. [Tex. Civ. App.] 72 S. W. 91.

3. Petition in an action on a bond of an insurance agent, held not to constitute a variance from the evidence in that it alleged the contract was that of a general agent and not of the insurance company. Foster v. Franklin L. Ins. Co. [Tex. Civ. App.] 72 S. W. 91. Where in defense to an action against the agent's sureties to recover embezzled funds, it is alleged that the funds came into the hands of the agent in transactions not within the scope of the bond, the excepted funds must be specified or there must be an allegation that such specification is not in the power of defendants. Id.

4. Pacific Mut. Ins. Co. v. Shaffer, 30 Tex. Civ. App. 313.

5. Agent obtained the policy from a pledgee. Edwards v. Sun Ins. Co. [Mo. App.] 73 S. W. 886. Evidence held sufficient to establish a contract of insurance after dissolution of a partnership through retention of unearned premium, and an agreement by an agent to insure and also to show want of cancellation notice to insured. Baldwin v. Pa. Fire Ins. Co., 206 Pa. 248.

6. The fact that an insurer exceeds his authority in agreeing to issue at some future time and in a certain contingency, an endowment policy, does not render a valid binding policy in a form which the insurer has a right to issue, which is issued to be in effect pending delivery of the endowment policy, absolutely void. Calandra v. Life Ass'n, 84 N. Y. Supp. 498.

7. Thornburg v. Farmers' Life Ass'n [Iowa] 98 N. W. 105.

8. Wheeler v. Mut. Reserve Fund Life Ass'n, 102 Ill. App. 48.

9. Gwaltney v. Provident Sav. Life Assur. Soc., 132 N. C. 925.

10. Bushnell v. Farmers' Mut. Ins. Co., 91 Mo. App. 522.

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where the insured accepts it and does not show that he was in any manner affected by the absence of notice.[11]

Inception of risk.—The contract is complete on execution and delivery of the policy in accord with a written application.[12] A deposit of the policy in the post-office by the insurer, properly addressed to the applicant and postage prepaid, is a good delivery.[13] The application if accepted may constitute a contract of insurance until the issuance and acceptance of the certificate in its stead.[14]

On notification to insured that if he desires his policies again to be put in force, he shall send a check for the full amount by return mail, the reinsurance is effectual from the time the letter containing the check is posted.[15]

Acceptance of a risk is not to be implied from an unreasonable delay in acting on the application.[16]

Under statutory provisions that the membership of mutual fire insurance companies shall consist of every person insured who signs an application for insurance, the mere signature of an application is not sufficient.[17]

Open policies.—A floating policy of insurance, providing that it is not applicable to property covered by more specific insurance, does not apply to property so insured until by removal it loses the protection thereof.[18] An insurer against loss in the mails may exact notice of mailing of specific packages as a condition to liability.[19]

Termination of risk.—The liability of a mutual benefit fire company terminates on death of the member.[20]

An adjudication of bankruptcy of the insured does not release insurance on account of provisions as to proof of loss or impossibility of compliance therewith.[21]

Where insurance is to cease on fall of any part of the building, the fall must be of a material or substantial part thereof, but the distinctive character of the building need not be destroyed.[22] The falling of a substantial part of a building avoids insurance on the remaining portions thereof which are separately occupied and remain intact and capable of being used for business purposes, the pol-

11. Dwinnell v. Felt [Minn.] 95 N. W. 579.

12. Travelers' Ins. Co. v. Jones [Tex. Civ. App.] 73 S. W. 978. Where a policy is issued and delivered by insured to an agent of its own selection and by him delivered to an authorized agent of the insured who accepts it before the loss occurs, the contract is binding. Facts held to show completion of contract of insurance negotiated by the pastor of a church under circumstances rendering him the agent of the company. National Mut. Church Ins. Co. v. Trustees of M. E. Church, 105 Ill. App. 143.

13. Armstrong v. Mut. Life Ins. Co. [Iowa] 96 N. W. 954.

14. An application for accident insurance expressly provided that the contract should be complete when the application was received at the company's office and accepted. Robinson v. U. S. Ben. Soc. [Mich.] 94 N. W. 211. An instruction that if the secretary of a mutual insurance company accepted plaintiff's application and membership fee and told plaintiff that the policy of insurance would be executed and delivered to him, then a contract of insurance was entered into is erroneous as omitting the question of authority to pass on applications and issue policies. Gillespie Home Tp. Mut. Fire Ins. Co. v. Prather, 105 Ill. App. 123.

15. The fact that at the time the check was mailed, insured's bank account was overdrawn, is immaterial, if there were funds in the bank before the check could have been presented. Pa. Lumbermen's Mut. Fire Ins. Co. v. Meyer [C. C. A.] 126 Fed. 252.

16. Brink v. Merchants' & F. United Mut. Ins. Ass'n [S. D.] 95 N. W. 929.

17. Under Ky. St. § 702, the policy must have been delivered or the premium paid before loss. Blue Grass Ins. Co. v. Cobb, 24 Ky. L. R. 2132, 72 S. W. 1099.

18. Cotton stored in a warehouse. Macon Fire Ins. Co. v. Powell, 116 Ga. 703.

19. Deposit of a letter in the post office addressed to the insurers and describing the package insured as a requirement for the inception of liability by an insurer against loss in the mails is shown by deposit of the letter in a United States mail box at the railroad station. Evidence held sufficient to show the mailing of a notice of the shipment of a package of currency insured under an open policy before the occurrence of the theft. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 95 N. W. 232.

20. Cook v. Kentucky Growers' Ins. Co., 24 Ky. L. R. 1956, 72 S. W. 764.

21. Fuller v. New York Fire Ins. Co. [Mass.] 67 N. E. 879.

22. The fall of a cupola forming a third story of a two story building avoids a policy containing such provision. Home Mut. Ins. Co. v. Tomkies [Tex.] 71 S. W. 814.

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icies by which such portions are insured providing that all insurance shall immediately cease on fall of the building or any part thereof.[23]

§ 5. *Insurable interests. Property.*—Under the married women's acts a husband has no insurable interest in his wife's property.[24] In Texas, a second husband has an insurable interest in the property of his wife and her children by the first marriage which is occupied as a homestead.[25]

A mortgagee has an insurable interest to the extent of his debt and may recover the insurance on the property covered by his mortgage, regardless of any other security he may hold.[26] After foreclosure and expiration of the period of redemption, the mortgagor has no insurable interest.[27]

An equitable title, such as that of a beneficiary of a trust,[28] or of vendees in possession, confers an insurable interest.[29]

An equitable assignee or the appointee of the right to receive a portion of the proceeds need not have an insurable interest.[30]

Human life.—Insurable interest in human life is based on benefit or advantage in the continuance of the life of insured; illustrations will be found in the notes.[31]

Consent of the husband is not necessary to allow the wife to insure his life for her benefit or that of herself and children.[32]

The insurer cannot set up want of insurable interest in the beneficiary, where the insurance is effected by the insured and the premiums paid by him, though the policy provides that all claims shall be subject to proof of interest.[33]

Assignees of life policies issued in good faith may be without insurable interest,[34] though it has been held also that a life policy cannot be assigned for collateral to an assignee without an insurable interest,[35] and that an assignee for security takes only to the extent of the debt.[36]

Local laws applicable to companies organized in the state, avoiding poli-

23. Nelson v. Traders' Ins. Co., 86 App. Div. [N. Y.] 66.

24. Const. art. 9, § 7. Planters' Mut. Ins. Co. v. Loyd [Ark.] 75 S. W. 725.

25. Continental Fire Ass'n v. Wingfield [Tex. Civ. App.] 73 S. W. 847.

26. Kent v. Aetna Ins. Co., 84 App. Div. [N. Y.] 428.

27. Though the secretary of the mortgagee, a corporation, had expressed a willingness to still accept payment of the debt. Pope v. Glens Falls Ins. Co., 136 Ala. 670.

28. Gerringer v. North Carolina Home Ins. Co. [N. C.] 45 S. E. 773.

29. Brooks v. Erie Fire Ins. Co., 76 App. Div. [N. Y.] 275.

30. Baughman v. Camden Mfg. Co. [N. J. Eq.] 56 Atl. 376.

31. Insurable interest in human life: Daughter has in life of father. Farmers' & T. Bank v. Johnson, 118 Iowa, 282. A fiancee has in her affianced. Optiz v. Karel [Wis.] 95 N. W. 948. **Creditors** may have an insurable interest in the life of a manager of a corporation who is apparently the originating and directing personality in the enterprise. Merchants' Nat. Bank v. Comins [N. H.] 55 Atl. 191. A creditor has an insurable interest in the life of a debtor only to such amount as will satisfy his indebtedness, but the policy is not void as to an excess if with insured's consent though the creditor must account to the insured's estate therefor. Strode v. Meyer Bros. Drug Co. [Mo. App.] 74 S. W. 879. Community creditor has not in life of wife. Cameron v. Barcus [Tex. Civ. App.] 71 S. W. 423.

One living with a man as his wife under a mistaken belief that she is legally married to him and dependent on him for support, has an insurable interest. Scott's Adm'r v. Scott, 24 Ky. L. R. 1356, 77 S. W. 1122. A woman may insure her life for the benefit of a man, though not lawfully married to him. Ruoff v. Hancock Mut. Life Ins. Co., 86 App. Div. [N. Y.] 447.

32. Rev. St. 1898, § 2347. Ellison v. Straw [Wis.] 92 N. W. 1094.

33. Foster v. Preferred Acc. Ins. Co., 125 Fed. 536.

34. Metropolitan Life Ins. Co. v. Brown [Ind.] 65 N. E. 908; Merchants' Nat. Bank v. Comins [N. H.] 55 Atl. 191. Endowment policy payable to insured in case he survive the accumulation period. McDonough v. Aetna Life Ins. Co., 38 Misc. [N. Y.] 625.

35. Assignment of policy on life of a wife to one becoming surety on notes for the husband. Thornburg v. Aetna Life Ins. Co., 30 Ind. App. 682.

36. A life policy may be assigned to secure a loan to the beneficiary to the extent of the loan though the assignee has no insurable interest [Code, §§ 3044, 3046, 3443]. Farmers' & T. Bank v. Johnson, 118 Iowa, 282. An assignment to one paying premiums who is without insurable interest, confers an interest only to the extent of the moneys paid. Mutual Life Ins. Co. v. Richards [Mo. App.] 72 S. W. 487.

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cies assigned to persons without insurable interests, save where as security for debt, do not apply to policies issued by foreign corporations.[37]

§ 6. *The premium. Necessity of payment.*—Payment of the premium is essential to the attaching of the risk,[38] though a promise to pay on delivery of a policy is a sufficient consideration to support a binding slip.[39] It is reasonable to require that the premium must be paid before loss,[40] or while the applicant is in good health.[41] Nonpayment may be excused where occasioned by the insurer's fault in neglecting to fix the requisite amount.[42] An agreement by an agent to advance a first premium, which is not complied with, will not cause a policy to be regarded as in force, the agent having no power to make such an agreement and the insured being charged with knowledge of such limitation on the agent's power.[43]

Amount of premium.—Where a loss occurs under a binding slip, a reasonable premium may be exacted.[44] Insured is not entitled to a customary rebate, where before he accepts a policy, he is informed that it will not be given.[45] By its contract a life company may be prevented from increasing premiums,[46] but if the insurer has a right to increase premiums, it is not estopped by failure through mistake to exercise such right promptly. Where there are to be adjustments of premiums at the end of five year periods, the insurer is not estopped from claiming an increased premium during a period, by the fact that by mistake it collects three bi-monthly premiums during the first of the period at the rate prevailing during the preceding five years.[47]

Assessments in mutual companies.—A reference to sections of statutes imposing liability on members of mutual companies, together with the by-laws in an insurance policy, is not sufficient to render the policy holder liable for his percentage of losses.[48] A member cannot be assessed for losses accruing before inception of membership.[49] Assessments for purposes other than payment of losses may be

37. Burns' Rev. St. 1901, § 4914h. Metropolitan Life Ins. Co. v. Brown [Ind.] 65 N. E. 908.

38. Unless waived. Mauck v. Merchants' & M. F. Ins. Co. [Del.] 54 Atl. 952.

39. The delivery of the binding slip to be void on delivery of the policy completes the temporary contract of insurance. Smith & W. Co. v. Prussian Nat. Ins. Co., 68 N. J. Law, 674.

40. German Ins. Co. v. Shader [Neb.] 96 N. W. 604.

41. The policy does not become binding if the premium is paid before delivery of the policy and during illness of the insured. Langstaff v. Metropolitan L. Ins. Co. [N. J. Law] 54 Atl. 518. On an issue as to whether at the time of delivery of the policy, insured was in sound health causing obligation to be incurred, the jury should be instructed to find for defendant in case they find a negative. Metropolitan L. Ins. Co. v. Howle [Ohio] 68 N. E. 4.

42. Where insured informs an agent that he will not pay a premium due until the cost of a tenancy permit is ascertained and will pay it all at one time, to which the agent assents, it will prevent the company from denying liability for non-payment where no notice of the amount of premium, or that the permit will not be issued until it is paid, is given before the loss. Home Ins. Co. v. Holder, 24 Ky. L. R. 2483, 74 S. W. 267.

43. Hewitt v. American U. L. Ins. Co., 85 App. Div. [N. Y.] 279.

44. Where a binding slip is issued but the agent promises that he will attempt to secure a reduction in the rate, insured is bound to pay a reasonable rate, where it is not fixed before delivery of the policy and the happening of the loss. Smith & W. Co. v. Prussian Nat. Ins. Co., 68 N. J. Law, 674.

45. Evidence held to show termination of oral agreement to give rebates. Depew v. Krulewitch, 84 N. Y. Supp. 242.

46. A promise by a general agent that an original rate of premium shall not be raised, is not so unreasonable that the insured should not be liable on it, where the policy contained a note that unless there was an unforeseen mortality, the level rate of the first premium would be maintained in all cases. Gwaltney v. Provident S. L. Assur. Soc., 132 N. C. 925.

47. Smallwood v. Life Ins. Co., 133 N. C. 15.

48. Construing statutes. Dwinnell v. Kramer, 87 Minn. 392.

49. Especially where members who would have been liable for proportionate shares of losses have ceased to be members and have been released from liability on their notes. Where the charter provides that assessments on premium notes shall be made at the next meeting after losses, an assessment cannot be made for the purpose of paying money borrowed to pay losses occurring

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made.[50] If the secretary is authorized to make assessments, an assessment is valid though he acts on advice of the board of directors.[51] The order of assessment is prima facie evidence of its necessity.[52] Insured in a mutual company, who keeps the policy and receives the benefit of the insurance, is estopped from setting up fraudulent representations as to the character of the policy in defense of an action to recover additional premiums.[53] In the absence of statutes or contract provisions requiring notice of intention to levy an assessment on the policy holders of a mutual company, such notice is not necessary.[54] The form of notice need not be unvarying,[55] and it need not contain a detailed statement showing the necessity of the assessment,[56] though it must follow statutory provisions.[57] Where assessments are made payable in a certain time from the date of notice, the date is regarded as being that on which the insured should have received the notice in due and regular course of mail, and not the date of the paper in which the notice was printed or on which it was mailed,[58] and where notice of assessment states that an officer of the company will be at a certain place at a certain time to receive payment, the time of payment runs from the date of receipt of the notice.[59] A loss under a later policy cannot be set off against a delinquent assessment.[60]

Under a charter power to change the basis of assessments on policy holders, a mutual assessment life company may in the absence of fraud graduate its assessments according to the age of the policy holder when the assessment is made, instead of age when policy was issued, though the increased assessment occasioned thereby is prohibitive.[61]

What is payment.[62]—A note does not constitute an absolute payment,[63] unless that of a third person,[64] or negotiated,[65] nor is the mailing of a check where not accepted as such and not drawn against funds,[66] nor an order on wages to be

through a long space of time before and after the inception of membership. Mut. F. Ins. Co. v. Jean, 96 Md. 252.

50. Where the statute permits assessment of premium notes by the directors to meet losses, expenses and other liabilities of the company, an assessment may be made, though all the insurance losses have been paid [Rev. St. 1899, §§ 7960, 7958]. American G. F. M. Ins. Co. v. Mattson [Mo. App.] 73 S. W. 365.

51. Phelps County F. M. Ins. Co. v. Johnston [Neb.] 92 N. W. 576.

52. Assessment of notes by directors. American G. F. M. Ins. Co. v. Mattson [Mo. App.] 73 S. W. 365.

53, 54. Dwinnell v. Felt [Minn.] 95 N. W. 579.

55. The fact that a mutual company subsequently changes the form of its notice of assessment, does not affect the sufficiency of a form previously used. Shuman v. Juniata Farmers' M. F. Ins. Co., 206 Pa. 417.

56. A detailed schedule of notes subject to assessment and the amount of loss and unpaid expenses, need not be incorporated in the order and notice of assessment. American G. F. M. Ins. Co. v. Mattson [Mo. App.] 73 S. W. 365.

57. Publication not stating the amount of the assessment and notice not stating loss for which assessment was levied, not sufficient under Rev. St. 1898, § 1935, requiring that notice of when an assessment was levied and when it became due shall be published and notice of amount of loss and the sum due from the member as his share, shall be mailed to the member. Milwaukee T. Co. v. Farmers' M. F. Ins. Co., 115 Wis. 371.

58. Ferrenbach v. Mut. R. F. Life Ass'n, 121 Fed. 945.

59. Shuman v. Juniata Farmers' M. F. Ins. Co., 206 Pa. 417.

60. Where on expiration of the time for payment of an assessment, a policy lapses and a renewal policy is issued practically covering the same property, the insured cannot, as against an action to recover the assessment still due, set off a subsequent fire loss. Patrons M. F. Ins. Co. v. Coble, 20 Pa. Super. Ct. 533.

61. Gaut v. Mut. R. F. Life Ass'n, 121 Fed. 403.

62. Evidence of payment of premium, see post, § 20 C.

63. Non-payment of a note executed for a first premium which is made a condition precedent to the life of the policy, defeats recovery. Union Cent. L. Ins. Co. v. Hughes [Tex. Civ. App.] 70 S. W. 1010. Facts held to show forfeiture of policy for non-payment of a note given to secure extension of time of premium payments. Sharpe v. N. Y. L. Ins. Co. [Neb.] 98 N. W. 66.

64. Failure to pay a note given by a third person when due, will not avoid a policy. Galvin v. Union Cent. L. Ins. Co., 24 Ky. L. R. 2452, 74 S. W. 275.

65. Where the agent is entitled to the entire first premium and accepts and negotiates a note, the insurer by obtaining possession of the note, cannot assert a default in payment. Union L. Ins. Co. v. Parker [Neb.] 92 N. W. 604.

66. Walls v. Home Ins. Co., 24 Ky. L. R. 1452, 71 S. W. 650.

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earned;[67] but a good check is sufficient if the agent is authorized to accept it.[68] Payment to an unauthorized agent is sufficient if the company or a duly authorized agent afterward receive it.[69] The insurer is not liable on an agent's unauthorized acceptance of merchandise in payment of a premium.[70] The fact that a soliciting agent, without knowledge of the company, has moneys belonging to the insured from which he has agreed to pay the premium will not prevent cancellation.[71]

Right to forfeit.—Where the by-laws and policy provide for cancellation on non-payment of premiums or assessments, a mutual fire company may take such action,[72] and after notice of such cancellation and destruction of the risk, the company cannot be compelled to reinstate the policy.[73]

Forfeiture for non-payment may be provided for in the policy,[74] or in a premium note,[75] and forfeiture may be enforced for nonpayment of notes.[76] Incontestable clauses do not overcome a specific provision for forfeiture for nonpayment of premium.[77]

Delay in delivery of the policy until after its date does not excuse nonpayment of premiums on date specified therein.[78] A provision that payments shall be before noon on certain days is not altered to allow payments after noon by a provision that if the premiums are not paid on or before the days mentioned, the policy shall cease.[79] Where insured is misled by a provision in a policy that at the end of each term of five years dividends would be applied to reduce premiums,

67. Where the insured gives an order on an employer to pay monthly premiums from his wages, the policy is forfeited, where on failure to earn wages, the premium is not paid for the month in which the loss occurs. Reed v. Travelers' Ins. Co., 117 Ga. 116. Where the yearly premium is divided into four monthly installments regarded as payments for consecutive periods of two, three and five months, no recovery can be had after the expiration of the first two months when the second installment is not paid, though an assignment of wages has been given therefor, which would not be payable until after the injury happened, the insured having rendered payment impossible by ceasing work and collecting all money in the hands of the employer. Herbert v. Standard L. & A. Ins. Co., 23 Ohio Circ. R. 225.

68. Evidence held to show authority of agents to receive checks instead of money in payment of premiums. Travelers' Ins. Co. v. Brown [Ala.] 35 So. 463.

69. Mauck v. Merchants' & M. F. Ins. Co. [Del.] 54 Atl. 952.

70. Folb v. Firemen's Ins. Co., 133 N. C. 179.

71. Merchants' & M. M. Ins. Co. v. Baker [Neb.] 94 N. W. 627.

72. Merchants' & M. M. Ins. Co. v. Baker [Neb.] 94 N. W. 627; Perry v. Farmers' M. L. Ins. Co., 132 N. C. 283.

73. Merchants' & M. M. Ins. Co. v. Baker [Neb.] 94 N. W. 627.

74. Non-payment on certain hour, on certain day. Tibbits v. Mut. B. L. Ins. Co., 159 Ind. 671. Where a premium has not been paid, notice of cancellation is sufficient to terminate the risk and such notice may be unnecessary, where by the terms of the policy no liability is created, unless the premium is paid. O'Connell v. Fidelity & Casualty Co., 87 App. Div. [N. Y.] 306.

75. A policy may be avoided by failure to pay a premium note at maturity where the note so stipulates though the policy makes no such provision. Ressler v. Fidelity M. L. Ins. Co. [Tenn.] 75 S. W. 735. Facts held to show a borrowing of money from insurer to pay a premium and pledging of right to a paid up policy as security therefor rather than a promise to pay the premium at a later date placing the right to insurance at the risk of loss in case the promise was not fulfilled on the day fixed. Manhattan L. Ins. Co. v. Wright [C. C. A.] 126 Fed. 82.

76. Liability is terminated by failure to pay any note given the company for a premium, whether as evidence of debt or payment, if the policy provides that failure to pay any premium or note, or interest when due, will terminate the insurance and calls for cash payments only. Behling v. N. W. Nat. L. Ins. Co. [Wis.] 93 N. W. 800. A provision that failure to pay any premium or note or interest shall terminate insurance includes a note given on exchange of policies to secure a portion of the cash payment of the reserve value, which it is agreed shall be a lien against the policy, until discharged or paid. Id. A suspension may be asserted for non-payment of a premium note, if so provided in the policy, though the note is to the agent as payee, where the insurer is the owner. Hooker v. Continental Ins. Co. [Neb.] 96 N. W. 663. A provision that nonpayment of a note given to extend a premium shall forfeit the policy, is not invalidated by a statutory provision that all contracts as to insurance must be plainly expressed in the policy, since if applicable, the statute avoids the entire transaction including the extension of time. Fidelity M. L. Ins. Co. v. Price [Ky.] 77 S. W. 384. Sickness of insured is not an excuse for non-payment of a premium note. Home Ins. Co. v. Wood, 24 Ky. L. R. 1638, 72 S. W. 15.

77. Schmertz v. U. S. L. Ins. Co. [C. C. A.] 118 Fed. 250.

78, 79. Tibbits v. Mut. B. L. Ins. Co., 159 Ind. 671.

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and bona fide believing that notices and payment of three premiums were evidence of such application, then a delay of less than three months in correspondence and asserting his rights is not unreasonable, and on tender of the intervening premiums and expressions of willingness to pay at that rate, the company has no right to cancel the policy.[80]

Notice.—Though the policy has been assigned with the assurer's consent, notice of maturity of a premium may be given the assured.[81] Mailing of notice to insured's last known address is a necessary condition to the right to forfeit for nonpayment of premiums, where the policy provides for notice by mail before the premiums are due.[82]

Under the New York statute, a notice of forfeiture for nonpayment of premium must state insured's right to surrender value or paid up policy.[83]

A statement that insured has decided to allow his policy to lapse, and a subsequent application for reinstatement, waives notice of maturity of premium.[84] Statutes requiring notice of the maturity of premiums will not prevent a forfeiture, though notice is not given, where for twelve years the insured neglects to pay any premiums.[85]

Waiver of initial premium may be inferred from delivery of the policy,[86] and an agreement to extend credit may waive provisions that the risk shall not attach until payment of the premium;[87] but a provision that the first premium payment must be made while applicant is in good health is not waived by an agreement that he shall have a specified length of time in which to pay the premium and take the policy.[88] The insured is charged with notice that without express authority an agent cannot waive a first premium, where the application states that insurance is not to be operative prior to its payment.[89]

Where the entire property is destroyed, receipt of a premium after the loss waives an exemption from liability during default,[90] and if it is desired to repudiate the act of an agent in accepting a premium after a loss, the money must be returned or tendered to the insured.[91]

Waiver of forfeiture for nonpayment of note does not result from a failure

80. Smallwood v. Life Ins. Co., 133 N. C. 15.

81. Mut. Ben. L. Ins. Co. v. First Nat. Bank, 25 Ky. L. R. 172, 74 S. W. 1066.

82. Denver L. Ins. Co. v. Crane [Colo. App.] 73 Pac. 875. Under the New York law providing that notice of premium must be mailed insured at his last known postoffice address "in this state," where a life policy is issued to a resident of Texas, notice must be mailed insured at his last known address in Texas. Wash. L. Ins. Co. v. Berwald [Tex. Civ. App.] 72 S. W. 436.

83. Security, T. & L. Ins. Co. v. Hallum [Tex. Civ. App.] 73 S. W. 554. Under the New York statute, in Texas, notice of the maturity of a premium as fixed by an agreement for an extension, must be given. Wash. L. Ins. Co. v. Berwald [Tex. Civ. App.] 72 S. W. 436. An affidavit which fails to show that a notice to work a forfeiture for non-payment of premiums stated the amount of premium due, the place where it is payable, the person to whom payable and the intent to forfeit on default in payment, is insufficient under Laws New York 1892, p. 1972, c. 690, § 92, and is not admissible in evidence. Seely v. Manhattan L. Ins. Co. [N. H.] 55 Atl. 425.

84. Denver L. Ins. Co. v. Crane [Colo. App.] 73 Pac. 875.

85. Lone v. Mut. L. Ins. Co. [Wash.] 74 Pac. 689. Evidence held not to show abandonment of a policy as an excuse for failure to give notice of maturity of premium. Wash. L. Ins. Co. v. Berwald [Tex. Civ. App.] 72 S. W. 436.

86. If an insurer makes a policy complete in form and sends it out for delivery to the insured and after such delivery and before a loss by fire treats the policy as a valid and binding contract, from such facts, in the absence of contrary proof, payment of premium or a waiver may be inferred. Mauck v. Merchants' & M. F. Ins. Co. [Del.] 54 Atl. 952.

87. German Ins. Co. v. Shader [Neb.] 93 N. W. 972.

88. Mut. L. Ins. Co. v. Sinclair, 24 Ky. L. R. 1543, 71 S. W. 853.

89. In an action on such policy the beneficiary has the burden of proving express authority of a general agent to extend time of payment for 30 days and agree that the policy should go into effect at once. Russell v. Prudential Ins. Co. 176 N. Y. 178.

90. German Ins. Co. v. Shader [Neb.] 93 N. W. 972.

91. It is not sufficient to return it to the agent with instructions to that effect. German Ins. Co. v. Shader [Neb.] 93 N. W. 972.

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to return it, where no attempt to collect it was made,[92] or collection after maturity.[93] The insured must prove that he was ready and willing to pay a premium note at the place where it was payable in order that he may take advantage of the fact that it was not there as a waiver of forfeiture on that ground.[94] Where a premium note stipulates for payment at the company's office, a waiver by the agent in an agreement to bring the note to insured is revoked by a notice from the company to pay at its office.[95]

If a note in payment of a premium is accepted on condition that the policy shall cease and determine in case it is not paid at maturity, an affirmative action is not necessary to forfeit the policy on nonpayment.[96]

Authority of an agent to waive forfeiture for nonpayment cannot be inferred from the fact that the note is sent to him for collection against a provision of the policy prohibiting waiver by agent.[97]

Waiver of assessments.[98]—Failure to claim a forfeiture for nonpayment of assessments, a notice of further assessments and acceptance of payment thereof, amount to a waiver.[99] The waiver may be after destruction of the property,[1] but it seems the entire property covered by the policy must be destroyed.[2] A custom to accept payment of assessments after due will not be extended to justify acceptance after destruction of property.[3]

Making of other mortuary calls is not a defense, where deceased died more than the specified time after the making of the call for which the policy is declared forfeited.[4]

Waiver of subsequent premiums.—Limitations on the authority of officers to agree to an extension of premiums does not prevent the company being bound by an extension made by an actually authorized agent,[5] and a stipulation against waiver or modification of terms, except in writing, does not prevent a waiver implied by law from conduct amounting to an estoppel.[6] A right to insist on for-

92. N. Y. L. Ins. Co. v. Warren Deposit Bank, 25 Ky. L. R. 325, 75 S. W. 234.

93. Where an insurance contract stipulates that on failure to pay a note given for part of the premium at maturity, the entire premium shall be considered as earned and the note payable without reviving the policy, the fact that the insurance company agrees to an extension of time and thereafter demands and receives payment of the note, does not deprive the insurer of the right to insist on a previous forfeiture. Texas Fire Ins. Co. v. Knights of Labor Lodge [Tex. Civ. App.] 74 S. W. 809.

94. Joy v. Liverpool, L. & G. Ins. Co. [Tex. Civ. App.] 74 S. W. 822.

95. Home Ins. Co. v. Wood, 24 Ky. L. R. 1638, 72 S. W. 15.

96. Iowa Life Ins. Co. v. Lewis, 187 U. S. 335. Non-payment of premium note. Behling v. Northwestern Nat. Life Ins. Co. [Wis.] 93 N. W. 800.

97. Iowa Life Ins. Co. v. Lewis, 187 U. S. 325.

98. Evidence held to show waiver of right to claim a forfeiture for non-payment of an assessment by ratification of an agent's act in restoring insured to membership. Barrett v. Des Moines Mut. Hail & Cyclone Ins. Ass'n [Iowa] 94 N. W. 473.

99. Farmers' Benev. Fire Ins. Ass'n v. Kinsey [Va.] 43 S. E. 333.

1. Evidence held insufficient to establish a custom to accept assessments over-due. Perry v. Farmers' Mut. Fire Ins. Ass'n, 132 N. C. 283.

2. Phelps County Farmers' Mut. Ins. Co. v. Johnston [Neb.] 92 N. W. 576.

3. The by-laws and regulations of a mutual fire company provided that default in assessments should work a forfeiture. Perry v. Farmers' Mut. Fire Ins. Ass'n, 132 N. C. 283.

4. Brown v. Mut. Reserve Fund Life Ass'n, 137 Cal. 278, 70 Pac. 187.

5. Washington Life Ins. Co. v. Berwald [Tex. Civ. App.] 72 S. W. 436. A general agent may waive a forfeiture for non-payment of premiums, though the policy declares that no agent has such authority and that waivers must be in writing signed by specified officers. Act of sub-agent of a general agent in collecting a premium after its maturity and after a loss held to estop the insurer. Aetna Life Ins. Co. v. Fallow [Tenn.] 77 S. W. 937.

6. Such as acceptance of past due premiums or collateral security for notes securing same, waiving a stipulation for forfeiture on non-payment of premium notes at maturity. Bennett v. Union Cent. Life Ins. Co., 203 Ill. 439. Where the company accepts over-due premiums, it cannot assert lack of authority on the part of an agent to extend time for payment. Though the policy stipulates against modifications except in formal manner. Union Cent. Life Ins. Co. v. Whetzel, 29 Ind. App. 658. Evidence held insuffi-

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feiture may be waived by acceptance of overdue premiums,[7] or by a custom to do so,[8] but a waiver of prompt payment of premiums in a particular year or years does not prevent the company from enforcing a forfeiture in subsequent years, when it gives due notice of its intention.[9] Provisions for forfeiture on nonpayment are not waived for an entire year by extension of a particular premium for a less period.[10] Such waiver need not be based on a new consideration or an estoppel, and is not such an alteration of the contract that it must be in writing.[11]

Denial of liability on other grounds may waive forfeiture for default in respect to premiums.[12]

Retention of note taken in extension of time of payment of premium does not waive the forfeiture, the note being canceled and retained as evidence of nonpayment at maturity,[13] nor does a demand for payment of such a note, where accompanied by a blank certificate of health for reinstatement thus showing claim of forfeiture.[14]

The acceptance of an order on a third person during the lifetime of insured waives a right to insist on a forfeiture for nonpayment of premiums after the insured's death.[15]

Effect of waiver.—Where there is a waiver of time of payment, the amount due need not be paid or tendered prior to the death of the insured,[16] and a certificate of good health cannot be required, since the policy does not lapse.[17]

Application of net value, surplus or reserve to prevent a forfeiture.—A surplus belonging to the insured must be applied, in order to prevent forfeiture for nonpayment of assessments.[18]

A fund styled a guaranty fund, consisting of the surplus of premiums after deduction of actual death losses, must be applied, to prevent forfeiture under the

cient to establish a contract for the extension of time of payment of premiums and waiver by receipt of payment, after notice of loss. Hooker v. Continental Ins. Co. [Neb.] 96 N. W. 663.

7. Ryer v. Prudential Ins. Co., 85 App. Div. [N. Y.] 7. A provision for the lapse of policy during default in payment of an installment of premiums is waived by demand of payment of the full amount of installment long after it was due. Walls v. Home Ins. Co., 24 Ky. L. R. 1452, 71 S. W. 650.

8. Where there has been a custom to allow payments to run over, a promise by the agent to hold up a note for an installment of premiums may estop the company from insisting on a forfeiture. Continental Ins. Co. v. Browning, 24 Ky. L. R. 992, 70 S. W. 660. Forfeiture on the ground of failure to pay premium on the day when due, cannot be asserted where the course of dealing of the company has been such as to induce insured to believe that it will not be insisted on. Illinois Life Ass'n v. Wells, 102 Ill. App. 544. Provisions in the policy as to payment of premiums may be waived, where there has been a custom to collect premiums and an employe of the general agent collects after the injury a premium prior thereto. Aetna Life Ins. Co. v. Fallow [Tenn.] 77 S. W. 937. Evidence held to show waiver of provisions requiring payment of premiums on specified days in case of an insurance agent insured, installments of whose premiums had been paid from commissions due. Ill. Life Ass'n v. Wells, 200 Ill. 445.

9. Schmertz v. U. S. Life Ins. Co. [C. C. A.] 118 Fed. 250.

10. Fidelity Mut. Life Ins. Co. v. Price, 25 Ky. L. R. 1148, 77 S. W. 384.

11. Civ. Code 1698. Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 73 Pac. 740. A waiver of forfeiture is on sufficient consideration where induced by a transfer of an interest in a judgment to be collateral security for the notes securing premiums due and unmatured. Bennett v. Union Cent. Life Ins. Co., 203 Ill. 439.

12. Where the agent states that a policy has lapsed and may be reinstated only on a medical certificate, the company waives nonpayment of a final premium which insured at the time of statement had a right to pay. Te Bow v. Washington Life Ins. Co., 172 N. Y. 623.

13. Sharpe v. New York Life Ins. Co. [Neb.] 98 N. W. 66.

14. Fidelity Mut. Life Ins. Co. v. Price, 25 Ky. L. R. 1148, 77 S. W. 384.

15. Bennett v. Union Cent. Life Ins. Co., 203 Ill. 439.

16. Illinois Life Ass'n v. Wells, 200 Ill. 445.

17. Aetna Life Ins. Co. v. Sanford, 200 Ill. 126.

18. A corporation organized under Laws 1883, p. 104, rendering it similar in purpose to, if not absolutely, a fraternal insurance order, must apply a surplus to prevent forfeiture, though it has issued to the member a bond representing the member's share of such surplus bearing interest and applicable to the payment of assessments, and must make such application, though insured has not requested it, or surrendered the bond. Knights Templars & Masons' Life Indemnity Co. v. Vail [Ill.] 68 N. E. 1103.

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New York statute, requiring such application of the reserve on a policy. Such statute covers a policy for a single year, containing an agreement to reinsure at a stipulated rate, and the demand for application may be by the beneficiary after insured's death.[19]

The Missouri statute, requiring the application of the net value of the policy as a single premium to extend insurance on nonpayment of premium by the insured, does not apply to insurance on the assessment or natural premium plan, in which the policy has no accumulated or actual net value.[20]

Local statutes guarding against forfeiture for nonpayment of premiums are, in some states, made inapplicable to the policies of foreign companies doing business therein, where such policies contain contractual provisions of substantially similar import.[21]

Statutory provisions against forfeiture for nonpayment of premiums conferring rights on beneficiaries cannot be waived by the insured,[22] but condition in a note given for a premium payment, that on default the policy would be forfeited except as the right to a surrender value, covers a right to extended insurance.[23]

The period during which a policy will be kept in force after default in payment of premiums will be computed from the expiration of the period of grace provided for the payment of premiums.[24]

Where insured defaults, his rights and obligations are to be measured at the date of default and not a prior date.[25] Where a loan has been made equivalent to the value of the policy, there can be no extended insurance on

19. In the policy in issue, premiums were fixed with reference to estimated death losses and the guaranty fund was determined by the amount left after deducting actual losses, while in an ordinary policy both the reserve and premiums are calculated on estimated death losses, and the estimate is not corrected by the actual losses as they occur. Nielsen v. Provident Sav. Life Assur. Soc., 139 Cal. 332, 73 Pac. 168.

20. Mutual Reserve Life Ins. Co. v. Roth [C. C. A.] 122 Fed. 853. A contract requiring an assessment on the policy and not on the insured, to meet emergencies exceeding the reserve fund, is not an assessment contract in the meaning of a provision that assessment contracts shall be those in any manner or degree dependent on collection of assessments on persons holding similar contracts [Rev. St. 1889, §§ 5856-5859]. Folkens v. Northwestern Nat. Life Ins. Co., 98 Mo. App. 480.

21. Rev. St. 1889, § 5859, as amended by Act April 19, 1895, exempts from the application of sections 5856-5858, policies prescribing a surrender value or paid up or temporary insurance in case of default or a provision for an unconditional cash surrender value, equal to the net single premium which the preceding sections declare shall be applied to temporary insurance or a provision for the unconditional commutation of the policy for non-forfeitable, paid up insurance, "provided that in no instance shall a policy be forfeited for non-payment of premiums after the payment of three annual premiums thereon * * * but the holder shall be entitled to paid up insurance, the net value of which shall be equal to that provided for in section 5856." Under this statute insured may have an option as to which settlement he will accept. Nichols v. Mut. Life Ins. Co. [Mo.] 75 S. W. 664. A New York policy with an agreement for temporary insurance is within the exception (Epperson v. New York Life Ins. Co., 90 Mo. App. 432) but a policy is not within such provision if it provide that indebtedness other than for loans advanced in payment of premiums may be deducted from the net value, though such value is computed on a percentage more favorable to the insured than that established by the statute. Application within three months, cannot be made a condition to payment of the surrender value or the application of the net reserve to the purchase of a non-participating paid up policy. Smith v. Mut. Ben. Life Ins. Co., 173 Mo. 329. The proviso contemplates insurance fully paid for life. Nichols v. Mut. Life Ins. Co. [Mo.] 75 S. W. 664.

22. Laws N. Y. 1877, c. 321, § 1. Mutual Life Ins. Co. v. Hill [C. C. A.] 118 Fed. 708.

23. The policy contained a table of losses and surrender values in paid or extended insurance. Drury's Adm'x v. New York Life Ins. Co., 25 Ky. L. R. 68, 74 S. W. 663.

24. Prudential Ins. Co. v. Devoe [Md.] 56 Atl. 809.

25. Provisions of a ten payment life policy on which premiums were paid partially in cash and partially with notes, examined and held not to permit insured, who forfeits by non-payment of premiums at the end of ten years, to have dividends applied to his premium notes for the earlier period of the policy thus entitling him to paid up insurance for a portion of his policy. Madison v. Northwestern Mut. Life Ins. Co. [Cal.] 75 Pac. 113.

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forfeiture for nonpayment of premiums,[26] though insurer has consented to an assignment of the policy to a third person, where it is indorsed with the indebtedness of the insured, nor though the policy provides that loans by the insurer are to be accompanied by a satisfactory assignment to the insurer as collateral.[27] A loan is not rendered usurious by the fact that on forfeiture of the policy for nonpayment of premiums and maturity of the loan, the entire cash surrender value is applied to it, thus removing a right to extended insurance, if the cash surrender value of a policy is not diminished by a loan.[28]

Time is not of the essence of an agreement to issue a paid-up policy on forfeiture of a life policy, but demand must be within a reasonable time.[29] The right may be barred by laches.[30] Bankruptcy is not an excuse.[31]

Though the general agent has no authority to issue policies, a demand of a paid-up policy may be made on him, where there is no particular provision in the original policy.[32] The demand should be definite.[33]

A denial of liability after death of insured is a waiver of any surrender of the policy necessary to the purpose of having a reserve applied to the continuation of the insurance or the purchase of a paid-up policy.[34] Necessity of surrender of the original policy may be obviated by its loss.[35] The insurer, after directing insured to continue his search for a lost policy, cannot assert unreasonable delay unless continued so long as to justify a conclusion of abandonment.[36]

Recovery back of premiums.—Where insured is by fraud induced to accept possession of a policy, different in its nature from that for which he bargained, he may return it within a reasonable time and recover premiums paid.[37] In

26. Statutory provisions as to the manner in which policies shall be valued on the question of the company's solvency, do not apply to a valuation as determining assured's rights, the rules for which are provided in the policy [Ky. St. 1899, § 653]. Mutual Ben. Life Ins. Co. v. First Nat. Bank, 25 Ky. L. R. 172, 74 S. W. 1066. Where it is provided that accumulated profits are to be applied to the extension of insurance to prevent forfeiture, the amount of a certificate of indebtedness given as part of the first payment must be deducted in determining the amount of accumulated profits applicable to the extension of the policy. Tate v. Mut. Ben. Life Ins. Co., 131 N. C. 389. A provision that on non-payment of premium, the policy is to be indorsed for such amount of paid up insurance as the excess of the reserve fund held by the company over such indebtedness will purchase, will not prevent a forfeiture, where at the time default is made in payment of a second premium, the amount which insured owes the company is less than the reserve fund. Sharpe v. N. Y. Life Ins. Co. [Neb.] 98 N. W. 66.

27, 28. Mutual Ben. Life Ins. Co. v. First Nat. Bank, 25 Ky. L. R. 172, 74 S. W. 1066.

29. Mutual Life Ins. Co. v. O'Neil, 25 Ky. L. R. 983, 76 S. W. 839; Washington Life Ins. Co. v. Glover [Ky.] 78 S. W. 146. Evidence in an action to recover the value of a paid up life policy held to show an extension of time of payment of premiums causing a demand for a paid up policy to have been made while the original was in force. Union Cent. Life Ins. Co. v. Whetzel, 29 Ind. App. 658.

30. Delay for seventeen years after the right to a policy accrues, is laches. Mutual Life Ins. Co. v. O'Neil, 25 Ky. L. R. 983, 76 S. W. 839. Five years after maturity of a premium note is sufficient. New York Life Ins. Co. v. Warren Deposit Bank, 25 Ky. L. R. 325, 75 S. W. 234. Five years from the day when insured might first have demanded its issuance is sufficient. Equitable Life Assur. Soc. v. Warren Deposit Bank [Ky.] 75 S. W. 275. Demand for a paid-up policy within two years after lapse is reasonable, though the reserve after six months was distributed to continuing policy-holders. Washington Life Ins. Co. v. Glover [Ky.] 78 S. W. 146.

31. Equitable Life Assur. Soc. v. Warren Deposit Bank, 25 Ky. L. R. 839, 76 S. W. 391.

32. Union Cent. L. Ins. Co. v. Whetzel, 29 Ind. App. 658.

33. A sufficient demand for issuance of a non-participating policy for paid up insurance as provided by the contract on surrender to sustain an action for breach of the contract, is not shown by a statement by the insured to the agent that he would like to have what he was entitled to after which insured left the agent without awaiting a reply. Keyser v. Mut. L. Ins. Co., 104 Ill. App. 72.

34. Nielsen v. Provident S. L. Assur. Soc. 139 Cal. 332, 73 Pac. 168.

35. Where assured proves that his policy is stolen and that while he cannot surrender it, he is still the owner, an action by him for a paid up policy may be maintained without pleading willingness to execute a discharge of defendant's liability. Wilcox v. Equitable L. Assur. Soc., 173 N. Y. 50.

36. Lindenthal v. Germania L. Ins. Co., 174 N. Y. 76.

37. Acts of the agent in taking the policies from insured after delivery, by representation that a mistake had been made in writing them, and that he was acting under direction of the general agents, may be shown

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an action for such purpose, the instructions must be confined to that issue.[38] There must be an unconditional offer to restore the insurer to his former condition, or a waiver of such offer.[39]

An applicant who accepts an ordinary policy to be in force until the issuance of an endowment policy is, on failure of the endowment policy to be issued within a reasonable time, entitled to a credit for the excess of premium paid by him.[40] If in pari delicto, insured cannot recover premiums on the ground of illegality of the policy,[41] nor can his administrator,[42] though innocent parties will be protected.[43] An infant may recover premiums paid by him, insurance not being regarded as a necessity.[44]

If the company chooses to validate a policy after knowledge of misstatements of a material fact in the application, premiums paid cannot be recovered.[45]

If the insurer wrongfully cancels a policy, premiums paid may be recovered,[46] or if an application for reinstatement is rejected in bad faith.[47] Where it appears that a request for the cancellation of a fire insurance policy was made together with a request for repayment of unearned premiums before new insurance is taken out, plaintiff is entitled to recover unearned premiums as to such policies.[48]

A provision for forfeiture of payments in case a life policy shall become void is not void as to unearned premiums on account of want of consideration, and where the policy is avoided before the expiration of insurance purchased by a quarterly payment, unearned premium cannot be recovered on the ground that only forfeiture of earned premiums was contemplated.[49]

Correspondence between the insurance department of a state and an in-

as a step toward proving an actual return of the policies. Armstrong v. Mut. L. Ins. Co. [Iowa] 96 N. W. 954.

38. Instructions as to certain acts of defendant as to a re-examination of insured, held to omit the issue of fraud; to be too vaguely expressed to submit the question of an intent to cancel; and not to be supported by the evidence on the theory of intent of defendant to treat the policy as not in force. They should not take up unreasonable delay in making delivery, where the action is founded on an absolute failure to deliver. Where the ground of recovery of a premium is fraud, the jury should not be instructed that the policies were in force, if delivered in a reasonable time. Armstrong v. Mut. L. Ins. Co. [Iowa] 96 N. W. 954.

39. Bostwick v. Mut. L. Ins. Co., 116 Wis. 392.

40. Calandra v. Life Ass'n, 84 N. Y. Supp. 498.

41. Where the illegality of a policy appears on its face and is known to both parties, it being expressly prohibited by statute, the premiums paid cannot be recovered. Wheeler v. Mut. R. F. Life Ass'n, 102 Ill. App. 48.

42. Where insuring lives of others without their knowledge or consent is made a felony, the administrator of one taking out such insurance cannot recover premiums paid notwithstanding the insurer had knowledge of all the facts [Burns' Rev. St. 1901, § 4905]. Work v. American M. L. Ins. Co., 31 Ind. App. 153.

43. A wife who innocently applies for insurance on her husband's life without his knowledge, may recover the premiums paid by her in case the policy is void, being induced to make the application by the insurer's agent. Metropolitan L. Ins. Co. v. Asmus, 25 Ky. L. R. 204, 78 S. W. 204.

44. On avoidance of such a contract, the insurer cannot deduct from the premiums paid the expense of keeping the contract in force. Simpson v. Prudential Ins. Co. [Mass.] 68 N. E. 673.

45. Fay v. Prudential Ins. Co., 80 App. Div. [N. Y.] 350.

46. In an action to recover premiums paid on the ground of wrongful cancellation, the plaintiff is entitled to have determined, issues of fraudulent representations concerning increase of premiums and of whether if dividends are properly declared and applied to premiums as promised in the policy, the premiums would have amounted to more than the sum tendered by him. Smallwood v. Life Ins. Co., 133 N. C. 15. The amount recoverable consists of the premiums with interest on each from the date of payment. Gwaltney v. Provident S. L. Assur. Soc., 132 N. C. 925.

47. If the policy is surrendered and a new policy taken for a smaller amount, insured may on the wrongful rejection of re-instatement of the latter policy, recover payments from the date of the original policy. Puschman v. Hartford L. & A. Ins. Co., 92 Mo. App. 640.

48. Comp. St. 1901, § 42, c. 43. Farmers' M. Ins. Co. v. Phoenix Ins. Co. [Neb.] 95 N. W. 3.

49. Dickerson v. N. W. M. L. Ins. Co., 200 Ill. 270.

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surance company is inadmissible in an action against the company to recover premiums.[50]

Reinstatement.—A policy may be reinstated in equity where it has been forfeited after complainant had done all that he was justified in believing would be required of him by a prior course of dealing of the company.[51] The rules applicable to original applications are generally applicable to proceedings for reinstatement.[52] Keeping of a certificate of health for reinstatement of a policy six days before returning it cannot be objected to by the insured.[53]

§ 7. *Interpretation and effect of contract.*[54] *Kind of insurance.*—Where a policy states on its face that it is a mutual company and that insured is subject to pay an additional premium, the contract is not changed by the fact that it is represented to be a stock policy.[55] The amount recoverable on insurance against fire, on a vessel moored and used as a hospital, is not governed by the laws of marine insurance.[56] Where the insured has a valid obligation for a conveyance of the fee and has erected a substantial dwelling house on the land, his interest is not personalty but realty within the meaning of laws providing that in case of insurance of real property defendant cannot deny that the property was worth the amount of insurance.[57]

General rules of interpretation.—A contract of insurance will be liberally construed for the protection of the insured,[58] even in mutual companies,[59] but according to the plain meaning of the language employed[60] in its common popular sense.[61] Facts within the literal meaning of a provision will not warrant forfeiture unless within its reason.[62] Ambiguities must be construed against forfeitures,[63] but in order to avoid a forfeiture, the court cannot go beyond a fair construction of the language.[64] Attendant circumstances should be considered in determining intent.[65]

In other respects, rules applicable to construction of contracts generally are applicable.[66] For the meaning of particular descriptions, see the footnotes.[67]

50. Calandra v. Life Ass'n, 84 N. Y. Supp. 498.

51. Forfeiture asserted for non-payment of premium which insured had paid by check as was his custom. Travelers' Ins. Co. v. Brown [Ala.] 35 So. 463.

52. Provisions that misrepresentations must have contributed to the contingency on which the policy is to become due, apply to applications for re-instatement [Rev. St. 1899, § 7890]. Jenkins v. Covenant M. L. Ins. Co., 171 Mo. 375. A statement by the insured to revive a policy is a representation and not a warranty of good health, where by the terms of the policy the statement should be signed by the beneficiary. To defeat a recovery it must be proved that the representation is untrue, made knowingly with fraudulent intent, was material and relied on. Aetna L. Ins. Co. v. Rehlaender [Neb.] 94 N. W. 129. A medical examination on reinstatement may be waived by collection of subsequent premiums and such waiver cannot be afterward annulled. Evidence held to require submission of the question to the jury. Denver L. Ins. Co. v. Crane [Colo. App.] 73 Pac. 875.

53. Fidelity M. L. Ins. Co. v. Price, 25 Ky. L. R. 1148, 77 S. W. 384.

54. Interpretation of conditions and provisions against misrepresentation, see post, § 12B.

55. Dwinnell v. Felt [Minn.] 95 N. W. 579.

56. Detroit v. Grummond [C. C. A.] 121 Fed. 963.

57. Rev. St. 1899, §§ 7969, 7970. Bode v. Firemen's Ins. Co. [Mo. App.] 77 S. W. 116.

58. Brooks v. Metropolitan L. Ins. Co. [N. J. Law] 56 Atl. 168. In case of doubt as to whether words are used in an enlarged or restricted sense. Provident S. L. Assur. Soc. v. Cannon, 103 Ill. App. 534.

59. Though members of mutual companies are chargeable with knowledge of the by-laws, ambiguous clauses in their contracts must be construed strictly against the insured. Brock v. Brotherhood Acc. Co. [Vt.] 54 Atl. 176.

60. Proviso for termination of insurance on fall of building [Laws 1886, c. 406, p. 720]. Nelson v. Traders' Ins. Co., 86 App. Div. [N. Y.] 66.

61. Del. Ins. Co. v. Greer [C. C. A.] 120 Fed. 916.

62. Henton v. Farmers' & M. Ins. Co. [Neb.] 95 N. W. 670.

63. Home M. Ins. Co. v. Tompkins, 30 Tex. Civ. App. 404. Ambiguities or contradictions in a policy are to be reserved against the insurer where there are no controlling indications of intent. American S. S. Co. v. Indemnity M. M. Assur. Co. [C. C. A.] 118 Fed. 1014. Conditions and provisos will be strictly construed against the insurers. Provident S. L. Assur. Soc. v. Cannon, 103 Ill. App. 534.

64. Behling v. N. W. Nat. Life Ins. Co. [Wis.] 93 N. W. 800.

65. Pietri v. Seguenot, 96 Mo. App. 258.

66. A written amount controls an indorsement in figures. Bushnell v. Farmers' M. Ins.

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Conflict of laws.—The situs of a contract of insurance is a question as to which there is a variance of authority.[68] By provision in the contract, it may be construed under the laws of the company's domicile,[69] though the contrary is held in some jurisdictions,[70] and where the contract is in fact a local contract, the public policy of the state where made cannot be avoided by provisions in the policy adopting a law of the corporation's domicile.[71] The courts of a state are not bound to construe the contracts of a foreign insurance company in the manner in which they are construed by the courts of the corporation's domicile or under the statutes of such state.[72]

Where a policy insuring against loss of currency in the mails is issued to a bank in Mexico, provision as to the manner in which packages are to be prepared for shipment and shipped will be governed by the laws of that nation.[73]

Standard policies.—Though a fine is provided for issuance of other than standard statutory policy, an illegal policy will not be changed by law so as to conform to the legal standard, but must be construed as it reads.[74]

Other writings as part of contract.—By-laws of a mutual insurance company must be made a part of its policy before they can affect the terms.[75] Where the

Co., 91 Mo. App. 523. A reference to a plan may cure omission of a specific building in the descriptive portion of a policy. Griffing Iron Co. v. Liverpool & L. & G. Ins. Co., 68 N. J. Law, 368. Where the contract of insurance is for twelve months from date, a subsequent clause cutting down the liability to 11½ months, is repugnant and will be rejected. Bean v. Aetna L. Ins. Co. [Tenn.] 78 S. W. 104. The application signed by the insured controls a schedule copied therefrom and attached to a policy as where in a policy of employers' liability insurance there was an omission to strike the word "not" from a statement that: "the estimated pay roll does not include the wages paid by the sub-contractors," though the word "yes" appeared after such statement and where in the application the word "not" was stricken out and the word "yes" appeared. Dives v. Fidelity & Casualty Co., 206 Pa. 199.

67. Insurance of store or office furniture or fixtures describing the property insured as a building including gas, steam and water pipes and all other permanent fixtures contained therein, does not cover shelves and counters which were not built into the building and were capable of being easily removed without injury to them or to the building. Banyer v. Albany Ins. Co., 85 App. Div. [N. Y.] 122. Instruments, appliances and material incidental to a dental office does not include dental books. American F. Ins. Co. v. Bell [Tex. Civ. App.] 75 S. W. 319. A provision that losses on railroad rolling stock shall be settled in accordance with rules of the Master Car Builders' Ass'n does not cause cars which are so out of order as not to be interchangeable under such rules, to be excluded from the property insured. Phila. Underwriters v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 71 S. W. 419. Goods held in trust include goods on storage. Southern C. S. & P. Co. v. Dechman [Tex. Civ. App.] 73 S. W. 545.

68. A life policy is governed by the laws of the state where it is signed and sealed and premiums and loss are payable and the corporation has its domicile. Franklin L. Ins. Co. v. Galligan [Ark.] 73 S. W. 102. A policy is governed by the law of the state where it is issued, so far as it relates to its nature, validity and interpretation. In an action on a New York policy, it must be shown that a notice required by Laws New York 1892, p. 1972, c. 690, § 92, has been duly mailed to the insured together with non-payment of premiums in order to establish a forfeiture on such ground. Seely v. Manhattan L. Ins. Co. [N. H.] 55 Atl. 425. The state in which application for insurance is made, the policy accepted and the premium paid, is that whose laws govern the contract. Contract held a Kentucky contract over a contention that it was a New York contract based on the fact that on its face it purported to have been executed at the city of New York. Carrollton Furniture Mfg. Co. v. American C. I. Co. [C. C. A.] 124 Fed. 25.

69. Contract delivered in Washington held governed by Laws New York 1877, c. 321, § 1, requiring notice of forfeiture for nonpayment of premiums. Mut. L. Ins. Co. v. Hill [C. C. A.] 118 Fed. 708.

70. Pietri v. Seguenot, 96 Mo. App. 258.

71. A contract made by a foreign insurance company authorized to do business within the state and based on an application in writing to an agent within the state delivered within the state, and the first premium paid therein, is to be regarded in the absence of other facts, as a local contract. Albro v. Manhattan L. Ins. Co., 119 Fed. 629.

72. Though the statute of the corporation's domicile is copied into the policy, and provisions in the policy are stated therein to be in compliance with such statute, the contract and not the statute will control in case of variance. Wash. L. Ins. Co. v. Glover [Ky.] 78 S. W. 146.

73. In this case it was held that a boy seventeen years of age who took the money to the post office was not an adult, notwithstanding the policy was issued to a bank located in Mexico since the court would not take notice that under the law of Mexico a male infant becomes an adult at fourteen. Banco De Sonora v. Bankers' M. Casualty Co. [Iowa] 95 N. W. 232.

74. Hewins v. London Assur. Corp. [Mass.] 68 N. E. 62.

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application is made a part of the contract, agreements therein are binding on the beneficiaries.[76] A notice on the back of a premium receipt may become a part of the contract if referred to on the face.[77]

Provision for calling medical attendant.—A physician called by the insured, under a provision allowing him to do so, is called by him as agent of the insurer and may recover against the insurer without regard to the indemnity provided in other portions of the policy.[78]

Severability of contract.—Where a policy stipulates that it shall be entirely void on certain named conditions, it is not made a severable risk by distribution of the amount of insurance through different classes or articles of property.[79] Where the mortgagor and mortgagee are insured as their interests may appear, there is a several liability.[80]

§ 8. *Modification and rescission of contract.*—Mistake must be mutual to authorize the reformation of an insurance policy therefor.[81] The insured may have a policy reformed, though he has not read it after having an opportunity.[82] The time within which insured should discover that a policy delivered to him is not that which he bargained for begins with the receipt of the policy.[83]

Where, through a mistake of an agent, a policy insuring the deceased wife's property is issued in the name of the wife, neither the husband nor the heirs having knowledge of such fact, the policy may be reformed in equity and recovery had thereon in the same action.[84]

Where the policy provides that insured is to leave with his employers sufficient to pay monthly premiums, a claim on the funds in the hands of the employer is a rejection of an offer of rescission by insured, and the wife of insured is not estopped to collect the policy by the fact that she accepts her husband's wages, the insurance company having withdrawn its claim and it not appearing that she had any knowledge thereof.[85]

§ 9. *Cancellation.*—A policy of insurance can be canceled by one of the parties only by strict compliance with its terms, unless such terms are waived.[86] A cancellation may be asserted, though the insurer is estopped from contesting liability on the ground of nonpayment of premiums.[87] Mistake in surrendering for cancellation must be mutual to authorize a recovery thereafter.[88]

After the death of the insured, a previously unaccepted offer of cancella-

75. If a statute require that the exact sum payable on the happening of the contingency insured against, must be specified, a specification in the policy cannot be changed by by-laws not set out therein though made a part thereof by recital [Rev. St. 1899, § 7903]. Goodson v. Nat. Masonic Acc. Ass'n, 91 Mo. App. 339.

76. Liability in case of suicide. Limitation of action on policy. Treat v. Merchants' Life Ass'n, 198 Ill. 431.

77. Provision that if a note is given in payment and not paid at maturity the policy shall determine. Iowa L. Ins. Co. v. Lewis, 187 U. S. 335.

78. The claim need not have been included in the insured's claim for reimbursement of the judgment obtained by an injured servant. Kelly v. Md. Casualty Co., 89 Minn. 337.

79. Germania F. Ins. Co. v. Schild [Ohio] 68 N. E. 706.

80. Kent v. Aetna Ins. Co., 84 App. Div. [N. Y.] 428.

81. Dougherty v. Lion F. Ins. Co., 41 Misc. [N. Y.] 285.

82. Failure to read is not laches. Taylor v. Glens Falls Ins. Co. [Fla.] 32 So. 887.

83. Contracts cannot be rescinded after a delay of four and a half months unless applicant has been fraudulently deterred from examining it by something occurring at time of its delivery. Bostwick v. Mut. L. Ins. Co., 116 Wis. 392.

84. Taylor v. Glens Falls Ins. Co. [Fla.] 32 So. 887.

85. Travelers' Ins. Co. v. Jones [Tex. Civ. App.] 73 S. W. 978.

86. Evidence held insufficient to show a proper cancellation of a policy before loss. Bradshaw v. Fire Ins. Co., 89 Minn. 334.

87. O'Connell v. Fidelity & Casualty Co., 87 App. Div. [N. Y.] 306.

88. Where property is insured on an application making a faulty description and a policy is subsequently written correctly describing the premises, and after delivery is returned by mistake and cancelled the intention being to return the erroneous policy. there can be no recovery on the erroneous policy after loss. Birnstein v. Stuyvesant Ins. Co., 83 App. Div. [N. Y.] 436.

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tion cannot be accepted,[89] but an action to cancel on the ground of previously undiscovered fraud may be brought.[90]

An agent instructed to cancel cannot agree to a conditional cancellation.[91]

Authority of soliciting agent.—The company is not bound by the act of a soliciting agent in canceling policies where he is unauthorized to do so and no knowledge of his act is established.[92] Soliciting agents cannot receive notice of cancellation,[93] though brokers who have for several years obtained insurance for insured may do so as to a policy obtained by them through another agency from a company which they do not represent.[94]

Notice to the insured is essential,[95] unless waived.[96] In order that a notice of reduction of the amount of insurance be binding on insured, it must be shown that he acquiesced therein.[97] Notice to the trustee in a deed of trust is unnecessary, though the policy is pledged as collateral to the deed.[98] Sufficiency of notice of cancellation to a mortgagee is governed by the circumstances of the particular case.[99]

Return of premium.[1]—Where unearned premium is to be returned on surrender of the policy on cancellation, the company on canceling the policy need not return or tender the premium until the policy is surrendered.[2] Cancellation cannot be effected by a return of the unearned premium to a person unauthorized by the real beneficiary to consent to cancellation.[3]

Where accident policies stipulate that an insurance is limited to one ticket and that premiums paid for tickets in excess will be returned on demand, one of two policies issued to the same person at the same time for the same period is void, though the amount of premium paid on it has not been tendered insured.[4]

§ 10. *Assignments and transfers.*[5] *Gifts.*—A policy of insurance being per-

89. Where the insurer does not accept an offer of cancellation and demands the premium, it cannot on the death of the insured accept the offer of cancellation by a withdrawal of a claim on insured's wages in payment of the premium. Travelers' Ins. Co. v. Jones [Tex. Civ. App.] 73 S. W. 978.

90. Union L. Ins. Co. v. Riggs, 123 Fed. 312. In an action to cancel a policy for fraud brought after the death of the insured, persons alleged to have been concerned in the fraud may be joined for the adjudication of their liability for costs. Id.

91. Where insured delivers up his policy to a local agent for cancellation on the understanding that the agent will procure insurance in another company, and the policy is delivered to the insurer, there is an absolute cancellation. Miller v. Fireman's Ins. Co. [W. Va.] 46 S. E. 181.

92. Phenix Ins. Co. v. Radford [Neb.] 93 N. W. 1000.

93. Edwards v. Sun Ins. Co. [Mo. App.] 73 S. W. 886.

94. Edwards v. Home Ins. Co. [Mo. App.] 73 S. W. 881.

95. An insurance policy remains in force though cancelled on the books of the agent, it being his intention to substitute therefor a policy on another company, if the insured has no notice of the intended substitution, the first policy is retained by him and the second is not delivered. Kerr v. Milwaukee M. Ins. Co. [C. C. A.] 117 Fed. 442. A policy providing that it may be cancelled on five days' notice by the insurer, a telegram to insured's agent directing that the risk would not be carried and that the policy should be cancelled operates as a cancellation on the expiration of five days. Schwarzschild & S. Co. v. Phoenix Ins. Co. [C. C. A.] 124 Fed. 52. The fact that a bookkeeper of insured takes the agents to a bank where the policy is deposited, does not justify the agents in believing that the bank had authority to surrender such policy or receive notice of cancellation without notice to the insured. Edwards v. Sun Ins. Co. [Mo. App.] 73 S. W. 886.

96. A settlement on the basis of the amount to which the insurer has claimed that it has reduced its risk, is a waiver of the right to object to such reduction of the risk in the absence of fraud. McLean v. American M. F. Ins. Co. [Iowa] 98 N. W. 146.

97. McLean v. American M. F. Ins. Co. [Iowa] 98 N. W. 146.

98. Edwards v. Sun Ins. Co. [Mo. App.] 73 S. W. 886.

99. Notice held too indefinite and uncertain. State Ins. Co. v. Hale [Neb.] 95 N. W. 473.

1. Under Comp. St. 1901, c. 43, § 42, the right to unearned premium becomes fixed on demand by insured before taking of additional insurance. Farmers' M. Ins. Co. v. Phoenix Ins. Co. [Neb.] 95 N. W. 3.

2. El Paso Reduction Co. v. Hartford F. Ins. Co., 121 Fed. 937; Schwarzschild & S. Co. v. Phoenix Ins. Co. [C. C. A.] 124 Fed. 52.

3. Return to the daughter of a mortgagee to whom the policy was conditionally payable and who had possession. Taylor v. Glens Falls Ins. Co. [Fla.] 32 So. 887.

4. Wilkinson v. Travelers' Ins. Co. [Tex. Civ. App.] 72 S. W. 1016.

5. Change of beneficiaries, see post, § 17.

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sonalty may be subject of a gift inter vivos[6] by parol and without notice to the insurer.[7] A transfer by a husband to his wife of a policy payable to his executors, administrators or assigns is, in Louisiana, to be governed by the rules of law prescribed for donations.[8]

Sufficiency and validity.—The law governing the contract of insurance does not control the validity of an assignment which is governed by the law of the place where it is made.[9] A formal manner of transfer may be waived by the insurer.[10] Third persons cannot object.[11]

An assignment under seal reciting that it is for value is presumed to be on a good consideration.[12] Filing with the insurer amounts to a delivery to the assignee.[13] A promise to give an assignment such attention as it may deserve establishes notice to the insurer.[14] A recital in an assignment that it is subject to a claim which in fact does not exist is surplusage and does not affect the assignment of the entire sum.[15] An assignment may be in the form of an instrument changing the beneficiaries.[16]

Operation and effect.—A written assignment of a policy of insurance as collateral security amounts to a mortgage of it.[17] Earnings are properly paid the insured.[18] If it is specified that the interest of the pledgee shall not be invalidated by any act of the owner, the pledgee is not bound by agreements as to extent of losses between the owner and the company.[19]

An assignment of a life policy executed in accordance with its terms by insured and beneficiary leaves the entire legal interest in the assignee.[20]

Where the company has knowledge of transfers of the property and assents to the assignment of the policy, it is as effectual as if a new policy is written,[21] and after a valid gift of an insurance policy, the donee has a continuing right and may keep the policy in force by payment of premiums.[22]

Consent to an assignment of the policy and transfer of the property precludes the assertion of a breach of condition by the original holder as against the transferee on a subsequent loss,[23] but does not preclude the assertion as

6. Statutory Construction Law, § 4 (Laws 1892, p. 1485, c. 677), evidence held sufficient to establish a completed gift. McGlynn v. Curry, 82 App. Div. [N. Y.] 431.

7. Notwithstanding a requirement in a life policy that assignments shall be in writing. Evidence held sufficient to establish delivery of the policy completing such a gift. Optiz v. Karel [Wis.] 95 N. W. 948.

8. Though life insurance in favor of a third person may be a stipulation pour autrui, assignments thereof are simply the transfer of an incorporeal right. Miller v. Manhattan Life Ins. Co., 110 La. 652.

9. Miller v. Manhattan Life Ins. Co., 110 La. 652.

10. By its president. Davis v. Farmers' Mut. Fire Ins. Ass'n [N. C.] 45 S. E. 955.

11. A provision against assignment when waived by the insurer through admission of liability and payment of the money into court cannot be taken advantage of by a claimant of the money. Merchants' Nat. Bank v. Comins [N. H.] 55 Atl. 191. The validity of a policy or of an assignment cannot be questioned by the administrator of a debtor whose life the creditor has insured. Maynard v. Life Ins. Co., 132 N. C. 711.

12. McDonough v. Aetna Life Ins. Co., 38 Misc. [N. Y.] 625.

13. McDonough v. Aetna Life Ins. Co., 38 Misc. [N. Y.] 625. Where there is no intent to defraud the government, the fact that the assignee after the assignment is executed, affixes revenue stamps and cancels them in the name of the assignor without authority, is immaterial. Farmers & T. Bank v. Johnson, 118 Iowa, 282.

14. A letter from the company in which it is stated that an assignment will be placed on file for such attention as it may deserve when the policy becomes a claim, is a sufficient indication of assent to the assignment. Tremblay v. Aetna Life Ins. Co., 97 Me. 547.

15. Tremblay v. Aetna Life Ins. Co., 97 Me. 547.

16. Giving the new beneficiaries a vested interest. Stoll v. Mut. Ben. Life Ins. Co., 115 Wis. 558.

17. Manhattan Life Ins. Co. v. Wright [C. C. A.] 126 Fed. 82.

18. Sommer v. New England Mut. Life Ins. Co., 21 Pa. Super. Ct. 501.

19. Scottish Union & Nat. Ins. Co. v. Field [Colo. App.] 70 Pac. 149.

20. Tremblay v. Aetna Life Ins. Co., 97 Me. 547.

21. Hayes v. Saratoga & W. Fire Ins. Co., 81 App. Div. [N. Y.] 287.

22. McGlynn v. Curry, 82 App. Div. [N. Y.] 431.

23. Home Mut. Ins. Co. v. Nichols [Tex. Civ. App.] 72 S. W. 440.

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against the assignee of fraud, of which the company had no notice at the time of consent.[24] Where the interests of successive assignees of a policy of life insurance have terminated by the death of the assignor whose interests were contingent on survival of insured, the company, if it has not had knowledge of the death of the assignor, is not estopped from denying the interest of the last assignee, by the fact that it makes an offer to such assignee of a certain sum for a legal surrender.[25]

A provision against assignment is not violated by deposit of the policy as collateral security to an assignment of the mortgage note, the policy containing a mortgage clause,[26] or by assignment after loss.[27]

Assignments by beneficiary.—A wife who is the beneficiary in a life policy on her husband's life does not, by an assignment to which the husband's consent is not shown, pass his right to a surrender value.[28] The husband's consent may be shown by the fact that he also assigns the policy in writing.[29] Under a policy payable to a named beneficiary if living, and if not, to her children, in case of her death before the insured after assignment of her interest, the children take as against the assignee.[30] In Wisconsin, a married woman who is the beneficiary of a policy on her husband's life cannot assign her interest nor can the person paying the premiums or her husband.[31] After the beneficiary's rights have become vested by death of the insured, a release must be based on consideration and an attempted release not completed at the time of insured's death becomes inoperative.[32]

§ 11. *Reinsurance.*—An insurance company which by taking over the entire assets of another insurance company has disabled it from complying with contracts made with its policy holders cannot thereafter say that it is not liable to such policy holders upon the ground that the absorbed company has not complied with its contracts with the reinsurer, and the insured may bring an action in his own name.[33]

Where a member of an association of underwriters continues to sell insurance after a fund measuring his limited liability is exhausted, he is regarded as bound to provide another fund on the conditions of his original contract, and payment of a previous liability is not a defense to the enforcement of a policy against him.[34]

An association issuing a Lloyd's policy may provide that action be brought against the general manager as attorney in fact, but if he has resigned and his place has not been filled, action on the policy may be brought against individual members.[35]

24. Northwestern Life Ins. Co. v. Montgomery, 116 Ga. 799.

25. Mutual Life Ins. Co. v. Hagerman [Colo. App.] 72 Pac. 889.

26. Key v. Continental Ins. Co. [Mo. App.] 74 S. W. 162.

27. Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283.

28. Rathborne v. Hatch, 85 N. Y. Supp. 775.

29. Laws 1879, c. 248, is complied with by written assignments executed by the husband and wife separately to the same person on the same day and on the same paper. Sherman v. Allison, 77 App. Div. [N. Y.] 49.

30. Mutual Life Ins. Co. v. Hagerman [Colo. App.] 72 Pac. 889.

31. Rev. St. 1898, § 2347. Ellison v. Straw, 116 Wis. 207.

32. An application for a change of insurance policies in which the insured did not join and which all the beneficiaries did not sign before the insured's death, is ineffectual, and though delivered to the administrator after insured's death may be revoked, being without consideration. Saling v. Bolander [C. C. A.] 125 Fed. 701.

33. Ruohs v. Traders' Fire Ins. Co. [Tenn.] 78 S. W. 85.

34. Burke v. Rhoads, 82 App. Div. [N. Y.] 325.

35. Where it is sought to charge individual members of an underwriters' association, the jury should not be instructed that a provision that actions must be brought against the general manager as attorney in fact is not abrogated by any resignation or intended resignation of such manager after the fire, and a charge from which it might be inferred that mere ownership of a dwelling

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§ 12. *Avoidance of policy by misrepresentations, breach of warranty or condition.*[36] *A. Warranties, representations and conditions. Definitions; distinctions and effect.*—The contract may determine the status of representations and promises as warranties,[37] but the language must be exact and not misleading to insured.[38] Warranties usually cannot be predicated on a statement of opinion.[39] It is usually made essential by statute that statements in the application to be regarded as warranties must be incorporated in the policy, in which case an original application controls a copy attached to, but not referred to, in the body of the policy,[40] and where a correct copy is required, no portion of the application may be relied on if answers, even though not bearing on the ground of forfeiture, are omitted.[41]

Compliance with warranties.—As to representations, substantial compliance only is required, but warranties must be literally and exactly fulfilled,[42] and at common law, though as to immaterial matters,[43] and so under jurisprudence based on the civil law.[44] Good faith is not an excuse.[45] Truth only is involved.[46]

Statutory provisions.—Many states have now enacted statutes providing that whatever may be the technical effect of the statements and promises of insured, whether to be regarded as representations or affirmative or promissory warranties, untruth shall not be a defense to liability on the policy, unless with regard to a matter contributing to the loss,[47] or increasing the hazard.[48] The false statements are sometimes required to have been made willfully and with an intent to

might authorize service of an officer of the association in a foreign state is misleading. Perrysburg & T. Transp. Co. v. Gilchrist, 24 Ohio Circ. R. 165.

36. Forfeiture for nonpayment of premiums or assessments, see ante, § 6.

37. Germier v. Springfield Fire & Marine Ins. Co., 109 La. 341. Statements to medical examiner held warranties. Dimick v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 55 Atl. 291. A warranty that statements in the application are true, full and complete and are offered to the company together with those contained in the declaration to the medical examiner as a consideration and basis for the contract, does not make declarations to the medical examiner, warranties. Home Life Ins. Co. v. Fisher, 188 U. S. 726, 47 Law. Ed. 667.

38. It is not sufficient to term statements strict affirmative warranties where the contract is doubtful, contradictory, or where it contains statements to induce the insured to believe otherwise. Provident Sav. Life Ins. Soc. v. Cannon, 103 Ill. App. 534.

39. It is a mere warranty of the applicant's opinion to warrant that facts which the company should know have not been left unstated. Louis v. Conn. Mut. Life Ins. Co., 172 N. Y. 659. Statements that insured has never had any bodily or mental infirmity and is in sound condition mentally and physically except as stated, are warranties and not representations resting in belief. Standard Life & Acc. Ins. Co. v. Sale [C. C. A.] 121 Fed. 664.

40. Dimick v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 55 Atl. 291.

41. It is sufficient that under certain circumstances they might affect the rights of the parties [Acts Mass. 1894, c. 522, § 73]. Albro v. Manhattan Life Ins. Co., 119 Fed. 629.

42. Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. [C. C. A.] 124 Fed. 25.

43. Where under a policy of insurance against loss in the mails insured warrants that he will have money packages packed and sealed by two adults, one of whom continues in its control until it is deposited at the post office, the insured cannot, as against a defense that the warranty has not been complied with, assert that it was not material to the loss. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 95 N. W. 232. That insured had not had medical attendance. Schane v. Metropolitan Life Ins. Co., 76 App. Div. [N. Y.] 271.

44. Germier v. Springfield F. & M. Ins. Co., 109 La. 341.

45. Standard Life & Acc. Ins. Co. v. Sale [C. C. A.] 121 Fed. 664.

46. A false statement purporting to be a complete answer authorizes forfeiture of a policy issued in reliance thereon, where the application stipulates that the answers shall be warranties and if untrue in any respect, the policies shall be void. Farrell v. Security Mut. Life Ins. Co. [C. C. A.] 125 Fed. 684. If statements in the application are made warranties, an untrue statement concerning a fact which is or ought to be within the personal knowledge of the applicant avoids the policy. Dimick v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 55 Atl. 291.

47. Rev. St. 1899, § 7890. Jenkins v. Covenant Mut. Life Ins. Co., 171 Mo. 375; Franklin Life Ins. Co. v. Galligan [Ark.] 73 S. W. 102. Acts 1895, p. 332, c. 160, § 22, is applicable to warranties as well as representations in requiring them to be material though its language is: "such misrepresentation is made with actual intent to deceive or unless the matter represented increase the risk of loss." Hartford Life Ins. Co. v. Stalling [Tenn.] 72 S. W. 960.

48. Laws 1895, p. 400, c. 175, § 20. Price v. Standard Life & Acc. Ins. Co. [Minn.] 95 N. W. 1118.

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deceive, to be ground for avoidance,[49] though under the Misssouri statute, the intent may be fraudulent, if the misstatements are not as to matters causing the loss.[50] These statutes apply to accident companies,[51] and are extended to foreign companies operating within the states,[52] some states going so far as to make statutes applicable only to foreign companies.[53] They are not retroactive.[54] They cannot be avoided by the policy[55] or application.[56]

Representations.—There is in the absence of an express provision on that head, an implied condition in every contract of insurance of the truth of all material representations of the insured on the faith of which the contract is made, though they are oral and not set out in the policy.[57]

Mere misrepresentations must be material[58] which may be shown by the fact that specific questions are directed toward their subject-matter.[59] They must cause the issuance of the policy,[60] and insured must know their materiality as well as falsity.[61] An actual intent to deceive must be present,[62] which will not be presumed from mere falsity,[63] though intent to prejudice the insurer need not be shown.[64]

Incontestable provisions barring all defenses except actual fraud preclude the company from setting up constructive fraud or untruthful statements in the application,[65] but do not prevent a rescission for fraud within a reasonable time after discovery and on return of premiums,[66] or a correction of the amount of insurance to conform with the true age of the applicant, there having been a misstatement thereof.[67]

Effect of severability of policy.—Where the policy is severable, a breach of condition as to one portion of the risk may not be fatal as to the remainder.[68]

49. Laws 1895, p. 400, c. 175, § 20. Price v. Standard Life & Acc. Ins. Co. [Minn.] 95 N. W. 1118.

50. Rev. St. 1899, § 7890. Representations that insured's concubine was his wife, and of freedom from syphilis. Ashford v. Metropolitan Life Ins. Co., 98 Mo. App. 505.

51. Acts 1894, p. 1059, c. 662 (Poe's Supp. Code Pub. Gen. Laws 1900, art. 23, § 142a). Maryland Casualty Co. v. Gehrmann, 96 Md. 634.

52. St. 1894, c. 522, § 21. Abraham v. Mut. Reserve Fund Life Ass'n, 183 Mass. 116.

53. Policy of a domestic company is avoided by false warranty as to existing insurance [Construing Mo. St.]. Williams v. St. Louis Life Ins. Co., 97 Mo. App. 449.

54. An amendment making a statute providing that misrepresentations shall be fatal only when contributory to the loss by making such statute applicable only to the residents of Missouri, does not affect a previously issued policy to one not a citizen. Franklin Life Ins. Co. v. Gailigan [Ark.] 73 S. W. 102.

55. Express stipulation that answers are to be regarded as warranties, and the company not bound by knowledge of the solicitor of facts not stated in writing in the application. North American Acc. Ins. Co. v. Sickles, 23 Ohio Circ. R. 594.

56. North American Acc. Ins. Co. v. Sickles, 24 Ohio Circ. R. 232.

57. Evans v. Columbia Fire Ins. Co., 40 Misc. [N. Y.] 316.

58. Stipulation that a policy shall be void if statements in the application are untrue in any particular which would have led to the applicant's rejection. New Era Ass'n v. MacTavish [Mich.] 94 N. W. 599.

59. Answers to specific questions in terms warranted to be true. Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. [C. C. A.] 124 Fed. 25.

60. Ley v. Metropolitan Life Ins. Co. [Iowa] 94 N. W. 568.

61. Question of whether any facts are left unstated which the company ought to know. Louis v. Conn. Mut. Life Ins. Co., 172 N. Y. 659.

62. Fraud is defined as false representation of fact made with knowledge of its falsity with intent that it be acted on and actually acted on by the company to its injury. Ley v. Metropolitan Life Ins. Co. [Iowa] 94 N. W. 568.

63. Ley v. Metropolitan Life Ins. Co. [Iowa] 94 N. W. 568. The insurer must prove that such statements were fraudulent, that insured knew that they were false and that they are material to the risk. Provident Sav. Life Assur. Soc. v. Cannon, 103 Ill. App. 534; Summers v. Metropolitan Life Ins. Co., 90 Mo. App. 691.

64. Northwestern Life Ins. Co. v. Montgomery, 116 Ga. 799.

65. Northwestern Life Ins. Co. v. Montgomery, 116 Ga. 799.

66. New York Life Ins. Co. v. Weaver's Adm'r, 24 Ky. L. R. 1086, 70 S. W. 628.

67. Doll v. Prudential Ins. Co., 21 Pa. Super. Ct. 434.

68. A policy in which a building and a stock in trade are insured for distinct, specified amounts, is not avoided as to the building by a change of the ownership of stock without notice to the insured. Royal Ins. Co. v. Martin, 24 Sup. Ct. 247. Where a policy of insurance against loss on sales generally has attached to it a rider undertaking

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Rights of beneficiary on misstatement by insured.—The vested interest of a beneficiary in a life policy will not prevent a forfeiture by reason of acts of the insured,[69] though the beneficiary is innocent of fraud.[70]

Rights of mortgagee on breach by insured.—Mortgage clauses, making loss, if any, payable to a mortgagee as his interest may appear, place the mortgagee at the risk of acts of the mortgagor, avoiding the insurance under the original policy.[71] The mortgagee's rights may be saved by provision in the policy against invalidation by act of the owner or insured.[72] The cases conflict as to whether such provision creates an independent contract.[73]

(§ 12) *B. Operation of particular representations, warranties and conditions.*[74] *Other insurance.*—As a general rule, statements by insured as to other insurance are regarded as material and, when false, will avoid the policy.[75] Applicant's knowledge of such insurance is conclusively presumed.[76] It need not be absolutely payable to the insured's estate.[77] Permission to renew authorizes a substitution of policies.[78]

Location of the risk must be correctly stated where affecting the hazard.[79]

Ownership and title.—Correct statement of insured's title may be demanded. Policies usually require any interest other than sole and unconditional ownership

to insure against loss on sales to a particular firm to a specified amount, the latter is a different contract from that embodied in the original policy and not invalidated by representations as to the insured's gross sales and gross losses during previous years made in the application for the original policy. Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. [C. C. A.] 124 Fed. 25. Where a house and its contents are insured, misrepresentation as to ownership of the house avoids insurance on the contents. Germier v. Springfield F. & M. Ins. Co., 109 La. 341. Machinery owned by a third party included in a policy, requiring sole and unconditional ownership, avoids the entire policy though the other property is insured for a stated amount. Elliott v. Teutonia Ins. Co., 20 Pa. Super. Ct. 359.

69. Married woman beneficiary. Behling v. Northwestern Nat. Life Ins. Co. [Wis.] 93 N. W. 800.

70. On policy obtained by fraud of the insured. Somers v. Metropolitan Life Ins. Co., 90 Mo. App. 691.

71. Delaware Ins. Co. v. Greer [C. C. A.] 120 Fed. 916. The mortgagee recovers in the right of the mortgagor and only when he may recover. Keith v. Royal Ins. Co. [Wis.] 94 N. W. 295. The mortgagee is not protected against a condition avoiding the policy on transfer by the owner without written notice. Jaskulski v. Citizens' Mut. Fire Ins. Co. [Mich.] 92 N. W. 98. Where the mortgagee does not require the insertion of the clause in the Standard Policy stating that his interest shall not be invalidated by the act of the mortgagor or owner. Rosenstein v. Traders' Ins. Co., 79 App. Div. [N. Y.] 481.

72. A mortgagee may recover though by an innocent mistake of himself or agent a wrong name is inserted in the body of the policy as the owner of the legal title and equity of redemption. The policy contained the usual clause against mis-statement of title or interest. Phoenix Assur. Co. v. Hinds [Kan.] 73 Pac. 893. The acts against which the mortgagee is protected are such acts of commission or omission on the part of the owner or mortgagor that may forfeit the policy. The mortgagee is protected against the failure of the mortgagor to furnish proofs of loss. Glens Falls Ins. Co. v. Porter [Fla.] 33 So. 473.

73. The effect of providing that a policy payable to a mortgagee as his interest may appear, shall not be invalidated as to the mortgagee's interest by any act or neglect of the mortgagor or owner, is to create two separable contracts relating to the same subject of indemnity but applying to different interests, and the mortgagee may recover though before issuance of the policy the mortgagor has transferred his interest to one who procures insurance in the mortgagor's name. Smith v. Union Ins. Co. [R. I.] 55 Atl. 715. While a clause making a policy payable to a mortgagee and providing that his interest may not be invalidated by any act of the mortgagor, does not create an independent contract in favor of the mortgagee, it gives him a separate contractual status so that he can recover where the mortgagor could not. Glens Falls Ins. Co. v. Porter [Fla.] 33 So. 473.

74. Evidence of breach of warranty or untruthfulness of representations, see post, § 20C.

75. Moore v. Mut. Res. F. Life Ass'n [Mich.] 95 N. W. 573.

76. Williams v. St. Louis L. Ins. Co., 97 Mo. App. 449.

77. Other insurance includes a paid-up policy payable to the executors, administrators or assigns, with a reservation to the insurer of the right to pay the money to any person who has incurred expenses on behalf of the insured. Dimick v. Metropolitan L. Ins. Co. [N. J. Err. & App.] 55 Atl. 291.

78. A new policy may be taken instead of a renewal certificate. Stage v. Home Ins. Co., 76 App. Div. [N. Y.] 509.

79. Misrepresentation as to the location of cotton presses as being in couples may be shown where the number of presses and their neighborhood affects the risk. Evans v. Columbia F. Ins. Co., 40 Misc. [N. Y.] 316.

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to be specifically stated.[80] Such stipulations relate to the time of issuance of the policy.[81] The agent is not bound to investigate insured's title.[82]

Incumbrance.—Of the same nature as the ownership clauses are clauses requiring existing or subsequent incumbrances to be stated;[83] but where a policy is issued without representations as to title, the insurer cannot object that the insured's interest was not correctly stated or existing incumbrances disclosed.[84]

Change of title or interest.—Policies usually incorporate a requirement that any change of title or interest must be reported to the insurer and his consent obtained. Such provisions are valid,[85] and for their interpretation, see the footnotes.[86] A reconveyance before loss may cure a forfeiture for change in title.[87]

80. Nature of title satisfying condition for sole ownership: Interest of a partner does not (McGrath v. Home Ins. Co., 84 N. Y. Supp. 374) nor an undivided interest with a mortgage on the residue, for more than the entire value (Palatine Ins. Co. v. Dickenson, 116 Ga. 794) nor title in trust for insured and others, to sell and distribute proceeds (Bradley v. German-American Ins. Co., 90 Mo. App. 369) nor interest of a vendor who has received a large portion of the purchase money from the vendee and allowed the vendee to enter into possession, though the legal title has not passed (Rosenstock v. Miss. Home Ins. Co. [Miss.] 35 So. 309) nor of a vendee who has executed an instrument amounting to a contract to re-sell (Farmers' & M. Ins. Co. v. Hahn [Neb.] 96 N. W. 255).

Mortgagor before foreclosure has such interest. Wolf v. Theresa Village M. F. Ins. Co., 115 Wis. 402; Union Assur. Soc. v. Nalls [Va.] 44 S. E. 896.

Vendee of realty under a land contract is a sole and unconditional owner. Matthews v. Capital F. Ins. Co., 115 Wis. 272. Possession may be under an unconditional parol contract. Milwaukee M. Ins. Co. v. Rhea [C. C. A.] 123 Fed. 9. There may be an agreement to pay a balance due, or sell or re-sell and reconvey to the seller (Stowell v. Clark, 171 N. Y. 673), or a contract authorizing the seller to take possession in case notes given for purchase price are not paid when due (Scottish U. & N. Ins. Co. v. Strain, 24 Ky. L. R. 958, 70 S. W. 274).

81. A policy is void though issued after insured's death and though no application was ever made. Rosenstock v. Miss. Home Ins. Co. [Miss.] 35 So. 309.

82. Pope v. Glens Falls Ins. Co., 136 Ala. 670.

83. A provision against incumbrance is violated by the fact that a house insured is on land incumbered by a vendor's lien, though the lien existed before the house was built. Curlee v. Tex. Home F. Ins. Co. [Tex. Civ. App.] 73 S. W. 831, 986. Omission of the fact that there is a mortgage on premises insured, is a material fact and prevents insurance being effective, though made without intent to deceive or defraud. Hayes v. U. S. F. Ins. Co., 132 N. C. 702. An agreement by a vendee that his vendor transfer land, which the vendee holds under a contract of sale to secure a debt owing by the vendee to a third person, is an incumbrance. Hogue v. Farmers' M. F. Ins. Co., 116 Wis. 656.

84. Union Assur. Soc. v. Nalls [Va.] 44 S. E. 896.

85. Jaskulski v. Citizens' M. F. Ins. Co. [Mich.] 92 N. W. 98.

86. Change of Title or Interest. There is no violation as long as the insured continues to be the sole and exclusive owner and possessor of the property insured. Stenzel v. Pa. F. Ins. Co., 110 La. 1019. A conveyance by joint owners to one owner is not a "sale, transfer or incumbrance." German M. F. Ins. Co. v. Fox [Neb.] 96 N. W. 652. A transfer by insured to a firm in which he is a silent partner will avoid a policy so conditioned as to property which passes from the insured to any other person otherwise than by due operation of law unless notice is given to the insurer. Royal Ins. Co. v. Martin, 24 Sup. Ct. 247, 48 Law. Ed. ——. Conveyance to the wife of the insured must be assented to. Melcher v. Ins. Co. of Pa., 97 Me. 512.

A mortgage is not a change of interest, title or possession (Wolf v. Theresa Village M. F. Ins. Co., 115 Wis. 402), though in form of an absolute deed executed for security (Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283). The execution of a deed which is not delivered and which is not to take effect except on the death of insured does not change unconditional or sole ownership. Frankin Ins. Co. v. Feist [Ind. App.] 68 N. E. 188. A conveyance to secure another from a possible liability which never occurs, is not a change of title though absolute in form. Henton v. Farmers' & M. Ins. Co. [Neb.] 95 N. W. 670. Delivery, fraudulently procured, of a duly executed deed is not a change of ownership. Hartford F. Ins. Co. v. Warbritton, 66 Kan. 93, 71 Pac. 278. A recorded deed under which no consideration is paid and without change of possession executed to prevent enforcement of a judgment is a change in title. Rosenstein v. Traders' Ins. Co., 79 App. Div. [N. Y.] 481. A contract to convey under which consideration is not paid and there is no change in possession or the right thereto, is not a change in interest or title. Home M. Ins. Co. v. Tompkies, 30 Tex. Civ. App. 404. A guardian's contract of sale, subject to approval by the court, is not a change of interest, title or possession. Tiemann v. Citizens' Ins. Co., 76 App. Div. [N. Y.] 5. Purchase by a devisee of insured in partition, is a change of title. Dornblaser v. Sugar Valley M. F. Ins. Co., 20 Pa. Super. Ct. 536. Execution of a bill of sale placed in the hands of a third person to be delivered on full payment of the consideration at which time title is to pass, a portion of the consideration having been paid is change of title or interest. Excelsior Foundry Co. v. Western Assur. Co. [Mich.] 98 N. W. 9. An adjudication of bankruptcy is not a sale or transfer of the property where the loss occurs before the estate vests in the trustee. Fuller v. N. Y. F. Ins. Co. [Mass.] 67 N. E. 879.

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Notice of foreclosure or other legal proceedings instituted which may affect insured's title may be required.[88] On commencement of such proceedings, the policy may provide that the insurance terminate, in which case the insured should apply for cancellation of the policy and return of unearned premium.[89]

Where there is no provision that a policy shall be void on beginning of foreclosure proceedings by the mortgagee to whom loss is payable, such mortgagee may recover, though there is a condition that in case of foreclosure proceedings without notice to the company the policy should be void.[90]

Iron safe clauses.—For the purpose of avoiding fraud, clauses are inserted in the policy requiring insured to keep correct books and invoices in a fireproof safe. Such provisions are valid,[91] and compliance is a condition precedent to recovery.[92] The invoice to satisfy this provision must be sufficiently specific to show the condition of the stock,[93] and such invoices must be kept, though their production is not insisted on.[94] Inadvertent omission to place them in the safe will not aid insured,[95] but if while in the safe they are destroyed through its not being fireproof, the insured has complied if he believe that the safe fulfilled the requirements of the policy.[96] Books of third persons will not satisfy a provision for the production of books by insured, though showing the facts required to be shown by the insured's books.[97]

Increase of risk.—Notice of increased hazard must be given to the insurer when the policy so stipulates,[98] and the insured must avoid any change in the premises which will increase danger.[99] Use of a portable engine within a prescribed distance of buildings insured, in a permanent manner as is necessary to the filling of a silo, is a breach of warranty against such use.[1] A provision that

87. German M. F. Ins. Co. v. Fox [Neb.] 96 N. W. 652.

88. Proceedings of which insured acquired knowledge at any time before loss are included. Del. Ins. Co. v. Greer [C. C. A.] 120 Fed. 916. A stipulation concerning notice of sale by virtue of any mortgage, is inoperative in Louisiana, since there is in such statute no extra judicial enforcement of the mortgage. Stenzel v. Pa. F. Ins. Co., 110 La. 1019. Commencement of foreclosure proceedings does not include waivers of legal delays and other waivers of a nature to greatly facilitate and expedite judicial proceedings if begun. Id. Where the insurer has notice of entry of a judgment and issuance of execution thereof, notice of the sheriff's advertisement for sale, is unnecessary. Ulysses Elgin Butter Co. v. Home Ins. Co., 20 Pa. Super. Ct. 320.

89. Hayes v. U. S. F. Ins. Co., 132 N. C. 702.

90. Henton v. Farmers' & M. Ins. Co. [Neb.] 95 N. W. 670.

91. Iron safe clauses are held reasonable and valid. Maupin v. Scottish U. & N. Ins. Co., 53 W. Va. 557.

92. Keet-Rountree Dry Goods Co. v. Mercantile Town M. Ins. Co. [Mo. App.] 74 S. W. 469.

93. A provision for the keeping of an inventory is not complied with unless the inventory is such that from its inspection one familiar with the business may readily determine the character of the articles on hand, a mere summary of the stock of goods is not sufficient. Del. Ins. Co. v. Monger [Tex. Civ. App.] 74 S. W. 792. A provision for the keeping of books is complied with where the books will fairly show a man of ordinary intelligence all purchases and sales for cash and credit. Conn. F. Ins. Co. v. Clark, 24 Ohio Circ. R. 33.

94. Robinson v. Aetna F. Ins. Co. [Ala.] 34 So. 18.

95. If the policy stipulates that insured shall keep a set of books and produce them in case of loss, he is not excused by the destruction of the books in the fire, his negligence contributing thereto. Rives v. Fire Ass'n of Phila. [Tex. Civ. App.] 77 S. W. 424.

96. Where the insured believes that the safe is fire proof and it is of the kind usually understood to be so. Underwriters' Fire Ass'n v. Palmer [Tex. Civ. App.] 74 S. W. 603.

97. Rives v. Fire Ass'n of Phila. [Tex. Civ. App.] 77 S. W. 424.

98. On a policy against flooding of a building by an automatic sprinkler, a provision that notice shall be given of any defect making the sprinkler system more hazardous, is limited to defects in the sprinkling machine. Wertheimer Swarts Shoe Co. v. U. S. Casualty Co., 172 Mo. 135.

99. Temporary displacement of a sprinkling system through freezing is not an increase of risk relieving the insurer from liability where extra care has been taken in watching the plant and immediate steps adopted to repair it and the repairs were not a change in the system discharging the insurer. Cummer Lumber Co. v. Associated Mfrs. Mut. Fire Ins. Corp., 173 N. Y. 633.

1. Though the insurance covers engines, shafting and belting, where there were other engines located within one of the insured buildings. An upright portable engine used in operating an ensilage cutter is a "steam farm engine." Wilson v. Union Mut. Fire Ins. Co. [Vt.] 55 Atl. 662.

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the policy shall be void, if the hazard be increased by any means within the control of the insured, does not modify the effect of clauses referring to other specific means.[2]

Guarding against extra hazard are conditions against vacancy,[3] inoperation of machinery,[4] and requiring permits for alterations and repairs.[5]

Keeping of gasoline or other explosives is generally authorized by special permit,[6] and violations of restrictions against such keeping are fatal, though by a tenant without insured's knowledge.[7] Gasoline and increase of hazard clauses are to be construed separately, hence the keeping of gasoline may avoid a policy without regard to increase of risk or resultant loss.[8]

Watchmen.—Temporary absence of a watchman will not avoid a policy if insured has acted with due diligence.[9]

Conditions against release of claims against persons causing loss must be complied with.[10]

Protection from further damage after the fire loss, where stipulated in the policy, is a condition precedent to recovery unless waived.[11] The appointment of a receiver in bankruptcy does not remove the insurer's right to have the property cared for by insured.[12]

Condition of health.—As a general rule, statements of the insured as to condition of health leading to the issuance of the policy are regarded as material and must be true.[13] Warranties as to absence of bodily or mental infirmities and as to sound mental and physical condition except as stated may be exacted.[14] Cases in which particular representations as to health have been considered are grouped

2. Thuringia Ins. Co. v. Norwaysz, 104 Ill. App. 390.

3. A temporary vacation during a change of tenants is not such a vacation as will avoid the policy, where the property was insured as in the possession of the tenants. Unreasonable time not elapsing. Union Ins. Co. v. McCullough [Neb.] 96 N. W. 79. Breach of condition against vacancy or change of occupancy while a ground of forfeiture does not of itself avoid the policy. Hunt v. State Ins. Co. [Neb.] 92 N. W. 921.

4. A provision that the policy shall be void if the property insured is not operated for more than a specified length of time, avoids the policy after expiration of a longer period during which the property has remained idle by permission of the company, though the time fixed in the policy has not expired after the termination of the permitted period. El Paso Reduction Co. v. Hartford Fire Ins. Co., 121 Fed. 937.

5. A reasonable limitation as to the time in which mechanics may be employed in the insured building in alterations or repairs, is applicable, though the work done is reasonably necessary for the ordinary repair and preservation of the property. Fifteen days is a reasonable limitation. German Ins. Co. v. Hearne [C. C. A.] 117 Fed. 289, 59 L. R. A. 492. Rubbing and polishing woodwork, regilding light fixtures, reburnishing, plumbing and repairing defects in plastering and spouting, are repairs, within the meaning of the limitation as to the time for which mechanics may be employed in repairing insured premises. Id.

6. "Keeping of gunpowder or explosives," covers manufacturing flash light powder. Lutz v. Royal Ins. Co., 205 Pa. 159.

7. Thuringia Ins. Co. v. Norwaysz, 104 Ill. App. 390.

8. Evidence held to show a sufficient keeping of gasoline to avoid a policy. Norwaysz v. Thuringia Ins. Co., 204 Ill. 334.

9. The obligation is fulfilled by the employment of competent men for the purpose though one of them leaves without the knowledge or consent of the insured and a fire occurs during his absence. McGannon v. Millers' Nat. Ins. Co., 171 Mo. 143.

10. A stipulation that a contract should not be made whereby anyone should not be liable for act or neglect causing a fire, is avoided by a stipulation in the lease under which insured holds stipulating that risk of fire through the proximity of the lessor's railroad track is assumed by the lessee. Kennedy v. Iowa State Ins. Co., 119 Iowa, 29. A condition by which insured agrees not to enter into any special agreement releasing carriers from their common law or statutory liabilities, if broken, avoids the policy notwithstanding a loss of goods in transit was by a fire of incendiary origin for which the carrier was not liable. Bloomingdale v. Columbia Ins. Co., 84 N. Y. Supp. 572.

11. Thornton v. Security Ins. Co., 117 Fed. 773.

12. Fuller v. New York Fire Ins. Co. [Mass.] 67 N. E. 879.

13. Jeffrey v. United Order of Golden Cross, 97 Me. 176. Within the meaning of act June 23, 1885, P. L. 134, are questions as to good health, last attendance of physician, nature of complaint for which consulted, spitting of blood, and serious illnesses. Murphy v. Prudential Ins. Co., 205 Pa. 444. Consultation of a physician and absence of liver diseases. Flippen v. State Life Ins. Co., 30 Tex. Civ. App. 362.

14. Standard L. & A. Ins. Co. v. Sale [C. C. A.] 121 Fed. 664.

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in the notes.[15] A change of health after issuance of the policy does not affect the contract.[16]

Attendance of physicians.[17]—Treatment for temporary indisposition need not be stated.[18] There is a conflict of authority as to whether insured must have summoned the physician.[19]

Miscellaneous statements.—The cases as to materiality and effect of other statements, concerning such matters as family history,[20] occupation,[21] habits and use of intoxicants,[22] and other applications for insurance,[23] or rejection thereof, are grouped in the notes.[24]

Notice of post mortem, though required, need not be given unless shown to be material.[25]

(§ 12) *C. Waiver or estoppel as to misrepresentations, breaches of war-*

15. Sound health means freedom from sensible disease and apparent derangement of functions by which health may be tested (Jeffrey v. United Order of Golden Cross, 97 Me. 176), or the absence of any vice in the constitution or disease of a serious nature having a direct tendency to shorten life in distinction to a temporary ailment or indisposition (Packard v. Metropolitan Ins. Co. [N. H.] 54 A. 287; Clemens v. Metropolitan Life Ins. Co., 20 Pa. Super. Ct. 567). Bodily infirmity must be something amounting to an actual inroad on physical health. Black v. Travellers' Ins. Co. [C. C. A.] 121 Fed. 732. Evidence of receipt of sick benefits from benefit society and cessation of work under a doctor's advice, does not falsify a warranty of good health, where it appears that the insured was free from organic disease. Clemens v. Metropolitan Life Ins. Co., 20 Pa. Super. Ct. 567. A warranty of physical soundness is not broken by the fact that the applicant's leg is slightly curved and on that account more susceptible to inflammation in case of accident. Md. Casualty Co. v. Gehrmann, 96 Md. 634. Where answers are warranties, insured must in case of doubt as to whether he has been an inmate of a hospital, give a complete statement of the facts or state that he does not know. The fact that insured has been sent by a physician to a hospital in order that he might get good bed and board indicates that he has been an "inmate." Farrell v. Security Mut. Life Ins. Co. [C. C. A.] 125 Fed. 684.

16. Grier v. Mut. L. Ins. Co., 132 N. C. 542.

17. Attendance of physicians concealed from the insured will avoid the policy. Moore v. Mut. Reserve Fund Life Ass'n [Mich.] 95 N. W. 573. A warranty as to the name of the physician in attendance during a most recent illness, is not broken by giving the name of one of two physicians in attendance, the name given being that of the one in attendance during the latter and greater portion of the illness. Franklin Life Ins. Co. v. Galligan [Ark.] 73 S. W. 102.

18. Blumenthal v. Berkshire Life Ins. Co. [Mich.] 96 N. W. 17. Attendance during a slight bilious fever need not be mentioned. Franklin Life Ins. Co. v. Galligan [Ark.] 73 S. W. 102.

19. Statement of non-attendance of physician is falsified, though insured objected to the doctor being sent for and did not take his medicine, though she allowed him to examine and prescribe for her. Flippen v State Life Ins. Co., 30 Tex. Civ. App. 362. A warranty that insured had been attended by a certain named physician is not broken by the fact that during a slight ailment, another physician had been called by insured's wife over his objection it not appearing that his medicine was taken or his course of treatment followed. Crosby v. Security Mut. Life Ins. Co., 86 App. Div. [N. Y.] 89.

20. Statement by applicant that sister died from kidney inflammation when in fact she died from chronic pneumonia, is not prima facie material. New Era Ass'n v. MacTavish [Mich.] 94 N. W. 599.

21. Abandonment of occupation is not shown by cessation therefrom after six months, there being no engagement in a different occupation. Falsifying a statement that applicant's occupation was labor in a rolling mill. Clemens v. Metropolitan Life Ins. Co., 20 Pa. Super. Ct. 567.

22. To falsify a negative answer to a question of "Have you ever used spirits, wine or malt liquors to excess?" there must be more than a showing that insured had sometimes but not habitually drunk to excess. Provident Sav. Life Assur. Soc. v. Exchange Bank [C. C. A.] 126 Fed. 360. Proof of occasional excess does not show a breach of warranty as to the use of intoxicants where the form of question indicates that the information sought was the applicant's habit or practice. Equitable Life Assur. Soc. v. Liddell [Tex. Civ. App.] 74 S. W. 87. Where the policy requires insured not to use intoxicating liquors to excess, an instruction is erroneous which leaves to insured the determination of what is an excessive use. Union Life Ins. Co. v. Jameson [Ind. App.] 67 N. E. 199.

23. A prior application for insurance must be disclosed, though conditional and not to become operative as a request for insurance, unless insured afterward decided that he desired a policy, if he should be accepted as a risk. Webb v. Security Mut. Life Ins. Co. [C. C. A.] 126 Fed. 635.

24. Unfavorable reports by physicians in several instances and rejections concealed from the insured will avoid the policy. Moore v. Mutual Reserve Fund Life Ass'n [Mich.] 95 N. W. 573.

25. The insurer was immediately notified of the post mortem and an offer of another post mortem made and there was no showing that the first examination disclosed facts that would have been hidden on the second, and the first was held under circumstances rendering doubtful plaintiff's knowledge or consent. Loesch v. Union C. & S. Co., 176 Mo. 654.

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ranty or condition subsequent.—There can be no waiver without knowledge.[26] The insurer is charged with knowledge of the facts disclosed in a prior application which is referred to.[27] The president of the company may waive a breach of warranty in the absence of a by-law showing that he does not possess the authority usual to his office.[28] In many states knowledge of the soliciting agent is deemed knowledge of the insurer, estopping it from setting up facts known to the agent at the time of issuance of the policy as a ground of forfeiture,[29] though the application states that only a general agent may make contracts relative to risks, and that waiver of conditions must be indorsed on the policy,[30] and the same doctrine is held to apply to facts coming to the knowledge of the soliciting agent after the issuance of the policy,[31] though not universally.[32]

Knowledge of a broker soliciting insurance and placing his orders with the insurer's agent will not work a waiver of a requirement of sole and unconditional

26. Evidence of waiver, see post, § 20 C. Where a fraudulent concealment by the agent in issuing a policy to himself is not known at the time negotiations for payment are entered into, such defense is not waived. Firemen's Fund Ins. Co. v. McGreevy [C. C. A.] 118 Fed. 415. Payment of a portion of the loss to a mortgagee does not waive change of ownership. Cottom v. National Fire Ins. Co., 65 Kan. 511, 70 Pac. 357. A provision against incumbrance by chattel mortgage is not waived by indorsement making the loss payable to the mortgagees as their interest might appear, where it is not shown that the insurer had knowledge of the fact that the persons to whom the indorsement was made were mortgagees. Atlas Reduction Co. v. New Zealand Ins. Co., 121 Fed. 929.

27. Rhode v. Metropolitan Life Ins. Co. [Mich.] 93 N. W. 1076.

28. Traders' Mut. Life Ins. Co. v. Johnson, 200 Ill. 359.

29. Hunt v. State Ins. Co. [Neb.] 92 N. W. 921. Soliciting agent's knowledge is within a statutory provision that mistakes, errors, or fraudulent statements of which the agent or company has knowledge, shall not vitiate the insurance [Rev. St. § 3265]. North American Acc. Ins. Co. v. Sickles, 23 Ohio Circ. R. 594. Knowledge of other insurance. Stage v. Home Ins. Co., 76 App. Div. [N. Y.] 509; Herbert v. Standard Life & Acc. Ins. Co., 23 Ohio Circ. R. 225. Knowledge that there was a doctor's office in the building and that plaintiff had no iron safe. Phoenix Ins. Co. v. Randle, 81 Miss. 720. Condition of insured's title. Gerringer v. N. C. Home Ins. Co., 133 N. C. 407; State Mut. Ins. Co. v. Latourette [Ark.] 74 S. W. 300. Knowledge that insured is only a vendee in possession. Brooks v. Erie Fire Ins. Co., 76 App. Div. [N. Y.] 275. There is no fraud in a representation that insured is the owner of the land on which the property is situated, where the agent is informed that notes for the purchase money are not yet paid. Underwriters' Fire Ass'n v. Palmer [Tex. Civ. App.] 74 S. W. 603. Misrepresentation as to ownership does not cause a policy in a mutual insurance company to be void, where a building and personal property therein owned by a tenant are insured in a mutual company, the application being signed by a name indicating joint ownership by the husband of the tenant at the suggestion of the agent who knew the several interests in the property. Farmers' Mut. F. & L. Ins. Co. v. Ward, 24 Ohio Circ. R. 156. Statements of a cashier of a mortgagee bank that no mortgage was claimed on the strength of which the agent with knowledge of the mortgage issues the policy, operate to show a waiver of a condition against encumbrance. Brenner v. Conn. Fire Ins. Co. [Mo. App.] 74 S. W. 406. Representations that buildings intended for smallpox patients were occupied by a city sexton. De Soto v. American Guaranty Fund Mut. Fire Ins. Co. [Mo. App.] 74 S. W. 1. Railroad ticket agents authorized to solicit accident risks may waive restrictions against insurance of cripples. Standard Life & Acc. Ins. Co. v. Holloway, 24 Ky. L. R. 1856, 72 S. W. 796. A statement of an agent soliciting a policy of credit insurance that a question as to the statement of losses applied only to losses of customers rated in the book of a certain commercial agency, may estop the insurer from asserting that the policy was avoided by a misrepresentation. The question is for the jury. Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. [C. C. A.] 124 Fed. 25. Where at the time of receipt of the application and delivery of an accident policy the insurer's agent knew that insured had made claim against another accident company for indemnity and that an accident policy held by him had been canceled, a breach of warranty to the contrary is waived. Carr v. Pacific Mut. Life Ins. Co. [Mo. App.] 75 S. W. 180. An agent issuing a certificate on an application signed by the brother of insured, waives a by-law requiring personal signature. Thornburg v. Farmers' Life Ass'n [Iowa] 98 N. W. 105.

30. Local agent who wrote out, countersigned and delivered the policy. Continental Fire Ass'n v. Norris, 30 Tex. Civ. App. 299.

31. Knowledge of an agent of the commencement of foreclosure proceedings will estop the company from asserting a ground of forfeiture. Benjamin v. Palatine Ins. Co., 80 App. Div. [N. Y.] 260. Knowledge that insured has made a contract to sell the property. Ormsby v. Laclede Farmers' Mut. F. & L. Ins. Co. [Kan. App.] 72 S. W. 139.

32. Notice that gasoline is being kept on the premises does not effect a waiver of the right to forfeit therefor. Cassimus v. Scottish Union & Nat. Ins. Co., 135 Ala. 256.

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ownership.[33] Mutual insurance companies may be bound by the acts of their agent in waiving conditions of the policy.[34]

Policies containing condition against waiver of their terms are variously construed. It has been held that such provision may be waived in the same manner as any other,[35] or may refer merely to alterations after the contract becomes binding;[36] but it has been held also that provisions requiring waiver of conditions to be indorsed on the policy are a binding limitation on local agents,[37] and that an attempt to show an oral waiver is an attempt to vary the terms of the contract.[38]

False statements by agent.—On the principle that the soliciting agent acts for the insurer and not the insured rests the rule that insured is not responsible for misstatements knowingly inserted in the application by the agent or medical examiner.[39] The rule will not apply to another insurer which issues a policy on the basis of the same application.[40] The insured is not liable for a mistake of the agent,[41] and is not bound to see that he acts in good faith.[42] If the application is signed by insured without knowledge of the fraud, the company cannot defend, though it provide that the statements of the insured therein shall be warranties.[43] Provisions in the policy that the solicitor is to be regarded as the insured's agent, while ineffectual to render him such, may place the duty on insured of seeing that the application is correct.[44] Under such a policy, untrue answers entered

33. McGrath v. Home Ins. Co., 84 N. Y. Supp. 374.

34. Companies organized under Rev. St. 1899, c. 119, art. 10. Ormsby v. LaClede Farmers' Mut. F. & L. Ins. Co. [Kan. App.] 72 S. W. 139. Description of the risk as a dwelling, under direction of the agent, will estop the company though there is a statutory provision that waiver of condition must be indorsed on the application and policy [Rev. St. § 8091]. Ross-Langford v. Mercantile Town Mut. Ins. Co., 97 Mo. App. 79.

35. Provision that waiver must be in writing. Lutz v. Anchor Fire Ins. Co. [Iowa] 94 N. W. 274. Adjustment and unconditional promise to pay a loss with full knowledge of the forfeiture, may amount to a waiver of failure to comply with promissory warranties. Tillis v. Liverpool & L. & G. Ins. Co. [Fla.] 35 So. 171. Consent to transfer of property may be oral. Home Mut. Ins. Co. v. Nichols [Tex. Civ. App.] 72 S. W. 440. Other insurance. Kotwicki v. Thuringia Ins. Co. [Mich.] 95 N. W. 976. A general agent may waive any stipulations in the policy, notwithstanding a clause in the policy forbidding it. Gwaltney v. Provident Sav. Life Assur. Soc., 132 N. C. 925.

36. A provision in a policy of insurance that waiver of any of its provisions must be in writing, signed by chief officers of the company and attached to the policy does not refer to changes in the blank form of the policy before it becomes binding on the parties, and does not limit the authority of an agent to make a contract with a mortgage clause. State Ins. Co. v. Hale [Neb.] 95 N. W. 473. Persons dealing with an agent are not bound by hidden restrictions or restrictions in the policy subsequently issued as to acts concerning the application. Fidelity Mut. Fire Ins. Co. v. Lowe [Neb.] 93 N. W. 749.

37. Hunt v. State Ins. Co. [Neb.] 92 N. W. 927.

38. An oral waiver of an iron safe clause at or before the issuance of the policy. Maupin v. Scottish Union & Nat. Ins. Co., 53 W. Va. 557. A provision that if the subject of insurance is encumbered by chattel mortgage, the policy was to be void, is not open to construction. Hammell v. Insurance Co. of Pa., 24 Ohio Circ. R. 101. The insurer is not estopped from benefiting by a provision against the keeping of gasoline by the fact that the agent states that such right is conferred by a clause insuring such other merchandise as is usually kept in similar stocks, there being no allegation that plaintiff was ignorant, could not read or understand the policy or was deceived or misled. Cassimus v. Scottish Union & Nat. Ins. Co., 135 Ala. 256.

39. Hayes v. Saratoga & W. Fire Ins. Co., 81 App. Div. [N. Y.] 287; Provident Sav. Life Assur. Soc. v. Cannon, 201 Ill. 260; Fidelity Mut. Fire Ins. Co. v. Lowe [Neb.] 93 N. W. 749; Parrish v. Rosebud Min. & Mill. Co. [Cal.] 71 Pac. 694. Stating no encumbrance. Ormsby v. LaClede Farmers' Mut. F. & L. Ins. Co. [Kan. App.] 72 S. W. 139. Describing the premises as a dwelling, where they were in fact occupied as a meat market. Mead v. Saratoga & W. Fire Ins. Co., 81 App. Div. [N. Y.] 282. Evidence held to show that a mistake in the ownership of property insured was not due to negligence of insurer. McCarty v. Hartford Fire Ins. Co. [Tex. Civ. App.] 75 S. W. 934. Statements written by examining physician. Franklin Life Ins. Co. v. Galligan [Ark.] 73 S. W. 102.

40. Parrish v. Rosebud Min. & Mill. Co. [Cal.] 71 Pac. 694.

41. Omission of a joint owner will not avoid the policy. Title being in husband and wife, the agent having full knowledge, and insured having made no misrepresentation. Carnes v. Farmers' Fire Ins. Co., 20 Pa. Super. Ct. 634.

42. Though the application is attached to the policy which is delivered. Otte v. Hartford Life Ins. Co., 88 Minn. 423.

43. Otte v. Hartford Life Ins. Co., 88 Minn. 423.

44. A provision that the solicitor of insurance and medical examiner ought to be regarded as the agents of the insured and that any false, incorrect or untrue answer

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by the solicitor and by the medical examiner, if of the character made warranties by the contract, avoid the policy.[45]

Examiner's certificate.—Statutory provision that a certificate of health by a medical examiner or physician acting as such shall estop the insurer from setting up the defective health of insured at the time the policy went into effect, unless the certificate is procured by the fraud or deceit of the insured, is regarded as referring to the examiner's certificate and not to the approval of his report by the medical director who passes on his report.[46]

Delivery of the policy to insured, with knowledge of a right to forfeit, waives such right.[47] Delivery to the soliciting agent does not have such effect.[48]

Acceptance of premiums or assessments after knowledge works a waiver or estoppel.[49] But on acquiring knowledge, the insurer is not bound to return unearned premiums,[50] especially where the contract so provides.[51] By statute in some states, misrepresentations in the application cannot be made a defense unless the premiums accepted are deposited in court.[52]

Delay in asserting.—Forfeitures must be claimed within a reasonable time.[53]

Admission of liability or proceedings looking toward a settlement operate as a waiver of known grounds of forfeiture,[54] but investigation of loss and determination of amount of damages will not operate as a waiver of broken conditions, where insured before investigation makes an express agreement to the contrary.[55]

or concealment of the facts shall render the policy void, will require the insured to take notice of the limitations of the company's agents. Dimick v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 55 Atl. 291.

45. This holding is not disturbed by the common law of New York so far as answers written by insurance solicitors are concerned, they being such as the applicant himself was at liberty to insert. Dimick v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 55 Atl. 291.

46. Wood v. Farmers' Life Ass'n [Iowa] 95 N. W. 226.

47. Moore v. Mut. Reserve Fund Life Ass'n [Mich.] 95 N. W. 573. Company is estopped in the absence of fraud to assert that the policy is void on account of non-payment of premium or ill health, where the policy itself provides that on approval of the application and issuance of the policy it is in force from the day of application. Grier v. Mut. Life Ins. Co., 132 N. C. 542. Where agent of an accident insurance company knowingly sells a crippled person a policy, the company cannot assert a provision against insurance of cripples. Standard Life & Acc. Ins. Co. v. Holloway, 24 Ky. L. R. 1856, 72 S. W. 796. If an agent accepts a risk with knowledge that the applicant is not yet eligible and the certificate is delivered on compliance with the condition as to eligibility the status at the time of application cannot be asserted as a defense. Delaney v. Modern Acc. Club [Iowa] 97 N. W. 91. Other insurance. Stage v. Home Ins. Co., 76 App. Div. [N. Y.] 509.

48. Facts held not to show delivery to the applicant. Mutual Ben. Life Ins. Co. v. Sinclair, 24 Ky. L. R. 1543, 71 S. W. 853.

49. Where answers as to health are materially false but an agent required to investigate the insured's health, knows the facts and continues to collect premiums, the false answers are waived though made with an intent to deceive. Sun Life Ins. Co. v. Phillips [Tex. Civ. App.] 70 S. W. 603. Additional insurance. Mississippi Home Ins. Co. v. Dobbins, 81 Miss. 623; Mississippi Fire Ass'n v. Dobbins, 81 Miss. 630.

50. Violation of iron safe clause of which the insurer had no knowledge prior to the loss. Robinson v. Aetna Fire Ins. Co., 135 Ala. 650.

51. In order to resort to a defense of suicide, the insurer need not tender back unearned premium, where the policy provides that in such event all payments shall be forfeited to the company; the defense then does not amount to a rescission of the contract. Dickerson v. Northwestern Mut. Life Ins. Co., 200 Ill. 270.

52. Rev. St. 1899, § 7891. Lavin v. Empire Life Ins. Co. [Mo. App.] 74 S. W. 866.

53. Treating the policy as in force after knowledge of facts on which a forfeiture may be claimed is a waiver. Hunt v. State Ins. Co. [Neb.] 92 N. W. 921. Breach of a condition against the keeping of gasoline. Cassimus v. Scottish Union & Nat. Ins. Co., 135 Ala. 256. Additional insurance. Swedish American Ins. Co. v. Knutson [Kan.] 72 Pac. 526.

54. A disclosure in garnishment by creditors of the beneficiary in which the insurer states that it is not indebted to the beneficiary does not operate as a waiver of false warrants in the application though a later statement of the breaches of warranty relied on was filed on a showing that when the interrogatories were first answered a full answer could not be given because defendant was then engaged in investigation. Moore v. Mut. Reserve Fund Life Ass'n [Mich.] 95 N. W. 573. Iron safe clause. Tillis v. Liverpool & L. & G. Ins. Co. [Fla.] 35 So. 171. Consent to a prior removal may be given by acts and conduct of an adjuster even after the loss. Montgomery v. Delaware Ins. Co. [S. C.] 45 S. E. 934.

55. Hayes v. U. S. Fire Ins. Co., 132 N. C. 702.

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Such agreement is valid though made after loss.[56] A statement that the insurer will not pay the gross amount of policies separately insuring a building and a stock of merchandise does not waive a requirement for the keeping of an inventory of stock.[57]

Payment to mortgagee.—Where a policy provides for payment to a mortgagee, notwithstanding certain breaches of conditions by the owner and for subrogation of the insurance company to the rights of the mortgagee in case of any payment, a waiver of forfeiture does not arise from a payment to the mortgagee of the amount of the mortgage;[58] nor is such waiver to be predicated on a payment to the insured of a balance remaining after satisfying a foreclosure decree obtained by the mortgagee, if such payment is made on an express agreement that it should be without prejudice to the insurance company's right to enforce payment of the judgment of foreclosure which was assigned to it.[59]

Proofs of loss.—Requiring the insured to prepare proofs of loss after knowledge of breach of conditions amounts to a waiver,[60] in the absence of agreement or circumstance showing a contrary understanding,[61] and where insured is not misled.[62] Conditions precedent to the attaching of insurance under an open policy are not waived by the exaction of additional proofs of loss by the insurer on discovery of the facts relating to such conditions.[63]

Reliance on other defenses.—It is also held that an assertion of definite grounds of forfeiture is a waiver of other grounds.[64] Where the insured is not misled, a claim of absence of liability based on one particular violation of a policy does not prevent the insurer from relying on breaches of other conditions.[65]

§ 13. *The risk assumed. Loss and causes of loss.*[66]—The insurer may assert that the policy does not cover the cause of loss, though he cannot defend on account of falsity in the application.[67]

Life insurance.—Provisions that the policy shall be null and void in case of a suicide, whether sane or insane, are not against public policy,[68] and bar recovery

56. Iron safe clause. Keet-Rountree Dry Goods Co. v. Mercantile Town Mut. Ins. Co. [Mo. App.] 74 S. W. 469.

57. Keet-Rountree Dry Goods Co. v. Mercantile Town Mut. Ins. Co. [Mo. App.] 74 S. W. 469.

58. Vacancy without consent or commencement of foreclosure proceedings without notice. Wisconsin Nat. Loan & Bldg. Ass'n v. Webster [Wis.] 97 N. W. 171.

59. Wisconsin Nat. Loan & Bldg. Ass'n v. Webster [Wis.] 97 N. W. 171.

60. Concurrent insurance. Fidelity Mut. Fire Ins. Co. v. Murphy [Neb.] 95 N. W. 702. Where an adjuster with knowledge of noncompliance with an iron safe clause requires the insured to make affidavit of the loss without claiming the forfeiture there is a waiver. Couch v. Home Protection Fire Ins. Co. [Tex. Civ. App.] 73 S. W. 1077.

61. Where the adjuster though denying liability on the ground of ownership advises the preparation of proofs of loss to prevent a forfeiture, such facts do not establish a waiver, though the proofs were received by the company. Matthie v. Globe Fire Ins. Co., 174 N. Y. 489. If the proofs of loss stipulate that their furnishing shall not be a waiver of any rights of the company, a breach of condition is not waived by having the insured prepare such proofs. Curlee v. Tex. Home Fire Ins. Co. [Tex. Civ. App.] 73 S. W. 831, 986. Furnishing of blank stating on its face that the company waived none of the conditions in the policy does not waive a condition forfeiting the policy in case a post-mortem was held without notice to the insurer. Loesch v. Union Casualty & Surety Co., 176 Mo. 654. A waiver of forfeiture on the ground of sole and unconditional ownership is not shown by the fact that the insurer demanded additional proof of loss after knowledge of a lien on the property for unpaid purchase money. Hartford Fire Ins. Co. v. Enoch [Ark.] 77 S. W. 899.

62. Loesch v. Union Casualty & Surety Co., 176 Mo. 654.

63. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 95 N. W. 232.

64. Hence an insurer against loss in the mails cannot assert that the package lost was not deposited in the mail by an adult as required in the policy after denial of liability on other grounds. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 95 N. W. 232.

65. Cassimus v. Scottish Union & Nat. Ins. Co., 135 Ala. 256.

66. Evidence of cause of loss, see post, § 20 C.

67. An exception in an accident policy against a liability for death resulting wholly or partly from infirmity or disease, may be raised as a defense notwithstanding statutory provisions against defenses on the ground of fraudulent application [Rev. St. §§ 3625, 3626]. Aetna L. Ins. Co. v. Dorney, 68 Ohio St. 151.

68. N. W. M. Ins. Co. v. Churchill, 105 Ill. App. 159, 164.

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where insured takes his own life other than accidentally, without regard to his mental condition.[69] Such provisions are self-executing,[70] and bind the beneficiary.[71]

A statutory provision providing that suicide shall not be a defense, unless contemplated at the time of making application for the policy, covers self-destruction while insane.[72] Such a statute does not prevent accident companies from contracting that a smaller amount shall be payable in case of death by suicide than in case of death by accidental and involuntary causes.[73]

Where insured, though innocent, is legally executed for a crime, no liability arises on the policy.[74]

Accident insurance.—Definitions of accident should not eliminate the element of chance.[75] Death from disease, a natural though not necessary consequence of an accidental physical injury, is a death from accident,[76] and diseased condition of an organ rendering an accident more likely does not prevent the accident from being "independent of all other causes";[77] but under an exception against injuries received in consequence of being under the influence of or affected by or resulting directly or indirectly from diseases or bodily infirmity, recovery cannot be had for a fall from a window while delirious.[78] Specific exceptions do not limit a general exception of a different nature.[79] Accident policies frequently require that death or injury must result from "external, violent and accidental means." For the interpretation of this and similar phrases, see the footnotes;[80] so for requirements of external and visible marks of injury,[81] limitations against death or injury from poison or things taken internally,[82] death or injury from voluntary

69. Clarke v. Equitable L. Assur. Soc. [C. C. A.] 118 Fed. 374.

70. "If the insured shall die by his own hand whether sane or insane" then the policy shall be null and void. Dickerson v. N. W. M. L. Ins. Co., 102 Ill. App. 280.

71. Dickerson v. N. W. M. L. Ins. Co., 102 Ill. App. 280.

72. Rev. St. Mo. 1879, § 5982. Knights Templars' & M. L. Indemnity Co. v. Jarman, 187 U. S. 197.

73. Rev. St. Mo. 1899, § 7896. Whitfield v. Aetna L. Ins. Co., 125 Fed. 269.

74. Burt v. Union Cent. L. Ins. Co., 187 U. S. 262.

75. Error to define an accidental cause as one which may happen by chance. Smouse v. Iowa State Traveling Men's Ass'n, 118 Iowa, 436.

76. Blood poisoning following an accidental scratch. Delaney v. Modern Acc. Club [Iowa] 97 N. W. 91. Rheumatism. Travelers' Ins. Co. v. Hunter, 30 Tex. Civ. App. 489.

77. Rupturing of cancerous kidney. Fetter v. Fidelity & Casualty Co., 174 Mo. 256.

78. The delirium is the proximate cause of the injury. Carr v. Pac. M. L. Ins. Co. [Mo. App.] 75 S. W. 180.

79. Where there is a list of specified exceptions, such as intoxicants, anaesthetics, vertigo, etc., acts resulting from which are not insured against a subsequent exception of "any diseases or bodily infirmity" is not limited by the preceding specifically stated exceptions they not being of the same nature or kind. Carr v. Pac. M. L. Ins. Co. [Mo. App.] 75 S. W. 180.

80. Death from septic peritonitis resulting from bicycle riding is excluded. Appel v. Aetna L. Ins. Co., 86 App. Div. [N. Y.] 83. Death through being struck by a car while crossing a railroad track creates liability (Payne v. Fraternal Acc. Ass'n, 119 Iowa, 342) or death from dilation of the heart resulting from a strain in lifting a weight, such as insured had been accustomed to lift without difficulty (Horsfall v. Pac. M. L. Ins. Co., 32 Wash. 132, 72 Pac. 1028). Policy held to render the insurer liable for death from accident, though the accident did not produce immediate total and continuous disability. Rorick v. Ry. O. & E. Acc. Ass'n [C. C. A.] 119 Fed. 63.

81. Visible marks of injury on the body are afforded by a redness of the brain tissue disclosed by the autopsy or by death of the body. Union C. & S. Co. v. Mondy [Colo. App.] 71 Pac. 677. That after an accident deceased became deathly sick and pale, his hands and feet became cold and perspiration stood out on his face and hands, and that on the day after his skin which previously had been ruddy, became a bluish gray color and remained so until his death, furnishes visible, external marks. Horsfall v. Pac. M. L. Ins. Co., 32 Wash. 132, 72 Pac. 1028.

82. An exception of injuries resulting from poison or anything taken accidentally or otherwise taken, administered, absorbed or inhaled does not cover medicine, even though it contain poison or anything taken or administered in good faith to alleviate physical pain even though it results in unexpected and unintentional death. Dezell v. Fidelity & Casualty Co., 176 Mo. 253. Contra, Kennedy v. Aetna L. Ins. Co. [Tex. Civ. App.] 72 S. W. 602. Does not allow recovery for infection of the eyes resulting from accidental contact with poison ivy. Preferred Acc. Ins. Co. v. Robinson [Fla.] 33 So. 1005. Covers death resulting from the eating of oysters, which whether poisonous or not, or taken accidentally or not, were consciously and voluntarily swallowed by insured. Md. Casualty Co. v. Hudgins [Tex.] 76 S. W. 745.

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exposure to danger,[83] or while engaging in a more hazardous occupation,[84] or from causes intentionally or voluntarily encountered by insured.[85]

Health insurance.—If insured has two diseases, one of which is insured against, either of which is sufficient to disable him entirely from transacting his business, he may recover.[86]

Fire insurance.—Liability exists for all loss occasioned directly by the fire, though it happens during or after the extinguishment thereof.[87] Negligence of the insured or his agent contributing to the loss is not a defense.[88] Where a husband and wife join in an application for insurance on the wife's property, the wife's right to the proceeds is not affected by the wrongful acts of the husband in setting fire to the property without her knowledge.[89]

A rider allowing removal of goods, providing that during removal the property shall be insured in each location, does not insure the goods while in transit.[90]

A policy stipulating against liability for loss by explosion of any kind unless fire ensue imposes no liability for loss by concussion caused by an explosion in a neighboring building.[91]

83. Involuntary is not equivalent to undesigned or unintentional in describing movement causing rupture of blood vessel. Smouse v. Iowa State Traveling Men's Ass'n, 118 Iowa, 436. One rightfully crossing a railroad track at a point recognized as a thoroughfare, is not "walking or being on a railroad bridge, road-bed or location" violating the laws or rules of the corporation. Payne v. Fraternal Acc. Ass'n, 119 Iowa, 342. An exception against accident while walking on a railroad road bed, covers a portion of the track long used by the residents of the neighborhood as a common pathway without objection on the part of the railroad. Weinschenk v. Aetna L. Ins. Co., 183 Mass. 312. An instruction that to bring a case within the exception of an accident policy it must appear that insured was walking or being on the road bed of a railroad voluntarily, is sufficient though plaintiff contends that insured was not voluntarily on the road bed at the time of the accident if he had fallen down and was unable by reason of inability to move to get out of the way quickly enough to escape injury. Id. Passing from one car to another of a vestibuled train will not be a forfeiture of an accident policy. Insured was thrown from an open door of the vestibule and it was not shown that he should have known that the door was open. Robinson v. U. S. Ben. Soc. [Mich.] 94 N. W. 211. Attempt by young, vigorous traveling man to board a train running from eight to ten miles an hour is voluntary or necessary exposure to danger or to obvious risk of injury. Small v. Travelers' Protective Ass'n [Ga.] 45 S. E. 706. Exception of injury in "entering or trying to enter a moving conveyance" covers a sudden starting of a car just as plaintiff had got on its steps. Travelers' Ins. Co. v. Brookover [Ark.] 71 S. W. 246. Evidence held not to show voluntary exposure to danger in cleaning a gun. Union C. & S. Co. v. Goddard, 25 Ky. L. R. 1035, 76 S. W. 832.

Injuries received while hunting do not include injuries received while helping make a fire on a hunting expedition (Wilkinson v. Travelers' Ins. Co. [Tex. Civ. App.] 72 S. W. 1016), or while cleaning a gun after a hunting trip (Union C. & S. Co. v. Goddard, 25 Ky. L. R. 1035, 76 S. W. 832).

84. Where it is stipulated that riding a bicycle for pleasure is not an occupation, one injured while incidentally riding a bicycle, was not engaged in a more hazardous occupation or exposure. Comstock v. Fraternal Acc. Ass'n, 116 Wis. 382. A classification of "cattle shipper and tender in transit" as more hazardous, does not include a "tender of horses in transit." Brock v. Brotherhood Acc. Co. [Vt.] 54 Atl. 176.

85. A provision that the insured shall not be liable for injury received from fighting or scuffling, etc., in the absence of any qualification, may be assumed to refer to altercations for which the insured is in some degree to blame and in which he is to some degree at least a voluntary participator. Dismissal of complaint on ground that such provision in a policy of accident insurance was shown by plaintiff's testimony to be violated, held error. Coles v. N. Y. Casualty Co., 87 App. Div. [N. Y.] 41. A stipulation as to injuries intentionally inflicted on himself by insured or by any other person covers injuries received by the insured through retaliation of a person on whom insured was making an unjustifiable assault. Fidelity & Casualty Co. v. Smith [Tex. Civ. App.] 71 S. W. 391. Injuries received from breaking a blood vessel in attempting to remove a night-shirt are deemed to be voluntary. Smouse v. Iowa State Traveling Men's Ass'n, 118 Iowa, 436.

86. Existence of prostatitis as well as diabetes insured against. Travelers' Ins. Co. v. Duvall, 25 Ky. L. R. 137, 74 S. W. 740.

87. Plaintiff is entitled to an instruction that if his goods are damaged by water or chemicals thrown thereon by a fire extinguisher or from being trampled on or thrown about in efforts to put out the fire, such damages are covered by the policy. Cohn v. Nat. Ins. Co., 96 Mo. App. 315.

88. Scottish U. & N. Ins. Co. v. Strain, 24 Ky. L. R. 958, 70 S. W. 274.

89. Union Ins. Co. v. McCullough [Neb.] 96 N. W. 79.

90. Goodhue v. Hartford F. Ins. Co. [Mass.] 67 N. E. 645.

91. Hustace v. Phenix Ins. Co., 175 N. Y. 292. Where the policy exempts the company from liability for loss occasioned by explosion and confines loss from fire resulting from explosion to damages actually occasioned by the fire, an instruction properly

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Plate glass insurance.—Damages resulting from a gasoline vapor explosion are not from fire, though the gas is ignited by a match or light;[92] but a breaking from such an explosion is not covered by an exception against damages sustained by the "blowing up of the building."[93]

The fact that there is a hole in the glass at the time of the issuance of the policy does not show that a later break was in consequence of or connected therewith.[94]

Casualty insurance.—A limitation that the policy does not cover loss from assured's neglect to use all reasonable means to preserve the property does not exempt insurer from a loss on account of negligence of insured's servants, but refers to care to be used after the loss.[95] A provision against loss resulting from the willful act of assured does not free the insurer from liability from the act of a servant in placing fastenings of windows in such position as to break the pipe of an automatic sprinkler, where it is not alleged that he knew that the consequence might follow.[96]

Boiler insurance.—Insurance against boiler explosion covers loss occasioned by flooding from the discharge of an automatic sprinkler system by escaping steam from a burst pipe.[97]

Employer's and contractor's liability insurance.—Costs of successful defenses are not impliedly covered.[98] Insurance against accidental bodily injury covers accidentally contracted diseases.[99]

If a judgment against the firm is set aside as to one of the partners, there is no liability on an agreement to indemnify the partnership against any judgment that might be rendered against it.[1]

Where the policy excepts personal injuries caused by contractors' or subcontractors' workmen, plaintiff must prove that the injury resulted only from the negligence of himself or his employes, and must prove that it was not caused by a subcontractor or a subcontractor's workman.[2] The insurer is not prevented from denying liability by reason of its failure to defend an action on a bond given by insured for the purpose of releasing money held by the obligee in which the insured agreed to hold the obligee harmless on account of any judgment in behalf of any person injured, and discharge such judgment, whether groundless or otherwise.[3]

Title insurance.—Title insurance is designed to save insured harmless from any loss through defects, liens or encumbrances that may affect or burden his title when he takes it, and if insured gets a good title, in the absence of stipulation to the contrary the covenant of the insurer is fulfilled and there is no liability. Such a contract usually bears the date of the deed of the title which it purports to insure, and where there is a discrepancy between these dates, the circumstance

states that defendant was not liable for any damages caused by the explosion, unless fire ensued and if there was an explosion and fire ensued thereafter, defendant was liable only for the actual damages caused by the fire and was not liable for any damages caused or resulting from the explosion. Cohn v. Nat. Ins. Co., 96 Mo. App. 315.

92, 93. Vorse v. Jersey Plate Glass Ins. Co., 119 Iowa, 555.

94. Glass in the absence of a contrary stipulation is to be regarded as insurable though pierced by a hole. McMyler v. Union C. & S. Co., 84 N. Y. Supp. 170.

95, 96. Wertheimer Swarts Shoe Co. v. U. S. Casualty Co., 172 Mo. 135.

97. Hartford S. B. I. & Ins. Co. v. Sonneborn, 96 Md. 616.

98. A policy covering any common law or statutory liability of insured to persons other than employes who might accidentally sustain bodily injuries directly occasioned by the business operations of the insured, does not cover the cost of successful defense of suits. Cornell v. Travelers' Ins. Co., 175 N. Y. 239.

99. Acute kidney disease produced by the absorption of poison consequent on handling infected paper in the course of employment. Columbia Paper Stock Co. v. Fidelity & Casualty So. [Mo. App.] 78 S. W. 320.

1. Kelley v. London G. & A. Co., 97 Mo. App. 623.

2. Evidence held insufficient. Tolmie v. Fidelity & Casualty Co., 41 Misc. [N. Y.] 451.

3. Tolmie v. Fidelity & Casualty Co., 41 Misc. [N. Y.] 451.

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occasioning it should be noted in the contract.[4] A contract will not be divided into one of indemnity against loss and also of guaranty.[5]

Confirmation of a tax or assessment by a city is not a final judgment or decree on a lien within the meaning of a policy of title insurance.[6] No recovery can be had for negligence of the insurer in searching the title.[7]

§ 14. *Extent of loss and liability therefor.*[8] *Accident insurance.*—Where the policy provides in case of suicide for payment of a fractional part of the amount otherwise payable, such sum is to be computed on the benefit ordinarily payable, and not on the double amount stipulated in specified circumstances.[9]

If it appears that at the time of injury the insured was exposed to hazard peculiarly incident to an occupation classed as more hazardous than that named in the application as the occupation of the insured, his recovery should be limited to the amount of insurance the premium paid would purchase in the more hazardous class, the policy so providing.[10] Provisions for limited liability in case of injuries intentionally inflicted by a third person are binding, though a higher rate be paid for insurance as a member of a class specially exposed to the risk of such injury.[11]

A paymaster traveling on business of a railroad company from station to station and stopping to pay employes wherever they may be on the road is not a "passenger" on steam cars entitled to double indemnity under the policy.[12]

Time previous to employment of a physician cannot be included where disability is limited to such time as insured is in the care of a physician.[13] Prolongation of disability by a premature attempt to use an injured limb does not terminate a right to weekly indemnity.[14] A single act in the line of insured's profession will not bar him from claiming that he was immediately, continuously and wholly disabled by an accident, or the fact that disability is claimed only from the third day after the accident at which time he became confined to his bed.[15] The fact that a person is not too sick to go by street car to his doctor's office does not prevent him from being confined to the house or being totally disabled.[16]

Amputation of an arm a little below the elbow is "loss of an arm."[17]

Health insurance.—Recovery for total disability cannot be had where insured continues to direct his business.[18]

Fire insurance.—The market value is not necessarily the measure of loss, but the actual value, taking into consideration the cost of rebuilding and allowing for

4. Facts held to authorize reformation of policy so as to make it bear the date of conveyances. Trenton Potteries Co. v. Title Guarantee & Trust Co., 176 N. Y. 65.

5. A policy of title insurance which guarantees the completion of certain buildings according to plans and specifications thereon, does not authorize the insured to recover on failure of the houses to comply with the specifications unless actual loss is shown. Wheeler v. Equitable Trust Co., 206 Pa. 428.

6. Taylor v. N. J. Title Guarantee & Trust Co. [N. J. Law] 56 Atl. 152.

7. Trenton Potteries Co. v. Title Guarantee & Trust Co., 176 N. Y. 65.

8. Evidence of amount of loss, see post, § 20 C.

9. Van Slooten v. Fidelity & Casualty Co., 78 App. Div. [N. Y.] 527.

10. Evidence held to show injury while tending cattle in transit falling within occupation of "stock dealer tending stock in transit." Loesch v. Union C. & S. Co., 176 Mo. 654.

11. Policeman insured as such shot while effecting an arrest. Grimes v. Fidelity & Casualty Co. [Tex. Civ. App.] 76 S. W. 811.

12. Though the pay car was a specially equipped passenger car. Travelers' Ins. Co. v. Austin, 116 Ga. 264, 59 L. R. A. 107.

13. Hayes v. Continental Casualty Co., 98 Mo. App. 410.

14. Md. Casualty Co. v. Gehrmann, 96 Md. 634.

15. Brendon v. Traders' & T. Acc. Co., 84 App. Div. [N. Y.] 530.

16. Mut. Ben. Ass'n v. Nancarrow [Colo. App.] 71 Pac. 423.

17. Garcelon v. Commercial Travelers' E. A. Ass'n [Mass.] 67 N. E. 868.

18. If insured is able to spend a portion of the day at his store superintending his business sick benefits cannot be recovered under a clause—if insured is wholly incapacitated from transacting any and every kind of the work or business pertaining to his occupation and is entirely confined to the house or bed. Shirts v. Phœnix A. & S. B. Ass'n [Mich.] 97 N. W. 966.

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difference between new and old.[19] Increased cost of repair by reason of building laws may be considered.[20] But where the policy provides that the loss or damage shall not exceed what it would cost to repair or replace with material of like kind and quality, and that insurer shall not be liable beyond the actual value destroyed by fire for loss occasioned by ordinance or law regulating construction or repair of buildings, the rule is otherwise.[21] A provision in the policy for liability only to a specified portion of the actual cash value must be considered, though the value of the property destroyed equals the amount of the insurance.[22] If statutes provide that in case of total loss the insurer shall be liable for the value as fixed by the policy, the policy cannot provide that no more will be paid than what it will cost insured to replace the building, or that the actual cash value will be paid.[23] The fact that before a fire plaintiffs had entered into a contract of sale of the property which they thereafter consummated on the original terms will not prevent a recovery on the policy.[24]

Employer's liability.—On insurance indemnifying against liability for judicially determined claims for injuries, interest does not run until the loss or damage is finally settled by determination of the court of last resort to which an appeal is taken. If the insurer appeal without the wish of the insured, he is chargeable with the costs.[25]

Concurrent insurance.—Provisions in other policies of insurance are not to be considered in determining the liability of an insurer who has expressly stipulated the manner in which his liability shall be fixed in event of concurrent insurance.[26] In determining the amount of insurance for the purpose of apportioning the loss, the face of the policies is to be resorted to regardless of the cash value of the property or a duty imposed on the insurer by certain of the policies to obtain other insurance or become a co-insurer.[27] When two policies insure the same property, but one of them covers other property also, without specifying how much of the insurance applies to each property, a case of double insurance is not presented and the policies do not pro rate.[28] Liabilities between blanket and specific policies are to be apportioned by considering the full amount of the blanket insurance on the first item; on the second item, such amount less the liability on the first; and so on, the items being taken in the order of greatest loss.[29]

§ 15. *Notice and proof of loss. A. Necessity and sufficiency.*—Provisions of policies relating to matters to be done by insured after the loss, which do not alter the insurer's risk or increase his liability, are to be given a favorable construction toward insured.[30] Where no forfeiture for failure to furnish proof of

19. Stenzel v. Pa. F. Ins. Co., 110 La. 1019.

20. The company is bound in case of loss and damage to either pay the amount for which it should be liable or replace the property with other of the same kind and goodness, or may notify the insured of its intention to rebuild or repair the premises. Hewins v. London Assur. Corp. [Mass.] 68 N. E. 62.

21. Hewins v. London Assur. Corp. [Mass.] 68 N. E. 62.

22. Instruction to contrary held erroneous. Roberts v. Ins. Co. of America, 94 Mo. App. 142.

23. Ky. St. § 700. Hartford F. Ins. Co. v. Bourbon County Ct., 24 Ky. L. R. 1850, 72 S. W. 739. Rev. St. § 3643 fixing the extent of liability in case of total loss, cannot be waived or arbitrated unless the loss is partial and the only question for the jury is such question. Eureka F. & M. Ins. Co. v. Gray, 24 Ohio Circ. R. 268.

24. Tiemann v. Citizens' Ins. Co., 76 App. Div. [N. Y.] 5.

25. Stephens v. Pa. Casualty Co. [Mich.] 97 N. W. 686.

26. Kan. City Paper Box Co. v. American F. Ins. Co. [Mo. App.] 75 S. W. 186.

27. Stephenson v. Agricultural Ins. Co., 116 Wis. 277. Defendant's liability is to be determined by the amount of the face of its policy divided by the amount of the total insurance and multiplied by the amount of the loss. Farmers' Feed Co. v. Scottish U. & N. Ins. Co., 173 N. Y. 241.

28. Meigs v. Ins. Co. of N. A., 205 Pa. 378.

29. Schmaelzle v. London & L. F. Ins. Co., 75 Conn. 397.

30. Schilansky v. Merchants' & M. F. Ins. Co. [Del.] 55 Atl. 1014. A phrase in the beginning of a policy stating that it is issued subject and according to the agreements and conditions therein mentioned, which are to be considered as conditions precedent, which

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loss is provided in the policy, plaintiff should not be precluded if it appears that the purpose for which notice and proofs are required has been accomplished.[31] Proof of death as a condition precedent does not require proof of cause of death.[32]

Where a subsequent disability does not arise from the original accident but from a later accident to the old wound, the insured cannot recover without making new proofs of loss.[33]

Time.—Statutory provisions that contractual stipulations for notice precedent to right to sue for damages must be reasonable and not less than of a certain period avoid clauses in insurance policies requiring insured to give immediate notice of extent of injury.[34] Otherwise such stipulations in accident or employer's liability policies are reasonable.[35] Provisions requiring furnishing of proofs in specified times, being conditions subsequent, are fulfilled by furnishing of proof within a reasonable time under all circumstances.[36]

Immediate notice need not be given where insured is prevented from so doing by unconsciousness.[37]

Notice of injury to an employe given to a forewoman is not notice to the employer requiring notice to the insurer, where the knowledge of the forewoman was not derived within the scope of her duties in respondent's employ.[38]

A specified time for notice of the accident causing disability or death from accident does not begin to run until disability or death results.[39]

A limitation for proofs of fire loss begins to run after the fire has terminated

is exceedingly remote from other clauses in the policy to which it may refer, will not be regarded as working a forfeiture on account of failure to give notice of an accident in a specified time where such forfeiture is not clearly provided for. Hurt v. Employers' Liability Assur. Corp., 122 Fed. 828.

31. Dezell v. Fidelity & Casualty Co., 176 Mo. 253. Failure to file within time stipulated does not work a forfeiture but may prevent the bringing of a suit until complied with. Gerringer v. N. C. H. Ins. Co., 133 N. C. 407. Postponement of enforcement of payment is the only effect of delay though the furnishing of proofs is delayed an unreasonable time. Eureka F. & M. Ins. Co. v. Gray, 24 Ohio Circ. R. 268. A provision as to the time in which proofs of loss shall be made in connection with another provision making the proceeds payable in a certain time after making of such proofs, does not cause a timely furnishing of proofs of loss to be a condition precedent to recovery, but merely postpones the time in which action may be brought. Indian River State Bank v. Hartford F. Ins. Co. [Fla.] 35 So. 228.

32. Life Assur. Co. v. Haughton [Ind. App.] 67 N. E. 950.

33. Clanton v. Travelers' Protective Ass'n [Mo. App.] 74 S. W. 510.

34. Md. Casualty Co. v. Hudgins [Tex. Civ. App.] 72 S. W. 1047.

35. Failure to give immediate notice stipulated in an employer's liability policy forfeits the insurance. London G. & A. Co. v. Siwy [Ind. App.] 66 N. E. 481; Columbia Paper Stock Co. v. Fidelity & Casualty Co. [Mo. App.] 78 S. W. 320.

36. **Life:** Facts held to show reasonable notice and submission of proofs of death though not within the time prescribed in the policy, where the death did not come to the knowledge of the beneficiary. Munz v. Standard L. & A. Ins. Co. [Utah] 72 Pac. 182. Notice on the 12th day after death of insured held not as a matter of law, an unreasonable delay. Horsfall v. Pac. M. L. Ins. Co., 32 Wash. 132, 72 Pac. 1028. Where the provision was for notice within two months from the accident, a letter of a physician making an autopsy written three months after insured's death, stating that at the autopsy no disorder was disclosed except two broken ribs, the result of accident, and that beneficiary claimed under the policy, is not a compliance. Legnard v. Standard L. & A. Ins. Co., 81 App. Div. [N. Y.] 320.

Employer's liability policy. Columbia Paper Stock Co. v. Fidelity & Casualty Co. [Mo. App.] 78 S. W. 320. Not complied with by notice more than three months after action begun and after issue is joined and case noted for trial. London G. & A. Co. v. Siwy [Ind. App.] 66 N. E. 481.

Fire: A requirement of notice forthwith is not complied with by notice in more than two months, where a delay is not reasonably excused. Cook v. North British & M. Ins. Co., 183 Mass. 50. Where proof is required within 60 days, a mailing on the 60th day after occurrence of the fire, is not a compliance. Huse & L. Ice & Transp. Co. v. Wielar, 86 N. Y. Supp. 24.

37. **Accident policy.** Hayes v. Continental Casualty Co., 98 Mo. App. 410. Especially where the law as settled at the time of the issuance of the policy makes an exception of such a case. Comstock v. Fraternal Acc. Ass'n, 116 Wis. 382.

38. Columbia Paper Stock Co. v. Fidelity & Casualty Co. [Mo. App.] 78 S. W. 320.

39. Where a believed to be trivial injury was received which subsequently resulted in both disability and death, notice given four days after death and within ten days after disability is timely under a provision requiring notice within fifteen days. Rorick v. Ry. O. & E. Acc. Ass'n [C. C. A.] 119 Fed. 63.

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or abated to such an extent that an inspection of the property damaged may be had.[40]

Form and contents.—Interests in the property are usually required to be stated,[41] though not such as arise after loss.[42] Failure of the proof of loss to set out other insurance is not material unless it is shown that there was other insurance.[43] Proof of cost price in claim of loss is not sufficient where articles have been used for sometime.[44]

Conclusiveness and effect.[45]—To render a misstatement in the proofs of loss fatal, it must be fraudulent.[46] Mistake in proofs may be shown.[47] Proof of loss is not to be regarded as tending to prove the ownership of the property, or the fact of loss, its amount, or material facts in issue.[48]

(§ 15) *B. Waiver and estoppel to claim.*—A local agent with authority to make contracts of insurance, collect premiums and sign policies, may waive proofs of loss,[49] or an adjuster who is held out by insurers as a proper person with whom insured is to negotiate.[50] Provisions that agents shall not have power to waive conditions or provisions of the policy are not applicable to such waivers.[51] Though see footnote.[52] The waiver need not be on consideration,[53] may be established by conduct subsequent to the breach,[54] and cannot be recalled.[55]

Furnishing of proofs of loss will not prevent an assertion that they have been waived,[56] though it has been held that where the plaintiff furnishes proofs of loss, the question of alleged waiver does not arise.[57]

Denial of liability is a waiver of proofs of loss,[58] but a denial after expiration

40. Nat. Wall Paper Co. v. Associated Mfrs. M. F. Ins. Corp., 175 N. Y. 226.

41. Where a carrier insured is required only to give its own interest and interest of all others in the property, a statement of the names of the owners of goods lost, the value and damages sustained by each, as far as could be stated, is sufficient. Force v. St. Paul F. & M. Ins. Co., 81 App. Div. [N. Y.] 633.

42. A provision that a preliminary proof of loss shall state the interest of the insured and all others in the property, does not apply to an interest acquired under a deed of assignment executed after the loss in the policy or in a debt due thereunder. Mauck v. Merchants' & M. F. Ins. Co. [Del.] 54 Atl. 952.

43. Schilansky v. Merchants' & M. F. Ins. Co. [Del.] 55 Atl. 1014.

44. Germier v. Springfield F. & M. Ins. Co., 109 La. 341.

45. Admissibility of proofs of loss as evidence, see post, § 20 C.

46. Cheever v. Scottish U. & N. Ins. Co., 86 App. Div. [N. Y.] 328. Evidence held sufficient to show false swearing in proofs of loss with intent to defraud. Anibal v. Ins. Co. of N. A., 84 App. Div. [N. Y.] 634.

47. Assignee of insured may show that a mistake made by him in stating the origin of fire was due through failing to understand insured. White v. Merchants' Ins. Co., 93 Mo. App. 282. A statement in the proofs of death verified by plaintiff as to insured's age, is not conclusive on her. Bowen v. Preferred Acc. Ins. Co., 82 App. Div. [N. Y.] 458. A statement as to the articles in the premises covered by the policy is not conclusive on insured, and he may on trial of an action on the policy testify that he remembers other articles being present, his attention being particularly called thereto. Rockey v. Firemen's Ins. Co., 83 App. Div. [N. Y.] 633.

48. Schilansky v. Merchants' & M. F. Ins. Co. [Del.] 55 Atl. 1014.

49. By writing, parol or acts amounting to an estoppel. Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 So. 228.

50. Dobson v. Hartford Fire Ins. Co., 86 App. Div. [N. Y.] 115. Where sent expressly to adjust the loss. Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392. Mortgagees to whom policies are payable as their interests may appear, are not in default, where told by the company's adjuster that the owner is the proper person to make out proofs of loss. Carnes v. Farmers' Fire Ins. Co., 20 Pa. Super. Ct. 634.

51. Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 So. 228. The conduct of an adjuster may estop the insurer from insisting on proofs of loss, though there are statutory provisions requiring that the conditions must be expressly waived and in writing indorsed on the policy [Rev. St. 1898, §§ 1941-62]. Matthews v. Capital Fire Ins. Co., 115 Wis. 272.

52. Under a provision that waivers must be indorsed on the policy and signed by the president or secretary, provisions as to notice and proof of death cannot be waived by an agent authorized to countersign the policy. Legnard v. Standard Life & Acc. Ins. Co., 81 App. Div. [N. Y.] 320.

53. Dobson v. Hartford Fire Ins. Co., 86 App. Div. [N. Y.] 115.

54. Dobson v. Hartford Fire Ins. Co., 86 App. Div. [N. Y.] 115.

55. Dobson v. Hartford Fire Ins. Co., 86 App. Div. [N. Y.] 115. Duty to furnish cannot be revived by a demand on the part of the insurer. Roberts v. Insurance Co. of America, 94 Mo. App. 142.

56. Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 So. 228.

57. Ulysses Elgin Butter Co. v. Hartford Fire Ins. Co., 20 Pa. Super. Ct. 384.

58. Fire. Gerringer v. N. C. Home Ins. Co., 133 N. C. 407; Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283; Conn. Fire Ins. Co. v.

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of the time stipulated in which they are to be furnished is not a waiver,[59] nor does the insurer by denying in an answer that its policy covers the loss waive a defense of want of notice which is expressly pleaded also.[60] Insured need not be misled.[61]

An agent unauthorized to adjust a loss or to accept proofs of loss may have authority to deny liability on a policy, and the insurer need not be shown to have knowledge of the denial.[62]

Acceptance and retention of defective proofs.—Strict compliance with provisions of an accident policy as to the furnishing of final proofs of extent and duration of injury will not be demanded where the beneficiary has not acted with laches or in bad faith, and the objections to the sufficiency of the proof could readily have been removed by the insurer.[63] Retention of proofs of loss furnished too late may be considered on the question of waiver,[64] and retention of proofs of loss without objection is an estoppel against assertion of alleged defects in form.[65]

Proceedings for settlement.[66]—Proofs of loss are waived by agreement to submit to arbitration and actions of the company's adjuster conceding the insurer's liability,[67] as where negotiations induce insured to believe that proofs of loss will not be required and refusal to pay is on other grounds.[68] The effect of such acts may be obviated where it is not yet too late for insured to comply with the policy.[69]

Failure to urge.—Objection that notice of an accident has not been given cannot be made after the company has filed an amended answer, though the pleadings are withdrawn for that purpose.[70]

Facts taking place of formal notice.—Where defendant's answer discloses that it had the same knowledge of the facts as plaintiff, and agrees with the facts stated in the petition, notice in due time will be conclusively presumed.[71] The fact

Hilbrant [Tex. Civ. App.] 73 S. W. 558; Taylor v. Glens Falls Ins. Co. [Fla.] 32 So. 887. A response on receipt of proofs of loss, that the insurer had information of facts freeing it from liability but offering to consider evidence to the contrary, authorizes a suit on the policy at once without submission of further proofs. Phenix Ins. Co. v. Luce [C. C. A.] 123 Fed. 257. An admission in the answer of waiver of proofs of loss together with a denial of liability on specific grounds, waives the preliminary proofs. Pa. Fire Ins. Co. v. Young, 25 Ky. L. R. 1350, 78 S. W. 127. Denial on ground that policy is not in force waives questions of sufficiency. Lansing v. Commercial Union Assur. Co. [Neb.] 93 N. W. 756.

Life. Prudential Ins. Co. v. Devoe [Md.] 56 Atl. 809; Cole v. Preferred Acc. Ins. Co., 40 Misc. [N. Y.] 260. Delay in furnishing proofs of death is waived where due to the acts of the agent of the insurer and objection to payment is made on other grounds. Union Casualty & Surety Co. v. Mondy [Colo. App.] 71 Pac. 677. Where in reply to a request for blanks on which to make proofs of death, the insurer denies liability on the ground that the policy has lapsed, proof of death as required in the policy is waived. Seely v. Manhattan Life Ins. Co. [N. H.] 55 Atl. 425.

Accident: Proof of loss of time. Hayes v. Continental Casualty Co., 98 Mo. App. 410.

Hail: Waiver of right to more specific proof. Condon v. Des Moines Mut. Hail Ass'n [Iowa] 94 N. W. 477.

59. State Ins. Co. v. School Dist. No. 19, 66 Kan. 77, 71 Pac. 272.

60. Dezell v. Fidelity & Casualty Co., 176 Mo. 253.

61, 62. Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 So. 228.

63. Western Travelers' Acc. Ass'n v. Holbrook [Neb.] 94 N. W. 816.

64. Dobson v. Hartford Fire Ins. Co., 86 App. Div. [N. Y.] 115. Notice of an accident. Hurt v. Employers' Liability Assur. Corp., 122 Fed. 828.

65. Cummer Lumber Co. v. Associated Mf'rs Mut. Fire Ins. Corp., 173 N. Y. 633.

66. Under Code, § 1742, requiring sworn statement of loss and a policy with a similar provision, compliance is not waived by the fact that the adjuster fails to call on insured as he agrees nor is it a compliance for insured to send to the insurer a letter from another company showing the manner in which another policy on the loss had been adjusted. Ervey v. Fire Ass'n of Phila., 119 Iowa, 304.

67. Branigan v. Jefferson Mut. Fire Ins. Co. [Mo. App.] 76 S. W. 643.

68. Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392. Proceedings for adjustment and promise of adjuster to take the matter up with the company for settlement, may waive proof of loss on injury to crops by hail. Condon v. Des Moines Mut. Hail Ass'n [Iowa] 94 N. W. 477.

69. Proofs of loss are not waived by the fact that adjusters request the furnishing of a list of property destroyed, where such list is objected to while there is yet time to furnish proofs of loss under the policy. Riker v. Fire Ins. Co., 85 N. Y. Supp. 546.

70. Fidelity & Casualty Co. v. Brown [Ind. T.] 69 S. W. 915.

71. Such presumption is in the nature of a judgment on the answer. Dezell v. Fidelity & Casualty Co., 176 Mo. 253.

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that the attorneys of the insurer endeavored to settle for a small sum and received a written report of the accident will not be held as a waiver of a condition for immediate notice in a contractor's liability policy.[72]

Stipulations avoiding waiver.—Defense of an action is not a waiver of immediate notice of the commencement thereof required by the policy of an employer's liability company, where the defense was begun on an express agreement that it should not be a waiver.[73]

§ 16. *Adjustment of loss. Arbitration.*—A settlement between the insurer and insured is not rendered inconclusive by an agreement before adjustment that investigation of the loss should not waive the right of either party,[74] and if it be really a settlement, the insurer must release a mortgage of which he took an assignment, notwithstanding his stipulation that he paid only to avoid litigation and not under the policy.[75]

Necessity for arbitration.—An appraisement is authorized, although there is a total loss.[76]

Where an award is made a condition precedent to the maintenance of an action, it must be made where appraisal is tendered before suit,[77] though the award is made only prima facie evidence;[78] but failure of an appraisement through the conduct of the appraisers without fault of the insured will not forfeit his right to sue.[79] To necessitate arbitration, there must be an actual disagreement.[80]

Validity and construction of provisions for arbitration.—Provisions for arbitration as to the amount of loss are valid,[81] but cannot be used by the insurer oppressively or in bad faith.[82] Arbitration is dispensed with in case of total loss where the statute fixes a total loss at the face value of the policy.[83]

Misrepresentation as to the legal construction of a contract for submission to arbitration will not vitiate the contract to submit if the parties are under no relation of trust and confidence,[84] and a written agreement therefor cannot be varied by prior or contemporaneous verbal agreements.[85] If the terms are understood, a

72. On a question of waiver of written notice, a letter written by defendant's attorney to plaintiffs with regard to a settlement of the claim on which liability was predicated, is not admissible nor are other questions invading the confidence of attorney and client. Rooney v. Maryland Casualty Co. [Mass.] 67 N. E. 862.

73. London Guaranty & Acc. Co. v. Siwy [Ind. App.] 66 N. E. 481.

74. McLean v. American Mut. Fire Ins. Co. [Iowa] 98 N. W. 146.

75. Company though denying liability, paid a mortgagee and took an assignment but subsequently settled with the insured and gave receipts stating that a sum was paid to avoid litigation and not under the policy. Prinz v. Citizens' Ins. Co., 80 App. Div. [N. Y.] 638.

76. Under a provision that on disagreement as to the amount of loss, it shall be ascertained by appraisers who shall estimate the loss stating separately the sound value and damage. Stout v. Phoenix Assur. Co. [N. J. Eq.] 56 Atl. 691.

77. Vincent v. German Ins. Co. [Iowa] 94 N. W. 458.

78. Kersey v. Phoenix Ins. Co. [Mich.] 97 N. W. 57.

79. After insurer and insured had appointed appraisers they failed to agree on an umpire, but insured was not connected with the conduct of his appraiser. Conn. Fire Ins. Co. v. Cohen [Md.] 55 Atl. 675.

80. A disagreement is sufficiently shown by the fact that the insurer demands an arbitration, having expressed his dissatisfaction at the amount claimed, and the insured agrees. Kersey v. Phoenix Ins. Co. [Mich.] 97 N. W. 57. A refusal of the insurer to pay an amount stated in an itemized statement of the insured, does not show a genuine difference necessitating an appraisal under a stipulation that if the insured and insurer differ as to the ascertainment of the amount of a loss, then there shall be an appraisement. Continental Ins. Co. v. Vallandingham, 25 Ky. L. R. 468, 76 S. W. 22.

81. Continental Ins. Co. v. Vallandingham, 25 Ky. L. R. 468, 76 S. W. 22. Public Laws Me. 1895, p. 18, § 1, c. 18, requiring that no action may be brought until the amount of the loss or damage is determined by three arbitrators, or there is a waiver thereof by both parties, and inserting such requirement in the form of policy to which all insurance companies are restricted, is constitutional and does not deprive insurers of the right of trial by jury. In re Opinion of Justices [Me.] 55 Atl. 828.

82. Continental Ins. Co. v. Vallandingham, 25 Ky. L. R. 468, 76 S. W. 22.

83. Ky. St. § 700. Hartford F. Ins. Co. v. Bourbon County Ct., 24 Ky. L. R. 1850, 72 S. W. 739.

84. Rutter v. Hanover F. Ins. Co. [Ala.] 35 So. 33.

85. An agreement held to demand appraisal of property totally destroyed as well

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promise to induce the making of the agreement will not support a charge of fraud.[86]

A provision for the submission of a disagreement in valuation to arbitration does not cover a controversy involving the validity of the claim.[87]

Waiver.—A denial of all liability abrogates the necessity of arbitration,[88] or the knowing selection by the insurer of one not a discreet, disinterested and impartial man as an appraiser,[89] or bad faith.[90] Failure for two months of the appraiser to act will not show a waiver by insurer of its rights to an appraisal.[91] By insisting on a void appraisement the insurer waives his right to another.[92] After refusal to comply with the contract calling for appraisement, the insurer cannot object to uncertainty arising as to the amount of the loss.[93]

Qualification and procedure of arbitrators.[94]—An award is not avoided by the fact that the appraisers are not sworn.[95] Where the arbitrators are men of experience, they need not take evidence.[96]

Formal notice to insured or meeting of appraisers is not generally requisite, though insured should have notice or knowledge.[97] The parties should have notice of time and place of hearing if evidence must be taken.[98] An award made by the company's appraiser and umpire in the absence of insured and his appraiser without notice does not bind insured.[99] Failure of insured to object to a proceeding without notice or to ask to be heard on a casual meeting with the appraisers is not a waiver.[1]

Report or award.[2]—The award must be complete.[3] Where the policy and submission require appraisers to find both the sound value and damage, a blank in

as that partially destroyed. Rutter v. Hanover F. Ins. Co. [Ala.] 35 So. 33.

86. Townsend v. Greenwich Ins. Co., 39 Misc. [N. Y.] 87.

87. Hogadone v. Grange M. F. Ins. Co. [Mich.] 94 N. W. 1045. Under an agreement to arbitrate the amount of loss, the appraisers may determine whether the loss is total as well as determine the amount in case it is partial. Williamson v. Liverpool & L. & G. Ins. Co., 122 Fed. 59.

88. Denial of liability for loss of cattle on the ground that they were not killed by lightning, the cause of loss insured against. White v. Farmers' M. F. Ins. Co., 97 Mo. App. 590; Conn. F. Ins. Co. v. Hilbrant [Tex. Civ. App.] 73 S. W. 558; Stoddard v. Cambridge M. F. Ins. Co. [Vt.] 54 Atl. 284.

89. Continental Ins. Co. v. Vallandingham, 25 Ky. L. A. 468, 76 S. W. 22.

90. Evidence held insufficient to show bad faith of the insurer in arbitration proceedings absolving the insured from further compliance therewith. Kersey v. Phoenix Ins. Co. [Mich.] 97 N. W. 57.

91. Williams v. German Ins. Co., 90 App. Div. [N. Y.] 413.

92. American F. Ins. Co. v. Bell [Tex. Civ. App.] 75 S. W. 319.

93. Dunn v. Springfield F. & M. Ins. Co., 109 La. 520.

94. Evidence held to show prejudice of an arbitrator and to show that insured was not estopped from objecting to an award by previous knowledge of the disqualification of an arbitrator or by a recognition of its validity. Produce Refrigerator Co. v. Norwich U. F. Ins. Soc. [Minn.] 97 N. W. 875.

95. Stout v. Phoenix Assur. Co. [N. J. Eq.] 56 Atl. 691.

96. Builders and contractors selected to appraise the sound value of and loss on property. Vincent v. German Ins. Co. [Iowa] 94 N. W. 458.

97. Kaiser v. Hamburg-Bremen F. Ins. Co., 172 N. Y. 663. Appraisers appointed under a provision of a New York standard policy, are not arbitrators and insured need not have notice of their meeting. Townsend v. Greenwich Ins. Co., 86 App. Div. [N. Y.] 323.

98. Continental Ins. Co. v. Garrett [C. C. A.] 125 Fed. 589. Where there has been a total loss and evidence is necessary to arrive at the value of the property the insured should have notice of an appraisement. Stout v. Phoenix Assur. Co. [N. J. Eq.] 56 Atl. 691.

99. Schmitt v. Boston Ins. Co., 82 App. Div. [N. Y.] 234.

1. Continental Ins. Co. v. Garrett [C. C. A.] 125 Fed. 589.

2. An award that the net cash value of the property at the time of award was $350 and that the actual damage was $143 is not in the proper form as an award for a total loss. Stout v. Phoenix Assur. Co. [N. J. Eq.] 56 Atl. 691.

3. Appraisers are without authority to refuse to appraise property claimed by insured to have been destroyed. Where they omit such property their appraisement is void. American F. Ins. Co. v. Bell [Tex. Civ. App.] 75 S. W. 319. If both totally and partially destroyed property is to be appraised, a report appraising only the goods partially destroyed is not binding. Rutter v. Hanover F. Ins. Co. [Ala.] 35 So. 33. The umpire's award must consider in detail the damage to injured goods and the value of those totally destroyed. Schmitt v. Boston Ins. Co., 82 App. Div. [N. Y.] 234.

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the award as to the sound value will not be assumed to intend the finding of absence of such value or aided by a contention that finding was immaterial.[4]

Effect.—An arbitration entered into under the provisions of a policy is not to be regarded as a common-law arbitration, the pendency of which is not a bar to an action.[5]

In an action on a policy, evidence of the value of the property totally destroyed is admissible, though there has been an arbitration, if the award states the value of that partially destroyed only and a subsequent agreement between the parties has changed a contract for submission of both the total and partial loss to one of submission of partial loss only.[6] After an agreement for an appraisement and an award, parol evidence is not admissible in an action on the policy to show a prior agreement fixing the minimum sum which could be established by appraisers, unless there is a showing of fraud or mistake.[7]

Setting aside.—Though arbitration is specified in the policy, an action may be brought to set aside an award and to recover on the policy,[8] and objection to the award may be stated for the first time in the complaint.[9]

Where equity obtains jurisdiction for the purpose of setting aside an award on an insurance policy which has been pleaded as a bar to a pending suit at law on the policy, it may retain the case for the purpose of determining the loss or damage or in its discretion remit that subject to a court of law.[10] The questions of whether defendant is entitled to a new appraisement, whether a policy was nullified by the violation of a vacancy clause and the amount of damages are legal questions which will not be determined on a bill to set aside an appraisement.[11]

Harmful results need not arise from improper conduct of a party tending to affect a decision on an arbitration to authorize the setting aside of the award.[12]

The effect of an agreement by defendant that an award should be set aside, made at the trial of an action for such purpose, is to render the award of no further effect, though under the agreement, a rearbitration is to be had and defendant repudiates such agreement.[13]

§ 17. *Right to proceeds.*—Where property is insured without the owner's consent or knowledge, he may become entitled to the benefit of the insurance by adoption.[14] Where a policy insures the interests of a life tenant, remaindermen are not entitled to any portion of the proceeds.[15]

Employer's liability insurance.—Where the contract insurance is not a guaranty of liability for negligence to employes but of indemnity against loss by reason of liability, insured only can recover thereon.[16] It cannot be urged that the

4. Continental Ins. Co. v. Garrett [C. C. A.] 125 Fed. 589.

5. Arbitration agreement held to show that it was entered into under the policy. Kersey v. Phoenix Ins. Co. [Mich.] 97 N. W. 57. Insured is not justified in abandoning an appraisal and beginning an action on the policy, where he has entered into an agreement for the appraisal and bad faith on the part of the insurer is not shown. Williams v. German Ins. Co., 90 App. Div. [N. Y.] 413.

6. Rutter v. Hanover F. Ins. Co. [Ala.] 35 So. 33.

7. Townsend v. Greenwich Ins. Co., 86 App. Div. [N. Y.] 323.

8. Vincent v. German Ins. Co. [Iowa] 94 N. W. 458.

9. The insurers were not prejudiced by failure of insured to state the specific ground of objection to an award before pleading it in his complaint, since at that time they could have offered to submit to another arbitration and having elected to defend on the ground that the award was valid, could not complain that they were not notified of the object of the suit. Produce Refrigerator Co. v. Norwich U. F. Ins. Soc. [Minn.] 97 N. W. 875.

10. Continental Ins. Co. v. Garrett [C. C. A.] 125 Fed. 589.

11. Stout v. Phoenix Assur. Co. [N. J. Eq.] 56 Atl. 691.

12. Evidence held to justify setting aside the award. Ins. Co. of N. A. v. Hegewald [Ind.] 66 N. E. 902.

13. Goodwin v. Merchants' & B. M. Ins. Co., 118 Iowa, 601.

14. Adoption is not necessary where insurance is pursuant to a custom of the trade of storage. Southern C. S. & P. Co. v. Dechman [Tex. Civ. App.] 73 S. W. 545.

15. Bennett v. Featherstone [Tenn.] 71 S. W. 589.

16. The holder of an unsatisfied judg-

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common-law assignment for the benefit of creditors operates as a payment by insured of the claim, where it does not appear that claimant became a party to such assignment.[17]

Interpretation of particular designations of beneficiaries.—Under a policy agreeing to pay to either an executor or administrator, husband or wife, relation by blood or lawful beneficiary, the company may at its option make payment to any of the persons named.[18] Legal representatives include all persons either natural or artificial who by operation of law stand in the place of and represent the interests of the insured.[19] A child, a member of insured's family, but not legally adopted, is not an "heir."[20] Where "children" are beneficiaries, after-born children are included,[21] or an after-adopted child.[22] "Wife and surviving children" includes both the children of the wife named and children by a former marriage.[23] A policy payable to wife or children, on death of the children before insured, confers no interest on a grandson.[24] A policy payable to a named beneficiary, and in the event of the death of the beneficiary before insured to insured's executors, administrators and assigns, becomes a portion of the insured's estate controlled by the terms of his will.[25]

The policy must be reformed in order to authorize a recovery on it by the heirs, where it has been issued in the name of a person deceased at the time.[26]

Vested rights of beneficiaries.—A policy of life insurance creates a vested interest in the beneficiary on issuance,[27] but not where the policy provides that insured may, without the beneficiary's consent, diminish the amount of the insurance or appoint another beneficiary.[28] His rights may be prejudiced by a waiver by the insured.[29] In Alabama, the wife's interest in a policy payable to herself and children, their executors, administrators or assigns, terminates with her death.[30] Statutes providing that policies for the benefit of a married woman shall be the sole property of such married woman and shall inure to her separate use and benefit and that of her children, confer a contingent vested interest on the beneficiary

ment against the insured for damages for personal injuries cannot recover against the insurer on a policy agreeing to indemnify insured against damages for injuries suffered by his employes, it being provided that no action shall be brought except by the insured himself to reimburse him for a loss actually paid in satisfaction of a judgment after trial. Frye v. Bath G. & E. Co., 97 Me. 241.

17. Frye v. Bath G. & E. Co., 97 Me. 241.

18. Brooks v. Metropolitan L. Ins. Co. [N. J. Law] 56 Atl. 168.

19. The receiver of an insolvent corporation is included. Alford v. Consolidated F. & M. Ins. Co., 88 Minn. 478.

20. Merchant v. White, 77 App. Div. [N. Y.] 539, 12 Ann. Cas. 233.

21. Roquemore v. Dent, 135 Ala. 292; Scull v. Aetna L. Ins. Co., 132 N. C. 30. Children not in esse are entitled to take under a policy payable to insured's wife and in case of her death before insured, to his children and also children of a second marriage. Helmken v. Meyer [Ga.] 45 S. E. 450.

22. A policy made payable to the insured, his executors, administrators or assigns for the benefit of his widow, if any, otherwise to his surviving children, passes to a child afterward adopted, there being no widow or issue surviving and the right of the child cannot be altered or taken away by will or otherwise nor is it affected by a statutory provision as to premiums for preceding years applicable to beneficiaries taking by descent [Rev. St. c. 75, § 10]. Virgin v. Marwick, 97 Me. 578.

23. State L. Ins. Co. v. Redman, 91 Mo. App. 49.

24. D'Arcy v. Mut. L. Ins. Co., 108 Tenn. 567.

25. Schumacher v. Schumacher [Tex. Civ. App.] 75 S. W. 50.

26. Taylor v. Glens Falls Ins. Co. [Fla.] 32 So. 887.

27. Laughlin v. Norcross, 97 Me. 33; Franklin L. Ins. Co. v. Galligan [Ark.] 78 S. W. 102; Sangunitto v. Goldey, 84 N. Y. Supp. 989. Where a person effects insurance on his life in favor of his wife, her rights become vested so that the insurer and insured cannot terminate the contract without her consent, except as provided in the policy or by-law. Wash. L. Ins. Co. v. Berwald [Tex.] 76 S. W. 442. The beneficiary of a life policy payable to the wife, and on her decease to the children, has a vested interest, and the husband on death of both beneficiaries has no right to collect the cash surrender value of the policy. D'Arcy v. Mut. L. Ins. Co., 108 Tenn. 567.

28, 29. Denver L. Ins. Co. v. Crane [Colo. App.] 73 Pac. 875.

30. Code 1876, §§ 2733, 2734, provides that a wife may insure her husband's life and the proceeds shall be payable to her in case she survive, otherwise to her children. Roquemore v. Dent, 135 Ala. 292.

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which cannot be divested by the insured by altering the beneficiary or disposing of the proceeds by will,[31] though there is a provision for another disposition in case the wife does not survive the insured.[32] The children take a contingent interest in policies taken out for the benefit of their mother, generally conditioned on the death of the mother before maturity of the policy, in which case they take free from the claims of creditors in the same manner as she would have.[33]

Where, without the wife's knowledge, a policy on the husband's life payable to her is surrendered, the wife may recover as though a paid-up policy was issued at the time of surrender in accordance with the terms of the surrendered policy.[34]

Change of beneficiaries.—An informal change of beneficiaries of which the company has no notice may be revoked by a subsequently executed will.[35] Conditions in the policy must be complied with,[36] though they may be waived by payment of the proceeds into court by the insurer.[37] A change in beneficiaries must be completed before the death of the insured in order to allow the new beneficiary to maintain an action on the policy, otherwise claim should be made against the insured's administrator on the agreement to transfer the proceeds.[38]

Assignees.[39]—If indorsements of fire policies do not amount to assignments but are mere appointments of a third person to receive a portion of the money, the insured is entitled to recover the entire amount under the policy.[40] Where a policy is assigned to one paying premiums and making advancements to the beneficiaries, it is regarded only as for security and the beneficiaries are entitled to any surplus of the proceeds after reimbursement of the assignee.[41] Under a provision for payment to executors, administrators or assigns, the administrators may claim as against an assignee who has in writing released the policy stating that the consideration of the assignment was fully paid.[42]

Mortgagees.—Where the mortgagees take out a policy, naming the owner as the insured in which the mortgagees are made payees as their interests may appear, the mortgagees are entitled to the proceeds, where the owner repudiates the taking out of the policy.[43] Under agreements by a mortgagor to effect insurance, a mortgagee has an equitable lien on the proceeds of the policies placed in force, though they run to the mortgagor alone, which passes to an assignee of the mortgage.[44]

Persons paying premiums.—Payment of premiums by a third person will not invalidate a payment of proceeds to the designated beneficiary, where the person making such payment does not secure the consent of the insured to his substitution as beneficiary, and he has no right to recover expenses incurred by him.[45] One of several beneficiaries who advances premiums acquires an equitable lien on the proceeds requiring the others to contribute for his reimbursement. Limi-

31. Laws 1891, c. 376; Rev. St. 1898, § 2347. Ellison v. Straw, 116 Wis. 207.

32, 33. Ellison v. Straw, 116 Wis. 207.

34. Weatherbee v. N. Y. L. Ins. Co., 182 Mass. 342.

35. Stoll v. Mut. Ben. L. Ins. Co., 115 Wis. 558.

36. Condition that change of beneficiary shall occur only by written notice to the company at its home office accompanied by the policy, and indorsement of the same on the policy. Sangunitto v. Goldey, 84 N. Y. Supp. 989.

37. Opitz v. Karel [Wis.] 95 N. W. 948.

38. O'Brien v. Continental Casualty Co. [Mass.] 69 N. E. 308.

39. Assignments and transfers of policy, see ante, § 10.

40. Baughman v. Camden Mfg. Co. [N. J. Ch.] 56 Atl. 376.

41. Baldwin v. Haydon, 24 Ky. L. R. 900, 70 S. W. 300.

42. Phœnix M. L. Ins. Co. v. Opper, 75 Conn. 295.

43. There was a provision in the policy that an interest should exist in favor of the mortgagees as affected by conditions attached or appended to the policy. Carnes v. Farmers' F. Ins. Co., 20 Pa. Super. Ct. 634.

44. Hyde v. Hartford F. Ins. Co. [Neb.] 97 N. W. 629.

45. Evidence held insufficient to show a consent to change. Canavan v. Hancock M. L. Ins. Co., 39 Misc. [N. Y.] 782.

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tations against the enforcement of such right to contribution run from the death of the insured.[46]

Creditors.—The proceeds of a policy of life insurance for the benefit of a married woman become her separate property, and while free from claims arising prior to the maturity of the contract, are then subject to her obligations as other portions of her estate.[47] By statutes in certain states, policies for the benefit of a married woman are not subject to the claims of her creditors or of other persons while in the hands of the insurer,[48] but an accumulated surplus payable to insured, under a tontine policy, is not exempt from his creditors, though the wife is the person named as a beneficiary.[49]

A policy may be made payable to creditors despite an exemption of insurance.[50] An exemption from the debts of the certificate holder or beneficiary does not cut off creditors from a policy payable to the debtor's personal representatives.[51] Under a policy providing for payment to a beneficiary, his legal representatives or assigns, the widow, to whom the balance remaining on the policy is bequeathed, takes as executrix and not as beneficiary, and takes after payment of debts.[52] A life policy made payable to the executor of a husband does not become subject to the claims of his creditors by a will under which insured provides that after his debts are paid all of his property shall go to his wife, but does not specifically refer to the policy.[53] A policy in favor of a minor debtor on the life of a mother is not subject to the expenses of the mother's succession.[54]

A claim on a policy of insurance after loss is a subject of garnishment.[55]

Trustee in bankruptcy or assignee for creditors.—Assignable policies of insurance pass to the trustee in bankruptcy,[56] and the trustee may enforce the policy for a loss occurring between the adjudication of bankruptcy and his appointment as trustee.[57] A policy of life insurance having a cash surrender value payable to the debtor or on his death before the termination of an accumulation period to his wife does not pass to the insured's trustee in bankruptcy,[58] and if the wife assigns her interest to the debtor, a subsequent assignment by the debtor of such interest is not in fraud of creditors, since such assignment does not pass the debtor's right to take the proceeds if he survive the endowment period.[59] Though the assignment of the policy constitutes a preference on which bankruptcy proceedings are sustained, the trustee in bankruptcy cannot ignore the assignment, nor can he because the creditor surrenders the policy without a transfer in writing.[60]

An action by an assignee for the benefit of creditors on a policy issued his assignor cannot be sustained on evidence insufficient to establish a valid transfer or continuance of the policy in accordance with its requirements.[61] Such action

46. Stockwell v. Mut. L. Ins. Co., 140 Cal. 198, 73 Pac. 833.
47. Ellison v. Straw, 116 Wis. 207.
48. Rev. St. 1898, § 2347. Ellison v. Straw, 116 Wis. 207.
49. Rev. St. 1898, § 2347. Ellison v. Straw [Wis.] 97 N. W. 168.
50. Rev. St. 1899, § 7908. Pietri v. Seguenot, 96 Mo. App. 258.
51. Next of kin cannot claim it. Rev. St. 1899, § 7908. Assessment insurance company. Pietri v. Seguenot, 96 Mo. App. 258.
52. The insurer was neither a fraternal nor a mutual benefit association. Leonard v. Harney, 173 N. Y. 352.
53. Shannon's Code, §§ 4030, 4231. Cooper v. Wright [Tenn.] 75 S. W. 1049.
54. Succession of Emonot, 109 La. 359.
55. Meridian L. & I. Co. v. Ormond [Miss.] 35 So. 179.
56, 57. Fuller v. N. Y. F. Ins. Co. [Mass.] 67 N. E. 879.
58. Rev. St. c. 49, § 94; c. 75, § 10; Bankruptcy Acts 1898, 30 Stat. 548, c. 541, § 6; 30 Stat. 565, c. 541, § 70. Pulsifer v. Hussey, 97 Me. 434.
59. Pulsifer v. Hussey, 97 Me. 434.
60. Traders' Ins. Co. v. Mann [Ga.] 45 S. E. 426.
61. Not sufficient for plaintiff to show that in consideration of his promise to pay an unpaid premium, defendant agreed to insure plaintiff's interest in property mentioned in the policy issued to his assignor by proper indorsements on the policy or by

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cannot be submitted on the theory that there was an agreement to insure the assignee's interest, where such agreement is not pleaded.[62]

Interpleader. Deposit in court.—Where whatever hazard in payment there is results from the insurer's unjustified act in withholding payment from a claimant, it is not entitled to an interpleader.[63] Where a policy payable to a wife is sufficiently matured to demand a paid-up policy in case of default of payment of premium, no interpleader can be had between the wife seeking to recover as though a paid-up policy had been issued, and one to whom a new policy issued on the surrender of the original was assigned with insurer's consent.[64] In an action against an insurance company on a check given for the proceeds of a policy, the company cannot pay the money into court and by interpleader stating equities adverse to the beneficiary obtain a release from liability.[65] Where the policy is payable to the wife of insured or her children should she die before insured, payment by the company into the orphan's court, where administration of the insured's estate is pending, protects the company.[66] The filing of an interpleader is a waiver of the insurer's rights as against the claimants.[67]

§ 18. *Settlements and policy loans.*—Though an insurer has been in the habit of accepting surrenders of endowment policies at other than contract periods, it is not bound to continue the practice.[68] Under a tontine policy providing a specific tontine period, the liability for tontine dividend accumulations becomes absolute on the expiration thereof.[69]

Where a company takes its paid-up policy as collateral, it cannot insist on an agreement that on default in the payment of interest the policy shall be surrendered at the customary cash surrender value.[70]

§ 19. *Payment and discharge.*—Though the contract provides for payment to the beneficiary, it may be made to his guardian where he is an infant. Hence payment to the guardian of the lawful beneficiary is a sufficient plea to an action by the executrix.[71]

Where a policy is assigned to an assignee to collect the proceeds and apply the same to the payment of the assignor's indebtedness to the assignee, the assignor has no further claim against the insurance company after recovery by the assignee in his own name, and may only recover as against the assignee such amount as remained after satisfaction of the debt.[72] Payment under an instrument erroneously treated as an assignment is not a defense.[73]

Rebuilding and repairing.—The time stipulated in which to exercise an op-

issuing a binding slip. Northam v. Dutchess County M. Ins. Co. [N. Y.] 69 N. E. 222.

62. Northam v. Dutchess County M. Ins. Co. [N. Y.] 69 N. E. 222.

63. Kirsop v. Mut. L. Ins. Co., 87 App. Div. [N. Y.] 170.

64. Weatherbee v. N. Y. L. Ins. Co., 182 Mass. 342.

65. N. W. M. L. Ins. Co. v. Kidder [Ind. App.] 69 N. E. 204.

66. Voss v. Conn. M. L. Ins. Co. [Mich.] 92 N. W. 102.

67. Waives a provision for the filing of duplicate assignments sent to the home office of the company. McGlynn v. Curry, 82 App. Div. [N. Y.] 431. The insurer recognizes the status of a beneficiary as well as the validity of the policy by interpleading such beneficiary and paying the amount of the policy into court in an action by insured's administrator. Sangunitto v. Goldey, 84 N. Y. Supp. 989.

68. Pulsifer v. Hussey, 97 Me. 434.

69. Policy written September 19, 1885, with a period of fifteen years expires with the close of September 18, 1900, at which time the obligation becomes a debt to insured subject to garnishment and where the insured has an election to withdraw the accumulated surplus in cash or to use it in various manners with regard to continuing insurance, a finding in garnishment proceedings that an absolute debt existed on the part of the insurer, renders a finding of election necessary. Ellison v. Straw [Wis.] 97 N. W. 168.

70. N. Y. Life Ins. Co. v. Curry, 24 Ky. L. R. 1930, 72 S. W. 736.

71. Brooks v. Metropolitan Life Ins. Co. [N. J. Sup.] 56 Atl. 168.

72. Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 So. 228.

73. Stoll v. Mut. Ben. Life Ins. Co., 115 Wis. 558.

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tion to repair begins to run at the time of waiver of proofs of loss.[74] Under statutes providing that on partial loss the insurer shall pay a sum equal to the damage done to the property or repair to the extent of such damage at the option of the insured, the insured may demand cash payment of a sum equal to the damage, though the insurer offers to repair or pay a sum fixed.[75] Where a loss is made payable to a mortgagee, the insured is not authorized, after the company has elected to make payment in money, to bind the mortgagee by an agreement relieving the insurer from such obligation.[76]

Subrogation.—A statutory provision against the assignment of causes of action not arising from contract will not prevent an insurer from having a remedy over against the person causing a loss, where a subsequent statute provides that on payment of the loss the insurance company shall be subrogated to the rights of recovery in behalf of insured. Though the latter statute provides for an assignment of the insured's right of action, the insurer may maintain an action without an assignment.[77] An insurer against accidents is not subrogated to insured's right to recover against a third person for negligence occasioning the injury.[78] A payment by an insurance company to the mortgagee extinguishes the mortgage to such an extent preventing the company from recovering such sum on foreclosure of the mortgage of which it has taken an assignment.[79] Where the action is by insured for the use of the insurers, the measure of damages is the loss resulting from the fire, though not in excess of the amount paid by the insurers.[80]

Release.—A full acquittance signed by insured after the payment of the amount of indemnity on proofs of an accident prevents a further claim on account of the injury alleged.[81] A statement of all claims which one insured against accident had or might have will be held as against a beneficiary to refer only to then accrued claims for disability and not to a subsequent death from the same accident.[82]

Actions by insured against third persons.—If the value of property insured exceeds the insurance, the insured may bring an action for the full amount against one whose wrong is responsible for loss.[83] Where property is destroyed by negligence of a third person, a recovery against him extinguishes the insurer's liability.[84] The settlement of a claim for personal injuries is not a defense to an action on an accident policy.[85]

§ 20. *Actions on policies.*[86] *A. Right of action, venue, parties. Right of action generally.*—Where the promise is to pay one half of an amount not ex-

74. Farmers' & M. Ins. Co. v. Warner [Neb.] 98 N. W. 48.

75. Rev. St. 1899, § 7971. Branigan v. Jefferson Mut. Fire Ins. Co. [Mo. App.] 76 S. W. 643.

76. An agreement between insured and insurer to arbitrate, stipulating that it is simply to fix the amount of loss and not to determine, waive or invalidate any other right of either party does not obviate a waiver of a right to rebuild resulting from the insurer's demand for an appraisement. Iowa Cent. Bldg. & Loan Ass'n v. Merchants' & B. Fire Ins. Co. [Iowa] 94 N. W. 1100.

77. Code § 177, Laws 1899, c. 54, § 43. Hamburg-Bremen Fire Ins. Co. v. Atlantic Coast Line R. Co., 132 N. C. 75.

78. Aetna Life Ins. Co. v. Parker [Tex.] 72 S. W. 168, 580.

79. Gardner v. Continental Ins. Co., 25 Ky. L. R. 426, 75 S. W. 283.

80. Cumberland Tel. & Tel. Co. v. Dooley [Tenn.] 72 S. W. 457.

81. The proofs stated the exact amount claimed as indemnity, the exact time of complete disability, the date when insured recovered sufficiently to resume his usual occupation and the date of resumption. Clanton v. Travelers' Protective Ass'n [Mo. App.] 74 S. W. 510.

82. Woodmen Acc. Ass'n v. Hamilton [Neb.] 96 N. W. 989.

83. Kansas City, etc., R. Co. v. Blaker [Kan.] 75 Pac. 71.

84. Kennedy v. Iowa State Ins. Co., 119 Iowa, 29.

85. The insurer is not entitled to be subrogated. Aetna Life Ins. Co. v. Parker [Tex. Civ. App.] 72 S. W. 621.

86. Service of process on foreign companies, see ante, § 2B. See Jurisdiction, § 4, for questions of jurisdiction of federal courts

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ceeding a certain sum realized from one disability assessment levied on each member, an action at law may be maintained, though a more appropriate remedy might be by a proceeding in equity to compel the levying of the assessment.[87]

A provision for examination of the insured under oath by a person named by the insurer does not establish a condition precedent to the action.[88] If payment of an award has been accepted, plaintiff must rescind and restore the amount, though paid to a mortgagee.[89]

Where it appears that only a small portion of the property alleged to have been destroyed ever belonged to plaintiff and that the action is an attempt to defraud, plaintiff is not entitled to any recovery.[90]

Tender by insurer of an amount specified as liability for partial disability fixes the liability of the insurer to such extent, though defenses are made against the policy.[91]

Venue.—By statute it may be provided that actions against foreign insurance companies are to be brought in the county where an agency is located or where it was located at the time the contract was made, or the cause of action accrues, and if no agency is maintained, in any county where the company may be found. If the company does not maintain an agency, it does not by appointing an agent for service of process, acquire a fixed residence in the county of his residence.[92]

When action may be brought.—A provision in the policy as to the time in which action must be brought is not to be enlarged by general statutory provisions.[93] Such provisions are binding unless waived.[94] Acts of the insurer may work a waiver or estoppel.[95]

A limitation as to the time in which actions shall be brought on the policy will be controlled by a provision that action must not be brought in less than a certain time after award by appraisers in case there is an appraisal.[96] As to compliance with such provisions, see citations.[97]

as to actions on policies; Examination of Witnesses, for examination of expert witnesses.

87. Declaration held to show a breach of an implied contract to levy an assessment. Garcelon v. Commercial Travelers' Eastern Acc. Ass'n [Mass.] 67 N. E. 868.

88. Scottish Union & Nat. Ins. Co. v. Strain, 24 Ky. L. R. 958, 70 S. W. 274.

89. Townsend v. Greenwich Ins. Co., 39 Misc. [N. Y.] 87; Id., 86 App. Div. [N. Y.] 323.

90. Schmidt v. Phila. Underwriters, 109 La. 884.

91. Wilkinson v. Travelers' Ins. Co. [Tex. Civ. App.] 72 S. W. 1016.

92. Civ. Code 1895, §§ 2145, 2057. Equity Life Ass'n v. Gammon [Ga.] 46 S. E. 100.

93. Ward v. Pa. Fire Ins. Co. [Miss.] 33 So. 841.

94. Sullivan v. Prudential Ins. Co., 172 N. Y. 482.

95. The fact that defendant retains the proofs of death together with the policy and an assignment thereof, does not show a waiver of the limitation. Sullivan v. Prudential Ins. Co., 172 N. Y. 482. A limitation as to the time in which action shall be brought, contained in the policy may be avoided by lack of knowledge occasioned by the agent of the company. A first action on the policy had resulted in a non-suit through the policy having been made payable to a person deceased. The mistake was first discovered at the trial, the agent having obtained the policy and withheld it and information as to its terms from plaintiffs. Taylor v. Glens Falls Ins. Co. [Fla.] 32 So. 887. If liability is denied, suit may be brought without awaiting the expiration of a period fixed in the contract. Modern Brotherhood v. Cummings [Neb.] 94 N. W. 144; Conn. Fire Ins. Co. v. Hilbrant [Tex. Civ. App.] 73 S. W. 553. Where proofs of death are waived, a limitation of the time in which action may be brought computed from the service of proofs of death is abrogated. Cole v. Preferred Acc. Ins. Co., 40 Misc. [N. Y.] 260.

96. Insurer may be estopped from claiming a twelve months' limitation where he has told the insured that the policy protects him, since it provides that no action can be brought until 60 days after an award. Williams v. German Ins. Co., 90 App. Div. [N. Y.] 413.

97. Plaintiff will be entitled to Monday on which to sue, if the last day falls on Sunday. Ryer v. Prudential Ins. Co., 85 App. Div. [N. Y.] 7. Action begun on the 19th of October following the death of a member of a mutual insurance company on June 5th, is not premature, where there was immediate proof of death and there is no denial of the sufficiency or receipt thereof and action cannot be brought until 90 days after their service. Thornburg v. Farmers' Life Ass'n [Iowa] 98 N. W. 105.

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A usee's rights as to limitations will be governed as if his action was brought at the time in which it was brought by himself and the other as joint plaintiffs.[98]

An action begun must be prosecuted to judgment to toll a specification in the policy limiting the time of action.[99] Nor is the right of action extended by a statutory provision, but where an action is defeated for a matter of form, a new action may be begun within prescribed time.[1]

A limitation as to the time of action in the policy cannot be asserted where an action was brought in due time but dismissed on an agreement of defendant to submit to rearbitration, and a new action brought in five months is not unreasonably delayed.[2]

Under statutory provisions that action will lie in case payment is withheld for more than a specified period after claims are due, action may be brought at the termination of such period, after the insurer has received satisfactory proofs of loss.[3] Furnishing additional proof of death at the insurer's request does not extend the period within which, by the terms of the by-laws, action must not be brought on the contract.[4] An objection that the action is prematurely brought must be pleaded.[5]

Parties.—Without regard to whether a beneficiary assigns his rights in the manner required by the policy, he may make a contract entitling another to collect the policy.[6] Suit should be by the real party in interest,[7] or by the legal holder of the policy to his use.[8] The wife may bring an action on a policy issued by mistake in the name of the husband, on dismissal of the suit of the husband.[9] A vendor who after a contract to sell insures property without reference to the contract or to the vendee cannot, after settlement of a loss, sue for the use of the vendee.[10] Where the mortgagor and mortgagee have conflicting in-

98. Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 So. 228.

99. An action begun and dismissed because plaintiff has not paid a privilege tax necessary, does not toll a limitation as to the time specified in the policy within which action must be begun [Ann. Code 1892, § 2758]. Ward v. Pa. Fire Ins. Co. [Miss.] 33 So. 841.

1. Ann. Code § 1892, § 2756. Ward v. Pa. Fire Ins. Co. [Miss.] 33 So. 841.

2. Goodwin v. Merchants & B. Mut. Ins. Co., 118 Iowa, 601.

3. Comp. Laws, § 7326. Putze v. Saginaw Valley Mut. Fire Ins. Co. [Mich.] 94 N. W. 191.

4. Wood v. Farmers' Life Ass'n [Iowa] 95 N. W. 226.

5. In grounds of defense filed under Code, § 3249. Farmers' Benev. Fire Ins. Ass'n v. Kinsey [Va.] 43 S. E. 338. A provision granting time for payment of losses in the by-laws of the insurer if not contained in the policy attached to the declaration, will not authorize a demurrer to the declaration on the ground of prematurity. Id.

6. Kendall v. Morrison [Tex. Civ. App.] 77 S. W. 31.

7. The insured may bring an action in his own name on a policy payable to a trustee as his interest may appear. Branigan v. Jefferson Mut. Fire Ins. Co. [Mo. App.] 76 S. W. 643. A mortgagee may sue as the real party in interest under a mortgage clause though he has deposited the policy as collateral on an assignment of the note and mortgage. Key v. Continental Ins. Co. [Mo. App.] 74 S. W. 162. Where the promise is made directly to the mortgagee and the owner pays the premium on account of the mortgagee and in fulfillment of his duty to do so the mortgagee may sue on the contract. Smith v. Union Ins. Co. [R. I.] 55 Atl. 715. A declaration alleging that the insured assigned and delivered the policy to an assignee with authority to collect the same and to appropriate the proceeds to the payment of the assignor's debt, is sufficient to show that the assignee is the real party in interest entitled to sue alone to recover on the policy [construing Rev. St. 1892, §§ 1981, 1982]. Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 So. 228.

8. A trustee to whom a creditor has surrendered a policy assigned to him by the debtor, without re-assigning the same in writing, may substitute the holder of the legal title by amendment. Traders' Ins. Co. v. Mann [Ga.] 45 S. E. 426. Where the insurer has marked the policy to be payable to the use of another, the insured may bring an action for such use. Schliansky v. Merchants' & Mf'rs' Fire Ins. Co. [Del.] 55 Atl. 1014.

9. Montgomery v. Delaware Ins. Co. [S. C.] 45 S. E. 934.

10. Wright v. Continental Ins. Co., 117 Ga. 499.

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terests, they should be determined by making the one party defendant in a suit by the other on the policy.[11]

The person in possession of a policy of life insurance may sue thereon, though the insured was a nonresident and did not die within the state or leave property therein.[12] Cases as to rights under particular policies are grouped below.[13]

(§ 20) *B. Pleading.*—The general rules of pleading governing actions on contract are applicable.[14] Repugnant causes of action must not be alleged,[15] but allegations of bad faith in breach do not set up an additional cause of action in tort.[16] Jurisdiction must be shown.[17] The facts supporting the right of recovery must be set out, such as eviction in case of title insurance,[18] the nature of the injury,[19] or attendance of physician in accident insurance,[20] or the value of the property destroyed in fire insurance.[21] Where the contract calls for payment at a stated time after proof of loss, it need not be alleged that the company was notified to make an assessment and had refused, or that an assessment had been made and payment refused, or that there were assets from which payment could be made.[22]

Averring performance.—Under statutes providing that performance of conditions precedent may be pleaded generally, an allegation that plaintiff has fully performed all the obligations required is sufficient.[23]

11. The fact that a mortgage does not cover all the property insured does not require the mortgagor to be joined in a suit by the mortgagee whose interest is severally insured. Kent v. Aetna Ins. Co., 84 App. Div. [N. Y.] 428.

12. Page v. Life Ins. Co., 131 N. C. 115.

13. The widow and children of insured may sue on a policy payable to executors, administrators or assigns. Sun Life Ins. Co. v. Phillips [Tex. Civ. App.] 70 S. W. 603. A daughter's husband may sue in his own name on policy payable to wife and children of insured, where the wife and daughter, who was the only child, died before insured. D'Arcy v. Mut. Life Ins. Co., 108 Tenn. 567. Where a contract is to pay to a certain living beneficiary, the administrator of insured cannot sue, though there is an optional clause in the policy for payment to the administrator. Ruoff v. Hancock Mut. Life Ins. Co., 86 App. Div. [N. Y.] 447.

14. An objection that the declaration does not set out the details of the contract is not available upon demurrer. Taylor v. N. J. Title Guarantee & Trust Co. [N. J. Law] 56 Atl. 152. Petition on an oral contract of insurance held sufficient as against an objection that it showed that the contract was without consideration and had not taken effect before insured's death. Pac. M. Ins. Co. v. Shaffer, 30 Tex. Civ. App. 313.

15. A declaration one count of which alleges that defendant was already indebted by reason of a loss having occurred and another count alleges that in consideration thereof and of certain other things defendant undertook to pay a certain sum if a loss should occur, and that such loss has occurred is inconsistent as to substance and vulnerable to a general demurrer. Hersey v. Northern Assur. Co. [Vt.] 56 Atl. 95.

16. Where the action is brought at law for breach of an implied contract to levy an assessment, allegations as to bad faith, fraudulent purpose and unlawful action on the part of defendant in rejection of plaintiff's claim do not make the declaration one in tort or one having one count on contract and one in tort. Garcelon v. Commercial Travelers' E. A. Ass'n [Mass.] 67 N. E. 868.

17. Complaint in an action against a foreign insurance company held insufficient as to allegation of facts establishing jurisdiction. Equity Life Ass'n v. Gammon [Ga.] 44 S. E. 978.

18. It is not a sufficient averment of eviction under adverse title to plead that a person named purchased the land at a tax sale and ever since has lawfully held as against insured. Taylor v. N. J. Title Guarantee & Trust Co. [N. J. Law] 56 Atl. 152.

19. An allegation stating that insured did not die of any bodily injury sustained through any external, violent or accidental means is an averment of a conclusion. Dezell v. Fidelity & Casualty Co., 176 Mo. 253.

20. Where the policy requires that benefits may be recovered only from the first to the last visit of a physician, a complaint sufficiently alleges such days where it states that insured was under the care of a physician from a certain day to another certain day. Mut. Ben. Ass'n v. Nancarrow [Colo. App.] 71 Pac. 423.

21. Where by statute the value of the property is conclusively fixed by the policy, an allegation of the amount for which insurance was effected, is all that is necessary [Rev. St. 1899, § 7969]. Bode v. Firemen's Ins. Co. [Mo. App.] 77 S. W. 116.

22. Brookshier v. Chillicothe Town M. F. Ins. Co., 91 Mo. App. 599.

23. Burns' Rev. St. 1901, § 373. Security A. & S. B. Ass'n v. Lee, 160 Ind. 249. Performance of promissory warranties or conditions subsequent need not be alleged, but there need be only a general averment of performance of conditions precedent [Rev. St. § 1045]. Tillis v. Liverpool & L. & G. Ins. Co. [Fla.] 35 So. 171.

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Where by statute general counts in assumpsit are made sufficient in declarations on insurance policies, the declaration need not set out the terms and conditions of the contract.[24] Such a statute requiring also a filing of a specification of the number of the policy, date of loss and items involved, with the writ, and further providing that a plea of non assumpsit shall put in issue only, the execution of the policy and the amount of damage is not invalid as requiring defendant to assume the burden of proof of matters rightfully resting on plaintiff, such as performance of conditions, interest, etc.[25] Nor is such a statute a denial of the equal protection of the laws.[26]

In a suit on a policy agreed to be issued, the plaintiff need not aver a compliance with its provisions.[27]

An allegation of performance of all conditions of the contract is sufficient, without averment that proof of loss was furnished at the proper time before suit,[28] but if a policy requiring as a condition precedent, the furnishing of proofs of loss is attached to and made a part of the petition, a failure to allege compliance is demurrable.[29]

Averring waiver of conditions.[30]—A waiver of stipulations in the policy must be pleaded and proved.[31] Plaintiff may in different counts aver a waiver of proofs of loss and compliance with provisions of policy as to proofs of loss and may rely on the count established by his evidence.[32] Though allegations creating a technical estoppel are not alleged, they may be sufficient to raise a question of waiver of proofs of loss.[33]

Averring ownership and interest.—The complaint must allege that plaintiff had an insurable interest at time of issuance of the policy and of the loss,[34] or aver ownership.[35] Where the allegations of the petition as to interest or title is defective, an answer that insured had a title less than fee simple cures the defect.[36]

24. Complaint held sufficient under acts 1896, p. 89, No. 121. Hersey v. Northern Assur. Co. [Vt.] 56 Atl. 95.

25, 26. Hersey v. Northern Assur. Co. [Vt.] 56 Atl. 95. Under such a statute the declaration need not allege that the specification has been filed [Acts 1896, p. 89, No. 121]. Id.

27. King v. Phoenix Ins. Co. [Mo. App.] 76 S. W. 55.

28. Rev. St. 1899, § 634, provides that it may be pleaded generally that all conditions have been performed without specially pleading performance of conditions precedent. McGannon v. Millers' Nat. Ins. Co., 171 Mo. 143. Complaint held sufficient. Fidelity & Casualty Co. v. Brown [Ind. T.] 69 S. W. 915.

29. Tex. H. M. F. Ins. Co. v. Bowlin [Tex. Civ. App.] 70 S. W. 797.

30. An averment that the amount of loss could not be agreed upon, does not prevent other allegations from being construed as an averment of waiver of proofs of loss. Germania F. Ins. Co. v. Pitcher, 160 Ind. 392.

31. Stipulations for payment of premium for inception of risk. German Ins. Co. v. Shader [Neb.] 96 N. W. 604.

32. Indian River State Bank v. Hartford F. Ins. Co. [Fla.] 35 So. 228.

33. Allegations considered. Germania F. Ins. Co. v. Pitcher, 160 Ind. 392.

34. Vernon I. & T. Co. v. Bank of Toronto, 29 Ind. App. 678; Bryan v. Farmers' M. Indemnity Ass'n, 81 App. Div. [N. Y.] 542. Where the complaint does not allege that plaintiff was owner at time of loss or possessed of an insurable interest, it is demurrable, but a demurrer cannot be based on a clerical error resulting in a policy, to allege that plaintiff was the owner at the time the policy was issued. Ohio Farmers' Ins. Co. v. Vogel, 30 Ind. App. 281. Petition held sufficient without a specific allegation of ownership or insurable interest, as against a general exception. Pa. F. Ins. Co. v. Jameson [Tex. Civ. App.] 73 S. W. 418. Petition held to show equitable interest of insured. Bode v. Firemen's Ins. Co [Mo. App.] 77 S. W. 116. Plaintiff must allege that he was the owner of the property at the time of the contract of insurance. Continental Fire Ass'n v. Bearden, 29 Tex. Civ. App. 569.

35. Petition held sufficiently to allege ownership as against general demurrer. American Cent. Ins. Co. v. White [Tex. Civ. App.] 73 S. W. 827. Complaint held sufficient to allege ownership of plaintiff at time of loss. Ins. Co. v. Hegewald [Ind.] 66 N. E. 902. A description in the petition of the house described as plaintiff's house can be rationally construed only as an allegation of ownership. Rogers v. Western Home Town M. F. Ins. Co., 93 Mo. App. 24.

36. Bode v. Firemen's Ins. Co. [Mo. App.] 77 S. W. 116.

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Negativing matters of defense.—As a general rule, the complaint need not deny matters of defense such as incumbrance,[37] or breach of condition for sole and unconditional ownership,[38] or that an assignment was a wagering contract.[39]

Where it is sought to recover an amount stipulated for an accident happening in a particular manner, negative conditions should be denied; but if such facts are established by the evidence, the complaint may be amended to conform to the proof.[40]

Plea or answer.—Where fraud is alleged generally and specifications of facts set out, the general allegation will be limited to the specifications.[41] If statutory provisions require misrepresentations to be material or fraudulent, the facts rendering them material must be pleaded.[42] It must be averred that the misrepresentation induced the issuance of the policy.[43]

Where the insurer pleads payment to another, it need not aver that such person has filed proofs of loss.[44]

A defense of suicide admits the performance of conditions precedent.[45] Breaches of conditions subsequent must be specifically pleaded.[46] Cases as to the sufficiency of particular pleas are collected in the notes.[47] After plaintiff has introduced his evidence, defendant cannot file a plea averring plaintiff's failure to exercise due diligence for his personal safety.[48]

General issue.—Non est factum is the proper plea in denial of the execution of a policy alleged to be under seal, and a plea that defendant did not covenant as alleged may be stricken on motion.[49]

An answer which admits the issuance of the policy, that it was in full force at the death of the insured, and then denies each and every allegation in the petition not thereinafter specifically admitted, is regarded neither as a general nor a special denial.[50]

37. Indian River State Bank v. Hartford F. Ins. Co. [Fla.] 35 So. 228.

38. Gardner v. Continental Ins. Co., 25 Ky. L. R. 426, 75 S. W. 283.

39. Action by assignee. Metropolitan L. Ins. Co. v. Brown [Ind.] 65 N. E. 908.

40. Lilly v. Preferred Acc. Ins. Co., 41 Misc. [N. Y.] 8.

41. Summers v. Metropolitan L. Ins. Co., 90 Mo. App. 691.

42. Ky. St. 1903, § 639. Answer held insufficient. Pac. M. L. Ins. Co. v. Bailey [Ky.] 78 S. W. 119.

43. Summers v. Metropolitan L. Ins. Co., 90 Mo. App. 691.

44. Brooks v. Metropolitan L. Ins. Co. [N. J. Law] 56 Atl. 168.

45. Meyer v. Supreme Lodge, K. of P., 82 App. Div. [N. Y.] 359.

46. Removal of the property. Montgomery v. Del. Ins. Co. [S. C.] 45 S. E. 934. Where there is no averment as to conditions concerning notice of illness in the complaint, failure to comply with a condition as to notice, must be pleaded. Mut. Ben. Ass'n v. Nancarrow [Colo. App.] 71 Pac. 423.

47. A plea setting up an arbitration agreement as provided in the policy and making a tender of the amount had under the appraisement, held good as against demurrer. Rutter v. Hanover F. Ins. Co. [Ala.] 35 So. 33. Defendant's answer read in connection with the petition, held sufficient to admit a defense that oysters were voluntarily taken into the insured's stomach and death ensued therefrom. Md. Casualty Co. v. Hudgins [Tex.] 76 S. W. 745. Special pleas alleging increase of hazard by means within assured's knowledge and control, in that insured kept gasoline in the building and that there was no agreement in the policy consenting thereto are not demurrable on the ground that there was no allegation of the manner in which the hazard was increased, of insured's knowledge thereof or of insurer's want of consent. Cassimus v. Scottish U. & N. Ins. Co., 135 Ala. 256. An answer seeking a forfeiture for failure of ownership, is not invalidated by the fact that it is defective in specifically denying plaintiff's ownership. White v. Merchants' Ins. Co., 93 Mo. App. 282. An allegation of misrepresentation as to encumbrances connected with a denial of the ownership alleged in the complaint, is to be regarded simply as a traverse of the cause of action stated in the complaint. Farmers' M. F. Ins. Co. v. Yetter, 30 Ind. App. 187. An allegation that a dispute existed between plaintiff and others as to ownership of the property destroyed, does not present a defense. Id.

Where there is a finding in favor of defendant on a defense sufficient to avoid his liability, failure to sustain exceptions to other defenses is not prejudicial. Joy v. Liverpool, L. & G. Ins. Co. [Tex. Civ. App.] 74 S. W. 822.

48. Poole v. Mass. Mut. Acc. Ass'n, 75 Vt. 85.

49. Tillis v. Liverpool & L. & G. Ins. Co. [Fla.] 35 So. 171.

50. Dezell v. Fidelity & Casualty Co., 176 Mo. 253.

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A defense of breach of condition may be made by the general issue and notice without a special plea alleging a violation of the contract.[51] Defendant cannot show fraud and false swearing in the proofs of loss under a general denial, though the evidence may be admissible for the purpose of showing the amount of loss,[52] nor can he take advantage of facts in evidence showing failure to exercise due diligence for personal safety.[53]

Replication or reply.[54]—In order to take advantage of statutory provisions that the company cannot deny the truth of an application unless a full and complete copy has been returned with the policy, the facts must be pleaded.[55] Where a waiver is pleaded in reply, the facts essential to its validity must be set out.[56]

Departure.—A reply setting up matter rendering a deed asserted in defense inefficacious to alter insured's sole and unconditional ownership is not a departure from a complaint averring title.[57] Though there is a general averment of conditions precedent, a replication alleging waiver of a pleaded forfeiture on the ground of breach of promissory warranties is not a departure.[58]

Variance.—Pleadings and proof must correspond.[59] Waiver of condition precedent cannot be taken advantage of, where compliance is pleaded.[60] Denial of information sufficient to form a belief as to ownership in plaintiff's intestate admits evidence that insured assigned the policy before intestate acquired any right therein.[61] Under a plea of a breach of an implied condition of truth of material representations of fact, misrepresentations may be shown.[62]

51. Wilson v. Union M. F. Ins. Co. [Vt.] 55 Atl. 662.

52. Cheever v. British-American Ins. Co., 86 App. Div. [N. Y.] 333.

53. Act 1896, No. 121, provides that in actions on insurance policies non-assumpsit places in issue only the execution of the policy and the amount of damages. Poole v. Mass. Mut. Acc. Ass'n, 75 Vt. 85.

54. Reply showing inefficacy of deed to alter title held sufficient as against an answer setting up a breach of a condition against sole and unconditional ownership. Franklin Ins. Co. v. Feist [Ind. App.] 68 N. E. 188.

55. Rev. St. 1892, § 3623. Metropolitan L. Ins. Co. v. Howle [Ohio] 68 N. E. 4.

56. It is a sufficient averment of waiver of a pleaded ground of forfeiture for keeping of gasoline, to allege that the agent issuing the policy was at the time informed of the keeping of the gasoline and that such agent told insured that the keeping was rightful. The authority requisite to the waiver must be averred and it must be alleged that the gasoline was kept as part of the stock insured, if it is sought to show that it was "merchandise usually kept in similar stocks," which was property covered. Cassimus v. Scottish U. & N. Ins. Co., 135 Ala. 256.

57. Franklin Ins. Co. v. Feist [Ind. App.] 68 N. E. 188.

58. Rev. St. § 1045, requires the complaint to contain only a general averment of conditions precedent. Waiver of forfeiture on the ground of failure to comply with iron safe clause. Tillis v. Liverpool & L. & G. Ins. Co. [Fla.] 35 So. 171.

59. Where the defense is that an accident did not occur, evidence that the action was prematurely brought is inadmissible. Modern Brotherhood v. Cummings [Neb.] 94 N. W. 144. On a plea of death from ptomaine poisoning, evidence that death resulted from something other than poison cannot be admitted in favor of the defendant. Md. Casualty Co. v. Hudgins [Tex. Civ. App.] 72 S. W. 1047. Variance between the description of the property in the complaint and in the policy does not render the complaint bad though it may be ground for objection to the introduction of the policy in evidence. Franklin Ins. Co. v. Feist [Ind. App.] 68 N. E. 188. A notice that liability was denied on the ground that the property was not in existence when the policy was delivered, does not prevent proof that a prior policy of another company covering the same property, which was to be replaced by defendant's policy, had not been cancelled when the property was burned. The defenses are consistent. Kerr v. Milwaukee Mechanics' Ins. Co. [C. C. A.] 117 Fed. 442. Variance between the number of the policy pleaded and that introduced in evidence as issued where the policy is identified and properly described in the judgment is immaterial, as is a misspelling of the name. Aetna L. Ins. Co. v. Parker, 30 Tex. Civ. App. 521. Under an averment of sole ownership, plaintiff cannot assert a partial ownership or present sole ownership. White v. Merchants' Ins. Co., 93 Mo. App. 282. Not fatal variance between suit in name of "Ulysses Elgin Butter Co., Limited" and policy of "Ulysses Elgin Butter Co." Ulysses Elgin Butter Co. v. Hartford F. Ins. Co., 20 Pa. Super. Ct. 384.

60. St. Paul F. & M. Ins. Co. v. Hodge, 30 Tex. Civ. App. 257, 259; Ryer v. Prudential Ins. Co., 82 N. Y. Supp. 971.

61. McDonough v. Aetna L. Ins. Co., 38 Misc. [N. Y.] 625.

62. Evans v. Columbia F. Ins. Co., 40 Misc. [N. Y.] 316.

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Amendments.—Injuries by a subsequent fire may be set up by amendment to the original petition.[63] If plaintiff has alleged performance of all conditions, an amendment allowing defendant to state that the proofs of loss were not received within the stipulated time, not being essential to defendant's case, is not prejudicial to plaintiff.[64] Under the Florida statute of amendments in a suit on a policy, a party may be changed from co-plaintiff to sole nominal plaintiff suing for use of his former co-plaintiff, and by subsequent amendment dropped from the case as nominal plaintiff and his usee substituted as the real and only plaintiff.[65]

(§ 20) *C. Evidence. Presumptions and burden of proof.*—A prima facie case results from proof of the policy and furnishing of proofs of death.[66] The insurer has the burden of establishing its lack of authority to transact business within the state,[67] or that it will not realize enough by an assessment to pay a loss,[68] or that a building fell before the fire broke out, thus terminating the insurance.[69] It need not show that an assignee is an actual person.[70] Insured must establish the facts essential to his recovery, such as ownership of the property[71] at the time of loss,[72] though not properly placed in issue,[73] and must show the value of the property destroyed.[74] He must show that risk was to begin at the time of signing the application.[75]

Delivery of policy is prima facie evidence of payment of the premium recited.[76] Failure to cancel supports the same inference.[77] Plaintiff establishes a prima facie case as against a claim of forfeiture for nonpayment of premiums by introducing a receipt for the premium in question executed by defendant's general agents,[78] but if defendant introduces evidence to rebut the receipt, the

63. Civ. Code, § 134, allows amendments in furtherance of justice in case they do not substantially change the claim or defense. Scottish U. & N. Ins. Co. v. Strain, 24 Ky. L. R. 958, 70 S. W. 274.

64. Huse & L. Ice & Transp. Co. v. Wielar, 86 N. Y. Supp. 24.

65. Indian River State Bank v. Hartford F. Ins. Co. [Fla.] 35 So. 228.

66. Provident Sav. Life Assur. Soc. v. Cannon, 103 Ill. App. 534.

67. Abraham v. Mut. Reserve Fund Life Ass'n, 183 Mass. 160.

68. Thornburg v. Farmers' Life Ass'n [Iowa] 98 N. W. 105. The burden is on the company to show insufficiency of assessment to pay loss, where the action is on a mutual policy providing that full indemnity is not to be paid, where the losses exceed the amount collected on the assessment. Delle v. State Mut. Hail Ins. Co., 119 Iowa, 173.

69. Phenix Ins. Co. v. Luce [C. C. A.] 123 Fed. 257; Friedman v. Atlas Assur. Co. [Mich.] 94 N. W. 757.

70. Assignee of a life policy is not presumed to be fictitious. McDonough v. Aetna Life Ins. Co., 38 Misc. [N. Y.] 625.

71. The insured must be the owner of the property at the time the insurance is secured as well as at time of the loss and must prove such ownership though the pleadings are defective and though there is a statutory provision that warranties shall be deemed representations only, where not materially affecting the risk [Rev. St. 1899, §§ 7973, 7974]. White v. Merchants' Ins. Co., 93 Mo. App. 282.

72. Milwaukee Fire Ins. Co. v. Todd [Ind. App.] 67 N. E. 697.

73. The burden on plaintiff to show that she is the owner of the property is not affected by the fact that defendant by a faulty and argumentative denial, denies plaintiff's ownership, coupled with an allegation that another person was the owner. Montgomery v. Delaware Ins. Co. [S. C.] 45 S. E. 934.

74. Rev. St. 1899, §§ 7969, 7970, makes the amount of insurance conclusive as to buildings but insured must establish the value of personalty. De Soto v. American Guaranty Fund Mut. Fire Ins. Co. [Mo. App.] 74 S. W. 1.

75. Brink v. Merchants' & F. United Mut. Ins. Ass'n [S. D.] 95 N. W. 929.

76. Union Life Ins. Co. v. Parker [Neb.] 92 N. W. 604. Where it recites that it is not to be delivered until such payment. The presumption is rebuttable. Page v. Life Ins. Co., 131 N. C. 115. Possession of an accident policy causes a presumption of payment of premium. Cole v. Preferred Acc. Ins. Co., 40 Misc. [N. Y.] 260.

77. Mauck v. Merchants' & Mf'rs' Fire Ins. Co. [Del.] 54 Atl. 952.

78. O'Connell v. Fidelity & Casualty Co., 87 App. Div. [N. Y.] 306. Though the insurance company forwards renewal receipts to policy holders and gives credit for the premium in advance of receipt of payment, proof of such custom will not cast the burden on the representatives or beneficiaries of decedent to show that a premium for which the company has issued its formal receipt has been actually paid. O'Connell v. Fidelity & Casualty Co., 87 App. Div. [N. Y.] 306.

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burden of proving payment by a preponderance of the evidence does not shift from plaintiff.[79] The company, if it admit the execution and death before a renewal premium is due, has the burden of showing that the policy is not in force, has been procured by fraud, and no premium paid.[80]

The burden of proof is on the party alleging fraud,[81] or misrepresentation,[82] or breach of warranty,[83] or the materiality of the breach.[84] If, to prevent a judgment being a lien on the premises avoiding a policy, complainant asserts that the property is exempt from such lien, the burden of proof is on him.[85]

The fact that because defendant has burden of proving a breach of warranty it is given the opening and closing in the introduction of evidence does not affect the rule as to the burden of proving a waiver of the breach.[86]

The burden of proving that death was from an injury intentionally rather than accidentally inflicted by a third person is on defendant,[87] or of showing death from a cause other than alleged.[88] Where defendant seeks to reduce its liability under a proviso that only one-tenth of the policy shall be paid in case death results from an injury intentionally inflicted by a third person, the intent becomes an essential part of the proof and is not presumed from the injury.[89]

Suicide must be established by defendant,[90] but plaintiff has the burden of showing unsoundness of mind on the part of the insured.[91]

79. Instruction held to improperly place the burden on defendant. O'Connell v. Fidelity & Casualty Co., 87 App. Div. [N. Y.] 305.

80. Page v. Life Ins. Co., 131 N. C. 115.

81. Under Code, § 1812, providing that fraud must exist to prevent a certificate of health from estopping the company from denying insured's health at the time of the policy, imposes the burden of establishing such fraud on insured. Ley v. Metropolitan Life Ins. Co. [Iowa] 94 N. W. 563.

82. There is a presumption that the insurer knows the location and nature of the business it insures. Birnstein v. Stuyvesant Ins. Co., 39 Misc. [N. Y.] 808. The burden of proving falsity of application for reinstatement is on defendant where the application and false statements are averred in the answer. Denver Life Ins. Co. v. Crane [Colo. App.] 73 Pac. 875. The insurer has the burden of establishing a defense that false answers induced the acceptance of the risk and that neither the insurer nor its agents had knowledge of such falsity. North American Acc. Ins. Co. v. Sickles, 23 Ohio Circ. R. 594.

83. Md. Casualty Co. v. Gehrmann, 96 Md. 634. An agreement to use diligence to maintain a sprinkler system not being a warranty or condition precedent, the burden is on insurer to show failure to use due diligence. Fuller v. N. Y. Fire Ins. Co. [Mass.] 67 N. E. 879. The insurer has the burden of proving increase of risk authorizing forfeiture. Taylor v. Security Mut. Fire Ins. Co., 88 Minn. 231.

84. Poe's Supplement Code Pub. Gen. Laws 1900, art. 23, § 142a. Md. Casualty Co. v. Gehrmann, 96 Md. 634. Where insured is more than 40 and does not live in the family of a sister afflicted with consumption, it will not be presumed that a misrepresentation of the sister's health was material. New Era Ass'n v. Mactavish [Mich.] 94 N. W. 599. The burden of proof of whether a misrepresentation increases the risk of loss is on defendant. Price v. Standard Life & Acc. Ins. Co. [Minn.] 95 N. W. 1118.

85. Must show that it arose from an action on express or implied contract. Franklin Ins. Co. v. Feist [Ind. App.] 68 N. E. 188.

86. Moore v. Mut. Reserve Fund Life Ass'n [Mich.] 95 N. W. 573. A provision in a policy excepting loss by fire during the existence of a riot unless loss is from independent causes authorizes the company to demand proof that the loss was from such causes or that such right was waived by a denial of all liability. Royal Ins. Co. v. Martin, 24 Sup. Ct. 247.

87. Stevens v. Continental Casualty Co. [N. D.] 97 N. W. 862. The presumption is that a gun shot wound was accidentally inflicted. Id.

88. Where plaintiff has shown death from hemorrhage following an accidental fall, the burden of showing death from cancer is on defendant. Fetter v. Fidelity & Casualty Co., 174 Mo. 256.

89. The jury cannot be required to find intentional commission of the act, if the facts may be reconciled with an accidental or non-intentional injury and the question in such a state of the evidence is for them. Stevens v. Continental Casualty Co. [N. D.] 97 N. W. 862.

90. Equitable Life Assur. Soc. v. Liddell [Tex. Civ. App.] 74 S. W. 87. Where the dead body of insured is found under circumstances indicating that death may have resulted from accident or suicide, the presumption is against suicide. Union Casualty & Surety Co. v. Goddard, 25 Ky. L. R. 1035, 76 S. W. 832. The presumption is against suicide, where insured was last seen late at night on board a vessel in mid ocean. It is also presumed that he died by accident or some external force within a policy insuring him against death through external, violent and accidental means. Travelers' Ins. Co. v. Rosch, 23 Ohio Circ. R. 491.

91. There is a presumption that one committing suicide is conscious of the char-

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Statements of a guardian made on hearsay in the proofs of death do not relieve the insurer from the necessity of proving such facts as against infant beneficiaries.[92]

Admissibility of evidence.—General rules as to the admissibility of evidence are applicable in actions to recover upon insurance policies.[93] Evidence which is

acter of his act. Under a policy stipulating against suicide whether sane or insane, no recovery can be had, where insured commits murder and suicide. Dickerson v. N. W. Mut. Life Ins. Co., 200 Ill. 270.

92. Stevens v. Continental Casualty Co. [N. D.] 97 N. W. 862.

93. Evidence held sufficient prima facie evidence of conspiracy to render the acts of either of two persons relating to a conspiracy for obtaining the proceeds of insurance admissible against the other. McCarty v. Hartford Fire Ins. Co. [Tex. Civ. App.] 75 S. W. 934. A witness can not testify as to the construction of the contract. Prudential Ins. Co. v. Devoe [Md.] 56 Atl. 809. Mailing of a check for the full amount of instalments may be shown as tending to show that plaintiff had not abandoned his contract. Walls v. Home Ins. Co., 24 Ky. L. R. 1452, 71 S. W. 650. Letters containing a denial of liability by the company and notice to the company of the death of insured are admissible. Prudential Ins. Co. v. Devoe [Md.] 56 Atl. 809.

Cause of loss: Where arson is set up as a defense to a fire policy, other circumstances tending to prove the guilt of the party charged with the commission of the offense, is admissible in evidence. Joy v. Liverpool, L. & G. Ins. Co. [Tex. Civ. App.] 74 S. W. 822. On a contention that fire originated from an explosion of mill dust, the condition of the mill at the time may be shown, the amount of mill dust collected and the omission of appliances against such dust. Orient Ins. Co. v. Leonard [C. C. A.] 120 Fed. 808. Where the defense is fraud, arson and perjury, statement of a fireman that partly burned matches were found in a rubbish box in the burning building and a hearsay statement of one of the arbitrators that the case was "loaded" are inadmissible. Goodwin v. Merchants' & B. Mut. Ins. Co., 118 Iowa, 601. There is no prejudicial error to allow witness to state that his field was damaged by the same storm that damaged plaintiff's. Condon v. Des Moines Mut. Hail Ass'n [Iowa] 94 N. W. 477.

Cause of death: It may be shown that at the time the policy was issued, insured questioned concerning the payment of losses on suicide as showing that suicide was in applicant's mind. Treat v. Merchants' Life Ass'n, 198 Ill. 431. A beneficiary may show that death resulted from accident, though insured did not disclose such accident to his physician. Travelers' Ins. Co. v. Hunter, 30 Tex. Civ. App. 489. The opinion of a coroner taking an inquest, as to suicide, is not competent, nor is a copy of the coroner's inquest. Aetna Life Ins. Co. v. Kaiser, 24 Ky. L. R. 2454, 74 S. W. 203. Coroner's inquest proceedings with which plaintiff had nothing to do, are inadmissible. Louis v. Con. Mut. Life Ins. Co., 172 N. Y. 659.

Amount of loss: The amount for which a settlement was made with another insurer, is immaterial. Goodwin v. Merchants' & B. Mut. Ins. Co., 118 Iowa, 601. Value of goods at the time of fire may be shown by evidence of cost price and length of use. Cheever v. Scottish Union & Nat. Ins. Co., 86 App. Div. [N. Y.] 328. As bearing on damages to a crop the yield of similar fields in the vicinity may be considered. Condon v. Des Moines Mut. Hail Ass'n [Iowa] 94 N. W. 477. On an issue of total loss things necessary to restore the building may be shown, but on such issue evidence of the cost of replacing the building is not admissible. Hartford Fire Ins. Co. v. Bourbon County Court, 24 Ky. L. R. 1850, 72 S. W. 739. If plaintiff's recollection of articles destroyed is the best evidence, lists made by her immediately after the fire, are admissible. Cheever v. Scottish Union & Nat. Ins. Co., 86 App. Div. [N. Y.] 328. Where the verdict is for the full amount of the insurance, it is harmless error to have admitted evidence as to the proportion of the loss caused by fire. Friedman v. Atlas Assur. Co. [Mich.] 94 N. W. 757. If the value of articles conceded to have been covered by the policy is disputed, it is impossible to determine whether or not the admission of evidence as to articles not covered was prejudicial. Fiske v. Royal Exch. Assur. Co. [Mo. App.] 75 S. W. 382.

Misrepresentations: As tending to show that insured was suffering with tuberculosis at time of application a physician can be asked whether or not a treatment administered prior to the date of the application was not a proper treatment for tuberculosis, and it may be shown that insured had consumption in the ensuing year and died in some 18 months of that disease. Murphy v. Prudential Ins. Co., 205 Pa. 444. A physician's certificate showing death by consumption the year after insurance, is admissible to show breach of a warranty against consumption. Ohmeyer v. Supreme Forest Woodmen Circle, 91 Mo. App. 189. The company's officers cannot testify that truthful statements of certain facts in the application would have caused applicant's rejection. New Era Ass'n v. Mactavish [Mich.] 94 N. W. 599. The physician examining the applicant cannot be asked as to whether had facts been disclosed to him, he would have passed him as a first-class risk, where the issue is the truthfulness of answers made warranties by the policy. Murphy v. Prudential Ins. Co., 205 Pa. 444. Custom among insurance companies as to acceptance of applications of persons who have attempted suicide, is not admissible and it cannot be shown that the fact that the applicant had made such an attempt would have been considered in passing on his application. Louis v. Conn. Mut. Life Ins. Co., 172 N. Y. 659. Refusal to permit an expert to state his opinion as to the use of intoxicants as being a pernicious habit, is not error where the defense is that use of intoxicating liquors to excess contributed to insured's death. Union Life Ins. Co. v. Jameson [Ind. App.] 67 N. E. 199.

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admissible against the insured is usually admissible as against his assignee,[94] though where a policy has properly been assigned to the vendee of property, previous negotiations between the vendor and insurance company are not admissible to show the property covered unless known by the vendee when he took the transfer.[95]

The policy pleaded is admissible,[96] and if execution and delivery is admitted by answer, identification or foundation is unnecessary.[97] Since the private papers of the company cannot be compelled to be surrendered, a certified copy of an original application may be attached to a deposition.[98]

The proofs of death are admissible and conclusive against the beneficiary, unless erroneous or made under mistake.[99] They are not relevant as substantive evidence as to the cause or manner of the insured's death.[1] A record of inquest proceedings furnished by plaintiff's counsel after the furnishing of proofs of death is not a part thereof so as to be admissible against plaintiff.[2] A copy of the proofs of loss is inadmissible, unless it is shown that the original is lost or destroyed or in possession of the opposite party who refuses to produce it on notice.[3] Notice before trial that proof of death is erroneous is not necessary to allow plaintiff to explain an erroneous statement therein.[4]

Declarations and acts of agents while acting on the insurer's business and within the scope of their employment are admissible.[5]

Where an agreement by an adjuster to pay is pleaded, evidence thereof is admissible.[6]

Sufficiency of evidence.—Cases in which the sufficiency of evidence to establish particular issues has been considered are grouped in the footnotes according to such issues.[7]

Where the fact of a doctor's prescription is established, a druggist may be permitted to testify that he filled such prescription, though he does not know who presented it. Flippen v. State Life Ins. Co., 30 Tex. Civ. App. 362. Payment of sick benefits from other insurers before application, is admissible to show breach of warranty therein as to sickness. Seidenspinner v. Metropolitan Life Ins. Co., 175 N. Y. 95.

94. Joy v. Liverpool, L. & G. Ins. Co. [Tex. Civ. App.] 74 S. W. 822.

95. Conn. Fire Ins. Co. v. Hilbrant [Tex. Civ. App.] 73 S. W. 558.

96. Code Pub. Gen. Laws, art. 75, § 24, par. 108. Prudential Ins. Co. v. Devoe [Md.] 56 Atl. 809.

97. Fidelity Mut. Fire Ins. Co. v. Lowe [Neb.] 93 N. W. 749.

98. Speiser v. Phoenix Mut. Life Ins. Co., [Wis.] 97 N. W. 207.

99. Hassencamp v. Mut. Ben. Life Ins. Co. [C. C. A.] 120 Fed. 475. Conclusiveness of proofs of loss in general, see ante, § 15A.

1. Aetna Life Ins. Co. v. Kaiser, 24 Ky. L. R. 2454, 74 S. W. 203.

2. Louis v. Conn. Mut. Life Ins. Co., 172 N. Y. 659.

3. Hartford Fire Ins. Co. v. Enoch [Ark.] 77 S. W. 899.

4. Abraham v. Mut. Reserve Fund Life Ass'n, 183 Mass. 116.

5. A letter written by an adjuster to a representative of the company, is not admissible if it is not shown to be relevant to the issue. Hartford Fire Ins. Co. v. Bourbon County Court, 24 Ky. L. R. 1850, 72 S. W. 739. Where by mistake a wife's property is insured in the name of the husband, the declarations and acts of the agent made to the husband are binding on the insurer for the wife's benefit. Montgomery v. Delaware Ins. Co. [S. C.] 45 S. E. 934. A letter by a general agent to the home office of the insurer and referring to the failure of insured to make payment of premium, and containing a further statement of his promise to pay in a few days, is admissible as a declaration. Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 73 Pac. 740. A statement of the manager of an insurance company tending to show waiver, will be admissible though made without knowledge of the death of the insured. Illinois Life Ass'n v. Wells, 200 Ill. 445. Statements that the state agents said that they would make accommodations as to payments of premiums, are admissible and do not contradict a provision against waiver of forfeiture save by certain officers. Washington Life Ins. Co. v. Berwald [Tex. Civ. App.] 72 S. W. 436.

6. Germinder v. Machinery Mut. Ins. Ass'n [Iowa] 94 N. W. 1108.

7. **Formation of contract:** Issuance of policy. McCarthy v. Mut. Reserve Fund Life Ass'n [Tex. Civ. App.] 74 S. W. 921. Authority of agent to make oral contract. King v. Phœnix Ins. Co. [Mo. App.] 76 S. W. 55. To show that policy was taken out by insured to secure a creditor and not by the creditor in his own right. Strode v. Meyer Bros. Drug Co. [Mo. App.] 74 S. W. 379. Whether sending a policy to decedent with knowledge of a general agent was a waiver of a provision for cash payment. Cross v. Security Trust & Life Ins. Co., 171

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A verbal contract of insurance cannot be recovered on where the evidence is conflicting as to the property insured and wanting as to the rate of premium and

N. Y. 671. Where the policy recites that it should not be delivered until the first premium is paid, and it is admitted that the first renewal premium was not due at the time of death, an instruction that the policy should be found in force if the jury believe the evidence, is justified. Page v. Life Ins. Co., 131 N. C. 115.

Ownership: Evidence held to show ownership in another than insured. McCarty v. Hartford Fire Ins. Co. [Tex. Civ. App.] 75 S. W. 934. Evidence that the property was in defendant's private dwelling, occupied by himself and family, is prima facie evidence of ownership. American Cent. Ins. Co. v. White [Tex. Civ. App.] 73 S. W. 827.

Cause of loss: Negligence of third person impleaded as a defendant causing fire from which loss resulted. Philadelphia Underwriters v. Ft. Worth R. Co. [Tex. Civ. App.] 71 S. W. 419. To show that the fall of a building was caused by fire. Friedman v. Atlas Assur. Co. [Mich.] 94 N. W. 757. To go to the jury on the question of whether a building fell before or after a fire broke out. Phoenix Ins. Co. v. Luce [C. C. A.] 123 Fed. 257.

Cause of death: Suicide. Treat v. Merchants' Life Ass'n, 198 Ill. 431; Hassencamp v. Mut. Ben. Life Ins. Co. [C. C. A.] 120 Fed. 475; Furbush v. Md. Casualty Co. [Mich.] 95 N. W. 551. Suicide by shooting. Aetna Life Ins. Co. v. Kaiser, 24 Ky. L. R. 2454, 74 S. W. 203. Suicide with morphine. Equitable Life Assur. Soc. v. Liddell [Tex. Civ. App.] 74 S. W. 87. To overcome presumption against suicide. Rumbold v. Supreme Council Royal League, 103 Ill. App. 596. Suicide need be established only by a fair preponderance of the evidence. Kerr v. Modern Woodmen [C. C. A.] 117 Fed. 593. To support plaintiff's explanation of the accident and reasons for not giving immediate notice. Hayes v. Continental Casualty Co., 98 Mo. App. 410. To show death from accident. Woodmen Acc. Ass'n v. Hamilton [Neb.] 96 N. W. 989; Union Casualty & Surety Co. v. Goddard, 25 Ky. L. R. 1035, 76 S. W. 832. Evidence held to support the inference of an accidental fall in the absence of showing that it was the result of design or insane impulse. Western Travelers' Acc. Ass'n v. Holbrook [Neb.] 94 N. W. 816. Evidence held to show that defendant was not injured while attempting to leave a train in motion. Lilly v. Preferred Acc. Ins. Co., 41 Misc. [N. Y.] 8. To show fact and date of death. Rogers v. Manhattan Life Ins. Co., 138 Cal. 285, 71 Pac. 348.

Misrepresentation: To show that pistol shot wounds had not caused insured to be in other than good health before issuance of the policy. Mutual Life Ins. Co. v. Sinclair, 24 Ky. L. R. 1543, 71 S. W. 853. To show untruth of statements of good health and absence of any disorder or weakness tending to impair applicant's constitution. Jeffrey v. United Order of Golden Cross, 97 Me. 176. To prove conclusively false warranty as to age. Bowen v. Preferred Acc. Ins. Co., 82 App. Div. [N. Y.] 458. To justify submission to the jury of good faith in concealment of a hemorrhage in an application. Ley v. Metropolitan Life Ins. Co. [Iowa] 94 N. W. 568. To show that insured was not in sound health at the date of the policy, where it appeared that at the delivery of the policy he appeared to be suffering only from a temporary ailment, but died of heart disease and consumption in six months. Packard v. Metropolitan Ins. Co. [N. H.] 54 Atl. 287. To show misrepresentation as to temperance demanding a new trial after a contrary finding by the jury. Holtum v. Germania Life Ins. Co., 139 Cal. 645, 73 Pac. 591. To justify refusal of submission of defense of false ownership. Scottish Union & Nat. Ins. Co. v. Strain, 24 Ky. L. R. 958, 70 S. W. 274. To establish that insurance was in force before delivery of the policy or payment of the premium. Blue Grass Ins. Co. v. Cobb, 24 Ky. L. R. 2132, 72 S. W. 1099. Non-suit held properly granted on the ground of untruthful statement of interest of insured. Alberts v. Insurance Co. of North America, 117 Ga. 854. A pension record is not conclusive as to the fact that insured was afflicted with a bodily infirmity. Black v. Travelers' Ins. Co. [C. C. A.] 121 Fed. 732.

Breach of condition: Additional insurance. Aetna Ins. Co. v. Eastman [Tex. Civ. App.] 72 S. W. 431. Materiality of breach of warranty as to physical soundness and previous collection of insurance. Md. Casualty Co. v. Gehrmann, 96 Md. 634. Compliance with condition for the taking of invoices of stock. Pa. Fire Ins. Co. v. Young, 25 Ky. L. R. 1350, 78 S. W. 127. Evidence held sufficient to go to the jury on the question of instalment of a sprinkler system before issuance of policies. Fuller v. N. Y. Fire Ins. Co. [Mass.] 67 N. E. 879. To warrant submission to jury of whether property was in the building described in the policy. Gustin v. Concordia Fire Ins. Co., 90 Mo. App. 373. Undisputed evidence that greater premiums were charged under certain conditions, is not conclusive that there was an increased risk. Taylor v. Security Mut. Fire Ins. Co., 88 Minn. 231. Evidence held sufficient to justify finding that a deed by insured to his wife did not pass title avoiding a policy of insurance. Hogadone v. Grange Mut. Fire Ins. Co. [Mich.] 94 N. W. 1045.

Waiver of breach: Existence of tax liens. Martin v. Fidelity Ins. Co., 119 Iowa, 570. Incumbrance. German Ins. Co. v. Stiner [Neb.] 96 N. W. 122. Unconditional and sole ownership. Pope v. Glens Falls Ins. Co., 136 Ala. 670. Change in ownership. Keith v. Royal Ins. Co. [Wis.] 94 N. W. 295. Iron safe clause. Couch v. Home Protection Fire Ins. Co. [Tex. Civ. App.] 73 S. W. 1077. Additional insurance. Lutz v. Anchor Fire Ins. Co. [Iowa] 94 N. W. 274. Provision against insurance of cripples. Standard Life & Acc. Ins. Co. v. Holloway, 24 Ky. L. R. 1856, 72 S. W. 796. Evidence held sufficient to show waiver of a clearing of logs and brush from the neighborhood of a house, as a condition precedent to taking effect of risk. Duby v. Farmers' Mut. Fire Ins. Co. [Mich.] 95 N. W. 720. Evidence held sufficient to demand submission to the jury of the question of whether a soliciting agent is to be held the agent of the insurer within the meaning of a statute authorizing him to bind the com-

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terms of the insurance.[8] In an action to set aside an award and recover on the policy, plaintiff may recover if he established any of his alleged grounds to set aside the award.[9] An allegation that the assignor was the husband of insured must be sustained by proof, where placed in issue.[10]

Loss need not be established beyond a reasonable doubt.[11] Photographs as to condition of building after a fire are not conclusive.[12] Evidence of value of property when new and of the length of use is not sufficient to establish the value at time of destruction.[13] Plaintiff's evidence as to the highest value of the goods destroyed will control a higher statement by an insurance broker, the facts on which the broker's information is based not being stated.[14] The testimony of insured as to the acreage of his crop may be believed as against defendant's witness whose testimony is from estimates, as may his evidence as to the yield as against similar evidence.[15]

(§ 20) *D. Questions for jury, instructions, findings. Questions of law and fact.*—Conflicting evidence as to facts must be resolved by the jury,[16] so it must determine questions of substantial truth of representations,[17] whether there was voluntary exposure to danger,[18] whether a material or substantial part of a building fell,[19] whether insured's bookkeeper had authority to receive notice of cancellation,[20] or whether insured had mental capacity to agree to cancellation.[21]

It is ordinarily a question for the jury as to whether a misrepresentation is material,[22] but it may be a question of law.[23] Intent to deceive or defraud in

pany by waiver, and of the question of whether there was collusion between the agent and insured to defraud the insurer thus preventing the company being bound though there were false statements known to the agent [Rev. St. 1898, § 1977]. Speiser v. Phoenix Mut. Life Ins. Co. [Wis.] 97 N. W. 207.

Proof of loss: To show notice of accident under a contractor's liability policy. Rooney v. Md. Casualty Co. [Mass.] 67 N. E. 882. To establish a refusal to comply with provision for notice to the insurer of an autopsy. Legnard v. Standard Life & Acc. Ins. Co., 81 App. Div. [N. Y.] 320. Waiver of proofs of loss. McCarthy v. Mut. Reserve Fund Life Ass'n [Tex. Civ. App.] 74 S. W. 921.

Miscellaneous matters: Question of whether a policy was in force at the time of insured's death. McCarthy v. Mut. Reserve Fund Life Ass'n [Tex. Civ. App.] 74 S. W. 921. Waiver of limitation as to time of bringing action. Bowen v. Preferred Acc. Ins. Co., 82 App. Div. [N. Y.] 458. To support recovery on fire policy. Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392. To show that defendant was not intended as the beneficiary. Olmstead v. Olmstead, 76 App. Div. [N. Y.] 582. To justify submission of whether property was a homestead. Martin v. Fidelity Ins. Co., 119 Iowa, 570.

8. Keystone Mattress & Spring Bed Co. v. Pittsburg Underwriters, 21 Pa. Super. Ct. 38.

9. Insurance Co. of North America v. Hegewald [Ind.] 66 N. E. 902.

10. Flaherty v. Metropolitan Life Ins. Co., 38 Misc. [N. Y.] 759.

11. Dunn v. Springfield F. & M. Ins. Co., 109 La. 520.

12. Hartford Fire Ins. Co. v. Bourbon County Court, 24 Ky. L. R. 1850, 72 S. W. 739.

13. De Soto v. American Guaranty Fund Mut. Fire Ins. Co. [Mo. App.] 74 S. W. 1.

14. Rockey v. Firemen's Ins. Co., 88 App. Div. [N. Y.] 633.

15. Condon v. Des Moines Mut. Hail Ass'n [Iowa] 94 N. W. 477.

16. Breach of the warranty of health. Black v. Travellers' Ins. Co. [C. C. A.] 121 Fed. 732. Increase of risk by alteration of building or adjacent structures, unless there is a certain inference from undisputed facts. Taylor v. Security M. F. Ins. Co., 88 Minn. 231. On conflict of evidence as to age, a verdict cannot be directed. Dolan v. Mut. R. F. Life Ass'n, 182 Mass. 413. Whether plaintiff's evidence or a physician's is more worthy of belief as to circumstances attending an accident preventing the giving of proper notice is for the jury. Hayes v. Continental Casualty Co., 98 Mo. App. 410. Where payment of premium is denied as a defense to an action on a policy, a verdict should not be directed for plaintiff, where a waiver is not pleaded and the evidence of payment is conflicting. Farmers' & M. Ins. Co. v. Graff [Neb.] 96 N. W. 605. Where after the issuance of a renewal receipt, insured is sent a notice of cancellation based on failure to pay the same premium, the question of payment becomes one for the jury. O'Connell v. Fidelity & Casualty Co., 87 App. Div. [N. Y.] 306.

17. Whether a representation is substantially true or substantially false, is for the jury. Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. [C. C. A.] 124 Fed. 25.

18. Being on railroad track. Payne v. Fraternal Acc. Ass'n, 119 Iowa, 342.

19. Home Mut. Ins. Co. v. Tompkies, 30 Tex. Civ. App. 404.

20. Edwards v. Sun Ins. Co. [Mo. App.] 73 S. W. 886.

21. McCluskey v. Springfield F. & M. Ins. Co. [Vt.] 56 Atl. 662.

22. Price v. Standard L. & Acc. Ins. Co. [Minn.] 95 N. W. 1113. Materiality of a false

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a misrepresentation, or whether it increases the risk of loss, is for the jury.[24] The question of the sufficiency of proofs of loss is one of law, where there is no evidence of bad faith.[25]

Instructions must as in other actions conform to the pleadings,[26] and proof,[27] should consider all the issues,[28] be clear and unambiguous,[29] need not define phrases

answer not a warranty is for the jury. Louis v. Conn. M. L. Ins. Co., 172 N. Y. 659. Where the evidence is conflicting as to the existence of a tumor, the question of whether a statement that such tumor did not exist is material, is for the jury. Proctor v. Metropolitan L. Ins. Co., 20 Pa. Super. Ct. 523.

23. Fireman's Fund Ins. Co. v. McGreevy [C. C. A.] 118 Fed. 415. Though there is a statutory provision that though the application causes the truth of answers to be warranted, misrepresentations in good faith must be material to effect a forfeiture, the question need not be left to the jury, if the matter stated is manifestly material or absolutely and visibly false. Proctor v. Metropolitan L. Ins. Co., 20 Pa. Super. Ct. 523.

24. Price v. Standard L. & Acc. Ins. Co. [Minn.] 95 N. W. 1118.

25. Where there is a requirement that notice of loss shall contain a statement of all incumbrances and insured leaves a blank unfilled provided for such statement, though his attention is called to it, his duty to furnish such information is not a question for the jury. Ulysses Elgin Butter Co. v. Hartford F. Ins. Co., 20 Pa. Super. Ct. 384.

26. The defendant cannot object to an instruction drawn in accord with its pleadings. Allegation that a certain statement in an employer's certificate was made with evil intent. Perpetual B. & L. Ass'n v. U. S. F. & G. Co., 118 Iowa, 729. Where the facts on which a fraud is predicated are not stated, there is no basis for an instruction submitting that issue. Summers v. Metropolitan L. Ins. Co., 90 Mo. App. 691. Where it is not claimed that the contract is ambiguous, it is not proper to inform the jury as to the manner in which it should be construed in resolving any doubt. Union L. Ins. Co. v. Jameson [Ind. App.] 67 N. E. 199. Where the furnishing of proofs of injury is undisputed, the necessity of such proofs need not be referred to in the instructions. Modern Brotherhood v. Cummings [Neb.] 94 N. W. 144. It is proper to instruct that fraud is never presumed but must be clearly proved, where arson is alleged. Bannon v. Ins. Co. of N. A., 115 Wis. 250. Instructions as to recovery of interest should not vary from the contractual provision. White v. Farmers' M. F. Ins. Co., 97 Mo. App. 590.

27. Quoting a question as "Have you ever had any chronic and persistent hoarseness" instead of "chronic or persistent hoarseness" does not alter the meaning of the question, rendering the instruction error. Blumenthal v. Berkshire L. Ins. Co. [Mich.] 96 N. W. 17. An instruction as to the effect of an agreement or custom in estopping the company from insisting on a forfeiture for non-payment of premiums, should be refused in the absence of evidence. Schmertz v. U. S. L. Ins. Co. [C. C. A.] 118 Fed. 250. Where a waiver of proofs of loss is asserted, such issue should not be omitted from an instruction purporting to cover the whole case. Roberts v. Ins. Co. of America, 94 Mo. App. 142. Evidence of the furnishing of notes to secure over due premiums held to justify an instruction on the question of waiver of time of payment by agreement to extend. Aetna L. Ins. Co. v. Sanford, 200 Ill. 126. An instruction on misrepresentation as to the name of the usual medical attendant, is not warranted by evidence that some time previously insured had been treated by a physician who had subsequently removed from the locality. Provident S. & L. Assur. Soc. v. Cannon, 201 Ill. 260.

28. Instruction held to sufficiently present adverse theories as to the occasion of the fall of a building being due to an explosion in an adjacent building or to overloading. Orient Ins. Co. v. Leonard [C. C. A.] 120 Fed. 808. Where several grounds of forfeiture are alleged, the instruction should not be confined to one of them. Ormsby v. Laclede Farmers' M. F. & L. Ins. Co., 98 Mo. App. 371. Instructions held to properly present a defense on the ground that the death of insured did not result solely from the accident alleged. Fidelity & Casualty Co. v. Brown [Ind. T.] 69 S. W. 915. Where there is a contention that a condition for payment on a specified day, was waived, an instruction is properly modified to take into consideration such contention. Aetna L. Ins. Co. v. Sanford, 200 Ill. 126. Instruction held to properly submit the question of a waiver, of a forfeiture on account of existence of an incumbrance. German Ins. Co. v. Stiner [Neb.] 96 N. W. 122. Where the jury's finding is necessarily based on the ground that the fall of a building was caused by fire and not explosion, failure to submit an issue as to whether the building fell as the result of an explosion is harmless. Friedman Co. v. Atlas Assur. Co. [Mich.] 94 N. W. 757.

29. Instruction held erroneous and contradictory in attempting to describe excessive indulgence in intoxicating liquors while submitting to the jury the question of whether indulgence was excessive. Union L. Ins. Co. v. Jameson [Ind. App.] 67 N. E. 199. A definition that strict care means immediate care need not be given. Hayes v. Continental Casualty Co., 98 Mo. App. 410. An instruction as to proof of good health necessary on reinstatement held misleading where given in connection with evidence that proof of health was waived. Denver L. Ins. Co. v. Crane [Colo. App.] 73 Pac. 875. In an action on a policy of boiler insurance use of the word "tubes" rather than "flues" in an instruction, is immaterial where the pleadings, counsel and witnesses use the words tubes, flues, and pipes, interchangeably in speaking of the same thing. Hartford Steam Boiler Insp. & Ins. Co. v. Ashland Steel Plant, 25 Ky. L. R. 97, 74 S. W. 730. An instruction as to the manner in which facts on which fraud is charged must be proven is not confusing as not defining whether the facts referred to the pleadings

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in ordinary use,[30] and must not charge on the facts.[31] Error may be cured by other portions of the charge.[32]

Special findings must state that insured owned the property at the time of loss.[33]

(§ 20) *E. Judgment and enforcement; attorney's fees.*—Where an action is brought on separate policies against the same defendant, separate judgments need not be rendered on each policy.[34]

Where the amount of the policy is to be paid in instalments, judgment should be entered for each instalment as it matures, not for the whole amount with execution to issue on the instalments as they fall due,[35] or for the commuted value stipulated in the policy, where such value is only payable on consent of the insured, which consent has not been filed.[36]

A judgment in a cross action by defendant against a local agent issuing the policy based on his noncommunication of facts to the company may be refused, where it is not shown that such noncommunication controlled the issuance.[37] If the complaint seeks to set aside an award and recover on the policy, on a finding that the award is valid, judgment should be rendered for the amount thereof and not for dismissal.[38]

A verdict cannot be reduced on account of the existence of another policy which was properly taken notice of in the instructions.[39]

Assessments to meet liability.—A policy holder may after judgment compel by mandamus the assessment of the members of a mutual insurance company to secure funds for the payment of the judgment.[40] If the certificate stipulates for payment of a definite sum to be realized from an assessment, a money judgment can be rendered and it is not necessary to make simply an order to the insurer to make and pay over the proceeds of an assessment.[41] Though a by-law provides that the beneficiary shall be paid the amount of an assessment on all members in good standing, the levy of an assessment is not essential to the insurer's liability if there are other sources from which the benefits may be paid and there is a fixed amount more than which the insured is not bound to pay.[42] Such by-laws do not prevent the recovery of the amount of the certificate unless the insurer shows that an assessment levied in accordance with the by-laws would not have produced such sum.[43]

Interest.—Where the amount of loss would have been immediately ascertained

or to the evidence. Ley v. Metropolitan L. Ins. Co. [Iowa] 94 N. W. 568.

30. "Attached addition" used in describing property need not be defined in the instructions. Not a question of law. Conn. F. Ins. Co. v. Hilbrant [Tex. Civ. App.] 73 S. W. 558.

31. The jury may be instructed that if property were destroyed or damaged by fire to an amount in excess of the entire insurance, plaintiff could recover the amount of his policy, does not remove from the jury the question of whether fire damage exceeded such insurance. Orient Ins. Co. v. Leonard [C. C. A.] 120 Fed. 808.

32. Error in requiring the facts establishing fraud to be inconsistent with any other reasonable or probable theory is removed by an express charge in the same paragraph that the defense need be established only by a fair preponderance of the evidence. Ley v. Metropolitan L. Ins. Co. [Iowa] 94 N. W. 568.

33. A finding that plaintiff was at the time the policy was issued, the owner of buildings insured which were located on leased land, is not equal to a finding of ownership at time of loss. Milwaukee F. Ins. Co. v. Todd [Ind. App.] 67 N. E. 697.

34. Rev. St. 1898, § 2609a. Bannon v. Ins. Co. of N. A., 115 Wis. 250.

35. N. Y. L. Ins. Co. v. English [Tex.] 72 S. W. 58.

36. Rev. St. art. 1335. N. Y. L. Ins. Co. v. English [Tex. Civ. App.] 70 S. W. 440.

37. Continental Fire Ass'n v. Norris, 30 Tex. Civ. App. 299.

38. Maher v. Home Ins. Co., 75 App. Div. [N. Y.] 226.

39. Goodwin v. Merchants' & B. M. Ins. Co., 118 Iowa, 601.

40. Perry v. Farmers' M. L. Ins. Co., 132 N. C. 283.

41. Thornburg v. Farmers' Life Ass'n [Iowa] 98 N. W. 105.

42, 43. Wood v. Farmers' Life Ass'n [Iowa] 95 N. W. 226.

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by an honest appraisement, interest may be recovered from the day of a demand made when the loss was payable.[44]

Attorney's fees.—Statutes authorizing the recovery of attorney's fees in actions on policies of life and fire insurance companies are not unconstitutional.[45] They are not necessarily also applicable to accident insurance companies.[46]

If policy is payable in ten annual instalments, the penalties and attorney's fees are to be computed on the instalments due at the institution of the suit.[47]

INTEREST.

§ 1. Right to Interest and Demands Bearing Interest (547).
§ 2. Rate and Computation (549).
§ 3. Remedies and Procedure to Recover Interest (549).

§ 1. *Right to interest and demands bearing interest.*—An express written contract to pay a certain sum at a fixed time will carry interest from maturity.[1] Where a contract obligation does not expressly provide for interest, a demand is necessary to set interest running.[2] Commencement of suit is equivalent to demand.[3] Interest is not allowable on an unliquidated claim or an open account;[4] but where the sum due has been ascertained or is capable of being ascertained, interest will run from demand.[5] All the conditions of the contract must be complied with before interest will run.[6]

Commercial paper payable on demand,[7] or certificates of indebtedness,[8] bear

44. Schmitt v. Boston Ins. Co., 82 App. Div. [N. Y.] 234.

45. Chapter 4173, Act June 2, 1893 (Laws 1893, p. 101), does not contravene U. S. Const. art. 14, § 1, or Declaration of Rights, § 1. Tillis v. Liverpool & L. & G. Ins. Co. [Fla.] 35 So. 171. Gen. St. 1901, § 3410. Hartford F. Ins. Co. v. Warbritton, 66 Kan. 93, 71 Pac. 278. Comp. St. 1899, c. 43, § 45. Farmers' M. Ins. Co. v. Cole [Neb.] 93 N. W. 730; Lansing v. Commercial Union Assur. Co., Id. 756.

46. Rev. St. art. 3071. Aetna L. Ins. Co. v. Parker, 30 Tex. Civ. App. 521; Aetna Life Ins. Co. v. Parker [Tex.] 72 S. W. 168, 580.

47. N. Y. L. Ins. Co. v. English [Tex. Civ. App.] 70 S. W. 440, but on reversal of a judgment for an excessive amount fees will not be allowed on the proper sum. N. Y. L. Ins. Co. v. English [Tex.] 72 S. W. 58.

1. Sale of goods. Computing Scales Co. v. Long, 66 S. C. 379.

2. Building contract. Excelsior Terra Cotta Co. v. Harde, 85 N. Y. Supp. 732; O'Keeffe v. New York, 176 N. Y. 297. Bank deposit in absence of special contract. Baker v. Williams & E. Banking Co., 42 Or. 213, 70 Pac. 711. Due bills for money loaned, with no mention of interest or of any specific time of payment. Ross v. Walker [Fla.] 32 So. 934. In case of the insolvency of a bank the presentation and allowance of a claim are equivalent to a demand. Baker v. Williams & E. Banking Co., 42 Or. 213, 70 Pac. 711. A demand for an excessive sum is not a compliance. Excelsior Terra Cotta Co. v. Harde, 85 N. Y. Supp. 732. But contra, interest will be allowed on the sum actually due even though there was an excessive demand and the account was bona fide in dispute. Loomis v. Gillett, 75 Conn. 298.

3. Agent's commissions. Brown v. Lapp, 25 Ky. L. R. 1134, 77 S. W. 194. Surety on an executor's bond. Bassett v. Fidelity & Deposit Co. [Mass.] 68 N. E. 205; Nelson v. Hirsch Iron & Rail Co. [Mo. App.] 77 S. W. 590.

4. Building contract. Excelsior Terra Cotta Co. v. Harde, 85 N. Y. Supp. 732 (semble). Action of tort for negligence. Pungs v. American Brake Beam Co., 102 Ill. App. 76.

5. Damages for breach of contract [Mo. R. S. 1899, § 3705]. Nelson v. Hirsch Iron & Rail Co. [Mo. App.] 77 S. W. 590. Contract for excavation at a fixed price per yard. Becker v. New York, 77 App. Div. [N. Y.] 635. In an action of tort for defendant's wrongful payment of commissions to a purchasing agent. Pungs v. American Brake Beam Co., 102 Ill. App. 76. Or in the absence of demand from the date of suit. Nelson v. Hirsch Iron & Rail Co. [Mo. App.] 77 S. W. 590. On open account under the Montana statute [Civ. Code, § 4280]. Hefferlin v. Karlman [Mont.] 74 Pac. 201. Damages for diversion of water supply for municipal purposes bear interest from date of suit. Lonsdale Co. v. Woonsocket [R. I.] 56 Atl. 448. On destruction of property by railway company, interest will be allowed from the date of the loss. Gulf, etc., R. Co. v. Sheperd [Tex. Civ. App.] 76 S. W. 800. Contra, Union Pac. R. Co. v. Holmes [Kan.] 74 Pac. 606.

6. Proof of death in case of an insurance policy. Rogers v. Manhattan Life Ins. Co., 138 Cal. 285, 71 Pac. 348. Architect's acceptance in case of building contract. Whitehead v. Brothers' Lodge I. O. O. F., 24 Ky. L. R. 1633, 71 S. W. 933. Presentation of interest coupons. Abraham v. New Orleans Brewing Ass'n, 110 La. 1012. Presentation of benefit certificate according to the by-laws of the association. Grand Lodge Locomotive Firemen v. Orrell [Ill.] 69 N. E. 68.

7. A mortgage note. And though by its terms payable on demand no demand is nec-

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interest from date. Other paper from maturity,[8] unless the terms expressly or by implication fix the question.[10]

An executor or trustee who bona fide advances his personal funds for the benefit of the estate is entitled to interest;[11] but where he is guilty of bad faith relative to investments, he is chargeable with interest at the legal rate;[12] but where the officers or trustees of a public corporation wrongfully loan,[13] or receive money on an interest contract, interest will be disallowed.[14]

Interest is incidental to the debt, and cannot exist after the debt is discharged.[15] Interest will not stop on overdue bonds until actual notice of call for payment.[16]

Interest is allowed as damages for unreasonable delay in payment or detention of money. This is the settled rule and does not lie within the discretion of the court;[17] but where the retention has not been wrongful and there has been no misapplication of the money,[18] or when a tender is made of the amount due, interest will not be allowed.[19]

essary to set interest running. Curtis v. Smith, 75 Conn. 429.

8. Mills' Ann St. § 2252. Midland Fuel Co. v. Schuessler [Colo. App.] 71 Pac. 894.

9. A note which provides for interest, but is silent as to the rate and as to when interest will begin to run, bears interest from its maturity. Goss Printing Press Co. v. Daily States Pub. Co., 109 La. 759 (semble).

10. Where a note contains a provision for interest at a certain rate "from ——— until paid," and the contract with which the note is identified refers to the note as bearing interest and stipulates for the payment of principal and interest of the note at maturity, interest will run from the date of the note, not from maturity. Goss Printing Press Co. v. Daily States Pub. Co., 109 La. 759.

11. A director who is appointed trustee of a corporation to settle certain claims and who buys in and adjusts such claims with his own money. Kroegher v. Calivada Colonization Co. [C. C. A.] 119 Fed. 641. One who holds property as security for advancements made to the owner, and pays a prior mortgage with his own money to prevent foreclosure. Natter v. Turner [N. J. Eq.] 55 Atl. 650. Where a state officer, after the failure of a bank in which he has wrongfully deposited public funds, has reimbursed the public treasury, he becomes the private owner of the bank deposit and is entitled thereafter to interest on the same. Baker v. Williams & E. Banking Co., 42 Or. 213, 70 Pac. 411.

12. Brigham v. Morgan [Mass.] 69 N. E. 418. And even though acting honestly and in good faith, if he mingles the funds of the estate with his own. In re Stanton, 41 Misc. [N. Y.] 278.

13. Baker v. Williams & E. Banking Co., 42 Or. 213, 70 Pac. 711.

14. Where county commissioners, without proper statutory authority, agree to pay interest on advances by a third party to pay county warrants, the county is not liable for such interest. National Bank v. Duval County [Fla.] 34 So. 894.

15. A bank is not chargeable with interest for the wrongful detention of a deposit if the depositor subsequently withdraws the deposit without interest or demand therefor. Arnold v. Sedalia Nat. Bank [Mo. App.] 74 S. W. 1038.

16. Williamson County v. Farson, 199 Ill. 71.

17. Loomis v. Gillett, 75 Conn. 298. In an action against the endorser of a promissory note. Tidball v. Shenandoah Nat. Bank, 100 Va. 741. Contract for labor and materials. Loomis v. Gillett, 75 Conn. 298. Money had and received from the date of receipt under B. & C. Comp. § 4595. Graham v. Merchant [Or.] 72 Pac. 1088. On an agreement for the sale of land with a defective title the sum advanced may be recovered with interest from the end of the period fixed for the consummation of the sale. Lesserich v. Sellers, 119 Iowa, 314. An executor who negligently fails to account for money which he owes to the testator is chargeable with interest from the date of the testator's death. Bassett v. Fidelity & Deposit Co. [Mass.] 68 N. E. 205. Cf., G. S. (1888) 2942. Where the detention is due to the defendant's maintenance of his defense to the plaintiff's claim. Saling v. Bolander [C. C. A.] 125 Fed. 701. One recovering money which has come into the hands of the receiver of an insolvent national bank as a trust fund, recovers the same as a fund which has always remained his and not as the payment of a debt, and is therefore not entitled to interest thereon. Hallett v. Fish, 123 Fed. 201.

18. In the case of a partner with firm money in his hands. Kelley v. Shay, 206 Pa. 215. A public treasurer who in good faith withholds the payment of money in his hands pending the adjudication of conflicting claims. Newport Wharf & Lumber Co. v. Drew [Cal.] 74 Pac. 697. Money withdrawn by an officer of a corporation under mistake and seasonably repaid. Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312. The mere defense of a suit is not "unreasonable and vexatious delay" under the statute. Seymour v. Richardson Fueling Co., 103 Ill. App. 625. Where taxes are paid under protest and recovered, interest does not run until judgment. Columbia Sav. Bank v. Los Angeles County, 137 Cal. 467, 70 Pac. 308. In the absence of statute or a valid agreement for interest, county warrants do not bear interest even after demand and refusal to pay for lack of funds. National Bank v. Duval County [Fla.] 34 So. 894.

19. Tender of balance on contract of sale.

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§ 2. *Rate and computation.*—Interest will be computed upon the amount due at the contract rate, if not usurious, otherwise at the rate fixed by statute.[20] A money[21] judgment draws interest from its rendition at the statutory rate.[22] When the rate of interest is changed by statute, interest will be computed on the old rate up to the time of the change, and by the new rate thereafter;[23] but where a contract stipulates for the payment of legal interest, the rate in force when the contract was made will continue until payment, notwithstanding an intermediate change in the law.[24] To create an obligation to pay compound interest, there must be an agreement to pay interest upon interest.[25]

§ 3. *Remedies and procedure to recover interest.*—Interest may be allowed, though no demand for the same be made in the oral complaint or bill of particulars.[26] Where there is no agreement to pay interest on a loan, demand for the

Lamprey v. St. Paul & C. R. Co. [Minn.] 94 N. W. 555. Where the maker of a note made payable at a particular place has the fund at such place ready to discharge the note at its maturity. Chapman v. Wagner [Neb.] 96 N. W. 412.

20. On an accounting between a mortgagor and mortgagee interest on mortgagee's receipts should be calculated at same rate as his advances as they operate as a reduction pro tanto of the mortgage indebtedness. Moss v. Odell [Cal.] 74 Pac. 999. In an accounting interest should not be computed on the entire indebtedness of one party to a date after a part had been paid. Id. A statute providing that when a rate of interest is specified in a contract that rate shall continue until full payment is made, does not prevent the allowance of a greater rate of interest after maturity, where there is a provision to that effect in the contract. Promissory note. Holmes v. Dewey, 66 Kan. 441, 71 Pac. 836. Where a note provides for a rate of interest until maturity and a higher rate thereafter, interest will be allowed on the unpaid interest instalments at the higher rate. Klingenfeld v. Houghton [Neb.] 96 N. W. 76. Where a mortgage note provides that upon default in the payment of interest the principal shall become due at the option of the holder and bear interest at a higher rate after maturity, the holder is not entitled to the higher rate till he declares his option. Id.

21. Alternative judgment in replevin is such. Martin County Bank v. Bird [Minn.] 96 N. W. 915.

22. Though the judgment is for an amount made up in part of interest [Mass. Rev. Laws, c. 177, § 8]. East Tennessee Land Co. v. Leeson [Mass.] 69 N. E. 351. Though entered on a usurious contract which operates as a forfeiture of interest [Idaho Rev. St. 1887, § 1266]. Finney v. Moore [Idaho] 74 Pac. 866. A judgment liquidating the damages in an action of tort bears interest from its date, and not from judicial demand. Ortolano v. Morgan's L. & T. R. & S. S. Co., 109 La. 902. Where, on an appeal, the amount of a judgment is reduced, interest will be calculated on the unremitted balance from the date of the original judgment. Rawlings v. Anheuser-Busch Brewing Ass'n [Neb.] 94 N. W. 1001. Interest on a judgment is not suspended by appeal, writ of error, or certiorari where the judgment of the lower court is affirmed. Columbia Sav. Bank v. Los Angeles County, 137 Cal. 467, 70 Pac. 308. Where a statute provides for the payment of a high rate of interest upon special assessments from the time of delinquency, a decree enforcing a tax lien arising thereon will draw interest at the same rate. Lincoln v. Lincoln St. R. Co. [Neb.] 93 N. W. 766.

23. If the rate is changed after the cause of action has accrued but before judgment. Graham v. Merchant [Or.] 72 Pac. 1088. Where the change is made during the pendency of a suit. Saling v. Bolander [C. C. A.] 125 Fed. 701. Where the change is made after the entry of judgment but before payment. Stanford v. Coram [Mont.] 72 Pac. 655. A statute changing the rate of interest which a judgment shall bear after entry is not unconstitutional as impairing an obligation of contract since a judgment is in no sense a contract. Id. A statute provision fixing the legal rate of interest upon judgments and decrees is not repealed by a later statute providing that the "interest of money" shall be at a different rate. On the ground that interest of money on account and interest on money judgments are distinguished in the title of the later statute, and are treated in different sections of the prior statutes. Union Steamboat Co. v. Erie & W. Transp. Co., 189 U. S. 363, 47 Law. Ed. 854.

24. So also in the case of a contract upon which the law provides for the payment of legal interest. Graham v. Merchant [Or.] 72 Pac. 1088 (semble). Where a demand note provides that the maker shall pay the conventional rate of interest until the note is paid, the payment of such rate after maturity of the note and after the rate has been reduced by statute does not constitute usury. Mastin v. Cochran's Ex'r, 25 Ky. L. R. 712, 76 S. W. 343.

25. Cullen v. Whitham [Wash.] 74 Pac. 581. A note providing for the annual payment of interest does not entitle the holder to interest on overdue interest, but is a simple interest bearing obligation. Id. Damages for a continuing trespass, in case of the diversion of water supply for municipal purposes, is not to be compounded annually. Lonsdale Co. v. Woonsocket [R. I.] 56 Atl. 448. Where a demand note provides for interest semi-annually, unpaid interest instalments draw interest from the date they are due. Mastin v. Cochran's Ex'r, 25 Ky. L. R. 712, 76 S. W. 343.

26. Agent's commission. Kohn v. Schuldenfrei, 84 N. Y. Supp. 870. A special count in a declaration for interest upon the amount claimed as principal while perhaps unnecessary is not an improper pleading and is

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amount due and the date of such demand must be alleged and proved in order to justify a judgment for interest.[27] In order to recover interest, the damages claimed in the pleadings must be laid in a sufficient amount to cover the loss at the time the cause of action accrued, together with interest to the time of trial.[28] A direction to enter judgment for a designated sum without mentioning interest is not a determination that interest shall not be allowed.[29] A statute denying the right of appeal from money judgments for less than a specified sum does not deprive the appellate court of jurisdiction in regard to the allowance of interest upon the sum found to be due.[30]

The holder of a fund for which there are adverse claimants should pay the money into court or file a disclaimer and appear as a stakeholder only, otherwise he will be chargeable with interest.[31]

INTERNAL REVENUE.

§ 1. On Spirituous Liquors (550).
§ 2. Oleomargarine Act, August 2nd, 1886 (551).
§ 3. War Revenue Acts, June 13, 1898, and March 2, 1901 (551).

§ 1. *On spirituous liquors.*—A common carrier, by accepting liquors for delivery to the consignee upon payment of the price, does not carry on the business of a retail liquor dealer at the place of the residence of the consignee, within the statute requiring a special license tax from such dealers.[32]

On the purchase of distilled spirits by the United States while in a bonded warehouse, they are withdrawn from the operation of the internal revenue laws.[33] The giving of a warehouse bond will not relieve the sureties on the distiller's bond for taxes on liquors distilled during the term of the bond,[34] nor will the failure of the proper officers to collect the revenues on removal preclude a recovery against the sureties on the bond.[35]

Where the officers promulgated a regulation permitting the addition of water to liquors, the government is estopped to declare a forfeiture by reason thereof,[36] but the addition of any coloring matter after the barrels or casks have been examined and stamped will subject them to forfeiture.[37]

The statute forbidding shipments of liquors under any other than the proper name does not forbid a shipment without any designation.[38]

not subject to demurrer. Suit on fire insurance policy. Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 So. 228.

27. Shinn v. Wooderson, 95 Mo. App. 6. Where a bank agrees to pay interest on daily balances which is ascertainable from data in the bank's possession, it is not necessary to make demand for any specific sum before bringing suit. Linn County v. Farmers' & Merchants' Bank [Mo.] 75 S. W. 393.

28. San Antonio & A. P. R. Co. v. Addison [Tex.] 70 S. W. 200.

29. Judgment entered by appellate court. Whitehead v. Brothers' Lodge I. O. O. F., 24 Ky. L. R. 1633, 71 S. W. 933. When the court in a replevin suit, orders the entry of an alternative judgment for the return of the property or for a designated sum representing its value, but makes no mention of interest in the order, the clerk of court on entering judgment may add interest from the date of the order. Martin County Bank v. Bird [Minn.] 96 N. W. 915.

30. Whitehead v. Brothers' Lodge I. O. O. F., 24 Ky. L. R. 1633, 71 S. W. 933.

31. Bank deposit. Arnold v. Sedalia Nat. Bank [Mo. App.] 74 S. W. 1038 (semble). But interest has been disallowed even where the debtor joins in the answer of one of the adverse claimants, instead of expressly disclaiming any interest in the money and appearing as a stakeholder only. Newport Wharf & Lumber Co. v. Drew [Cal.] 74 Pac. 697.

32. U. S. v. Adams Exp. Co., 119 Fed. 240; U. S. v. Orene Parker Co., 121 Fed. 596.

33. The distiller cannot therefore be charged with the tax on a claimed excess of shrinkage therein. U. S. v. Mullins [C. C. A.] 119 Fed. 334.

34. U. S. v. Nat. Surety Co. [C. C. A.] 122 Fed. 904.

35. U. S. v. Mullins [C. C. A.] 119 Fed. 334.

36. Such a regulation will not, however, permit the addition of caromel or other coloring matter after stamping. U. S. v. 3 Packages of Distilled Spirits, 125 Fed. 52.

37. Within Rev. St. § 55. U. S. v. 3 Packages of Distilled Spirits, 125 Fed. 52.

38. Rev. St. § 3449. Marking a package "glass, this side up with care" is not a des-

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A distiller of apple brandy may be indicted for an attempt to defraud the government of the tax due thereon.[39] The indictment for violating the revenue laws must describe the offense with particularity.[40]

The information for forfeiture of liquors shipped without the proper designation on the package must aver that the shipper was a distiller, dealer, etc.[41] Animals seized which were used in removing spirits with intent to defraud the government may be sold at auction by the deputy collector as provided by U. S. Rev. St. § 3460,[42] and the title to such animals relates back to the time of the commission of the offense.[43] The purchaser at a sale by the collector for internal revenues to support his title must show a compliance with the material requirements of the law.[44]

§ 2. *Oleomargarine Act, August 2nd, 1886.*—Only products made in conscious imitation of butter are taxable under the act.[45]

§ 3. *War revenue acts, June 13, 1898, and March 2, 1901.*—The provision imposing stamps on manifests for clearance of any ship is unconstitutional.[46]

Bonds given to a state and municipality as a condition precedent to the issuance of a liquor license were exempted,[47] nor need a sheriff's certificate to an appraisal in foreclosure be stamped.[48] Income received on stock owned by a corporation engaged solely in refining sugar will be included in its gross receipts.[49] A legacy in trust to the executors, the income to be paid the beneficiary, and when he shall have arrived at a certain age the principal, or in case of death before that time, to pass to lineal descendants, becomes fixed within the act on the passing of the property to the executors.[50] Under act March 2, 1901, an administrator's bond was not subject to the tax.[51] The medicinal preparations, subject under schedule P., are those protected by patent, trademark or proprietary rights;[52] but if the trademark merely signifies its origin, being used on all articles of the same manufacturer, it is not necessarily subject to the tax,[53] nor do mere representations as to merit subject them.[54] A mild form of beer sold in bottles as a "tonic" is within the schedule, though revenue had been paid thereon as beer before it was bottled.[55]

It is only where the stamp is omitted with fraudulent intent that the instrument is void,[56] and in the absence of proof to the contrary, it will be presumed

ignation of the contents. U. S. v. 20 Boxes of Corn Liquor, 123 Fed. 135.

39. Under Rev. St. 3257 which was not repealed by Act Mch. 3, 1877, and Act Oct. 18, 1888. U. S. v. Ridenour, 119 Fed. 411.

40. Indictment under U. S. Rev. St. § 3279 for carrying raw material to a distillery on which no sign was kept, etc., must set out the kind of material delivered and that the distillery was for the production of spirits. Terry v. U. S. [C. C. A.] 120 Fed. 483.

41. Rev. St. § 3449, applies only to that class of shippers. U. S. v. 20 Boxes of Corn Liquor, 123 Fed. 135.

42. Pilcher v. Faircloth, 135 Ala. 311.

43. Under U. S. Rev. St. § 3450 even as to intervening bona fide purchasers. Pilcher v. Faircloth, 135 Ala. 311.

44. Under Rev. St. U. S. § 3199 the deed is prima facie evidence only of the name of the person liable for the taxes, the name of the purchaser, and of the price paid. Stewart v. Pergusson, 133 N. C. 276.

45. Food product known as "Fruit of the Meadow" held not taxable thereunder. Braun v. Coyne, 125 Fed. 331.

46. It is an imposition of a tax on the cargo of exports. N. Y. & C. Mail S. S. Co. v. U. S., 125 Fed. 320.

47. Ambrosini v. U. S., 187 U. S. 1, 47 Law. Ed. 49.

48. Rieck v. Zoller [Neb.] 92 N. W. 728.

49. Irrespective of whether it was the sole stockholder in the other corporation or that the dividends were earned in previous years. American Sugar Refining Co. v. Rutan, 123 Fed. 979.

50. Act June 13, 1898, c. 448. Vanderbilt v. Eidman, 121 Fed. 590.

51. McNally v. Field, 119 Fed. 445.

52. Plasters held not such preparations. Johnson v. Rutan, 122 Fed. 993.

53, 54. Johnson v. Rutan, 122 Fed. 993.

55. U. S. v. Iler Brew. Co. [C. C. A.] 121 Fed. 41.

56. The affixing of a revenue stamp after the execution of a note in this state and payable therein, apparently, is not an alteration of the instrument within Mass. Rev. Laws, c. 73, § 142. Rowe v. Bowman, 183 Mass. 488; First Nat. Bank v. Stone [Iowa] 91 N. W. 1076. Transaction held to have been conducted as agent and not a violation of Act Mch. 2, 1901, relating to taxes on business

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that the document offered in evidence was stamped at the proper time.[57] The instrument may be admitted, though stamped at the time of the trial.[58] The provision that instruments not properly stamped shall not be admitted in evidence applies only to use in federal courts.[59] Writing admissible in state courts though not stamped.[60] Unstamped checks which had been paid are admissible on a collateral matter.[61]

INTERNATIONAL LAW.[62]

The treaty of Paris did not make a native of Porto Rico a citizen of the United States.[63] While under its military governor, Cuba was not a part of the United States, but a foreign country.[64] The treaty in 1795 with Great Britain did not release France from obligations under the treaty of 1778.[65] After the treaty with France of Feb. 6, 1778, was abrogated by Act July 7, 1798, c. 67, the law of nations must govern in determining the international obligations of that country.[66] The French Government, suing for protection of rights in a trade-name for benefit of a private lessee of springs of the government, whose lease has long existed and still has thirty years to run, is not exempt from the rule of laches because of the treaty with France of June 11, 1887, art. 8, providing for protection of commercial names.[67] State courts have no jurisdiction in actions against a foreign sovereign state or any political division of it.[68] Judicial notice is taken of treaties and of their effect in transferring territorial dominion.[69]

of "bucket shops" because the memorandum of sale was not stamped. U. S. v. Clawson, 119 Fed. 994.

57. Glaser v. Glaser [Okl.] 74 Pac. 944.

58. First Nat. Bank v. Stone [Iowa] 91 N. W. 1076.

59. Dillingham v. Parks, 30 Ind. App. 61; Rowe v. Bowman, 183 Mass. 488; Sulpho-Saline Bath Co. v. Allen [Neb.] 92 N. W. 354; Buttorff v. Lewis [Iowa] 95 N. W. 262; Foster v. Pac. Clipper Line, 30 Wash. 515, 71 Pac. 48.

60. State v. Glucose Sugar Refining Co., 117 Iowa, 524; Ratliff v. Ratliff, 131 N. C. 425; Davis v. Evans, 133 N. C. 320; Pierpont v. Johnson, 104 Ill. App. 27.

61. The prohibition of the act of congress was upon the offer of checks when relied upon as valid instruments for the purpose for which they were drawn. Bryan v. First Nat. Bank, 205 Pa. 7.

NOTE.—**Want of revenue stamp as affecting criminal prosecutions.** Following the English cases, which begin with King v. Hawkeswood, 1 Leach, C. L. 257, 2 East, P. C. 955, it is generally held that the absence of a revenue stamp from an instrument the subject of crime is immaterial. Thus that an alleged forged instrument lacks the prescribed stamp is no defense. Thomas v. State [Tex.] 46 L. R. A. 454; State v. Mott, 16 Minn. 472; State v. Hill, 30 Wis. 416, overruling John v. State, 23 Wis. 504; People v. Tomlinson, 35 Cal. 507; State v. Haynes, 6 Coldw. 550; Cross v. People, 47 Ill. 152; David v. State, 61 Md. 309; State v. Young, 47 N. H. 402. The cases put the doctrine not only on the ground that the federal statutes do not contemplate that an unstamped instrument is without legal efficacy, but on the contrary allow it to be subsequently stamped on certain proof; but also on the ground that it is incompetent for federal law to affect the essentials of a crime against the state, and thus modify the state statute defining the same.

The doctrine of the English cases seems to be that while an unstamped instrument may be the subject of crime such an instrument is not admissible in evidence on a collateral issue (Rex v. Smythe, 5 C. & P. 201). In the United States, however, it is affected by the respective provinces of state and federal legislation, and there seems to be no reason why the rule admitting unstamped instruments in state courts would not be equally applied in criminal cases.

See cases collected in note to Knox v. Rossi [Nev.] 48 L. R. A. 305.

62. See Aliens; Ambassadors and Consuls; Extradition; Treaties; War. As to collision between vessels of different nations, see Shipping and Water Traffic. International arbitration, see Arbitration and Award § 6. 1 Curr. Law, 208. Person "hired or salaried" to another as construed in extradition treaty with France. In re Balensi, 120 Fed. 864. Status of South African Republic after British military occupation and before proclamation of annexation. In re Taylor, 118 Fed. 196.

63. In re Gonzalez, 118 Fed. 941.

64. U. S. v. Assia, 118 Fed. 915.

65. Construction of most favored nation clause. The James & William, 37 Ct. Cl. 303.

66. The Atlantic, 37 Ct. Cl. 17.

67. French Republic v. Saratoga Vichy Spring Co., 191 U. S. 427.

68. Hassard v. U. S. of Mexico, 173 N. Y. 645.

69. That Philippines became part of United States territory. La Rue v. Kan. M. L. Ins. Co. [Kan.] 75 Pac. 494.

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INTERPLEADER.

§ 1. Right to (552). § 2. Procedure and Relief (554).

§ 1. *Right to.*—The necessary elements of a bill of interpleader are that two or more persons have made a claim against the complaint for the same thing,[70] that the complainant has no beneficial interest in the thing claimed,[71] that the complainant cannot determine who is entitled thereto without hazard,[72] and that the complainant has filed an affidavit that there is no collusion between him and any of the claimants.[73] It will not lie where the complainant has a clear, adequate and unembarrassed remedy at law,[74] nor if the person seeking it has incurred an independent liability to either of the claimants,[75] nor if the stakeholder has already contested his liability to the claimants in an action at law, and judgment has been rendered against him,[76] nor where the plaintiff is a necessary party to the litigation to determine the amount which he should bring into court; and the objection may be raised by demurrer.[77] Ordinary judgment creditors cannot be compelled

70. Hasberg v. Moses, 81 App. Div. [N. Y.] 199; Supreme Council, C. B. L. v. Murphy [N. J. Eq.] 55 Atl. 497. A railroad engineer deposited money with the company, to be paid on his death to his widow. It was claimed by the widow and the executor of his will. Pa. R. Co. v. Stevenson, 63 N. J. Eq. 634. Plaintiff sues for real estate commissions. Defendant admits his liability to pay either to the plaintiff or a third party and offers to pay the fund into court. Rasines v. Ives, 85 App. Div. [N. Y.] 483. Plaintiffs, as stock commission merchants, sold goods the proceeds of which were claimed by both defendants. Duke v. Duke, 93 Mo. App. 244. A purchaser of goods, relying on the title of the seller and afterwards learning of the claim of a third party, is entitled to an affidavit in the nature of a bill of interpleader. Jaques v. Dawes [Neb.] 92 N. W. 570 Amount due on an insurance policy where children of assured's first wife and those of his second wife both claimed the amount. Helmken v. Meyer [Ga.] 45 S. E. 450. Certificate of a benefit association claimed by the beneficiary and by the widow of the holder, claiming that the beneficiary was changed by undue influence on the husband. Sovereign Camp Woodmen v. Wood [Mo. App.] 75 S. W. 377. Insurance company allowed to interplead the beneficiary in a suit by the administrator of the holder under a claim of change of beneficiary. Sangunitto v. Goldey, 84 N. Y. Supp. 989. In an action by a railroad against an insurance company on a fire policy which gave the company the right of subrogation against the wrong doer, the defendant was allowed to interplead another railroad as being responsible for the fire. Phila. Underwriters v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 71 S. W. 419. But where a receiver in bankruptcy was ordered by the district court to deliver an insurance policy to the plaintiff, he was not allowed in an action against him to interplead a receiver appointed by a state court on a judgment creditor's petition without showing how the state receiver was interested in contesting the plaintiff's title. Chapuis v. Long, 77 App. Div. [N. Y.] 272.

71. Hasberg v. Moses, 81 App. Div. [N. Y.] 199. He must have no interest in conflict with that of either claimant. Montpelier v. Capital Sav. Bank [Vt.] 56 Atl. 89.

72. Hasberg v. Moses, 81 App. Div. [N. Y.] 199. Where the bill shows that one of the claimants is unquestionably entitled to the fund and that the other claimant has no valid claim, the bill will not lie. Sovereign Camp Woodmen v. Wood [Mo. App.] 75 S. W. 377. The answer of a claimant showing that one of the claimants is entitled does not affect the complainant's right to bring the bill. Id. A doubt of law justifies a bill of interpleader as well as a doubt of fact. Id. Under a statute giving a person in possession of property claimed by more than one person a right to bring a suit in the nature of a bill of interpleader against the claimants to determine their rights, the plaintiff need not allege that suit has been threatened or that he is in danger of incurring two judgments for the same property. Daulton v. Stuart, 30 Wash. 562, 70 Pac. 1096.

73. Hasberg v. Moses, 81 App. Div. [N. Y.] 199.

74. Hartford L. Ins. Co. v. Weed [Vt.] 56 Atl. 97. See, also, Fleming v. Blosser Printing Co. [Ga.] 44 S. E. 805. A servant obtained judgment against the master for wages. Subsequently the master was garnisheed for the same wages in another state by a creditor of the servant, and not setting up the judgment in the first suit, judgment was rendered against him. Held that a bill by the master to compel the assignee of the servant's judgment to interplead with the servant's creditor would not lie. Wabash R. Co. v. Flannigan, 95 Mo. App. 477.

75. In a suit against an insurance company on a check given in settlement of the amount claimed by the plaintiff as beneficiary of a policy, the defendant cannot interplead certain creditors of the assured who claim the fund. N. W. M. L. Ins. Co. v. Kiduer [Ind. App.] 69 N. E. 204.

76. Tralles v. Metropolitan Club, 18 App. D. C. 588.

77. Complainant contracted with a firm for building a school house. Before completion the firm became bankrupt and the complainant completed the building and offered to pay into court the balance after deducting from the contract price the amount it had paid to complete the contract. The holders of orders for materials furnished for the building, the trustee in bankruptcy, and a third person who claimed to have furnished material on the order of the complainant all claimed the fund. Held a bill of interpleader would not lie against these claimants.

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to interplead at the instance of a common debtor.[78] A person claiming property which has been attached may interplead.[79] A defendant is not entitled to interpleader if he has been guilty of laches.[80]

A code complaint of interpleader will usually lie upon the same grounds as those which sustain a bill of interpleader in chancery.[81]

The defendant in a bill of interpleader is not entitled to affirmative relief either by a cross bill or by way of counterclaim.[82]

§ 2. *Procedure and relief.*—The bill must state the nature of the claims, and upon what they are based.[83] An interpleader may be made by answer.[84] When an order of interpleader is made upon the application of the original defendant, permitting him to pay into court the amount sued for and directing that a third person who claims the amount be substituted as defendant, the proper practice is for the plaintiff to file a supplemental complaint alleging such additional facts as are necessary to show a right to recover against the substituted defendant.[85] Where the complainant in the interpleader has acted in good faith and has grounds on which to base his call for an interpleader, he is entitled to his costs out of the fund,[86] and the whole costs in the proceeding, including those allowed the complainant, will be charged to the claimant whose invalid claim caused the proceeding to be instituted.[87]

A person claiming a fund who is interpleaded in a suit has the burden of proof.[88]

INTOXICATING LIQUORS.

§ 1. Control of the Liquor Traffic; Validity of Statutes and Ordinances (554).
§ 2. Local Option Laws (557).
§ 3. Licenses and License Taxes; Application for and Granting License (559).
§ 4. Regulation of Traffic (564).
§ 5. Actions for Penalties (566).
§ 6. Criminal Prosecutions (566).
A. Offenses and Responsibility Therefor in General (566).
B. Indictment, Information, or Complaint (568).
§ 7. Summary Proceedings (572).
§ 8. Abatement of Traffic and Injunction (573).
§ 9. Civil Liabilities for Injuries Resulting from Sale (573).
§ 10. Property Rights in and Contracts Relating to Intoxicants (575).
§ 11. Drunkenness as an Offense (575).

§ 1. *Control of the liquor traffic; validity of statutes and ordinances.*—There being no inherent right in the people to traffic in intoxicating liquors, the regula-

Montpelier v. Capital Sav. Bank [Vt.] 56 Atl. 89.

78. Wabash R. Co. v. Flannigan, 95 Mo. App. 477. It has even been held that an insurance company which has been garnisheed in Connecticut by a creditor of the beneficiary and sued in Vermont by the beneficiary cannot, before either case has proceeded to judgment, maintain a bill to require the two to interplead. Hartford L. Ins. Co. v. Weed [Vt.] 56 Atl. 97.

79. Miller v. Campbell Commission Co. [Okl.] 74 Pac. 507.

80. In an action on an insurance policy it appeared that at maturity of the policy the plaintiff was the only claimant to the fund. The company having delayed payment until another claimant appeared is not entitled to interpleader. Kirsop v. Mut. L. Ins. Co., 87 App. Div. [N. Y.] 170. Stockholders of a corporation cannot intervene after a decree in a suit against it declaring it insolvent, to set up defenses not open to the corporation itself after decree. Cumberland Lumber Co. v. Clinton Hill Lumber Co., 64 N. J. Eq. 521.

81. N. W. M. L. Ins. Co. v. Kidder [Ind. App.] 69 N. E. 204.

82. A city illegally assessed certain lands abutting on a proposed street, and brought a bill of interpleader against the abutters to determine the mode of distribution of the assessment collected. Held that one of the abutters who had deeded a piece of land to the city as part payment of his assessment could not have a reconveyance in that proceeding. Los Angeles v. Amidor, 140 Cal. 400, 73 Pac. 1049.

83. Sovereign Camp Woodmen v. Wood [Mo. App.] 75 S. W. 377.

84. In an action on a note the defendant answered that the plaintiff, defendant and a third person were defendants in an equity suit still pending, in which it was sought to subject the note or its proceeds to judgments obtained against the third person, that the defendant owed the note and was willing to pay it. Held he was entitled to an interpleader. Atkinson v. Carter [Mo. App.] 74 S. W. 502.

85. Plaintiff sued defendant for wages and defendant interpleaded one who claimed under an assignment of the wages. Sayer v. Beirne, 78 App. Div. [N. Y.] 491. Under § 820 of the Code allowing the substitution of the defendant, when there is ground for interpleader, the defendant can be discharged

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tion of the traffic is wholly within the police power of the state,[89] and the traffic is not one of the privileges or immunities of citizenship guarantied by the constitution.[90] Nor is it within any of the various bills of rights. Hence, statutes prohibiting sales to particular persons, such as Indians,[91] minors,[92] and drunkards,[93] and statutes prohibiting the traffic in particular places,[94] especially on vote of the inhabitants thereof,[95] have been sustained; the latter against such objections as that they lack uniform operation,[96] or abridge the privileges and immunities of citizens, or deprive them of liberty or property without due process of law, or deny them the equal protection of the laws, or as being class legislation.[97] But a statute punishing physicians for giving prescriptions in local option territory is not within the constitutional power of the legislature to enact a law enabling the voters to determine whether the "sale" of intoxicating liquors within certain municipal divisions shall be prohibited,[98] and the Texas local option law which contravenes neither the State nor the Federal constitution, except as to the prohibition concerning physicians, is not by the invalidity of such provision wholly invalidated.[99]

Statutes requiring licenses of all dealers and punishing such as do not obtain them,[1] statutes determining the conditions on which licenses may be granted and

only on delivery of all the property claimed. He cannot be discharged if he has delivered the property to another claimant. Mason v. Rice, 85 App. Div. [N. Y.] 315. An action by the administrator of a policy holder against the company and one claiming the amount of the policy by assignment is properly brought under § 452 of the Code as one to determine conflicting claims. Hasberg v. Moses, 39 Misc. [N. Y.] 25. On the hearing of a motion for an interpleader, affidavits in support thereof cannot properly be read and received, which have not been served upon the opposite side and which it has had no opportunity to answer. Chapuis v. Long, 77 App. Div. [N. Y.] 272.

86. Sovereign Camp Woodmen v. Wood [Mo. App.] 75 S. W. 377. Contra, Helmken v. Meyer [Ga.] 45 S. E. 450. As to recovery of attorney's fees see Great Council of Texas, I. O. of R. M. v. Adams [Tex. Civ. App.] 75 S. W. 560.

87. Sovereign Camp Woodmen v. Wood [Mo. App.] 75 S. W. 377.

88. In a suit by an assignee of an insurance policy, where the company impleaded the assured's administrator it was held that the latter had the burden of proof. Maynard v. Life Ins. Co., 132 N. C. 711.

89. A statute prohibiting druggists from allowing liquors lawfully sold to be drunk on their premises is not unreasonable when applied to physicians keeping drug stores and prescribing liquor [Rev. St. 1899, § 3051]. State v. Finney [Mo.] 77 S. W. 992. The prohibition of ball or tenpin alleys in connection with saloons is valid [Crim. Code Neb. § 221]. Koepke v. State [Neb.] 93 N. W. 1129.

90. Council of Farmville v. Walker [Va.] 43 S. E. 558; Danville v. Hatcher [Va.] 44 S. E. 723.

91. Ex parte Finnegan [Nev.] 71 Pac. 642. The statute prohibiting sales to Indians who have allotments or patents to land which the United States holds in trust for them is valid though such Indians are citizens. Mulligan v. U. S. [C. C. A.] 120 Fed. 93.

92. State v. Gulley, 41 Or. 318, 70 Pac. 385; People v. Werner, 174 N. Y. 132; Gray v. State [Tex. Cr. App.] 72 S. W. 169; Banks v. State, 136 Ala. 106; Hamer v. People, 104 Ill. App. 555.

93. Jenkins v. State [Miss.] 34 So. 217.

94. The "Four mile law" of Tennessee is not unconstitutional as class legislation or as denying the equal protection of the laws [Acts 1877, p. 37, c. 23 as amended]. Webster v. State [Tenn.] 75 S. W. 1020. Only a party can appeal from the granting of a petition to prohibit the sale. Holford v. Kirkland [Ark.] 71 S. W. 264.

95. Severance v. Murphy [S. C.] 46 S. E. 35. The Kentucky law for the better enforcement of the local option law is constitutional. Huyser v. Commonwealth, 25 Ky. L. R. 608, 76 S. W. 174. The Beal municipal local option law of Ohio is valid under the state constitution and does not unlawfully discriminate in contravention of the Federal constitution. Lloyd v. Dollisin, 23 Ohio Circ. R. 571.

96. Rev. St. 1889, p. 765, art. 3, c. 22. Ex parte Handler [Mo.] 75 S. W. 920; State v. Handler [Mo.] 76 S. W. 984.

97. Rev. St. 1895, tit. 69, and Pen. Code, art. 402. Rippey v. State [Tex. Cr. App.] 73 S. W. 15; Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766.

98. Tex. Pen. Code, art. 405; Const. art. 16, § 20. Stephens v. State [Tex. Cr. App.] 73 S. W. 1056.

99. Rev. St. Tex. 1895, tit. 69. Busch v. Webb, 122 Fed. 655; Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766.

1. A statute providing for the punishment of those selling without license where sales are permitted and those selling where sales are not permitted is not bad as embracing more than one subject of legislation [Fla. Acts 1901, p. 58, c. 4930]. Brass v. State [Fla.] 31 So. 307. The statute prohibiting sales without license and excepting therefrom native wine and cider manufactured in the state is invalid so far as the exception discriminates against the wines and cider of other states but such invalidity does not affect the validity of the rest of the statute. Commonwealth v. Petranich [Mass.] 66 N. E. 807.

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the procedure on application and granting of licenses,[2] and the grounds and procedure on which they may be revoked, have been upheld.[3] If a license or regulative law, however, is in reality a revenue measure, it must conform to the general revenue policy of the state,[4] and no such regulation is valid which discriminates between the people of the several states, or violates the commerce clause of the Federal constitution.[5]

Statutes prohibiting unlawful sales, or the keeping of liquors or places for unlawful sales,[6] and declaring such places nuisances and subjecting them to abatement or injunction,[7] and providing for searches and the seizure and confiscation of property found therein,[8] are valid. The so-called dispensary laws, placing the traffic wholly in the hands of agents appointed by state authority, are generally upheld.[9]

Statutes regulative of the liquor traffic however must be framed with due regard to the constitutional provisions concerning the distribution of governmental

2. Moynihan's Appeal, 75 Conn. 358. The statute providing that a license shall not be granted if a majority of the voters remonstrate is valid and not an unlawful discrimination as all applicants are treated alike [Burns' Rev. St. 1901, § 7283i]. Boonershine v. Uline, 159 Ind. 500.

3. A statute empowering city and other boards to revoke and discontinue licenses is not repugnant to the State or Federal constitution [Nev. Act Mar. 10, 1903, §§ 1, 3; Act Mar. 16, 1903, § 20, subd. 8]. Wallace v. Reno [Nev.] 73 Pac. 528. The provision of the New York liquor tax law amendment that unless the holder of the certificate files a verified answer to a petition for revocation denying the alleged violation, the certificate shall be revoked is void as taking property without due process of law and compelling the holder if guilty to confess by oath or by silence [Laws 1900, p. 862, c. 367, § 9]. In re Cullinan, 40 Misc. [N. Y.] 423. Right to raise constitutional question held not waived (In re Cullinan, 82 App. Div. [N. Y.] 445), but the invalidity of that portion of the law does not invalidate the scheme of revocation but leaves the law as it stood before the amendment (In re Cullinan, 40 Misc. [N. Y.] 583). The amendment of 1903 permitting an unverified answer and providing for a hearing on the evidence renders it constitutional [Laws 1903, p. 1125, c. 486, § 12]. In re Cullinan, 41 Misc. [N. Y.] 392.

4. State v. Bengsch, 170 Mo. 81; State v. Eby, 170 Mo. 497. The Virginia act to establish a dispensary in a certain district is not a tax law since it may or may not result in the raising of revenue but is a police regulation and is constitutional [Acts 1901, c. 113]. Council of Farmville v. Walker [Va.] 43 S. E. 558.

5. Commonwealth v. Petranich [Mass.] 66 N. E. 807. The Missouri special tax act of 1901 is violative of the Federal constitution for discrimination between the people of the states [Act Apr. 17, 1901]. State v. Bengsch, 170 Mo. 81. The Missouri beer inspection law is unconstitutional both as a revenue measure and as violative of the fourteenth amendment [Rev. St. 1899, c. 117, art. 4]. State v. Eby, 170 Mo. 497. See, also, State v. Broeder, 90 Mo. App. 156. An ordinance or statute requiring all dealers to procure a license from the city or state applies to a nonresident manufacturer who maintains a depot in the city or state for the sale of his product, but does not for that reason unlawfully discriminate in favor of a manufacturer located in such city or state. Nor is such ordinance or statute an interference with interstate commerce in view of the Wilson act [Act Aug. 8, 1890, c. 428, 26 Stat. 313 (U. S. Comp. St. 1901, p. 3177)]. Duluth B. & M. Co. v. Superior [C. C. A.] 123 Fed. 353. Comp. Laws Mich. §§ 5379, 5380. People v. Voorhis [Mich.] 91 N. W. 624; Schlitz Brewing Co. v. Superior [Wis.] 93 N. W. 1120.

6. The Minnesota law prohibiting the keeping of places for the unlawful sale of intoxicating liquor is not invalid as class legislation nor as authorizing unreasonable searches and seizures [Laws 1901, c. 252]. State v. Stoffels [Minn.] 94 N. W. 675.

7. The statute of Maine conferring upon the supreme judicial court jurisdiction in equity upon petition of not less than 20 legal voters to enjoin the continuance of a liquor nuisance is constitutional [Pub. Laws 1891, c. 98]. Davis v. Auld, 96 Me. 559.

8. That the right to trial by jury is not given by the statute authorizing proceedings for seizure and confiscation of liquors does not render it invalid. Sothman v. State [Neb.] 92 N. W. 303. The Kansas statute denouncing places where liquors are unlawfully kept as common nuisances and providing for the condemnation and destruction of property found therein is constitutional [Gen. St. 1901, § 2493]. State v. McManus, 65 Kan. 720, 70 Pac. 700.

9. The Alabama act establishing a dispensary at Camp Hill is invalid [Acts 1900, 1901, p. 295]. Harlan v. State, 136 Ala. 150. The dispensary law of South Carolina in providing that certain counties may or not as the majority decide, provide dispensaries is not an unconstitutional discrimination [Cr. Code, § 563]. Severance v. Murphy [S. C.] 46 S. E. 35. The act establishing a dispensary in the city of La Grange, Georgia, having been ratified by the people of the city, an amendment thereto is not invalid for want of like ratification, the act not so requiring [Act Dec. 3, 1901 (Acts 1901, p. 506); Act Dec. 18, 1902 (Acts 1902, p. 487)]. Dallis v. Griffin, 117 Ga. 408. A local act prohibiting the sale of liquors otherwise than through the medium of a dispensary is a prohibitory law within the meaning of a general statute making it penal to sell liquors in any county where the sale is prohibited by law [Pen Code 1895, § 428]. Barker v. State [Ga.] 44 S. E. 874.

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powers,[10] the right of trial by jury,[11] the prohibition of ex post facto laws,[12] and the right of one accused of crime to demand the nature and cause of the accusation.[13]

Cities generally under the powers granted by their charters to regulate the traffic may enact and enforce such ordinances regarding the hours of closing and general conduct of the traffic as the authorities deem expedient.[14] They may also prohibit illegal sales and keeping for illegal sale,[15] exact licenses, prohibit sales without license,[16] and confine the traffic to certain localities within the corporate limits.[17] An ordinance, however, making one in possession of premises on which liquor is disposed of by any pretense whatever, guilty without opportunity of defense, is violative of the bill of rights,[18] and a municipal corporation cannot establish a dispensary for the sale of liquors under its power to control and direct the sale of liquors, especially in a county which has adopted the local option law.[19]

§ 2. *Local option laws.*—Statutes providing that the inhabitants of the various municipal subdivisions of the state may by vote determine whether the sale of liquors shall be permitted within the subdivision are, as was seen above,[20] generally upheld; such statutes generally provide that on petition of a certain proportion of the qualified voters of the county or district,[21] an election shall be called by the proper authorities, submitting the question to the voters.[22] The general

10. The Connecticut statutes designating the several grounds for refusal of a license and for a trial de novo on appeal to the superior court are not objectionable as conferring administrative powers on the judiciary. Moynihan's Appeal, 75 Conn. 358. The New Jersey act attempting to confer upon the court of common pleas, power to appoint excise commissioners is void as an attempt to confer executive powers on the judiciary [Laws 1901, c. 107, p. 239]. Schwarz v. Dover, 68 N. J. Law, 576.

11. Sothman v. State [Neb.] 92 N. W. 303. The right of trial by jury is not invaded by a statute giving the recorder of a city jurisdiction of offenses under ordinances without a jury. Cranor v. Albany [Or.] 71 Pac. 1042.

12. The Louisiana Law of 1902 by implication repeals the prior law and is ex post facto as to prior offenses [Act No. 66 of 1902. Rev. St. § 910. Acts 1886, No. 83]. State v. Callahan, 109 La. 946.

13. The provision of the Alabama Code that an indictment for selling without license need not state the name of the person to whom sold is not in violation of defendant's constitutional right to demand the nature and cause of the accusation [Code 1896, § 5077]. Jones v. State, 136 Ala. 118.

14. McNulty v. Toopf, 25 Ky. L. R. 430, 75 S. W. 258. "Screen" ordinance held valid. Danville v. Hatcher [Va.] 44 S. E. 723; McNulty v. Toopf, 25 Ky. L. R. 430, 75 S. W. 258. An ordinance prohibiting the assembling of females in a saloon is valid. Hoboken v. Greiner, 68 N. J. Law, 592; Cronin v. Adams, 24 Sup. Ct. 219. Dramshop keepers in Illinois may be authorized to sell in any quantity, and an ordinance so providing is not an unlawful discrimination against a wholesaler. Strauss v. Galesburg, 203 Ill. 234. The city of Albany, Oregon, has power under its charter to prohibit the sale of liquors on Sunday and the power therein granted to license liquor sellers does not curtail it. Cranor v. Albany [Or.] 71 Pac. 1042.

15. Rooney v. City Council [Ga.] 45 S. E. 72. Such an ordinance does not conflict with the native wine law of the state. Osburn v. Marietta [Ga.] 44 S. E. 807.

16. Duluth B. & M. Co. v. Superior [C. C. A.] 123 Fed. 353; Schlitz Brew. Co. v. Superior [Wis.] 93 N. W. 1120. Const. art. 11, § 6; Pol. Code, § 3366. Ex parte Braun [Cal.] 74 Pac. 780. The city council of Minneapolis have power to prohibit and punish the sale of malt liquor without a license. State v. Gill [Minn.] 95 N. W. 449. An ordinance providing for licenses is not repealed by a further one making additional regulations of the traffic. Ex parte Hinkle [Mo. App.] 78 S. W. 317. Under the statute in Missouri, cities of the fourth class may by ordinance exact a license fee of dramshop keepers who already have a license from the county court [Rev. St. 1899, § 5978]. Id. An ordinance fixing a dramshop license in a city of the fourth class at 1,000 dollars is not unreasonable. Id.

17. In Illinois [Hurd's Rev. St. 1899, c. 24, art. 5, § 1, par. 46]. Strauss v. Galesburg, 203 Ill. 234.

18. Campbellsburg v. Odewalt, 24 Ky. L. R. 1717, 1739, 72 S. W. 314.

19. Lofton v. Collins, 117 Ga. 434.

20. Ante, § 1.

21. A petition filed with the town clerk is not a condition precedent to an order of court for a resubmission of the excise question [Laws 1901, p. 1535, c. 640, § 3]. In re Bertrend, 40 Misc. [N. Y.] 536. A special town meeting will not be ordered on the ground that a submission at the regular meeting was improper because the petition was not signed by the requisite number of voters [Liquor Tax Law, § 16 (Laws 1900, p. 855, c. 367)]. In re Rogers, 41 Misc. [N. Y.] 389.

22. The Texas local option law authorizes elections in cities and towns though not specifically naming them [Tex. Rev. St. 1895, tit. 69]. Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766. An order calling an election at the same term at which the petition is filed is void. Com. v. McCarty [Ky.] 76 S. W. 173. Since the commissioner's court has power at any time to change precinct boundaries, an order calling a local option election which mistakes the established boundary of a precinct is nevertheless valid as the order establishes a new boundary.

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rules of procedure in calling and conducting elections,[22] canvassing the vote and publishing the results,[24] and for contesting them, apply to elections under these statutes.[25] On determining the result in favor of the adoption of the law, an order is entered[26] which has the effect to prohibit the traffic in the designated territory,[27] notwithstanding prior special rights or charters granted to particular portions thereof;[28] but a municipal charter granted to a city within the county, providing that the city may regulate the traffic, repeals the local option law theretofore in force in that county so far as the city is concerned.[29]

The legislature by amending the local option law cannot affect the territory in which the law is already in force.[30] Nor can the commissioner's court by changing the boundaries of a precinct affect the application of the law to the territory contained in the old precinct.[31]

By reason of a saving clause, the repeal of the local option law in a precinct under the Texas law does not affect prosecutions for prior offenses.[32]

A defendant prosecuted under the local option law is bound by the decision in a contest of the election as to every question that could have been raised therein, whether it was in fact raised or not.[33]

Martin v. Mitchell [Tex. Civ. App.] 74 S. W. 565.

23. Insufficiency of publication of the notice of election is no ground of contest where no prejudice to the voters is shown [Tex. Rev. St. art. 3387]. Norman v. Thompson [Tex.] 72 S. W. 62; In re O'Hara, 40 Misc. [N. Y.] 355. But such irregularity is one that will in fact invalidate the election. Ex parte Conley [Tex. Cr. App.] 75 S. W. 301; Nelson v. State [Tex. Cr. App.] 75 S. W. 502. Order calling election and notices thereof held sufficient. Williams v. Davidson [Tex. Civ. App.] 70 S. W. 987. Order held to sufficiently show publication of notice of election. Ex parte Sullivan [Tex. Cr. App.] 75 S. W. 790. Orders calling and determining result of local option election held sufficient. Sinclair v. State [Tex. Cr. App.] 77 S. W. 621. That the minutes of the commissioner's court containing orders relating to the election are not signed does not invalidate the orders. Davidson v. State [Tex. Cr. App.] 73 S. W. 808. Since the commissioner's court is authorized by statute to conduct business whenever a quorum is present, a local option election is valid though the county judge was not present at the opening day of the term at which it was ordered. Racer v. State [Tex. Cr. App.] 73 S. W. 968. A local option election is not invalidated by failure of the court to record the orders at the time designated by the law; such acts being ministerial may be done at any subsequent term. Ex parte Walton [Tex. Cr. App.] 74 S. W. 314.

The ballots used at a local option election in Ohio need not conform to the general election law. Stick v. State, 23 Ohio Circ. R. 392.

24. The declaration and publication of the result of an election is a ministerial act that may be enjoined. Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766.

25. A canvass and return of a vote decided adversely to contestants by majorities which cannot be overcome by counting the votes as claimed by them will not be set aside. In re Bertrend, 40 Misc. [N. Y.] 536. In a proceeding to set aside the canvass of the votes the town board is a proper party as a board and its members are proper parties as individuals since they are the canvassing board. Id. A contest in Texas can be maintained only for some irregularity in the conduct of the election itself (Norman v. Thompson [Tex.] 72 S. W. 62; Lowery v. Briggs [Tex. Civ. App.] 73 S. W. 1062) but the district court has jurisdiction to try a contest on a ground going to its validity, not specified in the statute [Rev. St. 1895, § 3397] (Oxford v. Frank, 30 Tex. Civ. App. 343).

26. A copy of the record of the result of the canvass of the return of the election is prima facie evidence that the canvass was had at the time provided by law [Fla. Acts 1901, p. 60, c. 4930]. Brass v. State [Fla.] 34 So. 307.

27. A negative vote on the local option law suspends but does not destroy a privilege to traffic in intoxicating liquors and on reversal of the vote the dealer is again entitled to his certificate unless he has shown his intention to abandon the traffic. People v. Brush, 41 Misc. [N. Y.] 56. An order of the commissioner's court prohibiting the sale of liquors is valid though it does not contain the statutory exceptions. Racer v. State [Tex. Cr. App.] 73 S. W. 968. The local option law, while permitting the sale of liquor in case of sickness on prescription prohibits the sale of alcohol by wholesale druggists to retail druggists for use in their business. Greiner-Kelley Drug Co. v. Truett [Tex. Civ. App.] 75 S. W. 536.

28. An incorporated city or town may be deprived of its statutory authority to tax, license and regulate saloons within its limits by the operation of the local option law though adopted by the votes of persons living outside the city [Tex. Rev. St. art. 427]. Williams v. Davidson [Tex. Civ. App.] 70 S. W. 987. A special act prohibiting the sale of intoxicants in a city is not repealed by the adoption of the local option law by the county in which the city is located. Locke v. Com., 25 Ky. L. R. 76, 74 S. W. 654.

29. Com. v. Lemon [Ky.] 76 S. W. 40.

30. Ex parte Elliott [Tex. Cr. App.] 72 S. W. 837.

31. Medford v. State [Tex. Cr. App.] 74 S. W. 768; Woods v. State [Tex. Cr. App. 75 S. W. 37; Nilson v. State [Tex. Cr. App.] 75 S. W. 502.

32. Woods v. State [Tex. Cr. App.] 75 S W. 37.

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Alcohol is an intoxicating liquor within the local option law.[34]

It is no crime to give away liquor in territory under the Texas local option law,[35] unless the gift is a cloak for a sale.[36]

An indictment cannot be maintained for engaging in the occupation of selling in a local option county without a license; it should be for "selling."[37]

§ 3. *Licenses and license taxes; application for and granting license.*—Authority to grant licenses is generally vested in the county court or governing body of the county,[38] though, as the granting of a license is a judicial act,[39] there is no objection to its being vested in judicial officers as is done in many states. Town boards and the common councils of cities also are frequently authorized to license.[40] Such boards are empowered to act only as the statute directs,[41] whence in Missouri the excise commissioners have no jurisdiction to grant a license until the petition has been on file 10 days,[42] and the statutory bond has been approved.[43] In Kentucky, the denial of an application for a license is effective for a year and cannot be renewed at the subsequent term of court;[44] but in Iowa, where under the statute but one consent can be canvassed by the board of supervisors in any one year, the filing of a consent and its withdrawal before canvass does not preclude the subsequent canvass of another within the year.[45] Under the Iowa mulct law, the filing of the petition for the removal of the bar of prosecution operates ipso facto to remove it, and a finding by the district court that it is sufficient is an adjudication binding on all interested.[46]

Where a proper application for a license is made by one who complies with all the requirements of the law and there is no objection from residents, the court's duty to issue the license is plain[47] and can be enforced by mandamus.[48] The burden, however, of showing himself to be within the law and a proper person for a license is on the applicant.[49]

In New York licenses are grantable under certain conditions to hotel keepers only, and the question frequently arises whether or not the applicant's premises are a hotel.[50] Where a statute restricts the granting of a license to a "law abiding,

33. Locke v. Com., 24 Ky. L. R. 654, 69 S. W. 763.

34. Greiner-Kelley Drug Co. v. Truett [Tex. Civ. App.] 75 S. W. 536.

35. Bottoms v. State [Tex. Cr. App.] 73 S. W. 16.

36. Acts 1902, p. 41, c. 14. Com. v. Dickerson [Ky.] 76 S. W. 1084.

37. Robinson v. State [Tex. Cr. App.] 75 S. W. 526.

38. The North Carolina general statute giving the boards of county commissioners jurisdiction to issue liquor licenses repeals the special act giving exclusive jurisdiction in Northampton county to judges of the superior court [Pub. Laws 1901, p. 141, c. 9, § 76; Acts 1900, p. 70, c. 17]. In re Burgwyn, 1€3 N. C. 115.

39. Weber v. Lane, 99 Mo. App. 69.

40. An ordinance requiring that the application for a license shall be signed by a majority of the householders residing within a certain distance from the proposed saloon is, while unrepealed, binding on the council. Bachman v. Phillipsburg, 68 N. J. Law, 552.

41. Ristine v. Clements, 31 Ind. App. 338.

42. Mo. Rev. St. 1899, § 3020. State v. Seibert, 97 Mo. App. 212; Cooper v. Hunt [Mo. App.] 77 S. W. 483.

43. Rev. St. 1899, § 2995. State v. Bennett [Mo. App.] 73 S. W. 737.

44. Hensley v. Metcalfe County Ct., 25 Ky. L. R. 204, 74 S. W. 1054.

45. Iowa Code, § 2450. In re Canvass of Statement of General Consent to Sale of Intoxicating Liquors [Iowa] 95 N. W. 194.

46. McConkie v. Remley, 119 Iowa, 512.

47. Hodges v. Metcalfe County Ct. 25 Ky. L. R. 772. 76 S. W. 381.

48. Code, § 3520. Harlan v. State, 136 Ala. 150.

49. Hodges v. Metcalfe County Ct. [Ky.] 78 S. W. 177.

50. See, also, post, § 3E, surrender, transfer or revocation of license. Changing the location of the barroom does not deprive a hotel of its character as such within the liquor tax law. In re Brewster, 39 Misc. [N. Y.] 689, 85 App. Div. 235. A house which is kept open for the entertainment of all who come to it without previous agreement as to duration of stay or terms of entertainment is a hotel within the liquor tax law, though the proprietor does not keep a register, a safe for valuables or a stable for the accommodation of travelers, and displays the sign "Boarding House." Id. Where a house was occupied as a hotel on March 23, 1896, but for a time since that date was not so occupied, it lost its character as a hotel and hence was not entitled to a certificate without obtaining consents. In re Brewster, 85 App. Div. [N. Y.] 235.

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assessed, taxpaying, male citizen above 21 years of age," a licens
Burchard & Co." is void.[51]

It is frequently provided that applications for license sh
by the consent of a certain proportion of the inhabitants of t
statutory provision that an application shall be signed by two-th
of the town means only the qualified voters.[53] Where authorit
to householders, the owners of business houses,[54] and persons
procures to take quarters within the circumscribed area for the
his application, are properly disregarded.[55] Authority is someti
dent freeholders,[56] and in such case a husband holding lands b
to recommend the granting of a license;[57] but infant children, t
heirs to estates of inheritance in real estate in the precinct, ar

Prior to the time when the common council takes jurisd
cation, names may be added to or taken from it, but not aft
sons signing a recommendation for license cannot withdraw fr
bate judge has refused the application and mandamus has issu
It is not necessary to republish the notice of application after a
permitted to be added to the petition.[61] Where, after procu
the requisite number of voters, a new municipality is erected
recanvass must be made to ascertain whether the requisite n
the town signed the statement.[62]

In some states remonstrances or protests are permitted to
habitants, and if the remonstrants are in sufficient numbers
tion.[63] In such jurisdictions a remonstrant may sign by atto
an authorization to such attorney to sign any and all remo
The remonstrance need not state the grounds influencing
Where the mere filing of a remonstrance does not operate to p
of a license, a hearing is provided for,[67] and in such case the

51. State v. Scott, 96 Mo. App. 620.
52. Certain petitioners held not entitled to be counted. State v. Scott, 96 Mo. App. 620.
53. Wray v. Harrison, 116 Ga. 93.
54. In re Ireland, 41 Misc. [N. Y.] 425.
55. Bachman v. Phillipsburg, 68 N. J. Law, 552.
56. It being no part of the official duties of the register of deeds to search the records of his office to ascertain whether the signers of a petition to obtain a license are freeholders, he may charge such fees therefor as he pleases and cannot be required to turn them over to the county. State v. Holm [Neb.] 97 N. W. 821.
57. Harlan v. State, 136 Ala. 150.
58. Thompson v. Egan [Neb.] 97 N. W. 247.
59. Bachman v. Phillipsburg, 68 N. J. Law, 552.
60. Harlan v. State, 136 Ala. 150.
61. Thompson v. Egan [Neb.] 97 N. W. 247.
62. New town in township. Iowa Mulct Law. Schuneman v. Sherman, 118 Iowa, 230.
63. A majority of the legal voters of the town is sufficient; a majority of the voters of the ward in which the saloon is proposed to be situated not being necessary. Shaffer v. Stern, 160 Ind. 375. Persons having the right to withdraw their names from a remonstrance up to within three days before the granting of license, must exercise their right before the beginning of the three days' period. Sexton App.] 68 N. E. 929. R whole of the 24 hour which they can file th A remonstrance filed or ing of a license on Mo statute requiring thre St. 1901, § 7283i]. S Ind. 375. A protest received by the clerk marked filed is filed w the law [Comp. St. c. State [Neb.] 96 N. W. a general denial the n be served on all pers eral consent, but only it. Fitzgibbon v. Macy
64. Burns' Rev. St. v. Stern, 160 Ind. 375; 64 N. E. 14; White v. F 144; Fried v. Nelson, 30 shine v. Uline, 159 In gent, 31 Ind. App. 697.
65. Ragle v. Mattox an authorization signe the legal voters of a by the death of two c as to those two. Shaf 375.
66. Burns' Rev. St. Boomershine v. Uline,
67. A continuance o permit does not oust Burnham [Iowa] 94 N. bond for costs is filed v

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is given of the charges in a remonstrance does not entitle the applicant to a license as of right,[68] the burden being on him to prove all facts entitling him to a license, including the fact that he has published his notice of application in the papers having the largest circulation in the county.[69]

In Kentucky, appeals from the county to the district court are heard on bills of exception on the same evidence heard below and not de novo,[70] and where the bill shows that the county court had no discretion, but should have granted the license, the case should be remanded with directions;[71] but a remand for a new trial is not prejudicial where the applicant was not in fact entitled to a license.[72] In Nebraska, however, on appeal the case is tried de novo and the court should not be influenced by the finding below.[73] A motion for a new trial is not necessary to obtain a review.[74] On appeal from an order of commissioners granting a license, the proof of lack of qualifications must be clear to warrant a revocation of the license.[75] The appellate court in Pennsylvania will not review the action of the court of quarter sessions in refusing a license, where the record shows it was refused "after hearing."[76]

Certiorari is the proper remedy to determine the validity of a license where the facts relied on are of record, such as whether the petition was on file for 10 days before granting the license and whether the petitioners withdrew their names and subscribed to the remonstrance;[77] but an appellate court will deny the writ where nothing is alleged why the application was not made to the court of general original jurisdiction.[78] Since an application for certiorari need not be verified, it is no objection that one of the relators therein administered the oath to his co-relators.[79]

An injunction will not be granted against the exercise of a liquor license alleged to be void on grounds that appear of record and are hence reviewable by certiorari.[80]

Mandamus to compel the issuance of a liquor license will be denied where the petition alleges a compliance with the wrong statute.[81]

Bonds.—A bond is usually required of the licensee, signed by sufficient sureties,[82] conditioned against the violation of the law by the principal.[83] Such bonds

vided by the statute the finding of sufficiency of the board of supervisors will be set aside. Fitzgibbon v. Macy, 118 Iowa, 440. It cannot be shown that the persons making affidavit to the signatures were not "reputable persons" [Iowa Code, § 2452]. In re Canvass of Statement of General Consent to Sale of Intoxicating Liquors [Iowa] 95 N. W. 194. After an appeal is taken to the district court, the poll books if preserved may be considered though not introduced until after the period during which they are required to be preserved has elapsed. Reed v. Jugenheimer, 118 Iowa, 610. Where an applicant before hearing transfers his right to another a readvertisement is necessary. In re Keiper's License, 21 Pa. Super. Ct. 512.

68. In re Chuya's License, 20 Pa. Super. Ct. 410.

69. Smith v. Young [Okl.] 74 Pac. 104.

70. Hensley v. Metcalfe County Ct., 25 Ky. L. R. 204, 74 S. W. 1054; Meredith v. Com. [Ky.] 76 S. W. 8.

71. Hodges v. Metcalfe County Ct. [Ky.] 76 S. W. 381.

72. Hodges v. Metcalfe County Ct. [Ky.] 78 S. W. 177.

73. Bennett v. Otto [Neb.] 94 N. W. 807.

74. Bennett v. Otto [Neb.] 94 N. W. 807.

75. Grounds alleged held insufficient. Appeal of Burns [Conn.] 56 Atl. 611.

76. In re Chuya's License, 20 Pa. Super. Ct. 410.

77. Cooper v. Hunt [Mo. App.] 77 S. W. 483.

78. Refused in court of appeals. State v. Wilson, 90 Mo. App. 154.

79. State v. Bennett [Mo. App.] 73 S. W. 737.

80. Cooper v. Hunt [Mo. App.] 77 S. W. 483.

81. Pa. Act Apr. 3, 1872 (P. L. 843); Act May 13, 1887 (P. L. 103). Com. v. McClure, 204 Pa. 196.

82. The determination of the township board or city council as to the sufficiency of the bond is not final but may be reviewed on certiorari by the circuit court. Farr v. Anderson [Mich.] 93 N. W. 6.

83. It is no breach of a pharmacist's bond that a clerk made an illegal sale contrary to orders in the absence of his employer. Cullinan v. Burkhard, 41 Misc. [N. Y.] 321. A condition in a liquor bond for a hotel that the obligor shall not permit the premises to become disorderly includes the rooms in which the liquor business is carried on. Cullinan v. Fidelity & Casualty Co., 84 App. Div. [N. Y.] 296.

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should be for the statutory amount,[84] state the principal's pla be properly executed.[86] Their obligation is to the state in th for violation of the law,[87] and for the use of individuals injur

Payment of license fee or tax.—Payment of license fees against the persons,[89] for the business,[90] in the amount[91] a provided by the statute, and the moneys so collected must b statute provides.[93]

Scope and effect of license.—A license to sell does not a to act as undisclosed agent for another; the license is a perso to the licensee;[94] but it is not a private or property right, but at any time without notice;[95] and the city may impose an restriction it sees fit.[96] A license cannot be dated back to cov it issued.[97]

Surrender, transfer, or revocation of license.—In New Y

84. That defendants gave a bond in a greater sum than the statute provided for their principal's business will not invalidate it but it will be enforced for the statutory penalty. Meador v. Adams [Tex. Civ. App.] 76 S. W. 238.

85. That the application for a certificate and the bond erroneously gave the applicant's place of business a wrong number, in fact a vacant lot across the street, will not release the surety from liability for illegal sales by the principal. Cullinan v. Fidelity & Casualty Co., 41 Misc. [N. Y.] 119. The declaration in an action on a bond counting on an illegal sale in a place other than that named in the bond is demurrable. Adams v. Miller, 81 Miss. 613.

86. A bond not signed by the secretary of the indemnity company until after a violation of the law, though received by the authorities on the promise that he would sign it on his return home, is void. Cullinan v. Bowker, 84 N. Y. Supp. 696.

87. See, also post, § 5, actions for penalties. The liability of the surety is not affected by a sale by the principal of the business and certificate where it has not been transferred or surrendered according to law [Liquor Tax Law, §§ 25, 27]. Cullinan v. Parker, 39 Misc. [N. Y.] 446. Allowing premises to become disorderly. Cullinan v. Fidelity & Casualty Co., 84 App. Div. [N. Y.] 296. One who deposits as indemnity a sum of money with a fidelity company signing his liquor bond on the agreement to refund it on discharge of the company's liability as surety is entitled to recover it on proof of compliance with the law and is not compelled to wait until limitations have run in favor of the surety as to actions on the bond. Shea v. Fidelity & Casualty Co., 83 App. Div. [N. Y.] 305. Where the surety on a bond given as was supposed under the Iowa Mulct law paid a judgment recovered against him and sued his principal on an oral promise of indemnity, the fact that the principal was not within the law and hence that the bond was void is a complete defense. Gorman v. Williams, 117 Iowa, 560.

88. See, also, post, § 8, civil liability for injuries. Sureties on a liquor bond are not liable for exemplary damages in an action under the civil damage law under the law of South Dakota. Garrigan v. Thompson [S. D.] 95 N. W. 294.

89. A solicitor in the employ of a retail dealer cannot be required to pay the liquor tax in Louisiana. Swords v. Le Blanc [La.] 35 So. 622. The act o the sale of liquors ir lumbia does not apply restaurants in the Cap persons conducting the take out licenses. Pa D. C. 469.

90. A nonintoxicati less than two per cen the "Dow law" of Oh 4364-9]. State v. Kau 1062.

91. Amount of tax the Bronx, New York v. Hilliard, 40 Misc. [per cent license tax puted on the cost pri United States interna liams v. Iredell Coun 300.

92. Where an ordi ment of the fee a pr plication, the granting prepayment of the fe the license void and given to the town to invalid for want of c v. Clements, 31 Ind. cannot be enforced in specific tax on the s Brewer v. Nutt [Ga.] 4

93. In Washington, pay into the state tre the license fees collec ger's Ann. Codes & S Seattle, 31 Wash. 149, cial law providing tha by sellers in Alma Cit plied to school purpos the general law provid eys shall be paid into fund [Sp. Laws 1889, Laws 1903, p. 305. c. [Minn.] 97 N. W. 670.

94. Ruemmeli v. Cr 908.

95. McConkie v. Re The liquor tax certific law of New York diff the fact that the la privilege while the ri holder is one of prop the owner and prote rules of law. In re C [N. Y.] 445.

96. Hoboken v. Greil

97. Ristine v. Cleme

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liquor tax certificate on surrendering it and abandoning the business is entitled to a rebate of the unearned portion of the tax paid;[98] but one paying money in Florida to the tax collector, as a deposit on account of a liquor license, cannot recover it of him on suspending business, though the license was never issued because the entire tax was not paid.[99] In Kentucky, a liquor dealer's license is a mere personal privilege and cannot be treated as part of his assets in bankruptcy, though the statutes permit it to be transferred on his death or the sale of his business;[1] but in Massachusetts[2] and in Pennsylvania, it is a part of a bankrupt's assets and may be claimed by him as a part of his exemption.[3]

The certificate of payment of the liquor tax in New York is subject to revocation at the suit of the excise commissioner[4] against the holder[5] for any cause that would have prevented the granting of a certificate,[6] or its transfer,[7] and for any violation of the law.[8]

An application on information and belief, supported by affidavits setting up facts justifying cancellation, is sufficient,[9] and confers jurisdiction,[10] though the court cannot revoke the certificate without proof of the facts set up.[11]

98. The applicant must show that he has ceased selling, and that the deputy commissioner of excise has issued receipts for it does not relieve him of the necessity [Laws 1897, c. 312, § 25]. People v. Cullinan, 173 N. Y. 604. Where a certificate was issued in fraud of the state on false representations, a good faith assignee who furnished the money for it cannot recover the rebate. People v. Hilliard, 81 App. Div. [N. Y.] 71. It is only where a complaint or a prosecution is pending that a certificate holder is deprived of his right of rebate on surrender; merely that a violation of the law has occurred is not sufficient. People v. Cullinan, 41 Misc. [N. Y.] 404. A single conviction of an employe will not deprive a certificate holder of his right to a rebate [Liquor Tax Law, § 34 (1 Laws 1897, p. 237, c. 312)]. People v. Cullinan, 41 Misc. [N. Y.] 404.

99. Johnson v. Atkins [Fla.] 32 So. 879.

1. Bonnie v. Perry's Trustee, 25 Ky. L. R. 1560, 78 S. W. 208.

2. Since the police commissioners of Boston refuse to recognize a mortgage of a liquor license, but permit it to be sold in bankruptcy proceedings for the benefit of creditors, the court will not recognize a mortgagee as having any interest in the proceeds as that would be against the policy of the commissioners without whose cooperation no fund could arise. In re McArdle, 126 Fed. 442. Complainant held not entitled to lien on proceeds of liquor license in Massachusetts as against creditors of bankrupt. Ross v. Saunders, 123 Fed. 737.

3. In re Olewine, 125 Fed. 840.

4. A consent to a transfer by a deputy commissioner will not estop the commissioner from applying for a revocation for a prior illegal sale where at the time of the consent the deputy did not know of the violation of the law and the commissioner did not know of the deputy's consent. In re Cullinan, 87 App. Div. [N. Y.] 47.

5. Proceedings to cancel are properly brought against the one to whom the certificate was issued though he has no connection with the business or with the violation. Cullinan v. Kuch, 39 Misc. [N. Y.] 641.

6. A small house erected for the purpose of defeating the application for a liquor tax certificate, and in which a man and wife live paying rent therefor is a "dwelling house" and if within 200 feet of the hotel renders false a statement in the application to the contrary and authorizes its revocation. In re Ryon, 39 Misc. [N. Y.] 698. Where at the time of the application for a certificate for a hotel, the building did not comply with the law the certificate should be revoked (Id.), and changes subsequent to the application and before any liquor was sold will not operate to prevent revocation (In re McMonagle, 41 Misc. [N. Y.] 407). Where an applicant states that on a certain date his house was a hotel and has been so occupied continuously since, the fact that the latter statement was a mistake is ground for revoking the certificate. In re Brewster, 85 App. Div. [N. Y.] 235. The applicant for a certificate is confined to the business he states in his application and cannot contest revocation on the ground that he is entitled to a certificate for another business. In re Ireland, 41 Misc. [N. Y.] 425.

7. The statement in an application for a transfer that the applicant intends to conduct a hotel and that the building complies with the requirements of the statute is material and if false will necessitate cancellation of the certificate. In re Cullinan, 39 Misc. [N. Y.] 646.

8. Evidence held sufficient to show violation of law. In re Ryon, 85 App. Div. [N. Y.] 621. Where in a proceeding to revoke the certificate for illegal sales the evidence is consistent with the good faith of defendant in treating the special agents of the excise commissioner as guests of his hotel, the certificate should not be revoked [Liquor Tax Law, § 28, subd. 2]. In re Cullinan, 75 App. Div. [N. Y.] 301. That the bartender made the sales contrary to the certificate holder's express injunction (In re Cullinan, 39 Misc. [N. Y.] 636), or that gambling was carried on in defendant's absence without his knowledge or consent is no defense (In re Cullinan, 84 N. Y. Supp. 492). That a hotel keeper sells whisky to casual callers and incidentally serves sandwiches is ground for revoking his certificate as such callers are not guests in that they do not resort to the hotel for the purpose of obtaining and do not actually obtain meals therein in good faith [Liquor Tax Law (Laws 1897, p.

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Where the answer fails to deny the allegations of the a
the court will without reference and on proof of formal mat
tificate,[12] and where defendant denies some of the charges in
mation and belief and fails to deny others, the court will no
to those charges supported by affidavit.[13] By objecting to tl
petition to cancel his license, defendant waives the right to ob
tionality of the law authorizing cancellation.[14] A proceeding
discontinued on application of the defendant, but only on app
instituting the proceeding.[15]

In Nevada, a liquor license may be revoked by the comm
without notice to the licensee, where there is reason to belie
is a nuisance, a menace to public health, or detrimental to pub

In Colorado, conviction of the holder in court is not a pr
tion of a saloon license by the county commissioners for violat

In Texas, the temporary closing of the business at the
licensed and carrying it on at another place does not forfeit
on again at the place where licensed.[18]

Sale without license.—Offenses under the license laws and
for are governed by the same general rules applicable to othe
liquor laws, and will be discussed in a subsequent section of
will be found a few cases peculiarly illustrative of the license l

§ 4. *Regulation of traffic. Prohibition of sale or keep*
times.—The power to prohibit sales and keeping open at part
Sundays, election days, holidays and certain hours of the ni
and where defendant served guests on Sunday, in an open
barroom and separated therefrom by a wooden partition exte

236, c. 312) § 31, subd. 2]. In re Cullinan, 41 Misc. [N. Y.] 3.

9. In re Cullinan, 173 N. Y. 610.

10. In re Cullinan, 40 Misc. [N. Y.] 423.

11. In re Cullinan, 39 Misc. [N. Y.] 354.

12. In re Cullinan, 39 Misc. [N. Y.] 646.

13. In re Cullinan, 39 Misc. [N. Y.] 354.

14. In re Cullinan, 173 N. Y. 610.

15. Laws 1901, c. 640. In re Cullinan, 39 Misc. [N. Y.] 558.

16. Wallace v. Reno [Nev.] 73 Pac. 528.

17. Mills' Ann. St. § 2332. Board of Com'rs v. Mayr [Colo.] 74 Pac. 458.

18. McLeod v. State [Tex. Civ. App.] 76 S. W. 216.

19. See post, § 6, Criminal Prosecutions.

20. Pursuit of occupation of selling without license held not shown. Barnes v. State [Tex. Cr. App.] 72 S. W. 177. A justice of the peace in Missouri has jurisdiction of a prosecution for a sale without license. State v. Back [Mo. App.] 72 S. W. 466.

A license to sell in a particular room will not support sales in a garden surrounding such room. Tron v. Lewis, 31 Ind. App. 178. One may be convicted of selling without a license in a county where no license has been obtained for failure to obtain the consent of the necessary freeholders. Hodge v. State, 116 Ga. 852.

A license granted to an alderman of a village by himself and one other against the objection of the mayor, clerk, and the third alderman is no protection against a prosecution for selling without license. Hugonin v. Adams [Miss.] 33 So. 497.

An unregistered clerk in a drug store conducted by a registere erly prosecuted for s and not far a sale as a pharmacist. State v. S. W. 466.

One convicted of sel ties to be drunk on having paid the tax punishable under the viding a punishment which no other pun [Pen. Code, § 15]. Pe [N. Y.] 102. An indict out license need not s buyer (State v. Back 466), nor that the win tic wine (Wells v. Sta An indictment substar of the Code for sell license is not demurra it does not sufficiently stituting the alleged ground that it fails tc tity or value of the li sold and whether th premises and drunk Code 1895, § 421]. W S. E. 443. Under an i a shop without a lic at any time between the date of finding t shown. State v. Stov

21. See ante, § 1, C fic. Cranor v. Alban Evidence held sufficie tion. Keeping open o ens v. State [Tex. Cr.

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to the ceiling, he was properly convicted of not keeping closed on Sunday;[22] but one who at the request of the proprietor procures liquor therefrom for their joint use on Sunday is not guilty of selling, giving away, furnishing or causing to be furnished.[23] That defendant charged with keeping his saloon open on Sunday has a boarding house which was also open is no defense;[24] and to sell beer on Saturday and deliver it on Sunday through a broken window is to keep open on Sunday.[25]

An indictment for keeping "open a tippling house" on Sunday need not allege facts which show it to be a tippling house or that any liquors were sold there on that day,[26] and where the prosecution is for not keeping closed, no sale need be shown.[27] An indictment for a sale on a certain Sunday is supported by evidence of a sale on any Sunday within a year before the finding of the indictment.[28]

That defendant was in charge of a club house kept open on Sunday is sufficient to convict of keeping the house.[29]

Prohibition of sale in certain places.—It is customary to provide by statute or ordinance that the sales shall be confined to one room,[30] without partitions or stalls,[31] and regulations confining sales to particular localities in cities[32] and prohibiting sales within certain distances of churches and schools, are common.[33]

Prohibition of sale to certain persons.—Sales to irresponsible persons, such as Indians,[34] drunkards[35] and minors,[36] are generally prohibited; but one who acts as agent for a minor in buying liquor for him is not guilty of selling to him.[37] An order by a parent to authorize a sale to his minor son must be special both as to time and quantity.[38] The prohibition of the assembling of females in a saloon is a fair police regulation.[39]

Officers or boards charged with enforcement.—The governor and council in New Hampshire are not entitled to approve the appointment of the special agents of the license commissioners, their duty extending only to approval of their number and compensation.[40]

22. Sullivan v. District of Columbia, 20 App. D. C. 29.

23. Norris v. Oakman [Ala.] 35 So. 450.

24. Hofheints v. State [Tex. Cr. App.] 74 S. W. 310.

25. Wallis v. State [Tex. Cr. App.] 76 S. W. 231.

26. O'Neil v. State, 116 Ga. 839.

27. Sullivan v. District of Columbia, 20 App. D. C. 29.

28. Webb City v. Parker [Mo. App.] 77 S. W. 119.

29. O'Neil v. State, 116 Ga. 839.

30. A refrigerator room incapable of entrance or use for other purposes is not unlawful. State v. Donahue [Iowa] 94 N. W. 503. Selling in a garden surrounding the room. Tron v. Lewis, 31 Ind. App. 178.

31. Room partitioned off held a "stall." State v. McGregor, 88 Minn. 74; Danville v. Hatcher [Va.] 44 S. E. 723; McNulty v. Toopf, 25 Ky. L. R. 430, 75 S. W. 258.

32. Strauss v. Galesburg, 203 Ill. 234.

33. Webster v. State [Tenn.] 75 S. W. 1020. A statute prohibiting sales within one mile of a certain college applies to territory in another county but within one mile of the college. State v. Knotts, 131 N. C. 705. The Texas statute prohibiting the sale of liquors within three miles of any church on petition of a majority of the inhabitants, and providing that the act shall not apply to one already having a license, excepts only those who had licenses at the time of enacting the law [Acts 1881, p. 140]. Viefhaus v. State [Ark.] 75 S. W. 585. A local law prohibiting sales in a certain locality does not prevent the local operation of a general law prohibiting sales all over the state within a certain distance from churches, and one guilty of an offense under the general law though within the territory covered by the local law may be prosecuted under the general law. Blake v. State [Ga.] 45 S. E. 249.

34. Mulligan v. U. S. [C. C. A.] 120 Fed. 98. A conviction may be had of an attempt to sell liquor to an Indian [Cutting's Comp. § 4377]. Ex parte Finnegan [Nev.] 71 Pac. 642.

35. Where a drunkard in Mississippi gave defendant money to buy whisky with and he went into another state and bought it but delivered it to a third person before the returning train reached Mississippi the offense was complete. Jenkins v. State [Miss.] 34 So. 217. The sale by a wholesale dealer of five gallons of beer not to be drunk on the premises as authorized by statute is not rendered unlawful by knowledge that the purchaser is an inebriate and intends to drink it at his residence [Ky. St. 1899, §§ 2557, 2558]. Walker v. Commonwealth, 25 Ky. L. R. 401, 75 S. W. 242.

36. State v. Gulley, 41 Or. 313, 70 Pac. 385; People v. Werner, 174 N. Y. 132; Gray v. State [Tex. Cr. App.] 72 S. W. 169.

37. Banks v. State, 136 Ala. 106.

38. Hamer v. People, 104 Ill. App. 555.

39. Hoboken v. Greiner, 68 N. J. Law, 592; Cronin v. Adams, 24 Sup. Ct. 219.

40. Laws 1903, p. 83, c. 95, § 5. Opinion of the Justices [N. H.] 55 Atl. 943.

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§ 5. *Actions for penalties.*—By statute in some sta penalty lies at the suit of the state or some officer thereof or manufacturing[42] without license, and against the princi men for violation of the law by a licensee.[44]

§ 6. *Criminal prosecutions. A. Offenses and responsi eral.*—The New York city court of special sessions has juris sale of liquor to be drunk on the premises without payment

An illegal sale, violative of two different statutes, may either,[46] and different illegal acts, parts of the same transacti punished.[47] In a prosecution for maintaining a nuisance, the place has been abated.[48] A statute punishing the " for intoxicants in local option territory will not support a or accepting" orders.[49] The Kentucky statute which pro device, subterfuge or pretense shall be allowed to evade the o law is not directed solely at mechanical devices such as a "blind tigers."[50] That a town attorney gave a detective r purchased liquor from one having no permit is no defense t not being shown to have instructed the detective to buy.[51] T the result of a local option election was enjoined without jur tion having in fact been made in violation of it, is no defense violation of the law.[52] Failure of a druggist to include the the residences of buyers in his report to the county auditor is A farmer cannot sell cider of his own production in Massac more than maximum percentage of alcohol.[54] A person may for sale liquor, the title to which is in another.[55]

A delivery of liquor on checks issued by a company re

41. A sale by a husband who is general manager of his wife's store, made contrary to her express orders will not subject her to the penalty. Thurman v. Adams [Miss.] 33 So. 944.

42. The penalty provided for manufacturing without a license contrary to ordinance cannot be recovered by a city from a brewing company the business of which is carried on outside the city limits. Consumers' Brew. Co. v. Norfolk [Va.] 43 S. E. 336.

43. Petition and proof held to sufficiently show that defendant was duly licensed. Earl v. State [Tex. Civ. App.] 76 S. W. 207. In an action for a penalty against a club for illegal selling it is not necessary that the petition negative that the club was within the exception of the statute in favor of corporations organized before March 23, 1896 [Liquor Tax Law, § 31, cl. b.]. Cullinan v. Criterion Club, 39 Misc. [N. Y.] 270.

44. Cullinan v. Burkhard, 41 Misc. [N. Y.] 321; Cullinan v. Fidelity & Casualty Co., 84 App. Div. [N. Y.] 292, 296; Meador v. Adams [Tex. Civ. App.] 76 S. W. 238; Cullinan v. Fidelity & Casualty Co., 41 Misc. [N. Y.] 119; Adams v. Miller, 81 Miss. 613; Cullinan v. Bowker, 84 N. Y. Supp. 696; Cullinan v. Parker, 39 Misc. [N. Y.] 446; Shea v. Fidelity & Casualty Co., 83 App. Div. [N. Y.] 305; Gorman v. Williams, 117 Iowa, 560. Where in an action by the state on a liquor dealer's bond for a penalty for illegal sales the evidence shows without doubt that the sales were made by persons for whose acts the principal was liable, instructions on "agency" and "employe" were unnecessary. Scalfi v. State [Tex. Civ. App.] 73 S. W. 441.

45. People v. Bag

46. State v. Quin where it is manifes several statutes that tended to provide a not provided for by tion under such sta pears that the sale other statute [Ga. I Barker v. State, 117

47. The conviction ing illegal sales is r for perjury in makir required by the local v. Van Buren Circu W. 927. Under the Missouri each packa the certificate on it hence a plea of form a different package Broeder, 90 Mo. App.

48. Kan. Gen. St, Lee, 65 Kan. 698, 70

49. Ark. Acts 1901 lian Co. v. State [Ar

50. Ky. St. § 2570. L. R. 974, 70 S. W. 4

51. People v. Ch 1108.

52. Lively v. State W. 1048.

53. Code, § 2394. 97 N. W. 1093.

54. Rev. Laws, c. den, 183 Mass. 1.

55. State v. Grun State v. Stevens, 119

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its store is a sale,[56] and an illegal sale is not shorn of its illegality by a subsequent agreement to consider the transaction a loan instead of a sale on credit.[57]

Giving away liquor is within the statute prohibiting furnishing,[58] though the giver be a sales agent and the quantity given a mere taste as a sample.[59]

Furnishing to the members of a club on tickets is "selling,"[60] and so is furnishing for cash or charging against a sum previously paid in by the member,[61] but where defendant assisted in making up a fund with which liquor was bought and drunk by defendant and the others, no sale by defendant or any of the others is shown.[62] Where a purse is made up by several to buy liquor of defendant, there may be a conviction for a sale to any person giving money to defendant.[63]

A sale made by a traveling agent is not complete until the principal has severed the quantity from his stock and delivered it to a carrier consigned to the buyer, whence the sale takes place at the seller's place of business and not at the buyer's.[64] A carrier is not liable for unlawful sale where he delivers shipments C. O. D.,[65] and an ordinance providing otherwise is void;[66] but an agent for a liquor house who procures buyers for packages originally sent C. O. D. and remaining unclaimed sells within the state and is liable.[67] Where the liquor was paid for in advance and sent into the prohibited territory, it cannot be said to be sent C. O. D.[68] Where liquor is sent into local option territory by an agent who is instructed not to deliver it without payment of the price, such delivery and payment constitute a sale,[69] and where a wholesale dealer residing in another county sells in a local option county and ships the goods there from his stock, he is liable.[70]

A bona fide sale for medicinal purposes is not within the statute,[71] and a medicinal compound of whisky and other ingredients is not rendered unlawful by the fact that on settling, the whisky may become separated from the remainder.[72] A physician's prescription is no defense to sale by one who is not a druggist,[73] and a prescription dated in October is no defense where the witness swears he has bought several times without a prescription and at least once in July.[74]

The assistant of a registered pharmacist, though not registered, may sell on a proper prescription under the supervision of his preceptor;[75] but the fact that defendant, prosecuted for an illegal sale, was barkeeper on a steamboat whose owners had complied with the laws of the United States and the state in which was situated her home port, is no defense.[76]

A statute prohibiting a physician from prescribing liquor to one not actually ill in any county, justice precinct, city or town where the sale of liquor has been

56. Ford v. State [Tex. Cr. App.] 77 S. W. 800.
57. Lupo v. State [Ga.] 45 S. E. 602.
58. Acts 1902, p. 92, No. 90. State v. Tague [Vt.] 56 Atl. 535.
59. State v. Jones, 88 Minn. 27.
60. Hurd's Rev. St. 1901, p. 750. People v. Law & Order Club, 203 Ill. 127.
61. State v. Peak, 66 Kan. 701, 72 Pac. 237.
62. Creasy v. Com., 25 Ky. L. R. 893, 76 S. W. 509; Miller v. Com., 25 Ky. L. R. 848, 76 S. W. 515; Wilson v. Com., 25 Ky. L. R. 1085, 76 S. W. 1077; Whitmore v. State [Ark.] 77 S. W. 598.
63. Redd v. State [Tex. Cr. App.] 77 S. W. 214; Parker v. State [Tex. Cr. App.] 77 S. W. 782.
64. State v. Shields, 110 La. 547.
65. U. S. v. Lackey, 120 Fed. 577; Carthage v. Duvall, 202 Ill. 234.
66. Carthage v. Munsell, 203 Ill. 474. Cf., Sinclair v. State [Tex. Cr. App.] 77 S. W. 62.
67. State v. Cohen, 65 Kan. 849, 70 Pac. 600.
68. Sinclair v. State [Tex. Cr. App.] 77 S. W. 621.
69. Davidson v. State [Tex. Cr. App.] 73 S. W. 808.
70. Doores v. Com., 25 Ky. L. R. 459, 76 S. W. 2.
71. Burns' Rev. St. 1901, § 7276; Horner's Rev. St. 1901, § 5312. Parker v. State [Ind. App.] 68 N. E. 912.
72. Burns' Rev. St. 1901, § 7277; Horner's Rev. St. 1901, § 5313. Parker v. State [Ind. App.] 68 N. E. 912.
73. State v. Shanks, 98 Mo. App. 138.
74. State v. Lantz, 90 Mo. App. 15.
75. State v. Hammack, 93 Mo. App. 521; State v. Russell, 99 Mo. App. 373.
76. State v. Blands [Mo. App.] 74 S. W. 8.

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prohibited, does not apply to a school district under the loc prohibit him from writing a prescription for himself;[78] to b ing must result in an illegal sale, and where no sale results,

Where the evidence shows that defendant acted merely in buying for him, no conviction of a sale can be had;[80] it i if he acted as agent of the seller,[81] and the guilt or innocen another depends upon his own good faith and not on the for whom the liquor is bought.[82]

Criminal intent is not a necessary ingredient of offen laws;[83] whence a sale to a minor is an offense, though the se after inquiry of the minor[84] and his father that he was ove In Texas, however, unless the seller knows the buyer to be guilty.[86] Neither is lack of knowledge of the intoxicating p a defense.[87] An employer is liable for the acts of his servant or authority,[88] and even against his positive instructions wher they were disobeying such instructions.[89] In North Carolir a drug store is not liable for an illegal sale by his registered to his instructions,[90] but in Kentucky, he is liable for an ur his clerk in the regular course of business.[91]

(§ 6) *B. Indictment, information, or complaint.*—An in fy in what particular the act complained of violated the statu complained of was without license,[93] or occurred on electio dictment for keeping open on Sunday need not allege that it

77. Gordon v. State [Tex. Cr. App.] 73 S. W. 398.

78. Tex. Pen. Code 1901, art. 405. Hawk v. State [Tex. Cr. App.] 72 S. W. 842.

79. Williams v. State [Tex. Cr. App.] 77 S. W. 783.

80. Cook v. State [Tex. Cr. App.] 76 S. W. 463; Brown v. State [Tex. Cr. App.] 76 S. W. 475. Purchase for self and another. Crawford v. State [Tex. Cr. App.] 76 S. W. 576; Whitmore v. State [Ark.] 77 S. W. 598.

81. Sinclair v. State [Tex. Cr. App.] 77 S. W. 621. One who at a saloon keeper's request and in his presence waits upon customers may be convicted of selling as agent of a third person on Sunday. Pigford v. State [Tex. Cr. App.] 74 S. W. 323.

82. Whitmore v. State [Ark.] 77 S. W. 598.

83. Williams v. State [Tex. Cr. App.] 77 S. W. 215; State v. Harris [Iowa] 97 N. W. 1093; State v. Handler [Mo.] 76 S. W. 984. The offense of keeping open on election day need not have been committed unlawfully and willfully [Tex. Pen. Code, art. 185]. Knox v. State [Tex. Cr. App.] 77 S. W. 13.

84. Hill's Ann. Laws Or. § 1913. The act of Feb. 20, 1891, making it an offense for a minor to misrepresent his age to buy liquor is immaterial. State v. Gulley, 41 Or. 318, 70 Pac. 385.

85. People v. Werner, 174 N. Y. 132.

86. Gray v. State [Tex. Cr. App.] 72 S. W. 169.

87. Williams v. State [Tex. Cr. App.] 77 S. W. 215; State v. Eaton, 97 Me. 289; State v. Gill [Minn.] 95 N. W. 449.

88. Lehman v. D. C., 19 App. D. C. 217. Though in Georgia it seems the rule merely places the burden on the defendant to show his servant's lack of authority. Rooney v. Augusta, 117 Ga. 709. Wholesale liquor dealer held responsible for unlawful sales made in name of another. Webster v. State [Tenn.] 75 S. W. 102 of a hotel keeper bu time as ordered by g ing saloon and furnis agent and his master City v. Thornhill, 68 N

89. Com. v. Coughl

90. State v. Neal, 1

91. Locke v. Com., W. 763. Partners m son v. Com., 24 Ky. L.

92. State v. Park W. Va. 591. An alle did "unlawfully sell (State v. Solio [Del.] commit the crime of did violate the liquor states no offense (Pe Div. [N. Y.] 24). In that defendant did away, or dispose of the word unlawfully alternatively alleged. Ala. 61.

93. An indictment ants not being drugg medicinal purposes, but not stating that bad. State v. Holder, dictment alleging a another which allege no license is bad for defendant had none.

94. An indictment day within three m must give the number v. State [Tex. Cr. A information for givin day an election was cincts to vote on loc ty is void as an elec two precincts for an v. State [Tex. Cr. App

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of unlawful sale,[95] nor need an indictment for selling specify the particular kind of liquor,[96] and an information charging in the statutory form that defendant "unlawfully engaged in and carried on the business of a dealer in liquors" is not bad for omission of the word "intoxicating."[97] An indictment under the local option law must show that the law was in force in the jurisdiction.[98] An indictment charging that defendant "did unlawfully sell, give away or otherwise dispose of" intoxicating liquor,"[99] one that, after specifying various liquors, adds "and other drinks unknown,"[1] and one charging that defendant sold "intoxicating liquors to wit: whisky, brandy, ale, beer, and wine, a mixture thereof," are sufficiently certain.[2] An indictment charging defendant as "a liquor dealer or keeper of a barroom" is not in the alternative, since the terms "keeper" and "dealer" are synonymous.[3] An indictment alleging that defendant allowed "a certain shop" in a certain building to be used for an unlawful purpose is sufficient.[4]

The right of one accused to a bill of particulars rests in the discretion of the court.[5]

An indictment charging an unlawful sale need not negative the exceptions in a proviso in the statute permitting the use of liquor in certain cases,[6] and where a subsequent statute makes certain sales lawful, it need not be alleged that the sale complained of was not one of those.[7] Where intent or guilty knowledge is a necessary ingredient of the offense, it must be alleged,[8] but not otherwise.

The officer's jurat to a complaint for violating the local option law need not show that it was sworn to by a credible person,[9] and where all information is sworn to positively, the county attorney need not file with it the affidavits or oral evidence reduced to writing on which it is founded.[10]

An information charging that defendant did "sell, give away and dispose of"

95. Lehman v. Dist. of Columbia, 19 App. D. C. 217; City of Louisiana v. Anderson [Mo. App.] 73 S. W. 875.

96. Maddox v. State [Ga.] 44 S. E. 806; State v. Blands [Mo. App.] 74 S. W. 3; Brass v. State [Fla.] 34 So. 307.

97. Brass v. State [Fla.] 34 So. 307.

98. Complaint held to sufficiently show that law was in force in the county. Hollar v. State [Tex. Cr. App.] 73 S. W. 961. Information held to sufficiently charge the adoption of the law Williams v. State [Tex. Cr. App.] 70 S. W. 213. Precinct having adopted local option held sufficiently described. Woods v. State [Tex. Cr. App.] 75 S. W. 37. Indictment need not show that the petition under which the vote was taken was filed in the county court at the term preceding that at which the election was ordered. Locke v. Com., 24 Ky. L. R. 654, 69 S. W. 763.

99. Sims v. State, 135 Ala. 61.

1. Maddox v. State [Ga.] 44 S. E. 806.

2. Proof showing sale of "hop tonic." Cockerel' v. Com., 24 Ky. L. R. 2149, 73 S. W. 760.

3. Hofheintz v. State [Tex. Cr. App.] 74 S. W. 310.

4. State v. Wiseman, 97 Me. 90.

5. Held properly denied. Jones v. State, 136 Ala. 118; Brass v. State [Fla.] 34 So. 307.

6. Sims v. State, 135 Ala. 61. The warrant and information need not show that the defendant was not a druggist and did not sell for sacramental purposes. People v. Rall [Mich.] 98 N. W. 8. An indictment for maintaining a plan for the illegal sale of liquor need not negative defendant's right to sell under the mulct law nor specify in what respect the mulct law has been violated. State v. Donahue [Iowa] 94 N. W. 503. An indictment for selling without license need not allege that the liquor was not native wine, etc. Com. v. Petranich, 183 Mass. 217. The indictment for selling on Sunday need not negative that defendant is an hotel keeper. Lehman v. D. C., 19 App. D. C. 217. In an indictment under the local option law it is not necessary to negative a license or other authority to give away intoxicants [Mo. Rev. St. 1899, § 3032]. State v. Handler [Mo.] 76 S. W. 984. In a prosecution under the beer inspection act of Missouri, the information must charge in direct terms that the package did not have the certificate upon it, but it need not negative that the beer was sold for export without the state. State v. Broeder, 90 Mo. App. 156.

7. Tigner v. State [Ga.] 45 S. E. 1001.

8. An indictment of a county clerk for issuing a license to sell in a local option precinct. Com. v. Wood, 25 Ky. L. R. 1019, 76 S. W. 842. An indictment for having in possession a house where liquors are illegally sold. Hinkle v. Com., 25 Ky. L. R. 313, 75 S. W. 231.

9. Burk v. State [Tex. Cr. App.] 72 S. W. 685.

10. Kan. Gen. St. 1901, § 2743. State v. Peak, 66 Kan. 701, 72 Pac. 237.

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liquors on Sunday is not double,[11] nor is one charging th spirituous, malt and intoxicating liquors;[12] but an informati the same count the maintenance of a nuisance in each of twc is bad.[13]

Where the evidence shows several sales on the same nig should be required to elect,[14] and where, on an indictment in an unlawful sale, one sale is proved, this constitutes an electi other sales is inadmissible.[15]

That an indictment alleges a sale to an Indian of a certa and the proof shows that he is within that class and another, no variance.[16] An indictment for selling "spirituous liquors, beer" is supported by proof of the sale of a pint of beer, since uous liquors" are surplusage.[17]

Judicial notice.—The court will take judicial notice th and alcohol[20] are intoxicants, that where the word "beer" is use common lager or bock beer is meant,[21] and that a glass of v cents is a quantity less than three gallons.[22]

Presumptions and burden of proof.—That defendant has ense is prima facie evidence that he is engaged in the busines defendant took money from another and shortly gave him the onus on him to show where he got it, failing which he is of selling;[24] but where the charge is for an unlawful sale, shown to have made the particular sale charged; proof that he business is not sufficient.[25] Where the keeper of a barroom in with selling on Sunday and the evidence sustains the charge, him to show that the sale was to a bona fide guest of the hotel cution for violation of the local option law, the burden is upo beyond a reasonable doubt that the election was held in conf ute.[27]

Admissibility of evidence.—Though in a prosecution for option law defendant cannot be convicted of any sale other th the indictment, other sales may be shown as to his system with sale was in accordance;[28] but where the facts testified to show certainly, such evidence is not admissible.[29] Evidence of sal charged to have been acting with defendant is admissible, if acting together.[30] In a prosecution for keeping with intent

11. Cranor v. Albany [Or.] 71 Pac. 1042.
12. Maddox v. State [Ga.] 44 S. E. 806.
13. State v. Wester [Kan.] 74 Pac. 239.
14. Stick v. State, 23 Ohio Circ. R. 392.
15. Wilson v. State, 136 Ala. 114.
16. Mulligan v. U. S. [C. C. A.] 120 Fed. 98.
17. State v. Watts [Mo. App.] 74 S. W. 377.
18. Pedigo v. Com., 24 Ky. L. R. 1029, 70 S. W. 659; Sothman v. State [Neb.] 92 N. W. 303.
19. Hodge v. State, 116 Ga. 852.
20. Sebastian v. State [Tex. Cr. App.] 72 S. W. 849.
21. Locke v. Com., 25 Ky. L. R. 76, 74 S W. 654; Williams v. State [Ark.] 77 S. W. 597.
22. State v. Blands [Mo. App.] 74 S. W. 8.
23. Guy v. State, 96 Md. 692; Frudie v. State [Neb.] 92 N. W. gerald [Iowa] 94 N. W
24. Mack v. State, 1 v. State [Tex. Cr. App.] v. State [Tex. Cr. App.]
25. Guy v. State, 96 M
26. Lehman v. D. C.,
27. Stick v. State, 2 Bottoms v. State [Tex. 16, 20, 963; Watkins v. 77 S. W. 799. Adoptio county held not sufficie v. State [Tex. Cr. App.]
28. Efird v. State [' W. 957; Hollar v. Stat S. W. 961.
29. Walker v. State W. 401, 861; Grimes v. 72 S. W. 862; Parker v. 75 S. W. 30.
30. Peterson v. Stat S. W. 977.

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unlawful sales may be shown to prove intent.[31] That the prosecuting witness has the reputation of violating the local option law also is not admissible.[32]

In a trial for keeping a nuisance, evidence of the character of defendant's premises several years before the law under which he is prosecuted went into effect is inadmissible;[33] but evidence of the condition of the place five days after the date of the offense and three days after the filing of the complaint was inadmissible to prove that defendant kept the place,[34] and liquors and appliances used therewith, found on the premises and seized under the search warrant, may be introduced in evidence.[35]

The testimony of a non-expert, that the liquor he drank was alcohol, is admissible,[36] and another witness than prosecutor may state that he has drunk the kind of liquor described by prosecutor and that it is intoxicating.[37]

On the issue of whether the seller of liquor knew the buyer to be a minor, evidence that other minors drank with him is competent;[38] and where the only evidence of a boy's age is the testimony of his father, defendant should be allowed to show for the purpose of impeachment that the father told him the boy was over the statutory age.[39]

In a prosecution for selling by a druggist without the prescription of a practicing registered physician, the registration is material,[40] and the druggist's report of liquors sold is competent as an admission, irrespective of whether he could have been required to make the report or punished for not making it.[41]

In a prosecution for selling on election day, defendant should be permitted to show that the order calling the election was void for want of jurisdiction.[42]

Weight and sufficiency of evidence.—A purchaser is not the accomplice of the seller under the local option law, and his testimony does not need corroboration.[43]

One holding license to sell liquors may be convicted of keeping liquors for illegal sale on proof of a single illegal sale;[44] but proof of a single sale of three pints will not sustain a conviction of selling by small measure of less than a quart.[45] Proof of a sale by a druggist without a prescription, on any day within twelve months before finding the indictment, is sufficient.[46] Cases in which the sufficiency of the evidence to sustain a conviction has been considered will be found in the footnotes.[47]

31. Com. v. Coughlin, 182 Mass. 558. Keeping open on election day—evidence of sale and giving away held admissible. Knox v. State [Tex. Cr. App.] 77 S. W. 13.

32. Smith v. State [Tex. Cr. App.] 77 S. W. 801.

33. State v. Engleman, 66 Kan. 340, 71 Pac. 859.

34. Topeka v. Chesney, 66 Kan. 480, 71 Pac. 843.

35. State v. Stoffels [Minn.] 94 N. W. 675.

36. Sebastian v. State [Tex. Cr. App.] 72 S. W. 849.

37. West v. State [Ind. App.] 69 N. E. 465. Evidence as to liquors held inadmissible because not shown to have been the same as that purchased by witness. Parker v. State [Tex. Cr. App.] 75 S. W. 30.

38. Gray v. State [Tex. Cr. App.] 72 S. W. 169.

39. People v. Werner, 174 N. Y. 132.

40. State v. Morgan, 96 Mo. App. 343.

41. People v. Robinson [Mich.] 98 N. W. 12.

42. Neimann v. State [Tex. Cr. App.] 74 S. W. 558.

43. Smith v. State [Tex. Cr. App.] 77 S. W. 801; Terry v. State [Tex. Cr. App.] 71 S. W. 968; Walker v. State [Tex. Cr. App.] 72 S. W. 401.

44. Rooney v. Augusta, 117 Ga. 709.

45. State v. Holder [N. C.] 45 S. E. 862.

46. State v. Lantz, 90 Mo. App. 15.

47. **Evidence sufficient:** Conviction of violation of dispensary law. State v. Nickels, 65 S. C. 169. Conviction of maintaining a common nuisance. State v. Thoemke, 11 N. D. 386. Conviction under local option law. Locke v. Com., 24 Ky. L. R. 654, 69 S. W. 763. Conviction of keeping a tippling house. Pedigo v. Com., 24 Ky. L. R. 1029, 70 S. W. 659. That defendant was an employe of B. as charged. Bradley v. State [Tex. Cr. App.] 75 S. W. 32. Defendant held sufficiently identified as the seller of liquor. Henry v. State [Ark.] 76 S. W. 1071. Venue held not sufficiently shown there being no evidence that the town of W. where defendant made the sale was in the county alleged. State v. Hottle [Mo. App.] 78 S. W. 311.

Evidence of sale held sufficient: Witness furnishing money standing at a distance.

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Trial.—Jurors in a local option prosecution are competent to a "Law and Order League," the object of which is the enforc option law,[48] and that the jury commissioners and the jury we ists is no ground for reversal of a conviction.[49]

Whether the liquor sold was intoxicating,[50] and whether also a physician and furnished whisky slightly medicated on hi did so in good faith, are questions for the jury.[51]

Where there is no evidence that defendant was acting as prosecutor in obtaining liquor for him, no instruction on ag Other decisions on the propriety of instructions will be found

A special verdict stating merely that defendant, about a finding of the bill, sold a quart of whisky for 30 cents, will n ment of conviction of selling without a license.[54]

§ 7. *Summary proceedings. Searches, seizures and f* shipped into the state C. O. D. and held for delivery to the con not knowing the character of the goods, is the property of the in the state by him for sale, and is liable to confiscation unde In Kansas proceedings to condemn and destroy contraband li before the conviction of the person charged with keeping the to the enactment of the "Hurrell Law," seizure of the fixture unauthorized until after a judgment abating the nuisance.[57]

An affidavit made on information and belief only will no suance of a search warrant.[58] The warrant of arrest and searc in the same instrument.[59]

Goldwater v. State [Tex. Cr. App.] 77 S. W. 221. Defense of agency interposed. Taylor v. State [Tex. Cr. App.] 77 S. W. 221; Johnson v. State [Tex. Cr. App.] 77 S. W. 225. Sale of government warehouse certificate and delivery of liquor thereon. Parker v. State [Tex. Cr. App.] 77 S. W. 783. Prosecutor took up liquor and left money. Hargrove v. State [Tex. Cr. App.] 76 S. W. 926.

Evidence of sale held insufficient: Persons going in on election day without authority and helping themselves. Emerson v. State [Tex. Cr. App.] 76 S. W. 436. Contra, Knox v. State [Tex. Cr. App.] 77 S. W. 13. Sales on Sunday by a hotel keeper. People v. Ryan, 86 App. Div. [N. Y.] 524; In re Cullinan, 75 App. Div. [N. Y.] 301.

Keeping for sale: With intent to sell unlawfully. Com. v. Foster, 182 Mass. 276.

Character of liquor: Intoxicating property of "Tin Top" held not sufficiently proved. Faucett v. State [Tex. Cr. App.] 73 S. W. 807. "Waukeshaw" held sufficiently shown to be intoxicating. Racer v. State [Tex. Cr. App.] 73 S. W. 807. Finding that liquor was intoxicating held supported by evidence. Taylor v. State [Tex. Cr. App.] 72 S. W. 181. Not supported—sale to minor. Sinclair v. State [Tex. Cr. App.] 70 S. W. 218.

Time of sale: Evidence that sale took place on Sunday held sufficient. Tackaberry v. State [Tex. Cr. App.] 72 S. W. 384. Sale on Sunday held established by evidence. Pigford v. State [Tex. Cr. App.] 74 S. W. 323. Conviction of keeping open on Sunday held supported by evidence. Moncla v. State [Tex. Cr. App.] 70 S. W. 548. Testimony of complaining witness that he bought of defendant "along in June and in April" of a certain year fixes the certainty. West v. Stat E. 465.

Knowledge of mine knowledge sufficiently State [Tex. Cr. App.] sufficiently shown. Sin Cr. App.] 70 S. W. 218.

48. Guy v. State, 96 N

49. Lively v. State [T W. 1048.

50. State v. Gill [Min

51. Rowe v. Common 974, 70 S. W. 407.

52. Taylor v. State [T W. 536, 77 S. W. 221.

53. For an instructio of the testimony of de v. State [Neb.] 92 N. W for keeping place (P [Mich.] 98 N. W. 12), pr whisky in possession fo (State v. Norris, 65 S. C option district (William App.] 77 S. W. 215; Tayl App.] 77 S. W. 221). Pr ing a nuisance—owners disputed—instructions h State v. Stevens, 119 Iow

54. State v. Bradley,

55. State v. American 447.

56. State v. McManus, 700.

57. Laws 1901, c. 232, Co. v. Campbell, 66 Kan.

58. State v. McGahey 865.

59. State v. Stoffels [

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Whenever the outer door of a hotel is open, a police officer has a right to go into every part of the building to search for violations of the liquor law, and one who resists him is guilty of obstructing an officer;[60] but resistance to a search warrant, void for want of authority in the court to issue it, cannot be punished as a contempt,[61] and defendant cannot be in contempt in resisting a search warrant of which he had no knowledge.[62]

An action may be maintained against a constable who has seized liquors under the dispensary law in good faith but in fact without legal grounds.[63]

§ 8. *Abatement of traffic and injunction.*—Though the illegal sale of liquor is a public nuisance which may be abated by process instituted in the name of the state,[64] the acts of an agent of a common carrier cannot be declared a common nuisance where he delivers liquors sent C. O. D., in the absence of any showing that his conduct of the business was offensive in manner;[65] but in Iowa, it is held that the building in which an express office is situated under such circumstances may be abated.[66]

That the state by statute or common law can proceed and has hitherto proceeded by criminal prosecution to punish for the maintenance of a liquor nuisance and for the abatement thereof does not prevent the legislature authorizing it to proceed in equity to restrain, enjoin or abate such nuisance by the use of the equity writ of injunction,[67] and the remedy so created is cumulative and may be used, though the ordinary remedies are complete and available.[68] A municipal corporation may enjoin the illegal sale of intoxicating liquors therein as a nuisance, though the voters have not determined against the sale of liquor.[69]

The implied repeal of that section of the Kansas act of 1887[70] creating and defining a liquor nuisance, by the act of 1901[71] on the same subject, destroyed the force of the section providing a remedy by injunction to abate a nuisance of the kind mentioned in the repealed section.[72]

A petition for an injunction against a permit holder under the Iowa Mulct law should state in what respect he has violated the law in order that he may join issue and make his defense;[73] but it need not allege that defendant intends to continue the illegal use.[74]

The proceedings are governed by the general rules of equity procedure, but are not subject in every respect to its strictures,[75] and on the withdrawal of the relator, the court may substitute the county solicitor and treat the complaint as one for a violation of the liquor law.[76]

§ 9. *Civil liabilities for injuries resulting from sale. Civil damage laws.*—A child dependent for support on a father who commits a crime while intoxicated has a cause of action against the person furnishing the liquor, where the intoxication was the cause of the crime and the conviction of the crime deprives the child

60. Liquor Tax Law (Laws 1896, c. 112) § 37. People v. Miller, 79 N. Y. Supp. 1122.
61. State v. McGahey [N. D.] 97 N. W. 865.
62. State v. McGahey [N. D.] 97 N. W. 865.
63. Moore v. Ewbanks, 66 S. C. 374; Smith v. Lafar [S. C.] 46 S. E. 332.
64. Lofton v. Collins, 117 Ga. 434. A large garden or park with bands of music and illumination in which liquor selling is carried on is a nuisance. Tron v. Lewis, 31 Ind. App. 178.
65. Carthage v. Munsell, 203 Ill. 474.
66. Code, § 2384. Latta v. U. S. Exp. Co. [Iowa] 92 N. W. 68; Dosh v. U. S. Exp. Co. [Iowa] 93 N. W. 571.
67. Pub. Laws Me. 1891, c. 98. Davis v. Auld, 96 Me. 559.
68. Ga. Act Dec. 19, 1899. Legg v. Anderson, 116 Ga. 401.
69. Rev. Civ. Code, 1903, §§ 2400, 2403. Britton v. Guy [S. D.] 97 N. W. 1045.
70. Gen. St. 1901, § 2463.
71. Gen. St. 1901, § 2493.
72. State v. Estep, 66 Kan. 416, 71 Pac. 857.
73. Abrams v. Sandholm, 119 Iowa, 583.
74. Wright v. O'Brien [Me.] 56 Atl. 647.
75. Wright v. O'Brien [Me.] 56 Atl. 647.
76. State v. Lynch [N. H.] 55 Atl. 553.

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of support,[77] and a widow may recover for loss of her support her husband from the use of liquor sold him while intoxicated istrator cannot maintain an action for the death of his intestate

Any one who furnished liquors at the time of the intoxic any and all damages resulting from the intoxication,[80] though it is held that an unlicensed dealer is not liable.[81] Under the the location of the premises is material and the bondsmen can for sales made in any other premises than those described in th

Where an action is based on the death of the person to wh the sale must have resulted in intoxication, and the intoxicatio the efficient cause of death to create liability;[83] but where an i exposes himself that he contracts pneumonia and dies, the sale sulting in the intoxication is the proximate cause of his death.[8

Liquor sellers are liable for inducing habitual drunkenness for a consequent thriftless and dissipated career followed by hi ceased to furnish him; but they are not liable for such damages dealers before defendants engaged in the business.[85]

A statute providing that good faith as to a minor's age i action on a liquor dealer's bond for selling to him does not a for allowing him to enter and remain in a saloon,[86] but if th no longer than was necessary to get a drink given him in goo belief of his maturity, there is no liability, since there must b well as an entry.[87] Emancipation of a minor is no defense to a rent for allowing him to enter and remain in a saloon.[88] Neithe an action for selling that plaintiff did not object to others s though such acts might be admissible on the question of conse son said as to his father's consent is not admissible.[89]

Under the Iowa Mulct law providing that the tax shall premises, the location of the premises is material, and an amen spect introduces a new cause of action and is not permissible aft run.[90]

A widow cannot recover exemplary damages from the b plaintiff's wife, grounding her action on unlawful sales to he him and attempted to demolish defendant's saloon, is not admis of damages.[92]

The burden is on defendant to show that the sales were l

77. Loftus v. Hamilton, 105 Ill. App. 72, 75.

78. Nelson v. State [Ind. App.] 69 N. E. 298; Garrigan v. Thompson [S. D.] 95 N. W. 294.

79. Burns' Rev. St. 1901, §§ 285, 7288. Couchman v. Prather [Ind. App.] 68 N. E. 599.

80. Johnson v. Carlson [Neb.] 95 N. W. 788.

81. Paulson v. Langness [S. D.] 93 N. W. 655.

82. O'Banion v. De Garmo [Iowa] 96 N. W. 739, Saffrol v. Cobun [Tex. Civ. App.] 73 S. W. 828.

83. Baker v. Summers, 201 Ill. 52; Jaroszewski v. Allen, 117 Iowa, 632.

84. Nelson v. State [Ind. App.] 69 N. E. 298.

85. Stahnka v. Kreitle [Neb.] 92 N. W. 1042. See, also, League v. Ehmke [Iowa] 94 N. W. 938.

86. Rev. St. 1895, art. by Laws 1901, p. 314, c. son [Tex.] 73 S. W. 9 [Tex. Civ. App.] 76 S. W.

87. Cox v. Thompson S. W. 819; Minter v. Sta 76 S. W. 312; Tinkle v. S. W. 609. Entry on t sions. Tinkle v. Sween 73 S. W. 248.

88. Cox v. Thompson

89. Roach v. Springer S. W. 933.

90. O'Banion v. DeGa W. 739.

91. Garrigan v. Thom W. 294.

92. Gough v. State [1043.

93. Jaroszewski v. Al League v. Ehmke [Iowa]

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Where the intoxicated person was killed in a gambling room near defendant's saloon, the admission of evidence that defendant's attention had been called to the gambling room is erroneous.[94] Other matters of evidence are noted below.[95]

Where an intoxicated person is killed by collision of his vehicle with a telephone pole, alleged by defendant to have been negligently placed, the question of proximate cause of death is for the jury.[96]

Instructions in those as in other cases should clearly state the issues,[97] and the giving of an instruction in the language of the statute creating the liability without stating what plaintiff must prove is error.[98]

Plaintiff, if entitled to recover at all, is entitled to costs where the claim for damages brings the case within the jurisdiction of courts of record.[99]

§ 10. *Property rights in and contracts relating to intoxicants.*—One cannot recover the price of intoxicating liquors illegally sold,[1] but the seller may recover the price of liquors purchased with intent to resell in violation of the law, if he had no knowledge of the buyer's unlawful intent,[2] and mere knowledge of the buyer's unlawful purpose will not bar his recovery.[3] In an action on a current account, defendant has the burden of proving that a part of it is for liquor illegally sold.[4] A note given by defendant for liquor sold by plaintiff on credit to defendant's son to be drunk on plaintiff's premises is one for the purchase price of liquor and is void.[5] The record holder of a liquor tax certificate is not liable for the price of goods sold to another who is conducting business under it.[6]

Where a licensee assumes to conduct a business under the license as the undisclosed agent of another, the contract of agency is unlawful and the principal cannot maintain an action thereon.[7] A note given in consideration of the execution of a written statement of consent to the establishment of a saloon under the Iowa Mulct law is void as against public policy.[8] A contract never to permit the sale of liquor on certain premises is not against public policy, and though not a covenant running with the land, may be enforced in equity against a purchaser with notice.[9]

Liquors which have been shipped to purchasers in another state and have arrived at their destination and been stored in the carrier's warehouse, waiting delivery to the consignee, have arrived in such state within the meaning of the Wilson law[10] and the carrier is not liable to the consignor for their loss by seizure under the laws of the state into which they are shipped.

§ 11. *Drunkenness as an offense.*—One is not drunk when his mental or physical faculties are not affected.[11] That defendant was drunk in a private house, made no disturbance and was not exposed to public view, is no defense.[12]

94. Baker v. Summers, 201 Ill. 52.

95. Evidence in suit founded on inducing habitual drunkenness. League v. Ehmke [Iowa] 94 N. W. 938. Judgment based on allowing minor to remain in saloon held not supported by evidence. Dickson v. Holt, 80 Tex. Civ. App. 297. Consent of parent to sales to minor son. Roach v. Springer [Tex. Civ. App.] 75 S. W. 933.

96. Jaroszewski v. Allen, 117 Iowa, 632.

97. Instructions in a suit founded on inducing habitual drunkenness. League v. Ehmke [Iowa] 94 N. W. 938.

98. Baker v. Summers, 201 Ill. 52.

99. Purvis v. Segar [Mich.] 93 N. W. 261.

1. Dreyfus v. Goss [Kan.] 72 Pac. 537.

2. Fuller v. Hunt, 182 Mass. 299.

3. McWhorter v. Bluthenthal, 136 Ala. 563.

4. Overstreet v. Brubaker, 98 Mo. App. 75.

5. Laws 1896, p. 74, c. 112, § 32, as amended by Laws 1897, p. 237, c. 312. Wagner v. Scherer, 89 App. Div. [N. Y.] 202.

6. Furey v. O'Connor, 85 N. Y. Supp. 324.

7. Ruemmell v. Cravens [Okl.] 74 Pac. 908.

8. Acts 25th Gen. Assem. c. 62, § 17. Greer v. Severson, 119 Iowa, 84.

9. Sullivan v. Kohlenberg, 31 Ind. App. 215.

10. Act Cong. Aug. 8, 1890, 26 Stat. 313 (U. S. Comp. St. 1901, p. 3177). Southern R. Co. v. Heymann [Ga.] 45 S. E. 491.

11. Roden v. State, 136 Ala. 89.

12. Mass. Rev. Laws, p. 1791, c. 212, § 39. Com. v. Conlin [Mass.] 68 N. E. 207.

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In Vermont, imprisonment in the house of correction may be ber of days there are dollars of fine,[13] and on conviction of a may be imposed in addition to fine and imprisonment.[14]

JOINT ADVENTURES.

A joint adventure is an enterprise undertaken by sever But the mere fact that a number of persons employ anoth severally in the same line of business does not show them joint adventure, nor render them jointly liable.[16] A majority turers may act as the agent of them all,[17] and may bind on by their action, even though he has no actual notice of the m action is taken.[18] An implied contract arises on the part of to repay to his co-adventurers money paid by them for his shar

Members of a joint adventure acting as its general mar pelled to account for all secret profits derived therefrom,[20] members who have improperly derived an advantage from w are excluded.[21]

JOINT-STOCK COMPANIES.

In some states the organization of a joint stock company i ute.[22] Such company may be organized to deal in real esta of managers thereof may have the power to authorize the exe and deeds.[24] A shareholder may be estopped to deny a conv board of managers.[25]

The real estate of such a company is regarded as personal interest therein cannot be sold under an execution on real esta

13. V. S. 5206, Acts 1902, p. 112, No. 90, § 97. In re Rogers [Vt.] 55 Atl. 661.

14. V. S. 1864, Acts 1902, p. 112, No. 90, § 97. In re Rogers [Vt.] 55 Atl. 661.

15. Joint purchase of a horse. Newman v. Ruby [W. Va.] 46 S. E. 172. See Cyc. Law Dict. 504.

16. Owners of land contracting severally with a purchaser thereof, are not jointly liable to a broker for his commissions in making the sale. Whaples v. Fahys, 87 App. Div. [N. Y.] 518.

17. A contract between joint adventurers for the purchase of lots to be divided among them as a majority of the subscribers may decide constitutes the majority the agent of them all for that purpose; and a division so made binds them all, even though one of the subscribers had no actual notice of the meeting at which the division was made. Morey v. Clopton [Mo. App.] 77 S. W. 467.

18. Where the subscriber was out of the state, and had only constructive notice of the meeting. Morey v. Clopton [Mo. App.] 77 S. W. 467.

19. An action at law may be maintained therefor (Newman v. Ruby [W. Va.] 46 S. E. 172), though certain conditions as to the contract under which the money is paid are not fulfilled, if he afterwards approves the contract (Id).

20. Weidenfeld v. Hollins, 41 Misc. [N. Y.] 439.

21. But before they can be compelled to account the plaintiff must show that they were his fiduciaries, and that they had realized indirect profits or joint adventure, in w lowed to participate, f examination before tria enfeld v. Hollins, 41 Mi

22. Comp. Laws Mic ing articles of associa the register of deeds is they are filed when the register of deeds and latter takes the reco are separated. Stradle Co. [Mich.] 97 N. W. 7

23. The title to whi for the company. In Works Estate, 204 Pa. of the proceeds of the t a company ("limited canal project is within v. Cargill Elevator Co. A conveyance from on is not invalidated by t ber of the one compa of the other. Id.

24. Stradley v. C [Mich.] 97 N. W. 775.

25. A member signi sociation appointing a a place outside the sta ognizing their right state, cannot complai conveyances authorize at a meeting outside t Cargill Elevator Co. [

26. In re Pittsburg 204 Pa. 432.

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Where a shareholder is represented at a meeting by proxy, he is estopped to deny the legality of such meeting,[27] and a presumption of irregularity of the meeting of a board of managers is not raised by the mere fact that all the members of the board were not present.[28] Notice by mail of an annual meeting is sufficient.[29]

The rights, powers, and liabilities of the shareholders, as between themselves, are regulated by the law of partnerships.[30] A shareholder can dispose of his stock only according to the articles of association, where provision is made therein for that purpose.[31] He may bid for and purchase land of the company at a public sale, conducted fairly and openly,[32] or purchase claims against it where it has gone into liquidation.[33] But he cannot maintain an action for an accounting against a trustee of the company for the increased value of a share delivered to him for sale.[34] A member advancing money to pay incumbrances on company property is entitled to all the rights of the original incumbrancer.[35]

Dissolution of a joint stock company may be decreed for fraud in its management or for good cause shown.[36]

JUDGES.[37]

§ 1. Designation, Qualification and Tenure (577).
§ 2. Special or Substitute Judges (578).
§ 2. Powers, Duties and Liabilities (579).
§ 4. Disqualification in Particular Cases (580).

§ 1. *Designation, qualification and tenure.*—If the constitution fixes the term of judges and the time of their election, the legislature cannot alter the same.[38] A constitutional prohibition of the establishment of new courts does not, however, forbid the adoption by statute of new methods of choosing judges.[39]

27. By contending that the meeting outside the state was contrary to law, and the by-law authorizing the proxy invalid. Stradley v. Cargill Elevator Co. [Mich.] 97 N. W. 775.

28. Stradley v. Cargill Elevator Co. [Mich.] 97 N. W. 775.

29. Under Comp. Laws Mich. 1897, § 6083, requiring written notice to each member ten days before the meeting. Stradley v. Cargill Elevator Co. [Mich.] 97 N. W. 775.

30. Retired members of a banking "partnership" held not entitled to be reimbursed out of assets remaining after liquidation for the payment of debts while they were yet members of firm. Stockdale v. Maginn [Pa.] 56 Atl. 439.

31. A provision in the articles of association requiring a member or his personal representative wishing to dispose of his stock to offer it to the association or one of its members does not apply in case of the death of a member so as to prevent his stock passing to his residuary legatee; the mere delivery of stock to a residuary legatee by an executor is not a transfer within the meaning of such provision. Lane v. Albertson, 78 App. Div. [N. Y.] 607.

32. The purchase by a member of a joint stock company ("limited partnership") of land of the company at a foreclosure sale for less than its value is not conclusively a fraud. Stradley v. Cargill Elevator Co. [Mich.] 97 N. W. 775.

33. The chairman of a "partnership association" acting as its superintendent is not thereby precluded from buying up claims against it for his own benefit, where it has gone into liquidation and trustees appointed to wind up its affairs. Morris v. Imperial Cap Co. [Mich.] 98 N. W. 5.

34. Where the trustee acts as his agent in making the sale and himself becomes the purchaser thereof in good faith, with the shareholders' consent. Swan v. Davenport, 119 Iowa, 46.

35. Members of a joint stock company ("limited partnership") advancing money to pay mortgages on property owned by the company, and taking assignments of such mortgages, are entitled to all the rights of the original mortgagee against the company. Stradley v. Cargill Elevator Co. [Mich.] 97 N. W. 775.

36. The fraud in the management of a joint stock company necessary to effect a dissolution under Laws N. Y. 1894, p. 413, c. 235, § 5, must be such as would defeat the rights of shareholders contrary to the agreement of the association, or those managing the association must be converting its profits or assets to their own use. Colton v. Raymond, 41 Misc. [N. Y.] 580. A joint stock company's assigning mortgages to its manager to avoid paying taxes is not a fraud on the members of the company. Stradley v. Cargill Elevator Co. [Mich.] 97 N. W. 775.

37. See titles Courts, 1 Curr. Law, 824; Jurisdiction, post.

38. People v. Knopf, 198 Ill. 340; People v. Olsen, 204 Ill. 494; People v. Campbell, 138 Cal. 11, 70 Pac. 918. Lengthening term by no provision for election. State v. Moores [Neb.] 96 N. W. 1011.

39. Grayson v. Bagby, 25 Ky. L. R. 44, 74 S. W. 659.

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Under the power to increase the number of judges of a court provide for a temporary increase.[40] A provision that judges vents the designating of incumbent judges for a newly creat district.[41] Vacancies in the office of judge may sometimes ernor alone until such time as he may secure the confirm ment by the senate.[42]

A judge of a municipal court, elected by and having part of a township or county, is not a township or county offic

Failure to qualify[44] or disqualification[45] or a defect in th does not avoid proceedings before a judge.

Salary.—A constitutional power to fix salaries cannot nicipalities.[47] Under a constitutional power to increase j the legislature must, in raising the salaries, treat all alike claim for compensation for extra work unless it is allowed if a statute gives a judge an additional office, he may have A diminution of a judge's jurisdiction does not affect his sa tected against diminution during the judge's term are not tax

§ 2. *Special or substitute judges. Appointment and* of a term is not an "engagement" of the regular judge whi pointment of a special justice to sit at an adjournment Where, by statute, a special justice is elected by vote of th those voting is sufficient to elect.[54] In the absence of con the legislature may authorize the interchange of circuits b judge from an outside district is called to try the case, the randum need not contain the reasons for the call.[56] Calling sit in extra session does not usurp a legislative prerogative by ber of judges.[57] The power to substitute a justice of the pe police judge may be exercised where he is biased and a ch possible.[58] An agreement for submission of a case to a pa technical objections to his acting.[59]

40. State v. McBride, 29 Wash. 335, 70 Pac. 25.

41. Election must be provided. In re Mansfield, 22 Pa. Super Ct. 224.

42. In re Advisory Opinion to the Governor [Fla.] 34 So. 571.

43. Griffith v. Manning [Kan.] 73 Pac. 75.

44. The fact that a judge has not taken the constitutional oath does not render his acts invalid. Tower v. Whip, 53 W. Va. 158.

45. Acceptance of an office legally incompatible with his judgeship. Old Dominion B. & L. Ass'n v. Sohn [W. Va.] 46 S. E. 222.

46. Will not work release on habeas corpus of one convicted. Smith v. Sullivan [Wash.] 73 Pac. 793.

47. Salaries of "state" judges. Colbert v. Bond [Tenn.] 75 S. W. 1061.

48. Bennett v. State [S. D.] 93 N. W. 643.

49. Pawnee County v. Belding [Neb.] 95 N. W. 776; Finley v. Ter. [Okl.] 73 Pac. 273. A judge is not bound to appear and defend his jurisdiction when it is questioned in a higher court and has no claim for services in so doing. Garfield County Com'rs v. Beardsley [Colo. App.] 70 Pac. 155.

50. But not if the statute merely increases his powers. Finley v. Ter. [Okl.] 73 Pac. 273.

51. Ft. Scott v. Slater [Kan.] 72 Pac. 550. **In a proceeding b his salary** he shoul show his duties by but should be allow timony. Daniel v. L. R. 159, 74 S. W.

52. In re Taxation 692.

53. Caldwell v. B 748.

54. Merrell v. Stat W. 979. For constr provisions relating t cial judges, see Kru App.] 72 S. W. 601 Bender [Tex. Civ. Ap

55. First Nat. Ba [Miss.] 33 So. 849; G [Ind. T.] 70 S. W. 8.

56. Com. v. Scou 503; State v. Hunter,

57. All regular ju Bigcraft v. People, 3

58. There was no be sent on a chang under laws 1901, c. 1 er [Neb.] 95 N. W. 6

59. Bohannon v. T 76 S. W. 46.

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Powers.—A visiting judge legally called from a different judicial district has all the powers of the regular judge.[60] If a special justice, called in to try a case on account of affidavit of bias of the regular justice, does not finish the case before the expiration of his term, another special justice may be called in.[61] A special justice may finish a case pending before him after the return of the regular judge.[62] If a decree of a special justice holding a court is reversed by the higher court, he cannot be compelled by mandamus to rehear the case, the term of his special appointment having expired.[63]

§ 3. *Powers, duties and liabilities.*—The powers of judges as such are distinct from their powers as a court.[64] A single judge may, if properly authorized, exercise the power of the full court on a matter.[65]

Effect of change of judge or expiration of term.—The judge hearing the case must, if able, settle it for appeal;[66] but if his term of office ends with written statement of a case for appeal to be made, but with no time limit for making the "case," the appeal fails, though the judge succeeds himself.[67] He may after his term sign and file his conclusions of law and fact,[68] and a signing after the case had passed out of his district by redistricting has been upheld.[69] The statutory power of the successor of a deceased judge to sign in the latter's stead a bill of exceptions carries with it power to overrule a motion for a new trial.[70] If the judge before whom the motion for a new trial is made dies while it is pending, his successor may determine it.[71] Where one judge orders an inquisition as to sanity which comes up before another judge, the latter may deny the inquisition because of the insufficiency of an affidavit presented to the former.[72]

Territorial limitations on judge's power.[73]—A district judge cannot grant a temporary injunction when out of his district.[74] He may hear motions in ancillary proceedings anywhere in his district and not necessarily in the county within which the case is pending.[75] If a question of reference to a master is submitted to a judge at the trial in term time, he may make the order while holding court in another county.[76]

Powers of judges in vacation or at chambers.—Where the length of a term of court is prescribed by statute, all acts done by the court after the prescribed period has elapsed are coram non judice and void.[77] But if the court is authorized by statute to hold special sessions, a simple adjournment to a day beyond the pending term may be valid as the appointment of a special session.[78] Statutory power

60. Demaris v. Barker [Wash.] 74 Pac. 362. May call another judge if disqualified. State v. Gilman, 97 Mo. App. 296. Contra, State v. Gillham, 174 Mo. 671.

61. Fordyce v. State, 115 Wis. 608.

62. Bohannon v. Tarbin, 25 Ky. L. R. 515, 76 S. W. 46.

63. Rumsey v. Lindsey [Pa.] 56 Atl. 430.

64. Judges as well as courts of record can issue warrants against election officers. In re Election Ct., 204 Pa. 92.

65. Certiorari proceedings. Statute assailed as encroachment on court. Brown v. Street Lighting Dist. [N. J. Law] 55 Atl. 1080.

66. Equitable Ins. Co. v. Fishburne [S. C.] 45 S. E. 204.

67. Mowery v. Wilson State Bank [Kan.] 72 Pac. 539.

68. Storrie v. Shaw [Tex.] 75 S. W. 20.

69. Patterson v. Yancey, 97 Mo. App. 681. The converse was held where the new judge signed it in the face of a contrary provision by statute. Carr v. Noah, 28 Ind. App. 105.

70. Fehlhauer v. St. Louis [Mo.] 77 S. W. 843.

71. Union Pac. R. Co. v. Lotway [Neb.] 96 N. W. 527.

72. Lee v. State [Ga.] 43 S. E. 994.

73. A change in the territorial limits of a judge's jurisdiction does not affect his right to sign a bill of exceptions. Patterson v. Yancey, 97 Mo. App. 681.

74. Bedwell v. Ross [Okl.] 73 Pac. 267.

75. Moore v. Moore, 131 N. C. 371.

76. Muckenfuss v. Fishburne, 65 S. C. 573.

77. In re Stevenson, 125 Fed. 843; Oliver v. Snider, 176 Mo. 63; Storrie v. Shaw [Tex. Civ. App.] 76 S. W. 596; Webb v. Hicks, 117 Ga. 335. After a term of court has ended in which an order changing venue is made it is beyond the power of the court to set aside the order. State v. Fort [Mo.] 77 S. W. 741. In New York a supreme judge may ex parte and in vacation allow time to plead in an action pending in the county court when the county court could do so. Edwards v. Shreve, 83 App. Div. [N. Y.] 165.

78. In re Stevenson, 125 Fed. 843.

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to adjourn a term of court in the preceding vacation must accordance with the statutory authority.[79] Courts of eq thorized by statute to make interlocutory decrees in vacati point and remove trustees at chambers.[81] Common law ju ized to issue in vacation the writs of habeas corpus[82] and ce bail bonds.[84] But judges have been denied the power in bill,[85] to order a sale of a minor's property,[86] to hear mot set aside a judgment,[88] or to grant a writ of assistance.[89]

Immunities and exemptions.—The judges of superio risdiction are not liable for their judgments in matters w though they be made oppressively, maliciously and corrup poses liability upon a judge for accepting a guardian's bon bound to see that a signature by an agent is duly authentic sive fees is no ground for impeachment of a judge unless h an attorney holds the office of surrogate and violates the la it is no ground for disbarment, but for removal from office ing a case cannot be called as a witness in that case.[94]

Disability to practice.—An attorney at law elevated practice except in those cases in which he is himself a pa inferior court, if a member of the bar, may accept an app the state in a criminal case not tried before him.[96]

§ 4. *Disqualification in particular cases.*—Common l der judgments voidable, but statutory disqualifications usu Disqualification of a judge arises from interest in the subj tion, relationship to one of the parties, and statutory prohi

79. Martin v. Scott [Ga.] 44 S. E. 974.
80. Webb v. Hicks, 117 Ga. 335. Order to tutor to deposit funds. Succession of Wegmann, 110 La. 930.
81. Heath v. Miller, 117 Ga. 854.
82. In re Election Court, 204 Pa. 92.
83. People v. Stillings, 76 App. Div. [N. Y.] 143.
84. State v. Eyermann, 172 Mo. 294.
85. Cain v. Wyoming, 104 Ill. App. 538.
86. Mitchell v. Turner, 117 Ga. 958.
87. Wood v. Wiley Mfg. Co., 117 Ga. 517.
88. Chapman v. State, 116 Ga. 598.
89. Hartsuff v. Huss [Neb.] 95 N. W. 1070.
90. Webb v. Fisher, 109 Tenn. 701; Patterson v. Yancey, 97 Mo. App. 681.
91. Best v. Robinson, 24 Ky. L. R. 767, 69 S. W. 1087.
92. State v. Lovejoy, 135 Ala. 64.
93. In re Silkman, 84 N. Y. Supp. 1025.
94. State v. De Maio [N. J. Law] 55 Atl. 644.
95. Perry v. Bush [Fla.] 35 So. 225.
96. Bliss v. State [Wis.] 94 N. W. 325.
97. Forest Coal Co. v. Doolittle [W. Va.] 46 S. E. 238.
98. In re Nevitt [C. C. A.] 117 Fed. 448.

Disqualification by interest: Judge interested in lease of property in controversy. Forest Coal Co. v. Doolittle [W. Va.] 46 S. E. 238. If the statute provides that a judge shall not be interested in the cause tried before him, it is no ground for objection that he is interested in the determination of the points raised. (Judge owned land on river adjoining that alleged to be damaged by pollution of the stream.) New Odorless Sewerage Co. v. Wisdom, 30 Tex. Civ. App. 224. A judge who pass on a claim w sents against an es 2545, 2869, 2870]. Pac. 862. The fact ing on the bench w corporation to whi and afterwards, wh ored to procure a disqualify him to mandamus to pay gone to judgment. 117 Fed. 448. Judg ministration of an against estate. El Bank [Tex. Civ. A

Judge having act tion. State v. Gray Having been couns issue here raised Blackwell v. Farm Civ. App.] 76 S. W for state in aidin for same crime no v. State [Tex. Cr. merly attorney for ble v. First Judici 530. Preparing mo er court. Gaines App.] 74 S. W. 58

Disqualification and interested pa grandfather. In re Fed. 1010. Membe corporation for wh trustee. Smith v. At common law, re tion. In re Eaton

Bias.—Bias or prejudice is no disqualification in the absence of statute.[99] Statutory proceedings for disqualifying a judge by affidavit must be availed of strictly in accordance with their provisions.[1] In some jurisdictions, allegations of bias in an affidavit, stating grounds for the same, cannot be controverted.[2] Such a statute has been held to allow but one change.[3] The facts in the cases collected in the note have been held not to constitute bias.[4] A judge is not disqualified to try the question whether he is biased.[5] A temporary disqualification of a judge, arising after the trial of a case but before argument, does not prevent him from deciding the case after the disqualification is removed.[6] If the party unfavorably affected by the disqualification of the judge does not make reasonable protest, he cannot avail himself of the objection.[7] When a judge is the sole person having jurisdiction and the law provides no method of getting another, he must determine as a matter of necessity.[8] A judge disqualified by interest may be restrained from proceeding by a writ of prohibition.[9] Mandamus is the proper remedy to compel a judge under disqualification to provide for an impartial trial.[10] Upon certiorari to quash a conviction because of the judge's bias, evidence of bias should be presented upon a rule obtained from the court.[11]

JUDGMENT.[12]

§ 1. Time for Decision (581).
§ 2. Judgments on Offer, Consent, Stipulation or Confession (582).
§ 3. Default or Office Judgments (582).
§ 4. Requisites (583).
A. In General (583).
B. Parties (583).
C. Conformity to Process, Pleading, Proof, Verdict or Findings (584).
D. Judgment Non Obstante (584).
§ 5. Interpretation and Effect in General (584).
§ 6. Entry and Docketing or Indexing (585).
§ 7. Opening, Amending and Vacating by Suit, Motion or Writ of Error Coram Nobis (586).
A. Time for Application (586).
B. Amendment, Correction and Modification (587).
C. Grounds and Propriety of Opening or Vacating (588).
D. Parties Applicant and Opposed (591).
E. Relief Grantable (591).
F. Modes of Procedure (592).
§ 8. Collateral Attack (594).
§ 9. Lien (597).
§ 10. Suspension and Revival (598).
§ 11. Assignment (599).
§ 12. Payment, Discharge and Satisfaction; Interest (600).
§ 13. Actions on Judgment (600).

§ 1. *Time for decision.*—Entry or rendition within the time prescribed by statute is essential,[13] but tardiness does not make it void[14] unless jurisdiction be

99. In re Weston [Mont.] 72 Pac. 512.

1. Affidavit too late. In re Kasson's Estate [Cal.] 74 Pac. 436.

2. Powers v. Com., 24 Ky. L. R. 1007, 70 S. W. 644.

3. State v. Gardiner, 88 Minn. 130.

4. Judge believed defendant guilty. State v. Morrison [Kan.] 72 Pac. 554. Judge previously had ordered prisoner held for trial for perjury. State v. Brownfield [Kan.] 73 Pac. 925. Judge had previously tried the case without a jury. Doll v. Stewart, 30 Colo. 320, 70 Pac. 326. Judge had made remarks derogatory to the prisoner's honesty. Bismarck v. State [Tex. Cr. App.] 73 S. W. 965.

5. Talbot v. Pirkey, 139 Cal. 326.

6. Cases of temporary appointments to a higher court. Irving Nat. Bank v. Moynihan, 78 App. Div. [N. Y.] 141; Kane v. Hutkoff, 38 Misc. [N. Y.] 678.

7. Relationship disclosed at trial—five days' delay and unfavorable decision, before entry of protest. Smith v. Amiss, 30 Ind. App. 530. No protest until after verdict, relationship known during trial. Berry v. State, 117 Ga. 15.

8, 9. Forest Coal Co. v. Doolittle [W. Va.] 46 S. E. 238.

10. Gamble v. First Judicial Dist. Ct. [Nev.] 74 Pac. 530.

11. State v. De Maio [N. J. Law] 55 Atl. 644.

12. For matters relating to foreign judgments see Foreign Judgments, 2 Curr. Law, 50. For conclusiveness see Former Adjudication, 2 Curr. Law, 60. For enforcement of judgments see Execution; Creditors' Suits; Supplementary Proceedings; Sequestration.

13. Under Conn. Rev. St. 1902, § 510, a judgment of the common pleas rendered later than the next term after trial commenced against express objection is erroneous. Party held not estopped from objecting to later rendition. Lawrence v. Cannavan [Conn.] 56 Atl. 556.

14. That the judge of the superior court did not render a decision within 90 days as required by Const. art. 4, § 20, will not ren-

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thereby lost.[15] In computing the time, Sunday will not be
motion for new trial has been held not a judgment.[17] Rer
ble,[18] but ministerial acts attendant thereon may be.[19]

§ 2. *Judgments on offer, consent, stipulation or co*
judgment may be made in a case of unliquidated damages,[20]
on the party and not on his attorney,[21] and must be accep
given in time to be available.[22] A judgment on consent afte
written power to plaintiff's attorney is, in the absence of fraud
that judgment shall follow the result of a case then on trial
issues not embraced in such action.[24] Judgment on stipulati
an accepted award is a judgment on consent.[26] Before a j
can be taken, a summons should have been issued and return
time.[27] The affidavit of the justice of the claim is not essen
judgment by confession.[28]

§ 3. *Default or office judgments.*[29]—A judgment by d
where the pleas present no material issues,[30] but it cannot b
murrer filed was undisposed of,[31] or after the death of
expiration of the time for revivor,[32] or against a partnershi
composing it had answered.[33] It is within the court's disc
of the cause of action on application for a default judgm
plaint.[34] If the amount of damages is ascertainable only
must be assessed by a jury,[35] since the default merely admit
and the charge of conspiracy and fraud must be proved by
of evidence.[37] Proof of the execution of the mortgage sued
A second inquiry as to damages need not be taken on failu
the terms of the order opening the first default.[39]

In Delaware, in actions on instruments in writing for
an affidavit of demand is a condition precedent.[40]

der a judgment entered thereafter void. Demaris v. Barker [Wash.] 74 Pac. 362..

15. Under Laws 1902, c. 580, § 230, the justice of the municipal court of New York loses jurisdiction if he fails to file decision within fourteen days after submission. Van Valis v. Charcona, 40 Misc. [N. Y.] 226; Organ v. Interurban St. R. Co., 85 N. Y. Supp. 872. Applied to case commenced before but submitted after that act went into effect. Wallace v. Harris, 40 Misc. [N. Y.] 216.

16. Justice's judgment. Huber v. Ehlers, 76 App. Div. [N. Y.] 602.

17. The statute does not apply to a decision on a motion for a new trial. Collins v. Lamson Consol. Store Service Co., 85 N. Y. Supp. 111.

18. Mandamus to compel decision denied. McInerney v. Tarvin, 24 Ky. L. R. 2005, 72 S. W. 1107.

19. Marstiller v. Ward, 52 W. Va. 74.

20. Mo. Rev. St. 1899, § 757. Maxwell v. Mo., K. & T. R. Co., 91 Mo. App. 582.

21. Since the attorney cannot compromise the claim. Maxwell v. Mo., K. & T. R. Co., 91 Mo. App. 582.

22. Neb. Civ. Code, § 565. Becker v. Breen [Neb.] 94 N. W. 614.

23. Such judgment is not a judgment by confession under Sand. & H. Dig. § 5872. Houpt v. Bohl [Ark.] 75 S. W. 470.

24. Abbott v. Lane [Neb.] 95 N. W. 599.

25. Corby v. Abbott [Mont.] 73 Pac. 120.

26. McLeod v. Graham, 132 N. C. 473.

27. After the la
the filing of the cc
turn of the summor
is not available.
Cal. 270, 70 Pac. 88.

28. Smith v. Ridl

29. The doctrine
treated in title Def

30. Glens Falls
33 So. 473. Judg
amended petition s
action is void, no
sued thereon. Cope
1734, 72 S. W. 284.

31. Warford v. T
73 S. W. 1023.

32. Bauer v. Wo

33. Owen v. Kul
W. 432.

34. Sibley v. Wel

35. The clerk ca
and enter final juc
action on an insu
amount of loss mu
Falls Ins. Co. v. Po

36. Osborn v. Le

37. Neeley v. Rol

38. Downing N.
Colo. 283, 70 Pac. 4

39. Greenberg v
930.

40. Del. Rev. Co
Affidavit held insuf
to show and attach

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The right to enter a default judgment may be barred by laches.[41] If it appeared on a trial that plaintiff was not entitled to recover, he cannot complain that the court refused to allow him a default judgment.[42]

Office judgments.—In scire facias upon a judgment the plaintiff may take an office judgment and file his affidavit of the amount due.[43] If no plea is filed, the office judgment becomes final on the last day of the term following the entry,[44] and the plaintiff may thereafter at any time demand judgment by filing the required affidavit or prove his case.[45] The affidavit for final judgment must state that the sum due remains unpaid.[46] The duty of the court to render judgment on the filing of an affidavit of the amount due after an office judgment, without an order of inquiry as to damages or plea by the defendant, is immaterial and may be enforced by mandamus.[47]

§ 4. *Requisites. A. In general.*—Where the trial of facts is by the court without a jury, a decision is an essential prerequisite to the judgment.[48] A finding alone is not a judgment.[49] The judgment or record should be signed,[50] which may be without notice on the day of rendition of the decision.[51] After decision and interlocutory judgment thereon, it is error to enter judgment upon the interlocutory judgment.[52] A judgment by confession need not recite that evidence was heard.[53] If a court of general jurisdiction in the exercise of a special or limited jurisdiction grants a default judgment, it must show the existence of the jurisdictional facts.[54]

(§ 4) *B. Parties.*—Judgment can be entered only against parties,[55] and it cannot therefore be entered against the surety for costs;[56] but if entered against the surety, it is invalid only as to him.[57]

If the liability is joint, the judgment should go against all the defendants, though the omission of one of the debtors is not necessarily fatal,[58] and judgment may in some jurisdictions be entered against those served.[59]

count. Reybold v. Denny, 3 Pen. [Del.] 589. If the demand is on a certificate of a fraternal insurance association the affidavit should show a compliance with rules, by-laws and regulations [Rev. Code 1893, p. 789, c. 106]. Hibbert v. Guardian S. & L. Ass'n, 3 Pen. [Del.] 591.

41. Judgment entered eight years after service of the summons is voidable and in St. Paul municipal court may be set aside under Sp. Laws 1889, c. 351, § 2, subd. 7. Coleman v. Akers, 37 Minn. 492.

42. Owen v. Kuhn [Tex. Civ. App.] 72 S. W. 432.

43. Under Code 1899, c. 125, § 46. Marstiller v. Ward, 52 W. Va. 74.

44. Code 1899, c. 125, § 46. Marstiller v. Ward, 52 W. Va. 74. Code 1899, c. 125, § 46. The defendant cannot thereafter plead; if however there is an order for inquiry the plea may be filed at the succeeding term after entry of the office judgment or any term thereafter. Id.

45. Marstiller v. Ward, 52 W. Va. 74. He need not file his affidavit and declaration at rules. Id.

46. Marstiller v. Ward, 52 W. Va. 74; Hutton v. Holt, 52 W. Va. 672. Sufficiency of affidavit of amount due to entitle plaintiff to final judgment after office judgment. Marstiller v. Ward, 52 W. Va. 74.

47. Code 1899, c. 125, § 46. Marstiller v. Ward, 52 W. Va. 74; Lentschner v. Lentschner, 80 App. Div. [N. Y.] 43.

48. Sommer v. Sommer, 87 App. Div. [N. Y.] 434.

49. Males v. Murray, 23 Ohio Circ. R. 396.

50. A judgment signed by a special judge is not void because he did not take the oath of office. Tower v. Whip, 53 W. Va. 158.

The failure of the judge to sign the foreclosure decree or record will not invalidate the decree. Gallentine v. Cummings [Neb.] 96 N. W. 178. In Louisiana judgments must be signed by the judges and read in open court and until then they are only inchoate. Baham v. Stewart, 109 La. 999.

51. White Crest Canning Co. v. Sims, 30 Wash. 374, 70 Pac. 1003.

52. Crichton v. Columbia Ins. Co., 81 App. Div. [N. Y.] 614.

53. Day v. Johnson [Tex. Civ. App.] 72 S. W. 426.

54. A judgment by default under Ala. Code 1896, § 1856, merely reciting that the defendant had failed to properly answer interrogatories is insufficient and cannot be sustained as a general default judgment. Goodwater Warehouse Co. v. Street, 137 Ala. 621. Judgment held sufficient as to form of recitals. Staacke v. Walker [Tex. Civ. App.] 73 S. W. 408. Judgment against minor and next of friend held proper in form. Day v. Johnson [Tex. Civ. App.] 72 S. W. 426.

55. Ault v. Cowan, 20 Pa. Super. Ct. 628.

56. On a verdict for defendant it is error to render judgment for costs against the sureties for costs. Pacific Exp. Co. v. Emerson [Mo. App.] 74 S. W. 132. In Ala. under Code § 1315 a motion is a jurisdictional prerequisite. Dow Wire Works Co. v. Englehardt, 136 Ala. 608.

57. Pacific Exp. Co. v. Emerson [Mo. App.] 74 S. W. 132.

58. Such a judgment is at most merely

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(§ 4) *C. Conformity to process, pleading, proof, verdict o*
ment must conform to the pleadings and the record as a whole,
therefore be in excess of the amount claimed,[61] but if it exceeds
it is void only as to the excess.[62] Judgments must follow the

(§ 4) *D. Judgment non obstante* will be granted where
that the party against whom the verdict is rendered is enti
as where there is a special verdict inconsistent with the gener
the record shows that the issues joined were not immaterial, i
fendant.[66] Where a contrary verdict should have been rende
direct it,[67] but unless it clearly appears from the evidence that t
entitled to judgment as a matter of law, the judgment will n
motion for judgment for all defendants non obstante veredicte
where it appears that it may have been granted as to some of th
In North Dakota, a motion for a directed verdict must have
application for a judgment non obstante can be entertained.[70]
for the jury to pass upon, a motion for judgment non obstante

§ 5. *Interpretation and effect in general.*[72]—The adjudica
recitals as to what is awarded.[73] Decrees and orders on the

voidable. Seymour v. Richardson Fueling Co., 205 Ill. 77; School Dist. No. 34 v. Kountze [Neb.] 92 N. W. 597. A joint judgment on an obligation on which the defendants were severally liable is not reversible error [Mills' Ann. Code, § 78]. Johnson v. Bott [Colo. App.] 72 Pac. 612.

59. Van Zandt v. Winters, 22 Pa. Super. Ct. 181.

60. Solt v. Anderson [Neb.] 93 N. W. 205; Satterlund v. Beal [N. D.] 95 N. W. 518; Smith v. St. Louis Transfer R. Co., 92 Mo. App. 41; Handlin v. Dodt [La.] 34 So. 881; Koehler v. Reed [Neb.] 96 N. W. 380; Denver Life Ins. Co. v. Bucknum [Colo. App.] 70 Pac. 1092. The parties may, however, try the case on different issues than those raised. Knickerbocker v. Robinson, 83 App. Div. [N. Y.] 614. A joint judgment is not sustained by a declaration on the common counts against both defendants and the bill of particulars stated a cause of action against but one of the defendants since in such case the bill of particulars controls. Schoenberger v. White, 75 Conn. 605. A judgment for labor and materials does not support a petition for work and labor. Fidelity & Deposit Co. v. Parkinson [Neb.] 94 N. W. 120. The judgment should be for installments sued for and should not include installments falling due pending the action. Stockton v. Jacksonville & A. R. Co. [Fla.] 33 So. 401. Recovery held within pleadings. Schlimbach v. McLean, 83 App. Div. [N. Y.] 157. Judgment in claim and delivery reversed because warrant from pleadings and verdict. Conley v. Dunn [Mont.] 72 Pac. 654. Applied to default judgment. Halvorsen v. Orinoco Min. Co. [Minn.] 95 N. W. 320.

61. This though the verdict exceeds the demand. Davis v. Hall [Neb.] 97 N. W. 1023; Powell v. Horrell, 92 Mo. App. 406; Lifshitz v. McConnell, 80 App. Div. [N. Y.] 289; Smith v. Morrison [Colo. App.] 74 Pac. 535. The verdict in an action for tort must allow interest to warrant its inclusion in the judgment. It must also be demanded in the pleadings. San Antonio, etc., R. Co. v. Addison [Tex.] 70 S. W. § 994, providing for r parties to a judgme against one co-debtor separate judgment aga larger than the origin v. Burch, 140 Cal. 548.

62. Lawton v. Nichol

63. If against two d against but one will b v. Cover, 102 Ill. App. [Tex. Civ. App.] 70 S. against the defendants is warranted on a verd Southern Kansas R. Co App.] 74 S. W. 335. Ju ized by verdict. Galv Hubbard [Tex. Civ. App riance between judgme plevin. Dysart v. Ter 70 S. W. 986. Though c was unanimous it will court acted properly i reciting a concurrence the jurors as authorize p. 381. Reed v. Mexico 53.

64. Ft. Scott v. Eads A.] 117 Fed. 51.

65. After general ve is error on motion for judgment non obstante. O'Connor [Mich.] 94 N.

66. Friedly v. Gliddir

67. Laws 1901, c. 6 drews & G. Elevator Co

68. Aetna Indemnity D.] 95 N. W. 436.

69. Bank of Glencoe

70. Laws 1901, c. 63, [N. D.] 95 N. W. 440.

71. Nelson v. Grond 299.

72. See matters perti titles treating of specif

73. Recital a sum a ment that sum and "cos worth, 66 Kan. 783, 71 P

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construed together.[74] Variances in name may be disregarded when not such as to produce uncertainty.[75] A judgment against "A. B. C., administrator of D. E.," deceased, which fails to direct a levy on the goods of the deceased, is a personal judgment against the representative.[76] Those matters will be regarded as adjudicated which are within the scope of the particular proceeding.[77]

§ 6. *Entry and docketing or indexing. Journal entries or minutes.*—Incident to its power to correct the record[78] the court may, before entry of record, correct the journal entry nunc pro tunc to conform to the judgment rendered.[79] That the journal entry of a judgment for costs did not contain the amount of costs will not invalidate the judgment.[80]

An order of dismissal for delay in serving the summons is effective for all purposes if entered on the court's minutes, though not in the judgment book.[81]

The entry may be nunc pro tunc,[82] but not where the decision did not order the clerk to enter judgment accordingly.[83] Where, pending determination, one of the parties dies, the court may enter its decision as of the term when the case was taken under advisement.[84]

Stay or suspension.—A judgment need not be entered until final disposition of the motion for a new trial or in arrest,[85] and the courts may stay entry until plaintiff remits an admitted credit which had not been called to the attention of the court or jury.[86]

The register of actions is not a part of the *judgment roll.*[87] The clerk in making up the judgment roll has no authority to recite in the postea of the record the right to a body execution.[88]

In docketing judgments the statute must be followed,[89] and filing a transcript in another county does not make the judgment a judgment of that county.[90]

74. Hopkins v. Cofold, 103 Ill. App. 167.

75. A judgment against W. B. G. is enforceable against William B. G., the surnames being idem sonans. Gottlieb v. Alton Grain Co., 87 App. Div. [N. Y.] 380. A judgment against "Isaac F." is not a judgment against Israel F. Greenberg v. Angerman, 84 N. Y. Supp. 244.

76. Thomson v. Mann, 53 W. Va. 432.

77. Affidavit and traverse in attachment. Reese v. Damato [Fla.] 33 So. 462. If relief against property be granted a statement that no personal judgment "is now" given means only that it is deferred and not denied. Tax lien case. Woolley v. Miller, 24 Ky. L. R. 1542, 71 S. W. 856. Judgment held to exclude barred note. Malone v. Garver [Neb.] 92 N. W. 726. By joining in second action party was concluded as to matter involved in that set aside. Watts v. Bruce [Tex. Civ. App.] 72 S. W. 258. Remark that a thing was not essential to the judgment awarded. State v. Clinton County Com'rs [Ind.] 68 N. E. 295.

See title Former Adjudication, 2 Curr. Law, 60.

78. See post, § 4B.

79. The judge's notes on the trial may be used as evidence. Morrill v. McNeill [Neb.] 91 N. W. 601.

80. Edwards v. Farmers' & M. State Bank [Kan.] 72 Pac. 534.

81. Marks v. Keenan, 140 Cal. 33, 73 Pac. 751.

82. Fisk v. Osgood [Neb.] 96 N. W. 237.

83. Particularly where it appears that the absence of counsel was the reason for the court's failure to so direct. Vance v. Ravenswood, S. & G. R. Co., 53 W. Va. 338.

84. Seymour v. Richardson Fueling Co., 205 Ill. 77.

85. Bevering v. Smith [Iowa] 96 N. W. 1110.

86. Johnston v. Bowers [N. J. Law] 55 Atl. 230.

87. Haupt v. Simington, 27 Mont. 480, 71 Pac. 672.

88. The attorney must take the responsibility. Bacon v. Grossmann, 90 App. Div. [N. Y.] 204.

89. A docket of a judgment which included only the costs omitting the damages is not sufficiently docketed so as to create a lien for the damages. Wilson v. Beaufort County Lumber Co., 131 N. C. 163. A judgment of a municipal court of the city of New York docketed in the county clerk's office against the defendant under a fictitious or christian name is not a lien on his property. Code, § 2884, has no application to such court. Bernstein v. Schoenfeld, 81 App. Div. [N. Y.] 171. Docketed abstract held insufficient to create a lien. Schneider v. Dorsey [Tex. Civ. App.] 72 S. W. 1029. That the abstract recorded does not name the costs or the amount thereof, does not nullify the judgment [Rev. St. 1899, § 3759]. Green v. Meyers, 98 Mo. App. 438. Transcript of judgment by municipal court for docket in court of record held sufficient as to form. Funk v. Lamb, 87 Minn. 348. Affidavit to secure recording of a justice's judgment held sufficient. Frohlich v. Mitchell [Mich.] 93 N. W. 1087. An affidavit of non-existence of personalty is not necessary in order to docket a justice's judgment in the common pleas [2 Gen. St. p. 1898]. Curtis v. Stout [N. J. Law] 54 Atl. 252.

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Striking off void entries.—An entry of a void judgment sl and this may be done on motion in the court on whose docket

§ 7. *Opening, amending and vacating by suit, motion c nobis. A. Time for application.*[93]—It is only during the te courts of general jurisdiction have inherent power to vacate[94] ments on motion.[95] If the motion is made during the term of ment, determination may be had at the subsequent term.[96] T motion to set aside a default judgment.[97] If, however, the ju by fraud,[98] or if the court rendering it was without jurisdictior should not have been granted, it may be set aside at a subseq A county court in Nebraska has no power to vacate its judgm the ground that it is void for want of jurisdiction over the A surrogate's decree in New York may be vacated at any time.

Judicial mistakes cannot be corrected at a subsequent t so as to make the judgment conform to the records[5] or finding may be corrected nunc pro tunc at a subsequent term.[7] A amendments can be made only on notice.[8]

90. Since under code, § 3958, an execution can only issue from the county of rendition. Brunk v. Moulton Bank [Iowa] 95 N. W. 238.

91. Mut. L. Ins. Co. v. Tenan, 204 Pa. 332.

92. Common pleas may vacate void docket entry of a justice's judgment; and Act March 22, 1901, validating docketing of judgments in that court is ineffective as against vested rights of others than the debtor. Certiorari is available but not the best remedy. McLaughlin v. Cross, 68 N. J. Law, 599.

93. For new trial see New Trial and Arrest of Judgment. For bill of review see Equity, § 11, 1 Curr. Law, 1087.

94. Brand v. Baker, 42 Or. 426, 71 Pac. 320; Eager v. Blake [Neb.] 96 N. W. 74; Snyder v. Middle States L., B. & C. Co., 52 W. Va. 655; Streeter v. Gleason [Iowa] 95 N. W. 242. Applied to judgment under local improvement act [Laws 1897, p. 121]. Chicago v. Nodeck, 202 Ill. 257. Where the court adjourned without completing all business under Code, c. 112, § 4, a judgment rendered on that day cannot be vacated on motion during the adjourned term. Childers v. Loudin, 51 W. Va. 559. A district court on reversal of a judgment of an inferior court cannot at a subsequent term vacate such judgment. Bastian v. Adams [Neb.] 97 N. W. 231. The right to open a judgment after term being statutory must be availed of within the period fixed. Bean v. Dove [Tex. Civ. App.] 77 S. W. 242. Applied to a divorce judgment. Civ. Code, § 426, provides the only method for setting aside such judgments. Hendrix v. Hendrix, 25 Ky. L. R. 632, 76 S. W. 165; Greer v. Greer, 25 Ky. L. R. 655, 76 S. W. 166.

The court has power to make necessary orders to enforce the judgment after the judgment term. Jones v. Miller [Neb.] 92 N. W. 201.

95. Coxe v. Omaha C., C. & L. Co. [Neb.] 94 N. W. 519.

96. Walker v. Moser [C. C. A.] 117 Fed. 230.

97. Leavitt v. Bolton, 102 Ill. App. 582. Practice act March 29, 1902, regulates practice only as to pleadings. Jett v. Farmers' Bank, 25 Ky. L. R. 817, 76 S. W. 385. In the absence of fraud or surprise a motion to vacate a judgment of prosecution cannot be man v. Baltimore & 47 Law. Ed. 946. A m judgment may be ma the term of rendition. not apply. Pa. F. Ins S. W. 127; Green v. Fed. 928.

98. Chicago v. No Iowa relief against a er the judgment term petition entitled in t not by a separate su Code, §§ 4091-4094]. J Co. [Iowa] 96 N. W. 7

99. Chicago v. Noc

1. As where defe bankruptcy proceedi such case Code, § 379(Nat. Bank v. Flynn,

2. McCormick Ha Stires [Neb.] 94 N. W

3. Code, § 1290, d Mather's Estate, 41 M

4. The failure of randum of judgment is a judicial mistake [Conn.] 55 Atl. 594. peal. Applied to j demurrer. Second N der [W. Va.] 46 S. E.

5. Bishop v. Seal, court has inherent po records at any time s Ricaud v. Alderman,

6. Where in reple the plaintiff was ent judgment but the juc alternative form, it m tion at a subsequen 568, 569, 575. First S 65 Kan. 816, 70 Pac. 8 appeal a motion to c on the face of the ju McGraw v. Roller, 53

7. Judgment on a clerical misprision so amendment. Burnside

8. Page v. Shields,

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A motion made during the judgment term stands continued to the subsequent term without a special order therefor.[9]

A judgment, void for want of jurisdiction, may be set aside on motion, though an appeal therefrom is pending.[10] After entry and payment, the court is without power on motion to modify the judgment.[11]

The right to have a judgment opened,[12] vacated,[13] amended,[14] corrected or modified, may be lost by laches.[15]

(§ 7) *B. Amendment, correction and modification.*—Merely because the judgment entered was erroneous does not justify its correction.[16] A judgment may be amended so as to conform to the judgment actually rendered.[17] Mere judicial errors[18] or clerical misprisions[19] as where by mistake it was greater than the amount claimed,[20] by an erroneous computation of interest,[21] or where the costs allowed were by mistake omitted by the clerk,[22] or where the name of a joint obligor was included by mistake in the default judgment,[23] may be corrected on motion, but errors of law,[24] or amendments which alter the decision on the merits, cannot so be made.[25] Amendments which do not change the effect of the judgment is not ground for objection.[26]

Uncertainty as to parts of the judgment may be cured by remittitur of rights thereunder.[27]

Where relief not prayed for was given by the judgment, the remedy is by motion to modify the judgment.[28] Correction nunc pro tunc can be made only where the records show that a different judgment than the one entered was rendered.[29] It is not only a right but a duty of the court to vacate its judgment during the term, sua sponte, on ascertaining that the court had not jurisdiction[30] or when based on erroneous rulings.[31]

9. Presumption from the record that the motion was filed during the proper term. Donaldson v. Copeland, 201 Ill. 540.

10. As a judgment in attachment against an administrator on a debt of the decedent. O'Loughlin v. Overton [Kan.] 74 Pac. 604.

11. As by retaxation of costs and an appearance of the attorney on the motion will not confer jurisdiction. Iowa S. & L. Ass'n v. Chase, 118 Iowa, 51.

12. Party held guilty of laches barring right to have judgment opened with leave to object to referee's report. Koehler v. Brady, 82 App. Div. [N. Y.] 279. A delay of one year held not alone sufficient to bar application to open confessed judgment on the ground that defendant's signature to the note was forged. Shannon v. Castner, 21 Pa. Super Ct. 294.

13. After six months after rendition the court is without jurisdiction to entertain the motion (Canadian & A. M. & T. Co. v. Clarita L. & I. Co., 140 Cal. 672, 74 Pac. 301); for irregularities judgments may be vacated on motion in the same court, within three years after rendition in the circuit court. Reed v. Nicholson, 93 Mo. App. 29.

14. Code Civ. Proc. §§ 724, 1282, after one year. Deagan v. King, 83 App. Div. [N. Y.] 428.

15. Hirshbach v. Ketchum, 79 App. Div. [N. Y.] 561.

16. Burns v. Sullivan, 90 Mo. App. 1.

17. Entry held not a decision precluding the entry of a different decree. Canadian & A. M. & T. Co. v. Clarita L. & I. Co., 140 Cal. 672, 74 Pac. 301. Decree directed to be corrected to conform to the conclusion of law. Foster v. Bender [Mont.] 73 Pac. 121.

18. As a correction so as to make allowance of commissions to the administrator instead of to the broker. In re Willard's Estate, 139 Cal. 501, 73 Pac. 240.

19. Premature submission held a clerical misprision. Woolley v. Louisville, 24 Ky. L. R. 1357, 71 S. W. 893. Clerical misprisions may be corrected by evidence outside the record. Crenshaw v. Crenshaw, 24 Ky. L. R. 600, 69 S. W. 711.

20. Brown v. Woodward, 75 Conn. 254.

21. Dils v. Hatcher, 25 Ky. L. R. 891, 76 S. W. 514.

22. Thomas v. Thomas [Me.] 56 Atl. 651.

23. Weston v. Citizen's Nat. Bank, 84 N. Y. Supp. 743.

24. Chicago & S. E. R. Co. v. State, 159 Ind. 237.

25. A judgment in an equity action for the return of property cannot be changed into one for money damages. Dunscomb v. Poole, 41 Misc. [N. Y.] 335; Kepler v. Wright [Ind. App.] 68 N. E. 618.

26. Knotts v. Crossly [Neb.] 95 N. W. 848.

27. Uncertainty as to receiver's fees is cured by his waiver of fees. Watson v. Williamson [Tex. Civ. App.] 76 S. W. 793.

28. Not by action to review the judgment. Williams v. Manley [Ind. App.] 69 N. E. 469.

29. Evidence held insufficient to authorize correction. Burns v. Sullivan, 90 Mo. App. 1. An ex parte entry of a prejudicial judgment and against the express directions of the attorney may be vacated. City St. Imp. Co. v. Emmons, 138 Cal. 297, 71 Pac. 332.

30. As where it appears that the complainant in bastardy proceedings was mentally incapacitated to sue. State v. Jehlik, 66 Kan. 301, 71 Pac. 572.

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(§ 7) *C. Grounds and propriety of opening or vacating.*[3] Before entry by the clerk, the court has power to vacate his juc consideration of the case.[33]

After term.—The ordinary grounds are mistake or excusable defects of jurisdiction,[34] or surprise,[35] whether the judgment be wise; but the absence of a contest is persuasive.[36] Material new applicant, though diligent, was ignorant at the time,[37] will i which is thus made unconscionable.[38]

Mistake[39] may be in the entry of judgment[40] or the amoun to the adversary's fault.[42] Excusable neglect[43] may be attribut absence[45] or to pendency of propositions for settlement,[46] pr ance[47] or fraudulent misrepresentations.[48] An agent's or att the same as the principal's.[49]

31. Smith v. Milwaukee Elec. R. & L. Co. [Wis.] 96 N. W. 823.

32. See New Trial and Arrest of Judgment. For bill of review see Equity.

33. State v. Brown, 31 Wash. 397, 72 Pac. 86.

34. Klinesmith v. Van Bramer, 104 Ill. App. 384; McHale v. Metz [Neb.] 96 N. W. 1004; Balch v. Beach [Wis.] 95 N. W. 132; Polarek v. Gordon, 102 Ill. App. 356. Defects of jurisdiction. Stai v. Selden, 87 Minn. 271.

35. Facts held to show surprise justifying selling aside of default. Bradley v. McPherson [N. J. Eq.] 56 Atl. 303. Party defendant allowed to come in on ground of surprise. Lutz v. Alkazin [N. J. Eq.] 55 Atl. 1041.

36. See notes following.

37. If on the ground of subsequently discovered evidence it must appear material and that due diligence was exercised. Hayes v. U. S. Phonograph Co. [N. J. Eq.] 55 Atl. 84.

38. As where petitioner is a personal representative of a deceased person having no personal knowledge of the facts. Polarek v. Gordon, 102 Ill. App. 356.

39. Mistake of fact. Sprague v. Auffmordt, 183 Mass. 7. Mistake as between corporate officers as to employment of attorney held to justify vacation of default judgment. Barto v. Sioux City Elec. Co., 119 Iowa, 179. Motion on ground of mistake and inadvertence granted. Lawson v. Adams, 89 App. Div. [N. Y.] 303.

Mistaken belief that service was defective is one of law. Plano Mfg. Co. v. Murphy [S. D.] 92 N. W. 1072.

40. Judgment in condemnation proceedings properly vacated on the ground of mistake, etc. Fargo v. Keeney, 11 N. D. 484.

41. Application to open judgment on the ground that defendant had been overcharged in items of account refused. Lauer Brew. Co. v. Chmielewski, 206 Pa. 90.

42. Mistake in trying to serve notice of appearance due to illegible signature on summons held excusable. Wheeler v. Castor, 11 N. D. 347.

43. Hess v. Lell [Neb.] 94 N. W. 975.

Neglect held inexcusable. Harlow v. First Nat. Bank, 30 Ind. App. 160. Neglect held under the facts excusable. Klabunde v. Byron-Reed Co. [Neb.] 98 N. W. 182. Application to vacate default judgment on the ground of illiteracy refused. Dean v. Noel, 24 Ky. L. R. 969, 70 S. W. 406.

44. Judgment opened because answer was mailed in time but was lost in the mail. Boyd v. Williams [N. J. Eq.] 56 Atl. 135.

45. Absence from sta [Ind. App.] 66 N. E. 10.

46. Default judgment cated because of reliance settlement. McBride v. 573, 72 Pac. 105.

47. A parol agreeme prosecute the action is gr a default judgment. A Cady Co. [Mo. App.] 76 negligence to rely on a that no advantage woul in entering appearance law being barred at th covery of the judgment. ell, 182 Mass. 443. Judg obtained by default hel Batzle v. Trumbower, 22

48. Fraudulent repres defendant was induced fending is ground for set ment. Judgment for ann Everett v. Everett, 85 N.

49. Excusable neglect attorney. O'Brien v. Le Pac. 1004. Negligence o excuse. Field v. Heckm 377; Pepper v. Clegg, 13

A default taken while tendance in another co should be vacated. Ho App. Div. [N. Y.] 365. D set aside where plain moved from the state a plaintiff of the facts or case. Atkinson v. Abra [N. Y.] 498.

Judgment opened and to put in defense on the been misled by his couns er [N. J. Law] 55 Atl. ney's fraud not discover for new trial. Watson [Tex. Civ. App.] 73 S. W

Not excusable. That c overlooked instructions ness or inattention is not & O. R. Co. v. Ryan [I 923. Refusal to open de en during absence of c Greenberg v. Angerman. Agent's neglect imputa not ground for openin Threshing Mach. Co., 13 v. Liverpool, L. & G. Ins Failure of the attorney

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The fraud to justify equitable relief must be extrinsic or collateral to the cause of action;[50] fraud in procuring the judgment[51] is such. Akin to it is the statutory ground of perjury.[52] When the fraud is that of an officer not imputable to the plaintiff, the remedy, if any, is at law.[53] It may be actual or constructive[54] and must be clearly shown.[55]

Defective jurisdiction appears on a premature entry of a default judgment,[56] or entry on the unauthorized appearance of attorney where no original process had been served[57] or without appointment of a guardian ad litem for infant defendants.[58] Want of service[59] may be shown despite the presumption favoring the record or recitals therein[60] and by parol.[61] From the record alone can invalidity on the face of the judgment be found.[62]

stituted attorney of the pendency of the action is not an excuse. Welch v. Mastin, 98 Mo. App. 273. Facts held to show such lack of diligence on the part of counsel as to justify denial of a motion to set aside a default judgment. Eggleston v. Royal Trust Co., 205 Ill. 170. A mere misunderstanding of the attorneys as to the time of convening of the court is not excusable. Savage v. Dinkler [Okl.] 72 Pac. 366. Negligence of agent of defendant held not excuse though it was averred that the default was the result of collusion between him and plaintiff. Tex. F. Ins. Co. v. Berry [Tex. Civ. App.] 76 S. W. 219. Statements of clerk held not to excuse default. Patterson v. Yancey, 97 Mo. App. 681.

50. Demaris v. Barker [Wash.] 74 Pac. 362. That the contract sued on was forged is not a charge of fraud in the procurement of the judgment. Graham v. Loh [Ind. App.] 69 N. E. 474.

Judgment against a corporation in favor of its manager set aside. New River Mineral Co. v. Seeley, 120 Fed. 193.

51. Fraudulent representations preventing defense. Tapana v. Shaffray, 97 Mo. App. 337. Facts held to show fraudulent collusion. Balch v. Beach [Wis.] 95 N. W. 132. Insufficient showing of fraud to justify vacation of judgment. Ruppin v. McLachlan [Iowa] 98 N. W. 153; Tapana v. Shaffray, 97 Mo. App. 337. The procurance of an ex parte attachment and judgment is a fraud. Truitt v. Darnell [N. J. Eq.] 55 Atl. 692.

Procuring a false return of service is such a fraud as will justify vacation. Frankel v. Garrard, 160 Ind. 209.

A false allegation in the complaint which without it would not have stated a cause of action amounts to a fraud upon the court. Tremblay v. Aetna L. Ins. Co., 97 Me. 547. Statements in petition held not to constitute a fraud or imposition on the court so as to justify equitable relief. Ruppin v. McLachlan [Iowa] 98 N. W. 153.

Intentional production of false testimony, the basis of the decree. Miller v. Miller's Estate [Neb.] 95 N. W. 1010.

Confessed judgments. Balch v. Beach [Wis.] 95 N. W. 132. Admissibility of evidence on hearing to open confessed judgment. Shannon v. Castner, 21 Pa. Super. Ct. 294. Sufficiency of evidence on question of fraud in use of signature to note containing warrant of attorney to confess judgment to justify opening the confessed judgment. Shannon v. Castner, 21 Pa. Super. Ct. 294. Evidence of notice disproved fraud. Miller v. Miller's Estate [Neb.] 95 N. W. 1010.

52. An action under Gen. St. Minn. 1894, § 5434, to set aside a judgment on the ground of perjury will not lie after pleading and a full trial on the merits, no deceit having been practiced on defendant. Moudry v. Witzka, 89 Minn. 300.

53. Serving officer. Graham v. Loh [Ind. App.] 69 N. E. 474. In an action on administrator's bond the decree on settlement of his accounts cannot be attacked on the ground of fraud on the part of the probate court. Remedy is appeal. Bonner v. Gorman [Ark.] 77 S. W. 602.

54. Klabunde v. Byron-Reed Co. [Neb.] 98 N. W. 182.

55. Reay v. Treadwell, 140 Cal. 412, 73 Pac. 1078. The burden is on the complainant to show fraud and collusion in procuring service of process. Off v. Jack, 204 Ill. 79. Refusal to open default sustained there being a conflict between affidavits as to whether attorney was misled by plaintiff's attorney or was negligent in not appearing on the trial. Hoffman v. Loudon, 96 Mo. App. 184.

56. Hennessy v. Tacoma S. & R. Co. [Wash.] 74 Pac. 584; Culbertson v. Salinger [Iowa] 97 N. W. 99; Reed v. Nicholson, 93 Mo. App. 29; Martin v. Universal Trust Co., 76 App. Div. [N. Y.] 320; Oden v. Vaughn Grocery Co. [Tex. Civ. App.] 77 S. W. 967. A default judgment because of non appearance, entered after order obtained and served extending the time to answer and before the expiration of such time will be vacated. Littauer v. Stern [N. Y.] 69 N. E. 538. That the copy summons by mistake were made returnable at a subsequent term justifies the vacation of a default judgment at a previous term. Patterson v. Yancey, 97 Mo. App. 681. On service of a garnishment notice in another state within less than 20 days of the term at which the judgment was taken the garnishee was bound to appear at the second succeeding term [Code. § 3517, subd. 3]. Streeter v. Gleason [Iowa] 95 N. W. 242.

57. Clear and convincing proof that appearance was unauthorized is essential to justify setting aside. Turner v. Turner [Wash.] 74 Pac. 55.

58. A proceeding in the circuit court to set aside a judgment of a justice is a direct proceeding. Weiss v. Coudrey [Mo. App.] 76 S. W. 730.

59. Default judgment vacated because of insufficient service. Patton v. Campbell's Trustee, 25 Ky. L. R. 275, 74 S. W. 1092.

60. The record as to service may be contradicted in a direct proceeding. Carpenter v. Anderson [Tex. Civ. App.] 77 S. W. 291. Evidence held sufficient to show non-service

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A judgment by confession may be opened on a showing of rious defense by any of the defendants[63] if improperly[64] or i tered.

Mere informalities.[66]—Process contained only the initials Errors or irregularities[68] or the existence of a meritorious defen was or might have been invoked,[70] are not cause for vacation un statute.[71]

Statutes prescribing grounds for vacating judgments in act ments in garnishment.[72]

It must appear that the judgment was prejudicial,[73] hen a good defense available to the applicant[74] unless the judgme face,[76] though where such invalidity was not patent, one was

and the existence of a meritorious defense. Kochman v. O'Neill, 202 Ill. 110. Under the evidence a default judgment was set aside though sheriff returned due service. Parker v. Van Dorn Iron Works, 23 Ohio Circ. R. 444.

Recitals of due service held controlled by the record and to show non-service rendering the judgment void in a direct proceeding. State v. Dashiell [Tex. Civ. App.] 74 S. W. 779.

61. Patterson v. Yancey, 97 Mo. App. 681. See, also, post, § 8, Collateral Attack; and Former Adjudication, 2 Curr. Law, 60, 67.

62. Motion on that ground denied. Canadian & A. M. & T. Co. v. Clarita L. & I. Co., 140 Cal. 672, 74 Pac. 301.

63. Custer v. Harmon, 105 Ill. App. 76. Evidence held sufficient to justify opening judgment by confession. Provident B. & L. Ass'n v. Cresswell, 204 Pa. 105.

64. A notice of motion to take judgment for money under Code 1887, § 3211, takes the place of both writ and declaration. Notice held insufficient in not allowing the 15 days as required. Tench v. Gray [Va.] 46 S. E. 287. Entry of confessed judgment under particular contract; the contract must be made a part of the record. Weaver v. McDevitt, 21 Pa. Super. Ct. 597. To warrant opening a judgment by confession on contract permitting entry of judgment on affidavit stating the amount due, the defendant must furnish evidence sufficient to raise a substantial doubt as to the correctness of the amount so stated. Duquesne Brew. Co. v. Thomas [Pa.] 56 Atl. 421.

65. Judgment by agreement with next of friend set aside as improvident as to the minor. Day v. Johnson [Tex. Civ. App.] 72 S. W. 426.

66. East Tenn. Land Co. v. Leeson [Mass.] 69 N. E. 351.

67. The objection should be raised before the confirmation of the default. Baham v. Stewart, 109 La. 999.

68. Klinesmith v. Van Bramer, 104 Ill. App. 384. As that an amended judgment was void because made ex parte and at a subsequent term, since the defendant therein had an adequate remedy at law by offering the original judgment in evidence in the action based on the amended judgment. Hoover v. Bartlett, 42 Or. 145, 70 Pac. 378. Under the facts the court refused to open default (Field v. Heckman [Wis.] 95 N. W. 377); as where it was claimed that the plaintiff in the judgment action had assigned the cause of action to anoth v. Bernard, 97 Mo. App.

69. Osborn v. Leach, v. Mastin, 98 Mo. App. B. V. R. Co. v. Driskill S. W. 997. That cause by limitations is not alo tion. McDaniel v. Town

70. Considine v. Lee, 1 default will not be open up a new affirmative d answer being a mere g man v. Loudon, 96 Mo.

71. Rendering final j the complaint on a hear ment of a receiver is ar taining the judgment [2 St. § 5153]. Motion held which to base a vacatio 32 Wash. 154, 72 Pac. 10 nesses is not within Co Erichson v. Sidlo, 76 Ap

72. Code Civ. Proc. § ware Co. v. Klippert [Ka

73. Motion to vacate ice of process, the judg the defendant under a nied, there having been n it against applicant. M App. Div. [N. Y.] 294. such a showing the mere to place the cause on the justify vacating the defa by v. St. James Orphan W. 155. One holding a trust cannot sue to set rem because he had not suit. Uehlein v. Burk, 1

74. To justify vacatio show a valid defense. [Iowa] 97 N. W. 86; Cha Tex. Civ. App. 424; Wh Ill. App. 281. Code, §§ 40 of showing. Culbertson 97 N. W. 99. The petiti such a defense as that th ed to pass upon it. Br [N. J. Eq.] 56 Atl. 303. filed with the motion to that the note sued on stamped presents no defe syth, 205 Pa. 466.

75. Cooley v. Barker

76. August Kern Ba Freeze [Tex.] 74 S. W. appointment of a guard infant defendant a de shown. Weiss v. Coudr W. 730.

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cause must be shown.[78] To entitle one to equitable relief against a default judgment, it must appear that he has a meritorious defense, that he has no adequate remedy at law, and that the default was not due to any neglect on his part.[79] Subsequent matters rendering enforcement inequitable will justify a vacation only when necessary for the protection of the adverse party.[80] Available means of averting the taking of judgment must have been pursued.[81] An invalid extension of time to answer is no protection.[82]

The discretion of the court ultimately controls.[83]

(§ 7) *D. Parties applicant and opposed.*—A legal successor of a party may apply,[84] or a third person defrauded by a collusive judgment.[85] A judgment void on its face may be vacated on application of a person irrespective of his interest;[86] if, however, the judgment is only in rem, a defendant who had parted with his interest cannot move to set it aside.[87]

All the parties to the original action should be made parties to the action to set aside the judgments,[88] including a subsequent transferee of the land attempted to be sold under the void judgment.[89]

(§ 7) *E. Relief grantable.*—Relief against fraud will be such as the facts and justice require.[90]

Conditions may be imposed,[91] but not where the judgment was procured by fraud,[92] or where the judgment, a default, should not have been granted.[93] Judgment may be retained and merely opened.[94] Defaults should be opened and not stricken off when relief is prayed on equitable grounds.[95] Relief in inferior courts must be confined to that which the statute authorizes.[96] Time to answer is incidental to vacation and leave to appear.[97]

77. A justice of the peace had entered a continuance after he had lost jurisdiction but his docket did not show it. True v. Mendenhall [Kan.] 73 Pac. 67.

78. Lasswell v. Kitt [N. M.] 70 Pac. 561.

79. Koehler v. Reed [Neb.] 96 N. W. 380.

80. Laramie Nat. Bank v. Steinhoff [Wyo.] 73 Pac. 209.

81. Failure to have applied for a continuance on the ground of absence of parties and attorneys will bar relief. Aultman v. Higbee [Tex. Civ. App.] 74 S. W. 955. Failure to answer when he might to prevent default. Lasswell v. Kitt [N. M.] 70 Pac. 561; Dorwart v. Troyer [Neb.] 96 N. W. 116.

82. Erroneous extension of time to answer out of term is not an excuse. Deering Harvester Co. v. Thompson, 116 Ga. 418.

83. Sufficiency of evidence to justify opening confessed judgment. Zartman v. Spangler, 21 Pa. Super. Ct. 647; Cabanne v. Macadras, 91 Mo. App. 70; O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004; Snively v. Fisher, 21 Pa. Super. Ct. 56; Calvert, W. & B. V. R. Co. v. Driskill [Tex. Civ. App] 71 S. W. 997; Childs v. Ferguson [Neb.] 93 N. W. 409; Deering Harvester Co. v. Thompson, 116 Ga. 418; Welch v. Mastin, 98 Mo. App. 273. So held in a proceeding to set aside a compromise judgment and the discretion properly exercised. Watts v. Bruce [Tex. Cir. App.] 72 S. W. 258. Refusal to open plaintiff's default held not an abuse of discretion. Crane v. Sauntry [Minn.] 96 N. W. 794.

84. Default against school trustee opened on application of new board. Queal v. Bulen, 89 Minn. 477.

85. As where the husband confessed judgment in favor of his brother the wife held entitled to have an issue determined whether the judgment was based on a consideration and confessed to defraud her. Waterhouse v. Waterhouse, 206 Pa. 433.

86. Winrod v. Wolters [Cal.] 74 Pac. 1037.

87. Browne v. Palmer [Neb.] 92 N. W. 315.

88. Tereba v. Standard Cabinet Mfg. Co. [Ind. App.] 68 N. E. 1033.

89. Frankel v. Garrard, 160 Ind. 209.

90. The action under Gen. St. 1894, § 5434 is of an equitable nature. Geisberg v. O'Laughlin, 88 Minn. 431.

91. As an immediate filing of the pleading and an early trial. Chicago v. English, 198 Ill. 211. Term held reasonable. Id. Requiring payment of counsel fee. Randell v. Shields, 80 App. Div. [N. Y.] 625. Proportion of taxes and costs imposed on setting aside tax judgment. State v. Dashiell [Tex. Civ. App.] 74 S. W. 779. Application granted but attachment allowed to stand. In re Warthman [Del.] 55 Atl. 6.

92. Rauer's L. & C. Co. v. Gilleran, 138 Cal. 352, 71 Pac. 445.

93. As where counsel was in attendance in another court as a witness under subpoena. Hopkins v. Meyer, 76 App. Div. [N. Y.] 365.

94. The judgment may be permitted to stand as security. Applied to New York Municipal Court. Long Branch Pier Co. v. Crossley, 40 Misc. [N. Y.] 249.

95. Davidson v. Miller, 204 Pa. 223.

96. Power to vacate judgment and grant a new trial does not authorize a vacation and entry instead for the adverse party. New York Municipal Court. Insky v. Chatkoff, 84 N. Y. Supp. 253.

97. Headdings v. Gavette, 86 App. Div. [N. Y.] 592.

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Injunction or other relief from judgments.—Equity will enjoin an inequitable use of[98] or the enforcement of a common law judgment[99] where the court had not jurisdiction of an equitable defense[1] or for the purpose of set off, the judgment creditor being insolvent,[2] or to remove it as a cloud,[3] but not because it appeared on the face of the pleading that the action was barred by limitations.[4]

(§ 7) *F. Modes of procedure.*—Remedies against judgments not void on the face of the record originated in equity, but have been adapted by many statutes in proceedings by motion or action. The statutory remedy by motion, when applicable,[5] is generally to be pursued rather than an independent action or suit,[6] for while statutory and equitable remedies may concur and be cumulative,[7] the statutory remedy is a legal remedy which will, if adequate, defeat equitable relief.[8] Ignorance of new facts until the statutory remedy was barred will invoke equity.[9] Motion will reach judgments void on the face of the record.[10] In Georgia, it will reach only such.[11] A motion in the nature of a writ of error coram nobis will not lie to vacate a judgment on the ground of want of jurisdiction, where the question was not raised on the trial.[12] In Nebraska, a proceeding by petition is appropriate when the judgment is not void but voidable.[13]

A court may enjoin the use of a judgment of another court of concurrent jurisdiction[14] unless the statute otherwise provides.[15] A federal court sitting in equity has jurisdiction to enjoin a judgment as unconscionable against a nonresident

98. An agreement between debtor and creditor to submit claims including a judgment to arbitration construed and held to include a submission and discharge of the judgment. Jones v. Thomas [Wis.] 97 N. W. 950.

99. As where it was entered after written agreement not to take advantage of delay in appearance. Brooks v. Twitchell, 182 Mass. 443. Remedy against judgment against garnishee held to be by appeal and not by suit to enjoin enforcement. Eidemiller v. Elder, 32 Wash. 605, 73 Pac. 687.

1. Headley v. Leavitt [N. J. Err. & App.] 55 Atl. 731.

2. Norton v. Wochler [Tex. Civ. App.] 72 S. W. 1025; Commercial State Bank v. Ketchum [Neb.] 96 N. W. 614.

3. Action to cancel a void judgment as a cloud on title is not governed by Code, §§ 4091-4094. Iowa S. & L. Ass'n v. Chase, 118 Iowa, 51.

4. The objection being available by appeal or writ of error. Patterson v. Yancey, 97 Mo. App. 681.

5. That the judgment relied on as evidence was subsequently vacated is not ground for setting aside the judgment in the action on motion. Code, § 195 providing for setting aside judgments on the ground of excusable neglect does not apply where the defendant answered and was represented by counsel. Peeples v. Ulmer, 64 S. C. 496.

6. Phelps v. Western Realty Co. [Minn.] 94 N. W. 1085.

The remedy by motion while ordinarily preferable to relieve against an attorney's negligence will be rejected in favor of action where the infected judgments and orders are numerous and the relief grantable on motion inadequate. Reich v. Cochran, 41 Misc. [N. Y.] 621.

7. The remedy provided by Code, § 662, is concurrent. Default judgment set aside. MacCall v. Looney [Neb.] 96 N. W. 238. Equity has jurisdiction to vacate a void judgment on apparent lien on title. Code, §§ 4091-4094, do not preclude equitable relief in cases not covered by such provisions. Iowa Sav. & Loan Ass'n v. Chase, 118 Iowa, 51.

8. Legal remedy must be pursued. Racey v. Racey [Okl.] 73 Pac. 305; Baer v. Higson [Utah] 72 Pac. 180.

9. 2 Ballinger's Codes & St. §§ 5153, 5156. State v. Superior Court, 31 Wash. 53, 71 Pac. 740. As where by reason of the facts the plaintiff was unable to discover the fraud until after the legal remedy was barred. De Garcia v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 77 S. W. 275.

10. As for want of proof of service of the process. Stai v. Shelden, 87 Minn. 271.

11. The statute so providing is not merely declaratory. Williams v. O'Neal [Ga.] 45 S. E. 978. That the petition failed to state defendant's residence cannot be raised after judgment. Tietjen v. Merchants' Nat. Bank, 117 Ga. 501.

12. Hadley v. Bernero [Mo. App.] 78 S. W. 64.

13. The remedy to vacate a default judgment procured by fraud is by petition and summons under Neb. Code Civ. Proc. § 602, subd. 4. Gutterson v. Meyer [Neb.] 94 N. W. 969; Baldwin v. Burt [Neb.] 96 N. W. 401.

14. As a superior court of one county the judgment of a superior court of another county. Allis v. Hall [Conn.] 56 Atl. 637; Noerdlinger v. Huff, 31 Wash. 360, 72 Pac. 73.

15. **Iowa Code, § 4364,** requires the action to be brought in county of rendition. In case of a justice's judgment the suit must be brought in the county where the transcript was recorded. Brunk v. Moulton Bank [Iowa] 95 N. W. 238.

Texas: The court of the county of rendition alone has jurisdiction to restrain its enforcement. Aultman v. Higbee [Tex. Civ. App.] 74 S. W. 955.

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defendant, though the statute of the state wherein the judgment was rendered provided a remedy at law.[16] Since a justice of the peace is without jurisdiction to set aside a judgment rendered before him,[17] the action may be brought in the court wherein the transcript of the judgment is recorded.[18]

The equitable remedy may be lost by laches or limitations.[19]

The vacation should be had only on notice[20] which may be in general terms.[21]

Everything necessary to support the opening should be shown,[22] hence, a copy of a proposed pleading[23] or its equivalent[24] should be annexed or set out. In an action to avoid a default judgment, for want of service of process, the petition must deny the existence of the facts recited in the sheriff's return.[25] The petition for equitable relief must show that equity can afford relief,[26] and it must appear that the judgment was prejudicial and oppressive.[27]

Verification[28] or an affidavit of merits, if necessary,[29] should be positive as to matters within applicant's knowledge.[30] Affidavit of merits is not necessary where the default should be set aside as a matter of right.[31]

Consent to open a decree should be in writing.[32]

The merits of the action cannot be determined on the application.[33] Only the papers on which the motion to vacate is based can be considered.[34]

A motion to open a default is not a bar to a motion based on new facts subsequently discovered.[35]

16. Neb. Code, §§ 602-611, provide a cumulative remedy. National Surety Co. v. State Bank [C. C. A.] 120 Fed. 593.

17. Frankel v. Garrard, 160 Ind. 209.

18. In Washington in the superior court [2 Ballinger's Ann. Codes & St. § 5136]. Noerdlinger v. Huff, 31 Wash. 360, 72 Pac. 78. In Indiana the circuit court. Frankel v. Garrard, 160 Ind. 207. In Iowa in the district court. Brunk v. Moulton Bank [Iowa] 95 N. W. 238. The supreme court having jurisdiction to enjoin though not to set aside a judgment of a municipal court of the city of New York because void. Johnson v. Manning, 75 App. Div. [N. Y.] 285.

19. Complainant held not guilty of laches. Brooks v. Twitchell, 182 Mass. 443. Defendant held not guilty of laches in applying for relief against a default judgment. Strowbridge v. Miller [Neb.] 94 N. W. 825. Limitations of real actions applies in an action to recover land sold under void tax judgment and not the limitation of proceedings to set aside judgments. Green v. Robertson, 30 Tex. Civ. App. 236. Tex. Rev. St. 1895, art. 3358, applies. State v. Dashiell [Tex. Civ. App.] 74 S. W. 779. In Indiana under Burns' Rev. St. 1901, § 399, the action is barred after two years. Tereba v. Standard Cabinet Mfg. Co. [Ind. App.] 68 N. E. 1033. Mere neglect to act against a void judgment until an attempted enforcement is not such laches as will bar a proceeding to enjoin. Cooley v. Barker [Iowa] 98 N. W. 289.

20. The objection cannot be raised for the first time after a trial on the merits and reversal on appeal. Objection to vacation of default judgment against co-maker of the note sued on. Weston v. Citizens' Nat. Bank, 84 N. Y. Supp. 743.

21. O'Brien v. Leach, 139 Cal. 220.

22. Childs v. Ferguson [Neb.] 93 N. W. 409. Allegations of mistake and excuse held sufficient. MacCall v. Looney [Neb.] 96 N. W. 238.

23. Schumpp v. Interurban St. R. Co., 81 App. Div. [N. Y.] 576; Meyer v. New York, 80 App. Div. [N. Y.] 534; Childs v. Ferguson [Neb.] 93 N. W. 409; Waters v. Raker [Neb.] 96 N. W. 78.

24. Court may take affidavit in lieu. Wheeler v. Castor, 11 N. D. 347. In divorce after personal service a mere statement of "a good defense" held insufficient. Maguire v. Maguire, 75 App. Div. [N. Y.] 534.

25. Baham v. Stewart, 109 La. 999. Sufficiency of petition in suit to amend. Mullins v. Rieger, 169 Mo. 531.

26. Estes v. Timmons [Okl.] 73 Pac. 803.

27. Sufficiency of petition for relief. Van Every v. Sanders [Neb.] 95 N. W. 870.

28. Petition to open default dismissed for want of verification and failure of petitioner to appear. Smothers v. Meridian Fertilizer Factory, 137 Ala. 166, 33 So. 898.

29. If the moving papers on a motion to vacate a default judgment show a meritorious defense or cause of action the necessity for an affidavit of merits is a question for the court. Crane v. Sauntry [Minn.] 96 N. W. 794. Affidavit of merits is essential to a suit to set aside a judgment, reciting that defendant though not cited answered but defaulted on the trial, on the ground that the attorney was without authority to appear. Chambers v. Gallup, 30 Tex. Civ. App. 424.

30. Verification by the attorney on information and belief is insufficient where the ground was want of personal service of process. Smothers v. Meridian Fertilizer Factory, 137 Ala. 166.

31. As where plaintiff's attorney erroneously returned the answer. American Audit Co. v. Industrial Federation, 84 App. Div. [N. Y.] 304.

32. A judgment of divorce cannot be set aside on oral consent [Code, § 426]. Greer v. Greer, 25 Ky. L. R. 1247, 77 S. W. 703.

33. Bradley v. McPherson [N. J. Eq.] 56 Atl. 303.

34. Zeltner v. Henry Zeltner Brewing Co., 83 N. Y. Supp. 366.

35. Sutherland v. Mead, 80 App. Div. [N. Y.] 103.

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Proceedings by petition under a statute have been regarded as part of the main action and reviewable with it,[36] but defects in an affidavit must be assailed below.[37]

§ 8. *Collateral attack. What is collateral.*—A motion in the trial court[38] or an action to set aside a judgment on the ground of fraud is not a collateral attack thereon,[39] though brought while an action on the judgment was pending;[40] but to question the validity of the judgment in proceedings to revive,[41] or to impeach it in defense to an attempt to enforce it,[42] or to set aside a fraudulent transfer by the debtor,[43] or a suit to obtain another and independent judgment which will destroy the effect of a former judgment,[44] is a collateral attack against the latter.

Grounds.—If regular on its face, a judgment cannot be attacked between the same parties,[45] but may be if void on its face,[46] as for defect,[47] or uncertainty of parties,[48] or want of sufficient service of process or publication in lieu thereof,[49] or want of record facts on which to support the judgment,[50] or if fraud entered into its procurement.[51] The fraud must be that of the adversary, not of the court or its officers.[52]

36. That the proceedings under 2 Ballinger's Ann. Codes & St. §§ 5153, 5156, to vacate a judgment were docketed by the clerk as though a separate action will not make it such but they will be considered as though brought in the original action, and can be reviewed on appeal from the original judgment. State v. Superior Court, 31 Wash. 53, 71 Pac. 740.

37. Headdings v. Gavette, 86 App. Div. [N. Y.] 592.

38. Stai v. Selden, 87 Minn. 271; Graham v. Loh [Ind. App.] 69 N. E. 474.

39. Frankel v. Garrard, 160 Ind. 209. An action in the district court to set aside a justice's judgment is a direct proceeding. Carpenter v. Anderson [Tex. Civ. App.] 77 S. W. 291.

40. People v. McKelvey [Colo. App.] 74 Pac. 533.

41. Haupt v. Simington, 27 Mont. 480, 71 Pac. 672.

42. Frawley v. Pennsylvania Casualty Co., 124 Fed. 259. As in an action in aid of execution. Morley v. Stringer [Mich.] 95 N. W. 978. That the claim in judgment was champertous cannot be raised in garnishment under the judgment. Kerr v. Kennedy, 119 Iowa, 239. In an action to recover costs awarded by a judgment it is not a defense that the costs were waived. Maxwell v. Quimby, 90 Mo. App. 469. An intervention in a suit to foreclose a mortgage executed under order of the probate court for the purpose of setting up lack of jurisdiction to so order is a collateral attack. Stambach v. Emerson, 139 Cal. 282, 72 Pac. 991. Questions relating to the validity of a decree directing a foreclosure may not be raised by objections to confirmation of sale. Central Trust Co. v. Peoria R. Co. [C. C. A.] 118 Fed. 30. Attempt to set up a defense to an action on the judgment which should have been placed in the original action. Tilton v. Goodwin, 183 Mass. 236.

43. Budlong v. Budlong [Wash.] 78 Pac. 783.

44. Where the former judgment declared a trust terminated a subsequent action to declare it in force is a collateral attack. Spencer v. Spencer, 31 Ind. App. 321. A suit in the circuit court to enjoin the collection of a school tax held not a collateral attack on the judgment of the county court directing an election for the establishment of the school. Waring v. Bertram, 25 Ky. L. R. 307, 75 S. W. 222.

45. Miles v. Ballantine [Neb.] 93 N. W. 708; Graham v. Loh [Ind. App.] 69 N. E. 474; Banking House v. Dukes [Neb.] 97 N. W. 805; National Bank v. Home Security Co., 65 Kan. 642, 70 Pac. 646; Noerdlinger v. Huff, 31 Wash. 360, 72 Pac. 73.

46. Inhabitants of Winslow v. Inhabitants of Troy, 97 Me. 130; Tremblay v. Aetna Life Ins. Co., 97 Me. 547; Wilson v. Lubke, 176 Mo. 210. Divorce decree. Inhabitants of Winslow v. Inhabitants of Troy, 97 Me. 130; Spencer v. Spencer, 31 Ind. App. 321. Applied to foreign judgment. Old Wayne Mut. Life Ass'n v. Flynn, 31 Ind. App. 473.

47. Real party in interest not made a party. A judgment for taxes against the heirs of a former owner is not binding on his grantee not a party and without notice of the suit. Green v. Robertson, 30 Tex. Civ. App. 236. Rendition of judgment against corporation after dissolution. In re Stewart, 39 Misc. [N. Y.] 275; Holmes v. Columbia Nat. Bank [Neb.] 97 N. W. 26.

48. That the judgment was against the defendant giving his initials only, it nowhere appearing in the record that he was known by any other name does not render it invalid and subject to collateral attack. Vickborn v. Pollack [Mich.] 95 N. W. 576.

49. Code Civ. Proc. § 602, subd. 3, applies only to judgments voidable for irregularity. Baldwin v. Burt [Neb.] 96 N. W. 401. In case of constructive service as provided in Rev. St. 1899, § 570 if the return fails to show that a copy of the petition was also left a default judgment thereon is void. Feurt v. Caster, 174 Mo. 289. Service held insufficient to confer jurisdiction. Thornily v. Prentice [Iowa] 96 N. W. 728; Earnest v. Glaser [Tex. Civ. App.] 74 S. W. 605.

50. An amendment of the judgment roll by inserting additional findings after property had been sold under the original judgment is a jurisdictional defect. Muller v. Naumann, 85 App. Div. [N. Y.] 337.

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Judgments cannot be collaterally attacked for mere irregularities of procedure which at most render them voidable,[52] or errors of law,[54] or because the jurisdictional facts are imperfectly set out,[55] nor can a recorded justice's judgment be attacked for insufficiency of the transcript.[56]

A default judgment is no more subject to collateral attack than any other judgment.[57]

A collateral attack on a foreign judgment does not deny full faith and credit.[58]

The rules against collateral attack apply to courts of limited jurisdiction if facts invoking it appear of record,[59] and to inferior jurisdictions which show requisite jurisdictional facts.[60]

Right to attack.—It is not necessary that objection should have been made to the service,[61] or relief sought against the judgment,[62] or a meritorious defense be shown.[63]

A third person summoned in supplementary proceedings may show that the judgment is void.[64]

Jurisdiction is presumed in favor of superior courts whether of limited[65] or

51. A stipulation that the same judge should retry the cause is not evidence of fraud or collusion. Bohannon v. Tarbin, 25 Ky. L. R. 515, 76 S. W. 46. When presented as claims against a bankrupt's estate it may be shown that they were collusively confessed to defraud other creditors. Chandler v. Thompson, 120 Fed. 940. Fraud in the allowance of claims by the commissioners is not ground for collateral attack on the decree of the probate court based on such allowance. Judge of Probate v. Lee [N. H.] 56 Atl. 188. A mere allegation that the suit was brought in one state to avoid the laws of another state is insufficient. Hudson Kimberly Pub. Co. v. Young, 90 Mo. App. 505.

52. Bonner v. Gorman [Ark.] 77 S. W. 602; Graham v. Loh [Ind.] 69 N. E. 474.

53. School Dist. v. Kountze [Neb.] 92 N. W. 597; Becker v. Studeman, 86 App. Div. [N. Y.] 94; Banking House v. Dukes [Neb.] 97 N. W. 805. Applied to surrogate's decrees. Sutherland v. St. Lawrence County, 42 Misc. [N. Y.] 38. Disqualification of judge. Forest Coal Co. v. Doolittle [W. Va.] 46 S. E. 238. Irregularities in service of process. Muchmore v. Guest [Neb.] 96 N. W. 194. Rendition of judgment after debtor's death. Robinett's Adm'r v. Mitchell [Va.] 45 S. E. 287. Non appointment of a guardian ad litem. Court also held to have jurisdiction of the subject matter and persons. Myers v. Pedigo, 24 Ky. L. R. 1923, 72 S. W. 734. Because the court sua sponte after term corrected the judgment. Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co., 126 Fed. 552. Invalidity of a reference. McLeod v. Graham, 132 N. C. 473. Invalidity of a receiver's appointment. Powell v. National Bank [Colo. App.] 74 Pac. 536. An order directing a receiver to pay a judgment against him cannot be attacked on the ground that the appointment was invalid. Painter v. Painter, 138 Cal. 231, 71 Pac. 90. A judgment of the circuit court impeaching the validity of a will is not subject to collateral attack because some of the beneficiaries were not before the court on the appeal from the probate court [Ky. Rev. St. 1899, §§ 4850, 4859, 4861, 4862 provide a remedy in such case]. Bohannon v. Tarbin, 25 Ky. L. R. 515, 76 S. W. 46. Transmission of the original order transferring the cause on account of disqualification of the court instead of a certified copy. Finley v. Chamberlin [Fla.] 35 So. 1. Absence of findings. Cizek v. Cizek [Neb.] 96 N. W. 657. That the judgment confessed was without the affidavit of authority to confess the judgment or that the statement was insufficient. St. John Wood-Working Co. v. Smith, 82 App. Div. [N. Y.] 348.

54. Ruppin v. McLachlan [Iowa] 98 N. W. 153.

55. Recital of disqualification of judge as ground of jurisdiction of the court to which the cause was transferred. Finley v. Chamberlin [Fla.] 35 So. 1.

56. Cole v. Potter [Mich.] 97 N. W. 774.

57. Ruppin v. McLachlan [Iowa] 98 N. W. 153.

58. Fraudulently decoying party into jurisdiction. Jaster v. Currie [Neb.] 94 N. W. 995.

59. **Probate decrees.** Hadley v. Bourdeaux [Minn.] 95 N. W. 1109; Ewing v. Mallison, 65 Kan. 484, 70 Pac. 369. Applied to surrogate's appointment of a personal representative. Tanas v. Municipal Gas Co., 84 N. Y. Supp. 1053.

60. The rules of collateral attack apply to **justice's judgments** (Burns v. Barker [Tex. Civ. App.] 71 S. W. 328); to common pleas and justice's judgments (Plains Township's Appeal, 206 Pa. 556). Objection non residence of parties (Cole v. Potter [Mich.] 97 N. W. 774).

61. Frawley v. Pennsylvania Casualty Co., 124 Fed. 259; Jaster v. Currie [Neb.] 94 N. W. 995. He need not first appear specially to quash the service of process where he was brought within the jurisdiction by fraud. Jaster v. Currie [Neb.] 94 N. W. 995.

62. The judgment debtor need not first apply to have the judgment set aside. Rice v. Allen [Neb.] 95 N. W. 704.

63. Statute requiring such showing (Code Civ. Proc. § 602) applies only when affirmative relief is sought. Baldwin v. Burt [Neb.] 96 N. W. 401.

64. Judgment obtained against a corporation after its dissolution. In re Stewart, 39 Misc. [N. Y.] 275.

65. Probate Court. Saloman v. Wincox's

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general jurisdiction,[66] unless the record itself dispels it;[67] but not in favor of inferior[68] or special ones.[69] The same presumptions favor federal courts as are indulged in favor of the state courts of record.[70]

Thus, it will be presumed that proper service of process was had,[71] or that a person not a party to the record voluntarily appeared,[72] and that attorneys had authority to appear[73] and compromise,[74] that a continuance had been had where the record shows that the hearing was had at a later date than the day of return.[75] Even in favor of a justice's judgment, it is presumed that the excess above the jurisdictional amount was interest,[76] and that the server of process had authority.[77] This presumption prevails over an inference from the judge's minutes.[78] If the existence of jurisdictional facts was determined in the action, it cannot be raised collaterally.[79] It may be disproved where fraudulently made to appear[80] or if collateral to the merits and involving no retrial of them.[81] Recitals in a superior court's judgment may not be controverted as a general rule, nor those of inferior courts which involve a retrial of the merits.[82]

Estate, 104 Ill. App. 277; Hadley v. Bourdeaux [Minn.] 95 N. W. 1109.

Applied to probate judgments. In re Davison's Estate [Mo. App.] 73 S. W. 372.

Justice courts are superior. Recital of due service overcomes an attack that it was on Sunday. Burns v. Barker [Tex. Civ. App.] 71 S. W. 328. On collateral attack it cannot be shown that deceased was not a resident of the surrogate's county and without jurisdiction to appoint the plaintiff administrator. Van Gaasbeek v. Staples, 85 App. Div. [N. Y.] 271. Applied to order of appointment of a guardian. Beardsley v. Thomas [Tex. Civ. App.] 72 S. W. 411.

66. Meddis v. Kenney, 176 Mo. 200; Hodges v. Brice [Tex. Civ. App.] 74 S. W. 590; Mesnager v. De Leonis, 140 Cal. 402, 73 Pac. 1052; Johnson v. Friant, 140 Cal. 260, 73 Pac. 993. Silent as to process. Northington v. Reed, 25 Ky. L. R. 354, 75 S. W. 206; Miller v. Farmer's Bank, 25 Ky. L. R. 373, 75 S. W. 218. The affidavit for an attachment will be presumed to have been made though the record is silent. Eltonhead v. Allen [C. C. A.] 119 Fed. 126. That one not originally a party but impleaded by answer had appeared, the journal entry so reciting, though record was silent. National Bank v. Home Security Co., 65 Kan. 642, 70 Pac. 646. Indorsements on a judgment though incomplete held sufficient to support presumption that published service was had. Talbot v. Roe, 171 Mo. 421.

67. Haupt v. Simington, 27 Mont. 480, 71 Pac. 672; Finley v. Chamberlin [Fla.] 35 So. 1.

68. County court in New York. Special proceedings. In re Baker, 173 N. Y. 249. Justice of the peace must show it on face of his proceedings. Garrett v. Murphy, 102 Ill. App. 65. When the proceedings are regular on the face even these may be so aided. Presumed that court continued in session until the date of trial. Levadas v. Beach, 117 Ga. 178.

69. Court of general jurisdiction exercising special powers. Glos v. Woodworth, 202 Ill. 480.

70. Bracken v. Milner, 99 Mo. App. 187.

71. Northington v. Reed, 25 Ky. L. R. 354, 75 S. W. 206. Where it appears that a debtor sued out a certiorari complaining of a judgment in garnishment proceedings, it will be presumed that he was a party thereto unless the record shows the contrary (Lampkin v. Northington, 115 Ga. 989; Mott v. Ft. Edward Waterworks Co., 79 App. Div. [N. Y.] 179), though no service is shown (Miller v. Farmer's Bank, 25 Ky. L. R. 373, 75 S. W. 218).

72. National Bank v. Home Security Co., 65 Kan. 642, 70 Pac. 646.

73. Such presumption is stronger in a collateral than in a direct proceeding. Heath v. Miller, 117 Ga. 854.

74. Hartford Fire Ins. Co. v. King [Tex. Civ. App.] 73 S. W. 71.

75. Particularly after the lapse of 30 years, rights having been acquired under the judgment. Heath v. Miller, 117 Ga. 854.

76. And that the rate was stipulated in the contract and legal at the time of making. Smith v. Ridley, 30 Tex. Civ. App. 153.

77. Noerdlinger v. Huff, 31 Wash. 360, 72 Pac. 73.

78. The judge's minutes cannot be resorted to in collateral proceedings to show error or mistake as that the judgment was rendered in vacation and that no adjournment had been had. Bracken v. Milner, 99 Mo. App. 187.

79. McClure v. Paducah Iron Co., 90 Mo. App. 567.

80. Where the provision of the contract sued on and which gave the justice jurisdiction was forged, the defendant not appearing may collaterally impeach the judgment by oral evidence of the facts. Cooley v. Barker [Iowa] 98 N. W. 289.

81. Last residence of a decedent. Ewing v. Mallison, 65 Kan. 484, 70 Pac. 369.

And see Ostby v. Secor [Iowa] 94 N. W. 571; Tremblay v. Aetna Life Ins. Co., 97 Me. 547.

82. The order in supplementary proceedings reciting the jurisdictional facts is presumptive evidence of their existence. Lisner v. Toplitz, 86 App. Div. [N. Y.] 1; Talbot v. Roe, 171 Mo. 421. Evidence held insufficient to overcome presumption of service from recitals in judgment. Ballard v. Way [Wash.] 74 Pac. 1067. That the process was served on a legal holiday cannot be raised collaterally. Burns v. Barker [Tex. Civ. App.] 71 S. W. 328. As to service of process or presumed to be true. McKibben v. McKibben, 139 Cal. 448, 73 Pac. 143. On a motion the recitals as to service of process may be controverted. Ricaud v. Alderman, 132 N. C. 62. A recital of appearance by all parties by at-

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§ 9. *Lien.*—The judgment must be properly docketed and indexed.[83] The certificate of lien permitted to be filed in Connecticut need not accurately describe the debtor's precise interest in the realty sought to be affected,[84] and that it was insufficient as to some parcels of land will render it invalid as to other parcels.[85]

Statutes requiring the issuance of an execution to preserve the lien on realty apply to justices' judgments docketed in a court of record,[86] and the execution must have been delivered to the sheriff, the mere issuance being insufficient.[87] If not so issued, the lien is lost.[88]

The lien attaches immediately on loss of an exemption right.[89] The judgment lien relates back to the date of a statutory lien sued on.[90] Junior judgments are liens against the property in the hands of a subsequent purchaser of the debtor's equity of redemption from sale under a senior judgment.[91]

A leasehold estate is subject to a judgment lien,[92] as is a testamentary devise,[93] and fixed and definite rights under a testamentary trust.[94]

Priority of a judgment lien is not affected by action on the judgment and the recovery of a new judgment therein.[95]

The limitations on judgment lien begin to run from the time of the rendition of the final judgment on appeal,[96] or from the time of the loss of the homestead exemption.[97] The stay of execution on appeal will not suspend the operation

torneys may be impeached by evidence in a suit to annul the judgment and this though a count in ejectment was joined. Mullins v. Rieger, 169 Mo. 521. Applied to surrogate's order of instructions. In re Bodkin's Estate, 34 N. Y. Supp. 552. Recitals and proceedings in the record do not save a foreign judgment in personam from collateral attack for actual want of jurisdiction of the person. German Sav. & L. Soc. v. Dormitzer, 24 Sup. Ct. 221. Recital held conclusive because confirmed by other evidence. Mott v. Ft. Edward Water Works Co., 79 App. Div. [N. Y.] 179.

83. See ante, § 8. Judgment held sufficiently indexed in docket. Fulkerson v. Taylor [Va.] 46 S. E. 309. Judgment against E. G. S. is a lien on the property of Eleanor G. S. The names being idem sonans and held to charge a purchaser with notice. Green v. Meyers, 98 Mo. App. 438.

84. Gen. St. 1902, § 4149. In proceedings to foreclose such lien the amount and nature of debtor's interest will not be determined. Ives v. Beecher, 75 Conn. 564.

85. Ives v. Beecher, 75 Conn. 564.

86. Hurd's Rev. St. 1901, c. 77, § 1. Execution must be issued within one year. Issuance of an execution from the justice court is not sufficient. Brockway v. Trinity M. E. Church, 205 Ill. 238; Whiteford v. Hootman, 104 Ill. App. 562.

87. Tex. Rev. St. 1895, arts. 3289, 3290. Schneider v. Dorsey [Tex.] 74 S. W. 526.

88. Purchaser held to take free from lien [Sayles' Rev. St. art. 3289, 3290]. First Nat. Bank v. Adams [Tex. Civ. App.] 72 S. W. 403. 2 Pasch. Dig. art. 7005. The fact that debtor was insolvent did not release the creditor of his duty to issue an execution each year. Johnson v. Weatherford [Tex. Civ. App.] 71 S. W. 789.

89. As on the abandonment of a homestead. Smith v. Thompson, 169 Mo. 553.

90. Boyer v. Webber, 22 Pa. Super. Ct. 35. The judgment of the insolvency court declaring the assignment for the benefit of all creditors relates back to the time of making the assignment. Mengert v. Brinkerhoff, 67 Ohio St. 472.

91. People's Sav. Bank v. McCarthy, 119 Iowa, 586.

92. Ives v. Beecher, 75 Conn. 564. Judgment debtor held a mere conduit through whom title was conveyed to a bona fide purchaser from a grantee of the debtor and the judgment consequently not a lien on the property. Gordon v. Cox [Tenn.] 75 S. W. 925.

93. Civ. Code, §§ 1341, 671, 14 subd. 2. Martinovich v. Marsicano, 137 Cal. 354, 70 Pac. 459.

94. Ives v. Beecher, 75 Conn. 567.

95. Springs v. Pharr, 131 N. C. 191. Lien held superior to an attorney's lien. Teller v. Hill [Colo. App.] 72 Pac. 811. Owner of land awarded a judgment for damages in condemnation held to have waived his equitable lien. Southern R. Co. v. Gregg [Va.] 42 S. E. 570. Partition decree directing application of co-tenant's share of proceeds in satisfying judgment liens against him held not to remove lien of a judgment which was a lien on such co-tenant's homestead; such proceeds having been sufficient to satisfy only a senior judgment. Smith v. Piper, 118 Iowa, 363. Mont. Comp. St. 1887, div. 5, § 707, providing a judgment against a railroad company for personal injuries shall be a superior lien on property within the state does not apply to street railways. Cent. Trust Co. v. Warren, 121 Fed. 323.

96. A judgment of the superior court is a lien for five years from the time of affirmance by the supreme court [Ballinger's Ann. Codes St. §§ 5132, 5143, 5192]. Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046. Under Fla. Rev. St. 1895, § 1972, the lien attaches as to property attached in the action from the time of the entry by the clerk of the circuit court of the levy and a description of the property in the lien book. Stockton v. Nat. Bank [Fla.] 34 So. 897.

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of the statute,[96] but proceedings to enforce the lien against the realty of the deceased debtor, pending administration on his estate, arrests the statute.[99] After expiration of the statutory life, the lien cannot be revived,[1] nor will the issuance of an execution extend the life of the lien.[2]

The lien is suspended by an order of cancellation, though the order is appealed with a stay of proceedings.[3] The withdrawal of the certificate of a judgment from the clerk's office will not destroy the lien.[4] After the lapse of the statutory time for junior judgment lienors to redeem from a sale under a senior judgment, their liens are lost.[5]

A purchaser of the land may remove an invalid lien of a judgment as a cloud on his title,[6] and a correction nunc pro tunc so as to make it a lien constitutes a cloud on the title of an intervening purchaser.[7]

§ 10. *Suspension and revival.*—The statute of limitations of revivor of actions does not apply to proceedings to revive a judgment.[8] That suit on a judgment is barred by limitations will not affect the right to revive the judgment within the statutory time.[9] In Washington, the life of the judgment is coextensive with the life of the lien.[10] The limitations begin to run from the time of the rendition of the judgment.[11] An order directing the statement of account by the representatives of the deceased debtor before the judgment is dormant,[12] and the commencement of proceedings to revive on the last day tolls the statute,[13] as does a pending action on the judgment[14] or a stay of execution.[15] Where the issuance of an execution is essential to the life of the judgment,[16] if the execution is not properly docketed, the dormancy statute is not tolled.[17]

Justices' judgments docketed may be revived.[18]

96. As on abandonment of the homestead. Smith v. Thompson, 169 Mo. 553.

98. Sublette v. St. Louis, I. M. & S. R. Co., 96 Mo. App. 113.

99. Lien obtained against realty under Code, § 674, is not merged in a judgment against his estate. In re Wiley's Estate, 138 Cal. 301, 71 Pac. 441.

1. It is not revived by the allotment of a homestead after such time. Wilson v. Beaufort County Lumber Co., 131 N. C. 163.

2. 2 Ballinger's Ann. Codes & St. § 5132. Sale of the property after the expiration of the lien is void, though the execution was issued before expiration. Hardin v. Day, 29 Wash. 664, 70 Pac. 118.

3. And a purchaser at a judicial sale of the debtor's land subject to certain mentioned liens in which such judgment was not included takes free from the lien thereof. In re Coleman, 77 App. Div. [N. Y.] 496.

4. Certificate filed by probate judge [Code 1898, §§ 1920, 1921]. Emrich v. Gilbert Mfg. Co. [Ala.] 36 So. 322.

5. Wood v. Rankin, 119 Iowa, 448.

6. As where the judgment was not docketed in the clerk's office on incorporation of a part of the county wherein the land was situate as a city under Code 1887, § 3570. Wicks v. Scull [Va.] 46 S. E. 297.

7. Municipal court judgment docketed in county clerk's office against the owner under fictitious name. Bernstein v. Schoenfeld, 81 App. Div. [N. Y.] 171.

8. School Dist. No. 34 v. Kountze [Neb.] 92 N. W. 597.

9. Sublette v. St. Louis, I. M. & S. R. Co., 96 Mo. App. 113.

10. 2 Hill's Ann. St. & Codes, §§ 462, 463. After expiration of five years after rendition. Tacoma Nat. Bank v. Sprague [Wash.] 74 Pac. 393. And an execution cannot thereafter issue without revivor. Hewitt v. Root, 31 Wash. 312, 71 Pac. 1021.

11. Though not signed by the judge until several months after rendition and though it provided that it should have effect as of the day of signing. Barthrop v. Tucker, 29 Wash. 666, 70 Pac. 120.

12. Robinett's Adm'r v. Mitchell [Va.] 45 S. E. 287. Under Laws 1895, p. 619, c. 359, the running of limitations is not suspended until there has been actual allotment of the homestead. Application of the above act as amended. Act 1901, p. 855, c. 612. Farrar v. Harper, 133 N. C. 71.

13. As the issuance of a scire facias. In re Campbell's Estate, 22 Pa. Super. Ct. 432.

14. In such case there is no necessity for the issuance of an execution or revivor. Treat v. Wilson, 65 Kan. 729, 70 Pac. 893.

15. The revival of a judgment after the lapse of one year without return of execution is not necessary where the debtor procures a delay of execution. Moses v. U. S., 19 App. D. C. 290.

16. Code, § 445, requiring issuance of execution to keep judgment alive does not refer to special executions provided by Gen. St. 1901, § 4994. Watson v. Keystone Iron Works Co. [Kan.] 74 Pac. 269.

17. Nowell v. Haire, 116 Ga. 386; Smith v. Bearden, 117 Ga. 822.

18. The supreme court of the District of Columbia is the proper court in which to revive by scire facias a justice's judgment docketed under R. S. D. C. § 1022. Green v. Mann, 19 App. D. C. 243.

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The judgment debtor is entitled to reasonable notice of the application to revive[19] or revivor may be had by agreement.[20]

Revival should be in the name of the legal holder,[21] and one who has no real interest cannot procure it to be done by the legal holder.[22] While all the judgment defendants should be made parties, yet the action will not abate because some of the parties could not be found so as to make service of the process on them.[23]

In proceedings brought by the representative of the judgment creditor and a subsequent assignee, a plea that the assignee acquired nothing by the assignment presents a good defense.[24]

Personal service of an order of revivor of a judgment, void for want of personal service on the defendant, will not validate it.[25]

§ 11. *Assignment.*—Generally, judgments are assignable,[26] but at common law the assignee takes only an equitable title.[27] A joint owner may assign his interest.[28] The giving of notice of the assignment to the debtor is not a condition precedent to the acquisition of a defeasible title or interest in the assignee,[29] nor will the failure to give notice render the assignment invalid as to creditors of the assignor.[30] As between the parties, an assignment before entry of the judgment is valid.[31] The assignment of a foreign judgment to a resident will not make it a domestic judgment in effect.[32]

The assignee acquires only the same[33] and no greater rights than the assignor had,[34] and subject to all the equities against him.[35]

The legal assignee is the proper party to sue on the judgment[36] or to revive it,[37] though he holds no formal assignment thereof,[38] and the assignor is not a necessary party.[39]

19. Sixteen days held sufficient. Kan. & T. C. Co. v. Carey, 65 Kan. 639, 70 Pac. 589.

20. The agreement for an amicable revival need not be signed by the judgment creditor. In re Campbell's Estate, 22 Pa. Super. Ct. 432.

21. Scire facias. In re Campbell's Estate, 22 Pa. Super. Ct. 432.

22. The judgment debtor cannot under Code 1887, § 3577, revive the judgment in the name of the representative of the deceased creditor for the purpose of appeal. Charlottesville v. Stratton's Adm'r [Va.] 45 S. E. 737.

23. Clark v. Commercial Nat. Bank [Neb.] 94 N. W. 958.

24. Since it does not question the transaction between deceased and his assignor. Fla. Cent. & P. R. Co. v. Luffman [Fla.] 33 So. 710.

25. Logan County v. Carnahan [Neb.] 95 N. W. 812.

26. Wood v. Carter [Neb.] 93 N. W. 158. Assignment questioned on ground of fraudulent representation by assignee held valid and the assignment agreement properly performed. Rickards v. Bemis [Tex. Civ. App.] 78 S. W. 239.

27. Proof of assignment of a foreign judgment. Price v. Clevenger, 99 Mo. App. 536. While not assignable at common law or under the statutes of Illinois yet equity will enforce an assignment if made bona fide and for a valuable consideration. On application of the judgment creditor the court refused to set aside the assignment as against a subsequent assignee. Pearson's Ex'rs v. Luecht, 199 Ill. 475.

28. And such assignee may redeem from a prior lien. Hunter v. Mauseau [Minn.] 97 N. W. 651.

29. So held where the assignment was made in a foreign state where the common law was presumed to exist. Price v. Clevenger, 99 Mo. App. 536.

30, 31. Williams v. West Chicago St. R. Co., 199 Ill. 57.

32. To make it a lien the assignee must in the state of his residence procure a judgment thereon. Frye-Bruhn Co. v. Meyer, 121 Fed. 533.

33. In re Day's Estate, 21 Pa. Super. Ct. 118. The assignment of a judgment in favor of the ward against his guardian carries with it the right to enforce the guardian's bond. Heisen v. Smith, 138 Cal. 216, 71 Pac. 180 Where after an unrecorded absolute assignment the judgment creditor settles with the debtor and satisfies the judgment to avoid liability for the face of the judgment to his assignee on the ground of insolvency of the debtor the assignor must show that the insolvency existed at the time of the trial. Hohle v. Randrup, 39 Misc. [N. Y.] 334. The consideration for the assignment cannot be questioned by third persons not creditors or in privity; the extent of the rights passing is not governed by the price paid. Metropolitan Bank v. Blaise, 109 La. 92.

34. Ricaud v. Alderman, 132 N. C. 62.

35. Frankel v. Garrard, 160 Ind. 209. He takes subject to an agreement to retransfer excess of property taken under the judgment. Fischbeck v. Mielenz [Wis.] 96 N. W. 426.

36. Campbell v. Harrington, 93 Mo. App. 315; Bond v. Carter [Tex. Civ. App.] 73 S. W. 45; Price v. Clevenger, 99 Mo. App. 536. The assignment of a judgment in Kansas carries with it the legal title and the assignee may sue thereon in another state in his own name. Martin v. Wilson, 120 Fed. 202.

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§ 12. *Payment, discharge and satisfaction; interest.*[40]—After expiration of the statutory life of a judgment, it is presumed to be satisfied.[41]

A payment[42] to a clerk of court, who has no right as such to receive money due on judgment, is not a satisfaction.[43] A contract may discharge it if so intended.[44] Only the matters adjudicated are satisfied.[45] Payment by one of the joint debtors operates as a satisfaction of the judgment irrespective of the intention of the parties to keep it alive.[46] A payment on a judgment should first be applied on the interest, and in case of surplus, then on the principal, and the balance bears interest from the day of such payment.[47]

If satisfaction is obtained by fraud it may be set aside,[48] or if after payment the creditor refuses to satisfy it of record, he may be held liable for the penalty.[49]

The exercise of an option to rescind a contract of sale operates to avoid a judgment for the purchase money.[50] Matters of discharge which have arisen since the rendition of the judgment may be availed of by motion,[51] and the objection that the proceedings were based on a supplemental petition is waived by pleading to the petition.[52] A motion as well as action will lie to satisfy or vacate of record a judgment satisfied by operation of law.[53]

Judgments draw interest from date of rendition.[54]

§ 13. *Actions on judgment.*—The law at the time of the recovery governs limitations[55] which begin to run at the time of rendition, and is not tolled by an

37. School Dist. No. 34 v. Kountze [Neb.] 92 N. W. 597.

38. Linton v. Baker [Neb.] 96 N. W. 251.

39. Wood v. Carter [Neb.] 93 N. W. 158. Purchaser at a sale of corporate property under order of court held to be the equitable owner of a judgment in favor of the corporation, but to an action thereon by the purchaser or his assignee the corporation, its assignees and receiver should be made parties. McCardle v. Aultman Co. [Ind. App.] 67 N. E. 236.

40. Right to set off judgments see Set Off and Counterclaim. Effect of discharge of debtor as a bankrupt see Bankruptcy.

41. That is after ten years, but as to a judgment entered before Rev. St. 1899, § 4297 took effect, 20 years. Wencker v. Thompson's Adm'r, 96 Mo. App. 59. A mere written acknowledgment of existence without a promise to pay will not rebut the presumption of payment from expiration of the statutory life of the judgment [Rev. St. 1879, § 3251]. Chiles v. School Dist. [Mo. App.] 77 S. W. 82.

42. Evidence held sufficient to show payment. Howard v. London Mfg. Co., 24 Ky. L. R. 1934, 72 S. W. 771.

43. Therefore a motion to direct payment to the creditor will not lie. Whitesboro v. Diamond [Tex. Civ. App.] 75 S. W. 540.

44. Agreement held not to affect a satisfaction of a judgment. Crotser v. Lamont [Colo. App.] 70 Pac. 695.

45. Satisfaction of a judgment in unlawful detainer held not to satisfy rents pending appeal to secure which an appeal bond had been given. Carmack v. Drum [Wash.] 73 Pac. 377.

46. The debtor paying cannot issue execution against codebtors. Deleshaw v. Edelen [Tex. Civ. App.] 72 S. W. 413. A release of a joint debtor in writing reciting "so far as the same can be done without releasing * * * [the other debtor] from payment of the balance" does not operate to discharge such other debtor. Barnum v. Cochrane, 139 Cal. 494, 73 Pac. 242. On a joint judgment against several defendants they are liable inter se according to their interest in the subject matter. Smith v. New Orleans R. Co., 109 La. 782.

47. Rawlings v. Anheuser-Busch Brewing Ass'n [Neb.] 94 N. W. 1001.

48. Evidence held insufficient to show fraud in obtaining satisfaction. Pannell v. Pannell [Mo. App.] 73 S. W. 289.

49. Wis. Rev. St. § 2915. He cannot be held liable pending an appeal from a judgment in an action to determine whether it had been paid by an accord and satisfaction. The refusal must be willful. Johnson v. Huber [Wis.] 93 N. W. 826.

50. Ward v. Warren [Or.] 74 Pac. 482.

51. As a satisfaction by receipt of rents and profits of the land after decree holding defendant held the legal title in trust. That proceedings for the discharge by petition will not bar a new application by motion. Dunton v. McCook [Iowa] 94 N. W. 942.

52. All parties appearing in such proceeding, it was held that the court had jurisdiction to determine the issues. Dunton v. McCook [Iowa] 94 N. W. 942.

53. Gen. St. 1894, § 5435, as where the vendor who had recovered judgment for part of the purchase money subsequently elected to rescind the contract. Warren v. Ward [Minn.] 97 N. W. 886.

54. Applied to decree for money made up in part of interest. East Tennessee Land Co. v. Leeson [Mass.] 69 N. E. 351. Interest runs from the date of rendition on the amount the plaintiff is entitled to and not from the day of the remittitur of the excess. Rawlings v. Anheuser-Busch Brewing Ass'n [Neb.] 94 N. W. 1001. Alternative judgment in replevin is a money judgment bearing interest. Martin County Bank v. Bird [Minn.] 96 N. W. 915.

See, also, title Interest, 2 Curr. Law, 547.

55. Chiles v. School Dist. [Mo. App.] 77 S. W. 82. Tice v. Fleming, 173 Mo. 49. In Iowa

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appeal therefrom in the absence of a supersedeas bond,[56] and an action on a docketed justice's judgment is within the general statute limiting actions on judgments.[57] In pleading a judgment, portions thereof which have been vacated on appeal may properly be omitted.[58] The judgment need not be proved by record where the plaintiff pleads it and the defendant admits the recovery, but pleads merely the statute of limitations.[59]

JUDICIAL SALES.

§ 1. Occasion for and Nature of Judicial Sales (601).
§ 2. The Order, Writ or Decree (601).
§ 3. Levy, Seizure or the Like (601).
§ 4. Notice and Advertisement of Sale (601).
§ 5. Sale and Conduct of It (602).
§ 6. Confirmation and Setting Aside Sales (602).
§ 7. Completion of Sale; Deeds (602).
§ 8. Title and Rights under Sales and under Deed (603).
A. Defects and Collateral Attack (603).
B. As against Outstanding Claims (603).
C. Rights under Sale (603).

The peculiarities of judicial sales in the various specific proceedings have a place elsewhere. This article deals rather with general rules.[60]

§ 1. *Occasion for and nature of judicial sales.*—A judicial sale is one which is made by a court of competent jurisdiction in a pending cause through its authorized agent.[61] Judicial sales may be ordered by a court of equity through its receiver without allowing redemption.[62] They may be private.[63] They are not considered voluntary sales by the owner and therefore are not champertous, though the interest conveyed is that of a disseisee.[64] The legislature may constitutionally provide by statute for the judicial sale of property in which there are contingent interests, the proceeds to be held subject to the same contingencies.[65]

§ 2. *The order, writ or decree.*—Where a judicial sale is ordered, it is, presumably, for cash,[66] and free from taxes.[67] An order of sale of land and deed thereunder must describe the land or they are void.[68]

§ 3. *Levy, seizure or the like.*—A provision of the statute that a sheriff shall levy upon personalty before realty is directory, merely, and does not render void a levy upon realty in which the sheriff does not return that he has searched without success for personalty.[69] The right of a sheriff to compel specific performance of a contract to buy land sold by him is conditional upon his having fully complied with the statutory requirements for a valid sale.[70]

§ 4. *Notice and advertisement of sale.*[71]—The notice of a sale need not state the amount due under the decree,[72] but should contain a description of the property to be sold so that bidders may be attracted.[73]

action on a justice's judgment is barred after 18 years. Citizens' Nat. Bank v. Harris [Iowa] 95 N. W. 272.

56. Bank of Stockham v. Weins [Okl.] 71 Pac. 1073; Sublette v. St. Louis R. Co., 96 Mo. App. 113.

57. Cole v. Potter [Mich.] 97 N. W. 774. The statute limiting the right to sue on justices' judgments does not apply. Sullivan v. Miles [Wis.] 94 N. W. 298.

58. State v. Board of Com'rs [Ind.] 68 N. E. 295.

59. Price v. Clevenger [Mo. App.] 74 S. W. 894.

60. See Estates of Decedents, Executions, Foreclosure, Receivers.

61. McAllister v. Harman [Va.] 42 S. E. 920.

62. Mercantile Realty Co. v. Stetson [Iowa] 94 N. W. 859.

63. Sale of bankrupt's property by referee. In re Hawkins, 125 Fed. 633.

64. De Garmo v. Phelps, 176 N. Y. 455.

65. Springs v. Scott, 132 N. C. 548.

66. Shrady v. Van Kirk, 77 App. Div. [N. Y.] 261.

67. Brown v. Timmons [Tenn.] 72 S. W. 958.

68. Roberts v. Thomason, 174 Mo. 378.

69. Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046.

70. Polhemus v. Priscilla [N. J. Eq.] 54 Atl. 141.

71. An advertisement of a judicial sale published in every issue of a weekly newspaper for thirty days before the sale has been held sufficient. Cuyler v. Tate [Neb.] 93 N. W. 675.

72. Foreclosure decree. Gallentine v. Cummings [Neb.] 96 N. W. 178.

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§ 5. *Sale and conduct of it. Who shall conduct sale.*—The executor himself, if capable, is the proper person to make a statutory sale of decedent's real estate to pay his debts,[74] but a sheriff may conduct sales in part personally and in part by his deputy.[75]

Conditions precedent.—A commissioner to conduct judicial sale, if the statute require him to give a bond, must give a bond for a resale.[76] The immediate filing of an appraisal by the officer before making the sale has been held necessary to the validity of the sale.[77] In order that the sheriff may have authority to make a second appraisement of property to be sold, his return must show the statutory conditions to have been complied with.[78] Unsecured creditors of a corporation are not necessary parties to a proceeding to confirm judicial sale of its property.[79] Heirs are not entitled to notice of an administrator's petition to sell.[80] A court may reasonably require a deposit of fifty dollars from successful bidders at judicial sales.[81]

§ 6. *Confirmation and setting aside sales.*—The petition for cancellation of an order for a judicial sale is an equitable, not common law proceeding.[82] A judicial sale will not be set aside for inadequacy of price unless it be so gross as to shock the conscience.[83] But the court has a broad discretion, and may authorize a resale where the property will surely bring a larger sum.[84] The fact that the original suit was prosecuted against the defendant by the initials only of his Christian names with his surname is no objection to the confirmation of a judicial sale resulting from the suit.[85] If a court grants a writ of assistance to put a purchaser at a judicial sale into possession, such act is an implied confirmation of the sale.[86] If the purchaser at a judicial sale allows confirmation to be refused without opposition, he cannot raise the question by a motion for a new trial.[87]

§ 7. *Completion of sale; deeds.*—A purchaser at a judicial sale makes a contract with the court and can be relieved from it only by order of the court.[88] He will be relieved if the title is subject to reasonable doubt,[89] and his deposit will be returned,[90] but not because of litigation of which he knew at the time he bid.[91]

73. Morrison v. Lincoln Sav. B. & S. D. Co. [Neb.] 96 N. W. 230.

74. Holly v. Gibbons, 176 N. Y. 520.

75. U. S. Nat. Bank v. Hanson [Neb.] 95 N. W. 364.

Compensation: Where the commissioner in charge of a judicial sale is by statute allowed five dollars extra compensation for each separate tract of land sold, an allowance of fifteen dollars where the land lies in four different counties and is covered by three hundred different patents, is not excessive. Weller v. Hull's Assignee, 24 Ky. L. R. 2185, 74 S. W. 172.

Proceeds: The sheriff selling under an order of the court is the proper custodian of the proceeds until the sale is confirmed when he should pay them to the proper parties. Craw v. Abrams [Neb.] 94 N. W. 639.

76. Tompkins v. Dyerle [Va.] 46 S. E. 300.

77. Chadron Loan & Bldg. Ass'n v. O'Linn [Neb.] 95 N. W. 358.

78. Gundry v. Brown [Neb.] 96 N. W. 610.

79. Godchaux v. Morris [C. C. A.] 121 Fed. 482.

80. Irwin v. Flynn, 110 La. 829. Contra, (minor heirs). Hill v. Taylor [Mo. App.] 74 S. W. 9.

81. Green v. Diezel [Neb.] 92 N. W. 1004.

82. Files v. Brown [C. C. A.] 124 Fed. 133. **Allegations in a petition** to set aside a sale that "the judgment of sale is erroneous and contrary to law," and that the land "was not advertised according to law" are mere statements of conclusions and of no effect. Wigginton v. Nehan, 25 Ky. L. R. 617, 76 S. W. 196.

83. Blanks v. Farmers' Loan & Trust Co., 122 Fed. 849; Koch v. West, 118 Iowa, 468; Booker v. Louisville, 25 Ky. L. R. 497, 76 S. W. 18. Where inadequacy of price was joined with insufficient notice—sale set aside. B'Hymer v. Lund, 24 Ky. L. R. 767, 69 S. W. 1079.

84. McCallum v. Chicago Title & Trust Co., 203 Ill. 142.

85. Fisk v. Gulliford [Neb.] 95 N. W. 494. But if the judgment is against O. P. Buchanan the sheriff has no jurisdiction to sell the lands of Porter O. Buchanan. Buchanan v. Edmisten [Neb.] 95 N. W. 620.

86. State v. Evans, 176 Mo. 310.

87. In re Richard's Estate, 139 Cal. 72, 72 Pac. 633.

88. Parish v. Parish, 87 App. Div. [N. Y.] 430.

89. Stephens v. Flammer, 40 Misc. [N. Y.] 278. Only defect arose from possibility of existence of a dissipated man in ill health who, thirty years before, at age of thirty, had disappeared and had not been heard from since—held not valid objection. McNulty v. Mitchell, 41 Misc. [N. Y.] 293. Contingent remainderman not made party to a suit involving property sold held valid objection. New York Security & Trust Co. v. Schoenberg, 87 App. Div. [N. Y.] 262.

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Where a purchaser at a judicial sale fails to complete his purchase, the court may, in its discretion, order an attachment for contempt to issue or direct a resale and hold the purchaser for any loss.[92]

§ 8. *Title and rights under sales and under deed. A. Defects and collateral attack.*—A judicial sale procured through fraud will be set aside,[93] but not against a bona fide purchaser for value.[94] Miscellaneous decisions concerning defects are collected in the note.[95]

Estoppel.—An estoppel to deny the validity of the sale arises when an heir receives his share of the proceeds of a void sale of land by the administrator,[96] and where a plaintiff having obtained a void judgment took the proceeds of a sale under his judgment.[97] It has also been held that a person buying at a judicial sale subject to taxes is estopped to deny the validity of the assessment of the taxes.[98] But one purchasing subject to a mortgage is not estopped to deny the validity of the mortgage.[99]

(§ 8) *B. As against outstanding claims.*—The rule of caveat emptor applies to all judicial sales.[1] An administrator's sale conveys no greater interest than deceased had.[2] Liens of those not parties to the proceeding are preserved,[3] but liens of parties are extinguished unless the decree of sale otherwise provides.[4]

(§ 8) *C. Rights under sale.*—Property sold at judicial sales becomes immediately at the risk of the purchaser.[5] When a judicial sale converts land into money for the payment of debts, the money belongs to the creditors in the order of their liens, and interest accruing before distribution goes with the principal upon which it accrues and does not go to subsequent unsatisfied lienholders.[6] A judicial sale of an interest in cutting stone carries also a right to reasonable use of the surface over the stone for the purpose of making the stone available.[7] To prove title under a sheriff's sale, not only the judgment, but also the record of the case resulting in the sheriff's sale, must be offered.[8] A purchaser of land, title to which runs through a sheriff's deed, is chargeable with notice of the court record in the case in which the judicial sale was ordered.[9] If by a decree of foreclosure one year is allowed by statute for redemption, a redemption of the mortgagor's interest

90. McCaffrey v. Little, 20 App. D. C. 116.
91. Dunlop v. Mulry, 85 App. Div. [N. Y.] 498.
92. Rowley v. Feldman, 84 App. Div. [N. Y.] 400.
93. Conspiracy of claimant and administrator. McAdow v. Boten [Kan.] 72 Pac. 529; Smith's Adm'r v. Wells, 24 Ky. L. R. 2166, 73 S. W. 742.
94. Morrow v. Cole, 132 N. C. 678.
95. The omission in an administrator's deed of the recital of the confirmation of the sale by the court does not render the deed void but merely prevents its being evidence of the fact. El Paso v. Ft. Dearborn Nat. Bank [Tex.] 74 S. W. 21. Statutory requirements as to time for confirming judicial sales, where time is not of the essence or substance of the thing to be done are considered directory. Custer v. Holler, 160 Ind. 505. The mere fact that the brother of an appraiser bid at the sale does not render the sale invalid. Mastin v. Zweigart, 24 Ky. L. R. 1920, 72 S. W. 750. The failure of a master to record the certificate of redemption from a sale under a foreclosure decree does not extinguish the right to redeem. Morava v. Bonner, 205 Ill. 321.
96. Meddis v. Kenney, 176 Mo. 200.
97. Muller v. Naumann, 85 App. Div. [N. Y.] 337.
98. Cottle v. Erie County, 173 N. Y. 591.
99. Zimmerman v. McMasters, 25 Ky. L. R. 456, 76 S. W. 5.
1. Walkau v. Manitowoc Seating Co., 105 Ill. App. 130; Flanary v. Kane [Va.] 46 S. E. 312; Bullock v. Gudgell, 25 Ky. L. R. 1413, 77 S. W. 1126; Keen v. McAfee, 116 Ga. 728.
2. Lahey v. Broderick [N. H.] 55 Atl. 354.
3. Thompson v. Brownlie, 25 Ky. L. R. 622, 76 S. W. 172; Bassell v. Caywood [W. Va.] 46 S. E. 159; Denny v. Broadway Nat. Bank [Ga.] 44 S. E. 982. Wife's inchoate right of dower. Jewett v. Feldheiser [Ohio] 67 N. E. 1072.
4. Receiver's sales. Scott v. Farmers' & M. Nat. Bank [Tex.] 75 S. W. 7; Abraham v. New Orleans Brew. Ass'n, 110 La. 1012; Gunter v. Selvern R. Co., 66 S. C. 407.
5. Thomas v. Caldwell, 136 Ala. 518.
6. In re Campbell's Estate, 22 Pa. Super. Ct. 430.
7. Bedford-Bowling Green Stone Co. v. Oman, 24 Ky. L. R. 2274, 73 S. W. 1038.
8. Clem v. Meserole [Fla.] 32 So. 815; Ronk v. Higginbotham [W. Va.] 46 S. E. 128. Where the judgment upon which a sale was made purports to be against a non-resident to prove the sale the purchaser must show proper service upon the judgment defendant. Evans v. Aldridge [N. C.] 45 S. E. 772.
9. Albers v. Kozeluh [Neb.] 94 N. W. 521.

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by an attaching creditor does not extend the mortgagor's time for redemption beyond the first year.[10]

JURISDICTION.

§ 1. Definitions and Distinctions (604).
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§ 13. Acquisition and Divestiture (630).
§ 14. Objections to Jurisdiction and Presumptions Respecting It (631).

§ 1. *Definitions and distinctions.*—Jurisdiction properly speaking is the power of a court to entertain and determine a cause, though the word is not always used in this narrow sense, courts frequently using it to express the idea more accurately expressed by the phrase "power to grant relief," as where a federal court dismissed a libel in admiralty for the reason that "jurisdiction" was not shown by it,[11] in that no maritime lien arose under the facts alleged, and it was held that this dismissal did not affect the power of the court to award costs against the libelant, the court having in fact "jurisdiction," though it had not power to grant relief in the particular case.[12] This title deals with the powers of courts to entertain causes of particular kinds, brought before them in particular manners, on particular grounds, but does not include a discussion of their powers to grant particular kinds of relief or the relief peculiar to certain courts.[13]

§ 2. *Elements and constituents in general.*—Jurisdiction does not depend upon the character of the decision or judgment, for when a suit is brought by a competent party, by legal process, in a court having power to entertain and determine causes of the kind in question, jurisdiction exists and no error of law committed in deciding the case will affect it.[14]

Primarily every court has the power to decide as to its own jurisdiction, and it is the province and duty of the court to determine whether jurisdictional facts exist, and act accordingly;[15] but a mere assertion of want of service on the defendant will not deprive the court of jurisdiction, and in such case the court has power to decide the question of fact upon proof sufficient for judicial cognizance.[16]

An actual controversy[17] between competent parties,[18] concerning a subject of

10. Stocker v. Puckett [S. D.] 96 N. W. 91.
11. The Francesco, 116 Fed. 83.
12. The Francesco, 113 Fed. 112. Where bankruptcy proceedings are dismissed for the reason that because of nonresidence the court has no jurisdiction over the alleged bankrupt, no costs can be awarded. In re Williams, 120 Fed. 34.
13. See Admiralty; Bankruptcy; Equity, etc.; Indictment and Prosecution.
14. State v. Ausherman [Wyo.] 72 Pac. 200; Ruppin v. McLachlan [Iowa] 98 N. W. 153; State v. Foster [La.] 35 So. 536. Erroneous order of probate court preferring certain claims. Stambach v. Emerson, 139 Cal. 282, 72 Pac. 991. Application for receiver. Powell v. Nat. Bank of Commerce [Colo. App.] 74 Pac. 536. Irregular appointment of receiver in pending cause. Troughber v. Akin [Tenn.] 73 S. W. 118.
15. State v. Ausherman [Wyo.] 72 Pac. 200; Pa. R. Co. v. Rogers, 52 W. Va. 450.
16. People v. McCarthy, 41 Misc. [N. Y.] 429.
17. Opinions of the court or judges on questions of law presented by election officers are extrajudicial and without legal effect for want of an actual controversy. In re Election Ct., 204 Pa. 92.
18. Heirs of Indian cannot maintain suit

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which the court has jurisdiction,[19] and jurisdiction over the defendant,[20] by process and service,[21] by publication or otherwise, are necessary,[22] though process and service may be waived. Whence a general appearance, in person or by attorney, confers jurisdiction over the defendant;[23] but a waiver of issue and service of citation before commencement of proceedings will not.[24] A defective service may sometimes confer jurisdiction, but where there is no service, no jurisdiction is obtained.[25] Service obtained by a trick will not avail,[26] though an objection that service was so obtained may be waived.[27] Objection is not waived by failure to attack it in a court where one was decoyed by fraud,[28] nor can the culpable party object that he might if diligent have escaped being served.[29] A person of unsound mind cannot confer jurisdiction by consent.[30]

In Nebraska and Ohio, where a cross-bill is filed out of time, a summons to the plaintiff is necessary to give the court jurisdiction over the necessary parties to grant the affirmative relief prayed.[31]

No notice to the owner is necessary in condemnation proceedings at the suit of the state, where the question is on the appropriation merely as distinguished from the right to compensation, unless some constitutional or statutory provision requires it.[32]

Consent of parties cannot confer jurisdiction over the subject-matter,[33] nor over the defendant, where residence is a jurisdictional fact.[34] Nor can a want of such jurisdiction be waived,[35] and where service is necessary to give jurisdiction over the subject-matter, it cannot be waived.[36]

Jurisdiction cannot be conferred by estoppel.[37]

If the court in which a case originates has no jurisdiction of its subject-matter, none can be gained by an appeal.[38]

§ 3. *Legislative power respecting jurisdiction.*—The legislature cannot confer legislative or executive power on a court nor create a court having such powers;[39] but the manner of invoking the jurisdiction of courts may be regulated.[40]

for unlawful detainer of ancestor's lands. Engleman v. Cable [Ind. T.] 69 S. W. 894. Indian nation held not entitled to sue. Daniels v. Miller [Ind. T.] 69 S. W. 925. Nation held proper party. Brought v. Cherokee Nation [Ind. T.] 69 S. W. 937. Mere custodian of decedent's property cannot sue. Smith v. Terry Peak Miners' Union [S. D.] 94 N. W. 694.

19. Erret v. Pritchard [Iowa] 96 N. W. 963; Sims v. Kennedy [Kan.] 73 Pac. 51; Shea v. Regan [Mont.] 74 Pac. 737; Ex parte Robertson [Tex. Cr. App.] 72 S. W. 859.

20. Ex parte Robertson [Tex. Cr. App.] 72 S. W. 859.

21. Turner v. Turner [Wash.] 74 Pac. 55.

22. Evans v. Alridge, 133 N. C. 378.

23. Non-resident. Gorman v. Stillman, 25 R. I. 55. Bankruptcy proceedings. In re Smith, 117 Fed. 961.

24. In re Graham, 39 Misc. [N. Y.] 226, 12 Ann. Cas. 157.

25. Service on agent of receivers gives no jurisdiction over railroad company. Vickery v. Omaha, K. C. & E. R. Co., 93 Mo. App. 1.

26. Frawley v. Pa. Casualty Co., 124 Fed. 259. Sending note into jurisdiction by request. Gregory v. Howell, 118 Iowa, 26.

27. Lytle v. McCune, 20 Pa. Super. Ct. 594.

28, 29. Jaster v. Currie [Neb.] 94 N. W. 995.

30. Proceedings to declare insanity. Inhabitants of Winslow v. Inhabitants of Troy, 97 Me. 130.

31. Youngson v. Bond, 64 Neb. 615; Southward v. Jamison, 66 Ohio St. 290.

32. Buckwalter v. School Dist. No. 42, 65 Kan. 603, 70 Pac. 605.

33. Home S. & T. Co. v. Dist. Ct. [Iowa] 95 N. W. 522; Mathias v. Mathias, 104 Ill. App. 344; Foote v. Lake County, 198 Ill. 638; Boales v. Ferguson [Neb.] 96 N. W. 337; Edney v. Baum [Neb.] 97 Mo. 252; Freer v. Davis, 52 W. Va. 1, 59 L. R. A. 556; Klingelhoefer v. Smith, 171 Mo. 455. Appointment of receiver when not ancillary to any other action. Vila v. Grand Island El. L., I. & C. S. Co. [Neb.] 94 N. W. 136. Election contest. Mercer v. Woods [Tex. Civ. App.] 78 S. W. 15. Contempt proceedings on legal holiday. Davidson v. Munsey [Utah] 74 Pac. 431; Bank of Colloden v. Bank of Forsyth [Ga.] 46 S. E. 424.

34. Perlman v. Gunn, 41 Misc. [N. Y.] 166.

35. Appeal from justice's court—want of transcript. Demilly v. Grosrenaud, 201 Ill. 272.

36. Election contest. Mercer v. Woods [Tex. Civ. App.] 78 S. W. 15.

37. Henderson v. Hall, 134 Ala. 455; Klingelhoefer v. Smith, 171 Mo. 455.

38. Erret v. Pritchard [Iowa] 96 N. W. 963; Sims v. Kennedy [Kan.] 73 Pac. 51; Shea v. Regan [Mont.] 74 Pac. 737.

39. Western Union Tel. Co. v. Austin [Kan.] 72 Pac. 850.

40. Finlen v. Heinze, 27 Mont. 123, 69 Pac. 829, 70 Pac. 517.

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It is not however within the power of the legislature to curtail or enlarge the jurisdiction of a constitutional court unless that power is expressly conferred by the constitution.[41]

Conversely, the legislature may confer such jurisdiction on the courts as is within their general powers, or is permitted by the constitution,[42] and may deny them such as is not necessarily within the constitutional grant.[43] A statute extending the right of review to cases not theretofore reviewable cannot constitutionally apply to cases decided in the lower court before its enactment.[44]

§ 4. *Federal jurisdiction. A. Generally.*—The national courts, though not of inferior, are courts of limited jurisdiction. They are creatures of the statute and possess no powers except those conferred upon them either expressly or by necessary implication;[45] whence all doubtful questions should be resolved against the jurisdiction.[46]

The district courts have been, since the organization of the government, invested with the powers and original jurisdiction over captures and seizures as subjects of prize.[47] And the supreme court of the district of Columbia, sitting as a district court of the United States, has the same jurisdiction as a prize court as other district courts of the United States.[48]

The courts of the United States have no jurisdiction of suits against a state,[49] and a suit against the attorney general of a state to enjoin criminal prosecutions is a suit against the state forbidden by the federal constitution;[50] but a suit against individuals, for the purpose of preventing them as officers of a state from enforcing

41. Habeas corpus granted by justice of supreme court. Ex parte Cox [Fla.] 33 So. 509. The constitution of Montana does not authorize the legislature to deny the right of appeal in any case [Const. art. 8, §§ 3, 15]. Finlen v. Heinze, 27 Mont. 123, 70 Pac. 517. The Montana statute providing for the appointment by the supreme court of a substitute judge to try causes in certain cases is invalid as an attempt to extend the jurisdiction of the supreme court beyond the limits fixed by the constitution. In re Weston [Mont.] 72 Pac. 512.

42. The power to compel railroad companies to protect grade crossings is properly conferred upon the chancery court of New Jersey, and is consistent with its general equity jurisdiction [Act March 16, 1898]. Palmyra Tp. v. Pa. R. Co., 63 N. J. Eq. 799. In New Jersey, the statute authorizing the court of quarter sessions to organize the grand jury and to receive and transmit to the oyer for trial, indictments which the court of quarter sessions is not empowered to try, is valid [P. L. 1898, p. 866]. State v. Gruff, 68 N. J. Law, 287. The section of the Municipal Court Act of New York conferring on such court jurisdiction of cases against foreign corporations is valid [Laws 1902, p. 1489, c. 580, § 1, subd. 18]. Lehigh & N. E. R. Co. v. American B. & T. Co., 40 Misc. [N. Y.] 698. A statute may confer power on the probate court in Utah to determine the interests of grantees of heirs or devisees. Snyder v. Murdock [Utah] 73 Pac. 22. The legislature in Florida is empowered to confer jurisdiction upon the circuit court in cases involving less than $100 though that amount is constitutionally within the jurisdiction of justices of the peace. State v. Reeves [Fla.] 32 So. 814. The legislature may pass a law regiating the jurisdiction of the court of appeals of Kentucky with reference to cases involving the validity of ordinances of cities of the first class though there is but one city of that class in the state and the constitution prohibits local laws regulating jurisdiction [Const. § 59; Ky. St. 1899, § 2922]. Louisville v. Wemhoff, 25 Ky. L. R. 995, 76 S. W. 876. The statute authorizing the Supreme Court of Texas to transfer causes from one of the courts of appeals to another to equalize their labors is valid. Bond v. Carter [Tex.] 72 S. W. 1059.

43. A state may deny its courts jurisdiction of suits between foreign corporations on causes of action arising without the state. Anglo American Provision Co. v. Davis Provision Co., 191 U. S. 373. Under the constitutional guaranty of equal protection of the laws a nonresident has the same right as a resident to maintain an action in the state courts against a foreign corporation. Kidd v. N. H. Traction Co. [N. H.] 56 Atl. 465. The statute of Illinois requiring the appellate court of Illinois to make conclusive findings of fact is constitutional. Earnshaw v. Western Stone Co., 200 Ill. 220.

44. Gompf v. Wolfinger, 67 Ohio St. 144.

45. In re Williams, 120 Fed. 38; Hoodly v. Chase, 126 Fed. 818. Government cannot appeal in Chinese exclusion case. U. S. v. Mar Ying Yuen, 123 Fed. 159. Cannot admit to bail persons arrested for extradition under treaty with foreign government. In re Wright, 123 Fed. 463.

46. Joy v. St. Louis, 122 Fed. 524.

47. Judiciary Act, 24th Sept. 1789, c. 20, § 9. U. S. v. Sampson, 19 App. D. C. 419.

48. U. S. v. Sampson, 19 App. D. C. 419.

49. U. S. Const. amend. 11. Union Trust Co. v. Stearns, 119 Fed. 790. Federal jurisdiction of suits against state, see note to Tindall v. Wesley, 13 C. C. A. 165.

50. Const. amend. 11. Union Trust Co. v. Stearns, 119 Fed. 790.

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an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of the eleventh amendment.[51]

The federal courts are prohibited by statute from staying proceedings of a state court or its officers,[52] except in bankruptcy cases,[53] but they may restrain collection of an unconscionable judgment rendered in a state court, because such an injunction acts in personam on the plaintiff and not on the court or its officer.[54]

The federal courts have no probate jurisdiction, as that term is generally employed,[55] and have no jurisdiction to exercise the function of parens patriae for the determination of the right to the custody of an insane person;[56] but where the state statutes provide for a contest of the validity of a will after probate, and the necessary diversity of citizenship exists and the amount in controversy is sufficient to meet the requirements of the judiciary act, the federal courts can take jurisdiction.[57] A federal court will not exercise its equitable jurisdiction in such a case, however, where an adequate remedy at law is provided by the state statute.[58] Especially where it was not availed of.[59]

When, by the statute law of a state, a right of action has become fixed or a legal liability incurred, that liability may be enforced and the right of action pursued in any court having jurisdiction over the subject-matter and the parties;[60] but a state statute cannot give the federal court jurisdiction of a suit in equity to quiet title to real estate in possession of defendant.[61]

A suit to collect additional duty for insufficient appraisal of imported goods, being penal in its nature, the district court and not the circuit court has jurisdiction.[62]

Statutes extending the jurisdiction of the *court of claims* will be strictly construed and the grants of jurisdiction therein contained must be shown clearly to cover the case.[63] Where there is no disputed question of fact, and the decision of the secretary of the interior turns exclusively upon the proper construction of an act of congress, his decision is not final, and if adverse to the claimant, the court of claims has jurisdiction.[64] The courts can exercise only such jurisdiction over the moral obligations of the government towards the Indians as congress may confer upon them;[65] but the court of claims has jurisdiction not only to pronounce judgment, but like other courts, to inquire into the question whether its judgment has been properly executed.[66]

51. Prout v. Starr, 188 U. S. 537, 47 Law. Ed. 584.

52. Rev. St. 720 (U. S. Comp. St. 1901, p. 581). National Surety Co. v. State Bank [C. C. A.] 120 Fed. 593; Hall v. Bridgeport Trust Co., 123 Fed. 739. A county commissioner's court in Texas in declaring and publishing the results of a local option election acts ministerially and is not a court, hence may be enjoined. August Busch & Co. v. Webb, 122 Fed. 655.

53. In re William E. De Lany & Co., 124 Fed. 280.

54. Nat. Surety Co. v. State Bank [C. C. A.] 120 Fed. 593.

55. Hale v. Coffin, 114 Fed. 567; O'Callaghan v. O'Brien, 116 Fed. 934; Wart v. Wart, 117 Fed. 766; Williams v. Crabb [C. C. A.] 117 Fed. 193, 59 L. R. A. 425; Carrau v. O'Calligan [C. C. A.] 125 Fed. 657.

56. Hoadly v. Chase, 126 Fed. 818.

57. O'Callaghan v. O'Brien, 116 Fed. 934; Williams v. Crabb [C. C. A.] 117 Fed. 193, 59 L. R. A. 425; Wart v. Wart, 117 Fed. 766; Sawyer v. White [C. C. A.] 122 Fed. 223.

58. Carrau v. O'Calligan [C. C. A.] 125 Fed. 657.

59. Federal courts will not interfere to protect the rights of creditors who had every opportunity to prove their claims in receivership proceedings in the state courts and chose to take the chance of protecting themselves otherwise. Dobson v. Peck, 119 Fed. 254.

60. International Nav. Co. v. Lindstrom [C. C. A.] 123 Fed. 475; Jones v. Mut. Fidelity Co., 123 Fed. 506. Appointment of receiver for insolvent corporation. U. S. Shipbuilding Co. v. Conklin [C. C. A.] 126 Fed. 132.

61. Giberson v. Cook, 124 Fed. 986.

62. Helwig v. U. S., 188 U. S. 605, 47 Law. Ed. 614.

63. Tribes or bands and not individual Indians may sue under 26 Stat. 636, 27 Stat. 86. Blackfeather v. U. S., 37 Ct. Cl. 233. For a discussion of the jurisdiction of the court of claims over claims against the District of Columbia see Barnes v. D. C., 37 Ct. Cl. 342.

64. Com. T. I. & T. Co. v. U. S., 37 Ct. Cl. 532.

65. Blackfeather v. U. S., 190 U. S. 368, 47 Law. Ed. 1099.

66. Pam-to-pee v. U. S., 187 U. S. 371, 47 Law. Ed. 221.

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The superior courts of general jurisdiction of the *District of Columbia* are courts of the United States as distinguished from mere territorial courts,[67] and the exercise of the powers and jurisdiction of the district courts of the United States by the justices of the supreme court of the District of Columbia in special term constitutes that court to all intents and purposes a district court of the United States with the powers and jurisdictions of the district courts.[68]

(§ 4) *B. As affected by diversity of citizenship.*—The circuit courts of the United States have original jurisdiction of suits of a civil nature at law or in equity, where the matter in dispute exceeds $2,000 and an alien is a party, or the suit is between a citizen of the state where it is brought and a citizen of another state.[69] It is the court's duty to see that this jurisdiction is not invoked collusively;[70] but the fact that a minority stockholder, suing to enjoin an alleged breach of corporate trust, is supported by other minority stockholders who are residents of the state, does not show collusion.[71]

Regard is always had to the real rather than to the nominal party,[72] and the court will not require the joinder of an unnecessary party where the effect of it would be to oust the court's jurisdiction;[73] but where it appears that indispensable parties have been omitted, they must be brought in, and if bringing them in deprives the court of jurisdiction, the plaintiff must abide the consequences.[74] Jurisdiction based on diversity of citizenship having been once obtained, is not divested by the intervention of other parties who could not have maintained suit in the federal court.[75]

Jurisdiction is not conferred where citizens of the state where suit is brought are to be found on both sides of the controversy[76] and the arrangement of the parties in the bill for the purpose of showing jurisdiction is not controlling on the court, it being the court's duty, for jurisdictional purposes, to ascertain the necessary parties to the suit and align them upon the one side or the other according to their true interests and attitude, irrespective of their designations in the bill.[77] One of several trustees refusing to sue and made a defendant for that reason should not be regarded as a plaintiff, where so regarding him would oust the jurisdiction.[78]

Suit cannot be maintained in the Federal court by an assignee based on diversity of citizenship, unless his assignor might have maintained it;[79] but the assignee

67, 68. U. S. v. Sampson, 19 App. D. C. 419.

69. U. S. Rev. St. § 629 (1) as amended by Act March 3, 1875, c. 137; Act March 3, 1887, c. 373; Act Aug. 13, 1888, c. 866. Diverse citizenship as ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.

70. Suit by assignee on municipal bonds issued under law held unconstitutional by state courts. Edwards v. Bates County, 117 Fed. 526.

71. Equity Rule 94. New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 Fed. 776.

72. Bishop v. Boston & M. R. R., 117 Fed. 771. In a suit brought by an administrator for the benefit of the next of kin of a decedent the citizenship of the administrator and not of the beneficiaries controls. Bishop v. Boston & M. R. R., 117 Fed. 771. Where a guardian sues, his citizenship and not that of the ward, determines jurisdiction. Mexican Cent. R. Co. v. Eckman, 187 U. S. 429, 47 Law. Ed. 245.

73. Suit by one of two heirs to set aside will. Williams v. Crabb, 117 Fed. 193, 59 L. R. A. 425.

74. Ban v. Columbia Southern R. Co. [C. C. A.] 117 Fed. 21; Carrau v. O'Calligan [C. C. A.] 125 Fed. 657. One charged with conspiracy to defraud and against whom judgment is asked is a necessary party. Post v. Buckley, 119 Fed. 249.

75. Lilienthal v. McCormick [C. C. A.] 117 Fed. 89.

76. In a suit against copartners jurisdiction fails if one or more of them are citizens of the same state with complainant. Raphael v. Trask, 118 Fed. 777. That a merely formal party is of the same citizenship as plaintiff will not deprive the court of jurisdiction. Hyde v. Victoria Land Co., 125 Fed. 970.

77. New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 Fed. 776; Elkins v. Chicago, 119 Fed. 957; Joseph Dry Goods Co. v. Hecht [C. C. A.] 120 Fed. 760; Waller v. Coler, 125 Fed. 821; Menefee v. Frost, 123 Fed. 633; Carroll v. Chesapeake & O. Coal Agency Co. [C. C. A.] 124 Fed. 805. Suit by stockholder against domestic and foreign corporation. Redfield v. Baltimore & O. R. Co., 124 Fed. 929.

78. Einstein v. Ga. So. & F. R. Co., 120 Fed. 1008, cf., Menefee v. Frost, 123 Fed. 633.

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of choses in action, made by a corporation and payable to bearer, may sue upon them in the Federal court if diversity of citizenship exists, without reference to the citizenship of the assignor.[80]

National banks are citizens of the states in which they are located,[81] and a corporation incorporated in two or more states is a citizen of each;[82] but a foreign corporation, by complying with the state law authorizing it to do business in that state, which law provides that it shall thereupon become a domestic corporation, does not become a citizen of that state so as to affect jurisdiction.[83] Alien members of a limited partnership organized and doing business in New York may maintain suit in New York against citizens of New York.[84] Diversity of citizenship will not of itself confer jurisdiction of habeas corpus proceedings.[85]

(§ 4) *C. As affected by the existence of a Federal question.*[86]—The Federal courts have jurisdiction in cases where the United States are a party,[87] trade mark[88] and patent cases,[89] and suits at common law or in equity arising under the constitution or laws of the United States.[90] National banks, however, cannot invoke the jurisdiction of the Federal courts simply upon the ground that they were created by, and exercise their powers under, acts of congress,[91] though the Federal courts have jurisdiction of cases brought against a stockholder's agent winding up the affairs of a national bank, irrespective of citizenship.[92] The Federal courts have jurisdiction to enjoin unreasonable rates by interstate carriers under the Interstate Commerce Act, irrespective of the citizenship of the parties,[93] where jurisdiction

79. Rev. St. § 629. Suit by partner assignee of partner to enforce railroad lien. Ban v. Columbia So. R. Co. [C. C. A.] 117 Fed. 21. Suit by assignee of employment contracts to restrain divulgence of trade secrets. American Colortype Co. v. Continental Colortype Co., 188 U. S. 104, 47 Law. Ed. 404.

80. County warrants. Kearny County Com'rs v. Irvine [C. C. A.] 126 Fed. 689.

81. Continental Nat. Bank v. Buford, 191 U. S. 119.

82. Goodwin v. N. Y., N. H. & H. R. Co., 124 Fed. 358.

83. Southern R. Co. v. Allison, 190 U. S. 326, 47 Law. Ed. 1078.

84. Jewish Colonization Ass'n v. Solomon, 125 Fed. 994.

85. Hoadly v. Chase. 126 Fed. 818.

86. Jurisdiction of federal courts in cases involving federal question, see notes to Bailey v. Mosher, 11 C. C. A. 308; Mont. Ore Purch. Co. v. Boston & M. Consol. C. & S. Min. Co., 35 C. C. A. 7.

87. The circuit court has jurisdiction of an action against the United States for the value of lands rendered valueless by river and harbor improvements constructed by authority of congress. U. S. v. Lynah, 188 U. S. 445, 47 Law. Ed. 539; U. S. v. Williams, 188 U. S. 485, 47 Law. Ed. 554. In a suit on a contractor's bond given under the federal statute, the United States is only a nominal party whence the federal courts have jurisdiction only under such circumstances as would confer jurisdiction if the suit were brought in the name of the real party in interest. U. S. v. Sheridan, 119 Fed. 236.

88. It is the use without right of the registered trade-mark of another in foreign or Indian commerce that gives jurisdiction to the federal courts under the trade mark act. Warner v. Searle, 191 U. S. 195.

89. An action by a patentee for royalties is within the jurisdiction of a state court (Standard Sewing Mach. Co. v. Leslie [C. C. A.] 118 Fed. 557) as is one to obtain a conveyance of an interest sold to plaintiff, for an injunction and accounting (Merrill v. Miller [Mont.] 72 Pac. 423) and so is a suit for the price of a patent right, though the validity of the patent is called in question (Pratt v. Hawes [Wis.] 95 N. W. 965); though it has been held in Minnesota that such an action in which it is necessary to decide the validity of a patent is within the exclusive jurisdiction of the federal courts (Fuller v. Schutz, 88 Minn. 372). That an action involves the taxing of letters patent by a state does not give the federal courts jurisdiction. Ind. Mfg. Co. v. Koehne, 188 U. S. 681, 47 Law. Ed. 651.

90. A controversy between a city and a person claiming a right under an act of congress to erect a dock in navigable water in such city, is within the jurisdiction of the circuit court without respect to citizenship. Cummings v. Chicago, 188 U. S. 410, 47 Law. Ed. 525; Calumet G. & E. Co. v. Chicago, 188 U. S. 431, 47 Law. Ed. 532. The statute giving the same right of attachment in federal courts that is possessed by the courts of the states wherein they are held makes the state statutes respecting attachments United States statutes and where suit is brought on an attachment bond executed in a suit in the federal court under such law a federal question is involved. Files v. Davis, 118 Fed. 465. A suit to enjoin a city from repudiating its contract with complainant is not one for specific performance but one to enforce a constitutional right, of which a federal court has jurisdiction. Riverside & A. Ry. Co. v. Riverside, 118 Fed. 736.

91. Continental Nat. Bank v. Buford, 191 U. S. 119.

92. Weeks v. International Trust Co. [C. C. A.] 125 Fed. 370.

93. Tift v. Southern R. Co., 123 Fed. 789.

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is invoked on the ground of impairment of obligation of contract or deprivation of privilege. It is not essential that there should really be a valid contract or that the impairment or deprivation complained of should really be effected through legislation or other action of the state; but it is sufficient if these grounds of suit are claimed in good faith and not frivolously;[94] but mere anticipated[95] or threatened action will not suffice.[96] The acts complained of, however, must be exercised by authority of the state, and mere trespasses by state agents beyond the authority of the statute under which they assume to act will not call in question the validity of the statute as tested by the constitution of the United States.[97] The power of the United States courts to intervene by habeas corpus in a case where a disregard of Federal law is charged is beyond doubt, but it is rarely exercised, as it involves a conflict of authority which is undesirable. The better practice is to allow the case to take its course through the state courts and appeal to the supreme court of the United States if necessary;[98] but where an officer of the army under orders of his superior does an act in violation of a void injunction granted by a state court, and is thrown into jail for contempt, he will not be left to his remedy by appeal, but in the exercise of the court's discretion will be discharged on habeas corpus.[99] The state courts have jurisdiction to try non-tribal Indians for crimes committed on reservations.[1] A proceeding in rem to enforce a lien for repairs on a boat navigating the Erie canal is within the exclusive jurisdiction of the Federal courts.[2]

(§ 4) *D. Averments and objections as to jurisdiction.*—The facts essential to give a Federal court jurisdiction either on the ground of diversity of citizenship[3] or of the existence of a Federal question[4] must be distinctly alleged and not left to inference. Neither can the jurisdiction be invoked by anticipating a defense, such allegations being merely surplusage,[5] though one suing in his own right and as assignee of another may set up facts in his bill showing that his assignor had in fact no such interest as would make him a necessary party to the suit, and thereby deprive the Federal court of its jurisdiction based on diversity of citizenship.[6] Where a stockholder sues to enforce rights properly asserted by the corporation, he must show that the corporation has refused to assert the right in order to make

94. Repudiation by city of contract to furnish power. Riverside & A. R. Co. v. Riverside, 118 Fed. 736. Divestiture by city of franchise granted railway company. Pac. Elec. Co. v. Los Angeles, 118 Fed. 746.

95. The anticipated action of a state court in so deciding as to deny complainant a right or privilege guaranteed by the federal constitution will not confer jurisdiction on the federal court. Defiance Water Co. v. Defiance, 191 U. S. 184.

96. A constitutional question is not raised by the threat of a city council to pass an unconstitutional ordinance. Elkins v. Chicago, 119 Fed. 957.

97. Huntington v. New York, 118 Fed. 683.

98. Prosecution for violation of peddlers' license law. Ex parte Rearick, 118 Fed. 928; In re Stone, 120 Fed. 101. Police officer held in state court for shooting deserter from U. S. army in attempt to arrest. In re Matthews, 122 Fed. 248. The power of the United States courts to interfere in interstate extradition proceedings is undoubted, but will be exercised with caution and only in cases of urgency where the error is plain and the necessity for federal intervention obvious. In re Strauss [C. C. A.] 126 Fed. 327.

99. In re Turner, 119 Fed. 231.

1. State v. Howard [Wash.] 74 Pac. 382.

2. Perry v. Haines, 24 Sup. Ct. 8, 48 Law. Ed. ——.

3. Insufficient averment that defendant corporation is a citizen of the state. Lownsdale v. Gray's Harbor Boom Co., 117 Fed. 983. An averment of the residence of the parties is not the equivalent of an averment of citizenship. Gale v. Southern B. & L. Ass'n, 117 Fed. 732. Diverse citizenship held shown by bill. Tonopah Fraction Min. Co. v. Douglass, 123 Fed. 936. An averment that complainants are all of Cognac in France, and citizens of the Republic of France is a sufficient averment of noncitizenship without a specific averment of alienage. Hennessy v. Richardson Drug Co., 189 U. S. 25, 47 Law. Ed. 697, 103 O. G. 1681; Hennessy v. Moise, 189 U. S. 35, 47 Law. Ed. 698.

4. Obligation of contract, due process of law, and equal protection of laws. Underground R. R. v. New York, 116 Fed. 952. Federal question held sufficiently averred. Manigault v. Ward, 123 Fed. 707.

5. Filhiol v. Torney, 119 Fed. 974; Joy v. St. Louis, 122 Fed. 524; Boston & M. Consol. C. & S. Min. Co. v. Mont. Ore Purch. Co., 188 U. S. 632, 47 Law. Ed. 626; Id., 188 U. S. 645, 47 Law. Ed. 634.

6. Ban v. Columbia So. R. Co. [C. C. A.] 117 Fed. 21.

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effective his own diversity of citizenship from that of the corporation and the defendant.[7] Though the question of jurisdiction will not be summarily disposed of on motion for a preliminary injunction, the burden is upon the complainant to satisfy the court that there is at least reasonable probability of ultimate success upon the question of jurisdiction as well as upon the merits.[8]

The question whether there is a real diversity of citizenship need be raised in no particular manner, except that notice must be given,[9] and the burden of disproving the diversity of citizenship alleged by plaintiff is on defendant.[10]

§ 5. *Federal appellate jurisdiction. A. Appeals between Federal courts.*— The fundamental question of jurisdiction, first, of the supreme court, and then of the court from which the record comes, presents itself on every writ of error and appeal in the supreme court, and must be answered by the court whether propounded by counsel or not.[11] The right of appeal from the district courts in matters of prize has always been direct to the supreme court.[12] Whence an appeal from the supreme court of the District of Columbia in a case of prize lies not to the court of appeals of the District, but to the supreme court of the United States.[13] Where the jurisdiction of the circuit court rests solely on the ground that the cause of action arose under the constitution of the United States, an appeal lies directly to the supreme court,[14] and if an appeal is presented to the circuit court of appeals and then goes to decree, the supreme court will reverse it, not upon the merits, but by reason of want of jurisdiction in that court.[15] Where the order appealed from involves no question but that of jurisdiction, the appeal lies not to the circuit court of appeals but direct to the supreme court.[16] Where the circuit court decides the question of its jurisdiction and the alleged unconstitutionality of a state law in favor of the plaintiff, but decides against him on the merits, plaintiff cannot appeal directly to the supreme court for the purpose of a revision of the judgment on the merits.[17] The question whether a Federal court ought to take jurisdiction of a case after one has been begun in a state court involving the same subject-matter is not a question of Federal jurisdiction that may be certified by the circuit to the supreme court.[18] The supreme court has jurisdiction of a writ of error in contempt proceeding in the district court only when the jurisdiction of the district court is involved.[19] A judgment in a criminal case cannot be reviewed on writ of error from the Federal supreme court to the court of appeals of the District of Columbia.[20] The supreme court may review on writ of error judgments of the district court of Porto Rico, in cases in which the matter in dispute exceeds $5,000.[21]

7. U. S. Equity Rule 94. Elkins v. Chicago, 119 Fed. 957; Waller v. Coler, 125 Fed. 821. Concerted action with other minority stockholders does not show collusion. New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 Fed. 776.

8. Huntington v. New York, 118 Fed. 683.

9. Adams v. Shirk [C. C. A.] 117 Fed. 801.

10. Adams v. Shirk [C. C. A.] 117 Fed. 801; Kilgore v. Norman, 119 Fed. 1006.

11. Continental Nat. Bank v. Buford, 191 U. S. 119; Defiance Water Co. v. Defiance, 191 U. S. 184. No appeal lies from an order granting a license for a vessel in Alaska. Pacific Steam Whaling Co. v. U. S., 187 U. S. 447, 47 Law. Ed. 253; Pacific Coast S. S. Co. v. U. S., 187 U. S. 454, 47 Law. Ed. 256.

12, 13. U. S. v. Sampson, 19 App. D. C. 419.

14. Cummings v. Chicago, 188 U. S. 410, 47 Law. Ed. 525; Calumet Grain & Elevator Co. v. Chicago, 188 U. S. 431, 47 Law. Ed. 532.

15. Union & Planters' Bank v. Memphis, 189 U. S. 71, 47 Law. Ed. 712.

16. Board of Councilmen v. Deposit Bank [C. C. A.] 124 Fed. 18. Statute applies to Hawaii. Wright v. MacFarlane [C. C. A.] 122 Fed. 770. Dismissal at circuit for want of jurisdiction. Hays v. Richardson [C. C. A.] 121 Fed. 536. That the question of jurisdiction is not federal is immaterial. St. Louis Cotton Compress Co. v. American Cotton Co. [C. C. A.] 125 Fed. 196.

17. Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373.

18. Louisville Trust Co. v. Knott, 191 U. S. 225.

19. O'Neal v. U. S., 190 U. S. 36, 47 Law. Ed. 945.

20. Sinclair v. D. C., 24 Sup. Ct. 212.

21. Royal Ins. Co. v. Martin, 24 Sup. Ct. 247.

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Where the bill is based not only on diversity of citizenship but also on the alleged unconstitutionality of the constitution, statutes or ordinances of a state, an appeal lies direct to the supreme court and the whole case is open for consideration,[22] and the circuit court cannot narrow the supreme court's authority by a certificate relating only to jurisdiction,[23] but where a question of jurisdiction alone is certified from the circuit or district court to the supreme court, the whole case is not open to the supreme court, but only the question of jurisdiction;[24] notwithstanding the circuit court, in dismissing the bill for want of jurisdiction, also expressed its opinion on the merits.[25]

The supreme court has jurisdiction of an appeal from the circuit court of appeals in any case where one of the parties is a foreign state.[26] Where the jurisdiction of the Federal court is invoked on the ground of diverse citizenship alone, the judgment of the circuit court of appeals is final, and no appeal lies to the supreme court.[27] In patent cases,[28] and in cases where the jurisdiction of the circuit court is invoked on the ground of diversity of citizenship and a Federal question appears, and an appeal is taken to the circuit court of appeals, no appeal from that court will lie to the supreme court, irrespective of whether the question raised is one which could have been appealed to the supreme court in the first instance;[29] but in cases where the jurisdiction was not originally invoked entirely on the ground of diverse citizenship,[30] and in cases of infringement of trade marks used in foreign and Indian commerce the judgment of the circuit court of appeals is not final, and an appeal lies to the supreme court.[31] A suit does not arise under the constitution of the United States so as to give the supreme court jurisdiction of an appeal from the circuit court of appeals, unless it really and substantially involves a dispute or controversy as to the effect or construction of the constitution, upon the determination of which the result depends,[32] and which appears on the record by a statement in legal and logical form, such as is required in good pleading.[33]

The circuit court of appeals has no power to review questions of jurisdiction of the court below, but such question will be certified to the supreme court.[34] The circuit court of appeals has no authority to certify a "case" to the supreme court for decision, and has authority to certify a question of law only when the judges consider it doubtful.[35] In cases coming to the circuit court of appeals on writ of error, only questions of law are examined,[36] and its appellate jurisdiction is limited

22. Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 Law. Ed. 778.

23. Giles v. Harris, 189 U. S. 475, 47 Law. Ed. 909.

24. Mexican Cent. R. Co. v. Eckman, 187 U. S. 429, 47 Law. Ed. 245.

25. Hennessy v. Richardson Drug Co., 189 U. S. 25, 47 Law. Ed. 697; Hennessy v. Moise, 189 U. S. 35, 47 Law. Ed. 698.

26. Republic of Columbia v. Cauca Co., 190 U. S. 524, 47 Law. Ed. 1159.

27. Continental Nat. Bank v. Buford, 191 U. S. 119; Arbuckle v. Blackburn, 119 U. S. 405.

28. Cary Mfg. Co. v. Acme Flexible Clasp Co., 187 U. S. 427, 47 Law. Ed. 244.

29. Ayres v. Polsdorfer, 187 U. S. 585, 47 Law. Ed. 314; Arbuckle v. Blackburn, 191 U. S. 405; Spencer v. Duplan Silk Co., 191 U. S. 526; Keyser v. Lowell [C. C. A.] 117 Fed. 400; Watkins v. King [C. C. A.] 118 Fed. 524.

30. Northern Pac. R. Co. v. Soderberg, 188 U. S. 526, 47 Law. Ed. 575.

31. Warner v. Searle, 191 U. S. 195.

32. Defiance Water Co. v. Defiance, 191 U. S. 184; Arbuckle v. Blackburn, 191 U. S. 405.

33. Statement must appear in plaintiff's pleading. Spencer v. Duplan Silk Co., 191 U. S. 526.

34. Sun Print. & Pub. Ass'n v. Edwards [C. C. A.] 121 Fed. 826. Where a case is removed from a state court to the United States circuit court and the jurisdiction is sustained the question of jurisdiction cannot be reviewed on writ of error by the circuit court of appeals, but the same will be certified to the supreme court. Pa. Lumbermen's Mut. Fire Ins. Co. v. Meyer [C. C. A.] 126 Fed. 352. An order of the circuit court denying a receiver's petition for an accounting raises no question of jurisdiction necessary to be certified. Chapman v. Atlantic Trust Co., 119 Fed. 257.

35. What constitutes "repairing" within fire insurance policy. German Ins. Co. v. Hearne [C. C. A.] 118 Fed. 134.

36. Hume v. U. S. [C. C. A.] 118 Fed. 689; Dysart v. Mo., K. & T. R. Co. [C. C. A.] 122 Fed. 228.

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to the review of final decisions of the courts below.[37] An appeal in a case of claim against the United States which has been dismissed on the enactment of a statute withdrawing the jurisdiction is properly reinstated on the enactment of another law providing that pending cases shall not be affected by the prior act.[38]

(§ 5) *B. Control over state courts.*—The supreme court of the United States can review the decision of a state court as to the validity of a statute of the United States only when against the validity of the statute.[39] Where a claim of the benefit of the constitution of the United States is specially made in the trial court and is passed upon adversely to the claimant, a Federal question exists.[40] A claim that the Federal question presented to the state court was rightly decided there cannot deprive the supreme court of jurisdiction, since the power to decide whether the Federal issue was rightly disposed of involves the exercise of jurisdiction.[41]

When two propositions are presented in a record from a state court, one involving a Federal question, and the other not, the supreme court will not assume jurisdiction if the latter question is sufficient of itself, notwithstanding the Federal question, to sustain the judgment of the state court;[42] but if the judgment could not have been rendered without deciding the Federal question,[43] or if it is evident that the non-Federal question is used as the basis for a decision in fact denying the appellant a Federal right, the supreme court will take jurisdiction and decide the case,[44] though where an actual discrimination under a constitutional law is charged, such discrimination will not be presumed, but must be proved.[45] Where the case in a state court turns upon the construction rather than the validity of the statute of another state, full faith and credit thereto is not denied by such decision and a Federal question is not presented.[46]

A mere assertion of a Federal question will not give the supreme court jurisdiction to review the decision of a state court,[47] but it must appear on the record that some right, title, privilege or immunity was "specially set up or claimed" at the proper time in the proper way,[48] and a Federal question is not raised for review when the state supreme court refuses to pass upon it because not properly raised in the trial court.[49] An objection in the state court that an act of the state is unconstitutional and void relates only to the power of the state legislature under the state constitution.[50] Where the question asserted to be contained in the record is manifestly lacking all color of merit, the writ of error will be dismissed.[51]

37. Morgan v. Thompson [C. C. A.] 124 Fed. 203; Menge v. Warriner [C. C. A.] 120 Fed. 816.

38. U. S. v. McCrory [C. C. A.] 119 Fed. 861.

39. 20 Stat. 25, c. 20; U. S. Comp. St. 1901, p. 575, making standard silver dollars legal tender. Baker v. Baldwin, 187 U. S. 61, 47 Law. Ed. 75.

40. Manley v. Park, 187 U. S. 547, 47 Law. Ed. 296; Detroit, Ft. W. & B. I. R. v. Osborn, 189 U. S. 383, 47 Law. Ed. 860.

41. Andrews v. Andrews, 188 U. S. 14, 47 Law. Ed. 366.

42. Balk v. Harris, 132 N. C. 10; Citizens' Bank v. Parker, 24 Sup. Ct. 181, 48 Law. Ed. ——.

43. Balk v. Harris, 132 N. C. 10.

44. Rogers v. Ala., 24 Sup. Ct. 257, 48 Law. Ed. ——.

45. Tarrance v. Fla., 188 U. S. 519, 47 Law. Ed. 572.

46. Johnson v. N. Y. L. Ins. Co., 187 U. S. 491, 47 Law. Ed. 273; Finney v. Guy, 189 U. S. 335, 47 Law. Ed. 839.

47. Wabash R. Co. v. Flannigan, 24 Sup. Ct. 224, 48 Law. Ed. ——; Iowa v. Rood, 187 U. S. 87, 47 Law. Ed. 86; Sawyer v. Piper, 189 U. S. 154, 47 Law. Ed. 757.

48. Jacobi v. Ala., 187 U. S. 133; Johnson v. N. Y. L. Ins. Co., 187 U. S. 491, 47 Law. Ed. 273; Manley v. Park, 187 U. S. 547, 47 Law. Ed. 296; Pa. R. Co. v. Hughes, 191 U. S. 477; Wabash R. Co. v. Flannigan, 24 Sup. Ct. 224, 48 Law. Ed. ——; Beals v. Cone, 188 U. S. 184, 47 Law. Ed. 435; Telluride Power Transmission Co. v. Rio Grande W. R. Co., 187 U. S. 569; Hooker v. Los Angeles, 188 U. S. 314, 47 Law. Ed. 487; Onondaga Nation v. Thacher, 189 U. S. 306, 47 Law. Ed. 826; Howard v. N. C., 191 U. S. 126. If it appear in the motion for a new trial and in the assignment of errors to the supreme court of the state it is sufficient. San Jose L. & W. Co. v. San Jose Ranch Co., 189 U. S. 177, 47 Law. Ed. 765; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 Law. Ed. 821.

49. Layton v. Mo., 187 U. S. 356, 47 Law. Ed. 214; Mut. L. Ins. Co. v. McGrew, 188 U. S. 291, 47 Law. Ed. 480.

50. Jacobi v. Ala, 187 U. S. 133, 47 Law.

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The highest court of a state may administer the common law according to its understanding and interpretation of it, without raising any question of Federal law reviewable by the supreme court.[52]

Merely that an action is brought under a Federal statute does not give the right of appeal from a state court,[53] but where the contention is that title to ore taken from a mine depends upon which of two acts of congress the mine was patented under, and involves the effect of the want of parallelism of the end lines of the location, a Federal question is so presented that the supreme court has jurisdiction.[54]

Whether the denial by the courts of one state of the validity of a decree of divorce granted in another violates the full faith and credit clause of the constitution is a Federal question,[55] and where the complaint sets up a right to recover as the result of a judicial sale, made under decrees both of the courts of the United States and of a state other than that in which the suit is brought, a Federal question exists in the record.[56]

The supreme court has jurisdiction in a case involving a title to real estate founded on a Spanish grant claimed to have been perfected by the treaty between the United States and Spain;[57] but where the controversy in the state court does not involve a construction of the treaty with Mexico, but only the validity of certain land grants made prior to the treaty, no Federal question is involved.[58]

Upon writ of error to the supreme court of a state, the supreme court of the United States cannot review questions of the sufficiency of the evidence.[59]

§ 6. *Territorial limitations.*—In the absence of specific statutory enactment to that effect, it is undoubtedly the general rule of law that no court has authority or jurisdiction beyond the territorial limits of the district for which it has been established, notwithstanding that it may be only one of numerous similar courts of the same sovereignty.[60] Whence no court can by its writ impose a duty upon an officer outside its territorial limits,[61] and service of process of the Federal court outside the district for which it is holden is a nullity.[62] Service of process of a state court on a defendant beyond the boundaries of the state does not authorize a personal judgment against him.[63] The recorder's courts of the city of New Or-

Ed. 106; Layton v. Mo., 187 U. S. 356, 47 Law. Ed. 214.

51. Wabash R. Co. v. Flannigan, 24 Sup. Ct. 224, 48 Law. Ed. ——.

52. Right of carrier to limit common law liability. Pa. R. Co. v. Hughes, 191 U. S. 477. A decision that conspiracy to defraud is a common law offense and as such cognizable by the courts of a state though there is no statute defining the offense is not a federal question. Howard v. Fleming, 191 U. S. 126. A decision of a state court rejecting the state's claim to lands founded on its sovereignty over the beds of lakes within its borders does not involve a federal question, since such sovereignty and ownership do not flow from the constitution or any treaty or statute of the United States but from the principles of the common law. Iowa v. Rood, 187 U. S. 87, 47 Law. Ed. 86. The question of the estoppel of a city to collect assessments for benefits by a public improvement is not federal. Schaefer v. Werling, 188 U. S. 516, 47 Law. Ed. 570.

53. Rev. St. §§ 2325, 2326. Beals v. Cone, 188 U. S. 184, 47 Law. Ed. 435.

54. Kennedy Min. & Mill. Co. v. Argonaut Min. Co., 189 U. S. 1, 47 Law. Ed. 685.

55. Andrews v. Andrews, 188 U. S. 14, 47 Law. Ed. 366.

56. Commercial Pub. Co. v. Beckwith, 188 U. S. 567, 47 Law. Ed. 598.

57. Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 Law. Ed. 266.

58. Hooker v. Los Angeles, 188 U. S. 314, 47 Law. Ed. 487.

59. Thayer v. Spratt, 189 U. S. 346, 47 Law. Ed. 845.

60. Palmer v. Thompson, 20 App. D. C. 273.

61. Court of one district cannot order marshal of another district to arrest person found therein. Palmer v. Thompson, 20 App. D. C. 273.

62. Bankruptcy. In re Waukesha Water Co., 116 Fed. 1009. The district court of the United States cannot by any order or process coerce the appearance of a citizen of another district, or if he does not appear, make a valid order against him as on default. City Water Supply Co. v. Ottumwa, 120 Fed. 309. The rules governing the issuance and service of process of courts to other districts in the same jurisdiction or the procurement of process in other districts in aid of a court will be treated in Process.

63. Hedrix v. Chicago R. Co. [Mo. App.] 77 S. W. 495.

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leans, however, may send their process to and compel the attendance of witnesses from all parts of the city.[64]

§ 7. *Limitations resting in situs of subject-matter or status of litigants.*—Jurisdiction over persons and property in any state is confined to the persons and property within the territorial bounds of the state.[65] A cause of action between two foreign corporations will be presumed to have arisen without the jurisdiction in the absence of a showing to the contrary.[66] Equal protection of the laws entitles a nonresident to sue in any case where a resident might,[67] and a foreign corporation may if authorized.[68] In New York, the state courts take cognizance of actions by Seneca Indians.[69] In the absence of voluntary appearance or service within the state, no jurisdiction exists over nonresidents in respect to property without the state.[70] Jurisdiction of persons may bring in personal property which they hold, though rights therein owe their existence to laws of a foreign state and the property may be therein.[71] It cannot rest solely on residence of one defendant who is merely nominal.[72]

Property within a state belonging to a nonresident is subject to the jurisdiction of the courts of that state and may be applied by proper proceedings to pay debts owing by its owner, though he be not served within the state,[73] but the inquiry in such a case can be carried only to the extent necessary to control the disposition of the property.[74]

There is no doubt that courts have jurisdiction of actions between nonresidents for torts committed without their territorial jurisdictions;[75] but such jurisdiction will be declined in New York in the absence of special reasons for entertaining it.[76] The rights arising from injury to a passenger by a carrier on the high seas on board a ship owned in New Jersey are determinable by the laws of New Jersey, notwithstanding she was registered in the port of New York.[77] Indebtedness may be enforced where the debtor is domiciled[78] on a liability derived from foreign laws,[79] or suit may be founded on a note brought into the state.[80]

64. State v. Marmouget, 110 La. 191.

65. Pa. R. Co. v. Rogers, 52 W. Va. 450.

66. Snow v. Snow-Church Surety Co., 80 App. Div. [N. Y.] 40.

67. Suit against foreign corporation. Kidd v. N. H. Traction Co. [N. H.] 56 Atl. 465.

68. Suit on foreign contract. Slaytor-Jennings Co. v. Specialty Paper Box Co. [N. J. Law] 54 Atl. 247.

69. Jimeson v. Pierce, 78 App. Div. [N. Y.] 9.

70. Wilson v. American Palace Car Co. [N. J. Err. & App.] 55 Atl. 997.

71. But the courts of a state have jurisdiction over stocks and bonds fraudulently transferred by a foreign to a resident corporation, over the equity of a resident corporation in stocks and bonds pledged by it to a foreign corporation, and over a chose in action against a resident corporation belonging to a foreign corporation. Kidd v. N. H. Traction Co. [N. H.] 56 Atl. 465.

72. That the sheriff of the county is made a nominal defendant will not give a court jurisdiction in a suit in which all the substantial defendants are aliens and none of whom have been served. Reynolds & H. Estate Mortg. Co. v. Martin, 116 Ga. 495.

73. The courts of a state have jurisdiction over property therein belonging to a foreign corporation to which notice has been given outside the state as provided by statute [N. H. Pub. St. 1901, c. 219, § 9]. Kidd v. New Hampshire Traction Co. [N. H.] 56 Atl. 465. Attachment in the district of property of a non-resident confers jurisdiction on the court to the extent of the property attached. Brand v. Brand, 25 Ky. L. R. 987, 76 S. W. 868. An action in attachment may be brought in Kansas against a non resident of the state in any county in which he has property though he may at the time be sojourning in another county in the state. Reynolds v. Williamson [Kan.] 74 Pac. 1122.

74. Record must show existence of property. Coughran v. Germain [S. D.] 97 N. W. 743.

75. Bain v. Northern Pac. R. Co. [Wis.] 98 N. W. 241.

76. Personal injury in another state—action between non resident individuals. Collard v. Beach, 81 App. Div. [N. Y.] 582.

77. Lindstrom v. International Nav. Co., 117 Fed. 170.

78. The courts of Illinois have jurisdiction to enforce the liability of a resident stockholder of a foreign corporation. Parkhurst v. Mexican S. E. R. Co., 102 Ill. App. 507.

79. The Federal court has jurisdiction of a suit at law by a creditor against a stockholder of an insolvent corporation to enforce a liability created by the statutes of a state other than that in which the court is held. Atlantic Trust Co. v. Osgood, 116 Fed. 1019.

80. Where a note has been sent within the jurisdiction for collection an action for

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Where the property sought to be subjected to the plaintiff's claim is a debt owing to the defendant by a third person, jurisdiction of it must be obtained by service on the third person, and when service is so made the question whether the debt itself was within the jurisdiction arises. In West Virginia, it is said that a debt owing by a nonresident to a nonresident cannot be impounded by garnishment unless payment thereof is enforceable at some particular place within the state.[81] Suit will not lie against a nonresident, though supported by garnishment against a resident of the state, it not appearing but that the garnishee's debt is payable at the residence of the nonresident creditor;[82] especially not when it does appear that the debt is a foreign judgment.[83] Payment of a judgment in garnishment of a foreign debt may, however, be pleaded as a defense by the debtor.[84]

Nonresidence of both parties to a local cause of action is a common statutory ground of jurisdiction;[85] but when the venue lies with another court, the suit will be refused.[86] An objection on that ground may be waived,[87] though if specified in the grant of jurisdiction, residence may go to jurisdiction as well as to venue.[88] Corporations are "resident" in the place of domicile or general office,[89] but by doing business a foreign corporation becomes amenable to suits in personam.[90]

Service on the agent of a nonresident is sufficient where authorized by law,[91]

its possession may be maintained therein on the ground of fraud. Gregory v. Howell, 118 Iowa, 26.

81. Pa. R. Co. v. Rogers, 52 W. Va. 450. A railroad company having no office and doing no business in the state cannot be held in garnishment in a suit against an employe where the company, the employe, the service performed by him and the contract for it all have their situs in the state of the domicile of the company and no service has been had on the employe. Id.

82. Beasley v. Lennox-Haldeman Co., 116 Ga. 13.

83. In Minnesota it is held that a judgment rendered in that state in favor of a citizen against a foreign corporation cannot be impounded by a proceeding in rem in the state where the corporation is domiciled, there having been no service or appearance there by the owner of the judgment. Boyle v. Musser-Sauntry Land, Logging & Mfg. Co., 88 Minn. 456.

84. By a foreign insurance company owing a citizen of the state for a loss occurring within the state, that it had paid a judgment rendered in garnishment proceedings in the state of its domicile, was sustained. Sexton v. Phoenix Ins. Co., 132 N. C. 1.

85. An action against a non resident corporation by a non resident on a cause of action arising in the state is expressly authorized by the Code of North Carolina [Code, § 194 (2)]. Bryan v. Western Union Tel. Co., 133 N. C. 603.

86. Where a continuous tort by a railroad company is begun in one county and continued in another, suit for it may be brought in either county. Carrying passenger by station. Central of Georgia R. Co. v. Dorsey, 116 Ga. 719. Injury in one county, death in another. Gibbs v. Gibbs [Utah] 73 Pac. 641. See, also, Fields v. Daisy Gold Min. Co. [Utah] 73 Pac. 521; White v. Rio Grande W. R. Co., 25 Utah, 346, 71 Pac. 593.

In New York, actions to recover a penalty must be brought in the county where the cause of action arose [Code Civ. Proc. § 983]. Liability of officers of corporation for false report. Hutchinson v. Young, 80 App. Div. [N. Y.] 246. **In the municipal court of the city of New York** all must reside out of the city, as well as out of the district. Goldman v. Jacobs, 38 Misc. [N. Y.] 781.

In Georgia the superior court of the county in which the land lies cannot enjoin a sale under a power in a security deed where the grantee lives in another county, though the trustee conducting the sale resides in the county where the land lies. Meeks v. Roan, 117 Ga. 865.

In Kentucky a suit to quiet title as against mortgages executed by the plaintiff is transitory and must be brought in the county of defendant's residence and not where the land lies. Shouse v. Taylor, 24 Ky. L. R. 1842, 72 S. W. 324.

87. Kearns v. New York & Q. C. R. Co., 86 N. Y. Supp. 179; Brinn v. Rinderman, 38 Misc. [N. Y.] 792; Fischer v. Brooklyn Heights R. Co., 84 N. Y. Supp. 254.

88. **The county court of New York** can take jurisdiction of an action to recover money only, only when the defendant is a resident of the county [Const. art. 6, § 14]. Perlman v. Gunn, 41 Misc. [N. Y.] 166.

89. A railway company that only maintains a station and depot in a city is not a resident of such city so as to bring it within the exclusive jurisdiction of the city court thereof. Robinson v. Mo. Pac. R. Co. [Kan.] 72 Pac. 854.

90. The courts of Texas have jurisdiction of a suit by a non-resident against a foreign corporation doing business in the state though the proceeding is not in rem. Western Union Tel. Co. v. Shaw [Tex. Civ. App.] 77 S. W. 433.

91. Service on state insurance commissioner. Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 47 Law. Ed. 987. Service on a foreign executor's local agent appointed under the statute confers jurisdiction on the executor [Gen. Laws 1896, c. 212, § 45]. Gorman v. Stillman, 25 R. I. 55. Service on a resident agent of a foreign corporation is effective. Barnes v. Western Union Tel. Co., 120 Fed. 550.

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and service on the agent of a foreign corporation appointed under the state law gives jurisdiction to the Federal court of a suit by a citizen of the state where it is brought on a transitory cause of action arising elsewhere;[92] but service on an agent not so appointed will not be effective unless the defendant is actually doing business within the state.[93]

Where a defendant objects to the jurisdiction on the ground of nonresidence, the question of residence is one of fact.[94]

Actions concerning real estate are generally triable where the land lies,[95] but where an action is brought to recover realty and for the value of timber cut therefrom and defendant disclaims title and possession, only a personal action is left in which defendant may object to the jurisdiction of his person for nonresidence.[96]

A suit brought in the Federal court on the ground of diversity of citizenship if objected to can be maintained only in the district of the residence of one of the parties,[97] and the bankruptcy act requires that persons adjudged bankrupts must have resided six months in the district where the petition is filed;[98] but a defendant may waive his right to be sued in the district of his residence, by submitting himself to the jurisdiction of the court,[99] especially in patent cases, where the Federal courts have full jurisdiction.[1] A surety company signing contractors' bonds given under the Federal statutes may be sued in any district in which it gives bonds.[2]

Courts of equity have power to act in personam upon persons within their jurisdictions by restraining them from using the courts of another state[3] or another county of the same state to accomplish an inequitable purpose,[4] and to compel them to convey lands lying in another state.[5] A court has jurisdiction to enjoin another from diverting water from a stream by means of a ditch in an adjoining state and carrying it to his lands in the forum state, to the injury of other lands in the forum state.[6] In a suit for specific performance, the court may compel a resident grantee to convey, he having had notice, though the court has no jurisdiction over the nonresident vendor.[7] The Federal court of one district can enjoin the marshal of another district from enforcing a void judgment rendered in the latter district by seizure of property in the former,[8] and the district court of one county may restrain its sheriff from selling property in that county seized by virtue of an execution in another county,[9] especially if the ground alleged is the invalidity of the judgment.[10]

92. Gale v. Southern Bldg. & Loan Ass'n, 117 Fed. 732.

93. Central Grain & Stock Exch. v. Board of Trade of Chicago [C. C. A.] 125 Fed. 463.

94. Ovid Tp. v. Haire [Mich.] 94 N. W. 1060; Kent v. Crenshaw [Iowa] 94 N. W. 1131.

95. Suit to establish trust. Booker v. Aitken, 140 Cal. 471, 74 Pac. 11.

96. Adams v. Drews, 110 La. 456.

97. Chesapeake & O. Coal Agency Co. v. Fire Creek Coal & Coke Co., 119 Fed. 942; Occidental Consolidated Min. Co. v. Comstock Tunnel Co., 120 Fed. 518.

98. Where a traveling gambler has resided in the jurisdiction only two months, the court has no jurisdiction. In re Williams, 120 Fed. 34.

99. A demurrer is not a waiver, though filed on other grounds. Chesapeake & O. Coal Agency Co. v. Fire Creek Coal & Coke Co., 119 Fed. 942. **Contra,** Bottum v. Nat. R. Bldg. & Loan Ass'n, 123 Fed. 744. A general appearance is a waiver. Occidental Consolidated Min. Co. v. Comstock Tunnel Co., 120 Fed. 518; Barnes v. Western Union Tel. Co., 120 Fed. 550.

1. General Elec. Co. v. Wagner Elec. Mfg. Co., 123 Fed. 101.

2. Act Aug. 13, 1894 (28 Stat. 279 [U. S. Comp. St. 1901, p. 2315]). U. S. v. Sheridan, 119 Fed. 236; U. S. v. O'Brien, 120 Fed. 446.

3. Attachment in foreign state of property exempt in state of party's domicile. Margarum v. Moon, 63 N. J. Eq. 586. Bringing suit in another state to avoid use of depositions taken in state of residence. Locomobile Co. v. American Bridge Co., 80 App. Div. [N. Y.] 44.

4. State v. Fredlock, 52 W. Va. 232.

5. Gates v. Paul [Wis.] 94 N. W. 55.

6. Willey v. Decker [Wyo.] 73 Pac. 210.

7. Fowler v. Fowler, 204 Ill. 82.

8. Kirk v. U. S., 124 Fed. 324.

9. Ohio Colorado Min. & Mill. Co. v. Wiley [Colo. App.] 71 Pac. 1001. In Connecticut, the superior court of one county may enjoin in an independent action the use of a judgment rendered by the superior court of another county. Allis v. Hall [Conn.] 56 Atl. 637.

10. Noerdlinger v. Huff, 31 Wash. 360, 72 Pac. 73.

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A nonresident cannot maintain suit for divorce,[11] and if residence in the county is jurisdictional it cannot be waived.[12]

Only the probate court of the county of his residence can appoint an administrator or executor or probate the will, where the decedent was a resident of the state;[13] but the court of any county in which deceased left property can appoint an administrator for the estate of a nonresident,[14] and in Utah, an administrator may be appointed for the estate of a nonresident decedent, though he left no property in the state.[15] Unless the statutes so require, and except in the case of nonresident decedents, the possession of an estate by the decedent is not a prerequisite to the jurisdiction for the appointment of an administrator;[16] but the municipal court of the city of Providence, R. I., has jurisdiction to appoint an administrator only when the deceased left assets within the city.[17]

The court of their domicile has jurisdiction to appoint a guardian for minors, though they may not be within the state at the time, as against the court of a state in which they are sojourning merely,[18] and the court of a county in which an injured waif of unknown parentage is found has jurisdiction to appoint a guardian for him.[19]

The court has jurisdiction of adoption proceedings in a case of a child born and resident in the state, though her father was a citizen of and resided in a foreign country.[20, 21]

§ 8. *Limitations resting in amount or value in controversy.*—To give the circuit court of the United States jurisdiction of a case on account of the existence of a Federal question or diversity of citizenship, the matter in dispute must exceed $2,000 exclusive of interest and costs.[22] Similiar provisions are to be found in the constitutions and statutes of the states defining the jurisdiction of their several courts.[23] The amount is not controlling if other jurisdictional

11. Though the defendant is a resident there and the cause (desertion) occurred there. Blandy v. Blandy, 20 App. D. C. 535.

In the District of Columbia divorce cannot be granted for a cause occurring outside the District unless the plaintiff shall have resided in the District for two years preceding his application. Blandy v. Blandy, 20 App. D. C. 535.

In New York: The plaintiff must have been a resident of that state when the offense was committed and must be a resident when the action is begun [Code Civ. Proc. § 1756]. Harris v. Harris, 83 App. Div. [N. Y.] 123.

Kentucky: A wife, plaintiff in divorce, does not lose her residence by enforced absence from the state while earning her livelihood. Boreing v. Boreing, 24 Ky. L. R. 1288, 71 S. W. 431.

12. Divorce cases in Colorado can be brought only in the county where the plaintiff resides, or where the defendant resides or where the defendant last resided. Residence is a jurisdictional question. Branch v. Branch, 30 Colo. 499, 71 Pac. 632.

13. Ewing v. Mallison, 65 Kan. 484, 70 Pac. 369.

14. Wright v. Roberts, 116 Ga. 194; In re Barandon's Estate, 41 Misc. [N. Y.] 380.

15. In re Tasanen's Estate, 25 Utah, 396, 71 Pac. 984.

16. Holburn v. Pfanmiller's Adm'r, 24 Ky. L. R. 1613, 71 S. W. 940.

17. Williams v. Ripley [R. I.] 56 Atl. 777.

18. Probate Court. Residence of mother is domicile of minor fatherless child. Modern Woodmen v. Hester, 66 Kan. 129, 71 Pac. 279.

19. County Court. Louisville & N. R. Co. v. Kimbrough, 24 Ky. L. R. 2409, 74 S. W. 229.

20, 21. Probate Court. Stearns v. Allen, 183 Mass. 404.

22. U. S. v. Sheridan, 119 Fed. 236; Hyde v. Victoria Land Co., 125 Fed. 970. Suit to set aside judgments—consolidation of claims, not allowed. McDaniel v. Traylor, 123 Fed. 338. Habeas Corpus Case. Hoadly v. Chase, 126 Fed. 818. Suit by member of nonstock corporation to restrain illegal and ultra vires acts by governing body. McKee v. Chautauqua Assembly, 124 Fed. 808. Suit on a bond in the name of the United States for the benefit of an individual is no exception to the rule. U. S. v. Sheridan, 119 Fed. 236. Jurisdiction of circuit courts as determined by amount in controversy see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent, etc., Shoe Co. v. Roper, 36 C. C. A. 459.

23. California, Superior Court, $300. Winrod v. Wolters [Cal.] 74 Pac. 1037.

New Jersey Chancery, $50. Margarum v. Moon, 63 N. J. Eq. 586; Quairoli v. Italian Ben. Soc., 64 N. J. Eq. 205.

New York, County Court, $2,000. Howard Iron Works v. Buffalo El. Co., 176 N. Y. 1.

Nevada, District Court. Trespass to land by sheep. Dangberg v. Ruhenstroth, 26 Nev. 455, 70 Pac. 320.

Washington Appellate jurisdiction of supreme court, $200. Taylor v. Spokane Falls & N. R. Co., 32 Wash. 450, 73 Pac. 499. Interest may be added to the original claim

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facts or conditions concur to confer or divest jurisdiction.[24] If equity is involved, a justice of the peace loses jurisdiction whatever the amount.[25] Under such provisions it is held that the amount the plaintiff in good faith claims, irrespective of the amount of recovery,[26] and irrespective of amendments,[27] set-offs and counterclaims,[28] furnishes the test of jurisdiction; but the amount demanded by plaintiff will not be considered the amount in controversy, where it is shown by other averments in the declaration to be overstated.[29] Where the jurisdiction depends upon a particular sum, suits in which the damages cannot be calculated in money are not within it.[30] In Vermont, jurisdiction in replevin for beasts distrained, as between justice and county courts, depends upon the actual value of the beasts and not on the value as stated in the writ.[31]

The amount in controversy or matter in dispute as testing the jurisdiction of a court is the value of that which the complainant claims to recover or the value of that which the defendant will lose.[32] The value of the right affected, not merely the damage to it is considered by federal courts.[33] Applications of this test to particular actions are collected in the note.[34]

Herring v. Chesapeake & W. R. Co. [Va.] 45 S. E. 322. A note for $50 and attorney's fees at five per cent per month is beyond the jurisdiction of a justice of the peace in Missouri, where the jurisdiction is limited to $50. Bay v. Trusdell, 92 Mo. App. 377.

24. The circuit court in Florida has jurisdiction of the statutory action to recover four times the amount of fees unjustly claimed by an officer in an action in that court though the amount involved is less than $100. State v. Reeves [Fla.] 32 So. 814.

25. Note for small amount but charging married woman's separate estate. Harvey v. Johnson, 133 N. C. 352.

26. Fla. Cent. & P. R. Co. v. Seymour [Fla.] 33 So. 424; Ball v. Sledge [Miss.] 35 So. 447. Presumption as to good faith of claim. Sanger v. Chesapeake & O. R. Co. [Va.] 45 S. E. 750. Suit to declare and enforce lien. Lilienthal v. McCormick [C. C. A.] 117 Fed. 89.

27. Where the statute provides that appellate jurisdiction shall exist only when the "original amount in controversy" is over $200, an amendment of the complaint before trial reducing the amount claimed below $200 will not deprive defendant of his right to appeal. Taylor v. Spokane Falls & N. R. Co., 32 Wash. 450, 73 Pac. 499.

28. Payment of part of a claim after suit brought will not oust the jurisdiction though the amount in controversy is reduced thereby to less than the original jurisdiction of the court. Jackson v. Corley, 30 Tex. Civ. App. 417. Where the complaint demands an amount within the jurisdiction of the court, a plea of payment of part of it, leaving an amount unpaid less than jurisdictional amount, will not oust the jurisdiction. Prince v. Takash, 75 Conn. 616. Where suit is brought in the county court of New York on a claim within its jurisdiction, such jurisdiction is not lost by counterclaim of an amount beyond the jurisdiction. Howard Iron Works v. Buffalo El. Co., 176 N. Y. 1. Though it is otherwise as to the municipal court of Stillwater, Minnesota, by statute. Jourdain v. Luchsinger [Minn.] 97 N. W. 740.

29. U. S v. Sheridan, 119 Fed. 236. Where a note is for an amount great enough to give the superior court jurisdiction, but the sum actually due thereon is alleged to be less than the jurisdictional amount, the court has no jurisdiction. Harvey v. Johnson, 133 N. C. 352.

30. Anticipated consequential damages incapable of ascertainment. Or. R. & N. Co. v. Shell, 125 Fed. 979.

31. Widber v. Benjamin [Vt.] 58 Atl. 1071.

32. Suit by owner of fraction of property for annulment of mortgages on whole. Cowell v. City Water Supply Co. [C. C. A.] 121 Fed. 53.

33. Amelia Mill. Co. v. Tenn. C., I. & R. Co., 123 Fed. 811.

34. **Taxes and licenses:** In a suit by a taxpayer to enjoin the issue of municipal bonds, it is the amount of the bonds and not the amount of tax which might be illegally imposed on complainant thereby. Ottumwa v. City Water Supply Co., 119 Fed. 315. In a suit to enjoin the enforcement of a license tax it is not alone the amount of the tax but the value of complainant's right to conduct his business without being subject to the tax. Hutchinson v. Beckham [C. C. A.] 118 Fed. 399. In a suit to set aside special tax bills it includes the bills against lots of which the plaintiff is the equitable owner as well as those which he owns in fee. Field v. Barber Asphalt Pav. Co., 117 Fed. 925.

When a **lien on land** is sought to be enforced or avoided it is the amount of the lien and not the value of the land. Suit to enforce judgment lien. Matteson v. Matteson [Mich.] 93 N. W. 1079. Suit to set aside judgments. McDaniel v. Traylor, 123 Fed. 338. In a suit to enjoin a **permanent injury to land,** it is the value of the land and not the amount of the injury (In re Turner, 119 Fed. 231), and in a suit **to recover land,** it is its value to defendant as it is being used (King v. So. R. Co., 119 Fed. 1016).

Where **a contract** by a city to furnish electric power to a railway company is impaired, it is not the amount to be paid under the contract but the value of complainant's rights thereunder (Riverside & A. R. Co. v. Riverside, 118 Fed. 736), and in a suit to enjoin the violation of contract not to engage in certain business it is the value of the object to be gained by the suit and not the amount of complainant's damages arising

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Several distinct demands by different persons cannot be joined to make up the jurisdictional amount,[35] but the assets of an insolvent corporation proceeded against and the joint claims of the creditors joining in the bill furnish the measure of the amount involved, regardless of whether any individual creditor is interested to the prescribed amount.[36]

The jurisdictional amount must be alleged to be involved either directly or by necessary inference.[37] It is immaterial that there is no express allegation that plaintiff's right is worth that much,[38] and where no specific amount is claimed, an amendment as to that matter may be allowed after the evidence is in.[39] Where several paragraphs of a complaint counting on the same cause of action each claim the same amount, that amount and not the sum of the several amounts claimed is the amount in controversy, and it is not augmented by the general prayer for other and further relief.[40] Where it appears from the complaint that the claim is beyond the court's jurisdiction and no part of it is waived, the demand for judgment for an amount within the jurisdiction will not confer it.[41] A demurrer is properly sustained to a petition under which the damages recoverable are less than the court's jurisdiction,[42] and where a demurrer is sustained to so much of a complaint that the amount remaining in controversy is less than the jurisdictional amount, the action is properly dismissed.[43] Where suit is brought in good faith for a sum large enough to confer jurisdiction, a subsequent striking out of part of the items, leaving a sum less than the court's jurisdiction, will not oust it.[44]

§ 9. *Limitations resting in character of subject-matter or object of action.*[45] —Justices of the peace,[46] county,[47] municipal[48] and other inferior courts,[49] are

from the violation (American Fisheries Co. v. Lennen, 118 Fed. 869).

Where an injunction is sought to **restrain the prosecution of a foreign attachment** to apply a laborer's wages to the payment of a debt, the amount of wages garnished and not the amount of the debt, determines whether the court has jurisdiction. Marsarum v. Moon, 63 N. J. Eq. 586. In a suit by a taxpayer to enjoin the **illegal use of a school building** the value of the building and not the value of complainant's interest therein furnishes the test. Sugar v. Monroe, 108 La. 677, 59 L. R. A. 723.

In a suit against an officer and his bondsmen **to recover fees unlawfully collected** by him the amount of fees and not the penalty of the bond is the amount in controversy. McCall v. Zachary, 131 N. C. 466.

35. Consolidation of demands to confer jurisdiction [Conn. Gen. St. 1902, §§ 557, 558]. Brennan v. Berlin Iron Bridge Co., 75 Conn. 393. Several labor claimants cannot combine to make jurisdictional amount. Winrod v. Wolters [Cal.] 74 Pac. 1037. Actions on several insurance policies consolidated under statute. Amount in controversy is the claim under each policy. Wis. Cent. R. Co. v. Phoenix Ins. Co., 123 Fed. 989.

36. Jones v. Mut. Fidelity Co., 123 Fed. 506.

37. A two story brick school house will be presumed to be worth more than $50, the amount necessary to give the chancery court jurisdiction. Quairoli v. Italian Ben. Soc., 64 N. J. Eq. 205. An allegation that the water right defendant interferes with is worth $2,000 and a claim for damages for prior division amounting to $2,500 sufficiently show that upwards of $2,000 is involved. Morris v. Bean, 123 Fed. 618. Sufficiency of showing of value—replevin for deed. Pasterfield v. Sawyer, 133 N. C. 42.

38. State v. Board of Pharmacy, 110 La. 99.

39. Boyd v. Roanoke R. & L. Co., 132 N. C. 184.

40. Baltimore & O. R. Co. v. Ryan [Ind. App.] 68 N. E. 923.

41. Poirier v. Martin, 89 Minn. 346.

42. Damages against telegraph company. Gaddis v. W. U. Tel. Co. [Tex. Civ. App.] 77 S. W. 37.

43. W. U. Tel. Co. v. Arnold [Tex. Civ. App.] 77 S. W. 249. Exemplary damages not recoverable. Malin v. McCutcheon [Tex. Civ. App.] 76 S. W. 586. Compare Ingham v. Ryan [Colo. App.] 71 Pac. 899.

44. Burmister v. Empire Gold Min. & Mill. Co. [Ariz.] 71 Pac. 961.

45. Cf., § 4, ante as to Federal jurisdiction resting in existence of Federal questions, etc.

46. Forcible entry and detainer. Heiney v. Heiney [Or.] 73 Pac. 1038. Trespass. Dold v. Knudson [Neb.] 97 N. W. 482. Replevin for a deed does not invalidate title to real estate. Pasterfield v. Sawyer, 133 N. C. 42. A plea of title to remove an action of trespass from a justice of the peace must set forth title in the defendant, merely denying plaintiff's title is not sufficient. Garcin v. Roberts [N. J. Law] 55 Atl. 43.

47. Action to recover damages for fraudulent conveyance of title held in trust does not involve title. Espey v. Boone [Tex. Civ. App.] 75 S. W. 570.

48. An action upon open account to recover a sum of money alleged to be due for a section in a city cemetery is not a suit in-

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generally denied jurisdiction of actions involving the title to land, though where the question of title arises only collaterally, jurisdiction is not ousted.[50] Neither have such courts any equitable jurisdiction.[51]

An action on a married woman's note binding her separate estate is equitable in its nature though for an amount within the ordinary jurisdiction of a justice.[52] An action will lie in the supreme court of New York to enforce a judgment of the Seneca Indians' peacemaker's court relating to lands.[53]

Actions ex delicto[54] are frequently withdrawn by statute from the jurisdiction of justices' and like courts, but damages for nondelivery under a contract sounds as a cause arising out of contract.[55]

Though the Federal courts have exclusive jurisdiction of contests over the validity of patents,[56] the jurisdiction of a state court in a case properly within its jurisdiction is not ousted merely because the validity of a patent is necessary to be decided therein.[57] The state courts have no jurisdiction to try and determine the validity of acts or decisions of the officers of the land department of the general government,[58] but after the title has passed from the government, the state courts may adjudicate the claims of rival claimants.[59] The United States court in the Indian Territory has jurisdiction of an action to foreclose a mortgage of lands executed by an Indian to a citizen of the United States,[60] and of cases brought by a tribe against persons holding lands as claimants to membership in the tribe, notwithstanding such claim has been decided adversely.[61]

§ 10. *Limitations resting in character or capacity of parties litigant.*—A sovereign state cannot be sued in its own courts[62] or in any other without its own consent,[63] but a justice has jurisdiction of a suit against a county in West Virginia.[64] A state court has no jurisdiction to inquire upon habeas corpus into the validity of enlistments into the naval or military service of the United States.[65] An action against the United States for injuries by a passenger in an

volving the title to land. Adas Yeshurun Soc. v. Fish, 117 Ga. 345.

49. An additional prayer for relief beyond the jurisdiction of the court will not deprive the court of jurisdiction to entertain a case otherwise within its jurisdiction. Randolph v. Hudson [Okl.] 74 Pac. 946.

50. Summary proceedings for possession. Van Deventer v. Foster, 87 App. Div. [N. Y.] 62. Action to recover cash deposit on sale of real estate on failure of title. Elinsky v. Berger, 87 App. Div. [N. Y.] 584. An action on a covenant against incumbrances in a warranty deed does not involve the title to real property. Dafoe v. Keplinger [Neb.] 95 N. W. 674.

51. Ehrlich v. Shuptrine, 117 Ga. 882; Fordham v. Ehrlich, 117 Ga. 883; Huntley v. Hutchinson [Minn.] 97 N. W. 971. Action for an accounting and to settle partnership affairs. Erret v. Pritchard [Iowa] 96 N. W. 963. While the municipal court of New York has no jurisdiction to grant affirmative relief in the form of a judgment based upon an equitable defense interposed by a respondent in a summary proceeding, it has the right to entertain an equitable defense in such a proceeding and receive evidence in support of it. Schlaich v. Blum, 85 N. Y. Supp. 335.

52. Harvey v. Johnson, 133 N. C. 352.

53. Recovery of lands set apart as dower. Jimeson v. Pierce, 78 App. Div. [N. Y.] 9.

54. The municipal court of New York City has no jurisdiction of an action for the recovery of money paid under duress. Goldstein v. Abramson, 86 N. Y. Supp. 80.

55. Justices of the peace in Delaware have jurisdiction of an action for damages for failure to deliver personal property sold, though such action sounds in damages. Gruell v. Clark [Del.] 54 Atl. 955.

56. Fuller v. Schutz, 88 Minn. 372; Standard Sewing Mach. Co. v. Leslie [C. C. A.] 118 Fed. 557.

57. Pratt v. Hawes [Wis.] 95 N. W. 965; Merrill v. Miller [Mont.] 72 Pac. 423; Ind. Mfg. Co. v. Koehne, 188 U. S. 681, 47 Law. Ed. 651.

58. Homestead entries. Tiernan v. Miller [Neb.] 96 N. W. 661. Railroad grant. McDonald v. Union Pac. R. Co. [Neb.] 97 N. W. 440.

59. Johnson v. Fluetsch, 176 Mo. 452.

60. Crowell v. Young [Ind. T.] 69 S. W. 829.

61. Hargrove v. Cherokee Nation [Ind. T.] 69 S. W. 823.

62. State v. Mortensen [Neb.] 95 N. W. 831.

63. Hassard v. U. S. of Mexico, 173 N. Y. 645.

64. Taylor County Ct. v. Holt, 53 W. Va. 532.

65. Marine corps. Com. v. Butler, 19 Pa. Super. Ct. 626.

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elevator of a government building sounds in tort and cannot be maintained in any court.[66]

§ 11. *Original jurisdiction. A. Exclusive, concurrent and conflicting.*[67]—Jurisdiction will be declined when the amount is within the cognizance of a lower court and no other features of the proceeding invoke it.[68] In states which have probate courts, their jurisdiction over administration proceedings and other proceedings committed to them is generally exclusive.[69] Indiana has no separate probate court, the circuit courts of that state having exclusive jurisdiction of all matters relating to the settlement of decedent's estates.[70]

An adoption of the mode of procedure appropriate to a matter triable in a different court does not withdraw jurisdiction.[71]

The ordinary courts in Colorado are excluded from jurisdiction to determine which faction of a political party is entitled to representation within the party councils.[72]

Cases in which there are two or more courts to which resort may be had for relief are numerous,[73] e. g., between equity and courts of probate,[74] it being a familiar rule that when there exist two tribunals possessing concurrent and complete jurisdiction of the subject-matter, the jurisdiction becomes exclusive in the one before which proceedings are first instituted,[75] and that such court will be permitted to pursue its jurisdiction to the end to the exclusion of all others, and will not permit its jurisdiction to be impaired or perverted by a resort to some other tribunal;[76] on the same principle, where two suits are brought in the same court to accomplish the same result, the suit first instituted is entitled to priority.[77]

66. Bigby v. U. S., 188 U. S. 400, 47 Law. Ed. 519.

67. Compare ante, § 4, Federal Jurisdiction.

68. The district court in Texas has no jurisdiction of a motion to require the clerk to pay over $50 received by him in satisfaction of a judgment, since as an original suit it is not within the court's jurisdiction as to amount, and as a motion is not ancillary to the original suit since the clerk's action in receiving the money is not authorized. Whitesboro v. Diamond [Tex. Civ. App.] 75 S. W. 540.

69. The district court of Nebraska has no original jurisdiction in probate matters. Reischick v. Reiger [Neb.] 94 N. W. 156; Genau v. Roderick [Neb.] 94 N. W. 523.

70. English v. Randle, 29 Ind. App. 681.

71. Justices of the peace and not the quarterly courts have jurisdiction in Kentucky of prosecutions for obstructing public highways. Cincinnati, N. O. & T. P. R. Co. v. Baughman, 25 Ky. L. R. 705, 76 S. W. 351.

72. Statute (Sess. Laws 1901, p. 169, c. 71) gives it to state central committees. People v. Dist. Ct. [Colo.] 74 Pac. 896.

73. The supreme and superior courts of Georgia have concurrent jurisdiction to compel officers of the latter court by mandamus to perfect bills of exception. Cooper v. Nisbet [Ga.] 45 S. E. 692.

74. The surrogate and supreme court in New York have concurrent jurisdiction in the appointment of a successor to a deceased testamentary trustee. In re Chase's Estate, 40 Misc. [N. Y.] 616. The circuit court of Missouri has jurisdiction of an action for necessaries furnished an insane person notwithstanding the statutory provisions for appointing guardians of the persons and estates of such persons by the probate court. St. Louis v. Hollrah, 175 Mo. 79.

75. Receivership proceedings in co-ordinate state courts. McDowell v. McCormick [C. C. A.] 121 Fed. 61; McKay v. Van Kleeck [Mich.] 94 N. W. 367. But the rule does not apply in bankruptcy cases, and prior proceedings in state courts are not effective to deprive the bankruptcy court of jurisdiction. In re Knight, 125 Fed. 35. Voluntary assignment proceedings in county court. Hillis v. Asay, 105 Ill. App. 667. Supreme and surrogates' court. Westerfield v. Rogers, 174 N. Y. 230; Levett v. Polhemus, 86 App. Div. [N. Y.] 495. Suit for possession of note, injunction against suit thereon in other county. Gregory v. Howell, 118 Iowa, 26. Probate courts of different counties. Stone v. Byars [Tex. Civ. App.] 73 S. W. 1086; Ewing v. Mallison, 65 Kan. 484, 70 Pac. 369; In re Davison's Estate [Mo. App.] 73 S. W. 373. Application for ferry privilege over stream forming boundary between counties. Clark County Ct. v. Warner, 25 Ky. L. R. 857, 76 S. W. 828.

76. Ewing v. Mallison, 65 Kan. 484, 70 Pac. 369; State v. Fredlock, 52 W. Va. 232; Union L. Ins. Co. v. Riggs, 123 Fed. 312; Stewart v. Wis. Cent. R. Co., 117 Fed. 782. The jurisdiction of a federal court in equity to set aside fraudulent conveyances by a judgment debtor is not affected by his filing his petition in bankruptcy after suit begun. Nat. Bank of Republic v. Hobbs, 118 Fed. 626. Where an estate is in process of administration in the probate court, the district court is not authorized to oust the jurisdiction of the probate court by entertaining a suit against the administrator on a

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It is a settled rule that when a state court and a Federal court may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted.[78] While the rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court, it is limited to actions which deal either actually or potentially with specific property or objects, and does not apply to actions strictly in personam.[79] Neither does it apply to actions brought to enforce an entirely distinct claim or right.[80] Where administration has been completed and the property has passed out of control of the probate court and beyond its jurisdiction, the Federal courts have power to subject the property in the hands of a distributee to the debts of the decedent.[81]

When a court once gets jurisdiction of a case, it retains it and proceeds to pass upon and determine all matters incident thereto,[82] especially if it be a court of

claim against the decedent. O'Loughlin v. Overton [Kan.] 74 Pac. 604.

77. Receivership proceedings and assignment for benefit of creditors. Flint v. Powell [Colo. App.] 72 Pac. 60.

78. Conflicts of jurisdiction between federal and state courts see note to Louisville Trust Co. v. Cincinnati, 22 C. C. A. 356; Baltimore & O. R. Co. v. Wabash R. Co., 119 Fed. 678. Suit against purchaser of railroad from receivers. Stewart v. Wis. Cent. R. Co., 117 Fed. 782. Mandamus against receivers of federal court denied. Rogers v. Chippewa Circuit Judge [Mich.] 97 N. W. 154. State court in equity refusing jurisdiction of cause determinable in pending suit in Federal court. Sprigg v. Com. T. I. & T. Co. [Pa.] 56 Atl. 33. Collusive attempt to confer jurisdiction on state court after stipulation of armistice in federal court. McKechney v. Weir [C. C. A.] 118 Fed. 805. Probate proceedings in state court not enjoined in federal court. McPherson v. Miss. Valley Trust Co. [C. C. A.] 122 Fed. 367; Hall v. Bridgeport Trust Co., 123 Fed. 739. Receivership proceedings in state and federal courts. Knott v. Evening Post Co., 124 Fed. 342. Enforcement of judgment of state court will not be enjoined. Bailey v. Willeford, 126 Fed. 803. Habeas corpus to inquire into the detention of an insane person pending inquisition in state court refused. Hoadly v. Chase, 126 Fed. 818. Jurisdiction of judgment creditor's bill not ousted by bankruptcy. Pickens v. Roy, 187 U. S. 177, 47 Law. Ed. 128. Condemnation proceedings in state court not restrained. Benjamin v. Brooklyn Union El. R. Co., 120 Fed. 428. The Federal court has no jurisdiction to enjoin receivership proceedings in a state court supplementary to an execution issued on a judgment rendered in the state court. Mutual Reserve F. L. Ass'n v. Phelps, 190 U. S. 147, 47 Law. Ed. 987. The bankruptcy court cannot enjoin the enforcement of a lien acquired by a judgment creditor by bill filed more than four months before bankruptcy though the judgment was not rendered until after bankruptcy. Pickens v. Roy, 187 U. S. 177, 47 Law. Ed. 128; Metcalf v. Barker, 187 U. S. 165, 47 Law. Ed. 122. A federal court may entertain an action and render judgment against a corporation notwithstanding pending proceedings in the state court to wind up its affairs. Anglo-American L. M. & A. Co. v. Cheshire Provident Inst., 124 Fed. 464. Where an injunction has been obtained in a state court against disposing of rights pending a patent infringement suit in the federal court, a counter injunction will not be granted because of the usual comity between the courts. Green v. Porter, 123 Fed. 351. The rights of all subcontractors and materialmen serving legal stop notices under the mechanics' lien law on the owner of buildings being erected by a contractor before the contractor filed his petition in bankruptcy, are enforceable in the state court. South End Imp. Co. v. Harden [N. J. Ch.] 52 Atl. 1127. Bill by aliens to annul nuncupative will probated in state court. O'Callaghan v. O'Brien, 116 Fed. 934. Where a claim for a personal injury against a railroad company was sued in the state court and presented to the receiver of the federal court, and on reference to the master rejected the same day that judgment for the plaintiff was rendered in the state court, it was held that the jurisdiction being concurrent, the federal court was bound by its own judgment, and a petition in intervention based on the judgment in the state court must be dismissed. Goodwin v. Atchison, T. & S. F. R. Co. [C. C. A.] 118 Fed. 403. After suit has been brought on an insurance policy in a state court, the federal court has no jurisdiction based on diversity of citizenship to entertain a suit to cancel the policy, on grounds that may be set up as a defense in the state court. Cable v. U. S. L. Ins. Co., 191 U. S. 288.

79. Suit to enforce decree of state court giving one railroad right to cross another. Baltimore & O. R. Co. v. Wabash R. Co. [C. C. A.] 119 Fed. 678.

80. Jurisdiction of a bill to enjoin an insolvent corporation unable to resume business from the exercise of its franchises is not ousted by a showing therein that in the Federal court a suit based on diversity of citizenship is pending the object of which is the appointment of a receiver and a distribution of its property among creditors and stockholders, the purpose of the action in the state court not being pecuniary. Gallagher v. Asphalt Co. [N. J. Eq.] 55 Atl. 259.

81. Hale v. Coffin, 114 Fed. 567.

82. McCall v. Zachary, 131 N. C. 466; Jackson v. Corley, 30 Tex. Civ. App. 417. Where money has been paid into court in a cause of which the court had jurisdiction, the authority of the court to determine to whom

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equity, as it is well settled that once a court of equity has obtained jurisdiction upon any equitable ground, it will retain it to do complete justice between the parties, although in so doing it will become necessary to establish purely legal rights or to grant legal remedies.[83] Where jurisdiction attaches by virtue of averments made in good faith and prayer for relief founded thereon, it is not ousted by the fact that at the trial it appears that plaintiff is not entitled to the relief prayed for, but in such case the court will grant such relief as is within the issues, though not within its jurisdiction if prayed alone.[84]

No court has jurisdiction to enjoin the violation of an executory order of another court.[85] Neither can one court set aside, modify,[86] control,[87] or enjoin the decree of another of concurrent jurisdiction,[88] though it may restrain the enforcement of such decree by acting in personam on the parties, and may have to adjudge the decree invalid to justify such procedure,[89] and where a Federal court has obtained jurisdiction, it may protect that jurisdiction by injunction against bringing any other action in any other court involving the same subject-matter.[90]

(§ 11) *B. Ancillary or assistant.*—Since the Federal courts have jurisdiction of all suits and proceedings ancillary or assistant to suits of which it has jurisdiction, without regard to the tests of jurisdiction applied to original or independent suits,[91] receivers appointed by such courts may maintain suits therein to collect assets, or protect assets in their possession, regardless of either the citizenship of the parties or the amount in controversy;[92] but the bankruptcy court has no jurisdiction over a controversy between trustees and an adverse claimant of property of the bankrupt.[93] A district court of one district has no jurisdiction

the fund belongs without regard to questions of jurisdiction as to the parties claiming it is unquestioned. Myers v. Luzerne County, 124 Fed. 436; Varick v. Hitt [N. J. Eq.] 55 Atl. 139. Where the bankruptcy court has acquired the lawful custody of property to which conflicting liens attach it has jurisdiction to determine the priority of such liens though the trustee has no interest in such question. Chauncey v. Dyke Bros. [C. C. A.] 119 Fed. 1; In re Antigo Screen Door Co. [C. C. A.] 123 Fed. 249. Distribution of remnants in admiralty among claimants not entitled to maritime lien. The Library, 119 Fed. 539.

83. Longshore v. Longshore, 200 Ill. 470; Gates v. Paul [Wis.] 94 N. W. 55; Lothrop v. Duffield [Mich.] 96 N. W. 577; Whetstone v. McQueen, 137 Ala. 301. Where personal property is divided by a divorce decree the only remedy for possession is in the court making the decree. Jackson v. Jackson [Mich.] 98 N. W. 260. Decree of possession in suit for partition. LeSage v. LeSage, 52 W. Va. 323. Where a trustee in bankruptcy invokes the aid of a state court of equity to obtain possession of property in the hands of a third person, the court has jurisdiction to compel him to reimburse the party in possession for moneys he has paid to preserve the property as a condition of granting the relief. Arnold v. Eastin's Trustee, 25 Ky. L. R. 895, 76 S. W. 855.

84. Prayer for lien denied—judgment for debt rendered. Bridge v. Carter [Tex. Civ. App.] 77 S. W. 245; Randolph v. Hudson [Okl.] 74 Pac. 946.

85. Woods v. Root [C. C. A.] 123 Fed. 402.

86. Bill of review. Mathias v. Mathias, 104 Ill. App. 344; In re Teitelbaum, 84 App. Div. [N. Y.] 351.

87. A decree of the probate court as to a matter altogether within its jurisdiction cannot be controlled by equity. Kauffman v. Gries [Cal.] 74 Pac. 846.

88. Special statutory provision in Indian Territory [Ind. T. Ann. St. 1899, § 2510]. Hampton v. Mays [Ind. T.] 69 S. W. 1115. So in Texas [Rev. St. 1895, § 2996]. Chriswell v. Lussier [Tex. Civ. App.] 75 S. W. 552.

89. Lothrop v. Duffield [Mich.] 96 N. W. 577; Ohio Colo. Min. & Mill. Co. v. Wiley [Colo. App.] 71 Pac. 1001. Scire facias on a forfeited recognizance is an original process in a special proceeding and where issued against a non resident surety will be enjoined in the district of the surety's residence. Kirk v. U. S., 124 Fed. 324.

90. Union Life Ins. Co. v. Riggs, 123 Fed. 312. Rev. St. § 720. Stewart v. Wisconsin Cent. R. Co., 117 Fed. 782.

91. Injunction to restrain action on decree, diversity of citizenship not necessary. Thompson v. Schenectady R. Co., 124 Fed. 274. Actions on attachment bonds executed in suit pending in federal court. Attachment bonds. Files v. Davis, 118 Fed. 465. A suit to restrain private persons from selling the stock of a company is not ancillary to a bill filed to foreclose the mortgages on the railway of such company. Raphael v. Trask, 118 Fed. 777.

92. Unfair competition. Brookfield v Hecker, 118 Fed. 942. Collection of assets. Alexander v. Southern Home Bldg. & Loan Ass'n, 120 Fed. 963; Bottom v. Nat. R. Bldg. & Loan Ass'n, 123 Fed. 744. Suit in other jurisdiction. Conklin v. U. S. Shipbuilding Co., 123 Fed. 913.

93. 30 Stat. 552, 553, § 23. In re Rochford [C. C. A.] 124 Fed. 182; In re Waterloo

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to grant an injunction,[94] or an order to examine persons residing in the district in aid of bankruptcy proceedings in another state.[95] The court in which an indictment is pending has jurisdiction to forfeit a recognizance founded thereon in which a nonresident is surety.[96] Except in a few cases provided for by law, the circuit courts of the United States can issue writs of mandamus in aid of an existing jurisdiction only, and when such writs are issued by any circuit court to enforce its own judgment, the jurisdiction cannot be enlarged to cover the judgments of other courts.[97] An order to examine books, papers, etc., to enable plaintiff to frame his complaint, will not be granted in New York when there is no showing that the action to which it is ancillary can be brought in New York.[98]

(§ 11) *C. Inferior and limited.*—Statutes conferring jurisdiction upon inferior courts are strictly construed and will not by construction be aided or extended by inference or implication beyond their express terms.[99] Jurisdiction equal to a circuit court carries an equal equitable jurisdiction.[1] Cases applying the statutes are collected in the note.[2] All facts necessary to give such courts jurisdiction must affirmatively appear of record and no presumptions are indulged in their favor.[3] The probate courts,[4] and those county courts which exist in many states between the magistrates' or justices' courts and the courts of general jurisdiction often possess a civil jurisdiction subject to specified limits, usually excluding trial of title to land.[5] Where the probate courts have superior jurisdiction over matters within their cognizance, they exercise equitable powers so far as to make their jurisdiction efficient.[6] In other states, such courts possess only those powers conferred expressly or by implication, by constitution or statute,[7] but not otherwise,[8] among which equity powers are not enumerated.[9]

Organ Co., 118 Fed. 904; In re Flynn, 126 Fed. 422.

94. In re Williams, 120 Fed. 38.

95. In re Williams, 123 Fed. 321.

96. Kirk v. U. S., 124 Fed. 324.

97. U. S. v. New Orleans [C. C. A.] 117 Fed. 610.

98. Snow v. Snow-Church Surety Co., 80 App. Div. [N. Y.] 40.

99. Sims v. Kennedy [Kan.] 73 Pac. 51.

1. The Cape Girardeau, Missouri, court of common pleas has equitable jurisdiction. Oliver v. Snider [Mo.] 75 S. W. 591.

2. **The municipal court of New York** has jurisdiction over actions for breach of contract, express or implied (recovery of fine paid under mistake of fact. Harrington v. New York, 40 Misc. [N. Y.] 165. Compare. Goldstein v. Abramson, 86 N. Y. Supp. 30), and is expressly authorized to entertain an action against an executor or administrator as such where the recovery is not to exceed $500 (Laws 1902, p. 1489, c. 580, tit. 1, § 1, subd. 18. Pache v. Oppenheim, 84 N. Y. Supp. 926). It has no jurisdiction of an action growing out of a written contract of conditional sale of personal property, except to enforce the lien (Samodwitz v. Karpf, 80 App. Div. [N. Y.] 496), replevin for chattel mortgaged property (Ginzburg v. De Silvestri, 86 N. Y. Supp. 89), and none over actions for torts (action by street car passenger for ejection is not in tort. Kearns v. New York & Q. C. R. Co., 86 N. Y. Supp. 179).

In Georgia: The city court of Bainbridge has no equitable powers. (Setting aside assignment. Ehrlich v. Shuptrine, 117 Ga. 882; equitable attachment [Civ. Code, § 4543], Fordham v. Ehrlich, 117 Ga. 883), but the judge of the city court of Wrightsville has power to issue the writ of habeas corpus (Sumner v. Sumner, 117 Ga. 229).

3. Glos v. Woodard, 202 Ill. 480; Pa. R. Co. v. Rogers, 52 W. Va. 450. Proceedings in county court to lay out highway. In re Baker, 173 N. Y. 249.

4. Congress in addition to the jurisdiction granted by the legislature has conferred jurisdiction on the probate courts of Oklahoma in town site matters. Finley v. Territory [Okl.] 73 Pac. 273.

5. The county court of Texas has no jurisdiction of an action to try title to land. Espey v. Boone [Tex. Civ. App.] 75 S. W. 570. But in Colorado it has jurisdiction concurrent with the district court, of a suit in equity to quiet title to premises not exceeding $2,000 in value. Arnett v. Berg [Colo.] 71 Pac. 636.

6. When necessary, though without general equity powers. Genau v. Abbott [Neb.] 93 N. W. 942. Specific performance. Genau v. Roderick [Neb.] 94 N. W. 523; Wheeler v. Wheeler, 105 Ill. App. 48; Thomson v. Barker, 102 Ill. App. 304. The county court of Colorado has authority to hear and determine the claim of a surety who has discharged an obligation, for contribution from the estate of a deceased co-surety. McAllister v. Irwin's Estate [Colo.] 73 Pac. 47.

7. New York. Case v. Spencer, 86 App. Div. [N. Y.] 454. The surrogate in New York has jurisdiction to try disputed claims against an estate on consent of parties [Amendment of 1895, Code Civ. Proc. 1822]. Clark v. Hyland's Estate, 84 N. Y. Supp. 640.

8. In re Reinach, 41 Misc. [N. Y.] 78.

9. Ancillary administrator cannot consider general insolvency of nonresident decedent. Lewis v. Rutherford [Ark.] 72 S. W.

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Laws conferring on superior and inferior courts a particular jurisdiction are construed as adopting these limitations.[10]

(§ 11) *D. Original jurisdiction of courts of last resort.*—The cases are few and exceptional in which the appellate courts will take original jurisdiction at the suit of a private person,[11] and in Colorado, the jurisdiction is exercised with great reluctance, even when the attorney general petitions, the proper practice in both cases being to begin proceedings in the district court.[12] In Nebraska, it is held that the designation in the constitution of cases in which the supreme court has original jurisdiction is a prohibition of it in other cases,[13] and the supreme court of Washington for similar reasons declines original jurisdiction of disbarment proceedings.[14] The supreme court of Texas can issue its writ of mandamus only against state officers.[15] In Colorado where the time before election is insufficient to give the cause the consideration it demands, original jurisdiction in an election case will be declined.[16]

The highest courts of the several states and lesser courts which are of last resort as to inferior jurisdictions[17] have general supervision and control of proceedings in the lower courts,[18] and in the exercise of that supervision have jurisdiction to issue the several original writs known to the common law, among them being prohibition,[19] mandamus,[20] and certiorari,[21] whenever necessary to restrain or compel action by the inferior tribunals within their jurisdictional bounds.

373. The orphans' court of New Jersey has no jurisdiction on an application for administration to determine whether a widow's release of all interest in her husband's estate was obtained by fraud. Mullaney v. Mullaney [N. J. Err. & App.] 54 Atl. 1086. Where between a decedent and a claimant there have been mutual running accounts requiring an accounting, the orphans' court has no jurisdiction and an attempted adjudication by it is a nullity. Miller v. Fulton, 206 Pa. 595. The probate court of Vermont has no power to grant relief by way of subrogation even in favor of an executor in behalf of his testator. Wilder's Ex'x v. Wilder [Vt.] 53 Atl. 1072.

10. Suits by Seneca Indians are to be in the supreme court if they involve land titles. Jimeson v. Pierce, 78 App. Div. [N. Y.] 9.

11. Injunction against holding election. State v. Wilcox, 11 N. D. 329. Quo warranto against county for usurpation of franchise. State v. McLean County, 11 N. D. 356. Injunction to restrain advertisement for bids for school text books. Snell v. Welch [Mont.] 72 Pac. 308. The Supreme Court of Nebraska will not in general take original jurisdiction of suits in mandamus involving private rights only; but where a case is presented on the pleadings involving questions of law alone it will. State v. Kineval [Neb.] 97 N. W. 798. The business of the Supreme Court of Wisconsin will be confined to its appellate jurisdiction except in case of an application where for peculiar and satisfactory reasons it is not or cannot be made elsewhere. In re Mielke [Wis.] 98 N. W. 245. Adequate remedy by appeal. State v. Thompson [La.] 35 So. 582; State v. District Court [Mont.] 74 Pac. 200.

12. Quo warranto against a private corporation. People v. American Smelting & Refining Co., 30 Colo. 275, 70 Pac. 413.

13. Edney v. Baum [Neb.] 97 N. W. 252.

14. In re Waugh, 32 Wash. 50, 72 Pac. 710.

15. Board of eclectic medical examiners are not. Betts v. Johnson [Tex.] 73 S. W. 4.

16. Mills v. People, 30 Colo. 396, 70 Pac. 692.

17. Cape Girardeau common pleas cannot exercise superintending control over the probate court of that county, though equal in jurisdiction to a circuit court. Koehler v. Snider [Mo.] 76 S. W. 1032.

18. N. C. Const. art. 4, § 8. State v. Crook, 132 N. C. 1053.

19. State v. St. Paul, 109 La. 8. Absence of remedy by appeal. State v. Superior Court, 31 Wash. 481, 71 Pac. 1095; State v. Thompson [La.] 35 So. 582. The Supreme Court of Missouri may issue the writ of prohibition to prevent the trial of misdemeanor cases of which it has no jurisdiction on appeal. State v. Eby, 170 Mo. 497. The court of appeals of Kentucky has jurisdiction to grant a writ of prohibition against a circuit judge proceeding without jurisdiction [Ky. Const. § 10]. Campbellsville Tel. Co. v. Patteson, 24 Ky. L. R. 832, 69 S. W. 1070. The Supreme Court of Wyoming has jurisdiction to restrain by writ of prohibition the action of an inferior court in excess of its jurisdiction. State v. Ausherman [Wyo.] 72 Pac. 200.

20. State v. District Court [Minn.] 97 N. W. 581. The superintendent authority of the King's bench over inferior tribunals is, to the extent that it may be exercised by the use of the writ of mandamus, included in and part of the original jurisdiction given by the constitution to the Supreme Court. State v. Graves [Neb.] 92 N. W. 144. The Supreme Court of Missouri has jurisdiction to require the Court of Appeals to reinstate and determine an appeal to that court over which it has jurisdiction and has improperly dismissed. State v. Smith, 172 Mo. 618.

21. State v. Thompson [La.] 35 So. 582; State v. St. Paul, 109 La. 8. The Supreme Court of Tennessee has power to review by certiorari a proceeding by a railroad company to condemn land. Tenn. Cent. R. Co. v. Campbell [Tenn.] 75 S. W. 1012. The only power the court of appeals of the District of

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§ 12. *Appellate jurisdiction.*[22]—Generally speaking, appellate courts derive their jurisdiction over any case from the law, and the parties cannot confer it by consent.[23] On the expiration of courts of appeals by limitations, the supreme court will be reinvested ipso facto with the jurisdiction it previously possessed.[24] Where an action is appealable only on the ground of the validity of a statute, the jurisdiction of the court extends only as far as the validity of the statute and that part of the judgment necessarily dependent thereon is concerned.[25] The supreme court cannot take jurisdiction by transfer from the intermediate court if it could not do so direct.[26] The right of appeal is frequently limited to cases involving a certain amount[27] or presenting certain questions, such as the constitutionality of a statute or ordinance,[28] or the construction thereof,[29] or the title to real estate.[30]

Columbia can exercise over convictions in the police court is by writ of error based on bill of exceptions: it may issue the writ of certiorari in aid of its appellate jurisdiction, but not as an original writ according to the course of the common law to bring up proceedings from the police court. Sullivan v. District of Columbia, 19 App. D. C. 210.

22. Compare Appeal and Review, §§ 4 C, 5, 1 Curr. Law. 103 et seq.

23. Review of approval of supersedeas bond. Home S. & T. Co. v. Dist. Ct. of Polk County [Iowa] 95 N. W. 522. Probate proceedings reviewable only on petition in error. Boales v. Ferguson [Neb.] 96 N. W. 337.

24. Atchison, T. & S. F. R. Co. v. Morris, 65 Kan. 532, 70 Pac. 651.

25. Henry v. Thurston County, 31 Wash. 638, 72 Pac. 488; Burguieres v. Sanders [La.] 35 So. 478.

26. Justice's judgment. Altman v. Huffman, 30 Colo. 278, 70 Pac. 420. Appeal from county court. Currier v. Clark [Colo.] 72 Pac. 55.

27. **United States** Supreme Court. A bill to obtain on the ground of fraud in the sale the conveyance of a strip of land of slight value, or in case that relief is denied, a recission of the contract of sale of the whole tract and a return of the purchase money amounting to $6,000, presents an amount in dispute of over $5,000 necessary to give the U. S. Supreme Court jurisdiction of an appeal from the Court of Appeals of the District of Columbia. Shappirio v. Goldberg, 24 Sup. Ct. 259, 48 Law. Ed. ——. Where the matter in dispute in a territorial court is the possession of certain public land for which a contested entry has been made, and it is clear from the facts that such right of possession is worth much less than $5,000, the Supreme Court of the United States has no jurisdiction. McClung v. Penny, 189 U. S. 142, 47 Law. Ed. 751.

Colorado Supreme Court $2,500. Brennan Mercantile Co. v. Vickers [Colo.] 73 Pac. 45; Mitchell v. Mitchell [Colo.] 72 Pac. 1054.

Illinois Supreme Court, $1,000. Garden City Sand Co. v. American Refuse Crematory Co., 205 Ill. 42; North Chicago St. R. Co. v. Cossar, 203 Ill. 608.

Indiana Supreme Court $6,000. Smith v. American Crystal Monument Co., 160 Ind. 141.

Kentucky. An allowance to a creditor of less than $200 is not appealable though the judgment settles an estate of over $200. Cox v. Higginbotham's Adm'r, 25 Ky. L. R. 1057, 76 S. W. 1079.

Louisiana $2,000. Succession of Bothick, 110 La. 109; Tebault v. New Orleans, 108 La. 686. When the property involved in succession proceedings amounts to $2,000 the Supreme Court of Louisiana has jurisdiction. Succession of Bothick, 110 La. 109.

Virginia. The Supreme Court of Appeals of Virginia has jurisdiction of an appeal by executors from a decree requiring them to pay out legacies amounting to more than $500 though no legacy amounts to so much. Ginter's Ex'rs v. Shelton [Va.] 45 S. E. 892. The provision of the constitution of Virginia that the supreme court of appeals shall not have jurisdiction except in certain cases where the matter in controversy is of less value than $300 does not proprio vigore confer that jurisdiction. Flanary v. Kane [Va.] 46 S. E. 312.

28. The Supreme Court of Colorado has jurisdiction of cases involving any provision of the state or federal constitution. Evidence showing fraudulent substitution of bill in legislature raises no question. Holmberg v. News-Times Pub. Co. [Colo.] 73 Pac. 865. Where a tax is legal or constitutional, and the assessment of it only is attacked, no constitutional question is presented and the Louisiana Supreme Court will have no jurisdiction unless the constitutional amount, $2,000 is involved. Tebault v. New Orleans, 108 La. 686. The Supreme Court of Louisiana has no jurisdiction of an appeal where the only question is the right of relator to pay $1 poll tax in a particular manner. State v. Sanders [La.] 35 So. 509.

29. The court of appeals of Kentucky has jurisdiction of an appeal from an order determining the right to recover interest though it would have none of the appeal from the judgment finding the amount due for want of the jurisdictional amount. Whitehead v. Brothers' Lodge, 24 Ky. L. R. 1633, 71 S. W. 933.

30. The Supreme Court of Colorado has no jurisdiction on appeal from a judgment of a county court in forcible entry and detainer for less than $2,500. Brennan Mercantile Co. v. Vickers [Colo.] 73 Pac. 45. Action for cutting timber, denial of title. Roach v. Moss Tie Co., 24 Ky. L. R. 1222, 71 S. W. 2. Trespass quare clausum, plea liberum tenementum. Patterson v. Moss Tie Co., 24 Ky. L. R. 1571, 71 S. W. 930. In Kentucky where a lien is asserted on land the title is brought in controversy and the court of appeals has jurisdiction regardless of the amount involved. Bybee's Ex'r v. Poynter [Ky.] 77 S. W. 698. Mechanic's lien. Fowler v. Pompelly, 25 Ky. L. R. 615, 76 S. W. 173.

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Jurisdiction as between courts of intermediate and last resort depends on statutory limitations resting in amount or value,[31] freehold, franchise, revenue or public questions.[32] The existence of such a controversy as will deprive the intermediate court of jurisdiction must appear upon the record to have been properly raised and decided in the court below, and where it does not so appear, the supreme court will not have nor the appellate court lack jurisdiction.[33]

The court of appeals of Colorado being created by statute has only such jurisdiction as is given it by the statute creating it.[34] Appeals lie to it from a final judgment of a court of record in a civil case, regardless of the amount of the judgment.[35] It has jurisdiction of appeals in forcible entry and detainer cases,[36]

31. **In Colorado.** An appeal from an order for the payment of $2,500 alimony lies not to the supreme court, but, if at all, to the court of appeals. Mitchell v. Mitchell [Colo.] 72 Pac. 1054.

Indiana. The supreme court has jurisdiction of appeals from the appellate court in certain cases only when the amount in controversy exceeds $6,000. (Applies only to money judgments—affidavits not receivable to show value of property in controversy). Smith v. American Crystal Monument Co., 160 Ind. 141; Burke v. Barrett [Ind.] 68 N. E. 896. As determining the jurisdiction of the **Missouri** court of appeals, the amount in dispute is the amount of a judgment rendered for plaintiff in an action for wrongful death, though the statute provides a greater recovery in the nature of stipulated damages. Marsh v. Kan. City So. R. Co. [Mo. App.] 78 S. W. 284.

In Texas, interest allowed by the judgment on the amount recovered is considered as a part of the amount in controversy. W. U. Tel. Co. v. Noland [Tex. Civ. App.] 77 S. W. 1031.

No appeal lies in Indiana to the supreme or appellate court in any civil case within the jurisdiction of a justice of the peace. Everette Piano Co. v. Bash [Ind. App.] 68 N. E. 329.

32. **Appeals lie direct to the Supreme Court of Illinois** from the circuit in cases where a freehold, franchise, statute, or question of revenue is involved, or the state is interested. Wood v. Chicago, 205 Ill. 700. Question of freehold. Seidschlag v. Antioch, 198 Ill. 413; Harlem v. Suburban R. Co., 198 Ill. 337; Perry v. Bogarth, 198 Ill. 328; Helton v. Elledge, 199 Ill. 95; Kesner v. Miesch, 204 Ill. 320; Williams v. Spitzer, 203 Ill. 505; Biggins v. Lambert, 204 Ill. 142. Franchise. People v. West Chicago St. R. Co., 203 Ill. 551. Constitutionality of statute. Union Drainage Com'rs v. Commissioners of Highways, 199 Ill. 80; Foote v. Lake County, 198 Ill. 638; Sauter v. Anderson, 199 Ill. 319. Revenue. People v. Hendee, 199 Ill. 55; Reed v. Chatsworth, 201 Ill. 480; People v. Helt, 203 Ill. 111; Wilson v. Marion County, 205 Ill. 580. State interested. People v. Hendee, 199 Ill. 55. Writ of error to review an order dismissing a petition for mandamus to the state's attorney to compel him to bring quo warranto to try title to an office. People v. Deneen, 201 Ill. 452. Cases under the levee act. In re McCaleb, 105 Ill. App. 28.

An appeal lies direct to the Supreme Court in **Indiana** when a franchise (Ind. R. Co. v. Hoffman [Ind.] 69 N. E. 399) or the construction of a statute (State v. Wright, 159 Ind. 422; State v. Bagby, 29 Ind. App. 554) is involved, regardless of the amount in controversy. The **supreme court of Missouri** has jurisdiction of appeals in cases involving the title to real estate, but neither a suit to declare and enforce a lien on land (Klingelhoefer v. Smith, 171 Mo. 455) though the question of ownership was collaterally in issue (Bruner Granitoid Co. v. Klein, 170 Mo. 225) nor a proceeding to set aside a special tax bill as a cloud on title (Smith v. Westport [Mo.] 74 S. W. 610) nor a suit for the obstruction of a road reserved in a deed to railroad company (Porter v. Kan. City & N. C. R. Co. [Mo.] 74 S. W. 992) involve title, and where the allegations on which a prayer for a conveyance is based are not denied there is no question of title. Krepp v. St. Louis & S. R. Co., 99 Mo. App. 24. But a decree confirming a party's title to land and charging it with a resulting trust (Hewitt v. Price [Mo. App.] 74 S. W. 884) a suit to set aside a fraudulent conveyance (Balz v. Nelson, 171 Mo. 682; Reed v. Colp [Mo. App.] 74 S. W. 422) involve title and surplus money arising from a foreclosure sale is treated as realty and a question as to its disposal involves title (Eubank v. Finnell [Mo. App.] 73 S. W. 354). Dismissal of case for want of prosecution does not raise question. Harding v. Carthage, 171 Mo. 442. A decision of the Supreme Court of Missouri upon a constitutional question in a prior case does not remove such question from a subsequent case. Brown v. Mo., K. & T. R. Co. [Mo.] 74 S. W. 973; State v. Smith [Mo.] 75 S. W. 625. An error in procedure in regard to costs does not involve the denial of due process of law so as to raise a constitutional question. Woody v. St. Louis & S. F. R. Co. [Mo.] 73 S. W. 475.

33. Validity or constitutionality of statute. Morgan Park v. Knopf, 199 Ill. 444; Kreyling v. O'Reilly, 97 Mo. App. 384; State v. Smith, 176 Mo. 44; Canton v. McDaniel, 91 Mo. App. 626; Dawson v. Waldheim, 91 Mo. App. 117. Taxing attorney's fee under unconstitutional statute. Brown v. Mo., K. & T. R. Co. [Mo.] 74 S. W. 973. Indictment quashed for failure to charge an offense under statute involved. State v. Wright, 159 Ind. 422; State v. Barnett, 159 Ind. 432. Prosecution for violation of gas and oil well act. Given v. State, 160 Ind. 552.

34. Decree of county court in proceeding to connect outlying territory to city. Fletcher v. Smith [Colo. App.] 70 Pac. 697.

35. Crebbin v. Shinn [Colo. App.] 74 Pac. 795.

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and to review a final judgment granting mandamus against the state board of canvassers;[37] but it has no jurisdiction of an appeal from an order retaxing costs.[38] The appellate court of Illinois has no jurisdiction of cases involving questions of freehold,[39] or franchise,[40] neither has it jurisdiction to determine the validity or constitutionality of a statute;[41] but where the construction only and not the constitutionality is involved, the appellate court has jurisdiction.[42] It has no jurisdiction of proceedings which relate to the revenue directly,[43] of cases in which the state is interested as a party or otherwise,[44] nor of appeals under the levee act.[45] The appellate court of Indiana has no jurisdiction of cases in which the construction of a statute is in question.[46] The court of appeals of Missouri has no jurisdiction of cases involving the title to land,[47] of cases against a county,[48] or of cases involving the construction of the state or Federal constitution,[49] and will not consider a constitutional question raised collaterally, but will accept the law assailed as valid.[50] The jurisdiction of the appellate term of the supreme court of New York over appeals from orders exists solely by statute.[51] Where the issue involved in a license suit in the first city court of New Orleans is exclusively one of fact, the state has a right to appeal to the court of appeals, the amount in dispute being appealable to that court.[52] The court of civil appeals of Texas has jurisdiction of an appeal from the district court in a suit brought before a justice for less than $100.[53] In Oklahoma, appeals from the probate court when acting within

36. Schafer v. Hegstrom [Colo. App.] 71 Pac. 396.

37. Orman v. People [Colo. App.] 71 Pac. 430.

38. Van Buskirk v. Balch [Colo. App.] 74 Pac. 792.

39. Dolton v. Malta, 102 Ill. App. 417. The test is whether one of the parties loses or gains a freehold by the decision. McDavid v. Sutton, 104 Ill. App. 626. Foreclosure involving homestead. Kellogg Newspaper Co. v. Corn Belt Nat. B. & L. Ass'n, 105 Ill. App. 62. Suit to compel owner of land under river to lower tunnel. People v. West Chicago St. R. Co., 105 Ill. App. 439. Proceedings for penalty for obstruction of highway do not involve question. Seidschlag v. Antioch, 198 Ill. 413. Suit by railroad company claiming perpetual easement in street. Harlem v. Suburban R. Co., 198 Ill. 337. Proceedings to vacate highway and establish another. Perry v. Bozarth, 198 Ill. 328. Bill to remove cloud on title caused by void judgment. Helton v. Elledge, 199 Ill. 95. Contract to convey. Kesner v. Miesch, 204 Ill. 320. Foreclosure—controversy as to what land is subject to the lien. Williams v. Spitzer, 203 Ill. 505. Suit to set aside fraudulent conveyance. Biggins v. Lambert, 204 Ill. 142.

40. People v. West Chicago St. R. Co., 203 Ill. 551.

41. People v. West Chicago St. R. Co., 203 Ill. 551; People v. Church, 103 Ill. App. 132; Union Drainage Com'rs v. Com'rs of Highways, 199 Ill. 80.

42. Services of county treasurer as supervisor of assessments. Foote v. Lake County, 198 Ill. 638. Intoxicating liquors—action under civil damage act. Sauter v. Anderson, 199 Ill. 219.

43. People v. Hendee, 199 Ill. 55. Interpleader between village and town to determine right to money raised by tax. Reed v. Chatsworth, 201 Ill. 480. Contest between school districts as to right to school tax money. People v. Helt, 203 Ill. 111.

44. Mandamus to county clerk to furnish duplicate assessment books. People v. Hendee, 199 Ill. 55.

45. In re McCaleb, 105 Ill. App. 28.

46. Action on constable's bond in justice court. State v. Bagby, 29 Ind. App. 554. Prosecution for refilling labelled bottle. State v. Wright, 159 Ind. 422.

47. Suit to set aside trust deed. Lappin v. Crawford, 92 Mo. App. 453.

48. Carbin v. Adair County, 171 Mo. 385.

49. Question must be properly raised in the record—requested instruction. Canton v. McDaniel, 91 Mo. App. 626; Dawson v. Waldheim, 91 Mo. App. 117. Admission of evidence unsupported by plea as not due process of law and violative of equal protection of law. Suess v. Imperial L. Ins. Co. [Mo. App.] 73 S. W. 353. Criminal case. State v. Kentner [Mo. App.] 74 S. W. 9. Validity of special tax bills involving constitutionality of city ordinance. State v. Smith [Mo.] 75 S. W. 625. The question as to when a statute takes effect is not constitutional. Hilgert v. Barber Asphalt Pav. Co., 173 Mo. 319. The erroneous decision of a court on the validity of a contract is not a law impairing the obligation of a contract within the meaning of the state or federal constitution. Id. Plea of ultra vires by national bank. First Nat. Bank v. American Nat. Bank, 173 Mo. 153.

50. Houck v. Patty [Mo. App.] 73 S. W. 389.

51. Motion to set aside judgment of dismissal. Cohen v. Ridgewood Shirt Co., 84 N. Y. Supp. 133.

52. State v. Judge of Ct. of Appeal, 109 La. 749.

53. Southern Kan. R. Co. v. Cooper [Tex.] 73 S. W. 947.

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its probate jurisdiction lie only to the district court, notwithstanding only a question of law is involved.[54]

Cases appealed to the wrong court may be on motion or suo motu certified to the other court,[55] and in case of a wrongful refusal to do so, the supreme court will compel it by mandamus,[56] and redocketing in a new form so as to confer jurisdiction is authorized in some states.[57]

Further appeal.—Similar matters, e. g. the amount,[58] or a conflict of opinion or doubt,[59] may be ground for jurisdiction of a further appeal.

§ 13. *Acquisition and divestiture.*—A grant of a special jurisdiction by constitution requires legislation as to the mode of its exercise.[60] It is a general rule that provisions of a contract depriving the courts of jurisdiction of their subject-matter are void, or at least will not be enforced,[61] but a contract that makes the courts of the jurisdiction where the parties reside the forum for the adjudication of their differences is valid.[62] Proceedings commenced under state insolvency laws before the passage of the bankruptcy act are not affected by it,[63] but suits founded on claims which a discharge in bankruptcy will release are stayed.[64] It may be lost by delay or interruption of the proceedings,[65] or expiration of term,[66] or finality of the judgment.[67] The creation of a new district out of part of the

54. Carpenter v. Russell [Okl.] 73 Pac. 930.

55. Corbin v. Adair County, 171 Mo. 385; Klingelhoefer v. Smith, 171 Mo. 455; First Nat. Bank v. American Nat. Bank, 173 Mo. 153; Hilgert v. Barber Asphalt Pav. Co., 173 Mo. 319; Morrow v. Pullman Palace Car Co., 98 Mo. App. 351; Suess v. Imperial L. Ins. Co. [Mo. App.] 73 S. W. 313; Eubank v. Finnell [Mo. App.] 73 S. W. 354; Woody v. St. Louis & S. F. R. Co. [Mo.] 73 S. W. 475; Reed v. Colp [Mo. App.] 74 S. W. 422; Smith v. Westport [Mo.] 74 S. W. 610; Hewitt v. Price [Mo. App.] 74 S. W. 884; Brown v. Mo., K. & T. R. Co. [Mo.] 74 S. W. 973; Porter v. Kan. City & N. C. R. Co. [Mo.] 74 S. W. 992; Marsh v. Kan. City So. R. Co. [Mo. App.] 78 S. W. 284. Supreme court's jurisdictional amount not involved. Jackson v. Binnicker [Mo.] 77 S. W. 740.

56. State v. Smith [Mo.] 75 S. W. 625.

57. In the Colorado supreme court where an appeal is dismissed for want of jurisdiction, the case will be redocketed on error if it appear that the court would have had jurisdiction by that proceeding. Brennan Mercantile Co. v. Vickers [Colo.] 73 Pac. 45; McAllister v. Irwin's Estate [Colo.] 73 Pac. 47. The court of appeals of the Indian Territory has no jurisdiction of an appeal from an order taxing costs in citizenship proceedings. Chickasaw Nation v. Roff [Ind. T.] 76 S. W. 101.

58. The supreme court has jurisdiction of appeals from the appellate court only in case the amount involved is $1,000 or more. Suit to enforce liability of stockholders. Garden City Sand Co. v. American Refuse Crematory Co., 205 Ill. 42. In actions ex contractu or ex delicto, if the damages sought to be recovered are speculative in character and not capable of direct proof, and the damages are $1,000 or more as shown by the judgment, an appeal lies from the judgment of the appellate court to the supreme court without a certificate of importance. North Chicago St. R. Co. v. Cossar, 203 Ill. 608.

59. Where a minority of the court deems a decision contrary to the ruling of the supreme court, the cause should be certified to the supreme court (Hess v. Gansz, 90 Mo. App. 439), and thereupon the supreme court has jurisdiction to determine the entire appeal, notwithstanding no conflict exists (Clark v. Mo., K. & T. R. Co. [Mo.] 77 S. W. 882). But where the court unanimously feel that there is a conflict they should not certify but should decide in accordance with the ruling of the supreme court. Wilden v. McAllister [Mo.] 77 S. W. 730. Whenever either court of appeals considers its decision in a case to be in conflict with the decision of the other court in a similar case, the case is transferred to the supreme court. Morrow v. Pullman Palace Car Co., 98 Mo. App. 351.

60. The provision of the Texas constitution giving the district court jurisdiction over election contests is not self executing and that court can try such cases only in the manner prescribed by statute [Tex. Const. art. 5, § 8, as amended 1891]. Mercer v. Woods [Tex. Civ. App.] 78 S. W. 15.

61. Provision for arbitration in insurance policy. Phoenix Ins. Co. v. Zlotky [Neb.] 92 N. W. 736; Hartford F. Ins. Co. v. Hon [Neb.] 92 N. W. 746, 60 L. R. A. 436.

62. Mittenthal v. Mascagni, 183 Mass. 19.

63. Osborn v. Fender, 88 Minn. 309.

64. First Nat. Bank v. Flynn, 117 Iowa. 493.

65. Failure of the justice of the **Municipal Court of New York** to render his judgment within the time agreed upon by stipulation, ousts his jurisdiction. Oregon v. Interurban St. R. Co., 85 N. Y. Supp. 872. Failure in **Ohio** to determine a case within 90 days after final hearing as directed by statute does not [Bates' Ann. St. §§ 557-1, 557-2]. James v. West, 67 Ohio St. 28.

66. The October term of the supreme court of the District of Columbia expires on December 31 and it is too late after that date to move for a prolongation of the term. Gordon v. Randle, 189 U. S. 417, 47 Law. Ed. 875.

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territory of an old one and a transfer to the new court of all pending causes that would have been brought there had the court been in existence, divests the old court of all jurisdiction in regard to such causes.[68] Where the district court of a county is held alternately at two places, there is but one court, and jurisdiction is not lost by failure to try a case at the place where the suit was brought.[69] The act of congress of 1900 relative to the district courts of Alaska, did not deprive them of jurisdiction of a prosecution for murder pending at the time of its passage.[70] Where jurisdiction has been obtained by reason of the residence of one of several defendants, it is not lost by reason of the death of the resident defendant.[71] Jurisdiction of a court is not divested by appeal in a case of which the court appealed to has not jurisdiction.[72] A court cannot resume jurisdiction of a cause by setting aside its order changing the venue, after jurisdiction has attached in the other county.[73]

§ 14. *Objections to jurisdiction and presumptions respecting it.*—A court will take judicial notice of its want of jurisdiction.[74] A defendant has the right to raise the question of the jurisdiction of a court of equity, by plea, and to demand in limine the judgment of the court, whether he should answer the bill.[75]

A person appealing specially to object to the jurisdiction must point out specifically the defects on which he relies;[76] but in New Jersey, a plea to the jurisdiction need not designate another court which has jurisdiction, though it was otherwise in England,[77] and is otherwise in Texas.[78] A plea to the jurisdiction, alleging residence in another county, need not affirmatively state that the pleader has not submitted himself to the jurisdiction of the court,[79] but where such a plea is pleaded by certain joint defendants and fails to deny the plaintiff's averments of their joint liability with the others, they will be deemed to have submitted to the jurisdiction of the court in those respects and to be in court for all purposes.[80] Where a complaint fails to show necessary jurisdictional facts, it is demurrable.[81] A requested instruction to find for defendant does not challenge jurisdiction when not given as a ground for the request.[82]

A plea to the merits does not waive the defect of jurisdiction of the subject-matter,[83] since such questions may be raised at any time, even on appeal;[84] but after a party has once appeared, generally he cannot object to jurisdiction of his person,[85] and an objection to jurisdiction of the person is waived by a plea of the

67. The appellate court of Missouri cannot certify a cause to the supreme court for conflict after the term at which its judgment is rendered. Hess v. Gansz, 90 Mo. App. 439.

68. Stillman v. Hart [C. C. A.] 126 Fed. 359.

69. Sparks v. Galena Nat. Bank [Kan.] 74 Pac. 619.

70. Bird v. U. S., 187 U. S. 118, 47 Law. Ed. 100.

71. Lofton v. Collins, 117 Ga. 434.

72. Bradley v. Milwaukee Mechanics' Ins. Co., 90 Mo. App. 349.

73. Stone v. Byars [Tex. Civ. App.] 73 S. W. 1086; Meisen v. Rothfeld, 89 App. Div. [N. Y.] 447.

74. Everette Piano Co. v. Bash [Ind. App.] 68 N. E. 329.

75. Wilson v. American Palace Car Co. [N. J. Err. & App.] 55 Atl. 997.

76. Gretsch v. Maxfield [Neb.] 93 N. W. 934.

77. Wilson v. American Palace Car Co. [N. J. Err. & App.] 55 Atl. 997.

78. Tex. & P. R. Co. v. Lynch [Tex.] 75 S. W. 486.

79. Sites v. Lane [Tex. Civ. App.] 72 S. W. 873.

80. Gulf, C. & S. F. R. Co. v. North Tex. Grain Co. [Tex. Civ. App.] 74 S. W. 567.

81. Perlman v. Gunn, 41 Misc. [N. Y.] 166; Gaddis v. W. U. Tel. Co. [Tex. Civ. App.] 77 S. W. 37; W. U. Tel. Co. v. Arnold [Tex. Civ. App.] 77 S. W. 249.

82. Southern Elec. R. Co. v. Hageman [C. C. A.] 121 Fed. 262.

83. Edney v. Baum [Neb.] 97 N. W. 252.

84. Vila v. Grand Island E. L., I. & C. S. Co. [Neb.] 94 N. W. 136; Aram v. Edwards [Idaho] 74 Pac. 961; Freer v. Davis, 52 W. Va. 1, 59 L. R. A. 556; Walters v. Wiley [Neb.] 95 N. W. 486. The jurisdiction of the state court of a prosecution for a crime committed by a tribal Indian on the reservation may be first questioned on appeal. State v. Howard [Wash.] 74 Pac. 382. Objection that contempt proceedings were had on a legal holiday may be first made on appeal. Davidson v. Munsey [Utah] 74 Pac. 431.

85. Hargrove v. Cherokee Nation [Ind. T.]

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general issue after a plea to the jurisdiction had been overruled.[86] Asking leave to intervene and subsequently withdrawing before intervening does not waive the right to object on the ground of nonresidence on being cited in at the instance of the defendant in the case.[87] By voluntarily submitting himself to the jurisdiction of a court having general jurisdiction over the subject-matter, defendant waives any question as to the propriety of the tribunal.[88] In a case where the district court has original jurisdiction of the subject-matter and the case comes into that court improperly by appeal, the defendant by appearing, answering and going to trial without objection waives his objection that the district court did not acquire jurisdiction by the appeal.[89] An appellant is not estopped to deny the jurisdiction of the subject-matter of the court to which he appeals,[90] but one removing a cause into the Federal court is estopped to deny its jurisdiction, except on the ground that the state court had none.[91]

A court of general jurisdiction will be presumed to have acted within its jurisdiction,[92] but with reference to the proceedings of courts of limited or inferior jurisdiction, or of a court of general jurisdiction exercising special powers, facts necessary to give the court jurisdiction must affirmatively appear, and in the absence of such facts, jurisdiction will not be presumed, as in case of a court having general jurisdiction.[93] The probate court, though a court of limited jurisdiction, is not inferior, and as liberal intendments will be indulged in its favor while acting within the sphere of its jurisdiction as would be extended to the circuit courts,[94] a constitutional court of another state will be presumed to be one of general jurisdiction,[95] and to possess the powers which it appears to have exercised unless the contrary is made to appear, and it will be presumed that the modes of procedure pursued by it, although differing from the practice in a given state, are authorized by the state in which it acts,[96] but like the judgments of other courts of general jurisdiction, judgments of the probate court may be attacked even collaterally if, when tested by their own accompanying record it appears that the court had no jurisdiction.[97]

69 S. W. 823; Gorman v. Stillman, 25 R. I. 55; Occidental Consol. Min. Co. v. Comstock Tunnel Co., 120 Fed. 518; White v. Rio Grande Western R. Co., 25 Utah, 346, 71 Pac. 593. Application for removal to other court. Duke v. Caluwaert, 40 Misc. [N. Y.] 623. By asking the quashal of the writ on which his property is held defendant invokes the jurisdiction of the court and waives his objection on the ground of non residence. McLain v. McCollum [Tex. Civ. App.] 72 S. W. 1027.

86. Ovid Tp. v. Haire [Mich.] 94 N. W. 1060; Brand v. Brand, 25 Ky. L. R. 987, 76 S. W. 868. Illegality of service is not waived by plea to the merits after denial of his motion to set aside the service. Cent. G. & S. Exch. v. Board of Trade [C. C. A.] 125 Fed. 463.

87. Sites v. Lane [Tex. Civ. App.] 72 S. W. 873.

88. English v. Randle, 29 Ind. App. 681; In re Crawford, 68 Ohio St. 58; Highway Com'rs v. Big Four Drainage Dist. [Ill.] 69 N. E. 576. General demurrer. Ill. Cent. R. Co. v. Glover, 24 Ky. L. R. 1447, 71 S. W. 630.

89. School Dist. v. Gautier [Okl.] 73 Pac. 954.

90. Klingelhoefer v. Smith, 171 Mo. 455.

91. Mastin v. Chicago, R. I. & P. R. Co., 123 Fed. 827.

92. Meddis v. Kenney, 176 Mo. 200.

93. In re Baker, 173 N. Y. 249; Glos v. Woodard, 202 Ill. 480. Garnishment and attachment. Pa. R. Co. v. Rogers, 52 W. Va. 450.

94. Salomon v. Wincox's Estate, 104 Ill. App. 277; In re Davison's Estate [Mo. App.] 73 S. W. 373; Alexander v. Barton [Tex. Civ. App.] 71 S. W. 71; Johnson v. Weatherford [Tex. Civ. App.] 71 S. W. 789; Howell v. Dinneen [S. D.] 94 N. W. 698; Reischick v. Reiger [Neb.] 94 N. W. 156.

Illinois: Salomon v. Wincox's Estate, 104 Ill. App. 277; Wheeler v. Wheeler, 105 Ill. App. 43; Thomson v. Barker, 102 Ill. App. 304.

Missouri: In re Davison's Estate [Mo. App.] 73 S. W. 373; Langston v. Canterbury, 173 Mo. 122.

Nebraska: Reischick v. Reiger [Neb.] 94 N. W. 156; Genau v. Abbott [Neb.] 93 N. W. 942; Genau v. Roderick [Neb.] 94 N. W. 523.

South Dakota: Howell v. Dinneen [S. D.] 94 N. W. 698.

Texas: Alexander v. Barton [Tex. Civ. App.] 71 S. W. 71; Johnson v. Weatherford [Tex. Civ. App.] 71 S. W. 789.

Colorado: McAllister v. Irwin's Estate [Colo.] 73 Pac. 47.

95. Poll v. Hicks [Kan.] 72 Pac. 847.

96. Probate proceedings. Tunnicliffe v. Fox [Neb.] 94 N. W. 1032.

97. Langston v. Canterbury, 173 Mo. 122.

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JURY.

§ 1. The Necessity or Occasion for Jury Trial (633).
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§ 1. *The necessity or occasion for jury trial. A. Under the constitution.*—The common law right of trial by jury has been guaranteed by the Federal and the several state constitutions.[98] The Federal provisions in relation to trials by jury for crimes and criminal prosecutions apply to the territories of the United States.[99]

Unless it is otherwise provided, this guaranty is confined to those cases where at the time of the adoption of the constitution the law gave the right and not in those cases where the right and the remedy with it are thereafter created by statute.[1] This has been held to be the rule under constitutional enactments which declare that "the right of trial by jury shall remain inviolate."[2] In some of the states the guarantee is expressly limited to cases where it had "heretofore" been enjoyed.[3] A statute which enables each party in a cause triable by jury to have determined by the jury every essential fact in the case,[4] or special facts,[5] does not abridge the right. Recent applications of this guaranty are collected in the note.[6]

98. Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 27 Mont. 536, 71 Pac. 1005; Clark v. State [Tex. Cr. App.] 76 S. W. 573; Pinckney v. Green [S. C.] 45 S. E. 202; Mackenzie v. Gilbert [N. J. Law] 54 Atl. 524; McLeod v. Lloyd [Or.] 71 Pac. 795.

99. Queenan v. Territory, 11 Okl. 261, 71 Pac. 218.

1. Hathorne v. Panama Park Co. [Fla.] 32 So. 812; Tinsley v. Kemery, 170 Mo. 310; Cranor v. Albany [Or.] 71 Pac. 1042. The right guaranteed is the right as it existed at common law. Jones v. Wood, 24 Ky. L. R. 840, 70 S. W. 45; Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 27 Mont. 536, 71 Pac. 1005. The constitutional provisions of Missouri are not violated by a statute authorizing special juries. Eckrich v. St. Louis Transit Co. [Mo.] 75 S. W. 755.

2. Hathorne v. Panama Park Co. [Fla.] 32 So. 812; Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 27 Mont. 288, 70 Pac. 1114; Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 60 L. R. A. 190; Sothman v. State [Neb.] 92 N. W. 303; Terry v. State, 24 Ohio Circ. R. 111; Unger v. Fanwood Tp. [N. J. Law] 55 Atl. 42; State v. Neterer [Wash.] 74 Pac. 668. The constitutional guarantee that the right of trial by jury shall remain inviolate embraces only cases in which one was entitled to a trial by jury at common law. McLeod v. Lloyd [Or.] 71 Pac. 795.

3. Tinsley v. Kemery, 170 Mo. 310; State v. Shepherd [Mo.] 76 S. W. 79.

4. Citizens' St. R. Co. v. Jolly [Ind.] 67 N. E. 935.

5. Hurd's Rev. St. 1899, c. 110, § 58a, does not offend it by giving right to special finding in addition to general verdict. Pittsburg, C., C. & St. L. R. Co. v. Smith [Ill.] 69 N. E. 873.

6. Reference in action at law. Tinsley v. Kemery, 170 Mo. 310.

Proceeding to revive a dormant judgment. Farak v. First Nat. Bank [Neb.] 93 N. W. 682.

Upon the question of liability upon a purely legal demand the defendant is entitled to a trial by jury. Hudson v. Wood, 119 Fed. 764.

"Value in controversy" exceeding twenty dollars: In the federal courts where the value in controversy exceeds twenty dollars, the right of trial by jury is expressly guaranteed. Jones v. Mut. Fidelity Co., 123 Fed. 506. "Amount of judgment" not equivalent to "value in controversy" [Const. U. S. Amend. art. 7]. Missouri, etc., R. Co. v. Phelps [Ind. T.] 76 S. W. 285. See, also, the following cases interpreting this provision. Dennee v. McCoy [Ind. T.] 69 S. W. 858; Archard v. Farris [Ind. T.] 69 S. W. 821.

Rule requiring an affidavit of defense sustained. Fidelity & Deposit Co. v. U. S., 187 U. S. 315, 47 Law. Ed. 194.

Probate matters transferred by appeal or otherwise from the county to the district court. Stone v. Byars [Tex. Civ. App.] 73 S. W. 1086. Not of right on trial in circuit on appeal from probate of will. Moody v. Found [Ill.] 69 N. E. 831. Not on appeal

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Instructing verdict in a proper case is not a violation of this right.[7] Nor is the right violated by a statute providing for a new trial for insufficiency of evidence and excessive damages.[8] Nor does an appellate court by setting aside the verdict of the jury in the trial court violate the constitutional guaranty.[9] But an act authorizing the taking of private property without providing for the assessment by a jury of the owners, compensation has been held to be unconstitutional.[10]

A statute is invalid which requires minors who were previously entitled to a jury trial without demand when charged with a crime to make formal demand therefor in order to secure it.[11] A court may determine facts to fix punishment on a plea of guilty.[12]

State causes removed to Federal courts.—Where proceedings for the condemnation of land under the power of eminent domain delegated by a state have been removed from the state into the Federal court, and a state statute provides for the assessment of damages by commissioners, that method must be followed, and there is no right under the Federal constitution to an assessment by a jury.[13] In equitable actions the constitution does not guarantee the right.[14] It does not guarantee it where the cause was originally the subject of equity jurisdiction.[15] In a case purely cognizable in equity where no legal issue is presented, a party is not entitled as of right to a jury trial.[16] It is discretionary with the court in equitable

from refusal of county court to extend time for filing claim against estate. Ribble v. Furmin [Neb.] 98 N. W. 420.

Not of right in summary proceeding to destroy gambling devices. Furth v. State [Ark.] 78 S. W. 759. Not in proceedings to seize and destroy liquors. Kirkland v. State [Ark.] 78 S. W. 770. Proceeding to destroy seized gambling devices is in rem and not jury case. Kite v. People [Colo.] 74 Pac. 886.

Appeal from equalization proceedings. State v. Fleming [Neb.] 97 N. W. 1063.

In magistrates' courts in South Carolina the right exists [Const. art. 1, § 5; Civ. Code 1902, § 986]. Pinckney v. Green [S. C.] 45 S. E. 202.

In New York a person accused of a misdemeanor is not entitled to a trial by jury [Const. 1867, art. 6, § 26; Const. 1894, art. 6, § 23]. People v. Stein, 80 App. Div. [N. Y.] 357.

7. Henry v. Thomas [Tex. Civ. App.] 74 S. W. 599.

8. Ingraham v. Weidler, 139 Cal. 588, 73 Pac. 415.

9. Hintz v. Michigan Cent. R. Co. [Mich.] 93 N. W. 634; Bank of Fisher v. Adams, 88 Minn. 421.

10. King v. Greenwood Cemetery Ass'n, 67 Ohio St. 240. By the express provision of the Illinois constitution when private property is taken for public use the compensation therefor, when not made by the state, must be ascertained by a jury. Juvinall v. Jamesburg Drainage Dist., 204 Ill. 106. Remedy will be considered as permissive, not compulsory if jury right is impaired (condemnation proceedings). Waterbury v. Platt Bros. & Co. [Conn.] 56 Atl. 856.

11. In re Mansfield, 22 Pa. Super. Ct. 224.

12. Pen. Code, § 1192, making court trier of degree on a plea of guilty. People v. Chew Lan Ong [Cal.] 75 Pac. 186.

13. Postal Tel. Cable Co. v. Southern R. Co., 122 Fed. 156.

14. Jones v. Wood, 24 Ky. L. R. 840, 70 S. W. 45.

Incidental award of damages in equity. Rhoades v. McNamara [Mich.] 98 N. W. 392. Action on policy reduced to issue between receiver of insured and creditors asserting fraud. Voss v. Smith, 87 App. Div. [N. Y.] 395. Injunction against nuisance. Reaves v. Territory [Okl.] 74 Pac. 951.

Court and parties are bound treating equity case as law. Voss v. Smith, 87 App. Div. [N. Y.] 395.

15. Hathorne v. Panama Park Co. [Fla.] 32 So. 812. In New Hampshire there is no constitutional right to a jury trial in equity. State v. Sunapee Dam Co. [N. H.] 55 Atl. 899.

16. Jones v. Wood, 24 Ky. L. R. 840, 70 S. W. 45; Maggs v. Morgan, 30 Wash. 604, 71 Pac. 188; Montague v. Best, 65 S. C. 455. Defendant in an action which under the allegations of the complaint, is purely an "action in equity" is not entitled to a jury trial. Porter v. International Bridge Co., 79 App. Div. [N. Y.] 358.

Action held to be equitable, and therefore, not entitling a party to a trial by jury, as a matter of right. Dykman v. U. S. Life Ins. Co., 176 N. Y. 299; Merrill v. Prescott [Kan.] 74 Pac. 259; Gregory v. Perry [S. C.] 45 S. E. 4; Lincoln Trust Co. v. Nathan, 175 Mo. 32; Morrison v. Snow [Utah] 72 Pac. 924. A suit before the District Court of Alaska sitting in probate to establish a claim against a decedent's estate is not a suit at common law within the meaning of the constitutional provision guarantying the right of trial by jury "in suits at common law." Esterly v. Rua, 122 Fed. 609. In an action to determine an adverse claim to real property, plaintiff being in possession, the answer contained a counterclaim in ejectment. It was held that the procedure was not changed by reason of this counterclaim, and that the defendant was not entitled to a trial by jury. Johnson v. Peterson [Minn.] 97 N. W. 384.

Causes held to be purely common law actions and therefore either party entitled to a jury trial. Kentucky Land & Immigration Co. v. Crabtree, 24 Ky. L. R. 743, 70 S. W. 31.

Case involving title to personal property held not to be solely cognizable in equity.

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causes of action whether issues of fact shall be tried by the court or sent to a jury. If submitted to a jury, their verdict is simply advisory, and not binding upon the court.[17] Where a new class of cases is, by legislative action, directed to be tried as chancery causes, it must appear, in order to entitle the court to determine questions of fact arising therein without submitting them to a jury, that, when tested by general principles of equity, such cases are of an equitable character, and can be more properly tried in a court of equity than in a court of law.[18]

Cases of contempt of court were never triable by jury.[19]

Character of jury guaranteed.—A common law jury is meant; that is, a jury composed of 12 men—neither more nor less.[20] Unanimity of verdict is part of the right guaranteed until otherwise constitutionally provided.[21]

Mandamus to compel a jury trial will issue where the court refuses to grant a jury trial in a case where it is of right upon demand seasonably made.[22]

(§ 1) *B. In cases not covered by constitution.*—The constitutional right to trial by jury is in many jurisdictions re-enforced by statutory enactments. These statutes are usually more specific than are the constitutional provisions, as to the cases in which a jury may be demanded, and frequently enlarge the right. Usually, however, they give the right only in actions at law,[23] but sometimes authorize a jury trial of questions of fact arising in equitable actions, or make provision for trial by jury of equitable defenses in legal actions.[24] In a number of states there

but either party entitled to a jury trial. Neff v. Manuel [Iowa] 97 N. W. 73.

Statutes held to deny a trial by jury in actions at law and, therefore, to be unconstitutional. Ahl v. Grissom [Okl.] 72 Pac. 372; McNulty v. Mt. Morris Elec. Light Co., 172 N. Y. 410. Statute conferring jurisdiction on a court of chancery to order an account to be taken of damages for a trespass on timbered land held to impair the constitutional right of trial by jury. McMillan v. Wiley [Fla.] 33 So. 993.

17. Kyle v. Shore [Colo. App.] 71 Pac. 895. But in North Carolina it has been held that issues of fact raised by pleadings in actions for the enforcement of equitable rights must be tried by jury unless waived. Boles v. Caudle [N. C.] 45 S. E. 835.

Effect of application for injunctive relief in an action at law: The fact that in an action of trespass quare clausum fregit application is made to the court to exercise its equity powers in granting injunctive relief is not sufficient to deprive either party of his rights to have the legal issues submitted to a jury. State v. Hart [Utah] 72 Pac. 938.

Assessment of damages in equity: In New Hampshire it has been held that the assessment of damages in equity, the court otherwise having jurisdiction, stands no different with regard to the constitutional right of trial by jury than any ordinary issue in equity; the question of assessment by a jury is within the discretion of the trial court. State v. Sunapee Dam Co. [N. H.] 55 Atl. 899. But in Nebraska it has been held that where in a suit in equity the plaintiff tenders an issue of damages the defendant upon raising such issue by answer is entitled to demand a trial thereof by a jury. Horton v. Simon [Neb.] 97 N. W. 604.

Statute authorizing lienor to recover judgment for sums due him: How the New York statute, Code of Civil Procedure, sec. 3412, authorizing a lienor who fails to establish a valid lien to recover judgment for such sums as are due him, may be given effect without a violation of the constitutional guarantee of trial by jury. Hawkins v. Mapes-Reeves Const. Co., 82 App. Div. [N. Y.] 72. See, also, Steuerwald v. Gill, 85 App. Div. [N. Y.] 605.

18. State v. Sunapee Dam Co. [N. H.] 55 Atl. 899.

19. State v. Shepherd [Mo.] 76 S. W. 79.

20. Dennee v. McCoy [Ind. T.] 69 S. W. 858; Queenan v. Territory, 11 Okl. 261, 71 Pac. 218.

Note. An act for struck juries affords impartiality which is not lessened by the peculiar manner of selecting the jury hence it is valid if the number of jurors and the rule of unanimity is preserved. Lommen v. Minneapolis Gaslight Co., 65 Minn. 196, 33 L. R. A. 437 [with briefs of counsel] citing authorities very fully and exhaustively discussing the historical significance of the right of trial by jury.

21. Girdner v. Bryan, 94 Mo. App. 27. In Missouri a three-fourths verdict is authorized in civil cases. The Colorado statute (Sess. Laws 1899, p. 244, c. 111) authorizing a verdict in civil cases to be returned by three-fourths of the number of jurors sitting was invalid. Clough v. McKay [Colo.] 73 Pac. 30.

22. State v. Hart [Utah] 72 Pac. 938.

23. By the Missouri practice the criterion by which the right to a jury trial is determined is the character of the action—that is, the relief sought—not the distinction between legal and equitable properties. New Harmony Lodge v. Kan. City, Ft. S. & M. R. Co. [Mo. App.] 74 S. W. 5. In justice courts only on appeal to jury from justice's judgment without jury. Beach v. Lavender Bros. [Ala.] 35 So. 352.

24. Under the Indiana statute, Burns' Rev. St. 1901, § 412, in an exclusively equitable action, a party cannot demand a jury trial, but the court may, in its discretion, for its information, cause any question of fact to be

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are statutes providing that actions to recover money or specific personal property shall be tried by a jury.[25]

An action in the nature of a creditor's bill is not such an action.[26] Neither is a case relating to the probate of a will.[27] In others the right is given in eminent domain proceedings.[28] Other provisions which have recently been interpreted by the courts are shown below.[29] The right to demur to evidence is not taken away by a statute giving the right to a trial by jury.[30]

(§ 1) *C. Loss or waiver of right.*—In civil actions[31] and prosecutions for misdemeanor[32] the right may be waived, but not in felony cases.[33]

What constitutes a waiver. In general.—The right to a trial by jury cannot be dispensed with except by the consent of the parties entitled to it.[34] Any unequivocal acts or conduct which clearly show a willingness or intention to forego the right, and are so treated by the trial court without objection will amount to a waiver.[35] The form and manner of waiver is in some jurisdictions regulated by

tried by a jury. Shroyer v. Campbell [Ind. App.] 67 N. E. 193. In an action for judgment on notes and foreclosure of a vendor's lien securing them, when an issue is joined as to the amount due, either party is entitled to a jury trial under the Oklahoma statutes [Wilson's Rev. & Ann. St. 1903, §§ 4448-4450, 4458]. Sherman v. Randolph [Okl.] 74 Pac. 102. Equitable defense in a legal action triable by the court without a jury under the Washington statutes [Code 1881, §§ 204, 88 subd. 3]. Peterson v. Phila. M. & T. Co. [Wash.] 74 Pac. 585. Discretion to send to jury calendar will be carefully exercised when jury docket is crowded. Evans v. Nat. Broadway Bank, 88 App. Div. [N. Y.] 549. No issue out of chancery where partnership accounts all before court. Slaughter v. Danner [Va.] 46 S. E. 289.

Framing and sending issues out of chancery see Equity, § 8, 1 Curr. Law, 1080. Case wrongly tried to jury will be reversed where court dismissed without opinion and there was an issue of fact. Flanigan v. Skelly, 89 App. Div. [N. Y.] 108.

25. Action held not to be an action "to recover money or specific personal property" within the meaning of a Missouri statute providing that such actions shall be tried by a jury. Yancey v. People's Bank [Mo. App.] 74 S. W. 117. Executors suing under section 7 of Personal Property Act may have jury trial of facts. Montgomery v. Boyd, 78 App. Div. [N. Y.] 64.

26. Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273.

27. Gallon v. Haas [Kan.] 72 Pac. 770.

28. For the construction of such a statute especially in relation to the meaning of the word "property," see Sawyer v. Com., 182 Mass. 245, 59 L. R. A. 726. Proceedings by a railroad company for condemnation of a right of way under the North Carolina statutes [Pub. Laws 1893, p. 111, c. 48]. Holly Shelter R. Co. v. Newton, 133 N. C. 136, 132. Jury is proper in condemnation proceedings involving only damages. Chicago I. & E. R. Co. v. Wysor Land Co. [Ind.] 69 N. E. 546.

29. **Bankruptcy proceedings:** Right to trial by jury of one against whom an involuntary petition in bankruptcy has been filed, under the bankrupt act [U. S. Comp. St. 1901, p. 3429]. Morss v. Franklin Coal Co., 125 Fed. 998.

Case involving ownership and right of possession of property: Right of trial by jury under the Washington statute, Ballinger's Ann. Codes & St., sec. 4967, where the ownership and right of possession of real or personal property is involved. Filley v. Murphy, 30 Wash. 1, 70 Pac. 107.

In a garnishment proceeding either party entitled to a jury under Iowa statute [Code, § 3945]. Neff v. Manuel [Iowa] 97 N. W. 73.

Counterclaim: Right of defendant to a jury trial of issues arising on his counterclaim under the provisions of certain New York statutes [Code Civ. Proc. §§ 968, 974]. Herb v. Metropolitan Hospital & Dispensary, 80 App. Div. [N. Y.] 145.

Under a New York statute the parties to an action for a nuisance are entitled to a jury (term "action for a nuisance" construed). Miller v. Edison Elec. Illuminating Co., 78 App. Div. [N. Y.] 390. Code Civ. Proc. § 2653a, allows but does not command submission of action on validity of will to jury. Haughian v. Conlan, 86 App. Div. [N. Y.] 290. Not allowable in separation action. Statutes construed. Packard v. Packard, 84 N. Y. Supp. 1090.

30. Reed v. Gold [Va.] 45 S. E. 868.

31. State v. Neterer [Wash.] 74 Pac. 668; Sherman v. Randolph [Okl.] 74 Pac. 102.

32. Vagrancy. Hollis v. State [Ga.] 45 S. E. 617.

33. In a felony case neither the defendant nor his counsel can waive his constitutional right to have a trial by a jury of 12 persons. Queenan v. Ter., 11 Okl. 261, 71 Pac. 218.

34. Lilienthal v. McCormick [C. C. A.] 117 Fed. 89; Hudson v. Wood, 119 Fed. 764.

35. Schumacher v. Crane-Churchill Co. [Neb.] 92 N. W. 609. What amounts to a waiver of the right of trial by jury, see also the following cases: Montague v. Best, 65 S. C. 455; Hawkins v. Mapes-Reeve Const. Co., 82 App. Div. [N. Y.] 72.

Facts held to constitute a waiver. Blanton v. Howard, 25 Ky. L. R. 929, 76 S. W. 511; Steuerwald v. Gill, 85 App. Div. [N. Y.] 605; Albemarle Steam Nav. Co. v. Worrell, 133 N. C. 93. A failure to demand a jury until after a case has been on trial for more than 30 days is a waiver of the right. Whitcomb v. Stringer, 160 Ind. 82. Agreement entered into between counsel held a waiver. Nashville, C. & St. L. R. v. Cody, 137 Ala. 597.

Facts held not to constitute a waiver of the right of a jury trial. Deane Steam Pump Co. v. Clark, 84 App. Div. [N. Y.] 450. Both

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statute.[36] In Washington, the legislature is authorized by the constitution to make such regulations.[37] A denial of a demand for a trial by jury is not error where the demand is not made as required by law.[38]

Waiver by nonassertion of right.—Failure to seasonably demand jury may work a waiver of the right.[39] So may a voluntary submission of issues of fact to the court,[40] or failure to appear.[41] A party waives his right to trial by jury by a failure to take exception to the transference of the case to the equity docket.[42] A statute authorizing a case to be entered on the court docket, where a request is not made by a party within a certain time that it be entered on the jury docket, does not violate the constitutional guarantee.[43] A failure to enter a demand for a jury trial upon an appeal from the judgment of a justice of the peace is a waiver of the right.[44]

Effect of failure to pay cost of jury.—In the absence of a statute so providing, a refusal by a party to pay in advance the costs of summoning and paying jurors does not constitute a waiver of the right of trial by jury.[45] But the right has been held barred where the plaintiff invoked the protection of a statute relieving from the necessity of giving security for costs.[46]

A waiver of a jury before a United States commissioner does not constitute a waiver of the parties' right to trial by jury upon an appeal.[47]

Estoppel of a party to claim a court trial does not bind court to try by jury.[48]

Renewal of demand; subsequent trials.—Where a party has at a proper time and in a proper manner made his demand for a jury, and the court has denied the same, to which ruling he duly excepts, he is not required to renew such demand upon going to trial at a subsequent term of court.[49] A waiver of a jury at the first trial of a cause does not operate to prevent either party from demanding a jury at the second trial of the same cause, after the judgment rendered at the first trial has been set aside.[50]

moving for directed verdict and standing by their motions. Bank of Park River v. Norton [N. D.] 97 N. W. 860. Asking an instruction in the nature of a demurrer to the evidence held not a waiver of the right to have the jury pass upon certain issues. New Harmony Lodge v. Kan. City, Ft. S. & M. R. Co. [Mo. App.] 74 S. W. 5.

36. In North Carolina a jury trial can be waived only by written consent in person or by attorney, or by oral consent entered in the minutes [Clark's Code, §§ 416, 417]. Hahn v. Brinson, 133 N. C. 7.

37. Under the Constitution of Washington which provides that the legislature may provide "for waiving of the jury in civil cases where the consent of the parties interested is given thereto," the legislature may define what act or neglect shall constitute such consent. State v. Neterer [Wash.] 74 Pac. 668.

38. In re Heaton's Estate, 139 Cal. 237, 73 Pac. 186; Ward v. Lemon [Ariz.] 73 Pac. 443. The absence of an express demand constitutes a waiver of a jury in a will case under the provisions of the Kentucky statutes [St. 1899, §§ 4850, 4861]. Bohannon v. Tarbin, 25 Ky. L. R. 515, 76 S. W. 46. Written demand in the probate court for a jury trial filed in the district court is sufficient to authorize the district court to order a jury trial without further notice under the statute. Pine v. Callahan [Idaho] 71 Pac. 473.

39. Must be within statutory time. Heard v. Kennedy, 116 Ga. 36. No demand until trial had begun and no fact in issue. Maddux v. Walthall [Cal.] 74 Pac. 1026. It is competent for the legislature to so fix the time, if it be a reasonable time. Ward v. Lemon [Ariz.] 73 Pac. 443. A trial by jury is waived by an arraignment in the City court of Utica without a demand for a jury two days before the day set for trial under Laws N. Y. 1882, p. 93, c. 103, as amended by Laws 1888, c. 60, p. 99 and Laws 1889, c. 154, p. 178. People v. Halwig, 41 Misc. [N. Y.] 227.

40. Without asking for a jury. Davis v. Auld, 96 Me. 559; Horton v. Simon [Neb.] 97 N. W. 604. See, also, Schumacher v. Crane-Churchill Co. [Neb.] 92 N. W. 609.

41. Mills' Ann. Code, § 178. Cerussite Min. Co. v. Anderson [Colo. App.] 75 Pac. 158.

42. Vincent v. German Ins. Co. [Iowa] 94 N. W. 458. But it has been held that an order transferring a cause to the equity docket because of equitable defenses set up in the answer does not preclude the moving party from demanding that the purely legal issues be tried by jury. Schumacher v. Crane-Churchill Co. [Neb.] 92 N. W. 609.

43. McKay v. Fair Haven & W. R. Co., 75 Conn. 608.

44. Moore v. Crosthwait, 135 Ala. 272.

45. Pinckney v. Green [S. C.] 45 S. E. 202. Rule applicable to a suit in a justice's court. Mackenzie v. Gilbert [N. J. Law] 54 Atl. 524.

46. Action dismissed because plea of poverty untrue. Woods v. Bailey, 122 Fed. 967.

47. Dennee v. McCoy [Ind. T.] 69 S. W. 858.

48. Weldon v. Brown, 89 App. Div. [N. Y.] 586.

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Waiver upon a fictitious issue.—A waiver by a defendant of the right to a jury trial upon a fictitious issue does not constitute a waiver of a right to a jury after plaintiff has been permitted to amend his complaint by setting up a new and entirely different cause of action.[51]

§ 2. *Eligibility to and exception from jury service.*—A jury is commonly required to be of "good and lawful men."[52] At common law, the fact that a juror had been convicted of a crime was a cause of challenge propter defectum, and this rule has, in most of the United States, received express statutory sanction;[53] but in the absence of an express statute, a juror who has been convicted in another state is competent,[54] and accepting a juror in a trial for murder who had been convicted of felony is not a denial of due process of law or of the equal protection of the laws to the person convicted.[55]

At common law, the fact that a juror is an alien disqualifies him.[56] Residence beyond the jurisdiction of the court renders one incompetent to serve as a juror.[57] In the absence of a statutory requirement, however, the particular place of residence of a juror is no test of his qualification so long as he lives within the jurisdiction of the court. It is, therefore, no valid objection to a venire that it was selected entirely from a single city.[58] Prior jury service within a specified time is in some states a statutory disqualification.[59] Such a statute does not disqualify one who had served in a former trial at the same term.[60]

By statute in North Carolina one who has a suit "pending and at issue" in the court is disqualified.[61]

Public officers may sit unless specially declared disqualified.[62] Under a statute providing that judicial officers "shall not be compelled to serve as jurors," such officers are not absolutely disqualified, but merely privileged to claim exemption.[63]

In Texas, the fact that one has not paid his poll tax is a ground of challenge for cause.[64] But this fact does not absolutely disqualify him to serve as a juror.[65] Members of the state militia are exempt from jury service in Alabama.[66]

The qualifications of a juror do not depend in any degree upon his knowledge or want of knowledge of the law of evidence as applicable to criminal trials.[67] It will be presumed until the contrary appears that persons summoned by the proper officer were duly qualified.[68]

§ 3. *Disqualification pertaining to the particular cause.*[69] *Constitutional*

49. Farak v. First Nat. Bank [Neb.] 93 N. W. 682.

50. Schumacher v. Crane-Churchill Co. [Neb.] 92 N. W. 609. Facts held not to constitute a waiver of the right to a jury upon a new trial of a case. Freifeld v. Sire, 84 N. Y. Supp. 144.

51. Reese v. Baum, 83 App. Div. [N. Y.] 550.

52. By constitutional provision in North Carolina a jury in a criminal case is required to be composed of good and lawful men. The term "good and lawful men" as used in this provision is defined by statute [Const. art. 1, § 13; Code 1883, § 1722]. State v. Vick, 132 N. C. 995.

53. Queenan v. Territory, 11 Okl. 261, 71 Pac. 218. Persons "charged with any crime or offense" disqualified to serve as jurors. State v. Nicholas, 109 La. 84.

54-56. Queenan v. Territory, 11 Okl. 261, 71 Pac. 218.

57. A nonresident of a county is not qualified to serve as a juror in the county court. Monson v. State [Tex. Cr. App.] 76 S. W. 570. But temporary absence from county before trial does not disqualify a juror. Sikes v. State, 116 Ga. 182.

58. Williams v. State [Tex. Cr. App.] 75 S. W. 859.

59. Nebraska statute construed. Figg v. Donahoo [Neb.] 95 N. W. 1020.

60. Carlson v. Holm [Neb.] 95 N. W. 1125.

61. One is not disqualified under this provision unless he has a suit to be tried at the same term at which he is drawn to serve as a juror. State v. Spivey, 132 N. C. 989.

62. Deputy sheriff not occupied may be talesman. State v. Forbes [La.] 35 So. 710.

63. State v. Lewis, 31 Wash. 75, 71 Pac. 778.

64. Code Crim. Proc. art. 673. Carter v. State [Tex. Cr. App.] 76 S. W. 437.

65. Poole v. State [Tex. Cr. App.] 76 S. W. 565.

66. Jarvis v. State [Ala.] 34 So. 1025.

67. People v. Conklin, 175 N. Y. 333.

68. Bruen v. People [Ill.], 69 N. E. 24.

69. Error in accepting or rejecting juror made harmless by opportunity to exercise peremptory, see post, § 8 D, also Harmless Error; Indictment and Prosecution, § 15.

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right to unbiased and unprejudiced jurors.—The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution.[70]

Conscientious scruples against capital punishment.—A person is disqualified to serve as a juror in a capital case who has conscientious scruples against capital punishment.[71] In some jurisdictions prejudice against capital punishment is declared by statute to be a disqualification.[72]

Prejudice against a class of litigants or actions.—Prejudice of a juror against nonresident plaintiffs who might have brought actions in courts of their own state will disqualify him in a suit by a nonresident plaintiff.[73] So a prejudice against a certain class of actions will disqualify for service in such an action.[74]

Knowledge of issues involved.—One who in a criminal case is a material witness to controverted facts constituting the offense is disqualified to serve as a juror.[75] Jurors who served on the trial of one prosecuted for larceny are not qualified to serve as jurors on a prosecution for receiving the stolen property.[76] It is not a ground of challenge to a juror, on the trial of a prisoner under an indictment, that he had previously served as a juror on the trial of a plea in bar to the same indictment.[77] It is held no objection that a juror heard part of the evidence on application for bail, no opinion having been formed.[78] A juror may be challenged for actual bias.[79] The term "actual bias" has in some states been defined by statute.[80]

Opinion on issues involved.—An unqualified opinion on any material issue involved in a case will disqualify one to serve as a juror therein.[81] If a juror has formed an opinion from personal knowledge of the facts, or from information derived from witnesses, or from others professing to know the facts, he is incompetent,[82] and this notwithstanding his statement that he will render an im-

70. Quill v. Southern Pac. Co., 140 Cal. 268, 73 Pac. 991; State v. Fullerton, 90 Mo. App. 411; State v. Stentz, 30 Wash. 134, 70 Pac. 241; Naylor v. Metropolitan St. R. Co., 66 Kan. 407, 71 Pac. 835.

71. State v. Vick, 132 N. C. 995; Johnson v. State [Tex. Cr. App.] 71 S. W. 25.

72. Burns' Rev. St. 1901, § 1862. Coppenhaver v. State, 160 Ind. 540. Rev. Code, § 1074, subsec. 8. People v. Cebulla, 137 Cal. 314, 70 Pac. 181. What constitutes a fixed opinion against capital punishment within the meaning of the Alabama statute [Code 1896, § 1518]. Thayer v. State [Ala.] 35 So. 406.

73. Naylor v. Metropolitan St. R. Co., 66 Kan. 407, 71 Pac. 835.

74. Quill v. Southern Pac. Co., 140 Cal. 268, 73 Pac. 991.

75. This notwithstanding a statute providing that "a juror may be examined by either party as a witness, if he be otherwise competent." State v. Stentz, 30 Wash. 134, 70 Pac. 241.

76. Clark v. State [Tex. Cr. App.] 72 S. W. 591.

77. Rev. St. § 7278. Carano v. State, 24 Ohio Circ. R. 93.

78. State v. Riddle [Mo.] 78 S. W. 606.

79. State v. Stentz, 30 Wash. 134, 70 Pac. 241. A particular cause of challenge to a juror under the Montana statutes, Penal Code, sec. 2048, is the existence of a state of mind on his part which will prevent him from acting with entire impartiality and without prejudice to the rights of either party. State v. Mott [Mont.] 74 Pac. 728. Discretion of trial court in determining juror's competency upon a challenge for actual bias under the Oregon statute. Statute held constitutional. State v. Armstrong [Or.] 73 Pac. 1022.

80. Definition given in Washington statute. State v. Stentz, 30 Wash. 134, 70 Pac. 241.

81. Pine v. Callahan [Idaho] 71 Pac. 473. Where, upon the whole examination of a person summoned as a juror the most that can be made of it is that he had formed and expressed an opinion upon the merits of the case that would require strong evidence to overcome; that his mind is not in such a condition as to be influenced solely by the evidence to be submitted on the trial, and that he would be influenced to a great extent by the opinion already formed, but that nevertheless he would go into the jury box, and, if the evidence should prove strong enough disregard such opinion and decide the case upon such evidence—a challenge for cause should be sustained. State v. McCoy, 109 La. 682.

82. Turner v. State [Tenn.] 69 S. W. 774; Wilson v. State, 109 Tenn. 167; People v. Cebulla, 137 Cal. 314, 70 Pac. 81. In a criminal case knowledge of facts material to a conviction disqualifies one to serve as a juror. State v. Stentz, 30 Wash. 134, 70 Pac. 241. During the course of his examination a veniremen stated that he conversed with parties who had conversed with witnesses; that he accepted what they said as being the facts in the case; that the names of the witnesses were given him in those conver-

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partial verdict.[83] As to the effect on the competency of a juror of an opinion formed from evidence given on a former trial of the case, the most recent cases are not entirely in harmony.[84] If the juror's opinion is founded upon mere rumor, although it may be fixed and require evidence to remove it, it does not disqualify if he says he can disregard it and render a verdict solely upon the law and evidence.[85] A juror is not disqualified because he has formed an impression or opinion from newspaper accounts as to the guilt of one charged with a crime, if he states that such impression will not influence him in arriving at a just verdict,[86] and this notwithstanding his statement that it will require testimony to remove the opinion he has formed.[87] So the fact that a juror states that he has formed an opinion as to the guilt of the defendant, if he does not disclose the facts that influenced him in forming his opinion, does not disqualify him where he states that he can give the defendant a fair and impartial trial uninfluenced by his opinion.[88]

If it appears from the examination of a juror that he has no fixed opinion as to the merits of the controversy, and has no prejudice for or against any party to the controversy, a challenge for cause should be overruled.[89]

The fact that a juror expresses an unqualified opinion as to the guilt of the defendant of a crime other than that with which he is charged will not disqualify him, if at his examination it is not made to appear that if the defendant is guilty of the one crime he is necessarily guilty of the other.[90]

sations; that he had an opinion well grounded and fixed, and that his opinion was unfavorable to the defendant, and it would require evidence to remove it. It was held that he was disqualified to serve as a juror. Turner v. State [Tenn.] 69 S. W. 774. In Indiana where a juror stated that his mind was not entirely free to try the cause, that he had formed an opinion that would require some evidence to change, and that his opinion was formed by talking with some persons whom he supposed knew all about the case, the question of sustaining a challenge to him for cause was held to be within the sound discretion of the trial court. Tipton L., H. & P. Co. v. Newcomer [Ind. App.] 67 N. E. 548.

83. Turner v. State [Tenn.] 69 S. W. 774. Juror held, under all the circumstances of the case, to be disqualified on the ground of an opinion formed as to defendant's guilt, notwithstanding that upon a somewhat persistent cross-examination he expressed belief in his ability to render an impartial verdict. State v. Crofford [Iowa] 96 N. W. 889.

84. The fact that a juror states that from hearing the evidence in the former trial of the case he had formed and expressed an opinion in favor of one of the parties will not in North Carolina disqualify him if he further states that notwithstanding such expression of opinion he can try the case impartially according to the evidence and charge of the court. Dunn v. Wilmington & W. R. Co., 131 N. C. 446. But in a case in the federal courts it was held that if the opinion of a juror as to the guilt or innocence of one charged with crime has been formed or expressed upon the testimony of witnesses duly sworn in a court of justice bearing directly upon the issue to be tried, the court should always allow a challenge for bias, notwithstanding that such juror declares under oath that he can fairly and impartially try the case. Dolan v. U. S. [C. C. A.] 123 Fed. 52.

Jurors who have heard part of the evidence on a former trial, are not for that reason disqualified if they state that they can decide the case solely on the evidence adduced without reference to the evidence on the former trial. State v. Prins, 117 Iowa, 505.

85. Turner v. State [Tenn.] 69 S. W. 774; Taylor v. State [Tex. Cr. App.] 72 S. W. 396; Jahnke v. State [Neb.] 94 N. W. 158; Wilson v. State, 109 Tenn. 167.

86. State v. Croney, 31 Wash. 122, 71 Pac. 783; Dimmick v. U. S. [C. C. A.] 121 Fed. 638; Jahnke v. State [Neb.] 94 N. W. 158; Lindsay v. State, 24 Ohio Circ. R. 1; State v. Gartrell, 171 Mo. 489.

87. Lindsay v. State, 24 Ohio Circ. R. 1.

88. Parker v. State [Tex. Cr. App.] 77 S. W. 783. See, also, Jarvis v. State [Ala.] 34 So. 1025.

89. Pine v. Callahan [Idaho] 71 Pac. 473. Juror held not disqualified on ground of prejudice where his examination showed that he had neither formed nor expressed an opinion as to the guilt or innocence of the defendant, and where he stated that he could give the defendant a fair and impartial trial. State v. Brownfield [Kan.] 73 Pac. 925.

90. State v. John [Iowa] 93 N. W. 61.

Opinion as to killing but none upon question of self defense: In the trial of a homicide case, where defendant admits the killing and justifies on the ground of self defense, a juror who states that he has formed or expressed an opinion as to the guilt of the defendant, is not for that reason alone disqualified, if, from his entire examination, it clearly appears such opinion is based upon the belief in the mind of the juror that defendant killed deceased, but that the juror has neither formed nor expressed any opinion as to whether the de-

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The question of the disqualification of jurors because of opinions formed or expressed, is, in many of the states, regulated by statute. Some of these statutory provisions have recently been interpreted by the courts.[91]

Interest in a corporation party may disqualify one to sit in an action affecting it,[92] but a taxpayer in a municipality is not so disqualified.[93] The members of any association of men combining for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money for such purpose, are disqualified to sit as jurors in the trial of a cause in which the question is whether the defendant shall be found guilty of violating that law.[94]

One is not disqualified to serve as a juror in a prosecution for violating the local option law because he is a Prohibitionist.[95]

Relationship or acquaintance.—A juror who is related by affinity to a party to the suit is disqualified.[96] But affinity between a juror and counsel is not enough to disqualify.[97] A juror who stands in the relation of attorney and client to the adverse party is incompetent,[98] and in some states a partner or agent.[99] A

fendant was justified in taking the life of deceased. State v. Morrison [Kan.] 72 Pac. 554.

91. Under the Ohio statute a juror is not disqualified merely because he has formed an opinion as to the guilt or innocence of one charged with crime if he states that he believes he can render an impartial verdict uninfluenced by such opinion [Rev. St. § 7278, par. 2]. Carano v. State, 24 Ohio Circ. R. 93. So under the Mississippi statute a juror is not disqualified merely because he has an impression or opinion as to the guilt of one charged with crime, if he makes oath that he is impartial and it appears to the court that he is so [Code 1892, § 2355]. Fugitt v. State [Miss.] 33 So. 942. Under the South Carolina statute the trial judge may determine the competency of one to serve as a juror in a criminal case who has expressed an opinion upon the case, but who declares that he will, nevertheless, be governed by the law and the testimony. State v. Milam, 65 S. C. 321. In New York a juror who has formed an opinion concerning the guilt or innocence of a person charged with crime is disqualified, notwithstanding his statement that he believes he could render an impartial verdict, if no inquiry is made and he does not state whether such opinion would influence his verdict [Code Crim. Proc. § 376]. People v. Miller, 81 App. Div. [N. Y.] 255. Partial opinion as to guilt or innocence formed held not to disqualify under provisions of Michigan statute [Comp. Laws, § 11,947]. People v. Quimby [Mich.] 96 N. W. 1061.

A statute is not unconstitutional which provides that no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to the jury, founded upon public rumor, statements in public journals, or common notoriety, provided it appear to the court that he can and will act impartially and fairly upon the matters submitted to him. State v. Mott [Mont.] 74 Pac. 728.

92. Any person connected with an indemnifying company as a stockholder or otherwise is disqualified to sit as a juror in a case the result of which might be of pecuniary interest to such company. Spoonick v. Backus-Brooks Co. [Minn.] 94 N. W. 1079.

93. Detroit v. Detroit Ry. [Mich.] 95 N. W. 992.

94. Member of an organization liable to assessment for prosecution of persons violating the liquor laws. State v. Fullerton, 90 Mo. App. 411. But in Maryland it has been held that one is not disqualified to serve as a juror in a prosecution for violating the local option law because he belongs to a league the principal object of which is the enforcement of such law. Guy v. State, 96 Md. 692.

95. Lively v. State [Tex. Cr. App.] 73 S. W. 1048.

96. What constitutes relationship by affinity. North Ark. & W. R. Co. v. Cole [Ark.] 70 S. W. 312; Kelso v. Kuehl, 116 Wis. 495. In New York jurors are disqualified if related by consanguinity or affinity to a party within the sixth degree [Code Crim. Proc. § 1166]. Bradt v. Peck, 81 App. Div. [N. Y.] 295. A juror is not disqualified by reason of the fact that he is the brother of the wife of defendant's brother, who actively assisted in the defense of the law suit. Smith v. Smith [Ga.] 46 S. E. 106. It appeared that the daughter of one of the jurors married the half-nephew of the president of the defendant company, but that he died several years before the trial. It was held that this fact did not disqualify the juror. Miller v. South Covington & C. St. R. Co., 24 Ky. L. R. 207, 74 S. W. 747.

97. Kelso v. Kuehl, 116 Wis. 495. The fact that a juror in a criminal case was an uncle by marriage of the district attorney and this was not known to the defendant or his counsel until after trial is no ground for a new trial under the California statute [Pen. Code, § 1181]. People v. Boren, 139 Cal. 210, 72 Pac. 899.

98. An attorney of a party to an action is not an adverse party within the meaning of this provision. McCorkle v. Mallory, 30 Wash. 632, 71 Pac. 186. The fact that a juror is in the employ of an express company and that some of the attorneys for the defendant are also attorneys for the express company does not disqualify the juror. Miller v. South Covington & C. St. R. Co.,

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person is not disqualified to serve as a juror in a homicide case merely because he knew the deceased.[1]

Proof of disqualification.—Grounds of disqualification must be apparent.[2] Where there are affidavits charging jurors with having made disqualifying statements, the positive denials of the jurors to making such statements are entitled to much weight.[3] In determining whether a juror is disqualified in a criminal case by reason of opinions or impressions formed by him, his conduct, demeanor, and bearing in court may properly be accorded material weight in considering the facts disclosed by his answers.[4]

§ 4. *Discretion of court to excuse juror.*—The court may, in the exercise of a sound discretion, excuse a juror from serving, and the exercise of such discretion is not error unless abused to the detriment of a party.[5] If the court is in doubt as to the qualification of a juror, it is not error to excuse him; and it is better to do so, to the end that a fair and free jury may be obtained, and the risk, trouble, and expense of a new trial avoided.[6] It is not error for the court to refuse to send for a juror who is engaged in the trial of another case.[7]

§ 5. *The jury list and drawing the panel.*—A party to an action, if he is entitled to a trial by jury, is also entitled, at the commencement of the trial, to a panel drawn in substantial conformity with statutory requirements. A failure to conform to such requirements is good ground for challenge to the array.[8] Of course statutes relating to the selection of the jury list and the drawing of the panel must conform to the constitution.[9] Certain provisions relating to the method of drawing jurors have been held to be merely directory.[10] The use of a drawer from which to draw the names of jurors is a substantial compliance with a statute prescribing a box.[11] Recent cases have interpreted constitutional provisions and statutes having relation to the place from which persons on the

25 Ky. L. R. 207, 74 S. W. 747. Legal relations between a prosecuting attorney and a justice of the peace will not disqualify the latter from serving as a juror. State v. Lewis, 31 Wash. 75, 71 Pac. 778. A statute disqualifying jurors in criminal cases between whom and the defendant certain relations exist held not to disqualify a juror who is the client of the prosecuting attorney. State v. Carter [Iowa] 96 N. W. 710.

99. Juror tenant to a party under a crop lease is not "partner" or "agent" [Code Civ. Proc. § 602]. Arnold v. Producers' Fruit Co. [Cal.] 75 Pac. 326.

1. Andrews v. State [Tex. Cr. App.] 76 S. W. 918.

2. Juror's suggestion to state's attorney not to take a certain venireman not of itself sufficient to support challenge to the latter. State v. Forbes [La.] 35 So. 710. Answer to long involved question that he would have to be satisfied of "innocence" does not show bias when questioner used "innocence" meaning guilt instead. People v. Chutnacut [Cal.] 75 Pac. 340.

3. State v. Morrison [Kan.] 72 Pac. 554.

4. State v. Crofford [Iowa] 96 N. W. 889.

5. Peaden v. State [Fla.] 35 So. 204; Mathis v. State [Fla.] 34 So. 287. Excusing juror under discretionary power for good excuse no error without prejudice shown. State v. Michel [La.] 35 So. 629. Juror excused upon the representation of the prosecuting attorney that he desires to introduce him as a witness. Barnes v. Com., 24 Ky. L. R. 1143, 70 S. W. 827. On a trial for murder it is not error for the court to excuse some of jurors drawn on the panel, in advance of the call of the case for trial, without the knowledge or consent of the prisoner. Com. v. Payne, 205 Pa. 101. In Alabama the court may excuse one summoned as a juror who swears that he is a minor [Code 1896, § 5020]. Stewart v. State, 137 Ala. 33.

6. State v. Buralli [Nev.] 71 Pac. 532. The court may without a challenge by the state excuse a juror in a capital case who voluntarily states that he does not think he is competent to serve by reason of his scruples against capital punishment. State v. Vick, 132 N. C. 995. Excusing of juror on examination by court disclosing doubt of citizenship after he was passed by both parties. Keady v. People [Colo.] 74 Pac. 892. Where in a civil case defendant's counsel insisted that it would appear that the real plaintiff was an insurance company, and a juror stated that if this were so he could not act impartially, it was not error for the court to excuse him. Marande v. Tex. & P. R. Co. [C. C. A.] 124 Fed. 42.

7. Jarvis v. State [Ala.] 34 So. 1025.

8. State v. Landry [Mont.] 74 Pac. 418.

9. Statutory provisions relating to selection of jury list held not violative of the constitutional guarantee of "trial by an impartial jury of the country." State v. Boiln [Wyo.] 70 Pac. 1. Gen. Laws 1899, c. 151, p. 154 prescribing mode in counties of 200,000 population not class legislation. State v. Ames [Minn.] 98 N. W. 190.

10. State v. May, 172 Mo. 630. Rev. St. 1899, § 3769. State v. Stuckey, 98 Mo. App. 664.

11. Miller v. South Covington & C. St. R. Co., 25 Ky. L. R. 207, 74 S. W. 747.

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jury list shall be taken,[12] what persons shall be competent to have their names placed on the list,[13] information as to the competency of such persons,[14] the effect of the omission from the list of qualified persons,[15] publication of the list[16] and its revision,[17] the placing the names of jurors in the wheel,[18] the persons entitled to draw the panel,[19] and the order of drawing panels.[20] The defendant in a criminal prosecution has no right to designate the particular persons that shall compose the panel.[21]

§ 6. *The venire and like process.*—The method of summoning jurors is regulated by statute in the several states.[22] Where the provisions of a statute in relation to the summoning of a jury are not mandatory, but merely directory, mere irregularities will not be deemed prejudicial unless it is clearly shown that some injury has resulted therefrom.[23] No objection can be taken to any venire facias for a petit jury, except for fraud in drawing or summoning the jurors.[24] A defendant in a criminal case has no vested right in the number of jurors provided for in the venire to fill incomplete panels.[25]

§ 7. *Empaneling trial jury.*—The right to have a jury selected in the manner prescribed by law is a substantial right of which a party cannot be arbitrarily

12. Constitutional provision requiring an impartial jury from the county where the offence is committed construed [Const. art. 1, § 10]. Lloyd v. Dollisin, 23 Ohio Circ. R. 571. Territory from which jurors should be drawn under local statutes in Iowa. State v. Higgins [Iowa] 95 N. W. 244. "To be selected from electors of the whole county." Not violated by drawing quota from each election district, first, excluding those who had served within three years. Com. v. Zillafrow [Pa.] 56 Atl. 539.

13. Pennsylvania statute, Act of April 10, 1867, (P. L. 1867, 62) requiring jurors to be selected from "the whole qualified electors of the respective county at large" construed. Com. v. Zillafrow [Pa.] 56 Atl. 539.

14. A strict compliance with a statutory requirement that the assessor obtain from persons assessed information touching their qualifications for jury service is not essential to the securing of a legal jury list [Rev. St. 1899, §§ 3387, 3390]. State v. Bolin [Wyo.] 70 Pac. 1.

15. Omission from jury list by commissioners of persons competent to serve as jurors but known to be exempt from jury duty is not a ground for a challenge to the panel under the Montana statutes. State v. Tighe, 27 Mont. 327, 71 Pac. 3. Where it is required by statute that the jury list shall consist of the names on the assessment roll of all persons whom the jury commissioners believe to be competent and qualified to serve, an intentional omission by the commissioners of a number of names of those whom they know or believe to be qualified will vitiate the list [Rev. St. 1899, § 3346]. State v. Bolin [Wyo.] 70 Pac. 1.

16. Louisiana statute construed [Act No. 135 of 1898]. State v. Winters, 109 La. 3.

17. Failure to observe regulations of North Carolina statute, Code, §§ 1722, 1728, relative to the revision of the jury list does not vitiate the venire. State v. Dixon, 131 N. C. 808. Jury commissioners who have made an illegal jury list required to meet again and make a new list [Rev. St. 1899, § 3345]. State v. Bolin [Wyo.] 70 Pac. 1.

18. Description of jurors by initials on slips placed in wheel sufficient identification. Com. v. Scouton, 20 Pa. Super. Ct. 503.

19. A panel drawn by a commissioner, who is at least an officer de facto, is regular. People v. Conklin, 175 N. Y. 333. Legal when drawn by de facto commissioner. State v. Scott, 110 La. 369. Authority of court to make a list of jurors to complete panel [Rev. St. §§ 3795, 3797]. State v. May, 172 Mo. 630.

20. Order of drawing panels under provisions of Pennsylvania statute, Act of April 14, 1834, § 120, where three panels are to be drawn at the same time. Com. v. Zillafrow [Pa.] 56 Atl. 539. Order in which grand, petit, criminal and traverse venires are to be drawn (P. L. 1834, 363) is directory only, and presumably harmless to one accused. Id.

21. If the panel from which the jury was selected was composed of qualified persons the defendant cannot object that the court rejected certain veniremen who were also qualified. State v. Reynolds, 171 Mo. 552.

22. In Georgia where a superior court is required to continue in session for more than one week, the court must summon a separate panel of jurors for each week, but this requirement does not apply to an adjourned or extra session [Pen. Code 1895, § 862]. Cribb v. State [Ga.] 45 S. E. 396; Buchanan v. State [Ga.] 45 S. E. 607.

23. Queenan v. Ter., 11 Okl. 261, 71 Pac. 218.

Provisions held merely directory: The Missouri statutes providing for summoning jurors are merely directory. State v. Faulkner, 175 Mo. 546. Provisions of Pennsylvania statute as to order of drawing venires, where three are to be drawn at the same time, are merely directory. Com. v. Zillafrow [Pa.] 56 Atl. 539.

24. Stewart v. State, 137 Ala. 33. Effect of mistaken entry on docket that venire was quashed when it is subsequently corrected. Id. Sheriff may summon special venire though a state's witness. Com. v. Zillafrow [Pa.] 56 Atl. 539.

25. State v. Croney, 31 Wash. 122, 71 Pac. 783.

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deprived.[26] Therefore, where the mode of forming the trial jury from the panel is prescribed by statute, that mode should be followed in every essential particular.[27] It is not error for the court to require the defendant to proceed with the selection of a jury from a less number of jurors than were summoned, if the absent jurors are afterwards brought into court and passed on before the jury is completed.[28] Whenever objection is raised to the mode followed in selecting the jury, the necessity arises of making a minute of the objection and of the facts upon which it is founded.[29]

§ 8. *Arraying and challenging. A. Challenge to the array.*—A challenge to the array is a proper method of objecting to the mode of summoning jurors,[30] but it is not the proper method of raising the question of the disqualification of individual jurors.[31] A challenge to the array must be made before verdict.[32] The right to object to irregularities in the summoning of a special venire is waived if objection is not raised before verdict.[33]

(§ 8) *B. Challenges for cause. Right to list of jurors.*—By statute in many states a defendant in a criminal case is entitled to have a copy of the list of jurors summoned to try his case, so that he shall have every facility to make his challenges.[34]

The challenge.—It is not essential that a challenge for statutory cause should be made in the exact language of the statute. It is sufficient if the attention of the court is directed to the specific objection made.[35] The right to challenge a juror for cause may be waived,[36] as by a failure to object to or challenge the juror[37] before the verdict is rendered, where it does not appear that the fact of the juror's disqualification was unknown to the party or his counsel when the juror was accepted.[38] This rule is sanctioned by statute in some states.[39] In some

26. Tex. & N. O. R. Co. v. Pullen [Tex. Civ. App.] 75 S. W. 1084.

27. State v. Riggs, 110 La. 509. Under the California statutes a jury for the trial of a case in one department of the superior court of a county can not be empaneled from the panel of another department combined with the regular panel in attendance. People v. Wong Bin, 139 Cal. 60, 72 Pac. 505.

Where the name of a juror had been inadvertently left out of the box from which the drawings to make up the trial jury were made, and this not being discovered until all the other names had been drawn, it was held proper for the court to then have a slip containing this name put in the box and have it drawn from as the others had been drawn. Stone v. State, 137 Ala. 1.

Juror considering verdict in another case: Rule under Alabama statute, Acts 1900-1901, p. 1994, where a juror whose name is drawn for the trial of a cause is found to be upon a jury considering a verdict in another case. Thomas v. State, 134 Ala. 126.

Veniremen serving on a special jury: Action of court in tendering to defendant in a criminal case veniremen who were serving on a special jury held not error under circumstances. Reyna v. State [Tex. Cr. App.] 75 S. W. 25.

28. Newman v. State [Tex. Cr. App.] 70 S. W. 951. General venireman may be called and sworn if he comes in before jury is complete. State v. Forbes, 111 La. ——, 35 So. 710.

29. Acts 1896, No. 113, p. 162. State v. Riggs, 110 La. 509.

30. Bruen v. People [Ill.] 69 N. E. 24. It lies only for fraud in drawing or summoning. Statutes (Code 1896, § 4997) fixing mode are directory. Stewart v. State, 137 Ala. 33.

31. Teal v. State [Ga.] 45 S. E. 964.

32. Sylvester v. State [Fla.] 35 So. 142.

33. Queenan v. Ter., 11 Okl. 261, 71 Pac. 218.

34. Under the Alabama statute, Code 1896, § 5005, the name of a regular juror who was not summoned was properly omitted from the list of jurors served on the defendant. Collins v. State, 137 Ala. 50. Requirement of Missouri statute as to service of list of jurors on defendants in criminal cases [Rev. St. 1899, § 2619]. State v. Faulkner, 175 Mo. 546. Failure to include name in list served is harmless where he had not been found nor summoned. Stewart v. State, 137 Ala. 33. "Dove" Duke in venire and "Dave" Duke in list served the latter being correct is no error. Stewart v. State, 137 Ala. 33.

35. Figg v. Donahoo [Neb.] 95 N. W. 1020.

36. The right to challenge a juror on account of his incompetency by reason of the fact that he has been convicted of a felony, may be waived by a person who is on trial for a felony, or even in a capital case. Queenan v. Ter., 11 Okl. 261, 71 Pac. 218.

37. A failure, in a criminal case, to object to a juror who had served on the grand jury which returned the indictment, amounts to a waiver of such juror's disqualification. Sapp v. State, 116 Ga. 182.

38. Fulcher v. State [Miss.] 35 So. 170; Queenan v. Ter., 11 Okl. 261, 71 Pac. 218. A new trial will not be granted on the ground that one of the jurors was of unsound mind if the party making the motion knew this fact in an early stage in the trial but made

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jurisdictions a failure to challenge the juror before the jury is empaneled has been held to constitute a waiver of the right.[40]

(§ 8) *C. Peremptory challenges and standing jurors aside. Peremptory challenges.*—A party entitled to exercise the right of peremptory challenge need not give any reason for doing so.[41] Where a statute gives the right of peremptory challenge absolutely, prejudice will be conclusively presumed from a denial of the right.[42]

Number allowed.—Where there are two defendants in a civil suit whose interests are identical and who are represented by the same counsel, they constitute but one party, and are entitled only to the number of peremptory challenges allowed a party.[43] But under statutes which declare that each party to a civil suit shall be allowed a certain number of peremptory challenges, co-defendants who are at variance on the issue of fact as between themselves are each entitled to the full number of challenges allowed a party,[44] and in the absence of an express statutory prohibition, it is permissible for such defendants to consult and act together in exercising their challenges.[45]

The statutes in the several states prescribe the number of peremptory challenges allowable in criminal prosecutions, and sometimes make express provision as to the number permissible where two or more defendants are jointly prosecuted.[46] Under a statute which provides that "the people and the accused shall be entitled,

no objection on that ground until after verdict. Pfeiffer v. Dubuque [Iowa] 94 N. W. 492. A verdict will not be set aside because of the disqualification of a juror by reason of his relationship to one of the parties, where upon a motion for a new trial it affirmatively appears that the fact of relationship was known to the losing party prior to the trial. Hadden v. Thompson [Ga.] 44 S. E. 1001.

39. Statute expressly providing that the verdict of the jury shall not be affected on account of the disqualification of a juror unless the juror was challenged for the specific cause before the finding of the verdict. State v. Lewis, 31 Wash. 75, 71 Pac. 778. But under the New York statute relating to the disqualification of a juror by reason of relationship to a party, though the party related to the juror must raise the objection before the case is opened, any other party to the issue may raise the objection within six months after the date of verdict. This provision is applicable to all courts [Code Civ. Proc. §§ 1166, 3347, subd. 14]. Bradt v. Peck, 81 App. Div. [N. Y.] 295.

40. In criminal cases, even in prosecutions for murder, where the facts are known, an objection to the competency of a juror comes too late if it is made after the jury is empaneled. State v. Morrison [Kan.] 72 Pac. 554. The court may, in its discretion allow a juror to be challenged for cause at any time before the jury is empaneled. State v. Vick, 132 N. C. 995. In a criminal case the state may challenge for cause jurors who have been previously passed by both parties and who have taken their seats in the jury box but who have not been sworn, upon its being discovered that they are disqualified by reason of nonresidence. Monson v. State [Tex. Cr. App.] 76 S. W. 570.

Challenge permitted "before the juror is actually sworn": Under a statute permitting a challenge for cause "at any time before the juror is actually sworn," it must be interposed before the commencement of the ceremony [Laws 1887, p. 132]. Leary v. North Jersey St. R. Co. [N. J. Law] 54 Atl. 527.

41. State v. Hunter, 118 Iowa, 686.

42. State v. Hunter, 118 Iowa, 686. It is harmless to allow peremptory out of time where juror was prejudiced against capital punishment. Brewer v. State [Ark.] 78 S. W. 773.

43. St. Louis S. W. R. Co. v. Barnes [Tex. Civ. App.] 72 S. W. 1041.

44. Waggoner v. Dodson [Tex.] 69 S. W. 993; First Nat. Bank v. San Antonio & A. P. R. Co. [Tex.] 77 S. W. 410. But in Illinois under a statute providing that "in all civil actions each party shall be entitled to a challenge of three jurors," it was held that each side to the case has but three peremptory challenges, whether there be one or a number of persons plaintiff or defendant, and whether or not the interests of persons on the same side are conflicting [Rev. St. p. 781, c. 110, § 49]. Gordon v. Chicago, 201 Ill. 623. Under the peculiar provisions of the Kentucky statutes each side in a civil action is entitled to only three peremptory challenges, regardless of the number of plaintiffs or defendants, and whether or not there is a conflict of interests between persons on the same side [St. 1899, §§ 2258, 2267]. Cumberland Tel. & Tel. Co. v. Ware's Adm'x, 24 Ky. L. R. 2519, 74 S. W. 289.

45. First Nat. Bank v. San Antonio & A. P. R. Co. [Tex.] 77 S. W. 410.

46. When two or more defendants are tried together each is entitled under the express provisions of an Alabama statute to five peremptory challenges and no more [Acts 1890-91, p. 561]. Hudson v. State, 137 Ala. 60. Under the express provisions of a New Jersey statute where two or more defendants are jointly indicted and tried, they together, and not severally, are entitled to 10 peremptory challenges [P. L. 1898, p. 896]. State v. MacQueen [N. J. Law] 55 Atl. 1006; State v. Rachman, 68 N. J. Law, 120.

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each[47] to a prescribed number of peremptory challenges, if two or more defendants are tried jointly, each is entitled to the full number of challenges allowed, as if he had been tried separately.[47]

Time for challenge.—In North Carolina, the right of peremptory challenge must be exercised before the twelve jurors have been accepted by both parties.[48] In Texas, it would seem that it is not permissible to challenge peremptorily a juror after he has been passed, even though the jury has not been completed.[49] In Florida, the right in a criminal case must be exercised before the jurors are sworn in chief.[50] Under the California statute, the right in a criminal case must be exercised before the juror is sworn to try the cause, but the court may, for cause permit it to be exercised after the juror is sworn and before the jury is completed.[51] Under the New Jersey statutes, the right in civil actions must be exercised as the names of the jurors are drawn from the box.[52]

Juror out of courtroom.—It is not error for the court, in a criminal case, to permit the state to peremptorily challenge a juror who is not at the time in the courtroom, if the court had at first held such juror disqualified, but had subsequently changed its opinion after the juror had left the courtroom.[53]

Order of challenges.—According to the best practice, peremptory challenges are exercised alternately, one by one, and after each challenge the panel refilled; but in the absence of statutory provision, the mode and order of challenge is left to the sound discretion of the trial court, and unless there has been manifest abuse of the discretion, the action of the court will not be disturbed.[54] In some jurisdictions alternate challenges are prescribed by statute.[55]

Even where the court has improperly overruled challenges for cause and the defendant has exhausted his peremptory challenges, it is not error for the court to refuse to permit the defendant to challenge peremptorily a juror who is unobjectionable.[56]

Waiver of right to challenge.—One entitled to peremptory challenges may waive the right.[57] The neglect to exercise the right at the proper time constitutes a waiver of it.[58] Under the common law method of impaneling a jury, by swearing each juror as he is passed for cause and not challenged peremptorily, there was no waiver of peremptory challenges, except that they could not be exercised as to the jurors already sworn,[59] and where the practice of alternate challenges exists, a failure by a party to challenge in turn does not constitute a waiver of the right of peremptory challenge as to one or more of the jurors subsequently called.[60] A waiver of a peremptory challenge does not amount to an acceptance of a juror already in the box.[61]

47. Carpenter v. People [Colo.] 72 Pac. 1072.

48. Dunn v. Wilmington & W. R. Co., 131 N. C. 446.

49. Andrews v. State [Tex. Cr. App.] 76 S. W. 918.

50. Mathis v. State [Fla.] 34 So. 287.

51. Pen. Code, § 1068. People v. Boren, 139 Cal. 210, 72 Pac. 899.

52. Gen. St. p. 1852, § 40; Laws 1902, p. 640. Leary v. North Jersey St. R. Co. [N. J. Law] 54 Atl. 527.

53. Dodd v. State [Tex. Cr. App.] 72 S. W. 1015.

54. Nicholson v. People [Colo.] 71 Pac. 377.

55. Under the Iowa statute, Code, § 3686, peremptory challenges are required to be made alternately. State v. Hunter, 118 Iowa, 686. Pennsylvania statute Act of March 31, 1860, sec. 38, giving the right to challenge to the commonwealth and the defendant alternately was not repealed by the act of July 9, 1901 (P. L. 629). Com. v. Conroy [Pa.] 56 Atl. 427.

56. Carter v. State [Tex. Cr. App.] 76 S W. 437.

57. State v. Hunter, 118 Iowa, 686.

58. Dunn v. Wilmington & W. R. Co., 131 N. C. 446; Andrews v. State [Tex. Cr. App.] 76 S. W. 918; Mathis v. State [Fla.] 34 So. 287. As to what is the proper time to exercise the right, see supra this section.

59. Moore v. People [Colo.] 73 Pac. 30.

60. Moore v. People [Colo.] 73 Pac. 30; State v. Hunter, 118 Iowa, 686.

61. State v. Hunter, 118 Iowa, 686.

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When erroneous permission to challenge amounts to prejudicial error.—It is prejudicial error for the court to allow a party to challenge a juror peremptorily after he has waived his right to do so by a neglect to exercise it at the proper time, if the other party had previously exhausted all his peremptory challenges.[62] Such action on the part of the court is not prejudicial error, however, where the other party had not exhausted his challenges.[63]

When jurors have been stood aside by the state and all the other veniremen have been exhausted without forming a jury, the court may order the names of the jurors who had been stood aside to be returned to the hat and drawn again.[64]

(§ 8) *D. Examination of jurors and trial of challenges. The challenge should precede the examination.*—Before challenge a party has no right to interrogate a juror to ascertain whether he is subject to challenge. But the court, in its discretion, may permit such interrogation, and, when allowed, it is not revisable.[65]

The scope of the examination of jurors is left largely to the sound discretion of the trial court, and it is only when an abuse of discretion is clearly shown, the appellate court is authorized to interfere.[66] Considerable latitude should be allowed to the end that all who have any bias or prejudice or are otherwise disqualified may be excluded from the panel,[67] and also to enable the party to intelligently determine his peremptory challenges.[68] While it is perhaps the better practice to allow a juror on his voir dire in a criminal case to be asked whether if selected as a juror in the case he will give the defendant the benefit of the presumption of innocence until he has heard all the evidence, and whether he will wait until he has heard all the evidence before making up his mind, yet it is not reversible error to exclude such questions.[69] It is not proper to ask a juror if he has a feeling of prejudice against a man who stands charged with a crime.[70] It is proper in murder cases to ask jurors if they have any conscientious scruples in regard to the infliction of the death penalty for crime in cases depending wholly on circumstantial evidence.[71] A juror's knowledge or ignorance concerning questions of law is not a proper subject of inquiry.[72]

Error, if it exists, in sustaining an objection to a question asked a juror, is cured where almost the identical question is subsequently asked and answered without objection.[73]

Absence of juror or counsel.—When a juror is absent when called, the court is not required to delay in proceeding with the trial until the juror can be found and brought into court for the purpose of examination.[74] Where a party has an

62. Dunn v. Wilmington & W. R. Co., 131 N. C. 446.

63. Glenn v. State [Ark.] 71 S. W. 254.

64. State v. Utley, 132 N. C. 1022.

65. Jarvis v. State [Ala.] 34 So. 1025.

66. Foley v. Cudahy Packing Co., 119 Iowa, 246.

67. Swift v. Platte [Kan.] 72 Pac. 271; Tarpey v. Madsen [Utah] 73 Pac. 411; State v. King, 174 Mo. 647. Questions permissible in the examination of jurors who were present at and heard part of the testimony given on the trial of one who was jointly indicted for the offense for which the defendant is being tried. State v. King, 174 Mo. 647. Discretion of court to allow jurors in personal injury cases to be examined as to their connection with or interest in insurance companies which indemnify employers against loss or damage arising from injuries to their employes. Swift v. Platte [Kan.] 74 Pac. 635. Duty of court on motion of either party to ascertain whether a juror is related to either of the parties to the suit [Code 1902, § 2944]. Robinson v. Howell, 66 S. C. 326.

68. State v. King, 174 Mo. 647; Foley v. Cudahy Packing Co., 119 Iowa, 246; Spoonick v. Backus-Brooks Co. [Minn.] 94 N. W. 1079; Tarpey v. Madsen [Utah] 73 Pac. 411.

69. Ryan v. State, 115 Wis. 488.

70. State v. Croney, 31 Wash. 122, 71 Pac. 783.

71. Johnson v. State [Tex. Cr. App.] 71 S. W. 25. Scope of examination permissible under a statute making a prejudice against inflicting capital punishment a ground of challenge [Burns' Rev. St. 1901, § 1862]. Coppenhaver v. State, 160 Ind. 540.

72. People v. Conklin, 175 N. Y. 333. It is not proper to ask a juror on his voir dire whether he knows that the defendant in a criminal case is entitled to the benefit of the presumption of innocence, as it calls upon him to anticipate the instructions to be given by the court. Ryan v. State, 115 Wis. 488.

73. State v. Armstrong [Or.] 73 Pac. 1022.

74. Tarver v. State, 137 Ala. 29.

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attorney in court, he is not deprived of right to examine the jury by the refusal of the court to wait for an associate counsel.[75]

Further examination after jurors are passed discretionary with court.—After the jurors are passed by the parties, any further examination of them is not a matter of right, but of discretion in the court.[76] If on such examination, good challenge for cause is presented, the court may allow the juror to be challenged therefor.[77]

Tribunal for the trial of challenges.—The common law practice of appointing triors to try the fitness of a juror who has been challenged to the favor has in the United States become almost obsolete. Under the statutes of most of the states the court is the tribunal for the trial of challenges, whether they be for principal cause or to the favor.[78]

Challenge as part of the record.—When a challenge is in writing, was sworn to, served upon the prosecuting attorney and filed, and as appears from the journal entry was submitted to the court, it is a part of the record without bill of exceptions or a statement of facts.[79]

Mode of excepting to challenge.—The statutes in the several states usually make provision as to the mode of excepting to challenges.[80] If a party desires to avail himself of the objection that the other party in challenging a juror has not stated the ground of his challenge, he should expressly state that that is the ground of his objection. By simply denying the challenge he waives any formal objection to it.[81]

Review on appeal of findings of trial court.—In Washington, it has been held that the discretion of the trial court to determine partiality or impartiality in a jury is subject to review by the appellate court under the constitutional guaranty to the accused of a trial by an impartial jury.[82] But in some jurisdictions the finding of the trial court upon challenges is not subject to review, or is subject to review only in certain cases.[83] The finding of the trial court upon a challenge to a

75. Fischer v. Brooklyn Heights R. Co., 84 N. Y. Supp. 254.

76. Dunn v. Wilmington & W. R. Co., 131 N. C. 446. It is not error for the court to refuse to permit counsel for defendant in a criminal case to interrogate the jurors, after they are sworn, in chief, as to whether they were on the grand jury that found the indictment, where no excuse for failure to put the questions on the voir dire examination is shown, except that the matter was "overlooked," and where it is not suggested to the court that there is any reason to believe that any juror was a member of such grand jury. Ferrell v. State [Fla.] 34 So. 220. Where jurors in a criminal case had been members of a jury that had convicted another person for participation in the same offense for which the defendant is indicted, the defendant if he wishes to have the jurors declared disqualified on this ground must direct his examination to the point while the jurors are upon their voir dire. He cannot take advantage of this matter after conviction if he has failed to so bring out the fact of their disqualification. Russell v. State [Tex. Cr. App.] 72 S. W. 190.

77. Dunn v. Wilmington & W. R. Co., 131 N. C. 446.

78. O'Fallon Coal Co. v. Laquet, 198 Ill. 125. By the North Carolina statutes the court is constituted the trier of jurors [Code 1883, §§ 405, 1199]. State v. Vick, 132 N. C. 995. Under the Illinois practice the competency of a juror whether raised by principal challenge or challenge to the favor, as at common law, is triable by the court without the intervention of triors, the ruling of the court being reviewable upon appeal or writ of error. O'Fallon Coal Co. v. Laquet, 198 Ill. 125. Method in Georgia of testing impartiality of jurors who are challenged on the ground that they have already served in a trial against others involved in the same transaction [Pen. Code 1895, § 757]. Lewis v. State [Ga.] 45 S. E. 602.

79. State v. Vance, 29 Wash. 435, 70 Pac. 34.

80. Mode of excepting to challenge under Montana statutes [Pen. Code, §§ 2036-2039, 2170]. State v. Tighe, 27 Mont. 327, 71 Pac. 3.

81. People v. Cebulla, 137 Cal. 314, 70 Pac. 181.

82. State v. Stentz, 30 Wash. 134, 70 Pac. 241.

83. In North Carolina the rulings of law by judges of the superior courts, on challenges for principal cause, are subject to review by the supreme court; but their findings of fact are conclusive. Upon challenges to the favor the findings of the judges of the superior courts are conclusive on appeal. State v. Vick, 132 N. C. 995. Under a statute which provides that "the decision of the court upon challenges to the panel and for cause, shall not be subject to exception," errors in the manner in which the jury were selected or that a juror lacked the statutory

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juror on the ground that he has a fixed opinion that will bias his verdict will not be set aside on appeal unless error is manifest.[84] In passing on a motion for a new trial based upon the alleged incompetency of a juror, the trial court is called upon to exercise a sound legal discretion. In the absence of a clear showing of error in this regard, the appellate court will not interfere.[85]

When improperly overruling challenge is ground for setting aside verdict.—Where, in a criminal prosecution, a challenge for cause is improperly overruled, and the defendant's peremptory challenges are exhausted before the jury is obtained, the accused is prejudiced,[86] and the verdict will be set aside, even though it be not shown that any juror objectionable to him was allowed to serve;[87] but not if the juror was peremptorily challenged.[88] But refusal to sustain a challenge for cause is not reversible error where the jury is made up before the accused has exhausted his peremptory challenges.[89]

§ 9. *Talesmen and additional panels. Authority to procure additional jurors.*—There are in most states statutes providing for obtaining jurors where those on the regular panel are insufficient,[90] or where the regular panel has been discharged.[91] When the regular panel is exhausted, the court may order that persons be summoned from the body of the county to complete the jury, notwithstanding a statutory authorization to complete the jury by drawing names from the talesman box.[92] Generally, talesmen should not be summoned or a special venire resorted to until the regular panel has been exhausted.[93] Under a statute authorizing the

qualifications will not be considered on appeal. Alderson v. Com., 25 Ky. L. R. 32, 74 S. W. 679.

84. If the court refuses to sustain the challenge its finding will not be set aside unless it affirmatively appears that on the answers of the juror, taken as a whole, he entertained a fixed opinion which would bias his verdict. Jarvis v. State [Ala.] 34 So. 1025. Action of court in overruling challenge made on the ground of juror's previous opinion and prejudice held not to be, under the circumstances, an abuse of discretion. Lindsey v. State [Ohio] 69 N. E. 126.

85. State v. Mott [Mont.] 74 Pac. 728.

86. State v. McCoy, 109 La. 682; State v. Stentz, 30 Wash. 134, 70 Pac. 241.

87. State v. McCoy, 109 La. 682.

88. Brewer v. State [Ark.] 78 S. W. 773.

89. State v. Champoux [Wash.] 74 Pac. 557; Peaden v. State [Fla.] 35 So. 204; State v. Tyler [Iowa] 97 N. W. 983. If the court in a criminal case erroneously overrules a challenge for cause, or erroneously refuses to allow a venireman to answer one of the questions propounded to him, or erroneously sustains objections interposed by the state to certain questions propounded to a veniremen, and thereafter the defendant excludes the obnoxious juror by a peremptory challenge, he cannot be injured by such ruling, unless it appears that before the jury was sworn his quiver of peremptory challenges was exhausted. Mathis v. State [Fla.] 34 So. 287. See, also, Indictment and Prosecution, § 15.

90. Right of court under the Kansas statute [Gen. St. 1901, § 3815], to order more jurors to be drawn after commencement of the term, where the number previously drawn is in his opinion insufficient. State v. Davis [Kan.] 73 Pac. 87. In Texas the proper method to complete the jury in a homicide case, after the original special venire list has been exhausted is to authorize the sheriff to summon a certain number of jurors to be selected by him as talesmen, but the defendant may waive his right to have talesmen thus selected by the sheriff. Newman v. State [Tex. Cr. App.] 70 S. W. 951.

Where a jury is out considering a case when another case is called for trial and before a jury in the latter case is completed the remainder of the panel is exhausted, and the court in pursuance of statutory authority summons talesmen who are interrogated and qualified the court may in its discretion after the other jury have returned their verdict and are discharged complete the jury being impaneled either from the talesmen or from the jury just discharged. Tex. & N. O. R. Co. v. Wright [Tex. Civ. App.] 71 S. W. 760.

91. Authority of court under the Missouri statute to order the sheriff to summon a jury from bystanders, when the regular panel has been discharged [Rev. St. 1899, §§ 3769, 3770]. State v. Stuckey, 98 Mo. App. 664. Jury selected from special panel after regular panel has been discharged [Code Civ. Proc. § 664]. Lamb v. State [Neb.] 95 N. W. 1050. Right of court to draw tales jurors for attendance during an adjourned session. Buchanan v. State [Ga.] 45 S. E. 607; Cribb v. State [Ga.] 45 S. E. 396.

92. State v. John [Iowa] 93 N. W. 61.

93. The defendant in a criminal case has the right to demand that all the jurors summoned upon the original venire, and not then engaged on other jury duty, shall be submitted to his acceptance or rejection before talesmen are resorted to for the formation. State v. Riggs, 110 La. 509. What contingencies will warrant requiring a party to take a jury from a special venire, under the provision of the Texas statute [Rev. St. 1895, art. 3150]. Tex. & N. O. R. Co. v. Pullen [Tex. Civ. App.] 75 S. W. 1084.

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court to fill vacancies on a jury when they occur after the jury box has been exhausted, it will be presumed, in the absence of an averment to the contrary, that the designation by the court of a juror to fill a vacancy was made after the jury box was exhausted.[94]

Method of selecting talesmen.—The court may, within its discretion, order jurors summoned as tales de circumstantibus to be called one at a time.[95] It is not a valid objection to a special venire that it had been drawn by the jury commissioners for another term of the court, the term having been changed by the legislature after the commissioners were appointed.[96] The mere fact that commissioners appointed to select a special panel for the trial of a negro charged with crime did not draw any negroes on the list is not ground for quashing the indictment.[97] Irregularity in ordering talesmen to be summoned in connection with a special venire is not ground for quashing the venire.[98]

Method of objecting to discrimination in summoning talesmen.—One charged with crime, in order to avail himself of a discrimination against him in summoning talesmen, must, when the list of talesmen is first brought in, move to quash the same.[99]

Time for objecting to special venire.—It is too late to object that an accessory cannot be tried on a special venire after the jury has been passed upon and each juror accepted, and without exhausting the peremptory challenges. It is conclusively presumed in such case that the jury is unobjectionable.[1]

§ 10. *Special and struck juries and juries of less than twelve.*—Special juries were allowed by the common law.[2] In most of the United States there are statutes making provision as to when a special or struck jury may be had, the mode and time of making application therefor, and the method of selecting and summoning the jurors. Some of these statutory provisions have recently been interpreted by the courts.[3] The constitutionality of some of the statutes relating to special juries has been upheld.[4] It would seem that in the absence of statutory direction, the method and order of drawing jurors from the special venire is a matter which is largely within the discretion of the court.[5] In a murder case

94. Act 1901, § 4. Turner v. State [Tenn.] 69 S. W. 774.

95. Com. v. Payne, 205 Pa. 101. Method of selecting talesmen under the Texas statute [Code Cr. Proc. 1895, arts. 647-649]. Locklin v. State [Tex. Cr. App.] 75 S. W. 305. Evidence insufficient to show willful contempt in selecting biased talesman. Richards v. U. S. [C. C. A.] 126 Fed. 105.

96. Carter v. State [Tex. Cr. App.] 76 S. W. 437.

97. Carter v. State [Tex. Cr. App.] 76 S. W. 437; Thompson v. State [Tex. Cr. App.] 77 S. W. 449.

98. Locklin v. State [Tex. Cr. App.] 75 S. W. 305.

99. Carter v. State [Tex. Cr. App.] 76 S. W. 437.

1. State v. Register, 133 N. C. 746.

2. State v. Lehman, 175 Mo. 619.

3. In Missouri either party is entitled to a special jury on motion made therefor three days before that on which the case is set for trial [Rev. St. 1899, § 3791]. State v. Faulkner, 175 Mo. 546. In Texas defendants in capital cases are entitled to a special venire in the absence of waiver [Code Cr. Proc. arts. 642-681]. Farrar v. State [Tex. Cr. App.] 70 S. W. 209. In Missouri, in cities having a jury commissioner, that officer, under the direction of the court, selects the names of persons for the special jury, and furnishes them to the sheriff or other officer to summon them. State v. Faulkner, 175 Mo. 546; State v. Lehman, 175 Mo. 619. Drawing special jurors for capital cases under provisions of the Alabama statute, Cr. Code, § 5004. Hunt v. State, 135 Ala. 1. In New Jersey a struck jury in a criminal case can be selected only from the county in which the indictment was found. State v. Young [N. J. Law] 55 Atl. 91. Rule under Alabama statute, Code 1896, § 5007, where mistakes occur in the names of special jurors summoned. Collins v. State, 137 Ala. 50.

4. A statute providing for special jurors which requires a party applying for one to deposit the cost thereof, though it puts it out of the reach of a poor man to have a special jury, is not a denial of the equal protection of the law within the meaning of the constitutional inhibition. Eckrich v. St. Louis Transit Co., 176 Mo. 621. The New York special jury law, Laws 1896, p. 354, c. 378, is constitutional. People v. Conklin, 175 N. Y. 333.

See note, ante, § 1A.

5. Method of drawing a special jury where two lists of jurors have been summoned. State v. Faulkner, 175 Mo. 546.

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the court is not required to have a regular panel in attendance while a jury is being selected from a special panel which has been drawn in accordance with the provisions of the statute.[6] There is no waiver if the defendant objects to being tried by any other than a special venire at any time prior to his agreeing to be tried by the regular jury.[7]

By the common law, the number of jurors required for petit juries, except in special cases, is twelve, and in states where the common law is in force, this is the number required in the absence of a constitutional or statutory provision to the contrary.[8] In some jurisdictions, however, provision is made for juries, in certain cases, composed of a smaller number than twelve.[9]

§ 11. *Swearing.*—The better practice is to postpone the swearing in chief of the jurors until the full panel is obtained, so as to allow the longest possible time for the peremptory challenges, but in the absence of statutory provision, the rule is that the time and manner of swearing jurors in chief, after they have been examined on voir dire and an opportunity given for challenge, are within the sound judicial discretion of the court, the exercise of which will not be disturbed by an appellate court unless clearly abused.[10]

§ 12. *Compensation, sustenance and comfort of jurors.*—The compensation of jurors is a matter of statutory regulation. The courts have recently passed upon the constitutionality of certain statutes having relation to this matter,[11] and have interpreted some of the provisions of such statutes.[12] Under statutes which provide that the fees of "jurors" shall be a certain sum "for each day's attendance," a juror is entitled to his per diem for each day his attendance is required in court whether sworn to try any case or not.[13]

The jury should be made comfortable for the night after they have been locked up, whether before or after they find their verdict; but it would seem that a failure to look after the comfort of the jury is not a ground for reversing the verdict, especially if the finding was arrived at after the alleged discomfort had been endured.[14]

JUSTICES OF THE PEACE.

§ 1. **The Office, Terms, Vacancies (651).**
§ 2. **Compensation, Duties and Liabilities (652).**
§ 3. **Jurisdiction**—In General, Amount Involved, Title to Realty, Criminal Prosecutions (652).
§ 4. **Procedure in Justices' Courts**—In General, Attachment and Garnishment, Process and Appearance, Pleadings and Issues, Set-off and Counterclaim, Continuance and Dismissal, Juries, Trial and New Trial, Verdicts and Judgments, Executions, Costs (655).
§ 5. **Appeal and Error**—In General, Appellate Jurisdiction, Time for Taking Appeal, Notice, Undertakings, Transcripts and Records, Dismissals, Trial Term, Pleadings and Issues, Trial and Judgment, Review (660).
§ 6. **Certiorari (666).**

§ 1. *The office.*—Justices of the peace include one distinct class of judicial

6. Henry v. People, 198 Ill. 162.
7. Farrar v. State [Tex. Cr. App.] 70 S. W. 209.
8. Florida F. & M. Co. v. Boswell [Fla.] 34 So. 241.
9. Laws 1899, cc. 4717, 4735, pp. 111, 124. Florida F. & M. Co. v. Boswell [Fla.] 34 So. 241. Under the Colorado statutes (Mills' Ann. Code, § 179), which provides that the jury shall consist of six persons, unless the parties agree to a smaller number not less than three, a jury cannot consist of less than six persons unless both parties consent thereto. Branch v. Branch, 30 Colo. 499, 71 Pac. 632. What constitutes a waiver of objection to a jury of less than twelve. Florida F. & M. Co. v. Boswell [Fla.] 34 So. 241.
10. Mathis v. State [Fla.] 34 So. 287. Under the Iowa statute (Code § 5369), the jury should not be sworn until all the peremptory challenges are either waived or exercised, and the jurors accepted. State v. Hunter, 118 Iowa, 686.
11. Statute relating to the fees of jurors held not to be unconstitutional on the ground of not being uniform in its operation. Jackson v. Baehr, 138 Cal. 266, 71 Pac. 167. Statute providing for the payment of money to jurors who had served in criminal cases held to violate a constitutional inhibition against making gifts of public money. Powell v. Phelan, 138 Cal. 271, 71 Pac. 335.
12. The legal fiction that a term of court is but one day held not to affect the con-

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officers under constitution reciting the courts in which judicial powers are reposed.[15] They are precinct and not city officers, though city and precinct boundaries are the same.[16]

A constitutional provision limiting terms of office to four years and allowing justices in cities to be elected for terms prescribed by law authorizes the legislature to make the terms of the first elected city justices four years and nine months, the succeeding terms to be four years.[17] The legislature of Utah may create municipal courts,[18] and by the creation thereof the office of justice of the peace was abolished.[19] One elected as city justice under such act is not exempt from the provision requiring surrender of files, papers, etc., because he had been a precinct justice.[20] The office of city justice being abolished in certain jurisdictions, an incumbent may not hold after the term for which he was elected.[21] In Kentucky, the governor may fill vacancies by appointment.[22]

A justice holding over on the claim that his successor had not qualified, and it being a debatable question depending on whether the nearest person elected and failing to qualify was to be his successor, and he having custody of the records and acting as justice, is a de facto officer.[23]

Justices in Kentucky are members of the fiscal court.[24]

An information in quo warranto to oust a justice must show that the office which defendant claims and the duties which he performs is the office to which relator is entitled.[25]

§ 2. *Compensation, duties and liabilities.*—The compensation of justices is ordinarily by fees taxed against litigants as part of the costs.[26]

A justice is not liable on his bond for refusal to accept appeal bonds not complying with statutory requirements,[27] nor for issuance of execution where he has no official notice of supersedeas.[28] He is not liable for false imprisonment where he has jurisdiction,[29] but is liable for false imprisonment of a person disobeying a subpoena issued after he lost jurisdiction of the case.[30]

§ 3. *Jurisdiction.*—Jurisdiction of justices is purely statutory, and statutes conferring it are to be strictly construed.[31] It may not be affected by special or

struction of a statute, U. S. Comp. St. 1901, p. 565, relating to the allowance of mileage compensation to jurors. In re Grand Jurors' Mileage, 120 Fed. 307. Duty of county auditor to issue warrants for the fees of jurors [Pen. Code, § 1143]. Jackson v. Baehr, 138 Cal. 266, 71 Pac. 167.

13. Jackson v. Baehr, 138 Cal. 266, 71 Pac. 167.

14. State v. Riggs, 110 La. 509.

15, 16. Love v. Liddle [Utah] 72 Pac. 185.

17. People v. Kent, 83 App. Div. [N. Y.] 554.

18. State v. Howell [Utah] 72 Pac. 187.

19. Sess. Laws 1901, c. 109. Nystrom v. Clark [Utah] 75 Pac. 378. It does not conflict with Rev. St. 1898, § 3760, providing for disposition of justice's papers on expiration of term, death or removal. Id.

20. Nystrom v. Clark [Utah] 75 Pac. 378.

21. State v. Howell [Utah] 72 Pac. 187.

22. Traynor v. Beckham, 25 Ky. L. R. 981, 76 S. W. 844.

23. Deuster v. Zillmer [Wis.] 97 N. W. 31.

24. Stephens v. Wilson, 24 Ky. L. R. 1832, 72 S. W. 336.

25. State v. Tancey [Ind.] 69 N. E. 155.

26. Justices in Louisiana receive no fees in criminal matters and peace bond cases. Justice may not require payment of costs in addition to giving the peace bond exacted. State v. Foster, 109 La. 587. In Georgia the justice is entitled to 50 cents for answering writ of certiorari. McMichael v. So. R. Co., 117 Ga. 518. The Maryland act governing compensation of justices of Baltimore county is constitutional. Herbert v. Baltimore County Com'rs [Md.] 55 Atl. 376.

27. Tender within statutory time was less than statutory amount, party thereafter tendered a bond for the proper amount. Frohlichstein v. Jordan [Ala.] 35 So. 247.

28. Verbal notice only. Frohlichstein v. Jordan [Ala.] 35 So. 247.

29. On the ground that the complaint was defective in not alleging necessary facts where he has jurisdiction of the subject-matter and the complaint states facts sufficient to apprise defendant of the nature of the charge against him. Smith v. Jones [S. D.] 92 N. W. 1084.

30. In an action for false imprisonment for refusal to obey a void subpoena evidence that plaintiff used abusive language to the officer executing the writ and was imprisoned therefor is not admissible. Holz v. Rediske, 116 Wis. 353.

31. Held not to authorize jurisdiction of an attachment undertaking in excess of statutory amount on change of venue though Gen. St. Kan. 1901, § 5231, allowed such actions on bonds given before justice in whose

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local laws.[32] The justice has no equity jurisdiction,[33] and may not try a suit involving a settlement of partnership accounts,[34] nor of an action for subrogation,[35] nor a proceeding for the abatement of a nuisance.[36]

A justice has jurisdiction of claim proceedings on a levy made under execution from a justice court.[37]

A justice having full jurisdiction of a demand will not lose jurisdiction as to such demand by the fact that it is coupled with another matter of which he has no jurisdiction.[38]

Amount.[39]—Jurisdiction is determined by the amount demanded and not by the amount of the debt.[40] In replevin it is the allegation of value of the property replevied.[41] The amount in excess of the jurisdiction must be waived.[42] In some jurisdictions this may not be done by amendment.[43] The fact that the judgment by inclusion of interest exceeds jurisdictional amount will not take case out of justice's jurisdiction,[44] but the justice may not allow interest antedating a judgment, where its effect would be to exceed the jurisdictional amount.[45] A statute requiring the consolidation of all demands of a nature to be consolidated and which do not exceed the jurisdictional amount when consolidated does not apply to distinct claims, the aggregate of which when consolidated exceeds that amount.[46] Laws giving justices jurisdiction where the balance due on a contract does not exceed a certain amount do not require that the balance should be agreed upon.[47]

Within the statutory limitations as to amount, he has jurisdiction of an action for damages for breach of contract for sale of personalty,[48] against a county court for the recovery of money due on a contract in West Virginia,[49] to recover penalties,[50] actions quasi ex contractu in Pennsylvania.[51]

court the action was pending and his successor in office. Sims v. Kennedy [Kan.] 73 Pac. 51. Summary proceedings under Pa. Act of June 16, 1836. Nevil v. Heinke, 22 Pa. Super. Ct. 614.

32. Love v. Liddle [Utah] 72 Pac. 185.

33. Woman may not be sued in a justice court to charge her separate estate. Harvey v. Johnson, 133 N. C. 352. Hence Rev. St. art. 2996, requiring writs to enjoin execution of judgments to be returned to the court rendering the judgment does not apply to justices of the peace. Foust v. Warren [Tex. Civ. App.] 72 S. W. 404; Osborne v. Gatewood [Tex. Civ. App.] 74 S. W. 72.

34. An action against a partner for half a sum fraudulently appropriated which should have been taken into account on a partnership accounting did not involve a settlement of partnership accounts within acts depriving justices of jurisdiction of such settlements. Erret v. Pritchard [Iowa] 96 N. W. 963.

35. Fidelity & Deposit Co. v. Jordan [N. C.] 46 S. E. 496.

36. The justice may entertain jurisdiction of a prosecution for maintaining a nuisance. State v. Schaffer, 31 Wash. 305, 71 Pac. 1088.

37. Under Burns' Rev. St. Ind. 1901, § 1500, giving jurisdiction to $200 in action of contract, one may sue for breach of warranty of piano costing $400 claiming damages in $200, the instrument being alleged to be worth $125 by reason of defects and expenses of repair amounting to $75. Everett v. Brown, 117 Ga. 342.

38. Herry v. Benoit [Tex. Civ. App.] 70 S. W. 359.

39. Justices of the peace in Missouri in 1823 had jurisdiction over an action for $125 damages for killing stock. Sublette v. St. Louis, etc., R. Co., 96 Mo. App. 113.

40. Knight v. Taylor, 131 N. C. 84. In an action for breach of warranty of an article jurisdiction is not affected by an amendment stating the value of the article, the amount of the damages remaining the same. Everette Piano Co. v. Bash [Ind. App.] 68 N. E. 329.

41. Knoche v. Perry, 90 Mo. App. 483. In the absence of showing that the valuation was knowingly magnified or diminished for jurisdictional purposes. Ball v. Sledge [Miss.] 35 So. 447.

42. Poirier v. Martin [Minn.] 94 N. W. 865; De Lamater v. Martin, 117 Ga. 139.

43. Under the Missouri code where an action is brought for an amount in excess of the justice's jurisdiction an amendment reducing the damages within the jurisdictional amount is unauthorized. Rev. St. Mo. 1899, § 4079, allowing amendments to supply omissions and deficiencies in the interest of justice. U. S. Fidelity & Guaranty Co. v. Foskett-Kessner Feed Co. [Mo. App.] 73 S. W. 364.

44. James v. Crown Cereal Co., 90 Mo. App. 227.

45. Ferguson v. Reiger [Or.] 73 Pac. 1040.

46. Hurd's Rev. St. 1901, p. 1116, § 18. Page v. Shields, 102 Ill. App. 575.

47. Froelich v. Christie, 115 Wis. 549.

48. Gruell v. Clark [Del.] 54 Atl. 955.

49. Taylor County Court v. Holt, 53 W. Va. 532.

50. Penalty for refusal to allow inspection of books by stockholders. Dwyer v. Smelter City State Bank, 30 Colo. 315, 70 Pac. 323. In Michigan justices have no jurisdiction of an action of debt on an officer's bond with a

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Title to realty.—He is without jurisdiction of actions involving title to realty,[52] and should certify such cases to courts having jurisdiction.[53] He is not deprived of jurisdiction where the question is only incidentally involved,[54] or where an allegation of title in a pleading is unnecessary.[55] The question is not generally involved in actions for injuries to realty.[56] Jurisdiction of forcible entry and detainer is given the justice by the laws of some of the states.[57]

The residence determining jurisdiction must be bona fide.[58] A railroad company is not a resident of city solely by reason of maintaining a station therein.[59] Jurisdiction of a nonresident cannot be obtained by collusive joinder with a resident.[60] Delaware justices have no jurisdiction where neither plaintiff nor defendant resides within the hundred or adjoining hundred where the suit was brought.[61] A justice has no jurisdiction of replevin for property in his township, where both parties reside elsewhere.[62]

Jurisdiction in criminal matters.[63]—Justices usually have jurisdiction of crimes summarily triable.[64] A justice has jurisdiction as an examining magistrate of the offense of indecent exposure.[65] In Kansas, a justice is without juris-

penalty in excess of the statutory amount. Richland Tp. v. Cliff [Mich.] 92 N. W. 285.

51. Croskey v. Wallace, 22 Pa. Super. Ct. 112.

52. Ejectment. McMahon v. Howe, 40 Misc. [N. Y.] 546. A Nebraska justice in an action for trespass to lands may try only the fact of possession. He has no jurisdiction to inquire into the title or rights of possession between the parties. Dold v. Knudson [Neb.] 97 N. W. 482. The landlord and tenant act of North Carolina gives a justice no jurisdiction of ejectment by a mortgagee against a mortgagor in possession involving title to realty. Smith v. Garris, 131 N. C. 84. In an action on a bond for the removal of a cause on the ground that the title to land was involved it is no defense that plaintiff brought the action as agent of the owners of the premises. Curtiss v. Curtiss, 182 Mass. 104.

53. Graham v. Conway, 91 Mo. App. 391.

54. Obstruction of highway. Dolton v. Dolton, 201 Ill. 155. Title to realty is not brought in question so as to require bond on removal where the action was appealed in a controversy as to the title to ice between parties claiming under sale from lessee and owner of pond respectively. Abbott v. Cremer [Wis.] 95 N. W. 387. An action on a note given for a contract to convey land, the only defense being payment. Patterson v. Freeman, 132 N. C. 357. An action on covenants against incumbrances in a warranty deed does not involve title to real estate. Dafoe v. Keplinger [Neb.] 95 N. W. 674.

55. Heiney v. Heiney [Or.] 73 Pac. 1038. Title to real property is not involved in an action for forcible entry and detainer by plaintiff's allegation that he was the owner of the property and its denial by defendant, the allegation being unnecessary. Chicago, etc., R. Co. v. Nield [S. D.] 92 N. W. 1069.

56. Where damages to realty are remote a justice has no jurisdiction under laws conferring jurisdiction of trespass for direct and immediate injuries to realty. Duross v. Hobson, 3 Pen. [Del.] 445. The action for willful trespass on lands is within New Jersey justice jurisdiction and defendant may plead title. Carcin v. Roberts [N. J. Law] 55 Atl. 43.

57. Under the Oregon laws giving justices jurisdiction of actions to recover possession of real property and making an appearance equivalent to personal service, a justice court in unlawful detainer is given jurisdiction by filing of answer by defendant. McAnish v. Grant [Or.] 74 Pac. 396. The California code giving justices jurisdiction of forcible entry and detainer within certain limits as to amount includes both actions of forcible entry and unlawful detainer though such actions are separately defined by other sections [Cal. Code Civ. Proc. §§ 113, subd. 1, 1160, 1161]. Ivory v. Brown, 137 Cal. 603, 70 Pac. 657.

58. Residence sustaining jurisdiction is shown by residence on party's own premises, his residence in county contended for being in a hotel, he having no home place in such county. Kent v. Crenshaw [Iowa] 94 N. W. 1131.

59. A railroad maintaining a station for local business is not a resident of a city within laws depriving justices outside the city of jurisdiction over residents of such city and investing jurisdiction in city courts. Robinson v. Missouri Pac. R. Co. [Kan.] 72 Pac. 854.

60. Strowbridge v. Miller [Neb.] 94 N. W. 825.

61. Lewis v. White [Del.] 55 Atl. 830.

62. Dennis v. Bailey [Mo. App.] 78 S. W. 669. Lack of jurisdiction because of nonresidence of parties is not waived by going to trial. Dennis v. Bailey [Mo. App.] 78 S. W. 669.

63. See Criminal Law for jurisdiction of courts of general jurisdiction; Indictment and Prosecution, § 18, for procedure on summary prosecutions; Arrest and Binding Over for jurisdiction and proceedings of committing magistrates.

64. Justices in Idaho have jurisdiction of the violation of gambling laws (In re Rowland [Idaho] 70 Pac. 610), and in North Carolina they have concurrent jurisdiction with the superior court of a violation of the anti-dueling law (State v. Fritz [N. C.] 45 S. E 957). In Kentucky justices of the peace have jurisdiction to try offense of wilfully obstructing public roads [Ky. St. §§ 1093, 1141] Cincinnati, etc., R. Co. v. Baughman, 25 Ky. L. R. 705, 76 S. W. 351.

65. State v. Perry, 117 Iowa, 463.

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diction to commit a boy to the reform school.[66] A justice's jurisdiction, being strictly limited, is lost by disregard of statutes regulating procedure as by proceeding after an affidavit for change of venue is filed,[67] or continuance for longer than the statute allows.[68]

Objection to jurisdiction.—Objection to disqualification may be raised on appeal.[69] An objection to jurisdiction on the ground that the parties did not live in the justice's town is waived by going to trial without raising the objection.[70] It is an open question in New Jersey whether question of jurisdiction is waived by failure to object until after a jury has been demanded, impaneled and sworn.[71]

Acts in excess of jurisdiction may be restrained.[72]

§ 4. *Procedure in justices' courts. In general.*—A justice's court in Connecticut is a court of record.[73]

A suit in a justice's court is commenced by the delivery of the writ to the constable.[74] Error in commencing an action on Sunday may be waived by filing pleas of reconvention.[75]

A party may waive a tort and sue as on a contract.[76]

The docket of a justice is evidence of matters required by law to be stated therein and of other proceedings had before him in the cause which he may recite therein.[77]

Change of venue.—The affidavit for change of venue on the ground of bias should state reasons why affiant believes he could not obtain a fair trial.[78] The affidavit cannot be amended at the hearing,[79] and is not invalidated by failure of the notary to state the date of the expiration of his commission.[80] The entry of a judgment after a sufficient affidavit for change of venue is filed is a nullity.[81] The error in wrongfully denying the change is not waived by participation in the trial.[82] Where defendant, granted a change of venue, refuses to pay accrued costs as required by law, the justice may proceed with the trial.[83]

Contempt.—Where the alleged contempt was committed out of court, proceedings thereon must be based on complaint, information or affidavits, and the justice's record must show same.[84] Under laws allowing punishment by fine and imprisonment for contempt, a justice may sentence to imprisonment without imposing a fine.[85]

Criminal prosecutions.[86]—A magistrate may not issue a warrant for a crime unless he has some evidence that it has been committed.[87] The information must

66. In re Stokes [Kan.] 73 Pac. 911.
67. Baskowitz v. Guthrie [Mo. App.] 73 S. W. 227.
68. Burbanks Hardware Co. v. Hinkel, 76 App. Div. [N. Y.] 183; Holz v. Rediske, 116 Wis. 353; Reed v. Parker [Mich.] 95 N. W. 979; Moore v. Taylor, 88 App. Div. [N. Y.] 4.
69. Knowledge thereof was not had until after judgment. Walters v. Wiley [Neb.] 95 N. W. 486.
70. Huber v. Ehlers, 76 App. Div. [N. Y.] 602. The objection that the action is brought in the wrong township is lost where not taken at the trial [Cal. Code Civ. Proc. § 890, subd. 4]. McGorray v. Superior Court [Cal.] 74 Pac. 853.
71. State v. Fleming [N. J. Law] 53 Atl. 225.
72. The supreme court of New York may restrain a justice from issuing compulsory process of subpoena under information insufficient to give him jurisdiction. People v. Tuthill, 79 App. Div. [N. Y.] 24.
73. Church v. Pearne, 75 Conn. 350.
74. Rev. St. Mo. 1899, § 3850. Heman v. Larkin, 99 Mo. App. 294; Id. [Mo. App.] 70 S. W. 907.
75. Benchoff v. Stephenson [Tex. Civ. App.] 72 S. W. 106.
76. Parker v. Southern Exp. Co., 132 N. C. 128.
77. Heman v. Larkin [Mo. App.] 70 S. W. 907.
78, 79. Bacot v. Deas [S. C.] 45 S. E. 171.
80. Baskowitz v. Guthrie, 99 Mo. App. 304.
81. A circuit court may vacate the judgment of a justice wrongfully refusing a change of venue and send the case back with directions to grant the change. Baskowitz v. Guthrie, 99 Mo. App. 304.
82. O'Reilly v. Henson, 97 Mo. App. 491.
83. Mont. Code Civ. Proc. § 1484. Taney v. Vollenweider [Mont.] 72 Pac. 415.
84, 85. Church v. Pearne, 75 Conn. 350.
86. See, also, Indictment and Prosecution, § 18.
87. People v. McGirr, 39 Misc. [N. Y.] 471.

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show the commission of an offense.[88] In Missouri, a justice cannot issue a warrant for an accused until the prosecuting attorney has filed an information, unless there is danger of escape or he is without a known place of abode and may not issue the warrant on the mere affidavit of the complaining party.[89] In Nebraska, a justice may not accept money in lieu of bail.[90]

Attachment and garnishment.—In Missouri, attachment will lie only where the property is in the justice's township or in the defendant's township or an adjoining township.[91] Attachment for rent will not be defeated on the ground that justice attached jurat as a notary public.[92] The Idaho act for the prorating of proceeds of attached property does not apply to justice's courts.[93] In Illinois, the trial of the right of property attached is had before the justice issuing the writ if he resides in the county, or if unable to attend then before some other justice in the county or before a justice of the county of the levy if the writ was issued from another county.[94]

The affidavit in garnishment must show the judgment on which the proceedings are based, the amount thereof and execution issued thereon and returned unsatisfied.[95] A mortgagee obtaining the release of an attachment levied on mortgaged property in the hands of a third person who is summoned in garnishment cannot object to an order requiring garnishee to pay a sum of money into court for the benefit of plaintiff.[96]

Process and appearance.—The summons in an action by a partnership need not recite that fact.[97] A copy of the cause of action is made a part of the summons in some states.[98] Jurisdiction of a corporation is not acquired by summons against the officers thereof as individuals.[99] In Nebraska, a summons must be served at least three days before the return day;[1] in New York, not less than six nor more than twelve days before the return day.[2] A summons is not rendered invalid by being made returnable on a holiday. The party may appear the first day thereafter.[3] An intervening holiday is not to be excluded.[4] The docket should show when the summons was issued,[5] and contain the officer's return.[6] Prior to return, the justice is without jurisdiction of the person of defendant.[7] A party may

88. An information that defendants committed "the crime of misdemeanor" at a certain time and place by violating the liquor tax law did not sufficiently state the commission of a crime to give the justice jurisdiction. People v. Tuthill, 79 App. Div. [N. Y.] 24.

89. McCaskey v. Garrett, 91 Mo. App. 354.

90. Bondsmen held not liable for failure to properly account for same. Snyder v. Gross [Neb.] 95 N. W. 636.

91. Belshe v. Lamp, 91 Mo. App. 477.

92. McDermott v. Dwyer, 91 Mo. App. 185.

93. Kimball v. Raymond [Idaho] 72 Pac. 957.

94. The proceeding may be instituted by a mortgagee. Armour Packing Co. v. Sjogren, 103 Ill. App. 197.

95. Garrett v. Murphy, 102 Ill. App. 65.

96. Wiseman v. Jaco [Neb.] 95 N. W. 367.

97. Biddle v. Spatz [Neb.] 95 N. W. 354.

98. In a suit in a justice's court it is immaterial whether the "copy" of the "cause of action sued on" is contained in the body of the summons or is attached as an exhibit thereto. Southern R. Co. v. Collins [Ga.] 45 S. E. 306. A contract a part of notes sued on may properly be attached to the summons. Nat. Computing Scale Co. v. Eaves, 116 Ga. 511.

99. Kirkpatrick Const. Co. v. Cent. Elec. Co., 159 Ind. 639. Act 1895, p. 176, relating to service of process in justice court on agents of foreign insurance companies applies to the city court of Elmira. Murray v. American Casualty Ins. Co., 88 App. Div. [N. Y.] 224.

1. Code Civ. Proc. Neb. § 911. Strowbridge v. Miller [Neb.] 94 N. W. 825.

2. Service on Nov. 29th return day being on December 5th is sufficient. Jones v. Wallace, 75 App. Div. [N. Y.] 401, 11 Am. Cas. 392.

3. Strowbridge v. Miller [Neb.] 94 N. W. 825.

4. Chicago, M. & St. P. R. Co. v. Nield [S. D.] 92 N. W. 1069.

5. Purdy v. Law [Mich.] 94 N. W. 182. A justice in Missouri is not required to enter in his docket the time of the delivery of a summons to the constable. Heman v. Larkin, 99 Mo. App. 294.

6. Where the docket shows issuance of a summons returnable at a certain time and place and a subsequent entry of return and filing showing personal service there is a sufficient showing of personal service on or prior to day of return. Sullivan v. Miles. 117 Wis. 576.

7. Moore v. Taylor, 84 N. Y. Supp. 518.

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show that the summons was not served on him and that the return is incorrect.[8] In Texas, actions may not be commenced in justice courts against nonresidents by notice.[9] A provision governing entry of judgment where one of the defendants is a nonresident does not apply to a nonresident corporation whose secretary was served in another county, the corporation not having appointed an agent in the state on whom service could be made.[10]

Appearance confers jurisdiction.[11] The fact of appearance must be noted in the docket; it cannot be shown by parol evidence.[12] The appearance waives defects in process.[13] There is such appearance where the party asks a continuance.[14]

Pleadings and issues.—Formal pleadings are not required. A plain statement of the demand is sufficient.[15] Rights depend on what is proved and not what is pleaded.[16] A complaint may be filed, though the statute does not require formal pleadings.[17] The justice's summons may be a substitute for the complaint, where no other complaint is filed.[18] The account sued on must in some states be filed with the justice.[19] The title of a bill of particulars is a part of the pleading,[20] and merely formal defects therein will be disregarded.[21] A statement in the bill of particulars that the plaintiff is a partnership formed for the purpose of trade and doing business in the state suffices to sustain an action in the firm name.[22] No pleading is required on the part of an endorser as a basis for judgment against principal debtor.[23] The general issue is raised by appearance of defendant.[24] A failure of consideration for notes may be shown; it is not necessary to set up defense by way of counterclaim.[25] Under laws dispensing with formal pleadings in justices' courts, the contract of shipment is admissible on behalf of the carrier in an action for delay, though not pleaded.[26] A code provision as to the mode of

8. Burbanks Hardware Co. v. Henkel, 76 App. Div. [N. Y.] 183.

9. Carpenter v. Anderson [Tex. Civ. App.] 77 S. W. 291.

10. Code N. C., § 874. Williams v. Iron Belt B. & L. Ass'n, 131 N. C. 267.

11. State v. Perry, 117 Iowa, 463.

12. Shearouse v. Wolf, 117 Ga. 426.

13. Forsythe v. Huey, 25 Ky. L. R. 147, 74 S. W. 1088. On appearance by attorney and objecting for defect in the summons as to the defendant's Christian name the justice has power to amend the summons, the service in all other respects being regular. Abrahams v. Jacoby [N. J. Law] 54 Atl. 525.

14. Holz v. Rediske [Wis.] 97 N. W. 162; Kirkpatrick Const. Co. v. Cent. Elec. Co., 159 Ind. 639.

15. Manley v. Crescent Novelty Mfg. Co. [Mo. App.] 77 S. W. 489. While formal pleadings are not required there must be something alleged in the statement or account filed which will in some manner inform the defendant of what complaint is made. Maxwell v. Quimby, 90 Mo. App. 469. A statement should show whether the party seeks to recover on contract or for negligence. Redmon v. Chicago, R. I. & P. R. Co., 90 Mo. App. 68. A paper reciting "E. K., Dr. to W. J." making sale of saloon stock, $92.50 is a sufficient statement. Johnson v. Kahn, 97 Mo. App. 628. In an action before a justice the cause is sufficiently stated by a statement setting out two claims of work performed between certain dates for defendant by two different parties with the amount due thereon and copies of written assignments of the claims to plaintiff. White v. Mo. Pac. R. Co., 98 Mo. App. 542. Where suit on infant's note was begun in justice court ratification without pleading that fact may be shown on appeal. Snyder v. Gericke [Mo. App.] 74 S. W. 377.

16. Wilcox v. Tetherington, 103 Ill. App. 404.

17. Bessemer Ice Delivery Co. v. Brannon [Ala.] 35 So. 56.

18. Parker v. Southern Exp. Co., 132 N. C. 128.

19. Nickerson v. Leader Mercantile Co., 90 Mo. App. 336. Laws requiring the filing of instruments sued upon do not apply to actions on subscription lists signed by numerous persons. Heinrich v. Mo. & I. Coal Co. [Mo. App.] 76 S. W. 674. The requirement as to filing the instrument sued upon may be complied with after the suit is commenced, or if appealed by filing in the appellate court. Keyes & W. Livery Co. v. Freber [Mo. App.] 76 S. W. 698. The instrument sued on may be filed at any time before the jury is sworn or trial commenced. McDermott v. Dwyer, 91 Mo. App. 185. Rev. St. Mo. 1899, § 3853. White v. Mo. Pac. R. Co., 98 Mo. App. 542.

20. Biddle v. Spatz [Neb.] 95 N. W. 354.

21. Complaint described courts as "justice court" instead of "Recorder of City of G. ex officio justice of the peace." Adams v. Kelly [Or.] 74 Pac. 399.

22. Biddle v. Spatz [Neb.] 95 N. W. 354.

23. Kyle v. Richardson [Tex. Civ. App.] 71 S. W. 399.

24. Melican v. Mo. Edison Elec. Co., 90 Mo. App. 595.

25. Bales v. Heer, 91 Mo. App. 426.

26. Helm v. Mo. Pac. R. Co., 98 Mo. App. 419.

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proof and defense on an open account does not apply to actions for loss or destruction of goods by carrier.[27]

Set-off and counterclaim.—Set-off or counterclaim must be filed before trial.[28] The Wisconsin code allows a justice to dismiss a counterclaim for lack of supporting evidence after the jury is impaneled.[29]

Continuance and postponement.—A justice may grant continuances only where authorized by statute, as the court is one of limited jurisdiction,[30] and an unauthorized continuance will oust the court of jurisdiction.[31] A United States commissioner in Indian Territory having once obtained jurisdiction of subject-matter by filing complaint does not lose it by continuance of the action.[32] A general objection to a postponement will not raise the question of the sufficiency of the affidavit. The insufficiency must be pointed out specifically.[33] A justice's docket giving the reason for the adjournment is conclusive on that question.[34]

Dismissal.—A practice act against dismissal of suits by plaintiff, where set-off is set up, does not apply to the dismissal of appeals from justice courts.[35] A case dismissed for failure to comply with an order for costs may be commenced anew and the case will then stand as if originally commenced on the new complaint.[36]

Juries.—A jury trial is allowed in Alabama only on appeal to a jury from the judgment of a justice.[37] The right of trial by jury cannot be waived by failure of defendant to pay the jury fee.[38]

Trial and new trial.—Jurisdiction is lost by absence of the justice on the day to which the case is regularly adjourned,[39] and nonappearance of plaintiff on the return day of the summons will have the same effect in Michigan.[40] A new trial will not be granted on account of the justice reading his minutes of the evidence to the jury without requesting an absent party to return.[41] A Code provision allowing a new trial for absence of defendant at trial on a showing of injustice and excuse for absence does not apply where the party actually participated in the trial.[42]

27. Ga. Civ. Code 1895, § 4130. Caudell v. Southern R. Co. [Ga.] 45 S. E. 712.

28. Failure to do so prevents party from availing himself thereof on appeal. Hunter v. Helsley, 98 Mo. App. 616.

29. Rev. St. Wis. 1898, §§ 3653, 3571. Fuller v. Tubbs, 115 Wis. 212.

30. Lyman-Eliel Drug Co. v. Cooke [N. D.] 94 N. W. 1041. Where the pleadings are closed on the day to which the case is adjourned a defendant as a matter of right is entitled to an adjournment for one week in Minnesota [Gen. St. Minn. 1894, § 4990]. Kennedy v. Kellum [Minn.] 96 N. W. 792. A second adjournment is allowed in Wisconsin where an answer is put in after the first adjournment where the showing of its necessity is made. Field v. Heckman [Wis.] 95 N. W. 377. In North Dakota a justice may grant a continuance after the commencement of the trial on a showing as to matters coming to applicant's knowledge after the commencement of the trial [Rev. Codes N. D. 1899, § 6650]. Lyman-Eliel Drug Co. v. Cooke [N. D.] 94 N. W. 1041.

31. Burbanks Hardware Co. v. Henkel, 76 App. Div. [N. Y.] 183, 12 Ann. Cas. 66. A justice loses jurisdiction where he adjourns a case the fourth time on his own motion without consent of both parties or affidavit of absence of necessary witness. Holly v. Rediske, 116 Wis. 353. A justice will lose jurisdiction of resident defendants by adjourning case to the return day of a defective alias summons sent to another county. Reed v. Parker [Mich.] 95 N. W. 979. A New York justice adjourning a case for more than eight days as allowed by the code loses jurisdiction. Moore v. Taylor, 84 N. Y. Supp. 518.

32. Where unable to try case at one term he may continue same until following term. Franklin v. Bottoms [Ind. T.] 76 S. W. 287.

33. Lyman-Eliel Drug Co. v. Cooke [N. D.] 94 N. W. 1041.

34. The docket showed that the adjournment for the fourth time was because of absence of attorney, the law allowing such adjournment only on consent of both parties or affidavit of absence of necessary witnesses. Holz v. Rediske, 116 Wis. 353.

35. Maplewood Coal Co. v. Phillips [Ill.] 69 N. E. 514.

36. Donahoe v. Mitchem [Okl.] 74 Pac. 903.

37. Beach v. Lavender Bros. [Ala.] 35 So. 352.

38. Pinckney v. Green [S. C.] 45 S. E. 202; Mackenzie v. Gilbert [N. J. Law] 54 Atl. 524.

39. McKenna v. Murphy, 68 N. J. Law, 522.

40. Purdy v. Law [Mich.] 94 N. W. 182.

41. Welker v. Allen, 39 Misc. [N. Y.] 523.

42. Code Civ. Proc. § 3064. Fischer v. Brooklyn Heights R. Co., 84 N. Y. Supp. 254.

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Verdicts and judgments.—A finding by a jury that "we the jury find for the plaintiff and render judgment for a specified sum" is a verdict and not a judgment.[43] A justice in Nebraska may set aside a verdict for fraud, partiality or undue means.[44]

Judgments.—Formality is not required; the judgment is sufficient if the docket recites that the court rendered judgment for a certain amount and for designated sum as costs,[45] and may be aided by marginal notes, files and record.[46] Parties may in some states consent that case be taken under advisement, though the statute requires immediate entry of judgment.[47] In proceedings for trial of right of property in Nebraska, the only judgment the justice may render is for costs, the order for restoration not being a judgment, but merely the means of apprising the officer of the result of the proceeding.[48] On a summons returnable forthwith, a judgment by default is properly entered on the day of return.[49] A law requiring rendition of judgment within four days allows rendition on the fifth day, where the fourth day was Sunday.[50]

In some jurisdictions, a justice has power to set aside a judgment rendered by him.[51] Where the judgment is invalid, a direct suit will lie to set same aside,[52] but such suit may not be had before the justice, as he is without equity jurisdiction.[53] The existence of a meritorious defense must be shown,[54] and this rule applies equally where the action is to restrain enforcement.[55] Bar by limitations is such a defense.[56] A justice's judgment will not be enjoined where party has another adequate legal remedy.[57]

Where the justice has jurisdiction of the person and subject-matter, the judgment is not subject to collateral attack,[58] and this is the case where the judgment is regular on its face.[59]

43. And the copying of such verdict in the docket without judgment whereby party may be harassed authorizes quashal of such supposed judgment without showing a defense. Beach v. Lavender Bros. [Ala.] 35 So. 352.

44. Neb. Code Civ. Proc. § 983. Dafoe v. Keplinger [Neb.] 95 N. W. 674.

45. Glaucke v. Gerlich [Minn.] 98 N. W. 94. Under laws allowing intendments favorable to the sufficiency of proceedings before justices it is not material that the judgment should show that trial was had at the hour fixed in the citation [Shannon's Code, § 5988]. McDougle v. Fulmer [Miss.] 34 So. 152.

46. Fowler v. Thomsen [Neb.] 94 N. W. 810.

47. Westover v. Van Dorn Ironworks Co. [Neb.] 97 N. W. 598.

48. Neb. Code Civ. Proc. § 996 et seq. McCormick Harvesting Mach. Co. v. Scott [Neb.] 92 N. W. 599.

49. Heavalow v. Conner [Del.] 54 Atl. 1055.

50. Huber v. Ehlers, 76 App. Div. [N. Y.] 602.

51. Upon the hearing of a petition for a writ of prohibition to prevent a justice of the peace from setting aside a judgment rendered by him it is competent to prove by the parol testimony of the magistrate that the judgment which was apparently valid was in reality void as having been rendered at a time when no judgment could lawfully be rendered in his court. Bacon v. Jones, 117 Ga. 497. In Missouri a justice is without power to set aside a judgment at the instance of plaintiff, the statute allowing the justice power to set aside a judgment only giving that relief to defendant [Rev. St. Mo. 1899, § 3969]. Crooker Shoe Co. v. Fry [Mo. App.] 78 S. W. 313.

52. Where the defects invalidating a justice's judgment appear on the face of the transcript advantage thereof may be taken in an action to quiet title to land sold on an execution thereunder. Purdy v. Law [Mich.] 94 N. W. 182. An action to set aside a justice's judgment all parties in interest being made defendants is a direct and not a collateral attack and proof outside the record as to service of process on which the judgment is based is admissible. Carpenter v. Anderson [Tex. Civ. App.] 77 S. W. 291.

53. Frankel v. Garrard, 160 Ind. 209.

54. Equitable relief will not be granted against a justice's judgment void for want of jurisdiction of the person of defendant unless on showing of the existence of a meritorious defense thereto. Jurisdiction lost by unauthorized continuance. True v. Mendenhall [Kan.] 73 Pac. 67. Where rendered against an infant, for whom no guardian had been appointed a meritorious defense need not be shown. Weiss v. Coudrey [Mo. App.] 76 S. W. 730.

55, 56. Strowbridge v. Miller [Neb.] 94 N. W. 825.

57. A bill will not lie to restrain the enforcement of a justice's judgment where plaintiff has an adequate remedy by appeal. Dolton v. Dolton, 201 Ill. 155. A bill to enjoin a judgment as void must show that plaintiff is without an adequate remedy at law. Hickok v. Caton, 53 W. Va. 46.

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A justice's judgment duly transcripted has the same effect as if rendered by a court of record.[60] A suit on a justice's judgment is barred after five years in Missouri, and may be revived by scire facias at any time within five years.[61] The Mississippi circuit courts have jurisdiction of foreign justices' judgments where the amount of the judgment plus costs paid by plaintiff therein exceed $200.[62]

The judgment of a justice is not such a record as entitles it to be introduced without proof of the handwriting of the justice who rendered it.[63]

Executions.—The justice's docket must separately state the items for which execution is issued.[64] The execution may be amended,[65] and is not invalid for failure to fill unnecessary blanks.[66] Where the constable made two returns, one on the execution which showed a valid garnishment and another on the notice to the garnishee, insufficient for failure to make the declaration to the garnishee as required by law, the return on the execution will control.[67] Several executions in favor of different persons cannot when levied on the same property be met by a single claim of property by a third person.[68] Rights acquired by a bona fide purchaser on an execution on a justice's judgment fair on its face will be protected, though the judgment be invalid.[69] A justice may not quash an execution.[70]

Costs.—Requirement of security for costs in suits by nonresidents is waived by appearance and request for postponement.[71] In Louisiana, defendant in a peace bond proceeding cannot be required to pay costs.[72]

§ 5. *Appeal and error.*—Errors of the justice in matters of which he had jurisdiction will be reviewed only by appeal and not by writ of review,[73] nor by prohibition,[74] nor by injunction.[75] The right of appeal in particular actions,[76]

58. Brush v. Smith [Cal.] 75 Pac. 55. A judgment may not be avoided for error of a justice in passing on a motion for a continuance. Disque v. Herrington, 139 Cal. 1, 72 Pac. 336. The judgment of a justice is not subject to collateral attack for mere irregularities attendant on its rendition. Kendall v. Smith [Kan.] 72 Pac. 543. A justice's judgment rendered on service within and less than the period provided by law is not subject to collateral attack for insufficiency of service. Crooker Shoe Co. v. Fry [Mo. App.] 78 S. W. 313.

59. A justice's judgment regular on its face cannot be impeached collaterally by showing that neither party lived in the township adjoining the justice's residence. Cole v. Potter [Mich.] 97 N. W. 774.

60. So held as to limitations applicable and liability to collateral attack. Cole v. Potter [Mich.] 97 N. W. 774. A transcripted judgment under laws investing such judgments with dignity of higher court judgments is not within limitation laws applicable only to courts not of record. Sullivan v. Miles, 117 Wis. 576. Under the laws of West Virginia a judgment of a justice is a lien on realty from the date of rendition but not as against a bona fide purchaser unless docketed in the judgment lien record in the clerk's office. Nuzum v. Herron [W. Va.] 44 S. E. 257.

61. Rev. St. Mo. 1899, § 4273. Sublette v. St. Louis, I. M. & S. R. Co., 96 Mo. App. 113.

62. McDougle v. Fulmer [Miss.] 34 So. 152.

63. Patterson v. Freeman, 132 N. C. 357.

64. Where the justice issuing the execution on which garnishment was levied failed to separately state on his docket an account of the debt, damages and costs and of the fees due each person and the rate of interest as required by law the execution was void and the garnishment insufficient to confer jurisdiction of debts sought to be attached [Rev. St. Mo. 1899, § 4037]. Kansas & T. Coal Co. v. Adams, 99 Mo. App. 474.

65. A justice's execution may be amended by inserting the name of the township, the name of the justice and the county appearing. Brann v. Blum, 138 Cal. 644, 72 Pac. 168.

66. A provision against unfilled blanks does not require that name should be inserted in a blank following the word defendant in an execution. Brann v. Blum, 138 Cal. 644, 72 Pac. 168.

67. Rev. St. Mo. 1899, § 338. Kansas & T. Coal Co. v. Adams, 99 Mo. App. 474.

68. Miller v. Mattox [Ga.] 45 S. E. 237.

69. Carpenter v. Anderson [Tex. Civ. App.] 77 S. W. 291.

70. Brownfield v. Thompson, 96 Mo. App. 340. A United States commissioner is without power to quash an execution on the ground that the judgment was void. Little v. Atchison, etc., R. Co. [Ind. T.] 76 S. W. 283.

71. Costello v. Palmer, 20 App. D. C. 210.

72. State v. Foster, 109 La. 587.

73. McAnish v. Grant [Or.] 74 Pac. 396. Refusal to grant a continuance. Disque v. Herrington, 139 Cal. 1, 72 Pac. 336. A case in appellate court on writ of error upon request of plaintiff in error will be treated as being in said court on appeal although the requirements of the statute as to form of petition and bond in such appeal have not been complied with. Schaffer v. McJunkin [W. Va.] 46 S. E. 153.

74. Knight v. Zahnhiser, 53 W. Va. 370.

75. Failure to pursue remedy by appeal or certiorari does not authorize substitution of suit by injunction. Kyle v. Richardson

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or by one of several defendants,[77] or by a garnishee,[78] being dependent on statute, is sometimes restricted. The appeal lies only from a final judgment,[79] and in most states is given only where a stated amount is involved.[80]

An appeal from a justice's judgment in an ordinary action amounts to a general appearance in the case,[81] and waives irregularity in the service of process.[82] It vacates the judgment until appeal is disposed of, but on dismissal of appeal the justice's judgment becomes final.[83] While the error proceeding from an order discharging an attachment is pending, the justice may try the action, but has no jurisdiction to tax the costs to either party.[84]

Some states require a showing of good faith.[85]

Appellate jurisdiction.—An appeal will lie to the supreme court of Indiana where the proper construction of a statute is in question.[86] The court to which the appeal is taken is limited by the jurisdiction of the justice,[87] and where the

[Tex. Civ. App.] 71 S. W. 399. A justice's judgment final as less than the amount necessary for appeal may not be reviewed by means of an injunction against the issuance of an execution thereunder. St. Louis, etc., R. Co. v. Coca Cola Co. [Tex. Civ. App.] 75 S. W. 562.

76. In Nebraska prior to 1901 no appeal would lie from a judgment in forcible entry and detainer. Sullivan Transfer Co. v. Paska [Neb.] 96 N. W. 163.

77. The laws of Missouri allow such an appeal. Roberts, J. & R. Shoe Co. v. Coulson, 96 Mo. App. 698.

78. The laws of Wisconsin allow defendant to appeal from a judgment rendered by a justice against a garnishee [Rev. St. Wis. 1898, §§ 3722, 3753]. Eastlund v. Armstrong, 117 Wis. 394. The payment by a garnishee of a municipal court judgment does not affect defendant's right to appeal. Id.

79. A judgment is not final which does not dispose of a cross-action or plea in reconvention. Carothers v. Holloman [Tex. Civ. App.] 75 S. W. 1084. That "the court heard the evidence and considers from the evidence and contract in court that the tender is all that is due the plaintiffs and so renders judgment" shows a judgment authorizing an appeal. Oklahoma Vinegar Co. v. Kaupp, 136 Ala. 629. An appeal lies from a justice's judgment amended nunc pro tunc to show a judgment disposing of the entire case though he had lost jurisdiction of the suit and the time for appeal had expired, he having the power to amend his records to correct clerical errors. Gray v. Chapman [Tex. Civ. App.] 74 S. W. 564. A contention that a judgment was entered on a nonsuit preventing appeal is not sustained where plaintiff after impaneling the jury on defendant's plea of not guilty refused to proceed and directed the justice to enter judgment for costs. Severance v. Elliott [Vt.] 56 Atl. 85.

80. A county court has no jurisdiction of an appeal by defendant where sum demanded in reconvention is less than $20. He may not on appeal increase the sum above that originally demanded. Barnes v. Feagon [Tex. Civ. App.] 74 S. W. 329. Where an execution issues from a justice court for less than $50 and is levied on property worth more than $50 either party to a claim case growing out of such levy may appeal to the superior court. Napier v. Woodall [Ga.] 45 S. E. 684. In Delaware there may be no appeal from a judgment for five dollars or less by a party against whom it is given where there is no counterclaim or set off pleaded [Rev. Code Del. 1893, p. 754, c. 99, § 24]. Armstrong v. Brockson, 3 Pen. [Del.] 587. A plea in excess of the amount necessary to appeal having been abandoned and plaintiff's demand being for less there could be no appeal from a judgment for plaintiff's full demand. Texas, etc., R. Co. v. Hooks [Tex. Civ. App.] 70 S. W. 233. Where the amount of a tender deducted from the recovery leaves an amount less than the statutory sum allowed for appeal the right thereto is lost. Siver v. Mulligan [Iowa] 94 N. W. 491. Appeal from justices in Indian Territory may be had without reference to the amount of the judgment. Missouri, etc., R. Co. v. Phelps [Ind. T.] 76 S. W. 285; Dennee v. McCoy [Ind. T.] 69 S. W. 858. Act Cong. March 1, 1895, providing for appeal when "judgment" exceeds $20 violates Const. Amend. 7, allowing appeal where "value in controversy" exceeds such sum. Missouri, etc., R. Co. v. Phelps [Ind. T.] 76 S. W. 285; Archard v. Farris [Ind. T.] 69 S. W. 821.

81. Rev. St. Mo. 1899, § 4060. Wencker v. Thompson's Adm'r, 96 Mo. App. 59.

82. Silley v. Burt, 21 Pa. Super. Ct. 518.

83. Sublette v. St. Louis, etc., R. Co., 96 Mo. App. 113.

84. An error proceeding from an order of a justice discharging an attachment continues the attachment lien and brings the ruling to the appellate court for review. Rhodes v. Samuels [Neb.] 93 N. W. 148.

85. An affidavit of good faith as a condition to appeal is not invalid by reason of erroneous designation of party in one part of the affidavit the party being correctly designated in another part. Ladd v. Witte, 116 Wis. 85. An appeal will not be defeated under the Wisconsin Code by the fact that the affidavit of good faith was not separately entitled and neither it nor the notice gave the name of the particular justice the papers in all other respects satisfying the statutory requirements. Wattawa v. Jahnke, 116 Wis. 491.

86. Action for construction of contract allowing use of premises in operating for natural gas held not to involve construction of landlord and tenant act [Burns' Rev. St. 1901, § 1337f]. Mendenhall v. Diamond Plate Glass Co. [Ind.] 68 N. E. 595.

87. Shea v. Regan [Mont.] 74 Pac. 737; Hesser v. Johnson [Okl.] 74 Pac. 320; Mc-

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justice had no jurisdiction, the higher court has none;[88] hence, the appellate court may not enter a judgment in excess of the justice's jurisdiction.[89] The amount in controversy at the time of rendition of judgment by the justice controls and fixes the status as to jurisdiction on appeal.[90] A court to which an appeal is taken by one filing a plea of reconvention in the lower court in excess of the justice's jurisdiction is not ousted of jurisdiction by defendant's abandonment of his appeal, this not amounting to an abandonment of the plea.[91] When the justice determines that the action involves title to real estate, the appellate court takes original jurisdiction without regard to whether his determination is right.[92] In Alabama, no plea in abatement having been filed for want of jurisdiction in that the amount demanded exceeded the jurisdiction on appeal, the case will be treated as though it originated in the appellate court and the recovery may exceed the amount of the justice's jurisdiction.[93] In Virginia, the appeal in the first instance is to the county or corporation court of the county, except in cases involving constitutionality of ordinances and by-laws, when the appeal is to the circuit having jurisdiction over the county or corporation.[94]

Time for taking appeal.—In New York, the time allowed one not personally served and not appearing runs from time of service of notice of judgment.[95] An appeal from a justice's judgment in an unlawful detainer action is returnable to the circuit court in Missouri within six days after its rendition, if rendered during term of circuit court to which appeal is taken.[96] That appeal was taken within the statutory three days is shown where the traverse was filed and bond executed the second day after the trial as shown by the record.[97] The appeal will be allowed on a showing of ignorance of rendition of judgment within the statutory time, where defendant is a nonresident and action is commenced on attachment and the party has used diligence.[98]

Notice of appeal.—Notice of appeal may be served either on the adverse party or his attorney.[99] In unlawful detainer in Missouri, it must be given ten days before the first day of the term at which the cause is to be determined.[1] Under the Iowa practice, a failure to give notice of an appeal ten days before the next term after rendition continues the case over such term, unless there is a waiver or voluntary appearance.[2] The notice is not defective for failure to state the date of the judgment; the style of the cause and the name of the justice rendering the judgment being given.[3]

Bonds.—An undertaking must be given.[4] In Texas, it is not necessary for appellant to give bond where judgment against him is for costs only.[5] It is gen-

Cormick Harvesting Mach. Co. v. Scott [Neb.] 92 N. W. 599.

88. Sims v. Kennedy [Kan.] 73 Pac. 51.

89. Ferguson v. Reiger [Or.] 73 Pac. 1040. Excess of recovery may be cured by remittitur. Downs v. Bailey, 135 Ala. 329.

90. Barnes v. Feagon [Tex. Civ. App.] 74 S. W. 329.

91. Benchoff v. Stephenson [Tex. Civ. App.] 72 S. W. 106.

92. Westport v. Hauk, 92 Mo. App. 364.

93. Anderson v. Winton, 136 Ala. 422.

94. Valley Turnpike Co. v. Moore, 100 Va. 702.

95. Where personal service was served on one not an agent of defendant and he made no appearance an appeal may be taken before personal service of notice of judgment under a provision allowing 20 days for appeal after service of notice of judgment on one not personally served with summons [N. Y. Code Civ. Proc. § 3046]. Sammis v. Nassau L. & P. Co., 91 App. Div. [N. Y.] 7.

96. The word "term" includes the entire period from first day of term. Hadley v. Bernero, 97 Mo. App. 314. Sunday is to be included. Warner v. Donahue, 99 Mo. App. 37.

97. Forsythe v. Huey, 25 Ky. L. R. 147, 74 S. W. 1088.

98. Jackson v. Jackson [Mich.] 98 N. W. 260.

99. Richmire v. Andrews & G. E. Co., 11 N. D. 453.

1. Mo. Rev. St. 1899, §§ 3366, 4074. American Brass Mfg. Co. v. Philippi [Mo. App.] 77 S. W. 475.

2. Code, § 4560. Insel v. Kennedy [Iowa] 94 N. W. 456.

3. Munroe v. Herrington, 99 Mo. App. 288.

4. An act allowing the prosecution of suit by a poor person without furnishing security for costs does not extend the privilege so as

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erally sufficient where there is a substantial compliance with statutory requirements.[6] In Nebraska, an appeal bond approved by the justice is sufficient, though signed only by the judgment debtors.[7] The bond must be approved.[8] In Minnesota, the sureties may justify before the court commissioner of the proper county.[9] Provisions as to the time of filing appeal bonds are strictly construed.[10] Insufficiency of bond on appeal is waived where the objecting party interposes a counterclaim and participates in a trial of all the issues.[11] One filing a defective appeal undertaking should be allowed to file a new undertaking.[12] A surety on appeal bond is liable on the judgment, though appeal never formally entered in appellate court. The "affirmance" on which the bond is conditioned may be had by the act of the party in failing to enter appeal.[13]

Transcripts and records.—It is the duty of the justice to transmit transcript and he may not delegate the duty to an attorney of one of the parties.[14] The transcript must be complete[15] and certified.[16] A justice amending a transcript in obedience to a rule may not amend as to matters required by such rule.[17] In Wisconsin, the law allows compulsion of justice's return, even after expiration of term of office, and in case of death of justice, to ascertain facts as to trial below by witnesses.[18] A transcript of a justice is not evidence of anything transpiring out of court or not in the regular progress of a cause.[19]

Dismissal.—The appeal will be dismissed for failure to prosecute same with diligence,[20] unreasonable delay in making return,[21] neglect to pay filing fee,[22] failure to give undertaking.[23] It may be dismissed on motion by an appellee

to allow an appeal without giving bond. Hyatte v. Wheeler [Mo. App.] 73 S. W. 1100.

5. Voges v. Dittlinger [Tex. Civ. App.] 72 S. W. 875.

6. A bond on appeal conditioned that appellant shall prosecute his appeal to effect and shall satisfy the judgment which may be rendered against him substantially complies with the Texas statute. Girvin v. Wood [Tex. Civ. App.] 75 S. W. 49. Appeal bond is sufficient that describes courts and parties with enough exactness to identify the cause, the parties, the court, and the nature of the recovery. Kusmierz v. Mahula [Tex. Civ. App.] 77 S. W. 966. An appeal will not be defeated by the omission of the county and number of the justice's precinct from the bond where there is no uncertainty as to such matters and the bond was duly approved. Condon v. Robertson [Tex. Civ. App.] 76 S. W. 934.

7. State Sav. & Loan Ass'n v. Johnson [Neb.] 98 N. W. 32.

8. In North Dakota it is not necessary that the undertaking on appeal be approved and filed in district court before it is served. Wilson v. Atlantic Elevator Co. [N. D.] 97 N. W. 535; Eldridge v. Knight, 11 N. D. 552. Approval of appeal bond is shown by transmission of papers and transcript though the formal approval is not endorsed on the bond. Ragley v. Hobbs [Tex. Civ. App.] 74 S. W. 813. Tendering bond to justice in time and reading names of sureties, their sufficiency not being questioned is a sufficient filing of the bond though approved thereafter. Winner v. Williams [Miss.] 35 So. 308. Where the approval shows that the bond was filed in time the fact of approval thereafter will not invalidate the bond. Id.

9. Betts v. Newman [Minn.] 97 N. W. 371.

10. Ignorance of date of rendition of judgment will not excuse failure. Johnston v. Payton [Neb.] 95 N. W. 777. An appeal will be dismissed where bond not filed as recited in transcript. State v. Hammond, 92 Mo. App. 231. Where the absence of the justice from the state prevents filing appeal bond within the statutory time the appeal may be allowed in Missouri on showing of the facts [Rev. St. Mo. 1899, §§ 4065, 4066]. Atkinson v. Burns, 91 Mo. App. 266.

11. Miller v. Lewis [S. D.] 97 N. W. 364.

12. Wasem v. Bellaho [S. D.] 97 N. W. 718.

13. Morgan v. Soisson, 21 Pa. Super. Ct. 141.

14. Bower v. Patterson, 116 Ga. 814.

15. A record failing to show trial of the case or its decision by the justice and no bond for appeal will not confer jurisdiction on the appellate court [Miss. Code 1892, §§ 83, 84]. Ball v. Sledge [Miss.] 35 So. 214.

16. An appellate court is without jurisdiction where the certificate to the transcript is unsigned and particularly where the papers on file do not show the parties so as to identify the litigation. Demilly v. Grosrenaud, 201 Ill. 272. Laws requiring the justice to send up a true transcript of all docket entries is not complied with by a certificate that the transcript was a true copy of the judgment. Barker v. David [Del.] 55 Atl. 334.

17. Curtis v. Tyler, 90 Mo. App. 345.

18. Rev. St. Wis. 1898, §§ 3764, 3765. Allard v. Smith [Wis.] 97 N. W. 510.

19. McKenna v. Murphy, 68 N. J. Law, 522.

20. Delay of 11 months after perfecting appeal justifies dismissal. American Brass Mfg. Co. v. Phillippi [Mo. App.] 77 S. W. 475.

21. Allard v. Smith [Wis.] 97 N. W. 510.

22. Mo. Rev. St. 1899, p. 2563, § 17. Cabanne v. Macadaras, 91 Mo. App. 70.

23. Heiney v. Heiney [Or.] 73 Pac. 1038.

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where appellant has failed to perfect his appeal by filing his transcript, the appellee not seeking to avail himself of his right to produce a transcript and have judgment of affirmance entered.[24] An appeal will not be dismissed for failure to file the transcript within the statutory time, where appellant was blameless,[25] nor because the transcript is not complete,[26] nor because title to realty is involved, before hearing proof of that fact,[27] nor for failure of defendant to appear where he has answered and raised a material issue,[28] nor for failure to send up certificate as to the payment of costs accruing in the trial of the cause, as this is a matter between the magistrate and the party liable,[29] nor for failure to docket for the proper term where the error was that of the clerk.[30] A motion to dismiss an appeal taken on questions of law only is properly overruled where irregularities alleged do not affect jurisdiction of court over appeal.[31] An order of a county court dismissing an appeal from a justice for lack of jurisdiction is not a final order from which appeal may be taken.[32] An appellate court may reinstate a case improperly dismissed.[33]

Trial term.—In North Carolina, an appeal is to be docketed on the trial docket for the next term, though it is a criminal term.[34] In Delaware, the appeal shall be tried at the first term after the appeal unless continued for cause.[35]

Pleadings and issues.—A plea for the first time in the appellate court is governed by rules of such appellate court.[36] The insufficiency of an affidavit is waived if no motion to dismiss the appeal for defects therein is made.[37] Amendments not changing the issues are allowable[38] within the court's discretion.[39] An amendment in excess of the statutory amount ousts the court of jurisdiction.[40] Necessary affidavits not filed in the justice court may be filed in the appellate court. Counterclaims and set-offs not pleaded in the justice court may not be set up on appeal.[41] A plea of general issue in the appellate court admits the filing of a declaration so as to allow an amendment.[42] A plea to jurisdiction on the ground of nonresidence is waived by plea of general issue in the appellate court.[43] Issues

24. Warner v. Donahue, 99 Mo. App. 37.

25. Hagadorn v. Wagoner [Neb.] 96 N. W. 184; Goodrich v. Peterson [Wyo.] 74 Pac. 497.

26. Diminution of record should be suggested if anything not properly bought is needed. Wolcott's Estate v. McCormick Harvesting Mach. Co. [Neb.] 96 N. W. 216.

27. Pasterfield v. Sawyer, 132 N. C. 258.

28. It is the duty of the plaintiff to prove his case. Barnes v. Southern R. Co. [N. C.] 45 S. E. 531.

29. Gibson v. Cook, 116 Ga. 817.

30. Johnson v. Andrews, 132 N. C. 376.

31. Olson v. Shirley [N. D.] 96 N. W. 297.

32. Valley Turnpike Co. v. Strickler, 100 Va. 702.

33. Code W. Va. 1899, c. 127, § 11. Gorrell v. Willis [W. Va.] 46 S. E. 139.

34. Johnson v. Andrews, 132 N. C. 376.

35. Rev. Code Del. c. 99, p. 755, § 26. Moore v. Pearson Packing Co. [Del.] 55 Atl. 5.

36. Ward v. Reed [Mich.] 96 N. W. 438.

37. Poston v. Williams, 99 Mo. App. 513.

38. Forsythe v. Huey, 25 Ky. L. R. 147, 74 S. W. 1088; Dixon v. Johnson [Or.] 74 Pac. 394. To show that plaintiffs were a partnership. Gunther v. Aylor, 92 Mo. App. 161. Amendments are allowed on appeal in Texas that specify items of damages with more particularity and enlarge the amount. Van Alstyne v. Morrison [Tex. Civ. App.] 77 S. W. 655. One suing for special salary consisting of commissions may not on appeal claim an additional sum as guaranteed salary. Sun Life Ins. Co. v. Murff [Tex. Civ. App.] 72 S. W. 1040. One intervening in a suit in a justice's court to foreclose a lien who fails to ask judgment against defendant may amend in the appellate court. Douglas v. Robertson [Tex. Civ. App.] 72 S. W. 868.

39. Hartford Fire Ins. Co. v. Warbritton, 66 Kan. 93, 71 Pac. 278.

40. Heath v. Robinson [Vt.] 53 Atl. 995.

41. A partial failure of consideration of note sued on by reason of fraud and deceit in sale of article for which note was given is a counterclaim [Rev. St. Mo. § 3852]. Shepherd v. Padgett [Kan. App.] 72 S. W. 490; Shepherd v. Padgitt, 91 Mo. App. 473. That a counterclaim was unnecessary in justice court because an exception to plaintiff's pleading was sustained does not entitle defendant to make it on appeal. Clements v. Carpenter [Tex. Civ. App.] 78 S. W. 369. Objection to a plea as not made in justice court may be made when it is reduced to writing though it had been previously stated. Id.

42. Ovid Tp. v. Haire [Mich.] 94 N. W. 1060.

43. Ovid Tp. v. Haire [Mich.] 94 N. W. 1060. Though on the trial of an action against partners in a justice court defend-

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on appeal are those tried by the justice.[44] Extrinsic evidence to show the nature of a case tried before a justice on a motion directed against an alleged change of issues on appeal should be clear, convincing and satisfactory.[45] On appeal, a party may not avail himself of the fact that no undertaking for costs on a postponement was required where the attention of the justice was not called to the omission.[46] On the trial of an appeal regularly taken, the court may not pass upon the legality of the procedure below.[47]

Trial and judgment.—A case stands for trial de novo where the appeal is on questions of both law and fact.[48] On appeal from an order of a justice denying a motion to open a default judgment, the court may disregard the justice's findings and try the case anew.[49] Where case is tried de novo, the trial is to be without regard to defects in proceedings before the justice.[50] Jury may be claimed on the trial of appeal, though waived before the justice.[51] The superior court in which an appeal to be tried de novo is pending may not vacate the judgment on mere motion.[52] The offer to confess judgment on appeal to save costs must be served on the party representing the party in appellate court.[53] Under laws allowing appellee an affirmance on the payment of a docket fee on failure of appellant to perfect the appeal within the statutory time, the docketing by the clerk without payment by the party will not entitle him to affirmance.[54]

Review.—The court in error proceedings will not review questions raised for the first time in an appeal.[55]

Judicial notice and presumptions.—Courts will take judicial notice of the justice's district.[56]

Nothing can be presumed in favor of jurisdiction; such jurisdiction must appear affirmatively on the face of the proceedings.[57] Appellate courts presume that the justice heard proofs before rendering a default judgment,[58] and that damages assessed were properly ascertained, though that fact does not appear in the judgment.[59] There is a presumption that the debt declared on was within the justice's jurisdiction where the judgment was within the amount and the docket showed plaintiff's appearance and the filing of a written complaint and proof of

ants failed to file an affidavit denying the partnership as required by law they could file same on appeal as the action is there tried de novo. Simon v. Ryan [Mo. App.] 73 S. W. 353.

44. Carey v. Lameroux, 22 Pa. Super. Ct. 560; Van Buren County Sav. Bank v. Mills, 99 Mo. App. 65. Where warrant on which case was tried stated that the debt was due for board it was improper on appeal to admit evidence on a claim for nursing. Harrison v. McMillan, 109 Tenn. 77. The appeal must be disposed of on the same theory that the party tried it in the court below. Snyder v. Gericke [Mo. App.] 74 S. W. 377.

45. Inglehart v. Lull [Neb.] 95 N. W. 25.

46. Lyman-Eliel Drug Co. v. Cooke [N. D.] 94 N. W. 1041.

47. Vandervoort v. Fleming, 68 N. J. Law, 507.

48. Swinehart v. Pocatello M. & P. Co. [Idaho] 70 Pac. 1054.

49. Turner v. Case Threshing Mach. Co. [N. C.] 45 S. E. 781.

50. Bessemer Ice Delivery Co. v. Brannon [Ala.] 35 So. 56.

51. Dennee v. McCoy [Ind. T.] 69 S. W. 858.

52. Deuster v. Zillmer [Wis.] 97 N. W. 31.

53. McLear v. Reynolds, 76 App. Div. [N. Y.] 267.

54. Code Iowa, §§ 4559, 3660. Vasey v. Parker, 118 Iowa, 615.

55. Defects in an affidavit for attachment. Linam v. Jones, 134 Ala. 570. A judgment cannot be impeached for a formal defect in the title describing the court where first raised on appeal. Adams v. Kelly [Or.] 74 Pac. 399. Where a defendant proceeds to trial in justice's court on an amended petition he cannot on appeal urge departure from original complaint. Boeker v. Crescent Belting & Packing Co. [Mo. App.] 74 S. W. 385. An appellate court will not review taxation of costs unless a motion to retax was made in the justice court. Ward v. Rees [Wyo.] 72 Pac. 581. Objections to jurisdiction may be made for the first time on appeal. Fidelity & Deposit Co. v. Jordan [N. C.] 46 S. E. 496.

56. The circuit courts of Alabama will take judicial notice of the ward for which an ex officio justice was appointed. Russell v. Huntsville, R. L. & P. Co., 137 Ala. 627.

57. Garrett v. Murphy, 102 Ill. App. 65

58. Brann v. Blum, 138 Cal. 644, 72 Pac. 168.

59. McDougle v. Fulmer [Miss.] 34 So. 152.

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debt.[60] Under a requirement that justices enter the time of the appearance of the parties, there is no presumption of plaintiff's appearance on the return day where the docket makes no mention of such appearance.[61] County courts in New York may reverse judgments where against the weight of evidence.[62]

Determination.—In an error proceeding from an order discharging an attachment, the only judgment the appellate court may render is the judgment affirming or reversing the order of the justice and taxing the costs.[63] Where the justice's judgment was erroneous and the only error in a default judgment of reversal on appeal was in the taxation of costs, which excess was trifling, an order vacating the judgment of reversal was erroneous.[64] A judgment for restitution "for damages, interest and costs" on reversal of a justice's judgment which has been collected is erroneous under laws declaring that the appellate court shall order the amount collected restored with interest.[65] In some jurisdictions, it is proper to retain the case for trial on reversal.[66] Where the only question on appeal was as to the propriety of the justice's ruling on a jurisdictional question, the fact of a meritorious defense is not material on a motion to set aside a default judgment of reversal.[67] Where the order discharging the attachment is reversed, the justice is reinvested with complete jurisdiction of ancillary proceedings, and may then tax the attachment costs against the unsuccessful party.[68]

§ 6. *Certiorari. Nature and propriety of remedy.*—Certiorari may not be resorted to where the party has a remedy by appeal.[69] It will not lie to set aside a verdict or judgment which is absolutely void.[70] Judgments are reviewable by certiorari where no appeal is provided by statute,[71] and where the justice has proceeded after losing jurisdiction.[72]

When writ will issue and parties.—The writ does not lie from a decision of a

60. Sullivan v. Miles, 117 Wis. 576.

61. Purdy v. Law [Mich.] 94 N. W. 182.

62. The New York Code gives the county court on appeal no power to order a new trial unless the decision is against the weight of evidence [Code Civ. Proc. § 3063]. Murphy v. Dernberg, 84 App. Div. [N. Y.] 101. A county court in New York may reverse a judgment on appeal as against the weight of evidence and order a new trial before the same justice or before another justice to be designated [Laws 1900, c. 553, amending Code Civ. Proc. § 3063]. Hartmann v. Hoffman, 76 App. Div. [N. Y.] 449, 12 Ann. Cas. 124. A code provision allowing reversal of a justice's judgment as against the weight of evidence is to be exercised only where the judgment is palpably against the evidence. Murtaugh v. Dempsey, 85 App. Div. [N. Y.] 204.

63. Rhodes v. Samuels [Neb.] 93 N. W. 148.

64. Field v. Heckman [Wis.] 95 N. W. 377.

65. Rev. St. Wis. 1898, § 3772. Eastlund v. Armstrong, 117 Wis. 394.

66. Where the court reverses the judgment of the justice on petition in error the proceeding should not be dismissed but the case should be set down for trial [Neb. Code Civ. Proc. § 601]. Westover v. Van Dorn Iron Works Co. [Neb.] 97 N. W. 598. The effect of a reversal of justice's judgment dismissing an action is to reopen the case for trial in the appellate court [Rev. Code N. D. 1899, § 6771a]. Olson v. Shirley [N. D.] 96 N. W. 297. A code provision that when the justice's judgment is reversed the appellate court shall retain the case for trial refers only to cases which have been entirely disposed of by final order will not cover reversal of order discharging attachment merely. Rhodes v. Samuels [Neb.] 93 N. W. 148. Where the justice lost jurisdiction by failure to grant change of venue on sufficient affidavit being filed the case will be remanded with direction to grant such change. Baskowitz v. Guthrie, 99 Mo. App. 304.

67. Field v. Heckman [Wis.] 95 N. W. 377.

68. Rhodes v. Samuels [Neb.] 93 N. W. 148.

69. An appeal will lie from the action of a justice overruling a motion to vacate a default judgment and certiorari may not be invoked. State v. Laurendeau, 27 Mont. 522, 71 Pac. 754. Certiorari will not lie to review the judgment of a justice in highway proceedings where he had jurisdiction and no reason is shown why appeal was not resorted to. Hegenbaumer v. Heckenkamp, 202 Ill. 621. A party having a remedy by appeal may not resort to certiorari. Kent v. Crenshaw [Iowa] 94 N. W. 1131.

70. Levadas v. Beach, 117 Ga. 178.

71. Loloff v. Heath [Colo.] 71 Pac. 1113.

72. Certiorari is the remedy to vacate judgments of United States commissioners whether jurisdiction lost of subject matter or of defendant. Franklin v. Bottoms [Ind. T.] 76 S. W. 287. Certiorari is the proper remedy to review irregularity of a court in trying case after jurisdiction is lost by unauthorized adjournment. Vandervoort v. Fleming, 68 N. J. Law, 507.

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justice in a case pending until after the final determination of the case, even though the decision amounts to a final determination of the case.[73] The time within which writ will be granted is governed by statute.[74] Mandamus will lie to compel its dismissal where granted after the expiration of the statutory time.[75] Where a summons in a suit for unlawful detainer and writ of certiorari removing the case were served the same day, there is a presumption that the clerk did not issue certiorari until after service of summons.[76] The justice is the sole respondent and it is improper to make a party to the cause a party respondent.[77]

Proceedings for writ.—A writ of certiorari to a justice may be served by a private person.[78] The testimony should be set out in the answer,[79] and the answer should be authenticated.[80] The testimony need not be set out in the return where the conviction is not summary.[81]

Bond must be given,[82] which may be amended where filed within such time as shall not delay other party.[83]

Hearing and questions which may be raised.—At the hearing of a certiorari in the superior court under the Georgia practice, nothing can be considered by the judge but the petition and the answer, unless the parties consent to wider scope of inquiry and this though the judge has private knowledge of facts not disclosed in the record.[84] Where the evidence was sufficient to support the judgment, the certiorari is properly overruled.[85] Where verdict is not demanded under law or evidence, new trial should be granted.[86] Certiorari should be sustained where

73. Singer Mfg. Co. v. McNeal P. & G. Co., 117 Ga. 1005.

74. Under laws of Texas certiorari cannot be granted after 90 days from judgment of justice [Tex. Rev. St. art. 346]. Kyle v. Richardson [Tex. Civ. App.] 71 S. W. 399. A writ will not be granted after the statutory time for filing notice where the party had knowledge of the suit and had ample opportunity to appeal or bring certiorari under the statute. Jacobs v. Brooke [Mich.] 92 N. W. 783.

75. Jacobs v. Brooke [Mich.] 92 N. W. 783.

76. Gossett v. Devorss, 98 Mo. App. 641.

77. Chamberlain v. Edmonds, 18 App. D. C. 332.

78. Gossett v. Devorss, 98 Mo. App. 641.

79. The answer of a justice to a petition for certiorari should either incorporate therein the evidence introduced on the trial of the case or adopt in whole or in part the statement of such evidence contained in the petition for certiorari. Southern R. Co. v. Leggett, 117 Ga. 31.

80. Where the magistrate's answer to the writ did not verify the statement in plaintiff's petition that a verdict and judgment were rendered against him nor disclose what disposition if any was made of the case the superior court has no jurisdiction to sustain the certiorari. Garrett v. McIntosh, 116 Ga. 911. The certificate by the justice that "true copies of all the proceedings in said cause are herewith sent up" is not a verification of the correctness of the statements contained in the petition for certiorari. Southern R. Co. v. Leggett, 117 Ga. 31. Where the evidence is not properly authenticated by the justice and no exceptions to the answer have been filed as required by law the superior court may on its own motion dismiss the certiorari for ambiguity. Id. A certificate that "the foregoing brief of testimony is true in substance and in form, as far as I can recollect," signed before the petition for certiorari had been presented to the judge of the superior court, is not a substitute for the authentication of the evidence in the answer required by law. Id.

81. N. J. Soc. for Prevention of Cruelty v. Mickeloit [N. J. Law] 54 Atl. 559.

82. The chief clerk of a local freight depot acting as station agent is not an agent qualified to give bond for a railroad on application for certiorari under laws allowing agents to give bonds [Civ. Code Ga. § 4369]. Stevens v. Ala. Midland R. Co., 116 Ga. 790. A certiorari bond should be made payable to a defendant served where action was against two as partners and one was not served and other defendant prevailed on issue that he was not a partner. Writ was void where bond made payable to the partnership. Miller Co. v. Anderson [Ga.] 45 S. E. 365. In Pennsylvania the recognizance to give certiorari the effect of a supersedeas must be taken either by the judge of the court of common pleas or the prothonotary or justice to whom certiorari issues. Wesley v. Sharpe, 19 Pa. Super. Ct. 600.

83. Gossett v. Devorss, 98 Mo. App. 641.

84. Tyner v. Leake, 117 Ga. 990.

85. Southern R. Co. v. Fincher, 116 Ga. 966; Napier v. Dye, 117 Ga. 537. Certiorari is properly overruled where the verdict is sustained by the law and evidence and the complaint merely stated that the verdict was contrary thereto. Weldon v. Ayers, 116 Ga. 181; Lambert Floral Co. v. Lambert, 117 Ga. 188. Certiorari is properly overruled where complaining party consented to inspection of property in dispute and the verdict was based on this inspection. Ford v. Price & L. Cider & Vinegar Co., 116 Ga. 793.

86. Walker v. Hillyer [Ga.] 46 S. E. 92; Hudgins v. Lampkin [Ga.] 45 S. E. 679; Widgeon v. Southern Exp. Co. [Ga.] 45 S. E. 679;

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illegal testimony of a prejudicial character was admitted.[87] There is a presumption of jurisdiction where the petition to review judgment does not deny jurisdiction,[88] and that a case was heard while the court was in lawful session.[89] A certiorari in Georgia may be dismissed on the ground that a question of fact was involved, no appeal to the jury having been entered, the case involving less than $50.[90] It may not be objected that a justice was without jurisdiction because of a district court having cognizance of the action in the city, where there is no proof that the justice resided in the city.[91]

Judgment.—Under the Georgia practice, the court may render final judgment where the error complained of is an error of law,[92] and in cases where certiorari is overruled.[93] Judgment on certiorari setting aside a judgment is improper where the record shows its satisfaction and discharge before the justice made his return thereon.[94]

KIDNAPPING.[95]

A child may be kidnapped by its parent from a lawful custodian.[96] In Montana, secret confinement or imprisonment is not an element of "kidnapping by enticing" one from another state.[97]

LANDLORD AND TENANT.

§ 1. Definitions and Distinctions (668).
§ 2. Creation of the Relation. Leases (669). Use and Occupation (669).
§ 3. The Different Kinds of Tenancies and Their Incidents (672).
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A. Reversion (673).
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§ 5. Mutual Rights and Liabilities in Demised Premises (674).
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§ 9. Landlord's Remedies for Recovery of Rent (688).
§ 10. Landlord's Remedies for Recovery of Premises (692).
§ 11. Liability of Third Persons to Landlord or Tenant (695).
§ 12. Crimes and Penalties (696).

§ 1. *Definitions and distinctions.*—The letting of apartments for a dwelling with the right to enter only for the making of repairs and improvements constitutes the lessor a landlord and not a lodging house keeper or innkeeper.[98] A free-

Lovvorn v. Jones [Ga.] 46 S. E. 92; Ferry & Co. v. Mattox [Ga.] 44 S. E. 1005.

87. Dougan v. Dunham, 115 Ga. 1012.

88. Hegenbaumer v. Heckenkamp, 202 Ill. 621.

89. It being shown that a justice's court regularly met on the 14th of July, but that the magistrate was unable on that day to dispose of all the cases ready for hearing, it is to be presumed, nothing to the contrary appearing, that a particular case tried on the 19th of July was heard while the court was still lawfully in session. Levadas v. Beach, 117 Ga. 178.

90. Singer Mfg. Co. v. Falls [Ga.] 45 S. E. 723.

91. N. J. Soc. for Prevention of Cruelty v. Mickeloit [N. J. Law] 54 Atl. 559.

92. It is only in cases in which the error complained of is an error of law, which must finally govern the case that the trial judge has authority to render a final judgment in a case brought to the superior court by writ of certiorari. Williams v. Bradfield, 116 Ga. 705.

93. Ford v. Price & L. Cider & Vinegar Co., 116 Ga. 793. On the hearing of a petition for certiorari where the certiorari is overruled it is not erroneous for the judge of the superior court to order "that the judgment of the lower court proceed," and that the officers of the superior court have judgment for their costs. Ga. S. & F. R. Co. v. Giddens, 117 Ga. 799.

94. State v. Laurendeau, 27 Mont. 522, 71 Pac. 754.

95. Taking female for forcible marriage or defilement see Abduction, 1 Curr. Law, 6.

96. In re Peck, 66 Kan. 693, 72 Pac. 265.

97. Pen. Code, § 380, subd. 3. State v. Stickney [Mont.] 75 Pac. 201.

98. He has no lien. Shearman v. Iroquois H. & A. Co., 85 N. Y. Supp. 365.

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hold is created if the occupancy may continue during life.[99] One holding premises under contract to purchase cannot be summarily dispossessed as a tenant.[1]

§ 2. *Creation of the relation. Leases. Parties.*—The lessor's estate must be sufficient to support possession.[2] The lease may be made by an agent,[3] and his authority may be implied,[4] or an unauthorized lease may be ratified.[5] Joint agents or trustees must concur.[6] Lessees may hold in common.[7] Leases by public[8] or private corporations[9] may be made within their powers.

Establishment of the relation.—A lease is formed by a meeting of the minds of the parties on the essential elements of the subject-matter.[10] A mere agreement to lease,[11] or mere retention of premises during the pendency of negotiations for a

99. By an instrument by one having right to homestead entry authorizing another to occupy or rent, in consideration of conservation of the property, and to prove up on death of maker of the instrument who reserved certain use of the premises, a freehold estate rather than a lease is created. Mann v. Mann [Cal.] 74 Pac. 995. A writing between a divorced husband and wife, whereby she is given the use of certain property during her life, providing that "this lease" should cease upon her re-marriage, that if the husband sold the property or the house burned, the husband should secure to the wife the rental value thereof, is not a lease in fact, but a conveyance of a life estate. Budlong v. Budlong, 31 Wash. 228, 71 Pac. 751. A lease of agricultural land "for the full term of forty years or during the full term of the natural life" of the lessees, will not be held an estate for years but an estate for life. Wegner v. Lubenow [N. D.] 95 N. W. 442.

1. Rule stated in text held to obtain under agreement for rent upon failure of vendee to comply with terms of agreement, vendor having wrongfully refused tender by vendee. That vendee did not tender exact amount did not alter status of parties. Griffith v. Collins, 116 Ga. 420.

2. Right to rents and profits pending completion of purchase. Fitch v. Windram [Mass.] 67 N. E. 965.

3. A general manager or general agent of a corporation, acting within the scope of his authority, may lease property for corporate purposes. Drew v. Billings-Drew Co. [Mich.] 92 N. W. 774; Donovan v. Schoenhofen Brew. Co., 92 Mo. App. 341.

4. One possessing power of attorney to make a lease may extend one already existing. Pittsburg Mfg. Co. v. Fidelity T. & T. Co. [Pa.] 56 Atl. 436. From mere authority to collect rents, however, authority to make rental contracts cannot be deduced. Dieckman v. Weirich, 24 Ky. L. R. 2340, 73 S. W. 1119. A husband as agent for his wife cannot, in Minnesota, create a leasehold interest in her real property. Van Brunt v. Wallace, 88 Minn. 116. Burden of proving husband's authority is on lessee holding wife's property under lease sealed but not purporting to be in wife's behalf. Her knowledge and acquiescence, however, were held to estop her. Western N. Y. & P. R. Co. v. Rea, 83 App. Div. [N. Y.] 576.

5. Lease authorized by neither lessor nor lessee firm. Golding v. Brennan, 183 Mass. 286.

6. Where, under a trust instrument, the exercise of judgment by all trustees in matters touching the estate is made requisite, a lease by one of such trustees only is ineffective. Ratification by the remainder will not be assumed unless full knowledge on their part is shown. Winslow v. Baltimore & O. R. Co., 188 U. S. 646, 47 Law. Ed. 635.

7. Under agreement that landlord shall have a specified portion of the crop as rent, neither party in fact occupying the premises, the parties become tenants in common. Black v. Golden [Mo. App.] 78 S. W. 301. Where possession of lessees was originally acquired by assignment of lease from another, assignees of lease then agreeing that consideration, profits and losses should be paid and enjoyed equally, and in a subsequent lease no words were used indicating their status, held, under laws of New York, they became tenants in common; held, further, that their original agreement did not make them partners in the leasehold. McPhillips v. Fitzgerald, 76 App. Div. [N. Y.] 15.

8. An enactment authorizing a lease of property acquired by a city for a public purpose for uses private and inconsistent therewith is, in Minnesota, unconstitutional. Sanborn v. Van Duyne [Minn.] 96 N. W. 41.

9. A national bank may lease property for its own use for a period in excess of its legalized existence. Weeks v. International Trust Co. [C. C. A.] 125 Fed. 370. Right of tenancy as between incorporated and unincorporated military organization decided. Mihlbauer v. Infantry Corps, 205 Pa. 180.

10. Scottish American Mortg. Co. v. Taylor [Tex. Civ. App.] 74 S. W. 564. A tenancy will not be deemed to have been created against the intent of the parties. Payment of rent may be evidence of intent. Pusey v. Presbyterian Hospital [Neb.] 97 N. W. 475. Where one party puts in the use of certain property in which he has a life estate against the experience of the other members of a firm, the firm have a leasehold interest in the property. Hart v. Hart, 117 Wis. 639. As to submission of evidence to jury as to offer to lease. Armitage v. Kistler [Neb.] 97 N. W. 1029. Irregularity consisting of interlineations in an oil lease to protect newly discovered heirs deemed waived by original lessor by insisting on performance and acceptance of royalties after discovery of the interlining. Barnsdall v. Boley, 119 Fed. 191.

11. A formal lease was contemplated. St. Louis Brew. Ass'n v. Niederluecke [Mo. App.] 76 S. W. 645. "Agreement to lease" held not to have created a tenancy where tenant rescinded before taking possession and while landlord was still looking up tenant's references. Foster v. Clifford, 86 N. Y. Supp. 28.

Whether a writing is a lease or a mere

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lease, does not create the relation,[12] yet a person entering as a prospective lessee may actually be a tenant.[13] Acceptance and entry into possession are essential.[14] The lease should purport to be the act of the person charged or entitled.[15] An expired lease may prove tenancy and disprove a purchase.[16] A materially altered lease will be rejected.[17]

A lease of premises for immoral purposes is void, conferring no rights on lessee.[18]

The relation reaches to all who obtain possession through the tenant,[19] though for certain purposes not to a subtenant,[20] there being no privity of contract with a subtenant.[21] However, by the assumption of all terms and obligations of the lease by an assignee thereof, a contract may be established between such assignee and the landlord.[22] This the original lessee has no power to annul.[23] Where the tenant surrendered but the landlord procured him to collect rent from a subtenant and conceal the fact of surrender, he thereby accepted such subtenant as a tenant.[24]

Actionable use and occupation.—A landlord may waive trespass and accept the trespasser as a tenant,[25] and recover for use and occupation if the premises were apparently private.[26]

The statute of frauds requires leases for longer than a specified term to be written,[27] but a tenancy may arise from entry and possession and payment of rent

agreement to lease depends upon the intent of the parties. This intent, when ascertained, will overcome a construction otherwise derivable from the words used. Donovan v. Schoenhofen Brew. Co., 92 Mo. App. 341.

12. During a year. Parsons v. Frank, 38 Misc. [N. Y.] 756. Mere talk concerning leasing of property, even though proposed lessee is using the land, may be insufficient to prove agreement to pay rent. Gillespie v. Hendren, 98 Mo. App. 622.

13. Although a contemplated formal lease is not yet signed, one party may nevertheless become tenant of the other under the parol negotiations. Coffee v. Smith, 109 La. 440.

14. Actual occupation is not necessary. Bunch v. Elizabeth City Lumber Co. [N. C.] 46 S. E. 24. Possession will be deemed admitted by admission of making of lease and the grounding of defense on failure of landlord to comply with certain terms of the lease. Malick v. Kellogg [Wis.] 95 N. W. 372. By granting permission to occupy, acceptance of rent and the giving of receipts therefor, tenancy of party is accepted to rejection of tenancy of former tenant. Squire v. Ferd Heim Brew. Co., 90 Mo. App. 462.

15. A lease under seal executed by an agent in his own name and apparently as his own act, though in fact for his principal, is not binding on such principal. Lenney v. Finley [Ga.] 45 S. E. 593. A lease by one acting in fact for another, the only evidence whereof is the word "trustee" following the lessor's name, the transaction will be deemed that of the party signing, the word "trustee" being merely descriptio personae. Fargason v. Ford [Ga.] 46 S. E. 431. A party, though acting merely as agent for one who originally leased the premises, becomes liable for rent specified in a notice that, if he continues in possession, such rent will be charged to him. Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440. In West Virginia, one not mentioned in body of lease is not a party thereto. Barnsdall v. Boley, 119 Fed. 191.

16. Bemis v. Allen, 119 Iowa, 160.

17. Incompetent evidence in the absence of due explanation. Landt v. McCullough [Ill.] 69 N. E. 107.

18. Berni v. Boyer [Minn.] 97 N. W. 121.

19. Neff v. Ryman, 100 Va. 521.

20. In summary proceedings to recover possession by a "landlord" from a "tenant." Schlaich v. Blum, 85 N. Y. Supp. 335. Fictitiously leasing to different tenant to defeat subtenant's right to renewal admitted against owner to show that subtenant was not owner's tenant. Id. Occupation by husband who was to pay fixed charges and interest for use of it shows a tenancy under wife. Wife's declarations to contrary must be connected in point of time. Van Arsdale v. Buck, 82 App. Div. [N. Y.] 383.

21. Williams v. Michigan Cent. R. Co. [Mich.] 95 N. W. 708.

22. Adams v. Shirk [C. C. A.] 117 Fed. 801.

See, also, post, § 5 B, Assignment and subletting.

23. Adams v. Shirk [C. C. A.] 117 Fed. 801.

24. Simmons v. Pope, 84 N. Y. Supp. 973.

25. Merchants' State Bank v. Ruettell [N. D.] 97 N. W. 853; Gillespie v. Hendren, 98 Mo. App. 622. Compare Janouch v. Pence [Neb.] 93 N. W. 217. Evidence as to ownership of property in action for use and occupation. Emory Mfg. Co. v. Rood, 182 Mass. 166.

26. No use and occupation where occupant could not have supposed premises were private property. Ettlinger v. Degnon McLean Contracting Co., 55 N. Y. Supp. 394. Evidence of same. Id.

27. See Frauds, Statute of, 2 Curr. Law, 108. A parol lease until landlord could obtain a new tenant, the tenant being in fact secured within a year, held not within the statute of frauds. Drew v. Billings-Drew Co. [Mich.] 92 N. W. 774. One agreeing to lease concurrently with agreement of landlord to make improvements cannot claim agreement void under statute of frauds because making of improvements not stated as part of con-

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under a void lease,[28] and the statute is no defense to liability for use and occupation.[29] A parol lease for such term, to begin in futuro, is void.[30] Taking possession and payment of rent will take a parol lease out of the statute.[31] A lease wanting the signature of the lessee may be valid by estoppel.[32]

Breach of agreement to make lease.—A tenant's refusal to execute a lease as agreed makes no cause of action where he attorned by consent.[33] Earnest money may be recovered back where the prospective tenant refuses in good faith to make a lease.[34]

Construction of leases, and proof of the terms of tenancy.—The wording, read in connection with the surrounding circumstances, the subject-matter and the situation of the parties, must enable the land leased to be located.[35] A word may be construed according to the sense required.[36] The lease may contain collateral contracts.[37] Where complete in itself other instruments will be disregarded.[38] The ordinary rule as to parol explanations of writings prevails.[39] A void lease may be evidence of amount of rent only.[40] An occupant during a term who is not by assignment or otherwise a party to the lease is not presumed to be in under it.[41] A hold over is presumed to be on the same terms.[42] A provision onerous to the

sideration in the written agreement. Donovan v. Shoenhofen Brew. Co. [Mo. App.] 76 S. W. 715. The New Jersey statute of frauds, in its bearing on leases construed. Charlton v. Columbia Real Estate Co., 64 N. J. Eq. 631.

Sufficiency of writing. A proposition to accept a lease if certain specified terms are incorporated, accepted by telegram, satisfies the statute of frauds. Donovan v. Schoenhofen Brew. Co., 92 Mo. App. 341. Signature to a lease by lessor, with unintentional omission of signature by lessee, followed by letter from lessee upon receipt of lease assenting to its terms, satisfies the statute of frauds. Woodruff v. Butler [Conn.] 55 Atl. 167. See, also, Doxey's Estate v. Service, 30 Ind. App. 174.

28. Weinhaner v. Eastern Brew. Co., 85 N. Y. Supp. 354. Acceptance of rent may or may not be held to constitute binding acceptance of party paying as tenant, according to the circumstances. Winslow v. Baltimore & O. F. Co., 188 U. S. 646, 47 Law. Ed. 635.

29. Van Arsdale v. Buck, 82 App. Div. [N. Y.] 383. A wife's promise to continue the payments of rent, upon the death of her husband, the lessee, she to retain possession, is not within the statute of frauds as a promise to pay the debt of another. Linam v. Jones, 134 Ala. 570.

30. Butts v. Fox, 96 Mo. App. 437.

31. Sorrells v. Goldberg [Tex. Civ. App.] 78 S. W. 711. An oral agreement for a lease for more than one year does not constitute an executed contract where payment is merely by endorsement on a past-due note and alleged lessee does not go into possession. Merchants' State Bank v. Ruettell [N. D.] 97 N. W. 853.

32. Baltimore & O. R. Co. v. Winslow, 18 App. D. C. 438. After term cannot object that lessor did not sign lease. Equitable L. A. Soc. v. Schum, 40 Misc. [N. Y.] 657.

33. Silva v. Bair [Cal.] 75 Pac. 162.

34. Aquelina v. Provident Realty Co., 84 N. Y. Supp. 1014.

35. Goodsell v. Rutland-Canadian R. Co. [Vt.] 56 Atl. 7. Where exact location of premises is in dispute, the trial judge may make a personal examination thereof. Weinhaner v. Rockland L. T. Rock Co., 174 N. Y. 509.

A lease so drawn as to be **misleading** as to time, and lacking certainty as to property covered, will not be deemed **constructive notice** to one actually misled thereby. Thurlough v. Dresser [Me.] 56 Atl. 654.

36. Swift v. Occidental M. & P. Co. [Cal.] 74 Pac. 700. Where doubt exists as to whether particular writings constitute a new lease or renewal of one existing, construction placed on writings by parties is competent evidence. Wood v. Edison Elec. Illuminating Co. [Mass.] 69 N. E. 364.

37. A provision in a lease that the lessee might purchase within a specified time for a specified price deemed a contract independent of the lease. Mathews Slate Co. v. New Empire Slate Co., 122 Fed. 972.

See Vendor and Purchaser.

38. Two leases of separate properties, executed on separate dates, neither referring to the other, will be construed as independent instruments. Anderson v. Winton, 136 Ala. 422. An instrument containing all essential facts of a lease may be deemed final although referring to another instrument designated as a lease. Bradley v. Metropolitan Music Co., 89 Minn. 516.

39. Parol evidence to explain intent of parties in drawing and executing written lease will not be admitted. Bullock, etc., Elec. Co. v. Coleman, 136 Ala. 610. Parol proof that tenancy was not for year but from month to month is inadmissible. Equitable L. A. Soc. v. Schum, 40 Misc. [N. Y.] 657. That parties agreed at and before the date of execution of written lease that upon sale of premises proceeds should be applied in reduction of tenant's note to landlord cannot be shown by parol. Boone v. Mierow [Tex. Civ. App.] 76 S. W. 772. The real consideration for a contract of lease may be shown by parol. First Nat. Bank v. Flynn, 117 Iowa, 493.

40. Not terms of tenancy. Goodwin v. Clover [Minn.] 98 N. W. 322.

41. Weinhaner v. Eastern Brew. Co., 85 N. Y. Supp. 354.

42. Baylies v. Ingram, 84 App. Div. [N. Y.] 360. Evidence held to show that tenant

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tenant will be presumed to run with the land, even after expiration of the lease.[43] A tenant cannot recover against his landlord for failure to fulfill covenants alleged to have been made by parol prior to execution of the lease.[44]

Reformation will be ordered where it is evident a lease has omitted material covenants through inadvertence of draftsman.[45]

§ 3. *The different kinds of tenancies and their incidents.*[46] *Tenancy for a term or from year to year or term to term.*—One who enters[47] under a lease for a year, void because parol and to begin in futuro,[48] or a tenant for a year holding over,[49] becomes a tenant from year to year. By holding over where tenancy was for one month only, a month to month tenancy is established.[50] Such a tenancy results from accepting a month's rent under a void lease.[51] An oral lease of city property has been held to operate as a lease from month to month.[52]

Tenancy at will.—A tenant at will is one whose estate, commenced under agreement with the landlord, is determinable at the will of either party.[53] Tenancy at will may be established in a variety of ways. Thus the relation may be established by entry into possession with the consent of the landlord pending negotiations for a formal lease;[54] by holding over by consent of landlord until personal property can be removed;[55] by the payment and acceptance of a month's rent under no agreement whatsoever;[56] by entry into possession under an agreement with the landlord, void under the statute of frauds.[57] The owner must consent, mere knowledge does not suffice.[58] The payment of rent in fixed periods may change it to a tenancy from year to year.[59] A tenant at will enjoys control of the premises the same as a tenant for a specified period.[60] He is entitled to grass grown on the premises, and may recover for destruction thereof while it is still standing.[61]

Tenancy at sufferance.—A tenant at sufferance is one who, entering lawfully,

who held over did so on a new agreement. Bon v. Fenlon, 84 N. Y. Supp. 858.

43. Special provision in a lease for a year adverse to lessee, there being neither actual payment of rent nor removal, will be held to run with the land after the expiration of the term, there being continued possession. Kennedy v. Iowa State Ins. Co., 119 Iowa, 29.

44. Drischman v. McManemin, 68 N. J. Law, 337.

45. Thomas v. Conrad, 24 Ky. L. R. 1630, 71 S. W. 903.

46. Evidence to prove character of tenancy. Dixon v. Silberblatt, 86 N. Y. Supp. 262. Evidence that tenant was merely holding over under a monthly lease and not under a parol lease for a term held sufficient for jury. Sorrells v. Goldberg [Tex. Civ. App.] 78 S. W. 711.

47. Tenancy from year to year cannot be predicated on void writing unless the alleged tenant had possession or the right to it. Seymour v. Warren, 86 App. Div. [N. Y.] 403.

48. Butts v. Fox, 96 Mo. App. 437.

49. Baltimore Dental Ass'n v. Fuller [Va.] 44 S. E. 771.

50. Baker v. Kenney [N. J. Law] 54 Atl. 526.

51. Bent v. Renken, 86 N. Y. Supp. 110.

52. Squire v. Ferd Heim Brewing Co., 90 Mo. App. 462.

53. Willis v. Harrell [Ga.] 45 S. E. 794; Nicholas v. Swift [Ga.] 45 S. E. 708. In Arkansas, after lapse of four months after taking possession of land under verbal consent of owner, party still remains a tenant at will. St. Louis, etc., R. Co. v. Hall [Ark.] 74 S. W. 293.

54. Carteri v. Roberts, 140 Cal. 164, 73 Pac. 818.

55. Landsberg v. Tivoli Brewing Co. [Mich.] 94 N. W. 197.

56. Van Brunt v. Wallace, 88 Minn. 116.

57. Nicholes v. Swift [Ga.] 45 S. E. 708. Entry under void written lease makes tenancy at will. Claimant under lessor held liable for taking crops without first regularly terminating tenancy. Goodwin v. Clover [Minn.] 98 N. W. 322.

58. Agreement to pay for prior occupancy if owner would let him remain does not show it, nor does the bringing of ejectment before time for such payment. Center Creek Min. Co. v. Frankenstein [Mo.] 78 S. W. 785.

59. In South Carolina, one holding over after the termination of a parol lease for a year, is a tenant at will. This may be changed to a tenancy from year to year, where, the entry having been under a void parol lease, the tenant pays the rent that accrues after the year from the time he first entered. Matthews v. Hipp, 66 S. C. 162. In West Virginia, a party entering under an unsealed lease for a term in excess of five years is a tenant at will. Where, however, the rental is paid periodically, he becomes a tenant from year to year. An abandonment of the premises in the latter case will not annul the relation of landlord and tenant. A notice of intention to vacate is necessary. Arbenz v. Exley, 52 W. Va. 476.

60. Kearines v. Cullen, 183 Mass. 298.

61. St. Louis, etc., R. Co. v. Hall [Ark.] 74 S. W. 293.

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holds over after the termination of his lease.[62] By statute, a tenant at sufferance may be made liable for rent.[63] Legally speaking, a tenant at sufferance is a wrongdoer. He is not, therefore, entitled to notice to vacate.[64]

§ 4. *Rights and interests remaining in the landlord. A. Reversion.*—The landlord is entitled to the residue of the estate left after the termination of the leasehold period.[65] By reason of this interest, a landlord may sue for injury to the freehold by a third party, even though the tenant be in possession.[66] The duty of the tenant to return the premises in good condition is elsewhere treated.[67]

(§ 4) *B. Right of re-entry and control.*—In the absence of express agreement,[68] a landlord may not re-enter and assume control for mere breach of covenant; otherwise, for breach of a condition on which the lease depends.[69] The right of re-entry must be peaceably exercised.[70] A provision for forfeiture for breach of covenant is not exclusive of other remedies.[71]

(§ 4) *C. Estoppel of tenant to deny title.*—A tenant is estopped to deny his landlord's title.[72] Based on this doctrine, a declaration in trespass and ejectment

62. Willis v. Harrell [Ga.] 45 S. E. 794. Rule held to apply where lessor dies during year. Wood v. Page, 24 R. I. 594. A stipulation in a contract of sale between landlord and tenant that the latter shall be removable as a tenant at sufferance if he fails to make stipulated payments does not make the vendee a tenant of the vendor. Hill v. Sidle, 116 Wis. 602.

63. Martin v. Allen [Kan.] 74 Pac. 249.

64. Willis v. Harrell [Ga.] 45 S. E. 794.

65. Sittel v. Wright [C. C. A.] 122 Fed. 434. That the lease was illegal in no way affects landlord's reversionary right. Id. The "Curtis Act," as applied to the Indian Territory, does not affect the obligation of a white man as lessee to restore premises to Indian lessor at termination of period. Fraer v. Washington [C. C. A.] 125 Fed. 280. A telegraph company as tenant on a railroad's right of way, under agreement by which rent was paid and telegraph company placed under obligation to vacate at end of term acquires no equities thereby assisting it in condemning the demised premises and preventing reversion. Western Union Tel. Co. v. Pa. R. Co., 120 Fed. 362.

66. Arnold v. Bennett, 92 Mo. App. 156.

67. See post, § 5 C.

68. Where the lease makes provision for re-entry for breach of covenant, upon breach the re-entry may be without notice. Metropolitan Land Co. v. Manning, 98 Mo. App. 248. In Vincent v. Crane [Mich.] 97 N. W. 34, sale of produce held violation of covenant warranting re-entry where, under agreement, sale was to be only upon mutual consent. Where, however, the lease contains no such provision, ejectment cannot be maintained, the remedy in such case being an action for damages. Ocean Grove Camp Meeting Ass'n v. Sanders, 68 N. J. Law, 631. A mortgagee of a leasehold interest subsequently assigned subject to his mortgage may pay rent and taxes left unpaid by the assignee, and thereby prevent re-entry by lessor under a lease providing for such re-entry in case of default in payment of taxes. Dunlop v. James, 174 N. Y. 411. Damages suffered by lessor for breach of covenant that upon lessee's bankruptcy lessor might re-enter and recover loss sustained by lack of a tenant, held not provable against bankrupt's estate. In re Shaffer, 124 Fed. 111. In Washington, under code, default by tenant where lease gives right of re-entry therefor, right of forcible entry and eviction not open to landlord. Spencer v. Commercial Co., 30 Wash. 520, 71 Pac. 53.

69. Spencer v. Commercial Co., 30 Wash. 520, 71 Pac. 53, where subletting without authority held no ground for re-entry. California Civ. Code, § 791, gives a right of re-entry on default during term. Earl Orchard Co. v. Fava, 138 Cal. 76, 70 Pac. 1073. In Illinois, upon default not more than ten days' notice of termination of tenancy need be given. And although by the lease right of re-entry for default is not given, the right exists by law. Drew v. Mosbarger, 104 Ill. App. 635.

70. In California that a landlord has the right to retake premises does not necessarily justify him in making forcible entry thereon. Kerr v. O'Keefe, 138 Cal. 415, 71 Pac. 447. Allegation that defendant "unlawfully entered on the land and then and there turned this plaintiff out of possession thereof * * * and ever since * * * said defendants have held and still hold possession thereof" does not allege unlawful entry and forcible detainer in one count. Id. The term "liquidated damages" used in a lease is not conclusive as to actual damages suffered. Caesar v. Rubinson, 174 N. Y. 492.

71. Though a lease provides that lessor may declare forfeiture for breach of covenant, the lessor may waive forfeiture and proceed by any other remedy open. Springer v. Chicago Real Estate, L. & T. Co., 202 Ill. 17.

72. A tenant cannot show that his landlord has failed to make improvements necessary to the validity of his title (Ellis v. Fitzpatrick [C. C. A.] 118 Fed. 430), or that, no previous notice having been given, he himself has acquired title by adverse possession (Sittel v. Wright [C. C. A.] 122 Fed. 434), or that he has attorned to another claiming a paramount title (Wilson v. Lyons [Neb.] 94 N. W. 636). Compare Piper v. Cashell [C. C. A.] 122 Fed. 614. See for further illustration Ikard v. Minter [Ind. T.] 69 S. W. 852; Turner v. Gilleland [Ind. T.] 76 S. W. 253; Swift v. Dixon, 131 N. C. 42; Allen v. Hall [Neb.] 92 N. W. 171; Adams v. Shirk [C. C. A.] 117 Fed. 801; Western Union Tel. Co. v. Pa. R. Co., 120 Fed. 363; Jones v. Reilly, 174 N. Y. 97. In Montana, the statutory provision that when the relation of landlord and ten-

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which states the existence of the relation of landlord and tenant is sufficient.[73] He does not hold adversely so as to obtain title by limitations[74] until he repudiates the tenancy.[75] This rule obtains even though at the time of the execution of the lease the tenant was in possession claiming title in himself,[76] unless he was induced to make the lease by fraud.[77] A tenant cannot deny the landlord's title by assailing the lease for want of authority in tenant's agent to negotiate it.[78] The estoppel of a tenant extends to his assignees.[79]

§ 5. *Mutual rights and liabilities in demised premises. A. Occupation and enjoyment.*[80]—A covenant for quiet enjoyment may be implied from a demise,[81] and either refusal to put the tenant into possession,[82] or a wrongful eviction,[83] is a breach thereof. The extent of the landlord's right of re-entry and how it must

ant has existed, the tenant's possession is deemed that of the landlord until the expiration of five years from termination of tenancy applies only when tenant is holding possession obtained under the lease. Talbott v. Butte City Water Co. [Mont.] 73 Pac. 1111. It has been held that as a defense to an action for rent, the tenant may show that the landlord has parted with the title to the premises, including right to rent after the transfer. Allen v. Hall [Neb.] 92 N. W. 171. One holding a tax certificate prior to his tenancy may, upon becoming a tenant, notify his landlord that he will acquire a tax deed if landlord fails to redeem. Although he obtains such deed, however, the presumption that he is not denying his landlord's title renders it unnecessary that he be made a party defendant to an action to foreclose a mortgage on the premises. Brown v. Atlanta Nat. Bldg. & Loan Ass'n [Fla.] 35 So. 403. A tenant may buy the title of his landlord at foreclosure sale. The fact of purchase and of lease from purchaser may, in such case, be shown by subtenant as defense to action of unlawful detainer. Moston v. Stow, 91 Mo. App. 554. The rule obtains, also, as between white men, citizens of the United States, in the Indian Territory. Ellis v. Fitzpatrick [C. C. A.] 118 Fed. 430.

73. Ayotte v. Johnson [R. I.] 56 Atl. 110.

74. A tenant cannot acquire title to land by limitation as against one to whom he pays for the use thereof. Slattery v. Slattery [Iowa] 95 N. W. 201.

75. The statute of limitations begins to run upon repudiation by tenant of his tenancy. New York & Tex. Land Co. v. Dooley [Tex. Civ. App.] 77 S. W. 1030. While it is the general rule that this estoppel continues until the tenant delivers possession (Sittel v. Wright [C. C. A.] 122 Fed. 434), it has been held that where a tenant has brought home to his landlord the fact of his definite and continued denial of his landlord's title, his possession may be deemed adverse without surrender of premises (Neff v. Ryman, 100 Va. 521).

76. Johnson v. Thrower, 117 Ga. 1007; Willis v. Harrell [Ga.] 45 S. E. 794.

77. Jones v. Reilly, 174 N. Y. 97.

78. Sittel v. Wright [C. C. A.] 122 Fed. 434.

79. Adams v. Shirk [C. C. A.] 117 Fed. 801; Stewart v. Keener, 131 N. C. 486; Rowland v. Dillingham, 83 App. Div. [N. Y.] 156. Title of town which leased street privileges. Owen v. Brookport [Ill.] 69 N. E. 952. The rule would not, of course, bar a denial of the landlord's title by one merely entering after abandonment by and under no contract with the tenant. Stewart v. Keener, 131 N. C. 486. Whether a tenant's use of premises constitutes a nuisance is for the jury. Louisville & N. Terminal Co. v. Jacobs, 109 Tenn. 727.

80. With reference to compelling lessee to occupy leased premises, see Jones v. Hamm [Mo. App.] 74 S. W. 150.

81. Kitchen Bros. Hotel Co. v. Philbin [Neb.] 96 N. W. 487; Herpolsheimer v. Funke [Neb.] 95 N. W. 688.

82. That another tenant held under full right, barring delivery to lessee, does not relieve lessor. Bernhard v. Curtis, 75 Conn. 476. Rendering premises unfit for occupation by remodelling of same constitutes eviction entitling tenant to damages. That the contractors violated landlord's instructions, where their conduct was within apparent scope of authority and tenant had no notice of excess thereof, did not lessen landlord's liability. Wusthoff v. Schwartz, 32 Wash. 337, 73 Pac. 407, the court holding, also, that payment of rent in advance did not constitute constructive acquiescence in acts of the landlord.

83. A contract to lease will not be deemed to have been broken from evidence of breach from which no rational mind can infer the fact to be established. Vogeler v. Devries [Md.] 56 Atl. 782. A lessee from one having no title suffers no harm until he be evicted or required to pay rent a second time by the true owner. Sherman v. Spalding [Mich.] 93 N. W. 613. It is a breach of the lease for the lessor to enter and exclude the lessees though it is professedly done to protect him from injury to the premises. Waller v. Cockfield, 111 La. ----, 35 So. 778. In Texas, a distress warrant must be alleged to have been sued out "unjustly" as well as "illegally" in order to enable tenant to recover. Hurst v. Benson [Tex. Civ. App.] 71 S. W. 417. For eviction in accordance with law, action for damages by tenant against landlord will not lie. Juergen v. Allegheny County, 204 Pa. 501. The term "eviction" is now applied to any form of expulsion. Griesheimer v. Bothman, 105 Ill. App. 585. In North Dakota, for recovery of treble damages for forcible ejectment, the entry must be with force, though not necessarily applied. Wegner v. Lubenow [N. D.] 95 N. W. 442. In California, one who, though he has entered peaceably, turns out the party in possession by force, threats, or threatening conduct, is guilty of forcible entry. Kerr v. O'Keefe, 138 Cal. 415, 71 Pac. 447.

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be exercised is elsewhere treated.[84] Only eviction will breach the covenant for quiet enjoyment.[85] Payment of rent is not necessarily prerequisite to the right to quiet enjoyment.[86] A tenant may treat an eviction from a portion of the premises as an eviction from the whole.[87] Acts of the landlord substantially impairing the enjoyment of the premises and causing the tenant to remove therefrom amount to a constructive eviction.[88] The general measure of damages for eviction or failure to give possession is the difference between the value of the term and the stipulated rental,[89] but special damages may be awarded[90] if pleaded.[91] If the eviction be partial, damages therefrom may be set off against rent.[92] A lease of part of a building impliedly covers right to use whatever is reasonably necessary to

84. See ante, § 4B.

85. Greenwood v. Wetterau, 84 N. Y. Supp. 287. A foreclosure sale of the premises does not breach the covenant of quiet enjoyment until the purchaser receives his deed. Mason v. Lenderoth, 84 N. Y. Supp. 740. It will be presumed that the sale contained the usual direction that the purchaser be let into possession on production of his deed, and the tenant must show when the deed was delivered. Id. Modification of injunction against tearing down building held erroneous as leaving to lessor to do what he thought proper. Benedict v. International Banking Corp., 88 App. Div. [N. Y.] 488.

86. Under a lease providing for payment of rent monthly in advance and for re-entry for default, the payment construed to be a condition subsequent to right of quiet enjoyment. Hence to recover for wrongful eviction allegation of payment was not necessary. Spencer v. Commercial Co., 30 Wash. 520, 71 Pac. 53.

87. Anderson v. Winton, 136 Ala. 422.

88. Physical expulsion is not necessary. Acts destroying comfort and safety suffice. Dennick v. Ekdahl, 102 Ill. App. 199. Evidence of constructive eviction by bad odors held too vague. Diehl v. Watson, 89 App. Div. [N. Y.] 445. Evidence of insufficient heat and removal should go to jury on issue of constructive eviction by breach of covenant to heat. Butler v. Newhouse, 85 N. Y. Supp. 373. Eviction after the filing of lessor's estate in bankruptcy is not ground for action for damages for failure to observe covenant for quiet enjoyment by lessee against bankrupt estate. In re Pennewell [C. C. A.] 119 Fed. 139. There cannot be a constructive eviction without an abandonment of the premises. Greenwood v. Wetterau, 84 N. Y. Supp. 287; Hirsch v. Olmesdahl, 38 Misc. [N. Y.] 757. Letting other parts of the premises for a noisy business will not, where the tenant remains in possession. Greenwood v. Wetterau, 84 N. Y. Supp. 287.

89. The measure of damages for failure to give possession is the difference between the reserved rent and the rental value. Evidence of rent paid by lessees for other premises is incompetent. Rosenblum v. Riley, 84 N. Y. Supp. 884. Tenant not put into possession may recover difference between rental value and rent reserved and also special damages which are natural but not necessary consequences of breach. Williamson v. Stevens, 84 App. Div. [N. Y.] 518. The lease having been for "telephone call booths" it is not provable on the special damages alleged that a very high profit would have accrued from the patronage of curb brokers of which patronage the lessor had not been informed. Williamson v. Stevens, 84 App. Div. [N. Y.] 518. A distress warrant made part of landlord's pleadings need not be introduced in evidence by tenant in counterclaim for damages for its service. Hurst v. Benson [Tex. Civ. App.] 71 S. W. 417. An optional renewal period cannot be included in the time for which a tenant may recover upon being dispossessed prior to the commencement of such period or the exercise of the option. Jackson v. Doll, 109 La. 230.

90. Scottish-American Mortg. Co. v. Taylor [Tex. Civ. App.] 74 S. W. 564; Gross v. Heckert [Wis.] 97 N. W. 952; Bernhard v. Curtis, 75 Conn. 476, where lessee was held entitled to loss occasioned by reserving goods for use in store, purchase of fixtures, etc., as special damages. Lessees of a cotton gin may recover what they would have earned during the remainder of the term (Waller v. Cockfield, 111 La. ——, 35 So. 778), and where the eviction is tortious exemplary damages have been given (Id.). A lessor failing to deliver premises after payment of first installment of rent is properly chargeable with costs in suit by lessee to recover money paid. Deluise v. Long Island R. Co., 174 N. Y. 516. In ascertaining damages resulting from dispossession, net income of business prior thereto may be shown. Gildersleeve v. Overstolz, 90 Mo. App. 518. Value of services in breaking land and mowing weeds prior to breach, and of services in removing corn thereafter made necessary by the breach, not recoverable. Rogers v. McGuffey [Tex. Civ. App.] 75 S. W. 817. For breach by landlord of lease providing for delivery of one-half of crops as rental, measure of damages held to be reasonable market value of one half crop less amount tenant earned or could reasonably have earned after breach. Rogers v. McGuffey [Tex.] 74 S. W. 753; Id. [Tex. Civ. App.] 75 S. W. 817. In tenant's counterclaim for damages for service of distress warrant, tenant may not show landlord's reputation for honesty and fair dealing to be bad. Hurst v. Benson [Tex. Civ. App.] 71 S. W. 417.

91. In order that special damages may be recovered, they must be alleged. Drischman v. McManemin, 68 N. J. Law, 337. In order that the damage so suffered may be awarded or deducted from rent otherwise due, the amount of the damage must be definitely pleaded and proven. Riggs v. Gray [Tex. Civ. App.] 72 S. W. 101; Murphy v. Century Bldg. Co., 90 Mo. App. 621.

92. Herpolsheimer v. Funke [Neb.] 95 N. W. 688; Kitchen Bros. Hotel Co. v. Philbin [Neb.] 96 N. W. 487.

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the enjoyment thereof.[93] Since the maintenance of a nuisance is against public policy, an agreement of a landlord to insure quiet enjoyment, though the tenant maintain a nuisance on the premises, is void as against public policy.[94]

(§ 5) *B. Assignment and subletting.*—In the absence of provision in regard thereto, the right of tenant to sublet is implied. Where, however, the lease prohibits subletting except upon express consent of lessor, burden to establish such consent rests on lessee,[95] and is liable in damages if he sublet without it.[96] A covenant against assignment of lease without lessor's consent is inapplicable to a case in which assignee takes by operation of law.[97] The sublessee is entitled to possession,[98] and his right cannot be impaired by surrender by the lessee[99] or re-entry by lessor,[1] but where the lessor's consent was on condition, the sublessee takes subject thereto.[2] An assignee is liable to the lessor.[3] A definite contract of subletting should be shown; thus, the grant of privilege to an employe to use a house on the premises,[4] or the entry into contract by the tenant to pay another a salary and to allow him in addition a portion of the profits for managing the estate,[5] does

93. Kitchen Bros. Hotel Co. v. Philbin [Neb.] 96 N. W. 487. Illustrations: A lease of a building includes its adjuncts, as steps leading thereto. Kearines v. Cullen, 183 Mass. 298. In a lease of rooms in an office building, right to use of contiguous water-closets, wash basins therein, elevators, hallways, stairs and entrances is implied. Hall v. Irwin, 78 App. Div. [N. Y.] 107. Use of door and hallway is implied in a lease of a ground-floor room of a hotel by a ticket broker. Kitchen Bros. Hotel Co. v. Philbin [Neb.] 96 N. W. 487. A lease of a second story apart naturally carries with it right to enjoyment of air and light. Stevens v. Salomon, 39 Misc. [N. Y.] 159. A lease of city premises, described by street and number, carries with it the right to the use of yards and appurtenances to the building. Snook & A. Furniture Co. v. Steiner, 117 Ga. 363. A questionable right to use leased land for certain purposes without accounting may become established by waiver of landlord of right to object. Swift v. Occidental M. & P. Co. [Cal.] 74 Pac. 700. A lease of lots for an extended period to a summering association, with display of plat showing streets giving access to the lots, constitutes a dedication of the use of the streets to the lessees. This use may not, however, be exclusive. Thousand Island Park Ass'n v. Tucker, 173 N. Y. 203. One suing his lessor for purpose of establishing his right of way may in certain cases, where defendant dies during suit after conveying premises to another, have the grantee made party defendant. Stolts v. Tuska, 83 App. Div. [N. Y.] 426. The leasing of property subject to regulations to be made by lessor does not authorize lessor to make unreasonable regulations. Thousand Island Park Ass'n v. Tucker, 173 N. Y. 203. That prospector may burn oil produced on claim, held, in no way tending to prove right of lessee so to do. Swift v. Occidental M. & P. Co. [Cal.] 74 Pac. 700.

94. Lebanon C. & I. Co. v. Faulkner, 25 Ky. L. R. 1037, 76 S. W. 1083; Louisville & N. Terminal Co. v. Jacobs, 109 Tenn. 727.

95. Simpson v. Moorhead [N. J. Eq.] 56 Atl. 887; Zeigler v. Lichten, 205 Pa. 104; Berryhill v. Healey, 89 Minn. 444; Springer v. Chicago Real Estate, L. & T. Co., 202 Ill. 17. Prohibition to sublet is not necessarily deducible from prohibition to assign a lease. Moore v. Guardian Trust Co. [Mo.] 73 S. W. 143. That at the time of executing lease, both parties intended that lessee should occupy, does not prevent lessees from subletting, the lease authorizing such action on part of lessees. Id. A sublessee cannot recover from lessee for false representations as to his right to sublease, where provision against subletting is a mere covenant, since in such case lease is not avoided by the subletting. In re Pennewell [C. C. A.] 119 Fed. 139. Lease for a year with privilege to renew from year to year for five years is for more than two years and is assignable without written consent [Rev. St. 1899, § 4107]. Jones v. Kansas City Board of Trade [Mo. App.] 78 S. W. 843. Contra it seems is Jones v. Hamm [Mo. App.] 74 S. W. 150. In Texas by Rev. St. 1895, art. 3250, assignment cannot be made without consent of the lessor. Acquiescence and acceptance of rent from the assignee however implies consent. Willey Lodge v. Paris [Tex. Civ. App.] 73 S. W. 69.

96. Breach of covenant not to sublet for hazardous business renders the tenant liable for additional insurance premium. Roulaine v. Simpson, 84 N. Y. Supp. 875. Receiving rent after breach of covenant not to sublet for hazardous business does not waive right to damages therefrom. Id.

97. In re Bush, 126 Fed. 878.

98. If possession be withheld both general and special damages for such withholding may be recovered. Griesheimer v. Bothman, 105 Ill. App. 585. Where the general damages are held constituted by the difference between the value of the term and the rental unpaid. Id.

99. Oshinsky v. Greenberg, 39 Misc. [N. Y.] 342.

1. By an assignment of a lease, by lessee, lessee is precluded from re-entry against the wishes of his assignee. Simpson v. Moorhead [N. J. Eq.] 56 Atl. 887.

2. Subsequent assignment to another did not release him therefrom. Springer v. Chicago Real Estate, L. & T. Co., 202 Ill. 17.

3. Mead v. Madden, 85 App. Div. [N. Y.] 10.

4. Vincent v. Crane [Mich.] 97 N. W. 34.

5. Markowitz v. Greenwall Theatrical Circuit Co. [Tex. Civ. App.] 75 S. W. 74.

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not constitute a subletting.[6] So, also, an assignment of a lease absolute on its face may be shown by parol to be in effect a transfer as collateral security only.[7] A sale at foreclosure is not an assignment.[8] The presumption that one in possession of leased premises, occupying after lessee without knowledge of lessor, has taken an assignment of the lease, may be overcome by a showing that occupant is a subtenant or licensee of lessee.[9] Though a sublease be voidable either as executed without authority or for failure to comply with the statute of frauds, it may be validated by estoppel.[10] The lessor's assignee may be held liable for charges previously incurred by the tenant.[11] A purchaser from the landlord assumes the latter's status toward the tenant.[12] The effect of assignment on rights and liabilities as to rent is elsewhere treated.[13] Between a lessor and sublessee there exists neither privity of contract nor estate.[14] Privity of contract may be established, however, by attornment of sublessee to lessor.[15]

(§ 5) *C. Repairs and improvements.*—No implied contract exists on part of landlord to make repairs,[16] and accordingly he cannot be charged with repairs[17] or betterments made by the tenant.[18] But statutes in some states require the lessor to keep the premises in habitable repair,[19] and if in such case, lessor refuses to make repairs reasonably necessary, they may be made by lessee and charged to lessor,[20] but such failure does not terminate the lease.[21] A lessor may, of course, bind himself to make repairs,[22] and if he fails to comply with his covenant, the tenant may

6. A proposed assignment of lease and a proposed acceptance thereof do not substantiate allegation of a written assignment. Landt v. McCullough [Ill.] 69 N. E. 107.

7. Gross v. Heckert [Wis.] 97 N. W. 952. Where a lessee of a three-story building assigned the lease, taking back from his assignee a lease of the two upper floors, and thereafter the lessee made agreement that assignee might use second story until he, the lessee, needed it, at a specified rental, the lessee was deemed assignee's landlord as to the second story, there being no merger of assignee's estate in the second floor in his estate under the assignment of the lease. Tolsma v. Adair [Wash.] 73 Pac. 347.

8. Dunlop v. Mulry, 85 App. Div. [N. Y.] 498.

9. Washington Real Estate Co. v. Roger Williams Silver Co. [R. I.] 56 Atl. 686.

10. Wildey Lodge v. Paris [Tex. Civ. App.] 73 S. W. 69; Springer v. Chicago Real Estate, L. & T. Co., 102 Ill. App. 294; Baker v. J. Maier & Zobelein Brewery, 140 Cal. 540. Assignee who went into possession cannot plead that in bankruptcy proceedings it was held that assignment was void as in contemplation of bankruptcy. Mead v. Madden, 85 App. Div. [N. Y.] 10.

11. Held liable for gas and water charges by a tenant in possession who by agreement was to attorn. Hobson v. Silva, 137 Cal. xix, 70 Pac. 619.

12. And as such is barred from securing a good title, upon finding his original title defective, and attempting to evict his tenant thereunder. Iowa Sav. Bank v. Frink [Neb.] 92 N. W. 916.

13. See post, § 6.

14. McDonald v. May, 96 Mo. App. 236. Where the Missouri court holds, in consequence of rule stated, that lessor cannot recover rent from sublessee after accepting premises from lessee.

15. McDonald v. May, 96 Mo. App. 236.

16. Torreson v. Walla 11 N. D. 481; Kearines v. Cullen, 183 Mass. 298; Goldberg v. Besdine, 76 App. Div. [N. Y.] 451. Nor is there an implied contract that landlord will make repairs called for by public officers. Pratt v. Grafton Elec. Co., 182 Mass. 180. The duty of providing a fire escape required by statute, however, rests upon the landlord, not upon the tenant in possession. Carrigan v. Stillwell, 97 Me. 247.

17. Riggs v. Gray [Tex. Civ. App.] 72 S. W. 101; Thomas v. Conrad, 24 Ky. L. R. 1630, 71 S. W. 908. Where the question is definitely provided for by the lease, it cannot, of course, be submitted to the jury. Marshall v. Harber [Iowa] 91 N. W. 774.

18. Hart v. Hart, 117 Wis. 639.

19. Jackson v. Doll, 109 La. 230; Aikin v. Perry [Ga.] 46 S. E. 93. A sewer connection is rather an improvement than a repair and a dwelling may be fit for habitation although through lack of sewer connection the cellar contains water. Torreson v. Walla, 11 N. D. 481. Where the law obligates landlord to repair, whether or not he agreed with a third person to make repairs in no way affects his liability for failure so to do. Aikin v. Perry [Ga.] 46 S. E. 93; Wagner v. Welling, 84 N. Y. Supp. 979.

20. Thompson v. Clemens, 96 Md. 196, 60 L. R. A. 580.

21. A covenant to repair in case of injury or destruction is independent, and failure to comply therewith does not release tenant from rent. Tenant may in such case either sue directly for damages, or recoup himself therefor when action for rent is instituted. Arbenz v. Exley, 52 W. Va. 476.

22. Promise of landlord to repair made to tenant after execution of lease and occupation by tenant is void for want of consideration. Gavan v. Norcross, 117 Ga. 356; Whitehead v. Comstock [R. I.] 56 Atl. 446. In itself alone, the striking out of the words "and external" from a clause in a lease providing that tenant "should make any and all repairs, internal and external" does not cre-

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recoup loss therefrom.[23] The lessee cannot recover, however, where the lessor has acted with reasonable promptness upon discovering the defect.[24] Though a landlord is under obligation to repair, he need not make good patent defects existing at time of leasing and of which both parties were cognizant.[25] An obligation to repair cannot be construed as an obligation to rebuild in case of destruction,[26] nor will an agreement that rent shall cease upon the destruction of a building leased obligate lessor to rebuild.[27] A landlord may, of course, bind himself to rebuild in case premises are destroyed.[28] A tenant may, also, bind himself to make repairs and prevent deterioration. In such case, the cause rendering performance necessary is immaterial. And if he fails to perform, the landlord may have the repairs made and charged to tenant.[29]

(§ 5) *D. Insurance and taxes.*—A lessee does not impliedly contract to keep premises insured nor to pay for insurance placed thereon.[30] Permitting insurance to lapse does not constitute breach of a covenant in a lease to have insurance written.[31]

A lessee does not impliedly contract to pay taxes.[32] Where the lease contains a covenant that lessee shall pay taxes, the same will be deemed assumed as part of the rent.[33] An ordinary covenant to pay taxes does not obligate lessee to pay the taxes levied on the rental which he himself pays to the lessor.[34] A covenant

ate a covenant on part of landlord to make external repairs. Castagnette v. Nicchia, 76 App. Div. [N. Y.] 371. The word "exterior" as applied to a hotel and used in a lease in specifying by whom repairs are to be made, covers a partly covered wooden platform or sidewalk from the exterior wall to a railroad platform, used as means of ingress, and for a refreshment pavilion. May v. Ennis, 78 App. Div. [N. Y.] 552. Where agreement is made that the expense of repairs shall be borne equally by landlord and tenant, a further provision that repairs desired by either shall be submitted to the other may be waived by tenant, either directly or by acts indicative of such intent. Parker v. Brown House Co., 117 Ga. 1013.

23. Lincoln Trust Co. v. Nathan, 175 Mo. 32; Thompson v. Clemens, 96 Md. 196, 60 L. R. A. 580; Gillick v. Jackson, 40 Misc. [N. Y.] 627; Schenk v. Forrester [Mo. App.] 77 S. W. 332. Anticipated profits of business are not recoverable in action for breach of covenant to repair. The measure of damages is the difference in rental value with and without repairs. Godfrey v. India Wharf Brewing Co., 87 App. Div. [N. Y.] 123.

24. Forrest v. Buchanan, 203 Pa. 454. Agreement of landlord to repair a portion of premises may be construed to apply only to that part to which tenant made objection. Roberts v. Cotty [Mo. App.] 74 S. W. 886. Landlord must prove that performance of covenant was prevented by tenant. Marx v. Marvin, 85 N. Y. Supp. 376. Non-performance of covenant to repair by a certain date is not excused by attempts to perform in a reasonable time. Id.

25. Aikin v. Perry [Ga.] 46 S. E. 93.

26. Jackson v. Doll, 109 La. 230.

27. Gavan v. Norcross, 117 Ga. 356.

28. In such case, using twice the time necessary is not a re-building within reasonable time. Lincoln Trust Co. v. Nathan, 175 Mo. 32. Where landlord covenants to rebuild, and tenants covenant to pay rent during period of rebuilding in case of destruction by fire, landlord need not pay over insurance received though he fails to rebuild. Id.

29. Barnhart v. Boyce, 102 Ill. App. 172. A remainderman holding at will cannot after surrender recover for improvements in the absence of a contract. Guthrie v. Guthrie, 25 Ky. L. R. 1701, 78 S. W. 474. A covenant by tenant to repair does not extend to an elevator of which the landlord retains control. Building leased "with elevator service." Wagner v. Welling, 84 N. Y. Supp. 979. A covenant to keep premises in as good condition as when taken is not satisfied by keeping same in a condition usual with ordinarily prudent owners. Vincent v. Crane [Mich.] 97 N. W. 34. So, also, by such provision, worthless rubbish may not be left in premises. Boardman v. Howard [Minn.] 96 N. W. 84. In an action for failure to return premises in as good condition as when received, wear and tear excepted, difference in value when received and when delivered, wear and tear excepted, may be shown by cost of rebuilding destroyed improvements, the difference between the value of the same new and in the condition in which they should have been when premises were delivered being estimated. Daggett v. Webb [Tex. Civ. App.] 70 S. W. 457. By acceptance of premises and cancellation of the lease a landlord waives right to claim damages for failure of lessee to fully observe terms of the lease. Geddis v. Folliett [S. D.] 94 N. W. 431.

30. Hart v. Hart, 117 Wis. 639.

31. Johnson v. Kindred State Bank [N. D.] 96 N. W. 588.

32. Hart v. Hart, 117 Wis. 639.

33. Knight v. Orchard, 92 Mo. App. 466.

34. Woodruff v. Oswego Starch Factory [N. Y.] 68 N. E. 994. Rents reserved and the land earning the same are not regarded as the same property right with reference to taxation. Id. In Alabama, lease granting to lessee right to go upon the land, box pine trees and remove crude turpentine, does not create a "separate and special interest" in the land taxable under Code provisions. Ashe Carson Co. v. State [Ala.] 35 So. 42.

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to pay taxes promptly when due is broken by failure to pay until some time after due. That payment is made before imposition of penalty does not alter the rule.[35]

(§ 5) *E. Injuries from defects and dangerous condition. To tenant or his servant.*—The relation between landlord and tenant is purely contractual. In the absence of express provision otherwise, the tenant takes the premises as he finds them, and if by reason of defects then existing or subsequently arising, the tenant suffers loss, he cannot hold the landlord liable therefor.[36] That the defects were known to the landlord and could not be known to the tenant by the exercise of ordinary diligence does not alter the rule.[37] If the landlord is by statute or covenant bound to make repairs,[38] he is liable for damages resulting from his failure to do so.[39] It is to be carefully observed that the want of implied obligation of the landlord to make repairs applies only to that part of the premises over which the tenant assumes control. For damage occasioned by defects in a portion of the building over which the landlord retains control, as a hallway used by all tenants in common, the landlord may be held.[40] Though the landlord is under obligation to repair, however, for injury caused by wanton exposure of his property, the tenant cannot recover,[41] and notice from the tenant of the defects is some-

35. Metropolitan Land Co. v. Manning, 98 Mo. App. 248.

36. Shinkle v. Berney, 68 Ohio St. 328; Kearines v. Cullen, 183 Mass. 298; Sherman v. Ludin, 79 App. Div. [N. Y.] 37. In absence of provision otherwise, a landlord is liable to his tenant only for acts of misfeasance. Roberts v. Cotty [Mo. App.] 74 S. W. 886. Landlord not liable for injuries to tenant's wife suffered by reason of defect in floor existing at time of letting. Borggard v. Gale, 205 Ill. 511. A landlord, not having covenanted for repairs, is not liable for damages for defective condition of premises occasioned to licensee of tenant. Brady v. Klein [Mich.] 95 N. W. 557. A lessor is not liable for injury caused to a tenant by commission of nuisance by an independent contractor employed in remodelling the building, the lessor having reserved no right of control and the work not being dangerous in itself. Boss v. Jarmulowsky, 81 App. Div. [N. Y.] 577.

37. Franklin v. Tracy [Ky.] 77 S. W. 1113; Bullock, etc., Elec. Co. v. Coleman, 136 Ala. 610. Where landlord admits knowledge of defects, tenant is not prejudiced by exclusion of evidence showing such knowledge. Aikin v. Perry [Ga.] 46 S. E. 93. A lessor is not rendered liable for injuries to employe of lessee under an allegation that lessor knew or by exercise of reasonable care could have known of defect causing injury at the time of the leasing. King v. Creekmore [Ky.] 77 S. W. 689. The employe of a tenant having full possession and covenanting to repair cannot recover against the landlord for personal injuries from defects. Leaux v. New York, 87 App. Div. [N. Y.] 398.

38. See ante, § 5 C.

39. The neglect of a landlord in failing to remedy occurring defects will be measured from the time such defects began, not from the time they reached the danger point. Hoag v. Williamsburgh Sav. Bank, 75 App. Div. [N. Y.] 306. An agreement by a landlord to supply the dwelling with water does not render him liable for damage suffered by tenant through escape of water and formation of ice, due to defect in the pipes. Whitehead v. Comstock & Co. [R. I.] 56 Atl. 446. Liability of landlord for injury to health caused by misrepresentations of agent as to plumbing, see Clogston v. Martin, 182 Mass. 469. A tenant suffering damage by reason of defect in premises, landlord being under obligation to keep in repair, must show damage received after contract of leasing made with landlord under whom he is now holding. Aikin v. Perry [Ga.] 46 S. E. 93. Recovery by a tenant for injury suffered by reason of failure of landlord to make repairs as covenanted requires allegation of personal neglect by landlord. Allegation of neglect merely incident to breach of contract is insufficient. Frank v. Mandel, 76 App. Div. [N. Y.] 413. Failure of landlord to comply with a statute requiring certain precautions against injury to tenants is competent, though not conclusive, evidence of negligence. Ziegler v. Brennan, 75 App. Div. [N. Y.] 584. One bound by a lease to furnish elevator service cannot relieve himself from liability for personal injuries by delegating the duty to an independent contractor. Wagner v. Welling, 84 N. Y. Supp. 979.

40. Hoag v. Williamsburgh Sav. Bank, 75 App. Div. [N. Y.] 306; La Plante v. La Zear [Ind. App.] 68 N. E. 312. A drain pipe running from the roof through the cellar into the sewer is not demised to the tenant of the cellar but the landlord is liable for defects therein. Levine v. Baldwin, 87 App. Div. [N. Y.] 150. Lease requiring tenant of part of building to make such repairs as were necessitated by acts of the lessee or necessary to keep property in good condition does not require him to repair defects not caused by him in drain pipe from roof. Id. Ordinary care requires protection of tenant from acts of other tenants making conditions unsafe. Wesener v. Smith, 89 App. Div. [N. Y.] 211. Contributory negligence of tenant who fell over obstruction in back yard held for the jury. Id.

41. Goldberg v. Besdine, 76 App. Div. [N. Y.] 451; Aikin v. Perry [Ga.] 46 S. E. 93.

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times required.[42] The issue of negligence is determined on the same considerations as obtain in other actions for damages.[43]

To stranger.—For injury to a stranger occasioned by defects arising after the leasing and complete relinquishment of control by the landlord, the tenant, and the tenant only, can be held,[44] and the same rule makes a subtenant alone answerable for injuries resulting during his possession,[45] but for injury by a defect existing and known to the landlord at the time of leasing, he is liable,[46] and he is liable also for injury from defects in any portion of the building over which he retains control.[47] This liability of the landlord to a stranger has been limited, however, to those cases in which the defect amounts to a public nuisance.[48]

(§ 5) *F. Emblements and fixtures.*—A tenant has ordinarily the right to remove emblements,[49] except in case of a leasing on shares by which the title to the crops is in the landlord.[50] A mere trespasser cannot claim a tenant's right to harvest a crop he has planted.[51]

42. The tenant is not entitled to recover damages if he did not give the written notice of defects required by the lease. Sternberg v. Burke, 84 N. Y. Supp. 862.

43. Report to landlord of leakage, inspection by him, and appearance of pipe showing defect of considerable duration held to sustain finding of negligence. Levine v. Baldwin, 87 App. Div. [N. Y.] 150. Allegations of existing condition of premises "so as to make it dangerous," held sufficient statement of negligence. Wesener v. Smith, 89 App. Div. [N. Y.] 211. Evidence of debris hidden by grass along path, and of such condition for several months held to prove negligence. Id. Verdict held against weight of evidence on matter of damages. Nieland v. Mahnken, 89 App. Div. [N. Y.] 463. In an action against lessor and lessee of an oil and gas lease for injury caused by negligence of lessee, the question of negligence as framed by the pleadings should be submitted to the jury. Langabaugh v. Anderson [Ohio] 67 N. E. 286.

44. King v. Creekmore [Ky.] 77 S. W. 689; Langabaugh v. Anderson [Ohio] 67 N. E. 286; Atwill v. Blatz [Wis.] 95 N. W. 99. A guest of a tenant stands in no better position to recover for injury suffered by failure of landlord to make repairs as agreed than does the tenant. Frank v. Mandel, 76 App. Div. [N. Y.] 413. Guarantors of performance by lessee of the usual covenants are not liable for injuries to stranger by falling through cellar door in public sidewalk. Fehlhauer v. St. Louis [Mo.] 77 S. W. 843. As between a market company lessor and third persons, the maxim qui facit per alium facit per se applies, rendering the market company liable for negligence of the lessees of its stalls for failure to keep aisles in proper condition. Wash. Market Co. v. Clagett, 19 App. D. C. 12. Defense to an action against a landlord by a stranger for recovery of damages suffered by an object flying from landlord's building that premises had been leased for term of years, landlord having no control thereover, that building had been constructed by competent architects and artisans, and defendant relied wholly upon them, that the accident was due to negligence of plaintiff and was caused by a vis major, in that a hurricane caused unseating of object, held not demurrable. Uggla v. Brokaw, 77 App. Div. [N. Y.] 310.

45. Walter v. Dennehy, 93 Mo. App. 7.

46. Barrett v. Lake Ontario Beach Imp. Co., 174 N. Y. 310; Waterhouse v. Schlitz Brew. Co. [S. D.] 94 N. W. 587; Matthews v. New York, 78 App. Div. [N. Y.] 422; Stoetzele v. Swearingen, 90 Mo. App. 588; Isham v. Broderick, 89 Minn. 397; Carrigan v. Stillwell, 97 Me. 247. For injury to a third party arising from a defect in sidewalk in front of premises existing at time of lease, landlord may be held. Kirchner v. Smith [Pa.] 56 Atl. 947.

47. May v. Ennis, 78 App. Div. [N. Y.] 552. One having leased a portion of premises, he occupying the remainder, placing gas pipes in the building solely for his own benefit, must use ordinary and reasonable care to see that the portion leased is not injured by the escape of gas from such pipes. The tenant in such case does not assume the risk of escape of gas. Indianapolis Abattoir Co. v. Temperly, 159 Ind. 651. Repair of a defective portion of a building, after injury to tenant by reason thereof, by an agent of landlord, is not admission of control of the defective portion unless agent acted under landlord's instructions, nor is voluntary repair an admission of liability for defect. Kearines v. Cullen, 183 Mass. 298. A landlord warranting security of fence is not entitled to notice of defect therein as condition precedent to his liability for damages which tenant is required to pay a third party by his cattle escaping by reason of such defect. Schenk v. Forrester [Mo. App.] 77 S. W. 332.

48. Brady v. Klein [Mich.] 95 N. W. 557; Fehlhauer v. St. Louis [Mo.] 77 S. W. 843.

49. A tenant under an oral lease is entitled to produce planted and grown by him prior to sale of the land. Simanek v. Nemetz [Wis.] 97 N. W. 508. In Missouri, a tenant from year to year owns a growing crop of clover, under a contract with the landlord therefor, as against one purchasing the land after the time for giving the 60 days' notice of termination of tenancy has passed. Horman v. Cargill [Mo. App.] 73 S. W. 1101; Whorley v. Karper, 20 Pa. Super. Ct. 347.

50. Where the landlord is to receive one-half, the crop title is in him (Northness v. Hillestad, 87 Minn. 304); but where he is to receive one-half the "income," title to the crops is in the tenant (Rowlands v. Voechting, 115 Wis. 352). Title held to be in land-

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Manure made in the ordinary course of husbandry belongs to the landlord, but that from cattle kept for purposes other than agriculture and fed with purchased food belongs to the tenant.[52]

Fixtures of a movable character or as to which a right of removal is reserved may be removed by the tenant,[53] during the tenancy.[54] By failure to make provision in regard thereto at the time of renewal of a lease, a tenant is barred from removing fixtures placed by him during the original term.[55] A grantee without notice takes free of an oral agreement for removal of an improvement.[56] The landlord may recover for unlawful removal of fixtures in unlawful detainer as for waste.[57] The courts do not favor forfeitures, however, and will show leniency toward tenant.[58] By acceptance of premises while subtenant is in possession, landlord is affected with notice of right of subtenant to remove fixtures stipulated for by sublease.[59] A tenant is entitled to a reasonable time after the expiration of the lease to remove his personal property not in the nature of fixtures.[60]

§ 6. *Rent and the payment thereof.*—Rent is a sum of money or other consideration issuing out of the property and payable periodically.[61] An agreement to pay rent may be invalidated by fraud of the lessor,[62] but occupation by the tenant waives the fraud.[63] It is not incumbent on landlord to demand rent before due.[64] A deposit subject to forfeiture as liquidated damages, for breach may be required;[65] and the lessee cannot have it applied to arrears of rent.[66] A lease fixing the rent at a stated sum "for the first three years, from" a stated date to one three years thence, cannot be varied by parol proof that the rent was to be at the rate of said sum per year.[67] Advance payment of rent for the last two months of the term cannot be recovered back where the tenant was dispossessed for nonpayment of rent for preceding months.[68] Right to rent ordinarily passes with the title to the property. In conveying title, rent for a certain future period may however be reserved.[69] So, also, rent not due may be assigned, though the title to

lord until division. Kelly v. Rummerfield, 117 Wis. 620.

51. Wadge v. Kittleson [N. D.] 97 N. W. 856.

52. Rule of apportionment suggested. Nason v. Tobey, 182 Mass. 314.

53. See Fixtures.

54. If not removed during tenancy the fixtures become forfeited to the landlord. Smith v. Boyle [Neb.] 92 N. W. 1018. By special provision tenant may be allowed certain time after the expiration of the term in which to remove fixtures. Brown v. Ward, 119 Iowa, 604. By urging a tenant, at time of making of lease, to buy fixtures placed by preceding tenant, landlord is estopped to claim the fixtures as part of the realty. Morrison v. Sohn, 90 Mo. App. 76.

55. Champ Spring Co. v. Roth Tool Co. [Mo. App.] 77 S. W. 344; Spencer v. Commercial Co., 30 Wash. 520, 71 Pac. 53; Nieland v. Mahnken, 89 App. Div. [N. Y.] 463.

56. Tenant may in such case recover from landlord. Smyth v. Stoddard, 203 Ill. 424.

57. Champ Spring Co. v. Roth Tool Co. [Mo. App.] 77 S. W. 344.

58, 59. Morrison v. Sohn, 90 Mo. App. 76.

60. Refusal to permit tenant to enter premises to remove his personal property constitutes conversion. Smith v. Boyle [Neb.] 92 N. W. 1018.

61. Wegner v. Lubenow [N. D.] 95 N. W. 442.

62. In Nebraska, in an action involving validity of lease, knowledge of lessor in inducing the making of the lease that his representations are false is immaterial. Bauer v. Taylor [Neb.] 98 N. W. 29.

63. Forgotson v. Becker, 39 Misc. [N. Y.] 816.

64. McDermott v. Dwyer, 91 Mo. App. 185.

65. The retention of a deposit of $5,000.00, designated in the lease as subject to forfeiture as liquidated damages for default, is not unconscionable. Adler v. Kramer, 39 Misc. [N. Y.] 642. In New York, the provisions in a lease that a deposit by lessee to secure lessor, and to be applied as payment of rent for the last two months, and that for failure of lessee to observe covenants of the lease, the deposit may be retained as liquidated damages and to cover costs, are not in violation of Code provisions. Lesser v. Stein, 39 Misc. [N. Y.] 349.

66. A lessee cannot require that a deposit made to protect lessor against default in observance of covenants by lessee, if any, and if none, then to apply to payment of last three months of term, be applied to liquidate deficiency in rent soon after taking possession. Brill v. Schlosser, 40 Misc. [N. Y.] 247.

67. Liebeskind v. Moore, 84 N. Y. Supp. 850.

68. Forgotston v. Brafman, 84 N. Y. Supp 237.

69. Allen v. Hall [Neb.] 92 N. W. 171. An assignment of a lease by lessor does not carry rent earned and due prior to the assignment. Wise v. Pfaff [Md.] 56 Atl. 815.

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the property be reserved.[70] Whether a tenant exercising an option to purchase is liable for the current instalment of rent depends on the terms of the contract.[71] An agent to procure tenants but not to lease has no authority to receive rent.[72] On renewal[73] or holding over the terms of the original lease are impliedly adopted. Where, however, after certain holding over, tenant is notified that beginning with a specified future date rent will be increased to specific sum, by holding over thereafter, tenant becomes liable therefor.[74] The landlord's damages for refusal to execute a lease and abandonment is the difference in rentals.[75]

Defenses, set-offs and reductions.—Eviction,[76] or, of course, a surrender and acceptance,[77] is a defense to a claim for subsequent rent, and where, on destruction of premises, lessor notifies lessee that he will not rebuild, liability of tenant for rent at once terminates, the lease having been of buildings, not of land.[78] Breach of covenant to repair on part of landlord may be ground for counterclaim in an action for rent.[79] By assignment of a lease, the assignor does not escape liability for rent for the term. That the lease permitted the assignment does not alter this rule.[80] The landlord cannot, however, recover from both the tenant and

In Texas, rents derived from the separate estate of a married woman are community property. Where assigned by husband and wife, therefore, for debt of husband, extension of time of payment made to husband does not discharge the assignment. De Berrera v. Frost [Tex. Civ. App.] 77 S. W. 637. An assignment of all "right, title and interest in and to" a lease under seal passes all interest both in the premises and all rent accruing, even though the instrument of assignment itself is not sealed. Keeley Brew. Co. v. Mason, 102 Ill. App. 381. An assignment of rents to secure a claim is valid as against a receiver of the property appointed under order of the court. Brownson v. Roy [Mich.] 95 N. W. 710.

70. That tenant is holding over does not alter the rule. Brownson v. Roy [Mich.] 95 N. W. 710.

71. Landlord held not estopped to demand rent. Granger v. Riggs [Ga.] 44 S. E. 983.

72. Acceptance of a tenant procured by an agent does not ratify the act of agent in receiving a deposit on account of rent. McGowan v. Treacy, 84 N. Y. Supp. 497.

73. Renewal contract not stipulating rent is at the same rent. Western N. Y. & P. R. Co. v. Rea, 83 App. Div. [N. Y.] 576.

74. Moore v. Harter, 67 Ohio St. 250. A hold-over tenant, who after expiration of term arbitrarily prevents arbitration agreed on to fix the value of improvements, becomes liable for use and occupation regardless of the rent reserved with interest, prior to such refusal only for the rent reserved and without interest. Conger v. Ensler, 85 App. Div. [N. Y.] 564. Under Georgia laws a tenant at sufferance cannot be held for double rent, until after notice to vacate. Willis v. Harrell [Ga.] 45 S. E. 794.

75. Hence evidence that tenant kept possession through the profitable season is irrelevant., Silva v. Bair [Cal.] 75 Pac. 162.

76. Anderson v. Winton, 136 Ala. 422; Dennis v. Miller, 68 N. J. Law, 320; Vogel v. Hemming, 84 N. Y. Supp. 473. Eviction and abandonment for want of heat is defense. Butler v. Newhouse, 85 N. Y. Supp. 373. A provision for termination of the tenancy and refund of rent in case of a sale does not avail a tenant who though a sale was made, was allowed to stay out his term. Childs v. Skillin, 39 Misc. [N. Y.] 825. In an action for rent, the fact of retention of premises negatives a claim of constructive eviction. Hirsch v. Olmesdahl, 38 Misc. [N. Y.] 757; Greenwood v. Wetterau, 84 N. Y. Supp. 287. Where tenant suffers a partial eviction due to the wilful fault of the landlord, the latter can neither recover for rent as on an express contract for letting, nor on an implied contract for use and occupation, nor for benefits received. Moore v. Mansfield, 182 Mass. 302. If the tenant elects to treat an eviction as partial he may set off damages against rent. Herpolsheimer v. Funke [Neb.] 95 N. W. 688; Kitchen Bros. Hotel Co. v. Philbin [Neb.] 96 N. W. 487. That a lease provides that a tenant shall make no claim against a landlord for any "latent defect or change of condition" does not warrant a demand for rent during an eviction in the form of the making of repairs in such manner as to render premises untenantable. Hall v. Irvin, 78 App. Div. [N. Y.] 107.

77. See post, § 8.

78. Snook & A. Furniture Co. v. Steiner, 117 Ga. 363. Where landlord agrees to rebuild in case of fire, and tenant agrees to pay rent during period of repair, right to recover rent is dependent upon the performance of agreement to repair. Lincoln Trust Co. v. Nathan, 175 Mo. 32. In West Virginia, a lease of land carries payment of rent for the entire term, even though a building on the land is burned through no fault of the tenant. Where there is a special provision in the lease to the contrary, or where the lease is of a room or a building as opposed to a lease of land, the rule is otherwise. Arbenz v. Exley, 52 W. Va. 476.

79. Hirsch v. Olmesdahl, 38 Misc. [N. Y.] 757. Under a lease exempting tenant from payment of rent in case premises suffer injury until premises are again rendered fit for tenancy, a landlord cannot recover rent for a hold-over period between injury to premises and their repair. American Bicycle Co. v. Hoyt [Wis.] 95 N. W. 92.

80. Rector v. Hartford Deposit Co., 102 Ill. App. 554. Held, however, there being no restraint by the terms of the lease, an assignee thereof may reassign and thereby

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his assignee for the same period.[81] Failure to perform agreement to sign a consent required by law for use for saloon cannot be predicated on refusal, where lessee's husband and not lessee was the applicant.[82] Upon abandonment of premises during term, landlord may relet for benefit of lessee and charge lessee with the deficiency.[83] It is readily apparent that the full deficiency cannot be recovered in an action at law until the full term has expired.[84] Where the acreage is less than is specified, the tenant is entitled to an abatement of rent.[85] Where property as a whole is subject to certain ground rent, the owners in common may, as between themselves, make partition and relieve a part from burden of the rent, placing the burden on the remainder left undivided.[86] An oral agreement that the tenant might occupy rent free is inadmissible to vary a sealed lease,[87] but an oral agreement may allow a tenant reimbursement for betterments as an off-set.[88] Agreement to reduce and acceptance of instalments of reduced rental may be shown in an action to secure payment. Where lease is in writing, agreement to reduce cannot, however, be shown by parol.[89] Rent cannot be recovered on a lease to a city providing that none should be paid unless an appropriation therefor should be made by the city council. That it was understood that such an appropriation would be made is immaterial.[90] Where a lease is subject to rules of a city department, it is no defense to action for rent that the action of such department seriously impairs the value of the lease.[91]

§ 7. *Rental on shares.*—Cropper's contracts are treated in the title Agriculture. The right of a tenant on shares to harvest and remove growing crops after the term is treated in section 5 of this topic. A tenant agreeing to deliver part of crop as rental must cultivate farm in husbandlike manner.[92] The landlord is entitled to his share of shock fodder as well as of corn.[93] The money value of the landlord's share is to be estimated as of the time when it should have been delivered.[94]

avoid liability for rent accruing thereafter. Springer v. Chicago Real Estate, L. & T. Co., 102 Ill. App. 294. That a lessor has accepted portions of rent from the assignee of a lease, giving personal receipts therefor but running to his original tenant, does not estop lessor from holding his original tenant liable. Rector v. Hartford Deposit Co., 102 Ill. App. 554. Assignment of saloon lease to manager of brewery held not to make him liable, where rent was received from the tenant until breach. Blum v. Flanagan, 84 N. Y. Supp. 146. That a lessor accepts rent from a corporation which succeeds a firm does not necessarily release individual members of the firm from liability. Golding v. Brennan, 183 Mass. 286. A landlord's right to recover rent is not affected by attornment of tenant to parties having no right to the land. Alford v. Carver [Tex. Civ. App.] 72 S. W. 869. Evidence held to show that assignment to lessor's agent was fictitious. Dresner v. Fredericks, 91 App. Div. [N. Y.] 224.

81. Law v. Uhrlaub, 104 Ill. App. 263. An assignee of a lease, rent payable periodically in advance, may recover the rent for one of such periods where he has paid same in advance and suffered ejectment by the landlord prior to the termination thereof. Mallette v. Hillyard, 117 Ga. 423.

82. Guth v. Mehling, 84 App. Div. [N. Y.] 586.

83. Oldwurtel v. Wiesenfeld [Md.] 54 Atl. 969; McElroy's Estate v. Brooke, 104 Ill. App. 220. Covenant for entry and reletting as lessee's agent holding him liable for deficiency survives recovery by summary proceedings. Baylies v. Ingram, 84 App. Div. [N. Y.] 360. Money received on a reletting during the term is to be credited in an action for rent. Isaacson v. Wolfensohn, 84 N. Y. Supp. 555.

84. Nicholes v. Swift [Ga.] 45 S. E. 708.

85. A lease of a plantation by name, stating number of acres approximately is not a lease per aversionem. McVea v. Vance, 110 La. 998. In determining rent due under a lease providing for specified sum per tillable acre, testimony of one familiar with the land may be admitted to rebut testimony of one who has made survey thereof. Turner v. Meier [Tex. Civ. App.] 70 S. W. 984. A loan by a tenant to the landlord made independently, cannot be included among advancements for improvements to be off-set against rent by agreement of parties. Chamberlain v. Monkhouse [Kan.] 72 Pac. 860.

86. Jones v. Rose, 96 Md. 483.

87. Kaven v. Chrystie, 84 N. Y. Supp. 470.

88. Written agreement for purchase, providing for tenancy of prospective purchaser on default in payments. Held, oral agreement of owner's agent that in case of tenancy allowance would be made from rent for improvements, admissible. British & A. Mortg. Co. v. Cody, 135 Ala. 622.

89. Evans v. Lincoln Co., 204 Pa. 448.

90. Marsh v. Bridgeport, 75 Conn. 495.

91. Lease of privilege of erecting bill board. Landau v. Gude, 84 N. Y. Supp. 672.

92. Cammack v. Rogers [Tex. Civ. App.] 74 S. W. 945.

93. Black v. Golden [Mo. App.] 78 S. W. 301.

94. Harmon v. Payton [Kan.] 74 Pac. 618.

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§ 8. *The term, termination of tenancy, renewals, holding over.*[95] *The term.*—Leases silent as to term are interpreted by custom or implied intention,[96] or by statutes fixing the term in such cases.[97] In its bearing on the statute of frauds, a lease for one year with option to renew for a similar or greater period, upon specified notice, is a lease for more than one year.[98] In Maryland, the policy is against perpetual or irredeemable leases.[99]

Termination of tenancy.—The right to terminate a tenancy for cause, and upon termination and unlawful detention, to take proper action to acquire possession, is enjoyed in full by either a grantee or an assignee of the landlord.[1]

By agreement.—A lease may be terminated prior to the expiration of the term by agreement,[2] or pursuant to a reservation in the lease of such right,[3] but a breach of covenant calling such a stipulation into force may be waived.[4] An option in the tenant to buy must be claimed in writing to change the possession.[5] An original lease may be deemed to have terminated ipso facto by the formation of a new lease.[6]

A lease may be rescinded for mistake,[7] fraud[8] or duress,[9] or for failure of consideration.[10] Such rescission must be prompt.[11] The right of a tenant or licensee

95. Leases of Indian lands between white men and Choctaw and Chickasaw Nations not annulled by Atoka agreement. Ellis v. Fitzpatrick [C. C. A.] 118 Fed. 430. See Indians.

96. A provision in a lease for surrender of the premises by tenant in case of sale thereof by landlord within a specified time, tenant to be given specified notice and to have specified proportion of rent, constitutes a limitation of the term rather than a condition of the lease. Upon sale and performance by landlord, therefore, the term terminates ipso facto. Ronginsky v. Grantz, 39 Misc. [N. Y.] 347. A provision in a lease that lessee shall retain possession until the value of a building placed on the premises by lessee shall be paid by lessor is binding even after expiration of the period otherwise provided by the lease. Moshassuck Encampment, No. 2, v. Arnold, 25 R. I. 65; Andrews v. Marshall Creamery Co., 118 Iowa, 595, 60 L. R. A. 399.

97. In Georgia, by statute, a tenancy will be construed to be for the calendar year where no specification is made in regard thereto at the time of leasing. Willis v. Harrell [Ga.] 45 S. E. 794.

98. Donovan v. Schoenhofen Brewing Co., 92 Mo. App. 341. A lease for one year, with option of renewal for one, two, three or four years is within terms of an agreement for lease with option of renewal for one, two, three, four or five years. Donovan v. Schoenhofen Brewing Co. [Mo. App.] 76 S. W. 715. A term "not exceeding two years" does not embrace a term for one year with option of renewing the lease from year to year for five years. Jones v. Hamm [Mo. App.] 74 S. W. 150. But contra it seems is Jones & Oglebay v. Kansas City Board of Trade [Mo. App.] 78 S. W. 843.

99. Swan v. Kemp [Md.] 55 Atl. 441.

1. Drew v. Mosbarger, 104 Ill. App. 635.

2. Dennis v. Miller, 68 N. J. Law, 320.

3. Either party may terminate a lease by paying the other $50 under an agreement that if either party shall see fit to terminate this lease before it expires he shall pay the other $50. Small v. Clark, 97 Me. 304. Provision may be made in a lease for the termination of the tenancy upon the happening of a specified contingency. Snook & A. Furniture Co. v. Steiner, 117 Ga. 363. On default where lease so provides. Cochran v. Philadelphia M. & T. Co. [Neb.] 96 N. W. 1051.

4. A provision in a lease that the lease shall become void upon breach of a covenant by lessee, may be waived by lessor. A lease does not become ipso facto void upon a breach of covenant, therefore, and a tenant cannot terminate a lease by breach against the wish of his landlord. English v. Yates, 205 Pa. 106. Under a lease providing that for failure of lessor to comply with certain covenants, lessee should have option to declare lease forfeited upon giving 30 days' notice, lessee gave to lessor the privilege of making the covenants good during the 30 days. On his failure so to do, the lessee had reasonable time to remove his effects. Channel v. Merrifield [Ill.] 69 N. E. 32.

5. Provision in a lease that at any time during term lessee may buy, rent paid to be applied on purchase price, requires more than mere verbal statement of intent to buy to permit lessee to continue to occupy as owner. Hill v. Allen [Mass.] 69 N. E. 333.

6. Drew v. Billings-Drew Co. [Mich.] 92 N. W. 774; Bowman v. Wright [Neb.] 92 N. W. 580.

7. Where lessor and lessee believe that certain changes can be made in the building, without which the lessee would not enter into the contract, the lease may be rescinded when the making of the changes is found impossible. Barker v. Fitzgerald [Ill.] 68 N. E. 430, the court holding that the fact that the lessor could not be placed in statu quo did not affect the question, since money damages could be allowed to secure an equitable settlement.

8. For false representations of lessor relative to the rentals which the premises were then yielding, relied upon by lessee, a lease may be rescinded. In such case the damages suffered, together with a deposit made as security, may be recovered by lessee. Prince v. Jacobs, 80 App. Div. [N. Y.] 243.

9. Threats held insufficient to show sublease induced by duress. Piper v. Cashell [C. C. A.] 122 Fed. 614.

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in land may be terminated by disseisin of the lessor and adverse claim.[12] By denial of landlord's title and assertion of title in himself, an assignee's rights under a lease become terminated.[13] A lease is not terminated by adjudication of bankruptcy against the lessor.[14]

Surrender, abandonment and eviction.—At the expiration of the term, the lessee must surrender possession if he would terminate the tenancy.[15] A surrender and the intention so to terminate must be actually or constructively brought to the lessor's notice,[16] must be complete[17] and timely,[18] and if to an agent, his authority must appear.[19] It must appear that the lessee had the right to surrender.[20] Acceptance of a surrender is shown by a reletting.[21] Assent to an abandonment[22] or a vacation by the lessee when so requested[24] has the same effect. Upon either complete or partial eviction, tenant may abandon the premises and deem the tenancy terminated.[25]

Destruction of premises.—While the interest of a lessee of a mere apartment in a building terminates upon the destruction of the premises, and he cannot successfully demand that he be given similar room in a building erected on the same land,[26] yet a lease of land is not terminated at common law by the destruction of a building placed thereon and forming its main value.[27]

10, 11. Where consideration for a lease is the maintenance of a school of a specified character, it is too late, after seventeen years, to allege that the consideration has failed in that the school maintained is not of the character required. Wildey Lodge v. Paris [Tex. Civ. App.] 73 S. W. 69.

12. White v. Brash [Ariz.] 73 Pac. 445.

13. Wildey Lodge v. Paris [Tex. Civ. App.] 73 S. W. 69.

14. In re Pennewell [C. C. A.] 119 Fed. 139, where the court points out that by reason of principle stated a sublessee cannot secure damages against bankrupt estate on allegation of forfeiture of his sub-lease by the bankruptcy. Bankruptcy does not terminate lease. Witthaus v. Zimmerman, 91 App. Div. [N. Y.] 202.

15. That a lessor has waived a covenant prohibiting subletting, does not relieve lessee from necessity of surrendering possession at expiration of the term. And where he is unable so to do by reason of the refusal of the sublessee to vacate, the lessor may deem the lease renewed. Sullivan v. Ringler, 171 N. Y. 693.

16. Not by the mere act of leaving the key at the office of the lessor during his absence. Durfee v. United Stores [R. I.] 52 Atl. 1087. Otherwise, however, where the surrender of the keys is accompanied with notice of intention to terminate. Channel v. Merrifield [Ill.] 69 N. E. 32. Testimony of lessee to statements of lessor held to make a jury issue as to surrender. Ewing v. Barnard, 84 N. Y. Supp. 137.

17. Surrender of possession on demand for payment of rent or surrender held not to release the tenant where there was no evidence that his undertenant did not remain in possession or that the janitor had authority to receive the keys. Morris v. Dayton, 84 N. Y. Supp. 392.

18. Surrender as a defense to rent must be made out by proof of delivery of the entire premises in the time specified. Evidence insufficient to show a surrender. Morris v. Dayton, 86 N. Y. Supp. 172.

19. Morris v. Dayton, 86 N. Y. Supp. 172.

20. Where lessee has entered under a written lease for one year, with privilege of five years, rental in cash annually, evidence that after continuing in possession three years, lessee then stated he did not want premises, and surrendered same, did not tend to prove lease had expired. Faseler v. Kothman [Tex. Civ. App.] 70 S. W. 321.

21. The tenant must show that a reletting was within such time as to constitute an acceptance of surrender. Isaacson v. Wolfensohn, 84 N. Y. Supp. 555. Where the janitor accepted the keys and the landlord leased to another there was an acceptance of surrender. Krumdieck v. Ebbs, 84 N. Y. Supp. 525.

22. A mere taking charge of premises upon abandonment by tenant, though coupled with a leasing for tenant's benefit, does not express assent to abandonment; otherwise where landlord leases for his own benefit. Hayes v. Goldman [Ark.] 72 S. W. 563. It is for the jury to decide whether acts of landlord constitute assent to tenant's abandonment. Id. Abandonment of a mining lease may be deduced from a long period of nonuser. Negaunee Iron Co. v. Iron Cliffs Co. [Mich.] 96 N. W. 468.

24. Action of lessor's agent in telling lessee to move, and posting notice "to let" on premises prior to termination of lease period, may terminate the lease even though a provision existed therein that lessor might lease for benefit of lessee if premises became vacant, and might post notice as he did prior to expiration of term. Crane v. Edwards, 80 App. Div. [N. Y.] 333.

25. Moore v. Mansfield, 182 Mass. 302; Dennick v. Ekdahl, 102 Ill. App. 199.

26. Gavan v. Norcross, 117 Ga. 356, where it was held, also, that termination of tenant's interest not waived by notice by landlord after destruction of premises that he deemed tenant's interest terminated by his failure to pay rent. See, also, Snook & A. Furniture Co. v. Steiner, 117 Ga. 363. Under provision in a lease that in the event of destruction of the premises the landlord shall at once rebuild, and that until the rebuilding is concluded tenant shall pay no rent, the rela-

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Forfeiture.—Forfeiture is a loss of tenancy for breach of covenant. The law does not look with favor thereon, and unless the applicant has scrupulously complied with the covenants by him to be performed, the application will be denied.[28] Where the lease clearly confers the right, however, and the landlord is free from blame, the courts will not interfere.[29] And although forfeiture may result from breach of covenant by tenant, a landlord may not summarily decide that breach has occurred and thereupon eject tenant without hearing or opportunity to defend.[30] The right to enforce forfeiture, where it exists, is in the then owner of the premises.[31] Forfeiture of a mining lease may be decreed where equity requires.[32]

Notice to vacate and demand of possession.—A notice appropriate to the character of the tenancy[33] conformable to the statute,[34] or a demand of rent on the due day unless dispensed with,[35] is necessary to forfeit a lease. Demand for rent previous to forfeiture is essential where right of forfeiture is dependent upon default in payment thereof.[36] A periodical tenancy requires notice to vacate at the end of the month or year current.[37] No notice need be given if the lease dispenses with it,[38] nor where one holds under lease definitely determining the rental period. Otherwise, where tenant has held over by consent of landlord, express or implied.[39] A grantee demanding possession need not exhibit his title deeds.[40] A tender of the value of improvements may be necessary.[41] Waiver of

tion of the parties is suspended during the rebuilding, and is immediately re-established upon the completion thereof. Id. That workmen are in the leased premises making repairs does not of necessity show that premises were at the time untenantable. Field v. Surpless, 83 App. Div. [N. Y.] 268.

27. Lincoln Trust Co. v. Nathan, 175 Mo. 32. Where agreement exists that in case of destruction, premises are to be rebuilt for tenant, upon such destruction tenant cannot repudiate the tenancy. Lehmeyer v. Moses, 174 N. Y. 518.

28. Knight v. Orchard, 92 Mo. App. 466. For subletting without consent of landlord in violation of statute, lease may be declared forfeited. Markowitz v. Greenwall Theatrical Circuit Co. [Tex. Civ. App.] 75 S. W. 74, 317. Action for detainer lies for failure of lessee to pay rent or vacate upon written demand under a lease for one month and from month to month thereafter, terminable at the option of either party. Ellis v. Fitzpatrick [C. C. A.] 118 Fed. 430. A lessor cannot complain for failure of tenant to perform a covenant which he himself has rendered impossible. Metropolitan Land Co. v. Manning, 98 Mo. App. 248.

An action for injunction to restrain trespass by tenant is not an action to declare forfeiture. Metropolitan Land Co. v. Manning, 98 Mo. App. 248.

29. Acceptance of rent after breach of a covenant, as that no liquor should be sold on the premises, does not bar declaration of forfeiture for continuance of the breach thereafter. Granite Bldg. Ass'n v. Greene, 25 R. I. 48.

30. Murphy v. Century Bldg. Co., 90 Mo. App. 621.

31. Small v. Clark, 97 Me. 304.

32. Negaunee Iron Co. v. Iron Cliffs Co. [Mich.] 96 N. W. 468.

33. The relationship and rights of tenant for a term of years are not affected by a 30-days notice to quit. Bent v. Renken, 86 N. Y. Supp. 110. Bringing unlawful detainer is a sufficient notice in a tenancy at will. Earl Orchard Co. v. Fava, 138 Cal. 76, 70 Pac. 1073. Notice of raise in rent delivered one day before the month was out is not sufficient to oust tenant from month to month either as notice to quit or for nonpayment. Miller v. Lowe, 86 N. Y. Supp. 16.

34. On default only ten days' notice of termination need be given. Drew v. Mosbarger, 104 Ill. App. 635.

35. Cole v. Johnson [Iowa] 94 N. W. 1113. Demand of rent on due day necessary to forfeit. Code Civ. Proc. § 1020 as amended to dispense with demand held unconstitutional for want of proper title and of repealing clause. Godwin v. Harris [Neb.] 98 N. W. 439.

36. Under the California code, permitting tenant to perform within three days after notice has been served, the fact that tenant could not perform, and demand of performance was therefore unnecessary, did not obviate necessity for demand for possession. Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449.

37. A landlord's notice to a tenant from month to month, requiring tenant to vacate, is not vitiated by stating the time of required vacation as of one day after the expiration of the month. Searle v. Powell [Minn.] 94 N. W. 868. In New Jersey, a monthly tenancy is terminated by a notice to vacate on one of the recurring periods of the tenancy, served on the same day of the preceding month. Baker v. Kenney [N. J. Law] 54 Atl. 526.

38. Metropolitan Land Co. v. Manning, 98 Mo. App. 248.

39. Mastin v. Metzinger [Mo. App.] 74 S. W. 431; Morris v. Healy Lumber Co. [Wash.] 74 Pac. 662. Notice to vacate need not be given to one who, although entering under a lease void under the statute of frauds, holds to the end of the term. Butts v. Fox, 96 Mo. App. 437.

40. In Missouri, it is not necessary, in ac-

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notice may be proved by acts of parties.[42] A valid notice to vacate may be withdrawn only by mutual consent.[43] Although an irregularity exists, a lessee may be estopped by his acts from denying sufficiency of notice to vacate, where his acts are such as to mislead the lessor to his prejudice.[44] On the other hand, however, acceptance of rent after serving notice to vacate does not necessarily operate as a withdrawal of such notice.[45] Where the tenant has broken other covenants, his payment of rent for the purpose of obtaining restitution does not rehabilitate his tenancy.[46] In an action for possession for nonpayment of rent, a tender of same with costs for the first time on appeal is ineffective.[47] A notice to vacate need be in no specific form,[48] but must be unconditional.[49] It will not be ineffective by reason of an inadvertent transposition of pronouns not misleading in fact,[50] and in the signature to the notice, the name of the agent, followed by the words "agent for" the landlord is as effectual as the name of the landlord followed by the word "by" the agent.[51] Where the length of notice to vacate is arranged by agreement, notice by mail is sufficient, if actually received.[52] See the note as to service held sufficient.[53]

Renewal under express agreement.—The lease may by its terms fix the right to renew[54] in favor of either party.[55] Such a covenant for renewal may be void for uncertainty.[56] The conditions precedent thereto must be fully performed,[57]

tions of unlawful detainer, that at time of making demand for possession by grantee of lessor the grantor's deed shall be exhibited. Tucker v. McClenny [Mo. App.] 77 S. W. 151.

41. In Indian Territory under the Curtis Act, held that a lessor, stipulating to pay the value of improvements made by lessee at expiration of term, may tender value of improvements and maintain action of unlawful detainer upon refusal of lessee to vacate. Fraer v. Washington [C. C. A.] 125 Fed. 280.

42. Waiver of right to statutory notice of intention to vacate deduced from agreement of tenant to give notice if he decided to remain, followed by advertisement of premises and posting rent notices by landlord for more than statutory period. Eimermann v. Nathan, 116 Wis. 124.

43. Western Union Tel. Co. v. Pa. R. Co., 120 Fed. 362, where acceptance of rent after notice is not deemed conclusive evidence of waiver. See, also, Mathews Slate Co. v. New Empire Slate Co., 122 Fed. 972.

44. Baltimore Dental Ass'n v. Fuller [Va.] 44 S. E. 771; Snyder v. Porter [Neb.] 95 N. W. 1009.

45. W. U. Tel. Co. v. Pa. R. Co. [C. C. A.] 123 Fed. 33.

46. Bateman v. Superior Ct., 139 Cal. 140, 72 Pac. 922.

47. Walter Commission Co. v. Gilleland, 98 Mo. App. 584.

48. Earl Orchard Co. v. Fava, 138 Cal. 76, 70 Pac. 1073.

49. Baltimore Dental Ass'n v. Fuller [Va.] 44 S. E. 771.

50. Lacrabere v. Wise [Cal.] 71 Pac. 175.

51. Earl Orchard Co. v. Fava, 138 Cal. 76, 70 Pac. 1073.

52. Bloom v. Wanner, 25 Ky. L. R. 1646, 77 S. W. 930.

53. In California, handing of notice to vacate to defendant's wife, reading of same by her to him at proper time, held sufficient service. Earl Orchard Co. v. Fava, 138 Cal. 76, 70 Pac. 1073. Notice to vacate signed and delivered by one of two parties entitled to possession in common, said party acting for both to the knowledge of lessee, held sufficient. Id.

54. "Privilege of continuing in possession" for a specified term is equivalent to privilege of renewal. Western N. Y. & P. R. Co. v. Rea, 83 App. Div. [N. Y.] 576.

55. Agreement that if lessor cannot give or "refuses to give" an extension agreed on he shall purchase improvements made by lessee does not give latter an option for renewal but gives it to lessor. Neiderstein v. Cusick, 83 App. Div. [N. Y.] 36.

56. Howe v. Larkin, 119 Fed. 1005. Provision in a lease for one year that tenant may have "privilege of longer" is too indefinite to justify retention beyond the year. Nor can parol evidence, in such case, be introduced to show meaning of parties. Howard v. Tomicich, 81 Miss. 703.

57. Notice by lessee of intention to renew. Pittsburgh Mfg. Co. v. Fidelity Title & Trust Co. [Pa.] 56 Atl. 436. No performance of conditions precedent to renewal being shown, evidence that tenant expected renewal under agreement therefor, held, inadmissible. Swift v. Occidental Min. & Petroleum Co. [Cal.] 74 Pac. 700. Renewal of lease dependent upon faithful performance of covenants may be refused even though landlord has previously waived right of forfeiture for other breaches of covenant. Id. Express provision for renewal of lease, with further provision that new agreement must be made at renewal as to part of premises, renders renewal of any part dependent on consummation of new agreement as to part specified. Cammack v. Rogers [Tex. Civ. App.] 74 S. W. 945. In an oil and gas lease for five years and as much longer "as oil and gas was found in paying quantities," there is an implied condition for development of the property in good faith in order to the continuance after five years. Barnsdall v. Boley, 119 Fed. 191. Under a lease for a stated period "and as much longer as oil and gas are found in paying quantities" lessee may continue after stated period where the land contains a well producing 1,000,000 feet

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but performance may be at any time within the time agreed.[58] A lease containing right to renew as one of its covenants does not, however, carry right to second renewal as one of such covenants.[59] A lease may, also, contain the simple provision that lessee enjoys option to renew. In such case the option will be deemed exercised by expression of intention to renew both before and after termination of the lease and the making of improvements by landlord, not required by lease, in reliance on tenant's statements.[60] The tenant will be deemed to have exercised such option by remaining in possession after termination of original period.[61] Such an option is waived by surrender of possession.[62] Provision that lessee shall give specified notice of intention to renew is for the benefit of lessor. He may therefore waive failure to give such notice.[63] The grantor of an option to renew cannot take advantage of his own act preventing renewal within the specified time.[64] A bonus to an assignor in case of "renewal" is earned, though the renewal be in piecemeal, but not if the rent is increased.[65]

Holding over without agreement.—There is no contractual right to hold over against terms of the lease and the notice.[66] Mere failure to turn over keys and remove certain useless furnishings at the termination of the lease period does not necessarily operate as a renewal.[67] Failure of tenant to move at termination of term during negotiations with landlord's agent as to rate of rent does not constitute a holding over by consent of landlord.[68] In Nebraska, it has been held that one becomes a hold-over tenant rather than a tenant under express agreement where landlord has taken insufficient action to terminate tenancy, and tenant has neither paid nor tendered rent due.[69]

§ 9. *Landlord's remedies for recovery of rent. Parties and procedure generally.*—The lessor's assignee may institute any authorized proceedings necessary in order to collect the rent.[70] Several co-grantees may join.[71] A mortgagee who

per day, worth at least 3 cents per 1,000 feet. Summerville v. Apollo Gas Co. [Pa.] 56 Atl. 876.

Not precedent: Under an option to continue a lease "by paying $40 each year" payment need not be made at the beginning of each year. Blodgett v. Lanyon Zinc Co. [C. C. A.] 120 Fed. 893.

58. Agreement that lessee shall have made certain improvements by a specified time, held, not avoidable by lessor prior to such time, for failure of lessee to make the improvements proportioned to the time having elapsed, it not appearing that the improvements cannot be completed on time or that lessee is not able to respond in money damages upon failure. Mortimer v. Hanna [Miss.] 35 So. 159.

59. Winslow v. Baltimore & O. R. Co., 188 U. S. 646, 47 Law. Ed. 635.

60. Andrews v. Marshall Creamery Co., 118 Iowa, 595.

61. Brown v. Samuels, 24 Ky. L. R. 1216, 70 S. W. 1047; Caley v. Thornquist [Minn.] 94 N. W. 1084, where part of rent for renewal period was paid. Lease deemed renewed by men holding over, although lease provided that for renewal lessee should give notice or pay specified sum. In re Thompson's Estate, 205 Pa. 555. An option to renew for another year deemed exercised by tenant remaining in possession, though he had notified a clerk of landlord that he did not wish to remain for more than a month, and clerk had assented, landlord never being informed of notification or clerk's assent. Hayes v. Goldman [Ark.] 72 S. W. 563. A second holding over under lease providing for renewal will be deemed to be under implied contract. Roller v. Zundelowitz [Tex. Civ. App.] 73 S. W. 1070.

62. Jackson v. Doll, 109 La. 230.

63. Wood v. Edison Elec. Illuminating Co. [Mass.] 69 N. E. 364. Receipt of rent after term waives written notice of tenant's election to renew. Schuck v. Schwab, 84 N. Y. Supp. 896.

64. Blodgett v. Lanyon Zinc Co. [C. C. A.] 120 Fed. 893.

65. Newman v. Tolmie, 81 App. Div. [N. Y.] 111.

66. Where a lease from a railroad to a telegraph company expressly provides for vacation upon termination of period and notice by railroad, the telegraph company acquires no contractual right to remain after such termination and notice. Western Union Tel. Co. v. Pa. R. Co. [C. C. A.] 123 Fed. 33.

67. Brennan v. New York, 80 App. Div. [N. Y.] 251. Failure of a chattel mortgagee to remove goods surrendered and surrender keys delivered to him for surrender by subtenant at the proper time, will not operate to renew the lease as against tenant in chief. Ketcham v. Ochs, 74 App. Div. [N. Y.] 626, 34 Misc. [N. Y.] 470.

68. Mastin v. Metzinger [Mo. App.] 74 S. W. 431.

69. Snyder v. Porter [Neb.] 95 N. W. 1009.

70. Keeley Brew. Co. v. Mason, 104 Ill. App. 241.

71. Adams v. Shirk [C. C. A.] 117 Fed. 801.

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has the right to collect rents may also procure a receivership.[72] The action for use and occupation is ex contractu, resting on the relation of a tenancy.[73] Rent may be proved against an insolvent's estate[74] and may be enforced ratably against various funds of an insolvent.[75] The law courts will redress a mistake affecting the amount.[76] The tenant may set off damages for fraud in procuring the lease[77] or counterclaim on a breach of covenant to repair,[78] but the right to allowances must be claimed before judgment.[79] The amount due[80] and the making and existence of the lease if declared on[81] must be well pleaded; and proved substantially as laid.[82] When so pleaded, an error in miscalling the action one for "use and occupation,"[83] or for "rent" instead of damages,[84] may be ignored. Matters of defense such as misrepresentation[85] must be pleaded, and denials must be direct.[86] The landlord must prove rent due[87] if not admitted.[88] If qualified, he may state his opinion as to the value of use and occupation of the premises.[89]

A stipulated right to relet and apply the proceeds must be exercised by the landlord in interest.[90] If action for deficiency be begun before expiration of the term, recovery will be limited to that accrued.[91]

Distress.—The remedy where it still exists is usually much circumscribed by statutes.[92] Distress will not lie for breach of a covenant to pay water rent.[93]

72. The statutory sequestration proceedings do not adequately protect a mortgage creditor. A receiver of the property may therefore be appointed at instance of such creditor. De Berrera v. Frost [Tex. Civ. App.] 77 S. W. 637.

73. Hence cannot be where holding was adverse or there was no tenancy. Hill v. Coal Valley Min. Co., 103 Ill. App. 41; Janouch v. Pence [Neb.] 93 N. W. 217.

74. Loss sustained on reletting is provable against the insolvent estate of lessee. McGraw v. Union Trust Co. [Mich.] 98 N. W. 390.

75. Liability of lessee, a bank operating separate departments, should be prorated against assets of each department on winding up. McGraw v. Union Trust Co. [Mich.] 98 N. W. 390.

76. An agreement to reduce rent made under a mistake of law, will not be canceled by equity, the landlord having remedy at law under the original lease. Norris v. Crowe, 206 Pa. 438.

77. Bauer v. Taylor [Neb.] 96 N. W. 268.

78. Hirsch v. Olmesdahl, 88 Misc. [N. Y.] 757.

79. A demand that, in determining rent due a certain allowance should have been made, is too late when made after entry of judgment. Woodruff v. Butler [Conn.] 55 Atl. 167.

80. Allegation in complaint for rent that plaintiff claimed of defendant, as rent a specified number of pounds of cotton, or its alternative value, specifying amount, held, insufficient. Linam v. Jones, 134 Ala. 570.

81. Recovery of the increased rental for the first year elapsing after original term of a lease extending option to renew upon payment of such increase, necessitates allegation that the continuance was under the lease. Crystal Ice Co. v. Morris, 160 Ind. 651.

82. Recovery for rent cannot be had against a wife where evidence indicates her husband to have been lessee. Fludder v. Vaughan, 24 R. I. 471. In an action for rent, an allegation of a written assignment of lease is not sustained by the introduction of a bond signed by defendants referring to the lease as "assigned" to defendants. Landt v. McCullough [Ill.] 69 N. E. 107. In an action for rent, declaration of an unsigned and unacknowledged lease, proof of a lease purporting to have been executed by both parties, held, variance. Id.

83. Complaint alleging facts making out an express contract sustained though it denominated the cause of action "use and occupation." Sherman v. Ludin, 84 App. Div. [N. Y.] 579.

84. It is immaterial that the declaration in suit by lessor against lessee, upon default in rent and re-entry by landlord, sets out the cause of action as for rent instead of damages for breach of covenant, whereby the lessee is liable for rent during remainder of term. Weeks v. International Trust Co. [C. C. A.] 125 Fed. 370.

85. False representations in inducing a lease, not pleaded, cannot be submitted to a jury in defense to an action for rent. Marshall v. Harber [Iowa] 91 N. W. 774.

86. An answer must deny plaintiff's allegation that defendant was in possession and so remains. Pleading a surrender and fraud without this leaves the answer demurrable. Forgotson v. Becker, 39 Misc. [N. Y.] 816.

87. Stevens v. Beardsley [Mich.] 96 N. W. 571. In an action for rent, a deed of conveyance is irrelevant unless it be shown that the premises conveyed and the premises leased are the same. Linam v. Jones, 134 Ala. 570.

88. Mensing v. Cardwell [Tex. Civ. App.] 75 S. W. 347. Verdict for rent set aside where amount due was not admitted or proved. Vogel v. Hemming, 84 N. Y. Supp. 473.

89. Ish v. Marsh [Neb.] 96 N. W. 58.

90. Weeks v. International Trust Co. [C. C. A.] 125 Fed. 370.

91. McCready v. Lindenborn, 172 N. Y. 400.

92. Texas: A party in applying for a distress warrant must show one of the statutory grounds. Jackson v. Corley, 30 Tex. Civ. App. 417. Removal of cotton to have same baled, with subsequent return there-

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The right to pursue the remedy passes to lessor's assignee,[94] and may be good as against subtenant.[95] A landlord may waive his right to distrain for rent by permitting sale of tenant's property without objection.[96] Notice and demand are not necessary if the rent is due.[97] If no damage results, the tenant cannot complain that the landlord entitled to distress exercised it in an unlawful way.[98] A wrongful seizure of goods may be a conversion by the landlord.[99] The practice under the statutes of the several states is shown in the note.[1] Property taken by law under distress is in custody of the law and is not subject to conflicting levy.[2] The quashing of a distress warrant releases the "replevy" bond given for the goods.[3]

Attachment or judicial seizure is authorized in some jurisdictions in favor of a landlord whose security is endangered.[4] If a portion be disposed of, the remainder may in Kansas be attached before maturity of the rent.[5]

Liens and securities for payment of rent. Lien.—A crop mortgage covers crops of a sublessee.[6] An unrecorded provision for a future crop mortgage is ineffective against creditors.[7] A landlord's lien on goods of the tenant put in store without any surrender of his rights by the landlord is superior to the warehouseman.[8] In Texas, a statutory lien exists on goods in a leased storehouse for rent to accrue during the contract year.[9] Statutory liens in favor of a landlord must rest in substantial conformity to the statute, else their priority may be lost.[10]

of, and use of reasonable products to feed stock does not justify distress warrant. Riggs v. Gray [Tex. Civ. App.] 72 S. W. 101. Affidavit for distress warrant that tenant is about to remove products is sustained where products are removed and converted on the day following. Riggs v. Gray [Tex. Civ. App.] 72 S. W. 101.

93. It constitutes an agreement to make payment to whom payment is due. Evans v. Lincoln Co., 204 Pa. 448.

94. Keeley Brew. Co. v. Mason, 102 Ill. App. 381.

95. In Georgia distress as against subtenant is good even though subtenant has given a note for the rent to the tenant who has transferred it to another. Barlow v. Jones, 117 Ga. 412. Distress may be for improvements which tenant agreed to make. Fountain v. Whitehead [Ga.] 46 S. E. 104.

96. In re Smith, 123 Fed. 188.

97. Keeley Brew. Co. v. Mason, 102 Ill. App. 381.

98. Brown v. Howell, 68 N. J. Law, 292.

99. Allegation that landlord converted produce belonging to tenant, sustained by finding that officer delivered same to landlord, who, with others, consumed it. Riggs v. Gray [Tex. Civ. App.] 72 S. W. 101.

1. **Texas:** An affidavit made to obtain a distress warrant excludes presumption that any ground is relied on except that alleged. Jackson v. Corley, 30 Tex. Civ. App. 417. Propriety of returning writ to county court dependent rather on rent due at time of trial than at time of issuing of warrant and filing of petition. Allen v. Brunner [Tex. Civ. App.] 75 S. W. 821. Expense incurred in landlord's suit for rent under distress warrant will be deemed included in a judgment ordering that defendant "do have and recover of plaintiff all costs of court." Jackson v. Jernigan [Tex. Civ. App.] 77 S. W. 271.

2. A mortgage execution cannot be levied on such property. Camp v. Williams [Ga.] 46 S. E. 66. In an action against a sheriff for not having sold property under a mortgage execution, he is entitled to have a prior distress warrant indicate what articles were taken. Id. It is not for the sheriff to inquire whether the levy of a distress warrant is excessive. Id. It is for a mortgagee, and not the sheriff holding the foreclosure execution, to resist an invalid distress warrant. Similarly, it is for the mortgagee or the members of the firm, not for the sheriff, to resist a distress warrant under which the property of a firm is held, the party to be distrained being a member thereof. Id.

3. Jackson v. Corley, 30 Tex. Civ. App. 417.

4. Sufficiency of affidavit of leasing and rent due to support attachment for rent due for premises under New York laws. Steele v. Gilmour Mfg. Co., 77 App. Div. [N. Y.] 199.

In Oklahoma, affidavit and proof of affidavit in attachment to recover rent must be in accordance with statute. The attachment, to be valid, must be on crops grown or growing on the land. Greeley v. Greeley [Okl.] 73 Pac. 295.

In Texas, warrant to seize property of tenant about to remove same may issue though rent not due. Allen v. Brunner [Tex. Civ. App.] 75 S. W. 821.

Malicious attachment: That a landlord sues out an attachment to recover a valid claim for rent, while indebted to his tenant in an amount in excess of the rent claimed, does not sustain an allegation of malice. Smeaton v. Cole [Iowa] 94 N. W. 909.

5. **In Kansas,** where rent is payable in portion of crop, landlord may attach portion of crop remaining where part disposed of, although rent in crop not due and sufficient portion of crop remains to satisfy claim. Harmon v. Payton [Kan.] 74 Pac. 618.

6. Eckles v. Ray [Okl.] 75 Pac. 286.

7. Ryan v. Donley [Neb.] 96 N. W. 49.

8. Pig iron stored on a plat subleased to warehouseman. American Pig Iron Storage

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It is conversion to defeat the lien by disposal of crops.[11] An implied promise to pay landlord's lien on crop arises as against one inducing landlord to allow him to receive, or, where he has already received, to allow him to dispose of the crop, by holding out to landlord that his rent is safe and will be paid.[12] One who acquires crops subject to lien is liable as on an implied contract.[13] A purchaser of crops who is liable may be sued after the lien has expired,[14] and after he has been garnished by the landlord may be liable for any deficiency.[15] The landlord must prove the amount due him.[16] The purchaser may discharge the lien and look to the tenant.[17]

By consent to a transfer[18] or a substitution of other security[19] or delay in asserting the lien,[20] it may be waived in favor of third persons, as well as the tenant.[21] A crop lien may be waived by parol.[22] Whether agency to lease land either actually or apparently includes authority to waive a crop lien is for the jury.[23] A subletting will not release the tenant.[24] Innocent purchasers[25] are protected against such liens as are not absolute.

The lien may be protected by injunction against disposal of crops[26] or of a merchandise stock.[27] Under a lease creating a lien on crops, a court of equity

Warrant Co. v. Sinnemahoning I. & C. Co., 205 Pa. 403.

9. Allen v. Brunner [Tex. Civ. App.] 75 S. W. 821.

10. In Texas, lien of mortgagee failing to file as required by statute becomes postponed to lien of landlord. Liquid Carbonic Acid Mfg. Co. v. Lewis [Tex. Civ. App.] 75 S. W. 47.

11. Jackson v. Corley, 30 Tex. Civ. App. 417.

12. Shealy v. Clark, 117 Ga. 794.

13. Attachment may issue as on contract. Judge v. Curtis [Ark.] 78 S. W. 746.

14. Purchaser of tenant's crop during existence of lien. Belshe v. Batdorf, 98 Mo. App. 627. Acceptance of property by mortgagee on which landlord had a lien, constitutes conversion by mortgagee. That mortgagee held the property until lien of landlord expired did not alter the rule. Mensing v. Cardwell [Tex. Civ. App.] 75 S. W. 347.

15. Second action may be maintained against purchaser. Belshe v. Batdorf, 98 Mo. App. 627.

16. Judge v. Curtis [Ark.] 78 S. W. 746. Whether landlord profited by bidding in other property securing his rent is irrelevant to the liability of a purchaser of crops subject to a lien. Wimp v. Early [Mo. App.] 78 S. W. 343.

17. May off-set such payment against tenant's action for purchase price. Hardy v. Matthews [Mo. App.] 74 S. W. 166.

18. In Iowa, consideration for waiver of a landlord's lien may consist in his impliedly granting permission to tenant to place good title to the crop in another. Fishbaugh v. Spunaugle, 118 Iowa, 337. Sale of his crop under permission of agent duly empowered places title in an innocent purchaser free from lien of landlord. Id. By permitting tenant to use portion of a crop subject to his lien, however, a landlord does not waive lien on entire crop in favor of subsequent claimant. Johnston v. Kleinsmith [Tex. Civ. App.] 77 S. W. 36. Consent to sale is a waiver. Wimp v. Early [Mo. App.] 78 S. W. 343.

19. Clause in deed of trust held to mean only that crop lien was not waived, not that crop was mortgaged. Wimp v. Early [Mo. App.] 78 S. W. 343. Allegations held sufficient to let in proof of waiver of statutory lien on crops by other mode than taking of other security. Id.

20. Failure of a landlord to foreclose his lien, though a distress warrant is formally obtained, is a waiver of such lien. Bond v. Carter [Tex. Civ. App.] 73 S. W. 45.

21. British & A. Mortg. Co. v. Cody, 135 Ala. 622.

22. Agent orally authorized may do so. Wimp v. Early [Mo. App.] 78 S. W. 343. The crop is not realty. Id.

23. Wimp v. Early [Mo. App.] 78 S. W. 343. Agent's waiver as to other crops is irrelevant. Id.

24. The original tenant remains liable for removal of crop in violation of law. State v. Crook, 132 N. C. 1053.

25. In Alabama, a chattel mortgagee, in the absence of waiver or estoppel, is not an innocent taker under a statute giving a landlord a lien paramount to all others. British & A. Mortg. Co. v. Cody, 135 Ala. 622. As against a landlord having a lien by law on agricultural products for a specified time after removal thereof from farm by tenant, one purchasing within the specified time cannot be deemed an innocent taker. American Cotton Co. v. Phillips [Tex. Civ. App.] 71 S. W. 320. The issue of knowledge of tenancy on the part of alleged innocent purchaser of crop subject to landlord's lien may be submitted to jury where the question is in doubt. Belshe v. Batsdorf, 98 Mo. App. 627. The payment by him in a previous year of rent he then being mortgagee of crops, is sufficient notice to raise inquiry of tenancy and lien. Judge v. Curtis [Ark.] 78 S. W. 746.

26. In Iowa, an injunction may issue to restrain disposal of products of the farm at the instance of the landlord where, although the rent is not due, the tenant is shown to be insolvent. Gray v. Bremer [Iowa] 97 N. W. 991.

27. Held, however, in Iowa, that a tenant cannot prejudice the lien of his landlord by shipping goods in leased building to an-

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will decline to retain a greater portion thereof than necessary to liquidate the debt.[28] And where a lien is attempted to be enforced, all defenses open to a lessee are open to his assignee.[29] Foreclosure should be against all the goods covered,[30] and may in Texas be joined with an action against the purchaser.[31]

The right to retain a deposit made to secure lessor against loss of rent is deemed waived by re-entry for failure to pay rent.[32]

§ 10. *Landlord's remedies for recovery of premises.*—The plaintiff must prove right of possession or ownership,[33] but the right to dispossess a tenant may be reserved by a grantor.[34] Generally speaking, whatever remedy to secure possession is open to lessor is open equally to his grantee.[35]

Appropriate remedies.—Ejectment will lie where there is a right of re-entry.[36] Injunction will lie to prevent irreparable injury from use of the premises after forfeiture.[37]

Unlawful detainer will lie against a tenant who holds over without right[38] or whose term has become forfeited by default,[39] and under certain statutes for wrongfully using the premises.[40] The assignor is not guilty after he has assigned the lease,[41] nor is the assignee after reassignment.[42] A grantee is not affected by his grantor's acquiescence in nonpayment of rent.[43]

Summary dispossession will be denied where lessor has, in bad faith, refused tender of rent and costs.[44] The relation of landlord and tenant must subsist.[45] It may be maintained, though forcible detainer is subsequently begun.[46] A stranger to summary proceedings cannot intervene and defend.[47]

other town, even though lessee be solvent. Wallin v. Murphy, 117 Iowa, 640.

28. Momrich v. Schwartz [Neb.] 96 N. W. 636.

29. Thomas v. Conrad, 25 Ky. L. R. 169, 74 S. W. 1084.

30. Jackson v. Corley, 30 Tex. Civ. App. 417.

31. Jackson v. Corley, 30 Tex. Civ. App. 417. The court has jurisdiction of a suit to foreclose a landlord's lien on goods, although while the litigation is pending, the goods are converted by parties who have purchased them, and the sum claimed for conversion joined in the foreclosure suit is below that requisite to confer jurisdiction on the court when first set up. Jackson v. Corley, 30 Tex. Civ. App. 417.

32. Caesar v. Rubinson, 174 N. Y. 492.

33. Cleary v. Waldron [N. J. Law] 54 Atl. 565.

34. Tucker v. McClenny [Mo. App.] 77 S. W. 151.

35. Tucker v. McClenny [Mo. App.] 77 S. W. 151; Hadley v. Bernero, 97 Mo. App. 314; Metropolitan Land Co. v. Manning, 98 Mo. App. 248. In Georgia, a grantee of property during a lease period may acquire control from tenant by a dispossessory warrant. Willis v. Harrell, 118 Ga. 906.

36. Under a lease providing for re-entry upon default of tenant. McMahon v. Howe, 40 Misc. [N. Y.] 546; Ocean Grove Camp Meeting Ass'n v. Sanders, 68 N. J. Law, 631. In a suit in ejectment where the issue is right of lessee to possession determinable from construction of the lease and evidence adduced, evidence that landlord took possession under claim of forfeiture is irrelevant. Summerville v. Apollo Gas Co. [Pa.] 56 Atl. 876.

37. Negaunee Iron Co. v. Iron Cliffs Co. [Mich.] 96 N. W. 468.

38. In California, justice courts have jurisdiction of actions both of forcible entry and unlawful detainer, though separately defined by the code. Ivory v. Brown, 137 Cal. 603, 70 Pac. 657.

39. That the period of a lease has not expired does not bar an action for unlawful detainer upon a lease providing for such action in case of default. Preston v. Stover [Neb.] 97 N. W. 812. In Nebraska, action for detention may be maintained upon default of tenant and statutory notice where lease provides for retaking upon default. Cochran v. Phila. M. & T. Co. [Neb.] 96 N. W. 1051. Landlord must either prove requisite notice to quit or an occupancy under a lease and a holding over. Weinhaner v. Eastern Brew. Co., 85 N. Y. Supp. 854. Receipt of rent suffices to show tenancy. Id.

40. Maintaining a nuisance. Eveleth v. Gill, 97 Me. 315.

41. In absence of proof of concerted action to deprive landlord of premises, tenant placing a third party in possession at expiration of his own term is not liable for unlawful detainer. St. Louis Brew. Ass'n v. Niederluecke [Mo. App.] 76 S. W. 645.

42. Assignee is not liable who has reassigned and surrendered before notice. Ben Lomond Wine Co. v. Sladky [Cal.] 75 Pac. 332.

43. In Oklahoma, action of unlawful detainer not barred by grantee against tenant by reason of possession of premises by tenant for over two years with consent of grantor, without payment of rent. Donahoe v. Mitchem [Okl.] 74 Pac. 903.

44. Asbyll v. Haims, 38 Misc. [N. Y.] 578.

45. Evidence insufficient to show relation of landlord and tenant, the occupant being a subtenant. Schlaich v. Blum, 85 N. Y. Supp. 335.

46. In Missouri, action for rent and possession under landlord and tenant act not

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Procedure.—In New York and Georgia, the necessary affidavit or verification may be made by an agent.[48] The statutory notice must be given.[49] Objection to lack of sufficiency of notice to terminate is waived by failure to plead not guilty and by pleading extension of the term.[50]

The relation of tenancy (in certain of the statutory proceedings available to "landlords"),[51] possession by the tenant,[52] facts showing an unlawful detainer,[53] and plaintiff's title to possession,[54] must be pleaded, and amendments may be allowed according to the usual rules.[55] Defenses must be pleaded,[56] and matters of counterclaim are not so pleadable.[57] The character of the tenancy proved must not vary from that to which the notice given applies.[58]

Only tenancy and default can be tried in unlawful detainer, and paramount title in lessee,[59] or that defendant holds an invalid title to the property,[60] or that defendant corporation has begun condemnation proceedings,[61] or that lessee has sublet without authority, and sublessees are not made parties,[62] constitutes no defense. On the other hand, as a valid defense to the action, proof may be made

deemed abated by subsequent action of forcible detainer. Walter Commission Co. v. Gilleland, 98 Mo. App. 584.

47. Code Civ. Proc. § 2244, allowing persons claiming possession to intervene applies only to the persons enumerated in sections 2231, 2232 and 2237. Heuser v. Antonius, 84 N. Y. Supp. 580.

48. In Georgia, the affidavit necessary to dispossess a tenant holding over or in default on rent may be made by landlord's agent. Johnson v. Thrower, 117 Ga. 1007. In New York, the agent of a domestic corporation may verify a petition in summary proceedings to dispossess a tenant. It is not essential that the verification be by a corporate officer. Stuyvesant Real Estate Co. v. Sherman, 40 Misc. [N. Y.] 205.

49. When an action for rent and possession is supplemented by attachment for rent the giving of 10 days' notice required for the attachment confers jurisdiction though the main action requires but five days' notice. State v. Rainey, 99 Mo. App. 218. In New York a notice in summary proceedings must be in the alternative—for payment of rent or possession. McMahon v. Howe, 40 Misc. [N. Y.] 546.

50. Snyder v. Porter [Neb.] 95 N. W. 1009.

51. A statement that one party has attorned to another and paid him rent may be equivalent to stating that the relation of landlord and tenant existed between the parties. State v. Rainey, 99 Mo. App. 218.

52. Statement of leasing for specified time, occupation by defendant, demand for possession within specified time after termination of period, refusal of defendant to surrender, held, sufficient allegation of possession by defendant. Earl Orchard Co. v. Fava, 138 Cal. 76, 70 Pac. 1073.

53. In Missouri, in unlawful detainer by grantee of lessor, allegation that plaintiff, on a specified date was and ever since has been entitled to possession, and that defendant willfully and without force held over after termination of his term, is in compliance with statute. Tucker v. McClenny [Mo. App.] 77 S. W. 151. As to sufficiency of allegations in unlawful detainer, see further Armstrong v. Mayer [Neb.] 95 N. W. 483.

54. Jurisdiction to oust a tenant is not conferred on the court by a petition which fails to allege petitioner to be owner, landlord, agent or otherwise entitled to possession. Cram v. Dietrich, 38 Misc. [N. Y.] 790. An averment in a petition in summary proceedings that petitioner is "lessee and as such is landlord" does not sufficiently aver his interest [Code Civ. Proc. § 2235]. Loft v. Kaziz, 84 N. Y. Supp. 228. Summary proceedings must set out the landlord's interest and not merely that he was landlord else there is failure of jurisdiction warranting injunction in tenant's favor. Kazis v. Loft, 81 App. Div. [N. Y.] 636. Allegation that petitioner is agent for named person alleged to be owner sets forth title. Equitable L. Assur. Soc. v. Schum, 40 Misc. [N. Y.] 657.

55. In case of mutual mistake continuing to a certain point in the trial as to the time of termination of the period, motion to amend will be permitted even pending a motion to dismiss for the variance. Earl Orchard Co. v. Fava, 138 Cal. 76, 70 Pac. 1073. Technical imperfections in answer may be amended where defect was not misleading. Van Deventer v. Foster, 87 App. Div. [N. Y.] 62.

56. In municipal court, city of New York, to recover possession for default in payment of rent, defense of **res adjudicata** can be raised only by answer, not by motion. By motion, questions of jurisdiction, sufficiency of petition, notice and other cognate matters may be raised. Fritztuskie v. Wauroski, 83 App. Div. [N. Y.] 150.

57. Breach of covenant to repair while pleadable in a summary proceeding must be pleaded by way of counterclaim and not as defense [Laws 1893, p. 1750, c. 705]. Jefferson Real Estate Co. v. Hiller, 39 Misc. [N. Y.] 784.

58. Allegation of monthly hiring (requiring five days' notice) is not supported by proof of a month to month tenancy and 30-days notice. Bent v. Renken, 86 N. Y. Supp. 110.

59. Hill v. Watkins [Ind. T.] 69 S. W. 837.

60. Turner v. Gilliland [Ind. T.] 76 S. W. 253.

61. Morris v. Healy Lumber Co. [Wash.] 74 Pac. 662.

62. Tucker v. McClenny [Mo. App.] 77 S. W. 151.

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that the landlord's title has terminated either by operation of law, by judgment, or act of the landlord,[63] or that the deed from tenant to landlord and the lease from landlord to tenant were procured by fraud,[64] or that the action is based upon the failure of tenant to pay rent by reason of difference of view as to the amount of rent payable.[65] Collateral issues of title do not oust jurisdiction in summary proceedings.[66]

In some states, rent may be recovered in the same action,[67] or damages,[68] or a penalty for detention,[69] or restitution be given to a tenant who pays the rent due.[70]

Where averment in summary proceedings that rent is due is denied, such averment must be proved.[71] Service of notice to pay rent or surrender must be alleged and proved.[72] The giving of notice to pay rent or surrender is not a notice in a special proceeding, service of which may be proved by affidavit when denied.[73] A statute authorizing the action for use of premises for the maintenance of a statutory common nuisance is in its nature penal and requires strict proof.[74]

Acts authorizing restitution on filing bond before judgment are valid.[75] A retention bond has been held not to run in favor of a grantee.[76] The writ[77] is valid despite irregularities in procedure.[78]

Accrued rent is not discharged by terminating the lease by possessory proceedings.[79] The costs are regulated by statute.[80]

Injunction against proceedings will not issue when the defense may be made

63. Fry v. Boman [Kan.] 73 Pac. 61.

64. Simon Newman Co. v. Lassing [Cal.] 74 Pac. 761.

65. Brown v. Samuels, 24 Ky. L. R. 1216, 70 S. W. 1047.

66. Van Deventer v. Foster, 87 App. Div. [N. Y.] 62.

67. In California, the court may determine rent due and render judgment therefor under a complaint demanding a month's rent, where the alleged unlawful detainer is after default in rent. Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440. A complaint in unlawful detainer may include demand for rents which became due prior to institution of the action. Ellis v. Fitzpatrick [C. C. A.] 118 Fed. 430.

68. In Missouri, damages for unlawful detainer may be predicated as from date of demand only, not from date of entry into possession. Moston v. Stow, 91 Mo. App. 554. In New York, damages may be recovered for the wrongful withholding of property both prior and subsequent to the commencement of the action. Willis v. McKinnon, 79 App. Div. [N. Y.] 249.

69. In California, where unlawful detainer is after default in rent, judgment may be given for three times the amount of rent due at date of trial. Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440. In Missouri, twice the value of the monthly rents may be recovered in unlawful detainer proceedings. This may be true despite a stipulation of parties limiting damages for detention to a less amount. Hadley v. Bernero, 97 Mo. App. 314.

70. In California, the code permitting payment into court of rent found due and restoration to estate thereupon, where proceeding is for unlawful detainer upon default in rent, does not give right of re-entry where there were other breaches of covenant in addition to default in rent. Bateman v. Superior Ct., 139 Cal. 140, 72 Pac. 922.

71. Brill v. Norkett, 84 N. Y. Supp. 142.

72. Lacrabere v. Wise [Cal.] 75 Pac. 185. In California, the bringing of an action in unlawful detainer may render notice of termination of tenancy at will unnecessary. Earl Orchard Co. v. Fava, 138 Cal. 76, 70 Pac. 1073.

73. Code Civ. Proc. §§ 1161, 2009. Lacrabere v. Wise [Cal.] 75 Pac. 185.

74. Eveleth v. Gill, 97 Me. 315. Where a mere allegation that the "estate in the premises has terminated" was held insufficient.

75. Not unconstitutional as depriving tenant of property without process of law. Morris v. Healy Lumber Co. [Wash.] 74 Pac. 662.

76. In Arkansas, sureties on a retention bond in unlawful detainer are relieved from liability for a holding-over of principal, where, during the term of the lease, the landlord has conveyed the premises to another. Brooks v. Buie [Ark.] 70 S. W. 464.

77. Evidence as to whether officer removed property from part of premises not covered by dispossess warrant held for the jury. Moriarity v. Wagner, 84 N. Y. Supp. 864.

78. That the anterior proceedings were irregular does not justify sheriff in refusing to execute writ to collect rent and place plaintiff in possession, the writ being in all respects regular. State v. Rainey, 99 Mo. App. 218.

79. In New York a lease is cancelled by the issue of a warrant in summary proceedings. The recovery of rent up to the time of the issuance of the warrant is not, however, barred thereby. Adler v. Kramer, 39 Misc. [N. Y.] 642.

80. In New York, a landlord prevailing in a summary proceeding, in which forcible entry and detainer is not involved, may be allowed as costs ten dollars, but no more. Lauria v. Capobianco, 39 Misc. [N. Y.] 441.

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or the injury averted in the dispossessory proceeding,[81] unless irreparable injury would result,[82] but it may issue to enable the lessee to institute legal proceedings for his protection.[83]

Matters relating to practice on new trial[84] or review[85] in the various jurisdictions are decided in cases cited. Constructive eviction and surrender are questions of fact which will not be reviewed on conflicting evidence.[86] After a new trial is ordered in dispossess proceedings, a jury may be demanded, though it was waived on the first trial.[87] Defenses must be made below.[88]

§ 11. *Liability of third persons to landlord or tenant.*—For injury to the leasehold estate, third persons are liable to the lessee. The lessor cannot maintain action therefor.[89] A tenant in possession may sue for recovery of damages occasioned to his leasehold interest by a nuisance. That his occupation began while the nuisance existed does not alter the rule.[90] Where lessees have privilege of removing building at expiration of term, in estimating damages caused by the falling upon it of an adjoining building, consideration may be had to the probability of securing a renewal of lease, rental value for remainder of term and cost of removing the collapsed structure as ordered by city authorities.[91] A lessee cannot recover a fire loss occasioned by negligence of lessor, where policy provides that it shall become void where insured releases any party from liability for causing loss, and insured lessee has so released lessor.[92] The lessee, in bringing suit, need not join the lessor as a party.[93] For injury to the reversionary interest,

81. Equity will not restrain the execution of a warrant to dispossess a tenant, where the relation of landlord and tenant clearly exists. The tenant has his remedy at law by filing a counter affidavit. Johnson v. Thrower, 117 Ga. 1007. Under the Pennsylvania bill to restrain summary proceedings against tenants, allegation that complainant believes he cannot receive a fair trial because justice and jury is friendly to landlord, is insufficient. Neither is it sufficient to allege that tenant placed reliance on landlord's promise to extend the lease, had not given the notice required by the lease, and the landlord had failed to redeem his promise. Denny v. Fronheiser [Pa.] 56 Atl. 406.

82. Summary proceedings may be enjoined if there is a claim of right and eviction would endanger life, but not solely because of a claim of right triable in such proceedings. Weber v. Rogers, 41 Misc. [N. Y.] 662.

83. Where a lessee railroad has rightfully constructed its road on the premises, the lessor cannot dispossess the lessee until time is given to start condemnation, where lessee is willing to pay for use of land, amount to be determined in condemnation proceedings. Baltimore & O. R. Co. v. Winslow, 18 App. D. C. 438. See, also, Winslow v. Baltimore & O. R. Co., 188 U. S. 646, 47 Law. Ed. 635.

84. Motion by defendant to be relieved of judgment in unlawful detainer does not estop him, if motion is denied, from moving for new trial on the ground of lack of sufficiency of evidence. Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449.

85. In Missouri, a justice may decree possession, but cannot enter judgment for rent in excess of his jurisdiction. Upon trial de novo on appeal to circuit court, the landlord may elect to have decree of possession, but cannot have judgment for rent in excess of the justice's jurisdiction. Walter Commission Co. v. Gilleland, 98 Mo. App. 584. In Missouri, an appeal in unlawful entry and detainer from judgment of justice is returnable to circuit court within six days after judgment is rendered, where judgment rendered during circuit court term. Hadley v. Bernero, 97 Mo. App. 314. In Mississippi, where a tenant appeals in proceedings to dispossess him, he may file in the circuit court, for the first time, an affidavit denying the facts on which the summons was issued. Harvey v. Clark, 81 Miss. 166. In New York, a justice may determine whether or not all rent due under a lease has been paid. If guilty of error in his decision, an appeal lies from the final order awarding possession. If possession be awarded to landlord and, from decision of justice the amount of rent unpaid cannot be ascertained, tenant may apply to equity for relief. Natkins v. Wetterer, 76 App. Div. [N. Y.] 93.

86. Call v. Case, 84 N. Y. Supp. 166.

87. Freifeld v. Sire, 84 N. Y. Supp. 144.

88. That by his subsequent acts tenant has overcome a forfeiture cannot be raised for the first time in appellate court. Metropolitan Land Co. v. Manning, 98 Mo. App. 248.

Equitable defense may be entertained in municipal court. Schlaich v. Blum, 85 N. Y. Supp. 335.

89. Southern R. Co. v. State, 116 Ga. 276; Coney v. Brunswick & F. Steamboat Co., 116 Ga. 222. The lessee of a pier extending beyond low-water mark may enjoin the use of the same by one claiming right on sole ground that the pier is public. Coney v. Brunswick & F. Steamboat Co., 116 Ga. 222.

90. Bly v. Edison Elec. Illuminating Co., 172 N. Y. 1, 58 L. R. A. 500.

91. McPhillips v. Fitzgerald, 76 App. Div. [N. Y.] 15.

92. Kennedy v. Iowa State Ins. Co., 119 Iowa, 29.

93. Dale v. Southern R. Co., 132 N. C. 705.

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right of action is in the lessor. Where the leasehold interest is not affected, the lessee cannot maintain action.[94] The tenant on shares has a title to sue for a wrongful levy on crops.[95] As to intervening rights, the renewal lease does not date back.[96] Property put on the premises by an intruder is either personalty or fixtures and in neither case belongs to the tenant.[97]

§ 12. *Crimes and penalties.*—If the removal of crops be made criminal, the intent is immaterial.[98] The tenant may enforce a penalty for obstructing a way of which he has the use.[99]

LARCENY.

§ 1. **Common Law Larceny (696).**
§ 2. **Statutory Larceny, Theft, etc. (698).**
§ 3. **Indictment and Prosecution (698).**
A. Indictment (698).
B. Admissibility of Evidence (701).
C. Effect of Possession of Stolen Property (702).
D. Sufficiency of Evidence (703).
E. Instructions (704).
F. Trial, Sentence and Review (705).

§ 1. *Common law larceny.*—Larceny is the felonious taking and carrying away of the personal goods of another with intent to deprive the owner of his property therein, and to appropriate the same to the use of the taker.[1] An asportation,[2] non-consent of the owner,[3] and a felonious intent to thereby convert the stolen property to defendant's own use,[4] are necessary elements of larceny. Where possession is taken under circumstances showing a want of felonious intent, such as a bona fide claim of right,[5] a claim of ownership in one's self,[6] family,[7] or employer,[8] for a joke,[9] in the regular discharge of one's duty,[10] or for any purpose

94. Sposato v. New York, 75 App. Div. [N. Y.] 304.

95. Notwithstanding they are subject to a lien. Parker v. Hale [Tex. Civ. App.] 78 S. W. 555.

96. One holding under a renewed oral lease holds with notice of a foreclosure suit begun after the formation of the original lease but prior to its renewal. McLean v. McCormick [Neb.] 93 N. W. 697.

97. Property put on premises by one who held a posterior lease taken with notice but reserving right to remove his property. Linden Oil Co. v. Jennings [Pa.] 56 Atl. 1074.

98. State v. Crook, 132 N. C. 1053, where a grass and hay patch is held not to be a crop.

99. Morrison v. Chicago & N. W. R. Co., 117 Iowa, 587.

1. State v. Spencer [Del.] 53 Atl. 337; State v. Palmer [Del.] 53 Atl. 359; State v. Murphy, 90 Mo. App. 548. See, also, Embezzlement, 1, p. 998; False Pretenses and Cheats, 1, p. 1204.

2. Defendant surprised in attempt. State v. Knolle, 90 Mo. App. 238. Mere pointing out cattle in a field and selling them to a third person is not larceny. Long v. State [Fla.] 32 So. 870. Frustrated attempt to unscrew diamond stud not theft from person. Rodriquez v. State [Tex. Cr. App.] 71 S. W. 596. Inserting hand in another's pocket not securing money therein is not theft from the person. Tarrango v. State [Tex. Cr. App.] 71 S. W. 597. Trespass no longer enters into larceny. People v. Mills, 91 App. Div. [N. Y.] 331.

3. State v. Littrell, 170 Mo. 13; State v. Waller, 174 Mo. 518. Instigation of detective employed by owner amounts to consent (State v. Waghalter [Mo.] 76 S. W. 1028), but mere suspicion of defendant's intent and neglect in protecting property does not (Lowe v. State [Fla.] 32 So. 956).

4. State v. Littrell, 170 Mo. 13; State v. Palmer [Del.] 53 Atl. 359; State v. Riggs [Idaho] 70 Pac. 947. Delirium tremens as defense. State v. Kavanaugh [Del.] 53 Atl. 335. Intoxication as defense. Collins v. State, 115 Wis. 596; Stokes v. State [Tex. Cr. App.] 70 S. W. 95. Instruction as to good character held erroneous. State v. Birkby [Iowa] 97 N. W. 980. Such intent is not tested by the acts of the accused after the taking except as they indicate the intent at the time he took it. State v. Palmer [Del.] 53 Atl. 359. Cow theft, intent to secure reward for return held within issues. Davis v. State [Tex. Cr. App.] 74 S. W. 544.

5. Retaking possession of property sold after dispute as to amount due. People v. Walburn [Mich.] 92 N. W. 494. Instruction held sufficient. Roberts v. State [Tex. Cr. App.] 70 S. W. 423. Cotton theft—right of possession derived from one having special interest. Tyler v. State [Tex. Cr. App.] 70 S. W. 750. An instruction putting the burden on defendant to establish that he took the property under an honest belief of ownership is error. State v. Weckert [S. D.] 95 N. W. 924.

6. Taking of live stock in belief of ownership. State v. Sally, 41 Or. 366, 70 Pac. 396; Long v. State [Fla.] 32 So. 870. Killing hogs on range. Blair v. State [Ark.] 71 S. W. 482.

7. Cow stealing: Claim of good faith not substantiated. Jackson v. State, 137 Ala. 96. Hog theft, defendant assisting brother to kill. Newberry v. State [Tex. Cr. App.] 74 S. W. 774.

8. Jackson v. State [Tex. Cr. App.] 70 S. W. 749. Driving cattle away in belief of ownership in employer. People v. Hoagland, 138 Cal. 338, 71 Pac. 359.

9. Taking pistol from another's pocket in daylight. Jackson v. State, 116 Ga. 578.

10. Employe removing goods from one room to another. State v. Foy, 131 N. C. 804.

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excluding the presumption of intent to deprive the owner of his property,[11] there is no larceny. Merely that the taking was open, unconcealed and in the presence of others is, however, not conclusive of good faith.[12] A bailee who has lawful possession,[13] as one who has been loaned an article,[14] or an agent managing a store for the owner,[15] cannot commit larceny. Merely that possession was obtained, however, by colorable consent of the owner, as by a trick or device,[16] is no defense; but false representations inducing one to sell property unconditionally do not constitute larceny.[17] If defendant came into possession in good faith with the owner's consent, a subsequent conversion of it will not amount to larceny, but if he had the intent at the time of taking possession of converting it to his own use, it is larceny, and whether or not he had such intent is for the jury.[18] Where one is seeking to have a dollar changed and another takes it, saying he will go and get it changed, and the owner demands the money back and seizes him and he breaks away and runs with intent to steal the dollar, there is a case of simple larceny.[19]

The finder of lost property is not guilty of larceny unless he appropriates it with knowledge or the means of knowledge of the true owner,[20] and where personal property is taken and retained by a person incapable of committing a crime, the custody is that of the owner, and one taking it from such irresponsible agent, with intent to convert it, is guilty of larceny, as in the case of finding lost property.[21]

A dog,[22] money won at gaming,[23] and a county warrant, may be the subject of larceny.[24] Where animals or other creatures are not domestic, but are ferae naturae, larceny may notwithstanding be committed of them if they are fit for food of man and dead, reclaimed, or confined so that they may be taken at any time by the owner.[25]

Where a purse secured by a steel chain wrapped around the owner's finger is suddenly snatched by one intending to steal it with force sufficient to break the chain and injure the owner's finger, the offense is robbery, not larceny from the person.[26]

A conspiracy to steal and sell live stock is pending until the sale has been made and the proceeds divided.[27]

A purchase of the animal subsequent to taking it from the range is no defense to a prosecution for horse theft.[28] Kleptomania is not a defense except as tested by the "right and wrong" theory; a mere irresistible impulse to steal being no defense.[29]

11. Taking horse to ride to next town is not larceny. Leland v. State [Miss.] 33 So. 842; Hartley v. State [Tex. Cr. App.] 71 S. W. 603; Windom v. State [Tex. Cr. App.] 72 S. W. 193.

12. Jackson v. State, 137 Ala. 96; Verberg v. State, 137 Ala. 73.

13. Finlayson v. State [Fla.] 35 So. 203.

14. Overcoat. Smith v. State [Tex. Cr. App.] 75 S. W. 298.

15. Bismarck v. State [Tex. Cr. App.] 73 S. W. 965.

16. Viberg v. State [Ala.] 35 So. 53; Finlayson v. State [Fla.] 35 So. 203. Inducement to bet on fraudulent game. State v. Murphy, 90 Mo. App. 548; Randle v. State [Tex. Cr. App.] 70 S. W. 958; Conner v. State [Tex. Cr. App.] 76 S. W. 924. "Short change." Verberg v. State, 137 Ala. 73.

17. Foster v. State, 117 Ga. 39; Powell v. State [Tex. Cr. App.] 70 S. W. 968.

18. Taking up estray on request of owner. State v. Meldrum, 41 Or. 380, 70 Pac. 526. Instructions held erroneous. State v. Riggs [Idaho] 70 Pac. 947. Hiring livery horse to go to one place and going to another. People v. Jackson, 138 Cal. 462, 71 Pac. 566.

19. Fitzgerald v. State, 118 Ga. 855.

20. Gen. St. 1894, § 6720. State v. Hoshaw, 89 Minn. 307.

21. Where one procures an infant to enter a house and take property therefrom he is guilty of larceny. Rice v. State, 118 Ga. 48.

22. Rockwell v. Oakland Circuit Judge [Mich.] 94 N. W. 378.

23. Fay v. State [Tex. Cr. App.] 70 S. W. 744.

24. State v. Morgan, 109 Tenn. 157.

25. Fish in pound nets in Great Lakes. State v. Shaw, 67 Ohio St. 157, 60 L. R. A. 481.

26. Smith v. State, 117 Ga. 320.

27. Lamb v. State [Neb.] 95 N. W. 1050; O'Brien v. State [Neb.] 96 N. W. 649.

28. Landreth v. State [Tex. Cr. App.] 70 S. W. 758.

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One who being present, actually or constructively,[30] at the time larceny is committed, abets and counsels therein, is guilty of the crime,[31] though he takes no active part in it,[32] as is one who, being absent, counsels and advises its commission, and receives and secretes the stolen property;[33] but the crime of receiving stolen goods is distinct from larceny.[34]

§ 2. *Statutory larceny, theft, etc.*—Under the Penal Code of New York,[35] larceny may be committed, by misrepresentations leading to the sale of a worthless article,[36] or, by holding out the inducement of a profitable investment and subsequent misapplication of the funds thereby obtained;[37] but the ordinary relation that exists between broker and customer will not support an indictment for larceny as agent, bailee, or trustee.[38] For a physician to procure medicine from the city ostensibly for a poor person and then charge such person for it, he being in fact not a poor person, is an appropriation to his own use of public property in his control.[39]

Asportation is not an element of larceny from the person in California.[40]

In Texas, in order to constitute theft as a bailee, a fraudulent intent in converting the property is necessary.[41]

Cutting and removing timber from the land of another is not larceny in Washington.[42]

A warehouseman was held properly prosecuted for larceny as bailee and not as warehouseman, in Oregon.[43]

A receipted voucher in Minnesota[44] and files in public custody in New York[45] may be the subject of larceny. Whether or not the bringing into one district or state property stolen in another is punishable in the jurisdiction to which the property is brought, there can be no conviction in the absence of proof that defendant brought the property into the jurisdiction, and an instruction that puts the burden upon him to show a disposition of it before coming into the jurisdiction is error.[46]

Value is not an element in the theft of particular classes of property like cattle[47] or horses.[48]

§ 3. *Indictment and prosecution. A. Indictment.*—Larceny, being an infamous crime, may not be prosecuted in the Indian Territory by information.[49]

29. Lowe v. State [Tex. Cr. App.] 70 S. W. 206.

30. Baldwin v. State [Fla.] 35 So. 220; Newberry v. State [Tex. Cr. App.] 74 S. W. 774.

31. People v. Putnam, 85 N. Y. Supp. 1056.

32. State v. Palmer [Del.] 53 Atl. 359; Bynum v. State [Tex. Cr. App.] 72 S. W. 844.

33. Pearce v. Okl. [C. C. A.] 118 Fed. 425; Lamb v. State [Neb.] 95 N. W. 1050. An ordinance defining petit larceny by its common law definition includes within its terms accessories before the fact. Reed v. State [Miss.] 35 So. 178.

34. See Receiving Stolen Goods.

35. § 528.

36. Agency for worthless insurance company. People v. Walker, 85 App. Div. [N. Y.] 556. Worthless mining stock. People v. Putnam, 85 N. Y. Supp. 1056.

37. People v. Hackett, 82 App. Div. [N. Y.] 86.

38. People v. Thomas, 83 App. Div. [N. Y.] 226. Cf. People v. Karste [Mich.] 93 N. W. 1081.

39. N. Y. Pen. Code, § 528, subd. 2. People v. Lavin, 41 Misc. [N. Y.] 53.

40. Pen. Code, § 484, subd. 2. People v. Lonnen, 139 Cal. 634, 73 Pac. 586.

41. Instruction failing to so state. Smith v. State [Tex. Cr. App.] 76 S. W. 434.

42. 2 Ball. Ann. Codes & St. §§ 7108, 7109, 7141. Tacoma Mill Co. v. Perry, 32 Wash. 650, 73 Pac. 801.

43. Hill's Ann. Laws, §§ 1771, 4201-4207. State v. Humphreys [Or.] 70 Pac. 824.

44. State v. Scanlan, 89 Minn. 244.

45. Bribing an officer in order to abstract a paper from public files is statutory grand larceny in the second degree (stealing or unlawfully obtaining a record [Pen. Code, § 531, subd. 3]). People v. Mills, 91 App. Div. [N. Y.] 331.

46. Money stolen by express messenger. Davis v. U. S., 18 App. D. C. 468. An indictment for larceny in C. county is supported by proof of stealing in Canada and bringing the stolen property into C. county [Pen. Code, §§ 1561, 1569, 1572]. State v. De Wolfe [Mont.] 74 Pac. 1084.

47. Value of cattle feloniously converted need not be alleged or proved [Mills' Ann. St. § 1256 and Laws 1891, p. 430, § 1]. Quinn v. People [Colo.] 75 Pac. 396.

48. Horse stolen in another jurisdiction. The statute denounces such theft when the property is brought into the state, "as if com-

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Though used in indictments for larceny time out of mind, the omission of the words "then and there being found"[50] and "feloniously" is not fatal to an indictment which charges that defendant unlawfully stole,[51] and an indictment charging that defendant after entering a house "did privately steal therefrom" is good against the objection that it does not charge an asportation, wrongful taking, or taking with intent to steal.[52]

The intent to deprive the owner of his property need not be specifically alleged, if the language used otherwise imports such intent;[53] but an unnecessary averment of intent to feloniously convert will not render an information double.[54] An averred "intent to deprive the owner of the possession" does not satisfy a statute defining the intent as one "to deprive another of his property."[55]

An indictment for statutory larceny must allege all the statutory elements[56] and contain allegations that will clearly apprise the defendant under which statute he is prosecuted.[57] To charge the bringing of stolen property into the state, the criminality of the original taking must be stated.[58] No asportation need be alleged in larceny from the person in California.[59] In Texas, the consent of the owner must be negatived; but an indictment for theft from a partnership need not specifically negative the consent of each of the partners.[60]

The property alleged to have been stolen must be described with sufficient particularity to apprise defendant of what he is accused and to furnish him immunity from subsequent prosecution for the same offense,[61] whence property taken cannot be described by what it is enclosed within, because that gives no idea of the extent of the goods taken;[62] but an indictment for attempted larceny need not describe the property nor allege that it had any value.[63]

At the common law, it was necessary in describing money to state the kinds and value of the pieces,[64] but this is no longer necessary in most jurisdictions, it being sufficient to state that it was "current money;"[65] there must be an averment of monetary currency however, "five dollars of the goods and chattels of A" not be-

mitted in this state." Beard v. State [Tex. Cr. App.] 78 S. W. 348.

49. Williams v. U. S. [Ind. T.] 69 S. W. 849.

50. Baldwin v. State [Fla.] 35 So. 220.

51. State v. Smith, 31 Wash. 245, 71 Pac. 767; Baldwin v. State [Fla.] 35 So. 220.

52. Jefferson v. State [Ga.] 45 S. E. 61.

53. Martin v. State [Neb.] 93 N. W. 161; State v. Halpin [S. D.] 91 N. W. 605; Territory v. Garcia [N. M.] 75 Pac. 34.

54. Van Syoc v. State [Neb.] 96 N. W. 266.

55. Steil v. Territory [Okl.] 71 Pac. 653.

56. Information against warehouseman for larceny as bailee sustained. State v. Humphreys [Or.] 70 Pac. 824. Indictment for larceny of county warrant held sufficient. State v. Morgan, 109 Tenn. 157. An indictment for theft by a borrower held sufficient [White's Ann. Pen. Code, art. 877, § 1501]. Young v. State [Tex. Cr. App.] 75 S. W. 798. Under the statute in Massachusets the word "steal" includes all forms of criminal taking and converting, by larceny, embezzlement, and false pretenses [Rev. Laws, c. 218, § 38]. Com. v. Kelley [Mass.] 68 N. E. 346.

57. Chicken stealing [Crimes Act, §§ 158, 162]. State v. Shutts [N. J. Law] 54 Atl. 235.

58. Indictment sufficient to allege that theft in another state was then and there a crime. Beard v. State [Tex. Cr. App.] 78 S. W. 348.

59. Pen. Code, § 484, subd. 2. People v. Lonnen, 139 Cal. 634, 73 Pac. 586.

60. Wesley v. State [Tex. Cr. App.] 73 S. W. 960.

61. "One bull" is a sufficient description. Peeples v. State [Fla.] 35 So. 223. Stolen horse held sufficiently described. Teal v. State [Ga.] 45 S. E. 964. Description of hogs stolen held no variance. State v. Montgomery [S. D.] 97 N. W. 716. "Seven bags of chickens of the value of twenty dollars" is not a sufficient description, chickens usually being regarded by number or weight. State v. Shutts [N. J. Law] 54 Atl. 235. "One horse" is sufficient description of property. State v. Collett [Idaho] 75 Pac. 271. But to refer to "a horse" as "said mule" is fatal. Duncan v. State [Tex. Cr. App.] 70 S. W. 543.

62. State v. Shutts [N. J. Law] 54 Atl. 235.

63. Bloch v. State [Ind.] 68 N. E. 287.

64. Whitson v. State, 160 Ind. 510.

65. Description of money stolen held sufficient. Verberg v. State, 137 Ala. 73; Davis v. U. S., 18 App. D. C. 468. Pocket book and money. State v. Williams, 118 Iowa, 494; State v. Connor, 118 Iowa, 490. "Seventeen dollars in money each of the value of one dollar" is sufficient (Fay v. State [Tex. Cr. App.] 70 S. W. 744); "gold, silver and paper money" is sufficient [Sand. & H. Dig. § 1717] (Marshall v. State [Ark.] 75 S. W. 584). "United States currency" admits proof of any kind of current funds (Dennis v. State [Tex. Cr. App.] 74 S. W. 559) made legal tender by congress (Summers v. State [Tex. Cr. App.] 76 S. W. 762).

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ing sufficient.[66] An averment that the money stolen was money "of the United States" is material, and though unnecessary, must be proved.[67]

An indictment for the larceny of money orders is supported by evidence of the theft of "pay checks" in fact orders drawn for the payment of money by one officer of a corporation on another.[68]

The value of each article should be stated,[69] but it need not be alleged that that value is in the lawful money of the United States,[70] and there need be no allegation of value where the offense does not depend upon value.[71] The value need not be proved exactly as laid.[72]

The property must be alleged to be that of some owner,[73] known or unknown,[74] and may be laid in an estate,[75] a bailee,[76] the apparent or ostensible owner,[77] the servant of the owner, he being in actual possession,[78] or one who had custody, care and control of the property.[79] Ownership of lost money is properly laid in the owner, though he had not custody of it at the time of the theft, he being in constructive possession.[80]

The corporate capacity of a corporation alleged to be the owner of the property need not be set out,[81] and an indictment charging property in certain persons as trustees of a certain church is not objectionable in not laying it in the church, where there is no averment that the church was ever incorporated.[82]

Possession[83] and ownership are material and must be proved as laid.[84]

In an indictment for larceny by a bailee, it is necessary to allege the name of the bailor, and in concise terms the purpose or use for which the property was intrusted to the defendant.[85]

Counts for theft and embezzlement are properly joined.[86]

An indictment for simple larceny is supported by proof of stealing from a

66. Whitson v. State, 160 Ind. 510.

67. Marshall v. State [Ark.] 75 S. W. 584.

68. Barnes v. State [Fla.] 35 So. 227. Pay check held sufficiently described. Gaines v State [Tex. Cr. App.] 77 S. W. 10.

69. State v. Shutts [N. J. Law] 54 Atl. 235.

70. Baldwin v. State [Fla.] 35 So. 220.

71. State v. Shutts [N. J. Law] 54 Atl. 235. See, also, ante, § 1.

72. Railroad tickets. Kush v. State [Tex. Cr. App.] 77 S. W. 790.

73. Ownership held sufficiently averred. State v. Montgomery [S. D.] 97 N. W. 716.

74. Landreth v. State [Tex. Cr. App.] 70 S. W. 758.

75. State v. Sherman [Ark.] 74 S. W. 293.

76. Proceeds of property intrusted to prosecutor to sell. Viberg v. State [Ala.] 35 So. 53. In larceny by bailee who hired from an owner's agent the authority of the agent should be averred and his consent negatived. McCarty v. State [Tex. Cr. App.] 78 S. W. 506.

77. State v. Acebal, 110 La. 129.

78. Kush v. State [Tex. Cr. App.] 77 S. W. 790. Where railroad tickets are alleged to be the property of the agent of the railroad company they need not be charged to be in custody of a servant of the agent. Id.

79. Cattle. Taylor v. State [Tex. Cr. App.] 75 S. W. 35.

80. Martin v. State [Tex. Cr. App.] 72 S. W. 386.

81. Territory v. Garcia [N. M.] 75 Pac. 34; Mattox v. State, 115 Ga. 212.

82. Bingle v. State [Ind.] 68 N. E. 645.

83. Guest at hotel, theft from grip left in office in charge of clerk. Odell v. State [Tex. Cr. App.] 70 S. W. 964. The owner of a ranch is not in possession of an estray running with the cattle of his lessee on the ranch, where such cattle are in the immediate charge of the lessee's servants. Palmer v. State [Neb.] 97 N. W. 235. That cattle had escaped from the owner's enclosure and were in an adjoining pasture does not remove them from his custody, care and control. Taylor v. State [Tex. Cr. App.] 75 S. W. 35.

84. State v. De Wolfe [Mont.] 74 Pac. 1084. A charge of larceny from a dwelling house laying ownership in the owner of the fee is not supported by proof of larceny from the room of a guest at a hotel in possession of a lessee. Trice v. State, 116 Ga. 602. That there are two persons, father and son, of the name of the alleged owner is no variance. Windom v. State [Tex. Cr. App.] 72 S. W. 193; Wesley v. State [Tex. Cr. App.] 73 S. W. 960. Proof that the horse alleged to have been stolen was an estray and the owner unknown is sufficient to show ownership in an unknown person. Landreth v. State [Tex. Cr. App.] 70 S. W. 758. Where the witnesses referred to the owner only by his surname and there is no evidence that his initials were as alleged a conviction cannot stand. Atkins v. State [Tex. Cr. App.] 70 S. W. 744. Where ownership is alleged in different counts in different persons proof of ownership in either supports the indictment. Roberts v. State [Tex. Cr. App.] 70 S. W. 423. Property laid in B. may be proved in him and another. State v. Ireland [Idaho] 75 Pac. 257.

85. State v. Holton, 88 Minn. 171.

86. Davis v. U. S., 18 App. D. C. 468.

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house,[87] and a conviction on a charge of larceny from the house is supported by proof of burglary;[88] but an indictment for larceny will not support a verdict of guilty of driving off the animal of another without felonious intent.[89] Where one intrusted with money by another fraudulently converts it to his own use, he is properly convicted of larceny after trust, though he may have fraudulently induced the delegation of the trust with intent to so convert the money.[90]

A conviction for receiving cannot be had under an indictment for larceny,[91] neither will evidence of the receiving of stolen goods support a conviction of larceny.[92]

(§ 3) *B. Admissibility of evidence.*—Declarations by accused,[93] his conduct during a search,[94] other thefts,[95] and all the facts connected with such thefts,[96] when part of the res gestae, are admissible; but the theft of other articles merely is not.[97] Facts which identify accused with a person in possession of the property,[98] declarations in his presence concerning the property,[99] or matters concerning those connected with accused,[1] or his suspicious conduct[2] may be shown. Friendship for a suspect may prove a motive in stealing indictments.[3]

The market value, where the goods are shown to have one, is the correct basis of estimate.[4] The denial of defendant that he gave out any of his employer's goods to a confederate is admissible to show that his acts in giving them out were not innocent.[5] In a prosecution for theft by obtaining property by giving worthless checks, defendant should be allowed to show that he had money in a bank of slightly different name from the one drawn on.[6]

The parol evidence rule has no application to a case where prosecutor was by fraudulent misrepresentations induced to pay money and enter into a contract fair on its face.[7]

An unrecorded brand may be used in a prosecution for theft of cattle to prove identity but not ownership.[8] Testimony that the owner desired a third person

87. Mattox v. State, 115 Ga. 212.
88. Green v. State [Ga.] 45 S. E. 990.
89. State v. Palmer [Del.] 53 Atl. 359.
90. Walker v. State, 117 Ga. 260; Cunnegin v. State [Ga.] 44 S. E. 846.
91. Watts v. People [Ill.] 68 N. E. 563.
92. Watts v. People [Ill.] 68 N. E. 563; Roberts v. State [Wyo.] 70 Pac. 803; Baldwin v. State [Fla.] 35 So. 220.
93. Defendant's statements to his wife immediately after finding money he is accused of stealing are material, as res gestae. Martin v. State [Tex. Cr. App.] 72 S. W. 386.
94. That accused was greatly excited when search began but led it until it progressed to the place where goods were hidden then fell behind. Gilford v. State [Tex. Cr. App.] 78 S. W. 692.
95. Evidence of the stealing of other articles to assist the theft in question is proper as res gestae. State v. Halpin [S. D.] 91 N. W. 605.
96. Where horses of several owners are stolen, driven and sold at the same time, evidence of all the facts may be shown. Glover v. State [Tex. Cr. App.] 76 S. W. 465.
97. State v. Wackernagel, 118 Iowa, 12. Especially when the prosecutor and the court know they cannot be connected with the one in question. Tijerina v. State [Tex. Cr. App.] 74 S. W. 913.
98. That a man looking like defendant who sold a stolen horse gave defendant's name. Turpin v. Com., 25 Ky. L. R. 90, 74 S. W. 734.
99. His father's declarations that there was no bacon on premises but what was in smoke house (prosecution for theft of bacon found hidden). Gilford v. State [Tex. Cr. App.) 78 S. W. 692.
1. That the skin of the stolen calf was found in another's possession may be shown where such other and defendant have been connected in the theft. Norsworthy v. State [Tex. Cr. App.] 77 S. W. 803.
2. That accused was seen with a sack at the time and place of the theft of bacon which was found hidden next morning at his home. Gilford v. State [Tex. Cr. App.] 78 S. W. 692.
3. The pendency of an investigation of a crime which pointed toward a friend of accused is admissible to show a motive in stealing indictments. People v. Mills, 91 App. Div. [N. Y.] 331.
4. Baden v. State [Tex. Cr. App.) 74 S. W. 769. Testimony as to general value of standard article held admissible though witness did not know market value in the county. Odell v. State [Tex. Cr. App.] 70 S. W. 964. Testimony as to value of hogs stolen held admissible. State v. Montgomery [S. D.] 97 N. W. 716.
5. People v. Cole [Cal.] 74 Pac. 547.
6. Powell v. State [Tex. Cr. App.] 70 S. W. 968.
7. People v. Walker, 85 App. Div. [N. Y.] 556.
8. Sapp v. State [Tex. Cr. App.] 77 S. W. 456. Cattle brands not entitled to record

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to take his mule to a certain place has no tendency to prove that he consented that defendant should take it.[9] In a prosecution for stealing money from the person of an intoxicated man, defendant is entitled to show that prosecutor was accustomed to lose money while drunk and unjustly accuse people of taking it.[10]

(§ 3) *C. Effect of possession of stolen property.*—Possession of stolen property without explanation is evidence of guilt,[11] but it should be recent[12] and exclusive in defendant[13] or his confederates,[14] and the presumption of guilt raised thereby may be overcome by proof of any facts inconsistent with the theory of guilt.[15] One having possession of stolen property may explain the circumstances under which he got possession, showing that his possession is an innocent one,[16] and his explanation when made is proper for the jury to consider.[17] This rule, however, does not apply where the circumstances under which defendant acquired possession are all in evidence.[18] An explanation which contains elements contradictory is not satisfactory to rebut this presumption.[19]

A valueless unsigned money order from a stolen book is admissible, having been traced to defendant, as tending to prove larceny of the package that contained it.[20] The corpus delicti must be independently proved to call in force this presumption,[21] and the goods in possession must be identified as those stolen.[22]

Contrary to the common law rule, possession of a range animal puts the burden on defendant of explaining it, in Washington,[23] and in Texas, proof of possession and false statements of defendant's right sufficiently prove the corpus delicti of horse theft, the animal being taken from the range.[24] Various cases in which the effect of recent possession is discussed are mentioned in the note.[25]

may be shown. Swan v. State [Tex. Cr. App.] 76 S. W. 464.

9. Broomfield v. State [Tex. Cr. App.] 74 S. W. 915.

10. State v. Lewis, 133 N. C. 653.

11. State v. Spencer [Del.] 53 Atl. 337; People v. Farrington, 140 Cal. 656, 74 Pac. 288; Palmer v. State [Neb.] 97 N. W. 235. But the presumption is one of fact and not of law. State v. Hoshaw, 89 Minn. 307. Stolen cattle: Instructions held erroneous. Roberts v. State [Wyo.] 70 Pac. 803. Instruction on effect of possession held demanded by evidence. Owen v. State [Ga.] 46 S. E. 433.

12. A year held too remote. Porter v. State [Tex. Cr. App.] 73 S. W. 1053. Lapse of three days requires charge on circumstantial evidence. Davis v. State [Tex. Cr. App.] 74 S. W. 544. Circumstances surrounding defendant's possession of another's property held to dispense with necessity of proof that larceny had been committed recently to authorize conviction. State v. Spencer [Del.] 53 Atl. 337.

13. Watts v. People, 204 Ill. 233; State v. Wackernagel, 118 Iowa, 12.

14. Cattle thieves. Porter v. People [Colo.] 74 Pac. 879. Hog stealing. Jackson v. State [Ga.] 45 S. E. 604. Finding the goods in accused's house in which his family resided does not show an exclusive possession and raises no presumption; neither does possession in a co-defendant unless a conspiracy be shown. State v. Drew [Mo.] 78 S. W. 594.

15. Hogs driven into defendant's enclosure by third persons. Watts v. People, 204 Ill. 233.

16. State v. Spencer [Del.] 53 Atl. 337. Taking live stock in belief of ownership, instructions held proper. State v. Sally, 41 Or. 366, 70 Pac. 396. Claim of purchase from a peddler. Porter v. State [Tex. Cr. App.] 73 S. W. 1053.

17. Claim of purchase of stolen watch from a stranger on street repudiated. State v. King [Iowa] 96 N. W. 712. Finding sustained against accused though his explanation of how he came by the stolen goods was not contradicted. State v. Ireland [Idaho] 75 Pac. 257.

18. State v. Spencer [Del.] 53 Atl. 337.

19. State v. Collett [Idaho] 75 Pac. 271, giving approved instruction.

20. Barnes v. State [Fla.] 35 So. 227.

21. Where the only evidence of the corpus delicti in larceny from the person was defendant's possession of money alleged to have been stolen and certain accusations of him and his denials thereof, a conviction is not sustained. Stringer v. State, 135 Ala. 60.

22. Where there is no evidence that the goods found in defendant's possession are the ones alleged to have been stolen, or to connect defendant in any other way with the crime the conviction cannot stand. Hodnett v. State, 117 Ga. 705. Conviction based on defendant's possession of cigars similar to some alleged to have been stolen set aside. Williams v. U. S. [Ind. T.] 69 S. W. 849.

23. 2 Ball. Ann. Codes & St. 7114. State v. Eubank [Wash.] 74 Pac. 378.

24. Landreth v. State [Tex. Cr. App.] 70 S. W. 758.

25. Owen v. State [Ga.] 46 S. E. 433; Davis v. State [Tex. Cr. App.] 74 S. W. 544; Taylor v. State [Tex. Cr. App.] 75 S. W. 35; Stewart v. State [Tex. Cr. App.] 77 S. W. 791; People v. Farrington, 140 Cal. 656, 74 Pac. 288; State v. King [Iowa] 96 N. W. 712; Landreth v. State [Tex. Cr. App.] 70 S. W. 758; Wingo v. State [Tex. Cr. App.] 75 S. W.

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(§ 3) *D. Sufficiency of evidence.*—In larceny as in other crimes, it is indispensable that the fact that the crime has been committed be shown by competent evidence,[26] and merely that some one not present at the trial accused defendant of stealing his clothes will not support a conviction.[27] A stranger's unauthorized presence in a dwelling house, ransacking drawers during the occupant's temporary absence, justifies his conviction of an attempt to steal.[28]

The asportation[29] as well as want of consent of the owner may be shown by circumstances,[30] and nonconsent is sufficiently shown by the testimony of one of several owners, where the circumstances and issues rebut consent.[31] That the deceased owner of cattle attended several terms of court for the purpose of testifying against defendant for stealing them is admissible to show want of consent.[32]

The felonious intent of defendant must be proved,[33] but it may be inferred from the circumstances surrounding the taking.[34]

The value,[35] description[36] and ownership of the property stolen must be proved;[37] but proof of the ownership of the brand on stock is not proof of ownership of the stock.[38]

Cases turning on the sufficiency of the evidence of defendant's participation in the crime,[39] and to support a verdict of guilty, are collected in the note.[40]

29; McAlister v. State [Tex. Cr. App.] 76 S. W. 760; State v. Rose [Mo.] 76 S. W. 1003; State v. Eubank [Wash.] 74 Pac. 378; Younger v. State [Wyo.] 73 Pac. 551; Porter v. People [Colo.] 74 Pac. 879; Roberts v. State [Wyo.] 70 Pac. 803.

26. Hog theft—corpus delicti sufficiently shown. Turner v. State [Tex. Cr. App.] 74 S. W. 777. Theft of money, corpus delicti held sufficiently shown independent of testimony of accomplice. Atkins v. State [Tex. Cr. App.] 70 S. W. 744. Larceny of cow and calf by carrying away in hack held not shown. State v. Scott [Mo.] 76 S. W. 950. Embezzlement as administrator held shown by evidence. Com. v. Kelley [Mass.] 68 N. E. 346.

27. State v. Pugh, 131 N. C. 807.

28. Bloch v. State [Ind.] 68 N. E. 287.

29. Horse theft. Ellison v. State [Tex. Cr. App.] 72 S. W. 188.

30. Atkins v. State [Tex. Cr. App.] 70 S. W. 744; Van Syoc v. State [Neb.] 96 N. W. 266; Palmer v. State [Neb.] 97 N. W. 235. Owners non consent held not shown. Lowe v. State [Fla.] 32 So. 956. Evidence sufficient that owner did not consent to the taking. State v. Ireland [Idaho] 75 Pac. 257.

31. Weigrefe v. State [Neb.] 92 N. W. 161.

32. Sapp v. State [Tex. Cr. App.] 77 S. W. 456.

33. Live stock driven away in belief of ownership—conviction not supported. People v. Hoagland, 138 Cal. 338, 71 Pac. 359. Felonious intent held not shown—employe removing goods from one room to another. State v. Foy, 131 N. C. 804. Horse theft, defense of good faith held not colorable. Hays v. State [Tex. Cr. App.] 72 S. W. 598. Whether defendant took a range horse under claim of right held properly submitted to the jury. State v. Eubank [Wash.] 74 Pac. 378. Criminal intent held not sufficiently shown. Larceny of pistol from person. Jackson v. State, 116 Ga. 578. Preparation of a fabricated account of the loss of bailed animal in order to cover a purpose of killing and appropriating the animal when fat shows a present and not a future conversion. Quinn v. People [Colo.] 75 Pac. 396.

34. State v. Palmer [Del.] 53 Atl. 359. Larceny as bailee by warehouseman. State v. Humphreys [Or.] 70 Pac. 824.

35. Value held sufficiently shown. State v. Blain, 118 Iowa, 466. Value of property held sufficiently shown. Mercer v. State [Tex. Cr. App.] 76 S. W. 469. Conviction of grand larceny sustained as to value of hogs stolen. State v. Montgomery [S. D.] 97 N. W. 716.

36. That the stolen horse was a "range animal" held sufficiently shown. State v. Eubank [Wash.] 74 Pac. 378.

37. Cotton theft—exclusive right of possession in alleged owner held not shown. Tyler v. State [Tex. Cr. App.] 70 S. W. 750.

38. State v. De Wolfe [Mont.] 74 Pac. 1084.

39. Theft from the person, conviction supported notwithstanding prosecution's failure to positively identify defendant. Burns v. State [Tex. Cr. App.] 71 S. W. 965. Defendant's participation as accessory after the fact to larceny from the person held shown. State v. King, 88 Minn. 175. Hog stealing—defendant's guilt held satisfactorily shown. Jackson v. State [Ga.] 45 S. E. 604.

40. Verdict of guilty supported. State v. Blain, 118 Iowa, 466; Weigrefe v. State [Neb.] 92 N. W. 161. Larceny of live stock—conviction held supported. Lamb v. State [Neb.] 95 N. W. 1050; O'Brien v. State [Neb.] 96 N. W. 649. Conviction of larceny of horses supported. Younger v. State [Wyo.] 73 Pac. 551. Larceny after trust held shown. Walker v. State, 117 Ga. 260. Larceny from guest at hotel. Verdict on conflicting evidence sustained. Wardlow v. State [Ga.] 45 S. E. 971. Larceny of book of checks of railroad company sufficiently shown. McCray v. State [Fla.] 34 So. 5. Possession obtained in game, evidence held insufficient to convict. Randle v. State [Tex. Cr. App.] 70 S. W. 958. Theft of money—accomplice held sufficiently corroborated. Ezell v. State [Tex. Cr. App.] 71 S. W. 283. Theft of ring—conviction supported by evidence. Chessley v. State [Tex. Cr. App.] 74 S. W. 548. Theft of bicycle—evidence sufficient to support conviction. Thompson v. State [Tex. Cr. App.] 76 S. W.

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A voluntary return of the stolen property is not proved by defendant's disclosure of its whereabouts after arrest.[41]

(§ 3) *E. Instructions.*—The instructions in larceny cases as in all prosecutions should give a proper definition of the offense,[42] should set forth all the issues raised by the evidence,[43] such as included offenses of lesser degree,[44] and avoid reference to phases of the law of larceny not properly within the issues as presented by the evidence.[45] An instruction correctly stating the probative effect of possession of stolen property will not require a reversal, notwithstanding the constitutional mandate against instructions on matters of fact,[46] and an instruction that possession of stolen property casts on one the burden of explaining such possession is not objectionable as casting on him the burden of establishing his innocence.[47] Various instructions considered with reference to the issues of the particular case are mentioned in the notes.[48]

561. Theft of pistol, conviction not sustained on circumstantial evidence. Gillam v. State [Tex. Cr. App.] 76 S. W. 923. Horse theft—conviction sustained by evidence. Bynum v. State [Tex. Cr. App.] 72 S. W. 844; Hartley v. State [Tex. Cr. App.] 71 S. W. 603; Jackson v. State [Tex. Cr. App.] 70 S. W. 749. Larceny from the person held shown. Martin v. State [Neb.] 93 N. W. 161. Conviction of warehouseman for larceny as bailee sustained. State v. Humphreys [Or.] 70 Pac. 824. Larceny of city property left in street by employes held sufficiently shown. State v. Nolle, 96 Mo. App. 524.

41. Cattle theft. Taylor v. State [Tex. Cr. App.] 75 S. W. 35.

42. An instruction defining theft from the person giving all the statutory elements is sufficient (Chitwood v. State [Tex. Cr. App.] 71 S. W. 973) and an instruction defining theft as bailee and failing to include the element of fraudulent intent is erroneous. Sale of horse under claim of permission of owner. Smith v. State [Tex. Cr. App.] 76 S. W. 434. Likewise an instruction purporting to state the elements of larceny and omitting nonconsent of the owner (State v. Waller, 174 Mo. 518; State v. Littrell, 170 Mo. 13) and the intent to convert the property to defendant's own use is erroneous (State v. Littrell, 170 Mo. 13). An erroneous instruction as to what constitutes asportation is harmless where it was uncontradicted and sufficiently proved, and the defense was a taking under claim of right. Williams v. State [Fla.] 35 So. 335. Omission of words "belonging to another without his consent" is error. Beard v. State [Tex. Cr. App.] 78 S. W. 348.

43. Where the defense is "kleptomania" an instruction to apply the "right and wrong" test is sufficient. Lowe v. State [Tex. Cr. App.] 70 S. W. 206. Instruction on effect of recent possession of stolen property held demanded by evidence. Owen v. State [Ga.] 46 S. E. 433; Davis v. State [Tex. Cr. App.] 74 S. W. 544.

44. On indictment for felonious horse stealing a charge as to included misdemeanor should be given (Cr. Code, § 264) especially if felonious intent is doubtful (Cr. Code, § 1256). Cox v. Com. [Ky.] 78 S. W. 423. Where several articles of less value than $50 are found at defendant's house, and none over, all of them stolen from his employer, and there is no evidence that he took them more than one at a time, an instruction on misdemeanor is called for. White v. State [Tex. Cr. App.] 72 S. W. 185.

45. An instruction on prosecutor's consent is properly refused when the question is not raised by the evidence. Burns v. State [Tex. Cr. App.] 71 S. W. 965; Stokes v. State [Tex. Cr. App.] 70 S. W. 95. A charge on circumstantial evidence is not required where defendant admits the taking and justifies it by claim of right. Roberts v. State [Tex. Cr. App.] 70 S. W. 423; Landreth v. State [Tex. Cr. App.] 70 S. W. 758. Where an accomplice denied that defendant stole money and claimed that his former contrary statement was false an instruction on corroboration is error. Lott v. State [Ark.] 75 S. W. 850. That defendant claimed to have been hired to drive cattle did not make an instruction on recent possession inapplicable (Taylor v. State [Tex. Cr. App.] 75 S. W. 35), but where no explanation is offered by defendant of his recent possession of the stolen property, no instruction on that phase of the evidence is proper (Stewart v. State [Tex. Cr. App.] 77 S. W. 791).

46. People v. Farrington, 140 Cal. 656, 74 Pac. 288.

47. State v. King [Iowa] 96 N. W. 712. Instruction on effect of possession of stolen horse held not to put upon defendant burden of explaining beyond a reasonable doubt. Landreth v. State [Tex. Cr. App.] 70 S. W. 758.

48. **Horse theft—Instructions held proper.** Ellison v. State [Tex. Cr. App.] 72 S. W. 188; Wingo v. State [Tex. Cr. App.] 75 S. W. 29. Defense of taking to ride and return. Windom v. State [Tex. Cr. App.] 72 S. W. 193; Hartley v. State [Tex. Cr. App.] 71 S. W. 603. Instruction held not to put burden on defendant of proving owner's consent beyond reasonable doubt. Smith v. State [Tex. Cr. App.] 76 S. W. 434. Possession, principals, and recent possession of stolen property. Wingo v. State [Tex. Cr. App.] 75 S. W. 29.

Attempt to escape or avoid arrest. State v. Williams, 118 Iowa, 494; State v. Connor, 118 Iowa, 490. **Original taking by consent** of owner. State v. Meldrum, 41 Or. 380, 70 Pac. 526.

Principals and accomplices. McAlister v. State [Tex. Cr. App.] 76 S. W. 760; Wingo v. State [Tex. Cr. App.] 75 S. W. 29. Good faith of defendant helping brother kill hog. Newberry v. State [Tex. Cr. App.] 74 S. W. 774.

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(§ 3) *F. Trial, sentence and review.*—defendant's intent in getting possession of prosecutor's property by a device is a question of fact for the jury.[49]

Since the grade of the offense and the resulting punishment depend upon whether the property stolen was of a certain value or over, it is generally necessary that the verdict find the value,[50] but where the value is not material, the failure of the jury to fix it as directed by the statute will not warrant a reversal.[51] It is not necessary that the verdict fix the value of money.[52]

When the punishment is specially prescribed for a species of theft, general laws do not apply.[53] In Iowa, sentences are imposed by the jury and are reviewable by the supreme court.[54] New trials are grantable for insufficiency of the evidence as in other cases.[55] A foreign law is a fact which must be preserved as such for review.[56]

LIBEL AND SLANDER.

§ 1. Definitions and Distinctions (705).
§ 2. Actionable Words (706).
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B. Words Imputing Crime or Want of Chastity (714).
C. Words Exposing to Contempt or Ridicule (715).
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E. Disparagement of Property or Title (720).
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§ 11. Evidence (728).
§ 12. Trial and Review (729).
§ 13. Criminal Libel (729).
A. What Is (729).
B. Indictment and Prosecution (730).

§ 1. *Definitions and distinctions.*—Statutory definitions differ in some minor particulars.[57]

The difference between a libel and a slander is in general the difference between writing or printing and spoken words, but in New York it has been held that

Taking live stock in belief of ownership. State v. Sally, 41 Or. 366, 70 Pac. 396.

Requested charge on receipt of property from third person held covered by charge as given. Chessley v. State [Tex. Cr. App.] 74 S. W. 548.

Recent possession of stolen property.—Instructions held proper. State v. Rose [Mo.] 76 S. W. 1003; Wingo v. State [Tex. Cr. App.] 75 S. W. 29; State v. Eubank [Wash.] 74 Pac. 378; Porter v. People [Colo.] 74 Pac. 879; Younger v. State [Wyo.] 73 Pac. 551.

Improper. Roberts v. State [Wyo.] 70 Pac. 803.

49. Verberg v. State, 137 Ala. 73.

50. Value held sufficiently stated. State v. Williams, 118 Iowa, 494. "Guilty of larceny" does not include a finding that accused stole the particular amount alleged. State v. Robertson [La.] 35 So. 916.

51. Kellar v. Davis [Neb.] 95 N. W. 1028.

52. Reed v. State [Neb.] 92 N. W. 321.

53. Punishment of theft (Pen. Code 1895, art. 858) does not apply to horse theft (punishable under article 881 as amended Acts 1897, p. 83, c. 67). Beard v. State [Tex. Cr. App.] 78 S. W. 348.

54. Larceny from person. 10 years not excessive statute allowing 15. State v. Williams, 118 Iowa, 494; State v. Connor, 118 Iowa, 490.

55. In the absence of satisfactory evidence of the corpus delicti and that defendant was the perpetrator, a new trial should be granted. Aaron v. State, 116 Ga. 582.

56. Statement of facts must contain foreign laws to admit of examination into criminality of theft in foreign state. Beard v. State [Tex. Cr. App.] 78 S. W. 348.

57. A libel under the statute of Illinois comprehends a malicious defamation expressed in printing or the like, tending to impeach the honesty, integrity, virtue or reputation of one living and thereby expose him or her to public hatred, contempt, ridicule or financial injury [Rev. St. c. 38, § 177]. Spolek Denni Hlasatel v. Hoffman, 105 Ill. App. 170. Under the statutes of Texas any publication tending to injure the reputation of one who is alive, and thereby expose him to either public hatred, contempt, ridicule, or financial injury, is a libel [Laws 27th Leg. p. 30]. Walker v. San Antonio Light Pub. Co., 30 Tex. Civ. App. 165.

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defamatory words, spoken in the presence of reporters and representatives of newspapers, the speaker knowing the words will be published in the newspapers, constitute a cause of action for libel.[58]

§ 2. *Actionable words. A. In general.*—Language cannot be regarded as libelous merely because it is inelegant[59] or imputes to one merely selfish motives.[60]

The publication of one's photograph, whether accompanied by his own or another's name, or by no name, in connection with an article libelous per se, is actionable.[61]

In determining whether a publication is libelous, the language must be taken in its ordinary signification,[62] viewed in the light of all the circumstances surrounding its publication.[63]

58. Weston v. Weston, 83 App. Div. [N. Y.] 520.

59. Hanna v. Singer, 97 Me. 128.

60. Charge of having endeavored to procure legislation to be relieved of sewer assessments. Foot v. Pitt, 83 App. Div. [N. Y.] 76.

61. De Sando v. N. Y. Herald Co., 88 App. Div. [N. Y.] 492; Morrison v. Smith, 83 App. Div. [N. Y.] 206.

62. Herringer v. Ingberg [Minn.] 97 N. W. 460; Dawson v. Baxter, 131 N. C. 65.

63. Holmes v. Clisby [Ga.] 45 S. E. 684. Where words are capable of two constructions, one actionable and the other not, that construction will be adopted which the circumstances show the words naturally bore. Berea College v. Powell [Ky.] 77 S. W. 381. It is not proper to separate words or phrases from the context. All parts of the paper should be read in connection to collect their true meaning. Kilgour v. Evening Star Newspaper Co., 96 Md. 16.

NOTE.

Construction of words—(A) In general: It was at one time thought that, in construing words relied upon to sustain an action for libel or slander, they should be given an innocent construction, if possible, or be construed, as it was expressed, in mitiori sensu; but this doctrine is no longer recognized, and has not been generally recognized for more than a century. The established rule now is, that words are to be construed according to their natural and ordinary meaning, and as they would naturally be understood by persons hearing or reading them, unless it affirmatively appears that they were used and understood in some other sense. Peake v. Oldham, Cowp. 275, Bigelow's Cas. 122, Bigelow's Lead. Cas. 73; Simmons v. Mitchell, 6 App. Cas. 156; Cooper v. Greeley, 1 Denio [N. Y.] 358, Burdick's Cas. 218; Logan v. Steele, 1 Bibb [Ky.] 593, 4 Am. Dec. 659; Chase v. Whitlock, 3 Hill [N. Y.] 139, Chase's Cas. 113; More v. Bennett, 48 N. Y. 472, Erwin's Cas. 349; Watson v. McCarthy, 2 Ga. 57, 46 Am. Dec. 380; Little v. Barlow, 26 Ga. 423, 71 Am. Dec. 219; Hamilton v. Dent, 1 Hayw. [N. C.] 117, 1 Am. Dec. 552; Rue v. Mitchell, 2 Dall. [Pa.] 58, 1 Am. Dec. 258; Walton v. Singleton, 7 Serg. & R. [Pa.] 451, 10 Am. Dec. 472; Beers v. Strong, Kirby [Conn.] 12, 1 Am. Dec. 10; Sawyer v. Elfert, 2 Nott & McC. [S. C.] 511, 10 Am. Dec. 633; Stallings v. Newman, 26 Ala. 300, 62 Am. Dec. 723; Harrison v. Findley, 23 Ind. 265, 85 Am. Dec. 456; Adams v. Lawson, 17 Grat. [Va.] 250, 94 Am. Dec. 455; Hess v. Sparks, 44 Kan. 465, 24 Pac. 979, 21 Am. St. Rep. 300; Edwards v. San Jose P. & P. Soc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70; St. James Military Academy v. Gaiser, 125 Mo. 517, 46 Am. St. Rep. 502; World Pub. Co. v. Mullen, 43 Neb. 126, 47 Am. St. Rep. 737; Furr v. Speed, 74 Miss. 423; Nailor v. Ponder, 1 Marv. [Del.] 408.

"Words are to be taken neither in the milder, nor in the more grievous sense, but in that sense in which they would be understood by those who heard them; the judge ought not to torture them into a charge of guilt, nor explain them into innocence, contrary to their obvious import." McGowan v. Manifee, 7 T. B. Mon. [Ky.] 314, 18 Am. Dec. 178. The early rule was to construe words in mitiori sensu, as it was said, which was in effect to construe them, if possible, so as to hold them not actionable, "but this rule has long since been exploded, and has given way to one which accords more with reason and the common sense of mankind. It is now settled that words are to be taken in that sense in which they would be understood by those who hear or read them." Logan v. Steele, 1 Bibb [Ky.] 593, 4 Am. Dec. 659 (decided in 1809).

An alleged libel is to be construed as a whole. Although one part of a statement taken alone may be injurious to another's character, if the effect of that part is removed by another part of the statement, it is not a libel. Chalmers v. Payne, 5 Tyrw. 766, 2 Cromp., M. & R. 156, Bigelow's Lead. Cas. 113.

When so construed, the words may be defamatory on their face, in which case, as we shall see, the action may be maintained, unless the defendant can and does allege and prove that under the circumstances they were fairly capable of being understood in a special sense rendering them not defamatory, and that they were so understood. Or they may not be defamatory on their face, in which case, as we shall see, the action cannot be maintained unless the plaintiff can and does show that they were, under the particular circumstances, fairly capable of a special meaning rendering them defamatory, and that they were so understood. See the cases hereafter cited.

(b) Province of the court and jury: Whether words are defamatory and actionable on their face, or when given a particular meaning ascribed to them by the plaintiff or defendant, is a question of law to be determined by the court. Capital & C. Bank v. Henty, 7 App. Cas. 741; Mulligan v. Cole, L. R. 10 Q. B. 549; Trebby v. Transcript Pub. Co., 74 Minn. 84, 73 Am. St. Rep. 330; Dexter v. Taber, 12

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Johns. [N. Y.] 239; Moore v. Francis, 121 N. Y. 199, 18 Am. St. Rep. 810, Chase's Cas. 126; Hume v. Arrasmith, 1 Bibb [Ky.] 165, 4 Am. Dec. 626; Barrows v. Bell, 7 Gray [Mass.] 301, 66 Am. Dec. 479; Harrison v. Findley, 23 Ind. 265, 85 Am. Dec. 456; Negley v. Farpow, 60 Md. 158, 45 Am. Rep. 715; Bourreseau v. Detroit Evening Journal Co., 63 Mich. 425, 6 Am. St. Rep. 320; Brewer v. Chase, 121 Mich. 526, 80 Am. St. Rep. 527; Cotulla v. Kerr, 74 Tex. 89, 15 Am. St. Rep. 819; Collins v. Dispatch Pub. Co., 152 Pa. 187, 34 Am. St. Rep. 636; Scullin v. Harper [C. C. A.] 78 Fed. 460; Williams v. McKee, 98 Tenn. 139; De Fronsac v. News Co. [R. I.] 35 Atl. 1046; Kilgour v. Evening Star Newspaper Co., 96 Md. 16. And the same is true of the questions whether words which are defamatory on their face are capable of a particular special meaning rendering them not defamatory, as claimed by the defendant, or whether words not defamatory on their face are capable of a special meaning rendering them defamatory, as claimed by the plaintiff. Harrison v. Findley, 23 Ind. 265, 85 Am. Dec. 456; Stewart v. Minn. Tribune Co., 40 Minn. 101, 12 Am. St. Rep. 696; Wofford v. Meeks, 129 Ala. 349, 87 Am. St. Rep. 66; Kilgour v. Evening Star Newspaper Co., 96 Md. 16; and cases supra.

But whether ambiguous words, or words decided by the court to be capable of a special meaning ascribed to them, different from their ordinary meaning, rendering them defamatory or not defamatory, as the case may be, were in fact used and understood in such special sense, or whether they were used and understood as applying to the plaintiff, who was not named, is a question of fact for the jury to determine, taking into consideration all the circumstances under which they were uttered or published. Chalmers v. Payne, 5 Tyrw. 766, 2 Cromp. M. & R. 156, Bigelow's Lead. Cas. 113; Edwards v. Chandler, 14 Mich. 471, 90 Am. Dec. 249; Call v. Hayes, 169 Mass. 586; Dedway v. Powell, 4 Bush [Ky.] 77, 96 Am. Dec. 283; Van Vechten v. Hopkins, 5 Johns. [N. Y.] 211, 4 Am. Dec. 339; McKinly v. Rob, 20 Johns. [N. Y.] 351, 356, Erwin's Cas. 352; Cooper v. Greeley, 1 Denio [N. Y.] 347, Burdick's Cas. 218; Garby v. Bennett, 40 App. Div. [N. Y.] 163; Tiepke v. Times Pub. Co., 20 R. I. 200; Hayes v. Press Co., 127 Pa. 642, 14 Am. St. Rep. 874; Price v. Conway, 134 Pa. 340, 19 Am. St. Rep. 704; Haines v. Campbell, 74 Md. 158, 28 Am. St. Rep. 240; Sharpe v. Larson, 67 Minn. 428; Knapp v. Fuller, 55 Vt. 311, 45 Am. Rep. 618; Rodgers v. Kline, 56 Miss. 808, 31 Am. Rep. 389; Cotulla v. Kerr, 74 Tex. 89, 15 Am. St. Rep. 819; Alcorn v. Bass, 17 Ind. App. 500.

(c) Words defamatory on their face: If the words, when construed according to their natural and ordinary meaning, are defamatory on their face, which, as we have seen, is a question of law for the court, the action may be maintained unless the defendant, and the burden is on him, can and does show that they were capable of a special meaning rendering them not defamatory, and that they were so understood. Peake v. Oldham, Cowp. 275, Bigelow's Cas. 122, Bigelow's Lead. Cas. 73. An innuendo stating the meaning of words, is never necessary when the meaning of the words set out in the declaration or complaint is clear, and they are defamatory on their face, and if used in such a case, it may be rejected as surplusage. Perkins v. Mitchell, 31 Barb. [N. Y.] 461, Erwin's Cas. 361; More v. Bennett, 48 N. Y. 472, Erwin's Cas. 349; Pfitzinger v. Dubs [C. C. A.] 64 Fed. 696, Erwin's Cas. 334; Bourreseau v. Detroit Evening Journal Co., 63 Mich. 425, 6 Am. St. Rep. 320; Callahan v. Ingram, 122 Mo. 355, 43 Am. St. Rep. 583; Hayes v. Press Co., 127 Pa. 642, 14 Am. St. Rep. 874; Collins v. Dispatch Pub. Co., 152 Pa. 187, 34 Am. St. Rep. 636

The mere fact that the words might possibly have been used in a special sense rendering them not defamatory, is no ground for so construing them, so as to exempt the plaintiff from liability, instead of giving them their natural meaning, unless it is shown that they were in fact used and understood in such special sense. Thus where a declaration alleged that the defendant said of the plaintiff, "You are guilty of" the death of a certain person (not merely the cause of his death), Lord Mansfield held that the words naturally imputed a charge of murder because of the use of the word "guilty," and refused to give them an innocent construction on the defendant's contention that they might have meant that the death was caused in some other way. Peake v. Oldham, Cowp. 275, 277, Bigelow's Cas. 122, Bigelow's Lead. Cas. 73. In this case the defendant had further said, "and rather than you should go without a hangman, I will hang you," which of course put the construction beyond a doubt; but Lord Mansfield was of opinion that the words quoted in the text were alone sufficient to impute such charge. See, also, Jarnigan v. Fleming, 43 Miss. 710, 5 Am. Rep. 514; More v. Bennett, 48 N. Y. 472, Erwin's Cas. 349. Whether words were capable of such a special meaning is, as we have seen, a question of law for the court, and whether, taking into consideration the circumstances under which they were published, they were used and understood in such sense, is a question of fact for the jury.

But in order that the defendant may show that words defamatory on their face were used in a special sense rendering them not defamatory, the words must be fairly capable of such meaning, for it is the effect of his words, not his intention, which determines his liability. "The actionable or innocent character of words depends, not on the intention with which they were published, but on their actual meaning and tendency when published. A man is bound to know the natural effect of the language he uses." Pollock, Torts (Webb's Ed.) 314. If a man, therefore, publishes words which in their natural and ordinary sense are defamatory, and they are so understood by his hearers or readers, he cannot escape liability by saying that he did not intend them in that sense. Roe v. Chitwood, 36 Ark. 215; Jarnigan v. Fleming, 43 Miss. 710, 5 Am. Rep. 514; Williams v. McKee, 98 Tenn. 139; Nicholson v. Rust, 21 Ky. L. R. 645, 52 S. W. 933. "Words are to be understood in their plain and natural import, according to the ideas they are calculated to convey to those to whom they are addressed. In ascertaining the meaning of the speaker, reference must be had to the words used and the circumstances under which they were uttered, and the author is presumed to have used them in the sense which their use is [was] calculated to convey to the minds of his hearers." Roe v. Chitwood, 36 Ark. 215.

Although the words complained of are not

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only capable of the defamatory meaning ascribed to them, but ordinarily and naturally have such meaning, they are not actionable, where the defendant proves the circumstances under which they were used, and these circumstances show that the words were not only used but understood by the hearers in a sense which does not render them actionable. Pollock, Torts (Webb's Ed.) 313; Lord Cromwell's Case, 4 Coke, 13; Van Rensselaer v. Dole, 1 Johns. Cas. [N. Y.] 279, Chase's Cas. 115; Dedway v. Powell, 4 Bush [Ky.] 77, 96 Am. Dec. 283; Trabue v. Mays, 3 Dana [Ky.] 138, 28 Am. Dec. 61; Shecut v. McDowell, 3 Brev. [S. C.] 38, 5 Am. Dec. 536; Fawsett v. Clark, 48 Md. 494, 30 Am. Rep. 481; Egan v. Semrad, 113 Wis. 84. Thus, as we have seen, it is not actionable to call a man a "murderer," where the word is shown to have been used and understood with reference to his killing game by engines or traps (Lord Cromwell's Case, 4 Coke, 13), or to call men "highwaymen, robbers, and murderers," where the words are shown to have been used and understood with reference to transactions known not to amount to the charge the words import. Van Rensselaer v. Dole, 1 Johns. Cas. [N. Y.] 279.

Slanderous words may be retracted or so qualified or explained as not to convey a slanderous meaning, and where such retraction, qualification or explanation is made at the time of speaking the words or before separation of the persons who have heard them, the words are not actionable. Trabue v. Mays, 3 Dana [Ky.] 138, 28 Am. Dec. 61; Simons v. Lewis, 51 La. Ann. 327. And explanation of such words made by another person present at the time, if adopted by the speaker, and so understood to be by all present, will prevent the words from being actionable. Trabue v. Mays, supra.

(d) Words not defamatory on their face—Innuendo and colloquium.—If words are not defamatory on their face, the plaintiff may show, to support his action, that they were, under the circumstances attending their publication, capable of a special meaning rendering them defamatory, and that they were used and understood in such special sense (Bornman v. Boyer, 3 Bin. [Pa.] 515, 5 Am. Dec. 380; Thompson v. Lusk, 2 Watts [Pa.] 17, 26 Am. Dec. 91; Hayes v. Press Co., 127 Pa. 642, 14 Am. St. Rep. 874; Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672; Haines v. Campbell, 74 Md. 158, 28 Am. St. Rep. 240; Knapp v. Fuller, 55 Vt. 311, 45 Am. Rep. 618; Price v. Conway, 134 Pa. 340, 19 Am. St. Rep. 704; Hinesley v. Sheets, 18 Ind. App. 612, 63 Am. St. Rep. 356); the question whether they were used and understood in such special sense being ordinarily, as we have seen, a question of fact for the jury to determine. Thus the words, "I have made the charge against him, and I will go on with it," will support an action, if the pleading of the plaintiff is in proper form, and it is made to appear thereby that the words were used with reference to plaintiff's testimony in an action, and meant that he had committed perjury. Thompson v. Lusk, 2 Watts [Pa.] 17, 26 Am. Dec. 91. And so of the words "He swore to a lie." Commons v. Walters, 1 Port. [Ala.] 377, 27 Am. Dec. 635. See, also, McClaughry v. Wetmore, 6 Johns. [N. Y.] 82, 5 Am. Dec. 194.

But when the plaintiff seeks to put an actionable meaning on words by which it is not naturally and obviously conveyed, he must show that the words are fairly capable of such meaning, and whether they are so or not is a question of law for the court. Capital & C. Bank v. Henty, 7 App. Cas. 741; Mulligan v. Cole, L. R. 10 Q. B. 549. "Words are not deemed capable of a particular meaning merely because it might by possibility be attached to them; there must be something in either the context or the circumstances that would suggest the alleged meaning to a reasonable mind. In scholastic language, it is not enough that the terms should be 'patent' of the injurious construction; they must not only suffer it, but be fairly capable of it." Pollock, Torts (Webb's Ed.) 314, 315.

When the words published are not defamatory in their natural and ordinary meaning, but could be and were used with a special meaning rendering them so, the plaintiff has the burden of showing this fact; and, in order to do so, he must allege such special meaning in his pleading, as by alleging that the defendant published certain words concerning plaintiff, setting them out verbatim or in substance, and averring that the defendant thereby meant, etc. Such an averment is called an innuendo. It is always essential, in code pleading as well as at common law, unless declared unnecessary by statute, where the words set out in the declaration or complaint are not defamatory on their face, but were used in a special sense rendering them so; and if it is omitted in such a case the pleading is demurrable as not stating a cause of action, and cannot be aided at the trial by proof of the special meaning. Cooper v. Greeley, 1 Denio [N. Y.] 347, Burdick's Cas. 218; Thompson v. Lusk, 2 Watts [Pa.] 17, 26 Am. Dec. 91; Pittsburgh, A. & M. P. R. Co. v. McCurdy, 114 Pa. 554, 60 Am. Rep. 363; Vickers v. Stoneman, 73 Mich. 421, Erwin's Cas. 355; Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672; Harrison v. Manship, 120 Ind. 43.

The averment of the words used, and the innuendo alleging the special sense in which they were used and understood, do not always show that the words are actionable. In such a case it is necessary to allege by way of inducement and colloquium the facts showing the application of the words so as to warrant the explanatory meaning given them by the innuendo, for "an innuendo cannot extend the sense of the words beyond their natural meaning, unless something is put upon the record by way of introducing matter, with which they can be connected." Vickers v. Stoneman, 73 Mich. 421, Erwin's Cas. 355. And see Snell v. Snow, 13 Metc. [Mass.] 278, 46 Am. Dec. 730; Brettun v. Anthony, 103 Mass. 37, Chase's Cas. 147; Sheely v. Briggs, 2 Har. & J. [Md.] 363, 3 Am. Dec. 552; Peterson v. Sentman, 37 Md. 140, 11 Am. Rep. 534; Patterson v. Wilkinson, 55 Me. 42, 92 Am. Dec. 568; Pelton v. Ward, 3 Caines [N. Y.] 73, 2 Am. Dec. 251; Little v. Barlow, 26 Ga. 423, 71 Am. Dec. 219; Miles v. Vanhorn, 17 Ind. 245, 79 Am. Dec. 477; McFadin v. David, 78 Ind. 445, 41 Am. Rep. 587; Harrison v. Manship, 120 Ind. 43; K——— v. H———, 20 Wis. 239, 91 Am. Dec. 397; Clute v. Clute, 101 Wis. 137; Legg v. Dunleavy, 80 Mo. 558, 50 Am. Rep. 512; Shaffer v. Kintzer, 1 Bin. [Pa.] 537, 2 Am. Dec. 488; Pittsburgh, A. & M. P. R. Co. v. McCurdy, 114 Pa. 554, 60 Am. Rep. 363; Posnett v. Marble, 62 Vt. 481, 22

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Am. St. Rep. 126; Richmond v. Post, 69 Minn. 457; Tiepke v. Times Pub. Co., 20 R. I. 200; Kilgour v. Evening Star Newspaper Co., 96 Md. 16.

For a good illustration of colloquium and innuendo, see Thompson v. Lusk, 2 Watts [Pa.] 17, 26 Am. Dec. 91. Words merely charging that a person administered morphine to another on the day the latter made a will, and that if it had not been for that, such person's daughters would not have gotten what they did, cannot be extended by an innuendo to mean that such person unlawfully administered poison causing death. McFadin v. David, 78 Ind. 445, 41 Am. Rep. 587. A publication by a street railroad company that a conductor was discharged for "failing to ring up all fares collected," was held not to be libellous, in the absence of a showing that it was meant to impute a crime or dishonesty. Pittsburgh, A. & M. P. R. Co. v. McCurdy, 114 Pa. 554, 60 Am. Rep. 363. In an action for spoken words, which are claimed to be actionable per se because spoken of plaintiff in relation to his office, profession, or business, averments are necessary by way of inducement and colloquium to show that the plaintiff held the particular office, or was engaged at the time in the particular business or profession, and to connect the words complained of therewith. Ayre v. Craven, 2 Adol. & E. 2.

(e) Application of the words to the plaintiff: The fact that the name of the plaintiff was not mentioned in the libel or slander complained of is immaterial, if he shows by proper averments in his complaint (which is necessary), and proves at the trial, that the libel or slander was intended and understood to refer to him, the question in such a case being ordinarily one for the jury. Wakley v. Healey, 7 C. B. 591; Le Fanu v. Malcomson, 1 H. L. Cas. 637; Russell v. Kelly, 44 Cal. 641, 13 Am. Rep. 169; Van Vechten v. Hopkins, 5 Johns. [N. Y.] 211, 4 Am. Dec. 339; Smart v. Blanchard, 42 N. H. 137; Mix v. Woodward, 12 Conn. 262; Goodrich v. Davis, 11 Metc. [Mass.] 484; Miller v. Butler, 6 Cush. [Mass.] 71; Hardy v. Williamson, 86 Ga. 551, 22 Am. St. Rep. 479; Colvard v. Black, 110 Ga. 642; Wofford v. Meeks, 129 Ala. 349, 87 Am. St. Rep. 66; State v. Mason, 26 Or. 273, 38 Pac. 130, 46 Am. St. Rep. 629; Boehmer v. Detroit Free Press Co., 94 Mich. 7, 34 Am. St. Rep. 318; Davis v. Marxhausen, 103 Mich. 315, Paige's Cas. 383.

(f) Defamation by irony or insinuation; interrogation; opinion; hearsay; silence: It is not necessary to a slander or libel that the defamatory charge or imputation shall be made in direct and positive terms, or that it shall be made as of the knowledge of the person making it; but it may be made by irony or insinuation, interrogation, expression of opinion, or hearsay, etc. Cooper v. Greeley, 1 Denio [N. Y.] 347, Burdick's Cas. 218; Adams v. Lawson, 17 Grat. [Va.] 250, 94 Am. Dec. 455; Haines v. Campbell, 74 Md. 158, 28 Am. St. Rep. 240; Wofford v. Meeks, 129 Ala. 349, 87 Am. St. Rep. 66; World Pub. Co. v. Mullen, 43 Neb. 126, 47 Am. St. Rep. 737; Hanchett v. Chiatovich [C. C. A.] 101 Fed. 742; Nailor v. Ponder, 1 Marv. [Del.] 408; Nord v. Gray, 80 Minn. 143; and other cases in the notes following. "The publisher of a libel cannot escape liability by veiling a calumny under artful or ambiguous phrases, or by indirectly charging that which would be slanderous if imputed in direct and undisguised language." Andrews, J., in Sanderson v. Caldwell, 45 N. Y. 398, 6 Am. Rep. 105.

Words may be given a defamatory meaning, even directly contrary to their natural meaning, by being uttered in a tone of irony or insinuation,—as where a man ironically says of another, "A. will not play the fool or the hypocrite," meaning that he will and does. Steph. Dig. Crim. Law, 205, citing 1 Hawk. P. C. 543.

An action may be maintained for speaking words imputing a crime, although not in direct and positive terms, but by way of interrogation only, if, according to the natural and fair construction of the language used, in connection with the circumstances, the hearers had a right to believe that the defendant intended to charge the plaintiff with the commission of a crime. And the same is true, of course, of other defamatory words. Gorham v. Ives, 2 Wend. [N. Y.] 534, Chase's Cas. 114; Sawyer v. Eifert, 2 Nott & McC. [S. C.] 511, 10 Am. Dec. 633; Waters v. Jones, 3 Port. [Ala.] 442, 29 Am. Dec. 261.

Expressing a suspicion or an opinion that one has been guilty of a crime may be actionable slander or libel. Thus it is actionable to say of another, "I believe," or "I have reason to believe," that he has committed a certain felony. Waters v. Jones, 3 Port. [Ala.] 442, 29 Am. Dec. 261; McGowan v. Manifee, 7 T. B. Mon. [Ky.] 314, 18 Am. Dec. 178; Logan v. Steele, 1 Bibb [Ky.] 593, 4 Am. Dec. 659; Hart v. Reed, 1 B. Mon. [Ky.] 166, 35 Am. Dec. 179; Miller v. Miller, 8 Johns. [N. Y.] 58; Alcorn v. Bass, 17 Ind. App. 500. Words calculated to cause the hearers to suspect that the person of whom they are spoken has committed a crime are actionable, although they do not directly charge the crime. Proctor v. Owens, 18 Ind. 21, 81 Am. Dec. 341; Dickey v. Andros, 32 Vt. 55; World Pub. Co. v. Mullen, 43 Neb. 126, 47 Am. St. Rep. 737; Nailor v. Ponder, 1 Marv. [Del.] 408; Haynes v. Clinton Printing Co., 169 Mass. 512.

It is actionable slander to charge a crime on hearsay, as by saying of a person that it is the general opinion of the people in the neighborhood, or that "it is reported," etc., that he committed the crime. Waters v. Jones, 3 Port. [Ala.] 442, 29 Am. Dec. 261; Schenck v. Schenck, 20 N. J. Law, 208; World Pub. Co. v. Mullen, 43 Neb. 126, 47 Am. St. Rep. 737; Haynes v. Clinton Print. Co., 169 Mass. 512.

Mere silence cannot amount to slander. New York, etc., R. Co. v. Schaffer, 65 Ohio St. 414, 87 Am. St. Rep. 629, where a railroad company refused to give a discharged employe a "clearance card." and thereby prevented his obtaining other employment.

What constitutes actionable libel in general: A libel, as distinguished from a slander, is the publication of defamatory matter in writing or its equivalent, as by printing, pictures, signs, etc. "There is no doubt that drawing, printing, engraving, and every other use of permanent visible symbols to convey a distinct idea, are in the same case with writing." Pollock, Torts (Webb's Ed.) 287.

In determining whether particular words are actionable per se, the same rules do not apply to libel as to slander. What would not be actionable without alleging and proving special damage, if merely spoken, may be actionable per se if written or printed or otherwise published in a libel. Any words

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which would be actionable, if spoken, will certainly be actionable if published in writing or its equivalent. "Written words are libellous in all cases where, if spoken, they would be actionable" (Andrews, J., in Moore v. Francis, 121 N. Y. 199, 18 Am. St. Rep. 810, Chase's Cas. 126), as words falsely imputing to another the commission of a crime, which would be actionable slander if spoken (Johnson v. St. Louis Dispatch Co., 65 Mo. 539, 27 Am. Rep. 293; McAllister v. Detroit Free Press Co., 76 Mich. 338, 15 Am. St. Rep. 318; Park v. Detroit Free Press Co., 72 Mich. 560, 16 Am. St. Rep. 544; Belo v. Fuller, 84 Tex. 450, 31 Am. St. Rep. 75; Upton v. Hume, 24 Or. 420, 33 Pac. 810, 41 Am. St. Rep. 863; World Pub. Co. v. Mullen, 43 Neb. 126, 47 Am. St. Rep. 737) or words which falsely impute to another a loathsome contagious disease which would tend to exclude him from society; or words falsely conveying a charge of unfitness, dishonesty, or incompetence in an office, profession, trade, or calling (Krug v. Pitass, 162 N. Y. 154, 76 Am. St. Rep. 317; Moore v. Francis, 121 N. Y. 199, 18 Am. St. Rep. 810, Chase's Cas. 126; Sanderson v. Caldwell, 46 N. Y. 398, 6 Am. Rep. 105; Bodwell v. Osgood, 3 Pick. [Mass.] 379, 15 Am. Dec. 228; Watson v. Trask, 6 Ohio, 531, 27 Am. Dec. 271; Holt v. Parsons, 23 Tex. 9, 76 Am. Dec. 49; St. James Military Academy v. Gaiser, 125 Mo. 517, 46 Am. St. Rep. 502; Wofford v. Meeks, 129 Ala. 349, 87 Am. St. Rep. 66; Mosnat v. Snyder, 105 Iowa, 500).

The law of libel, however, goes much further than this, and gives a cause of action, without the necessity for alleging and proving any special damage as in the case of slander, for any words which are false, and not justified or privileged, and which are either injurious to the character or credit, domestic, public, or professional, of the person concerning whom they are published, or in any way tend to cause men to shun his society, or bring him into hatred, contempt, or ridicule. Pollock, Torts (Webb's Ed.) 290; Villers v. Monstey, 2 Wils. 403; Thorley v. Kerry, 4 Taunt. 355, Bigelow's Cas. 135, Bigelow's Lead. Cas. 90, Erwin's Cas. 312; Pfitzinger v. Dubs, 64 Fed. 696, Erwin's Cas. 334; Tillson v. Robbins, 68 Me. 295, 28 Am. Rep. 50, Chase's Cas. 124; Cooper v. Greeley, 1 Denio [N. Y.] 347, Burdick's Cas. 218; King v. Root, 4 Wend. [N. Y.] 113, 21 Am. Dec. 102; Morey v. Morning Journal Ass'n, 123 N. Y. 207, 20 Am. St. Rep. 730; Buckstaff v. Viall, 84 Wis. 129; Bradley v. Cramer, 59 Wis. 309, 48 Am. Rep. 511; Street v. Johnson, 80 Wis. 455, 27 Am. St. Rep. 42; Giles v. Clarke, 69 N. H. 92; McCorkle v. Binns, 5 Bin. [Pa.] 340, 6 Am. Dec. 420; Pittock v. O'Niell, 63 Pa. 253, 3 Am. Rep. 544; Barr v. Moore, 87 Pa. 385, 30 Am. Rep. 367; Collins v. Dispatch Pub. Co., 152 Pa. 187, 34 Am. St. Rep. 636; Wood v. Boyle, 177 Pa. 620, 55 Am. St. Rep. 747; Colby v. Reynolds, 6 Vt. 489, 27 Am. Dec. 574; Fonville v. McNease, Dudley L. [S. C.] 303, 31 Am. Dec. 556; Obaugh v. Finn, 4 Ark. 110, 37 Am. Dec. 773; Riley v. Lee, 88 Ky. 603, 21 Am. St. Rep. 358; Adams v. Lawson, 17 Grat. [Va.] 250, 94 Am. Dec. 455; Stewart v. Swift Specific Co., 76 Ga. 280, 2 Am. St. Rep. 40.

"Much which, if only spoken, might be passed as idle blackguardism, doing no discredit save to him who utters it, when invested with the dignity and malignity of print is capable, by reason of its permanent character and wide dissemination, of inflicting serious injury." Tillson v. Robbins, 68 Me. 295, 28 Am. Rep. 50. "Scandalous matter," said Lord Holt, "is not necessary to make a libel. It is enough if the defendant induce an ill-opinion to be had of the plaintiff, or to make him contemptible and ridiculous." Cropp v. Tilney, 3 Salk. 225. To maintain an action for such a publication it is not necessary, as in an action for slander, to show any special damage. Sanderson v. Caldwell, 45 N. Y. 398, 6 Am. Rep. 105; and other cases above cited.

Illustrations: Thus it has been held libellous per se to write or print of a man that he is a "rogue," a "swindler," a "cheat," or to otherwise impute dishonesty, fraud, or corruption, or any moral turpitude, although to speak such words is not an imputation of crime, and would not be actionable slander unless spoken with reference to his office, profession, trade or business. Austin v. Culpeper, Skin. 123; Bell v. Stone, 1 Bos. & P. 331; J'Anson v. Stuart, 1 Term R. 748; Obaugh v. Finn, 4 Ark. 110, 37 Am. Dec. 773; Wofford v. Meeks, 129 Ala. 349, 87 Am. St. Rep. 66; Tillson v. Robbins, 68 Me. 295, 28 Am. Rep. 50, Chase's Cas. 124; Hardy v. Williamson, 86 Ga. 551, 22 Am. St. Rep. 479; Wood v. Boyle, 177 Pa. 620.

It is libellous per se to say or insinuate that a person has set fire to his own building to obtain the insurance thereon. World Pub. Co. v. Mullen, 43 Neb. 126, 47 Am. St. Rep. 737. Compare Reid v. Providence Journal Co., 20 R. I. 120 (where it was held that the article in question made no such imputation).

It was held not actionable per se, however, to publish of the plaintiff that he was supervising architect of a building, and promised and gave defendants work on it for a commission paid to him by them, no facts being alleged to show that it was a violation of his duty to take such commission. Legg v. Dunleavy, 80 Mo. 558, 50 Am. Rep. 512. And although in most jurisdictions it is not actionable per se to speak words falsely imputing want of chastity to a girl or woman, or fornication or adultery to a man, where fornication and adultery are not punished as a crime, it is actionable libel to make such a charge in writing or print. Bodwell v. Osgood, 3 Pick. [Mass.] 379, 15 Am. Dec. 228; More v. Bennett, 48 N. Y. 472, Erwin's Cas. 349. It was held libellous per se to publish of a woman that she was "a dashing blonde, twenty years old, and is said to have been a concert-hall singer and dancer at Coney Island"—it being alleged and proved that "a concert hall at Coney Island" was a place of evil-repute, and a resort for disorderly persons, and that female singers and dancers there were generally depraved women. Gates v. New York Recorder Co., 155 N. Y. 228.

It has also been held libellous and actionable per se to publish of another that he adds to his other vices ingratitude (Cox v. Lee, L. R. 4 Exch. 284); that he is a "liar," or has uttered a falsehood (Monson v. Lathrop, 96 Wis. 386, 65 Am. St. Rep. 54; Hake v. Brames, 95 Ind. 161; Riley v. Lee, 88 Ky. 603, 21 Am. St. Rep. 358; Colvard v. Black, 110 Ga. 642); that he is the author of a false and malicious report respecting another (Colby v. Reynolds, 6 Vt. 489, 27 Am. Dec. 574); that he has been excluded from his church or its ordinances "by reason of his infamous, groundless assertions" (McCorkle v. Binns, 5

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Bin. [Pa.] 340, 6 Am. Dec. 420); that he is an infidel and has opposed the religious institutions of his country (Stow v. Converse, 3 Conn. 325, 8 Am. Dec. 189); that, under the cloak of religious and spiritual reform, he hypocritically, and with the grossest impunity, deals out his malice, uncharitableness and falsehoods (Thorley v. Kerry, 4 Taunt. 355, Bigelow's Cas. 135, Bigelow's Lead. Cas. 90, Erwin's Cas. 312). To say of a person that he is a drunkard (Sanderson v. Caldwell, 45 N. Y. 398, 6 Am. Rep. 105); a "swine" (Solverson v. Peterson, 64 Wis. 198, 54 Am. Rep. 607, Paige's Cas. 380); a "frozen snake" (Hoare v. Silverlock, 12 Q. B. 624), a "black sheep" (McGregor v. Gregory, 11 Mees. & W. 287), an "itchy old toad" (Villers v. Monsley, 2 Wils. 403), a "villain" (Bell v. Stone, 1 Bos. & P. 331; Obaugh v. Finn, 4 Ark. 110, 37 Am. Dec. 773). To say that a person does not pay his debts, or to convey such impression by sending through the mail a letter on the envelope of which is the name of an association with a statement that it is an association for the collection of bad debts. McDermott v. Union Credit Co., 76 Minn. 84; Muetze v. Tuteur, 77 Wis. 236, 20 Am. St. Rep. 115; State v. Armstrong, 106 Mo. 395, 27 Am. St. Rep. 361.

The false protest of a draft or note, if published, may be a libel. May v. Jones, 88 Ga. 308, 30 Am. St. Rep. 154; Hirshfield v. Fort Nat. Bank, 83 Tex. 452, 29 Am. St. Rep. 660. It is libellous per se to say of a man that he has absconded without paying his debts, and swindled the writer out of money advanced for work to be done (Obaugh v. Finn, 4 Ark. 110, 37 Am. Dec. 773); to say of a person that he is responsible for alleged corruptions, intimidation, and fraud in a public election (Tillson v. Robbins, 68 Me. 295, 28 Am. Rep. 50, Chase's Cas. 124); or that he has "charge of the sack" for an election about to be held (Edwards v. San Jose Print. & Pub. Soc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70); to charge a wife with deserting her husband in his sickness (Smith v. Smith, 73 Mich. 445, 16 Am. St. Rep. 594); to falsely publish that a man has committed suicide (Cady v. Brooklyn Union Pub. Co., 23 Misc. [N. Y.] 409); to charge, in publishing the suicide of a man, that it was induced by the exactions of his wife, and by her fraudulent conduct in taking wages for her son which he had not earned (Bradley v. Cramer, 59 Wis. 309, 48 Am. Rep. 511); to falsely say that another is or was insane (Morgan v. Lingen, 8 Law T. [N. S.] 800; Perkins v. Mitchell, 31 Barb. [N. Y.] 465, Erwin's Cas. 361; Moore v. Francis, 121 N. Y. 199, 18 Am. St. Rep. 810, Chase's Cas. 126).

Contra. Mayrant v. Richardson, 1 Nott & McC. [S. C.] 347, 9 Am. Dec. 707. It is libellous to publish of another that he is "insane, and a fit person to be sent to the lunatic asylum," or that "he is so disordered in his senses as to endanger the persons of other people, if left unrestrained," etc. (Perkins v. Mitchell, 31 Barb. [N. Y.] 465, Erwin's Cas. 361); to publish a notice of the death of a living person calculated to subject her to ridicule (McBride v. Ellis, 9 Rich. Law [S. C.] 313, 67 Am. Dec. 553); to say that a person is threatened with a breach of promise suit, that he and his friends are moving to effect a reconciliation, but the young lady insists on his marrying her (Morey v. Morning Journal Ass'n, 123 N. Y. 207, 20 Am. St. Rep. 730); to call one a disreputable person and charge him with having maliciously published a report tending to injure the city in which he lives (Trebby v. Transcript Pub. Co., 74 Minn. 84, 73 Am. St. Rep. 330).

Any false defamatory words published concerning another in writing or print, and which have a tendency to injure or prejudice him in his profession, trade, business, or employment, are actionable per se, and without alleging or proving special damage, whether or not they have reference to his professional or business character, so that they would be actionable per se, if merely spoken. Hetherington v. Sterry, 28 Kan. 426, 42 Am. Rep. 169; Price v. Conway, 134 Pa. 340, 19 Am. St. Rep. 704; Williams v. Davenport, 42 Minn. 393, 18 Am. St. Rep. 519; Hardy v. Williamson, 86 Ga. 551, 22 Am. St. Rep. 479; Krug v. Pitass, 162 N. Y. 154, 76 Am. St. Rep. 317; Ivey v. Pioneer S. & L. Co., 113 Ala. 349; Tonini v. Cevasco, 114 Cal. 266, 46 Pac. 103. This is true of words published concerning a lawyer (Sanderson v. Caldwell, 46 N. Y. 398, 6 Am. Rep. 105; Hetherington v. Sterry, 28 Kan. 426, 42 Am. Rep. 169; Mosnat v. Snyder, 105 Iowa, 500); or an engineer (Hardy v. Williamson, 86 Ga. 551, 22 Am. St. Rep. 479); or minister (Johnson v. Synett, 157 N. Y. 684; Potter v. New York Evening Journal Pub. Co., 68 App. Div. [N. Y.] 95; Jones v. Roberts, 73 Vt. 201. Compare Porter v. Post Pub. Co., 20 R. I. 88, holding a particular publication not to be a libel on a clergyman) or of a merchant or tradesman or other business man (Mitchell v. Bradstreet Co., 116 Mo. 226, 38 Am. St. Rep. 592; Brown v. Vannaman, 85 Wis. 451, 39 Am. St. Rep. 860; Robinson v. Eau Claire Book & Stationery Co., 110 Wis. 369; Hayes v. Press Co., 127 Pa. 642, 14 Am. St. Rep. 874; Meas v. Johnson, 185 Pa. 12; Hanchett v. Chiatovich [C. C. A.] 101 Fed. 742; American Book Co. v. Gates, 85 Fed. 729; Davey v. Davey, 36 App. Div. [N. Y.] 640; Brown v. Holton, 109 Ga. 431; Dun v. Weintraub, 111 Ga. 416; Bee Pub. Co. v. World Pub. Co., 59 Neb. 713); or of an employe (Call v. Hayes, 169 Mass. 586; Moore v. Francis, 121 N. Y. 199, 18 Am. St. Rep. 810, Chase's Cas. 126; Norfolk & W. Steamboat Co. v. Davis, 12 App. D. C. 306); or a school teacher, etc., (Bodwell v. Osgood, 3 Pick. [Mass.] 379, 15 Am. Dec. 228; Bray v. Callihan, 155 Mo. 43; Darling v. Clement, 69 Vt. 292). It is a libel to charge that the business of the proprietor of a patent medicine is swindling. Dr. Shoop Family Medicine Co. v. Wernich, 95 Wis. 164.

It is libellous per se to publish of an attorney that he is a drunkard and makes extortionate charges for his services (Sanderson v. Caldwell, 46 N. Y. 398, 6 Am. Rep. 105); or that he abandoned his client's cause in the midst of litigation brought on by his advice, to the client's detriment (Hetherington v. Sperry, 28 Kan. 426, 42 Am. Rep. 169).

It is libellous per se to publish of a physician that he is a blockhead and fool, that he hates persons of a certain nationality so much that he would not help them if he could, and to appeal to persons of that nationality not to intrust themselves to his care (Krug v. Pitass, 162 N. Y. 154, 76 Am. St. Rep. 317); or of an engineer that he conspired to defraud his employer (Hardy v. Williamson, 86 Ga. 551, 22 Am. St. Rep. 479); or of an actor that he has been guilty of ungentlemanly and discourteous conduct (Williams v. Davenport, 42 Minn. 393, 18 Am. St. Rep. 519).

A letter written by one of two dealers ad-

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vising a shipper to look out for the other dealer "that you are shipping milk or cream to, unless you have surety for your goods, as he does not pay any of his shippers anything, and he sells the milk and cream for about what it costs him, and the shippers are the losers."—is libellous per se. Brown v. Vannaman, 85 Wis. 451, 39 Am. St. Rep. 860.

It is libellous per se to falsely publish of a merchant or business man that he is insolvent (Hayes v. Press Co., 127 Pa. 642, 14 Am. St. Rep. 874; Brown v. Holton, 109 Ga. 431); or that he has made an assignment (Mitchell v. Bradstreet Co., 116 Mo. 226, 38 Am. St. Rep. 592); or that he has infringed another's patent or trade-mark (Watson v. Trask, 6 Ohio, 531, 27 Am. Dec. 271).

It is libellous per se to publish false defamatory words concerning a person conducting a school or other educational institution, which tend to injure his business. Price v. Conway, 134 Pa. 340, 19 Am. St. Rep. 704; St. James Military Academy v. Gaiser, 125 Mo. 517, 46 Am. St. Rep. 502; Darling v. Clement, 69 Vt. 292. Thus it is libellous to charge a person maintaining a school or other institution of learning with maintaining an "immoral school," a "dancing school," harmful "to the moral and religious interests of the community," and calling upon friends of religion and good morals not to patronize it. St. James Military Academy v. Gaiser, 125 Mo. 517, 46 Am. St. Rep. 502.

It has been held not libellous per se to publish of a merchant or tradesman merely that he has executed a chattel mortgage. Dunn v. Weintrab, 111 Ga. 416; Newbold v. Bradstreet, 57 Md. 38, 40 Am. Rep. 426.

It is libellous to say that a bank-teller became mentally deranged by reason of overwork, and while in that condition made injurious statements regarding the affairs of the bank. Moore v. Francis, 121 N. Y. 199, 18 Am. St. Rep. 810, Chase's Cas. 126.

In like manner, it is libellous per se to publish of a public officer false defamatory matter which tends to diminish public confidence in his ability, fitness, or integrity, and thus injure him in his office, whether the words are published in relation to his office or not. King v. Root, 4 Wend. [N. Y.] 113, 21 Am. Dec. 102; Lansing v. Carpenter, 9 Wis. 540, 76 Am. Dec. 281; Nehrling v. Herald Co., 112 Wis. 558; Bourreseau v. Detroit Evening Journal Co., 63 Mich. 425, 6 Am. St. Rep. 320; Cotulla v. Kerr, 74 Tex. 89, 15 Am. St. Rep. 819; Boehmer v. Detroit Free Press Co., 94 Mich. 7, 34 Am. St. Rep. 318; Bailey v. Holland, 7 App. D. C. 184; Martin v. Paine, 69 Minn. 482; Sharpe v. Larson, 67 Minn. 428; Tiepke v. Times Pub. Co., 20 R. I. 200; McIntyre v. Journal Co., 5 App. Div. [N. Y.] 609. It is libellous to falsely represent that a public officer (the president of the senate, for example) was in a beastly state of intoxication while in the discharge of his duties, and an object of loathing and disgust. King v. Root, 4 Wend. [N. Y.] 113, 21 Am. Dec. 102.

A publication which charges a judge with being destitute of the capacity and attainments necessary for his station or that he openly abandoned the common principles of truth, or that he sold, directly or indirectly, the appointment of clerk, is libellous. Robbins v. Treadway, 2 J. J. Marsh. [Ky.] 540, 19 Am. Dec. 152. But to charge a judge with improprieties, which would not be cause for impeachment or removal, is no more actionable than the same charge against a private citizen would be. Id. It is not libellous to charge a judge with erring in judgment, or with disregarding public sentiment. Id. And the same is true of officers of private corporations or associations. It is libellous to say of the treasurer of a church that he obstinately retained in his hands without just cause, funds of the church after every effort had been exhausted to induce him to turn them over. Holt v. Parsons, 23 Tex. 9, 76 Am. Dec. 49. It is libellous to impute to a person, after he has ceased to hold a public office, dishonesty or misconduct therein, although the charge may not impute a crime and would not be actionable if merely spoken. Russell v. Anthony, 21 Kan. 450, 30 Am. Rep. 436; Sharpe v. Larsen, 67 Minn. 428.

To render written or printed words actionable per se as a libel, they must at least tend to disgrace a man or bring him into hatred, contempt or ridicule, or to injure him in his business or calling. Mere general abuse or scurrility, however ill-natured and vexatious, if it does not have such a tendency, will not support an action. Rice v. Simmons, 2 Har. [Del.] 417, 31 Am. Dec. 766. See Reid v. Providence Journal Co., 20 R. I. 120.

And it is not libellous to publish of a person merely that he did something which he had a legal right to do, without anything more, as to say that a saloon-keeper, to get rid of a just claim in court, set up as a defense a prohibitory liquor law under which no action could be maintained for the price of liquors sold in violation thereof (Homer v. Engelhardt, 117 Mass. 539, Chase's Cas. 128); or to say of a person (the words not being spoken in reference to his trade or business) that he had for some years owed for medical attendance, and when sued therefor, having no other defense, he cowardly slunk behind the statute of limitations (Hollenbeck v. Hall, 103 Iowa, 214, 64 Am. St. Rep. 175; Bennett v. Williamson, 4 Sandf. [N. Y.] 60. Contra, where special damage—discharge from and loss of employment—was alleged and proved. Hollenbeck v. Ristine, 105 Iowa, 488, 67 Am. St. Rep. 306); or to say of a professional man that he has moved his office up to his house "to save expense" (Stewart v. Minn. Tribune Co., 40 Minn. 101, 12 Am. St. Rep. 696).

Words actionable on proof of special damage only: When words are actionable per se, as in the cases above referred to, it is not necessary to allege or prove any special damage from their utterance. "In such cases, that some damage has been sustained is an implication of law." Newbit v. Statuck, 35 Me. 315, 58 Am. Dec. 706, and other cases above cited. When words are not actionable per se within the rules above stated, but are defamatory, an action will lie if special damage has been sustained as a natural consequence. Lynch v. Knight, 9 H. L. Cas. 577; Pollard v. Lyon, 91 U. S. 225, Burdick's Cas. 199, Erwin's Cas. 315; Olmsted v. Miller, 1 Wend. [N. Y.] 506; Bradt v. Tousley, 13 Wend. [N. Y.] 253, Paige's Cas. 377; Canning v. Owen [R. I.] 52 Atl. 1027; Linney v. Maton, 13 Tex. 449; McQueen v. Fulgham, 27 Tex. 463. But in order that an action may be maintained the plaintiff must both allege and prove the special damage. Pollard v. Lyon, 91 U. S. 225, Burdick's Cas. 199, Erwin's Cas.

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315; Lodge v. O'Toole, 20 R. I. 405; Buys v. Gillespie, 2 Johns. [N. Y.] 115, 3 Am. Dec. 404; Knight v. Blackford, 3 Mackey [D. C.] 177, 51 Am. Rep. 772; Hollingsworth v. Shaw, 19 Ohio St. 430, 2 Am. Rep. 411; Tobias v. Harland, 4 Wend. [N. Y.] 537; Hirshfield v. Fort Nat. Bank, 83 Tex. 452, 29 Am. St. Rep. 660; Morasse v. Brochu, 151 Mass. 567, 21 Am. St. Rep. 474. No action lies without proof of special damage, for calling a man opprobrious names, such as liar, cheat, rogue, rascal, swindler, black-leg, and the like, where the words, as in the cases enumerated, do not amount to an imputation of crime, and are not spoken of him in relation to his office, profession, trade, or business. Van Tassel v. Capron, 1 Denio [N. Y.] 250, 43 Am. Dec. 667; Oakley v. Farrington, 1 Johns. Cas. 129, 1 Am. Dec. 107; Chase v. Whitlock, 3 Hill [N. Y.] 139, Chase's Cas. 113.

In such cases, the special damage is the ground of action, and to support the action, it must be the intended or the natural and probable result of the words complained of. Pollock, Torts (Webb's Ed.) 290, 291; Pollard v. Lyons, 91 U. S. 225, Burdick's Cas. 199, Erwin's Cas. 315; Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420, Chase's Cas. 121, Erwin's Cas. 328; Anonymous, 60 N. Y. 262, 19 Am. Rep. 174.

If a person speaks defamatory words of another which are not actionable per se, and by reason thereof the latter is dismissed from an office or employment by a third person,—as where defamatory words concerning an employe or servant, which are not actionable per se, cause his dismissal by his employer or master,—the special damage sustained by reason of the dismissal is the natural and probable consequence of the defamation, and will support an action. Pollock, Torts (Webb's Ed.) 291; Lynch v. Knight, 9 H. L. Cas. 577.

Special damage, however, resulting, not directly from the speaking of defamatory words by another, but from their voluntary repetition by a third person who heard them, is generally too remote to support an action against the original speaker, unless the latter authorized the repetition, or the person repeating them was under a legal or moral duty to do so. Pollock, Torts (Webb's Ed.) 292; Parkins v. Scott, 1 Hurl. & C. 153; Hastings v. Stetson, 126 Mass. 329, 30 Am. Rep. 683; Shurtleff v. Parker, 130 Mass. 293, 39 Am. Rep. 454; Elmer v. Fessenden, 151 Mass. 359, Burdick's Cas. 213; Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420, Chase's Cas. 121, Erwin's Cas. 328; Schoepflin v. Coffey, 162 N. Y. 12. Compare Zier v. Hoffiin, 33 Minn. 66, 53 Am. Rep. 9. In the latter cases,—where the repetition was in pursuance of a legal or moral duty, or was authorized by the original speaker,—an action will lie. Pollock, Torts (Webb's Ed.) 292; Ward v. Weeks, 7 Bing. 211; Keenholts v. Becker, 3 Denio [N. Y.] 346; Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420, Chase's Cas. 121, Erwin's Cas. 328.

In order that special damage may support an action for words not actionable per se, there must be a definite temporal loss,—"a loss of some material advantage must be shown." Pollock, Torts (Webb's Ed.) 293. It has been held therefore that the action will not lie where the only special damage is the loss by the plaintiff of the good opinion of his neighbors,—consortium vicinorum. (Pollock, Torts [Webb's Ed.] 293. See Pollard v. Lyon, 91 U. S. 225, Burdick's Cas. 199, Erwin's Cas. 315; Beach v. Ranney, 2 Hill [N. Y.] 309); as where the only damage is exclusion from membership in a religious society, which is not shown to carry with it as of right any definite temporal advantage. Pollock, Torts (Webb's Ed.) 293; Roberts v. Roberts, 5 Best & S. 384. But there is a sufficient temporal loss to support an action, in case of loss of the consortium as between husband and wife (Lynch v. Knight, 9 H. L. Cas. 577. See Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307); loss of voluntary hospitality of one's relatives or friends (Davies v. Solomon, L. R. 7 Q. B. 112; Williams v. Hill, 19 Wend. [N. Y.] 305); loss of fuel, clothing, etc., with which another has been in the habit of providing the plaintiff gratuitously (Beach v. Ranney, 2 Hill [N. Y.] 309).

But a complaint for slander in calling plaintiff a drummer for a whore-house, which alleged that in consequence thereof the plaintiff had been socially ostracized, was held good as showing special damage, in Mudd v. Rogers, 19 Ky. L. R. 1329, 43 S. W. 255.

The withholding by a father from his minor daughter of a promised dress and a course of music lessons was held not to be such special damage as would sustain an action for slander in imputing self-pollution to the girl, where the father testified that he did not believe the charge (Anon., 60 N. Y. 262, 19 Am. Rep. 174); loss of entertainment at an inn or other public house (Olmsted v. Miller, 1 Wend. [N. Y.] 506); breaking off of a marriage engagement (Moody v. Baker, 5 Cow. [N. Y.] 351; Linney v. Matson, 13 Tex. 449); or loss of actual membership in a social club, but not the loss of the mere chance of being elected to membership (Chamberlain v. Boyd, 11 Q. B. Div. 407).

Mere mental trouble or distress resulting from defamatory words not actionable per se is not sufficient special damage to sustain an action. Allsop v. Allsop, 5 Hurl. & N. 534; Woodbury v. Thompson, 3 N. H. 194; Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420, Chase's Cas. 121, Erwin's Cas. 328; Hirshfield v. Ft. Worth Nat. Bank, 83 Tex. 452, 29 Am. St. Rep. 660.

If the words are actionable per se, mental suffering is an element of damages. Cahill v. Murphy, 94 Cal. 29, 30 Pac. 195, 28 Am. St. Rep. 88. And by the weight of authority, even illness and the expenses thereof, and inability to work and consequent pecuniary loss, caused merely by the effect on one's mind of defamatory words are not such special damages as will support an action. Allsop v. Allsop, 2 Law T. (N. S.) 290; Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420, Chase's Cas. 121, Erwin's Cas. 328 (disapproving, and in effect overruling on this point, Bradt v. Towsley, 13 Wend. [N. Y.] 253, Paige's Cas. 377, and other earlier New York cases); Shafer v. Ahalt, 48 Md. 171, 30 Am. Rep. 456. Contra, Underhill v. Welton, 32 Vt. 40; McQueen v. Fulgham, 27 Tex. 463. "It cannot be said that sickness is the natural consequence of defamatory or slanderous words. Such might or might not be the result, depending in a great measure upon the sensibilities and temperament of the person." Shafer v. Aholt, 48 Md. 171, 30 Am. Rep. 456.

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(§ 2) *B. Words imputing crime or want of chastity.*—An unprivileged publication, in writing, in print, or by spoken words, of a false charge that another is guilty of a crime, is actionable per se.[64] Some crime, defined and punished by law, however, must be charged,[65] but it is not necessary that the accusation be expressed in unequivocal language.[66] Though it is not as a general rule actionable to say that a person "would commit" an offense, yet where the whole conversation shows an intent to charge that plaintiff is accustomed to commit that offense, the words are actionable.[67]

At the common law it is actionable to speak or write of a female words imputing to her a want of chastity,[68] but the charge must be direct.[69] By the statute in Illinois, it is actionable to falsely utter words of any person amounting to a charge of having been guilty of adultery or fornication.[70]

64. Donahoe v. Star Pub. Co. [Del.] 55 Atl. 337; Cooke v. O'Malley, 109 La. 382. A charge that plaintiff is a blackmailer, has brought blackmailing suits and procured the publication of libels against himself in order to found suits upon them. Palmer v. Mahin, 120 Fed. 737. That plaintiff is a blackmailer and gambler. Weston v. Weston, 83 App. Div. [N. Y.] 520. "You get out of here. You came in here to see what you could find to steal." Laury v. Evans, 87 Minn. 396. "You are stealing my corn." McMinemee v. Smith [Iowa] 93 N. W. 75. "You broke in there and stole some goods." Hinchman v. Knight [Mich.] 94 Mo. 1. That certain persons, naming them, were on their way to the county seat to testify in the case of plaintiff and another "for burning" a schoolhouse. Berea College v. Powell, 25 Ky. L. R. 1235, 77 S. W. 381. An oral charge of forgery is slanderous per se. Ruble v. Bunting, 31 Ind. App. 654. So also to say of one that he is the greatest rumseller in town. Davis v. Starrett [Me.] 55 Atl. 516. And so is a statement that plaintiffs, a husband and wife, "used something that they get no children" if it is intended thereby to charge them with the crime of abortion. Hitzfelder v. Kopplemann [Tex. Civ. App.] 70 S. W. 353.

65. Foot v. Pitt, 83 App. Div. [N. Y.] 76. A statement that plaintiff had written anonymous letters, that they were scurrilous, and that it was a state's prison offense, charges no crime under the laws of the United States. Middleby v. Effler [C. C. A.] 118 Fed. 261. In Massachusetts it is not actionable to charge a man with selling his vote, it not being a crime in that state for one to receive money for his vote. Doyle v. Kirby [Mass.] 68 N. E. 843. Where the charge is "You stole my land. You stole my money!" the latter charge is in no way qualified by the former though there was a controversy between the parties over land. Hamlin v. Fautl [Wis.] 95 N. W. 955. A statement that plaintiff is without "mental rectitude" followed by a statement of the circumstances on which it is founded is not libelous per se. Shepherd v. Baer, 96 Md. 152. Where it was published of plaintiff that insurance companies considered his property "peculiarly susceptible to fire" but there was no innuendo in the declaration defendant need not show as a justification that he burned his own property. Conner v. Standard Pub. Co., 183 Mass. 474.

66. Expression of belief sufficient. Covington v. Roberson [La.] 35 So. 586.

67. Words which imply that plaintiff, a married woman, is an adulteress. Iles v. Swank, 105 Ill. App. 9. And a statement that plaintiff would steal certain property if he got a chance has been held criminally libelous. Browing v. Com., 25 Ky. L. R. 482, 76 S. W. 19.

68. Words imputing a want of chastity to a female are actionable as well when spoken of a married as an unmarried woman. Cushing v. Hederman, 117 Iowa, 637. Imputation of venereal disease is libelous per se. McDonald v. Nugent [Iowa] 98 N. W. 506.

69. To say of a woman that she is a "dirty bitch" is not actionable. Jacobs v. Cater, 87 Minn. 448. Contra, the allegation being a "damned bitch" (Stoner v. Erisman [Pa.] 56 Atl. 77); but a statement that plaintiff, a married woman, "sought elsewhere a substitute" for her husband, and that her husband "saw her begin to make love" to another man who is subsequently called "the seducer" is actionable (Spolek Denni Hlasatel v. Hoffman, 105 Ill. App. 170; Hlasatel v. Hoffman [Ill.] 68 N. E. 400).

70. 1 Starr & C. c. 126, § 1. Iles v. Swank, 105 Ill. App. 9.

NOTE.

Words imputing crime: Although the words must impute what amounts to a crime in law, the offense need not be specified with legal precision; the implication may be by general words. "It is enough if the charge * * *, in its natural and obvious sense, and as it would reasonably be understood by persons hearing it, conveys the meaning attached to it by the plaintiff." Buckley v. O'Niel, 113 Mass. 193, 18 Am. Rep. 466; Thompson v. Lewiston Daily Sun Pub. Co., 91 Me. 203; Furr v. Speed, 74 Miss. 423. Thus it is clearly actionable per se, as imputing larceny, to call another a "thief," or to say that he "stole" or has "stolen" property, if there is nothing to show that the words were used in any other than their ordinary meaning. Nye v. Otis, 8 Mass. 121, 5 Am. Dec. 79; Van Ankin v. Westfall, 14 Johns. [N. Y.] 233, Chase's Cas. 113; Harman v. Cundiff, 82 Va. 239; Shipp v. McCraw, 3 Murph. [N. C.] 463, 9 Am. Dec. 611; Frolich v. McKiernan, 84 Cal. 177, 24 Pac. 114; Berdeaux v. Davis, 58 Ala. 611; Quigley v. McKee, 12 Or. 22, 5 Pac. 347, 53 Am. Rep. 320; Bacon v. Mich. Cent. R. Co., 55 Mich. 224, 54 Am. Rep. 372; Youngs v. Adams, 113 Mich. 199; Savoie v. Scanlan, 43 La. Ann. 967, 26 Am. St. Rep. 200; Darling v. Clement, 69 Vt. 292.

To say of a person that he is "a thieving puppy" is actionable. Little v. Barlow, 26

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(§ 2) *C. Words exposing to contempt or ridicule.*—Any false and malicious writing published of another is libelous per se when its tendency is to render him

Ga. 423, 71 Am. Dec. 219. To say of another "He has been accused of horse-stealing; he sued his accusers, and the defendants had a verdict," imputes the crime of larceny. Johnson v. St. Louis Dispatch Co., 65 Mo. 539, 27 Am. Rep. 293. And it is actionable per se, subject to the same qualification, to say of a person that he is "perjured," or has committed "perjury" (Hopkins v. Beedle, 1 Caines [N. Y.] 347, 2 Am. Dec. 191; Commons v. Walters, 1 Port. [Ala.] 377, 27 Am. Dec. 635) or that he has "murdered" another (Stallings v. Newman, 26 Ala. 300, 62 Am. Dec. 723), or "poisoned" another (Furr v. Speed, 74 Miss. 423). To say of another, "He makes his money easy; he keeps a gambling place," or "a gambling hell," is equivalent to saying that he keeps a place resorted to for the purpose of gambling, which is made a criminal offense by statute. Buckley v. O'Niel, 113 Mass. 193, 18 Am. Rep. 466.

In some of the cases it is held that it is not slander per se to say of another that he has taken a false oath in court or in a certain court, on the ground that the words do not necessarily impute that the false oath was taken corruptly, and in a court having jurisdiction to administer an oath, which are essential to perjury. Ward v. Clark, 2 Johns. [N. Y.] 10, 3 Am. Dec. 383, Bigelow's Cas. 128, Bigelow's Lead. Cas. 81. See, also, Hopkins v. Beedle, 1 Caines [N. Y.] 347, 2 Am. Dec. 191; Crone v. Angell, 14 Mich. 340.

But in these jurisdictions to say that one is "perjured," or committed "perjury," is actionable. Hopkins v. Beedle, supra. And it has been held actionable to say, "You swore to a lie, for which you now stand indicted" (Pelton v. Ward, 3 Caines [N. Y.] 73, 2 Am. Dec. 251), or, "He has sworn falsely, and I will attend to the grand jury respecting it" (Gilman v. Lowell, 8 Wend. [N. Y.] 573, 24 Am. Dec. 96), or to say, "That is false," to a witness while testifying in a cause in court to a point material to the issue (McClaughry v. Wetmore, 6 Johns. [N. Y.] 82, 5 Am. Dec. 194). But other cases hold otherwise on the ground that such words in their common meaning import a charge of perjury. Hamilton v. Dent, 1 Hayw. [N. C.] 117, 1 Am. Dec. 552; Rue v. Mitchell, 2 Dall. [Pa.] 58, 1 Am. Dec. 258; McGaw v. Hamilton, 184 Pa. 108, 63 Am. St. Rep. 786; Beers v. Strong, Kirby [Conn.] 12, 1 Am. Dec. 10.

In some cases, also, it has been held not actionable to say of another, "He burnt my barn," etc., as the burning may have been innocently done, so as not to constitute arson (Barham v. Nethersal, 4 Coke, 20); while other cases hold that such words are actionable on the ground that they would naturally and ordinarily be understood as a charge of arson (Logan v. Steele, 1 Bibb [Ky.] 593, 4 Am. Dec. 659. And see Waters v. Jones, 3 Port. [Ala.] 442, 29 Am. Dec. 261; Nailor v. Ponder, 1 Marv. [Del.] 408; Davis v. Carey, 141 Pa. 314).

While words are actionable when they impute a crime in general terms, without giving the particulars, yet, if the particulars are given in charging another with an offense, they must not be inconsistent with the offense alleged to have been charged. Thus to say that a person "stole" property is not actionable, where the particulars are given and they are such that the act could not have been larceny. This is illustrated by the case above referred to, in which it was held not to be actionable to say of a person that he stole the parish bell-ropes when he was church-warden, since, as the title was in him ex officio, the act could not amount to larceny (Jackson v. Adams, 2 Bing. N. C. 402), and by many other cases. Thus where the words proved were "He is a thief, for he has stolen my beer," but it appeared that they were spoken by a brewer concerning his servant and in reference to transactions which could not constitute larceny, but were a mere breach of trust, it was held that the words were not actionable. Cristie v. Cowell, Peake, 4. See, also, Shecut v. McDowell, 3 Brev. [S. C.] 38, 5 Am. Dec. 536; Egan v. Semrad, 113 Wis. 84.

It is not actionable to say of a person that his charges for services were so excessive as to be "simply petit larceny," as the context shows that no charge of crime was intended. Ivey v. Pioneer S. & L. Co., 113 Ala. 349. To charge a man with stealing is actionable, but not to charge him with stealing something which is not the subject of larceny; as real property, for example. Ogden v. Riley, 14 N. J. Law, 186, 25 Am. Dec. 513.

To say of a man, "You are a thief, for you stole my tree" was held not to be actionable, as it showed that the act charged was not a felony (trees not being the subject of larceny), but a trespass (Minors v. Leeford, Cro. Jac. 114), or doors to a house (Blackburn v. Clark, 19 Ky. L. R. 659, 41 S. W. 430). There was a like decision where it was said that a person "stole windows from B's house" (Wing v. Wing, 66 Me. 62, 22 Am. Rep. 548); and where it was said that a person had "stolen" corn out of another's field, it appearing that the words had reference to standing corn (Stitzell v. Reynolds, 67 Pa. 54, 5 Am. Rep. 396).

To charge one with stealing the key to a door is a charge of larceny. Hoskins v. Tarrence, 5 Blackf. [Ind.] 417, 35 Am. Dec. 129. To charge one with stealing a dog is actionable where a dog is regarded as the subject of larceny, but not otherwise. Findlay v. Bear, 8 Serg. & R. [Pa.] 571; Harrington v. Miles, 11 Kan. 480, 15 Am. Rep. 355. And see 2 Clark & M., Crimes, 668. To steal clothing from a dead body cast ashore from a wreck is larceny, and therefore words falsely imputing such an act to another is actionable slander. Wonson v. Sayward, 13 Pick. [Mass.] 402, 23 Am. Dec. 691, Paige's Cas. 364. In like manner, saying of a person that he is a "murderer" is not actionable where it is made to appear that the words were not used in their ordinary sense, but with reference to the killing of game by the plaintiff by means of engines. Lord Cromwell's Case, 4 Coke, 13. To say that certain persons are "highwaymen, robbers, and murderers," is not actionable, if the defendant shows that they were spoken and understood in reference to transactions which were known not to amount to the

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contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or deprive him of the companionship of respectable people.[71]

charge they naturally import. Van Rensselaer v. Dole, 1 Johns. Cas. [N. Y.] 279, Chase's Cas. 115.

An action will not lie for merely saying that another will commit a crime, or intends to do so, as for saying that one "will steal" (Bays v. Hunt, 60 Iowa, 251. See, also, Seaton v. Cordray, Wright [Ohio] 101; Cornelius v. Van Slyck, 21 Wend. [N. Y.] 70, 71), or is going to start and maintain a house of illfame (Fanning v. Chace, 17 R. I. 388, 33 Am. St. Rep. 878). To say that a married woman solicited a man not her husband to have intercourse with her is not actionable, although adultery may be punishable as a crime. K——— v. H———, 20 Wis. 239, 91 Am. Dec. 397.

Words imputing to another the commission of a crime are held to be actionable, not because they may subject the person charged to a criminal prosecution and punishment, but because of the injury to his reputation from such a charge. An action will lie, therefore, without allegation of special damage, for falsely saying or imputing that another has been convicted and served a sentence for a crime. To say that a person was a returned convict was held actionable per se in an English case, since it imputed an offense punishable by transportation; and it was held immaterial that the words imported that the punishment had already been suffered, since the obliquy remained. Fowler v. Dowdney, 2 Moody & R. 119, Chase's Cas. 114. See, also, Gainford v. Tuke, Cro. Jac. 536; Smith v. Stewart, 5 Pa. 372; Shipp v. McCraw, 3 Murph. [N. C.] 463, 9 Am. Dec. 611. It is actionable per se to say of a person that he has been in the penitentiary (Michael v. Matheis, 77 Mo. App. 556), or for falsely saying that he has been tried or arraigned for a crime and would have been convicted if it had not been for certain influence, etc. (Carpenter v. Tarrant, Lee t. Hardw. 339; Halley v. Stanton, Cro. Car. 268). Although a man may have been convicted of a felony, it seems that it is actionable to call him a felon after he has undergone his sentence, for he is then no longer a felon in law. Brett and Cotton, L. J., in Leyman v. Latimer, 3 Exch. Div. 352.

Words imputing unchastity or immoral conduct: At common law it was not regarded as actionable per se to charge a woman with unchastity or adultery, or to charge a man with fornication or adultery, as these offenses were not indictable at common law, but were cognizable in the ecclesiastical courts only. Pollock, Torts (Webb's Ed.) 298. And the rule still applies in most jurisdictions unless it is changed by statute, or unless such conduct is punished by statute. Charging a woman with adultery or fornication (Buys v. Gillespie, 2 Johns. [N. Y.] 115, 3 Am. Dec. 404; Bradt v. Towsley, 13 Wend. [N. Y.] 253, Paige's Cas. 377; Pollard v. Lyon, 91 U. S. 225, Burdick's Cas. 199, Erwin's Cas. 315; Elliott v. Ailsberry, 2 Bibb [Ky.] 473, 5 Am. Dec. 631; Underhill v. Welton, 32 Vt. 40; Berry v. Carter, 4 Stew. & P. [Ala.] 387, 24 Am. Dec. 762; Linney v. Maton, 13 Tex. 449; Shafer v. Ahalt, 48 Md. 171, 30 Am. Rep. 456); charging a woman with being a common prostitute (Brooker v. Coffin, 5 Johns. [N. Y.] 188, 4 Am. Dec. 337, Bigelow's Cas. 126, Bigelow's Lead. Cas. 77).

To charge a girl with self-pollution is not actionable per se. Anon., 60 N. Y. 262, 19 Am. Rep. 174. To say that a person is a "drummer for a whore-house" is not actionable per se. Mudd v. Rogers, 19 Ky. L. R. 1329, 43 S. W. 255.

In some jurisdictions to verbally charge a woman with unchastity is held actionable per se because of the injury to her reputation, whether it is a crime or not. Smith v. Silence, 4 Iowa, 321, 66 Am. Dec. 137; Haynes v. Ritchey, 30 Iowa, 76, 6 Am. Rep. 642; Barnett v. Ward, 36 Ohio St. 107, 38 Am. Rep. 561. But by a statute in England it is now expressly provided that words imputing unchastity or adultery to any woman or girl shall be actionable without proof of special damage. 54 & 55 Vict. c. 51. And there are somewhat similar statutes in some of the states in this country. See Gray v. Elzroth, 10 Ind. App. 587, 53 Am. St. Rep. 400; Nicholson v. Dunn, 21 Ky. L. R. 643, 52 S. W. 935; Stewart v. Major, 17 Wash. 238, 49 Pac. 503.

Even in the absence of such a statute, the common law rule does not apply where by statute, as in most jurisdictions, fornication and adultery are punished as offenses. To charge a woman or man with the commission of fornication or adultery, or to say of a woman that she is a "whore," or otherwise impute unchastity, is actionable per se as imputing a crime, where adultery, fornication, being a common prostitute, etc., as the case may be, is punished by statute in such a way (it must be by indictment in some jurisdictions), as to come within the rule in the particular jurisdiction as to words imputing crime. Noyes v. Hall, 62 N. H. 594; Smalley v. Anderson, 2 T. B. Mon. [Ky.] 56, 15 Am. Dec. 121; Linney v. Maton, 13 Tex. 449; Underhill v. Welton, 32 Vt. 40; Walton v. Singleton, 7 Serg. & R. [Pa.] 451, 10 Am. Dec. 472; Klewin v. Bauman, 53 Wis. 244; Patterson v. Wilkinson, 55 Me. 42, 92 Am. Dec. 568; Kelley v. Flaherty, 16 R. I. 234, 27 Am. St. Rep. 739; Mooney v. Bennett, 44 App. Div. [N. Y.] 423; Browning v. Powers [Mo.] 38 S. W. 943. It is a charge of unchastity or adultery to say that a woman has slept with a man not her husband, or was in bed with him. Barnett v. Ward, 36 Ohio St. 107, 38 Am. Rep. 561.

It is actionable per se (where fornication and adultery are crimes) to say of another man, "You got to bed with Sarah M.;" or to say, "He is such a whoring fellow that it is with difficulty he can keep a girl about the house, being continually riding them;" or to say, "He has committed fornication," although he is a married man. Walton v. Singleton, 7 Serg. & R. [Pa.] 451, 10 Am. Dec. 472. See, also, as to whether particular words impute unchastity or adultery to a woman, or fornication or adultery to a man (Radke v. Kolbe, 79 Minn. 440; Mooney v. Bennett, 44 App. Div. [N. Y.] 423; Lovejoy v. Whitcomb, 174 Mass. 586), and to say of an unmarried girl that she "has been to swear off a young one," is an imputation of fornication (Patterson v. Wilkinson, 55 Me. 42, 92 Am. Dec. 568). But to call a woman

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(§ 2) *D. Words injuring in business or occupation.*—Defamatory words falsely spoken or written of one, which prejudice him in his business, are actionable per se;[72] so also of words reflecting on the character or qualifications of a professional man,[73] and this applies to words aspersing a public officer in the conduct of his office.[74]

a "bitch" or "slut" does not impute adultery or prostitution, and is not actionable per se. K——— v. H———, 20 Wis. 239, 91 Am. Dec. 397; Robertson v. Edelstein, 104 Wis. 440; Roby v. Murphy, 27 Ill. App. 394.

It is not actionable as imputing unchastity to say of a woman "She is a damned slut, she is a damned bitch, she is a damned sow, and those who know her know that she is no account." Peters v. Garth, 20 Ky. L. R. 1934, 50 S. W. 682. See, also, Craig v. Pyles, 18 Ky. L. R. 1043, 39 S. W. 33. But it has been held that unchastity is imputed by speaking of a woman as a certain man's "old slut." Kennenberg v. Neff, 74 Conn. 62. Nor is it actionable to impute to a woman desire for or solicitation of sexual intercourse with a man not her husband. To charge a married woman with seating herself on the lap of a man not her husband, and insisting upon his having intercourse with her, are not actionable, as they merely show her desire to commit adultery. K——— v. H———, 20 Wis. 239, 91 Am. Dec. 397.

It is not actionable to impute to a person the commission of sodomy or bestiality, when such an act is not punishable as a crime. Coburn v. Harwood, Minor [Ala.] 93, 12 Am. Dec. 37; Davis v. Brown, 27 Ohio St. 326; Melvin v. Weiant, 36 Ohio St. 184, 38 Am. Rep. 572.

But in Iowa, where it is held actionable per se to charge a woman with unchastity, whether unchastity is a crime or not, a charge of sodomy or bestiality against a woman is held a charge of unchastity within the rule. Haynes v. Ritchey, 30 Iowa, 76, 6 Am. Rep. 642; Cleveland v. Detweiler, 18 Iowa, 299. The same would perhaps be held in Ohio.

Words imputing disease: It is well settled that it is actionable per se to falsely and maliciously utter words imputing to another a contagious disease of so loathsome a character that it would cause him to be excluded from society,—such as leprosy, the plague, and venereal diseases. Pollock, Torts (Webb's Ed.) 299; Carslake v. Mapledoram, 2 Term R. 473, Bigelow's Lead. Cas. 84; Bloodworth v. Gray, 7 Man. & G. 334; "Joannes" v. Burt, 6 Allen [Mass.] 236, 83 Am. Dec. 625; Golderman v. Stearns, 7 Gray [Mass.] 181, Chase's Cas. 116; Watson v. McCarthy, 2 Ga. 57, 46 Am. Dec. 380; Kaucher v. Blinn, 29 Ohio St. 62, 23 Am. Rep. 727, Paige's Cas. 366. This rule applies, however, to such contagious diseases only as are of a loathsome character, like those above enumerated. It does not apply to smallpox, scarlet fever, diphtheria, and the like, or to insanity. "Joannes" v. Burt, 6 Allen [Mass.] 236, 83 Am. Dec. 625.

The words must impute that the person has the disease, not merely that he had it at some time in the past. "Charging another with having had a contagious disorder is not actionable; for unless the words impute a continuance of the disorder at the time of speaking them, the gist of the action fails; for such a charge cannot produce the effect which makes it the subject of an action, namely, his being avoided by society." Carslake v. Mapledoram, 2 Term R. 473, Bigelow's Lead. Cas. 84. And see Pike v. Van Wormer, 5 How. Pr. [N. Y.] 171.

71. Williams v. Fuller [Neb.] 94 N. W. 118. An article ridiculing the published literary opinions of a college professor is not libelous per se. Triggs v. Sun P. & P. Co., 91 App. Div. [N. Y.] 259.

72. Plaintiff, a contractor, was charged with not paying his bills and that he would put in inferior grades of material. Cooley v. Galyon, 109 Tenn. 1, 60 L. R. A. 139. Defendant said of plaintiff, a miller, that "He just beat me out of $1100 in three months." Fred v. Traylor, 24 Ky. L. R. 1906, 72 S. W. 768. Merchants charged with neglecting and refusing to pay debts when due. Salomon v. Armour & Co., 123 Fed. 342. A written communication charging a merchant with "cutting" prices, nothing appearing that he is bound, by contract or otherwise, not to do so, is not libelous per se. Willis v. Eclipse Mfg. Co., 81 App. Div. [N. Y.] 591. An order published by a railroad company in language temperate and decorous that an employe, without naming him, has been dismissed from its service, in the absence of extrinsic evidence of malice, is not actionable. Brown v. Norfolk & W. R. Co., 100 Va. 619, 60 L. R. A. 472. To publish of a business firm that "the opinion is expressed that a local bank has been secured" imputes a want of credit or responsibility, which necessarily and presumptively causes pecuniary loss, and is therefore actionable per se (Minter v. Bradstreet Co., 174 Mo. 444), but a publication which has the effect merely of disparaging a tradesman's goods is not actionable without an allegation of special damage (Holmes v. Clisby, 118 Ga. 820; McLoughlin v. American Circular Loom Co. [C. C. A.] 125 Fed. 203). Railroad clearance card "Cause for leaving service, unsatisfactory service. Conduct good" is not libelous per se. Ill. Cent. R. Co. v. Ely [Miss.] 35 So. 873.

73. To say of a physician that he is "a jackass in the guise of a doctor" and a savage unworthy to retain his diploma is actionable. Bornmann v. Star Co., 174 N. Y. 212. So also to say that he is a "quack." Elmergreen v. Horn, 115 Wis. 385. To publish of magnetic healers that they are "miserable charlatans" is not actionable, the plaintiffs failing to show the rationale of the business of magnetic healing. Weltmer v. Bishop, 171 Mo. 110. Statements embodied in a written challenge to a minister's right to sit at a general conference, that he "has rendered himself unworthy of membership in the convention" and that he "is unworthy of a seat in this convention on moral grounds" are libelous per se (Cranfill v. Hayden [Tex. Civ. App.] 75 S. W. 573), but the law of libel is not designed to shield one in the practice of an illegal business. Magnetic healing. Weltmer v. Bishop, 171 Mo. 110.

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74. Kilgour v. Evening Star Newspaper Co., 96 Md. 16; Jarman v. Rea, 137 Cal. 339, 70 Pac. 216; Herringer v. Ingberg [Minn.] 97 N. W. 460. Words imputing a want of integrity in any one holding an office of confidence or trust, whether an office of profit or not, are actionable per se (Jarman v. Rea, 137 Cal. 339, 70 Pac. 216), but as against a public officer they must impute to him some incapacity or lack of due qualification to fill the position or some positive past misconduct which will injuriously affect him in it. Prosecuting attorney declining to prosecute for death of baby denounced as "outrage" (Kilgour v. Evening Star Newspaper Co., 96 Md. 16), and where the neglect imputed is in relation to a matter wholly outside his duties as such officer. Announcement by prosecuting attorney that he would refuse to recommend payment for an autopsy (Id.; Dawson v. Baxter, 131 N. C. 65), or where there is no allegation that plaintiff held an office at the time of publication, or that the language referred to him in his official capacity, it can only be considered as a publication concerning a private individual (Hanna v. Singer, 97 Me. 128).

NOTE.

Words prejudicing another in his office, business or calling: Defamatory words are actionable per se if they convey a charge of unfitness, dishonesty, or incompetence in an office, profession, or trade; or "in short, where they manifestly tend to prejudice a man in his calling." Pollock, Torts (Webb's Ed.) 288; Lumby v. Allday, 1 Tyrw. 217, Bigelow's Cas. 131, Bigelow's Lead. Cas. 84; Seaman v. Bigg, Cro. Car. 480; Onslow v. Horne, 3 Wils. 177, 186; Gribble v. Pioneer Press Co., 34 Minn. 342; Mains v. Whiting, 87 Mich. 172, Paige's Cas. 368; McMillan v. Birch, 1 Bin. [Pa.] 178; Wilson v. Cottman, 65 Md. 190; Burtch v. Nickerson, 17 Johns [N. Y.] 217, 8 Am. Dec. 390; Cruikshank v. Gordon, 118 N. Y. 178; Camp v. Martin, 23 Conn. 86; Knight v. Blackford, 3 Mackey [D. C.] 177, 51 Am. Rep. 772; Hayner v. Cowden, 27 Ohio St. 292, 22 Am. Rep. 303; Spiering v. Andrae, 45 Wis. 330, 30 Am. Rep. 744; Morasse v. Brochu, 151 Mass. 567, 21 Am. St. Rep. 474; Lovejoy v. Whitcomb, 174 Mass. 586; Swan v. Thompson, 124 Cal. 193, 56 Pac. 878; Ivey v. Pioneer S. & L. Co., 113 Ala. 349. In the application of this rule, it makes no difference what the nature of the employment is, provided it is lawful, or whether the conduct imputed is such as in itself the law will blame or not, provided it is inconsistent with the due fulfillment of what the party, in virtue of his employment or office, has undertaken. Pollock, Torts (Webb's Ed.) 303.

An action will lie, it seems, for defamatory words spoken concerning another in his office or profession, where the office or profession is in point of law wholly or to some extent honorary, as well as where it carries with it the legal right to temporal profit (Pollock, Torts [Webb's Ed.] 303; Onslow v. Horne, 3 Wils. 177; Aston v. Blagrave, 1 Strange, 617); but with this qualification, namely, that where there is no profit in fact, an oral charge of unfitness is not actionable per se unless, if true, it would be a ground for removal (Pollock, Torts [Webb's Ed.] 303; Alexander v. Jenkins [1892] 1 Q. B. 797).

Illustrations: It has been held actionable per se to say of a lawyer that he is a cheat (Rush v. Cavenaugh, 2 Pa. 187), or a shyster (Gribble v. Pioneer Press Co., 34 Minn. 342); that he is "the dirty sewer through which all the slums of this embezzlement have flowed" (Mains v. Whiting, 87 Mich. 172, Paige's Cas. 368), or to impute to him dishonesty, or disloyalty to his clients, or general incompetency in his profession (Peard v. Jones, Cro. Car. 382; Chipman v. Cook, 2 Tyler [Vt.] 456; Garr v. Selden, 6 Barb. [N. Y.] 416).

It has been held not to be actionable, without showing special damage, to impute to a lawyer ignorance or want of skill in a particular case only, and not in general. Foot v. Brown, 8 Johns. [N. Y.] 50. But this view is not sound. Secor v. Harris, 18 Barb. [N. Y.] 425, Chase's Cas. 119. And it is actionable per se to say of a physician or surgeon that he is a quack (White v. Carroll, 42 N. Y. 161, 1 Am. Rep. 503); that "he is no good, only a butcher; I would not have him for a dog" (Cruikshank v. Gordon, 118 N. Y. 178); or that he has killed patients, or otherwise charge him with ignorance, misconduct, negligence, or any unfitness in the practice of his profession (Martyn v. Burlings, Cro. Eliz. 589; Tutty v. Alewin, 11 Mod. 221; Foster v. Scripps, 39 Mich. 376; Secor v. Harris, 18 Barb. [N. Y.] 425, Chase's Cas. 119; Carroll v. White, 33 Barb. [N. Y.] 615; White v. Carroll, 42 N. Y. 161, 1 Am. Rep. 503; Sumner v. Utley, 7 Conn. 257; Morasse v. Brochu, 151 Mass. 567, 21 Am. St. Rep. 474; Crane v. Darling, 71 Vt. 295). And see Krug v. Pitass, 162 N. Y. 154, 76 Am. St. Rep. 317. Some courts have held that it is not actionable per se to charge a physician with ignorance or malpractice in a particular case only, and not generally. Rodgers v. Kline, 56 Miss. 808, 31 Am. Rep. 389. And see Camp v. Martin, 23 Conn. 86. But the better opinion is to the contrary. Secor v. Harris, 18 Barb. (N. Y.) 425, Chase's Cas. 119; Sumner v. Utley, 7 Conn. 257; Johnson v. Robertson, 8 Port. (Ala.) 486; Tutty v. Alewin, 11 Mod. 221. Thus it is actionable per se to say of a physician in regard to his treatment of children not over three years of age. "He killed my children: he gave them tea-spoonful doses of calomel; and it killed them; they died the same day" (Secor v. Harris, supra. And see Johnson v. Robertson, supra); to say of a minister, or priest in connection with his office or calling, that he is a drunkard, or of immoral habits, or to otherwise impute to him misconduct or unfitness in his calling (Gallwey v. Marshall, 9 Exch. 294; McMillan v. Birch, 1 Bin. [Pa.] 178, 2 Am. Dec. 426; Hayner v. Cowden, 27 Ohio St. 292, 22 Am. Rep. 303; Chaddock v. Briggs, 13 Mass. 248, 7 Am. Dec. 137; Hellstern v. Katzer, 103 Wis. 391; to say such words of a school teacher (Bray v. Callihan, 155 Mo. 43; Darling v. Clement, 69 Vt. 292; Bodwell v. Osgood, 3 Pick. [Mass.] 379, 15 Am. Dec. 228); to impute to cashiers, clerks, bookkeepers, and the like, incompetency, unfitness, or dishonesty in relation to their employment (Fowles v. Bowen, 30 N. Y. 20; Wilson v. Cottman, 65 Md. 190); to charge a domestic servant as such with immoral conduct, or dishonesty, etc. (Pollock on Torts [Webb's Ed.] 302; Seaman v. Bigg, Cro. Car. 480); to say of a game keeper that he traps game, etc. (Foulger v. Newcomb, L. R. 2 Exch. 327).

It is actionable per se to say of a minister

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that wherever he has previously exercised ministerial functions, he has had trouble with women, and that in one instance the trouble was such that his wife threatened to leave him (Ritchie v. Widdemer, 59 N. J. Law, 290.

It is actionable per se to say of a trader or mechanic who sells goods or does work on credit, that he keeps false books, or to otherwise impute to him dishonesty or fraud in his business. Burtch v. Nickerson, 17 Johns. [N. Y.] 217, 8 Am. Dec. 390; Fowles v. Bowen, 30 N. Y. 20; Hoyle v. Young, 1 Wash. [Va.] 150, 1 Am. Dec. 446. And it is actionable per se to say of a merchant or tradesman who purchases on credit, that he is a bankrupt, and unable to pay his debts, or that he does not pay his debts, or to in anyway charge him with insolvency, or with dishonesty or other misconduct in connection with his business. Read v. Hudson, Raym. 610; Lewis v. Hawley, 2 Day [Conn.] 495, 2 Am. Dec. 121; Freisinger v. Moore, 65 N. J. Law, 286; Sewall v. Catlin, 3 Wend. [N. Y.] 391; Darling v. Clement, 69 Vt. 292; Davis v. Ruff, Cheves [S. C.] 17, 34 Am. Dec. 584; McIntyre v. Weinert, 195 Pa. 52.

It is actionable per se to say of a farmer, that he is not able to pay his debts, that he owes more than he is worth, and that those whom he owes had better push him or they will lose. Phillips v. Hoefer, 1 Pa. 62, 44 Am. Dec. 111; Dobson v. Thornistone, 3 Mod. 112.

To say of a drover, whose business it is to buy cattle, drive them to market, and sell them, that he is bankrupt, is actionable per se. Lewis v. Hawley, 2 Day [Conn.] 495, 2 Am. Dec. 121.

And it is actionable per se to say of an innkeeper "Deal not with S., for he is broke, and there is neither entertainment for man or horse." Southam v. Allen, 3 Salk. 326.

But merely to say of a merchant that he has executed a chattel mortgage is not actionable per se. Newbold v. Bradstreet, 57 Md. 38, 40 Am. Rep. 426. And see Dun v. Weintraub, 111 Ga. 416. "As regards the reputation of traders the law has taken a broader view than elsewhere. To impute insolvency to a tradesman, in any form whatever, is actionable." Pollock, Torts (Webb's Ed.) 303. And it is actionable to speak defamatory words concerning a person engaged in conducting a school or other educational institution, which tend to prejudice him in his business. It is actionable per se to impute to one engaged in keeping and teaching boys, intemperance and failure to keep boys from stealing. Darling v. Clement, 69 Vt. 292. See, also, St. James Military Academy v. Gaiser, 125 Mo. 517, 46 Am. St. Rep. 502; Price v. Conway, 134 Pa. 340, 19 Am. St. Rep. 704.

It is actionable per se to speak concerning a person holding a public office, and in relation to his office, false and defamatory words which convey a charge of unfitness, dishonesty, or incompetence therein. "It may be laid down as the settled rule, that slanderous words spoken of a person in an office of profit, and relating to him in such office, importing a charge of unfitness, either in respect of morals or capacity, for the duties of such office, or a want of integrity, or corruption therein, are actionable per se." Gove v. Blethen, 21 Minn. 80, 18 Am. Rep. 380; Heller v. Duff, 62 N. J. Law, 101; O'Brien v. Times Pub. Co., 21 R. I. 256. Thus it is actionable per se to call a justice of the peace "a damned fool of a justice" (Spiering v. Andrae, 45 Wis. 330, 30 Am. Rep. 744); or to say of a justice of the peace who has decided a case tried before him, "He perjured himself in deciding the suit against me, contrary to all law and evidence; it is the damnedest erroneous decision I ever saw any justice give; it was a damned outrage, and was done for spite (Gove v. Blethen, 21 Minn. 80, 18 Am. Rep. 380). The rule applies, of course, to executive and legislative, as well as judicial officers. It is actionable per se to say of a sheriff that he has used his official position to protect a disorderly house. Heller v. Duff, 62 N. J. Law, 101.

It is actionable per se to falsely charge a policeman with being drunk at roll-call or on duty. O'Brien v. Times Pub. Co., 21 R. I. 256.

Limitations of this rule: To render words spoken of a man actionable per se on this ground, "they must be spoken of him in relation to or in the way of a position which he holds, or a business he carries on, at the time of speaking." Pollock, Torts (Webb's Ed.) 301, 302. See Forward v. Adams, 7 Wend. [N. Y.] 204, Chase's Cas. 116. Unless they relate to his business, or office, they are not actionable without proof of special damage, unless on the ground that they impute a crime. Doyley v. Roberts, 3 Bing. N. C. 835; Miller v. David, L. R. 9 C. P. 118; Brayne v. Cooper, 5 Mees. & W. 249; Ayre v. Craven, 2 Adol. & E. 2; Van Tassel v. Capron, 1 Denio [N. Y.] 250, 43 Am. Dec. 667; Forward v. Adams, 7 Wend. [N. Y.] 204, Chase's Cas. 116; Ireland v. McGarvish, 1 Sandf. [N. Y.] 155, Chase's Cas. 118; Divens v. Meredith, 147 Ind. 693; Buck v. Hersey, 31 Me. 558; Redway v. Gray, 31 Vt. 292. Thus while it is actionable per se to charge a lawyer with cheating his clients, or with being a shyster, or with general incompetency in his profession, it is not actionable per se to charge him with cheating other persons than clients on occasions unconnected with his business, where the charge does not amount to an imputation of a crime, as to say of an attorney that he has defrauded his creditors, and has been whipped off a race-course (Doyley v. Roberts, 3 Bing. N. C. 835). And it is not actionable to impute incontinence or other misconduct to a physician, unless in connection with his profession, where the charge does not impute a crime. Ayre v. Craven, 2 Adol. & E. 2; Divens v. Meredith, 147 Ind. 693 (where it was held not to be actionable per se to call a physician a "white capper"). To say of the keeper of a house of public entertainment, "He is a dangerous man"; "He is a desperate man"; "I am afraid to go in his house alone"; "I am afraid of my life,"—was held not to be actionable per se as affecting his business, on the ground that the words did not relate to his business, or charge any delinquency therein. Ireland v. McGarvish, 1 Sandf. [N. Y.] 155, Chase's Cas. 118.

Words spoken of a public officer, but not having any relation to his office, and not amounting to a charge of crime, are not actionable per se, but are on the some footing as words spoken of any private citizen. Van Tassel v. Capron, 1 Denio [N. Y.] 250, 43 Am. Dec. 667.

In Sillars v. Collier, 151 Mass. 50, it was held not to be actionable per se to say of a member of the legislature, after referring

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(§ 2) *E. Disparagement of property or title.*—A bona fide claim of title to plaintiff's property is not actionable.[75]

§ 3. *Malice.*—Malice, express or implied, is an essential ingredient of libel;[76] but where words imputing a crime and actionable in themselves are published or spoken, the law presumes malice and implies that the plaintiff has received some damage. In such cases express malice need not be shown.[77] The defendant, however, may show that the circumstances attending the utterance were such that malice is not to be implied therefrom and that they were not spoken with malice.[78] Malice arises as well from reckless publications as from those inspired by personal ill will,[79] and if there is a reasonable and natural inference that plaintiff was referred to by the actionable words, then the defendant is liable.[80] Express malice, entitling plaintiff to exemplary damages, must be proved; it is never implied; but it may be proved directly or indirectly,[81] and is rebutted by facts

to a change of position, "Sometimes the change of heart comes from the pocket." Thus it has been held not to be actionable, in the absence of an allegation of special damages, to call a magistrate a "damned blackleg," or "damned rogue," etc., and charge him with being in a "combined company to cheat strangers," where no official misconduct or neglect of duty is imputed to him. Van Tassel v. Capron, 1 Denio [N. Y.] 250, 43 Am. Dec. 667; Oakley v. Farrington, 1 Johns. Cas. [N. Y.] 129, 1 Am. Dec. 107.

Speaking of a magistrate as "Squire," in using opprobrious words concerning him, is mere descriptio personae, and does not import that the words were spoken of him in respect of his office. Van Tassel v. Capron, supra.

It follows from what has been said above that words spoken of a person in relation to a profession or business which he has ceased to practice or carry on at the time the words are spoken, or of a person in relation to an office which he has ceased to hold, since they are not spoken of him in relation to his office, profession or business, are not within the rule allowing an action without proof of special damage. Bellamy v. Burch, 16 Mees. & W. 590; Forward v. Adams, 7 Wend. [N. Y.] 204, Chase's Cas. 116. "The ground of action in these cases is that the party is disgraced or injured in his profession or trade, or exposed to the hazard of losing his office, in consequence of the slanderous words, not that his general reputation and standing in the community are affected by them. It will be recollected that the words spoken in this class of cases are not actionable of themselves, but that they become so in consequence of the special character of the party of whom they are spoken. The fact of his sustaining that special character, therefore, lies at the very foundation of the action." Forward v. Adams, supra.

It is also necessary that the words shall "either amount to a direct charge of incompetence or unfitness, or impute something so inconsistent with competence or fitness that, if believed, it would tend to the loss of the party's employment or business." Pollock, Torts (Webb's Ed.) 302; Lumby v. Allday, 1 Tyrw. 217, Bigelow's Cas. 131, Bigelow's Lead. Cas. 87.

The rule rendering actionable per se defamatory words concerning a person in his trade or business does not apply to words relating merely to the quality of articles made, produced, or furnished by a person. These he impliedly submits to criticism. Dooling v. Budget Pub. Co., 144 Mass. 258, 59 Am. Rep. 83.

Words tending to disinherit: There is an old case in which it was held actionable per se to call a prospective heir a bastard, because the charge if true would disinherit him (Humphreys v. Strutfield, 1 Rolle Abr. 39, pl. 5, Cro. Cas. 469); but it is doubtful if this was the law even in England. See Nelson v. Staff, Cro. Jac. 422, 1 Vin. 396, pl. 18, 2 Vent. 26, 28. It is not so in this country. Hoar v. Ward, 47 Vt. 657.

75. Patent right. Squires v. Wason Mfg. Co., 182 Mass. 137. It is error to mulct a defendant in damages for having placed of record a title which he had acquired to certain property, even though it may thereafter in a proper proceeding be determined that plaintiff's title is paramount. Handlin v. Dodt, 110 La. 936.

76. State Mut. Life & Annuity Ass'n v. Baldwin, 116 Ga. 855.

77. Donahoe v. Star Pub. Co. [Del.] 55 Atl. 337; Crane v. Bennett, 77 App. Div. [N. Y.] 102; Brandt v. Morning Journal Ass'n, 81 App. Div. [N. Y.] 183; Whiting v. Carpenter [Neb.] 93 N. W. 926. Calling plaintiff a blackmailer. Palmer v. Mahin, 120 Fed. 737. Calling plaintiff a thief. Hamlin v. Fauti [Wis.] 95 N. W. 955; Schofield v. Baldwin, 102 Ill. App. 560. The Pa. act of Apr. 11, 1901 (P. L. 74) did not change the common law rule that if an article is libelous per se and is false as to plaintiff, malice arises. Clark v. North American Co., 203 Pa. 346.

78. Schofield v. Baldwin, 102 Ill. App. 560. Source of information may be shown. Conner v. Standard Pub. Co., 183 Mass. 474.

79. Crane v. Bennett, 77 App. Div. [N. Y.] 102; Clark v. North American Co., 203 Pa. 346; Turner v. Hearst, 137 Cal. 332, 70 Pac. 18.

80. As where the libel describes plaintiff by his residence, occupation, official position and surname, but gives him a wrong Christian name. Clark v. North American Co., 203 Pa. 346.

81. Donahoe v. Star Pub. Co. [Del.] 55 Atl. 337; Minter v. Bradstreet Co., 174 Mo. 444; Cranfill v. Hayden [Tex. Civ. App.] 75 S. W. 573. Showing that publisher knew the statement to be false when he made it. Cranfill v. Hayden [Tex. Civ. App.] 75 S. W. 573. Repetitions of a slander. Davis v. Star-

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tending to show the truth of the statement published and defendant's belief therein.[82]

§ 4. *Privilege and privileged communications.*—Privileged communications are classified as either absolute or qualified. In the former is embraced any matter which is pertinent to the issues in a judicial proceeding,[83] even though it be concerning a stranger to the record or proceeding in question,[84] and whether the alleged defamatory matter is pertinent is a question of law for the court to determine.[85]

In the latter class are embraced all official communications made by an officer in the discharge of a public duty.[86] Likewise any communication, made bona fide and in an honest belief, about a matter in which (1) the speaker or writer has an interest or duty; (2) the hearer or addressee has a corresponding interest or duty; and (3) which is made in the protection of that interest or in the performance of that duty.[87] It is not necessary that the duty which affords the privilege be a legal duty or one of perfect obligation. It is sufficient if the words were spoken in the performance of a moral or social duty of imperfect obligation if defendant honestly believed that he owed it to plaintiff.[88]

rett [Me.] 55 Atl. 516. Where defendant had plaintiff black-listed by the Plumbers' Association as for "unjustly failing to meet his obligations" when the difference between them was whether plaintiff legally owed a certain account, it was held that express malice might be inferred. Trapp v. Du Bois, 76 App. Div. [N. Y.] 314. An instruction that if the jury believed that the article in question was libelous and false and untrue the law inferred malice to sustain the action was held to be a correct statement of legal malice. Fish v. St. Louis County Print. & Pub. Co. [Mo. App.] 74 S. W. 641.

82. Donahoe v. Star Pub. Co. [Del.] 55 Atl. 337; Minter v. Bradstreet Co., 174 Mo. 444; Cranfill v. Hayden [Tex. Civ. App.] 75 S. W. 573.

83. Contents of a pleading. Crockett v. McLanahan, 109 Tenn. 517. References to plaintiff in an application to perpetuate testimony held to be immaterial and irrelevant to the issues and therefore without the pale of privilege. King v. McKissick, 126 Fed. 215. Answers by a witness. When asked if plaintiff was a "reliable" contractor witness replied that he did not pay his bills and would put in a grade of material inferior to that called for in specifications. Held responsive to question of counsel. Cooley v. Galyon, 109 Tenn. 1, 60 L. R. A. 139. On the appearance of plaintiff after arrest for false pretenses, defendant, an attorney for the complaining witness, told him he would have to settle or "go up the road." The conversation was held outside the justice office near the front thereof. Held privileged. Craig v. Burris [Del.] 55 Atl. 353. Letters written to an attorney by one seeking to set himself right in a business transaction and to avoid anticipated litigation. Coffee v. Smith, 109 La. 440.

84. Cooley v. Galyon, 109 Tenn. 1, 60 L. R. A. 139; Crockett v. McLanahan, 109 Tenn. 517.

85. Crockett v. McLanahan, 109 Tenn. 517.

86. The report of a committee of aldermen, appointed to investigate a dramshop, on the complaint of citizens, is in the discharge of official duty, and therefore privileged. Weber v. Lane, 99 Mo. App. 69. A finding by a board of health is not privileged where it goes beyond their official duty. Charging negligence on the part of other physicians. Mauk v. Brundage, 68 Ohio St. 89.

87. Harrison v. Garrett, 132 N. C. 172. Cases of privileged communications to or by members of a family in view of the proposed marriage of a member thereof. McBride v. Ledoux [La.] 35 So. 615; Leonard v. Whetstone [Ind. App.] 68 N. E. 197. An answer by a husband to a question addressed to his wife, if it do not go beyond the question or occasion. Middleby v. Effler [C. C. A.] 118 Fed. 261. The publication by a railroad company of an order that an employe had been dismissed from its service "for intimating that an officer of the company had cast reflections upon the ancestry of another officer." Brown v. Norfolk & W. R. Co., 100 Va. 619, 60 L. R. A. 472. So also an order by a railroad company to its conductors that a discharged employe failed to surrender certain tickets. Central of Georgia R. Co. v. Sheftall, 118 Ga. 865. Where defendant in answer to a letter from a third person concerning an article patented by plaintiff, answered that it owned the right to manufacture and sell the article and there was reasonable ground for its officers to believe they did so own said rights the statement was privileged so that no action would lie for preventing a sale. Squires v. Wason Mfg. Co., 182 Mass. 137. Whether a publication disparaging a tradesman's goods was made by a rival with the sole purpose of protecting himself is a question of intention, and this question is for the jury. Holmes v. Clisby, 118 Ga. 820. A letter written by defendant railroad company to a newspaper and by it published, stating that plaintiff represented himself as an advertising agent of the company, whereas he had no connection whatever with the company, is not privileged. St. Louis S. W. R. Co. v. McArthur [Tex. Civ. App.] 72 S. W. 76. The doctrine of privilege does not afford shelter to one who makes slanderous statements to others as well as public officers, it appearing the statements were made to the officers at a casual meeting. Bigner v. Hodges [Miss.] 33 So. 980.

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Newspaper reports of proceedings in court are conditionally privileged, as are fair criticisms thereof, if proceeding from good motives and founded on fair statements of fact.[89] Another instance of qualified privilege is the right to answer libel by libel. This is analogous to the right of self defense. The resistance may be carried to a successful termination, but the means used must be reasonable and without malice.[90] While the conduct of public officials and candidates for public office is open to criticism, no privilege attaches to the unjust imputation of criminal offenses or of bad motives for public conduct on their part.[91]

Whether or not a communication falls within the class denominated "qualifiedly or conditionally privileged" depends on whether it was made without express malice and in good faith.[92]

Where defamatory matter is libelous per se, privilege is a defense to be pleaded and proved, and upon the defense rests the burden of showing that the publication was privileged.[93]

§ 5. *Publication.*—To repeat or publish a slanderous statement is to indorse it as genuine;[94] but the mere sending of a letter through the mail is not a publication,[95] though publication may be made by dictating it to a stenographer,[96] and

88. Hudnell v. Eureka Lumber Co., 133 N. C. 169.

89. Conner v. Standard Pub. Co., 183 Mass. 474. But this does not permit the publisher to prejudge a case, or misstate it, or hold up to scorn or ridicule a party pursuing his legal remedies in court. Brown v. Providence Telegram Pub. Co. [R. I.] 54 Atl. 1061; Moore v. Dispatch Print. Co., 87 Minn. 450. Nor does it include a publication which is not confined to the contents of a divorce petition naming plaintiff as co-respondent, but the greater part of which consists of sensational gossip (Stuart v. Press Pub. Co., 83 App. Div. [N. Y.] 467, and where a publication purports to be a report of court proceedings and is as to most of its facts true, but contains comments, inferences and insinuations directly tending to excite ridicule and depreciation of plaintiff's character and its whole tone shows that it was intended primarily to injure him it is libelous (Brown v. Providence Telegram Pub. Co. [R. I.] 54 Atl. 1061). A statement that a prosecution was nolle prossed is not unfair though the fact was that the grand jury found no bill. Conner v. Standard Pub. Co., 183 Mass. 474. The privilege attaching to a proper criticism of a public officer by a newspaper may be lost by the manner of the publication; the evidence of malice may be intrinsic, from the style and tone of the article. Com. v. Scouton, 20 Pa. Super. Ct. 503. Whether the privilege afforded by the N. Y. Code Civ. Proc. §§ 1907, 1908, to newspaper reports of judicial proceedings extends as well to pleadings or papers filed in a proceeding as to the actual proceedings in open court discussed. Stuart v. Press Pub. Co., 83 App. Div. [N. Y.] 467.

90. Fish v. St. Louis County Print. & Pub. Co. [Mo. App.] 74 S. W. 641; Shepherd v. Baer, 96 Md. 152. But mere irritating publications by plaintiff are no justification, and it is no defense to the publisher of a newspaper to show that the article complained of was prepared by another person in answer to an attack on him by plaintiff. Hess v. Gansz, 90 Mo. App. 439. Where there is a mutual exchange of opprobrious epithets, or vituperation and abuse on both sides, an action in damages for slander will not lie. Bloom v. Crescioni, 109 La. 667.

91. Bee Pub. Co. v. Shields [Neb.] 94 N. W. 1029. Publications of falsehoods concerning officers, and candidates for office are never privileged. Donahoe v. Star Pub. Co. [Del.] 55 Atl. 837; Jarman v. Rea, 137 Cal. 339, 70 Pac. 216. A distinction is taken between publications relating to public and private persons as to whether they are libelous. A citizen has the right to comment fairly and with an honest purpose on the conduct of public officers. Herringer v. Ingberg [Minn.] 97 N. W. 460.

92. St. Louis S. W. R. Co. v. McArthur [Tex. Civ. App.] 72 S. W. 76; Brown v. Norfolk & W. R. Co., 100 Va. 619, 60 L. R. A. 472; Minter v. Bradstreet Co., 174 Mo. 444. A libelous statement made on an occasion not absolutely privileged is presumed by law to be false and to have been made maliciously. In such case the burden is on the publisher to show the truth of the statement and upon his failure to do so the presumption becomes conclusive. Cranfill v. Hayden [Tex Civ. App.] 75 S. W. 573. Where however the occasion is such as to impose upon the publisher an apparent duty to speak, the presumption of malice is removed, and it will be assumed the publication was prompted by a sense of duty and not malice. In such case the burden is on the plaintiff to show malice. Id.; Brown v. Norfolk & W. R. Co., 100 Va. 619, 60 L. R. A. 472; Harrison v. Garrett, 132 N. C. 172. A communication warning against the intent of plaintiff to steal defendant's property can only be justified by circumstances which would induce a reasonable man to believe his property in danger. Browning v. Com. [Ky.] 76 S. W. 19.

93. Newspaper articles. Stuart v. Press Pub. Co., 83 App. Div. [N. Y.] 467. So also where a railroad company, having charged that one who represented himself an advertising agent of the company was a swindler, claimed the publication was privileged. St. Louis S. W. R. Co. v. McArthur [Tex. Civ. App.] 72 S. W. 76.

94. Bee Pub. Co. v. Shields [Neb.] 94 N. W. 1029.

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where the sender so addresses a libelous letter that in ordinary course it will reach a third person and as a natural result of the manner in which it is sent or addressed the letter does reach and its contents become known to such third person, there is sufficient publication.[97] Where one in the course of an interview sought by newspaper reporters makes defamatory statements of another, knowing they will be published, it is for the jury to say whether or not he was the instigator of, and responsible for, their publication.[98]

The publication of a libel will not be restrained by the writ of injunction.[99]

§ 6. *Justification.*—The substantial truth of the charge is a complete defense,[1, 2] but that the information in the libel was obtained from another whose name was stated in the article is no justification.[3]

Justification must be specially pleaded by the defendant, and upon this issue the burden is on him to show the truth of the libelous statement.[4]

§ 7. *Damages, and the aggravation and mitigation thereof. A. Actual or compensatory damages.*—Upon proof of publication of words libelous per se and their application to plaintiff, he is entitled to such compensatory damages as are attributable to the publication[5] without proof of special damage,[6] and in such case a plea of not guilty entitles plaintiff to a verdict for nominal damages and such compensatory damages as the evidence shows him entitled to.[7]

(§ 7) *B. Punitive or exemplary damages* can be awarded only where there is clear proof of express malice;[8] but where the publication was inspired by ill will or by a willful intent to injure, or was made in reckless disregard of the rights of the person defamed, the right to their recovery is unquestioned,[9] and a news-

95. Sun Life Assur. Co. v. Bailey [Va.] 44 S. E. 692. Sending libelous letter to person libeled is not publication. Code § 5090 making it sufficient for criminal prosecution does not apply. Yousling v. Dare [Iowa] 98 N. W. 371.

96. Sun Life Assur. Co. v. Bailey [Va.] 44 S. E. 692.

97. Letter addressed to two persons, one not interested. Schmuck v. Hill [Neb.] 96 N. W. 158.

98. Weston v. Weston, 83 App. Div. [N. Y.] 520.

99. Photograph in rogue's gallery. Owen v. Partridge, 40 Misc. [N. Y.] 415.

1, 2. Leghorn v. Review Pub. Co., 31 Wash. 627, 72 Pac. 485. In Nebraska by provision of the code [Code Civ. Proc. § 132]. Larson v. Cox [Neb.] 93 N. W. 1011. Proof that insurance companies had cancelled existing insurance on plaintiff's property justifies an allegation that they refused to again insure him. Conner v. Standard Pub. Co., 183 Mass. 474. A charge of stealing a gas radiator from leased premises is not justified by wrongfully removing a gas chandelier therefrom, nor is a charge that he is a "skin" justified by the fact that he is in arrears for rent. Christianson v. O'Neil, 39 Misc. [N. Y.] 11.

3. Palmer v. Mahin [C. C. A.] 120 Fed. 737.

4. Cranfill v. Hayden [Tex. Civ. App.] 75 S. W. 573.

5. Mauk v. Brundage, 68 Ohio St. 89. Where plaintiff alleges that he is injured in his good name, fame and credit among his neighbors by the libel he can recover compensatory damages notwithstanding the statute Act of June 13, 1898 (P. L. p. 476) providing that there can be no recovery for more than actual damages proved and specially alleged except on proof of express malice, unless the plaintiff has made a demand in writing for a retraction. Marsh v. Edge, 68 N. J. Law, 661.

6. McMinemee v. Smith [Iowa] 93 N. W. 75; Williams v. Fuller [Neb.] 94 N. W. 118; Friedman v. Pulitzer Pub. Co. [Mo. App.] 77 S. W. 340; Dunn v. Hearst, 139 Cal. 239, 73 Pac. 138. Where defendant charged a married woman with adultery on three different occasions it was proper to instruct the jury to find substantial damages. Knowlden v. Guardian Print. & Pub. Co. [N. J. Err. & App.] 55 Atl. 287.

7. Donahoe v. Star Pub. Co. [Del.] 55 Atl. 337; Palmer v. Mahin, 120 Fed. 737. Shame and mortification may constitute grievous mental suffering and are elements of actual damage. Graybill v. De Young, 140 Cal. 323, 73 Pac. 1067.

8. Donahoe v. Star Pub. Co. [Del.] 55 Atl. 337.

9. To publish a statement that the person defamed denies the previously published matter is not a retraction. Palmer v. Mahin [C. C. A.] 120 Fed. 737. Punitive damages may be founded on the personal ill will of a reporter for defendant newspaper. Clifford v. Press Pub. Co., 78 App. Div. [N. Y.] 79. Punitive damages may be given for a libel recklessly or carelessly published as well as one induced by personal ill will. Crane v. Bennett, 77 App. Div. [N. Y.] 102; Brandt v. Morning Journal Ass'n, 81 App. Div. [N. Y.] 183. Where it appeared in evidence that the libel after being written was submitted to at least two of defendant's officers before publication it must be considered their deliberate utterance and the expression of their well considered temper and attitude towards him, making the case one which forbids the

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paper publisher may be liable for exemplary damages, though he had no knowledge of the publication and it was made in his absence and contrary to a general order.[10]

(§ 7) *C. Aggravation of damages.*—Repetitions of the slander or libel even after suit begun are admissible,[11] but language which is not actionable per se and which does not contain the same imputation as that counted on is not admissible for the purpose of enhancing damages by showing malice.[12] The social standing of the parties[13] and the circulation of defendant's newspaper are material,[14] but the standing of a defendant corporation is not.[15] Though in the absence of a plea of justification plaintiff may recover without proof of the falsity of the charge, he may prove its falsity, as in no other way can the difference between a mere technical misstatement and a cruel and irremedial falsehood be shown, and the proper measure of damages applied.[16] Where the libel complained of charged plaintiff with being a blackmailer, his business, reputation and standing before the publication, and the effect of the publication on his business, reputation and feelings, and his acts when he learned of the publication may be shown.[17]

(§ 7) *D. Mitigation of damages.*—As affecting the amount of exemplary damages, the truth of the charge or defendant's belief in it may be offered in mitigation.[18] The publisher cannot testify that he believed he was justified and made the publication for the public good,[19] and a general rumor of the truth may also be shown.[20] But where compensatory damages only are claimed, evidence of lack of ill will or malice are inadmissible for that purpose.[21] Irritating conduct by plaintiff[22] and his general bad character may be shown,[23] but as in other cases it cannot be shown by specific acts.[24]

assessment of merely nominal damages. Brown v. Providence Telegram Pub. Co. [R. I.] 54 Atl. 1061. To publish of plaintiff that he is party to a conspiracy to defraud insurance companies by obtaining insurance on the lives of aged people and if desirable hasten their deaths, and that many have been poisoned and the lives of others attempted entitles him to exemplary damages. Duke v. Morning Journal Ass'n [C. C. A.] 120 Fed. 860. So, also, to say of him that he is a thief. Schofield v. Baldwin, 102 Ill. App. 560. The refusal or neglect of defendant to publish a retraction after having had his attention called to it is in itself a basis for punitive damages; the tone and wording of the libel as indicative of a desire to make a sensation and injure others regardless of the effect on plaintiff are also material. Clark v. North American Co., 203 Pa. 346. An instruction excluding exemplary damages is error. Turner v. Hearst, 137 Cal. 232, 70 Pac. 18.

10. Crane v. Bennett, 77 App. Div. [N. Y.] 102; Id. [N. Y.] 69 N. E. 274.

11. Spolek Denni Hlasatel v. Hoffman, 105 Ill. App. 170; Crane v. Bennett, 77 App. Div. [N. Y.] 102; Bee Pub. Co. v. Shields [Neb.] 94 N. W. 1029; Davis v. Starrett, 97 Me. 568. So, also, of repetitions of it to persons other than the one alleged. Cushing v. Hederman, 117 Iowa, 637.

12. Jacobs v. Cater, 87 Minn. 448.

13. Whiting v. Carpenter [Neb.] 93 N. W. 926.

14. Palmer v. Mahin [C. C. A.] 120 Fed. 737; Bee Pub. Co. v. Shields [Neb.] 94 N. W. 1029.

15. Sun Life Assur. Co. v. Bailey [Va.] 44 S. E. 692.

16, 17. Palmer v. Mahin [C. C. A.] 120 Fed. 737.

18. Spolek Denni Hlasatel v. Hoffman, 105 Ill. App. 170; Donahoe v. Star Pub. Co. [Del.] 55 Atl. 337; Palmer v. Mahin [C. C. A.] 120 Fed. 737; Mauk v. Brundage, 68 Ohio St. 89. Nothing is competent to show the intent of defendant in publishing the libel, which was not known to him when he made it. Palmer v. Mahin [C. C. A.] 120 Fed. 737.

19. Palmer v. Mahin [C. C. A.] 120 Fed. 737. Where the charge is that plaintiff is an open and persistent law breaker, indictments against him that were defective are not admissible to prove the truth of the charge or in mitigation of damages. Davis v. Hamilton, 88 Minn. 64. Where defendant files no plea of justification under the statute, but pleads not guilty, the utmost effect of evidence that he had probable cause to believe that the charge was true and that it was published for the public good, is to negative express malice, and thus defeat the claim for exemplary damages [11 Del. Laws, c. 449, p. 511]. Donahoe v. Star Pub. Co. [Del.] 55 Atl. 337.

20. Hess v. Gansz, 90 Mo. App. 439; Donahoe v. Star Pub. Co. [Del.] 55 Atl. 337.

21. Knowlden v. Guardian Print. & Pub. Co. [N. J. Err. & App.] 55 Atl. 287; Palmer v. Mahin [C. C. A.] 120 Fed. 737.

22. Xavier v. Oliver, 80 App. Div. [N. Y.] 292. Libelous article called out or provoked by another previous article. Fish v. St. Louis County Print. & Pub. Co. [Mo. App.] 74 S. W. 641.

23. Hess v. Gansz, 90 Mo. App. 439. Evidence that plaintiff did not bring suit for prior libels of the same nature is not admis-

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(§ 7) *E. Inadequate and excessive damages.*[25]—An appellate court will not interfere with the award of a jury unless the amount awarded is so grossly inadequate or excessive as to shock the moral sense and raise a reasonable presumption that the jury was actuated by passion or prejudice.[26]

§ 8. *Persons liable.*—A master is liable for the libelous letter of his servant written in course of his employment,[27] and by a parity of reasoning a corporation is responsible for the publication of a libel by or through its agents;[28] but a partnership is not liable to respond in damages to a person aggrieved by reason of slanderous reports concerning him, circulated by one only of its members without the knowledge and sanction of his co-partners.[29] An insane person is not liable for slander, but to defeat a recovery upon the ground of insanity it should satisfactorily appear that at the time of speaking the defamatory words the person uttering them was either totally deranged or laboring under an insane delusion on the subject to which the words related.[30] That recovery had also been had against defendant's wife for speaking the same words independently of him is not bar to the action.[31]

§ 9. *Conditions precedent.*—A precedent demand for retraction is required in some states.[32]

§ 10. *Pleading. A. Declaration, complaint, or petition.*—A declaration or complaint for libel must set out the particular words used,[33] and allege that they were published of and concerning the plaintiff,[34] and where the matter complained of is not libelous per se must allege special damage, specifically setting forth the

sible to prove his bad character. Davis v. Hamilton, 88 Minn. 64.

24. Davis v. Hamilton, 88 Minn. 64.

25. **Not excessive:** $2,500 for charging a county attorney with bribery. Bee Pub. Co. v. Shields [Neb.] 94 N. W. 1029. $150 for charging a village butcher with selling diseased meats. Bigner v. Hodges [Miss.] 33 So. 980. $1,000 for falsely charging one with being a swindler, forger and thief. Graybill v. De Young, 140 Cal. 323, 73 Pac. 1067. $1,500 for publication in paper having 32,000 circulation. Brown v. Providence Tel. Pub. Co. [R. I.] 54 Atl. 1061. $27,000 where a prosperous business is maliciously ruined by a commercial agency. Minter v. Bradstreet Co., 174 Mo. 444. $500 for saying "you are stealing my corn." McMinemee v. Smith Iowa] 93 N. W. 75. $50 increased to $500 where a mother in the presence of her son and a sister is called a "God damned thief." Fatjo v. Seidel, 109 La. 699. **Verdict reduced:** $40,000 reduced to $25,000 for libeling a police magistrate. Crane v. Bennett, 77 App. Div. [N. Y.] 102. $1,500 to $600 where one was charged with being the "greatest rum-seller" in town. Davis v. Starrett, 97 Me. 568. $5,000 to $3,000 for loss of business to a publisher. Daisley v. Douglass, 119 Fed. 485. Because of mitigating circumstances, a verdict of $7,000 was reduced to $1,738.20 where plaintiff had been called a strumpet. Riker v. Clopton, 83 App. Div. [N. Y.] 310; $36,000 reduced to $20,000. Duke v. Morning Journal Ass'n, 120 Fed. 860.

26. Dunn v. Hearst, 139 Cal. 239, 73 Pac. 128. But where a plaintiff, of good reputation and social standing, receives but 6 cents damages, the evidence showing the articles in defendant newspaper libelous per se and without justification, it was proper for the court, under the N. Y. Code Civ. Proc. to set aside the verdict as inadequate [§ 999]. Stuart v. Press Pub. Co., 83 App. Div. [N. Y.] 467.

27. Trapp v. DuBois, 76 App. Div. [N. Y.] 314. So, also, is the proprietor of a newspaper liable for a libelous article published therein although published without his knowledge. Williams v. Fuller [Neb.] 94 N. W. 118; Crane v. Bennett, 77 App. Div. [N. Y.] 102; Clifford v. Press Pub. Co., 78 App. Div. [N. Y.] 79; Dunn v. Hearst, 139 Cal. 239, 73 Pac. 138; Graybill v. De Young, 140 Cal. 323, 73 Pac. 1067.

28. Sun Life Assur. Co. v. Bailey [Va.] 44 S. E. 692; Hudnell v. Eureka Lumber Co., 133 N. C. 169. Commercial agency. Minter v. Bradstreet Co., 174 Mo. 444.

29. Hendricks v. Middlebrooks Co., 118 Ga. 131.

30. Irvine v. Gibson [Ky.] 77 S. W. 1106.

31. Cushing v. Hederman, 117 Iowa, 637.

32. Article signed with author's surname only is not anonymous so that no demand for retraction need be made. Williams v. Smith [N. C.] 46 S. E. 502.

33. Van Alstyne v. Lewis, 41 Misc. [N. Y.] 355. It is not sufficient to allege the substance or effect of the language used. Gendron v. St. Pierre [N. H.] 56 Atl. 915. A complaint that sets out the spoken words and follows them with "or words of like purport, meaning and effect" is bad. Drohan v. O'Brien, 76 App. Div. [N. Y.] 265.

34. Van Alstyne v. Lewis, 41 Misc. [N. Y.] 355; Corr v. Sun Print. & Pub. Ass'n [N. Y.] 69 N. E. 288; Stromberg v. Tribune Ass'n, 88 App. Div. [N. Y.] 589. A declaration for libel on plaintiff's trade or occupation which does not allege that it was published of and concerning plaintiff's trade or occupation is bad. Harkness v. Chicago Daily News Co., 102 Ill. App. 162.

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facts;[35] but an averment that defendant used language of plaintiff imputing a want of chastity is sufficient without alleging that she is a married woman.[36]

Each publication of matter libelous per se is a separate cause of action; but all can be joined in one petition or complaint,[37] and in Kentucky, two separate slanders made to different parties and at different times may be sued for in the same petition against the same party.[38] Where the publication contains several libelous statements, plaintiff is not required in his declaration to select and rely on any one, but may rely upon all or any of them.[39] Though a libel may affect plaintiff as an individual, as a professional man, and as an officer, it only constitutes one libel consisting of different items, and such items cannot be made distinct causes of action by declaring on each in separate counts.[40]

In Kentucky, a petition in an action for libel must be verified.[41] Statutory demand for retraction must be alleged.[42]

Colloquium and innuendo.—Where the publication fails to identify plaintiff, the declaration must by words of inducement, colloquium and innuendo connect him with it;[43] but where the publication is set out in the declaration and is clearly libelous and actionable per se, no innuendoes assigning any specific libelous meaning to the words are necessary,[44] and in such case innuendoes not justified by the language of the article will be treated as surplusage;[45] where, however, a particular meaning is ascribed to language, which standing alone might be regarded as libelous per se, the plaintiff to succeed must support the meaning he himself has ascribed to the publication,[46] and, failing in this, he cannot fall back on the general meaning of the words.[47] Words not actionable in themselves may be made so by a colloquium and proper averments,[48] and it is competent to explain in this way an ambiguous publication, to point out the intention of the author, and to show wherein the effect of the language was to injure him;[49] but where there is no colloquium to support it, the innuendo can never be taken to expand or enlarge the meaning of the words used and give them a particular meaning different from that which they would ordinarily convey in their more innocent signification.[50]

35. Willis v. Eclipse Mfg. Co., 81 App. Div. [N. Y.] 591; Martin v. Press Pub. Co., 40 Misc. [N. Y.] 524; Doyle v. Kirby [Mass.] 68 N. E. 843; Ford v. Lamb, 116 Ga. 655. Where the allegation was that plaintiff had been "injured in his reputation and credit personally" and in "his business as publisher" without saying how or in what way. King v. Sun Print. & Pub. Co., 82 N. Y. Supp. 787. But see Maglio v. N. Y. Herald Co., 83 App. Div. [N. Y.] 44, where the statement that the plaintiff's hotel property had "become depreciated in value" was held a sufficient allegation, and Hitzfelder v. Koppelmann, 30 Tex. Civ. App. 162, where an allegation that plaintiff "became sick and suffered great bodily pain" was held sufficient.

36. Stutsman v. Stutsman, 30 Ind. App. 645.

37. Cent. of Ga. R. Co. v. Sheftall, 118 Ga. 865.

38. Code § 83. Fred v. Traylor, 24 Ky. L. R. 1906, 72 S. W. 768.

39. Donahoe v. Star Pub. Co. [Del.] 53 Atl. 567.

40. Hess v. Gansz, 90 Mo. App. 439.

41. Civil Code Proc. § 116. Berea College v. Powell [Ky.] 77 S. W. 382.

42. Complaint not so alleging is demurrable. Williams v. Smith [N. C.] 46 S. E. 502.

43. Hanna v. Singer, 97 Me. 128.

44. Donahoe v. Star Pub. Co. [Del.] 53 Atl. 567; Cent. of Ga. R. Co. v. Sheftall, 118 Ga. 865; Williams v. Fuller [Neb.] 94 N. W. 118.

45. Brown v. Providence Tel. Pub. Co. [R. I.] 54 Atl. 1061.

46. Morrison v. Smith, 83 App. Div. [N. Y.] 206.

47. Martin v. Press Pub. Co., 40 Misc. [N. Y.] 524.

48. Jarman v. Rea, 137 Cal. 339, 70 Pac. 216; Hauptner v. White, 81 App. Div. [N. Y.] 153. Where the language used, standing alone, does not appear to be actionable, an allegation of the specific crime with which the plaintiff is charged must be introduced, or the declaration will be bad. The Massachusetts practice act (Pub. St. 1882, c. 167), provides that no innuendoes are necessary. Middleby v. Effler [C. C. A.] 118 Fed. 261. An innuendo which alleges that the words set out in the declaration were uttered in a "defamatory sense" of and concerning the plaintiff is sufficient. Ely v. Ely [N. J. Law] 56 Atl. 1.

49. Holmes v. Clisby, 118 Ga. 820. Plaintiff was called a "damned bitch," the innuendo was that she, being a married woman, was guilty of adultery. Stoner v. Erisman [Pa.] 56 Atl. 77; Cent. of Ga. R. Co. v. Sheftall, 118 Ga. 865.

50. Kilgour v. Evening Star Newspaper Co., 96 Md. 16. Statement that plaintiff's

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(§ 10) *B. Plea or answer.*—Under the code in New York a general denial is not a defense, and should not be pleaded as such.[51]

A special plea must not include matters that are admissible under the general issue.[52]

A justification must be as broad as, and co-extensive with, the libelous matter as explained by the innuendoes,[53] and a plea alleging the truth of the publication must set up the facts upon which the allegation is based; to state that it is "substantially true" is insufficient. It must also admit the publication; to refer to it as the "supposed libel" does not do this;[54] but a plea of justification is good without alleging that the defamatory words were spoken with good motives or for justifiable ends.[55]

An answer setting up new matter both in justification and mitigation should not be overruled where it is conceded that the matter alleged is admissible in mitigation.[56]

(§ 10) *C. Demurrer.*—Where the language declared on is ambiguous,[57] or if the words are fairly susceptible of a defamatory meaning, it is error to sustain a demurrer to a declaration good in form on the ground that it fails to state a cause of action.[58] Whether the publication is privileged cannot be reached by demurrer.[59] A demurrer admits that the article declared on was published, but does not admit that it was libelous, where there is no allegation that its statements were false,[60] nor does it admit that matter set out in a pleading in another case was not pertinent to the issues in that case, such question being one of law and not of fact.[61]

(§ 10) *D. Bill of particulars.*—Defendant is entitled to a bill of particulars, stating who the auditors of the words were, where he denies speaking them,[62] but he is not entitled to a bill specifying what parts of the publication are libelous, in what respect it is false, and what portions are admitted to be true where he expressly declares the bill is not necessary to enable him to answer.[63]

(§ 10) *E. Issues, proof and variance.*—That the matter complained of was of common report and published without malice,[64] and that the publication was

child was not her husband's held insufficiently connected with her by colloquium. Stutsman v. Stutsman, 30 Ind. App. 645. Where plaintiff is charged with "cutting" prices there being no allegation that he was under contract not to do so. Willis v. Eclipse Mfg. Co., 81 App. Div. [N. Y.] 591. Alleged defamatory words cannot be made broader, nor their natural meaning extended, enlarged or restricted, by innuendo, alone. Herringer v. Ingberg [Minn.] 97 N. W. 460; Naulty v. Bulletin Co., 206 Pa. 128. Where words, interpreted in the usual and ordinary acceptation of their meaning do not impute a crime their meaning cannot be enlarged by an innuendo so as to accomplish that purpose. Moss v. Harwood [Va.] 46 S. E. 385.

51. Dinkelspiel v. N. Y. Evening Journal Pub. Co., 42 Misc. [N. Y.] 74. A general denial of every allegation except publication is relevant where the complaint charges express malice. Id.

52. Donahoe v. Star Pub. Co., 3 Pen. [Del.] 545.

53. Plaintiff's demurrer to defendant's answer overruled. Grubb v. Elder [Kan.] 72 Pac. 790. A declaration reciting that defendant uttered of plaintiff, a public officer, that "He is short $6,000 in his accounts, and if he had his just dues he would be behind the bars" counts upon a single indivisible slander; and an answer justifying only as to the latter portion of the language is not broad enough and demurrable. Stock v. Keele, 86 App. Div. [N. Y.] 136.

54. Donahoe v. Star Pub. Co., 3 Pen. [Del.] 545.

55. Larson v. Cox [Neb.] 93 N. W. 1011.

56. Doyle v. Fritz, 86 App. Div. [N. Y.] 515. Where the alleged libel was a charge that defendant charged extortionate fees as attorney, an answer setting out the proceedings in which it was alleged that such fees were charged is relevant. Westervelt v. N. Y. Times Co., 91 App. Div. [N. Y.] 72.

57. Cornish v. Bennett, 38 Misc. [N. Y.] 688; Kuster v. Press Pub. Co., 80 App. Div. [N. Y.] 615.

58, 59. Harkness v. Chicago Daily News Co., 102 Ill. App. 162.

60. Shepherd v. Baer, 96 Md. 152.

61. Crockett v. McLanahan, 109 Tenn. 517.

62. Mason v. Clark, 75 App. Div. [N. Y.] 460.

63. Kuster v. New York Times Co., 79 App. Div. [N. Y.] 39.

64. Donahoe v. Star Pub. Co., 3 Pen. [Del.] 545, 55 Atl. 337.

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privileged, may be shown under the general issue,[65] but in the fact that the matter complained of was published properly for public information and without malice must be specially pleaded.[66] There is no variance where the fund from which money was taken is described in the declaration as a "special postal fund" and in the proof as a "deposit made there as a cash bond."[67]

§ 11. *Evidence.*—The truth of the published statement,[68] unless excluded by the plea or answer,[69] and the meaning of the language where ambiguous or not generally known,[70] are always in issue. The truth, however, not being a defense in Massachusetts if actual malice is shown,[71] the author of a libel may show the source of his information to rebut malice; but accounts of the same transaction in other papers are immaterial.[72]

Where all the counts charge slanderous words, actionable per se, it is sufficient for plaintiff to prove substantially any set of words in some one or more of the statements of slanderous words contained in the declaration or the different counts.[73]

In an action for imputing a want of chastity to a female, it is not necessary to show that she is unmarried further than to show she is not married to the person with whom she is alleged to have committed the unchaste acts.[74]

Where the cross-examination of plaintiff is such as to amount to an attack on his character, he should be permitted to show that it is good.[75]

Where defendant absolutely denied using the words alleged and he was corroborated by another witness who was present, a verdict for defendant was not contrary to evidence.[76]

65. Donahoe v. Star Pub. Co. [Del.] 55 Atl. 337.

66. Donahoe v. Star Pub. Co., 3 Pen. [Del.] 545.

67. Leghorn v. Review Pub. Co., 31 Wash. 627, 72 Pac. 485.

68. Declarations and statements of plaintiff tending to prove the truth of the charge are admissible (Davis v. Hamilton, 88 Minn. 64), but defendant cannot testify to the conclusion that the article was true (Id.); and evidence that plaintiff did not bring suit for prior libels of the same nature is not admissible (Id.). Where it was published of plaintiff that he had been arrested and held to bail evidence that his brother was wanted by the police was immaterial. Clark v. North American Co., 203 Pa. 346. So also where it was published of plaintiff that she was in jail for contempt, evidence that in another proceeding, based on the same alleged wrongdoing, plaintiff obtained a reversal, is improper, and its admission reversible error. Archibald v. Press Pub. Co., 82 App. Div. [N. Y.] 513.

69. An answer having denied that the allegel libelous article was published of and concerning the plaintiff and averred its truth it is not error to exclude evidence that the libelous charges were true of the plaintiff. Williams v. Fuller [Neb.] 97 N. W. 246. It is reversible error to admit in evidence an affidavit made more than a year after the publication of the libel by a third person which shows that plaintiff was innocent of the crime charged, the only question in the case being one of damages. Cudlip v. N. Y. Evening Journal Pub. Co., 174 N. Y. 158. Where plaintiff was charged with putting his wife in an insane asylum, and the only issue was the wife's sanity, it was error to admit a letter from her brother to plaintiff setting out reasons why he, the brother, had caused her incarceration in a like asylum. Kuster v. Press Pub. Co., 80 App. Div. [N. Y.] 615.

70. A local meaning of the words cannot be shown; it must be a general meaning. Stating of plaintiff that he must settle or "go up the road." Craig v. Burris [Del.] 55 Atl. 353. Where the publication is actionable per se evidence that defendant did not intend to charge plaintiff with a crime or impute to him that which the language of the article fairly implies is inadmissible. Davis v. Hamilton, 88 Minn. 64. Where only a part of the auditors understood the circumstances referred to by a charge of thieving and that it amounted technically only to a trespass, evidence of such circumstances is inadmissible. Hamlin v. Fauti [Wis.] 95 N. W. 955. See, also, Hinchman v. Knight [Mich.] 94 N. W. 1.

71. Rev. Laws, c. 173, § 91. Conner v. Standard Pub. Co., 183 Mass. 474.

72. Clark v. North American Co., 203 Pa. 346.

73. Iles v. Swank, 202 Ill. 453. Calling plaintiff a thief is sufficiently proved by words amounting to charge of larceny. Schofield v. Baldwin, 102 Ill. App. 560.

74. Cushing v. Hedran, 117 Iowa, 637. In a prosecution for slander of unchastity evidence of good reputation at a later date is inadmissible to discredit the slander, and impeach witnesses testifying to former acts of unchastity. Bowers v. State [Tex. Cr. App.] 75 S. W. 299.

75. Clark v. North American Co., 203 Pa. 346.

76. Kelso v. Kuehl, 116 Wis. 495.

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On proper affidavit of materiality, a subpoena duces tecum will be issued to bring in defendant's shipping, mailing and subscription lists.[77] Secondary evidence of an alleged libelous letter cannot be given without showing loss or destruction of the original.[78]

§ 12. *Trial and review.*—Whether the publication is libelous per se,[79] whether it was privileged,[80] and whether an innuendo is fairly warranted by the language declared on, are questions of law;[81] but whether the language fairly construed amounts to a charge of crime,[82] and whether defendant was without any malicious intent, and therefore not justly amenable to substantial damages, are questions for the jury.[83] If the publication is libelous per se, plaintiff is entitled to go to the jury, though he has by innuendo attached a meaning thereto which the language will not sustain.[84] In Louisiana, the duty of fixing damages for a newspaper libel is imposed upon the court, not upon the jury.[85]

Instructions as in other cases should be confined to the issues in the case,[86] and where the court undertakes to state a case upon which the plaintiff may or should recover, it must state a complete case, and embrace all the elements necessary to support a verdict.[87] Failure to caution the jury against allowing punitive damages is not error where they are told to allow such damages as will compensate, and the verdict is not too large.[88] Defendant cannot complain that the court limited certain testimony to the mitigation of damages when counsel expressly stated on offering it that it was not to show justification.[89]

Where there are several defendants, all of whom are guilty, though some only were actuated by express malice, it is proper to render a verdict as to all for compensatory damages and against such as were guilty of express malice for exemplary damages.[90]

The action of a trial court in granting a new trial where the verdict was so excessive as to indicate passion and prejudice on the part of the jury will not be set aside or reversed unless it is manifest that there was an abuse of the judicial discretion.[91]

After verdict, the court will usually construe the language in that sense which will support the verdict.[92]

§ 13. *Criminal libel. A. What is.*—A criminal libel is committed by any writing calculated to create disturbances of the peace, corrupt the public morals,

77. Palmer v. Mahin [C. C. A.] 120 Fed. 737.

78. Admission by writer of correctness of newspaper publication thereof does not dispense with the primary evidence. Prussing v. Jackson [Ill.] 69 N. E. 771.

79. Shepherd v. Baer, 96 Md. 152; Kilgour v. Evening Star Newspaper Co., 96 Md. 16; Mauk v. Brundage, 68 Ohio St. 89.

80. Mauk v. Brundage, 68 Ohio St. 89.

81. Kilgour v. Evening Star Newspaper Co., 96 Md. 16.

82. Bribery and malfeasance in office. Bee Pub. Co. v. Shields [Neb.] 94 N. W. 1029. Where the charge was "you swore to a lie" evidence that the parties had been witnesses on opposite sides of a law suit makes a case for the jury as to whether perjury was meant to be charged. Dell v. McBride [Mich.] 95 N. W. 717.

83. Weston v. Weston, 83 App. Div. [N. Y.] 520.

84. Morrison v. Smith [N. Y.] 69 N. E. 725.

85. Cooke v. O'Malley, 109 La. 382.

86. Circulation of slanderous reports—instructions held not prejudicial to plaintiff. Sonka v. Sonka [Tex. Civ. App.] 75 S. W. 325. Where the record is silent as to an apology at the hands of a newspaper being asked for or declined, and there is not a syllable to be found in the evidence respecting an apology, it is error for the court to instruct the jury that they may take into consideration the absence of one. Friedman v. Pulitzer Pub. Co. [Mo. App.] 77 S. W. 340. For instructions where action was for words actionable or not depending on whether the hearers understood the circumstances, see Hinchman v. Knight [Mich.] 94 N. W. 1; Hamlin v. Fauti [Wis.] 95 N. W. 955.

87. Sun Life Assur. Co. v. Bailey [Va.] 44 S. E. 692.

88. Whiting v. Carpenter [Neb.] 93 N. W. 926.

89. Hinchman v. Knight [Mich.] 94 N. W. 1.

90. Mauk v. Brundage, 68 Ohio St. 89.

91. Friedman v. Pulitzer Pub. Co. [Mo. App.] 77 S. W. 340.

92. Berea College v. Parvell [Ky.] 77 S. W. 382.

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or lead to any act which when done is indictable, and statutes in some states extend this definition.[93]

(§ 13) *B. Indictment and prosecution.*—Where the matter published is libelous per se, it is not necessary to aver that it tended to impeach the honesty, integrity, virtue or reputation of the complaining witness;[94] but where the language is not defamatory in itself, the omission of an allegation that it tends to expose one to public hatred, contempt or ridicule, or deprives one of the benefits of public confidence and social intercourse, is fatal.[95] Where a lengthy newspaper article contains matter that is libelous with much that is not, the libelous matter should be singled out and the prosecution based thereon. An information failing in this is defective.[96]

The substance of the language used must be set out and proved as laid.[97]

Where the matter charged in the indictment refers to the person named therein as libeled, and the publication is admitted, a prima facie case is made out.[98] Evidence of the reputation of the prosecutrix must be confined to the time of the alleged slander.[99] A prosecutrix will not be compelled to submit to a physical examination in support of defendant's claim that alleged slander was true.[1]

LICENSES.

§ 1. Power to Require and Validity of Statutes (730).
§ 2. Interpretation of Statutes and Ordinances and Persons Subject (732).
§ 3. Collection and Payment of License Fees (733).
§ 4. Effect of Obtaining or Failure to Obtain License (734).

§ 1. *Power to require and validity of statutes.*—Occupation taxes are in the nature of licenses and are not a taxation of personalty for revenue purposes,[2] and may be required in addition to the revenue tax;[3] but if a license law lack regulative features, it must be sustained if at all as a revenue measure.[4]

The right to require license taxes, being an exercise of the police power,[5]

93. Provident Sav. Life Assur. Soc. v. Johnson, 24 Ky. L. R. 1902, 72 S. W. 754. A statement that plaintiff would steal certain property if he got a chance is libelous per se. Browning v. Com. [Ky.] 76 S. W. 19.

94. People v. Seeley, 139 Cal. 118, 72 Pac. 834.

95. State v. Clark [Kan.] 74 Pac. 232. In North Carolina under a code provision making it a misdemeanor to destroy the reputation of an innocent woman an allegation that certain words amounted to a charge of incontinency, was insufficient [Code, § 1113]. State v. Mitchell, 132 N. C. 1033.

96. Jackson v. State [Tex. Cr. App.] 77 S. W. 223.

97. Charge of incest. West v. State [Tex. Cr. App.] 71 S. W. 967.

98. Com. v. Scouton, 20 Pa. Super. Ct. 503.

99. Bowers v. State [Tex. Cr. App.] 75 S. W. 299; Gipson v. State [Tex. Cr. App.] 77 S. W. 216.

1. Charge of unchastity. Bowers v. State [Tex. Cr. App.] 75 S. W. 299.

2. Kansas City v. Richardson, 90 Mo. App. 450. A license tax is distinguished from an occupation tax to sustain a vehicle license law, the state imposing no occupation tax on vehicles and the constitution limiting occupation taxes of cities to half the amount imposed by the state. Brown v. Galveston [Tex.] 75 S. W. 488. The Montana food inspection law imposing a license fee on vendors of milk to be collected by the inspector does not make the fee a tax by reason of requiring its payment into the treasury. State v. McKinney [Mont.] 74 Pac. 1095.

3. Troy v. Harris [Mo. App.] 76 S. W. 662; Hogan v. Indianapolis, 159 Ind. 523; Levy v. State [Ind.] 68 N. E. 172. Under an act allowing cities to "license, regulate, tax or suppress brokers" a city may impose an occupation tax. Hot Springs v. Rector [Ark.] 76 S. W. 1056. Cities in Virginia may levy license taxes on machine shops. Norfolk v. Griffith-Powell Co. [Va.] 45 S. E. 889.

4. Ex parte Braun [Cal.] 74 Pac. 780. Where the taxation of an occupation is merely for regulation, it is an exercise of police power; if its object is revenue it must be referred to the taxing power. Lamar v. Adams, 90 Mo. App. 35. California cities may license occupations as a revenue measure, that being a "municipal affair" within an exception in the constitution. Ex parte Braun [Cal.] 74 Pac. 780. An ordinance imposing a license on street cars being a revenue measure is invalid where applied to a company operating under a charter requiring a payment of a certain percentage of its receipts to the city. New York v. Twenty-Third St. R. Co., 77 App. Div. [N. Y.] 373. A city may not require a license tax as a condition to practice of the legal profession by one duly licensed by the state and the tax can be sustained if at all only as a revenue measure. Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674.

5. The power to tax occupations is not forbidden either by state or federal consti-

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the ordinary principles governing taxation for revenue, such as equality and uniformity, do not apply,[6] and such regulations do not infringe other constitutional provisions unless the license charge is excessive,[7] or the classification is unreasonable or discriminating.[8] A constitutional provision against restraint of trade is not infringed.[9] Occupation taxes cannot be so imposed as to regulate interstate commerce,[10] and the fact that they are police regulations does not of course exempt them from constitutional provisions as to plurality of subjects[11] or as to

tutions. In re Lipschitz [N. D.] 95 N. W. 157. Laws regulating license of barbers are a valid exercise of the state's police power. State v. Sharpless, 31 Wash. 191, 71 Pac. 737. Requirement of license to stand or drive hack in public streets sustained. People v. Sewer, W. & S. Commission, 90 App. Div. [N. Y.] 555.

6. Kansas City v. Richardson, 90 Mo. App. 450; Strater Bros. Tobacco Co. v. Com. [Ky.] 78 S. W. 871; State v. Hammond Packing Co., 110 La. 180; In re Lipschitz [N. D.] 95 N. W. 157. It is no objection to a vehicle license ordinance that it omits to tax street cars, automobiles and vehicles of non-residents. Kersey v. Terre Haute [Ind.] 68 N. E. 1027. A law imposing a tax on cigarette dealers is not unconstitutional for lack of uniformity for exempting jobbers doing an interstate business with customers without the state. Cook v. Marshall County [Iowa] 93 N. W. 372.

7. One attacking a license law as being so unreasonable as to amount to a tax on the business within the inhibition of a constitutional provision must show wherein it exceeds the actual costs or reasonable charges for enforcing the regulations. Seattle v. Barto, 31 Wash. 141, 71 Pac. 735. An ordinance imposing a license tax of $50.00 a day on transient and bankrupt sale merchants is unreasonable. Springfield v. Jacobs [Mo. App.] 73 S. W. 1097. An ordinance imposing a license fee on telegraph poles of companies engaged in interstate business is not a valid exercise of police power where no inspection had been made and the amount was several times in excess of what could reasonably be exacted for any such purpose. Postal Tel. Cable Co. v. Taylor, 192 U. S. 64.

8. Peddlers' act sustained. In re Watson [S. D.] 97 N. W. 463. A law taxing attorneys lending money without taxing other money lenders is violative of the uniformity clause. Beckett v. Savannah, 118 Ga. 58. An ordinance imposing a license tax on dealers in oil and exempting from its provisions dealers handling oils on which the license has been paid is invalid for lack of uniformity, the classification being unreasonable. Standard Oil Co. v. Spartanburg, 66 S. C. 37. License laws may not make arbitrary discriminations based on the value of the stock and the taxes paid thereon. State v. Mitchell, 97 Me. 66. There is no discriminating classification in placing persons loaning money on chattel security in a class different from banks. Cowart v. City Council of Greenville [S. C.] 45 S. E. 122. An allegation that a certain amount fixed as a license tax is unequal, unjust and disproportionate to that on other occupations without recital of facts to support it is a mere conclusion of law. Covington v. Herzog [Ky.] 76 S. W. 538. Discrimination against magnetic healers in act licensing medical practitioners sustained. Parks v. State, 159 Ind. 211. The Indiana act taxing transient merchants did not take property without due compensation and is not a special law because of the incidental provision as to payment of fees into school fund. It is not void for exempting sheriffs, assignees and public officers as authorizing inequality of taxation and does not violate the provisions of the state constitution guaranteeing life, liberty and pursuit of happiness. Levy v. State [Ind.] 68 N. E. 172. A peddlers' license law applicable solely to non residents violates the privileges and immunities clause of the constitution. In re Jarvis, 66 Kan. 329, 71 Pac. 576. An act applicable to all transient merchants does not grant special privileges and immunities. Levy v. State [Ind.] 68 N. E. 172. The Indiana act imposing license tax on transient merchants did not violate the equal protection of the laws clause of the constitution of the United States. Id.

9. Ordinances establishing public markets and requiring vendors elsewhere to take out licenses do not restrain trade within the constitutional sense. Buffalo v. Hill, 79 App. Div. [N. Y.] 402.

10. Kehrer v. Stewart [Ga.] 44 S. E. 854. The North Dakota act imposing licenses on hawkers and peddlers does not authorize a tax on interstate commerce. In re Lipschitz [N. D.] 95 N. W. 157. The commerce clause is violated by requiring a license fee from the agent of a non resident firm delivering goods sold on orders. Caldwell v. State, 187 U. S. 622, 47 Law. Ed. 336. A village may impose an occupation tax on telegraph companies doing business therein where it imposes no restriction on interstate business or business of the government. Western Union Tel. Co. v. Wakefield [Neb.] 95 N. W. 659. The North Carolina laws imposing a license tax on all persons engaged in the business of selling sewing machines violates the commerce clause when applied to a machine shipped into the state by a non resident on a written order of a customer under an ordinary C. O. D. consignment. Norfolk & W. R. Co. v. Sims, 191 U. S. 441. A vehicle license ordinance is not operative on a merchant, a non resident of the state, delivering his merchandise to customers in the state and at railroad station for shipment. Dooley v. Bristol [Va.] 46 S. E. 296. A license tax imposed on peddlers by municipalities does not burden trade relations of a merchant in another state with a person who is required to pay for goods purchased before they are delivered to him in such state. In re Pringle [Kan.] 72 Pac. 864. A law taxing telephones does not contravene the commerce clause where it is applicable solely to instruments used solely in domestic business. State v. Rocky Mountain Bell Tel. Co., 27 Mont. 394, 71 Pac. 311. Act requiring licensing of persons soliciting orders for goods held void. In re Kinyon [Idaho] 75 Pac. 268.

11. The Indiana law taxing transient mer-

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special legislation.[12] A license tax on the business of a buyer of cotton for export is a duty on exports, within the meaning of the constitution.[13] An ordinance licensing milk vendors and providing for an inspection fee to be paid to the inspector as his compensation does not violate a law against taxing persons selling farm products in cities without the regular market houses.[14] A city imposing a license must act within its charter power.[15] They have no retrospective effect.[16]

There is a presumption that levy of license tax was for purposes allowed by law.[17] The decisions of state courts sustaining constitutionality of license ordinances are binding on Federal courts.[18]

§ 2. *Interpretation of statutes and ordinances and persons subject.*[19]—A statute imposing a license tax will in case of doubt be construed most strongly against the government and in favor of the citizen.[20] Under the laws of Missouri, a brewer delivering beer to his customers must take out a vehicle license.[21] Laws imposing a license tax on a particular business intend that the person shall hold himself out as such and be actually engaged therein.[22] The New York charter requiring certification of engineers has no application to a nonresident engineer temporarily employed on river scows in the removal of obstructions under contract with the government.[23] Where different kinds of business subject to license are combined, they must pay license on each business.[24] The Missouri act

chants did not violate the provision against plurality of subjects. Levy v. State [Ind.] 68 N. E. 172. An ordinance does not violate rules as to plurality by the enumeration of the trades and occupations liable to license taxation. Seattle v. Barto, 31 Wash. 141, 71 Pac. 735. An ordinance levying license tax on real estate agents so defined as to include "real estate agents and brokers, house agents, rental agents, loan and brokerage companies" is not unconstitutional though the several classes are grouped under one head. Covington v. Herzog [Ky.] 76 S. W. 538.

12. The Washington barber's license act is not objectionable as local legislation. State v. Sharpless, 31 Wash. 191, 71 Pac. 737.

13. State v. Allgeyer, 110 La. 839.

14. Norfolk v. Flynn [Va.] 44 S. E. 717.

15. A city may impose a license tax on "magnetic, psychic and other healers" in Kansas. Steiner v. Liggett [Kan.] 72 Pac. 577. The city of New York may impose on licensed hackmen an additional fee for hacks allowed to stand at other than public hack stands. New York v. Reesing, 77 App. Div. [N. Y.] 417. The laws of Oregon authorize the imposition of a license tax on attorneys. Lent v. Portland [Or.] 71 Pac. 645.

An ordinance for licensing business for purposes of "regulation and revenue" is repealed by an act giving municipalities power to impose such taxes solely for purposes of regulation. Santa Monica v. Guidinger, 137 Cal. 658, 70 Pac. 732. A provision of an ordinance creating the remedy for the enforcement of a license tax is repealed by repeal of an ordinance imposing the tax. Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674.

16. An act requiring a license fee of corporations increasing their capital stock has application to corporations created thereafter and those incorporated before but authorized thereafter to increase their capital stock and not companies created prior to the act and then given the right to increase the capital stock. Com. v. Buffalo & S. R. Co. [Pa.] 56 Atl. 409. A statute repealing a license requirement has no retrospective effect. Flanigan v. Sierra County [C. C. A.] 122 Fed. 24.

17. Brown v. Galveston [Tex.] 75 S. W. 488.

18. Flanigan v. Sierra County, 122 Fed. 24.

19. See Auctions and Auctioneers, Attorneys and Counsellors, Common Schools, Intoxicating Liquors, Medicine and Surgery for licenses applicable to the particular business or profession.

20. Washington Elec. Vehicle Transp. Co. v. D. C., 19 App. D. C. 462. An automobile is not covered by an ordinance imposing a vehicle tax on proprietors of "hacks, cabs, omnibuses, and other vehicles for the transportation of passengers for hire," this type of vehicle not being in use at the time of the passage of the ordinance. Id. A law allowing cities to license itinerant doctors and itinerant physicians and surgeons gave no power to require a license from a "dental surgeon." Cherokee v. Perkins, 118 Iowa, 405.

21. A brewer delivering beer to his customers must take out a license. Kansas City v. Smith, 93 Mo. App. 217.

22. A manufacturer is a merchant if he keeps goods manufactured by him at a store kept by him for the sale of such goods in the ordinary course of trade but not if he only manufactures goods to fill orders from his customers. Kansas City v. Ferd Heim Brewing Co., 98 Mo. App. 590. One is engaged in the business of a dealer in pistols in Alabama who has a place for their sale and who holds himself out for business though only one sale may be shown. Act does not apply to sales of pledged pistols by licensed pawnbrokers. Morningstar v. State, 135 Ala. 66. An occasional purchaser of a note without seeking the transaction does not make the party subject to the privilege tax for shaving notes. Trentham v. Moore [Tenn.] 76 S. W. 904.

23. People v. Prillen, 173 N. Y. 67.

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imposing license taxes on local insurance agencies does not authorize the imposition of an additional license tax on the individual insurance agents.[25] A privilege tax on cotton seed oil mills of a certain capital does not have reference to the capital stock.[26] In Massachusetts, a nonresident purchasing from manufacturers bits of unavailable iron and reselling them is not a junk dealer,[27] otherwise, persons engaged in the business of buying old gold and silver articles to be sold for dental or minting purposes.[28] A person selling ranges by sample, taking orders for future delivery to be paid for only on such delivery, is not a peddler.[29] A nonresident architect paying occasional visits to a town to inspect buildings in course of construction and to see that his plans and specifications are carried out is liable to a license tax on architects required by such city.[30]

A lessee of a street railroad is not liable for fees due from the lessor prior to the lease, though the lessee took the property "subject to all the debts and liabilities of the first company.[31]

A city may require applicants for brokers' licenses to execute a sworn statement that all their orders were executed on the respective exchanges.[32] One illegally conducting a stock exchange is to be pursued criminally and not as a tax defaulter failing to pay occupation tax imposed on dealers in "futures" lawfully engaged in the business.[33]

Exemptions.—In Georgia, disabled Confederate soldiers are exempt from the payment of business tax.[34] A sugar refiner is a manufacturer, and as such exempt from license taxation under the constitution of Louisiana.[35]

§ 3. *Collection and payment of license fees.*—A company accepting an ordinance granting a right to maintain poles and wires on condition of payment of a stipulated yearly license fee may not thereafter question the reasonableness of the charges.[36]

A right to collect a license tax prior to repeal of act imposing the tax ceases with the repeal.[37] A law requiring no license fee does not authorize recovery back of a proportional part of a fee paid by one under the former law.[38] Under the Atlantic City ordinance for licensing auctioneers, etc., passed July 14, 1902, no license fee becomes payable until June 1, 1903.[39]

That one paid a license tax one year without protest will not estop him to deny the validity of an ordinance increasing the amount for subsequent years.[40]

A license may be revoked without notice to the licensee where there is reason

24. Seller of soda water and restaurant keeper. State v. Rombotis, 110 La. 433. In Alabama one taking out a merchant's license cannot be compelled to take out a license as a seller of millinery, where he sold but did not trim. Tuscaloosa v. Holczstein, 134 Ala. 636.

25. Kansas City v. Oppenheimer [Mo. App.] 75 S. W. 174.

26. Hazlehurst Oil Mill & Fertilizer Co. v. Decell [Miss.] 33 So. 412.

27. Com. v. Ringold, 182 Mass. 308.

28. Com. v. Hood, 183 Mass. 196.

29. Potts v. State [Tex. Cr. App.] 74 S. W. 31; Harkins v. State [Tex. Cr. App.] 75 S. W. 26.

30. Wilson v. City Council of Greenville, 65 S. C. 426. Evidence of practical work as architect, the writing of articles on architecture for technical journals, use of stationery and sign announcing that fact, designation as an architect by the directory together with information showing location of building designed and superintended authorizes issuance of certificate under New Jersey laws to persons engaged in architecture at the passage of P. L. 1902, p. 54. Cardiff v. New Jersey State Board of Architects [N. J. Law] 54 Atl. 294.

31. New York v. Third Ave. R. Co., 77 App. Div. [N. Y.] 379.

32. Hot Springs v. Rector [Ark.] 76 S. W. 1056.

33. Jones v. Stewart [Ga.] 44 S. E. 879.

34. Coxwell v. Goddard [Ga.] 46 S. E. 412.

35. State v. American Sugar Refining Co., 108 La. 603.

36. Postal Tel. Cable Co. v. Newport [Ky.] 76 S. W. 159.

37. Bradstreet Co. v. Jackson, 81 Miss. 283.

38. Ryan v. New York, 40 Misc. [N. Y.] 228.

39. Atlantic City v. Freisinger [N. J. Law] 54 Atl. 249.

40. Standard Oil Co. v. Spartanburg, 66 S. C. 37.

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to believe that the business is a nuisance, a menace to public health, or detrimental to peace or morals.[41]

A complaint to enjoin the enforcement of vehicle license ordinance should allege use of streets by plaintiff's vehicles and his ownership of the vehicles.[42] A complaint for practicing medicine without a license need not specify the particular acts or means of practice.[43]

An information under an act imposing a license tax on peddlers of cooking stoves or ranges must show that the stoves sold were cooking stoves or ranges.[44] An information under an act imposing a license on peddlers of specified articles and providing that a merchant paying an occupation tax shall be exempt from such tax for selling the articles in his store must negative the fact that defendant was such merchant.[45] In a prosecution for violation of laws requiring licenses from junk dealers, evidence is inadmissible to show the interpretation put on the law by officials.[46]

§ 4. *Effect of obtaining or failure to obtain license.*—Generally, the effect of failure to obtain license is to invalidate contracts so that there may be no recovery thereunder.[47] A contract for sale of property by an unlicensed broker is not absolutely void.[48]

LICENSES TO ENTER ON LAND.

§ 1. Nature, Creation and Indicia of a License and Distinction from Easements and Other Estates (734).
§ 2. Rights and Liabilities of Licensees (734).
A. Bare Licensees (735).
B. Licenses Coupled With an Interest (736).

§ 1. *Nature, creation and indicia of a license and distinction from easements and other estates.*—A license is an authority or permission to do some one act or a series of acts on the land of another.[49] A license may be either an express authority, conferred in writing[50] or by parol agreement,[51] or an implied authority inferred from the relationship of the parties.[52] A license may be granted

41. Wallace v. Reno [Nev.] 78 Pac. 528.
42. Kersey v. Terre Haute [Ind.] 68 N. E. 1027.
43. White v. Lapeer Circuit Judge [Mich.] 94 N. W. 601.
44. Harkins v. State [Tex. Cr. App.] 75 S. W. 26.
45. Potts v. State [Tex. Cr. App.] 74 S. W. 31.
46. Com. v. Hood, 183 Mass. 196.
47. A physician in Texas may not recover for service where he is not regularly licensed. Wickes-Nease v. Watts, 30 Tex. Civ. App. 515. An imperfect registration of a physician cured by the issuance of a certificate from the proper authority relates back to the original registration and renders his contracts of employment legal from that date. Ottaway v. Lowden, 172 N. Y. 129. Where one of the members of a firm engaged in plumbing business did not hold certificate the firm could not recover for work done [Building Code Law N. Y. par. 25, subd. 3]. Schnaier v. Navarre Hotel & Importation Co., 82 App. Div. [N. Y.] 25. The fact that the principal had not paid his privilege tax does not prevent him from holding his agent to account for proceeds of transaction. Decell v. Hazlehurst Oil Mill & Fertilizer Co. [Miss.] 35 So. 761.
48. Ober v. Stephens [W. Va.] 46 S. E. 195. One selling real estate for another without holding himself out to be a real estate broker may recover though he has not taken out a broker's license as required by statute. Black v. Snook, 204 Pa. 119.
49. Fonda, J. & G. R. Co. v. Olmstead, 84 App. Div. [N. Y.] 127; Price v. Madison [S. D.] 95 N. W. 933; Coyne v. Warrior Southern R. Co. [Ala.] 34 So. 1004.
50. Price v. Madison [S. D.] 95 N. W. 933. Boise City Artesian H. & C. Water Co. v. Boise City [C. C. A.] 123 Fed. 232; Barney v. Lincoln Park Com'rs, 203 Ill. 397; Brown v. New York, 78 App. Div. [N. Y.] 361; Caughie v. Brown, 88 Minn. 469.
51. Fonda, J. & G. R. Co. v. Olmstead, 84 App. Div. [N. Y.] 127; Kastner v. Benz [Kan.] 73 Pac. 67; Oster v. Broe [Ind.] 64 N. E. 918; Snyder v. East Bay Lumber Co. [Mich.] 97 N. W. 49; Turner v. Mobile, 135 Ala. 73; Worthen v. Garno, 182 Mass. 243.
52. Where one carries on a public business, he gives to the public an implied license to enter his premises upon the business there carried on. Chesley v. Rocheford [Neb.] 96 N. W. 241; Muench v. Heinemann [Wis.] 96 N. W. 800. But mere acquiescence on the part of a railroad company in the use of its track by the public does not confer any right to use the same, or amount to a license. Wilmurth's Adm'r v. Ill. Cent. R. Co. [Ky.] 76 S. W. 193.

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for a consideration,[53] but is valid, though gratuitous.[54] A license, in so far as the licensor has right and authority to grant the same,[55] authorizes the performance of the acts specified or those necessary for the enjoyment of the license, but cannot be extended or varied.[56] A license to enter land and do certain acts thereon does not create the relation of landlord and tenant,[57] nor does it amount to an easement, for it confers no right or interest in the land.[58] But a grant in proper form of a perpetual right of user, though described as a license, gives the grantee an easement or other interest in the land.[59] Possession or user under a license is not adverse, and will not create an easement by prescription.[60]

§ 2. *Rights and liabilities of licensees. A. Bare licensees.*—In the law of torts, where the term is usually employed, a bare licensee is one who enters on the premises of another, with his consent, but without any invitation, express or implied. He can recover only for wanton or willful injury to him by the licensor.[61] This branch of the subject is more specifically treated elsewhere.[62] The term bare licensee may be used also in a wider sense to mean one who is given a bare license, as distinguished from a license coupled with an interest. The distinction is mainly one of degree and the cases are not uniform, but generally one who acts under a gratuitous license without incurring any substantial expense in reliance on the license is a bare licensee.[63] A license without consideration is terminated by failure to act on it within a reasonable time,[64] by a conveyance of the property of the licensor,[65] or by a mere notice from the licensor that the license is revoked.[66]

53. Price v. Madison [S. D.] 95 N. W. 933; Kastner v. Benz [Kan.] 73 Pac. 67; Caughie v. Brown, 88 Minn. 469.

54. Kibbey v. Richards, 30 Ind. App. 101; Snyder v. East Bay Lumber Co. [Mich.] 97 N. W. 49.

55. A license to quarry stone on certain land is subordinate to a prior grant by deed of a right of way over the same. Coyne v. Warrior Southern R. Co. [Ala.] 34 So. 1004. A written license to cut all the timber upon the lands described therein to which the licensor had any right, title or interest, conferred no consent or authority on the licensee to cut timber on land which, though included in the parcel of land described in the license, belonged to a third party. Caughie v. Brown, 88 Minn. 469.

56. Where a railroad company for a consideration allows a telegraph company to erect its poles on a right of way which the railroad company has acquired for the construction of its road, this gives the telegraph company a license as against the railroad company but does not bar a claim for damages by the owner of the land for the additional burden. Hodges v. Western Union Tel. Co., 133 N. C. 225. The proprietor of a grain elevator built by permission on the right of way of a railroad company is a licensee on the premises and must operate his elevator subject to the right of the company to use the track for its trains and for switching purposes in the ordinary and usual way. Chicago, B. & Q. R. Co. v. Giffen [Neb.] 96 N. W. 1014.

57. Squire v. Ferd Heim Brew. Co., 90 Mo. App. 462. License to enter and remove crops. Janouch v. Pence [Neb.] 93 N. W. 217.

58. A bill of sale of standing timber, while insufficient to convey any interest in the realty is admissible as evidence to prove a license to enter upon the premises for the purpose of cutting and removing lumber. Price v. Madison [S. D.] 95 N. W. 933. See, also, Easements.

59. An indenture between a property owner and park commissioners whereby the former grants to the latter perpetual leave and license to occupy a portion of his land for park purposes transferred a permanent interest in the property so long as it should be used for the specified purpose, and such license is not revoked by a subsequent conveyance by the grantor. Barney v. Lincoln Park Com'rs, 203 Ill. 397.

60. Continuance for twenty years of a wall erected under a license does not necessarily give a right by adverse possession. Percival v. Chase, 182 Mass. 371. The user of a private way under a naked license and without an assertion of adverse right, will not establish an easement by prescription against the owner of the land. Kibbey v. Richards, 30 Ind. App. 101. Possession by a licensee is the possession of the licensor and does not prevent the latter giving possession to another. Percival v. Chase, 182 Mass. 371. But where the owners of land traversed by a natural water course unite in widening it for better drainage, the continued and unobstructed use thereof for 40 years will raise a presumption that the widening was done, not under a license, but under a claim of right which has become good by prescription. Spink v. Corning, 172 N. Y. 626.

61. Fall of weight from a structure in process of building. Chesley v. Rocheford [Neb.] 96 N. W. 241. One doing business with the employees of the licensor, though expressly directed by him to use the elevator which caused the injury. Muench v. Heinemann [Wis.] 96 N. W. 800.

62. See Negligence.

63. See Tiffany, Real Prop. p. 678 et seq.

64. Right to remove timber where no time

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(§ 2) *B. Licenses coupled with an interest.*—An executed parol license, given for a valuable consideration, and upon the strength of which the licensee has expended money or labor, is a license coupled with an interest and is not revocable,[67] and rights acquired thereunder will be protected in equity.[68]

LIENS.

§ 1. Common Law, Equitable and Statutory Liens (737).
A. Common Law Liens (737).
B. Equitable Liens (737).
C. Statutory Liens (738).
§ 2. Priorities Between Liens (739).
§ 3. Transfer and Substitution of Liens (740).
§ 4. Extinguishment and Discharge (740).
§ 5. Enforcement and Protection of Liens (735).

Scope of article.—This article treats only of liens in general; specific liens being treated under the specific topics to which they relate.[69]

limit is fixed. Snyder v. East Bay Lumber Co. [Mich.] 97 N. W. 49.

65. Jayne v. Cortland Waterworks Co., 42 Misc. [N. Y.] 263. An oral license to use a right of way is not binding upon the licensor's vendee when no mention of the right of way is made in the deed. Worthen v. Garno, 182 Mass. 243. A license to enter on land and cut timber, though granted for a consideration, is terminated by the sale of the land, but the licensee has the right to remove any timber he has cut prior to such sale. Price v. Madison [S. D.] 95 N. W. 933; Polk v. Carney [S. D.] 97 N. W. 360.

66. A license to use a private way, where no consideration is paid therefor, or any value parted with on the faith that the license is perpetual, is revocable at the will of the owner. Kibbey v. Richards, 30 Ind. App. 101. A landowner's verbal consent that another person may put a sewer through his land is a mere revocable license, which may be terminated by reasonable notice. Fonda, J. & G. R. Co. v. Olmstead, 84 App. Div. [N. Y.] 127. A permit by the board of docks allowing the construction of a dumping board on a part of a dock, if construed as a license, is revocable at pleasure Brown v. New York, 78 App. Div. [N. Y.] 361. Permission by a railroad company for the use of its poles on which to erect a telephone line, in return for certain privileges in the use of such line, no time being specified, is a license only and may be revoked after reasonable notice. Western Union Tel. Co. v. Carver [Tex. Civ. App.] 74 S. W. 55. A city ordinance giving a company the right to lay water pipes in the streets without specifying any term is a license only, revocable at the will of the city. In the absence of statutory authority a city has no power to grant a perpetual franchise. Boise City Artesian H. & C. Water Co. v. Boise City [C. C. A.] 123 Fed. 232. A parol license for the erection of structures on land is revocable at the pleasure of the licensor, and though acted on does not raise an estoppel in pais against the licensor. Erection of wharves on shore lands. Turner v. Mobile, 135 Ala. 73. Where the public are for some years allowed to use a roadway, the erection of obstructions at either end of such roadway by the owner and maintaining the same in place for a reasonable time is sufficient notice that the license to use the road has been withdrawn. In this case the maintenance of an obstruction for four months was held sufficient. Ill. Cent. R. Co. v. Waldrop, 24 Ky. L. R. 2127, 72 S. W. 1116.

67. License to adjoining owner to use stairway and make entrance through party wall. Kastner v. Benz [Kan.] 73 Pac. 67. License to cut timber, no time limit being fixed, is not revoked by failure to exercise it within a reasonable time. Watson v. Adams [Ind. App.] 69 N. E. 696. A license coupled with an interest cannot be revoked by a lessee of the licensor who takes with knowledge so long as the license is not abused. Darlington v. Mo. Pac. R. Co., 99 Mo. App. 1. Where a licensee, relying on the license, takes possession and makes improvements, the license may become irrevocable by equitable estoppel. License to lay water pipes to a spring. Moore v. Neubert, 21 Pa. Super. Ct. 144. Where a railroad company puts in a switch track on private land, partly at its own expense and partly at the expense of the owner of the land, and for their mutual advantage, the company had a license coupled with an interest in the switch, and such license could not be arbitrarily or suddenly revoked. Darlington v. Mo. Pac. R. Co., 99 Mo. App. 1. Where, by an oral agreement between their owners, adjoining buildings were erected with a stairway wholly on the land of one for the joint use of himself and the other owner who provided no other means of access to the upper stories, a revocation of the license was enjoined in a court of equity on the ground that it would cause great injury to the licensee. Dodge v. Johnson [Ind. App.] 67 N. E. 560. Where a licensee sues a licensor for damages for the revocation of an oral license, and recovers the whole sum he has expended on the faith of the license, he no longer has any right to enforce the license, but the latter must be treated as revoked. Oster v. Broe [Ind.] 64 N. E. 918.

68. Maple Orchard, G. & V. Co. v. Marshall [Utah] 75 Pac. 369.

69. See Attachment; Agency; Attorney and Counselor; Auctions and Auctioneers; Brokers; Carriers; Chattel Mortgages; Executions; Factors; Inns, Restaurants, and Lodging Houses; Judgments; Mechanics' Liens; Mortgages; Taxes; Vendor and Purchaser; Agister's Liens (see Animals); Logging Liens (see Forestry and Timber); Crop Liens (see Agriculture and Landlord and Tenant); Maritime Liens (see Shipping and Water Traffic).

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§ 1. *Common law, equitable and statutory liens. A. Common law liens.*—A common law lien is the mere right of retaining possession of certain personal property on which work and labor has been performed until the claim for such services has been satisfied.[70] It is dependent upon possession, actual or constructive,[71] which must be obtained in a lawful manner, and with the owner's consent.[72]

(§ 1) *B. Equitable liens.*[73]—An equitable lien arises by express contract, showing an intention to charge certain property therein described with a certain obligation or debt,[74] as by an order,[75] note,[76] check,[77] or assignment;[78] but the assignment must be of some obligation owing to the assignor.[79] The contract must show an intention to charge the property with a certain obligation or debt,[80] and must describe the property sufficiently for identification.[81] A mere promise to pay from a particular fund is not sufficient; there must be some positive act of appropriation on the part of the debtor whereby he ceases to control the fund.[82] An equitable lien is not dependent upon possession,[83] and can be created only by the owner or his authorized agent.[84]

An equitable lien may also arise, in the absence of an express agreement, upon equitable principles where the rights of the parties cannot otherwise be secured.[85]

70. Burrough v. Ely [W. Va.] 46 S. E. 371. One repairing a machine upon request may retain possession thereof to secure payment of his charges for repairs. Henderson v. Mahoney [Tex. Civ. App.] 72 S. W. 1019. Factors. Ermeling v. Gibson Canning Co., 105 Ill. App. 196. Attorney. In re Sweeney, 86 App. Div. [N. Y.] 547. Carrier: Storage charges on goods not promptly called for. Schumacher v. Chicago & N. W. R. Co. [Ill.] 69 N. E. 825. And see titles Agency; Attorney and Counselor; Factors.

71. Possession of bills of lading entitles one to a lien on the property evidenced thereby for money furnished to pay drafts attached to such bills. First Nat. Bank v. San Antonio R. Co. [Tex.] 77 S. W. 410.

72. A mover of furniture acquires no lien for services on property which he was told not to move, and which in fact he did not move, but possession of which he obtained without the owner's consent. Booker v. Reilly, 85 App. Div. [N. Y.] 614. Factor. People's Bank of Pratt v. Frick Co. [Okl.] 73 Pac. 949.

73. For specific equitable liens see titles Chattel Mortgages; Mortgages; Vendor and Purchaser.

74. Evidence held insufficient to show that a son agreed to pledge stock with his mother as security for money advanced to buy the stock so as to create an equitable lien on the stock in favor of the mother's estate. Duvall v. Hambleton [Md.] 55 Atl. 431.

75. An order given, for a valuable consideration, for the payment of money out of a specific fund creates an equitable lien upon such fund. Third Nat. Bank v. Atlantic City, 126 Fed. 413.

76. A note executed in consideration of a devise, creates an equitable lien upon the estate in favor of the devisee. Ballard v. Camplin [Ind.] 67 N. E. 505.

77. Checks drawn on a special fund create an equitable lien thereon for the amount of such checks. Fortier v. Delgado [C. C. A.] 122 Fed. 604.

78. An assignment of part of an indebtedness secured by a mortgage creates a lien pro tanto on such mortgage. Miller v. Campbell Commission Co. [Okl.] 74 Pac. 507.

79. The assignment by one of apportionment warrants drawn in his own favor against his own property, creates an equitable lien in favor of the assignee, as the warrants created no obligation in the assignor's favor. United Loan & Deposit Bank v. Bitzer [Ky.] 78 S. W. 183.

80. Duvall v. Hambleton [Md.] 55 Atl. 431; Elmore v. Symonds, 183 Mass. 321. A contract to dig a well payment for which is to be made in land at a certain price, or in cash (Meyer v. Quiggle, 140 Cal. 495, 74 Pac. 40); or to look exclusively to trust property in the hands of a trustee for a debt or charge (Industrial Lumber Co. v. Texas Pine Land Ass'n [Tex. Civ. App.] 72 S. W. 875), does not show sufficient intention to charge the property.

81. Franklin v. Browning [C. C. A.] 117 Fed. 226.

82. An agreement to pay over rents of certain specified property as they accrue does not create an equitable lien, unless there is an express stipulation to that effect, or language from which such an intention clearly appears, as in payment of a debt representing money used to increase the value of the property on which the lien is claimed. Elmore v. Symonds, 183 Mass. 321.

83. A factor, in pursuance of an agreement, may have an equitable lien for advances on all goods for which invoices are sent him, whether actually shipped or remaining in the hands of the consignor. In re Olzendam Co., 117 Fed. 179. See, also, Howard v. Delgado [C. C. A.] 121 Fed. 26.

84. One having legal title to land cannot by contract create an equitable lien for another having an equitable interest therein without the latter's authority or consent. Atlantic Trust & Banking Co. v. Nelms, 116 Ga. 915.

85. One of two or more beneficiaries of a life insurance policy, who pays premiums to keep it alive is entitled to an equitable lien on the proceeds for his reimbursement. Stockwell v. Mut. Life Ins. Co., 140 Cal. 198, 73 Pac. 833. In Washington an owner of land who pays overdue taxes in good faith, in ignorance of a sale, is entitled to a judgment against the tax purchaser for the

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The doctrine applicable to a quasi-public corporation that persons furnishing material or labor to keep it in operation are entitled to a preferential payment out of its assets, amounting to an equitable lien, does not apply to gas companies,[86] nor to services rendered to a railroad company in furthering business other than railroad business.[87]

(§ 1) *C. Statutory liens.*[88]—A statutory lien is one that is declared to be such by statute, and embraces in modified form some of the common law liens;[89] but in order that one may avail himself of such lien, he must comply with all the requirements of the statute,[90] as by filing a statement of his claim,[91] or by delivery and notice.[92] One will not acquire a statutory lien if he has no valid and enforceable claim for services,[93] or if he has not performed services required by the statute,[94] or if, where the lien is dependent upon possession, he obtains possession unlawfully.[95] A statutory lien, in the absence of express legislation, does not attach to public property;[96] nor to such property in the hands of a private person, who obtained title thereto after the claim to a lien arose.[97] A party to whom a certain sum is payable by a devisee under the terms of a devise by another has a lien upon the legacy for such sum.[98] A laborer, within the meaning of statutes giving him a lien for services, is one who performs manual labor only.[99]

amount so paid, and to have it declared a lien on the property. Rothchild Bros. v. Rollinger, 32 Wash. 307, 73 Pac. 367.

86. Allegations in bill held too vague to support this doctrine even though the case had been one within it. Louisville & N. R. Co. v. Memphis Gaslight Co. [C. C. A.] 125 Fed. 97.

87. As in a logging venture. Security Sav. & Trust Co. v. Goble R. Co. [Ore.] 74 Pac. 919.

88. For specific statutory liens see titles Mechanics' Liens; Attachment; Execution; Inns, Restaurants, and Lodging Houses; Taxes; Crop Liens (see Agriculture and Landlord and Tenant); Agister's Liens (see Animals); Logging Liens (see Forestry and Timber); Warehousing and Deposits.

89. But a statutory lien for labor does not arise under a statute providing that in cases of attachment, etc., one having a claim for labor against the defendant may give notice thereof and be paid out of the proceeds unless his claim is disputed [Code Civ. Proc. Cal. § 1206]. Winrod v. Wolton [Cal.] 74 Pac. 1037.

90. Moher v. Rasmusson [N. D.] 95 N. W. 152. Notice presented by an employe, under Iowa Code, §§ 4019, 4020, requiring the presentation of a notice of claim before sale to effect a labor lien, does not create a lien on the fund derived from a foreclosure sale, such sections not applying to a foreclosure by notice and sale. Wells v. Kelley [Iowa] 96 N. W. 1104. Lien of drainage ditch contractor under Ky. St. § 2400 is effective only from giving of certificate of amount due by county surveyor. Dixon v. Labry [Ky.] 78 S. W. 430.

91. A thresher, claiming a lien under R. S. 1899, § 4824, must file a statement in the office of the register of deeds showing "the amount and quantity of grain threshed." Moher v. Rasmusson [N. D.] 95 N. W. 152.

92. A public cartman claiming a lien on property under the ordinances of New York City must convey and deliver the property to the property clerk of the police department, or to a convenient storage warehouse, and give notice, in writing, with a brief statement of particulars, to the bureau of licenses; and not keep the property in his own possession. Browning v. Belford, 83 App. Div. [N. Y.] 144; Taylor v. Smith, 87 App. Div. [N. Y.] 78.

93. A public cartman is not entitled to a lien, under a city ordinance, for his charges for transportation, where injury to the goods in transit was in excess of such charges. Browning v. Belford, 83 App. Div. [N. Y.] 144.

94. Although he has performed some services, other than those provided for, in respect to the property. Taylor v. Smith, 87 App. Div. [N. Y.] 78.

95. A warehouseman cannot claim a lien, as against a mortgagee, under a statute giving warehousemen a lien on goods stored for services rendered, on property stored with him in violation of a condition that the mortgagor should not remove the property without the mortgagee's written consent [Laws N. Y. 1897, p. 533, c. 418, art. 6, § 73]. Allen v. Becket, 84 N. Y. Supp. 1007.

96. A logging lien does not attach to property of the United States government [G. L. Minn. 1899, c. 342, p. 432]. Rowley v. Conklin, 89 Minn. 172.

97. Rowley v. Conklin, 89 Minn. 172.

98. Under Ky. St. 1899, §§ 2066 and 467, creditors of a testator have a lien of record for their debts on land which he has directed by his will to be sold and from the proceeds to pay his debts. Hurst v. Davidson [Ky.] 76 S. W. 37.

99. Independent contractors, clerks, secretaries, or agents, are not workmen or laborers having a special privilege on property for their wages under the laws of Louisiana. Fortier v. Delgado, 122 Fed. 604. **Maine**—Rev. St. c. 91, § 38, as amended by c. 183, p. 172, P. L. 1889, giving a logging lien protects laborers only; "whoever labors" means "laborer," and in the statutory sense is one who performs manual labor under direction of his employer, and not an independent contractor. Littlefield v. Morrill, 97 Me. 505.

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Construction.—The provisions of lien laws must be liberally construed, with a view to effect their objects and promote justice;[1] but the operation, extent, and character of the lien is to be ascertained only from the terms of the statute; and courts cannot extend it to cover cases for which the statute does not provide.[2] A statute making a purchaser personally liable for the full amount of a lien, if the property is so charged that the lien cannot be enforced against it after proper proceedings, is unconstitutional, as depriving the purchaser of his property without due process of law.[3]

§ 2. *Priorities between liens.*[4]—As between equitable liens, priority depends upon which one has the better equity,[5] as between an equitable and a common law particular lien, it depends upon notice of the latter lien.[6] As between statutory liens, priority depends upon the express statutory provisions and compliance therewith, in the absence of which it would depend upon priority in time and notice.[7] As between an equitable and a statutory lien, in the absence of statute fixing priority, it depends upon which lien is prior in time.[8]

1. Phillips v. Salmon River M. & D. Co. [Idaho] 72 Pac. 886.

2. Moher v. Rasmusson [N. D.] 95 N. W. 152. A lien law providing that "all conditions and reservations in a contract for the sale of goods and chattels, accompanied by immediate delivery" and providing that title shall remain in the seller until paid for, shall be void, unless filed, does not require the filing of a conditional contract for the sale of chattels to be manufactured by the seller. Duntz v. Granger Brew. Co., 41 Misc. [N. Y.] 177, construing Lien law N. Y. § 112 (Laws 1897, c. 418, p. 540).

3. Rogers-Ruger Co. v. Murray, 115 Wis. 267, 59 L. R. A. 737, construing R. S. Wis. 1898, § 3336.

4. It is not within the scope of this article to discuss priorities depending on the defectiveness of one or the other of the two hostile liens. Thus if an attachment levy be asserted as superior to a chattel mortgage because it is alleged that the latter was unrecorded or not filed the point involved is one concerning the Recordation of Chattel Mortgages which title and others like it see to ascertain what acts are efficient to claim and preserve a lien.

5. As between equitable liens upon a specific fund priority depends upon date of notice to the debtor, holding such fund; presentation of an order creating such lien to the debtor constitutes sufficient notice for this purpose. Third Nat. Bank v. Atlantic City, 126 Fed. 413. A junior mortgagee of specific property who furnished money to buy it has an equity superior to a general mortgagee who claims in the specific property only by virtue of an "after-acquired property" clause. Farmers' L. & T. Co. v. Denver, L. & G. R. Co. [C. C. A.] 126 Fed. 46. A vendor's lien retained in a deed is superior to a subsequent mortgage on the same property, although the mortgagee, through fraud of the mortgagor, had no notice of the deed which was unrecorded. Hall's Adm'r v. Hall's Adm'x, 24 Ky. L. R. 2317, 73 S. W. 1120. A mortgage lien is superior to a prior vendor's lien of which the mortgagee had no notice. Hubbell v. Henrickson, 175 N. Y. 175. An unrecorded contract of conditional sale is superior to a subsequent chattel mortgage, though the debt secured by the mortgage was contracted before the sale. First Nat. Bank v. Reid [Iowa] 98 N. W. 107. A mortgage lien on real estate and chattels as fixtures is subsequent to a vendor's lien on the chattels purchased under an agreement that the title thereto was to remain in the seller until paid for. Duntz v. Granger Brew. Co., 41 Misc. [N. Y.] 177. A judgment lien is superior to a prior mortgage lien where the mortgagor is absent from the state until after the time allowed by the statute of limitations has elapsed. Though the mortgagor's absence suspends the running of the statute of limitations as against the mortgagee's right of foreclosure, it does not suspend the statute so as to prevent other liens from attaching. Brandenstein v. Johnson, 140 Cal. 29, 73 Pac. 744.

6. A judgment lien is superior to an attorney's particular lien, where the judgment creditor had no notice of the attorney's intention to claim a lien at the time he filed his transcript of the judgment. Teller v. Hill [Colo.] 72 Pac. 811.

7. Under the statute in **Montana** a lien for services rendered within sixty days is preferred to attaching creditors, if within ten days after notice to the attaching officer, suit is brought to establish his claim; but such lien is waived if he fails to sue within such time. Shea v. Regan [Mont.] 74 Pac. 737.

8. An attachment of land, of a mortgagor, subject to a recorded mortgage, creates a lien only on the equity of redemption. London & S. F. Bank v. Dexter Horton & Co. [C. C. A.] 126 Fed. 593. The lien of a beneficiary of the estate of a trustee for reimbursement for the trustee's defalcation, is inferior to a prior lien secured by an attaching creditor of such trustee. Wales v. Sammis, 120 Iowa, 293. A vendor's lien on property covers permanent improvements to such property, in the absence of an intention of the parties to treat them as personalty, and is superior to a mechanic's lien for the improvements. Watson v. Markham [Tex. Civ. App.] 77 S. W. 660. A chattel mortgage is superior to a prior lien of a judgment creditor by delivery of writ of execution to the sheriff, where by act of counsel the levy is not made until after the chattel mortgage was recorded. Ankele v. Elder [Colo. App.] 75 Pac. 29. A warehouseman's lien under Laws 1902, p. 1775, c. 608, is not superior to

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§ 3. *Transfer and substitution of liens.*—Though as a general rule a common law lien is nonassignable, if a person accepts an assignment of such a lien and possession of the property, securing it, according to an agreement therefor, and having induced the lienor to make such assignment, he is estopped to assert the validity of the transfer.[9] As to whether there was an assignment or transfer of a lien, a finding that the lien was "transferred and delivered" is sufficient.[10] A contract lien in favor of a corporation advancing money to purchase goods is equitable and passes to its successor.[11]

§ 4. *Extinguishment and discharge.*—A common law lien may be waived by the lienor converting the property subject to it,[12] and it will be discharged by payment of the debt for which it is security.[13]

An equitable lien against a bankrupt's property is not extinguished by his discharge in bankruptcy.[14] So an equitable lien created by a devise does not lapse by the death of the devisee before the testator,[15] nor can it be defeated by the devisee's wife, who enters on the lands devised, on the testator's death,[16] nor by the fact that a note executed in consideration of the devise was made to a third person instead of the testator.[17]

A statutory right of lien may be waived by the lienor failing to sue within a limited time to establish his claim;[18] or by obtaining a personal judgment without enforcing the lien.[19]

§ 5. *Enforcement and protection of liens.*—In most cases of statutory liens, the statute expressly provides a mode for its enforcement, as by sale.[20]

Statutory proceedings to enforce or foreclose.—A junior lienor cannot complain that the superior lienor has adopted a means for satisfying his lien other than that provided by statute, if such means do not injure his interests.[21] One

liens of mortgagees and sellers on conditional sale. Singer Mfg. Co. v. Becket, 85 N. Y. Supp. 391.

A statute providing that when a corporation's property shall be put into the hands of a trustee, laborer's debts not exceeding $100 and performed within six months before the transfer of property shall be first paid, does not give such laborers claims superior to mortgage liens, under R. S. 1899, § 3167. Cunningham v. Elm Grove Z. & L. Co. [Mo. App.] 76 S. W. 487. But in Georgia, a laborer's lien is superior to a mortgage to secure purchase money, and to all other liens not expressly declared superior or provided for by statute [Civ. Code Ga. §§ 2792, 2793] Bradley v. Cassels, 117 Ga. 517.

A landlord's statutory lien for rent is superior to a mortgage executed by the tenant upon property subject to the lien, where the mortgage is not forthwith filed for record, as required by statute (Liquid Carbonic Acid Mfg. Co. v. Lewis [Tex. Civ. App.] 75 S. W. 47), and if the property is sent by the tenant to the mortgagee, the latter cannot defeat the landlord's lien by claiming to hold the property as that of the tenant, till the lien has ceased (Mensing v. Cardwell [Tex. Civ. App.] 75 S. W. 347). Where one enters under a contract of purchase, and on default, under the terms of such contract, becomes a tenant, the owner's crop lien relates back to the time of entry, so as to be superior to a chattel mortgage given before default. British & A. Mortg. Co. v. Cody, 135 Ala. 622.

9. Davis v. Nat. Surety Co., 139 Cal. 223, 72 Pac. 1001.

10. Without a further finding of delivery of possession of the property. Davis v. Nat. Surety Co., 139 Cal. 223, 72 Pac. 1001.

11. Cincinnati Tobacco Warehouse Co. v. Leslie [Ky.] 78 S. W. 413.

12. People's Bank v. Frick Co. [Okl.] 73 Pac. 949.

13. A bank's lien on cotton for money advanced is terminated by delivery to it of the proceeds of sale of such cotton. First Nat. Bank v. San Antonio R. Co. [Tex.] 77 S. W. 410.

14. A judgment lien, upon a note waiving the homestead exemption upon lands of a bankrupt exempted by the bankrupt court, obtained within four months before the adjudication of bankruptcy is not discharged by a discharge in bankruptcy. McKenney v. Cheney, 118 Ga. 387.

15, 16, 17. Ballard v. Camplin [Ind.] 67 N. E. 505.

18. By failing to sue within ten days after notice to an attaching officer. Shea v. Regan [Mont.] 74 Pac. 737.

19. Cropper's lien. Bond v. Carter [Tex. Civ. App.] 73 S. W. 45.

20. For specific statutory enforcement of liens, see titles Agriculture; Animals; Inns, Restaurants and Lodging Houses; Landlord and Tenant; Forestry and Timber; Mechanics' Liens; Mines and Minerals; Partnership; Railroads; Shipping and Water Traffic; Taxes; Wharves.

21. An agister may adopt, with the consent or acquiescence of his bailor, a means other than a statutory foreclosure, if he does not thereby injure a junior lienor. Dale v. Council Bluffs Sav. Bank [Neb.] 94 N. W. 983.

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claiming a statutory lien for labor cannot sue in a court of equity to dismiss an attachment suit and enforce his claim, as he has an adequate remedy at law.[22]

Equitable remedies and procedure.—An equitable lien can be enforced in a court of equity only, as by a suit to foreclose,[23] the usual mode of which is by a decree for a sale of the property to which the lien attaches, and application of the proceeds to the debt; or by a decree restraining the owner from disposing of it.[24] Such lien may be enforced against the property in the hands of the original owner,[25] his receivers,[26] trustee in bankruptcy,[27] purchasers with notice,[28] or voluntary assignees;[29] but not against a bona fide purchaser for value,[30] or an attaching creditor.[31] An equitable lien may be enforced by a Federal court, though the state statutes recognize only mortgages and contractual "privileges."[32]

Intervention.—In a suit to foreclose a lien, a lienor may intervene and assert his lien upon the same property, and have its status as to priority determined.[33]

Common law remedies and procedure.—A common law lien, being merely a right to possession, cannot be actively enforced, as by a sale of the property.[34] The remedies to determine or sustain this lien must be found in a court of law.[35] If the lienor is wrongfully deprived of his possession, he may maintain detinue for the goods or trover and conversion for their value.[36]

LIFE ESTATES, REVERSIONS AND REMAINDERS.

§ 1. Nature and Definitions (741).
§ 2. Mutual and Relative Rights and Remedies of Life Tenants and Future Tenants and Their Privies (744).
§ 3. Rights and Remedies Between Third Persons and Life Tenants, Remaindermen or Reversioners (745).

This article is limited in scope. The principles common to all life and reversionary estates have been collected here and those applicable to particular freeholds are excluded to other titles conducive to an easier and more familiar search.[37] Matters pertaining to the instruments by which these estates are created belong to the titles treating of such instruments.[38]

§ 1. *Nature and definitions.*—Generally speaking, a life estate is a freehold which may or must endure for life,[39] being then determined.[40] If the estate has

22. By an independent attachment suit, or in the original attachment suit. Winrod v. Wolters [Cal.] 74 Pac. 1037.

23. Cochran v. Siegfried [Tex. Civ. App.] 75 S. W. 542. And see title Vendor and Purchaser. The granting of a personal judgment in addition to the enforcement of a lien, in an action to foreclose, is not void on its face, on the ground that the granting of a personal judgment is not within the jurisdiction of the court. Canadian & A. Mortg. & Trust Co. v. Clarita Land & Inv. Co., 140 Cal. 672, 74 Pac. 301.

24, 25. In re Olzendam Co., 117 Fed. 179.

26. In re Olzendam Co., 117 Fed. 179. As against general creditors. Howard v. Delgado [C. C. A.] 121 Fed. 26.

27. Evidence held insufficient to entitle complainant to an equitable lien on a liquor license of a bankrupt firm, as against firm creditors, for money claimed to have been loaned under a verbal agreement to one of the partners for partnership use. Ross v. Saunders, 123 Fed. 737.

28, 29, 30. In re Olzendam Co., 117 Fed. 179.

31. In Massachusetts or New Hampshire. In re Olzendam Co., 117 Fed. 179.

32. Held under Louisiana statutes. Howard v. Delgado [C. C. A.] 121 Fed. 26.

33. Douglas v. Robertson [Tex. Civ. App.] 72 S. W. 868.

34. Neither at law nor in equity. Burrough v. Ely [W. Va.] 46 S. E. 371.

35. And in the absence of statutory provisions to that effect, or other grounds for equitable relief, it is not subject to a suit in equity. Burrough v. Ely [W. Va.] 46 S. E. 371.

36. To the amount of his claim. Burrough v. Ely [W. Va.] 46 S. E. 371.

37. See Curtesy, 1, p. 830; Dower, 1, p. 956.

38. Deeds of Conveyance, 1, p. 908; Wills.

39. Words construed to give a life estate: A contract between a divorced husband and wife by which land was granted by the husband to the wife provided that the estate should close on the wife's marriage and that the husband should have the right to sell, and upon exercising that right she should surrender possession on the husband's securing to her the monthly rental value of the premises gives the wife a life estate until she marries subject to the condition of surrending possession in case of sale. Budlong v. Budlong, 31 Wash. 228, 71 Pac. 751. A

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any inheritable character, it is a fee.[41] A devise of the income or rents and profits of land is a devise of the land itself, and whether the estate is for life or in fee must be determined by the limitations in the devise or the expressed intention of the testator.[42] That portion of an estate for another's life which remains after the tenant's death while the cestui que vie lives is real estate.[43]

There must be a particular legal estate to support a remainder,[44] and the conveyance must also give or grant the estate in remainder.[45] A delivery of a deed to a life tenant is a delivery to all who may take in remainder.[46] The particular tenant not the remainderman has the seisin.[47] But a remainderman is seised in law so as to become a stock of descent while the particular freehold is yet outstanding.[48]

Where there is a person in being, specifically designated, who would have a right to possession upon the determination of the preceding estate, the remainder is vested.[49] A remainder is contingent when limited to an uncertain person, or upon

deed by A. to B. of property, and the words "it is understood that the above conveyance is to be good" during her life and on her death to revert to the heirs of B. and A. (her husband) gives a life estate to A. Beedy v. Finney, 118 Iowa, 276. Testator devised the residue of his estate to his wife for life, if she remained his widow, and if not one-third for her life and two-thirds to his daughter for her life, and on the death of the wife to the daughter for life, and on the death of the daughter and wife, in fee to those who would take from the wife and the testator as on an intestacy. The wife and daughter take a life interest. Van Driele v. Kotvis [Mich.] 97 N. W. 700. Funds were given in trust for A for life, with remainder to the heirs of her body, if living at her death, and if not, to the testator's heirs. The trustee invested in land, part of the purchase money being paid by A's husband. A deed was made to A for life, remainder to the heirs of her body, if living at her death, and if not to the testator's heirs to the amount of the purchase money paid by the trustees. Held A took a life estate in all the land and not merely in that proportioned to the amount paid by the trustees. Clay v. Clay's Guardian, 24 Ky. L. R. 2016, 72 S. W. 810. A deed to A in trust for B (a married woman) for life and on her death to such children as she may have at her death begotten of the grantor with power to B to empower A to sell and reinvest, gives a legal life estate to B, as the trust became executed, under the Married Woman's Act, on delivery of the deed. Tillman v. Banks, 116 Ga. 250. Deed construed to grant life estate with power and remainder subject to the power. Dickey v. Barnstable [Iowa] 98 N. W. 368. Usufructuary under the Civil Law.—Maguire v. Maguire, 110 La. 279.

40. A devise to the testator's son, and if he should die, to his wife for life gives the son a life estate. In re Willis' Will [R. I.] 55 Atl. 889.

41. A deed to A to have and to hold to his heirs and assigns forever, and on his death to his children by his first wife gives A a fee simple. Humphrey v. Potter, 24 Ky. L. R. 1264, 70 S. W. 1062. A devise to the wife for life, subject to certain provisions for the children, remainder to the children, but during the wife's life the children to have the portion set apart to them during the testator's life gives the children a fee in the land so set apart. Newton v. Odom [S. C.] 45 S. E. 105.

A deed to A and the heirs of his body lawfully begotten during their lives and should he and his heirs become extinct then the estate to revert to grantor's heirs gives A a **fee conditional.** Mattison v. Mattison, 65 S. C. 345. Upon a devise to one for life with remainder to his heirs the **Rule in Shelley's Case** applies. A devise of the use, benefit and control of lands to A during his life and on his death to his lawful heirs gives A a fee. Deemer v. Kessinger, 206 Ill. 57. Where however the word "heirs" is construed as "children" the rule does not apply. Deed to A for life, and on her death to such heirs as she may hereafter have, but if she leaves no lawful issue, over to B, gives A a life estate. Duckett v. Butler [S. C.] 45 S. E. 137. See, also, Deeds, 1, p. 908; Real Property; Wills.

42. Simmons v. Morgan [R. I.] 55 Atl. 522. Married woman devised the estate and her husband claimed it as personalty. Folwell v. Folwell [N. J. Eq.] 56 Atl. 117.

43. In jurisdictions where estates per autre vie are devisable, such an estate of a person who dies before the cestui qui vie passes by will as realty.

44. Deed by husband to his wife to have and to hold after the death of the husband for her life and on her death to the husband's heirs forever is valid. Christ v. Kuehne, 172 Mo. 118. The interest of a wife during coverture in lands wherein a life estate has been deeded to her by her husband is a sufficient particular estate to support a remainder. Id.

45. A deed to A for life with power to sell or mortgage for her support, remainder to the grantor's children equally to their use gives a life estate to A with power to sell or mortgage, the children of the grantor getting nothing, there being no operative words of conveyance to support their estate. Holland v. Keyes [R. I.] 52 Atl. 1094.

46. Chapin v. Nott, 203 Ill. 341.

47. A wife has no dower in a vested remainder, expectant on an estate for life, under 1 Rev. St. (1st Ed.) p. 740. Jackson v. Walters, 86 App. Div. [N. Y.] 470.

48. Early v. Early [N. C.] 46 S. E. 503.

49. Chapin v. Nott, 203 Ill. 341.

Vested remainders: Deed to A in trust for B for life and on her death to her issue, if any, and if no issue, to C, gives a vested remainder to B's issue then living. Fields v.

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the happening of an uncertain event, that is, when limited to a person not in esse, or not ascertained, or limited to take effect upon an event which may never happen or which may not happen until after the preceding estate is determined.[50] By reason of the rule against perpetuities, a future estate must vest within a certain time, usually measured by "lives in being and twenty-one years and a fraction thereafter."[51] Under the law of wills, a remainder failing falls into the residue.[52] Un-

Gwynn, 19 App. D. C. 99. A devise to the testator's brother A in trust for his child or children, but A to have the rents and profits for his life, gives A a life estate with a vested remainder in fee to his children, except in case they die before the testator. Dalmazzo v. Simmons [Ky.] 78 S. W. 179. A devise to A for life and on his death to his next of kin, gives A a life estate and a remainder in fee to his heirs. In re Willis' Will [R. I.] 55 Atl. 889. A deed to A and her husband and her children forever gives life estate to A and her husband with vested remainder to children living at the date of the deed, the remainder opening up to admit after-born children. Blackburn v. Blackburn, 109 Tenn. 674. A deed to a married woman and her bodily heirs and assigns gives her a life estate with a remainder in fee to her heirs (under a statute changing a fee tail into a life estate and remainder in fee). Chew v. Kellar, 171 Mo. 215. A deed to A to have and to hold to her and her bodily heirs and assigns gives a life estate to A with remainder in fee to the heirs of her body even where by statute a conveyance passes all the grantor's interest unless a different intent is expressed or implied. Utter v. Sidman, 170 Mo. 284. A deed to A for life and on her death to such child or children or representatives of child or children that she may bring forth by the grantor and leave in life, gives a vested remainder to those children in esse at the delivery of the deed and the class is opened to take in children afterwards born, the remainder to the unborn children being contingent until born, under Civ. Code 1895, §§ 3100, 3103. Fields v. Lewis, 118 Ga. 573. A deed to A, B and C in fee reserving a life estate in the grantor and upon his death to be equally divided among A, B and C and if either should die without leaving child or children surviving, the survivor or survivors and their children to take the whole gives a vested remainder in A, B and C in fee, defeasible upon any remainderman dying without child surviving him which would vest the whole estate in the survivors and their children—a shifting use. Scottish-American Mortg. Co. v. Bunckley, 81 Miss. 599. A devise to A for life and on her death to those of the testator's children who may survive "also my sister Julia to have an equal share * * * with my children if she survives" A, gives vested remainders to those children in esse at A's death, and contingent remainders to those not in esse at that time. In re Moran's Will [Wis.] 96 N. W. 367. Testator devised property to "A my son, and to his heirs," not to be liable for his debts but to descend to his bodily heirs at his death. To B he devised property "on the same principles as" that of A, not being liable for his debts but to descend to his bodily heirs, and in case of none, to his brothers and sisters. Held the words "on the same principles" referred to liability for debts and not to the word "heirs" and that B took a life estate with remainder in fee to the heirs of his body. Turner v. Hause, 199 Ill. 464. A deed to A and the heirs of her body and if she dies without issue to three persons named and in esse at the delivery of the deed, gives the three a vested remainder. It is not a fee upon a fee but an alternative limitation of two fees upon the life estate. Chapin v. Nott, 203 Ill. 341. A deed to A for life and on his death to B, C and D in fee, but if either of the last three die in the lifetime of A without issue at his death, his share to vest in the survivors. Held a valid conditional limitation, and on the death of B a fee simple vested in C and D. Gray v. Hawkins, 133 N. C. 1. Where personal property is bequeathed to the wife with the charge and the request that at her death she leave all that portion not used to the children or their descendants, it gives a life estate to the wife, and a remainder to the children. In re Stickney, 41 Misc. [N. Y.] 70.

50. Fields v. Gwynn, 19 App. D. C. 99.

Contingent remainders: A devise to A for life and on his death "to his children or their heirs as the law directs" gives a life estate to A, with a contingent remainder, the words "or their heirs" being construed as words of purchase. Taylor v. Taylor, 118 Iowa, 407. A deed to A for life, remainder to the children "living at the death of" A, and if there is no such child, over, is a contingent remainder. Howbert v. Cauthorn, 100 Va. 649. A devise to A for life, but if she marries again after testator's decease, to be divided equally among A and the two daughters of the testator, and upon the death of A unmarried to the two daughters gives a contingent remainder to the daughters. Thompson v. Adams, 205 Ill. 552. Deed of property to A for life and on his death to such of his children as he by will appoints. Until A's death the interest of his children is a contingent remainder. Taylor v. Adams, 93 Mo. App. 277. A devise to A for life and at her death to be equally divided among her children living at her death gives a vested remainder to the class, but the interest of the members is contingent on their being alive at A's death. Nichols v. Guthrie, 109 Tenn. 535. On a devise to A and her offspring for life, remainder to her grandchildren, if there are no grandchildren in esse at the date of the will or at the testator's death, the fee vests in the testator's heirs, to the use of such grandchildren as may thereafter be born. Holton v. Jones, 133 N. C. 399. On a bequest to testator's three daughters free from control of their husbands and with power to dispose of it by will, but if any daughter die before her husband to vest in him, the remainder takes effect only when the first taker dies in the lifetime of the testator. Louisville City Nat. Bank v. Wooldridge [Ky.] 76 S. W. 542.

51. See Perpetuities.

52. See Wills. Upon a devise to A for life remainder to her grandchildren, in default of grandchildren, the testator's heirs will take,

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der a deed it becomes a reversion. There is no reversion where a trust fails, if the deed creating it recites a pecuniary consideration.[53]

In personalty.—Life estates and future estates may be created in personalty by the same language as in the case of land.[54]

§ 2. *Mutual and relative rights and remedies of life tenants and future tenants and their privies. The life tenant's rights.*—While a life tenant cannot open new mineral workings, he may take the profits of those existing[55] and those are deemed within this rule which are opened after the life estate accrues, but pursuant to a grant from the tenant's grantor.[56] Otherwise he has only the interest on the proceeds from mines or wells.[57] Where a tenant for life pays off an incumbrance upon the estate, he is presumed to do so for his own benefit and may enforce the lien for reimbursement above the proportion of the debt which he is bound to contribute.[58] A life tenant under a will may discharge or anticipate an obligation to a remainderman, and acceptance by the latter will be implied.[59] Cash dividends are to be treated as income and go to the life tenant; but stock dividends are capital and go to the remainderman.[60] While a power in the life tenant to sell and reinvest will not be controlled at the instance of the remainderman,[61] equity will protect the remainderman whom a life tenant conspires to defraud by exercising a power to dispose of the fee.

The remainderman's rights.—The doctrine of the acceleration of estates is founded upon the desire of courts of equity to give effect to the intention of the testator, and when such intention would be frustrated by allowing it, it will be denied.[62] Where a remainderman pays off an encumbrance on the estate, he is entitled to acquire the rights of an equitable holder of the encumbrance against his co-remaindermen.[63] A contingent remainderman has no action for waste,[64] but the estate of the life tenant is liable to the remainderman for a conversion of the property in his lifetime.[65] The trustee having the legal estate is the proper party plaintiff in a suit for dividends due the estate, and such suit is not abated by the death of the cestui que trust who has the income for life.[66] The life tenant must pay the current charges for taxes and ordinary repairs.[67] Where the life tenant

even though by a statute a devise which fails goes into the residue, if the intention of the testator is clear to exclude the land from the residue. Holton v. Jones, 133 N. C. 399.

53. Davis v. Jernigan [Ark.] 76 S. W. 554. But land conveyed to the trustees of a town reverts to the grantor upon the abandonment of the purpose for which the land is taken. Downes v. Domock, 75 App. Div. [N. Y.] 513.

54. Stallcup v. Cronley's Trustee [Ky.] 78 S. W. 441.

55. Suit by remainderman for his share of the royalties. Andrews v. Andrews, 31 Ind. App. 189. Tenant by the curtesy cannot empower lessee to extract oil from the land. Barnsdall v. Boley, 119 Fed. 191.

56. He is entitled to royalties from oil wells opened by the testator's lessee even after the life estate accrued. Andrews v. Andrews, 31 Ind. App. 189.

57. Eakin v. Hawkins, 52 W. Va. 124. Where farm lands are drilled and oil produced a life tenant in common therein has an interest in the oil equal to his proportion of the interest on the proceeds of its sale. Life tenant took under the statute a surviving spouse's share of the land (one-third) for life. Lone Acre Oil Co. v. Swayne [Tex. Civ. App.] 78 S. W. 380.

58. Downing v. Hartshorn [Neb.] 95 N. W. 801.

59. Money to go to remaindermen on the death of the life tenant. In re Pope's Estate [Minn.] 97 N. W. 1046.

60. Cash dividend even though new stock offered on the same day for the amount of the dividend. Lyman v. Pratt, 183 Mass. 58.

61. Alternative order to give bond or deposit proceeds in court. Dickey v. Barnstable [Iowa] 98 N. W. 368.

62. Property was given by will in trust for the wife for life and on her death to her children, share and share alike, and the issue of a deceased child by right of representation. Held that distribution could not be accelerated by a release by the widow of her share, it being impossible to tell who would be entitled to take at the death of the widow. Rogers v. Safe Deposit & Trust Co. [Md.] 55 Atl. 679.

63. Whether he does so or not is a question of intention (evidence showing an intention to have encumbrance extinguished). Kinkead v. Ryan [N. J. Err. & App.] 55 Atl. 730.

64. Taylor v. Adams, 93 Mo. App. 277.

65. Anderson v. Northrop [Fla.] 33 So. 419.

66. People's Nat. Bank v. Cleveland, 117 Ga. 908.

67. Testator gave his daughter the income of a fund, and a dwelling house for her life.

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is executor and was indebted to the testator at the latter's death, he may be compelled by the remainderman to pay the debt or give security therefor.[68] The death of the life tenant terminates a lease made by him.[69]

There can be no partition between a life tenant and a remainderman,[70] but they may join in a conveyance and divide the proceeds,[71] and in some states it is provided that the property may be sold in a proceeding for that purpose.[72] Where a petition is brought for sale of land and there are contingent interests, it is not necessary to make persons defendants who by remote contingency may become interested in the premises.[73]

It is fraud for the life tenant to bring a suit against the remainderman claiming absolute title to the property.[74]

The possession of the life tenant cannot be adverse to that of the remainderman, hence the statute of limitations does not run in favor of a purchaser of the life estate against the remainderman[75] until the life tenant's death,[76] unless the remainderman has been given a right by statute.[77] A life tenant may purchase at a sale made under a power, even though his consent is necessary for the exercise of the power.[78]

§ 3. *Rights and remedies between third persons and life tenants, remaindermen or reversioners.*—A life tenant can convey no greater estate than he has,[79] but if he attempts to convey the fee and afterwards acquires it, it will enure to the benefit of his grantee by way of estoppel.[80] A contingent remainder cannot be

with directions to his executors to pay the taxes, cost of repairs and insurance, and the residue to trustees to pay one-half the income to her. Held the taxes, repairs and insurance must come out of the income of the fund and not out of the principal of the residuary estate. In re Tracy, 87 App. Div. [N. Y.] 215. Taxes. Downey v. Strouse [Va.] 43 S. E. 348. Where a person has a homestead in real estate the rents of which are not sufficient to make repairs and he is unable to make them the court may order timber to be sold to defray the expenses thereof. Flener v. Flener, 24 Ky. L. R. 725, 69 S. W. 954. War revenue taxes and state transfer taxes must be deducted from the life tenant's income under a devise in trust. In re Tracy, 87 App. Div. [N. Y.] 215.

If the remainderman pays taxes he has a remedy over therefor against the life tenant. Abernethy v. Orton, 42 Or. 437, 71 Pac. 327.

68. In re Hunt's Estate, 38 Misc. [N. Y.] 721.

69. Holden v. Boring, 52 W. Va. 37.

70. Turner v. Barraud [Va.] 46 S. E. 318.

71. But they may join and sell the property where the life tenant and remaindermen sold for $40,000 real property, and the remaindermen received $24,000 and the life tenant $16,000 which he mingled with his own property. Upon the life tenant's death, nine years afterwards, it was held the remaindermen had no ownership in the $16,000, in the absence of evidence showing that this amount was not to be the life tenant's share. Withnell v. Withnell [Neb.] 96 N. W. 221.

72. A trust will not ordinarily be dissolved unless the object of the trust has been accomplished, all interests thereunder vested and the trustee consents [Laws 1897, p. 507, c. 417, § 3, construed]. Metcalfe v. Union Trust Co., 87 App. Div. [N. Y.] 144. A court has power to order the sale of real estate limited to a tenant for life, with remainder to children or issue, and on failure thereof, over to persons all or some of whom are not in esse, when one of the class first in remainder after the expiration of the life estate is in esse and a party to the proceeding. Springs v. Scott, 132 N. C. 548.

73. Laws 1903, c. 99, § 2. Hodges v. Lipscomb, 133 N. C. 199. See, also, Smith v. Gudger, 133 N. C. 627.

74. Ruppin v. McLachlan [Iowa] 98 N. W. 153.

75. Turner v. Hause, 199 Ill. 464; Graham v. Stafford, 171 Mo. 692; Carver v. Maxwell [Tenn.] 71 S. W. 752; Chicago, P. & St. L. R. Co. v. Vaughn, 206 Ill. 234; Beaty v. Clymer [Tex. Civ. App.] 75 S. W. 540; Snow v. Monk, 81 App. Div. [N. Y.] 206; Davis v. Wilson, 25 Ky. L. R. 21, 74 S. W. 696. Conveyance to A for life, remainder to his heirs. A conveys to B. B's possession is not adverse to the heirs of A until A's death. Porter v. Osmun [Mich.] 97 N. W. 756. Possession by a purchaser under an executory contract of sale, made by the husband alone, of land owned in joint tenancy by husband and wife is not adverse to the wife. McNeeley v. South Penn Oil Co., 52 W. Va. 616.

76. Bottorff v. Lewis [Iowa] 95 N. W. 262.

77. Murray v. Quigley [Iowa] 92 N. W. 869.

78. McLenegan v. Yetser, 115 Wis. 304.

79. Ex parte Richardson, 66 S. C. 413; Chicago, P. & St. L. R. Co. v. Vaughn, 206 Ill. 234.

80. Where a life tenant purported to convey in fee a right of way to a railroad and subsequently the remainderman conveyed all his interest to the life tenant it was held that the latter conveyance enured to the benefit of the railroad in equity. Archer v. Yazoo & M. V. R. Co. [Miss.] 34 So. 387.

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taken on execution,[81] but it is assignable in equity.[82] The same is true of a remainder in personalty.[83] A vested remainder may be sold.[84]

LIMITATION OF ACTIONS.

§ 1. Statutes of Limitation, Validity, Interpretation and Law Governing (746).
§ 2. Period of Limitation (747).
§ 3. Disabilities and Exceptions (749).
A. In General (749).
B. Obstructing Suit. Concealment of Cause of Action (749).
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D. Trusts (750).
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G. Infancy and Coverture (751).
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§ 4. Accrual of Cause of Action (751).
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§ 5. Commencement of Action (755).
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§ 6. Revival of Obligation (757).
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B. Bar of Debt as Affecting Security (759).
C. Against Whom Available (760).
D. To Whom Available (760).
§ 8. Pleading and Evidence (760).

This title is designed to treat only of limitations applicable to actions. Limitations of other proceedings are treated in the titles pertaining thereto.[85]

§ 1. *Statutes of limitation, validity, interpretation and law governing.*—The essential attribute of a statute of limitations is that it accords and limits a reasonable time within which a suit may be brought upon causes of actions sought to be affected.[86] Such statutes are ordinarily valid, though applicable only to particular classes of persons,[87] and are not open to the objection that they deprive one of property without due process of law;[88] but limitations of actions on foreign judgments must not deny full faith and credit thereto.[89] They operate prospectively only,[90] unless a contrary intent is clear,[91] though it is held that amendments may be retroactive.[92] In cases of conflict between general and special statutes, the latter governs,[93] and the longer period is allowed where several sections are appli-

81. Nichols v. Guthrie, 109 Tenn. 535; Kinkead v. Ryan [N. J. Err. & App.] 55 Atl. 730; Howbert v. Cauthorn, 100 Va. 649. Unless the person who may take is ascertained. Taylor v. Taylor, 118 Iowa, 407. A contingent remainder may be sold under Ky. St. 1899, c. 15, §§ 209-216, allowing the sale of any interest or claim to real estate. Davis v. Willson, 25 Ky. L. R. 21, 74 S. W. 696.

82. Nichols v. Guthrie, 109 Tenn. 535.

83. Remainder in personalty is not assignable except in equity. Stallcup v. Cronley's Trustee [Ky.] 78 S. W. 441. Equity will enforce such an assignment only when supported by a good consideration. Id.

84. Sale of a vested remainder of $32,500 for $8,750. In re Phillips' Estate [Pa.] 55 Atl. 212. An administrator may sell an estate to pay debts, even though subject to the widow's homestead. Williams v. O'Neal [Ga.] 45 S. E. 978.

85. See Appeal and Review; New Trial, and similar titles.

86. Keyser v. Lowell [C. C. A.] 117 Fed. 400.

87. Iowa Code, § 1051, as to limitation of actions against special charter cities held constitutional. Ulbrecht v. Keokuk [Iowa] 97 N. W. 1082. Session Laws 1903, p. 26, c. 24, § 1, amending Code Civ. Proc. § 35, regulating limitation of actions brought by the state held valid. State v. City of Aberdeen [Wash.] 74 Pac. 1022.

88. Linton v. Heye [Neb.] 95 N. W. 1040.

89. A state statute which bars the maintenance of an action against a resident on a judgment in another state on a cause of action barred in the former state but not in the state wherein the judgment was rendered does not give full credit to judgments of another state. Keyser v. Lowell [C. C. A.] 117 Fed. 400.

90. Shields v. Whitlock, 110 La. 714. Applied to Gen. St. 1866, c. 191, § 7. Dice v. Hamilton [Mo.] 77 S. W. 299. Act 1897, p. 441, c. 404, amending Code 1887, § 2933. Kesterson v. Hill [Va.] 45 S. E. 288; Mo. Rev. St. 1899, § 4277, is not retrospective nor does it impair the obligation of contracts. Kreyling v. O'Reilly, 97 Mo. App. 384. Rev. St. 1899, § 4297, does not apply to a judgment entered before it went into effect. Tice v. Fleming, 173 Mo. 49. Pub. Laws 1902, p. 49, c. 976, § 1, barring actions for personal injuries after two years does not apply to causes arising prior to the time the act went into effect. Rotchford v. Union R. Co., 25 R. I. 70. A judgment barred by limitations was not revived or given any validity by Laws 1894, c. 307, extending the time of limitations on judgments. In re Guttroff's Estate, 39 Misc. [N. Y.] 483. Statutes requiring a new promise to remove the bar to be in writing are prospective in their operation. Vinson v. Palmer [Fla.] 34 So. 276.

91. Walker v. People, 202 Ill. 34.

92. In re Moench's Estate, 39 Misc. [N. Y.] 480.

93. Sutton v. Hancock, 118 Ga. 436; Hawley v. Griffin [Iowa] 92 N. W. 113.

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cable.[94] The law in force at the time of the maturity of the obligation generally governs.[95] The lex loci governs as to limitations.[96] The Federal courts in actions at law in applying limitations follow the rules which obtain in the courts of the state within which the action is tried,[97] and the law of the state wherein the action was brought controls on removal to a Federal court.[98]

§ 2. *Period of limitation.*—The particular periods of limitation are so dependent on the terms of the statutes as to be incapable of general statement. The statutes ordinarily prescribe different periods for actions involving realty,[99] actions on contracts and specialties,[1] actions in tort,[2] actions for penalties,[3] actions

94. Crum v. Johnson [Neb.] 92 N. W. 1054.

95. Wilson v. Pickering [Mont.] 72 Pac. 821. Change in limitation statute held to apply to a reassessment for street improvements though the original assessment was made under the statute repealed. Young v. Tacoma, 31 Wash. 153, 71 Pac. 742. See, also, "Statutes" as to effect of amendments.

96. If by reason of absence from the state wherein the cause of action accrued the statute was tolled the action is not barred in the state wherein it is sought to be enforced. Martin v. Wilson, 120 Fed. 202; O'Donnell v. Leis, 104 Ill. App. 198. Minn. Gen. St. 1894, §§ 5145, 5146 construed. Powers Mercantile Co. v. Blethen [Minn.] 97 N. W. 1056; Janeway v. Burton, 201 Ill. 78. Whether a judgment claim presented in bankruptcy was barred depends upon the statute of the state wherein the proceedings were brought that being the state of the residence of the bankrupt. Hargadine-McKittrick Dry Goods Co. v. Hudson, 122 Fed. 232. A transitory cause of action barred by the law of the state where it arose is barred in the state wherein it is sought to be enforced [Neb. Code Civ. Proc. § 18]. Taylor v. Union Pac. R. Co., 123 Fed. 155. A nonresident cannot, in a federal court, maintain an action against the estate of a decedent on a claim barred by the settlement of the estate under the laws of the state. Security Trust Co. v. Black River Nat. Bank, 187 U. S. 211, 47 Law. Ed. 147. Where the cause of action arose in the state of the residence of the parties and the debtor thereafter removed to another state and by the law of both states the claim was barred it is barred in this state [N. Y. Code Civ. Proc. § 390a]. Holmes v. Hengin, 41 Misc. [N. Y.] 521. Hurd's Rev. St. 1899, p. 1119. Strong v. Lewis, 204 Ill. 35.

97. Limitations held not to begin to run until demand made. Birckhead v. De Forest [C. C. A.] 120 Fed. 645; Taylor v. Union Pac. R. Co., 123 Fed. 155; Crissey v. Morrill [C. C. A.] 125 Fed. 878.

98. In Pennsylvania a debt barred by limitations is not available as a set off against a legacy. Wilson v. Smith, 117 Fed. 707.

99. **In Alabama** a suit to foreclose a real mortgage is not within the statute. Bailey v. Butler [Ala.] 35 So. 111.

California: Action construed and held to be an action to recover realty. Murphy v. Crowley [Cal.] 73 Pac. 820.

Iowa: Action to set aside tax deed held barred, under Code, § 1448, though the plaintiff claimed that the purchaser was acting as her agent relative to the land and could not therefore purchase. Bemis v. Plato [Iowa] 93 N. W. 83.

Kentucky: Action to recover realty held barred. Rose v. Ware [Ky.] 76 S. W. 505.

Michigan: Pub. Acts 1885, p. 207, No. 153, relating to title of purchasers at tax sales held a statute of limitations and applying only to sales subsequent to Act 1893 and valid. St. Mary's Power Co. v. Chandler-Dunbar Water Power Co. [Mich.] 95 N. W. 554. The action to recover dower after divorce is within the statute; the right of action does not arise from the decree but under statute. Moross v. Moross [Mich.] 93 N. W. 247.

Missouri: Rev. St. 1899, § 4277, limiting time to foreclose a mortgage applies to a proceeding to subject the surplus arising on foreclosure of a prior mortgage [Rev. St. 1899, § 4277]. Kreyling v. O'Reilly, 97 Mo. App. 384.

New York: The special statute of one year upon actions to recover a narrow strip encroached on by a wall applies though the wall occupies only a part of the strip [Code Civ. Proc. § 1499]. Volz v. Steiner, 67 App. Div. [N. Y.] 504.

Texas: An action to recover an interest in land which had been bought at execution sale on agreement that the amount of the bid should be considered as a loan to the debtor the purchaser to take a deed in his own name as security, held an action to recover realty and not barred in four years under Rev. St. 1895, art. 3358. Stafford v. Stafford [Tex.] 70 S. W. 75. Bill to set aside tax judgment and deed is barred after fourteen years [Rev. St. 1895, § 3358]. State v. Dashiell [Tex. Civ. App.] 74 S. W. 779. An action by the holder of the equitable title to set aside an absolute conveyance is within the statute. Craig v. Harless [Tex. Civ. App.] 76 S. W. 594. An action to set aside a tax deed on the ground of invalidity of the tax judgment is within the statute. Green v. Robertson, 30 Tex. Civ. App. 236.

1. **Alabama:** The three-year statute does not apply to actions on accounts stated or for goods sold. Moore v. Crosthwait, 135 Ala. 272.

Georgia: Action by stockholders of lessor corporation to recover rents payable to them is barred by the four-year statute; the contract of lease not being a covenant under seal. Farrar v. Southwestern R. Co., 116 Ga. 337. The assumption to pay an outstanding debt by a grantee is a simple contract and not a specialty. Taylor v. Forbes' Adm'x [Va.] 44 S. E. 388. The endorsement of a guaranty on a sealed note is a contract under seal though no seal is attached to the indorsement, and is barred after 20 years. Baldwin Fertilizer Co. v. Carmichael, 116 Ga. 762.

Kentucky: Note held not in form of bill of exchange and not within Ky. St. § 483, so as to be barred in five years. Magoffin v.

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against municipalities,[4] actions on mortgages,[5] or for foreclosure thereof.[6] Courts of equity in enforcing equitable rights and remedies,[7] or a legal claim, will

Boyle Nat. Bank, 24 Ky. L. R. 585, 69 S. W. 702. Action held one for goods sold and not on accounts between merchants and the two-year statute not applicable. Fennell v. Myers [Ky.] 76 S. W. 136.

Massachusetts: Action on note by the representative of the payee to the use of the assignee is within Pub. St. c. 197, § 6. Boutelle v. Carpenter, 182 Mass. 417.

Missouri: The general statute does not apply to actions on bonds of notaries public which must be brought within three years under Rev. St. 1899, § 8836. State v. Hawkins [Mo. App.] 77 S. W. 98. Obligations certain or contingent are within a statute limiting the time in which to sue on obligations in writing. Howe v. Mittelberg, 96 Mo. App. 490.

Nebraska: An action on an appeal bond is barred after ten years [Neb. Code Civ. Proc. § 14]. Crum v. Johnson [Neb.] 92 N. W. 1054.

Oregon: Action on a public officer's bond barred after 6 years under Bal. & C. Ann. Codes & St. § 6. State v. Davis, 42 Or. 34, 71 Pac. 68.

Texas: Action to recover rent against tenant holding over held action on an implied and not on written contract. Roller v. Zundelowitz [Tex. Civ. App.] 73 S. W. 1070.

2. Arkansas: Rev. St. 1838, § 7, intended to limit to one year actions for crim. con. and the actions therein mentioned does not include an action by a husband to recover for injuries to his wife. Emrich v. Little Rock Traction & Elec. Co. [Ark.] 70 S. W. 1035.

Virginia: Action on a fidelity bond is not an action on a contract, specialty or instrument in writing. An action against a county treasurer and sureties is not governed by Code 1887, § 2920, but is barred after ten years as to the sureties. Jennings v. Taylor [Va.] 45 S. E. 913.

California: Action for conversion is barred after three years under Code Civ. Proc. § 338. Lowe v. Ozmun, 137 Cal. 257, 70 Pac. 87. Action construed and held one in tort for conversion. Scrivner v. Woodward, 139 Cal. 314, 73 Pac. 863. Action to recover land which the wife had conveyed to her husband on condition that they be not recorded until her death in case he survived her held not within Code Civ. Proc. § 338 limiting time within which to sue to recover on ground of fraud, etc. Kenney v. Parks, 137 Cal. 527, 70 Pac. 556. Complaint construed and held to set up a cause of action for fraud and not for the recovery of real property. Murphy v. Crowley [Cal.] 70 Pac. 1024.

Colorado: Action to foreclose trust deed given to secure a note seeking a personal judgment and the cancellation of an unauthorized release is not an action for fraud within Mills' Ann. St. § 2911. Murto v. Lemon [Colo. App.] 75 Pac. 160.

District of Columbia: Injury to the person held not continuing and barred by limitations. Jackson v. Emmons, 19 App. D. C. 250.

Iowa: Partition where to establish the title plaintiff must avoid a certificate of final payment on public lands on ground of fraud is within the statute as to actions for fraud. Murray v. Quigley [Iowa] 92 N. W. 869.

Kansas: Negligent shooting is a battery and is barred after one year [Gen. St. Kan. 1901, subd. 4, § 4446]. Byrum v. Edwards, 66 Kan. 96, 71 Pac. 250. An action by trustee in bankruptcy to set aside fraudulent conveyances is an action based on fraud and barred in two years. Harrod v. Farrar [Kan.] 74 Pac. 624.

Kentucky: Action held one for breach of contract for carriage of live stock and not sounding in tort. Burnside & C. R. R. Co. v. Tupman, 24 Ky. L. R. 2052, 72 S. W. 786. Action held not based on fraud but on implied warranty. Strubbe v. Lewis [Ky.] 76 S. W. 150.

Louisiana: Action for wrongful death. Goodwin v. Bodcaw Lumber Co., 109 La. 1050. Trespass on land barred in one year prior to Act 1902. No. 33, p. 41. Shields v. Whitlock, 110 La. 714.

Nebraska: Within the statute affecting actions based on fraud may be included actions affecting title to realty [Neb. Code Civ. Proc. § 12]. Kohout v. Thomas [Neb.] 93 N. W. 421.

Ohio: An action to avoid conveyances constructively fraudulent is within the statute relating to actions for fraud [Rev. St. 1892, § 4982]. Stivens v. Summers, 68 Ohio St. 421.

South Dakota: Statute limiting the time to sue to recover for flooding land does not apply to actions to restrain one from interfering with water rights [Comp. Laws, § 5593]. Lone Tree Ditch Co. v. Rapid City Elec. & Gas Light Co. [S. D.] 93 N. W. 650.

Texas: Actions to set aside judgments on the ground of fraud are barred after four years [Rev. St. 1895, art. 3358]. Watson v. Texas R. Co. [Tex. Civ. App.] 73 S. W. 830.

Virginia: Creditor's suit based on actual fraud is not barred by Code, § 2929, prescribing a five years' limitation to actions to set aside conveyances, etc. Flook v. Armentrout's Adm'r, 100 Va. 638.

3. The action under the federal anti-trust act to recover for injuries to business is not an action to recover penalties within the statute fixing the time to sue to recover the latter. Act July 2, 1890, c. 647 not governed as to limitation by U. S. Rev. St. § 1047. Atlanta v. Chattanooga Foundry & Pipe Works [C. C. A.] 127 Fed. 23. Action for an injury to personalty within the Tennessee statute. Shan. Code, § 4470, but governed by § 4473, and barred in ten years. Id.

4. The obligation of a municipality which is the successor to another municipality is neither "statutory" not "implied" within the statute of limitations. Van Auken v. Garfield Tp., 66 Kan. 594, 72 Pac. 211.

5. If the right of subrogation results ipso facto in an equitable assignment of the mortgage it is enforceable during the life of the mortgage. Boevink v. Christiaanse [Neb.] 95 N. W. 652.

6. Sale under power is not governed by the statute limiting the time in which foreclosure may be brought. Miller v. Coxe, 133 N. C. 578; Cone v. Hyatt, 132 N. C. 810; Menzel v. Hinton, 132 N. C. 660.

7. Suit held one to declare the equitable estate which arose out of a payment of the purchase money for land purchased by a husband and that the statute did not begin to run against the children as heirs until after the termination of the husband's curtesy

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give effect to the statute.[8] The general statute applies to special proceedings, such as mandamus.[9]

§ 3. *Disabilities and exceptions. A. In general.*—Where the statute has begun to run against a negotiable instrument, it will continue to run against a subsequent holder whether under disability or not,[10] and a statute limiting time to redeem from tax sales has been held to apply to persons under disabilities as well as those sui juris.[11] Where the limitation is a condition precedent to the right of action, the term is not suspended by causes which suspend ordinary limitations.[12] Since the cause of action for partition between co-tenants is a continuing one, it cannot be affected by the statute of limitations.[13]

(§ 3) *B. Obstructing suit, concealment of cause of action.*—Any obstruction causing the creditor to delay suing,[14] as a concealment of the cause of action,[15] suspends the statute until discovery.

(§ 3) *C. Pendency of action or proceeding affecting right to sue.*—The general rule is that the pendency of a suit operates to suspend the statute as to the parties thereto, so far as the subject-matter is concerned, but the suspension exists only as to the particular suit and not to the cause of action therein involved.[16] In case of an election between two remedies, the statute does not cease to run against the other. Therefore limitations against an action on mortgage notes is not suspended by the pendency of an action to foreclose the mortgage,[17] except where a personal judgment is sought.[18] The running of limitations against applications for deficiency judgment is suspended by an appeal from the decree confirming the sale on foreclosure.[19]

right. Condit v. Bigalow, 64 N. J. Eq. 504; Mantle v. Speculator Min. Co., 27 Mont. 473, 71 Pac. 665; Sioux City & St. P. R. Co. v. O'Brien County, 118 Iowa, 582. The time to file a bill of review by analogy is the same as the time in which to petition for a new trial. Williams v. Starkweather 24 R. I. 512, 25 R. I. 77. Statutes regulating time in which actions shall be commenced anew after nonsuit, are regarded as applicable to suits in equity [2 Starr & C. Ann. St. p. 2642, c. 83, par. 25]. Lamson v. Hutchings [C. C. A.] 118 Fed. 321. Action affecting realty conveyed by deed intended as a mortgage held not one of specific performance but of trespass to try title, though by a cotemporaneous writing the grantee agreed to reconvey upon certain conditions. Turner v. Cochran, 30 Tex. Civ. App. 558.

8. As a claim for compensation for deficiency in quantity of land conveyed by deed. Maxwell v. Wilson [W. Va.] 46 S. E. 349; Sibley v. Stacey, 53 W. Va. 292.

9. Jones v. Board of Police Com'rs [Cal.] 74 Pac. 696. By mandamus to compel commission under Drainage Act to levy assessments, etc. People v. Marsh, 82 App. Div. [N. Y.] 571. In a proceeding to authorize the receiver to enforce stockholders' liability the defense cannot be pleaded. Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co., 64 N. J. Eq. 517.

10. Meyer v. Christopher, 176 Mo. 580.

11. The statute limiting the time to redeem from tax sales applies to persons under disabilities as well as to those sui juris. Sparks v. Farris [Ark.] 71 S. W. 255.

12. Meyer v. Moss, 110 La. 132.

13. Dresser v. Travis, 39 Misc. [N. Y.] 358.

14. Code, § 2932. Promises of payment held not an obstruction. Liskey v. Paul, 100 Va. 764. Where the surety on an obligation caused the maker to deposit a sum of money with the payee which the latter was to apply on payment the time between the deposit and the determination of the action by other creditors to avoid the deposit as a preference will be deducted from the limitations against an action by the payee against the surety. Exch. Bank v. Thomas [Ky.] 74 S. W. 1086, 75 S. W. 283. Conduct of grantor held not to have prevented grantee from suing for breach of covenant of warranty. Bray v. Fletcher [Mich.] 93 N. W. 624.

15. Parmelee v. Price, 105 Ill. App. 271. Applied to action on notary's bond for false acknowledgment of a deed. State v. Hawkins [Mo. App.] 77 S. W. 98. Applied to action for breach of contract. Atchison, T. & S. F. R. Co. v. Atchison Grain Co. [Kan.] 70 Pac. 933. After open possession for two years by a bona fide purchaser of property stolen the owner's right of action to recover is barred. Luter v. Hutchinson, 30 Tex. Civ. App. 511. As from the time of knowledge of the conversion by the agent. Guernsey v. Davis [Kan.] 73 Pac. 101.

16. The pendency of a suit to enforce an express trust in mining land does not suspend the operation of the statute against an accounting for ores extracted and to restrain operation. Mantle v. Speculator Min. Co., 27 Mont. 473, 71 Pac. 665. A bill not a general creditor's bill does not suspend the running of limitations against other judgments. Gunnell's Adm'rs v. Dixon's Adm'r [Va.] 43 S. E. 340. Pendency of suits to prevent the collection of taxes prevents the running of limitations against tax privileges. State v. Recorder of Mortgages [La.] 35 So. 534.

17. Hinchman v. Anderson, 32 Wash. 198, 72 Pac. 1018.

18. Carstens v. Eller [Neb.] 97 N. W. 631.

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(§ 3) *D. Trusts.*—Trusts which are exempted from the operation of the statute are express trusts, technical or continuing trusts, cognizable only in a court of equity,[20] and not implied[21] or constructive trusts,[22] and in case of continuing trusts, limitations begin to run at the time of repudiation.[23] In case of constructive trusts, the statute will not begin to run until the cestui knew or could have known of the repudiation,[24] and if the constructive trust is in land, a repudiation occurs by a conveyance thereof.[25]

(§ 3) *E. Insolvency.*—The statute is tolled during the pendency of insolvency,[26] or bankruptcy proceedings against the debtor.[27]

(§ 3) *F. Insanity and death.*—The insanity which will toll the statute must have existed at the time of the accrual of the cause of action.[28] Death of the creditor[29] or debtor does not suspend the statute,[30] but a presentment of the claim to the personal representative will.[31] A failure to appoint a representative, however, will not operate to extend the statute.[32]

19. Brand v. Garneau [Neb.] 93 N. W. 219.

20. A devisee of realty upon which was imposed by the will a money charge in favor of a third person held not a trustee of an express trust. Merton v. O'Brien, 117 Wis. 437. Appropriation by congress not paid to but covered into the treasury in the credit of the beneficiary is an express trust and a repeal of the appropriation is a repudiation of the trust. Russell v. U. S., 37 Ct. Cl. 113. As between a vendor under bond for title there exists an express trust and the statute will not run against the purchase money notes until there is a termination of the trust relation. Williams v. Young [Ark.] 71 S. W. 669. The ten year statute bars an action for breach of the provisions of an express trust created by a written instrument. Newton v. Rebenack, 90 Mo. App. 650.

21. As against one receiving trust funds in payment of a personal obligation of the trustee. Beecher v. Foster, 51 W. Va. 605.

22. In cases of constructive trusts as where the officers of a corporation wrongfully conveyed away corporate property the three and six year statutes are not applicable. N. W. Land Ass'n v. Grady, 137 Ala. 219. Money collected by an attorney is not such a trust as would be exempted from the operation of the statute. Sheaf v. Dodge [Ind.] 68 N. E. 292. Officers of a corporation are not such trustees as will prevent them from pleading the bar of the statute. Actions for maladministration. Boyd v. Mut. Fire Ass'n, 116 Wis. 155. Action construed to be one on constructive trust. Buttles v. De Baun, 116 Wis. 323. In the absence of circumstances justifying greater delay an action to enforce a constructive trust is barred after two years. Lide v. Park, 135 Ala. 131.

23. Greenley v. Shelmidine, 83 App. Div. [N. Y.] 559; Thorn v. De Breteuil, 86 App. Div. [N. Y.] 405; Yeary v. Crenshaw, 30 Tex. Civ. App. 399; Mantle v. Speculator Min. Co., 27 Mont. 473, 71 Pac. 665. Money deposited with the husband by the wife held to have been held in trust for her children and recovery not barred. Stanley's Estate v. Pence, 160 Ind. 636. Code, § 3447, constructive trust held created by deed absolute on its face. Newis v. Topfer [Iowa] 96 N. W. 905. Parties purchasing land for another with his funds who took title in their own name held to hold in trust. White v. Costigan, 138 Cal. 564, 72 Pac. 178. While both parties are in possession limitations do not run against an action to enforce a constructive trust in the land. Ackley v. Croucher, 203 Ill. 530.

24. Repudiations, time thereof and knowledge are questions of fact. Crowley v. Crowley [N. H.] 56 Atl. 190. A repudiation of a trust brought home to the knowledge of the person entitled to enforce it starts the statute running. Buttles v. De Baun, 116 Wis. 323.

25. Blackledge v. Blackledge [Iowa] 91 N. W. 818.

26. Though the insolvency statute permits the bringing of certain actions on leave obtained. Union Collection Co. v. Soule [Cal.] 74 Pac. 549.

27. The bankruptcy of a fraudulent grantor tolls the statute limiting the time within which creditors may avoid the conveyance. Sheldon v. Parker [Neb.] 92 N. W. 923; Schreck v. Hanlon [Neb.] 92 N. W. 625.

28. This, though the insanity followed immediately after the accrual of the action or was the result of the injury sued for. Roelefsen v. Pella [Iowa] 96 N. W. 738.

29. Stanton v. Gibbins [Mo. App.] 77 S. W. 95.

30. Va. Code 1887, § 2933 amended act Feb. 19, 1898, applies only where the right to prosecute is obstructed by persons. Templeman's Adm'r v. Pugh [Va.] 46 S. E. 474. Does not suspend the statute fixing time in which to foreclose a real mortgage since it is not a debt which must be presented to his representative. Gleason v. Hawkins, 32 Wash. 464, 73 Pac. 533.

31. In case of a personal claim by the representative a proceeding instituted by him to sell land to pay the claim tolls the statute. Code 1883, § 164. Harris v. Davenport, 132 N. C. 697. The objector has the burden to prove notice on the part of the representative to sue as provided by Code, § 2817. Nicholas v. Sands, 136 Ala. 267. Ball. Ann. Codes, § 4810 prescribing time for enforcement of debts against a decedent does not apply to actions to foreclose mortgages on realty since such action may be brought against the heirs. Gleason v. Hawkins, 32 Wash. 464, 73 Pac. 533. The presentment of a claim to the administrator and his inclusion of it in his accounts stop the running of the statute. Succession of Willis, 109 La. 281. The mere neglect of the representative of the deceased debtor to perform his duties will not toll the statute limiting time to enforce against deceased debtors. The creditor could have en-

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(§ 3) *G. Infancy and coverture.*—Limitations do not run against infants[33] or married women during coverture.[34] In Missouri, if an equitable cause of action in favor of the wife against the husband accrues during coverture, the statute runs against her from that time.[35]

(§ 3) *H. Absence and nonresidence.*—Nonresidence tolls the statute.[36] If the cause of action accrues while defendant is out of the state, the statute does not begin to run until his return,[37] or if he departs from the state after the accrual, the time of absence will be deducted,[38] and the continuity of absence is not destroyed by casual visits to the state.[39] Absence or nonresidence will not however affect the running of the statute against actions concerning realty.[40]

§ 4. *Accrual of cause of action. A. In general.*—Since statutes of limitations affect only the remedy, they begin to run when the right to enforce the remedy exists.[41] If the right of action depends upon some affirmative act on the part of the claimant, he must act with reasonable diligence.[42] If the statute began to run

forced performance of duties under 2 Ball. Ann. Codes, §§ 6167, 6168. Bank of Montreal v. Buchanan, 32 Wash. 480, 73 Pac. 482. A claim barred by the provisions of Gen. Laws R. I. c. 234, § 8 fixing time to sue representatives to one year after death of the debtor is barred though presented pursuant to Gen. Laws, c. 215, §§ 2-4. MacNeill v. Gallagher, 24 R. I. 490.

32. After the lapse of six years without administration on the estate of a deceased mortgagor the mortgage could not be foreclosed. 2 Ball. Codes & St. §§ 4798, 4642 so provides. Gleason v. Hawkins, 32 Wash. 464, 73 Pac. 533. Though limitations do not run in favor of a deceased debtor where administration is delayed the heirs cannot extend limitations by delaying administration. Stanton v. Gibbins [Mo. App.] 77 S. W. 95. Though the mortgage security was barred the debt which matured after the death of the debtor is provable where the administration was not had until 20 years after the death of the debtor. Gleason v. Hawkins, 32 Wash. 464, 73 Pac. 533.

33. Gibson v. Draffin [Ky.] 77 S. W. 928; George v. Delaney [La.] 35 So. 894; Albers v. Kozeluh [Neb.] 97 N. W. 646. A proceeding in behalf of a minor legatee under Code Civ. Proc. § 396 is not barred though the right to compel executors is barred. In re Pond's Estate, 40 Misc. [N. Y.] 66. Shannon's Code, § 4448, limiting time in which to sue after removal of the disability does not apply to the ward's action against guardian on majority which is governed by § 4473. Jackson v. Crutchfield [Tenn.] 77 S. W. 776.

34. Crouch v. Crouch, 30 Tex. Civ. App. 288; Wren v. Howland [Tex. Civ. App.] 75 S. W. 894; Estes v. Turner, 30 Tex. Civ. App. 365. Limitation against an action to recover the wife's land sold by the husband without her consent does not begin to run until the husband's death. Higgins v. Stokes, 24 Ky. L. R. 2427, 74 S. W. 251. Ky. St. 1899, § 2506, permitting actions by married women to be brought after termination of coverture was not repealed by § 2128 permitting married women to hold property, etc. Sturgill v. Chesapeake & O. R. Co. [Ky.] 76 S. W. 826; Higgins v. Stokes, 25 Ky. L. R. 919, 76 S. W. 834. Applied to an action to recover for personal injuries; and this though the husband might reduce the recovery to possession subject to the wife's equity. Hill v. Ragland, 24 Ky. L. R. 1053, 70 S. W. 634. The exception by reason of coverture applies to a "free trader" during coverture under Code, § 1827. Wilkes v. Allen, 131 N. C. 279. In equity during coverture limitation will not run in favor of the husband against the wife. Condit v. Bigalow, 64 N. J. Eq. 504.

35. Rosenberger v. Mallerson, 92 Mo. App. 27.

36. And a foreign corporation is without the state within Code, § 21. Williams v. Metropolitan St. R. Co. [Kan.] 74 Pac. 600; Kesterson v. Hill [Va.] 45 S. E. 288. Code, § 162 providing that term of non residence shall not be deemed part of the limitation applies to an action to recover the penalty for receiving usury. Williams v. Iron Belt B. & L. Ass'n, 131 N. C. 267; Davenport v. Allen, 120 Fed. 172. Previous residence and removal from the state will not prevent the statute running in his favor [Ky. St. 1899, §§ 2531, 2532]. Bybee's Ex'r v. Poynter [Ky.] 77 S. W. 698.

37. Janeway v. Burton, 201 Ill. 78. Pub. St. 1882, c. 205, § 5 does not intend that the time of absence should merely be deducted but fixes a new time for the "prescribed period" of limitation to begin. Cottrell v. Kenney, 25 R. I. 99. Creditor held a resident of the state at the time of the accrual of the cause of action. In re Smith's Will [Or.] 75 Pac. 133. Evidence of non-residence is not evidence of absence from the state. Miller v. Baier [Kan.] 72 Pac. 772.

38. New suit. Comp. Laws 1897, § 2921. Lindauer Mercantile Co. v. Boyd [N. M.] 70 Pac. 568.

39. N. Y. Code Civ. Proc. § 401. Conn. T. & S. Deposit Co. v. Wead, 172 N. Y. 497. If the debtor continues his place of business within the state at which he spends the working hours of every working day the statute is not tolled. Webster v. Citizens' Bank [Neb.] 96 N. W. 118.

40. Which applies to resident as well as non resident married women during coverture. Linton v. Heye [Neb.] 95 N. W. 1040. Non-residence of the parties to the mortgage does not prevent the running of the statute. Christian v. John [Tenn.] 76 S. W. 906. Absence from the state of the owner of the land will not prevent the statute from running against a mortgage thereon which the owner is not obligated to pay. Hogaboom v. Flower [Kan.] 72 Pac. 547.

41. Staninger v. Tabor, 103 Ill. App. 330

42. As where the right of a creditor to set

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against an undisclosed agent or trustee, it began at the same time to run against the principal or cestui.[43]

Suits for partnership accounting accrue on the termination of the partnership,[44] and on fidelity bonds on the day of the violation thereof,[45] and on a stay bond on the day of decision by the appellate court.[46] Recovery of back taxes accrues at the time when the property could have been assessed.[47] The right of action for wrongful garnishment process accrues at the time of the levy,[48] and for contribution between attaching creditors on the determination of the invalidity of the attachment.[49] The right to maintain a creditor's bill accrues at the time of the recovery of the judgment[50] and return of the execution.[51]

The action to recover money paid accrues at the time of the payment,[52] and for money had and received at the time of receipt.[53]

The action against the residuary legatee for a debt of the ancestor does not accrue until the bond as legatee is filed,[54] and to recover distributive shares accrues at the time of the final settlement of the representative's accounts,[55] and order of distribution,[56] and to recover dower at the time of the husband's death.[57] Rights of action by remaindermen do not accrue until termination of the life estate,[58] though the life tenant had conveyed by deed purporting to convey absolute title.[59]

A cause of action to recover land against a purchaser in possession under contract to purchase accrues at the time of the default of the payment of the consideration note.[60] The cause of action to recover the damages awarded in eminent domain accrues at the time of the award.[61] The action by a subsequent grantee of public land accrues at the time of the registration of the previous grant.[62]

aside a conveyance as fraudulent depends upon his first reducing his claim to judgment and a delay of two years in reducing the claim to judgment held a bar to the action. Donaldson v. Jacobitz [Kan.] 72 Pac. 846.

43. Barden v. Stickney, 132 N. C. 416. The statute begins to run against the heir to enforce a constructive trust when it began to run against the cestui deceased. Lide v. Park, 135 Ala. 181.

44. Petty v. Haas [Iowa] 98 N. W. 104.

45. Grant County B., L. & S. Ass'n v. Lemmon [Ky.] 78 S. W. 874. Where at common law wardship of the female ward terminated upon her marriage the husband's right of action on the guardian's bond for a conversion begins to run at the time of the marriage. Fowler v. McLaughlin, 131 N. C. 209.

46. Cook v. Smith [Kan.] 72 Pac. 524.

47. Chicago, St. L. & N. O. R. Co. v. Com., 24 Ky. L. R. 2124, 72 S. W. 1119. A proceeding by an auditor's agent to recover back taxes on an annuity is an action barred after five years from the time when the property could have been assessed. Com. v. Nute, 24 Ky. L. R. 2138, 72 S. W. 1090.

48. Montague v. Cummings [Ga.] 45 S. E. 979.

49. First Nat. Bank v. Avery Planter Co. [Neb.] 95 N. W. 622.

50. Montgomery Iron Works v. Capital City Ins. Co., 137 Ala. 134.

51. Not from the date of the fraudulent transfer. Blackwell v. Hatch [Okl.] 73 Pac. 933.

52. State v. Stonestreet, 92 Mo. App. 214. The redemption having taken place pending an action against the United States to determine ownership which was decided adversely to the person redeeming. Sioux City & St. P. R. Co. v. O'Brien County, 118 Iowa, 582. Action to recover back money paid on contract to purchase land, the vendor not having title, though he believed he had good title is not an action on ground of mistake so as to accrue at the time of the discovery. Barden v. Stickney, 132 N. C. 416. A cause of action to recover by the accommodation indorser (Strauss v. Denny, 95 Md. 690) or maker of a note accrues at the time of payment by him (Leonard v. Leonard, 138 Cal. xix., 70 Pac. 1071). A statute providing that a cause of action for relief on the ground of mistake does not accrue until the mistake has been discovered does not apply to an action to recover money paid to redeem government land from the tax sale made in ignorance that the plaintiff was the owner thereof [Iowa Code, § 3449]. Sioux City & St. P. R. Co. v. O'Brien County, 118 Iowa, 582.

53. Barred after four years. Murphy v. Omaha [Neb.] 95 N. W. 680. Applied in an action to recover moneys collected as attorney. Sheaf v. Dodge [Ind.] 68 N. E. 292.

54. Pym v. Pym [Vis.] 96 N. W. 429.

55. Action to recover distributive share does not accrue until final accounting by the representative. Edwards v. Kelly [Miss.] 35 So. 418.

56. Smith v. Moore [Va.] 46 S. E. 326.

57. Barred in fifteen years (Winchester v. Keith, 24 Ky. L. R. 1033, 70 S. W. 664; Lucas v. White, 120 Iowa, 735; Lucas v. Whitacre [Iowa] 96 N. W. 776), except where the widow is in possession (Sperry v. Swiger [W. Va.] 46 S. E. 125).

58. Show v. Monk, 81 App. Div. [N. Y.] 206; Carver v. Maxwell [Tenn.] 71 S. W. 752; Bottorff v. Lewis [Iowa] 95 N. W. 262.

59. Turner v. Hause, 199 Ill. 464.

60. Richards v. Carter, 201 Ill. 165.

61. Spalding v. Omaha [Neb.] 94 N. W. 714.

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Right to foreclose a real mortgage does not necessarily accrue at the time of the death of the mortgagor.[63] Limitations against an action for cutting timber on another's land against the original trespasser and subsequent purchaser under the statute begins to run from the time of the original trespass.[64]

Mistake.—The statute runs from the time of the discovery of the mistake,[65] or where by the exercise of diligence it could have been discovered.[66]

Fraud.—Limitations do not begin to run against a cause of action based on fraud until the discovery thereof,[67] or from such time as by the exercise of ordinary care plaintiff might have discovered it,[68] since a party by his own negligence cannot defer the running of the statute.[69] It is generally presumed that any fraud connected with the transfer of land was discovered at the time of recordation of the conveyance.[70] The defendant has the burden of proving knowledge of the fraud,[71] and whether due diligence to discover the fraud had been exercised is a question for the jury.[72]

(§ 4) *B. Action on contract.*—If the contract is void ab initio, the right to restrain its performance accrues at the time the contract was made.[73]

If an instrument be payable on demand at a specified time and place, the stat-

63. Barred after ten years under Code 1883, § 158. Ritchie v. Fowler, 132 N. C. 788.

63. Nor does the allowance of the secured note as a claim against his estate set the statute in motion. Linn v. Ziegler [Kan.] 75 Pac. 489.

64. Wis. Rev. 1898, § 4269. A dismissal of the action as to the original trespasser did not change the nature of the action. Grunert v. Brown [Wis.] 95 N. W. 959. The action under Hill's Ann. Code Wash. § 1694 accrues at the time the lumber is removed from the state. Bergman v. Inman [Or.] 72 Pac. 1086.

65. Reformation of written instrument. Bottorff v. Lewis [Iowa] 95 N. W. 262. Action to cancel release of mortgage. Perry v. Williams, 40 Misc. [N. Y.] 57. Actions to reform written instruments on the ground of mistake are not affected by any statutes of limitations. Wall v. Meilke, 89 Minn. 232.

66. Maxwell v. Walsh, 117 Ga. 467.

67. Conduct of administrator held to have been a fraud on heirs. Kelly v. Pratt, 41 Misc. [N. Y.] 31. Code Civ. Proc. § 382, subd. 5. The statute has no application to an action by the ward to compel an accounting by the representatives of the deceased guardian. Libby v. Van Derzee, 80 App. Div. [N. Y.] 494. Action affecting realty held not barred. Arnett v. Berg [Colo. App.] 71 Pac. 636; Ruff v. Milner, 92 Mo. App. 620. If the fraud is a continuing fraud the operation of the statute is suspended, as where defendant as agent invested plaintiff's funds in second mortgage security representing to plaintiff that it was first mortgage security. Faust v. Hosford, 119 Iowa, 97. The heirs' right to set aside conveyances by the ancestor procured by fraud accrues at the time of his death, the undue influence having continued until the death. Aldrich v. Steen [Neb.] 98 N. W. 445. Applied to fraudulent conveyance. Brasie v. Minneapolis Brew. Co., 87 Minn. 456.

68. Cole v. Boyd [Neb.] 93 N. W. 1003. Action for fraudulent investment plaintiff's funds by agent. Faust v. Hosford, 119 Iowa, 97. Applied to action to restrain enforcement of a judgment entered without notice to defendant. Foust v. Warren [Tex. Civ. App.] 72 S. W. 404. Delay of 20 years held unreasonable. Lewis v. Duncan, 66 Kan. 306, 71 Pac. 577. Applied to an action to set aside a judgment on account of fraud in the attorneys representing the party. Watson v. Tex. & P. R. Co. [Tex. Civ. App.] 73 S. W. 830. Plaintiff held in a position to have discovered the fraud and the action barred. Callan v. Callan, 175 Mo. 346; Wolkins v. Knight [Mich.] 96 N. W. 445. Held that the creditor could not have discovered the fraud by use of reasonable diligence. Wilhoit v. Musselman, 24 Ky. L. R. 2011, 72 S. W. 1112.

69. Ryan v. Woodin [Idaho] 75 Pac. 261. Action by vendee to recover for shortage in acreage held barred. Sibley v. Hayes, 30 Tex. Civ. App. 61. Want of knowledge that the contract to issue an insurance policy had been breached by failure to issue the policy will not prevent the running of the statute against an action for the breach. Everett v. O'Leary [Minn.] 95 N. W. 901.

70. Irwin v. Holbrook, 32 Wash. 349, 73 Pac. 360; Fuller v. McMahon [Iowa] 94 N. W. 205. Action to cancel deed on the ground that because of fraud, the grantor supposed he was executing a power of attorney accrues at the time of filing the conveyance for record. Rogers v. Richards [Kan.] 74 Pac. 255. In case of the bankruptcy of the grantor that action by his trustee to avoid conveyances on ground of fraud is not barred until two years after the estate is closed provided it is not barred by the state laws at the time the petition was filed. Sheldon v. Parker [Neb.] 92 N. W. 923; Schreck v. Hanlon [Neb.] 92 N. W. 625. Where all the parties are nonresidents fraud is not deemed discovered by the recordation of the deed. Coulson v. Galtsman [Neb.] 96 N. W. 349. As against creditors constructive notice by the recordation of a fraudulent conveyance is not sufficient to start the statute. Chinn v. Curtis, 24 Ky. L. R. 1563, 71 S. W. 923.

71. Faust v. Hosford, 119 Iowa, 97.

72. Plaintiff held justified in relying on representations fraudulent in fact. Instruction held proper. Faust v. Hosford, 119 Iowa, 97.

73. Rev. St. 1892, § 4985 applies. Defiance Water Co. v. Defiance [Ohio] 67 N. E. 1052.

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ute begins to run at its maturity,[74] though there is no presentation as required by its terms,[75] but if payable after demand, the statute begins to run from the time of actual demand.[76] In case of executory contracts not fixing time of performance, the right to enforce it accrues within a reasonable time.[77] For breach of performance of a covenant, the action accrues on the day of the covenanted performance.[78] The statute begins to run from the time of demand made under contracts payable in instalments.[79]

Action to recover for services under an implied contract accrues at the time the services were completed, and a demand is not necessary to set the statute in motion.[80] The right of action for compensation as attorney accrues on the termination of his relationship as attorney in the suit.[82]

A cause of action to recover under a contract to pay by will accrues on the death of the promisor.[83]

Action against a bailee accrues at the time of the commission of the act inconsistent with the bailment,[84] and against gratuitous bailee of money at the time of demand for return.[85]

The right of action on a municipal warrant accrues on the day of issuance,[86] or where there is a fund in existence for its payment or a sufficient time had elapsed to create the fund.[87]

The action for breach of contract accrues at the time of the default, as an action on a bond conditioned to perform a certain act, but on a bond to indemnify,

74. Alger v. Alger, 83 App. Div. [N. Y.] 168; De Raismes v. De Raismes [N. J. Law] 56 Atl. 170. On a demand payable after date thereof the statute begins to run on the day following the date. Hardon v. Dixon, 77 App. Div. [N. Y.] 241.

75. Wurth v. Paducah [Ky.] 76 S. W. 143. A cause of action for attorney's fees stipulated in the note arose on maturity of the note. Barred within four years thereafter. Nease v. James [Tex. Civ. App.] 72 S. W. 87.

76. Hanson v. Hanson [Neb.] 97 N. W. 23. Applied to certificates of deposit. In re Cook, 86 App. Div. [N. Y.] 586; Sharp v. Citizens' Bank of Stanton [Neb.] 98 N. W. 50.

77. The action for specific performance cannot accrue while the grantor is receiving payments in performance. Burnell v. Bradbury [Kan.] 74 Pac. 279. A cause of action by a grantee under bond for title does not accrue until a breach of the bond after request for performance. Tenzler v. Tyrrell [Tex. Civ. App.] 75 S. W. 57. A right of action for breach of contract to insure accrues after the expiration of a reasonable time within which the policy should have been issued. Everett v. O'Leary [Minn.] 95 N. W. 901.

78. Blair v. St. Louis, etc., R. Co., 92 Mo. App. 538.

79. Limitations begin to run from the time when assessments on corporate stock are due under calls made which are barred after three years whether in the hands of the original subscriber or his assignee as against the corporation or creditors. Gold v. Paynter [Va.] 44 S. E. 920. Limitations run from time call made on subscription to corporate stock. Otter View Land Co.'s Receiver v. Bolling's Ex'x, 24 Ky. L. R. 1157, 70 S. W. 834. If the mortgage permitted payment of half of the debt in one year the balance after the lapse of another year the statute will begin to run at the expiration of two years if the mortgagee elects to wait that time. Cone v. Hyatt, 132 N. C. 810. Applied to contract of subscription to corporate stock payable upon calls made. West v. Topeka Sav. Bank, 66 Kan. 524, 72 Pac. 252.

80. Rev. St. 1898, § 4022, applies. In re Sheldon's Estate [Wis.] 97 N. W. 524.

Contra. An action to recover on a promise to pay for personal services does not accrue until demand for payment. Action construed and held not to be based on new promise so as to extend the statute but on an original promise to pay. Rankin v. Anderson, 24 Ky. L. R. 647, 69 S. W. 705.

82. McCrea v. Scofield, 86 N. Y. Supp. 10. On the facts claim for services rendered as attorney held barred. Greek v. McDaniel [Neb.] 94 N. W. 518.

83. Banks v. Howard, 117 Ga. 94. Action held to have accrued on death of the debtor and not barred. Brown v. Silver [Neb.] 96 N. W. 281. The statute does not begin to run against an action to recover for services rendered deceased on agreement to compensate by provision in the will until the death of decedent. Bennett v. Lutz [Iowa] 93 N. W. 288.

84. Under Rev. St. 1899, § 1575. Previous demand is not necessary to start the statute. Bollman Bros. Co. v. Peake, 96 Mo. App. 253.

85. Such case is not within Shan. Code, § 4477. Goodwin v. Ray, 108 Tenn. 614.

86. Smith v. Lawler [Ky.] 78 S. W. 851.

87. Brannon v. White Lake Tp. [S. D.] 95 N. W. 284; Board of Com'rs of Greer Co. v. Clarke [Okl.] 70 Pac. 206. Where municipal warrants are to be paid from a particular fund, which under the statute could be used for no other purpose a warrant holder's action for a diversion of such fund does not accrue until notice or knowledge thereof. New York Security & Trust Co. v. Tacoma, 30 Wash. 661, 71 Pac. 194. Accrual of cause of action by contractor against city for failure to assess damages for a public improvement. Ash v. Independence [Mo. App.] 77 S. W. 104.

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it accrues at the time when pecuniary loss results.[88] In case of several breaches, the statute begins to run against each from the time when it takes place.[89]

For breach of covenant of seisin, the action accrues at the time of the delivery of the deed,[90] and for breach of covenant of title, accrues after the conviction.[91]

Accounts.—Mutual accounts must on both sides relate to trade in merchandise, labor or something provable by book entries and mutual demands for money loaned cannot be included.[92] In case of mutual accounts, if the last item is within the period, the action is not barred; such item is equivalent to a subsequent promise reviving the debt.[93]

(§ 4) *C. Action in tort.*—For torts the right of action accrues at the time of the injury.[94] Generally, the cause of action accrues when the wrong is done.[95] The abutting owners' liability over to the city for injuries resulting from defective sidewalks does not accrue until the city's liability is fixed.[96] If the injury is continuing, recovery may be had for any damages accruing within the statutory period, though the remedy for the original wrong is barred.[97]

§ 5. *Commencement of action. A. In general.*—In Iowa[98] and New Jersey, an action is commenced by the issuance and delivery of the summons to the sheriff for service,[99] and in Nebraska, it is the date of summons if there is actual service;[1] or when there is no service,[2] voluntary appearance of the defendant without service is a commencement of the action.[3] In Washington the action is not

88. Northern Assur. Co. v. Borgelt [Neb.] 93 N. W. 226.

89. Northern Assur. Co. v. Borgelt [Neb.] 93 N. W. 226.

90. Action must be brought under Code, § 158, within ten years when not based on fraud. Shankle v. Ingram, 133 N. C. 254.

91. Wiggins v. Pender, 132 N. C. 628.

92. Accounts held not mutual. Hudson v. Hudson, 21 Pa. Super. Ct. 92. Action held to be on separate and distinct contracts and not on an account. Shafer v. Pratt, 79 App. Div. [N. Y.] 447.

93. Hudson v. Hudson, 21 Pa. Super. Ct. 92. Charge held a part of the same mutual account so as to save same from the bar. Gibson v. Jenkins, 97 Mo. App. 27. Petition held not demurrable on ground of bar. Wagener v. Steele, 117 Ga. 145.

94. Action for damages for flooding lands does not accrue at the time of construction of the embankment causing the flood. St. Louis, etc., R. Co. v. Stephens [Ark.] 78 S. W. 766; O'Connor v. Aetna Life Ins. Co. [Neb.] 93 N. W. 137; Nashville, etc., Ry. v. Dale & N. Mill. Co. [Kan.] 74 Pac. 596. Action by abutting owner for damages resulting from the construction of a drain in the street held to have accrued at the time of the construction. Griffin v. Drainage Commission of New Orleans, 110 La. 840.

95. In case of the erection of a smelter emitting fumes and smoke known to be poisonous to vegetation a cause of action therefor arises when the vegetation is killed by the smoke and fumes and not when the smelter was erected. Sterrett v. Northport Min. & Smelt. Co., 30 Wash. 164, 70 Pac. 266. Action against the recorder of deed for making erroneous record of mortgage accrues at the time of the making of the record. Is barred after five years under Burn's Rev. St. 1901, § 294, irrespective of whether the parties had notice of the error. State v. Walters [Ind. App.] 66 N. E. 182. An action to recover for injuries resulting from the construction of a railroad in the street in front of plaintiff's premises is barred after the lapse of six years from the construction of the road [Burns' Rev. St. 1901, § 293, c. 3]. Southern Indiana R. Co. v. Brown, 30 Ind. App. 684. Damages for injuries resulting from construction and operation of railroad held separable and not an entirety and the 5 and 15 year statute applicable. Klosterman v. Chesapeake R. Co., 24 Ky. L. R. 1233, 71 S. W. 6. Trespass for flooding lands accrues at the time of the occurence. Finley v. Williamsburgh, 24 Ky. L. R. 1336, 71 S. W. 502.

96. Lincoln v. First Nat. Bank [Neb.] 93 N. W. 698.

97. Every nuisance which is not permanent and which can be abated is a fresh nuisance for which a new action will lie. Southern R. Co. v. Morris [Ga.] 46 S. E. 85. Trespass by railroad held continuing and not a bar to action therefor within the statutory time. Knapp & C. Mfg. Co. v. New York R. Co. [Conn.] 56 Atl. 512. As where the entry was for the purpose of obtaining sap for turpentine though more than the statutory time had elapsed since the original trespass. Monroe v. McCranie [Ga.] 45 S. E. 246. Action for negligent treatment by surgeon held not to have accrued until the relationship had been severed. Gillette v. Tucker, 67 Ohio St. 106.

98. Iowa Code 1873, § 2532, so provides but the section is held not to apply to a suit to redeem land of a deceased lunatic from tax sale order. Hawley v. Griffin [Iowa] 92 N. W. 113.

99. County v. Pacific Coast Borax Co., 68 N. J. Law, 273. The delivery of the writ to a constable for service is the commencement of the action before a justice of the peace. Heman v. Larkin [Mo. App.] 70 S. W. 907.

1. Reliance Trust Co. v. Atherton [Neb.] 93 N. W. 150.

2. Amendment of complaint held not to set out a new cause of action. Cole v. Boyd [Neb.] 93 N. W. 1003.

3. Reliance Trust Co. v. Atherton [Neb.] 93 N. W. 150.

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deemed to have been commenced until the complaint is filed.[4] Where both parties are nonresidents, the levy of an attachment on property fraudulently conveyed stops the running of the statute.[5]

To suspend the statute as against a claim set off, it must be such a one as can be set off in the action,[6] and though the reconvention plea was defective but susceptible of amendment, it will stay the statute.[7]

An erroneous assumption of jurisdiction by the court will not toll the statute.[8] The issuance of process which cannot bring the defendant before the court is not a commencement of the action,[9] as where the process is not signed.[10]

(§ 5) *B. Amendment of pleading.*—When an amendment to a pleading introduces a new cause of action, the statute runs until the making of the amendment,[11] but merely correcting a defect in the original declaration,[12] or supplying omissions and stating the cause of action with more certainty,[13] or the correction of the name of defendant[14] or the bringing in of new parties, is not setting up a new cause of action.[15] If there is a misnomer of the defendant, the original pleading filed will not arrest the statute in the absence of any excuse for the mistake,[16] and an amendment of a claim as assignee, setting up the claim as surety who had paid, the obligation states a new cause of action.[17]

(§ 5) *C. After nonsuit or dismissal.*—The statute is suspended by bringing an action, though it is dismissed but not on the merits,[18] as a dismissal by

4. 2 Ball. Codes & St. § 4807. Cresswell v. Spokane County, 30 Wash. 620, 71 Pac. 195. Action held to have been commenced at the time of the filing of the original bill not at the time of the supplied bill filed after loss of the original. Miller v. Rich, 204 Ill. 444.

5. If promptly followed by a creditor's bill. Coulson v. Galtsman [Neb.] 96 N. W. 349.

6. Where the plaintiff in partition made a city a party defendant to compel it to present its claim for taxes the statute as to such claim is not suspended. Louisville v. Kohnhorst's Adm'x [Ky.] 76 S. W. 43.

7. Southern Cold Storage & Produce Co. v. Dechman [Tex. Civ. App.] 73 S. W. 545.

8. An erroneous assumption of jurisdiction of the probate court over claim will not toll the statute as to the claim. Miller v. Fulton [Pa.] 56 Atl. 74.

9. As the issuance of a notice under Sayles Ann. Civ. St. 1897, art. 1230, by a justice of the peace against non-resident defendant. August Kern Barber Supply Co. v. Freeze, 96 Tex. 513. Process allowed to be amended so as to prevent the bar. Wright v. Eureka Tempered Copper Co. [Pa.] 55 Atl. 978.

10. Schwartz v. Lake, 109 La. 1081.

11. That the officer of a corporation was a party to the action to wind it up will not prevent him from pleading the bar to a new cause of action set up against him for maladministration. Boyd v. Mut. Fire Ass'n, 116 Wis. 155; Shroyer v. Pittenger [Ind. App.] 67 N. E. 475; Fisher v. Musick's Ex'r, 24 Ky. L. R. 1913, 72 S. W. 787. Amended declaration held not to set up a new cause of action. Chicago City R. Co. v. McMeen, 206 Ill. 108. Amended petition held not to state a new cause of action. Burton-Lingo Co. v. Beyer [Tex. Civ. App.] 78 S. W. 248. Amendment in action for wrongful death held not to set up new cause of action. State v. Chesapeake Beach R. Co. [Md.] 56 Atl. 385. Amendment of declaration held not to change the cause of action so as to bring it within the statute. Seely v. Manhattan L. Ins. Co. [N. H.] 55 Atl. 425. An amendment setting up the statute allowing the action for death to be brought by the representative is not setting up a new cause of action so as to apply the statute of limitations. Louisville & N. R. Co. v. Pointer's Adm'r, 24 Ky. L. R. 772, 69 S. W. 1108.

12. Mott v. Chicago & M. El. R. Co., 102 Ill. App. 412. An amendment stating a different place whereat the accident happened is not a statement of a new cause of action. Chicago City R. Co. v. McMeen, 102 Ill. App. 318.

13. Marshalltown Stone Co. v. Louis Drach Const. Co., 123 Fed. 746.

14. Particularly where defendant corporation answered on the verdicts and filed a plea of misnomer. Sentell v. Southern R. Co. [S. C.] 45 S. E. 155. Suing defendant under wrong name held in view of the defendant's conduct in pleading without disclosing its proper name until after the bar such a mistake as would relieve plaintiff. Prichard v. McCord-Collins Co., 30 Tex. Civ. App. 582. Change of name of party plaintiff held not to make new cause of action so as to make the statute operative. Hucklebridge v. Atchison, T. & S. F. R. Co., 66 Kan. 443, 71 Pac. 814.

15. Particularly where the new party acquired an interest pendente lite. State v. Woodruff, 81 Miss. 456; Lyons v. Berlau [Kan.] 73 Pac. 52.

16. Martinez v. Dragna [Tex. Civ. App.] 73 S. W. 425.

17. Van Patten v. Waugh [Iowa] 98 N. W. 119.

18. As where the action was brought in the individual names of the partners instead of in the partnership name. Wolf v. New Orleans Tailor Made Pants Co., 110 La. 427. An action for wrongful death is within Code, § 146 allowing a new action to be brought within one year after dismissal or non-suit. Meekins v. Norfolk & S. R. Co., 131 N. C. 1. Code Civ. Proc. § 405, limiting the time in which a new action may be brought after termination of the action in any manner other than on the merits applies to actions to foreclose mechanics' liens. Conolly v.

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reason of defective service of process.[19] Bringing a second suit pending a suit for the same cause of action, and then taking a nonsuit, is not within a statute permitting the bringing of a second action after dismissal of the first.[20] After reversal, a new action of any kind having for result the same relief as was obtained in the original action may, under the code, be brought within one year.[21] The time within which to bring the second action begins to run from the time of nonsuit of the first.[22] To save the second action after nonsuit, the plaintiff must be the same or there must be an identity of right or privity of interest,[23] and the petition therein must aver that the dismissal was not caused by reason of any negligence on the part of the plaintiff.[24] An action to recover a penalty is not a continuation of a criminal proceeding for the same offense previously dismissed.[25]

§ 6. *Revival of obligation.*—An action for tort once barred cannot be revived.[26]

A new promise to pay revives a barred contractual obligation,[27] and a promise to pay by will is a sufficient revivor.[28] The acknowledgment to revive the debt must be direct, unequivocal and without qualification, and amount to a direct admission of a present existing liability,[29] it must plainly specify the demand,[30] and promise to pay it.[31] The acknowledgment must recognize the debt as existing, and there must be a promise to pay,[32] or such facts from which a promise

Hyams, 176 N. Y. 403. The statute prescribing the time within which an action for wrongful death should be brought is not suspended by the pendency and dismissal without prejudice of a former action [Civ. Code Kan. §§ 422, 43]. Rodman v. Mo. Pac. R. Co., 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704.

19. N. C. Code 1883, § 166, applied to proceeding by administrator to sell lands to pay debts. Harris v. Davenport, 132 N. C. 697.

20. Mo. & S. W. L. Co. v. Quinn, 172 Mo. 563.

21. Cal. Code Civ. Proc. § 355. Kenney v. Parks, 137 Cal. 527, 70 Pac. 556. After reversal of an action for personal injuries without a new venire a second action begun after two years from the injury is barred under Act June 24, 1895. Spees v. Boggs, 204 Pa. 504.

22. Under Code Civ. Proc. § 98, subd. 2, par. 2, as to actions to recover realty. Richardson v. Riley [S. C.] 45 S. E. 104.

23. An action brought in one year by the purchaser of the land at the administrator's sale after dismissal of the suit by the administrator will not save the action. Meddis v. Wilson, 175 Mo. 126.

24. Code, § 3455. Petition held not to contain a sufficient showing of diligence. Cepriley v. Paton, 120 Iowa, 559.

25. Ky. St. 1899, § 1138; Cr. Code, §§ 158-160. Com. v. Elkins, 25 Ky. L. R. 485, 76 S. W. 25.

26. Applied to action against city for injuries resulting from defective sidewalk. Van Auken v. Adrian [Mich.] 98 N. W. 15.

27. Statement held to constitute a new promise. Jenckes v. Rice, 119 Iowa, 451. New promise held insufficient to continue cause of action. Morehouse v. Morehouse, 140 Cal. 88, 73 Pac. 738. Petition held insufficient to show new promise. Cook v. Farley [Neb.] 95 N. W. 683. New promise held a question for the jury. Gill v. Donovan, 96 Md. 518. Correction of error in instruction on question of new promise. Gill v. Staylor [Md.] 55 Atl. 398. Writing held insufficient to constitute a new promise within Code, § 2922. Liskey v. Paul, 100 Va. 764. Subsequent promises held insufficient to toll the statute. Franklin v. Franklin, 22 Pa. Super. Ct. 463.

28. Gill v. Donovan, 96 Md. 518; Neish v. Gannon, 198 Ill. 219.

29. Durban v. Knowles, 66 Kan. 397, 71 Pac. 829. Letters held not admissible. Kelly v. Strouse, 116 Ga. 872. Writing held sufficient to revive barred debt. Maddox v. Walker's Ex'x, 25 Ky. L. R. 124, 74 S. W. 741. Letter by mortgagor held not such an acknowledgment as would toll the statute. Wood v. Merrietta, 66 Kan. 748, 71 Pac. 579. Evidence sufficient to show new promise. Henry v. Zurflieh, 203 Pa. 440. Evidence that deceased declared that he would make provision in his will for plaintiff is not evidence of an agreement or promise to pay for the services rendered him. Gill v. Staylor [Md.] 55 Atl. 398. Declarations to third persons are not of themselves sufficient to constitute a promise to pay or an acknowledgment of the debt. Burns' Rev. St. 1901, § 302 provides that the new promise must be in writing. They may, however, be admitted to show intention of the debtor at the time of making the partial payments. McBride v. Ulmer, 30 Ind. App. 154. Rule is applicable to all forms of writings. Thornton v. Nichols [Ga.] 45 S. E. 785. A mere acknowledgment of the debt is not alone sufficient. Hahn v. Gates, 102 Ill. App. 385. The duplication and substitution of the original obligation by the maker because the original was worn and old is not an acknowledgment nor a promise to pay. Goodrich v. Case, 68 Ohio St. 187. A written statement showing the amount paid for another purpose is not sufficient. Davis v. Davis [Me.] 56 Atl. 588.

30. Indorsement on note held insufficient to revive the debt. Hughes v. Treadaway, 116 Ga. 663. Writing held to sufficiently identify the obligation. Campbell v. Campbell, 118 Iowa, 131.

31. Weil v. Jacobs' Estate [La.] 35 So. 599.

32. Bucker v. Korff's Estate [Neb.] 97 N.

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can be implied;[33] but it need not expressly admit that debt is unpaid.[34] A conditional promise to pay is insufficient, though accompanied by a partial payment, without proof that the condition has been fulfilled.[35] An offer to buy the note is not an acknowledgment of the debt.[36]

The part payment to remove the bar must be made on the obligation sued on and under such circumstances as to amount to an acknowledgment of an existing liability,[37] and a part payment in the absence of rebutting evidence raises a presumption of an acknowledgment and new promise.[38] If the payment is made to apply to an indebtedness consisting of many items, all will be saved,[39] though the decisions are conflicting on the question whether in the absence of specific directions payments on account can be applied to the earliest charges.[40]

The new promise, acknowledgment or part payment must be made by the debtor or some one authorized by him;[41] therefore, payment by one obligor does not toll the statute as to the co-obligor if made without the authority or assent of the latter.[42]

W. 804. A mere recognition of the debt is insufficient. Warren v. Cleveland [Tenn.] 76 S. W. 910. Foster v. Bowles, 138 Cal. 346, 71 Pac. 494.

33. Letter held insufficient as a new promise. Lambert v. Doyle, 117 Ga. 81.

34. Letter held to sufficiently admit that the note was unpaid. Will v. Marker [Iowa] 98 N. W. 487.

35. Promise held conditional. Tridell v. Munhall, 124 Fed. 802.

36. Com. T. & S. Deposit Co. v. Wead, 172 N. Y. 497.

37. Good v. Ehrlich [Kan.] 72 Pac. 545; Rothschild v. Sessell, 103 Ill. App. 274. Admissibility of evidence on question of payment so as to revive the obligation. Fowles v. Joslyn [Mich.] 97 N. W. 790. Payments held not made under such circumstances as to repel the presumption of recognition of the obligation. Neilands v. Wright [Mich.] 95 N. W. 997. Evidence sufficient to go to the jury on question of whether payments had been made so as to revive the debt. Fowles v. Joslyn [Mich.] 97 N. W. 790. Payment held insufficient to toll the statute. McBride v. Ulmer, 30 Ind. App. 154. Admissibility of evidence of payments to take action on note out of the statute. Small v. Rose, 97 Me. 286. Evidence held insufficient to show payment suspending the operation of the statute. McBride v. Ulmer, 30 Ind. App. 154. A partial payment accompanied by a promise to pay the balance takes the claim out of the statute up to that time. Pond v. French, 97 Me. 403. Payment on account with a promise to pay in the future though the balance unpaid was not fixed tolls the statute, as a promise to pay out of property at death. Neish v. Gannon, 198 Ill. 219.

38. Evidence held sufficient to show entry of credit with authority of the debtor. Gorman v. Pettus [Ark.] 77 S. W. 907; Pond v. French, 97 Me. 403; Barnes v. Pickett Hardware Co., 203 Pa. 570.

39. Pond v. French, 97 Me. 403. Particularly when claimed to be in full payment. Florence, etc., R. Co. v. Tennant [Colo.] 75 Pac. 410.

40. Where there is a claim consisting of several separate causes of action a payment to "charge on my account," in absence of specific directions cannot be applied on claims barred. Shafer v. Pratt, 79 App. Div. [N. Y.] 447. In case of accounts in the absence of specific directions it will be presumed that the debtor intended payments made to be applied to the earliest transactions. Sleet v. Sleet, 109 La. 302. In the absence of specific directions payments on running accounts may be applied in extinguishing the earlier items. Marion Water Co. v. Marion [Iowa] 96 N. W. 883. The entry of money collected by an attorney as credited on an account without authority will not suspend the operation of the statute as to portions previously barred. In re Sawyer's Estate, 88 Minn. 218.

41. A written promise by the agent of the debtor is insufficient. Gen. St. p. 1976, § 10, requires an acknowledgment to be in writing by the party charged. De Raismes v. De Raismes [N. J. Law] 56 Atl. 170. An indorsement on the obligation to suspend the bar must be in the debtor's handwriting or shown to have been made with his privity. In re Salisbury's Estate, 41 Misc. [N. Y.] 274. Indorsements on the obligation not in the handwriting of the debtor or shown to have been made with his authority are not evidence of an acknowledgment. Civ. Code art. 2278 applied where the widow had unconditionally accepted the community and the action was to enforce against her the note of the deceased husband. Weil v. Jacob's Estate [La.] 35 So. 599. Admissibility of evidence to show endorsements of payments by agent were authorized. Bond v. Wilson, 131 N. C. 505. An indorsement not written by the payor whether made before or after the statute has run is admissible in evidence. McDowell v. McDowell's Estate [Vt.] 56 Atl. 98. Indorsements on notes held to have been made with assent of the maker and to prevent the running of the statute. Fletcher v. Brainerd [Vt.] 55 Atl. 608. Evidence of indorsements on notes held admissible. Ward v. Hoag, 78 App. Div. [N. Y.] 510. The arbitrary indorsement of a credit of which the defendant had no knowledge or did not assent thereto will not suspend the statute. Atchison, etc., R. Co. v. Atchison Grain Co. [Kan.] 70 Pac. 933. The partial payment must be made by some authorized person. Cone v. Hyatt, 132 N. C. 810. A credit to an account of a third person not shown to have been authorized by the creditor or to have been acquiesced in by him will not suspend the statute. Kirkpatrick v. Goldsmith, 81 App. Div. [N. Y.]

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Municipal officers in the absence of express authorization cannot revive a barred claim,[43] nor can an assignee for the benefit of creditors,[44] and in states where the statute is an absolute bar, the schedule of a barred claim by the bankrupt will not make it provable.[45] In New York[46] and New Jersey, the representative of a deceased debtor may remove the bar by a new promise,[47] but not in Georgia[48] or West Virginia.[49]

Agreements extending time for payment of the debt extends the statute as to the obligation and mortgage security.[50]

§ 7. *Operation and effect of bar. A. In general.*—A claim barred is not available as a set-off.[51] The statutes may be pleaded against a part of the cause of action.[52] If the obligation is barred, interest accruing thereon is also barred.[53] If the deed of trust for the benefit of creditors gave the trustee discretionary power as to time of sale, the power may be exercised, though the debts are barred.[54] That the action for damages for flooding land is barred will affect the right to abate the nuisance.[55] That an action on the guaranty of payment of the mortgage note by the assignor mortgagee was barred will not affect the assignees' lien on the insurance under covenant to insure.[56] Where the right to foreclose a deed absolute on its face is barred, the right to redeem is also barred.[57] Though the remedy by foreclosure is barred, the mortgagee may proceed by ejectment.[58]

(§ 7) *B. Bar of debt as affecting security.*—The surety's liability[59] for contribution is not affected because action against the principal is barred.[60] If the debt is barred, the mortgage security is also barred,[61] though this rule does not prevail in Connecticut,[62] Nebraska,[63] North Carolina,[64] South Dakota,[65] and North

265. Evidence held insufficient to show payments endorsed on note were made by defendant. Coulter v. Bank of Clear Creek County [Colo. App.] 72 Pac. 602.

42. McDonald v. Weidmer, 103 Ill. App. 390.

43. As a claim for damages for negligence not presented within the statutory time. Van Auken v. Adrian [Mich.] 98 N. W. 15; Wurth v. Paducah [Ky.] 76 S. W. 143. The levy and collection of a tax will not revive municipal obligations barred by statute. Wurth v. Paducah [Ky.] 76 S. W. 143. A municipal corporation to renew a barred debt must comply with Const. art. 11, §§ 5, 7, forbidding the creation of a debt without providing a fund for its payment. Tyler v. Jester [Tex. Civ. App.] 74 S. W. 359.

44. Robinson v. McDowell, 133 N. C. 182.

45. In re Wooten, 118 Fed. 670.

46. Holly v. Gibbons, 176 N. Y. 520.

47. Letters held admissible to show new promise. Hewes v. Hurff [N. J. Err. & App.] 55 Atl. 275.

48. Hughes v. Treadaway, 116 Ga. 663.

49. Defense pleaded by a representative goes to both personal and real assets. Findley v. Cunningham, 53 W. Va. 1.

50. Such agreements need not be recorded to operate as a suspension of the statute as to subsequent purchasers or mortgagees. Kraft v. Holzmann, 206 Ill. 548.

51. State Hospital for Insane v. Phila. County, 205 Pa. 336.

52. Bergman v. Inman [Or.] 73 Pac. 341. If a part of the claim only is barred a demurrer to the whole on that ground is bad. Gulf Red Cedar Co. v. Crenshaw [Ala.] 35 So. 50.

53. Porter's Adm'x v. Shattuck's Estate [Vt.] 54 Atl. 958.

54. Robinson v. McDowell, 133 N. C. 182.

55. Ennis v. Gilder [Tex. Civ. App.] 74 S. W. 585.

56. Hyde v. Hartford F. Ins. Co. [Neb.] 97 N. W. 629.

57. Fitch v. Miller, 200 Ill. 170.

58. Rev. St. §§ 4977, 4980 apply. Bradfield v. Hale, 67 Ohio St. 316.

59. That the action against the payee on the note is barred does not bar the action against the guarantor. Seabury v. Sibley, 183 Mass. 105.

60. Where co-sureties on a note agree after paying the note, to share equally in collections made thereon, an action for breach of such contract and recovery on a share in the collections, is not affected by the bar of limitations on an action against the principal. Cramer v. Redman, 10 Wyo. 328, 68 Pac. 1003.

61. Rev. St. 1901, § 11, construed in connection with § 16. Craft v. Holzmann, 206 Ill. 548; Cooper v. Haythorn, 66 Kan. 91, 71 Pac. 277. Under Mo. Rev. St. 1899, § 4276, if the debt is barred the mortgage security is also, though the statute § 4277 permits mortgages already executed to be foreclosed within two years after the debt was barred. Stanton v. Gibbins [Mo. App.] 77 S. W. 95; Duke v. Story, 116 Ga. 388.

62. Northrup v. Chase [Conn.] 56 Atl. 518.

63. A mortgage on realty continues as a lien for ten years from the maturity of the debt. Nares v. Bell [Neb.] 92 N. W. 571.

64. Applied to a surety who had executed a mortgage to secure the debt of another. Miller v. Coxe, 133 N. C. 578.

65. A barred note is admissible in an action concerning the lien given to secure it which was not barred. Alexander v. Ransom [S. D.] 92 N. W. 418.

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Dakota.[66] And in Oregon, while the mortgage can be foreclosed, a personal judgment cannot be entered against the mortgagor.[67] That the debt is barred will not affect the right to execute the power of sale in the mortgage security.[68] The pledgee in possession may enforce the pledge, though the debt is barred.[69]

(§ 7) *C. Against whom available.*—State statutes do not operate against claims by the United States,[70] nor against claims by the state,[71] nor against lands owned by the state,[72] or held by municipal corporations.[73] In the discharge of a public duty, the statute will not run against municipal corporations.[74]

(§ 7) *D. To whom available.*—Generally, the defense is personal,[75] yet in bankruptcy any creditor of the debtor may interpose the defense,[76] or a cestui,[77] or an heir liable for the debts of the ancestor,[78] or which would, if enforced, affect the realty descended, may plead the statute against such debts.[79] The purchaser of the equity may plead the statute against the mortgage,[80] and a subsequent lienor can plead the statute against a prior lien,[81] as may his assignee against an action to set aside a discharge of a senior mortgage.[82] The grantee assuming a mortgage debt may plead the statute as to it.[83] It is the duty of the officers of a municipal corporation to plead the statute when it can.[84] A foreign corporation may plead the statute provided it had, all the time the statute ran, an agent within the state.[85]

§ 8. *Pleading and evidence.*—To be available, the defense must be pleaded by answer,[86] though it may be raised by demurrer when it is apparent on the face

66. Satterlund v. Beal [N. D.] 95 N. W. 518.

67. Overholt v. Dietz [Or.] 72 Pac. 695.

68. Menzel v. Hinton, 132 N. C. 660.

69. Commercial Sav. Bank v. Hornberger, 140 Cal. 16, 73 Pac. 625.

70. U. S. v. Fidelity Trust Co., 121 Fed. 766.

71. 2 Rev. St. 1852, p. 78, § 222, was repealed by Rev. St. 1881, § 304, and a corporate charter granted in 1847, is a contract in writing so that a claim for money due the state thereunder prior to the revision of 1881 would be barred in 20 years. Terre Haute & I. R. Co. v. State, 159 Ind. 438.

72. Zepeda v. Hoffman [Tex. Civ. App.] 72 S. W. 443. The statutes do not run as against the state in respect to lands granted it by congress for the benefit of certain railroads. Galloway v. Doe, 136 Ala. 315.

73. Russell v. Lincoln, 200 Ill. 511.

74. The statute as to seven years' possession and payment does not bar a city from recovery of an assessment. Mecartney v. People, 202 Ill. 51.

75. The present owner of the land cannot plead the statute against an action to reform a discharge of a mortgage thereon by a former owner particularly where he had notice. Perry v. Williams, 40 Misc. [N. Y.] 57. The corporation being a party to the proceedings a creditor cannot object that claims on which dividends were allowed were barred. Dozier v. Arkadelphia Cotton Mills [Ark.] 75 S. W. 469.

76. In re John B. Lafferty & Bros., 122 Fed. 558.

77. Woods v. Douglass, 52 W. Va. 517.

78. Haines v. Haines [N. J. Law] 54 Atl. 401.

79. Bybee's Ex'r v. Poynter [Ky.] 77 S. W. 698. Heirs held estopped by conduct of ancestor to plead the statute. Foster v. Foster, 24 Ky. L. R. 1396, 71 S. W. 524. By making the mortgagor's heirs parties the plaintiff is estopped to claim they are not proper parties and not entitled to plead the bar to the mortgage. Gleason v. Hawkins, 32 Wash. 464, 73 Pac. 533.

80. Stancill v. Spain, 133 N. C. 76.

81. Judgment creditor may plead bar against prior mortgage. De Voe v. Runkle [Wash.] 74 Pac. 836. Junior mortgagee. Miller v. Coxe, 133 N. C. 578. Parties to foreclosure made such because claiming an interest in the property cannot plead limitations against the mortgage. Lincoln M. & T. Co. v. Parker, 65 Kan. 819, 70 Pac. 892.

82. Subsequent assignees of junior mortgagees may plead the bar of the statute to an action by senior mortgagees to set aside a discharge on the ground of mistake. Perry v. Fries, 85 N. Y. Supp. 1064.

83. Smith v. Davis, 90 Mo. App. 533.

84. Trowbridge v. Schmidt [Miss.] 34 So. 84.

85. O'Connor v. Aetna L. Ins. Co. [Neb.] 93 N. W. 137.

86. Sedgwick v. Concord Apartment House Co., 104 Ill. App. 5; Cone v. Hyatt, 132 N. C. 810; Call v. Shewmaker, 24 Ky. L. R. 686, 69 S. W. 749; Belken v. Iowa Falls [Iowa] 98 N. W. 296; Barclay v. Barclay, 206 Pa. 307; Satterlund v. Beal [N. D.] 95 N. W. 518; Hallett v. New England Roller Grate Co., 119 Fed. 873; Butler v. Copp [Neb.] 97 N. W. 634. Though not pleaded action by infant held not barred. Jones v. Comer [Ky.] 76 S. W. 392. Unsecured creditors cannot compel the debtor to plead the bar as against secured creditors. Anderson v. McNeal [Miss.] 34 So. 1. In both legal and equitable actions a failure to plead the bar waives the objection though it appears on the face of the complaint that the action is barred. Schmitt v. Hager, 88 Minn. 413. If a plea of limitations had been filed after trial at which the defendant was not represented he may file exceptions containing a correct statement of the evidence and if it appears that the claim is in fact barred a new trial will be ordered. Lambert v. Doyle, 117 Ga.

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of the pleading that the action is barred,[87] and where it fails to aver any suspension of the statute;[88] but the defense cannot be raised by motion to strike out the pleading.[89] There is an exception, however, in favor of the representative of the deceased debtor.[90]

It is within the court's discretion to allow an amendment setting up the defense.[91]

The facts constituting the bar must be set out in the plea,[92] and the statute must be specifically pleaded[93] by setting up the section relied on,[94] though the language of the statute need not be followed, but the gist of it must be averred.[95] If the defendant pleads the fact, he need not plead the conclusion that therefore the action was barred.[96]

As against a defense, the statute may be pleaded by a reply.[97]

Any exception from the operation of the statute, as coverture,[98] or a new promise, to be available, must be pleaded.[99] The plaintiff need not declare the new promise, but may so reply to the defense of the statute,[1] and matter showing that defendant was estopped to set up the defense is proper by way of reply.[2]

81. In equity if the action would have been barred at law, the objection may be raised by demurrer. Parmelee v. Price, 105 Ill. App. 271.

87. Davis v. Mills, 121 Fed. 703; Thompson v. Cincinnati R. Co., 109 Tenn. 268. It is error to overrule a demurrer to a set off, the plea showing on its face that the claim was barred by limitations. Brewer v. Grogan, 116 Ga. 60. Applied to suit to enforce a legal claim in equity. Maxwell v. Wilson [W. Va.] 46 S. E. 349. Applied to mechanic's lien. The complaint must aver that the period has not passed. Savings Bank v. Powhatan Clay Mfg. Co. [Va.] 46 S. E. 294. The objection of bar appearing on the face of the complaint it cannot be raised for the first time on a second trial. 2 Ball. Ann. Codes & St. §§ 4907, 4909, 4911, provides that the objection shall be waived if not raised by answer or demurrer. Bay View Brewing Co. v. Grubb, 31 Wash. 34, 71 Pac. 553. Though it appears on the face of the declaration that the action is barred the objection must be raised by answer and not by demurrer. The bringing of an action to recover for personal injuries within two years whether it is or is not a condition precedent to a right to recover, each case must depend on its peculiar fact and the plaintiff should be given an opportunity to set up those facts. Wall v. Chesapeake R. Co., 200 Ill. 66.

88. As where the petition fails to state when the fraud was discovered. Newman Grove State Bank v. Linderholm [Neb.] 94 N. W. 616.

89. Jackson v. Lemler [Miss.] 35 So. 306.

90. McBride v. Ulmer, 30 Ind. App. 154. Burn's Rev. St. 1901, § 2479. McBride v. Ulmer, 30 Ind. App. 154. In proceedings to compel an accounting before the surrogate, the administrator may interpose the objection at any time before the close of the evidence. In re Rothschild's Estate, 89 App. Div. [N. Y.] 161.

91. Application made for the first time after a trial has been had denied. Kennan v. Smith, 115 Wis. 463. Allowance of amendment to reply by setting up the statute against the counterclaim after part of the evidence was in held not error. Thomas v. Price [Wash.] 74 Pac. 563. Held error not to allow an amended answer to be filed setting up the defense. Louisville & N. R. Co. v. Hall, 24 Ky. L. R. 2487, 74 S. W. 280. It is not an abuse of discretion to refuse to allow a plea to be filed where the action had been pending two years and trial had before a commissioner. Foster v. Foster, 24 Ky. L. R. 1396, 71 S. W. 524.

92. Satterlund v. Beal [N. D.] 95 N. W. 518. Sufficient averment. Dufrene v. Anderson [Neb.] 93 N. W. 139. An averment that the period "has long since expired" is not sufficient. Schrieber v. Goldsmith, 39 Misc. [N. Y.] 381. Plea of bar held insufficient. Murray v. Barden, 132 N. C. 136. A joint plea held sufficient to admit evidence as to each of the defendants separately. Henning v. Wren [Tex. Civ. App.] 75 S. W. 905.

93. The defense is not avoidable under the general issue. Stancill v. Spain, 133 N. C. 76; Williams v. Starkweather, 24 R. I. 512. Merely stating that defendant has been in adverse possession for more than 30 years is insufficient. Uniontown v. Berry [Ky.] 76 S. W. 145.

94. Rev. St. 1898, § 2992. Nelden-Judson Drug Co. v. Commercial Nat. Bank [Utah] 74 Pac. 195.

95. Plea held sufficient. Bacon v. Chapman, 85 App. Div. [N. Y.] 309.

96. Pipes v. North Carolina Mica Mineral & Lumber Co., 132 N. C. 612.

97. In actions to quiet title the plaintiff may plead the statute against defendant's claim by replication [Colo. Code, § 255]. Schlageter v. Gude, 30 Colo. 310, 70 Pac. 428.

98. Meineke v. Edmundson [Tex. Civ. App.] 77 S. W. 238.

99. Notice of intention to rely thereon must be given under Code 1887, § 2922. Kesterson v. Hill [Va.] 45 S. E. 288. The writing relied on to remove the bar must be set forth literally or in substance. Thornton v. Nichols [Ga.] 45 S. E. 785. Reply held insufficient to set up new promise. Wurth v. Paducah [Ky.] 76 S. W. 143.

1. Vinson v. Palmer [Fla.] 34 So. 276. If the declaration sets up matter in avoidance of the statute in anticipation of the defense it is objectionable under special demurrer. Wall v. Chesapeake & O. R. Co., 200 Ill. 66.

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While the defendant has the burden of proving the defense,[3] yet if the plaintiff's testimony shows that the action is barred, the defendant need not introduce any evidence.[4] The plaintiff has the burden of showing facts which will exempt his claim from the bar.[5]

LIS PENDENS.

General rule.—As a general rule, lis pendens is in law notice of any fact averred in the pleadings pertinent to the matter in issue or the relief sought, and of the contents of exhibits filed and made a part of the pleadings.[6] It is immaterial whether the person acquiring an interest knew of the suit.[7] But a purchaser is only bound to take notice of an action pending at the time of his purchase,[8] and the rule has no application to a third person whose interest existed before the suit was commenced.[9]

The party asserting lis pendens must prosecute his suit with reasonable diligence.[10]

The purpose of the rule is to prevent third persons, during the pendency of litigation, from acquiring interests in the property which would preclude the court from granting the relief sought.[11] But while no advantage can be acquired by a transfer pendente lite, it is not void for that reason alone.[12]

Essential elements.—It is essential to the rule of lis pendens that the property be of a character subject to the rule, that the court has jurisdiction at the time of the transfer both of the property and the person from whom it is acquired, and that the property be sufficiently described in the pleadings to put the public on notice.[13] The purchaser must acquire title to property then in litigation,[14] and from a party to the suit.[15]

2. Under the facts defendant held estopped to set up the defense. Chesapeake & N. Ry. v. Speakman, 24 Ky. L. R. 1449, 71 S. W. 633.

3. Sloan v. King [Tex. Civ. App.] 77 S. W. 48. Admissibility of evidence. Brown v. Warner [Wis.] 93 N. W. 17.

4. Bradford v. Brown [Okl.] 71 Pac. 655.

5. Simpson v. Brown-Desnoyers Shoe Co., 70 Ark. 598; Crissey v. Morrill [C. C. A.] 125 Fed. 878. A general denial puts the burden on plaintiff of proving the alleged part payment. In such case defendant need not specially plead the statute. Good v. Ehrlich [Kan.] 72 Pac. 545. Since under Pub. St. 1891, c. 191, § 10, it is a condition precedent to right to sue to recover for wrongful death that the action be brought within the time limited. The plaintiff has the burden of proving that the action was brought within the statutory time. Poff v. New England Telephone & Telegraph Co. [N. H.] 55 Atl. 891.

6. Davis v. Miller Signal Co., 105 Ill. App. 657.

7. Under Civ. Code La. art. 2453. Wells v. Goss, 110 La. 347. In an action to compel a specific performance to convey land, a demand for a conveyance need not be made of a purchaser of the land after the action is commenced and to which he is made a party defendant, by an amended complaint. Kirkham v. Moore, 30 Ind. App. 549. A purchaser after judgment in the trial court, pending an appeal. Farmers' Bank v. First Nat. Bank, 30 Ind. App. 520.

8. He is not affected by a subsequent action. Davis v. Willson, 25 Ky. L. R. 21, 74 S. W. 696. Where defendant effects a settlement with adverse claimants whereby he acquires a judgment quieting title, and subsequent thereto the plaintiff sets up a claim then accruing through the former claimants but on different grounds from that on which the settlement was effected the defendant is not a purchaser pendente lite. Davis v. Willson, 25 Ky. L. R. 21, 74 S. W. 696.

9. Noyes v. Crawford, 118 Iowa, 15.

10. Kelley v. Culver's Adm'r [Ky.] 75 S. W. 272. Under Ky. St. 1899, § 2087, a lis pendens by the decedent's creditors may be created on the lands descended or devised only within six months after such descent or devise, and a purchaser after that period can be affected only by a valid lis pendens no matter what he knows of the decedent's creditors. Id.

11. Merrill v. Wright [Neb.] 91 N. W. 697.

12. A lease will not be annulled only because it was made pendente lite. State v. New Orleans Warehouse Co., 109 La. 64.

13. Davis v. Miller Signal Co., 105 Ill. App. 657; Noyes v. Crawford, 118 Iowa, 15. Description of property. Mashburn & Co. v. Dannenberg Co., 117 Ga. 567; Hillebrand v. Nelson [Neb.] 95 N. W. 1068.

14. Where a judgment is obtained against a principal and his sureties and suit is brought by the plaintiff's lien creditors against the property of the sureties, but not against that of the principal, one acquiring the principal's property during such suit is not a purchaser pendente lite. Woods v. Douglass, 52 W. Va. 517.

15. Code Civ. Proc. Neb. § 85, providing that "no interest can be acquired by third

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Commencement of action.—The time of commencing an action so as to make lis pendens effectual is the time of serving the summons on the defendant,[16] or entry in the cause of his voluntary appearance,[17] or when a petition is filed.[18]

Property within the rule.—There are authorities which deny the application of the doctrine of lis pendens to personal property, but the weight of authority is that it applies to all personal property except negotiable paper purchased before due, and articles of ordinary commerce sold in the usual way.[19]

Statutory lis pendens.—In some states, statutes regulate the commencement of lis pendens in certain cases, as by requiring the filing of a notice of the pendency of the action,[20] or of a petition,[21] and providing that the lis pendens shall be constructive notice from the time of filing.[22] But a failure to comply with such statutes does not affect a judgment rendered as notice to persons subsequently dealing with the property.[23]

The statutory notice applies only to the actions named in the statute.[24]

The function of statutory lis pendens is to give notice to all the world of the pendency of an action.[25] And lis pendens filed before the commencement of a proper action has no effect as notice until the action is actually pending.[26]

Continuity of lis pendens.—Lis pendens continues until the litigation is finally adjudicated[27] and during the term at which judgment is rendered.[28]

Statutory notice of lis pendens is not subject to the discretion and control of

persons in the subject-matter thereof as against the plaintiff's title" does not apply to independent rights or interests not acquired from or through a party to the suit. Merrill v. Wright [Neb.] 91 N. W. 697.

16. The action must be commenced by service of summons upon the defendant as prescribed by statute under Gen. St. Minn. § 5866. Spencer Co. v. Koell [Minn.] 97 N. W. 974. But the court in this case did not wish to be understood as intimating in case of service upon a nonresident by publication the action is not commenced, within the meaning of the above statute until the full period for publication has expired. Id.

17. Powell v. Nat. Bank of Commerce [Colo. App.] 74 Pac. 536.

18. A petition by an administrator for the sale of lands filed in the proper office, and particularly describing the lands, is notice to a subsequent purchaser under proceedings by the heirs for a sale for partition. Harris v. Davenport, 132 N. C. 697.

19. Powell v. Nat. Bank of Commerce [Colo. App.] 74 Pac. 536. While the doctrine of lis pendens has been relaxed in Colorado by Mills' Ann. Code, § 36, as to personal property it remains as at common law. Id. It applies to some kinds of personal property under certain actions concerning the same. Davis v. Miller Signal Co., 105 Ill. App. 657. It does not apply to shares of stock sold during the pendency of a suit concerning the same (Id.), or assigned by the defendant (American Press Ass'n v. Brantingham, 75 App. Div. [N. Y.] 435).

20. At the time of filing the complaint [Code N. C. 1883, § 229]. Morgan v. Bostic, 132 N. C. 743. Gen. St. Minn. 1894, § 5866, providing for the filing of such notice in any action in which the title to, or lien upon, or interest in any land is involved. Joslyn v. Schwend, 89 Minn. 71. Where such notice is filed a purchaser after judgment takes the chances incident to an appeal, since an appeal is not a new action. Farmers' Bank v. First Nat. Bank, 30 Ind. App. 520. Under Ball. Ann. Codes & St. Wash. § 4887, requiring lis pendens to be filed in order to give notice of the suit, a judgment foreclosing a mortgage is effective against a subsequent purchaser, although a lis pendens is not filed. London & S. F. Bank v. Dexter Horton & Co. [C. C. A.] 126 Fed. 593.

21. Code Iowa, § 3543. Noyes v. Crawford, 118 Iowa, 15; Cooney v. Coppock, 119 Iowa, 486.

22. 2 Ball. Ann. Codes & St. Wash. § 4887. Bigelow v. Brewer, 29 Wash. 670, 70 Pac. 129. Under such statute in an action to quiet title a finding that a deed and lis pendens were filed at a certain time and duly recorded need not show that they were recorded before third persons had taken the title under which they claim. The lis pendens notice is the material thing, and that became effective from the time of filing. Id. Code N. C. 1883, § 229. Morgan v. Bostic, 132 N. C. 743.

23. Failure to file a lis pendens, under Ball. Ann. Codes & St. Wash. § 4887, such statute having no application after judgment. London & S. F. Bank v. Dexter Horton & Co. [C. C. A.] 126 Fed. 593.

24. If filed in an action of a class not named is a nullity. Joslyn v. Schwend, 89 Minn. 71.

25. Joslyn v. Schwend, 89 Minn. 71.

26. Under Gen. St. Minn. 1894, § 5866. Joslyn v. Schwend, 89 Minn. 71. Until the complaint is filed under Code N. C. 1883, § 229. Morgan v. Bostic, 132 N. C. 743, and a purchaser, without actual knowledge, after his lis pendens is filed but before the complaint is filed is not charged with notice. Id.

27. It continues from the time of the dismissal of a suit to the time of filing a motion for a rehearing at a later term on which judgment was granted. Green v. Green, 23 Ohio Circ. R. 323.

28. Not merely to the time of judgment. Id.

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the court,[29] and can be discharged only in the manner prescribed by the statute,[30] unless it is filed in an action not named in the statute, or is an insufficient notice of a proper action,[31] or unless such discretion and control is given to the court by statute.[32]

Removal of lis pendens as cloud on title.—By statutes in certain states, an action may be maintained by one not a party to the original suit to set aside lis pendens as a cloud on his title, even though the suit in which it is filed has not been terminated.[33]

LOTTERIES.[34]

What constitutes.—To constitute a lottery, there must be a prize offered, and the payment of a consideration for a chance to obtain it.[35] The consideration need not be great; it may be in money or any other thing of value,[36] as may also the prize.[37] In some states, a raffle as distinguishable from a lottery is not punishable.[38] All persons assisting in conducting a lottery are liable as principals.[39]

29. A statutory lis pendens filed in a proper action, cannot be canceled by order of court, so long as the action is pending and undetermined. Joslyn v. Schwend, 89 Minn. 71.

30. As by an entry on the margin of the record thereof, or by a writing duly executed, acknowledged, and recorded [Gen. St. Minn. 1894, § 5866]. Joslyn v. Schwend, 89 Minn. 71.

31. Joslyn v. Schwend, 89 Minn. 71.

32. Upon application of any person aggrieved, at any time after the action is settled, discontinued or abated, under 2 Ball. Ann. Codes & St. Wash. § 4487, in actions for title to real estate. King v. Branscheid, 32 Wash. 634, 73 Pac. 668.

33. Under 2 Ball. Ann. Codes & St. Wash. § 5521, providing that any person in possession of real property may maintain a civil action against any person claiming an interest in said property, or any part thereof, or any right thereto, adverse to him, for the purpose of determining such claim. King v. Branscheid, 32 Wash. 634, 73 Pac. 668. His remedy under this statute is cumulative to the remedy under 2 Ball. Ann. Codes & St. Wash. § 4487, giving the court power, in actions for title to real estate where lis pendens is filed, at its discretion to order the lis pendens canceled of record at any time after the action is settled, discontinued or abated, on application of a person aggrieved. Id.

34. As to gambling devices other than lotteries, see Betting and Gaming; Gambling Contracts.

35. Three elements are essential—consideration, prize, and chance. Equitable Loan & Security Co. v. Waring, 17 Ga. 599.

Schemes constituting lotteries: An arrangement whereby one pays for a chance to obtain a preference in the distribution of a common fund contributed by himself and others. State v. Nebraska Home Co. [Neb.] 92 N. W. 763, 60 L. R. A. 448. The operation of a wheel-machine whereby the chance of winning of one depositing a coin therein depends alone upon the wheel's stopping at a color designated by the depositor, and in which skill or choice plays no part. Johnson v. State, 137 Ala. 101. A wheel machine whereby the chance of winning depends on the wheel stopping at a number corresponding with that purchased. Dalton v. State [Tex. Cr. App.] 74 S. W. 25. A scheme whereby the members of an organization were to receive, after a membership of five years, a distribution of a certain per cent. of a common fund paid in by them and new and lapsed members, the amount received depending on the getting in of new members, and if none were obtained certain members would be paid no money. Public Clearing House v. Coyne, 121 Fed. 927.

Schemes not lotteries: The giving of trading stamps [within Crim. Code Ala. § 4808]. State v. Shugart [Ala.] 35 So. 28. The distribution of lots of land among subscribers thereto, by a plan agreed upon between the subscribers themselves, as by drawing the number of a lot from one box and the name of a subscriber from another box. McCleary v. Chipman [Ind. App.] 68 N. E. 320. A contract to furnish piano to be given to the person having secured the greatest number of votes at the close of a contest, there being no element of chance in the award of the piano. Quatsoe v. Eggleston, 42 Or. 315, 71 Pac. 66. If a number of persons are entitled to a certain sum in any event though the sum to all may not be the same, it is legal, though they cannot all be paid at the same time, and which shall be paid at a certain time is determined by lot. It is a lottery only where the sum to be paid is determined wholly or partially by chance. Equitable Loan & Security Co. v. Waring, 117 Ga. 599.

36. Equitable Loan & Security Co. v. Waring, 117 Ga. 599.

37. As a preference in the distribution of a common fund. State v. Nebraska Home Co. [Neb.] 92 N. W. 763, 60 L. R. A. 448.

38. A raffle is not a lottery so as to subject the owner of the property to an indictment for the latter offense. The owner of a horse and buggy selling all the tickets for it is not indictable for conducting a lottery where the purchasers of the tickets shake dice among themselves to see who is to take the property. Risien v. State [Tex. Cr. App.] 71 S. W. 974. The difference between a lottery and raffle is that in a lottery a prize is awarded to a winner only, whereas in a raffle the prize is distributed to all the pur-

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In some states, lotteries are prohibited by constitutional provisions,[40] and are made crimes by statutory provision.[41] Some statutes prohibit the giving of premiums or gifts as inducements to purchasers.[42] The carriage of lottery tickets from one state to another may be prohibited by an act of congress under its power to regulate interstate commerce.[43] Acts of congress giving the postmaster general certain powers as to mail matter in reference to lotteries are not unconstitutional as invading personal rights.[44]

Indictment.—An indictment in the language of the statute is sufficient;[45] but one not charging all the elements of the crime is not.[46] It must not be too general.[47]

Evidence.—The admissibility[48] and sufficiency[49] of evidence in particular cases is discussed in the footnote.

MAIMING; MAYHEM.

In some states the offense of maiming is expressly regulated by statutes, variant in some respects from the common law,[50] which grade the offense.[51] Under some statutes, a specific intent to maim is unnecessary.[52]

chasers of tickets, and they decide by lot or otherwise who is to take the prize. Id. Wheel machine at which winner had the option of receiving a turkey but usually took money is a lottery and not a raffle. Dalton v. State [Tex. Cr. App.] 74 S. W. 25.

39. Whether as proprietor or agents. Thomas v. State, 118 Ga. 774. The finding of one in control of a "policy shop," with paraphernalia used in drawing is sufficient to convict, though he stated he was merely waiting in the place of another. Id.

40. Const. Or. art. 15, § 4.

41. **Oregon:** Bel. & C. Ann. Codes & St. § 1959.
Alabama: Crim. Code, § 4808.
Georgia: Pen. Code 1895, §§ 406, 407.
Missouri: Rev. St. 1899, § 2219.

42. The giving of a premium to one collecting all the letters spelling a certain word from packages, each of which contains a coupon with one of the letters, is an offense prohibited (by Rev. St. D. C. §§ 1176, 1177) of which a grocer selling such packages may be convicted. Sheedy v. District of Columbia, 19 App. D. C. 280. Act 1898, p. 93, prohibiting giving of trading stamps is unconstitutional. State v. Dodge [Vt.] 56 Atl. 983.

43. An express company engaged in carrying freight and packages from one state to another may be prohibited by congress from carrying lottery tickets by making it an offense against the United States [Act March 2, 1895, c. 191, 28 Stat. 963 (U. S. Comp. St. 1901, p. 3178)]. Champion v. Ames, 188 U. S. 321, 47 Law. Ed. 492. But such statute does not prohibit the carriage of such tickets from one state "through" another state or states to a destination not within one of the United States, as from a state to the District of Columbia. U. S. v. Whelpley, 125 Fed. 616.

44. Acts giving the postmaster general power, upon satisfactory evidence, to prohibit the payment of postal orders or delivery of registered letters to persons conducting a lottery or fraudulent scheme [Rev. St. U. S. § 3929; Act 1890, c. 908, § 2, 26 Stat. 466 (U. S. Comp. St. 1901, p. 2686), and § 4041 (U. S. Comp. St. 1901, p. 2749), approved March 2, 1895, c. 191, 28 Stat. 963 (U. S. Comp. St. 1901, p. 3178)]. Public Clearing House v. Coyne, 121 Fed. 927.

45. An indictment following the words of the statute, and setting forth further facts constituting a lottery. State v. Wilkerson, 170 Mo. 184. Under Rev. St. Mo. 1899, § 2219, providing a punishment for unlawfully aiding and assisting in making or establishing a policy as a business in the state.

46. Charging the accused of unlawfully exposing property to be by lot and chance disposed of and distributed to and among the purchasers of tickets therein does not charge him of lottery. Risien v. State [Tex. Cr. App.] 71 S. W. 974.

47. As a count charging the accused "with being concerned in interest in lottery policy writing generally." State v. Walls [Del.] 56 Atl. 111.

48. A license issued by a probate judge to maintain a lottery is inadmissible as evidence in a prosecution for maintaining a lottery, where the legislature is unauthorized to license a lottery. Johnson v. State, 137 Ala. 101.

49. Circumstantial evidence together with admissions of the accused will be sufficient to convict one of the statutory offense of aiding and assisting in making and establishing a policy, under Rev. St. Mo. 1899, § 2219. State v. Wilkerson, 170 Mo. 184. Evidence showing that the accused furnished, for a consideration, a policy slip with particular numbers thereon, which upon the happening of a contingency in the nature of a lottery would entitle the holder to receive money is sufficient to convict him of lottery policy writing independent of any express promise to pay. State v. Walls [Del.] 56 Atl. 111. Proof that one kept or maintained a lottery is sufficient to convict under an indictment for keeping, maintaining and operating the same. Proof of a drawing is not necessary. Thomas v. State, 118 Ga. 774. Although it is necessary for the state to prove, in an indictment for lottery policy writing that the policy slips contained certain particular numbers, it is unnecessary to prove what those numbers were. State v. Walls [Del.] 56 Atl. 111.

50. R. C. Del. 1852, amended 1893, p. 924, c. 127, §§ 8, 9, prescribing it as maliciously, with or without lying in wait, depriving a

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The allegation in an indictment for statutory maiming should be in the language of the statute;[53] though an allegation setting forth the acts constituting the offense sufficiently describes it.[54] But a bad allegation may be regarded as surplusage, so as to make the remainder of the indictment or information charging mayhem good.[55]

In a prosecution for mayhem, the court cannot charge an included offense of which a conviction cannot be had under the testimony;[56] nor should the instruction be broader than the sufficient allegations of the indictment.[57]

MALICIOUS MISCHIEF.

The crime of malicious mischief is regulated by statute, and generally consists of the malicious or willful injury to or destruction of property.[58] General malice is sufficient.[59] An indictment charging the offense in the language of the statute is sufficient.[60]

A defendant in a prosecution for malicious mischief may set up matters in justification of his acts,[61] except where he pleads an alibi.[62]

person of his genital organs, or putting out an eye, etc. State v. Holmes [Del.] 55 Atl. 343. Under such statute the offense is sufficiently charged although not alleged to have been committed either with or without lying in wait. Under Sess. Laws Colo. 1895, p. 156, c. 69, mayhem consists in unlawfully depriving a human being of a member of his or her body, or disfiguring or rendering it useless, etc., provided that no person shall be found guilty of mayhem, where the fact occurred during a fight had by consent, nor unless it appear that the person accused shall have been the assailant, or that the party maimed had in good faith endeavored to decline further combat. Carpenter v. People [Colo.] 72 Pac. 1072. R. S. Mo. 1899, § 1846, provides that every person who shall, on purpose and of malice aforethought, put out an eye, or slit, cut, or bite off the nose or lip of another, with intent to kill, maim, or disfigure such person, shall be adjudged guilty of mayhem. State v. Kyle [Mo.] 76 S. W. 1014.

51. Making it a felony if accomplished by lying in wait (R. C. Del. 1852, amended 1893, p. 924, c. 127, § 8) or a misdemeanor if without lying in wait (§ 9). State v. Holmes [Del.] 55 Atl. 343. Making it a high misdemeanor and fixing the punishment where the fact shall occur in actual fight, the party accused being thereof duly convicted [Sess. Laws Colo. 1895, p. 156, c. 69]. Carpenter v. People [Colo.] 72 Pac. 1072.

52. Under Sess. Laws Colo. 1895, p. 156, c. 69. Carpenter v. People [Colo.] 72 Pac. 1072.

53. An allegation charging that defendant did slit the eye, etc., of another is bad under a statute providing punishment for putting out an eye, etc. State v. Kyle [Mo.] 76 S. W. 1014.

54. Under R. C. Del. 1852, amended 1893, p. 924, c. 127, § 9, providing that one shall be guilty of a misdemeanor if he maliciously maims another an allegation that the defendant maliciously threw a certain acid into the eyes of another by reason of which they were destroyed is sufficient. State v. Holmes [Del.] 55 Atl. 343.

55. State v. Kyle [Mo.] 76 S. W. 1014.

56. Where the issue was whether the defendant had unlawfully deprived the prosecuting witness of an ear, and it was conceded that the latter had lost an ear during an encounter with the defendant, assault and battery cannot be charged. Carpenter v. People [Colo.] 72 Pac. 1072.

57. An instruction that if defendant cut the nose and "put out the eye," etc., under an indictment alleging that the defendant slit the eye and nose of another. State v. Kyle [Mo.] 76 S. W. 1014.

58. Hiding pieces of iron belonging to a threshing machine is malicious destruction of property under R. S. Mo. 1899, § 1959, for which an information will lie. State v. McLain, 92 Mo. App. 456. Shooting a dog. Atchison v. State [Tex. Cr. App.] 72 S. W. 998. But the act of pulling down or breaking the inclosures of another under Sand. & H. Dig. Ark. § 1784 is a trespass and not malicious mischief. State v. Culbreath [Ark.] 71 S. W. 254. A malicious prosecution for burning song books is unwarranted under Penal Code Tex. 1895, § 791, as such offense is provided for in § 777, and § 791 applies only to injuries not denounced by other provisions of the Code. Stanton v. State [Tex. Cr. App.] 74 S. W. 771. Wantonly running into a horse and injuring it is "malicious trespass on property for which no other penalty is provided" though defendant was also guilty of a punishable violation of the law of the road. Porter v. State [Miss.] 35 So. 218. It is not necessary to the offense of injuring a public jail (Penal Code, § 606) that defendant should be confined therein; though such fact is admissible to show motive. People v. Boren, 139 Cal. 210, 72 Pac. 899.

59. State v. Boles [Kan.] 74 Pac. 630. The offense of malicious injury to property defined in Code, § 1022, requires specific malice and general recklessness is insufficient. Porter v. State [Miss.] 35 So. 218.

60. Under Sand. & H. Dig. § 1784, and omitting the words "contrary to the form of the statute in such cases made and provided" does not vitiate the indictment. State v. Culbreath [Ark.] 71 S. W. 254. Injury to public jail under Pen. Code, § 606. People v. Boren, 139 Cal. 210, 72 Pac. 899.

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MALICIOUS PROSECUTION.

§ 1. Nature and Elements of the Wrong (767).
§ 2. Prosecution (767).
§ 3. Want of Probable Cause (767).
§ 4. Malice (769).
§ 5. Termination of Prosecution (769).
§ 6. Damages (770).
§ 7. Remedies and Procedure (770).

§ 1. *Nature and elements of the wrong.*—The necessary elements of an action for malicious prosecution have been defined as (1) a prosecution commenced against the plaintiff; (2) instituted or instigated by the defendant; (3) without probable cause; (4) maliciously; (5) legally and finally terminated in the plaintiff's favor.[62] No action lies for malicious prosecution of a civil suit unless accompanied by arrest of the person or seizure of property.[64] Otherwise the elements are the same as in an action for malicious criminal prosecution.[65]

§ 2. *The prosecution.*—If the defendant voluntarily made the complaint on which the warrant was issued and was otherwise active in the criminal proceedings, he is the prosecutor.[66] One who directs officers to make an arrest is liable therefor.[67] A principal may be liable for his agent's prosecution.[68] A partner is not liable for a malicious prosecution instituted by his co-partner.[69]

§ 3. *Want of probable cause.*—Probable cause for prosecution for crime is the existence of a state of facts sufficient to cause an ordinarily careful and prudent man to believe the accused guilty,[70] or to cause him to entertain an honest suspicion of guilt.[71] Circumstances of mental perturbation likely to confuse the judgment or disarm the caution of an ordinarily prudent man may be consid-

61. But it is no defense to shooting a dog that he did it in self defense where the dog was some distance from him inside the owner's fence (Atchison v. State [Tex. Cr. App.] 72 S. W. 998); nor is evidence of the dog's viciousness admissible where it is not shown that the defendant was in any danger from him; nor evidence that others had threatened to shoot the dog, where there was no evidence tending to connect anyone else with the shooting (Id.). See, also, title Animals, 1, pp. 81, 84.

62. In a prosecution for maliciously shooting a dog, after having pleaded an alibi, the defendant cannot set up either actual or apparent danger from the dog or his vicious habits. Atchison v. State [Tex. Cr. App.] 72 S. W. 998.

63. Schrieber v. Clapp [Okl.] 74 Pac. 316; McMorris v. Howell, 89 App. Div. [N. Y.] 272; Ruth v. St. Louis Transit Co., 98 Mo. App. 1. See Herbener v. Crossan [Del.] 55 Atl. 223. Motive is immaterial if there is probable cause. Lansing v. Oliver [Neb.] 95 N. W. 782. Where there are two or more defendants ancient practice to combine with a change of conspiracy is surplusage. Sale of goods without license. Lasher v. Littell, 202 Ill. 551.

64. Bonney v. King, 201 Ill. 47. "Interference by attachment, injunction, arrest or other provisional remedy." Paul v. Fargo, 84 App. Div. [N. Y.] 9. In some states damage above taxable costs is enough. Carbondale Inv. Co. v. Burdick [Kan.] 72 Pac. 781.

65. Carbondale Inv. Co. v. Burdick [Kan.] 72 Pac. 781. Suing on a paid note unlawfully in one's possession after maturity. French v. Guyot, 30 Colo. 222, 70 Pac. 683. Involuntary bankruptcy. Lawrence v. McKelvey, 80 App. Div. [N. Y.] 514.

66. Though he claimed to be acting under the directions of the justice who issued the warrant. Herbener v. Crossman [Del.] 55 Atl. 223. If defendant was present counseling and advising the prosecution he is liable though he did not sign the complaint. Eggett v. Allen [Wis.] 96 N. W. 803. Where the plaintiff merely proved that defendant had given his name to the grand jury in a list of physicians alleged to be practicing medicine illegally but there was no evidence of any indictment or prosecution set in motion by the defendant, a nonsuit was properly granted. Bryan v. Baird, 117 Ga. 177. Evidence that defendant was prosecutor held insufficient. Lehman v. Oschmann, 85 N. Y. Supp. 864.

67. McMorris v. Howell, 89 App. Div. [N. Y.] 272.

68. Street car conductor calling on policeman according to defendant's rules. Ruth v. St. Louis Transit Co., 98 Mo. App. 1. Railway police appointed by the governor are not agents of the railway for this purpose. Tucker v. Erie R. Co. [N. J.] 54 Atl. 557. Firm held not responsible for prosecution by its superintendent. Markley v. Snow [Pa.] 56 Atl. 999.

69. Unless committed in the course of and for the purpose of transacting the partnership business (Noblett v. Bartsch, 31 Wash. 551, 71 Pac. 551), or with express authority or knowledge (Lawrence v. Leathers, 31 Ind. App. 414).

70. Fox v. Smith [R. I.] 55 Atl. 698; Provident Sav. Life Assur. Soc. v. Johnson, 24 Ky. L. R. 1902, 72 S. W. 754; Bruff v. Kendrick, 21 Pa. Super. Ct. 468.

71. But unreasonable belief, however honest is insufficient. Eggett v. Allen [Wis.] 96 N. W. 803.

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ered.[72] The actual guilt or innocence of the accused is immaterial.[73] Credible information from reliable sources is sufficient,[74] and neglect to make reasonable inquiry charges the prosecutor with notice of facts that would have been disclosed;[75] but with this exception only facts known to the prosecutor at the time he instituted proceedings are to be considered.[76] A finding for the prosecutor in the original action is conclusive that there was probable cause,[77] unless obtained by undue means;[78] but want of probable cause is not necessarily to be inferred from a finding for the defendant.[79] It is prima facie evidence however.[80] Holding for trial by an examining magistrate is not conclusive evidence of want of probable cause.[81] Discharge by an examining magistrate is at least to be considered as bearing on want of probable cause.[82] Mere failure of prosecution, however, does not establish want of probable cause.[83] Waiver of preliminary examination is only prima facie evidence of probable cause.[84]

Admissibility of evidence as to want of probable cause is treated in the note.[85]

72. Gillispie v. Stafford [Neb.] 96 N. W. 1039; Small v. McGovern, 117 Wis. 608.

73. Bruff v. Kendrick, 21 Pa. Super. Ct. 468; St. Louis, etc., R. Co. v. Wallin [Ark.] 75 S. W. 477; Fox v. Smith [R. I.] 55 Atl. 698.

74. Fox v. Smith [R. I.] 55 Atl. 698.

75. Bechel v. Pacific Exp. Co. [Neb.] 91 N. W. 853. See Sudborough v. Pacific Exp. Co. [Neb.] 95 N. W. 3. But if not put on inquiry by facts known, he is not charged with knowledge even of facts he might have ascertained with reasonable diligence. Kan. & T. Coal Co. v. Galloway [Ark.] 74 S. W. 521. Need not ordinarily inquire of the suspect himself. Bechel v. Pacific Exp. Co. [Neb.] 91 N. W. 853. Failure to first identify the suspect was not reasonable inquiry. Removal of baggage subject to landlord's lien. Lawrence v. Leathers, 31 Ind. App. 414.

76. Lawrence v. Leathers, 31 Ind. App. 414; Bucki & Son Lumber Co. v. Atlantic Lumber Co. [C. C. A.] 121 Fed. 233. Hence evidence of the plaintiff's intentions or arrangements is not admissible by the defendant to show probable cause without first showing that the defendant knew of them at the time of the prosecution. Bank of Miller v. Richmon [Neb.] 94 N. W. 998. Knowledge of innocence acquired after prosecution begins will not show want of probable cause. Fox v. Smith [R. I.] 55 Atl. 698. The commission of other like offenses is material only if known to the prosecutor. Miles v. Walker [Neb.] 92 N. W. 1014.

77. Action under Gen. St. 1902, § 1105, for malicious prosecution of a civil suit. Frisbie v. Morris, 75 Conn. 637; Blackman v. West Jersey R. Co., 126 Fed. 252. A preliminary injunction is not such a final determination (but see dissenting opinion). Burt v. Smith, 84 App. Div. [N. Y.] 47. Query as to effect of hearings upon affidavits only. Mesnier v. Denike, 82 App. Div. [N. Y.] 404.

78. False affidavits causing imprisonment for contempt. Mesnier v. Denike, 82 App. Div. [N. Y.] 404.

79. Ruth v. St. Louis Transit Co., 98 Mo. App. 1; Hiersche v. Scott [Neb.] 95 N. W. 494. In the absence of statutory provisions. Smeaton v. Cole, 120 Iowa, 368.

80. Though no certificate that the complaint was willful and malicious and without probable cause was made under Rev. St. 1898, § 4791. Eggett v. Allen [Wis.] 96 N. W. 803. Finding of commissioners of insanity. Figg v. Hanger [Neb.] 96 N. W. 658. It has been held that it does not even tend to show want of probable cause on the ground of res inter alios acta. Bekkeland v. Lyons, 96 Tex. 255. Arrest on affidavit that about to leave state. Bank of Miller v. Richmon [Neb.] 94 N. W. 998. Reasons and opinions of trial judge who acquitted are admissible to explain weight of that evidence. Arrest for contempt of strike injunction on defendant's affidavit and prayer. Kan. & T. Coal Co. v. Galloway [Ark.] 74 S. W. 521.

81. Dean v. Noel, 24 Ky. L. R. 969, 70 S. W. 406. Even where he must adjudge probable cause. Bechel v. Pacific Exp. Co. [Neb.] 91 N. W. 853.

82. Miles v. Walker [Neb.] 92 N. W. 1014. The finding of a bill by a grand jury is some evidence, but court not bound to rule that it was prima facie evidence of probable cause. Perkins v. Spaulding, 182 Mass. 218.

83. Voluntary non-suit. Cohn v. Saidel, 71 N. H. 558; Fox v. Smith [R. I.] 55 Atl. 698.

84. Jones v. Wilmington R. Co., 131 N. C. 133.

85. Evidence that the plaintiff had embezzled other articles at about the same time from the same owner and under the same general circumstances is admissible to show probable cause and malice. Perkins v. Spaulding, 182 Mass. 218. Where indictment was in three counts and trial on only one and acquittal, defendant may put in evidence of guilt under other two counts. Provident Sav. Life Assur. Soc. v. Johnson, 24 Ky. L. R. 1902, 72 S. W. 754.

Testimony in the original case was not admitted to prove probable cause. Tuffy v. Humphrey, 88 App. Div. [N. Y.] 420. But see Loftus v. Meyer, 84 N. Y. Supp. 861. But proof of it has been allowed even by others than the witnesses themselves. Kan. & T. Coal Co. v. Galloway [Ark.] 74 S. W. 521.

Evidence competent at the trial of the charge is competent at the trial of the action for malicious prosecution. Perkins v. Spaulding, 182 Mass. 218.

Newspaper articles giving plaintiff's version of the transaction in addition to the facts of prosecution and acquittal cannot be put in evidence. Brown v. Smallwood, 86 App. Div. [N. Y.] 76.

An adequate civil remedy justified a finding of want of probable cause and malice. Necker v. Bates, 118 Iowa, 545.

Suing on a valid claim to which there is a known valid counterclaim is not want of

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Advice of counsel acted on in good faith after a full statement is a defense,[86] but not if based on false[87] or incomplete[88] statement of facts. All facts obtainable by reasonable diligence must be disclosed.[89]

§ 4. *Malice.*—Malice may consist of any motive other than a desire to bring a guilty party to justice.[90] Malice may be inferred from want of probable cause,[91] or from intentional use of criminal process for an unauthorized purpose;[92] but the want of probable cause cannot be inferred from malice.[93] Acquittal alone does not show malice.[94] Malice in general is insufficient; malice against the plaintiff in particular must be shown.[95]

§ 5. *Termination of prosecution.*—The original action must have been legally terminated before the action for malicious prosecution was commenced.[96] The termination must have been favorable to the present plaintiff,[97] but need not have been on the merits.[98]

probable cause. Coleman v. Botsford, 89 App. Div. [N. Y.] 104.

Facts tending to show the plaintiff's honest belief in his right to do an act within the literal definition of a statutory larceny (Code, § 4852) and hence absence of criminal intent should have been considered by the prosecutor in determining whether he had probable cause to prosecute. Kletzing v. Armstrong, 119 Iowa, 505.

86. St. Pierre v. Warner, 24 R. I. 295; Cohn v. Saidel, 71 N. H. 558; Small v. McGovern, 117 Wis. 608. Conclusive of probable cause and evidence of want of malice. Kan. & T. Coal Co. v. Galloway [Ark.] 74 S. W. 521. "Affects malice." Bucki & Son Lumber Co. v. Atlantic Lumber Co. [C. C. A.] 121 Fed. 233. But not the advice of the corporation's permanent counsel who was constituted agent to decide the whole matter and directed to act and instituted the prosecution in pursuance of such agency (Huckestein v. N. Y. Life Ins. Co., 205 Pa. 27); nor of a lawyer who was also director and secretary of defendant (Bucki & Son Lumber Co. v. Atlantic Lumber Co. [C. C. A.] 121 Fed. 233); nor of a public prosecuting attorney (Kletzing v. Armstrong, 119 Iowa, 505. Contra, St. Louis, etc., R. Co. v. Wallin [Ark.] 75 S. W. 477); nor of justice of the peace who issued warrant (Necker v. Bates, 118 Iowa, 545).

87. Miles v. Walker [Neb.] 92 N. W. 1014.

88. Lawrence v. Leathers, 31 Ind. App. 414; Hiersche v. Scott [Neb.] 95 N. W. 494; Connelly v. White [Iowa] 98 N. W. 144.

89. Rosenblatt v. Rosenberg [Neb.] 95 N. W. 686; Butcher v. Hoffman, 99 Mo. App. 239. But it is sufficient if the diligence used is also submitted to counsel and his advice honestly sought. Information got under threat of arrest as accessory. Gillispie v. Stafford [Neb.] 96 N. W. 1039. Where defendant stated only his view of the facts and not the opposite one relied on by plaintiff it is no defense. Butcher v. Hoffman, 99 Mo. App. 239.

90. Such as to collect a debt or compel delivery of property. Eggett v. Allen [Wis.] 96 N. W. 803. "Any evil or unlawful purpose as distinguished from that of promoting justice." Metropolitan L. Ins. Co. v. Miller, 24 Ky. L. R. 1561, 71 S. W. 921. "Malus animus or any improper or indirect motives." Campbell v. Baltimore & O. R. Co. [Md.] 55 Atl. 532. The relations of the parties and their conduct toward each other just before the criminal proceedings were admissible so far as they showed the motive of the prosecution. Clark v. Folkers [Neb.] 95 N. W. 328.

91. Herbener v. Crossan [Del.] 55 Atl. 223; Cohn v. Saidel, 71 N. H. 558; Connelly v. White [Iowa] 98 N. W. 144; Ruth v. St. Louis Transit Co., 98 Mo. App. 1; Gould v. Gregory [Mich.] 95 N. W. 414. But it is not an implication raised by law as in slander and libel. Small v. McGovern, 117 Wis. 608; Kelly v. Durham Traction Co., 132 N. C. 368. Contra, Herbener v. Crossan [Del.] 55 Atl. 223.

92. Regain possession of property. Rosenblatt v. Rosenberg [Neb.] 95 N. W. 686. Evidence that the prosecution was to collect a debt or punish for not paying a debt rather than to vindicate the law and punish crime, is competent under the issue of malice and want of probable cause. Clark v. Folkers [Neb.] 95 N. W. 328.

93. Clark v. Folkers [Neb.] 95 N. W. 328; Cohn v. Saidel, 71 N. H. 558; Herbener v. Crossan [Del.] 55 Atl. 223; Fox v. Smith [R. I.] 55 Atl. 698.

94. St. Pierre v. Warner, 24 R. I. 295; Ruth v. St. Louis Transit Co., 98 Mo. App. 1. Perhaps may infer malice from acquittal by committing magistrate. Noblett v. Bartsch, 31 Wash. 24, 71 Pac. 551. Perhaps acquittal on other prosecutions instituted by the defendant against the plaintiff with malice may be evidence of malice in the principal case. Coble v. Huffines, 133 N. C. 422. An adjudication by the criminal court that a second prosecution for the same offense was frivolous and malicious is some evidence of malice in the first prosecution (Coble v. Huffines, 132 N. C. 399), but not if the prosecutions were for different offenses (Coble v. Huffines, 133 N. C. 422). See, also, ante, § 3, inference of want of probable cause from acquittal.

95. Savage v. Davis, 131 N. C. 159.

96. As distinguished from malicious abuse of process. Bonney v. King, 201 Ill. 47; Tyler v. Smith [R. I.] 56 Atl. 683. And this does not infringe § 19 of Bill of Rights of the Const. of 1870 that "every person ought to find a certain remedy in the laws for all injuries and wrongs he may receive in his person, property or reputation." Bonney v. King, 201 Ill. 47.

97. Lansing v. Oliver [Neb.] 95 N. W. 782. The action cannot be based on an original bill in equity alleging fraud where though

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§ 6. *Damages.*[99]—The plaintiff may recover for loss of time,[1] attorney's fees,[2] injury to feelings[3] or reputation,[4] or inability to dispose of attached property;[5] but not for peril to his health from the incarceration.[6] Punitive damages in states allowing it may always be awarded in malicious prosecution.[7] Excessiveness of particular recoveries is treated in the note.[8]

§ 7. *Remedies and procedure.*—Case and not trespass vi et armis is the remedy where the process is regular.[9] An allegation that the defendant "falsely and maliciously and without just cause" charged the plaintiff sufficiently avers want of probable cause.[10] Advice of counsel should be pleaded as an affirmative defense.[11] Complaint must show that prosecution has terminated.[12] Plaintiff has the burden of proof of both want of probable cause and malice.[13] Jury may infer malice from want of probable cause and that shifts the "burden of proof" on the defendant to show absence of malice.[14] Whether certain facts constitute probable cause is for the court; but whether such alleged facts exist is for the jury.[15] Malice

the decree was for the original plaintiff the court denied the main contention of fraud. Swepson v. Davis, 109 Tenn. 99, 59 L. R. A. 501. Evidence of a nolle prosequi upon accord and satisfaction is admissible to show that there was no termination favorable to plaintiff. Loftus v. Meyer, 84 N. Y. Supp. 861. The court cannot submit to the jury the question whether the plaintiff was successful in the original suit and especially not let them consider on this point matters not passed on in the original suit. Swepson v. Davis, 109 Tenn. 99, 59 L. R. A. 501. See, also, ante, § 3, conviction conclusive of probable cause.

98. Hurgren v. Union M. L. Ins. Co. [Cal.] 75 Pac. 168. Dismissal of complaint by judge on preliminary hearing is a sufficient termination though it would not be a bar to further prosecution on the same charge. Waldron v. Sperry, 53 W. Va. 116. Improperly taking a criminal case from the jury is a sufficient termination since no further proceedings can be had under the double jeopardy rule. Schrieber v. Clapp [Okl.] 74 Pac. 316.

99. See, also, Damages, 1 Curr. Law, 833.

1. Ruth v. St. Louis Transit Co., 98 Mo. App. 1.

2. Ruth v. St. Louis Transit Co., 98 Mo. App. 1; Connelly v. White [Iowa] 98 N. W. 144.

3. Ruth v. St. Louis Transit Co., 98 Mo. App. 1; Cohn v. Saidel, 71 N. H. 558.

4. Miles v. Walker [Neb.] 92 N. W. 1014; Waldron v. Sperry, 53 W. Va. 116; Kelly v. Durham Traction Co., 132 N. C. 368; Ruth v. St. Louis Transit Co., 98 Mo. App. 1. What people said in relation to the attachment. French v. Guyot, 30 Colo. 222, 70 Pac. 683. General reputation as to matter charged may be admitted in mitigation of damages (insanity). Hiersche v. Scott [Neb.] 95 N. W. 494. Evidence of the reputation of the plaintiff even after the prosecution is admissible. Eihlert v. Gommoll, 23 Ohio Circ. R. 586.

5. French v. Guyot, 30 Colo. 222, 70 Pac. 683.

6. Kan. & T. Coal Co. v. Galloway [Ark.] 74 S. W. 521.

7. Kelly v. Durham Traction Co., 132 N. C. 368. At least if the prosecution was actively carried on by defendant and not merely by his agent. Eggett v. Allen [Wis.] 96 N. W. 803. See, also, Connelly v. White [Iowa] 98 N. W. 144.

8. $7,500 sustained. Nat. Surety Co. v. Mabry [Ala.] 35 So. 698. $1,500 actual and $1,000 exemplary damages held excessive. Farrell v. St. Louis Transit Co. [Mo. App.] 78 S. W. 312. $1,000 sustained. Eggett v. Allen [Wis.] 96 N. W. 803.

9. Boyd v. Snyder [Pa.] 56 Atl. 924.

10. Bregman v. Kress, 83 App. Div. [N. Y.] 1.

11. Not merely evidence showing probable cause or rebutting malice. Especially where the counsel was a judge having certain duties in the case. (Probate judge advising a guardian.) Eihlert v. Gommell, 23 Ohio Circ. R. 586. See, also, supra, § 3.

12. Tyler v. Smith [R. I.] 56 Atl. 683.

13. Van v. Pac. Coast Co., 120 Fed. 699; O'Dell v. Hatfield, 40 Misc. [N. Y.] 13; Richards v. Jewett Bros. & Co., 118 Iowa, 629; Boush v. Fidelity & Deposit Co., 100 Va. 735.

14. Butcher v. Hoffman, 99 Mo. App. 239. Discharge by a committing magistrate is prima facie evidence but does not shift the burden of proof of want of probable cause. Noblett v. Bartsch, 31 Wash. 24, 71 Pac. 551.

15. Bruff v. Kendrick, 21 Pa. Super. Ct. 468; Provident S. L. Assur. Soc. v. Johnson, 24 Ky. L. R. 1902, 72 S. W. 754; Figg v. Hanger [Neb.] 96 N. W. 658; Bank of Miller v. Richmon [Neb.] 94 N. W. 998; Boush v. Fidelity & Deposit Co., 100 Va. 735. On disputed facts it is for the jury. Bucki & Son Lumber Co. v. Atlantic Lumber Co. [C. C. A.] 121 Fed. 233. On admitted (Huckestein v. N. Y. L. Ins. Co., 205 Pa. 27; Coleman v. Botsford, 89 App. Div. [N. Y.] 104) or undisputed facts, probable cause is for the court (Clark v. Folkers [Neb.] 95 N. W. 328; Lawrence v. Leathers, 31 Ind. App. 414; O'Dell v. Hatfield, 40 Misc. [N. Y.] 13). It has been said without qualification that probable cause is for the jury. Brown v. Smallwood, 86 App. Div. [N. Y.] 76; Connelly v. White [Iowa] 98 N. W. 144. An instruction upon hypothetical facts in accordance with the evidence on each side should be given and the jury told that such facts show or do not show probable cause. Metropolitan L. Ins. Co. v. Miller, 24 Ky. L. R. 1561, 71 S. W. 921; Miles v. Walker [Neb.] 92 N. W. 1014; Campbell v. Baltimore & O. R. Co. [Md.] 55 Atl. 532; Waldron v. Sperry, 53 W. Va. 116.

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is always exclusively for the jury.[16] Instruction as to probable cause should be based on all facts known to prosecutor.[17]

MANDAMUS.

§ 1. Nature and Office of Remedy in General (771).
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§ 1. *Nature and office of remedy in general. Purpose of writ.*—Mandamus lies to compel the performance of a duty imposed by law upon the person to whom, or the tribunal to which, it is directed.[18] Its only purpose is to compel the exercise of a power already possessed or the performance of a duty already existing, and no new power or duty can be created thereby.[19]

The issuance of the writ is discretionary with the court to which the application is made,[20] and it will not be issued except in the furtherance of justice and hence will be refused where it is apparent that the relator is animated entirely by the desire to gratify a spite against the respondent,[21] or that the acts, the performance of which is sought to be enforced, will be useless,[22] or beyond the power of the respondent to perform,[23] or will be a violation of a law,[24] or will subject the respondent to an action for damages.[25]

16. Cohn v. Saidel, 71 N. H. 553.

17. Instruction that certain facts constituted probable cause held properly modified by adding hypothesis as to other facts. Markley v. Snow [Pa.] 56 Atl. 999. Approved instruction on advice of counsel. Connelly v. White [Iowa] 98 N. W. 144.

18. Code Civ. Proc. Cal. § 1085. Maxwell v. Board of Fire Com'rs, 139 Cal. 229, 72 Pac. 996; Williams v. Bagnelle [Cal.] 70 Pac. 1058. Mills' Ann. Code § 303. Statton v. People [Colo. App.] 70 Pac. 157; Board of Trustees of Montrose v. Endner [Colo. App.] 70 Pac. 152. Code Iowa, § 43. Leonard v. Wakeman, 120 Iowa, 140. Gen. St. Kan. 1901, § 5184, prescribing when mandamus may issue. Sharpless v. Buckles, 65 Kan. 838, 70 Pac. 886. Code Civ. Proc. Ky. § 477. Young v. Beckham, 24 Ky. L. R. 2135, 72 S. W. 1092; State v. Coufal [Neb.] 95 N. W. 362; Warmolts v. Keegan [N. J. Law] 54 Atl. 813. Ballinger's Ann. Codes & St. Wash. § 5755. State v. Callvert [Wash.] 74 Pac. 573; Chapin v. Port Angeles, 31 Wash. 535, 72 Pac. 117; Roberts v. Erickson [Wis.] 94 N. W. 29.

19. Sharpless v. Buckles, 65 Kan. 838, 70 Pac. 886; State v. Royse [Neb.] 97 N. W. 473.

20. Town of Cicero v. People, 105 Ill. App. 406; Donahue v. State [Neb.] 96 N. W. 1038; People v. Listman, 40 Misc. [N. Y.] 372; People v. Lindenthal, 77 App. Div. [N. Y.] 515; Moore v. Napier, 64 S. C. 564.

21. Donahue v. State [Neb.] 96 N. W. 1038. Where relator's right is abrogated by statute pending the mandamus proceedings. Preferred Tontine Mercantile Co. v. Secretary of State [Mich.] 95 N. W. 417.

22. U. S. v. Norfolk & W. R. Co. [C. C. A.] 118 Fed. 554. Where respondent's answer admits that he is about to do the act demanded, the writ should not be issued. State v. Sunset Tel. & Tel. Co., 30 Wash. 676, 71 Pac. 198. Writ to compel allowance of amendment to statement of motion for new trial, refused because it did not appear that the new trial was not granted. State v. District Court [Mont.] 74 Pac. 498. Writ to compel mustering out of officer discharged under order of court martial, refused because his term of office had expired. U. S. v. Root, 18 App. D. C. 239. Writ to perfect an appeal from an order of injunction, refused because it appeared that the injunction would expire before the appeal could possibly be perfected and heard. Testard v. Brooks [Tex. Civ. App.] 70 S. W. 240. Mandamus does not lie to perfect an appeal which cannot possibly be effective. People v. Church, 103 Ill. App. 132. Mandamus to compel settlement of bill of exceptions refused where it appeared that the alleged error was without merit. Harris v. Roan [Ga.] 46 S. E. 433.

23. State v. District Court [Mont.] 74 Pac. 498. A judge whose authority expired with the decree cannot be compelled to preside at a rehearing. Rumsey v. Lindsey [Pa.] 56 Atl. 430.

24. Writ to compel building commissioner to approve plans for closing windows in a party wall, refused because the resulting structure would violate the building laws. People v. Calder, 85 App. Div. [N. Y.] 31. Writ refused because granting thereof would

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Only purely ministerial duties are enforceable by mandamus. The writ issues only to compel action, and never to control judgment or discretion,[26] except in case of gross abuse.[27] The test is not whether the person to whom the writ is directed is a ministerial or judicial officer, but whether the act is purely ministerial or involves the exercise of judgment or discretion.[28]

The remedy by mandamus rests upon legal duties on the part of the respondent, and legal rights on the part of the relator, and hence cannot rest solely upon equities existing between the parties.[29] The respondent's duty to perform the act demanded by the relator must be clear and imperative,[30] and the relator's right to demand the performance must be free from doubt.[31] The writ will not issue where the relator's right depends upon a debatable question of law,[32] or upon conflicting and uncertain facts;[33] but the mere fact that the relator's right is not disputed by the respondent is insufficient to sustain the writ.[34]

Conditions precedent.—From the rule just stated, that the respondent's duty must be clear and positive and the relator's right must be free from doubt, it follows that where anything remains to be done as a condition precedent to the positiveness of the respondent's duty, or to the accrual of the relator's right, mandamus will not lie.[35] Applying this rule, it has been held that a previous demand upon the

violate an act of legislature. Moore v. Napier, 64 S. C. 564.

25. People v. Blocki, 203 Ill. 363.

26. Walker v. Superior Court, 139 Cal. 108, 72 Pac. 829; U. S. v. Hitchcock, 19 App. D. C. 333; People v. Church, 103 Ill. App. 132; Leonard v. Wakeman, 120 Iowa, 140; State v. Stull [Neb.] 96 N. W. 121; State v. Coufal [Neb.] 95 N. W. 362; State v. Lincoln [Neb.] 94 N. W. 719. Unless there has been an abuse of discretion or such an evasion of duty as amounts to a refusal to perform. Illinois State Board v. People, 102 Ill. App. 614, wherein mandamus to compel the state board of health to issue a license to practice medicine was refused on account of the discretion vested in such board by statute 1887 entitled "Medicine and Surgery," § 2. Under Acts 1874, p. 327, the board of police commissioners have a discretion in the matter of reduction of the police force, not controllable by mandamus. State v. Police Com'rs [Mo.] 71 S. W. 215. Mandamus to compel reinstatement of pupil expelled by board of directors of public schools refused [see act May 8, 1854 (P. L. p. 622, § 23, subd. 6) and act March 3, 1818 (P. L. p. 127, § 9)]. Miller v. Clement, 205 Pa. 484. Not to review allowance of costs. Fleshman v. McWhorter [W. Va.] 46 S. E. 116. Whether a newly created position is similar to an abolished one so as to entitle the previous incumbent to reappointment is in the discretion of the civil service commissioners. People v. Cantor, 89 App. Div. [N. Y.] 50.

27. Atlanta v. Wright [Ga.] 45 S. E. 994.

28. Northington v. Sublette, 24 Ky. L. R. 835, 69 S. W. 1076; Matlock v. Smith, 96 Tex. 211; Payne v. U. S., 20 App. D. C. 581. See infra 2, Duties and Rights Enforceable by Mandamus.

29. Davis v. Miller Signal Co., 105 Ill. App. 657; Moores v. State [Neb.] 93 N. W. 986.

30. Minchener v. Carroll, 135 Ala. 409; Williams v. Bagnelle [Cal.] 70 Pac. 1058; Davis v. Miller Signal Co., 105 Ill. App. 657; Bacon v. Board of Chosen Freeholders [N. J. Law] 54 Atl. 234; People v. Democratic General Committee, 175 N. Y. 415. Mandamus to compel issuance of certificate to insurance company denied because it had done no business for several years. Yates v. People [Ill.] 69 N. E. 775.

31. Town of Cicero v. People, 105 Ill. App. 406; Scanlan v. Schwab, 103 Ill. App. 93; State v. District Court [Mont.] 74 Pac. 498; In re Perry, 88 App. Div. [N. Y.] 185; Hutton v. Holt, 52 W. Va. 672; In re Key, 189 U. S. 84, 47 Law. Ed. 220.

Where the respondent has been enjoined from doing the act demanded, the relator's right is not clear so long as the restraining order is in effect. Rothschild v. Gould, 84 App. Div. [N. Y.] 196.

Mandamus by convict to compel surrender of photographs and measurements: Mandamus will not lie to compel a prison superintendent to surrender photographs and measurements of the relator, taken, pursuant to law, while relator was under a sentence of conviction for a crime, though he has, at the time of the application for the writ, had a new trial and has been acquitted. In re Molineux, 41 Misc. [N. Y.] 154.

32. State v. Clark [N. J. Law] 55 Atl. 690.

33. Fidelity & Casualty Co. v. Linehan, 71 N. H. 622. See, also, Wooten v. Rogan, 96 Tex. 432. Where it appears that a disputed question of fact is involved mandamus will not issue. Territory v. Crum [Okl.] 73 Pac. 297.

34. Clarke v. Hill [Mich.] 93 N. W. 1044.

35. Mandamus to compel water commissioner to reconnect relator's building which was disconnected for non-payment of water rents. People v. Monroe, 41 Misc. [N. Y.] 198. Mandamus to compel payment of liquor license rebate. People v. Lyman, 67 App. Div. [N. Y.] 446. Duty of county auditor to register and certify county bonds, dependent on bond-holder's filing data showing that the bonds were issued in accordance with law [see Comp. St. Neb. 1901, c. 9, § 12]. State v. Weston [Neb.] 93 N. W. 182.

Court stenographer. Prepayment of fees is not a condition precedent of the attorney general's right to maintain mandamus to compel a court stenographer to furnish him

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respondent for performance is a condition precedent,[36] especially where the duty sought to be enforced affects the relator in a private capacity, and does not affect the public at large.[37] It has even been held that mandamus is the relator's last resort, and will not issue until all other remedies have failed.[38] On the other hand, it has been held that where the duty is positively and unconditionally imposed by law, no previous demand is necessary.[39] It has also been held that a previous application to a court to compel one of its ministerial officers to perform a duty positively imposed by law is not a condition precedent to the right to maintain mandamus to compel performance.[40]

Acquiescence, laches and limitations.—Where the respondent's duty and the relator's right have once co-existed, but the relator has, by his acquiescence, lost his right to demand performance by the respondent, mandamus will not lie.[41] The relator may likewise lose his right by unexcused delay,[42] or by the intervention of the statute of limitations.[43]

Other adequate remedy.—Mandamus never lies where there is any other adequate remedy in the ordinary course of law.[44] The mere fact, however, that there

with a transcript of proceedings to which the state is a party [see Code Civ. Proc. Mont. §§ 373, 374]. State v. Ledwidge, 27 Mont. 197, 70 Pac. 511.

36. State v. Holmes [Neb.] 97 N. W. 243, holding that mandamus will not lie to compel a court to vacate an order unless the relator has previously applied to such court to have the order vacated.

37. Mandamus by soldier discharged from veterans' home, to compel readmittance. Application for readmittance held a condition precedent. Wilson v. Board of Directors, 138 Cal. 67, 70 Pac. 1059.

38. State v. Holmes [Neb.] 97 N. W. 243.

39. Mandamus to compel levy of tax to pay judgment against municipality. Board of Sup'rs v. Thompson [C. C. A.] 122 Fed. 860. Mandamus to compel change of venue on account of judge having counsel for one of the parties [see Cuttinger's Comp. Laws, § 2545]. Gamble v. First Judicial Dist. Ct. [Nev.] 74 Pac. 530. Duty of oyster inspector, under Code Va. § 2153, to remove stakes from natural oyster beds. Lewis v. Christian [Va.] 43 S. E. 331. Duty of municipal authorities to levy tax to pay judgment. U. S. v. Saunders [C. C. A.] 124 Fed. 124.

When a demand would be useless it need not be made. U. S. v. Saunders [C. C. A.] 124 Fed. 124.

40. Duty of court stenographer to furnish transcripts of proceedings. State v. Ledwidge, 27 Mont. 197, 70 Pac. 511.

41. People v. Sturgis, 82 App. Div. [N. Y.] 580. Police captain, after being discharged, voluntarily surrendered the insignia of his office, accepted a pension, and made no objection to the instalment of his successor. People v. Board of Police Com'rs, 174 N. Y. 450.

42. State v. District Court [Mont.] 74 Pac. 498; People v. Greene, 87 App. Div. [N. Y.] 346; People v. Maxwell, 87 App. Div. [N. Y.] 391; People v. Marsh, 82 App. Div. [N. Y.] 571. Mandamus to reinstate policeman barred by seven years' laches. Jones v. Board of Police Com'rs [Cal.] 74 Pac. 696. Relator's right barred by laches of over a year after the termination of litigation involving a right similar to that asserted by him. People v. Sturgis, 82 App. Div. [N. Y.] 580.

Mandamus to compel reinstatement of an appeal in the court of appeals from a judgment against a city, is not barred by laches where the order of dismissal is made only a few days before the adjournment of a term of the supreme court, and the relator, after having tried in vain to procure a reinstatement in the circuit court, applies for mandamus at the next term of the supreme court, though the plaintiff in the original action has, in the meantime, applied to the trial court for mandamus to compel payment of his judgment, such application being still pending when the application for the writ from the supreme court is made, and no rights of third parties having intervened. State v. Smith, 172 Mo. 618.

Excuse: Ignorance of rights conferred by a public statute is no excuse for laches. People v. Maxwell, 87 App. Div. [N. Y.] 391.

43. Mandamus is a "special proceeding" within Cal. St. Lim. [Code Civ. Proc. pt. 2, tit. 21, § 363; pt. 3, tit. 1, § 1109]. Jones v. Board of Police Com'rs [Cal.] 74 Pac. 696. Is likewise a "special proceeding" within N. Y. St. Lim. [Code Civ. Proc. §§ 362-415]. People v. Marsh, 82 App. Div. [N. Y.] 571. New York Rev. Charter, § 302 [Laws 1901, p. 129, c. 466] limiting time for proceedings **for reinstatement** on police force to four months after discharge, not applicable to mandamus **to compel recognition** in the first instance as an officer on such force. People v. Green, 87 App. Div. [N. Y.] 346.

44. Williams v. Bagnelle [Cal.] 70 Pac. 1058; State v. District Court, 27 Mont. 280, 70 Pac. 981; Steel v. Clinton Circuit Judge [Mich.] 95 N. W. 993; Central Bitulithic Pav. Co. v. Manistee Circuit Judge [Mich.] 92 N. W. 938; Clark v. Hill [Mich.] 93 N. W. 1044. Code Civ. Proc. Neb. § 646. State v. Holmes [Neb.] 97 N. W. 243; Moores v. State [Neb.] 93 N. W. 986; State v. Graves [Neb.] 92 N. W. 144; State v. Jessen [Neb.] 92 N. W. 584; Jones v. Fonda, 85 App. Div. [N. Y.] 265; Kruegel v. Nash [Tex. Civ. App.] 70 S. W. 983; In re Key, 189 U. S. 84, 47 Law. Ed. 720.

Waiver: Intervention and defending does not constitute a waiver on the part of the intervener of the right to insist that the relator has another adequate remedy. People v. Board of Police Com'rs, 174 N. Y. 450.

Remedy in equity: Where a specific remedy in equity is provided by statute for the

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is another remedy is not sufficient to preclude the remedy by mandamus, where such other remedy is inadequate to meet the peculiar exigencies of the case,[45] nor will the mere fact that there is no other remedy authorize the issuance of the writ, where the case is not otherwise a proper one for mandamus.[46]

§ 2. *Duties and rights enforceable by mandamus. A. Judicial procedure and process. Duties relating to jurisdiction.*—Where a court refuses to take jurisdiction of a cause of which it has jurisdiction, mandamus lies to compel it to take jurisdiction;[47] likewise where an appellate court wrongfully dismisses an appeal on jurisdictional grounds, mandamus lies to compel a reinstatement.[48] Mandamus also lies to compel the dismissal of an appeal, where the appellate court has no jurisdiction.[49] It lies to compel the vacation of orders in excess of jurisdiction,[50] except where there is another adequate remedy.[51]

Ministerial duties.—Where it is the positive duty of a court, either by virtue of a statute or of an order from a superior court, to do a specific act, mandamus lies to compel performance of such act.[52]

very grievance which is sought to be redressed, mandamus will not lie, even though there may be no remedy at law. Clarke v. Hill [Mich.] 93 N. W. 1044; Selectmen of Gardner v. Templeton St. R. [Mass.] 68 N. E. 340.

Remedy by penalty or indictment is usually inadequate; but the fact that such remedies exist may be considered by the court in determining whether it will, in the exercise of its discretion, issue the writ. People v. Listman, 84 App. Div. [N. Y.] 633.

45. State v. Graves [Neb.] 92 N. W. 144.

There is no hard and fast rule that mandamus will not lie where there are other remedies, but the matter rests in the sound discretion of the court. People v. Lindenthal, 77 App. Div. [N. Y.] 515. Clear legal right and absence of legal remedy must concur. Territory v. Crum [Okl.] 73 Pac. 297. An appeal authorized from the decision of county commissioners on petitions is not an adequate remedy for their failure to consider a petition. State v. Menzie [S. D.] 97 N. W. 745. Mandamus will not lie to correct unauthorized allowance of amendments after remand. The remedy is by appeal. People v. District Court [Colo.] 75 Pac. 390. Mandamus will lie to compel a sheriff to surrender exempt property, the remedy by replevin not being adequate. State v. Gardner, 32 Wash. 550, 73 Pac. 690.

46. U. S. v. Hitchcock, 190 U. S. 317, 47 Law. Ed. 1074; Fleshman v. McWhorter [W. Va.] 46 S. E. 116.

47. Steel v. Clinton Circ. Judge [Mich.] 95 N. W. 993; State v. Dearing, 173 Mo. 492. Circuit judge compelled to take jurisdiction of a motion, under Rev. St. Fla. § 1305, against an officer to recover penalty for charging illegal fees. State v. Reeves [Fla.] 32 So. 814. Application to county court, under Ky. St. § 4241, to determine whether property omitted by the assessor and listed by the sheriff was assessable or not. Com. v. Newell, 24 Ky. L. R. 1197, 71 S. W. 4. Judge of the general sessions of peace compelled to act on application for fees by an attorney appointed to defend in a capital case. People v. Foster, 40 Misc. [N. Y.] 19. Justice of the peace compelled to take jurisdiction of a prosecution for violation of 86 Ohio Laws, p. 229, regulating sale of milk, it not appearing from the affidavit on which the prosecution was based that the offense was the defendant's second or subsequent offense. State v. Smith [Ohio] 68 N. E. 1044. County court compelled to ascertain and declare the result of a vote on relocation of a county seat. Morgan v. Wetzel County Ct., 53 W. Va. 372.

The writ of procedendo ad judicum was formerly the proper remedy to compel a court to take jurisdiction, but in modern practice this has been replaced by mandamus. State v. Smith [Ohio] 68 N. E. 1044.

48. Valley Turnpike Co. v. Moore, 100 Va. 702. Even though the dismissal be due to an erroneous interpretation by the appellate court of its own rules. State v. Smith, 172 Mo. 618; Id. 446.

Inability of the appellate court to reinstate of its own motion as where it has adjourned, will not deprive the supreme court of power to compel reinstatement by mandamus. State v. Smith, 172 Mo. 618.

49. State v. King, 109 La. 161. Appeal from justice's court after time allowed by law for such appeals had elapsed, see Comp. Laws Mich. § 936. Jacobs v. Brooke [Mich.] 92 N. W. 783.

50. Order adjudging party guilty of contempt. Dillon v. Shiawassee Circ. Judge [Mich.] 91 N. W. 1029. Order of injunction. State v. Graves [Neb.] 92 N. W. 144; Cent. Bitulithic Pav. Co. v. Manistee Circ. Judge [Mich.] 92 N. W. 938.

Where jurisdiction depends on conflicting evidence, and the court, after passing on such evidence, takes jurisdiction and issues an order of injunction, it cannot be said that such order was without authority. State v. Jessen [Neb.] 92 N. W. 584.

Presumption as to jurisdiction: Where affidavits in support of and against the issuance of a temporary injunction are not preserved by a bill of exceptions, it will be presumed, on mandamus to compel the vacation of such injunction, that the affidavits were sufficient to support the allegations of the petition and warrant the issuance of the injunction. Id.

51. Remedy by appeal. Steel v. Clinton Circ. Judge [Mich.] 95 N. W. 993; Dillon v. Shiawassee Circ. Judge [Mich.] 91 N. W. 1029; State v. Jessen [Neb.] 92 N. W. 584. See, also, supra, § 1, and infra this section.

52. Entry of office judgment under Code

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Matters involving judgment or discretion.—Mandamus does not lie to compel a court to decide any question in any particular way, where it has power to make any decision at all,[53] or to review such decision when made,[54] even though there be no other way of reviewing such decision.[55] Nor will mandamus lie in any case where the court or judge has any discretion as to whether the act demanded shall or shall not be done.[56]

Where there are other remedies.—Where an appeal lies from the act or decision of a court or judge, it is usually held to be an adequate remedy, precluding the right to mandamus.[57] Likewise, where it appears that relator cannot be injured by waiting for the trial of the case wherein the order complained of was made, mandamus will not lie to compel the vacation of the order.[58] Where, however, the remedy by appeal is inadequate, mandamus will lie.[59]

(§ 2) *B. Administrative and legislative functions of public officers. In general.*—Mandamus lies to compel administrative officers to perform duties specifically and positively imposed upon them by law,[60] but not to compel the per-

W. Va. 1899, c. 125, § 46. Marstiller v. Ward, 52 W. Va. 74; Hutton v. Holt, 52 W. Va. 672. Relief of surety from liability on bond as provided by Code Va. § 2887. U. S. Fidelity & Guaranty Co. v. Peebles, 100 Va. 585. Change of venue on account of judge having counsel for one of the parties, see Comp. Laws Nev. § 2545. Gamble v. First Judicial Dist. Ct. [Nev.] 74 Pac. 530. Discretion of judge, under Code Proc. La. art. 1016, relating to application by an undercurator to commence action for removal of the curator, is confined to the sufficiency of the ground set forth in the application, and where there is no doubt as to the sufficiency of such grounds, the judge's action upon such an application may be controlled by mandamus. State v. St. Paul, 110 La. 995. Jury trial in action at law. State v. Hart, 26 Utah, 229, 72 Pac. 938. Compliance with mandate of appellate court on reversal. State v. Thompson [Neb.] 95 N. W. 47; State v. Dist. Ct. [Minn.] 97 N. W. 581. Mandamus lies to compel the allowance of an appeal. Williams v. Cleaveland [Conn.] 56 Atl. 850.

Condition precedent: Under Cuttinger's Comp. Laws Nev., providing that no judge shall try a case in which he has been counsel for one of the parties, a previous motion for a change of venue on account of the statutory disability of the judge, is not a condition precedent to the right to maintain mandamus to compel such change. Gamble v. First Judicial Dist. Ct. [Nev.] 74 Pac. 530. A judge may be compelled to commit a witness for refusal to give deposition. Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006.

53. State v. Dist. Ct., 27 Mont. 280, 70 Pac. 981; State v. Dearing, 173 Mo. 492; Matlock v. Smith, 96 Tex. 211. Change of venue. People v. Church, 103 Ill. App. 132. Mandamus to compel reinstatement of petition for injunction against sale of city property (Proc. Code La. § 303), refused. State v. Sommerville, 110 La. 953. Does not lie to control proceedings after remand from appellate court, where such proceedings are not inconsistent with the decision on appeal. State v. Stull [Neb.] 96 N. W. 121; State v. Dist. Ct. [Minn.] 97 N. W. 581; U. S. v. Marshall [C. C. A.] 122 Fed. 428. Question of severance of causes of action involves judicial discretion. State v. St. Paul, 110 La. 722. When the circuit court enjoins the county court from entering judgment upon an order reversing a judgment of the county court which was affirmed by the circuit court, the ground of such injunction being matter arising or discovered since the reversal and remand by the supreme court, mandamus does not lie to compel the county court to enter such judgment. Fakes v. Stanley [Ark.] 70 S. W. 307.

54. State v. Dist. Ct., 27 Mont. 280, 70 Pac. 981; State v. Jessen [Neb.] 92 N. W. 584; Matlock v. Smith, 96 Tex. 211; Morgan v. Wetzel County Ct., 53 W. Va. 372.

55. Mandamus to compel vacation of a decree sustaining a plea to jurisdiction, refused. In re Key, 189 U. S. 84, 47 Law. Ed. 720.

56. Indorsement of statement of oral instructions, see Pen. Code Cal. § 1127. Walker v. Superior Ct., 139 Cal. 108, 72 Pac. 829. Allowance of witness fees under Code Cr. Proc. Tex. art. 1093. Murray v. Gillaspie, 96 Tex. 285.

57. Steel v. Clinton Circ. Judge [Mich.] 95 N. W. 993; State v. Dist. Ct., 27 Mont. 349, 71 Pac. 159; Krugel v. Nash [Tex. Civ. App.] 70 S. W. 983. Provisional injunction protecting one of the litigants in the possession of property already in his possession. State v. Jessen [Neb.] 92 N. W. 584. Discharge of jury and entry of judgment for defendant on ground that complaint did not state cause of action. State v. Dist. Ct., 27 Mont. 280, 70 Pac. 981.

58. Cent. Bitulithic Pav. Co. v. Manistee Circ. Judge [Mich.] 92 N. W. 938.

59. Provisional injunction transferring property from one litigant to the other. State v. Graves [Neb.] 92 N. W. 144. Order adjudging relator guilty of contempt, and imposing fine and imprisonment. Dillon v. Shiawassee Circ. Judge [Mich.] 91 N. W. 1029.

60. Leonard v. Wakeman, 120 Iowa, 140; U. S. v. Saunders [C. C. A.] 124 Fed. 124. Clerk of board of aldermen compelled to comply with a resolution of such board to strike a name from the roll of members and to place another name thereon. Warmolts v. Keegan [N. J. Law] 54 Atl. 813. Duty of board of public works to endorse their approval on private plat of lots conforming to the requirements of city charter. Owen v. Moreland [Mich.] 93 N. W. 1068. Duty of

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formance of an act which it may or may not be the officer's duty to perform, accordingly as he may decide in the exercise of judgment or discretion with which he is vested in the premises,[61] or to review an act done in the exercise of judicial discretion;[62] but the mere fact that an officer has to determine the existence of a certain fact before he can determine whether or not it is his duty to act, does not make his duty discretionary, where such fact may be ascertained without the exercise of judgment.[63] Where, however, the existence of the duty depends upon the existence of a fact which the officer is not authorized to determine, mandamus does not lie to compel him to perform the alleged duty, at least until the fact in question has been determined by a competent authority;[64] and the same rule applies where the duty depends upon a question of law which the officer is not authorized to decide.[65] Mandamus will not lie to redress a wrong committed by an administrative officer, unless such wrong consists of the failure or refusal to perform a duty.[66] There must be an actual default.[67]

commissioners to grant building permit. Macfarland v. U. S., 18 App. D. C. 554. Duty of county fiscal court to repair county bridge, see St. Ky. 1899, § 4345. Leslie County v. Wooton [Ky.] 75 S. W. 208. Duty of state commissioner of public lands to recognize validity of lease of tide water lands executed in behalf of state by such commissioner. State v. Callvert [Wash.] 74 Pac. 573. See, also, supra, § 1.

Where the law gives an officer power to do a certain act for the benefit of the public or of individuals, it is the officer's duty to do the act specified whenever the conditions and exigencies contemplated by the law as calling for the performance of such act arise, and in such case performance may be enforced by mandamus. U. S. v. Saunders [C. C. A.] 124 Fed. 124.

The fact that relator does not need performance of the act demanded does not bar his right to mandamus. State v. Ledwidge, 27 Mont. 197, 70 Pac. 511.

Mandamus not barred by private contract: Where a court stenographer employed an assistant to assist him in transcribing his notes taken in a case in which the state was a party, and promised such assistant not to deliver the transcript to the attorney general without receiving payment, it was held that, the attorney general being entitled by statute to receive the transcript without payment, the stenographer's private agreement was no defense in mandamus to compel him to furnish the attorney general with the transcript. State v. Ledwidge, 27 Mont. 197, 70 Pac. 511. Mandamus is the proper remedy to compel an officer to report on fees received as required by law. Finley v. Ter. [Okl.] 73 Pac. 273.

61. Matlock v. Smith, 96 Tex. 211; Orman v. People [Colo. App.] 71 Pac. 430; Northington v. Sublette, 24 Ky. L. R. 835, 69 S. W. 1076; State v. Coufal [Neb.] 95 N. W. 362. County supervisors empowered to repair county bridges (Code Iowa, § 422) having decided that a bridge did not need repair, mandamus did not lie. Leonard v. Wakeman, 120 Iowa, 140. Board of county commissioners cannot be compelled to approve or reject claims. State v. Morris [S. C.] 45 S. E. 178. Even where there has been an abuse of discretion. In re Croker, 78 App. Div. [N. Y.] 184.

Incomplete performance is equivalent to no performance, and officers cannot shield themselves behind their discretion in a matter unless they have really exercised such discretion. People v. Mole, 85 App. Div. [N. Y.] 335, holding that when town auditors rejected a claim, without passing upon it, because the claimant refused to furnish any evidence other than the affidavit provided for by Laws N. Y. 1890, p. 1235, c. 569, § 167, such rejection amounted to a refusal to audit. People v. Board of Sup'rs, 89 App. Div. [N. Y.] 152, holding that where county supervisors rejected a sheriff's bill on the ground that it was not chargeable to the county, mandamus would lie to compel the audit of such bill, it being by law chargeable to the county. See, also, Holt v. People, 102 Ill. App. 276. Removal of a militia colonel is not a ministerial act. State v. Jelks [Ala.] 35 So. 60.

62. Laws N. Y. 1897, p. 188, c. 378, § 537, providing that when a member of the street cleaning force is dismissed by the commissioner, he may have "certiorari or other appropriate remedy for the purpose of reviewing the action of the commissioner," does not include mandamus. People v. Woodbury, 88 App. Div. [N. Y.] 593.

63. Duty of oyster inspector, under Code Va. § 2153, to remove stakes from natural oyster beds, the limits of which are defined by Act Feb. 29, 1892; Acts 1893-94, p. 605, § 2. Lewis v. Christian [Va.] 43 S. E. 331. Duty of secretary of state to enter name of candidate for office, not rendered discretionary by the fact that he must first ascertain whether the candidate's nomination comes from a political party which cast a certain per centum of the votes cast at the last preceding election. Rose v. Bennett [R. I.] 56 Atl. 185. Duty of secretary of state to issue certificate showing compliance with Rev. St. Mo. 1899, § 1299, relating to private banking. State v. Cook, 174 Mo. 100.

64. Land office commissioner not authorized to determine whether a previous purchaser of land was an infant when he purchased, and hence it was not such officer's duty to sell to a subsequent applicant. Boozer v. Terrell, 96 Tex. 635.

65. County canvassing board not authorized to determine constitutionality of law under which votes were cast and returned. Sharpless v. Buckles, 65 Kan. 838, 70 Pac. 886.

66. County treasurer paid a voidable school warrant, though he had notice from

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De facto officers are amenable to mandamus proceedings.[68]

Court officers may be compelled by mandamus to perform the duties imposed upon them by law.[69]

Duties relating to use and enjoyment of public offices.—Mandamus lies to compel admission to the use and enjoyment of a public office to which the relator has been duly elected or appointed;[70] but not where the right to the office is contested by another claimant, and the respective rights of the parties depend upon a debatable question of law.[71] Where an officer is illegally discharged, mandamus lies to compel his reinstatement, provided his right to the office be clear.[72] It also

the trustees not to pay it. Mandamus would not issue to compel him to refund. State v. Bowman, 66 S. C. 140. Where tax was levied and paid to county treasurer, to be applied by him to the payment of a judgment, and he applied it to some other purpose, it was held that mandamus would lie to compel another levy. People v. Board of Sup'rs, 173 N. Y. 297.

67. N. W. Warehouse Co. v. Or. R. & Nav. Co., 32 Wash. 218, 73 Pac. 388. Mandamus will compel the performance of an official act where before the time when it is required the officer has announced his intention not to perform it. State v. Kineval [Neb.] 97 N. W. 798.

68. Stenographer employed by one litigant compelled to furnish other party copy of proceedings. Mockett v. State [Neb.] 97 N. W. 588.

69. Under Civ. Code Ga. 1895, § 5555, the supreme court and the superior court have concurrent jurisdiction to compel, by mandamus, the performance of any duty of the officers of the superior court which may be necessary to perfect a bill of exceptions (Cooper v. Nisbet, 118 Ga. 872); holding that where the bill of exceptions has reached the office of the clerk of the supreme court, the application for mandamus may be made to the supreme court, or an application may be made to such court to have the bill sent back to the superior court for correction there, and that when the defect in the bill cannot be remedied in the supreme court, the application for mandamus in the supreme court will be dismissed, and the bill of exceptions sent back to the superior court. Mandamus lies to compel the clerk of court to deliver a transcript. State v. Wells [La.] 35 So. 641.

70. Mandamus to compel civil service commissioners to certify relator's promotion, and to compel police commissioner to certify his name on pay-roll. People v. Ogden, 41 Misc. [N. Y.] 246. Admission as member of board of county supervisors. State v. Kersten [Wis.] 95 N. W. 120. Code Civ. Proc. Cal. § 1085. Maxwell v. Board of Fire Com'rs, 139 Cal. 229, 72 Pac. 996.

Civil service classifications involve quasi-judicial functions, and hence are not controllable by mandamus. People v. Collier, 175 N. Y. 196.

A discretionary power of appointment is not controllable by mandamus. People v. Swanstrom, 79 App. Div. [N. Y.] 94, construing City Charter of Greater New York, § 383; Hogan v. Collins, 183 Mass. 43. Certification of eligible list by civil service commission not enforceable until appointing officer has asked for such list, see New York City Charter, § 1543; Laws 1901, c. 466. Morrison v. Cantor, 173 N. Y. 646.

Who are officers: Secretary of board of fire commissioners under Freeholders charter of city and county of San Francisco, held not the clerk provided for by St. Cal. 1877-78, p. 685, c. 446, and hence could not maintain mandamus for admission to office of clerk. Maxwell v. Board of Fire Com'rs, 139 Cal. 229, 72 Pac. 996. Whether a newly created position is similar to an abolished one so as to entitle the previous incumbent to reappointment rests in the judgment of the civil service commissioners. People v. Cantor, 89 App. Div. [N. Y.] 50.

71. State v. Tillyer [N. J. Law] 55 Atl. 690.

72. Marshall v. Board of Managers, 103 Ill. App. 65; People v. Scannell, 172 N. Y. 316. Detective sergeant removed under manifestly incorrect interpretation of statutes. Sugden v. Partridge, 174 N. Y. 87. Member of board of school commissioners removed without authority by his associates. Akerman v. Board of School Com'rs, 118 Ga. 334. But see People v. Board of Police Com'rs, 174 N. Y. 450, expressly leaving undecided the question of the propriety of mandamus to compel reinstatement.

When the title to the office is in dispute and is not clear, mandamus to reinstate will not lie. People v. Board of Police Com'rs, 174 N. Y. 450.

The question in issue on mandamus to reinstate in office is not the motives of the officer or authority causing the discharge, but his power to do the act complained of. In re Croker, 78 App. Div. [N. Y.] 184.

Reinstatement before expiration of leave of absence, such leave having been granted upon relator's voluntary application, was refused by fire commissioner, and it was held that mandamus did not lie to compel reinstatement. In re Croker, 78 App. Div. [N. Y.] 184.

What amounts to a discharge. Laying off a bridge tender because his bridge has been taken down, and there is no place for him to fill, without removing other employees, is not a discharge within Laws N. Y. 1899, c. 370, § 21, and the municipal civil service law. People v. Lindenthal, 173 N. Y. 524.

When the moving authority has judicial discretion in the matter of removals for cause, mandamus does not lie to control such discretion, or to review acts done in the exercise thereof. Laws N. Y. 1897, p. 188, c. 378, § 537, providing that where a member of the street cleaning force is dismissed by the commissioner, he may have "certiorari or other appropriate remedy for the purpose of reviewing the action of the commissioner" does not include mandamus. People v. Woodbury, 88 App. Div. [N. Y.] 593.

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lies to compel retirement upon a proper basis.[73] Where an officer's salary is clearly and definitely fixed by law, mandamus lies to enforce the payment thereof.[74]

Duties relating to allowance and payment of claims against municipalities.— Mandamus lies to compel a county board to allow a claim against the county arising under a statute,[75] but not to approve or reject claims which they are required to credit.[76] It lies to compel the treasurer of a school district to register and pay orders properly drawn upon him.[77] It likewise lies to compel town or county authorities to audit claims and accounts.[78] It lies also to enforce a judgment against a municipality,[79] either by compelling the proper officers to issue a warrant for the amount of the judgment,[80] or by compelling the levy and collection of a tax to be applied thereto.[81]

73. Failure to act upon an application for retirement in a certain grade is tantamount to a refusal to act, and action may be compelled by mandamus. Fay v. Partridge, 78 App. Div. [N. Y.] 204.

74. School superintendent compelled to draw requisition for relator's salary as school teacher. Williams v. Bagnelle, 138 Cal. 699, 72 Pac. 408. County clerk compelled to sign orders directed to be issued by county board for probate register's salary. Roberts v. Erickson, 117 Wis. 324. Board of regents of state university compelled to issue certificates for salaries of university professors. Von Forel v. State [Neb.] 96 N. W. 648, distinguishing State v. Mortensen [Neb.] 95 N. W. 831, which held that mandamus will not lie to compel specific performance of contracts made by the state. See infra, Duties relating to public contracts.

The reason for allowing mandamus to enforce the payment of officers' salaries is that the salary is considered as a mere incident to the office, the holding of the office and the lapse of time being considered as giving the officer an absolute right to his accrued salary; but where no fiscal salary attaches to the office this reason cannot apply, and therefore mandamus will not lie in such case. Moores v. State [Neb.] 93 N. W. 986. See, also, Roberts v. Erickson, 117 Wis. 324; Williams v. Bagnelle [Cal.] 70 Pac. 1058.

Where an officer is suspended, and then removed from office by a competent authority, on mandamus to compel payment of his salary accruing between suspension and removal, the regularity of the removal proceedings cannot be raised. Hartwig v. Manistee [Mich.] 96 N. W. 1067.

Where the right to the salary is disputed mandamus will not lie until the dispute is settled in the ordinary course of law, provided it can be thus settled; for so long as the right to the salary is in issue, the officer has not a clear right thereto, and he also has another remedy at law. Where, however, the respondent in such a case answers on the merits the court may consider the question as to the relator's right to the salary claimed by him. Moores v. State [Neb.] 93 N. W. 986.

Evidence held to show relator's incumbency in office with sufficient certainty to entitle him to mandamus to compel payment of his salary. Moores v. State [Neb.] 93 N. W. 986.

Adequacy of other remedies: The remedy provided by Pol. Code Cal. § 1699, where school teachers' salaries are withheld, applies only where such salaries are withheld by the school trustees, and hence is not an adequate remedy which will prevent the issue of mandamus to compel a county superintendent of schools to draw a requisition for a teacher's salary. Williams v. Bagnelle, 138 Cal. 699, 72 Pac. 408. Where an action at law lies for the recovery of the salary, this is an adequate remedy, and mandamus will not issue. People v. Lindenthal, 77 App. Div. [N. Y.] 515. Where the relator has been removed from office, and his claim for back salary is disputed on the ground that he had no right to the office, his remedy is by quo warranto proceedings against his successor, provided one be appointed before the trial of the mandamus proceedings. Hartwig v. Manistee [Mich.] 96 N. W. 1067.

75. Claim of agricultural society arising under Comp. St. Neb. c. 2, § 2. State v. Coufal [Neb.] 95 N. W. 362, holding that the remedy by action was inadequate.

76. State v. Morris [S. C.] 45 S. E. 178.

77. Order drawn by director and countersigned by moderator of district. Leonard v. State [Neb.] 93 N. W. 988.

78. Duty of county commissioners of Charleston county to audit accounts of the Charleston sanitary and drainage committee. State v. Morris [S. C.] 45 S. E. 178. But not where no appropriation has been made for the payment of the claim. See Mills' Ann. Code Colo. §§ 4447-4449. Board of Trustees v. Endner [Colo. App.] 70 Pac. 152.

A claim for damages to property by reason of the closing of a highway, may be enforced adequately by an action at law and hence mandamus will not lie to compel the municipal authorities to audit it. Jones v. Fonda, 85 App. Div. [N. Y.] 265.

79. The writ of mandamus to enforce the collection of judgments of the national courts against municipalities is the legal substitute for a writ of execution to enforce judgments against private parties, and the rights of their judgment creditors to their respective writs are equally inviolable. U. S. v. Saunders [C. C. A.] 124 Fed. 124; Kinney v. Eastern Trust & Banking Co. [C. C. A.] 123 Fed. 297.

80. Notwithstanding the remedy by attachment provided by Ball. Ann. Codes & St. § 5677. Chapin v. Port Angeles, 31 Wash. 535, 72 Pac. 117.

81. Notwithstanding that a tax had already been levied and collected, and paid to the county treasurer, who had applied it to some other purpose. People v. Board of Sup'rs, 173 N. Y. 297.

No previous demand upon the officers is necessary as a condition precedent to man-

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Election officers may be compelled by mandamus to perform the duties imposed upon them by law.[82] The members of the governing committee or body of a political party are officers within this rule.[83]

Duties relating to public contracts.—Mandamus does not lie to compel officers of municipal or public corporations to perform the ordinary business contracts of such corporations;[84] but it will lie to enforce compliance with the requirements of the law in regard to the awarding of public contracts.[85]

Duties relating to taxation.—Whenever it is the duty of public officers to levy a tax, mandamus lies to compel the levy.[86] A taxpayer may, by mandamus, enforce

damus to compel the levy, where a statute makes it their positive duty to make such levy, or where such a demand would be useless. U. S. v. Saunders [C. C. A.] 124 Fed. 124.

Construction of statutes: Statutes conferring powers and imposing duties upon municipal officers to levy taxes to pay judgments against municipalities, supersede statutes, and their limitations, conferring less extensive powers and duties upon such officers to levy taxes to pay municipal bonds, when the bonds have become merged in a final judgment. Thenceforth the statutes authorizing the levy of taxes to pay judgments become the measure of the officers' authority. Id.

82. Duty of officer to include in the notice of election the name of party entitled to be included therein. People v. Knopf, 198 Ill. 340. Duty of village officers, under Rev. St. Ill. c. 24, § 57, to "examine and canvass" returns, they having undertaken to canvass the ballots instead of the returns. Holt v. People, 102 Ill. App. 276. Duty of registrars of voters to reject illegal votes, the illegality of the votes being apparent on the face of the record, see Rev. Laws Mass. c. 11, § 267. Flanders v. Roberts, 182 Mass. 524. Duty of mayor of a town to certify returns of a town election. Bourgeois v. Fairchild, 81 Miss. 708. Duty of county clerk to place candidate's name on party ticket instead of name of another person who was not duly nominated. State v. Weston, 27 Mont. 185, 70 Pac. 519, 1134. Duty of secretary of state to enter name of candidate for office duly nominated. Rose v. Bennett [R. I.] 56 Atl. 185.

Questions considered: On mandamus to compel the secretary of state to file a certificate of nomination, the court, in passing upon the respondent's duty in the premises will not consider whether the present incumbent's term expires on a certain day, such question being disputed and doubtful. State v. Chatterton [Wyo.] 70 Pac. 466.

The court, in the exercise of its discretion will refuse to compel the secretary of state to file a certificate of nomination, where it appears that an election as to the office in question at the time designated would be unfair and would mislead the voters. Id.

83. Duty to place candidate's name on official ballot before primary election. Young v. Beckham, 24 Ky. L. R. 2135, 72 S. W. 1092. Duty of board of canvassers to issue certificate of nomination. Cannon v. Board of Canvassers, 24 R. I. 473.

The ascertainment of the fact of nomination will not be controlled by mandamus. Id.

84. Especially where the suit would be, in effect, a suit against the state. State v. Mortensen [Neb.] 95 N. W. 831.

85. Under Comp. St. Neb. c. 68, § 2, requiring public work to be let to the "lowest and best bidder," mandamus lies to compel the state printing board to let a printing contract to one who was in fact the lowest and best bidder. Marsh v. State [Neb.] 96 N. W. 520. But see State v. Lincoln [Neb.] 94 N. W. 719, wherein it was held that mandamus would not lie to compel a city council to award a contract to supply the city waterworks with coal, to one claiming to be the lowest and best bidder; the reason being that the determination of who was the lowest and best bidder involved the exercise of judicial discretion.

Where the contract has already been awarded to another, mandamus may nevertheless issue if the relator be entitled to it under the law. Marsh v. State [Neb.] 96 N. W. 520.

86. Duty of county commissioners to levy tax to pay interest on bonds, and duty of county clerk to keep the proceeds of such tax as a special fund, see Mills' Ann. St. Colo. § 941. Board of Com'rs v. Sims [Colo.] 74 Pac. 457; State v. Board of Com'rs [Ind.] 68 N. E. 295; People v. Board of Sup'rs, 173 N. Y. 297; U. S. v. Saunders [C. C. A.] 124 Fed. 124.

The tax must be for a lawful purpose: otherwise mandamus will not issue. It will not issue to compel the levy of a tax for the benefit of an adjunct school district which was not lawfully created. State v. Board of Com'rs [Neb.] 95 N. W. 6.

When duty to levy becomes positive: Where a resolution of a county board to levy a tax for a special purpose is affirmed by the courts, the duty of the board to make the levy thereupon becomes positive, and may be enforced by mandamus. State v. Board of Com'rs [Ind.] 68 N. E. 295.

No demand is necessary where the duty to make the levy is plainly imposed by statute. U. S. v. Saunders [C. C. A.] 124 Fed. 124. Mandamus is the proper remedy to compel levy of a tax where an assessment has been confirmed. Com'rs of Highways v. Big Four Drainage Dist. [Ill.] 69 N. E. 576. Mandamus is the proper remedy to review the omission of items by a board of equalization. Appeal will not lie. People v. Priest, 85 N. Y. Supp. 481. A judgment confirming a drainage assessment is sufficient to authorize mandamus against a town to compel levy, the town having had an opportunity to be heard at the confirmation. Com'rs of Highways v. Big Four Drainage Dist. [Ill.] 69 N. E. 576.

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his right to examine the books of a municipal corporation of which he is a citizen.[87] It likewise lies to compel the cancellation of an illegal resolution for a levy.[88] But it does not lie to compel the collecting officer to accept, in satisfaction of a tax, an amount less than that shown by the tax books, though the amount thus shown be incorrect, and the tax be void.[89] Whether mandamus will issue in aid of redemption of property sold for taxes depends upon the construction of the various statutes relating to redemption.[90]

Duties relating to the issue of certificates and licenses.—Officers charged with the duty of issuing certificates and licenses may be compelled by mandamus to perform such duties.[91]

Duties relating to executions.—Where an officer holding a writ of execution which it is his duty to execute, refuses to execute it, he may be compelled to do so by mandamus.[92]

Duties relating to streets and highways.—Mandamus lies to compel municipal officers to keep the streets and highways in proper condition for ordinary use and travel.[93]

Duties arising under municipal ordinances.—Mandamus lies to compel the enforcement of municipal ordinances; but the court, in its discretion, should not issue the writ for this purpose except in extreme cases.[94]

Duties relating to conduct of public schools.—Mandamus lies to compel public

87. Proposed increase of taxation and additional expenditure of city funds, is such an exigency as will authorize the issuance of mandamus to compel the city officers to allow a tax-payer to examine the city records. State v. Williams [Tenn.] 75 S. W. 948.

Adequate remedy: Where a board of county commissioners, pursuant to a decision of court declaring a suspended tax valid, made an order for the collection of such tax, but subsequently made another order declaring the first order void, which last order operated to prevent the auditor from putting the tax on the duplicate, it was held that mandamus would issue to compel the making of a new order, and that the relators would not be required either to appeal from the second order, on the assumption that the board had jurisdiction to make it, or, upon the assumption to the contrary, to disregard such second order and to rely on the first as still existing. State v. Board of Com'rs [Ind.] 68 N. E. 295.

88. State v. Board of Com'rs [Ind.] 68 N. E. 295.

89. Property assessed in wrong district, thus causing excessive tax; but the collector had no power to change the books. Relator's remedy was by resistance against collection, or by recovery of property if sold. State v. Brown, 172 Mo. 374.

90. Under Comp. Laws Mich. §§ 3959, 3960, mandamus will not issue to compel the state auditor to accept taxes and issue certificate of redemption as to land bought in by the state and resold by it, unless the tax be void or the resale be unauthorized. Kennedy v. Auditor General [Mich.] 96 N. W. 928. Under Code Colo. § 307, a county treasurer cannot issue a certificate of redemption for less than the full amount charged against the property; and hence where land is sold for taxes thereon and also for taxes on the owner's personalty, one holding a mortgage on the land cannot by mandamus compel the treasurer to accept in redemption that portion only of the full amount which was chargeable to the land. Statton v. People [Colo. App.] 70 Pac. 157.

91. Duty of secretary of state, under Rev. St. Mo. 1899, § 1299 relating to private banking, to issue certificate showing compliance with the law. State v. Cook, 174 Mo. 100. Duty of board of county examiners to give a teacher a certificate showing the result of his grading by such board. Northington v. Sublette, 24 Ky. L. R. 835, 69 S. W. 1076.

Licenses to practice medicine may or may not, under St. Ill. 1887, entitled "Medicine and Surgery," be issued by the state board of health, accordingly as such board may or may not find that the applicant's diploma is from a legally chartered medical institution "in good standing." Ill. State Board of Health v. People, 102 Ill. App. 614.

When relator has not paid the license fees required by an ordinance as a condition precedent to the issuance of the license, mandamus to compel the city clerk to issue the license will not issue. Eidson v. Flounlacker, 24 Ky. L. R. 2441, 74 S. W. 198.

Hearing on protest against granting liquor license may be obtained by mandamus, see Comp. St. Neb. c. 50, § 3. Moores v. State [Neb.] 96 N. W. 225. Mandamus to compel issuance of certificate to insurance company denied because it had done no business for several years. Yates v. People [Ill.] 69 N. E. 775.

92. State v. Stokes, 99 Mo. App. 236.

93. It is the prima facie duty of the mayor and council of a city to keep the streets free from obstructions. People v. Harris, 203 Ill. 272.

94. People v. Listman, 40 Misc. [N. Y.] 372, denying writ to compel commissioner of public safety to enforce Sunday laws.

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school authorities to perform their duties relating to appointment, promotion and grading of teachers;[95] or their duties relating to the books to be used;[96] or to compel admittance to the school of children entitled to admittance.[97]

Federal officers are subject to control by mandamus to the same extent as state officers, where their duties are purely ministerial, and do not involve the exercise of judgment or discretion; mandamus lies to compel the performance thereof;[98] but not where the duties involve the exercise of judgment or discretion in the performance of the act demanded.[99]

Legislative and governmental duties are not subject to control by mandamus;[1] but an executive officer may be compelled by mandamus to perform a purely ministerial duty.[2]

(§ 2) *C. Private duties; natural persons; corporations.*—Rights based on private contract are not enforceable by mandamus.[3]

Corporations may be compelled by mandamus to perform the duties and obligations imposed upon them by their charters,[4] or by statute.[5] It does not lie to compel a street railroad to give transfers, where the law provides a penalty for such refusal, which is recoverable by the party injured, and is sufficient to cover the damages sustained.[6] Nor does it lie to compel a street railroad company to comply with an ordinance relating to the location and construction of the road, where a specific remedy in equity is provided by statute, which is adequate and effectual.[7] The right of a stockholder to inspect the books of his corporation may, under some circumstances, be enforced by mandamus.[8] So also may a stockholder's

95. See 3 Laws N. Y. 1901, p. 483, c. 466. Brooklyn Teachers' Ass'n v. Board of Education, 85 App. Div. [N. Y.] 47, distinguishing In re Stebbins, 41 App. Div. [N. Y.] 269, on the ground, among others, that there no list was required by law to be filed. Duty to issue certificates of grade. Northington v. Sublette, 24 Ky. L. R. 835, 69 S. W. 1076.

96. Duty to make record of books adopted by the board of examiners. American Book Co. v. McElroy [Ky.] 76 S. W. 850.

97. State v. Penter, 96 Mo. App. 416. Remedy is by mandamus against the officer charged with the duty of admitting the pupil, and not by injunction against the enforcement of illegal requirements. Board of Public Education v. Felder, 116 Ga. 788.

Reinstatement of pupil: Where a pupil has been discharged by a competent authority, after a full examination into the charge against him, mandamus will not lie to compel his reinstatement. see Act May 8, 1854, (P. L. 622, § 23, sub... 6) and Act March 3, 1818 (P. L. 127). Miller v. Clement, 205 Pa. 484.

98. Duty of post master general to admit matter to mails under the classification of Act Cong. Mch. 3, 1899 (20 Stat. 355). Payne v. U. S., 20 App. D. C. 581.

99. Duty of secretary of interior to approve selection of public lands, see Act Cong. Mch. 2, 1895, (28 Stat. 876). U. S. v. Hitchcock, 19 App. D. C. 333, 347; Id., 190 U. S. 316, 47 Law. Ed. 1074. Duty of Dawes Commission to admit an applicant to membership of an Indian nation. Glenn-Tucker v. Clayton [Ind. T.] 70 S. W. 8. Allowance of fees by commissioner of pensions. U. S. v. Hitchcock, 19 App. D. C. 237, 503.

1. U. S. v. Hay, 20 App. D. C. 576. State board of canvassers of elections of representatives to General Assembly, act in a political and governmental capacity in making their canvass. Orman v. People [Colo. App.] 71 Pac. 430. Discharge under order of court martial during active service not reviewable on mandamus to compel secretary of war to muster out relator. U. S. v. Root, 18 App. D. C. 239.

2. Duty of governor, under St. Ky. § 3758, to issue commission to a duly appointed judge of city police court. Traynor v. Beckham [Ky.] 74 S. W. 1105.

3. Mandamus does not lie to compel reinstatement of a private individual as a member of an unincorporated association. Code Civ. Proc. N. Y. § 1919, allowing actions against such associations is not applicable to mandamus. Weidenfeld v. Keppler, 84 App. Div. [N. Y.] 235.

4. Loraine v. Pillsbury R. Co., 205 Pa. 132. Mandamus is the proper remedy to compel a gas company to furnish gas. Johnson v. Atlantic City Gas & Water Co. [N. J. Eq.] 56 Atl. 550.

5. It lies only when by statute a specific legal duty is imposed, and there is a clear breach of that duty. People v. Brooklyn Heights R. Co., 172 N. Y. 90.

Abuse of discretion vested in the directors of a railroad company by Laws N. Y. 1890, c. 565, § 101, relative to the running of trains, accommodations, etc., can not be remedied by mandamus. Application must be made to the board of railroad commissioners created by Laws 1882, c. 353; and then mandamus lies to enforce the decision of such board. People v. Brooklyn Heights R. Co., 172 N. Y. 90.

6. People v. Interurban St. R. Co., 85 App. Div. [N. Y.] 407.

7. Selectmen of Gardner v. Templeton St. R. [Mass.] 68 N. E. 340.

8. The remedy should not be allowed ex-

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right to inspect the by-laws of his corporation be enforced by mandamus.[9] Mandamus lies to compel a telephone company to give a subscriber access through its exchange to other subscribers to the system, where such subscriber is legally entitled to such access.[10] It likewise lies to compel an insurance company to pay a judgment for a loss.[11]

§ 3. *Jurisdiction.*—Under statutory or constitutional provisions giving the highest court of a state general supervisory control over the inferior courts and tribunals, such court has original jurisdiction of mandamus proceedings to enforce its power of supervisory control.[12]

The venue of mandamus proceedings is usually determined by the rules or statutes applicable to actions in general.[13]

§ 4. *Procedure in general; contents of alternative writ.*—The usual procedure on mandamus is the filing of a petition or other form of application, upon which an alternative writ is issued, followed by a motion to quash, which raises the questions arising on the face of the alternative writ.[14] A summons is improper and ineffectual. The sole method of bringing respondent into court is by the issuance and service of the statutory alternative writ.[15] But the parties may waive the usual procedure, and have the questions arising on the face of the petition determined on demurrer to the petition, without the issuance of the alternative writ.[16] The alternative writ is both a process and a pleading. It is the thing to be

cept in an emergency; and it should be limited by some regard for the interests of the corporation and its other stockholders. In re Colwell, 76 App. Div. [N. Y.] 615. The stockholder must first make a demand for an inspection; and the inspection must be necessary to enable him to protect his rights as a stockholder. In re Latimer, 75 App. Div. [N. Y.] 522, 12 N. Y. Ann. Cas. 9.

9. This right rests upon stronger grounds than the right to inspect the corporate books; and where it does not appear that the privilege will be abused, or that the relator is moved by any ulterior motive prejudicial to the corporation, mandamus will issue. In re Coats, 75 App. Div. [N. Y.] 567.

10. Mahan v. Michigan Tel. Co. [Mich.] 93 N. W. 629.

11. But not unless it appears that the money sought to be applied to relator's claim is applicable thereto under the company's charter. Michener v. Carroll, 135 Ala. 409.

12. State v. Graves [Neb.] 92 N. W. 144. See Const. Amend. 1884, § 8 (1 Rev. St. Mo. 1899, p. 94). State v. Smith, 172 Mo. 446.

On motion to quash, the jurisdiction of the supreme court is not subject to question, since Sup. Ct. Rule No. 2, § 2 (57 Pac. v) requires the supreme court to determine for itself the question of the necessity of the issuance of the writ from the supreme court instead of from the district court. Quere as to what would be the effect of traverse of the application, of pleading new matter in avoidance. State v. Ledwidge, 27 Mont. 197, 70 Pac. 511.

The Supreme Court of Texas has no jurisdiction to grant mandamus where the matter involves the decision of disputed facts. Wooten v. Rogan, 96 Tex. 434.

13. Under a statute (Act Pa. 1893) providing that the courts of common pleas of any county shall have jurisdiction as to "all corporations being and having their chief place of business within such county," where a railroad company has its road exclusively in one county, and its operating officers live in such county, while its chief office is in another county, mandamus against such company lies in either county. Loraine v. Pittsburg R. Co., 205 Pa. 132.

14. Petition. State v. Cook, 171 Mo. 348. See, also, § 6, Alternative Writ or peremptory writ in the first instance.

Notice of the application is required under La. Sup. Ct. Rule No. 12, § 2 (21 So. xi). State v. Couvillon, 109 La. 267.

A rule to show cause why an alternative writ shall not issue as prayed in the petition, may or may not be allowed, as the court in its discretion may determine, Code D. C. § 1274 providing that upon the filing of the petition the court "may" lay a rule, etc., and the word "may" being permissive and not mandatory. U. S. v. Hay, 20 App. D. C. 576.

15. Burns Rev. St. Ind. 1901, § 1184; Rev. St. 1881, § 1170; Horner's Rev. St. Ill. 1901, § 1170. Hart v. State [Ind.] 67 N. E. 996; Board of Com'rs of Miami County v. Mowbray, 160 Ind. 10.

The alternative writ is not a summons within Burns' Rev. St. Ind. 1901, § 662, providing that where all the defendants appear to an action, the summons is thereby carried out of the record. Such writ is, after it has been issued, in the nature of a complaint, and the petition and the writ must be considered together as setting out the cause of action and both may be demurred to collectively, or each may singly, and a demurrer to one reaches the other also. Hart v. State [Ind.] 67 N. E. 996.

16. State v. Cook, 171 Mo. 348. Full appearance is a waiver. Board of Com'rs of Miami County v. Mowbray, 160 Ind. 10.

Appearance and answer in obedience to a special rule of court, after a special appearance and objection on account of failure to issue an alternative writ, a summons having been issued instead, such objection having been overruled and the ruling duly excepted

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answered by the respondent, and it should therefore, by way of premises and inducement to its mandate, set out the facts clearly upon which the relator bases his rights, so as to show both the respondent's duty and the relator's right to have such duty performed.[17] The complaint, petition or affidavit on which the alternative writ is issued may be looked to in aid thereof.[18] The mandate of the alternative writ should be in the alternative, commanding the respondent to do the thing prayed for, or else to appear and show cause why a peremptory writ should not issue commanding him to do that thing.[19] Since the writ of mandamus is a discretionary writ, affidavits filed in support of and against the issuance thereof should not be scrutinized too closely, but should be examined with the view of reaching the real question in issue.[20]

§ 5. *Parties. A. Parties plaintiff. In general.*—Anyone capable of maintaining an action, and who has any peculiar interest in the performance of a duty imposed by law, has a standing to maintain mandamus to compel the performance of such duty; but where no private individual is peculiarly interested, the attorney general is the proper party to apply for the writ.[21]

Mandamus against municipal officers to compel them to perform duties which they owe to the citizens at large of such municipality may be maintained by any one of such citizens, though he have no interest in the performance of such duties separate and distinct from the interest of his fellow citizens.[22] Taxpayers of a county likewise have a standing to maintain mandamus to compel county officers to perform duties which affect such taxpayers as citizens of the county,[23] or of the taxpaying district to which they belong.[24]

Mandamus against corporations to compel them to perform the obligations imposed upon them by their charters cannot be maintained by a private individual,

to, is not a waiver of the issuance of the alternative writ. Hart v. State [Ind.] 67 N. E. 996.

Filing a demurrer to the petition, and, after the overruling thereof, filing an answer to the merits, after a motion to quash a summons which has improperly been issued instead of an alternative writ, is not a waiver of the issuance of the alternative writ. Board of Com'rs of Miami County v. Mowbray, 160 Ind. 10.

17. Longshore v. State, 137 Ala. 636. Writ for warrant on city current funds in payment of judgment must show nature of obligation on which the judgment is founded. Chapin v. Port Angeles, 31 Wash. 535, 72 Pac. 117. Writ to compel school to issue order in payment of judgment "for breach of contract" for a certain sum is too indefinite to show any duty on the part of the respondents [See Rev. St. Mo. 1889, §§ 9789, 9790]. State v. District School Board, 97 Mo. App. 613. The writ must state generally the cause of action [see 2 Ballinger's Ann. Codes & St. Wash. § 5757]. Chapin v. Port Angeles, 31 Wash. 535, 72 Pac. 117.

Writ to enforce judgment against city held sufficient. Hartman v. Brunswick [Mo. App.] 73 S. W. 726.

A motion to quash is proper where the alternative writ is fatally defective. Longshore v. State, 137 Ala. 636.

18. Longshore v. State, 137 Ala. 636; Hart v. State [Md.] 67 N. E. 996.

An affidavit in support of a former writ which was quashed, cannot be looked to in support of a new writ thereafter issued. Chapin v. Port Angeles, 31 Wash. 535, 72 Pac. 117.

19. A writ merely following the prayer of the petition, and commanding respondent to appear and show cause, without giving him the alternative privilege of performing the act demanded, is fatally defective. Longshore v. State, 137 Ala. 636.

20. People v. Moore, 78 App. Div. [N. Y.] 28.

21. Act Pa. June 8, 1893 (P. L. 345) did not change this rule. Loraine v. Pittsburg, J., E. & E. R. Co., 205 Pa. 132.

Mandamus to compel treasurer of Nebraska school district to pay properly drawn orders, lies at the instance of the county superintendent [see Comp. St. Neb. c. 79, § 11, subd. 3]. Leonard v. State [Neb.] 93 N. W. 988.

Where mandamus is applied for by an attorney in fact, the affidavit and petition should show such attorney's authority in the premises. In re Latimer, 75 App. Div. [N. Y.] 522, 12 N. Y. Ann. Cas. 9.

22. People v. Listman, 40 Misc. [N. Y.] 372; People v. Harris, 203 Ill. 272. See, also, People v. Interurban St. R. Co., 85 App. Div. [N. Y.] 407. But see People v. Stewart, 77 App. Div. [N. Y.] 181. Appointment of superintendent of incumbrances. People v. Swanstrom, 79 App. Div. [N. Y.] 94.

23. Maintenance and repair of county bridges, roads, etc. Bacon v. Board of Chosen Freeholders [N. J. Law] 54 Atl. 234; State v. Menzie [S. D.] 97 N. W. 745.

24. Levy and collection of tax. State v. Board of Com'rs [Ind.] 68 N. E. 295.

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unless he be peculiarly interested in the performance of such duties.[25] Mandamus by the state lies to compel a bridge company operating a bridge between two cities to perform its duties to the public;[26] but the state has no interest in the distribution of property between a city and a school district to which part of the city's territory has been added.[27]

(§ 5) *B. Parties defendant.*—The proper party defendant or respondent in mandamus proceedings is the party whose duty it is to perform the act demanded;[28] and where more than one party whose interests will be materially affected by the issuance of the writ, all should be joined as respondents.[29] Parties interested but not joined are sometimes allowed to intervene and defend.[30]

§ 6. *Petition.*—The allegations of a petition or application for mandamus will be construed most strongly against the relator,[31] and nothing essential to the right to the relief demanded will be taken by intendment.[32] The petition must therefore set forth every fact necessary to show that it is the duty of the respondent

25. Especially where provision is made by statute for the enforcement of such obligations by public officers. Street railway transfers [see Laws N. Y. 1890, p. 129, c. 565, § 157]. People v. Interurban St. R. Co., 85 App. Div. [N. Y.] 407. Failure to furnish, equip and operate railroad. Only attorney general may maintain mandamus. Loraine v. Pittsburg R. Co., 205 Pa. 132.

Sufficiency of interest: A private individual who has opened a coal mine on the line of a railroad, has a standing to maintain mandamus to compel the railroad company to carry his coal, where such company has refused to carry it solely because he would not sell coal to another company at much below what it was really worth. Loraine v. Pittsburg R. Co., 205 Pa. 132.

26. State v. Bangor [Me.] 56 Atl. 589.

27. State v. Wright [Kan.] 73 Pac. 50.

28. A judge who has made a void order forbidding the filing of a motion is not the proper respondent in mandamus to compel the filing of such motion. The clerk, whose duty it is to file the motion, notwithstanding the void order, is the proper party. Kruegel v. Nash [Tex. Civ. App.] 70 S. W. 983.

On mandamus to obtain inspection of municipal records the proper party respondent is the custodian of such records. Mayor of city held the custodian of city records [see Watkins' Dig. 1902, pp. 19, 20, § 6; p. 22, §§ 1, 2, p. 107, art. 5]. State v. Williams [Tenn.] 75 S. W. 948.

29. In mandamus to compel reinstatement in office which has been abolished, appointees to new office created in lieu of the one abolished are not necessary parties; but in mandamus to compel transfer to another office, the incumbents of such office are necessary parties. Jones v. Wilcox, 80 App. Div. [N. Y.] 167. But where an inferior officer has no authority to do the act demanded without the authority of his superiors, he is not a proper respondent in mandamus to compel the act, where he has not received authority to do it. Minchener v. Carroll, 135 Ala. 409. In mandamus to compel superintendent of building to enforce Building Code, § 105, all the owners of buildings which would be affected by such enforcement are necessary parties respondent. People v. Stewart, 77 App. Div. [N. Y.] 181.

In mandamus to compel a city to pay a judgment, the city taxpayers are not necessary parties defendant. Mandamus in such case is a mere substitute for execution, and the tax payers cannot intervene and reopen the questions litigated in the action which resulted in the judgment. Kinney v. Eastern Trust & Banking Co. [C. C. A.] 123 Fed. 297.

In mandamus against an inferior city officer to compel him to perform an act as to which he is under the control of his superior, it seems that the superior is a necessary party respondent. Donahue v. State [Neb.] 96 N. W. 1038.

Effect of dismissal of principal defendant: The relator applied to the commissioner of pensions for an attorney's fee in a pension case, and appealed from the commissioner's decision to the secretary of the interior, who affirmed the decision of the commissioner, and the relator then sought to obtain mandamus against both the commissioner and the secretary. The writ was granted as to the commissioner, but refused as to the secretary in which decision the relator acquiesced. It was held that the effect was to abate the action entirely, since the commissioner could not be compelled to override or reverse the decision of the secretary. Evans v. U. S., 19 App. D. C. 202.

30. Under Starr & C., Ann. St. 1896, p. 2682, c. 87, par. 7, § 7, any person having a special interest in the subject matter of the proceedings, may intervene and plead the same as though he had been an original defendant. People v. Blocki, 203 Ill. 363.

In mandamus to compel payment of a judgment against a city, the taxpayers cannot intervene and reopen the questions litigated in the action which resulted in the judgment though they were not parties to such action; since the mandamus proceeding is not a new action against the taxpayers, but is a mere substitute for an execution. Kinney v. Eastern Trust & Banking Co. [C. C. A.] 123 Fed. 297.

31. Scanlan v. Schwab, 103 Ill. App. 93. Pleadings in mandamus are under the Code to be construed in the same manner as other pleadings. Finley v. Territory [Okl.] 73 Pac. 273.

32. State v. Weston [Neb.] 93 N. W. 182.

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to perform the act demanded by the relator, and that relator has a clear right to demand such performance.[33] The facts must be set out with sufficient clearness to be either admitted or traversed by the respondent.[34] If the relator relies on a statute, he must show what statute,[35] and must allege all the facts necessary to bring him within the operation of the statute.[36] Likewise, if he rely on a municipal ordinance, he must allege the ordinance;[37] or if he rely on a resolution of a city council, he must show that the resolution was properly passed.[38] Where anything is required by the statute on which the relator relies as a condition precedent to the respondent's duty to perform the act demanded, facts showing performance of such condition must be alleged.[39] Allegations as to the time when a material fact oc-

33. Moores v. State [Neb.] 93 N. W. 986. Petition to compel mayor to sign interest bearing warrant must show that the ordinance providing for the issue of the warrant was properly passed, and that there is no money in the treasury to pay the warrant, there being a statute (Act Gen. Assem. July 1, 1901) providing that city warrants shall not bear interest where there is money in treasury to pay them. Scanlan v. Schwab, 103 Ill. App. 93. Petition to compel land office commissioner to recognize as valid a sale of school lands under Act Tex. Feb. 23, 1900, p. 32, c. 11, § 6, providing for sales out of a tract containing 2560 acres or less must show that the sale was out of such a tract. Moore v. Rogan, 96 Tex. 375. Petition to compel payment of official salary must show that relator took the oath of office, and that the amount claimed by the relator was due when he demanded it. People v. Perrin, 103 Ill. App. 410.

On mandamus to obtain inspection of corporate books, the petition alleged that relator had no knowledge of the condition of the affairs of the corporation (of which she was a stockholder), or the names of its other stockholders, and that it was necessary for her to examine the books of the corporation in order to ascertain the names and residences of such stockholders so that she might confer with them as to the management of the corporation's affairs. It was held that the petition was insufficient, in that it showed no demand for inspection, and showed no necessity for the inspection, certainly no necessity for inspection of all the books. In re Latimer, 75 App. Div. [N. Y.] 522, 12 N. Y. Ann. Cas. 9.

An averment of a custom on the part of a county judge to audit a clerk's claim for salary on a certain day each month, is not a sufficient averment of such judge's duty to audit on such day or at any other time. People v. Perrin, 103 Ill. App. 410. If the petition state the substance of a case, an alternative writ may be issued [see Act Pa. June 8, 1893, § 2 (P. L. 345)]. Miller v. Clement, 205 Pa. 484.

Demurrer: A petition which fails to aver any fact essential to the respondent's duty or the relator's right, is subject to a demurrer as being defective in substance. State v. Weston [Neb.] 93 N. W. 182. Petition held to show that county commissioners were sued in their official capacity. State v. Byrne, 32 Wash. 264, 73 Pac. 394. Petition to compel canvass of votes must show legal interest of relator in the result. State v. Chatterton [Wyo.] 73 Pac. 961. A petition to compel the state canvassing board to canvass votes must show that abstracts of the votes have been returned by the county clerk. Id. A petition showing that a tax levy was required to be made at a forthcoming session, about one week distant, sufficiently shows an emergency. State v. Byrne, 32 Wash. 264, 73 Pac. 394.

34. People v. Perrin, 103 Ill. App. 410.

35. If there be another statute which controls the subject matter of the petition, the court will take judicial notice of such statute, and deny the writ. Com. v. McClure, 204 Pa. 196.

36. Burns' Rev. St. Ind. 1901, § 5958; Horner's Rev. St. Ind. 1901, providing that only unmarried persons between the ages of six and twenty-one, shall have the benefit of the common schools. Weir v. State [Ind.] 68 N. E. 1023. Hurd's Rev. St. Ill. 1901, § 12, forbids discharge of classified officers except for cause. Sections 3, 11, exclude certain officers from classified service. Petition to reinstate relator in office on ground of wrongful discharge under section 12, must show that he does not come within section 11. Stott v. Chicago, 205 Ill. 281.

37. At least in a state court, which will not take judicial notice of municipal ordinances. Quaere as to municipal courts. Stott v. Chicago, 205 Ill. 281.

38. Scanlan v. Schwab, 103 Ill. App. 93.

39. Petition to compel state auditor to register and certify county refunding bonds, must show that relator has furnished respondent with data sufficient to enable him to pass on the validity of the bonds. State v. Weston [Neb.] 93 N. W. 182. Petition to compel town trustees to pay a bill, must allege a previous appropriation, where the town's liability on contract is dependent on such an appropriation [see Mills' Ann. Code, §§ 4447-4449]. Board of Trustees of Montrose v. Endner [Colo. App.] 70 Pac. 152.

On mandamus to compel construction of railroad crossing over a highway, an allegation that "due and legal notice of the filing and pendency of said petition (to construct the highway over the respondent company's right of way), and application for the location and establishment of said highway, and of the time and place set for hearing the same, was duly given," was held, in Baltimore, etc., R. Co. v. State, 159 Ind. 510, to be sufficient, though it did not appear which method of notice prescribed by Burn's Rev. St. 1901, § 6742, was followed, it appearing, however, from the facts in the case that the highway was ordered by the county board to be constructed, and such

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curred must be clear and specific, and must exclude the possibility of the occurrence of such fact at a time which would defeat the relator's right.[40] Where a prior demand is required, such demand must be alleged.[41] Uncertainty as to the name of the relator, or as to the person for whose benefit the writ is sought, is fatal.[42] Mere surplusage, however, in describing the relator, may be rejected, and will not render the petition insufficient.[43] Facts, not legal conclusions, must be alleged.[44] Matters of defense need not be negatived in the petition.[45]

Joinder of actions.—Two distinct demands by two separate persons cannot be joined in the same petition.[46]

The sufficiency of the verification of the petition depends upon the statute relating to such matter.[47]

§ 7. *Alternative writ or peremptory writ in the first instance; service and return by serving officers.*[48]—The usual practice is for an alternative writ to be issued in the first instance;[49] but where the rights and duties involved all depend upon questions of law, and it appears that the relator is entitled to have the performance of the act demanded, a peremptory writ may be issued in the first instance.[50] Where, however, the rights and duties of the parties are in issue, and depend upon disputed facts, a peremptory writ will not be issued in the first instance.[51]

§ 8. *Answer or return, and subsequent pleadings.*—The answer should set out

board being presumed to have found that the proper notice was given.

40. Allegation that certificate of nomination was presented "on the ——— day of September" held insufficient to show the duty of the secretary of state to file such certificate, the law requiring certificates to be filed forty days before the election, and the date of the election in question being Nov. 2. State v. Chatterton [Wyo.] 70 Pac. 466.

41. State v. Holmes [Neb.] 97 N. W. 243. Mandamus to obtain inspection of corporate books. In re Latimer, 75 App. Div. [N. Y.] 522, 12 N. Y. Ann. Cas. 9.

42. Petition to compel political party committee to admit a person to membership therein, failed to give name of such person. People v. Democratic General Committee, 175 N. Y. 415.

43. There were two corporations in the township of W., one called the "civil township," and the other the "school township." The petition by the township of W. described relator as "the civil township" of W. Held that the word civil was mere surplusage. Baltimore, etc., R. Co. v. State, 159 Ind. 510.

44. Allegation of passing civil service examination and appointment to office, not a sufficient allegation of classification pursuant to Hurd's Rev. St. Ill. 1901, § 3, so as to take relator out of the exceptions provided by section 11, depriving certain officers of the benefit of section 12, forbidding discharge without cause. Stott v. Chicago, 205 Ill. 281. Allegation that relator was entitled to attend a certain school, not sufficient under Burn's Rev. St. Ind. 1901, § 5958, restricting the privileges of the common schools to unmarried persons between six and twenty-one. Weir v. State [Ind.] 68 N. E. 1023. An averment that a claim was rejected "without right and against law" is a mere conclusion. San Luis Obispo County v. Gage, 139 Cal. 398, 73 Pac. 174. Allegations that relator is entitled to examine the books of a corporation of which he is a stockholder, because such examination is necessary to protect his rights, and general allegations that some of the transactions of the corporation are of doubtful legality, are mere conclusions, and hence insufficient. In re Colwell, 76 App. Div. [N. Y.] 615.

45. Facts which limit the general duty of respondent imposed by law, are matters of defense. U. S. v. Saunders [C. C. A.] 124 Fed. 124. Petition to compel reinstatement as member of a city department need not show that a proviso limitation on expense of the department was not exceeded in relator's appointment. People v. Scannell, 172 N. Y. 3.

46. Claims by two witnesses for fees in the same case. Ohlsan v. Durfrey [Miss.] 33 So. 973.

47. Under Burns' Rev. St. Ind. 1901, § 1183, anyone competent to make an affidavit may verify the petition. Baltimore, etc., R. Co. v. State, 159 Ind. 510.

48. Alternative writ to county commissioners to compel action on a petition held to sufficiently state the duty required. State v. Menzie [S. D.] 97 N. W. 745.

49. See supra, § 3.

50. Code Civ. Proc. N. Y. § 2070. People v. Lindenthal, 79 App. Div. [N. Y.] 43; People v. Unger, 85 App. Div. [N. Y.] 249. Act Pa. June 8, 1893 (P. L. 345). Miller v. Clement, 205 Pa. 484.

51. People v. Democratic General Committee, 82 App. Div. [N. Y.] 173; Jones v. Wilcox, 80 App. Div. [N. Y.] 167; People v. Wells, 78 App. Div. [N. Y.] 373; People v. Moore, 78 App. Div. [N. Y.] 28.

An alternative writ may issue on prayer for peremptory writ, where the peremptory writ cannot issue on account of the facts having been put in issue. Jones v. Wilcox, 80 App. Div. [N. Y.] 167.

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all the facts upon which the respondent intends to rely;[52] but it will be sufficient if it state matter in bar to the action,[53] or if the facts relied on as a bar are fairly inferable from the facts.[54] Affidavits filed with the answer cannot be considered, on demurrer, in order to supply defects in the answer.[55] Equitable defenses are not available as against a plain legal right to have the performance of the act demanded.[56] On mandamus to compel a court clerk to comply with an order made by the judge of such court, he cannot set up want of jurisdiction or power on the part of the judge to make such order.[57] Nor can the decision or action of a board or person vested with judicial or discretionary powers in the premises be attacked on mandamus to enforce a right based on such decision;[58] but the decision of an officer not vested with judicial or discretionary powers in the premises is not conclusive, and may be attacked on mandamus to enforce a right based thereon.[59] It seems that an answer admitting that the respondent is about to do the thing demanded will require a dismissal of the proceedings.[60] Where the answer is sufficient, and its averments are not put in issue by a proper reply, the averments will be taken as true, and the writ peremptory will be denied.[61] The averments of the answer will likewise be taken as true, where conflicting affidavits are filed in support of and against the issuance of a peremptory writ, and the relator insists upon a peremptory writ;[62] but they will not be taken as true when, upon an application for a peremptory writ, the court refuses to issue the writ in the peremptory form, and orders an alternative writ to issue to raise and try the issues of fact.[63]

Where the respondent demurs to the alternative writ, the question whether the relator is entitled to some form of relief is not, as in an ordinary action, raised; but the sole question is whether the relator is entitled to the specific relief prayed for in the petition and commanded in the alternative writ.[64] The petition and the alternative writ may be demurred to jointly or separately; and in the latter case, the demurrer to the one will reach the other, while the averments of the one will aid the other.[65]

52. U. S. v. Hitchcock, 19 App. D. C. 333.

53. Argumentativeness no objection. State v. Perry, 159 Ind. 508.

54. Compliance with Civil Service Act, § 10 (1 Starr & C. Ann. St. 1896 [2 Ed.] c. 24, § 328) as to discharge of probationer. Fish v. McGann, 205 Ill. 179. An answer to a petition alleging unlawful removal from service, which justifies suspension but does not deny removal is insufficient. People v. Wells, 89 App. Div. [N. Y.] 89.

Note. **The return** must clearly and certainly, without frivolity or evasion, set forth the facts. Com. v. Pittsburgh, 34 Pa. St. 522. They must be specific and direct, not argumentative or inferential. Com. v. Allegheny Co., 37 Pa. St. 277.

55. But they may be considered in order to determine whether the respondent should have time to file an amended or supplemental answer. State v. Wedge [Nev.] 72 Pac. 817.

56. Davis v. Miller Signal Co., 105 Ill. App. 657.

57. Order to transmit papers on change of venue. State v. Chapman, 67 Ohio St. 1.

58. Mandamus to compel issuance of warrant for claim allowed against town by a duly authorized body. People v. Clarke, 174 N. Y. 259. Title to office to which relator has been duly appointed not open to attack on mandamus to enforce right to such office. People v. Ogden, 41 Misc. [N. Y.] 246.

Where an order for a tax levy has been judicially affirmed the validity of such order can not be attacked on mandamus to compel the levy, the only question left open being the form of the order for the enforcement of the levy. State v. Board of Com'rs [Ind.] 68 N. E. 295.

59. Allowance of claim by county commissioners attacked on mandamus to compel county auditor to issue warrant. State v. Perry, 159 Ind. 508.

60. State v. Sunset Tel. & Tel. Co., 30 Wash. 676, 71 Pac. 198.

61. Longshore v. State, 137 Ala. 636; Thornton v. Board of Sup'rs [Mich.] 91 N. W. 840; State v. Williams [Tenn.] 75 S. W. 948.

62. In re Perry, 84 N. Y. Supp. 406.

63. People v. Board of Police Com'rs, 79 App. Div. [N. Y.] 82.

64. State v. Indianapolis Union R. Co., 160 Ind. 45.

In the District of Columbia, the return cannot be by way of demurrer to the petition upon which the rule to show cause is issued, and a demurrer has no proper place in the proceedings until the return to the rule to show cause comes in. Code D. C. §§ 1273-1282. U. S. v. Hitchcock, 19 App. D. C. 333.

65. Hart v. State [Ind.] 67 N. E. 996.

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The petition may plead to or traverse the allegations of the answer or return, or he may demur;[66] but a demurrer is not necessary.[67] On demurrer to the answer, affidavits filed therewith cannot be considered, except to determine whether the respondent should be allowed to file an amended or supplemental answer.[68]

§ 9. *Trial, hearing and judgment. A. Trial and hearing.*—Mandamus proceedings should be tried as soon as possible.[69] Where it appears that the respondent has failed to perform a duty, the performance of which is essential to the determination of the final issue in the cause, the court should not undertake to perform such duty, but should order the respondent to perform it.[70] Questions affecting one who is not a party to the proceedings will not be considered.[71] Any question properly involved may be considered, though it be not argued on the trial;[72] but a party who has invoked a statute in his own behalf will not be allowed to question its constitutionality.[73]

The burden of proof is on the relator to show a clear right on his own part and a positive duty on the part of the defendant;[74] but as to facts which limit the respondent's general liability under the land, the burden of proof is on him.[75]

Jury questions.—When the evidence presents an actual issue of fact, such issue is for the jury, and a verdict should not be directed.[76] The question of damages is likewise for the jury.[77]

The findings should follow the pleadings, and the findings of a referee in favor of the respondent should follow the return.[78]

Abatement and dismissal.—Mandamus proceedings against an incumbent of an office constituting a regular department of a municipal corporation, in the matter of appointment to or removal of an officer from office, do not abate upon the death of the respondent pending action.[79] Whenever it appears pending trial that the emergency which inspired the demand for the writ has ceased to exist, the cause should be dismissed.[80] In West Virginia, the relator still has his com-

66. U. S. v. Hitchcock, 19 App. D. C. 333. No replication is necessary to new matter in an answer. State v. Kineval [Neb.] 97 N. W. 798.

Note. The relator's right to institute mandamus may be questioned by demurrer. Farris v. Jones, 112 Ind. 498.

67. The court will, without demurrer, determine the sufficiency of the answer. Longshore v. State, 137 Ala. 636.

68. State v. Wedge [Nev.] 72 Pac. 817.

69. But where the only issue is as to relator's damages, there is no necessity for any greater haste than in an ordinary action. Hollister v. Donahoe [S. D.] 92 N. W. 12.

70. On mandamus to compel recount of ballots, as provided by Laws N. Y. 1896, c. 909, p. 966, § 114, it appeared that respondents had not complied with c. 909, p. 963, § 111, relating to the marking, endorsement and disposition of the ballots in question, and the court undertook to decide the cause without compliance by respondents with such section. This was held erroneous procedure. In re Perry, 84 N. Y. Supp. 406.

71. Mandamus to compel auditor general to allow relator to redeem land purchased by state for taxes, and resold by the state. Purchaser from state was not a party, and hence his duty to allow redemption held not open to consideration. Kennedy v. Auditor General [Mich.] 96 N. W. 928.

72. Parties cannot, by waiver or otherwise, enlarge the operation of the remedy of mandamus. State v. Holmes [Neb.] 97 N. W. 243.

73. State v. Morris [S. C.] 45 S. E. 178.

74. State v. District Court Department No. 1 [Mont.] 74 Pac. 498.

75. U. S. v. Saunders [C. C. A.] 124 Fed. 124.

76. People v. Dick, 84 App. Div. [N. Y.] 181.

77. Comp. Laws, S. D. §§ 5522, 5527. Hollister v. Donahoe [S. D.] 92 N. W. 12.

Allowance of interest on damages may be left to the jury, under Comp. Laws, S. D. § 4578, damages allowed on mandamus not being an obligation arising out of contract. Id.

The measure of damages on mandamus to compel an officer to execute a deed, is the value of the use of the property for the period during which the relator was deprived of the use thereof. Id.

78. But a mere verbal variance in the findings of a referee is not fatal, if the findings follow the return in substance. People v. Department of Health, 86 App. Div. [N. Y.] 521.

79. People v. Lantry, 40 Misc. [N. Y.] 428.

80. U. S. v. Norfolk R. Co. [C. C. A.] 118 Fed. 554. See, also, State v. Sunset Tel. & Tel. Co., 30 Wash. 676, 71 Pac. 198, wherein the defendant answered that it was about to do the thing demanded, and it was held that if any order at all were proper it would be an order of dismissal.

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mon law right to dismiss his suit, without prejudice, at any time before trial, where the respondent has not asked for affirmative relief.[81]

A motion for a new trial may be made in New York without the making of a case.[82]

(§ 9) *B. Judgment. Scope of relief.*—The judgment may in some cases go beyond the prayer for relief, and grant full relief in the premises.[83] Likewise, where an alternative writ is issued upon an application for a peremptory writ, the relief that may be granted will not be confined to that asked for in the alternative writ, where such writ was issued solely for the purpose of trying issues of fact.[84]

Form.—Where the issues raised by an alternative and the return thereto are tried by a judge, a jury having been waived, they must be decided by making and filing findings, or by a short decision.[85] The judgment should order the respondent to do the thing demanded, where it appears that it is his duty to do it.[86] An order of discontinuance, made on the application of the relator before the merits have been considered, on the ground that the relator has mistaken his remedy, should not state that the dismissal is "without prejudice to the right of the relator to sue."[87]

Conclusiveness.—The judgment on mandamus is usually conclusive as to all questions which were or which might have been litigated upon the trial.[88] It is likewise conclusive upon all whose interests were properly before the court for adjudication;[89] but where the respondent, as public officer, requests in his answer that he be required to do the act prayed for, and there is no *bona fide* litigation, the public will not be bound by a judgment granting the writ.[90]

Costs follow the judgment;[91] but on a judgment in favor of the relator on mandamus to compel a judge to dissolve an injunction which, at the instance of the plaintiff in the injunction suit, he has refused to dissolve, such plaintiff may be compelled to pay the costs.[92] Where, pending the proceedings, the respondent

81. U. S. v. Norfolk R. Co. [C. C. A.] 118 Fed. 554.

Form of order of dismissal when the relator takes voluntary nonsuit—see infra § 8B, Judgment.

82. Code Civ. Proc. §§ 999, 2082, 2083. People v. Knox, 78 App. Div. [N. Y.] 344.

83. Relief granted as to all candidates nominated by the same convention, on mandamus by one of such candidates. State v. Weston, 27 Mont. 185, 70 Pac. 519.

84. In such cases the relief prayed for in relator's original application may be granted. People v. Board of Police Com'rs, 79 App. Div. [N. Y.] 82.

Note. But ordinarily, where the alternative writ issues first, it must be explicit and complete in its mandatory part, for the peremptory writ must follow it, relator being concluded by the alternative writ. Florida, C. & P. R. Co. v. State, 31 Fla. 482, 20 L. R. A. 419. High, Ex. Leg. Rem. § 539. The courts cannot award the peremptory writ in any other form than that fixed by the alternative writ. High, Ex. Leg. Rem. § 548.

85. Code Civ. Proc. §§ 1022, 2082, 283. People v. Dalton, 77 App. Div. [N. Y.] 499.

86. A judgment to "re-audit" is erroneous. It should be to "audit." People v. Mole, 85 App. Div. [N. Y.] 33.

87. Since a dismissal without consideration of the merits could not possibly affect relator's cause of action (People v. York, 84 App. Div. [N. Y.] 440; distinguishing People v. York, 66 App. Div. [N. Y.] 453, 171 N. Y. 627), on the ground that in that case the merits had been considered, and the court, having decided that the relator had mistaken his remedy, inserted the clause "without prejudice" in order to obviate any subsequent contention that the dismissal would bar any other remedy which might be available. In the case under consideration the relator wished the clause "without prejudice" inserted in order to prevent the bar of the statute of limitations; but the court refused to insert such clause, and likewise refused to pass upon the effect of such a clause upon the statute of limitations.

88. Board of Sup'rs v. Thompson [C. C. A.] 122 Fed. 860.

89. Judgment ordering irrigation district to pay a judgment held conclusive against the board of supervisors of the county, the board of directors and the taxpayers of such district. Board of Sup'rs v. Thompson [C. C. A.] 122 Fed. 860.

90. People v. Knopf, 198 Ill. 340.

91. Code Civ. Proc. Neb. §§ 623, 624. State v. Holm [Neb.] 92 N. W. 1006.

92. Johnson v. New Orleans, 109 La. 696.

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performs, the costs may nevertheless be adjudged against him, if the case be such that, but for the performance, a peremptory writ would be issued.[93]

§ 10. *Peremptory writ.*—Where, pending the proceedings, the respondent performs the act demanded, the peremptory writ will not be issued.[94] Nor will it be issued in any case where, pending the proceedings, the emergency which inspired the application has ceased to exist.[95] It should not be issued where the respondent answers that he is about to do the thing demanded.[96] It will never be issued in a doubtful case.[97]

§ 11. *Performance.*—Performance pending proceedings necessarily puts an end to the litigation,[98] except as to the assessment of costs and damages.[99]

§ 12. *Review.*—Jurisdiction to review final judgments of inferior courts in civil cases includes jurisdiction to review a final judgment granting a writ of mandamus.[1] As in ordinary actions, appellate jurisdiction in mandamus proceedings is limited by the amount in controversy.[2] Notice of appeal is essential to the jurisdiction of the appellate court.[3]

Parties who appeal must have an appealable interest in the judgment appealed from.[4] And individual members of a board who have been inducted into office subsequent to the rendition of a judgment on mandamus against such board, have no such interest.[5]

Presumptions on appeal are rather in favor of the decision of the lower court than against it.[6]

Discretionary rulings of the trial court are not ordinarily reviewable.[7]

Review of facts.—Where the final order on mandamus is entered on the verdict of a jury, the practice is the same as in ordinary actions, and in order to present the facts for review on appeal, it is necessary to appeal from an order denying a motion for a new trial;[8] but where the issues are tried by the court, a jury trial having been waived, and findings are made, exceptions to such findings pre-

93. State v. Stokes, 99 Mo. App. 236.

94. State v. Stokes, 99 Mo. App. 236. But see infra, § 11, Review, as to the effect of performance pending appeal.

95. U. S. v. Norfolk R. Co. [C. C. A.] 118 Fed. 554.

96. State v. Sunset Tel. & Tel. Co., 30 Wash. 676, 71 Pac. 198.

97. See supra, § 1.

98. State v. Stokes, 99 Mo. App. 236. Performance pending appeal. See infra, § 11, Review.

99. See supra, § 8B, Judgment.

1. Mills' Ann. St. Colo. § 1002d. The fact that the appellate court has not original jurisdiction of mandamus proceedings does not change this rule. Orman v. People [Colo. App.] 71 Pac. 430. Mandamus is a civil action and as such appealable in Ohio. State v. Philbrick [Ohio] 69 N. E. 439.

2. The amount in controversy must appear affirmatively from the record. State v. Police Jury of Calcasieu Parish, 109 La. 266.

3. Consent of the parties cannot confer appellate jurisdiction. The jurisdictional facts must appear on the face of the record. Stephens v. Querry [Iowa] 97 N. W. 1115.

4. Board of election canvassers which has been ordered by peremptory writ to count certain ballots, held to have no appealable interest in an order setting aside an order, subsequent to the peremptory writ, for an alternative writ to compel the rejection of such ballots. People v. Unger, 85 App. Div. [N. Y.] 249.

5. State v. Board of Com'rs [Ind.] 68 N. E. 295.

6. Where it does not distinctly appear whether a dismissal in the lower court was on a demurrer or on a return controverting the averments of the petition, the appellate court will not assume that the return admitted the averments of the petition, the inference being rather the other way. U. S. v. Hitchcock, 19 App. D. C. 347.

7. Discretion in refusing to quash writ against town after expiration of time for appeal, the grounds of motion to quash being that the writ ordered the town to levy a tax in excess of the limit prescribed by law. Orr v. Atcheson, 66 Kan. 789, 71 Pac. 848. Discretion as to time of trial as to damages, the other questions having been disposed of. Hollister v. Donahoe [S. D.] 92 N. W. 12.

Discretion as to costs: In view of Code Civ. Proc. Neb. § 624, specifically providing that the plaintiff shall have costs on mandamus where he obtains judgment, the discretion vested in the trial court by section 623 as to the taxation of costs is not an arbitrary discretion, and an order taxing costs against a successful relator is reviewable. State v. Holm [Neb.] 92 N. W. 1006.

8, 9. People v. Wells, 85 App. Div. [N. Y.] 378.

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sent the whole case for review, the same as on an appeal from a judgment denying a motion for a new trial.[9] Nor is it essential, where the cause has been tried by the court without a jury, to make a case upon a motion for a new trial, and an appeal from an order denying a motion for a new trial without a case carries the whole matter to the appellate court for review.[10] Where the court, in trying the cause without a jury, fails to make findings, and this omission is disclosed by the case on appeal, the cause will be remitted to the trial court for a decision *nunc pro tunc*.[11] The decision of the trial court on questions of fact will not be disturbed where there is any evidence to support such decision.[12] Where both parties ask the lower court for a direction on the facts, a direction by the court has the same effect as a specific finding by the jury, and will not be disturbed where there is any evidence to support it;[13] and failure to ask to go to the jury on an issue as to which a party has the burden of proof, likewise makes a directed verdict against such party, equivalent to a specific finding against him on such issue.[14] Objections not made in the trial court will not be considered on appeal.[15]

Where there is no bill of exceptions, the appeal will be tried upon the record proper, which includes, however, the alternative writ.[16]

The appellant cannot complain of the action of the trial court in trying the case upon a certain theory, where he himself introduced evidence based upon such theory, which was admitted over the defendant's objection.[17]

The case will be dismissed on appeal by the respondent, where it appears that relator is not entitled to the relief demanded, there being no necessity for a remand to the trial court,[18] where it appears that the respondent has performed the act commanded by the judgment below, and there is no substantial litigation left between the parties.[19] An appeal by the relator from an adverse decision will be dismissed where it appears that, pending the appeal, he has lost his interest in the matter, thus leaving only a moot question before the court.[20] In any case, where

10. Code Civ. Proc. N. Y. §§ 968, 999, 2082, 2083. People v. Knox, 78 App. Div. [N. Y.] 344.

11. Code Civ. Proc. N. Y. §§ 1022, 2082, 2083. People v. Dalton, 77 App. Div. [N. Y.] 499.

12. Kreckler v. Perkins [Mich.] 97 N. W. 152; Thornton v. Board of Sup'rs [Mich.] 91 N. W. 840; State v. Penter, 96 Mo. App. 416.

13, 14. People v. Scannell, 172 N. Y. 316.

15. Introduction of petition as evidence. Board of Sup'rs v. Thompson [C. C. A.] 122 Fed. 860. On mandamus to compel the counting of a vote, the judge ordered the ballot box to be brought into court, opened the box, examined the ballots, and thereupon made an order that the respondents reconvene and count the contested ballot; but no objection was made to such proceeding in the trial court. People v. Unger, 85 App. Div. [N. Y.] 249.

16. Where the only exceptions presented by the bill of exceptions are to the action of the court in overruling the respondent's motion to set aside the peremptory writ which was issued against him, and his motion in arrest of judgment based on the ground that upon the pleadings and the record the judgment should have been in his favor, the bill of exceptions is practically eliminated from the record. Hartman v. Brunswick [Mo. App.] 73 S. W. 726.

17. Hollister v. Donahoe [S. D.] 92 N. W. 12.

18. State v. Police Com'rs [Mo.] 71 S. W. 215.

19. Stephens v. Querry [Iowa] 97 N. W. 1115. Especially where provision is made in the judgment for the reimbursement of respondent as to costs, and his interest in the subject matter of the suit, an office, has expired. Betts v. State [Neb.] 93 N. W. 167.

The performance must be pursuant to the mandate in order to constitute grounds for dismissal of the appeal. When the respondent performs the act commanded in due course of business, he still has the right to have his rights in the matter settled, provided, of course, he still have some interest in the matter. State v. Sunset Tel. & Tel. Co., 30 Wash. 676, 71 Pac. 198. Appeal dismissed where the order was complied with by third persons. Stephens v. Querry [Iowa] 97 N. W. 1115.

20. Pending an appeal from a decision reversing an order granting a writ to reinstate relator in office, it was made to appear by affidavits that relator had been discharged for causes not involved in the action, and had been paid his salary to date of discharge. Crocker v. Sturgis, 175 N. Y. 158.

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the record fails to disclose an essential jurisdictional fact, the appeal will be dismissed.[21]

The costs on appeal follow the judgment.[22]

MARINE INSURANCE.[23]

"Marine insurance" includes the issuance of ordinary fire policies on boats navigating the high seas and great lakes,[24] but a contract of insurance of a vessel moored and in use as a hospital is not a contract of marine insurance.[25] The organization of a mutual marine company is governed by statutes applicable generally to other mutual companies.[26] It is a proper regulation of foreign companies to exact both a franchise tax and an annual tax on gross premiums.[27] Statutes imposing personal liability on agents of foreign countries which have not complied with local laws are applicable to a contract made within the state, insuring property outside it.[28] Such statutes do not violate the constitution of the United States because of such application.[29] Actions based on such liability are not limited by provisions in the policy.[30] Persons describing themselves as agents cannot deny their status,[31] and the insurer may become estopped by acquiescence to deny their authority to collect premiums.[32]

The contract.—The ordinary rules of interpretation apply.[33]

Interpretation of terms is for the court.[34]

21. Notice—appeal. Stephens v. Querry [Iowa] 97 N. W. 1115. Necessary amount in controversy. State v. Police Jury of Calcasieu Parish, 109 La. 266.

22. Selectmen of Gardner v. Templeton St. R. Co. [Mass.] 68 N. E. 340.

23. See article Insurance for all questions of general nature.

24. Laws 1895, p. 392, c. 175. Dwinnell v. Minneapolis F. & M. Mut. Ins. Co. [Minn.] 97 N. W. 110.

25. Detroit v. Grummond, 121 Fed. 963.

26. Must comply with Laws 1895, p. 415, c. 175, § 47. Dwinnell v. Minneapolis F. & M. Mut. Ins. Co. [Minn.] 97 N. W. 110. See, also, Insurance.

27. Construing Laws 1901, p. 297, c. 118, amending Laws 1896, p. 859, c. 908, § 187 and Laws 1893, p. 1801, c. 725, amending Laws 1892, p. 1947, c. 690. People v. Thames & M. Marine Ins. Co., 176 N. Y. 531.

28. Act Pa. May 1, 1876 (P. L. 53, 66) § 48. Adler-Weinberger S. S. Co. v. Rothschild & Co., 123 Fed. 145.

29, 30. Adler-Weinberger S. S. Co. v. Rothschild & Co., 123 Fed. 145.

31. Issuing policies of marine insurance in behalf of a company and afterward issuing slips to be attached and in which they describe themselves as agents. Adler-Weinberger S. S. Co. v. Rothschild & Co., 123 Fed. 145.

32. Though an original agreement with insurance brokers does not contemplate payment of premiums to them, the insurer by allowing them to collect premiums without objection or by endeavoring to recover from them the premiums so collected, may be prevented from resorting to the insured. Mannheim Ins. Co. v. Chipman, 124 Fed. 950.

33. Where the language of a contract is determinate and precise, **oral evidence is not admissible** to explain it or vary it by proof of usage. A clause in a policy of re-insurance that the insurers "agree to pay the assured in full all claims for such loss arising from perils enumerated in the policy as the assured may in their judgment settle for with the owners or other parties interested." Ocean S. S. Co. v. Aetna Ins. Co., 121 Fed. 882.

34. Whether a vessel is "between piers," the evidence of position being undisputed. Huntley v. Providence Wash. Ins. Co., 77 App. Div. [N. Y.] 196.

Interpretation of particular phrases: A policy insuring a firm against loss on cargoes "belonging to them and as agents" is not to be interpreted as "for whom it may concern" and only such cargoes as belong to the firm as owner or in which it has an interest and risk as agent are covered. Marine Ins. Co. v. Walsh-Upstill Coal Co. [Ohio] 68 N. E. 21. A provision that "general average, salvage and special charges as per foreign customs" shall be paid "according to foreign statements or per rules of port of discharge" provides not only for adjusting loss according to foreign custom but also for payment of losses by the insurer according to the rules of the port of discharge and the insurer cannot contend that adjusters under the rules of the port of New York, that being the port of discharge, have power to ascertain the loss and the items composing it and to distribute the loss to the different interests but not to determine what portion thereof any insurance company shall pay and that such payment shall be controlled by the terms of the policy interpreted pursuant to the applicable rule. International Nav. Co. v. Sea Ins. Co., 124 Fed. 93. A vessel between piers 2,200 feet apart is not insured against floating ice as lying "between piers." Huntley v. Providence Wash. Ins. Co., 77 App. Div. [N. Y.] 196.

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Statutory provisions as to the size of type in which conditions or restrictive provisions must be printed do not apply to stipulations with respect to risks insured against which imposes no burden on the insured.[35]

The charterer of a vessel has an insurable interest against general average charges in all the goods carried by the vessel.[36]

Reinsurance.—A marine carrier which by its bills of lading is liable as an insurer effects a contract of reinsurance by insuring its risks, and cannot be compelled to pro rate liability.[37]

Avoidance of policy for breach of warranty or condition.—A warranty that a vessel has sailed may be immaterial when she is not yet overdue.[38] The stipulated duty of protecting a vessel must be so performed as not to unnecessarily break a warranty bearing on the risk.[39] Temporary absence of the master does not render a vessel unseaworthy, where the owner has taken sufficient means to comply with his warranty.[40] Underwriters on cargo are not relieved by the fact that the vessel leaves an intermediate port with knowledge of her master that she is in a condition prohibiting her from safely proceeding further on her voyage.[41] Deviation to procure medical treatment for a seaman does not invalidate the insurance.[42]

Risks and causes of loss.—The insurer is liable only for loss proximately occasioned by the perils insured against.[43] Thus, the collision clause does not cover the striking of a sunken or floating obstruction.[44] Where hatches are properly covered to render a vessel seaworthy in such respect for all ordinary purposes, the loss is not brought within an excepted case by the fact that the vessel fills through the hatches after stranding.[45] Under statutes relieving the insurer from liability for losses caused by the willful act of the insured but not from negligence, negligent navigation is not a defense to a loss arising from the perils of the sea.[46]

Indemnity against any liability to which a tug may be subjected by reason of collision or accident to other vessels covers both towage or salvage services.[47]

Extent of loss. Abandonment.—The right to abandon for a constructive total

35. Code Va. 1887, § 3252, does not apply to a provision in a rider printed in smaller than the statutory type "warranted free from claim for loss or damage caused by the bursting or collapsing of the boiler or the breaking of machinery unless caused by the stress of weather, stranding, burning or collision." Cline v. Western Assur. Co. [Va.] 44 S. E. 700.

36. Dodwell & Co. v. Munich Assur. Co., 123 Fed. 841.

37. Contract held to allow the carrier to recover in full against the re-insurer. Ocean S. S. Co. v. Aetna Ins. Co., 121 Fed. 882.

38. While it is ordinarily material whether a vessel has sailed when she is insured, lost or not lost, yet a representation honestly made and true at the time but false in fact, when the binding slip was made, may be deemed immaterial when the ship had not yet time to become overdue, when the application was made binding. Application was on inquiry and owner applied to have it made binding which was done the date of application being changed without the knowledge of insured. Meantime the vessel had been lost. Kerr v. Union Marine Ins. Co., 124 Fed. 835.

39. Breach of warranty that a vessel should remain moored during the winter months, is not excused by the clause requiring reasonable exertions to be made to safe-guard the vessel in case of any loss or misfortune, if proper precautionary measures can be taken without moving the vessel. Where leakage could be kept down by the pumps, the master is not authorized to move the vessel several miles and discharge the cargo and afterward move the vessel to a dry dock. Ryan v. Providence Wash. Ins. Co., 79 App. Div. [N. Y.] 316.

40. She was stranded during his absence. Lewis v. Aetna Ins. Co., 123 Fed. 157.

41. Morse v. St. Paul F. & M. Ins. Co., 122 Fed. 748.

42. The Iroquois [C. C. A.] 118 Fed. 1003.

43, 44. Cline v. Western Assur. Co. [Va.] 44 S. E. 700.

45. Lewis v. Aetna Ins. Co., 123 Fed. 157.

46. Civ. Code Cal. § 2629. Nome Beach L. & T. Co. v. Munich Assur. Co., 123 Fed. 820.

47. Under an agreement to indemnify for any loss caused "by collision or stranding resulting from any cause whatever to any other vessel or vessels," the insurer is liable where the tug finds a scow adrift and moors her there and the scow sinks and the master of the tug knowing that she was sunk does nothing to give notice to other vessels so that such vessels coming into the slip run upon her and injure her so that she becomes a total loss. Ferguson v. Providence Wash. Ins. Co., 125 Fed. 141.

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loss is not destroyed by a clause designed to protect the underwriters in taking possession of the property and interfering to save it from being regarded as accepting an abandonment,[48] or by the insertion of a memorandum clause stating that certain perishable articles are free from particular average.[49] Acts justified by a sue and labor clause do not amount to an acceptance of an abandonment which has been specifically refused.[50]

Right against vessel at fault.—An abandonment and total loss entitles the insurers to recover against a vessel whose tort has caused the loss, the damages over and above the amount paid on a valued policy.[51]

Actions on policies.—A binding slip is in itself a contract of insurance and a direct action at law in admiralty will lie on it.[52] A payee who disclaims interest need not be joined in an action on a policy by the owner.[53] A defense that the willful act of insured caused the loss must be well pleaded.[54] The burden is on the insured to prove a loss from an act insured against and for an amount which renders the insurer liable under the terms of the policy, though after notice of loss and abandonment, the insurer has demanded and accepted payment of a premium note.[55] The insurer has the burden of proving unseaworthiness.[56] It is not error to allow the jury to consider the fact that vessels engaged in trade to particular ports are generally equipped in a specified manner as bearing on seaworthiness, though the traffic to that particular port has but just begun.[57] Decisions as to sufficiency of evidence are grouped in the notes.[58]

MARRIAGE.[59]

§ 1. *Capacity of parties; fraud.*—The parties must be legally capacitated to marry each other.[60] Fraud is no defense to non-age.[61] Misrepresentation in a material respect to induce consent is fraud.[62] So is failure to disclose a fact which there is a duty to disclose.[63]

48, 49. Evidence held sufficient to show a constructive total loss of a perishable cargo, where the proceeds of the salved goods were but little more than the expense of the salvage. Devitt v. Providence Wash. Ins. Co., 173 N. Y. 17.

50. Soelberg v. Western Assur. Co. [C. C. A.] 119 Fed. 23.

51. They are not limited to a mere claim for indemnity based on the doctrine of subrogation and though the insured after abandonment to the insurer prosecutes a libel to a successful termination against a tort feasant vessel recovering more than the amount paid on the policy, the insurer is entitled to the surplus, notwithstanding the action was prosecuted without its aid and against its wishes, but the reasonable counsel fees and expenses of the insured may be repaid him. The Livingstone, 122 Fed. 278.

52. Remedy is not alone in equity. Kerr v. Union Marine Ins. Co., 124 Fed. 835.

53. Lewis v. Aetna Ins. Co., 123 Fed. 157.

54. Knowing full well that to navigate among ice was dangerous is not sufficient. Nome Beach L. & T. Co. v. Munich Assur. Co., 123 Fed. 820.

55. Evidence of injury compelling a vessel to seek a port of refuge and that the cost of repairs would exceed the repaired value is not sufficient to establish a constructive total loss or a partial loss. Soelberg v. Western Assur. Co. [C. C. A.] 119 Fed. 23.

56. Nome Beach L. & T. Co. v. Munich Assur. Co., 123 Fed. 820.

57. The jury may be instructed to consider whether vessels engaged in the Nome trade are generally sheathed or otherwise specially constructed to meet ice, though trade has but just begun to that port. Nome Beach L. & T. Co. v. Munich Assur. Co., 123 Fed. 820.

58. Evidence held to show loss of a canal boat from inherent weakness and not from a hidden obstruction upon which she settled with the tide. Long Dock M. & E. Co. v. Mannheim Ins. Co. [C. C. A.] 123 Fed 861. Evidence held to show that loss of a barge was due to defects in construction. Reilly v. Home Ins. Co., 81 App. Div. [N. Y.] 314. Evidence held to require a finding that a vessel was sea-worthy to be set aside. Morse v. St. Paul F. & M. Ins. Co., 124 Fed. 451. Evidence held to show that a vessel was moved from its mooring for a purpose other than for necessary repairs. Ryan v. Providence Wash. Ins. Co., 79 App. Div. [N. Y.] 316.

59. Contract to hasten marriage is **marriage brokerage** and void. Jangraw v. Perkins [Vt.] 56 Atl. 532. See Contracts, 1 Curr. Law 644.

60. Martin v. Martin [W. Va.] 46 S. E. 120.

61. Plaintiff's misrepresentation that he

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§ 2. *Licenses and essentials of a valid contract of marriage.*—"Proof" to be produced to the issuing officer is largely in his discretion and does not mean legal proof.[64] An officer required to make "reasonable inquiry" on issuing a license should not rely on statements of a person who procures the license for the parties and pass other accessible information.[65] What inquiries are "reasonable" is a question of law for the court.[66] A law requiring the recording of licenses with the return thereon means immediate recording when it is also provided for the speedy return of them and for reporting those not returned to the grand jury.[67] The officer is not negligent in relying on statements by the prospective husband and a friend, unless suspicion is aroused,[68] and he is not immune because of official position.[69]

A ceremonial marriage is valid, though performed by an officer out of his jurisdiction.[70]

A common law marriage is formed by cohabitation with present intention of the parties to sustain toward one another the relation of husband and wife,[71] which shall continue during the life of the parties, neither of whom shall during that time marry another.[72] Indian marriages may be upheld by this rule.[73] A ceremonial marriage during legal disability of one of the parties may become valid by cohabitation after the removal of the disability,[74] but a sham marriage disbelieved by one of the parties is not made good by cohabitation without matrimonial intent.[75]

The burden of proof of marriage rests on the claimant.[76] It may be shown by entries in a parish register,[77] or by a marriage certificate,[78] or license or records,[79] if properly identified and authenticated.[80] Record evidence is not essential.[81] And while in absence of a subsequent and binding contract, marriage will

was of legal age. Quigg v. Quigg, 42 Misc. [N. Y.] 48.

62. Di Lorenzo v. Di Lorenzo, 174 N. Y. 467. Thus a marriage procured by fraudulent representation that plaintiff was father of defendant's child may be set aside. Id.

63. Fact of venereal disease. Svenson v. Svenson, 78 App. Div. [N. Y.] 536.

64. Barnidge v. Kilpatrick [La.] 35 So. 757.

65. The officer did not know the parties, he did not examine a list of taxables then in his office and the person interrogated seemed ignorant in certain particulars. Trolinger v. Boroughs, 133 N. C. 312.

66. Trolinger v. Boroughs, 133 N. C. 312.

67. State v. Moore, 96 Mo. App. 431.

68, 69. Barnidge v. Kilpatrick [La.] 35 So. 757.

70. By mayor outside municipal limits is valid [Code, § 3147]. State v. McKay [Iowa] 98 N. W. 510.

71. Eaton v. Eaton [Neb.] 92 N. W. 995. Mere present cohabitation with agreement for future marriage not sufficient. In re Maher's Estate, 204 Ill. 25.

72. Riddle v. Riddle, 26 Utah, 268, 72 Pac. 1081.

73. Marriage according to the Indian custom. Kalyton v. Kalyton [Or.] 74 Pac. 491; Henry v. Taylor [S. D.] 93 N. W. 641.

74. Eaton v. Eaton [Neb.] 92 N. W. 995; Land v. Land, 206 Ill. 288; Manning v. Spurck, 199 Ill. 447. For statute making such provision, see Lufkin v. Lufkin, 182 Mass. 476, wherein the words "good faith" are used in the ordinary sense.

75. The woman cohabited in the belief in the validity of the marriage but there was lack of intent to marry on the part of the man and lack of holding out to the public that the marital relation existed. Lee v. State [Tex. Cr. App.] 72 S. W. 1005.

76. In re Davis' Estate, 204 Pa. 602.

77. Casley v. Mitchell [Iowa] 96 N. W. 725.

78. Where a marriage certificate was held competent evidence though the names failed to correspond. Dailey v. Frey, 206 Pa. 227. Where accused is entitled to be confronted by witnesses against him, a previous marriage cannot be proven by a mere certificate. People v. Goodrode [Mich.] 94 N. W. 14.

79. An original marriage license and the original marriage records are good evidence in prosecution for bigamy. Ferrell v. State [Fla.] 34 So. 220.

80. That an original marriage license is produced by one not its legal custodian and who fails to explain his custody, it may nevertheless be admitted in evidence if otherwise identified. State v. Pendleton [Kan.] 72 Pac. 527.

81. Casley v. Mitchell [Iowa] 96 N. W. 725. Oral testimony of ceremonial marriage, cohabitation, birth of children and mutual recognition of parenthood thereof, public recognition of one another as husband and wife, recognition as such by relatives and friends are all competent evidence in proving fact of marriage. Summerville v. Summerville, 31 Wash. 411, 72 Pac. 84; Mullaney v. Mullaney [N. J. Err. & App.] 54 Atl. 1086;

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not be presumed from cohabitation clearly illicit in its origin,[82] change of illicit cohabitation to cohabitation with matrimonial intent may be shown by circumstantial evidence.[83]

§ 3. *Validity and effect.*—Generally speaking, the law of the place of contract governs.[84] The common law prevailed in Utah prior to the Edmunds-Tucker

State v. Tillinghast [R. I.] 56 Atl. 181; People v. Goodrode [Mich.] 94 N. W. 14.

82. Henry v. Taylor [S. D.] 93 N. W. 641.

83. Potter v. Clapp, 203 Ill. 592.

84. **Note. Validity of foreign marriages. What law governs. General rules.** Marriage is void or valid, generally speaking, according to the law where it is celebrated. Hills v. State, 61 Neb. 589, 57 L. R. A. 155; Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164; Phillips v. Gregg, 10 Watts [Pa.] 158, 36 Am. Dec. 158; Dumaresly v. Fishly, 3 A. K. Marsh. [Ky.] 368; Clark v. Clark, 52 N. J. Eq. 650.

If valid, other states will recognize it. State v. Shattuck, 69 Vt. 403, 60 Am. St. Rep. 936; Roche v. Washington, 19 Ind. 53, 81 Am. Dec. 376; Johnson v. Johnson, 30 Mo. 72, 77 Am. Dec. 598; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549; Fornshill v. Murray, 1 Bland Ch. [Md.] 479, 18 Am. Dec. 344; Hiram v. Pierce, 45 Me. 367, 71 Am. Dec. 555; State v. Patterson, 2 Ired. [N. C.] 346, 38 Am. Dec. 699; Spears v. Shropshire, 11 La. Ann. 559, 66 Am. Dec. 206; Jackson v. Jackson, 82 Md. 17, 34 L. R. A. 773; Corrie's Case, 2 Bland, Ch. [Md.] 488. This rule is adopted by statute in Nebraska. Gibson v. Gibson, 24 Neb. 394.

The converse that invalidity at the place of contract follows the marriage everywhere is also true. Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164; Phillips v. Gregg, 10 Watts [Pa.] 158, 36 Am. Dec. 158; Canale v. People, 177 Ill. 219. An apparent exception is that of persons who retaining a domestic domicile are married abroad according to the home laws. Phillips v. Gregg, 10 Watts [Pa.] 158, 36 Am. Dec. 158. The English cases seem to deny even this exception. See notes to Hills v. State, 57 L. R. A. 155, 156.

A foreigner domiciled in a state may contract a valid marriage by conformity to domestic law, though the laws of his sovereignty forbid foreign marriages without license from the king. Roth v. Roth, 104 Ill. 35, 44 Am. Rep. 81.

As a corollary to the general rule, the proof of a foreign marriage is to be made by showing facts necessary to prove it at the place where it was made. Patterson v. Gaines, 6 How. [U. S.] 550, 12 Law. Ed. 553.

The high seas have no law under which an irregular marriage can be sustained, save the law of the domicile of the parties. Therefore, this is an apparent rather than a real exception to the rule of recognition. See Holmes v. Holmes, 1 Abb. [U. S.] 525, Fed. Cas. No. 6,638; Norman v. Norman, 121 Cal. 620, 42 L. R. A. 343; Bishop, Marriage, Div. & Sep. § 894. If the vessel were foreign, this rule might not be true.

A like principle applies to a marriage where there is no local law, as in unorganized territory. Davis v. Davis, 1 Abb. N. C. 140.

Non-ceremonial or common law marriages made in another state or country are valid if their validity was recognized there. Meister v. Moore, 96 U. S. 76, 24 Law. Ed. 826; Jackson v. Jackson, 82 Md. 17, 34 L. R. A. 773; Clark v. Clark, 52 N. J. Eq. 650; Smith v. Smith, 52 N. J. Law, 207; Hynes v. McDermott, 82 N. Y. 41, 37 Am. Rep. 538.

Tribal and pagan ceremonies may be so sustained. Thus Indian marriages (supra, p. 795, n. 73; In re Wilbur, 8 Wash. 35, 35 Pac. 407), and Chinese marriages (In re Lum Lin Ying, 59 Fed. 682), are recognized when the marriage contract corresponds in essential respects with that recognized by Christian countries generally.

Hence, if the marriage of Indians is by their custom a temporary union dissoluble at will, it is not recognized. State v. Tacha-na-tah, 64 N. C. 614 and obiter in Roche v. Washington, 19 Ind. 53, 81 Am. Dec. 376. But the contrary has been held in Wall v. Williamson, 8 Ala. 48; Earl v. Godley, 42 Minn. 361, reported as Earl v. Wilson, 7 L. R. A. 125.

Polygamous, concubinal and incestuous unions. While marriages which merely want in ceremony some of the formalities approved by domestic law may be recognized because of their conformity to the law of the place of contract, yet there are well defined classes of unions which are denied recognition because in some essential the marriage relationship formed by the contract offends the domestic law or its policy. It is generally considered necessary that the marriage shall be consonant with the moral standard of Christian countries, and with natural law as accepted by such countries. Moreover, it will in no case be recognized in the face of a law which denies such validity. True v. Ranney, 21 N. H. 52, 53 Am. Dec. 164; In re Wilbur, 8 Wash. 35, 40 Am. St. Rep. 886; Smith v. Smith, 52 N. J. Law, 207; Pennegar v. State, 87 Tenn. 244, 10 Am. St. Rep. 648; Medway v. Needham, 16 Mass. 157, 8 Am. Dec. 131; Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509; State v. Ross, 76 N. C. 242, 22 Am. Rep. 678; Com. v. Graham, 157 Mass. 73, 34 Am. St. Rep. 255; Jackson v. Jackson, 82 Md. 17; Sneed v. Ewing, 5 J. J. Marsh. [Ky.] 460, 22 Am. Dec. 461. Whether the first marriage will be void because in contemplation of subsequent polygamous ones is in dispute. Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321, seems to be in the affirmative; and the earlier cases of Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509, and Wall v. Williamson, 8 Ala. 48, and Earl v. Godley, 42 Minn. 361, reported Earl v. Wilson, 7 L. R. A. 125, lean to the negative. In Michigan, even a second polygamous Indian marriage has been upheld (Kobogum v. Jackson Iron Co., 76 Mich. 498), because, as the court said, polygamy is not universally unlawful. When the tribal government of Indians is no more, the tribal customs cannot be reverted to in order to sustain a marriage by locally domiciled Indians. Such a marriage is domestic. Roche v. Washington, 19 Ind. 53, 81 Am. Dec. 376.

Children may, however, be legitimized by

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Act.[85] Intoxication of one of contracting parties renders marriage merely voidable.[86] Insanity makes it void.[87] Marriage with an impotent,[88] or insane person restored to sanity,[89] may be affirmed. An incestuous marriage will be dissolved, though the applicant entered into the relation with full knowledge.[90] While the existence of a marriage contract renders impossible a common law marriage of either party to a third person,[91] yet in civil cases, dissolution of a former will be presumed from proof of solemnization of a later marriage.[92] Nor will such presumption be overcome by mere denial of one of the parties to the former marriage, who for years after the consummation of the later marriage has made no objection thereto.[93] Proof of subsequent ceremonial marriage, taken alone, is insufficient to overcome evidence of prior common law marriage.[94] No valid marriage contract can be formed while a decree divorcing one of the parties is open to re-

statute if the offspring of a mere de facto marriage. Johnson v. Johnson, 30 Mo. 72, 77 Am. Dec. 598.

Persons incapacitated by the law of domicile. It is said to be the better rule that the law of the place rather than that of the domicile will determine whether capacity to enter into a foreign marriage will be recognized. A distinction is made and an exception laid that if the domiciliary incapacity rests in some moral or religious impediment which the law adopts, then the foreign marriage is invalid, though the parties could legally marry where they did. See note to 57 L. R. A. 155, 161, 173.

Foreign marriages made invalid by statutes. Since the legislature may regulate the validity of marriages, it may say which shall be void, though celebrated abroad. Pennegar v. State, 87 Tenn. 244, 2 L. R. A. 703; State v. Tutty, 41 Fed. 753.

The statute must clearly evince a policy against such marriages as the ones assailed, and not merely a prohibition against the contracting of such marriages within the state. Mere prohibitions have no extraterritorial force. Notes to 60 Am. St. Rep. 941; 57 L. R. A. 155; and cases there collected. In Virginia, it was held that a marriage between a white and a negro, declared to be "absolutely void," was void though contracted in another state which permitted such a union. Kinney v. Com., 30 Gratt. [Va.] 858, 32 Am. Rep. 690. Tennessee denied the validity of a marriage between a divorced person and the paramour, because the statute declared such marriage prohibited while the aggrieved spouse lived, and the marriage was contracted elsewhere in order to avoid the prohibition. Pennegar v. State, 87 Tenn. 244, 10 Am. St. Rep. 648.

But such legislation is infrequent and the rules of construction are against reading into the statutes a meaning which accomplishes this result. Stevenson v. Gray, 17 B. Mon. [Ky.] 212, cited in note to 60 Am. St. Rep. 944. When, however, such a policy has been prescribed by statute, it makes the question whether the law of the place or of the domicile governs capacity unimportant. Note to 57 L. R. A. 155, 173.

85. Riddle v. Riddle, 26 Utah, 268, 72 Pac. 1081.

86. Barber v. People, 203 Ill. 543.

87. Winslow v. Troy, 97 Me. 130.

88. Living with husband for 20 years and accepting support for 10 years longer affirms a marriage voidable for his impotency. G——— v. G——— [N. J. Eq.] 56 Atl. 736.

89. Gross v. Gross, 96 Mo. App. 486.

90. Martin v. Martin [W. Va.] 46 S. E. 120.

91. Blanks v. Southern R. Co. [Miss.] 35 So. 570.

92. McKibbin v. McKibbin, 139 Cal. 448, 73 Pac. 143; Howton v. Gilpin, 24 Ky. L. R. 630, 69 S. W. 766.

93. Scott's Adm'r v. Scott [Ky.] 77 S. W. 1122. Burden rests on parties contesting validity of marriage on ground of existence of such relation with another on part of one of parties, to show such relation not previously dissolved. Potter v. Clapp, 203 Ill. 592.

94. Shank v. Wilson [Wash.] 74 Pac. 812.

Note. Presumption of dissolution of former marriage: In favor of a marriage it is presumed strongly against an existing former marriage. The presumption of life until after seven years yields to it; and it is presumed if necessary that the former one was judicially dissolved. Disproof of this presumption need not be plenary but only sufficient to support a negative. Thereupon the burden shifts.

In bigamy the defendant urging it must prove a dissolution of the first marriage. The presumptions neutralize each other.

This presumption aids only a valid marriage and does not arise in the face of statutes bearing on the facts, nor where the real facts easily accessible are not proved. Both spouses must so conduct themselves as to accord with the presumption and it cannot be invoked by an absentee on the strength of his own absence or his lack of information of the other one.

The presumption while strong is not absolute. It is called into force by the absence of facts and hence is to be indulged with caution. The facts should be sought for which will affirm or negative the issue. From exhaustive note to Pittinger v. Pittinger, 89 Am. St. Rep. 198.

Marriage, disappearance of husband, belief in his death for over five years, ceremonial marriage to second husband, subsequent death of first husband and continuance of marital relation with second husband, held to sustain judgment for separation and alimony. Taylor v. Taylor, 173 N. Y. 266. The simple fact of error in naming one of the parties will not render a decree of divorce invalid and overturn this presumption. Howton v. Gilpin, 24 Ky. L. R. 630, 69 S. W. 766.

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view.[95] Marriage to a second husband after the expiration of the statutory period warranting the presumption that the first husband is dead will be valid until annulled by the court.[96]

Upon marriage, a woman becomes chargeable to her husband's pauper settlement.[97]

§ 4. *Proceedings for annulment.*—It is only when the statute warrants it that a guardian or committee may sue.[98] The person imposed on must be party to a suit by a relative in her behalf,[99] and a jurisdictional residence is essential,[1] and notice to the other spouse.[2] In New York, a wife may sue if either party was below the age of consent and if the marriage was not ratified by cohabitation after attaining that age.[3] A complaint will be dismissed upon clear proof of collusion of parties.[4] The wife may move for alimony at any time before final decree.[5] The trial is as in equity.[6] A motion to annul a second marriage on the pleadings filed in a divorce suit should not be allowed where issue is tendered on the death of the former spouse.[7] Judgment annulling a marriage as bigamous will be set aside on a showing that the first marriage was sham and the applicant was induced by fraud to make no defense.[8]

§ 5. *Criminal offenses.*—One who knowingly procures another to perform a marriage ceremony without authority is an accessory before the fact.[9] The indictment need not aver a conspiracy to seduce, nor set out the pretensions to authority.[10] In this crime the wife may testify against the husband who procures such a marriage.[11]

MARSHALING ASSETS AND SECURITIES.

The doctrine of marshaling assets and securities is a rule of equity founded in natural justice.[12] The general rule is that where one creditor has a right to enforce his debt out of two funds or properties, to but one of which another can resort, the former may be compelled in equity first to seek satisfaction out of the singly charged fund or property.[13] It is essential to the application of this doctrine that both funds belong to a common debtor.[14]

95. Eaton v. Eaton [Neb.] 92 N. W. 995

96. In re Harrington's Estate. 140 Cal. 244, 73 Pac. 1000. After long absence of a husband, his death may be presumed though no effort has been made to find him. In re Harrington's Estate, 140 Cal. 244, 73 Pac. 1000.

97. Winslow v. Troy, 97 Me. 130.

98. Rev. St. c. 60, § 18, allowing "either party" does not include guardian. Winslow v. Troy, 97 Me. 130.

99. Coddington v. Larner, 75 App. Div. [N. Y.] 532.

1. Evidence of coming to the state two years previous, that absence from the state was to secure employment, that child remained in state continuously, held sufficient to prove one year's residence. Summerville v. Summerville, 31 Wash. 411, 72 Pac. 84.

2. Winslow v. Troy, 97 Me. 130.

3. This remedy (Code Civ. Proc. § 1743) is in addition to that under section 1742 which became obsolete when the age of consent was raised. Conte v. Conte, 82 App. Div. [N. Y.] 335.

4. Svenson v. Svenson, 78 App. Div. [N. Y.] 536. Evidence held to show collusion. Id.

5. In New York, wife may make motion for alimony after adverse decree and during pendency of appeal. Di Lorenzo v. Di Lorenzo, 78 App. Div. 577.

6. And reviewable as such. Gross v. Gross, 96 Mo. App. 486.

7. Taylor v. Taylor, 173 N. Y. 266.

8. Everett v. Everett, 85 N. Y. Supp. 922.

9. Evidence admissible is governed by ordinary rules. Barclay v. Com. [Ky.] 76 S. W. 4.

10, 11. Barclay v. Com. [Ky.] 76 S. W. 4.

12. Peery v. Elliott [Va.] 44 S. E. 919.

13. Anthes v. Schroeder [Neb.] 94 N. W. 611; Harran v. Du Bois, 64 N. J. Eq. 657 As between a purchase of a portion of a guardian's lands and the ward's lien on all his land. Smith's Ex'r v. May, 24 Ky. L. R. 873, 70 S. W. 199. A mortgagee of nine lots, a portion of whose claim is preferred to that of a mortgagee of one of the lots, may be compelled to make the preferred portion out of the eight lots not subject to other mortgage. Clarke v. Calvert, 72 App. Div. [N. Y.] 630. Where overdue taxes and debts for labor and materials constitute prior liens on mortgaged and also unencumbered property, the mortgagee may compel such liens to be paid out of the unencumbered property before resorting to that subject to the mortgage. Herman Goepper & Co. v. Phoenix Brew. Co., 25 Ky. L. R.

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This doctrine may be invoked in bankruptcy cases against a trustee.[15] It has also been applied in favor of a debtor who by making payments becomes a creditor of his co-debtor.[16]

Limitations of doctrine.—But a creditor or incumbrancer cannot enforce this doctrine where it would work an injustice to one having an equal or superior equity,[17] or to a party against whom it is invoked;[18] nor against one who is merely a surety of the original debtor.[19]

Alienation in inverse order.—Where lands subject to an incumbrance are sold at different times and in different lots, as between the purchasers thereof, the land is subject to the grantor's debts in equity in the inverse order of their alienation; but this rule applies only where there has been a sale of a portion of the property;[20] nor can it be enforced when it would be inequitable to parties concerned to do so.[21]

Subrogation.—Where the property out of which a junior creditor is entitled to satisfy his debt is taken to satisfy the debt of a senior creditor, the junior creditor may enforce his claim out of other property of the debtor by being subrogated to the rights of the senior creditor therein;[22] but he cannot claim to be subrogated to the senior creditor's rights against a mere surety.[23]

84, 74 S. W. 726. A bona fide purchaser of property without notice of a mortgage improperly recorded, and covering other property may compel the mortgagee to go against the other property before resorting to that purchased Bagley v. Weaver [Ark.] 77 S. W. 903.

Under Ky. St. 1899, § 74, lien creditors of an insolvent must exhaust the security and will then come in pro rata for the balance. Weller v. Hull's Assignee, 24 Ky. L. R. 2185, 74 S. W. 172.

14. Peery v. Elliott [Va.] 44 S. E. 919. A bank which is a creditor of one partner secured by an assignment of his share in a certain fund cannot compel a trust company, which is a creditor of both partners secured by an assignment as to the bank's debtor of the same fund and as to the other partner of his share in that fund and also in another fund, to exhaust the latter fund first. Columbia F. & T. Co. v. First Nat. Bank [Ky.] 76 S. W. 156.

15. As between partnership and individual creditors, under equitable jurisdiction conferred on a court of bankruptcy by Banker Act July 1, 1898, c. 541, § 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420). Burleigh v. Foreman [C. C. A.] 125 Fed. 217.

16. Where a mortgage to secure a loan covers the property of two different persons one of whom makes payments to the other on such loan he has an equity to demand that the property of the other shall be sold on foreclosure before resorting to his property described in the mortgage. Blackwell v. British-American Mortg. Co., 65 S. C. 105.

17. A court of equity will not enforce the rule where it would work an injustice to require one of two creditors having a lien on two securities to resort first to the one on which the other creditor has no lien. Anthes v. Schroeder [Neb.] 94 N. W. 611. Where a second mortgagee has a right to compel a prior mortgagee to look first to property not doubly charged judgment creditors of the mortgagor purchasing his equity in the singly charged property cannot insist that the first mortgage shall be first enforced on the doubly charged property. Harron v. Du Bois, 64 N. J. Eq. 657. Where there are other claims against the singly charged fund which would exhaust it, in such case the court will decree that payment should be made the doubly secured creditor one-half from the doubly charged fund and one-half from the singly charged fund. N. Y. Public Library v. Tilden, 39 Misc. [N. Y.] 169.

18. Peery v. Elliott [Va.] 44 S. E. 919.

19. If a wife's land is mortgaged for a husband's debt, a subsequent judgment creditor of the husband cannot insist that the mortgagee shall proceed first against the property of the wife. Stewart v. Stewart [Pa.] 56 Atl. 323. After the wife's death the husband's one-third interest in her estate should be taken first, before going against the wife's administrator. Herbert v. Rupertus, 31 Ind. App. 553.

20. Where a combination of railroad companies purchases a shop with machinery, and takes a deed subject to a vendor's lien, and the machinery is subsequently removed and used by one of the constituent companies, there is not a sale thereof so as to require the vendor to resort to the real estate first for his lien. Mercantile Trust Co. v. Chicago, P. & St. L. R. Co. [C. C. A.] 123 Fed. 393. Owner of an easement may require sale in inverse order. Merced Security Sav. Bank v. Simon [Cal.] 74 Pac. 356.

21. Where a purchaser of one of two parcels of land subject to a mortgage fails to notify the mortgagee of the purchase he cannot insist that a subsequent mortgagee by release from the first in ignorance of the purchase shall first enforce his mortgage against the parcel not purchased by him. Bridgewater Roller Mills Co. v. Receivers of Baltimore B. & L. Ass'n, 124 Fed. 718.

22. Anthes v. Schroeder [Neb.] 94 N. W. 611. A mortgagee, failing to render his mortgage valid by a compliance with the statute by reason of which mortgage chattels are taken by a judgment creditor of the mortgagor, is entitled to be subrogated to the judgment lien upon the mortgagor's lands. Boice v. Conover, 63 N. J. Eq. 273.

23. Where a wife's land is mortgaged to

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Liability of paramount creditor.—A senior creditor by releasing his right to a singly charged fund with notice of the junior creditor's right will lose his claim on the doubly charged fund to the amount he has so released; but the junior creditor must have been one who had a right to or in the doubly charged property.[24]

MARTIAL LAW.

Martial law in its general significance presupposes a state of war.[25] In a more limited sense, however, it is applied to the establishment of military rule for the suppression of domestic insurrection.[26] Such an establishment of military rule is martial law, in that the powers of the commander are the same as in war. In both cases, such powers are limited to the military necessity of the occasion.[27] The distinction, however, is made that in case of public war the military commander is answerable only to his military superiors, while in case of domestic insurrection, he is answerable civilly and criminally to the laws of the land.[28] But with respect to privates and subordinate officers, there is no such liability, the order of their superior being a complete justification unless it is plain beyond a reasonable doubt that the order was unjustified.[29]

secure her husband's debt a subsequent judgment creditor cannot claim to be subrogated to the mortgagee's security against the wife. Stewart v. Stewart [Pa.] 56 Atl. 323. See the title Subrogation.

24. Where a defendant in an action of replevin by a mortgagee for mortgaged property does not allege that he was the owner of the property or a purchaser for value, he cannot defend the action on the ground that the mortgagee had partially released a judgment obtained against the mortgagor, sufficient to pay the mortgage claim. Graves v. Currie, 132 N. C. 307.

25. Ex parte Milligan, 71 U. S. 2. Instructions for the Government of the Armies of the United States in the Field, § 1; Davis, International Law, p. 295. See, also, Military and Naval Law.

26. There may be peace for all the ordinary purposes of life, and yet a state of disorder in special directions which has the effect of war. Com. v. Shortall [Pa.] 55 Atl. 952. This case is based on the dissenting rather than the majority opinion in Ex parte Milligan, 71 U. S. 2, and goes beyond the general holding. See Griffin v. Wilcox, 21 Ind. 377.

27. It is the emergency that gives the right. In deciding upon this necessity, the state of facts as they appear to the officer at the time must govern. Taney, C. J., in Mitchell v. Harmony, 13 How. 115. So far as his powers for the preservation of order are concerned, there is no limit but the necessities and exigencies of the situation, and in this respect, there is no difference between a public war and domestic insurrection. Com. v. Shortall [Pa.] 55 Atl. 952. It depends for its existence, extent and operation on the imminence of the peril and the obligation to provide for the general safety. Hare, Const. Law, p. 930. "The resort to the military arm of the government means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander. To call out the military, and then have them stand quiet and helpless, while mob law overrides the civil authorities, would be to make the government contemptible, and destroy the purpose of its existence.

"The effect of martial law is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful."

"There is no real difference in the commander's powers in a public war and in domestic insurrection. In both he has whatever powers may be needed for the accomplishment of the end, but his use of them is followed by different consequences. In war he is answerable only to his military superiors, but for acts done in domestic territory, even in the suppression of public disorder, he is accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts and by civil action at the instance of parties aggrieved. On this all the authorities agree, and the result flows from the view that martial law in this sense is merely an extension of the police power of the state, and therefore an 'off-shoot of the common law, which though ordinarily dormant in peace may be called forth by insurrection or invasion.'" Mitchell, J., in Com. v. Shortall [Pa.] 55 Atl. 952.

28. Respublica v. Sparhawk, 1 Dall. 357; Ford v. Surgent, 97 U. S. 594; Hare, Const. Law, p. 906.

29. Com. v. Shortall [Pa.] 55 Atl. 952; U. S. v. Clark, 31 Fed. 710; McCall v. McDowell, 1 Abb. [U. S.] 212, Fed. Cas. No. 8,673; Riggs v. State, 3 Cold. [Tenn.] 85; Bryan v. Walker, 64 N. C. 141; Griffin v. Wilcox, 21 Ind. 370; In re Fair, 100 Fed. 149.

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MASTER AND SERVANT.

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§ 6. Crimes and Penalties—Peonage, Violation of Labor Contracts, Penalties for Failure to Pay Wages Monthly (866).

§ 1. *The Relation and statutory regulations.*—The relation rests upon contract either express or implied[30] and does not include volunteers[31] nor the servants of an independent contractor.[32] It may continue during temporary absences from

30. A winchman is not the servant of a stevedore where the contract provides that the vessel shall furnish the winchman and the stevedore is without power to give orders or discharge the winchman. The Slingsby, 120 Fed. 748. The relation does not exist between a road commissioner and men employed by him in repairing street. Bowden v. Derby [Me.] 55 Atl. 417. It exists between an accident insurance company and its medical adviser in the exercise of the right to examine an insured person. Tompkins v. Pacific Mut. Life Ins. Co., 53 W. Va. 479, 44 S. E. 439. A lighterage company working under the direction of the owner's employe makes him its employe, and hence liable for loss of goods through negligent loading. Smith v. Booth, 122 Fed. 626. One may be regarded as master who holds himself out as proprietor of a place where the servant works. Record of a prior action in which defendant sued as proprietor of place where servant worked does not prove that defendant continued to be proprietor and employer. Gardiner v. Earle [R. I.] 56 Atl. 1035. Evidence held sufficient that a son driving his father's wagon was servant and not bailee. Davis v. Dregne [Wis.] 97 N. W. 512. Evidence that a driver was at work in defendant's field and under defendant's foreman held sufficient where it had been proposed to have such driver work in exchange for a like service. Sacker v. Waddell [Md.] 56 Atl. 899. The relation of master and servant held not to exist. Lenderink v. Rockford [Mich.] 98 N. W. 4. See, also, topic Implied Contracts.

31. One riding on a mixed train regularly once a week for some time without paying fare but assisting in handling baggage and unloading cars is not an employe of the railroad company. Chaney v. Louisiana R. Co., 176 Mo. 598, 75 S. W. 595.

32. Consolidated Fireworks Co. v. Koehl, 206 Ill. 283, 68 N. E. 1077; affirming Consolidated Fireworks Co. v. Koehl, 103 Ill. App. 152; Wilbur v. White [Me.] 56 Atl. 657; Parkhurst v. Swift, 81 Ind. App. 521, 68 N. E. 620; Louthan v. Hewes, 138 Cal. 116, 70 Pac. 1065. Weighers and loaders of cane for shipment to refineries at an agreed price per ton are independent contractors and not laborers within the lien laws of Louisiana. Fortier v. Delgado, 122 Fed. 604. The owner of a building is bound to exercise care to prevent injuries to servants of independent contractor by agencies under his control or direction. Appel v. Eaton, 97 Mo. App. 428, 71 S. W. 741; Jacobs v.

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duty[33] and is not ipso facto lost by violation of rules.[34] One employing for an undisclosed principal is liable as an employer.[35]

Contracts of employment are within the statute of frauds.[36] If the contract is made by an officer or agent, he must be authorized.[37] Like other contracts, it must not contemplate violation of law.[38] Where service is continued after the expiration of a fixed term, it is presumed to be under the same contract.[39] In an action on a contract for services, the plaintiff has the burden of proving its terms.[40] Testimony as to matters leading up to the employment,[41] and of custom, are admissible.[42] It is presumed that a contract of employment is to be performed in the state where executed.[43]

Eight-hour laws applicable only to employment on public works have been held unconstitutional in New York[44] and Ohio.[45] The Kansas law has been upheld.[46] The Nevada eight-hour law for workingmen in mines, smelters, and mills for reduction of ores,[47] the Missouri eight-hour law for persons engaged in mining beneath the surface,[48] the New York laws limiting the hours of employes in bakeries,[49] and the New Jersey ten-hour law for street railway employes, have been upheld.[50]

The Illinois act creating free employment offices which prevents the furnishing of lists to employers whose employes are on strike or locked out is unconstitutional.[51]

Organizations, strikes, and lockouts.[52]—Workmen have a right to combine and cease work in a body[53] on refusal of employer to discharge nonunion employes.[54]

Fuller, 67 Ohio St. 70, 65 N. E. 617. One engaging to deliver goods for another and employing a servant to do the driving held to be an independent contractor. John's Adm'r v. McKnight [Ky.] 78 S. W. 862. See topic Independent Contractors.

33. A servant in the employ of railroad does not lose his status by quitting work to get a drink of water. Jarvis v. Hitch [Ind. App.] 65 N. E. 608.

34. An engine wiper is not a passenger by reason of riding on an engine in violation of rules. Streets v. Grand Trunk R. Co., 76 App. Div. [N. Y.] 480.

35. Morris v. Malone, 200 Ill. 132, 65 N. E. 704.

36. Biest v. Ver Steeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081. A contract of hiring for an indefinite term is not within the statute of frauds as it may be performed within a year. Matthews v. Wallace [Mo. App.] 78 S. W. 296.

37. A corporation is bound by the contract of employment entered into with its president. The contract is ratified by acceptance of the services. Egbert v. Sun Co., 126 Fed. 568.

38. A contract for labor on Sunday not tending to disturb peace and good order of society and not violating the criminal code is valid in Illinois. McCurdy v. Alaska & C. Commercial Co., 102 Ill. App. 120.

39. The presumption is rebuttable. Home Fire Ins. Co. v. Barber [Neb.] 93 N. W. 1024. The expression of the hope that parties to a five-year contract would continue does not amount to a renewal of the contract. Brightson v. Claflin, 84 App. Div. [N. Y.] 557. Where at the expiration of a five-year contract of employment the employer stated that he hoped that relations would be continued and the servant continued to work for some years without entering into the contract, there was a renewal of the contract as one from year to year. Id. Services after the termination of the contract are at the contract rate. Laubach v. Cedar Rapids Supply Co. [Iowa] 98 N. W. 511. Held a question for the jury whether continued services were a renewal of the contract, the notice of discharge stating that some further services might be desired. Id.

40. Fell v. H. Fell Poultry Co. [N. J. Err. & App.] 55 Atl. 236.

41. Selley v. American Lubricator Co., 119 Iowa, 591, 93 N. W. 590.

42. Johnston-Woodbury Hat Co. v. Lightbody [Colo. App.] 70 Pac. 957.

43. Cook v. Todd, 24 Ky. L. R. 1909, 72 S. W. 779. Where the contract is silent as to the place of performance, parol evidence is admissible to show the locality. Id.

44. Creates an arbitrary distinction and not within police power. People v. Orange County Road Const. Co., 175 N. Y. 84, 67 N. E. 129.

45. Liberty of contract. Cleveland v. Clements Bros. Const. Co., 67 Ohio St. 197, 65 N. E. 885, 59 L. R. A. 775.

46. Does not impair contract or deny equal protection of law. Atkin v. Kansas, 191 U. S. 207.

47. Nev. St. 1903, p. 33, c. 10. In re Boyce [Nev.] 75 Pac. 1.

48. It is not class legislation but a proper exercise of the police power. State v. Cantwell [Mo.] 78 S. W. 569.

49. Laws 1897, p. 485, c. 415, art. 8, § 110. People v. Lochner [N. Y.] 69 N. E. 373.

50. In re Ten-Hour Law for Street Ry. Corporations, 24 R. I. 603.

51. Due process. Mathews v. People, 202 Ill. 389, 67 N. E. 28.

52. See, also, the topics Conspiracy and Injunction.

53. Jersey City Printing Co. v. Cassidy [N. J. Eq.] 53 Atl. 230.

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Employers may lawfully contract for laborers to take the place of strikers,[55] and may combine to resist demands of employes.[56] The right of an association supporting a strike to employ pickets and other agencies to attain the objects of the strike is not the subject of protection by means of an injunction.[57]

Termination of service and discharge.—An employer may discharge an employe without notice at any time where there is no contract of employment for definite term,[58] and so where the right to discharge is retained;[59] but a contract of employment from month to month can be terminated only at the end of the month, except by consent or for cause.[60] Where the matter is governed by contract, its provisions will govern the matter of termination of the relation.[61] Employe may be discharged for intoxication,[62] immoral conduct,[63] disobedience of orders and instructions,[64] or overcharges in expense account.[65] Discharge will not be warranted by the fact that servant engaged in idle talk about the establishment of a competing business.[66] An employer is not bound to discharge an employe immediately on receiving notice of bad conduct.[67] Orders of discharge giving reason therefor are privileged communications.[68] An employer may keep a book containing the names

54. Jersey City Printing Co. v. Cassidy [N. J. Eq.] 53 Atl. 230.

55. Mathews v. People, 202 Ill. 389, 67 N. E. 28.

56. Atkins v. Fletcher [N. J. Eq.] 55 Atl. 1074. It is no ground for an injunction by members of a labor union that defendant, its officers and agents, have combined to destroy the union and are interfering with employes for joining union. Boyer v. Western Union Tel. Co., 124 Fed. 246.

57. Atkins v. Fletcher Co. [N. J. Ch.] 55 Atl. 1074.

58. Boyer v. W. U. Tel. Co., 124 Fed. 246.

59. Leonard v. Sparks, 109 La. 543. Discharge of traveling salesman for association with immoral woman held justified, the contract specifically authorizing discharge on that ground. Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896. A contract making the retention of an employe conditional on his ceasing to associate with a woman of ill repute is not against public policy. Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896.

60. Dodson-Braun Mfg. Co. v. Dix [Tex. Civ. App.] 76 S. W. 451. A letter requesting a substitute will not amount to repudiation of a servant's contract of employment, giving the employer a right to discharge him. Daniels v. Boston & M. R. Co. [Mass.] 68 N. E. 337. A traveling salesman under contract to work for a year provided his services were satisfactory, and no providential cause ensued rendering either party unable to fulfill it, cannot be discharged from mere caprice. Atlanta Stove Works v. Hamilton [Miss.] 35 So. 763.

61. One employed so long as a certain account remained with the master cannot be discharged at the whim of the master so long as the account remains. Downes v. Poncet, 38 Misc. [N. Y.] 799. Where servant was employed on a verbal contract for a specified period, a subsequent written agreement allowing the employer to discharge the servant at the end of any week was without consideration. Fanger v. Caspary, 87 App. Div. [N. Y.] 417. Striking employes who return to work under an agreement by which they are to receive pay for lost time, and future differences are to be submitted to arbitration and work one week under the agreement after having received a portion of the consideration, are not justified in quitting for default in payment of the rest of the consideration without submitting the matter to arbitration. Eden v. Silberberg, 89 App. Div. [N. Y.] 259. The two weeks notice is sufficient where given on Monday to become effective on Saturday night of the following week and the two weeks salary is accepted without complaint. Leslie v. Robie, 84 N. Y. Supp. 289.

62. Contract for employment for life was subject to condition of sobriety. Mowbray v. Gould, 83 App. Div. [N. Y.] 255.

63. Superintendent of mine keeping lewd women on premises. Moynahan v. Interstate Min., Mill. & Develop. Co., 31 Wash. 417, 72 Pac. 81.

64. Shields v. Carson, 102 Ill. App. 38; Von Heyne v. Tompkins, 89 Minn. 77, 93 N. W. 901; Shute v. McVitie [Tex. Civ. App.] 72 S. W. 433. Refusal to return samples. Shields v. Carson, 102 Ill. App. 38. Signing name to employer's correspondence. Russell v. Inman, 79 App. Div. [N. Y.] 227. An employe may be discharged for violation of rule against smoking in portion of factory where inflammables were in constant use. Honigstein v. Hollingsworth, 39 Misc. [N. Y.] 314.

65. Hutchinson v. Washburn, 80 App. Div. [N. Y.] 367.

66. Day v. American Machinist Press, 86 App. Div. [N. Y.] 613.

67. Atlantic Compress Co. v. Young, 118 Ga. 868. A railroad continuing to employ a servant with knowledge of delinquencies there is an election not to discharge the servant but such delinquencies may be considered in case of a subsequent breach. Daniels v. Boston & M. R. Co. [Mass.] 68 N. E. 337.

68. Brown v. Norfolk & W. R. Co., 100 Va. 619, 60 L. R. A. 472. See, also, Libel and Slander as to defamatory clearance cards.

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of discharged employes with the reason for their discharge and allow other employers of labor access thereto.[69]

A servant rightfully discharged may recover the difference between the value of his services and sums paid him less damages for his breach of the contract.[70] A servant may quit before the expiration of the term for an assault on him by the master.[71] Both parties to a contract of employment are absolved from liability for continued performance where the servant is incapacitated.[72]

Actions for wrongful discharge.—An employe may recover damages for wrongful discharge,[73] the measure of damages being the amount of the salary less earnings or amounts that could have been earned meantime,[74] but not earnings after the expiration of the period covered by the contract.[75] The remedy for discharge in violation of the terms of the contract is for the breach of the contract and not for tort.[76]

An averment of a contract of employment is sufficient which alleges an agreement to serve in a certain capacity for certain wages and defendant's refusal to permit plaintiff to enter upon his duties.[77] A complaint in an action for wrongful discharge with malice should aver the wages received, the amount due at time of dismissal, and inability to obtain other employment.[78] An employer may base his reason for discharge on a cause not known by him at the time of the discharge.[79] Facts justifying discharge may not be shown under general denial.[80]

Certificates showing groundlessness of cause of discharge are inadmissible.[81] An offer to pay a certain amount if the party left quietly may not be shown on question of liability.[82] Where the contract of employment is entire, the plaintiff, in order to recover, must show that he was discharged without cause or had a reasonable excuse for quitting.[83]

Where evidence on issue of wrongful discharge is conflicting, the matter should be submitted to the jury.[84] It is a question for jury whether conduct of servant was sufficient ground for his discharge.[85]

69. Boyer v. W. U. Tel. Co., 124 Fed. 246.
70. Shute v. McVitie [Tex. Civ. App.] 72 S. W. 433.
71. Erickson v. Sorby [Minn.] 96 N. W. 791.
72. O'Connor v. Briggs, 182 Mass. 387.
73. Walsh v. N. Y. & Ky. Co., 88 App. Div. [N. Y.] 477.
74. Latimer v. York Cotton Mills, 66 S. C. 135; Leslie v. Roble, 84 N. Y. Supp. 289; School Dist. of Omaha v. McDonald [Neb.] 94 N. W. 829; Heagy v. Irondale Lead Co., 101 Mo. App. 361, 73 S. W. 1006. A verdict for the full amount of compensation for remainder of term after discharge is excessive where plaintiff's efforts to obtain other employment were intermittent. Goebel v. Pomeroy Bros. Co. [N. J. Law] 55 Atl. 690. One agreeing in consideration of permanent employment as superintendent of a building to work for a less rate until its completion may recover the reasonable value of his services on breach of the contract. Davidson v. Laughlin, 138 Cal. 320, 71 Pac. 345. Compensatory damages only can be recovered and they must be alleged. Westwater v. Grace Church, 140 Cal. 339, 73 Pac. 1055. In an action for damages for wrongful discharge of a servant under a contract whereby he was to be employed so long as he performed his duty in a businesslike manner, evidence as to his probable length of life might be relevant on the question of damages. Daniels v. Boston & M. R. Co. [Mass.] 68 N. E. 337. Where a servant has a contract for permanent employment and has the option of continuing the employment or not, he is entitled on wrongful discharge to compensatory damages. Id. Where a servant has a contract of employment and is unlawfully discharged, he can recover what he would have received under the contract less the amount he has earned in the meantime. Latimer v. York Cotton Mills, 66 S. C. 135. A servant is not bound to seek other employment where he is waiting in reasonable expectation of being called into service at any time. Matthews v. Wallace [Mo. App.] 78 S. W. 296.
75. Hughes v. School Dist. No. 37, 66 S. C. 259.
76. Westwater v. Grace Church, 140 Cal. 339, 73 Pac. 1055. Where a singer's contract provided that six months' notice should be given by the party desiring to terminate was broken without notice, the remedy is an action for breach of contract. Id.
77. Prescott v. Puget Sound B. & D. Co., 31 Wash. 177, 71 Pac. 772.
78. Westwater v. Grace Church, 140 Cal. 339, 73 Pac. 1055.
79. Loveman v. Brown [Ala.] 35 So. 708
80. Schreiber v. Ash, 84 N. Y. Supp. 946.
81. Tishman v. Kline, 84 N. Y. Supp. 452.
82. Higgins v. Shepard, 182 Mass. 364, 65 N. E. 805.
83. Hofstetter v. Gash, 104 Ill. App. 455.
84. Marsh v. Bergman, 84 N. Y. Supp. 469.

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§ 2. *Right of master in services of employe and compensation therefor; relief funds and medical attendance.*—An employe may not appropriate any portion of the master's time to his own use without the master's consent.[86]

Where the contract provides for weekly payment of wages, the servant's abandonment of the work on default does not estop him from recovering what he had earned.[87]

Trade secret.—A servant may be restrained from disclosing a trade secret.[88]

Wages, commissions and other remuneration.—The Indiana act against assignment of wages is constitutional.[89] The weekly wage law,[90] the Illinois statute regulating deductions in certain employments,[91] and the minimum wage law for persons employed on public works, are unconstitutional.[92] A statement of the amount of work done and when it was payable is not payment by a non-negotiable order.[93] Contracts for a fixed period are ordinarily regarded as entire, and no recovery can be had for part performance.[94]

An employe may recover where the master prevents performance,[95] but not where work is prevented by his own sickness.[96] An employer accepting statements in accordance with employe's theory of his salary without objection for a year and a half may not thereafter question the amount.[97] A Sunday on which an employe is required to work is a "working day" for which expenses should be allowed.[98] Where a contract of employment is made for one year at a stipulated salary per month, an agreement during the term to receive less or pay more than the contract rate is void, unless supported by some change in place, hours or other consideration.[99]

An employe entitled to a percentage of the profits of the firm is not entitled

85. Day v. American Machinist Press, 86 App. Div. [N. Y.] 613.

86. Atlantic Compress Co. v. Young, 118 Ga. 809. If plaintiff gave some attention to his own affairs with defendant's consent not taking up time which should have been devoted to his employer, this fact will not amount to a breach of the contract. Biest v. Ver Steeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081.

87. Tichenor v. Bruckheimer, 40 Misc. [N. Y.] 194.

88. Sanitas Nut Food Co. v. Cemer [Mich.] 96 N. W. 454; Stone v. Goss [N. J. Err. & App.] 55 Atl. 736.

89. Laws 1899, p. 193, c. 124. International T. B. Co. v. Weissinger, 160 Ind. 349, 65 N. E. 521.

90. Infringes right of private contract and is not an exercise of police power [Ind. Laws 1899, p. 193, c. 124]. Republic I. & S. Co. v. State, 160 Ind. 379, 66 N. E. 1005.

91. Making it unlawful for mining or manufacturing employers to make any but specified deductions from wages of employes, and exempting farmers from the provisions of the act. Kellyville Coal Co. v. Harrier, 207 Ill. 624, 69 N. E. 927.

92. Due process [Burns' Rev. St. 1901, §§ 7055a, 7055b]. Street v. Varney Elec. Supply Co., 160 Ind. 338, 66 N. E. 895.

93. Rev. St. 1899, § 8142. State v. Balch [Mo.] 77 S. W. 547.

94. One employed by the week can only recover his wages by showing a full performance or a legal excuse for not continuing work during the full week. Eden v. Silberberg, 89 App. Div. [N. Y.] 259. A contract for a fixed period at a specified salary per year and expenses with a provision for termination for failure of performance on notice is entire and not severable so that the benefits and value of the services for a part of the period could be apportioned pro rata. Ornstein v. Yahr & L. Drug Co. [Wis.] 96 N. W. 826.

95. Stone v. Bancroft, 139 Cal. 78, 70 Pac. 1017, 72 Pac. 717. The fact that during a time plaintiff was prevented from working by his employer he devoted a small part of his time to other employment did not amount to a breach of contract on his part preventing recovery of accrued salary. Id. In an action for salary due under a contract, evidence that though defendant had prevented plaintiff from working he had not discharged him does not make tenable the objection that the action was for breach of contract and not for salary. Id. Where one ready and willing to perform services under his contract is prevented by the master, there is a presumption of damages to the amount specified in the contract in the absence of claim that he could or did obtain other employment. Hancock v. Board of Education, 140 Cal. 554, 74 Pac. 44. A stenographer is entitled to the reasonable value of services in attending hearings where his services were not required by reason of adjournments. Hendrickson v. Woods, 77 App. Div. [N. Y.] 644.

96. McGarrigle v. McCosker, 83 App. Div. [N. Y.] 184.

97. Moller v. J. L. Gates Land Co. [Wis.] 97 N. W. 174.

98. Ornstein v. Yahr & L. Drug Co. [Wis.] 96 N. W. 826.

99. Davis v. Morgan, 117 Ga. 504.

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to a share of the profits outside the scope of the firm's business.[1] Cases construing particular contracts for commissions are collected in the footnote.[2]

In the absence of contract as to compensation, there may be recovered the amount generally paid in the neighborhood for work of a similar character.[3]

Additional compensation.—One performing services under a contract allowing him a bonus on the production of a certificate of a manager as to his faithful performance of his duties may recover, though the certificate is not produced, but is wrongfully withheld by the manager.[4] A salesman employed for a year at a specified salary to be given a bonus if his sales exceeded a certain amount is entitled to the bonus where the sales exceeded the amount, though the contract was terminated before the expiration of the year.[5]

Medical treatment.—Where the employer fails to furnish medical attendance in accordance with the contract, the cause of action is for breach of the contract and not in tort for the negligence.[6] A corporation contracting to treat its employes for injuries for a consideration is liable for malpractice of the physician employed.[7] A railroad company deriving no profit from a hospital supported by money retained from employes' wages is only required to use ordinary care in the selection of a physician, and where this is done, it is not liable for injuries caused by improper treatment.[8]

Benefit and relief funds.—The decision of a medical examiner as to an injured servant's ability to work within relief department regulations is a mere conclusion and not binding on the parties.[9] A physician may collect for his services to an employe in a relief hospital maintained by numerous companies from the company employing the injured man.[10] A rule of a relief department that a judgment in a suit against the company should preclude demand on relief fund does not apply to a judgment for defendant on demurrer.[11]

1. Amsden v. Dunham, 78 App. Div. [N. Y.] 33.

2. A salesman entitled to commissions only on sales where goods were not returned is not entitled to such commissions on goods sold under warranty subject to approval unless they have been accepted. Ross v. Portland C. & S. Co., 30 Wash. 647, 71 Pac. 184. Under a contract for a year at a monthly salary and commissions on sales over $24,000, the contract to be canceled on 10 days' notice, but that at the close of that period the accounts should be settled on the same basis as though the year had expired, the salesman on termination of the contract before the expiration of the year was entitled to commissions on sales in excess of $2,000 a month. Mayer v. Goldberg, 116 Wis. 96, 92 N. W. 556. Where no commissions have been earned, a servant may not, after the termination of the contract, recover amounts that were to be advanced to apply on commissions earned. Souler v. McDowell Garment Mach. Co., 38 Misc. [N. Y.] 786. A salesman entitled to commissions on sales of goods accepted by purchasers is entitled to such commissions where a customer had no right to reject them though the goods had not been shipped to the customer. Ross v. Portland C. & S. Co., 30 Wash. 647, 71 Pac. 184. An agreement for the advance of a certain sum monthly to be deducted from the commissions computed at the end of the period of employment which was indeterminate does not, prior to the termination, form a basis for a counterclaim for advances in excess of the commissions earned. Schlesinger v. Burland, 42 Misc. [N. Y.] 206. Sufficient to show a hiring by the month and not upon commission. Moller v. J. L. Gates Land Co. [Wis.] 97 N. W. 174.

3. Bryan v. Brown, 3 Pen. [Del.] 504. See, also, topic, Implied Contracts.

4. Kinnerk v. Phila. Ball Club, 92 Mo. App. 669.

5. Scheuer v. Monash, 40 Misc. [N. Y.] 668.

6. Galveston, H. & S. A. R. Co. v. Hennigan [Tex. Civ. App.] 76 S. W. 452.

7. Sawdey v. Spokane Falls & N. R. Co., 30 Wash. 349, 70 Pac. 972. Evidence held sufficient to support finding that the examining physician of the relief department as well as a physician employed by him were joint attending physicians of plaintiff. Haggerty v. St. Louis, K. & N. W. R. Co., 100 Mo. App. 424, 74 S. W. 456.

8. Poling v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 75 S. W. 69.

9. Medical examiners report that servant suffering amputation was able to work did not mean a recovery from disability where examiner declared to plaintiff that he was able to do light work. Chicago, B. & Q. R. Co. v. Olson [Neb.] 97 N. W. 831. Decision that claimant is not entitled to any further benefits is not binding, being a mere conclusion. Id.

10. Fla. Southern R. Co. v. Steen [Fla.] 34 So. 571.

11. O'Reilly v. Pa. R. Co. [N. J. Law] 54 Atl. 233.

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Actions for wages.—One employed as a superintendent in the state is not required to object to removal of the plant from the state in order to recover salary under the contract after the removal.[12] There may be no recovery for exposure to inclement weather while waiting to enter into a contract of employment.[13]

Complaints[14] are fatally defective which fail to aver performance of services sued for.[15] Employment is sufficiently pleaded by allegation of employment by defendant, performance of the services with a statement of items of work done, and the amount due.[16] A judgment in an action for services alleged to have been performed at joint request of defendants is not sustainable in the absence of evidence that the services were performed at the request of both defendants.[17]

A limitation on actions by employes is only available where pleaded.[18]

The payment of wages to himself by the employe out of the master's funds does not prevent a claim for overpayment by the employer unless he had knowledge of the overcharge and unreasonably delayed demand for repayment.[19] In an action for wages, a counterclaim for damages to the subject of the employment will not be sustained where the servant had no orders as to the manner of its protection and followed the methods of his employer in the matter.[20]

Under a contract providing for payment of an extra amount of salary at the end of the year on condition that the work is satisfactory to defendant, plaintiff must prove this condition.[21] In the absence of evidence of joint liability, there may be no recovery for services in another state by a corporation having the same name.[22] Reports of employer to mercantile agencies as to amount of business, but containing no specific reference to business on which commissions were claimed, are not admissible.[23] Evidence as to good faith of servant in making demand for wages months after the termination of her service, she making no demand at the time, is admissible.[24] See note for cases as to sufficiency of evidence.[25]

Whether a plaintiff by acceptance of a decree for wages under protest waives right to additional amount under contract is a question for the jury.[26]

Liens and preferences.—Liens of laborers have priority of mortgages given to secure the payment of purchase money in Georgia.[27] The Iowa laborer's lien law preferring labor debts on the insolvency of a corporation is not applicable to foreclosure of mortgage and sale so as to create a lien on the fund derived from the sale of corporate property.[28] The laborer's lien given threshers under the California laws is not lost by the fact that the laborer makes an entire contract for the services of himself and team.[29] The lien is assignable.[30] Liens and preferences are ordi-

12. Cook v. Todd, 24 Ky. L. R. 1909, 72 S. W. 779.
13. Reames v. Jones Dry Goods Co., 99 Mo. App. 396, 73 S. W. 935.
14. Sufficiency of petition. Biest v. Ver Steeg Shoe Co., 97 Mo. App. 635, 70 S. W. 1081.
15. Nye v. Bill Nye Mill Co., 42 Or. 560, 71 Pac. 1043.
16. International Power Co. v. Hardy, 118 Ga. 512.
17. Johnson v. Lawson [Colo. App.] 71 Pac. 652.
18. Stone v. Bancroft, 139 Cal. 78, 70 Pac. 1017.
19. Moynahan v. Interstate Min., Mill. & Develop. Co., 31 Wash. 417, 72 Pac. 81.
20. Failure to protect load of wheat whereby it was damaged by weather. Rawlings v. Clark [Colo. App.] 74 Pac. 346.
21. Joseph Campbell Preserve Co. v. Holcomb [Kan.] 72 Pac. 552.
22. St. Louis S. W. R. Co. v. Smith [Ark.] 73 S. W. 101.
23. Segler v. Bernstein, 82 App. Div. [N. Y.] 267.
24. Thompson v. Adams, 82 App. Div. [N. Y.] 569.
25. Preble v. Wicklund [N. D.] 95 N. W. 442; Pearson v. Great Northern R. Co. [Minn.] 95 N. W. 1113. Evidence insufficient to prove employment. Preyer v. Schwenck, 38 Misc. [N. Y.] 769. A finding that employe was to receive certain wages was sustained by evidence that she had stated to a witness that she was to receive such wages. Stuart v. Lord, 138 Cal. 672, 72 Pac. 142.
26. Stevens v. Mich. Soap Works [Mich.] 96 N. W. 435.
27. Bradley v. Cassels, 117 Ga. 517.
28. Code Iowa, §§ 4019, 4020. Wells v. Kelley [Iowa] 96 N. W. 1104.
29. Cal. St. 1885, p. 109, c. 125. Clark v. Brown [Cal.] 74 Pac. 548.

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narily confined by the statute to persons performing manual labor,[31] but if he perform such labor, it is immaterial that he was called a superintendent.[32] The action to foreclose the laborer's lien is an action in equity.[33]

§ 3. *Master's liability for injuries to servant. A. Nature and extent in general. Statutory provisions.*—The failure of a master to perform duties imposed by statute is negligence per se.[34] Violation of the statute must be the proximate cause of the injury,[35] and the statute must be one designed for the benefit of the employe.[36]

The fact that a person employing children is punishable for misdemeanor will not defeat liability for injuries to such child.[37]

The relation of master and servant must exist at the time of the injury,[38] and the injured person must be engaged in the duties of his employment.[39] The neg-

30. Clark v. Brown [Cal.] 74 Pac. 548.

31. A superintendent of an iron company is not within the law as to priority of wages in cases of insolvency of corporations. Pullis Bros. Iron Co. v. Boemler, 91 Mo. App. 85. The laborer's lien law of Florida gives a lien on the product to bookkeeper of a mill company, a time keeper, and one under contract to haul logs at a certain per diem, using his own team in so doing. First Nat. Bank v. Kirkby, 43 Fla. 376.

32. Laws 1897, p. 772, c. 624, § 29. Hopkins v. Cromwell, 89 App. Div. [N. Y.] 481.

33. So that costs are recoverable irrespective of the amount of the recovery. Clark v. Brown [Cal.] 74 Pac. 548.

34. Diamond Block Coal Co. v. Cuthbertson [Ind. App.] 67 N. E. 558; Brower v Locke, 31 Ind. App. 353, 67 N. E. 1015; Indiana Mfg. Co. v. Wells, 31 Ind. App. 460, 68 N. E. 319.

35. Where the injury would not have occurred but for the unlawful employment of a child, the unlawful employment is evidence of negligence. Marino v. Lehmaier, 173 N. Y. 530, 66 N. E. 572. A prima facie case of negligence is made where violation of child-labor law is shown and injury resulted from failure to guard dangerous machinery. Perry v. Tozer [Minn.] 97 N. W. 137.

36. Acts requiring a railroad company to fence, and imposing a penalty for failure where stock are injured by reason of the failure, does not affect liability for injuries to an employe caused by derailment by cattle on unfenced track. Snyder v. Pa. R. Co., 205 Pa. 619. Hurd's Rev. St. 1901, p. 1202, requiring attendants at mine doors is designed not only to promote ventilation, but to prevent accidents in running cars through such doors. Himrod Coal Co. v. Stevens, 203 Ill. 115, 67 N. E. 389. A railway company is liable for injuries caused a section hand for failure of an engineer to blow a whistle at a crossing as required by statute. Missouri, etc., R. Co. v. Taff [Tex. App.] 74 S. W. 89.

37. Marino v. Lehmaier, 173 N. Y. 530, 66 N. E. 572.

38. Western Wheel Works v. Stachnick, 102 Ill. App. 420; Central Coal & Iron Co. v. Grider's Adm'r [Ky.] 74 S. W. 1058. Sufficiency of evidence of employment. Henderson v. Kansas City, 177 Mo. 477, 76 S. W. 1045. Evidence sufficient to show employment by defendant rather than by a corporation claimed to have purchased the business. Daly v. Minke, 86 N. Y. Supp. 92. Insufficiency of evidence of negligence of defendant causing the death of their employe in an elevator in a building not belonging to defendant and not in use for his servants except as used by them on their own volition to avoid use of stairs. McGinnis v. Kerr, 204 Pa. 615. Allegations being sufficient to admit evidence that one defendant was operating the works on his own account, he is properly held to a master's liability. Johnson v. Gebhauer, 159 Ind. 271, 64 N. E. 855. One furnishing an appliance to an independent contractor is not liable for injuries to a servant of such contractor caused by defects in the absence of proof that the appliance was inherently dangerous. Southern Oil Co. v. Church [Tex. Civ. App.] 74 S. W. 797. An action for an injury will not lie against a corporation for an injury in a mill purchased by the corporation after the accident. Wieder v. Bethlehem Steel Co., 205 Pa. 186. Stevedores are negligent in not furnishing safe place for work for longshoreman. Duggan v. Phelps, 82 App. Div. [N. Y.] 509. A steamship company which sent an employe onto a barge owned by another party to assist in hauling it into position alongside the steamer is not liable for injury to such employe by a defect in the deck of the barge. Huebner v. Hammond, 80 App. Div. [N. Y.] 122. A railroad company is liable for injuries to employes of other roads operating trains on its tracks. Keck v. Philadelphia & R. R., 206 Pa. 501. One who borrows a hand car from an employe of a railway company, who has no authority to lend it for such use on the track, is a trespasser. Louisville & N. R. Co. v. Wade [Fla.] 35 So. 863.

39. A master is not liable for injuries to his servant caused by another, the servant temporarily having left his [illegible] to render assistance. Longa v. Stanley [illegible]od Elevator Co. [N. J. Law] 54 Atl. 251. [illegible] company is not made liable for injuries to employes using hand car for purposes of their own by the fact that the foreman asked them to bring his mail and some nails on their return. Illinois Cent. R. Co. v. Dotson, 24 Ky. L. R. 1459, 71 S. W. 636. The fact that laborers were injured in an elevator while descending to eat their dinners did not take them out of the master's employ at the time of an accident to the elevator. Boyle v. Columbian Fire Roofing Co., 182 Mass. 93, 64 N. E. 726. A brakeman is not deprived of his status by the fact that he was injured in a caboose before the train was made up

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ligence must be of the master or one for whose acts he is responsible.[40] The rule that the master is not liable if the servants at the time are under the control of another is without application where some control is retained by the master.[41] The doctrine of independent contractors is specifically treated elsewhere.[42]

The master is not an insurer of the servant against accidents and is bound only to the exercise of ordinary care.[43]

His liability is based solely on negligence,[44] and such negligence must have been the proximate cause of the injury,[45] and it is not important that the negli-

on the theory that his employment did not begin until the train was made up. Chicago, etc., R. Co. v. Oldridge [Tex. Civ. App.] 76 S. W. 581. Servant who attempted to loosen a hod elevator at request of subcontractor who was operating it is acting outside his duty. Longa v. Stanley Hod El. Co. [N. J. Law] 54 Atl. 251.

40. The employer is not liable for the negligence of volunteer bystanders. Appel v. Eaton, 97 Mo. App. 428, 71 S. W. 741. Nor for injuries caused by the act of a substitute selected by an employe where there was no neglect by remaining employes. Setterstrom v. Brainerd R. Co., 89 Minn. 262, 94 N. W. 882. A locomotive operating a train on a road belonging to another company under permission is not within laws providing that any person who sustains injury while engaged in railroad work about any train of a company of which he is not an employe shall have the same right of action as if he were an employe [Pa. Act Apr. 4, 1868]. Keck v. Philadelphia & R. R., 206 Pa. 501. A lessor company is not liable for injuries to employes of the lessee company caused by the lessee's negligence. Swice's Adm'x v. Maysville R. Co. [Ky.] 75 S. W. 278. One may recover for injuries from a corporation to whom the contract under which he was employed was assigned though the contract could not be legally assigned. Patton v. McDonald, 204 Pa. 517. A master is not liable for injuries to the servant caused by the servant's voluntarily going into a dangerous place to protect the master. Saylor v. Parsons [Iowa] 98 N. W. 500.

41. Garven v. Chicago R. Co., 100 Mo. App. 617, 75 S. W. 193.

42. See Independent Contractors.

43. Loid v. Rogers, 68 N. J. Law, 718; Highland Boy Gold Min. Co. v. Pouch, 124 Fed. 148. It is the duty of both master and servant to exercise reasonable care commensurate with the dangerous character of the employment. Karczewski v. Wilmington City R. Co. [Del.] 54 Atl. 746.

44. Harris v. Balfour Quarry Co., 131 N. C. 553, 42 S. E. 973; McHugh v. Manhattan R. Co., 88 App. Div. [N. Y.] 554; Fowler v. Brooks, 65 Kan. 861, 70 Pac. 600. A nonsuit is properly granted where the evidence shows the injury was the result of accident; or if there was any negligence the plaintiff was not free from fault. Edwards v. Central of Georgia R. Co., 118 Ga. 678, 45 S. E. 462.

45. El Paso & N. W. R. Co. v. McComas [Tex. Civ. App.] 72 S. W. 629; Walsh v. New York R. Co., 80 App. Div. [N. Y.] 316; Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12; Streets v. Grand Trunk R. Co., 76 App. Div. [N. Y.] 480. Missouri, etc., R. Co. v. Schilling [Tex. Civ. App.] 75 S. W. 64; Land v. Southern R. [S. C.] 45 S. E. 203; Lindsay v. Norfolk R. Co., 132 N. C. 59, 43 S. E. 511; Andrews v. Jefferson Cotton Oil & Refining Co. [Tex. Civ. App.] 74 S. W. 342; Sanders v. Stimson Mill Co., 32 Wash. 627, 73 Pac. 688; Baltimore, etc., R. Co. v. Henderson, 31 Ind. App. 441, 68 N. E. 308; Morrison v. Whittier Mach. Co. [Mass.] 67 N. E. 646; McQueeny v. Chicago R. Co., 120 Iowa, 522, 94 N. W. 1124; Southern Ind. R. Co. v. Martin, 160 Ind. 280, 66 N. E. 886; Truax v. Minneapolis R. Co., 89 Minn. 143, 94 N. W. 440; Seccombe v. Detroit Elec. R. [Mich.] 94 N. W. 747; Princeton Coal & Min. Co. v. Roll [Ind.] 66 N. E. 169; Kurstelska v. Jackson, 89 Minn. 95, 93 N. W. 1054; Fay v. Willmarth, 183 Mass. 71, 66 N. E. 410; Hermann v. Clark, 89 Minn. 132, 94 N. W. 436. The act of the foreman of a telephone crew in bringing a telephone wire in contact with a live electric wire thereby causing the death of a member of the crew is the proximate cause of the death. Cumberland Tel. & Tel. Co. v. Ware's Adm'x, 24 Ky. L. R. 2519, 74 S. W. 289. The act of a servant in returning to a building on fire to use a telephone is the proximate cause of injuries thereafter resulting and not the negligent construction of same. Chattanooga Light & Power Co. v. Hodges [Tenn.] 70 S. W. 616, 60 L. R. A. 459. The proximate cause of an injury to an employe riding on front of engine and colliding with a vehicle at the crossing is the combined negligence of the engineer and the gatekeeper, the engineer in failing to whistle and ring bell, and the gatekeeper in failing to lower gate. Chicago & A. R. Co. v. Wise 206 Ill. 453, 65 N. E. 500. A servant sent to assist in lacing a belt commenced the work when he reached to take hold of the belt so as to establish causal connection between defendant's negligence and the injury. Grijalva v. Southern Pac. Co., 137 Cal. 569, 70 Pac. 622. Where the circumstances show nothing as to the cause but leaves the matter open to conjecture as to whether the master's negligence was the cause, there is a failure of proof. Hurt v. Louisville R. Co. [Ky.] 76 S. W. 502. Negligence in constructing switch tracks close together held proximate cause of injury to brakeman riding on ladder and struck by car on other track. Baltimore, etc., R. Co. v. Roberts [Ind.] 67 N. E. 530. Throwing switch wrong was proximate to a fall received by a person from the ensuing collision with car in which he was. Setterstrom v. Brainard R. Co., 89 Minn. 262, 94 N. W. 882. Insufficient to prove negligence as proximate cause of death by being caught in a steam winch. Hermann v. Clark, 89 Minn. 132, 94 N. W. 436. Negligence of train dispatcher producing imminent danger of collision is the proximate cause of injury to a brakeman thrown from the train by an emergency stop made to avoid collision. Phinney v. Illinois Cent. R. Co. [Iowa] 98 N. W. 358. A master who orders a serv-

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gence of a third person contributed with that of the master.[47] There may be no recovery where accident was not the probable consequence of the condition.[48] A recovery is not to be defeated by the fact that plaintiff was susceptible to injury.[49] It is not necessary to recovery that the negligence be willful.[50] Punitive damages are recoverable for willful negligence.[51]

Contracts limiting or releasing liability.[52]—A master may not by contract limit his liability for negligence.[53] Such contracts have been held not opposed to public policy,[54] but employers' rules otherwise reasonable are not invalid merely because they tend to relieve the master from his common-law liability.[55] An administrator may release a company from liability by acceptance of benefits from relief department.[56] The election of a widow to accept provision of a relief certificate does not bar action by personal representative.[57] A contract for services as flagman for life in consideration of release of claim for injuries made with the superintendent is not ultra vires.[58] A release may be avoided for fraud inducing its execution,[59] or for gross inadequacy.[60] An employer is not discharged of liability by the fact that accident insurance is carried by the employe, though employer paid a part of the premium, there being no contract by which it was agreed that acceptance of the insurance money released the employer.[61] Laws invalidating contracts limiting liability do not forbid compromises after the injury.[62] A release from liability for injuries invalid under the laws of the state where made is not validated by the fact that the injury occurred without the state.[63] The Missouri act invalidating contracts of release between railroads and their employes is not applicable to use by a railroad company of such release given by a porter to a sleeping car company.[64]

(§ 3) *B. Tools, machinery, appliances and places for work.*—The master is required to use due care in providing and maintaining suitable and proper machin-

vant to use a vicious horse is liable for injuries to servant caused by such viciousness if he knew or ought to have known of it. McCready v. Stepp [Mo. App.] 78 S. W. 671.

47. St. Louis, etc., R. Co. v. Neal [Ark.] 78 S. W. 220. The failure of the proprietor of a yard, into which a switch is run, to have a watchman to warn employes at work above the track of the approach of trains concurred with the negligence of a locomotive in backing into the yard without a signal. Merchants & Planters' Oil Co. v. Burns [Tex.] 72 S. W. 626.

48. Persinger's Adm'x v. Alleghany Ore & Iron Co. [Va.] 46 S. E. 325.

49. Weak abdominal wall easily ruptured. Texas, etc., R. Co. v. Lee [Tex. Civ. App.] 74 S. W. 345.

50. Bane v. Irwin, 172 Mo. 306, 72 S. W. 522.

51. Boyd v. Seaboard Air Line R. Co. [S. C.] 45 S. E. 186; Louisville & N. R. Co. v. Hall, 24 Ky. L. R. 2487, 74 S. W. 280.

52. And see topic Releases.

53. Texas & P. R. Co. v. Swearingen, 122 Fed. 193.

54. Porter releasing Pullman company and assenting to assignment of agreement to carrying company for defense. McDermon v. Southern Pac. Co., 122 Fed. 669.

55. Rules that trainmen must, as far as practicable, inspect cars do not tend to relieve railroad company from master's common-law liability nor are such rules unreasonable. Scott v. Eastern R. [Minn.] 95 N. W. 892.

56. Pittsburg, etc., R. Co. v. Gipe, 160 Ind. 360, 65 N. E. 1034.

57. Oyster v. Burlington Relief Department [Neb.] 91 N. W. 699, 59 L. R. A. 291.

58. Invalidity may not be urged after statute of limitations has run against the action for the injuries. Usher v. New York R. Co., 76 App. Div. [N. Y.] 422.

59. Galloway v. San Antonio R. Co. [Tex. Civ. App.] 78 S. W. 32; New Omaha Thomson-Houston Elec. Light Co. v. Rombold [Neb.] 93 N. W. 966; Western R. v. Arnett, 137 Ala. 414. A Pullman porter's failure to read his contract of employment releasing the company for injuries will not avoid same. New York Cent., etc., R. Co. v. Difendaffer [C. C. A.] 125 Fed. 893.

60. $125 for death of miner between 40 and 50 years of age. Russell v. Dayton Coal & Iron Co., 109 Tenn. 43, 70 S. W. 1.

61. Dover v. Miss. River R., 100 Mo. App. 330, 73 S. W. 298.

62. The laws of North Carolina invalidating contracts to waive liability thereunder does not prevent compromises after an injury has been suffered, it having application only to contracts before the injury. Fleming v. Southern R. Co., 131 N. C. 476, 42 S. E. 905.

63. Mexican Nat. R. Co. v. Jackson [C. C. A.] 118 Fed. 549.

64. McDermon v. Southern Pac. Co., 122 Fed. 669. The Missouri act abolishing the fellow-servant rule and invalidating releases from liability for injuries to passengers is not applicable where the defendant is not a Missouri corporation and the injury occurs in a distant state [Rev. St. Mo. 1899, § 2876]. McDermon v. Southern Pac. Co., 122 Fed. 669.

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ery, appliances, materials and structures for business in which he and his servants are engaged,[65] but he is only required to provide a place as safe as the proper carrying out of the work will reasonably permit,[66] and is not an insurer of their safety.[67]

Only ordinary or reasonable care is required as to appliances and machinery[68] and places for work.[69] The master is not required to adopt the newest and safest devices and appliances;[70] those in common use by like employers will suffice,[71] nor is he expected to guard against accidents not reasonably to be foreseen.[72] Where he changes the appliances, he is bound to see that they are as safe as the old appliances.[73]

65. Parlett v. Dunn [Va.] 46 S. E. 467; Broadfoot v. Shreveport Cotton Oil Co. [La.] 35 So. 643; Kimbell v. Homer C. & Mfg. Co., 109 La. 963; Clay City L. & S. Co. v. Noe [Ky.] 76 S. W. 195; Davis v. Turner [Ohio] 68 N. E. 819; Butterman v. McClintic-Marshall Const. Co., 206 Pa. 82; Foley v. Cudahy Packing Co., 119 Iowa, 246, 93 N. W. 284; New Omaha Thomson-Houston Elec. Light Co. v. Rombold [Neb.] 93 N. W. 966; Merchants' & P. Oil Co. v. Burns [Tex. Civ. App.] 72 S. W. 626; Peter & M. Steam Stone Works v. Green [Ky.] 76 S. W. 844; Bowden v. Derby, 97 Me. 536; McDonald v. Standard Oil Co. [N. J. Err. & App.] 55 Atl. 289; Palmer v. Kinloch Tel. Co., 91 Mo. App. 106; Karczewski v. Wilmington City R. Co. [Del.] 54 Atl. 746; Finnerty v. Burnham, 205 Pa. 305; Roche v. Denver & R. G. R. Co. [Colo. App.] 73 Pac. 880; Towle v. Stimson Mill Co. [Wash.] 74 Pac. 471.

66. Sinberg v. Falk Co., 98 Mo. App. 546, 72 S. W. 947; Parlett v. Dunn [Va.] 46 S. E. 467. A flogging hammer used for striking chisels is an implement within the rule requiring the master to furnish safe tools and appliances. Vant Huyl v. Great Northern R. Co. [Minn.] 96 N. W. 789.

67. Louisville & N. R. Co. v. Hall, 24 Ky. L. R. 2487, 74 S. W. 280; Kelly v. Stewart, 93 Mo. App. 47; Glasscock v. Swofford Bros. Dry Goods Co. [Mo. App.] 74 S. W. 1039. The master is bound to furnish a reasonably safe place for his servant to work but is not bound to make the place absolutely safe nor insure the servant against ordinary risks incident to the employment. Wilson v. Chess & W. Co. [Ky.] 78 S. W. 453.

68. Ralph v. American Bridge Co., 30 Wash. 500, 70 Pac. 1098; Standard L. & P. Co. v. Munsey [Tex.] 76 S. W. 931; Atlantic & D. R. Co. v. West [Va.] 42 S. E. 914; Beunk v. Valley City Desk Co. [Mich.] 95 N. W. 548; Chicago, R. I. & T. R. Co. v. Long [Tex. Civ. App.] 74 S. W. 59; Louisville & N. R. Co. v. Mounce's Adm'r, 24 Ky. L. R. 1378, 71 S. W. 518; Franklin v. Mo., K. & T. R. Co., 97 Mo. App. 473, 71 S. W. 540; Tex. & Ft. S. R. Co. v. Hartnett [Tex. Civ. App.] 75 S. W. 809; New Omaha T. H. Elec. Light Co. v. Rombold [Neb.] 97 N. W. 1030; Johnson v. Gebhauer, 159 Ind. 271, 64 N. E. 855; Campbell v. T. A. Gillespie Co. [N. J. Err. & App.] 55 Atl. 276; Lancaster Cotton Oil Co. v. White [Tex. Civ. App.] 75 S. W. 339; Howard v. Mo. Pac. R. Co., 173 Mo. 524, 73 S. W. 467; Palmquist v. Mine & S. S. Co., 25 Utah, 257, 70 Pac. 994; Allen B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818; Langdon-Creasy Co. v. Rouse, 24 Ky. L. R. 2095, 72 S. W. 1113; Beckman v. Anheuser-Busch Brew. Ass'n, 98 Mo. App. 555, 72 S. W. 710; Bodie v. Charleston & W. C. R. Co., 66 S. C. 302, 44 S. E. 943; Gallman v. Union Hardwood Mfg. Co., 65 S. C. 192, 43 S. E. 524; O'Neill v. Chicago, R. I. & P. R. Co. [Neb.] 92 N. W. 731, 60 L. R. A. 443; Koehler v. N. Y. Steam Co., 84 App. Div. [N. Y.] 221. The owner will not be held to have been negligent in furnishing appliances for raising timbers, where out of a large number raised, only one fell. Paoline v. J. W. Bishop Co. [R. I.] 55 Atl. 752. Where the defect would not have been disclosed by inspection, the master is not guilty in purchasing such appliance. Md. Tel. & Tel. Co. v. Cloman, 97 Md. 620. Master is not a guarantor of safety of appliances and is not negligent in permitting the use of an appliance which usage of trade has sanctioned as reasonably safe. Westinghouse El. & M. Co. v. Heimlich [C. C. A.] 127 Fed. 92.

69. Knight v. Sadtler L. & Z. Co., 91 Mo. App. 574; Ill. Steel Co. v. Ryska, 102 Ill. App. 347; Stumbo v. Duluth Zinc Co., 100 Mo. App. 635, 75 S. W. 185; Chewall v. Palmer Brick Co., 117 Ga. 106, 43 S. E. 443; Roche v. Denver & R. G. R. Co. [Colo. App.] 73 Pac. 880.

70. Glenmont Lumber Co. v. Roy [C. C. A.] 126 Fed. 524; Corbett v. St. Vincent's Industrial School, 79 App. Div. [N. Y.] 334. While it is not negligence per se to fail to equip engines with the latest devices, the jury may consider the practicability of later devices and their effect on safety of employes. Bryce v. Burlington, C. R. & N. R. Co., 119 Iowa, 274, 93 N. W. 275. Where the appliance is reasonably safe for its purpose, a master is not liable for failure to furnish a better appliance. Duntley v. Inman, 42 Or. 334, 70 Pac. 529. The master's duty in furnishing safe appliances is to use ordinary care, and he is not negligent in not adopting a method believed by some persons to be less perilous than the one he adopted. Parlett v. Dunn [Va.] 46 S. E. 467. Reasonably safe but not best. McDonald v. Standard Oil Co. [N. J. Err. & App.] 55 Atl. 289.

71. Boyle v. Union Pac. R. Co., 25 Utah, 420, 71 Pac. 988; Hayzel v. Columbia R. Co., 19 App. D. C. 359.

72. Whitson v. Wrenn [N. C.] 46 S. E. 17. A master constructing a handrail along a passageway sufficient for the purpose is not liable for injuries caused by its giving way when fallen against, as this would not be anticipated. Decker v. Stimson Mill Co., 31 Wash. 522, 72 Pac. 98. A sawmill proprietor who can and fails to provide against a possibility of danger to employes resulting from defective machinery is liable for resulting injury. Collins v. Lewis [La.] 35 So. 886.

73. Welle v. Celluloid Co., 175 N. Y. 401, 67 N. E. 609. Altering of working appliances without the servant's knowledge, and placing them in an insecure condition held to be the

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It is not important on the question of liability that the master did not own the appliance,[74] or was a mere lessee of the premises.[75]

The master is not liable for unsafe conditions while the machinery is in process of erection.[76] An appliance will not be regarded as unsafe by reason of the fact that it was new and not in general use, where its operation is shown to be simple and safe.[77]

The master having furnished safe appliances is not liable for their negligent use,[78] or the failure of the servant to use same.[79] If there were at hand and furnished by the master adequate appliances, he will not be liable because a part of an appliance furnished by him was used in conjunction with a thing not furnished by him, but substituted without his notice or authority with the consequence that his appliance did not work safely.[80]

It is essential to liability that the failure to furnish proper appliances should be the proximate cause of the accident.[81]

Maintenance.—The master has not fulfilled his whole duty by furnishing appliances and machinery within the foregoing rules. He is required to use the same care in their maintenance[82] by making necessary repairs.[83] The rule as to safety of appliances has no application where the injured servant was employed to repair the defect and had repaired it.[84]

Inspection is required,[85] and master will be liable for injuries from defects that

proximate cause of plaintiff's injury. Monongahela River Consol. C. & C. Co. v. Campbell [Ky.] 78 S. W. 405.

74. Ehlen v. O'Donnell, 102 Ill. App. 141.

75. Adams Express Co. v. Smith, 24 Ky. L. R. 1915, 72 S. W. 752.

76. Trigg v. Lindsay [Va.] 43 S. E. 849.

77. Wagner v. N. Y., C. & St. L. R. Co., 76 App. Div. [N. Y.] 552.

78. Donohoe v. Lonsdale Co., 25 R. I. 187. One furnishing a safe appliance to independent contractors is not liable for defects arising from its use. Cent. C. & I. Co. v. Bailey's Adm'r [Ky.] 76 S. W. 842. There was no negligence in failing to furnish a safe tool where it was rendered dangerous solely by the act of the servant in using it without necessity in a place where it could be caught by machinery. Hettich v. Hillje [Tex. Civ. App.] 77 S. W. 641. A railway company is not liable for injuries caused by cars escaping from a siding onto the main line if the escape was due to the brakes being tampered with. Norfolk & W. R. Co. v. Cromper's Adm'x [Va.] 44 S. E. 898. Circumstances held to show that the servant did not change the construction of the appliances so as to weaken it. Ehlen v. O'Donnell, 205 Ill. 38, 68 N. E. 766.

79. Conner v. Draper Co., 182 Mass. 184, 65 N. E. 39.

80. Hackett v. Masterson, 84 N. Y. Supp. 751.

81. Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307; Chicago, B. & Q. R. Co. v. Healey [Neb.] 97 N. W. 1024; Edd v. Union Pac. Coal Co., 25 Utah, 293, 71 Pac. 215. In an action for injuries caused by a collision, a defective sill of the tender will not be considered as a proximate cause as it would be impracticable to require sills strong enough to resist the force of a collision. Brommer v. Phila. & R. R. Co., 205 Pa. 432. That a defective rope was cause of the accident is not shown where the accident might have happened had the rope been perfect. Cothron v. Cudahy Packing Co., 98 Mo. App. 343, 73 S. W. 279. A defect in a wheel moving another by friction held to be the proximate cause of an injury caused by the breaking of the latter wheel. Pautz v. Plankington Packing Co., 118 Wis. 47, 94 N. W. 654.

82. Houston Biscuit Co. v. Deal, 135 Ala. 168; Zellars v. Mo. Water & Light Co., 92 Mo. App. 107; Vartanian v. New York R. Co. [R. I.] 56 Atl. 184; Ball v. Gussenhoven [Mont.] 74 Pac. 871.

83. Shebek v. Nat. Cracker Co., 120 Iowa 113, 94 N. W. 930; Olney v. Boston & M. R. R., 71 N. H. 427; Boyle v. Union Pac. R. Co., 25 Utah, 420, 71 Pac. 988. It is as much negligence to fail to keep automatic couplers in repair as to fail to attach them as required by law. Elmore v. Seaboard Air Line R. Co., 132 N. C. 865, 44 S. E. 620.

84. Kleine v. Freunds Sons Shoe & Clothing Co., 91 Mo. App. 102.

85. Henderson Brew. Co. v. Folden [Ky.] 76 S. W. 520; Simone v. Kirk, 173 N. Y. 7, 65 N. E. 739; Peet v. H. Remington & Son Pulp & Paper Co., 86 App. Div. [N. Y.] 101; Scott v. Eastern R. of Minn. [Minn.] 95 N. W. 892; Smith v. New York, etc., R. Co., 86 App. Div. [N. Y.] 188. A stevedore using a derrick belonging to the owner of the cargo without testing same is liable to one of his workmen for injuries caused by defects therein. Sharpley v. Wright, 205 Pa. 253. A company is liable for injuries resulting from failure to inspect appliances, though employes know that accidents will occur though appliances are inspected. Smith v. New York, etc., R. Co., 86 App. Div. [N. Y.] 188. Poles used by linemen. Walsh v. New York & Q. C. R. Co., 80 App. Div. [N. Y.] 316; Henderson Brew. Co. v. Folden [Ky.] 76 S. W. 520. Nonsuit refused where old hoisting chain broke obviously from wearing away of links and which would have appeared on inspection. Hopwood v. Benjamin Atha & J. Co., 68 N. J. Law, 707.

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would have been revealed by an inspection.[86] This duty is a continuing one,[87] and must be thorough[88] and such as ordinary prudence requires.[89] A master is not liable for latent defects where he has exercised ordinary care to detect same and failed to discover such defect.[90] The duty of inspection does not require special tests before use of machinery.[91] A master is supposed to have knowledge of usage as to inspection.[92] The failure to inspect must have been the proximate cause of the accident.[93]

Railroads.—The duty of care applies to railroad machinery,[94] equipments,[95] and tracks and roadbed,[96] including substructure of bridges.[97] The rule of due care

86. Merritt v. Victoria Lumber Co. [La.] 35 So. 497; Finnerty v. Burnham, 205 Pa. 305. A railroad company is not liable for an injury to a brakeman caused by a defect in car received from a connecting carrier and the injury not being such as could be discovered by ordinary inspection. Anderson v. Erie R. Co., 68 N. J. Law, 647.

87. Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972.

88. Potts v. Shreveport Belt R. Co., 110 La. 1; The Columbia, 124 Fed. 745. Inspection of elevator inadequate where confined to oiling machinery but no hammer test of gear wheels for more than a year. Swenson v. Metropolitan St. R. Co., 78 App. Div. [N. Y.] 379. Jabbing screw driver into lamp poles, though customary, is not a sufficient inspection as superficial decay only is disclosed thereby. Rowley v. American Illuminating Co., 83 App. Div. [N. Y.] 609.

89. McGrath v. Delaware R. Co. [N. J. Err. & App.] 55 Atl. 242. Randolph v. New York R. Co. [N. J. Err. & App.] 55 Atl. 240. It will not be said as a matter of law that there was negligence in failing to inspect all belts in factory daily where they are numerous and it would be impossible to make a daily inspection. Boucher v. Roberon Mills, 182 Mass. 500, 65 N. E. 819.

90. Atlantic & B. R. Co. v. Reynolds, 117 Ga. 47. Railroad not bound to guard against grab iron screws pulling out of decaying wood in foreign car regularly inspected by it. Anderson v. Erie R. Co., 68 N. J. Law, 647.

91. South Baltimore Car Works v. Schaefer, 96 Md. 88. The use of a derrick chain purchased from reputable makers who represented it well made and tested and which on visual inspection did not disclose defects is not negligence in a master. Westinghouse Elec. & Mfg. Co. v. Heimlich [C. C. A.] 127 Fed. 92.

92. Thayer v. Smoky Hollow Coal Co. [Iowa] 96 N. W. 718.

93. Covington Sawmill & Mfg. Co. v. Clark [Ky.] 76 S. W. 348; Snyder v. Rogers Co. [N. J. Err. & App.] 55 Atl. 303; South Baltimore Car Works v. Schaefer, 96 Md. 88.

94. Sims v. Southern R. Co., 66 S. C. 520.

95. Locomotives should be equipped with automatic couplers. Fleming v. Southern R. Co., 131 N. C. 476. There is a presumption of defect of brakes or setting where a train escapes from a siding on to the main track. Jones v. Kansas City R. Co. [Mo.] 77 S. W. 890. The failure to equip an engine with a brake which would have prevented a collision is the proximate cause of resulting derailment. Choctaw, etc., R. Co. v. Holloway, 24 Sup. Ct. 102. A railroad company is negligent in furnishing section hands with a worn out handcar with brakes out of repair. Chicago, etc., R. Co. v. Long [Tex.] 74 S. W. 59. A railroad furnishing a defective push car which would not hold an ordinary load would be liable for injuries caused thereby, though the servant overloaded the car. Mitchell v. Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647. A railroad company is liable for an injury resulting from a hidden defect in the handle of a handcar, where the company had an opportunity to discover the defect. Norfolk & W. R. Co. v. Wade [Va.] 45 S. E. 915. A railroad company is guilty of negligence in allowing an engine to start on its trip without a chimney for a headlight in consequence of which the headlight may not be used and a conductor on another train is killed by a collision caused thereby. It is not material that the chimney could have been obtained at a station along the route. Sutter v. New York, etc., R. Co., 79 App. Div. [N. Y.] 362. A railroad will not be liable for injuries to a brakeman caused by the escape of cars from a sidetrack where the brakes were sufficient but had been tampered with. Norfolk & W. R. Co. v. Cromer's Adm'x [Va.] 44 S. E. 898. The fact of change in the character of a pilot to equip the engine with an automatic coupler does not constitute negligence, though causing the engine to overturn on collision with cattle. Briggs v. Chicago & N. W. R. Co. [C. C. A.] 125 Fed. 745.

96. It cannot be said as a matter of law that it was negligence to allow snow and ice to accumulate in switchyards and on tracks. Sankey v. Chicago, etc., R. Co., 118 Iowa, 39, 91 N. W. 820. It is not negligence to use unblocked frogs in a railroad freight yard, it appearing that such frogs were in general use in that part of the country. Kilpatrick v. Choctaw R. Co., 121 Fed. 11. A railroad is required to use care to keep tracks free from obstruction and in case of derailment by cattle the matter is not affected by statutes as to fences. Mendizabal v. New York Cent. R. Co., 89 App. Div. [N. Y.] 386. The end of a switch should be protected by a bumper. Pennsylvania R. Co. v. Jones [C. C. A.] 123 Fed. 753. A railroad company owes the duty of diligence in maintaining its track. Hamilton v. Michigan Cent. R. Co. [Mich.] 97 N. W. 392. A railroad company was negligent in leaving open a ditch in the path of brakemen engaged in coupling cars so that it became hidden by a heavy snow. De Cair v. Manistee & G. R. Co. [Mich.] 95 N. W. 726.

97. A railroad company is liable for injuries caused by a pile bridge over a swift river with an insufficiency of earth to support the piles. Copeland v. Wabash R. Co., 175 Mo. 650, 75 S. W. 106.

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in its application to bridge construction requires a consideration of the topography of the country drained.[98] Care is required as to erections at side of and over track.[99] A derrick car is considered an appliance.[1]

Automatic coupler and drawbar statutes.—Congress has power to deny the defense of the fellow-servant doctrine where there was a violation of the law requiring trains to be equipped with automatic couplers.[2] The act is only applicable to cars used in interstate commerce,[3] and does not require that the coupler should be able to couple automatically with other makes of couplers.[4] The failure to equip must have been the proximate cause of the accident.[5] Knowledge of violation by defendant need not be shown.[6] The holdings as to whether the act requires automatic couplers on locomotives are not harmonious.[7]

Elevator shafts must be protected.[8] The master is liable for injuries caused by unsafe elevators furnished for the use of employes.[9] An ordinary hoist for builders erected by carpenters is not an appliance within the rule as to safety of appliances.[10]

Places for work.—A master is not required to furnish an employe with a safe place to work as against a temporary danger in connection with the work and known to the employe.[11] Rule as to safety of place for work includes safety of place used for changing clothes necessitated by nature of work,[12] lodging room occupied by domestic,[13] floors,[14] and uncovered openings in same,[15] and manholes of sewers on premises.[16] Where a stairway is removed, notice must be given.[17]

98. Copeland v. Wabash R. Co., 175 Mo. 650, 75 S. W. 106.

99. A railroad is not required to build its bridges so as to accommodate persons standing at full height on top of freight cars. Erie R. Co. v. McCormick [Ohio] 68 N. E. 571. It is the duty of a railroad company to place structures at such a distance from the tracks as not to endanger the lives of switchmen compelled to ride on the side of freight cars. Tex. & P. R. Co. v. Swearingen [C. C. A.] 122 Fed. 193. It is negligence for a railroad company to maintain a post in dangerous proximity to the track. Galveston, H. & S. A. R. Co. v. Brown [Tex.] 77 S. W. 832. It is negligence as a matter of law for a railroad company to maintain a waterspout over its tracks at such a height as to be a menace to brakemen on freight trains. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64. A railroad owes no duty to light mail cranes for employes familiar with the road. Kenney v. Meddaugh [C. C. A.] 118 Fed. 209. The rule as to safe places for work is not violated by placing mail cranes close to passing locomotives. Id. A railroad company is negligent in permitting projections to extend over tracks that may injure brakemen on top of cars. Rope hanging in loop from water pipe. Lindsay v. Norfolk & S. R. Co., 132 N. C. 59. To see that telltales on a railroad track are in proper condition is the duty of a master. McGarrity v. N. Y., N. H. & H. R. Co. [R. I.] 55 Atl. 718.

1. Wagner v. N. Y., C. & St. L. R. Co., 76 App. Div. [N. Y.] 552.

2. Kan. City, M. & B. R. Co. v. Flippo [Ala.] 35 So. 457.

3. Act Congress March 2, 1893, as amended Apr. 1, 1896. Winkler v. Phila. & R. R. Co. [Del.] 53 Atl. 90.

4. Johnson v. Southern Pac. Co. [C. C. A.] 117 Fed. 462.

5, 6. St. Louis, I. M. & S. R. Co. v. Neal [Ark.] 78 S. W. 220.

7. Locomotive not a car. Larabee v. N. Y., N. H. & H. R. Co., 182 Mass. 348, 66 N. E. 1032; Johnson v. Southern Pac. Co. [C. C. A.] 117 Fed. 462. Code Iowa, §§ 2079-2083. Bryce v. Burlington, C. R. & N. R. Co., 119 Iowa, 274, 93 N. W. 275. Tender is a car. Phila. & R. R. Co. v. Winkler [Del.] 56 Atl. 112; Winkler v. Phila. & R. R. Co. [Del.] 53 Atl. 90.

8. An employer leaving freight elevator shafts unprotected is guilty of negligence aside from the fact of violation of duty imposed by law. Hillebrand v. Standard Biscuit Co., 139 Cal. 233, 73 Pac. 163.

9. Continental Tobacco Co. v. Knoop, 24 Ky. L. R. 1268, 71 S. W. 3.

10. Gittens v. William Porten Co. [Minn.] 97 N. W. 378. The construction and setting up of a hoisting apparatus which required skill in order to render it safe for the work to be done by servants is the master's duty in which he must exercise ordinary care to see that it is reasonably safe. Parlett v. Dunn [Va.] 46 S. E. 467.

11. Davis v. Trade Dollar Consol. Min. Co. [C. C. A.] 117 Fed. 122.

12. Muhlens v. Obermeyer, 83 App. Div. [N. Y.] 88.

13. Collins v. Harrison [R. I.] 56 Atl. 678.

14. It is the employer's duty to protect employe from the dangers of falling into floor openings. Bredeson v. Smith Lumber Co. [Minn.] 97 N. W. 977. Use of board in platform for two years longer than its ordinary life shows that it was unsafe. Adams Exp. Co. v. Smith, 24 Ky. L. R. 1915, 72 S. W. 752.

15. There is a failure of duty as to safe place for work where floor over which trucks are run is allowed to get out of repair causing injury to employes by truck upsetting. Mo. Malleable Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12.

16. Leaux v. New York, 84 N. Y. Supp. 511.

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The duty as to safety of place for work has application to scaffolds, platforms and racks.[18] The care required in the erection of such structures has been the subject of legislation in some of the states.[19]

It is the duty of a miner to have the rooms of the mine inspected and see that they are in reasonably safe condition for the servants to work in.[20] The rule as to safe place for work does not apply to the entry room of a mine constantly changing by labor performed therein.[21] The duty to furnish a safe place for work is violated by a master placing a quantity of dynamite in an air shaft where employes are at work, a concussion of 60 pounds being sufficient to explode same.[22] Measures for the protection of mine workers have been enacted in most states.[23]

Persons engaged in the electrical business must exercise care and prudence as to insulation and other means for the protection of employes.[24] Shafts and dangerous machinery must be safe guarded.[25] The New York Factory Act for the

17. That a fellow employe was engaged in removing a door is not notice that stairs beyond the door have been removed. Preuschoff v. Stroh Brew. Co. [Mich.] 92 N. W. 945.

18. Metcalf v. Nystedt, 102 Ill. App. 71; Hagerty v. Evans, 87 Minn. 435, 92 N. W. 399; Gwiney v. Le Baron, 182 Mass. 368, 65 N. E. 789. A rack collapsing when only half full of lumber shows a failure to furnish a proper appliance. Corbett v. American Screen Door Co. [Mich.] 95 N. W. 737.

19. A temporary arch to support brickwork is not a scaffold within the New York labor law governing safety of scaffolds [Laws 1897, p. 467, c. 415, § 18]. Haughey v. Thatcher, 85 N. Y. Supp. 935. Under the New York law requiring safety of scaffolds, the master is liable, though the servant participated in construction, unless the servant knew of the defect or by the exercise of reasonable care might have known of it. Jury authorized to find nonassumption where boards used were painted on one side and discolored with dirt on the other. Wingert v. Krakauer, 76 App. Div. [N. Y.] 34. The New York laws extending liability of employers to make compensation for injuries suffered by employes did not take away rights existing under other laws as to safety of scaffolds, nor take away similar common-law rights [Law 1902, p. 1748, c. 600]. Gmaehle v. Rosenberg, 40 Misc. [N. Y.] 267. The New York labor law requiring safe construction of scaffolds used in the "erection, repairing, altering or painting of a house, building or structure," applies to scaffolds erected in a factory to attach machinery to the ceiling. Wingert v. Krakauer, 76 App. Div. [N. Y.] 34. Failure to erect a platform to prevent fall of tools on laborers beneath will not be regarded as the proximate cause of an injury where there was no proof that it would be possible to construct a platform strong enough to withstand fall of tool in question. Miniter v. Chicago & N. W. R. Co. [Iowa] 96 N. W. 1108.

20. Tradewater Coal Co. v. Johnson, 24 Ky. L. R. 1777, 72 S. W. 274.

21. Heald v. Wallace, 109 Tenn. 346, 71 S. W. 80.

22. Angel v. Jellico Coal Min. Co. [Ky.] 74 S. W. 714.

23. A statute requiring examination of mines on alternate days and that safety is secured by props does not make the owner an insurer of the safety of miners [Burns' Rev. St. Ind. 1894, § 7472]. Wooley Coal Co. v. Bracken, 30 Ind. App. 624, 66 N. E. 775. Failure of mine owner to furnish timbers for supports on request as provided by statute is negligence, rendering owner liable for injuries resulting therefrom [Ballinger's Ann. Codes & St. § 3178]. Green v. Western American Co., 30 Wash. 87, 70 Pac. 310. A violation of the Missouri act as to safety appliances for the protection of persons using mine shafts for conveyance may not be invoked by one whose business it is to run the hoisting appliance [Rev. St. Mo. 1899, § 8811]. Barron v. Mo. L. & Z. Co., 172 Mo. 228, 72 S. W. 534. The Missouri law requiring mine owners to supply supports in mines where required intends that they shall be furnished when needed without waiting for requests from the workmen [Mo. Rev. St. § 8822]. Bowerman v. Lackawanna Min. Co., 98 Mo. App. 308, 71 S. W. 1062. The laws of Kansas require operators to employ competent fire bosses to examine the mine daily and the operator is liable for injuries to miners by explosion of gas caused by failure to make the proper inspection [Kan. Laws, 1897, c. 159]. Schmalstieg v. Leavenworth Coal Co., 65 Kan. 753, 70 Pac. 888, 59 L. R. A. 707. The laws of Washington require mine owners to provide sufficient ventilation and the duty is a positive one [Ballinger's Ann. Codes & St. § 3165]. Czarecki v. Seattle & S. F. R. & N. Co., 30 Wash. 288, 70 Pac. 750.

24. Potts v. Shreveport Belt R. Co., 110 La. 1. A master is negligent who directs an employe to work in a place which he is told is unsafe as where the servant, a lineman, is directed to mount the pole of another company, the dangers of which are told him by the foreman of the latter company. Shanks v. Citizens' General Elec. Co. [Ky.] 76 S. W. 379. Where two electric companies contracted for joint use of certain poles, the duty of one of them to keep its wires properly insulated to prevent injury to employes of the other company was a duty incident to operation and nontransferable. Standard L. & P. Co. v. Munsey [Tex.] 76 S. W. 931. Where the evidence shows a combination of two electric companies and that their wires were sustained by the same poles, one of the companies was bound to exercise care to prevent injury to employes of the other. Dallas Elec. Co. v. Mitchell [Tex.] 76 S. W. 935.

25. Recovery may be had for injuries caused by failure to keep in repair cover-

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protection of operatives by requiring guards for shafting and set screws does not require protection of set screws beyond the reach of operatives and only dangerous to persons other than operatives.[26]

The duty as to light is not fulfilled by merely furnishing materials therefor.[27] There may be no recovery on the ground of poor light in the place where the injury resulted from other causes.[28]

Knowledge.—It is necessary that master should have knowledge of the defect and he is held to knowledge of defects, the existence of which he could have acquired by the exercise of ordinary care.[29] Knowledge of defects is established where it is shown that the machine was constructed by defendant.[30] Where the defect occurs in the original construction of the appliance, knowledge of master will be presumed.[31] Notice from state mine examiner to defendant's fire boss sufficient to charge defendant with notice of dangerous condition.[32]

(§ 3) *C. Methods of work, rules and regulations.*—The master has the duty of using ordinary care in his methods of work to prevent injury to the servant.[33] The rule requires observance of statutes requiring adoption of means to this end.[34] It does not require protection from accidents not to be reasonably anticipated.[35]

ings for shafts. Levy v. Grove Mills Paper Co., 80 App. Div. [N. Y.] 384. Laws imposing on the master the duty of safeguarding "all belting and gearing" does not oblige the master to guard shafting and pulleys [R. I. Gen. Laws 1896, c. 68, § 6]. Pierce v. Contrexville Mfg. Co. [R. I.] 56 Atl. 778. Boy of 16 injured by obeying order to throw a belt and by reason of machinery below being exposed he fell into same. Winters v. Boll Bros. Mfg. Co., 204 Pa. 41. Failure to provide guards for machinery as required by statute does not create a statutory liability unless such failure is contrary to the inspector's orders. Ind. Mfg. Co. v. Wells, 31 Ind. App. 460, 68 N. E. 319. Failure of master to guard his machinery as required by statute is negligence. Id.

26. Laws 1897, c. 415. Shaw v. Union Bag & Paper Co., 76 App. Div. [N. Y.] 296.

27. The duty of a master to properly light place for work was not discharged by furnishing lamps, material for new lights and a competent electrician. Devaney v. Degnon-McLean Const. Co., 79 App. Div. [N. Y.] 62.

28. A nail struck squarely on the head sprang from the place, inflicting the injury; effect would have been same if place was properly lighted. Anderson v. Forrester-Nace Box Co. [Mo. App.] 77 S. W. 486.

29. Louisville & N. R. Co. v. Roberts, 24 Ky. L. R. 1160, 70 S. W. 833; Morgan v. Mammoth Min. Co., 26 Utah, 174, 72 Pac. 688; Nashville, C. & St. L. R. Co. v. Cody, 137 Ala. 597; Mo. Malleable Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12; Roche v. Denver & R. G. R. Co. [Colo. App.] 73 Pac. 880; Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147; Herbert v. Mound City B. & S. Co., 90 Mo. App. 305; Hayzel v. Columbia R. Co., 19 App. D. C. 359; Consol. Stone Co. v. Morgan, 160 Ind. 241, 66 N. E. 696; Baltimore & O. S. W. R. Co. v. Greer, 103 Ill. App. 448. Even if a railroad siding has a defective switch but the condition of the siding is such as to make it reasonably safe to use it, an employe cannot recover for an injury caused by the escape of a car from the siding if such escape was caused by a defective brake, unless the defect was known to the employes of the company having charge of the same or could have been known to them by the exercise of reasonable care. Jones v. Seaboard Air Line R. Co. [S. C.] 45 S. E. 188. The tendency of wooden appliance to decay may be considered. Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972. A master called upon to send a servant to a third person to make repairs had a right to assume that there was no defect in appliances making it dangerous to perform the work. Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147.

30. Consol. Stone Co. v. Morgan, 160 Ind. 241, 66 N. E. 696.

31. Finnerty v. Burnham, 205 Pa. 305.

32. Riverton Coal Co. v. Shepherd, 207 Ill. 395, 69 N. E. 921.

33. Pittsburg, C., C. & St. L. R. Co. v. Hewitt, 102 Ill. App. 428. Failure of master to have a screen in front of a blast furnace is negligence authorizing a recovery by a servant injured thereby. Curtis v. McNair, 173 Mo. 270, 73 S. W. 167. Plaintiff, a manager of one of a large number of stores maintained by defendant with full charge and visited only occasionally by defendant's auditing agent, had the duty of keeping a gasoline lamp in safe condition and not the master. Langdon-Creary Co. v. Rouse, 24 Ky. L. R. 2095, 72 S. W. 1113. A superintendent ordering a servant under a wagon drawn by a span of mules was guilty of gross negligence in excusing the driver and taking no precaution to prevent their starting other than placing himself in front of them. Hugumin v. Hinds, 97 Mo. App. 346, 71 S. W. 479.

34. Hurd's Rev. St. Ill. 1901, p. 1202, requires mine owners to maintain attendants at the main doorways of mines. And there is a presumption that if maintained they would perform their duty. Himrod Coal Co. v. Stevens, 203 Ill. 115, 67 N. E. 389. A statute declaring that no person under 16 shall be allowed to clean moving machinery prevents the cleaning of parts intended to remain stationary while the parts designed to move are in motion. Brower v. Locke, 31 Ind. App. 353, 67 N. E. 1015.

35. There may be no recovery for injuries caused by a break in the insulation on a

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The master is not required to examine as to unexploded shots before renewing operation of drill but could cause the examination to be made by the operator of the drill and his helper.[36]

It is negligence for a motorman to leave his motor after turning on the current to look after a trolley off the wire.[37]

In the operation of trains care should be observed as to signals,[38] they should comply with laws regulating speed,[39] lookouts should be placed on leading car backed over crossing,[40] where cars are left uncoupled they should be secured,[41] derailing switches should be installed,[42] numerous handcars should be so operated that danger of collision may be avoided,[43] and where a train is moved in construction work its speed should not be so great as to endanger employes engaged in throwing material therefrom.[44] A brakeman will not be presumed to have been

wire recently installed whereby electricity was discharged causing injury to employe, as this was not to be anticipated. Fulton v. Grieb Rubber Co. [N. J. Law] 54 Atl. 561. A railroad laborer cannot recover for injuries from being shot by some one on a passing excursion train, there being no signs of disorder on the train or anything to indicate that such an act would be committed. Jones v. Mo., K. & T. R. Co. [Tex. Civ. App.] 73 S. W. 1090. A railroad company is not liable for injuries caused by a collision with cars that have escaped from a siding onto a main track, where they were driven thereon by a storm of unanticipated violence. Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890. It is not negligence for owners of a horse to remove the bridle and put on halter in its place and turn her over to a driver to lead her to feed box without unhitching from wagon, there being nothing in the surroundings to frighten the mare. Fifer v. Burch [Neb.] 94 N. W. 107.

36. Livengood v. Joplin-Galena Consol. L. & Z. Co. [Mo.] 77 S. W. 1077.

37. Sams v. St. Louis & M. R. Co., 174 Mo. 53, 73 S. W. 686.

38. A switch engine should give warning when backed over crossing used by employes. Chicago, I. & L. R. Co. v. Cunningham [Ind. App.] 69 N. E. 304. It is the duty of railroad company to use ordinary and reasonable care to cause operative to be notified of the approach of trains to prevent collisions. Northern Pac. R. Co. v. Mix, 121 Fed. 476. An engineer is negligent in not signaling before backing a train. Gulf, C. & S. F. R. Co. v. Cooper [Tex. Civ. App.] 77 S. W. 263. A brakeman engaged in coupling and uncoupling cars had a right to assume that engine would not be moved without a signal. Galveston, H. & S. A. R. Co. v. Courtney, 30 Tex. Civ. App. 544, 71 S. W. 307. Stopping a train without signal from the engine as required by rules justified jury in finding that act the proximate cause of a collision between parts of a broken train. San Antonio & A. P. R. Co. v. Ankerson [Tex. Civ. App.] 72 S. W. 219. Where a brakeman was injured by the backing of cars without signal from the engine, it is not important that the engineer did not know that brakeman was between the cars. Galveston, H. & S. A. R. Co. v. Courtney, 30 Tex. Civ. App. 544, 71 S. W. 307. The engineer of a switch engine backing a train without signal is guilty of negligence. Black v. Mo. Pac. R. Co., 172 Mo. 177, 72 S. W. 559. It is the duty of an engineer to ring bell and exercise ordinary care to avoid injury to servants of the company employed on track. Smith v. Atlanta & C. A. L. R. Co., 132 N. C. 819. Usage of employes of different railway companies using the same road as to signals, when approaching the intersection, makes a new rule as to operation of trains. Southern Ind. R. Co. v. Davis [Ind. App.] 68 N. E. 191. Where a conductor who was in a position to see a brakeman at work between cars on a siding did not attempt to stop another train from backing on the siding or warn the brakeman of his danger, he was guilty of negligence. Southern R. Co. v. Otis, Adm'r [Ky.] 78 S. W. 480. The backing of a freight train upon a siding against cars standing there without warning by whistle is negligence as to a brakeman between such cars. Id.

39. Mo., K. & T. R. Co. v. Goss [Tex. Civ. App.] 72 S. W. 94; Smith v. Atlanta & C. A. L. R. Co., 132 N. C. 819.

40. A rule requiring a lookout on the leading car over a crossing or a flagman at the crossing is not complied with by the presence of a brakeman at a crossing to signal the engineer and to couple and uncouple cars, he being presumably engrossed with these duties. Mo., K. & T. R. Co. v. Jones [Tex. Civ. App.] 75 S. W. 53.

41. It was negligence to leave a train uncoupled from the engine on a down grade secured only by air brakes, they not being able to hold a train in that position more than five minutes. Cincinnati, N. O. & T. P. R. Co. v. Maley's Adm'r [Ky.] 76 S. W. 334.

42. Cooper v. N. Y., O. & W. R. Co., 84 App. Div. [N. Y.] 42. The fact that there was no derailing switch does not show negligence per se in an action for injuries caused by collision with escaped cars. Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890.

43. Middlesborough R. Co. v. Stallard's Adm'r, 24 Ky. L. R. 1666, 72 S. W. 17.

44. A railroad company is liable to a trackman for injuries caused by negligently throwing material from a construction train, though the contract for construction provided that the company should not be liable for accidents which might occur on the material cars, the train being operated by servants of the company who participated in the act by running the train at an excessive rate of speed. St. Louis & S. W. R. Co. v. Arnold [Tex. Civ. App.] 74 S. W. 819.

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thrown off his guard by absence of telltales where it is not averred that he knew of the use of such means of warning.[45]

Customary methods.—Ordinarily the master will be held to have performed his duties by the use of methods in use by others in the same business.[46] Fact of custom will not excuse the performance of an act negligent in itself.[47] Plaintiff to be bound by a custom must have knowledge of its existence.[48]

Rules.—Where employes are numerous and their safety depends on performance of duties at stated times and in a given manner, it is the duty of the master to promulgate proper rules for their guidance.[49] Before liability for failure to promulgate rules, it must be shown that rules are practicable and required.[50] Where those issued are sufficient, he is not required to adopt others.[51] Rules are not required where the duties are simple or the appliances easily understood.[52] The master is not required to promulgate rules to cover unforeseen contingencies.[53] Rules should be explicit,[54] and reasonable.[55] The master will be held to knowledge of general violation of rules.[56] A railroad conductor may not be charged with the violation of a rule where he is running his train under an order authorizing him to ignore the rule.[57] The fact that there is a general violation of orders by employes for whose government it was promulgated may not be invoked by one in another line of employment.[58] Rules will be reasonably construed.[59] The violation of the

45. Hollingsworth v. Chicago, I. & L. R. Co., 160 Ind. 259, 65 N. E. 750.

46. Kane v. Falk Co., 93 Mo. App. 209; Gulf, C. & S. F. R. Co. v. Hill, 29 Tex. Civ. App. 12, 70 S. W. 103; La Barre v. Grand Trunk Western R. Co [Mich.] 94 N. W. 735; Keck v. American Tel. & Tel. Co., 131 N. C. 277. The practice of making a flying switch, being a common method, is not of itself negligence. Carr v. St. Clair Tunnel Co. [Mich.] 92 N. W. 110. Shifting cars by "kicking back" is not negligence per se. Fla. Cent. & P. R. Co. v. Mooney [Fla.] 33 So. 1010.

47. Braaflat v. Minneapolis & N. El. Co. [Minn.] 96 N. W. 920. Whether a train was handled with ordinary care and not whether handled in the usual and ordinary way is the test to determine liability for injuries to a brakeman on the roof of an icy car caused by sudden bump of train. Tex. & P. R. Co. v. Behymer, 189 U. S. 468, 47 Law. Ed. 905.

48. Galveston, H. & S. A. R. Co. v. Pendleton. 30 Tex. Civ. App. 431, 70 S. W. 996.

49. Boyle v. Union Pac. R. Co., 25 Utah, 420, 71 Pac. 988; Wright's Adm'r v. Southern R. Co. [Va.] 42 S. E. 913. In the absence of rules as to the use of racks for lumber, in case of the overloading of a rack by order of a foreman, the negligence will be that of the master. Corbett v. American Screen Door Co. [Mich.] 95 N. W. 737. A card furnished by a railroad company to its engineers and containing a column headed "minimum time freight trains between stations," but relative to which there is no rule making it an engineer's duty to regard this minimum time does not bind the engineer or his representatives. Cent. of Ga. R. Co. v. Vining, 116 Ga. 284. Failure to provide rule for notice before moving cars on warehouse track held negligence. Bain v. Northern Pac. R. Co. [Wis.] 98 N. W. 241.

50. Kapella v. Nichols Chemical Co., 83 App. Div. [N. Y.] 45.

51. Merchants' & P. Oil Co. v. Burns, 96 Tex. 573, 74 S. W. 758; Shannon v. N. Y. Cent. & H. R. R. Co., 84 N. Y. Supp. 646. Rules requiring a conductor on the rear platform and signals before backing electric cars are sufficient without other rules where no additional rules of other lines are shown. Seccombe v. Detroit Elec. R. [Mich.] 94 N. W. 747.

52. The business of unloading logs from flat cars is not so hazardous as to require master to formulate rules governing conduct of employes. Boyer v. Eastern R. Co., 87 Minn. 367, 92 N. W. 326. Rules are not required for the government of employes operating appliances easily understood and used for a great variety of purposes. Derrick. Wagner v. N. Y., C. & St. L. R. Co., 76 App. Div. [N. Y.] 552.

53. Murphy v. Milliken, 84 App. Div. [N. Y.] 582; Gila Valley, G. & N. R. Co. v. Lyon [Ariz.] 71 Pac. 957.

54. Notice of non-clearing points on side of track should specify all locations. Notice construed to apply to other points than place of injury. Bradburn v. Wabash R. Co. [Mich.] 96 N. W. 929.

55. A rule requiring use of stick in making couplings does not apply where it would be impossible to make the coupling in that way by reason of the weight and length of the coupling. Fleming v. Southern R. Co., 131 N. C. 476. Rules requiring brakeman to inspect steps on cars and that conductors see that this duty is performed are reasonable and not opposed to public policy. Scott v. Eastern R. Co. [Minn.] 95 N. W. 892.

56. Clark v. Manhattan R. Co., 77 App. Div. [N. Y.] 284. Failure to observe rule as to inspection of engine generally disregarded is not negligence between engineer and company. Galveston, H. & S. A. R. Co. v. Collins [Tex. Civ. App.] 71 S. W. 560.

57. Boyle v. Union Pac. R. Co., 25 Utah, 420, 71 Pac. 988.

58. St. Louis S. W. R. Co. v. Spivey [Tex.] 76 S. W. 748.

59. Scott v. Eastern R. Co. [Minn.] 95 N. W. 892. The fact that one injured by a handcar collision was riding to dinner in

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rule must be the proximate cause of the injury.[60] A violation of rules governing train dispatcher is prima facie evidence of negligence.[61]

(§ 3) *D. Warning and instructing servant.*—The master has the duty of warning and instructing employes as to the dangers of the employment,[62] of which the master has knowledge or ought to have knowledge.[63] It is not required where the employe is experienced,[64] or the danger is obvious.[65] It is particularly required in the case of inexperienced or youthful employes.[66] The instruction must be suffi-

violation of a rule requiring section hands to carry their dinner will not defeat a recovery, the object of the rule not being based on grounds of safety of the employe but to prevent loss of time from work. McGinn v. McCormick, 109 La. 396.

60. A rule that a brakeman should never place himself in a dangerous position unless he knows that the engineer has seen and obeyed his signal is not violated where the engine was stopped in response to the brakeman's signal and the injury was caused by backing the train without the engineer first signalling. Gulf, etc., R. Co. v. Cooper [Tex. Civ. App.] 77 S. W. 263.

61. Northern Pac. R. Co. v. Mix [C. C. A.] 121 Fed. 476.

62. Brower v. Timreck, 66 Kan. 770, 71 Pac. 581; United Laundry Co. v. Steele, 24 Ky. L. R. 1899, 72 S. W. 805; Illinois Steel Co. v. Ryska, 102 Ill. App. 347; McDonnell v. Central of Georgia R. Co., 118 Ga. 86; Taylor v. Bradford [Miss.] 35 So. 423; Evans v. La. Lumber Co. [La.] 35 So. 736; Borgerson v. Cook Stone Co. [Minn.] 97 N. W. 734; Northern Pac. R. Co. v. Tynan [C. C. A.] 119 Fed. 288; Momence Stone Co. v. Turrell, 205 Ill. 515, 68 N. E. 1078. A master setting an employe to work with a machine with which he is unfamiliar and there is a safe and an unsafe method of operation, it is his duty to instruct as to the safe method. Wright v. Stanley [C. C. A.] 119 Fed. 330. A railroad company should warn switchmen of the dangers of lumber piles close to the tracks in yards where switching is done. Bradburn v. Wabash R. Co. [Mich.] 96 N. W. 929. It is the duty of employer to notify tunnel driver of the location of unexploded blasts. McMillan v. North Star Min. Co., 32 Wash. 579, 73 Pac. 685. The master must use ordinary care in instructing servant as to the use of the materials furnished. Gallman v. Union Hardwood Mfg. Co., 65 S. C. 192. It is the duty of the master to give timely warning of blasts. Orman v. Salvo [C. C. A.] 117 Fed. 233.

63. Evans Laundry Co. v. Crawford [Neb.] 93 N. W. 177; Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147. The master is not required to warn of dangers of which he has no knowledge or reason to suspect. Wilson v. Northern Pac. R. Co., 31 Wash. 67, 71 Pac. 713. An employer is not required to warn against dangers of which he is ignorant and where he had been advised of safety by competent persons. Electrical shock. Aga v. Harbach [Iowa] 93 N. W. 601. It is the duty of the master to give notice of latent defects of which he has knowledge. Pittsburg, etc., R. Co. v. Hewitt, 102 Ill. App. 428. The employer of an electric lineman is negligent in failing to notify the lineman of the fact that wires were improperly placed and current turned on. General Elec. Co. v. Murray [Tex. Civ. App.] 74 S. W. 50. knowledge of assistant foreman that a machine was liable to fall held not imputable. Bauer v. American Car & F. Co. [Mich.] 94 N. W. 9.

64. Berlin v. Mershon [Mich.] 93 N. W. 248; Conner v. Draper Co., 182 Mass. 184, 65 N. E. 39; Hettich v. Hillje [Tex. Civ. App.] 77 S. W. 641; Saucier v. N. H. Spinning Mills [N. H.] 56 Atl. 545. Miner as to the dangers from an unsupported roof. Kansas & T. Coal Co. v. Chandler [Ark.] 77 S. W. 912. Section foreman of 17 years' experience—unusual weight of push car assigned him. Seery v. Gulf, etc., R. Co. [Tex.] 77 S. W. 950. Helper of drill operator for explosives as to dangers from unexploded shots. Livengood v. Joplin-Galena Consolidated Lead & Zinc Co. [Mo.] 77 S. W. 1077. One operating a machine that starts as soon as it releases a log is not entitled to notice of the time of starting where he knows of such fact by reason of long experience. Olsen v. North Pac. Lumber Co. [C. C. A.] 119 Fed. 77. Where it is part of an employe's duty to remove defective appliances, it is not the employer's duty to inform him as to which are unsafe to work upon. Kellogg v. Denver City Tramway Co. [Colo. App.] 72 Pac. 609.

65. Arkland v. Taber-Prang Art Co. [Mass.] 68 N. E. 219; Herbert v. Mound City Boot & Shoe Co., 90 Mo. App. 305; Kiser v. Hot Springs Barytes Co., 131 N. C. 595; Chmiel v. Thorndike Co., 182 Mass. 112, 65 N. E. 47; Simone v. Kirk, 173 N. Y. 7, 65 N. E. 739; Harrington v. Union Cotton Mfg. Co., 182 Mass. 566, 66 N. E. 414; Buston v. Harvard Brewing Co., 183 Mass. 438, 67 N. E. 356; Paoline v. Bishop [R. I.] 55 Atl. 752; Brundige v. Dodge Mfg. Co., 183 Mass. 100, 66 N. E. 604. Mangle in laundry. Gaudet v. Stansfield, 182 Mass. 451, 65 N. E. 850. Miner wandering from path in mine, the employer furnishing employes with a guide. Smith v. Thomas Iron Co. [N. J. Law] 54 Atl. 562. Danger that a machine will fall if negligently operated need not be called to servant's attention. Bauer v. American Car & F. Co. [Mich.] 94 N. W. 9.

66. Vinson v. Morning News, 118 Ga. 655; Ala. Steel & Wire Co. v. Wrenn, 136 Ala. 475; Marcus v. Loane, 133 N. C. 54; Franklin v. Mo. K. & T. R. Co., 97 Mo. App. 473, 71 S. W. 540; Pittsburg, etc., R. Co. v. Hewitt, 102 Ill. App. 428; Evans Laundry Co. v. Crawford [Neb.] 93 N. W. 177; Patterson v. Cole [Kan.] 73 Pac. 54; Ittner Brick Co. v. Killian [Neb.] 93 N. W. 951; Karczewski v. Wilmington City R. Co. [Del.] 54 Atl. 746; Doyle v. Pittsburg Waste Co., 204 Pa. 618; Yentsch v. Chloride of Silver Dry Cell Battery Co., 96 Md. 679. The duty of warning is particularly imperative in the case of children employed around dangerous machinery. Fitzgerald v. Alma Furniture Co., 131 N. C. 636. A boy set to work with a vicious horse whose vi-

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cient.[67] It is not necessary to warn as to matters not hazardous,[68] nor as to unanticipated dangers,[69] nor as to dangers of negligence of fellow-servant.[70] Master should warn as to dangers from striking employes where the master has knowledge of such danger and the servant has no such knowledge.[71] The failure to warn or instruct must be the proximate cause of the injury to sustain a recovery on that ground.[72]

(§ 3) *E. Fellow-Servants.*—The doctrine that there may be no recovery for injuries caused by the negligence of a fellow-servant,[73] the master having performed his duty as to appliances and places for work,[74] is a common-law doctrine,[75] and, in the absence of evidence, is presumed to obtain in a sister state.[76] Where there is no statutory rule determining the matter, Federal courts will determine whether parties are fellow-servants by the general rule without regard to where contract of employment was made.[77] In an action for death of a servant in Canada, the fellow-servant law of that country will be recognized in an action in this country.[78] The

clousness on former occasions is known to the master should be informed of the dangers. Carena v. Zanmatti, 82 App. Div. [N. Y.] 11. In an action for injuries, it may be shown that the brother of the injured servant notified the superintendent of his inexperience as showing knowledge. Ala. Steel & Wire Co. v. Wrenn, 136 Ala. 475. A railroad company is not required to warn a call boy of the dangers of riding on the side of freight cars in the yards, his duties not requiring him to ride on such cars. St. Louis S. W. R. Co. v. Spivey [Tex.] 76 S. W. 748. It is the duty of a corporation when it employs inexperienced men and places them in dangerous positions directly under others having the direction and control of dangerous appliances to give the latter notice of the fact of such inexperience and caution them as to the necessity of exercising special caution towards assuring their safety. Evans v. La. Lumber Co. [La.] 35 So. 736.

67. The notice of the condition and situation of a burned bridge is sufficient which gives its number and location between certain mile posts. St. Louis, etc., R. Co. v. Mize [Ark.] 71 S. W. 660. Telling servant to be careful in loading dynamite sufficiently warns him not to load into holes too small. Kopf v. Monroe Stone Co. [Mich.] 95 N. W. 72.

68. Parish v. Mo., K. & T. R. Co. [Tex.] 76 S. W. 234.

69. Gay's Adm'r v. Southern R. Co. [Va.] 44 S. E. 707.

70. Klos v. Hudson River Ore & Iron Co., 77 App. Div. [N. Y.] 566.

71. Holshouser v. Denver Gas & Elec. Co. [Colo. App.] 72 Pac. 289.

72. Clark v. Mo., K. & T. R. Co. [Mo.] 77 S. W. 882; Fronk v. Evans City Steam Laundry [Neb.] 96 N. W. 1053. The omission of a vice-principal of a mining company examining a place for work after a fire to warn men of dangers or remedy the defect is the proximate cause of a collapse injuring one working in the place. Baumann v. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139. There may be no recovery for injuries on the ground of a want of instruction as to the dangers of operating a machine, where the injury was caused by other machinery than that on which he was employed. Injury in elevator. Baldwin v. Urner, 206 Pa. 459.

73. Western R. v. Arnett, 137 Ala. 414; Richardson v. Mesker, 171 Mo. 666, 72 S. W. 506; Rosemand v. Southern R., 66 S. C. 91, 44 S. E. 574; Krintzman v. Interurban St. R. Co., 84 N. Y. Supp. 243; Miniter v. Chicago & N. W. R. Co. [Iowa] 96 N. W. 1103; Cedartown Cotton Co. v. Hanson, 118 Ga. 176; Miller v. McKeesport Connecting R. Co., 205 Pa. 60, 54 Atl. 496; Norman v. Middlesex & S. Traction Co., 68 N. J. Law, 728; McQueeney v. Norcross, 75 Conn. 381; Hale v. Kan. City Southern R. Co., 120 Fed. 735; The Troy, 121 Fed. 901; Fay v. Wilmarth, 182 Mass. 71, 66 N. E. 410; Nordquist v. Fuller, 182 Mass. 411, 65 N. E. 834; Ahern v. Hildreth, 183 Mass. 296, 67 N. E. 328; Carr v. Shields, 125 Fed. 827; Ralph v. American Bridge Co., 30 Wash. 500, 70 Pac. 1098; Norman v. Middlesex & S. Traction Co., 68 N. J. Law, 728; Ennis v. Little [R. I.] 55 Atl. 884. Allowing hammer to fall in ore carrier and thence carried into crusher causing injury. Mollique v. Iowa Gold Min. & Mill. Co. [Colo. App.] 71 Pac. 427.

74. Peet v. Remington & Son Pulp & Paper Co., 86 App. Div. [N. Y.] 101; Miniter v. Chicago & N. W. R. Co. [Iowa] 96 N. W. 1103; Gittens v. William Porten Co. [Minn.] 97 N. W. 378; Enright v. Oliver [N. J. Err. & App.] 55 Atl. 277; Morrison v. Whittier Mach. Co. [Mass.] 67 N. E. 646; Thompson v. Worcester [Mass.] 68 N. E. 333; Robinson v. Taku Fishing Co., 42 Or. 527, 71 Pac. 790; Lenderink v. Rockford [Mich.] 98 N. W. 4; Walters v. George A. Fuller Co., 82 App. Div. [N. Y.] 254. The duty as to supervision does not require protection from negligence and carelessness of fellow servants. Dixon v. Union Iron Works [Minn.] 97 N. W. 375. An employer is not required to inspect the daily adjustment of machinery in his plant and is not liable for an insufficient adjustment made by a fellow workman. South Baltimore Car Works v. Schaefer, 96 Md. 88. Fellow servant selected weak and unsuitable rope instead of a proper one which had been furnished by master. Amburg v. International Paper Co., 97 Me. 327.

75. Rosemand v. Southern R., 66 S. C. 91, 44 S. E. 574.

76. Rosemand v. Southern R., 66 S. C. 91, 44 S. E. 574.

77. Pa. Co. v. Fishack [C. C. A.] 123 Fed. 465.

78. Rick v. Saginaw Bay Towing Co. [Mich.] 93 N. W. 632.

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negligence of fellow-servants is one of the risks of the employment assumed by the servant.[79] Gross negligence of a fellow-servant will authorize a recovery in Kentucky.[80] A master is not liable for acts of a superintendent not within the line of his duties.[81] The doctrine may not be invoked as against one not in the master's employ at the time of the injury.[82]

Employer's liability acts and constitutional provisions in some of the states have abrogated the doctrine in its application to certain employments. Cases construing such provisions are collected in the footnote.[83]

79. McDonald v. Standard Oil Co. [N. J. Err. & App.] 55 Atl. 289; Cooper v. N. Y., O. & W. R. Co., 84 App. Div. [N. Y.] 42; Dishon v. Cincinnati, N. O. & T. P. R. Co., 126 Fed. 194; Southern Ind. R. Co. v. Harrell [Ind.] 68 N. E. 262; Bunker Hill & S. M. & C. Co. v. Kettleson, 121 Fed. 529; Bauer v. American Car & Foundry Co. [Mich.] 94 N. W. 9. Instruction criticised for use of term "occasional" carelessness of fellow servant. Cumberland T. & T. Co. v. Ware's Adm'x, 24 Ky. L. R. 2519, 74 S. W. 289.

Contra, the carelessness of a fellow servant is not a risk incident to the employment of operating a railroad and is not assumed [Rev. St. Mo. 1899, § 2873]. Thompson v. Chappell, 91 Mo. App. 297. Stevedores unloading a vessel into a lighter were not charged with notice of the careless way their employes were doing the work by the fact that one injured had spoken to one of the employes not in charge as to the matter. Thornton v. Hogan, 82 App. Div. [N. Y.] 500.

80. Board v. Chesapeake & O. R. Co., 24 Ky. L. R. 1079, 70 S. W. 625. In Kentucky, there can be no recovery for injuries resulting from the negligence of a superior in service unless the negligence shown is gross. Kentucky Distilleries & Warehouse Co. v. Schreiber, 24 Ky. L. R. 2236, 73 S. W. 769. Gross negligence of foreman to direct a workman to let fall a heavy timber without warning workmen below. Board v. Chesapeake & O. R. Co., 24 Ky. L. R. 1079, 70 S. W. 625.

81. Tickling an employe engaged in cleaning a dangerous machine. Western R. v. Milligan, 135 Ala. 205. The act of a foreman of a switching crew in placing a torpedo on the track as a prank is not within the line of his duties so as to make the company liable. Sullivan v. Louisville & N. R. Co., 24 Ky. L. R. 2344, 74 S. W. 171.

82. Simone v. Kirk, 173 N. Y. 7, 65 N. E. 739. Servant of contractor engaged by engineer of subcontractor. Longa v. Stanley Hod El. Co. [N. J. Law] 54 Atl. 251. The rule denying the master's liability for an injury by a fellow servant has no application to one who has left the scene of his labors and was engaged in his own pursuits. Louisville & N. R. Co. v. Wade [Fla.] 35 So. 863.

83. Alabama: A fireman is not a person in charge or control of a locomotive within the Alabama act, though in the cab and directed by the engineer to perform an act which he mistakes for a command to move the locomotive. Louisville & N. R. Co. v. Goss, 137 Ala. 319. Negligence of another servant having charge of "any part of the track of railroad" does not require that the track should be complete and in the charge of a section foreman, and includes track under the charge of a construction foreman. Southern R. Co. v. Howell, 135 Ala. 629.

Florida: The term "employe," in statute making a railroad company liable for injuries caused one employe by the negligence of another means such an employe as would be a fellow servant. Louisville & N. R. Co. v. Wade [Fla.] 35 So. 863.

Georgia: A chartered street railroad is a railroad company within statutes making company liable for injuries through negligence of fellow servant [Civ. Code Ga. 1895, §§ 2297, 2323.] Savannah, T. & I. of H. R. v. Williams, 117 Ga. 414.

Indiana: Under the Indiana employer's liability act, an employe of a corporation may not recover for injury resulting from negligence of a superior servant unless injured while obeying the special order of such superior in reference to particular work as distinguished from general instructions. Indiana Mfg. Co. v. Buskirk [Ind. App.] 69 N. E. 925. Applicable to railroads in process of construction. Southern Ind. R. Co. v. Harrell [Ind. App.] 66 N. E. 1016. A machine moved by its own steam along a railroad track operating a piledriver is a locomotive within the Indiana law making a corporation liable for injuries to employes caused by a person in charge of a locomotive [Burns' Rev. St. 1901, § 7083]. Jarvis v. Hitch [Ind.] 65 N. E. 608; Id., 67 N. E. 1057. Burns' Rev. St. 1901, § 7083, making railroad companies liable for injuries by the negligence of an employe in charge of a signal, switchyard, shop, roundhouse, train, etc., does not apply to an employe in charge of a switch. Indianapolis & G. R. T. Co. v. Foreman [Ind.] 69 N. E. 669. Burns' Rev. St. 1901, § 7083, making railroad companies liable for injuries to an employe by negligence of one under whose orders he was, requires that the negligent employe be authorized to give such orders. Id.

Iowa: The Iowa law allowing recovery for negligence of railway agents and servants when connected with the use and operation of a railroad is not limited to employment connected with movement of trains, but allows recovery by an employe engaged in railroad work exposing him to hazard from the operation of a railroad. Employe unloading rails from a repair train. Williams v. Iowa Cent. R. Co. [Iowa] 96 N. W. 774. The Iowa employer's liability act applicable to the operation of railways does not apply to injuries received by a servant in the reconstruction of an abandoned railway track [Code Iowa, 1897, § 2071]. Mitchell v. Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647.

Massachusetts: Act only applies where the employe is in the exercise of due care and diligence at the time. Sievers v. Eyre, 122 Fed. 734. A yard master is in control of a train as to an inspector under the Massachusetts employer's liability act. Brady v. New York, etc., R. Co. [Mass.] 68 N. E. 227

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The positive duty of the master to furnish a reasonably safe place to work,[84] and to instruct the servant as to dangers of the employment,[85] cannot be delegated,

Minnesota: Injury to one working near warehouse spur track by movement of cars thereon held from risk peculiar to operation of railroad. Gen. St. Minn. 1894, § 2701. Bain v. Northern Pac. R. Co. [Wis.] 98 N. W. 241.

Mississippi: The Mississippi constitutional provision limiting the application of the fellow-servant doctrine to railroads does not apply to actions founded on the negligence of the master in failing to furnish a safe way. Gulf & S. I. R. Co. v. Bussy [Miss.] 35 So. 166. The Mississippi employer's liability act applicable to employes of corporations annulling the fellow-servant doctrine and doctrine of assumption of risk is unconstitutional, as imposing burdens on corporations without reference to differences arising out of the nature of the business, not imposed on natural persons and denies to all the corporations the equal protection of the laws [Laws 1898, p. 85, c. 66]. Ballard v. Miss. Cotton Oil Co., 81 Miss. 507. A declaration is sufficient under the Mississippi provision which avers that the injuries to a fireman were caused by the negligence of the engineer, his superior officer, who had the right to control his services. Cheaves v. Southern R. Co. [Miss.] 34 So. 385. A fireman may recover for injuries caused by the engineer's negligence under a constitutional provision allowing recovery by employe as though not an employe, where the injury results from the negligence of one having a right to control the services of the injured person [Const. Miss. § 193]. Id. 33 So. 649.

Missouri: Rev. St. Mo. 1899, § 2873, displacing the fellow-servant doctrine as to railroads, applies to all persons whose work is directly necessary to the running of trains, and includes section hands. Callahan v. St. Louis Merchants' Bridge Terminal R. Co., 170 Mo. 473, 71 S. W. 208, 60 L. R. A. 249; Thompson v. Chappell, 91 Mo. App. 297; Rice v. Wabash R. Co., 92 Mo. App. 35; Callahan v. St. Louis Merchants' Bridge Ter. R. Co., 170 Mo. 473, 71 S. W. 208. It is not unconstitutional as subjecting railroads to liability to their employes not imposed on others under similar conditions. A corporation to which the fellow-servant act is not applicable is not made subject to the fact that it is authorized to own and operate steam railroads. Sams v. St. Louis & M. R. Co., 174 Mo. 53, 73 S. W. 686. It does not include street railroads [Rev. St. Mo. 1899, § 2873]. Sams v. St. Louis & M. R. Co., 174 Mo. 53, 73 S. W. 686; Johnson v. Metropolitan St. R. Co. [Mo. App.] 78 S. W. 275.

New York: Under the New York employer's liability act giving an action for servant's injuries resulting from negligence of one intrusted with superintendence where the servant is exercising due care, absence of contributory negligence must be shown [Laws 1902, p. 1748, c. 600, § 1, subd. 2]. McHugh v. Manhattan R. Co., 88 App. Div. [N. Y.] 554; Sievers v. Eyre, 122 Fed. 734. Under the employers' liability act of New York, making employer liable for acts of one engaged in superintendence, the employer is liable for an injury caused by the fall of a derrick occasioned by the superintendent's neglect to guy same after his attention had been called to the matter and the master had furnished the ropes therefor. Bellegarde v. Union Bag & Paper Co., 90 App. Div. [N. Y.] 577. The employer's liability act of New York, securing to an injured employe the same remedies for injuries given a stranger where the injuries were caused by the negligence of a superintendent or acting superintendent, merely prevents the superintendent's negligence from being imputed to the employe, and hence an employe rightfully on employer's premises is not to be regarded as a trespasser. Bellegarde v. Union Bag & Paper Co., 41 Misc. [N. Y.] 106.

North Carolina. The North Carolina act allowing recovery by any servant or employe for injuries from defective machinery embraces all servants and is not limited to those engaged in running trains [Priv. Laws 1897, c. 56]. Mott v. Southern R. Co., 131 N. C. 234.

Ohio. Under the laws of Ohio an engineer is the constructive superior of a fireman in a different branch of the service [87 Ohio Laws, p. 1503]. Erie R. Co. v. Kane [C. C. A.] 118 Fed. 223. Under laws that every person in the employ of a railroad company having charge or control of employes in any separate department who have no power to direct or control the branch in which they are employed, two switch crews handling different trains in the same yard are in different departments. Id.

South Carolina. The South Carolina constitutional provision displacing the common-law doctrine of fellow-servants confers a right but does not create a presumption or rule of evidence. Land v. Southern R. [S. C.] 45 S. E. 203.

Texas. The Texas act defining the term fellow-servants in relation to railroad and street railroad companies does not contain a plurality of subjects. Mexican Nat. R. Co. v. Jackson [C. C. A.] 118 Fed. 549. In Texas, a servant of a railroad does not assume the risk of injury through the negligence of a fellow-servant. Tex. & P. R. Co. v. Putnam [C. C. A.] 120 Fed. 754. The foreman of a bridge gang in his duty to see that the track is clear is a vice-principal under the Texas employer's liability act [Sayles' Tex. Civ. St. 1897, art. 4560g]. Tex. & P. R. Co. v. Carlin, 189 U. S. 354, 47 Law. Ed. 849. A push car is a "car" within the Texas employers' liability act annulling the fellow-servant doctrine in its application to servants engaged in the operation of cars, locomotives, etc. [Rev. St. Tex. art. 4560f. Statute to be liberally construed]. Tex. & P. R. Co. v. Webb [Tex. Civ. App.] 72 S. W. 1044. Employes transporting ballast on a push car are "operating a car" within the Texas employers' liability act, making companies liable for injuries to a servant operating a car through the negligence of any other servant [Sayles' Ann. Civ. St. 1897, art. 4560f]. Seery v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 77 S. W. 950. The Texas employers' liability act applicable to servants engaged in operating locomotives or trains covers employes operating locomotives in railroad yards or around coal chutes. Gulf, C. & S. F. R. Co. v. Howard [Tex. Civ. App.] 96 Tex. 582. Employes taking rails from cars and laying them on ties ready for spikers

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and any servant charged therewith is a vice-principal.[86] The master is required to exercise ordinary care in the selection of competent servants,[87] and he may not delegate this duty so as to avoid liability for failure to exercise such care.[88] The master is liable where he retains a servant with knowledge of his unfitness or if he could have known of it by the exercise of ordinary care,[89] and this knowledge must be proved by plaintiff.[90] A single casual act of neglect by an employe does not make such a case of incompetency that knowledge thereof by the employer will render him liable for negligence in his retention.[91] Servants must be in sufficient numbers for the work in hand.[92] It must be shown that inadequacy of force employed caused injury.[93]

Determination of relation.—Where the master delegates the performance of duties which he is personally bound to perform to agents, they are regarded as vice-principals, and where entrusted with these duties are not fellow-servants, and the master is responsible for their negligence.[94] This includes persons in control of

are not operating a car under the Texas employers' liability act. Lakey v. Tex. & P. Co. [Tex. Civ. App.] 75 S. W. 566. A street railway is not within the provisions of the fellow-servant statute applicable to railroads, whereby the master of the common servants is made answerable for their negligence to each other. Johnson v. Metropolitan St. R. Co. [Mo. App.] 78 S. W. 275. Circumstances disclosed in the case held sufficient to show that defendant was a street railway company and not liable under the fellow-servant statute applicable to railroads. Id.

84. See ante, § 3 B.

85. See ante, § 3 D.

86. Simone v. Kirk, 173 N. Y. 7, 65 N. E. 739; Robinson v. Taku Fishing Co., 42 Or. 537, 71 Pac. 790; English v. Amidon [N. H.] 56 Atl. 548; Clay City Lumber & Stave Co. v. Noe [Ky.] 76 S. W. 195; Good Eye Min. Co. v. Robinson [Kan.] 73 Pac. 102.

87. Ill. Cent. R. Co. v. Smiesni, 104 Ill. App. 194; Metropolitan West Side El. R. Co. v. Fortin, 203 Ill. 454, 67 N. E. 977; Amburg v. International Paper Co., 97 Me. 327; State v. Chesapeake Beach R. Co. [Md.] 56 Atl. 385; Evans v. La. Lumber Co. [La.] 35 So. 736; Southern Pac. Co. v. Huntsman [C. C. A.] 118 Fed. 412. Charitable institution. Corbett v. St. Vincent's Industrial School, 79 App. Div. [N. Y.] 334. Employment of physician. Big Stone Gap Iron Co. v. Ketron [Va.] 45 S. E. 740; Haggerty v. St. Louis, K. & N. W. R. Co., 100 Mo. App. 424, 74 S. W. 456. A master is not liable for negligence of a mere foreman unless negligent in employing one who is incompetent or negligent. Southern Ind. R. Co. v. Martin, 16 Ind. 280, 66 N. E. 886. Evidence of incompetency of a fellow-servant held insufficient to go to the jury. Ging v. Miller [Pa.] 56 Atl. 1008.

88. Evans v. La. Lumber Co. [La.] 35 So. 736.

89. Gila Valley, G. & N. R. Co. v. Lyon [Ariz.] 71 Pac. 957; Enright v. Oliver [N. J. Err. & App.] 55 Atl. 277; Harris v. Balfour Quarry Co., 131 N. C. 553. Incompetency of a conductor of slight stature within the master's knowledge is not shown where there have been no complaints to the master. Seccombe v. Detroit Elec. R. [Mich.] 94 N. W. 147; Tex. & N. O. R. Co. v. Lee [Tex. Civ. App.] 74 S. W. 345.

90. Big Stone Gap Iron Co. v. Ketron [Va.] 45 S. E. 740; W. R. Trigg Co. v. Lindsay [Va.] 43 S. E. 349.

91. Wicklund v. Saylor Coal Co., 119 Iowa, 335, 93 N. W. 305.

92. Pa. Co. v. Fishack [C. C. A.] 123 Fed. 465; Bodie v. Charleston & W. C. R. Co., 66 S. C. 302, 44 S. E. 943; Peterson v. American Grass Twine Co. [Minn.] 96 N. W. 913; Ill. Cent. R. Co. v. Langan [Ky.] 76 S. W. 32. It was negligence to direct one man to lower a large timber into a trench occupied by workmen, where at least two men were required to properly handle the timber. Chesapeake & O. R. Co. v. Board [Ky.] 77 S. W. 189.

93. Strained back of employe received in loading street rails. Haviland v. Kan. City, P. & G. R. Co., 172 Mo. 106, 72 S. W. 515.

94. Hoelter v. McDonald, 82 App. Div. [N. Y.] 423; Evans v. La. Lumber Co. [La.] 35 So. 736; Parkhurst v. Swift, 31 Ind. App. 521, 68 N. E. 620; St. Louis & S. F. R. Co. v. Skaggs [Tex. Civ. App.] 74 S. W. 783. Safe place for work and suitable appliance. Roche v. Denver & R. G. R. Co. [Colo. App.] 73 Pac. 880. Defective appliance. Franklin v. Mo., K. & T. R. Co., 97 Mo. App. 473, 71 S. W. 540; Orr v. Southern Bell Tel. & Tel. Co., 132 N. C. 691. Inspection. Hopwood v. Benjamin A. & I. Co., 68 N. J. Law, 707; Smith v. N. Y., C. & St. L. R. Co., 86 App. Div. [N. Y.] 188. Safe place for work. Bauman v. C. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139; Vartaman v. N. Y., N. H. & H. R. Co. [R. I.] 56 Atl 184; John S. Metcalf Co. v. Nystedt, 203 Ill. 333, 67 N. E. 764; Good Eye Min. Co. v. Robinson [Kan.] 73 Pac. 102. The care of machinery. Ellis v. Thayer, 183 Mass. 309, 67 N. E. 325. Ventilation of mine. Czarecki v. Seattle & S. F. R. & N. Co., 30 Wash. 288, 70 Pac. 750. Servant delegated master's duty as to lighting place of employment. Madigan v. Oceanic Steam Nav. Co., 82 App. Div. [N. Y.] 206. Superintendent having sole charge of the selection of tools and appliances. Hall v. Marshutz [Cal.] 71 Pac. 692. Where it was the duty of the master to look after telltales and see that they were not looped up, failure of other employes to look after such telltales will not excuse the master. McGarrity v. N. Y., N. H. & H. R. Co. [R. I.] 55 Atl. 718. The controlling consideration in determining whether an employe is a vice-principal is, not his comparative

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work,[95] with power to hire and discharge men,[96] but the latter power is not absolutely essential to the relation,[97] and one may be held a fellow-servant who volunteers service to one without authority to employ him.[98] Engineers,[99] railroad conductors,[1] and train dispatchers are generally held to be representatives of the master.[2] An employer is not made liable for the selection of a defective appliance by a fellow-servant by the fact that he had a superintendent in charge, such close oversight being impracticable.[3] The fact that one is designated as foreman,[4] or re-

rank, not his authority to command, and not his authority to employ and discharge, but whether he is the representative of the master in respect to those duties which he cannot escape by delegation. Southern Ind. R. Co. v. Harrell [Ind.] 68 N. E. 262. One erecting a "hanger" on which a pulley shaft is placed under the direction of the superintendent is not a fellow-servant of an operative in the mill. Crandall v. Stafford Mfg. Co. [R. I.] 54 Atl. 52. Under the Virginia laws, the maintenance of a safe roadbed is a duty belonging to a vice-principal. Louisville & N. R. Co. v. Pointer's Adm'r, 24 Ky. L. R. 772, 69 S. W. 1108. An employer may delegate the duty of watching ropes on derricks as to their condition where he has furnished sufficient new ropes at hand. Ivers v. Minn. Dock Co., 84 App. Div. [N. Y.] 27. Employes regulating and inspecting machinery which injured employe does not use are not fellow-servants. Ellis v. Thayer, 183 Mass. 309, 67 N. E. 325. Inspectors of machines not fellow-servants with operators. Hopwood v. Benjamin A. & I. Co., 68 N. J. Law, 707.

95. Roberts v. Fielder Salt Works [Tex. Civ. App.] 72 S. W. 618; Mahoney v. Bay State Pink Granite Co. [Mass.] 68 N. E. 234; Pierce v. Arnold Print Works, 182 Mass. 260, 65 N. E. 368; Bane v. Irwin, 172 Mo. 306, 72 S. W. 522; Slack v. Harris, 200 Ill. 96, 65 N. E. 669; Kelly v. Stewart, 93 Mo. App. 47; Fox v. Jacob Dold Packing Co., 96 Mo. App. 173, 70 S. W. 164; Mo. Malleable Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12; Borden v. Falk Co., 97 Mo. App. 566, 71 S. W. 478; Borgeson v. Cook Stone Co. [Minn.] 97 N. W. 734; Foley v. Cudahy Packing Co., 119 Iowa, 246, 93 N. W. 284. A mine boss. Island Coal Co. v. Swaggerty, 159 Ind. 664, 65 N. E. 1026. The hook tender in a logging camp giving direction to men and having the duty of selecting appliances (Bailey v. Cascade Timber Co., 32 Wash. 319, 73 Pac. 385); sawyer in charge of a mill (Evans v. La. Lumber Co. [La.] 35 So. 736). The relation of vice-principal as between mine boss and miner is not affected by fact that there is a superintendent over both. Bane v. Irwin, 172 Mo. 306, 72 S. W. 522. An engineer in control of his train to such an extent as to order its movements is a vice-principal and not a fellow-servant on train with which he collided. Morrison v. Northern Pac. R. Co. [Wash.] 74 Pac. 1064. Where the master has not given a servant authority to direct another and has no knowledge of such assumed authority, his consent to the exercise of such authority will not support a presumption of such authority in the directing employe. Tex. & P. Coal Co. v. Manning [Tex. Civ. App.] 78 S. W. 545. The president of a corporation is a vice-principal with power in the absence of a superintendent to give orders to an engineer. Consumers' Paper Co. v. Eyer, 160 Ind. 424, 66 N. E. 994.

96. De Armas v. Bell, 109 La. 181; Merritt v. Victoria Lumber Co. [La.] 35 So. 497; Vogel v. American Bridge Co., 84 N. Y. Supp. 799; Butterman v. McClintic-Marshall Const. Co., 206 Pa. 82; Young v. Hahn, 96 Tex. 99, 70 S. W. 950; Chicago House Wrecking Co. v. Birney [C. C. A.] 117 Fed. 72; Pierce v. Arnold Print Works, 182 Mass. 260, 65 N. E. 368. A boss directing the work of a large force of men with power to discharge and who marked the place for drilling but doing none himself is a superintendent within the liability acts. Mahoney v. Bay State Pink Granite Co. [Mass.] 68 N. E. 234.

97. Lamb v. Littman, 132 N. C. 978.

98. Longa v. Stanley Hod El. Co. [N. J. Law] 54 Atl. 251.

99. A railroad company is liable for injuries to an employe making a coupling caused by the engineer's negligence. Gulf, C. & S. F. R. Co. v. Wilder [Tex. Civ. App.] 75 S. W. 546. Where an engineer under direction of his superior left his engine unguarded and another was injured thereby, the injury was not caused by the act of a fellow-servant. Goe v. Northern Pac. R. Co., 30 Wash. 654, 71 Pac. 182. Employe operating passenger train is fellow-servant of one riding home from work in another train. Indianapolis & G. Rapid Transit Co. v. Foreman [Ind.] 69 N. E. 669.

1. A conductor of a freight train is in charge of same though absent therefrom where nothing meanwhile is done contrary to his orders. Carroll v. N. Y., N. H. & H. R., 182 Mass. 337, 65 N. E. 69.

2. Northern Pac. R. Co. v. Mix [C. C. A.] 121 Fed. 476; Brommer v. Phila. & R. R. Co., 205 Pa. 432.

3. Morrison v. Whittier Mach. Co. [Mass.] 67 N. E. 646.

4. Davis v. Trade Dollar Consol. Min. Co. [C. C. A.] 117 Fed. 122; Southern Ind. R. Co. v. Martin, 160 Ind. 280, 66 N. E. 886; Loid v. J. S. Rogers Co., 68 N. J. Law, 713; Enright v. Oliver [N. J. Err. & App.] 55 Atl. 277; Leonard v. Mallory, 75 Conn. 433; Pistoner v. American Can Co., 119 Fed. 496. Shepherd v. Southern Pine Co., 118 Ga. 292. The foreman of a section crew and laborer. Ill. Cent. R. Co. v. Atwell, 198 Ill. 200, 64 N. E. 1095. Washhouse foreman in a brewery and one piling the kegs to be washed, and a washerman. Houston Ice & Brew. Co. v. Pisch [Tex. Civ. App.] 77 S. W. 1047. A foreman of a gang of men whose principal work is that of a laborer with the others and selected for his position on account of his greater experience is a fellow-servant of the others. Mulligan v. McCaffrey, 182 Mass. 420, 65 N. E. 831; Lynch v. Bush Co., 89 App. Div. [N. Y.] 286. Assistant foreman. Bauer v. American Car & Foundry Co. [Mich.] 94 N. W. 9.

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ceives a larger salary, does not determine the relation.[5] The test generally adopted is the character of the act,[6] and one, though in charge of work, will be regarded as a fellow-servant where engaged in a common service with the injured servant.[7] A laborer taking the place of a superintendent will become a vice-principal as to the duties of the superintendent.[8] The relation may not exist where servants are employed in different kinds of work.[9] Servants should be so associated as to exer-

5. Fritz v. Western Union Tel. Co., 25 Utah, 263, 71 Pac. 209.

6. Galvin v. Pierce [N. H.] 54 Atl. 1014; Skelton v. Pac. Lumber Co., 140 Cal. 507, 74 Pac. 13; Vartanian v. N. Y., N. H. & H. R. Co. [R. I.] 56 Atl. 184. Servants engaged in different duties in the same establishment are not fellow-servants. The servants must be engaged in the same common employment and engaged in the same common work under that common employment. Merritt v. Victoria Lumber Co. [La.] 35 So. 497. There is no liability where the manner of the removal of an embankment was a detail of the work left to the judgment of a foreman. Van Derhoff v. N. Y. Cent. & H. R. R. Co., 84 N. Y. Supp. 650. An engineer of a switch engine who neglects to attach the safety chains connecting the engine and tender is not as to such matter a fellow-servant of the fireman who had just commenced work with him. Chicago & E. I. R. Co. v. Heerey, 105 Ill. App. 647. An elevator operator running elevator up and down shaft to allow janitor to clean shaft is a fellow-servant of the janitor. Tubelowish v. Lathrop, 104 Ill. App. 82. Negligence of trainman to protect train while switching is the negligence of a fellow-servant with reference to the conductor of a colliding train killed by the negligence. Sutter v. N. Y. Cent. & H. R. R. Co., 79 App. Div. [N. Y.] 362. Workmen selecting material for erection of a hoist for raising material on a two-story building are fellow-servants of persons of one who directs the hoisting. Gittens v. William Porten Co. [Minn.] 97 N. W. 378. Gangs of men returning from their work on different hand cars are fellow-servants. Baltimore & O. S. W. R. Co. v. Henderson, 31 Ind. App. 441, 68 N. E. 308. A captain of a yacht leaving a cannon loaded after firing a salute is a fellow-servant of the seaman whose duty it is to clean the cannon. Sievers v. Eyre, 122 Fed. 734. Negligence of superintendent, directing engineer to increase speed of machine to test its safety without disconnecting other machinery whereby an emery wheel was caused to burst was the act of a vice-principal. Skelton v. Pac. Lumber Co., 140 Cal. 507, 74 Pac. 13. The act of a quarry boss in prematurely ordering the engineer of a derrick to lift a stone by which an employe was injured was the act of a fellow-servant. Galvin v. Pierce [N. H.] 54 Atl. 1014. An assistant roadmaster is a vice-principal with reference to section hands loading rails on moving cars. Le Barre v. Grand Trunk Western R. Co. [Mich.] 94 N. W. 735. Relation as vice-principal held not to be changed while doing the work of a fellow-servant. Strode v. Conkey [Mo. App.] 78 S. W. 678.

7. Wagner v. New York, C. & St. L. R. Co., 76 App. Div. [N. Y.] 552; Slack v. Harris, 206 Ill. 96, 65 N. E. 669; Dixon v. Union Ironworks [Minn.] 97 N. W. 375; Freeman v. Sloss Sheffield Steel & Iron Co., 137 Ala. 481; Batty v. Niagara Falls Hydraulic Power & Mfg. Co., 79 App. Div. [N. Y.] 466. A foreman engaged in holding a ladder for a workman replacing a belt. Hall v. U. S. Canning Co., 76 App. Div. [N. Y.] 475. Foreman engaged in work of cleaning a carding machine is fellow-servant of an operator of the machine whose duty it was to clean the machine. Duffy v. Platt, 205 Pa. 296. A foreman in charge of a steam shovel while assisting in replacing a chain is a fellow-servant of a laborer engaged in the same work. McQueeny v. Chicago, M. & St. P. R. Co., 120 Iowa, 522, 94 N. W. 1124. The negligence of a foreman in selecting an appliance is that of a fellow servant, where sufficient appliances were furnished. Ivers v. Minnesota Dock Co., 84 App. Div. [N. Y.] 27. But see Chicago Hair & Bristle Co. v. Mueller, 203 Ill. 558, 68 N. E. 51. A section foreman did not lose his status as vice-principal by helping work hand car. Missouri, K. & T. R. Co. v. Smith [Tex. Civ. App.] 72 S. W. 418. The fact that a superintendent acted in the capacity of a fellow-servant in preparing blasts does not change his character to a fellow-servant for a negligent order as to firing the blasts. Bane v. Irwin, 172 Mo. 306, 72 S. W. 522. A foreman in charge of miners is not a fellow-servant with the men while taking part in their work so as to relieve the master from liability for his negligence in doing the work. Donnelly v. Aida Min. Co. [Mo. App.] 77 S. W. 130.

8. Fritz v. Western Union Tel. Co., 25 Utah, 263, 71 Pac. 209. A deck hand acting as captain of the watch is not a fellow-servant of another deck hand so as to relieve the owners from liability for assault. Memphis & N. Packet Co. v. Hill, 122 Fed. 246.

9. A laborer in a factory and a carter employed by another to haul dirt there from the factory. Louisville R. Co. v. Anderson [Ky.] 76 S. W. 153. One employed to set dogs in a log to hold on the saw carriage and inspector whose duty it was to remove rafters spikes therefrom before they came to the carriage. Covington Sawmill & Mfg. Co. v. Clark [Ky.] 76 S. W. 348. One employed to keep up the furnace fire in the air shaft of a mine and employes of the same master engaged in track laying in the mine. Angel v. Jellico Coal Min. Co. [Ky.] 74 S. W. 714. Longshoreman loaned by lighterage company and workmen for stevedore. Thornton v. Hogan, 82 App. Div. [N. Y.] 500. A locomotive fireman and boiler inspector. Marsh v. Lehigh Valley R. Co., 206 Pa. 558. A brakeman and conductor. Grout v. Tacoma Eastern R. Co. [Wash.] 74 Pac. 665. A track walker and the operatives of a train. Louisville & N. R. Co. v. Davis, 24 Ky. L. R. 1415, 71 S. W. 658. Railroad employes engaged in construction of switch in yard of a manufacturer and employe of the latter. Harrington v. Erie R. Co., 79 App. Div. [N. Y.] 26. An inspector of roadbed and locomotive engineer.

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cise an influence promotive of caution.[10] Persons engaged in a common work and with similar duties are fellow-servants.[11] There may be no recovery for injuries caused by obedience to the commands of a fellow-servant,[12] nor where the accident occurred at a time when the injured person was not employed.[13] See footnote for collection of holdings as to existence of relation between particular persons.[14]

Hamilton v. Michigan Cent. R. Co. [Mich.] 97 N. W. 392. Car inspectors and conductors of train. McDonald v. Michigan Cent. R. Co. [Mich.] 93 N. W. 1041. An expressman employed at a fixed rate to cart freight from a factory but at the same time carting freight for the public is not within the fellow-servant doctrine as to the factory owner. Lochrain v. Autophone Co., 77 App. Div. [N. Y.] 542. An employe riding on a work train assumes the dangers incident to travel on such trains but not dangers on account of negligent equipment and operation of the train. Missouri, K. & T. R. Co. v. Hawk, 30 Tex. Civ. App. 142, 69 S. W. 1037. A section foreman riding on a hand car with a defective brake assumed the risk of dangers from the appliances but not that of trainmen failing to whistle for a cut and curve. Texas Cent. R. Co. v. Bender [Tex. Civ. App.] 75 S. W. 561. An employe returning from work on a train does not assume risks of defective appliances. Noe v. Rapid R. Co. [Mich.] 94 N. W. 743. An employe on construction work does not assume the risk of running trains at night with the headlight behind a box car whereby a collision with a hand car is caused. Barley v. Southern Ind. R. Co., 30 Ind. App. 406, 66 N. E. 72. One whose duty it is to keep up the furnace fire in the air shaft of a mine does not assume the risks from dynamite placed near to the fire to thaw by employes of an entirely distinct department. Angel v. Jellico Coal Min. Co., 25 Ky. L. R. 108, 74 S. W. 714. Servants in another department are not fellow-servants of injured person though both were under the same foreman, the work causing the injury not being participated in by the injured party. The foreman is a vice-principal. Gaudie v. Northern Lumber Co. [Wash.] 74 Pac. 1009.

10. Otstot v. Ind., Ill. & I. R. Co., 103 Ill. App. 136; Chicago City R. Co. v. Leach, 104 Ill. App. 30. Tinners and carpenters working on the same job and associated in such a way as to exercise an influence of caution on each other are fellow-servants. Voigt v. Anglo-American Provision Co., 202 Ill. 462, 66 N. E. 1054. A freight conductor not on duty, riding home on one of his master's trains, is not a fellow-servant of operators of the train. Illinois Cent. R. Co. v. Leiner, 202 Ill. 624, 67 N. E. 398.

11. Engine cleaners—Injury caused by one entering cab and starting engine. Galveston, etc., R. Co. v. Cloyd [Tex. Civ. App.] 78 S. W. 43. An elevator inspector not fellow-servant of one whose duties require him to ride therein. Cudahy Packing Co. v. Anthes [C. C. A.] 117 Fed. 118. Where employes of common master riding on wagon were not engaged in a common enterprise and the injured one had no control over the driver, the court cannot say as a matter of law that there was an imputation of negligence. Ciuffi v. Metropolitan St. R. Co., 84 N. Y. Supp. 918. As a general rule the employes of a common master engaged in the common employment of erecting a building are all fellow-servants without regard to their particular line of employment. Enright v. Oliver [N. J. Err. & App.] 55 Atl. 277.

12. Van Derhoff v. New York Cent. R. Co., 84 N. Y. Supp. 650; McKean v. Colo. Fuel & Iron Co. [Colo.] 71 Pac. 425. A workman giving an order to raise a derrick. Southern Ind. R. Co. v. Harrell [Ind.] 68 N. E. 262.

13. Orman v. Salvo [C. C. A.] 117 Fed. 233.

14. Relation of fellow-servant exists between yardmaster and switchman. Pennsylvania Co. v. Fishback [C. C. A.] 123 Fed. 465. Engineer in charge of a train on which rails were being loaded and section hand engaged in the work. Le Barre v. Grand Trunk Western R. Co. [Mich.] 94 N. W. 735. Where an engineer controls his train and orders its movements, he is a vice-principal with reference to a brakeman. Morrison v. Northern Pac. R. Co. [Wash.] 74 Pac. 1064. "Loader" and a "driller" in stone blasting. Kopf v. Monroe Stone Co. [Mich.] 95 N. W. 72. The relation of a hook tender in a tank-moving crew held to be that of a vice-principal. Bailey v. Cascade Timber Co., 32 Wash. 319, 73 Pac. 385. The relation of a "rigging tender" in a tank-moving crew held to be that of a vice-principal. Id. Engineers of different engines in the service of the same company. Pittsburg, etc., R. Co. v. Gipe, 160 Ind. 360, 65 N. E. 1034. Fireman and conductor. Howe v. Northern Pac. R. Co., 30 Wash. 569, 70 Pac. 1100. A blacksmith employed to make car links and laborer on same car. Buck v. New Jersey Zinc Co., 204 Pa. 132, 60 L. R. A. 458. Men in charge of derrick on roof of building and mason's helper. McQueeney v. Norcross, 75 Conn. 381. Engineer and fireman. Norfolk & W. R. Co. v. Cromer's Adm'x [Va.] 44 S. E. 898. Engine wiper and engineer with whom he is riding. Streets v. Grand Trunk R. Co., 76 App. Div. [N. Y.] 480. Flagman and engineer. Erickson v. Kansas City, O. & S. R. Co., 171 Mo. 647, 71 S. W. 1022. Operator of a machine and helper. Richardson v. Mesker, 171 Mo. 666, 72 S. W. 506. Station agent in the employ of a railroad company handling express matter and employe of the express company. Hopper v. Southern Exp. Co., 133 N. C. 375. Loader of derrick box and signal man. Shaw v. Bambrick-Bates Const. Co., 102 Mo. App. 666, 77 S. W. 96. A sub foreman of a section crew and members of crew. Ohio River & C. R. Co. v. Edwards [Tenn.] 76 S. W. 897. A longshoreman and riggers of stevedore. Duggan v. Phelps, 82 App. Div. [N. Y.] 509. A tagman in a quarry and laborers therein. O'Neal v. Clydesdale Stone Co. [Pa.] 56 Atl. 929. A brakeman on a freight train and fireman temporarily performing the duties of the engineer. Louisville & N. R. Co. v. Sullivan's Adm'r [Ky.] 76 S. W. 525. A laborer employed in the reconstruction of an abandoned railway track and the boss engaged in the same service. Mitchell v. Wabash R. Co., 97 Mo. App. 411,

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In Virginia, all serving a common master, working under the same control, deriving authority and compensation from the same source and engaged in the same general business, although in different grades or departments, are fellow-servants and take the risks of each other's negligence.[15]

Proximate cause and concurring negligence.—The negligence of the fellow-servant must have been the proximate cause of the injury.[16] Where the proximate cause of the injury is the master's negligence, he may not escape liability on the ground that the negligence of a fellow-servant concurred therein.[17]

(§ 3) *F. Risks assumed by servant. Nature of defense.*—Where the injury results from an assumed risk, there can be no recovery[18] though the injured person exercised the highest degree of care,[19] and it is not important that safer places for work were provided for similar work in other departments.[20] The defense is available whether the risk assumed is great or small, whether the danger from it was imminent and certain or remote and improbable and whether or not the servant was guilty of contributory negligence in assuming the risk or in exposing himself to the danger.[21] Assumption of risk and contributory negligence are distinct and separate defenses. The former rests in contract, the latter in tort.[22] The common-law doctrine of assumed risk is still in force in Indiana.[23] A master is not required to use reasonable care to prevent the servant from assuming the risks incidental to the

76 S. W. 647. A car starter and motormen. Sams v. St. Louis & M. R. Co., 174 Mo. 53, 73 S. W. 686. An employe taking rails from car and laying them on the track, and employe who at the foreman's direction gives signals which control the work. Lakey v. Texas & P. R. Co. [Tex. Civ. App.] 75 S. W. 566. Rubbish hauler and carpenter. Johnson v. Metropolitan St. R. Co. [Mo. App.] 78 S. W. 275. Operator of a steam drill and helper. Livengood v. Joplin-Galena Consol. Lead & Zinc Co. [Mo.] 77 S. W. 1077. The foreman of a switching crew and fireman and engineer in charge of an engine on which he is riding. Chicago & A. R. Co. v. Wise, 206 Ill. 453, 69 N. E. 500. Flagman of one train and engineer of another. Miller v. Central R. Co. [N. J. Err. & App.] 55 Atl. 245. Foreman of a switching crew and one handling gates at a street crossing. Chicago & A. R. Co. v. Wise, 206 Ill. 453, 69 N. E. 500.

15. Trigg v. Lindsay [Va.] 43 S. E. 349.

16. Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307. Where a servant attempting to repair belting is injured by the starting of the machine, the operator not having properly fastened the controlling lever, the negligence is that of a fellow-servant and is not caused by failure to properly warn the servant. Ward v. Connor, 182 Mass. 170, 64 N. E. 968.

17. Baumann v. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139; Czarecki v. Seattle & S. F. R. & Nav. Co., 30 Wash. 288, 70 Pac. 750; Tradewater Coal Co. v. Johnson, 24 Ky. L. R. 1777, 72 S. W. 274; Campbell v. Gillespie [N. J. Err. & App.] 55 Atl. 276; American Tin Plate Co. v. Williams, 30 Ind. App. 46, 65 N. E. 304; Cudahy Packing Co. v. Anthes [C. C. A.] 117 Fed. 118; Pennsylvania R. Co. v. Jones [C. C. A.] 123 Fed. 753; Noe v. Rapid R. Co. [Mich.] 94 N. W. 743; Armour v. Golkowska, 202 Ill. 144, 66 N. E. 1037; Howe v. Northern Pac. R. Co., 30 Wash. 569, 70 Pac. 1100; Thomas v. Smith [Minn.] 97 N. W. 141; Jackson v. Merchants' & Miners' Transp. Co., 118 Ga. 651, 45 S. E. 254; St. Louis, etc., R. Co. v. Haist [Ark.] 72 S. W. 893; Bodie v. Charleston & W. C. R. Co., 66 S. C. 302, 44 S. E. 943; St. Louis S. W. R. Co. v. Smith, 30 Tex. Civ. App. 336, 70 S. W. 789; Vandyke v. Memphis, N. O. & C. Packet Co., 24 Ky. L. R. 1283, 71 S. W. 441; Texas & N. O. R. Co. v. Lee [Tex. Civ. App.] 74 S. W. 345; Louisville & N. R. Co. v. Crady, 24 Ky. L. R. 2339, 73 S. W. 1126; Loveless v. Standard Gold Min. Co., 116 Ga. 427, 59 L. R. A. 596; Mo. Malleable Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12; McGinn v. McCormick, 109 La. 396; Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890; Chicago & A. R. Co. v. Wise, 206 Ill. 453, 69 N. E. 500, Garant v. Cashman, 183 Mass. 13, 66 N. E. 599, Southern Bauxite Min. & Mfg. Co. v. Fuller, 116 Ga. 695; Tanner v. Harper [Colo.] 75 Pac. 404. An employe of one railway company can recover from another company for injuries caused by such company's negligence and the contributory negligence of his own fellow-servant regardless of a fellow-servant statute making his own master liable. Southern Ind. R. Co. v. Davis [Ind. App.] 68 N. E. 191, 69 N. E. 550.

18. Dozier v. Atlanta, 118 Ga. 354; Hermann v. Clark, 89 Minn. 132, 94 N. W. 436; Koepcke v. Wis. Bridge & Iron Co., 116 Wis. 92, 92 N. W. 558; Ball v. Gussenhoven [Mont.] 74 Pac. 871.

19. Ball v. Gussenhoven [Mont.] 74 Pac. 871.

20. Koepcke v. Wisconsin Bridge & Iron Co., 116 Wis. 92, 92 N. W. 558.

21. St. Louis Cordage Co. v. Miller [C. C. A.] 126 Fed. 495.

22. St. Louis Cordage Co. v. Miller [C. C. A.] 126 Fed. 495; Ball v. Gussenhoven [Mont.] 74 Pac. 871; Hettich v. Hillje [Tex. Civ. App.] 77 S. W. 641.

23. American Rolling Mill Co. v. Hullinger [Ind.] 67 N. E. 986.

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employment.[24] It is essential to the defense that the risk assumed should be the proximate cause of the injury.[25]

The larger array of cases hold that there is no assumption of risk where the master fails in a statutory duty.[26] The Federal courts hold that factory acts requiring the master to guard dangerous machinery do not abolish the defense.[27]

Dangers incidental to business.—The servant assumes the risk of dangers natural and incidental to the business.[28] They must be the ordinary risks.[29] Extraordinary[30] and unusual risks are not assumed.[31] The servant assumes risk of

24. Gallman v. Union Hardwood Mfg. Co., 65 S. C. 192.

25. A recovery will not be defeated by the concurrence of assumed risk and negligence of defendant. Tex. Cent. R. Co. v. Bender [Tex. Civ. App.] 75 S. W. 561. An engineer accepting and using a defective headlight without protest does not assume the risk of danger from a misplaced switch though the injury might have been avoided if the headlight had not been defective. International & G. N. R. Co. v. Moynahan [Tex. Civ. App.] 76 S. W. 803. Where the injury was caused by backing a train without warning a contention that the employe assumed the risk of a defect in a coupler is without merit. Gulf, C. & S. F. R. Co. v. Cooper [Tex. Civ. App.] 77 S. W. 263.

26. Brower v. Locke, 31 Ind. App. 353, 67 N. E. 1015; Green v. Western American Co., 30 Wash. 87, 70 Pac. 310; Emporia v. Kowalski, 66 Kan. 64, 71 Pac. 232. Burns' Rev. St. 1901, § 7087i, requires vats to be guarded. Baltimore & O. S. W. R. Co. v. Henderson, 31 Ind. App. 441, 68 N. E. 308. A miner does not assume risks of omission to establish a code of elevator signals required by law. Island Coal Co. v. Swaggerty, 159 Ind. 664, 65 N. E. 1026. A flagman at a crossing does not assume the risk of dangers from engines running in excess of speed limit without a switchman on the tender. Mo., K. & T. R. v. Goss [Tex. Civ. App.] 72 S. W. 94. Master is liable for violation of a statutory requirement for protection of miners though negligence of fellow-servant contributed to injury. Russell v. Dayton Coal & Iron Co., 109 Tenn. 43, 70 S. W. 1. The fact that an employe remains in the service of a railroad knowing of a failure to equip with automatic couplers may not be urged as a defense. Elmore v. Seaboard Air Line R. Co., 132 N. C. 865.

27. Gen. St. Minn. 1894, § 2248. Glenmont Lumber Co. v. Roy [C. C. A.] 126 Fed. 524. 2 Rev. St. Mo. 1899, § 6433. St. Louis Cordage Co. v. Miller [C. C. A.] 126 Fed. 495.

28. Big Stone Gap Iron Co. v. Ketron [Va.] 45 S. E. 740; St. Louis & S. F. R. Co. v. Skaggs [Tex. Civ. App.] 74 S. W. 783; Scheir v. Quirin, 77 App. Div. [N. Y.] 624; Batty v. Niagara Falls Hydraulic Power & Mfg. Co., 79 App. Div. [N. Y.] 466; Parish v. Mo., K. & T. R. Co. [Tex. Civ. App.] 76 S. W. 234; Middendorf v. Schulze, 105 Ill. App. 221; Nash v. Dowling, 93 Mo. App. 156; Chicago City R. Co. v. Leach, 104 Ill. App. 30; Evans Laundry Co. v. Crawford [Mo.] 93 N. W. 177; Gulf, C. & S. F. R. Co. v. Wilder [Tex. Civ. App.] 75 S. W. 546. Danger of cave in of soil. McQueeny v. Chicago, M. & St. P. R. Co., 120 Iowa, 522, 94 N. W. 1124; Christiensen v. Rio Grande Western R. Co. [Utah] 74 Pac. 876. Workmen engaged in repairing a track near a tunnel are bound to take notice of danger of passing trains and assume risk. Sanker v. Pa. R. Co., 205 Pa. 609. A lineman assumes the risk of dangers of weakness of poles. Kellogg v. Denver City Tramway Co. [Colo. App.] 72 Pac. 609. Switchman. Mo., K. & T. R. Co. v. Schilling [Tex. Civ. App.] 75 S. W. 64. Brakeman. Baltimore & O. S. W. R. Co. v. Greer, 103 Ill. App. 448. Pulp shoveler assumes risks of mass slipping. Vykess v. Duncan Co., 84 N. Y. Supp. 398. Brakeman employed to stop defective cars brought to repair shop. Gerstner v. N. Y. Cent. & H. R. R. Co., 81 App. Div. [N. Y.] 562. A section hand unloading ties from a car knowing of the method of piling the ties on cars assumes the risk of their sliding when the train starts suddenly. Branco v. Ill. Cent. R. Co., 119 Iowa, 211, 93 N. W. 97. Flying cinders by section hand. Duree v. Chicago, M. & St. P. R. Co., 118 Iowa, 640, 92 N. W. 890. Risk of injury was assumed by one employed to stop coal cars running on a down grade and prevent overrunning a coal chute. McGrath v. Dela., L. & W. R. Co., 68 N. J. Law, 425. The sudden stopping of a train by the use of an emergency brake instead of a "service stop" is not a risk assumed by a brakeman. Benedict v. Chicago G. W. R. Co. [Mo. App.] 78 S. W. 60. The fall of staging furnished as a completed structure for certain work and allowed to remain for other work is not a passing risk of employment. Bourbonnais v. West Boylston Mfg. Co. [Mass.] 68 N. E. 232. A motorman knowing of a custom of running cars backward without red lights on the rear and that no telephone connections to warn cars following of the fact assumes the risk. Seccombe v. Detroit Elec. R. [Mich.] 94 N. W. 747.

29. Malott v. Hood, 201 Ill. 202, 66 N. E. 247. An employe is not chargeable with notice and to have assumed the risk of insufficient coverings of catch basins. Allen B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818. Ordinary risks, and those which he knew or ought to have known, but not unusual ones. McDonald v. Standard Oil Co. [N. J. Err. & App.] 55 Atl. 289.

30. Zellars v. Mo. Water & Light Co., 92 Mo. App. 107. The failure of a railroad company to protect the open end of a switch with a bumper subjects trainmen to a danger not an ordinary risk. Pa. R. Co. v. Jones [C. C. A.] 123 Fed. 753. If the danger is unusual and not ordinarily incident to the work, the employe does not assume the risk by continuing at work unless the peril was so imminent as to cause a reasonably prudent man to abandon the work. Riverton Coal Co. v. Shepherd, 207 Ill. 395, 69 N. E. 921.

31. An elevator operator does not assume risks of use of the elevator by hotel guests. Lyons v. Dee, 88 Minn. 490, 93 N. W. 899.

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dangers outside of the scope of his employment and voluntarily undertaken by him.[32] He is not relieved of the risk by the fact that the employment is hazardous.[33] A railroad employe working on a train on the track of another company does not assume risks incident to the operation of the other road.[34]

Reliance on care of master.—The servant has a right to rely on performance of duties by master and does not assume risks created by the master's negligence[35] as to appliances,[36] methods of work,[37] and places to work;[38] but this rule applies

An employe in an oil yard working over a switch therein does not assume the risks of danger from locomotives entering the yard through closed gates without warning. Merchants & P. Oil Co. v. Burns [Tex. Civ. App.] 72 S. W. 626. A brakeman attempting to signal a train to prevent a collision as required by the rules does not assume the risk of being misled as to the distance of the train so as to prevent his recovery where after futile efforts he returns to the train to get a red light and is injured by the collision. Tex. & N. O. R. Co. v. Scott, 30 Tex. Civ. App. 496, 71 S. W. 26.

32. Hamrick v. Balfour Quarry Co., 132 N. C. 282. A call boy riding on cars when his duties do not require him to ride on cars at all is a licensee riding at his own risk. St. Louis S. W. R. Co. v. Spivey [Tex.] 76 S. W. 748.

33. Harte v. Fraser, 104 Ill. App. 201; Pittsburg, C., C. & St. L. R. Co. v. Hewitt, 102 Ill. App. 428; Houston, E. & W. T. R. Co. v. De Walt, 96 Tex. 121, 70 S. W. 531.

34. Keck v. Phila. & R. R., 206 Pa. 501.

35. Ala. G. S. R. Co. v. Brooks, 135 Ala. 401; Ill. Steel Co. v. Ryska, 102 Ill. App. 347; Moore v. Mo., K. & T. R. Co., 30 Tex. Civ. App. 266, 69 S. W. 997; Emporia v. Kowalski, 66 Kan. 64, 71 Pac. 232; Hone v. Mammoth Min. Co. [Utah] 75 Pac. 381. The master is an insurer of the servant's safety from any negligent act of his own and the servant never assumes any risk for the negligence of the master or his deputy though the deputy be a fellow-servant in other regards. Zellars v. Mo. Water & Light Co., 92 Mo. App. 107. Negligence of other employes not assumed where fellow-servant rule is abolished. Phinney v. Ill. Cent. R. Co. [Iowa] 98 N. W. 358; Mo., K. & T. R. Co. v. O'Connor [Tex. Civ. App.] 78 S. W. 374.

36. Chicago & E. I. R. Co. Huff, 104 Ill. App. 594; Mo., K. & T. R. Co. v. Blackman [Tex. Civ. App.] 74 S. W. 74; Boucher v. Robeson Mills, 182 Mass. 500, 65 N. E. 819. An engineer has the right to assume that the engine and tender furnished him are reasonably safe. Tex. & Ft. S. R. Co. v. Hartnett [Tex. Civ. App.] 75 S. W. 809. A railroad employe does not assume the risk arising from the company's failure to furnish cars in good order and fit for the purpose intended. Northern Pac. R. Co. v. Tynan, 119 Fed. 288. The plea of assumption of risk is not available where the injury was solely due to master's negligence in furnishing a proper appliance. Curtis v. McNair, 173 Mo. 270, 73 S. W. 167. An employe may assume that tools and machinery are provided with such guards and protection from injury as are usual unless their absence is apparent or his attention has been called thereto. Doyle v. Pittsburg Waste Co., 204 Pa. 618. An employe knowing that an old rope had broken had a right to assume that a new rope had been substituted. Geldard v. Marshall, 43 Or. 438, 73 Pac. 330. May assume safe condition of tools and places unless he is on notice that conditions are unsafe. New Omaha T. H. E. L. Co. v. Dent [Neb.] 94 N. W. 819.

37. A locomotive engineer does not assume the risk of cars which have escaped from a side track and are unattended on the main track. Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890. An employe scabbling stone on cars standing on a side track did not assume the risk of his employer leaving the cars unblocked. Chicago, I. & L. R. Co. v. Martin, 31 Ind. App. 308, 65 N. E. 591. A fireman on an engine detached to go ahead and get water had a right to assume that proper steps would be taken to secure the train from escaping on a down grade. Cincinnati, N. O. & T. P. R. Co. v. Maley's Adm'r [Ky.] 76 S. W. 334. A miner does not assume the risk of the substitution of a powder of a higher explosive power and more dangerous character without notice. Chambers v. Chester, 172 Mo. 461, 72 S. W. 904. One employed to work about cars does not take the risk of injury by having a train pushed violently against the car on the side track on which he was employed without warning, it being customary to give warnings when trains were moved on side tracks. Carroll v. N. Y., N. H. & H. R. R., 182 Mass. 337, 65 N. E. 69. A freight conductor sleeping in a caboose while waiting for orders does not assume the risks of the caboose being negligently run into by a switch engine. St. Louis S. W. R. Co. v. McDowell [Tex. Civ. App.] 73 S. W. 974. Though an employe in excavation work assumes the risks of the employment, he may assume that the customary warning of impending fall of earth would be given him. Rafferty v. Nawn, 182 Mass. 503, 65 N. E. 830. A carpenter does not assume the risks of temporary perils occasioned by a hasty loading of an incomplete structure. Sinclair v. Waddill, 200 Ill. 17, 65 N. E. 437; St. Bernard Coal Co. v. Southard [Ky.] 76 S. W. 167; Adams Exp. Co. v. Smith, 24 Ky. L. R. 1915, 72 S. W. 752.

38. Momence Stone Co. v. Turrell, 205 Ill. 515, 68 N. E. 1078; Armour v. Golkowska, 203 Ill. 144, 66 N. E. 1037. An employe will not be said, as a matter of law, to have assumed the risk of unlighted stairs in leaving a building by its only exit, the building having theretofore been lighted. English v. Amidon [N. H.] 56 Atl. 548. One working in the hold of a vessel does not assume risk of working there without lights which should have been furnished when it became dark. Madigan v. Oceanic Steam Nav. Co., 82 App. Div. [N. Y.] 206. A painter has a right to assume that the scaffold furnished by his employer is reasonably safe for him to use in his work. Ehlen v. O'Donnell,

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only to negligence of the master or one for whom he is responsible, not to the negligence of a fellow-servant.[39]

Operation with inadequate force.—The servant assumes risk of injuries from the employment of an inadequate force where he knows the dangers resulting therefrom,[40] otherwise where he is inexperienced.[41]

Knowledge of defects.—The servant assumes the risk of dangers from the existing condition of the premises, machinery, etc., which he knows and appreciates,[42]

102 Ill. App. 141. A miner has a right to assume that the room where he is sent to work is in a reasonably safe condition until, by the use of ordinary care, he can discover the contrary. Diamond Block Coal Co. v. Cuthbertson [Ind. App.] 67 N. E. 558. A brakeman has a right to assume that structures will be placed a safe distance from the track. Gorham v. Sioux City Stockyards Co., 118 Iowa, 749, 92 N. W. 698. A servant may, by assenting to work in a dangerous place, relieve the master from the duty of furnishing a safe place for work. Christienson v. Rio Grande Western R. Co. [Utah] 74 Pac. 876. Employe may assume that machinery is properly protected. Doyle v. Pittsburg Waste Co., 204 Pa. 618. Not that dipper of steam shovel would fall and from striking ties throw them upon plaintiff several feet distant. Bender v. Great Northern R. Co., 89 Minn. 163, 94 N. W. 546. Evidence held sufficient that operator at a lumber conveyor did not assume risk from gearing under the conveyor table. Spoonick v. Backus-Brooks Co., 89 Minn. 354, 94 N. W. 1079.

39. See ante, § 3 E.

40. San Antonio Traction Co. v. De Rodriguez [Tex. Civ. App.] 77 S. W. 420; Leitner v. Grieb [Mo. App.] 77 S. W. 764; Seery v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 77 S. W. 950. Contra, Illinois Cent. R. Co. v. Langan [Ky.] 76 S. W. 32.

41. San Antonio Traction Co. v. De Rodriguez [Tex. Civ. App.] 77 S. W. 420.

42. Drake v. Auburn City R. Co., 173 N. Y. 466, 66 N. E. 121; Pautz v. Plankinton Packing Co., 118 Wis. 47, 94 N. W. 654; Ft. Worth & D. C. R. Co. v. Ramp, 30 Tex. Civ. App. 483, 70 S. W. 568; Illinois Steel Co. v. Ryska, 102 Ill. App. 347; Nelson v. Oil City St. R. Co. [Pa.] 56 Atl. 933; St. Louis S. W. R. Co. v. Barrett [Tex. Civ. App.] 72 S. W. 884; Wright v. Chicago, I. & L. R. Co., 160 Ind. 583, 66 N. E. 454; Ehrenfried v. Lackawanna Iron & Steel Co., 89 App. Div. [N. Y.] 130; Bauer v. American Car & Foundry Co. [Mich.] 94 N. W. 9; Loid v. Rogers, 68 N. J. Law, 713; Pierce v. Contrexville Mfg. Co. [R. I.] 56 Atl. 778; St. Louis Cordage Co. v. Miller [C. C. A.] 126 Fed. 495; Gill v. Nat. Storage Co. [N. J. Law] 56 Atl. 146; Wexler v. Salisbury [Minn.] 98 N. W. 95; Harte v. Fraser, 104 Ill. App. 201; Chicago Screw Co. v. Weiss, 203 Ill. 536, 68 N. E. 54; Chicago & E. I. R. Co. v. Heerey, 203 Ill. 492, 68 N. E. 74; Nelson v. Kelso [Minn.] 97 N. W. 459; Franklin v. Missouri, K. & T. R. Co., 97 Mo. App. 473, 71 S. W. 540; Cothron v. Cudahy Packing Co., 98 Mo. App. 343, 73 S. W. 279; Hartrich v. Hawes, 202 Ill. 334, 67 N. E. 13; Crawford v. American Steel & Wire Co. [C. C. A.] 123 Fed. 275. A miner of intelligence, continuing work in a mine with knowledge of the absence of fire protection. Harvey v. Mountain Pride Gold Min. Co. [Colo.] 70 Pac. 1001. An experienced laborer engaged in the business of unloading ties from a car assumes the risk of injury from throwing ties from a door only partly open. St. Louis S. W. R. Co. v. Austin [Tex. Civ. App.] 72 S. W. 212. Structures near track. Galveston, etc., R. Co. v. Mortson [Tex. Civ. App.] 71 S. W. 770. Defective ladder. Hall v. U. S. Canning Co., 76 App. Div. [N. Y.] 475. An experienced miner assumed the risk of danger from an overhanging rock with knowledge of the condition of the roof where he fails to call for supports as required by the rules. Heald v. Wallace, 109 Tenn. 346, 71 S. W. 80. A fireman will be held to have assumed the risk from proximity of a mail crane to the track where he has knowledge of its existence by having passed it for months. Kenney v. Meddaugh [C. C. A.] 118 Fed. 209. A brakeman warned and knowing of the dangers of riding on top of cars while passing under a certain bridge assumed the risk. Hollingsworth v. Chicago, I. & L. R. Co., 160 Ind. 259, 65 N. E. 750. Unloading logs from flat cars. Boyer v. Eastern R. Co., 87 Minn. 367, 92 N. W. 326. An employe assumes the risk of dangers of a method of operating trains with which he is familiar. Field v. New York Cent. R. Co., 86 App. Div. [N. Y.] 148. A brakeman assumes risks of train not equipped with air brakes where he knows that they are not attached. Texas, etc., R. Co. v. Peden [Tex. Civ. App.] 74 S. W. 932. Employe of roundhouse with knowledge of pits assumes risk of danger of falling where crossing the roundhouse in the dark. Galveston, etc., R. Co. v. Walker [Tex. Civ. App.] 76 S. W. 228. A servant working for years with a servant in the habit of becoming intoxicated assumed the risk. Illinois Cent. R. Co. v. Smiesni, 104 Ill. App. 194. One will be held to have assumed the risk of a dangerous employment of which he has full knowledge and the danger causing the injury is more apparent to him than to any other person. Lehman v. Carbon Steel Co., 204 Pa. 612. Knowledge of the vicious character of an escaped Texas steer by a railroad sectionman is shown where he armed himself with a heavy club several feet in length. Clark v. Missouri, K. & T. R. Co. [Mo.] 77 S. W. 882. Where a miner knows of a change in the grade of powder furnished him, it is not necessary that he be notified of the change. Chambers v. Chester, 172 Mo. 461, 72 S. W. 904. A brakeman assumes the risk of danger of falling in open drain while making coupling of the existence of which he has had knowledge for more than a year. Miller v. Detroit R. Co. [Mich.] 95 N. W. 718. It was not necessarily notice of defect of poles on which lineman was at work that the wires were being changed from wooden to iron poles. Walsh v. New York & Q. C. R. Co., 80 App. Div. [N. Y.]

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or in the exercise of reasonable care would know and appreciate,[43] and risks of dangers of which he has equal opportunities to know with the master.[44] He does not assume risks of dangers of which he has no knowledge under the rule.[45] The servant by continuing in the employment assumes those risks and dangers that arise during the service, the same as those in existence when he entered the employment,[46] including dangers from failure of master to fully discharge his duty

316. An experienced brakeman will be held to have assumed the risk of danger from snow and ice on a car where he had opportunity to know of its presence thereon and being required to do so by the rules of the company. Kilkin v. New York Cent. R. Co., 76 App. Div. [N. Y.] 529. A yardmaster assumes the risks of dangers of which he has warned switchmen. Shannon's Adm'r v. Louisville R. Co., 24 Ky. L. R. 1083, 70 S. W. 626. A master is not liable for defect in a nail causing an injury to an experienced carpenter who had knowledge of these occasional defects. Anderson v. Forrester-Nace Box Co. [Mo. App.] 77 S. W. 486. "Driller" who undertook to load a hole at the direction of "loader," the latter not being a superior, assumed the risk. Kopf v. Monroe Stone Co. [Mich.] 95 N. W. 72. Only obvious perils or those actually known are assumed. Cobb Chocolate Co. v. Knudson, 207 Ill. 452, 69 N. E. 816. Where a servant deemed curbing of a sewer not necessary, he was held to have assumed the risk of caving. Lenderink v. Rockford [Mich.] 98 N. W. 4. A servant held to have assumed the risk of a sand bank caving in. Ft. Worth Stockyards Co. v. Whittenburg [Tex. Civ. App.] 78 S. W. 363.

43. Zellars v. Missouri Water & Light Co., 92 Mo. App. 107; Chenall v. Palmer Brick Co., 117 Ga. 106; Johnson v. Southern Pac. Co. [C. C, A.] 117 Fed. 462; Crawford v. American Steel & Wire Co. [C. C. A.] 123 Fed. 275; Atchison. etc.. R. Co. v. Bancord, 66 Kan. 81, 71 Pac. 253; Tex. Portland Cement Co. v. Poe [Tex. Civ. App.] 74 S. W. 563; Bookman v. Masterson, 83 App. Div. [N. Y.] 4; Louisville & N. R. Co. v. Hall, 24 Ky. L. R. 2487, 74 S. W. 280; Breeden v. Big Circle Min. Co. [Mo. App.] 76 S. W. 731. A seaman assumes the risk of cleaning a cannon without ascertaining whether it is loaded. Sievers v. Eyre, 122 Fed. 734. A servant assumes all risks of which he might by the exercise of reasonable care have known. Chicago & B. Stone Co. v. Nelson [Ind. App.] 69 N. E. 705. Where a servant had been 30 years in a certain employment and knew the risks and hazards of the business, he will be deemed to have assumed them. Harrington v. Wabash R. Co. [Mo. App.] 78 S. W. 662. If an employe might by ordinary care have acquired knowledge of the incompetency of a fellow-servant, he cannot recover for injuries sustained through the latter's negligence. Indianapolis & G. R. T. Co. v. Foreman [Ind.] 69 N. E. 669. A servant familiar with the work he was to do and with a full knowledge of its obvious dangers who continued to work in a dangerous place without complaint held to have assumed the risk. Parlett v. Dunn [Va.] 46 S. E. 467. Danger from flying chips from cutting with a cold chisel held obvious. McDonald v. Standard Oil Co. [N. J. Err. & App.] 55 Atl. 289. Servant accustomed to use of dynamite is bound to know danger of forcing it into too small a blast hole. Kopf v. Monroe Stone Co. [Mich.] 95 N. W. 72. A servant in a bridge-building crew must know or have reason to know of the risks of an employment before he can be held to have assumed them. Seeds v. American Bridge Co. [Kan.] 75 Pac. 480. Liability of a traveling hoist to fall, plaintiff having operated it frequently every day. Bauer v. American Car & Foundry Co. [Mich.] 94 N. W. 9.

44. Webster Mfg. Co. v. Nisbett, 105 Ill. App. 261; Kitzberger v. Chicago R. Co. [Neb.] 93 N. W. 935; Conrad Tanning Co. v. Munsey [Ky.] 76 S. W. 841; Ludd v. Wilkins, 118 Ga. 525; O'Connell v. Clark, 75 App. Div. [N. Y.] 619. Explosiveness of varnish by one knowing of its tendency. Vallie v. Hall [Mass.] 68 N. E. 829. The right of an employe to recover for injury caused by an unsafe appliance is not affected by the fact that he had equal means with his employer of knowing that it had not been constructed in a reasonably safe manner. Pfisterer v. Peter [Ky.] 78 S. W. 450.

45. Johnson v. Gehbauer, 159 Ind. 271, 64 N. E. 855; Henderson Tobacco Extracts Works v. Wheeler [Ky.] 76 S. W. 34; Cooper v. New York, O. & W. R. Co., 84 App. Div. [N. Y.] 42; Galveston, etc., R. Co. v. Brown [Tex. Civ. App.] 77 S. W 832; Garant v. Cashman, 183 Mass. 13, 66 N. E. 599; Chenall v. Palmer Brick Co., 117 Ga. 106. Unexploded blasts. McMillan v. North Star Min. Co., 32 Wash. 579, 73 Pac. 685. Knowledge of danger of a structure placed too near track is not shown by fact that brakeman had passed the place once before in the dark and was looking for obstructions on the track. Gorham v. Sioux City Stock Yards Co., 118 Iowa, 749, 92 N. W. 698. A switchman does not assume the risk from lumber piles close to the track in an unfamiliar lumber yard. Bradburn v. Wabash R. Co. [Mich.] 96 N. W. 929. One employed to clean a drain does not, in the absence of knowledge, assume the risk of poisonous gases in such drain. Cox v. American Agricultural Chemical Co., 24 R. I. 503. Plaintiff may show that the machine by which he was hurt was in a dangerous condition for a long time before and within half an hour of the accident; and that its condition was not apparent to him but was known to the master. Williams v. William Deering & Co., 104 Ill. App. 290. A railroad company is liable for injuries caused by overloading cars beyond their estimated capacity where the conductor in charge of train or other agent has knowledge of the fact and it was not known to the party injured. Louisville, etc., R. Co. v. Chandler's Adm'r, 24 Ky. L. R. 998, 70 S. W. 666. An employe not familiar with machinery is not chargeable with knowledge of the interior of a cylinder because he had once helped to clean a similar cylinder. Joyce v. American Writing Paper Co. [Mass.] 68 N. E. 213.

46. St. Louis Cordage Co. v. Miller [C. C.

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as to safety of place of work and appliances.[47] Knowledge of a defect in an appliance carries with it knowledge of the increased danger in its use.[48] Knowledge may be presumed from long use of the instrumentality.[49] An employe assumes the risks of work knowing all the facts except one which in view of those known is immaterial.[50] The servant is not held to knowledge of latent dangers,[51] and is not required to make a critical examination to discover same.[52] A conductor is not required to examine cars turned over to him where there is an inspector of cars employed at the station.[53]

Obvious dangers.—The servant assumes the risks of obvious dangers.[54] The

A.] 126 Fed. 495; Webster Mfg. Co. v. Goodrich, 104 Ill. App. 76. An employe persisting in work in a trench after notification of its unsafe condition assumes the risk of a cave-in. Lenderink v. Rockford [Mich.] 98 N. W. 4.

47. Glenmont Lumber Co. v. Roy [C. C. A.] 126 Fed. 524.

48. Texas, etc., R. Co. v. Peden [Tex. Civ. App.] 74 S. W. 932.

49. It is to be assumed that a brakeman working for six months on trains on which the engine was not equipped with air brakes knew of the dangers. Texas, etc., R. Co. v. Peden [Tex. Civ. App.] 74 S. W. 932. One assisting to make flying switches for several days before the accident assumed the risk. Carr v. St. Clair Tunnel Co. [Mich.] 92 N. W. 110. An employe experienced in the business of throwing belts assumed the risks of throwing a belt from narrow transverse timbers 19 feet from the floor. Koepcke v. Wis. Bridge & Iron Co., 116 Wis. 92, 92 N. W. 558. Where the servant knew of the condition of the appliance and had used it prior to the time of the injury it is a question for the jury whether the danger from its use was apparent to a man of ordinary prudence. Hartrich v. Hawes, 202 Ill. 334, 67 N. E. 13.

50. Ohio River & C. R. Co. v. Edwards [Tenn.] 76 S. W. 897.

51. Corbett v. American Screen Door Co. [Mich.] 95 N. W. 737; Welle v. Celluloid Co., 175 N. Y. 401, 67 N. E. 609; Shepherd v. Morton-Edgar Lumber Co., 115 Wis. 522, 92 N. W. 260. Welded handle with no indication of weakness—inexperienced employe. Murphy v. Marston Coal Co., 183 Mass. 385, 67 N. E. 342.

52. Brazil Block Coal Co. v. Gibson, 160 Ind. 319, 66 N. E. 882; Walsh v. New York & Q. C. R. Co., 80 App. Div. [N. Y.] 316; Rick v. Saginaw Bay Towing Co. [Mich.] 93 N. W. 632; Moore v. Missouri, K. & T. R. Co. [Tex.] 69 S. W. 997; Choctaw, etc., R. Co. v. Holloway, 191 U. S. 64; Illinois Steel Co. v. Ryska, 102 Ill. App. 347; McDonnell v. Cent. R. Co., 118 Ga. 86; Allen B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818. A section foreman does not assume the risks of dangers from a bent axle on his handcar where the defect could only be discovered by overturning the car and applying a straight edge. Missouri, K. & T. R. Co. v. Blackman [Tex. Civ. App.] 74 S. W. 74. A servant is not required to examine an elevator before riding thereon. Continental Tobacco Co. v. Knoop, 24 Ky. L. R. 1263, 71 S. W. 3. Close inspection as to structures near track is not required of brakeman. Galveston, etc., R. Co. v. Mortson [Tex. Civ. App.] 71 S. W. 770. A conductor has tested brakes sufficiently by turning them and is not required to examine for possible faulty repairs of brake chains under freight cars. McDonald v. Michigan Cent. R. Co. [Mich.] 93 N. W. 1041. A brakeman riding on the side of the car injured by striking a post in dangerous proximity to the track and engaged in the performance of his duties was not required to inspect the premises to discover the danger. Galveston, etc., R. Co. v. Brown [Tex. Civ. App.] 77 S. W. 832.

53. Barksdale v. Charleston & W. C. R. Co., 66 S. C. 204.

54. Choctaw, etc., R. Co. v. McDade, 191 U. S. 64; Bradburn v. Wabash R. Co. [Mich.] 96 N. W. 929; Roccia v. Black Diamond Coal Min. Co. [C. C. A.] 121 Fed. 451; Ahern v. Hildreth, 183 Mass. 296, 67 N. E. 328; Arkland v. Taber-Prang Art Co. [Mass.] 68 N. E. 219; Alvey v. American Writing Paper Co. [Mass.] 68 N. E. 333; New Omaha Thomson-Houston Elec. Light Co. v. Rombold [Neb.] 97 N. W. 1030; Schultz v. Chicago, etc., R. Co., 116 Wis. 31, 92 N. W. 377; Fischer v. Goldie [Mich.] 94 N. W. 5; Dixon v. Union Iron Works [Minn.] 97 N. W. 375; Western & A. R. Co. v. Moran, 116 Ga. 441; Parsons v. Hammond Packing Co., 96 Mo. App. 372, 70 S. W. 519; Harvey v. McConchie, 77 App. Div. [N. Y.] 361; Beckman v. Anheuser-Busch Brew. Ass'n, 98 Mo. App. 555, 72 S. W. 710; Willdigg v. Knox, 80 App. Div. [N. Y.] 390; Alabama Steel & Wire Co. v. Wrenn, 136 Ala. 475; Hettich v. Hillje [Tex. Civ. App.] 77 S. W. 641; Osborne v. Ala. Steel & Wire Co., 135 Ala. 571; Southern R. Co. v. Howell, 135 Ala. 639; Joyce v. American Writing Paper Co. [Mass.] 68 N. E. 213; Withee v. Somerset Traction Co. [Me.] 56 Atl. 204; Missouri, K. & T. R. Co. v. Dyer [Tex. Civ. App.] 75 S. W. 930; Illinois Steel Co. v. McNulty, 105 Ill. App. 594; Kleine v. Freunds Sons Shoe & Clothing Co., 91 Mo. App. 102; Fields v. New York Cent. R. Co., 86 App. Div. [N. Y.] 148; Glenmont Lumber Co. v. Roy [C. C. A.] 126 Fed. 524. An employe of a saw mill assumes the risk of dangers from a circular saw in operation. Mushinsky v. Vincent [Mich.] 97 N. W. 43. Cotton seed on floor causing person walking on same to slip. Deviny v. Planters' Oil Mill [Miss.] 33 So. 492. Fall of kegs piled on slanting slippery floor. Houston Ice & Brewing Co. v. Pisch [Tex. Civ. App.] 77 S. W. 1047. Loading logs. McMillan v. Spider Lake Sawmill & Lumber Co., 115 Wis. 332, 91 N. W. 979. Proximity of poles to car track. Houston Elec. Co. v. Robinson [Tex. Civ. App.] 76 S. W. 209. Injury in elevator from projection. Operator had passed it over 700 times, it was visible, and at time of injury he was read-

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fact that the defect is open to ordinary observation is not conclusive as to whether it is an obvious danger.[55]

Compliance with commands and assurance of safety.—There is no assumption where the act is done in compliance with a command[56] unless the risk of danger is imminent and would not be incurred by a person of ordinary prudence.[57] A like rule applies where the servant is assured of safety by the master[58] unless the danger is so manifest that a person of ordinary prudence and caution would not have incurred it.[59]

Inexperienced or youthful employes.—The rule making knowledge of the danger a condition to assumption of risk has particular application to the case of inexperienced employes not warned of the dangers.[60] The rule of assumption of

ing newspaper. Olson v. Hanford Produce Co., 118 Iowa, 55, 91 N. W. 806. Piling steel rails on soft ground. Grant v. Nat. R. Spring Co., 86 App. Div. [N. Y.] 593. Intelligent girl operating simple laundry machine. Kupkofski v. Spiegel [Mich.] 97 N. W. 48. Ladder slipping by reason of a cleat splitting. Wood v. Tileston & Hollingsworthy Co., 182 Mass. 449, 65 N. E. 810. Mounting moving switch engine. Chicago, I. & L. R. Co. v. Barr, 204 Ill. 163, 68 N. E. 543. Falling of a tilted stone on which plaintiff was working. Archambault v. Archambault [Mass.] 68 N. E. 199. Miner injured by fall of slate—familiar with working such mines—made test and decided not to prop. Dickason Coal Co. v. Unverferth, 30 Ind. App. 546, 66 N. E. 759. That power cannot be turned off to release a limb drawn into a machine by reason of a defect in the machinery is not an obvious risk. Desrosiers v. Bourn [R. I.] 52 Atl. 1080. A servant engaged in unloading a cargo of timber and cotton from a ship assumed the risk of the timber falling on him when the cotton, which had supported the timber, was removed. Toohey v. Ocean S. S. Co., 78 App. Div. [N. Y.] 178. The danger of injury in taking down a telephone pole without "spikes" and "dead men" to lower it is not an obvious danger assumed by one attempting to do the work without the tools. Orr v. Southern Bell Tel. & Tel. Co., 132 N. C. 691, 44 S. E. 401. An employe venturing on a track to remove an object dangerous to an approaching train can only recover for injuries received where the appearance of danger is such as to arouse a reasonable apprehension of danger. Gulf, etc., R. Co. v. Roane [Tex. Civ. App.] 76 S. W. 771. Defect in construction held not ascertainable on ordinary careful observation. Indiana Nat. Gas & Oil Co. v. Vauble, 31 Ind. App. 370, 68 N. E. 195.

55. A switchman required to ride on the ladder at the side of a freight car is not chargeable as a matter of law with knowledge that a structure at the side of the track built by the company is so close to the track as to be dangerous merely because open to ordinary observation. Texas & P. R. Co. v. Swearingen [C. C. A.] 122 Fed. 193.

56. Hettich v. Hillje [Tex. Civ. App.] 77 S. W. 641; King's Adm'r v. Covington R. Co., 24 Ky. L. R. 1942, 72 S. W. 757; Texas & P. R. Co. v. Behymer, 189 U. S. 468, 47 Law. Ed. 905. One sent into another department does not assume risk of danger of an imperfect belt in that department. Goldthorpe v. Clark-Nickerson Lumber Co., 31 Wash. 467, 71 Pac. 1091. A lineman does not assume the risk of injury from a live wire on a pole belonging to another company which he is directed to mount at the command of his foreman though knowing the dangers of the work and the inadequacy of his appliances. Shanks v. Citizens' General Elec. Co. [Ky.] 76 S. W. 379. An employe of a painter ordered to use a certain scaffold is not bound to inspect same. Ehlen v. O'Donnell, 205 Ill. 38, 68 N. E. 766.

57. Wrightsville & T. R. Co. v. Lattimore, 118 Ga. 581; Illinois Steel Co. v. Ryska, 200 Ill. 280, 65 N. E. 734; Slack v. Harris, 200 Ill. 96, 65 N. E. 669.

58. A servant continuing work after complaint of the incompetency of a fellow-servant does not assume the risk where he is assured by the master that such servant is all right and is ordered to continue his work. La Salle County Carbon Coal Co. v. Offergeld, 104 Ill. App. 494. An employe assumes risks of obvious dangers and will not be heard to say that he relied on the assurance of the master that there was no defect nor danger. Ft. Worth Iron Works v. Stokes [Tex. Civ. App.] 76 S. W. 231. A miner is not guilty of contributory negligence for failing to discover dangerous condition of roof where he relied on assurance of his employer's room dresser having authority over him that the room was safe. St. Bernard Coal Co. v. Southard [Ky.] 76 S. W. 167.

59. Harte v. Fraser, 104 Ill. App. 201.

60. Republic Iron & Steel Co. v. Ohler [Ind.] 68 N. E. 901; Allison v. Long Clove Trap Rock Co., 75 App. Div. [N. Y.] 267. Ordinary laborer sent to make coupling. Branz v. Omaha & C. B. R. & Bridge Co., 120 Iowa, 406, 94 N. W. 906. A servant with but little experience in the use of trucks and no experience in hauling ice on same did not as a matter of law assume the risk incident to the boxes slipping backward though charged with knowledge of defect of the truck in not having a cleat to prevent such slipping. Parsons v. Hammond Packing Co., 96 Mo. App. 372, 70 S. W. 519. One unfamiliar with machinery is not chargeable with knowledge of the interior of a cylinder by the fact that he once helped clean the interior of a similar cylinder. Joyce v. American Writing Paper Co. [Mass.] 68 N. E. 213. An employe engaged in lowering timbers does not assume the risk on the first day of his employment of a rope breaking though he knows it parted the previous day. Geldard v. Marshall [Or.]

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risks qualified by consideration of their capacity is applicable to infants.[61] The child-labor laws determine that children have not the judgment necessary for employment in dangerous positions and against assumption of risks.[62] Youthful and inexperienced employes do not assume risks of dangers where action is in obedience to orders of superior.[63]

Notice or complaint to master and promise to repair.—The servant assumes the risk of lack of safety of place of work and appliances where he fails to notify the master of such defects.[64] He may recover where he has called the master's attention to the defect if the work though perilous was not inevitably dangerous.[65] There is no assumption by a continuance at work for a reasonable time after promise to make repairs[66] unless the dangers are so great that they would not be encountered by an ordinarily prudent man.[67] The promise to repair must be definite,[68] and may be made by a representative of the master.[69] A servant relying on a promise to repair a defective machine is not relieved from the duty of exercising care for his safety in the use of the machine.[70] Return to work after promise to repair defect shows a reliance on the promise.[71]

73 Pac. 330. A section hand assisting to load cars at the direction of his boss does not assume risks which were not obvious and of which he had no knowledge, the work not being in the line of his employment. International & G. N. R. Co. v. Gaitanes [Tex. Civ. App.] 70 S. W. 101. The doctrine of assumption of risk has no application where an inexperienced employe is directed to operate a dangerous machine without warning. Coleman v. Perry [Mont.] 72 Pac. 42.

61. Henderson v. Kansas City, 177 Mo. 477, 76 S. W. 1045; Evans Laundry Co. v. Crawford [Neb.] 93 N. W. 177; Upthegrove v. Jones & Adams Coal Co., 118 Wis. 673, 96 N. W. 385; Shebek v. National Cracker Co., 120 Iowa, 414, 94 N. W. 930. Boy of 11 years injured in attempting to throw belt held not to have assumed risk. Henderson Cotton Mills v. Warren's Adm'r, 24 Ky. L. R. 1030, 70 S. W. 658. If a minor servant is injured through his own negligence in voluntarily encountering a risk of which he had knowledge, the employer is not liable whether he has instructed him or not. Fries v. American Lead Pencil Co. [Cal.] 75 Pac. 164.

62. Marino v. Lehmaier, 173 N. Y. 530, 66 N. E. 572.

63. Franklin v. Missouri, K. & T. R. Co., 97 Mo. App. 473, 71 S. W. 540.

64. St. Louis Cordage Co. v. Miller [C. C. A.] 126 Fed. 495.

65. Williams v. Clark, 204 Pa. 416. An inexperienced servant is relieved of the assumption where he reports the defect and is told to run the machine until quitting time, when it will be repaired. King-Ryder Lumber Co. v. Cochran [Ark.] 70 S. W. 606. Notice of a defect in an appliance is presumed to refer only to the defects affecting the purpose for which it is used. Shemwell v. Owensboro & N. R. Co. [Ky.] 78 S. W. 448.

66. Webster Mfg. Co. v. Nisbett, 105 Ill. App. 261; Leaux v. New York, 87 App. Div. [N. Y.] 405; Nash v. Dowling, 93 Mo. App. 156; Rice v. Eureka Paper Co., 174 N. Y. 385, 66 N. E. 979; Atchison, etc., R. Co. v. Sledge [Kan.] 74 Pac. 1111; Republic Steel & Iron Works v. Gregg, 24 Ky. L. R. 1627, 71 S. W. 900; Highland Boy Gold Min. Co. v. Pouch [C. C. A.] 124 Fed. 148; Cudahy Packing Co. v. Skoumal [C. C. A.] 125 Fed. 470. Where repairs to a step were promised by the engineer and the fireman had no knowledge that they had not been made at an intervening station when they could have been made he did not thereafter assume the risk of danger in using such step. Gulf, C. & S. F. R. Co. v. Garren [Tex. Civ. App.] 72 S. W. 1028. A servant not guilty of contributory negligence by continuing to work with knowledge of defect where he is promised that defect will be repaired and previous to such repairs there will be no dangerous use of the defective appliance. Curtis v. McNair, 173 Mo. 270, 73 S. W. 167. A domestic will not waive her right to recovery for failure to repair roof of her lodging room by remaining in the service for seven days after discovery of its condition where she was promised repairs. Collins v. Harrison [R. I.] 56 Atl. 678. Where a master promises to repair, such promise does not make him an insurer of the servant's safety during the time necessary to make the repairs. Shemwell v. Owensboro & N. R. Co. [Ky.] 78 S. W. 448. Where a servant notifies the master that a roof is defective, the master's promise to repair will not relieve the servant of his contributory negligence for going on it to extinguish a fire before it had been repaired. Id. One week is not an unreasonable length of time to rely on a promise to repair. Id.

67. Roccia v. Black Diamond Coal Min. Co., 121 Fed. 451; Webster Mfg. Co. v. Nisbett, 105 Ill. App. 261; Musser-Sauntry Land, L. & Mfg. Co. v. Brown [C. C. A.] 126 Fed. 141; Kansas & T. Coal Co. v. Chandler (Ark.) 77 S. W. 912; Atchison, T. & S. F. R. Co. v. Sledge [Kan.] 74 Pac. 1111; Webster Mfg. Co. v. Nesbitt, 205 Ill. 273, 68 N. E. 936.

68. Remark of engineer after making an ineffectual attempt to repair a defective step that "I will have it fixed" not sufficient to prevent assumption of risk. Gulf, C. & S. F. R. Co. v. Garren, 96 Tex. 605, 74 S. W. 897.

69. The promise of an engineer to have a step repaired was that of the company on which the fireman had a right to rely. Gulf, C. & S. F. R. Co. v. Garren [Tex. Civ. App.] 72 S. W. 1028.

70. Reiser v. Southern P. M. & L. Co.,

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Methods and appliances adopted by employe.—A servant instructed to inspect appliances assumes the risks of defective appliances selected by him.[72] Where the master has performed his duties as to appliances and places of work, the servant will assume risks of appliances selected by himself,[73] and the use of methods adopted by him contrary to those provided,[74] as where the employe voluntarily puts himself in place of danger.[75] An employe having a choice between two methods of doing the work who chooses the more dangerous assumes the risk involved in the choice.[76] The fact that the service was outside the servant's duties does not affect the doctrine of assumed risk where there was no danger in the work and the danger was in the place selected by the servant for purposes of convenience, there being safe places practicable for the purpose.[77]

Disobedience of rules.[78]—A servant assumes risks of uniform violation of rules of which he has knowledge.[79]

Proof of fact of assumption must be clear.[80]

(§ 3) *G. Contributory negligence.*[81]—There may be no recovery where the servant is guilty of contributory negligence;[82] but recovery for injuries by willful

24 Ky. L. R. 796, 69 S. W. 1085; Johnson v. Anderson & M. Lumber Co., 31 Wash. 554, 72 Pac. 107.

71. Curtis v. McNair, 173 Mo. 270, 73 S. W. 167.

72. Higgins v. Southern Pac. Co., 26 Utah, 164, 72 Pac. 690.

73. Northern Ohio R. Co. v. Rigby [Ohio] 68 N. E. 1046; Cronin v. Russel W. & F. Co. [Mich.] 93 N. W. 1070; Tiffaney v. Hathaway, 182 Mass. 431, 65 N. E. 811; Floyd v. Colorado F. & I. Co. [Colo. App.] 70 Pac. 452. One taking employment with a knowledge of its dangers, and that dangers will be lessened by the use of ordinary expedients within his reach, assumes the risks of such employment. Crawford v. American S. & W. Co. [C. C. A.] 123 Fed. 275.

74. Lodi v. Maloney [Mass.] 68 N. E. 229. Use of hands instead of stick to clean corn shredder. Frink v. Potts, 105 Ill. App. 92. An employe assumes the risk of riding in a freight elevator where the master has furnished other means of reaching different floors. O'Donnell v. MacVeagh, 205 Ill. 23, 68 N. E. 646.

75. George Fowler Son & Co. v. Brooks, 65 Kan. 861, 70 Pac. 600. Packing-house employe familiar with a catch basin and its lids assumed the risk from fall therein where there was a safer way around. Cichowicz v. International Packing Co., 206 Ill. 346, 68 N. E. 1083. A switchman assumes the risk of dangers from climbing over couplings of trains to which an engine is attached ready to start though the warning bell was not sounded. McKee v. Chicago, B. & Q. R. Co., 96 Mo. App. 671, 70 S. W. 922.

76. Palmer v. Kintoch Tel. Co., 91 Mo. App. 106. When an employe has the power to adopt his own methods and he wantonly, knowing and appreciating the dangers of both, selects the more dangerous of two ways, he does so at his peril, and cannot recover. Ill. Steel Co. v. McNulty, 105 Ill. App. 594.

77. Hettich v. Hillje [Tex. Civ. App.] 77 S. W. 641. There is no question as to the violation of the duty to furnish a safe place for work where the servant makes the selection to suit his convenience and the work could have been done with safety elsewhere. Id.

78. Natchez Cotton Mill Co. v. McLain [Miss.] 33 So. 723.

79. Rule requiring cars on side track to be left coupled. Tex., S. V. & N. W. R. Co. v. Peden [Tex. Civ. App.] 74 S. W. 932. A brakeman entering the employ of a railroad with knowledge of violation of speed ordinance assumes the risk. Martin v. Chicago, R. I. & P. R. Co., 118 Iowa, 148, 91 N. W. 1034, 59 L. R. A. 698. A brakeman will not necessarily be held to have assumed the risk of a violation of rules as to speed by failing to apply the air brakes unless the conditions were such that an ordinarily prudent man would have applied the air brakes. International & G. N. R. Co. v. Cochrane [Tex. Civ. App.] 71 S. W. 41.

80. Mere knowledge of the existence of the risk does not in all cases raise the presumption that the servant has agreed to assume it. Chicago, I. & L. R. Co. v. Martin, 31 Ind. App. 308, 65 N. E. 591. An employe cannot be said as a matter of law to have assumed a risk incident to his employment unless the assumption is shown by undisputed evidence or so clearly proven that no reasonable inference can be drawn to the contrary. Revolinski v. Adams Coal Co., 118 Wis. 324, 95 N. W. 122.

81. Contributory negligence defined. Hone v. Mammoth Min. Co. [Utah] 75 Pac. 381.

82. Daniel v. Cent. of Ga. R. Co. [Ga.] 46 S. E. 107; Fla. Cent. & P. R. Co. v. Mooney [Fla.] 33 So. 1010; Steeples v. Panel & Folding Box Co. [Wash.] 74 Pac. 475; Andrews v. Jefferson C. O. & R. Co. [Tex. Civ. App.] 74 S. W. 342; Scheir v. Quirin, 77 App. Div. [N. Y.] 624; Riley v. Banner Lumber Co., 109 La. 274; Holmes v. Bradenbaugh, 172 Mo. 53, 72 S. W. 550; Chapman v. Pere Marquette R. Co. [Mich.] 94 N. W. 1049; Parker v. Pine Tree Lumber Co., 89 Minn. 500, 95 N. W. 323; Morris v. Boston & M. R. R. [Mass.] 68 N. E. 680; Erie R. Co. v. Kane [C. C. A.] 118 Fed. 223; Karczewski v. Wilmington City R. Co. [Del.] 54 Atl. 746. Laborer in trench injured by passing car—trench sufficiently wide so that injury need not have occurred. Riddle v.

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violation of statute regulating mines is not defeated by contributory negligence,[83] though one guilty of contributory negligence may not complain that his employer did not have cars equipped with safety couplers as required by the Federal act.[84] The contributory negligence must be the proximate cause of the injury.[85]

Care required of servant.—The degree of care required of the servant is ordinary care[86] or such care as would be exercised by persons of ordinary prudence similarly situated,[87] and not the highest degree of care.[88] A conductor discovering a defective car in his train must exercise his best judgment as to carrying it in his train.[89] The servant should have knowledge of the danger.[90] He may rely on the care of the master in furnishing reasonably safe instrumentalities and methods.[91] The fact of the servant's knowledge of defects is not conclusive as to his negligence

Forty-Second St., M. & St. N. Ave. R. Co., 173 N. Y. 327, 66 N. E. 22. There may be no recovery where the injury was not caused by a defective coupler but because plaintiff negligently used his foot to push bumper into place. Elmore v. Seaboard Air Line R. Co., 132 N. C. 865. Experienced carpenter failing to test sufficiency of joist. Baxter v. Lusher, 159 Ind. 381, 65 N. E. 211. Kicking bumper of approaching car. Elmore v. Seaboard Air Line R. Co., 131 N. C. 569. Action of lineman of experience in stringing wires from bracket. Mulligan v. McCaffrey, 182 Mass. 420, 65 N. E. 831. Laborer sitting on front end of most remote car pushed by engine and thrown therefrom by sudden stop. Haynes v. Ft. Dodge & O. R. Co., 118 Iowa, 393, 92 N. W. 57.

83. Riverton Coal Co. v. Shepherd, 207 Ill. 395, 69 N. E. 921.

84. Winkler v. Phila. & R. R. Co. [Del.] 53 Atl. 90.

85. Horton v. Ft. Worth P. & P. Co. [Tex. Civ. App.] 76 S. W. 211. The act of a brakeman in placing signals on the rear of the caboose while the train is in motion is not contributory negligence where the injury is caused by stopping the train by use of an emergency brake. Benedict v. Chicago G. W. R. Co. [Mo. App.] 78 S. W. 60. Plaintiff may show that his portion of the work was not dangerous where the injury was caused by the negligence of the master in not properly protecting him from injury where contributory negligence was relied on. Southern C. & F. Co. v. Bartlett, 137 Ala. 234. Absence from post of duty will not prevent recovery unless that fact contributed to the injury. Chicago, B. & Q. R. Co. v. Camper, 199 Ill. 569, 65 N. E. 448.

86. Bodie v. Charleston & W. C. R. Co., 66 S. C. 302; Ala. S. & W. Co. v. Wrenn, 136 Ala. 475. Duty to examine as to guard rail around platform. Steeples v. Panel & Folding Box Co. [Wash.] 74 Pac. 475. Sufficiency of plea alleging contributory negligence. Osborne v. Ala. S. & W. Co., 135 Ala. 571; Upthegrove v. Jones & A. Coal Co., 118 Wis. 673, 96 N. W. 385.

87. Southern R. Co. v. Howell, 135 Ala. 639; Rice v. Wabash R. Co., 101 Mo. App. 459, 74 S. W. 428; Louisville & N. R. Co. v. Sullivan's Adm'r [Ky.] 76 S. W. 525; Bair v. Heibel [Mo. App.] 77 S. W. 1017. Where a person is employed in the presence of a known danger, to constitute contributory negligence it must be shown that he voluntarily and unnecessarily exposed himself to danger. Potts v. Shreveport Belt R. Co., 110 La. 1. An employe is not guilty of contributory negligence as a matter of law by failure to examine as to the sufficiency of racks on which he piles lumber. Corbett v. American Screen Door Co. [Mich.] 95 N. W. 737. Contributory negligence exists only where something is done or omitted which an ordinarily prudent man would not have done or omitted under the circumstances and which was the proximate cause of the injury. Hone v. Mammoth Min. Co. [Utah] 75 Pac. 381.

88. A carpenter is not required to exercise the highest degree of care as to work on scaffold to avoid injury. Hester v. Jacob Dold Packing Co., 95 Mo. App. 616, 75 S. W. 695.

89. Barksdale v. Charleston & W. C. R. Co., 66 S. C. 204.

90. Mullen v. Metropolitan St. R. Co., 89 App. Div. [N. Y.] 21. A fireman is not guilty of contributory negligence in using a defective step that the engineer promised to have repaired where he supposed that the repairs were made at an intervening station. Gulf, C. & S. F. R. Co. v. Garren [Tex. Civ. App.] 72 S. W. 1028. An elevator operator injured by falling down shaft on account of removal of elevator by guest is not guilty of contributory negligence as a matter of law. Lyons v. Dee, 88 Minn. 490, 93 N. W. 899. A brakeman is not guilty of contributory negligence in stepping into a freshly dug trench hidden by a heavy fall of snow. De Cair v. Manistee & G. R. R. Co., [Mich.] 95 N. W. 726. Employe falling in partially covered waterway. Osborne v. Ala. S. & W. Co., 135 Ala. 571.

91. Tex. & Ft. S. R. Co. v. Hartnell [Tex. Civ. App.] 75 S. W. 809. An employe is not deprived of his remedy by the fact that he was employed on the work. He has a right to assume that the foreman in charge performed his duty. Laborer injured by defectively loaded car which he helped load. El Paso & N. W. R. Co. v. McComas [Tex. Civ. App.] 72 S. W. 629. Failure to inspect car and discover broken step held proximate cause of injury by falling from step. Scote v. Eastern R. of Minn. [Minn.] 95 N. W. 892. Employe need not investigate for latent defects. Allen B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818. It is the master's duty to furnish a safe place to work in and safe appliances to work with and a servant can assume he has done so in the absence of warning. Buoy v. Clyde Mill. & El. Co. [Kan.] 75 Pac. 466. Where a servant is instructed by a master to use certain scaffolding, it is not incumbent on him to inspect it. Ehlen v. O'Donnell, 205 Ill. 38, 68 N. E. 766.

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in using the appliance or continuing in the service[92] unless the danger is so great as to threaten immediate injury,[93] and is such that persons of ordinary prudence under the same circumstances would not have undertaken their use.[94] The rules of diligence must be adjusted to the character of the work in which plaintiff is engaged.[95] It is not of itself contributory negligence to engage in a dangerous occupation.[96] An employe may not recover for injuries increased by his own imprudence.[97] Intoxication of employe at the time will not preclude recovery for master's negligence.[98]

The doctrine is applicable to children, they being held to care commensurate with their age.[99]

Appliances, methods, and places for work.—The servant may be guilty of contributory negligence in the selection of the appliance where proper ones furnished by the master are within reach,[1] and where, proper appliance being furnished, he fails to use same.[2] It is his duty to call for proper appliances,[3] and he may select such as appear reasonably safe for the work.[4] A servant is guilty of negligence where he sits on a dangerous machine not in operation but liable to be started without warning.[5]

The following are examples of want of care amounting to contributory negligence: Failure to assure safety by adoption of usual precautions;[6] adoption of un-

92. Osborne v. Ala. S. & W. Co., 135 Ala. 571.

93. Edwards v. Barber Asphalt Pav. Co., 92 Mo. App. 221; Nash v. Dowling, 93 Mo. App. 156; Cardwell v. Chicago G. W. R. Co., 90 Mo. App. 31; Herbert v. Mound City B. & S. Co., 90 Mo. App. 305. If a servant might reasonably have supposed he could safely work at a place by the use of "care and caution," he did not assume the risk of the injury which occurred. Henderson v. Kan. City, 177 Mo. 477, 76 S. W. 1045.

94. Hartrich v. Hawes, 103 Ill. App. 433; Ill. Steel Co. v. Ryska, 200 Ill. 280, 65 N. E. 734; Wrightsville & T. R. Co. v. Lattimore, 118 Ga. 581. Although an employe on a scaffold may know of defects which do not render it glaringly dangerous, he may continue his work on the assumption that it is safe. Hester v. Jacob Dold Packing Co., 95 Mo. App. 616, 75 S. W. 695.

95. Wrightsville & T. R. Co. v. Lattimore, 118 Ga. 581. Contributory negligence by an engineer injured by collision with escaped cars from a switch is not shown by continuance at work with knowledge that there were no derailing switches. Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890.

96. Potts v. Shreveport Belt R. Co., 110 La. 1; Ala. S. & W. Co. v. Wrenn, 136 Ala. 475.

97. Tex. & P. R. Co. v. Behymer, 189 U. S. 468, 47 Law. Ed. 905. There may be no recovery for injuries caused by want of care in treatment of original injury. Tex. Portland Cement Co. v. Poe [Tex. Civ. App.] 74 S. W. 563.

98. Lyons v. Dee, 88 Minn. 490, 93 N. W. 899.

99. Eagle & P. Mills v. Herron [Ga.] 46 S. E. 405; Bredeson v. C. A. Smith Lumber Co. [Minn.] 97 N. W. 977; Rogers v. Samuel Meyerson Printing Co. [Mo. App.] 78 S. W. 79; Ritchie v. Krueger, 102 Ill. App. 654. There is a presumption of care by a boy of 13. Rogers v. Samuel Meyerson Printing Co. [Mo. App.] 78 S. W. 79. A boy 15 years old, of ordinary intelligence and familiar with machinery he is operating is capable of contributory negligence. Killelea v. Cal. Horseshoe Co., 140 Cal. 602, 74 Pac. 157. If a minor servant knowingly encounters dangers incident to the employment, it is immaterial that he has not been warned. Fries v. American Lead Pencil Co. [Cal.] 75 Pac. 164.

1. Brundige v. Dodge Mfg. Co., 183 Mass. 100, 66 N. E. 604; Lee v. Kan. City Gas Co., 91 Mo. App. 612; Campbell v. T. A. Gillespie Co. [N. J. Err. & App.] 55 Atl. 276; Umburg v. International Paper Co., 97 Me. 327; McGrath v. Del., L. & W. R. Co., 68 N. J. Law, 425.

2. Kellogg v. Denver City Tramway Co. [Colo. App.] 72 Pac. 609. A servant charged with the care of a floor and the duty of caring for openings and keeping the place lighted and furnished with lanterns is guilty of contributory negligence in not using such lanterns while walking after dark on an unprotected platform without using his lantern. Steeples v. Panel & Folding Box Co. [Wash.] 74 Pac. 475. There may be no recovery for insufficient light in place of work where the employe had been furnished with a lantern which he failed to use. Anderson v. Forrester-Nace Box Co. [Mo. App.] 77 S. W. 486.

3. Crawford v. American S. & W. Co. [C. C. A.] 123 Fed. 275.

4. A lineman ascending a pole to cut wires may use such of the appliances furnished as appear reasonably safe for the work. Walsh v. N. Y. & Q. C. R. Co., 80 App. Div. [N. Y.] 316.

5. Calvert v. Brosius [Ky.] 77 S. W. 1098.

6. An employe whose duty it is to nail cleats at the end of a gang plank used to load cars is guilty of contributory negligence in failing to nail such cleats where injuries result from such neglect. St. Louis S. W. R. Co. v. Barrett [Tex. Civ. App.] 72 S. W. 884. Hod carrier injured by failure to examine height of timbers above platform on which he was carrying his load.

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usual methods, safe methods being provided;[7] injury while absent from post of duty;[8] allowing attention to be distracted;[9] failure to look when in a place where accident likely to occur;[10] leaving place of safety for position of obvious danger;[11] selection of unsafe place while awaiting performance of work by others;[12] standing between cars on sidetrack when switching in progress;[13] working in dark or with insufficient light;[14] failure of engineer to have train under control;[15] undermining supports;[16] leaning on cogwheel which communicated power to machinery.[17] The

McCarthy v. Emerson, 77 App. Div. [N. Y.] 562. A seaman engaged in cleaning a cannon is guilty of contributory negligence where he does not ascertain whether it is loaded. Sievers v. Eyre, 122 Fed. 734. A servant repairing belting is guilty of contributory negligence in failing to properly secure the lever controlling the machine over which he is working. Ward v. Connor, 182 Mass. 170, 64 N. E. 968.

7. Chamberlain v. Waymire [Ind. App.] 68 N. E. 306; Whitson v. Wrenn [N. C.] 46 S. E. 17. Employer is not liable for injuries caused by use of a dangerous passage where he has furnished a safe passageway. McKean v. Colo. F. & I. Co. [Colo. App.] 71 Pac. 425. A fireman releasing hand from handhold and putting entire strength on bell cord while train was rounding curve at high speed and is injured by its breaking is guilty of contributory negligence. Ill. Cent. R. Co. v. Mercer, 24 Ky. L. R. 908, 70 S. W. 287. An employe is guilty of contributory negligence in crossing over the automatic doors of an elevator shaft where a different safe route is available. Connors v. Merchants' Mfg. Co. [Mass.] 69 N. E. 218. A miner always conducted to his place of work by a guide who attempted to reach the place without this assistance was guilty of contributory negligence. Smith v. Thomas Iron Co. [N. J. Law] 54 Atl. 562. A servant reaching into a machine to get an object accidentally dropped therein and which could be reached by other means is guilty of negligence. Doerr v. St. Louis Brew. Ass'n, 176 Mo. 547, 75 S. W. 600.

8. Phillips v. Cent. R. Co., 68 N. J. Law, 605.

9. Contributory negligence is shown where the operator of a mangle looked away from a machine she was operating to smile in recognition of a passerby. Gaudet v. Stansfield, 182 Mass. 451, 65 N. E. 850.

10. Donohoe v. Lonsdale Co. [R. I.] 55 Atl. 326. A railway employe riding on an inspection speeder is guilty of contributory negligence in not continuously looking for trains at crossings, the car capable of being stopped in one foot and he having a large unobstructed view of the track. Ind. I. & I. R. Co. v. Trinosky [Ind. App.] 69 N. E. 402. A motorman failing to look for approaching car is guilty of contributory negligence. Bobb v. Union Traction Co., 206 Pa. 265. An employe riding a bicycle in a dense fog knowing of the schedule of trains is guilty of contributory negligence in colliding with a train the operatives of which were not required to keep a special lookout for him. Jacob's Adm'r v. Chesapeake & O. R. Co., 24 Ky. L. R. 1879, 72 S. W. 308. An employe using a tricycle is bound to keep lookout for approaching train. Id. It is contributory negligence for a brakeman crossing numerous switches to stand with his back in the direction from which cars could be kicked. Dolphin v. New York, N. H. & H. R. Co., 182 Mass. 509, 65 N. E. 820. A switchman is guilty of contributory negligence in switching cars on the wrong track whereby he was injured where an inspection of the rails would have shown his error. Louisville & N. R. Co. v. Mounce's Adm'r, 24 Ky. L. R. 1378, 71 S. W. 518.

11. One leaving a place of safety to place himself in a position of obvious danger may not recover for resulting injuries. Erie R. Co. v. Kane [C. C. A.] 118 Fed. 223; Choctaw, O. & G. R. Co. v. Stallings, 70 Ark. 603, 70 S. W. 303. Conductor of freight train stepping on side track and injured by shifting engine. Lassiter v. Raleigh & G. R. Co., 133 N. C. 244. The employe cannot recover if the use of the known defective appliance could not have caused his injury if he had not placed himself in a position of danger in its use. Hayzel v. Columbia R. Co., 19 App. D. C. 359. An employe injured while sitting on the steps of a caboose is guilty of contributory negligence. Howard v. Southern R. Co., 132 N. C. 709.

12. Southern Ind. R. Co. v. Harrell [Ind.] 68 N. E. 262. A servant who stands so close to the edge of a wide platform as to be struck by a train is guilty of contributory negligence. Norfolk & W. R. Co. v. Hawkes [Va.] 46 S. E. 471.

13. Dillon v. Iowa Cent. R. Co., 118 Iowa, 645, 92 N. W. 855.

14. Johnson v. Anderson & M. Lumber Co., 31 Wash. 554, 72 Pac. 107. A servant supplied with sufficient lighting facilities could not complain of an accident caused by insufficient lights. Steeples v. Panel & Folding Box Co. [Wash.] 74 Pac. 475. An employe whose duty it is to keep himself supplied with lamp oil and matches may not recover for injuries received while away from his place to supply himself with matches which he had forgotten. Hollingsworth v. Pineville Coal Co., 24 Ky. L. R. 2437, 74 S. W. 205. An employe injured by falling in a wheel pit, the location of which is familiar to him, may not recover. Illinois Steel Co. v. Downey, 103 Ill. App. 101.

15. Shannon v. N. Y. Cent. & H. R. R. Co., 84 N. Y. Supp. 646.

16. The law requiring mine operators to employ overseers to inspect overhead spaces may not be invoked where the inspection was made and the injured person thereafter worked for several hours undermining the support that released the rock causing his injury [Tenn. Acts 1881, c. 170]. Heald v. Wallace, 109 Tenn. 346, 71 S. W. 80. A miner sent into a mine to remove slate that had fallen from the roof was guilty of contributory negligence on removing a prop and failing to restore it to position whereby he was injured. Dickason Coal Co. v. Peach [Ind. App.] 69 N. E. 189.

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servant is not guilty of contributory negligence where the methods adopted by him are those in general use.[18] Contributory negligence is not to be measured solely by what actually happened.[19] Instances where element of contributory negligence was wanting are collected in footnote.[20]

Disregard of instructions, warnings, and rules.—The servant is guilty of contributory negligence where his injuries are caused by a disregard of instructions[21] or warnings,[22] or a disobedience of rules,[23] unless such rules are uniformly violated

17. Richardson v. Mesker, 171 Mo. 666, 72 S. W. 506.

18. Broadfoot v. Shreveport Cotton Oil Co. [La.] 35 So. 643. It is not negligence per se for a brakeman to go between a car and the engine to make a coupling. Kansas City, M. & B. R. Co. v. Flippo [Ala.] 35 So. 457. A brakeman sleeping in a caboose according to custom is not guilty of contributory negligence where the caboose is moved into a position that will intercept a passing train. Houston & T. C. R. Co. v. McGowan [Tex. Civ. App.] 74 S. W. 339. A brakeman was not guilty of contributory negligence in climbing on a caboose to get a red lantern to warn a following section where the engineer of that section had failed to whistle at customary places and crossings within half mile of rear of first section and it was difficult to determine the distance in the nighttime. Texas & N. O. R. Co. v. Scott, 30 Tex. Civ. App. 496, 71 S. W. 26. One employed as a common laborer sent to the top of a building to start a stalled elevator and injured by its fall will not as a matter of law be held guilty of contributory negligence in shaking the elevator to release it, that method having been sufficient on previous occasions, it not appearing that he knew what caused the stoppage or that the danger was obvious to him. American Distributing Co. v. Thorne, 122 Fed. 431.

19. Olsen v. Cook Inlet Coal Fields Co. [C. C. A.] 121 Fed. 726. Contributory negligence of a mine driver hit by top rock not proved by fact that mule passed it safely. Hamilton v. Mendota Coal & M. Co., 120 Iowa, 93, 94 N. W. 282.

20. Failure of worker to keep constant outlook for crane operated in his vicinity. Gould Steel Co. v. Richards, 30 Ind. App. 348, 66 N. E. 68. Laborer on construction riding home on a flat car of the construction train instead of the caboose. Barley v. Southern Ind. R. Co., 30 Ind. App. 406, 66 N. E. 72. Cager at a mine required to work with great rapidity stepping on a cage to adjust a car he is loading instead of running around the shaft by the "traveling way" and injured by a premature hoisting of the cage. Princeton Coal & Min. Co. v. Roll [Ind.] 66 N. E. 169. Lineman not bound to fasten pole which he ascends with guy ropes unless danger is apparent. Walsh v. New York & Q. C. R. Co., 80 App. Div. [N. Y.] 316. Use of material hoist to ascend to upper floor instead of using stairs. Boyle v. Columbian Fire Proofing Co., 182 Mass. 93, 64 N. E. 726. A flagman warning passers of dangers from a locomotive backing at an excessive rate turning his back to the engine momentarily while engaged in the work of warning approaching people. Missouri, K. & T. R. Co. v. Goss [Tex. Civ. App.] 72 S. W. 94. The fact that a conductor on the rear of a backing electric car jumped after signaling his motorman to stop to avoid collision with a following car does not constitute negligence. Seccombe v. Detroit Elec. R. [Mich.] 94 N. W. 747. A brakeman is not guilty of contributory negligence as to an injury caused by striking a structure near track by standing on ladder at side of car looking to the rear for signals from the conductor to repeat to the engineer, that being his place of duty and his first work at the place of the accident. Galveston, H. & S. A. R. Co. v. Mortson [Tex. Civ. App.] 71 S. W. 770.

21. Sheehan v. Standard Gaslight Co., 87 App. Div. [N. Y.] 174. Schlemmer v. Buffalo, R. & P. R. Co. [Pa.] 56 Atl. 417; Koren v. Nat. C. & C. Co., 82 App. Div. [N. Y.] 527. Where the injury was caused by reaching across a machine to remove an obstruction as another employe did whom he was directed to follow, he will not be regarded as negligent for failure to go around the machine to do the work. Joyce v. American Writing Paper Co. [Mass.] 68 N. E. 213.

22. Cron v. Toledo & M. R. [Mich.] 93 N. W. 1078. A servant failing to go to a place of safety after being warned may not recover for a resulting injury. Orman v. Salvo [C. C. A.] 117 Fed. 233. One repeatedly warned of dangers of moving cars by placing a crow bar under the wheel and standing astride the rail is guilty of contributory negligence if injured by cars pushed against him while in such attitude. Street's Ex'x v. Norfolk & W. R. Co. [Va.] 45 S. E. 284. Car cleaner having been warned not to stand on car floors while switching held not negligent in law where car was carelessly "kicked" down on wrong track and struck car where he was then standing. Setterstrom v. Brainerd & M. M. R. Co., 89 Minn. 262, 94 N. W. 882.

23. Webb v. Haynes, 75 App. Div. [N. Y.] 620; Nordquist v. Great Northern R. Co., 89 Minn. 485, 95 N. W. 322. Guy rope cut by lineman. Leach v. Cent. N. Y. Tel. & Tel. Co., 81 App. Div. [N. Y.] 637. Coupling cars. McDonough v. Grand Trunk R. Co. [Me.] 56 Atl. 913; Scott v. Eastern R. Co. [Minn.] 95 N. W. 892; Nordquist v. Great Northern R. Co., 89 Minn. 485, 95 N. W. 322. Thrusting head out of window of electric car. Govan v. New Orleans & C. R. Co. [La.] 35 So. 484. Employe on construction train left to flag approaching trains left his post and was killed by the backing of the construction train. Texas & N. O. R. Co. v. Fields [Tex. Civ. App.] 74 S. W. 930. There may be no recovery by a fireman for injuries caused by his violation of a rule requiring fireman to assist the engineer in watching for signals and obstructions. Erie R. Co. v. Kane [C. C. A.] 118 Fed. 223. Disobedience of rule requiring use of stick to make couplings is not excused by the fact that the

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with the master's knowledge.[24] Violation of rules is not negligence per se.[25] In the absence of instructions to pursue a particular method, an employe is not negligent in adopting the more hazardous of two methods if the one he adopted was one which a prudent man would have adopted under like circumstances.[26]

Compliance with commands.—A servant cannot be charged with negligence in obeying a master's orders, unless he acts recklessly in doing so[27] or obedience would involve a risk obviously dangerous.[28] A servant entirely familiar with the operation of a dangerous thing which was not defective may not recover for injuries caused thereby in obeying a threatening command from another employe.[29]

Sudden emergencies.—One is not guilty of negligence for failure to adopt the safest course where confronted with a sudden emergency.[30]

Discovered peril and master's continuing negligence.—There may be a recovery notwithstanding contributory negligence where the injury could have been avoided by the exercise of ordinary care after discovery of plaintiff's peril,[31] and in some jurisdictions where the master's negligence as to appliances amounts to a continuing negligence.[32]

The evidence of contributory negligence must be clear.[34] One who seeks to rescue another from imminent peril is not thereby guilty of contributory negligence.[35]

conductor in charge of the train knew the brakeman was without a stick, there being nothing shown to impute the conductor's knowledge to defendant. Binion v. Georgia S. & F. R. Co., 118 Ga. 282.

24. Rule requiring stick to be used in making coupling. Texas Cent. R. Co. v. Yarbro [Tex. Civ. App.] 74 S. W. 357.

25. Missouri, K. & T. R. v. Jones [Tex. Civ. App.] 75 S. W. 53; Texas Cent. R. Co. v. Bender [Tex. Civ. App.] 75 S. W. 561; Texas Cent. R. Co. v. Yarbro [Tex. Civ. App.] 74 S. W. 357; Missouri, K. & T. R. Co. v. Bodie [Tex. Civ. App.] 74 S. W. 100.

26. Florida Cent. & P. R. Co. v. Mooney [Fla.] 33 So. 1010.

27. Ill. Steel Co. v. Ryska, 102 Ill. App. 347.

28. Ittner Brick Co. v. Killian [Neb.] 93 N. W. 951. A person sent into another department and unfamiliar with the surroundings in a poorly lighted room is not to be denied a recovery on the theory that he should have had the room sufficiently lighted. Goldthorpe v. Clark-Nickerson Lumber Co., 31 Wash. 467, 71 Pac. 1091. A servant cannot recover for injuries received in following heavy car wheels up an incline instead of walking by the side, the usual way, although ordered to do so by the foreman, the order being unreasonable and unjust. Zentz v. Chappell [Mo. App.] 77 S. W. 86. May recover if work was not inevitably dangerous. Williams v. Clark, 204 Pa. 416. Going on a roof, under direction of a master who knows of its defective condition does not relieve the servant from contributory negligence. Shemwell v. Owensboro & N. R. Co. [Ky.] 78 S. W. 448. A servant must exercise ordinary care in determining whether he will do an act, attended with danger, required by the master. Pressed Steel Car Co. v. Herath, 207 Ill. 576, 69 N. E. 959.

29. Russell v. Riverside Worsted Mills, 24 R. I. 591.

30. Middleborough R. Co. v. Stallard's Adm'r, 24 Ky. L. R. 1666, 72 S. W. 17; San Antonio & A. P. R. Co. v. Ankerson [Tex. Civ. App.] 72 S. W. 219; McGinn v. McCormick, 109 La. 396; Texas Cent. R. Co. v. Bender [Tex. Civ. App.] 75 S. W. 561. The negligence of an engineer in placing a brakeman in a position where he must act under stress of an emergency and in such stress chooses the unsafe method of escape is the proximate cause of the injury. San Antonio & A. P. R. Co. v. Ankerson [Tex. Civ. App.] 72 S. W. 219.

31. Smith v. Atlanta & C. Air Line R. Co., 132 N. C. 819; Chicago, R. I. & T. R. Co. v. Long [Tex. Civ. App.] 74 S. W. 59; Gulf, C. & S. F. R. Co. v. Roane [Tex. Civ. App.] 75 S. W. 845. The doctrine of discovered peril will not apply to a sectionman seen by the engineer on the track until he has good reason to believe that he will not get off the track. Evans v. Wabash R. Co. [Mo.] 77 S. W. 515. It is negligence to fail to take steps to stop a train where it is apparent that employe does not hear signals. Kelley v. Chicago, B. & Q. R. Co., 118 Iowa, 387, 92 N. W. 45.

32. The failure to equip cars with automatic couplers is a continuing negligence and contributory negligence is not a defense. Elmore v. Seaboard Air Line R. Co., 132 N. C. 865; Fleming v. Southern R. Co., 131 N. C. 476. Where the injury is caused by failure to furnish sufficient tools with which to perform the work, the master's negligence is continuing so that contributory negligence will not relieve from liability. Orr v. Southern Bell Tel. & Tel. Co., 132 N. C. 691.

34. Revolinsky v. Adams Coal Co., 118 Wis. 324, 95 N. W. 122.

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(§ 3) *H. Actions.* 1. *In general.*—Where the servant continues work with defective appliances on promise to supply proper tools and meanwhile to indemnify the servant for injuries, the action must be in tort for the negligence and not on the promise.[36] A servant suing for injuries need not return money received by him for wages and medical bills after the accident where it was not accepted in compromise of the claim.[37]

Notice of injury.—It is required by the employers' liability act that notice of injury be given within sixty days after its occurrence.[38] Where there is no proof of notice to the employe as required by law, a nonsuit is properly granted.[39]

Defenses.—Release is a matter of defense.[40] It is no defense to an action for injuries caused by a defective switch that the switch was approved by a city engineer.[41] The jury may not consider defendant's liability to punishment under criminal laws for violation of child-labor laws.[42] A constitutional provision that knowledge of defects shall not be a defense except as to conductors in charge of defective cars voluntarily operated by them does not bar action by a conductor unless he would have regarded them as unsafe if he had exercised ordinary prudence.[43]

Jurisdiction and venue.—The cause of action is not local[44] though it arise under a statute.[45] The place of the injury will determine liability and not the place where a car was loaded defectively.[46] An action against a contracting stevedore by an employe for injuries is not within the admiralty jurisdiction.[47] Residence in a county within a statute as to venue is not shown by fact that plaintiff worked for some time in the county where injured.[48]

Limitations may not be pleaded by one who has violated a promise of employment on condition that suit be not brought and the employe is thereby induced to delay his action until after the statute has run.[49]

Jurors may be asked as to interest in accident insurance companies when defendant is indemnified by such companies.[50]

(§ 3*H*) 2. *Parties.*—Licensees of a mine are liable for injuries with third persons working the mine for them for a share of the profits.[51] Where the action is brought against the master and another, there may be a recovery against the master alone.[52] Where bondholders of an electric company formed an association to recon-

35. Saylor v. Parsons [Iowa] 98 N. W. 500. Pittsburg, C., C. & St. L. R. Co. v. Lynch [Ohio] 68 N. E. 703.

36. Obanhein v. Arbuckle, 80 App. Div. [N. Y.] 465.

37. Continental Tobacco Co. v. Knoop, 24 Ky. L. R. 1268, 71 S. W. 3.

38. Sess. Laws Colo. 1893, p. 129, c. 77. Lange v. Union Pac. R. Co. [C. C. A.] 126 Fed. 338. The New York employers' liability act does not displace common-law rights and remedies, and hence the requirement therein as to notice to master of injuries within a stated time applies only to actions to enforce the extended liability given by the act [Laws 1902, p. 1748, c. 600]. Rosin v. Lidgerwood Mfg. Co., 89 App. Div. [N. Y.] 245. The Massachusetts act as to notice as a prerequisite to action is complied with by a notice that plaintiff was injured by defendant's negligence without explicit claim of damages and signed by his attorney [St. 1894, c. 389, § 1]. Carroll v. N. Y., N. H. & H. R. R., 182 Mass. 337, 65 N. E. 69.

39. Laws N. Y. 1902, p. 1748, c. 600, § 2 require notice to be given within 120 days. Stahl v. Schoonmaker, 84 N. Y. Supp. 239.

40. Hedlun v. Holy Terror Min. Co. [S. D.] 92 N. W. 31. See, also, topic Releases.

41. Birmingham Traction Co. v. Reville, 136 Ala. 335.

42. Jacobs v. Fuller & H. Co., 67 Ohio St. 70, 65 N. E. 617.

43. Const. S. C. art. 9, § 15. Barksdale v. Charleston & W. C. R. Co., 66 S. C. 204.

44. Benedict v. Chicago G. W. R. Co. [Mo. App.] 78 S. W. 60.

45. Bain v. Northern Pac. R. Co. [Wis.] 98 N. W. 241.

46. El Paso & N. W. R. Co. v. McComas [Tex. Civ. App.] 72 S. W. 629.

47. Campbell v. Hackfeld [C. C. A.] 125 Fed. 696.

48. Galveston, H. & S. A. R. Co. v. Cloyd [Tex. Civ. App.] 78 S. W. 43.

49. Chesapeake & N. R. v. Speakman, 24 Ky. L. R. 1449, 71 S. W. 633.

50. Spoonick v. Backus-Brooks Co., 89 Minn. 354, 94 N. W. 1079; Foley v. Cudahy Packing Co., 119 Iowa, 246, 93 N. W. 284. See Death by Wrongful Act for parties to action for death of servant.

51. Rice v. Smith, 171 Mo. 331, 71 S. W. 123.

52. Chicago, I. & L. R. Co. v. Martin, 31 Ind. App. 308, 65 N. E. 591.

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struct certain of the company's lines under permission of its receiver, it could be sued for injuries to a servant only in the names of the members.[53] In Washington, plaintiff may join a local employe of a nonresident master.[54] A joint action cannot be maintained against a railroad company and an employe for an injury due to the negligence of the employe who was a fellow-servant.[55] There is no cause of action against a foreman joined with a railroad company in an action for injuries due to furnishing defective appliances where it is not alleged that other and safer appliances of the kind were furnished the foreman.[56]

(§ 3*H*) 3. *Pleading and issues.*—The negligence complained of must be definitely and specifically set out[57] and the complaint must be free from ambi-

53. Standard L. & P. Co. v. Munsey [Tex. Civ. App.] 76 S. W. 931.

54. Morrison v. Northern Pac. R. Co. [Wash.] 74 Pac. 1064; McHugh v. Northern Pac. R. Co., 32 Wash. 30, 72 Pac. 450. Court may decline to remove to Federal court on dismissal of the resident employes where the dismissal was opposed. Howe v. Northern Pac. R. Co., 30 Wash. 569, 70 Pac. 1100.

55. Helms v. Northern Pac. R. Co., 120 Fed. 389.

56. Cause was properly removable, the company being a citizen of another state. Cincinnati, N. O. & T. P. R. Co. v. Robertson [Ky.] 74 S. W. 1061.

57. Morris v. Eastern R. Co., 88 Minn. 112, 92 N. W. 535; Miller v. Merchants' & M. Transp. Co., 115 Ga. 1009; State v. Schwind Quarry Co., 97 Md. 696; Northern Pac. R. Co. v. Mix [C. C. A.] 121 Fed. 476. Sufficiency of allegation of defective appliances and machinery. Jarvis v. Hitch [Ind. App.] 65 N. E. 608; Brazil Block Coal Co. v. Gibson, 160 Ind. 319, 66 N. E. 882; McGraw v. Great Northern Paper Co., 97 Me. 343; Robinson v. Taku Fishing Co., 42 Or. 537, 71 Pac. 790. Safety of place for work. Russell v. Riverside Worsted Mills, 24 R. I. 591. Defective car. Jones v. People's R. Co. [Del.] 53 Atl. 1065. Want of due care in protection of servant. Ill. Steel Co. v. Stonevick, 199 Ill. 122, 64 N. E. 1014. Negligent construction of an appliance. Rope. McElwaine-Richards Co. v. Wall, 159 Ind. 557, 65 N. E. 753. Negligence in not boxing shafting under a window in which employes were in the habit of sitting. Wheeler v. Oak Harbor Head L. & H. Co. [C. C. A.] 126 Fed. 348. Neglect to perform statutory duties for safety of miners. Diamond Block Coal Co. v. Cuthbertson [Ind. App.] 67 N. E. 558. Complaint held to state cause of action under employers' liability act. Ind. Mfg. Co v. Buskirk [Ind. App.] 68 N. E. 925. Allegation that injuries were caused "without fault, neglect, or want of due care on plaintiff's part but solely through the fault and neglect of defendants, his agents, servants, and employes" is too general to amount to a charge of an act of negligence. Carr v. Shields, 125 Fed. 827. Negligence is averred with sufficient definiteness under the Alabama employers' liability act in a complaint which alleges fall of derrick by reason of defects in retaining rods and that the wall to which the derrick was attached was not strong enough to support the same and that the defects had not been discovered because of negligence of defendant or the negligence of some person in defendant's service intrusted with the duty of seeing that the ways and machinery were in proper condition. Southern C. & F. Co. v. Jennings, 137 Ala. 247. Negligence is sufficiently averred by a court averring injury to brakeman while engaged in the discharge of his duties and that the injury was proximately caused by the negligence of the engineer in operating the engine. Ala. G. S. R. Co. v. Brooks, 135 Ala. 401. Negligence of a foreman is sufficiently averred by allegation that foreman negligently ordered plaintiff, while taking down a broken piece of shafting, to take out the bolts and fastenings which held the shaftings in place without in any way securing them so as to prevent their fall. Southern C. & F. Co. v. Bartlett, 137 Ala. 234. Negligence in an action for injuries caused by a train left on a down grade running into a locomotive and injuring a brakeman is sufficiently averred by an allegation that the brakes on the cars were insufficient to hold them. Cincinnati, N. O. & T. P. R. Co. v. Maley's Adm'r [Ky.] 76 S. W. 334. A complaint is sufficient which alleges that the master negligently left a protrusion from a pulley and negligently used the defective pulley and that by reason of the protrusion the belt was caught and the servant injured, that the servant was doing extra hazardous work by order of the master and that the master knew of the danger and the servant did not. Norton-Reed Stone Co. v. Steele [Ind. App.] 69 N. E. 198. Defect of appliance is averred where the want of a spring at a switch or other appliance to hold the rail in position was a defect in defendant's ways and was not remedied owing to defendant's negligence and the defect caused the injury. Birmingham Traction Co. v. Reville, 136 Ala. 335. Defect as cause of injuries is shown in a count alleging that certain machinery was to be set in motion by the shifting of a belt from a loose to a fixed pulley; that provision was made for attaching a bar to said machine which prevented accidental shifting; that the bar was removed by defendant in consequence of which machinery was set in motion and injury resulted. Houston Biscuit Co. v. Dial, 135 Ala. 168. A count in the declaration is sufficient which alleges negligent employment of a servant to do the work, that he did it, and that he was unfit. Flynn v. International Power Co., 24 R. I. 291. A cause of action is stated by allegation that while plaintiff was working in a shaft under orders, an iron bucket gave way through imperfect appliances and the gross carelessness of defendant and his agents and fell on plaintiff injuring him. Murphy v. Hopper, 75 App. Div. [N. Y.] 606. The count alleging negligence in starting a machine

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guity,[58] and these requirements have particular application to actions under statutes in derogation of the common law.[59] A complaint under a statute should use the equivalent of the words of the statute if the exact words are not used.[60] A count alleging negligence to repair defective machinery should specify in what respect the omission consisted.[61] Plaintiff is confined in his proof to the acts of negligence alleged,[62] and may not recover if the injury resulted from other causes than those averred.[63] Acts without the pleaded negligence may be shown in some cases where contributory negligence is an issue.[64] Plaintiff must allege that the negligence of

should designate the particular machine claimed to have been negligently started. Kennedy v. Del. Cotton Co. [Del.] 55 Atl. 7. A narr. averring that deceased was employed by defendant and stationed at a machine known as a calendar, and that the appliances connected therewith were dangerous to life, were unprotected and moved by steam power and that by means of the premises deceased was caught, bruised and instantly killed by such machine, was sufficiently definite. Id. Negligence is sufficiently averred by complaint that the shuttle of the loom was thrown against plaintiff because of defendant's negligence in using the loom. Merritt v. American Woolen Co., 71 N. H. 493. Averment that employer was negligent in putting molten slag on the floor and in causing a ladle to be pushed with great force against plaintiff without warning does not charge two acts of negligence acting co-jointly but proof of either will sustain action. Gould Steel Co. v. Richards, 30 Ind. App. 348, 66 N. E. 68.

58. A petition is not ambiguous for charging the negligence against the master, its servants or agents, as the purpose is clearly to charge negligence of principal acting through servants or agents. Eagle & P. Mills v. Herron [Ga.] 46 S. E. 405. In an action for sickness caused by failure to repair roof of lodging room of domestic, the allegation of the promise to repair and breach thereof being stated merely to excuse failure to leave employment on discovery of the danger does not constitute a second cause of action. Collins v. Harrison [R. I.] 56 Atl. 678. An allegation in a declaration that injury was caused by the negligence of the officials or some one of the employes of the defendant and especially by the negligence of the employes of defendant or its officers is not an alternative allegation but as indicating that the words are used in the same sense. State v. Chesapeake Beach R. Co. [Md.] 56 Atl. 385. In an action against a master for personal injuries to a servant, a general charge of negligence is sufficient as against an objection first made on trial. Johnson v. Metropolitan St. R. Co. [Mo. App.] 78 S. W. 275. Negligence of officers "or" employes held not to be in the disjunctive. State v. Chesapeake Beach R. Co. [Md.] 56 Atl. 385. An allegation that the railway company itself negligently ran its train against an employe excludes the theory that the negligent act was done by persons over whose acts the company had no control. Chicago, I. & L. R. Co. v. Barnes [Ind.] 68 N. E. 166. A complaint which states a cause of action for negligent killing of plaintiff's decedent, on any theory, is sufficient against a demurrer. Id. General allegation that an appliance "was defective, dangerous, and out of repair," is bad. McGraw v. Great Northern Paper Co., 97 Me. 343. Need not be alleged that master knew or should have known of facts constituting negligence. Sweeney v. Jessup & M. P. Co. [Del.] 54 Atl. 954.

59. Acts for the protection of miners by requiring sufficient props are in derogation of the common law and complaint must allege every fact necessary to bring the case within the statute. Cole v. Mayne, 122 Fed. 836. A petition for servant's injuries alleging master's negligence held to support a verdict for plaintiff, there being no bill of evidence in the record. U. S. Cast Iron Pipe & Foundry Co. v. Gable [Ky.] 78 S. W. 485. Complaint held sufficient whether or not the statute requiring signals for highways applies to highways crossing a switchyard. Chicago, I. & L. R. Co. v. Barnes [Ind.] 68 N. E. 166. Complaint held sufficient under Indiana statute declaring a railway company liable for injuries caused by the negligence of any employe in charge of a switch, engine, or train. Id. An allegation in an action for injuries that defendant failed to guard his machinery as required by statute is a sufficient charge of negligence. Ind. Mfg. Co. v. Wills, 31 Ind. App. 460, 68 N. E. 319. A complaint which alleges negligence in failing to comply with a statute is not defective for failing to negative exceptions in the statute, it not being intended that there should be any exception with reference to this particular requirement. Chamberlain v. Waymire [Ind. App.] 68 N. E. 306.

60. Southern Ind. R. Co. v. Martin, 160 Ind. 280, 66 N. E. 886.

61. Kennedy v. Del. Cotton Co. [Del.] 55 Atl. 7.

62. Garven v. Chicago, R. I. & P. R. Co., 100 Mo. App. 617, 75 S. W. 193. Where the action is based on the theory that the accident was occasioned by a rotten tie, evidence as to defective road bed at other places is properly excluded. Briggs v. East Broad Top R. & C. Co., 206 Pa. 564. The court may refuse to submit the case where there is no evidence to support the claim made as to the cause of the injury in the declaration. Id.

63. One alleging an insufficient appliance, the defect consisting in its being made of a certain material, fails to make a prima facie case unless it is so made. Breeden v. Big Circle Min. Co. [Mo. App.] 76 S. W. 731.

64. The fact that automatic levers were on the wrong side may be shown though not pleaded on the issue of contributory negligence in uncoupling cars by hand. Galveston, H. & S. A. R. Co. v. Courtney, 30 Tex. Civ. App. 544, 71 S. W. 307. Defects in cars which plaintiff, a brakeman, was ordered to hold may be considered though

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the master was the proximate cause of the injury.[65] Allegation that injury was caused by negligence of yardmaster who had charge of yards and to whose orders decedent was bound to conform sufficiently alleges that the yardmaster was a vice-principal under the Indiana employers' liability act.[66] The complaint need not allege the duty of the railroad company to have lights and watchmen on cars, or give signals.[67] Where injury resulted from failure to promulgate rules that fact must be averred.[68] The plaintiff must allege knowledge of defendant of defects and his own ignorance of same[69] unless the negligence of the master consists in violation of a duty imposed by statute.[70] In an action for death of employe, the declaration need not allege plaintiff's ignorance of facts and circumstances constituting negligence nor is it necessary that declaration should allege that defendant had or should have had knowledge of any facts or circumstances which would constitute negligence on his part.[71] The complaint alleging a lack of knowledge need not allege lack of opportunity to ascertain danger.[72] An allegation of knowledge includes constructive knowledge.[73] Notice of accident must be given the master under the laws of New York and complaint should show fact[74] except where relief is not asked under such laws.[75] The complaint must state facts showing that plaintiff did not assume the risk.[76] Due care on the part of plaintiff should be averred.[77] The complaint

not alleged in the count of the complaint on which recovery was based, contributory negligence in failing to hold the cars being alleged. Ala. G. S. R. Co. v. Ellis, 137 Ala. 560. Petition held sufficient to justify recovery for injuries to a servant on the ground of master's negligence in commanding her to operate the machine though such negligence was not one of the acts specifically enumerated. Adolff v. Columbia P. & B. Co., 100 Mo. App. 199, 73 S. W. 321.

65. Clear Creek Stone Co. v. Dearmin, 160 Ind. 162, 66 N. E. 609. Proximate cause is sufficiently averred in a complaint alleging that by reason of defendant's negligence and plaintiff's injuries, plaintiff suffered shock and permanent injury; that defendant's negligence consisted in having revolving knives under a table unguarded and that plaintiff while working thereon was injured by contact therewith. Shepherd v. Morton-Edgar Lumber Co., 115 Wis. 522, 92 N. W. 260. Negligence as the proximate cause of injury is alleged in complaint that defendant negligently used a hoisting rope in the derrick on which plaintiff was employed which was old and unfit for use, too short and improperly fastened, and that by reason of these defects it gave way, falling on plaintiff. The employers' liability act of Indiana requires that the complaint should state that injury occurred by reason of the defect; allegation of defect is not sufficient [Burns' Rev. St. 1901, § 7083]. Cleveland, C., C. & St. L. R. Co. v. Scott, 29 Ind. App. 519, 64 N. E. 896.

66. Lake Erie & W. R. Co. v. Charman [Ind.] 67 N. E. 923.

67. Chicago, I. & L. R. Co. v. Barnes [Ind.] 68 N. E. 166.

68. Wagner v. N. Y., C. & St. L. R. Co., 76 App. Div. [N. Y.] 552.

69. Norton-Reed Stone Co. v. Steele [Ind. App.] 69 N. E. 198; Chamberlain v. Waymire [Ind. App.] 68 N. E. 306; Flynn v. International Power Co., 24 R. I. 291. Notice is sufficiently charged by an allegation that an appliance for employes' safety was removed by the president of the defendant corporation. Houston Biscuit Co. v. Dial, 135 Ala. 168.

70. In pleading a violation of a statute requiring protection of machinery it is not necessary to allege that plaintiff had no knowledge of the unguarded condition. Ind. Mfg. Co. v. Wells, 31 Ind. App. 460, 68 N. E. 319. Under the Alabama employers' liability act it is not necessary for complaint to negative that plaintiff had knowledge of the defect as that is a matter of defense. Nashville, C. & St. L. R. v. Cody, 137 Ala. 597.

71. Sweeney v. Jessup & M. P. Co. [Del.] 54 Atl. 954.

72. Baltimore & O. S. W. R. Co. v. Roberts [Ind.] 67 N. E. 530. Where the servant alleges that he was wholly unaware of, and had no knowledge or information of, the danger he was subjected to by the negligent act of the superintendent, he need not allege that he could not have known of such danger by the exercise of ordinary care. Peter & M. Steam Stone Works v. Green [Ky.] 76 S. W. 844.

73. Johnson v. Gebhauer, 159 Ind. 271, 64 N. E. 855.

74. Law 1902, p. 1748, c. 600. Service of complaint insufficient. Johnson v. Roach, 83 App. Div. [N. Y.] 351. Laws N. Y. 1902, c. 600, § 2. Gmaehle v. Rosenberg, 80 App. Div. [N. Y.] 541.

75. The complaint in an action for injuries caused by unsafe scaffolds is not demurrable for failure to aver notice under the employers' liability law as the labor law under which the action was brought did not require notice. Id., 40 Misc. [N. Y.] 267.

76. American Rolling Mill Co. v. Hullinger [Ind.] 67 N. E. 986. Assumption of risk is negatived in a petition which avers ignorance of dangers and that she had not been warned of them. Wheeler v. Oak Harbor Head L. & H. Co. [C. C. A.] 126 Fed. 348. A complaint alleging that plaintiff did not know that the position to which he was transferred was more dangerous than that which he formerly occupied does not nega-

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should aver the negligence to be that of the master or his representative.[78] The name of the negligent vice-principal need not be stated.[79] It is not necessary to negative that act was that of a fellow-servant.[80] A declaration averring defendant's duty to employ competent servants and the negligent employment of incompetent persons by reason of which plaintiff was injured states a good cause of action.[81] That a derrick was used for ordinary purposes is shown by averment that it gave way while loaded with coal for engines.[82] Rules are sufficiently pleaded by stating their substance.[83] Conclusions of law may not be alleged.[84]

tive his knowledge of the dangers of such position. Chicago & B. Stone Co. v. Nelson [Ind. App.] 69 N. E. 705. Denial of knowledge of danger without denial of opportunity to know is sufficient. Baltimore & O. S. W. R. Co. v. Roberts [Ind.] 67 N. E. 530. Denial of contributory negligence does not negative assumption of risk. Indianapolis & G. R. T. Co. v. Foreman [Ind.] 69 N. E. 669. The defenses of contributory negligence and assumption of risk are inconsistent with each other and the existence of one excludes the existence of the other. Ball v. Gussenhoven [Mont.] 74 Pac. 871. An allegation that the servant was young, inexperienced, and incompetent to judge of danger incident to the operation of machinery, does not supply the place of an averment as to failure to instruct the servant. Ind. Mfg. Co. v. Wells, 31 Ind. App. 460, 68 N. E. 319. A complaint for injuries caused by unsafe appliances must allege knowledge on the part of the master and want of knowledge on the servant's part. Chamberlain v. Waymire [Ind. App.] 68 N. E. 306. A complaint in an action for injuries which fails to allege want of knowledge on the part of the servant of the unguarded condition of the machinery and dangers resulting therefrom, states no cause of action on a common law liability. Ind. Mfg. Co. v. Wells, 31 Ind. App. 460, 68 N. E. 319. It is not necessary to allege that the plaintiff had no knowledge of the unguarded condition of the machinery in pleading the statutory liability of the master for failure to comply with the statute. Id. It need not have been alleged that servant was ignorant of facts constituting negligence. Sweeney v. Jessup & M. P. Co. [Del.] 54 Atl. 954.

77. A failure to allege circumstances whereby plaintiff was prevented from observing the dangers to which he was exposed is not cured by a general averment of due care at the time of the accident. Russell v. Riverside Worsted Mills, 24 R. I. 591. Where the declaration as a whole shows a want of due care, the fact that due care is alleged will not save it from being demurrable. Donohoe v. Lonsdale Co. [R. I.] 55 Atl. 326. Absence of contributory negligence need not be averred by a plaintiff. Ball v. Gussenhoven [Mont.] 74 Pac. 871. Under the laws of Indiana, a plaintiff is not required to plead a want of contributory negligence. Parkhurst v. Swift, 31 Ind. App. 521, 68 N. E. 620.

78. Burton v. Magann-Fawk Lumber Co., 25 Ky. L. R. 40, 74 S. W. 662. A complaint in an action against a railroad company for injuries which charges employment by defendant at the time of the injury, and injury while in the line of his duty and the exercise of due care by the carelessness of defendant while conforming to the orders of a superior officer is sufficient. Southern Ind. R. Co. v. Harrell [Ind. App.] 66 N. E. 1016. A complaint sufficiently charges the giving of a specific order and its execution under employers' liability act which alleges that the employe was bound to and did conform to the orders of a third person in the performance of all duties pertaining to the employment and that when injured he was in the discharge of the duties of his employment. Ind. Mfg. Co. v. Buskirk [Ind. App.] 68 N. E. 925. The relation of vice-principal is shown by allegation that master mechanic had full charge of work on which plaintiff was engaged and entrusted by the employer with the duty of keeping plant, tools, and machinery in proper condition. American Rolling Mill Co. v. Hullinger [Ind.] 67 N. E. 986. The theory that the negligence was that of some one for whom defendant was not responsible is nullified by the plain allegation that a railroad corporation negligently ran the train against plaintiff. Chicago, I. & L. R. Co. v. Barnes [Ind.] 68 N. E. 166. Under employers' liability acts suspending the fellow-servant doctrine as to negligence of persons to whose orders the servant was bound to conform, the fact of superintendence must be averred and injury whilst the superior was in the exercise of superintendence [Ala. Code, § 1749]. Southern Car & Foundry Co. v. Bartlett, 137 Ala. 234. General averment that the injury was caused by the negligence of the master, made by way of inducement, will not aid averments showing that the negligence was that of a fellow-servant. Indianapolis & G. R. T. Co. v. Foreman [Ind.] 69 N. E. 669. Complaint for injury by negligence of incompetent fellow-servant must deny plaintiff's knowledge of his incompetency. Denial of knowledge of the particular negligence which caused the accident does not meet this rule. Id. If declaration shows that fellow-servant was negligent allegation of negligence in selecting servant is necessary. State v. Chesapeake Beach R. Co. [Md.] 56 Atl. 385.

79. The complaint need not name the servant whose negligent act caused the injury under an act making the master liable for injuries caused by the negligent act of a servant intrusted with the duty of seeing that the machinery was in proper order. Houston Biscuit Co. v. Dial, 135 Ala. 168.

80. Mott v. Chicago & M. El. R. Co., 102 Ill. App. 412.

81. Peter v. Middlesex & S. Traction Co. [N. J. Law] 55 Atl. 35.

82. Clear Creek Stone Co. v. Dearmin, 160 Ind. 163, 66 N. E. 609.

83. Galveston, H. & S. A. R. Co. v. Karrer [Tex. Civ. App.] 70 S. W. 328.

84. Petition in action against railroad company for malpractice by physician em-

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Amendments are allowable[85] and may be required where pleading is indefinite or uncertain.[86] Plaintiff may not be compelled to amend a complaint so as to show what acts were negligent and what willful.[87]

The laws of Washington require liberality in the construction of pleadings in actions for injuries to servants.[88]

The plea of contributory negligence must state the particulars; a general plea is insufficient.[89] The plea is not required where complaint shows plaintiff's negligence.[90] Under a plea that injured brakeman was riding on the front of car to watch for obstructions and negligently rode with his leg over the side of the car and failed to notify anyone of dangerous proximity of an obstruction, both facts must be proved to sustain plea.[91] The defense of fellow-servant may be taken advantage of without special plea.[92]

Assumption of risk must be pleaded specifically[93] unless the facts on which the defense is based appear in the complaint[94] or the evidence.[95] Where the servant's injuries arose solely from risks incident to the business, the defense of assumption of risk may be proved under a general denial.[96]

ployed by relief department not objectionable for allegation of conclusions of law. Haggerty v. St. L., K. & N. W. R. Co., 100 Mo. App. 424, 74 S. W. 456. The bare conclusion of law as to the duty of a master to provide safe places for labor which arises from the facts alleged will be stricken as surplusage. Green v. Indian Gold Min. Co., 120 Fed. 715. Allegation that employe riding home from work was a passenger is a mere conclusion not admitted by demurrer. Indianapolis & G. R. T. Co. v. Foreman [Ind.] 69 N. E. 669.

85. Sufficiency of pleading to permit amendment. Columbia Min. Co. v. Wellmaker, 118 Ga. 606, 45 S. E. 455. An amended complaint which charged, in addition to negligence alleged in the original, defects in the works and machinery, held not to change the cause of action. Tanner v. Harper [Colo.] 75 Pac. 404. Amendment by adding allegation of negligence in selecting a negligent fellow-servant does not state a new cause of action. State v. Chesapeake Beach R. Co. [Md.] 56 Atl. 385.

86. Uncertainty in pleadings as to servants may be ordered to be made definite under the New York Code [Code Civ. Proc. § 546]. Donovan v. Cunard S. S. Co., 85 N. Y. Supp. 1113. Where pleading is not indefinite, an amendment may not be required setting up the place where the injury occurred, the remedy being by bill of particulars. Dumar v. Witherbee, 84 N. Y. Supp. 669.

87. Lynch v. Spartan Mills, 66 S. C. 12.

88. Grout v. Tacoma Eastern R. Co. [Wash.] 74 Pac. 665.

89. Scott v. Seaboard Air Line R. Co. [S. C.] 45 S. E. 129; Western R. Co. v. Arnett, 137 Ala. 414. Contributory negligence is not shown by a complaint which alleges that injuries were incurred while plaintiff, a girl, was sitting in a window, by her skirts being caught in a shaft, under the window, of which she was ignorant, and that it was customary for employes to sit in the window. Wheeler v. Oak Harbor Head Lining & Hoop Co. [C. C. A.] 126 Fed. 348.

90. Complaint held not to show contributory negligence in methods of work about a planing table. Shepherd v. Morton-Edgar Lumber Co., 115 Wis. 522, 92 N. W. 260. A complaint does not show contributory negligence by averring lack of knowledge of machinery by reason of which he could not by due care have discovered defects. East Brooklyn Box Co. v. Nudling, 96 Md. 390.

91. Southern R. Co. v. Howell, 135 Ala. 639.

92. Vinson v. Morning News, 118 Ga. 655. Under a general denial of a complaint alleging that the erroneous order was given by defendant superintendent or train dispatcher it may be shown that the order was given by a fellow-servant without pleading that fact. Pennsylvania Co. v. Fishack [C. C. A.] 123 Fed. 465.

93. Sankey v. Chicago, R. I. & P. R. Co., 118 Iowa, 39, 91 N. W. 820; Dorsett v. Clement-Ross Mfg. Co., 131 N. C. 254; Galveston, H. & S. A. R. Co. v. Brown [Tex. Civ. App.] 77 S. W. 832. Insufficiency of plea to show that the danger was obvious. Ala. Great So. R. Co. v. Brooks, 135 Ala. 401. Where the assumption of a risk not usually and ordinarily incident to the employment is relied on as a defense, such assumption must be specially pleaded. Evans Laundry Co. v. Crawford [Neb.] 93 N. W. 177. A plea of assumption of risk in that he had knowledge or notice is defective as the averment of knowledge or notice being in the alternative is no stronger than an averment of notice which is not the equivalent of knowledge. Osborne v. Ala. Steel & Wire Co., 135 Ala. 571. A plea alleging facts showing the danger to be obvious is not to be criticised for failure to expressly aver that it was obvious. Ala. Great So. R. Co. v. Brooks, 135 Ala. 401.

94. Complaint held to show an assumed risk. Boyer v. Eastern R. Co., 87 Minn. 367, 92 N. W. 326. Complaint does not show an obvious defect by alleging occurrence of injury by reason of inadequacy of support of scaffolding known to defendant's superintendent and unknown to plaintiff. Indiana Natural Gas & Oil Co. v. Vauble, 31 Ind. App. 370, 68 N. E. 195.

95. Ehrenfried v. Lackawanna Iron & Steel Co., 89 App. Div. [N. Y.] 130.

96. Curtis v. McNair, 173 Mo. 270, 73 S. W. 167.

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Reply.—Failure to reply to an answer pleading contributory negligence entitles defendant to a peremptory instruction.[97]

Issues, proof, and variance.—The evidence must conform to the issues.[98] Immaterial variance will be disregarded.[99] Whether the servant was killed in the discharge of his duties is put in issue by a denial of that fact alleged in the petition.[1] The plea of contributory negligence is not an admission of negligence dispensing with proof thereof.[2] Under general allegations of incompetency of pit boss, evidence of specific acts of incompetency and his disregard of the lives of miners is admissible.[3] Plaintiff is not relieved from the necessity of proving that defendant knew that an escaped Texas steer injuring plaintiff was vicious by the fact that an answer in the case admitted that Texas cattle were wild and vicious and that when confined were more dangerous than usual which fact was of general notoriety among railroad men.[4]

(§ 3*H*) 4. *Evidence. Presumptions and burden of proof.*—Mere happening of accident does not ordinarily raise a presumption of negligence. That fact must be proved.[5] Where the accident is of a kind which does not ordinarily occur without

97. Brooks v. Louisville & N. R. Co., 24 Ky. L. R. 1318, 71 S. W. 507.

98. Allegation of injury caused by weakness of hook precludes evidence that the injury was caused by fact that hook was not properly placed and all the weight was placed on its point. Jernigan v. Houston Ice & Brew. Co. [Tex. Civ. App.] 77 S. W. 260; Davis v. Broadalbin Knitting Co., 90 App. Div. [N. Y.] 567. Where the evidence shows that the injury was caused by following heavy car wheels up an incline there may be no recovery, the complaint averring negligence in failing to have a sufficient force for the work and not furnishing adequate appliances. Zentz v. Chappell [Mo. App.] 77 S. W. 86. In an action for damages based on death of plaintiff's intestate by the negligent operation of a construction train, the issue tendered by the answer and made by the pleadings was that decedent's direct employer was an employe of appellants who operated the train and consequently deceased was a fellow-servant of the trainmen. Held, that evidence was inadmissible which was offered to show that in fact the train was not under the control of or operated by appellants. Pierce v. Brennan, 88 Minn. 50, 92 N. W. 507. There is no variance between an allegation that other workmen and the foreman dropped a rail on plaintiff's foot and failure of proof that the foreman had hold of the rail. Eberly v. Chicago, B. & Q. R. Co., 96 Mo. App. 361, 70 S. W. 381. The case should be withdrawn from the jury where the cause of the accident is different from that alleged in the complaint. Oglesby v. Mo. Pac. R. Co., 177 Mo. 272, 76 S. W. 623. In an action for injuries caused by defective machinery, evidence as to experience of the superintendent to account for the defect is inadmissible. Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307. The evidence must conform to the specific acts of negligence alleged. East Tenn. & W. N. C. R. Co. v. Lindamood [Tenn.] 78 S. W. 99. Averment that foreman allowed another hand car under his control to rush with dangerous speed against car occupied by plaintiff allows proof that the collision occurred while the cars were racing. Rice v. Wabash R. Co. [Mo. App.] 74 S. W. 428. Under a complaint alleging injury to one eye, evidence as to injury to the other eye is inadmissible in the absence of evidence that injury to such eye was a necessary result of injury to the eye averred. Dittman v. Edison Elec. Illuminatng Co., 87 App. Div. [N. Y.] 68. Proof of defect from long use not fatally variant from averment that "construction and arrangement" were defective. Henderson Brew. Co. v. Folden [Ky.] 76 S. W. 520. Where a complaint charges several acts of negligence, it is sufficient to prove that the injury complained of resulted from one. Chicago, I. & L. R. Co. v. Barnes [Ill.] 68 N. E. 166.

99. Ehlen v. O'Donnell, 205 Ill. 38, 68 N. E. 766. Averment that injury was caused by taking hold of brakebeam while stepping from one car to another. Evidence that party was applying brake having one foot on one car and the other on another at the time the beam broke. International & G. N. R. Co. v. Collins [Tex. Civ. App.] 75 S. W. 814. There is no material variance between an allegation that the party received injuries from a defective passage way from cars to a yard and proof that what was termed a yard was a roofed space. Conrad Tanning Co. v. Munsey [Ky.] 76 S. W. 841. There is no variance between allegation that rail was negligently dropped on plaintiff's foot and proof that it struck the ground and rebounded. Eberly v. Chicago, B. & Q. R. Co., 96 Mo. App. 361, 70 S. W. 381.

1. Cincinnati, N. O. & T. P. R. Co. v. Cook's Adm'r [Ky.] 75 S. W. 218.

2. George Fowler, Sons & Co. v. Brooks, 65 Kan. 861, 70 Pac. 600.

3. Green v. Western American Co., 30 Wash. 87, 70 Pa. 310.

4. Clark v. Mo., K. & T. R. Co. [Mo.] 77 S. W. 882.

5. Duntley v. Inman, 42 Or. 334, 70 Pac. 529, 59 L. R. A. 785; Cincinnati, etc., R. Co. v. Cook's Adm'r, 24 Ky. L. R. 2152, 73 S. W. 765; Kellogg v. Denver City Tramway Co. [Colo. App.] 72 Pac. 609; Loushay v. Erie R. Co., 75 App. Div. [N. Y.] 619; Hansen v. Seattle Lumber Co., 31 Wash. 604, 72 Pac. 457; Moran v. Munson S. S. Line, 82 App. Div. [N. Y.] 489; Towle v. Stimson Mill Co.

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negligence, want of due care may be inferred from the mere happening of the accident.[6] Under the laws of Ohio, evidence of defective appliance on a railroad car and that employe was injured thereby is prima facie evidence of negligence of defendant.[7] The unexplained fall of a scaffold is prima facie proof of violation of the New York labor law.[8] The general rule casts on the plaintiff the burden of proof of negligence,[9] and on defendant that of contributory negligence;[10] but where contributory negligence is shown, the burden is on the servant to show that the master could have avoided the injury by the exercise of due care,[11] unless the defense is disclosed by the complaint.[12] In some jurisdictions the servant must show his freedom from contributory negligence.[13] The burden of proof of nonassumption of risk[14] and incompetency of fellow-servants is on plaintiff.[15] One relying on the absence of the relation of fellow-servants has the burden of establishing its nonexistence.[16] A railroad company has the burden of showing the necessity for the employment of an emergency brake instead of the ordinary "service stop" where injuries were caused by the use of the former.[17] There is a presumption that the

[Wash.] 74 Pac. 471; East Tenn. & W. N. C. R. Co. v. Lindamood [Tenn.] 78 S. W. 99; Mountain Copper Co. v. Van Buren [C. C. A.] 123 Fed. 61; Tex. Mexican R. Co. v. Mendez [Tex. Civ. App.] 78 S. W. 25. Mere evidence that a push car broke down under a load of iron rails is not sufficient evidence of negligence. Mitchell v. Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647. The fact that a strand of a tell tale was missing at the time of injury to a brakeman passing under low bridge does not show negligence unless the length of time it was missing was shown and that injury was caused by the fact that it was missing. Quinlan v. New York, N. H. & H. R. Co., 89 App. Div. [N. Y.] 266.

6. Fall of brick arch. Chenall v. Palmer Brick Co., 117 Ga. 106. Where an engineer is injured in a collision with cars that have escaped from a siding, the railroad has the burden of proof of freedom from negligence. Jones v. Kansas City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890. Fact that crow bar used by servants fell through the floor and injured servants working below casts on defendant the burden of showing that the accident was not the result of negligence. Johnson v. Metropolitan St. R. Co. [Mo. App.] 78 S. W. 275.

7. Evidence sufficient to require submission under act [Bates' Ann. St. § 3365-21]. O'Connell v. Pennsylvania Co. [C. C. A.] 118 Fed. 989.

8. Laws 1897, p. 461, c. 415. Johnson v. Roach, 83 App. Div. [N. Y.] 351.

9. Brooks v. Louisville & N. R. Co., 24 Ky. L. R. 1318, 71 S. W. 507; Schamberger v. Somerset Chemical Co. [N. J. Law] 54 Atl. 247; Oglesby v. Mo. Pac. R. Co., 177 Mo. 272, 76 S. W. 623; Karczewski v. Wilmington City R. Co. [Del.] 54 Atl. 746. Where the jury is unable to determine which of the two defects alleged caused the injury, there may be no recovery. East Tenn. & W. N. C. R. Co. v. Lindamood [Tenn.] 78 S. W. 99. The plaintiff has the burden of showing that appliances were defective to the knowledge of the master had he used ordinary care. Glasscock v. Swofford Bros. Dry Goods Co. [Mo. App.] 74 S. W. 1039.

10. Brower v. Locke, 31 Ind. App. 353, 67 N. E. 1015; Central of Georgia R. Co. v. Vining, 116 Ga. 284; Northern Pac. R. Co. v. Tynan [C. C. A.] 119 Fed. 288. Where deceased was killed instantly, the defense that he was guilty of contributory negligence must be proved by defendant. Texas & P. R. Co. v. Reagan [C. C. A.] 118 Fed. 815. Where plaintiff makes out his case without showing contributory negligence, the burden is on defendant to establish same as an affirmative defense. Pomerene v. White [Neb.] 97 N. W. 232. Where the position of an employe on a bridge was perilous and parties on a handcar could have seen such condition in time to have prevented the accident, defendant has burden of proof of contributory negligence. Chicago, R. I. & T. R. Co. v. Long [Tex. Civ. App.] 74 S. W. 59. The burden of proof of contributory negligence in an action for injuries to an inexperienced employe is on defendant. Ala. Steel & Wire Co. v. Wrenn, 136 Ala. 475; Bain v. Northern Pac. R. Co. [Wis.] 98 N. W. 241. Where there is no direct evidence of the cause of the accident, the instinct of self-preservation may be considered on the issue of contributory negligence. Rule applied where plaintiff's intestate fell from a car at night. Phinney v. Ill. Cent. R. Co. [Iowa] 98 N. W. 358.

11. Smith v. Atlanta & C. Air Line Co., 132 N. C. 819.

12. New Omaha Thomson-Houston Elec. Light Co. v. Dent [Neb.] 94 N. W. 819.

13. Skapura v. Nat. Sugar Refining Co., 83 App. Div. [N. Y.] 21.

14. Chicago & E. I. R. Co. v. Heerey, 203 Ill. 492, 68 N. E. 74. A servant cannot recover where it is not shown whether the injury resulted from the negligence of the master or from risks assumed by the servant. Cothron v. Cudahy Packing Co., 98 Mo. App. 343, 73 S. W. 279. Burden of assumption of risk is on defendant where answer tenders that defense. Shebek v. Nat. Cracker Co., 120 Iowa, 414, 94 N. W. 930.

15. Klos v. Hudson River Ore & Iron Co., 77 App. Div. [N. Y.] 566.

16. Shaw v. Bambrick-Bates Construction Co., 102 Mo. App. 666, 77 S. W. 96.

17. Benedict v. Chicago G. W. R. Co. [Mo. App.] 78 S. W. 60.

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master provided suitable appliances and kept them in repair[18] and had no knowledge of a defect.[19] As to a fellow-servant, it will not be presumed that his co-servant would have selected an obviously imperfect tool when he might have chosen a good one.[20]

Admissibility.—Employer's negligence may be shown by direct evidence or by evidence from which negligence is inferable.[21] On the question of the master's negligence, evidence is admissible to show the happening of similar accidents[22] of which master had knowledge;[23] failure to use safety devices;[24] methods of work four months before the accident, there being no suggestion of the adoption of a different method;[25] insufficiency of light in mine making it difficult for employe to detect defects;[26] repairs made before[27] but not those made after the accident;[28] insufficiency of means adopted to hold cars on side track;[29] insufficiency of force to perform work;[30] the interchange of power between two electric lines controlled as one;[31] the condition of the appliance immediately after the accident;[32] promises to change dangerous methods of work;[33] defective condition of other appliances fur-

18. East Tenn. & W. N. C. R. Co. v. Lindamood [Tenn.] 78 S. W. 99; Franklin v. Mo. K. & T. R. Co., 97 Mo. App. 473, 71 S. W. 540. There is no presumption that an appliance was free from defects when furnished the employe. Texas & Ft. S. R. Co. v. Hartnett [Tex. Civ. App.] 75 S. W. 809. Where an appliance was in good order there is a presumption that it continued so to the time of the accident, plaintiff having the burden of showing the contrary. East Tenn. & W. N. C. R. Co. v. Lindamood [Tenn.] 78 S. W. 99. Fact that car was foreign and appeared in train loaded raises inference that it was merely in carriage and not an appliance furnished by carrier. Anderson v. Erie R. Co., 68 N. J. Law, 647.

19. Franklin v. Mo., K. & T. R. Co., 97 Mo. App. 473, 71 S. W. 540.

20. Campbell v. Gillespie [N. J. Err. & App.] 55 Atl. 276.

21. Towle v. Stimson Mill Co. [Wash.] 74 Pac. 471. In action for injuries by being struck by a switch target, evidence is admissible to show that the target was used because others were not obtainable and that it was the intention to replace it with another as soon as possible. International & G. N. R. Co. v. Bearden [Tex. Civ. App.] 71 S. W. 558.

22. Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972. That machinery had started by the accidental slipping of a belt on former occasions. Houston Biscuit Co. v. Dial, 135 Ala. 168. Uncovered cog wheel. Dorsett v. Clement-Ross Mfg. Co., 131 N. C. 254. Where complaint alleged that cable was worn out, evidence that prior to the accident the grip on a coal car failed to work because of defects in the cable is admissible. Revolinsky v. Adams Coal Co., 118 Wis. 324, 95 N. W. 122. Evidence that tell tales that threw brakeman from car were looped at ends was admissible though not alleged as ground of negligence. McGarrity v. New York, N. H. & H. R. Co. [R. I.] 55 Atl. 718. Evidence of a prior accident of a similar nature ascertained by the master subsequent to the accident complained of is inadmissible. Roche v. Llewellyn Ironworks Co., 140 Cal. 563, 74 Pac. 147.

23. It may not be shown that when the master was investigating injuries to a servant at a place to which he was sent to make repairs he learned of previous accidents occasioned in like manner. Roche v. Llewellyn Ironworks Co., 140 Cal. 563, 74 Pac. 147.

24. Derailing switches. Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890.

25. Gayle v. Mo. C. & F. Co., 177 Mo. 427, 76 S. W. 987.

26. Mine. Revolinski v. Adams Coal Co., 118 Wis. 324, 95 N. W. 122; Brazil Block Coal Co. v. Gibson, 160 Ind. 319, 66 N. E. 882.

27. Evidence as to defects in appliance at time of repairs shortly before accident is admissible where one of the issues was as to the sufficiency of repairs. Towle v. Stimson Mill Co. [Wash.] 74 Pac. 471. Where defendant offered evidence that the appliance was found all right after the accident, plaintiff may prove that after a later accident the appliance was repaired. Gulf, C. & S. F. R. Co. v. Brooks [Tex. Civ. App.] 73 S. W. 571.

28. McGarr v. Nat. & P. Worsted Mills, 24 R. I. 447, 60 L. R. A. 122. Admission of evidence that an overhanging water spout was reconstructed so as to be free from danger is not erroneous where the jury is told that its only purpose is to test the accuracy of measurements offered by defendant to show that the water spout was not a menace. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64.

29. In an action for injuries caused by the escape of a train left on a down grade without an engine attached, it may be shown that air brakes would hold a train only for a short time. Cincinnati, N. O. & T. P. R. Co. v. Maley's Adm'r [Ky.] 76 S. W. 334.

30. Brady v. N. Y., N. H. & H. R. Co. [Mass.] 68 N. E. 227.

31. Where, in an action against two electric companies, it was alleged that they were in fact one concern, evidence as to their custom in interchanging power is admissible. Dallas Elec. Co. v. Mitchell [Tex. Civ. App.] 76 S. W. 935.

32. Slack v. Harris, 200 Ill. 96, 65 N. E. 669. Thirteen months after, too remote. East Tenn. & W. N. C. R. Co. v. Lindamood, 109 Tenn. 407, 74 S. W. 112. The appliance causing the injury is admissible though repaired after the accident. Boucher v. Robeson Mills, 182 Mass. 500, 65 N. E. 819.

33. On the question of due care, evidence of a yardmaster's promise not to move cars

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nished;[34] changes in appliances without notice to servant;[35] the incompetency of other servants and their misconduct;[36] knowledge of the master of the injured servant's incompetency for the work to which he was assigned.[37] Where the negligence is in furnishing a defective appliance, it is immaterial that the master built the appliance.[38] Photographs showing conditions surrounding accident are admissible.[39] A model of scaffolding causing injury may be used for purposes of illustration though not introduced.[40] Protection by accident insurance from loss from injuries to employes may not be shown.[41] Safety of machine is not shown by evidence that it was afterwards operated without accident.[42] The impaired capacity of the injured person as a result of the accident may be shown.[43] The admissions in an abandoned pleading may be proven.[44]

Rules of the employers are admissible.[45] The usual and customary methods of work may be shown,[46] including those adopted and in use by other employers in the same line.[47] The master's knowledge of the custom must be shown.[48]

while inspector was at work made some weeks before the accident is admissible. Brady v. N. Y., N. H. & H. R. Co. [Mass.] 68 N. E. 227.

34. Franklin v. Mo., K. & T. R. Co., 97 Mo. App. 473, 71 S. W. 540. In an action for the death of a brakeman thrown from a car by looped tell tales it may be shown that other tell tales had been similarly looped in the vicinity. McGarrity v. N. Y., N. H. & H. R. Co. [R. I.] 55 Atl. 718.

35. Where the claim is that a fuse furnished was quicker than those previously furnished a blaster, evidence is admissible to show how quick the fuse in question burned. Hedlun v. Holy Terror Min. Co. [S. D.] 92 N. W. 31.

36. Questions as to duties of a pit boss and complaints as to insufficiency of timbers furnished are competent on question of incompetency of such boss. Green v. Western American Co., 30 Wash. 87, 70 Pac. 310. On the issue of negligence of a conductor in insufficiently securing a train left on a down grade after the engine had gone forward, it may be shown that the conductor was not in his proper place. Cincinnati, N. O. & T. P. R. Co. v. Maley's Adm'r [Ky.] 76 S. W. 334. Where the conductor and brakeman of the train causing the injury were intoxicated at the time thereof, evidence as to their use of intoxicants on other occasions was admissible. Mo., K. & T. R. Co. v. Jones [Tex. Civ. App.] 75 S. W. 53. Knowledge of defect by employe charged with the duty of rectification may be shown. Birmingham Traction Co. v. Reville, 136 Ala. 335. Incompetency of a fellow-servant may be shown by evidence, a reputation for recklessness, and specific instances of a disregard of rules resulting in reprimand. Metropolitan W. S. El. R. Co. v. Fortin, 203 Ill. 454, 67 N. E. 977. The motive for failing to discharge an employe for disobedience of orders is not material. Copeland v. Ferris, 118 Iowa, 554, 92 N. W. 699.

37. Ala. S. & W. Co. v. Wrenn, 136 Ala. 475.

38. Mitchell v. Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647.

39. Southern Pac. Co. v. Huntsman [C. C. A.] 118 Fed. 412.

40. Geist v. Rapp, 206 Pa. 411.

41. Roche v. Llewellyn I. W. Co., 140 Cal. 563, 74 Pac. 147.

42. Republic I. & S. Works v. Gregg, 24 Ky. L. R. 1627, 71 S. W. 900.

43. One injured by negligence of master may show that he was discharged from his position by the master because of his impaired capacity. Southern C. & F. Co. v. Bartlett, 137 Ala. 234. Testimony of a conductor injured in a collision that he could not read or distinguish colors and would not be strong enough for the duties of a freight conductor is not objectionable as stating conclusion. St. Louis S. W. R. Co. v. McDowell [Tex. Civ. App.] 73 S. W. 974.

44. Galloway v. San Antonio & G. R. Co. [Tex. Civ. App.] 78 S. W. 32. Where evidence was conflicting as to the duty of a servant to perform a service, an abandoned pleading of defendant stating it to be one of the servant's is admissible. Houston, E. & W. T. R. Co. v. De Wolt, 96 Tex. 121, 70 S. W. 531.

45. Book of rules showing duties of yardmaster. Baltimore & O. S. W. R. Co. v. Roberts [Md.] 67 N. E. 530. When rules became operative may be shown. Lake Erie & W. R. Co. v. Charman [Ind.] 67 N. E. 923. Rules of a railroad company as to precaution taken to secure cars. Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890.

46. Western R. of Ala. v. Arnett, 137 Ala. 414; Stauning v. Great Northern R. Co., 88 Minn. 480, 93 N. W. 518. Evidence of a custom requiring a master to inspect a mine is admissible on the question of miner's exercise of due care. Thayer v. Smoky Hollow Coal Co. [Iowa] 96 N. W. 718. Switching. Mo., K. & T. R. Co. v. Schelling [Tex. Civ. App.] 75 S. W. 64. Evidence that machines at two other places were equipped differently does not show common usage against equipment like that of defendant's machines. Saucier v. N. H. Spinning Mills [N. H.] 56 Atl. 545. Custom of a mining district as to height of entries is admissible on issue that particular entry was too low. Hamilton v. Mendota C. & M. Co., 120 Iowa, 147, 94 N. W. 282. Evidence of practice of yard master to examine train before ordering it moved is admissible. Chicago & E. I. R. Co. v. Driscoll, 207 Ill. 9, 69 N. E. 620. Exclusion of evidence relative to custom of brakemen to straighten tell tales held not reversible error there being no occasion for proof of custom. McGarrity v. N. Y., N. H. & H. R. Co. [R. I.] 55 Atl. 718.

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On question of contributory negligence it may be shown that injured person was acquainted with conditions.[49] Where the question is as to whether it was the servant's duty to inspect appliances, evidence is admissible showing that the duty in the particular instance belonged to the master.[50] An experienced operative injured by a machine may show that it was not equipped as other like machines on which he had worked.[51] The jury may consider the fact of absorption in work as excusing negligence in colliding with a post of which employe had knowledge.[52] Evidence of long continued labor without sleep is admissible on the question where the injured person was in a condition to appreciate dangers.[53] Before reliance on a method of protection imposed by law is shown, the injured person must show that he had knowledge of the existence of such statute.[54] On the question of invitation to use a prohibited appliance, its use by employe's superior and the failure of such superior to protest against its use by the injured servant in his presence is admissible.[55] Mere conclusions of fact are inadmissible.[56] Plaintiff may testify directly that he did not appreciate any danger from the defective appliance.[57] That there was nothing to indicate defect except on close inspection is not conclusive.[58]

Expert and opinion evidence.—Expert testimony is admissible as to the sufficiency of a force to properly handle work;[59] effect of fall of derrick mast and the proper balancing of derricks;[60] manner of putting up a hoisting apparatus;[61] suitability of a pulley;[62] the necessity of servant at place of injury;[63] safety of laundry

Customs and usages as to inspection of appliances. Thayer v. Smoky Hollow Coal Co. [Iowa] 96 N. W. 718. Custom as to riding on side of cars while inspecting is admissible to show performance of duty in customary manner. International & G. N. R. Co. v. Bearden [Tex. Civ. App.] 71 S. W. 558. Custom as to stopping handcar to allow section hands to mount same. Galveston, H. & S. A. R. Co. v. Puente, 30 Tex. Civ. App. 246, 70 S. W. 362. Testimony that it was customary for section foreman to ride on front of handcar is admissible in action for injuries caused by slipping therefrom. Galloway v. San Antonio & G. R. Co. [Tex. Civ. App.] 78 S. W. 32; Devaney v. Degnon-McLean Const. Co., 79 App. Div. [N. Y.] 62. The custom of brakemen walking before moving cars to make coupling may be shown. De Cair v. Manistee & G. R. R. Co. [Mich.] 95 N. W. 726. Where rule as to signals for protection of rear of trains disabled or stopping at unusual place are silent as to the party charged with the duty of placing the signals, evidence is admissible as to the custom in such a case. Mo., K. & T. R. Co. v. Bodie [Tex. Civ. App.] 74 S. W. 100.

47. Railroads. Bodie v. Charleston & W. C. R. Co., 66 S. C. 302; Seaboard Air Line R. v. Phillips, 117 Ga. 98. The existence and use of derailing switches. Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890. Rules for the protection of car inspectors on other roads are admissible. Devoe v. N. Y. Cent. & H. R. R. Co., 174 N. Y. 1, 66 N. E. 568.

48. Bourbonnais v. West Boylston Mfg. Co. [Mass.] 68 N. E. 232.

49. Injury to brakeman from low bridge under which he had repeatedly passed. Quinlan v. N. Y., N. H. & H. R. Co., 89 App. Div. [N. Y.] 266.

50. Storrie v. Grand Trunk Elevator Co. [Mich.] 96 N. W. 569.

51. Saucier v. N. H. Spinning Mills [N. H.] 56 Atl. 545.

52. Republic I. & S. Co. v. Jones [Ind. App.] 69 N. E. 191.

53. Republic I. & S. Co. v. Ohler [Ind.] 68 N. E. 901.

54. A servant injured by the uplift of automatic elevator doors over an elevator shaft may not be asked as to reliance on statute requiring the use of warming devices on freight elevators where it is not shown that she had knowledge of the existence of the law which went into effect only two days before the accident happened. Connors v. Merchants' Mfg. Co. [Mass.] 69 N. E. 218.

55. Boyle v. Columbian F. P. Co., 182 Mass. 93, 64 N. E. 726.

56. Another operator should not state whether he had any "opportunity to see," etc., but rather he should describe the machine and let the jury judge. Spoonick v. Backus Brooks Co., 89 Minn. 354, 94 N. W. 1079.

57. Murphy v. Marston Coal Co., 183 Mass. 385, 67 N. E. 342.

58. Allen B. Wrisley Co. v. Burke, 208 Ill. 250, 67 N. E. 818. A witness may state that a fragment "looked like a fresh break." Ill. Cent. R. Co. v. Behrens [Ill.] 69 N. E. 796.

And see topic Evidence, 1 Curr. L. p. 1136.

59. Fritz v. W. U. Tel. Co., 25 Utah, 263, 71 Pac. 209.

60. The proper balancing of derricks, the effect of the breaking of a pivot on an evenly balanced derrick, and whether the fall of a derrick mast would fracture the pivot, are proper subjects of expert evidence. Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972.

61. Parlett v. Dunn [Va.] 46 S. E. 467. An expert witness cannot testify as to his own method of putting up a derrick. Id.

62. Wabash Screen Door Co. v. Black [C. C. A.] 126 Fed. 721.

63. Servant injured by falling gate. Storrie v. Grand Elevator Co. [Mich.] 96 N. W. 569.

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mangle;[64] the proper method of moving boilers;[65] the effect of black damp in mine.[66] The condition of a hammer and its suitability for the purpose of a striking hammer is not a proper subject for expert testimony,[67] nor is the danger of an employment.[68] One engaged in the railroad business for more than 20 years, part of the time as a car inspector, could state whether a defect in a brakebeam could be discovered by proper inspection.[69] The fact that a witness is a millwright does not show his competency as an expert to give an opinion as to the cause of a break in a pulley.[70] Where there is no evidence to show the nature of the defect, expert evidence that certain enumerated defects would have caused the injury is inadmissible.[71]

64. Coleman v. Perry [Mont.] 72 Pac. 42.

65. Palmquist v. Mine & S. Supply Co., 25 Utah, 257, 70 Pac. 994.

66. Czarecki v. Seattle & S. F. R. & N. Co., 30 Wash. 288, 70 Pac. 750.

67. Vant Huyl v. Great Northern R. Co. [Minn.] 96 N. W. 789. Opinion evidence as to whether or not a place was a safe one for a servant to work in held inadmissible. Winters v. Naughton, 91 App. Div. [N. Y.] 80.

68. Expert testimony to show that certain employment is not dangerous to health is not admissible to prove a statute enacted to preserve the health of persons engaged therein is not necessary. State v. Cantwell [Mo.] 78 S. W. 569. On the question whether a mode of construction was negligent, the hypothetical question should not premise the occurrence of the accident resulting from such construction. Ennis v. Little [R. I.] 55 Atl. 884.

69. International & G. N. R. Co. v. Collins [Tex. Civ. App.] 75 S. W. 814.

70. Duntley v. Inman, 42 Or. 334, 70 Pac. 529.

71. East Tenn. & W. N. C. R. Co. v. Lindamood [Tenn.] 78 S. W. 99.

Particular facts: That negligence was that of a fellow-servant. Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307. Request for support within Hurd's Ill. Rev. St. 1899, c. 93, §§ 14, 16. O'Fallon Coal Co. v. Laquet, 198 Ill. 125, 64 N. E. 767. Adequacy of sounding test for emery wheel and its common use. Chattanooga Machinery Co. v. Hargraves [Tenn.] 78 S. W. 105. Injury caused by failure to promulgate rules. Corcoran v. New York, N. H. & H. R. Co., 77 App. Div. [N. Y.] 505. That engine could have been stopped after discovery of servant's peril. Koons v. Kansas City S. B. R. Co. [Mo.] 77 S. W. 755. Employment as superintendent within employer's liability act. McHugh v. Manhattan R. Co., 88 App. Div. [N. Y.] 554. Assumed risk. Texas & N. O. R. Co. v. Lee [Tex. Civ. App.] 74 S. W. 345; Wexler v. Salisbury [Minn.] 98 N. W. 95; Joyce v. American Writing Paper Co. [Mass.] 68 N. E. 213; Chicago Screw Co. v. Weiss, 203 Ill. 536, 68 N. E. 54; Baltimore & O. S. W. R. Co. v. Roberts [Ind.] 67 N. E. 530; Meany v. Standard Oil Co. [N. J. Law] 55 Atl. 653. That negligence of the engineer and not failure of air brakes caused the injury. Snyder v. Pa. R. Co., 205 Pa. 619. Defendant's ownership of locomotive causing injury. Swift v. Ronan, 202 Ill. 202, 66 N. E. 963. Proximate cause. Baltimore & O. S. W. R. Co. v. Roberts [Ind.] 67 N. E. 530. Existence of relation of master and servant. Vallie v. Hall [Mass.] 68 N. E. 829; Wright v. Bertiaux [Ind.] 66 N. E. 900. Evidence that the master furnished plans for trestle and gave orders during the work and inspected the material used shows responsibility for its unsafe condition. Mengle v. McClintic-Marshall Const. Co., 89 App. Div. [N. Y.] 334. There is evidence of negligence where the rock thrown from under a train injuring a track walker was carried under the train for over two miles as shown by a groove cut by it in the ties and ballast. Louisville & N. R. Co. v. Davis, 24 Ky. L. R. 1415, 71 S. W. 658. The use of a stub pilot in place of a longer pilot which was less liable to throw cattle than a long pilot for which it was substituted is not evidence that its use was the proximate cause of a fireman's death caused by overturning engine on collision with cattle. Briggs v. Chicago & N. W. R. Co. [C. C. A.] 125 Fed. 745. Evidence that foreman was not required to inspect planks used for temporary scaffolding but merely to furnish sufficient planks and that proper ones were used did not warrant a finding that it was his duty to see that the staging was safe. Thompson v. Worcester, 184 Mass. 354, 68 N. E. 833. Subsequent similar experiments show that abnormal action of a machine was not caused in the way claimed. Saucier v. N. H. Spinning Mills [N. H.] 56 Atl. 545. Evidence of the competence of foreman is inadmissible where the action is based on a specific negligent act by him. Cobb Chocolate Co. v. Knudson, 207 Ill. 452, 69 N. E. 816. That a witness was refused permission to examine the alleged defective machinery by daylight is admissible. Chicago & E. I. Co. v. Rains, 203 Ill. 417, 67 N. E. 840. Reasons why brakeman got down from car and passed in front of it. De Cair v. Manistee & G. R. R. Co. [Mich.] 95 N. W. 726. Evidence of a servant's discharge held inadmissible as to his competency. Winters v. Naughton, 91 App. Div. [N. Y.] 80. Testimony of injured servant as to condition of machinery held admissible. Lamb v. Littman, 132 N. C. 978, 44 S. E. 646. Report of an accident to an insurance company insuring the employer against accidents to his employes is admissible so far as it contains admissions of the employer relevant to the controversy. Roche v. Llewellyn Ironworks, 140 Cal. 563, 74 Pac. 147. Evidence that repairs were being made after the accident held admissible. Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972. Evidence relative to the construction of certain mining machinery held inadmissible in an action for injury to a servant. Luman v. Golden An-

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Sufficiency of evidence of negligence[72] and contributory negligence[73] is treated in the note.

cient Channel Min. Co., 140 Cal. 700, 74 Pac. 307. Declarations of existing suffering made some time after an accident is admissible in an action for injuries. Southern Indiana R. Co. v. Davis [Ind. App.] 69 N. E. 550. That pulleys made by the same employes, in the same manner had burst held competent evidence on an issue of defendant's negligence in using a defective pulley. Wabash Screen Door Co. v. Black [C. C. A.] 126 Fed. 721. Evidence of other looped tell tales in the yard held admissible in an action for an injury caused by a brakeman being thrown from a car by one. McGarrity v. New York, N. H. & H. R. Co. [R. I.] 55 Atl. 718. Evidence that ropes in a tell tale were knotted held competent though negligence in that respect was not alleged. McGarrity v. New York, N. H. & H. R. Co. [R. I.] 55 Atl. 718.

Harmless error: Error in permitting question whether mine driver's position was correct held harmless by reason of answer given. Hamilton v. Mendota Coal & M. Co., 120 Iowa, 147, 94 N. W. 282. Refusal to admit plaster cast of dent in rails was harmless against successful party. Hamilton v. Mich. Cent. R. Co. [Mich.] 97 N. W. 392. Error in receiving testimony that defect had been repaired when jury viewed place is harmless where it was in evidence otherwise. Spoonick v. Backus-Brooks Co., 89 Minn. 354, 94 N. W. 1079.

72. Evidence sufficient: Johnson v. Metropolitan St. R. Co. [Mo. App.] 78 S. W. 275. Defectively constructed scaffold, insufficient planks and nails. Geist v. Rapp, 206 Pa. 411; Buoy v. Clyde Milling & Elevator Co. [Kan.] 75 Pac. 466, Furnishing defective apparatus. Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307; Towle v. Stimson Mill Co. [Wash.] 74 Pac. 471. Failure to guard pit. Ill. Steel Co. v. Stonevick, 199 Ill. 122, 64 N. E. 1014. Scabbling stones on flat cars not blocked. Chicago, I. & L. R. Co. v. Martin, 31 Ind. App. 308, 65 N. E. 591. Yardmaster's failure to warn engineer of position of brakeman between cars. Lake Erie & W. R. Co. v. Charman [Ind.] 67 N. E. 923. Failure to properly inspect side rods on an engine. Galveston, H. & S. A. R. Co. v. Collins [Tex. Civ. App.] 71 S. W. 560. No headlight on engine; failure to ring bell. Erickson v. Kansas City, O. & S. R. Co., 171 Mo. 647, 71 S. W. 1022. Coal gate on engine giving way. Gulf, C. & S. F. R. Co. v. Brooks [Tex. Civ. App.] 73 S. W. 571. Running handcar against plaintiff. Chicago, R. I. & T. R. Co. v. Long [Tex. Civ. App.] 74 S. W. 59. Narrow step on pilot of engine. St. Louis & S. F. R. Co. v. Skaggs [Tex. Civ. App.] 74 S. W. 783. Foreman of bridge crew pulling guy-rope on derrick. St. Louis S. W. R. Co. v. Smith, 30 Tex. Civ. App. 336, 70 S. W. 789. Defective construction of bridge. Copeland v. Wabash R. Co., 175 Mo. 650, 75 S. W. 106. Defectively constructed pushcar. Mitchell v. Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647. Putting in a train an old worn and out of repair car. Oglesby v. Missouri Pac. R. Co., 177 Mo. 272, 76 S. W. 623. Insufficient equipment of brakes and brakemen. Robertson v. Cayard [Tenn.] 77 S. W. 1056. Brakes not properly set on car on a sidetrack. Jones v. Kansas City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890. Old, worn, and defective boiler and insufficient inspection. Marsh v. Lehigh Valley R. Co., 206 Pa. 558. No lugs or lips on safety hooks on engine. Huebner v. Erie R. Co., 68 N. J. Law, 468. Accumulation of ice and snow in railroad yards. Sankey v. Chicago, R. I. & P. R. Co., 118 Iowa, 39, 91 N. W. 820. Dumping a pile of ashes and cinders on the track between the rails. Chittick v. Minneapolis, St. P. & S. S. M. R. Co., 88 Minn. 11, 92 N. W. 462. Revolving plate of crane boom on steam shovel broken: careless engineer. Bender v. Great Northern R. Co., 89 Minn. 163, 94 N. W. 546. Failure of train dispatcher to notify trains where to meet. Northern Pac. R. Co. v. Mix [C. C. A.] 121 Fed. 476. Rail on one side of track lower than that on the other; track shaky. Hoelter v. McDonald, 82 App. Div. [N. Y.] 423. Allowing a worktrain running backward to be derailed by cattle on the track. Mendizabol v. N. Y. Cent. & H. R. R. Co., 89 App. Div. [N. Y.] 386. Ties out of place and rails too close together of which master should have known. Momence Stone Co. v. Turrell, 205 Ill. 515, 68 N. E. 1078. Worn flanges on car wheels causing derailment. Roberts v. Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111. Ordering servant to work near revolving shaft. Grijalva v. Southern Pac. Co., 137 Cal. 569, 70 Pac. 622. Substituting blasting powder of higher explosive power without notifying workman. Chambers v. Chester, 172 Mo. 461, 72 S. W. 904. Engineer at mine shaft disregarding signals and lowering cages at dangerous speed. Princeton Coal & Min. Co. v. Roll [Ind.] 66 N. E. 169. Improper entrance to cage; substituting quicker fuse without notice. Hedlun v. Holy Terror Min. Co. [S. D.] 92 N. W. 31. In operating skip cars. Renlund v. Commodore Min. Co., 89 Minn. 41, 93 N. W. 1057. Refuse on railway track in mine. Muren Coal & Ice Co. v. Howell, 204 Ill. 515, 68 N. E. 456. Directing men to drill on a stone which was in an unsafe position. Mahoney v. Bay State Pink Granite Co. [Mass.] 68 N. E. 234. Gas escaping from blast furnace on account of defective hopper. Illinois Steel Co. v. Ryska, 200 Ill. 280, 65 N. E. 734. Permitting straw, waste and oil to be stored in coal mine near where lamps were used. Utah Sav. & Trust Co. v. Diamond Coal & Coke Co. [Utah] 73 Pac. 524. Insufficient apparatus for loading large tank; directing employe to stand in dangerous place. Palmquist v. Mine & Smelter Supply Co. [Utah] 70 Pac. 994. Uprights resting on insecure foundation. Bourbonnais v. West Boylston Mfg. Co. [Mass.] 68 N. E. 232. Master's knowledge of defective scaffold. Metcalf v. Mystedt, 203 Ill. 333, 67 N. E. 764. Defectively constructed scaffold: timbers too light. Ehlen v. O'Donnell, 205 Ill. 38, 68 N. E. 766. Rusty pulley; strings and laces hanging from belt. Goldthorpe v. Clark-Nickerson Lumber Co., 31 Wash. 467, 71 Pac. 1091. Failure to warn servant of a hole near foot of a ladder leading down hatchway of a vessel. Morton v. Moran Bros. Co., 30 Wash. 362, 70 Pac. 968. Vat in a meat packing establishment close to shaft and belt shifter. Morris v. Malone.

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(§ 3*H*) 5. *Questions of law and fact.*—Negligence of the master is ordinarily a question for the jury as where the inquiry is as to the necessity and sufficiency

200 Ill. 132, 65 N. E. 704. Opening hot water faucet in mash tub. Kentucky Distilleries & Warehouse Co. v. Schreiber, 24 Ky. L. R. 2236, 73 S. W. 769. Loose handle on screw machine. Chicago Screw Co. v. Weiss, 203 Ill. 536, 68 N. E. 54. Broken safety collar on driving shaft in oil mill. Broadfoot v. Shreveport Cotton Oil Co. [La.] 35 So. 643. Defectively cemented belt. Cummings v. Nat. & Providence Worsted Mills, 24 R. I. 390. Directing servant to go into open elevator shaft. Wolf v. Devitt, 83 App. Div. [N. Y.] 42. Failure to box gearing on a circle saw. Perry v. Tozer [Minn.] 97 N. W. 137. Insufficient post in trestle. Baumann v. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139. Did not assume risk of working near revolving shaft in elevator. Ready v. Peavey Elevator Co., 89 Minn. 154, 94 N. W. 442. Falling of lumber defectively piled. Isherwood v. Jenkins Lumber Co., 87 Minn. 388, 92 N. W. 230. Defective hook in hoisting apparatus. Jernigan v. Houston Ice & Brewing Co. [Tex. Civ. App.] 77 S. W. 260. Rods and chains in hoisting apparatus. Gurney v. Le Baron, 182 Mass. 368, 65 N. E. 789. Working near a rapidly revolving fly wheel and crank disc. Henderson v. Kansas City, 177 Mo. 477, 76 S. W. 1045. Directing the moving of a large tank. Fremont Brewing Co. v. Hansen [Neb.] 93 N. W. 211. Furnishing insufficient lumber for sewer trench sheathing. Kurstelska v. Jackson, 89 Minn. 95, 93 N. W. 1054. Servant was warned of danger of passing near circular saw. Green v. Barnes Mfg. Co. [N. J. Law] 55 Atl. 1083. That master directed employe to do certain work. Patterson v. Cole [Kan.] 73 Pac. 54. Whether mode of cleaning fan was obviously dangerous to sixteen-year-old boy for jury. Doyle v. Pittsburg Waste Co., 204 Pa. 618. Allowing dangerous plate to remain while workman was tearing out wall beneath. Williams v. Clark, 204 Pa. 416. Negligence of train dispatcher making collision imminent; plaintiff's intestate being thrown from the train by an emergency stop. Phinney v. Ill. Cent. R. Co. [Iowa] 98 N. W. 358. Failure of yardmaster to ascertain that a car was off the track before ordering train moved. Chicago & E. I. R. Co. v. Driscoll, 207 Ill. 9, 69 N. E. 620. Gas and air charged with dust allowed to accumulate in mine. Riverton Coal Co. v. Shepherd, 207 Ill. 395, 69 N. E. 921. Explosion of locomotive boiler. Illinois Cent. R. Co. v. Behrens [Ill.] 69 N. E. 796. Failure to warn minor servant as to exposed cog wheels. Cobb Chocolate Co. v. Knudson, 207 Ill. 452, 69 N. E. 816. Failure to provide suitable place to work. Ball v. Gussenhoven [Mont.] 74 Pac. 871. Evidence held to show that an appliance furnished by defendant was in use at time of injury. Galveston, etc., R. Co. v. Butchek [Tex. Civ. App.] 78 S. W. 740. That a master knew of the viciousness of a horse given a servant to work with. McCready v. Stepp [Mo. App.] 78 S. W. 671. Evidence as to cause of death held sufficient to go to the jury. Wabash Screen Door Co. v. Black [C. C. A.] 126 Fed. 721. Starting cars on warehouse track without warning. Bain v. Northern Pac. R. Co. [Wis.] 98 N. W. 241. Sufficient to show that abnormal action of steam shovel which had a defective part was due to negligence. Bender v. Great Northern R. Co., 89 Minn. 163, 94 N. W. 546. Direction of a verdict where vice-principal had seen a servant in a dangerous position just before the accident held error. Bain v. Northern Pac. R. Co. [Wis.] 98 N. W. 241. Verdict held not contrary to the evidence in an action for negligence for failing to keep tell tales in proper position. McGarrity v. New York, N. H. & H. R. Co. [R. I.] 55 Atl. 718. Where plaintiff's accounts of the manner in which he received his injuries are conflicting, the verdict will not be disturbed on the ground that the jury were left to guess how the accident occurred. Joyce v. American Writing Paper Co. [Mass.] 68 N. E. 213. A verdict will not be disturbed on a contention that it was impossible for plaintiff to have been injured as he claimed. Joyce v. American Writing Paper Co. [Mass.] 68 N. E. 213.

Evidence insufficient: Harrington v. Wabash R. Co. [Mo. App.] 78 S. W. 662. Foreman ordering brakes applied on handcar before reaching stopping place without notifying plaintiff. Western R. Co. v. Arnett, 137 Ala. 414. Falling of bricks from building under construction. Holzman v. Katzman, 84 N. Y. Supp. 250. To show that elevator was out of repair to defendant's knowledge. Kindorf v. Hoellerer, 87 App. Div. [N. Y.] 628. In failing to provide proper screen to cover rollers of a mangle and to keep treadle in repair. Baynard v. Standard Knitting Mills Co., 85 N. Y. Supp. 734. In failing to provide a hook with a safety snap on a hoisting apparatus. Skapura v. Nat. Sugar Refining Co., 83 App. Div. [N. Y.] 21. To show that an engineer was inefficient. Streets v. Grand Trunk R. Co., 78 App. Div. [N. Y.] 480. Coupling apparatus for cars. Johnson v. Houston & T. C. R. Co. [Tex. Civ. App.] 72 S. W. 1021. Splinters in floor of platform; one of them penetrated plaintiff's sole and injured his foot. Wendall v. Chicago & A. Ry. Co., 100 Mo. App. 556, 75 S. W. 689. To show negligence in allowing roadbed of pushcar used for hauling cinders from gas plant to become undermined. Chandler v. Kansas City, Mo., Gas Co., 174 Mo. 321, 73 S. W. 502. To show too high a pressure of steam in a boiler causing it to explode. Beunk v. Valley City Desk Co. [Mich.] 95 N. W. 548. To show inadequate spark arrester or improper management of draft by engineer. Durec v. Chicago, M. & St. P. R. Co., 118 Iowa, 640, 92 N. W. 890. As to giving warning of approaching train. Brown v. Chicago, R. I. & P. R. Co., 120 Iowa, 280, 92 N. W. 662. In master mechanic ordering engineer to start defective engine. Lawson v. American Steel & Wire Co., 204 Pa. 604. To show that engine used for running a printing press was inadequate or defective. Boston v. Buffum, 97 Me. 230. To show that a sill tender of engine was defective. Gentry v. Southern R. Co., 66 S. C. 256. That timbers for scaffolding were too light or that construction was defective. Sitterding v. Patterson's Adm'x [Va.] 43 S. E. 557. In engineer allowing heavy plate to be insecurely propped up in engine room. Indiana Mfg. Co. v. Buskirk [Ind. App.] 68 N. E. 925.

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of inspection,[74] the promulgation[75] and reasonableness of rules;[76] sufficiency and

In putting servant to work dressing a slab of stone tilted up with chips and blocks. Archambault v. Archambault [Mass.] 68 N. E. 199. In employing an apprentice at stone dressing who had seven months' experience. Ettore v. Swingle, 183 Mass. 194, 66 N. E. 705. In operating cable for unloading stone from flat car. Southern Indiana R. Co. v. Martin, 160 Ind. 280, 66 N. E. 886. To show that accident was caused by defective carriage of circular saw. Hansen v. Seattle Lumber Co., 31 Wash. 604, 72 Pac. 457. To show failure of section foreman to warn workmen of approaching train. Atchison, T. & S. F. R. Co. v. Hamlin [Kan.] 73 Pac. 58. Evidence held insufficient as to slippery condition of newly-polished floor. Diver v. Singer Mfg. Co., 205 Pa. 170. Evidence held to sustain a finding that machinery was not defective. Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307. Evidence held insufficient to show that a mine owner did not furnish his servants a suitable place to work in. Spring Valley Coal Co. v. Robizas, 207 Ill. 226, 69 N. E. 925.

73. Evidence sufficient: Walking over trap door which worked automatically when another way had been provided. Connors v. Merchants' Mfg. Co. [Mass.] 69 N. E. 218. Walking on railway track with umbrella held in front of him. Chicago, I. & E. R. Co. v. Cunningham [Ind. App.] 69 N. E. 304. Walking across a railroad track without looking for approaching trains. Evans v. Wabash R. Co. [Mo.] 77 S. W. 515. Signalling the engineer to back the front division of a parted train into the rapidly approaching rear division. Texas & N. O. R. Co. v. Stewart, 30 Tex. Civ. App. 408, 71 S. W. 330. Working beneath an ascending bucket of coal without knowing whether it was going up all right or not. Skapura v. Nat. Sugar Refining Co., 83 App. Div. [N. Y.] 21. Car coupler not getting from between cars after coupling. McHugh v. Manhattan R. Co., 88 App. Div. [N. Y.] 554. Carrying lantern in violation of orders where there were gas fumes causing explosion. Dickescheid v. Betz, 80 App. Div. [N. Y.] 8. Failure to watch out for moving cars in switchyard. Sours v. Great Northern R. Co., 88 Minn. 504, 93 N. W. 517. Getting into wheat bin in elevator close to rapidly revolving shaft. Braaflat v. Minneapolis & N. Elevator Co. [Minn.] 96 N. W. 920. In not giving proper notice to switchman before going under a car standing on track. Fay v. Chicago, B. & Q. R. Co. [Neb.] 96 N. W. 638. In allowing her hand to get caught in a laundry roller. Kupkofski v. Spiegel [Mich.] 97 N. W. 48. Running a handcar on the track when train was approaching; not getting it off in time. Chicago, B. & Q. R. Co. v. Healey [Neb.] 97 N. W. 1024. In forcing a piece of timber that was pinching onto an edger. Egnor v. Foster Lumber Co., 115 Wis. 530, 92 N. W. 242. In not exercising due caution around a buzz saw. Arkland v. Taber-Prang Art Co., 184 Mass. 243, 68 N. E. 219. Engineer not keeping control of his train on down grade. Jones v. N. Y., N. H. & H. R. Co., 184 Mass. 89, 68 N. E. 14. Not using due care in working about a slab of stone weakly propped up. Archambault v. Archambault, 184 Mass. 274, 68 N. E. 199. In riding on freight elevator not intended to carry passengers. O'Donnell v. McVeagh, 205 Ill. 23, 68 N. E. 646. In using his hands to uncouple cars equipped with automatic couplers. Gilbert v. Chicago, R. I. & P. R. Co., 123 Fed. 832. In touching timber on moving carriage in sawmill. Rucks v. Minden Lumber Co., 109 La. 933. In walking through a tunnel on railroad track knowing a train was coming. Sanker v. Pa. R. Co., 205 Pa. 609. Failure of section man to get his hand car off the track. McHugh v. Northern Pac. R. Co., 32 Wash. 30, 72 Pac. 450. Working in furnace under plate which was apparently likely to fall and of which warning had been given. Williams v. Clark, 204 Pa. 416. Contributory negligence held for the jury where inexperienced miner was injured by caving of rock which experienced men then present did not think would fall. Hone v. Mammoth Min. Co. [Utah] 75 Pac. 381. That another similarly situated with plaintiff escaped injury without difficulty is not conclusive as to contributory negligence. Phinney v. Ill. Cent. R. Co. [Iowa] 98 N. W. 358. Evidence held to support finding that brakeman did not assume risk from switch tracks being close together so that man on ladder of car might strike car on another track. Baltimore & O. S. W. R. Co. v. Roberts [Ind.] 67 N. E. 530. Evidence held to support finding that brakeman injured by car on another track while riding on the ladder of a car was not negligent. Baltimore & O. S. W. R. Co. v. Roberts [Ind.] 67 N. E. 530. Evidence as to whether plaintiff called the master's attention to defective lights and remained under promise of repair and whether a prudent man would have remained held for the jury. Held v. American Window Glass Co. [Pa.] 56 Atl. 1077. Evidence of contributory negligence held for the jury. Tanner v. Harper [Colo.] 75 Pac. 404. Evidence held sufficient to warrant the direction of a verdict for defendant. O'Donnell v. MacVeagh, 205 Ill. 23, 68 N. E. 646. Evidence held to show such contributory negligence as precluded a recovery. Id.

Evidence insufficient: Galloway v. San Antonio & G. R. Co. [Tex. Civ. App.] 78 S. W. 32; Smith v. Kentucky Lumber Co. [Ky.] 78 S. W. 120; Baltimore & P. R. Co. v. Landrigan, 20 App. D. C. 135. Mule driver not seeing a point of rock protruding downward over a road in a mine. Hamilton v. Mendota Coal & Min. Co., 120 Iowa, 147, 94 N. W. 282. Workman at roundhouse standing directly in front of an engine. Stanning v. Great Northern R. Co., 88 Minn. 480, 93 N. W. 518. Passing close to a rip saw. Merritt v. Victoria Lumber Co. [La.] 35 So. 497. Brakeman on running board of engine. Gulf & S. I. R. Co. v. Bussy [Miss.] 35 So. 166. Workman on flat car scabbling stone leaping from moving train. Chicago, I. & L. R. Co. v. Martin, 31 Ind. App. 308, 65 N. E. 591. Running elevator where machinery was in a dangerous condition under repair. Slack v. Harris, 200 Ill. 96, 65 N. E. 669. Working on slab of stone lying on chips on a sloping surface of a quarry. Mahoney v. Bay State Pink Granite Co. [Mass.] 68 N. E. 234. Leaning against defective guard on dock staging. Garant v. Cashman, 183 Mass. 13, 66 N. E. 599. Failing to notice obstruction preventing his es-

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safety of appliances and machinery;[77] safety of places for work;[78] warning and in-

cape from a track in a mine. Muren Coal & Ice Co. v. Howell, 204 Ill. 515, 68 N. E. 456. Riding on one of three handcars run at high rate of speed in close proximity under direction of foreman; one derailed. International & G. N. R. Co. v. Pina [Tex. Civ. App.] 77 S. W. 979. Making coupling by hand between cars where the automatic coupler was out of order. Murphy v. Baltimore & O. S. W. R. Co., 24 Ky. L. R. 1500, 71 S. W. 886. Car inspector riding on steps of moving car knocked off by switch stand. International & G. N. R. Co. v. Bearden [Tex. Civ. App.] 71 S. W. 558. Workman in culvert failing to get out of way of descending timber. Board v. Chesapeake & O. R. Co., 24 Ky. L. R. 1079, 70 S. W. 625. Section man so engrossed in his work as to fail to hear an approaching train. Texas & P. R. Co. v. Carter [Tex. Civ. App.] 73 S. W. 50. Failing to hear hand car coming. Chicago, R. I. & P. R. Co. v. Long [Tex. Civ. App.] 74 S. W. 59. Inexperienced workman on board ship stepping in hole in dark place. Morton v. Moran Bros. Co., 30 Wash. 362, 70 Pac. 968. Conductor of trolley car struck by trolley post while on the running board collecting fares. Withee v. Somerset Traction Co. [Me.] 56 Atl. 204. Brakeman going between cars of moving train to adjust airbrakes. Pharr v. Atlanta & C. Air Line R. Co., 132 N. C. 418. Walking, as directed by the master, into an open elevator shaft in the dark. Wolf v. Devitt, 83 App. Div. [N. Y.] 42. Getting in front of slowly moving quarry car. Allison v. Long Clove Trap Rock Co., 75 App. Div. [N. Y.] 267. Riding on pilot of switch engine, thrown off by brakes being suddenly applied. Texas & P. R. Co. v. Putman, 120 Fed. 754. Car repairer working under cars on track without observing location. Chicago Terminal Transfer R. Co. v. Stone [C. C. A.] 118 Fed. 19. In riding on an engine over a defective track. Hammer v. Pressed Steel Car Co., 204 Pa. 594. In getting caught by unguarded set screw in a revolving shaft. Huff v. American Fire Engine Co., 84 N. Y. Supp. 651. Contradictory evidence held not to justify a peremptory charge for defendant on ground of contributory negligence in plaintiff. Chicago & A. R. Co. v. Raidy, 203 Ill. 310, 67 N. E. 783. Facts held to show that plaintiff was not negligent. Joyce v. American Writing Paper Co. [Mass.] 68 N. E. 213. Facts held insufficient to constitute contributory negligence as a conclusion of law. Galveston, H. & S. A. R. Co. v. Butchek [Tex. Civ. App.] 78 S. W. 740.

74. Bourbonnais v. West Boylston Mfg. Co., 184 Mass. 250, 68 N. E. 232. Whether defect could be discovered by reasonable inspection is question for jury. Roche v. Denver & R. G. R. Co. [Colo. App.] 73 Pac. 880. Question of sufficiency of appliance not inspected is for jury. Allison v. Long Clove Trap Rock Co., 75 App. Div. [N. Y.] 267. Whether tests were sufficient. Galveston, H. & S. A. R. Co. v. Collins, 31 Tex. Civ. App. 70, 71 S. W. 560. Welded handle with no indication of weakness. Murphy v. Marston Coal Co., 183 Mass. 385, 67 N. E. 342. Loose set screw. Ellis v. Thayer, 31 Ind. App. 295, 67 N. E. 325. Whether plaintiff was negligent in not testing valves before turning on gas which exploded. Paden v. Van Blarcom, 100 Mo. App. 185, 74 S. W. 124. Where several trains pass over the same road daily and evidence showed that the bridge had been burned a considerable time before the accident it is a question for the jury whether or not the railway company was negligent in not inspecting the bridge within 15 hours preceding the accident. Tex. Mexican R. Co. v. Mendez [Tex. Civ. App.] 78 S. W. 25.

75. Devoe v. N. Y. Cent. & H. R. R. Co., 174 N. Y. 1, 66 N. E. 568.

76. Tex. Cent. R. Co. v. Yarbro [Tex. Civ. App.] 74 S. W. 357.

77. Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890; Szymanski v. Blumenthal [Del.] 56 Atl. 674; Nashville, C. & St. L. R. v. Cody, 137 Ala. 597; Bailey v. Cascade Timber Co., 32 Wash. 319, 73 Pac. 385; Geldard v. Marshall, 43 Or. 438, 73 Pac. 330; Ready v. Peavey Elevator Co., 89 Minn. 154, 94 N. W. 442; Pierce v. Brennan, 88 Minn. 50, 92 N. W. 507; Bookman v. Masterson, 83 App. Div. [N. Y.] 4; Devereux v. Utica Steam Cotton Mills, 84 App. Div. [N. Y.] 34; Parsons v. Hammond Packing Co., 96 Mo. App. 372, 70 S. W. 519; Boucher v. Robeson Mills, 182 Mass. 500, 65 N. E. 819. Mo. Rev. St. 1899, c. 6433. Bair v. Heibel [Mo. App.] 77 S. W. 1017. Whether Federal rules as to draw bar requirements complied with a question for the jury. St. Louis, I. M. & S. R. Co. v. Neal [Ark.] 78 S. W. 220. Question whether a pulley was defective and whether defendant was negligent in using it held for the jury. Wabash Screen Door Co. v. Black [C. C. A.] 126 Fed. 721. Question whether cars in a mine had been negligently left in a certain position held for the jury. Spring Valley Coal Co. v. Robizas, 207 Ill. 226, 69 N. E. 925. Whether or not a machine was dangerous within the meaning of a statute providing that children shall not be permitted to operate dangerous machines held to be for the jury. Gallenkamp v. Garvin Mach. Co., 91 App. Div. [N. Y.] 141.

78. Highland Boy Gold Min. Co. v. Pouch [C. C. A.] 124 Fed. 148; Hamilton v. Mendota C. & M. Co., 120 Iowa, 147, 94 N. W. 282; Garant v. Cashman, 183 Mass. 13, 66 N. E. 599; Gila Valley, G. & N. R. Co. v. Lyon [Ariz.] 71 Pac. 957; Kerrigan v. Market St. R. Co., 138 Cal. 506, 71 Pac. 621; Muhlens v. Obermeyer, 83 App. Div. [N. Y.] 88; Southern R. Co. v. Howell, 135 Ala. 639; McDannald v. Wash. & C. R. R. Co., 31 Wash. 585, 72 Pac. 481; Leaux v. N. Y., 87 App. Div. [N. Y.] 405; Dorsett v. Clement-Ross Mfg. Co., 131 N. C. 254, 42 S. E. 612; Rogers v. Meyerson Printing Co. [Mo. App.] 78 S. W. 79; Winters v. Naughton, 91 App. Div. [N. Y.] 80. Sufficiency of scaffolds for jury. Flannigan v. Ryan, 89 App. Div. [N. Y.] 624. Negligence in failing to keep coal shutes far enough from track when not in use so as to injure employes on passing trains. Louisville & N. R. Co. v. Hall, 24 Ky. L. R. 2487, 74 S. W. 280. The question of a master's negligence is for the jury where evidence shows that any danger in the place of employment was latent. Wood v. Victor Mfg. Co., 66 S. C. 432.

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structing servant;[79] methods of work;[80] compliance with statutory requirements;[81] competency of fellow-servant.[82] The cause of the injury[83] and whether negligence of master was proximate cause are questions of fact,[84] and so as to the question whether the relation of master and servant existed between the parties.[85] Fraud in procuring a release is a question for the jury.[86]

Whether the negligence was that of a fellow-servant[87] or a vice-principal is a

79. Preuschoff v. Strob Brew. Co. [Mich.] 92 N. W. 945; Rafferty v. Nawn, 182 Mass. 503, 65 N. E. 830; Mercantile Laundry Co. v. Kearney, 97 Md. 15. Whether the dangers were such as to require warning. Le Barre v. Grand Trunk Western R. Co. [Mich.] 94 N. W. 735. Negligence of employer as to insufficient warning of youthful and inexperienced employe question for jury. Corbett v. St. Vincent's Industrial School, 79 App. Div. [N. Y.] 334.

80. Ill. Steel Co. v. Sitar, 199 Ill. 116, 64 N. E. 984; Smith v. Atlanta & C. A. L. R. Co., 132 N. C. 819; Gaudie v. Northern Lumber Co. [Wash.] 74 Pac. 1009; Fronk v. Evans City Steam Laundry [Neb.] 96 N. W. 1053; Louisville & N. R. Co. v. Gordan, 24 Ky. L. R. 1819, 72 S. W. 311; Dover v. Miss. River & B. T. R., 100 Mo. App. 330, 73 S. W. 298; Houston Biscuit Co. v. Dial, 135 Ala. 168; Galveston, H. & S. A. R. Co. v. Karrer [Tex. Civ. App.] 70 S. W. 328; Roche v. Denver & R. G. R. Co. [Colo. App.] 73 Pac. 880; Ill. Steel Co. v. De Lac, 201 Ill. 150, 66 N. E. 245. Whether railroad company was guilty of negligence in not having brakeman and conductor so stationed as to detect break in train and prevent collision of parts. Louisville & N. R. Co. v. Gilliam's Adm'x, 24 Ky. L. R. 1536, 71 S. W. 863. Whether foreman was negligent in telling section hand to jump on rapidly moving hand car. Galveston, H. & S. A. R. Co. v. Puente, 30 Tex. Civ. App. 246, 70 S. W. 362. Whether the act of a master in leaving unguarded machinery in such condition that touching a lever would set it in motion is negligence. Goe v. Northern Pac. R. Co., 30 Wash. 654, 71 Pac. 182. Whether a mine boss was negligent in failing to signal an elevator engineer when he saw dangerous position of employe is a question for the jury. Island Coal Co. v. Swaggerty, 159 Ind. 664, 65 N. E. 1026. Question of negligence in not adopting regulations held to be for the jury. Bain v. Northern Pac. R. Co. [Wis.] 98 N. W. 241.

81. Whether a door is a principal door within the mining act. Himrod Coal Co. v. Stevens, 104 Ill. App. 639. Whether a car not equipped with automatic couplers was engaged in interstate commerce. Kan. City, M. & B. R. Co. v. Flippo [Ala.] 35 So. 457. Whether railroad had failed to comply with federal requirements as to drawbars. St. Louis, I. M. & S. R. Co. v. Neal [Ark.] 78 S. W. 220; Houston & T. C. R. Co. v. Turner [Tex. Civ. App.] 78 S. W. 712. Whether defendant violated a speed ordinance held for the jury. Id.

82. Southern Pac. Co. v. Huntsman [C. C. A.] 118 Fed. 412.

83. Whether a brakeman was killed by an overhanging waterspout was for the jury where last seen alive he was signaling the engineer and the waterspout was in his course. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64. Whether injuries received at hands of employe were in the manner alleged is a question for the jury. Wolfarth v. Sternberg [N. J. Law] 56 Atl. 173. The cause of the explosion of dynamite placed in proximity to a furnace fire is a question for the jury. Angel v. Jellico Coal Min. Co. [Ky.] 74 S. W. 714. Evidence sufficient to make it question for jury whether negligence of engineer caused brakeman's injuries. Tex. & P. R. Co. v. Putman [C. C. A.] 120 Fed. 754. Question of cause of death is for the jury where there is even circumstantial evidence and suggestion of theories does not reduce the matter to one of speculation in such a case. Wabash Screen Door Co. v. Black [C. C. A.] 126 Fed. 721.

84. Baltimore & O. S. W. R. Co. v. Henderson, 31 Ind. App. 441, 68 N. E. 308; Armour v. Golkowska, 202 Ill. 144, 66 N. E. 1037; Chicago H. & B. Co. v. Mueller, 203 Ill. 558, 68 N. E. 51; Bailey v. Cascade Timber Co., 32 Wash. 319, 73 Pac. 385; Birmingham Traction Co. v. Reville, 136 Ala. 335; Olney v. Boston & M. R. R., 71 N. H. 427; Lassiter v. Raleigh & G. R. Co., 133 N. C. 244. Whether the negligence of a fellow-servant was the proximate cause and whether the defendant's negligence was a contributory cause is a question for the jury. Gila Valley, G. & N. R. Co. v. Lyon [Ariz.] 71 Pac. 957. Whether defect in swinging circle on steam shovel was proximate cause of the falling of the dipper. Bender v. Great Northern R. Co., 89 Minn. 163, 94 N. W. 546. Whether the proximate cause of the plaintiff's injury was the negligence of a train crew in not properly setting the brakes of a car held to be a question for the jury. Louisville & N. R. Co. v. Ewing's Adm'x [Ky.] 78 S. W. 460.

85. Tubelowish v. Lathrop, 104 Ill. App. 82; Brower v. Timreck, 66 Kan. 770, 71 Pac. 581; Laubach v. Cedar Rapids Supply Co. [Iowa] 98 N. W. 511.

86. Dorsett v. Clement-Ross Mfg. Co., 131 N. C. 254.

87. Metropolitan West Side El. R. Co. v. Fortin, 203 Ill. 454, 67 N. E. 977; Rich v. Saginaw Bay Towing Co. [Mich.] 93 N. W. 632; Le Barre v. Grand Trunk Western R. Co. [Mich.] 94 N. W. 735; Crabtree Coal Min. Co. v. Sample's Adm'r, 24 Ky. L. R. 1703, 72 S. W. 24; Adler v. Metropolitan St. R. Co., 84 N. Y. Supp. 877; Metcalf v. Nystedt, 102 Ill. App. 71; Murray v. Metropolitan St. R. Co., 84 N. Y. Supp. 876; Mo. Malleable Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12; Sikes v. Mo. Granite Co., 92 Mo. App. 12; Ky. D. & W. Co. v. Schreiber, 24 Ky. L. R. 2236, 73 S. W. 769. Whether head brakeman was negligent so as to charge master in procuring another to do his work. Setterstrom v. Brainerd & N. M. R. Co., 89 Minn. 262, 94 N. W. 882. Whether one acting as foreman was fellow-servant is for jury. Allen B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818. Question whether mule driver and car-loader in a mine were fellow-servants held

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question for the jury,[88] unless the facts determining the rela in which case the matter is for the court,[89] and so with cc and assumption of risk.[91]

for the jury. Spring Valley Coal Co. v. Robizas, 207 Ill. 226, 69 N. E. 925. Whether an assistant yardmaster giving orders for movement of cars in the yard acts as a fellow-servant of the switching crew is for the jury. Chicago & E. I. R. Co. v. Driscoll, 207 Ill. 9, 69 N. E. 620. The sufficiency of evidence to show authority of one employe to direct another is, when it does not necessitate a conclusion of authority, for the jury. Tex. & P. Coal Co. v. Manning [Tex. Civ. App.] 78 S. W. 545.

88. Tex. & P. R. Co. v. Carlin, 189 U. S. 354, 47 Law. Ed. 849; Comers v. Washburn Crosby Co. [Minn.] 97 N. W. 733; Pierce v. Arnold Print Works, 182 Mass. 260, 65 N. E. 368; Ala. G. S. R. Co. v. Ellis, 137 Ala. 560; Renlund v. Commodore Min. Co., 89 Minn. 41, 93 N. W. 1057; Chicago House Wrecking Co. v. Birney [C. C. A.] 117 Fed. 72.

89. Shaw v. Bambrick-Bates Const. Co., 102 Mo. App. 666, 77 S. W. 96; Ill. Steel Co. v. Coffey, 205 Ill. 206, 68 N. E. 751; Slack v. Harris, 200 Ill. 96, 65 N. E. 669; Gayle v. Mo. C. & F. Co., 177 Mo. 427, 76 S. W. 987; Otstot v. Ind., I. & I. R. Co., 103 Ill. App. 136; Chicago City R. Co. v. Leach, 104 Ill. App. 30.

90. Olney v. Boston & M. R. R., 71 N. H. 427; Levy v. Grove Mills Paper Co., 80 App. Div. [N. Y.] 384; Sinclair v. Waddill, 200 Ill. 17, 65 N. E. 437; McGarrity v. N. Y., N. H. & H. R. Co. [R. I.] 55 Atl. 718; Green v. Western American Co., 30 Wash. 87, 70 Pac. 310; Olsen v. Cook Inlet Coal Fields Co., 121 Fed. 726; Mo., K. & T. R. Co. v. Bodie [Tex. Civ. App.] 74 S. W. 100; Same v. Jones [Tex. Civ. App.] 75 S. W. 53; Fox v. Jacob Dold Packing Co., 96 Mo. App. 173, 70 S. W. 164; Gulf, C. & S. F. R. Co. v. Cornell, 29 Tex. Civ. App. 596, 69 S. W. 980; Tex. Cent. R. Co. v. Bender [Tex. Civ. App.] 75 S. W. 561; Szymanski v. Blumenthal [Del.] 56 Atl. 674; Republic I. & S. Co. v. Jones [Ind. App.] 69 N. E. 191; Galveston, H. & S. A. R. Co. v. Walker [Tex. Civ. App.] 76 S. W. 228; Otstot v. Ind., I. & I. R. Co., 103 Ill. App. 136; Hone v. Mammoth Min. Co. [Utah] 75 Pac. 381; Hester v. Jacob Dold Packing Co., 95 Mo. App. 16, 75 S. W. 695; Gaudie v. Northern Lumber Co. [Wash.] 74 Pac. 1009; Steinhauser v. Savannah, F. & W. R. Co., 118 Ga. 195; Smith v. Atlanta & C. A. L. R. Co., 132 N. C. 819; Ellis v. Thayer, 183 Mass. 309, 67 N. E. 325; Corbett v. St. Vincent's Industrial School, 79 App. Div. [N. Y.] 334; Ehlen v. O'Donnell, 102 Ill. App. 141; Hillebrand v. Standard Biscuit Co., 139 Cal. 233, 73 Pac. 163; Houston Biscuit Co. v. Dial, 135 Ala. 168; Adams Exp. Co. v. Smith, 24 Ky. L. R. 1915, 72 S. W. 752; Galveston, H. & S. A. R. Co. v. Pendleton, 30 Tex. Civ. App. 431, 70 S. W. 996; Eberly v. Chicago, B. & Q. R. Co., 96 Mo. App. 361, 70 S. W. 381; Galveston, H. & S. A. R. Co. v. Puente, 30 Tex. Civ. App. 246, 70 S. W. 362; Crabtree Coal Min. Co. v. Sample's Adm'r, 24 Ky. L. R. 1703, 72 S. W. 24; Louisville & N. R. Co. v. Gordan, 24 Ky. L. R. 1819, 72 S. W. 311; Black v. Mo. Pac. R. Co., 172 Mo. 177, 72 S. W. 559; McDannald v. Wash. & C. R. R. Co., 31 Crandall v. Staffor Galveston, H. & S. Tex. Civ. App. 544, v. Mo., K. & T. R. S. W. 540; Boyle Utah, 420, 71 Pac Packing Co., 119 I Pierce v. Arnold 260, 65 N. E. 368; S N. M. R. Co., 89 N Ittner Brick Co. v. 951; Branz v. Oma 120 Iowa, 406, 94 N & H. Elec. Light C N. W. 966; Bouche Mass. 500, 65 N. [Ind. App.] 65 N. E Clintic-Marshall C Chicago T. T. R. 118 Fed. 19; Bourb Mfg. Co., 184 Mass. v. Cascade Timber Pac. 385; Hone v. M 75 Pac. 381; Smith R. Co., 132 N. C. warehouse injured spur track. Bain [Wis.] 98 N. W. 2 brakeman who fell near switch while g switch. Murray v. H.] 54 Atl. 289. In near exposed cog w foreman. Cobb Ch 207 Ill. 452, 69 N. E tributory negligenc held to be for th Garvin Mach. Co., Whether a brakema sonable care should see whether brake fore uncoupling he the jury. Louisville Adm'x [Ky.] 78 S brakeman was exerc thrown from a car tion for the jury. H. & H. R. Co. [question whether ar would have taken circumstances held Steel Car Co. v. H E. 959. Question of in a switchman lights held for the Co. v. Raidy, 203 Though plaintiff wa negligence, the que could have avoided cise of ordinary c jury. Smith v. Atl 132 N. C. 819.

91. Gilbert v. Ch 123 Fed. 832; Chic Camper, 199 Ill. 569 Johnson [N. H.] 54 & S. A. R. Co. v. 78 S. W. 740; Murp 183 Mass. 385, 67 N. ris, 118 Iowa, 554. Boston & M. R. R.

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Where facts are uncontroverted, the question is no longer for the jury.[92]

(§ 3*H*) 6. *Instructions.*[93] Instructions must be applicable to and respond to the evidence[94] and issues.[95] They must be free from ambiguity,[96] and not mis-

Hul v. Great Northern R. Co. [Minn.] 96 N. W. 789; Coleman v. Perry [Mont.] 72 Pac. 42; Slack v. Carter [N. H.] 56 Atl. 316; Ill. Cent. R. Co. v. Atwell, 198 Ill. 200, 64 N. E. 1095; Otstot v. Ind., I. & I. R. Co., 103 Ill. App. 136; Gaudie v. Northern Lumber Co. [Wash.] 74 Pac. 1009; Whalen v. Utica Hydraulic Cement Co., 103 Ill. App. 149; Lynch v. Brooklyn Heights R. Co., 89 App. Div. [N. Y.] 217; Adolff v. Columbia P. & B. Co., 100 Mo. App. 199, 73 S. W. 321; Olney v. Boston & M. R. R., 71 N. H. 427; McDannald v. Wash. & C. R. R. Co., 31 Wash. 585, 72 Pac. 481; Devereux v. Utica Steam Cotton Mills, 84 App. Div. [N. Y.] 34; Bredeson v. C. A. Smith Lumber Co. [Minn.] 97 N. W. 977; Spoonick v. Backus-Brooks Co., 89 Minn. 354, 94 N. W. 1079; New Omaha T. H. Elec. Light Co. v. Rombold [Neb.] 93 N. W. 966; Sinberg v. Falk Co., 98 Mo. App. 546, 72 S. W. 947; Ittner Brick Co. v. Killian [Neb.] 93 N. W. 951; Ill. Steel Co. v. Ryska, 200 Ill. 280, 65 N. E. 734; Giles v. Jones, 204 Pa. 444; Young v. Del., L. & W. R. Co., 68 N. J. Law, 603; Chicago H. & B. Co. v. Mueller, 203 Ill. 558, 68 N. E. 51; Wright v. Stanley [C. C. A.] 119 Fed. 330; Ill. Cent. R. Co. v. Sporleder, 199 Ill. 184, 65 N. E. 218; Tex. & P. R. Co. v. Swearingen [C. C. A.] 122 Fed. 193; Armour v. Golkowska, 202 Ill. 144, 66 N. E. 1037; Chicago & E. I. R. Co. v. Heerey, 203 Ill. 492, 68 N. E. 74. What is a reasonable time to make promised repairs is a question for the jury. Kinmundy v. Anderson, 103 Ill. App. 457. Assumption of risk by brakeman from "jigger stand" in an unusual place. Murray v. Boston & M. R. R. [N. H.] 54 Atl. 289. Rotten floor discoverable only by close inspection. Allen B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818.

92. Chattanooga L. & P. Co. v. Hodge, 109 Tenn. 331, 70 S. W. 616; Wendall v. Chicago & A. R. Co., 100 Mo. App. 556, 75 S. W. 689.

93. See main title Instructions.

94. Gulf, C. & S. F. R. Co. v. Hill, 29 Tex. Civ. App. 12, 70 S. W. 103; Curtis v. McNair, 173 Mo. 270, 73 S. W. 167; Tex. & N. O. R. Co. v. Lee [Tex. Civ. App.] 74 S. W. 345; Mo., K. & T. R. Co. v. Schilling [Tex. Civ. App.] 75 S. W. 64; Tex. Portland Cement Co. v. Poe [Tex. Civ. App.] 74 S. W. 568; Donk Bros. C. & C. Co. v. Stroff, 200 Ill. 483, 66 N. E. 29; Tex. & P. R. Co. v. Putman [C. C. A.] 120 Fed. 754; St. Louis & S. F. R. Co. v. Skaggs [Tex. Civ. App.] 74 S. W. 783; Glasscock v. Swofford Bros. Dry Goods Co. [Mo. App.] 74 S. W. 1039; Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890; Doherty v. Rice, 182 Mass. 182, 64 N. E. 967; Brady v. N. Y., N. H. & H. R. Co., 184 Mass. 225, 68 N. E. 227; Sinclair v. Waddill, 200 Ill. 17, 65 N. E. 437; Galveston, H. & S. A. R. Co. v. Pendleton, 30 Tex. Civ. App. 431, 70 S. W. 996. There was no error in refusing to instruct as to a rule against brakemen going between cars in motion where the train was at a standstill when the brakeman went between the cars. Gulf, C. & S. F. R. Co. v. Cooper [Tex. Civ. App.] 77 S. W. 263. An instruction that a master must not expose his servant to risks beyond those incident to his employment is improper where there is no evidence of such exposure. Parlett v. Dunn [Va.] 46 S. E. 467. An instruction that if plaintiff had been instructed to look out for looped tell tales, etc., was improper where there was no evidence of such instructions or that he appreciated the danger from such looping. McGarrity v. N. Y., N. H. & H. R. Co. [R. I.] 55 Atl. 718. Refusal to charge relative to contributory negligence held proper. Mo., K. & T. R. Co. v. O'Connor [Tex. Civ. App.] 78 S. W. 374.

95. Ft. Worth & D. C. R. Co. v. Kelley [Tex. Civ. App.] 76 S. W. 942; Gulf, C. & S. F. R. Co. v. Cooper [Tex. Civ. App.] 77 S. W. 263; Highland Boy Gold Min. Co. v. Pouch [C. C. A.] 124 Fed. 148; Olsen v. North Pac. Lumber Co. [C. C. A.] 119 Fed. 77; Ill. Steel Co. v. Wierzbicky, 206 Ill. 201, 68 N. E. 1101; Edd v. Union Pac. Coal Co., 25 Utah, 293, 71 Pac. 215; International & G. N. R. Co. v. Hoyt, 30 Tex. Civ. App. 518, 70 S. W. 1012; Reser v. American Cotton Co. [Tex. Civ. App.] 71 S. W. 782; United Laundry Co. v. Steele, 24 Ky. L. R. 1899, 72 S. W. 305; Adolff v. Columbia P. & B. Co., 100 Mo. App. 199, 73 S. W. 321. Assumption of risk need not be pleaded so as to authorize an instruction thereon. Evans Laundry Co. v. Crawford [Neb.] 93 N. W. 177. Rule violated by instructing as to unsafe place for work where the only negligence alleged was the employment of incompetent fellow-servants. Schwarzschild & S. Co. v. Weeks, 66 Kan. 800, 72 Pac. 274. Where there is any real question as to the existence of the relation of master and servant it should be submitted. Sacker v. Waddell [Md.] 56 Atl. 399. The issue of the duty of a railroad company to promulgate and enforce rules so as to authorize an instruction thereon is raised by a complaint alleging a failure to warn and an answer alleging promulgation of rules sufficient for the protection of the injured person. Mo., K. & T. R. Co. v. Jones [Tex. Civ. App.] 75 S. W. 53. Allegation of rules is sufficiently averred to base an instruction thereon which states that defendant at the time of the accident had in force a rule requiring an engineer on stopping at an unusual place to signal trainmen to protect the rear of the train. Mo., K. & T. R. Co. v. Bodie [Tex. Civ. App.] 74 S. W. 100. Where the injured brakeman had several years' experience at the business and was familiar with appliances causing the injury and knew what his fellow employes were about to do and the danger arising therefrom, an instruction on assumption of risks limiting it to appreciated danger is without the issues. Chicago, R. I. & T. R. Co. v. Oldridge [Tex. Civ. App.] 76 S. W. 581. There is no error in refusing to submit to the jury the question of the speed at which a car was delivered where plaintiff's theory was that the accident was caused by a defect in the brake and the speed was in no way material whether the brake was defective or not. Hurt v. Louisville & N. R. Co. [Ky.]

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leading.[97] The court may not invade the province of the jury by instructing the weight of evidence[98] or what facts would constitute negligence.[99] The i

76 S. W. 502. An instruction is not erroneous because basing plaintiff's right of recovery on negligence causing a cave-in instead of failure to furnish a safe place to work where there was no such allegation in the complaint. Logsdon v. Western Brick Co., 25 Ky. L. R. 141, 74 S. W. 706. Where the violation of a rule was not pleaded as a defense and was not specifically submitted to the jury as a bar to a recovery, the court properly refused to instruct on its habitual violation by employes and superior officers. Horton v. Ft. Worth P. & P. Co. [Tex. Civ. App.] 76 S. W. 211. A charge in the language of a statute making a railroad company liable for injuries to persons by the running of cars, locomotives, and machinery is not applicable in an action for injuries to a lineman by the fall of a telegraph pole. Seaboard Air Line R. v. Phillips, 117 Ga. 99. Assumption of risk is rightly submitted where the train causing the inspector's injury was being made up in the ordinary way and that plaintiff was familiar with the work and its dangers. Rea v. St. Louis S. W. R. Co. [Tex. Civ. App.] 73 S. W. 555. An instruction omitting reference to contributory negligence, safe appliances, and foreman's authority, held erroneous in an action for injuries. Killelea v. Cal. Horseshoe Co., 140 Cal. 602, 74 Pac. 157. In an action by a miner against his employer, founded on negligence at common law and tried on the theory that it was predicated on a statute, an instruction applying the statute is not error. Spring Valley Coal Co. v. Robizas, 207 Ill. 226, 69 N. E. 925.

96. An instruction that defendant has burden of proving injury by negligence of a fellow-servant, the case being submitted on plaintiff's evidence alone is not erroneous, where the evidence to which the instruction was applicable was explained. Consol. Kan. City S. & R. Co. v. Osborne, 66 Kan. 393, 71 Pac. 838. Instruction in action caused by overloading car not erroneous in that the term "estimated capacity" might have been understood by the jury as equivalent to "marked capacity." Louisville, H. & St. L. R. Co. v. Chandler's Adm'r, 24 Ky. L. R. 2035, 72 S. W. 805. An instruction is erroneous which is open to the construction that plaintiff could not be guilty of contributory negligence unless defendant was free from negligence. Wadsworth v. Bugg [Ark.] 76 S. W. 549. Example of confusion from use of terms "assumption of risk," "negligence of co-employes" and "negligence of the company." Cooper v. N. Y., O. & W. R. Co., 84 App. Div. [N. Y.] 42. Instructions were not harmful to plaintiff which were susceptible of the construction that contributory negligence included assumed risk and would not bar a recovery without it. Horton v. Ft. Worth P. & P. Co. [Tex. Civ. App.] 76 S. W. 211.

97. Northern Ohio R. Co. v. Rigby [Ohio] 68 N. E. 1046; Wright v. Stanley [C. C. A.] 119 Fed. 330; Gould Steel Co. v. Richards, 30 Ind. App. 348, 66 N. E. 68; Shebek v. Nat. Cracker Co., 120 Iowa, 414, 94 N. W. 930; Ill. Steel Co. v. Wierzbicky, 206 Ill. 201, 68 N. E. 1101; Reser v. American Cotton Co. [Tex. Civ. App.] 71 S. W. 782. An instruction that it was an employer's to furnish a suitable and safe plac work did not mislead by failing to re only a "reasonably" suitable and safe Grijalva v. Southern Pac. Co., 137 Cal 70 Pac. 622. Where the evidence is flicting as to whether the accident i mine happened from failure of defends furnish timbers or from plaintiff's f to use those furnished, it was misle to instruct without qualification tha fendant assumed the duty of furnish reasonably safe place for work. Kan. Coal Co. v. Chandler [Ark.] 77 S. W It is not error to use the words "reaso care" instead of "ordinary care" as to ter's duty of inspection. Louisville & Co. v. Pointer's Adm'r, 24 Ky. L. R 69 S. W. 1108. An instruction allow recovery if the employe was injured b negligence of the engineer is too inde as allowing recovery for any negli while the only ground shown was for lision. Louisville & N. R. Co. v. Sull Adm'r [Ky.] 76 S. W. 525. An instru is misleading that allows the jury or consider defendant's evidence on the tion of contributory negligence. Gulf, S. F. R. Co. v. Howard [Tex. Civ. 75 S. W. 803. Not misleading as callin a finding of how a door came open as as whether it came open by negligen contributory negligence or the act o low-servant. Saucier v. N. H. Spi Mills [N. H.] 56 Atl. 545.

98. Charge that failure to look and for cars thrown by a "flying switch" weight of evidence. Galveston, H. & S. Co. v. Puente, 30 Tex. Civ. App. 246, 70 362. An instruction that if it was the d the engineer under the rules of the pany to give a signal to protect the of the train on stopping train at an un place and he failed to do so and was of negligence which was the proximate of the collision to find for plaintiff wa on the weight of the evidence. Mo., K. R. Co. v. Bodie [Tex. Civ. App.] 74 S. W An instruction that the jury may not sider precautions after the accident t termine question of negligence is charge on the facts. Gallman v. Union wood Mfg. Co., 65 S. C. 192. That min tries should be uniform in height and invades jury question whether entry safe. Hamilton v. Mendota C. & M. Co Iowa, 147, 94 N. W. 282.

99. Instruction not open to objection it charged inferentially what facts constitute negligence. Galveston, H. A. R. Co. v. Mortson, 31 Tex. Civ. App 71 S. W. 770; Robert Portner Brew. Cooper, 116 Ga. 171. It is not error struct the jury that if they find certain to be true they shall hold defendant though they are not instructed that must find him guilty of negligence. go Screw Co. v. Weiss, 203 Ill. 536, 68 54. An instruction, enumerating c facts which if proved would author finding for plaintiff but omitting all ence to plaintiff's knowledge or mea knowing the condition of things is er

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should be stated.[1] The existence of disputed facts may not be assumed.[2] Facts about which there is no conflict should not be submitted.[3] Where defective, the instruction may be cured by other instructions[4] unless the defect is in the announcement of a wrong principle.[5] An instruction against recovery for negligence of fellow-servants should charge who were such fellow-servants.[6] An instruction is defective which ignores the element of contributory negligence.[7] Instructions as to assumed risk should include danger reasonably to be anticipated,[8] and position and duties at the time of the accident.[9] Cases passing upon sufficiency of particular instructions are collected in note.[10]

ous. Ind. Natural G. & O. Co. v. Vauble, 31 Ind. App. 370, 68 N. E. 195.

1. An instruction requiring plaintiff to prove all the material allegations in his petition is objectionable as leaving it to the jury to determine what allegations were material. Williams v. Iowa Cent. R. Co. [Iowa] 96 N. W. 774.

2. Galveston, H. & S. A. R. Co. v. Karrer [Tex. Civ. App.] 70 S. W. 328; Marcus v. Loane, 133 N. C. 54. Charge that mine driver might have avoided injury by keeping as low as mule's back held bad as assuming facts. Hamilton v. Mendota C. & M. Co., 120 Iowa, 147, 94 N. W. 282.

3. Where competency of a foreman is admitted by plaintiff it should not be submitted to the jury. Duffy v. Platt, 205 Pa. 296. The court need not charge as to duty of ordinary care of employer where uncontradicted evidence shows that such care was not exercised. Choctaw, O. & G. R. Co. v. Holloway, 191 U. S. 334. Failure to charge as to master's knowledge of defect is not important where evidence shows that appliance was defective and had been condemned by the master. Goldthorpe v. Clark-Nickerson Lumber Co., 31 Wash. 467, 71 Pac. 1091.

4. Donk Bros. C. & C. Co. v. Stroff, 200 Ill. 483, 66 N. E. 29; Seaboard A. L. R. v. Phillips, 117 Ga. 98. Instruction that defendant had burden of proof of contributory negligence is cured by other instruction that the fact was to be determined from all the testimony by whomsoever introduced. General Elec. Co. v. Murray [Tex. Civ. App.] 74 S. W. 50. Instruction in an action by an engineer for injuries caused by collision with cars escaped from a siding is not erroneous which allows a recovery by plaintiff for negligent omission to "fasten and secure" the cars, particularly in connection with other instructions as to reasonable care. Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890. It is not necessary that the defenses of assumption of risks and contributory negligence should be included in the instruction covering liability for negligence where the matter is fully covered by later instructions. Chicago, R. I. & T. R. Co. v. Oldridge [Tex. Civ. App.] 76 S. W. 581. Where a part of a charge is erroneous if standing alone but is immediately followed by language which informs the jury distinctly that they must find defendant guilty of negligence it was held to obviate the objection to the charge. Mo., K. & T. R. Co. v. O'Connor [Tex. Civ. App.] 78 S. W. 374. An instruction ignoring plaintiff's knowledge of defects in scaffolding can be cured only by withdrawing it from the jury. Ind. Natural G. & O. Co. v. Vauble, 31 Ind. App. 370, 68 N. E. 195.

5. Instruction in action for death of engineer in landslide erroneous and not cured by correct statement of rules in other portions of charge. Scott v. Astoria R. Co., 43 Or. 26, 72 Pac. 594.

6. Le Barre v. Grand Trunk R. Co. [Mich.] 94 N. W. 735.

7. Williams v. Iowa Cent. R. Co. [Iowa] 96 N. W. 774. There is not a belittling of the defense of contributory negligence by a remark of the judge in submitting the issue that he had some doubt of its propriety under the facts. Isherwood v. Jenkins Lumber Co., 87 Minn. 388, 92 N. W. 230.

8, 9. McGarrity v. N. Y., N. H. & H. R. Co. [R. I.] 55 Atl. 718.

10. **Negligence:** Measure of defendant's care. Ill. Steel Co. v. Wierzbicky, 206 Ill. 201, 68 N. E. 1101. Collapse of derrick. Clear Creek Stone Co. v. Dearmin, 160 Ind. 162, 66 N. E. 609; Consol. Coal Co. v. Morgan, 160 Ind. 241, 66 N. E. 696. Explosion. Chicago & E. I. R. Co. v. Rains, 203 Ill. 417, 67 N. E. 840; Chambers v. Chester, 172 Mo. 461, 72 S. W. 904. Injury to brakeman in making a coupling. Elmore v. Seaboard Air Line R. Co., 132 N. C. 865. Injury to conduit employe. Pierce v. Arnold Print Works, 182 Mass. 260, 65 N. E. 368. Care of master as to appliances. Parsons v. Hammond Packing Co., 96 Mo. App. 372, 70 S. W. 519. Notice of danger from burned trestle. St. Louis, I. M. & S. R. Co. v. Mize [Ark.] 71 S. W. 660. Injuries by overturning tram car. American Tin Plate Co. v. Williams, 30 Ind. App. 46, 65 N. E. 304. Insufficiency of instruction as omitting element of duty of master's inspection of mine. Thayer v. Smoky Hollow Coal Co. [Iowa] 96 N. W. 718. It is not an objection to an instruction as to care to be observed that it is described as that which a person of ordinary prudence and caution is "accustomed" to exercise under like circumstances. St. Louis S. W. R. Co. v. Smith, 30 Tex. Civ. App. 257, 70 S. W. 789. An instruction as to reasonable care in confining cars on a side track and allowing the jury to consider customary methods in use for that purpose is not erroneous for omitting reference to assumed risk, the jury being instructed that if they had been driven from the side track by a storm of unusual violence there could be no recovery. Jones v. Kansas City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890. It is not error to refer to a break in the rim of a pulley as a defect where there is an admission of break in the answer and the court expressly charged that there could be no recovery unless this break or defect caused the injuries complained of. Eagle & P. Mills v. Herron [Ga.] 46 S. E. 405. An instruction that the jury might consider evidence of a similar accident which had occurred since any re-

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(§ 3H) 7. *Verdicts and findings.*—The general verdict is controverted by special finding only when the two cannot be reconciled by any evidence admis under the issues.[11] Courts will seek to reconcile findings with the general dict.[12]

pairs had been made was held not erroneous. Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972. An instruction relieving an engineer from negligence causing a collision between trains of different companies is harmless in an action by such engineer's fireman for injuries there sustained. Southern Ind. R. Co. v. Davis [Ind. App.] 68 N. E. 191. In an action for the death of a servant, an instruction that the duty of inspection must be continuously fulfilled, and in ascertaining whether it was the character of the business should be considered and anything short would not be ordinary care, was proper. Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972. In an action for personal injuries where the sole question was whether the plaintiff had been provided a suitable place to work in, an instruction that plaintiff assumed the ordinary risks of employment and that if attended with danger it was necessary to use ordinary care to avoid injury was held inapplicable. Pfisterer v. Peter [Ky.] 78 S. W. 450. An instruction that a master is presumed to know whatever might endanger the person of his employe in the course of his employment is erroneous. Roche v. Llewellyn Ironworks, 140 Cal. 563, 74 Pac. 147. An instruction relative to working appliances of a railway company held proper. Boyd v. Seaboard Air Line R. Co. [S. C.] 45 S. E. 186. An instruction stating what facts would constitute negligence in an action for personal injuries is properly refused. Bodie v. Charleston & W. C. R. Co., 66 S. C. 302. Modification of an instruction relative to the negligence of the master held proper. Id. An instruction that it was the duty of an employer to adopt appliances suitable to the work and to exercise due care to ascertain whether the appliances were suitable and safe is proper. Id. Instruction that master need not have known or authorized acts of section men held erroneous where there was evidence that acts were done off the right of way and hence outside scope of employment. Axtell v. Northern Pac. R. Co. [Idaho] 74 Pac. 1075. An instruction to consider the liability of all wooden structures to get out of repair held not erroneous. Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972. Instruction that master must use "all reasonable precautions" requires only ordinary care. Wrisley v. Burke, 203 Ill. 250, 67 N. E. 818. Instruction that plaintiff need prove only one item of negligence proper. Chicago & E. I. R. Co. v. Rains, 203 Ill. 417, 67 N. E. 840.

Contributory negligence: Youth and inexperience being inherent and not the result of carelessness or negligence, it is not error to state in an instruction in an action for personal injuries that if plaintiff "because of his youth and inexperience, failed to appreciate the danger," without adding or by the use of reasonable care on his part could or would have known it. Ittner Brick Co. v. Killian [Neb.] 93 N. W. 951. The question of contributory negligence in attempting to remove a coupling pin between two freight cars with the switchman's back to the engine is fairly presented by an struction that if he could have seen m ments of an engine on the same trac time to have avoided injury he was g of contributory negligence in turning back to the engine. Black v. Mo. Pac Co., 172 Mo. 177, 72 S. W. 559. A charge contributory negligence is a bar to a covery even though it was not the pr mate cause of the injury is erroneous i action for the death of a servant. Hou & T. C. R. Co. v. Turner [Tex. Civ. A 78 S. W. 712. An instruction that if jury should find that a child was of character and intelligence that it knev the danger itself and that the negli of the master did not contribute to the jury they should find for the defendar erroneous. Fries v. American Lead Pe Co., 141 Cal. 610, 75 Pac. 164. An instruc that plaintiff in obeying the order of def ant's foreman had a right to rely on the ter to see that the place was reason safe is not misleading where other inst tions stated the law as to contributory ligence and assumption of risk. Cobb Ch late Co. v. Knudson, 207 Ill. 452, 69 N 816.

Assumption of risk: Scott v. Seab Air Line R. Co. [S. C.] 45 S. E. 129. Assu tion of risk. Illinois Steel Co. v. Wi bicky, 206 Ill. 201, 68 N. E. 1101. An inst tion that if the injured person knew of defect, and the danger if any was obv and open to inspection, was not erron as requiring the employe to inspect to cover the defect. Horton v. Ft. W Packing & Provision Co. [Tex. Civ. App. S. W. 211. Instruction that if dece brakeman knew that tell tales are ap become looped he assumed the risk of jury therefrom properly refused for o sion to require that deceased had knowledge. McGarrity v. New York, N & H. R. Co. [R. I.] 55 Atl. 718. Instruc as to assumption of risk ignoring evid of specific order to do the work in a cer manner properly refused. Cobb Choc Co. v. Knudson, 207 Ill. 452, 69 N. E.

Release: Release from liability. Mom Stone Co. v. Turrell, 205 Ill. 515, 68 N 1078.

11. Clear Creek Stone Co. v. Dearmin, Ind. 162, 66 N. E. 609. Answers not in sistent with verdict. Jarvis v. Hitch App.] 65 N. E. 608. Verdict held not in sistent with findings. Roe v. Winston Minn. 160, 94 N. W. 433. Findings hel conflict with general verdict. Wooley Co. v. Bracken, 30 Ind. App. 624, 66 N 775. A finding that plaintiff could avoided injury by due care is inconsis with general verdict in favor of plai Republic Iron & Steel Co. v. Jones App.] 69 N. E. 191. Sufficiency of find in action for injuries caused by explosio natural gas. Consumers' Paper Co. v. E 160 Ind. 424, 66 N. E. 994.

12. Ready v. Peavey Elevator Co., Minn. 154, 94 N. W. 442; Texas Cent. R. v. Bender [Tex. Civ. App.] 75 S. W.

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§ 4. *Liability for injuries to third persons.*—The rule of liability of a master for the act of his servant is not based on the idea of the master's negligence but is a rule of public policy holding one liable for the acts of his agent.[13] It is essential to liability that the relation of master and servant exist between the one sought to be held liable and the person causing the injury,[14] and excludes liability for acts of independent contractors.[15] The master will not be liable for a wrongful act of one employed by him for a tort committed as the servant of another,[16] nor for the acts of a substitute engaged by a servant without any authority to delegate his master's power in respect of the particular work in charge of the servant.[17] This liability extends to negligence of incompetent servants retained with knowledge of incompetency[18] or habits unfitting them for the performance of duties.[19] The master is liable for all acts within the scope of the servant's employment[20]

Wright v. Chicago, I. & L. R. Co., 160 Ind. 583, 66 N. E. 454. A general verdict under a complaint that the machine was insufficient and permitted to become out of repair is not impeached by findings that the machines had not become out of repair but were originally insufficient. American Tin Plate Co. v. Williams, 30 Ind. App. 46, 65 N. E. 304. A finding that servant could have avoided the injury by working in another way is not inconsistent with a finding that he was free from contributory negligence. Gaudie v. Northern Lumber Co. [Wash.] 74 Pac. 1009. A verdict for plaintiff with a finding that the work could be done another way does not assume that the other way would have been less dangerous. Gould Steel Co. v. Richards, 30 Ind. App. 348, 66 N. E. 68.

13. Helms v. Northern Pac. R. Co., 120 Fed. 389; Appel v. Eaton, 97 Mo. App. 428, 71 S. W. 741.

14. Moore v. Stainton, 80 App. Div. [N. Y.] 295; Thurn v. Williams, 84 N. Y. Supp. 296; Axtell v. Northern Pac. R. Co. [Idaho] 74 Pac. 1075. The grantor in a deed of trust is the principal of an elevator operator hired by trustee, who was in possession under a written instrument constituting him the grantor's agent. Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035. The relation between the owner of a licensed cab and a driver is that of master and servant so far as relates to passengers. Cargill v. Duffy, 123 Fed. 721. The assignees of a lease as trustees for the lessee and not the lessor are liable for negligence of a janitor employed by them. Falardeau v. Boston Art Students' Ass'n, 182 Mass. 405, 65 N. E. 797. Greater New York charter giving police officers power to direct the movement of vehicles does not authorize a police officer to direct a motorman to use his car to push a coal truck blockading traffic so as to render the company liable for the motorman's negligence. Connelly v. Metropolitan St. R. Co., 84 N. Y. Supp. 305. A husband is not liable for the negligent driving of a wife, she not being engaged in driving as his servant. Radke v. Schlundt, 30 Ind. App. 213, 65 N. E. 770.

15. Boss v. Jarmulowsky, 81 App. Div. [N. Y.] 577; Salliotte v. King Bridge Co., 122 Fed. 378; Ann v. Herter, 79 App. Div. [N. Y.] 6; Cratt v. Albemarle Timber Co., 132 N. C. 151; Richmond v. Sitterding [Va.] 43 S. E. 562. Employment of independent contractor to make excavation does not relieve owner from duty of giving timely notice of the nature and extent of the excavation. Davis v. Summerfield, 133 N. C. 325. See topic Independent Contractors.

16. A corporation is not liable for a homicide by a public officer appointed by the company to protect its property from trespassers the killing being down while in pursuance of duty as a public officer. Sharp v. Erie R. Co., 90 App. Div. [N. Y.] 502. Not liable for acts of one procured by servant to do servant's work (brakeman). Setterstrom v. Brainerd & N. M. R. Co., 89 Minn. 262, 94 N. W. 882.

17. Appel v. Eaton & Prince Co., 97 Mo. App. 428, 71 S. W. 741.

18. The master is liable to third persons where the negligence was that of an incompetent servant of whose incompetency he had knowledge. McGahie v. McClennen, 86 App. Div. [N. Y.] 263.

19. The employer is liable where the servant in charge of patients has the reputation of an habitual drunkard. Missouri, K. & T. R. Co. v. Freeman [Tex. Civ. App.] 73 S. W. 542. The Texas employers' liability act is broad enough to cover negligence of employes in charge of a hospital camp maintained by the road. Id.

20. Floor walker causing arrest of customer on false charge of shoplifting. Cobb v. Simon [Wis.] 97 N. W. 276. Trap door carelessly left open. Pomerene v. White [Neb.] 97 N. W. 232; Sandles v. Levenson, 78 App. Div. [N. Y.] 306. A locomotive engineer moving his locomotive over a torpedo in proximity to third persons with knowledge commits a tort for which the master is liable. Enting v. Chicago & N. W. R. Co., 116 Wis. 13, 92 N. W. 358. A master is liable for the act of his servant in putting water on a sidewalk which formed into ice though not specifically directed to use the water, it being the servant's duty to sweep the sidewalk. Kavanagh v. Vollmer, 84 N. Y. Supp. 475. The proprietor of a hotel is liable for the negligence of a bell boy in letting water overflow a bathtub injuring goods in a store beneath as the service was in the line of the boy's employment. Steele v. May, 135 Ala. 483. Arresting a man for rape held not within the scope of a railway conductor's employment. Patterson v. Maysville & B. S. R. Co. [Ky.] 78 S. W. 870. An arrest for arson, three months after the burning, at the instance of a superintendent, held not the act of the master. Markley v. Snow [Pa.] 56 Atl. 999. The proprietor of a hotel

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though without his knowledge or contrary to his wishes[21] and in excess of autl ity,[22] as for libelous letters written to one indebted to the master,[23] and acts a from master's premises, the directions not limiting servant to duties on the pr ises.[24] The liability of the master extends to acts warranted by the authority ferred on the servant.[25] The test of the scope of the employment is the purpos the act and not its method.[26] The master is not liable for the acts of the serv without the line of his duty[27] or where there has been an entire departure f strict course of duties by the servant.[28] Where the act is within the scope of employment, the master is liable though the act is wanton and willful;[29] other where the willful or malicious act is without the scope of the employment.[30] tort may be ratified by retention of the servant with knowledge.[31] It is not ne sary to ratification to show that information of tort came from injured perso Ratification is essential to recovery of punitive damages.[33]

A landowner is not liable to a mere licensee injured on the premises by fall into a tank left open by a servant.[34]

is liable for a trespass committed by his servant upon a guest whether the servant was engaged in the discharge of his duties at the time or not. Clancy v. Barker [Neb.] 98 N. W. 440. A master is liable for acts of his servant done in the scope of his authority though the wrong be occasioned by negligence or by a wanton and reckless purpose to accomplish the master's purpose in an unlawful manner. Southern R. Co. v. James, 118 Ga. 340. Evidence held sufficient to warrant a finding that the wrong done by the servant was done within the range of his employment. Id.

21. Weber v. Lockman [Neb.] 92 N. W. 591, 60 L. R. A. 313; Wickham v. Wolcott [Neb.] 95 N. W. 366.

22. A railroad company is liable for assault of conductor on trespassers. Hamilton v. Chicago, M. & St. P. R. Co. [Iowa] 93 N. W. 594. A railroad company is liable for assault committed by depot hands in protecting property though they may have exceeded their authority. Houston & T. Cent. R. Co. v. Bell [Tex. Civ. App.] 73 S. W. 56.

23. Trapp v. Du Bois, 76 App. Div. [N. Y.] 314.

24. A special officer may make arrests away from employer's premises, so as to make him liable for false imprisonment where the directions to make arrests for certain causes do not limit the officer to the premises. Kastner v. Long Island R. Co., 76 App. Div. [N. Y.] 323, 12 Ann. Cas. 77.

25. Loomis v. Hollister, 75 Conn. 718. A street car conductor required to call policeman to make arrest for disturbance is authorized to cause the arrest and prefer the charge so as to make the company liable for malicious prosecution. Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055. Leaving trap door open while repairing dwelling. Pomerene v. White [Neb.] 97 N. W. 232. A corporation is liable to third person for injuries caused by an explosion of boilers defectively repaired under the supervision of their engineer. James McNeil & Bro. Co. v. Crucible Steel Co. [Pa.] 56 Atl. 1067.

26. Cobb v. Simon [Wis.] 97 N. W. 276.

27. Waters v. Anthony, 20 App. D. C. 124. A master is not liable for the negligent act of a servant if at the time he is not then engaged in the duties of his employment, although the act be one whicl done by such servant while on duty at a time when actually engaged in his m ter's service would clearly be within scope of his duties. Lima R. Co. v. Lit 67 Ohio St. 91, 65 N. E. 861. A railroad c pany is not liable for injuries caused b fireman purposely throwing a piece of from the tender at one standing beside track, it not being thrown with the idea protecting property or furthering empl er's interests. Louisville & N. R. Co. Routt [Ky.] 76 S. W. 513. Not liable fo willful shooting by employe to watch pr erty. Holler v. P. Sanford Ross, 68 N Law, 324, 59 L. R. A. 943.

28. Loomis v. Hollister, 75 Conn. 718. employer is not liable for an assault m by a servant employed to collect ins ments due on goods or remove same w the consent of the party. McGrath v. chaels, 80 App. Div. [N. Y.] 458.

29. Franklin Life Ins. Co. v. People, Ill. App. 554; Aiken v. Holyoke St. R. 184 Mass. 269, 68 N. E. 238; City Delivery v. Henry [Ala.] 34 So. 389. Where a mas instructs a servant to do a lawful act the servant while engaged in the mast business and intending to do the act thorized is reckless in the performance the act and inflicts injury on another, master is liable. Southern R. Co. v. Jan 118 Ga. 340. A railroad company is lia for the malicious act of an employe in pu ing a boy off a freight car if the act within the scope of his authority thou not in the "interest and business" of company. Williams' Adm'r v. Southern Co., 24 Ky. L. R. 2214, 73 S. W. 779. A r road company is liable for the tort of servant in placing a torpedo on the tr for his amusement. Euting v. Chicago N. W. R. Co., 116 Wis. 13, 92 N. W. 358, L. R. A. 158.

30. Brennan v. Merchant, 205 Pa. Arrest in order to extort money. Cobb Simon [Wis.] 97 N. W. 276.

31, 32. Cobb v. Simon [Wis.] 97 N. 276.

33. Rueping v. Chicago & N. W. R. 116 Wis. 625, 93 N. W. 843; Kastner v. L Island R. Co., 76 App. Div. [N. Y.] 323, Ann. Cas. 77.

34. Dixon v. Swift [Me.] 56 Atl. 761.

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One employing another to do an act unlawful in itself will be liable for an injury caused by the act.[35]

The liability of master and servant is joint and several.[36] A servant is not liable to third persons for nonperformance of duties incident to his employment but only for acts of positive wrong and negligence.[37]

Actions and defenses.—The fact of loss of temper as causing unjustifiable violence is not a defense.[38]

The complaint may allege that the master did the negligent acts and aver generally that they were negligently and carelessly done.[39]

On the question whether master or a corporation of which he was a stockholder was defendant, the fact of failure of the corporation to file annual reports may not be considered.[40] See footnote for cases on sufficiency of evidence.[41]

Questions of law and fact.—It is a question of fact for the jury whether the act causing an injury to a third person was occasioned by an act of a servant;[42] whether retention amounts to ratification;[43] whether the act was within the scope of the employment;[44] whether defendant or a corporation of which he was a stockholder was liable for servant's negligence;[45] whether deviation was in line of service;[46] whether act was negligent or in the performance of a duty.[47] The question of liability for an unjustifiable assault by a clerk in defendant's store is for the court, the only question for the jury being as to amount of damages.[48]

§ 5. *Interference with relation by third person.*—It is an actionable wrong to induce one to break his contract of employment.[49] Under the laws of Louisiana it is a condition precedent to civil liability for enticement that there should have been a criminal prosecution and conviction.[50] Under the Alabama laws punishing enticement of servants before the expiration of term of service there may be no conviction of one employing a cropper before his crops are gathered under an information charging enticement from service of prosecutor where the agreement between prosecutor and cropper was that service should begin after cropper had gathered his crop.[51] The Arkansas statute against enticement of laborers under contract does not allow recovery of damages against the landlord of a tenant guilty of enticement.[52] The offense of hiring one already under contract of employ-

35. Wilbur v. White [Me.] 56 Atl. 657.

36. Gardner v. Southern R. Co., 65 S. C. 341; Schumpert v. Southern R. Co., 65 S. C. 332. An action will lie against a corporation and a servant for the willful tort of the servant though not directed or ratified by the master. Riser v. Southern R. Co. [S. C.] 46 S. E. 47.

37. Kelly v. Chicago & A. R. Co., 122 Fed. 286; Bryce v. Southern R. Co., 125 Fed. 958.

38. Texas & N. O. R. Co. v. Taylor [Tex. Civ. App.] 73 S. W. 1081.

39. Gayle v. Mo. Car & Foundry Co., 177 Mo. 427, 76 S. W. 987.

40. Werner v. Hearst [N. Y.] 69 N. E. 221.

41. Sufficiency of evidence that depot policeman was acting in his capacity as an officer and not as a party to a private brawl. Texas & N. O. R. Co. v. Taylor [Tex. Civ. App.] 73 S. W. 1081. Sufficiency of evidence of fact of employment of son as servant of father. Davis v. Dregne [Wis.] 97 N. W. 512.

42. Lima R. Co. v. Little, 67 Ohio, 91, 65 N. E. 861.

43. Cobb v. Simon [Wis.] 97 N. W. 276.

44. Brennan v. Merchant & Co., 205 Pa. 258.

45. Werner v. Hearst, 76 App. Div. [N. Y.] 375.

46. The court may not, as a matter of law, say that a deviation by a driver to get oil for a fellow-servant was not in the line of his service. Lovejoy v. Campbell [S. D.] 92 N. W. 24.

47. Whether torpedo placed on track for notice to engineers is a question for the jury where there was some evidence that it was placed thereon by a fireman for his own amusement. Euting v. Chicago & N. W. R. Co., 116 Wis. 13, 92 N. W. 358.

48. Collins v. Butler, 83 App. Div. [N. Y.] 12.

49. Brown Hardware Co. v. Ind. Stoveworks, 96 Tex. 453, 73 S. W. 800.

50. St. No. 50 of 1892. Kline v. Eubanks, 109 La. 241.

51. Code 1896, § 5505, as amended by Acts 1900, 1901, p. 1215. Streater v. State, 137 Ala. 1.

52. Sand. & H. Dig. § 4792. Sunny Side Co. v. Read [Ark.] 70 S. W. 462.

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ment, a misdemeanor under the laws of Mississippi, is committed at the pla the second hiring and not of the first.[53] Under the laws of Georgia an action not lie against one who, knowing a servant had abandoned a contract of se resting in parol, hired him without the consent of his employer before the ex tion of his term of service.[54]

There may be a recovery against one for maliciously inducing the dischar an employe.[55]

Injunction may be invoked to prevent interference by third persons.[56]

§ 6. *Crimes and penalties.*—The laws of the United States make it a fense to hold a person in a condition of peonage.[57] Such laws are constitutio The condition of peonage is defined as a condition of enforced servitude by w the servitor is restrained of his liberty and compelled to labor for the payment real or pretended debt against his will.[59] The offense is committed where a p is hired to perform labor under guard under a signed contract and held to the formance of the contract by threats or punishment or undue influence whe desires to abandon the employment,[60] and by holding one to employment thr collusion of officers after payment of fine and costs by labor under the laws of bama.[61] The laws of Alabama allowing one to contract in open court for lab satisfy fine and costs paid by his surety do not allow an assignment of such tract without the convict's consent.[62] Judicial officers are liable for evasion o peonage laws.[63] The Alabama act subjecting one to imprisonment for breach labor contract is unconstitutional.[64]

Under laws punishing violation of labor contracts where advances are obta the indictment is fatally defective which fails to allege that the property wa tained from the employer.[65] A statute making it an offense to entice a la under contract with another duly entered into between the parties does not a to the case of a minor under contract made by his father.[66] The Georgia act ishing persons obtaining goods on the promise to perform labor is not vio where there is a sale outright, the money to be paid at a later date, the chaser agreeing to perform labor if he fails to pay at the stipulated time.[6 written contract signed by one witness is sufficient within the laws of South C lina making it an indictable offense to fail to perform services under a con by a laborer working on shares and receiving advances thereon.[68]

A complaint in an action for a penalty under a law allowing its rec for failure to pay wages monthly in the absence of contract to the contrary show absence of contract.[69] An indictment for violation of an eight-hou law by a public contractor must allege that the contract was made after the actment of the statute.[70] Prohibition against "exacting" over ten hours incl voluntary contracts by employes to serve longer.[71]

53. Acts Miss. 1900, p. 140, c. 101. King v. State [Miss.] 35 So. 691.

54. Ga. Acts 1901, p. 63, requires a written contract. Caldwell v. O'Neal, 117 Ga. 775.

55. An indemnity company threatened to cancel policy if employe was not discharged for refusal to settle claim. London Guarantee & Acc. Co. v. Horn, 206 Ill. 493, 69 N. E. 526.

56. Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759.

An extensive collection of cases as to liability of third persons for interference with the relation by third persons will be found in 11 Am. St. Rep. 466.

57. Rev. St. U. S. § 5526. Peonage C 123 Fed. 671.

58, 59, 60, 61, 62, 63, 64. Peonage C 123 Fed. 671.

65. Ala. Code 1896, § 4730. Hillia State, 137 Ala. 89.

66. State v. Rhody [S. C.] 45 S. E.

67. Ga. Acts 1903, p. 90. Calhoun v. [Ga.] 46 S. E. 428.

68. State v. Long, 66 S. C. 398.

69. Burns' Rev. St. Ind. 1901, §§ 7056, Toledo, St. L. & W. R. Co. v. Long, 160 564, 67 N. E. 259.

70. People v. Orange County R. C. Co N. Y. 84, 67 N. E. 129.

71. In re Ten Hour Law R. I. 60

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MASTERS IN CHANCERY.

§ 1. Office, Eligibility, Appointment and Compensation (867).
§ 2. Proceedings for Reference (867).
§ 3. Proceedings on Reference and Hearing by Master (867).
§ 4. Report of Master, Exceptions and Objections (868).
§ 5. Powers of Court and Proceedings on Review of Report (868).
§ 6. Re-reference (868).

§ 1. *Office, eligibility, appointment and compensation.*—The court of common pleas in Pennsylvania cannot appoint a special master to conduct a corporate election without a decree ordering the election.[1] Commissioners appointed under a special law, to determine compensation for water supplied by a town to an insane hospital, are referees, not masters.[2] Appointment of a deputy clerk of a Federal circuit court as special master for a special reason is not void because such reason is not given in the order.[3] The master should file an itemized statement of his official services and the legal fee for each item.[4] He may be allowed his statutory fees for taking testimony, though the parties employ and pay a stenographer.[5] Statutory attorney's fees for taking of depositions in the Federal courts cannot be allowed as to evidence taken on reference.[6]

§ 2. *Proceedings for reference.*—A cause cannot be referred for final determination by the master without review by the court.[7] Where the bill shows necessity for an account, reference may be made on the pleadings without notice to defendant.[8] An order of reference may be made out of the regular term.[9] A master should not be appointed to take testimony on bill and answer in an accounting by an agent or trustee involving many items and requiring discovery as incident.[10] A stipulation for trial before a master waives the right to object that there is a legal remedy.[11] An order of reference to assess damages by a trial judge in equity is conclusive.[12]

§ 3. *Proceedings on reference and hearing by master.*—A special master, on reference to determine damages from a restraining order, cannot determine its improvident issuance.[13] Defendant may be required, on accounting before a master, to produce documentary evidence relating to subject-matter of the reference.[14] The master may adjourn a hearing, in a suit to remove a cloud on title, to the recorder's office where the deeds in plaintiff's claim of title were recorded.[15] Though he has power to rule on objections, he should receive evidence subject to exceptions, until close of the testimony, so that the objectionable testimony shall appear in the record to be reviewed on exceptions.[16] He will not open a case for newly-discovered evidence, merely collateral to the issues and cumulative, no sufficient reason being given for failure to produce it before the evidence closed.[17] Where

1. Equity rule 60 as amended Jan. 15, 1894. Yetter v. Del. Valley R. Co., 206 Pa. 485.
2. Acts 1898, p. 723, c. 564. The only questions open for review on their award were those which they referred to the court. Danvers Selectmen v. Com. [Mass.] 69 N. E. 320.
3. As required by Act March 3, 1879 (20 Stat. 415). Briggs v. Neal [C. C. A.] 120 Fed. 224.
4. Smyth v. Stoddard, 203 Ill. 424.
5. Barker v. Fitzgerald [Ill.] 68 N. E. 430.
6. U. S. Rev. St. § 824 applies only to depositions taken out of court to be used on hearing of a cause. Kissinger-Ison Co. v. Bradford Belting Co. [C. C. A.] 123 Fed. 91.
7. Ellwood v. Walter, 103 Ill. App. 219.
8. Briggs v. Neal [C. C. A.] 120 Fed. 224.
9. Reference to the register under rule 1, chancery prac. Whetstone v. McQueen, 137 Ala. 301.
10. Collection of many notes which agent had collected partly in farm produce and disposed of in trades; the decree should be made on the case as made by the bill and answer. Irvine v. Epstein [Fla.] 33 So. 1003.
11. Quieting title. Sanders v. Riverside [C. C. A.] 118 Fed. 720.
12. Instead of trial by jury, especially where such mode would require many trials. State v. Sunapee Dam Co. [N. H.] 55 Atl. 899.
13. Terry v. Robbins, 122 Fed. 725.
14. Contracts and correspondence as to sale of machines on accounting for profits and damages in infringement of patent [equity rule 77]. Goss Printing-Press Co. v. Scott, 119 Fed. 941.
15. Glos v. Woodard, 202 Ill. 480.
16. Ellwood v. Walter, 103 Ill. App. 219.
17. Oliver v. Wilhite, 201 Ill. 552.

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contentions of both parties are fully sustained on reference, costs should be portioned.[18] The parties cannot be required to pay stenographer's fees for tak testimony.[19]

§ 4. *Report of master, exceptions and objections.*—A finding of fact, im terial to the issues involved and prejudicial to plaintiff, is erroneous.[20] On a re ence for assessment of damages and settlement of questions of law and fact quested by the parties, the master need only report, at request of the parties, dence material to any question of law raised at the hearing.[21] Submission c whole cause as to law and facts by written stipulation of parties renders the n ter's findings conclusive on both save as to exceptions.[22] Where no objection made to a report because the abstract merely of deeds was set out when the rec thereof was in evidence before the master, the report cannot be set aside on appe A reference, hearing, report and confirmation, in an accounting covering a pe of six years, all made on the same day, show too hasty investigation and will set aside.[24] An exception merely challenging the master's report as erroneou too general.[25] A party dissatisfied with the master's findings of fact must ob to the master or the court cannot entertain an exception to a finding for omi facts.[26] Errors of the master as to admission of evidence can only be raised reference to the report and not by exception filed to the report or in a bri Objections to the report cannot be made for the first time on appeal.

§ 5. *Powers of court and proceedings on review of report.*—Findings of cannot be revised without the evidence.[28] Findings of fact, concurred in by Federal circuit court, while of great weight, are not conclusive on the appel court and it must examine the record.[29] The action of the court, on the com in of a report, in receiving additional testimony on one point, is not reversible er though erroneous, where none of the testimony was prejudicial to plaintiffs, they objected to the examination unless the case was opened generally.[30] Di gard by defendant of an order to produce evidence before the master, and ne gence in presenting his evidence, will warrant refusal to open the cause after de to admit his evidence.[31] Where a cause is submitted on the register's report exceptions, chancery rules requiring a note of testimony offered at a hearing not apply.[32]

§ 6. *Re-reference.*—Recommitment of a master's report for a statem of the evidence is in the discretion of the court.[33] Where the master's term exp before he heard the case and he reported the evidence already taken, the court co try the case or make another reference.[34] Where a party, against warning, the evidence before the master so that the latter could not determine an issue, court may refuse to recommit the report for further evidence.[35]

18. Reference to hear and determine exceptions to bill for impertinence. Hall v. Bridgeport Trust Co., 122 Fed. 163.

19. Attempt to assess fees against losing party. Smyth v. Stoddard, 203 Ill. 424. The parties cannot be required to pay fees of a stenographer in taking evidence nor can the master refuse to take their evidence for non-payment [2 Starr & C. Ann. St. 1896, c. 90, par. 9, § 9]. Glos v. Flanedy [Ill.] 69 N. E. 862.

20. Newton Rubber Works v. De Las Casas, 182 Mass. 436.

21. East Tenn. Land Co. v. Leeson, 183 Mass. 37.

22. Sanders v. Village of Riverside [C. C. A.] 118 Fed. 720.

23. Glos v. Woodard, 202 Ill. 480.

24. Diggs v. Ingersoll [Miss.] 34 So.

25. Hoagland v. Saul [N. J. Eq.] 53 704.

26. Gray v. N. Y. Nat. B. & L. Ass'n, Fed. 512.

27. Sowles v. Sartwell [Vt.] 56 Atl.

28. Henderson v. Foster, 182 Mass. East Tenn. Land Co. v. Leeson, 183 Mass.

29. Briggs v. Neal [C. C. A.] 120 Fed.

30. Oliver v. Wilhite, 201 Ill. 552.

31. It did not appear that his evide would change the result. Rudgear v. U Leather Co. [Ill.] 69 N. E. 30.

32. Rules chancery prac. 76, 77. Wi stone v. McQueen, 137 Ala. 301.

33. Henderson v. Foster, 182 Mass.

34. Heyward v. Middleton, 65 S. C. 493.

35. Sowles v. Sartwell [Vt.] 56 Atl.

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MECHANICS' LIENS.

§ 1. Nature of Lien and Right to It in General (869).
§ 2. Services, Materials and Claims for Which Liens May be Had (869).
§ 3. Properties and Estates Therein Which May be Subjected to the Lien (871).
§ 4. The Contract Supporting the Lien and the Privity of the Landowner Thereto (872).
A. In General (872).
B. Contracts by Vendors, Purchasers, Lessors, and Lessees (873).
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§ 5. Acts and Proceedings Necessary to Acquire Lien (875).
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B. Filing and Recording Claim and Statement Thereof (878).
§ 6. Amount of Lien and Priority Thereof (879).
§ 7. Assignment or Transfer of Lien (881).
§ 8. Waiver, Loss, or Forfeiture of Lien or Right to Acquire It (881).
§ 9. Discharge and Satisfaction (882).
§ 10. Remedies and Procedure to Enforce Lien (882).
A. By Scire Facias, Attachment, and Other Statutory Legal Proceedings (882).
B. By Foreclosure as in Equity (883).
C. By Intervention or Cross Proceedings (886).
D. Interpleader (886).
§ 11. Indemnification Against Liens (886).

§ 1. *Nature of lien and right to it in general.*—The mechanic's lien exists solely by statute. This statute, as to the proceedings necessary to perfect and enforce the lien, was formerly construed with all the strictness usual to statutes derogatory of the common law and is still so construed in some states.[36] The more recent trend of decision, however, is towards a relaxation of the ancient strictness,[37] while the statute in many states expressly declares its purpose to be remedial and entitled to liberal construction.[38] The law in force at the time when a contract is entered into governs the rights of the parties thereto[39] and persons claiming under them,[40] and material furnished prior to the enactment of the law will not support the lien.[41] The mechanic's lien law of Kentucky is constitutional.[42] The section of the California code providing for intervention by those having labor claims against attached property does not give a lien, but merely provides a means of enforcing one.[43] There are two distinct provisions in the statutes of Michigan authorizing liens on the property of foreign mining corporations doing business in that state.[44] The lien arises from the contract and the doing of the work or furnishing materials, and not from a failure to give notes or a mortgage as promised.[45]

§ 2. *Services, materials and claims for which liens may be had.*—Where the service performed includes both lienable and nonlienable items in such a manner as to be inseparable, the lien fails,[46] and cannot be supported by applying payments in satisfaction of the nonlienable articles.[47] Whether contractors, subcontractors, and sub-subcontractors are entitled to the lien, depends upon the construction given the particular words of the statute. The primary purpose of the law having been to protect laborers, it is generally held that persons of the classes enumerated are not included unless clearly within the terms of the law.[48] Likewise the serv-

36. Moher v. Rasmusson [N. D.] 95 N. W. 152; Carswell v. Patzowski, 3 Pen. [Del.] 593; Christian v. Allee, 104 Ill. App. 177; M. Pugh Co. v. Wallace, 198 Ill. 422.
37. O'Shea v. O'Shea, 91 Mo. App. 221.
38. Mahley v. German Bank, 174 N. Y. 499.
39. Kendall v. Fader, 199 Ill. 294.
40. Tabor-Pierce Lumber Co. v. International Trust Co. [Colo. App.] 75 Pac. 150.
41. Choctaw & M. R. Co. v. Speer Hardware Co. [Ark.] 71 S. W. 267.
42. Ky. St. § 2463. Stewart v. Gardner-Warren Implement Co., 24 Ky. L. R. 1216, 70 S. W. 1042.
43. Code Civ. Proc. § 1206. Winrod v. Wolters [Cal.] 74 Pac. 1037.
44. Comp. Laws 1897, §§ 5472, 10755. M. C. Bullock Mfg. Co. v. Sunday Lake Iron Min. Co. [Mich.] 93 N. W. 611.
45. Vanderpoel v. Knight, 102 Ill. App. 596.
46. Labor lienable and materials not. McDowell v. Rockwood, 182 Mass. 150. Articles becoming fixtures and others mere personal property. Rinzel v. Stumpf, 116 Wis. 287.
47. Rinzel v. Stumpf, 116 Wis. 287.
48. Laborers only and not contractors are within the logging lien law of Maine [Rev. St. c. 91, § 38, as amended by Pub. St. 1889, p. 172, c. 183] (Littlefield v. Morrill, 97 Me. 505) and the laborer's lien law of Louisiana (Fortier v. Delgado & Co., 122 Fed. 604). A subcontractor is entitled to the lien in Ore-

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ices[49] and the structure,[50] as well as the alterations,[51] fixtures,[52] and other be ments,[53] which may support the lien, depend largely upon the phraseology o particular statute.

A statute providing a lien for labor will not support one for materials labor,[54] and where the statute expressly provides a lien for materials, it gene covers only such as are actually incorporated into the building or work,[55] and mere tools and implements,[56] or materials used merely to facilitate the bus of the contractor,[57] though it has been held that a lien may be had for mate in good faith delivered at the premises for use in the building, though som them were afterwards used for other purposes.[58] The labor or materials r however, have been furnished on the credit of the particular building or v and if not so furnished, as upon the general credit of the contractor, the fails.[59]

Where the statute provides that the reasonable value only of labor and terials may be recovered, the contractor's profit[60] and necessary expenses are

gon [B. & C. Comp. § 5640] (Smith v. Wilcox [Or.] 74 Pac. 708) but not in Texas [Rev. St. art. 3312, giving lien on railroad] (Eastern Tex. R. Co. v. Foley, 30 Tex. Civ. App. 129). In Connecticut, a contractor under a subcontractor may procure a lien without the owner's consent by serving the statutory notice on the owner [Gen. St. 1902, § 4137]. Barlow v. Gaffney [Conn.] 55 Atl. 582. Subcontractors are not entitled to the lien in Wisconsin (Dallman v. Clasen, 116 Wis. 113; Farmer v. St. Croix Power Co., 117 Wis. 76), and a showing that the first subcontract was a mere subterfuge will not charge the land in the absence of a showing that the owner was a party to the fraud [Rev. St. 1898, §§ 3314, 3315] (Dallman v. Clasen, 116 Wis. 113).

49. An architect is entitled to the lien (Field v. Consol. Mineral Water Co. [R. I.] 55 Atl. 757; Spalding v. Burke [Wash.] 74 Pac. 829), and a foreman and watchman are within the mining lien law of Idaho [Laws 1893, p. 51, § 1] (Idaho Min. & Mill Co. v. Davis [C. C. A.] 123 Fed. 396). Labor in hauling material used in the house will support the lien. Fowler v. Pompelly, 25 Ky. L. R. 615, 76 S. W. 173. A civil engineer on railroad construction is not a "mechanic, laborer or operative." Gulf & B. V. R. Co. v. Berry [Tex. Civ. App.] 72 S. W. 1049.

50. Under the mechanic's lien law of Oregon, a railroad is a structure upon which and for the building of which a lien may be claimed [Laws 1885, p. 13]. Ban v. Columbia So. R. Co. [C. C. A.] 117 Fed. 21. The term "appurtenance," in that section of the lien law reciting what structures may give rise to the lien, means anything that will constitute an appurtenance to the land, and is not restricted to appurtenances to buildings. Cady Lumber Co. v. Greater America Exposition Co. [Neb.] 93 N. W. 961. The construction of a sidewalk in the street in front of lots will not give a lien in the absence of an express provision therefor in the statute [Mills' Ann. St. § 2867]. Fleming v. Prudential Ins. Co. [Colo. App.] 73 Pac. 752.

51. Temporary alterations made by a lessee for his own convenience, not affixed to the building in a manner to become part of the realty, will not support a lien. Hanson v. News Pub. Co., 97 Me. 99.

52. Shelving placed in a store building and fastened to the wall at the owner's will support the lien, but tables m standing on the floor will not. Rinz Stumpf, 116 Wis. 287.

53. A contractor who furnishes labor materials in installing electric wires, duits, switches and other electrical a ances in a house to be used for lighting entitled to the lien. Scannevin v. Co Mineral Water Co. [R. I.] 55 Atl. 754.

54. Pa. Act June 17, 1887 [P. L. James Smith Woolen Mach. Co. v. Bro 206 Pa. 543. N. C. Code, § 1255, as ame by Laws 1897, p. 511, c. 334, giving pri over trust deed. Cheesborough v. Ashe Sanatorium [N. C.] 46 S. E. 494.

55. Machines furnished to become a of a building will serve as a basis for lien. Campbell v. John W. Taylor Mfg. 64 N. J. Eq. 344. Materials purchased not used are not covered by the lien. phy v. Fleetford, 30 Tex. Civ. App. 487. dence held to warrant finding that mate were used in building. Noyes v. Smith Civ. App.] 77 S. W. 649.

56. Choctaw & M. R. Co. v. Speer H ware Co. [Ark.] 71 S. W. 267.

57. Lumber used in constructing form hold concrete in place and subsequently moved and used on another work is not nished and actually used in the buildir as to entitle the furnisher to a lien. Ke dy v. Com., 182 Mass. 480. One furnis materials for a permanent bridge er under contract and also for a temporary erected by the contractor to escape the alty provided in his contract for dela entitled to a lien only for the material ing into the permanent structure the porary one having been carried awa the contractor on completion of his tract. Stimson Mill Co. v. Los Angeles tion Co. [Cal.] 74 Pac. 357.

58. Kalina v. Steinmeyer, 103 Ill. App

59. Evidence held insufficient to that credit was given to building. Cran v. Neel [Mo. App.] 77 S. W. 766. Unles furnisher knows at the time of furni that his materials are to be used in particular building, he has no lien. T. Pierce Lumber Co. v. International Co. [Colo. App.] 75 Pac. 150.

60. Where a subcontractor furnishe entire work and materials for a house

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ments of that reasonable value;[61] but where the statute provides a lien only for labor, one using a team in performance of his labor is not entitled to include in his lien the value of the labor of his team.[62]

§ 3. *Properties and estates therein which may be subjected to the lien.*—By the laws of most of the states the lien attaches to the land to the extent at least of the interest of the person procuring the building to be built, whether he be the owner in fee,[63] mortgagor in possession,[64] lessee,[65] or in possession under a contract of purchase;[66] and in some states, where the person in possession of the land and procuring the building to be erected is not the owner, the contractor is entitled to a lien on the building separate from the land.[67]

In some states, the statute limits the lien to the parcel of land designated for use in connection with the building erected thereon not exceeding a specified area.[68]

Public buildings and improvements not being as a rule considered subject to the lien laws,[69] Congress and some of the state legislatures have passed laws requiring public officers making contracts for such works to take bonds of the contractors conditioned for the payment of the laborers and materialmen, failing in which, they are personally liable for such claims.[70] In other states, the statute provides for notices by subcontractors, laborers and materialmen, to municipalities as a means of obtaining a lien on moneys due contractors for public work,[71] and subject to foreclosure in the same manner.[72]

price not exceeding the original contract, his lien will cover any profit he may make. Smith v. Wilcox [Or.] 74 Pac. 708.

61. The cost of cartage may be included in the statement of the value of materials. Jones v. Kruse, 138 Cal. 613, 72 Pac. 146.

62. Klondike Lumber Co. v. Williams Bros. [Ark.] 75 S. W. 854.

63. Short v. Stephens, 92 Mo. App. 151.

64. Though a lien is inferior to a mortgage on the property for the reason that the mortgagees were not made parties to the foreclosure, it will attach to the equity of redemption. Martin v. Berry, 159 Ind. 566.

65. Lehmer v. Horton [Neb.] 93 N. W. 964; Poole v. Fellows, 25 R. I. 64; Sunshine v. Morgan, 39 Misc. [N. Y.] 778. The lien attaches to a leasehold interest and to buildings erected by one tenant and sold to another, who has acquired a lease of the same interest, and this notwithstanding the removal of the buildings at the end of the term is expressly required by the lease. Zabriskie v. Greater America Exposition Co. [Neb.] 93 N. W. 958.

66. Sawyer & A. Lumber Co. v. Clark, 172 Mo. 588; Short v. Stephens, 92 Mo. App. 151; Wilson v. Lubke, 176 Mo. 210.

67. Shull v. Best [Neb.] 93 N. W. 753; Sawyer & Austin Lumber Co. v. Clark, 172 Mo. 588. The Pennsylvania statute giving a lien on the improvements on leased land gives it only on the machinery on which the labor was performed [Pa. Act June 17, 1887 (P. L. 409)]. James Smith Woolen Mach. Co. v. Browne, 206 Pa. 543. One who builds an extension of an existing railroad in Oregon may claim his lien on the extension only. Ban v. Columbia So. R. Co. [C. C. A.] 117 Fed. 21.

68. One acre [Wis. Rev. St. 1898, § 3314]. Dusick v. Meiselbach [Wis.] 95 N. W. 144; Mayes v. Murphy, 93 Mo. App. 37.

69. Notwithstanding its general terms, including "all buildings" and extending to "corporations as well as individuals," the mechanic's lien law does not create a lien on the property of a municipal corporation. Waterworks. Emory v. Laurel Com'rs, 3 Pen. [Del.] 191. Free public library. Young v. Falmouth, 183 Mass. 80. An armory erected by a corporation composed of members of the national guard is private property, subject to the lien. Arrison v. Company D, N. D. Nat. Guard [N. D.] 98 N. W. 83.

70. Act Aug. 13, 1894, requiring such bonds as between private individuals, is invalid. San Francisco Lumber Co. v. Bibb, 139 Cal. 192, 72 Pac. 964; Snell v. Bradbury, 139 Cal. 379, 73 Pac. 150. Under the act of congress, it is not a condition precedent to bringing an action by the person entitled in the name of the United States that an affidavit of the claim be filed with the department having charge of the work (U. S. v. American Surety Co., 21 Pa. Super. Ct. 153), but no action can be sustained on the bond until payment under the contract is due (Id.). Under such a statute in Michigan (Comp. Laws 1897, §§ 10743-10745), it is held that a good faith approval of such a bond will absolve the officers, though it in fact does not protect the laborers because of false justification. Huebner v. Nims [Mich.] 94 N. W. 180. In Massachusetts, only those who would be entitled to a lien if the property were that of a private individual are entitled to the benefits of the act [Pub. St. c. 16, § 64]. Kennedy v. Com., 182 Mass. 480. Where the bond contained no stipulation as to laborers and the contractor recovered a judgment in which rights of laborers were not in issue, there cannot be a further recovery on the bond by laborers. Lancaster v. Frescoln, 203 Pa. 640.

71. James P. Hall Incorporated Co. v. Jersey City, 64 N. J. Eq. 766; Nat. Bank of La

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§ 4. *The contract supporting the lien and the privity of the landowner th*
to. A. In general.—A mechanic's lien must have for its foundation a contr
express or implied, made by some one having some interest in the land,[73] and
most states it is immaterial whether the contract be oral or written; but a
cannot be claimed in Michigan on a homestead under a verbal contract,[74] and
Illinois, in order to entitle one to a lien on a verbal contract, the work must
done or materials furnished within one year from its date, and the contract n
provide for payment within such time.[75]

In Illinois, if no time is fixed in a written contract for the comple
of the work[76] and payment therefor, there can be no lien,[77] either in favor of

Crosse v. Petterson, 102 Ill. App. 501. Such a statute is not invalid for giving subcontractors a remedy not available to contractors. West Chicago Park Com'rs v. Western Granite Co., 200 Ill. 527. The mere filing of an unverified notice, will not give the claimant an unqualified right to the fund, nor justify the municipality in withholding it from the contractor longer than the statutory 90 days allowed the claimant to bring suit for it. Third Nat. Bank v. Atlantic City, 126 Fed. 413. The notice should state the particulars both of the principal and the subcontract. James P. Hall Incorporated Co. v. Jersey City, 64 N. J. Eq. 766. Notice actually brought to the attention of the board charged with the duty is sufficient in Illinois (West Chicago Park Com'rs v. Western Granite Co., 200 Ill. 527); but in New York, it must be filed with the particular officer designated by the statute (Terwilliger v. Wheeler, 81 App. Div. [N. Y.] 460; Hawkins v. Mapes-Reeves Const. Co., 82 App. Div. [N. Y.] 72; Westgate v. Shirley, 42 Misc. [N. Y.] 245), and a statement filed with the county clerk as in case of a private improvement will create no lien on the fund furnished to pay for a public improvement, as in such case the statement should be filed with the board having charge of the work (Terwilliger v. Wheeler, 81 App. Div. [N. Y.] 460).

Failure of the public officer to withhold payment after notice subjects him to liability on his bond, but the remedy thus provided is not exclusive, and a lien on the improvement bonds may be enforced in equity. Nat. Bank of La Crosse v. Petterson, 102 Ill. App. 501; West Chicago Park Com'rs v. Western Granite Co., 200 Ill. 527. By express provision of the statute in New York, funds provided by the public to pay for public improvements are subject to a lien in most respects similar to that allowed against private buildings. Terwilliger v. Wheeler, 81 App. Div. [N. Y.] 460.

72. Hawkins v. Mapes-Reeves Const. Co., 82 App. Div. [N. Y.] 72; Perry v. Levenson, 82 App. Div. [N. Y.] 94. The municipality is not a necessary party to such action. Hawkins v. Mapes-Reeves Const. Co., 82 App. Div. [N. Y.] 72. On failure to establish the lien, plaintiff is entitled to a personal judgment against the contractor, as in other cases (Terwilliger v. Wheeler, 81 App. Div. [N. Y.] 460). Statute so providing not invalid as interfering with right of jury trial (Hawkins v. Mapes-Reeves Const. Co., 82 App. Div. [N. Y.] 72), and the surety on the bond given to discharge the lien will be liable therefor (Id.), but is not a necessary party to the foreclosure suit (McDonald v. New York, 89 App. Div. [N. Y.] 131).

Where the suit to foreclose is not defe by the public officers, and they owe a bal to the contractor, the judgment goes aga them in form, but is enforceable only o the fund. Westgate v. Shirley, 42 Misc. Y.] 245. An unsuccessful claimant of fund is liable only for the costs of the gation of his particular claim, the cost the main case being payable out of the f James P. Hall Incorporated Co. v. Je City, 64 N. J. Eq. 766.

73. Sawyer & A. Lumber Co. v. Cl 172 Mo. 588; Wilson v. Lubke, 176 Mo. Materials furnished employes of subcontr ors having no privity with the owner not support the lien. Choctaw, etc., R. C Speer Hardware Co. [Ark.] 71 S. W. 267. property of an owner not contracting become bound in Wisconsin if he has kn edge of the building and consents the Rev. St. 1898, § 3314. Married woman bound by knowledge. Lentz v. Eimern [Wis.] 97 N. W. 181. It is not necessar entitle a laborer to a lien that he be ployed to do any particular part of the w a general employment is sufficient. Ah L v. Harwood, 140 Cal. 500, 74 Pac. 41.

Where the original contract provides the parties may agree to alterations in work without invalidating or otherwise tering it, work done under supplemen contracts on the same buildings, by wa adding more to them than the original tract provided, is lienable under the orig contract as extra work. South End Imp. v. Harden [N. J. Ch.] 52 Atl. 1127.

74. Finding that property was no homestead held supported by evidence. ray Lumber Co. v. Keohane [Mich.] 9 W. 489. If the homestead be worth r than the constitutional amount, $1,500, lien will attach to the excess. McAlist Des Rochers [Mich.] 93 N. W. 887.

75. Zuttermeister v. Central Lumber 104 Ill. App. 120; Richardson v. Central L ber Co., 105 Ill. App. 358. An agreemer pay on completion will not be implie as to give a lien where the work was act ly done within the year. Williams v. Rit house & Embree Co., 198 Ill. 602; Hinde American Trust & Sav. Bank, 198 Ill. Dymond v. Bruhns, 200 Ill. 292. The tract must provide that the work be don materials furnished within the year. F v. Wallace, 198 Ill. 422.

76. Where an impossible time is fi such as a date earlier than the date of contract, there is in effect no time fi Superior Lumber Co. v. Gottlieb, 102 App. 392. But this provision of the law reference only to the original contract

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contractor or a subcontractor;[78] but in some states, a contract making no provision as to time will be construed as intending completion within a reasonable time.[79]

One who has failed to perform his contract is not entitled to a lien,[80] and on counterclaim, the owner can recover damages for his nonperformance,[81] but insolvency of the owner will excuse nonperformance.[82]

Where the contract provides that sufficient may be withheld from the amount due the contractor to indemnify the owner against claims by subcontractors, the filing of such claims does not defeat the contractor's right to recover the balance.[83]

Where the owner gets such a performance as he contracted for, he is not interested in a dispute between the contractor and a subcontractor as to whether the subcontractor fully performed his contract.[84] So also, whether or not the claimant performed his contract is a matter that concerns only the owner and his contractor; and a junior incumbrancer is not entitled to defend on the ground of incomplete performance, where the owner, without collusion, has confessed judgment for the claim.[85]

(§ 4) *B. Contracts by vendors, purchasers, lessors, and lessees.*—As was stated above,[86] where the person contracting as owner has an interest less than the entire estate, only such interest as he possesses is subject to the lien, except in those states where the statute expressly provides otherwise,[87] unless the owner of the outstanding interest expressly consent to the improvement,[88] or unless the

not to subcontracts. Kalina v. Steinmeyer, 103 Ill. App. 502.

77. Webbe v. Curran, 198 Ill. 18. Time held sufficiently fixed by inference. Roulet v. Hogan, 203 Ill. 525. Under the law of Illinois of 1895, no lien arose where the time stipulated for payment was more than one year subsequent to that set for completion of the work. Vanderpoel v. Knight, 102 Ill. App. 596. But an extension of the time for completion does not defeat the lien. Sedgwick v. Concord Apartment House Co., 104 Ill. App. 5.

78. Von Platen v. Winterbotham, 203 Ill. 198.

79. Lang v. Menasha Paper Co. [Wis.] 96 N. W. 393; Koerper v. Royal Inv. Co. [Mo. App.] 77 S. W. 307.

80. MacKnight Flintic Stone Co. v. New York, 78 App. Div. [N. Y.] 641; Id., 78 App. Div. [N. Y.] 640; Woolf v. Schaefer, 41 Misc. [N. Y.] 640. By negligently and willfully departing from the plans and specifications in such a manner as to materially reduce the value of the building, the builder loses his right to a lien. Smith v. Ruggiero, 173 N. Y. 614; Schultze v. Goodstein, 82 App. Div. [N. Y.] 316.

81. Woolf v. Schaefer, 41 Misc. [N. Y.] 640.

82. Huetter v. Redhead, 31 Wash. 320, 71 Pac. 1016.

83. Perry v. Levenson, 82 App. Div. [N. Y.] 94.

84. Indiana R. Co. v. Wadsworth, 29 Ind. App. 586.

85. Nolt v. Crow, 22 Pa. Super. Ct. 113.

86. Ante, § 3. Where the purchaser of materials is a lessee, his estate only is the interest affected by the lien, and not the reversion of the lessor. Poole v. Fellows, 25 R. I. 64. Where the person contracting as owner has only a contract to purchase, the lien may be enforced against the land, provided it can be enforced during the life of the contract. Sawyer & A. Lumber Co. v. Clark, 172 Mo. 558. Where a contract of sale is fulfilled by delivery of the deed to the purchaser before the lien is foreclosed, the lien attaches to the fee. Short v. Stephens, 92 Mo. App. 151. In the absence of any agreement or intention of the parties to the contrary, permanent improvements placed on land become part of the realty, and, as such, subject to a vendor's lien, notwithstanding the mechanic's lien law, and a decree treating them as personalty and subject to the lien is error. Watson v. Markham [Tex. Civ. App.] 77 S. W. 660.

87. Ah Louis v. Harwood, 140 Cal. 500, 74 Pac. 41; Birch v. Magic Transit Co., 139 Cal. 496, 73 Pac. 238.

88. Where a contract of sale provides that the purchaser shall have immediate possession of the land for the purpose of erecting buildings thereon, there is no such assent to the erection as will bind the vendor's interest for the labor and materials used in the erection. Beck v. Catholic University, 172 N. Y. 387, 60 L. R. A. 315. Where a lease does not require or authorize the lessee to construct improvements on the demised premises, the estate of the lessor is not liable to the lien, unless the lessor has otherwise expressly consented and agreed that such improvements should be made upon his premises. Crandall v. Sorg, 198 Ill. 48; Rice v. Culver, 172 N. Y. 60. Where the lease provides that all repairs shall be made at the expense of the tenant, the lien does not attach to the reversion, though the owner was cognizant of the work. Sunshine v. Morgan, 39 Misc. [N. Y.] 778.

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contract under which he holds was made in contemplation of the improvement for which the lien is claimed; in which case it has been held that the lease or contract of sale is practically a building contract, and subjects the interest of the lessor or vendor to the lien.[89] In California, however, the owner must expressly disaffirm liability on becoming cognizant of the improvement or his estate will be held.[90]

Where a contract is made and work begun before the person contracting as owner has any title, his subsequent purchase will not give effect to the lien over the vendor's mortgage for the purchase money.[91] Decisions relative to the rights of lienors and mortgagees when the mortgage is given to raise money to improve the property are discussed elsewhere.[92]

(§ 4) *C. Subcontractors and materialmen.*—The rights of subcontractors and laborers and materialmen in most states are determined by the contract with the owner, and he is not liable to them beyond the terms of the original contract,[93]

89. Where a fair construction of the lease under the circumstances shows that the lessor intended to be and was interested in the building, the lien will attach to his interest as well as to that of the lessee. Steeves v. Sinclair, 171 N. Y. 676. Where a contract of sale and a lease back from the purchaser to the vendor when construed together show that the lessor is interested in the building, the lien will attach, though the lease expressly provides otherwise. Crandall v. Sorg, 198 Ill. 48. And where the lessee is known by the lessor, his brother, to be insolvent, and the land was purchased by the lessor with the intention of leasing it for the purpose, the lien will attach. Lengelsen v. McGregor [Ind.] 67 N. E. 524.

90. If the owner of leased land post a notice disaffirming liability within three days after operations actually commenced, he will be relieved from liability, though he had previous knowledge of the intention to build [Cal. Code Civ. Proc. § 1192]. Birch v. Magic Transit Co., 139 Cal. 496, 73 Pac. 238. A stipulation in a contract of sale of land that the vendor shall not be liable for labor or materials employed in contemplated construction thereon will not relieve him. He can protect himself only by the statutory notice or its equivalent. Ah Louis v. Harwood, 140 Cal. 500, 74 Pac. 41.

91. Wilson v. Lubke, 176 Mo. 210.

92. Post, § 6.

93. California Iron Const. Co. v. Bradbury, 138 Cal. 328, 71 Pac. 346. A contract to build several buildings at a specific price for each is severable, and a payment actually due the contractor on one cannot be applied to the expense of completing the others to the prejudice of claimants contributing to the one on which the payment is due. White v. Livingston, 174 N. Y. 538. The owner is entitled as against the subcontractor to set off his damages for default of the contractor only in such sum as he had been damaged at the time the subcontractor filed his lien. Anisansel v. Coggeshall, 83 App. Div. [N. Y.] 491. A general indebtedness of the owner to the contractor will not support the lien in favor of a subcontractor; it must be an indebtedness on the building contract. Hathorne v. Panama Park Co. [Fla.] 32 So. 812. Plea held sufficient to show that nothing was due contractor. Alabama Lumber Co. v. Smith [Ala.] 35 So. 693.

Payments to contractor: The fact that the contractor has paid the subcontractor before a contractor under the latter makes his claim will not relieve the contractor, where the statute does not require that the lienor's principal must be unpaid to entitle him to a lien. Barlow Bros. Co. v. John W. Gaffney & Co. [Conn.] 55 Atl. 582. Payments made to the contractor are not a defense to the owner, unless distributed by the contractor to laborers and materialmen as the law directs (Green v. Farrar Lumber Co. [Ga.] 46 S. E. 62; Barton v. Grand Lodge, 70 Ark. 613; Delray Lumber Co. v. Keohane [Mich.] 92 N. W. 489), notwithstanding his want of notice of their claims (Nelson Mfg. Co. v. Mann, 24 Ky. L. R. 1547, 71 S. W. 851).

Assignment by contractor: An assignment by the contractor of a past due claim before service of any legal stop notice will defeat the lien of a subcontractor, but not that of a laborer or materialman. Adams v. Wells, 64 N. J. Eq. 211. In New York, the assignee's claim to funds due the contractor is prior to that of lienors whose liens are filed subsequent to the assignment (Hall v. New York, 79 App. Div. [N. Y.] 102; Id. 176 N. Y. 293; Harvey v. Brewer, 82 App. Div. [N. Y.] 589), accepted order (Garden City Co. v. Schnugg, 81 N. Y. Supp. 496); but the rule is otherwise in Louisiana (Simpson v. New Orleans, 109 La. 897). The lienor's claim is not defeated by an assignment as collateral merely, where there is a surplus due the contractor. McDonald v. New York, 89 App. Div. [N. Y.] 131.

Abandonment by contractor: Where the sureties of a contractor are obliged to complete the work, lien claimants under the contractor are entitled only to that part of the contract price earned by and due to the contractor, at the time of abandonment, and not to any portion becoming due by reason of the services of the sureties (St. Peter's Catholic Church v. Vannote [N. J. Eq.] 56 Atl. 1037); but where the surety on consideration of a release of further liability completes the contract, he becomes the assignee of the contractor and his right to final payment is subject to the liens perfected before the assignment (Smith v. Schile, 81 App. Div. [N. Y.] 199). Where the owner completes, lienors are entitled to the difference, if any, between the actual cost of com-

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notwithstanding his knowledge of their operations.[94] To have this effect, however, the contract must observe certain formalities,[95] and in some states must with its specifications[96] be filed in a public office designated by statute.[97]

§ 5. *Acts and proceedings necessary to acquire lien. A. Notice, and demand, statement of claim and affidavit.*—In those states in which the liability of the owner to others than the contractor is measured solely by the original contract and the state of the account between him and the contractor at the time the lien is claimed, it is generally provided that in order to fix the liability of the owner to the lienor and justify him in withholding payment to the contractor, a notice must be served upon him by the lienor, setting forth the amount and particulars of his claim. Such a notice, when served upon the owner as the statute directs, operates as a legal assignment to the subcontractor of the amount due the contractor to the extent of the subcontractor's claim.[98] The filing of a subcontractor's lien in New York,[99] or the service of the stop notice in New Jersey, intercepts not only the moneys due and payable under the contract and unassigned, but also those to become due.[1] A materialman who notifies the owner as provided by the statute acquires an interest in the unpaid balance due the contractor which he may enforce in equity, though he acquires no lien on the building.[2] In those states where the building contract is not the sole measure of the owner's liability, it is generally provided that a laborer or materialman must give notice to the owner of his intention to claim a lien before or in some cases within a certain time after furnishing;[3] in which case, a prompt disaffirmance of liability on the part of an owner who has not contracted for an improvement will release him.[4] The

pletion to the owner and the amount the contractor would have been entitled to on completion (White v. Livingston, 174 N. Y. 538), and materialmen who continue to furnish the owner are entitled to full pay for all materials furnished after abandonment and to their pro rata share of what the contractor had earned at the time of abandonment. Delray Lumber Co. v. Keohane [Mich.] 92 N. W. 489.

94. Butler v. Aquehonga Land Co., 86 App. Div. [N. Y.] 439; Wood v. Atlantic R. Co., 131 N. C. 48.

95. Law so providing is valid [Colo. Laws 1893, p. 315, c. 117]. Chicago Lumber Co. v. Newcomb [Colo. App.] 74 Pac. 786.

96. Reference therein to other house for details is sufficient. California Iron Const. Co. v. Bradbury, 138 Cal. 328, 71 Pac. 346, 617. Revision 1898, p. 538, § 2. English v. Warren [N. J. Eq.] 54 Atl. 860.

97. Contract as filed held sufficient, though not setting forth entire agreement. California Iron Const. Co. v. Bradbury, 138 Cal. 328, 71 Pac. 346, 617. Contract need not set forth amount to be paid thereunder. Snell v. Bradbury, 139 Cal. 379, 73 Pac. 150. Notwithstanding the contract is filed as required by law to protect the owner from liens other than that of the contractor, if the parties abrogate it and substitute a parol one, the property will be subject to liens of subcontractors. Buckley v. Hann, 68 N. J. Law, 624.

98. South End Imp. Co. v. Harden [N. J. Eq.] 52 Atl. 1127. The remedy by stop notices given materialmen is limited to buildings for which the contract and specifications have been filed. English v. Warren [N. J. Eq.] 54 Atl. 860.

99. White v. Livingston, 174 N. Y. 538.

1. Kreutz v. Cramer, 64 N. J. Eq. 648.

2. Weldon v. Superior Court, 138 Cal. 427, 71 Pac. 502. To entitle a claimant to stop payment to the contractor in this manner, however, there must have been a demand of payment upon the contractor and a refusal by him. Demand held not shown by evidence. Adams v. Wells, 64 N. J. Eq. 211. Demand of payment by subcontractor before filing notice with owner held sufficient. South End Imp. Co. v. Harden [N. J. Eq.] 52 Atl. 1127.

3. In Massachusetts, where the buyer of materials is not the owner of the land, no lien attaches unless the seller notifies the owner of his intention to claim the lien (McDowell v. Rockwood, 182 Mass. 150), and this protection inures to a mortgagee of the owner as against one furnishing to a purchaser under a land contract (Id.), and bars the claimant in a case where labor and materials are so commingled as to be inseparable (Id.). The provision of the statute of Indiana dispensing with notice of lien in cases where the owner is in "failing circumstances" applies only to laborers employed in shops and factories [Acts 1889, p. 257]. Sulzer-Vogt Mach. Co. v. Rushville Water Co., 160 Ind. 202. Furnisher of material for gas will not be included. National Supply Co. v. Stranahan [Ind.] 69 N. E. 447. The "owner" that must be notified under the statute of Rhode Island is the owner of the estate or interest to be affected, whether it be a fee, a leasehold or a lesser interest [Gen. Laws 1896, c. 206, § 5]. Poole v. Fellows, 25 R. I. 64. One who holds title for the fraudulent protection of another is not entitled to the notice of intention to file the lien. Baltis v. Friend, 90 Mo. App. 408.

4. William H. Birch & Co. v. Magic Tran-

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filing in some public office of a statement showing the amount and particulars of the lien claimed is practically a universal prerequisite. This statement is called by some statutes a notice, by some a statement, and by others an affidavit of claim, but by whatever name called, the formal requisites of it and the notices mentioned in the preceding paragraphs are practically the same, in so far as the statutes under which they are filed are similar. Everything expressly directed by the statute to be stated by the notice must be so stated or the notice will be bad,[5] notwithstanding the clause of the statute declaring that it should be liberally construed,[6] and an untrue statement of a material matter will vitiate the claim,[7] though nonjurisdictional errors will be disregarded.[8]

Where various papers forming part of an account refer to each other in such a way as to give the information required, it is sufficient.[9]

A statute giving a lien on the improvements on leased land will not support a lien claiming on the land and improvements.[10]

Failure of the claim to specify the section of the statute under which it is claimed is not ground for dismissal,[11] especially where there is only one statute under which a lien may be claimed.[12]

The statement must be verified,[13] must describe the land,[14] and where the lien against the land fails through inaccurate description, there is no lien against the building.[15] The name of the owner or reputed owner must be stated,[16] and the name and residence of the lienors,[17] and it must be shown with whom the original contract was made,[18] and to whom the labor or materials were furnished.[19]

sit Co., 139 Cal. 496, 73 Pac. 238; Ah Louis v. Harwood, 140 Cal. 500, 74 Pac. 41.

5. Moher v. Rasmusson [N. D.] 95 N. W. 152; New Jersey Steel & Iron Co. v. Robinson, 85 App. Div. [N. Y.] 512; Toop v. Smith, 87 App. Div. [N. Y.] 241. An omission in the notice of claim is jurisdictional and cannot be supplied by amendment. Hawkins v. Boyden, 25 R. I. 181.

6. Mahley v. German Bank, 174 N. Y. 499.

7. Untrue statement as to time set for completion of work and payment therefor. Christian v. Allee, 104 Ill. App. 177. The claimant is not entitled to a lien for materials furnished by another, but stated in his statement to have been furnished by himself. Sickman v. Wollett [Colo.] 71 Pac. 1107.

8. Westgate v. Shirley, 42 Misc. [N. Y.] 245. A clerical error in the date of the account may be corrected. Baltis v. Friend, 90 Mo. App. 408.

9. Holland v. Cunliff, 96 Mo. App. 67; O'Shea v. O'Shea, 91 Mo. App. 221.

10. Pa. Act, June 17, 1887 (P. L. 409). James Smith Woolen Mach. Co. v. Browne [Pa.] 56 Atl. 43.

11. Being amendable. Hawkins v. Boyden, 25 R. I. 181.

12. White v. Livingston, 174 N. Y. 538.

13. Partnership cannot verify. Kane v. Hutkoff, 81 App. Div. [N. Y.] 105. Verification by agent as true of his own knowledge or information and belief is good. McDonald v. New York, 89 App. Div. [N. Y.] 131; Jones v. Kruse, 138 Cal. 613, 72 Pac. 146.

14. Security Nat. Bank v. St. Croix Power Co., 117 Wis. 211; Dusick v. Meiselbach [Wis.] 95 N. W. 144. Kan. Gen. St. 1901, § 5121, providing for amendment in this respect is valid. Atkinson v. Woodmansee [Kan.] 74 Pac. 640. Where the lien is allowed to the extent of one acre only, the acre on which the buildings stand must be described. Mayes v. Murphy, 93 Mo. App. 37.

15. Mayes v. Murphy, 93 Mo. App. 37.

16. Error in corporate name not excused by averment that corporations are substantially the same. Cook v. Gallatin R. Co. [Mont.] 72 Pac. 678. A claimant is justified in naming as owner the person appearing from the public records to be such, and if the statement is made in good faith, the lien will not be lost because it is subsequently ascertained that some other person is the owner. Shryock v. Hensel, 95 Md. 614. A statement failing to set forth the name of the owner at the time it is filed, if known, is bad, and where it sets forth the name of one who has conveyed and is verified, the error cannot be excused on the ground that the owner's name was not known. Waters v. Johnson [Mich.] 96 N. W. 504. The claimant can be relieved of the effect of such an error only on proof of facts amounting to an estoppel on the part of the grantee. Id. Where, during the course of the employment, the property is transferred, a statement of the name of the owner at the time the employment began and at the time the lien was filed is sufficient. Ah Louis v. Harwood, 140 Cal. 500, 74 Pac. 41. A statement that the owners and reputed owners were certain named persons is sufficient. Seattle Lumber Co. v. Sweeney [Wash.] 74 Pac. 1001. The statement may be amended as to the name of the owner [Kan. Gen. St. 1901, § 5121, so providing, is constitutional]. Atkinson v. Woodmansee [Kan.] 74 Pac. 640. A designation of a corporation as owner in a claim filed after the corporation has gone into the hands of a receiver will not deprive the claimant of his right to a preference at the hands of the receiver. Doty v. Auditorium Pier Co. [N. J. Eq.] 56 Atl. 720.

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The notice in most states must contain or be accompanied by an itemized account of the labor and materials for which the lien is claimed.[20] In New York the lien must state the labor performed, the materials furnished, and the agreed price thereof,[21] stating when they were furnished,[22] and truthfully setting forth the amount due the claimant.[23] In New York, a statement from which cannot be determined whether the claim is for labor and materials furnished or to be furnished,[24] and whether the amount claimed is the agreed price or value, is bad,[25] notwithstanding it follows the language of the statute.[26]

Where, as in Wisconsin, only the contractor and those having direct contractual relations with him are entitled to the lien, the statement must show that the claimant was employed by the principal contractor,[27] that he furnished labor or materials,[28] and that the balance due is due from the principal contractor;[29] but in other states, the affidavit to the account need not state that the material was furnished under contract,[30] and a subcontractor's claim in Colorado need set out only the terms of the original contract,[31] and need not state in express

17. Statement of firm name and place of business is insufficient. Kane v. Hutkoff, 81 App. Div. [N. Y.] 105.

18. May be amended in this respect. Lentz v. Elmermann [Wis.] 97 N. W. 181.

19. In the absence of prejudice, an error in naming the person to whom the labor and materials were furnished is not fatal. Building erected by lessee. Steeves v. Sinclair, 171 N. Y. 676. In the absence of prejudice, the fact that the subcontractor names only the head of the contracting firm instead of using the firm name is immaterial. Cady Lumber Co. v. Conkling [Neb.] 98 N. W. 42.

20. The account must state the character of the work or material furnished. O'Shea v. O'Shea, 91 Mo. App. 221. A charge in a lien account is not a lumping one where it includes only lienable items which were the subject of an entire contract for a given price which is also shown to be the reasonable value of the articles. Holland v. Cunliff, 96 Mo. App. 67; Baumhoff v. St. Louis & K. R. Co., 171 Mo. 120.

In Illinois, if extras are claimed, the claim for them must be itemized (Christian v. Allee, 104 Ill. App. 177), but failure to itemize only goes to defeat the claim as to the extras and not the entire claim (Sedgwick v. Concord Apartment House Co., 104 Ill. App. 5).

21. Clarke v. Heylman, 80 App. Div. [N. Y.] 572. A notice which includes items so remote as to be nonlienable is good as to the items not too remote. Steeves v. Sinclair, 171 N. Y. 676; Wolfley v. Hughes [Ariz.] 71 Pac. 951.

22. A notice failing to state when the first item of work was done is insufficient, being expressly required by the statute (Mahley v. German Bank, 174 N. Y. 499); but mere indefiniteness as to dates of furnishing is not fatal (Eggert v. Snoke [Iowa] 98 N. W. 372), and where a statement setting forth the times when the materials were furnished is required, one stating that the claimant built the building between certain dates and furnished all the materials therefor is sufficient (Kendall v. Fader, 199 Ill. 294).

23. Items held properly included. Cline v. Shell [Or.] 73 Pac. 12. A credit by mistake for which there is no consideration will not preclude plaintiff from claiming the reasonable value of his materials disregarding the credit. Noyes v. Smith [Tex. Civ. App.] 77 S. W. 649. By attempting by stop notice to impound a greater sum than is actually due him, the claimant loses his right and hence an owner when sued after demand and notice may plead that less was due than was claimed in the notice. Taylor v. Wahl [N. J. Law] 55 Atl. 40. A statement omitting to give credit for a set off, of which the claimant testifies he was unable to procure a statement, is not for that reason bad. Kasper v. St. Louis Terminal R. Co. [Mo. App.] 74 S. W. 145. A notice claiming $30,000 as due is not objectionable because it could under the contract have been paid with $5,000 in cash and $25,000 in stock. Baumhoff v. St. Louis & K. R. Co., 171 Mo. 120. The fact that by mistake the sum named in the lien statement is too large is not fatal to the lien (Kendall v. Fader, 199 Ill. 294; Kalina v. Steinmeyer, 103 Ill. App. 502; McAlister v. Des Rochers [Mich.] 93 N. W. 887; Chicago Lumber Co. v. Newcomb [Colo. App.] 74 Pac. 786); but where the amount is intentionally exaggerated, though without fraudulent intent, the lien will fail (New Jersey Steel & Iron Co. v. Robinson, 85 App. Div. [N. Y.] 513).

24. Bossert v. Happel, 40 Misc. [N. Y.] 569. A notice claiming under a contract not fully performed through no fault of the claimant is defective if it fail to state how much of the contract is performed and the value thereof. White v. Livingston, 174 N. Y. 538.

25. New Jersey Steel & Iron Co. v. Robinson, 85 App. Div. [N. Y.] 512. Alternative averment bad. Villaume v. Kirchner, 85 N. Y. Supp. 377.

26. Bossert v. Happel, 89 App. Div. [N. Y.] 7.

27. Dusick v. Meiselbach [Wis.] 95 N. W. 144.

28. Dusick v. Meiselbach [Wis.] 95 N. W. 144. A statement failing to state that the claimant has furnished any labor or materials is fatally defective. Security Nat. Bank v. St. Croix Power Co., 117 Wis. 211.

29. Rev. St. 1898, § 3315. Dusick v. Meiselbach [Wis.] 95 N. W. 144.

30. Terry v. Prevo [Neb.] 95 N. W. 338.

31. Chicago Lumber Co. v. Newcomb [Colo. App.] 74 Pac. 786.

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terms that the materials for which the lien is claimed were furnished by the claimant.[32] In Washington, a notice following the language of the statute is sufficient, though it does not show the contractual relations between the owner and contractor nor that the owner caused the building to be erected.[33]

Where separate buildings have been erected under one general contract, a lien may be had against all the property;[34] but where the contract is divisible,[35] and especially where the houses belong to different owners,[36] the lien is separate as to each house and should be so claimed.

The notice or statement should be served on the owner,[37] personally where possible,[38] and is sufficient, though served without the county,[39] and by copy instead of original.[40]

(§ 5) *B. Filing and recording claim and statement thereof.*—The proper and timely filing in the proper office of the statutory notice or statement is in most states jurisdictional;[41] but in Rhode Island, no notice of lien need be given

32. Sickman v. Wollett [Colo.] 71 Pac. 1107.

33. Seattle Lumber Co. v. Sweeney [Wash.] 74 Pac. 1001.

34. Contiguous lots. Holland v. Cunliff, 96 Mo. App. 67. The furnisher of electrical appliances for a group of buildings is entitled to a lien on the buildings, they being maintained for a common purpose, though they are not on contiguous lots and the claimant is not able to show what portions were used in a particular building. Lehmer v. Horton [Neb.] 93 N. W. 964. By express provisions of the statute in Alabama, a separate lien need not be filed where several buildings are erected under one contract [Act Mch. 4, 1901]. Cocciola v. Wood-Dickerson Supply Co., 136 Ala. 532. When a single debt exists for work done or materials furnished in the erection of several buildings, the liens therefor are to be enforced by a single lien claim and a single declaration in which the debt is to be apportioned among the buildings and curtilages according to their respective liability. Culver v. Lieberman [N. J. Err. & App.] 55 Atl. 812. Where several mining claims are owned and operated as one mine, a claim of lien need not designate the amount claimed as to each location, but may treat the whole as a single claim on a single property [Laws Idaho 1893, p. 51, § 7]. Idaho Min. & Mill. Co. v. Davis [C. C. A.] 123 Fed. 396. Failure to designate the amount claimed on each of several properties does not invalidate the lien, but merely postpones it as to those which comply with the statute in that respect. Seattle Lumber Co. v. Sweeney [Wash.] 74 Pac. 1001; Phillips v. Salmon River M. & D. Co. [Idaho] 72 Pac. 886.

35. Where material is furnished for separate buildings, the liens thereon are separate, though they are erected on one parcel of land and the contracts are evidenced by a single writing; but a double house, divided by a solid partition wall, does not call for separate liens. Halsted & Harmount Co. v. Arick [Conn.] 56 Atl. 628. Where several buildings are built from material furnished by one person, he is entitled to separate liens on them, though he cannot positively state what material went into each. Similar dwelling houses. Halsted & Harmount Co. v. Arick [Conn.] 56 Atl. 628. Dwelling house and outbuildings. White v. Livingston, 174 N. Y. 538. A contract to do the painting and glazing on a certain number of houses for a certain price per house in which separate payments on estimate are provided for, and it is specified that payments of the amounts due on particular houses shall release the lien as to such houses, is divisible and a lien may be claimed on any one or more houses unpaid for (Nolt v. Crow, 22 Pa. Super. Ct. 113), and failure to specify the amount due on each building will invalidate the lien (Mertens v. Cassini Mosaic & Tile Co., 53 W. Va. 192).

36. A subcontractor furnishing materials for several buildings under an entire contract with a contractor bound by separate contracts is not entitled to a lien on all the buildings for a lump sum, notwithstanding the statute provides that every contractor is the owner's agent. Beach v. Stamper [Or.] 74 Pac. 208. In such case a separate lien for each house is proper. Smith v. Wilcox [Or.] 74 Pac. 708. Where a subcontractor building two houses applies payments made him by the contractor equitably between them, the separate owners of the houses cannot complain that it is impossible to determine what has been paid on each. Id.

37. The attorney of a claimant has authority to direct service. Cady v. Fair Plain Literary Ass'n [Mich.] 97 N. W. 680. Executors and not trustees to whom property has been devised are proper parties on whom to serve the notice. Bruner Granitoid Co. v. Klein, 100 Mo. App. 289.

38. Where it is possible by the exercise of reasonable diligence to secure personal service, substituted notice by posting on the door of the house will not suffice. Hill v. Kaufman [Md.] 56 Atl. 783.

39. Dusick v. Meiselbach [Wis.] 95 N. W. 144.

40. Lentz v. Elmerman [Wis.] 97 N. W. 181.

41. Where the evidence fails to show that the statement was filed in the proper office within the time limited by the statute, the action fails. Tidball v. Holyoke [Neb.] 97 N. W. 1019. Where the property on which a lien is claimed is located in two towns, failure to file the account in both of them waives the lien as to that part of the property lying in the town in which the account is not filed. Poole v. Fellows, 25 R. I. 64. Delivery to the clerk is a sufficient filing, though the fee is not paid where the clerk though not marking the paper filed, makes no demand

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an owner where he is the purchaser of the materials for which the lien is sought, and none need be recorded.[42]

In some states, the statement cannot be filed until after actual completion of the building,[43] and it is generally provided that contractors cannot file their liens until a certain period after the time for those claiming under them to make their claims has passed.[44]

A certain period after completion or abandonment of the work is always provided within which liens must be filed or lost,[45] and whether the last of the work or materials were furnished on the date stated[46] and whether the last work done on the building was done in good faith to complete it under the contract or merely to preserve the lien are questions of fact.[47] Any work in good faith done to complete the building will suffice to preserve the lien,[48] but not work done long after completion.[49] Materials furnished long after the actual completion of the work will not be effective to cut off another lien which has in the interim been foreclosed,[50] or abandonment by the contractor will not,[51] and after an account is past due, an agreement to extend the time of payment a "reasonable time" will not extend the time for filing the lien.[52]

Where work is done from time to time on an entire contract, a lien filed in time after the last of the work is performed will cover it all, notwithstanding successive liens were filed from time to time as the work progressed and allowed to lapse.[53]

§ 6. *Amount of lien and priority thereof.*—Where a building association agrees to pay mechanic's lienors a balance due on a building constructed on premises mortgaged to the association, they are entitled to interest from the time of completion, less dues and premiums due the loan company.[54]

Liens filed against the same building or work are generally regarded as

for his fee as a condition of filing it. Lang v. Menasha Paper Co. [Wis.] 96 N. W. 393.

42. Poole v. Fellows, 25 R. I. 64.

43. Jones v. Kruse, 138 Cal. 613, 72 Pac. 146; Tabor-Pierce Lumber Co. v. International Trust Co. [Colo. App.] 75 Pac. 150. But a cessation of work for 30 days is equivalent to a completion for that purpose. Jones v. Kruse, 138 Cal. 613, 72 Pac. 146. Where work is done under an entire contract, no lien can be filed before completion of the work, though the contractor goes on and finishes. General Fire Extinguisher Co. v. Chaplin, 183 Mass. 375. A claimant under the mining lien law of Idaho may file his lien, though he is still performing his duties and the statute provides that liens must be filed within 60 days after cessation of work [Laws 1893, p. 51, § 7]. Idaho Min. & Mill. Co. v. Davis [C. C. A.] 123 Fed. 396.

44. A lien statement filed by the principal contractor prior to the expiration of the time within which the owner may require of the contractor the statement of the amounts due laborers and materialmen is ineffectual, though there are in fact no claims outstanding against the contractor. Clark v. Anderson, 88 Minn. 200. Only a contractor who made his contract with the owner or reputed owner of the building, and one who has furnished both labor and materials, are entitled to the thirty days after ninety days after the completion of the work to file their liens; one who has furnished labor only must file within 90 days. Carswell v. Patzowski [Del.] 55 Atl. 1013.

45. A lien filed on August 4 is within 90 days after furnishing the last of materials May 6. Seattle Lumber Co. v. Sweeney [Wash.] 74 Pac. 1001.

46. Lamb Lumber Co. v. Benson [Minn.] 97 N. W. 143.

47. Bankers' Bldg. & Loan Ass'n v. Williams [Neb.] 96 N. W. 655. Oiling floor held not to preserve lien. Steuerwald v. Gill, 85 App. Div. [N. Y.] 605.

48. Joralman v. McPhee [Colo.] 71 Pac. 419. Material furnished for a division fence between two houses will not preserve the lien on the houses and where such an item is the only one furnished within the statutory period prior to the filing of the statement, the lien fails. Miller v. Heath, 22 Pa. Super. Ct. 313.

49. After the owner has accepted materials as complete from the contractor, he cannot by ordering more from the subcontractor revive the subcontractor's right to file a lien, it having been lost by lapse of time. Sulzer-Vogt Mach. Co. v. Rushville Water Co., 160 Ind. 202.

50. Cahoon v. Fortune Min. & Mill. Co. [Utah] 72 Pac. 437.

51. Naughton & D. Slate Co. v. Nicholson, 97 Mo. App. 332.

52. Lazzari v. Havens, 39 Misc. [N. Y.] 255.

53. Clarke v. Heylman, 80 App. Div. [N. Y.] 572.

54. McMullen v. Griggs, 23 Ohio Circ. R. 417.

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simultaneous, regardless of the date of filing,[55] and are given preference over all other unsecured creditors of the owner and their representatives,[56] as well as subsequent purchasers,[57] and incumbrancers of the property.[58]

In those states where a lien is allowed on the building separate from the land where the person contracting as owner has not complete title to the land, the lien is paramount as to the building over a prior trust deed on the land.[59]

As determining priority between mechanics' liens and other incumbrances, the lien is regarded as attaching when the first work is done or materials delivered on the land,[60] and not before, though the contract was made before the incumbrance was recorded.[61]

A judgment on a mechanic's lien is entitled to the priority the lien itself had, but as against incumbrances earlier in date, the matters that give it priority must be affirmatively shown, since the judgment implies nothing beyond the indebtedness on which it is based.[62]

The rule obtaining where leases and contracts of sale are made in contemplation of improvements[63] does not apply to mortgages given under like circumstances, and the lien of an ordinary mortgage is not subordinate to mechanics' liens because the money which it was given to secure was loaned for the purpose of improving the mortgaged premises and under an express contract that it be so used.[64] On the contrary, where by its terms the amount secured by a mortgage was to be used for the improvement of the property, it is a prior lien on the building in so far as the money was actually applied to the improvement;[65] but

55. Where liens are claimed under both provisions of the Michigan statutes authorizing liens on the property of foreign mining corporations, such liens are simultaneous, and those claimed under either law will be given priority over those claimed under the other. Bullock Mfg. Co. v. Sunday Lake Iron Min. Co. [Mich.] 93 N. W. 611.

56. A claim entitled to a mechanic's lien should be given preference by a receiver. Doty v. Auditorium Pier Co. [N. J. Eq.] 56 Atl. 720. A trustee in bankruptcy takes the property subject to valid existing mechanics' liens upon it. South End Imp. Co. v. Harden [N. J. Eq.] 52 Atl. 1127.

57. A purchaser with notice takes subject to the lien. Eggert v. Snoke [Iowa] 98 N. W. 372.

58. A judgment on a mechanic's lien ranks as a judgment from the date of its entry; and as against incumbrances of a later date, it is on the face of the record a prior lien on the property bound by it. Nolt v. Crow, 22 Pa. Super. Ct. 113. Where a lessee begins the repair of premises in his possession and during progress of the work purchases and pays for them by borrowing money from a third person, the deed, mortgage and payment all constituting one transaction, the lien of the mortgage is not subordinate to that of the mechanics doing the work on the premises. Boggs v. McEwen [Neb.] 96 N. W. 666.

59. Holland v. Cunliff, 96 Mo. App. 67. Mills' Ann. St. §§ 2884, 2885. Joralman v. McPhee [Colo.] 71 Pac. 419; Hudson v. Barham [Va.] 43 S. E. 189.

60. Holland v. Cunliff, 96 Mo. App. 67. The lien attaches when the work begins, and becomes operative when the notice is given. Hawkins v. Boyden, 25 R. I. 181. The bringing on the ground of machines intended to become a part of the building is a commencement of the building. Campbell v. John W. Taylor Mfg. Co., 64 N. J. Eq. 344. Where the contract is made and some of the materials delivered before the mortgage is recorded, the lien is superior. Evidence held to show priority of lien. Cahn v. Romandorf [Neb.] 93 N. W. 411. A mortgagee who knows the building is in progress when he makes his loan and that more work and materials will be required to finish it is not a creditor without notice. Bond Lumber Co. v. Masland [Fla.] 34 So. 254.

61. Where materials were contracted for before but not delivered until after the recording of a mortgage, the mortgage is superior. Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680. A contract to furnish lumber for one year in contemplation of improvements not definitely decided on will not give a lien prior to that of a mortgage executed after its making, but before the improvements are begun. Martin v. Tex. Bricquette & Coal Co. [Tex. Civ. App.] 77 S. W. 651. An agreement to continue in force a prior contract stipulated to be effective for one year, and to continue to furnish materials to complete the purpose for which they were needed is a new contract and is not entitled to the priority over a mortgage that the original one had. Martin v. Tex. Bricquette & Coal Co. [Tex. Civ. App.] 77 S. W. 651.

62. Nolt v. Crow, 22 Pa. Super. Ct. 113.

63. Ante, § 4 E.

64. Chaffee v. Sehestedt [Neb.] 96 N. W. 161. Testimony as to the purpose of a trust deed held a mere conclusion or opinion of witness. Martin v. Tex. Bricquette & Coal Co. [Tex. Civ. App.] 77 S. W. 651.

65. Joralman v. McPhee [Colo.] 71 Pac. 419. The lien of a mortgage for moneys advanced and actually used for the erection of the building is superior to a mechanic's lien

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where a part of the money raised ostensibly to improve the property is diverted by the owner and borrower from its intended use, the mortgagee is entitled to priority only as to the amount actually used on the property.[66]

§ 7. *Assignment or transfer of lien.*—Formerly the lien was generally regarded as a mere personal privilege and unassignable. The modern doctrine, however, is that it is an attribute of the debt and following the rule that the assignment of a debt carries with it the security belonging to it, the right to perfect and enforce the lien generally follows the ownership of the debt on which it is founded. Such is the express provision of the statute of many states.[67] The effect therefore of an unconditional assignment of the claim is to divest the assignor of his right to a lien,[68] and of all control over it,[69] and vest it in the assignee;[70] but neither a mere execution and delivery by the claimant of an order on the debtor,[71] or the claimant's attorney,[72] nor an assignment of the contract or lien as collateral security, will have such effect,[73] especially where the assignee is a party to the proceeding and disclaims all rights.[74]

A bank which is permitted to complete work under a subcontract assigned to it as collateral security becomes a subcontractor and is entitled to a lien.[75]

Where liens are assigned pending foreclosure, and the assignees intervene and are recognized as the parties in interest, they are bound by any point decided in the case that would be conclusive as to their assignor.[76]

§ 8. *Waiver, loss, or forfeiture of lien or right to acquire it.*—The lien is waived by any provision in the original contract incompatible with its existence, such as an agreement to take something besides money in payment,[77] or agreeing in an entire contract for a lump sum to furnish lienable and nonlienable articles.[78] It is also waived by a subsequent acceptance of security either on the property, or that of individuals not parties to the transaction;[79] but taking the note of the owner who incurred the debt is not necessarily a waiver,[80] nor is the acceptance by a subcontractor of an order on the owner for the amount due him.[81]

filed subsequently to the recording of the mortgage, whether the mortgage was executed to secure future advances, or money already advanced, and while the building was in course of erection. Young v. Haight [N. J. Law] 55 Atl. 100.

66. Chauncey v. Dyke Bros. [C. C. A.] 119 Fed. 1.

67. It is not necessary that the person entitled to a lien first file a statement of his claim to make it assignable. McAlister v. Des Rochers [Mich.] 93 N. W. 887.

68. Bankers' Bldg. & Loan Ass'n v. Williams [Neb.] 96 N. W. 655.

69. Bankruptcy of the contractor after assignment of his contract and rights thereunder to pay laborers and materialmen does not affect the assignee's right to a lien, and settlement by the owner with the trustee in bankruptcy is no defense. Kudner v. Bath [Mich.] 97 N. W. 685.

70. The assignee of both the contractor and such of his laborers as have filed liens may recover on the contractor's claim after the time for filing other liens has passed and discharge of the liens already filed is not a condition precedent. Cady v. Fair Plain Literary Ass'n [Mich.] 97 N. W. 680. A trustee in bankruptcy may file and enforce a lien belonging to the bankrupt. Davis v. Fidelity & Deposit Co., 75 App. Div. [N. Y.] 518; Held v. Burke, 83 App. Div. [N. Y.] 509.

71. No acceptance by debtor. Omaha Oil & Paint Co. v. Greater America Exposition Co. [Neb.] 93 N. W. 963.

72. Where plaintiff gave one of his materialmen an order on his attorney for the amount of his claim to be paid out of the plaintiff's judgment when collected is not such an assignment as will defeat plaintiff's right to recover as to the amount of the order. Holland v. Cunliff, 96 Mo. App. 67.

73. Hawkins v. Mapes-Reeves Const. Co., 82 App. Div. [N. Y.] 72.

74. Shapiro v. Schultz [Ind. App.] 68 N. E. 184.

75. Security Nat. Bank v. St. Croix Power Co., 117 Wis. 211.

76. Shryock v. Hensel, 95 Md. 614.

77. Notes and mortgage. Vanderpoel v. Knight, 102 Ill. App. 596. An agreement to take a note and mortgage on other lands as additional security does not waive the right to a lien. Halsted v. Arick [Conn.] 56 Atl. 628. An agreement to take bonds and stock will waive the lien only so far as payment is actually made under the contract. Baumhoff v. St. Louis & K. R. Co., 171 Mo. 120.

78. Rinzel v. Stumpf, 116 Wis. 287; McDowell v. Rockwood, 182 Mass. 150.

79. Taking trust deed on building by subcontractors waives their lien. Kendall v. Fader, 199 Ill. 294.

80. Cady Lumber Co. v. Greater America Exposition Co. [Neb.] 93 N. W. 961; Kendall v. Fader, 199 Ill. 294.

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The claimant may release his lien in so far as his own interests are concerned;[82] but no subsequent agreement between the owner and contractor will be given validity to prejudice the rights of subcontractors, laborers and materialmen against the amounts earned under the contract.[83]

The surrender of a lease prior to its expiration and the acceptance thereof by the lessor will not defeat liens on the leasehold estate.[84]

Where the holder of a lien purchases the property on which there is another lien, equity will not treat his lien as merged in his title so as to give the other lien priority.[85]

§ 9. *Discharge and satisfaction.*—Where, under the statute, the lienor is notified to bring suit to enforce his lien on pain of its vacation, a good faith effort to obtain service on the owner within the time limited is sufficient.[86] Money deposited by the owner at the request of the contractor, out of a payment due him, with the county clerk to discharge subcontractors' liens, on failure of those liens, becomes the property of the contractor and is not subject to the claims of liens subsequently filed.[87] A discharge of the owner in bankruptcy will not defeat the lien.[88]

§ 10. *Remedies and procedure to enforce lien. A. By scire facias, attachment, and other statutory legal proceedings.*—Where the contract provides that the building must be delivered to the owner "with full release of liens" before the final payment is due, the contractor cannot maintain an action on a lien claim brought before the release was delivered, though releases are tendered in court at the time of trial.[89]

In Florida, it is permissible in a common law action to join with a special count to enforce a lien, common counts for work done and materials furnished, and upon account stated.[90]

In Delaware, one who purchased the property after the contract was made is not a necessary party;[91] but in New Jersey, the rights of the builder and the several owners and mortgagees are to be settled in a single suit, by the judgment in which the priorities of the liens of the plaintiff and each of the defendants are to be settled.[92]

Service of the scire facias on the defendant without service on the occupant of the building or posting it thereon as provided by the statute is insufficient.[93]

A recital in a declaration against an owner, after demand and stop notice, that plaintiff has obtained judgment against the contractor for the amount

81. Lentz v. Eimermann [Wis.] 97 N. W. 181.

82. A subcontractor who has released his lien cannot maintain an action against the sheriff for wrongful distribution of the proceeds of a sale of the property made in reliance on the release. Dowd v. Crow, 205 Pa. 214. A subcontractor releasing his lien to enable the contractor to raise money to carry on the work cannot as against the incumbrancer allege that he signed under an agreement that the release should not be effective unless all claimants signed it, where the contractor in procuring the release acted for himself and not as the agent of the incumbrancer. Dowd v. Crow, 205 Pa. 214.

83. White v. Livingston, 174 N. Y. 538. The surrender of a building contract after commencement of the work and the substitution of another stipulating against the filing of liens by either the contractor or any one claiming under him cannot prejudice the rights of one who furnishes labor or materials under the original contract. Lee v. Williams, 22 Pa. Super. Ct. 564, 571.

84. McAnally v. Glidden, 30 Ind. App. 22.

85. Bullock Mfg. Co. v. Sunday Lake Iron Min. Co. [Mich.] 93 N. W. 611.

86. William H. Jackson Co. v. Haven, 87 App. Div. [N. Y.] 236.

87. White v. Livingston, 174 N. Y. 568.

88. Holland v. Cunliff, 96 Mo. App. 67.

89. Titus v. Gunn [N. J. Err. & App.] 55 Atl. 735.

90. Rev. St. 1892, §§ 1004, 1744, as amended by c. 4582, p. 122, approved June 2, 1897. West v. Grainger [Fla.] 35 So. 91.

91. Carswell v. Patzowski [Del.] 55 Atl. 342.

92. Culver v. Lieberman [N. J. Err. & App.] 55 Atl. 812.

93. Rev. Code, p. 820. Carswell v. Patzowski, 3 Pen. [Del.] 593.

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claimed in his notice, is a mere recital of evidence and is surplusage and will not defeat a plea by the owner that the claimant claimed more than was actually due him.[94]

A proceeding to secure an attachment to enforce a mechanic's lien cannot be commenced by affidavit. An order of court is necessary to its issuance.[95]

A judgment by the claimant against the contractor is not conclusive upon the owner.[96]

To give a judgment on a mechanic's lien priority over an incumbrance created prior to the entry of the judgment, proof must be made that the building to which it relates was commenced before the incumbrance was created; that work was done or materials furnished by the claimant for or about the construction of the building, for which the law gives a lien, and that the claim therefor was filed as a lien within six months thereafter.[97]

The judgment in scire facias on a mechanic's lien is as invulnerable to collateral attack as any other.[98]

Where the contractor, though a nonresident, appears generally, a personal judgment against him is proper, though the lien fails for insufficient proceedings against the land.[99]

(§ 10) *B. By foreclosure as in equity. In general.*—With a few exceptions, the remedy generally provided for the enforcement of a mechanic's lien is by suit in equity,[1] which is regarded as distinct from and unaffected by any right the claimant may have to sue at law for the debt.[2]

Where one claiming under the contractor sues, a personal judgment against the contractor is not essential,[3] and after the contractor's laborers have enforced their claims by foreclosure, the contractor is entitled to enforce his claim for the balance of the contract price.[4]

Jurisdiction.—The court of general original jurisdiction of the county in which the land is situate has jurisdiction to enforce the lien,[5] and the rights of all claimants serving stop notices on the owner before the filing of a petition in bankruptcy against the contractor are enforceable in the state court.[6]

Limitations.—Unless the action is brought within the statutory period, the lien is lost.[7]

Abatement.—The cause of action survives the death of the owner of the property,[8] and may be continued in the name of the lienor, though he assigns his claim after bringing suit.[9]

94. Taylor v. Wahl [N. J. Law] 55 Atl. 40.
95. De Soto Lumber Co. v. Loeb [Tenn.] 75 S. W. 1043.
96. Taylor v. Wahl [N. J. Law] 55 Atl. 40.
97. Nolt v. Crow, 22 Pa. Super. Ct. 113.
98. Nolt v. Crow, 22 Pa. Super. Ct. 113.
99. Smith v. Colloty [N. J. Err. & App.] 55 Atl. 805.
1. No bill lies to enforce the common law lien on personal property. Burrough v. Ely [W. Va.] 46 S. E. 371.
2. A claimant may maintain separate actions for the debt and to enforce his lien. Power v. Onward Const. Co., 39 Misc. [N. Y.] 707. Plaintiff is not barred from enforcing his lien by the fact that the funds due him are in the hands of a trust company and he has an action against it therefor, where the trust company has refused to pay him at the owner's request. Baumhoff v. St. Louis & K. R. Co., 171 Mo. 120.
3. Holland v. Cunliff, 96 Mo. App. 67.
4. Boucher v. Powers [Mont.] 74 Pac. 942.
5. District court. Noyes v. Smith [Tex. Civ. App.] 77 S. W. 649.
6. South End Imp. Co. v. Harden [N. J. Eq.] 52 Atl. 1127.
7. Terwilliger v. Wheeler, 81 App. Div. [N. Y.] 460. The provision of the Indiana statute dispensing with the necessity of notice, where the debtor is in failing circumstances, does not operate to extend the time for bringing suit to enforce the lien in such cases [Burns' Rev. St. 1894, §§ 7255, 7257, 7259]. Smith v. Tate, 30 Ind. App. 367. Where an action to foreclose is brought within the statutory period and prosecuted to a final judgment not on the merits, a new action may be brought any time within a year from that final termination. Conolly v. Hyams, 176 N. Y. 403.
8. Perry v. Levenson, 82 App. Div. [N. Y.] 94.
9. Hawkins v. Mapes-Reeves Const. Co., 82 App. Div. [N. Y.] 72; Perry v. Levenson, 82 App. Div. [N. Y.] 94.

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Parties.—Neither a mortgagee,[10] an owner after bankruptcy,[11] nor a general creditor of the owner, is a necessary party to the foreclosure suit;[12] but in a suit by a materialman, the contractor is,[13] though failure to make him a party is regarded in Missouri as a mere irregularity.[14]

Bill, complaint or petition.—The bill must show a compliance with all the statutory requisites to the fixing of the lien,[15] such as the filing of a proper statement[16] within the time limited by the statute;[17] must show that suit has been timely brought,[18] that payment of the amount claimed therein is presently due;[19] and must describe the land with sufficient accuracy to permit its location.[20] Patent clerical errors, however, are immaterial,[21] and such defects are curable by amendment, as are curable in other equitable actions.[22] A complaint that states facts sufficient to justify a personal judgment against the owner is not demurrable,[23] nor is it subject to attack for the first time on appeal, though personal judgment was denied below and foreclosure decreed.[24]

A complaint by a trustee in bankruptcy alleging that he has filed a lien for material furnished by the bankrupts and that they also filed a lien and assigned it to him states but one cause of action.[25]

A waiver of the right to a lien on such of the property as is situated in one town, the balance being in another, is not ground for a demurrer to the petition to enforce the lien.[26]

A subcontractor's petition is good, though it prays judgment against the owner,[27] and in those states in which the liability of the owner is measured by the original contract, the subcontractor's complaint must allege the principal contract,[28] and show that something was due the contractor at the time of filing the lien.[29] Such averments are not necessary in those states where the liability of the owner is not so limited.[30]

10. But not being a party, he is not bound by the decree and may attack it by injunction. Fleming v. Prudential Ins. Co. [Colo. App.] 73 Pac. 752.

11. After bankruptcy, service on the trustee is sufficient without service on the bankrupt owner. Hawkins v. Boyden, 25 R. I. 181.

12. One having a mere money demand against defendant cannot intervene though plaintiffs consent. Cook v. Gallatin R. Co. [Mont.] 72 Pac. 678. Persons furnishing gas fixtures for the building under a contract of conditional sale are not necessary parties to a suit to foreclose a lien. Baldinger v. Levine, 83 App. Div. [N. Y.] 130.

13. Clayton v. Farrar Lumber Co. [Ga.] 45 S. E. 723.

14. Holland v. Cunliff, 96 Mo. App. 67.

15. Such allegations are jurisdictional and when denied must be proved as laid. McGlauflin v. Wormser [Mont.] 72 Pac. 428.

16. A petition not averring that the statement was subscribed and sworn to is bad and is not cured by filing a copy of the statement therewith. Newport & D. Lumber Co. v. Lichtenfeldt, 24 Ky. L. R. 1969, 72 S. W. 778.

17. Seattle Lumber Co. v. Sweeney [Wash.] 74 Pac. 1001.

18. A bill failing to allege that the period of limitations has not passed is demurrable. Sav. Bank of Richmond v. Powhatan Clay Mfg. Co. [Va.] 46 S. E. 294.

19. The complaint must state that the architect's certificate necessary to final payment has been given or demanded or excuse the want of such averment. McGlauflin v. Wormser [Mont.] 72 Pac. 428.

20. Security Nat. Bank v. St. Croix Power Co., 117 Wis. 211. Patent clerical errors in the description of the land will not vitiate the petition. Sawyer & A. Lumber Co. v. Clark, 172 Mo. 588.

21. Sawyer & A. Lumber Co. v. Clark, 172 Mo. 588. Clerical error in stating date of filing notice held immaterial. Seattle Lumber Co. v. Sweeney [Wash.] 74 Pac. 1001.

22. Hawkins v. Boyden, 25 R. I. 181. The petition may be amended at the trial to conform to the evidence, where no prejudice will follow. Baltis v. Friend, 90 Mo. App. 408. Where the contract provides for alterations, an amendment of the complaint at the trial to show modifications is properly permitted. Poerschke v. Horowitz, 84 App. Div. [N. Y.] 443.

23. Security Nat. Bank v. St. Croix Power Co., 117 Wis. 211.

24. Lengelsen v. McGregor [Ind.] 67 N. E. 524.

25. Davis v. Fidelity & Deposit Co., 75 App. Div. [N. Y.] 518.

26. Poole v. Fellows, 25 R. I. 64.

27. Kasper v. St. Louis Terminal Ry. Co. [Mo. App.] 74 S. W. 145.

28. Clapper v. Strong, 41 Misc. [N. Y.] 184.

29. Hathorne v. Panama Park Co. [Fla.] 32 So. 812.

30. Cady Lumber Co. v. Conkling [Neb.] 98 N. W. 42.

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Plea or answer.—Averments in the answer without relevancy to the issues are properly stricken out.[31]

The lienor not being entitled to a personal judgment, in South Carolina, there can be no counterclaim by the owner against him.[32]

Judgment.—In most states, plaintiff is entitled to a personal judgment against the person liable for the debt,[33] though he fails to establish his lien,[34] and by express provision of the code in New York, where plaintiff fails to establish a valid lien, he is entitled to a personal judgment against his debtor, if proved,[35] though the statute, it is said, does not extend to cases where there never was any right to a valid lien, since to give it effect in these cases would deprive the defendant of his constitutional right to a jury trial on a mere unsupported allegation.[36] Subcontractors not filing liens, however, are not entitled to personal judgments against the contractor,[37] and where plaintiff declares as a subcontractor, but fails to allege a contract between his principal and the owner, he cannot, on it appearing that nothing was due the contractor from the owner, have a personal judgment against the owner on the theory of a direct contract with him.[38] Whether or not a personal judgment may be had on failure of the lien, the right to personal judgment for a deficiency remaining after enforcement against the property is almost universal,[39] except in South Carolina, in which state no personal judgment even for a deficiency may be rendered.[40] Only parties and privies are bound by the judgment,[41] and where mortgagees, necessary parties to the suit, have not been brought in, they may, after the time limited for bringing suit expires, enjoin the sale under the decree foreclosing the lien.[42] In those states in which a lien on buildings separate from the land are allowed, the judgment may be enforced in a proper case against the building as personal property.[43]

Appeal.—An appeal lies from an order dismissing the action in Kentucky regardless of the amount in controversy.[44] A decree in favor of a materialman whose right is based on notice to the owner and not on a lien on the building is review-

31. Ontario-Colorado Gold Min. Co. v. MacKenzie [Colo. App.] 74 Pac. 791.

32. Tenny v. Anderson Water, L. & P. Co. [S. C.] 45 S. E. 111.

33. McHale v. Maloney [Neb.] 93 N. W. 677.

34. Spalding v. Burke [Wash.] 74 Pac. 829.

35. Code Civ. Proc. § 3412; Terwilliger v. Wheeler, 81 App. Div. [N. Y.] 460; Hawkins v. Mapes-Reeves Const. Co., 82 App. Div. [N. Y.] 72; Steuerwald v. Gill, 85 App. Div. [N. Y.] 605; Clapper v. Strong, 41 Misc. [N. Y.] 184; Villaume v. Kirchner, 85 N. Y. Supp. 377.

36. Mowbray v. Levy, 85 App. Div. [N. Y.] 68; Deane Steam Pump Co. v. Clark, 84 App. Div. [N. Y.] 450; Id., 84 N. Y. Supp. 851; Castelli v. Trahan, 77 App. Div. [N. Y.] 472.

37. Nussberger v. Wasserman, 40 Misc. [N. Y.] 120.

38. Kane v. Hutkoff, 81 App. Div. [N. Y.] 105.

39. A general execution cannot issue on the judgment until the property covered by the lien has been exhausted. Marks v. Pence, 31 Wash. 426, 71 Pac. 1096. Where a decree has been passed adjudging claimant entitled to a lien, ordering a sale of the property, the payment of prior liens and the residue if any to claimant, and awarding him an execution for any deficiency, a subsequent decree confirming a sale for less than the amount of prior liens and making no mention of complainant is not a finality so as to bar his right to execution under the prior decree. McCarthy v. Holtman, 19 App. D. C. 150.

40. Tenny v. Anderson Water, L. & P. Co. [S. C.] 45 S. E. 111.

41. Holland v. Cunliff, 96 Mo. App. 67.

42. Martin v. Berry, 159 Ind. 566.

43. The purchaser of a building on which a lien has been decreed separate from the land is entitled to maintain replevin for it. Shull v. Best [Neb.] 93 N. W. 753. Where one who furnishes material to one merely in possession of land obtains a lien on the building separate from the land on the theory that it is personalty only, a purchaser at the foreclosure sale cannot be defeated of his right to remove the building by the subsequent purchase of the land by the original possessor. Id. Where it is decreed that the lien of the mechanic is superior as to the building and that of a mortgagee is superior as to the land, the court cannot adjudge the amount of the lien on the building with the right of the landowner to pay it and save the building. The most the decree can do is to adjudge title in each party as to his particular part of the property with right to the owner of the building to remove it within a reasonable time. Wilson v. Lubke, 176 Mo. 210.

44. Fowler v. Pompelly [Ky.] 76 S. W. 173.

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able by appeal and not by writ of review.[45] Where a subcontractor sues to enforce a lien, error will not lie to review a ruling sustaining a demurrer in behalf of the owner, the cause being still pending as to the contractor and others.[46] On appeal from a judgment fixing the priority of liens, the appellant can be given priority over those only whom he has made parties to the appeal.[47]

Costs.—Where plaintiff has judgment but the only issue litigated is between the owner and a party other than plaintiff, as to which the owner is successful, the owner is properly awarded his costs against such party.[48]

Where defendant tenders the amount he admits to be due and brings it into court, on judgment going as he claimed, his costs are properly ordered paid out of the fund in court.[49]

The matter of costs in Illinois is not governed by the chancery rule, but is controlled entirely by the statute in force at the time the contract was made,[50] and a taxing of costs and fees without evidence at ten per cent of the recovery, being the maximum allowed by the statute, is at most only an irregularity.[51]

The allowance of attorney's fees without proof of their reasonableness is error in Florida,[52] and they are not allowable at all in Colorado[53] or Kansas, the statute providing therefor being regarded in the latter state as a denial of the equal protection of the laws,[54] though it is otherwise in Idaho.[55]

In New York, the claimant is entitled to bring suit for foreclosure in the supreme court without subjecting himself to costs, however small his claim.[56]

(§ 10) *C. By intervention or cross proceedings.*—The bankruptcy court has jurisdiction to determine the priority of liens on the fund arising from the sale of the bankrupt's property, though the trustee has no interest in that question.[57] A defendant lien claimant is entitled, in Wisconsin, to a judgment establishing his lien without service of an answer demanding such relief on the owner, but is not entitled to a personal judgment against him without such service.[58]

(§ 10) *D. Interpleader.*—The owner of a building bringing interpleader to determine the distribution of the sum due the contractor is not entitled to costs where the sum found against him is considerably greater than he admitted.[59]

§ 11. *Indemnification against liens.*—A statute requiring owners to take bonds from the contractors conditioned for the payment of laborers and materialmen and inuring to such claimants is void,[60] and a bond apparently given thereunder will not be upheld as a common law obligation, though it does not recite the statute.[61]

A surety on the bond of the contractor given to secure faithful performance of the contract cannot enforce a lien for materials against the building.[62]

The owner may proceed against the surety in Missouri without exhausting his

45. Weldon v. Superior Court, 138 Cal. 427, 71 Pac. 502.
46. Pittsburgh Plate Glass Co. v. Peper, 96 Mo. App. 595.
47. Hall v. New York, 176 N. Y. 293.
48. Harvey v. Brewer, 82 App. Div. [N. Y.] 589.
49. Kruegel v. Kitchen [Wash.] 74 Pac. 373.
50. Kendall v. Fader, 199 Ill. 294; Kalina v. Steinmeyer, 103 Ill. App. 502.
51. Kalina v. Steinmeyer, 103 Ill. App. 502.
52. Gundy v. Drew [Fla.] 34 So. 305.
53. Sickman v. Wollett [Colo.] 71 Pac. 1107.
54. Kan. Gen. St. 1901, § 5125. Atkinson v. Woodmansee [Kan.] 74 Pac. 640.
55. Sess. Laws 1899, p. 150, c. 1. Thompson v. Wise Boy Min. & Mill. Co. [Idaho] 74 Pac. 958.
56. Faville v. Hadcock, 39 Misc. [N. Y.] 397.
57. Chauncey v. Dyke Bros. [C. C. A.] 119 Fed. 1.
58. Dusick v. Meiselbach [Wis.] 95 N. W. 144.
59. English v. Warren [N. J. Eq.] 54 Atl. 860.
60. Cal. Code Civ. Proc., § 1203. Snell v. Bradbury, 139 Cal. 379, 73 Pac. 150.
61. San Francisco Lumber Co. v. Bibb, 139 Cal. 192, 72 Pac. 964.
62. Closson v. Billman [Ind.] 69 N. E. 449.

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remedy against the contractor,[63] and where the surety defends suit on the lien, he cannot on subsequent suit by the owner on the bond make any defense as to the validity of the lien not availed of in the suit thereon.[64]

Where the bond is conditioned to pay the owner any sums he may have to pay to remove liens, it does not stand as security to the laborers and materialmen, and they are not entitled to maintain suit on it.[65]

The surety is liable to the owner for a judgment he has paid a materialman in excess of the contract price, though the materialman notified him of his claim while he still had enough of the contract price in his hands to pay it;[66] but where the contract makes no provision against liens, and the bond is conditioned only for performance thereof, the sureties are not liable for the owner's damages on account of liens.[67]

MEDICINE AND SURGERY.[68]

§ 1. Public Regulations of the Business of Treating Disease (887).
§ 2. Regulations Concerning Keeping and Sale of Drugs and Medicines (888).
§ 3. Employment and Contracts with Physicians, etc. (888).
§ 4. Malpractice and Other Torts (889).

§ 1. *Public regulations of the business of treating disease.*—The "practice of medicine" within the meaning of statutes which regulate it is construed strictly.[69] The state, in its exercise of police power, may make reasonable regulations for the practice of medicine,[70] dentistry,[71] or pharmacy.[72] But it is beyond the police

63, 64. Manny v. National Surety Co. [Mo. App.] 78 S. W. 69.

65. Green Bay Lumber Co. v. Independent School Dist. [Iowa] 97 N. W. 72.

66. Neith Lodge No. 21, I. O. O. F., v. Vordenbaumen [La.] 35 So. 524.

67. Boas v. Maloney, 138 Cal. 105, 70 Pac. 1004.

68. Includes physicians, druggists, dentists, etc.

69. Osteopathy is not the practice of medicine. State v. MacKnight, 131 N. C. 717, 59 L. R. A. 187; Hayden v. State, 81 Miss. 291. An osteopathic physician whose treatment consists in manipulating the muscles with his hands does not violate a statute forbidding an unlicensed person to apply "any drugs, medicine or other agency or application" [Gen. St. p. 2086, §§ 34, 36]. State v. Herring [N. J. Law] 56 Atl. 670. A "magnetic healer" is engaged in the practice of medicine within the meaning of a statute making it unlawful to practice medicine without a license [Burns' Rev. St. §§ 7318-7323 E]. Parks v. State, 159 Ind. 211. A Christian Scientist is not a "physician" within the meaning of an ordinance imposing a penalty upon any physician, who having treated a contagious disease, fails to report it to the board of health. Kan. City v. Baird, 92 Mo. App. 204. A dental surgeon is not within a statute giving cities power to regulate "itinerant doctors, physicians and surgeons." Cherokee v. Perkins, 118 Iowa, 405. Medicine as applied to human ailments means something which is administered, either internally or externally in the treatment of disease or the relief of sickness. Kan. City v. Baird, 92 Mo. App. 204.

70. Parks v. State, 159 Ind. 211; Reetz v. Michigan, 188 U. S. 505, 47 Law. Ed. 563; Meffert v. State Board of Medical Registration & Examination, 66 Kan. 710, 72 Pac. 247. Where a statute relieves from examination applicants who have diplomas from a medical college with a four-year course, it does not apply to an applicant if at the time of his residence at the college the course was three years. Moore v. Napier, 64 S. C. 564. Laws 1887, p. 225, providing for the issuing of certificates by the board of health to those who hold diplomas from medical institutions in good standing as determined by the board, gives the board power to declare that only those institutions with a four-year course are in good standing. Ill. State Board of Health v. People, 102 Ill. App. 614. Pub. Acts 1903, p. 209, No. 162, creating the State Board of Osteopathic Registration and Examination, provides for examination and registration of persons before practicing osteopathy, and excepts from examination those in practice "at the time of the passage of this act." Held, that the time when the act took effect and not the date of its approval must be taken with reference to the exception. Mills v. State Board of Osteopathic Registration & Examination [Mich.] 98 N. W. 19.

71. P. L. 1898, p. 118 held constitutional. State v. Chapman [N. J. Law] 55 Atl. 94. Acts 1897, p. 119. Morris v. State, 117 Ga. 1; State v. Board of Dental Examiners, 31 Wash. 492, 72 Pac. 110. A statute giving power to a state board to restrict the practice of dentistry to those holding diplomas from a dental school, college or university without respect to the ability of the applicant to pass an examination conducted by the board itself, is not unconstitutional as class legislation. Gothard v. People [Colo.] 74 Pac. 890.

72. Ky. Board of Pharmacy v. Cassidy, 25 Ky. L. R. 102, 74 S. W. 730. But they

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power of the legislature to provide that the "practice of medicine" shall mean the management for reward of any disease, physical or mental, real or imaginary, with or without drugs or surgical operation, so as to subject all persons engaged in these pursuits to the restrictions placed upon physicians and surgeons.[73] A statute giving a state board power to revoke the license of a physician for immoral conduct is valid. It is not ex post facto nor does it deprive him of property without due process of law.[74] A license to practice medicine illegally issued may be revoked without notice by the board which grants it.[75] The complaint for practicing medicine without a license need not state the particular acts or means by which the defendant practiced.[76]

§ 2. *Regulations concerning keeping and sale of drugs and medicines.*—A druggist is liable for damages from negligence in selling poison or other drugs,[77] but where he holds a license certificate, he is not responsible for the unlawful act of his clerk, committed without his knowledge or consent.[78] On a prosecution for carrying on a drug business without a license,[79] the burden of proving a license is on the defendant.[80] Where druggists are by statute allowed to sell liquor upon an application to be filled out by the applicant, the application must be completely filled out or the druggist will be guilty of violating the law.[81] A statute forbidding the sale of drugs, medicines, poisons, etc., except by registered pharmacists, is not violated by the sale of patent or proprietary medicines.[82]

§ 3. *Employment and contracts with physicians, etc.*—One who summons a physician for a member of his family is liable.[83] A physician or surgeon may recover the reasonable value of his services, but they must be rendered in good faith

can have no retroactive effect. State v. Board of Pharmacy, 110 La. 99.

73. Act 1903, p. 1074, c. 697. Defendant was a masseur. State v. Biggs, 133 N. C. 729.

74. Even though the immoral conduct was before the passage of the act. Meffert v. State Board of Medical Registration & Examination, 66 Kan. 710, 72 Pac. 247. A statute requiring registration of physicians and prohibiting those not registered from practicing is not invalid as an ex post facto law, even as to physicians practicing before its passage and whose registration is subsequently refused. Reetz v. Mich., 188 U. S. 505, 47 Law. Ed. 563.

75. Volp v. Saylor, 42 Or. 546, 71 Pac. 980.

76. White v. Lapeer Circuit Judge [Mich.] 94 N. W. 601. See, also, State v. Flanagan [R. I.] 55 Atl. 876. An indictment that the defendant is "engaged in the practice" of medicine without a license is sufficient under a statute providing that he shall not "enter upon the practice" of medicine without a license. Com. v. Campbell, 22 Pa. Super. Ct. 98. On a prosecution for practicing medicine without a license, evidence of a newspaper advertisement by one with the same name as the defendant's will not warrant a conviction. State v. Dunham, 31 Wash. 636, 72 Pac. 459.

77. Mistake in selling copperas for Glauber's salt. Kennedy v. Plank [Wis.] 97 N. W. 895. Where a statute forbids druggists to sell poison in quantities or doses except on a physician's prescription, it is contributory negligence as a matter of law for one to obtain morphine from a druggist's clerk, and in case of death from an overdose, there can be no recovery from the druggist on the ground of negligence. Fowler v. Randall, 99 Mo. App. 407. It is not contributory negligence for the plaintiff to use carbolic acid out of a bottle with a label marked "carbolic acid," if he sent the empty bottle with that label to the druggist and ordered arnica and it was sent back without a change of label. Peterson v. Westmann [Mo. App.] 77 S. W. 1015.

78. Clerk sold liquor to person without a physician's prescription. Cullinan v. Burkhard, 41 Misc. [N. Y.] 321.

79. Pen. Code, art. 455, prohibiting others than licensed pharmacists from selling medicine, does not apply to the sale of intoxicating liquor on prescription. Watson v. State [Tex. Cr. App.] 78 S. W. 504. The defendant is not entitled to a new trial on the ground of newly discovered evidence, if by due diligence such evidence could have been procured before the trial. State v. Morgan, 96 Mo. App. 343. In order to revoke a druggist's license on a conviction for a second offense under a statute providing for such revocation, the previous conviction must be charged in the indictment. State v. Watts [Mo. App.] 74 S. W. 376.

80. State v. Horner, 52 W. Va. 373.

81. State v. Harris [Iowa] 97 N. W. 1093.

82. Ky. Board of Pharmacy v. Cassidy, 25 Ky. L. R. 102, 74 S. W. 730.

83. An old lady living in a family for 9 years and performing services for which she receives the necessaries of life is a member of the family, and the head of the family who calls in the physician is liable unless he gives notice that he will not pay for such services. Grattop v. Rowheder [Neb.] 95 N. W. 679.

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and upon the defendant's express or implied promise to pay for them.[84] Whether or not the result is beneficial is immaterial.[85] Where a house physician calls in a surgeon to operate upon defendant, the latter is liable for the reasonable value of the surgeon's services, unless the hospital authorities agreed to furnish the services of a surgeon.[86] A physician cannot recover for his services without showing a compliance with the statutes regulating the practice of medicine,[87] nor if he has been guilty of malpractice;[88] but a note given for the services of a physician practicing without a license is valid in the hands of a bona fide purchaser.[89]

§ 4. *Malpractice and other torts.*—A physician or surgeon is bound to employ such reasonable skill and diligence as is ordinarily exercised in his profession and is liable to his patient only for his failure to use such skill and diligence.[90] In an action for malpractice, only such damages can be allowed as the deceased sustained in his lifetime,[91] and punitive damages are not usually allowed.[92] In an action for malpractice, it is in the discretion of the court to compel the plaintiff to exhibit her injury, when a physician is testifying as an expert for the defense.[93] Medical works, being hearsay, are inadmissible, except on cross-examination, when a specific work may be referred to to discredit a witness who has based his testimony upon it.[94] Where a railroad retains a certain sum monthly from the wages of its employes for a hospital fund, in order to render them medical attendance when necessary, and derives no profit from such fund, the only duty it owes to an employe is one of ordinary care to retain a competent physician, and if it uses such

84. McCoy v. Fletcher, 85 N. Y. Supp. 1022; Abram v. Krakower, 84 N. Y. Supp. 529. In an action for services rendered to one of defendant's employes, an instruction that the jury may presume that the vice-president and general manager of defendant corporation had authority to employ plaintiff to render such services is proper. Hasler v. Ozark Land & Lumber Co. [Mo. App.] 74 S. W. 465. Where a physician rendered initial treatment to defendant, the question of authorization for subsequent treatment is for the jury. Head v. American Bridge Co., 88 Minn. 81. In an action for services, if there is no conflict in the evidence of experts as to their value, the jury cannot disregard such evidence and decide on their own judgment. Ladd v. Witte, 116 Wis. 35. Where a physician rendered services to a railroad in caring for passengers injured in a wreck, the jury should consider his skill and experience, the character and amount of the services. McKnight v. Detroit & M. R. Co. [Mich.] 97 N. W. 772.

85. At least in cases of surgery. Ladd v. Witte, 116 Wis. 35.

86. Crumrine v. Austin [Mich.] 94 N. W. 1057.

87. Wooley v. Bell [Tex. Civ. App.] 76 S. W. 797. If the statute is prohibitory. Wickes-Nease v. Watts, 30 Tex. Civ. App. 515. Where defendant denied plaintiff's right to practice medicine, a certificate of the clerk of the superior court, showing his registration, is prima facie proof of his right to practice. Trentham v. Waldrop [Ga.] 45 S. E. 988. Laws 1893, c. 661, § 148, providing that a registration defective in form may be cured by filing a regent's certificate, relates back to legalize contracts of employment made with the physician during his defective registration. Ottaway v. Lowden, 172 N. Y. 129, 11 Ann. Cas. 412.

88. Brinkman v. Kursheedt, 84 N. Y. Supp. 575.

89. Citizens' State Bank v. Nore [Neb.] 93 N. W. 160; State v. Hall, 109 La. 290.

90. Dislocation of hip; mistake in diagnosis. English v. Free, 205 Pa. 624. In the following cases negligence was found: Compound fracture of tibia and fibula of leg above the ankle. Leisenring v. La Croix [Neb.] 94 N. W. 1009. Injury to right knee. Aspy v. Botkins, 160 Ind. 170. Negligently leaving a sponge in an incision made for the removal of an appendix. Gillette v. Tucker, 67 Ohio St. 106. Oblique fracture of left thigh bone. Morris v. Despain, 104 Ill. App. 452. Compound fracture of the leg. Baxter v. Campbell [S. D.] 97 N. W. 386. See, also, Thomas v. Dabblemont, 31 Ind. App. 146. In the following cases no negligence was found: Failure to use a tourniquet. De Long v. Delaney, 206 Pa. 226. Use of X-rays to locate a foreign substance. In such a case the rule requiring opinions of defendant's own school on the question of negligence does not apply. Henslin v. Wheaton [Minn.] 97 N. W. 882. Dislocated arm. Instruction that defendant was bound to use the skill exercised by ordinarily skillful and prudent physicians "in that vicinity" held erroneous. Burk v. Foster, 24 Ky. L. R. 791, 69 S. W. 1096, 59 L. R. A. 277. A charge that the defendants would not be liable if they performed the operation in a careful and skillful manner, believing that it was proper, is too broad. Such belief must be well founded and acquired in the exercise of due professional care and skill. Johnson v. Winston [Neb.] 94 N. W. 607.

91. Ramsdell v. Grady, 97 Me. 319.

92. Baxter v. Campbell [S. D.] 97 N. W. 386.

93. Aspy v. Botkins, 160 Ind. 170.

94. Bailey v. Kreutzmann [Cal.] 75 Pac. 104.

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care, it is not liable for the negligence of such physician in treating one of its employes.[95]

MERCANTILE AGENCIES.

A mercantile agency is liable in libel for the acts of its agents.[96] A statement to a mercantile agency may constitute fraud as to any subscriber to the agency, authorizing a rescission.[97] Whether a statement is so old that it is negligence for the subscriber to rely on it is a question of fact.[98] Failure three months after a statement showing solvency does not establish that the statement was fraudulent.[99] Receipt of an unfavorable agency report of a buyer's solvency does not authorize the seller to rescind an executory contract of sale.[1]

MILITARY AND NAVAL LAW.

§ 1. Organization, Maintenance and Enlistment.—Enlistment; Compensation for Services or Property; State Militia (890).
§ 2. Regulations and Discipline (892).
§ 3. Military Tribunals (892).
§ 4. Civil Status, Rights and Liabilities of the Military (892).
§ 5. Martial Law (892).
§ 6. Soldiers' Homes and Indigent Soldiers (892).

§ 1. *Organization, maintenance and enlistment.*—The office of "engineer of the fleet" was not abolished by the navy personnel act of Mar. 3, 1899, though the officers of the engineer corps were transferred to the navy and designated otherwise.[2]

Enlistment.[3]—Enlistment of a minor between 18 and 21 in the navy without consent of parents is voidable as to the parents.[4] Where he was taken from custody of the father to whom he had returned, habeas corpus will lie to settle his status and custody.[5]

Compensation for services or property.—The retired pay of naval officers is 75 per cent. of sea pay.[6] The pay of a fleet engineer was not reduced by the act of June 7, 1900.[7] An officer attached to a vessel at sea and not detached by competent authority is entitled to sea pay while temporarily in a naval hospital because of a wound received in the line of duty.[8] A naval officer, at home on leave of ab-

95. Poling v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 75 S. W. 69; Haggerty v. St. Louis, K. & N. W. R. Co., 100 Mo. App. 424. Contra, Sawdey v. Spokane Falls & N. R. Co., 30 Wash. 349, 70 Pac. 972.

96. Minter v. Bradstreet Co., 174 Mo. 444.

97, 98. Mashburn v. Dannenberg Co., 117 Ga. 567.

99. Bentley v. Woolson Spice Co. [Neb.] 95 N. W. 803.

1. Kavanaugh Mfg. Co. v. Rosen [Mich.] 92 N. W. 788.

2. The act was to increase the efficiency of the navy personnel and not to curtail the power of the President [30 Stat. 1004. Rev. St. § 1393 not repealed]. Denig v. U. S., 37 Ct. Cl. 383.

3. Evidence on appeal in habeas corpus proceedings to release naval recruit under 18 enlisting without parental consent. Thomas v. Winne [C. C. A.] 122 Fed. 395.

4. Rev. St. U. S. § 1418, and other statutes construed. Thomas v. Winne [C. C. A.] 122 Fed. 395. An enlistment by one under 18, without such consent, on representation that he was over 21, is not void as to the minor, but voidable only at the father's instance. U. S. v. Reaves [C. C. A.] 126 Fed. 127. One who enlisted in the navy under 18 without his father's consent, by false representations as to his age and received the usual pay until he deserted, could not be discharged, after arrest, from custody of the naval authorities on habeas corpus sued out by the father, though the latter could demand the son's discharge from the navy after the son has answered and satisfied the pending charges against him. U. S. v. Reaves [C. C. A.] 126 Fed. 127.

5. A judgment for the father concludes the government as to the status of the son. Ex parte Reaves, 121 Fed. 848. A petition for habeas corpus alleging invalidity of the enlistment for want of parental consent presents no issue of intoxication of the recruit [Rev. St. U. S. art. 19, § 1624]. Thomas v. Winne [C. C. A.] 122 Fed. 395.

6. 30 Stat. 1008. Creighton v. U. S., 37 Ct. Cl. 327. That a later statute is silent as to the kind of pay of a retired naval petty officer does not repeal by implication Act Mar. 3, 1899 (30 Stat. 1008) and Act Aug. 1, 1894 (28 Stat. 212), providing that such pay shall be founded on sea pay. Id.

7. 31 Stat. 697 and Rev. St. § 1556, construed. Denig v. U. S., 37 Ct. Cl. 383.

8. Navy Regulations 1896, par. 1154; Rev. St. 1556, not contravened. Collins v. U. S., 37 Ct. Cl. 222.

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sence, ordered to a new station for special service, then back home before expiration of his leave, is entitled to mileage;[9] but an officer discharged at his own request is not.[10] A law providing that civil war officers not mustered in at the proper time shall be paid as though mustered in at the proper time cannot be construed as opening officers' accounts, or as a new promise to pay debts barred by limitations.[11] An officer properly assigned to command a brigade in the war with Spain is entitled to a brigadier-general's pay, though the president ordered a third battalion to be established for each regiment, and during part of the time the brigade was not complete.[12] The Act Jan. 12, 1899, giving extra pay to volunteer soldiers and officers on being mustered out, is prospective and extends to those afterward enlisted under Act Mar. 2, 1899.[13] A soldier discharged before his regiment is mustered out is not entitled to two months' extra pay given to volunteers.[14] The Act Mar. 3, 1899, giving increased pay to naval officers appointed from civil life, is to be construed to give such pay to officers not receiving their maximum pay on June 30, 1899, but to exclude those receiving maximum pay on that date.[15] The money appropriated by Act Mar. 3, 1897, for maintenance of students and attaches and information abroad, was in the nature of a contingent fund to be expended by the secretary of the navy in his discretion, and the amount he intended to allow an officer sent abroad is the only question to be determined in a particular case.[16] The accounting officers cannot inquire into the necessity or expediency of assigning an army officer to a command above his grade.[17]

State militia.—A particular county cannot exclusively be required to impose taxes for maintenance of the state militia or any part of it.[18] An independent military company organized under a statute making them subject to orders of the governor is a part of the militia of the state.[19] The act of the governor in removing a militia colonel for the good of the service without trial or charges preferred cannot be controlled by mandamus, nor did it constitute a removal within a Federal statute requiring a courtmartial for dismissal in time of peace.[20] Payment made to an army officer for private property lost in service under a special law for that purpose cannot be recovered in absence of mistake or fraud.[21] Troops designated by order of a state governor to serve on June 20, 1898, under the president's proclamation, May 25, 1898, were entitled to pay from the former date, though enrolled under a prior order of the governor.[22]

9. He is traveling "when under orders," within Act Mar. 3, 1835 (4 Stat. 755), Act June 16, 1874 (18 Stat. 72) and Act June 30, 1876 (19 Stat. 65). Fitzpatrick v. U. S., 37 Ct. Cl. 332.

10. Construction of Rev. St. § 1289. The intent of the statute cannot be controlled by a construction given by accounting officers. Barnett v. U. S., 37 Ct. Cl. 49. Rev. St. § 1289, as amended by act Feb. 27, 1877, c. 69 (19 Stat. 243, 244). U. S. v. Sweet, 189 U. S. 471, 47 Law. Ed. 907. An enlisted man in the volunteer army, discharged on his own application, cannot recover travel pay and commutation of subsistence from the place of discharge to the place of enrollment [Rev. St. § 1290]. U. S. v. Barnett, 189 U. S. 474, 47 Law. Ed. 908.

11. Act Feb. 24, 1897 (29 Stat. 593). Orr v. U. S., 37 Ct. Cl. 292.

12. Act Apr. 26, 1898 (30 Stat. 364, §§ 2, 7). Glenn v. U. S., 37 Ct. Cl. 254.

13. 30 Stat. 784, 979. Clark v. U. S., 37 Ct. Cl. 60.

14. Act Jan. 12, 1899 (30 Stat. 784). Clark v. U. S., 37 Ct. Cl. 60.

15. 30 Stat. 1004, 1007, § 13. White v. U. S., 37 Ct. Cl. 365.

16. 29 Stat. 648. Dyer v. U. S., 37 Ct. Cl. 337.

17. Though they may inquire into the regularity of the assignment and to what extent the service was performed. Glenn v. U. S., 37 Ct. Cl. 254.

18. It is an arm of the state government not a county institution. Laws 1899, § 27, c. 4684, requiring county commissioners of a county having a battery or company to provide an armory held unconstitutional and void. State v. Dickenson [Fla.] 33 So. 514.

19. The state and not the city is liable for pay of armory janitors. Witt v. Madigan, 24 Ohio Circ. R. 263.

20. The act was one of discretion not ministerial; as to the second consideration, see R. S. U. S. § 1229. State v. Jelks [Ala.] 35 So. 60.

21. Under Act Cong. Mch. 3, 1885 (23 Stat. 350), sufficiency of allegations of complaint as to negligence of defendant as constituting fraud or mistake. U. S. v. Willcox [C. C. A.] 118 Fed. 729.

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§ 2. *Regulations and discipline.*[22]—Admiralty law governs the liability of the United States for a collision between a merchant vessel and a navy vessel in time of war.[24] A soldier must obey his superior unless illegality of his orders clearly appears and will be protected by the officers in obeying.[25] The government is not liable to a civilian physician employed by an officer where an army physician may be obtained.[26]

§ 3. *Military tribunals.*—Courts-martial do not have exclusive jurisdiction of forgery by an army officer of an obligation of the United States.[27] "Imprisonment" under the sixtieth article of war means at hard labor or to a penitentiary where that is a part of the discipline, where the offense could be so punished if occurring under the civil laws.[28]

§ 4. *Civil status, rights and liabilities of the military.*—A soldier is not subject to civil jurisdiction for acts in the performance of his duties,[29] but a Federal district court may indict and try one of forgery of an obligation of the United States, though he was an army officer and the act was committed at an army post to defraud an enlisted soldier, where accused has been discharged without action by the military authorities.[30]

§ 5. *Martial law.*—A general order by a governor calling out the militia to maintain peace in a strike district is a declaration of qualified martial law in that district.[31]

§ 6. *Soldiers' homes and indigent soldiers.*—The National Home for Disabled Volunteers cannot be sued in tort.[32] Members of the South Dakota Soldiers' Home are subject to good discipline and may be dishonorably discharged for misconduct.[33] Commissioners of the Home are personally liable for damages for wrongful and malicious expulsion of an inmate.[34] A decision of the township trustee in Indiana as to application of a law providing for burial of indigent honorably discharged soldiers at expense of the county is conclusive on the county.[35]

22. Act Mar. 26, 1898 (30 Stat. 420), as amended by act July 7, 1898 (30 Stat. 721). Foreman v. U. S., 37 Ct. Cl. 226.

23. War vessels as amenable to navigation rules in time of war. Watts v. U. S., 123 Fed. 105.

24. The officer's discretion cannot avail; the court had jurisdiction to render a decree against the government for loss resulting from violation of international navigation laws. Watts v. U. S., 123 Fed. 105.

25. Member of militia engaged in suppressing a strike. Com. v. Shortall, 206 Pa. 165.

26. Army Regulations, § 1452. Preston v. U. S., 37 Ct. Cl. 39.

27. By statute or constitution. Neall v. U. S. [C. C. A.] 118 Fed. 699.

28. Sentence by court-martial. In re Langan, 123 Fed. 132.

29. A militiaman who commits homicide in performance of orders of an officer for suppression of a domestic insurrection is excusable unless he acted beyond his authority and must have known that his act was illegal. In suppression of strike troubles; sufficiency of evidence to show liability. Com. v. Shortall, 206 Pa. 165. An army officer in discharge of his duty, under orders of the secretary of war executing an act of congress, cannot be arrested on order or warrant of a state court, and he will be discharged by a Federal court on habeas corpus. In re Turner, 119 Fed. 231. A state court cannot restrain an army officer from doing work he is ordered to perform by a superior in execution of an act of congress; nor can he be punished for violation of the injunction. In re Turner, 119 Fed. 231.

30. Courts-martial do not have exclusive jurisdiction of such offenses either under the statutes or constitution. Neall v. U. S. [C. C. A.] 188 Fed. 699.

31. Com. v. Shortall, 206 Pa. 165. The commanding officer under martial law is limited in his powers only by necessities of the situation whether the insurrection is public or domestic. Id.

32. It is a corporation for national purposes only, and as such is a part of the government. Overholser v. National Home for Disabled Volunteer Soldiers, 68 Ohio St. 236.

33, 34. Black v. Linn [S. D.] 96 N. W. 697. "The presumption being that all public officers act in the utmost good faith, the question is not whether the treatment of which appellant complains was right or wrong, but whether his dishonorable discharge and exclusion from the home was maliciously affected. The rule sustained by the greater weight of well reasoned authority is that public officers entrusted by law with the exercise of judgment and discretion are liable to a person injured as the result of their acts only when such acts are prompted by malice or corruption." Id.

35. Acts 1901, p. 330, c. 147, §§ 34, 35 (Burns' Rev. St. 1901, §§ 8165j, 8165k). Gardner v. Board of Com'rs of Knox County [Ind.] 67 N. E. 990.

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MINES AND MINERALS.

§ 1. General Common Law Principles (893).
A. Public Ownership (893).
B. Private Ownership; Right of Freehold Tenants of Less Than Fee (893).
§ 2. Acquisition of Mining Rights in Public Lands (894).
A. What Lands Are Locatable (894).
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§ 7. Working Contracts (902).
§ 8. Public Mining Regulations (902).
§ 9. Statutory Liens and Charges (902).
§ 10. Remedies and Procedure Peculiar to Mining Rights (903).

§ 1. *General common law principles. A. Public ownership.*—Prior to the Act of 1887,[36] purchasers of state school lands in Texas took them subject to the reservation of all minerals by the state, but purchasers since then take under no such reservation, and the revised statutes of 1895[37] released to all such prior owners the minerals theretofore reserved, so that at present the owners of such lands are the owners of all minerals therein.

(§ 1) *B. Private ownership; right of freehold tenants of less than fee.*—Under the statute of Idaho, the owner of a majority interest in a mine is entitled to work it and account to the owner of the minority interest, but he cannot exclude the minority owner from access to the property.[38] Entry by a prospector and sinking shafts on plaintiff's land is not in itself ground for an injunction to restrain the trespass.[39] Though natural gas is not subject to absolute ownership while in its natural state, the owner of the soil must in dealing with it use his own property with due regard to the rights of his neighbor. He will not be allowed deliberately to waste the supply for the purpose of injuring his neighbor.[40] An adjoining owner tapping a common reservoir of natural gas cannot enjoin the use of pumps by his adjoiner, where such use does not relieve all back pressure in the wells;[41] but a railway company having only an easement for a right of way can be enjoined by the gas lessee of the owner of the fee of the whole tract from sinking wells on the right of way which will diminish the flow from the balance of the tract.[42] Contracts for the sale of mines and interests therein are governed by the same rules as contracts for the sale of other real property,[43] except that time is

36. Chapter 99.

37. Article 4041. Heil v. Martin [Tex. Civ. App.] 70 S. W. 430.

38. Sweeney v. Hanley [C. C. A.] 126 Fed. 97.

39. King v. Mulliner, 27 Mont. 364, 71 Pac. 155; Harley v. Mont. Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407.

40. Louisville Gas Co. v. Ky. Heating Co. [Ky.] 77 S. W. 368.

41. Richmond Natural Gas Co. v. Enterprise Natural Gas Co., 31 Ind. App. 222, 66 N. E. 782; Consumers' Gas Trust Co. v. American Plate Glass Co. [Ind.] 68 N. E. 1020.

42. Consumers' Gas Trust Co. v. American Plate Glass Co. [Ind.] 68 N. E. 1020.

43. Contract for the sale of mineral rights held within statute of frauds and **void for want of writing.** McConathy v. Lanham [Ky.] 76 S. W. 535.

Interpretation and construction: Agreement to give plaintiff an interest in a mine held to be conditioned on his interesting capital therein. Baum v. Rainbow Smelting Co., 42 Or. 453, 71 Pac. 538. Contract between prospector and others furnishing money and supplies held one of bargain and sale referring to **existing claims** and to convey no interest in **future locations.** Roberts v. Date [C. C. A.] 123 Fed. 238. Bond to convey held not a warranty as to the **size of the claim.** Sumpter Gold Min. Co. v. Browder [Colo.] 73 Pac. 38. Where a contract for the sale of mining claims provides for a **reduction of the price** for land lost by adverse claims, such losses subsequently occurring are no ground for rescission. Smith v. Detroit & D. G. Min. Co. [S. D.] 97 N. W. 17. A contract of sale of a claim to be conveyed "by **good and sufficient deed in fee simple**" is construed to mean a conveyance of such title as the vendor has, it being perfect except that he has no patent. Bach v. Cascade Min. Co., 29 Wash. 50, 70 Pac. 487.

One who takes possession under a contract of sale reserving mineral rights cannot while he continues to hold thereunder acquire **title by adverse possession** to the mineral rights. Louisville & N. R. Co. v. Massey, 136 Ala. 156, 33 So. 896.

Purchaser of claim held obligated to pay

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always considered as of the essence of the contract, the character of the property rendering it peculiarly liable to fluctuation.[44] Such a contract cannot be rescinded after their value has been greatly reduced by a demonstration of their unproductiveness.[45]

§ 2. *Acquisition of mining rights in public lands. A. What lands are locatable.*—Lands chiefly valuable for deposits of petroleum or other mineral oils may be located as placer claims,[46] but whether a deposit of brick clay will support a location has been questioned.[47] A location by a stranger to the title of mines on land already sold under the Texas statute providing for the sale of state school lands is unauthorized and creates no interest in the locator.[48]

(§ 2) *B. Who may locate.*—No person, unless he is a citizen of the United States or has declared his intention to become such, is entitled to a patent for mineral land.[49] Neither are officers, clerks or employes of the general land office, including mineral surveyors and their deputies, entitled to locate claims.[50] It is not necessary that a person should act personally in taking up a claim or in doing the acts required to give evidence of the appropriation or to perfect the appropriation,[51] and the assignee of one who discovers mere surface indications of mineral may follow up such indications, and on discovery obtain a valid location and patent.[52]

§ 3. *Mode of locating claim and acquiring patent. A. Making and perfecting location.*—The marking of a mineral location need be done in no particular manner, any marking on the ground by stakes, monuments, mounds and written notices, whereby the boundaries of the location can be readily traced, being sufficient,[53] and an excessive claim will not invalidate the location, but only renders it voidable as to the excess.[54] The width of a claim is the distance by a right line between its sides and not the length of its oblique end lines.[55] When a valid location of a claim is once made, it vests in the locator and his successors in interest, the right of possession thereto, which right cannot be divested by the obliteration or removal without the fault of the locator, or his successor in interest, of the stakes and monuments marking its boundaries, or the obliteration or removal from the claim of the location notice posted thereon.[56]

The right of original locators to change their original location, so long as such change does not interfere with existing rights of others acquired previous to such change, is unquestioned,[57] and the law does not require that the object or purpose of making the amended certificate shall be specified therein, but the filing will be effectual for all the purposes enumerated in the statute, whether such purposes are

purchase price, though already the owner of part thereof overlapping prior claim. Griffin v. American Gold Min. Co. [C. C. A.] 123 Fed. 283.

Where an option to purchase is accepted within the time limited, it becomes an absolute sale, and failure to pay the price on the day set will not revoke it. Pa. Min. Co. v. Smith [Pa.] 56 Atl. 426. Agreement held a mere option and not a contract of sale. Lawrence v. Pederson [Wash.] 74 Pac. 1011.

44. Williams v. Long, 139 Cal. 186, 72 Pac. 911.

45. Smith v. Detroit & D. G. Min. Co. [S. D.] 97 N. W. 17.

46. Bay v. Okl. Southern Gas, Oil & Min. Co. [Okl.] 73 Pac. 936.

47. King v. Mullins, 27 Mont. 364, 71 Pac. 155.

48. Laws 1887, c. 99. Heil v. Martin [Tex. Civ. App.] 70 S. W. 430; Id., 96 Tex. 209, 71 S. W. 814.

49. Oregon King Min. Co. v. Brown [C. C. A.] 119 Fed. 48; Tonopah Traction Min. Co. v. Douglass, 123 Fed. 936.

50. Lavagnino v. Uhlig [Utah] 71 Pac. 1046.

51. McCulloch v. Murphy, 125 Fed. 147.

52. Bay v. Okl. Southern Gas, Oil & Min. Co. [Okl.] 73 Pac. 936.

53. Rev. St., § 2324. Oregon King Min. Co. v. Brown [C. C. A.] 119 Fed. 48.

54. McPherson v. Julius [S. D.] 95 N. W. 428; Walton v. Wild Goose M. & T. Co. [C. C. A.] 123 Fed. 209; McIntosh v. Price [C. C. A.] 121 Fed. 716.

55. Davis v. Shepherd [Colo.] 72 Pac. 57.

56. Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co., 125 Fed. 389, 408.

57. Tonopah & S. L. Min. Co. v. Tonopah

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mentioned in the certificate or not.[58] Defects in an original location, which are corrected before the discovery of mineral without its lines and within the lines of a subsequent overlapping location, cure the original.[59]

Notices of location are to be liberally construed and are not invalid because of mistakes therein as to courses and distances;[60] but they must contain the substance of the statutory requisites.[61] A designation of the boundaries of a claim by reference to the boundary of a prior claim is valid.[62] A description of corner posts in the language of the statute directing their size is sufficient, though they are in fact taller than stated.[63]

No record of the notice of location is necessary unless the laws of the state and the rules and regulations of the mining district in which the claim is located require it,[64] and the recording of a substantial copy of the notice of the discovery and location of a claim in those districts where a record is required is sufficient.[65]

There can be no valid mining claim until a discovery is made within the lines of such claim and outside the lines of any other valid existing lode location;[66] but it is not necessary that the locator shall be the first discoverer. If it appear that he knew of a prior discovery within the limits, he may base his location upon it.[67] An abandoned lode claim under which no discovery was made does not invalidate a subsequent placer claim.[68] Where the discovery shaft of a claim is within the lines of a prior claim and for that reason lost to the locator, but other discoveries of mineral are made on otherwise vacant ground within the claim within the time allowed to perfect and complete the location, the location is valid.[69]

(§ 3) *B. Maintaining location; forfeiture, loss or abandonment.*—A liberal construction is given to the law requiring annual assessment work,[70] but it must be done within the limits of the claim,[71] be of sufficient value to comply with the statute,[72] and be at least begun before the close of the year.[73] Work can be performed on one claim for the benefit of several,[74] and one or more co-owners may do the work for all.[75]

Min. Co., 125 Fed. 389; Wilson v. Freeman [Mont.] 75 Pac. 84.

58. Tonopah & S. L. Min. Co. v. Tonopah Min. Co., 125 Fed. 389.

59. McPherson v. Julius [S. D.] 95 N. W. 428.

60. Walton v. Wild Goose Min. & Trading Co. [C. C. A.] 123 Fed. 209; Tonopah & S. L. Min. Co. v. Tonopah Min. Co., 125 Fed. 389, 400, 408.

61. Hahn v. James [Mont.] 73 Pac. 965.

62. McIntosh v. Price [C. C. A.] 121 Fed. 716; Carlin v. Freeman [Colo. App.] 75 Pac. 26.

63. Walker v. Pennington, 27 Mont. 369, 71 Pac. 156.

64. Peters v. Tonopah Min. Co., 120 Fed. 587; McIntosh v. Price [C. C. A.] 121 Fed. 716; Oregon King Min. Co. v. Brown [C. C. A.] 119 Fed. 48.

65. St. Or. Oct. 14, 1898. Oregon King Min. Co. v. Brown [C. C. A.] 119 Fed. 48.

66. McPherson v. Julius [S. D.] 95 N. W. 428; Gemmel v. Swain [Mont.] 72 Pac. 662. Action to recover price of claims sold. La Grande Inv. Co. v. Shaw [Or.] 72 Pac. 795. Petroleum lands. Bay v. Okl. Southern Gas, Oil & Min. Co. [Okl.] 73 Pac. 936; Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083.

67. McMillen v. Ferrum Min. Co. [Colo.] 74 Pac. 461.

68. McConaghy v. Doyle [Colo.] 75 Pac. 419.

69. Tonopah & S. L. Min. Co. v. Tonopah Min. Co., 125 Fed. 408; Treasury Tunnel Min. & R. Co. v. Boss [Colo.] 74 Pac. 888.

70. McCulloch v. Murphy, 125 Fed. 147. Though the locators have done upwards of $1,000 worth of work, and erected valuable improvements, money paid a laborer to live in the house on the claim and watch it cannot be considered as paid for work done on the claim so as to hold it for a particular year when the assessment was not otherwise worked. Hough v. Hunt, 138 Cal. 142, 70 Pac. 1059.

71. Evidence held sufficient to show that it was not so done. Wagner v. Dorris [Or.] 73 Pac. 318.

72. $100 value held not shown. Wagner v. Dorris [Or.] 73 Pac. 318.

73. Where a locator doing his assessment work left his tools in the workings Saturday night, Dec. 30, and began again on Monday morning and finished his work, there was no abandonment that would subject the claim to relocation between 12 and 1 o'clock Monday morning. Fee v. Durham [C. C. A.] 121 Fed. 468.

74. Community of interest in claims is necessary. Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co., 30 Colo. 431, 71 Pac. 389.

75. Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123.

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A forfeiture cannot be established except upon clear and convincing proof of the failure of the original locator to have work performed or improvements made to the amount required by law,[76] and the burden of proof to establish the forfeiture rests upon him who asserts it.[77] That the records of the mining district do not show that the assessment for a particular year has been done is not conclusive, there being no statutory provision that failure to record the certificate shall forfeit the claim.[78]

Where a locator applies for and receives a patent for a portion only of his location, including his discovery shaft, but remains in possession of the balance, there is not an abandonment of such balance.[79]

No title can be acquired to a mineral location by platting a town site upon it.[80]

(§ 3) *C. Relocation.*—A relocation on lands actually covered at the time by a valid and subsisting location is void, because the law does not allow such a thing to be done,[81] and a claim is not subject to relocation after the original locator has resumed work.[82] Where a locator includes more land than the law allows, a subsequent locator cannot enter upon a part of the claim on which the original locator is at work and locate it as unoccupied ground; the original locator has a right to select what portion of the claim he will elect to hold.[83] Where one of several cotenants of a claim attempts to relocate it, his acts enure to the benefit of all.[84]

A relocator in Colorado is not required to sink the abandoned shaft 10 feet deeper than it was at the time of abandonment,[85] but his declaratory statement must describe the original discovery shaft.[86]

Where a railroad is built across a claim that is afterwards abandoned, a relocation of it is subject to the rights of the railroad company.[87]

The cancellation of the entry of a mining location by the land office without authority does not render the ground open to relocation.[88]

Where land covered by two overlapping locations is omitted from their application for patent by the prior locators under an agreement with the junior locator that it shall be patented by him, the omission of it from the junior patent by the land office will not subject it to relocation.[89]

(§ 3) *D. Proceedings to obtain patent; adverse claims.*—The omission of the name of one of the co-owners of a claim in the application for a patent is harmless as to him where he has conveyed his interest to one of his co-owners.[90] A stranger cannot acquire any rights in a mining claim after the application of another for a patent therefor has been allowed and he has paid for and received a certificate of entry which vests in him the title as against third persons.[91]

An adverse claim must be filed within 60 days from the date of publication,[92]

76. Walton v. Wild Goose M. & T. Co. [C. C. A.] 123 Fed. 209; McCulloch v. Murphy, 125 Fed. 147.

77. McCulloch v. Murphy, 125 Fed. 147; Callahan v. James [Cal.] 74 Pac. 853.

78. McCulloch v. Murphy, 125 Fed. 147.

79. Miller v. Hamley [Colo.] 74 Pac. 980.

80. Callahan v. James [Cal.] 74 Pac. 853.

81. McCulloch v. Murphy, 125 Fed. 147.

82. Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co., 30 Colo. 431, 71 Pac. 389. An attempted relocation on Sunday night after midnight of Dec. 31, where the original locator in working his assessment rested over Sunday is void. Fee v. Durham, 121 Fed. 468.

83. McIntosh v. Price [C. C. A.] 121 F. 716.

84. Attempted relocation in name of brother held a mere subterfuge. Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123.

85. Mills' Ann. St., § 3162. Carlin v. Freeman [Colo. App.] 75 Pac. 26.

86. Wilson v. Freeman [Mont.] 75 Pac. 84.

87. Bonner v. Rio Grande S. R. Co. [Colo.] 72 Pac. 1065.

88, 89. Rebecca Gold Min. Co. v. Bryant [Colo.] 71 Pac. 1110.

90. Wetzstein v. Largey, 27 Mont. 212, 70 Pac. 717.

91. Neilson v. Champagne Min. & Mill. Co. [C. C. A.] 119 Fed. 123.

92. U. S. Rev. St. §§ 2325, 2326. And if no such is filed, it will be conclusively presumed that none exists. Lily Min. Co. v. Kellogg [Utah] 74 Pac. 518; Lavagnino v. Uhlig, 26 Utah, 1, 71 Pac. 1046. Waiver of objection to time of filing. Pa. Min. Co. v. Bales [Colo.

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and the complaint in the adverse suit must be filed within 30 days after the adverse claim is filed,[93] but the complaint need not allege such filing.[94] Prior location may be shown under a general denial.[95]

The suit in support of an adverse claim may be in form a suit in equity or at law,[96] and a suit to quiet title and possession to certain mining ground may, after application for a patent on the part of the defendant and the filing of an adverse claim by the plaintiff, stand as a suit to determine an adverse claim under the Federal statute.[97] A state court cannot, however, adjudge which of two contestants is entitled to a patent,[98] though if neither party is entitled to a patent, the court must so find.[99]

Certificates of location of mining claims are not conclusive evidence of the facts which they recite against parties who claim the land they describe adversely to their makers.[1] A lode claimant as against a placer patent has the burden of proving a known lode,[2] but he cannot prove a prior claim inconsistent with his own.[3]

Where an adverse claimant waives his claim by failing to introduce any evidence of title, he is not entitled to a view by the jury, on the theory that the government is a party in interest for the purpose of seeing that a proper title is shown in the successful party.[4] A party may be appointed as one of the guides at a view,[5] and where the court finds that defendant never made a valid location, errors in admitting evidence regarding the location and working of the claim by a person not a party to the suit are immaterial.[6] A locator who has no title cannot have judgment, though defendant has none.[7] Neither can he take any benefit from the title existing in a third person who has not filed any adverse claim.[8] Nor can he object to a judgment for defendant on the ground that he has not performed his assessment work, that question being solely within the jurisdiction of the land office.[9] The parties' rights are to be tested by the law at the time the location was made.[10]

§ 4. *Ownership or estate obtained by claim, location, and patent; apex rights.*[11] —A locator has no such title after a conveyance and abandonment of the claim that

App.] 70 Pac. 444. A protest filed against the issuance of a patent to a mining claim after the application for the patent has been allowed, the purchase money paid, and a certificate of entry issued, does not give the protestant any basis for a suit in equity to annul the patent issued after the protest. Neilson v. Champagne Min. & Mill. Co. [C. C. A.] 119 Fed. 123. The claimant of a tunnel site located across lode claims is not required to file an adverse claim; when applications for patents of the lode claims are made, in order to protect his rights in those cases in which his interest in the lode claims is so uncertain, contingent and intangible that it cannot be fairly litigated when the applications are made. Uinta Tunnel M. & T. Co. v. Creede & C. C. Min. & Mill. Co., 119 Fed. 164.

93. U. S. Rev. St. § 2326. Hopkins v. Butte Copper Co. [Mont.] 74 Pac. 1081.

94. Pa. Min. Co. v. Bales [Colo App.] 70 Pac. 441; Rawlings v. Casey [Colo. App.] 73 Pac. 1090; Hopkins v. Butte Copper Co. [Mont.] 74 Pac. 1081.

95. McConaghy v. Doyle [Colo.] 75 Pac. 419.

96. U. S. Rev. St. § 2326. Tonopah Traction Min. Co. v. Douglass, 123 Fed. 936. Adverse claim held not waived by amending application and accepting patent for land not covered by contest. Mackay v. Fox [C. C. A.] 121 Fed. 487. Necessary parties to action to determine adverse claim. Id. Death of party and survival of action to determine adverse claim. Id.

97. Rev. St. U. S. § 2326. Jones v. Pac. Dredging Co. [Idaho] 72 Pac. 956.

98. Gruwell v. Rocco [Cal.] 74 Pac. 1028.

99. Wilson v. Freeman [Mont.] 75 Pac. 84.

1. Uinta Tunnel, M. & T. Co. v. Creede & C. C. Min. & Mill. Co. [C. C. A.] 119 Fed. 164.

2. The burden is on claimant to show that a vein included in a placer patent was known at the time of the application. McConaghy v. Doyle [Colo.] 75 Pac. 419.

3. In suit to establish adverse claim defendant may show a prior placer claim where such claim covered plaintiff's lode, but not defendant's. McConaghy v. Doyle [Colo.] 75 Pac. 419.

4. Connolly v. Hughes [Colo. App.] 71 Pac. 681; McMillen v. Ferrum Min. Co. [Colo.] 74 Pac. 461.

5. Wilson v. Harnette [Colo.] 75 Pac. 395.

6. Reins v. King, 27 Mont. 511, 71 Pac. 763.

7. Hahn v. James [Mont.] 73 Pac. 965.

8. Lavagnino v. Uhlig, 26 Utah, 1, 71 Pac. 1046.

9, 10. Wilson v. Freeman [Mont.] 75 Pac. 84.

11. Mining rights in water, see Waters and Water Supply.

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the community interest of his wife attaches.[12] Whether or not a vein contains mineral cannot be inquired into collaterally after patent.[13] A known vein which cannot be included in a placer patent is one known at the time of application to contain minerals in paying quantities.[14] The owners of the surface of mining ground are prima facie owners of all ore bodies found within the planes of its boundaries;[15] but under the mining laws of the United States, a vein properly located is part and parcel of the location within which it is embraced throughout its entire depth, within the limits defined by law, even though on its downward course it enters an adjacent location.[16] Whence the owner of the apex of a vein has a right to follow it on its dip beyond the side lines of his claim,[17] whether the vein crosses the end lines of his claim or not;[18] but the point at which the apex in its course departs from either side line of the claim marks the point where the right to follow it on the strike under such location ceases, and extra lateral rights are limited accordingly.[19]

Possession and ownership of the surface of a lode mining claim, being the possession of the lode to the full extent of the extra lateral right of the owner of the claim,[20] carries with it the right to a portion of the lode between the end line planes produced, though entirely severed from the portion within the surface boundaries of his claim by a prior location on the same lode,[21] and the discovery and removal of ore from a vein on territory other than that on which it apexes does not break its continuity so that the owner of the apex cannot follow it beyond the point where the ore has been removed.[22]

It is always competent for the owners of adjoining claims to conclusively adopt the line established by a prior survey as their boundary or division line, whether it is the correct one or not,[23] and a purchaser with notice is estopped to deny the adjoiner's right to such an agreed line as the boundary of his extra lateral rights.[24]

§ 5. *Private conveyances or "grants" of mineral rights in lands.*—Petroleum and natural gas are part of the soil as are other minerals;[25] but where land was known to have valuable coal deposits underlying it, a conveyance of the "surface" severs that part of it from all underlying strata, and the grantee is not entitled to oil and gas subsequently discovered.[26] An exception in a deed to land of

12. McAlister v. Hutchinson [N. M.] 75 Pac. 41.

13. Davis v. Shepherd [Colo.] 72 Pac. 57.

14. McConaghy v. Doyle [Colo.] 75 Pac. 419. Mere outcroppings, though they might sustain a lode claim, are not sufficient to show a known vein. Id. Evidence that vein was known at time of placer patent held insufficient. Id.

15. Maloney v. King, 27 Mont. 428, 71 P. 469. Contract to convey held to include all minerals in territory. Bogart v. Amanda Consol. Gold Min. Co. [Colo.] 74 Pac. 882. Conflict of rights of locators of tunnel site and patentees of lode claims. Uinta Tunnel M. & T. Co. v. Creede & C. C. Min. & Mill. Co. [C. C. A.] 119 Fed. 164.

16. Rev. St. U. S. § 2322. Davis v. Shepherd [Colo.] 72 Pac. 57.

17. Continuity of vein having complications held established. Pa. Consol. Min. Co. v. Grass Valley Exploration Co., 117 Fed. 509. Rights of purchaser of part of claim by metes and bounds. Mont. Ore-Producing Co. v. Boston & M. Consol. C. & S. Min. Co., 27 Mont. 288, 70 Pac. 1114; Id., 27 Mont. 536, 71 Pac. 1005. Whether a lead is such as a reasonable man would be justified in following is a proper subject of expert testimony. Wilson v. Harnette [Colo.] 75 Pac. 395.

18. Southern Nev. G. & S. Min. Co. v. Holmes Min. Co. [Nev.] 73 Pac. 759.

19. Davis v. Shepherd [Colo.] 72 Pac. 57; Southern Nev. G. & S. Min. Co. v. Holmes Min. Co. [Nev.] 73 Pac. 759. Secondary vein. Ajax Gold Min. Co. v. Hilkey [Colo.] 72 Pac. 447.

20. Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co. [C. C. A.] 121 Fed. 973; State v. Dist. Ct. [Mont.] 73 Pac. 230.

21. Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co. [C. C. A.] 121 Fed. 973.

22. Davis v. Shepherd [Colo.] 72 Pac. 57.

23. Unequivocal acts may show such an agreement. Tonopah & S. L. Min. Co. v. Tonopah Min. Co., 125 Fed. 400.

24. End line between claims on same vein. Kennedy Min. & Mill. Co. v. Argonaut Min. Co., 189 U. S. 1, 47 Law. Ed. 685.

25. Haskell v. Sutton, 53 W. Va. 206.

26. Williams v. South Penn Oil Co., 52 W. Va. 181.

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"the use and occupancy of any one of the coal banks on said land" does not reserve the title to the coal or any part thereof.[27] An instrument may be construed as severing the minerals in place from the fee, though it uses terms appropriate to a lease only.[28] Coal under a railroad and under a creek is "available" within the terms of a contract of sale, though it can be mined only at an enhanced cost.[29] Where one sells a right of way or parcel of land, reserving the minerals with the right to mine, the right must be so exercised as not to undermine the surface support, unless that right is reserved by express words.[30]

§ 6. *Leases.*—Leases of mines and of land for mining purposes are governed by rules similar in most respects to those governing leases of other real property,[31] but a contract to pay a stated sum per ton as royalty for a term of years implies on the one hand an agreement to operate the property with reasonable diligence, during the term,[32] and on the other a covenant that mineral is present in the land, and if none is found, the lessee is not liable for the minimum royalty,[33] but under such a lease the lessee has no right to reduce the agreed amount on the ground of inferior quality of ore.[34] Neither can a lessee defend a suit for the minimum royalty on the ground that the quarry is not as profitable to him as it would be if plaintiff would permit the cancellation of switching agreement between him and the railroad.[35] An assignee of a coal lease is bound by reason of the privity of estate to a performance of all express covenants which run with the land.[36] Ores dug by a licensee under a license reserving a portion as royalty belong to the owner of the fee, unless otherwise especially provided in the license.[37] One who has a mere license to mine for ore on a specified portion of the land of another has no action of trespass against a third person who takes ores therefrom.[38] An agreement to pay a certain additional sum as rent out of the first six months' profit means the first six months during which the mine made a profit.[39] A sum to be paid out of profits of a lease does not become due by reason of an assignment of the lease if no profit was made during the whole term.[40] A lack of consideration at the beginning may be supplied by expenditure

27. Chapman v. Mill Creek C. & C. Co. [W. Va.] 46 S. E. 262.

28. An instrument which in terms is a demise of all the coal in, under and upon a tract of land with the unqualified right to mine and remove the same is a sale of the coal in place and effects a severance of the title whether the purchase money stipulated for is a lump sum or is a certain price for each ton mined and called rent or royalty and notwithstanding a term is created within which the coal is to be taken out. Hosack v. Crill, 18 Pa. Super. Ct. 90, 204 Pa. 97.

29. In re Redstone O., C. & C. Co.'s Dissolution [Pa.] 56 Atl. 355.

30. Silver Springs, O. & G. R. Co. v. Van Ness [Fla.] 34 So. 884.

31. Lease for coal mine held to give by implication **right to build switch track** to mine. Ingle v. Bottoms, 160 Ind. 73.

Prospecting and exploration lease held to obligate lessee to pay $3,000 on **failure to continue exploration** through stipulated term. Hollister v. Sweeney, 88 Minn. 100.

Judgment of **ejectment** held properly entered **for default** of payment of royalties as provided in lease. Beedle v. Hilldale Min. Co., 204 Pa. 184.

Lessee held liable for **minimum annual rental**, though amounting to more than specified royalty per ton for coal actually mined. Lehigh Valley Coal Co. v. Everhart, 206 Pa. 118; Berwind-White Coal Min. Co. v. Martin [C. C. A.] 124 Fed. 313.

Licensee held liable for royalties reserved by mining license against objection of **fraud** in execution of license. Dermott v. Priddy, 98 Mo. App. 146.

A lease of a coal mine providing that the lessee shall furnish the lessor a certain amount of coal annually free, pay a certain price for the coal mined, and shall not close down the mine for more than a year at a time is not void for want of **mutuality.** Ingle v. Bottoms, 160 Ind. 73.

32. Sharp v. Behr, 117 Fed. 864.

33. Brooks v. Cook [Ala.] 34 So. 960.

34. Sharp v. Behr, 117 Fed. 864.

35. Skillen v. Logan, 21 Pa. Super. Ct. 106.

36. Consol. Coal Co. v. Peers, 205 Ill. 531.

37. Chitwood v. Lanyon Zinc Co., 93 Mo. App. 225.

38. Arnold v. Bennett, 92 Mo. App. 156.

39. Laing v. Holmes, 93 Mo. App. 231.

40. Where the assignee of a lessee agreeing to pay a stated sum out of the profits of the lease to his assignor, worked the mine diligently for several months without profit and then assigned to another who also worked for the balance of the term without profit, he did not by the fact of assigning render himself liable for the amount agreed to be

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of time and money in exploration as agreed.[41] Equity will enforce a forfeiture of a mining lease when it works equity and protects the landowner against the indifference and laches of the lessee and prevents a great mischief,[42] and where mining lessees have abandoned their works and entirely withdrawn from the land, it is an abandonment, and they will not be permitted to return to take advantage of the subsequent discoveries of others on the lands.[43]

Oil and gas leases.—A lease of land for oil and gas purposes is in effect a grant of a part of the corpus of the land;[44] but the title under such a lease is inchoate and contingent and for the purposes of search only until oil or gas is found. If not found, no estate vests in the lessee, and his right, whatever it is, ends when the unsuccessful search is abandoned. If found, then the right to produce becomes a vested right upon the terms of the lease.[45] In all such leases, a covenant to "protect the lines" of and "well develop" the land leased is implied by law,[46] for the breach of which the lease may be treated by the grantor as forfeited,[47] or subject to suit for cancellation.[48] After the right of the lessee has ripened into a vested estate by the drilling of a producing well, if the lessee in possession and still producing oil fails to fully develop the land or neglects to protect its lines by drilling other wells, the lessor's remedy is not by way of forfeiture of the lessor's right to operate under the lease, but by an action for damages caused by such breach.[49] The law recognizes a distinction between the abandonment of operations under an oil lease and an intention to abandon or surrender the lease itself. Unless bound by the terms of the lease so to do, it will not permit the lessee to hold the lease without operating under it and thereby prevent the lessor from operating on the land or leasing it to others.[50]

The clause of forfeiture in an ordinary oil lease is for the benefit of the lessor, and no act of the lessee will terminate it without concurrence of the lessor.[51]

paid. Caley v. Portland [Colo. App.] 71 Pac. 892.

41. Where an agreement giving one a right to explore land for minerals for one-half thereof is invalid as without consideration or mutuality when made, but he expends time and money in exploration and discovers valuable minerals, a consideration arises and on a sale of the land he has an action against the owner for half the value of the mineral developed. Brown v. Bowman [Ga.] 46 S. E. 410.

42, 43. Negaunee Iron Co. v. Iron Cliffs Co. [Mich.] 96 N. W. 468.

44. Haskell v. Sutton, 53 W. Va. 206.

45. Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501; Emery v. League, 31 Tex. Civ. App. 474, 72 S. W. 603. An oil and gas lease does not of itself create the relation of landlord and tenant, and at the end of any year either party may terminate any rights arising thereunder in the absence of any possession taken by the lessee. Ind. Natural G. & O. Co. v. Pierce [Ind. App.] 68 N. E. 691.

46. Barnsdall v. Boley, 119 Fed. 191; Logan Natural G. & F. Co. v. Great Southern G. & O. Co. [C. C. A.] 126 Fed. 623; Kellar v. Craig [C. C. A.] 126 Fed. 630; Acme Oil & Min. Co. v. Williams, 140 Cal. 681, 74 Pac. 296; Swift v. Occidental M. & P. Co. [Cal.] 74 Pac. 700; Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 588, 59 L. R. A. 566. Contra, in Kansas. Rose v. Lanyon Zinc Co. [Kan.] 74 Pac. 625. Oil and gas lease held to be for a term of 10 years conditioned on the payment of $40 per year after the first 5 years if no well is dug. Monfort v. Lanyon Zinc Co. [Kan.] 72 Pac. 784.

47. Gadbury v. Ohio & I. Consol. N. & I. Gas Co. [Ind.] 67 N. E. 259. Where the lessee sunk more than the stipulated number of wells which proved unproductive and then stopped his operations for more than two years, his lease was forfeited. Florence Oil & Refining Co. v. Orman [Colo. App.] 73 Pac. 628; Hodges v. Brice [Tex. Civ. App.] 74 S. W. 590. Lease held not subject to forfeiture after expiration of period for drilling first well, stipulated rent being paid. Friend v. Mallory, 52 W. Va. 53. Lessees, after drilling dry well, held entitled to reasonable time to return and make further developments. Henne v. South Penn Oil Co., 52 W. Va. 192. Where no well is drilled, an oil and gas lease cannot be extended beyond the term created by the mere payment of the rent stipulated for failure to drill. Ind. Natural G. & O. Co. v. Pierce [Ind. App.] 68 N. E. 691.

48. Coffinberry v. Sun Oil Co. [Ohio] 67 N. E. 1069; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501.

49. Kellar v. Craig [C. C. A.] 126 Fed. 630. The remedy for the breach of the implied covenant to develop is not a forfeiture but an action for damages. Core v. N. Y. Petroleum Co., 52 W. Va. 276.

50. Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 59 L. R. A. 566. Forfeiture clause held to convert lease into lease from year to year at option of lessee, no well being dug. Lowther Oil Co. v. Guffey, 52 W. Va. 88.

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Under a lease providing, besides other consideration, that the lessor should have gas for domestic use from the lessor's pipe lines, the failure to pay the other consideration will not work a forfeiture as long as the lessor continues to use gas from the lessee's lines.[52]

Where lessees agree to begin drilling within a year and in default pay a stated sum per annum for the land, the lessor in default of drilling does not have to wait until the full term of the lease has expired before he can recover the per annum rental.[53] An oil and gas lease demising the land for 10 years and as much longer as gas is obtained in paying quantities or the rental paid as provided is not extended beyond the term by the discovery of a producing well and closing and anchoring it and paying the minimum rental provided for undeveloped territory,[54] nor by the drilling of a well not producing in paying quantity.[55]

An oil lease, made on the alleged consideration of one dollar, not in fact paid, and which binds the lessee to do nothing in the way of search or development is void.[56]

A tenant by the curtesy cannot convey the right to a lessee to extract oil from the land,[57] nor without authority from a court of equity can a guardian lease the land of his ward for such purposes.[58]

In Indiana the devisee of a life estate is entitled to royalties from oil wells opened by the testator's lessee after the life estate accrued;[59] but in West Virginia, the interest of a life tenant in the proceeds of royalty oil is the interest on the fund during his natural life.[60]

Where a tract of land subject to lease is divided between different grantees, each grantee is entitled to the royalty accruing from the wells on the tract owned by him.[61] Where the owner of a half interest in land granted it reserving one-fourth of all oil, gas or other minerals, and subsequently leased it, reserving one-eighth as royalty, he is entitled not to one thirty-second of the whole amount produced by the tract, but to one thirty-second of one-half thereof.[62] A prior lessee whose lease has been avoided and the land subsequently leased does not, by payment of the rent reserved by his lease, acquire the right to the royalties reserved in the second lease.[63] Where two adverse claimants to land lease it to the same company, the claimant out of possession cannot sue the other in equity for the royalties he has received on the lease.[64]

The assignee or any subsequent assignee of a gas lease is liable for the rental of the premises;[65] but not if the lease has expired before assignment.[66]

Where land subject to oil leases is partitioned, the oil under the land is properly reserved from the decree.[67]

That the lessee is wasting the gas, or that he misrepresented the purpose for which he wanted the lease, his purpose being in fact to waste the gas to the in-

51. Henne v. South Penn Oil Co., 52 W. Va. 192.
52. King v. Morristown F. & L. Co. [Ind. App.] 68 N. E. 310.
53. Doxey's Estate v. Service, 30 Ind. App. 174, 65 N. E. 757.
54. American Window Glass Co. v. Williams, 30 Ind. App. 685, 66 N. E. 912.
55. Chaney v. Ohio & I. Oil Co. [Ind. App.] 69 N. E. 477.
56. Roberts v. McFaddin [Tex. Civ. App.] 74 S. W. 105.
57. Barnsdall v. Boley, 119 Fed. 191.
58. Haskell v. Sutton, 53 W. Va. 206.
59. Andrews v. Andrews, 31 Ind. App. 189, 67 N. E. 461.
60. Eakin v. Hawkins, 52 W. Va. 124.
61. N. W. Ohio Natural Gas Co. v. Ullery, 68 Ohio St. 259, 67 N. E. 494.
62. Dickson v. Fertig, 21 Pa. Super. Ct. 283.
63. Eclipse Oil Co. v. Garner, 53 W. Va. 151.
64. Zinn v. Zinn [W. Va.] 46 S. E. 202.
65. Burton v. Forest Oil Co., 204 Pa. 349; MacDonald v. O'Neil, 21 Pa. Super. Ct. 364.
66. Chaney v. Ohio & I. Oil Co. [Ind. App.] 69 N. E. 477.
67. Hanna v. Clark, 204 Pa. 149.

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jury of another lessee of the same owner, is not ground for cancellation of the lease, the parties being protected against waste by the statute.[68]

A lessee in an oil lease will not be permitted during his possession and beneficial enjoyment of the leased premises to allege in defense of an action for the stipulated rent that the lessor under whom he entered had not title at the time of his entry.[69]

The West Virginia act of 1872-73, fixing three years' limitation for suits to recover land leased for oil and other minerals, was repealed in 1882, and was invalid for want of a proper title.[70] Other cases construing oil and gas leases as to the rights of the parties thereunder are collected in the note.[71]

§ 7. *Working contracts.*—Plaintiff cannot recover for failure of defendants to develop certain mining lands as agreed, where, by the laws of the province where the land is situated, plaintiff has not acquired the right to mine.[72] A partnership agreement by certain landowners to explore their lands for "minerals" does not include coal, where for more than forty years after the making of the contract and an abandonment of all rights thereunder coal had no market value.[73] A contract between co-tenants, whereby one is to work the mine and pay the other royalty, does not obligate the one to pay a greater royalty where instead of working the mine he leases it for an increased royalty.[74] Cases construing other working agreements between co-owners are collected in the note.[75]

§ 8. *Public mining regulations.*—The eight hour law as applied to mining is not class legislation and is a proper police regulation.[76] Statutes prohibiting the owners of gas and oil wells from allowing gas or oil to escape therefrom do not deprive the owner of his property without due process of law,[77] and statutes prohibiting waste of oil, gas and other minerals and providing for the plugging of abandoned wells are likewise constitutional.[78]

§ 9. *Statutory liens and charges.*—The provisions of the Idaho lien law must be liberally construed with a view to effect their objects and promote jus-

68. Louisville Gas Co. v. Ky. Heating Co. [Ky.] 77 S. W. 368.

69. MacDonald v. O'Neil, 21 Pa. Super. Ct. 364.

70. Acts 1871-72, p. 152, c. 61; Acts 1882, p. 298, c. 102. McNeeley v. South Penn Oil Co., 52 W. Va. 616.

71. Reduction of rent on gas well held not to apply to other wells subsequently drilled under same lease. Hunter v. Appollo O. & G. Co., 204 Pa. 385. A well producing 1,000,000 feet of gas per day worth from 3 to 5 cents per 1,000 feet produces in paying quantities under the terms of a lease, though it is not marketed. Summerville v. Apollo Gas Co. [Pa.] 56 Atl. 876. Taking possession of a well for the purpose of testing is not an acceptance of it creating an obligation on the part of the acceptor to pay for it under the terms of his lease. Neely v. Rochester Tumbler Co. [Pa.] 56 Atl. 942. Evidence is inadmissible to show that "gas" in a lease is understood to mean only that which comes from a gas well and not that which may appear in an oil well. Burton v. Forest Oil Co., 204 Pa. 349. A covenant to drill a well every two months is not broken where more than one well for each two months the lease has been in effect have been drilled, though more than two months may have elapsed between wells. Kellar v. Craig [C. C. A.] 126 Fed. 630. Where an oil and gas lease provides that if the lessee abandons the lease while there is a well sufficient for the lessor's domestic use, such well shall be left in a condition to be used by him, the lessor cannot take up the piping from such well whether or not it is personal property. Ohio Oil Co. v. Griest, 30 Ind. App. 84, 65 N. E. 534. Lessees held not liable for minimum rent after expiration of time agreed upon for sinking first well, none having been sunk. Briggs v. Elder, 22 Pa. Super. Ct. 324.

72. Jones v. Holden, 182 Mass. 384, 65 N. E. 808.

73. White v. Sayers [Va.] 45 S. E. 747.

74. Gregg v. Roaring Springs L. & M. Co., 97 Mo. App. 44, 70 S. W. 920.

75. Contract between landowners to explore for minerals held to create a mere partnership, terminable at will. White v. Sayers [Va.] 45 S. E. 747. A contract between joint lessees of a mine providing for a division of profits monthly held to contemplate no division until the total receipts exceed the total expenses. Taylor v. Thomas [Colo.] 71 Pac. 381. Agreement under which two persons located a claim held under the evidence to be that they should with a third person each own one-third thereof, and not that the locators should each own one-half. Perelli v. Candiani, 42 Or. 625, 71 Pac. 537.

76. State v. Cantwell [Mo.] 78 S. W. 569.

77. Burns' Rev. St. 1901, §§ 7510-7512 Given v. State, 160 Ind. 552.

78. Ky. St. 1899, §§ 3910-3914. Com. v. Trent [Ky.] 77 S. W. 390.

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tice.[79] Where ore extracted from a mine is milled upon the ground, in a mill belonging to the mine, labor performed therein may be the basis for a lien on the mine.[80] A person employed as foreman and watchman is entitled to the lien,[81] and one placed in charge of mining property, consisting of both personal and real, has a lien on the personal property while in possession thereof.[82] Where several claims are operated as one mine, a lien need not describe the particular claim relative to which the services were rendered,[83] the only effect of failure to specify the amount due on each claim being to postpone the lien to other liens filed against the same claims.[84] That it is not shown that the claimant has ceased to perform labor at the time of filing his claim will not invalidate it, though the statute provides that the claim must be filed within 60 days after performance of the labor.[85]

The lien provided by the Michigan statute on the property of foreign mining corporations and that provided on the property of all mining corporations are concurrent, neither having priority over the other.[86]

§ 10. *Remedies and procedure peculiar to mining rights.*—One in possession of a mining claim in Alaska under a valid location has such title as will support an action to quiet title against an adverse claimant.[87] The Montana statute providing for an inspection of defendant's workings in a suit to establish extra-lateral rights is constitutional against the objection that it deprives defendant of his property without due process of law.[88]

Where plaintiff in ejectment fails to show a valid location, he can take no benefit from the invalidity of defendant's location, defendant being in possession.[89] One who goes upon the land of another under a bona fide belief in his right and mines coal is liable in trover for the value of the coal immediately upon its severance, without deduction for the value of his labor in severing it,[90] and one who removes oil from land belonging to another by virtue of a decree is liable for its value at the date of the decree, that being greater than its value when taken.[91] The use of a drainage drift constructed by permission of plaintiff will not be enjoined where the effect would be to cause great loss both to defendant and plaintiff's grantees.[92]

MISTAKE AND ACCIDENT.

§ 1. Definitions and Elements of Each, and Distinction Between Mistakes of Law and Fact (903).
§ 2. Effect of Mistake or Accident on Contracts (904).
§ 3. Procedure to Obtain Relief (905).

§ 1. *Definitions and elements of each, and distinction between mistakes*

79. Description of claims as "Salem Bar Mines," they being known as the "Salem Bar Mine," is sufficient. Phillips v. Salmon River M. & D. Co. [Idaho] 72 Pac. 886; Thompson v. Wise Boy Min. & Mill. Co. [Idaho] 74 Pac. 958.

80. Thompson v. Wise Boy Min. & Mill Co. [Idaho] 74 Pac. 958.

81. Sess. Laws 1893, p. 49, § 1. Idaho Min. & Mill. Co. v. Davis [C. C. A.] 123 Fed. 396.

82. Idaho Comstock Min. & Mill. Co. v. Lundstrum [Idaho] 74 Pac. 975.

83. Idaho Min. & Mill. Co. v. Davis [C. C. A.] 123 Fed. 396.

84. Phillips v. Salmon River M. & D. Co. [Idaho] 72 Pac. 886.

85. Idaho Min. & Mill. Co. v. Davis [C. C. A.] 123 Fed. 396.

86. Comp. Laws 1897, §§ 5472, 10755. Bullock Mfg. Co. v. Sunday Lake Iron Min. Co. [Mich.] 93 N. W. 611.

87. Fulkerson v. Chisna M. & I. Co., 122 Fed. 782.

88. Code Civ. Proc. § 1314. State v. Dist. Ct. [Mont.] 73 Pac. 230; State v. Dist. Ct. [Mont.] 74 Pac. 132. Complaint to establish extra lateral rights held sufficient to authorize order for inspection of defendant's workings. Mont. Ore Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co., 27 Mont. 288, 70 Pac. 1114; State v. District Court [Mont.] 73 Pac. 230.

89. Benton v. Hopkins [Colo.] 74 Pac. 891.

90. Ivy Coal & Coke Co. v. Ala. Coal & Coke Co., 135 Ala. 579.

91. Southern Oil Co. v. Scales [Tex. Civ. App.] 69 S. W. 1033.

92. Hopkins v. Stoneroad, 21 Pa. Super. Ct. 168.

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of law and fact.—This topic treats only of mistake and accident as ground for equitable relief.[93] Mistake of fact has been defined to be an unconscious ignorance or forgetfulness of a fact past or present material to the contract, or belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed. Equity will relieve against the consequences of such a mistake,[94] but not a mere mistake of opinion or belief. The mistake must be as to a past or present material fact.[95] Equity will not grant relief because of ignorance or mistake of law unless there will be great hardship in enforcing the contract,[96] but even though a deed or contract is understood by the parties before signing, equity will reform it if when given a legal construction it fails to express their mutual intent.[97]

§ 2. *Effect of mistake or accident on contracts.*—An instrument executed under a mistake of fact may be rescinded whether the mistake is unilateral[98] or mutual,[99] there being no meeting of minds. It may be reformed only if the mistake was mutual; that is, the instrument must fail to express the intention of both parties, but it must appear that there was an agreement between the parties.[1] To warrant rescission, the condition of affairs must permit of a sub-

93. As ground for new trial, see New Trial and Arrest of Judgment. See, also, the topic Equity, and the topics treating of particular subjects of equitable jurisdiction, such as Cancellation of Instruments, Reformation of Instruments and Specific Performance, and also such titles as Contracts, Deeds and Gifts.

94. Marshall v. Hornier [Okl.] 74 Pac. 368. Equity will not interfere for the purpose of carrying out an intention which the parties did not have when they entered into a transaction, but which they might or even would have had if they had been more correctly informed as to the law. Wall v. Meilke [Minn.] 94 N. W. 688.

95. Duration of injury. Chicago & N. W. R. Co. v. Wilcox [C. C. A.] 116 Fed. 913; In re Alexander's Estate, 206 Pa. 47. Mistake of judgment is not ground for setting aside an award. Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458.

96. Norris v. Crowe, 206 Pa. 438; Wall v. Meilke, 89 Minn. 232, 94 N. W. 688; Bottorff v. Lewis [Iowa] 95 N. W. 262. Compromise of a disputed legal question. Connor v. Etheridge [Neb.] 92 N. W. 135. Option for sale of land. Carter v. Love [Ill.] 69 N. E. 85. Offer of judgment. Walsh v. Empire Brick & Supply Co., 85 N. Y. Supp. 528. Mistake as to priority of claim. Atlanta Trust & Banking Co. v. Nelms, 116 Ga. 915.

97. Lease. Brown v. Ward, 119 Iowa, 604, 93 N. W. 587; Wall v. Meilke [Minn.] 94 N. W. 688. Insurance policy—mistake as to legal owners of property. Lansing v. Commercial Union Assur. Co. [Neb.] 93 N. W. 756. Legal effect of an agreement. Hopwood v. McCausland, 120 Iowa, 218, 94 N. W. 469.

98. Translation of a deed. Wirsching v. Grand Lodge, F. A. M. [N. J. Eq.] 56 Atl. 713. Deed in settlement of tax claims. Farmers' Loan & Trust Co. v. Suydam [Neb.] 95 N. W. 867. Deed. Stewart v. Dunn, 77 App. Div. [N. Y.] 631. Assumption of mortgage by grantee. Bowman v. Besley [Iowa] 97 N. W. 60; Youngstown Elec. Light Co. v. Butler County Poor Dist., 21 Pa. Super. Ct. 95. Mistake as to prices. Singer v. Grand Rapids Match Co., 117 Ga. 86. Judgment obtained by mistake in return day in a summons. Patterson v. Yancey, 97 Mo. App. 681, 71 S. W. 845.

99. Lease. Strength of walls. Barker v. Fitzgerald, 105 Ill. App. 536; Lord v. Horr, 30 Wash. 477, 71 Pac. 23. Lease. Thomas v. Conrad, 24 Ky. L. R. 1630, 71 S. W. 903. Assumption of mortgage. Boulden v. Wood, 96 Md. 332, 53 Atl. 911. Discharge of mortgage. Saint v. Cornwall [Pa.] 56 Atl. 440. Wrong seal upon bonds. Defiance v. Schmidt [C. C. A.] 123 Fed. 1. Insurance policy. Pictet Spring Water Ice Co. v. Citizens' Ins. Co., 24 Ky. L. R. 1461, 71 S. W. 514. Contract of sale. Null v. Elliott, 52 W. Va. 229. An agreement. Barker v. Pullman's Palace Car Co., 124 Fed. 555. Mutual mistake in bill of lading. Fowle v. Pitt, 183 Mass. 351, 67 N. E. 343. Mistake in rate of interest made by scrivener. Story v. Gammell [Neb.] 94 N. W. 982. Gift causa mortis $4,500 given instead of $500. Crippen v. Adams [Mich.] 92 N. W. 496. Equity will reform a supersedeas bond for mistake. Nourse v. Weitz, 120 Iowa, 708, 95 N. W. 251.

1. Keith v. Woodruff, 136 Ala. 443. Failure to reserve coal. Montgomery v. Mann, 120 Iowa, 609, 94 N. W. 1109; Drachler v. Foote, 84 N. Y. Supp. 977. Deed. Failure to reserve coal. Baab v. Houser, 203 Pa. 470. Mortgage and notes. Sauer v. Nehls [Iowa] 96 N. W. 759. Words "oil and gas" left in deed by mistake. Nutter v. Brown, 51 W. Va. 598. Failure to reserve part of land granted to grantee. Barry v. Rownd, 119 Iowa, 105, 93 N. W. 67; Kee v. Davis, 137 Cal. 456, 70 Pac. 294. Erroneous description of land. Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901. Words "trustee for," etc., inserted. Aller v. Crouter, 64 N. J. Eq. 381. Location of a roadway reserved improperly stated. White v. Shaffer [Md.] 54 Atl. 974. Mistake in estate granted. Wiemer v. Himmel, 200 Ill. 374, 65 N. E. 680. Deed. Bottorff v. Lewis [Iowa] 95 N. W. 262; Southern Finishing & Warehouse Co. v. Ozment, 132 N. C. 839. Deed of gift—mistake of scrivener. Ferrell v. Ferrell, 53 W. Va. 515. Deed—mistake of scrivener. Marshall v. Homier [Okl.] 74 Pac. 368. Deed, grant of land not property of grantor. McGulgan v. Gaines [Ark.] 77 S. W. 52. A void mortgage will

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stantial restoration,[2] and the plaintiff after discovering the mistake must place the other party in statu quo.[3] A decree to reform a deed must expressly save all intervening rights.[4] If parties act under a contract as executed, equity will not later reform because of a mistake.[5] Acquiescence, consisting in unnecessary delay after knowledge of mistake, will defeat equitable relief,[6] but not, it has been held, if no one will suffer because of reformation of the deed.[7] The party to be charged with laches should have knowledge of matter involved, or after notice, have failed to obtain knowledge, or there must have been circumstances which should have induced inquiry.[8] Mistake which is the result of the party's own negligence will not be relieved against in equity.[9] Equity will grant relief to a party who through a mutual mistake confers a benefit upon another, by requiring the party benefited to reimburse the other.[10]

§ 3. *Procedure to obtain relief.*—To invoke the aid of equity, a bill to reform must state the particular circumstances constituting the mistake.[11] The burden of showing mistake rests upon person who asserts it.[12] A petition which alleges a mutual mistake of fact by parties to an agreement, but fails to ask a reformation of the agreement, is an attempt to vary the terms of a written contract by parol and is demurrable.[13]

Evidence.—The character of evidence necessary to reform a deed must be clear, precise and indubitable. A bare preponderance of evidence is not sufficient.[14] Parol evidence of the actual agreement is admissible to reform an instrument in equity.[15]

MORTGAGES.

§ 1. Nature and Elements of Mortgages (906).
§ 2. Validity (906).
§ 3. Equitable Mortgages (908).
§ 4. Absolute Deed as Mortgage (908).
§ 5. Nature and Incidents of Trust Deeds as Mortgages (913).
§ 6. Construction and Effect of Formal Mortgages (914).
§ 7. Title and Rights of Parties (915).
§ 8. Lien and Priorities (918).
§ 9. Assignments of Mortgages (919).
§ 10. Transfer of Title of Mortgagor (920).
§ 11. Transfer of Premises to Mortgagee and Merger (922).
§ 12. Payment, Release or Satisfaction (923).
§ 13. Subrogation (927).

Scope of article. An earlier topic[16] has fully treated the procedure by which

not be reformed. Mortgage to secure husband's debts. Day v. Shiver, 137 Ala. 185.

2. Barker v. Fitzgerald, 105 Ill. App. 536.

3. Failure to tender amount received by mistake. Niederhauser v. Detroit Citizens' St. R. Co. [Mich.] 91 N. W. 1028. Grantee occupied wrong parcel of land. Wieneke v. Deputy, 31 Ind. App. 621, 68 N. E. 921.

4. Babb v. Houser, 203 Pa. 470; White v. Shaffer [Md.] 54 Atl. 974; Adams v. Drews, 110 La. 456.

5. Fuller v. Schrenk, 171 N. Y. 671, 64 N. E. 1126.

6. Knowledge that mortgage did not include parties' agreed upon. Van Beck v. Milbrath [Wis.] 94 N. W. 657. Laches. Nutter v. Brown, 51 W. Va. 598, 42 S. E. 661.

7. Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901.

8. Wall v. Meilke [Minn.] 94 N. W. 688; Bottorf v. Lewis [Iowa] 95 N. W. 262, under the Code.

9. Contract to build. Youngstown Elec. Light Co. v. Butler County Poor Dist., 21 Pa. Super. Ct. 95. Ignorance of contents of an insurance policy. Bostwick v. Mut. Life Ins. Co., 116 Wis. 392, 92 N. W. 246.

10. Artesian well dug by mistake on wrong land. Pearl Tp. v. Thorp [S. D.] 96 N. W. 99. Description in deed less than that pointed out. Equitable Trust Co. v. Milligan, 31 Ind. App. 20, 65 N. E. 1044.

11. Batson v. Findley, 52 W. Va. 343.

12. Reimer v. Green Room Club, 84 N. Y. Supp. 561.

13. Petition by one partner to recover from another. Nystuen v. Hanson [Iowa] 91 N. W. 1071.

14. Williamson v. Carpenter, 205 Pa. 164. Deed. Wall v. Meilke [Minn.] 94 N. W. 688. Release. Willard v. Davis, 122 Fed. 363. Agreement—mistake of agents. Barker v. Pullman Palace Car Co., 124 Fed. 555; Ottomeyer v. Pritchett [Mo.] 77 S. W. 62; Bailey v. Wood, 24 Ky. L. R. 801, 69 S. W. 1103. Failure to reserve right of way. Drachler v. Foote, 84 N. Y. Supp. 977; Keith v. Woodruff, 136 Ala. 443. Mortgages and notes. Sauer v. Nehls [Iowa] 96 N. W. 759; Reimer v. Green Room Club, 84 N. Y. Supp. 561; Bowman v. Besley [Iowa] 97 N. W. 60. Release of claim. Chicago, etc., R. Co. v. Wilcox [C. C. A.] 116 Fed. 913; Baab v. Houser, 203 Pa. 470; Boulden v. Wood, 96 Md. 332; Williamson v. Carpenter, 205 Pa. 164.

15. Wieneke v. Deputy, 31 Ind. App. 621,

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mortgages are foreclosed and the premises sold. This article is devoted to the mortgage as an instrument and the substantive rights growing from it. The doctrine of notice and the operation of the recording acts will be the subject of a separate article[17] dealing with all conveyances of or acquisitions of interests in land.[18] The application of the statute of frauds,[19] the effect of the mortgage as an encumbrance,[20] and the purchase of lands subject to mortgages,[21] each receive treatment elsewhere.[22]

§ 1. *Nature and elements of mortgages.*—A mortgage is a security for debt, hence a conveyance, though to pay debts, is not a mortgage.[23] Whatever is the form of the instrument equity will, as between the parties, hold it to be a mortgage if such was the intention.[24] The mortgagor need not remain in possession.[25]

A contingent remainder,[26] a purchaser's right under a contract of sale of lands,[27] or a ward's estate in real property still in the hands of the guardian after ward's majority,[28] is susceptible of being mortgaged.

§ 2. *Validity.*—With respect to execution and validity, mortgages are in general subject to the same requirements as deeds.[29] For certain purposes acknowledgment is necessary, though not requisite as between the parties unless a statute requires it.[30] They may be vitiated by champerty,[31] failure of consideration,[32] for the sufficiency of which, see notes,[33] material alteration,[34] fraud[35]—

68 N. E. 921. Rate of interest. Story v. Gammell [Neb.] 94 N. W. 982. Mortgage and notes. Sauer v. Nehls [Iowa] 96 N. W. 759. Deed—mistake in stating an incumbrance. Kee v. Davis, 137 Cal. 456, 70 Pac. 294. Insurance policy. Gwaltney v. Provident Sav. Life Assur. Soc., 132 N. C. 925. Deed. Marshall v. Homier [Okl.] 74 Pac. 368. Contract to construct railroad. Linn v. East Eagle & H. M. Turnpike Co., 24 Ky. L. R. 978, 70 S. W. 401.

16. Foreclosure of Mortgages on Land, 2 Curr. Law, 14.

17. Notice and Record of Title.

18. Record of deeds as well as of mortgages will be treated; also the equitable doctrine of bona fide purchase.

19. Frauds, Statute of.

20. Covenants for Title; Vendor and Purchaser.

21. Vendor and Purchaser.

22. Rights and liabilities between life tenant and remainderman, see Life Estates, etc.; between heirs and personal representatives, see Estates of Decedents. Rights of mortgagee in eminent domain proceeding, see Eminent Domain.

23. Conveyance in trust to sell for creditors and repay surplus to grantor [3 Comp. Laws, § 8839]. Geer v. Traders' Bank [Mich.] 93 N. W. 437.

24. See post, §§ 3, 4.

25. Moore v. Boagni [La.] 35 So. 716.

26. Ky. St. 1899, § 2341. Davis v. Willson, 25 Ky. L. R. 21, 74 S. W. 696.

27. Titcomb v. Fonda R. Co., 38 Misc. [N. Y.] 630.

28. The lien is valid as against a purchaser with notice. Shoop v. Stewart, 66 Kan. 631, 72 Pac. 219.

29. See article Deeds.

30. See Acknowledgment; Dower; Homestead; Notice and Record of Title.

31. See article Champerty. The life tenant's possession is not adverse rendering a mortgage by the remainderman champertous [Ky. St. 1899, c. 15, §§ 209-216]. Davis v. Willson, 25 Ky. L. R. 21, 74 S. W. 696. Where, on the day a purchaser at a judicial sale obtains a deed, he executes a mortgage to secure the purchase price, the mortgagee will be regarded as a purchaser at judicial sale and the transaction not champertous, though the premises are in the possession of an adverse occupant. De Garmo v. Phelps, 176 N. Y. 455, 68 N. E. 873.

32. See article Deeds. Facts pleaded, averring that property for which the notes and mortgage were given, had been taken from defendant under a superior claim, held sufficient as a defense against an assignee alleged to have notice, especially when the assignee took the notes after due. Stoy v. Bledsoe, 31 Ind. App. 643, 68 N. E. 907.

33. A moral obligation to pay pre-existing legal debt is a good consideration for the execution of a note and mortgage in its payment. Fourth Nat. Bank v. Craig [Neb.] 96 N. W. 185. A note furnishing consideration may be executed prior to the mortgage. Sargent v. Cooley [N. D.] 94 N. W. 576. If the debt secured is not owned by the mortgagee, there is a failure of consideration. Welbon v. Webster, 89 Minn. 177, 94 N. W. 550. An extension by a second mortgagee is on sufficient consideration when procured by the reduction by the mortgagor of the amount of a first mortgage. Evidence held sufficient to show an extension. Bradley v. Glenmary Co., 64 N. J. Eq. 77.

34. See Alteration of Instruments. Evidence held sufficient to show that a mortgage was not altered. Conkling v. Levie [Neb.] 94 N. W. 987.

35. See article Fraud and Undue Influence. Inducing a wife to sign a mortgage on the husband's land by representations that the money to be raised would pay all other incumbrances. Ristine v. Clements, 31 Ind. App. 338, 66 N. E. 924. Misrepresentations as to the value of realty are not fraud where the mortgagee may view property. McMullen v. Griggs, 23 Ohio Circ. R. 417. Represents

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which may result in but partial invalidity,[36] undue influence,[37] incapacity of the mortgagor,[38] or duress[39]—which may be waived by payments of interest.[40]

An agent executing a mortgage must do so before his power is revoked by the principal's death.[41]

A mortgage taken in the name of an agent for the purpose of escaping taxation will not be avoided on the ground of public policy.[42]

Provisions for the acceleration of maturity of the debt, on default in the payment of interest, are valid.[43]

Where mortgages are required to be in writing with the formality of grants of realty, a parol agreement that a mortgage shall stand as security for future advances is invalid.[44] Attestation is unnecessary as between the parties.[45] Mortgages to a corporation may be acknowledged before its officers or stockholders.[46] The trustees need not be present when the deed is executed, nor need the mortgage be redelivered to the trustee after it has been deposited for record.[47] Defects may be cured by a confirmatory deed[48] or ratification.[49]

Mortgagors cannot assert in defense to a mortgage that it created an unlawful preference.[50] An assignee in insolvency elects to recognize the validity of a mortgage as an encumbrance by a suit to recover the value of the property on the ground that it was an unlawful preference.[51]

In mortgages by married women,[52] the husband must join.[53] Whether a mortgage for her husband's debt is valid depends on her statutory power to charge

tion by legal owner that he was the sole owner, where in fact there was an outstanding equitable interest, is not fatal where the equitable owner does not interpose any claim. Id.

36. Where the answer sets up only misrepresentations as to a portion of the mortgage, it should not be adjudged totally invalid, there being no allegation that it was wholly illegal. Such finding is not justified by the fact that evidence as to the misrepresentations was received without objection. Kittel v. Schmieder, 85 N. Y. Supp. 977.

37. Evidence held sufficient. Thorp v. Smith [N. J. Err. & App.] 54 Atl. 412. Mortgage was unconscionable. Sims v. Sims, 101 Mo. App. 407, 74 S. W. 449.

38. See article Incompetency. Where the mortgagor is without understanding at the time of execution of the mortgage, the good faith of the mortgagee is immaterial, but if he has been induced to accept the mortgage in place of that of a third person, such third person should be made a party in foreclosure in order that a remedy may be asserted against him. Finding insufficient to show that the mortgagor was without understanding within the meaning of Civ. Code, § 38, and non-consenting within the meaning of Civ. Code, §§ 1550, 1565. Jacks v. Estee, 139 Cal. 507, 73 Pac. 247. Evidence held sufficient. Farmers' Bank v. Normand [Neb.] 92 N. W. 723; Tatum v. Tatum's Adm'r [Va.] 43 S. E. 184.

39. See article Duress. Evidence held insufficient. Bogue v. Franks, 199 Ill. 411, 65 N. E. 346. Threat of enforcing judgment is not duress. Dispeau v. First Nat. Bank, 24 R. I. 508.

40. Dispeau v. First Nat. Bank, 24 R. I. 508.

41. Brown v. Skotland [N. D.] 97 N. W. 543.

42. It was recorded and there was an unrecorded assignment to the principal. Callicott v. Allen, 31 Ind. App. 561, 67 N. E. 196.

43. Curran v. Houston, 201 Ill. 442, 66 N. E. 228.

44. Civ. Code, § 2922. Eikelman v. Perdew, 140 Cal. 687, 74 Pac. 291.

45. A mortgage is admissible in evidence on proof of execution. Pulliam v. Hudson, 117 Ga. 127.

46. See Acknowledgment. President and chief executive officer. Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680. The attesting witnesses and the notary taking the acknowledgment, may be stockholders. Mortgage executed in accordance with Rev. St. Ohio 1892, § 4106. Read v. Toledo Loan Co., 68 Ohio St. 280, 67 N. E. 729. Secretary acting as agent in the negotiation of the loan. Gilbert v. Garber [Neb.] 95 N. W. 1030.

47. In re Goldville Mfg. Co., 118 Fed. 892.

48. In that an original deed was either a forgery or obtained from the grantor while insane. Harris v. Kiel [Tex. Civ. App.] 70 S. W. 226.

49. An agreement for extension which is insufficient as not limiting the time may be validated by a subsequent recognition and ratification. Leis v. Sinclair [Kan.] 74 Pac. 261.

50. Mortgage executed to a director of an association to discharge a mortgage to the association no complaint being made by other creditors and stockholders. Beatty v. Somerville, 102 Ill. App. 487.

51. Sowles v. Lewis, 75 Vt. 59.

52. See Husband and Wife for complete treatment of effect of coverture on conveyances.

53. Ky. St. 1899, § 2128. Deusch v. Questa, 25 Ky. L. R. 707, 76 S. W. 329. Community property. Humphries v. Sorenson [Wash.] 74 Pac. 690.

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her separate property for such purpose.[54] If she lacks that power, the mortgage is voidable but not void.[55] She may become concluded to say that it was without consideration moving to her,[56] but a wife joining her husband as surety in a mortgage stating that the debt is joint and several may, for the purpose of obtaining a right of subrogation, though not to defeat the mortgage, show that she was surety.[57] If the mortgage on its face appears to have been executed by her as principal, she has the burden of establishing that the debt was her husband's and that she executed the mortgage as surety.[58]

The mortgagee is not affected by fraud or undue influence exercised by the mortgagor's husband to which the mortgagee was not a party.[59]

A married woman who entrusts a mortgage to her husband for delivery upon condition is estopped from denying the delivery, though he does not impart his secret oral instructions as to conditions.[60]

§ 3. *Equitable mortgages.*—A promise to pay a certain sum to another for the purchase money of specified lands will not be regarded as an equitable mortgage on the land in the absence of evidence of the intention of the parties, the burden of establishing which is on the person asserting it.[61]

§ 4. *Absolute deed as mortgage.*—Any transfer of property as security regardless of form may be in effect a mortgage.[62] The grantor need not understand the nature of the transaction,[63] and may have regarded the grantee as absolute owner.[64] A possibility of working fraud is not fatal to the application of this rule.[65]

54. A mortgage by the wife on her separate property is not invalid, though the entire consideration pass to her husband. Wilson v. Neu [Neb.] 95 N. W. 502; Hallowell v. Daly [N. J. Eq.] 56 Atl. 234.

55. Strangers cannot assail it. Field v. Campbell [Ind. App.] 67 N. E. 1040.

56. A mortgage given at the time she takes title to the property and as a part of the transaction cannot be avoided on the ground that it is to secure the debt of a third party without consideration. Conkling v. Levie [Neb.] 94 N. W. 987. Where the mortgage secures the release of a valid lien, the wife cannot assert that it was given to secure the husband's debt. Field v. Campbell [Ind. App.] 67 N. E. 1040.

57. Snook v. Munday, 96 Md. 514.

58. Mohr v. Griffin, 137 Ala. 456; Field v. Campbell [Ind. App.] 67 N. E. 1040.

59. Evidence held insufficient to show fraud on a married woman invalidating the mortgage. Mohr v. Griffin, 137 Ala. 456. A special plea must allege such participation or notice. Walker v. Nicrosi, 135 Ala. 353. Evidence held to show an acknowledgment and execution by the wife over a contention that she was by fraudulent representations induced to sign. Citizens' Bank v. Jones, 117 Wis. 446, 94 N. W. 329.

60. Alexander v. Welcker [Cal.] 74 Pac. 845.

61. Jones v. Kennedy [Ala.] 35 So. 465.

62. An agreement whereby a third person purchased property under a foreclosure sale and executed a new mortgage with a promise to permit the original mortgagor to purchase and assume the new mortgage. English v. Rainear [N. J. Eq.] 55 Atl. 41. Retention of title as security for expenditures with agreement to accept pay in installments with interest. McCrillis v. Cole [R. I.] 55 Atl. 196. Execution of deeds by a married woman to a third person, reciting facts creating an indebtedness to the grantor's husband, and that it is the intention that the grantee shall reconvey to the grantor's husband. Dillon v. Dillon, 24 Ky. L. R. 781, 69 S. W. 1099. Trustee's sale to the creditor at less than the value of the property under an agreement that the conveyance shall be void in case the debtor repay the amount within a time specified. Thacker v. Morris, 52 W. Va. 220. Instrument reciting a loan and a deposit of deeds together with the permission to sell in case redemption is not had before a certain date. Horton v. Murden, 117 Ga. 72. One who takes title for another with an agreement to convey on re-payment of advances is a mortgagee. The remedies of the parties are as in the case of a formal mortgage. Beebe v. Wis. Mortg. Loan Co., 117 Wis. 328, 93 N. W. 1103. Evidence held sufficient to show that a conveyance was intended as security. Fahay v. State Bank of O'Neill [Neb.] 95 N. W. 505.

63. Facts held to justify a redemption after the period fixed in the original agreement for a reconveyance. Rose v. Gandy, 137 Ala. 329.

64. Where a conveyance for security is to a son-in-law, the grantor a widow, is not by recognizing him as an absolute owner, precluded from asserting subsequently that the conveyance was a mortgage. Tuggle v. Berkeley [Va.] 43 S. E. 199.

65. The fact that one of the objects of an instrument sought to be declared a mortgage was to place the mortgagor in such a position that she could subsequently more successfully commit a fraud if she so concluded does not justify a ruling to the effect that although no attempt was ever made to perpetuate the fraud and there was nothing more on plaintiff's part than a mere

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There must be a debt secured,[66] which, though it need not be created by an express promise,[67] must be capable of enforcement by action.[68] The loan need not come into the hands of the mortgagor if applied for his benefit and for the purpose contemplated in the original agreement.[69]

Mere retention of possession will not defeat an absolute conveyance,[70] unless joined with other elements.[71] The same is true of an agreement to reconvey,[72] which must be dependent on the satisfaction of a debt.[73] Inadequacy of price does not alone evidence a mortgage, though it may be considered.[74]

Requisites of defeasance.—Under the statutes in certain states, a defeasance cannot be admitted to convert a deed into a mortgage, though contemporaneous with the execution and delivery of the deed, unless acknowledged and recorded,[75] but while the debtor may not assert that the transfer is a mortgage, his creditors may sell his equity and distribute the proceeds.[76] A bond for a deed in the ordinary form is not to be regarded as an instrument of defeasance where it does not recite the indebtedness or refer to a prior conveyance.[77] A statute designed to protect bona fide purchasers as against unrecorded or parol defeasances does not prevent a warranty deed being shown to be a mortgage in an action on an insurance policy.[78] An instrument of defeasance need not refer to the original deed where there is evidence sufficient to show the connection.[79] The original deed may be read to ascertain the quantum of the estate mortgaged.[80]

Effect.—The legal title vests in the grantee.[81] If the contract is for reconveyance on payment, no foreclosure is required,[82] and unless the provision is that

intention, then defendant may retain plaintiff's property as his own. De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813.

66. Held to show a conditional sale and not a mortgage where there was a transfer in payment of a mortgage, the cancellation furnishing the consideration for the deed and no new debt being created. Holladay v. Willis [Va.] 43 S. E. 616. Evidence held to show that a deed was to be treated as a mortgage not extinguishing a loan until its payment. Evans v. Thompson, 89 Minn. 202, 94 N. W. 692.

67. Beebe v. Wis. Mortg. Loan Co., 117 Wis. 328, 93 N. W. 1103.

68. Evidence held insufficient to establish a mortgage. Reed v. Parker [Wash.] 74 Pac. 61.

69. Advance to complete payment of purchase money and to pay for improvements. Ball v. Marske, 202 Ill. 31, 66 N. E. 845.

70. No actual delivery of the property, and the buyer said that he would not evict the grantor. Franklin v. Sewall, 110 La. 292.

71. Inadequate consideration, retention of possession, and a debt secured, sufficient. Tuggle v. Berkeley [Va.] 43 S. E. 199.

72. Giving of a concurrent option to purchase, to a third party or to the owner of the equity of redemption. Braun v. Vollmer, 89 App. Div. [N. Y.] 43.

73. Wolf v. Theresa Village Mut. F. Ins. Co., 115 Wis. 402, 91 N. W. 1014; Tannyhill v. Pepperl [Neb.] 96 N. W. 1005. Contemporaneous agreement to sell and reconvey between the same parties and for equal consideration, repayment to be made in future payments with interest, time being of the essence of the contract to reconvey, is sufficient. Wells v. Geyer [N. D.] 96 N. W. 289. Agreement for a re-conveyance on payment of a certain amount within a specified time is not sufficient (Yost v. First Nat. Bank, 66 Kan. 605, 72 Pac. 209) especially where interest is not payable (Bates v. Sherwood, 24 Ohio Circ. R. 146).

74. Forester v. Van Auken [N. D.] 96 N. W. 301.

75. Act June 8, 1881, P. L. 84. Lohrer v. Russell [Pa.] 56 Atl. 333. Act June 8, 1881, does not invalidate an agreement between a debtor and creditor that both should endeavor to sell land of the debtor transferred to the creditor and that the debtor should receive any surplus after discharge of the debt with the proceeds. Moran v. Munhall, 204 Pa. 242.

76. Debtor's right barred by Act 1881, P. L. 84 requiring a recorded defeasance. Eberly v. Shirk, 206 Pa. 414.

77. Gen. St. 1901, § 4217. Holmes v. Newman [Kan.] 75 Pac. 501.

78. Rev. St. 1898, § 2243. Wolf v. Theresa Village Mut. F. Ins. Co., 115 Wis. 402, 91 N. W. 1014.

79. Evidence held sufficient to show conclusively that an instrument was a mortgage under which there had been a satisfaction or a reconveyance. Turner v. Cochran, 30 Tex. Civ. App. 558, 70 S. W. 1024.

80. Recital that the grantor conveyed a half interest in certain described property and "also in the following property" being the same as described in a deed conveying the entire interest, will be regarded as contemplating the entire title in the lands last described. Description of land in defeasance held sufficient when construed in reference to other conveyances and proof showing identity. Turner v. Cochran, 30 Tex. Civ. App. 558, 70 S. W. 1024.

81. Absolute deed as security against possible future liability. Baxter v. Pritchard [Iowa] 98 N. W. 372.

82. Grantee need not bring an action to

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the deed is to become void on payment, a reconveyance is necessary to revest title in the grantor.[83] Where such retransfer is not made, an heir of the grantee is not liable in damages for recording the deed.[84] If the grantee sells to a bona fide purchaser, action may be brought against the grantee for the value of the property,[85] but the grantee may on transfer of the debt convey the land,[86] and is not liable for a fraud of his grantee in transferring to an innocent purchaser, defeating the right to redeem, there being no showing that his act was with intent to aid in the fraud.[87]

The conveyance does not extinguish the debt and the mortgagee may recover the money loaned in case he derive no benefit from the conveyance.[88]

Where, without the knowledge of an equitable mortgagee, there is an agreement between the mortgagor and one selling him personalty that the title to the personalty shall remain in the seller, the mortgagee may claim such property on its becoming fixtures as against the seller.[89]

Subsequent transferees.—An absolute deed may be declared a mortgage, though an innocent purchaser has made improvements, since he can be reimbursed.[90] Mortgagees of the grantee are to be regarded as equitable assignees of the equitable mortgagee's interest.[91] Though the mortgage is in the form of an absolute deed, an assignee of the note acquires only a mortgage lien by a quit-claim deed from the mortgagee if with knowledge.[92]

Where the mortgagor is in possession, a transferee takes subject to his rights, though after default.[93] A contract for reconveyance on payment of a loan to secure which there has been an absolute conveyance, if recorded, is constructive notice to the heirs of the grantee, and their laches is not excused by want of knowledge unless there is fraud on the part of claimants under the deed.[94]

Knowledge on the part of the mortgagee prior to an assignment that a third party has an equitable lien against the premises does not affect the rights of his assignee who has neither actual nor constructive notice of such rights.[95]

As against a lien secured by attachment against the grantee, the grantor may show that a recorded absolute deed was intended as a mortgage.[96]

Surrender or loss of right to redeem.—The right to redeem and the right to foreclose are reciprocal and barred by the same limitations.[97] After execution of an absolute deed as a mortgage, the estate may be vested in the mortgagee by a bona fide agreement between the parties.[98] The agreement may be oral,[99] but

divest grantor of his equitable right of redemption. Fitch v. Miller, 200 Ill. 170, 65 N. E. 650.

83. Knowles v. Knowles [R. I.] 56 Atl. 775.

84. The remedy in such case is an action in covenant and not in tort. Knowles v. Knowles [R. I.] 56 Atl. 775.

85. Such action is not one involving title to land or to try title, and a county court may have jurisdiction if the amount involved is not too great. In the petition a description of the property by reference to a judgment containing an adequate description, is sufficient. Espey v. Boone [Tex. Civ. App.] 75 S. W. 570.

86. Such act is not breach of a bond for title to re-convey. Cumming v. McDade, 118 Ga. 612.

87. Cumming v. McDade, 118 Ga. 612.

88. Evans v. Thompson, 89 Minn. 202, 94 N. W. 692.

89. Person holding title to land as security for expenditures in erecting a mill may hold an engine placed in the mill on an agreement that title should not pass. McCrillis v. Cole [R. I.] 55 Atl. 196.

90. Carveth v. Winegar [Mich.] 94 N. W. 381.

91. Kiddell v. Bristow [S. C.] 45 S. E. 174.

92. Comp. Laws, § 3243. State v. Mellette [S. D.] 92 N. W. 395.

93. English v. Rainear [N. J. Eq.] 55 Atl. 41.

94. Fitch v. Miller, 200 Ill. 170, 65 N. E. 650.

95. Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680.

96. Though Sayles' Ann. Civ. St. art. 4640 provides that mortgages shall be void as to creditors and subsequent purchasers for value and without notice unless filed for record. Long v. Fields, 31 Tex. Civ. App. 241, 71 S. W. 774.

97. Fitch v. Miller, 200 Ill. 170, 65 N. E. 650; Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283.

98. Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283.

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must be free from fraud, unfairness or undue influence.[1] To hold the grantee for the purchase price as an absolute purchaser, the evidence of the transaction must be sufficient to convey an interest in real property under the statutes.[2]

Where there is a reserved right to repurchase, redemption may be had after expiration of the time for repurchase if the transaction is held to constitute a mortgage,[3] but a subsequent agreement for extension of the time to a specified date may render the date fixed of the essence of the agreement.[4]

Proceedings to establish.[5]—A deed may be declared to be a mortgage on a cross complaint in an action to reform the description, though a reconveyance cannot be decreed in the absence of proof of the amount due the grantee.[6] Where an absolute conveyance is alleged to have been given to secure the purchase price of personalty, the mortgagor's remedy is an action in equity for an accounting of the rents and profits and to have the deed declared a mortgage, and not an action at law to recover the purchase price.[7] A court of equity has jurisdiction to restrain waste and to ascertain whether the debt has been paid and decree payment of any amount found due.[8]

An innocent third person to whom the grantee of an absolute deed, in effect a mortgage, has agreed to convey, need not be made a party to a suit by the mortgagor to establish his rights, but such third person's rights should be saved.[9]

Laches is not shown where there were repeated efforts to induce a reconveyance and the grantee avoided the grantor.[10]

Tender.—A bill cannot be maintained to have an absolute conveyance declared a mortgage without an offer to redeem.[11] Tender need not be made prior to the action.[12] The grantor is not entitled to reconveyance from an original or subgrantee until full payment of the debt.[13] The grantor's transferee is in the same position.[14]

99. Cramer v. Wilson, 202 Ill. 83, 66 N. E. 869; Baxter v. Pritchard [Iowa] 98 N. W. 372.

1. Where after an absolute conveyance between a client and his attorney intended as security, the attorney sets up an agreement on consideration vesting him with the entire title, the burden is on him to establish the fairness of the transaction. Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283. Where the mortgagor is in possession under an absolute conveyance as security, an agreement arising from mistake and without consideration to relinquish the right to redeem and to surrender possession, is not enforceable. Wells v. Geyer [N. D.] 96 N. W. 289.

2. Where together with a conveyance intended as a mortgage an option is given to the grantee to buy for the consideration expressed in the deed, a letter from the grantee stating that she elected to exercise the option, in return to which the grantor writes a letter stating that he releases the premises with the understanding that the balance of the purchase price is to be paid, creates no obligation for the payment of the consideration expressed in the conveyance. Reich v. Dyer, 91 App. Div. [N. Y.] 240.

3. Rose v. Gandy, 137 Ala. 329. Where a married woman conveys her property and takes back a counter-letter permitting her to redeem within a year, her intent to execute a mortgage will not allow the conveyance to be held such as against the purchaser who has held possession in good faith thinking that he was a purchaser for six years, the price not being inadequate. Caldwell v. Trezevant [La.] 35 So. 619.

4. Svenson v. Rohrer, 206 Pa. 407.

5. Allegations of a complaint held not sufficient to authorize the setting aside of contracts between the assignee of a purchaser at a mortgage sale and the mortgagor on the ground that the real agreement was an extension or renewal of the mortgage and not one of sale and purchase. Phelps v. Western Realty Co., 89 Minn. 319, 94 N. W. 1085.

6. Pleadings held sufficient. Murphy v. Murphy [Cal.] 75 Pac. 60.

7. Weise v. Anderson [Mich.] 96 N. W. 575.

8. Injunction against cutting timber. Bigelow v. Thompson [Mich.] 94 N. W. 1077.

9. Beebe v. Wis. Mortg. Loan Co., 117 Wis. 328, 93 N. W. 1103.

10. Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283.

11. Mack v. Hill [Mont.] 72 Pac. 307.

12. Reese v. Rhodes [Ariz.] 73 Pac. 446. Where defendant denies that he holds as a mortgagee and claims the property as his own, while the amount of indebtedness secured is also in dispute, an action may be maintained without any previous offer of payment. The decree should be for a reconveyance on the payment by plaintiff of any balance found due. De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813.

13. Cumming v. McDade, 118 Ga. 612.

14. Cannot compel a conveyance from the mortgagee where the indebtedness has not

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One who contends that his absolute conveyance of realty was in fact a mortgage to secure the price of certain personalty cannot bring an action to recover the price of the personalty without accounting for the rents and profits during the time he has been in occupancy.[15]

Burden of proof and evidence.—One asserting a deed to be a mortgage has the burden.[16]

The character of a deed as a mortgage may be shown by parol,[17] as may the connection of writings causing them to amount to a mortgage, though from their face such intent is not apparent,[18] though in some jurisdictions not in an action at law.[19] Such evidence is not objectionable on the ground that it alters the terms of a written contract.[20]

The consideration may be inquired into.[21] The circumstances surrounding the transaction, conversations at the time, and the value of the property, may be shown.[22] Consideration of transactions between the parties prior to the date of the instrument should not be limited to the mere purpose of throwing light on the intention of the parties where the deed is executed pursuant to agreements shown therein.[23]

Quantum of proof.—The status of a deed as a mortgage must be established by clear and satisfactory evidence,[24] must be unequivocal and convincing,[25] and uncontradictory.[26] If the grantor is out of possession, his unaided parol evidence is not sufficient.[27] The degree of proof necessary to establish a mortgage as against a theory of conditional sale is less than to establish it against an absolute conveyance.[28]

To authorize the reformation of a warranty deed in equity on the ground of

been paid and he makes no offer or tender of the balance due. Covert v. Covert [Or.] 74 Pac. 205.

15. Weise v. Anderson [Mich.] 96 N. W. 575.

16. Miller v. Price, 66 S. C. 85; Bryant v. Broadwell, 140 Cal. 490, 74 Pac. 33. A vendee has the burden of showing that a deed absolute on its face is in effect a mortgage rendering the title tendered him unmarketable. Braun v. Vollmer, 89 App. Div. [N. Y.] 43.

17. Northern Assur. Co. v. Chicago Mut. B. & L. Ass'n, 198 Ill. 474, 64 N. E. 979; Stafford v. Stafford, 29 Tex. Civ. App. 73, 71 S. W. 984.

18. Beebe v. Wis. Mortg. Loan Co., 117 Wis. 328, 93 N. W. 1103. Evidence held sufficient. Oberdorfer v. White [Ky.] 78 S. W. 436. Warranty deed. Ross v. Howard, 31 Wash. 393, 72 Pac. 74. Agreement to permit a redemption from a purchase at foreclosure. Brown v. Johnson, 115 Wis. 430, 91 N. W. 1016. In an action on an insurance policy the question being whether there was a change of title and interest. Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283.

19. Billingsley v. Stutler, 52 W. Va. 92.

20. Hurlbert v. Kellogg L. & M. Co., 115 Wis. 225, 91 N. W. 673.

21. Forster v. Van Auken [N. D.] 96 N. W. 301.

22. Carveth v. Winegar [Mich.] 94 N. W. 381. An assignment of a judgment against plaintiff to the alleged mortgagee is admissible to show the relation of the parties. Reese v. Rhodes [Ariz.] 73 Pac. 446.

23. Grier v. Casares [Tex. Civ. App.] 76 S. W. 451.

24. In re Holmes, 79 App. Div. [N. Y.] 264.

Evidence held sufficient. Carveth v. Winegar [Mich.] 94 N. W. 381. To show that an absolute deed was a mortgage though insufficient to show coercion or undue influence. Butler v. Carvin [Wash.] 74 Pac. 813. To show that an absolute deed was a mortgage which had been satisfied and that there had been no valid agreement by which entire title was to vest in the mortgagee. Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283; Heaton v. Gaines, 198 Ill. 479, 64 N. E. 1081.

Evidence held insufficient. Little v. Braun, 11 N. D. 410, 92 N. W. 800; Philips v. Mo [Minn.] 97 N. W. 969; Wright v. Wright [Iowa] 98 N. W. 137; Emery v. Lowe, 140 Cal. 379, 73 Pac. 981; Miller v. Price, 66 S. C. 85; Franklin v. Sewall, 110 La. 292. To establish a debt or a parol defeasance. Little v. Braun, 11 N. D. 410, 92 N. W. 800. To show that a re-conveyance was conditioned on the payment of a sum additional to that expressed. McCaughey v. McDuffie [Cal.] 74 Pac. 751. Contract held to evidence a sale with a right to re-purchase and not a mortgage. Martin v. Allen [Kan.] 74 Pac. 249. Evidence held to show an absolute conveyance followed by a conditional re-sale or option, the conveyance having been by one of the grantors in order to extinguish a debt, and it not being shown that the party asserting that the transaction was a mortgage had secured his co-grantor's interest. Pumilia v. De George [Tex. Civ. App.] 74 S. W. 813.

25. Holladay v. Willis [Va.] 43 S. E. 616.

26. Franklin v. Sewall, 110 La. 292.

27. Code 1892, § 4233. Schwartz v. Lieber [Miss.] 32 So. 954.

28. Rose v. Gandy, 137 Ala. 329.

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mistake, it having been the intention to execute a mortgage, the mistake must be mutual and the evidence clearly satisfactory, specific and convincing.[29]

Instructions.—Where it is contended that an absolute deed is a mortgage, the court should submit to the jury the instrument with the attending facts and circumstances adducing any evidence with such instruction on the legal effect of the instrument as will meet the various phases of the case.[30]

Findings and decree.[31]—Without foundation for such a decree in the pleadings in suit for reconveyance, it is error to make an order limiting the time in which plaintiffs must pay the sum found due or be foreclosed of all rights to redeem the property and obtain a conveyance.[32] The assignee of a mortgage is not concluded by a judgment declaring an equitable mortgage a superior lien where he is not made a party to the proceeding.[33]

The imposition of costs on defendant is justified by his repudiation of plaintiff's title and his refusal to account.[34]

§ 5. *Nature and incidents of trust deeds as mortgages.*[35]—The trustee may purchase the debt.[36] He must act for both the debtor and creditor in conducting sale.[37] He may be personally liable where he makes application of the money received under a trust deed contrary to the directions of the maker.[38] If time is of the essence of a contract to deliver corporate bonds or pay a certain sum in cash, a trustee of an after executed mortgage has no power to waive the limitation and deliver the bonds.[39]

One appointed to execute a power of sale by the trustees under a security deed acquires no interest in the property authorizing the superior court of the county of his residence to take jurisdiction of a controversy with his principals.[40]

The trustee is in the legal status of a mortgagee and invested not only with a power of sale but the other powers usually possessed by mortgagees;[41] with the beneficiary he may bring trover for conversion of the property.[42] Independent of the provisions of the trust deed, he has the power, when the necessity arises, to invoke the aid of a court of equity to preserve the trust estate,[43] but the owner may still maintain an action for damage to property,[44] and where paying taxes and interest on the mortgage debt and in no way committing or suffering any waste

29. Evidence held insufficient. Forester v. Van Auken [N. D.] 96 N. W. 301.

30. Where a conditional conveyance is not in issue, an instruction thereon should not be given. Bradford v. Malone [Tex. Civ. App.] 77 S. W. 22.

31. Findings in a suit to establish a mortgage held sufficient to negative an allegation that any indebtedness that was due or might become due for commissions was secured. De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813.

32. McGrath v. McGrath [Conn.] 56 Atl. 551.

33. Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680.

34. De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813.

35. See Foreclosure of Mortgages on Land for sale by trustee or under power.

36. Brewer v. Slayter, 18 App. D. C. 48.

37. Must limit its expenses to reasonable amounts. Smith v. Olcott, 19 App. D. C. 61.

38. Liable where he pays to a contractor erecting buildings on the property while there are outstanding claims for labor and material contrary to directions, thus occasioning loss, the contractor being insolvent. Recovery may also be had for a sum necessary to complete the work occasioned by misappropriation by the contractor, payment having been made to him before completion. The amount of recovery is limited to a sum fixed by settlement between the makers of the deed and the contractor. Wallrath v. Bohnenkamp, 97 Mo. App. 242.

39. Was not vested with such power as agent of the person entitled to the bond. Barrett v. Twin City Power Co., 118 Fed. 861.

40. Meeks v. Roan, 117 Ga. 865.

41. Robeson v. Dunn [S. D.] 96 N. W. 104. See post, § 7, for rights in general of mortgagees.

42. Edge v. Emerson [Ark.] 73 S. W. 793.

43. The trustees of a trust deed covering telephone franchises may enjoin a city from interfering with the company's property under an ordinance prohibiting the extension of poles and wires unless a franchise is obtained, and under a resolution requiring the poles and wires to be removed after a certain date and directing their removal by the city authorities, such ordinance being without authority. Old Colony Trust Co. v. Wichita, 123 Fed. 762.

44. If it is still sufficient to secure the debt. Watkins v. Kaolin Mfg. Co., 131 N. C. 536, 60 L. R. A. 617.

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or impairing the security, the trustee has no right to maintain an action against third persons injuring the property, if the owner has begun a similar action.[45]

§ 6. *Construction and effect of formal mortgages.*—A provision that a note is to be construed by the laws of a certain state does not extend to the construction of a mortgage given to secure it.[46]

Property and interests conveyed.[47]—The mortgage is confined to the land or interest described.[48] An easement may be regarded as an "appurtenance,"[49] and leaseholds for 99 years as personalty.[50] Fixtures pass with the land.[51] An after-acquired title in trust does not pass.[52] A mortgage without covenant of seisin or warranty has no greater effect than a quitclaim deed and is not operative on a title subsequently acquired.[53]

The fact that there was a very slight priority of time in the record of a mortgage will not justify a presumption that a deed to the mortgagor was not delivered before the execution of the mortgage.[54]

Extrinsic evidence may be resorted to to identify the land.[55] For this purpose parol declarations of a deceased mortgagee are admissible to show that certain land was not understood or intended by the parties to be included in the mortgage.[56] A false lot number may be rejected where the description is otherwise sufficient.[57] If the question of identity arises on a mortgage execution, the burden of identification rests on the execution plaintiff.[58]

Debts secured.[59]—A note and mortgage for a specified sum may be shown by parol to be given as security for any balance which might at any time exist on an anticipated running account between the mortgagor and mortgagee.[60] Such an agreement will not be implied as against other creditors of a bankrupt.[61] Costs and expenses incurred do not include attorney's fees in a subsequent action.[62] A

45. Acton by a foreign corporation as trustee of a deed of trust on the property of a telephone company to restrain the acts of strikers, brought in the Federal court, cannot be maintained, the grantor having brought a similar action in the state court. Illinois Trust & Sav. Bank v. Minton, 120 Fed. 187.

46. Keene Five Cent Sav. Bank v. Reid, 123 Fed. 221.

47. See Deeds for general descriptions. Word "premises" in release clause of trust deed held to refer to the corpus of the realty and not to mean as in the habendum clause of a deed the estate granted. Sands v. Kaukauna Water Power Co., 115 Wis. 229, 91 N. W. 679.

48. Where, pending litigation, an attorney takes a mortgage on the interest of a party, only the actual interest is covered regardless of the amount received by the party under an agreed judgment on settlement. Davis v. Willson, 25 Ky. L. R. 21, 74 S. W. 696; Kelso v. Russell [Wash.] 74 Pac. 561.

49. A strip of land used as a common way passes as an "appurtenance." Putnam v. Putnam, 77 App. Div. [N. Y.] 554.

50. A mortgage covering all the franchises of the telephone company and all the real and personal property covers leasehold interests and franchises held under a 99 year lease. Old Colony Trust Co. v. Wichita, 123 Fed. 762.

51. Evidence held to show that improvements made by occupant became fixtures passing by a subsequent mortgage. Morley v. Quimby [Mich.] 92 N. W. 943.

52. Where the mortgagor executes a mortgage on land which he does not own and then takes a paramount title in trust for a third person, the mortgagee on foreclosing after his death takes no greater interest than his estate. Stacy v. Henks [Tex. Civ. App.] 74 S. W. 925.

53. Donovan v. Twist, 85 App. Div. [N. Y.] 130.

54. Deed was recorded four minutes after the mortgage. Wheeler v. Young [Conn.] 55 Atl. 670.

55. Description held sufficiently definite. Johnson v. McKay [Ga.] 45 S. E. 992. Description together with extrinsic facts held sufficient to include subsequently acquired property. Ferguson v. W. Connally & Co. [Tex. Civ. App.] 76 S. W. 609.

56. Stancill v. Spain, 133 N. C. 76.

57, 58. Johnson v. McKay [Ga.] 45 S. E. 992.

59. See Foreclosure of Mortgages on Land for items which may be included in decree and for rights in surplus.

60. It may be shown to be enforceable beyond the sum named in the mortgage. Evidence held sufficient to establish such contention. Lippincott v. Lawrie [Wis.] 97 N. W. 179.

61. In re Johnson, 125 Fed. 838.

62. Bowery Bank v. Hart, 77 App. Div. [N. Y.] 121. A provision that in event of nonpayment of bonds the mortgagor binds itself to pay attorney's fees incurred by the holder will be construed to mean attorney's fees in case employment of an attorney is made necessary by default on any of the payments to be made under the mortgage.

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detachment of coupons from bonds secured does not deprive the holders of the security of the mortgage.[63]

§ 7. *Title and rights of parties. Nature of mortgagor's interest.*[64]—At common law the mortgagee took the legal title, though in many states it is now regarded as remaining in the mortgagor.[65] In Ohio, after condition broken, the mortgagee has legal title and may either sue to foreclose or bring ejectment.[66]

Estoppel as to title.—The mortgagor cannot deny his title in foreclosure.[67] As against a purchase-money mortgage, the grantee mortgagor cannot dispute his grantor's title.[68]

Covenants of warranty prevent assertion of after-acquired title,[69] but the rule that one conveying with warranty cannot, on acquisition of title, assert his want of title at the time of making the first conveyance, does not estop his mortgagees giving priority to the title of one who, from his negligent failure to examine the records, has been induced to purchase the land from one having no title.[70]

Assumption of possession by mortgagee.—Where rents and profits are not pledged, the mortgagor has the right of possession and to the rents and profits until a deed is taken after foreclosure sale.[71] A purchaser of a mortgage after the right to recover on the note and to foreclose is barred cannot be regarded as a mortgagee in possession.[72]

The mortgagee need not have such possession as required to acquire a title by disseisin in order that he may have the rights of a mortgagee in possession.[73] He need not give the mortgagor or his assigns personal notice of his taking of possession.[74] When he holds under an elder dowress he is not accountable for rents and profits where the widow is not bound to account until the dower is assigned.[75] He cannot be ousted by a writ of entry by an execution creditor.[76] If possession is under a void foreclosure believed by him to be valid he cannot be dispossessed without payment of the debt.[77] He is not entitled to compensation for the care of the mortgagor and the property.[78]

A first mortgagee in possession is not to be regarded as a tenant of subsequent mortgagees.[79]

The mortgagor's remedy is by an action to redeem where foreclosure is barred.[80]

Rents and profits.[81]—A pledge of the rents and profits is not an interference with the equity of redemption and may be enforced,[82] though the property is ample

Abraham v. New Orleans Brew. Ass'n, 110 La. 1012.

63. Long Island Loan & Trust Co. v. Long Island City R. Co., 85 App. Div. [N. Y.] 36.

64. See Executions for levy on mortgagor's interest.

65. Ortengren v. Rice, 104 Ill. App. 428. See Tiffany, Real Prop. II., § 507, p. 1168, for states so holding.

66. Bradfield v. Hale, 67 Ohio St. 316, 65 N. E. 1008.

67. State Mut. B. & L. Ass'n v. Batterson [N. J. Eq.] 56 Atl. 703. Incorporation of the words "and warrants" may estop the mortgagor from denying his ownership [1 Starr & C. Ann. St. 1896 (2d Ed.) p. 924, § 11]. Roderick v. McMeekin, 204 Ill. 625, 68 N. E. 473.

68. Townsend v. Kreigh [Mich.] 94 N. W. 732.

69. Mortgage without covenants does not pass after-acquired title. Donovan v. Twist, 85 App. Div. [N. Y.] 130.

70. Wheeler v. Young [Conn.] 55 Atl. 670.

71. Ortengren v. Rice, 104 Ill. App. 428.

72. Morford v. Wells [Kan.] 74 Pac. 615.

73. The value of property taken from the mortgaged premises is for the jury. Holbrook v. Greene [Me.] 56 Atl. 659.

74. Though possession is so taken without notice, the mortgagor cannot afterward lawfully remove grass growing on the premises. Holbrook v. Greene [Me.] 56 Atl. 659.

75. Dower Act, § 2; Gen. St. p. 1276. Moffett v. Trent [N. J. Eq.] 56 Atl. 1035.

76. Carrasco v. Mason [N. H.] 54 Atl. 1101.

77. Stouffer v. Harlan [Kan.] 74 Pac. 610.

78. Moss v. Odell [Cal.] 74 Pac. 999.

79. Hatch v. Falconer [Neb.] 93 N. W. 172.

80. Ejectment will not lie. Kelso v. Norton, 65 Kan. 778, 70 Pac. 896.

81. Contract transferring rents to the mortgagee construed and held to authorize a retention until there should be no arrears of insurance, taxes and interest. Peterson v. Phila. M. & T. Co. [Wash.] 74 Pac. 585.

82, 83. Ortengren v. Rice, 104 Ill. App. 428. Rents accruing during the possession of the mortgagee under a foreclosure sale

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security and the debtor is solvent.[83] They are a primary security in the manner as the land.[84] But where not pledged, the mortgagee cannot reach unless the property is insufficient.[85] He must have a receiver appointed to them.[86]

Where a wife mortgages her separate property as security, she is entitl recover rents collected from the mortgagees after her discharge as surety.[87]

A mortgagee in possession may be charged with rents lost through his f to collect,[88] though it is held that there must be willful default or gross ligence.[89] He must account to subsequent mortgagees,[90] but possession mu taken under the encumbrance against which subsequent mortgagees seek to rents and profits charged.[91]

On an accounting between the mortgagor and mortgagee, moneys receiv the mortgagee operate to reduce the indebtedness pro tanto reducing the int bearing principal.[92]

The mortgagee should not be allowed a greater interest on advances tha is charged with on her receipts.[93] If he has assumed to sell the premises ar vendee has made betterments, he should be credited with the increased values arising from such betterments.[94]

Where the mortgagee is required to keep the mortgaged premises in ope while he is in possession, he cannot be charged with rental but need account for the net proceeds of the business which he must operate as an ordinarily pr owner.[95]

Payment of taxes.[96]—Where the mortgagor covenants to pay all assess on account of the mortgage or the debt secured, a tax assessment agains mortgagee based on the mortgage is within the covenant.[97] A mortgagee in session is entitled to interest on taxes paid.[98] Where he assumes to sell the pre and contracts with his vendee that the vendee shall pay taxes, no liability imposed on the mortgagee to pay such taxes, he cannot have credit therefor.[9

Insurance.—Under an agreement in the mortgage by the mortgagor to in

which is subsequently reversed cannot be recovered, but the mortgagor's only remedy is to have them applied on the debt. Cowdery v. London & S. F. Bank, 139 Cal. 298, 73 Pac. 196.

84, 85. McLester v. Rose, 104 Ill. App. 433.

86. Corporate property. Georgetown Water Co. v. Fidelity T. & S. Vault Co. [Ky.] 78 S. W. 118.

87. White v. Smith, 174 Mo. 186, 73 S. W. 610.

88. In an action for such purposes, no presumption in favor of plaintiff arises from the fact that the buildings were fully tenanted when surrendered. The rental value does not raise a presumption as to the extent of damages, and plaintiff must show how many tenants there were and as to what rents there was a failure to collect. Maurer v. Grimm, 84 App. Div. [N. Y.] 575.

89. Evidence held sufficient to show that it was the duty of a mortgagee in possession to rent the premises in parcels, but that its duty was discharged by exercising the care and diligence an ordinarily prudent and active owner would have exercised to lease the building as a whole to one tenant, and its liability for rent should be so measured. Pollard v. American F. L. Mortg. Co. [Ala.] 35 So. 767. Evidence held to support a finding that no reasonable necessity existed for employing and paying age and about the rental of the land b mortgagee in possession, it being a no dent corporation. Id.

90. Hatch v. Falconer [Neb.] 93 172.

91. The right does not arise wh prior mortgagee advances money to a person to purchase the equity of re tion at sheriff's sale, and such third takes possession only from the fact such mortgagee purchases a first mo taking an assignment in the name other but not entering into possession. ron v. Du Bois, 64 N. J. Eq. 657.

92, 93. Moss v. Odell [Cal.] 74 Pac.

94. Pollard v. American F. L. Mort [Ala.] 35 So. 767.

95. Briggs v. Neal [C. C. A.] 120 Fe

96. Under a mortgage conveying a sion for the appointment of a recei case of default in the payment of inte taxes, a receiver may be appointe mortgage being a second mortgage being doubtful whether the property sufficient value to satisfy the mortg make any payment on the bond. Tho Davis, 85 N. Y. Supp. 661.

97. Green v. Grant [Mich.] 96 N. V

98, 99. Pollard v. American F. L. Co. [Ala.] 35 So. 767.

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the mortgagee has an equitable lien on the proceeds of the policy, though it runs to the mortgagor alone.[1] Proceeds collected by the mortgagor are held in trust for the mortgagee.[2]

Under an agreement by the mortgagor to insure, the trustee is entitled to the proceeds of insurance taken out by the mortgagor's assignee for creditors.[3]

Waste.—The mortgagor is not entitled to use timber on the mortgaged premises for the payment of other debts by reason of an authorization to cut timber to pay taxes, insurance and overdue interest.[4] The mortgagee may enjoin acts reducing the value of the security,[5] and an injunction cannot be avoided by the execution of a bond for such damages as the mortgagee may suffer, where the acts enjoined invade the very substance of the property pledged as security for payment of the debt.[6]

A mortgagee in possession under a void sale out of court, who disposes of buildings on the property, is liable for waste.[7] If he undertakes to sell the land, he is liable for the waste which he authorizes the transferee to commit.[8]

Sale by mortgagee.—Where the mortgagor sells after expiration of a power to make a private sale, he must be required to account for the full market value of the property irrespective of the amount realized.[9]

Acquisition of outstanding title.—The mortgagor or his grantee cannot acquire a tax title as against the mortgagee,[10] but a mortgagee paying delinquent taxes may be subrogated to the county's lien as against a subsequent mortgagee whose incumbrance is given priority.[11] The mortgagee if not bound to pay taxes may purchase at a tax sale.[12] A second mortgagee cannot assert an outstanding tax title acquired by him as against a first mortgagee.[13]

Persons holding in subordination to the mortgage cannot acquire title by adverse possession.[14]

1. Such lien passes to an assignee of the mortgage as against his assignor where the assignor has guaranteed payment of the indebtedness, become owner of the premises, and taken insurance thereon, and may be enforced though a personal action against the assignor on his guaranty of payment is barred by limitations. Hyde v. Hartford F. Ins. Co. [Neb.] 97 N. W. 629.

2. James v. West, 67 Ohio St. 28, 65 N. E. 156.

3. American Ice Co. v. Eastern T. & B. Co., 188 U. S. 626.

4. Parties to whom the mortgagor sells the timber do not acquire title as against the mortgagee. Holbrook v. Greene [Me.] 56 Atl. 659.

5. Removal of a refrigerating plant from a brewery. Schmaltz v. York Mfg. Co., 204 Pa. 1, 59 L. R. A. 907. Where the principal value of the land as security is in the timber thereon, the cutting and manufacturing of the timber may be enjoined, though it is shown that not more than one-tenth of it will be taken before maturity of the mortgage. Beaver Flume & Lumber Co. v. Eccles [Or.] 73 Pac. 201. Where there is a mortgage for $30,000.00, second to one for $5,000.00, on timber land, costing originally $47,500.00, the value of the security is not so disproportionate to the amount of the debt as to justify a refusal to enjoin manufacture of the timber thereon by the grantor, though large improvements have been placed on the premises for such purpose, where the improvements are of little value without the timber and the market price of timber is fluctuating. Id.

6. Preparation to manufacture lumber from timber constituting almost the entire security. Beaver Flume & Lumber Co. v. Eccles [Or.] 73 Pac. 201.

7. May be counterclaimed to a deficiency judgment. Staunchfield v. Jeutter [Neb.] 96 N. W. 642.

8. Pollard v. American F. L. Mortg. Co. [Ala.] 35 So. 767.

9. The mortgagee cannot charge the mortgagor with the expenses and outlay of making the sale. Market value is the fair value of the property as between one who wants to buy and one who wants to sell, irrespective of particular circumstances rendering the property of peculiar value to either the purchaser or vendor. Evidence held to show realization of such value. Reilly v. Cullen, 101 Mo. App. 32, 74 S. W. 370.

10. Shrigley v. Black, 66 Kan. 213, 71 Pac. 301; Davis v. Evans, 174 Mo. 307, 73 S. W. 512.

11. Dunsmuir v. Port Angeles G., W., E. L. & P. Co., 30 Wash. 586, 71 Pac. 9.

12. Moore v. Boagni [La.] 35 So. 716. An agreement between the mortgagee, who has purchased at tax sale, and the mortgagor construed not to show an intention in the mortgagee to retain the property, the rent thereon, the penalties on the taxes and to collect besides principal due him and interest. Id.

13. Second mortgagee had a right to redeem from the sale. Davis v. Evans, 174 Mo. 307, 73 S. W. 512.

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Action on debt.—Action may be brought on the primary obligations sec
though a mortgage of all the mortgagor's property has been executed to secur
payment ratably of all the obligations held by numerous creditors.[15] By st
in certain states an action on the debt cannot be brought without leave, wh
petition in foreclosure has been filed.[16]

§ 8. *Lien and priorities.*[17]—Bona fide mortgagees are protected against s
equities.[18] Fractions of a day will be considered where mortgages are not exe
simultaneously and not intended to be concurrent.[19] Mortgage liens are inf
to those for public improvements,[20] or for operating expenses during receivers

The fact that a mortgage is for money used in improvements does not dis
a prior mortgage,[22] nor does it render the mortgage so given inferior to mech
liens;[23] but a mortgage may acquire the priority of a lien for which it is su
tuted.[24] Where the holder of a second lien is induced to postpone it in favor
person advancing money to discharge a first lien and erect a building on the p
ises, she is entitled to priority so far as the proceeds of the loan are not so appl
Execution of new note on an extension of time will not displace the lien.[26]

If extrinsic facts have taken a contract for the conveyance of land fron
statute of frauds, they operate in favor of the grantee as against a mortgagee
the grantor with notice.[27]

Where the mortgagor transfers subject to the mortgage, the mortgage
precedence of a trust deed executed by a subsequent grantee, though such deed
ulates that the trustees shall not be liable for the mortgage debt.[28]

Mortgages of future acquired property attach to the interest obtained b
mortgagor only, and are inferior to junior liens, encumbrances or equities
which the property comes to the mortgagor.[29]

14. See article Adverse Possession. Stancill v. Spain, 133 N. C. 76.

15. Where one of several bondholders secured by the same mortgage brings an action at law against the mortgagor, the prospective levy on the mortgaged property on the judgment to be rendered is no defense in favor of the mortgagor. Kimber v. Gunnell Gold Min. & Mill. Co. [C. C. A.] 126 Fed. 137.

16. Code Civ. Proc. § 848, prior to Laws 1897, p. 378, c. 95. If an action is brought after institution of foreclosure proceedings, authority from the court having jurisdiction in foreclosure, to maintain the action at law, must be alleged in the petition. Mann v. Burkland [Neb.] 94 N. W. 116.

17. See Notice and Record of Title for all questions of lien as dependent on actual or constructive notice. See Bankruptcy, for surrender of mortgaged property to mortgagees by trustee in bankruptcy.

18. Will be protected as against heirs entitled to assert a resulting trust against the mortgagor who have allowed the mortgagor to retain possession for several years. Johnston v. Johnston, 173 Mo. 91, 73 S. W. 202. A wife cannot assert a secret equity in land in her husband's name. Dill v. Hamilton, 118 Ga. 208.

19. Sanely v. Crapenhoft [Neb.] 95 N. W. 352.

20. Special assessments for street improvements are superior to a prior mortgage. Kirby v. Waterman [S. D.] 96 N. W. 129.

21. To displace the lien of a mortgage and charge corporate property with an operating expense as a preferential there must be a receivership, the su must have been furnished within the ed time prior thereto, and it must a that there was a diversion of the ea earnings for the benefit of the mortg either by the payment of interest or th terment of the mortgaged property. ments of the complaint held insufficie a proceeding to charge the property gaslight company. Louisville & N. I v. Memphis Gaslight Co. [C. C. A.] 12 97.

22. Clarke v. Calvert, 72 App. Div. [630.

23. Money loaned, under an expres tract for the purpose of improving the gaged premises. Chaffee v. Sehestedt 96 N. W. 161.

24. A mortgage taken as security i sideration of forbearance to file a me ic's lien is prior to an unrecorded pur money mortgage to which the mech lien would have been prior. O'Bri Fleckenstein, 86 App. Div. [N. Y.] 140.

25. Joralman v. McPhee [Colo.] 71 419.

26. First Nat. Bank v. Citizens' Bank [Wyo.] 70 Pac. 726.

27. Linder v. Whitehead, 116 Ga. 2(

28. Foster v. Bowles, 138 Cal. 34(71 Pac. 494, 495.

29. If, after the execution of a mor with an after-acquired property claus mortgagor takes the equitable title t subject to a condition that he shall p purchase price thereon owing by his ferror, the mortgagee cannot enforce

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The statute of limitations while not running against the mortgagee's right to foreclose during the absence of the mortgagor from the state may allow other liens to attach in priority to the mortgage after expiration of the period limited.[30]

§ 9. *Assignments of mortgages. Requisites and validity.*—The assignment must identify, by sufficient description, the mortgage.[31] The fact that a mortgage is an asset of the estate is sufficient consideration for its transfer to the representative of the estate.[32] Delivery is evidenced by the record of an assignment.[33] The burden is on an assignee in confidential relationship to the assignor to show good faith.[34] A defective assignment may be subsequently cured with the assent of the assignor.[35]

Equitable assignments.—Transfer of the debt secured carries the mortgage as an incident.[36] Transfer of a portion operates pro tanto.[37] The debt may be transferred by delivery of the notes without indorsement.[38] An equitable assignment so arising is not controlled by statutes relating to formal assignments.[39]

A conveyance with warranty by mortgagees in possession after the law day in the mortgages operates as an assignment in equity of the mortgage debt.[40]

Effect.—Assignment of a mortgage and note does not pass the mortgagee's legal title.[41] But a conveyance of the mortgagee's right, title and interest confers the same title as held by the mortgagee, though the grantee may not have power to sell under the mortgage.[42] An action will lie on a covenant of amount due contained in the assignment, though the bond and mortgage are held void in an action thereon against the makers as usurious, and knowledge of the assignor need not be established.[43] Obligations assumed by an assignee may bind those who take under him.[44]

Outstanding equities in favor of the mortgagor may be asserted by him,[45]

veyance of the legal title or subject to his mortgage a subsequent mortgage of that title to another, for the purpose of securing the payment of a loan, a portion of the proceeds of which was applied to the payment of the unpaid part of the purchase price of the land, except on condition that there shall be repaid to the subsequent mortgagee, the moneys which were taken from the proceeds of his loan and applied to the debt for the purchase price together with taxes paid by him during the existence of his claim. Farmers' L. & T. Co. v. Denver, L. & G. R. Co. [C. C. A.] 126 Fed. 46.

30. Brandenstein v. Johnson, 140 Cal. 29, 73 Pac. 744.

31. Bill of sale describing certain notes and mortgages and naming the parties thereto, giving their place of residence and the county in which the mortgages are recorded in the possession of the grantee, is sufficient. Persons v. Persons [N. D.] 97 N. W. 551.

32. Evidence held sufficient to show that a mortgage was given for money borrowed from decedent's estate, though not mentioned in the inventory of the administrator. Ambrose v. Drew, 139 Cal. 665, 73 Pac. 543.

33. Evidence held for the jury though not contradicted where by a single witness evidently biased in favor of one party and as to the declarations and admissions of deceased person. Van Gaasbeek v. Staples, 85 App. Div. [N. Y.] 271.

34. Snyder v. Snyder [Mich.] 92 N. W. 353.

35. Failure to insert the assignee's name. Fidelity Ins., T. & S. D. Co. v. Nelson, 30 Wash. 340, 70 Pac. 961.

36. Grether v. Smith [S. D.] 96 N. W. 93; Brynjolfson v. Osthus [N. D.] 96 N. W. 261.

37. Where the indebtedness is held separately, an assignment by one creditor of his portion of the debt carries with it a proportionate part of the mortgage security. Guthrie v. Treat [Neb.] 92 N. W. 595. The detaching of an interest coupon from a bond by the owner and transfer to a third person amounts to an assignment pro tanto. Curtiss v. McCune [Neb.] 94 N. W. 984.

38. McMillan v. Craft, 135 Ala. 143.

39. Burns' Rev. St. 1901, § 1107a, et seq. Perry v. Fisher, 30 Ind. App. 261, 65 N. E. 935.

40. Hooper v. Birchfield [Ala.] 35 So. 351.

41. He holds the legal title in trust to secure payment of the note in the hands of his assignee. Collins v. Davis, 132 N. C. 106.

42. Deans v. Gay, 132 N. C. 227.

43. Buehler v. Pierce, 175 N. Y. 264, 67 N. E. 573.

44. Where the terms of an assignment impose the duty on an assignee to pay taxes, a transferee of the certificate of purchase on foreclosure by a subsequent assignee takes subject to the burden of the taxes and cannot recover them. Anglo-Californian Bank v. Eudey [C. C. A.] 123 Fed. 39.

45. Evidence held insufficient to show that a note was for accommodation and not within the rule that assignees of a mortgage take subject to defenses by the mortgagor. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800. Bonds secured by mortgage are liable in the hands of third persons to such defenses as the payor may have or may have had against the original payee before notice of the assignment. Hess v. Selvage [Ky.] 76 S. W.

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or his subsequent grantee;[46] but the assignee is not subject to latent equiti third persons.[47] An assignment by a separate instrument will not cut of equities of the maker of the note by reason of statutory provisions contempl indorsement on the note.[48] Where the assignee of a mortgage fails to mak quiry, he is chargeable with notice of the facts which would be disclosed o proper inquiry.[49] A mortgage without consideration may be enforced by an cent assignee only to the extent of the sum paid by him.[50] One succeeding t rights of a bona fide purchaser is entitled to protection to the same extent.[51] by leaving an assignment with his agent, the mortgagee enables a fraud assignment as collateral, he cannot thereafter deny the agency.[52]

Record.[53]—Under the recording acts, assignments of mortgages may b corded.[54] Time of record of assignments does not alter priorities establishe the record of the mortgages.[55] If an assignee does not record his assignmen must show actual knowledge as against a subsequent purchaser for a valuable sideration.[56] His assignment must be filed for record before record of a deed a judicial sale foreclosing a prior lien in proceedings to which he was made a p in order that he may be protected.[57]

§ 10. *Transfer of title of mortgagor.*—The rights of the mortgagee c be affected by a subsequent transfer by the mortgagor.[58] A quitclaim deed mortgagor passes his interest under an assignment taken for his benefit.[59]

Agreements to assume the mortgage debt must be express and cannot from any mere implication or legal imputation.[60] They may be verbal.[61]

134. Facts held to show that a creditor taking an assignment was chargeable with knowledge of his son whom he had made his agent. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800. Where the mortgage makes all the notes due and collectible on maturity and default in payment of any, a purchaser of the notes and mortgage after one is due is subject to all defenses existing against the original payee. Stoy v. Bledsoe [Ind. App.] 68 N. E. 907.

46. Elser v. Williams, 104 Ill. App. 238.

47. Equity of married woman who permits her husband to hold land purchased with her separate estate and to execute a mortgage thereon. Boyer v. Webber, 22 Pa. Super. Ct. 35.

48. Hurd's Rev. St. 1899, c. 98, § 4. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800.

49. Reliance on the statement of the mortgagor will not excuse further inquiry. Morris v. Joyce, 63 N. J. Eq. 549.

50. Evidence held insufficient to show knowledge of falsity of a certificate of validity, defeating the rights of assignees as innocent purchasers. Verity v. Sternberger, 172 N. Y. 633, 65 N. E. 1123. One taking a bond and mortgage as his distributive share of an estate is to be regarded as a purchaser for value. Boyer v. Webber, 22 Pa. Super. Ct. 35.

51. Morris v. Joyce, 63 N. J. Eq. 549. The assignee acquires all the rights of the assignor as to priority unaffected by his knowledge not in the possession of his assignor. Coonrod v. Kelly [C. C. A.] 119 Fed. 841.

52. Morris v. Joyce, 63 N. J. Eq. 549.

53. See Notice and Records of Title.

54. Burns' Rev. St. 1901, § 1107. Artz v. Yeager, 30 Ind. App. 677, 66 N. E. 917.

55. Allison v. Manzke [Wis.] 94 N. W. 659.

56. Where an assignment is recorded and there is a subsequent assignment b assignee which is not of record, a purc discharges the duty of investigation im on him by the record of the mortga inquiry as to the mortgage debt o original assignee and intermediate o of the land. Artz v. Yeager, 30 Ind. 677, 66 N. E. 917.

57. Gillian v. McDowell [Neb.] 92 991.

58. Blair v. St. Louis R. Co., 92 Mo. 538.

59. Sowles v. Lewis, 75 Vt. 59.

60. **Not implied** from the conve (Heffernan v. Weir, 99 Mo. App. 301, W. 1085), or a recital that a conveya subject to a mortgage (Elser v. Wil 104 Ill. App. 238), or from agreement contract of purchase, that payments sh applied to the reduction of a mortgage ers v. Makely, 131 N. C. 60). The ins of an agreement to assume an incumb in a deed to a third person withou knowledge or consent, the transfer merely for convenience and over gra objection, does not render the grantee for a deficiency. Gill v. Robertson App.] 71 Pac. 634. An agreement by assuming grantees to pay interest in sideration of an extension of the debt not impose a personal liability on the Crebbin v. Shinn [Colo. App.] 74 Pac Evidence that in a deed to a third who took no interest in the mortgaged ises, it was stated that the grantee ass the mortgage, will not support a c sion that one to whom the grantee co assumed to pay the debt to the mort Arnold v. Randall [Wis.] 98 N. W. 23

Implied: A transfer with warranty as to two described mortgages for a tremely inadequate price together wit dence of the grantor that the grantee

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equity of redemption furnishes a consideration,[62] as does an extension of the mortgage debt.[63] Conditions to assumption must be complied with.[64]

Where the mortgaged premises are conveyed to one who agrees to convey to the actual purchasers, such persons do not become the real grantees bound by a contract in the first conveyance with the grantee who assumed the mortgage debt.[65]

Effect of assumption.—An express assumption estops the grantee from attacking the validity of a mortgage,[66] hence it has been held he cannot assert usury,[67] though one assuming the mortgage indebtedness and interest assumes only legal interest.[68] Assumption operates as renewal tolling the statute of limitations.[69] The grantee may save defenses.[70] The mortgagor is liable for failure to secure an extension according to agreement.[71] An assumption of the entire debt is reduced by the amount the grantee holds.[72]

Status of mortgagor as surety.—After a transfer in which payment of the mortgage debt is assumed, the mortgagee must respect the rights of the original mortgagor as surety.[73] The mortgagor is discharged by an unauthorized extension to the grantee,[74] or any alteration of the contract though not material.[75] Some states hold, however, that a new contract is required to make the mortgagor surety.[76] The mortgagor has on account of his liability as surety a direct interest in a foreclosure sale and the trustee owes him the duty of conducting it fairly,[77] and the

sumed payment of the mortgages held sufficient to show an assumption. Pike v. Wathen [Ky.] 76 S. W. 322.

61. Suit against the grantee to foreclose and secure a personal judgment on the grantor's notes. Bossingham v. Syck, 118 Iowa, 192, 91 N. W. 1047.

62. Steele v. Johnson, 96 Mo. App. 147, 69 S. W. 1065.

63. Iowa Loan & Trust Co. v. Haller, 119 Iowa, 645, 93 N. W. 636.

64. Condition that the mortgagee should sign it and that interest and taxes should be paid by third person about to purchase the property. Iowa Loan & Trust Co. v. Haller, 119 Iowa, 645, 93 N. W. 636.

65. Rev. St. 1898, § 2077, preventing a resulting trust in such case but vesting absolute title in the grantee named except as against creditors. Arnold v. Randall [Wis.] 98 N. W. 239.

66. Limitations. Christian v. John [Tenn.] 76 S. W. 906. Purchase at execution sale. Steele v. Walter, 204 Pa. 257.

67. People's Bldg. L. & Sav. Ass'n v. Pickard [Neb.] 96 N. W. 337.

68. Gardner v. Continental Ins. Co., 25 Ky. L. R. 426, 75 S. W. 283.

69. Christian v. John [Tenn.] 76 S. W. 906.

70. A purchaser of the equity of redemption who deducts from the purchase price the amount of the mortgage is not estopped to assert usury as against the mortgage, where at the time of his purchase it is agreed that usury exists and usurious interest is deducted from the amount of the mortgage assumed. National Mut. Bldg. & Loan Ass'n v. Retzman [Neb.] 96 N. W. 204.

71. His contract is not fulfilled by an effort to secure an extension or an offer to purchase an assignment of the debt from the owner who was unwilling to assign it. In case of a failure to secure such extension, the grantee may secure it and charge the grantor with any additional interest or charges over the amount fixed in the original agreement. Leis v. Sinclair [Kan.] 74 Pac. 261.

72. A purchaser at a judicial sale who retains the price of the sale and assumes to pay a debt secured by mortgage on the property is liberated from his assumption to an extent to which the mortgage debt is due to himself, though in the deed to him the entire price is said to be retained to pay the entire mortgage debt. Abraham v. New Orleans Brewing Ass'n, 110 La. 1012.

73. Smith v. Davis, 90 Mo. App. 533.

74. Where the mortgagor is a director of the corporation to which the property is conveyed, that fact alone is not sufficient to show his consent to extensions agreed on between the mortgagee and the corporation treasurer. Franklin Sav. Bank v. Cochrane, 182 Mass. 586. A receipt of interest in advance by the mortgagor may operate as an extension of time discharging the mortgagor from his liability as surety. New York Life Ins. Co. v. Casey, 81 App. Div. [N. Y.] 92.

75. Evidence held to show an increase in the rate of interest releasing the mortgagor from liability as surety after sale of the premises. New York Life Ins. Co. v. Casey, 81 App. Div. [N. Y.] 92.

76. An assumption does not make the mortgagors sureties in such a sense as to release them in case of an unauthorized extension of time to the purchaser. Iowa Loan & Trust Co. v. Haller, 119 Iowa, 645, 93 N. W. 636. If land encumbered by a mortgage is sold, an agreement between the vendor and the vendee that any expense to which the vendee is put on account of the mortgage shall be deducted from the amount of his purchase-money notes does not cause the land to be a surety for the amount of the debt so that an extension of the mortgage indebtedness will release it, the mortgage being between parties other than those to the contract of sale and the mortgagee not consenting to its terms. Hurd v. Thrasher [Tex. Civ. App.] 71 S. W. 803.

77. Dwyer v. Rohan, 99 Mo. App. 120, 73

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mortgagee cannot assert that the mortgagor's title having been defective, tained no loss by reason of a fraudulent sale.[78]

Action on agreement.—A petition by the mortgagor against the gra sufficient which alleges failure to pay a mortgage debt assumed and the e foreclosure of deficiency judgment against plaintiff which was paid by him

Conveyance of part of premises.—A purchaser of a portion of the p is entitled to have the residue first sold to pay the amount due on the mor and the mortgagee cannot thereafter release portions of the mortgaged p so as to prejudice the grantee's right,[81] unless the grantee is negligent ing to give the mortgagee notice, in which case he may release or subordin claim on the property retained by the mortgagor, without impairing his against that sold.[82]

§ 11. *Transfer of premises to mortgagee and merger.*—Where the in the mortgage and in mortgaged premises become the same, the personal l of the mortgagor is extinguished,[83] hence, where the mortgagee has acqui equity of redemption, a subsequent purchaser may assume that the mort merged,[84] but there is no presumption of merger where a joint mortgagor p debt, takes an assignment of the mortgage and conveys his interest subject th

If the wife has given a mortgage on her separate estate and the husba chases it, it does not merge in any title that either had at the execution mortgage.[86]

The owner of an equity of redemption may, in an action for foreclosu vey to the holder of the mortgage and discontinue the action and thus cut right of redemption;[87] though the foreclosure suit is dismissed after the ance, the deed amounts merely to a conveyance of the mortgagor's equity demption, and the indebtedness secured by the mortgage may be a good co tion.[88]

S. W. 384. In case of a fraudulent sale to the mortgagee, the mortgagor, if the premises have been transferred to an innocent purchaser depriving him of the right to redeem, should be relieved from liability to the extent of the loss sustained by the fraud of the mortgagee and trustee, though the mortgagor could have been sued on the mortgage note without security having been enforced. Id.

78. Applying the general principle that a pledgee, mortgagee or bailee of personal property who has unlawfully converted it to his own use cannot question the ownership to a contract involving realty. Dwyer v. Rohan, 99 Mo. App. 120, 73 S. W. 384.

79. Such cause of action is not affected by immaterial and redundant allegations. Hoffman v. Loudon, 96 Mo. App. 184, 70 S. W. 162.

80. Bagley v. Weaver [Ark.] 77 S. W. 903.

See, also, Foreclosure, etc., 2 Curr. Law, p. 14; Marshaling, etc., Securities, 2 Curr. Law, p. 798. Where the mortgaged premises are platted and sold in parcels, a sale under the mortgage should be in the inverse order of alienation, and where mechanics' and judgment liens have attached to the parcels, sale of the tract as a whole under the trust deed may be enjoined until the priorities of the liens are determined. Hudson v. Barham [Va.] 43 S. E. 189.

81. Grantee of right of way. Merced Security Sav. Bank v. Simon [Cal.] 74 Pac. 356. If the mortgagee agrees to buy in a of the property covered by the mort the mortgagor, it amounts to a re such portion of the property, and th feree may insist on the application amount of the debt before resort ma to the premises transferred to him v. Souders, 175 Mo. 455, 75 S. W. 413.

82. The transferee cannot insist parcel retained be first subjected mortgage as against a subsequent m to whom the first mortgagee Bridgewater Roller Mills Co. v. Rece Baltimore Bldg. & Loan Ass'n, 124 I

83. One of two grantees of th gaged premises took an assignme grantees contributing equally. Ar v. Purcell, 74 App. Div. [N. Y.] 623. ment to a member of a firm of a mort land, the fee of which is in the part the amount of the debt being paid firm (Fretwell v. Branyon [S. C.] 157), or assignment to the grantee mortgagor who took a conveyance s the mortgage and expressly assu promised to pay it as a part of the eration (Forthman v. Deters [Ill.] 97).

84. Artz v. Yeager, 30 Ind. App. N. E. 917.

85. Saint v. Cornwall [Pa.] 56 At

86. Skinner v. Hale [Conn.] 56

87. Braun v. Vollmer, 89 App. Div 48.

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§ 12. *Payment, release or satisfaction.*[89]—Receipt of proceeds of insurance by the mortgagee extinguishes the mortgage to such extent.[90] Execution of a new note and surrender of the old on reduction of the debt does not discharge the mortgage.[91]

Sufficiency of payment.[92]—The general rule is that a mortgagee cannot require as a condition of redemption the payment of any other debt not a lien on the land.[93] Agents for collection of interest coupons, who without authority pay them without knowledge or request of either the mortgagor or mortgagee, acquire no lien for their amount.[94] Where the mortgage is made to secure a particular class of debts, purchase of debts of another class will not release the liability.[95]

Tender.—The lien of a deed of trust is not removed by a tender sufficient to stop the running of interest unless the tender is kept good, amounting to a payment of the debt.[96] Where a surety desires to pay the mortgage debt and be subrogated to the rights of a mortgagee, a tender in excess of the debt, interest and costs is sufficient where complainant alleges that she has been unable to discover the exact amount due.[97]

Payment after assignment.—There is a conflict as to the effect of failure of the assignee to notify the mortgagor of assignment.[98] Where the note is not negotiable, payment to the original payee without notice of an assignment is a satisfaction.[99] The record of an assignment is not in itself notice,[1] nor the fact that the mortgagee has not possession of the instruments at the time of payment,[2] nor are casual remarks,[3] nor a notice mailed but not shown to have been received.[4]

After a recorded assignment of the note, payment may be to the holder, though the mortgagor has knowledge of adverse claims to the right of payment.[5]

88. Glover v. Fitzpatrick [Ind. T.] 69 S. W. 856.

Under an agreement that the mortgagee will pay to the mortgagor any surplus arising from a future sale of the property, the mortgagor is not entitled to recover an amount realized due to subsequent improvements by the mortgagee. In re Hoerr's Estate, 20 Pa. Super. Ct. 425.

89. See Payment for application of payments and general rules as to payment.

90. Gardner v. Continental Ins. Co., 25 Ky. L. R. 426, 75 S. W. 283.

91. The mortgage was retained. Davis v. Thomas [Neb.] 92 N. W. 187. Evidence held insufficient to show a discharge. Gilbert v. Garber [Neb.] 95 N. W. 1030.

92. Evidence held insufficient to establish payment. Archibald v. Banks, 203 Ill. 380, 67 N. E. 791. To show discharge of a mortgage rendering an attachment a prior lien. Fitch v. Duckwall [Ky.] 78 S. W. 185.

93. Indebtedness for commissions cannot be recovered. De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813.

94. Bennett v. Chandler, 199 Ill. 97, 64 N. E. 1052.

95. Deed made to secure certificates of an insolvent bank conditioned for reconveyance of a certain sum to the trustees. Mich. Trust Co. v. Red Cloud [Neb.] 92 N. W. 900.

96. Knollenberg v. Nixon, 171 Mo. 445, 72 S. W. 41.

97. Snook v. Munday, 96 Md. 514.

98. An assignee of the indebtedness will not be protected in the absence of notice to the mortgagor as against payments to the original holder. Napieralski v. Simon, 198 Ill. 384, 64 N. E. 1042. Contra, Fitzgerald v. Beckwith, 182 Mass. 177, 65 N. E. 36.

99. Where the mortgage provides that the mortgagors agree to pay all taxes and assessments, and all taxes and assessments levied on the holder of the mortgage for and on account of the same, such provisions destroy the negotiability of a note which it is given to secure and one who purchases and takes the mortgage with the note will be held to have had notice of its conditions. Garnett v. Myers [Neb.] 94 N. W. 803. Execution of a new mortgage to the mortgagee who was the collecting agent of the assignee, without payment to the assignee. Prescott v. Brooks [N. D.] 94 N. W. 88.

1. Real Property Law, § 271; Laws 1896, p. 616, c. 547; 1 Rev. St. First Div., p. 763, part 2, c. 3, § 41. Barnes v. Long Island R. E. Exch. & Inv. Co., 84 N. Y. Supp. 951.

2. Barnes v. Long Island R. E. Exch. & Inv. Co., 84 N. Y. Supp. 951.

3. A general conversation in which the president of the corporation mortgagee stated that the mortgages of the corporation had been assigned and in which the secretary of the corporation told the mortgagor that he could continue to do business with him, is not sufficient to warrant the conclusion that the mortgagor had notice of the assignment or information placing him on inquiry. Barnes v. Long Island R. E. Exch. & Inv. Co., 84 N. Y. Supp. 951.

4. The notice was not sent to the legal address of the mortgagor but to that of a friend of his. Barnes v. Long Island R. E. Exch. & Inv. Co., 84 N. Y. Supp. 951.

5. Casner v. Johnson, 66 Kan. 404, 71 Pac 819.

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Authority to collect interest may permit the assignor[6] or his agent t the principal.[7]

An assignor wrongfully receiving payment may be compelled to disch mortgage.[8]

Release by bar of limitations.[9]—The bar of the debt does not bar t gage.[10] If both parties are in common possession, one cannot be advers other so as to start limitations.[11] Limitations will run against a mortg though the owner of the premises is absent from the state, if he is not to pay the mortgage.[12]

Construction of formal release or agreement of release.—A declaratio release of a mortgage that it is fully paid is controlled and modified statements which show it to be a satisfaction only of the specific tracts m therein.[13] A release of part of a tract by metes and bounds does not rele covered by the mortgage;[14] neither can the releasee claim such easeme appurtenance.[15] An agreement to take effect on a certain condition req existence of that particular condition.[16]

Where permission is contained in the deed of trust for the grantor any portion of the property and secure its release by paying the price on secured, the debt may be paid before maturity with the proceeds of a seco gage on the land.[17] If, on an exchange of property, a mortgagee agrees t his mortgage and accept a new mortgage on the land received by the m

6. The assignee is bound by collections of principal contrary to instructions in the absence of notice to the mortgagor. Fitzgerald v. Beckwith, 182 Mass. 177, 65 N. E. 36.

7. Where a nonresident mortgagee after assignment collects interest for the assignee, payment may be made by the mortgagor to the resident agent appointed by the mortgagee to collect the debt. Breck v. Meeker [Neb.] 93 N. W. 993.

8. The original mortgagee allowed payment to be made to its financial officer. Barnes v. Long Island R. E. Exch. & Inv. Co., 84 N. Y. Supp. 951.

9. See Limitation of Actions; Foreclosure of Mortgages on Land. Cf. Adverse Possession.

10. Statute barring note in six years and the mortgage in ten. Satterlund v. Beal [N. D.] 95 N. W. 518; Northrop v. Chase [Conn.] 56 Atl. 518.

11. The wife does not hold adversely to the husband so as to cause limitations to run as against a mortgage on her separate estate which he has purchased until his rights are denied by her, both being in possession of the premises and in enjoyment of the rents and profits equally. Skinner v. Hale [Conn.] 56 Atl. 524.

12. Hogaboom v. Flower [Kan.] 72 Pac. 547.

13. Scott v. Hay [Minn.] 97 N. W. 106.

Amount necessary to obtain release: Where a trust deed authorizes the trustee to sell so much of the property not in excess of a certain sum as may be necessary to pay the amount due on certificates of deposit, and contains a further provision that the grantor shall be entitled to a reconveyance on the deposit by the grantor of such sum or so much thereof as may be necessary to pay his pro rata share of the amount due on the debt secured, the property conveyed to the extent of such sum security for the debt and the gran titled to redeem at any time by ment of that sum to the trustee, or as would bear the same relation t remaining unpaid at the time o tion as the original sum bore to nal amount of the debt. Mich. T Red Cloud [Neb.] 96 N. W. 140.

14. Where, after a mortgage is the land has been platted, a rele of the plats by metes and bounds cludes the only one of the pla touching the lot does not release Queens County Sav. Bank v. G Misc. [N. Y.] 711.

Property released: A permissi mortgagor to lease, reserved in gage, providing that when the leas the mortgaged lots should be app the lots and the premises should r ject to the lien of the mortgage the mortgage should be a lien on refers by "premises" to the lots not the estate granted. Sands v. W. P. Co., 115 Wis. 229, 91 N. W.

15. Queens County Sav. Bank 83 App. Div. [N. Y.] 629.

16. An agreement that a quit by the mortgagor should satisfy case a judgment in ejectment by gagors against the mortgagees affirmed on appeal, but that the l become due and payable if the j reversed and settled in favor of gagee, does not cause the debt due in case of a reversal not s question of title, and where th deed is set up as a bar to the retrial, the mortgagee cannot den ant's right to have the mortgag Bradshaw v. Gunter, 135 Ala. 240.

17. Snow v. Bass, 174 Mo. 14 630.

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an action to compel him to release cannot be brought without a tender of the new mortgage.[18]

Estoppel to assert satisfaction.—Though a mortgage has been satisfied of record, if the terre-tenants fail to defend scire facias, they cannot assert title as against the purchasers under scire facias on the ground of satisfaction.[19]

Erroneous or unauthorized discharge.—A satisfaction may be shown to have been by mistake, misrepresentation or fraud,[20] but mistake cannot be asserted against third persons misled to their disadvantage.[21]

One co-mortgagee cannot affect the rights of the other by a release.[22] A guardian's attempted satisfaction of a mortgage held by his ward without order of the court is void.[23] The record of the mortgage may afford constructive notice of rights as to release.[24]

Where a power of attorney from the mortgagee is fraudulently used in the entry of a release of a mortgage, judgment for the amount of the mortgage debt and interest is properly entered against the wrongdoer.[25]

Setting aside satisfaction.[26]—Where the mortgagee, believing that he has acquired the mortgagor's title, cancels the mortgage, he may have it re-established as against parties whose position has not been changed.[27] Contingent remaindermen are necessary parties to proceedings to set aside a satisfaction.[28]

18. Trombley v. Cannon [Mich.] 96 N. W. 516.

19. Saint v. Cornwall [Pa.] 56 Atl. 440.

20. Saint v. Cornwall [Pa.] 56 Atl. 440. Evidence held to show that a discharge by an assignee releasing the mortgage of record was not at the request of the assignor, the mortgage having been assigned as collateral. Lowry v. Paw Paw Sav. Bank [Mich.] 93 N. W. 530.

21. Where, believing that the holders of a third mortgage had been made parties to foreclosure proceedings under a second mortgage, the second mortgagee having purchased at the foreclosure sale releases a first mortgage which had been assigned to him of record, and the third mortgagees then bring suit to foreclose, one to whom they assign their judgment in good faith is to be regarded as an assignee of the mortgagee, and the second mortgagee is estopped from asserting that the release of the first was by mistake. Raymond v. Whitehouse, 119 Iowa, 132, 93 N. W. 292. A release of record of a mortgage by the mortgagee, after he has sold and delivered the notes secured thereby to a third person, will protect a bona fide purchaser of the mortgaged premises who had no notice at date of purchase or payment of the consideration, that the debt was assigned or was unpaid, or that the release was unauthorized. Montgomery v. Waite [Neb.] 95 N. W. 343. Evidence held insufficient to show actual notice of a prior lien authorizing a setting aside of its satisfaction as against an assignee of a junior encumbrance. Perry v. Fries, 85 N. Y. Supp. 1064.

22. Howe v. White [Ind.] 69 N. E. 684. When a satisfaction recorded purports to be by a co-mortgagee severally, subsequent mortgagors are charged with notice of the interest of those mortgagees not releasing. Howe v. White [Ind. App.] 67 N. E. 203.

23. Martin v. De Ornelas, 139 Cal. 41, 72 Pac. 440. While a ward is not bound by unauthorized attempts of her guardian and third persons to substitute a note and mortgage on a different piece of property for a mortgage belonging to her estate, she cannot avail herself of the substituted mortgage after having elected to enforce her rights under the original by a suit to foreclose the same. After such election, the second mortgage is of no further validity and the title obtained subsequent thereto is not affected by it. Nor can the second mortgagee be allowed to resort to subrogation and have both mortgages held to be in force as against a purchaser for value without notice of the equities. Martin v. De Ornelas, 139 Cal. 41, 72 Pac. 440.

24. Purchasers are charged with notice from the record of a trust deed that the trustee has no power to release except on satisfaction of the notes secured. Murto v. Lemon [Colo. App.] 75 Pac. 160. Persons for whose benefit a mortgage is executed may foreclose it to enforce the promise for their benefit, notwithstanding it has been satisfied by the original parties before the beneficiaries had knowledge of their rights under the contract, and the record of the mortgage is constructive notice to a vendee so that he is a party to a wrongful satisfaction executed incident to his purchase. Tweeddale v. Tweeddale, 116 Wis. 517, 93 N. W. 440.

25. Persons v. Persons [N. D.] 97 N. W. 551.

26. An action to set aside the cancellation of a mortgage is barred by Code Civ. Proc. § 388 in ten years, there being no fraud alleged. Perry v. Fries, 85 N. Y. Supp. 1064. An action to recover a personal judgment against the maker of the notes secured and to foreclose the trust deed which incidentally involves the cancellation of an unauthorized release deed is not barred by a statute applicable to bills for relief on the ground of fraud [2 Mills' Ann. St. § 2911]. Murto v. Lemon [Colo. App.] 75 Pac. 160.

27. Where, after default of the mortgagor, the mortgagee secures a release of the widow's dower and a deed from the mortgagor's father under a mistaken impression that the property had descended to the father, the

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A senior mortgagee who releases a portion of the premises to enable is to be charged with any loss to junior mortgagees occasioned by the rele to be credited with any benefits occasioned solely by the release.[29] A vo transferee of the mortgaged premises, though regarded as junior mortgag no greater rights than his grantor, the mortgagor, to have the mortgage c satisfied.[30]

Procedure to redeem or cancel.—Where a conveyance is procured by mortgages on the land conveyed may be set aside on cancelling the conv where it appears that they were executed to persons implicated in the fra transaction and without consideration.[31]

The right to redeem may be lost by limitations,[32] adverse possessio laches.[34] Where no time of repayment is fixed in a mortgage to secure fut vances, the mortgagees are not bound to wait indefinitely, but may file a b ing on the mortgagor to redeem within such time as equity shall decree permit a sale and liquidation.[35]

The bill must be accompanied by a tender in conformity with the mort which must be kept good.[37] The amount need not include a sum for taxes claimed.[38] If the consideration was entirely of past due indebtedness, it necessary that there be an offer to restore it.[39]

In a proceeding in equity to redeem the amount of outstanding ta which the mortgagee stipulated to pay may be determined as between tl ties.[40] Claimants under tax deeds should be joined.[41] If a court of equ acquired jurisdiction for the purpose of an accounting and redemption, a quent sale made under the power by the mortgagee will be set aside when sary to relief, for which jurisdiction has been assumed.[42]

Statutory penalties for failure to release.—The right of the person den release must not be mooted,[43] and good faith in a belief that the debt is

release is without consideration and the mortgage may be re-established as against the mortgagor's heirs. Swedesboro L. & B. Ass'n v. Gans [N. J. Eq.] 55 Atl. 82.

28. Contingent remainders being made by the Rev. St., devisable, descendible and alienable future estates. N. Y. S. & T. Co. v. Schoenberg, 87 App. Div. [N. Y.] 262.

29. Flanagan v. Shaw, 174 N. Y. 530, 66 N. E. 1108; Id., 74 App. Div. [N. Y.] 508.

30. To insist on satisfaction because the mortgagee who also held a chattel mortgage to secure the debt, purchased the chattels mortgaged at their full price and applied them on the debt without foreclosing the chattel mortgage. Spencer v. Forcht [S. D.] 92 N. W. 392.

31. Being part of the fraudulent scheme. Harris v. Dumont [Ill.] 69 N. E. 811.

32. Absence of parties to a mortgage will not operate to stop the running of the statute of limitations. Acts 1885, p. 41, c. 9 makes exception in favor of parties under disability. Christian v. John [Tenn.] 76 S. W. 906.

33. The question resting solely on the nature of the mortgagee's occupancy. Munro v. Barton [Me.] 56 Atl. 844. After expiration of the statutory period a transfer of the equity of redemption by foreclosure or act of the parties is presumed [Civ. Code 1895, § 2734]. Horton v. Murden, 117 Ga. 72.

34. A bill to set aside a mortgage and redeem on account of duress is barred by laches when five and a half years after the mortgage sale and one of the mortgagee's witnesses has become incapacitate peau v. First Nat. Bank, 24 R. I. 508. there is no time of repayment fix mortgage to secure future advan mortgagor is without remedy where teen years after purchase by the m at a sheriff's sale he allows them t in possession. Baker v. Bailey, 204

35. Baker v. Bailey, 204 Pa. 524.

36. A tender accompanied by a c not established by the deed that t gagee would satisfy a preceding m subject to which the mortgagors h title is ineffectual. Mott v. Rutte Eq.] 54 Atl. 159.

37. McNeil v. Sun & E. S. B., M. F. Ass'n, 75 App. Div. [N. Y.] 290.

38. Williams v. Williams, 117 V 94 N. W. 25.

39. Jenkins v. Jonas Schwab C 35 So. 649.

40. Where the prayer is for an ing and that taxes be offset aga mortgage, the complainant cannot pelled to pay the entire amount du mortgage debt and depend on the defendant's intestate for protection outstanding tax titles. Crummett field [Me.] 56 Atl. 1053.

41. Crummett v. Littlefield [Me.] 1053.

42. Nat. B. & L. Ass'n v. Cheat Ala. 395.

43. Sullivan Sav. Inst. v. Shar 96 N. W. 522.

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is a defense,[44] but not debts not a part of the mortgage debt.[45] Attorney's commissions which arise in a premature suit and issuance of execution need not be paid.[46] The expense of an acknowledgment of the mortgagee's certificate must be paid or tendered.[47] Under the Alabama statute, partial payments need not be entered.[48]

Where the note is misdescribed in the mortgage as recorded while one purchasing in reliance on the record is entitled to a release on the payment of the recorded amount, he cannot enforce a statutory penalty on failure of the mortgagee to release, the statutory provision being that the debt which the mortgage was made to secure should be paid.[49]

An assignee for collection may be liable.[50] Joint mortgagors must sign the request for satisfaction unless those not signing are shown to have had knowledge and to assent, and it is not sufficient that they join in an action for the penalty.[51] A defense that the mortgagee was holding the mortgage as security for another debt, by agreement, must be specially pleaded.[52]

Where the penalty imposed is a per cent. of the amount of the mortgage absolutely, there must be no deductions on account of partial payments or partial releases.[53] On appeal, it cannot be raised for the first time that plaintiff was entitled to but a portion of the recovery.[54]

Revival.—Reissuance of a note after payment of the debt will not revive the mortgage.[55]

§ 13. *Subrogation.*[56]—One primarily and solely liable for the mortgage debt is not entitled to subrogation,[57] but a joint mortgagor who discharges the mortgage is entitled to be subrogated as against co-mortgagors.[58] A life tenant who pays a mortgage on the entire estate cannot keep the charge alive as to his individual estate by taking an assignment, where the lien will operate fraudulently or inequitably.[59]

A mere volunteer loaning money to discharge a mortgage is not entitled to

44. Rev. St. 1899, § 4363. Snow v. Bass, 174 Mo. 149, 73 S. W. 630.

45. Rev. St. 1899, §§ 4358, 4363. Henry v. Orear [Mo. App.] 78 S. W. 283.

46. Act May 28, 1715; 1 Smith's Laws, p. 94. Steigerwald v. Phila. Brew. Co., 21 Pa. Super. Ct. 540.

47. Rev. Civ. Code, § 2601. Mader v. Piano Mfg. Co. [S. D.] 97 N. W. 843. A petition which fails to allege such tender is not good on the theory that it is sufficient to require the execution and delivery of a certificate of discharge that has not been acknowledged. The protection of title by the removal of clouds remaining of record after full satisfaction of debts secured by mortgage being the sole object of the statute. Mader v. Piano Mfg. Co. [S. D.] 97 N. W. 843.

48. Acts 1898-99, p. 26 amending Code 1896, § 1065. In an action against the cestui que trust failure to charge in such manner cannot be said to be harmless where there was evidence that only partial payments had been made. S. W. B. & L. Ass'n v. Acker [Ala.] 35 So. 468.

49. Burns' Rev. St. 1894, § 1105; Acts 1893, p. 64. Osborn v. Hocker, 160 Ind. 1, 66 N. E. 42.

50. Rev. St. 1899, § 4358. Henry v. Orear [Mo. App.] 78 S. W. 283.

51. Code 1896, § 1066. It is not sufficient that the nonsigning mortgagor be the wife of the signing mortgagor and that he signed her name. Jowers v. Brown, 137 Ala. 581.

52, 53. Rev. St. 1899, § 4363. Henry v. Orear [Mo. App.] 78 S. W. 283.

54. Henry v. Orear [Mo. App.] 78 S. W. 283.

55. Hibernia Nat. Bank v. Succession of Gragard, 109 La. 677.

56. See article Subrogation.

57. Where money due on a mortgage is paid by one whose duty it is by contract or otherwise to pay the mortgage, a transfer which in form purports to be an assignment amounts to a release. Walker v. Neil, 117 Ga. 733. One purchasing land subject to a charge at an execution sale cannot have a mortgage which he satisfies kept alive as against the charge. Steele v. Walter, 204 Pa. 257.

58. Cannot be charged with rents and profits by a grantee of the delinquents until there has been a reimbursement. Look v. Horn, 97 Me. 283.

59. Hence a life tenant occupying the property as a homestead, paying and taking an assignment of a mortgage thereon, cannot by an assignment in which the wife does not join, render it enforceable against the life estate, the property being occupied as a homestead and the last assignment amounting to an encumbrance thereon. Downing v. Hartshorn [Neb.] 95 N. W. 801.

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subrogation,[60] unless his act is ratified,[61] but subrogation may be had whe ment is with such intent,[62] the intent being essential,[63] or where a new m taken as security for the loan is invalid, the loanor believing in good faith would be substituted in place of that which he discharged.[64]

Where a person having an interest in real property has paid money to a mortgage to protect his interest, he is entitled, when justice requires, to stituted and treated as an equitable assignee of the lien, notwithstanding been canceled of record,[65] though not as against a purchaser in good faith on the record where the person satisfying the prior lien was negligent in amining the records for subsequent incumbrances before doing so,[66] and chaser who through mistake of law does not acquire title to the extent he t he was doing cannot be subrogated to mortgages discharged by his gra against strangers to the transaction in which the mistake occurred,[67] though been held that where, after decease of the mortgagor, the creditor surrende mortgage in consideration of a conveyance by the widow to his wife, the was entitled to be subrogated to his rights under the mortgage as against c of the mortgagor whose interest was overlooked at the time of the settlemer

Junior lienholders may be subrogated to prior liens discharged by though without the mortgagor's consent;[70] so where creditors secured by tru furnish money to take up a note secured by a prior trust deed, they may stituted to the rights thereunder, though the note is indorsed to their tru trustee for the debtor.[71] Where successive mortgagees satisfy prior liens, of subrogation acquired by an intermediate mortgagee does not pass to a late gagee who discharges his lien.[72]

60. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800.

61. Where a junior encumbrancer pays the prior mortgage without the mortgagor's knowledge, his act is ratified and confirmed by the payment of instalments of the debt to him by the grantor, allowing him to be protected by the first lien, though he has canceled it of record. Bowen v. Gilbert [Iowa] 98 N. W. 273.

62. Powers v. McKnight [Tex. Civ. App.] 73 S. W. 549. One to whom the premises have been quitclaimed by deed reciting that they were subject to an incumbrance cannot contend that the mortgage is discharged by payments by a third person for the mortgagor, it being understood that the mortgage is to be kept alive for his benefit. Everett v. Gately, 183 Mass. 503, 67 N. E. 598.

63. Where money is loaned to satisfy a trust deed on the understanding that a new deed will be executed for security, the creditors on failure to execute the new deed cannot be subrogated to the security of the deed which is discharged. Berry v. Bullock, 81 Miss. 463. Where an agent executes a subsequent invalid mortgage without authority and discharges a prior mortgage without the mortgagor's consent, subrogation to the rights of the prior mortgagee cannot be claimed. Gray v. Zellmer, 66 Kan. 514, 72 Pac. 228.

64. One loaning money to discharge a lien on a homestead and taking back a mortgage, invalid because executed by a woman who while ostensibly the occupant's wife, was not such in fact. Gordon v. Stewart [Neb.] 96 N. W. 624; Lashua v. Myhre, 117 Wis. 18, 93 N. W. 811.

65. Elliott v. Tainter, 88 Minn. N. W. 124. A junior lien holder who senior lien may be subrogated, tho has canceled the senior lien of recor a mistake of law as to the effect of ment, no rights of third parties ir ing. Bowen v. Gilbert [Iowa] 98 N.

66. Coonrod v. Kelly [C. C. A.] 1 841.

67. Purchase under a belief that acquiring title to the entire premise in fact the grantor owned only an u half which as between his grantor heirs of the co-owner, was chargeat a mortgage on the entire premises, t take being in no way induced by t of the co-owner. Deavitt v. Ring Atl. 978.

68. This case apparently conside mistake as one of law which will lieved against contrary to the gener Hutchison v. Fuller [S. C.] 45 S. E.

69. One paying a purchase-mon with notice of a subsequent mort entitled to keep it alive as again mortgage. Crawford v. Maddox, 117

70. A junior lienholder may pay due on the prior encumbrance and be gated to its lien without awaiting for proceedings by the prior lienholder. v. Gilbert [Iowa] 98 N. W. 273.

71. Their trustees may maintain tion to have the land sold and the p applied to the benefit of the creditc nishing the money, all the persons i est being made parties, it appeari the mistake in the name of the tru gether with the contention of a secon gagee that the power of sale had b stroyed would seriously affect the p

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Transferees of the equity of redemption who discharge a first mortgage when foreclosure proceedings are brought thereon, a decree being entered that the bond and mortgage be assigned to them, are subrogated to the rights of the mortgagee as against subsequent mortgagees.[73]

MOTIONS AND ORDERS.

The office of motions and the application of the proceedings by motion have been greatly enlarged in modern practice and by statute in order to expedite and simplify procedure.[74] A party may not by motion, open up a question already disposed of in order to appeal from the motion.[75] Irregularity in proceeding by motion will be considered waived unless seasonably taken advantage of.[76]

None but parties or persons in interest in the proceeding may institute motions.[77]

The moving papers must set out the facts on which the motion is based, and not mere conclusions of law.[78] The ordinary rule of pleading, that facts alleged in an answer and not controverted in a reply are taken to be true applies equally well in a hearing on a petition for a rule to show cause, where answer is made.[79] A motion to strike from the files another motion, though improper practice, if granted, will be treated as overruling the original motion.[80]

Notice is not required if no opposition can be made.[81] Grounds must be specified in a notice.[82] An order to show cause should be returnable at the prescribed time.[83]

Hearing and rehearing.—The establishment by rule of a motion day does not necessarily preclude hearing on other days.[84] Reference to take proof on motion should be denied where the question is neither important nor doubtful.[85] The order in which motions shall be heard is largely discretionary.[86] They may be heard by a successor to the trial judge.[87]

In New York, where order to show cause is asked instead of giving notice of motion, the affidavit must state all the facts required by Code Civ. Proc. § 78, and Gen. Rule of Practice 37.[88] An order become final cannot be reargued, though

which the land would be sold. Davidson v. Gregory, 132 N. C. 389.

72. The right being an equitable right of action. Bigelow v. Scott, 135 Ala. 236.

73. A subsequent decree in foreclosure by a second mortgagee that the property be sold and the second and third mortgages paid does not preclude the assignee of the first mortgage from bringing a suit to foreclose it. Newcomb v. Lubrasky [N. J. Eq.] 55 Atl. 89.

74. See article Motions, 14 Enc. Pl. & Pr. 75.

75. Reid v. Fillmore [Wyo.] 73 Pac. 849.

76. Motion heard on answer and proof. Crawford v. Southern Rock Island Plow Co. [Tex. Civ. App.] 77 S. W. 280.

77. Mayer v. Flammer, 81 N. Y. Supp. 1062.

78. Wigginton v. Nehan, 25 Ky. L. R. 617, 76 S. W. 196. So, also, that the land was "not advertised for sale according to law." Id. A motion to set aside a judgment sale alleging, it "was erroneous and contrary to law," states a mere conclusion. Id.

79. Arnold v. Carter, 19 App. D. C. 259.

80. Reid v. Fillmore [Wyo.] 73 Pac. 849.

81. Order extending time to answer may be made ex parte. Edwards v. Shreve, 83 App. Div. [N. Y.] 165.

82. Motion to dismiss appeal. Albany Brass & Iron Co. v. Alton, 84 N. Y. Supp. 180. Notice of motion to vacate an order for irregularity must state the irregularity complained of [Gen. Rule Prac. 37]. Van Wickle v. Weaver Coal & Coke Co., 88 App. Div. [N. Y.] 603.

83. That an order to show cause was made returnable in more than four days does not invalidate an order made thereon. Hoenig v. Paine, 38 Misc. [N. Y.] 819.

84. Rule 15 Cook County Superior Court does not require contested motions to be heard only on Saturday. Chicago v. English, 198 Ill. 211.

85. Bischoff v. Bischoff, 88 App. Div. [N. Y.] 126.

86. If a new trial be allowed and an application be then made to change the venue, a motion to revoke the order for a new trial may be heard before the other. Watson v. Williamson [Tex. Civ. App.] 76 S. W. 793.

87. A judge may hear a motion in a case tried by a deceased predecessor in office. Union Pac. R. Co. v. Lotway [Neb.] 96 N. W. 527. See, also, Judges.

88. Stryker v. Churchill, 39 Misc. [N. Y.] 578.

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on a new hearing a different decision would be made.[89] and tending to bar further proceedings must be heard merits.[90]

A motion may be renewed after an appeal which Where an order denying a motion imposes a condition fc tion must be complied with.[92] Pendency of a motion bar lief.[93] Denial of a motion for reference does not bar judge.[94]

An order may be made orally,[95] and it may be enter decision of a preliminary motion may be announced in bodied in the final decree.[97] The order should recite the tion was made,[98] and should recite all preliminary obje ing.[99]

An order operates no further than the necessary r One not granting the relief asked operates as a denia motion is conclusive on the party if not appealed from,[3] assailed for irregularity.[4] A presumption exists that t regular and made upon proper notice.[5] An order accep ties will not be set aside because counsel on the motion a at the hearing.[6] Recitals as to appearance and consent a A court has full power over its orders during the term dered.[8] Resettlement of an order by stating the ground pelled;[9] and an order improvidently entered cannot be v An order made at a previous term cannot be overruled treated as though no subsequent order had been made.[11]

89. Klipstein v. Marchmedt, 39 Misc. [N. Y.] 794.

90. It is error to deny it on the ground that there is another remedy. Cornish v. Coates [Minn.] 97 N. W. 579.

91. Reversal of order granting motion without stating reason for such reversal does not bar a renewal of the motion on additional evidence. Malone v. Saints Peter and Paul's Church, 83 App. Div. [N. Y.] 80.

92. Murphy v. Kelly, 85 N. Y. Supp. 912.

93. McCaffrey v. Butler, 84 N. Y. Supp. 776.

94. Gregory v. Perry, 66 S. C. 455.

95. Adjournment. Cribb v. State, 118 Ga. 316. But a mere announcement of opinion by a judge without an order to the clerk will not sustain the entry of final judgment nunc pro tunc. Id.

96. If the clerk fails to make a note of such oral order, it may be corrected nunc pro tunc. Cribb v. State, 118 Ga. 316. So also where through mistake of the clerk, an interlocutory order is not entered, a nunc pro tunc entry is proper. Vance v. Ravenswood, S. & G. R. Co., 53 W. Va. 338.

A finding that the order was made need not be express but may be by necessary implication. Creedon v. Patrick [Neb.] 91 N. W. 872.

97. Halk v. Stoddard [S. C.] 45 S. E. 140.

98. Recital compelled on appeal from denial of motion to resettle order. American Audit Co. v. Industrial Federation, 87 App. Div. [N. Y.] 275; Allen v. Becket, 84 N. Y. Supp. 1009.

99. Objection show cause to s cation had been In re Nat. Gran [N. Y.] 593.

1. Arnold v.

2. Powell v. Y.] 228.

3. Overruling na. In re Rand Halvorsen v. Or 95 N. W. 320. Se 2 Curr. Law, 63 default does nc judgment on a v. Mead, 80 App

4. Entry of hours after it i larity. Allen v.

5. Jones v. I

6. State v. D 88 Minn. 95, 92

7. In re Bod 552.

8. Watson v. 76 S. W. 793. order of admiss [Ark.] 78 S. W. may be set asi a motion for a v. Williamson 793.

9. Hall v. F Y.] 248.

10. Allen v.

11. State v.

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MUNICIPAL BONDS.[12]

§ 1. Power to Issue (931).
§ 2. Conditions Precedent (932).
§ 3. Execution (935).
§ 4. Form and Requisites (935).
§ 5. Issue and Sale (935).
§ 6. Rights and Liabilities Arising Out of Illegal Issue (936).
§ 7. Transfer (936).
§ 8. Payment (939).
§ 9. Scaling Overissue (940).

§ 1. *Power to issue.*—A municipal corporation has only such power to issue bonds as is expressly conferred upon it by a statute or the state constitution,[13] or is necessarily inferred from an authority expressly given,[14] and is limited to the purposes for which it was granted,[15] and even though the bonds are issued under a special act which is unconstitutional, they are not invalid if sufficient authority for such issuance is conferred by a prior general statute.[16] A municipal corporation may be authorized to issue non-liability bonds, securing them by a mortgage on the property in reference to which the bonds are issued.[17] A statute authorizing the issuance of municipal bonds to a certain amount does not require that they shall all be issued at the same time.[18] In a suit in a Federal court, the power of a municipal corporation to issue bonds is to be determined by the law of the state where the bonds were issued.[19]

A municipality may be authorized by the legislature to issue bonds for special purposes, as to build public bridges,[20] to pay subscriptions to railroad stock or aid in railroad construction,[21] to improve public roads or streets,[22] to erect or repair

12. Evidences of municipal indebtedness containing a promise to pay but not creating a new debt are not municipal bonds, under a statute prescribing the method of issuing, approving, and registering such bonds. Tyler v. Jester [Tex. Civ. App.] 74 S. W. 359.

13. Appleton W. W. Co. v. Appleton, 116 Wis. 363, 93 N. W. 262. Act Feb. 2, 1899, § 1, authorizing every incorporated city or town to issue municipal coupon bonds includes a village organized under general laws (Const. § 1, art. 12), providing for the incorporation, organization and classification of cities and towns. Brown v. Grangeville [Idaho] 71 Pac. 151. Under a statute authorizing a school district to borrow money on an unusual exigency for a term of one year, and also for the purpose of erecting a school house and refunding a previous indebtedness for an unlimited time, a district's power to issue bonds to pay for orders issued in a compromise could only be under the first provision, hence are void where issued for a term of years. Montpelier S. B. & T. Co. v. School Dist. No. 5, 115 Wis. 622, 92 N. W. 439. A statute in reference to cities under special charters, authorizing an issuance of bonds for waterworks, is a general law governing a certain class of cities designated by law. Appleton W. W. Co. v. Appleton, 116 Wis. 363, 93 N. W. 262.

14. Fernald v. Gilman, 123 Fed. 797. A resolution under Village Law § 128 (Laws 1897, c. 414) that there "shall be raised upon the village" the necessary amount for the purchase of a water works system authorizes the issue of municipal bonds for that purpose. N. Y. & R. Cement Co. v. Davis, 173 N. Y. 235, 66 N. E. 9.

15. Potter v Lainhart [Fla.] 33 So. 251. To pay subscriptions to railroad stock. Edwards v. Bates County, 117 Fed. 526. A charter provision giving the common council power to issue bonds for certain purposes only, but not including general bonds for special street improvements. Uncas Nat. Bank v. Superior, 115 Wis. 340, 91 N. W. 1004.

A special act authorizing an issue of bonds, under authority of general laws requiring it must specify the purposes for which the proceeds of such bonds are to be used. Wilkins v. Waynesboro, 116 Ga. 359.

16. Schmidt v. Defiance, 117 Fed. 702; Defiance v. Schmidt [C. C. A.] 123 Fed. 1.

17. Laws 1899, c. 348, authorizing cities of the third and fourth classes to issue bonds for a waterworks secured by a mortgage on the waterworks, but without creating any liability on the city; and under this power the city may issue other than regular municipal bonds for waterworks. Appleton W. W. Co. v. Appleton, 116 Wis. 363, 93 N. W. 262.

18. They may be issued in instalments for less amounts. Wells v. Sioux Falls [S. D.] 94 N. W. 425.

19. Franklin County Com'rs v. Gardiner Sav. Inst. [C. C. A.] 119 Fed. 36.

20. Schmidt v. Defiance, 117 Fed. 702.

21. Edwards v. Bates County, 117 Fed. 526; Wetzell v. Paducah, 117 Fed. 647. County bonds. Wilkes County Com'rs v. Coler, 190 U. S. 107, 47 Law. Ed. 971; Stanly County Com'rs v. Coler, 190 U. S. 437, 47 Law. Ed. 1126; Green County v. Shortell [Ky.] 75 S. W. 251. It is not essential to the power of a county to issue bonds in aid of an unfinished railroad that it have an interest therein. Stanly County Com'rs v. Coler, 190 U. S. 437, 47 Law. Ed. 1126. To purchase land for depot purposes. Jennings Banking & Trust Co. v. Jefferson, 30 Tex. Civ. App. 534, 70 S. W. 1005.

22. Franklin County Com'rs v. Gardiner Sav. Inst. [C. C. A.] 119 Fed. 36; Potter v. Lainhart [Fla.] 33 So. 251. Comp. St. Neb. 1901, § 14, c. 45, authorizing the issuance of bonds in aid of works of internal improve-

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schoolhouses,[23] to erect a courthouse and jail,[24] or to pay for a water-works system.[25]

Refunding bonds.—A municipal corporation has no authority, under a statute authorizing refunding bonds, to issue such bonds to pay an unauthorized indebtedness.[26]

Limitation of indebtedness.—A municipal corporation can issue bonds only to the extent of the indebtedness it may incur, as limited by constitutional or statutory provisions; and a statute authorizing an issuance in excess of such limitation is unconstitutional and void, and the bonds issued thereunder are void.[27] But the term "issue" is held to refer to the time of sale of the bonds, and if at such time the limit of indebtedness is not exceeded, the bonds will be valid.[28] Refunding bonds issued to take up other claims or bonds issued in excess of the debt limit are also invalid.[29]

Curative acts.—Where municipal bonds are invalid by being issued without authority or without complying with certain statutory requirements, they may be validated by a subsequent statute passed for that purpose,[30] if the provision violated could have been omitted in the original statute,[31] and this right of the legislature is not defeated by an adjudication of a court that the bonds are void.[32]

§ 2. *Conditions precedent.*—Where the statute authorizing an issue of municipal bonds prescribes certain conditions precedent to the issue, such conditions must be strictly complied with,[33] and the records at least of minor divisions of government, must show the fact.[34] It is prerequisite to the issue of aid bonds

ment, improving streets in cities of the second class, etc., applies only to works specifically designated in such statute. State v. Weston [Neb.] 96 N. W. 668.

23. Allen v. Adams, 66 S. C. 344.

24. Potter v. Lainhart [Fla.] 33 So. 251.

25. N. Y. & R. Cement Co. v. Davis, 173 N. Y. 235, 66 N. E. 9; Appleton W. W. Co. v. Appleton, 116 Wis. 363, 93 N. W. 262.

26. Bonds issued at a directors' meeting, at which no tax was voted to pay therefor, in an attempt to ratify a previous unauthorized compromise and orders issued are not refunding bonds, within a statute authorizing such bonds to refund an indebtedness, as both the compromise and the orders issued were void for want of authority. Montpelier S. B. & T. Co. v. School Dist. No. 5, 115 Wis. 622, 92 N. W. 439.

27. Laws N. D. 1903, c. 49, p. 54, authorizing an issuance of bonds to erect buildings for the State Normal School in excess of the indebtedness limited by the state constitution, section 182. State v. McMillan [N. D.] 96 N. W. 310. Refunding bonds increasing the aggregate amount of a county's indebtedness beyond the constitutional limit. Reynolds v. Lyon County [Iowa] 96 N. W. 1096.

Evidence: Where the question in issue in an action on school district bonds is whether the district debt limit had been exceeded, an order of the board of trustees crediting the school district is the best evidence of the amount of taxable property; secondary evidence of the tax rolls for two years previous is inadmissible. Montpelier S. B. & T. Co. v. School Dist. No. 5, 115 Wis. 622, 92 N. W. 439.

28. By an increase in taxable values, though such limit was exceeded at the time the bonds were actually issued. Austin v. Valle [Tex. Civ. App.] 71 S. W. 414.

29. Reynolds v. Lyon County [Iowa] 96 N. W. 1096.

30. Acts Fla. 1901, c. 4912, validating county bonds issued since May 11, 1899, for the purpose of constructing highways, courthouses, or jails, or for either purpose. Potter v. Lainhart [Fla.] 33 So. 251. Municipal bonds invalid by reason of a failure to provide for a sinking fund for their redemption. Id.

31. Givens v. Hillsborough County [Fla.] 35 So. 88.

32. Because of their failure to comply with some statutory requirement. Givens v. Hillsborough County [Fla.] 35 So. 88.

33. Completion of work for which issued. Edwards v. Bates County, 117 Fed. 526. Where county bonds are not to be issued to pay subscriptions to railroad stock until the railroad shall exonerate it from payment of a subscription to stock of another road, such exoneration is a condition precedent to the issue of the bonds, and if the railroad fails to perform the condition an issue of the bonds would be invalid. Green County v. Shortell [Ky.] 75 S. W. 251.

34. A mere subsequent recital will not supply the omission in a call for an election of a finding that it was on petition by "taxpayers and residents." Edwards v. Bates County, 117 Fed. 526. Record disclosing that all requirements of the statute as to notice and election were literally or substantially complied with. Wimberly v. Twiggs County, 116 Ga. 50. Records of school board held not to show sufficient compliance with R. S. 1879, § 7032, providing for notice and election to authorize the board to issue bonds. Thornburg v. School Dist. No. 3, 175 Mo. 12, 75 S. W. 81. A county clerk's certificate being the only evidence of an election under a statute authorizing the county court to issue bonds upon a favora-

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that the prescribed conditions as to the execution of the enterprise be complied with.[35] Previous presentment to the attorney general for his approval is sometimes required.[36] It may also be a condition precedent that the bonds shall have indorsed thereon a certificate that they are within the debt limit.[37]

In *Georgia,* statutory provision is made for a preliminary adjudication of the validity of an issue of municipal bonds, where there is some question as to whether the statutory requirements have been complied with.[38]

Assent of voters or taxpayers.—Perhaps the most usual condition precedent required to an issue of municipal bonds is the assent of the qualified voters or taxpayers of the municipality as determined by an election held for that purpose,[39] or by a petition,[40] though, in the absence of a constitutional restriction, such power may be given without requiring such assent.[41] The proposition submitted at an election must comply with the statutory requirements.[42] Where the bonds are sought to be issued for several purposes, the proposition may be submitted as an entirety,[43] though under some statutes it is unlawful for more than one proposi-

ble election is a jurisdictional fact, which will not be supplied by a recital in the records of the court that such certificate was filed. Edwards v. Bates County, 117 Fed. 526. See Potter v. Lainhart [Fla.] 33 So. 251.

35. A condition to an issue of county bonds to pay subscriptions to railroad stock, that the railroad company shall construct a road through the county, is not complied with by the construction of a short distance of the road in the county. Green County v. Shortell [Ky.] 75 S. W. 251. See, also, Railroads as to prerequisites to aid other than bond issues.

36. An attorney general's certificate as required by Acts Tex. 1893, c. 64, is sufficient to effectuate an issuance of county bonds though the proof in an action on such bonds shows that their presentment to him was not authorized by the county but does not show that the county commissioners failed to do so. Martin County v. Gillespie County, 30 Tex. Civ. App. 307, 71 S. W. 421.

37. Const. N. D. § 187. State v. McMillan [N. D.] 96 N. W. 310.

38. Act Ga. 1897 (Acts 1897, p. 82; Van Epps' Code Supp. § 6074 et seq.) provides a method by which the courts shall determine whether the consent of the qualified voters has been obtained to the issuance of bonds in the manner prescribed by law, and as to whether a debt may be lawfully incurred by the municipality. Epping v. Columbus, 117 Ga. 263. A judgment for validating an issuance of bonds will not be refused because the authorities of the municipality have entered into a contract for their sale for less than their real value. Id. It is no objection to an action to validate before the bonds have been issued, that provision is not made for their payment, unless it clearly appears that the municipality does not intend to make such provision (Id.); nor is it an objection that a specified number of voters in favor of the issuance were unqualified if with such number stricken out it does not appear that the requisite number as prescribed by statute had not voted in its favor (Id.).

39. Edwards v. Bates County, 117 Fed. 526; Wetzell v. Paducah, 117 Fed. 647; Green County v. Shortell [Ky.] 75 S. W. 251. R. S. Wis. 1878, §§ 942, 943 (Re-enacted in R. S. 1898, §§ 942, 943) are not repealed by Laws 1889, c. 326, as amended by Laws 1893, c. 312 (R. S. 1898, § 925-133) and by Laws 1893, c. 311 (R. S. 1898, § 926-11), and therefore a city acting under such laws cannot issue bonds for waterworks without first submitting the question to a vote of the people. Appleton W. W. Co. v. Appleton, 116 Wis. 363, 93 N. W. 262. The fact that a city by a special charter adopts a statute providing for the issuance of bonds for waterworks does not make such statute a special one, so as to relieve the city from submitting the question of issuance of bonds to a vote of the people as required by a general statute. Id. The fact that a statute requiring an election may result in mischief, since bonds have been issued without submitting a proposition for their issuance, does not justify its being disregarded or overridden by the court, though in some cases such fact may be considered. Id.

40. A petition failing to show that it was signed by a majority of the taxpayers on property, not including persons taxed for dogs or highway tax only, as prescribed by statute, does not authorize the issue of bonds, and bonds issued thereunder are void. Clarke v. Northampton [C. C. A.] 120 Fed. 661.

41. A statute authorizing a township board to issue and sell bonds to pay for certain public improvements is not unconstitutional as an invasion of the right of local self-government because it does not require a vote of the electors, since a township board is an elective body and the powers conferred upon it by such statute are in accord with other powers previously exercised by it. Grosse Pointe Tp. v. Finn [Mich.] 96 N. W. 1078.

42. Under Laws N. Y. 1897, c. 414, §§ 260, 261, 263, requiring a proposition for the adoption of a sewerage system describing the same and its cost, to be submitted, in the form required by statute, to the vote of qualified voters, village bonds issued under a proposition adopted by a majority of all the voters of a village, and which merely embodied a resolution passed by the village trustees are void. Brockport v. Green, 39 Misc. [N. Y.] 231.

43. Under R. S. Fla. § 591, as amended by Acts 1899, c. 4711, and R. S. § 593, and a

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tion to be submitted at the same election.[44] The call for an election under some statutes must be by a petition,[45] or by a proclamation.[46] The form of ballot to be used may be prescribed by statute.[47] The vote requisite to show assent and authorize an issuance of bonds is regulated wholly by statute,[48] and is to be determined only from the number of votes cast on that particular proposition,[49] unless the statute requires the vote to be a certain proportion of all the qualified voters of the municipality whether voting or not.[50] But it has been held that such vote need not include voters in a recently annexed part of a city.[51] The use of improper influence on voters in favor of an issuance of bonds will not invalidate the election.[52]

Notice of election is a matter of statutory requirement which must be complied with,[53] and if notice is not published for the period prescribed by statute, the election should be declared invalid and the bonds be held void.[54] A notice failing to specify all particulars in reference to the bonds prescribed by statute is not a valid notice of an election.[55]

Providing for payment of bonds.—In some states it is expressly provided by the constitution or statutes that a statute or resolution providing for the issuance

majority vote on such question authorizes the issuance. Potter v. Lainhart [Fla.] 33 So. 251.

44. Act Ky. March 17, 1870 (1 Acts Ky. 1869-70, p. 102), providing that it shall be unlawful for certain officers therein designated to submit more than one proposition for taxation to voters at any one election applies only to such officers, and not to a city council ordering such an election under power given it by the city's charter, though more than one proposition is submitted at the election, nor affect bonds issued in compliance with the election. Wetzell v. Paducah, 117 Fed. 647.

45. Petition of a majority of the freeholders for a special election to issue bonds. Allen v. Adams, 66 S. C. 344. When a municipal board has power to act (calling an election to vote bonds) on petition of persons whose qualifications are prescribed, the call must be supported by finding that they had such qualifications (on petition of "taxpayers and residents"). Edwards v. Bates County, 117 Fed. 526.

46. Sommercamp v. Kelly [Idaho] 71 Pac. 147.

47. Act Feb. 2, 1899, § 2. Brown v. Grangeville [Idaho] 71 Pac. 151. "For bonds" or "against bonds." Potter v. Lainhart [Fla.] 33 So. 251.

48. A majority of the votes cast is sufficient in an election under R. S. Fla. §§ 592-595, to authorize an issuance of bonds for purposes designated in § 591. Potter v. Lainhart [Fla.] 33 So. 251.

49. Under Act Ky. March 20, 1900, a vote of two-thirds of those voting on a question to issue bonds is sufficient, though at the same election a larger number of votes is cast on another question of which number the votes in favor of issuance would not have been two-thirds. Worthington v. Board of Education, 24 Ky. L. R. 1510, 71 S. W. 879.

50. Under a statute requiring two-thirds of the qualified voters to vote for an issuance of bonds the determination whether such number has voted therefor may be had from the list of registered voters, or from tally sheets of the last general election of the municipality. Wilkins v. Waynesboro, 116 Ga. 359.

51. An election has been held not to be invalidated by the fact that voters in a recently annexed part of a city were not given an opportunity to vote. Lancaster v. Owensboro, 24 Ky. L. R. 2249, 73 S. W. 775.

52. If they were not actually coerced against their wishes. Epping v. Columbus, 117 Ga. 263.

53. A publication in a weekly paper for five weeks is sufficient notice of an election as required by a village ordinance. State v. Weston [Neb.] 93 N. W. 728. The fact that the notice bears no date if it appears to be made and published prior to the election for the time required by statute does not affect its validity. Wimberly v. Twiggs County, 116 Ga. 50. Act Ga. 1879 (Pol. Code, § 377) requiring notice of an election upon an issuance of county bonds for 30 days next preceding the election, is not repealed or modified by Act 1891 (Acts 1890-91, vol. 1, p. 241; Civ. Code, § 5458) requiring certain public officers to publish notices of sales and orders. Davis v. Dougherty County, 116 Ga. 491. Under the provision of a town charter and ordinance that books of registration shall be closed ten days before election, a published notice which might be construed to indicate that the books will be closed earlier than ten days before will not be sufficient to invalidate an election if it does not appear that they were in fact illegally closed nor that any qualified voter was misled by such notice. Epping v. Columbus, 117 Ga. 263. The publication of a mayor's proclamation in a city paper of general circulation for more than thirty days, stating the time and place of an election to vote upon a proposition for an issuance of municipal bonds, complies with Sess. Laws Idaho, § 2, p. 30. Sommercamp v. Kelly [Idaho] 71 Pac. 147.

54. Davis v. Dougherty County, 116 Ga. 491.

55. An ordinance, under which the notice is given prescribing terms failing to comply with the statute is also void. Wilkins v. Waynesboro, 116 Ga. 359.

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of municipal bonds must provide for an annual tax levy before or at the time of issue to pay the principal and interest when due;[56] and a statute authorizing the issuance of such bonds without providing for a tax levy as required is unconstitutional and the bonds void.[57] No plan for otherwise raising funds for the purpose can be lawfully substituted for such provision.[58] But this provision need not be made until at or before the issue, and nothing to the contrary appearing, it will be presumed that provision will be made.[59] Under these provisions, the term "issue" is held to mean sale, and it is sufficient if such tax or fund is provided before the bonds are advertised and finally sold.[60] But these provisions apply only to bonds or instruments creating new debts.[61]

§ 3. *Execution.*—Municipal bonds can be executed only by the officers designated and in the manner prescribed by the statute authorizing their execution.[62] If the municipality is known by several names, bonds executed in either name which sufficiently identifies it are valid.[63] A municipal corporation having no official seal as prescribed by statute may adopt and use the seal of one of its officials in executing bonds of the corporation,[64] and where a seal other than the one prescribed by statute is mistakenly affixed, an innocent holder of the bonds is entitled to equitable relief by having the proper seal attached,[65] or by enjoining the municipality from setting up the want of a corporate seal as a defense to an action on the bonds.[66]

§ 4. *Form and requisites.*—A statute authorizing certain officers to issue municipal bonds may also authorize them to prescribe the form in which they shall be issued.[67] Authority to issue municipal bonds ordinarily authorizes the municipality to make them negotiable in form,[68] and to make them payable in a certain medium of payment.[69]

§ 5. *Issue and sale.*—The officers or board charged with the duty of issuing and controlling municipal bonds are ordinarily designated by the statute authorizing the issue,[70] and authority to issue and sell bonds implies the power to pledge the municipality's credit therefor.[71] After a bond issue has been authorized,

56. Const. Ga. 1877, art. 7, § 7. Wilkins v. Waynesboro, 116 Ga. 359. Civ. Code Ga. 1895, §§ 5894, 5897. Epping v. Columbus, 117 Ga. 263. Const. Tex. art. 11, §§ 5, 7. Tyler v. Jester [Tex. Civ. App.] 74 S. W. 359. Const. Wis. art. 11, § 3. Montpelier S. B. & T. Co. v. School Dist. No. 5, 115 Wis. 622, 92 N. W. 439.

57. Laws N. D. 1903, c. 49, p. 54, authorizing an issuance of bonds to erect buildings for the State Normal School. State v. McMillan [N. D.] 96 N. W. 310. A special act providing for an annual tax to pay interest and further providing for a sinking fund to pay the principal of bonds without contemplating an annual tax to pay therefor. Wilkins v. Waynesboro, 116 Ga. 359.

58. Wilkins v. Waynesboro, 116 Ga. 359.

59. In compliance with the constitution. Epping v. Columbus, 117 Ga. 263.

60. Under the Florida statutes providing that there must be a resolution providing for a sinking fund to redeem bonds issued for the erection of a courthouse and jail before the county commissioners may issue them. Potter v. Lainhart [Fla.] 33 So. 251.

61. Not to instruments acknowledging or extending the time of payment of existing obligations. Tyler v. Jester [Tex. Civ. App.] 74 S. W. 359.

62. County court. Edwards v. Bates County, 117 Fed. 526. County bonds issued by the board of county commissioners, in the prescribed form, signed by the chairman of the board, attested by the county clerk, who is clerk of the board, and countersigned by the county treasurer, under the seal of the board of county commissioners and reciting that they are county bonds are sufficiently executed. Potter v. Lainhart [Fla.] 33 So. 251.

63. The fact that a school district is known by several names does not affect the validity of bonds issued by it under one of the names where it is sufficiently identified by either name. State v. Brock, 66 S. C. 357.

64. Such seal does not affect the validity of the bonds. Schmidt v. Defiance, 117 Fed. 702. Seal of the city clerk. Schmidt v. Defiance, 117 Fed. 702.

65, 66. Defiance v. Schmidt [C. C. A.] 123 Fed. 1.

67. Potter v. Lainhart [Fla.] 33 So. 251.

68. A city charter authorizing an issuance of bonds in aid of a railroad. Jennings Banking & Trust Co. v. Jefferson [Tex. Civ. App.] 70 S. W. 1005.

69. County bonds payable in gold coin of the United States. Hillsborough County v. Henderson [Fla.] 33 So. 997.

70. Where a town council is about to elect a sewerage commission to take charge of a sewerage system under Act S. C., Feb.

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many matters of detail in respect to the issue may be determined by resolution of the board charged therewith.[72]

A bid for municipal bonds offered for sale if accepted is to be paid in current money only, and not in evidences of indebtedness against the municipality,[73] unless the bonds are issued to borrow money for the purpose of funding an outstanding indebtedness.[74] The bidder, if his bid is accepted, may be required to deposit security for the payment of the amount bid upon the delivery of the bonds,[75] and if he is allowed to withdraw his whole deposit upon making the first payment on bonds delivered, without proper authority in the officer allowing it, a subsequent statute may cure such irregularity.[76]

§ 6. *Rights and liabilities arising out of illegal issue.*—A taxpayer may sue in equity to enjoin an illegal issuance of municipal bonds;[77] but not where the issuance is authorized by implication.[78]

A municipal corporation may be held liable on an implied contract for money received by it on bonds illegally issued.[79] The statute of limitations does not begin to run against a bona fide holder of void municipal bonds in a suit to recover money paid therefor or to enforce the original indebtedness until the municipality has repudiated the bonds.[80]

§ 7. *Transfer.*—Municipal bonds negotiable in form may be negotiated so as to enable a bona fide holder to sue thereon in his own name,[81] and such bonds cannot be assailed in his hands for mere irregularities in the issue, or upon any ground,[82] except their issue without authority.[83] But where the bonds are not negotiable, a purchaser thereof acquires no better title than his immediate transferror.[84] In an action by a bona fide holder, the question whether a private person

27, 1902 (23 St. at Large, p. 1040), a committee of public works elected under Act Mch. 2, 1896 (22 St. at Large, p. 83) has no right to control the sewerage bonds or their proceeds in preference to the town council. State v. Young, 66 S. C. 115.

71. Authority of a township to issue and sell bonds for street improvements. Grosse Pointe Tp. v. Finn [Mich.] 96 N. W. 1078.

72. Resolution determining the rate of interest. Hillsborough County v. Henderson [Fla.] 33 So. 997. Sufficiency of a resolution of a board of county commissioners upon a vote of the people providing for the issue of bonds for certain public improvements, under Rev. St. Fla. § 591, as amended by Acts 1899, c. 4711. Potter v. Lainhart [Fla.] 33 So. 251. Under Rev. St. Fla. 1892, § 591, requiring a resolution to state the amount of bonds required for each of two purposes, a resolution stating a gross amount for two designated purposes is sufficient where the amount for one of the purposes is fixed. Hillsborough County v. Henderson [Fla.] 33 So. 997.

73. Potter v. Lainhart [Fla.] 33 So. 251.

74. But a notice of sale of county bonds need not state that the bids are payable in current funds or in evidences of debts against the county under Rev. St. Fla. 1892, § 596. Givens v. Hillsborough County [Fla.] 35 So. 88.

75. Rev. St. Fla. § 597. Potter v. Lainhart [Fla.] 33 So. 251.

76. Potter v. Lainhart [Fla.] 33 So. 251.

77. But an allegation questioning the appointment of bond trustees will not justify an injunction of an issuance of county bonds. Givens v. Hillsborough County [Fla.] 35 So. 88.

78. As where a resolution under a statute is broad enough to cover the borrowing of money and hence also the issuance of bonds. New York & R. Cement Co. v. Davis, 173 N. Y. 235, 66 N. E. 9.

79. Money lent for an authorized purpose, but on bonds issued without authority. Fernald v. Gilman, 123 Fed. 797. Money received on sale of bonds issued in excess of limited indebtedness. Reynolds v. Lyon County [Iowa] 96 N. W. 1096.

80. Void county bonds issued to pay for county warrants taken up and canceled. Kearny County Com'rs v. Irvine [C. C. A.] 126 Fed. 689.

81. Municipal bonds payable to bearer may be sued upon by a holder, for the purpose of suit, without an indorsement, though the equitable ownership is in another; but they are subject to any defenses against the latter. Jennings Banking & Trust Co. v. Jefferson [Tex. Civ. App.] 70 S. W. 1005. County bonds in the form of negotiable instruments need not be presented to a commissioner's court before suit thereon. Martin County v. Gillespie County [Tex. Civ. App.] 71 S. W. 421.

82. Irregularity in issuing town highway bonds. Citizens' Sav. Bank v. Greenburgh, 173 N. Y. 215, 65 N. E. 978. The fact that the method prescribed by statute for the payment of municipal bonds is unconstitutional does not affect the validity of the bonds. Franklin County Com'rs v. Gardiner Sav. Inst. [C. C. A.] 119 Fed. 36.

83. Bonds issued without complying with certain conditions precedent. Brockport v. Green, 39 Misc. [N. Y.] 231.

84. Municipal improvement bonds, issued to anticipate instalments of a special assess-

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receiving aid from the bonds had complied with certain conditions before their delivery is immaterial.[85] Federal courts are not bound by the decisions of state courts as to the validity of municipal bonds, in suits by bona fide holders.[86]

The burden of proof in a suit on a municipal bond is upon the plaintiff to show that they were issued legally and with authority.[87] If only part of the issue is illegal, he has the burden of showing that the bonds sued on by him are not affected by the illegality.[88]

To constitute one a bona fide holder of municipal bonds, he must have given a valuable consideration therefor, and in the absence of proof to the contrary, such consideration is presumed.[89] If he becomes a holder after maturity, he must show title through a bona fide holder before maturity.[90] A bona fide holder is bound to take notice of such facts as appear on the face of bonds or in the public records referred to by recitals in the bonds;[91] but he is not chargeable with any element of fraud or irregularity in the conduct of the officers through whom the bonds are issued or disposed of.[92] The rights of holders accruing under a valid state law as to the issue of municipal bonds cannot be affected by subsequent decisions of the highest court of the state declaring such law to be invalid.[93]

Subrogation.—Bona fide holders of municipal bonds, issued without authority and therefore void, are entitled to be subrogated in equity to the rights of antecedent holders.[94]

Recitals.—General recitals in municipal bonds that all requirements of the law have been complied with apply only to acts required to be done by the law referred to in the bonds,[95] and are not affected by the fact that they were issued

ment, are not negotiable so as to give a purchaser thereof any right superior to that of the contractor to whom the bonds were issued. National Bank of La Crosse v. Petterson, 200 Ill. 215, 65 N. E. 687.

85. Where bonds purporting to be issued for a public purpose were in fact issued for a private one. Schmid v. Frankfort [Mich.] 96 N. W. 1056.

86. Federal courts will exercise their own judgment in determining the validity of municipal bonds in the hands of bona fide holders and are not bound by the construction given, to the statute under which they were issued, by the highest court of the state subsequent to their purchase. County bonds to aid a railroad under Code N. C. §§ 1996-1999. Stanly County Com'rs v. Coler, 190 U. S. 437, 47 Law. Ed. 1126.

87. Under Const. Mo. art. 10, § 12, one suing on school district bonds has the burden of proving that the issue of the bonds was assented to by two-thirds of the voters of the district, and that it does not exceed the limit of indebtedness as provided by that section. Thornburgh v. School Dist. No. 3, 175 Mo. 12, 75 S. W. 81. Purchasers of county bonds issued under Code N. C. §§ 1996-1999 in aid of railroad construction cannot assume that the railroad had been begun before the adoption of Const. N. C. 1868, which was dated prior to the railroad charter. Stanly County Com'rs v. Coler, 190 U. S. 437, 47 Law. Ed. 1126.

88. One suing on bonds, part of the issue of which was sold illegally, and of which fact he is chargeable with notice, has the burden of proving that the bonds sued on by him are not affected by such invalidity. Edwards v. Bates County, 117 Fed. 526.

89. Such a presumption exists in case of county bonds. Martin County v. Gillespie County [Tex. Civ. App.] 71 S. W. 421.

90. In order to protect an innocent holder of bonds issued illegally or without consideration, acquired after maturity, the burden of proof is on him to show that he acquired title through a bona fide holder for value before maturity. Edwards v. Bates County, 117 Fed. 526.

91. The fact that the recitals in a bond that all requirements and conditions precedent have been complied with have been inserted without authority does not charge a purchaser thereof with notice of that fact so as to permit the city to deny the validity of the bond. Schmidt v. Defiance, 117 Fed. 702. A purchaser of bonds is not protected by recitals therein where he is furnished with a copy of the minutes of a school district meeting at which the bonds were issued, and such minutes show that the bonds were illegally issued. Montpelier Sav. Bank & Trust Co. v. School Dist. No. 5, 115 Wis. 622, 92 N. W. 439. A purchaser of county bonds issued to pay a subscription to railroad stock is bound to take notice of the conditions on which such bonds were issued contained in the records of the county court, though not appearing on the bonds. Green County v. Shortell [Ky.] 75 S. W. 251.

92. Citizens' Sav. Bank v. Greenburgh, 173 N. Y. 215, 65 N. E. 978.

93. Franklin County Com'rs v. Gardiner Sav. Inst. [C. C. A.] 119 Fed. 36.

94. Bonds issued without authority to pay county warrants which are surrendered and canceled, give the holders of the bonds a right of subrogation to the rights of the original warrant holders. Kearny County Com'rs, Kan., v. Irvine [C. C. A.] 126 Fed. 689.

95. Not that a constitutional requirement

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under a special act.[96] A recital of a wrong statute does not affect the validity of the bonds.[97] Recital of authority and purpose for which they were issued entitles bona fide holders to assume that all conditions have been complied with,[98] and his good faith is not affected by the fact that in addition to relying upon recitals in the bond he also relies upon matters outside the bond.[99] The conclusiveness of a recital is the same whether it is of a fact of constitutional law or of legislative law.[1]

Estoppel.—General recitals in municipal bonds that they have been issued in compliance with all requirements of the law, and in proper form, estop the municipality, as against bona fide holders, to deny the validity of the bonds,[2] except as to matters showing that they were issued without authority,[3] and the same is true of certificates of approval attached to the bonds.[4] By such recitals, a municipality may be estopped to assert that they were issued in excess of the prescribed limitation of indebtedness,[5] or that the seal attached thereto is not the corporate seal of the corporation.[6] But if there are no recitals in the bonds either as to the authority to issue or as to compliance with statutory requirements, the municipality is not estopped to deny their validity on that ground.[7]

A municipality may also be estopped from denying the validity of its bonds by other acts on its part amounting to a ratification.[8] But there can be no ratification, amounting to an estoppel, of bonds void in their inception.[9] So where a municipality has received and used the proceeds from the sale of bonds, it will be

that a contemporaneous tax should be levied had been complied with. Montpelier Sav. Bank & Trust Co. v. School Dist. No. 5, 115 Wis. 622, 92 N. W. 439.

96. Where it was the duty of the officers executing and issuing the bonds to see that all requirements essential to the issuance have been complied with. Defiance v. Schmidt [C. C. A.] 123 Fed. 1.

97. Where the city has authority to issue the bond by another statute. Beatrice v. Edminson [C. C. A.] 117 Fed. 427. Erroneous recital that they were issued under a certain statute, which did not in fact authorize their issuance. Fernald v. Gilman, 123 Fed. 797.

98. Recitals in county bonds in aid of railroad construction, under Code N. C. §§ 1996-1999. Stanly County Com'rs v. Coler, 190 U. S. 437, 47 Law. Ed. 1126. Where bonds lawfully issued by a city recite a lawful purpose for which they were issued and also the ordinance providing for their issuance and sale, the city is estopped to deny their validity as against a bona fide holder, as that they were issued for an unlawful purpose. Defiance v. Schmidt [C. C. A.] 123 Fed. 1.

99. Schmid v. Frankfort [Mich.] 96 N. W. 1056.

1. King v. Superior [C. C. A.] 117 Fed. 113.

2. As providing for the collection of a tax to pay the principal and interest as required by the state constitution. King v. Superior [C. C. A.] 117 Fed. 113. Submission to vote of the question of their issuance. Defiance v. Schmidt [C. C. A.] 123 Fed. 1. Recitals made by officers having power to determine that all conditions were complied with, and no notice of any defect was given to the holder. Beatrice v. Edminson [C. C. A.] 117 Fed. 427; Wetzell v. Paducah, 117 Fed. 647.

3. Uncas Nat. Bank v. Superior, 115 Wis. 340, 91 N. W. 1004; Debnam v. Chitty, 131 N. C. 657. Recitals in school district bonds void for want of authority to issue them, by reason of constitutional provisions, does not estop the district to deny their validity in the hands of a bona fide holder before maturity. Thornburg v. School Dist. No. 3, 175 Mo. 12, 75 S. W. 81.

4. An attorney general's certificate reciting that county bonds were properly submitted to him as required by Acts Tex. 1893, c. 64, estops the county to contend that they were presented by an unauthorized person (Martin County v. Gillespie County, 30 Tex. Civ. App. 307, 71 S. W. 421); and the fact that a holder presenting them to the attorney general fails to notify him of their repudiation by the county does not invalidate them, if it is not shown that he had not otherwise acquired such knowledge, the county having received value for them.

5. Beatrice v. Edminson [C. C. A.] 117 Fed. 427.

6. Though the seal was not in fact an official seal as prescribed by statute. Schmidt v. Defiance, 117 Fed. 702.

7. Green County v. Shortell [Ky.] 75 S. W. 251.

8. Promptly paying interest on bonds for a long time raises a strong equity in favor of a purchaser during that time, and should be considered by the court together with other facts in determining the validity of such bonds, though such fact does not strictly speaking create an estoppel. Wetzell v. Paducah, 117 Fed. 647.

9. For want of authority to issue them. Uncas Nat. Bank v. Superior, 115 Wis. 340, 91 N. W. 1004. Paying interest on bonds void for lack of authority to issue them. Clarke v. Northampton [C. C. A.] 120 Fed. 661; Debnam v. Chitty, 131 N. C. 657; Green County v. Shortell [Ky.] 75 S. W. 251.

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estopped to deny their validity,[10] except where they were issued without authority.[11]

§ 8. *Payment.*—Municipal bonds may be paid and discharged from a fund not provided for the payment of any particular debt,[12] though the bonds were issued to be paid out of other funds;[13] but not where the fund was appropriated to the payment of some particular indebtedness,[14] and a statute cannot authorize the payment of such bonds from funds appropriated to a particular purpose by statutory or constitutional provision.[15]

Payment from special fund or tax.—Where a municipal corporation is authorized to issue bonds, the power of its officers to levy sufficient taxes to pay such bonds is a legal inference, in the absence of any inhibition or limitation of this power, in the statute which grants the power, in the general law, or in the constitution.[16] But in some states, the statutes authorizing issues of municipal bonds expressly provide for a special tax or fund to pay the principal and interest thereon, and charge certain officers with the duty of levying and collecting taxes for that purpose;[17] and such statutes apply to the payment of bonds previously issued as well as to subsequent issues.[18] In such case, a bondholder may maintain mandamus without a previous demand to compel the officer charged therewith to make the levy,[19] or to make an additional levy.[20] Where there are two series of bonds, of which a bondholder owns only one series, in maintaining mandamus to compel a levy he should sue on behalf of himself and all other bondholders.[21] A special fund so provided for must be applied in the manner prescribed by the statute.[22]

10. A county receiving value for original bonds cannot repudiate refunding bonds issued therefor. Martin County v. Gillespie County, 30 Tex. Civ. App. 307, 71 S. W. 421.

11. School district bonds. Thornburg v. School Dist. No. 3, 175 Mo. 12, 75 S. W. 81.

12. Provided the bonds canceled have not been pledged for the payment of other bonds. McDermott v. Sinking Fund Com'rs [N. J. Law] 55 Atl. 37.

13. Commissioners of a special fund, not pledged for the redemption of any particular bonds, having authority to cancel bonds of the city before maturity, may cancel them out of such fund. McDermott v. Sinking Fund Com'rs [N. J. Law] 55 Atl. 37.

14. A city charter authorizing the city council to appropriate a certain per cent. of the annual taxes for public school purposes does not require the city council to provide, out of such appropriation, for the redemption bonds issued to purchase ground and erect school buildings. Kennedy v. Birch [Tex. Civ. App.] 74 S. W. 593.

15. Laws N. D. 1903, c. 49, p. 54, authorizing an issuance of bonds for the erection of buildings for the State Normal School, and appropriating funds of such school to pay the principal and interest of such bonds. This is paying a state debt from funds provided for the school. State v. McMillan [N. D.] 96 N. W. 310.

16. U. S. v. Saunders [C. C. A.] 124 Fed. 124.

17. Under subdivs. 1, 2, 19, § 1282c, Comp. St. Neb. 1901. U. S. v. Saunders [C. C. A.] 124 Fed. 124. Provision by an ordinance for an annual tax to pay a bonded debt, although the interest and part of the principal may be paid from other sources. Epping v. Columbus, 117 Ga. 263. Sess. Laws Wash. 1897, p. 393, c. 118, § 97, requiring school directors to ascertain the amount of taxes required and report the same to the county commissioners who shall levy and collect the taxes required repeals Sess. Laws 1889-90, p. 48, c. 2, § 5, requiring school directors to levy taxes to pay interest on school bonds (State v. Byrne [Wash.] 73 Pac. 394); and such statute, in conferring this duty upon the county commissioners, is not unconstitutional as conferring upon one municipal corporation the taxing duties of another (Id.).

18. Sess. Laws Wash. 1897, p. 393, c. 118, § 97, providing for the levy of taxes to pay interest on school bonds, applies not only to bonds subsequently issued, but also to the payment of previous bonds, in the absence of intervening rights which may be impaired thereby. State v. Byrne [Wash.] 73 Pac. 394.

19. County commissioners refusing for several years to levy a tax, as required by law, to pay school bonds. State v. Byrne [Wash.] 73 Pac. 394. The court may compel a levy to pay all the bonded indebtedness in one year where the proper officers have refused to levy any tax. Id.

20. The fact that taxes levied in one year, without including taxes for payment of interest on bonds, had been partly paid does not justify the court in refusing to compel an additional levy under 1 Ball. Ann. Codes & St. § 1742, authorizing a relevy where there has been an erroneous levy. State v. Byrne [Wash.] 73 Pac. 394.

21. He cannot compel a levy in his own behalf only. State v. Byrne [Wash.] 73 Pac. 394.

22. A contract with brokerage company to repay it for buying up city bonds, and

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If a statute authorizing the issuance of bonds also provides for a special fund for their payment, without providing that they shall be paid only from that fund, or without an express stipulation to that effect in the bonds, they constitute general obligations against the municipality,[23] on which a holder thereof may have a judgment at law on default in their payment.[24]

If a judgment is rendered against a municipality upon its bonds, the statutes may also grant the power and impose the duty upon its officers, to levy and collect general taxes to pay such judgment.[25]

§ 9. *Scaling overissue.*—Where municipal bonds are issued in excess of authority, the whole issue is void and the court cannot scale them down to the amount that was lawful and give judgment thereon.[26]

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in addition a commission, is ultra vires, under Gen. St. Kan. 1899, §§ 6284, 6294, providing for the investment of a sinking fund in city bonds in a special manner. Ft. Scott v. Eads Brokerage Co. [C. C. A.] 117 Fed. 51.

23. District improvement bonds. U. S. v. Saunders [C. C. A.] 124 Fed. 124. See, also, under Ky. St. § 3010, providing for a sinking fund to pay the bonded debt of cities of the first class, and providing for the board of commissioners, when such fund and available assets are insufficient to meet future maturing bonds, to certify that fact to such city. Woolley v. Louisville, 24 Ky. L. R. 1357, 71 S. W. 893.

24. Franklin County Com'rs v. Gardiner Sav. Inst. [C. C. A.] 119 Fed. 86.

25. By §§ 4488-4492, Comp. St. Neb. 1901. U. S. v. Saunders [C. C. A.] 124 Fed. 124. General statutes authorizing and requiring officers of municipalities to levy and collect general taxes to pay judgments condition their power and duty from the time the judgments are rendered, in the absence of express or implied statutory provisions otherwise; and from that time such statutes supersede subsequent statutes granting less extensive powers under which the bonds merged in the judgment were issued. Id.

26. School district bonds in excess of debt limit. Thornburg v. School Dist. No. 3, 175 Mo. 12, 75 S. W. 81.

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Scope of title. This article is designed to treat, as strictly as may be proper, the law of municipalities as distinguished from that of streets and other public ways,[1] bridges,[2] public utilities, works and improvements,[3] health and sanitation,[4] building regulations,[5] the local taxing power[6] and licensing,[7] the granting of franchises,[8] and the law of public officers generally.[9]

The particular applications of the general law of municipalities to these several subjects should be sought in the titles just cited. There also will be discussed cases under laws and regulations peculiar to streets and the like. The body of law relating to each of these largely involves powers and duties of counties, towns, and of the public generally, as well as powers of municipalities. All this has been brought together into those respective titles relating to the subject matter of such powers and duties.

§ 1. *Nature and elements.*—According to the older and more correct notion, any public corporation for political purposes, possessed of subordinate local powers of legislation is municipal.[10] In modern usage the term commonly implies an incorporated city or village, and excludes counties, school districts, and the like.[11] Public boards, entrusted with the administration of a public service and possessed of corporate attributes, are municipal corporations.[12]

Name.—The corporation has no such exclusive right to its name as that it is wronged by the adoption of the same name for a different place though on the same railroad and though great confusion and inconvenience results.[13]

§ 2. *Creation and corporate existence. A. Creation and organization.*[14]—In most states the power to pass special acts of incorporation has been withdrawn or greatly restricted.[15] The erection of a village, out of a town, does not impair local self government.[16] Under general enabling acts, incorporation is formed by acceptance, usually signified by election or petition[17] by a majority of electors, which must be upon proper notice.[18] Application for the calling of such an election is needless, unless the statute calls for it.[19] The prerequisite conditions must all be fulfilled, but a trifling error in a census may be immaterial,[20] or may be

1. Highways and Streets, 2 Curr. Law 177. Public places such as parks see post, § 10.
2. Bridges, 1 Curr. Law 355.
3. Public Works and Improvements; Sewers and Drains; Waters and Water Supply.
4. Health, 2 Curr. Law 173.
5. Buildings, 1 Curr. Law 404.
6. Taxes.
7. Licenses, 2 Curr. Law 730.
8. Franchises, 2 Curr. Law 74. Compare titles treating of various sorts of franchised public service.
9. Officers and Public Employes.
10. 2 Kent Comm. 275; Angell & A. Corp. 9, 29; Cyc. Law Dict. "Municipal Corporations."
11. 44 Wis. 489; 34 Iowa, 84; 36 Minn. 430; 52 Mo. 309; cited in Cyc. Law Dict., "Municipal Corporations." The question often arises, whether school boards, etc., are city or state agencies; hence whether they are officers only or separate corporations. See post, § 6; Common Schools, 1 Curr. Law 544.
12. A water and sewerage board possessed of a name, with the power to sue and to contract, and having powers committed to it as a body, and not as individuals, and with the statutory attributes of incorporation will be so regarded. State v. Kohnke, 109 La. 838.
13. The use of a town name, on a railroad station near the town, cannot be restrained at the suit of the town. Gulf, etc., R. Co. v. Seminary, 81 Miss. 237.
14. The act creating the city of Greenhorn, Oregon, held constitutional. Adams v. Kelly [Or.] 74 Pac. 399. For governmental purposes the city of Covington, Ky., was not separated from the county of Kenton. McInerney v. Huelefeld, 25 Ky. L. R. 272, 75 S. W. 237. The various special acts relating to such city were repealed by general laws. Id.
15. See Statutes.
16. Town funds were transferred to village. Payne v. Grosse Pointe Tp. [Mich.] 96 N. W. 1077.
17. If a statute provide for elective action to adopt a higher class to which an already incorporated municipality is eligible, and provides for petition to the county authorities, if never before incorporated (Rev. St. 1889, art. 1, § 30), each method is exclusive of the other. State v. Mansfield, 99 Mo. App. 146, 72 S. W. 471.
18. The time for special election on the question of reincorporation of a village, held unreasonable and an abuse of the trustees' discretion. People v. Daley, 89 App. Div. [N. Y.] 156.
19. Notice of application for incorporation is not required in Indiana. Stembel v. Bell [Ind.] 68 N. E. 539.
20. The omission of three names from a

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cured by legislative act.[21] Large areas of farm land cannot be included to gain the necessary population.[22] If incorporated by an order of court, the order has the full force and effect of a judgment.[23]

Legislative recognition validates acts performed by a corporation de facto,[24] and a corporation de jure may cease by non user.[25]

(§ 2) *B. Consolidation, succession, and dissolution.*—The exclusion of some citizens by the rearrangement of lines, on a consolidation, does not deprive them of property, by excluding them from the benefits of that for which they were taxed,[26] neither does a constitutional delegation to the people, of the right to make their own charter, impair a republican form of government,[27] nor is it void for uncertainty, in so committing the charter to action of the people, the existing charter being in force until such action is taken.[28] By consolidating "all" corporations within "exterior" boundaries of a city, the smaller, separate, but enclosed towns are disincorporated and merged.[29] A charter may be dissolved only as the statutes have prescribed, hence a general law permitting renunciation by popular vote, of a charter under the general law, has no application to specially chartered towns.[30]

All rights of a municipality pass to its successor on incorporation[31] or consolidation,[32] and liabilities of a de facto corporation may so pass upon its de jure successor.[33] A statutory liability for property in "annexed" territory does not fall upon a newly erected village, for what buildings are thus transferred,[34] nor does such a statute retroact.[35] An express liability for debts will include liabilities ex delicto, as well as ex contractu.[36]

A general act providing for the dissolution of municipal corporations applies only to those incorporated under the general laws, and not to those holding special charters.[37] Consolidation of cities does not abrogate laws relating to one of them, but not dependent on its existence.[38]

census o- 1181 persons held not material, so also as to the use of christian initials of names on the lists. Stembel v. Bell [Ind.] 68 N. E. 589.

21. Stembel v. Bell [Ind.] 68 N. E. 589.

22. State v. Holloway [Minn.] 96 N. W. 40.

23. State v. Mansfield, 99 Mo. App. 146, 72 S. W. 471.

24. Muse v. Lexington [Tenn.] 76 S. W. 481.

25. Cincinnati, etc., R. Co. v. Baughman, 25 Ky. L. R. 705, 76 S. W. 351.

26. The constitutional amendment for the consolidation of the government of the city of Denver and Arapahoe county held valid. People v. Sours [Colo.] 74 Pac. 167.

27, 28. People v. Sours [Colo.] 74 Pac. 167.

29. Sess. Laws 1901, p. 162, c. 68, establishing the boundaries of the city of Denver, but excepting certain enclosed towns, was intended only to preserve their separate existence. The town of Montclair and other towns within the "exterior" boundaries became consolidated with the city of Denver on the adoption of Const. art. 20, § 1. Montclair v. Thomas [Colo.] 73 Pac. 48.

30. Ex parte Cross [Tex. Cr. App.] 71 S. W. 289.

31. Owen v. Brookport [Ill.] 69 N. E. 952. On the succession of cities, accrued rights under the old charter pass to the new corporation. Taxes and debts due. Bennison v. Galveston [Tex. Civ. App.] 78 S. W. 1089; Milster v. Spartanburg [S. C.] 46 S. E. 539.

32. New York v. Johns-Manville Co., 89 App. Div. [N. Y.] 449. A legislative act, conferring a power upon a municipal corporation, does not necessarily become inoperative by its consolidation with another corporation. Laws 1895, p. 474, c. 322, § 1, regulating use of "soft coal" in Brooklyn is not inoperative in view of Laws 1901, p. 652, c. 466, § 1609, and p. 653, § 1614. Id.

See, also, post, § 5.

33. Greer county, Texas, was a de facto municipal corporation until it was transferred to Oklahoma. Greer County Com'rs v. Clarke [Okl.] 70 Pac. 206.

34. Maumee School Tp. v. Shirley City, 159 Ind. 423.

35. Act March 3, 1899 (Burns' Rev. St. 1901, § 5997a), does not apply to a town incorporated in 1897, and it is not liable for debt of the township for school property in the territory embraced in the new corporation. Maumee School Tp. v. Shirley City, 159 Ind. 423, 65 N. E. 285.

36. The city was properly substituted as party defendant, in a pending action for negligence. Laws 1900, c. 665, as to village of Lansingburg and city of Troy. Tyler v. Lansingburg, 76 App. Div. [N. Y.] 165.

37. Ex parte Cross [Tex. Cr. App.] 71 S. W. 289.

38. New York v. Johns-Manville Co., 89 App. Div. [N. Y.] 449.

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(§ 2) *C. Classification.*—While legislative power to classify cities may be exercised, by making classes depend on population, the power cannot be delegated to courts.[39] An act applying to cities of a certain class "under special charter" does not specially legislate a new class of cities into existence.[40] The intention as found in a special act determines the class to which a municipality belongs.[41] The raising of townships to villages or boroughs will not be implied merely from a grant of similar powers.[42] Adoptive acts of electors by which a new classification is accepted, must be such as are prescribed.[43]

(§ 2) *D. Remonstrances; quo warranto.*—A court vested with power to receive petitions and set in motion proceedings for incorporation, cannot hear protests, unless such power also is given.[44] The remedy is quo warranto.[45] In case of delay and probable injury, however, the courts will refuse to oust.[46]

§ 3. *The charter; adoption, amendment, repeal, and abrogation.*—Charters must conform to the constitutional requirements respecting local laws and special legislation,[47] and accord with the general laws.[48] The repeal of a charter, by special law, is neither a "change" nor a special "charter" so forbidden.[49] A provision that incorporation must be by general laws does not require that the charter, in its entirety, must be contained in the general enabling act.[50] In the absence of proof of any special legislative act, it will be presumed that incorporation was had under the general act.[51] Uniformity of local government is not violated by making a city officer ex officio member of a board, unlike the other members, who are elective,[52] nor by making the mayor of a town sole representative on the county board, instead of allowing one from each ward, as in other cities in the state.[53] The power to adopt its own charter enables the city to adopt procedure for auditing claims and for appeals in the courts.[54] A specially chartered city, empowered to adopt a part of the general law, must adopt an integral part of the law, complete in itself.[55] It is not a delegation of legislative powers to authorize municipal corporations, organized under special charters, to amend their charters.[56] When the mode of submitting amendments is specially prescribed,

39. Ky. St. § 3264, though invalid in providing for the transfer of cities of the third class, by the courts, is valid as to taking census, and the future government and the rights of existing officers. Gilbert v. Paducah, 24 Ky. L. R. 1998, 72 S. W. 816.

40. Elting v. Hickman, 172 Mo. 237, 72 S. W. 700.

41. Washington, N. J., held a borough under the act incorporating it as a "borough or town" corporate. Tuttle v. Washington [N. J. Law] 52 Atl. 1101.

42. Township of first class is not made a borough by Act, April 28, 1899. Dempster v. United Traction Co., 205 Pa. 70.

43. State v. Mansfield, 99 Mo. App. 146, 72 S. W. 471.

44, 45. Velasques v. Zimmerman [Colo.] 70 Pac. 419; Eldred v. Johnson [Colo. App.] 71 Pac. 891.

46. Ouster from corporate franchise was refused, because of lapse of time, and certainty of great resultant injury. State v. Mansfield, 99 Mo. App. 146, 72 S. W. 471. After the exercise of municipal powers for 28 years, the state is estopped to question validity of incorporation. Soule v. People [Ill.] 69 N. E. 22.

47. Act amending charter is local bill which must have but one subject expressed in title. Rochester v. Bloss, 77 App. Div. [N. Y.] 28. Act relative to "improvements" held invalid, as also legalizing defective assessments. Id.

48. Ex parte Loving [Mo.] 77 S. W. 508.

49. Const. art. 3, § 56; art. 11, §§ 4, 5. Oak Cliff v. State [Tex. Civ. App.] 77 S. W. 24.

50. Held valid to allow specially incorporated cities to adopt amendments differing from general law. Yazoo City v. Lightcap [Miss.] 33 So. 949.

51. Shaw v. N. Y. Cent. & H. R. R. Co., 85 App. Div. [N. Y.] 137.

52, 53. A charter providing that the mayor shall be the city's sole representative on the county supervisors' board is not violative of the constitution providing for one system of town government. State v. Kersten [Wis.] 95 N. W. 120.

54. Duluth charter, § 80, providing for appeal to the district court from an allowance, or disallowance, of claims is valid. State v. District Ct. [Minn.] 97 N. W. 132.

55. The adoption in the charter of the city of Antigo of subdivision 40, § 52, subsec. 7, is invalid, because the general laws contained in chapter 18 were not adopted with it, and the city therefore was without power to sprinkle streets at the cost of the lots fronting thereon. Borgman v. Antigo [Wis.] 97 N. W. 936.

56. Code 1892, § 3039, as amended Act March 12, 1900, p. 79, c. 69 does not violate

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that mode alone is regular.[57] A charter provision that proposed amendments should so be submitted, at a general election, that each proposition may be voted on separately, is complied with, where the proposition contained several sections relevant to the same matter, and the voters were required to vote for or against the entire amendment.[58] Amendments should with certainty identify the provision amended.[59]

A constitutional amendment prohibiting creation of cities by special charters does not repeal such charters already in existence,[60] nor is a special charter repealed by general act, particularly one which is not to be repealed by general act, unless expressly so provided.[61] A repeal of a charter may be effected by act annexing the city to one of another class.[62]

A charter may be forfeited by nonuser.[63]

§ 4. *The territory. Annexations and severances; wards and divisions.*— Land within the boundaries will be presumed to be a part of the municipal territory,[64] and the "exterior" boundaries will not mean the boundaries of wholly enclosed, but separate municipalities.[65]

The existence of prior statutes providing for the annexation of territory, on consent, does not deprive the legislature of power to compel annexation without such consent.[66] Neither is a statute regulating such matters, a contract not to be impaired.[67] Limits may be extended, irrespective of the question of benefit to the annexed territory, or its liability for the pre-existing debts of the corporation.[68] Nor are any constitutional rights infringed by the liability to taxation for existing debts,[69] and representation of the annexed territory may be deferred until the next election.[70]

While the legislature may delegate the power to fix territorial limits or boundaries to local bodies,[71] it cannot delegate to the owner of land the power to sever it.[72] However, a sole owner and resident may petition, under a statute requiring a fixed plurality of voters and owners to join.[73] A general statute providing for territorial severances applies to cities created by special charter.[74]

Const. § 88. Yazoo City v. Lightcap [Miss.] 33 So. 949.

57. Provisions respecting "legislative acts" do not apply to the mode of adopting charter amendments by the people, if a separate section relating thereto does not draw in the former provisions. Ehrhardt v. Seattle [Wash.] 74 Pac. 827 holding that amendment need only be submitted by resolution, not by ordinance.

58. Amendment of Seattle charter, March 4, 1902, deprived the city council of any power over the expenditure of the library fund. State v. Riplinger, 30 Wash. 281, 70 Pac. 748.

59. Amendment to section 29 of article "8" may be good as to section 29, article 4, if it can be identified without the figure 8. Ehrhardt v. Seattle [Wash.] 74 Pac. 827.

60. Ulbrecht v. Keokuk [Iowa] 97 N. W. 1082.

61. Charter as amended (Laws 1878, p. 50, c. 49, § 6), providing that the mayor shall be the city's sole representative on the county board of supervisors, was not repealed by the revision of the statutes. State v. Kersten [Wis.] 95 N. W. 120.

62. Charters of cities of more than 10,000 population may be repealed or amended by special legislative act, and charters of cities of less population may be repealed by annexing them to the former. Oak Cliff v. State [Tex. Civ. App.] 77 S. W. 24.

63. As for failure to exercise it for 17 years. Cincinnati, N. O. & T. P. R. Co. v. Baughman, 25 Ky. L. R. 705, 76 S. W. 351.

64. Miller v. Sterling, 198 Ill. 523, 65 N. E. 132.

65. Montclair v. Thomas [Colo.] 73 Pac 48.

66. Compulsory annexation statute held constitutional and valid. Toney v. Macon [Ga.] 46 S. E. 80.

67. Annexation act 1888, p. 113, c. 98, did not constitute a contract between the city and state, so as to render act 1902, p. 199, c. 130, unconstitutional as impairing the obligation of contracts. Joesting v. Baltimore, 97 Md. 589.

68. Hollister v. Rochester, 41 Misc. [N. Y.] 559.

69, 70. Toney v. Macon [Ga.] 46 S. E. 80.

71. Dillon, Mun. Corp. § 183. Circuit court has jurisdiction. Coughran v. Huron [S. D.] 96 N. W. 92.

72. Laws 1897, c. 267, p. 487 (Gen. St. 1901, c. 115), is unconstitutional in that part where it allows, on certain conditions, the owner to sever his land from corporate limits, in that it attempts to confer legislative powers on him. Hutchinson v. Leimbach [Kan.] 74 Pac. 598.

73, 74. Coughran v. Huron [S. D.] 96 N. W. 92.

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The propriety of annexation is generally, and of disconnection is often, reposed in discretion,[75] and such a provision may retroact.[76] A council required to fix boundaries of such territory, preliminary to action by a court on the merits, cannot refuse to do so on the ground of injustice of the proposed severance.[77] Personal motives are to be ignored,[78] but their conduct and declaration, so far as they show the situation and probable effect on the community,[79] and the fitness of the land, and demand for urban purposes, may be shown.[80] Annexation may be allowed for convenience to railway communication.[81] Acts preliminary to a severance, on petition to court, may be enforced by mandamus.[82]

The character of ownership in property taken in is not changed.[83]

The procedure being statutory must be strictly followed.[84] An "owner," though not residing on vacant land sought to be disconnected, may sign the petition.[85] Defects in service of notice of proceedings are waived by general appearance.[86] The annexed lands must be identified by certain bounds.[87]

Proceedings to annex or sever territory are reviewable as proceedings at law.[88] Residents and taxpayers of the territory may apply for review.[89] On an appeal triable de novo, the petition may be amended by omitting part of the property proposed to be annexed.[90]

The division into wards, election or justices' districts, being governed solely by the local statutes, is treated in the foot notes.[91] An ordinance determining wards may be effective, though the statutory notice of such action is omitted.[92]

Plats. It is not an unreasonable regulation that any plat for an addition shall not be approved if any part of the land is subject to a city tax lien.[93] The vacation of city plats and of the streets thereof pertains to other titles.[94]

75. So by statute as to disconnection. Roodhouse v. Briggs, 105 Ill. App. 116.

76. Ill. act May 10, 1901, makes the disconnection of territory discretionary with the council, and applies to pending proceedings. Roodhouse v. Briggs, 105 Ill. App. 116. Act May 10, 1901, giving "discretion" instead of absolute duty to disconnect city territory, held to retroact by virtue of a clause so declaring. Burchett v. People, 197 Ill. 593.

77. Petitioners had benefitted by city expenditures. Lebanon v. Knott, 24 Ky. L. R. 1992, 72 S. W. 790.

78. McCoy v. Cloverdale Trustees, 31 Ind. App. 331, 67 N. E. 1007.

79, 80. Under conditions existing, annexation of territory held proper. McCoy v. Cloverdale Trustees, 31 Ind. App. 331, 67 N. E. 1007.

81. Annexation held proper. Collins v. Crittenden, 24 Ky. L. R. 899, 70 S. W. 183. Order refusing to extend corporate limits reversed. Fredonia v. Rice, 24 Ky. L. R. 2331, 73 S. W. 1125.

82. Defining bounds by ordinance. Lebanon v. Knott, 24 Ky. L. R. 1992, 72 S. W. 790.

83. Extending to include a turnpike does not affect its franchise to take tolls. Columbia & C. C. Turnpike Co. v. Vivion [Mo. App.] 77 S. W. 89. By extension an included homestead may be changed from rural to urban. Lauchheimer v. Saunders [Tex.] 76 S. W. 750.

84. Under Rev. Pol. Code 1903, § 1511, all preliminary steps before the council must be taken before the circuit court can take jurisdiction. Weiland v. Ashton [S. D.] 98 N. W. 87.

85. Pol. Code, § 1609, requires three-fourths of owners and voters. Coughran v. Huron [S. D.] 96 N. W. 92.

86. Proceedings to annex. Motion to quash for insufficiency of petition. McCoy v. Board of Trustees of Cloverdale, 31 Ind. App. 331, 67 N. E. 1007.

87. Description sufficient. Oak Cliff v. State [Tex. Civ. App.] 77 S. W. 24.

88. By writ of error. Heebner v. Orange City [Fla.] 32 So. 879. By certiorari. Moore v. Perry, 119 Iowa, 423, 93 N. W. 510.

89. Moore v. Perry, 119 Iowa, 423, 93 N. W. 510.

90. McCoy v. Cloverdale Trustees, 31 Ind. App. 331, 67 N. E. 1007.

91. The city of Cincinnati, under Act Oct. 22, 1902, must be divided into 24 wards, no more and no less; the act being a general act. Zumstein v. Mullen, 67 Ohio St. 382, 66 N. E. 140. In changing boundaries of wards and election precincts, publication of notice is not a condition precedent to the adoption of the ordinance. Burns' Rev. St. 1901, § 3471, provides that the council shall give notice, etc. Landes v. Walls, 160 Ind. 216, 66 N. E. 679; Paxton v. Bogardus, 201 Ill. 628, 66 N. E. 853. An unequal division into justices' districts, by the commissioners, is not an objection which can be raised by a taxpayer in a suit to enjoin collection of taxes assessed against him. McInerney v. Huelefeld, 25 Ky. L. R. 272, 75 S. W. 237.

92. Landes v. Walls, 160 Ind. 216, 66 N. E 679.

Publication of ordinances, see post, § 7.

93. People v. Adams [Colo.] 73 Pac. 866.

See, also, Dedication.

94. Dedication; Highways and Streets.

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§ 5. *Authority and power of municipality. A. Legislative control.*—Local self government, as guaranteed by some constitutions,[95] is not impaired by the appointment of merely supervising officers over the taxing powers of a city.[96] Reasonable control of municipal affairs,[97] within constitutional limitations,[98] is within legislative power.[99] Matters of local concern may be delegated,[1] provided the legislative discretion and function are not infringed,[2] and powers delegated may be resumed at any time.[3] Power may be granted to municipalities to purchase waterworks for municipal purposes,[4] and ultra vires purchases may be legalized by ratifying enactments.[5]

(§ 5) *B. Express, implied, customary and prescriptive powers.*—Express grants of power in general terms are limited by particularizations in later clauses.[6] Municipal corporation may exercise such powers as are incidental to the express powers given, and such as are essential to the objects and purposes of the corporation,[7] but a reasonable doubt as to the existence of a power is fatal to its being.[8] The absence of a power cannot be supplied by construction or acquiescence.[9] The general powers conferred by charter are restricted by particular provisions specifically setting forth its powers.[10]

An incorporated village is included in the generic words "city or town," in a general grant of power,[11] and from a grant to cities of a class, the absence of a similar provision for cities of other classes, implies a withholding of such power.[12]

Extra-territorial powers.—The rule that municipal authority does not extend beyond its territorial limits applies only to governmental, and not business functions, which, in so far as reasonably necessary to its existence and purpose, the city may do beyond its limits.[13]

The power to legislate upon local matters must ordinarily be exercised con-

95. 1 Curr. Law, 601. Municipalities are not entitled, as a matter of right, under the constitution of Mississippi, to local self government [Const. 1890, § 139]. Adams v. Kuykendall [Miss.] 35 So. 830.

96. The appointment of a state agent to supervise the action of municipal tax officers does not deprive the latter of the right of local self government. Act 1894, c. 34, p. 29, is not therefore unconstitutional, though it applies to cities under special charter. Adams v. Kuykendall [Miss.] 35 So. 830.

97. It is without power to fix an arbitrary price to be paid for labor on public works in municipalities. Street v. Varney El. Supply Co., 160 Ind. 338, 66 N. E. 895.

98. Such statute also deprives citizens of their property without due process, and if it merely fixes the price to be paid "unskilled labor," it is invalid as class legislation. Street v. Varney Electrical Supply Co., 160 Ind. 338, 66 N. E. 895.

99. The legislature may control the taxing power of municipal corporations, under special charter. Adams v. Kuykendall [Miss.] 35 So. 830.

1. May delegate its power to regulate charges by common carriers to the municipality. Under 1 Starr & C. (2d Ed.) pp. 689-715, art. 5, § 1, the city of Chicago had power to regulate fares of street railway companies, and compel the issuance of transfers. Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

2. See Constitutional Law, 1 Curr. Law, 573.

3. Regulation and control of streets. New England T. & T. Co. v. Boston Terminal Co., 182 Mass. 397, 65 N. E. 835.

4, 5. Mayo v. Dover & F. Village Fire Co., 96 Me. 539.

6. Blankenship v. Sherman [Tex. Civ. App.] 76 S. W. 805.

7. Mayo v. Dover & F. Village Fire Co., 96 Me. 539; Schneider v. Menasha, 118 Wis. 298, 95 N. W. 94.

8. Ft. Scott v. W. G. Eads Brokerage Co. [C. C. A.] 117 Fed. 51. The rule that courts will lean towards a favorable construction of the exercise of an express power will not be applied, where the question is whether power existed to do the particular act. State v. Butler [Mo.] 77 S. W. 560.

9. State v. Butler [Mo.] 77 S. W. 560. A municipality may be estopped in the exercise of its private powers or on principles analogous to estoppel be denied relief in equity. See Estoppel, § 4, 1 Curr. Law p. 1136.

10. Blankenship v. Sherman [Tex. Civ. App.] 76 S. W. 805.

11. Hence entitled to issue bonds under Act Feb. 2, 1899, § 1. Brown v. Grangeville [Idaho] 71 Pac. 151.

12. As power to erect pest houses and hospitals. Arnold v. Stanford, 24 Ky. L. R 626, 69 S. W. 726.

13. Purchase of stone quarry to improve streets. Schneider v. Menasha, 118 Wis. 298, 95 N. W. 94.

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sistently with general laws and fundamental rights, but this does not prevent a departure from the common law.[14] Want of power can be assailed only by one who has an interest to be affected by unauthorized ordinances.[15] The powers respecting public works and improvements are fully treated in later articles.[16]

(§ 5) *C. Delegation of powers.*—Functions or powers involving the exercise of judgments or discretion granted to the legislative or administrative bodies cannot be delegated to an individual or committee thereof, otherwise, in case of absolute, fixed, and certain ministerial functions.[17]

(§ 5) *D. Exercise of powers.*—Where the mode of exercise of an express power is prescribed, it must be followed,[18] but if the manner of exercise is not prescribed, the municipality may exercise it in any manner most convenient.[19]

(§ 5) *E. Mandatory and directory.*—The granting of a power to a municipality does not create a duty to exercise the power.[20]

(§ 5) *F. Judicial control over exercise of powers.*[21]—The exercise of discretionary powers will not be judicially reviewed,[22] except when fraud is shown, or there has been a manifest invasion of private rights,[23] or where they partake of a judicial character.[24] Courts will not ordinarily enjoin the passage of unauthorized ordinances, but will act only when steps are taken to enforce them.[25]

§ 6. *Officers and employes. A. In general.*[26]—The creation or abolishment[27] of offices not constitutional is for the legislature,[28] and in the absence of

14. A provision in a city charter permitting the city to enact ordinances not inconsistent with the laws of the state, held not to have any reference to the common law of the state. Cargill v. Duffy, 123 Fed. 721.

15. Property owner can not assail license ordinance until his property is denied license. Flick v. Broken Bow [Neb.] 93 N. W. 729.

16. Public Works and Improvements; Sewers and Drains; Waters and Water Supply.

17. Jewell Belting Co. v. Bertha [Minn.] 97 N. W. 424; Carbondale v. Wade, 106 Ill. App. 654. As the appointment of a committee to attend to construction of sewers, with power to employ engineer to receive or reject bids without report to the council. Lowery v. Lexington, 25 Ky. L. R. 392, 75 S. W. 202. As to delegate to an officer the right to arbitrarily determine that a wooden building, without fire limits when erected, and which has been more than half destroyed by fire was a nuisance, and to refuse to permit it to be rebuilt. Roanoke v. Bolling [Va.] 43 S. E. 343. Under the evidence, held that a city had constituted a particular officer as agent to accept assignments to it. Lamoreux v. Morin [N. H.] 54 Atl. 1023. An order directing the clerk to sign subscription to railroad stock is not a delegation of power. Green County v. Shortell, 25 Ky. L. R. 357, 75 S. W. 251.

18. The commissioner of water supply, under Greater New York charter, is without authority to purchase land at private sale, for the purpose of increasing the water supply of Brooklyn, without the concurrence or approval of the common council and when all the formalities of §§ 486, 488, 489 have been complied with. Queens County Water Co. v. Monroe, 83 App. Div. [N. Y.] 105. The consent of the electors must be obtained before light franchise can be granted. Carthage v. Carthage Light Co., 97 Mo. App. 20, 70 S. W. 936. Contract with brokerage firm to invest city funds held ultra vires Ft. Scott v. W. G. Eads Brokerage Co. [C. C. A.] 117 Fed. 51. Cal. Act, March 11, 1901, contemplates that on failure of the successful bidder for franchise, to complete his bid, the council should dispose of it to the next highest bidder, and the acceptance of an oral bid thereafter was ultra vires. Pac. Elec. Co. v. Los Angeles, 118 Fed. 746. A resolution confirming a contract for light, made with the consent of the electors, as required by Laws 1903, p. 146, c. 86. The latter act is constitutional. Wadsworth v. Concord, 133 N. C. 587.

19. Danville v. Hatcher [Va.] 44 S. E. 723.

20. As the lighting of streets. Daytona v. Edson [Fla.] 34 So. 954.

21. Who may restrain, see post, § 16B.

22. State v. Police Com'rs of Kansas City [Mo.] 71 S. W. 215. The fire commissioner's authority and reasons for granting a chief a vacation cannot be reviewed by mandamus. People v. Sturgis, 78 App. Div. [N. Y.] 184. As the control of the sale of intoxicating liquors. Danville v. Hatcher [Va.] 44 S. E. 723. That the sum proposed to be expended for a city building is unreasonable, will not in the absence of bad faith be considered by the court. Parker v. Concord, 71 N. H. 468. As the letting of contracts for street improvements by board of aldermen. Field v. Barber Asphalt Pav. Co., 117 Fed. 925.

23. The contemplated destruction of private property not a nuisance per se, as shade trees along a highway, may be reviewed. Frostburg v. Wineland [Md.] 56 Atl. 811.

24. As the question of extension of corporate limits. Moore v. Perry, 119 Iowa, 423, 93 N. W. 510.

25. Kadderly v. Portland [Or.] 74 Pac. 710.

26. Personal dealings with corporations, see post, § 10E.

27, 28. The legislature may abolish of-

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express power a municipal corporation cannot create new offices.[29] The power to abolish an office even during incumbency remains, though removals are forbidden unless for cause.[30] A mere rearrangement of the organization of a department, continuing the same incumbents with the same duties, does not create new offices.[31] An office is abolished, where a charter provision transfers its functions to a new department,[32] but it will not follow merely from the creation of a new office embracing most of the functions of the old one.[33] Changing a public board, the approval of which determined criminality of an act, does not retroact to wipe out a previous crime, in view of a rule of construction, that all prosecutions begun shall be finished.[34]

Who are city officers.—A board in control of local works is ordinarily a municipal, and not a state, agency, though it may have extra-territorial powers.[35] Local boards of officers having corporate attributes,[36] or declared to possess them,[37] are separate corporations and not officers of a city. Where members of such boards must be city electors, no one can serve ex officio if his proper office does not call for like qualifications.[38] School boards are separate corporations, unless the statute provides otherwise.[39] Statutes fixing the rank of "acting" officers relate to the time of going into effect.[40] A contractor, who is subject merely to inspection, is an independent contractor, whose servant can not recover from the city.[41]

(§ 6) *B. Election or appointment.*—The manner of choosing officers is a legislative province,[42] unless prescribed by the constitution,[43] but legislative designation of temporary officers of a new corporation does not offend the guaranty of local self government,[44] nor the elective system,[45] nor the elective franchise.[46] Lo-

fices created by it. As by changing the office of commissioner of jurors of a city to a county office. In re Allison, 172 N. Y. 421, 65 N. E. 263.

29. Lowery v. Lexington, 25 Ky. L. R. 392, 75 S. W. 202. Creation of office of page to council of Yonkers, with salary, was without authority. O'Connor v. Walsh, 83 App. Div. [N. Y.] 179.

30. City attorney appointed by the council. Act March 6, 1899, did not repeal Burns' Rev. St. 1894, § 3476, permitting abolition of certain offices. Such abolition being the exercise of a discretion, cannot be reviewed by the court. Downey v. State, 160 Ind. 578, 67 N. E. 450.

31. To which civil service rules and methods of appointment apply. Sugden v. Partridge, 174 N. Y. 87.

32. A charter amendment creating a department of public health and safety, in effect, repealed a prior ordinance creating a department for the inspection of buildings. Cutshaw v. Denver [Colo. App.] 75 Pac. 22.

33. The act creating the City Court of the city of Ft. Scott did not abolish the office of police judge, there being no express abolition, and the exclusive jurisdiction of the city court not extinguishing all his powers. Ft. Scott v. Slater [Kan.] 72 Pac. 550.

34. People v. Scannell, 40 Misc. [N. Y.] 297.

35. Water and sewerage board. State v. Kohnke, 109 La. 838.

36. Water and sewerage board of New Orleans. State v. Kohnke, 109 La. 838.

37. Gunnison v. Board of Education, 80 App. Div. [N. Y.] 480. Board of Education was not united with city by Greater New York charter. Id.

38. State v. Kohnke, 109 La. 838.

39. Board of Education and not city should be sued for teachers' salaries. Gunnison v. Board of Education, 80 App. Div. [N. Y.] 480. It was not "united" with Greater New York as contemplated by Greater New York Charter, § 1614. Id. The board of education is a corporate agent of city of Little Falls under Laws 1895, c. 565, and not a separate corporation. Ocorr v. Little Falls, 77 App. Div. [N. Y.] 592.

40. Sugden v. Partridge, 174 N. Y. 87.

41. Caving of sewer trench upon workman. Lenderink v. Rockford [Mich.] 98 N. W. 4.

42. The legislature may authorize the governor to appoint members of the board of fire and police commissioners. State v. Broatch [Neb.] 94 N. W. 1016.

43. The legislature is without power to appoint municipal officers. Laws 1901, p. 122, c. 466, § 290, providing that detective sergeants, acting as such, April 1, 1901, shall not be reduced except in manner by law provided, and constituting them the bureau of detectives in New York City, did not create a new office or fill the position with new men, and did not therefore violate Const. art. 10, § 2, providing that all officers not provided for, shall be elected by the electors of the city, or appointed by the proper authorities. Sugden v. Partridge, 174 N. Y. 87, 66 N. E. 655. Laws 1901, c. 466, changing terms of detective sergeants of New York City, violates Const. 1894, art. 10, § 2, providing for election by electors or appointment by the authorities of the city. People v. Partridge, 38 Misc. [N. Y.] 697. A detective sergeant is a city officer within such law. Id.

44-46. Officers to hold until their successors are elected. Lambert v. Norman [Ga.] 46 S. E. 433.

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cal government does not require elective officers.[47] City officers are not made elective where the constitution merely prescribes who shall have "the right" to vote for such.[48] When it has made city officers elective, that provision is not repealed by a later charter, silent as to the mode of election.[49] Election need not be by ballot unless so indicated by the charter.[50] Where the offices are provided for, but no provision is made for election thereto, the officers may be elected in such mode as the mayor and the legislative body may determine.[51] A provision for city elections at different times from general elections has been held not to refer to elections for vacancies.[52] The power to state, in an election notice, what officers are to be elected does not include power to specify when they shall be elected.[53] Words indicating time for an election upon consolidation are to be reasonably construed, so as to accord with the purposes of the act, and the orderly transfer of government.[54] The power to impose "additional qualifications" for city electors must be so exercised as not to increase enumerated conditions defined by the constitution.[55] The right to vote for all city officers is violated by designating outside officers as ex officio members of a local public corporation, which though it may act outside the city does so solely for the city's benefit.[56] One, incumbent of an office, cannot be designated as ex officio officer of a city which requires higher qualifications.[57]

The mayor has the appointing power, in the absence of provision for election[58] or appointment by the council,[59] but generally subject to the consent of the legislative body,[60] which, once given, cannot be recalled.[61] If election is by vote of

47. Government by an appointive commission selected by governor instead of mayor and council is valid. Brown v. Galveston [Tex.] 75 S. W. 488.

48. A charter creating a governing commission for a municipality, to succeed the mayor and council, and empowering the governor to appoint the majority of its members is not violative of a constitutional provision, that persons having certain qualifications shall have the right to vote for mayor [Galveston Amended Charter, 1901, § 5]. Brown v. Galveston [Tex.] 75 S. W. 488. And see Ex parte Lewis [Tex. Cr. App.] 73 S. W. 811, holding contra.

49. The mayor should be elected though Laws 1903, c. 122, does not expressly direct election of mayors of cities of the first class. Gilbert v. Craddock [Kan.] 72 Pac. 869.

50. The "council" of Somersworth may elect a city clerk by motion and yea and nay vote, the amendment (Laws 1901, c. 209, § 5), having omitted the requirement that the vote should be "in convention" of the "councils" and on "joint ballot." Attorney General v. Remick, 71 N. H. 480.

51. Under Code 1892, § 2992, a resolution adopted at the first meeting of the aldermen after the regular election. Applied to a police justice. Rich v. McLauren [Miss.] 35 So. 337.

52. Election to fill unexpired term of an officer may be held in the same year in which a congressman is elected. Const. §§ 148, 152, 167, applies only to elections held at expiration of the terms. Smith v. Doyle, 25 Ky. L. R. 958, 76 S. W. 519.

53. People v. Kent, 83 App. Div. [N. Y.] 554.

54. Under Wash. Sess. Laws, 1889-90, c. 7, § 10, as amended in Laws 1903, p. 297, c. 145, after consolidation of contiguous cities the election of officers therefor may be held at any time "within" six months. Scouten v. Whatcom [Wash.] 74 Pac. 389. The latter act having omitted the word "within" by mere clerical misprision did not postpone the time to "six months thereafter." Id.

55. State v. Kelly, 81 Miss. 1.

56. The New Orleans Water and Sewerage Board. State v. Kohnke, 109 La. 838.

57. One office required citizenship in the city, the other did not, hence its incumbent though himself a citizen was ineligible ex officio. State v. Kohnke, 109 La. 838.

58. Appointment to fill vacancy on board of fire and police commissioners, caused by resignation of a member, made by a mayor pro tem held not justified under the facts. Watkins v. Mooney, 24 Ky. L. R. 1469, 71 S. W. 622. In New York it is the duty of the mayor of a city to appoint board for the examination of plumbers. Laws 1900, c. 327, art. 3, § 40, is applicable to cities incorporated under Laws 1897, c. 360. People v. Moore, 78 App. Div. [N. Y.] 28.

59. The charter of Owatonna does not vest exclusive power in the city council to appoint night watchman. State v. Grabarkiewicz, 88 Minn. 16, 92 N. W. 446. In Jersey City, the power to appoint the board of excise is in the board of aldermen. Fitzgerald v. Jersey City [N. J. Law] 53 Atl. 819. The council may appoint the member for a newly created ward. Burns' Rev. St. 1901, § 3484, provides that vacancies shall be filled by the council. Landes v. Walls, 160 Ind. 216, 66 N. E. 679. Under Ky. Sts. §§ 3510, 3551, 3552, the council has power to fill vacancy in the office of police judge, and it is the governor's duty, under § 3758, to issue a commission to the appointee which may be compelled by mandamus. Traynor v. Beckham, 25 Ky. L. R. 283, 74 S. W. 1105.

60. State v. Sheets, 26 Utah, 105, 72 Pac. 334. Held not necessary to appointment tc

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the council, the mayor has such voting rights as the charter gives him.[62] A veto power on "measures" does not include elections by the council.[63]

The council may, however, appoint its own clerks and officers,[64] and generally, each officer or head of departments may appoint his own assistants.[65] Failure to approve a bond within the statutory time will not deprive the appointee of office.[66] Appointments, on the merit system of civil service, are the subject of treatment in another title.[67]

Where no present necessity exists for filling an office, and no public interest is affected by a failure to appoint, the officer having authority will not be compelled to appoint one to the position.[68]

Under power to designate the judges and courts of election contests, a city council may be made judge of qualifications of its own members,[69] and if the legislative body is, by statute, made judge of the election and qualification of its members, it has jurisdiction of a contest between the candidates for election to such body,[70] but not for election to the office of mayor.[71] A power to judge the election returns of members, gives no right to go behind the returns.[72] A member, who is holding over, cannot cast the deciding vote in favor of his own re-election.[73]

A mere reorganization of a force of officers who are retained does not create new offices and new appointees.[74] When a city is re-organized, a new officer is a successor, if he succeed to any part of a former one's powers.[75]

A law declaring incompatibility of specific named offices does not bring in

board of fire and police commissioners, on vacancy caused by resignation of a member, concurrence being required on appointment, but the mayor having power to fill vacancies. Watkins v. Mooney, 24 Ky. L. R. 1469, 71 S. W. 622. Appointments to office must be confirmed by a majority of the whole council, under P. L. p. 285. Day v. Lyons [N. J. Law] 56 Atl. 153.

61. In re Fitzgerald, 82 N. Y. Supp. 811.

62. The mayor is entitled to a vote at the election of officers by the legislative body, only in case of a tie [Miss. Code 1892, § 2992] (Rich v. McLauren [Miss.] 35 So. 337), nor has he any right to exercise the veto, under Code 1892, § 3001, at such election (Id.). On election of alderman he may vote, and this though other statute provides that he can vote only in case of a tie. People v. Wright, 30 Colo. 439, 71 Pac. 365; People v. Herring, 30 Colo. 445, 71 Pac. 413. Under Sess. Laws 1901, pp. 384, 385, the successors of aldermen whose terms expired April, 1902, have been elected by those whose terms did not expire until April, 1903. People v. Wright, 30 Colo. 439, 71 Pac. 365.

63. Rich v. McLauren [Miss.] 35 So. 337.

64. The council alone has power to appoint its clerk. Charter of the city of Louisiana, art. 2, § 5, and art. 4, § 9, refer to the same officer. State v. Poucher, 98 Mo. App. 109, 71 S. W. 1125.

65. If the charter provides that the officer shall appoint his own assistants, neither the mayor nor the council can appoint them. Charter provisions interpreted. Cutshaw v. Denver [Colo. App.] 75 Pac. 22. Commissioners of estimate to acquire lands, appointed in 1901, are under New York City charter (Laws 1897, c. 378, subc. 21), entitled to appoint their own clerk. In re Board of Public Improvements, 38 Misc. [N. Y.] 509.

66. Orlean City Charter, § 14. In re Fitzgerald, 82 N. Y. Supp. 811.

67. Officers and Public Employes.

68. Appointment of assistant to president of the borough under New York charter, § 383. People v. Swanstrom, 78 App. Div. [N. Y.] 94.

69. City Council of Cripple Creek v. Hanley [Colo. App.] 75 Pac. 600. Hence certiorari will not reach its decision on the merits. Id.

70. 1 Starr & C. Ann. St. 1896, p. 684. Massey v. People, 201 Ill. 409, 66 N. E. 392. A city charter providing that the board of trustees may finally determine a municipal election contest, where granted after the passage of a statute giving jurisdiction to the superior court, of such contest, confers exclusive jurisdiction on the city council [City Charter of Santa Rosa (St. 1871-2, p. 628, § 8, as amended by St. 1875-6, p. 251, § 9) excludes jurisdiction of the superior court under Code Civ. Proc. § 1111]. Carter v. Superior Ct. of Sonoma County, 138 Cal. 150, 70 Pac. 1067.

71. St. 1867, c. 251, § 9, Rev. Laws, c. 8, § 5. Flanders v. Roberts, 182 Mass. 524, 65 N. E. 902.

72. New York City Charter, § 27 (Laws 1901, c. 466), does not authorize the board of aldermen to go behind the returns as canvassed by the board of county canvassers and certified to the board of election. People v. Fornes, 79 App. Div. [N. Y.] 618.

73. Charter of Paterson, § 23 (P. L. 1871, p. 817), empowering the board of aldermen to judge of the qualifications of its members. Winters v. Warmolts [N. J. Law] 56 Atl. 245.

74. Since Laws 1901, p. 122, c. 466, § 290, did not create a new office, it is not in conflict with Const. art. 5, § 9, requiring appointments and promotions to be made under the civil service rules. Sugden v. Partridge, 174 N. Y. 87, 66 N. E. 655.

75. Commissioner of water, gas, and electricity succeeds to subway commissioner. People v. Monroe, 85 App. Div. [N. Y.] 542.

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others not named.[76] A councilman, on being elected to the incompatible office of mayor, may qualify as such, and thereby resign as councilman.[77]

The appointment should be in writing or in the form of a resolution of the appointing body duly recorded,[78] and if an assignment is only temporary that fact should be stated.[79] The persons chosen should be designated by name or at least with certainty.[80] The right of preference for reappointment is not a reappointment.[81]

(§ 6) *C. Term of office or employment. Abolishment of position.*—Subject to the constitution the legislation may fix terms of office.[82]

If the relationship is contractual, and the salary not an incident to the office, the term is indefinite.[83] Officers accept their offices subject to the power of the legislature,[84] or municipality,[85] to abolish the office, and such action is not reviewable if in good faith.[86] Statutes in some cases[87] provide for a reappointment to other office if vacant. Economical reasons will justify a reduction of employees.[88]

76. The term "councilmen and aldermen" as used in Cartersville charter and Van Epps' Supp. § 6132, does not include the mayor, and he may while acting as such be elected to the office of school commissioner. Akerman v. Ford, 116 Ga. 473.

77. The positions being incompatible the acceptance of one ipso facto vacates the other. Gilbert v. Craddock [Kan.] 72 Pac. 869.

78. Applied to an office carrying a yearly salary. Stenson v. New York, 40 Misc. [N. Y.] 533.

79. Under a resolution assigning a patrolman of the New York City police force to the position of detective sergeant if it fails to state that the appointment is temporary, his status is that of a detective sergeant, and he can be reduced or removed only in the prescribed manner. Sugden v. Partridge, 174 N. Y. 87, 66 N. E. 655.

80. Order of commissioner appointing detective sergeants, held not to comply with Laws 1897, c. 378, § 290. People v. Partridge, 38 Misc. [N. Y.] 697.

81. State v. Hawes, 177 Mo. 360, 76 S. W. 653.

82. May fix terms of justices of the peace in Auburn, the provision as to their terms in "towns" being inapplicable. People v. Auburn, 83 App. Div. [N. Y.] 554. So much of act 1903, p. 12, c. 8, § 6, as enlarged the term of office of the chamberlain appointed by the council of Elmira is unconstitutional. In re Haase, 41 Misc. [N. Y.] 114. Laws 1903, p. 8, c. 8, amending Laws 1894, c. 615, § 6, p. 1388, which continued the chamberlain of Elmira in office from the expiration of his term, March, 1903, until Dec., 1903, is an appointment to office in violation of Const. art. 10, § 2, securing to cities the right of elective offices. In re Haase, 88 App. Div. [N. Y.] 242. Constitutional extension of term of county and township officers does not apply to city police judge. Griffith v. Manning [Kan.] 73 Pac. 75.

83. People v. Redfield, 86 App. Div. [N. Y.] 367. A janitor in a police station is an employe and not a public officer, and the acceptance of such a position in the city of Orange, constituted a contract voidable by the city in accordance with charter, § 8. Dolan v. Orange [N. J. Law] 56 Atl. 130.

84. Gilbert v. Paducah, 24 Ky. L. R. 1998, 72 S. W. 816; O'Toole v. Stewart, 75 App. Div. [N. Y.] 497. The term of coroner's physician, in New York City, is co-extensive with the term of the appointing coroner, and his office is abolished with his superior's. People v. Goldenkranz, 38 Misc. [N. Y.] 682.

85. Downey v. Boston, 184 Mass. 20, 67 N. E. 450. Greater New York Charter 1901, § 1101, providing that principals appointed by board of education shall hold positions, subject to removal, etc., on abolishment of unnecessary positions, applies to appointees before consolidation. Cusack v. Board of Education, 78 App. Div. [N. Y.] 470.

86. Laws 1901, c. 466, abolished the department of buildings in New York City, and under charter, § 1543, providing for reinstatement when the superintendent of buildings decides that the services are needed, his decision in that regard is not reviewable by the court. People v. Stewart, 75 App. Div. [N. Y.] 497. Where the appointment was under civil service rules, the abolition must be done in good faith. A veteran cannot be deprived of office by the abolition thereof in bad faith. Jones v. Wilcox, 80 App. Div. [N. Y.] 167.

87. He must be appointed to a new office created in lieu of it with like duties (Jones v. Wilcox, 80 App. Div. [N. Y.] 167); but cannot insist that he be retained in another position which he is competent to fill (People v. Lindenthal, 173 N. Y. 524, 66 N. E. 407). See full treatment in Officers and Public Employes. School principal is entitled to preference, in case of rearrangement without reducing number of positions. Cusack v. Board of Education, 78 App. Div. [N. Y.] 470.

88. The board of police of Kansas City, under Acts 1874, p. 327, § 6, in exercise of the power therein granted to reduce the police force, may dismiss officers whose term of office had not yet expired. In case of failure of appropriations the power may be exercised and the necessity for the reduction will not be reviewed. State v. Police Com'rs [Mo.] 71 S. W. 215. Reduction of appropriations may justify dismissal. People v. Department of Health, 86 App. Div. [N. Y.] 521 This is true though the city charter provides for discharge only for inefficiency, misconduct or neglect of duty. Interest in the police pension fund created by voluntary contribution does not affect the power of discharge. In re Lazenby, 76 App. Div. [N. Y.] 171.

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(§ 6) *D. Vacancies and hold-overs.*—The power to fill vacancies is derived, either from the general appointive power or from special provision.[89] If a vacancy is declared for the purpose of a new election, one must be held, though holding over results from failure to elect.[90] To declare vacancies and fill them at an illegally convened meeting is a nullity.[91]

After expiration of the term the officer holds over at the pleasure of the appointing power,[92] or until the appointment[93] and qualification of his successor.[94] After expiration of the term, and in the absence of a reappointment, the officer is no longer an officer de jure,[95] but officers who hold over pending election of successors are still clothed with official powers.[96]

(§ 6) *E. Transfers on adoption of new charter.*—On the adoption of a new charter, or the succession of the corporation, the succession of incumbents to the new offices is determined by the charter and general laws,[97] identity in the offices being usually necessary.[98] It is usual to enact that old officers shall hold over until the new ones qualify.[99]

(§ 6) *F. Removal, reductions, and reinstatement.*—The power to remove officers, except such as hold at pleasure,[1] is statutory.[2] Appointive officers are removable only by the appointing power[3] or in such other manner as the laws prescribe. This power is frequently limited to causes related to the incumbent's effi-

89. Council empowered to fill its own vacancies may fill those caused by erecting new wards. Landes v. Walls, 160 Ind. 216, 66 N. E. 679. Council and not governor may fill vacancy of police judge—construing statutes. Traynor v. Beckham, 25 Ky. L. R. 283, 74 S. W. 1105.

90. Village trustees under Laws 1892, p. 1657, c. 681, § 5. In re Travis, 87 App. Div. [N. Y.] 554.

91. Benwood v. Wheeling R. Co., 53 W. Va. 465.

92. Rev. St. 1889, append., art. 29, giving a police officer who has served full term preference, does not operate as a reappointment. State v. Hawes, 177 Mo. 360, 76 S. W. 653.

93. Beverly v. Hattiesburg [Miss.] 35 So. 876.

94. Within Const. art. 12, § 1. People v. Herring, 30 Colo. 445, 71 Pac. 413. Holds over until the contest is decided or certificate issued. He cannot be ousted at the instance of one apparently elected on the face of the returns. Scales v. Faulkner, 118 Ga. 152.

95. And the city is liable only for services actually rendered and accepted, and the legality of his subsequent suspension cannot be reviewed. Houston v. Albers [Tex. Civ. App.] 73 S. W. 1084.

96. Village trustees may therefore call an election after failure to elect successors, being empowered to call all special elections [Laws 1896, p. 115, c. 183, § 33, subd. 22]. Section 9 empowering the clerk to make such a call does apply, but evidently relates to an emergency when there is no other officer to act. In re Travis, 87 App. Div. [N. Y.] 554.

97. An attendance officer of public schools is an employe, not of the educational staff. Hence is not continued in office by Greater New York Charter, § 1117. People v. Board of Education, 86 App. Div. [N. Y.] 537.

98. A charter abolition of a department, and an assignment of its duties to a newly created department, together with other duties, the head of the old does not thereby become the head of the new department. Cutshaw v. Denver [Colo. App.] 75 Pac. 22. Clerk of the department, under the old San Francisco charter, held not the same office as secretary, under the new charter, so as to entitle the former to appointment as the latter. Maxwell v. Board of Fire Com'rs, 139 Cal. 229, 72 Pac. 996.

99. Until the next general election after incorporation as a city of another class. From third to second class under Ky. St., §§ 3264, 3172. Gilbert v. Paducah, 24 Ky. L. R. 1998, 72 S. W. 816. On proclamation of a city as one of the first class, after the time fixed for holding annual elections, officers elected at a special election, under Okl. St. 1893, § 544, whose term is two years, hold until the next succeeding but one annual election. Wright v. Jacobs [Okl.] 70 P. 193; Territory v. Jacobs [Okl.] 70 P. 197.

1. Collectors of taxes, town assessors, and town clerks of Dover, no longer hold at pleasure of council [Act March 23, 1900]. Vreeland v. Pierson [N. J. Law] 57 Atl. 151.

2. Power to remove "any officers" includes those elected. Riggins v. Richards [Tex.] 77 S. W. 946. Reappointed officer is within power to remove appointees within six months. MacLellan v. Marine [Md.] 56 Atl. 359.

3. Hence when they have become transferred by law to new offices, not so filled, a previous power of removal ceases (members of Denver fire and police board transferred to and made officers of city and county of Denver). People v. Adams [Colo.] 73 Pac. 866. The Seattle chief of police alone has power to remove clerk appointed by him. The civil service commission has not power. Easson v. Seattle, 32 Wash. 405, 73 Pac. 496. Recorder of cities of the first class have power to remove a city assessor. Act March 7, 1901 (P. L. 20) and Art. 12, §§ 1 and 2 are not conflicting. Neuls v. Scranton City, 20 Pa. Super. Ct. 286.

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ciency,[4] and required to be exercised in good faith,[5] but sometimes at pleasure.[6] When the term is indefinite the appointing power may remove at pleasure.[7]

Incompetency,[8] neglect of duty,[9] and violation of rules of the department, are grounds for removal.[10] In New York City, marriage of a school teacher is not ground for discharge.[11]

The statutory method for removal of officers is exclusive.[12] A council[13] hearing charges is not judicial, hence is not disqualified by interest.[14] A provision for due notice and opportunity sufficiently indicates a legal mode of procedure.[15]

The right to notice and a hearing on charges preferred before removal,[16] or

4. The mayor has the sole power of appointment and removal of election commissioners and intoxication held sufficient ground. Hogan v. Collins, 183 Mass. 43, 66 N. E. 429. The fire commissioner of New York City has power, after trial for cause, to remove a fire chief. People v. Sturgis, 39 Misc. [N. Y.] 448.

5. Where in good faith and pursuant to precedent finding, an officer removes a subordinate, he cannot be made liable in damages though the removal was without authority. De Armas v. Bell, 109 La. 181. Removal of officer held made in good faith. Id.

6. Under St. Louis Charter, art. 4, § 14, an officer may remove his assistants without cause and at his pleasure. Magner v. St. Louis [Mo.] 78 S. W. 782. Baltimore Charter, § 25, and the provision that the removal may be at the pleasure of the mayor, during the first six months of the term of his appointees, applies to an officer reappointed by the mayor. MacLellan v. Marine [Md.] 56 Atl. 359.

7. Under Rev. St. 1889, art. 29, § 7, a police officer, reduced to position of turnkey, holds office at the pleasure of the board of commissioners. State v. Hawes, 177 Mo. 360, 76 S. W. 653.

8. Incompetency held to justify removal. People v. Coler, 78 App. Div. [N. Y.] 248. Dismissal is justified where the police officer needlessly and unjustifiably beat one with a club, particularly where he had been twice convicted on similar charges. People v. Partridge, 88 App. Div. [N. Y.] 60.

9. Evidence held insufficient to warrant discharge of patrolman of New York City police force for neglect of duty. In re Koch, 91 App. Div. [N. Y.] 194. Finding of deputy commissioner held sufficient to justify dismissal of police officer. People v. Partridge, 87 App. Div. [N. Y.] 573.

10. Evidence held insufficient to justify dismissal of police captain in New York City for violation of the rules of the department. People v. Greene, 89 App. Div. [N. Y.] 296. Because the officer refused to continue his vacation is not ground for release or removal. Fire chief can only be removed on charges preferred. In re Croker, 175 N. Y. 158, 67 N. E. 307, and see same case, 78 App. Div. 184. A police officer may be removed for any conduct unbecoming an officer, and the charges need not be limited to violation of the rules of the department. Local Acts 1901, No. 416, § 5. A charge that when home on sick leave he was engaged in manual labor was not a charge of absence from duty so as to limit the punishment under the latter charge. Oesterreich v. Fowle [Mich.] 92 N. W. 497. Under New York Charter, § 292, the police commissioner may compel a detective sergeant to perform duties of a sergeant of police, and if officer accepts the assignment he is subject to the rules of the department. People v. Greene, 91 App. Div. [N. Y.] 58.

11. A by-law of the school board so providing is in conflict with charter, § 1117. Murphy v. Maxwell, 39 Misc. [N. Y.] 166.

12. The council of East Grand Forks is without power to remove the mayor on charges. State v. Thompson [Minn.] 97 N. W. 887.

13. "Council" held to mean the president and a majority (Rev. St. 1895, art. 3268, subd. 5, relating to joint authority), when on trial of mayor who, with the aldermen, constituted the regular council. Riggins v. Richards [Tex.] 77 S. W. 946.

14. The councilman who had preferred charges is not thereby disqualified from participating in the trial. Riggins v. Richards [Tex.] 77 S. W. 946.

15. Riggins v. Richards [Tex.] 77 S. W. 946.

16. Fireman, incumbent of office of deputy tax commissioner of New York, is not protected. People v. Wells, 176 N. Y. 462, 68 N. E. 883. Regular policemen of Hagerstown appointed under Acts 1898, c. 192. Board of Street Com'rs v. Williams, 96 Md. 232. A school teacher appointed after the adoption of the charter can be removed only on the grounds and in the manner prescribed by section 1093 of the revised charter. People v. Board of Education, 78 App. Div. [N. Y.] 501. A dismissal of a police officer in city of New Orleans, without a precedent finding of guilty, is unlawful. State v. Board of Police Com'rs, 109 La. 369. Applied to a police captain who had not reached age limit [Laws 1898, c. 596]. People v. Board of Police Com'rs, 79 App. Div. [N. Y.] 82. Turnkey promoted to patrolman, held within the rule. State v. Hawes, 177 Mo. 387, 76 S. W. 617. An ordinance, so providing as to officers elected by the board of aldermen, held not to apply to a policeman, under a commission holding over. Beverly v. Hattiesburg [Miss.] 35 So. 876. Health officer is not an employe as the term is used in Minn. Code, § 189. State v. Craig [Ohio] 69 N. E. 228. Driver in street cleaning force held to have had sufficient opportunity to make an explanation. People v. Woodbury, 88 App. Div. [N. Y.] 593. After probationary period one appointed under the classified service, is entitled to notice of charges, etc. People v. De Forest, 83 App. Div. [N. Y.] 410. The fire marshal in New York City is within the charter provision prohibiting removal except on trial of charges, under Laws 1897, p. 273, c. 378, § 779, amended, Laws 1901, p. 321, c. 466, and Greater New York Charter, p. 257, § 739. People v. Sturgis, 87 App.

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reduction,[17] depends on the particular statutes. This right does not apply to suspensions or dismissals for economical reasons.[18] An officer claiming a statutory protection must bring himself clearly within it.[19] The charges should be in writing,[20] and defects therein are waived, by answering on the merits without objection.[21] The order of dismissal need not have the exact accuracy of a judgment of a court of record.[22]

The removal of officers may be reviewed by the court,[23] by certiorari if in determining the charges the trial body act judicially.[24] Removals, however, will be reviewed on the ground of insufficiency of evidence, only when fraud is averred.[25]

Div. [N. Y.] 413. Chief clerk in tax department borough of Manhattan, New York City (People v. Wells, 85 App. Div. [N. Y.] 378), and the cashier of commissioner of public works (People v. Cantor, 39 Misc. [N. Y.] 454), and a salaried food inspector, are not within Greater New York Charter, § 1543, providing that "no regular clerk or head of department" shall be removed without opportunity to make explanation (People v. Department of Health, 86 App. Div. [N. Y.] 521). A discharged veteran, employed as a deputy tax commissioner in New York City, is excepted from operation of civil service law, c. 370, § 21, and is not entitled to hearing on stated charges. People v. Wells, 176 N. Y. 462, 68 N. E. 883. Civil Service Law 1902, p. 805, c. 270, § 21, providing that fire veterans shall not be removed from office except on charges heard, applies to a deputy tax commissioner in New York City, and the exception "deputy" therein refers to persons holding confidential relation to the appointing power. People v. Wells, 86 App. Div. [N. Y.] 270. A patrolman appointed to perform duties of detective sergeant may be removed or reduced at the pleasure of the police commissioner—New York City Charter 1897, § 290, controls Charter 1901, § 290, being violative of Const. art. 10, § 2. People v. Partridge, 78 App. Div. [N. Y.] 199. Employment under a per diem salary may be terminated at any time and is not within civil service laws 1899, p. 809, c. 370, § 21, prohibiting discharge without hearing, etc. People v. Redfield, 86 App. Div. [N. Y.] 367. One employed for an indefinite term and at a monthly salary is not an officer, within a charter removal provision. Magner v. St. Louis [Mo.] 78 S. W. 782.

17. Detective sergeants of the New York City police force, under Charter §§ 288, 296, may after trial on charges, be reduced. People v. Greene, 91 App. Div. [N. Y.] 58. Laws 1901, p. 122, c. 466, § 290, continuing detective sergeants of New York City in office, acting as such April 1, 1901, shall not be reduced or removed except in manner provided, applies to members acting when the act took effect. Sugden v. Partridge, 174 N. Y. 87, 66 N. E. 655. A street sweeper, who had been appointed assistant foreman, may be removed as such without notice for absence from duty for the fixed time without leave. People v. Woodbury, 75 App. Div. [N. Y.] 503. A patrolman temporarily appointed to act as detective sergeant is not within Laws 1901, p. 122, c. 466, § 290, providing that police sergeants acting on April 1, 1901, should not be reduced, etc. People v. Greene, 87 App. Div. [N. Y.] 421.

18. Civil Service Laws 1898, p. 447, c. 186, § 13, does not apply where the removal was solely because of insufficient appropriation. People v. Department of Health, 86 App. Div. [N. Y.] 521. A person suspended under Laws 1901, c. 466 providing for the reduction of officers and employes is not entitled to notice under New York City Charter, § 1543. Employes held entitled to alternative writ to require proper transmission of removal to civil service board. People v. Wells, 78 App. Div. [N. Y.] 373. Notice of intended removal of an employe is not necessary, where the removal is solely on the ground of economy in the public service. In re Seide, 38 Misc. [N. Y.] 663.

19. The provision of the consolidation act, making patrolmen of five years service members of the first grade, applies only to those who were patrolmen before the consolidation, and accordingly the grade of a park policeman, on consolidation of that force with the regular force, is to be determined by the amount of the salary he was receiving at the time of the consolidation, though he had served more than five years. Bennett v. New York, 81 App. Div. [N. Y.] 6.

20. Rule 8 of the Chicago civil service commission requiring a written statement by the accused is not warranted by the civil service law. Lindblom v. Doherty, 102 Ill. App. 14. The specification and not the complaint governs the charges against a policeman. Oesterreich v. Fowle [Mich.] 92 N. W. 497.

21. As that the complaint against a policeman was not verified. Oesterreich v. Fowle [Mich.] 92 N. W. 497.

22. Objection to competency of witness on trial against fireman. People v. Scannell, 80 App. Div. [N. Y.] 320. Under Greater New York Charter, Laws 1901, p. 127, c. 466, § 300, a deputy police commissioner may try the charges against a police officer and the commissioner may pronounce judgment thereon. Evidence examined and held insufficient to sustain charge of misconduct, and new trial ordered. People v. Partridge, 86 App. Div. [N. Y.] 310.

23. As removal of police officer in Cumberland, under Pub. Laws 1896, p. 69, c. 495. Donahue v. Town Council of Cumberland, 25 R. I. 79. Greater New York Charter, Laws 1897, p. 188, c. 378, § 537, expressly so provides. People v. Woodbury, 88 App. Div. [N. Y.] 593. The certiorari to review such trial should not contain a provision staying execution of order until review, since the special term can, under Code, § 2140, only determine whether the commissioner had power to remove. People v. Sturgis, 39 Misc. [N. Y.] 448. Mere prejudice of the dismissing officer is not ground for staying execution of the order of removal, pending review. Id.

24. Gill v. Brunswick, 118 Ga. 85. Under

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Under a power to remove for cause, a mere statement of the reasons and opportunity to be heard, suffices,[26] and preliminary notice and hearing is not required.[27] If it be authorized for cause at pleasure, no cause even need be given.[28] Such action is nonjudicial and not reviewable.[29]

The appointment of a successor operates as a removal of the incumbent,[30] and makes a previous irregular removal innocuous,[31] but the rejection of the mayor's nomination is not in effect a removal from office.[32]

There should be a formal removal or notice to the incumbent.[33]

Reinstatement.—Mandamus is the remedy to reinstate one unlawfully removed from office,[34] and if respondent's answer raises no issue of fact, a peremptory writ of mandamus will issue compelling reinstatement.[35] The right to reinstatement, however, may be lost by laches,[36] or by resignation after removal.[37]

(§ 6) *G. Compensation.*—Officers are entitled only to such compensation as is provided by statute or ordinance.[38] Recovery cannot be had on a quantum meruit.[39] In the absence of provisions therefor, they cannot recover for extra services.[40]

Code, § 1068, restricting certiorari to review of exercise of judicial functions, certiorari is not the remedy where the appointing officer removed the appointee without trial. In re Carter, 141 Cal. 316, 74 Pac. 997.

25. Hogan v. Collins, 183 Mass. 43, 66 N. E. 429. The return of the findings and judgment of removal of the trial officers cannot be contradicted by evidence taken under a general rule to take testimony. Judgment of board of police commissioners. Quinn v. Board of Police Com'rs [N. J. Law] 55 Atl. 634.

26. State v. Kennelly [Conn.] 55 Atl. 555.

27. The statute requires a notification of the removal, and the cause, and a report to the council. In re Carter, 141 Cal. 316, 74 Pac. 997.

28. Magner v. St. Louis [Mo.] 78 S. W. 782.

29. In re Carter, 141 Cal. 316, 74 Pac. 997.

30. State v. Craig [Ohio] 69 N. E. 228.

31. That the removal of a city clerk is invalid is immaterial, where it was followed by a proper election of a successor, since his term is only until a successor is chosen. Attorney General v. Remick, 71 N. H. 480.

32. In re Fitzgerald, 82 N. Y. Supp. 811.

33. Jenkins v. Scranton, 205 Pa. 598.

34. People v. Board of Police Com'rs, 79 App. Div. [N. Y.] 82. To mandamus to compel reinstatement to office abolished in bad faith, the appointee of the new office is a necessary party, but if the proceeding is to compel a transfer to the new office he is not a necessary party. Jones v. Willcox, 80 App. Div. [N. Y.] 167. Petition for mandamus to compel reinstatement of police officer, in Chicago, held insufficient. Stott v. Chicago, 205 Ill. 281, 68 N. E. 736.

35. Discharged fire volunteer reinstated, though position which he held had been abolished. People v. Lindenthal, 79 App. Div. [N. Y.] 43. The return to the mandamus for reinstatement of a fireman must allege an unexplained absence for five days [New York Rev. Charter, § 735]. People v. Sturgis, 77 App. Div. [N. Y.] 151.

36. Rev. Charter, § 302, New York, limiting the time to proceed for reinstatement as a member of the police force does not apply to mandamus to secure position as member of the detective force. People v. Greene, 87 App. Div. [N. Y.] 346. A member of a police department, by accepting the pension, is not estopped to claim his removal illegal, and on reinstatement, such pension may be deducted from the salary due and paid over to the fund. People v. Board of Police Com'rs, 79 App. Div. [N. Y.] 82.

37. Of a fireman. People v. Sturgis, 77 App. Div. [N. Y.] 636.

38. Fees in the prosecution of offenses under ordinances cannot be collected from the city unless so provided for. Kreader v. Fremont [Neb.] 96 N. W. 616. Compensation of attorney for city of the fourth class. Ludlow v. Richie [Ky.] 78 S. W. 199. Compensation of city attorney, see Atchison v. Owensboro, 24 Ky. L. R. 1529, 71 S. W. 864. Right of commissioners of estimate and assessment to compensation, see In re City of New York, 78 App. Div. [N. Y.] 87. Officer appointed held a police officer and not a deputy marshal so as to make the marshal liable for his salary under ordinance appointing the marshal. Oakcliff v. Etheridge [Tex. Civ. App.] 70 S. W. 602. Police sergeants held entitled to compensation as such and certification on the pay rolls. Toole v. Ogden, 39 Misc. [N. Y.] 581. "Two per cent" on $100 for tax assessor held to mean two cents on $100 where a literal meaning would have made compensation unreasonable. Oakcliff v. Etheridge [Tex. Civ. App.] 76 S. W. 602.

39. It is the duty of the council of Springfield to fix the compensation of license commissioners appointed under St. 1894, c. 428. The appointment does not constitute a contract. Cook v. Springfield, 184 Mass. 247, 68 N. E. 201.

40. As for services rendered as a notary though the head of the department promised to pay therefor. Spencer v. New York, 42 Misc. [N. Y.] 284. Employe held to have performed services as notary voluntarily. Hughes v. New York, 84 App. Div. [N. Y.] 347. Clerk in bureau of highways held not entitled to recover from the city fees as commissioner of deeds in taking affidavits of inspectors. Benjamin v. New York, 77 App. Div. [N. Y.] 62. Applied to clerk in building department. McCabe v. New York, 77 App. Div. [N. Y.] 637. Employe held to have waived any right to fees as commissioner of deeds. Knox v. New York, 78 App. Div. [N.

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Where the salary is an incident to the office, the officer is entitled to recover salary accruing from the time he was prevented from performing his duties,[41] as by a wrongful removal from office;[42] if, however, another had been appointed to the position to whom the salary had been paid, the de jure officer cannot recover from the corporation,[43] but his remedy is against the de facto officer.[44]

To recover compensation, the officer must be an officer de jure.[45] Quo warranto and not injunction lies to prevent the payment of salaries because of invalidity of appointment.[46]

An officer may waive his right to compensation[47] as by a delay in proceeding for reinstatement.[48] Back salary, to which an officer is entitled, carries interest.[49] Contracts for employment of city employes may properly stipulate for the nonassignability of the salary.[50]

As to those offices, the compensation whereof cannot be increased,[51] an addition for ex officio services is invalid.[52] Salaries fixed by charter cannot be changed[53] nor charter maximums be exceeded,[54] nor can the council change those fixed by other officers under charter authority.[55] Control of a city board carries power to fix salaries of its subordinates.[56] It is not unlawful to reduce a percentage commission in anticipation of unexpectedly large receipts whereby the income of an office would be augmented.[57] Salaries of mere employes are subject to

Y.] 868. The assessors of Racine City must serve on the board of review without extra compensation. Morey v. Racine, 116 Wis. 8, 92 N. W. 426.

41. Sanitary inspectors are officers, entitled to salary during time they are prevented from performing their duties, as by failure to make a reassignment under consolidation of cities—Greater New York Charter, § 1536. Stoddart v. New York, 80 App. Div. [N. Y.] 254.

42. Alsberge v. New York, 75 App. Div. [N. Y.] 360. On discharge of a police officer by the mayor, an appeal to the city council is not a condition precedent to a recovery of salary for the unexpired term when such removal is illegal. Rate of recovery. Cawthon v. Houston, 31 Tex. Civ. App. 1, 71 S. W. 329.

43. Martin v. New York, 176 N. Y. 371, 68 N. E. 640. And see Jones v. Buffalo, 79 App. Div. [N. Y.] 328.

44. This where the salary is an incident to the office as clerk to board of aldermen. Martin v. New York, 82 App. Div. [N. Y.] 35.

45. Scott v. Chicago, 205 Ill. 281, 68 N. E. 736.

46. Greene v. Knox, 175 N. Y. 432, 67 N. E. 910.

47. Assistant fire marshal in New York City held under the facts not entitled to recover salary for a party of the term of service. McGough v. New York, 83 App. Div. [N. Y.] 322. Right to recover unlawful reduction. Grant v. Rochester, 79 App. Div. [N. Y.] 460.

48. As a delay of two years. Police officer held wrongfully discharged though after trial. People v. Partridge, 83 App. Div. [N. Y.] 262. A policeman removed prior to January 1, 1902, could commence proceedings for reinstatement any time within four months after that date and within two years after his discharge under Laws 1901, c. 466, § 1614,—but by waiting until after that act took effect, he waived his right to salary for the period of absence. Healy v. Partridge, 75 App. Div. [N. Y.] 511.

49. Stoddart v. New York, 80 App. Div. [N. Y.] 254.

50. State v. Kent, 98 Mo. App. 281, 71 S. W. 1066.

51. City treasurer. Board of Education v. Moore, 24 Ky. L. R. 1478, 71 S. W. 621. Commissioner of public works. Grant v. Rochester, 79 App. Div. [N. Y.] 460.

52. Const. § 161. Allowance to treasurer for services as treasurer also of board of education is invalid. Board of Education v. Moore, 24 Ky. L. R. 1478, 71 S. W. 621.

53. A medical officer held not a member of the New York City uniformed force of the fire department and not within charter Laws 1897, p. 258, c. 378, § 740, providing that the salaries of such force shall remain unchanged on consolidation. Right of such officer to increase. Lyons v. New York, 82 App. Div. [N. Y.] 306.

54. Electrician held an officer within city charter and an ordinance fixing his salary void as in excess of the charter amount. $1,200 for eight months is more than "$1,200 per annum." Alden v. Campbell, 30 Wash. 392, 70 P. 1094.

55. The council empowered to disapprove an estimate or any item in it is not enabled to change a salary which was fixed under power given to the board submitting the estimate. Grant v. Rochester, 79 App. Div. [N. Y.] 460.

56. The city council has control over the board of public works and may reduce the salary of a deputy street commissioner appointed by the latter [St. 1900, p. 291, c. 367, § 38; § 34, par. 2.]. Faulkner v. Sisson, 183 Mass. 524, 67 N. E. 669.

57. An ordinance reducing the commissions of the treasurer because funds were about to come into his hand which were not contemplated at the time of fixing his commissions is valid. Grenada v. Wood, 81 Miss. 303

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deductions;[58] hence, if the salary is not an incident to the office, recovery cannot be had for the time of lawful suspension[59] or absence on account of sickness,[60] or wrongful removal unless he shall first have been reinstated.[61]

(§ 6) *H. Pensions and reliefs.*—In some municipalities, policemen and firemen may, after expiration of their term or when incapacitated from injuries received in the service, be retired on a pension[62] or assigned to nonactive duties,[63] which right may be determined by mandamus.[64] Rights of officers in relief associations are elsewhere treated.[65]

§ 7. *Legislative functions and their exercise. A. Nature and extent of legislative power.*[66]—The granting of a franchise is legislative and not judicial.[67]

Ordinances should be general in their operation and not oppressive or unreasonable nor should they discriminate in favor of a particular class of persons[68] nor conflict with the general laws of the state.[69] If an ordinance be so remote from public purposes that its relation thereto cannot be discovered,[70] or if it invades private rights it will be declared invalid.[71] Ordinances under a general grant of

58. A school teacher is not a city officer but a mere employe, whose employment is contractual and hence subject to salary deductions. Murphy v. Board of Education, 38 Misc. [N. Y.] 706.

59. Irrespective of whether the officer was finally removed. Under Rev. St. 1899, § 5904, alderman may provide for suspension pending trial of charges. Blackwell v. Thayer, 101 Mo. App. 661, 74 S. W. 375. Laws 1901, c. 466, § 1543. Kastor v. New York, 39 Misc. [N. Y.] 709. Though appointed from the classified service. Bannister v. New York, 40 Misc. [N. Y.] 408. Member of street cleaning department held estopped to claim salary for time of suspension by failure to tender services and by obtaining employment elsewhere during such time. Driscoll v. New York, 78 App. Div. [N. Y.] 52. Where there was an insufficient appropriation an agreement between the commissioner and a member of the uniformed force of the department of street cleaning in Brooklyn that he should take a leave of absence, a certain number of days without pay estops him from claiming compensation for the time of such absence. Downs v. New York, 75 App. Div. [N. Y.] 423.

60. Veteran taken from civil-service list and employed in public parks at a per diem wage, is not an officer. Eckerson v. New York, 80 App. Div. [N. Y.] 12.

61. Van Sant v. Atlantic City, 68 N. J. Law, 449.

62. In New York City a police officer is not entitled to retirement on half pay when under suspension on charges of misconduct. People v. Greene, 87 App. Div. [N. Y.] 589. The examination and finding of the medical officer is a condition precedent to the right of retirement of a police officer on being permanently disabled [Laws 1899, p. 446, c. 265, § 8]. State v. Board of Trustees [Wis.] 96 N. W. 825. Fireman held not in the performance of duties at the time of receiving the injury and therefore his widow was not entitled to the pension provided by P. L. 1897, p. 263. Scott v. Jersey City, 68 N. J. Law, 687.

63. Injured fireman held entitled to employment as nonactive fireman at regular salary, under Greater New York Charter § 790. People v. Sturgis, 85 App. Div. [N. Y.] 20.

64. The detail of a patrolman to perform the duties of detective sergeant does not make him a holder of such office so as to be retired as such. People v. Partridge, 78 App. Div. [N. Y.] 204. Under the statute, police commissioner of Brooklyn is without authority to revoke pension of widow of deceased policeman who had served 20 years and who had died before Laws 1888, c. 583, tit. 11, § 42, took effect. People v. Partridge, 172 N. Y. 305, 65 N. E. 164.

65. Fraternal and Mutual Benefit Associations.

66. See, also, ante, § 5.

67. Hence, the statutory notice of the application need not specify when action will be taken or hearing had. Benwood v. Wheeling R. Co., 53 W. Va. 465.

68. Toney v. Macon [Ga.] 46 S. E. 80. An ordinance imposing a license tax of $35 for each six months on hucksters and of $15 on their assistants held not to be invalid as unjust or unreasonable. Kansas City v. Overton [Kan.] 75 Pac. 549. The expense of inspection and regulation, the amount of city indebtedness and the necessary cost of carrying on the municipal government should be considered in determining whether such license is reasonable. Id. A city ordinance imposing a license tax on hucksters is not invalid because it exempts from its operation those who are personally selling the products of their own or leased lands. Id. An ordinance permitting persons engaged in a particular business in a particular place to carry it on but forbidding others, who come in afterwards, to carry on similar business, is discriminating and invalid. Mandeville v. Band [La.] 35 So. 915.

See full discussion as applied to police regulations post, § 10. See, also, Licenses, 2 Curr. Law, p. 730.

69. Ordinance regulating opening and closing saloons on Sunday held invalid. Fay v. State [Tex. Cr. App.] 71 S. W. 603. Obstructing streets. Ex parte Cross [Tex. Cr. App.] 71 S. W. 289. Obstruction of highway by railroad trains. Louisville & N. R. Co. v. Com., 25 Ky. L. R. 1452, 78 S. W. 124.

70. Ordinance granting privilege to furnish lights, etc., held unreasonable. Le Feber v. Northwestern Heat, L. & P. Co. [Wis.] 97 N. W. 203.

71. As where it attempted to fix rates for

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power may be questioned as unreasonable.[72] Where power to legislate on a certain subject is conferred on a municipal corporation and the mode of its exercise is not prescribed, ordinances passed in pursuance thereof must be a reasonable exercise of the power, or they will be declared invalid.[73] But this power to declare an ordinance unreasonable is restricted to cases in which the legislature has enacted nothing upon the subject-matter of the ordinance, and consequently to cases in which the ordinance was passed under the supposed incidental power of the corporation or under a grant of power general in its nature, and it does not exist where the municipal corporation is authorized to pass ordinances of a specific and defined character.[74] Where a city council is vested with full power over a subject, and the mode of its exercise is not limited by the charter, it may exercise it in any manner most convenient.[75] Courts of equity cannot interfere by injunction with the exercise in good faith by municipal corporations of discretionary powers conferred on them by law,[76] and that an ordinance has been assented to by popular vote will not prevent the court from declaring it unreasonable,[77] but the insertion of words so as to avoid the objection of unreasonableness is not within the province of the court particularly when the ordinance is plain and unambiguous.[78] Unless the court can see that a given police regulation has no just relation to the object which it purports to carry out, and no reasonable tendency to protect the public health, safety, comfort, or morals, the decision of the council as to the necessity or reasonableness of the regulation is conclusive.[79] The burden of proving invalidity[80] or unreasonableness[81] is on the one asserting it. Extraneous facts showing the motives for passing an ordinance cannot be inquired into.[82]

(§ 7) *B. Meetings, votes, rules, and procedure.*—Special meetings must be on the required notice,[83] but lack of notice may be cured by presence of a quorum[84] or by ratification in later meetings.[85]

To convene and transact business, a legal quorum[86] must be present. The

water to be furnished the city and its inhabitants at such sum as would operate to deprive the company of reasonable returns for its investment. Palatka Waterworks v. Palatka, 127 Fed. 161.

72. Springfield v. Starke, 93 Mo. App. 70. An ordinance adopted by a city under a grant of power to legislate generally on a given subject, if unreasonable, unjust and oppressive, will be held invalid by the courts. City of Chicago v. Brown, 205 Ill. 568, 69 N. E. 65.

73, 74, 75, 76. City of Danville v. Hatcher [Va.] 44 S. E. 723.

77. Le Feber v. N. W. Heat, L. & P. Co. [Wis.] 97 N. W. 203. An ordinance granting an exclusive right to furnish light to a city and its inhabitants for a period of 30 years, with a possible extension of 20 years more, at rates greatly in excess of those generally paid for such service, held to be void for unreasonableness. Le Feber v. Northwestern Heat, L. & P. Co. [Wis.] 97 N. W. 203.

78. This would in effect be an amendment. Pittsburg smoke ordinance § 3 held unreasonable and void. Pittsburg v. Keech, 21 Pa. Super. Ct. 548.

79. Odd Fellows Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 Pac. 987.

80. Chicago & A. R. Co. v. Carlinville, 103 Ill. App. 251.

81. Snouffer v. Cedar Rapids & M. C. R. Co., 118 Iowa, 287, 92 N. W. 79.

82. Odd Fellows Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 Pac. 987. In proceedings involving the validity of an ordinance the motives of the legislative body cannot be inquired into. Dobbins v. Los Angeles, 139 Cal. 179, 72 Pac. 970.

83. But no indebtedness having been incurred a meeting not on call was held to be unobjectionable to tax payers. Sommercamp v. Kelly [Idaho] 71 Pac. 147.

84. All were present [Code, § 688]. Moore v. City Council of Perry, 119 Iowa, 423, 93 N. W. 510. All except one member were present though no call in writing had been made as required by Sess. Laws 1899, p. 29, § 1. Sommercamp v. Kelly [Idaho] 71 P. 147.

85. Failure to notify one member is cured by ratification in later meetings of the acts done, (Territory v. De Wolfe [Okl.] 74 Pac. 98), as the confirmation of an appointment to office by the mayor, the salary to which had been previously fixed by ordinance (State v. Sheets [Utah] 72 Pac. 334).

86. Generally a majority of the council shall constitute a quorum to transact any business whereby a liability is created. Where the council consists of four members and the mayor, three will constitute a quorum for the election of members whose term of office expired. People v. Wright, 30 Colo. 439, 71 Pac. 365. But if it consists of six members and the mayor four will constitute a quorum and three is not sufficient to elect. People v. Herring, 30 Colo. 445, 71 Pac. 413.

None can be formed by acts of less than a

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failure of a minority to vote is no objection.[87] A majority must exclude all disqualified members.[88] An interest which disqualifies[89] will alone impair the right to vote.

The mayor usually votes only on a tie.[90] A member of the legislative body is not deprived of his right to vote therein because he has been elected mayor pro tem.[91] Whether prescribed standing rules must be followed has been affirmed[92] and also denied.[93] If the chairman refuses to put a motion, any member may put it,[94] or a temporary chairman selected at once by the board.[95]

Procedure is not interrupted by the induction of new members.[96]

(§ 7) *C. Records and journals.*—Matters which may be reasonably inferred from the journal need not be expressed,[97] all presumptions being in favor of the regularity of the meetings[98] and proceedings of the legislative body,[99] unless the city has clearly exceeded its power,[1] but lack of a quorum to take the measures recorded as apparently regular may be collaterally assailed.[2] To support the presumption necessary matters must appear of record,[3] but it has also been held that nothing but an affirmative showing on the record will overthrow it.[4]

Ordinances must be recorded in the journal of proceedings,[5] which must show yeas and nays if such is the statutory requisite to passage.[6]

(§ 7) *D. Titles and ordaining clauses.*—Provisions as to the form of the enacting clause of ordinances are directory merely, and a failure to literally follow a prescribed form will not render the ordinance void.[7] If a title, when taken by itself, relates to a unified subject or object, it is single in its subject, however much such unified subject is capable of division.[8] The mere fact that the subject-matter

quorum attempting to declare and fill vacancies with persons favorable to contemplated action. Benwood v. Wheeling R. Co., 53 W. Va. 465.

87. Election by resolution. Attorney-General v. Remick, 71 N. H. 480.

88. Member voting on his own qualifications is biased. Winters v. Warmolts [N. J. Law] 56 Atl. 245.

89. Hicks v. Long Branch Commission [N. J. Err. & App.] 55 Atl. 250.

90. Rich v. McLauren [Miss.] 35 So. 337.

91. Harris v. People [Colo. App.] 70 Pac. 699.

92. Hicks v. Long Branch Commission [N. J. Err. & App.] 55 Atl. 250.

93. They may be waived. Sedalia v. Scott [Mo. App.] 78 S. W. 276.

94. Hicks v. Long Branch Commission [N. J. Law] 54 Atl. 568; Id., [N. J. Err. & App.] 55 Atl. 250. But not effectively when a mayor's refusal dissolves the meeting. Golden v. Toluca, 108 Ill. App. 467.

95. Hicks v. Long Branch Commission [N. J. Err. & App.] 55 Atl. 250.

96. Sands v. Trenton [N. J. Law] 57 Atl. 267.

97. Where the record shows that the presented ordinance was laid over, under the rules, it will be presumed that it was then read. Chicago Tel. Co. v. N. W. Tel. Co., 199 Ill. 324, 65 N. E. 329.

98. As that a quorum was present at the time of adjournment to a particular day. Moore v. Perry, 119 Iowa, 423, 93 N. W. 510.

99. But not where the record failed to show that the yeas and nays were taken as required by Code, § 683. Markham v. Anamosa [Iowa] 98 N. W. 493.

1. Ex parte Hinkle [Mo. App.] 78 S. W. 317. Presumption favors legality of ordinance (ordinance imposing license in addition to county license for sale of liquors). Id.

2. Benwood v. Wheeling R. Co., 53 W. Va. 465.

3. Calling yeas and nays. Markham v. Anamosa [Iowa] 98 N. W. 493.

4. Portland v. Yick [Or.] 75 Pac. 706.

5. Ky. St. § 3063. An answer that an ordinance "was not recorded on the day that it was passed" is insufficient. McNulty v. Toopf, 25 Ky. L. R. 430, 75 S. W. 258. An unsigned resolution to extend corporate limits, not recorded as required by Code, § 685, is ineffective. Moore v. Perry, 119 Iowa, 423, 93 N. W. 510.

6. Recital that on roll call, vote was unanimous, shows yea and nay vote. Marion Water Co. v. Marion [Iowa] 96 N. W. 883; Markham v. Anamosa [Iowa] 98 N. W. 493. Under Code, § 683, the "yeas and nays" must be recorded when each ordinance is acted upon. Record held insufficient. Markham v. Anamosa [Iowa] 98 N. W. 493.

7. People v. Burke, 206 Ill. 358, 69 N. E. 45. Enacting clause held not to invalidate ordinance because not a literal compliance with the charter. People v. Burke, 206 Ill. 358, 69 N. E. 45. Ordinance with enacting clause, "Be it ordained by the town council of the town of Sterling," held a sufficient compliance with a statute (Mills' Ann. St. Colo. § 4432) providing that the style of ordinances shall be "Be it ordained by the board of trustees." People v. Chipman [Colo.] 71 Pac. 1108. Where charter provided that enacting clause should read "Be it enacted by the city council of the city of Carlinville," an enacting clause "Be it ordained by the city of Carlinville" held sufficient. People v. Burke, 206 Ill. 358, 69 N. E. 45.

8. Seattle v. Barto, 31 Wash. 141, 71 Pac.

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is detailed in the title more minutely than is necessary does not invalidate the ordinance.[9] The general constitutional provisions respecting subject-matter and title of statutes do not, of themselves, operate on ordinances.[10] A title expresses the subject if it gives such notice of its object as to reasonably lead to an inquiry into its body.[11] A statutory provision that "no ordinance shall contain more than one subject, which shall be clearly expressed in the title," is a limitation on the power of the council to pass ordinances. It is mandatory, and ordinances passed in violation of it are inoperative because of want of power in the council to enact them.[12]

(§ 7) *E. Passage, adoption, amendment, and repeal of ordinances and resolutions.*—Charter provisions, for a yea and nay vote,[13] or adopted rules in the absence of a charter provision,[14] are binding. The court cannot judicially know that the general parliamentary rules, as adopted, call for three readings of ordinances.[15]

A majority of a quorum is ordinarily sufficient to pass a resolution or ordinance.[16] unless the charter calls for more.[17]

The approval of the mayor or executive is essential,[18] or such a failure to disapprove as works the same result,[19] or passage over a veto.[20] This is in addition

735; McNulty v. Toopf, 25 Ky. L. R. 430, 75 S. W. 258. "To prevent operation of pool rooms," will include punishment of keeper and of his servants, and of telegraph or telephone company, and its agents or messengers, transmitting messages, and of buyer or possessor of tickets. Louisville v. Wemhoff, 25 Ky. L. R. 995, 76 S. W. 876. An ordinance imposing a license tax cannot be regarded as embracing two subjects because it operates to regulate a business as well as to provide public revenue. Kan. City v. Overton [Kan.] 75 Pac. 549. An ordinance licensing various trades and occupations held not to contain more than one subject. Seattle v. Barto, 31 Wash. 141, 71 Pac. 735.

9. An ordinance prohibiting dispensing spirituous liquors during certain hours in saloons, coffee houses, etc., and requiring removal of obstructions to interior view of such places does not embrace more than one subject. McNulty v. Toopf, 25 Ky. L. R. 430, 75 S. W. 258.

10. In the absence of express provision, the constitutional provision that no law shall contain more than one subject, which shall be clearly expressed in its title, does not apply to municipal ordinances. Chicago Union Traction Co. v. Chicago, 207 Ill. 544, 69 N. E. 849.

11. An ordinance entitled "An ordinance to regulate certain trades and occupations" is sufficient without enumerating them. Seattle v. Barto, 31 Wash. 141, 71 Pac. 735. Ky. St. 1899, § 2777. The subject of an ordinance to prevent operation of pool rooms in Louisville held to be expressed in its title. Louisville v. Wemhoff, 25 Ky. L. R. 995, 76 S. W. 876. If the various provisions of the act all relate to, and are germane to, the subject expressed in the title, the requirement is satisfied. The subject of an ordinance, the title of which is to enable a waterworks company to lay its mains and pipes within the limits of a city, and to condemn private property, and which not only grants the right to lay mains and condemn property, but also provides for the payment of hydrant rentals, for the levy of a special tax therefor, for the collection of water rents from consumers, and for the purchase of the waterworks by the city after 25 years, is not sufficiently expressed in its title, and it is invalid under Iowa Code 1873, § 489. Marion Water Co. v. Marion [Iowa] 96 N. W. 883. There is no variance between the caption and the body of an ordinance where the ordinance provides for new gutter flags, and resetting curbstones, while the caption covers new combined curb and gutter. Chicago Union Traction Co. v. Chicago, 207 Ill. 544, 69 N. E. 849.

12. Marion Water Co. v. Marion [Iowa] 96 N. W. 883.

13. Hicks v. Long Branch Commission [N. J. Err. & App.] 55 Atl. 250. If the rules adopted provided that appropriation votes be taken by yea and nay, to be binding on the municipality must be so taken. They must be called on each ordinance. Markham v. Anamosa [Iowa] 98 N. W. 493.

14. General act, art. 3, § 13. But the rules prescribed thereunder do not apply to municipalities having special charters, hence the rules of procedure govern, as adopted by the council, and if they call for yeas and nays, such a vote is essential. Boyd v. Chicago B. & Q. R. Co., 103 Ill. App. 199.

15. The court cannot say that an ordinance should be read three times before passage or that a single reading was necessary. And an averment that such is a general rule of parliamentary law is a mere conclusion of the pleader, if not accompanied with an averment that the council had adopted it. Landes v. State, 160 Ind. 479, 67 N. E. 189.

16. Thurston v. Huston [Iowa] 98 N. W. 637.

17. A majority vote of all the members is necessary to the validity of an ordinance to authorize waterworks. Code 1873, § 489, controls and not § 471. Marion Water Co. v. Marion [Iowa] 96 N. W. 883. Unanimous vote of eight present out of nine is a majority of all. Id.

18. State v. Butler [Mo.] 77 S. W. 560. Should be signed by the president or at least the secretary. Mandeville v. Band [La.] 35 So. 915. Resolution extending limits. Moore v. Perry, 119 Iowa, 423, 93 N. W. 510.

19. The only purpose of the assembly in

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to signature by the temporary chairman of the legislative body,[21] and it cannot be supplied by mere acts of recognition.[22] The mayor de facto may sign,[23] or the mayor pro tem., provided conditions exist calling him into office.[24] A mere clerical attestation is not essential, unless so declared,[25] nor is the order in which enrollment and approval shall follow.[26] Provisions requiring signing after a certain time are held directory.[27]

Publication.—Statutes calling for publication must be complied with.[28] If a specific provision as to publication of ordinances exists, the general laws, as to legal notices, do not apply.[29] Ordinances should be promulgated in the manner required by law, and should be advertised and made public.[30]

Amendment, suspension, and repeal.—Legislative action may be revoked if no rights have attached under it.[31]

An amendment in direct conflict with the original ordinance operates to repeal the latter.[32]

Where an ordinance has been adopted it can be abrogated only in some manner prescribed by law;[33] it cannot be repealed or suspended,[34] or amended by a mere resolution.[35]

passing act 1899, p. 125, c. 94, § 1, was to confer on the mayor the power of veto and an ordinance is not necessarily invalid because of his failure to sign it. Landes v. State, 160 Ind. 479, 67 N. E. 189.

20. Capdeville v. New Orleans & S. F. R. Co., 110 La. 904.

21. Code, § 685. Moore v. Perry, 119 Iowa, 423, 93 N. W. 510.

22. And it is not approved by the mayor, by his calling an election to submit the question to the electors. Moore v. Perry, 119 Iowa, 423, 93 N. W. 510.

23. As where he holds over until his successor takes his place though the office in Pittsburgh had been abolished by act March 7, 1901, and a recorder substituted. Keeling v. Pittsburg, V. & C. R. Co., 205 Pa. 31.

24. The Kentucky Statute (Ky. St. § 3486), providing that the mayor shall be chairman of the board of council of certain cities, and that, in his absence, a mayor and chairman pro tempore shall be elected from the members of the board, "but that such person shall not perform the functions of the office of mayor unless the regular mayor has been absent from the county at least three days," does not require that three days shall elapse after the election of a chairman pro tempore before he can exercise the functions of the office of mayor, but that he shall not do so unless the regular mayor has been absent from the county at least three days. Chesapeake & O. R. Co. v. Maysville, 24 Ky. L. R. 615, 69 S. W. 728.

25. Not unless required by charter. Portland v. Yick [Or.] 75 Pac. 706.

26. Signing before enrollment and clerical attestation held merely irregular. Landes v. State, 160 Ind. 479, 67 N. E. 189.

27. An ordinance is valid though signed by a mayor pro tem, though three days had not elapsed since his election as such [Ky. St. § 3486]. Chesapeake & O. R. Co. v. Maysville, 24 Ky. L. R. 615, 69 S. W. 728. Though Act 1899, p. 125, c. 94, requires the mayor to sign ordinance after enrollment and attestation, it is not invalid where he signs it before the enrollment or attestation. Landes v. State, 160 Ind. 479, 67 N. E. 189.

28. Shaw v. N. Y. Cent. & H. R. R. Co., 85 App. Div. [N. Y.] 137. Under the laws of Kentucky (Ky. St. § 3045) there is no limitation as to when an ordinance should be published. It becomes effective from the time when such publication is made. McNulty v. Toopf, 25 Ky. L. R. 430, 75 S. W. 258.

29. Kan. City v. Overton [Kan.] 75 Pac. 549. The Kansas Statute (Gen. St. 1901, § 855), providing that ordinances shall be published in a newspaper within the city, controls as to publication of ordinances in cities of the first class, and not the statute relating to the publication of legal notices. (Gen. St. 1901, § 3893). Id. As to what is a newspaper in which publication may be made, see title Newspapers. Where an ordinance is amended after publication it is not necessary to republish the whole ordinance as amended, but the publication of the amendatory ordinance is sufficient. People v. Burke, 206 Ill. 358, 69 N. E. 45.

30. Mandeville v. Band [La.] 35 So. 915. Publication of a general city ordinance providing for the construction of sidewalks at the expense of abutting property owners is not necessary under the laws of Illinois (1 Starr & C. Ann. St. [2d Ed.] p. 717, c. 24, par. 65), and such ordinance takes effect from and after its passage. Pierson v. People, 204 Ill. 456, 68 N. E. 383.

31. Under Assembly Resolution May 24, 1899, improvement held to be permissive and not mandatory. Staples v. Bridgeport, 75 Conn. 509.

32. Chamberlain v. Saginaw [Mich.] 97 N. W. 156. Special ordinance passed after general one. Budd v. Camden Horse R. Co., 63 N. J. Eq. 804.

33. Ristine v. Clements, 31 Ind. App. 338, 66 N. E. 924. The annexing corporation cannot repeal ordinances of the annexed corporation. People v. Blocki, 203 Ill. 363, 67 N. E. 809.

34. People v. Latham, 203 Ill. 9, 67 N. E. 403.

35. Paxton v. Bogardus, 201 Ill. 628, 66 N. E. 853.

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Suspension under a referendum law operates only when the requirements of the statute are fully met,[36] and if it specifies that a certain petition shall be mandatory, any other petition will not be.[37]

(§ 7) *F. Construction and operation of ordinances in general.*—Ordinances have the force of law[38] localized in operation,[39] and if a franchise be granted or contract tendered, acceptance makes a contract.[40] Generally, ordinances take effect at the time of passage,[41] of which signature is a part,[42] though they may be made to take effect in the future or on the happening of a contingent event.[43]

If invalid provisions are separable, the ordinance is not invalid in toto,[44] otherwise if not separable.

An ordinance must be reasonably construed and in a manner not repugnant to common sense[45] nor to their own provisions.[46] Whether it is so unreasonable, unjust, or oppressive, is to be determined by the court in view of the existing circumstances and conditions.[47] A general ordinance may be incorporated by reference into subsequent special ordinances relating to the same subject.[48] One referring to the former and applying like regulations to other subject-matter of the same kind does not work a repeal.[49]

(§ 7) *G. Pleading and proving ordinances and proceedings.*—An ordinance may be pleaded by attaching and referring to a copy,[50] or by stating the city, title, number, and date.[51] State courts cannot take judicial notice of ordinances[52] unless so directed by law,[53] but municipal courts will take notice of those under which they have jurisdiction.[54] An ordinance passed under a charter directing judicial notice

36. Petition of 15 per cent. of voters essential. Ray v. Colby [Neb.] 97 N. W. 591. If some have signified dissent before action was taken their names are not counted. Id.

37. Ray v. Colby [Neb.] 97 N. W. 591.

38. Lindblom v. Doherty, 102 Ill. App. 14; Mandeville v. Band [La.] 35 So. 915.

39. Police jury ordinances. State v. Nicholas, 109 La. 84.

40. Chicago Tel. Co. v. N. W. Tel. Co., 199 Ill. 324, 65 N. E. 329. See, also, Franchises, 2 Curr. Law, 74; Public Works, etc.; Constitutional Law, 1 Curr. Law, 569.

41. Ordinance for construction of sidewalks held not within Village Act, art. 5, § 3, providing that ordinances imposing fines, etc., and for appropriations shall not take effect until 10 days after publication. Pierson v. People, 204 Ill. 456, 68 N. E. 383. If the petition under Neb. Comp. St. 1899, c. 26, art. 2, is not signed by at least 15 per cent. of the voters of the city requesting submission of the ordinance to the voters, it will not suspend the operation of the ordinance. Ray v. Colby [Neb.] 97 N. W. 591.

42. One cannot be punished for violating an ordinance which was not signed until after the offense was committed. A nunc pro tunc signature cannot supply the absence of all signature going to show validity of an ordinance. Mandeville v. Band [La.] 35 So. 915.

43. Bradley-Ramsay Lumber Co. v. Perkins, 109 La. 317.

44. McNulty v. Toopf, 25 Ky. L. R. 430, 75 S. W. 258; Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250, 91 N. W. 1081; Hillman v. Seattle [Wash.] 73 Pac. 791; Imes v. Chicago, B. & Q. R. Co., 105 Ill. App. 37. As an ordinance taking from the treasury the duty of receiving and dispensing certain funds and reducing his commissions. Grenada v. Wood, 81 Miss. 308; Le Feber v. N. W. Heat, L. & P. Co. [Wis.] 97 N. W. 203.

45. Von Diest v. San Antonio Traction Co. [Tex. Civ. App.] 77 S. W. 632. An ordinance making it unlawful to operate street cars unprovided with fenders and providing that every electric street car shall have a conductor and motorman, requires a fender and motorman only on motor cars, and not on trailers. Von Diest v. San Antonio Traction Co. [Tex. Civ. App.] 77 S. W. 632.

46. Provisions fixing water rate held not inconsistent. Kemble v. Millville [N. J. Err. & App.] 56 Atl. 311.

47. Chicago v. Brown, 205 Ill. 568, 69 N. E. 65. Where a macadam pavement had been in place less than four years, was in good condition, and no reason for removing it appeared, an ordinance requiring it to be torn up and replaced by asphalt was void, as unreasonable and oppressive. Chicago v. Brown, 205 Ill. 568, 69 N. E. 65.

48. Sidewalk ordinances. Pierson v. People, 204 Ill. 456, 68 N. E. 383.

49. Jeans v. Morrison, 99 Mo. App. 208, 73 S. W. 235.

50. Lexington v. Woolfolk [Ky.] 78 S. W. 910.

51. Welch v. Mastin, 98 Mo. App. 273, 71 S. W. 1090.

52. O'Brien v. Woburn, 184 Mass. 598, 69 N. E. 350. Petition therefore held not to show appointment to office, an allegation of due appointment being a mere conclusion. Stott v. Chicago, 205 Ill. 281, 68 N. E. 736.

53. Ky. St. § 2775 provides that courts shall take judicial notice of ordinances and that printed copy officially published under § 2761 is admissible without proof of passage or approval. Woolley v. Louisville, 24 Ky. L. R. 1357, 71 S. W. 893.

54. Taylor v. Sandersville, 118 Ga. 63.

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need not be proved though a new charter has been adopted provided it does not abrogate the ordinance.[55]

Before an ordinance can be admitted it must be shown that the statutory publication after passage had been complied with,[56] and the city clerk's certificate under seal is sufficient proof of publication.[57] To be admissible, the ordinance must be properly attested.[58] The book of ordinances properly identified is admissible to prove an ordinance though it does not appear that the keeping of such record was authorized.[59] A published book of ordinances is admissible if authorized by statute,[60] even though date of passage is not shown.[61] The printed certificate of the clerk that publication was authorized suffices.[62]

Proceedings of the legislative body may be proved by its records or minutes.[63]

(§ 7) *H. The remedy against invalid legislation* is to enjoin enforcement but not the passage of it.[64] If wholly ultra vires it may be collaterally assailed.[65] That the corporation in whose favor an ordinance was adopted was not yet in existence will not affect its validity.[66] The exercise of a right granted by ordinance may be assailed by anyone specially affected.[67] Any one of a large number affected may enjoin enforcement of a void ordinance.[68] If it has become a part of a contract none but interested parties may complain.[69] The mayor may and should assail the validity of an ordinance which he doubts,[70] though the right may be lost to a private person by laches.[71]

§ 8. *Administrative functions, their scope, and exercise.*[72]—The mayor,[73] police,[74] clerical,[75] and other administrative officers, have only such authority as the charter and ordinances confer. Conferring a power on an officer withdraws a like conflicting power granted to another.[76] An officer authorized to issue permits for works to be made may impose reasonable conditions.[77] An officer who

55. Gulf, C. & S. F. R. Co. v. Holt, 30 Tex. Civ. App. 330, 70 S. W. 591.

56. Shaw v. N. Y. Cent. & H. R. R. Co., 85 App. Div. [N. Y.] 137.

57. Pierson v. People, 204 Ill. 456, 68 N. E. 383.

58. O'Brien v. Woburn, 184 Mass. 598, 69 N. E. 350. Copies of ordinances certified by the clerk of the legislative body are admissible. The city clerk cannot certify so as to make them admissible. Boyd v. Chicago, B. & Q. R. Co., 103 Ill. App. 199. Where the original ordinance was lost and the copy was not authenticated, it may be proved by parol evidence. Cavanee v. Milan [Mo. App.] 74 S. W. 408. Ordinance held sufficiently proved by city attorney who last received it from clerk, the signature sheet being lost but a copy being offered. Webb City v. Parker [Mo. App.] 77 S. W. 119.

59. McCaffrey v. Thomas [Del.] 56 Atl. 382.

60. Rev. St. 1899, § 3100, book published by city authority. Campbell v. St. Louis & S. R. Co., 175 Mo. 161, 75 S. W. 86.

61. So under Denison special charter. Mo., K. & T. R. Co. v. Owens [Tex. Civ. App.] 75 S. W. 579.

62. Chicago & E. I. R. Co. v. Beaver, 199 Ill. 34, 65 N. E. 144.

63. Shaw v. N. Y. Cent. & H. R. R. Co., 85 App. Div. [N. Y.] 137.

64. Kadderly v. Portland [Or.] 74 Pac. 710; Boyd v. Councilmen of Frankfort, 25 Ky. L. R. 1311, 77 S. W. 669.

65. Ordinance wholly ultra vires may be collaterally assailed, e. g., one vacating street which council had no power to vacate. Lowe v. Lawrenceburg Roller Mills Co. [Ind.] 69 N. E. 148.

66. Chicago Tel. Co. v. N. W. Tel. Co., 199 Ill. 324, 65 N. E. 329.

67. As the laying of gas mains in the street. Ray v. Colby [Neb.] 97 N. W. 591.

68. Boyd v. Councilmen of Frankfort, 25 Ky. L. R. 1311, 77 S. W. 669.

69. Chicago Tel. Co. v. N. W. Tel. Co., 199 Ill. 324, 65 N. E. 329.

70. Capdevielle v. New Orleans & S. F. R. Co., 110 La. 904. Construction of pleadings in proceedings to restrain enforcement of ordinance. State v. Earle, 66 S. C. 194.

71. Right to have municipal ordinance set aside held barred by laches. Budd v. Camden [N. J. Law] 54 Atl. 569; Keeling v. Pittsburg, V. & C. R. Co., 205 Pa. 31.

72. A full discussion of late cases on the law of officers will be found in title Officers and Public Employes.

73. Galveston v. Hutches [Tex. Civ. App.] 76 S. W. 214.

74. Regulation of teams and traffic does not include authority to direct motorman to use his street car in helping a stalled coal wagon. Connelly v. Metropolitan St. R. Co., 84 N. Y. Supp. 305.

75. City clerk ex officio clerk of board of public works is not an official in charge of streets. Corey v. Ann Arbor [Mich.] 96 N. W. 477.

76. Building superintendent only, not state factory inspector, may order fire escapes on factories. New York v. Sailors' Snug Harbor, 85 App. Div. [N. Y.] 355.

77. Payment of cost of inspection. People v. Monroe, 85 App. Div. [N. Y.] 542. $100 a month held not excessive for inspection of subway extensions. Id.

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administers a department has no power to purchase land for his department beyond ordinary administrative purchases pursuant to the action of the council on matters of general policy,[78] and if modes of official procedure are prescribed, they must be followed.[79] Officers who sign and issue bonds have authority to bind the city by recitals that legal requisites have been done.[80] Official power must be exercised within corporate limits;[81] hence, a policeman cannot pursue or arrest a person outside the corporate limits.[82] De facto officer's acts are binding,[83] and a public act signed by the "acting mayor" may be sustained if such an officer be provided for.[84] Unauthorized acts of officers may be binding by ratification,[85] but official power can not be conferred by estoppel, nor can any acts of officers estop the city as to a matter of law.[86]

All members of a committee appointed to perform a municipal function are entitled to notice of the time and place of meeting to render the action of the majority binding.[87]

Any citizen may institute proceedings to compel municipal officers to perform their duty to the public without showing any special interest,[88] though if the officer would be personally liable on performance of a particular act ordered, he cannot be compelled to perform it.[89] A taxpayer may maintain an action against an officer to recover money paid him by the municipality under an illegal contract with such officer.[90]

The remedy to prevent exercise of powers conferred on a committee because not delegable is quo warranto.[91] If acts be enjoined, the injunction should not be so broad as to suspend all official functions.[92]

§ 9. *Custody and examination of records.*—Any person may examine official books and documents for the purpose of ascertaining financial conditions and the facts relative to expenditures,[93] and that the mayor appointed a committee to examine the books, allowing the person seeking inspection to name a part thereof,[94] or that the person desiring such examination is politically hostile to the administration,[95] or that the examination would cause great worry or inconvenience, is not ground for refusal of the right. The mandamus to enforce such right is properly directed to the mayor.[96]

78. Extension of water system requires legislative action. Queens County Water Co. v. Monroe, 83 App. Div. [N. Y.] 105.

79. Queens County Water Co. v. Monroe, 83 App. Div. [N. Y.] 105.

80. Defiance v. Schmidt [C. C. A.] 123 Fed. 1.

81. Marriage by mayor outside limits held valid as a ceremonial marriage, though unauthorized. State v. McKay [Iowa] 98 N. W. 510.

82. Sossamon v. Cruse, 133 N. C. 470.

83. Acts of city engineer's substitute while acting de facto are valid and binding. Akers v. Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536.

84. City St. Imp. Co. v. Rontet, 140 Cal. 55, 73 Pac. 729.

85. By raising a tax to pay for a building, a city may ratify authority of a board to bind it by contract for such building. Ocorr & R. Co. v. Little Falls, 77 App. Div. [N. Y.] 592. Recognition of former contracts does not estop denial of officer's power. Wormstead v. Lynn, 184 Mass. 425, 68 N. E. 841.

86. Village cannot be estopped by its trustees' consent to assert that a grade crossing was illegal because lacking consent of Railroad Commissioners. Bolivar v. Pittsburg, S. & N. R. Co., 84 N. Y. Supp. 678.

87. A part of the members of a water committee are without authority to modify the contract of the committee. Burge v. Rockwell City, 120 Iowa, 495, 94 N. W. 1103.

88. People v. Harris, 203 Ill. 272, 67 N. E. 785. A taxpayer is entitled to petition for mandamus to compel public officers to perform their duties affecting public interests generally, thus to make an appointment to office required by law. People v. Swanstrom, 79 App. Div. [N. Y.] 94.

89. People v. Blocki, 203 Ill. 363, 67 N. E. 809.

90. Stone v. Bevans, 88 Minn. 127, 92 N. W. 520.

91. Parker v. Concord, 71 N. H. 468.

92. To restrain enforcement of building ordinance as inapplicable to a particular building. Seagrist v. Stewart, 78 App. Div. [N. Y.] 631.

93. Charter held not to exclude persons not designated. State v. Williams [Tenn.] 75 S. W. 948.

94. State v. Williams [Tenn.] 75 S. W. 948.

95. Evidence held not to show fraudulent motive. State v. Williams [Tenn.] 75 S. W. 948.

96. He being custodian under Wat. Dig.

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§ 10. *Police power and public regulations. A. In general.*—All property is held, and all contracts are made, subject to the police power[97] when exercised by ordinances not offensive to the constitutional guaranties[98] and fairly and impartially executed.[99]

The police power cannot be limited by contract,[1] or defeated by an estoppel.[2]

A failure to enforce an ordinance[3] or a suspension thereof as to particular parties and times does not constitute a license to do the prohibited act.[4]

Laws and regulations necessary for the protection of the health, morals, and safety of society, are strictly within the legitimate exercise of it.[5] In the absence of constitutional restrictions, the legislature may invest municipal corporations with the police power of the state in whole or in part.[6] A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid simply because it may incidentally affect the exercise of some guarantied right;[7] but it must have some relation to the public health or safety, and such must be, in fact, the end sought to be obtained,[8] and the means used must be such as are reasonably necessary for the accomplishment of the purpose, and must not be unduly oppressive upon individuals or the public.[9] Where a city council is vested with full power over a subject, and the mode of its exercise is not limited, it may exercise it in any manner most convenient.[10] A municipality cannot arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful business and occupations,[11] or create a monopoly.[12]

1902, pp. 19, 20, § 6; p. 22, §§ 1, 2; p. 107, art. 5. State v. Williams [Tenn.] 75 S. W. 948.

97. The fact that an ordinance requiring street cars to be equipped with air brakes will require a large expenditure of money by the company will not render it invalid. People v. Detroit United Ry. [Mich.] 97 N. W. 36; Dobbins v. Los Angeles, 139 Cal. 179, 72 Pac. 970; Dept. of Health v. Ebling Brew. Co., 78 N. Y. Supp. 11.

98. Constitutional Law, 1 Curr. Law, 569.

99. A discriminatory execution of a valid ordinance is in violation of the State and Federal constitutions and subversive of justice. Boyd v. Board of Councilmen, 25 Ky. L. R. 1311, 77 S. W. 669.

1. Ottawa v. Bodley, 67 Kan. 178, 72 Pac. 545.

2. As to prohibit manufacture of gas within certain limits even as to works in the course of erection by having given a permit for such erection. Dobbins v. Los Angeles, 139 Cal. 179, 72 Pac. 970.

3. As failure to enforce ordinance prohibiting erection of certain buildings within fire limits. Chimine v. Baker [Tex. Civ. App.] 75 S. W. 330; Centralia v. Smith [Mo. App.] 77 S. W. 488.

4. A city is not liable for injuries resulting from an explosion of fire works during the time of suspension of ordinance forbiding their use. Landau v. New York, 90 App. Div. [N. Y.] 50.

5. Louisville v. Wemhoff, 25 Ky. L. R. 995, 76 S. W. 876.

6. Danville v. Hatcher [Va.] 44 S. E. 723. The police power of a municipal corporation under the constitution of California is as broad as the power of the legislature except that it must be local and not in conflict with the general laws. Such power is conferred by Const. art. 11, § 11; and San Francisco Charter, art. 2, c. 2, § 1, subd. 1, does not limit this grant. Odd Fellows' Cemetery Ass'n v. San Francisco, 140 Cal. 226, 72 Pac. 987.

Under the general welfare clause of its charter, a municipality cannot, as a general rule, exercise any powers but those which are necessarily or fairly implied from or incident to, its express powers, and those which are indispensable to the declared purposes for which the corporation was created. Watson v. Thomson, 116 Ga. 546, 59 L. R. A. 602.

In New York City, the superintendent of buildings alone has power to require fire escapes on factory buildings. The factory inspector has no such power under the Labor Law. Laws 1897, p. 481, c. 415, § 82 did not expressly nor by implication repeal Greater New York charter (Laws 1897 c. 378) page 224 § 647 providing that the superintendent of buildings in that city have jurisdiction to require fire escapes on factory buildings. City of New York v. Sailors' Snug Harbor, 85 App. Div. [N. Y.] 355.

7. Anderson v. State [Neb.] 96 N. W. 149.

8. Cal. Reduction Co. v. Sanitary Reduction Works [C. C. A.] 126 Fed. 29.

9. Cal. Reduction Co. v. Sanitary Reduction Works [C. C. A.] 126 Fed. 29; Ivins v. Trenton, 68 N. J. Law, 501. In a prosecution thereunder the fact that an ordinance is so unreasonable as to amount to a confiscation of property under the guise of regulation may be shown. State v. Earle, 66 S. C. 194.

10. Danville v. Hatcher [Va.] 44 S. E. 723.

11. Cal. Reduction Co. v. Sanitary Reduction Works [C. C. A.] 126 Fed. 29.

12. San Francisco supervisors held to have power to contract to remove garbage giving the party the exclusive privilege on certain payments to the city. Ordinance valid under statutes and as exercise of police power [St. 1863, c. 352, p. 540; Const. art. 11, § 11]. Cal. Reduction Co. v. Sanitary Reduction Works [C. C. A.] 126 Fed. 29.

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Unless a court can see that a given police regulation has no just relation to the object which it purports to carry out, and no reasonable tendency to protect the public safety, health, comfort, or morals, the decision of the legislative body as to the necessity or reasonableness of the regulation is conclusive.[13] It should be manifest that the discretion reposed in the municipal authorities has been abused by the exercise of the powers conferred in an arbitrary[14] or discriminating[15] manner. The test of whether an ordinance is a valid exercise of the police power or not is whether the regulation is a bona fide exercise of such power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation.[16]

Where a municipal corporation is expressly authorized to enact a certain ordinance in execution of the police power, such ordinance stands on the basis of a statute and its reasonableness cannot be inquired into by courts except as such question would bear on the constitutionality of a statute of the same nature.[17] It cannot be declared void because it is an unreasonable and oppressive exercise if the power exercised is bona fide for the protection of the public.[18] In Illinois the rule is limited to powers prescribed in detail.[19]

Such ordinances are presumed to be reasonable and valid, and the burden of showing that they are unreasonable is on the party attacking them.[20]

(§ 10) *B. For public protection* a city may regulate the speed of trains,[21] operation of locomotives,[22] and compel railroad companies to erect gates at crossings within the corporate limits,[23] and require elevation of tracks so as to avoid grade crossings over public streets.[24] Street railroads may be regulated to the extent of requiring reasonable safeguards against danger.[25] The city may forbid persons to let animals run at large and provide for impounding such animals.[26]

13. Ordinance forbidding burials in cemeteries in the city and county of San Francisco is valid. Odd Fellows' Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 Pac. 987; Dobbins v. Los Angeles, 139 Cal. 179, 72 Pac. 970. It will be upheld unless it has real relation to the object such as to preserve or protect public safety, health, comfort, or morals, or is a palpable invasion of rights secured by fundamental law. MacFarland v. Wash., A. & M. V. R. Co., 18 App. D. C. 456.

14. Chicago & A. R. Co. v. Carlinville, 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391.

15. An ordinance directing the removal of particular tracks from a street held unconstitutional as class legislation. People v. Blocki, 203 Ill. 363, 67 N. E. 809.

16. Anderson v. State [Neb.] 96 N. W. 149.

17. Anderson v. State [Neb.] 96 N. W. 149. The reasonableness of an ordinance is a question of law for the court. Chimine v. Baker [Tex. Civ. App.] 75 S. W. 330. Power to declare unreasonable restricted to ordinances passed under supposed incidental power of municipality. Danville v. Hatcher [Va.] 44 S. E. 723.

18. Ordinance requiring railroad companies to erect and maintain gates at street crossings held valid under the laws of Ky. [St. § 3490, subsec. 25]. Chesapeake & O. R. Co. v. Maysville, 24 Ky. L. R. 615, 69 S. W. 728.

19. In Illinois it is held that where an ordinance is passed in pursuance of a power expressly conferred by the legislature, and the details of such municipal legislation are prescribed, it cannot be held invalid as unreasonable, but if the details are not prescribed, then such ordinance must be a reasonable exercise of the power conferred. Chicago & A. R. Co. v. Carlinville, 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391.

20. Chicago & A. R. Co. v. Carlinville, 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391; Dept. of Health v. Ebling Brew. Co., 78 N. Y. Supp. 11; Ivins v. Trenton, 68 N. J. Law, 501. If the ordinance shows on its face that it contemplates a safeguard against a danger to the public it will be presumed to be valid. People v. Detroit United Ry. [Mich.] 97 N. W. 36.

21. Chicago & A. R. Co. v. Carlinville, 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391. And such ordinances if reasonable cannot be said to be invalid as an interference with interstate commerce or the United States mail. Ordinances regulating speed of trains within corporate limits are a valid exercise of the police power. Chicago & A. R. Co. v. Carlinville, 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391. Ordinance limiting speed of trains is held reasonable and valid. Chicago & A. R. Co. v. Carlinville, 103 Ill. App. 251. Burns' Rev. St. 1901, §§ 4404, 4357, cls. 4, 6, 9, 16. Baltimore & O. R. Co. v. Whiting [Ind.] 68 N. E. 266.

22. Ordinance to regulate escapement of steam from locomotives held reasonable. Pittsburg, C., C. & St. L. R. Co. v. Robson, 204 Ill. 254, 68 N. E. 468.

23. Ky. St. § 3490, sub. 25. Chesapeake & O. R. Co. v. Maysville, 24 Ky. L. R. 615, 69 S. W. 728.

24. Such ordinance does not invade property rights of adjoining landowner. Osburn v. Chicago, 105 Ill. App. 217.

25. Under statutes of Michigan (Comp. Laws, §§ 6425, 6447) requiring the consent of cities to the construction of street railways, and where a city has reserved the

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Buildings and other structures.—The city may regulate the erection and repair of buildings and other structures,[27] the use of theatres,[28] bill boards, posters, and signs.[29] But a building cannot be arbitrarily declared a nuisance,[30] nor does the conduct of inmates make it such.[31] The use of fireworks may be forbidden except at certain times or under consent of authorities.[32] For reconstruction of a structure to conform to specifications, the city is not absolutely entitled to recover from the delinquent owner.[33]

(§ 10) *C. Health and sanitation.*[34]—Everything which from its nature and surroundings is, or is liable to become, a menace to the public health, is a proper subject to be dealt with under the police power.[35] Thus the city may prohibit manufacture or storage of gas within certain limits,[36] and may require, under penalty,

power, in an ordinance granting such consent, to make such further rules and regulations as may be necessary to protect the public interest and welfare, it may thereafter require street cars to be equipped with air brakes. People v. Detroit United Ry. [Mich.] 97 N. W. 36.

26. McVey v. Barker, 92 Mo. App. 498. To impound hogs under Ky. St. 1899, § 3637, authorizing police and sanitary regulations. Thompson v. Millen, 24 Ky. L. R. 2479, 74 S. W. 288. Ordinance prohibiting animals running at large in Neosho held not repealed. Animals may be impounded though belonging to a non-resident, under Rev. St. Mo. 1899, § 5959. Jeans v. Morrison, 99 Mo. App. 208, 73 S. W. 235. The ordinance in this case was held to be in addition to and not in repeal of one enumerating other animals.

Negligently allowing horse to escape is not "permitting" him "to run at large." Decker v. McSorley, 116 Wis. 643, 93 N. W. 808.

27. They may prohibit erection of buildings of combustible material within certain limits. Ordinance held not to require buildings to be absolutely fire proof, and that it need not define the words "combustible" and "fireproof." Chimine v. Baker [Tex. Civ. App.] 75 S. W. 330. Power to regulate repair of buildings does not warrant ordinance against excavations below a certain depth without shoving up adjacent buildings. Carpenter v. Reliance Realty Co. [Mo. App.] 77 S. W. 1004. An adjoining owner may sue for an injunction to restrain the erection of a building in violation of such ordinance, where he can show that it will cause him special and irreparable injury. Chimine v. Baker [Tex. Civ. App.] 75 S. W. 330.

28. Space in rear of orchestra circle is not a "passage way" required to be kept clear. Greater N. Y. Charter, § 762. Sturgis v. Grau, 39 Misc. [N. Y.] 330. But space leading to a side entrance is. Sturgis v. Hayman, 84 N. Y. Supp. 126.

29. Greater New York charter (Laws 1897, p. 212, c. 378, § 610) did not authorize the park board to enact an ordinance prohibiting the posting of bills, placards, or advertising on property adjacent to public parks, and consol. act, § 688 authorizing it is in violation of const. art. 1, § 6, forbidding the taking of private property for public use without compensation. People v. Green, 85 App. Div. [N. Y.] 400. An ordinance regulating the height of bill boards and providing for destruction of those exceeding that height without permit is valid. Within Buffalo Charter, § 17 authorizing abatement of nuisances, but the ordinance (§ 48) was held to be prospective only in operation. Whitmier v. Buffalo, 118 Fed. 773.

30. A city ordinance declaring that if any person shall erect any structure within the city limits without the consent of the common council, which would be greatly injurious to adjacent property, and destroy the comfort, convenience, peace, and reasonable enjoyment of life of adjacent residents, the same shall constitute a nuisance and he shall be punished, etc., is unconstitutional, because giving arbitrary power to the council. Boyd v. Board of Councilmen, 25 Ky. L. R. 1311, 77 S. W. 669.

31. Without power to declare church to be erected for colored persons a nuisance on the ground that the method of worship employed in the building then occupied was so noisy as to be disagreeable to residents in the vicinity. Kentucky Statutes (§ 3290, subsecs. 24-26 and § 3290, subsecs. 14, 16) giving authority to regulate buildings and suppress nuisances, gives city no such power. Boyd v. Board of Councilmen, 25 Ky. L. R. 1311, 77 S. W. 669.

32. Ordinance prohibiting explosion of fireworks without consent of mayor valid. Centralia v. Smith [Mo. App.] 77 S. W. 488. Withdrawal of restriction does not make city liable for accident. Landau v. New York, 90 App. Div. [N. Y.] 50.

33. Under an ordinance forbidding, under penalty, the maintenance of certain structures except as authorized, recovery cannot be had by the city for cost of replacing by proper structure on failure of the owner to replace it. Water flumes across streets. Bountiful City v. Lee [Utah] 75 Pac. 368.

34. See, also, title Health, 2 Curr. Law, 173.

35. Cal. Reduction Co. v. Sanitary Reduction Works [C. C. A.] 126 Fed. 29. Whenever a thing or act is of such a nature that it may become a nuisance, or may be injurious to the public health, if not suppressed or regulated, the legislative body of a municipal corporation in California may, in the exercise of its police powers, make and enforce ordinances to regulate or prohibit such act or thing, although it may never have been offensive or injurious in the past. Odd Fellows' Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 Pac. 987.

36. Ordinance held to include works in course of construction under permit, the latter not constituting a contract so as to affect the validity of the ordinance. Dobbins v. Los Angeles, 139 Cal. 179, 72 Pac. 970.

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the use of smoke consumers on furnaces,[37] or forbid emission of smoke.[38] It may declare it a misdemeanor to permit weeds to grow;[39] may prohibit keeping certain animals within corporate limits,[40] and regulate the removal of dead animals;[41] may summarily abate nuisances to prevent the spread of contagious diseases even to the extent of the destruction of private property;[42] may be authorized to fill lots where water stagnates and to assess the cost to the owner.[43] It may maintain pest houses[44] even beyond city limits,[45] and may regulate or suppress cemeteries within the limits.[46]

(§ 10) *D. Regulation and inspection of business.*—The sale of intoxicating liquors,[47] the sale and inspection of milk within corporate limits,[48] the location of markets and regulation of sales[49] and of weights,[50] and licensing and regulation of hackmen and drivers,[51] are proper subjects of police power. When the state legislature, empowered to tax ad valorem or by license, taxes ad valorem, such an act is not to be regarded as repealing a city's general power to exact a license.[52]

37. Sanitary Code N. Y. § 134. Dept. of Health v. Ebling Brew. Co., 78 N. Y. Supp. 11. But to warrant a recovery it must appear that the emission was detrimental or annoying to some person. Dept. of Health v. Philip & W. E. Brew. Co., 38 Misc. [N. Y.] 537.

38. People v. Horton, 41 Misc. [N. Y.] 309.

39. Such an ordinance does not violate Const. art. 2, § 4, or U. S. Const. amendments art. 5. St. Louis v. Galt [Mo.] 77 S. W. 876. Under Const. art. 9, §§ 20-25, and the charter of St. Louis giving it power to abate nuisances on private property, such city has power to forbid the owner of land to permit the growth of weeds. Id.

40. Swine. Smith v. Collier, 118 Ga. 306. Ordinance providing that no live chickens may be kept in New York city without permit from board of health is valid. Adoption by the legislature of a provision of the sanitary code void because of want of power in the board of health is a ratification. Adoption held not a state law. People v. Davis, 78 App. Div. [N. Y.] 570.

In Massachusetts the **board of health alone has power** to regulate the business of keeping live stock within corporate limits and a town ordinance forbidding keeping of swine on penalty, etc., is void under Rev. Laws Mass. c. 75, § 91. Com. v. Rawson, 183 Mass. 491, 67 N. E. 605.

41. The arbitrary refusal to permit the owner to remove the carcass of a dead animal, which had not become a nuisance, in the manner prescribed by police regulations, is an attempt to deprive the owner of his property. Campbell v. D. C., 19 App. D. C. 131.

42. As the killing of animals affected with contagious disease. Rev. St. 1898, §§ 1411-12, does not provide an opportunity of the owner to be heard. Lowe v. Conroy [Wis.] 97 N. W. 942.

43. But it cannot assess the cost where negligence in grading streets causes it. Patrick v. Omaha [Neb.] 95 N. W. 477.

44. The maintenance of a pest house under express authority can be enjoined only when it is carelessly or negligently used contrary to the intent of the law. Lorain v. Rolling, 24 Ohio Circ. R. 82.

45. In Ohio a city may erect a pest house outside the corporate limits without the consent of the municipality in which the land whereon it is to be erected is situate. Lorain v. Rolling, 24 Ohio Circ. R. 82.

46. San Francisco ordinance prohibiting burial within corporate limits is not in conflict with Code, §§ 608-616 providing for incorporation of cemetery associations nor Pen. Code, §§ 292, 297, directing burial of deceased persons in cemeteries established by the supervisors, and is valid. Odd Fellows' Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 Pac. 987.

47. Danville v. Hatcher [Va.] 44 S. E. 723.

48. Norfolk city code, c. 43, § 344, is not invalid as purporting to operate without corporate limits nor invalid within Acts 1895-6, p. 685, c. 625, prohibiting taxation of farm products because it requires a license fee from dealers. Norfolk v. Flynn [Va.] 44 S. E. 717.

49. Under code, § 717. State v. Smith [Iowa] 96 N. W. 899. It is not in restraint of trade to establish public markets and require license from parties vending meats elsewhere. Buffalo v. Hill, 79 App. Div. [N. Y.] 402.

50. It is not an unreasonable restraint of trade to require corn sold in the city to be weighed on a city scale, and corn sold to mill for grinding held to be within the ordinance (State v. Smith [Iowa] 96 N. W. 899); but in the absence of express power to so enact, an ordinance requiring inspection of weights and measures, the costs thereof to be paid by the merchant, is unreasonable (Springfield v. Starke, 93 Mo. App. 70).

51. Under charter of Atlantic City and N. J. Gen. St. p. 2236, § 532, ordinance licensing drivers and making it unlawful for them to refuse to convey passengers is reasonable. Atl. City v. Fonsler [N. J. Law] 56 Atl. 119. Requiring license and fixing hack stands, is not discrimination between classes because it imposes fine on those not licensed. Combs v. Lakewood Tp., 68 N. J. Law, 582. An abutter by consenting to hackstands in front of his premises cannot exempt the hackman from liability for license fee for private hackstands. In New York city every coach or cab not using public hackstands must pay a specially prescribed license fee (Greater New York Charter, §§ 456, 457) and $25 additional if using stands not public (sections 50, 51; New York City Ordinance May 22, 1899, §§ 12, 13). N. Y. v. Reesing, 77 App. Div. [N. Y.] 417.

52. Laws 1889-90, p. 197, c. 244 did not restrict the general charter power to license

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The regulation of public services and utilities cannot be undertaken in the guise of abating nuisances where no charter power exists to do so directly,[53] nor can a franchise granted by the state be thereby impaired.[54] Such power is measured by charter.[55] A city supplying such service may cut it off for violation of rules.[56]

The regulation of the business of supplying gas and water to inhabitants and of service rates therefor is fully treated elsewhere.[57]

A license tax on telegraph companies,[58] and a prohibition against their furnishing information to pool rooms have been sustained,[59] but not a special tax on salesmen from without the state.[60]

Where there is nothing in the business calculated to interfere with the peace, good order, or safety of the community, it cannot, under the general welfare clause of its charter, prohibit one from carrying on his usual avocation on Christmas day,[61] nor in the absence of express authority compel grocery and dry goods stores to close at a particular time,[62] but they may compel closing of places dispensing spirituous liquors during certain hours and removal of obstructions to interior view of such places.[63]

The duty to take out a license rests on those only who are clearly within the terms of the ordinance.[64]

(§ 10) *E. Control of streets and public places.*—Municipalities can exercise no powers respecting streets excepting such as are conferred by statute.[65] The legislature may authorize them to prohibit collection of crowds on public streets to the hindrance of travelers.[66] Ordinances, prohibiting distribution of hand bills, circu-

machine shops. Norfolk v. Griffith-Powell Co. [Va.] 45 S. E. 889.

53. Ordinance construed and held not an attempt to abate a nuisance, under Burns' Rev. St. 1901, § 4357, subd. 4, but an attempt to regulate the price of gas, which the city was without power to do. Rushville Natural Gas Co. v. Morristown, 30 Ind. App. 455, 66 N. E. 179.

54. Ordinances regulating water conveyance cannot apply to a corporation conveying water through a city under a state franchise. Under Transportation Corporations law. Rochester & L. O. Water Co. v. Rochester, 176 N. Y. 36, 68 N. E. 117.

55. Under Ky. St. 1899, § 3290, cities of the third class have power to regulate water rates whether supported by private individuals or corporations. Owensboro v. Owensboro Waterworks Co., 191 U. S. 358. Duty of commissioner of water supply in New York City to test water meters under charter, § 475. People v. Monroe, 84 App. Div. [N. Y.] 241.

56. The water commissioner has not power under Greater New York Charter, § 478, in addition to cutting off the water supply for violation of its rules to arbitrarily require the consumer to pay any sum which he might fix as the cost for cutting off the supply and to refuse the consumer water in the absence of payment of such costs. Such charge is a penalty to be recovered by action. People v. Monroe, 41 Misc. [N. Y.] 198.

57. See Gas, 2 Curr. Law, 139; Water and Water Courses.

58. Norfolk ordinance No. 126 imposing license tax on telegraph companies held only to impose tax on state business and not violative of Fed. Const. art. 1, § 8, conferring on congress the sole right to regulate interstate commerce, or art. 10, § 4, of the state constitution authorizing the general assembly to levy taxes on business which cannot be reached by the ad valorem system. Postal Tel. Cable Co. v. Norfolk [Va.] 43 S. E. 207.

59. An ordinance prohibiting the operation of pool rooms is a valid exercise of the police power. Louisville v. Wemhoff, 25 Ky. L. R. 995, 76 S. W. 876.

60. Ordinance of Blakely imposing a special tax on "transient dealers" in merchandise held invalid under Van Epp's Code Supp. § 6045, forbidding such a tax. Hofmayer v. Blakely, 116 Ga. 777.

61. Watson v. Thomson, 116 Ga. 546, 59 L. R. A. 602.

62. Such power not granted to cities by Code N. C. § 3799. State v. Ray, 131 N. C. 814, 60 L. R. A. 634.

63. Under Ky. St. §§ 3058 & 3059. McNulty v. Toopf, 25 Ky. L. R. 430, 75 S. W. 258. But a provision in such ordinance making it applicable to druggists and wholesale dealers is invalid, they being prohibited from selling as a beverage. Id. A provision that the exit of any person from a saloon during the time when it should be closed shall be prima facie evidence of violation is invalid as an attempt to legislate on the weight of evidence. McNulty v. Toopf, 25 Ky. L. R. 430, 75 S. W. 258.

64. Engineer on scow temporarily in harbor not liable under ordinance for licensing of all engineers of boilers "in the city." People v. Prillen, 173 N. Y. 67, 65 N. E. 947.

65. Clay City v. Bryson, 30 Ind. App. 490, 66 N. E. 498. Power to define and remove nuisances does not allow a city to permit use of a street, so as to be a nuisance. Ice chute across sidewalk. Young v. Rothrock [Iowa] 96 N. W. 1105.

66. Evidence sufficient to convict defendant of violating such an ordinance. People v. Pierce, 85 App. Div. [N. Y.] 125.

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lars, etc., on city streets,[67] and prohibiting erection of swinging signs and permanent awnings over streets,[68] or regulating hack stands at railroad depots and grounds,[69] or the speed of automobiles,[70] are valid. An ordinance requiring a street railway company, under penalty, to clean streets between the rails, is a valid exercise of a police power.[71]

(§ 10) *F. Definition of offenses and regulation of criminal procedure.*—Within their charter powers,[72] cities may declare and define offenses,[73] and may regulate criminal procedure,[74] and enforce regulations clearly looking to the safety of the public, and reasonably adapted to such end.[75] The fact that the crime is also one at common law,[76] or that general statutes exist upon the same subject is not obnoxious to such power.[77]

§ 11. *Property and public places.*—The opening, maintenance and use of streets,[78] and the improvement of them,[79] are fully treated in other titles. When so empowered by charter,[80] land may be purchased for municipal purposes,[81] as for a public park,[82] and power to take by purchase may be implied.[83] By per-

67. Does not contravene const. art. 1, § 5, guaranteeing free speech. Anderson v. State [Neb.] 96 N. W. 149.

68. Ordinance held valid under charter of City of Trenton (N. J. P. L. 1874, p. 331). Does not invade any rights of the adjoining owner. Ivins v. Trenton, 68 N. J. Law, 501. Is not necessarily invalid because restricted to certain districts. Validity depends generally on the reasonableness of the ordinance, as where the portion affected is the business center and most crowded thoroughfare. Id.

69. City of the second class has full authority. Ottawa v. Bodley, 67 Kan. 178, 72 Pac. 545. Under the laws of Kansas (Gen. St. 1901, § 1005), authorizing cities to regulate railroad depots and depot grounds, a regulation requiring hackmen and others, who solicit passengers at railway stations, to occupy certain places designated by the city marshal, is reasonable and valid. Such power is not affected by any contract which a hackman may make with a passenger to meet him at a place other than that designated by the city marshal. Ottawa v. Bodley, 67 Kan. 178, 72 Pac. 545.

70. New York Laws 1903, p. 1418, c. 625, § 163, did not confer on municipalities the power to pass an ordinance to regulate the speed of automobiles. People v. Ellis, 88 App. Div. [N. Y.] 471.

71. Nor does it violate the rule as to equality and uniformity of legislation (Chicago v. Chicago Union Traction Co., 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666), and since a city cannot deprive itself of the right to exercise its police power, by ordinance or contract, it does not impair the contract granting the use of the streets (Id.).

72. In West Virginia, in the absence of express authorization, they are without authority to regulate or prohibit gaming or gaming devices. State v. Godfrey [W. Va.] 46 S. E. 185.

73. Under a power to regulate the running at large of dogs and to provide for their destruction, in case of violation, the municipal corporation may provide that the owner of such dog be guilty of a misdemeanor [Code Iowa, §§ 707, 680]. Sibley v. Lastrico [Iowa] 97 N. W. 1074. Under a city charter giving the council power to regulate the police of the city, it has authority to pass an ordinance making it a misdemeanor to disturb the peace by obstreperous conduct, unusual noise, fighting, etc. Glasgow v. Bazan, 96 Mo. App. 412, 70 S. W. 257. Under the laws of Delaware (18 Del. Laws, p. 277, c. 161, § 11) empowering cities to make such regulations and ordinances for the government of the town as they may deem necessary, they may adopt ordinances making it an offense to be drunk, disorderly and noisy. McCaffrey v. Thomas [Del.] 56 Atl. 382. May prohibit gambling and pool selling and delivery of telegrams to pool rooms. Louisville v. Wemhoff, 25 Ky. L. R. 995, 76 S. W. 876.

74. May authorize arrest without warrant when ordinance is violated in their view. Vann v. State [Tex. Cr. App.] 77 S. W. 813.

75. Ordinance requiring street cars to be equipped with air brakes held reasonable and valid. People v. Detroit United R. Co. [Mich.] 97 N. W. 36.

76. Ky. Rev. St. 1899, § 2782, merely defined the authority of a city of the first class in prescribing the limit of punishment. Louisville v. Wemhoff, 25 Ky. L. R. 995, 76 S. W. 876.

77. Rev. St. 1884, § 6258, does not prevent ordinances on subjects provided for by general law but intends only that they shall conform to general law. Glasgow v. Bezan, 96 Mo. App. 412, 70 S. W. 257. Ordinance prohibiting obstreperous conduct, unusual noise, or fighting. Id.

78, 79. Highways and Streets, 2 Curr. Law, 177; Dedication, 1 Curr. Law, 903. Public Works and Improvements.

80. Villages have no express or implied power to purchase realty for a public park under the laws of Missouri. Vaughn v. Greencastle [Mo. App.] 78 S. W. 50.

81. City of Concord, under Pub. St., c. 40, § 4, c. 50, § 5, and Laws 1849, c. 835, § 18, has power to purchase land for a city building. Parker v. City of Concord, 71 N. H. 468.

82. Under Ky. St., §§ 3038, 3058, subsec. 16, Lexington v. Kentucky Chautauqua Assembly, 24 Ky. L. R. 1568, 71 S. W. 943. Power to take lands for a "driveway with a park" or to extend or improve "such park," warrants the taking of new lands for part of an existing park, and for a connecting driveway [Laws 1881, p. 116]. Barney v. Lincoln Park Com'rs, 203 Ill. 397.

83. Power to take title to wharf by

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formance, an agreement to maintain certain reclaimed lands as a park, in consideration of a right to occupy, gives a vested interest in the public for park purposes, so long as the land shall be so used.[84] A city may own realty outside its limits for purposes which are essential to its welfare.[85] It is without power to acquire land to donate to a waterworks company.[86] A municipal corporation has implied power to light public buildings and streets,[87] and if given power to provide therefor, may purchase or erect light and water plants.[88] The legislature may commit the holding and management of waterworks to a board for the benefit of a city,[89] but in so doing a power to lease reserved to the mayor and council as part of a statutory dedication, cannot be repealed.[90] The title of New York City to the subaqueous lands of the Hudson river is subject to the public use of the river.[91] The streets therefore are extended over wharves erected,[92] and the legislature may provide for an exterior street over such lands.[93]

In the absence of express authorization a municipal corporation cannot sell property held and used by it for public purposes,[94] but it may sell any sort of property within the terms of the charter power to sell.[95] A lease may, however, be sustained, if in furtherance of a granted power,[96] and will not be enjoined merely because for a longer term than is authorized.[97] An option whereby the city has the privilege of buying property is not held for a public use, hence it may be sold, though the property, if purchased under the option, would have been so held.[98] It may purchase mortgaged property for public use, though it is forbidden to mortgage public property.[99]

An exclusive use of streets cannot be granted in the face of a statute contemplating the continuance of the public use,[1] nor can the public use be impaired for purely private benefit.[2]

"agreement or condemnation" includes power to purchase. Bell v. New York, 77 App. Div. [N. Y.] 437.

84. The occupant cannot revoke it by grant and his grantees are estopped. Barney v. Board of Com'rs of Lincoln Park, 203 Ill. 397, 67 N. E. 801.

85. The limit of the distance from its boundaries within which it may exercise this right depends on the nature of the end in view and the circumstances of each particular case. Schneider v. Menasha, 118 Wis. 298, 95 N. W. 94. May do so for sanitary purposes. E. g. for perfection of sewer system. Langley v. City Council of Augusta, 118 Ga. 590. A city having express authority to grade and pave streets and to purchase and hold all property necessary or convenient for its use has, by implication, authority to purchase a stone quarry outside its corporate limits, for the purpose of obtaining rock for street construction. Schneider v. Menasha, 118 Wis. 298, 95 N. W. 94.

86. Cain v. Wyoming, 104 Ill. App. 538.

87, 88. Fawcett v. Mt. Airy [N. C.] 45 S. E. 1029.

89. Brockenbrough v. Charlotte Water Com'rs [N. C.] 46 S. E. 28.

90. Act March 15, 1872, did not repeal act March 13, 1872, declaring certain land in San Jose a public park and authorizing a lease thereof. Harter v. San Jose, 141 Cal. 659, 75 Pac. 344.

91, 92, 93. Knickerbocker Ice Co. v. Forty-second St. & G. St. Ferry R. Co., 176 N. Y. 408, 68 N. E. 864. A grant by the city conveyed only pierage and wharfage rights. Id.

94. Waterworks and lighting systems. Lake County Water & Light Co. v. Walsh, 160 Ind. 632, 65 N. E. 530.

95. A general power to alienate property includes a power to sell property devoted to burial purposes. Wright v. Morgan, 191 U. S. 55.

96. Power to establish, construct, maintain, and control wharves, on banks not privately owned, authorizes a lease to one who will build the wharf. Kemp v. Stradley [Mich.] 97 N. W. 41. Street so extended is not in all respects a highway. Id.

Lease of a portion of a park for hotel purposes held valid, at least for 10 years, even if not for the stipulated term of 25 years. Harter v. San Jose, 141 Cal. 659, 75 Pac. 344.

98. May sell an option to purchase waterworks, since it is not property, owned by it dedicated to public use. DeMotte v. Valparaiso [Ind.] 67 N. E. 985.

99. While a municipality, unless expressly authorized, cannot mortgage property impressed with a public trust, yet it may purchase property employed in a public service which is subject to an incumbrance payable in the future. E. g. water works. State v. Topeka [Kan.] 74 Pac. 647.

1. Street railway franchise. Hurd's Rev. St. 1899, c. 131a, § 1. Russell v. Chicago & M. Electric R. Co., 205 Ill. 155, 68 N. E. 727. Cities in Oklahoma cannot grant exclusive gas or other public service franchises. Territory v. De Wolfe [Okl.] 74 Pac. 98.

2. Cannot grant away public use of street for a private switch track. Cereghino v. Oregon Short Line R. Co., 26 Utah, 467, 73 Pac. 634. Cannot be vacated for purely pri-

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The city cannot improve a private way.[3]

Mere informalities in the execution of a deed by a municipal corporation will not invalidate it.[4] Cases construing such grants are cited in the note.[5]

Title to municipal property cannot be acquired by adverse possession.[6]

There can be no diversion of property to a purpose different from, and not in contemplation of, that for which it was acquired,[7] but the municipal authorities have discretionary powers to make such casual and incidental use of public property as may not be inconsistent with, or prejudicial to, the main purpose for which they were acquired.[8] Open squares dedicated as such cannot be closed.[9] One peculiarly injured may sue for wrongful misuse of public property.[10]

A city is not liable for defects in a park building leased in good order to, and put in exclusive control of, the injured person's employer.[11]

§ 12. *Contracts. A. Power and authority in general.*—Contract power must be found in the charter[12] or implied as necessary or incident to corporate existence,[13]

vate reasons, e. g. to allow building on it. Pence v. Bryant [W. Va.] 46 S. E. 275.

3. Culver v. Yonkers, 80 App. Div. [N. Y.] 309.

4. As where executed by the mayor instead of by a special commissioner. Wright v. Morgan, 191 U. S. 55. A deed, to the bishop of Colorado, is within a resolution to convey to the Roman Catholic bishop of Colorado. Id.

5. Title held good under grant from city. San Francisco & F. Land Co. v. Hartung, 138 Cal. 223, 71 Pac. 337. Under grant of subaqueous lands, reserving right to order streets at grantees' expense, city held without right to wharfage at end of a street, and without right to permit buildings on reclaimed lands not in streets. Hastings v. New York, 39 Misc. [N. Y.] 728. A grant by the city "excepting" certain streets within the boundaries, held not to pass title either to existing or contemplated parts of such streets. Knickerbocker Ice Co. v. New York, 85 App. Div. [N. Y.] 530. Even had it been otherwise, the public rights in a pier at the end of a street would instantly attach when the pier was made. Knickerbocker Ice Co. v. New York, 85 App. Div. [N. Y.] 530. Conveyance of the pier itself to the grantee is subject to public rights. Id. City of New Orleans granted to New Orleans Auxiliary Sanitary association on condition that costs of improvements be paid by city on reversion. It was held that the grantee, having become insolvent, the city must take subject to rights of creditors. In re New Orleans Auxiliary Sanitary Ass'n, 109 La. 133.

6. Owen v. Brookport [Ill.] 69 N. E. 952.

7. Citizens who have voted to tax themselves for a specific work of public improvement are entitled to an injunction restraining the use of the property so acquired for purposes other than those originally contemplated. Sugar v. Monroe, 108 La. 677. A dedicated public square, for pleasure, cannot be used for public buildings. The legislature cannot change the purpose of the dedication. Fessler v. Union [N. J. Eq.] 56 Atl. 272. Consent to erection of a building on such ground does not assent to other structures. Id.

8. School building cannot be converted into a theater or used for the purpose of giving theatrical performances as a business. Sugar v. Monroe, 108 La. 677, 59 L. R. A. 723. Use of public park held not inconsistent with purpose of dedication. Huff v. Macon, 117 Ga. 428. That the authorities had leased certain property for a particular use will not prevent them from subsequently devoting it to another use, where the city charter provides that all the property of the city is vested in the mayor and city council, with full power of disposition of it. Building erected for an English-German school used for colored high-school. Davidson v. Baltimore, 96 Md. 509. Although property has been dedicated to public use, the city may make reasonable changes in the matter of the dedication. The city may change the means of operating a railway in case of necessity, in matter of a dedication, if it be deemed to public interest to make the change. Capdevielle v. New Orleans & S. F. R. Co., 110 La. 904.

9. Evidence and the plot held to show intention to dedicate as such. Guttery v. Glenn, 201 Ill. 275.

10. An abutter, the city having built a fire alarm tower. Fessler v. Union [N. J. Eq.] 56 Atl. 272. City may be ordered to remove it where not expensive and easily removed. Id. Abutter held not slothful. Id.

11. Leaux v. New York, 84 N. Y. Supp. 514. But the lessee is liable for failing to repair the defect. Leaux v. New York, 84 N. Y. Supp. 511.

12. Cities have power to contract for the removal of refuse, filth, and garbage from public premises within the corporate limits. Cities of the first class under Comp. St. Neb. 1899, c. 13a, art. 2. Kelley v. Broadwell [Neb.] 92 N. W. 643.

13. Under the law of North Carolina (Code §§ 3800, 3821) municipal corporations may contract for the construction of water and electric light plants, and provide for payment therefor, in the absence of charter provisions to the contrary. Fawcett v. Mt. Airy [N. C.] 45 S. E. 1029. In the absence of express authority, municipal corporations cannot purchase water works. Mayo v. Dover & F. V. Fire Co., 96 Me. 539; In re Board of Water Com'rs, 176 N. Y. 239, 68 N. E. 348. In the absence of express authority, a city is without power to contract to levy taxes in perpetuity to pay to a private concern for water supply. A contract which on its face is for all time at a fixed rate cannot be construed to continue during the corporate life of the water company and thus validated. Westminster Water Co. v. Westminster [Md.] 56 Atl. 990.

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and must be exercised for a public object[14] in a reasonable manner.[15] The legislature may grant to any municipal corporation, whether its municipal powers and purposes be general or limited, the power to purchase or construct, and maintain public service plants and to pay for the same by taxation.[16] Under authority authorizing a city to contract for works for furnishing the city with wholesome water, it may contract with a view to use by the inhabitants as well as for public purposes.[17] A contract to pay the proceeds of an annual tax of a certain per cent for a term of years is unreasonable and an abdication of the city's legislative power.[18] The power to erect or operate public service plants has been held to warrant a contract with private persons to furnish such service[19] or such facilities as will enable the city to do so.[20] When empowered to maintain and improve streets it may contract to make a roadway firm enough for street railway traffic, though less would have carried ordinary traffic.[21] It may for proper purposes contract to assume a private liability to keep up public ways,[22] and may be bound by a deed to it on consideration that the grantor be not liable to local assessments.[23]

14. A contract to provide an entertainment for citizens and guests is ultra vires. Com. v. Gingrich, 21 Pa. Super. Ct. 286.

15. A contract for thirty years, the rates to be fixed by the legislature from time to time, is valid. Jack v. Grangeville [Idaho] 74 Pac. 969.

16. The fact that the municipality may incidentally be compelled to furnish water to persons outside its limits does not make the act granting such power unconstitutional on the ground that the taxation authorized is unequal. Mayo v. Dover & F. V. Fire Co., 96 Me. 539. A statute authorizing a municipality to purchase or erect electric light plants. State v. Allen [Mo.] 77 S. W. 868. The statutes of Missouri (Rev. St. 1899, § 6275) granting power to cities to purchase, erect, and maintain electric plants for public and private lighting and authorizing the exercise of the right of eminent domain, is not unconstitutional as taking private property for private use (Mo. Const. art. 2, § 20), or as authorizing unequal taxation (art. 10, § 3), or as taking private property without consent of the owner (art. 2, § 20), or as taking private property without just compensation (art. 2, § 21), or as depriving persons of property without due process of law (art. 2, § 30), nor does the act violate the U. S. or state constitution (Const. U. S. art. 1, § 10, Const. Mo. art. 2, § 15), forbidding the passage of any law impairing the obligations of contracts, though an ordinance authorizing the issue of bonds for such purpose is passed while private persons, to whom had been granted an exclusive franchise, were operating a plant for that purpose, and the franchise had several years to run. Id. The Act of Missouri (Laws 1897, p. 49) authorizing municipal corporations to issue bonds for constructing or purchasing waterworks or electric lighting plants is not in contravention of the constitution (Const. Mo. art. 4, sec. 28) providing that no bill shall contain more than one subject, which shall be clearly expressed in the title. An ordinance ordering the issuance of bonds and the levying of taxes for the purpose of enabling the city to erect or maintain, and operate an electric plant for furnishing lights to the inhabitants of the city, is not in contravention of the Missouri constitution (art. 10, sec. 1), providing that the taxing power may be exercised by municipal corporations for corporate purposes, and (sec. 3) limiting the levying and collection of taxes for public purposes only, and (sec. 10) empowering the General Assembly to vest in cities the power to assess and collect taxes for municipal purposes. The furnishing of water and light to the inhabitants of cities is a public purpose, and the city may engage in such business. Id.

17. Under Burns' Rev. St. 1901, § 354, subd. 26. Scott v. La Porte [Ind.] 68 N. E. 278.

18. Westminster Water Co. v. Westminster [Md.] 56 Atl. 990. A power to levy an annual tax not exceeding a certain per cent. does not authorize a contract that the amount to be paid for water service shall not be lower than the present assessed valuation. Id.

19. If given power to erect water works may contract with private parties to purchase water for public use. Jack v. Grangeville [Idaho] 74 Pac. 969.

As to contracts of municipalities with water companies, see Waters and Water Companies.

20. If a municipality is given power to own and operate street railways, telegraph and telephone lines, gas, and other light works, it has power to contract for electricity for any such purposes and a contract to sublet electricity to a street railroad to be constructed by a company is not on its face ultra vires [St. Cal. 1891, pp. 233, 234; St. 1897, pp. 175, 176]. Riverside & A. R. Co. v. Riverside, 118 Fed. 736.

21. A contract that the city would repave and repair streets used by a street railway company held to bind the city to repair the foundation necessary for the support of the company's track. Detroit v. Detroit United R. [Mich.] 95 N. W. 736; Detroit v. Detroit Ry. [Mich.] 95 N. W. 992.

22. Has power to assume by contract the liability of a railroad to keep bridge over street in repair, under Va. Code 1887, § 1038. Hicks v. Chesapeake & O. R. Co. [Va.] 45 S. E. 888.

23. Acceptance of deed held sufficient to bind the city, and the grantor not liable for any street assessments as covenanted in the deed. Bartlett v. Boston, 182 Mass. 460, 65 N. E. 827.

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In an action the defense of ultra vires must be both pleaded and proved.[24] Where a contract is within the scope of the general powers of the city, and is valid on its face, it will be presumed that the city had power to make it, and that such power was properly exercised.[25] The city may become estopped to say that its electors voted for a contract under mistake of fact.[26]

The acts of the officers of a municipality cannot bind it unless they are acting within the scope of the powers expressly granted by its charter, or necessarily incident thereto, or indispensable to the proper exercise of the powers granted.[27] Direct authority must be clearly conferred,[28] and will not be extended by implication beyond the authority given.[29] Officers may bind the city by contracts outlasting their terms.[30] An officer entitled to be reimbursed for expense cannot bind the city by a contract directly with third persons for such expense.[31] Their want of authority must be specially pleaded.[32]

(§ 12) *B. Mode of contracting and proof of contracts.*—The charter mode must be followed if one is prescribed,[33] and the statutory or charter prerequisites must be met,[34] e. g., a preliminary ordinance authorizing it[35] or a requisition for supplies before purchase.[36] Contracts must be made by the officer authorized by the charter to make them,[37] and when the condition exists which calls forth his power.[38]

24, 25. Newport News v. Potter [C. C. A.] 122 Fed. 321.

26. A city is estopped which has voted to join another in purchase of a bridge and has assented to proceedings to find its value, from saying that the electors voted in misapprehension of the probable cost. State v. Bangor, 98 Me. 114.

27. Where a city has no authority to connect its water mains with an artesian well on private property, the act of its officers in so doing will not bind it so as to render it liable for water taken therefrom. Wilson v. Mitchell [S. D.] 97 N. W. 741. Waiving the trespass and seeking to recover on the contract does not change the rights of the parties.

28. The vote of a city council that it at once close a contract with an individual for the establishment by him of a system of water works does not authorize the mayor to enter into the contract with him. Marion Water Co. v. Marion [Iowa] 96 N. W. 883.

29. An officer empowered by ordinance to execute a "deed" cannot enter into warranties. Galveston v. Hutches [Tex. Civ. App.] 76 S. W. 214.

30. Held error to dismiss complaint in action to recover for sprinkling streets under contract on the ground that the trustees had no power to contract beyond their term of office. Schwan v. New York, 173 N. Y. 32, 65 N. E. 774.

31. The city of New Haven is not liable on a contract made by the selectmen as a board of registration for meals furnished to the board and its employes while in session, since under the charter § 209 the liability of the city is toward the selectmen and not toward a third party with whom they have incurred a debt as a part of their expenses. Heublein v. New Haven, 75 Conn. 545.

32. Want of authority of a municipal board to bind the city by contract. Ocorr & R. Co. v. Little Falls, 77 App. Div. [N. Y.] 592.

33. In re Board of Water Com'rs, 176 N. Y. 239, 68 N. E. 348. The only manner in which villages in New York can acquire the property of a waterworks company is under Laws 1875, p. 162, c. 181, § 22. Laws 1875, p. 157, c. 181, as amended by Laws 1881, p. 220, c. 175, by Laws 1883, p. 286, c. 255, and Laws 1885, p. 370, c. 211, refers only to property of individuals. Id.

34. Trowbridge v. Hudson, 24 Ohio Circ. R. 76. There is no implied liability to pay for articles furnished to and used by a city under a contract made by an officer in violation of, or without a compliance with, the terms of the charter. Keane v. New York, 88 App. Div. [N. Y.] 542.

35. A contract made before the adoption of an ordinance sanctioning it is invalid and the passage of the ordinance will not validate it. Evidence held to show that contract was entered into before ordinance was adopted. Paxton v. Bogardus, 201 Ill. 628, 66 N. E. 853.

36. Under N. Y. Charter, § 419, for goods sold a purchasing agent of the fire department where the necessity for the purchase has not been certified by the head of the department there can be no recovery on the contract of sale. Keane v. New York, 88 App. Div. [N. Y.] 542.

37. An ordinance empowering the board of health to contract for the removal of garbage violates St. Louis Charter, art. 6, § 27, requiring board of improvements to let contracts, etc. The power to pass such an ordinance is not conferred by art. 3, § 26. State v. Butler [Mo.] 77 S. W. 560. A city engineer held to be without power to modify a contract for the construction of a sewer. Lamson v. Marshall [Mich.] 95 N. W. 78.

38. Under the laws of Mass. (Rev. Laws, c. 51, § 6) a city superintendent of streets has no power to bind the city for the repair of its streets unless the repairs are unprovided for, and then only by complying with the statutory requirements. Wormstead v. Lynn, 184 Mass. 425, 68 N. E. 841.

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Under the system of inviting proposals,[39] contracts should ordinarily be awarded to the lowest responsible bidder,[40] after having legally advertised.[41] Advertisement is not efficient if the contract as advertised is on its face null and void.[42] When the charter required acceptance of lowest bid, it is immaterial that a higher one was more advantageous to the public.[43] Contracts of employment[44] or grants of franchise[45] do not fall within provisions applying this system to contracts generally. The skill and integrity of the bidders as well as financial ability must be considered in determining their responsibility,[46] and in the absence of fraud or gross abuse, the officer's discretion in selection will not be reviewed by courts.[47] The determination of who is the lowest responsible bidder rests upon the exercise of a bona fide judgment, based upon facts tending reasonably to the support of such determination.[48]

The mere acceptance of a bid does not constitute a contract.[49] It should be carried into a writing,[50] and although the statute does not expressly require this, nevertheless the authorities ought to require one.[51] A mere oral direction cannot evidence a contract made by the mayor and council.[52] A contract with a municipality cannot be established by custom or usage.[53] Where general authority to contract with reference to a subject is conferred on a municipality, and the man-

39. See title Public Contracts.

40. But such a charter provision held not to apply to a contract for furnishing water to the municipality under the constitutional provision granting to the city council the power to fix rates [Cal. Const. art. 14, § 1]. Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 Pac. 189. An ordinance requiring that all city printing shall bear the union label is against public policy and violative of the charter provision that contracts must be let to the lowest bidder; and also of U. S. Const. amendment 14, § 1. But it will be presumed that the bidder knew that the provision was invalid and he could ignore it in making his bid, and refuse to comply with the same in executing the contract. Marshall v. Nashville, 109 Tenn. 495, 71 S. W. 815. A provision requiring contracts for public improvements to be let to the lowest bidder is mandatory and unless the requirements imposed by statute are complied with, the contract is rendered invalid. Mobile City Charter, § 75. Bill held to allege failure to comply with provision. Inge v. Board of Public Works, 135 Ala. 187. A provision that the successful bidder for a public improvement should be liable for damages sustained by abutting owners and others and that alien or convict labor shall not be employed is invalid as tending to increase the amount of the bid. Id.

41. Advertisement for bids for public improvements held to have been published a sufficient length of time. Newport News v. Potter [C. C. A.] 122 Fed. 321.

42. State v. King, 109 La. 799.

43. Not a defense to prosecution for not letting to lowest bidder. People v. Scannell, 40 Misc. [N. Y.] 297. There is a "lowest" bid when two are equally low. Id.

44. Such a charter provision does not apply to employment of a consulting and supervising engineer. Newport News v. Potter [C. C. A.] 122 Fed. 321.

45. To maintain a belt railroad where only one bid would be attracted. Capdevielle v. New Orleans & S. F. R. Co., 110 La. 904.

46, 47. Mobile City Charter, § 75. Inge v. Board of Public Works, 135 Ala. 187. When it is directly charged that the letting was not to the lowest responsible bidder, it will not be presumed on demurrer, from the mere acceptance of the bid, that the board, in the exercise of its judicial discretion, after due consideration of all bids, determined such one to be the lowest responsible bidder.

48. Mobile City Charter, § 75. Inge v. Board of Public Works, 135 Ala. 187.

49. It is merely preparatory to the contract which must be in writing under Phila. Charter art. 14, and the city is not liable to the bidder for refusal to enter into a written contract. Smart v. Phila., 205 Pa. 329.

50. Charter of Phila. art. 14 providing that all contracts as to city officers shall be in writing, signed and executed in the name of the city, is mandatory. Smart v. Phila., 205 Pa. 329. A charter provision requiring contracts to be in writing is valid. Contract invalid under Charter of Eureka (sec. 127) requiring contracts to be in writing and the draft thereof to be approved by the council and city attorney and signed by the mayor. Times Pub. Co. v. Weatherby, 139 Cal. 618, 73 Pac. 465.

51. In an action by a city against a property owner to recover the cost of paving a certain sidewalk, the contract between the city and the contractor doing the work is not the foundation of the action, and the failure of the complaint to aver that such contract was in writing does not render it invalid. Drew v. Geneva, 159 Ind. 364, 65 N. E. 9.

52. A mere order by the mayor and board of aldermen does not constitute a contract. Order appointing plaintiff health officer of a town held not to be a contract and not to render the town liable for services rendered thereunder. Pass Christian v. Washington [Miss.] 34 So. 225.

53. Where the council had fixed the rate for publication of notices, a greater rate cannot be allowed by audit though it had been established by a long course of dealing. People v. Clarke, 79 App. Div. [N. Y.] 78.

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ner of executing the contract is not restricted, it may be held to a contract upon any evidence which convinces the jury that the service was accepted on the one hand with an expectation to pay for it, and, on the other hand, was rendered for an expected compensation.[54] A modification of a contract, or a waiver of conditions in a contract found to be prejudicial to its interests, can be made by a municipal corporation by implication.[55] A city may obligate itself by implication to pay for the services of a contractor hired by it to supervise the work of a contractor, or to complete work only partially completed by the contractor, where the work is done at the contractor's expense.[56]

Any material departure, in the contract awarded, from the terms and conditions upon which the bidding is had, renders it invalid.[57] The same is true where a contract sanctioned by election is departed from.[58] After performance, it is immaterial that the contract was not formally accepted.[59] Thus, where a city, under a contract with a water company, agreed to pay hydrant rentals at specified dates, for a specified period, to the trustee under a mortgage given by the company, no contract afterwards entered into between the company and the city could abrogate or lessen the vested rights of the trustee.[60]

The mayor's signature is not necessary to the contract which may be made by "order"[61] or by the council; hence an ordinance granting a franchise passed over a veto is none the less a contract for want of the mayor's signature.[62]

If a wrong seal purporting to be the city seal be used, it is mistake relievable in equity.[63]

(§ 12) *C. Construction and effect.*—Municipal contracts should be liberally construed in favor of the public.[64] The ordinance authorizing it becomes a part of the contract.[65] A contract lawfully made is inviolable either by the legislature[66] or the municipality,[67] or its political successors.[68] A city's inability to perform a contract is a breach suable whenever the contractor knows of it.[69]

54. Acceptance of light service held not to imply a contract for the year under Comp. Laws § 2908. Evidence on question of removal of contract. Howell Elec. L. & P. Co. v. Howell [Mich.] 92 N. W. 940.

55, 56. Newport News v. Potter [C. C. A.] 122 Fed. 321.

57. It is unimportant whether the change is a benefit to the city or not. Inge v. Board of Public Works, 135 Ala. 187.

58. An ordinance permitting contract for water supply held not invalid because differing in details from the one submitted to the electors of the city. Centerville v. Fidelity T. & G. Co. [C. C. A.] 118 Fed. 332.

59. Centerville v. Fidelity T. & G. Co. [C. C. A.] 118 Fed. 332.

60. The subsequent purchase of the works by the city does not relieve it from liability for such rentals. Centerville v. Fidelity T. & G. Co. [C. C. A.] 118 Fed. 332.

61. San Francisco Consol. Act April 25, 1863. (Interpretation of contract.) Cal. Reduction Co. v. Sanitary Reduction Works [C. C. A.] 126 Fed. 29. Under the act authorizing the board of supervisors of San Francisco to proceed under the police power by "regulation or order" (Cal. St. 1863, c. 352, p. 540), a contract for disposition of garbage may be made by an order, and the mayor's signature is not necessary to its validity. Id.

62. Capdevielle v. New Orleans & S. E. R. Co., 110 La. 904.

63. City clerk's seal on bonds. Defiance v. Schmidt [C. C. A.] 123 Fed. 1.

64. Contract between city and a street railroad company is a public contract. Ind. R. Co. v. Hoffman [Ind.] 69 N. E. 399.

See, also, Public Contracts.

65. State v. Kent, 98 Mo. App. 281, 71 S. W. 1066.

66. The legislature can no more interfere with valid contracts of municipal corporations than with those between mere citizens. Shinn v. Cuningham, 120 Iowa, 383, 94 N. W. 941. A law of Iowa (Acts 28th Gen. Assembly, p. 33, c. 50) limiting the payment for the discovery of property omitted from taxation to 15 per cent. of the taxes thus obtained, does not affect the rights of parties to a contract for the discovery of such property entered into before the statute took effect. Shinn v. Cuningham, 120 Iowa, 383, 94 N. W. 941.

67. Contracts entered into cannot be arbitrarily altered or changed. Valparaiso v. Valparaiso City Water Co., 30 Ind. App. 316, 65 N. E. 1063.

68. Franchises granted by the original municipality and accepted cannot be revoked by the municipality formed from the former territory. Jersey City, H. & P. St. R. Co. v. Garfield, 68 N. J. Law, 587.

69. Action for breach of contract with builder of public works accrues when notice of injunction making city unable to perform comes to contractor. Ash v. Independence [Mo. App.] 77 S. W. 104.

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(§ 12) *D. Ultra vires and unauthorized contracts.*—On contracts clearly ultra vires a municipality cannot be liable.[70] It cannot bind itself by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being legislatively authorized) is against public policy.[71] And unlike private corporations, the defense of ultra vires may be interposed as against an executed contract,[72] since any person dealing with them is conclusively presumed to know the limits of their powers.[73] No person can successfully plead ignorance to save himself from loss in dealing with a municipality as to matters expressly prohibited by its charter, nor as to any matter beyond the scope of corporate authority except in case his money or property has actually been used for legitimate corporate purposes. In that event, the court will afford a remedy to the extent of the corporate benefit, but no further.[74] But it is only when the subject-matter of the contract is clearly without the scope of its powers that the plea of ultra vires will be entertained,[75] and if the contract is not expressly prohibited,[76] or if it was within the scope of the city's authority but was ultra vires because illegally exercised, the city having received the benefit thereof may as against an innocent party be estopped to question its validity.[77] But no such estoppel can arise in favor of one who knowingly agrees to assist the municipality in the illegal exercise of its power.[78] A municipal corporation does not become liable for a debt by substituting the fiction of an implied contract for an express contract void for noncompliance with the terms of a statute not penal,[79] as where there was a noncompliance with terms of statute in awarding the contract,[80] or where the ordinance authorizing it was invalid because it embraced more than one subject.[81] That a contract is ultra vires in part will not necessarily invalidate the entire contract,[82] but an indivisible contract for an illegal period cannot be regarded as one for such period as would have been lawful.[83]

Unauthorized contracts cannot be supported by an estoppel,[84] but an officer's

70. Ft. Scott v. Eads Brokerage Co. [C. C. A.] 117 Fed. 51. Under 2 Acts 1883-4, p. 1318, c. 1494, and 3 Acts 1887-8, p. 170, c. 1071, the district trustees are without power to contract for water supply for fire protection and the district is not liable for water furnished for such purpose. South Covington Dist. v. Kenton Water Co. [Ky.] 78 S. W. 420. An ultra vires contract is no contract at all and is therefore not protected by the federal constitution. Westminster Water Co. v. Westminster [Md.] 56 Atl. 990.

71. South Covington Dist. v. Kenton Water Co. [Ky.] 78 S. W. 420.

72. Schneider v. Menasha, 118 Wis. 298, 95 N. W. 94; Ft. Scott v. Eads Brokerage Co. [C. C. A.] 117 Fed. 51; South Covington Dist. v. Kenton Water Co. [Ky.] 78 S. W. 420.

73. Schneider v. Menasha, 118 Wis. 298, 95 N. W. 94; South Covington Dist. v. Kenton Water Co. [Ky.] 78 S. W. 420; McKee v. Greensburg, 160 Ind. 378, 66 N. E. 1009; Ft. Scott v. Eads Brokerage Co. [C. C. A.] 117 Fed. 51; Jewell Belting Co. v. Bertha [Minn.] 97 N. W. 424.

74. Schneider v. Menasha, 118 Wis. 298, 95 N. W. 94.

75. Valparaiso v. Valparaiso City Water Co., 30 Ind. App. 316, 65 N. E. 1063. Compromise on water rates sustained. Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 Pac. 189.

76. Schneider v. City of Menasha, 118 Wis. 298, 95 N. W. 94; Balch v. Beach [Wis.] 95 N. W. 132.

77. Ft. Scott v. Eads Brokerage Co. [C. C. A.] 117 Fed. 51; Valparaiso v. Valparaiso City Water Co., 30 Ind. App. 316, 65 N. E. 1063; Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 Pac. 189. Money loaned in good faith for corporate purposes may be recovered though the corporation issued bonds therefor without authority. Fernald v. Gilman, 123 Fed. 797.

78. Ft. Scott v. Eads Brokerage Co. [C. C. A.] 117 Fed. 51.

79, 80. Moss v. Sugar Ridge Tp. [Ind. App.] 67 N. E. 460.

81. Iowa Code, 1873, § 489. Marion Water Co. v. Marion [Iowa] 96 N. W. 883.

82. Valparaiso v. Valparaiso City Water Co., 30 Ind. App. 316, 65 N. E. 1063; In re Board of Water Com'rs, 176 N. Y. 239, 68 N. E. 348. The inclusion of an option to purchase in a contract for water supply though the exercise of the option would have been ultra vires will not affect the validity of the contract. Centerville v. Fidelity T. & G. Co. [C. C. A.] 118 Fed. 332.

83. A contract between a city and a water company for water, on its face running forever and so ultra vires, will not be treated as one for a definite number of years—the period for which the company is chartered. Westminster Water Co. v. Westminster [Md.] 56 Atl. 990.

84. That the officer had previously made similar contracts will not estop the munic-

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contract without authority may be ratified.[85] If council alone can enter into contracts for public improvements the receipt, in silence, of the mayor's report of making the contract is not a ratification thereof.[86] There can be no ratification in the absence of knowledge by the city of the facts.[87]

Subsequent ratification by the legislature of an ultra vires contract is equivalent to previous authority where the parties acquiesced in the contract after such ratification.[88]

Only parties to the contract accepted and acted upon can question its validity.[89] If the contract was ultra vires, the city may, before it is acted upon, rescind it.[90]

(§ 12) *E. Effect of interest of officers in municipal contracts.*—Municipal officers cannot contract with the corporation[91] or become interested in any contract.[92] The motives actuating the purchase by an officer of claims against the municipality are immaterial.[93] An officer becomes interested by purchasing a claim arising out of a contract.[94] If a member of the council voted to award the contract to a concern in which he is interested, the resolution is void irrespective of whether his vote was necessary for its passage.[95] The municipality may recover money illegally received from it by one of its officers.[96]

§ 13. *Fiscal affairs and management.*[97]—Public funds and public credit can be devoted to public purposes only,[98] but it is proper to reimburse private persons,[99]

ipality from denying his authority to so contract. Wormstead v. Lynn, 184 Mass. 425, 68 N. E. 841. See Estoppel, § 4 (1 Curr. Law, 1136).

85. Evidence admissible to show contract by ratification. Detroit v. Grummond [C. C. A.] 121 Fed. 963.

86. A vote to close the contract does not authorize the mayor to enter into contract for the improvement. Marion Water Co. v. Marion [Iowa] 96 N. W. 883.

87. Mere allowance of a plumber's bill for connecting artesian well with water main is not sufficient to show knowledge that the well was private property. Wilson v. Mitchell [S. D.] 97 N. W. 741.

88. Contract by a fire company created by act of Maine legislature (Sp. Laws 1863. c. 262) ratified by c. 260, Sp. Laws 1887. Mayo v. Dover & F. V. Fire Co., 96 Me. 539. Ratification of contract of purchase of waterworks held valid though by the contract ratified the city must furnish water to a few persons outside of corporate limits which it was claimed would increase taxation. Id. Contract under ordinance invalid because of irregularity in its adoption held ratified by legislative act. Marion Water Co. v. Marion [Iowa] 96 N. W. 883.

89. Chicago Tel. Co. v. N. W. Tel Co., 199 Ill. 324, 65 N. E. 329. Irregularity in the exercise of the power where the party who received the contract is acting thereunder or that the party is not performing the conditions imposed cannot be collaterally raised by private parties. Cal. Reduction Co. v. Sanitary Reduction Works [C. C. A.] 126 Fed. 29.

90. McKee v. Greensburg, 160 Ind. 378, 66 N. E. 1009. Where, in an action against the city on the ground that it had refused to permit plaintiff to improve a street after accepting his bid, it appeared that the council afterward passed a resolution rescinding its action in accepting the bid, the burden was on plaintiff to show that jurisdiction had attached to make the improvement. Id.

91. Applied to village councilman accepting contract awarded. Stone v. Bevan, 88 Minn. 127, 92 N. W. 520. Under the laws of Minnesota (Gen. St. 1894, § 6666), a member of a village council cannot lawfully enter into a contract with the municipality for his own benefit, depending upon authority derived from a vote of such council. Such a contract is void, and money paid under it may be recovered for the village in a suit by a taxpayer. Id.

92. A contract made by a board of school trustees with the wife of one of its members, employing her to teach in the school over which it has supervision, is contrary to public policy and void under the laws of Idaho (Sess. Laws 1899, p. 96), the husband being pecuniarily interested in the contract. Nuckols v. Lyle [Idaho] 70 Pac. 101. Where plaintiff, through an agent, sold goods to the city, and, after plaintiff had forbidden him to collect therefor, the agent sold the claim to an alderman, payment by the city to the alderman is not a defense to a suit by plaintiff for the price of the goods, the purchase by the alderman being invalid under Texas Pen. Code, art. 264. But any part of the purchase price paid by the agent to plaintiff should be credited on the claim against the city. Tex. Anchor Fence Co. v. San Antonio, 30 Tex. Civ. App. 561, 71 S. W. 301.

93, 94. Tex. Anchor Fence Co. v. San Antonio, 30 Tex. Civ. App. 561, 71 S. W. 301.

95. Drake v. Elizabeth [N. J. Law] 54 Atl. 248. Interest held not such as would disqualify a member from voting to award a contract to a particular party. Hicks v. Long Branch Commission [N. J. Law] 54 Atl. 568.

96. Under contract with the municipality. Stone v. Bevans, 88 Minn. 127, 92 N. W. 520.

97. Presentation of claims and demands see post, § 15. Suing on same see post, § 16.

98. A municipality cannot loan its credit to purely private undertakings. An ordinance undertaking to build a city to pay

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or public agents,[1] if they have acted for, or have benefitted the municipality, and a moral or legal obligation to repay exists.[2] Municipal corporations may compromise claims for taxes.[3]

A village, newly created, may be given power to expend moneys raised by the town, from which it was erected.[4]

It is also a general rule that moneys specifically appropriated can be used for the contemplated purpose only; hence general judgments are payable only from the general fund.[5]

A tax payer may seek the aid of a court of equity and relief, by injunction, where the municipal authorities are about to issue illegal warrants or scrip, or to misappropriate public funds, or to abuse corporate powers,[6] or to prevent a municipal corporation from paying money from the public treasury without consideration,[7] and consequently, tax payers may interfere to prevent the recognition of an illegal claim, the obligation to pay the greater portion of which will otherwise fall on them.[8] The power of a court of equity to interfere in such cases is not affected by the fact that the claims have been reduced to judgments, where the judgments were obtained by fraudulent collusion, actual or constructive, on the part of municipal officers.[9]

When the charter requires an estimate and an appropriation for particular funds,[10] no debt can be created until that is done. Provisions for first ascertaining the existence of funds sufficient to pay a debt,[11] or for providing for creation of a fund for payment,[12] or forbidding debts in excess of current revenues,[13] in

water rentals to trustees of the bondholders of a water company, and pledging the taxing power to meet such payments, held ultra vires and void. Scott v. La Porte [Ind.] 68 N. E. 278.

99. It is a legitimate use of public funds to apply them in payment of a volunteer fire organization. New York Charter, § 722, held valid, and the comptroller not justified in refusing to pay. People v. Grout, 79 App. Div. [N. Y.] 61.

1. The municipality may reimburse expenses incurred and paid by an officer in an honest performance of his duties, and such reimbursement is not a donation of public funds. Does not contravene Const. art. 4, §§ 46, 47, or Rev. St. Mo. 1899, p. 2489. Police officer indemnified for judgment obtained against him for shooting a boy while trying to kill a wild steer running at large on city streets. State v. St. Louis, 174 Mo. 125, 73 S. W. 623.

2. It is an illegal donation of public moneys to pay damages for change of grade when there was no moral or legal liability to do so. People v. Phillips, 88 App. Div. [N. Y.] 560. This case discusses what is a moral obligation.

3. By taking deed of the property which was necessary for street purposes. Ostrum v. San Antonio, 30 Tex. Civ. App. 462, 71 S. W. 304.

4. Does not destroy local self government. Paye v. Grosse Pointe Tp. [Mich.] 96 N. W. 1077. Title of act held sufficiently broad. Id.

5. State v. Cottengin, 172 Mo. 129, 72 S. W. 498.

6. Inge v. Board of Public Works, 135 Ala. 187.

7, 8. Pleasants v. Shreveport, 110 La. 1046.

9. Balch v. Beach [Wis.] 95 N. W. 132.

10. It is proper to provide a general fund for the payment of claims which may arise, and for which it is impossible to estimate the exact amount which will be required. Id. Contract for the removal of garbage. Kelley v. Broadwell [Neb.] 92 N. W. 643.

11. For public improvements. Under Laws 1893, pp. 90, 92, §§ 108, 109, an ordinance for a public improvement, by a special assessment, without an ordinance that in the opinion of the council the general fund was in condition to pay the cost thereof is invalid, and there can be no recovery on tax bills issued to the contractor therefor. Sedalia v. Abell [Mo. App.] 76 S. W. 497.

12. An ordinance providing for the erection of a city hall to be paid for in cash, or by interest bearing obligations, for one quarter of the debt, payable in three annual installments, contravenes Texas Const. art. 11, § 5, providing that no debt shall be created unless provision is made to levy taxes, etc. Fourth Nat. Bank v. Dallas [Tex. Civ. App.] 73 S. W. 841. An indebtedness incurred by the city for the purchase of cemetery property is not such a debt as a city can incur without complying with the constitutional provision (Tex. Const. art. 11, §§ 5, 7), forbidding the creation of a debt by a city without providing at the same time for the annual levy of taxes sufficient to pay the interest thereon and to provide a sinking fund. Tyler v. Jester & Co. [Tex. Civ. App.] 74 S. W. 359. A constitutional provision (Civ. Code Ga. 1895, §§ 5894, 5897), requiring a municipal corporation to make provision for the payment of any debt it may incur, by providing for the assessment and collection of an annual tax sufficient to pay the principal and interest thereof, does not compel the collection of the tax when there are funds in the treasury, derived from other sources, which

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like manner, will invalidate the debt. A renewal of an existing obligation is not a new debt within such provisions,[14] but the renewal of a barred debt,[15] or renewal at an increased rate of interest,[16] or with an added condition for attorney's fees,[17] is. Debts made junior to current expenses are subject to the right of the municipality to determine what current expenses shall be incurred.[18] Statutes often except from such requirements, debts for "necessities";[19] or for "current or ordinary expenditures."[20]

Limitation of indebtedness.—A percentage limit based on taxable property is to be computed on the assessed value and not on the actual value of the property, where the two are not the same.[21] It is immaterial if an admitted excess is of indefinite amount.[22] A court will not compel an additional tax levy in excess of the statutory limitation for the satisfaction of judgments, for hydrant rentals, where the authorized tax for such purpose has been levied and collected.[23] Illegality reaches only the excess.[24] Equity will not compel the payment of municipal indebtedness, void at law, because in excess of the constitutional limitation.[25] Indebtedness in excess of the limit cannot be made good by ratification.[26] City officers are not personally liable for debts contracted by them, on behalf of the municipality, in excess of the constitutional limit.[27]

When the limit of indebtedness is not constitutional,[28] the legislature may

may be lawfully applied to the payment of the debt. Epping v. Columbus, 117 Ga. 263.

13. Under Louisiana Act 1877, No. 30, the city of New Orleans is without authority to incur indebtedness in excess of the current revenues, even for the erection of an electric light plant. State v. King, 109 La. 799.

14. (Tex. Const. art. 11, §§ 5, 7.) Tyler v. Jester & Co. [Tex. Civ. App.] 74 S. W. 359. A recital in an ordinance authorizing the issuance of renewal notes that they were issued for current expenses does not render the indebtedness prima facie valid. Id.

15, 16, 17. Tyler v. Jester & Co. [Tex. Civ. App.] 74 S. W. 359.

18. Under New Orleans Charter, Act No. 32, 1892, p. 39, § 2, judgments for debts of former years can be paid only after necessary expenses of the year have been met and what constitutes such expenses rests in the discretion of the municipal authorities. State v. New Orleans, 111 La. 374.

19. Contracts whereby municipal corporations make provision in advance for such prime necessities as light and water, and incur obligations therefor, to be met from current revenues do not fall within the provisions of statutes (Rev. St. La. 1876, § 2448) prohibiting them from contracting debts without providing for their payment. Blanks v. Monroe, 110 La. 944. The construction of water and electric light plants is a necessary expense within the meaning of the constitution of North Carolina (art. 7, § 7) providing that no municipal corporation shall contract any debt, except for the "necessary expenses" thereof, unless by vote of a majority of the voters therein, and the indebtedness therefor need not be approved by popular vote. Fawcett v. Mt. Airy [N. C.] 45 S. E. 1029.

20. Salaries of city officers are items of ordinary expenditure payable out of current revenues, and do not come within the provisions of the Texas constitution (art. 11, §§ 5, 7) requiring the creation of a sinking fund to pay municipal debts, and the levy of a tax for that purpose. Aldermen. Tyler v. Jester & Co. [Tex. Civ. App.] 74 S. W. 359. Salary of city marshal. Oak Cliff v. Etheridge [Tex. Civ. App.] 76 S. W. 602. So, also, is an indebtedness incurred for providing fire hydrants and water for fire protection, under Tex. Const. art. 11, §§ 5, 7 (Tyler v. Jester & Co. [Tex. Civ. App.] 74 S. W. 359) or for the erection of waterworks (Cain v. Wyoming, 104 Ill. App. 538).

21. City Water Supply Co. v. Ottumwa, 120 Fed. 309.

22. Where the contract provides for the payment of a definite sum which is beyond the debt limit, it is invalid, though a part of the liability is not definitely ascertainable. Contract construed, and held a contract to purchase light plant and within the constitutional inhibition of indebtedness. Baltimore & O. S. W. R. Co. v. People, 200 Ill. 541, 66 N. E. 148.

23. State v. Royse [Neb.] 98 N. W. 459. The levy of a tax under Neb. Ann. St. 1893, §§ 10698-10701, to satisfy a judgment, will not be enforced by mandamus, where such levy would exceed the debt limit, but the court will look behind the judgment to ascertain if it was for a debt which could be incurred beyond the limit. State v. Royse [Neb.] 98 N. W. 459.

24. A tax for the payment of such excess cannot be collected. Baltimore & O. S. W. R. Co. v. People, 200 Ill. 541, 66 N. E. 148. Bonds issued in excess of the statutory limit of indebtedness are void only as to such excess. Schmitz v. Zeh [Minn.] 97 N. W. 1049.

25, 26. Balch v. Beach [Wis.] 95 N. W. 132.

27. Lough v. Estherville [Iowa] 98 N. W. 308.

28. S. Dak. Const. art. 13, § 4, amended 1896, gives a city power to incur an additional indebtedness for providing water, regardless of existing indebtedness for other purposes. Wells v. Sioux Falls [S. D.] 94 N. W. 425.

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change or suspend it,[29] but the city itself cannot exercise such power unless the legislature has clearly delegated it.[30]

Existing indebtedness is reckoned by including the amount of actual indebtedness, and accrued interest,[31] and excluding bonds authorized but not issued,[32] the cost of improvements to be paid for by taxation or assessment.[33] Bonds and the debt which thay are issued to pay should not both be included.[34] A "debt" within the provisions limiting a legal amount of indebtedness includes all obligations which are a burden on the municipality, and which it is itself bound to pay.[35] If the city obligates itself to pay, no matter what its revenues from special assessments, a debt is created, which falls within the constitutional inhibition, but if it simply appropriates a part of its revenues and pledges them to the payment of the obligation, or if it simply undertakes, as a trustee or agent, to collect these assessments and apply them on the work without liability on its part for anything further, then no debt is created,[36] nor is there any, where such assessments and the retiring of other obligations meet the entire new obligation.[37] The fact that there is no provision, other than for a reassessment, to relieve the city from contingent liability where the assessment is declared invalid, does not alter the rule.[38] The fact that a city, already indebted in excess of the constitutional limit, has a part of the money necessary to carry out a contract for the construction of a water-

29. A municipality may be authorized by the legislature to exceed the debt limit to supply water, light, or sewers. Utah Const. art. 14, § 3, vests the legislature with power to authorize cities to increase their indebtedness for certain purposes. State v. Quayle, 26 Utah, 26, 71 Pac. 1060.

30. The provisions of the laws of Minnesota (Gen. Laws 1902, c. 33), allowing cities to issue bonds for the erection of armories do not authorize cities framing their own charters, under Gen. Laws 1902, c. 33, to incur an indebtedness for such armories in excess of the limit fixed by the latter act. Beck v. St. Paul, 87 Minn. 381, 92 N. W. 328. Section 10, c. 351, Gen. Laws, Minn. 1899, limiting the indebtedness of certain cities, is not in violation of the constitution, authorizing the classification of cities on the basis of population (Const. art. 4, § 36), nor does the fact that it provides for the payment of existing floating indebtedness or for water and light plants in excess of that limit render it invalid. Id. The restrictions upon the right of municipal corporation to increase its indebtedness under the laws of Minnesota (Laws 1895, c. 8, § 126, p. 50), cannot be enlarged by a two-thirds vote of the electors. The submission to the voters of the issuance of bonds (sec. 126, Proviso 4) provided for does not give a right to increase such indebtedness above such limit. Purcell v. East Grand Forks [Minn.] 98 N. W. 351.

31. Not interest to accrue. Epping v. Columbus, 117 Ga. 263.

32, 33, 34. Redding v. Espten Borough [Pa.] 56 Atl. 431.

35. Grunewald v. Cedar Rapids, 118 Iowa, 222, 91 N. W. 1059.

36. Grunewald v. Cedar Rapids, 118 Iowa, 222, 91 N. W. 1059. A contract requiring the city to pay for a company's lighting plant, as rental, constitutes an indebtedness within the Illinois Constitution (art. 9, § 12) prohibiting cities from becoming indebted in any manner, or for any purpose in excess of a certain fixed limit. Baltimore & O. S. W. R. Co. v. People, 200 Ill. 541, 66 N. E. 148. For water supply. Cain v. Wyoming, 104 Ill. App. 538. Waterworks for public use to be paid for out of a fund created by a special tax. Iowa Code, §§ 742-745, 895, are not unconstitutional as authorizing an increase of indebtedness. Swanson v. Ottumwa, 118 Iowa, 161, 91 N. W. 1048, 59 L. R. A. 620. A sewer tax authorized under Iowa Code, § 978, is not such a debt. It is not an obligation of the city which is only required to levy, collect and pay it over. Grunewald v. Cedar Rapids, 118 Iowa, 222, 91 N. W. 1059. Local improvements to be paid for by special funds created by assessment. Portland City Charter, 1903, §§ 400, 401 does not violate Const. art. 11, § 5, requiring acts of incorporation to restrict debts. Kadderly v. Portland [Or.] 74 Pac. 710. The issuance of bonds by a city in payment for street improvements, the cost of which was assessed against abutting owners, the assessment when collected to liquidate bonds, did not create a debt, within the meaning of the Kentucky Constitutional provision (§ 157) limiting municipal indebtedness. Catlettsburg v. Self, 25 Ky. L. R. 161, 74 S. W. 1064.

37. Warrants drawn on drainage assessments in payment of the purchase of a drainage plant, as authorized by statute, held not to create a new indebtedness, since they covered not only the price of the property, but the settlement of an existing indebtedness of the city to the previous owners upon assessments theretofore made against it, as the owner of streets and other public property, which had been reduced to judgments, and that the holders of the warrants were entitled to enforce the collection of such assessments for their benefit. Under La. Act No. 16 of 1876, authorizing New Orleans to purchase drainage plant of the Miss. Gulf Ship Cor. U. S. v. Capdevielle [C. C. A.] 118 Fed. 809.

38. Kadderly v. Portland [Or.] 74 Pac. 710.

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works system, and may be able to collect the rest by the time the obligation matures, does not alter the fact that such contract creates an indebtedness within the constitutional inhibition and hence is invalid.[39] Debts to be paid out of current funds are not included.[40] Rentals for water hydrants for fire purposes, payable at stated times and out of current funds cannot be included.[41] Money and assets in the treasury, and current revenues collected or in process of immediate collection, should be counted against the indebtedness of a municipal corporation in determining whether the constitutional limit has been exceeded.[42] Taxes voted or levied, should not be offset until they have been duly spread on the tax roll, and that has been placed in the hands of the proper municipal officer with authority to collect them.[43] Warrants drawn on the treasury are evidences of existing indebtedness merely, to be counted as such.[44]

Where elections to approve some fiscal policy are to be held separately from elections bearing on extraneous matters,[45] it is better practice to separate them also from elections to approve some plan of improvement to which the proposed fiscal policy is incident.[46]

The issue of municipal bonds, and the creation of indebtedness so evidenced, have already been treated in a separate article.[47] Certificates covering an existing indebtedness and designed merely to extend time of payment have been held not to be bonds which can only be issued in the manner of bonds.[48]

The manner in which municipalities must exercise their taxing power is reserved for treatment elsewhere.[49]

§ 14. *Torts and crimes.*—A municipal corporation is not liable for torts committed in the exercise of public or governmental functions,[50] as in exercising police powers,[51] for the protection of health.[52] For failure to exercise charter powers to abate nuisances,[53] or regulate matters of municipal concern,[54] no liability exists. A municipality is not liable for its failure to enact or enforce ordinances, nor for repealing them or suspending their operation.[55]

39. City Water Supply Co. v. City of Ottumwa, 120 Fed. 309.

40. Redding v. Espten Borough [Pa.] 56 Atl. 431.

41. Centerville v. Fidelity T. & G. Co. [C. C. A.] 118 Fed. 332.

42, 43, 44. Balch v. Beach [Wis.] 95 N. W. 132.

45, 46. Cain v. Smith, 117 Ga. 902. See full treatment in Municipal Bonds, ante, p. 931.

47. Municipal Bonds.

48. May be authorized by resolution or order entered on the minutes. Tyler v. Jester & Co. [Tex. Civ. App.] 74 S. W. 359.

49. Local assessments is discussed in Public Works and Improvements, other taxation in Taxes.

50. Enforcement of bicycle license ordinance held governmental. Simpson v. Whatcom [Wash.] 74 Pac. 577. Maintenance of lateral pipe from main to fire hydrant held not governmental. Dunston v. New York, 91 App. Div. [N. Y.] 355. For injuries sustained by one falling into a ditch, in a highway, dug to take up disused water mains, the town was held to act in a public capacity, though its purpose was not maintenance of the highway, but to sell the pipe. Stockwell v. Rutland, 75 Vt. 76.

51. As for acts done in the enforcement of licenses on bicycles. For prosecution under invalid ordinance regulating, the city it not liable. Simpson v. Whatcom [Wash.] 74 Pac. 577.

52. As for injuries resulting from the enforcement of an ordinance to prevent the spread of contagious diseases. The officer however acts at his peril. Verdon v. Bowman [Neb.] 97 N. W. 229. As for negligent acts of officers in charge of a pest house in the care of persons taken thereto, nor does Ky. St. 1903, § 6, giving cause of action for wrongful death, confer such right of action. Twyman's Adm'r v. Board of Councilmen [Ky.] 78 S. W. 446. As for negligent removal of weeds in an alley. McFadden v. Jewell, 119 Iowa, 321, 93 N. W. 302, 60 L. R. A. 401.

A municipality is not liable for the value of property destroyed by mistake on the order of its health officer. The health officer is personally liable in such cases. Lowe v. Conroy [Wis.] 97 N. W. 942.

53. As to pass ordinance for the prevention of a nuisance. Arnold v. Stanford, 24 Ky. L. R. 626, 69 S. W. 726. The failure of a corporation to exercise charter power to abate nuisances not rendering streets unsafe does not give persons injured a private action against the city. Miller v. Newport News [Va.] 44 S. E. 712; Dalton v. Wilson, 118 Ga. 100.

54. It is not any part of the duty of a municipal corporation to formulate rules respecting the performance of labor on its public works, in order to insure safety. Sullivan v. Rome, 86 App. Div. [N. Y.] 107.

55. The suspension, during a political campaign, of an ordinance prohibiting the discharge of fireworks in a city, does not

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But it is liable for torts committed in the performance of non-governmental municipal functions, or when acting in a private capacity.[56] Such is the case when carrying on public works for pecuniary profit,[57] or purely corporate purposes.[58] Negligence in the operation of public service plants is measured by a higher degree of care than that required respecting highways.[59] For entering on a private way, and making improvements on the supposition that it was a public way, the city is responsible in damages, or may be compelled to restore the original condition.[60]

In the exercise of a power for general convenience, there can be no recovery by an individual who failed to derive expected benefits.[61]

Where it is chargeable, the corporation can be held for the torts of its officers only when the act is within the scope of its powers,[62] or under express authority,[63] or ratified, or done in good faith pursuant to some general authority given,[64] and not where the act is ultra vires.[65] The negligent administration of governmental functions by officers is not imputed to the city,[66] nor is the city liable for acts of one under a permit to do certain work.[67] Municipal corporations liable for injuries resulting from negligent construction or care of streets[68] cannot avoid liability on the ground that the officers neglected their duty,[69] nor because an independent

make the city liable in damages for the death of an individual caused by the explosion of fireworks during a political celebration. Landau v. New York, 90 App. Div. [N. Y.] 50.

56. Simpson v. Whatcom [Wash.] 74 Pac. 577. As in the collection of refuse and waste materials, and dumping the same so that fire broke out. Denver v. Porter [C. C. A.] 126 Fed. 288. If a sewer maintained by it constitutes a nuisance it may be held for resulting damages. Dumping garbage into manholes, with perforated covers which allowed escape of noxious odors. Kolb v. Knoxville [Tenn.] 76 S. W. 823.

57. Henderson v. Kansas City, 177 Mo. 477, 76 S. W. 1045.

58. A city is liable for the negligent maintenance of a lateral water pipe connecting a fire hydrant, where the main pipe was used for all purposes of a city water supply. Dunston v. New York, 91 App. Div. [N. Y.] 355. The maintenance of a hydrant for fire purposes and from which water was sold for street sprinkling purposes is not solely an exercise of the governmental power. Chicago v. Selz, 202 Ill. 545, 67 N. E. 386.

59. It is bound to know whether an electric plant was reasonably safe. Owensboro v. Knox's Adm'r, 25 Ky. L. R. 680, 76 S. W. 191.

60. The abutter may sue in equity to set aside an assessment and for a restoration. Culver v. Yonkers, 80 App. Div. [N. Y.] 309.

61. As where the sewer constructed did not afford adequate drainage to an individual. Harrington v. Woodbridge Tp. [N. J. Law] 56 Atl. 141.

62. Held liable for acts of officers in constructing sewers, though outside city limits (Langley v. City Council of Augusta, 118 Ga. 590); as where the superintendent of streets, after termination of right to do so, removed gravel from a lot of land (Hunt v. Boston, 183 Mass. 303, 67 N. E. 244). Negligent acts of the city engineer in the improvements of streets. Normile v. Ballard [Wash.] 74 Pac. 566.

63. As for trespass in laying out highway by order of the council. Hathaway v. Osborne [R. I.] 55 Atl. 700. In actions to recover for injuries resulting from the exercise of political powers, the petition must aver an ordinance or resolution authorizing or ratifying the act, since the city can in them act only by its council. Arnold v. Stanford, 24 Ky. L. R. 626, 69 S. W. 726. Declaration held to sufficiently aver authorization of tortious assault without stating details. Wallace v. Newark [N. J. Law] 55 Atl. 1078. Demurrer held to admit authority of agents and that acts were not ultra vires. Id.

64. Filling land with soil. O'Donnell v. White, 24 R. I. 483.

65. As for trespass in entering lands, and connecting the owner's artesian well thereon with the city water mains, nor can the tort be waived and recovery be had on an implied contract for use and occupation. Wilson v. Mitchell [S. D.] 97 N. W. 741. Person injured by a fire department wagon while participating in a parade, as directed by the council, the council not being authorized to make the order. Blankenship v. Sherman [Tex. Civ. App.] 76 S. W. 805. Injuries to property from the erection of a pest house within corporate limits in violation of Ky. St. § 3909. Arnold v. Stanford, 24 Ky. L. R. 626, 69 S. W. 726. Torts of a street superintendent on lands not abutting the street. Tyler v. Revere, 183 Mass. 98, 66 N. E. 597.

66. Twyman's Adm'r v. Board of Councilmen [Ky.] 78 S. W. 446.

67. For negligent acts of one constructing a building on private property, under permit, the city cannot be held liable. Copeland v. Seattle [Wash.] 74 Pac. 582.

68. Cities incorporated under the general laws of the state. Moreton v. St. Anthony [Idaho] 75 Pac. 262.

69. If the city had notice of the defective condition of culvert. Clair v. Manchester [N. H.] 55 Atl. 935.

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contractor was at fault.[70] For torts committed in the execution of powers conferred on a board created by general act, and from which the municipality, as such, received no direct advantage, it cannot be held liable, and this though the city acquiesced therein.[71] The city may stipulate away its liability to a contractor for errors of city officials.[72] If ultra vires, there can be no waiver of tort to sue on an implied contract.[73]

The liability for property injured by mobs is statutory.[74]

Generally only compensatory damages can be recovered against a municipality.[75]

A city may be *indicted* only for its purely corporate non-governmental acts.[76]

§ 15. *Claims and demands.*—This section relates to claims and demands but not to the subject-matter thereof nor to those liabilities incurred in particular functions.[77] If a municipality is given a specific remedy for the collection of particular claims, the remedy is exclusive.[78]

Where it is provided that claims against municipal corporations shall first be presented, it is generally held that presentment is a condition precedent to suit,[79] that the presentment must be in the prescribed form and manner and particularity,[80] on the proper officers,[81] by the proper person,[82] and within the prescribed time[83] unless the failure to do so is excused for good cause,[84] or the city has already

70. Anderson v. Fleming, 160 Ind. 597, 67 N. E. 443.

71. Board for the inspection of buildings. Murray v. Omaha [Neb.] 92 N. W. 299.

72. Surveyor giving wrong grades. Becker v. New York, 176 N. Y. 441, 68 N. E. 855.

73. Wilson v. Mitchell [S. D.] 97 N. W. 741.

74. Under a statute making the city liable for injury to or destruction of property by a mob, the city was held liable irrespective of its efforts to prevent destruction. Chicago v. Pennsylvania Co. [C. C. A.] 119 Fed. 497. Evidence held insufficient as to damages sustained by mob. Fink v. New Orleans, 110 La. 84.

75. Ostrom v. San Antonio [Tex. Civ. App.] 77 S. W. 829.

76. Cannot be indicted for permitting a nuisance to be continued on private property and created by individuals. Georgetown v. Com., 24 Ky. L. R. 2285, 73 S. W. 1011; Board of Councilmen v. Com., 25 Ky. L. R. 311, 75 S. W. 217.

77. See Highways and Streets, 2 Curr. Law, 177, and like titles treating of that in respect whereof liability arises. Liability for keep and custody of city prisoners see Sheriffs and Constables; Charitable and Correctional Institutions, 1 Curr. Law, 507.

78. Rochester v. Gleichauf, 40 Misc. [N. Y.] 446.

79. Smith v. New York, 88 App. Div. [N. Y.] 606; Goddard v. Lincoln [Neb.] 96 N. W. 273. As a claim for fire apparatus sold the city [Bessemer city charter, § 62]. Rumsey & Co. v. Bessemer [Ala.] 35 So. 353. Under Duluth charter, § 80, an action on a claim will not lie until the provisions therein have been followed. State v. District Court [Minn.] 97 N. W. 132. A claim for damages must be presented and action commenced within the prescribed time. Ulbrecht v. Keokuk [Iowa] 97 N. W. 1082. Eau Claire city charter, c. 7, §§ 22-25, requires all claims to be filed with the clerk and in case of disallowance by the council an appeal to the circuit court may be taken. Morrison v. Eau Claire, 115 Wis. 538, 92 N. W. 280.

80. Sufficiency of presentment of claim for tort. Stoors v. Denver [Colo. App.] 73 Pac. 1094. Sufficiency of form of notice of claim for injuries resulting from defective sidewalk. Olcott v. St. Paul [Minn.] 97 N. W. 879. A claim for damages for personal injuries is not within Comp. Laws 1897, § 2754, requiring claims to be itemized. Hunter v. Ithaca [Mich.] 97 N. W. 712.

81. Notice of claim for damages resulting from defective condition of a street under control of the park board is sufficient if given to the city council. Kleopfert v. Minneapolis [Minn.] 95 N. W. 908. In New York city, notice of the claim must be served on the comptroller as well as on the corporation counsel. 3 Laws 1897, p. 92, c. 378, § 261, did not affect in any way Laws 1886, p. 801, c. 572. Smith v. New York, 88 App. Div. [N. Y.] 606.

82. Presentment by the assignor is sufficient to the maintenance of the action by the assignee. Lamson v. Marshall [Mich.] 95 N. W. 78.

83. Pub. Act 1899, p. 235, No. 155, limiting time to sue for personal injuries did not repeal Local Acts 1897, p. 1116, No. 475, c. 16, § 2, fixing time for presentation of such claims against municipal corporations. Woodworth v. Kalamazoo [Mich.] 97 N. W. 714. Claims for damages for personal injuries must be presented within the prescribed time. Local Acts 1897, p. 1116, No. 475, c. 16, § 2, should be construed as one paragraph. Id.

84. Noncompliance with the provision of presentment is excused by the fact that the claimant was incapacitated for the time as a result of the injury. Ehrhardt v. Seattle [Wash.] 74 Pac. 827. Under a statute requiring notice as a condition precedent to the liability therein created, **resulting incapacity is not an excuse** for failure to present the claim within the statutory time. Schmidt v. Fremont [Neb.] 97 N. W. 830.

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made notice or claim useless,[85] but the rule of presentment does not apply to suits in equity.[86]

Failure to present a claim within the time may bar the action,[87] and in absence of express authority officers cannot remove the bar;[88] but it is their duty to plead the statute of limitations.[89] Defects in the notice however may be waived,[90] but not an untimely presentment.[91] If the city unreasonably delays a decision on a disputed claim, suit may be brought.[92]

Audit and approval.—In Minnesota, New York, and Pennsylvania, auditing officers are held to act judicially in auditing claims,[93] but in Michigan it is held that they act ministerially.[94] The audit of an illegal claim, however, will not estop the city.[95]

Interest.—A claim bears interest from the time of presentment.[96]

Warrants and judgments.—Warrants delivered to an ostensible assignee but not bearing the assignor's indorsement import notice to subsequent transferee.[97] The payee may reach them in the subsequent transferee's hands.[98] A municipality cannot plead limitations against a warrant unless it shows that the fund provided for its payment has been in existence.[99] The holder of a warrant payable from a special fund may by mandamus compel assessment to create the fund.[1] In the enforcement of judgments of the national courts against municipal corporations, the writ of mandamus is the legal substitute for the writ of execution, and it is properly directed to the officers whose duty it is to see that judgments are paid.[2]

Only property held for profit, commerce, or investment, is subject to execution.[3] The municipality can be compelled to pay a general judgment only from the general fund and not a fund created for a special purpose.[4]

§ 16. *Actions by and against. A. In general.*[5]—Actions and prosecutions

85. The filing of a claim for illegal taxes paid under protest is not a condition precedent to an action to recover. Omaha v. Hodgskins [Neb.] 97 N. W. 346.

86. As to restrain pollution of water. Sammons v. Gloversville, 175 N. Y. 346, 67 N. E. 622.

87. County Board of Education v. Greenville, 132 N. C. 4. Based on a statutory liability within the required time bars the action. Morrison v. Eau Claire, 115 Wis. 538, 92 N. W. 280. As a claim based on a statutory liability for injuries resulting from a defective sidewalk. Schmidt v. Fremont [Neb.] 97 N. W. 830.

88. Wurth v. Paducah, 25 Ky. L. R. 586, 76 S. W. 143; Trowbridge v. Schmidt [Miss.] 34 So. 84. Claim for damages for tort. Van Auken v. Adrian [Mich.] 98 N. W. 15.

89. Trowbridge v. Schmidt [Miss.] 34 So. 84.

90. Retention of a defective notice will not affect a waiver neither party acting thereon. Chamberlain v. Saginaw [Mich.] 97 N. W. 156.

91. The mere acceptance of a claim will not waive the objection that it was not presented within the required time and ordinance requiring bills and accounts to be presented at a specified time held not to operate as a waiver of bar of claim for personal injuries. Kalamazoo v. Woodworth, [Mich.] 97 N. W. 714.

92. A stipulated remedy by referring disputes to certain officers is waived if the officers unreasonably delay decision. Johnson v. Albany, 86 App. Div. [N. Y.] 567. From May 26 to Sept. 5 held too long. Id.

93. The allowance of a claim by the board of audit is conclusive in a collateral proceeding. The objection of illegality of the claim raised on a proceeding by mandamus to compel payment is not a collateral attack. People v. Clarke, 79 App. Div. [N. Y.] 78. The authorized officers in auditing claims act quasi judicially. State v. District Court [Minn.] 97 N. W. 132. The audit of the controller is conclusive. Audit of accounts of health officer under P. L. 37. Com. v. Patterson, 206 Pa. 522.

94. In auditing claims the officer acts ministerially and not judicially. Under Const. art. 4, § 31, the legislature is without power to audit accounts and compel payment. Fitch v. Board of Auditors [Mich.] 94 N. W. 952.

95. People v. Clarke, 79 App. Div. [N. Y.] 78.

96. Sweeny v. New York, 173 N. Y. 414, 66 N. E. 101, reviewing many cases; O'Keeffe v. New York, 176 N. Y. 297, 68 N. E. 588.

97. Casey v. Lincoln Nat. Bank, 83 App. Div. [N. Y.] 91.

98. Casey v. Pilkington, 83 App. Div. [N. Y.] 91.

99. Board of Com'rs v. Clarke [Okl.] 70 Pac. 206.

1. Turner v. Guthrie [Okl.] 73 Pac. 283.

2. U. S. v. Saunders [C. C. A.] 124 Fed. 124.

3. Kerr v. New Orleans [C. C. A.] 126 Fed. 920.

4. State v. Cottengin, 172 Mo. 129, 72 S W. 498.

5. Actions for personal injuries on defective streets see Highways and Streets, §

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should be in the name of the municipality[6] and may be amended so as to so run.[7] Since it is the duty of a municipality to protect its streets, it may sue to determine the right of occupancy or molestation.[8]

A city is not immune from suits against it like a state.[9] In creating a liability against municipalities, the legislature may properly prescribe the remedy.[10] If the corporate existence of a city is unchanged by charter legislation, the suit does not abate.[11] Presentment of the claim sued on[12] in the manner required must be averred[13] though presentment may be set up by amendment.[14] A copy of the notice need not be attached.[15] The complaint must allege that the statutory time had expired before the action was brought,[16] and in case of certain contracts that an appropriation was made to pay the same.[17] If the contract on its face is not necessarily beyond its corporate powers, the plaintiff need not aver authority to make it.[18]

The defense of ultra vires must be pleaded[19] for a demurrer may admit power and authority.[20]

The assignee of a part of a claim against a town may sue to recover,[21] and the particular boards or officers whose action is involved are not necessary parties to actions against the municipality.[22]

In an action by a warrant-holder which was drawn against a particular fund for its diversion after drawing and presentment of the warrant and existence of the fund have been proved, the defendant has the burden of overcoming the prima facie case.[23] The corporation has the burden of proving that the claim is barred by

15, 2 Curr. Law, 177. See like titles for like kinds of actions—Bridges; Sewers and Drains; etc.

6. Const. § 123 directing prosecutions to be in the name of the commonwealth does not preclude prosecution for violation of ordinance in the name of a city. Louisville v. Wehmhoff, 25 Ky. L. R. 995, 76 S. W. 876.

7. A petition by a public attorney in his own name but in behalf of the corporation may be amended by striking his name from the caption and the allegations describing his relation to the suit. Lake Shore & M. S. R. Co. v. Elyria [Ohio] 69 N. E. 738.

8. Ray v. Colby [Neb.] 97 N. W. 591. The city or an officer may sue to test the right to maintain an obstruction on a street in the nature of an improvement with the city's permission. Chicago Tel. Co. v. N. W. Tel. Co., 199 Ill. 324, 65 N. E. 329.

9. Palatka Waterworks v. Palatka, 127 Fed. 161.

10. Eau Claire charter, c. 7, § 22, requiring actions to be maintained by appeal to the circuit court from disallowance so far as it applies to claims for injuries from defective sidewalks under Rev. St. 1898, § 1239, is not unconstitutional. Morrison v. Eau Claire, 115 Wis. 538, 92 N. W. 280. Nor is it rendered invalid by chapter 1, § 1, of the charter giving the city power to sue or be sued. Id. Nor is it invalid because it fails to provide a scheme for practice. Id. Duluth charter, § 80, providing for a taxpayers' appeal to the district court from the allowance of a claim against the city is due process of law. State v. District Court [Minn.] 97 N. W. 132.

11. The Consolidation Act being a compilation of laws relating to New York City, did not interrupt pending tax proceedings. Ely v. Azoy, 39 Misc. [N. Y.] 669.

12. Morrison v. Eau Claire, 115 Wis. 538, 92 N. W. 280. Claim for damages. Bigelow v. Los Angeles, 141 Cal. 503, 75 Pac. 111; Goddard v. Lincoln [Neb.] 96 N. W. 273.

13. The objection may be raised by demurrer since in such case the complaint does not state a cause of action. Morrison v. Eau Claire, 115 Wis. 538, 92 N. W. 280. On the comptroller in New York City. Smith v. New York, 88 App. Div. [N. Y.] 606.

14. El Paso v. Ft. Dearborn Nat. Bank [Tex. Civ. App.] 71 S. W. 799.

15. Act Dec. 20, 1899. Columbus v. McDaniel, 117 Ga. 823.

16. Laws 1897, p. 453, c. 414, § 322, prohibits actions for injuries until 30 days have elapsed since the notice was given. Since a complaint failing to so state does not state a cause of action the defendant may without demurrer raise the objection. Thrall v. Cuba, 88 App. Div. [N. Y.] 410.

17. Claim for services. De Wolf v. Bennett [Neb.] 91 N. W. 855.

18. As a contract of employment to superintend construction of a sewer. Newport News v. Potter [C. C. A.] 122 Fed. 321. Held not necessary to set out ordinance in complaint in action on contract. Valparaiso v. Valparaiso Water Co., 30 Ind. 316, 65 N. E. 1063.

19. Ryan v. Lone Tree [Iowa] 98 N. W. 287.

20. To make assault on plaintiff. Wallace v. Newark [N. J. Law] 55 Atl. 1078.

21. The town having provided for its payment and having notice of the assignment. Bennett v. Ogden, 81 App. Div. [N. Y.] 455.

22. School board to suit to enjoin the enforcement of an order changing text books. Madden v. Kinney, 116 Wis. 566, 93 N. W. 535.

23. Pine Tree Lumber Co. v. Fargo [N. D.] 96 N. W. 857.

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limitations.[24] Any citizen has an interest sufficient to support quo warranto against the municipal organization.[25] The particular in which an act is "inoperative, null, and void" should be averred.[26]

In proceedings or actions concerning official duties, if the officer had not acted in bad faith, or with malice or with gross negligence, costs should not be charged against them.[27]

(§ 16) *B. Suits in equity.*—Courts of equity have jurisdiction to restrain the proceedings of municipal corporations where those proceedings encroach on private rights and are productive of irreparable injury.[28]

Any taxpayer or person injuriously affected may sue to restrain[29] the misuse of public property[30] or funds,[31] as payments under void contracts,[32] or performance of a contract which is ultra vires,[33] or the violation of an ordinance.[34] A nuisance though resulting from a public work may be abated at the suit of the person affected.[35]

The right to restrain the method of exercise of a lawful power may be lost by laches.[36]

To a suit to restrain the making of a contract on the ground that it would exceed the constitutional limit of indebtedness, the party contracting is not an indispensable party.[37]

24. Tyler v. Jester [Tex. Civ. App.] 74 S. W. 359.

25, 26. Whitehurst v. Jones, 117 Ga. 803.

27. O'Connor v. Walsh, 83 App. Div. [N. Y.] 179.

28. As where the officers wrongfully refuse to allow a building to be repaired after damage by fire. Roanoke v. Bolling [Va.] 43 S. E. 343.

29. The petitioner in equity to protect public rights must allege some special injury. Landes v. Walls, 160 Ind. 216, 66 N. E. 679; Davidson v. Baltimore, 96 Md. 509; Cole v. Atlantic City [N. J. Law] 54 Atl. 226.

30. Sugar v. Monroe, 108 La. 677, 59 L. R. A. 723. A taxpayer to restrain the use of particular property for school purposes. Davidson v. Baltimore, 96 Md. 509. To restrain the use of city building for entertainments for private profit though petitioner is the owner of an opera house, he must show some other especial interest. Amusement Syndicate Co. v. Topeka [Kan.] 74 Pac. 606.

31. Inge v. Board of Public Works, 135 Ala. 187. Taxpayers may sell to restrain the enforcement of a judgment against the municipality wherein by reason of fraud on the part of the officers invalid claims were included. Evidence held sufficient to show fraudulent collusion. Balch v. Beach [Wis.] 95 N. W. 132. Resolution to employ counsel to assist in prosecuting pending litigation notwithstanding that under ordinance his fees were to be paid from the salary of the city solicitor. Cole v. Atlantic City [N. J. Law] 54 Atl. 226.

32. As a contract by a school trustee to employing his wife as a teacher. Nuckols v. Lyle [Idaho] 70 Pac. 401.

33. Scott v. La Porte [Ind.] 68 N. E. 278. The taxpayer's remedy is by injunction to restrain the performance of an invalid contract. Inge v. Board of Public Works, 135 Ala. 187.

34. An adjoining owner showing irreparable injury may enjoin the erection of building in violation of a municipal ordinance. Chimine v. Baker [Tex. Civ. App.] 75 S. W. 330.

Note. "It is true that an act will not be restrained by injunction merely because it is illegal, but when it is shown to be dangerous to life, detrimental to health, or seriously injurious to property, it will be restrained; and, while it has been held that the erection of a building will not be enjoined merely because it is prohibited by city ordinance, an injunction will be granted when allegations and proof show the infliction of injury for which there is no adequate legal remedy. Weakley v. Page (Tenn.) 53 S. W. 551, 46 L. R. A. 552; State v. Patterson (Tex. Civ. App.) 37 S. W. 478; York v. Yzaguairre (Tex. Civ. App.) 71 S. W. 563. There is some authority to the effect that an injunction will not lie to abate a nuisance that is not one in itself, independent of statutory declaration; but the weight of authority, we think, favors a different and more liberal doctrine, and permits restraint by injunction against statutory nuisances where it appears that material injury will be inflicted by them. In the case of Bank v. Sarlls (Ind.) 28 N. E. 434, 13 L. R. A. 481, 28 Am. St. Rep. 185, the subject under consideration is discussed, and it is said: 'When it is shown that the erection of a building, if permitted, will be in express violation of a valid municipal ordinance, although it would not be a nuisance per se, an individual who shows such fact, and shows, in addition, that its erection will work special and irreparable injury to him and to his property, is entitled to relief by injunction.' The same principle is enunciated in Blanc v. Murray, 36 La. Ann. 162, 51 Am. Rep. 7; McCloskey v. Kreiling (Cal.) 18 Pac. 433; King v. Davenport, 98 Ill. 305, 38 Am. Rep. 89; and Kaufman v. Stein (Ind.) 37 N. E. 333, 46 Am. St. Rep. 368." From Chimine v. Baker [Tex. Civ. App.] 75 S. W. 330.

35. As where a reservoir caused pools of stagnant water to stand on land of adjoining owner. Ennis v. Gilder [Tex. Civ. App.] 74 S. W. 585.

36. Parker v. Concord, 71 N. H. 468; Schmitz v. Zeh [Minn.] 97 N. W. 1049.

37. City Water Supply Co. v. Ottumwa, 120 Fed. 309.

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NAMES, SIGNATURES, AND SEALS.

§ 1. Names (988).
§ 2. Signatures (989).
§ 3. Seals (989).

§ 1. *Names.*[1]—Where a christian name is left blank in an instrument, it may be supplied by parol evidence.[2]

The omission of the full christian name of a party in pleadings may be fatally defective;[3] but a mere mistake in the spelling of a christian name is not a fatal defect if the person is identified as the proper party.[4] An abbreviation of a corporate name is a valid signature.[5]

It cannot be said as a matter of law that the same name appearing more than once in allied transactions is of the same person.[6]

Business names.—By statute, in some states, persons carrying on business under an assumed name other than the real names of the parties thereto must file a certificate setting forth the business name and the names of the persons thereto.[7]

Idem sonans.—It does not constitute a variance in legal documents or proceedings that names are not spelled the same if they have substantially the same sound.[8] If the names are necessarily pronounced substantially alike, the court may decide as a matter of law that they are idem sonans;[9] but if they do not, the question whether they are idem sonans is for the jury to decide.[10]

Property in name.—A right in a name may be protected by injunction[11] where the name used by the defendant is so similar to that of plaintiff as to be calculated to deceive the public.[12]

1. This section treats of names only in a general way; for a more specific treatment see special titles as Deeds of Conveyance; Partnership; Trade-Marks and Trade-Names.

2. Power of attorney appointing C. K. and — K., said C. K. and — K. composing and doing business under the name of K. Bros. La Vie v. Tooze, 43 Or. 590, 74 Pac. 210.

3. "Hudson L. Downs" is not sufficiently pleaded by "H. L. Downs," in an action against a nonresident to recover back taxes, and his full christian name appears on the record. Riffle v. Ozark L. & L. Co., 93 Mo. App. 41. "O. P. Buchanan" for "Porter O. Buchanan" is a substantial defect, in an action by attachment against a nonresident. Buchanan v. Edmisten [Neb.] 95 N. W. 620.

4. "Dollie" for "Dellie" held trivial variance. Thompson v. Alford, 135 Cal. 52, 66 Pac. 983. Naming a person "Dove Duke" in a venire, and "Dave Duke" in the list served on him, is not ground for quashing the venire where it appeared that there was no "Dove Duke" in the county, but there was a "Dave Duke." Stewart v. State, 137 Ala. 38.

5. In a corporate signature the letters "Mfg." instead of "Manufacturing" was used. Seiberling v. Miller, 207 Ill. 443, 69 N. E. 800.

6. A court cannot say without proof that a person named in a contract is the same as a person of the same name signing as solicitor a bill to enforce such contract. Farmer v. Sellers, 137 Ala. 112.

7. Pen. Code N. Y. § 363b. "Castle Brothers," composed of T. W. A. Castle and W. L. Castle, is not within such statute. Castle Bros. v. Graham, 87 App. Div. [N. Y.] 97.

8. **Names idem sonans:** "Jack Gordon alias John Gordon" and "Jack Gorden alias John Gorden." White v. State, 136 Ala. 58. "D.-K. Banking Co.," and "D.-K. Co." under Civ. Code, § 357. Donohoe-Kelly Banking Co. v. Southern Pac. Co., 138 Cal. 183, 71 Pac. 93. "Colin" and "Collin." Collin v. Farmers' A. M. F. Ins. Co. [Colo. App.] 70 Pac. 698. "Witt" and "Wid." Veal v. State, 116 Ga. 589. "John H. Veike" and "John H. Vieke" are idem sonans in two counts of an indictment. Selby v. State [Ind.] 69 N. E. 463. "Eleanor G. Sibert" and "E. G. Seibert." Green v. Meyers, 98 Mo. App. 438, 72 S. W. 128. "W. B. Gottleib" and "William B. Gottlieb." Gottlieb v. Alton Grain Co., 87 App. Div. [N. Y.] 380. "Guadlupe" and "Guadalupe." Reys v. State [Tex. Cr. App.] 76 S. W. 457. "Doorley" and "Dooley." N. Y. & T. Land Co. v. Dooley [Tex. Civ. App.] 77 S. W. 1030.

Names not idem sonans: "Wilhelmina G." and "Minnie G." Grober v. Clements [Ark.] 76 S. W. 555. "Willis H. T." and "Williams M. T." Thornily v. Prentice [Iowa] 96 N. W. 728. "Israel Finegold" and "Isaac Finegold." Greenberg v. Angerman, 84 N. Y. Supp. 244. "Nobles" and "Noble." Noble v. State [Ala.] 36 So. 19.

9. "Witt" and "Wid." Veal v. State, 116 Ga. 589.

10. Veal v. State, 116 Ga. 589.

11. Where the name of the complainant is generally known. Phila. T., S. D. & Ins. Co. v. Phila. Trust Co., 123 Fed. 534.

12. Legal Aid Soc. v. Co-operative Legal Aid Soc., 41 Misc. [N. Y.] 127. Where plaintiffs had filed a certificate in compliance with Penal Code § 363 setting forth the assumed name under which they intended to do business. Pettes v. American Watchman's Clock Co., 89 App. Div. [N. Y.] 345. An injunction may be maintained to restrain the use of a corporate name; and it is no objection to the injunction that no injury

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§ 2. *Signatures.*[13]—If a person is unable to write, his signature may consist of a mark made by him.[14] If made in the signer's presence at his request, the whole signature may be made by a third person.[15] The mere addition of words indicating representation does not make the signature one made in a representative capacity,[16] unless there are other circumstances indicating that they were intended to be so used.[17]

§ 3. *Seals.*[18]—A mere recital in an instrument that the parties have thereunto set their hands and seals is not a sufficient sealing.[19] The mistaken use of a wrong seal will not detract from its efficacy in equity if it was intended to be used as the seal of the party attaching it.[20]

Authority to attach a seal for another must be given under seal.[21]

A seal imparts consideration and the burden of proving want thereof is on the party alleging it.[22]

Statutory regulation of seals.—In some states, by statute, a seal may consist of a scroll or device set opposite the signature,[23] and statutes have been passed abolishing the use of private seals and abrogating the distinction between sealed and unsealed private contracts.[24]

NAVIGABLE WATERS.

§ 1. What are navigable (989).
§ 2. Relative, private, and public rights (990).
§ 3. Regulation, control and use (991).
§ 4. Remedies for injuries relating to (995).

The rights of riparian proprietors,[25] and consuming uses of the water,[26] are elsewhere specifically treated.

§ 1. *What are navigable.*—The test of a navigable water, in the legal sense

has resulted or will result from the use of such name. Edison Storage Battery Co. v. Edison Automobile Co. [N. J. Eq.] 56 Atl. 861. To prevent a corporation from using the surname of an inventor already used with his consent by another corporation. Id. Under Corporation Act § 8 (Laws 1896, p. 280, c. 185). Glucose Sugar Refining Co. v. American Glucose Sugar Refining Co. [N. J. Eq.] 56 Atl. 861.

13. For treatment of this subject in reference to particular instruments see titles Bonds; Deeds of Conveyance; Negotiable Instruments; Wills.

14. The true signature in such case is his act in making the mark, and not identifying words that may be attached thereto by another, as Willie X (his mark) Jones. Agurs v. Belcher, 111 La. —, 35 So. 607.

15. Or at the request of another in his presence. Mock v. Garson, 84 App. Div. [N. Y.] 65.

16. The abbreviation "Ex." added to a signature by an executor does not bind the estate. Sutherland v. St. Lawrence County, 42 Misc. [N. Y.] 38. The word "trustee" following a name is mere descriptio personae. Fargason v. Ford [Ga.] 46 S. E. 431.

17. G. L. & T. Co., H. O. D., Prest., W. B. T., Secy. is a sufficient signature for the company. English & S. A. Mortg. & Inv. Co. v. Globe L. & T. Co. [Neb.] 97 N. W. 612. To the same effect under Comp. Laws Mich. 1897, § 9509, see Ismon v. Loder [Mich.] 97 N. W. 769. The words "I approve" and a signature with description of office show that was in capacity of guardian. Bartlett v. Slater, 182 Mass. 208, 65 N. E. 73.

18. See, also, titles Bonds; Contracts; Corporations; Deeds; Mortgages.

19. Where a seal or scroll is not attached to the signatures. O'Rorke v. Geary [Pa.] 56 Atl. 541; Davis v. Bingham, 39 Misc. [N. Y.] 299.

20. Municipal bonds mistakenly sealed with the seal of the city clerk instead of the city seal. Defiance v. Schmidt [C. C. A.] 123 Fed. 1.

21. Hartnett v. Baker [Del.] 56 Atl. 672.

22. Howie v. Kasnowitz, 83 App. Div. [N. Y.] 295; Norris v. Norris, 85 App. Div. [N. Y.] 113. Civ. Code Ga. 1895, § 3656 is but a codification of the common law in this respect. Sivell v. Hogan [Ga.] 46 S. E. 67.

23. "[Seal]" set opposite the signatures is sufficient under Comp. Laws Mich. 1897, § 9005, especially where the teste clause purports it to be a seal. Ismon v. Loder [Mich.] 97 N. W. 769.

24. Comp. Laws Mich. 1897, § 10,417. Ismon v. Loder [Mich.] 97 N. W. 769. Const. 1874, Schedule § 1. Daniel v. Garner [Ark.] 76 S. W. 1063. Under such statutes the fact that a private seal is attached to a contract does not affect its validity as a simple contract. [Laws Minn. 1899, p. 88, c. 86]. Streeter v. Janu [Minn.] 96 N. W. 1128.

25. See Riparian Owners.

26. See Waters and Water Supply.

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of the term, is whether, in the ordinary state of water, it has capacity and suitability for the usual purposes of navigation.[27]

§ 2. *Relative, private, and public rights. Public rights.*—Title to land in the United States, below high-water mark, was, before the states became independent, in the crown. But the several colonies by their charters acquired dominion over such land and the right to regulate its use and improvement.[28] Since the Revolution, all the power of king and parliament with respect to such lands has resided in the legislatures of the respective states.[29] It has generally been held that the state holds the legal fee of all lands below high-water mark.[30] This right of the state is held, however, by virtue of its sovereignty, and in trust for all the inhabitants, not as a private proprietor.[31] The public rights secured by this trust are the rights of passage, navigation, and fishery,[32] and these rights extend to all land below high-water mark, unless it has been so used, built upon, or occupied, as to prevent the passage of boats and the natural ebb and flow of the tide.[33] As incidental to the right of navigation, persons engaged in navigating boats are entitled to land at a public wharf upon payment of wharfage,[34] and the general public has a right of passage over the places where land highways and navigable waters meet, and, when a wharf or bulkhead is built at the end of a land highway and into the adjacent waters, the highway is by operation of law extended by the length of the added structure.[35]

Private rights.—It has generally been held that riparian owners on tide waters have no title below high-water mark.[36] As to the limits of riparian ownership on non-tidal navigable waters, there is considerable diversity of opinion in the several states.[37] As between vendor and vendee and those who claim under them, the

27. Lake held not to be a navigable body of water in the legal sense. Webster v. Harris [Tenn.] 69 S. W. 782, 59 L. R. A. 324. In order to make a stream navigable by the public it is not enough that it is floatable, that is, capable of floating vessels or other craft. It must be a public highway. To be a public highway, it must have a terminus a quo the public can enter it, and a terminus ad quam they can leave it. Manigault v. Ward, 123 Fed. 707. In Minnesota all streams of sufficient volume to float sawlogs are navigable waters, but riparian owners have a right to construct dams, equipped with sufficient booms and sluice ways. Crookston W., P. & L. Co. v. Sprague [Minn.] 98 N. W. 347. The navigability of a stream is shown where it appears that a great many years previously boats navigated at certain seasons of the year and there is no evidence that its condition has changed. Boats and barges went up the river many years before. Miller v. Enterprise C. & L. Co. [Cal.] 75 Pac. 770. A slough used for rafting and booming logs and floating scows during ebb and flow of the tide may be considered navigable. Dawson v. McMillan [Wash.] 75 Pac. 807.

28. Colonial law regulating the use and improvement of such land construed. N. Y., N. H. & H. R. Co. v. Horgan [R. I.] 56 Atl. 179.

29. N. Y., N. H. & H. R. Co. v. Horgan [R. I.] 56 Atl. 179.

30. Rhode Island Motor Co. v. Providence [R. I.] 55 Atl. 696; Dundalk, etc. R. Co. v. Smith, 97 Md. 177; Roberts v. Fullerton, 117 Wis. 222, 93 N. W. 1111.

31. Rhode Island Motor Co. v. Providence [R. I.] 55 Atl. 696; Webster v. Harris [Tenn.] 69 S. W. 782, 59 L. R. A. 324; Bliss v. Ward, 198 Ill. 104, 64 N. E. 705; Roberts v. Fullerton, 117 Wis. 222, 93 N. W. 1111; Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 Law Ed. 266.

32. Rhode Island Motor Co. v. Providence [R. I.] 55 Atl. 696; Bliss v. Ward, 198 Ill. 104, 64 N. E. 705; Dundalk, etc., R. Co. v. Smith, 97 Md. 177; Roberts v. Fullerton, 117 Wis. 222, 93 N. W. 1111.

33. Rhode Island Motor Co. v. Providence [R. I.] 55 Atl. 696.

34. State v. Faudre [W. Va.] 46 S. E. 269.

35. Knickerbocker Ice Co. v. Forty-second St. & G. St. Ferry R. Co., 176 N. Y. 408, 68 N. E. 864.

36. Sullivan Timber Co. v. Mobile, 124 Fed. 644; Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 Law. Ed. 266. In Massachusetts, it has been held that a town has jurisdiction to lay out a way over land which is above mean high-water mark, but which is covered by the sea during the high courses of tides. Hunt v. Com., 183 Mass. 307, 67 N. E. 966.

37. In Wisconsin, a riparian proprietor upon a navigable stream has absolute title to the land to the line of ordinary high-water mark, and as incident thereto he owns to the center of the stream by the grace of the state, subservient, however, to public rights, substantially the same as those incident to navigable waters at common law; and the size of the stream does not in any event affect this rule. The rule however must necessarily be modified as regards riparian proprietors upon a stream forming a boundary between Wisconsin and another state, where the dividing line of jurisdiction is the center of the main channel of

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line of ordinary high tide at the time of the conveyance governs upon the question of riparian rights; and their respective rights as riparian owners, as fixed on the severance of the title, are not affected by subsequent changes in the shore line.[38] In determining the limit of private ownership upon tide waters in a state, the federal courts will follow the rule adopted by the courts of the state.[39] A riparian owner on navigable waters has the right of access to the water from his frontage,[40] and is entitled to build landings, wharves, or piers, in front of his land, out to the point of navigability,[41] for his own use, or for the use of the public.[42] This right is a private right incident to the ownership of the shore, which the riparian owner possesses, distinct from the rest of the public.[43] It is valuable, and is property, and can be taken for the public good only when due compensation is made,[44] and any one who interferes with it is liable in damages to the riparian owner.[45] But the right is subject to the right of the state to improve and develop navigation,[46] and to such rules and laws as the legislature may prescribe for the protection of the public rights in the water.[47] Riparian proprietors on navigable streams and lakes are entitled to have the water flow or remain in its natural condition undiminished and unpolluted.[48]

One who is not the owner of land on the shores of a navigable water cannot by an intrusion on the bed of such water acquire any vested rights or interests as against the riparian owners.[49]

Where an artificial, navigable channel is cut straightening a navigable river, abutting owners thereon and the public have the same rights and remedies in regard thereto that they would have had had such channel been a natural watercourse.[50] The fact that title of the bed of a navigable slough has been vested in a person by purchase from the state as tide lands gives him no right to obstruct navigation.[51]

§ 3. *Regulation, control, and use.*—The rights of the public in the navigable waters of a state are subject to such legal restraints as the legislature may impose.[52] The control of the state, however, must be consistent with the purposes of the trust under which it hold the navigable waters and the lands under them.[53] A state can make a valid grant of privileges or interests in or over its navigable waters subject to the public rights of navigation and fishery.[54] So the legislature

such stream. Franzini v. Layland [Wis.] 97 N. W. 499. Right to unsurveyed islands in navigable rivers in Wisconsin. Id. In Washington, land lying between the meander line of a navigable lake and the line of ordinary high water is the property of the upland owner. Johnson v. Brown [Wash.] 74 Pac. 677.

38. Grey v. Morris & C. Dredging Co., 64 N. J. Eq. 555.

39. Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 Law. Ed. 266.

40. Rhode Island Motor Co. v. Providence [R. I.] 55 Atl. 696; Lathrop v. Racine [Wis.] 97 N. W. 192; Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 188; Webster v. Harris [Tenn.] 69 S. W. 782, 59 L. R. A. 324; McCarthy v. Murphy [Wis.] 96 N. W. 531.

41. Lathrop v. Racine [Wis.] 97 N. W. 192; Webster v. Harris [Tenn.] 69 S. W. 782, 59 L. R. A. 324; McCarthy v. Murphy [Wis.] 96 N. W. 531.

42. Lathrop v. Racine [Wis.] 97 N. W. 192.

43. McCarthy v. Murphy [Wis.] 96 N. W. 531.

44. Lathrop v. Racine [Wis.] 97 N. W. 192. This right cannot be impaired by railroad companies for their corporate purposes without compensation to the owner. Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 188.

45. Rhode Island Motor Co. v. Providence [R. I.] 55 Atl. 696.

46. Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 188.

47. Lathrop v. Racine [Wis.] 97 N. W. 192. See infra, this title, Regulation, Control, and Use.

48. Webster v. Harris [Tenn.] 69 S. W. 782, 59 L. R. A. 324.

49. McCarthy v. Murphy [Wis.] 96 N. W. 531.

50. Lathrop v. Racine [Wis.] 97 N. W. 192.

51. Dawson v. McMillan [Wash.] 75 Pac. 807, citing New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190.

52. Roberts v. Fullerton, 117 Wis. 222, 93 N. W. 1111.

53. Bliss v. Ward, 198 Ill. 104, 64 N. E. 705. See supra, this title, Relative, Private, and Public Rights.

54. Dundalk, etc., R. Co. v. Smith, 97 Md. 177. Upon the admission of a state into the Union, she acquires the right to dispose of the title to any part of the soils under the tidewaters within her limits in such man-

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of a state has power to authorize encroachments upon the public tide waters, where they are made in the interests of navigation, for the erection of wharves, or are affected for other public purposes.[55] A legislative intent to make absolute surrender of the public right of fishery and navigation and of the riparian rights of the shore owners will not be implied.[56] Some of the peculiar provisions of grants by the state of lands under navigable waters have recently received the interpretation of the courts.[57] Under a New Jersey statute, the riparian owner has a prior right to lease land under the navigable water.[58]

The state may devolve upon a municipal corporation the trust under which it holds the shores of and the land under navigable waters.[59] So the state may impose upon a municipality the duty of keeping unobstructed navigable waters within its limits.[60] In the absence of such an imposition by the state, however, the duty does not rest upon a municipal corporation to keep such waters unobstructed. To charge a municipality with this duty the will of the state that it shall be so charged must be very plainly expressed.[61] The mere voluntary acts of a city in removing obstructions create no obligation to continue such acts.[62] A navigable river is not a highway within the meaning of a statute requiring municipalities to keep "all public highways, streets," etc., open and in repair.[63] Some peculiar provisions in grants by municipal corporations of lands under navigable waters have recently been interpreted by the courts.[64]

Political jurisdiction.—The property in, and dominion and sovereignty over, the soils under the navigable waters within her limits, which a state possesses is subject to the paramount right of navigation over the waters, so far as such navigation may be required by the necessities of commerce with foreign nations or among the several states, the regulation of which is vested in the Federal government by the constitution of the United States.[65] But legislation by a state for the pur-

ner as she may deem proper, subject only to the restraints imposed by the commerce clause of the federal constitution. U. S. v. Mission Rock Co., 189 U. S. 391, 47 Law. Ed. 865.

55. Rhode Island Motor Co. v. Providence [R. I.] 55 Atl. 696.

56. State v. Sunapee Dam Co. [N. H.] 55 Atl. 899. In North Carolina, in view of the policy of state which as evidenced by its legislation is for the state to retain the title to its navigable waters and the lands under them in trust for the people, a grant by the state to riparian proprietors of lands under the waters of a harbor in front of their lands, between high-water mark and deep water, was held to have conveyed to such proprietors only an easement as riparian proprietors to erect wharves, etc., on such lands. Shepard's Point Land Co. v. Atlantic Hotel, 132 N. C. 517.

57. Covenant in grant of land under navigable waters that grantee will not build certain structures without the grantor's permission, construed. Whitman v. New York, 39 Misc. [N. Y.] 43. Grant by the state to individuals of land in the bed of a navigable river upon certain conditions relating to the promotion of commerce, construed. Thousand Island Steamboat Co. v. Visger, 86 App. Div. [N. Y.] 126. How entry could be made on land covered by navigable water under the North Carolina statute, Laws 1891, c. 532, which is now repealed by Laws 1893, c. 4. Holley v. Smith, 132 N. C. 36. Rights of the City of New York in the waters of the Hudson River and to the lands under it, under certain statutes and charters. Knickerbocker Ice Co. v. Forty-second St. & G. St. Ferry R. Co., 176 N. Y. 408, 68 N. E. 864. Statutes interpreted as a recognition of a grant to a municipality of the privilege of filling in submerged lands for park purposes. Bliss v. Ward, 198 Ill. 104, 64 N. E. 705.

58. This right is one which appertains to the owner of the shore front, as owner, and is not a right of a character which can, so far as the state is concerned, be separated from the ownership of the riparian lands. Grey v. Morris & C. Dredging Co., 64 N. J. Eq. 555.

59. Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 Law. Ed. 266.

60. Fause v. Cleveland [C. C. A.] 121 Fed. 810.

Liability of a municipality for injury caused by a sunken wreck under a statute imposing upon it the duty of keeping navigable streams free from obstructions [Act Feb. 2d, 1854 (P. L. 37)]. McCaully v. Phila., 119 Fed. 580.

61, 62, 63. Faust v. Cleveland [C. C. A.] 121 Fed. 810.

64. Peculiar provisions of a municipal grant of land under tide water, construed. N. Y., N. H. & H. R. Co. v. Horgan [R. I.] 56 Atl. 179. Reservations in grants by municipal corporations of lands under navigable waters, construed. Whitman v. New York, 39 Misc. [N. Y.] 43; Knickerbocker Ice Co. v. Forty-second St. & G. St. Ferry R. Co., 39 Misc. [N. Y.] 27.

65. Const. of U. S. art. 1, § 8. U. S. v.

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pose of aiding commerce by the improvement of navigable streams by providing for the deepening of the channel or the removal of obstructions does not encroach upon the power of congress, if not in conflict with any system for their improvement provided by congress.[66] A stream can only be deemed navigable water of the United States so as to put it under the control of congress when it forms itself, or by its connection with other waters, a continued highway over which commerce is or may be carried on through other states or foreign countries in the customary mode in which such commerce is conducted by water.[67] By Federal statutes the creation of any obstruction not affirmatively authorized by law to the navigable capacity of any of the waters of the United States is expressly prohibited,[68] and the right to erect a structure in a navigable river, within the limits of a state, is made to depend upon the concurrent or joint assent of the national and state governments.[69] Upon the admission of a state into the Union, she acquires the same property in and sovereignty and jurisdiction over the shores of, and the soil under, navigable waters within her boundaries, not previously granted, as is possessed by the original states.[70] By the ordinance for the government of the Northwestern Territory the navigable waters leading into the Mississippi and St. Lawrence rivers were made common highways forever free to citizens of the United States and those of the several states.[71] The jurisdiction of two states over the waters lying between them is sometimes regulated by Federal legislation.[72] A state has the right to grant the exclusive right to ferry from its shores across a navigable river between two states, and such a franchise is valid without the concurrent sanction either of congress or of the state upon the opposite side of the river, or the right of landing beyond the limits of the state by which the grant is made.[73]

Establishment of harbors and the like.—The establishment of a harbor line permits the riparian owner to carry the upland or high-water mark out a certain distance from the natural shore, but until it is so filled out the public rights exist as before.[74]

Mission Rock Co., 189 U. S. 391, 47 Law. Ed. 865. Under the commerce clause in the Federal constitution, congress has paramount authority over all navigable waters of the United States. Kan. City, M. & B. R. Co. v. Wiygul [Miss.] 33 So. 965. Navigable waters are subject to the control of congress, and to its regulations and general supervision. Faust v. Cleveland [C. C. A.] 121 Fed. 810. But the shores of navigable waters and the soils under them were not granted by the constitution to the United States, but were reserved to the states respectively. Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 Law. Ed. 266. The authority of a state over a navigable river entirely within its limits is plenary, subject only to such action as congress may take in execution of its power under the constitution to regulate commerce among the several states. Cummings v. Chicago, 188 U. S. 410, 47 Law. Ed. 525; Calumet G. & El. Co. v. Chicago, 188 U. S. 431, 47 Law Ed. 532.

66. Faust v. Cleveland [C. C. A.] 121 Fed. 810. Right of the Federal and state governments to authorize the reasonable use of a navigable river in connection with a drainage canal. Corrigan Transp. Co. v. Sanitary Dist., 125 Fed. 611.

67. Manigault v. Ward, 123 Fed. 707.

68. Act Congress March 3rd, 1899, § 10 (U. S. Comp. St. 1901, p. 3540), an obstruction is "affirmatively authorized by law" within the meaning of this provision if it is authorized by a law of the state in which the water is situated, if such law was passed before congress had itself legislated upon the subject. Kan. City, M. & B. R. Co. v. Wiygul [Miss.] 33 So. 965.

69. Act March 3d, 1899, c. 425. Cummings v. Chicago, 188 U. S. 410, 47 Law. Ed. 525; Calumet G. & E. Co. v. Chicago, 188 U. S. 431, 47 Law. Ed. 532.

70. U. S. v. Mission Rock Co., 189 U. S. 391, 47 Law. Ed. 865; Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 Law. Ed. 266.

71. State v. Faudre [W. Va.] 46 S. E. 269.

72. The term "concurrent jurisdiction" as used in the federal laws giving the states of Minnesota and Wisconsin concurrent jurisdiction on the waters of the Mississippi River, defined. Roberts v. Fullerton, 117 Wis. 222, 93 N. W. 1111.

73. State v. Faudre [W. Va.] 46 S. E. 269.

74. Rhode Island Motor Co. v. Providence [R. I.] 55 Atl. 696; N. Y., N. H. & H. R. Co. v. Horgan [R. I.] 56 Atl. 179. Under the Rhode Island Statutes, the harbor commissioners cannot authorize encroachments in the public tide waters beyond the harbor line established by the legislature. Rhode Island Motor Co. v. Providence [R. I.] 55 Atl. 696. Statute authorizing a commission to establish bulkhead, wharf, drydock and boom lines and lines for similar structures, construed. Acts 1886-87, p. 647. Sullivan Timber Co. v. Mobile, 124 Fed. 644.

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Piers, jetties, levees, etc.—In a recent case, a grant of a pier was construed with reference to the rights in navigable waters passing thereby.[75] Where by long usage and immemorial custom, the owners of land abutting on tide waters in a city have been accorded the right to build wharves, bulkheads, booms, and other structures upon the flats and in the river in front of their uplands, not impeding navigation, an owner of such uplands is entitled to erect such structures in the manner and to the extent permitted by the usage.[76] A provision in a municipal charter authorizing the municipality to compel riparian proprietors on a navigable river to construct docks at their own expense on their own land cannot be justified as an exercise of the police power of the state.[77] A municipal charter which authorizes the municipality to levy a special assessment on the land of riparian owners on a navigable river to pay the cost of building docks in front of their lands, but which makes no provision for special benefits to accrue to such owners, violates the constitutional inhibition against the taking of private property for public use without just compensation.[78] A contractor constructing a breakwater is liable for damages to a vessel resulting from his negligence in not keeping a stake light burning, which he is under contract duty to maintain.[79] But if the vessel was in fault, and such fault proximately contributed to the accident, only one-half the damages and costs can be recovered.[80]

Bridges, booms, dams, etc.—An owner of land abutting on tide waters may acquire the right to erect wharves, booms, and other structures not impeding navigation by license or permission from the proper authorities, and such license, when obtained for a valuable consideration, cannot be revoked, when the grantee, having acted under it, would be injured by the revocation.[81] Subject to the powers of congress to regulate navigation, a state may authorize the building of bridges over navigable waters, though there may result some impediment to navigation.[82] A bay in which there is an undisputed tidal flow is not a "stream" within the meaning of a New York statute limiting the right of corporations to bridge streams.[83] The power to bridge a navigable stream includes the right to make repairs.[84] A public way cannot be laid out across a navigable river without the consent of the legislature.[85] Under the express provisions of a Maryland statute, no bridge can be erected in a navigable river unless authorized by an act of the general assembly.[86] The obstruction to navigation that results from the erection of a bridge

75. Knickerbocker Ice Co. v. Forty-second St. & G. St. Ferry R. Co., 176 N. Y. 408, 68 N. E. 864.

76. Sullivan Timber Co. v. Mobile, 124 Fed. 644.

77. Laws 1891, c. 40, §§ 65-67. Lathrop v. Racine [Wis.] 97 N. W. 192.

78. Const. Wis. Art. 1, § 13; Laws 1891, pp. 206, 216, c. 40, §§ 65-67, 77. Lathrop v. Racine [Wis.] 97 N. W. 192.

79. Harrison v. Hughes [C. C. A.] 125 Fed. 860. Measure of care and precaution required of contractor under such circumstances. Id.

80. Harrison v. Hughes [C. C. A.] 125 Fed. 860.

81. Sullivan Timber Co. v. Mobile, 124 Fed. 644.

82. Carvalho v. Brooklyn & J. B. Turnpike Co., 173 N. Y. 586, 65 N. E. 1115. In the absence of congressional legislation, a state may authorize the construction of a bridge over a navigable river of the United States. Kan. City, M. & B. R. Co. v. Wiygul [Miss.] 33 So. 965.

83. Laws 1890, c. 566, § 121. Carvalho v. Brooklyn & J. B. Turnpike Co., 173 N. Y. 586, 65 N. E. 1115.

84. Kan. City, M. & B. R. Co. v. Wiygul [Miss.] 33 So. 965. Certain Federal legislation held not to affect the right to repair bridges previously authorized by law. Id.

85. Chapin v. Me. Cent. R. Co., 97 Me. 151. The fact that a bridge company and its employes are engaged in bridging a navigable river without permission from the secretary of war does not give a company, engaged in navigating the river, a license to break the guy ropes supporting a large derrick and thus precipitate the derrick upon the workmen, where the navigating company has agreed with the bridge company that it will navigate its boats through an opening left by the latter between its pilings. Stewart-Peck Sand Co. v. Reyber, 66 Kan. 156, 71 Pac. 242.

86. Code Pub. Gen. Laws, art. 23, § 92. Dundalk, etc., R. Co. v. Smith, 97 Md. 177.

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spanning a navigable river is tolerated because of necessity and convenience to commerce upon land.[87] In the erection of the bridge, reasonable care and diligence are required to prevent injuries to the rights of riparian owners.[88] It must be so maintained and operated that navigation may not be impeded more than is absolutely necessary. It is incumbent upon the owner to place in charge persons competent to operate it, to watch for signals, and to open for the passage of vessels, and for the performance of such delegated duty he is responsible. He must also equip the bridge with proper lights, giving warning of its position and of its opening and closing. If the bridge cannot be opened, proper signals should be given to that effect, such as will warn an approaching vessel in time to heave to. A vessel having given proper signal to open and prudently proceeding under slow speed has the right to proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened.[89] To entitle a riparian owner to recover for injuries caused by the negligence of another in building a bridge, the negligence complained of must have been the proximate cause of the injuries.[90]

Drainage canal.—Damages caused in a measure by an increased current in a navigable river resulting from a reasonable use of the river in the construction of a drainage canal authorized by the Federal and state authorities is damnum absque injuria.[91]

§ 4. *Remedies for injuries relating to.*—For unlawful obstruction to navigation, proceedings will lie on behalf of the people.[92] But the duty to prevent obstructions rests upon the Federal and state governments and cannot be enforced by an individual.[93] Such an obstruction, if unauthorized by law, is a public nuisance, which will not be abated at the suit of an individual unless he is peculiarly affected and especially injured by it.[94] An individual cannot maintain an action to enjoin the construction of a turnpike road across navigable waters unless he can show special damage.[95] But an obstruction in navigable waters which curtails the right of access of a riparian proprietor will be enjoined at the suit of such proprietor.[96] A riparian owner on a navigable stream may recover damages for an injury to his rights different in degree and kind from any done to the public.[97] So the owner of a vessel may recover damages for an injury to

87. Clement v. Metropolitan West Side El. R. Co. [C. C. A.] 128 Fed. 271.

88. Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 186.

89. Clement v. Metropolitan West Side El. R. Co. [C. C. A.] 128 Fed. 271. Municipal ordinance relating to signals and to what is incumbent upon approaching vessels held to have no application to private bridges. Id.

90. Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 186. Contractor failing to buoy obstruction erected in building a bridge held not liable for injury to vessel where the captain had knowledge of the obstruction and was guilty of negligence. Hosford v. Wakefield, 117 Fed. 945.

91. Corrigan Transp. Co. v. Sanitary Dist., 125 Fed. 611. A clause in an authorization to a sanitary district to construct a drainage canal which provides that the district must assume all responsibility for damages to property and navigation interests by reason of the introduction of a current in a navigable river cannot be construed as meaning more than that whatever damages may legally arise are to be assumed by the district. Corrigan Transp. Co. v. Sanitary Dist., 125 Fed. 611.

92. Carvalho v. Brooklyn & J. B. Turnpike Co., 173 N. Y. 586, 65 N. E. 1115.

93. Faust v. Cleveland [C. C. A.] 121 Fed. 810.

94. Lownsdale v. Gray's Harbor Boom Co., 117 Fed. 933. A private party may abate an obstruction to navigable waters, where the has been specially damaged. Dawson v. McMillan [Wash.] 75 Pac. 807. And see McCarthy v. Murphy [Wis.] 96 N. W. 531.

95. In this case it was held that no special damage was shown. Carvalho v. Brooklyn & J. B. Turnpike Co., 173 N. Y. 586, 65 N. E. 1115.

96. Rhode Island Motor Co. v. Providence [R. I.] 55 Atl. 696. Injury to the rights of a riparian proprietor held sufficient to warrant the granting of an injunction. Fisk v. Ley [Conn.] 56 Atl. 559.

97. Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 188. A loaded scow owned by libellants sank in the night in a harbor channel. It was marked only by a spar buoy which was insufficient. An oyster steamer coming

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his vessel caused by an obstruction placed in the channel of a navigable stream.[98] One who has by usage or license acquired the right to erect wharves and other structures on the shores of navigable waters in a municipality in front of his uplands is entitled to an injunction restraining the city from recovering the land upon which the structures are built.[99]

NE EXEAT.

To justify the issuance of a writ of ne exeat, there must be shown an indebtedness by the defendant and an attempt by him to defraud his creditors by carrying unexempted property out of the state; the burden of proof being on the party applying for the writ.[1]

A ne exeat bond is broken by a departure from the state of the party bound thereby, without procuring a discharge of the writ, and without leave of court.[2] An action for the breach of a ne exeat bond should be brought in the name of the real party in interest.[3] The correctness of the lower court in granting the writ will not be questioned on the appeal of one who rendered its enforcement impossible.[4]

NEGLIGENCE.

§ 1. Definitions (996).
§ 2. Acts or Omissions Constituting Negligence (997).
A. Personal conduct in general (997).
B. Dangerous machinery and substances (998).
C. Use of lands, buildings, and other structures (999).
§ 3. Proximate Cause (1001).
§ 4. Contributory Negligence (1003).
§ 5. Actions (1006).

§ 1. *Definitions.—Actionable negligence* is the neglect of a legal duty owed by defendants to plaintiff in respect to the very matter or act charged as negligence.[5]

Gross negligence is the absence of slight care.[6]

Willful or wanton negligence is such a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness.[7] Gross and great negligence are relative terms each descriptive of negligence only.[8]

in ran afoul of the sunken wreck. The Mary S. Lewis, 126 Fed. 848.

98. Maxen v. Chicago & N. W. R. Co., 122 Fed. 555.

99. Sullivan Timber Co. v. Mobile, 124 Fed. 644.

1. Garden City Land Co. v. Gettins, 102 Ill. App. 261. Attempting to place unexempt property beyond the reach of his creditors is sufficient fraud to justify the issuance of a writ of ne exeat against a debtor. Id.

2. Whether before or after judgment. Marselis v. People [Colo. App.] 71 Pac. 429.

3. Action on a ne exeat bond given by a husband sued by a divorce properly brought in the name of the wife, under Code of Practice. Marselis v. People [Colo. App.] 71 Pac. 429.

4. Writs of ne exeat and injunction were issued against defendant. He was taken into custody on failure to file bond. He escaped and in defiance of the court remained beyond its jurisdiction. Bronk v. Bronk [Fla.] 35 So. 870.

5. Pittsfield C. Mfg. Co. v. Pittsfield S. Co., 71 N. H. 522, 60 L. R. A. 116; Western Wheel Works v. Stachnick, 102 Ill. App. 420.

6. Louisville & N. R. Co. v. Walden, 25 Ky. L. R. 1, 74 S. W. 694. Gross negligence is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under circumstances of equal or similar danger. Chesapeake & O. R. Co. v. Board, 25 Ky. L. R. 1118, 77 S. W. 189. Gross negligence for engineer of switch engine to leave engine on main track over which a passenger train was expected while he consorted with prostitutes. Cent. Tex. & N. W. R. Co. v. Smith [Tex. Civ. App.] 73 S. W. 537.

7. Chicago T. T. R. Co. v. Gruss, 102 Ill. App. 439. A willful act means an act showing that a person intended to do what was done and a wanton act means an act in total disregard of the rights of others. Gosa v. Southern R. [S. C.] 45 S. E. 810. The purpose to commit a willful injury will not be inferred when the result of the wrongful conduct may be reasonably attributed to negligence or inattention. Indianapolis St. R. Co. v. Darnell [Ind. App.] 68 N. E. 609. Contributory negligence is not a defense to actions for injuries wantonly inflicted. Cent.

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§ 2. *Acts or omissions constituting negligence. A. Personal conduct in general.*—The care required is termed ordinary care and is such care as men of ordinary prudence under similar circumstances usually employ and is determined by reference to all the attendant circumstances of the transaction,[9] and does not require precautions against unforeseen accidents happening without negligence,[10] nor happenings attributable to act of God or vis major.[11] Act of God or vis major may not be urged, however, where the accident might reasonably have been anticipated and could have been guarded against in the exercise of reasonable care and vigilance.[12]

Persons liable.—A city is not liable for acts of officers done in performance of a governmental function.[13] A hospital is liable for negligence of a physician in its employ only where due care was not observed in his selection.[14] Servants of a railroad company are not personally liable for injuries caused by their negligence unless the injury was the result of misfeasance and positive wrong.[15] Where two persons are working together in a common employment under circumstances casting on each the duty to exercise care not to injure the other, an action will lie for the breach of the duty though both are engaged in the common employment of the master.[16] A railroad company delivering a defective car to a connecting line is not liable for injuries to an employe of the latter after inspection by the receiving company.[17]

Joint and several liability.—Where the injury is the result of concurring negligence of two persons either[18] or both[19] are liable. When the tort charged is joint, there can be no recovery on proof of one or more separate torts.[20]

of Ga. R. Co. v. Partridge, 136 Ala. 587. Turning on power recklessly where boy clinging to car asked to be let off. Aiken v. Holyoke St. R. Co. [Mass.] 68 N. E. 238.

8. Belt R. Co. v. Banicki, 102 Ill. App. 642.

9. Failure of one felling a tree to notify passers of its impending fall may amount to actionable negligence. Driver of team was not guilty of contributory negligence as he had a right to rely on defendant to warn him. Burkhardt v. Schott, 101 Mo. App. 465, 74 S. W. 480. The care required in removing a person in distress from one town to another under the pauper laws is the care and prudence that a reasonably prudent man would exercise under like circumstances and the test is the means employed and effort to find out the person's condition rather than the physical condition itself. Merrill v. Bassett, 97 Me. 501. A person charged with the performance of a duty toward another in order to be guilty of negligence must have either done or neglected to do something which an ordinarily prudent and careful man acting in the same relation and under like circumstances would not have done or omitted to do even though damage may have resulted from his conduct. Id.

10. Young v. Mo. Pac. R. Co., 93 Mo. App. 267; Ill. Cent. R. Co. v. Smiesni, 104 Ill. App. 194; Chenall v. Palmer, 117 Ga. 144; McGuire v. Cent. R. Co., 68 N. J. Law, 608; Atlanta R. & P. Co. v. Gaston, 118 Ga. 413; Rea v. St. Louis S. W. R. Co. [Tex. Civ. App.] 73 S. W. 555; Dwyer v. Hills Bros. Co., 79 App. Div. [N. Y.] 46; Cleary v. Brooklyn F. & P. Co., 79 App. Div. [N. Y.] 35; McKenzie v. Waddell Coal Co., 89 App. Div. [N. Y.] 415; Fries v. American Lead Pencil Co., 141 Cal. 610, 75 Pac. 164; Consumers' Brew. Co. v. Doyle's Adm'x [Va.] 46 S. E. 390. One adequately securing a signboard on his premises within his property line and a greater distance from a highway is not liable for injuries in a runaway caused by its being blown down by a strong wind and the crash frightening plaintiff's horse. O'Sullivan v. Knox, 81 App. Div. [N. Y.] 488. In an action for injuries from a timber falling on plaintiff, the court should instruct that if the timber was loose owing to the act of some one not under defendant's control he would not be liable. Meeker v. Smith, 84 App. Div. [N. Y.] 111.

11. Colbourn v. Wilmington [Del.] 56 Atl. 605. Storm. Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890. Floods. Schrunk v. St. Joseph [Wis.] 97 N. W. 946; Shaughnessy v. Pittsburg, 20 Pa. Super. Ct. 609. Hurricane. Uggla v. Brokaw, 77 App. Div. [N. Y.] 810.

12. Harrison v. Hughes [C. C. A.] 125 Fed. 860. The act of God must be not only the proximate but the entire cause of the injury. Sonneborn v. Southern R. Co., 65 S. C. 502.

13. Twyman's Adm'r v. Board of Councilmen [Ky.] 78 S. W. 446.

14. Plant System R. & H. Dept. v. Dickerson, 118 Ga. 458.

15. Bryce v. Southern R. Co., 125 Fed. 953.

16. O'Brien v. Traynor [N. J. Err. & App.] 55 Atl. 207.

17. Mo., K. & T. R. Co. v. Merrill, 65 Kan. 436, 70 Pac. 358, 59 L. R. A. 711. See, also, topics dealing with particular relations such as Husband and Wife; Master and Servant, etc.

18. Muller v. Hale, 138 Cal. 163, 71 Pac. 81. One injured by the concurrent negligence of a fellow-servant and a stranger may recover from the stranger. St. Louis

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(§ 2) *B. Dangerous machinery and substances.*—The duty of ordinary care applies to dangerous machinery, tools, and appliances,[21] and fires liable to be communicated to adjacent property.[22] Reasonable care must be exercised as to electric wires.[23] There may be no recovery for injuries caused by blasting on the ground that notice thereof was not given, where plaintiff admits having knowledge that blasting was going on in sufficient time to have gone out of danger.[24]

A railroad company is not liable for injuries to a child caused by removal and explosion of a torpedo properly placed on the track at an obscure place to warn trains of track work.[25]

As a general rule a manufacturer or vendor is not liable to third persons for negligence in construction, manufacture, or sale of an article not intrinsically dangerous.[26]

S. W. R. Co. v. Swinney [Tex. Civ. App.] 78 S. W. 547.

19. A joint judgment may be recovered against a street railroad and a contractor doing its work for injuries caused by negligence in stretching a cord across the highway. Schiverea v. Brooklyn Heights R. Co., 89 App. Div. [N. Y.] 340.

20. Goodman v. Coal Tp., 206 Pa. 621. An action will not lie against a street railroad and a township for injuries caused by the alleged unsafe condition of a public road and tracks thereon where there is no allegation of concert of action. Belter v. Coal Tp., 206 Pa. 621.

21. Engine. Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164. Derrick. Bowden v. Derby, 97 Me. 536. Want of due care in the original construction of a machine is not established by evidence that it could have been made stronger by using other methods. Talley v. Beever [Tex. Civ. App.] 78 S. W. 23. An elevator company, furnishing a steam shovel to unload grain from a boat to its elevator is liable for injury to one unloading, from the breaking of a defective rope in the tackle negligently furnished. Connors v. G. N. Elevator Co., 90 App. Div. [N. Y.] 311.

22. Bock v. Grooms [Neb.] 92 N. W. 603. The owner of a sawmill is not liable for fire communicated therefrom by sparks unless guilty of negligence. Gerrish v. Whitfield [N. H.] 55 Atl. 551. The owner of premises taking such precautions as a man of ordinary prudence would exercise to confine a fire set out by him to his own premises is not guilty of negligence where it goes beyond his control on account of a whirlwind or an extraordinarily high wind. Bock v. Grooms [Neb.] 92 N. W. 603. In an action for destruction of building by fire communicated from defendant's building, it may be shown that the fire could have been controlled but for the fact that dynamite was stored in the building and people were warned to keep away. Cumberland Tel. & Tel. Co. v. Dooley [Tenn.] 72 S. W. 457. A defendant will not be liable for negligence in not having fire apparatus on hand where the evidence shows that the fire could not have been extinguished no matter what equipment had been furnished. Balding v. Andrews [N. D.] 96 N. W. 305. What constitutes ordinary care and prudence in the lawful use of fire depends on the circumstances of each case. Leaves and rubbish catching fire from sparks from sawmill not result of negligence. Collins v. George [Va.] 46 S. E. 684.

See, also, topic Fires.

23. Colbourn v. Wilmington [Del.] 56 Atl. 605. It is the duty of an electric company to use very great care as to insulation at places where people have a right to go for business or pleasure. Thomas v. Wheeling Elec. Co. [W. Va.] 46 S. E. 217. An Electric Light company's live wire fell in the street and plaintiff came in contact with it. Wolpers v. N. Y. & Q. Elec. L. & P. Co., 86 N. Y. Supp. 845. That a live electric wire was blown into the street by a storm is no excuse. Id.

24. Smith v. Day, 117 Fed. 956.

25. Louisville & N. R. Co. v. Hart, 24 Ky. L. R. 1123, 70 S. W. 830.

26. Huset v. Case Threshing Mach. Co. [C. C. A.] 120 Fed. 865; Standard Oil Co. v. Murray [C. C. A.] 119 Fed. 572; Marquardt v. Ball Engine Co. [C. C. A.] 122 Fed. 374. There is an exception in the case of the manufacturer or vendor of articles dangerous to human life or health like poisons in which case the negligence is actionable by parties who have no contractual relations with the manufacturer or vendor. Huset v. Case Threshing Mach. Co. [C. C. A.] 120 Fed. 865. The manufacturer of a gasoline device not inherently dangerous is bound only to exercise reasonable care to construct it of reasonable strength and fitness when used according to directions. Talley v. Beever [Tex. Civ. App.] 78 S. W. 23. Seller of a folding bed agreeing to put it in safe condition for use is liable for injuries caused by his negligent failure in this respect. Cox v. Mason, 89 App. Div. [N. Y.] 219. A land roller is not an intrinsically dangerous apparatus making the manufacturer liable for injuries to a third person, the defect being so concealed as to prevent its discovery by inspection. Kuelling v. Roderick Lean Mfg. Co., 88 App. Div. [N. Y.] 309. The owner who impliedly invites third parties to use defective machines or instruments manufactured or furnished by him is liable to them for injuries resulting from his negligence in the manufacture or care of them. Huset v. Case Threshing Mach. Co. [C. C. A.] 120 Fed. 865. See Schubert v. Clark, 49 Minn. 331, 15 L. R. A. 818 and Heizer v. Kingsland & D. Mfg. Co., 110 Mo. 605, 15 L. R. A. 821 for leading cases taking opposite views as to liability of manufacturer.

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(§ 2) *C. Use of lands, buildings, and other structures.*—The duty of ordinary care as to safety of premises extends to persons present thereon by express or implied invitation of the owner or person in control.[27] A bare licensee[28] or trespasser takes the risks as he finds them, and the only duty of the owner of the premises is not to inflict wanton injury,[29] and this rule applies to infant trespassers;[30] the exception being the case of maintenance by defendant of a dangerous place or structure attractive to children.[31]

27. Smith v. Jackson [N. J. Law] 56 Atl. 118; Bowden v. Derby, 97 Me. 536; Wilsey v. Jowett [Iowa] 98 N. W. 114; Chesapeake & O. R. Co. v. Wilder, 24 Ky. L. R. 1821, 72 S. W. 353; Van Doren v. Holbrook, C. & D. Cont. Co., 85 N. Y. Supp. 348. The fact that defendant was not the owner of defective scales causing injury is not important where he invited plaintiff to use them. McIntyre v. Pfaudler Vacuum Fermentation Co. [Mich.] 95 N. W. 527. A department store maintaining a reception room for the care of children must keep such room reasonably free from danger to such children. Miller v. Peck Dry Goods Co. [Mo. App.] 78 S. W. 682. A customer in a store by implied invitation of the proprietor may recover for injuries received though he entered through an alley door which customers are not invited to use. Burk v. Walsh, 118 Iowa, 397, 92 N. W. 65. Warehousemen are bound to use care proportioned to the risk to keep elevators on the premises reasonably safe for the access and use of those coming there at their invitation express or implied on business or for other beneficial purposes. Ford v. Crigler, 25 Ky. L. R. 56, 74 S. W. 661. There is an invitation to use a dangerous passageway where the clerk asks the customer to accompany him along same to another part of the building to examine goods. Reid v. Linck, 206 Pa. 109. One who hauls his cotton to be ginned at a public ginnery is not a mere licensee and may recover when injured on the premises by the owner's negligence. Horton v. Harvey [Ga.] 46 S. E. 70. The duty of the owner of a scaffold used by another is the exercise of ordinary care and should be commensurate with the risks of the situation or such care as persons of ordinary prudence would exercise to others under the same or similar circumstances. Lauritsen v. American Bridge Co., 87 Minn. 518, 92 N. W. 475. Operating motor cars in a mine. Williams v. Belmont C. & C. Co. [W. Va.] 46 S. E. 802. A person on another's premises by invitation assumes obvious risks. Id.

28. Chesley v. Rocheford [Neb.] 98 N. W. 429; Id., 96 N. W. 241; Slough v. Ragley Lumber Company [Tex. Civ. App.] 76 S. W. 779; Smith v. Hopkins [C. C. A.] 120 Fed. 921; Meyers v. Chicago, R. I. & P. R. Co. [Mo. App.] 77 S. W. 149; Bentley v. Loverock, 102 Ill. App. 166; Huebner v. Hammond, 80 App. Div. [N. Y.] 122. An employe is not a licensee as against a construction company repairing premises where the construction company was not in exclusive possession but premises were used by employes and such company was required to use reasonable care to prevent injury. Gile v. Bishop Co., 184 Mass. 413, 68 N. E. 837. One on premises to transact private business with an employe of defendant is a bare licensee. Muench v. Heinemann [Wis.] 96 N. W. 800; Dixon v. Swift, 98 Me. 207. Where horses hitched in the highway were, owing to the negligence of defendant, stung and in their frenzy broke into the yard near bee stands and were stung so that death resulted, the question of defendant's duty toward a licensee on his premises did not arise. Parsons v. Mauser, 119 Iowa, 88, 93 N. W. 86.

29. Belt R. Co. v. Banicki, 102 Ill. App. 642; Albert v. New York, 75 App. Div. [N. Y.] 553; Chicago T. Transfer Co. v. Kotoski, 199 Ill. 383, 65 N. E. 350; Currier v. Dartmouth College [C. C. A.] 117 Fed. 44; Frederburg v. Bear, 89 Minn. 241, 94 N. W. 683; Dixon v. Swift, 98 Me. 207. Persons using a roadway over a railroad company's right of way, after permission has been withdrawn and sufficient notice thereof been given, are trespassers. Ill. Cent. R. Co. v. Waldrop, 24 Ky. L. R. 2127, 72 S. W. 1116. The employe of a contractor injured while walking across a cement floor which had just been repaired by a subcontractor was not a trespasser so as to be precluded from recovering from the subcontractor for injuries. St. Louis E. M. Fire-Proofing Co. v. Dawson, 30 Tex. Civ. App. 261, 70 S. W. 450.

30. Norman v. Bartholomew, 104 Ill. App. 667. The occupier of premises on which children were accustomed to play is not liable for injuries to a child of tender years caused by a fire set out on the premises though he had taken no steps to keep children from the fire. Paolino v. McKendall, 24 R. I. 432, 60 L. R. A. 133. There may be no recovery against a city for the death of a child drowned in a city water reservoir at its top 25 feet above the street with sloping sides and surrounded by a fence with a hole under it through which children could and did enter. Peninsular Trust Co. v. Grand Rapids [Mich.] 92 N. W. 38. Where the door of a vacant house is left open and a young child playing therein is injured by the fall of a window which was being raised by a companion the owner will not be liable therefor. O'Connor v. Brucker, 117 Ga. 451. There may be no recovery for injuries to a child of 9 whose clothing caught on fire while poking in hot ashes for brass, the fire having been lighted on a vacant lot by defendant in the proper conduct of his business. Coleman v. Robert Graves Co., 39 Misc. [N. Y.] 85. The owner of premises graded to a level leaving a bank on one side to which resort is made for base ball purposes without invitation of the owner and children are attracted thereby is not liable for an injury to a child caused by caving of bank where the result is not anticipated from the condition of the bank. Ann Arbor R. Co. v. Kinz, 68 Ohio St. 210, 67 N. E. 479. A city is not liable for injuries to a boy caused by falling from a sea wall in course of construction by reason of not having a railing in position thereon as it would not

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The owner of property owes to the public the duty of maintaining it in such a reasonably safe condition that persons on the abutting sidewalk[32] or highway will not sustain injury,[33] and this liability may extend to the user of a private way.[34] A traveler in a public highway may assume its safety and is not required to search for obstructions and dangers therein.[35] A cemetery company is liable for injuries caused by fall of defectively set monument.[36]

The maintenance of an unguarded canal with steep banks through a thickly settled part of town may not amount to negligence allowing recovery for death of child of five years falling into such canal and drowning.[37]

Ordinary care is used by the owner where he intrusted the construction of a building to skilled persons on whom he relied,[38] and he is not liable for injuries caused by collapse of defective building unless he could have learned of the improper construction by the exercise of ordinary care.[39] Failure to make recess in wall high enough to take an intended column, whereby bricks were displaced injurying plaintiff, was negligence.[40] The laws of New York require the owner of a tenement containing a hall to have the same artificially lighted where there are no windows opening therefrom.[41] A contractor will not be liable to a third person for injuries caused by defective construction of a bridge when the injury

have been placed in position during the progress of the work and dangers were obvious. Albert v. New York, 75 App. Div. [N. Y.] 553. A child playing in the street is not a trespasser so as to make one running over her liable only for willful injury. O'Brien v. Hudner, 182 Mass. 381, 65 N. E. 788.

31. A railroad company knowing that its switchyard is used by children as a play ground must use ordinary care to discover their presence and prevent injury to them. Ollis v. Houston E. & W. T. R. Co. [Tex.] 73 S. W. 30. One who maintains on his premises an "attractive nuisance" is liable for resulting injuries and the rule covers the case of one maintaining a dangerous instrumentality—not in itself attractive, but in such proximity to an attractive situation on the premises of another as to form a dangerous whole. Consol. Elec. L. & P. Co. v. Healy, 65 Kan. 798, 70 Pac. 884. Knowledge that children play on a dangerous pile of wood maintained by a railroad company in close proximity to the track fixes liability without reference to ownership of ground on which wood is piled. Kan. City, Ft. S. & M. R. Co. v. Matson [Kan.] 75 Pac. 503. One leaving a dangerous pile of lumber in the public street where small children were in the habit of playing cannot escape liability for injury on the ground that the lumber was not negligently stacked. Harper v. Kopp, 24 Ky. L. R. 2342, 73 S. W. 1127. When the owner of dangerous premises knows or ought to know that children so young as to be ignorant of the danger will resort thereto, he must take such precautions to keep them from the premises or to protect them while there as a man of ordinary care and prudence under like circumstances would take. Chicago, B. & Q. R. Co. v. Krayenbuhl [Neb.] 91 N. W. 880, 59 L. R. A. 920. Recovery for injuries to a child of five years caused by defective piling of timbers in the highway is not defeated on the ground that the child became a trespasser in turning aside from an errand to play thereon. Busse v. Rogers [Wis.] 98 N. W. 219. The owner of a lumber yard negligently piling lumber on the street is liable for injuries to a child of five years attracted thereto to play by reason of the "teetery" way the timbers were piled. Id. The owner of a slate factory is liable for injuries to a child caused by leaning against a slab resting against the building on the sidewalk though the slab stood within the building line. Rachmel v. Clark, 205 Pa. 314.

32. Butts v. Nat. Exch. Bank, 99 Mo. App. 168, 72 S. W. 1083. There is sufficient evidence to go to the jury on the question of negligence where it appears that the section of a railing that fell on a pedestrian was not fastened and had been in that condition for some time. Id.

33. The owner of a gas well near a highway must use care as to blowing same off and travelers on the highway have a right to assume that it will not be blown off without warning. Snyder v. Phila. Co. [W. Va.] 46 S. E. 866.

34. Recovery for injuries from a runaway caused by noises from a gasoline engine is not to be defeated on the ground that the place where the runaway occurred was not a public street but a private way, defendant having acquiesced in its use. Wolf v. Des Moines Elevator Co. [Iowa] 98 N. W. 301.

35. Neal v. Wilmington & N. C. Elec. R. Co., 3 Pen. [Del.] 467.

36. Dutton v. Greenwood Cemetery Co., 80 App. Div. [N. Y.] 352.

37. McCabe v. American Woolen Co., 124 Fed. 283.

38. Uggla v. Brokaw, 77 App. Div. [N. Y.] 310.

39. Waterhouse v. Schlitz Brew. Co. [S. D.] 94 N. W. 587.

40. Norman v. Dowd, 86 App. Div. [N. Y.] 243.

41. Laws 1897, p. 474, c. 378. Bretsch v. Plate, 82 App. Div. [N. Y.] 399. That one could read a newspaper in a hallway at 5 P. M. in March does not show that it was sufficiently lighted without artificial light at 4 or 4:30 P. M. in December. Id.

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happens after its acceptance by the public.[42] Elevator shafts must be safeguarded.[43] Where the question is whether an elevator had a light at the time of the accident, it is not important whether it was customary for elevators to be lighted.[44]

Ordinary care is required as to excavations,[45] and they should be safeguarded.[46]

One shot by a *spring gun* placed in a melon patch may recover for the injuries,[47] and a code provision relating to homicide for theft at night may not be urged as a defense.[48]

The fact that a fire insurance salvage corps is given a right of way in the streets does not absolve it from liability for negligence.[49]

Persons liable.—The owner of premises is not liable for negligence of an independent contractor.[50] A city granting a building permit does not thereby become liable for negligence of the person constructing same.[51] A market company and not a lessee of a stall is liable for negligence of the stall lessee in failing to keep adjoining aisles free from obstructions, the lessee being regarded as the market company's agent.[52] The lessor of a lot for the production of oil or gas therefrom reserving a share of the oil produced but no control over methods of work is not liable for injuries caused by the escape of the oil.[53] The lessor of a defective toboggan slide is liable for injuries caused thereby.[54]

§ 3. *Proximate cause.*—There is no liability unless the negligence was the proximate cause of the injury.[55] The proximate cause is the cause which stands next in causation to the effect, not necessarily in time, but in causal relation.[56]

42. Salliotte v. King Bridge Co. [C. C. A.] 122 Fed. 378.

43. The duty to protect customers against dangers from unprotected elevator shafts does not restrict the proprietor to the use of guards and barriers. Burk v. Walsh, 118 Iowa, 397, 92 N. W. 65. The owner of a burning building is not liable for injuries to a fireman in falling down an elevator shaft because not safe-guarded where he entered the building through an unusual entrance and the safeguards could have been removed by others who had preceded him. Baker v. Otis Elevator Co., 78 App. Div. [N. Y.] 513.

44. Muller v. Hale, 138 Cal. 163, 71 Pac. 81.

45. Wilkins v. Grant, 118 Ga. 522; Irvine v. Smith, 204 Pa. 58. The owner of property is liable to an adjoining landowner for the negligence of an independent contractor where he failed to give timely notice of the nature and extent of the intended excavation. Davis v. Summerfield, 133 N. C. 325. The presence in a village street of an open ditch 300 feet long, 3 to 4 feet wide, and 18 to 30 inches deep, and which contained water, is negligence. Bradner v. Warwick, 86 N. Y. Supp. 935. A contractor making an excavation drilled holes within a foot of a water pipe and blasted without turning off the water, which escaped and overflowed plaintiff's land. Held negligence. Wheeler v. Norton, 86 N. Y. Supp. 1095.

46. It is the duty of a city to safeguard excavations whether the excavation was made by a city or an individual. Holitza v. Kan. City [Kan.] 74 Pac. 594. The owner of premises is liable for injuries caused by falling in a trench left unguarded by contractors as the excavation constituted a nuisance. Negligence. Thomas v. Harrington [N. H.] 54 Atl. 285; McKeon v. Weber Bldg. Co., 84 N. Y. Supp. 913.

47, 48. Grant v. Hass, 31 Tex. Civ. App. 688, 75 S. W. 342.

49. Muhs v. Fire Ins. Salvage Corp., 89 App. Div. [N. Y.] 389.

50. Parkhurst v. Swift, 31 Ind. App. 521, 68 N. E. 620; Salliotte v. King Bridge Co. [C. C. A.] 122 Fed. 378; Schutte v. United Elec. Co., 68 N. J. Law, 435; St. Louis E. M. Fireproofing Co. v. Dawson, 30 Tex. Civ. App. 261, 70 S. W. 450; Pittsfield C. Mfg. Co. v. Pittsfield Shoe Co., 71 N. H. 522, 60 L. R. A. 116. The clerk of the owner of premises injured by negligence of a contractor doing work thereon while going on errand for his employer may recover from the contractor for injuries. Kitchen v. Riter-Conley Mfg. Co. [Pa.] 56 Atl. 1083.

51. Copeland v. Seattle [Wash.] 74 Pac. 582.

52. Wash. Market Co. v. Clagett, 19 App. D. C. 12.

53. Langabaugh v. Anderson [Ohio] 67 N. E. 286.

54. Barrett v. Lake Ontario Beach Imp. Co., 174 N. Y. 310, 66 N. E. 968.

55. Pittsfield C. Mfg. Co. v. Pittsfield Shoe Co., 71 N. H. 522, 60 L. R. A. 116; Carrigan v. Stillwell, 97 Me. 247. Insufficiency of evidence to support finding that negligence of defendant in leaving unguarded a place on the river where he was cutting ice. Nellis v. Laughlin, 79 App. Div. [N. Y.] 470; Standard L. & P. Co. v. Munsey [Tex. Civ. App.] 76 S. W. 931; Murphy v. New York, 89 App. Div. [N. Y.] 93; Kube v. St. Louis Transit Co. [Mo. App.] 78 S. W. 55.

56. Chicago & E. I. R. Co. v. Heerey, 105 Ill. App. 647. The act of boys turning the power on an electric truck standing in a public street with power off and the brake on is the proximate cause of injuries caused by collision with the uncontrolled truck. Berman v. Schultz, 40 Misc. [N. Y.] 212. The sale of beef without giving information that

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It is sufficient if the effect follows naturally and probably though not directly and immediately.[57] The negligence must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result.[58] Where another cause intervenes without which the injury would not have occurred, such intervening cause is the proximate cause.[59] If the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such as its probable or natural consequences could reasonably have been anticipated by the original wrongdoer the causal connection is not broken.[60]

It is no defense to an action for damages for an injury of which the act or omission of the defendant was the proximate cause that the wrongful act of another concurred therein.[61]

it was infected was not the proximate cause of blood poisoning caused by cutting it up after purchaser knew it was putrid. Williams v. Wiedman [Mich.] 97 N. W. 966. Piling lumber on a sidewalk in the vicinity of the homes of numerous children with the knowledge of congregation of children there and climbing on the lumber was the proximate cause of injury to child caused by fall of lumber. True Co. v. Woda, 201 Ill. 315, 66 N. E. 369. A railroad company is not liable for communication of infectious diseases from a boarding car where the disease was acquired six weeks after the car was taken in charge by the state health authorities and there was no evidence of negligence on the part of the company. Mason v. Ill. Cent. R. Co. [Ky.] 77 S. W. 375. Where a team is frightened by the negligent blowing off of a gas well and the teamster in attempting to control them breaks a line whereby he is thrown from the wagon, the proximate cause of the injury is the negligent blowing off of the well and not the weakness of the line though the line was too weak for such an emergency. Snyder v. Philadelphia Co. [W. Va.] 46 S. E. 366. Negligence of a railroad company in starting a fire on plaintiff's premises would be the proximate cause of injury to his health resulting from overexertion in putting it out. Glanz v. Chicago, M. & St. P. R. Co., 119 Iowa 611, 93 N. W. 575. The proximate cause of injury from uninsulated wires clutched by one falling from a ladder is the fall from the ladder. Elliott v. Allegheny County Light Co., 204 Pa. 568. The illegal maintenance of a pest house was the proximate cause of plaintiff's contracting the disease while visiting in a nearby home one member of which was coming down with the disease. Henderson v. O'Haloran, 24 Ky. L. R. 995, 70 S. W. 662, 59 L. R. A. 718. Where a motorman was injured by collision with a car being backed to obtain relief for a derailed car the defect in the track causing the derailment was not the proximate cause of his injuries. Seccombe v. Detroit Elec. R. Co. [Mich.] 94 N. W. 747. A contractor in putting off a blast burst a water pipe which was laid on rock and not on soft material as required by the rules of the water department. Wheeler v. Norton, 86 N. Y. Supp. 1095. Failure to light a waiting room in a depot is not the proximate cause of an assault on a female passenger by a negro in such room. Prokop v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 79 S. W. 101. A motorman allowed a child, who did not appreciate the danger of jumping off a moving car, to ride on the front platform from which it jumped. Held the act of the motorman was the proximate cause. Denison & S. R. Co. v. Carter [Tex. Civ. App.] 79 S. W. 320.

57. Meyer v. Milwaukee Elec. R. & Light Co., 116 Wis. 336, 93 N. W. 6; Cole v. German Sav. & Loan Soc. [C. C. A.] 124 Fed. 113; Boyce v. Wilbur Lumber Co. [Wis.] 97 N. W. 563; Shaughnessy v. Pittsburg, 20 Pa. Super. Ct. 609. It is no defense to an action for negligence that the injury would have occurred regardless of such negligence. A railway company dug a ditch on its agent's premises; he was injured by falling into it. In an action for damages the defense was set up that he would have fallen into it if it had been on the company's grounds. Wood v. New York Cent. & H. R. R. Co., 86 N. Y. Supp. 817. Evidence of negligence in switching causing a collision and naphtha flowing out of the cars into the sewer and there exploding causing injury held sufficient to sustain a verdict. Gudfelder v. Pittsburg, C., C. & St. L. R. Co. [Pa.] 57 Atl. 70.

58. Atchison, T. & S. F. R. Co. v. Parry [Kan.] 73 Pac. 105. An injury which could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause or no cause whatever of the injury. Cole v. German Sav. & Loan Soc. [C. C. A.] 124 Fed. 113.

59. Cole v. German Sav. & Loan Soc. [C. C. A.] 124 Fed. 113. Causal connection is not shown by proof that plaintiff failed to close a gate a week previous to the accident by reason of escape of a horse through the gate onto a railroad track where the gate had been closed several times during the interval. Atkinson v. Chicago & N. W. Ry. Co. [Wis.] 96 N. W. 529.

60. Southern R. Co. v. Webb, 116 Ga. 152, 59 L. R. A. 109.

61. Cole v. German Sav. & Loan Soc. [C. C. A.] 124 Fed. 113. The leakage of gas is the proximate cause of injuries to a vacant house by explosion caused by a third person searching for the leak with a lighted candle. Consolidated Gas Co. v. Getty, 96 Md. 683. Where the proximate cause of an injury was negligence in permitting a guy rope to fall in a street and become charged with electricity, it is not material that the negligence of a third person contributed to

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If the injury may have resulted from either of two causes for one of which and not for the other the defendant is liable, plaintiff must show with reasonable certainty that defendant's negligence caused the injury and he will fail if the question is left open for conjecture.[62]

§ 4. *Contributory negligence.*—Contributory negligence is such an act or omission on the part of plaintiff amounting to a want of ordinary and proper care and prudence, as, concurring or co-operating with some negligent act of defendant, is the proximate cause of the injuries.[63] It requires two things: want of ordinary care,[64] and approximate connection between the want of ordinary care and the injury,[65] and, when proved, is a complete defense.[66] The ordinary care required is such care as a man of ordinary prudence might reasonably be expected to exercise under like circumstances,[67] and intends the exercise of faculties of sight and hearing,[68] but does not require the party to guard against unanticipated injuries,[69]

the accident. Neal v. Wilmington & N. C. Elec. R. Co., 3 Pen. [Del.] 467.

62. Smart v. Kansas City, 91 Mo. App. 586.

63. International & G. N. R. Co. v. Anchonda [Tex. Civ. App.] 75 S. W. 557; Colbourn v. Wilmington [Del.] 56 Atl. 605; Hanheide v. St. Louis Transit Co. [Mo. App.] 78 S. W. 820; Cleveland, C. C. & St. L. R. Co. v. Gahan, 24 Ohio Circ. R. 277; Norfolk & W. R. Co. v. Perrow [Va.] 43 S. E. 614; Consumers Brewing Co. v. Doyle's Adm'x [Va.] 46 S. E. 390; Fritz v. Western Union Tel. Co. [Utah] 71 Pac. 209; Chicago G. W. R. Co. v. Bailey, 66 Kan. 115, 71 Pac. 246; Labarge v. Pere Marquette R. Co. [Mich.] 95 N. W. 1073. There is a want of ordinary care constituting contributory negligence where something was done or omitted which an ordinarily careful and prudent man in a like situation would have done or omitted and which was the proximate cause of the injury. Hone v. Mammoth Min. Co. [Utah] 75 Pac. 331.

64. Nicholas v. Tanner, 117 Ga. 223; Pelfrey v. Tex. Cent. R. Co. [Tex. Civ. App.] 73 S. W. 411; Craig v. Benedictine Sisters' Hospital Ass'n, 88 Minn. 535, 93 N. W. 669. It is not contributory negligence of the owner of vacant premises injured by an explosion of gas that the premises were not inspected for a month. Consolidated Gas Co. v. Getty, 96 Md. 683.

65. Fishburn v. Burlington & N. W. R. Co. [Iowa] 98 N. W. 380; Georgia S. & F. R. R. Co. v. Cartledge, 116 Ga. 164, 59 L. R. A. 118; Frank v. St. Louis Transit Co., 99 Mo. App. 323, 73 S. W. 239; Harper v. Kopp, 24 Ky. L. R. 2342, 73 S. W. 1127; Baca v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 73 S. W. 1073. It is error to instruct that contributory negligence to bar recovery must have been the direct and proximate cause of plaintiff's injury. Galveston, H. & S. A. R. Co. v. Hubbard [Tex. Civ. App.] 70 S. W. 112.

66. Galveston, H. & S. A. R. Co. v. Holyfield [Tex. Civ. App.] 70 S. W. 221; Sattler v. Chicago, R. I. & P. R. Co. [Neb.] 98 N. W. 663.

67. Louisville & N. R. Co. v. Logsdon, 24 Ky. L. R. 1566, 71 S. W. 905; Schrunk v. St. Joseph [Wis.] 97 N. W. 946; Quill v. Southern Pac. Co., 140 Cal. 268, 73 Pac. 991; Meyers v. Chicago, R. I. & P. R. Co. [Mo. App.] 77 S. W. 149; Hanlon v. Milwaukee Elec. R. & Light Co., 118 Wis. 210, 95 N. W. 100. "Due care" is not the equivalent to "ordinary care." San Antonio v. Talerico [Tex. Civ. App.] 78 S. W. 28. It is the duty of one who raises a gate for lawful passage to open and close it himself and to see that it is kept open while passing through if that be necessary. Read v. Warwick Mills [R. I.] 56 Atl. 679.

68. Burns v. Metropolitan St. R. Co., 66 Kan. 188, 71 Pac. 244. A driver is guilty of contributory negligence where he knows of the defect in the highway and could have easily seen same in time to have avoided the accident if he had looked but was engaged in talking with a companion at the time. Knight v. Baltimore [Md.] 55 Atl. 388. A licensee using a freight elevator is guilty of contributory negligence in stepping off the elevator into an unguarded space between the elevator and the wall of the shaft without looking, the space being perfectly apparent. Gray v. Siegel-Cooper Co., 78 App. Div. [N. Y.] 118. One entering strange premises in the night is guilty of contributory negligence where he fails to examine passageways and thereby falls into an elevator shaft. Daley v. Kinsman, 182 Mass. 306, 65 N. E. 385. A licensee on unfamiliar premises which are poorly lighted who falls down an elevator shaft is guilty of contributory negligence. Bentley v. Loverock, 102 Ill. App. 166. It is not consistent with ordinary care for one to travel a highway covered with water to the depth of several feet entirely obscuring its location. Schrunk v. St. Joseph [Wis.] 97 N. W. 946. Plaintiff's horse stepped on a live wire in the street and fell. It was early morning and the light was not good and in helping his horse to rise plaintiff came in contact with the wire. Held not contributory negligence. Wolpers v. N. Y. & Q. Elec. Light & Power Co., 86 N. Y. Supp. 845.

69. A railway employe is not bound to anticipate an impediment erected by the owner of adjacent premises not required for the operation of the road. Iola Portland Cement Co. v. Moore, 65 Kan. 762, 70 Pac. 864. An expressman injured by a runaway caused by negligence of defendant in letting boxes fall while being lowered to the ground is not guilty of contributory negligence as a matter of law for failing to hitch the horses, it appearing that they were kind and the reins were within easy reach. Lochrain v. Autophone Co., 77 App. Div. [N. Y.] 542. One sleeping with a child coming down with the smallpox contracted from a nearby pest house illegally maintained is

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though one may be guilty of contributory negligence in failing to anticipate and act upon the contingency of another's negligence.[70] It is not of itself contributory negligence to engage in a dangerous occupation,[71] or to continue to live in apartments known to be defective.[72] Knowledge of defect causing injury is not conclusive but may be taken into consideration on question of care.[73] Injury, while violating an ordinance, may amount to contributory negligence.[74] One is not guilty of contributory negligence as a matter of law when seeking the rescue of another from imminent danger thereby imperilling his own life.[75] The relaxation of the rule of care where a party is required to act in the presence of impending danger applies only where the injured party is without fault in putting himself in the place of peril.[76] There may be no recovery of damages for injuries aggravated by plaintiff's neglect, the recovery being limited to the original injury.[77]

The defense of contributory negligence will not avail if defendant by the exercise of reasonable care could have avoided the accident.[78]

Children are charged with care commensurate with their age and understanding,[79] and there is practical unanimity of holdings that children beyond twelve years of age are capable of contributory negligence.[80] Children of tender years are not sui juris and are incapable of contributory negligence.[81]

not guilty of contributory negligence where he was ignorant of the proximity of the pest house and was informed by the child's mother that eruptions were caused by chicken pox. Henderson v. O'Haloran, 24 Ky. L. R. 995, 70 S. W. 662.

70. Erie R. Co. v. Kane [C. C. A.] 118 Fed. 223.

71. Potts v. Shreveport Belt R. Co., 110 La. 1.

72. Carpets and oilcloth on floor of hallway full of holes. Keating v. Mott, 86 N. Y. Supp. 1041.

73. South Omaha v. Taylor [Neb.] 96 N. W. 209. A telegram announcing that a derailing switch has been put in at his station does not charge a station agent with notice of a trench dug on his own premises so as to render him guilty of contributory negligence in falling into it. Wood v. New York Cent. & H. R. R. Co., 86 N. Y. Supp. 817. The fact that a book of rules made it the duty of the station agent to be familiar with the condition of the yard does not charge him with notice of an open ditch and render him guilty of contributory negligence in falling into it. Id.

74. Riding a bicycle at a speed prohibited by ordinance. Harrington v. Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15.

75. Saylor v. Parsons [Iowa] 98 N. W. 500. Attempt to rescue one from threatened injury by a fire patrol wagon driven through the streets at an excessive speed. Muhs v. Fire Ins. Salvage Corps, 89 App. Div. [N. Y.] 389. One trying to dissuade another from shooting a third person and is himself shot. Bitzer v. Caver, 25 Ky. L. R. 92, 74 S. W. 735.

76. Chattanooga Elec. Co. v. Cooper, 109 Tenn. 208, 70 S. W. 72. If plaintiff by the want of ordinary care on the part of defendant found himself in a condition of imminent peril the law would not hold him guilty of contributory negligence because he did not act in the best way to avoid injury. Riley v. Mo. Pac. R. Co. [Neb.] 95 N. W. 20.

77. Gulf, C. & S. F. R. Co. v. Robinson [Tex. Civ. App.] 72 S. W. 70; Atkinson v. Fisher [Neb.] 93 N. W. 211; Texas & P. R. Co. v. McKenzie, 30 Tex. Civ. App. 293, 70 S. W. 237. The doctrine requiring efforts to minimize effects of negligence is applicable to injuries to property. Louisville & N. R. Co. v. Sullivan Timber Co. [Ala.] 35 So. 327. Recovery cannot be defeated on the ground of improper treatment where a reputable physician was employed. Elliott v. Kansas City, 174 Mo. 554, 74 S. W. 617.

78. Turnbull v. New Orleans & C. R. Co. [C. C. A.] 120 Fed. 783; Richmond Traction Co. v. Martin's Adm'r [Va.] 45 S. E. 886; Coombs v. Mason, 97 Me. 270; Chicago Terminal Transfer Co. v. Gruss, 102 Ill. App. 439; Springfield Consol. R. Co. v. Puntenney, 200 Ill. 9, 65 N. E. 442; Livingston v. Wabash R. Co., 170 Mo. 452, 71 S. W. 136. Ordinary care must be used to prevent injury to trespassers. Young child on street car track where it could be seen. Carney v. Concord St. R. Co. [N. H.] 57 Atl. 218. When contributory negligence had been shown in an action for injuries to a child, it was error to dismiss the case when the defendant had prevented introduction of testimony as to the child's age by refusal to consent to the employment of an interpreter. Mennella v. Metropolitan St. R. Co., 86 N. Y. Supp. 930.

79. Mellen v. Old Colony St. R. Co. [Mass.] 68 N. E. 679; Parker v. Washington Elec. St. R. Co. [Pa.] 56 Atl. 1001; Rogers v. Samuel Meyerson Print. Co. [Mo. App.] 78 S. W. 79; McDonald v. Metropolitan St. R. Co., 75 App. Div. [N. Y.] 559; Lafferty v. Third Ave. R. Co., 85 App. Div. [N. Y.] 592; Atchason v. United Traction Co., 90 App. Div. [N. Y.] 571; Harper v. Kopp, 24 Ky. L. R. 2342, 73 S. W. 1127; Ittner Brick Co. v. Killian [Neb.] 93 N. W. 951; Quincy Gas & Elec. Co. v. Bauman, 104 Ill. App. 600.

80. Mitchell v. Ill. Cent. R. Co., 110 La. 630; Campbell v. St. Louis & S. R. Co., 175 Mo. 161, 75 S. W. 86; Charlton v. Forty-Second St., M. & St. N. Ave. R. Co., 79 App. Div. [N. Y.] 546; Albert v. New York, 75 App. Div. [N. Y.] 553; McDonald v. Metropolitan St. R. Co., 80 App. Div. [N. Y.] 238; Killelea v. Cal. Horseshoe Co., 140 Cal. 602, 74 Pac.

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One with impaired eyesight is required to exercise care beyond the ordinary.[82]

Imputed negligence.—Contributory negligence will be imputed to another than the negligent person so as to bar an action by such other for injuries received by him if the negligent person was under the direction and control of the injured person,[83] as in cases of injury by driver,[84] or where the injured person is not sui juris and the negligent person is responsible for him as a parent or guardian,[85] or elder brother or sister.[86] Where a minor is sui juris, negligence of parent can-

157. A minor assumes apparent risks which he is capable of comprehending. Motor cars in a mine. Williams v. Belmont Coal & Coke Co. [W. Va.] 46 S. E. 802. A child is accountable for that degree of care which is to be expected of a prudent person of his age. Boy 15 years of age on a railroad crossing. Dubiver v. City & S. R. Co. [Or.] 75 Pac. 693. An infant may be guilty of contributory negligence. They assume patent, obvious, and known dangers which they are able to appreciate and avoid. Evans v. Josephine Mills [Ga.] 46 S. E. 674.

81. Twenty-five months. O'Brien v. Wis. Cent. R. Co. [Wis.] 96 N. W. 424. Twenty-one months old. Carney v. Concord St. R. Co. [N. H.] 57 Atl. 218. Two years and six days. Carr v. Merchants' Ice Co., 91 App. Div. [N. Y.] 162. Three and one-half years. Livingston v. Wabash R. Co., 176 Mo. 452, 71 S. W. 136. Three years and ten months. True Co. v. Woda, 201 Ill. 315, 66 N. E. 369. Four years. Reliance Textile & Dye Works v. Mitchell, 24 Ky. L. R. 1286, 71 S. W. 425. Under five years. Eskildsen v. Seattle, 29 Wash. 583, 70 Pac. 64. Six years. Chicago City R. Co. v. Biederman, 102 Ill. App. 617; Ollis v. Houston, E. & W. T. R. Co. [Tex. Civ. App.] 73 S. W. 30. Under seven years. Ill. Cent. R. Co. v. Jernigan, 198 Ill. 297, 65 N. E. 88. Eight years. St. Louis, I. M. & S. R. Co. v. Colum [Ark.] 77 S. W. 596. A child under 12 years of age is presumed non sui juris but the contrary may be shown. Hill v. Baltimore & N. Y. R. Co., 75 App. Div. [N. Y.] 325, 11 Ann. Cas. 418.

82. Karl v. Juniata County, 206 Pa. 633.

83. Negligence of engineer not imputed to his fireman. Southern Ind. R. Co. v. Davis [Ind. App.] 68 N. E. 191; Id., 69 N. E. 550. Where a railroad yardmaster was killed in a collision between a train on which he was riding and a street car, the negligence of the railroad company in failing to keep a watchman at the crossing was not imputable to deceased in an action against the street railway company. Philip v. Herafy [Mich.] 97 N. W. 963.

84. Baxter v. St. Louis Transit Co. [Mo. App.] 78 S. W. 70; United R. & Elec. Co. v. Biedler [Md.] 56 Atl. 813; Marsh v. Kan. City Southern R. Co. [Mo. App.] 78 S. W. 284; Krintzman v. Interurban St. R. Co., 84 N. Y. Supp. 243; Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602, 65 N. E. 309; Louisville R. Co. v. Anderson, 25 Ky. L. R. 666, 76 S. W. 153; Ciuffi v. Metropolitan St. R. Co., 84 N. Y. Supp. 918. The contributory negligence of the driver of a fire truck in colliding with a street car will not be imputed to a fireman on the truck, he having no control over the driver and not being under his authority. Geary v. Metropolitan St. R. Co., 84 App. Div. [N. Y.] 514. It cannot be said as a matter of law that negligence of the driver of an insurance patrol wagon in colliding with a car is not imputable to an employe of the patrol riding with the driver and ringing the bell. Adler v. Metropolitan St. R. Co., 84 N. Y. Supp. 877. Contributory negligence of a son will not be imputed to his mother with whom he was riding in the absence of showing that he was in her employ so as to prevent her recovery for injuries caused by a defective street. Johnson v. St. Joseph, 96 Mo. App. 663, 71 S. W. 106. A driver's negligence is not imputable to a helper having distinct duties. Waters v. Metropolitan St. R. Co., 85 N. Y. Supp. 1120. The negligence of one with whom plaintiff was riding as a guest in a buggy struck by defendant's train is not imputable to plaintiff. Duval v. Atlantic Coast Line R. Co. [N. C.] 46 S. E. 750.

85. Lafferty v. Third Ave. R. Co., 85 App. Div. [N. Y.] 592; True Co. v. Woda, 201 Ill. 315, 66 N. E. 369. A parent is only required to exercise ordinary care to prevent injury to his child. Corbett v. Oregon Short Line R. Co. [Utah] 71 Pac. 1065. The fact that a father was absent from home and left the government of his children to the mother did not show negligence. Over v. Mo., K. & T. R. Co. [Tex. Civ. App.] 73 S. W. 535. The parents of a child 6½ years of age were not guilty of negligence in letting him accompany a brother 12 years of age, well acquainted with the city, to visit an aunt. Levine v. Metropolitan St. R. Co., 78 App. Div. [N. Y.] 426. Negligence on the part of a grandmother in charge of a five year old child is not shown by the fact that he left the elevator with other persons and was injured while returning on being called by his grandmother. Hayes v. Pitts-Kimball Co., 183 Mass. 262, 67 N. E. 249. A father leaving an eight-year old child unattended at a railroad station whence the child wanders on the track is guilty of contributory negligence preventing his recovery for loss of services occasioned by the injuries to the child. St. Louis, I. M. & S. R. Co. v. Colum [Ark.] 77 S. W. 596. A mother who lets her eight-year old child go into a yard to play with an older sister is not guilty of contributory negligence, the child having gone into the street and been run over by a team. O'Brien v. Hudner, 182 Mass. 381, 65 N. E. 788. On the question of care of a parent the jury may consider their station in life and therefrom determine whether poor parents were negligent in allowing young children to play under the care of older brothers or sisters. True Co. v. Woda, 104 Ill. App. 15. The negligence of the mother is not imputable to child four years of age. Nashville R. R. v. Howard [Tenn.] 78 S. W. 1098. Negligence of a parent of a child non sui juris cannot be imputed to the child. Carney v. Concord St. R. Co. [N. H.] 57 Atl. 218.

86. In an action for injuries to a child of

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not be imputed to him.[87] The negligence of the parent will not be imputed to the child in an action for the benefit of the child.[88] The negligence of a carrier is not imputed to a passenger who is injured by the concurrent negligence of the carrier and another and he may recover from both.[89] The negligence of one attempting to rescue another from a perilous position is not to be imputed to the injured person, though he may not have exercised the best judgment in the emergency.[90] The owners of property are not estopped to recover for injuries thereto by the contributory negligence of a predecessor in title.[91] The doctrine of imputed negligence does not obtain in Nebraska except in cases where there is the relation of partnership or agency or master and servant.[92]

The doctrine of *comparative negligence* which allowed a recovery notwithstanding slight contributory negligence where the negligence of defendant was "gross" does not exist in Illinois,[93] Nebraska,[94] or Virginia.[95]

§ 5. *Actions.*—The statutory *notice of injury* is sufficient though the amount demanded is not explicitly stated,[96] and may be signed by an attorney.[97] It is no *defense* that plaintiff had another remedy,[98] nor that a fellow-servant was negligent where the action is against one not their master.[99]

A joint tort feasor need not be joined.[1] The laws of Pennsylvania do not allow a recovery by a mother for injuries to a child not resulting in death.[2] One having no property interest in a threshing engine injured by collapse of bridge may not recover from the county for lost profits on a threshing contract.[3]

Pleading and issues.—The complaint is sufficient if the negligence is pleaded in general,[4] though not in definite terms,[5] particularly as against a general de-

6½ years in the care of a brother of 12 years, the negligence if any of the brother from being run down by a car will be imputable to the child. Levine v. Metropolitan St. R. Co., 78 App. Div. [N. Y.] 426.

87. Over v. Mo., K. & T. R. Co. [Tex. Civ. App.] 73 S. W. 535. An infant of sufficient age and intelligence to be allowed with prudence to go onto the streets unaccompanied is sui juris and it is only his contributory negligence that will defeat a recovery for injuries. Lafferty v. Third Ave. R. Co., 85 App. Div. [N. Y.] 592.

88. Eskildsen v. Seattle, 29 Wash. 583, 70 Pac. 64; Profit v. Chicago Great Western R. Co., 91 Mo. App. 369; St. Louis S. W. R. Co. v. Byers [Tex. Civ. App.] 70 S. W. 558.

89. Louisville & C. Packet Co. v. Mulligan [Ky.] 77 S. W. 704.

90. Schoenfeld v. Metropolitan St. R. Co., 40 Misc. [N. Y.] 201.

91. Richmond v. Gallego Mills Co. [Va.] 45 S. E. 877.

92. Hajsek v. Chicago, B. & Q. R. Co. [Neb.] 94 N. W. 609.

93. Macon v. Holcomb, 205 Ill. 643, 69 N. E. 79.

94. Riley v. Mo. Pac. R. Co. [Neb.] 95 N. W. 20.

95. Richmond Traction Co. v. Martin's Adm'x [Va.] 45 S. E. 886.

96. Mass. St. 1894, c. 389, § 1. Carroll v. New York, N. H. & H. R. R., 182 Mass. 237, 65 N. E. 69.

97. Hupfer v. Nat. Distilling Co. [Wis.] 96 N. W. 809.

98. The action for negligence will not be defeated by the fact that an action for maintaining a nuisance on the premises could be prosecuted. O'Sullivan v. Knox, 81 App. Div. [N. Y.] 438.

99. St. Louis Nat. Stock Yards v. Godfrey, 198 Ill. 288, 65 N. E. 90.

1. Raney v. La Chance, 96 Mo. App. 479, 70 S. W. 376.

2. Kelly v. Pittsburg & B. Traction Co., 204 Pa. 623.

3. Foster v. Lyon County Com'rs [Kan.] 74 Pac. 595.

4. Princeton Coal & Min. Co. v. Roll [Ind.] 66 N. E. 169; Kan. City, M. & B. R. Co. v. Flippo [Ala.] 35 So. 457; Louisville & N. R. Co. v. Jones [Fla.] 34 So. 246; Chicago v. Selz, 202 Ill. 545, 67 N. E. 386. In an action to recover damages for a single act of negligence it is unnecessary to allege the separate items of damage resulting therefrom. Nokken v. Avery Mfg. Co., 11 N. D. 399, 92 N. W. 487; Ala. Great S. R. Co. v Clark, 136 Ala. 450. A complaint alleging that plaintiff's property was burned by fire negligently set out by a railroad engine is sufficient without alleging in what the negligence consisted. It is not necessary for the declaration to set out the facts constituting the negligence, but an allegation of sufficient acts causing injury coupled with an averment that they were negligently done will be sufficient. Consumers' Elec. Light & St. R. Co., v. Pryor [Fla.] 32 So. 797. The character of the negligence is sufficiently set forth by an allegation that defendant ran a train backwards in a violent manner without notice or warning which fact constituted willfulness and recklessness. Bolin v. Southern R. Co., 65 S. C. 222. An allegation that defendant failed to properly safeguard a cellar way on the "common and public way" is not to be construed into an allegation that the way was a private way by the fact of averment that it afforded a means of egress and ingress to the prem-

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murrer.[6] It must aver the negligence to be that of defendant,[7] and that the negligence pleaded is the proximate cause of the injury.[8] Where the declaration contains no general averments, plaintiff's recovery will be limited to the particular negligence alleged.[9] The complaint need not set out names of defendants' servants inflicting the injuries.[10] In some jurisdictions it is not necessary to negative contributory negligence of injured person.[11] Otherwise where the injury is to property.[12] Allegation of concurrent acts of negligence against each of two defendants does not present a separable controversy.[13] Under code provision authorizing acts of negligence and acts of willful tort to be combined in one statement, the adverse party may not require a separation nor an election.[14] A bill of particulars may be required as to the time of an accident whether day or night and whether train was freight or passenger but not as to the number of the train causing the injury.[15]

The defense of contributory negligence must be specially pleaded,[16] unless it sufficiently appears from the complaint,[17] and must go beyond averring negligence as a conclusion; it must aver a state of facts to which the law attaches that conclusion.[18] Sufficiency of plea may be waived by failure to make a timely objec-

ises. Wesner v. Green [N. J. Law] 56 Atl. 237. In a complaint for injuries received at a railway crossing, an allegation that defendant was negligent, careless, and reckless in the operation of its trains, was held a sufficient allegation of negligence. Louisville & N. R. Co. v. Dick [Ky.] 78 S. W. 914.

5. Bucci v. Waterman [R. I.] 54 Atl. 1059. Negligence must be pleaded as a fact and not by way of inference. The averment read "knew or by the exercise of reasonable care 'might' have known." Wilkins v. Standard Oil Co. [N. J. Law] 57 Atl. 258.

6. Citizens' St. R. Co. v. Jolly [Ind.] 67 N. E. 935. A declaration will stand against a demurrer though inartistically drafted if it allege with sufficient certainty facts showing a legal duty and a neglect thereof and resulting injury without plaintiff's fault. Davey v. Erie R. Co. [N. J. Law] 54 Atl. 233. A complaint which alleges negligence generally is bad on demurrer; it should set forth the facts. Russell v. Central of Georgia R. Co. [Ga.] 46 S. E. 858.

7. Berry v. Dole, 87 Minn. 471, 92 N. W. 334.

8. Minnuci v. Philadelphia & R. Co. [N. J. Law] 53 Atl. 229; Shepherd v. Morton-Edgar Lumber Co., 115 Wis. 522, 92 N. W. 260. An allegation of necessity of heating to prevent injury to goods in premises from water caused by frozen pipes negatives the idea of other negligence as the proximate cause, as failure to employ watchman to inspect. Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co., 71 N. H. 522, 60 L. R. A. 116. The allegation that defendant's negligence caused decedent's death sufficiently avers proximate cause. Chicago & E. I. R. Co. v. Stephenson [Ind. App.] 69 N. E. 270. When specific negligence alleged is not the proximate cause, the petition is not helped as against demurrer by a general allegation that defendant ought to have foreseen the danger. Woman assaulted by negro in dark railroad waiting room. Prokop v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 79 S. W. 101.

9. Louisville & N. R. Co. v. Wade [Fla.] 35 So. 863.

10. Bolin v. Southern R. Co., 65 S. C. 222.

11. Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602, 65 N. E. 809; Chicago & E. I. R. Co. v. Stephenson [Ind. App.] 69 N. E. 270; Baltimore & O. R. Co. v. Ryan, 31 Ind. App. 597, 68 N. E. 923; Purcell v. Paterson & P. Gas & Elec. Co. [N. J. Law] 53 Atl. 235; Parkhurst v. Swift, 31 Ind. App. 521, 68 N. E. 620. It is not necessary to negative knowledge of dangerous condition of a bridge, the collapse of which injured plaintiff. Ind. Nat. Gas & Oil Co. v. O'Brien, 160 Ind. 266, 65 N. E. 918. A petition in a suit for personal injuries which does not allege plaintiff's freedom from contributory negligence does not state a cause of action. Brown v. Ill. Cent. R. Co. [Iowa] 98 N. W. 625.

12. Cleveland, C., C. & St. L. R. Co. v. Wisehart [Ind.] 67 N. E. 993.

13. Weaver v. Northern Pac. R. Co., 125 Fed. 155.

14. Code Civ. Proc. S. C. § 186a. And where the complaint states that the act was both negligently and willfully done, motion to make definite and not demurrer is the remedy. Schumpert v. Southern R. Co., 65 S. C. 332.

15. Bogard v. Ill. Cent. R. Co., 25 Ky. L. R. 624, 76 S. W. 170.

16. Ball v. Gussenhoven [Mont.] 74 Pac. 871; Meisner v. Dillon [Mont.] 74 Pac. 130; Holland v. Or. Short Line R. Co. [Utah] 72 Pac. 940; Southern R. Co. v. Shelton, 136 Ala. 191. An averment that death was not caused by defendant's negligence but by decedent's own negligence does not raise defense of contributory negligence. Cogdell v. Wilmington & W. R. Co., 132 N. C. 852.

17. The presumption of freedom from contributory negligence is overcome by specific averments in the complaint showing knowledge of danger and failure to exercise commensurate care. Lafayette v. Fitch [Ind. App.] 69 N. E. 414.

18. Osborne v. Ala. Steel & Wire Co., 135 Ala. 571. A plea that plaintiff was guilty of negligence, which was the proximate cause of his injury, raises the issue of contributory negligence. Stewart v. Galveston, H. & S. A. R. Co. [Tex. Civ. App.] 78 S. W. 979.

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tion.[19] Negligence is not admitted by a general denial and plea of contributory negligence.[20]

A peremptory instruction is properly given on failure to reply to answer pleading contributory negligence.[21] Under a code provision requiring reply only when the answer contains a counterclaim, failure to reply will not admit allegations of contributory negligence.[22]

The pleader is limited in his proof to the negligence particularly alleged.[23] Where negligence is generally averred, plaintiff may prove negligence in any form,[24] and where several acts of negligence are charged, he may prove any one of the acts and is not required to prove all.[25] Immaterial variances will be disregarded.[26] Plaintiff's knowledge of unsafe conditions may be shown under a general denial.[27]

Presumptions and burden of proof.—The law presumes that a man found killed by the alleged negligence of another exercised due care.[28] Where there is direct evidence as to the occurrence, the presumption of due care based on the instinct of self preservation does not obtain.[29] The violation of law may raise a presumption of negligence.[30] Long existence of a defect will imply constructive notice thereof.[31]

The doctrine of *res ipsa loquitur* applies where the accident in the ordinary course of things could not have happened if due care had been exercised.[32] The

19. Borden v. Falk Co., 97 Mo. App. 566, 71 S. W. 478; Cleveland, C., C. & St. L. R. Co. v. Coffman, 30 Ind. App. 462, 66 N. E. 179.

20. Leavenworth Light & Heating Co. v. Waller, 65 Kan. 514, 70 Pac. 365; George Fowler, Sons & Co. v. Brooks, 65 Kan. 861, 70 Pac. 600.

21. Brooks v. Louisville & N. R. Co., 24 Ky. L. R. 1318, 71 S. W. 507.

22. Mont. Code Civ. Proc. § 720. Coleman v. Perry [Mont.] 72 Pac. 42.

23. Georgia Brewing Ass'n v. Henderson, 117 Ga. 489. Averment of negligence in original construction will not authorize recovery on proof that it afterwards became insecure and was allowed to remain in that condition. Haines v. Pearson, 100 Mo. App. 551, 75 S. W. 194. Allegation of injury by negligence will not cover an assault so as to sustain a recovery for a willful injury proved. Greathouse v. Croan [Ind. T.] 76 S. W. 273. General plea of contributory negligence will not allow proof of aggravation by neglect. Louisville & N. R. Co. v. Mason, 24 Ky. L. R. 1623, 72 S. W. 27. In an action for injuries, an allegation that the elevator dump gave way by reason of the negligent manner in which it was handled does not raise the issue of improper construction. Healy v. Patterson [Iowa] 98 N. W. 576. Complaint alleged wanton and willful misconduct and mere negligence was proven. Wilson v. Chippewa Valley Elec. R. Co. [Wis.] 98 N. W. 536.

24. Collision with train at crossing. Tex. & P. R. Co. v. Meeks [Tex. Civ. App.] 74 S. W. 329.

25. Chicago, I. & L. R. Co. v. Barnes [Ind.] 68 N. E. 166; Carson v. S. R. Co. [S. C.] 46 S. E. 525.

26. Proof of injury on 10th of the month, the petition alleging date as the 11th. Louisville v. Walter's Adm'x, 24 Ky. L. R. 893, 76 S. W. 516. The fact that evidence tends to support a charge of negligence not made in the declaration does not render it improper so long as it has a material bearing on the negligence alleged. Cohen v. Chicago & N. W. R. Co., 104 Ill. App. 314.

27. Ind. Nat. Gas & Oil Co. v. O'Brien, 160 Ind. 266, 66 N. E. 742.

28. Cogdell v. Wilmington & W. R. Co., 132 N. C. 852.

29. Ames v. Waterloo & C. F. Rapid Transit Co., 120 Iowa, 640, 95 N. W. 161; Burk v. Walsh, 118 Iowa, 397, 92 N. W. 65.

30. There is a prima facie case of negligence where a child of tender years is injured by the falling of lumber piled on a sidewalk in violation of a city ordinance. True Co. v. Woda, 201 Ill. 315, 66 N. E. 869.

31. Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76.

32. Connor v. Koch, 89 App. Div. [N. Y.] 33; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164. The doctrine applies to injuries to passengers by the derailment of street cars (Adams v. Union R. Co., 80 App. Div. [N. Y.] 136), the collision of street cars on the same track (Robinson v. St. Louis & S. R. Co. [Mo. App.] 77 S. W. 493), the fall of a chimney (Travers v. Murray, 87 App. Div. [N. Y.] 552), fall of an iron column workmen were raising (Scheider v. American Bridge Co., 78 App. Div. [N. Y.] 163), the fall of a brick arch (Chenall v. Palmer Brick Co., 117 Ga. 144), bursting of water tank while being tested (Duerr v. Consolidated Gas Co., 86 App. Div. [N. Y.] 14). The doctrine of res ipsa loquitur is applicable where plaintiff's business was flooded from the defendant's floor above and there was no water coming from the ceiling immediately above. Kahn v. Burette, 85 N. Y. Supp. 1047. Negligence will not be presumed from mere fact of horse running away (Swafford v. Rosenbloom, 102 Ill. App. 578), break down of a push car when overloaded (Mitchell v. Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647). The doctrine of res ipso loquitur does not apply to a cracked

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doctrine raises the presumption of negligence but does not shift the burden of proof.[33] An unsuccessful attempt to prove the cause of the injury will not prevent a reliance on the doctrine of res ipsa loquitur.[34] The prima facie case of negligence by the happening of a railroad accident does not exist in favor of one of the crew. He must prove the precise cause of the accident.[35]

Plaintiff has the burden of proof of negligence[36] and causal connection,[37] and, in some jurisdictions, must show freedom from contributory negligence.[38] Defendant, it is ordinarily held, has the burden of proving contributory negligence[39] unless want of care is disclosed by plaintiff's evidence,[40] and is provable by a preponderance of evidence given by either or both parties.[41] Defendant must prove negligence aggravating injury.[42]

Evidence.—Negligence of either party may be shown by circumstantial evidence.[43] Conditions immediately before[44] or after the happening of the accident

gas pipe through which gas escapes, causing injury to occupant of sleeping rooms. People's Gaslight & Coke Co. v. Porter, 102 Ill. App. 461. Where plaintiff going around a car was struck by a car on another track, negligence is not to be inferred from the mere happening of the injury. Hornstein v. United R. Co., 97 Mo. App. 271, 70 S. W. 1105. A plaintiff in an action for an injury caused by a live wire is not obliged to point out the specific cause of the accident; it is sufficient to prove facts from which the jury can infer that the wire was defective or negligently operated. Wolpers v. New York & Q. Elec. L. & P. Co., 86 N. Y. Supp. 845.

33. Adams v. Union R. Co., 80 App. Div. [N. Y.] 136, 12 Ann. Cas. 386. Before plaintiff can recover under res ipsa loquitur he must prove some affirmative act or acts of negligence of defendant that was the proximate cause of the injury or to prove that appellant had omitted to perform some duty that the law required, which omission was the cause of the injury and until that is done defendant is not required to prove anything. Baltimore & O. S. W. R. Co. v. Greer, 103 Ill. App. 448.

34. Cassady v. Old Colony St. R. Co. [Mass.] 68 N. E. 10.

35. Oglesby v. Mo. Pac. R. Co. [Mo.] 76 S. W. 623.

36. Tubelowish v. Lathrop, 104 Ill. App. 82; Western Wheel Works v. Stachnick, 102 Ill. App. 420; Chicago & A. R. Co. v. Murphy, 198 Ill. 462, 64 N. E. 1011; Colbourn v. Wilmington [Del.] 56 Atl. 605; Oliver v. Columbia, N. & L. R. Co., 65 S. C. 1; Cincinnati, etc., R. Co. v. Cook's Adm'r, 24 Ky. L. R. 2152, 73 S. W. 765.

37. Warner v. St. Louis & M. R. R. Co. [Mo.] 77 S. W. 67; Consumers' Brewing Co. v. Doyle's Adm'x [Va.] 46 S. E. 390; Hawes v. Warren, 119 Fed. 978. Where the effect of the evidence is merely to establish that there are two independent causes, either one of which may have been the proximate cause of the injury, the burden is upon the plaintiff to show that the cause for which the defendant is responsible was one which produced the injury sought to be recovered for. Ahern v. Melvin, 21 Pa. Super. Ct. 462. Where plaintiff sought recovery for injuries from fire communicated from defendant's building and alleged the origin of the fire to be the negligent use of machinery, he had the burden of proving both the cause of the fire and defendant's negligence. Balding v. Andrews [N. D.] 96 N. W. 305.

38. Byrnes v. Interurban St. R. Co., 84 N. Y. Supp. 193; Thompson v. Metropolitan St. R. Co., 89 App. Div. [N. Y.] 10; Quill v. Southern Pac. Co., 140 Cal. 268, 73 Pac. 991; McDonough v. Grand Trunk R. Co. [Me.] 56 Atl. 913. The inference of freedom from contributory negligence is not to be drawn from the presumption that one will exercise care and prudence in regard to his own life and safety. O'Reilly v. Brooklyn Heights R. Co., 82 App. Div. [N. Y.] 492.

39. Galveston, H. & S. A. R. Co. v. Jackson [Tex. Civ. App.] 71 S. W. 991; Dubiver v. City & S. R. Co. [Or.] 75 Pac. 693; Holland v. Oregon Short Line R. Co. [Utah] 72 Pac. 940; Oliver v. Columbia, N. & L. R. Co., 65 S. C. 1; House v. Seaboard Air Line R. Co., 131 N. C. 103; Mo., K. & T. R. Co. v. Gist [Tex. Civ. App.] 73 S. W. 857; Chicago, R. I. & P. R. Co. v. Bule [Tex. Civ. App.] 73 S. W. 853.

40. Burns v. Metropolitan St. R. Co., 66 Kan. 188, 71 Pac. 244; Corbett v. Oregon Short Line R. Co., 25 Utah, 449, 71 Pac. 1065; Chicago, R. I. & P. R. Co. v. Lee, 66 Kan. 806, 72 Pac. 266; Mo., K. & T. R. Co. v. Jolley [Tex. Civ. App.] 72 S. W. 871; Gillum v. N. Y. & T. S. S. Co. [Tex. Civ. App.] 76 S. W. 232.

41. Indianapolis & G. Rapid Transit Co. v. Haines [Ind. App.] 69 N. E. 187; Chicago & E. I. R. Co. v. Stephenson [Ind. App.] 69 N. E. 270. Where there was a suspicion of contributory negligence in the case made by plaintiff, it is error to instruct that the burden was on defendant to show contributory negligence by a preponderance of the evidence. Denison & S. R. Co. v. Carter [Tex. Civ. App.] 70 S. W. 322; Id., 71 S. W. 292.

42. Wissler v. Atlantic [Iowa] 98 N. W. 131.

43. Black v. Rocky Mountain Tel. Co. [Utah] 73 Pac. 514; Indianapolis St. R. Co. v. Darnell [Ind. App.] 68 N. E. 609; Chicago v. Early, 104 Ill. App. 398.

44. Evidence that an elevator served by defendant's power would not run about an hour before an injury caused by a fallen live wire held admissible in an action for injury caused by the live wire. Wolpers v. New York & Queens Elec. L. & P. Co., 86 N. Y. Supp. 845.

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may be shown,[45] but not where a considerable time had elapsed.[46] The fact of changes and precautions after the accident may not be shown as an admission of previous want of care.[47] Such evidence is sometimes allowed to illustrate some other fact.[48] Evidence of condition of street near place of injury is admissible on the question of constructive notice.[49] On the question of injuries caused by blasting, evidence is admissible as to the weight of the charges used, the preparation of the holes, the weight put upon the blasts and their effect on the walls of the injured building.[50] Collapse of other buildings similarly constructed may be shown.[51] On the question whether a sufficient force was employed to perform a particular work which resulted in an injury, previous methods may be shown.[52] The condition of similar poles, which have been in the ground the same length of time as the defective one in question, may be shown on the question of the general condition of poles in use by defendant.[53] Former defects and repairs of appliance may be shown.[54] Expert testimony is admissible on the question whether a derrick was properly guyed.[55] As tending to show that at a certain time a hall was insufficiently lighted from a transom and open door, records of the weather bureau are admissible.[56] On the question of ordinary care as to repairs of city streets, the city may show inability by reason of its financial condition.[57] Evidence of complaints, made by plaintiff a few days after the accident, relating to the nature and extent of the injuries, is admissible.[58] Contributory negligence may not be proved by previous acts of carelessness on plaintiff's part.[59] Photographs are admissible.[60] Holdings as to sufficiency of evidence are collected in footnote.[61]

45. Devaney v. Degnon-McLean Const. Co., 79 App. Div. [N. Y.] 62; Slack v. Harris, 200 Ill. 96, 65 N. E. 669.

46. Chicago v. Early, 104 Ill. App. 398; Cheek v. Oak Grove Lumber Co. [N. C.] 46 S. E. 488.

47. Stevens v. Boston Elevated R. Co., 184 Mass. 476, 69 N. E. 338; Wager v. Lamont [Mich.] 98 N. W. 1; Elias v. Lancaster, 203 Pa. 638. The fact that manufacturers, after an accident, repaired the machine, using different methods to attain strength, does not show want of care in the original construction. Talley v. Beever [Tex. Civ. App.] 78 S. W. 23.

48. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64.

49. Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76.

50. Cebrelli v. Church Const. Co., 84 N. Y. Supp. 919.

51. Waterhouse v. Jos. Schlitz Brew. Co. [S. D.] 94 N. W. 587.

52. Schnable v. Providence Public Market, 24 R. I. 477.

53. Emporia v. Kowalski, 66 Kan. 64, 71 Pac. 232.

54. Vandercar v. Universal Trust Co., 80 App. Div. [N. Y.] 274.

55. Scheider v. American Bridge Co., 78 App. Div. [N. Y.] 163.

56. Bretsch v. Plate, 82 App. Div. [N. Y.] 399.

57. O'Brien v. Woburn, 184 Mass. 598, 69 N. E. 350.

58. Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76. Where a woman fell down an unlighted stairway, evidence of a conversation with her daughter immediately after the fall held inadmissible as part of the res gestae. Potter v. Cave [Iowa] 98 N. W. 569.

59. Aiken v. Holyoke St. R. Co., 184 Mass. 269, 68 N. E. 238.

60. Defective appliances. Hupfer v. Nat. Distilling Co. [Wis.] 96 N. W. 809. Construction and situation of staircase causing injury by reason of insufficient light. Bretsch v. Plate, 82 App. Div. [N. Y.] 399.

61. Sufficiency—negligence. Western D. & I. Co. v. Heldmaier [C. C. A.] 120 Fed. 238; Kan. City, Ft. S. & M. R. Co. v. Matson [Kan.] 75 Pac. 503; York v. Cleaves, 97 Me. 413; McIntyre v. Pfandler Vacuum Fermentation Co. [Mich.] 95 N. W. 527; Muhs v. Fire Ins. Salvage Corps, 89 App. Div. [N. Y.] 389; Hupfer v. Nat. Distilling Co. [Wis.] 96 N. W. 809; Scheider v. American Bridge Co., 79 App. Div. [N. Y.] 163; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164; Duerr v. Consolidated Gas Co., 86 App. Div. [N. Y.] 14. Contributory negligence. Black v. Mishawaka, 30 Ind. App. 104, 65 N. E. 538. Insufficiency—negligence. Ala. Midland R. Co. v. Swindell, 117 Ga. 883; Steinberg v. Schleshinger, 84 N. Y. Supp. 522; Conway v. Vezzetti [N. J. Law] 54 Atl. 226; Balding v. Andrews [N. D.] 96 N. W. 305. Contributory negligence. Humphreys v. Portsmouth Trust & Guarantee Co., 184 Mass. 422, 68 N. E. 836; Vandercar v. Universal Trust Co., 80 App. Div. [N. Y.] 274; Wilsey v. Jewett Bros. & Co. [Iowa] 98 N. W. 114. Insufficiency of evidence to justify finding that plaintiff, a child, had exercised the care of an adult, so as to entitle her to recover, notwithstanding the negligence of the person having her in charge. Smith v. City Realty Co., 79 App. Div. [N. Y.] 441. The fact that the top of the cylinder of a gasoline pear burner blew off when operated according to directions is not conclusive of negligence of the manufacturer. Talley v. Beever [Tex. Civ. App.] 78 S. W.

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Questions of law and fact.—The questions of negligence and contributory negligence are questions of fact for the jury and not for the court,[62] unless, on the facts admitted or conclusively proved, there is no reasonable chance of different minds reaching different conclusions.[63] Subject to the foregoing exception proximate cause[64] and capacity of infants are questions of fact.[65] It is the particular function of the jury to pass upon the credibility of the witnesses.[66]

23. Evidence that the chimney was seen to sway a year before it fell and that it was not secured will support a verdict for plaintiff injured by its fall. Travers v. Murray, 87 App. Div. [N. Y.] 552. The fact that boxes falling from an upper story were insecurely fastened and the fall caused a runaway is sufficient evidence of negligence to make a case for the jury. Loughrain v. Autophone Co., 77 App. Div. [N. Y.] 542. Where the circumstances attending the accident are in evidence, the absence of evidence of fault on the part of the injured party will justify an inference and be accepted as proof of the exercise of ordinary care. Metzger v. Chicago, 103 Ill. App. 605. Testimony of a lessee of a portion of a building that during his occupancy defendant, the owner of the building, took care of the building warranted a finding that an elevator shaft was within his control. Humphreys v. Portsmouth Trust & Guarantee Co., 184 Mass. 422, 68 N. E. 836.

62. Chicago City R. Co. v. Leach, 104 Ill. App. 30; Pelzel v. Schepp, 83 App. Div. [N. Y.] 444; Palmer v. Kinloch Tel. Co., 91 Mo. App. 106; Hone v. Mammoth Min. Co. [Utah] 75 Pac. 381; Jenkins v. Baltimore & O. R. Co. [Md.] 56 Atl. 966; Robinson v. Metropolitan St. R. Co., 91 App. Div. [N. Y.] 158; Howard v. Indianapolis St. R. Co., 29 Ind. App. 514, 64 N. E. 890; Hartung v. North Chicago St. R. Co., 102 Ill. App. 470; Riley v. Mo. Pac. R. Co. [Neb.] 95 N. W. 20; Otstot v. Ind., I. & I. R. Co., 103 Ill. App. 136; Quincy Gas & Elec. Co. v. Bauman, 104 Ill. App. 600; Chicago & A. R. Co. v. Gore, 105 Ill. App. 16; Coombs v. Mason, 97 Me. 270; McLean v. Erie R. Co. [N. J. Law] 54 Atl. 238; Economy Light & Power Co. v. Hiller, 203 Ill. 518, 68 N. E. 72; Van Doren v. Holbrook, C. & D. Contracting Co., 85 N. Y. Supp. 348; Taylor v. Seil [Wis.] 97 N. W. 498; Mathiesen v. Omaha St. R. Co. [Neb.] 97 N. W. 243; Nat. Metal Edge Box Co. v. Maroni [C. C. A.] 123 Fed. 410; Metropolitan St. R. Co. v. Hanson [Kan.] 72 Pac. 773; Muller v. Hale, 138 Cal. 163, 71 Pac. 81; Harmer v. Reed Apartment & Investment Co., 68 N. J. Law, 332; Neal v. Wilmington & N. C. Elec. Co., 3 Pen. [Del.] 467; Cummings v. Wichita R. & Light Co. [Kan.] 74 Pac. 1104; Parsons v. Manser, 119 Iowa, 88, 93 N. W. 86; Hajsik v. Chicago, B. & Q. R. Co. [Neb.] 94 N. W. 609; True Co. v. Woda, 201 Ill. 315, 66 N. E. 369; Mathew v. Wabash R. Co. [Mo. App.] 78 S. W. 271; Olsen v. Cook Inlet Coal Fields Co. [C. C. A.] 121 Fed. 726; Lauritsen v. American Bridge Co., 87 Minn. 518, 92 N. W. 475; Charlottesville v. Stratton's Adm'r [Va.] 45 S. E. 737; Norman v. Dowd, 86 App. Div. [N. Y.] 243; Waters v. Metropolitan St. R. Co., 85 N. Y. Supp. 1120. Negligence in safeguarding window of reception room in department store. Miller v. Peck Dry Goods Co. [Mo. App.] 78 S. W. 682. Whether a city has sufficient notice of the existence of a defect in a street. Holitza v. Kansas City [Kan.] 74 Pac. 594. Whether a child had wandered from an enclosed yard without custody or was in the charge of an older child. Mellen v. Old Colony St. R. Co. [Mass.] 68 N. E. 679. Whether beekeeper with knowledge of the bees' stinging propensity was guilty of negligence in placing stands near roadway. Parsons v. Mauser, 119 Iowa, 88, 93 N. W. 86. Whether a structure was built with due care in view of the use intended. Barrett v. Lake Ontario Beach Imp. Co., 174 N. Y. 310, 66 N. E. 968. Whether one assisting another in a perilous position was guilty of contributory negligence. Schoenfeld v. Metropolitan St. Ry. Co., 40 Misc. [N. Y.] 201. Whether motorman was negligent in allowing a seven-year old boy to ride on the front platform. Parker v. Washington Elec. St. R. Co. [Pa.] 56 Atl. 1001. Whether a father exercised due care in letting a small child go into an enclosed yard to play when she escaped into the street. Mellen v. Old Colony St. R. Co. [Mass.] 68 N. E. 679. It is a question for the jury whether an electric light company had offered a satisfactory explanation for a live wire being in the street. Wolpers v. New York & Queens Elec. L. & P. Co., 86 N. Y. Supp. 845. The question of due care in construction and operation of its lines by an electric light company is for the jury. A live wire fell in street and a person came in contact with it. Id. Question of negligence in one riding on a freight elevator held for the jury. Kentucky Distilleries & Warehouse Co. v. Leonard [Ky.] 79 S. W. 281. The question of due care in approaching a railroad track is for the jury. Plaintiff fell into a ditch of which he did not know. Wood v. N. Y. Cent. & H. R. R. Co., 86 N. Y. Supp. 817. Whether plaintiff was guilty of contributory negligence in catching her foot in a hole in a hallway carpet was a question for the jury. Keating v. Mott, 86 N. Y. Supp. 1041. Where a horse was injured by falling into a ditch, the question whether plaintiff was guilty of contributory negligence in driving a colt was for the jury. Bradner v. Warwick, 86 N. Y. Supp. 935.

63. Merchant v. South Chicago City R. Co., 104 Ill. App. 122; Baltimore & P. R. Co. v. Landrigan, 20 App. D. C. 135; Chanute v. Higgins, 65 Kan. 680, 70 Pac. 638; Illinois Cent. R. Co. v. Finfrock, 103 Ill. App. 232; Knight v. Baltimore, 97 Md. 647; St. Louis, I. M. & S. R. Co. v. Leftwich [C. C. A.] 117 Fed. 127; Meyers v. Chicago, R. I. & P. R. Co. [Mo. App.] 77 S. W. 149; Pittsburgh, etc., R. Co. v. Selvers [Ind.] 67 N. E. 680; Blumenthal v. Boston & M. R. R., 97 Me. 255; Lake Shore & M. S. R. Co. v. Liidtke [Ohio] 69 N. E. 653.

64. Parsons v. Mauser, 119 Iowa, 88, 93 N. W. 86; Schumpert v. Southern R. Co., 65 S. C. 332; Goe v. Northern Pac. R. Co., 30 Wash. 654, 71 Pac. 182; Cole v. German Sav. & Loan Soc. [C. C. A.] 124 Fed. 113; Atchison, T. & S. F. R. Co. v. Parry [Kan.] 73

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Instructions should be predicated on the evidence and the pleadings as supported by the evidence,[67] and may not infringe rules as to clearness,[68] assumption of facts,[69] undue emphasis,[70] weight and effect of evidence.[71] It is error for the court to instruct that given facts would constitute negligence when the facts are not such as are made by law to constitute negligence per se.[72] Requests for instructions may be denied where matter is sufficiently covered by charge.[73] A party

Pac. 105; Norris v. Ill. Cent. R. Co., 88 Ill. App. 614; Canfield v. North Chicago St. R. Co., 98 Ill. App. 1; True v. Woda, 104 Ill. App. 15; Gudfelder v. Pittsburg, etc., R. Co. [Pa.] 57 Atl. 70.

65. Hill v. Baltimore & N. Y. R. Co., 75 App. Div. [N. Y.] 325, 11 Ann. Cas. 418; Kelly v. Pittsburg & B. Traction Co., 204 Pa. 623. The question whether a child of six years is capable of contributory negligence. Ludtke v. L. S. & M. S. R. Co., 24 Ohio Circ. R. 120. Whether a child was guilty of contributory negligence in running into a barb wire fence, the existence of which she did not know. Cincinnati & H. Spring Co. v. Brown [Ind. App.] 69 N. E. 197. Whether child touching live wire on a dare had exercised care and discretion commensurate with his years. Owensboro v. York's Adm'r [Ky.] 77 S. W. 1130.

66. Where defendant introduces evidence to sustain plea of contributory negligence, it is for the jury to pass upon the credibility of witnesses and weight of their testimony, though plaintiff offered no evidence on the issue. Pharr v. Atlanta & C. A. L. R. Co., 132 N. C. 418.

67. Marr v. Bunker, 92 Mo. App. 651; Kelly v. Stewart, 93 Mo. App. 47; Brink's Chicago City Exp. Co. v. Herron, 104 Ill. App. 269; McIntire v. Pfandler V. F. Co. [Mich.] 95 N. W. 527; Galveston, H. & S. A. R. Co. v. Karrer [Tex. Civ. App.] 70 S. W. 328; Langabaugh v. Anderson [Ohio] 67 N. E. 286. Where defendant contended that an injury arose from a cause for which he was not liable, a requested instruction presenting such issue should be given. Tex. & P. R. Co. v. McKenzie, 30 Tex. Civ. App. 293, 70 S. W. 237. Where there is no evidence of a want of ordinary care on the part of the injured person, it is not error for the trial court to refuse to instruct as to the duty of the injured person to use such care to prevent the injury. Chicago G. W. R. Co. v. Bailey, 66 Kan. 115, 71 Pac. 246. The jury may be instructed as to the doctrine of res ipsa loquitur in its application to injuries to a passenger on a street car, the operation of the rule not being confined to determinations of the sufficiency of evidence by the court. Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 Pac. 169. An instruction is properly refused which required the jury to confine itself to acts of negligence set out in petition where a portion of the petition had been withdrawn from the jury. Stanley v. Cedar Rapids & M. C. R. Co., 119 Iowa, 526, 93 N. W. 489. Where there is a direct conflict in the evidence between negligence of defendant and contributory negligence of plaintiff, it is error to instruct that negligence may be inferred from the happening of the accident. Huneke v. West Brighton Amusement Co., 80 App. Div. [N. Y.] 268.

68. The expression "reasonable care" in an instruction is not misleading where the court uses the expression "ordinary care" in the same connection in other portions of the charge. Toledo, F. & N. R. Co. v. Gilbert, 24 Ohio Circ. R. 181. An instruction requiring the jury to find that plaintiff fell when she was using ordinary care for her own safety does not authorize a recovery without regard to her contributory negligence. Kean v. Schoening [Mo. App.] 77 S. W. 335. Instructions are misleading which tell the jury that plaintiff may not recover if he could have avoided the danger and that, if both parties are at fault, plaintiff's damages may be diminished. Savannah, F. & W. R. Co. v. Hatcher, 118 Ga. 273. An instruction setting out plaintiff's theory of the case and stating that he has the burden of proof of negligence throughout the case is not objectionable as requiring plaintiff to prove himself free from contributory negligence, no reference thereto having been made. Peck v. St. Louis Transit Co. [Mo.] 77 S. W. 736.

69. Dallas Elec. Co. v. Mitchell [Tex. Civ. App.] 76 S. W. 935. Where evidence of both parties clearly establishes the existence of the machinery causing the injury, the court may assume the fact in the charge. Henderson v. Kan. City, 177 Mo. 477, 76 S. W. 1045.

70. In an action for injuries, the jury should not have their attention repeatedly and unnecessarily called to the defense of contributory negligence. Pelfrey v. Tex. Cent. R. Co. [Tex. Civ. App.] 73 S. W. 411.

71. An instruction that purchase of a machine from reputable dealers, and that reputable mechanics were called to examine it and repair it, could be considered as tending to justify its use, was on a matter of fact. Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164.

72. Robert Portner Brew. Co. v. Cooper, 116 Ga. 171; Cent. of Ga. R. Co. v. McKinney, 118 Ga. 535; Chicago, B. & Q. R. Co. v. Krayenbuhl [Neb.] 91 N. W. 880, 59 L. R. A. 920. Where a group of facts of which there was evidence amounts in law to negligence, the court having left the question of their existence to the jury may state their legal effect. Seyfer v. Otoe County [Neb.] 92 N. W. 756. It seems the better practice to instruct the jury as to the principles of law by which they are to be governed, leaving the jury to apply the principles to the facts found, than to instruct that if they find certain facts to be established they would constitute negligence. Langbein v. Swift, 121 Fed. 416. Allowing an unsound tree to stand close to a railroad track. Ala. Midland R. Co. v. Guilford [Ga.] 46 S. E. 655.

73. Roberts v. Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111. An instruction that there may be no recovery if defendant was not negligent renders unnecessary an instruction that there may be no recovery if the injury was caused by the negligence of

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may not complain of the instructions given, unless he has requested instructions covering omissions and defects.[74] An instruction that negligence is the absence of such care as persons of ordinary diligence are expected to exercise is not erroneous for use of word "expected" for "accustomed."[75] The substitution of the word "negligence" for the word "fault" in an instruction does not change its meaning.[76] The use of the term "reasonably prudent person" instead of "ordinarily prudent person" may not be objected to by defendant as error, if any, is against plaintiff.[77]

Direction of verdict.—Where the evidence for plaintiff with all its justifiable inferences is insufficient to support the verdict, the court should direct a verdict for defendant.[78] A peremptory instruction for defendant is proper when there is no evidence of negligence.[79] An order of nonsuit is erroneous if any reasonable probability of defendant's negligence may account for the event by inference from the evidence in plaintiff's control.[80] Where there is evidence of contributory negligence, it is error to withdraw same from the jury by an instruction directing a verdict for plaintiff.[81]

Verdicts.—Where contributory negligence and imputed negligence are involved, the matter of fault as to each other should be submitted in an independent question for special verdict.[82]

Review.—A verdict is properly set aside where it is given on a theory which, if not mechanically impossible, is exceedingly improbable.[83] Imputed negligence being properly submitted to the jury, their finding will not be disturbed.[84]

NEGOTIABLE INSTRUMENTS.

§ 1. Elements and Indicia (1013).
§ 2. Form and Interpretation (1016).
§ 3. Anomalous Signatures and Indorsements—Maker or Indorser, or Surety or Guarantor (1017).
§ 4. Liabilities and Discharge of Primary Parties (1018).
§ 5. Liabilities and Discharge of Sureties, Guarantors, or Other Anomalous Parties (1020).
§ 6. Negotiation and Transfer Generally (1022).
§ 7. Acceptance (1023).
§ 8. Indorsement (1023).
§ 9. Presentment and Demand (1025).
§ 10. Protest and Notice Thereof (1026).
§ 11. New Promise After Discharge, and Waiver of Non-Presentment or the Like (1027).
§ 12. Accommodation Paper (1027).
§ 13. The Doctrine of Bona Fides (1028).
§ 14. Remedies and Procedure Peculiar to Negotiable Paper (1033).

§ 1. *Elements and indicia.*—To be negotiable, an instrument must provide

a third person. Muller v. Hale, 138 Cal. 163, 71 Pac. 81.

74. Galveston, H. & S. A. R. Co. v. Holyfield [Tex. Civ. App.] 70 S. W. 221. There may be no complaint of failure to define term "want of ordinary care" where there was no request therefor. Taylor v. Seil [Wis.] 97 N. W. 498. The inadvertent use of the word "skillful" in place of "careful" in describing ordinary care will be regarded as harmless where no instruction in point was offered. Southern R. Co. v. Otis' Adm'r [Ky.] 78 S. W. 480. Where two theories of establishing negligence are relied on and the court submits the case on one only, the plaintiff could not complain in the absence of a request for the submission on the other theory. Stewart v. Galveston, H. & S. A. R. Co. [Tex. Civ. App.] 78 S. W. 979.

75. Ready v. Peavey Elevator Co., 89 Minn. 154, 94 N. W. 442.

76. North Chicago St. R. Co. v. Rodert, 105 Ill. App. 314.

77. St. Louis S. W. R. Co. v. Brown [Tex. Civ. App.] 69 S. W. 1010.

78. Truskett v. Bronaugh [Ind. T.] 76 S. W. 294; Thomas v. Star & C. Milling Co., 104 Ill. App. 110; Kelly v. Cent. R. Co. [N. J. Law] 56 Atl. 145; Hajsek v. Chicago, B. & Q. R. Co. [Neb.] 97 N. W. 327. Contributory negligence of one standing on the railroad track without looking out for trains shown to be the proximate cause of his death, held no error to direct a verdict for defendant. Dunworth v. Grand Trunk Western R. Co. [C. C. A.] 127 Fed. 307.

79. Sattler v. Chicago, R. I. & P. R. Co. [Neb.] 98 N. W. 663. It was error to dismiss the complaint in an action for injuries where sufficient evidence had been given to take the case to the jury on question of defendant's negligence. Mennella v. Metropolitan St. R. Co., 86 N. Y. Supp. 930.

80. Hupfer v. Nat. Distilling Co. [Wis.] 96 N. W. 809.

81. Chicago, B. & Q. R. Co. v. Lilley [Neb.] 93 N. W. 1012.

82. Schrunk v. St. Joseph [Wis.] 97 N. W. 946.

83. Boston v. Buffum, 97 Me. 230.

84. Murray v. Metropolitan St. R. Co., 84 N. Y. Supp. 876.

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for the payment to a certain person or his order, or to bearer,[85] of a certain amount,[86] at a definite time.[87] The terms of payment must be certain.[88]

While the general rule is that a negotiable instrument must bear on its face entire certainty as to the amount to be paid at maturity,[89] the courts are not agreed as to what constitutes such certainty. Provisions for the payment of exchange,[90] or reasonable attorney's fees for collection,[91] are generally held not to destroy negotiability. But a stipulation for unreasonable fees will not be enforced.[92] As to stipulations in regard to payment of taxes,[93] or of a higher rate of interest after maturity,[94] the courts are not in agreement. In many states the negotiability of promissory notes is regulated by statute,[95] but the negotiability of an instrument

85. Randolph v. Hudson [Okl.] 74 Pac. 946; Westberg v. Chicago Lumber & Coal Co., 117 Wis. 589, 94 N. W. 572. There must be a payee named or a blank for the insertion of a payee's name. A check with a line drawn through the space intended for the payee's name, is void. Gordon v. Lansing State Sav. Bank [Mich.] 94 N. W. 741. A statement of account, and below it, written "I promise and order to pay the above amount in full," etc., is not negotiable. Weeger v. Mueller, 102 Ill. App. 258. A certificate of deposit payable to a person or his assigns is not. Zander v. New York Security & Trust Co., 81 App. Div. [N. Y.] 635. A note payable to the maker or order, when indorsed by him, becomes a negotiable instrument. In re Edson, 119 Fed. 487. Note signed by firm payable to a member of firm, in order to become a good legal contract, must be indorsed. Pettyjohn v. National Exchange Bank [Va.] 43 S. E. 203.

86. State Nat. Bank v. Cudahy Packing Co., 126 Fed. 543; Randolph v. Hudson [Okl.] 74 Pac. 946. Non-negotiable, where amount of interest could not be determined. Davis v. Brady [S. D.] 97 N. W. 719. Marginal figures, intended as reference, will not supply. Vinson v. Palmer [Fla.] 34 So. 276.

87. Westberg v. Chicago Lumber & Coal Co., 117 Wis. 589, 94 N. W. 572. "Due Oct. 1st" is sufficient. Torpey v. Tebo, 184 Mass. 307, 68 N. E. 223. As is definite time after maker's death, his estate being bound to pay it at that time. Kiesewetter v. Kress, 24 Ky. L. R. 1239, 70 S. W. 1065. In Missouri, the words, "The makers and indorsers agree to all extensions and partial payments, before or after maturity, without prejudice to the holder," do not destroy negotiability (City Nat. Bank v. Goodloe-McClelland Commission Co., 93 Mo. App. 123), but same provision does in Kansas (City Nat. Bank v. Gunter Bros., 67 Kan. 227, 72 Pac. 842). A note payable at specified time, provided a contingency had then occurred, does not become payable on the happening of the contingency, but only at maturity, and hence is negotiable (Middaugh v. Wilson, 30 Ind. App. 112, 65 N. E. 555), as is a note despite provision in attached mortgage for accelerating payment (Kendall v. Selby [Neb.] 92 N. W. 178); but one giving privilege to pay the whole or any portion thereof at any time before maturity is not (Lowell Trust Co. v. Pratt, 183 Mass. 379, 67 N. E. 363); nor is one upon which judgment may be entered at any time after date "whether due or not" (Wisconsin Yearly Meeting v. Babler, 115 Wis. 289, 91 N. W. 678); nor one providing that drawers and indorsers waive all defenses on the ground of any extension of time of payment given by the holders (Evans v. Odem, 30 Ind. App. 207, 65 N. E. 755).

88. Randolph v. Hudson [Okl.] 74 Pac. 946.

89. Agreement in note to pay uncertain sums at uncertain times before maturity. Roblee v. Union Stockyards Nat. Bank [Neb.] 95 N. W. 61.

90. Bovier v. McCarthy [Neb.] 94 N. W. 965; Haslack v. Wolf [Neb.] 92 N. W. 574, 60 L. R. A. 434.

91. In re Keeton, 126 Fed. 426; Clark v. Porter, 90 Mo. App. 143; State Nat. Bank v. Cudahy Packing Co., 126 Fed. 543. Under the Nebraska law the provision for "attorney's fees" is regarded as surplusage. Haslock v. Wolf [Neb.] 92 N. W. 574, 60 L. R. A. 434.

92. Where a note for $50 provided for attorney's fee of 5 per cent per month, amounted to $600—$800 at time of trial. Bay v. Trusdell, 92 Mo. App. 377.

93. Provision in mortgage attached to note that mortgagor shall pay taxes, and in default thereof mortgagee may pay them and recover interest at ten per cent on amount paid, does not affect the negotiability of the note. Kendall v. Selby [Neb.] 92 N. W. 178. A note providing for the payment of taxes, which provision cannot be rejected as surplusage, is non-negotiable. Smith v. Myers, 207 Ill. 126, 69 N. E. 858.

94. A penalty for higher rate of interest in case of default, being nonenforceable, does not affect the negotiability of a note. Kendall v. Selby [Neb.] 92 N. W. 178. Under Oklahoma Code requiring that a negotiable instrument must be free from any condition not certain of fulfillment, a clause providing for interest at 12 per cent from date, if not paid at maturity, destroys negotiability. Randolph v. Hudson [Okl.] 74 Pac. 946.

95. In Kentucky, a promissory note is not a negotiable instrument, unless statutory requirements are complied with (Wade v. Foster, 24 Ky. L. R. 1292, 71 S. W. 443); but a warehouse receipt is (Farmer v. Etheridge, 24 Ky. L. R. 649, 69 S. W. 761). In Indiana, a note given for a patent right must state that fact. Evidence held insufficient to show that a note was given for a patent right, as distinguished from a right to sell a patented article. Jones v. People's Nat. Bank [Ind. App.] 69 N. E. 466. In Kentucky, a note, to have the status of bill of exchange, must be payable and negotiable at an incorporated bank, and be endorsed to, and discounted by, some incorporated bank. Magoffin v. Boyle Nat. Bank, 24 Ky. L. R. 585, 69 S. W. 702.

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will be determined by the law merchant, in the absence of statutory enactment defining the elements.[96]

The negotiability of a note is not destroyed by the alteration of figures on the margin.[97]

Though a note and mortgage may be construed together to determine negotiability,[98] a note is not rendered non-negotiable merely by reference to, or provision for, collateral security.[99]

A promissory note, like other contracts, must rest upon a sufficient consideration,[1] and, as between the parties, failure or want of consideration may be shown.[2] So too, fraud is a defense as between the original parties,[3] or an agreement limiting the maker's liability.[4] A note must be delivered and accepted with the intention to make it a binding obligation.[5] Omission of revenue stamp does not render void.[6] Questions of validity are determined by the law of the place where payable.[7]

96. Whether stipulations, with regard to place of payment and costs of collection, destroy negotiability in an action brought thereon in federal courts, though it did according to rulings of courts in the state where it was made. State Nat. Bank v. Cudahy Packing Co., 126 Fed. 543.

97. The maker signed a note in blank, with the amount written in figures on the margin, and delivered it to the payee, who scratched the figures on the margin and filled in a different amount. Prim v. Hammel, 134 Ala. 652.

98. Kendall v. Selby [Neb.] 92 N. W. 178. Negotiability of the note may depend on provision in the mortgage. Consterdine v. Moore [Neb.] 96 N. W. 1021. Agreement to pay taxes held to render amount uncertain. Garnett v. Meyers [Neb.] 94 N. W. 803. But in Missouri, it is held that a mortgage being a mere security creating a lien on property, the provisions of the mortgage do not render the note evidencing the debt non-negotiable. City Nat. Bank v. Goodloe-McClelland Commission Co., 93 Mo. App. 123.

99. Roblee v. Union Stockyards Nat. Bank [Neb.] 95 N. W. 61. A negotiable note secured by a mortgage loses none of its attributes thereby, unless the mortgage contains restrictive words, and is referred to in the note, or brought to the knowledge of the purchaser. Brewer v. Slater, 18 App. D. C. 48.

1. Van Buren County Sav. Bank v. Mills, 99 Mo. App. 65, 72 S. W. 497; Boone v. Goodlett & Co. [Ark.] 76 S. W. 1059. Notes given payee for mere purpose of hindering maker's creditors. Baldwin v. Davis, 118 Iowa, 36, 91 N. W. 778. These have been **held sufficient:** Extending time, waiving forfeiture, etc., supports note given for back rent. Emery v. Lowe, 140 Cal. 379, 73 Pac. 981. Forbearance to sue though old note not delivered up. Humboldt Sav. & Loan Soc. v. Dowd. 137 Cal. 408, 70 Pac. 274. Issuance of a life insurance policy. Muller v. Swanton, 140 Cal. 249, 73 Pac. 994. Settlement in bastardy case. Jones v. Peterson, 117 Ga. 58. Taking up note, the maker of which is irresponsible. Crampton v. Newton's Estate [Mich.] 93 N. W. 250. These **held insufficient:** Evidence that, three years before defendant executed the note, he was indebted to payee's husband. Kramer v. Kramer, 80 App. Div. [N. Y.] 20. Love and affection. Shugart v. Shugart [Tenn.] 76 S. W. 821. Performance of services which one is morally bound to render without compensation, as services of daughter in caring for mother. Shugart v. Shugart [Tenn.] 76 S. W. 821. See, also, title Contracts.

2. Englehart v. Richter, 136 Ala. 562; Holmes v. Farris, 97 Mo. App. 305, 71 S. W. 116. Words "for value received," are not conclusive. Brewer v. Grogan, 116 Ga. 60. Failure of title to land forming consideration. Butler v. McCall [Ga.] 46 S. E. 647; Womelsdorf v. O'Connor, 53 W. Va. 314. But see Thurgood v. Spring, 139 Cal. 596, 73 Pac. 456, where held such is not failure of consideration after conveyance made and accepted. Receiving teller gave a note for shortage in funds handled by him, due to no cause for which he was liable. Broadway Trust Co. v. Fry, 40 Misc. [N. Y.] 680. Notes to be paid only from profits not enforceable where there were no profits. Hatzel v. Moore, 125 Fed. 828. Partial failure of consideration is a defense pro tanto (Brown v. Roberts [Minn.] 96 N. W. 793), this being an American doctrine (American Nat. Bank v. Watkins, 119 Fed. 545).

3. Farkas v. Monk [Ga.] 46 S. E. 670; Phillips v. Allen, 90 App. Div. [N. Y.] 531. Equity will enjoin negotiation and compel cancellation. Hightower & Crawford v. Mobile, etc., R. Co. [Miss.] 36 So. 82. Defense of fraud and failure of consideration permitted, although pleadings defective. Catterlin v. Lusk, 98 Mo. App. 182, 71 S. W. 1109. Fraudulent misrepresentations as to profits, etc. Nisson v. Wood, 140 Cal. 224, 73 Pac. 981. Contra, where one enters into a binding contract to give certain promissory notes, fraud in procuring him to sign the notes, or drunkenness at the time of execution, is no defense. Strickland v. Parlin, 118 Ga. 213.

4. Note of defendant for accommodation of payee and plaintiff indorsee, the two latter agreed with defendant to pay it at maturity and save defendant harmless. Clothier v. Webster Foundry Sand. Co., 21 Pa. Super. Ct. 386. Where there is a written contract, executed contemporaneously with the note, providing for indemnity, lack of consideration cannot be shown. Prouty v. Adams, 141 Cal. 304, 74 Pac. 845.

5. Constructive delivery is sufficient. Enneking v. Woebkenberg, 88 Minn. 259, 92 N. W. 932.

6. Unless omitted for fraudulent purpose. Rowe v. Bowman, 183 Mass. 488, 67 N. E. 636.

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§ 2. *Form and interpretation.*—Bank checks,[8] including cashiers' checks[9] and certificates of deposit,[10] are negotiable instruments; while stock certificates,[11] school warrants,[12] and municipal bonds are not.[13] In Missouri, a bill of lading is a bill of exchange,[14] as is a warehouse receipt in Kentucky.[15]

A note reciting "we promise to pay," and signed with the corporation name and the names of officers, as such, is the note of the corporation alone.[16] A note which is clearly signed by one in an official capacity merely is not the personal obligation of the signer.[17] But if words following a signature are merely to identify the signer, it is a personal obligation,[18] though the recitals in the body of the note often determine the liability.[19]

A note does not draw interest in the absence of a stipulation to that affect.[20] A note due one day after date, with interest, draws interest from maturity.[21] Interest on negotiable interest coupons may be allowed from the time they are detached from the bonds and pass into separate ownership,[22] and from maturity without the necessity of presentation if that would have been unavailing.[23]

7. Montana Coal & Coke Co. v. Cincinnati Coal & Coke Co. [Ohio] 69 N. E. 613; Clark v. Porter, 90 Mo. App. 143. Note executed on Sunday, payable in Massachusetts, is void by law of the latter state. Brown v. Gates [Wis.] 97 N. W. 221; Brown v. Gates [Wis.] 98 N. W. 205. Power to enter judgment by confession, note made in New York and payable in Pennsylvania. Krantz v. Kazenstein, 22 Pa. Super. Ct. 275.

8. A bank check is a bill of exchange within the meaning of § 9, c. 14, of Gen. St. 1901, providing for the acceptance of bills of exchange. Eakin v. Citizens' State Bank, 67 Kan. 338, 72 Pac. 874. Under Civ. Code, § 3254, a bank check is a bill of exchange. Donohoe-K. Banking Co. v. Southern Pac. Co., 138 Cal. 183, 71 Pac. 93.

9. N. W. Sav. Bank v. International Bank, 90 Mo. App. 205.

10. Sullivan v. German Nat. Bank [Colo. App.] 70 Pac. 162.

11. Though in the hands of holders for value and without notice they have some of the characteristics of negotiability. American Press Ass'n v. Brantingham, 75 App. Div. [N. Y.] 435. In Mississippi, a certificate of holding share of non-assessable stock in a certain lodge, payable in a specific time with a specific rate of interest, is a promissory note. Though the statute says it is a promissory note it does not say it is negotiable. Greenwood Lodge No. 135 v. Priebarsch [Miss.] 35 So. 427.

12. Kellogg v. School Dist. No. 10 [Okl.] 74 Pac. 110.

13. Green County v. Shortell, 25 Ky. L. R. 357, 75 S. W. 251.

14. Transfer without indorsement passes title to goods in hands of common carrier. American Z. L. & S. Co. v. Markle Leadworks, 102 Mo. App. 158, 76 S. W. 668. A vendor permitted the vendee to seal and bill cars of ore before being paid for. The vendee transferred the bills of lading to a bona fide holder. Id.

15. Farmer v. Etheridge, 24 Ky. L. R. 649, 69 S. W. 761.

16. American Nat. Bank v. Omaha Coffin Mfg. Co. [Neb.] 95 N. W. 672; English & S. A. Mortg. & Inv. Co. v. Globe L. & T. Co. [Neb.] 97 N. W. 612. The words "I or we promise," in the body of the instrument held not to render the officers liable thereon. Williams v. Harris, 198 Ill. 501, 64 N. E. 988. Where a note was signed by a corporation per "C. Sec." and "J., general manager" the word "Per" applied to both officers. Id.

17. A note "We or either of us promise," etc., "It being money borrowed to build a school-house" signed "T. W. Warferd, L. F. Green, Trustees," is not the personal note of the signers (Warford v. Temple, 24 Ky. L. R. 2268, 73 S. W. 1023), but under New York negotiable instruments law it can be shown by parol that one signed in a trust capacity (Megowan v. Peterson, 173 N. Y. 1, 65 N. E. 738).

18. So held as to words "Prest. Mt. Carmel Lgt. and Water Co." following a signature. Reed v. Fleming, 102 Ill. App. 668.

An executrix of a deceased farmer signed a note for a firm liability, in her individual capacity; she was held a joint maker. Fitch v. Fraser, 84 App. Div. [N. Y.] 119.

Notes signed with "Ex." added are obligations of the maker only, not of the estate of which he was executor. Sutherland v. St. Lawrence County, 42 Misc. [N. Y.] 38.

Promissory note in the form of "I promise to pay" signed, "E. B. Glisson Estate J. J. Glisson, administrator [L. S.]," held individual note of J. J. Glisson. Glisson v. Weil, 117 Ga. 842.

A note issued by a trustee in his representative capacity renders the trustee personally liable. Stitzer v. Whittaker [Neb.] 91 N. W. 713.

A term appended to name of party to a note is not conclusive of capacity of such party. Kitchen v. Holmes, 42 Or. 252, 70 Pac. 830, where the term "administratrix" followed the name of payee.

19. The words "we or either of us jointly and severally promise," etc., make a joint and several note. Second Nat. Bank v. Ralphsnyder [W. Va.] 46 S. E. 206. A note reciting "the G. Association," etc., "and we, the undersigned, promise to pay," and signed in the corporation's name "by P." and others who were its officers, binds both the corporation and the officers as individuals. Nunnemacher v. Poss, 116 Wis. 444, 92 N. W. 375.

20. Negotiable Instruments. Siff v. Forbes, 84 N. Y. Supp. 169.

21. Dyson v. Jones, 65 S. C. 308.

22. Long Island L. & T. Co. v. Long Island City & N. R. Co., 85 App. Div. [N. Y.] 36.

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The rules as to time of payment of demand paper are collected in the notes.[24] Words may be supplied to make time of payment clear.[25]

The determination of the legal effect of a note is for the court.[26] The courts will construe written instruments according to their legal effect, regardless of their form.[27] The presumption is that a note was signed on day of its date and prior to delivery.[28]

§ 3. *Anomalous signatures and indorsements.*—In most states the law presumes a signer to be a maker rather than an indorser, when he signs at the inception of the note and there is no evidence as to what liability he did assume,[29] and he is often held to the absolute liability of a maker,[30] but he is also variously held to be an indorser,[31] a guarantor,[32] and perhaps a surety.[33] The law of the place of payment governs.[34]

One who puts his name on the back of a note after its execution and delivery is a guarantor as to every man who knows these facts.[35]

Whether or not a person is liable as a guarantor, surety, or indorser, depends on the facts surrounding the signing.[36]

23. Though required to be presented by the contract. Abraham v. New Orleans Brew. Ass'n, 110 La. 1012.

24. A note payable "on demand after date" is not payable until the day after its date. Hardon v. Dixon, 77 App. Div. [N. Y.] 241. In Indiana, demand paper becomes overdue 30 days from date. Price v. Lonn, 31 Ind. App. 379, 68 N. E. 177. A certificate of deposit payable on demand on order of payee and bearing interest if held a certain time, does not mature so as to start limitations against the holder's right to recover thereon, until presentation for payment. In re Cook, 86 App. Div. [N. Y.] 586. A note overdue at date of delivery will be deemed payable on demand. Johnson v. Franklin Bank, 173 Mo. 171, 73 S. W. 191.

25. The words "one hundred and eighty, pay to the order of" held to indicate payment due 180 days after date. Moreland's Adm'r v. Citizens' Sav. Bank, 24 Ky. L. R. 1354, 71 S. W. 520.

26. Pettyjohn v. Nat. Exch. Bank [Va.] 43 S. E. 203.

27. "I hereby acknowledge that the note for $628.16 with interest at 8 per cent per annum, given by me to * * * dated * * * has not been paid. Original note * * * says has been lost. This is to renew said note"—signed by party—held a promissory note. Woodbridge v. Drought, 118 Ga. 671. A draft drawn by an authorized agent on his principal, a corporation, in favor of a third party, for a debt due by the corporation to said third party, will be treated as a promissory note of the corporation. Nat. F. Ins. Co. v. Eastern B. & L. Ass'n [Neb.] 91 N. W. 482. A writing in the form of a note, stipulating that it is to protect payee against specified threatened loss, to be void if no loss occurs, is a contract of indemnity rather than a note. Jenckes v. Rice, 119 Iowa, 451, 93 N. W. 384.

28. Wells v. Hobson, 91 Mo. App. 379.

29. Siemans & H. Elec. Co. v. Ten Broek, 97 Mo. App. 173, 70 S. W. 1092; Lyndon Sav. Bank v. International Co. [Vt.] 54 Atl. 191; Marshall Nat. Bank v. Smith [Tex. Civ. App.] 77 S. W. 237. A person making a blank indorsement on the back of a note before delivery, the note reading "I promise to pay" becomes either a joint maker or a surety, but not an indorser. Both v. Huff, 116 Ga. 8. Indorsers on a note who indorse a renewal note before delivery become joint makers of the renewal note. Citizens' C. & S. Bank v. Platt [Mich.] 97 N. W. 694.

30. Hollimon v. Karger, 30 Tex. Civ. App. 553, 71 S. W. 299.

In **New Hampshire** such indorser is liable without demand or notice. Nashua Sav. Bank v. Sayles, 184 Mass. 520, 69 N. E. 309.

In **Florida,** he is liable as a joint maker regardless of an agreement that he was to be a surety or of the fact that "demand, protest and notice waived" be written above his signature. Camp v. First Nat. Bank [Fla.] 33 So. 241. He is a co-maker where he participates in the consideration received. Pearl v. Cortright, 81 Miss. 300.

A wife signed a note believing she signed as surety and expected her husband to sign as principal; hers was the only signature on the paper. In negotiating the paper her husband represented that she was the principal. She was so held. Deering & Co. v. Veal [Ky.] 78 S. W. 886.

31. One who indorses a note, payable to the maker, before delivery to a third person, is liable only as indorser. Harnett v. Holdrege [Neb.] 97 N. W. 443.

32. In **Illinois,** all indorsers before delivery become guarantors. Tinker v. Catlin, 205 Ill. 108, 68 N. E. 773.

33. See Booth v. Huff, 116 Ga. 8.

34. Nashua Sav. Bank v. Sayles, 184 Mass. 520, 69 N. E. 309.

35. While note was in the hands of the payee he secured W. and C. to write their names on the back thereof with the knowledge that he wished to use the note to raise money. Thereafter the payee wrote his name below the others and sold the note to plaintiff who knew the facts. Held W. and C. guarantors. Hill v. Coombs, 93 Mo. App. 264; Hill v. Combs, 92 Mo. App. 242.

36. A payee transferred the note by a separate contract in which he guarantied the note free from defenses that could be made under § 2785 of the Code of Georgia, and also guarantied payments in full on the day due. Held a contract of indorsement. Baldwin Fertilizer Co. v. Carmichael, 116 Ga.

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The place of signature is not conclusive of signer's liability,[37] nor is the description appended to the signature,[38] and the exact liability may be shown by parol.[39] Character of signers of renewal note is not determined by reference to original.[40] In an action on a blank indorsement, the burden of proving what was the contract evidenced by the indorsement is on the plaintiff.[41]

An agreement between the parties as to the liability of irregular indorsers is binding on all who have notice thereof.[42]

§ 4. *Liabilities and discharge of primary parties.*—Maker and indorsers are alike debtors to the holder,[43] and are discharged where one who has assumed payment secures an extension without the knowledge or consent of the makers.[44] Under Neg. Inst. Law, an instrument is discharged where the principal debtor becomes the holder in his own right at or after maturity.[45] A note made in violation of the terms of a statute is void as between the original parties and those having knowledge of the violation[46] though it may be ratified,[47] but the fact that a note was made without authority,[48] or that the indorsee had no authority to purchase it,[49] will not discharge the maker.

The maker has all of the day on which a note matures in which to make payment.[50] The allowance of days of grace is determined by the lex loci contractus.[51]

762. Where county warrant recited "issued by authority of, and payment individually guaranteed by" signed by members of board of education, held individual liability that of guarantors not of drawers. Germania Bank v. Trapnell, 118 Ga. 578. Where an officer of a corporation indorsed a note of the corporation, after maturity, the evidence as to the circumstances and purpose thereof being conflicting, the question of the intention of the parties at the time is for the jury. Lyndon Sav. Bank v. International Co. [Vt.] 54 Atl. 191.

37. Shead v. Moore, 31 Wash. 283, 71 Pac. 1010. Wife signing above signature of husband shown to be surety only. Planters' B. & T. Co. v. Major, 25 Ky. L. R. 702, 76 S. W. 331. A wife signed a note on the second line for signatures. Held, not sufficient to give notice that she signed as surety. Deering & Co. v. Veal [Ky.] 78 S. W. 886.

38. The fact that the word "surety" is written after the name of one of the makers does not affect their joint and several liability to the payee. Galloway v. Bartholomew [Or.] 74 Pac. 467.

39. Lyndon Sav. Bank v. International Co. [Vt.] 54 Atl. 191; Tinker v. Catlin, 102 Ill. App. 264. Where the rights of innocent third parties are not involved. Herndon v. Lewis, 175 Mo. 116, 74 S. W. 976. Maker or payee. Helvie v. McKain [Ind. App.] 70 N. E. 178. Co-maker or surety. Markham v. Cover, 99 Mo. App. 83, 72 S. W. 474. Indorser not in the chain of title. Marshall Nat. Bank v. Smith [Tex. Civ. App.] 77 S. W. 237. To show that several persons whose names appear on a note bear the same relation thereto and those who pay are entitled to contribution. McDavid v. McLean, 104 Ill. App. 627. Signatures of payee and another person on back of note. Parol evidence is admissible to show that they are not first and second indorsers respectively. For a lengthy discussion of the law relating to admissibility of parol evidence as showing the liability of indorsers and other signers on a negotiable instrument see this case. The discussion is obiter, however. Young v. Sehon, 53 W. Va. 127. Where rights of third parties do not intervene, parol evidence is permissible to contradict the contract implied by law from a blank indorsement. Jaster v. Currie [Neb.] 94 N. W. 995.

40. The renewal note is a new contract. Siemans & H. Elec. Co. v. Ten Broek, 97 Mo. App. 173, 70 S. W. 1092.

41. Note made by one member of a partnership and indorsed by him in the firm name without authority. Lowry v. Tivy [N. J. Law]. 57 Atl. 267.

42. Young v. Sehon, 53 W. Va. 127.

43. Mechanics' Nat. Bank v. Keilkopf, 22 Pa. Super. Ct. 128.

44. Laumeier v. Hallock [Mo. App.] 77 S. W. 347.

45. An indorsee accepted part payment on a demand note and surrendered it to the maker, he promising to pay the balance. The maker was discharged. Schwartzman v. Post, 84 N. Y. Supp. 922.

46. Under Kansas Code, recovery barred on note for patent right by payee or transferee with knowledge unless note has inserted "given for a patent right." Pinney v. First Nat. Bank [Kan.] 75 Pac. 119.

47. Corporation note was made without authority. The corporation acquiesced in the matter for long time receiving benefits of transaction. When sued made no offer to return consideration. Held ratified or corporation estopped to deny note. Curtin v. Salmon River H. G. Min. & Ditch Co., 141 Cal. 308, 74 Pac. 851.

48. A by-law of a corporation, of which the payee had no notice, was not complied with. Lyndon Sav. Bank v. International Co. [Vt.] 54 Atl. 191.

49. Black v. First Nat. Bank, 96 Md. 399.

50. Hardon v. Dixon, 77 App. Div. [N. Y.] 241.

51. A note dated in Wisconsin but actually executed, negotiated, and made payable in Indiana, is an Indiana contract. Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664.

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Joint makers are jointly and severally liable,[52] but the right of contribution exists between them,[53] and the release of one will not release the others,[54] nor will an unsatisfied judgment against one,[55] nor the surrender of securities.[56] A promise by one to pay a voidable note is not binding on the others.[57] One is to a certain extent the agent of the other,[58] but assurances by one joint maker that there are no defenses to the note do not bind the other.[59]

A principal is liable upon the indorsement of his agent within the apparent scope of his authority,[60] but is not liable for obligations indorsed thereon by subsequent holders or strangers.[61]

The maker of a note is liable regardless of security.[62] If the money be left at the place where the note is payable, it will bar a recovery of interest after maturity and costs of suit,[63] but will not release him absolutely.[64] He is not entitled to credit for moneys paid by those secondarily liable,[65] nor to have the principal reduced by moneys paid as interest,[66] and that the consideration received was inadequate is no defense.[67]

A bank is liable on a draft which it issues under mistake of fact,[68] and a maker who pays a note without taking it up,[69] or negligently pays it to one who has no authority to collect,[70] is not discharged.

52. Waterville Trust Co. v. Libby, 98 Me. 241. In North Carolina, a note signed by husband and wife reciting that she as one of the principals bound her separate estate, binds her separate personal estate, but not her separate real estate. Harvey v. Johnson, 133 N. C. 352. The principal and surety to a promisory note are joint and several obligors. Heard v. Tappan, 116 Ga. 930.

53. This right is not lost by a release of one joint maker by the indorsee under Code Civ. Proc. § 1942. Farmers' & M. Bank v. Hawn, 79 App. Div. [N. Y.] 640.

54. Under Code Civ. Proc. § 1492. Farmers' & M. Bank v. Hawn, 79 App. Div. [N. Y. 640. Where not under seal. Valley Sav. Bank v. Mercer. 97 Md. 458.

55. Booth v. Huff, 116 Ga. 8.

56. Security was given to be held until another party had signed the note when it was to be delivered up. Pearl v. Cartright, 81 Miss. 300.

57. Promise after learning of misrepresentation as to consideration. Hayman v. Lambden [Md.] 54 Atl. 962.

58. Where a joint maker signs and delivers a note to his co-maker leaving the date blank, he impliedly authorizes the latter to fill in the date as of the time the note is actually negotiated. Lance v. Calvert, 21 Pa. Super. Ct. 102.

59. "Peddler's note" under Kentucky Code. Hays v. Walker, 25 Ky. L. R. 1045, 76 S. W. 1099.

60. Wedge Mines Co. v. Denver Nat. Bank [Colo. App.] 73 Pac. 873. Note signed by one of three stockholders, constituting a corporation, in the corporate name only, in the presence of the other managing stockholder, held valid. Buck v. Troy Aqueduct Co. [Vt.] 56 Atl. 285.

61. The assignee of an equity of redemption of a mortgage given to secure a note agreed to pay a higher rate of interest, and indorsed the note to that effect. Boutelle v. Carpenter, 182 Mass. 417, 65 N. E. 799.

62. The holder is under no obligation to look to a lien given, rather than to the parties made liable by the terms of a note. Franklin v. Browning [C. C. A.] 117 Fed. 226. Mere agreement that a note shall be paid from a specific fund does not create lien on the source of the fund. Id. Where a note was payable on demand and upon return of security given, tender back of security was unnecessary before commencing action on the note. Spencer v. Drake, 84 App. Div. [N. Y.] 272.

63. Dillingham v. Parks, 30 Ind. App. 61, 65 N. E. 300.

64. It is immaterial as a defense that when the note matured the maker had a sum sufficient to meet it on deposit in the hands at which it was payable, unless there is a failure to properly present the note. First Nat. Bank v. Dick, 22 Pa. Super. Ct. 445.

65. Pledgee of note need not credit the maker thereof with money received from one secondarily liable. Brown v. Pegram [C. C. A.] 125 Fed. 577.

66. 5 per cent a month was applied as interest to knowledge of maker. McLean v. Bryer [R. I.] 54 Atl. 373.

67. $15,000 given for services worth $2,500. Pettus v. Smith, 117 Fed. 967.

68. A bank received a deposit to the credit of a certain person; they wrote to another of the same name of the fact of the deposit and issued a draft for it at his request which was indorsed by him to plaintiff for full value. Held, that the bank was liable to plaintiff for the amount. Heavey v. Commercial Nat. Bank [Utah] 75 Pac. 727.

69. Payment of a note at the place designated does not discharge the payor unless the note is there to be surrendered. Chapman v. Wagner [Neb.] 96 N. W. 412. Payment to party not having note in his possession, is at peril of payor. Thompson v. Buehler [Neb.] 95 N. W. 854.

70. Maker had notice of the loss of a note, and paid it to a third person, without inquiry as to his title or authority. Page W. W. Fence Co. v. Pool [Mich.] 94 N. W. 1053.

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Alterations.—A material alteration[71] if made with intent to defraud[72] discharges those primarily liable;[73] but not an alteration made by consent or through honest mistake,[74] or made to make instrument conform to actual agreement.[75] Alterations may be ratified,[76] but the ratification must be made with full knowledge of all the facts,[77] and a similar rule has been held as to forgery.[78]

A check is an assignment pro tanto of the fund on which it is drawn,[79] and if the funds are sufficient, the drawee is liable to pay same absolutely upon demand,[80] and is liable for damages suffered by the drawer for his refusal to do so.[81] The drawer is liable absolutely to the drawee who pays the check.[82]

§ 5. *Liabilities and discharge of sureties, guarantors or other anomalous parties. Liability of sureties.*—While there may be a separate consideration,[83] one is not necessary as the original consideration is sufficient.[84] A surety who pays a note is entitled to reimbursement from maker,[85] and any collections on collateral constitute a credit in his favor.[86] Fraud may be a defense,[87] but not as to a bona fide holder.[88] A surety is not entitled to notice of demand and non-payment.[89] The contract of suretyship imposes no duty upon the sureties to defend their principals,[90] gives the principals no right to represent the sureties,[91] and gives no authority to one surety to charge his fellow sureties by either his knowledge or his conduct.[92] The principal and surety are jointly and severally liable.[93] Statutes in some states regulate the liability.[94]

71. Ball v. Beaumont [Neb.] 92 N. W. 170. Erasure of name of witness and its insertion in another place. Girdner v. Gibbons, 91 Mo. App. 412. "I" changed to "We" and the words "jointly and severally" inserted. Ofenstein v. Bryan, 20 App. D. C. 1.

72. Nat. Cap. Bank v. Bryan, 20 App. D. C. 26. In Georgia a material alteration in order to discharge the parties must be made with intent to defraud [Civ. Code, § 3702]. Miller v. Slade, 116 Ga. 772.

73. Though the holder proves that it was not altered after its receipt by him. Ofenstein v. Bryan, 20 App. D. C. 1.

74. Girdner v. Gibbons, 91 Mo. App. 412.

75. Payee changed the rate of interest from eight per cent as printed to 7½ per cent. Osborn v. Hall, 160 Ind. 153, 66 N. E. 457.

76. Lance v. Calvert, 21 Pa. Super. Ct. 102; Ball v. Beaumont [Neb.] 92 N. W. 170.

77. Ofenstein v. Bryan, 20 App. D. C. 1.

78. By admission of signature, alleged maker becomes liable though signature forged. Cent. Nat. Bank v. Copp, 184 Mass. 328, 68 N. E. 334.

79. A gambling loss paid by check is paid in the county where the check is drawn. Staninger v. Tabor, 103 Ill. App. 330. In **Florida** a draft or bill of exchange not specifying a particular fund for payment does not of itself operate as an assignment of money on deposit though the amount named in the instrument is the exact amount in the drawee's hands. Fulton v. Gesterding [Fla.] 36 So. 56.

80. Brown v. Schintz, 202 Ill. 509, 67 N. E. 172.

81. Loss of credit. American Nat. Bank v. Morey, 24 Ky. L. R. 658, 69 S. W. 759.

82. Though there was a failure of consideration. Seattle Nat. Bank v. Powles [Wash.] 73 Pac. 887.

83. Surrender of pledged stock is a sufficient consideration to support a contract of suretyship. Zuendt v. Doerner, 101 Mo. App. 528, 73 S. W. 873. The obligation of a surety on a renewal note, who as surety, signed the original note given for money advanced to the makers, is based on a sufficient consideration. First Nat. Bank v. Johnson [Mich.] 95 N. W. 975. A promissory note is not without consideration as to a surety, although the consideration, as between principal and payee, is the doing of an act by the latter which a previous contract had bound him to do, if the surety was not a party to such previous contract, and its performance was waived by the principal while it was yet executory. Merchants' Nat. Bank v. Ryan, 67 Ohio St. 448, 66 N. E. 426. Constitutes valid consideration for suretyship. An extension of time given the maker of a note already due is a sufficient consideration for the contract of the surety. Hannay v. Moody, 31 Tex. Civ. App. 88, 71 S. W. 325.

84. Leonard v. Viedenburgh, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317.

85. Hollimon v. Karger, 30 Tex. Civ. App. 553, 71 S. W. 299.

86. Robertson v. Angle [Tex. Civ. App.] 76 S. W. 317.

87. A purported surety is not estopped from setting off the defense of forgery, unless it clearly appears that he fraudulently withheld such information from the payee at a time when a recovery could have been had from the principal. Evidence that purported sureties on a note assisted the principal to leave the state, held insufficient. Maxwell v. Wright [Ind. App.] 64 N. E. 893.

88. One who signs a note as surety, in which are written the words, "five hundred," with spaces before and after them, which the maker fills up by writing "twenty" before, and "fifty" after, is liable thereon for the full amount to a bona fide holder. Hackett v. First Nat. Bank, 24 Ky. L. R. 1002, 70 S. W. 664.

89. First Nat. Bank v. Adamson, 25 R. I. 73.

90, 91, 92. Park v. Ensign, 66 Kan. 50, 71 Pac. 230.

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Discharge of sureties.—The surety is discharged if his contract be departed from,[95] as by extension of the time of payment without his consent,[96] and the extension must actually have been given[97] and accepted by the maker,[98] and such a discharge may be waived.[99] A material alteration discharges a surety,[1] and that notes were diverted from the purpose for which they were given may be a defense,[2] but a verbal agreement at time of execution, that surety is not to pay, does not absolve him from liability.[3] If a payee releases sufficient security to pay the debt the surety is discharged,[4] as he is by payment of the note.[5] The burden of proof is on the surety to show that he has been discharged.[6] When liability of surety is joint and several, action against principal is not a prerequisite to action against surety.[7] Rules as to when the holder of a note is obliged to proceed against the maker, before collecting of the surety, are largely statutory.[8]

Guarantors.—A guarantor's liability is separate and distinct from that of the maker or surety.[9] A mere offer of guaranty requires notice of acceptance, not so

93. Head v. Tappan, 116 Ga. 930; Hill v. Coombs, 93 Mo. App. 264.

94. In Kentucky, wife assumes no personal liability by signing husband's note as surety. Magoffin v. Boyle Nat. Bank, 24 Ky. L. R. 585, 69 S. W. 702. Under Civ. Code, § 2832, permitting surety to show himself such, except as against persons acting on belief of his apparent character as maker, wife claiming to be surety for husband must show that the payee knew of her suretyship. Farmers' & M. Bank v. De Sharb, 137 Cal. 685, 70 Pac. 771.

95. Daneri v. Gazzola, 139 Cal. 416, 73 Pac. 179. A surety has the right to impose the terms of his engagements, and is not liable outside of those terms, except in the case of a bona fide holder. Sutherland v. Mead, 80 App. Div. [N. Y.] 103.

96. Shuler v. Hummel [Neb.] 95 N. W. 350; Marshall Nat. Bank v. Smith [Tex. Civ. App.] 77 S. W. 237; Parlin & O. Co. v. Hutson, 198 Ill. 389, 65 N. E. 93. Under Civ. Code, §§ 2819, 2839, 2840. Daneri v. Gazzola, 139 Cal. 416, 73 Pac. 179. Accepting a demand note in payment. Johnson v. Franklin Bank, 173 Mo. 171, 73 S. W. 191. Accepting notes for interest, and agreeing to extend time. Steele v. Johnson, 96 Mo. App. 147, 69 S. W. 1065. Mere forbearance of suit does not constitute an extension. Guerguin v. Boone [Tex. Civ. App.] 77 S. W. 630.

97. A local custom that where a maker desired an extension of time, he would execute new notes, leave them at the bank with the understanding that the sureties on the old note would sign them, then the old notes would be canceled. First Nat. Bank v. Wells, 98 Mo. App. 573, 73 S. W. 293.

98. Mere offer to extend on certain terms, not accepted by maker, does not discharge surety. Bank of Morehead v. Elam, 24 Ky. L. R. 2425, 74 S. W. 209.

99. As by a clause to that effect in the note. First Nat. Bank v. Wells, 98 Mo. App. 573, 73 S. W. 293. The term "drawers" will be construed as designating simply original parties rendered liable, by execution and delivery, under terms of note waiving defenses for extension. Winnebago County State Bank v. Hustel, 119 Iowa, 115, 93 N. W. 70.

1. Ball v. Beaumont [Neb.] 92 N. W. 170.

2. A surety signed notes, under an agreement that they were to be used for a certain purpose, but afterward, with knowledge that they had been used for a different purpose, he executed new notes for which the original ones were delivered up and canceled. Held the diversion of the original notes from the purpose for which they were intended was no defense to the renewal notes. Baut v. Donly, 160 Ind. 670, 67 N. E. 503.

3. Rowe v. Bowman, 183 Mass. 488, 67 N. E. 636.

4. Gotzian & Co. v. Heine, 87 Minn. 429, 92 N. W. 398; Parlin & O. Co. v. Hutson, 198 Ill. 389, 65 N. E. 93.

5. A transaction may be deemed a payment although one party intended it as a sale and purchase. Riddle v. Russell, 117 Iowa, 533, 91 N. W. 810.

6. That the note has been satisfied out of securities. Boyd's Adm'r v. Farmers' Nat. Bank, 24 Ky. L. R. 756, 69 S. W. 964. To show extension. Columbia F. & T. Co. v. Mitchell's Adm'r, 24 Ky. L. R. 1844, 72 S. W. 350.

7. Brooks v. Thasher, 116 Ga. 62.

8. Under Missouri Statutes, mere failure of payee to sue maker until after his insolvency, no demand for suit having been made, does not release surety. He cannot excuse such demand by claiming not to know name of payee. Burge v. Duden [Mo. App.] 78 S. W. 653. Where the maker is insolvent, the payee is not required to bring suit, as provided by statute, in order to hold the sureties. Robertson v. Angle [Tex. Civ. App.] 76 S. W. 317. A payee is not required to proceed against maker by attachment in order to preserve rights against surety. Robertson v. Angle [Tex. Civ. App.] 76 S. W. 317. In Illinois, when the maker of a note dies, the holder must present it to the executor for allowance, or the surety will be released to the extent that recovery might have been had. Tinker v. Catlin, 205 Ill. 108, 68 N. E. 773. The holder of a promissory note, payable on demand, is not obliged to demand and proceed to collect the note before the time allowed by the statute of limitations, in order to hold a surety thereto, unless requested by said surety. McKelvy v. Berry, 21 Pa. Super. Ct. 276.

9. Hill v. Coombs, 93 Mo. App. 264. Adding a guarantor without the knowledge or consent of one of the makers did not release such maker. Anderson v. Hall [Neb.] 94 N. W. 981.

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an absolute guaranty.[10] Whether the contract of guaranty is based upon condition precedent, depends on the nature of the stipulations, and from the sense of the whole instrument taken together.[11] Though the maker be discharged, the guarantor need not be.[12] A guarantor is not entitled to notice of demand and nonpayment.[13] When a guarantor pays the debt he is subrogated to the right of the payee against the maker.[14]

§ 6. *Negotiation and transfer generally.*—Transferred negotiable paper by delivery passes title, subject, however, to equitable defenses.[15] An assignee of a note takes it subject to all the equities and defenses existing at the time of indorsement only.[16] It is no defense to a valid note that it was transferred after maturity and without consideration.[17] The transfer must be made by the owner or owners, or someone with their authority.[18] And the fact that the taking by the transferee is unlawful does not invalidate the paper.[19]

A transfer of a negotiable promissory note carries with it a mortgage securing it,[20] and all parties to said transfer are chargeable with knowledge of the contents of the mortgage, when referred to in the note or brought to their knowledge.[21]

A purchase of a draft with bill of lading attached, both indorsed in blank, is a purchase of the draft with the bill of lading as security. The purchaser, therefore, is not liable for performance of contract by consignor,[22] and when purchasing in good faith is not liable for the fraud of the consignor.[23] A stipulation for presentation of interest coupons passes with the obligation on the bonds.[24]

As between the parties, a check may be countermanded and payment forbidden by the drawer, at any time before cashed or certified to by the bank.[25]

10. Bankers' Iowa State Bank v. Mason Hand Lathe Co. [Iowa] 97 N. W. 7.

11. The note was payable "four months after date and upon return of securities pledged." Held, that no tender back, of securities, was necessary before bringing action against the guarantor. Seabury v. Sibley, 183 Mass. 105, 66 N. E. 603.

12. A guarantor is not discharged though limitations has run against the maker. Seabury v. Sibley, 183 Mass. 105, 66 N. E. 603. Guarantor improperly united with maker as party defendant. Judgment for guarantor. Held, future action to hold guarantor maintainable. Hill v. Combs, 92 Mo. App. 242.

13. First Nat. Bank v. Adamson, 25 R. I. 73; Fegley v. Jennings [Fla.] 32 So. 873; Gormley v. Hartray, 105 Ill. App. 625.

14. Entitled to securities. Fegley v. Jennings [Fla.] 32 So. 873.

15. A check payable to order was passed by delivery for a good consideration. Meuer v. Phenix Nat. Bank, 42 Misc. [N. Y.] 341. Delivery of a warehouse receipt without formal indorsement, transfers the title to the goods, where intention of parties clear. Sloan v. Johnson, 20 Pa. Super. Ct. 643. While county warrants are not negotiable in the sense of the law merchant, yet when made negotiable in form they are transferable by delivery or assignment. Germania Bank v. Trapnell, 118 Ga. 578.

16. **In favor of maker:** Breach of separate contract by payee three years after transfer of nonnegotiable note. Held, no defense to action by indorsee. State Bank v. Hayes [S. D.] 92 N. W. 1068. The recording acts, and not the law of the state governing negotiable instruments, determine the rights of an assignee of purchase-money notes as against a mortgagee or purchaser in good faith. First Nat. Bank v. Edgar [Neb.] 91 N. W. 404.

In favor of assignee: An assignment of one of a series of notes, having a common security, carries with it a porportionate part of the original debt, and pro tanto, the security. Guthrie v. Treat [Neb.] 92 N. W. 595.

17. Lockner v. Holland, 81 N. Y. Supp. 730.

18. Transfer of note containing no words of negotiability, by one of several payees therein named, without authority of co-payees, vests in transferee no title as against such co-payees, and such payee is liable to any one of them for his porportion of the amount so collected. Heard v. Kennedy, 116 Ga. 36. Where a note is payable to a party in a representative capacity, a purchaser is put on guard as to the payee's authority to sell. Wis. Yearly Meeting of Freewill Baptists v. Babler, 115 Wis. 289, 91 N. W. 678.

19. Bank unlawfully discounted notes. In re Edson, 119 Fed. 487.

20. Consterdine v. Moore [Neb.] 96 N. W. 1021; Tweto v. Burau [Minn.] 97 N. W. 128; Brynjolfson v. Osthus [N. D.] 96 N. W. 261.

21. Kendall v. Selby [Neb.] 92 N. W. 178; Bremer v. Slater, 18 App. D. C. 48.

22. Blaisdell v. Citizens' Nat. Bank, 96 Tex. 626, 75 S. W. 292.

23. Where drafts with bills of lading attached were purchased by a bank without notice of fraud, the bank is not liable to the consignee for fraud perpetrated by the consignor in making out the bills of lading. Blaisdell v. Citizens' Nat. Bank, 96 Tex. 626, 75 S. W. 292.

24. Abraham v. New Orleans Brew. Ass'n, 110 La. 1012.

25. Pullen v. Placer County Bank, 138 Cal. 169, 71 Pac. 83.

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§ 7. *Acceptance.*—The payee is entitled to an unconditional acceptance, and if he accepts a conditional one, he does so at his own risk.[26] Whether acceptance is absolute or conditional will be determined in view of all the surrounding circumstances.[27] In most states there are statutes requiring the acceptance of a bill of exchange to be in writing.[28] The reasonable time allowed, within which an order must be presented for acceptance, is such time as would be deemed reasonable by a prudent business man of ordinary intelligence.[29] Mere retention of a bill of exchange by the drawee does not amount to acceptance.[30] One accepting an order becomes primarily liable thereon. Certification of a check by a bank is the same as acceptance.[31] Where the order is upon a particular fund, acceptance will bind the drawee only to the extent of such fund.[32] The burden rests on drawee of ascertaining that the paper is genuine and drawn under due authority.[33]

§ 8. *Indorsement. By whom made.*—An indorsement must be made by the parties owning the instrument,[34] but may be made by an agent[35] whose authority may be orally conferred,[36] and need not be recited in the indorsement;[37] but an agent has no implied authority to indorse for his principal.[38] An indorsement without authority may be ratified.[39]

Sufficiency of indorsement.—An indorsement in order to pass title must show an intention to do so.[40] It need not be dated.[41]

26. Ford v. Angelrodt, 37 Mo. 50, 88 Am. Dec. 174.

27. Hogan v. Globe Mut. Bldg. & Loan Ass'n [Cal.] 71 Pac. 706. Words, "Accepted, payable as follows: $375 for completion of house * * *." Held, acceptance was conditional upon building being completed, and there was no liability where it was destroyed by fire before completion. Id., 140 Cal. 610, 74 Pac. 153. On acceptance of a draft based upon the fulfillment of an agreement, the terms of the agreement govern. Whether an unconditional acceptance can later be rendered conditional, query. Atlas Engine Works v. Woolford, 22 Pa. Super. Ct. 545.

28. In New York [Negotiable Instruments Law (Laws 1897, c. 612) § 220]. Izzo v. Ludington, 79 App. Div. 272. In Kansas [Gen. St. 1901, § 547]. Shutt Imp. Co. v. Erwin, 66 Kan. 261, 71 Pac. 521.

29. The question is properly one for the jury. Aspinall v. Viney, 206 Pa. 383.

30. Authorities collected, and doctrine discussed, though bill held non-negotiable. Westberg v. Chicago Lumber & Coal Co., 117 Wis. 589, 94 N. W. 572.

31. Cent. G. T. & Safe Deposit Co. v. White, 206 Pa. 611; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657. A check by a depositor on his account, certified by the bank, withdraws the amount from the depositor's account, just as though paid out. Cent. G. T. & Safe Deposit Co. v. White, 206 Pa. 611. A bank by certifying a check becomes primarily liable thereon. Poess v. Twelfth Ward Bank, 86 N. Y. Supp. 857. The holder, by delivery, of a check payable to order, which has been certified at his request by the bank, can recover of the bank when there are no equities. Meuer v. Phenix Nat. Bank, 42 Misc. [N. Y.] 341. One who has received payment on a certified check but who had repaid the money received thereon cannot maintain an action against the bank on its certification. Poess v. Twelfth Ward Bank, 86 N. Y. Supp. 857.

32. McMurray v. Sisters of Charity, 68 N. J. Law, 312.

33. A bank certified a check in favor of an indorsee who had the paper from one who had no authority to transfer it by indorsement. Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657.

34. Paper payable to joint payees must be indorsed by all in order to pass title. Draft payable to two brothers, indorsed and transferred by one only. Allen v. Corn Exch. Bank, 87 App. Div. [N. Y.] 335.

35. Northwestern Sav. Bank v. International Bank, 90 Mo. App. 205. Where a note is negotiated by a company's agent and the endorsement purports to be by the agent for the company, a finding that the note was endorsed by the payee is proper. New Haven Mfg. Co. v. New Haven Pulp & Board Co. [Conn.] 55 Atl. 604. A corporation may either expressly or by its business custom, authorize indorsements by any corporate officer. Black v. First Nat. Bank, 96 Md. 399.

36, 37. Northwestern Sav. Bank v. International Bank, 90 Mo. App. 205.

38. So held as to a superintendent of a manufacturing establishment. Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657.

39. As by receiving part of the money and giving extension of time (Allen v. Corn Exch. Bank, 87 App. Div. [N. Y.] 335), or accepting the funds (Rosenthal v. Hasberg, 84 N. Y. Supp. 290); but bringing action against the personal representatives of a co-payee who had indorsed and transferred without authority is not ratification (Allen v. Corn Exch. Bank, 87 App. Div. [N. Y.] 335).

40. Receipt for interest indorsed on a note held not sufficient. Everett v. Sullivan, 102 Ill. App. 133. An indorsement "without recourse" of a purchase money note, in which title to the property purchased is reserved in payee, does not carry the title of such property to the indorsee. Bradley v. Cassels, 117 Ga. 517.

41. Until the contrary appear, it takes

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Indorsement of a sealed instrument is a contract under seal.[42] An indorser may be estopped to deny the validity of his indorsement.[43]

Indorser's liability.—The liability of an indorser for value is not only upon the express contract of indorsement, but also upon an implied and extrinsic contract of genuineness,[44] including the genuineness of all prior indorsements.[45] Indorsement of a note not in circulation creates neither an express nor an implied contract,[46] nor does a restrictive indorsement not a representation of ownership,[47] nor do such as are not made for the purpose of transfer carry a guaranty of previous indorsements,[48] or vest any general property in the paper in the indorsee.[49] Members of a firm who indorse its paper individually assume indorser's liability.[50] An indorser may limit his contract by a separate written agreement.[51] In interpreting the liability of an indorser, the law looks to the intent rather than the mode of expression,[52] but parol contemporaneous evidence cannot be introduced to vary or alter the terms of the contract of indorsement.[53]

Discharge of indorser.—The general rule is that extension of time without the indorser's consent will release him,[54] but a conditional agreement canceled before maturity will not.[55] A material alteration of a note or of an indorsement thereon, changing the liability of the indorser, releases him.[56] An act by the holder

the date of the notes. Murto v. Lemon [Colo. App.] 75 Pac. 160.

42. Though no seal or scroll follows the indorser's signature. Baldwin Fertilizer Co. v. Carmichael, 116 Ga. 762.

43. A subsequent endorser is bound by adjudication of forgery of former endorsement, he having notice of action and opportunity to defend. First Nat. Bank v. First Nat. Bank, 68 Ohio St. 43, 67 N. E. 91. An indorser who has recovered judgment for the purchase price of notes is estopped from denying their validity when his own liability as an endorser is sought to be enforced. Norton v. Wochler, 31 Tex. Civ. App. 522, 72 S. W. 1025.

44. Packard v. Windholz, 40 Misc. [N. Y.] 347.

45. Egner v. Corn Exch. Bank, 86 N. Y. Supp. 107; First Nat. Bank v. First Nat. Bank, 68 Ohio St. 43, 67 N. E. 91; Simpson v. New Orleans, 109 La. 897; Meyer v. Rosenheim, 24 Ky. L. R. 2314, 73 S. W. 1129. Subsequent accommodation indorser is subject to this rule. Packard v. Windholz, 84 N. Y. Supp. 666.

46. But a contract may be shown by parol evidence. Elliott v. Moreland [N. J. Law] 54 Atl. 224.

47. An indorsement by a bank with a rubber stamp "pay through clearing house" is not a representation of ownership where the drawee knows that such stamp is used for collection purposes only. Crocker-Woolworth Nat. Bank v. Nevada Bank, 139 Cal. 564, 73 Pac. 456.

48. An indorsement for collection. First Nat. Bank v. City Nat. Bank, 182 Mass. 130, 65 N. E. 24.

49. An indorsee for collection is a mere agent for the collection of the paper. First Nat. Bank v. Farmers' & Merchants' Bank [Neb.] 95 N. W. 1062.

50. And is not relieved from liability by a composition with the firm. Faneuil Hall Nat. Bank v. Meloon, 183 Mass. 66, 66 N. E. 410.

51. New Blue Springs Mill. Co. v. De Witt, 65 Kan. 665, 70 Pac. 647. A note was indorsed to a bank under agreement that it was to be held as the note of the payee. In an action against the maker by the indorsee the burden was on the maker to show this agreement. National Bank of Rondout v. Byrnes, 84 App. Div. [N. Y.] 100. In Illinois it was held that indorsers could not make a valid agreement among themselves whereby the first indorser should become principal maker as to the second; the second as to the third, etc., which agreement would require the payee to follow the estates of the indorsers in order named, in case they died. Tinker v. Catlin, 205 Ill. 108, 68 N. E. 773.

52. The words "Assigned with recourse" indorsed on a note do not render the assignor a guarantor of payment where the note had been merged in a judgment. Redden v. First Nat. Bank, 66 Kan. 747, 71 Pac. 578. By a blank indorsement, before delivery, on the back of a note reading "I promise to pay" party so indorsing assumes a joint and several liability. Booth v. Huff, 116 Ga. 8.

53. Hately v. Pike, 162 Ill. 241, 53 Am. St. Rep. 304, with note. But see as to rule governing blank indorsements before delivery, ante § 3.

54. Whether an agreement by holder to extend time of payment, upon an assumption by a stranger to the note to pay same will discharge indorsers, quaere. Walker v. Washington Title Ins. Co., 19 App. D. C. 575.

55. One year before maturity a note was extended for two years providing interest was paid promptly. Default in payment of interest made before original date of maturity. Held indorsers still liable, notwithstanding a subsequent compliance no revival being demanded. Walker v. Washington Title Ins. Co., 19 App. D. C. 575.

56. Harnett v. Holdrege [Neb.] 97 N. W. 443. As the writing in a guaranty of payment, or a waiver of notice of presentment and protest, or a provision for exchange for other property (Id.).

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which discharges the maker will discharge the indorsers,[57] and laches in proceeding against maker may release assignor.[58] An indorser may be released,[59] and indorsements stricken out.[60]

An indorser is entitled to presentment for payment, demand, and notice of dishonor,[61] unless such demand and notice are waived by him.[62] He is also entitled to protest and notice thereof.[63]

The maker is liable to an indorser who has paid.[64]

Actions on indorser's contract.—In many states there are statutes regulating the time of suing indorsers.[65] In such actions the lex loci contractus controls,[66] unless such law is detrimental to the good morals of the lex fori.[67] This is true though the note be payable elsewhere.

Actions by indorsee.—The burden of proof rests upon plaintiff indorsee to prove validity of disputed indorsement to himself.[68]

§ 9. *Presentment and demand.*—A note must be presented for payment at maturity.[69] In the absence of special circumstances, in order to hold the drawer liable on his check, it must be presented not later than the day following its receipt, where the payee receives it in the same town in which the bank upon which it is drawn is situated.[70] If not located in the same town, it must be forwarded,

57. The holder of a note made in Louisiana and indorsed in New York got judgment against the maker and dealt with it in such a manner that under the law of Louisiana the maker was discharged. Held that the New York indorsers were discharged. Spies v. National City Bank, 174 N. Y. 222, 66 N. E. 736.

58. Delay of 30 days to sue maker, and of 5 months after judgment to issue execution thereon will discharge assignor. Adams v. Robinson, 25 Ky. L. R. 853, 76 S. W. 510.

59. In New Jersey, a married woman becoming possessed of a note which she had indorsed for accommodation, may release a prior indorser. Headley v. Leavitt [N. J. Err. & App.] 55 Atl. 731.

60. One to whom a note is subsequently returned may cancel endorsements by him. New Haven Mfg. Co. v. New Haven Pulp & Board Co. [Conn.] 55 Atl. 604. So held as to indorsement for collection. McAyeal v. Gullett, 105 Ill. App. 155 affirmed in 202 Ill. 214, 66 N. E. 1048.

61. Fonseca v. Hartman, 84 N. Y. Supp. 131. This is true where the indorser is the payee and the indorsee an accommodation discountee. Brown v. Crofton, 25 Ky. L. R. 753, 76 S. W. 372. Failure to present a bill of exchange promptly works a discharge of the indorser. Fritz v. Kennedy, 119 Iowa, 628, 93 N. W. 603. The release of one joint indorser, by failure to protest releases all the joint indorsers, the liability of joint indorsers being fixed by the common-law rule. Northrup v. Chambers, 90 Mo. App. 61. Burden of proof is on indorsers of renewal note to show they were discharged by failure to protest the original note (Citizens' Commercial & Sav. Bank v. Platt [Mich.] 97 N. W. 694), though done for accommodation (In re Edson, 119 Fed. 487). Lex loci contractus governs. Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664.

62. One so waiving contracts to pay the note at maturity upon failure of payment by maker. Franklin v. Browning [C. C. A.] 117 Fed. 226.

63. See post, § 10.

64. Though he has been released by another indorser. Jefferson County Nat. Bank v. Dewey, 90 App. Div. [N. Y.] 443. This right is not lost by the release of one joint-maker by the indorsee under Code Civ. Proc. § 1942. Farmers' & Merchants' Bank v. Hawn, 79 App. Div. [N. Y.] 640.

65. When a maker has been insolvent ever since the execution of notes, suit against an indorser need not be brought against the indorser at the next term of court after the right of action accrues. Norton v. Wochler, 31 Tex. Civ. App. 522, 72 S. W. 1025.

66. Sullivan v. German Nat. Bank [Colo.] 70 Pac. 162; Mechanics' Bank v. Chardavoyne [N. J. Err. & App.] 55 Atl. 1080; Spies v. National City Bank, 174 N. Y. 222, 66 N. E. 736. A note made in Louisiana and indorsed in New York, laws of New York control. Id. Where a note indorsed by a married woman in one state first comes into legal existence in another state, a statute exempting her from liability on such a contract in the first state, affords her no protection. Note indorsed in blank in New Jersey, filled in and negotiated in New York. Mechanics' Bank v. Chardavoyne [N. J. Err. & App.] 55 Atl. 1080.

67. Sullivan v. German Nat. Bank [Colo.] 70 Pac. 162.

68. Payne v. Liebee [Neb.] 91 N. W. 851. Admission of a first alleged indorsement is not admission of a second. Sturgis v. Baker [Or.] 72 Pac. 744. Indorsement of note of third party by one as executor to himself as individual is at most only voidable by beneficiaries of estate. Tyson v. Bray, 117 Ga. 689, 45 S. E. 74.

69. Under the statutes of Idaho the holder of a check or other bill of exchange is entitled to 10 days in addition to a reasonable time in which to present same. Chambers v. Custer County [Idaho] 71 Pac. 113.

70. Custom and usage among banks is not such special circumstance. Edminsten v. Herpolsheimer [Neb.] 92 N. W. 138. A check indorsed and delivered July 16th was not

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by mail, the next day.[71] But some courts hold that delay in presentment of a bank check is no defense where no injury is caused thereby.[72] In order to maintain an action against the drawer of a bill of exchange, demand must be made on the drawee, and payment refused by him.[73] Presentment must be made where the note is payable. When no place of payment is named, the presumption is that it is payable where the maker resides.[74]

§ 10. *Protest and notice thereof. Protest.*—In some states the necessity of protest is done away with by statute.[75]

Noting.—Noting is the act of a notary in minuting on a bill of exchange after it has been presented for acceptance or payment, the initials of his name, the date when such presentment was made, and the reason, if any has been assigned, for nonacceptance or nonpayment, together with his charge.[76] The noting is not indispensable, it being only a part of the protest; it will not supply the protest.[77] A protest is not rendered void by destruction of the paper on which same was noted.[78]

The certificate of protest as evidence.—Statutes generally indicate the value of the certificate of protest as evidence.[79]

Who are entitled to notice.—Those secondarily liable on a note are entitled to notice of protest.[80]

Form.—The law does not require any specific form for the notice of protest.[81] An indorser, in notifying preceding indorser of dishonor, may use notice sent him.[82]

Time of sending notice.—If the indorser lives in the same town, he is entitled to notice of protest on the day following, if in another town it is sufficient if the notice be mailed the following day.[83] Where a note is sent by the holder to an agent in another town for presentment to the maker, the agent is allowed one day to post the notice of dishonor to his principal, who has one additional day to send notice to last indorser, and the agent is not required to notify the indorser directly.[84] Each indorser is entitled to one additional day to notify his preceding indorser.[85]

presented for payment until the 19th, when the drawer had become insolvent and made an assignment. Brown v. Schintz, 202 Ill. 509, 67 N. E. 172.

71. Edminsten v. Herpolsheimer [Neb.] 92 N. W. 138.

72. Williams v. Brown, 80 App. Div. [N. Y.] 628; Id., 82 App. Div. 353; Fritz v. Kennedy, 119 Iowa, 628, 93 N. W. 603.

73. And this fact must appear on the face of the petition. Germania Bank v. Trapnell, 118 Ga. 578.

74. "Corner Main Street and First Avenue" written on margin of a note is no designation of its place of payment. Bailey v. Birkhofer [Iowa] 98 N. W. 594.

75. In Texas the liability of an indorser may be fixed without protest by suing the maker at the first term of the district court after the right of action accrues. Vitkovitch v. Kleinecke [Tex. Civ. App.] 75 S. W. 544.

76. Valid noting of protest is constituted by endorsement of the words "Protested for nonpayment" followed by the date and the official signature of party protesting. Moreland's Adm'r v. Citizens' Sav. Bank, 24 Ky. L. R. 1354, 71 S. W. 520.

77. Cyc. Law Dict., p. 637.

78. Moreland's Adm'r v. Citizens' Sav. Bank, 24 Ky. L. R. 1354, 71 S. W. 520.

79. The official certificate of protest under seal of the notary who protests a bill or note is presumptive evidence of the facts therein stated [Rev. St. Wis. 1898, § 176; Burns' Rev. St. Ind. 1894, § 8040]. Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664. Lex fori governs. Id.

80. Indorser. Fonseca v. Hartman, 84 N. Y. Supp. 131. Notice of protest is sufficient if given to indorser to hold him although, since indorsement, he has assigned for benefit of creditors. Moreland's Adm'r v. Citizens' Sav. Bank, 24 Ky. L. R. 1354, 71 S. W. 520.

81. It may be oral. Kelly v. Theiss, 77 App. Div. [N. Y.] 81, 12 Ann. Cas. 206. In Wisconsin, notice of dishonor may be written or oral, and in any terms sufficiently identifying the instrument and indicating its dishonor, if in writing, need not be signed, and a misdescription of the instrument protested will not invalidate the notice, unless the party is actually misled thereby. Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664. Lex loci contractus controls. Id.

82, 83, 84. Oakley v. Carr [Neb.] 92 N. W. 1000, 60 L. R. A. 431.

85. If indorser receives notice on Saturday, he may serve notice on next prior indorser on Monday following. Oakley v. Carr [Neb.] 92 N. W. 1000, 60 L. R. A. 431. Allegation by holder of a note that he caused notice to be given the last indorser but one will admit evidence that the notice was given to the last indorser and by him transmitted to the one next prior. Id.

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The notice should be properly addressed,[86] and, under the negotiable instruments law, where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice.[87]

§ 11. *New promise after discharge, and waiver of non-presentment or the like.*—One may waive demand and notice of protest.[88] Waiver by indorser of right to notice may be implied from his acts.[89]

Failure to demand payment and give notice is waived by a subsequent promise by the indorser to pay the note, with full knowledge of the facts.[90]

§ 12. *Accommodation paper.*—Accommodation paper embraces every bill or note to which a person has put his name as acceptor, drawer, maker, indorser, etc., without consideration to himself.[91] The maker of an accommodation note may become estopped to deny receipt of consideration.[92] A benefit accruing to the person accommodated is sufficient consideration to sustain the liability of accommodation indorsers.[93] It is doubtful if a manufacturing corporation can become an accommodation indorser.[94]

86. A notice of protest addressed to "C. H., N. Y." is insufficient where it is not shown that the indorser lived or ever had lived in New York. Fonseca v. Hartman, 84 N. Y. Supp. 131.

87. Miscarriage of mails, notice never received. State Bank v. Soloman, 84 N. Y. Supp. 976; Selover, Neg. Inst. Law, § 242, p. 291.

88. Franklin v. Browning [C. C. A.] 117 Fed. 226. A statement by an indorser to the payee of a note, before maturity, that he would see the maker, and if the latter did not make his account to the payee good, he would "go and shut him up," does not amount to a waiver, by the indorser, of demand and notice. Congress Brewing Co. v. Habenicht, 83 App. Div. [N. Y.] 141. A promise made by the maker of a note, as such, to pay if given more time, is not a waiver of his right to notice of protest as an indorser. Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664. The word "any" before the word "extension" in agreement for waiver of defense, on ground of "any extension" of time for payment, held to apply to any one of an indefinite number of extensions. Winnebago County State Bank v. Hustel, 119 Iowa, 115, 93 N. W. 70.

89. It is then a question of intention. Laumeier v. Hallock [Mo. App.] 77 S. W. 347. An indorser does not waive right to notice of dishonor by securing, as the agent of one who has assumed liability, an extension, his agency being known to the payee. Laumeier v. Hallock [Mo. App.] 77 S. W. 347. Waiver of demand and notice by one indorsing a note as guarantor will be deemed a waiver as indorser, not as guarantor. First Nat. Bank v. Adamson, 25 R. I. 73.

90. The burden of proof is on an indorsee to show that the indorser, when he made a new promise to pay the note, had full knowledge of the facts operating to release him from liability. Positive or direct evidence of such knowledge is, however, not required. State Bank of St. Johns v. McCabe [Mich.] 98 N. W. 20.

91. One who receives a benefit is not an accommodation indorser. Where a builder, in order to obtain a contract, procured a loan to be made to another. Vitkovitch v. Kleinecke [Tex. Civ. App.] 75 S. W. 544. Notes exchanged for mutual convenience are not accommodation paper. State Bank v. Hayes [S. D.] 92 N. W. 1068. An indorsement of a corporation's note, and deposit of the note in a bank as security for obligations of the corporation to the bank, is an indorsement for the accommodation of the corporation, and not of the bank. Bankers' Iowa State Bank v. Mason Hand Lathe Co. [Iowa] 97 N. W. 70. A person executed a note payable to himself and indorsed it in blank. It was secured by a deed of trust and deposited with another as security. The maker gave the party who held it authority to use it as security for a certain amount, but was fraudulently induced to sign an instrument stating that a third person was the owner of the note and the maker had received value therefor. Held, that the note was not made an accommodation note. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800. In an action on a note the maker and payee testified that it was an accommodation note for the benefit of the payee, and transferred to the holder for less than its face value. This, held sufficient to overcome the presumption that the holder was bona fide, and the question was for the jury whether the note was accommodation paper and whether the holder knew it. Strickland v. Henry, 175 N. Y. 372, 67 N. E. 611. An indorsement, with waiver of presentment, demand, and notice of protest, charges subsequent holders with notice that the liability of parties so indorsing is that of accommodation indorsers only, not of joint makers. Harnett v. Holdrege [Neb.] 97 N. W. 443. Evidence held sufficient to show that certain bills of exchange as between customer and factor were accommodation paper. Bailey v. Wood, 24 Ky. L. R. 801, 69 S. W. 1103.

92. Murphy v. Gumaer [Colo. App.] 70 Pac. 800, where persons dealing with the payee bank relied on the bona fide character of the notes as part of bank's assets. The fact that a maker, upon inquiry being made of him, does not state that a note is accommodation paper, casts some doubt as to the good faith of such a claim, when set up in defense to an action on the note. Rosenberg v. Hubbell, 76 App. Div. [N. Y.] 625.

93. Hills v. Coombs, 93 Mo. App. 264.

94. In order to obtain a certain corporation as security for the price of goods sold, the goods were billed direct to it, and then

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Liability of accommodation parties.—An accommodation indorser assumes the same liability as a regular indorser.[95] An accommodation maker, with full knowledge of security ample to pay note, is deemed surety only.[96]

The making of an accommodation note is a loan of the maker's credit, with no restriction on its use,[97] and he is liable to a bona fide holder, even though the latter knew the former to be an accommodation party,[98] but he is not liable to a bank, holding the same as collateral, for any indebtedness contracted since maturity.[99] A bona fide holder is the only one capable of enforcing accommodation paper which has been fraudulently diverted.[1]

Discharge of liability of accommodation indorser.—Indorsement for accommodation may be withdrawn at any time before the paper has passed into the hands of third parties.[2] An accommodation party may be relieved from liability by a renewal of the obligation, unless he acknowledges his liability with knowledge of such renewal,[3] and by neglect on part of holder.[4]

§ 13. *The doctrine of bona fides. Who may be a holder.*—In order to be a bona fide purchaser the holder must have acquired the paper in good faith.[5] This doctrine is peculiar to negotiable instruments.[6] The transferee of a negotiable instrument is presumed to have received it in good faith.[7]

Once bona fide holdership always bona fide holdership.—One who takes paper from a bona fide holder, even though he have notice of defenses, acquires all the rights of the latter.[8] The trustee of a deed of trust may become a bona fide holder of a note secured thereby.[9]

forwarded to the real buyer, who gave notes payable to the order of the first corporation, who indorsed them to the seller. The latter had knowledge of all the details. Held, corporation not liable on indorsement. In re Prospect Worsted Mills, 126 Fed. 1011.

95. Packard v. Windholz, 84 N. Y. Supp. 666; In re Edson, 119 Fed. 487. The fact that a payee's indorsement of a note was forged, does not discharge a subsequent accommodation indorser from liability to a later indorsee, who was compelled to take up the note before maturity. Packard v. Windholz, 40 Misc. [N. Y.] 847.

96. Gotzian & Co. v. Heine, 87 Minn. 429, 92 N. W. 398.

97. Action on accommodation note by an indorsee for value before maturity, held, want of consideration no defense, even though known to indorsee on receiving note. First Nat. Bank v. Dick, 22 Pa. Super. Ct. 445.

98. Black v. First Nat. Bank, 96 Md. 399. Where a check is given, at the instance of an alleged agent, as a loan to his alleged principal, the fact that the agent had no authority to act does not relieve the maker of liability, on the check, to the payee for loss suffered thereby. Levy v. Huwer, 80 App. Div. [N. Y.] 499.

99. Riverside Bank v. Jones, 75 App. Div. [N. Y.] 531.

1. This is not changed by the New York Negotiable Instruments Law. Sutherland v. Mead, 80 App. Div. [N. Y.] 103. The fraudulent diversion of a note from the purpose for which it was given is an affirmative defense, which accommodation indorsers sued thereon must plead. Id.

2. Markowitz v. Greenwall Theatrical Circuit Co. [Tex. Civ. App.] 75 S. W. 74, 317. Under the New York Negotiable Instruments Law, §§ 8, 55, the maker of an accommodation note is not relieved from liability by an extension of time of payment, without her consent. National Citizens' Bank v. Toplitz, 81 App. Div. [N. Y.] 593.

3. Bankers' Iowa State Bank v. Mason Hand Lathe Co. [Iowa] 97 N. W. 70.

4. Where a note could have been paid from collections made on collateral securities an accommodation maker is discharged. Quaker City Nat. Bank v. Hepworth, 21 Pa. Super. Ct. 566.

5. McGill v. Young [S. D.] 92 N. W. 1066; Citizens' Bank v. Rung Furniture Co., 76 App. Div. [N. Y.] 471. A bank purchasing a note of the payee, a depositor in said bank, and crediting him with the amount thereof, and permitting him to check it all out before maturity is a bona fide purchaser, and it is immaterial that the depositor afterwards had deposits in said bank. Fredonia Nat. Bank v. Tommel [Mich.] 92 N. W. 848. Sale and indorsement of note, long before maturity, to plaintiff, who gave credit or money therefor, held to show plaintiff bona fide holder. First Nat. Bank v. Schmitz [Minn.] 95 N. W. 577. A bank discounted notes indorsed by one partner in the partnership name, after dissolution. Notice of dissolution had not been published nor had the bank received actual notice. They had discounted similarly indorsed paper before. They were held not chargeable with bad faith. Second Nat. Bank v. Weston, 172 N. Y. 250, 64 N. E. 949. The fact that a bank purchased a check instead of receiving on deposit for collection does not justify a conclusion of bad faith. Citizens' State Bank v. Cowles, 89 App. Div. [N. Y.] 281.

6. Kellogg v. School Dist. No. 10 [Okl.] 74 Pac. 110.

7. Wedge Mines Co. v. Denver Nat. Bank [Colo. App.] 73 Pac. 878.

8. Hollimon v. Karger, 80 Tex. Civ. App.

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A finding that one is not a bona fide holder for value, without notice, is a finding of fact.[10]

Notice and knowledge.—To be a bona fide holder the paper must be taken without notice of existing equities.[11] The notice must be of facts sufficient to impute bad faith,[12] and where the facts are in dispute, it is a question for the jury.[13]

The transferee of paper is charged with notice of defects patent on the face of the instrument,[14] and if a series of instruments be taken, he is charged with notice of the contents of all,[15] or if irregularities are patent in the line of indorsement, he must take notice thereof.[16] Constructive notice is sufficient.[17] A principal is charged with notice of his agent's acts,[18] and knowledge of one member of an unincorporated banking firm is knowledge of the firm,[19] but notice to a director of a banking corporation, acquired privately, or through channels common to all, is not notice to the corporation.[20]

Notice of defects is not imputed to one who purchases at less than face value,[21]

558, 71 S. W. 299; Prentiss v. Strand, 116 Wis. 647, 93 N. W. 816; Citizens' State Bank v. Cowles, 39 Misc. [N. Y.] 571. A holder under a holder in due course has all the rights of the latter. Black v. First Nat. Bank, 96 Md. 399.

9. Brewer v. Slater, 18 App. D. C. 48.

10. American Nat. Bank v. Watkins [C. C. A.] 119 Fed. 545. The maker denied that his holding was bona fide. The credibility of the testimony as to the indorsement of the note to him and as to his good faith was held for the jury. Hugumin v. Hinds, 97 Mo. App. 546, 71 S. W. 479.

11. Burt v. Bennett, 116 Ga. 439; People's Bank v. Frick [Okl.] 73 Pac. 949. The agent of the owner of a note extended it without authority and fraudulently transferred it to another. Merchant L. & T. Co. v. Welter, 205 Ill. 647, 68 N. E. 1082. Evidence held sufficient to show that an indorsee had notice that an agreement existed between the maker and payee that other indorsers should sign before the note was delivered. Caudle v. Ford, 24 Ky. L. R. 1764, 72 S. W. 270. A charge for collection rendered by the holder of a note, held to show that he did not regard himself as a bona fide holder at that time. Bottom v. Barton [Colo. App.] 75 Pac. 153. Holder took note knowing that it was for accommodation only, and entered into an agreement to "pay it at maturity, and save the maker harmless." Clothier v. Webster Foundry Sand Co., 21 Pa. Super. Ct. 386. Where taker knew vendee owned but part of note. Kersey v. Fuqua [Tex. Civ. App.] 75 S. W. 56. An indorsee knew that a note was procured by fraudulent representations and the consideration was worthless. Taft v. Myerscough, 197 Ill. 600, 64 N. E. 711. One took notes as collateral security, knowing that they were fraudulently secured and without consideration. Baldwin v. Davis, 118 Iowa, 36, 91 N. W. 776. Plaintiff was a mere figurehead of the payee in bringing the action. State Bank v. Blakely & Co. [Tex. Civ. App.] 79 S. W. 331. Bovier v. McCarthy [Neb.] 94 N. W. 965, where attempted defense was usury.

12. Knowledge of an agreement which forms the consideration for a note, without knowledge of the breach of the agreement, is no defense. Black v. First Nat. Bank, 96 Md. 399.

13. Taft v. Myerscough, 197 Ill. 600, 64 N. E. 711. Whether indorsee had notice of fraud used in procuring a note and of the nature of the consideration.

14. The word "attorney" affixed to the name of a payee makes him a trustee. Hazeltine v. Keenan [W. Va.] 46 S. E. 609. An indorsement "for collection" is notice that the indorsee is agent only. First Nat. Bank v. Farmers' & M. Bank [Neb.] 95 N. W. 1062.

15. A purchaser of notes, one of which is overdue, secured by a mortgage which states that failure to pay any of the notes at maturity shall make all of the notes due. Stoy v. Bledsoe, 31 Ind. App. 648, 68 N. E. 907. Where in a series of notes it is stipulated that on failure to pay any one of them at maturity all shall become due, a purchaser who takes any of them after one is overdue. Lybrand v. Fuller, 39 Tex. Civ. App. 116, 69 S. W. 1005. One who purchases a note and mortgage is chargeable with notice of the conditions of the mortgage. Garnett v. Myers [Neb.] 94 N. W. 803. Note, mortgage, and assignment, sold and delivered together. Consterdine v. Moore [Neb.] 96 N. W. 1021.

16. The fact that a note is presented for discount by the maker is notice to the discounter that an indorsement thereon is for accommodation. Pettyjohn v. Nat. Exch. Bank [Va.] 43 S. E. 203. Indorsement of a corporation, not in the chain of title, holder charged with notice that the indorsement is for accommodation and hence unauthorized. Pelton v. Spider Lake S. & L. Co., 117 Wis. 569, 94 N. W. 393.

17. Robbins v. Swineburne Printing Co. [Minn.] 93 N. W. 331.

18. An insurance agent made fraudulent representations in procuring the execution of a note to himself, which he indorsed to his principal before maturity. Webb v. Moseley, 30 Tex. Civ. App. 311, 70 S. W. 349.

19. Adams v. Ashman, 203 Pa. 536.

20. Black v. First Nat. Bank, 96 Md. 399. That the officers of a bank to which a note is transferred are stockholders (one an officer) in a corporation which is the payee, does not charge the bank with notice of defenses of the maker against the payee. Iowa Nat. Bank v. Sherman [S. D.] 97 N. W. 12.

21. Where the transfer was made for less than face value, and indorsee had reason to believe one indorser solvent, the indorsee was not charged with notice that note was delivered merely as accommodation paper.

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or discounts a note at a rate of interest exceeding the legal rate,[22] unless the discount taken be so great as to impeach good faith.[23]

An indorsee is not required to investigate the financial standing of the makers and indorsers,[24] and circumstances of suspicion alone are insufficient to charge the purchaser with notice.[25] Nor does mere knowledge of facts sufficient to put a prudent man on inquiry,[26] but the contrary doctrine has been held.[27]

Taking in due course of business.—It is presumed that one has received paper in the due course of business,[28] but it must be properly indorsed.[29] It need not be paid for in money.[30] Where the evidence is conflicting as to whether or not plaintiff is a holder in due course, the question is for the jury.[31]

Taking before maturity.—To be a bona fide holder, one must purchase before maturity[32] paper properly indorsed,[33] but a delivery in escrow before maturity is sufficient.[34] In the absence of statute, the circumstances of each case will determine when demand paper becomes overdue.[35]

Parting with value.—Presumptive consideration is a characteristic of negotiable paper, but in order to be a bona fide holder the purchaser must part with value. The actual discharge of a pre-existing debt[36] or a part thereof is a parting with

Wright Inv. Co. v. Friscoe Realty Co. [Mo.] 77 S. W. 296.

22. A bank discounted a note at rate of seven per cent. when the legal rate was six per cent. Bank of Monongahela Valley v. Weston, 172 N. Y. 259, 64 N. E. 946.

23. Discounting at eight per cent. when the legal rate is six is not so great. Second Nat. Bank v. Weston, 172 N. Y. 250, 64 N. E. 949. Bought note three months after execution at discount of 40 per cent. Held, not for value in the usual course of business. McGill v. Young [S. D.] 92 N. W. 1066.

24. Hallock v. Young [N. H.] 57 Atl. 236.

25. Releasing original note and taking absolute title to collateral. Brewer v. Slater, 18 App. D. C. 48. Under a statute requiring actual knowledge of defect, or bad faith, mere suspicion of a defect, or gross negligence, or an endorsement reciting receipt of amounts by certain makers was held not to defeat assignee's title. Valley Sav. Bank v. Mercer, 97 Md. 458.

26. First State Bank v. Hammond [Mo. App.] 79 S. W. 493; Wilson v. Riddler, 92 Mo. App. 335.

27. Where the circumstances are such as to put one on inquiry as to the genuineness of the obligation of the maker, the purchaser is bound to make such inquiry, or be chargeable with knowledge of the facts it would have disclosed. Citizens' Bank v. Rung Furniture Co., 76 App. Div. [N. Y.] 471.

28. Citizens' State Bank v. Cowles, 39 Misc. [N. Y.] 571. Possession of paper properly indorsed is prima facie evidence of bona fide holding. Wilcox v. Tetherington, 103 Ill. App. 404.

29. The assignee of purchase money notes, executed by the vendee under a bond for a deed, takes subject to judgments of record against the vendor at the time of the assignment. First Nat. Bank v. Edgar [Neb.] 91 N. W. 404. One who takes a bill of exchange by assignment is not a bona fide holder. Gray Tie & Lumber Co. v. Farmers' Bank, 24 Ky. L. R. 2319, 74 S. W. 174. In Illinois, the form of indorsement is regulated by statute. Whether an indorsement is sufficient to make the indorsee a bona fide holder, is a question of law. Everett v. Sullivan, 102 Ill. App. 133.

30. A note obtained in exchange for property is obtained in the usual course of business. Cunningham v. Holmes [Neb.] 92 N. W. 1023.

31. Mut. Loan Ass'n v. Lesser, 76 App. Div. [N. Y.] 614.

32. Johnson County Sav. Bank v. Wootten, 118 Ga. 927; Freittenberg v. Rubel [Iowa] 98 N. W. 624; Williams v. Baker, 100 Mo. App. 284, 73 S. W. 339; Hunter v. Fiss, 86 N. Y. Supp. 1121. A note after maturity is a discredited and broken contract. Wolf v. Shelton, 159 Ind. 531, 65 N. E. 582. A person took notes, one of which was overdue and which was secured by a mortgage stating that failure to pay any of the notes at maturity rendered them all due. Stoy v. Bledsoe, 31 Ind. App. 643, 68 N. E. 907. An attorney at law had in his possession an overdue note payable to the maker and by him indorsed. He extended the time of payment thereon and indorsed it to another. Held, the purchaser was not a bona fide holder and the fact that the note had been paid was available against him. State v. Sutherland, 111 La. 381.

33. In California, an assignment of a note by the payee before maturity and indorsed by him after maturity does not render the assignee a bona fide holder. Reese v. Bell, 138 Cal. xix, 71 Pac. 87.

34. Where a negotiable promissory note has been indorsed and delivered in escrow before maturity, the purchaser is a bona fide holder although it is not delivered to him until after maturity. Cunningham v. Holmes [Neb.] 92 N. W. 1023.

35. A demand note cannot be considered overdue, and subject to equities in favor of the maker, when interest is paid before and after the transfer. McLean v. Bryer, 24 R. I. 599. Under the New York negotiable instruments law, § 92, four or five days from date of a check is not such an unreasonable length of time. Citizens' State Bank v. Cowles, 39 Misc. [N. Y.] 571. A check dated in New York June 1st and presented in Kansas the 8th is not overdue. Citizens' State Bank v. Cowles, 89 App. Div. [N. Y.] 281.

36. This is not changed by the New York negotiable instruments law. Sutherland v. Mead, 80 App. Div. [N. Y.] 103. One taking

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value,[37] as is taking a note as collateral security,[38] even for an antecedent debt,[39] but a broker receiving a note for the purpose of sale is not a taker for value,[40] nor is a bank which places the proceeds of a discounted note to the credit of an indorser.[41]

Rights of a bona fide holder.—As against a bona fide holder, no defense based on the equities between the parties can be set up, but only such defenses as invalidate the paper in its inception.[42] It follows that fraud cannot be set up,[43] unless it effects the very existence of the contract,[44] but some courts hold that even in such a case a bona fide holder will be protected.[45] Nor does entire failure of consideration afford a defense,[46] nor a total lack thereof,[47] nor illegality,[48] unless regulated by statute.[49] Payment to the original payee does not affect the bona fide holder,[50] nor is he bound by agreements between other parties to the indictment.[51] The legal incapacity of the payee is not available as a defense,[52] nor duress,[53] nor want of delivery,[54] nor that paper had been lost,[55] or stolen,[56] nor breach of warranty,[57] nor usury,[58] nor that it is accommodation paper.[59]

a note in payment of an antecedent debt is a holder for a valuable consideration in New Jersey and New York. Mechanics' Bank v. Chardavoyne [N. J. Err. & App.] 55 Atl. 1080; Iowa Nat. Bank v. Sherman [S. D.] 97 N. W. 12.

37. Smith v. Thompson [Neb.] 93 N. W. 678.

38. Black v. First Nat. Bank, 96 Md. 399.

39. Lashmett v. Prall [Neb.] 96 N. W. 152; Prim v. Hammel, 134 Ala. 652. There being no new consideration. Birket v. Elward [Kan.] 74 Pac. 1100.

40. American Valley Co. v. Wyman, 92 Mo. App. 294.

41. Albany County Bank v. People's Co-operative Ice Co., 86 N. Y. Supp. 773.

42. Perth A. Mut. L. H. & Bldg. Ass'n v. Chapman, 80 App. Div. [N. Y.] 556. A holder for value of commercial paper, valid on its face, is protected, without evidence of good faith, unless the circumstances are such as to show bad faith. Glines v. State Sav. Bank [Mich.] 94 N. W. 195. Title also supported by fact that note was received in due course of administration of husband's estate. Moores v. Jones [Neb.] 93 N. W. 1016.

43. Wilcox v. Tetherington, 103 Ill. App. 404; Clark v. Porter, 90 Mo. App. 143. Note executed by one partner with authority in fraud upon another. Farmer v. Etheridge, 24 Ky. L. R. 649, 69 S. W. 761. Note given for premium on fire insurance, company made an assignment, then house burned. Maker alleged fraud and failure of consideration (Hahn v. Bradley, 92 Mo. App. 399), but fraud of agent imputed to his principal who cannot claim as bona fide holder (Webb v. Moseley, 30 Tex. Civ. App. 311, 70 S. W. 349).

44. A signature procured by fraud, going to the character of the paper, the maker being without negligence and having no intention to sign a note. People's State Bank v. Ruxer, 31 Ind. App. 245, 67 N. E. 542. Maker illiterate, no negligence on his part, signed note thinking it was an order for a lightning rod, and also a policy of insurance. Keller v. Ruppold, 115 Wis. 636, 92 N. W. 364. Illiterate person induced by fraud to sign a note which he believed to be a receipt. Shenandoah Nat. Bank v. Gravatte [Neb.] 95 N. W. 694. That a person was negligent in signing an instrument without reading it precludes this defense. Wilcox v. Tetherington, 103 Ill. App. 404.

45. Person wanted defendant's P. O. address, defendant wrote it in a note or memorandum book, signature turned up on a note, held, answer alleging above facts is not good against a person claiming as a bona fide holder, unless there is a plea that holder had notice of fraud before acquiring note. Tower v. Whip, 53 W. Va. 158.

46. Burt v. Bennett, 116 Ga. 430. Notes given for goods not delivered. Beattyville Bank v. Roberts [Ky.] 78 S. W. 901.

47. Consideration was a past indebtedness which was barred by limitations. McDonald v. Randall, 139 Cal. 246, 72 Pac. 997.

48. Gambling note. Hurlburt v. Straub [W. Va.] 46 S. E. 163; Sullivan v. German Nat. Bank [Colo. App.] 70 Pac. 162. At common law a note given in payment of a gambling debt is good in the hands of a bona fide holder. Id.

49. Colo. Gen. St. § 850; Mills' Ann. St. § 1344, renders a gambling note void even in the hands of a bona fide purchaser. Sullivan v. German Nat. Bank [Colo. App.] 70 Pac. 162. In West Virginia, a gaming note is void even in hands of innocent holder unless maker has induced the taking by such innocent holder by promise of payment. Hurlburt v. Straub [W. Va.] 46 S. E. 163; Western Nat. Bank v. State Bank [Colo. App.] 70 Pac. 439.

50. Prim v. Hammel, 134 Ala. 652; Jurden v. Ming, 98 Mo. App. 205, 71 S. W. 1075.

51. Deed of trust securing notes made subject to other incumbrances. Long v. Gorman [Mo. App.] 79 S. W. 180. Note not to be negotiated. Black v. First Nat. Bank, 96 Md. 399. Parol agreement that a note given for whisky not delivered was to be paid only as whisky was received. Beattyville Bank v. Roberts [Ky.] 78 S. W. 901. Indorser entered into agreement with payee and maker. Ridgway v. Scott, 21 Pa. Super. Ct. 367.

52. That payee of a note is a foreign corporation, and has not complied with the laws of a state in regard to engaging in business therein. McMann v. Walker [Colo.] 72 Pac. 1055.

53. Wilson v. Neu [Neb.] 95 N. W. 502. The fact that the maker is legally arrested does not render a note, given to settle action and be released, void on the ground of duress. Jones v. Peterson, 117 Ga. 58.

54. Poess v. Twelfth Ward Bank, 86 N. Y. Supp. 857.

55. Notice to a bank that a certified check

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Forgery,[60] or a material alteration[61] which works a substitution of instruments,[62] are absolute defenses except where the maker has carelessly executed the paper so as to make the alteration possible,[63] or a statute has provided for a recovery.[64]

A note, negotiable in form, drawn in violation of an express statute, is void in the hands of a bona fide holder,[65] but such statutes are strictly construed.[66]

Burden of proof.—Where defendant shows that notes were procured by fraud, the burden of proof shifts to the plaintiff to show bona fide holdership,[67] and similar rule applies as to paper fraudulently put in circulation,[68] but where the defense is want of consideration, the burden is upon defendant to establish both want of consideration and that the holder is not a bona fide purchaser for value.[69]

The holder can recover against the maker according to the face of the instrument.[70] Where a bank pays money on a draft by a former agent, no longer authorized to draw, it can recover only the amount paid before receiving notice of the agent's want of authority.[71] Holder must realize on the security for its reasonable value,[72] unless it is void.[73]

has been lost. Poess v. Twelfth Ward Bank, 86 N. Y. Supp. 857.

56. Poess v. Twelfth Ward Bank, 86 N. Y. Supp. 857.

57. Horses for which check was given were sick. Citizens' State Bank v. Cowles, 89 App. Div. [N. Y.] 281.

58. Defendant gave a note for $300 to a third party agreeing that he might keep all he got for it over $100. McWhirter v. Longstreet, 39 Misc. [N. Y.] 831.

59. As to one maker. Coyne v. Anderson's Ex'rs, 24 Ky. L. R. 2156, 73 S. W. 753.

60. Evidence of forgery so clear that court should have directed a verdict. Roy v. First Nat. Bank [Miss.] 33 So. 411. Signed by agent. Pettyjohn v. National Exchange Bank [Va.] 43 S. E. 203.

61. Bank of Herington v. Wangerin, 65 Kan. 423, 70 Pac. 330, 59 L. R. A. 717; Commercial Bank v. Maguire, 89 Minn. 394, 95 N. W. 212; Paul v. Leeper, 98 Mo. App. 515, 72 S. W. 715. Note bore interest after maturity, word "maturity" struck out and "date" inserted, held a material alteration, and in this case fraudulent. Hocknell v. Sheley, 66 Kan. 357, 71 Pac. 839. Note for $60 raised to $160, held note avoided. Bank of Herington v. Wangerin, 65 Kan. 423, 70 Pac. 330, 59 L. R. A. 717. Under the above rule the cases where the note is delivered complete in all its parts, must be distinguished from those where the instrument is uttered in an incomplete form. Id.

62. Note, negotiable in form, detached from application for insurance. Rochford v. McGee [S. D.] 94 N. W. 695.

63. Where one signs a note, leaving blanks therein, the person to whom it is delivered may fill the same (Ofenstein v. Bryan, 20 App. D. C. 1), but he cannot alter or change the words written or printed (Id.); nor may he alter any of its terms upon subsequently getting possession of it (Id.). Instrument with the payee's name in blank may be filled in by any one into whose hands it comes. Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646. A note in blank fraudulently filled in and converted may be recovered on. Mechanics' Bank v. Chardavoyne [N. J. Err. & App.] 55 Atl. 1080.

64. Under the New York Negotiable Instruments Law, § 205, a note which has been materially altered may be enforced according to its original terms, provided it be in the hands of a holder, in due course, not a party to the alteration. Mutual Loan Ass'n v. Lesser, 76 App. Div. [N. Y.] 614; Packard v. Windholz, 40 Misc. [N. Y.] 347.

65. Face of the note imparts notice of illegality. Rochford v. McGee [S. D.] 94 N. W. 695.

66. In Nebraska, a statute was construed as not rendering void a note given for the services of an unlicensed medical practitioner. Citizens' State Bank v. Nore [Neb.] 93 N. W. 160. A statute which provides that notes given for patent rights shall indicate the consideration, and shall then be assignable, but not negotiable, and makes it a misdemeanor for persons to knowingly give or take such a note without the consideration being indicated, does not render the instrument void nor affect the rights of a bona fide purchaser. Brown v. Pegram [C. C. A.] 125 Fed. 577.

67. First State Bank v. Hammond [Mo. App.] 79 S. W. 493; Chapman v. Snyder [Neb.] 95 N. W. 346; Robbins v. Swineburne Print. Co. [Minn.] 98 N. W. 331; Glines v. State Sav. Bank [Mich.] 94 N. W. 195; McGill v. Young [S. D.] 92 N. W. 1066; Hahn v. Bradley, 92 Mo. App. 399. Where the defense is fraud in the inception of the note, and plaintiff gives evidence that it is a bona fide purchaser, held, defendant must show some evidence of mala fides, before introducing evidence of fraud. Fredonia Nat. Bank v. Tommei [Mich.] 92 N. W. 348.

68. J. Register's Sons Co. v. Reed [Mass.] 70 N. E. 53; Freittenberg v. Rubel [Iowa] 98 N. W. 624. Note given as a memorandum and fraudulently indorsed and transferred. Mitchell v. Baldwin, 88 App. Div. [N. Y.] 265.

69. Chapman v. Snyder [Neb.] 95 N. W. 346; Hahn v. Bradley, 92 Mo. App. 399.

70. Where an assignee of an equity of redemption of a mortgage given to secure a promissory note agreed to pay, and indorsed on the note a higher rate of interest, it was not an alteration, and in an action against the maker for a deficiency, the maker was not entitled to credit for interest

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§ 14. *Remedies and procedure peculiar to negotiable paper. Conditions precedent.*—Conditions precedent to payment of notes must be performed before an action can be maintained on those notes.[74] Demand of payment of a promissory note is not necessary before bringing action thereon.[75]

Parties plaintiff. Possession or indorsements as evidence of title.—Plaintiff must be the legal or equitable owner of a note in order to recover thereon.[76] Suit may now usually be maintained in the name of an assignee of a note,[77] though the assignment be by parol,[78] and where he has full legal title, the assignee need have no beneficial interest in the proceeds.[79] Where a note is in the name of an agent, it may be sued on by either the principal[80] or the agent.[81] An assignee's title may be assailed in order to prove a counterclaim against the assignor.[82] That an action by an indorsee is at the expense of the maker is immaterial.[83]

Possession or indorsement. Evidence of title.—Possession of a promissory note is prima facie evidence of its ownership,[84] as is indorsement of title in indorsee;[85]

paid in excess over face of the note. Boutelle v. Carpenter, 182 Mass. 417, 65 N. E. 799.

71. Bank had been instructed to pay drafts on principal by the agent. Baeschlin v. Chamberlain Banking House [Neb.] 93 N. W. 412.

72. Improper foreclosure, inadequate sum therefor realized, held, good defense to action for deficiency on a note, especially where holder of mortgage is purchaser. Boutelle v. Carpenter, 182 Mass. 417, 65 N. E. 799.

73. In Texas, a bona fide holder of notes executed by a husband alone and secured by a lien on a homestead cannot foreclose the lien. Peaslee v. Walker [Tex. Civ. App.] 78 S. W. 980.

74. Mendel v. Pickrell, 38 Misc. [N. Y.] 758.

75. Gormley v. Hartray, 105 Ill. App. 625.

76. Overholt v. Dietz [Or.] 72 Pac. 695. The payee of the note or those claiming under him must sue thereon. Suit by E. & E. as partners, defense is that S. E. is payee and real owner of note. Held, decision of question vital. Engel v. Atkinson [Colo. App.] 71 Pac. 683.

77. Louisville Coal Min. Co. v. International Trust Co. [Colo. App.] 71 Pac. 898. In Florida actions are brought in the name of the real party in interest. Vinson v. Palmer [Fla.] 34 So. 276.

78. The payee of a note retransferred to him after an assignment for the benefit of his creditors can maintain an action without a written assignment from the assignee. Brown v. Johnson, 135 Ala. 608. In a suit by an assignee of a note assigned by parol, such assignee must join his assignor under the Ky. Code. Crews v. Yowell, 25 Ky. L. R. 598, 76 S. W. 127.

79. A note was assigned to enable the assignee to realize on the claim in the interest of the original payee. Manley v. Park [Kan.] 75 Pac. 557.

80. A bank may maintain an action in its own name on a note made payable to the order of its cashier, who acted for the bank in the transaction. First Nat. Bank v. Johnson [Mich.] 95 N. W. 975.

81. An agent who purchases a note with his principal's money and has it indorsed to himself may maintain an action thereon in his own name. Cochran v. Siegfried [Tex. Civ. App.] 75 S. W. 542.

82. As against an alleged assignee, the maker may deny right to sue only for purpose of interposing counterclaim good as against payee. Power v. Hambrick, 25 Ky. L. R. 30, 74 S. W. 660, construing Kentucky Code. Under 2 Ballinger's Ann. Codes & St. § 4835, in a suit on a note by an alleged assignee against the maker, the latter cannot raise the question of plaintiff's right to sue thereon except as to any right of set-off or counterclaim he may be entitled to against the payee. Lodge v. Lewis, 32 Wash. 191, 72 Pac. 1009.

83. New Haven Mfg. Co. v. New Haven Pulp & Board Co. [Conn.] 55 Atl. 604.

84. Michigan Mut. Life Ins. Co. v. Klatt [Neb.] 92 N. W. 325; Murto v. Lemon [Colo. App.] 75 Pac. 160; Loftin v. Hill, 131 N. C. 105; Brynjolfson v. Osthus [N. D.] 96 N. W. 261. Non-negotiable note, assigned. Beaman v. Ward, 132 N. C. 68. Possession and production. Gumaer v. Sowers [Colo.] 71 Pac. 1103. In a suit by the payee on a note, there is a presumption that he is still the owner and holder. Berry v. Barton [Okl.] 71 Pac. 1074. Possession of a note is sufficient evidence of ownership to support suit thereon. New Haven Mfg. Co. v. New Haven Pulp & Board Co. [Conn.] 55 Atl. 604. As between the parties thereto. Holmes v. Farris, 97 Mo. App. 305, 71 S. W. 116. Possession of a note purporting to be indorsed is prima facie evidence of the indorsement and hence of title in holder. Huntley v. Hutchinson [Minn.] 97 N. W. 971. Where the original payee indorses a note which is afterwards indorsed back to such payee, possession by the payee is sufficient evidence of title without proof of the transfers, unless non-ownership is pleaded as a defense. But allegations that plaintiff, original payee, indorsed note to another, and that latter indorsed back to plaintiff, must be proven and mere indorsements insufficient as such proof. Dunlap v. Kelly [Mo. App.] 78 S. W. 664. Under the New York negotiable instruments law, where the maker of a note in his answer to a suit thereon does not deny its execution but sets up an affirmative defense, the production of the note by plaintiff as it was set out in the complaint is sufficient to make plaintiff's case and put defendant to his affirmative defense, though it is shown that the words "with interest" were added after execution of the note. Mutual Loan Ass'n v. Lesser, 76 App. Div. [N. Y.] 614. Holder of bearer paper is prima facie entitled to recover thereon. Buck v. Troy Aqueduct Co. [Vt.] 56 Atl. 285. It may be shown that holder is simply a trustee. Watford v. Windham, 64 S. C. 509.

85. Lodge v. Lewis, 32 Wash. 191, 72 Pac.

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but possession by a transferee of an unindorsed note payable to order is not prima facie evidence of ownership.[86] Possession of a note by the payee is presumptive evidence of nonpayment. Possession by the payor, is presumptive evidence of payment.[87] Possession is prima facie evidence that it was received before it became due,[88] for a valuable consideration,[89] and in the usual course of business.[90]

Parties defendant. Joinder of parties.—Upon the death of one of several who are jointly liable, the holder may sue the survivor.[91] One taking from an alleged agent must prove his authority before suing the alleged principal.[92] An action at law may be maintained against the maker of a lost note.[93] An action may be maintained against the maker of a note regardless of the fact that it was secured by a mortgage.[94]

Joinder of parties.—A joint action will lie against the indorsers and guarantors of a note,[95] but not against the maker and guarantor.[96]

The complaint.—The complaint should set out the note,[97] which may be declared upon according to its legal effect.[98] Ownership of the plaintiff should be alleged,[99] and if plaintiff claims as an indorsee, indorsement and delivery to him,[1] and the fact of the nonpayment of the note.[2] An omission in the complaint may be cured by the answer.[3] The fact that notes have been destroyed under duress must be specially pleaded.[4]

The answer.—A plea will be construed according to its legal effect though called by a wrong name.[5] The plea of non est factum may be joined with that of no consideration in an action between the parties to a note.[6] Defense of non est factum is not sufficiently set out by allegation of excess in amount of note by mistake and of no consideration for such excess.[7] Defense of non-execution and of payment are not inconsistent.[8] Allegation that if the note was transferred there was no con-

1009. In Colorado, a note payable to order may be transferred by delivery only. Held in an action on such a note indorsed by the payee, plaintiff may recover without proving the transfer of note. Gumaer v. Sowers [Colo.] 71 Pac. 1103.

86. Genuineness of indorsement denied, no proof of genuineness offered, held same as unindorsed instrument. Baker v. Warner [S. D.] 92 N. W. 393. Possession of a note, not payable to bearer, nor indorsed in blank, is not prima facie evidence of ownership. Hair v. Edwards [Mo. App.] 77 S. W. 1089.

87. Ellis' Adm'r v. Blackerby, 25 Ky. L. R. 1557, 78 S. W. 181. The note contained an indorsement of part payment and evidence of payment in full held insufficient. Romines v. McFarland, 103 Ill. App. 269. The introduction in evidence of notes with indorsements thereon presumptively establishes nonpayment. Murto v. Lemon [Colo. App.] 75 Pac. 160.

88, 89, 90. Loftin v. Hill, 131 N. C. 105.

91. So held, upon the death of a husband or wife prior to suit upon a note on which they were jointly liable. Providence County Sav. Bank v. Vadrais [R. I.] 55 Atl. 754.

92. A member of a partnership indorsed the firm name on a note signed by himself. He had no authority to bind the firm by indorsement. Held, that the payee must prove that the money was loaned to the firm and that they were liable as makers. Lowry v. Tivy [N. J. Law] 57 Atl. 267.

93. Matthews v. Matthews, 97 Me. 40.

94. Clark v. Eltinge [Wash.] 75 Pac. 866.

95. Hill v. Coombs, 93 Mo. App. 264.

96. Hill v. Combs, 92 Mo. App. 242.

97. Maccarone v. Hayes, 85 App. Div. [N. Y.] 41.

98. Second Nat. Bank v. Ralphsnyder [W. Va.] 46 S. E. 206.

99. Maccarone v. Hayes, 85 App. Div. [N. Y.] 41.

1. Manawaring v. Keenan, 86 N. Y. Supp. 262; Maccarone v. Hayes, 85 App. Div. [N. Y.] 41. In an action on a note payable to the order of a third person, an allegation of indorsement by the payee and ownership by plaintiff is insufficient to show title in plaintiff. National Life & Trust Co. v. Gifford [Minn.] 96 N. W. 919.

2. A statement in the complaint "that the whole of said note is owing from said defendant to said plaintiff" is not an averment of the fact of nonpayment. Knox v. Buckman Contracting Co., 139 Cal. 598, 73 Pac. 428.

3. Omission of words rendering a note negotiable in form cured by an incorporation of the note in the answer. Johnson v. Hibbard [Utah] 75 Pac. 737.

4. Plaintiff sued to recover on notes given as alimony and attempted to prove that defendant by threats of violence forced her to destroy them. Sturman v. Sturman, 118 Iowa, 620, 92 N. W. 886.

5. Under Neb. Inst. law, defense of fraudulent representation and no property of corporation whose stock formed alleged consideration, held plea of failure of consideration. Taft v. Myerscough, 197 Ill. 600, 64 N. E. 711.

6. Storey v. First Nat. Bank, 24 Ky. L. R. 1799, 72 S. W. 318.

7. Bitzer v. Utica Lime Co., 25 Ky. L. R. 479, 76 S. W. 20.

8. Bay v. Trusdell, 92 Mo. App. 377.

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sideration is not an admission that it was indorsed and transferred.[9] Counterclaim valid as against payee may be set up upon suit by one holding for collection only.[10] General averment of undue influence or duress is insufficient,[11] as is general allegation that the payee is not the owner and real party in interest.[12] Facts constituting fraudulent inception must be specifically alleged.[13] In some states, denial of signature is sufficient to admit defense of forgery.[14] Statutory requirements must be set forth.[15] Denial of indorsement and ownership upon information and belief raises a material issue.[16]

Necessary proof.—Generally speaking, the note should be read to the jury,[17] but mere failure to introduce note in evidence, or to explain such failure, no objection being made thereto, is not ground for nonsuit.[18] In some states, denial under oath requires proof of execution[19] and assignment.[20]

Evidence admissible generally.—The note may be admitted in evidence without proof of execution,[21] but after admission of execution of notes, evidence that the signature was irregular is inadmissible.[22] Statutory provisions as to admissibility of notes in evidence.[23] An indorsement is not competent evidence without proof of its genuineness.[24] One competent to testify as to the subject-matter of a note may testify as to the signature thereto.[25] Maker is competent to testify.[26] Forgery may not be shown by proof of other forgeries,[27] but ability of alleged forger to imitate signature may be shown.[28] Pass-book is admissible to show whether note was bought or discounted by loans.[29]

Presumptions and burden of proof.—When notes are not in evidence it is presumed that they are either payable to bearer or to order, and duly indorsed,[30] but when the execution of a note is denied there is no presumption that it has been regularly executed.[31] Valid sale is presumed from allegation by executor of sale of note for full and valuable consideration.[32] The law presumes that, as between the original parties, a note is supported by a sufficient consideration.[33] The burden of

9. Baker v. Warner [S. D.] 92 N. W. 393.
10. Stuart v. Harmon, 24 Ky. L. R. 1829, 72 S. W. 365.
11. Emery v. Lowe, 140 Cal. 379, 73 Pac. 981.
12. Berry v. Barton [Okl.] 71 Pac. 1074.
13. Allegation that one "is not educated in the English language" insufficient. People's State Bank v. Ruxer, 31 Ind. App. 245, 67 N. E. 542.
14. Under Maryland Code, affidavit that defendant knows signature not to be his is sufficient denial of signature to admit defense of forgery. Farmers' & M. Bank v. Hunter, 97 Md. 148.
15. Under a statute requiring knowledge on part of taker of infirmity of note in order to make it invalid in his hands, knowledge on part of taker must be alleged. Black v. First Nat. Bank, 96 Md. 399.
16. Maccarone v. Hayes, 85 App. Div. [N. Y.] 41.
17. Without the reading of the note to the jury, there is not sufficient evidence before them, in an action thereon, to entitle plaintiff to recover, there being no other evidence that anything was due. Horner v. Plumley, 97 Md. 271.
18. Leonard v. Leonard, 138 Cal. xix, 70 Pac. 1071.
19. Denial of maker's signature in an affidavit to the plea is sufficient to require proof of execution, though there is no denial in the plea [Acts 1898, p. 392, c. 123]. Horner v. Plumley, 97 Md. 271.
20. Under Georgia Code, § 3705, unless denied on oath, indorsement or assignment of note sued on by indorsee need not be proven. Tyson v. Bray, 117 Ga. 689.
21. Brown v. Johnson Bros., 135 Ala. 608.
22. Baker v. Warner [S. D.] 92 N. W. 393. Sustaining of objection to the offering of note in evidence until wife's signature is proven, husband's not being denied, excludes evidence of note as against her only. Horner v. Plumley, 97 Md. 271.
23. United States laws rendering notes inadmissible as evidence unless stamped applies only in federal courts. Rowe v. Bowman, 183 Mass. 488, 67 N. E. 636.
24. Western Mattress Co. v. Potter [Neb.] 95 N. W. 841.
25. Shepard v. Parker, 97 Me. 86.
26. But jury should decide where his testimony is uncorroborated. Waterman v. Waterman, 42 Misc. [N. Y.] 195. Maker of a note given to a person since deceased is incompetent to testify in regard thereto in an action by the administrator under Code, § 4604. Luke v. Koenen, 120 Iowa, 103, 94 N. W. 278.
27. Kingsbury v. Waco State Bank, 30 Tex. Civ. App. 387, 70 S. W. 551.
28. Kingsbury v. Waco State Bank, 30 Tex. Civ. App. 387, 70 S. W. 551.
29. Black v. First Nat. Bank, 96 Md. 399.
30. In re Williams, 120 Fed. 542.
31. Sears v. Daly, 43 Or. 346, 73 Pac. 5.
32. Guthrie v. Treat [Neb.] 92 N. W. 595.
33. Power v. Hambrick, 25 Ky. L. R. 30, 74 S. W. 660; Holmes v. Farris, 97 Mo. App. 305, 71 S. W. 116. A note reciting "Having been cause of money loss to my friend * * * I have given her," etc., "and promising to pay

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showing no consideration for a note is on the maker.[34] The party alleging fraud, illegality,[35] or duress,[36] must prove it. Such material alterations as reasonably excite suspicion from the note itself must be explained by the party offering the note in evidence.[37] Denial of indorsement and assignment to plaintiff casts on him the burden of proving ownership.[38] Affirmative defenses must be proved by defendant.[39]

Evidence admissible under pleadings.—Under a general denial to action by indorsee, plaintiff must prove the indorsement.[40] Under general denial and amendment, one may show his liability to be other than alleged in complaint.[41] Under the usual allegation of protest and notice of demand and nonpayment, oral notice may be proven,[42] but under an allegation that notice of dishonor has been waived, evidence of a waiver of presentment and demand is not admissible.[43]

Trial and instructions.—In the absence of special statutory enactment defining the elements of a negotiable instrument, the question of negotiability is one pertaining to the law merchant and with regard to which federal courts are not bound by local decisions.[44] An instruction that, if one sued as guarantor should be found an indorser, the verdict should be in his favor is erroneous.[45] On question of proper notification in foreign country, jury should be instructed as to foreign law.[46]

Verdict.—In some states, statutes affect verdicts on several defendants.[47]

Judgment and damages.—One properly called upon to defend suit on a note to which he is a party, may be bound by the judgment if he fails to respond.[48] It is proper to render judgment for uncontroverted part of consideration.[49] In some states, provision for attorney's fees is governed by statute.[50]

Indemnifying maker of lost instrument.—When lost paper is sued on, obligors should be protected by exacting indemnity lest paper pass to bona fide holders,[51] or judgment may be reserved until the bar of limitations is complete.[52]

to such friend," etc., held to import a consideration in an action between the parties thereto. Hickok v. Bunting, 86 N. Y. Supp. 1059. A note comes within the terms of the Iowa Code § 3069, providing that all contracts in writing signed by the party to be changed shall import a consideration. Luke v. Koenen, 120 Iowa, 103, 94 N. W. 278.

34. Note given by mother many years before in settlement of an account between mother and son. Cox v. Cox's Ex'r [Ky.] 79 S. W. 220. In an action to enforce a note against a decedent's estate, the burden of proving a consideration is on the estate. Kiesewetter v. Kress, 24 Ky. L. R. 1239, 70 S. W. 1065.

35. Loftin v. Hill, 131 N. C. 105.

36. Bullard v. Smith, 28 Mont. 387, 72 Pac. 761.

37. Ofenstein v. Bryan, 20 App. D. C. 1.

38. Overholt v. Dietz, 43 Or. 194, 72 Pac. 695.

39. Bank of Commerce v. Schlegel, 66 Kan. 509, 72 Pac. 210. The burden of proving that a note is secured by a mortgage, which must be foreclosed and applied on the debt before an action could be maintained, is on the defendant. Clark v. Eltinge [Wash.] 75 Pac. 866.

40. Baker v. Warner [S. D.] 92 N. W. 393.

41. One sued as maker permitted to show himself surety only. Ball v. Beaumont [Neb.] 92 N. W. 170.

42. Kelly v. Theiss, 77 App. Div. [N. Y.] 81, 12 Ann. Cas. 206.

43. Congress Brew. Co. v. Habenicht, 83 App. Div. [N. Y.] 141.

44. State Nat. Bank v. Cudahy Packing Co., 126 Fed. 543.

45. It being necessary that a valid defense releasing him from liability as indorser be found. Price v. Lonn, 31 Ind. App. 379, 68 N. E. 177.

46. Duty to notify the personal representative of indorser. Merchants' Bank v. Brown, 86 App. Div. [N. Y.] 599.

47. In **Indiana**, the issue being as to execution by each of two defendants, and each issue being submitted as parts of a single trial, a verdict finding for one defendant was inadequate as a basis for a judgment either for or against the plaintiff or both defendants, on the whole case. Maxwell v. Wright, 175 Ind. 518, 67 N. E. 267.

48. First Nat. Bank v. City Nat. Bank, 182 Mass. 130, 65 N. E. 24.

49. Bitzer v. Utica Lime Co., 25 Ky. L. R. 479, 76 S. W. 20.

50. Under Georgia Code, fee in addition to interest recoverable only when defendant files, and fails to sustain, plea (Demere v Germania Bank, 116 Ga. 317), and cannot be recovered when one of several pleas filed is sustained (Trentham v. Bluthenthal & Bickart, 118 Ga. 530). Allegation of suit thereon not essential in action on note providing for attorney's fees in case of nonpayment at maturity and suit to collect. Harris v. Scrivener [Tex. Civ. App.] 78 S. W. 705.

51. Law providing otherwise held unconstitutional as impairing obligation of contract. In re Cook, 86 App. Div. [N. Y.] 586. But see Matthews v. Matthews, 97 Me. 40, where held to be a matter of court's discretion.

52. Matthews v. Matthews, 97 Me. 40.

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NEWSPAPERS.

A newspaper published every day except Sundays and legal holidays is a daily paper.[1] A weekly publication is a newspaper.[2] As used in statutes regulating the publication of legal notices, etc., a newspaper must contain matters of general interest.[3] The fact that a newspaper is an exponent of socialistic doctrines does not avoid or render unlawful a publication of notice in it.[4] A notice published in a newspaper printed in a foreign language may be legal.[5] For the construction of statutes authorizing the designation of official newspapers and the publication of official matter, see the footnote.[6]

NEW TRIAL AND ARREST OF JUDGMENT.

§ 1. Right to Remedy in General (1038).
§ 2. Grounds (1038).
A. In General (1038).
B. Misconduct of Parties, Counsel, or Witnesses (1039).
C. Rulings and Instructions at Trial (1039).
D. Misconduct of or Affecting Jury (1040).
E. Irregularities or Defects in Verdict or Findings (1041).
F. Verdict or Findings Contrary to Law or Evidence (1041).
G. Surprise, Accident, or Mistake (1044).
H. Newly-Discovered Evidence (1045).
I. As Matter of Right in Ejecment (1048).
§ 3. Proceedings to Procure New Trial (1048).
§ 4. Proceedings at New Trial (1051).
§ 5. Arrest of Judgment (1051).
A. Grounds (1051).
B. Motions and Proceedings Thereon (1051).
C. Effect (1052).

This topic is designed to treat only the grounds for which judgment will be arrested or a new trial granted in the trial court. Other articles treat specifically of the grant of new trial by a reviewing court,[7] the modification and vacation of judgments without granting a new trial,[8] the erroneous[9] or prejudicial[10] char-

1. Puget Sound Pub. Co. v. Times Print. Co. [Wash.] 74 Pac. 802.

2. In Kansas, a weekly paper, containing current news and matters of general interest, was used to publish a city ordinance. Held a sufficient publication. Kansas City v. Overton [Kan.] 75 Pac. 549.

3. A daily paper containing market reports, items of interest, general public news, advertisements, and "plate matter," is a newspaper within the charter of Milwaukee, c. 3, § 9, requiring the city council to let advertising of ordinances, notices, etc., to the newspaper offering to do it for the lowest price. Hall v. Milwaukee, 115 Wis. 479, 91 N. W. 998. Under the charter of the city of Seattle, § 31, requiring the city council to designate a daily newspaper of general circulation, etc., as city official newspaper for city printing the word "general" does not mean "universal" and a daily paper publishing matters of general interest is a newspaper of general circulation though it gives special prominence to legal news. Puget Sound Pub. Co. v. Times Print. Co. [Wash.] 74 Pac. 802. But a paper containing only legal news, and a few advertisements, but no news of a political, religious, commercial, or social nature, is not a newspaper of general circulation. Reagan v. Duddy [Ky.] 78 S. W. 430.

4. Sheriff's publication of notice of sale in a newspaper whose tenets forbid private ownership. Michigan Mut. Life Ins. Co. v. Klatt [Neb.] 98 N. W. 436.

5. In Nebraska a statute required notice of sitting of board of equalization to be published in three daily papers. The notice was published in two papers printed in English and one in German, which were all the daily papers printed in the city. John v. Connell [Neb.] 98 N. W. 457.

6. Laws N. Y. 1898, p. 1014, c. 849, § 19, providing that the members of the board of supervisors in each county representing respectively each of the two political parties shall designate in writing a paper fairly representing the political party to which they respectively belong to publish the session laws, etc., authorizes a Republican elected on the Democratic ticket to join in selecting a Democratic paper. Norris v. Wyoming County Times, 83 App. Div. [N. Y.] 525. A county treasurer selecting a newspaper in which to publish delinquent tax lists (under Laws Okl. 1895, § 5, art. 3, c. 43, p. 222, amending St. 1893, § 9, art. 10, p. 1052), need not select the newspaper in which the county printing is done. Allen v. Board of Com'rs of Cleveland County [Okl.] 73 Pac. 286. Rate for publication in official newspapers. Wooster v. Mahaska County [Iowa] 98 N. W. 103. The term of an official newspaper designated under acts Ky. 1894, p. 268, c. 100, art. 5, § 12, as amended by acts 1898, p. 154, c. 63, § 1, and acts 1902, pp. 70, 71, c. 32, §§ 1-3, is until the first Monday in April of the following year from the designation. Democrat Pub. Co. v. Patterson [Ky.] 78 S. W. 131.

7. See Appeal and Review.

8. See Judgment.

9. See such topics as Argument of Counsel, Evidence, Examination of Witnesses, Instructions, Trial.

10. See Harmless Error.

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acter of particular rulings, the necessity of objections and exceptions to save rulings for motion for new trial and the necessity of motion for new trial to save questions for reviewing court.[11]

§ 1. *Right to remedy in general.*—The right to grant a new trial affords to the trial court an opportunity to correct errors in its own proceedings without subjecting the parties to the expense and inconvenience of an appeal, or petition in error.[12] The right to a new trial after judgment is not a constitutional right, nor a right essential to due process of law,[13] but a statutory privilege granted to an aggrieved party on statutory conditions, which must be complied with.[14] It will prevail only where injustice is manifest and no other relief is obtainable.[15] It can only be granted where there was a trial[16] and final decision,[17] and at the demand of the injured party.[18] Trial courts have great discretion,[19] and will be seldom interfered with on appeal, especially if new trial be granted,[20] except for errors of law.[21] Failure of party to demand a new trial precludes consideration by appellate court of errors for which a new trial might have been had, unless the trial court has already had an opportunity to pass upon the matter.[22]

§ 2. *Grounds. A. In general.*—A new trial will not be granted for errors which could not be corrected on another trial,[23] or which did not prejudice the moving party,[24] or for rights waived[25] or not properly saved at the trial.[26] The grounds for new trial are statutory, and in many states do not include defects in the judgment or decree,[27] or defects in pleadings[28] or rulings thereon,[29] or for

11. See Saving Questions for Review.

12. Chadron Loan & Bldg. Ass'n v. Scott [Neb.] 96 N. W. 220. It is a right inherent in courts, and can be had against a state in cases where the state can be sued. San Francisco Law & Collection Co. v. State, 141 Cal. 354, 74 Pac. 1047. In an equitable case, a motion to set aside a judgment, made within 15 days after its rendition is for all purposes a motion for a new trial. The court set aside a judgment and entered judgment for the other party after the expiration of five months, when it had no jurisdiction to disturb a judgment after 60 days. Aulbach's Ex'r v. Read [Ky.] 77 S. W. 204.

13. Etchells v. Wainwright [Conn.] 57 Atl. 121.

14. The plaintiff was barred from appeal because the trial judge died before filing findings required by statute in order to enable this court to review rulings. Etchells v. Wainwright [Conn.] 57 Atl. 121.

15. Turner v. Davis, 132 N. C. 187.

16. Little v. Atchison, etc., R. Co. [Ind. T.] 76 S. W. 283. Not where a default judgment, but motion to set aside is proper remedy. Pa. Fire Ins. Co. v. Young [Ky.] 78 S. W. 127. Nor in proceeding to settle accounts of a receiver and to fix his compensation. State v. District Court [Mont.] 72 Pac. 613.

17. Not granted where appellate court tries de novo. Stewart v. Kendrick [Okl.] 73 Pac. 299.

18. U. S. Rev. St. § 1088, authorizing new trials where any fraud, wrong, or injustice has been done the U. S. does not authorize the U. S. to demand a new trial where it has recovered judgment. Monroe v. U. S., 37 Ct. Cl. 79.

19. Com. v. Houghton, 22 Pa. Super. Ct. 52. Where granted during same term, court need not state reasons, unless for error of law, as court has great discretion and might allow new trial where an able lawyer had unduly influenced jury. Bird v. Bradburn, 131 N. C. 488. They may impose terms, which have some relation to issue; but not order conveyance of land which party had not asked for. Stauffer v. Reading, 206 Pa. 479. And see subd. F, infra.

20. Gathwell v. Cedar Rapids [Iowa] 97 N. W. 96.

21. Lawrence v. Pederson [Wash.] 74 Pac. 1011.

22. See topic Saving Questions for Review.

23. To enable party to recover damages where none prayed for. Bigelow v. Los Angeles, 141 Cal. 503, 75 Pac. 111. Upon matters not affecting special verdict [Ga. Civ. Code, § 4849]. Dozier v. McWhorter, 117 Ga. 786. Where judgment satisfied. Klinkle v. McClintock [Iowa] 93 N. W. 86. Where action prematurely brought, but it is not pleaded as defense. Leo Kee v. Wah Sing Chong, 31 Wash. 678, 72 Pac. 473.

24. See topic Harmless Error.

25. Where equitable action tried by jury. Morse v. Wilson, 138 Cal. 558, 71 Pac. 801.

26. See topic Saving Questions for Review.

27. Judgment or decree may be corrected without new trial (Collins v. Carr, 118 Ga. 205), or may be examined to see if findings support (Bemis v. McCloud [Neb.] 97 N. W. 828), but not on appeal from order denying new trial (Bryan v. Bryan, 137 Cal. xix, 70 Pac. 304). No provision for new trial where trial by court [Rev. Code 1899, § 5630] (Bank of Park River v. Norton [N. D.] 97 N. W. 860), but failure to make findings on all issues reversible error (Chaffee-Miller Land Co. v. Barber [N. D.] 97 N. W. 850).

28. Motion for new trial does not call into question the legal sufficiency of the pleadings (Kelly v. Strouse, 116 Ga. 872), or the insufficiency of complaint (Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 Pac. 700), or failure of reply to con-

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variance.[30] It may be granted as to some, and refused as to other parties to the action.[31]

(§ 2) *B. Misconduct of parties, counsel, or witnesses.*—A new trial may be granted for the misconduct of parties,[32] counsel,[33] or witnesses;[34] it being in the court's discretion to determine if the misconduct is such as justifies interference.[35]

(§ 2) *C. Rulings and instructions at trial.*—Errors in the admission or rejection of evidence,[36] in refusing to continue[37] or to change venue,[38] in directing a verdict[39] or in dismissing an action,[40] or in giving,[41] modifying,[42] failing,[43] or re-

trovert new matter in answer (Gross v. Scheel [Neb.] 93 N. W. 418).

29. Improper allowance of amendment to petition. Hammond v. George, 116 Ga. 792; Lowery v. Idelson, 117 Ga. 778. Refusal of leave to file answer after time; motion must relate to what occurs on trial. Rigdon v. Ferguson, 172 Mo. 49, 72 S. W. 504. Amending petition and striking out part of answer, not reviewed because defective record. Ledwith v. Campbell [Neb.] 95 N. W. 838. Overruling demurrer. Helberg v. Hammond Bldg., Loan & Sav. Ass'n, 31 Ind. App. 58, 67 N. E. 111. **Contra,** where refused to review action of court in striking out part of answer because no motion for new trial. Royer Wheel Co. v. Dunbar [Ky.] 76 S. W. 366.

30. Should object to evidence. Cowan v. Bucksport [Me.] 56 Atl. 901.

31. Here some defendants estopped by previous action. Equitable Mortg. Co. v. McWaters [Ga.] 46 S. E. 437.

32. Plaintiff talked about case with persons in hearing of jurors at recess and new trial granted, though it did not appear verdict was influenced. Grand Trunk R. Co. v. Davis [Vt.] 56 Atl. 982. Failure to prove that prevailing party talked with juror. Rice's Ex'rs v. Wyatt [Ky.] 76 S. W. 1087. New trial refused where after an altercation of parties, defendant asked protection of court and refused to proceed, and verdict directed for plaintiff. Eustis v. Steinson, 84 N. Y. Supp. 155.

33. Exhibiting to jury adverse party's requests for instructions with judge's interlineations, not ground for new trial. Clay County Com'rs v. Redifer [Ind. App.] 69 N. E. 305. Though court instructed jury to disregard attorney's remarks on defendant's wealth, it should not hesitate to grant a new trial if verdict nevertheless influenced. Sullivan v. Chicago, etc., R. Co., 119 Iowa, 464, 93 N. W. 367. That attorney gave an interview to reporters does not tend to prove that he procured statement of former trial to be published and to be distributed to jurors to prejudice them. Copeland v. Wabash R. Co., 175 Mo. 650, 75 S. W. 106.

34. New trial where plaintiff's witness asked jury, while court was absent, to do the square thing, though plaintiff not responsible, and not shown that jury influenced. Chicago Junction R. Co. v. McGrath, 203 Ill. 511, 68 N. E. 69.

35. Improper reference by attorney to previous trial in opening and closing did not influence verdict. Ledwith v. Campbell [Neb.] 95 N. W. 838.

36. New trial for admission of irrelevant testimony. Thompson v. Thompson, 118 Ga. 543. Discretion to receive testimony after case closed. Joplin Waterworks Co. v. Joplin, 177 Mo. 496, 76 S. W. 960. New trial where error in admission and rejection of evidence on question of damages, and verdict bordering on the excessive. Bull v. Bath Iron Works, 75 App. Div. [N. Y.] 380. The admission, over the objection of a party, of hearsay evidence, the natural tendency of which was to discredit his witnesses and prejudice his case, is ground for a new trial. Foster v. Atlanta Rapid Transit Co. [Ga.] 46 S. E. 840. Refusal to admit evidence of a witness as to a point in issue is not cause for a new trial when it appears that the same witness was allowed to testify to practically the same facts in other language. Maynard v. Newton, 116 Ga. 195.

37. No new trial for refusal to grant continuance because partner of defendant's attorney absent as congressman. In re Kasson's Estate, 141 Cal. 33, 74 Pac. 436. Error to refuse continuance where attorney stated that he was too sick to try case. Thompson v. Hays [Ga.] 45 S. E. 970.

38. Here failed to move in three days. Goodwin v. Bentley, 30 Ind. App. 477, 66 N. E. 496. **Contra,** under Utah Rev. St. 1898, § 3292, a new trial will not be granted where failed to move for change of venue because of prejudice of people of county. Anderson v. Mammoth Min. Co. [Utah] 73 Pac. 412.

39. New trial for error in directing verdict, though complaint might have to be amended. Jones v. Jones [S. D.] 96 N. W. 88.

40. New trial for erroneous dismissal of complaint as to certain defendants as to whom there was evidence. Tenoza v. Golliek, 80 App. Div. [N. Y.] 638. Improper denial of motion for nonsuit. Prevatt v. Harrelson, 132 N. C. 250. Not ground that judge refused to dismiss appeal. Hill v. Lundy, 118 Ga. 93.

41. Erroneous instructions. Bartlett v. Smith [Neb.] 95 N. W. 661. New trial for error in instructions resulting in excessive verdict, court in such case cannot reduce verdict. Jacoby v. Johnson [C. C. A.] 120 Fed. 487. Where withdrew from jury evidence relating to principal issue. Matthews v. Williams Mfg. Co. [Me.] 56 Atl. 759. New trial for conflicting instructions which are no guide to jury. Samuelson v. Gale Mfg. Co. [Neb.] 95 N. W. 809. No error in rulings. Brown v. Waterbury, 75 Conn. 727; Modern Brotherhood of America v. Cummings [Neb.] 94 N. W. 144; Hiersche v. Scott [Neb.] 95 N. W. 494; Epperson v. Stansill, 64 S. C. 485; McGarrity v. N. Y., etc., R. Co. [R. I.] 55 Atl. 718. Failure to point out why abstract correct charges not applicable to verdict. Glaze v. Mills [Ga.] 46 S. E. 99. Not error for judge to read jury entire code section, part of which was inapplicable, but not misleading, nor to summarize issues as made by pleadings, without charging as to a defense not pleaded or requested. Eagle &

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fusing instructions[44] which have prejudiced.[45] The discretion of a trial court over the trial will be seldom interfered with except for errors of law.[46]

Misconduct of court.—Prejudicial remarks of a judge,[47] or a corrupt attempt to influence a verdict or decision, is always a ground for a new trial.[48]

(§ 2) *D. Misconduct of or affecting jury.*—The fact that a juror has conversed with a party or his attorney,[49] or been present at a conversation of outsiders as to the case,[50] or viewed the premises alone,[51] or made experiments,[52] or went on his own knowledge,[53] or obtained liquor,[54] or during progress of trial is discovered to be of unsound mind,[55] or is disqualified because of interest,[56] may be a ground

P. Mills v. Herron [Ga.] 46 S. E. 405. No new trial where rulings correct though misunderstood some of facts. Glover v. Gasque [S. C.] 45 S. E. 113.

42. Where on return of verdict an additional charge was given as jury had not understood, and they still were perplexed and did not follow it, a new trial was granted. Champ Spring Co. v. Roth Tool Co. [Mo. App.] 77 S. W. 344. Confused by colloquy and modified instructions. Stuart v. Press Pub. Co., 83 App. Div. [N. Y.] 467. No new trial for additional instructions after argument. Joplin Waterworks Co. v. Joplin, 177 Mo. 496, 76 S. W. 960.

43. No new trial for not giving form of verdict for one side. Barton v. Hughes, 117 Ga. 867. No new trial for failure to instruct as to inadequacy of consideration where no request was made and inadequacy is doubtful. Thomas v. Brantley, 118 Ga. 588.

44. No new trial where directed verdict to be more specific, and failed to show charged details of one side's contention more than the other's. Jordan v. Downs, 118 Ga. 544. Error in instructions should be matter of exceptions rather than for new trial; unless injustice is otherwise inevitable, points of law are not raised by new trial. Pierce v. Rodliff, 95 Me. 346.

45. Error in instructions as to special interrogatories is not ground for new trial where jury answered that there was no evidence, and it would not have affected the general verdict. Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602, 65 N. E. 309. Where verdict is for party for whom it should have been directed, no new trial will be granted though inconsistent instructions were given. Fehlhauer v. St. Louis [Mo.] 77 S. W. 843.

And see topic Harmless Error.

46. Trial court should not reconsider instructions given on propositions of law, unless error committed through inadvertence. Thorne v. American Distributing Co., 117 Fed. 973. A ruling on a demurrer to the evidence is a decision of law on which trial court has no discretion, but which may be reconsidered on motion for a new trial. Buoy v. Clyde Milling & Elevator Co. [Kan.] 75 Pac. 466. Errors of law occurring at trial present legal questions in which trial court has no discretion. Fitger v. Archibald Guthrie & Co., 89 Minn. 330, 94 N. W. 888. Where legal question, no discretion in trial court, or distinction on appeal between orders granting or refusing a new trial. Neeley v. Roberts [S. D.] 95 N. W. 921.

47. New trial for misconduct of judge in declaring that it was revolting to put a daughter on the stand in an action between her father and mother. Pratt v. Pratt, 141 Cal. 247, 74 Pac. 742. Not ground of new trial, remark of judge in overruling motion to dismiss, "don't see how you can recover." Childs v. Ponder, 117 Ga. 553. Not ground for new trial where by slip of tongue called an act of scrivener a mistake of law, instead of a mistake of fact. Berry v. Clark, 117 Ga. 964.

48. Where female employe of successful party had solicited the judge with reference to a case on trial, and promised him benefits, a new trial will be granted. Finlen v. Heinze [Mont.] 73 Pac. 123.

49. Where plaintiff's attorney stated to the court before submission to jury that plaintiff's son and a juror had been together, and offered to excuse the juror to which defendant objected, and case was submitted to entire jury without objection, new trial was refused; but it was improper to remit part of verdict where plaintiff, herself, not at fault. Clark v. Elmendorf [Tex. Civ. App.] 78 S. W. 538.

50. Not shown that verdict was influenced by the presence of juror at discussion of case by outsiders, or by statement of juror in jury room of facts as to case heard outside of court, so new trial was refused. Montgomery v. Hanson [Iowa] 97 N. W. 1081

51. Where a juror, during an intermission, while on business of his own, went by the land which was claimed to be damaged, no new trial will be allowed. Caldwell v. Nashua [Iowa] 97 N. W. 1000.

52. No abuse of discretion to refuse new trial on affidavit of bailiff that he procured board for jury on which they made experiments in jury room. Affidavit of juror that they were thereby influenced was inadmissible. Moore v. Mo., K. & T. R. Co., 30 Tex. Civ. App. 266, 69 S. W. 997.

53. Foreman of jury familiar with coldness of defendants' depot, which was the issue. St. Louis S. W. R. Co. v. Ricketts, 96 Tex. 68, 70 S. W. 315.

54. That jurors broke into a room to get punch, that some were under the influence of liquor, that one went down town to get tobacco, that one went home, that one conversed with outsider as to case, not sufficiently proved. Walton v. Wild Goose Min. & T. Co. [C. C. A.] 123 Fed. 209. Furnishing liquor to jury, though with consent of court and counsel, held improper, but not enough alone for a new trial. Bernier v. Anderson [Idaho] 70 Pac. 1027.

55. Where attorney discovered two hours after trial had begun that a juror was of unsound mind and mentioned fact to judge, but made no objection, he waived his right. Code, § 3713, providing that where juror is sick or disabled, he may be discharged by consent, or a new trial had. Pfeiffer v. Dubuque [Iowa] 94 N. W. 492.

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for a new trial if the defeated party is prejudiced.[57] But where a juror has made false statements on his voir dire,[58] or is distantly related to a party,[59] or has read in the newspapers as to a case,[60] or is disqualified,[61] it has been otherwise held. The demand for a new trial should be prompt,[62] and the evidence should be clear, certain, and convincing,[63] and the trial court's decision thereon will be given great weight.[64] Impeaching affidavits of jurors will only be received to show a chance verdict.[65]

(§ 2) *E. Irregularities or defects in verdict or findings.*—Improper writing of verdicts is ground for new trial.[66] Irregularities may be corrected by court[67] or cured by action of party,[68] or may result in no trial at all.[69]

(§ 2) *F. Verdict or findings contrary to law or evidence.*—A new trial may be granted where the verdict or findings[70] are contrary to law[71] or to the evidence.[72]

56. In action for slander in political speech on liquor question where juror engaged in opposing liquor law, took an active part in electing defendant to office, and was agent of a railroad in which defendant was president and active manager, the right to a new trial is not waived by trying after discovery, when brought to the attention of judge. Wilson v. Clement, 126 Fed. 808. Where the jury were taken to view premises in a carriage hired by plaintiff of one of the jurors who was his regular livery man, no new trial was granted. Missouri Pac. R. Co. v. Bowman [Kan.] 75 Pac. 482.

57. No new trial for expression of opinion during trial in favor of defeated party. Rice's Ex'rs v. Wyatt [Ky.] 76 S. W. 1087.

58. Juror had falsely denied on voir dire that he was a client of plaintiff which was a ground for challenge. Hall v. Graziana. 25 Ky. L. R. 14, 74 S. W. 670. Proof, either by other jurors or persons, that a juror had formed an opinion contrary to his statement on voir dire, will not be received. Meisch v. Sippy, 102 Mo. App. 559, 77 S. W. 141. Juror's answers on voir dire cannot be impeached after verdict by proving his biased declarations before trial. Meisch v. Sippy, 102 Mo. App. 559, 77 S. W. 141.

59. Fact that grandfather of juror was first or second cousin of grandfather of husband of party, but juror not acquainted with party, was not ground for a new trial. Rice's Ex'rs v. Wyatt [Ky.] 76 S. W. 1087.

60. Juror saw in a newspaper the damages awarded at, and comments on, a former trial of case. Copeland v. Wabash R. Co., 175 Mo. 650, 75 S. W. 106.

61. Disqualification of juror because of failure to pay poll tax is not prejudicial. Alexander v. Von Koehring [Tex. Civ. App.] 77 S. W. 629.

62. New trial for misconduct of jury must be demanded within three days after trial, or excuse shown. Hopkins v. Watson [Kan.] 74 Pac. 233.

63. Not sufficient. Walton v. Wild Goose Min. & T. Co. [C. C. A.] 123 Fed. 209. Affidavit that juror told affiant that he had examined gates on defendant's cars is mere hearsay. Gans v. Metropolitan St. R. Co., 84 N. Y. Supp. 914. New trial refused on affidavit on information and belief that verdict was to be rendered when ten agreed. Com. v. Harrold, 204 Pa. 154. No new trial where affidavit of juror that special charges were not considered as being merely attorneys' views, refuted by counter affidavits. Gulf, etc., R. Co. v. Blanchard [Tex. Civ. App.] 73 S. W. 88. New trial refused on conflicting affidavits as to chance verdict. Archibald v. Kolitz, 26 Utah, 226, 72 Pac. 935.

64. Where conflicting affidavits as to whether jury had been separated, or had conversed with adverse party's attorney. Matoushek v. Dutcher [Neb.] 93 N. W. 1049.

65. Bernier v. Anderson [Idaho] 70 Pac. 1027. So under Utah Rev. St. 1898, § 3292, subd. 2. Black v. Rocky Mountain Bell Tel. Co. [Utah] 73 Pac. 514. Affidavit of a juror that the foreman of the jury said that he was familiar with defendants' depot and that it was always cold, which was the issue in the case, was inadmissible. St. Louis S. W. R. Co. v. Ricketts, 96 Tex. 68, 70 S. W. 315.

66. Where separate actions against different defendants were tried together and the judge gave separate charges, but the jury returned a single verdict against all defendants, a new trial was granted. Seller v. Green [N. J. Law] 54 Atl. 556.

67. Judge will correct verdict where error in computing interest. Dils v. Hatcher [Ky.] 76 S. W. 514.

68. New trial refused as to count where plaintiff remitted sum recovered under it. McElhone v. Wilkinson [Iowa] 96 N. W. 868.

69. Where juror was permitted to withdraw by court, there was a mistrial, that is no trial, so new trial refused. Rosengarten v. Central R. Co. [N. J. Law] 54 Atl. 564.

70. Findings of referee on same footing as verdict of jury. Ark. Land Co. v. Ladd [Mo. App.] 77 S. W. 322; Fell v. Hancock Mut. Life Ins. Co. [Conn.] 57 Atl. 175.

71. Motion on ground that the decision is against law, is or is not permissible, according as a new trial is, or is not, the means of correcting the error. Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 Pac. 700. Where jury clearly misunderstood the law. Uncas Paper Co. v. Corbin, 75 Conn. 675. That a verdict is against a specified charge is that it is against law. Pomeroy v. Gershon, 118 Ga. 521. Verdict cannot be supported on a theory of law contrary to that upon which the case was tried and submitted. Sensfelder v. Stokes [N. J. Law] 54 Atl. 517. Where verdict for defendant, though he admitted partial liability in answer. Virginia-Carolina Chemical Co. v. Kirven, 65 S. C. 197.

72. Under N. Y. Code Civ. Proc. § 999, the verdict may be set aside as against the law or the evidence after a contested trial. Klein v. Dunn, 86 N. Y. Supp. 101.

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Where a verdict is unsupported by evidence,[73] or so manifestly wrong as to show it was the result of misapprehension or prejudice, or corruption,[74] or against the preponderance of evidence,[75] or even where the evidence is fairly conflicting but the ends of justice require it,[76] it may be the duty[77] and is in the discretion[78] of the trial judge to grant a new trial. But this should not be done merely because he would have found otherwise,[79] or where the evidence fairly sustains the verdict.[80] An excessive[81] or inadequate[82] verdict is ground for new trial, or is

73. New trial must be granted where verdict was contrary to evidence; court cannot modify or change it. Chappell v. Jasper County Oil & Gas Co., 31 Ind. App. 170, 66 N. E. 515. Plaintiff's injury undisputed but conflict of evidence over its extent and verdict for defendant. Sleeper v. Des Moines [Iowa] 93 N. W. 585. Clear from evidence that plaintiff was contributorily negligent in rushing ahead of locomotive. Lewis v. Wash. County R. Co., 97 Me. 340. Great weight of evidence which showed that the engine bell was rung. Frank v. Pa. R. Co. [N. J. Law] 55 Atl. 691. Where verdict for plaintiff and failure to prove case, new trial granted without costs. Cohen v. Krulewitch, 77 App. Div. [N. Y.] 126, 12 Ann. Cas. 216. Where overwhelming evidence shows plaintiff was not kicked off the defendant's cars. Johnson v. N. Y. Cent. & H. R. R. Co., 40 Misc. [N. Y.] 350. Error to refuse where there is no evidence to sustain verdict. Colvin v. McCormick Cotton Oil Co., 66 S. C. 61. Where there was no objection at trial, there is no right to a new trial. Lincoln v. Felt [Mich.] 92 N. W. 780; Wineman v. Fisher [Mich.] 98 N. W. 404.

74. Boston v. Buffum, 97 Me. 230; Benjamin v. Metropolitan St. R. Co., 85 N. Y. Supp. 1052.

75. Herndon v. Lewis, 175 Mo. 116, 74 S. W. 976; Bartlett v. Smith [Neb.] 95 N. W. 661. Verdict not justified by evidence. Lincoln Traction Co. v. Moore [Neb.] 97 N. W. 605. Discretionary. Marr v. Burlington, C. R. & N. R. Co. [Iowa] 96 N. W. 716; Stephens v. Deatherage Lumber Co., 98 Mo. App. 365, 73 S. W. 291. Only evidence of negligence was the presumption which was rebutted. Ala. Great S. R. Co. v. Scruggs [Ga.] 45 S. E. 689. Though there is no right to direct a verdict on the preponderance of evidence it may be considered on motion for new trial. Wetherell v. Chicago City R. Co., 104 Ill. App. 357. Under Ky. Civ. Code, § 340, subd. 6, only granted where clearly and palpably against the weight of evidence. Hemstein v. Depue, 24 Ky. L. R. 886, 70 S. W. 190. Where defendant used due care. Merrill v. Bassett, 97 Me. 501. May grant new trial for insufficient evidence, though a demurrer to the evidence would not be sustained. Somerville v. Stockton [Mo.] 77 S. W. 298. Where evidence sustained some and failed as to other grounds of damage, verdict will be reduced or new trial granted. Vanderbeck v. Paterson, 68 N. J. Law, 584. New trial granted on the evidence though case was one that was necessarily submitted to a jury. Larkin v. United Traction Co., 76 App. Div. [N. Y.] 238. Verdict not set aside unless so greatly against the preponderance of evidence that the ends of justice will not be met. Cox v. Halloran, 82 App. Div. [N. Y.] 639.

76. New trial for conflict of evidence will not be reversed. Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449. New trial granted where justice requires because evidence not clear on point. Reed v. Corbin [La.] 35 So. 801. Where there is conflict of evidence new trial is in sound discretion of trial court. Ross v. Robertson [N. D.] 94 N. W. 765. In **Washington** a new trial may be granted for insufficiency of evidence though there was some evidence to support the verdict and the discretion of the trial court in granting it will not be reviewed further than to determine whether it had been abused. Welever v. Advance Shingle Co. [Wash.] 75 Pac. 863.

77. It is the duty of trial court to exercise discretion when verdict is claimed to be against the weight of evidence. Thompson v. Warren, 118 Ga. 644. It is the duty of the trial court to grant new trial where the verdict is palpably and manifestly against the weight of evidence. Johnston v. Sochurek, 104 Ill. App. 350. New trial should be granted where convinced verdict result of misunderstanding, prejudice, or undue influence. Hurt v. Louisville & N. R. Co. [Ky.] 76 S. W. 502. Where trial judge believes certain findings are not sustained it is his duty to set them aside, and grant new trial, as judgment cannot be rendered on the remaining findings. Casey-Swasey Co. v. Manchester Fire Assur. Co. [Tex. Civ. App.] 73 S. W. 864. That the trial judge believes verdict to be clearly against the weight of evidence imposes no duty on him to grant a new trial, especially where there have been three trials. Collins v. Janesville, 117 Wis. 415, 94 N. W. 309.

78. In discretion of trial court where verdict against weight of evidence. State v. Todd, 92 Mo. App. 1. Rule as to uncorroborated testimony of a party not conclusive and does not divest trial court of discretion to grant a new trial. Rochford v. Albaugh [S. D.] 94 N. W. 701. The motion to set aside as against the evidence is addressed to the sound discretion of the trial court. Brill v. Levin, 86 N. Y. Supp. 109.

79. Seemed against preponderance of evidence. Pringle v. Guild, 119 Fed. 962. Though the verdict is larger than the trial court would have given, and not as large as to indicate passion or prejudice. Occidental Consol. Min. Co. v. Comstock Tunnel Co., 125 Fed. 244. Though trial judge would have found differently, he is not obliged to set aside the verdict as against the weight of evidence. McCord v. Atlanta & C. Air Line R. Co. [N. C.] 45 S. E. 1031.

80. De Haven v. McAuley, 138 Cal. 573, 72 Pac. 152; Maxwell v. Inman, 116 Ga. 63; Wrenn v. Truitt, 116 Ga. 708; Deal v. Barnes, 117 Ga. 441; Wilkins v. Grant, 118 Ga. 522; Sibley Warehouse & Storage Co. v. Durand & Kasper Co., 102 Ill. App. 406. Evidence demanded judgment. Barnett v. Hines, 115 Ga. 1022. Verdict demanded by the evi-

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held to be against evidence with same result.[83] A new trial may be refused where party consents to the reduction, made by the court, of an excessive verdict[84] which is not arbitrary,[85] and the verdict is apportionable,[86] and not the result of passion or prejudice.[87] In some states an inadequate verdict will not be set aside if it equals the pecuniary loss[88] or is in an action of tort.[89] If a new trial is granted for mistake of the jury costs of trial should be taxed to the moving party as a condition.[90] There is no rule limiting the number of trials,[91] except that much stronger cases will be required to set aside successive verdicts to the

dence. Lane v. Macon, 118 Ga. 840. Where the verdict is for a sum in excess of that demanded in the complaint and which the evidence sustains, the complaint may be amended. Noyes Carriage Co. v. Robbins, 31 Ind. App. 300. Where fair conflict of evidence. Lee v. Huron Indemnity Union [Mich.] 97 N. W. 709. Evidence not so inherently unreasonable as to require a new trial. Hunt v. St. Paul City R. Co., 89 Minn. 448, 95 N. W. 312. That there were more witnesses on one side than on the other is not ground for a new trial. Campbell v. Delaware & A. Tel. & Tel. Co. [N. J. Law] 56 Atl. 303. Though court is not convinced that there is a fair preponderance of evidence to support verdict, where there is conflict, and nothing to show passion or prejudice of jury, no new trial should be granted. Eagan v. Hyde, 84 N. Y. Supp. 540. Evidence justified verdict though plaintiff recovered only half the wages claimed. Anderson v. McDonald, 31 Wash. 274, 71 Pac. 1037.

81. Farrell v. St. Louis Transit Co. [Mo. App.] 78 S. W. 312. The trial court may grant a new trial for excessive damages unless the action is manifestly arbitrary. Luyties v. Hardy, 101 Mo. App. 693, 74 S. W. 167. Only where there is abuse of discretion will the appellate court interfere with a new trial for excessive verdict resulting from passion and prejudice. Friedman v. Pulitzer Pub. Co., 102 Mo. App. 683, 77 S. W. 340. The verdict is not excessive though the court would not have given one so large. Dickerson v. Payne [N. J. Law] 53 Atl. 699.

82. New trial granted for nominal verdict where evidence showed substantial service rendered if employment at all. Thompson v. Burtis, 65 Kan. 674, 70 Pac. 603. Grossly inadequate. Reliance T. & D. Works v. Mitchell, 24 Ky. L. R. 1286, 71 S. W. 425. New trial for inadequate damages, though trial court was of opinion should not recover at all. Milliken v. New York, 82 App. Div. [N. Y.] 471. Granted for inadequate damages on the same principle as for excessive damages. Stuart v. Press Pub. Co., 83 App. Div. [N. Y.] 467. New trial granted where verdict was grossly inadequate and did not even cover medical expenses. Barette v. Carr [Vt.] 56 Atl. 93.

83. Under Cal. Code Civ. Proc. § 657, allowing new trials where insufficient evidence, and which is not in violation of Cal. Const. art. 1, § 7, as to jury trials, trial court may grant new trial unless successful party consents to a reduction. Ingraham v. Weidler, 139 Cal. 533, 73 Pac. 415. Under Iowa Code, § 3755, an inadequate verdict may be set aside as being against evidence. Tathwell v. Cedar Rapids [Iowa] 97 N. W. 96. Where damages are insufficient, the verdict is against the evidence. Bodie v. Charleston & W. C. R. Co., 66 S. C. 302.

84. Schmitt v. Northern Pac. R. Co. [Wis.] 98 N. W. 202; Ross v. Robertson [N. D.] 94 N. W. 765. Verdict of $76 reduced to $2, the actual damage, as no special damages claimed. Rose v. King, 76 App. Div. [N. Y.] 303. N. Y. Code Civ. Proc. § 999, allows court in its discretion to reduce an excessive verdict. Lawrence v. Wilson, 86 App. Div. [N. Y.] 472. Under Sayles' Civ. St. 1897, art. 1029a, remission of excessive verdict may be required as condition of denying a new trial. Ft. Worth & D. C. R. Co. v. Linthicum [Tex. Civ. App.] 77 S. W. 40. Appeal from order allowing ten days in which to consent to reduced verdict extinguishes the option. Swett v. Gray, 141 Cal. 63, 74 Pac. 439.

85. Where the trespass and damage are in dispute, the judge cannot arbitrarily remit part as condition of refusing new trial. Daniel v. Bailey, 118 Ga. 403.

86. New trial and not a reduced verdict where excessive because of error in instructions. Jacoby v. Johnson [C. C. A.] 120 Fed. 487.

87. Trial court may permit plaintiff to remit part of verdict, and refuse new trial, unless not apportionable, or the result of prejudice. Creve Coeur Lake Ice Co. v. Tamm, 90 Mo. App. 189. Where the damages are so large that the jury must have misconceived the evidence or are the result of passion, prejudice, partiality, or improper motive, the verdict cannot be remitted, but there must be a new trial. Close v. Hinsley, 104 Ill. App. 65. Error to reduce verdict from $600 to $150 as such excess could only be because of passion and prejudice, for which there must be a new trial, but verdict held not excessive. Plaunt v. Ry. Transfer Co. [Minn.] 97 N. W. 433.

88. Under Kan. Code Civ. Proc. § 307, new trial should not be granted because of smallness of damages, if they equal the pecuniary loss. Metropolitan St. R. Co. v. O'Neill [Kan.] 74 Pac. 1105. Under Neb. Code Civ. Proc. § 315, new trial not granted for smallness of damages if they are equal to pecuniary injury. O'Reilley v. Hoover [Neb.] 97 N. W. 470. Granted where damages inadequate to cover even pecuniary loss from injury. Caswell v. North Jersey St. R. Co. [N. J. Law] 54 Atl. 565.

89. Insufficient but more than nominal damages. Hamilton v. Pittsburgh, C., C. & St. L. R. Co., 104 Ill. App. 207.

90. Helgers v. Staten Island M. R. Co., 69 App. Div. [N. Y.] 570, citing many accordant cases. Where there is no assignment of reason for new trial, it is presumed to be for errors of jury, except where verdict was directed. Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664.

91. Court hesitates to grant a third trial. Brown v. Paterson Parchment Paper Co. [N. J. Law] 55 Atl. 87.

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same effect,[92] though a verdict will never be sustained upon a mere scintilla of evidence.[93] An appellate court will only interfere with a trial court's decision in extreme cases[94] or where the jury have found a certain act not to be negligence,[95] and interference is less likely where a new trial is granted than where refused,[96] or where the trial court acts promptly.[97]

(§ 2) *G. Surprise, accident, or mistake.—Surprise* resulting from fraudulent misrepresentation,[98] failure of juror to disclose material facts on voir dire,[99] absence of a witness where there was no negligence,[1] false testimony,[2] or from failure to require proof,[3] may in the discretion[4] of the trial court be ground for new trial, if some proof is presented on the motion,[5] and necessary objections were taken at the trial.[6] Illness of party[7] or near relative,[8] or of attorney[9] when at

92. Much stronger case required to interfere with second verdict. Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822. May grant second new trial when evidence left matter uncertain. Kimbrough v. Boswell [Ga.] 45 S. E. 977. May have second new trial where doubt if prima facie case rebutted. Johnson v. McKay [Ga.] 45 S. E. 992. After two verdicts have been set aside as against the weight of evidence, and there is a third for the same party, and there is some evidence to support it, the refusal of a new trial by the trial court will not be disturbed. Hyde v. Haak [Mich.] 93 N. W. 876.

93. Duty to grant third new trial where convinced verdict the result of misunderstanding, prejudice or undue influence. Hurt v. Louisville & N. R. Co. [Ky.] 76 S. W. 502.

94. Under Pa. Laws 1891, p. 101, power to reverse trial court's decision to be exercised only in extreme cases. Marcy v. Brock [Pa.] 56 Atl. 335. Under Ga. Civ. Code, § 5585, where law and evidence do not demand verdict, appellate court will not interfere with first grant of a new trial. Peed v. Hamilton, 117 Ga. 449; Cordray v. Savannah, T. & I. of H. R., 117 Ga. 464; Fell v. John Hancock M. L. Ins. Co. [Conn.] 57 Atl. 175; Garrett v. Driver-Harris Wire Co. [N. J. Law] 57 Atl. 127; Shibley v. Gendron [R. I.] 57 Atl. 304; Maynard v. Newton, 116 Ga. 195.

95. Boarding a moving train. Chicago & A. R. Co. v. Gore, 105 Ill. App. 16. Circuit Court of Appeals will not review denial of motion. Smith v. Hopkins [C. C. A.] 120 Fed. 921. Where conflict of evidence, not enough that court on reading would decide differently. Van Meter v. Lambert, 104 Ill. App. 243. Appellate court will not interfere with grant of new trial, where evidence slightly preponderates against the verdict. Dieckman v. Weirich, 24 Ky. L. R. 2340, 73 S. W. 1119. Where evidence not palpably in favor of verdict, grant of a new trial on the ground that it was palpably against weight of evidence will not be reversed. Los v. Scherer [Minn.] 97 N. W. 123. Decision of trial court will not be reversed unless defeated party made motion for judgment at trial. Ruckman v. Ormond, 42 Or. 209, 70 Pac. 707. Will not interfere with denial of new trial, unless no credible evidence to support verdict. Kennedy v. Plank [Wis.] 97 N. W. 895.

96. Reliance T. & D. Works v. Mitchell, 24 Ky. L. R. 1286, 71 S. W. 425; Floyd v. Paducah R. & L. Co., 24 Ky. L. R. 2364, 73 S. W. 1122; Rochford v. Albaugh [S. D.] 94 N. W. 701.

Contra, appellate court will not reverse action of trial court in refusing new trial on ground that the verdict is against the weight of the evidence, nor will it reverse the granting of a new trial for such ground. Vastine v. Rex, 93 Mo. App. 93.

97. New trial granted by court of its own motion. Uncas Paper Co. v. Corbin [Conn.] 55 Atl. 165.

98. New trial as fraud where plaintiff before trial was told in response to an inquiry that there had been no change in by-laws. Grand Lodge, A. O. U. W., v. Scott [Neb.] 93 N. W. 190.

99. Under Utah Rev. St. 1898, § 3292, where juror on voir dire failed to disclose a material fact, that he was a creditor of, and was suing, plaintiff. Tarpey v. Madsen, 26 Utah, 294, 73 Pac. 411.

1. No new trial will be granted where witness failed to appear though telephoned, but not subpoenaed (Johnson v. Doon [Mich.] 91 N. W. 742) or where witness absent who was present the day before in court, and attorney took no steps at trial to protect his rights (Erichson v. Sidlo, 76 App. Div. [N. Y.] 347).

2. New trial refused where adverse witness swore falsely as to position of shadow of telegraph pole, a material issue, as there could be no surprise. Powers v. Penn M. L. Ins. Co., 91 Mo. App. 55.

3. But new trial was refused where recitals in court's order releasing sureties not true, and their acceptance as true without proof was not anticipated. State v. Bongard, 89 Minn. 426, 94 N. W. 1093.

4. N. H. Pub. St. 1901, c. 230, § 1, permits new trial in any case where through accident, mistake, or misfortune, justice has not been done, and a further hearing would be equitable. Ela v. Ela [N. H.] 55 Atl. 358; State v. Bongard, 89 Minn. 426, 94 N. W. 1093; Anderson v. Medbery [S. D.] 92 N. W. 1087. Affidavits of statements made to attorney by persons not parties, contradicting their testimony on trial, considered. Ford v. McLane [Mich.] 91 N. W. 617. Defendant cannot have new trial because plaintiff failed in personal injury suit to produce his physician, after effort. Pittsburg, C., C. & St. L. R. Co. v. Robson, 204 Ill. 254, 68 N. E. 468.

5. Where failure to prove defendant operated the railway, some degree of proof, and not mere belief necessary on motion. Bolakosky v. Phila. & R. R. Co., 126 Fed. 230.

6. Where administrator suppressed evidence and hunted up evidence for adverse party, it is not ground for new trial for ad-

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the last moment,[10] inadvertence of court[11] or loss of pleadings or files,[12] where no fault is attributable to the moving party,[13] may be accident entitling a party to a new trial; and misapplying,[14] or not offering[15] evidence, or failure to appear at trial[16] or to reply,[17] may be relieved against if party avers good cause of defense,[18] but there must be a clear showing of diligence.[19]

(§ 2) *H. Newly-discovered evidence.*—A new trial will not be granted for newly-discovered evidence which is merely cumulative,[20] impeaching,[21] uncertain,[22]

ministrator de bonis non, who was appointed after trial, after having originally declined and who had been present at trial without objecting. Lane v. Bowes [Ind. App.] 67 N. E. 1002. It is not surprise that party had no time to identify weigh tickets when knew of it before trial closed. Matonshels v. Dutcher [Neb.] 93 N. W. 1049. New trial was refused where there was no exception to compelling trial in absence of plaintiff (Newtson v. Walker [Neb.] 95 N. W. 470) or where made no effort to obtain continuance for a witness known to be unable to attend; who was wanted to contradict a witness who had changed his testimony from that given at a former trial (Tex. Cent. R. Co. v. Yarbro [Tex. Civ. App.] 74 S. W. 357).

7. Where defendant was sick and trial was not adjourned. Merritt v. Mayfield, 89 App. Div. [N. Y.] 470. Where defendant, a material witness, was absent because of illness and continuance refused. Low, etc., Water Co. v. Hickson [Tex. Civ. App.] 74 S. W. 781.

8. Where plaintiff, a physician, by reason of the serious sickness of his daughter for three weeks before trial and misunderstanding of his attorney, was prevented from preparing his case. Jackson v. Shapard, 24 Ky. L. R. 713, 69 S. W. 954.

9. Error to refuse continuance where attorney stated he was too sick to try case. Thompson v. Hays [Ga.] 45 S. E. 970.

10. Under Ky. Civ. Code Prac. § 518, authorizing new trial for unavoidable casualty or misfortune preventing a party from appearing or defending, the illness of attorney at last moment is ground for new trial. Bone v. Blankenbaker, 24 Ky. L. R. 1438, 71 S. W. 638.

11. The court stated to the attorneys for both sides that the suit might be left open until the trial of a companion case in another county. The court forgot the statement, and the case being on the trial docket, was dismissed without notice to plaintiffs or their attorney. Goff v. Wilburn [Ky.] 79 S. W. 232.

12. Where answer lost and not filed and told by plaintiff's agent that case was settled. Head v. Ayer & L. Tie Co., 24 Ky. L. R. 728, 70 S. W. 55.

13. Failure to return bill of exceptions in statutory time, or loss of files, where no effort was made to replace them, is not ground. Saxton v. Harrington [Neb.] 94 N. W. 605.

14. Where evidence misunderstood and applied to wrong pulley. L'Esperance v. Hebron Mfg. Co., 25 R. I. 81.

15. No sufficient reason shown for not offering testimony as to lease at trial. Davis v. Tillar [Tex. Civ. App.] 74 S. W. 921.

16. Where party did not appear at trial because he did not know of altered deed, and was not negligent. Gill v. Fugate [Ky.] 78 S. W. 188. Absence of counsel, where leave of absence granted was intended for other cases, no ground for new trial. Southern R. Co. v. Beach, 117 Ga. 81.

17. Where answer amended day before trial and judgment non obstante veredicto because of failure to reply. Ill. Cent. R. Co. v. Beauchamp [Ky.] 77 S. W. 1096.

18. Where illness prevented attendance of party. Prentice v. Oliver [Ky.] 78 S. W. 469.

19. Where matters not brought to attention of the court before jury retired and which were not referred to in the charge might have affected the measure of damages for breach of contract. Kenney v. Knight, 127 Fed. 403. Plaintiff on advice of her counsel did not set up an available defense to a partition. She was aware of it, but was advised that another defense was sufficient. Held such a showing insufficient to set aside a judgment on motion for a new trial. Allen v. Foster [Tex. Civ. App.] 74 S. W. 800.

20. U. S. v. Ng Young, 126 Fed. 425; Janeway v. Burton, 102 Ill. App. 403; Turner v. Davis, 132 N. C. 187; Grapes v. Sheldon, 119 Iowa, 112, 93 N. W. 57; Connell v. Connell, 119 Iowa, 602, 93 N. W. 582; Mattern v. Sudarth, 65 Kan. 862, 70 Pac. 874; Moorehead v. Robinson [Kan.] 75 Pac. 503; Morin v. Robarge [Mich.] 93 N. W. 886; Cheever v. Scottish U. & N. Ins. Co., 86 App. Div. [N. Y.] 331; San Antonio & A. P. R. Co. v. Moore [Tex. Civ. App.] 72 S. W. 226; Parham v. Shockler [Tex. Civ. App.] 73 S. W. 839; Kreielsheimer v. Nelson, 31 Wash. 406, 72 Pac. 72. On sharply contested question at trial. Heenan v. Redmen, 101 Ill. App. 603. As to use of arm (Linton v. Smith, 31 Ind. App. 546, 68 N. E. 617) cumulative and unsatisfactory (Akers v. Akers, 24 Ky. L. R. 636, 69 S. W. 715). As to unfriendly relation between deceased and his daughter. Gibson v. Sutton, 24 Ky. L. R. 868, 70 S. W. 188. Affidavit of witness that he had made mistake as to place of accident, and defect was really not so great. Richmond v. Martin [Ky.] 78 S. W. 219. Same witness as at trial. Campion v. Lattimer [Neb.] 97 N. W. 290. One witness had testified as to evidence alleged to be new. Benson v. Hamilton [Wash.] 75 Pac. 805. The jury found a verdict on testimony of one witness. New trial not granted. No error. Id. Relate to matters already established. Norbury v. Harper [Neb.] 97 N. W. 438. Evidence only tended to reduce amount of recovery. Mo., K. & T. R. Co. v. Gist [Tex. Civ. App.] 73 S. W. 857. Evidence of handwriting. Collins v. Weiss [Tex. Civ. App.] 74 S. W. 46. Evidence that place did not exist when payment made not cumulative. Union C. L. Ins. Co. v. Loughmiller [Ind. App.] 69 N. E. 264.

21. Miller v. Potter, 102 Ill. App. 483; Smith v. Shook [Mont.] 75 Pac. 513; North

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immaterial[23] or incompetent,[24] nor where due diligence,[25] that is thorough and untiring search[26] to obtain it, has been used before trial,[27] or good excuse shown.[28]

Chicago St. R. Co. v. Wellner, 105 Ill. App. 652; Louisville Ins. Co. v. Hoffman, 24 Ky. L. R. 980, 70 S. W. 403; Davis v. State, 116 Ga. 87. Evidence that plaintiff had falsely testified as to a previous injury immaterial and merely impeaching. Chicago & E. I. R. Co. v. Stewart, 203 Ill. 223, 67 N. E. 830. Cumulative and not conclusive. Springer v. Schultz, 105 Ill. App. 544; Pelly v. Denison & S. R. Co. [Tex. Civ. App.] 78 S. W. 542.

22. Where witness who was to prove alleged title bond had already contradicted himself. Ramey v. Crum, 24 Ky. L. R. 741, 69 S. W. 950. Testimony extremely slight as compared with almost conclusive proof of other side. Young v. Warren County Bank, 91 Mo. App. 644. Inconclusive and uncertain; one witness testified at trial. Duckworth v. Ft. Worth & R. G. R. Co. [Tex. Civ. App.] 75 S. W. 913.

23. Gibson v. Hunt [Iowa] 94 N. W. 277. Where injured by fall of elevator because of defective bolt, not material to show was experimenting with safety device. Springer v. Schultz, 205 Ill. 144, 68 N. E. 753. Evidence of a lease from daughter not effective to show consideration of a deed to her. Stringfellow v. Hanson, 25 Utah, 480, 71 Pac. 1052. Affidavits of witnesses unknown and not discoverable at time of trial of action for breach of marriage contract, detailing facts which show that no marriage was ever entered into furnish grounds for new trial. Meisch v. Sippy, 102 Mo. App. 559, 77 S. W. 141.

24. Rice's Ex'rs v. Wyatt [Ky.] 76 S. W. 1087. Affidavit of conversation with plaintiff's husband mere hearsay. Spalding v. Edina [Mo. App.] 78 S. W. 302. Evidence as to events occurring after trial, as bankruptcy (Denny v. Broadway Nat. Bank, 118 Ga. 221) or sale of horse by partner after trial (Johnson v. Johnson [Colo.] 72 Pac. 604).

25. Not diligent. Rodgers v. Turpin, 118 Ga. 831; Springer v. Schultz, 205 Ill. 144, 68 N. E. 753; Grapes v. Sheldon, 119 Iowa, 112, 93 N. W. 57; Moorehead v. Robinson [Kan.] 75 Pac. 503; Seaman v. Clarke, 75 App. Div. [N. Y.] 345; Lyon v. Wilcox, 85 App. Div. [N. Y.] 617; Huse & L. Ice & Transp. Co. v. Wielar, 86 N. Y. Supp. 24; Edwards v. Anderson, 31 Tex. Civ. App. 131, 71 S. W. 555; Mo., K. & T. R. Co. v. Huff [Tex. Civ. App.] 78 S. W. 249. Witness appeared when trial ended and no effort made to reopen before the decision was filed nearly two months later. U. S. v. Ng Young, 126 Fed. 425. Not due diligence to procure new evidence as to extent of plaintiff's injuries where alleged not able to trace plaintiff from hospital, but did not allege what efforts were made. Chicago & A. R. Co. v. Raidy, 203 Ill. 310, 67 N. E. 783. Could have ascertained location of office. Union C. L. Ins. Co. v. Loughmiller [Ind. App.] 69 N. E. 264. Facts as to diligence must be set forth with particularity, and it is not enough to show that the evidence was not known to one of applicants, who was an invalid. Bertram v. State [Ind. App.] 69 N. E. 479. Facts of common knowledge which might have been discovered. Louisville Ins. Co. v. Hoffman, 24 Ky. L. R. 980, 70 S. W. 403. Failure to show why evidence that plaintiff had suffered from disease for years was not presented earlier. Louisville v. Walter's Adm'x [Ky.] 76 S. W. 516. Evidence given to attorney while other attorney making closing address to jury. Summers v. Metropolitan L. Ins. Co., 90 Mo. App. 691. Offer to prove age by witness who had seen family Bible, where application had been made for a continuance because of his absence. St. Louis S. W. R. Co. v. Bowles [Tex. Civ. App.] 72 S. W. 451. Where situation pointed to witness as person likely to know about the matter. Parham v. Shockler [Tex. Civ. App.] 73 S. W. 839. Evidence as to disqualification of probate judge who made sale many years before. El Paso v. Ft. Dearborn Nat. Bank [Tex. Civ. App.] 71 S. W. 799. Affidavit of one of two attorneys that he did not know of evidence before. King v. Hill [Tex. Civ. App. 75 S. W. 550. Where party well acquainted with person whose evidence was offered. Pelly v. Denison & S. R. Co. [Tex. Civ. App.] 78 S. W. 542. Where no effort to inquire of person living in same house with plaintiff, and a second trial one year after first. Jordan v. Seattle, 30 Wash. 116, 70 Pac. 743. Alleged release in possession of party asking new trial. Schmitt v. Northern Pac. R. Co. [Wis.] 98 N. W. 202. But there was diligence where witness before trial had denied knowledge (Chicago & E. I. R. Co. v. Syster [Ind. App.] 69 N. E. 476), and in securing new evidence of health of applicant for life insurance (St. Louis & S. F. R. Co. v. Gaston [Kan.] 72 Pac. 777), and where affidavit of one who had no interest that he had made diligent search before trial to secure firm books, and had only discovered them by accident afterwards (Waite v. Fish [S. D.] 95 N. W. 928). It is not enough to entitle a party to maintain a bill of review that the new evidence shows the decree to have been technically erroneous. It must appear that the complaining party was deprived of a substantial equity. The making of conditional deeds pending suit for rescission of contract of purchase to become effective in accordance with the result of the suit. Keith v. Alger [C. C. A.] 124 Fed. 32. Discovery of other alleged anticipatory patents in the public records is not sufficient basis for a bill to review a decree sustaining a patent. Kissinger-Ison Co. v. Bradford Belting Co. [C. C. A.] 123 Fed. 91. Before allowing a bill of review to be filed on the ground of after discovered evidence, the court must be satisfied that the evidence relied on is new and could not by ordinary diligence have been discovered prior to decree complained of. Baker v. Watts [Va.] 44 S. E. 929.

26. Where no affidavit to show the applicant searched register or made inquiries of guests at hotel near accident, but merely that diligent inquiry was made of persons likely to know and all sources of information searched, and witness was at hotel, though a transient, and gave no information of her knowledge until after trial. Gulf, C. & S. F. R. Co. v. Blanchard [Tex. Civ. App.] 73 S. W. 88. Affidavit that witness, whose home was opposite place of accident, was out of the state, does not show

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But the evidence should be such as would probably lead to a different result,[29] and must be supported by affidavits[30] and record of trial,[31] so as to appeal strongly to the discretion[32] of the trial court, as newly-discovered evidence is regarded with distrust,[33] and as its decision is seldom disturbed.[34] A motion for new trial on the

affirmatively that it was impossible by ordinary diligence to procure her attendance at trial. Atlanta Rapid Transit Co. v. Young, 117 Ga. 349.

27. Known to defendant before trial [Iowa Code, § 4092]. Connell v. Connell, 119 Iowa, 602, 93 N. W. 582. Where applicant knew a draft in bank was important evidence and did not apply for it until a short time before trial, when he failed to find it. Mattern v. Suddarth, 65 Kan. 862, 70 Pac. 874. Failure to show that facts were not known before trial, or why not presented before. Nisbet v. Wells [Ky.] 76 S. W. 120. Refused for evidence consisting of certain deeds of whose existence attorney knew before trial. De Lassus v. Winn, 174 Mo. 636, 74 S. W. 635. Must appear could not have discovered and produced at trial. Matoushek v. Dutcher [Neb.] 93 N. W. 1049. Where knew name and address of witness long before trial, without getting her evidence. Lane v. Brooklyn Heights R. Co., 85 App. Div. [N. Y.] 85. Did not show source of knowledge of evidence of handwriting, and though knew of deed, took no steps to inquire before trial. Collins v. Weiss [Tex. Civ. App.] 74 S. W. 46. Where before trial secured names but not the addresses of two witnesses, employees of adverse party. Bullock v. White Star S. S. Co., 30 Wash. 448, 70 Pac. 1106.

28. Cheever v. Scottish U. & N. Ins. Co., 86 App. Div. [N. Y.] 331. Not necessary to allege due diligence where existence of writings corroborating oral agreement to devise not known of until discovery (Conlon v. Mission of Immaculate Virgin, 87 App. Div. [N. Y.] 165) or where did not know of existence of private memorandum book of adverse party which was material evidence (Owsley v. Owsley [Ky.] 77 S. W. 897). No excuse that witness at trial failed to recollect that fire burned for two days. Huse & L. Ice & Transp. Co. v. Wielar, 86 N. Y. Supp. 24.

29. Chicago & E. I. R. Co. v. Syster [Ind. App.] 69 N. E. 476; San Antonio & A. P. R. Co. v. Moore [Tex. Civ. App.] 72 S. W. 226. Where witness claimed he met plaintiff, accused of setting the fire, at the fire, while he testified he was at a distance. Germinder v. Machinery M. Ins. Ass'n, 120 Iowa, 614, 94 N. W. 1108. Witness to accident, where no direct evidence before, and not known before trial. Schnee v. Dubuque [Iowa] 98 N. W. 298. Where unerring and convincing and probably have preponderating influence. Owsley v. Owsley [Ky.] 77 S. W. 897. Where affidavit of person unknown at time of trial, detailing facts which would show no marriage. Meisch v. Sippy, 102 Mo. App. 559, 77 S. W. 141. Where of such a nature as would probably change result, though largely cumulative. Chadron L. & B. Ass'n v. Scott [Neb.] 96 N. W. 220. Nearly irresistible evidence. Newschloss v. Wittner, 86 N. Y. Supp. 211. Must have been discovered subsequent to trial and due diligence used. San Antonio & A. P. R. Co. v. Moore [Tex. Civ. App.] 72 S. W. 226. New trial refused as no probable change. Lane v. Brooklyn Heights R. Co., 85 App. Div. [N. Y.] 85; Kennedy v. Plank [Wis.] 97 N. W. 895. By no means conclusive, or probable that another trial would result differently. Miller v. Potter, 102 Ill. App. 483. Not granted to enable a party to make a somewhat stronger case. Chicago & E. I. R. Co. v. Stewart, 104 Ill. App. 37. Must be such as ought to produce a different result on the merits. Springer v. Schultz, 105 Ill. App. 544. Did not make different result reasonably certain. Collins v. Weiss [Tex. Civ. App.] 74 S. W. 46; Mo., K. & T. R. Co. v. Huff [Tex. Civ. App.] 78 S. W. 249.

30. No affidavit of credibility of witness [Ga. Civ. Code, § 5481]. Atwater v. Hannah, 116 Ga. 745. Must have affidavits of witnesses or excuse for failure. Janeway v. Burton, 201 Ill. 78, 66 N. E. 337. No affidavit from parties who would give evidence. Stover v. Flower, 120 Iowa, 514, 94 N. W. 1100. Must have "affidavit showing truth of ground." Hall v. Graziana, 25 Ky. L. R. 14, 74 S. W. 670. Where no affidavit of witness, or excuse for failure to produce one. Elliott v. Martin, 27 Mont. 519, 71 Pac. 756. Her affidavit did not assert that she would testify. Lane v. Brooklyn Heights R. Co., 85 App. Div. [N. Y.] 85; Cheever v. Scottish U. & N. Ins. Co., 86 App. Div. [N. Y.] 331.

31. Properly denied where none of testimony taken at trial before court, as might be merely cumulative. Hopkins v. Watson [Kan.] 74 Pac. 233.

32. Coleman v. Cole, 96 Mo. App. 22, 69 S. W. 692; San Antonio & A. P. R. Co. v. Moore [Tex. Civ. App.] 72 S. W. 226. Evidence attacking character, and counter showing justified refusal. McNatt v. McRae, 117 Ga. 898; Turner v. Davis, 132 N. C. 187; Pitman v. Holmes [Tex. Civ. App.] 78 S. W. 961; Grand Lodge, A. O. U. W., v. Bartes [Neb.] 98 N. W. 715; Monmouth Pottery Co. v. White [Utah] 75 Pac. 622. Where it was shown plaintiff was hurt after accident since this went only to extent of injuries. Louisville & C. Packet Co. v. Mulligan [Ky.] 77 S. W. 704. Where inherent and apparent lack of truthfulness in affidavits. Kosmerl v. Mueller [Minn.] 97 N. W. 660. Discretion in trial court where merely cumulative and impeaching, and would not probably change result. Riley v. Mo. Pac. R. Co. [Neb.] 95 N. W. 20. Discretionary and may grant new trial without affidavits and though strict rules of evidence are not followed where it appears justice requires it. Ela v. Ela [N. H.] 55 Atl. 358. Discretion, though amendment to answer necessary to permit defense sought to be interposed. Polk v. Carney [S. D.] 97 N. W. 360.

33. To be regarded with distrust. Bertram v. State [Ind. App.] 69 N. E. 479.

34. Where contradictory, finding will not be disturbed. Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273. Will not reverse unless abuse shown. Summers v. Metropolitan Life Ins. Co., 90 Mo. App. 691. Discretionary, though made before different judge. Hausmann v. Sutter St. R. Co., 139 Cal. 174, 72 Pac. 905.

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ground of newly-discovered evidence must be supported by affidavits showing what the witnesses will testify, that it is probably true, and material, and that due diligence has been used.[35] The fact that newly-discovered evidence was not known at the time of trial must appear by the moving party's own affidavit.[36]

(§ 2) *I. As matter of right in ejectment.*—By statute in many states, a new trial as a matter of right is granted in actions to recover land, or to quiet title.[37] Such statutes are strictly construed.[38]

§ 3. *Proceedings to procure new trial.*—The motion for new trial should be made within the time limited by statute,[39] or of judgment,[40] or at the same term[41] if the ground is then known,[42] and must be prosecuted with reasonable diligence;[43] but the time of the hearing may be extended by the court,[44] or by the acquiescence

Readily reversed as made before different judge, and conspiracy and fiat perjury involved. Bennett v. Riley, 82 App. Div. [N. Y.] 639.

35. Turner v. Davis, 132 N. C. 187.

36. Smith v. Shook [Mont.] 75 Pac. 513.

37. Iowa Code, § 4205, provides new trial may be granted within one year from trial. Bevering v. Smith [Iowa] 96 N. W. 1110. Allowed in suit to cancel conveyance, as title involved. Krise v. Wilson, 31 Ind. App. 590, 68 N. E. 693. Motion should be made after judgment on verdict. Davis v. Kendall [Ind.] 68 N. E. 894. Wis. Rev. St. 1898, § 3092, allows in ejectment, and under § 3078 allowing equitable defenses a new trial of course may be had where the answer sets up an equitable counterclaim for specific performance. Newland v. Morris, 115 Wis. 207, 91 N. W. 664. May demand in open court, or by notice on journal, though claim for rent and damages, and equitable defense set up. Keller v. Hawk [Okl.] 74 Pac. 106. For a second new trial party must pay costs. Barnson v. Mulligan, 40 Misc. [N. Y.] 470.

38. Allowed any time during term, though prayer for partition joined. Kennedy v. Haskell [Kan.] 73 Pac. 913. But not allowed in partition suit, though defendant claimed title. Moorehead v. Robinson [Kan.] 75 Pac. 503; Schlicter v. Taylor, 31 Ind. App. 164, 67 N. E. 556.

39. Mo. Rev. St. 1899, § 803, providing motion may be made in four days, means calendar not court days. Long v. Hawkins [Mo.] 77 S. W. 77. Under Mo. Rev. St. 1899, § 803, motion must be made within four days of trial, and the fact must appear on the record. Pound's Estate v. Cassity, 91 Mo. App. 424. Where through oversight no entry of filing of motion on record, the trial court on formal application may order filing to be put on record as of day when made. Gilmore v. Harp, 92 Mo. App. 386.

40. Motion should be made after final judgment. Schneider v. Patton, 175 Mo. 684, 75 S. W. 155. Under N. Y. Consolidated Act, § 1367, as amended by Laws 1896, c. 748, motion must be made within five days after entry of judgment. Cothren v. Chaffee, 39 Misc. [N. Y.] 339. Application six months after time expired not justified because three weeks spent in negotiating for settlement or within discretion of court under S. D. Comp. Laws 1887, § 5093. McPherson v. Julius [S. D.] 95 N. W. 428. In New York municipal court a motion for new trial must be made at close of the trial or within five days from judgment entered, and in the latter case two days' notice of motion must be given, and the motion must be made within five days. Buchsbaum v. Feldman, 86 N. Y. Supp. 747.

41. Burns' Ind. Rev. St. 1901, § 570, providing application must be made at term verdict rendered, or if on last day, then on first day of next term, is imperative, and when record showed adverse party not present when motion filed he did not waive his right to object. Dugdale v. Doney, 30 Ind. App. 240, 65 N. E. 934. Under Neb. Code Civ. Proc. § 316, application must be made the same term. Quigley v. Mulford [Neb.] 95 N. W. 490. Presume motion made at same term where record does not show the contrary. Farmers' Trust Co. v. Treeman [Okl.] 73 Pac. 300. Motion and petition in intervention are in effect a motion for new trial, and properly dismissed as not filed in term. Graham v. Coolidge, 30 Tex. Civ. App. 273, 70 S. W. 231. May be made at same term, though in mean time application for change of venue has been filed. Watson v. Williamson [Tex. Civ. App.] 76 S. W. 793. In New Jersey, law courts may grant a new trial after the term, and equity will not exercise its jurisdiction when relief may be obtained at law. Hayes v. U. S. Phonograph Co. [N. J. Eq.] 55 Atl. 84. In North Carolina, motion for new trial, upon exceptions, or for insufficient evidence, or excessive damages, can only be heard at the same time the trial was had. Turner v. Davis, 132 N. C. 187.

42. Under Burns' Ind. Rev. St. 1901, § 572, where cause is discovered after term at which verdict rendered party may move within one year. Tereba v. Standard Cabinet Mfg. Co. [Ind. App.] 68 N. E. 1033. Not error because not filed within three days of trial for newly discovered evidence, as under Neb. Code Civ. Proc. § 316, it may be filed any time during term, and heard later. Chadron Loan & Bldg. Ass'n v. Scott [Neb.] 96 N. W. 220. The counsel did not file motion for new trial within three days as required by law. He did not know of certain ruling of the court until too late to make exceptions, of which he should have known. Goodrum v. Grimes [Mass.] 69 N. E. 1053.

43. Failure to engross and file bill of exceptions to be used in the hearing of the motion for five months from the time it was settled and ordered engrossed. The motion should have been denied on its merits. Galbrith v. Lowe [Cal.] 75 Pac. 831.

44. Where motion heard after time, and only part of period covered by extensions, presumed that an intermediate extension

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of the parties,[45] or may be set in vacation by order of court.[46] Affidavits and in some states oral testimony may be received.[47] Notice should be given,[48] and the motion may be joint[49] or be made after motion for judgment,[50] but it does not operate as a stay.[51] Where the error does not appear in the record, a bill of exceptions[52] or a brief of evidence[53] or statement of case[54] must be settled. Though the right is statutory,[55] the court has still some discretion.[56] A settlement may be compelled by mandamus.[57] The motion should state the ground[58] and specify

was lost. Crafts v. Carr, 24 R. I. 397, 60 L. R. A. 128. Where leave to file motion granted at term at which verdict rendered, it may be disposed of at any subsequent term. Walker v. Moser [C. C. A.] 117 Fed. 230. No jurisdiction to grant motion when it was heard a week after date to which continued. Whelchel v. Poor, 116 Ga. 426.

45. Appearance of both parties waives any discontinuance. McCarver v. Herzberg, 135 Ala. 542. Where motion that was made during term was heard and decided without objection in vacation, it will be assumed that it was on an adjourned day of regular term. State Ins. Co. v. School Dist. No. 19, 66 Kan. 77, 71 Pac. 272. Contra, S. D. Comp. Laws, § 5343, where no right to grant new trial after time for appeal had expired, though stipulated that motion should be heard at a time thereafter. Bright v. Juhl [S. D.], 93 N. W. 648.

46. Where there was no duly entered order motion cannot be heard in vacation, except as provided in Ga. Civ. Code, § 4324. Carroll v. Tumlin, 116 Ga. 716. Under Ga. Civ. Code, § 5484, essential that motion be filed with clerk within time, though judge in term granted rule nisi returnable in vacation, and other side consented. Hilt v. Young, 116 Ga. 708. Where order made to hear motion in vacation and giving until then to prepare and have approved brief of evidence, it is proper to dismiss motion to dismiss motion for new trial. Thompson v. Thompson, 118 Ga. 543.

47. Ford v. McLane [Mich.] 91 N. W. 617. Oral testimony of juror received. Matonshek v. Dutcher [Neb.] 93 N. W. 1049. Affidavits to disqualify judge from hearing motion not considered where not filed within ten days of notice of motion. In re Kasson's Estate, 141 Cal. 33, 74 Pac. 436. Motion need not be verified or sustained by affidavits filed at the time. St. Louis & S. F. R. Co. v. Gaston [Kan.] 72 Pac. 777.

48. Service of notice under S. D. Comp. Laws, 1887, § 5090, to apprise adverse party of grounds is a prerequisite, and waiver cannot be implied where there is nothing in record to show service or presence at hearing. MacGregor v. Pierce [S. D.] 95 N. W. 281. That one day's notice of hearing of motion not served on adverse party according to rules of local court not considered on appeal. Cochran v. Phila. Mortg. & Trust Co. [Neb.] 96 N. W. 1051.

49. Joint motion for new trial, which includes partner who disclaims, may be sustained as to those who do not. Equitable Mortg. Co. v. Gray [Kan.] 74 Pac. 614. Where verdict was given for defendants on different and separate defenses, a single joint motion against them all is insufficient if verdict good as to any one. Lydick v. Gill [Neb.] 94 N. W. 109. Where two or more parties join in motion, it must be overruled unless it can be sustained as to all. McCarthy v. Morgan [Neb.] 96 N. W. 489.

50. Right not lost because not united with motion for judgment non obstante veredicto. Nelson v. Grondahl [N. D.] 96 N. W. 299. May move for new trial within time, before motion for judgment on special findings has been decided it being a mere irregularity to file motions together. Davis v. Turner [Ohio] 68 N. E. 819.

51. In foreclosure suit, a motion for new trial pending will not of itself operate as a supersedeas, or stay the issuance of an order of sale pursuant to decree rendered. Walker v. Fitzgerald [Neb.] 95 N. W. 32.

52. Error should be pointed out specifically and not merely in language of statute. Hughes Bros. Mfg. Co. v. Reagan [Ind. T.] 69 S. W. 940.

53. Where motion is set for next term, and brief of evidence is made returnable on day named in vacation, judge has no right to extend time for latter. Blackburn v. Ala. Midland R. Co., 116 Ga. 936.

54. Court cannot of its own notion correct a statement after expiration of six months from order. Fountain Water Co. v. Superior Court, 139 Cal. 648, 73 Pac. 590. Under Idaho Rev. St. 1887, § 4441, only judge or referee, and not the attorneys can certify to statement on motion for new trial. Van Meter v. Squibb [Idaho] 72 Pac. 884. Amendment to statement of case not presented to judge, or filed with clerk as provided in Mont. Code Civ. Proc. § 1173, must be disregarded. Wright v. Mathews [Mont.] 72 Pac. 820.

55. A statutory remedy, and where relator failed to appear before judge to present amendment to statement of case, or to leave with clerk, he lost right to have settled at all. State v. Second Judicial Dist. Court [Mont.] 72 Pac. 412.

56. Court has discretion to relieve party from failure to serve statement in time, and it will be presumed that new trial was not refused on account of delay. Bailey v. Kreutzmann, 141 Cal. 519, 75 Pac. 104. Stipulation that statement might be settled before judge who tried case at another county seat is good and is notice to party. Cooper v. Burch, 140 Cal. 548, 74 Pac. 37. Where service was made of proposed amendment to statement, and objection at hearing was to any amendment at all, failure to serve notice was waived. Swett v. Gray, 141 Cal. 63, 74 Pac. 439.

57. Mandamus is exclusive remedy to compel a judge to settle a statement on motion for new trial. Hartmann v. Smith, 140 Cal. 461, 74 Pac. 7. Writ of mandate to judge to settle a statement and bill of exceptions will not issue where preponderance of evidence shows it was not presented in statutory time, though refusal was made on an-

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the errors particularly.[59] Thus, if the error is in instructions,[60] it should set forth the part complained of;[61] or if in the evidence,[62] should set it out,[63] or specify the finding not sustained.[64] Grounds not specified are not available.[65] On a demurrer to petition the facts are assumed to be true.[66] There is no right to have the motion heard before the same judge who tried the case.[67] The court may permit motion to be amended[68] or may dismiss motion,[69] or vacate its order.[70] A new trial may be given ex proprio motu,[71] and costs should be imposed.[72] In some states if no decision is made during the term, the motion is overruled.[73]

other ground. State v. District Court of Second Judicial Dist. [Mont.] 74 Pac. 414.

58. That findings and judgment of court is contrary to evidence and to law does not comply with Burns' Ind. Rev. St. 1901, § 568, cl. 6, allowing new trial on ground "the verdict or decision is not sustained by sufficient evidence or is contrary to law," since judgment may be contrary though findings are good. Lynch v. Milwaukee Harvester Co., 159 Ind. 675, 65 N. E. 1025; Baltimore & O. R. Co. v. Daegling, 30 Ind. App. 180, 65 N. E. 761. Motion that evidence is insufficient "to justify findings and judgment, and that the same are against law" is sufficient under Mont. Code Civ. Proc. § 1171, subd. 6, on ground of "insufficiency of evidence to justify verdict or other decision, or that it is against law." Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805.

59. Under S. D. Code Civ. Proc. § 303, subd. 4, if made on minute's notice of intention should have specified particular errors, or if on bill of exceptions, subds. 2 and 3, the specifications of error should have been contained therein, or annexed. Wenke v. Hall [S. D.] 96 N. W. 103. No waiver of right where counsel moved for new trial, and on court saying he would dispose of it right away and hear the reasons, counsel refused to urge them sarcastically saying "for fear you will grant it," but subsequently filed his written reasons under Ill. Practice Act, § 56. Landt v. McCullough, 206 Ill. 214, 69 N. E. 107.

60. Must point out error of specified charge. Central of Georgia R. Co. v. Goodson, 118 Ga. 833, 45 S. E. 680. Where instruction duly excepted to, not necessary to again except or refer to in motion. Lingle v. Lingle [Iowa] 96 N. W. 708.

61. Seaboard Air Line Ry. v. Phillips, 117 Ga. 98, 43 S. E. 494. Where motion assigns a group of instructions as erroneous, it is insufficient if one is good. Ledwith v. Campbell [Neb.] 95 N. W. 838.

62. Where complaint was on admission of evidence and did not show what it was. Spinks v. Thornton, 117 Ga. 829. Where for error in evidence, must show what objection made before trial judge. Woodbridge v. Drought, 118 Ga. 671.

63. Cannot be considered because of exclusion of evidence, where what witness would have answered does not appear. Courier-Journal v. Howard [Ga.] 46 S. E. 440. Motion to disregard statement will be sustained where it does not specify wherein evidence insufficient. Robson v. Colson [Idaho] 72 Pac. 951.

64. Specification that evidence insufficient as to certain findings, not too general. Holmes v. Hoppe, 140 Cal. 212, 73 Pac. 1002. Specification that evidence does not justify particular finding is sufficient. Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 Pac. 700. Specification that evidence insufficient to sustain finding that defendant had title to land is sufficient. Harris v. Duarte, 141 Cal. 497, 75 Pac. 58.

Contra, specification that evidence insufficient to justify certain finding does not sufficiently comply with Mont. Code Civ. Proc. § 1173 requiring one to specify particularly in what respect the evidence is insufficient. Finlen v. Heinze [Mont.] 73 Pac. 123.

65. In action for necessaries furnished wife and children, the fact the children were not his not available where not mentioned in motion. Rariden v. Mason, 30 Ind. App. 425, 65 N. E. 554.

66. Turner v. Turner, 24 Ky. L. R. 1143, 70 S. W. 833.

67. Where special judge tried case because of illness of regular judge, the latter may hear motion, when former unable to attend on last day of term. Chicago, I. & E. R. Co. v. Cunningham [Ind. App.] 69 N. E. 304. Should regularly be heard in same branch of court. Louisville Ins. Co. v. Hoffman, 24 Ky. L. R. 980, 70 S. W. 403. Mo. Rev. St. 1899, § 731, giving to judge's successor authority to sign bill of exceptions carries power to pass on motion for new trial. Fehlhauer v. St. Louis [Mo.] 77 S. W. 843. No new trial as matter of right where judge died before decision, but motion heard by successor. Union Pac. R. Co. v. Lotway [Neb.] 96 N. W. 527.

68. Amendment to motion allowed by judge not bad because not served on opponent. Robert Portner Brewing Co. v. Cooper, 116 Ga. 171. Discretion to allow motion to be amended. Kreielsheimer v. Nelson, 31 Wash. 406, 72 Pac. 72.

69. Any point of practice should be presented by a motion to dismiss motion for new trial, or it is waived. Walker v. Neil, 117 Ga. 733. Motion to dismiss motion for new trial lies in discretion of court. Equitable Mortg. Co. v. McWaters [Ga.] 46 S. E. 437.

70. Under 2 Ball's Wash. Ann. Codes & St. § 4953, an order for new trial may be vacated for mistake, but not for error. Coyle v. Seattle Elec. Co., 31 Wash. 131, 71 Pac. 733.

71. Where new trial granted case must be put regularly on docket, and judgment not given without notice to other party. State v. Blackman, 110 La. 266.

Contra, Appellate court reversed the grant of new trial for grounds not stated in motion. Vastine v. Rex, 93 Mo. App. 93.

72. Though a seeming hardship. Carter v. Interurban St. R. Co., 86 N. Y. Supp. 206.

73. Arizona Acts 1891, No. 49, par. 49, providing motion to be deemed overruled if not decided before end of term, is consti-

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The right to appeal is limited by the motion,[74] and the order will be sustained if possible.[75] Where a verdict is set aside because there is no evidence to support it, it is not error to refuse a new trial.[76]

§ 4. *Proceedings at new trial.*—The case should be put regularly on the docket,[77] and the objection that a nominal part of the costs has not been paid will not be allowed on new trial many years later.[78]

§ 5. *Arrest of judgment. A. Grounds.*—A motion to arrest judgment is allowed only for lack of jurisdiction,[79] or for such defects in the record and pleadings as will not support a judgment.[80] It is not enough that there are bad counts[81] or a misjoinder,[82] or that a demurrer would have been sustained,[83] nor will the court go outside of the record proper[84] in order to sustain motion.

(§ 5) *B. Motions and proceedings thereon.*—The court may act of its own motion,[85] and where motion is made, may correct errors,[86] all subject to exception.[87]

tutional, and applies, though judge by an order in chambers continued to another term on account of his illness. James v. Appel, 192 U. S. 129. Refusal cannot be reviewed where not disposed of at term, the court taking judicial notice that term presumptively ended the day before the next term. Lose v. Doran [Ariz.] 73 Pac. 443. Wis. Rev. St. 1898, § 2878, providing that where motion is not decided during term, it is deemed to be overruled, may be waived by counsel. Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664. N. Y. Laws 1902, p. 1557, c. 580, requiring a judgment in fourteen days, does not apply to a decision on motion for new trial. Collins v. Lamson Consol. Store Service Co., 85 N. Y. Supp. 1110.

74. Right to new trial on grounds not stated in motion cannot be raised in appellate court. Janeway v. Burton, 102 Ill. App. 403. Exceptions made during trial not preserved where no exception to refusal of new trial. Parsons v. Clark, 98 Mo. App. 28, 77 S. W. 582. Where nothing to indicate the grounds on which judge allowed amendment to motion, it cannot be reviewed. Sterling v. Unity Cotton Mills [Ga.] 45 S. E. 975.

75. Where ground of new trial is not stated it may be sustained on any that appears. De Haven v. McAuley, 138 Cal. 573, 72 Pac. 152. Order made at general term allowing new trial will be supported if justified on any ground of motion. Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449. Ground of new trial should be stated in order, but appellate court will examine record in order to sustain the order. Bernier v. Anderson [Idaho] 70 Pac. 1027. Where order granting new trial reversed on appeal, it is not necessary to settle an order denying a new trial. Sidmonds v. Brooklyn Heights R. Co., 75 App. Div. [N. Y.] 295.

76. The jury rendered a verdict for damages in an action for personal injuries when there was no evidence to warrant the court in submitting the case to the jury. Glennon v. Erie R. Co., 86 App. Div. [N. Y.] 397.

77. State v. Blackman, 110 La. 266.

78. $3.25 of costs not paid and continued by consent for ten years. Green v. Brown [N. M.] 72 Pac. 17.

79. Conditionally arrested judgment where complaint in divorce did not show residence in county, but only in state. Johnson v. Johnson. 30 Colo. 402, 70 Pac. 692.

80. That pleadings are so radically defective that successful party is not entitled to relief, must be raised by motion, or will not be considered on appeal. Alexander v. Grand Lodge, A. O. U. W., 119 Iowa, 519, 93 N. W. 508. Joinder of improper party plaintiff, which renders petition insufficient to support judgment. Jones v. Kansas City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890. Where declaration counts in trespass, and writs entitled case. Niles v. Brown [R. I.] 56 Atl. 1030. In Iowa, failure of a petition to state a cause of action may be taken advantage of by motion in arrest, but where the court on its own motion, no question having been raised as to the sufficiency of the pleadings, withdraws the case from the jury, the granting of a new trial on plaintiff's motion is not error and will not be disturbed unless it clearly appears that it was wrong. Brown v. Ill. Cent. R. Co. [Iowa] 98 N. W. 625.

81. After verdict, one good count will support judgment. Chicago & A. R. Co. v. Gore, 105 Ill. App. 16; Zellars v. Mo. W. & L. Co., 92 Mo. App. 107.

82. Not a mispleading under Hurd's Rev. St. 1899, p. 142, § 6. Chicago & A. R. Co. v. Murphy, 198 Ill. 462, 64 N. E. 1011.

83. Under Ill. Rev. St. c. 7, § 6, par. 9, where special demurrer would have been sustained because of want of allegation in suit by administrator of damage to next of kin. Peden v. American Bridge Co., 120 Fed. 523. Under Hurd's Ill. Rev. St. 1899, pp. 142, 143, complaint must not merely be bad on demurrer, but so defective as will not sustain a judgment. Hartrich v. Hawes, 202 Ill. 334, 67 N. E. 13.

84. Under Iowa Code, § 3758, allowing arrest where pleadings fail to state a cause of action, it did not appear from pleadings in suit or injunction bond that injunction suit was still pending, though such was conceded at trial, and arrest denied. Lacey v. Davis [Iowa] 98 N. W. 366. Under Mass. Pub. St. c. 167, § 82, the motion is not allowed for cause existing before verdict, as prior discharge in bankruptcy. Lane v. Holcomb, 182 Mass. 360, 65 N. E. 794. Only reaches defect appearing on face of record proper. McGammon v. Millers' Nat. Ins. Co., 171 Mo. 143, 71 S. W. 150. Not proper way to raise question of sufficiency of the evidence. Com. v. Wickett, 20 Pa. Super. Ct. 350. Matters of defense cannot first be brought into the record by motion in arrest. Vonderhorst Brew. Co. v. Amrhine [Md.] 56 Atl. 833.

85. Judgment arrested within twenty-

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(§ 5) *C. Effect.*—Where final decree entered after judgment has been arrested, it impliedly annuls the arrest.[88]

NON-NEGOTIABLE PAPER.

Any alteration of a promissory note renders it non-negotiable.[89] An uncertainty in amount or a contingency as to the time of payment of a note renders it non-negotiable.[90] Municipal and county warrants are non-negotiable.[91] The term "indorsement," in its technical sense, applies only to negotiable paper,[92] and hence the writing, on the back of a non-negotiable note, of the names of the payees, does not make them liable as "indorsers,"[93] but is equivalent to the making of a new non-negotiable note.[94] Title to a non-negotiable instrument passes by assignment or delivery,[95] and its assignment is binding on the maker, after notice to him.[96] The assignor of a non-negotiable promissory note impliedly warrants that the instrument itself is genuine.[97] A judgment of foreclosure is not res judicata as to the payee and indorsee of a non-negotiable note secured thereby, and a personal judgment can be subsequently acquired against such indorser.[98]

NOTARIES AND COMMISSIONERS OF DEEDS.[99]

A notary forfeits his office by accepting an incompatible office, but if he subsequently performs acts as a notary he does so as an officer de facto and such acts,

four hours by court sua sponte. Uncas Paper Co. v. Corbin [Conn.] 55 Atl. 165.

86. Error of law based on interpretation of record may be corrected by trial court where motion to arrest made. Reed v. Nicholson, 93 Mo. App. 29.

87. Denial of motion must be excepted to. Parsons v. Clark & Co., 98 Mo. App. 28, 77 S. W. 582.

88. Johnson v. Johnson, 30 Colo. 402, 70 Pac 692.

89. Bailey v. Gilman Bank, 99 Mo. App. 571, 74 S. W. 874. Replevin cannot be maintained to recover negotiable instrument unpaid, although, by reason of an immaterial alteration, suit cannot be maintained thereon. Bailey v. Gilman Bank, 99 Mo. App. 571, 74 S. W. 874. See, also, Negotiable Instruments.

90. An instrument in the form of a note and promising to pay a certain sum with interest "and taxes," held not to be a promissory note, the amount being uncertain, and that consequently a person indorsing it in blank did not become liable as an indorser under the statutes of Connecticut [Gen. St. § 1860]. Smith v. Meyers, 207 Ill. 126, 69 N. E. 858. An option to pay before maturity. Lowell Trust Co. v. Pratt, 183 Mass. 379, 67 N. E. 363. See, also, Negotiable Instruments.

91. Germania Bank v. Trapnell, 118 Ga. 578. See, also, Negotiable Instruments.

92. Lowell Trust Co. v. Pratt, 183 Mass. 379, 67 N. E. 363.

93. Where the payees of a non-negotiable note wrote their names on its back and passed it to plaintiff he could not recover against them on a declaration based on an alleged contract of indorsement. Lowell Trust Co. v. Pratt, 183 Mass. 379, 67 N. E. 363. Parol evidence is admissible to show the relation of persons, writing their names on the back of a non-negotiable note, to the holder thereof. Young v. Sehon, 53 W. Va. 127. And where such note does not represent an existing debt, one who loans money on it may, in the absence of an agreement to the contrary, of which he has notice, treat those whose names are on the back of it as copromisors or guarantors at his election. Young v. Sehon, 53 W. Va. 127. In Indiana, the indorsee of a non-negotiable note may recover against the indorsers, if he has exercised due diligence. Huston v. Fatka, 30 Ind. App. 693, 66 N. E. 74. When the maker of a non-negotiable instrument moved out of the state after it was indorsed and assigned by the payee, the holder could recover on the indorsement without attempting to pursue the maker. Id.

94. The indorser in such case is liable on a new promise to pay, which the party to whom the note is passed is entitled to fill in over the blank indorsement. Lowell Trust Co. v. Pratt, 183 Mass. 379, 67 N. E. 363.

95. Johnson v. Hibbard [Utah] 75 Pac. 737. Municipal warrants. Germania Bank v. Trapnell, 118 Ga. 578. The delivery of a non-negotiable note to plaintiff, for a valuable consideration and in good faith, operates as an equitable assignment of the same. Johnson v. Hibbard [Utah] 75 Pac. 737.

96. Payment by the maker of a non-negotiable note to an attaching creditor of the assignor, after notice of the assignment, does not discharge him from liability, and is no defense in an action against him by the assignee. Johnson v. Hibbard [Utah] 75 Pac. 737.

97. Bailey v. Gilman Bank, 99 Mo. 571, 74 S. W. 874.

98. Huston v. Fatka, 30 Ind. App. 693, 66 N. E. 74.

99. As to particular duties and powers see, also, Acknowledgment, 1 Curr. L. p. 17; Depositions, 1 Curr. L. p. 917, and Negotiable Instruments, 2 Curr. L. 1013.

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done before removal from office, are valid as to persons other than himself.[1] An officer, acting as notary, cannot recover fees as such from the city in the absence of an appropriation.[2]

A notary cannot act outside the territory for which he was appointed,[3] and his jurisdiction is a matter of judicial knowledge,[4] but the regularity of his acts will be presumed.[5]

Although as a general rule an acknowledgment is void when the notary taking the same is a beneficiary under the grant, the fact that the acknowledgment of a mortgage deed to a corporation is taken by a notary who is a stockholder therein does not invalidate the deed.[6] Nor will a relationship between the grantee and the notary, created by marriage or employment, destroy the validity of an acknowledgment taken by the latter.[7]

The acts of a notary are ministerial,[8] and accordingly a statute authorizing the notary to punish witness for contempt is unconstitutional as an attempt to vest judicial powers in ministerial officers.[9]

Failure to discharge any duty assumed in the capacity of a notary is a breach of his bond.[10] And his liability is not limited to misconduct. It extends to acts done in good faith but not in compliance with the statutory requirements.[11] The statute of limitations does not begin to run, in the case of a notary fraudulently certifying an acknowledgment, until the injured party has discovered, or reasonably should have discovered, the fraud.[12]

NOTICE AND RECORD OF TITLE.

§ 1. Bona Fide Purchasers and the Doctrine of Notice (1053).
§ 2. The Recording Acts and Constructive Notice Thereunder (1057).
§ 3. Recording Will or Probate Thereof (1059).
§ 4. Recording or Registration of Chattel Mortgages and Bills of Sale (1059).
§ 5. Registration and Certification of Land Titles Under the Torrens System (1061).

§ 1. *Bona fide purchasers and the doctrine of notice.*—Independently of the

1. Old Dominion Building & Loan Ass'n v. Sohn [W. Va.] 46 S. E. 222. In New York, a notary may be removed from office for accepting and using a free pass from a sleeping car company, that being a violation of the Constitution of New York, which forbids public officers from using any free pass or free transportation. People v. Wadhams, 176 N. Y. 9, 68 N. E. 65.

2. A salaried employe of department of public charities was appointed notary public and prepared affidavits to lunacy papers taken before him by department and city officials. Held, he could recover nothing where the city had made no appropriation to pay such fees. Spencer v. New York, 42 Misc. [N. Y.] 284.

3. Evans v. Dickinson [C. C. A.] 114 Fed. 284, construing McClellan's Dig. [Fla.] p. 791, § 1.

4. Russell v. Huntsville R. Light & Power Co., 137 Ala. 627. That a person taking an affidavit was a notary in a certain county. Black v. Minneapolis, etc., R. Co. [Iowa] 96 N. W. 984.

5. The court will presume that the person whose name appears to the jurat was a notary, that he acted within the county of his jurisdiction, that an affidavit was sworn to before or in the presence of the notary signing the jurat, and that it was sworn to by the subscriber of the affidavit. Black v. Minneapolis & St. L. R. Co. [Iowa] 96 N. W. 984.

6. Read v. Toledo Loan Co., 68 Ohio St. 280, 67 N. E. 729. Stockholder and president. Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680. Contra. "A stockholder in a corporation, who is likewise a notary, has such a direct, beneficial interest in the corporation as to disqualify him from taking an acknowledgment of an instrument running to it." Chadron Loan & Bldg. Ass'n v. O'Linn [Neb.] 95 N. W. 868.

7. Banking House of A. Castetter v. Stewart [Neb.] 98 N. W. 24. See, also, topic Acknowledgment, 1 Curr. L. p. 18.

8. Read v. Toledo Loan Co., 68 Ohio St. 280, 67 N. E. 729; Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680.

9. Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597.

10. Stork v. American Surety Co., 109 La. 713. The bondsmen of a notary are liable for his fraud in effecting a notarial cancellation of a mortgage. Receipt for fees as notary shows that he acted in that capacity and not as attorney. Id. Negligently accepting insufficient identification of grantor. State v. Grundon, 90 Mo. App. 266.

11. Thus if, in taking an acknowledgment, the notary relies on a mere introduction by a friend or acquaintance of the grantor, he

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recording acts a bona fide purchaser without notice, takes the land clear of equities of third persons,[13] but this rule applies only to grantees of the legal title.[14] By the recording acts the record of a conveyance is constructive notice to the world, and conversely, conflicting conveyances operate in the order of recordation.[15] The statutes, however, give immunity against prior conveyances, only to grantees or mortgagees in good faith. In other words, the subsequent grantee or mortgagee must be free not only from the constructive notice provided by the record,[16] but he must be a bona fide purchaser within the common law significance of the term. Caveat emptor applies to judicial and execution sales,[17] and to sales by fiduciaries.[18] To constitute one a bona fide purchaser within this rule he must take, (a) in good faith, (b) for a valuable consideration, (c) without notice or knowledge,[19] though in a few states the statutes do not require good faith and admit of no substitute for the record.[20]

Valuable consideration.—Purchase of land subsequent to an unrecorded deed must be for a valuable consideration,[21] and actual payment, before receipt of no-

assumes the risk of any mistake, in the event of which he is liable on his bond for any falsity in the certificate. Dictum, that if the grantee make the introduction he is estopped from setting up the notary's negligence. State v. Grundon, 90 Mo. App. 266.

12. State v. Hawkins [Mo. App.] 77 S. W. 98.

13. Gordon v. Cox [Tenn.] 75 S. W. 925. The lapse of forty years, death of all the parties to the deed and payment of a valuable consideration, held to raise a presumption of good faith. Dean v. Gibson [Tex. Civ. App.] 79 S. W. 363. This presumption held not overcome by evidence of a sale from an administratrix to her brother-in-law, and that the parties were well acquainted, it not appearing that their relations were intimate. Id. A purchaser from one who has obtained title by fraud must show that he is a bona fide purchaser for value. Heyman v. Swift, 91 App. Div. [N. Y.] 352. A mortgage acquired in good faith is not subject to a secret equity. Dill v. Hamilton, 118 Ga. 208.

14. One purchasing an equitable title is not a bona fide purchaser like one getting the legal title, and takes title subject to all existing rights. Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501. One purchasing from the grantee of a bond to convey title, which recites a consideration paid, is a purchaser in good faith. Title prior to heirs of grantee of bond. Stipe v. Shirley [Tex. Civ. App.] 76 S. W. 307.

15. Where two mortgages are executed to secure portions of the same loan, one first recorded has priority, the mortgages having passed into the hands of third persons. Kohn v. Warner, 105 Ill. App. 321.

16. See, post, § 2.

17. Flanary v. Kane [Va.] 46 S. E. 312. A purchaser must be held to have knowledge of a patent nullity in an order of sale. Rocques v. Levecque, 110 La. 306. Delivery of suspending bond to a sheriff operates as a suspension of a sale, and a purchaser at a sale acquires no title. August v. Gilmer, 53 W. Va. 65. Purchaser at judicial sale without notice of assignment of a mortgage to one not a party to the proceedings does not take subject to such mortgage. Gillian v. McDowell [Neb.] 92 N. W. 991. Purchasers at a judicial sale are protected against an unrecorded trust deed. Hunton v. Wood [Va.] 43 S. E. 186. A purchaser at an execution sale takes title superior to prior unrecorded deeds, if the lien of the judgment creditor was secured without notice. Hicks v. Pogue [Tex. Civ. App.] 76 S. W. 786. Creditor obtaining judgment and purchasing at a sheriff's sale is a purchaser in good faith. Hendryx v. Evans, 120 Iowa, 310, 94 N. W. 853. An attachment plaintiff purchasing at his own sale takes the lands charged with all the existing rights of third parties though created by parol. Parol trust. Beidler v. Beidler [Ark.] 74 S. W. 13. A deed absolute in form on the records may be shown, by parol, to be a mortgage, and the mortgagee's rights are prior to those of a creditor purchasing at a foreclosure sale, merely crediting the purchase price on his deed. Long v. Fields, 31 Tex. Civ. App. 241, 71 S. W. 774. Inadequacy of bid at execution sale by a grantor is not notice to his grantee of want of title in the judgment creditor. Unrecorded trust deed. Hart v. Gardner, 81 Miss. 650. A purchaser of land from a purchaser under a decree void for want of jurisdiction is not a bona fide purchaser without notice. A purchaser is bound to know the want of jurisdiction and defects of title apparent in documents under which he derives title. Waldron v. Harvey [W. Va.] 46 S. E. 603.

18. Purchasers from persons acting in a fiduciary capacity are subject to the rule of caveat emptor. Trustee. Neary v. Neary [Neb.] 97 N. W. 302. Administration proceedings of an estate do not furnish constructive notice of a sale of land by an administrator. Thompson v. Rust [Tex. Civ. App.] 74 S. W. 924. Caveat emptor applies to purchaser at administrator's sale. Towner v. Rodegeb [Wash.] 74 Pac. 50.

19. See, also, the topic Fraudulent Conveyances, 2 Curr. Law, 116, as to rights of grantor's creditors.

20. Collins v. Davis, 132 N. C. 106.

21. Lloyd v. Simons [Minn.] 95 N. W. 903. Deed given without consideration, void as to creditors whose claims existed at the time of its execution. Gustin v. Mathews [Utah] 70 Pac. 402. A conveyance of land by a creditor, made without consideration and with knowledge on the part of the grantee, is void. Hancock v. Elmer, 63 N. J. Eq. 802.

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tice, is indispensable.[22] A valuable consideration is a fair and reasonable price, according to the common mode of dealing between buyers and sellers.[23] A pre-existing debt is not such a consideration,[24] but surrender of an existing right is.[25] A mortgagee may be a purchaser in good faith and for a valuable consideration, within the meaning of recording acts, though he makes no inquiry as to other mortgages, and though the loan is for a greater amount than the consideration mentioned in the deed transferring title to the mortgagor.[26]

Notice or knowledge.—To take as against a prior deed or incumbrance, the purchaser must have no actual knowledge thereof,[27] in person, or by an agent[28] or privy.[29] Knowledge of facts putting on inquiry, is equivalent to knowledge of all

Circumstances surrounding the execution of a deed and the price purported to have been paid may warrant a finding of lack of consideration. $30 paid for land sold the following day at a profit of $500. Bigelow v. Brewer, 29 Wash. 670, 70 Pac. 129. One who does not show that he actually paid any consideration is not a purchaser for value. Kringle v. Rohmberg, 120 Iowa, 472, 94 N. W. 1115. To constitute a bona fide purchaser of real estate, a valuable consideration is necessary; it cannot be nominal, even though it is monetary, as against the equitable owner, and raises an irresistible inference of bad faith. Mackay v. Gabel, 117 Fed. 873.

22. Trice v. Comstock [C. C. A.] 121 Fed. 620; Barstow v. Beckett, 122 Fed. 140.

23. Collins v. Davis, 132 N. C. 106.

24. Land subject to unrecorded trust. Adamson v. Souder, 205 Pa. 498; O'Brien v. Fleckenstein, 86 App. Div. [N. Y.] 140. Taking a mortgage to secure a prior debt does not constitute one a purchaser for value. Stacy v. Henke [Tex. Civ. App.] 74 S. W. 925; Adamson v. Souder, 205 Pa. 498. But a creditor who purchases at an execution sale and merely credits the amount of his bid on the judgment is not a purchaser for value. Hicks v. Pogue [Tex. Civ. App.] 76 S. W. 786.

25. Mechanic's lien. O'Brien v. Fleckenstein, 86 App. Div. [N. Y.] 140. Reservation to a grantor in a deed is a valuable consideration for such deed. Aden v. Vallejo, 139 Cal. 165, 72 Pac. 905.

26. Allison v. Manzke, 118 Wis. 11, 94 N. W. 659.

27. Mortgage. Bigelow v. Brewer, 29 Wash. 670, 70 Pac. 129. Equity. Hogg v. Frazier, 24 Ky. L. R. 930, 70 S. W. 291. Contract of sale. Hunter v. McDevitt [N. D.] 97 N. W. 869. Defective execution sale. Day v. Johnson [Tex. Civ. App.] 72 S. W. 426. A purchaser of a mortgage and note, who knows of a claim by the mortgagor that it was obtained by fraud, is not a bona fide holder. Brown v. Holden, 120 Iowa, 191, 94 N. W. 482. A deed made in anticipation of insolvency, which fact is known to the grantee, is not taken bona fide. Owen v. Foley, 30 Tex. Civ. App. 86, 69 S. W. 811. An unrecorded deed takes precedence over one taken with actual notice of such deed (Blair v. Whittaker, 31 Ind. App. 664, 69 N. E. 182); but a mortgage deed in which a wife has joined will take priority over a resulting trust in her, even if mortgagee has actual notice of the trust (Fonda v. Gibbs [Vt.] 56 Atl. 91).

Actual notice. Purchaser held to have actual notice. Buchholz v. Leadbetter, 11 N. D. 473, 92 N. W. 830; Saunders v. King, 119 Iowa, 291, 93 N. W. 272. Possession by a grantee of unrecorded deed. Roberts v. Decker [Wis.] 97 N. W. 519. Knowledge of mutual mistake between grantor and grantee. Fond du Lac Land Co. v. Meiklejohn, 118 Wis. 340, 95 N. W. 142. Tax lien. Equitable Trust Co. v. Omaha [Neb.] 95 N. W. 650; Omaha Sav. Bank v. Omaha [Neb.] 95 N. W. 593. Unrecorded lien. Michigan Trust Co. v. Red Cloud [Neb.] 92 N. W. 900. Unrecorded conveyance. Perry v. Trimble, 25 Ky. L. R. 725, 76 S. W. 343. Prior mortgage. Sanely v. Crapenhoft [Neb.] 95 N. W. 352. Notice in deed itself. Blakely v. Ft. Lyon Canal Co. [Colo.] 73 Pac. 249; Williamson v. Baugh [Ark.] 76 S. W. 423. A purchaser, who is also a surveyor of lands which are acquired by survey, is charged with notice of survey made for a third party made by him. Bryant v. Main, 25 Ky. L. R. 1242, 77 S. W. 680. Notice to a party, actual or constructive, in a particular transaction of a fact which exempts a defendant from liability in that transaction, is notice in all subsequent transactions of the same character between the same parties. Webb v. Hancock Mut. Life Ins. Co. [Ind.] 69 N. E. 1006. In a foreclosure suit, the burden is on defendant to prove knowledge by the mortgagee of facts exempting the mortgagee from liability. Id. A purchaser, with notice of a prior deed delivered to a third person for delivery to the grantee at the grantor's death, cannot attack the fiction of relation which carries acceptance by the grantee back to the date of the delivery by the grantor. Emmons v. Harding [Ind.] 70 N. E. 142.

28. Notice to an agent is notice to his principal (Schreckhise v. Wiseman [Va.] 45 S. E. 745); but not unless acquired in that particular transaction, or of such a precise and particular nature that it must be present to his mind (Roderick v. McMeekin, 204 Ill. 625, 68 N. E. 473; Blair v. Whittaker, 31 Ind. App. 664, 69 N. E. 182). Knowledge of agent acquired in particular transaction. Blackwell v. British-American Mortg. Co., 65 S. C. 105. Knowledge acquired by an attorney, years previously, will not be regarded as charging him with notice of a claim on the proceeds of a deed of trust not disclosed by the recorded instrument. Goodyear v. Cook, 131 N. C. 3.

29. Notice to one of several mortgagees is not notice to all. Babcock v. Wells, 25 R. I. 30. Property acquired for benefit of all members of an association, subject to an unrecorded vendor's lien, cannot be acquired by any member of that association without notice of the lien. Mercantile Trust Co. v. Chicago, etc., R. Co. [C. C. A.] 123 Fed. 393. Knowledge of an equitable claim by a mort-

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that such inquiry would have disclosed,[30] and actual possession of the land by a third person is always deemed to put a purchaser on inquiry as to his interest.[31] A possession held jointly with another is not such a possession as is exclusive, or operates as notice, or to excite inquiry,[32] unless the possession is apparently consistent with the record title,[33] but the notice implied from possession does not extend beyond the land actually occupied.[34] The possibility of discovering the de-

gagee would not affect the claim of his assignee who had no notice of such claim. Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680.

30. Webb v. Hancock Mut. Life Ins. Co. [Ind.] 69 N. E. 1006; Parker v. Parker [N. J. Eq.] 56 Atl. 1094. An incongruity in the title apparent on the face of the record is sufficient to put a purchaser on inquiry. Id. The recital of a grossly inadequate consideration has often been held to put a purchaser on further inquiry, or charge him with notice of fraud. Webb v. Hancock Life Ins. Co. [Ind.] 69 N. E. 1006. Exclusive possession of a wife and information of her claim. Allen v. Moore, 30 Colo. 307, 70 Pac. 682; Beebe v. Wisconsin Mortg. Loan Co., 117 Wis. 328, 93 N. W. 1103. Conversations about a prior deed put upon inquiry. Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803. Inadequate price. Barstow v. Beckett, 122 Fed. 140. Knowledge of a levy of sequestration puts a subsequent attaching creditor upon inquiry. Cassidy v. Willis [Tex. Civ. App.] 78 S. W. 40. Knowledge of such facts as would put a prudent man upon inquiry, held evidence only of actual knowledge, but is not the same as actual knowledge. White v. Million, 102 Mo. App. 437, 76 S. W. 733. Thus irregularities of record e. g. a mortgage, illegal on its face, recorded in a chain of title. Lombard v. La Dow [C. C. A.] 126 Fed. 119. Deed state of property subject to a lease puts purchaser on inquiry as to terms of such lease, though unrecorded. Sweet v. Henry, 175 N. Y. 268, 67 N. E. 574. Inconsistency between mortgage record and discharge record puts purchaser upon inquiry. Scott v. Hay [Minn.] 97 N. W. 106. Omission of a necessary word in a deed puts purchaser upon inquiry as to his grantor's title. Word "before" or "after" omitted (O'Mahoney v. Flanagan [Tex. Civ. App.] 78 S. W. 245), or docket entries regarding a judgment constitute such notice (Patton v. Cooper, 132 N. C. 791). An intending purchaser who sees an act done, which is plainly done in the assertion of some right, is presumed to know such facts as he might have learned upon inquiry. Prior deed unrecorded but grantee putting up a structure. Atlantic City v. New Auditorium Pier Co., 63 N. J. Eq. 644. Possession of a co-tenant. Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042. Construction work by a railroad. Ill. Southern R. Co. v. Borders, 201 Ill. 459, 66 N. E. 382.

31. Thompson v. Borg [Minn.] 95 N. W. 896; English v. Rainear [N. J. Eq.] 55 Atl. 41; Blair v. Whittaker, 31 Ind. App. 664, 69 N. E. 182; Peterson v. Phila. Mortg. & Trust Co. [Wash.] 74 Pac. 585; Millard v. Wegner [Neb.] 94 N. W. 802; Baldwin v. Sherwood, 117 Ga. 827; Gray v. Zellmer, 66 Kan. 514, 72 Pac. 228; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501; Bryant v. Main, 25 Ky. L. R. 1242, 77 S. W. 680; Johnson v. Fluetsch, 176 Mo. 452, 75 S. W. 1005; Linder v. Whitehead, 116 Ga. 206. Possession of grantee by parol. Peery v. Elliott [Va.] 44 S. E. 919. Possession of a tenant. Schneider v. Mahl, 82 N. Y. Supp. 27; McCormick v. McCormick Harvesting Mach. Co., 120 Iowa, 593, 95 N. W. 181; Randall v. Lingwall [Or.] 73 Pac. 1. Joint occupancy of land by husband and wife is actual notice of her claim. Walker v. Neil [Ga.] 45 S. E. 387. Possession of obligee of a bond to convey. Hawley v. Hawley [Or.] 73 Pac. 3. Possession by a co-tenant. Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042. Occupancy by one of two joint owners. Truth Lodge No. 213, A. F. & A. M. v. Barton, 119 Iowa, 230, 93 N. W. 106. Knowledge that a mortgagor was a married man when he acquired title to premises in 1896, did not charge mortgagee with knowledge that the marriage relation continued to exist in 1900. Webb v. John Hancock Mut. Life Ins. Co. [Ind.] 69 N. E. 1006. Knowledge of mortgagee that mortgagors were husband and wife, that property had been conveyed to them as tenants in common two years before, and that the husband, three days before making a loan, conveyed to his wife through a trustee, for a consideration of $1, the property having a loan value of $4,000, held to put the mortgagee on inquiry so as to charge it with knowledge that the transfer was an evasion of the statute prohibiting married women making contracts of suretyship. Id. Fact held to show that a mortgage did not attach to a portion of the premises which a purchaser had entered into possession of under a contract of sale. Williams v. Spitzer, 203 Ill. 505, 68 N. E. 49.

32. Being on the premises, setting out shrubbery, superintending the construction of a cellar, or cleaning windows. Roderick v. McMeekin, 204 Ill. 625, 68 N. E. 473.

33. Wharf remaining on property after expiration of franchise. Aden v. Vallejo, 139 Cal. 165, 72 Pac. 905. Presence upon land of a party having no recorded claim together with owner of record is not constructive notice of such claim. Roderick v. McMeekin, 204 Ill. 625, 68 N. E. 473. Where one who has been a tenant of a grantor remains as tenant of a grantee, such possession does not constitute notice of a conveyance. Stockton v. Nat. Bank of Jacksonville [Fla.] 34 So. 897. Possession of a grantor of a recorded deed is not notice to a purchaser from the grantee of secret equities reserved. Agreement to reconvey. Hockman v. Thuma [Kan.] 75 Pac. 486. The residence upon land of children having a secret equity with their father having the legal title is not notice of such equity to a purchaser. Goodwynne v. Bellerby, 116 Ga. 901. Possession by grantee's widow is not notice to one claiming under a person to whom grantee and his wife had conveyed. Gray v. Lamb, 207 Ill. 258, 69 N. E. 794.

34. Five acres fenced in. Baxley v. Baxley, 117 Ga. 60.

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fect of title is not sufficient, the test being whether reasonable prudence demanded such inquiry as would disclose it.[35] The grantee of an innocent purchaser takes clear of equities, though he himself knew thereof.[36] An examination of the records after being put upon inquiry is sufficient to constitute one a bona fide purchaser.[37]

§ 2. *The recording acts and constructive notice thereunder. Eligibility to record.*—The recording acts require that a deed be executed with certain formalities.[38] A will is not such a muniment of title as is required to be registered in the registry of deeds,[39] and a decree transferring title need not be recorded.[40] A mortgage is to be regarded as a conveyance within recording acts.[41]

Necessity.—Record is not essential to the validity of a conveyance as between the parties,[42] but an unrecorded deed is void as against the recorded deed of a subsequent purchaser or mortgagee in good faith.[43] In some states a specified time is allowed to record conveyances, after which they become void as to subsequent purchasers.[44]

Sufficiency and effect.—The assignee of a mortgage may rely on its priority as disclosed by the record though a subsequently recorded mortgage bears an earlier date.[45] A deed recorded in the wrong registry is ineffectual except between the parties thereto.[46] The decisions are in conflict as to the effect of failure to index a rec-

35. Cahill v. Seitz, 86 N. Y. Supp. 1009.

36. Garner v. Boyle [Tex. Civ. App.] 77 S. W. 987.

37. Possession of one of several heirs. Stortha v. Chapline [Ark.] 70 S. W. 465.

38. Acknowledgment. McKenzie v. Beaumont [Neb.] 97 N. W. 225. Witnesses not present when grantor signed. Baxley v. Baxley, 117 Ga. 60. A deed which has neither been proved nor acknowledged but which has been recorded for the period of one year shall be deemed to be notice to subsequent purchasers. Williams v. Butterfield [Mo.] 77 S. W. 729.

39. McLavy v. Jones, 31 Tex. Civ. App. 354, 72 S. W. 407.

40. A final decree of the court in a suit for specific performance of a contract to convey, operating as a transfer of the equitable title to the land, is not a conveyance or contract to convey within the registration act [Acts 1885, p. 233, c. 147, § 1). Skinner v. Terry [N. C.] 46 S. E. 517.

41. Rev. St. 1898, §§ 2241, 2242. Allison v. Manzke, 118 Wis. 11, 94 N. W. 659.

42. Blair v. Whittaker, 31 Ind. App. 664, 69 N. E. 182. Under a statute of North Carolina, conveyances of land take effect only from the date of registration and no notice will supply the want of registration. Collins v. Davis, 132 N. C. 106.

43. Gillespie v. Buffalo, R. & P. R. Co., 204 Pa. 107; Whalon v. North Platte Canal & Colonization Co. [Wyo.] 71 Pac. 995. A prior record of one of two mortgages of even date is evidence of its superiority to the other mortgage. Kohn v. Warner, 105 Ill. App. 321. A prior unrecorded mortgage recorded before sheriff's deed obtained at an execution sale is recorded will take priority. Hendryx v. Evans, 120 Iowa, 310, 94 N. W. 853. Where a statute provides that every conveyance of real estate must be recorded within five days, else it is void against a subsequent purchaser whose conveyance shall be duly recorded, the first of two deeds to be recorded after the expiration of five days will take priority. McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795. 74 Pac. 491. Where an unrecorded deed by A was surrendered and a deed from A's grantor taken instead, a purchaser from A before such second deed is a bona fide purchaser. Fullenwider v. Ferguson, 30 Tex. Civ. App. 156, 70 S. W. 222.

Deed made before registry act is not rendered invalid by that act and leaves a subsequent purchaser's title open to reasonable doubt. Felix v. Devlin, 90 App. Div. [N. Y.] 103. Prior unrecorded mortgage. Coolidge v. Schering, 32 Wash. 557, 73 Pac. 682. Unrecorded declaration of trust. Home Sav. & State Bank v. Peoria Agricultural & Trotting Soc., 206 Ill. 9, 69 N. E. 17; Hunton v. Wood [Va.] 43 S. E. 186. A reservation of vendor's lien not embodied in the deed as required by Ky. St. 1899, § 500, or otherwise recorded is unavailable against bona fide purchasers. Hurst v. Hurst, 25 Ky. L. R. 714, 76 S. W. 325. Unrecorded discharge of part of mortgage not good against assignee. Gibson v. Thomas, 85 App. Div. [N. Y.] 243. Unrecorded deeds. Waggoner v. Dodson [Tex. Civ. App.] 71 S. W. 400; Harrison v. Ottman, 111 La. 730; Pierson v. McClintock [Tex. Civ. App.] 78 S. W. 706. One holding a mortgage of a corporation who neglects to record it cannot dispute the authority of a corporate officer to make a transfer of the property to a bona fide purchaser and assert that his mortgage is a prior lien. Coolidge v. Schering, 32 Wash. 557, 73 Pac. 682.

44. Conveyances void as to subsequent purchasers unless recorded within thirty days. Danner v. Crew, 137 Ala. 617. Under such a statute, a deed not recorded within such time is nevertheless notice from the time of its record. Blackwell v. British-American Mortg. Co., 65 S. C. 105. If neither of two deeds is recorded within the time limited, that first recorded takes precedence. McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491.

45. There is no presumption that the mortgage was actually delivered on the day of its date [Gen. St. N. J. p. 2106, § 22]. Coonrod v. Kelly [C. C. A.] 119 Fed. 841.

46. Record in wrong state. Phillips v.

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ord.[47] The record is, as a general proposition, constructive notice to creditors and all persons claiming an interest[48] of all that appears on its face, not only of the making of the recorded conveyance[49] but of matters therein stated or implied.[50] A quitclaim deed does not carry on its face notice of a defective title.[51] A party may rely on a record made by mistake,[52] but on the other hand if inquiry disclose facts inconsistent with the record, he may be justified in acting thereon.[53] Where an absolute deed is in fact given as a mortgage, its record as an absolute deed instead of as a mortgage gives it no priority over a mortgage prior of execution but later of rec-

Watuppa Reservoir Co., 184 Mass. 404, 68 N. E. 848. If land lies in a section of a county which is later set apart as a new county, it is not necessary to have conveyances recorded in the original county recorded in the new county. Bivings v. Gosnell, 133 N. C. 574. A mortgage by several mortgagors residing in different counties is valid if filed in only one county against subsequent mortgagees filing a mortgage in the same county. Russell v. St. Mart, 83 App. Div. [N. Y.] 543. A mortgage of real and personal property recorded with mortgages of realty but not with mortgages of personalty is invalid as to execution creditors. Hillebrand v. Nelson [Neb.] 95 N. W. 1068; Knickerbocker Trust Co. v. Penn Cordage Co. [N. J. Eq.] 55 Atl. 231. Record of a deed in a county other than that in which the land conveyed lies is not constructive notice. De Lassus v. Winn, 174 Mo. 636, 74 S. W. 635. Record of a certified copy in the right registry puts the burden on a subsequent purchaser. Moody v. Ogden, 31 Tex. Civ. App. 395, 72 S. W. 253.

47. A deed spread on the records is properly recorded though not indexed. Greenwood L. & G. Ass'n v. Childs [S. C.] 45 S. E. 167; Agurs v. Belcher, 111 La. 378. Contra, Koch v. West, 118 Iowa, 468, 92 N. W. 663; Chippewa River Land Co. v. Gates Land Co., 118 Wis. 345, 94 N. W. 37. Under a statute requiring indexing of judgments under defendants' names, it is sufficient if the word "Same" is used under a defendant's name to indicate a second judgment. Fulkerson v. Taylor [Va.] 46 S. E. 309. Right of judgment creditors is prior to that of a purchaser from the debtor who fails to record his deed. Flanary v. Kane [Va.] 46 S. E. 312. The record of a deed in which the clerk neglects to copy the acknowledgment is not constructive notice to subsequent purchasers. Dean v. Gibson [Tex. Civ. App.] 79 S. W. 863.

48. Registration is constructive notice only to creditors and subsequent purchasers or persons claiming some lien on the property. Embry v. Galbreath [Tenn.] 75 S. W. 1016. Grantor not charged with notice of alteration of deed after delivery but before record. Gill v. Fugate, 25 Ky. L. R. 1367, 78 S. W. 188.

49. Record of mortgage is constructive notice of a lien without record of a subsequent assignment thereof. Perry v. Fisher, 30 Ind. App. 261, 65 N. E. 935; Heintz v. Klebba [Neb.] 98 N. W. 431. Quitclaim deed from one whom the record showed to be only a life tenant. Chicago, P. & St. L. R. Co. v. Vaughn, 206 Ill. 234, 69 N. E. 113. Mortgage discharged by but one of two mortgagees. Howe v. White [Ind. App.] 67 N. E. 203. Where judgment lien is acquired before a prior deed is recorded and without notice, a purchaser of the land at an execution sale will not be affected by notice given on the day of sale. Danner v. Crew, 137 Ala. 617. No one can be an innocent purchaser of real estate where there are open and obvious defects in a record title. Grant from a trustee. Neary v. Neary [Neb.] 97 N. W. 302.

50. Reference in a recorded deed to other deeds puts purchasers on inquiry in respect thereto. Mitchell v. D'Olier, 68 N. J. Law, 375, 59 L. R. A. 949. Where a conveyance is made subject to a mortgage, and recorded, it is not necessary that subsequent conveyances be made expressly subject. Foster v. Bowles, 138 Cal. 346, 71 Pac. 494, 649. A purchaser of real estate is required to take notice of conditions and recitals in deeds of record in his chain of title which affect his title. Webb v. Hancock M. L. Ins. Co. [Ind.] 69 N. E. 1006. Recorded assignment of mortgage is notice to one purchasing of the assignee of an assumption of taxes therein. Assignment of mortgage. Anglo-Cal. Bank v. Eudey [C. C. A.] 123 Fed. 39. Constructive notice of a deed is not constructive notice of a decree not referred to in such deed. Cushing v. Schoeneman [Neb.] 96 N. W. 346. Bond to convey land does not impart notice to purchaser that obligee in bond stands in relation of mortgagor to the person holding the bond. Holmes v. Newman [Kan.] 75 Pac. 501. Constructive notice resulting from the recording of mortgages is only notice of the actual transaction, and a prior recorded mortgage which is void as to third parties does not constitute notice to subsequent parties. Baltimore H. G. Brick Co. v. Amos, 95 Md. 571. Knowledge of fraud by a grantor in one transaction held knowledge of fraud in a similar one. Warner v. Warner, 30 Ind. App. 578, 66 N. E. 760. Notice of a claim in fee is not constructive notice of a mortgage held by the same claimant. Thompson v. Lapsley [Minn.] 96 N. W. 788.

51. Babcock v. Wells, 25 R. I. 30; Boynton v. Haggart [C. C. A.] 120 Fed. 819.

52. Purchaser may rely upon a recorded discharge of mortgage executed by mistake if he has no actual knowledge. Discharge of 50 acres instead of 27. Perry v. Fries, 90 App. Div. [N. Y.] 484. A subsequent purchaser is protected against a mistake in the amount of the mortgage as recorded, in the absence of other knowledge. Osborn v. Hall, 160 Ind. 153, 66 N. E. 457.

53. If an undischarged mortgage appears on the record and upon inquiry, the mortgagee states that it has been paid purchasers for value are not bound by an unrecorded assignment of such mortgage unless they have actual knowledge of it. Artz v. Yeager, 30 Ind. App. 677, 66 N. E. 917.

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ord.[54] It is only as to matters properly subject of record that the record is constructive notice.[55] The record of a deed neither party to which appears in the recorded chain of title is no notice to subsequent purchasers.[56] A record insufficiently describing the land is not notice.[57]

Recording officers and administration of the acts.—Charges made by a register acting outside his official capacity need not be accounted for by him to the state.[58] An act providing for salary to be paid registers in counties of a certain size in lieu of fees not contrary to the Wisconsin constitution.[59] Under § 828 Rev. St. and § 2 of Act of Aug. 1, 1888, a person may examine indices of records kept by the clerk of circuit and district courts even though it is provided that the clerk may charge a fee for searching the records.[60] The special term cannot tax register's fees.[61]

§ 3. *Recording will or probate thereof.*—Record of a will is notice of devisee's title if properly filed though not in the county where devised land lies.[62] A will probated and appearing of record may operate as notice of the lack of power of an executor to vest title in the mortgagor.[63]

§ 4. *Recording or registration of chattel mortgages and bills of sale.*—This subject is specifically treated elsewhere.[64] It is provided by statute in most states that chattel mortgages, conditional sales, and the like,[65] are void as against creditors and subsequent purchasers or mortgagees in good faith[66] unless recorded[67] or

54. Hoschke v. Hoschke, 89 App. Div. [N. Y.] 125.

55. Purchaser not charged with constructive notice because of record of irregular collateral matters. Violation of trust by grantor. Albany Exch. Sav. Bank v. Brass, 171 N. Y. 693, 64 N. E. 1118.

56. Boynton v. Haggart [C. C. A.] 120 Fed. 819; Waggoner v. Dodson, 96 Tex. 415, 73 S. W. 517; Thompson v. Rust [Tex. Civ. App.] 74 S. W. 924; Stacy v. Henke [Tex. Civ. App.] 74 S. W. 925. Deed to the grantee of a grantee whose deed had never been recorded. Fullenwider v. Ferguson, 30 Tex. Civ. App. 156, 70 S. W. 222. By statute in Kentucky if the deed under which a grantor claims title is not recorded, the record of a deed given by him is not constructive notice to a purchaser. Goosby v. Johnson, 24 Ky. L. R. 610, 69 S. W. 697. A recorded deed from one not having title but who later acquires it is notice to a subsequent mortgagee. Bernardy v. Colonial & U. S. Mortg. Co. [S. D.] 98 N. W. 166. A recorded deed by one who is a stranger to the record title is not notice; accordingly where one conveys without title, and subsequently acquires title and conveys it, the title of the second grantee is superior to the equity of the first grantee to have the after acquired title accrue to him. Wheeler v. Young [Conn.] 55 Atl. 670. Record of conveyance by one holding title bond is notice to purchasers from vendor. Lewis v. Sizemore, 25 Ky. L. R. 1354, 78 S. W. 122. Mortgagee in a mortgage made before the mortgagor acquired title may be a purchaser in good faith. Allison v. Manzke, 118 Wis. 11, 94 N. W. 659.

57. Simmons v. Hutchinson, 81 Miss. 351.

58. Searching records for matters required by rule of excise board to be certified. State v. Holm [Neb.] 97 N. W. 821.

59. Verges v. Milwaukee County, 116 Wis. 191, 93 N. W. 44.

60. Bell v. Com. Title Ins. & Trust Co., 189 U. S. 131, 47 Law. Ed. 741.

61. Under N. Y. Code Civ. Pr. § 3287. In re Howe, 66 App. Div. [N. Y.] 7.

62. Dalmazzo v. Simmons, 25 Ky. L. R. 1532, 78 S. W. 179.

63. Neary v. Neary [Neb.] 97 N. W. 302.

64. See Chattel Mortgages, § 6, 1 Curr. Law, p. 518.

65. Bill of sale is not analogous to a chattel mortgage and need not be recorded under statutes mentioning only chattel mortgages. Stuart v. Mitchum, 135 Ala. 546. Assignment of a conditional bill of sale need not be recorded. English v. Hill, 116 Ga. 415. By statutes of Maine, an agreement that personal property delivered to another shall remain the property of the seller until paid for is not valid except between the parties unless recorded. Emerson Co. v. Proctor, 97 Me. 360. The statute of New Jersey requiring the recording of contract of conditional sale does not apply, where the property and the parties are without the state, and the contract does not contemplate the removal of the property to the state. Hirsch v. Leatherbee Lumber Co. [N. J. Law] 55 Atl. 645. The statute covers all instruments intended to operate as mortgages. Dunham v. Cramer, 63 N. J. Eq. 151; Clark v. Bright, 30 Colo. 199, 69 Pac. 506; Chitwood v. Lanyon Zinc Co., 93 Mo. App. 225. Lease binding property of lessee for payment of rent must be recorded. Feller v. McKillip, 100 Mo. App. 660, 75 S. W. 379.

66. The instrument is not void as against one who takes the mortgaged property under a mistaken belief that it is his own. Drumm-Flato Commission Co. v. First Nat. Bank, 65 Kan. 746, 70 Pac. 874. Under a statute which provides that an unrecorded mortgage is void as to third parties, an attaching sheriff is not a party within the meaning of the statute. Thompson v. Dyer [R. I.] 55 Atl. 824. An unrecorded mortgage has been held good as against an assignee for benefit of creditors. In re Thompson, 122 Fed. 174. But see Clark v. Bright, 30 Colo. 199, 69 Pac. 506. One who buys at attachment sale is not a purchaser within the Texas statute. Scott v. Cox, 30 Tex. Civ. App. 190,

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accompanied by a visible and continuing change of possession.[68] In Georgia neither requirement obtains.[69] Chattel mortgage must be recorded in the county in which the mortgagor resides even though the chattels are in another county,[70] and if property is located in a different county then in that county also.[71] In some states, however, it may be recorded in either county.[72] Statutes frequently impose a time limit for the record of chattel mortgages.[73] A chattel mortgage or bill of sale if properly recorded[74] and valid,[75] is constructive notice of all that appears from the face of the record,[76] but if the recorded mortgage does not adequately identify the property, it is not notice.[77]

70 S. W. 802. Only a person having a lien or interest can claim the benefit of the statute. Allcock v. Loy, 100 Ill. App. 573.

67. Folsom v. Peru Plow & Implement Co. [Neb.] 95 N. W. 635; Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113; Anderson v. Adams, 117 Ga. 919, 43 S. E. 982; Baker v. Becker [Kan.] 72 Pac. 860. Unrecorded chattel mortgage has been held void even as to creditors with notice. Johnson v. Spaulding [Neb.] 95 N. W. 808; Hillebrand v. Nelson [Neb.] 95 N. W. 1068.

68. McFarlan Carriage Co. v. Wells, 99 Mo. App. 641, 74 S. W. 878. Unrecorded conditional sale without delivery of possession. Webster Lumber Co. v. Keystone Lumber & Min. Co., 51 W. Va. 545. Change of possession of chattels to constitute notice must be open and notorious. Rice v. Sally, 176 Mo. 107, 75 S. W. 398. Where goods under an unexecuted agreement of sale, remain in the possession of the vendor, one who purchases of the vendee knowing that he has not paid for the goods is put upon inquiry to ascertain whether the vendee is entitled to the goods without payment on delivery. Hirsch v. Leatherbee Lumber Co. [N. J. Law] 55 Atl. 645.

69. In re Williams, 120 Fed. 542.

70. Rice v. Sally, 176 Mo. 107, 75 S. W. 398; Day & C. Lumber Co. v. Mack, 24 Ky. L. R. 640, 69 S. W. 712; Duke v. Duke, 93 Mo. App. 244. Chattel mortgage must be filed in different counties in which each of several mortgagors reside. Russell v. St. Mark, 83 App. Div. [N. Y.] 543. Chattel mortgage may be recorded in the county in which the property is located or in the county in which the mortgagor resides if within the state. Third Nat. Bank v. Blosser, 65 Kan. 859, 70 Pac. 373. One is not bound to search records of another state for chattel mortgages. Syck v. Bossingham, 120 Iowa, 363, 94 N. W. 920.

71. Anderson v. Leverette, 116 Ga. 732. By Civil Code of California, a chattel mortgage embracing articles in several counties is only valid as to articles situated in the county in which such mortgage is recorded. Crops of apples in two counties. Guras v. Porter, 118 Fed. 668.

72. Bank v. Bond, 64 Kan. 346, 67 Pac. 818.

73. Mortgage void as to subsequent purchasers in Indiana unless recorded within 45 days. State Bank v. Backus [Ind. App.] 66 N. E. 475. A chattel mortgage which remains unrecorded for an unreasonable period of time is void though later recorded against creditors subsequent to such record. In re H. G. Andrae Co., 117 Fed. 561. A statutory provision for recording a chattel mortgage "immediately" means with reasonable dispatch and a delay of five days if unexplained does not constitute such immediate record. Hardcastle v. Stiles [N. J. Law] 55 Atl. 104. Under Georgia statute, date when conditional contract fully completed is date of delivery of goods and record within thirty days from that date is binding. In re Gosch [C. C. A.] 126 Fed. 627. An instrument capable of being recorded under statute though not recorded within the time required by such statute is however constructive notice to purchasers after the date of its recording. Blackwell v. British-American Mortg. Co., 65 S. C. 105. Unless contract of conditional sale is recorded within thirty days, the sale is absolute as to subsequent creditors. Georgia. In re Gosch, 121 Fed. 602. On conflicting evidence as to whether the delay was by agreement, the question of validity was held to be for the jury. E. R. Godfrey & Sons Co. v. Citizens' Nat. Bank, 64 Neb. 477, 90 N. W. 239. In Texas, filing forthwith is required and a delay until the next day has been held fatal. Austin v. Welch, 31 Tex. Civ. App. 526, 72 S. W. 881.

74. Void acknowledgment. Farmers' & Merchants' Bank v. Stockdale [Iowa] 96 N. W. 732; Hunton v. Wood [Va.] 43 S. E. 186. Improper execution. Baxley v. Baxley, 117 Ga. 60. But a bill of sale of exempt property which has been recorded need not be acknowledged to be valid against creditors. Heisch v. Bell [N. M.] 70 Pac. 572. If a chattel mortgage is not recorded as required by statute it is invalid no matter what may have occasioned the omission to record. Fault of clerk. Knickerbocker Trust Co. v. Penn Cordage Co. [N. J. Eq.] 55 Atl. 231. If a statute declares a chattel mortgage void unless recorded, it is not sufficient that it was deposited with the clerk. Knickerbocker Trust Co. v. Penn Cordage Co. [N. J. Eq.] 55 Atl. 231. Leaving an instrument with the clerk conditionally is not a record. Gibson v. Thomas, 85 App. Div. [N. Y.] 243. Filing with clerk is sufficient. Improper entry by clerk. Durrence v. Northern Nat. Bank, 117 Ga. 385. A substantially true copy is sufficient under a statute requiring a true copy of a chattel mortgage to be deposited with the register. Error in the number of a township. Central Nat. Bank v. Brecheisen, 65 Kan. 807, 70 Pac. 895. Error in initial of party held fatal. Johnson v. Wilson, 137 Ala. 468.

75. Mortgage of property not owned by mortgagor. New England Nat. Bank v. N. W. Nat. Bank, 171 Mo. 307, 71 S. W. 191, 60 L. R. A. 256. Mortgage in a fictitious name is not notice. Id.

76. Huber v. Ehlers, 76 App. Div. [N. Y.] 602; Woods v. Rose, 135 Ala. 297; Dewitt v. Shea, 203 Ill. 393, 67 N. E. 761. Chattel mortgage. Thurlough v. Dresser [Me.] 56 Atl. 654.

77. Chattel mortgage must describe and

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§ 5. *Registration and certification of land titles under the Torrens System.* —Purpose of statute for registration of title is to provide a system whereby an intending purchaser of land may ascertain from the register who may convey title,[78] and the applicant for registration must establish that the fee is in him.[79] A proceeding under this statute should subject every title or claim to the land to judicial investigation.[80] The court is not bound by the examiner's report.[81] Defendants to be named in the summons need not be named in the order of court granting summons,[82] but the recommendation of the examiner as to who shall be defendants is mandatory.[83] Judgment against a defaulting defendant renders him a stranger to the proceedings.[84] Publication of a summons for a prescribed period is sufficient service upon nonresident defendants.[85] A person having an interest in the land and not having notice of proceedings may file an answer within sixty days of the decree.[86] The decree of registration is subject to the right of appeal within six months from the entry thereof.[87] A state tax lien is not an interest in and claim upon land within the meaning of Minn. Laws of 1903, § 6, c. 2341, p. 341.[88]

NOVATION.

A novation is the substitution of a new obligation for an old one which is thereby extinguished,[89] and is effected by substituting a new debtor for an old one,[90] or a new creditor for an old one,[91] or the substitution of a new obligation for an old one, between the same parties.[92]

Essential elements.—To constitute a novation there must be present all the elements of a legal contract,[93] as a mutual agreement,[94] a proper consideration,[95]

locate property so that it may be identified to be effective as constructive notice. Farmers' & Merchants' Bank v. Stockdale [Iowa] 96 N. W. 732; Hardaway v. Jones, 100 Va. 481. Cattle described as being in a certain township and county, the township named being in fact in another county. Trower Bros. Co. v. Hamilton [Mo.] 77 S. W. 1081. Description of crops. Woods v. Rose, 135 Ala. 297. Registration of a chattel mortgage puts the world upon notice of such facts as being followed by proper inquiry would have identified the property incumbered. Greer v. Crenshaw [Tex. Civ. App.] 76 S. W. 589.

78. Glos v. Kingman, 207 Ill. 26, 69 N. E. 632.

79. Glos v. Kingman, 207 Ill. 26, 69 N. E. 632; Glos v. Cessna, 207 Ill. 69, 69 N. E. 634.

80. Glos v. Kingman, 207 Ill. 26, 69 N. E. 632.

81, 82, 83. Dewey v. Kimball, 89 Minn. 454, 95 N. W. 317, 704.

84. Reed v. Carlson, 89 Minn. 417, 95 N. W. 303.

85. Dewey v. National Bond & Security Co. [Minn.] 96 N. W. 704; Dewey v. Kimball, 89 Minn. 454, 96 N. W. 704.

86. Reed v. Carlson, 89 Minn. 417, 95 N. W. 303.

87. Dewey v. Kimball, 89 Minn. 454, 95 N. W. 317.

88. National Bond & Security Co. v. Daskam [Minn.] 97 N. W. 458.

89. Note given by mutual agreement as substitution for an original debt from a third person. Dillard v. Dillard, 118 Ga. 97. See Cyc. Law Dict. 637.

An agreement that a purchaser should sell, for the best price obtainable, perishable goods which he had refused, is not a novation. Tilden v. Gordon [Wash.] 74 Pac. 1016.

Sufficiency of an allegation of novation. Sutter v. Moore Inv. Co., 30 Wash. 333, 70 Pac. 746.

90. With intent to discharge the old debtor. Sutter v. Moore Inv. Co., 30 Wash. 333, 70 Pac. 746; Ga. Home Ins. Co. v. Boykin, 137 Ala. 350; Dillard v. Dillard, 118 Ga. 97; Nickerson v. Leadef Mercantile Co., 90 Mo. App. 336.

91. With intent to transfer the rights of the old creditor to the new. Sutter v. Moore Inv. Co., 30 Wash. 333, 70 Pac. 746; Castle v. Persons [C. C. A.] 117 Fed. 835.

92. With the intent to displace the old obligation with the new. Sutter v. Moore Inv. Co., 30 Wash. 333, 70 Pac. 746.

93. Cutting v. Whittemore [N. H.] 54 Atl. 1098. Agreement alleged to create novation, held merged in subsequent writing. Ellis v. Conrad Seipp Brew. Co., 207 Ill. 291, 69 N. E. 808.

94. There must be an agreement on the part of the creditor to release the old debtor and accept the new one, who must bind himself to pay. Ga. Home Ins. Co. v. Boykin, 137 Ala. 350. The mere acceptance of an obligation by a new debtor is not sufficient, he must promise to pay the creditor, the consideration for this promise being the old debtor's release and the creditor's agreeing to look solely to the new debtor for his payment. Griffin v. Cunningham, 183 Mass. 548, 67 N. E. 660. The mere transfer of firm assets to a corporation, subject to firm debts, with the consent of the creditor, does not constitute a novation in the absence of an agreement by the corporation to pay such debts. Leggat v. Leggat, 79 App. Div. [N. Y.] 141. A mere order drawn by a debtor on a third person in favor of his creditor is

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proper parties,[96] and a valid prior obligation.[97] There must be the assent of all the parties to both the old and new contract to the substitution, the burden of proving which, is on the party who seeks to establish the novation.[98] Whether there has been such assent is a question of fact.[99]

Effect of novation.—By a novation substituting a new debtor the creditor may sue him thereon,[1] and the original debtor is released.[2] By a novation substituting a new creditor, the original creditor is estopped from collecting his debt, the debtor is released from paying him, and is legally bound to pay to the new creditor.[3]

Statute of frauds.—The substitution of a new debtor for another is not within the statute of frauds as a promise to answer for the debt of another.[4]

NUISANCE.

§ 1. Distinction Between Private and Public Nuisance (1062).
§ 2. What Constitutes a Nuisance (1062).
§ 3. Right to Maintain; Prescription (1064).
§ 4. Remedies Against Public Nuisance (1065).
A. Abatement and Injunction (1065).
B. Criminal Prosecution (1065).
C. Rights and Remedies of Private Persons (1065).
§ 5. Remedies Against Private Nuisance (1066).
A. Abatement and Injunction (1066).
B. Action for Damages (1067).

§ 1. *Distinction between private and public nuisance.*—A nuisance is private, where the injury suffered therefrom is different in kind from that suffered by others. It is public, where the injury suffered by all is similar in kind, even though differing in degree.[5]

§ 2. *What constitutes a nuisance.*—A nuisance is anything that unlawfully causes injury to the rights of the public or a private person, resulting in legal damage.[6] It must produce a tangible and appreciable injury to neighboring property,

not sufficient. Izzo v. Ludington, 79 App. Div. [N. Y.] 272.

95. Which in general is the release of prior obligations. Sutter v. Moore Inv. Co., 30 Wash. 333, 70 Pac. 746. To constitute a novation substituting a new party to a contract, it must be shown that the plaintiff released the original contractor from his obligations under the contract, and agreed to look to the new contractor alone, and that the old contractor released the plaintiff from his liability, and that the new contractor agreed with the plaintiff to perform the contract as his own. Stowell v. Gram, 184 Mass. 562, 69 N. E. 342.

96, 97. Sutter v. Moore Inv. Co., 30 Wash. 333, 70 Pac. 746.

98. Giving new notes, by one of the original obligors, to take up lien notes of such obligors, does not constitute a novation, in the absence of proof that the creditor accepted such notes as a substitute for and to extinguish the original lien debt. Cutting v. Whittemore [N. H.] 54 Atl. 1098. A demand by a creditor on a new debtor constitutes an acceptance of the latter's promise to pay. Lyon v. Clochessy, 86 N. Y. Supp. 245. Evidence of a conversation between the old debtor and the new debtor's manager may be admitted to prove that the new debtor agreed to assume the debt. Sutter v. Moore Inv. Co., 30 Wash. 333, 70 Pac. 746. Evidence held insufficient to show assent. Stowell v. Gram, 184 Mass. 562, 69 N. E. 342.

99. Cutting v. Whittemore [N. H.] 54 Atl. 1098; Sutter v. Moore Inv. Co., 30 Wash. 333, 70 Pac. 746.

1. Griffin v. Cunningham, 183 Mass. 505, 67 N. E. 660. The fact that a note given by a new debtor is for a greater amount than the original debt will not entirely defeat a recovery. Dillard v. Dillard, 118 Ga. 97, 44 S. E. 885.

2. Dillard v. Dillard, 118 Ga. 97.

3. Castle v. Persons [C. C. A.] 117 Fed. 835.

4. Lyon v. Clochessy, 86 N. Y. Supp. 245. Where defendant accepts an order of another in favor of the plaintiff, in payment of a debt of such other who is to be released in consideration of the defendant's promise to pay. Griffin v. Cunningham, 183 Mass. 505, 67 N. E. 660. A parol promise to pay the debt of another upon the consideration of its being cancelled. Berg v. Spitz, 87 App. Div. [N. Y.] 602.

5. Robinson v. Brown, 182 Mass. 266, 65 N. E. 377. As to a county suing to protect its property, a public nuisance is a private nuisance. Yuba County v. Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049. Whether a nuisance is private or public depends upon the extent of the annoyance caused. Com. v. Packard [Mass.] 69 N. E. 1067. In order to convict a person, it is not necessary that all the members of a community should be affected by the nuisance, nor is it a defense that there are some persons who approved the nuisance. West v. State [Ark.] 71 S. W. 483. A nuisance, to be indictable, must be in a populous neighborhood, or in a place sufficiently contiguous to a public highway to affect persons passing or repassing. Id.

6. Whatever is openly injurious to public health and comfort is a nuisance. West v. State [Ark.] 71 S. W. 483.

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or such as to render its enjoyment especially uncomfortable or inconvenient.[7] Thus pollution of a stream,[8] causing overflow of waters,[9] interference with the use of property,[10] acts, or structures, causing danger of accidental injury,[11] or contagion,[12] obstruction of public highways,[13] discharge of noxious gases or odors,[14] public disorder,[15] unpleasant sights and sounds,[16] have been held to be nuisances.

7. Brick manufacturing establishment held a nuisance. Powell v. Brookfield P. B. & T. Mfg. Co. [Mo. App.] 78 S. W. 646.

8. Pollution of a public stream, endangering health. Birmingham v. Land, 137 Ala. 538; Shain Packing Co. v. Burrus [Tex. Civ. App.] 75 S. W. 838. Discharge of surface water into a stream causing overflow. Hentz v. Mt. Vernon, 78 App. Div. [N. Y.] 515. The sewage of a city discharged into a stream flowing through land, the owner of which used it to water his cattle, is a nuisance. Vogt v. Grinnell [Iowa] 98 N. W. 782. Discharge of sewage. Vickers v. Durham, 132 N. C. 880.

9. Damming a creek, causing overflow and stagnant pools. Ennis v. Gilder [Tex. Civ. App.] 74 S. W. 585. Discharge of debris into a river resulting in overflow and the discharge of the debris on private property. Yuba County v. Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049.

10. Abstraction of water by an upper riparian owner. Harper, H. & D. Co. v. Mountain Water Co. [N. J. Eq.] 56 Atl. 297. A pier constructed below low-water mark by one having no rights in the shore. McCarthy v. Murphy [Wis.] 96 N. W. 531.

Held not to be nuisances: Twelve foot fence on private property, shutting off public view and obstructing air and light of neighbor, erected with malicious motives. Russell v. State [Ind. App.] 69 N. E. 482.

11. The keeping by a contractor, in a populous part of a city, of upwards of 100 pounds of dynamite, a quantity greatly in excess of the permit for its use issued by the city authorities, is a nuisance both at common law and under the New York City Charter. Ricker v. Shaler, 89 App. Div. [N. Y.] 300. An ice chute endangering safety of passers by. Young v. Chadima Bros. [Iowa] 96 N. W. 1105; Young v. Rothrock [Iowa] 96 N. W. 1105. A turntable should be guarded or fastened where it can be done without seriously interfering with the railroad's business. Chicago & E. R. Co. v. Fox [Ind. App.] 70 N. E. 81. The running of a train on a spur track across a public street; storage of powder. Kleebauer v. Western F. & E. Co., 138 Cal. 497, 71 Pac. 617, 60 L. R. A. 377. As to the storage of combustibles constituting a nuisance, see Schuck v. Main, 39 Misc. [N. Y.] 251.

Held not to be nuisances: The shooting off of rockets and other explosives, in a careful manner on one's own premises, during an exhibition of fireworks. Bianki v. Greater American Exp. Co. [Neb.] 92 N. W. 615. A construction of a cross switch, creating annoyance, but authorized by law, is not made a nuisance by failure to comply with prescribed regulations in all details. State v. Hartford St. R. Co. [Conn.] 56 Atl. 506.

12. A pest house. Barrett v. Henderson, 24 Ky. L. R. 771, 69 S. W. 1101; Arnold v. Stanford, 24 Ky. L. R. 626, 69 S. W. 726; Lorain v. Rolling, 24 Ohio Circ. R. 82.

13. Smithtown v. Ely, 75 App. Div. [N. Y.] 309, 11 Ann. Cas. 459; Nelson v. Fehd, 104 Ill. App. 114; Dolton v. Dolton, 201 Ill. 155, 66 N. E. 323; Price v. Stratton [Fla.] 33 So. 644; Wright v. Doniphan, 169 Mo. 601, 70 S. W. 146. Obstruction by a tree. Hildrup v. Windfall City, 29 Ind. App. 592, 64 N. E. 942; Pettit v. Grand Junction, 119 Iowa, 352, 93 N. W. 381. Navigable stream. State v. Poyner [N. C.] 46 S. E. 500. An obstruction in a road is a public nuisance, the mere existence of which indicates an injury that is special and peculiar to the premises adjacent, so as to allow the owner thereof to maintain an action for abatement. Street car company, without authority, put tracks within a few inches of curb, so that wagons could not halt in front of adjacent premises without danger of being hit, and hitching posts could not be maintained. Held a nuisance, and the owner of the premises suffered special and peculiar damages, so he could bring an action for abatement. Henning v. Hudson Valley R. Co., 85 N. Y. Supp. 1111. Flooding a public highway. Eaton v. People, 30 Colo. 345, 70 Pac. 426.

Held not to be nuisances: A hole excavated in a street for the purpose of laying water mains is not necessarily a common-law nuisance. Boston v. Abraham, 86 N. Y. Supp. 863. Trees in a street not obstructing traffic. Burget v. Greenfield, 120 Iowa, 432, 94 N. W. 933; Frostburg v. Wineland [Md.] 56 Atl. 811. A public market in a portion of the street forming only a temporary or partial obstruction. State v. Smith [Iowa] 96 N. W. 899.

14. A defective water-closet permitting leakage onto surrounding property. Finklestein v. Huner, 77 App. Div. [N. Y.] 424. Maintenance of a general city dump on private grounds by a municipality. Denver v. Porter [C. C. A.] 126 Fed. 288. A factory emitting noxious vapors. Danker v. Goodwin Mfg. Co., 102 Mo. App. 723, 77 S. W. 338. A stable on the building line established by ordinance. King v. Hamill, 97 Md. 103. A guano factory. Duffy v. Meadows Co., 131 N. C. 31, 42 S. E. 460. An oil or gas well. Pope v. Bridgewater Gas Co., 52 W. Va. 252. Building in the business center, for slaughtering animals and rendering tallow, emitting disagreeable odors. Rhoades v. Cook [Iowa] 98 N. W. 122. A pond formed by damming a stream and into which washings and filth of neighboring premises flow, creating an offensive odor and stench which greatly annoys the people in the neighborhood, is a nuisance. West v. State [Ark.] 71 S. W. 483. Under Laws 1895, p. 474, c. 322, § 1, providing that no factories shall use "soft coal," held, use of 20 per cent. of soft coal is a violation of the law. New York v. Johns-Manville Co., 89 App. Div. [N. Y.] 449. The piling of sand where it will be blown in large quantities upon surrounding property. Wilmot v. Bell, 76 App. Div. [N. Y.] 252. A sewer manhole, with perforated top, emitting noxious gases. Kolb v. Knoxville [Tenn.] 76 S. W. 823. The placing of refuse near occupied dwellings. Percival v. Yousling, 120 Iowa, 451, 94 N. W. 913. A bakery

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An act not a nuisance per se may be a nuisance by reason of the place or manner of its commission.[17] An object at one time objectionable may become a nuisance through change of circumstances.[18] A city has no more right to erect a nuisance than a private individual, and is liable in damages for so doing,[19] and a corporation, from the mere fact of its being incorporated, has no greater rights than a natural person in the same situation.[20]

Whether a particular use of premises must necessarily result in a nuisance is for the jury.[21] It is no answer to an action for damages that the injury resulted from the reasonable use of the plant, that it was built after the most approved patterns, and that only skilled persons were employed.[22]

§ 3. *Right to maintain; prescription.*—The right to commit a public nuisance cannot be acquired by prescription.[23] A nuisance cannot be deemed a necessity where the result can be accomplished by other means.[24] An enactment attempting to legalize a nuisance resulting in injury to the property of others is unconstitutional.[25] To base upon a legislative grant of power to do a thing an immunity from consequences which deprives or tends to deprive a person of that which is his property, there should at least be found a direction which is clear and quite unmistakably imperative.[26] That authority exists to construct a sewage system does not justify a city in discharging sewage into a public stream.[27] Authorization by corporate

near dwellings and negligently conducted. Alexander v. Stewart Bread Co., 21 Pa. Super. Ct. 526. A pool of stagnant water. Savannah, F. & W. R. Co. v. Parish, 117 Ga. 893; West v. State [Ark.] 71 S. W. 488. Poisonous fumes from a smelter. Sterrett v. Northport M. & M. Co., 30 Wash. 164, 70 Pac. 266.

15. Places for the dispensing of intoxicating liquors. Davis v. Auld, 96 Me. 559. Prizefights. Com. v. McGovern, 25 Ky. L. R. 411, 75 S. W. 261. Authority to sell liquor and operate a theater at a designated place does not authorize same to be so conducted as to offend public decency, amounting to public nuisance. Reaves v. Ter. [Okl.] 74 Pac. 951.

Held not to be nuisances: The playing of croquet in a decorous manner, though continued late into the night. Akers v. Marsh, 19 App. D. C. 28. The playing of base ball. Alexander v. Tebeau, 24 Ky. L. R. 1305, 71 S. W. 427.

16. Noise. Gilbough v. West Side Amusement Co., 64 N. J. Eq. 27. Factory operated with disturbing noises. Leeds v. Bohemian Art Glass Works [N. J. Err. & App.] 54 Atl. 1124. A hospital located next to a residence. Deaconess Home & Hospital v. Bontjes [Ill.] 69 N. E. 748. Ironworks. The discomfort must not be one of mere fastidiousness, but such as interrupts the average comfort of the average individual. Froelicher v. Oswald Ironworks, 111 La. 705. Opening of a gas well near a public highway in order to permit the gas to blow out the water, accompanied with noise alarming to passing horses. Snyder v. Phila. Co. [W. Va.] 46 S. E. 366. A blacksmith shop near dwellings. Marrs v. Fiddler, 24 Ky. L. R. 722, 69 S. W. 953.

Held not to be nuisances: An unsightly building. Flood v. Consumers Co., 105 Ill. App. 559. A railroad terminal, constructed at a point provided by law, properly conducted. Ga. R. & B. Co. v. Maddox, 116 Ga. 64. The operation of a railroad yard in an ordinary manner, without negligence, is not a nuisance for which the owner of adjoining property may recover, although his premises are injured by the smoke and dirt discharged from the engines, and his property decreased in value, owing to the noises and other inconveniences arising from the yard. Friedman v. N. Y. & H. R. Co., 89 App. Div. [N. Y.] 38. A railroad yard located and constructed under statutory authority, if constructed and operated in a proper manner, is not a nuisance, though it may become such by improper construction or by subsequent improper operation. Ga. R. & B. Co. v. Maddox, 116 Ga. 64.

17. Rogers v. John Week Lumber Co., 117 Wis. 5, 93 N. W. 821.

18. Mercer County v. Harrodsburg, 24 Ky. L. R. 1651, 71 S. W. 928.

19. Erected court house, jail, etc., in street, held nuisance. Pettit v. Grand Junction, 119 Iowa, 352, 93 N. W. 381.

20. Cannot operate brick burning establishment so as to constitute a nuisance. Powell v. Brookfield Pressed B. & T. Mfg. Co. [Mo. App.] 78 S. W. 646.

21. Louisville & N. Terminal Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954.

22. Powell v. Brookfield Pressed B. & T. Mfg. Co. [Mo. App.] 78 S. W. 646.

23. Isham v. Broderick, 89 Minn. 397, 95 N. W. 224. The right to continue a private nuisance will not be deemed to have been acquired by prescription where the use has been permissive, not adverse. Chillicothe v. Bryan [Mo. App.] 77 S. W. 465.

24. Young v. Chadima [Iowa] 96 N. W. 1105.

25. Sadlier v. New York, 40 Misc. [N. Y.] 78; Elyria v. Lake Shore & M. S. R. Co., 23 Ohio Circ. R. 482.

26. Power to do everything necessary to construct a street railway is not power to store dynamite in the heart of a city, contrary to city ordinances. Ricker v. Shaler, 89 App. Div. [N. Y.] 300.

27. Sammons v. Gloversville, 175 N. Y. 346, 67 N. E. 622.

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charter does not justify commission of a nuisance.[28] While a city may maintain a dumping board on a street planned, though as yet not formally opened,[29] it has no power to create a nuisance on land as yet uncondemned.[30] The fact that other persons are at the same time maintaining similar nuisances in the same vicinity is no justification or excuse.[31]

§ 4. *Remedies against public nuisance. A. Abatement and injunction.*—An action to abate or enjoin a public nuisance should proceed in the name of the public.[32]

(§ 4) *B. Criminal prosecution.*—An act indictable as a nuisance by the common law is prohibited by a statute declaring all common nuisances criminal.[33] Prosecutions for maintaining a nuisance are not actions for the abatement of a nuisance.[34] A license is a protection for acts committed under it after but not before its issuance.[35] One committing a nuisance in violation of law is liable therefor, though acting as agent for another.[36] Liability for a nuisance is not avoided by reason of a contract placing the duty of avoiding the nuisance upon another.[37] A city ordinance, conferring upon the common council arbitrary power to determine upon nuisances and impose penalties therefor is unconstitutional.[38] An intent to maintain a nuisance in the future is not a misdemeanor.[39] An indictment for the commission of a criminal nuisance should allege the public character thereof and the fact of the commission within a place over which the court has jurisdiction.[40] In an indictment for maintenance of an alleged nuisance, the opinion of experts as to the harmful effects thereof is admissible.[41] A complaint for the maintenance of a nuisance is insufficient, if alleging the commission of the acts constituting the offense in words of the present tense, without showing that any of the acts were committed prior to the time of filing the complaint.[42] An indictment for suffering and committing a common nuisance was not duplex as also charging the statutory offense of poisoning or polluting a stream, where these acts were alleged only as incidents and parts of the main offense, which was the creation of unhealthful and noisome odors.[43]

(§ 4) *C. Rights and remedies of private persons.*—An individual, suffering only in common with others, cannot maintain action to enjoin a public nuisance; otherwise, where the injury is peculiar to himself.[44] Thus obstruction of a public stream

28. Louisville & N. Terminal Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954.
29. Coleman v. New York, 173 N. Y. 612, 66 N. E. 1106.
30. Ennis v. Gilder [Tex. Civ. App.] 74 S. W. 585.
31. Pittsburgh, C., C. & St. L. R. Co. v. Crothersville, 159 Ind. 330, 64 N. E. 914.
32. People v. Condon, 102 Ill. App. 449; Wees v. Coal & Iron R. Co. [W. Va.] 46 S. E. 166; St. Louis v. Galt [Mo.] 77 S. W. 876; Wauwatosa v. Dreutzer, 116 Wis. 117, 92 N. W. 551. To abate public nuisance in Oklahoma territory, action may be maintained in the name of the territory, at the instance of the attorney general or a county attorney. Reaves v. Ter. [Okl.] 74 Pac. 951.
33. State v. De Wolfe [Neb.] 93 N. W. 746. Where a statute declares that all nuisances injuring part or all of the people is a crime, the enumeration of certain nuisances in the same section does not limit or restrict the first statement, construing § 232 of the Criminal Code of Neb. State v. De Wolfe [Neb.] 93 N. W. 746.
34. Const. art. 4, §§ 6, 10, as to jurisdiction of courts construed with reference to above proposition. State v. Schaffer, 31 Wash. 305, 71 Pac. 1088.
35. Keeping petroleum in a building. Com. v. Packard [Mass.] 69 N. E. 1067.
36. Terry v. State, 24 Ohio Circ. R. 111.
37. Slop from distillery sold to cattlemen, the latter to avoid nuisance, held distillery liable for polluting stream. Peacock Distillery Co. v. Com. [Ky.] 78 S. W. 893.
38. Boyd v. Board of Councilmen, 25 Ky. L. R. 1311, 77 S. W. 669. Within reasonable limits, a legislature may declare what shall constitute a nuisance. Pittsburg v. Keech Co., 21 Pa. Super. Ct. 548.
39. State v. Schaffer, 31 Wash. 305, 71 Pac. 1088.
40. State v. Uvalde Asphalt Pav. Co., 68 N. J. Law, 512.
41. West v. State [Ark.] 71 S. W. 483.
42. State v. Schaffer, 31 Wash. 305, 71 Pac. 1088.
43. Slops from distillery placed in stream, odors from distillery, etc., held a nuisance. Peacock Distillery Co. v. Com. [Ky.] 78 S. W. 893.
44. Baker v. McDaniel [Mo.] 77 S. W. 531; Aurora Elec. Light & Power Co. v. McWethy, 104 Ill. App. 479; Pence v. Bryant [W. Va.] 46 S. E. 275; Savannah, F. & N. R. Co. v. Parish, 117 Ga. 893; Todd v. New York [Neb.] 92 N. W. 1040. A public nuisance will not

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will not be enjoined at the instance of one suffering no distinct injury therefrom.[45] A riparian owner, on the other hand, may ordinarily maintain action to restrain the pollution of a stream.[46] Although recovery of damages for the creation of a nuisance is barred by the statute of limitations, suit for injunction may be maintained.[47]

While a municipal corporation may be held liable for commission of a nuisance especially injuring the party instituting the action,[48] it cannot be indicted and fined for failure to enforce an ordinance prohibiting nuisances.[49]

§ 5. *Remedies against private nuisance. A. Abatement and injunction.*—One personally injured thereby may abate a private nuisance. In so doing, however, he must abstain from excess.[50]

Where the injury resulting from a nuisance cannot be estimated or made good by a payment of money, suit for injunction is the proper remedy.[51] No request to abate a private nuisance is necessary in order to sue to restrain it, or for damages sustained thereby.[52] A private party suffering irreparable injury, by an act of a corporation, in excess of its powers, constituting a public nuisance, may invoke the ultra vires character of its acts in seeking to have same enjoined.[53] An action cannot be maintained to restrain an act from which a resultant nuisance is merely anticipated.[54] In doubtful cases, equity will not take jurisdiction until an alleged nuisance has been determined to be such by an action at law,[55] but where a nuisance

be restrained at the suit of a private person, unless such person suffers therefrom a special and particular injury distinct from that suffered by him in common with the public at large. Closing public square so complainant would have to walk around, he having no adjoining property could not maintain bill. Guttery v. Glenn, 201 Ill. 275, 66 N. E. 305. A bill for injunction showing alleged nuisance to be general and in no way occasioning special injury to petitioner will be denied. Rhymer v. Fretz, 206 Pa. 230. A writ to abate a common nuisance may be allowed although the part complained of is on private property, and the owners have made no complaint. Rand Lumber Co. v. Burlington [Iowa] 97 N. W. 1096.

45. Lownsdale v. Gray's Harbor Boom Co., 117 Fed. 983. A municipality is subject to an action for abatement of a nuisance equally with a private individual. Pettit v. Grand Junction, 119 Iowa, 352, 93 N. W. 381.

46. Doremus v. Paterson [N. J. Err. & App.] 55 Atl. 304. Further illustrating the principle, see Gilbough v. West Side Amusement Co., 64 N. J. Eq. 27. A statute prohibiting the pollution of public streams is not special legislation. State v. Diamond Paper Mills Co. [N. J. Err. & App.] 53 Atl. 1125. That an obstruction caused inconvenience in going to a certain point does not constitute the obstruction a private nuisance as to the person inconvenienced. Guttery v. Glenn, 201 Ill. 275, 66 N. E. 305.

47. Ennis v. Gilder [Tex. Civ. App.] 74 S. W. 585.

48. Knoxville v. Klasing [Tenn.] 76 S. W. 814; Kolb v. Knoxville [Tenn.] 76 S. W. 823.

49. Georgetown v. Com., 24 Ky. L. R. 2285, 73 S. W. 1011; Board of Councilmen v. Com., 25 Ky. L. R. 311, 75 S. W. 217; Miller v. Newport News [Va.] 44 S. E. 712; Dalton v. Wilson, 118 Ga. 100.

50. Chillicothe v. Bryan [Mo. App.] 77 S. W. 465; McKeesport Sawmill Co. v. Pa. Co., 122 Fed. 184. Removing a pier constituting a private nuisance and placing the material on the shore is not a conversion of the material. McCarthy v. Murphy [Wis.] 96 N. W. 531. One negligently and needlessly destroying property which has temporarily become to him a nuisance may be held for the unnecessary loss. The Mary, 123 Fed. 609. A municipality enjoys no authority to destroy private property not a nuisance per se. Frostburg v. Wineland [Md.] 56 Atl. 811.

51. St. Louis S. D. & Sav. Bank v. Kennett Estate [Mo. App.] 74 S. W. 474. That the authorities would have minimized the evil had they known of the condition of affairs is no answer to a suit for an injunction to restrain the maintenance of a private nuisance. Hospital. Deaconess Home & Hospital v. Bontjes [Ill.] 69 N. E. 748.

52. Finklestein v. Huner, 77 App. Div. [N. Y.] 424. Notice is only necessary when the nuisance itself existed before the person sought to be charged with its continuance became the owner of the premises. Id.

53. Seattle Gas & Elec. Co. v. Citizens' L. & P. Co., 123 Fed. 588.

54. Priewe v. Fitzsimons & C. Co., 117 Wis. 497, 94 N. W. 317. An injunction against a proposed legitimate business will not be granted, unless it appears that the operation of that business is necessarily a nuisance. Operating a baseball park is not a nuisance per se. Alexander v. Tebeau, 24 Ky. L. R. 1305, 71 S. W. 427.

55. Marrs v. Fiddler, 24 Ky. L. R. 722, 69 S. W. 953; Osburn v. Chicago, 105 Ill. App. 217; Sterling v. Littlefield, 97 Me. 479. A party having secured adjudication at law determining the maintenance of a nuisance by another may, upon the continuance thereof, secure an injunction. Harper, H. & D. Co. v. Mountain Water Co. [N. J. Eq.] 56 Atl. 297; Reese v. Wright [Md.] 56 Atl. 976. In Maine, a threatened nuisance may be restrained. The removal of an alleged nuisance, already existing, will not be compelled, however, until the fact of the nuisance is established by legal procedure. Sterling v. Littlefield, 97 Me. 479.

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is injurious to the health and destroys the peace of the neighborhood, equity will interfere, by injunction, without waiting for the determination of the question of the existence of the nuisance by an action at law.[56] And in order to invoke the aid of equity, there must be an allegation in the bill, that complainant's rights have been determined at law, or facts shown bringing the case within one of the exceptions.[57] In determining whether an alleged nuisance is such in fact, evidence of the character of surrounding buildings may be taken.[58] So, also, for this purpose, expert testimony may be introduced.[59]

Action to enjoin a private nuisance should proceed in the name of the party injured.[60] That one has voluntarily subjected himself to the inconvenience of a nuisance does not necessarily bar action by him for its restraint.[61] Proprietors of a nuisance cannot maintain action to restrain action for its abatement.[62] A decree restraining the use of a building as a hospital, "during the continuance of the relative proximity of the complainant's said residence" * * * and while said hospital is "of the present internal and external construction," is not inconsistent with the prayer that the defendant be "restrained and enjoined from further operating and carrying on said home and hospital."[63]

(§ 5) *B. Action for damages.*—In order to subject one to an action for nuisance, the injury must be material and substantial.[64] Damages can be recovered for direct, but not for consequential, injuries to property caused by a nuisance, although that nuisance is authorized by the legislature.[65] Injury resulting from a permanent nuisance is calculable in money. The remedy for a permanent nuisance is therefore at law for damages, not in equity for an injunction.[66] Each act of continuing a nuisance is a fresh nuisance.[67] A recovery of damages for the existence of a continuing nuisance, therefore, does not bar recovery for injuries subse-

56. Deaconess Home & Hospital v. Bontjes [Ill.] 69 N. E. 748. Where the necessity is imperious, or immediate, or irreparable injury is threatened, or there would be a necessity of a multiplicity of suits at law, no judgment at law is required. Sterling v. Littlefield, 97 Me. 479.

57. Sterling v. Littlefield, 97 Me. 479.

58. Mackay-Smith v. Crawford, 56 App. Div. [N. Y.] 136; Id., 171 N. Y. 662, 64 N. E. 1123; Eller v. Koehler, 68 Ohio St. 51, 67 N. E. 89.

59. Knoxville v. Klasing [Tenn.] 76 S. W. 814. In determining whether discharge of sewage constitutes a nuisance, a nonexpert may testify that the smell created made him sick. It may be shown also that there were no ventilators or deodorizing appliances and that all odors were necessarily carried to the outlet. Suddith v. Boone [Iowa] 96 N. W. 853.

60. Savannah, F. & N. R. Co. v. Gill, 118 Ga. 737; People v. Condon, 102 Ill. App. 449.

61. Bly v. Edison Elec. Illuminating Co., 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500.

62. Pittsburgh, C., C. & St. L. R. Co. v. Crothersville, 159 Ind. 330, 64 N. E. 914.

63. Deaconess Home & Hospital v. Bontjes [Ill.] 69 N. E. 748.

64. Eller v. Koehler, 68 Ohio St. 51, 67 N. E. 89. Where a brick manufacturing plant constitutes a nuisance to an adjoining landowner, causing damage to his crops by the escaping gases from the kilns, the loss is one for which the law provides a remedy in an action for damages. Powell v. Brookfield Pressed B. & T. Mfg. Co. [Mo. App.] 78 S. W. 646.

65. Sadlier v. New York, 40 Misc. [N. Y.] 78. Injuries are direct where there is an actual physical invasion of property. Id. Dirty water and slush falling or blown from a bridge, and flooding the roof and striking the walls and windows of a building, is a nuisance and a direct injury to private property, for which damages may be recovered, even though the erection of the bridge was authorized by the legislature. Id.

66. Dennis v. Mobile & M. R. Co., 137 Ala. 649. The erection of buildings not ordinarily regarded as permanent in character does not constitute a permanent nuisance. Frame buildings, held not permanent in character. Pettit v. Grand Junction, 119 Iowa, 352, 93 N. W. 381. The mere fact that sewers are of permanent construction does not render the nuisance occasioned by them permanent also, for the city may abate it at any time. Vogt v. Grinnell [Iowa] 98 N. W. 782. The damages to a lessee of a hotel from a nuisance maintained in the adjacent street are measured by the injury to its usable value, or the value of its use to him as distinguished from its rental value. Evidence as to loss of profits and as to amount of business done before and after is competent. Bates v. Holbrook, 89 App. Div. [N. Y.] 548. Where it appears, to a reasonable certainty, that injury has resulted directly from the maintenance of a nuisance, damages may be recovered notwithstanding uncertainty as to the amount. Bates v. Holbrook, 89 App. Div. [N. Y.] 548. The measure of damages to land because of a continuing nuisance is the loss in its use, and such damages as may result therefrom. Vogt v. Grinnell [Iowa] 98 N. W. 782.

67. Southern R. v. Cook, 117 Ga. 286.

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quently arising therefrom.[68] Individual damages may be recovered for the existence of a nuisance, although others have suffered the same injury.[69] The cause of action accrues upon the actual occurrence of the injury.[70] An action to abate a nuisance and for damages resulting from the existence thereof loses its equitable character upon the ceasing of the nuisance.[71] The court may, in certain cases, find that a nuisance exists, but deny damages.[72]

A community of interest does not exist between persons suffering injury to their respective properties through the existence of a nuisance. Each, therefore, may sue separately.[73] The fact that a tenant leases premises subsequent to the creation of a nuisance affecting the same does not preclude him from recovery for damages caused thereby.[74]

The measure of damages for the creation of a permanent nuisance is the depreciation in value of property affected thereby, past and prospective.[75] In estimating the damages resulting from a continuing nuisance, consideration may be given to the resultant inconvenience and discomfort,[76] depreciation in value of contiguous property, to date, both for sale[77] and rental purposes,[78] and the cost of removal, if capable thereof.[79] It is error, however, to add all expenses of suit to abate a nuisance to damages suffered therefrom.[80]

OBSTRUCTING JUSTICE.

The obstruction must be of an act within the lawful authority of the officer,[81] but an officer executing a justice's judgment not yet reduced to writing is proceeding on lawful authority.[82] The information must show that the officer was acting on lawful authority.[83] The specific acts of obstruction need not be charged.[84]

68. Bennett v. Marion, 119 Iowa, 473, 93 N. W. 558.

69. Percival v. Yousling, 120 Iowa, 451, 94 N. W. 913.

70. Sterrett v. Northport M. & S. Co., 30 Wash. 164, 70 Pac. 266.

71. McNulty v. Mt. Morris Elec. Light Co., 172 N. Y. 410, 65 N. E. 196.

72. Baker v. McDaniel [Mo.] 77 S. W. 531. Liability does not accrue for merely rendering possible the creation of a nuisance. Louisville & N. Terminal Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954. Liability for the existence of a nuisance cannot be escaped by delegating responsibility in regard thereto to another. Gulf, C. & S. F. R. Co. v. Chenault, 31 Tex. Civ. App. 558, 72 S. W. 868. Liability of owner for nuisance committed by subcontractor. Boss v. Jarmulowsky, 81 App. Div. [N. Y.] 577. New York Code relative to actions "for a nuisance" limited to common-law actions. Miller v. Edison Elec. Illuminating Co., 78 App. Div. [N. Y.] 390.

73. Ducktown S., C. & I. Co. v. Fain, 109 Tenn. 56, 70 S. W. 813.

74. Smoke from electrical plant. Hoffman v. Edison Elec. Illuminating Co., 87 App. Div. [N. Y.] 371.

75. Missouri, K. & T. R. Co. v. McGehee [Tex. Civ. App.] 75 S. W. 841; Langley v. Augusta, 118 Ga. 590. A tenant, in an action for a nuisance injuring leased premises, has an election whether to have his damages measured by the depreciation in the rental value of the premises as a whole or by the loss in the usable value thereof. In proving the latter, evidence that owing to smoke laundry had to be given out, entailing increased cost, is inadmissible, unless it is shown that such cost was reasonable. Conversations which showed that roomers left because of the smoke are admissible, and also reductions made in rent for rooms. Hoffman v. Edison Elec. Illuminating Co., 87 App. Div. [N. Y.] 371.

76. Louisville & N. Terminal Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954; Daniel v. Ft. Worth & R. G. R. Co., 96 Tex. 327, 72 S. W. 578; Houston, E. & W. T. R. Co. v. Charwaine, 30 Tex. Civ. App. 633, 71 S. W. 401; Davis v. Auld, 96 Me. 559. A tile drain is a continuing rather than a permanent nuisance. Costello v. Pomeroy, 120 Iowa, 213, 94 N. W. 490.

77. Daniel v. Ft. Worth & R. G. R. Co., 96 Tex. 327, 72 S. W. 578. For a continuing nuisance it is not proper to gauge the damage to surrounding property by estimating future effects. Alexander v. Stewart Bread Co., 21 Pa. Super. Ct. 526.

78. Shroyer v. Campbell, 31 Ind. App. 83, 67 N. E. 193.

79. Mellick v. Pa. R. Co., 203 Pa. 457; Mineral Wells v. Russell, 30 Tex. Civ. App. 232, 70 S. W. 453.

80. Newton Rubber Works v. De Las Casas, 182 Mass. 436, 65 N. E. 816.

81. Resisting effort of officer to make unlawful search of prisoner is not an offense. Lee v. State [Tex. Cr. App.] 74 S. W. 28.

82. Gibson v. State, 118 Ga. 29.

83. No averment of warrant, or that the misdemeanor for which the officer sought to arrest was committed in his presence. Lee v. State [Tex. Cr. App.] 74 S. W. 28.

84. Gibson v. State, 118 Ga. 29.

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OFFICERS AND PUBLIC EMPLOYES.[1]

§ 1. Definitions and Distinctions (1069).
§ 2. The Appointing Power (1069).
§ 3. Eligibility and Qualifications (1070).
A. In General (1070).
B. Civil Service (1071).
§ 4. Appointment or Employment (1071).
§ 5. Nature of Tenure and Duration of Term (1072).
§ 6. Resignation and Removal (1074).
§ 7. Proceedings to Try Title to Office (1077).
§ 8. Powers and Duties (1079).
§ 9. Compensation (1081).
§ 10. Liabilities (1085).
§ 11. Official Bonds and Liability Thereon (1086).

§ 1. *Definitions and distinctions.*—Whether a person in public employment is an officer and entitled to all the benefits and subject to all the burdens of that peculiar station, or is a mere agent or employe without the rights or responsibilities attaching to an office, is often difficult to determine. Trustees of the public schools,[2] primary election inspectors,[3] street or road commissioners[4] and notaries public,[5] are held to be officers, as are health officers,[6] members of the board of education of cities,[7] city attorneys,[8] and members of city councils.[9] The governing committee of a political party are "officers," against whom mandamus may issue under the Kentucky Code,[10] and license commissioners of the city of Springfield, Mass., are officers,[11] but a jailer or deputy sheriff is a mere agent of the sheriff, not an officer,[12] and the janitor of a city police station,[13] and the chief engineer of a city hall are not officers but mere employes,[14] and voluntarily taking the official oath prescribed for all officers will not elevate a mere employe to the dignity of an officer.[15] The position of a school teacher is that of an employe resting on the contract of employment, and not on that of an officer.[16] A city engineer is the agent of municipality[17] but a police officer is not,[18] and a medical officer of the New York city fire department is not a member of the uniformed force[19] though a fire marshal is.[20]

§ 2. *The appointing power.*—Under the constitution of the United States,[21] and those of most of the states,[22] the appointing power is an attribute of the executive, and statutes invading that right are generally held invalid,[23] though

1. The election of officers is treated in the topic Elections, 1 Curr. L. p. 981.
2. Ellis v. Greaves [Miss.] 34 So. 81.
3. Rabbitt v. Garand, 89 App. Div. [N. Y.] 119.
4. Bowden v. Derby, 97 Me. 536.
5. People v. Wadhams, 176 N. Y. 9, 68 N. E. 65.
6. State v. Craig [Ohio] 69 N. E. 228. But see State v. Massillon, 24 Ohio Circ. R. 249.
7. State v. Loechner [Neb.] 91 N. W. 874, 59 L. R. A. 915.
8. People v. Salisbury [Mich.] 96 N. W. 936.
9. State v. Kelly [Mo. App.] 77 S. W. 996.
10. Code Civ. Proc. § 477. Young v. Beckham, 24 Ky. L. R. 2135, 72 S. W. 1092.
11. Cook v. Springfield, 184 Mass. 247, 68 N. E. 201.
12. Stephenson v. Salisbury, 53 W. Va. 366.
13. Dolan v. Orange [N. J. Law] 56 Atl. 130.
14, 15. State v. Gray, 91 Mo. App. 438.
16. Murphy v. Board of Education, 87 App. Div. [N. Y.] 277.
17. Normile v. Ballard [Wash.] 74 Pac. 566.
18. Simpson v. Whatcom [Wash.] 74 Pac. 577.
19. Lyons v. New York, 82 App. Div. [N. Y.] 306.
20. People v. Sturgis, 87 App. Div. [N. Y.] 413.
21. Shurtleff v. U. S., 189 U. S. 311.
22. The governor of New Hampshire had authority in 1897 to appoint an agent to prosecute the state's civil war claims against the United States. Lambert v. Norman [Ga.] 46 S. E. 433; Opinion of the Justices [N. H.] 54 Atl. 950. The governor of Kentucky has authority to fill vacancies in the office of justice of the peace by appointment. Traynor v. Beckham, 25 Ky. L. R. 981, 76 S. W. 844.
23. In New Jersey where an act (Gen. St. p. 2618), establishing a system of parks and providing for governing boards thereof, was invalid as to the matter of appointing the governing board, it was held that this invalidity would not render the whole statute invalid, but that recourse would be had to the provision of the constitution for the appointing of officers by the governor, by and with the advice and consent of the senate. Ross v. Board of Chosen Freeholders [N. J. Law] 53 Atl. 1042. And where the legislature attempts to extend a term of office by postponing the term of the successor, the proper appointing power may fill the office in the interim. In re Haase, 41 Misc. [N. Y.] 114; Id., 88 App. Div. [N. Y.] 242. The governor in Arkansas has no inherent power to make appointments except as expressly provided in the constitution. Can-

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a statute naming certain appointees has been upheld, on the theory that the governor, by approving it, in effect made the appointments his own.[24]

The Kentucky statute incorporating a private police and detective agency and investing its members with all the powers of peace officers is unconstitutional.[25]

A statute limiting the right of cities and their contractors to employ any but citizens is invalid as an interference with the right to contract.[26]

In some states the right of local self government guaranteed to the people by their constitutions is regarded as being inconsistent with laws authorizing the appointment of officers or agents of municipalities by other than the municipalities themselves,[27] but this view does not universally obtain.[28] Illustrations of the right of municipalities to appoint officers or employ agents are given in the note.[29] The council of a city of the fourth class in Kentucky have authority to fill a vacancy in the office of the police judge by appointment.[30]

§ 3. *Eligibility and qualifications. A. In general.*—Generally speaking every person entitled to vote is eligible to office[31] if he be a resident of the district[32] and not the incumbent of an incompatible office. A county judge in Kentucky is ineligible to the office of supervisor of roads,[33] though it has been held that, where two offices are incompatible, a resignation from the prior one

not appoint capitol commissioners. Cox v. State [Ark.] 78 S. W. 756. Under the constitution of Arkansas the legislature may exercise the appointing power in cases not otherwise provided for. Acts 1903, p. 249, providing for legislative appointment of state capitol commission, is valid. Id.

24. Thomas v. State [S. D.] 97 N. W. 1011.

25. Act March 3, 1884. Swincher v. Com., 24 Ky. L. R. 1897, 72 S. W. 306.

26. Hurd's Rev. St. 1901, p. 141, c. 6, par. 10. Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786.

27. People v. Knopf, 198 Ill. 340, 64 N. E. 842, 1127; State v. Moores [Neb.] 96 N. W. 1011; Hunt v. Buhrer [Mich.] 94 N. W. 589. A legislative act, incorporating a town and providing that named persons shall act as mayor and aldermen thereof until their successors are elected and qualified, does not interfere with local self government. Lambert v. Norman [Ga.] 46 S. E. 433. In New York it is held that neither the law creating the state tax commission, (People v. State Board of Tax Com'rs, 174 N. Y. 417, 67 N. E. 69) nor the law recognizing and continuing the New York City detective department, appoint the officers thereof in violation of the constitutional provision for home rule [N. Y. Const. art. 10, § 2]. Sugden v. Partridge, 174 N. Y. 87, 66 N. E. 655; Fay v. Partridge, 174 N. Y. 526, 66 N. E. 1107.

28. In Nebraska the legislature may confer upon the governor of the state the power to appoint members of the board of fire and police commissioners of cities of the metropolitan class. State v. Broatch [Neb.] 94 N. W. 1016. A special city charter placing the power of appointing a majority of the board of commissioners of the city, corresponding to the mayor and aldermen, in the hands of the governor, is valid, the legislative power over cities being unlimited and there being no abstract principle of right of local self government recognized in the constitution of Texas. Brown v. Galveston [Tex.] 75 S. W. 488; cf. Ex parte Lewis [Tex. Cr. App.] 73 S. W. 811.

29. In the absence of charter authority, the common council of a city in New York cannot create an office and pay city money to the incumbent thereof. Appointment to office of page of common council of Yonkers held unauthorized. O'Connor v. Walsh, 87 App. Div. [N. Y.] 179. The city of Lexington, Ky., has no power under the constitution and its charter to create any office or officers other than those provided for therein. Lowery v. Lexington, 25 Ky. L. R. 392, 75 S. W. 202.

30. Traynor v. Beckham, 25 Ky. L. R. 283, 74 S. W. 1105. The board of supervisors in Iowa has authority to employ an agent to discover taxable property omitted from the tax rolls, and contract to pay him in proportion to the amount of taxes collected through his efforts. Disbrow v. Board, 119 Iowa, 538, 93 N. W. 585; Shinn v. Cunningham, 120 Iowa, 383, 94 N. W. 941. Boards of supervisors in Mississippi have authority to employ counsel in civil cases in which the county is interested, though they have in their employ a county attorney at a stated annual salary. Warren County v. Booth, 81 Miss. 267.

31. State v. Moore, 87 Minn. 308, 92 N. W. 4, 59 L. R. A. 447.

32. Where by the constitution, officers are required to be electors of the political divisions wherein the functions of their offices are to be performed, an officer of a larger division cannot be made ex officio the officer of a smaller one, though in the particular instance he happens to be an elector of the smaller division. State v. Kohnke, 109 La. 838.

33. Daviess County v. Goodwin, 25 Ky. L. R. 1081, 77 S. W. 185. Conceding that a member of the board of county commissioners cannot act as one of the county bond trustees, there can be no objection to his so acting where he resigns from the board before appointment as a trustee. Potter v. Lainhart [Fla.] 33 So. 251.

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is not necessary before entering upon the duties of the other, since the mere taking oath and filing bond operates ipso facto to vacate the prior office.[34]

In Indiana one who obtains a nomination by bribery is not disqualified from holding the office by the constitutional inhibition against securing an election by bribery,[35] and a contestant can take advantage of his opponent's ineligibility under the statute denouncing bribery at primary elections, only after conviction.[36]

By the statute in Maine, a collector of taxes, who has not had a final settlement with the town, is ineligible to the office of selectman or assessor of taxes.[37]

Though the refusal of an officer to qualify on election creates a vacancy which may be filled in the manner provided by law,[38] failure to take the prescribed oath of office will not prevent one becoming a de facto officer[39] and neither failure to take the oath of office within the period prescribed by statute for that purpose,[40] nor failure within the prescribed period to file a verified statement of election expenses,[41] will of itself work a forfeiture of an office and create a vacancy, where the oath is taken and filed before the term of office begins and before any steps have been taken to fill the office. Nor, where the oath is taken and the bond filed within the statutory period, does the failure of the proper authorities to approve the bond within the time affect the appointee's right.[42] A person elected to office is not required to take the official oath and file his bond before the certificate of election has been issued to him,[43] nor, where there is a question as to the regularity of his election, need he do so before his right to the office has been tried.[44] A councilman, holding over de facto, cannot, by his own vote upon the question of his own qualification, confer upon himself a de jure title to the office as against a contestant.[45]

(§ 3) *B. Civil service.*—A promotion of a patrolman to the office of telegraph operator can be made only under the civil service rules in New York City.[46] The certification of a veteran as entitled to appointment from the civil service list, after passing the examination, is conclusive as far as competency is concerned, and an appointment cannot be refused on the ground that in a similar position heretofore he was incompetent.[47]

§ 4. *Appointment or employment.*[48]—In New Jersey, under the borough act of 1897, an appointment to fill a vacancy in the common council must be concurred in by a majority of the whole council,[49] and it requires a majority of the city council, in Salt Lake City, to invest a person with the office of chief of police on appointment of the mayor.[50] Where less than a quorum of a city council meet and declare the seat of an absent member vacant, one appointed

34. Gilbert v. Craddock [Kan.] 72 Pac. 869.

35, 36. Const. Ind. art. 2, § 6. Gray v. Seitz [Ind.] 69 N. E. 456.

37. Rev. St. c. 8, § 12, as amended by Laws 1885, p. 280, c. 335. Springfield v. Butterfield, 98 Me. 155.

38. State v. Rice, 66 S. C. 1, 44 S. E. 80; Adams v. Doyle, 139 Cal. 678, 73 Pac. 582.

39. Rosell v. Board of Education, 68 N. J. Law, 498.

40. In re Drury, 39 Misc. [N. Y.] 288.

41. In re Drury, 39 Misc. [N. Y.] 288. The statute so providing being invalid as prescribing an oath of office different from the one in the constitution. Stryker v. Churchill, 39 Misc. [N. Y.] 578.

42. In re Fitzgerald, 82 N. Y. Supp. 811.

43. Gilbert v. Craddock [Kan.] 72 Pac. 869.

44. Rich v. McLauren [Miss.] 35 So. 337. Whether positions are confidential and therefore excepted from provisions of civil service law. People v. Collier, 78 App. Div. [N. Y.] 620.

45. Winters v. Warmolts [N. J. Law] 56 Atl. 245.

46. People v. Partridge, 89 App. Div. [N. Y.] 497.

47. People v. Stratton, 174 N. Y. 531, 66 N. E. 1114.

48. Employment of laborer by city in its water plant held sufficiently shown. Henderson v. Kan. City, 177 Mo. 477, 76 S. W. 1045.

49. P. L. p. 285. Day v. Lyons [N. J. Law] 56 Atl. 153.

50. State v. Sheets, 26 Utah, 105, 72 Pac. 334.

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by them to take his place is not a member, and a vote in which he participates is of no effect.[51] Where the appointment of an officer is a nullity for that the appointee is ineligible to the office, a legal appointment may be made, without legal ouster of the first appointee by quo warranto.[52] An appointment to an office which has been abolished cannot operate as an appointment to a newly created office possessing some of the same powers.[53] Any contract in the nature of a sale of a public office is void,[54] but an appointment of a deputy conditional on receiving a part of the fees is valid.[55] Where the statute requires an appointment to be in writing, one not written is invalid.[56]

Under the civil service law of New York, an employe suspended or released because of the abolition of his office is entitled to reappointment to the same, or a similar position, whenever his services are required.[57] The questions, whether the office to which he desires appointment is similar to the one abolished,[58] and whether there is need of his services, rest in the discretion of the person making the appointment, and he is not entitled to mandamus to compel the appointment merely because there is a vacancy.[59] A teacher employed in both day and night service is not, on termination of the night service, deprived of his employment so as to be entitled to preference.[60] A public school attendance officer is not entitled to maintain proceedings for reinstatement after suspension, he not being a member of the "educational staff" within the meaning of the charter of Greater New York,[61] and a disabled fireman is entitled to employment at the salary received while fireman, in some position in the department not requiring active service as a fireman.[62] A clerk who has taken the civil service examination and secured an appointment is a probationer, and can take no benefit from a prior appointment, where he was laid off from that service and waived reinstatement.[63]

The provision in the statutes of Missouri that patrolmen serving their full terms shall be preferred for reappointment does not operate ipso facto to reappoint them, but where they hold over after expiration of their terms, they do so at the pleasure of the commissioners.[64]

§ 5. *Nature of tenure and duration of term.*—It is presumed that a person acting in a public office was regularly elected or appointed to it,[65] and officers regularly appointed will be regarded as having a valid tenure of office, though the legislature has not designated their term of office.[66]

The incumbent of an office holds over under the law until his successor is

51. Benwood v. Wheeling R. Co., 53 W. Va. 465.

52. State v. Craig [Ohio] 69 N. E. 228.

53. Cutshaw v. Denver [Colo. App.] 75 Pac. 22.

54. Deputy sheriff. Stephenson v. Salisbury, 53 W. Va. 366. Deputy clerk of court. Horstman v. Adamson, 101 Mo. App. 119, 74 S. W. 398.

55. Stephenson v. Salisbury, 53 W. Va. 366.

56. Shepherd v. Trustees of Common School Dist. No. 2, 25 Ky. L. R. 1072, 76 S. W. 1084.

57. A veteran under such circumstances is entitled to a transfer to some other office. Jones v. Willcox, 80 App. Div. [N. Y.] 167.

58. People v. Cantor, 89 App. Div. [N. Y. 50.

59. Morrison v. Cantor, 173 N. Y. 646, 66 N. E. 1112.

60. Cusack v. Board of Education, 89 App. Div. [N. Y.] 355.

61. People v. Board of Education, 86 App. Div. [N. Y.] 537.

62. People v. Sturgis, 85 App. Div. [N. Y.] 20.

63. Fish v. McGann, 205 Ill. 179, 68 N. E. 761.

64. State v. Hawes, 177 Mo. 360, 76 S. W. 613.

65. Monterey v. Jacks, 139 Cal. 542, 73 Pac. 436. One person cannot hold two county offices, in the absence of a formal consolidation authorized by law, but where at an election all parties treat two certain offices as consolidated, it will be presumed they have been, and the candidate receiving the certificate of election will be inducted as against respondent, a hold over, who also was a candidate. See State v. Wolfenden, 26 Utah, 167, 72 Pac. 690.

66. Commissioners of sailors' boarding houses. White v. Mears [Or.] 74 Pac. 931.

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duly elected or appointed and qualified,[67] but where an appointive officer holds over after the expiration of his fixed term, it is at the pleasure of the appointing power.[68] The action of a board of trustees of a state asylum, in postponing action on the question of reappointment of a physician until after the expiration of his official term, does not amount to a re-election of him for another term, but on final decision against reappointment their action will relate back to the end of the term.[69]

An office is not vacant so long as it is supplied, in the manner provided by the constitution or laws, with an incumbent who is legally authorized to exercise the power and perform the duties which pertain to it.[70] And where the law points out what particular officer shall exercise the duties of another office, on the death or disability of its incumbent, the succeeding officer generally holds the full term, to which his principal was elected, as in case of the vice-president of the United States or the lieutenant governor of a state.[71] This is true also of an appointive office having a designated term, as to which it is held that the appointee to a vacancy, occurring by death or resignation, holds only for the balance of the unexpired term and not for a full term,[72] but where an elective office is filled by appointment, the appointee, as a rule, holds only until a regular successor can be elected at some general or special election.[73] A delayed reappointment of an officer, after the expiration of his term, does not extend his second term to four years from the date of his reappointment, but is only for the unexpired portion of the new term.[74]

Where the term of officers is fixed by the constitution, the legislature cannot extend them by providing that elections shall be held at a later date.[75] Nor even in the absence of any specific prohibition can it provide for the election of a judicial officer for a certain district, and then perpetuate him in office by repealing the law authorizing the election of his successor,[76] but a statute postponing an election is not necessarily invalid in toto, where there is a proper authority to make an ad interim appointment to fill the vacancy occurring by reason of the postponement of the term of the successor.[77] Certain offices, es-

67. People v. Khopf, 198 Ill. 340, 64 N. E. 842, 1127; Winters v. Warmolts [N. J. Law] 56 Atl. 245; Keen v. Featherston, 29 Tex. Civ. App. 563, 69 S. W. 983. On the transfer of a city in Kentucky from the third class to the second, the officers are entitled to retain their offices until their successors are elected and qualified, at the next regular election. Gilbert v. Paducah, 24 Ky. L. R. 1998, 72 S. W. 816. On the abolition of the office of mayor of the city of Pittsburgh by the legislature of Pennsylvania, and the vesting of the authority heretofore vested in him in the recorder, the retiring mayor was a de facto officer until the recorder qualified, and his acts as such were valid. Keeling v. Pittsburg, V. & C. R. Co., 205 Pa. 31. Under the Kentucky statute (Ky. St. 1899, § 4258), allowing the auditor of public accounts to appoint an agent in each county, the agent holds after the expiration of the auditor's term until removed. Sebree v. Com., 25 Ky. L. R. 121, 74 S. W. 716.

68. State v. Hawes, 177 Mo. 360, 76 S. W. 653.

69. Taber v. State Hospital for the Insane, 127 Fed. 174.

70, 71. State v. McBride, 29 Wash. 335, 70 Pac. 25.

72. Oil inspector. Tansey v. Stringer, 25 Ky. L. R. 916, 76 S. W. 537.

73. Under a constitutional provision that if an officer's unexpired term "will not end at the next succeeding annual election at which either city, town, county, district, or state officers are to be elected, the office shall be filled by appointment until such election" a vacancy in a town office may be filled at an election at which only a member of congress is to be elected. Smith v. Doyle, 25 Ky. L. R. 958, 76 S. W. 519, withdrawing opinion in 25 Ky. L. R. 278, 74 S. W. 1084. The fall election in 1903 is a "general election," determining the term of county officers appointed to fill a vacancy though such election is not a general one for the election of county officers. Mannix v. Selbach [Colo.] 74 Pac. 460.

In Kentucky, a sheriff elected to fill a vacancy is entitled to enter upon his duties immediately, in the stead of one appointed to fill the vacancy until an election, and he need not wait until the usual time for elected officers to go in. Jones v. Sizemore [Ky.] 79 S. W. 229.

74. Tansey v. Stringer, 25 Ky. L. R. 916, 76 S. W. 537.

75. People v. Knopf, 198 Ill. 340, 64 N. E. 842, 1127.

76. State v. Moores [Neb.] 96 N. W. 1011.

77. Hunt v. Buhrer [Mich.] 94 N. W. 589.

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pecially those created by the legislature, are entirely within its control, and may be shortened as to their terms or abolished at will.[78]

A statute, increasing the number of judges of the supreme court of Washington for a limited time only, is valid, notwithstanding the provision of the constitution defining the term of office of the judges.[79]

Decisions as to the terms of particular officers are mentioned in the note.[80]

§ 6. *Resignation and removal.*—Mere resignation will not relieve an officer of the burdens of his office.[81]

As to the power of removal, a distinction exists between officers and mere agents or employes, the former being removable only on proof of official misconduct, as a rule,[82] while the latter are generally removable at will, in the absence of some provision of law to the contrary.[83]

Where the power of appointment is conferred in general terms and without restriction, the power of removal in the discretion and at the will of the appointing power is implied, and always exists unless restrained and limited by some other provision of law.[84] This restraint, however, is frequently exercised, most commonly to prevent unnecessary and ill considered changes in the public service, as exemplified in the various civil service laws,[85] or to provide steady public

78. No one has a vested right to an office created by the legislature. That body may legislate him out of office at will. Dallis v. Griffin, 117 Ga. 408. The terms of recorders, city judges, and justices of the peace in cities in New York, are within the control of the legislature (People v. Auburn, 83 App. Div. [N. Y.] 554), and in Maryland, the constitutionality of a statute shortening the term of office of county commissioners elected for the term of six years was sustained by a divided court, no opinion being filed (Brown v. Brooke, 95 Md. 738). A merely appointive officer, like a city attorney, may be deprived of his office before the expiration of his term by legislative abolition of it. Downey v. State, 160 Ind. 578, 67 N. E. 450. On the abolition of justice precincts in a city, the terms of office of the justices therein expire and the offices cease to exist. Nystrom v. Clark [Utah] 75 Pac. 378.

79. State v. McBride, 29 Wash. 335, 70 Pac. 25.

80. Oil inspector in Kentucky holds for four years. Tansey v. Stringer, 25 Ky. L. R. 916, 76 S. W. 537. Patrolman in St. Louis, Mo., four years. State v. Hawes, 177 Mo. 387, 76 S. W. 617. The term of the county treasurers in Oklahoma begins on the first Monday in October succeeding their election. Finley v. Combs [Okl.] 71 Pac. 625. Under the constitution of Texas providing that the term of all officers not fixed thereby shall be two years, a police officer of a city holds office, in the absence of a reappointment, for two years only. Houston v. Albers [Tex. Civ. App.] 73 S. W. 1084.

81. The provision of the constitution of Texas that all officers within the state shall continue to perform the duties of their offices until their successors are qualified is mandatory, and an officer whose resignation is accepted but whose successor has not been appointed is still an officer. Keen v. Featherston, 29 Tex. Civ. App. 563, 69 S. W. 983.

82. A notary public may be removed from his office for accepting and using a free pass from a sleeping car company [N. Y. Const. art. 13, § 5]. People v. Wadhams, 176 N. Y. 9, 68 N. E. 65. In St. Louis, Mo., where a turnkey is promoted to the position of patrolman, that act amounts to a new appointment for the term of four years from its date, entitling him to charges, notice, and a hearing before removal (State v. Hawes, 177 Mo. 387, 76 S. W. 617), but the term of office of a turnkey having never been fixed, a patrolman reduced to that office after the expiration of his four year term, holds it subject to the pleasure of police commissioners (Id., 177 Mo. 360, 76 S. W. 653).

83. The janitor of a city police station is an employe merely. Dolan v. Orange [N. J. Law] 56 Atl. 130. The chief engineer of the city hall of Kansas City, Mo., is not an officer, but a mere employe. State v. Gray, 91 Mo. App. 438. A delinquent tax collector in Pennsylvania is an "appointed officer," removable at the pleasure of the county treasurer. Com. v. Connor [Pa.] 56 Atl. 443. The appointment, in the City of Orange, N. J., of a person as janitor of a police station for a term of years, and its acceptance, constitute a contract which may be avoided by the council, as provided by the charter. Dolan v. Orange [N. J. Law] 56 Atl. 130.

84. Mack v. New York, 82 App. Div. [N. Y.] 637. A contract, by a clerk of the county court, covering the whole period of his term, to employ a certain deputy, is void. Horstman v. Adamson [Mo. App.] 74 S. W. 398. In the absence of any constitutional or statutory provision, the president, by virtue of his general power of appointment, can remove an officer, though he were appointed by and with the advice and consent of the senate, and this power cannot be taken away by mere inference or implication, and, in the absence of plain language in the statute, congress will not be presumed to have taken it away. Shurtleff v. U. S., 189 U. S. 311. A deputy tax commissioner is removable at the pleasure of the appointing power. People v. Wells [N. Y.] 70 N. E. 218.

85. Under the Customs Administrative Act of June 10, 1890, § 12, the president may

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employment for those who by past military or other distinguished public service have recommended themselves to particular consideration.[86]

The effect of these laws is to elevate certain agents or employes in public service, as regards their tenure of office, to the plane of public officers, and entitle them to charges and a hearing before removal.[87] The protection is not granted, however, to all public servants.[88] In New York an honorably discharged volunteer fireman may be removed from his office, under the board of tax commissioners, without the hearing provided by the civil service law for other offices,[89] and a deputy collector of assessments and arrears may be removed without a hearing though he is an honorably discharged veteran,[90] but a deputy tax commissioner may not.[91] A fire marshal can be removed only on charges,[92] and an exception is always made in regard to those holding positions of confidence and trust, it being thought unjust to deprive an officer of the right to choose his own confidential agents. The chief clerk in the tax department of the borough of Manhattan, New York, is a confidential employe, subject to removal without charges made or reasons given.[93] An ordinance, providing that no employe elected by the council shall be discharged by it, except on written charges, will not protect a policeman who has served the term for which he was appointed and is holding over.[94] Whether persons in office at the time a civil service law takes effect are within its protection depends largely upon the phraseology of the statute,[95] but after an appointee under the law has served his probationary term,

remove appraisers for inefficiency, neglect, or malfeasance in office, and he may also under his general powers of removal, remove them without any of such causes. Where removed for cause they are entitled to a hearing, but if they are removed without notice and opportunity for defense, it will be presumed they were removed under the general power and not for any of the statutory causes. Shurtleff v. U. S., 189 U. S. 311, 47 Law. Ed. 828. Under the Charter of Baltimore, Maryland, (sec. 25) the mayor has authority to remove at pleasure during the first six months of their respective terms, all officers appointed by him, but thereafter he may remove them for cause only. This provision has been held to authorize the removal of officers appointed by a predecessor, and to those re-appointed for a second term. Maclellan v. Marine [Md.] 56 Atl. 359. Under the civil service law of Washington, only the appointing power can dismiss an employe, the trial before the civil service commission only serving as a basis therefor. Easson v. Seattle, 32 Wash. 405, 73 Pac. 496.

86. Veteran fireman. People v. Redfield, 86 App. Div. [N. Y.] 367; People v. Wells, 176 N. Y. 462; Id., 86 App. Div. [N. Y.] 270; People v. Folks, 89 App. Div. [N. Y.] 171; People v. Hamilton, 84 App. Div. [N. Y.] 369. Veteran soldiers. People v. McFadden, 75 App. Div. [N. Y.] 264.

87. A veteran volunteer fireman belonging to a company not officially connected with the municipality is entitled to the preference accorded to veterans in respect to removal without charges. People v. Folks, 89 App. Div. [N. Y.] 171. Charges against police captain held not sufficiently substantiated to justify removal. People v. Greene, 89 App. Div. [N. Y.] 296. The chief of the fire department in New York City cannot be removed by the fire commissioner for refusal to continue a vacation granted him on his own request. In re Croker, 175 N. Y. 158, 67 N. E. 307.

88. The health officer of a city is not an employe of the board of health, entitled to a hearing before discharge under the municipal code. State v. Craig [Ohio] 69 N. E. 228. A veteran fireman employed to furnish and drive a horse is not a person "holding a position by appointment or employment," entitled to a hearing before discharge. People v. Redfield, 86 App. Div. [N. Y.] 367. Coroner's chief clerk a "regular clerk" and not removable except on charges and after opportunity to explain. People v. Scholers, 86 N. Y. S. 713.

89. People v. Wells, 176 N. Y. 462, 68 N. E. 883.

90. People v. McFadden, 75 App. Div. [N. Y.] 264.

91. People v. Wells, 86 App. Div. [N. Y.] 270.

92. People v. Sturgis, 87 App. Div. [N. Y.] 413.

93. People v. Wells, 85 App. Div. [N. Y.] 378. The commissioner of public buildings in St. Louis, Mo., may remove the inspector, at his pleasure, without charges and trial, he being a mere assistant and not an officer. Magner v. St. Louis [Mo.] 78 S. W. 782.

94. Beverly v. Hattiesburg [Miss.] 35 So. 876.

95. In Illinois, one holding office at the time the civil service law went into operation does not by being allowed to retain his position, become entitled to the benefits of that law as to removal, or reduction in rank, enjoyed by those appointed under it. Sergeant of police. People v. Chicago, 104 Ill. App. 250. Though it is otherwise in New York. Detective sergeant. Sugden v. Partridge, 174 N. Y. 87, 66 N. E. 655; Fay v. Partridge, 174 N. Y. 526; People v. Greene, 87 App. Div. [N. Y.] 346; Id., 87 App. Div. [N. Y.] 421.

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he can be dismissed only on preferment of charges.[96] The law, however, is not an absolute protection, and notwithstanding it, public officers have a right to dispense with the services of employes, in good faith, from motives of economy,[97] or to meet a reduction in appropriation.[98] There are also grounds for immediate removal without notice, such as a refusal to explain a charge of insubordination by a superior,[99] and absence without leave for five consecutive days, by a police officer, which in New York amounts to a resignation,[1] disobedience of rules,[2] and under the law of New York, the marriage of a female school teacher, ipso facto, vacates her position, dispensing with the necessity of charges and a trial.[3]

The subject of the removal of public officers from office, either elective or appointive, is entirely within legislative control,[4] and a city council may be authorized to remove its mayor,[5] though such a provision is unusual.[6] The procedure in such cases prescribed by statute is exclusive,[7] and where the mayor is on trial, the majority of the aldermen presided over by their president are competent,[8] and aldermen who prefer charges against an officer are not thereby disqualified to sit.[9]

Under the civil service law of New York, the deputy county clerk is competent to hear and dispose of charges against a clerk in the county clerk's office,[10] and it is error for him to hear the evidence and then turn the case over to the county clerk for decision,[11] but the law expressly authorizes charges against a police officer to be heard by a deputy commissioner and decided by the commissioner.[12] The return of the finding and judgment of a board of police commissioners, upon a charge of neglect of duty, cannot be contradicted by evidence taken under a general rule to take testimony.[13]

In the absence of statutory authority, the action of the proper authority in removing a public officer or employe is not reviewable by the court,[14] though

96. People v. De Forest, 83 App. Div. [N. Y.] 410.

97. High school teachers. Bates v. Board of Education, 139 Cal. 145, 72 Pac. 907.

98. Good faith. People v. Department of Health, 86 App. Div. [N. Y.] 521.

99. Street cleaning force. People v. Woodbury, 88 App. Div. [N. Y.] 593.

1. People v. York, 173 N. Y. 610, 66 N. E. 1114.

2. Detective sergeants may be reduced in rank in New York City after trial on charges, and where one is acting under orders, as sergeant of police, and disobeys the rules appertaining to that office, his ignorance of the rules, as an excuse, is a matter within the discretion of the commissioners trying the charges. People v. Greene, 91 App. Div. [N. Y.] 58. Chief of police removed from office for participation in political meeting. Propriety of rule. Brownell v. Russell [Vt.] 57 Atl. 103.

3. Masten v. Maxwell, 87 App. Div. [N. Y.] 131.

4. Riggins v. Richards [Tex.] 77 S. W. 946; State v. Thompson [Minn.] 97 N. W. 887.

5. Riggins v. Richards [Tex.] 77 S. W. 946.

6, 7. State v. Thompson [Minn.] 97 N. W. 887. Inexcusable refusal of a mayor to issue or sign drafts for payment of salaries or claims as fixed by the council, amounts to misconduct in office authorizing removal by the council. Riggins v. Richards [Tex. Civ. App.] 79 S. W. 84.

8, 9. Riggins v. Richards [Tex.] 77 S. W. 946.

10, 11. People v. Hamilton, 84 App. Div. [N. Y.] 369.

12. People v. Partridge, 86 App. Div. [N. Y.] 310; Id., 87 App. Div. [N. Y.] 573.

13. Quinn v. Board of Police Com'rs [N. J. Law] 55 Atl. 634.

14. No appeal lies to the courts in Rhode Island from the action of a town council in removing a police officer. Donahue v. Town Council, 25 R. I. 79. The action of the mayor of the city of Bridgeport, Conn., in removing the director of public works is executive rather than judicial, and where he informs the director of the cause of his removal and gives him an opportunity to be heard, his discretion is absolute, regardless of his motives in making the order. State v. Kennelly [Conn.] 55 Atl. 555. Notice and hearing not being necessary to the removal of the fire commissioner of San Diego, Cal., the mayor, in making such removal, does not exercise judicial functions and hence his action is not reviewable by certiorari. In re Carter, 141 Cal. 316, 74 Pac. 997. But the trial and removal of police officers by the mayor and aldermen of Brunswick, Ga., is a judicial proceeding so reviewable. Gill v. Brunswick, 118 Ga. 85. On certiorari to review the action of a city council in an election contest, the court is confined to the sole question of jurisdiction of the council

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if an officer attempt to act entirely beyond his jurisdiction, he of course could be controlled, and the civil service law of New York expressly provides for the review of removals by mandamus for reinstatement.[15]

The appointment of a new officer by the proper authority is a sufficient indication of its pleasure that it no longer desires the services of the previous officer,[16] but an invalid attempt to appoint a new officer will not be so considered.[17] Relieving an officer of the national guard of his command, by the governor, is not a removal from his office such as is prohibited by the Federal statute.[18]

A police officer under suspension for misconduct is not entitled, by the civil service law of New York, to retirement under half pay for length of service.[19] Where, after a policeman's term of office has expired by limitation, he is suspended, it is immaterial whether his suspension was in accordance with the provisions of the charter.[20] A city of the fourth class in Missouri may provide by ordinance that, pending an investigation of charges against an officer, he may be suspended by a three-fourths vote of the board of aldermen.[21]

§ 7. *Proceedings to try title to office.*—The title of de facto officers to the offices they are in possession of cannot, in general, be collaterally attacked,[22] but the acts of an officer holding an absolutely void commission are open to collateral attack, and one convicted under an ordinance passed by an illegal body may inquire into their right to hold office by habeas corpus,[23] and a tax levied by a de facto board of assessors, being void, its validity on that ground may be objected to in a suit by the town to collect the tax.[24]

Quo warranto is the proper legal remedy for trying title to an office.[25] The remedy is employed to test the actual right to an office or franchise, and cannot be extended to relieve against official misconduct which does not work a forfeiture of the office,[26] but it may be brought in Indiana by a private citizen,

of the subject-matter and parties. City Council of Cripple Creek v. Hanley [Colo. App.] 75 Pac. 600. Evidence of neglect of duty held insufficient to justify patrolman's dismissal from force. In re Koch, 91 App. Div. [N. Y.] 194; People v. Partridge, 87 N. Y. Supp. 19. Evidence held insufficient to sustain charges against and removal of chief of fire department. People v. Sturgis, 86 N. Y. S. 687.

15. See post, § 7.

16. State v. Craig [Ohio] 69 N. E. 228.

17. Board of Education of Territory v. Territory [Okl.] 70 Pac. 792.

18. Rev. St. U. S. § 1229. State v. Jelks [Ala.] 35 So. 60.

19. People v. Greene, 87 App. Div. [N. Y.] 589.

20. Houston v. Albers [Tex. Civ. App.] 73 S. W. 1084.

21. Blackwell v. Tnayer [Mo. App.] 74 S. W. 375.

22. Ross v. Board of Chosen Freeholders [N. J. Law] 53 Atl. 1042; Rosell v. Board of Education, 68 N. J. Law, 498. The title of the mayor of a city will not be tried in quo warranto proceedings, brought by one of his appointees, against the incumbent refusing to surrender the office to which relator was appointed. State v. Badger, 90 Mo. App. 183. Title to an office cannot be tried collaterally in an action for salary. Van Sant v. Atlantic City, 68 N. J. Law, 449. Nor in an action to restrain payment thereof. Greene v. Knox, 175 N. Y. 432, 67 N. E. 910. Nor in a contest between third persons over the payment of his fees. Fees of deputy sheriff taxed as costs in suit. Williamson v. Lake County [S. D.] 96 N. W. 702. Nor in mandamus to restore relator to his office after his successor has been appointed and qualified. People v. Board of Police Com'rs, 174 N. Y. 450, 67 N. E. 78.

23. Galveston, Tex., Special Charter, providing for commissioners to govern city appointed by governor. Ex parte Lewis [Tex. Cr. App.] 73 S. W. 811. But see Brown v. Galveston [Tex.] 75 S. W. 488.

24. Springfield v. Butterfield [Me.] 56 Atl. 581.

25. Little v. Bessemer [Ala.] 35 So. 64; People v. Board of Police Com'rs, 174 N. Y. 450, 67 N. E. 78; Hartwig v. Mayor [Mich.] 96 N. W. 1067; Greene v. Knox, 175 N. Y. 432, 67 N. E. 910; Rabbit v. Garand, 89 App. Div. [N. Y.] 119. Police captain in New York City. People v. Ogden, 41 Misc. [N. Y.] 246. Township officers. State v. Conser, 24 Ohio Circ. R. 270. Trustee of a public school. Ellis v. Greaves [Miss.] 34 So. 81.

26. Right of county surveyor to act also as county engineer. State v. Scott [Neb.] 97 N. W. 1021. The irregularity of the election, under which an officer holds, cannot be shown in any proceeding except a statutory contest of election. Shepherd v. Trustees of Common School Dist., 25 Ky. L. R. 1072, 76 S. W. 1084. Until the decision of a contest the old incumbent of the office holds over, and he cannot be removed on quo warranto by the candidate, who, on the face of the returns, received the highest number of votes, though such candidate has taken the oath of office. Scales v. Falkner, 118 Ga. 152.

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only when he claims an interest in the office.[27] In Georgia, however, it is held that every citizen of a town has an interest in its municipal offices, which will support a quo warranto to test the rights of incumbents thereto.[28] A private person cannot maintain quo warranto to oust a person from an office of a body acting as a municipal corporation, on the ground that the body has no legal existence as a corporation; only the attorney general being authorized to act in such a case,[29] but where the attorney general has refused to act, a citizen taxpayer has such an interest as will permit him to proceed against the trustees of an alleged village, on the ground that the attempted incorporation was invalid.[30] A relator must show a good right in himself, and cannot recover on the weakness of the respondent's title,[31] but this rule is held in Kansas not to extend to requiring him to take the official oath and file his bond before bringing suit.[32] Matters of procedure are referred to in the note.[33] In an action under the Code in South Carolina, the issues are made up from the complaint and answer and not on return of the rule to show cause, as under the old practice of quo warranto.[34] Where to quo warranto, respondent alleges that a contest has been filed with the officers having jurisdiction, and that the same has been duly certified, such answer cannot be stricken out for failure to attach copies of the papers in the contest proceedings.[35]

Equity will interfere on behalf of an officer de facto, claiming to be an officer de jure, to prevent another, especially an intruder, from wresting the office from him without process of law,[36] and will enjoin proceedings for the removal of an officer under an invalid statute,[37] but will not interfere to determine questions concerning the appointment or election of public officers or their title to office.[38] Officers de facto will not be enjoined from exercising the functions of their offices, pending the trial of title thereto, because of the public interest that some one should continue to exercise the duties,[39] and neither prohibition[40] nor injunction can be used to perform the office of quo warranto.[41]

27. That he is a citizen and a tax payer is not sufficient. State v. Reardon [Ind.] 68 N. E. 169. And though the sheriff's office becomes vacant, by law, on the happening of a certain contingency, and the coroner has the right to exercise the duties of it until another election, he has no such interest in the office itself as will permit him to maintain the suit. State v. Dudley [Ind.] 68 N. E. 899. A municipal corporation is a proper relator in a quo warranto to oust a police officer. Beverly v. Hattiesburg [Miss.] 36 So. 74.

28. Whitehurst v. Jones, 117 Ga. 803.

29. Attack on office of alderman and president of council. Moore v. Seymour [N. J. Law] 55 Atl. 91. Members of a de facto board of education, organized under the general school law, cannot be ousted at the instance of a private relator in quo warranto, on the ground that such board has no legal corporate existence, such a proceeding being merely an attack upon the existence of a public corporation, and not maintainable by a private relator. Holloway v. Dickinson [N. J. Law] 54 Atl. 529.

30. The village must be made a party. State v. Leischer, 117 Wis. 474, 94 N. W. 299.

31. Failure to show that he has taken the oath or given the required bond. State v. Wheatley, 160 Ind. 183, 66 N. E. 684. In New Jersey the title of the relator as well as that of the respondent may be inquired into [P. L. 1895, p. 82]. Otis v. Lane [N. J. Law] 54 Atl. 442. Where relator's claim to the office is based on a notice of a motion to reconsider the vote by which he was dismissed, and it appears that, pending suit, the motion has been made and the previous action affirmed, the action should be dismissed for want of actual controversy. State v. Byrne, 31 Wash. 213, 71 Pac. 746.

32. Gilbert v. Craddock [Kan.] 72 Pac. 869.

33. Where a respondent in quo warranto desires to contest the allegations of fact upon which the petition is based, he must in his answer make a positive denial thereof under oath. Whitehurst v. Jones, 117 Ga. 803.

34. Code Civ. Proc. §§ 424 et seq. State v. Rice, 66 S. C. 1.

35. Scales v. Falkner, 118 Ga. 152.

36. Landes v. Walls, 160 Ind. 216, 66 N. E. 679. The remedy for a threatened usurpation of power is adequate at law. Threatened contempt proceeding by a county board against a collector who failed to account. Sayer v. Brown [Ga.] 46 S. E. 649.

37. Corscadden v. Haswell, 84 N. Y. Supp. 597.

38. Landes v. Walls, 160 Ind. 216, 66 N. E. 679.

39. State v. Rice, 66 S. C. 1. The court being without jurisdiction to make such an order, the disobedience of it is not contempt. State v. Rice [S. C.] 45 S. E. 153.

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Mandamus may be resorted to, to obtain admission as members of the board of supervisors of a county, where the relators have been granted certificates of election and properly certified as such to the county clerk,[42] and in New York, mandamus for reinstatement has largely taken the place of quo warranto, as a remedy for the trial of the right to public offices, under the civil service law,[43] but proceedings must be brought seasonably or they will be barred.[44]

§ 8. *Powers and duties.*—There is a presumption that public officers do as the law and their duty require them,[45] and a statute imposing a penalty on an officer for failure to do a particular thing, by implication, imposes a duty to do that thing.[46]

Officers of counties, townships, cities, and villages in auditing claims against their municipalities do not act judicially, but act as mere agents, and, if they reject claims, make no adjudication which prevents the claimant from his appeal to the courts.[47]

In declaring and publishing the result of a local option election, the commissioners' court of Texas acts ministerially, and not judicially, and hence it is not a court in the sense that its proceedings, in that behalf, may not be restrained by the Federal courts.[48]

Intercourse with foreign governments is conducted by the president, notwithstanding he habitually acts through the agency of the secretary of state,[49] and the legislative department, even if it has the power to do so, has not as yet undertaken to impose upon the secretary of state the duty of presenting and urging all claims for redress against foreign governments that citizens of the United States may exhibit to him for action.[50]

Other instances of the powers and duties of particular officers are referred to in the note.[51]

40. Board of Education v. Holt [W. Va.] 46 S. E. 134.

41. Howe v. Dunlap [Okl.] 72 Pac. 865; Little v. Bessemer [Ala.] 35 So. 64.

42. State v. Kersten, 118 Wis. 287, 95 N. W. 120. When an office is already filled by an actual incumbent, exercising the functions of the office de facto and under color of right, mandamus will not lie to compel the admission of another claimant, nor to determine the disputed question of title. Election contest—Office of alderman. City Council of Cripple Creek v. People [Colo. App.] 75 Pac. 603.

43. Necessary parties. Jones v. Wilcox, 80 App. Div. [N. Y.] 167. Suit abates on retirement of head of department. People v. Lantry, 88 App. Div. [N. Y.] 583. An order directing the commitment of a superseded officer, for failure to deliver the books and papers thereof to his successor, is fatally defective if it fail to describe the books and papers to be delivered. People v. Van Bergen, 40 Misc. [N. Y.] 139.

44. People v. Sturgis, 82 App. Div. [N. Y.] 580; People v. Greene, 87 App. Div. [N. Y.] 346; Jones v. Board of Police Com'rs, 141 Cal. 96, 74 Pac. 696.

45. Pine Tree Lumber Co. v. Fargo [N. D.] 96 N. W. 357; Watkins v. Havighorst [Okl.] 74 Pac. 318.

46. Duty of school district officer in Wisconsin to furnish certified copy of records [Rev. St. 1898, § 4148]. Musback v. Schaefer, 115 Wis. 357, 91 N. W. 966].

47. Fitch v. Board of Auditors of Claims [Mich.] 94 N. W. 952; Mitchell v. Clay County [Neb.] 96 N. W. 673.

48. August Busch & Co. v. Webb, 122 Fed. 655.

49, 50. U. S. v. Hay, 20 App. D. C. 576.

51. The commissioner of water supply, gas, and electricity, of the city of New York, has succeeded to the powers and duties of the board of commissioners of electrical subways. People v. Monroe, 85 App. Div. [N. Y.] 542. The water commissioner of New York City has no power, without the concurrence of the common council, to purchase lands to extend the water system of the city. Queens County Water Co. v. Monroe, 83 App. Div. [N. Y.] 105. A stipulation made by the attorney general of a state, as a party to an action in his official capacity, is binding on his successors in office. Prout v. Starr, 188 U. S. 537, 47 Law Ed. 584. A public officer made a party to a suit in his official capacity cannot complain of an order substituting his successor, however irregular it may have been. Buckers Irr. M. & I. Co. v. Farmers' Independent Ditch Co. [Colo.] 72 Pac. 49. It is the duty of an inspector of combustibles in New York City, when he knows of an illegal storage of dynamite, to seize and confiscate the same, though he has no specific order of the fire commissioner to that effect. People v. Murray, 76 App. Div. [N. Y.] 118. The county treasurer in Iowa is not charged with any duty in respect to investigation of property omitted from assessment, until he is apprised of the omission. Shinn v. Cunningham, 120 Iowa, 383, 94 N. W. 941. A member of the paid fire department of a city is not "on duty" while on his way home to his meals, though he is required to hold himself in readiness to per-

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Where a person is in fact exercising a public office under color of authority, his acts as to all the world are official and valid,[52] but he can take no benefit himself from his position,[53] and a de facto officer cannot remain undisturbed in office and claim that he is not a de jure officer. While in office he can be compelled to perform every official act, in behalf of another, which the duties of the office dictate.[54]

It may be asserted as a rule of universal application that, in the absence of any other adequate and specific legal remedy, mandamus will lie to compel the performance of purely ministerial duties, plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers,[55] but where the duty of the officer to act is not clearly shown,[56] or rests in his discretion,[57] or the law requires a judicial determination to be made, the writ will be denied,[58] though, where the duty of

form his duties at such times. Scott v. Jersey City, 68 N. J. Law, 687.

52. Keeling v. Pittsburg, V. & C. R. Co., 205 Pa. 31. One who forfeits his right to an office, of which he is an incumbent, by accepting another which is incompatible with it, and afterwards performs the functions of the office forfeited, is an officer de facto, and his acts done before his removal from that office are valid as to persons other than himself. Certificate of notary under such circumstances is valid. Old Dominion B. & L. Ass'n v. Sohn [W. Va.] 46 S. E. 222.

53. Not entitled to salary. State v. Chicago, 205 Ill. 281, 68 N. E. 736.

54. Stenographer assuming to act as public official compelled to furnish transcript notwithstanding employment by only one party. Mockett v. State [Neb.] 97 N. W. 588.

55. Warmolts v. Keegan [N. J. Law] 54 Atl. 813; People v. Knopf, 198 Ill. 340, 64 N. E. 842, 1127; Payne v. U. S., 20 App. D. C. 581, 605; U. S. v. Payne, 20 App. D. C. 606. No previous demand is necessary where apparent that it would be useless. U. S. v. Saunders [C. C. A.] 124 Fed. 124. Compelling payment of claim. People v. Clarke, 174 N. Y. 259, 66 N. E. 819. Compelling approval of plat which does not dedicate streets. Owen v. Moreland [Mich.] 98 N. W. 1068. Compelling county clerk to sign order for payment of salary of deputy register of probate. Roberts v. Erickson, 117 Wis. 324, 94 N. W. 29. Allowance of claim of agricultural society by county board. State v. Coufal [Neb.] 95 N. W. 362. Compelling stenographer employed by one party to furnish transcript to other. Mockett v. State [Neb.] 97 N. W. 588. Duty of board of school superintendents to make and file teacher's promotion lists. Brooklyn Teachers' Ass'n v. Board of Education, 85 App. Div. [N. Y.] 47. Civil service commissioners may be compelled to certify promotion of police officers on the pay roll. People v. Ogden, 41 Misc. [N. Y.] 246. Compelling issue of warrant for judgment rendered against city. Chapin v. Port Angeles, 31 Wash. 535, 72 Pac. 117. Compelling officer to pay over fees in excess of salary allowed by law. Finley v. Ter. [Okl.] 73 Pac. 273. Compelling release of surety on official bond. U. S. Fidelity & Guaranty Co. v. Peebles, 100 Va. 585, 42 S. E. 310. Compelling county court to convene and canvass vote. Morgan v. Wetzel County Ct., 53 W. Va. 372. Will lie to compel recognition of legal member of defendant board. Akerman v. Board of School Com'rs, 118 Ga. 334. Constable may be compelled to execute execution. State v. Stokes, 99 Mo. App. 236, 73 S. W. 254. Secretary of state may be compelled to issue certificate to private banker. State v. Cook, 174 Mo. 100, 73 S. W. 489. The governor may be compelled to issue a commission to a police justice regularly appointed. Traynor v. Beckham, 25 Ky. L. R. 283, 74 S. W. 1105. The fiscal court of Kentucky may be compelled to replace a county bridge. Leslie County v. Wooten, 25 Ky. L. R. 217, 75 S. W. 208.

56. State v. Cass County Commissioners [Neb.] 95 N. W. 6; U. S. v. Hay, 20 App. D. C. 576. Repair of road. Bacon v. Board of Chosen Freeholders [N. J. Law] 54 Atl. 234. Rejection of application of license to board of pharmacy will not be controlled. Henkel v. Millard, 97 Md. 24. Expulsion of pupil from public school. Miller v. Clement, 205 Pa. 484. Restoration of officer to position after successor has been appointed and qualified. People v. Board of Police Com'rs, 174 N. Y. 450, 67 N. E. 78. Restoration of officer to position under civil service. Stott v. Chicago, 205 Ill. 281, 68 N. E. 736. Compelling centralization of schools—lack of sufficient funds. State v. Board of Education, 24 Ohio Circ. R. 383. County treasurer will not be ordered to replace in school fund amount of voidable order paid with knowledge of circumstances. State v. Bowman, 66 S. C. 140.

57. Refusal of supervisors to repair bridge. Leonard v. Wakeman, 120 Iowa, 140, 94 N. W. 281. Award of contract to "best and lowest" bidder. State v. Lincoln [Neb.] 94 N. W. 719. Right of incumbents of abolished offices to re-employment in similar position. Donovan v. Cantor, 89 App. Div. [N. Y.] 50; Morrison v. Cantor, 173 N. Y. 646, 66 N. E. 1112. Decision of civil service commissioners as to classification of officers. People v. Collier, 175 N. Y. 196, 67 N. E. 309. Relieving officer of national guard of his command, by governor, is not a ministerial act. State v. Jelks [Ala.] 35 So. 60.

58. Judicial act defined. State v. Dunn, 86 Minn. 301, 90 N. W. 772. Removal of street commissioner by common council. Hartwig v. Manistee [Mich.] 96 N. W. 1067. Testing water meters. People v. Monroe, 84 App. Div. [N. Y.] 241. The courts have no general supervisory power over the officers of the land department, by which they can control the decisions of such officers upon questions within their jurisdiction. U. S. v. Hitchcock, 190 U. S. 316, 47 Law. Ed. 1074.

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the officer or board to act is clear, action will be compelled, though in acting, the officer must exercise discretion or judicial determination.[59] Action in a particular manner, however, cannot be controlled.[60] The writ will not be granted to accomplish an unlawful act,[61] and a commissioner of public works will not be compelled by mandamus to obey an order of the city council that will subject him to an action for damages,[62] nor to gratify the spite of a private individual,[63] nor to compel the director of public safety of a city to enforce the Sunday law.[64] The secretary of state is the confidential political agent of the president, for the execution of his will in matters committed to his discretion by the constitution. His acts are only politically examinable and cannot be controlled by the courts,[65] but the action of the postmaster general, in admitting matter to the second class of mail, may be controlled.[66]

§ 9. *Compensation.*—The compensation of a public officer belongs to him, not by force of any contract, but because the law attaches it to the office.[67] He is bound to perform the duties of his office, no matter how onerous they may be, for the compensation fixed by law,[68] and services performed for which the statute does not expressly authorize a charge must be performed gratuitously,[69] neither is his right to the salary affected by a diminution of the duties of the office, the office itself remaining,[70] and where the salary is illegally reduced during his term, the acceptance of the amount allowed will not estop him from claiming the remainder,[71] but where an officer accepts appointment without compensation until otherwise ordered, he cannot, on his salary being subsequently fixed, recover at that rate for the period prior to its being fixed,[72] and where one is appointed to a city office which has been abolished, serves, and accepts a certain sum from month to month, he has no further claim on the city, though the amount paid him is less than the salary provided by ordinance for the abolished office.[73]

Mere laborers and employes stand in a different relation to the public, however, their rights being measured by the contracts under which their services are

59. Will lie to compel proper board to audit claims. State v. Morris [S. C.] 45 S. E. 178.

60. Will not lie to compel auditing board to approve or reject claims. State v. Morris, [S. C.] 45 S. E. 178.

61. Order compelling building commissioner to permit closing of openings in party wall, in aid of an unlawful structure. People v. Calder, 85 App. Div. [N. Y.] 31.

62. Remove railway tracks from street. People v. Blocki, 203 Ill. 363, 67 N. E. 809.

63. Donahue v. State [Neb.] 96 N. W. 1038.

64. People v. Listman, 40 Misc. [N. Y.] 372.

65. Mandamus denied. U. S. v. Hay, 20 App. D. C. 576.

66. Payne v. U. S., 20 App. D. C. 581.

67. Bennett v. Orange [N. J. Law] 54 Atl. 249. And if none belongs to it, he is not entitled to recover for his services as on a quantum meruit. Cook v. Springfield, 184 Mass. 247, 68 N. E. 201. Where a county board has fixed the salary of an officer, and has not changed it, has levied and collected the tax to pay it, and appropriated the money therefor, it cannot prohibit its payment. Roberts v. Erickson, 117 Wis. 324, 94 N. W. 29. Where an office is established by statute and has a specific salary attached to it, the legal incumbent is entitled to the salary though the legislature appropriate a less amount, but this right does not extend to cases where the appointment and salary depend upon the appropriation alone. Indian inspectors, some appointed before and some after appropriation act. Smith v. U. S., 37 Ct. Cl. 119.

68. Duties of probate judge in town site matters. Finley v. Ter. [Okl.] 73 Pac. 273.

69. Compensation of sheriff for returning distress warrant "no property found." Red Willow County v. Smith [Neb.] 93 N. W. 151. The county treasurer, in Illinois, is not entitled to any further compensation for the additional service imposed upon him as supervisor of assessments. Foote v. Lake County, 206 Ill. 185, 69 N. E. 47. Nor is the county clerk, in Missouri, entitled to additional compensation for services as secretary of the board of equalization. State v. Adams, 172 Mo. 1, 72 S. W. 655. Where a city attorney accepts office, under a resolution fixing his salary and including all business of the city coming under his jurisdiction, he is not entitled to any further compensation, under the claim that it is for extraordinary services, but he may be reimbursed for his necessary expenses in attending cases on appeal. Ludlow v. Richie [Ky.] 78 S. W. 199. Clerk who also acts as notary not entitled to further compensation. Spencer v. New York, 42 Misc. [N. Y.] 284.

70. Bennett v. Orange [N. J. Law] 54 Atl. 249.

71. Butler County v. James, 25 Ky. L. R. 801, 76 S. W. 402.

72. McGough v. New York, 83 App. Div. [N. Y.] 322.

73. Cutshaw v. Denver [Colo. App.] 75 Pac. 22.

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performed,[74] and the acceptance by them of less than the legal compensation for their work is a waiver of the right to more.[75]

A de facto officer is not entitled to the salary; to be entitled to that he must be an officer de jure.[76] But one who is both a de facto and a de jure incumbent of a city office cannot be deprived of the salary attached thereto, by reason of the usurpation of the office at the instance of the city authorities.[77] A policeman who has served his term of office and for whom a successor has been appointed is not entitled to compensation, though he voluntarily performs duties.[78]

A judgment in quo warranto pending appeal is not a sufficient commission of office to authorize its holder to the salary,[79] but one who is duly elected to office, receives the certificate, qualifies, and performs the duties is entitled to the salary notwithstanding a contest,[80] and where one elected to office fails to qualify and is subsequently appointed to fill the vacancy, he is entitled to the salary notwithstanding a contest of the election.[81]

The Arkansas state senate alone cannot extend the powers of one of its committees beyond the session, so as to entitle its members to compensation.[82]

Neither officers nor employes are entitled to pay while out of office under suspension or removal,[83] but where the right to remove an officer exists, he is entitled to the statutory salary until actual removal,[84] and the marshal of a city is entitled to the salary of his office, for time during which he was sick and unable to perform its duties.[85]

An agreement by a public employe to take a leave of absence for a portion of his time for the year, with a corresponding decrease of pay, is valid, and having been acted upon, the employe will not be permitted to claim full pay.[86] Neither

74. Where a city, without protest, accepts services of a janitor of a building, tendered under a contract, it is bound to pay for them, whether the contract was valid or not, and regardless of the appointment of another janitor. Skinner v. Manchester [N. H.] 56 Atl. 313. An employe is entitled only to the compensation attached to the position to which he is appointed, though he performs the duties of another. Stenson v. New York, 40 Misc. [N. Y.] 533. An employe in the office of corporation counsel, who renders services as a notary public in connection therewith voluntarily, cannot recover extra compensation for such services. Hughes v. New York, 84 App. Div. [N. Y.] 347.

75. When a public employe becoming entitled under the law to an increase of pay continues to labor and accept pay at the original price without protest, he waives any right to collect the increase, as to time, more than six years prior to suit. Ryan v. New York, 177 N. Y. 271, 69 N. E. 599. Where a laborer employed by the war department under special contract works more than 8 hours a day, and accepts pay in full at the day rate, disregarding the overtime, he is not entitled to extra compensation for the overtime. U. S. v. Moses [C. C. A.] 126 Fed. 58.

76. Stott v. Chicago, 205 Ill. 281, 68 N. E. 736. Policeman serving after expiration of term is entitled to pay for services actually performed. Houston v. Albers [Tex. Civ. App.] 73 S. W. 1084.

77. Moores v. State [Neb.] 93 N. W. 733.

78. Beverly v. Hattiesburg [Miss.] 35 So. 876.

79. Bledsoe v. Colgan, 138 Cal. 34, 70 Pac. 924.

80. Wilson v. Fisher, 140 Cal. 188, 73 Pac. 850; Anderson v. Browning, 140 Cal. 223, 73 Pac. 986.

81. Adams v. Doyle, 139 Cal. 678, 73 Pac. 582.

82. Tipton v. Parker [Ark.] 74 S. W. 298.

83. A policeman of a city cannot maintain an action for his salary, on the ground that he was unlawfully dismissed from the service, while the dismissal remains unreversed. Van Sant v. Atlantic City, 68 N. J. Law, 449. Neither on reversal and reinstatement can he have his salary for the period he was out of the service, where he failed to bring proceedings for over two years (People v. Partridge, 83 App. Div. [N. Y.] 262); nor can a city marshal who has been suspended recover the salary of his office for the period of suspension, irrespective of whether the suspension is followed by removal (Blackwell v. Thayer, 101 Mo. App. 661, 74 S. W. 375); nor can a clerk recover salary for the period during which he did not serve, on being reinstated by mandamus after an illegal dismissal (Martin v. New York, 176 N. Y. 371, 68 N. E. 640; Id., 82 App. Div. [N. Y.] 35); nor after re-employment in a similar position after the abolition of his office (Kastor v. New York, 39 Misc. [N. Y.] 709). Where a street commissioner is suspended and afterwards removed as unfit for duty, he will be presumed to have been unfit during the period of his suspension and therefore not entitled to his salary (Hartwig v. Mayor [Mich.] 96 N. W. 1067); but where an officer, though superseded by another appointment, was not actually removed by the proper officer and was not notified of his removal, he can recover (Jenkins v. Scranton, 205 Pa. 598).

84. People v. Howe, 84 N. Y. Supp. 604.

85. Cavanee v. Milan, 99 Mo. App. 672, 74 S. W. 408.

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does work under orders at reduced hours for reduced pay entitle one to pay for full time.[87]

Since the constitution of California requires the legislature to fix the salaries of county officers, a statute that provides for payment by the county board for extra services rendered by county officers is invalid, if it leave the amount thereof to the discretion of the board,[88] as is an ordinance by a county board of supervisors, authorizing a tax collector to receive certain commissions for collecting license taxes.[89] Nor can a statute accomplish the same result by legalizing commissions theretofore unlawfully allowed by the county board.[90]

Where the constitution or a statute prohibits the changing of officers' salaries during their term, this cannot be accomplished incidentally, by authorizing the appointment of clerks or deputies for them, and paying their salaries,[91] nor by appointing deputies without the officer's consent, and paying their salaries out of the compensation legally belonging to the officer,[92] but a constitutional provision against raising an officer's salary during his term is not violated by the creation of a new office, with a different salary, though it appoint the old officer to the new office.[93] Where, in such case, the amount of salary has not been theretofore fixed, the amount appropriated the first year for that purpose fixes it, and any subsequent attempt to change it is void,[94] but a mere estimate by the proper officers of the amount necessary to pay an officer's salary for the ensuing year, followed by the necessary steps to raise the amount is not a fixing of the salary.[95]

Statutes providing an annual salary for county officers in lieu of fees,[96] and providing for the deposit in the county treasury of all fees over a certain maximum are upheld.[97]

In the absence of constitutional or statutory prohibition, the authority having control over an officer or employe may fix his salary.[98] A county board having

86. Downs v. New York, 173 N. Y. 651, 66 N. E. 1107.

87. Bannister v. New York, 40 Misc. [N. Y.] 408.

88. Const. Cal. art. 11, § 5. Agard v. Shaffer, 141 Cal. 725, 75 Pac. 343.

89. Butte County v. Merrill, 141 Cal. 396, 74 Pac. 1036.

90. Butte County v. Merrill, 141 Cal. 396, 74 Pac. 1036.

91. Etsell v. Knight, 117 Wis. 540, 94 N. W. 290; Jefferson County v. Waters, 24 Ky. L. R. 816, 70 S. W. 40.

92. Oak Cliff v. Etheridge [Tex. Civ. App.] 76 S. W. 602.

93. Thomas v. State [S. D.] 97 N. W. 1011. An increase of a city attorney's salary after his election but before he qualified was not an increase during his term within a charter prohibition. Riggins v. Richards [Tex. Civ. App.] 79 S. W. 84.

94. Butler County v. James, 25 Ky. L. R. 801, 76 S. W. 402.

95. Lyons v. New York, 82 App. Div. [N. Y.] 306.

96. The Wisconsin statute, establishing a salary for the registers of deeds for certain counties, and requiring them to turn their fees into the county treasury, is valid [Laws 1895, c. 169]. Verges v. Milwaukee County, 116 Wis. 191, 93 N. W. 44.

97. In Nebraska, where a county clerk's "fees" amount to more than $1,500 per annum, he is required to pay the excess into the county treasury, and this excess includes the amount paid him by the county board for acting as its clerk. Holcombe v. Dawson County [Neb.] 95 N. W. 835. In Missouri it includes the amount paid him as secretary of the board of equalization. State v. Adams, 172 Mo. 1, 72 S. W. 655. And in Oklahoma the probate judges must likewise pay over the fees received by them in townsite matters, where their whole receipts are in excess of the maximum. Finley v. Territory [Okl.] 73 Pac. 273.

98. The board of health of a city, in Ohio, may increase or diminish the salary of its health officer during his term at will. State v. Massillon, 24 Ohio Circ. R. 249.

The council of the city of Lynn, Mass., has authority to reduce the salary of a deputy street commissioner fixed by the board of public works. Faulkner v. Sisson, 183 Mass. 524, 67 N. E. 669.

The county council in Indiana may provide additional compensation for services performed by the auditor, under the county reform law, as well before January 1, 1900, as after. Burns' Rev. St. 1901, §§ 5594-5594e2. Pulaski County Com'rs v. Hayworth [Ind.] 69 N. E. 159.

Right of commissioner of water supply in New York City to reduce salary of clerk. People v. Dalton, 85 App. Div. [N. Y.] 110.

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power to fix the salary of a county officer at an annual session, may fix it at an adjourned meeting of the annual session,[3] and authority to employ agents, necessarily implies power to contract with them for their compensation.[4] An ordinance providing for the current salary of a city officer does not create a debt, within a constitutional provision invalidating any law creating a municipal debt and not providing for a sinking fund.[5]

No contract is valid which makes the payment of fees to a judicial officer dependent, in any way, on his decision between the parties,[6] but a contract between the state and an agent appointed to prosecute a claim is not against public policy, on account of a provision making compensation contingent on success.[7] Contract by which officer is to receive additional compensation from the county for extra official services is void.[8]

A city may authorize its street commissioner to accept assignments of future earnings of laborers, by a long course of dealings, as well as by formal action of its council,[9] but an assignment of the future salary or fees of a public officer is contrary to public policy and void.[10]

Reimbursement may be made to a public officer for necessary expenditures in the discharge of his duty, not contemplated by his contract of employment, or the law fixing his compensation.[11]

Where a warrant has been drawn for the payment of the salary of a municipal officer, and mandamus has issued to compel its delivery, an ordinance, assuming to repeal the authority under which the warrant was drawn, passed pending the suit, is void.[12] Decisions relating to the compensation of particular officers are mentioned in the note.[13]

The legislature of New York may enact that public employes shall receive not less than the prevailing rate of pay in the locality where their work is performed. Ryan v. New York, 177 N. Y. 271, 69 N. E. 599.

3. Douglas County v. Sommer [Wis.] 98 N. W. 249.

4. Opinion of the Justices [N. H.] 54 Atl. 950.

5. Oak Cliff v. Etheridge [Tex. Civ. App.] 76 S. W. 602.

6. Agreement by disclosure commissioner not to demand fees unless collected from judgment defendants. Watson v. Fales, 97 Me. 366.

7. Opinion of the Justices [N. H.] 54 Atl. 950.

8. Wilson v. Otoe County [Neb.] 98 N. W. 1050.

9. Lamoreux v. Morin [N. H.] 54 Atl. 1023.

10. First Nat. Bank v. State [Neb.] 94 N. W. 633.

11. Expenses of city attorney in attendance on appellate court. Ludlow v. Richie [Ky.] 78 S. W. 199. In Iowa, where the county recorder is compelled to employ a temporary assistant, he must render a bill therefor at each quarterly session of the board of supervisors, and can recover only the reasonable value of such services, regardless of the amount paid therefor [Code, § 496]. Allen v. Adams County, 120 Iowa, 63, 94 N. W. 261. A municipality may properly appropriate money to reimburse an officer for a judgment paid by him in a case growing out of the discharge of his public duty. Police officer shooting at wild animal and injuring pedestrian. State v. St. Louis, 174 Mo. 125, 73 S. W. 623.

12. Moores v. State [Neb.] 93 N. W. 733.

13. Commissions of county clerk in proceedings to call in treasury warrants. Duncan v. Scott County, 70 Ark. 607, 70 S. W. 314. Compensation of trustee to deliver railroad aid bonds. Mercer County Court v. Pearson, 24 Ky. L. R. 1368, 71 S. W. 639. The provision in the statutes of Indiana for the per diem compensation of members of the board of review applies as well to the members who are county officers as to those who are not [Acts 1891, p. 199, § 114, as amended by Acts 1895]. Seiler v. State, 160 Ind. 605, 65 N. E. 922, 66 N. E. 946. Compensation of county health officer, during quarantine. Hudgins v. Carter County, 24 Ky. L. R. 1980, 72 S. W. 730. Salary of county treasurer in New York. People v. Steuben County, 41 Misc. [N. Y.] 590. Treasurer of Jefferson county is entitled to only $500 for handling state funds. Upham v. State, 174 N. Y. 336, 66 N. E. 987. Pay of inspector in fire department of Brooklyn, N. Y. Flynn v. New York, 174 N. Y. 521, 66 N. E. 1109. Compensation of county auditor. State v. Godfrey, 24 Ohio Circ. R. 455. A county treasurer in Pennsylvania is entitled to no fees for collecting liquor license money for a city. Allentown v. Hartman, 22 Pa. Super. Ct. 400. Salary of city marshal under provision for "2 per cent on each $100 assessed" held to be 2 cents on each $100. Oak Cliff v. Etheridge [Tex. Civ. App.] 76 S. W. 602. County surveyors in counties of the twelfth class in Washington are entitled to the per diem only for time actually and necessarily spent in the discharge of their duties. Sayles v. Walla Walla County, 30 Wash. 194, 70 Pac. 256. Compensation of sheriff for pursuit of fugitives from justice beyond state boundaries. Douglas County v. Sommer [Wis.] 98 N. W. 249. A United States marshal may be allowed extra compensation for services ren-

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§ 10. *Liabilities.*—A ministerial officer, acting judicially within his jurisdiction, is not liable to a person injured thereby, unless his acts be willful and malicious,[14] and sound public policy forbids that public officers should be held responsible for the negligence of those whom they are obliged to employ, in the discharge of their duties, when such officers are not chargeable with any want of diligence or due care on their part,[15] neither is the relation of master and servant with its attendant responsibilities created by the employment of laborers by the street commissioner of a city, though the commissioner has the right to select and discharge them and has general direction of the work.[16]

In New York, an officer who discharges a veteran from the public service for any reason except incompetency or unbecoming conduct is liable to him in damages,[17] and a county treasurer, in Missouri, is liable in damages for refusal to pay a valid warrant, however honest he may have been in so refusing.[18]

Where no fee is fixed by law for a particular service, an officer cannot be penalized for overcharging.[19]

A municipality may maintain a common law action against an officer for fees illegally retained by him.[20]

Costs should not be charged against public officers in suits relating to their official duties, unless they have acted with gross negligence, in bad faith, or with malice,[21] but where they assume to act under an invalid statute, it is of their own wrong and they are chargeable.[22]

A member of the board of education of a city is a ministerial officer, within the meaning of the code provision denouncing a punishment for malfeasance in office,[23] and a city attorney is an executive or judicial officer, within the statute of Michigan punishing bribery by such officers.[24]

A police officer is liable to prosecution, in New York City, for neglect of duty in failing to suppress a disorderly house and arrest its inmates,[25] and so is an inspector of combustibles, for failure to seize dynamite illegally stored.[26] A deposition stating that a police captain and several officers came into deponent's cigar store, and some, or all of them, remained there continuously for eleven

dered outside his district in transferring a prize to another district. The Adula, 127 Fed. 849.

14. Under the statute of Michigan making it the duty of public officers contracting for the erection of public buildings to take bonds of the contractors conditioned for the payment of laborers and material men, a good-faith approval of the bond will relieve them of liability to the laborers, though the bond does not in fact protect the laborers [Comp. Laws 1897, §§ 10743-10745]. Huebner v. Nims [Mich.] 94 N. W. 180. County officers are not individually liable for injuries arising to individuals from their acts in constructing a ditch as a part of a county highway. Nussbaum v. Bell County [Tex.] 76 S. W. 430. County commissioners are not individually liable for injuries arising from improper electric wiring in the county jail. Miller v. Ouray Elec. Light & Power Co. [Colo. App.] 70 Pac. 447. The corporation counsel should not appear to defend a patrolman sued for a willful assault in making an arrest. Donahue v. Keeshan, 87 N. Y. Supp. 144.

15. Bowden v. Derby, 97 Me. 536. The general superintendent of a state insane asylum is not liable for injuries caused a pedestrian on the street by a patient allowed his liberty by the physician. Clough v. Worsham [Tex. Civ. App.] 74 S. W. 350.

16. But where a street commissioner selects a derrick and furnishes it to a laborer for use in his work, he is under the duty of using reasonable care to see that it is safe and suitable for the work and so maintained. And where he selects the place to work and invites and directs the workmen to labor therein, he assumes towards them the duty of seeing that the place is reasonably safe. Bowden v. Derby, 97 Me. 536.

17. Fallon v. Wright, 82 App. Div. [N. Y.] 193.

18. State v. Adams, 101 Mo. App. 468.

19. Musback v. Schaefer, 115 Wis. 357, 91 N. W. 966.

20. Sheriff. Douglas County v. Sommer [Wis.] 98 N. W. 249. County treasurer. Allentown v. Hartman, 22 Pa. Super. Ct. 400.

21. O'Connor v. Walsh, 83 App. Div. [N. Y.] 179.

22. Corscadden v. Haswell, 88 App. Div. [N. Y.] 158.

23. State v. Loechner [Neb.] 91 N. W. 874, 59 L. R. A. 915.

24. Comp. Laws 1897, § 11312. People v. Salisbury [Mich.] 96 N. W. 936.

25. People v. Glennon, 175 N. Y. 45, 67 N. E. 125. And see People v. Greene, 87 N. Y. Supp. 172.

26. Sufficiency of indictment. People v. Murray, 76 App. Div. [N. Y.] 118.

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days, against his protest, states a case of oppression in office.[27] A willful failure to settle accounts on the part of a public officer is shown, where he knowingly refused to settle, on the ground that he had lost some of his vouchers, and delayed settlement until he could procure duplicates.[28]

A statute providing for the removal of a city officer for certain misconduct does not exempt him from punishment, as an ordinary criminal,[29] and in Texas, where one appointed road overseer is prosecuted for willful failure to serve, the fact that he is illiterate is no defense.[30]

An indictment against a county supervisor for misconduct is sufficient where it sets forth breaches of statutory duty,[31] but an information against a police officer, for violation of duty in refusing to proceed to a place where alleged offenders were to be found, is bad, the statute only enjoining upon him the duty to arrest.[32]

On demurrer to an indictment for letting a contract to another than the lowest bidder, the court cannot consider whether the lowest bidder might not be in fact the highest, on account of inferiority of his goods, nor can it be held that there was no lowest because the two lowest were equal.[33]

Where a congressman took a non-negotiable note in payment for his services in procuring a contract with the government, limitations did not begin to run against the offense until payment of the note, it being void.[34]

§ 11. *Official bonds and liability thereon.*—A bond naming an obligee other than as required by the statute is nevertheless a good common law bond.[35]

At the common law the sureties on official bonds do not undertake to answer for acts done by their principals under color of office merely, but only for acts done by virtue of the office,[36] the rule, however, is otherwise by statute,[37] or decision,[38] in some states.

A county treasurer and his sureties are liable for money paid on forged warrants,[39] and the county auditor is liable on his bond for the act of his deputy in forging such orders,[40] but the sale of county warrants is no part of a county clerk's duties, and his bondsmen are not liable to one who has been defrauded by a clerk, by the sale of a forged warrant.[41]

The sureties on a bond for a subsequent term are not liable for prior defalcations.[42] Where there is no evidence that an officer's defalcation took place during his first term, and there is evidence that it occurred during his second term,

27. People v. Summers, 40 Misc. [N. Y.] 384.

28. Tracy v. Com., 25 Ky. L. R. 669, 76 S. W. 184.

29. State v. Kelley [Mo. App.] 77 S. W. 996.

30. France v. State [Tex. Cr. App.] 77 S. W. 452.

31. Letting contracts and approving claims for repair of bridges. State v. Jacques, 65 S. C. 178.

32. Laws 1903, p. 207, § 1. State v. King [Mont.] 72 Pac. 657.

33. People v. Scannell, 40 Misc. [N. Y.] 297.

34. U. S. v. Driggs, 125 Fed. 520.

35. Anderson v. Blair, 118 Ga. 211.

36. Misuse of money received by the secretary of state as member of the marks and brands committee. State v. Porter [Neb.] 95 N. W. 769. Failure of county attorney to pay over money collected on notes given by needy farmers. Wilson v. State [Kan.] 72 Pac. 517. Tax held collected by virtue of office. Anderson v. Blair, 118 Ga. 211. The sureties of an officer are not liable on his bond for money paid him by mistake, in excess of his official salary. U. S. v. Boyd, 118 Fed. 89. Whether taxes actually collected within the term covered by the bond were collected under a valid warrant is immaterial. Lake County v. Neilon [Or.] 74 Pac. 212.

37. Clerk of court held liable for money received as proceeds of judicial sale. Smith v. Patton, 131 N. C. 396.

38. In Minnesota, anything which is done under color of office and which would obtain no credit except for its appearing to be a regular official act is within the protection of an officer's bond and must be made good by the sureties. Assault and battery and false imprisonment by sheriff. Hall v. Tierney, 89 Minn. 407, 95 N. W. 219.

39. Ramsey County Com'rs v. Elmund, 89 Minn. 56, 93 N. W. 1054. Contra, State v. Weeks, 92 Mo. App. 359.

40. Ramsey County Com'rs v. Sullivan, 89 Minn. 68, 93 N. W. 1056.

41. State v. Harrison, 99 Mo. App. 57, 72 S. W. 469.

42. Lake County v. Neilon [Or.] 74 Pac. 212.

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from the fact that his annual settlement showed it to be on hand at the close of his first term, the sureties on his bond given for the second term are liable,[43] and judgment on a bond given for one term of office will not bar an action for a different cause, of another bond, for another term given by different sureties.[44]

Bondsmen are liable for the safe keeping of funds coming into an officer's hands, as well in the form of checks or drafts as in the form of coin or bank bills,[45] and where a treasurer delivered county bonds on presentation of a check for their value, which was unpaid, an objection by his bondsmen that they are not liable for the loss because the funds never came into the hands of the treasurer is untenable, since, if he had no authority to accept the check, then they are liable for his remissness in delivering the bonds without authority.[46]

A county clerk's bond, in Missouri, covers amounts received by him as fees for acting as secretary of the board of equalization, and not turned over as in excess of the amount of fees he is allowed to retain.[47]

Where a county treasurer refuses to pay a valid warrant and is compelled by mandamus, his sureties are liable for interest on the amount recovered for the period during which plaintiff was deprived of it, and for expenses of collection, including attorney's fees.[48]

In Indiana, an action will not lie on the bond of a constable to recover for an extortion, the statutory penalty being only a personal liability.[49]

At common law the sureties on official bonds cannot be relieved of their obligation,[50] and official bonds given during any one term of office are cumulative, the new bonds not taking the place of old ones, but being additional security merely,[51] but in several states, by statute, a corporation as well as an individual who has become surety on an official bond has an absolute right to be relieved therefrom on proper notice,[52] and in such case, the release of one surety operates to discharge the bond, and no liability exists for a subsequent defalcation,[53] but the sureties on a public administrator's bond are not discharged by a settlement by his administrator with the curator of a ward to whom he was indebted, there being in fact no transfer of assets,[54] and where the undertaking is that the officer will pay over all moneys collected by him, the bond is not discharged by his paying over an amount equal to the penalty of the bond, but the sureties are liable for any defalcation, regardless of the amount properly accounted for.[55] The surety on a tax collector's bond is not discharged by the fact that the county treasurer did not return correct answers to questions asked him by the surety, with reference to the collector's accounts, before going on the bond.[56]

An action may be maintained by the county against the treasurer's bondsmen, before the county auditors have adjusted his accounts,[57] and before his term of office expires,[58] and an action on the bond of a public officer for defalcation is an action on a liability created by statute, barred after the lapse of six years, and not an action on a sealed instrument to which the ten years' limitation applies.[59]

43. State v. Greer, 101 Mo. App. 669, 74 S. W. 881.
44. Brady v. Pinal County [Ariz.] 71 Pac. 910.
45, 46. Montgomery County v. Cochran [C. C. A.] 121 Fed. 17; Id., 126 Fed. 456.
47. State v. Adams, 172 Mo. 1, 72 S. W. 655.
48. State v. Adams, 101 Mo. App. 468, 74 S. W. 497.
49. Burns' Rev. St. 1901, § 6549. State v. Bagby, 160 Ind. 669, 67 N. E. 519.
50, 51. Fidelity & Deposit Co. v. Fleming, 132 N. C. 332.
52. U. S. Fidelity & Guaranty Co. v. Peebles, 100 Va. 585.
53. Laws 1883, p. 158, No. 63, §§ 15, 16. Cochise County v. Ritter [Ariz.] 73 Pac. 448. An audit, by the proper authority, of a public officer's accounts in the absence of fraud or collusion is conclusive. Com. v. Patterson, 206 Pa. 522.
54. State v. Greer, 101 Mo. App. 669, 74 S. W. 881.
55. Graham v. Baxley, 117 Ga. 42.
56. Com. v. American Bonding & Trust Co., 205 Pa. 372.
57. Lancaster County v. Hershey, 205 Pa. 343.
58. Montgomery County v. Cochran [C. C. A.] 126 Fed. 456.
59. State v. Davis, 42 Or. 34, 71 Pac. 68.

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An action on the bond of a county auditor, in Indiana, is properly brought in the name of the state on relation of the board of commissioners of the county.[60] On the bond of a Federal officer the action should be in the name of the United States,[61] and in Minnesota, by the county in the name of the board of county commissioners,[62] but a private person alone cannot maintain an action on an official bond running to the state,[63] and a town and the supervisor thereof cannot maintain an action on the bond of a county treasurer, for failure to pay over to it, its share of the state school money.[64]

An action against the heirs of a deceased public officer, participating in the distribution of his estate, cannot be joined with one against his bondsmen to recover money paid him by mistake, in excess of his legal salary, there being not only a misjoinder of parties but also a joinder of legal and equitable causes of action.[65]

The several breaches of the bond need not each be set out in a separate paragraph of the complaint.[66]

The mere introduction in evidence of what purports to be a copy of an official bond, without proof of its execution and delivery, will not authorize judgment against the sureties where they deny executing it.[67]

Where an auditor is appointed to hear the evidence and state the account between the county and its treasurer, and the auditor's report is not excepted to, there is no error in instructing a verdict for the amount shown thereby.[68]

Where persons sued as sureties on the bond of a county clerk deny its execution, and the clerk defends on the ground that the money received by him was as bailee only and not by virtue of his office, a tender of part payment by him does not impair the defense of the sureties.[69]

PARDONS AND PAROLES.

Amnesty does not bar a civil action to recover moneys embezzled.[70] A pardon restoring civil rights may be granted after the convict has served his term or has been pardoned.[71] The recited motives of the executive cannot be questioned.[72] Pardon may be granted after conviction but before sentence.[73] A pardon may be signed with the surname of the governor without his initials.[74] Error in stating the date of conviction and reciting the sentence does not invalidate the pardon.[75] A pardon is valid though it is not addressed to the person having custody of the convict.[76] A pardon may be delivered directly to the convict.[77] Pardon before sentence may be raised by motion for discharge.[78] A pardon for one offense, though reciting an intent to restore the convict to rights of citizenship, does not cover another conviction had at about the same time as that pardoned.[79]

60. Nowlin v. State, 30 Ind. App. 277, 66 N. E. 54.

61. Suit for substantial damage to a party on breach of the bond of a clerk of court, may be brought in the name of the United States, for use of the injured party. U. S. v. Bell, 127 Fed. 1002.

62. Ramsey County Com'rs v. Sullivan, 89 Minn. 68, 93 N. W. 1056.

63. Clough v. Worsham [Tex. Civ. App.] 74 S. W. 350.

64. Ulysses v. Collins, 81 App. Div. [N. Y.] 304.

65. U. S. v. Boyd, 118 Fed. 89.

66. Nowlin v. State, 30 Ind. App. 277, 66 N. E. 54.

67. Craw v. Abrams [Neb.] 94 N. W. 639; Id., 97 N. W. 296.

68. Harper v. Marion County [Tex. Civ. App.] 77 S. W. 1044.

69. Craw v. Abrams [Neb.] 94 N. W. 639; Id., 97 N. W. 296.

70. Act Cuban Congress, June 9, 1902. U. S. v. Neely, 126 Fed. 221.

71, 72. Locklin v. State [Tex. Cr. App.] 75 S. W. 305.

73, 74, 75, 76, 77, 78. Spafford v. Benzie Circ. Judge [Mich.] 98 N. W. 741.

79. Miller v. State [Tex. Cr. App.] 79 S. W. 567.

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PARENT AND CHILD.[80]

§ 1. Custody and Control of Child (1089).
§ 2. Support and Necessaries (1090).
§ 3. Services and Earnings and Injuries to Child (1090).
§ 4. Property Rights and Dealings Between Parent and Child (1091).
§ 5. Liability for Child's Torts (1091).

§ 1. *The custody and control* of children belong to their parents[81] primarily,[82] but their right is not absolute.[83] In cases of divorce, or voluntary separation, and in the absence of misconduct,[84] the children may be awarded to either parent,[85] in the sound discretion of the court,[86] their welfare being the primary consideration.[87] A parent may surrender the custody and control of his child to another,[88] if the latter be a suitable and proper person,[89] or he may emancipate a child.[90] A parent may moderately correct or chastise his child,[91] but for ex-

80. See, also, Adoption of Children; Guardianship; Infants.

81. The mother is equally entitled with the father [Iowa Code, § 3192]. Rowe v. Rugg, 117 Iowa, 606, 91 N. W. 903. And in Michigan the appointment of a testamentary guardian by the father is not operative until the mother has had a chance to be heard [3 Comp. Laws, § 5706]. Ohrns v. Woodward [Mich.] 96 N. W. 950. Wife's right, after husband's decease, not lost by re-marriage. Beall v. Bibb, 19 App. D. C. 311. Adoptive parents. Monk v. McDaniel, 116 Ga. 108.

82. State v. Anderson [Minn.] 94 N. W. 681. Even as against relatives who have cared for the child for years. In re Wilson [N. J. Eq.] 55 Atl. 160. The custody of a child was properly taken from those having her in their temporary custody, and given to her adopted parents who had means to care for her while the temporary custodian was in straitened circumstances. Miller v. Miller [Iowa] 98 N. W. 631. The parents' primary right seems to have been forgotten, where a mother was not allowed to recover her lost, but not abandoned, child from those who had cared for, and tried ineffectually to adopt, the child. McDonald v. Stitt, 118 Iowa, 199, 91 N. W. 1031. Notice should be given to parents of application for guardian (In re Chin Mee Ho, 140 Cal. 263, 73 Pac. 1002), otherwise appointment of guardian not conclusive as to his right of custody of child (In re Thomsen [Neb.] 95 N. W. 805). In proceedings between a father and grandmother contesting the right of custody of a child, the fact that the grandmother could give the child more comforts and a better education than the father could afford was not a controlling consideration. Dunkin v. Seifert [Iowa] 98 N. W. 558.

83. Ward v. Ward [Tex. Civ. App.] 77 S. W. 829. Though a father is financially able, he should not on habeas corpus be granted custody of his five year old daughter who is delicate, it being doubtful whether he is qualified to look after her welfare, and her mother's sister, with whom she has been for four years since her mother's death, being able and qualified. Kirkbride v. Harvey [Ala.] 35 So. 848.

84. In divorce proceedings, children awarded to father, where mother guilty of misconduct. Goodridge v. Goodridge, 25 Ky. L. R. 649, 76 S. W. 164. Mother's reputation for truth and chastity considered. Ward v. Ward [Tex. Civ. App.] 77 S. W. 829. Not misconduct, for wife to leave husband at his order. P. L. 1902, p. 264, gives chancellor discretion. Carson v. Carson [N. J. Eq.] 54 Atl. 149.

85. May reserve to other parent right to visit. Goodridge v. Goodridge, 25 Ky. L. R. 649, 76 S. W. 164.

86. The discretion should be governed by rules of law. Monk v. McDaniel, 116 Ga. 108. And habeas corpus, not petition in equity, the proper proceeding in N. J. Rossell v. Rossell, 64 N. J. Eq. 21.

87. Therefore decree left open for future control or modification (McGough v. McGough, 136 Ala. 170), and petition not barred because of previous contest (Pearce v. Pearce, 136 Ala. 188), or decree provides for custody for only two years (State v. Anderson [Minn.] 94 N. W. 681). The express preference of a child will be considered (Lamar v. Harris, 117 Ga. 993), but is not controlling (Beall v. Bibb, 19 App. D. C. 311; Monk v. McDaniel, 116 Ga. 108). In habeas corpus to determine the right of custody of a child, the interests of the child must be considered with the rights and interests of his parents. Miller v. Miller [Iowa] 98 N. W. 631.

88. May be implied from circumstances. Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35; In re De Freest's Estate, 41 Misc. [N. Y.] 535. Such person cannot appoint a testamentary guardian, as the trust is personal. Lamar v. Harris, 117 Ga. 993. If acted upon, not defeated though not in writing, or to be performed within one year. Jones v. Comer, 25 Ky. L. R. 773, 76 S. W. 392. In Minnesota such a surrender is not binding, being held to be against public policy. State v. Anderson [Minn.] 94 N. W. 681. It will be presumed that the surrender of custody, by a father, of his minor child is intended to be temporary unless the contrary clearly appears. Miller v. Miller [Iowa] 98 N. W. 631. A finding by a court, in habeas corpus proceedings, that a father had not consented to the adoption of his child by his grandmother, was not without support in the evidence, where it appeared that the wife once spoke of giving the child to her mother, and he objected, and after death of the wife he demanded the child. Dunkin v. Seifert [Iowa] 98 N. W. 558.

89. Carter v. Brett, 116 Ga. 114.

90. May be express, or implied, and subsequent conduct of parties is important as evidence. Carthage v. Canton, 97 Me. 473. Remarriage of mother does not emancipate. Blivin v. Wheeler [R. I.] 55 Atl. 760.

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cessive chastisement, or cruel treatment, he is liable criminally,[92] but not civilly.[93]

§ 2. *Support and necessaries.*—It is a father's duty to support his child,[94] and this renders him liable for necessaries furnished his child.[95] What are necessaries depends on the circumstances of each case.[96] Failure to support a child has been made a misdemeanor in many states.[97] Frequently there is a statutory duty for an adult to support indigent parents.[98]

§ 3. *Services and earnings, and injuries to child.*—A father is entitled to the services and earnings of his child, during its minority,[99] because of his duty to support and maintain the child.[1]

A father, unless barred by own negligence,[2] can recover from another for

91. Clasen v. Pruhs [Neb.] 95 N. W. 640; Goode v. State [Tex. Cr. App.] 77 S. W. 799. And this right may be delegated to an aunt, but not indiscriminately. Rowe v. Rugg, 117 Iowa, 606, 91 N. W. 903.

92. Prosecution for aggravated assault on daughter. Goode v. State [Tex. Cr. App.] 77 S. W. 799.

93. McKelvey v. McKelvey [Tenn.] 77 S. W. 664. In Nebraska civil recovery has been allowed against one in loco parentis. Clasen v. Pruhs [Neb.] 95 N. W. 640.

94. Includes the duty to furnish necessary medical attendance, and father not relieved though his child has a guardian. Leach v. Williams, 30 Ind. App. 413, 66 N. E. 172. He may be relieved by surrendering his child to others who assume its care. In re De Freest's Estate, 41 Misc. [N. Y.] 535. Order for support of children made in divorce proceedings is enforceable by contempt proceedings, being included as "alimony" in Mich. [Pub. Act 1899, p. 360, No. 230]. Brown v. Brown [Mich.] 97 N. W. 396. Where furnished adult child, presumed gratuitous. Terry v. Warder, 25 Ky. L. R. 1486, 78 S. W. 154.

95. At request of wife, which he had failed to provide, and had not given statutory notice. Humphreys v. Bush, 118 Ga. 628. But wife cannot bind him for necessaries, where he has already provided for wife's and children's support. Cory v. Cook, 24 R. I. 421. Father not relieved though he pays another for support of his child. Hazard v. Taylor, 38 Misc. [N. Y.] 774.

96. Admitted evidence as to father's means; commercial education may be a necessary for a daughter. Cory v. Cook, 24 R. I. 421. Board, clothing, and medicine. Humphreys v. Bush, 118 Ga. 628. Board, bed, and repairs to plumbing. Hazard v. Taylor, 38 Misc. [N. Y.] 774.

97. La. Act, No. 34, of session of 1902, as to willful neglect, constitutional. State v. Cucullu, 110 La. 1087. A criminal proceeding though instituted by a private party. State v. Peabody [R. I.] 55 Atl. 323. To convict under Ga. Pen. Code 1895, § 114, the child must be destitute as well as dependent. Dalton v. State, 118 Ga. 196; Baldwin v. State, 118 Ga. 328. N. Y. Penal Code, § 288, includes failure to provide medical attendance, though from conscientious scruples. People v. Pierson, 176 N. Y. 201, 68 N. E. 243. Where one prosecuted for failure to support his children did not claim to be in receipt of a lesser income by reason of physical disability, the exclusion of a question calling attention to such disability was not error. State v. Peabody [R. I.] 56 Atl. 1028. In a prosecution for nonsupport, where it was apparent from the statements of the witness that his knowledge of the subject was hearsay, such statements were properly excluded. Id. Evidence held sufficient to support a conviction for not furnishing his children necessaries of life. Id.

98. Or. B. & C. Comp. §§ 2654, 5254, but here an express contract. Belknap v. Whitmire, 43 Or. 75, 72 Pac. 589. Presumed that board furnished a parent is gratuitous. Nicholas v. Nicholas, 100 Va. 660. So of nursing, but a question for jury. Lillard v. Wilson [Mo.] 77 S. W. 74.

99. But he may allow them to the child and such allowance is good even as against the father's devisees. Crowley v. Crowley [N. H.] 56 Atl. 190. Services rendered by an adult living with a parent presumed gratuitous. Terry v. Warder, 25 Ky. L. R. 1486, 78 S. W. 154. Yet a question for jury. Lillard v. Wilson [Mo.] 77 S. W. 74.

1. McGarr v. National & Providence Worsted Mills, 24 R. I. 447, 60 L. R. A. 122.

2. For jury as to allowing child to cross R. R. tracks alone. Enright v. Pittsburg R. Co., 204 Pa. 543. Not negligent to allow a child of eleven to cross R. R. tracks. Tex. & P. R. Co. v. Ball [Tex. Civ. App.] 73 S. W. 420. Allowing eight year old son alone at station, where he crawled under cars, barred father, but child recovered, as jury found not old enough to appreciate the danger. St. Louis, etc., R. Co. v. Colum [Ark.] 77 S. W. 596. Father, as child's administrator, barred by negligence, where recovery will benefit him solely. O'Shea v. Lehigh Val. R. Co., 79 App. Div. [N. Y.] 254; Richmond, F. & P. R. Co. v. Martin's Adm'r [Va.] 45 S. E. 894. A parent must use reasonable prudence in the care of his children. Action to recover for death of a child caused by its being run over in the street. Del Rossi v. Cooney [Pa.] 57 Atl. 514. Where the family consisted of the parents and three small children, the father was away from home during the day time, but had erected a fence to prevent his children from going into the street, and the latch of the gate was beyond their reach, held sufficient to rebut the presumption of negligence arising from the fact that the child was alone in the street. Id. Where a father consents to his son's employment, he is chargeable with having consented to accept any risk naturally incident to the work, but not to those not naturally incident thereto. Dimmick Pipe Co. v. Wood [Ala.] 35 So. 885. Consent to shovel sand into molding flasks was not consent to use a wheelbarrow to wheel sand

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injuring his child,[3] on the theory that the relation of master and servant exists between them.[4] This theory limits[5] the damages to those resulting from loss of services,[6] and expenses necessarily incurred.[7] When the father is dead the right to recover belongs to the mother.[8]

§ 4. *Property rights and dealings between parent and child.*—The relation of parent and child will not prevent a parent from being held a trustee for his child,[9] nor will it invalidate gifts from one to the other.[10] It does not constitute one the agent of the other,[11] nor take a case out of the statute of frauds.[12]

§ 5. *Liability for child's torts.*—A father, where not himself negligent, is not liable for his child's torts.[13]

PARLIAMENTARY LAW.[14]

Where the chairman of a legislative board refuses to put a motion, it may be put by a temporary chairman at once selected by the board.[15]

about the pits in dangerous proximity to suspended flasks of molten metal. Id.

3. Bredeson v. Smith Lumber Co. [Minn.] 97 N. W. 977. Unlawfully decoying away son. Arnold v. St. Louis & S. F. R. Co., 100 Mo. App. 470, 74 S. W. 5. Contact with electric wires. Herron v. Pittsburg, 204 Pa. 509. Riding in cold cars. St. Louis So. R. Co. v. Campbell [Tex. Civ. App.] 75 S. W. 564. But a father may release a person from all liability for injuries to his child while in that person's service, and will thereby be barred from recovering as to negligent, but not as to criminal, acts of that person or his servants (New v. Southern R. Co., 116 Ga. 147, 59 L. R. A. 115), or a father by his conduct in the settlement of his child's action may be estopped from bringing one in his own right (Daly v. Everett Pulp & Paper Co., 31 Wash. 252, 71 Pac. 1014).

4. Callaghan v. Lake Hopatcong Ice Co. [N. J. Law] 54 Atl. 223. Essential to aver the child a servant of the parent. Scamell v. St. Louis Transit Co. [Mo. App.] 77 S. W. 1021.

5. No recovery for burial expenses. Callaghan v. Lake Hopatcong Ice Co. [N. J. Law] 54 Atl. 223. Nor for bereavement, or loss of society. McGarr v. Nat. & P. Worsted Mills, 24 R. I. 447, 60 L. R. A. 122; Schnable v. Providence Public Market, 24 R. I. 477. Nor for sickness and suffering. St. Louis, S. W. R. Co. v. Campbell [Tex. Civ. App.] 75 S. W. 564. Nor for physical or mental pain, nor for injuries that do not incapacitate for service. St. Louis S. W. R. Co. v. Gregory [Tex. Civ. App.] 73 S. W. 28.

6. Net value during minority (Schnable v. Providence Public Market, 24 R. I. 477), or during child's life, if he dies before majority (Callaghan v. Lake Hopatcong Ice Co. [N. J.] 54 Atl. 223).

7. Tex. & P. R. Co. v. Ball [Tex. Civ. App.] 73 S. W. 420. Medical attendance and nursing. Callaghan v. Lake Hopatcong Ice Co. [N. J. Law] 54 Atl. 223; Baxter v. St. Louis Transit Co. [Mo. App.] 78 S. W. 70; McGarr v. Nat. & P. Worsted Mills, 24 R. I. 447, 60 L. R. A. 122; St. Louis S. W. R. Co. v. Campbell (Tex. Civ. App.] 75 S. W. 564. Even where father himself the physician. St. Louis S. W. R. Co. v. Gregory [Tex. Civ. App.] 73 S. W. 28. But not where not paid for by father, and their reasonable value not shown. Fagan v. Interurban St. R. Co., 85 N. Y. Supp. 340.

8. Scamell v. St. Louis Transit Co. [Mo. App.] 77 S. W. 1021. So where the child is surrendered, or the mother has the entire control and ownership of the household receipts and expenditures, and supports the child. McGarr v. Nat. & P. Worsted Mills, 24 R. I. 447, 60 L. R. A. 122. Cal. Code Civ. Proc. § 376, giving right to mother where father has deserted includes case where she procured divorce for cruelty, and father had not since furnished support. Delatour v. Mackay, 139 Cal. 621, 73 Pac. 454. But the father's right of action does not on his death descend to the mother, but to his personal representative. Kelly v. Pittsburg & B. Traction Co., 204 Pa. 623.

9. Trust will result in favor of child, where title to land purchased with his money was taken by his father, to overcome contractual difficulties of minor. Crowley v. Crowley [N. H.] 56 Atl. 190.

10. Presumption inspired by affection, as gift from father eighty-eight years old to son who had managed his business for fifteen years. Sawyer v. White [C. C. A.] 122 Fed. 223. A gift by a father to his children of all his property remaining after previous transfers to them, made while he was having trouble with his second wife, may be revoked though made without any solicitation from his children. James v. Aller [N. J. Eq.] 57 Atl. 476. A voluntary settlement by a father after his second marriage, on the children of his first marriage, covering his homestead and one half his personal property, executed while he was steadily accumulating money will be sustained. Id.

11. Daughter of twenty-five who lived in family not thereby authorized to negotiate for sale of her mother's land. Hickox v. Bacon [S. D.] 97 N. W. 847.

12. A daughter who lived with father and helped pay for land not allowed any interest therein. Brooks v. Bule [Ark.] 70 S. W. 464. Where a father placed his son in possession of land, and the latter made improvements, he did not thereby gain title. Nicholas v. Nicholas, 100 Va. 660.

13. Not liable for shooting by a son of seven, where he had forbidden him to, and did not know that he did. carry a loaded gun. Taylor v. Sell [Wis.] 97 N. W. 498. In Loui-

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PARTIES.

§ 1. Who May or Must Sue (1092).
§ 2. Persons Who May or Must be Sued (1093).
§ 3. Designating and Describing Parties (1094).
§ 4. Additional and Substituted Parties (1094).
§ 5. Objections to and Defects of Parties (1096).

§ 1. *Who may or must sue.*[31]—The real party in interest should sue,[32] and the trustee of an express trust,[33] as an agent to purchase, who took title in his own name,[34] or who took an assignment for the purpose of collection,[35] or a factor, is the real party in interest.[36] A trustee in bankruptcy of the owner of paper,[37] or the assignee though without a written formal assignment is the real party in interest.[38] If, however, the assignment did not pass the legal title, the action should be brought in the name of the assignor, to the use of the assignee.[39] The assignor of a claim, as collateral, is the real party to sue.[40] Again, if the transfer is cham-

siana, under Civ. Code, § 2318, making father liable, the plaintiff could not recover, where, by insulting conduct he had provoked defendant's son to shoot him. Miller v. Meche [La.] 35 So. 491.

14. Constitutional requirements as to enactment of statutes are discussed in Statutes.

15. Discussing the standing rules of the Long Branch Commission. Hicks v. Long Branch Commission [N. J. Err. & App.] 55 Atl. 250.

31. Parties in particular relationship, see specific heads as Assignments for Benefit of Creditors; Bankruptcy; Corporations; Estates of Decedents; Guardian and Ward; Guardian ad Litem; Husband and Wife; Receivers, etc. Parties to actions to recover Indian lands see Indians. Brought v. Cherokee Nation [Ind. T.] 69 S. W. 937.

32. That plaintiff had contracted with one to make all collections will not prevent him from suing on a claim. N. Y. Phonograph Co. v. Nat. Phonograph Co., 119 Fed. 544. If the evidence shows that the right of action at the time it was brought, was in another and no other facts as to plaintiff's rights, a judgment for the plaintiff will be reversed. Gulf, C. & S. F. R. Co. v. Bartlett [Tex. Civ. App.] 75 S. W. 56. Code, § 570. It may be shown that persons suing as stockholders were not in fact the real owners of the stock standing in their names. MacGinness v. Boston & M. Consol. C. & S. M. Co. [Mont.] 75 Pac. 89. An action against the debtor and his sureties, though requested by the latter, is not an action in their behalf. Citizens' Bank v. Burrus [Mo.] 77 S. W. 748. Where a party assumed to pay the debts of another, one to whom no promise was made cannot sue the promisor, even though he undertook to pay the particular debt. Hawkins v. Cent. of Ga. R. Co. [Ga.] 46 S. E. 82. Action to transport freight at a preferential rate, held a contract for services and not within Code 1896, § 28, authorizing actions to be brought in the name of the real party in interest. Sullivan v. Louisville & N. R. Co. [Ala.] 35 So. 694. The mortgagee is the proper party to sue on a policy insuring the interests of both, though the mortgagor paid the premiums. Such a contract is direct and not collateral. Smith v. Union Ins. Co. [R. I.] 55 Atl. 715. That plaintiff sued for the use of another will not prevent a recovery, where it appears that he was the real party in interest. Key v. Continental Ins. Co., 101 Mo. App. 344, 74 S. W. 162.

33. Contract held to create an express trust. Nelson v. Hirsch & Sons' I. & R. Co., 102 Mo. App. 498, 77 S. W. 590. The insured is the proper party to sue to reform the policy as to premiums paid, since he stands in the relation of trustee of an express trust to the beneficiary's assignee. Hunt v. Provident Sav. Life Assur. Soc., 77 App. Div. [N. Y.] 338; Watford v. Windham, 64 S. C. 509. Plaintiff held not a trustee of an express trust. State v. Hawes, 177 Mo. 360, 76 S. W. 653.

34. Brannon v. White Lake Tp. [S. D.] 95 N. W. 284.

35. Howe v. Mittelberg, 96 Mo. App. 490, 70 S. W. 396.

36. Rev. St. 1898, § 2607. Proper party to recover purchase money. Beardsley v. Schmidt [Wis.] 98 N. W. 235.

37. Action on a policy of insurance which had been transferred as a preference, but surrendered to the trustee in bankruptcy, of the transferror, may be maintained by the latter though he holds no written reassignment. Traders' Ins. Co. v. Mann, 118 Ga. 381. After return of the insolvent's property, after settlement of his estate, he is the proper party to sue affecting it. In case of a note a written assignment by the assignee for creditors was not necessary. Brown v. Johnson Bros., 135 Ala. 608.

38. Assignee of a judgment. Linton v. Baker [Neb.] 96 N. W. 251. Under Iowa Code, § 3459, which requires actions to be brought by real party in interest. If delivered for the purpose of suit he holds the legal title. Salmon v. Rural Independent School Dist., 125 Fed. 235. The assignee of a ward's claim against his guardian is the party in interest to sue on the guardian's bond. Heisen v. Smith, 138 Cal. 216, 71 Pac. 180.

39. The Code did not impair the common-law remedy. Key v. Continental Ins. Co., 101 Mo. App. 344, 74 S. W. 162. Burns' Rev. St. 1901, § 277. If the assignor is dead, and no representative has been appointed within the state, there is no defect in failing to make the assignor or his representative a party. Boseker v. Chamberlain, 160 Ind. 114, 66 N. E. 448.

40. Hawkins v. Mapes-Reeve Const. Co., 82 App. Div. [N. Y.] 72. Lease assigned by lessee. Gross v. Heckert [Wis.] 97 N. W.

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pertous, the transferror should sue to the use of the transferee.[41] The pledgee may sue for a conversion of the pledged property of the pledgor.[42]

In tort the person injured is the proper party to sue.[43] Causes of action created by statute can be enforced only by the persons designated.[44]

Where the state statute permits a suit, in the name of a limited partnership, it may be so brought in a federal court.[45]

All persons having an interest in the subject-matter are properly joined as plaintiffs,[46] though joinder as party plaintiff of one who had parted with his interest is not fatal.[47] Persons having separate and distinct causes of action against another should not join as parties plaintiff.[48]

§ 2. *Persons who may or must be sued.*—Only such persons as will in some way be affected should be joined as defendants,[49] as persons in possession of the property, the subject-matter of the suit.[50] Only joint tort feasors can be joined[51]

952. The mortgagee who had assigned the mortgage note and the insurance policy as collateral is the proper party to sue on the policy, being liable as indorsee on the note. Key v. Continental Ins. Co., 101 Mo. App. 344, 74 S. W. 162.

41. As an action to recover possession of land which was held adversely when conveyed, the deed in such case being invalid, under Rev. Codes, § 7002. The grantor should sue to the use of the grantee. Galbraith v. Paine [N. D.] 96 N. W. 258. The assignee of a cause of action for breach of covenant of warranty is not the real party in interest. Code, § 177. The assignment is champertous. Such covenants follow the land. Ravenel v. Ingram, 131 N. C. 549.

42. If also pledged to indemnify another the pledgee sues as a trustee of an express trust. Hoffman House v. Foote, 172 N. Y. 348, 65 N. E. 169.

43. A guardian cannot, in his own name, maintain action for deceit in procuring an exchange of the ward's lands, though the false representations were made to him, and though the ward has since died and the guardian is his sole heir. Brock v. Rogers, 184 Mass. 545, 69 N. E. 334.

44. Action for wrongful death under Comp. Laws, 1897, § 3213, cannot be maintained by the personal representatives. Romero v. Atchison, T. & S. F. R. Co. [N. M.] 72 Pac. 37. The administrator is not the proper party to sue for wrongful death of a minor. The right is personal to the widow. Act March 2, 1891, § 13. Dickason Coal Co. v. Unverferth, 30 Ind. App. 546, 66 N. E. 759.

45. Mich. Pub. Acts, No. 191, p. 210, § 10. Where no diversity of citizenship is required to confer jurisdiction. Sanitas Nut Food Co. v. Force Food Co., 124 Fed. 302.

46. Jewish Colonization Ass'n v. Solomon, 125 Fed. 994. To an action for breach of contract to deliver goods to two parties both must join. Lemon v. Wheeler, 96 Mo. App. 651, 70 S. W. 924. Plaintiffs held to have a joint interest and to be entitled to maintain a joint action for breach of the contract. Dunn & Co. v. Smith [Tex. Civ. App.] 74 S. W. 576. Rev. St. § 5005. Though their interests are several. Farmers' M. F. & L. Ins. Co. v. Ward, 24 Ohio Circ. R. 156. Trustees under prior deeds of trust which had been discharged, held not proper parties plaintiff with a purchaser at foreclosure of subsequent deeds, in an action affecting the realty. Whitecotton v. St. Louis & H. R. Co. [Mo. App.] 78 S. W. 318. The mortgagor is not a necessary party plaintiff to an action on an insurance policy, severally insuring the interests of the parties, and this though the mortgage does not cover all the property. The conflicting interests should be determined by making him party defendant. Kent v. Aetna Ins. Co., 84 App. Div. [N. Y.] 428. An averment in the complaint that another had an interest in the contract with the plaintiff does not make the complaint objectionable because of nonjoinder of such party. Brown v. Salisbury, 123 Fed. 203. Several parties holding chattel mortgages may join in an action for conversion of the property by the sheriff, against sheriff. Trompen v. Yates [Neb.] 92 N. W. 647. To actions for injuries to land all the tenants in common should be made parties. Armstrong v. Canady [Miss.] 35 So. 138.

47. Action to determine adverse claims to mining property. Mackay v. Fox [C. C. A.] 121 Fed. 487.

48. Cobb v. Monjo, 90 App. Div. [N. Y.] 785. If the cause of action is in favor of the plaintiff individually and if he sues also in his representative capacity, there is a misjoinder. Groh v. Flammer, 89 App. Div. [N. Y.] 28.

49. Bagwell v. Johnson, 116 Ga. 464; Stull Bros. v. Powell [Neb.] 97 N. W. 249. In foreclosure of a municipal mechanic's lien, since the city is not interested and could not be prejudicially affected, it is not a necessary party. Hawkins v. Mapes-Reeves Const. Co., 82 App. Div. [N. Y.] 72. Suit to have deed by one claiming to be the owner in fee declared void. Ackley v. Croucher, 203 Ill. 530, 68 N. E. 86. A subsequent transferee of land is a proper party to an action by the judgment debtor to annul the judgment for fraud. Frankel v. Garrard, 160 Ind. 209, 66 N. E. 687. Applied to action to enforce a contract made with a corporation wherein certain stockholders were sought to be restrained from transferring their stock to innocent purchasers. Dupignac v. Bernstrom, 76 App. Div. [N. Y.] 105. Complaint in action against principal and surety on guaranty bond held not objectionable on ground of misjoinder of parties defendant. Scarratt v. Cook Brewing Co., 117 Ga. 181. As to parties to bill for injunction. Ex parte Haggerty, 124 Fed. 441. The grantee of the lessor is a proper party to an action to determine a right of way of a lessee over lands leased subsequently to others. Stoits v. Tuska, 83 App. Div. [N. Y.] 426.

50. Replevin. Engel v. Dado [Neb.] 92

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or they may be sued severally.[52] By making certain persons parties defendant, the plaintiff admits that they are proper parties.[53]

§ 3. *Designating and describing parties.*—Parties defendant may be described by the initial letters of their christian names when the latter are not known to the plaintiff.[54] The mere suffix of a representative capacity in the caption without any explanatory averment will be treated as descriptio personae.[55]

§ 4. *Additional and substituted parties.*[56]—New or additional parties can be brought in only when necessary for a complete determination of the controversy,[57] though it is discretionary with the court to allow additional parties.[58] In an action at law, the plaintiff cannot be compelled to bring in any other parties than those he has chosen.[59]

When justice requires it, the real party plaintiff may be substituted[60] as the heirs in the place of the administrator not entitled to prosecute the action,[61] or the purchaser of the claim from the assignee for the benefit of the creditors in-

N. W. 629. Action to recover realty. Farrand v. Kavanaugh [Mich.] 93 N. W. 1083. The receiver of an insolvent corporation is a necessary party to an action to enforce director's liability. Bauer v. Parker, 82 App. Div. [N. Y.] 289. The pledgee is not a necessary party to an action to determine the ownership between the pledgor and another consenting to the pledge. Edwards v. Mercantile Trust Co., 124 Fed. 381.

51. Corporations held improperly joined. Swain v. Tennessee Copper Co. [Tenn.] 78 S. W. 93.

52. Riverside Cotton Mills v. Lanier [Va.] 45 S. E. 875.

53. After making heirs parties defendant plaintiff cannot contend that they are not proper parties and therefore not entitled to set up defense of limitations. Gleason v. Hawkins, 32 Wash. 464, 73 Pac. 533.

54. Code, § 23. In a suit to foreclose a tax lien, the mortgagee defendant cannot be so sued even though the mortgage gave only the initials. In such case the plaintiff should proceed under § 148, by stating that the mortgagee's name is unknown and also make personal service of the summons. Gillian v. McDowell [Neb.] 92 N. W. 991.

55. So held in an action on a transferable contract where the plaintiff described himself as "trustee" in the caption. Marion Bond Co. v. Mexican Coffee & Rubber Co., 160 Ind. 558, 65 N. E. 748. Administrator. Glisson v. Weil, 117 Ga. 842. Action against "B guardian" is an action against an individual. Pinnell v. Hinkle [W. Va.] 46 S. E. 171.

56. Right of stockholders to intervene in actions affecting the corporation see Corporations.

57. Gen. St. 1894, § 5178, as amended by Laws 1895, c. 29, construed. Party held improperly brought in. Clay County Land Co. v. Alcox, 88 Minn. 4, 92 N. W. 464. Though the defendant waived the objection of nonjoinder if it appears that complete determination of the controversy cannot be had without the presence of other parties they should be brought in. Code, § 452, should be read in connection with § 499, applied to an action to reform an insurance policy where it was fraudulently made payable to insured or representatives instead of the creditor paying the premiums; the representatives were directed to be made parties. Steinbach v. Prudential Ins. Co., 172 N. Y. 471, 65 N. E. 281. Gen. St. 1894, § 5825, construed and held not error to refuse to direct additional parties to be brought in. Rock v. Donora Min. Co. [Minn.] 97 N. W. 889. Before answer another party may properly be joined as plaintiff [Burns' Rev. St. Ind. 1901, §§ 397, 399]. Frankel v. Garrard, 160 Ind. 209, 66 N. E. 687. In equity new parties can be added only when the allegations of the original petition are such as to warrant bringing them in. Amendment held to state a new cause of action. Roberts v. Atlantic Real Estate Co., 118 Ga. 502. The assignee is properly brought into an action by the heirs and representatives though it is claimed that the assignment to him was fraudulent. Hasberg v. Mut. Life Ins. Co., 81 App. Div. [N. Y.] 199. Personal representatives of a deceased defendant held not necessary parties since deceased's interests would not be prejudicially affected. Stolts v. Tuska, 82 App. Div. [N. Y.] 81. Code § 756 providing that in case of a change of interest or devolution of liability, the action may be continued, etc., mandamus for reinstatement of an employe cannot be continued against the city officer succeeding the relator. People v. Lantry, 88 App. Div. [N. Y.] 583. Held error not to bring in legatees to action by executor to quiet title. Spurlock v. Burnett, 170 Mo. 372, 70 S. W. 870.

58. Belding v. Archer, 131 N. C. 287. Discretion held properly exercised in bringing in subsequent grantee of plaintiff in action to recover damages resulting to abutting owner from construction of railroad. Pope v. Manhattan R. Co., 79 App. Div. [N. Y.] 583. Code 1902, §§ 143, 194. Hellams v. Prior, 64 S. C. 543.

59. Westinghouse v. Wyckoff, 81 App. Div. [N. Y.] 294.

60. Contoocook Fire Precinct v. Hopkinton, 71 N. H. 574. An amendment may be allowed changing a coplaintiff to a nominal plaintiff for the use of the other plaintiff and again by dropping such nominal plaintiff and substituting the usee as nominal plaintiff. Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 So. 228. Substitution of plaintiff held properly disallowed. Tillman v. Banks, 116 Ga. 250. Amendment held sufficient to bring in the substituted party. Homer v. Barr Pumping Engine Co., 182 Mass. 304, 65 N. E. 396.

61. Farrell v. Puthoff [Okl.] 74 Pac. 96.

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stead of the latter.[62] As a general rule on death of the plaintiff in actions affecting personalty, the representatives should be substituted,[63] while the pendente lite transferee may be substituted[64] on his own application.[65] Substitution is not absolutely necessary since the action may continue in the name of the assignor,[66] and the discretion of the court ultimately controls.[67]

In actions of tort, there can be no substitution of parties plaintiff,[68] and new parties defendant can be brought in only on stipulation,[69] though in New York the court may properly permit a joint tort feasor to be brought in.[70]

Substitution of the successor to plaintiff's interest can be had only on notice to him,[71] and application pending appeal should be made in both the trial and appellate courts.[72]

It must appear that the party seeking intervention has a direct and immediate interest which will be affected by the action.[73] A motion after appeal for leave to intervene comes too late.[74] The plea of intervention should contain all the alle-

62. 1 Starr & C. Ann. St. (2d Ed.) p. 375 and 3 Starr & C. Ann. St. (2d Ed.) p. 3000. Congress Const. Co. v. Farson & Libbey Co., 199 Ill. 398, 65 N. E. 357.

63. Tharp v. Page [Ark.] 74 S. W. 296; Friese v. Friese [N. D.] 95 N. W. 446. The personal representative of the deceased plaintiff may be substituted though he had parted with his interest before death. Betts v. De Selding, 81 App. Div. [N. Y.] 161. The administrator is properly substituted in place of the deceased widow plaintiff in an action for wrongful death of the husband. Fitzgerald v. Edison Elec. Illuminating Co. [Pa.] 56 Atl. 350. The assignee of the beneficiary is properly substituted as plaintiff on death of the insured pending an action to reform the policy. Under Code, § 757, as to the cause of action set up in the original complaint and § 756, as assignee of the entire claim. Hunt v. Provident Sav. Life Assur. Soc., 77 App. Div. [N. Y.] 338.

64. Bradford v. Brown [Okl.] 71 Pac. 655.

65. Purchaser pending appeal of an action to restrain nuisance [Ballinger's Ann. Codes & St. §§ 4824, 4837]. Baker v. Northwest Bldg. & Inv. Co. [Wash.] 74 Pac. 825. A purchaser after judgment and pending appeal is a purchaser pendente lite [Rev. Codes 1899, § 5234]. Sykes v. Beck [N. D.] 96 N. W. 844.

66. The general assignee for the benefit of creditors. Kringle v. Rhomberg, 120 Iowa, 472, 94 N. W. 1115. Code, § 756, applied in an action to foreclose a mechanic's lien; plaintiff after commencement of the action having assigned his interest. Perry v. Levenson, 82 App. Div. [N. Y.] 94. Code, § 40. McKnight v. Bertram Heating & Plumbing Co., 65 Kan. 859, 70 Pac. 345. Applied to action for unlawful detainer. Anderson v. Ferguson [Okl.] 71 Pac. 225; Hawkins v. Mapes-Reeve Const. Co., 82 App. Div. [N. Y.] 72. Failure to bring in party acquiring an interest pendente lite is not an objection. Action to determine adverse claims to mining property. Mackay v. Fox [C. C. A.] 121 Fed. 487.

67. Code, § 385. On death of plaintiff after decree his transferee was properly substituted. Fay v. Steubenrauch, 138 Cal. 656, 72 Pac. 156; Sykes v. Beck [N. D.] 96 N. W. 844. If it appears that recovery cannot be had against the defendants in any event, a substitution of parties plaintiff will not be allowed. Contoocook Fire Precinct v. Hopkinton, 71 N. H. 574. Where plaintiff's action was for damages for injuries to land from construction of a road it was error to allow his grantee to come in as co-plaintiff; the deed reserving no rights the action would be for past damages only. Pope v. Manhattan R. Co., 79 App. Div. [N. Y.] 583.

68. In trover an amendment by striking out the name of the plaintiff suing to the use of another and allowing the action to proceed in the name of the usee will not be allowed. Willis v. Burch, 116 Ga. 374.

69. The objection held waived by accepting the costs allowed as a condition. Farrand v. Kavanaugh [Mich.] 93 N. W. 1083.

70. Code, § 723. Schun v. Brooklyn Heights R. Co., 82 App. Div. [N. Y.] 560.

71. Betts v. De Selding, 81 App. Div. [N. Y.] 161.

72. As a general rule in the trial court first. Fay v. Steubenrauch, 138 Cal. 656, 72 Pac. 156.

73. Dickson v. Dows, 11 N. D. 407, 92 N. W. 798; Bangs v. Sullivan [Tex. Civ. App.] 73 S. W. 74. Legatee held sufficiently interested to allow intervention. Mertens v. Mertens, 87 App. Div. [N. Y.] 295. To an action to rescind a sale, the indorser of the consideration notes should be allowed to intervene; the purchaser becoming insolvent pending the suit. Hosmer v. Darrah, 85 App. Div. [N. Y.] 485. Held that persons in possession entitled under Code, § 2244 to defend summary proceedings are only those described in §§ 2231-2237; Heuser v. Antonius, 84 N. Y. Supp. 580. Indemnitors admitting their liability are properly admitted to appear in the action for damages. Boyer v. St. Louis, S. F. & T. R. Co. [Tex. Civ. App.] 72 S. W. 1038. A person having a claim against the individuals suing as a committee cannot intervene. Bangs v. Sullivan [Tex. Civ. App.] 73 S. W. 74. A subsequent purchaser of public lands will not be allowed to intervene in mandamus proceedings to compel a grant of the lands to relator. Sherrod v. Terrell [Tex.] 76 S. W. 442. Intervening parties cannot prosecute an appeal on the bond of the original plaintiff. Hight v. Batley, 32 Wash. 165, 72 Pac. 1034; Morton v. Supreme Council of Royal League, 100 Mo. App. 76, 73 S. W. 259.

74. 2 Ball. Ann. Codes & St. § 4846 applied to a suit affecting public interests. Hight v. Batley, 32 Wash. 165, 72 Pac. 1034.

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gations of a proper pleading.[75] A person by intervening does not thereby become a party defendant.[76]

Misnomer may be corrected where it is clear that defendant was the party intended to be sued.[77] The court may do so sua sponte,[78] or the court may, on the trial, strike out the name of a defendant where the co-defendant is not prejudiced thereby,[79] or strike out the representative capacity of the defendant so that the action will stand against him individually,[80] but an amendment cannot be made which substitutes a corporation in the place of an individual defendant.[81]

§ 5. *Objections to and defects of parties.*—The objection that plaintiff is not the real party in interest is available only where the defendant is thereby deprived of a good defense, as a set off, or where an adjudication would not be conclusive.[82] The objection that the action was brought without the consent of a co-plaintiff cannot be raised by the defendant,[83] it must appear that the nonjoinder of a person as defendant[84] or the irregular substitution of a co-defendant was prejudicial to the other defendant to permit him to raise the objection.[85] Irregularities in bringing in new parties may be waived.[86] The defect may be cured by an amendment bringing in the omitted parties.[87]

The objection of defect of parties is waived if not raised by demurrer or answer,[88] and if apparent on the face of the pleading it should be raised by demurrer, if not, then by answer.[89] By answering after the demurrer was overruled, the objection is not waived.[90]

75. Though defective, judgment was not disturbed. Blackwell v. Hatch [Okl.] 73 Pac. 933. Petition held to state facts sufficient to entitle petitioner to be made a party to a suit to set aside a fraudulent conveyance. Rau v. Shaver [Va.] 45 S. E. 873.

76. St. Charles St. R. Co. v. Fidelity & Deposit Co., 109 La. 491.

77. A slight defect in the spelling of defendant's name in an order of substitution for a fictitious name is trivial if defendant was the person intended. Dollie for Dellie. Thompson v. Alford, 135 Cal. 52, 66 Pac. 983. The complaint against "The Lewis Lumber Co.," a partnership, is properly amended by describing it as a corporation. Lewis Lumber Co. v. Camody, 137 Ala. 579.

78. Notice held sufficient to give notice of intention to apply for correction of the misnomer. The court had jurisdiction by reason of general appearance and plea of misnomer by defendant. Sentell v. Southern R. Co. [S. C.] 45 S. E. 155.

79. District court has power under P. L. 1898, p. 616, § 161. Lambeck v. Stiefel [N. J. Law] 56 Atl. 132. Amendment by striking out name of co-defendant, and allegations of partnership, so as to conform to the proof, held proper [Code, § 102]. York v. Nash, 42 Or. 321, 71 Pac. 59.

80. Boyd v. U. S. M. & T. Co., 84 App. Div. [N. Y.] 466.

81. Licausi v. Ashworth, 78 App. Div. [N. Y.] 486.

82. Sturgis v. Baker, 43 Or. 236, 72 Pac. 744. Failure to set up in the answer that the action should be prosecuted in the name of the trustee in bankruptcy of the defendant is a waiver of the objection. Hillyer v. Le Roy, 84 App. Div. [N. Y.] 129.

83. Cinfel v. Malena [Neb.] 93 N. W. 165.

84. Nonjoinder of occupant in ejectment under Hurd's St. 1901, p. 757, § 6. Glos v. Patterson, 204 Ill. 540, 68 N. E. 443.

85. Buckers I., M. & I. Co. v. Farmers' Independent Ditch Co. [Colo.] 72 Pac. 49, as by accepting the costs allowed as a condition.

86. Farrand v. Kavanaugh [Mich.] 93 N. W. 1083.

87. Overruling demurrer for nonjoinder of parties plaintiff held harmless if erroneous, where plaintiff during the trial amended by bringing in such parties. Fidelity & Deposit Co. v. Nisbet [Ga.] 46 S. E. 444.

88. Hines v. Consol. C. & L. Co., 29 Ind. App. 563, 64 N. E. 886; Hellams v. Prior, 64 S. C. 542. Mansf. Dig. § 5028, par. 4. Demurrer construed and held to be on that ground. Brought v. Cherokee Nation [Ind. T.] 69 S. W. 937. Burns' Rev. St. Ind. 1901, § 346. Boseker v. Chamberlain, 160 Ind. 114, 66 N. E. 448; Engel v. Dado [Neb.] 92 N. W. 629; Whitecotton v. St. Louis & H. R. Co. [Mo. App.] 78 S. W. 318. If not raised by answer is waived. Bauer v. Parker, 82 App. Div. [N. Y.] 289. The objection of non or misjoinder comes too late when made for the first time on the trial. Mackay v. Fox [C. C. A.] 121 Fed. 487.

89. As to capacity to sue. Blackwell v. British-American Mortg. Co., 65 S. C. 105; Herbert v. Montana Diamond Co., 81 App. Div. [N. Y.] 212. The objection of capacity to sue must be raised by answer. So held in action by school trustees to recover land. Crouch v. Posey [Tex. Civ. App.] 69 S. W. 1001; Ross v. Page, 11 N. D. 458, 92 N. W. 822; Glos v. Patterson, 204 Ill. 540, 68 N. E. 443. If the declaration alleges a joint cause of action against defendants, the objection of misjoinder of defendants cannot be raised by demurrer or plea in abatement. Those not guilty should plead the general issue. Purington-Kimball Brick Co. v. Eckman, 102 Ill. App. 183. Cannot be first raised in instructions to jury. Loomis v. Hollister, 75 Conn. 275.

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Misjoinder is not ground for demurrer,[91] nor can it be raised by answer[92] or by demurrer to the evidence.[93] In some states, however, it is an objection to be raised by demurrer.[94]

In case of misnomer of plaintiff corporation, the objection should be raised by plea in abatement.[95]

If the cause of action is given to a particular person, the objection of the right of the plaintiff to sue is not waived by failure to raise it by answer or demurrer.[96]

A demurrer to the facts will raise the objection of the right of the plaintiff to maintain the action,[97] the objection of capacity of the personal representative to sue,[98] but not the objection of defect in parties.[99] A demurrer for defect of parties does not raise objection of misjoinder,[1] and only raises the question whether other parties should be brought in.[2] That a person not joined as a defendant should have been brought in is not raised by a demurrer for defect of parties plaintiff.[3] A demurrer for legal capacity to sue reaches only personal disability, as infancy, idiocy, coverture, or want of title to the character in which the plaintiff sues.[4]

The demurrer[5] or answer must specify the defect of parties.[6] The facts showing that plaintiff is not the real party in interest must be averred where the objection is raised by answer.[7] The allowance of an amendment of the answer so as to set up misjoinder is discretionary.[8]

PARTITION.

§ 1. Right and Propriety (1097).
§ 2. Procedure for Partition (1099).
§ 3. Decision, Judgment, and Relief (1100).
§ 4. Commissioners and Their Proceedings (1102).
§ 5. Mode of Partition (1103).
§ 6. Sale and Proceedings Thereafter (1103).
§ 7. Voluntary Partition (1105).

§ 1. *Right and propriety.*—The action is now largely statutory and differs in form in the different states.[9]

90. Farmers' High Line C. & R. Co. v. White [Colo.] 75 Pac. 415.

91. Code, § 488 allows demurrer only on ground of nonjoinder. Hall v. Gilman, 77 App. Div. [N. Y.] 458. Adams v. Slingerland, 39 Misc. [N. Y.] 638; Id., 87 App. Div. [N. Y.] 312. Under Code, § 488, subds. 5, 6, as the joinder of too many parties defendant. Tew v. Wolfsohn, 77 App. Div. [N. Y.] 454; Olson v. Shirley [N. D.] 96 N. W. 297. The remedy is to prove that the suit abate as to the party improperly joined. Riverside Cotton Mills v. Lanier [Va.] 45 S. E. 875. South Dakota Rev. Code, § 121. Mader v. Piano Mfg. Co. [S. D.] 97 N. W. 843.

92. Since it is not new matter to be set up as a defense under Code, § 500. Adams v. Slingerland, 87 App. Div. [N. Y.] 312.

93. Groenmiller v. Kaub, 67 Kan. 844, 73 Pac. 100.

94. Daniels v. Miler [Ind. T.] 69 S. W. 925. A demurrer is necessary to raise the question of misjoinder of parties defendant. Doyle v. St. Louis Transit Co. [Mo. App.] 77 S. W. 471. Misjoinder is waived if not raised by demurrer as where the complaint states a separate cause of action against each defendant [Mills' Ann. Code, §§ 50, 55]. Johnson v. Bott [Colo. App.] 72 Pac. 612. Misjoinder of parties plaintiff should be raised by special demurrer. Rusk v. Hill, 117 Ga. 722.

95. Riemann v. Tyroler & V. Verein, 104 Ill. App. 413.

96. Statutory action for injuries received in mine. Poor v. Watson, 92 Mo. App. 89.

97. As where the plaintiff who had been a stockholder in a national bank sought to recover against officers for mismanagement, etc. The demurrer need not be on the ground of capacity to sue. Hanna v. People's Nat. Bank, 76 App. Div. [N. Y.] 224.

98. Dickason Coal Co. v. Unverferth, 30 Ind. App. 546, 66 N. E. 759.

99. Ross v. Page, 11 N. D. 453, 92 N. W. 822; Boseker v. Chamberlain, 160 Ind. 114, 66 N. E. 448.

1, 2. McKenney v. Minahan [Wis.] 97 N. W. 489.

3. Kent v. Aetna Ins. Co., 84 App. Div. [N. Y.] 428.

4. Does not raise question as to sufficiency of the complaint as stating a cause of action in favor of plaintiff. McKenney v. Minahan [Wis.] 97 N. W. 489.

5. Must name party not joined. Boseker v. Chamberlain, 160 Ind. 114, 66 N. E. 448.

6. Code, § 490. Hawkins v. Mapes-Reeve Const. Co., 82 App. Div. [N. Y.] 72.

7. Wenk v. New York, 82 App. Div. [N. Y.] 584. An averment that other persons not parties claim an interest in the note sued on was properly stricken out as irrelevant. Watford v. Windham, 64 S. C. 509.

8. Amendment asked for on the trial refused. Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913.

9. In Nebraska it is a proceeding in rem. Schick v. Whitcomb [Neb.] 94 N. W. 1023.

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Right is absolute.—It is a settled rule of law that one owning real property jointly with another is entitled to have partition of the same so that he may become the owner of a separate and distinct parcel of such property.[10]

Where there is nothing to show that the title, both legal and equitable, is not in the parties to the suit, partition must be granted,[11] and the fact that plaintiff has an adequate remedy at law is no bar where he is entitled to possession of the land.[12]

Parties entitled.—There can be no partition between life tenants and remaindermen,[13] but may be between tenants in common,[14] even though one of them has redeemed the property from a foreclosure sale,[15] or holds an incumbrance.[16] Partition may be had between joint heirs or devisees.[17] A widow renouncing the provisions of her husband's will and electing to take under the statute can bring suit for partition without waiting for the expiration of five years from the date of probate of the will.[18] The grantee of an heir may maintain partition.[19] Where an attempted conveyance is void, it is no bar to a suit for partition by the attempted grantor.[20]

Title.—Except where otherwise provided by statute,[21] the title must be undisputed,[22] but the title need be traced only to a common source.[23] The rule does not apply where title is impeached merely on equitable grounds.[24]

Possession.—Partition will lie only when several co-tenants hold and are in possession of the property.[25]

10. Ryan v. Egan, 26 Utah, 241, 72 Pac. 933. Partition is a matter of right, and may be decreed by a court of equity whether the title of the parties be legal or equitable, and the fact that inconvenience, injury, mischief or difficulty will result from a division or that a lien exists on one tenant's interest, will not deprive the co-tenant of the right to demand partition. Mylin v. King [Ala.] 35 So. 998.

11. Shipman v. Shipman [N. J. Eq.] 56 Atl. 694.

12. Le Sage v. Le Sage, 52 W. Va. 323.

13. Turner v. Barraud [Va.] 46 S. E. 318.

14. Hudson v. Hudson [Ga.] 46 S. E. 874. A tenant in common is not precluded from obtaining partition by reason of an agreement between all the tenants for the purchase of one tenant's interest, where such agreement had been canceled as between the vendor and the complainant in the partition suit. Mylin v. King [Ala.] 35 So. 998. In New York an action for partition will only lie where the parties are tenants in common and it must embrace all the lands possessed by them in common. Beetson v. Stoops, 91 App. Div. [N. Y.] 185.

15. Wettlaufer v. Ames [Mich.] 94 N. W. 950.

16. A tenant in common of an equal undivided share in lands, who also holds an incumbrance on the other share, can prosecute a suit for partition where he waives his lien upon the other share. Buttlar v. Buttlar [N. J. Eq.] 56 Atl. 722.

17. Lands devised by a void bequest. Dresser v. Travis, 39 Misc. [N. Y.] 358. Before the settlement of the estate, provided the time for filing claims has expired and there are sufficient personal assets to discharge the debts and expenses of administration. Schick v. Whitcomb [Neb.] 94 N. W. 1023.

18. Spratt v. Lawson, 176 Mo. 175, 75 S. W. 642.

19. Turnage v. Craig, 203 Ill. 167, 67 N. E. 762.

20. Berry v. Tenn. & C. R. Co., 134 Ala. 618.

21. Under New York Code, petition lies against persons claiming adverse title. Satterlee v. Kobbe, 173 N. Y. 91, 65 N. E. 952; Dixon v. Dixon, 38 Misc. [N. Y.] 652. In Illinois, the court may remove clouds. Glos v. Carlin, 207 Ill. 192, 69 N. E. 928.

22. Complainant in a partition suit must show ownership of an undivided interest in the property sought to be partitioned. Owen v. Brookport [Ill.] 69 N. E. 952. But bill retained to give opportunity to establish title at law. Bearden v. Benner, 120 Fed. 690; Eagle v. Franklin [Ark.] 75 S. W. 1093; Roller v. Clarke, 19 App. D. C. 539. See, also, Hanneman v. Richter, 62 N. J. Eq. 365. Executors in order to maintain partition proceedings must have title to the part of the property. Noecker v. Noecker, 66 Kan. 347, 71 Pac. 815.

Bare denial of title is not sufficient (Heinze v. Butte & B. Consol. Min. Co. [C. C. A.] 126 Fed. 1), nor a simple allegation that defendant claims title (Mertens v. Cook [Mich.] 97 N. W. 47).

23. In an action for partition where the deed under which defendant claimed was introduced to show common source of title and was sufficient for that purpose, it is not necessary for plaintiffs to show title deraigned from the sovereignty of the soil. Hughey v. Mosby, 31 Tex. Civ. App. 76, 71 S. W. 395. The deed was effectual to show common source of title though void. Id.

24. Ellis v. Feist [N. J. Eq.] 56 Atl. 369; Heinze v. Butte & B. Consol. Min. Co. [C. C. A.] 126 Fed. 1.

25. Wells v. Sweeney [S. D.] 94 N. W. 394. One not in possession nor entitled to the immediate possession of land cannot maintain action. Mersereau v. Camp, 42 Misc. [N. Y.] 253. Physical possession is not necessary but that inferred from legal title is sufficient. Heinze v. Butte & B. Consol. Min. Co. [C. C. A.] 126 Fed. 1. A joint tenant or tenant in common out of possession

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What may be partitioned.—Although the action most commonly occurs in regard to real estate, it may be had of personal property.[26] An equitable right of redemption is a subject for partition.[27]

Partition of homestead is governed by the statutory rules of the various states,[28] but it may be partitioned on the death of the father and mother where the guardian of a minor has failed to preserve the latter's homestead rights in the manner provided by statute.[29]

§ 2. *Procedure for partition. Jurisdiction and venue.*—Suit should be brought in the court having general equitable jurisdiction.[30] Where partition is sought of several tracts of land, it will lie in any county in which any one of the tracts is situated,[31] but courts of one state will not partition lands in another state.[32]

Notice to all parties interested is indispensable.[33]

Necessary parties.—Only parties having an interest in the real estate are necessary parties defendant in suit for partition.[34] Co-tenants are necessary parties.[35] Administrators of decedent need not be joined,[36] nor should his general creditors be made parties.[37] Generally speaking, judgment creditors and other incumbrancers need not be joined.[38] The interest of a party must appear before he can be heard to make a defense.[39] An order of revivor is not necessary, on death of party, if all interested parties are in court.[40]

cannot maintain a suit for partition against his co-tenants who hold adversely to him without joining with the demand for partition a cause of action for possession of the land, but the defendant waives this defect by answering and not sufficiently challenging the petition. Moorehead v. Robinson [Kan.] 75 Pac. 503. Suit cannot be retained as being one to quiet title and partition. Ellis v. Feist [N. J. Eq.] 56 Atl. 369.

26. Book of abstracts of title. Watson v. Williamson [Tex. Civ. App.] 76 S. W. 793. Vessel. Reynolds v. Nielson, 116 Wis. 483, 93 N. W. 455.

27. Fitch v. Miller, 200 Ill. 170, 65 N. E. 650, unless right has expired.

28. See Homesteads, 2 Curr. Law, p. 310. Will not be partitioned among the heirs while it continues to be occupied as such by the surviving husband, wife, or any minor child. Wells v. Sweeney [S. D.] 94 N. W. 394; McAnulty v. Ellison [Tex. Civ. App.] 71 S. W. 670.

29. Powell v. Naylor [Tex. Civ. App.] 74 S. W. 338. Partition may be had during the life of a widow, by the collateral heirs of her deceased husband, of the homestead set apart to her, there being no minors to postpone the partition. Saunders v. Strobel, 64 S. C. 489.

30. The Allen county superior court, in Indiana, has jurisdiction to grant partition of land, its jurisdiction being "concurrent with the circuit court in all civil cases" [Acts 1877, p. 43, c. 31]. Romy v. State [Ind. App.] 67 N. E. 998.

31. Murphy v. Superior Ct. of Los Angeles County, 138 Cal. 69, 70 Pac. 1070.

32. Schick v. Whitcomb [Neb.] 94 N. W. 1023.

33. Though described as parties "unknown." Savage v. Gray, 96 Me. 557; Perrine v. Kohr, 205 Pa. 602. Jurisdiction of tenants in common not joining in the petition for partition and not appearing in answer thereto, is not acquired by service by publication. Walters v. Bray [Tex. Civ. App.] 70 S. W. 443. Where no guardian ad litem was appointed for minor defendant, the fact that some one appeared and styled himself guardian ad litem for such defendant will not bind the infant. Turner v. Barraud [Va.] 46 S. E. 318.

34. Dresser v. Travis, 177 N. Y. 371, 69 N. E. 734. An auditor should not report all the evidence on a reference to find if an intervener's title gave him the right to oppose partition. In re Buttrick [Mass.] 69 N. E. 1044. Report held not to have done so. Id.

35. Though absent and unheard from for twenty years. Johnson v. Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748. Infants. Blue v. Waters, 24 Ky. L. R. 1481, 71 S. W. 889.

36. So held where alleged that decedent left no debts. Mertens v. Cook [Mich.] 97 N. W. 47. Joining the administrator is only proper under very exceptional circumstances. Sheehan v. Allen, 67 Kan. 712, 74 Pac. 245.

37. Sheehan v. Allen, 67 Kan. 712, 74 Pac. 245.

38. Even where a sale is decreed, unless creditors of a deceased tenant in common, joint tenant, or co-parcener. Childers v. Loudin, 51 W. Va. 559. A trustee and creditor in a deed of trust are not necessary parties in a partition suit where a sale is not sought. Waldron v. Harvey [W. Va.] 46 S. E. 603. One purchasing land at a foreclosure sale any time prior to the confirmation of the commissioner's report may be made a party to the partition. O'Connor v. Keenan [Mich.] 94 N. W. 186.

39. Plunkett v. Bryant [Va.] 45 S. E. 742. One who has a lien on the interest in the land of one party to partition proceedings may himself become a party thereto, under proper limitations as to his right to be heard on the final decree. Flamm v. Perry, 78 App. Div. [N. Y.] 603. In Massachusetts, both adversary claims and improvements

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The petition[41] must name the defendants,[42] and the interest of all parties[43] and possession must be alleged.[44]

Amendments to a bill for partition, made after hearing and determination, and which abandon the first case and substitute a new one, are not permissible.[45]

Where a defendant specially pleads his title the plaintiff need not answer specially, except as to matters in avoidance of such title.[46]

§ 3. *Decision, judgment, and relief. Removal of clouds.*—If it is the purpose of a statute that the title be cleared in a partition suit, all clouds, whether originating in the common chain of title or otherwise, may be removed.[47]

Determination of adverse interests.—On a suit for partition of land subject to prior leases the interests in the leases will not be partitioned,[48] but interest of a lessee made a party is barred.[49] Wife's inchoate right of dower should not be barred.[50] A mortgage cannot be defeated by subsequent partition,[51] but a grantee of one tenant will not be protected to the prejudice of the other tenants.[52]

Adjustment of claims between the parties.—Allowance must be made for improvements made in good faith,[53] but not where agreement existed for use of land

made under a belief of good title entitle one to oppose partition. Accordingly, one who fails to prove the kind of an adverse interest which entitles him to oppose partition will nevertheless not be ruled out, if he claims for improvements [Rev. St. c. 184, §§ 8, 9, 19]. In re Buttrick [Mass.] 69 N. E. 1044. In this case the title proved was a paramount one by adverse possession, hence the improvements were made by claimant under conditions bringing him within the statute.

40. As where deceased devised interest to a co-tenant named in the bill. Larrabee v. Larrabee, 24 Ky. L. R. 1423, 71 S. W. 645.

41. **Sufficiency of allegation** of necessity of sale: Under Civ. Code Prac. § 490, subsec. 2, it is sufficient to allege that the property "cannot be advantageously divided among the numerous devisees of said testator" when taken with other allegations which show, as a matter of fact, that the property cannot be divided without materially impairing its value. Zehnder v. Schoenbachler, 24 Ky. L. R. 947, 70 S. W. 278. A bill which alleges that the real estate is not susceptible of partition without injury to the parties concerned and praying for the sale thereof, is sufficient to give the court jurisdiction to decree a partition sale. Wickes v. Wickes [Md.] 56 Atl. 1017.

42. Salyer v. Elkhorn Land Imp. Co., 25 Ky. L. R. 1210, 77 S. W. 370.

43. If known or shown by record. Failure to do so is not excused by the allegation that it would take an immense amount of time and labor to ascertain facts. Salyer v. Elkhorn Land Imp. Co., 25 Ky. L. R. 1210, 77 S. W. 370. Allegations that plaintiff owns a tenth interest, and that defendant owns the remainder, that defendant is in possession of, and refuses to allow plaintiff to occupy the premises or to account for the rents, and claims title thereto, do not put in issue the title to the land. Mertens v. Cook [Mich.] 97 N. W. 47. Plaintiffs are not required to allege common source of title in order to entitle them to give evidence thereof. Hughey v. Mosby, 31 Tex. Civ. App. 76, 71 S. W. 395.

44. It is not sufficient to allege that plaintiff and defendant are tenants in common. Sterling v. Sterling, 43 Or. 200, 72 Pac. 741.

45. Haskins v. Glezen [R. I.] 55 Atl. 639. An amended bill for partition is not bad for departure because it prays for partition in kind, while the original bill alleged that an equitable partition in kind could not be made, and prayed for a sale. Berry v. Tenn. & C. R. Co., 134 Ala. 618.

46. Kuteman v. Carroll [Tex. Civ. App.] 70 S. W. 563.

47. Glos v. Carlin, 207 Ill. 192, 69 N. E 928.

48. Oil leases. Hanna v. Clark, 204 Pa. 149.

49. A lessee, made a party in a partition suit, who fails to appear and answer, is bound by the final judgment barring lease. Dresser v. Travis, 177 N. Y. 376, 69 N. E. 736.

50. The right follows the land allotted or proceeds apportioned. Schick v. Whitcomb [Neb.] 94 N. W. 1023.

51. Bank of Jeanerette v. Stansbury, 110 La. 301. In an action to foreclose a mortgage the court had no right to order the sale of the premises, under a decree in a partition suit which was commenced before the execution of the mortgage, and the payment of the mortgage debt from the proceeds of sale; the proper remedy was for the mortgagee to have intervened in the partition proceedings. Towle Bros. Co. v. Quinn, 141 Cal. 382, 74 Pac. 1046. A prior mortgage of an undivided part will not be affected by a bill for partition and an accounting for rents, even though the decree for the accounting finds that the mortgagor's interest is extinguished. Omohundro v. Elkins, 109 Tenn. 711, 71 S. W. 590.

52. Conveyance of part of the estate by metes and bounds is voidable as to grantor's co-tenants, so far as it is prejudicial to them, and if on partition sought by them the part conveyed is allotted to one of them, the grantee takes nothing by the conveyance. Kenoye v. Brown [Miss.] 35 So. 163. Where one defendant owns the property subject to the lien of another defendant for money paid for taxes, the decree should fix a time within which such amount should be paid. Cramer v. Wilson, 202 Ill. 83, 66 N. E. 869.

53. Though the improvements were made by a tenant in common in remainder during the existence of a preceding life estate. Shipman v. Shipman [N. J. Eq.] 56 Atl. 694.

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by one incurring the expense.[54] Generally speaking moneys expended for removal of incumbrances, payment of taxes, etc., can be recovered back,[55] and claims for rent adjudicated,[56] but rights entirely collateral cannot be adjusted.[57]

Receivers may be appointed.[58]

Costs.—Defendants are liable for all costs incurred by them in contesting the successful plaintiffs' claims,[59] but where bill seeks partition only and does not ask for a sale for costs, a decree ordering sale for costs is void.[60]

Attorney's fee is allowed in some jurisdictions.[61] An attorney of a party has a lien for his fees upon his client's distributive share, and is entitled to an order of payment therefrom, but where he is also the trustee appointed to make the sale, and as such receives the proceeds therefrom, he cannot retain any part of such

Rule does not apply to improvements made by stranger, nor to those which co-tenants were not obligated to, and did not, pay for. Pesqueira v. Kellogg [Ariz.] 71 Pac. 915. Widow allowed for betterments placed on community land. Legg v. Legg [Wash.] 75 Pac. 130.

54. Though the use properly belonged to another. Clark v. Clark [Mich.] 96 N. W. 924.

55. Where one co-tenant has discharged an incumbrance on the common property, or paid more than his share of the purchase price, he is entitled to recover ratable contribution from his co-tenants on an action for partition, and this right does not accrue until the action for partition is brought. Grove v. Grove, 100 Va. 556. Where one co-tenant had a claim against the other for taxes paid on the land and the latter had a claim against the former for expenses incurred in defending their title to the land, these claims settled in an action for partition. McClintock v. Fontaine, 119 Fed. 448. A remainderman, who during the existence of the life estate, makes improvements pursuant to his possession under the life tenant, is not entitled to an allowance therefor in partition, after the determination of the life estate. Porter v. Osmun [Mich.] 98 N. W. 859.

56. But a partition suit cannot be used as a means of adjusting personal demands between the parties which have no relation to the land, or proceeds thereof. Hanneman v. Richter, 63 N. J. Eq. 753.

57. In a suit for partition of A's land, her son cannot intervene and claim the land as administrator of his father, or as a general creditor of A, on the ground that A had converted the father's real and personal property to her own use and invested a portion thereof in the land sought to be partitioned. Rice v. Donald, 97 Md. 396. It is immaterial that plaintiffs' ancestor had received more than his share of the personal estate of the common ancestor of himself and the defendants in partition. Skillin v. Skillin, 80 App. Div. [N. Y.] 206.

58. Heinze v. Butte & B. Consol. Min. Co. [C. C. A.] 126 Fed. 1. A receiver will not be appointed over lands sought to be partitioned, where a temporary administrator of the estate of the deceased owner of the lands has already been appointed, because such administrator may properly be authorized by the surrogate's court to take possession of and manage the lands of the deceased. Weiher v. Simon, 41 Misc. [N. Y.] 202. A decree appointing a receiver cannot be attacked on appeal from a subsequent decree allowing him compensation. Mesnager v. De Leonis, 140 Cal. 402, 73 Pac. 1052. A judgment which is defective for failure to fix the receiver's fee is cured on the filing by such receiver of a remitter of all fees. Watson v. Williamson [Tex. Civ. App.] 76 S. W. 793.

59. Powell v. Naylor [Tex. Civ. App.] 74 S. W. 338.

60. Waldron v. Harvey [W. Va.] 46 S. E. 603.

61. Keeney v. Henning [N. J. Eq.] 55 Atl. 88. But not as against contestants who are not benefited by the attorney's services. St. Clair v. Marquell [Ind.] 67 N. E. 693. An attorney's fee is not allowed as "costs" under a statute allowing costs, but not enumerating an attorney's fee among them. Legg v. Legg [Wash.] 75 Pac. 130. In Illinois, a counsel's fee may be taxed where the rights and interests of all parties are properly set forth in the bill, but where such interests were not properly set forth and a defendant had to employ counsel to file a cross bill to protect his rights, the complainant could not recover counsel fees as costs. Case v. Case, 103 Ill. App. 177. Where, in a suit for partition, the petition correctly states the record title, and upon a third party showing his interest, the bill is amended without injury to the heirs, plaintiff's solicitor's fees, if properly proven, should be apportioned among those found legally entitled to that portion of the property. Mehan v. Mehan, 203 Ill. 180, 67 N. E. 770. A defense, valid and substantial in character, made in good faith and on reasonable grounds, will exempt a defendant from paying the complainant's attorney counsel fees, and this though the defense be unsuccessful. McMullen v. Reynolds, 105 Ill. App. 386. The decree for the counsel's fees may be entered in his favor, by name, although he is not a party to the suit. Id. In granting an attorney's fee the court will take into consideration the personal skill and standing of the attorney, his experience, the nature of the case, in regard to both its complexity and the amount involved, as well as the results attained. Id. Where it was discovered, after the report of the commissioners, that land had been allotted to the defendant which did not belong to the estate, and the matter was sent back to the commissioners, who made a new division, the happening of the error, while it will not affect the right of the complainant's counsel to a counsel fee, will diminish the amount allowed him for services. McMullen v. Doughty [N. J. Eq.] 55 Atl. 115.

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proceeds on account of his claim, but should pay the whole into court and then make his claim.[62]

Terms and provisions of decree.—Decree should not direct surrender of possession until after commissioners have made award.[63] It is error to decree a sale before a judicial determination of the rights and interests of the co-tenants in the land,[64] but an alternative decree to abide an action to determine rights may be proper.[65] Where an action in partition involves an accounting of transactions between the parties, the trial court or a referee should state the account, so that on review the court may pass upon the conclusions of the lower court and the evidence.[66]

Operation and effect of decree.—A judgment in partition is a mere severance of the unity of possession and community of interest, and does not in any other respect affect the character of the title or estate, unless it expressly so declares.[67] The decree is res judicata as to the question of title.[68] A decree for partition and sale together does not constitute a final decree, which after the term, passes beyond the power of the court to vacate.[69] After the confirmation of a final decree for sale, and the enrollment thereof, it cannot be varied or altered by exceptions to the auditor's account or petition.[70]

New trial, appeal and review.—A new trial cannot be claimed as of right.[71] A decree directing that partition be had cannot be reviewed on an appeal from a subsequent decree confirming the report of the commissioners,[72] but in states where the decree directing is not final the rule is otherwise.[73] Interlocutory parts of the decree are not reviewable,[74] nor are findings of fact.[75] A trustee appointed to sell cannot, as such, appeal from any order in the cause.[76]

§ 4. *Commissioners and their proceedings.*—Defendant need not be consulted as to the selection of commissioners,[77] and they need not be residents of a city adja-

62. Arnold v. Carter, 19 App. D. C. 259.

63. Then the decree will order possession surrendered to the person to whom the land is allotted, or if a sale is had, then to the purchaser. Chicago, P. & St. L. R. Co. v. Vaughn, 206 Ill. 234, 69 N. E. 113.

64. Childers v. Loudin, 51 W. Va. 559.

65. Under art. 5, § 26, of the Code, the court may make an alternative order of partition, the result depending on the facts to be found in another hearing. Wickes v. Wickes [Md.] 56 Atl. 1017.

66. Baldridge v. Coffman [Neb.] 98 N. W. 811.

67. Where a ranch through which runs a creek is partitioned into lands of four classes the first class having prior right to all water needed for irrigation, held, although some of the allotments of first-class land did not abut upon the stream, yet the partition did not change the water right belonging to the land from a riparian right to a right appurtenant. Rose v. Mesmer [Cal.] 75 Pac. 905.

After judgment of partition as between co-tenants **deeds must be executed** and the title severed before partition is in fact made. Rush v. Coomer, 24 Ky. L. R. 702, 69 S. W. 793.

68. A party to a partition suit, in which there is a final decree of partition, is estopped to set up an after-acquired title, as a defense in an action for trespass on the land partitioned to the other party, even though his title was acquired from one not a party to the partition suit. Carter v. White [N. C.] 46 S. E. 983.

69. Roller v. Clarke, 19 App. D. C. 539.

70. Rice v. Donald, 97 Md. 396.

71. Schlichter v. Taylor, 31 Ind. App. 164 67 N. E. 556.

72. Austin v. Austin [Mich.] 93 N. W. 1045

73. Appeal from decree confirming referees' report opens for review the several intermediate decrees and orders rendered in the suit. "Our statute * * * is substantially the same as in New York and California * * * and in both states the appeal must be taken from the decree confirming the report of the referees, and not from that ascertaining and determining the rights of the parties." Sterling v. Sterling, 43 Or. 200 72 Pac. 741. An order appointing commissioners to sell the property is interlocutory and not reviewable, until appeal is had from the final decree. Albemarle Steam Nav. Co. v. Worrell, 133 N. C. 93.

74. A decree ordering partition, and directing an accounting before a master, who was to report to the court as to payment of taxes and receipt of rents, is not appealable as to that portion directing an accounting, the same being an interlocutory order. Glos v. Clark, 199 Ill. 147, 65 N. E. 135.

75. As to the value of parties' interests in lands where supported by sufficient evidence Hanna v. Clark, 204 Pa. 149.

76. Yet if he is subjected to the jurisdiction of the court and made liable to any decree therein, he becomes a party and may appeal from such decree. Arnold v. Carter 19 App. D. C. 259.

77. The court requested the counsel for claimant to name them. Donaldson v. Donican, 199 Ill. 167, 65 N. E. 146.

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cent to the land,[78] and one is not disqualified to act as such because he had previously examined the land for the purpose of testifying in favor of one of the parties.[79]

Commissioners need not be sworn before a master in chancery.[80]

Directions or requests that no one attend meetings do not vitiate the proceedings.[81]

Opportunity need not be given for bidding on purparts.[82]

Return of the order of inquest should be certain and unambiguous,[83] and should clearly show such a partition as is prayed for.[84]

§ 5. *Mode of partition.*—Partition should be in kind and a sale ordered only where such division is inequitable or impossible,[85] but the parties may be estopped to object to a sale.[86]

Allotment.[87]—Land should be allotted with respect to quality as well as quantity.[88] There should be set off to the parties the portions on which they had erected buildings and made improvements.[89] If one co-owner is entitled to homestead which is set out to him, that must be considered in apportioning the land between him and the others.[90] Method decreed is not absolutely binding on the commissioners.[91]

§ 6. *Sale and proceedings thereafter.*—The sale must be of the whole land and not of an undivided interest therein.[92] A co-tenant, though a party to the suit, may purchase.[93]

Stay of sale pending another action may be denied where no effort was made to consolidate the causes.[94]

78. Donaldson v. Duncan, 199 Ill. 167, 65 N. E. 146.

79. Garth's Guardian v. Thompson, 24 Ky. L. R. 1961, 72 S. W. 782.

80. Where decree did not so direct. McMullin v. Doughty, 62 N. J. Eq. 252.

81. Attendance not being barred in fact. McMullin v. Doughty, 62 N. J. Eq. 252. Nor can complaint be made of allowance of attendance after such orders. Id.

82. Where the statute does not so provide. Hanna v. Clark, 204 Pa. 149.

83. In re Hogg's Estate, 206 Pa. 415.

84. Return of inquest should imply the parting of, or appraising of, several undivided interests in premises devised by different ancestors, where the petition contemplated a partition only of an undivided interest devised by one ancestor. In re Hogg's Estate, 206 Pa. 415.

85. Donaldson v. Duncan, 199 Ill. 167, 65 N. E. 146. Stewart v. Tennant, 52 W. Va. 559. Land adjacent to valuable mines but itself of no fixed or market value and having no known veins or bodies of ore should be divided. Ryan v. Egan, 26 Utah, 241, 72 Pac. 933. It is only when the land itself cannot be partitioned, that a sale may be ordered. Kloss v. Wylezalek, 207 Ill. 328, 69 N. E. 863. Presumption is that a city lot and house cannot be divided. Bell v. Smith, 24 Ky. L. R. 1328, 71 S. W. 433. Commissioners reported that a partition of a hexagonal building would be prejudicial; held, court should have ordered a sale, under the statute [Comp. Laws 1897, § 11,045]. Gilman v. Boden [Mich.] 98 N. W. 982. Strip formerly set off in common held not divisible in subsequent proceedings. Putnam v. Putnam, 77 App. Div. [N. Y.] 554. Where four parcels are differently situated and are of unequal value, all must be sold, since there can be no actual division of them which would be an equal one. Dresser v. Travis, 39 Misc. [N. Y.] 358. Where two joint owners erect a building, one constructing and occupying the basement, first floor and half of the roof, and the other the stairway, second floor and half of the roof, the property should be sold. Truth Lodge, No. 213, v. Barton, 119 Iowa, 230, 93 N. W. 106.

86. As where defendant in his answer joins in the prayer for sale (Heyward v. Middleton, 65 S. C. 493) or where the parties agree that the land cannot be well divided (Black v. Black, 206 Pa. 116).

87. Where there had been three different allotments none differing more than as to an acre and a barn thereon and no substantial inequality appeared in the last allotment. Garth's Guardian v. Thompson, 24 Ky. L. R. 1961, 72 S. W. 782.

88. Donaldson v. Duncan, 199 Ill. 167, 65 N. E. 146.

89. Without regard to value of such improvements. Milligan v. Masden, 25 Ky. L. R. 144, 74 S. W. 1049. The allotting to one party all improved land and to the other all unimproved land where the proportionate interests of the parties were duly maintained, and no inadequacy or excess of valuation was shown is not objectionable. McMullin v. Doughty, 62 N. J. Eq. 252.

90. Jarrell v. Crow, 30 Tex. Civ. App. 629, 71 S. W. 397.

91. At least if another mode is satisfactory to all the parties. Johnson v. Franklin [Tex. Civ. App.] 76 S. W. 611.

92. Stewart v. Tennant, 52 W. Va. 559. So held where partition was sought of lands devised by void bequest, the parcels devised to the several heirs being of unequal value. Dresser v. Travis, 39 Misc. [N. Y.] 358.

93. Unless specially benefited by the sale or there is some fraud. Childers v. Loudin, 51 W. Va. 559.

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Setting aside.—A sale will not be set aside for mere inadequacy of price[95] nor for mere irregularities or slight technicalities.[96] Where there is substantial error in the decree of sale, it will be set aside notwithstanding that it was beneficial to the complainant.[97] An objection to the manner in which the bidding was conducted cannot be heard where not raised by exceptions to the master's report, nor by assignments of error to the order of confirmation.[98] Regularity of the proceedings cannot be raised at the adjudication of the accounts of an executor who has received money from the partition sale.[99]

Release of purchaser.—The purchaser will not be released because of a technical defect in title,[1] nor because no right of way to the property is of record.[2] Whether irregularities in the sale or proceedings can be availed of by the purchaser depends upon the nature thereof.[3]

Opening sale.—The law is strongly opposed to opening sales to collateral attack and something more than a mere irregularity must be shown to justify the same,[4] but where the proceedings are void, collateral attack is justified.[5]

Charges and liens.—Taxes accruing after the sale are prima facie chargeable to the purchaser.[6] Paramount liens follow the property,[7] but not where sale is made free from liens,[8] and liens against the co-parceners' interests follow their distributive shares.[9]

What passes.—A final decree confirming a sale cuts off remainders and contingent interests properly brought into court; and gives the purchaser an indefeasi-

94. No motion to consolidate the two was made and the court did not deem it necessary to consolidate them of its own motion. Mylin v. King [Ala.] 35 So. 998.

95. Larrabee v. Larrabee, 24 Ky. L. R. 1423, 71 S. W. 645; Bethea v. Bethea, 136 Ala. 584. But will be where coupled with surprise and misapprehension on the part of the appellant. Columbia F. & T. Co. v. Bates, 24 Ky. L. R. 2412, 74 S. W. 248. Also where the day of sale was very stormy, snow covered the land while advertised thus preventing examination, and the judgment for sale contained a violation of the Code in regard to minors, a resale was ordered to prevent sacrifice of the minor's interest. Lipp's Guardian v. Allphin, 25 Ky. L. R. 1382, 77 S. W. 1105.

96. Irregularity in the appointment of a guardian ad litem. Parish v. Parish, 175 N. Y. 181, 67 N. E. 298. Description of land not inclusive. Bethea v. Bethea, 136 Ala. 584. Minor not summoned but his guardian appeared and answered for him. Bell v. Smith, 24 Ky. L. R. 1328, 71 S. W. 433.

97. Stewart v. Tennant, 52 W. Va. 559.

98. Black v. Black, 206 Pa. 116.

99. In re Samson's Estate, 22 Pa. Super. Ct. 93.

1. Title in one, missing for 43 years, who was 30 years old when he disappeared and for whom fruitless search has been made. McNulty v. Mitchell, 41 Misc. [N. Y.] 293.

2. Where the proof of a right by prescription is strong and clear. Metzger v. Martin, 87 App. Div. [N. Y.] 572.

3. That of several lots sought to be partitioned only one was ordered sold will not excuse purchaser. Friedrich v. Friedrich, 111 La. 26. Purchaser may be relieved where in violation of a rule of court guardians ad litem of minor parties were clerks of the attorneys of other parties thereto whose interests were likely to be adverse to that of the infants. Parish v. Parish, 77 App. Div. [N. Y.] 267, 12 Ann. Cas. 208.

4. Parish v. Parish, 175 N. Y. 181, 67 N. E. 298. A mere irregularity in the appointment of a guardian ad litem will not deprive the court of jurisdiction and thus leave the decree for partition open to subsequent collateral attack. O'Donoghue v. Smith, 85 App. Div. [N. Y.] 324. Refusal of a stay of proceedings, where the matter was twice decided in that cause and no fraud is alleged will not justify setting aside. Schwaman v. Truax, 76 App. Div. [N. Y.] 194.

5. Partition made in a suit in which it was not prayed. Turner v. Barraud [Va.] 46 S. E. 318. Minors not barred by a sale made by their father and tutor in violation of the code. Blair v. Dwyer, 110 La. 332.

6. Where the order of sale directs the trustee to pay taxes to the day of sale, he will not be justified in paying taxes accruing thereafter. Arnold v. Carter, 19 App. D C. 259.

7. Where decedent's land was sold in partition and the sale confirmed within two years of his death, the sale was subject to the lien of his debt and a creditor is not entitled to share in the proceeds of the sale save by agreement of the decedent's heirs to that effect. In re Bricker's Estate, 22 Pa. Super. Ct. 12.

8. Where a trustee appointed to sell land states to a bidder that all liens on the land will be paid out of the proceeds of the sale and the bidder thereupon buys, he takes the land divested of all liens. In re Sneathen's Estate, 22 Pa. Super. Ct. 45.

9. If one of two tenants in common places a mortgage on the whole property for his sole benefit it cannot be charged against his co-tenant's interest in the proceeds of a partition sale but is a lien against the distributive share of the mortgagor only. Hanson v. Hanson [Neb.] 97 N. W. 23.

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ble title to the property;[10] and is conclusive as to all lands actually covered by decree.[11] The purchaser takes title to growing crops not constructively severed.[12] He may recover for use and occupation,[13] and on his petition, the court may deduct the proper sum from the purchase money due to the occupant.[14]

A sufficient amount should be reserved to cover contingent charges on the land.[15]

§ 7. *Voluntary partition.*—Partition may be voluntary and by oral agreement,[16] or by deed,[17] and acts not in themselves sufficient to constitute a legal parol partition may, by estoppel, operate as such.[18]

Remaindermen are not bound by voluntary partition made by life tenants.[19]

The remedy for a refusal to carry out an agreement for partition of lands is a suit for specific performance, not a special proceeding for partition.[20]

10. Parish v. Parish, 175 N. Y. 181, 67 N. E. 298.

11. A final decree is res judicata as between the co-tenants and those claiming under the purchaser at such sale, even as to land not supposed at the time of such decree to be included. Norwood v. Gregg [S. C.] 45 S. E. 163.

12. A statement by the referee at the partition sale that there would be a claim of about 28 acres of rye against the place was not the equivalent of a statement that the rye was withdrawn from the sale. Banta v. Merchant, 173 N. Y. 292, 66 N. E. 13.

13. The purchaser at a partition sale is entitled to recover from persons wrongfully occupying the property the value of the use and occupation for the full time of their occupancy, though he might have dispossessed them sooner. Bethea v. Bethea [Ala.] 35 So. 1014. Where the occupants appeal from the decree affirming the sale and file a supersedeas bond, the purchaser on affirmance of the decree of confirmation is entitled to recover for the use and occupation independently of the bond. Id.

14. Bethea v. Bethea [Ala.] 35 So. 1014.

15. From the proceeds of a sale of land subject to notes payable on the contingency that the payees live until the date of maturity enough must be reserved with which to pay such notes on the happening of the contingency. If the latter fails this fund will then be distributed among the parties to the partition proceedings. Stevens v. Stevens, 172 Mo. 28, 72 S. W. 542.

16. Long v. Long, 30 Tex. Civ. App. 368, 70 S. W. 587.

NOTE. Validity of parol partitions. Long v. Long, supra, states that the validity of such partitions is settled in Texas. The Texas cases seem to rest upon the ground that the statute of frauds applies only to a sale of land, and not to a sale of an interest in land. But as said by Vann, J., in Taylor v. Milard, 118 N. Y. 244, 6 L. R. A. 667, "no title is transferred by a parol partition, even when it is carried into effect, as it acts only upon the unity of possession, and by ending that accomplishes the object in view. It ascertains and defines the limitations of the respective possessions." Mr. Tiffany says: "According to the English authorities, and also the decisions in a number of states, a partition by agreement must, to be valid under the statute of frauds, be in writing. In perhaps a majority of the states, however, a parol partition is upheld when followed by possession by the various tenants of the portions allotted to them,—a view which is based on different grounds by different courts. Thus it is stated that such a partition is valid in the case of a tenancy in common because it involves merely a severance of the possession between the various owners, and not a transfer of title, as this is already severed. Sometimes it is stated that a partition will be presumed from the exclusive possession by one tenant of a part of the premises for a considerable length of time. Occasionally, the state statute of frauds, applying in terms only to a sale of lands, is held not to include a partition. And sometimes the theory appears to be that one taking part in such a parol partition is estopped to deny its validity as against one who has received his share and erected improvements thereon. A parol partition, followed by the taking of possession of their allotted parts by the various cotenants, may be upheld in a court exercising equitable powers on the ground that this constitutes such part performance as takes the case out of the statute, and authorizes a decree for specific performance." Tiffany on Real Prop. § 174.

17. Deed conveys no title, but simply sets off in severalty what had formerly been held in common. Harrington v. Rawls, 131 N. C. 39; Snyder v. Elliott, 171 Mo. 362, 71 S. W. 826.

18. Jones v. Rose, 96 Md. 483. So held where invalid proceedings for partition were followed by an exchange of deeds, invalid under statute of frauds. Wescoat v. Wilson, 62 N. J. Eq. 177. A mere exchange of one owner's interest for another tract held not a verbal partition. Laufer v. Powell, 30 Tex. Civ. App. 604, 71 S. W. 549. Where a husband conveyed an undivided interest in realty to his wife, but in a partition suit her share was allotted to him, she not being a party, their possession of the share so allotted with the implied consent of the cotenants amounted at least to a parol partition giving her this share in severalty. Hays v. Marsh [Iowa] 98 N. W. 604. Parties going into possession and occupying land for over 20 years under a parol partition acquiesced in by all parties, and no fraud or inequality being shown, have a valid title. Bonner v. Bonner [Tex. Civ. App.] 78 S. W. 535.

19. Where statute provided means by which partition could have been obtained. Milligan v. Masden, 25 Ky. L. R. 144, 74 S. W. 1049.

20. Sumner v. Early [N. C.] 46 S. E. 492.

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PARTNERSHIP.

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§ 8. Limited Partnerships (1132).

§ 1. *What constitutes. Definition and purpose.*—A partnership has been defined as the contract relation subsisting between persons who have combined their property, labor, or skill, in an enterprise or business, as principals for joint profit.[1] There must be such a relation between the parties as that each is a principal and an agent for the other.[2] A partnership to continue until dissolved by mutual agreement, either partner having a right to demand a dissolution at any time, is a partnership at will.[3]

A partnership cannot be formed for a purpose prohibited by positive law or public policy.[4]

Essential elements.—It is essential to the formation of a true partnership that there should be a contract to that effect between all the partners,[5] for the sharing of profits,[6] or profits and losses.[7] It has been held that an obligation to share losses is essential,[8] though this obligation may be inferred, from an agreement to share profits, unless expressly excluded.[9] The mere association of persons in a joint undertaking does not constitute them partners.[10]

1. Field v. Eilers, 103 Ill. App. 374.
2. Pierpont v. Lanphere, 104 Ill. App. 232.
3. Wright v. Ross, 30 Tex. Civ. App. 207, 70 S. W. 234.
4. The burden of proving that a partnership was formed for an illegal purpose is on the person so alleging.
5. A partnership does not arise until a contract therefor is executed. Dow v. State Bank of Sleepy Eye, 88 Minn. 355, 93 N. W. 121. An agreement, between three parties, conveying to each other each one's interest in minerals which may be found on the lands owned by each, together with other privileges, and to develop the mines, if the mineral should be found in paying quantities, each of the parties to own in fee simple an undivided third of all the minerals and privileges, constitutes a mining partnership. White v. Sayers [Va.] 45 S. E. 747. But a contract, by which an owner of mining property agrees to transfer an interest therein to the plaintiff, in consideration of certain services in developing the properties, and certain payments, the owner and plaintiff together with certain others, to do the assessment work on the claims in certain proportions, constitutes a bargain and sale and not a partnership. Roberts v. Date [C. C. A.] 123 Fed. 238.
6. An agreement to contribute services and to share in the profits of a joint undertaking is sufficient to constitute one a partner in a firm. McMurtrie v. Guiler, 183 Mass. 451, 67 N. E. 358.
7. An agreement to furnish different materials on a construction contracted for, in the name of one of the parties, and to share the profits or losses thereof constitutes a partnership in the undertaking. U. S. v. Guerber, 124 Fed. 823. A contract of an owner of land to furnish his tenant with money to buy stock to be put on the land and cared for by the tenant, the profit or loss after repaying the amount furnished, with interest, to be equally divided, constitutes a partnership. Bank of Overton v. Thompson [C. C. A.] 118 Fed. 798.
But a contract between parties does not create a partnership, if it excludes the idea of community of profits and losses. Housels v. Jacobs [Mo.] 77 S. W. 857. A person employed to conduct a branch office for a firm, but having no share in the profits or losses, and contributing nothing to the capital is not a partner. Shute v. McVitie [Tex. Civ. App.] 72 S. W. 433.
8, 9. Johnson v. Carter, 120 Iowa, 355, 94 N. W. 850.
10. The association of attorneys in a suit,

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But the mere fact that parties agree to share profits, or profits and losses, does not of itself create a partnership, if they are not otherwise partners.[11] It is merely a presumption of law which prevails in the absence of controlling circumstances.[12] A partnership is not created where one shares the profits or proceeds of a joint undertaking by way of compensation,[13] or in lieu of wages.[14]

Intent as test.—The real test of the existence of a partnership is the intention of the parties as gathered from a construction of the contract they have made,[15] but this intention may be imputed, although the parties' actual intention was not to create a partnership.[16]

Who may become partners.—Any person competent to contract may become a partner, as a married woman,[17] under our modern statutes, even with her husband,[18] or two partnerships may form a new partnership.[19] But a national bank cannot become a member of a partnership, nor liable as a partner.[20]

through separate employments, who are not in fact partners, does not constitute them partners, so as to entitle them to compensation on that basis. Glidden v. Cowen [C. C. A.] 123 Fed. 48. Members of a corporation jointly purchasing stock therein to aid another member to dispose of corporate property more advantageously, their only benefit being the hope of an increased value of the respective stock holdings, are not partners, and the funds raised by such transaction in the hands of one of them may be retained for a debt due him by the seller. Loetscher v. Dillon, 119 Iowa, 202, 93 N. W. 98.

11. Leonard v. Sparks, 109 La. 543. Persons lending money to a third person under a written agreement to share in the profits, but not holding themselves out as partners, nor participating in the business, though the borrower represents himself as their partner, under Act Pa. Apl. 6, 1870 (P. L. 56). Jordan v. Patrick [Pa.] 56 Atl. 538. A partnership is not created by the fact that a borrower of money to do certain work agrees, after the work is completed, to divide his profits with the lender, after paying the loan, in consideration of an extension of time of payment. Moore v. Williams, 31 Tex. Civ. App. 287, 72 S. W. 222. The purchase of a lease and buildings by two brothers, under an agreement, to share equally the costs and profits and losses, does not of itself constitute a partnership. McPhillips v. Fitzgerald, 76 App. Div. [N. Y.] 15.

12. Pierpont v. Lanphere, 104 Ill. App. 232. An agreement only to share profits is merely evidence of a partnership. Johnson v. Carter, 120 Iowa, 355, 94 N. W. 850.

13. As for services rendered, or for property or money furnished. Pierpont v. Lanphere, 104 Ill. App. 232; Johnson v. Carter, 120 Iowa, 355, 94 N. W. 850. The capital and all the proceeds belonging to another. State v. Hunt [R. I.] 54 Atl. 937. One does not become a partner by having an interest in the proceeds of a joint undertaking, as a share of the profits for his services, if he has no interest in the subject matter. Where an owner of land furnishes timber which another agrees to convert into cross ties and deliver to the owner, who then sells them and divides the profits between them. Padgett v. Ford, 117 Ga. 508.

One employed as general superintendent of a firm at an annual salary and a certain per cent of the net profits, with power over the work as a partner, is not a partner. Hunt v. McCabe, 40 Misc. [N. Y.] 461. And therefore, where summarily discharged, he is not entitled to an injunction restraining other parties from interfering with the business; his remedy being an action against the partners for a wrongful discharge or for damages for the breach of contract of employment. Id.

14. Tex. & P. R. Co. v. Smissen, 31 Tex. Civ. App. 549, 73 S. W. 42.

15. Johnson v. Carter, 120 Iowa, 355, 94 N. W. 850. The intention between the partners inter se must govern. Leonard v. Sparks, 109 La. 543. If persons, in a joint undertaking, regard it as a partnership it will be so considered, even though there is no joint ownership, use, or enjoyment of profits. Huggins v. Huggins, 117 Ga. 151.

16. Where the surviving partner and administrator of the deceased partner agree that the surviving partner shall continue the business, and pay certain debts, they become partners and are liable as such. City Nat. Bank v. Stone [Mich.] 92 N. W. 99. If it appears to have been their intention to enter into the relation of partners, all subterfuges resorted to to evade liability for possible losses, while securing certainty of benefits, will be disregarded. Johnson v. Carter, 120 Iowa, 355, 94 N. W. 850. This intent may arise from a contract which gives rights or imposes liabilities different from those from which a partnership is ordinarily inferred. Huggins v. Huggins, 117 Ga. 151.

17. A married woman may become a partner by agreeing to contribute capital and the services of her husband. Orr v. Cooledge, 117 Ga. 195.

18. Under Code Iowa, §§ 3153, 3164 giving her the right to acquire, own, and dispose of property and make contracts, etc. Hoaglin v. Henderson & Co., 119 Iowa, 720, 94 N. W. 247.

19. Willson v. Morse, 117 Iowa, 581, 91 N. W. 823.

20. Merchants' Nat. Bank v. Wehrmann [Ohio] 68 N. E. 1004. Transferring mining shares to a national bank as security for an indebtedness does not constitute it a partner with liability as such. Id.

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Formalities of contract of partnership.—No particular forms of expression or formalities of execution are necessary to a valid contract of partnership. Any contract which shows an intention to be joint proprietors of the profits of a business to be carried on will constitute a partnership.[21] It is not essential that the term "partnership" should be used,[22] nor need a firm name be adopted.[23] The contract is not within the statute of frauds though the firm is formed to deal in real estate.[24]

Contracts for future partnerships.—Where persons have entered into a contract to become partners at some future time, or upon the happening of some future contingency, they do not become partners until the agreed time has arrived, or the contingency has happened.[25] The test is, to ascertain from the terms of the agreement itself, whether any time has to elapse or any act remains to be done before the right to share profits accrues, for, if there is, the parties will not be partners until such time has elapsed or the act has been performed.[26]

A contract for a future partnership is annulled by the death of one of the parties.[27]

Associations not for profit.—Societies and clubs, the object of which is not to share profits, are not partnerships, nor are their members, as such, liable for each other's acts.[28]

Stockholders in illegal or defective corporations.—The officers and stockholders of a corporation acting without authority of the law are liable as partners,[29] as is also true of promoters,[30] but the stockholders and officers of a de facto corporation cannot be held liable as partners,[31] nor can the stockholders or promoters of an existing corporation be held liable as partners, on the contracts or liabilities of the corporation.[32]

A stockholder cannot maintain an action to have the corporation changed to a partnership, because it is illegally organized, there being no intent to create a partnership.[33]

Evidence.—A partnership may be proved by any competent evidence, written or parol,[34] as by the admissions,[35] statements,[36] or declarations,[37] of the party sought

21. It has been held sufficient for the articles to be written on a piece of paper pasted in a blank book and the signatures on several pages following, where there is a proper connection between them. Moore v. May, 117 Wis. 192, 94 N. W. 45.

22, 23. Johnson v. Carter, 120 Iowa, 355, 94 N. W. 850.

24. Eaton v. Graham, 104 Ill. App. 296. And see topic Frauds, Statute of, 2 Curr. L. p. 108.

25. Dow v. State Bank of Sleepy Eye, 88 Minn. 355, 93 N. W. 121; Sabel v. Savannah R. & E. Co., 135 Ala. 380.

26. Dow v. State Bank of Sleepy Eye, 88 Minn. 355, 93 N. W. 121 (citing Shumaker, Partn. p. 78 et seq.).

27. Dow v. State Bank of Sleepy Eye, 88 Minn. 355, 93 N. W. 121.

28. An organization for religious and social purposes, the members putting in their property, living as one family and having everything in common, but there is no profit-sharing and no business, is not a partnership. Teed v. Parsons, 202 Ill. 455, 66 N. E. 1044. And see the topic Associations and Clubs, 1 Curr. L. p. 233.

29. Officers of a pretended corporation will be liable as partners, at common law, for goods purchased in its name and on its behalf. Worthington v. Griesser, 77 App. Div [N. Y.] 203.

30. Persons signing articles of incorporation, contracting debts, and incurring liabilities, in the name of a proposed corporation, before its existence. Ryland v. Hollinger [C. C. A.] 117 Fed. 216. To hold the incorporators liable as partners in an action on a note transferred by the corporation, before the certificate of corporation is issued, an indorsement by it, prior to the issuance of the certificate, must be alleged. Id. In a suit to hold incorporators liable as partners, on a transaction before corporate existence, an allegation that the articles of association were signed "on or about," a certain date, means on or before that date. Id.

31. Hoyt v. McCallum, 102 Ill. App. 287; Cannon v. Brush Elec. Co., 96 Md. 446; Mason v. Stevens [S. D.] 92 N. W. 424.

32. Ryland v. Hollinger [C. C. A.] 117 Fed. 216.

33. Lincoln Park Chapter No. 177 v. Swatek, 204 Ill. 228, 68 N. E. 429.

34. Its formation or continuance may be so proved. J. Harzburg & Co. v. Southern R. Co., 65 S. C. 539. Postal cards and letters, whether the testimony to connect them with the partners was given before or after their introduction. Sumner v. Gardiner, 184 Mass. 433, 68 N. E. 850.

Admissibility: Testimony held to be sufficiently competent and relevant to show that defendant was a partner at the time a

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to be charged as a partner, or by a proper decree of court.[38] But the statements or declarations of one partner are not admissible to prove a partnership against others,[39] unless made in their presence with their knowledge and consent,[40] or unless they admitted their truth, when repeated to them.[41] A person's contribution to, or interest in, firm property is also a circumstance to be considered, in determining whether he is a partner or not.[42] Though the evidence introduced may be sufficient

firm debt sued on was created. Rhodes v. Lowry [Ky.] 78 S. W. 459. Mercantile reports are not admissible on the issue of partnership, where it is not shown that they are based upon information given by one sought to be charged as partner, or by any one authorized by him, or that he knew that they were being gotten up, or that he knew of the existence of a general reputation that he was a partner. Marks v. Hardy's Adm'r [Ky.] 78 S. W. 864.

Evidence held sufficient to show a partnership in the following cases: Haynes v. Foley, 82 App. Div. [N. Y.] 629; Barrett v. Warren, 84 N. Y. Supp. 578. To show that a special partnership existed between plaintiff, an attorney, and defendants, attorneys, in regard to the prosecution and collection of certain claims. Leeds v. Ward, 38 Misc. [N. Y.] 674. As to a joint undertaking to make car brakes, in an action against a surviving partner, for services rendered at the request of the deceased partner. Griffiths v. Copeland, 183 Mass. 548, 67 N. E. 652. The fact that the brother of the purchaser of timber has general charge of its cutting, and that he and M. are jointly interested in the timber, the net profits to be paid to the purchaser for a joint debt of M. and the brother, is sufficient evidence of a partnership between the three to render them liable on a joint judgment for board furnished employees at the request of M. Wyckoff v. Luse, 67 N. J. Law, 218.

Evidence held insufficient to show a partnership in the following cases: As to the joining of parties to procure an ordinance authorizing the organization of a company. Arnold v. N. W. Tel. Co., 199 Ill. 201, 65 N. E. 224. To prove a partnership at a certain time before the happening of a contingency claimed by the defendant. Davenport v. Brown [Iowa] 93 N. W. 578. A finding that defendant is no way liable on notes and an open account as a partner or as an individual is not supported by evidence that he, together with H., took charge of a business for a third person, during the course of which such notes were given signed by himself and H., per H., and by H. alone. Sidney Stevens Imp. Co. v. Stuart [Idaho] 73 Pac. 21. To show a partnership between a decedent and his testator, so as to give him a share in land conveyed to the testator in his own name. Pepper's Ex'r v. Pepper's Adm'r, 24 Ky. L. R. 2403, 74 S. W. 253. A partnership is not established by evidence showing that the alleged partners did not examine the books, assume control or assist in the business, furnish labor, capital or skill, nor claim any interest in the rents or profits, nor require an accounting. Van Winkle v. Van Winkle, 200 Ill. 136, 65 N. E. 633.

35. Admissions of an alleged partner that he was such are admissible against him to prove the fact of partnership, though such admissions were made to a third person, and though they were not communicated to the person seeking to charge him as a partner. Barwick v. Alderman [Fla.] 35 So. 13. Whether an alleged partner's silence in the face of an assertion that he was a member of a partnership is an admission thereof, is a question for the jury. Sumner v. Gardiner, 184 Mass. 433, 68 N. E. 850.

36. A partnership may be proved by statements of either of two persons claimed to be partners. Weeks v. Hutchinson [Mich.] 97 N. W. 695. Testimony of a witness as to instructions given by one to another, in reference to the drafting of a partnership agreement, is admissible, together with other testimony to show the fact of partnership, where the party sought to be charged admitted he was a partner. Barwick v. Alderman [Fla.] 35 So. 13.

37. Evidence of declarations, denying a partnership, made by one sought to be charged as partner, at the time articles of dissolution are executed, is admissible on the issue of partnership where the articles of dissolution have been introduced to establish it. Marks v. Hardy's Adm'r [Ky.] 78 S. W. 864. But they are inadmissible to deny the partnership if they are made at a time not constituting part of the res gestae. Id.

38. A preliminary decree finding the existence of a partnership is not conclusive in a subsequent action between the parties; where, before final decree in the former action, the defendant was dismissed from the case without prejudice. Agnew v. Omaha Nat. Bank [Neb.] 96 N. W. 189.

39. Statements of a signer of a note sought to be enforced against the signer and certain others as partners. Moore v. Williams, 31 Tex. Civ. App. 287, 72 S. W. 222. Defendant is not estopped to deny a partnership, represented to exist by another, where there is in fact no partnership. Johnson v. Carter, 120 Iowa, 355, 94 N. W. 850.

40. Moore v. Williams, 31 Tex. Civ. App. 287, 72 S. W. 222. Where the existence of a partnership is in issue, the declarations of a partner are inadmissible to estop another from denying that he was a partner at the time of the creation of a debt, where the declarations are made after such time. Huyssen v. Lawson, 90 Mo. App. 82.

41. Huyssen v. Lawson, 90 Mo. App. 82.

42. U. S. v. Guerber, 124 Fed. 823; Padgett v. Ford, 117 Ga. 508; Van Winkle v. Van Winkle, 200 Ill. 136, 65 N. E. 633; McMurtrie v. Guiler, 183 Mass. 451, 67 N. E. 358; State v. Hunt [R. I.] 54 Atl. 937; Shute v. McVitie [Tex. Civ. App.] 72 S. W. 433. Where one contributes no capital, but leaves a portion of the profits, given to him as compensation for services, in the business as firm assets he thereby acquires a joint ownership and is a partner. Under Civ. Code Ga. § 2626. Huggins v. Huggins, 117 Ga. 151.

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to show a partnership as to third persons, it may be insufficient to show it as between the alleged partners themselves.[43]

A preponderance of evidence is required to prove a partnership, whether in an action against the firm by a third person, or in an action between the partners.[44]

The burden of proving a partnership is upon the party relying upon it,[45] but persons contracting to perform the duties of architects will be presumed, as between themselves, to be partners, in the absence of anything to the contrary.[46]

Questions of fact.—Whether a partnership exists in a particular case is a question of fact for the jury.[47] The existence of a partnership may be put in issue by a properly verified answer denying it.[48]

Partnerships as to third persons.—One may be held liable as a partner, on the principle of estoppel, where he holds himself out or permits himself to be held out, as such, and a third person gives credit to the firm on the faith of such representation.[49] But it is essential that the holding out must have been known to the person seeking to avail himself of it,[50] and the circumstances must be such as to create an estoppel.[51] In order that a partnership by estoppel may be brought into question, it must be pleaded.[52]

By some authorities a partnership is created as to third persons, where the parties share the profits of a joint undertaking, irrespective of whether they were partners, inter se, or not.[53]

§ 2. *Firm name, trade-mark, and good will.*[54]—Although persons constituting a partnership usually adopt a firm name, it is not essential that they should do so, but the partnership business may be conducted by the partners in their individual names.[55] In some states the use of firm names is, to some extent, regulated by

43. Boon v. Turner, 96 Mo. App. 635, 70 S. W. 916. Evidence of a sale of goods by a third person to certain persons, he continuing to carry on the business in the name of part of the sureties "& Co.," held insufficient to show a partnership between the parties, there being testimony that such sale was made as an indemnity against loss. Id. An ostensible partnership, appearing to third persons, is not conclusive of the relation, as between the parties themselves though it is evidence thereof. Neefus v. Eccles, 85 N. Y. Supp. 635.

44. An instruction that less strictness of proof is required to prove a partnership in actions by a third person against the firm than in actions between the partners is erroneous. Lawrence v. Westlake, 28 Mont. 503, 73 Pac. 119.

45. Davenport v. Brown [Iowa] 93 N. W. 578.

46. In a suit for an accounting. Miller v. Hale, 96 Mo. App. 427, 70 S. W. 258.

47. Johnson v. Carter, 120 Iowa, 355, 94 N. W. 850. The fact that a partner solicited other members to execute the bond and that he held himself out as a partner is for the jury to consider, in determining whether he was a partner at the time of its execution, where he denies it. Gordon v. Funkhouser, 100 Va. 675. Evidence sufficient to require submission to the jury. Swofford Bros. Dry Goods Co. v. Cowgill [Neb.] 96 N. W. 215. If there is some evidence from which it might be inferred that property was intended to be common property, it is sufficient to go to the jury on the issue of partnership in an action of replevin, by one as surviving partner, though the evidence was also consistent with the view that no such intention existed. Sparling v. Smeltzer [Mich.] 95 N. W. 571. Where the question of the existence of a partnership at a certain time is in issue, an instruction that a general partnership need not be shown is erroneous. O'Neill v. Crane. 77 App. Div. [N. Y.] 638.

48. Without putting such denial in a separate affidavit, under R. S. Mo. 1899, § 746. Donk Bros. Coal & Coke Co. v. Aronson [Mo. App.] 77 S. W. 132.

49. Fennell v. Myers, 25 Ky. L. R. 589, 76 S. W. 136; Johnson v. Marx Levy & Bro., 109 La. 1036; Huyssen v. Lawson, 90 Mo. App. 82; Daniel v. Lance, 21 Pa. Super. Ct. 474.

50. Sheldon v. Bigelow, 118 Iowa, 586, 92 N. W. 701.

51. A person repudiating, for a partnership, a contract made by one of the partners cannot be held liable, as a partner, for damages where the partner making the contract also repudiates it. And it is not shown that such person is a partner or that he is estopped to deny his liability as such. Jamison v. Cullom & Co., 110 La. 781.

52. Casey-Swasey Co. v. Treadwell & Co. [Tex. Civ. App.] 74 S. W. 791.

53. A contract, by which one party agrees to furnish 16 mules and harness, and the other 6 mules and harness, and the former to receive one-half of the net profits, constitutes a partnership as to third persons, although he was not to be responsible for debts or to have anything to do with the work. Brandon v. Conner, 117 Ga. 759.

54. See, also, topics Good Will, 2 Curr. Law, 142, and Trade-Marks and Trade-Names.

55. The fact that one partner conducts the firm business in his own name does not

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statute,[56] but even where a business is carried on under an assumed name, in violation of such a statute, it does not prevent a recovery by the persons constituting the firm, on a liability created under such name.[57] The use of a firm name containing the name of a deceased partner may be absolutely prohibited, unless authorized by statute.[58] In the absence of statute the mere use of the term "& Co." after a name does not import a partnership, or that more than one person is interested in the business.[59]

A purchaser of the good will of a partnership, at a sale thereof, acquires the right to continue the business under the firm name,[60] and for the purpose of advertising as its successor.[61] A breach of a covenant not to engage in the same business for a certain length of time, by partners, does not preclude a recovery on a bill of sale executed by them to the same parties to whom the good will was sold.[62]

A firm name dies with the last surviving partner, and does not pass to his personal representatives,[63] but as such representatives are entitled to the good will of the firm they may enjoin third persons from using the firm name.[64]

§ 3. *Firm capital and property. In general.*—Partnership property includes everything of value belonging to the partners as a firm, as distinguished from that belonging to them as individuals,[65] as property purchased with partnership funds though not used for partnership purposes.[66] The right to the use of the firm name, is a firm asset,[67] which is subject to be ordered for sale with the other firm property without condition, restriction, or limitation upon the purchaser.[68] But property of an individual partner, used for partnership purposes, is not partnership property,[69] and where property so used is lost, through the fault of a third person, a partner who has no interest therein cannot recover for its loss.[70]

Partnership real estate retains its character as realty, in the absence of an agreement to the contrary, except so far as it is necessary to be changed into personalty to pay firm debts, and debts due from one partner to another.[71]

prevent it from being a partnership. Field v. Ellers, 103 Ill. App. 374.

56. Where the name under which firm business is carried on correctly designates the members of the firm, it is not within a statute prohibiting such business to be carried on under an assumed name, unless they file a certificate setting forth the business name. "Castle Bros." is a correct designation of a firm composed of two brothers by that name, under Pen. Code N. Y. § 363b. Castle v. Graham, 87 App. Div. [N. Y.] 97.

57. For goods sold and delivered. Not filing a certificate under Pen. Code N. Y. § 363b. Doyle v. Shuttleworth, 41 Misc. [N. Y.] 42.

58. Slater v. Slater, 78 App. Div. [N. Y.] 449.

59. Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106.

60. Upon complying with the Partnership Law (L. 1897, c. 420) §§ 20, 21. Slater v. Slater, 175 N. Y. 143, 67 N. E. 224.

61. Slater v. Slater, 78 App. Div. [N. Y.] 449.

62. The bill of sale and covenant resting on different considerations. Kinney v. McBride, 88 App. Div. [N. Y.] 92.

63. Fisk v. Fisk, 77 App. Div. [N. Y.] 83, 12 Ann. Cas. 228.

64. Fisk v. Fisk, 77 App. Div. [N. Y.] 83, 12 Ann. Cas. 228.

65. Where a fund sent by clients to a firm of attorneys is deposited in bank by the attorneys to their own credit, and upon their death is not claimed by any one, it is a firm asset and not a trust fund which would escheat to the state. Under R. S. Mo. 1899, §§ 7381, 7382. Union Trust Co. v. Glover, 101 Mo. App. 725, 74 S. W. 436. As to the taxation of firm property see title "Taxes."

66. Real estate so purchased but rented to others. Foster v. Sargent [N. H.] 55 Atl. 423.

67. A firm name under which it has done business for years. Slater v. Slater, 175 N. Y. 143, 67 N. E. 224.

68. Slater v. Slater, 175 N. Y. 143, 67 N. E. 224.

69. Where a partner puts into the business the "use and occupation" of certain property for a certain specified time, the partnership has only a leasehold interest therein. Hart v. Hart, 117 Wis. 639, 94 N. W. 890.

70. Loss of a threshing engine owned by one partner cannot be recovered for by the other partner. Foster v. Lyon County Com'rs [Kan.] 74 Pac. 595.

71. Hauptmann v. Hauptmann, 91 App. Div. [N. Y.] 197. On the death of a partner in whose name title thereto is taken, it descends to his heirs, subject to the equity of the surviving partner to have it appropriated to pay firm debts. Smith v. Cowles, 81 App. Div. [N. Y.] 328. If it appears that it is not necessary to resort to it to pay firm debts or adjust balances between partners, the deceased partner's heirs may maintain an action to partition the property. Id.

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Whether or not any particular property is partnership property, depends upon the intention of the partners, as evidenced by their express or implied agreement.[72] Property originally owned by one or more partners, and used in the partnership business, may be joint or several as the partners agree.[73] Originally separate estate, it may be converted into joint estate, by a parol agreement between the parties.[74]

How title is held.—Partnership personalty may be acquired, held, and transferred, either in the name of the firm, or in the individual name of a partner or partners.[75] But title to real estate must be taken in the name of one or more of the partners, in which case a resulting trust exists in favor of the firm,[76] so that the property may be charged with partnership interest.[77]

Partner's interest.—A partner's interest in firm realty is simply his right in what may remain after adjusting the partnership affairs.[78] In the absence of a specific agreement partners' interests are presumed to be equal.[79] A partner's individual interest in a debt due the firm cannot be garnished in a court having no jurisdiction of the partnership or right to determine the partner's interest.[80] The levy of an attachment or execution by equitable proceedings, to ascertain the nature and extent of a partner's interest, is the only way of reaching such interest.[81]

§ 4. *Rights and liabilities as to third persons. A. Power of partner to bind firm. In general.*—In the absence of a special agreement to the contrary, each member of a partnership has power, express or implied, to bind his firm, and consequently all the other partners, by all acts within the real or apparent scope of the partnership business,[82] as by an admission,[83] or by collecting firm debts; and this power applies to bind a secret partner, unless exclusive credit was given to the ostensible partners,[84] and if a partner acts in good faith and with due diligence for the firm's benefit, a resulting loss must be borne by all the members alike.[85] A partner may be bound by the acts of his co-partner by estoppel.[86]

72. In the absence of an express agreement it must depend on their intention, which in the absence of evidence showing an intention, the court must determine from the consideration of which form of estate better accords with the general intention of the parties. In re Swift, 118 Fed. 348. The fact that it was on land purchased by a partner with private funds, taking title thereto in his own name, is a controlling circumstance as to its private character. Lamb v. Rowan [Miss.] 35 So. 690.

73. In re Swift, 118 Fed. 348.

74. Which agreement may be proved by a course of conduct; by entries upon the partnership books. In re Swift, 118 Fed. 348.

75. A bank deposit in a partner's individual name is not conclusive that the partnership has no interest therein, extraneous evidence is admissible to show equitable ownership in the firm. Gansevoort Bank v. Carragan [N. J. Err. & App.] 55 Atl. 741.

76. Parol evidence is sufficient to establish this. Kringle v. Rhomberg, 120 Iowa, 472, 94 N. W. 1115.

77. Kringle v. Rhomberg, 120 Iowa, 472, 94 N. W. 1115.

78. Hauptmann v. Hauptmann, 91 App. Div. [N. Y.] 197. A deceased partner's widow is entitled to dower in his share of the firm, only after partnership debts and equitable claims between the partners are settled. Davidson v. Richmond, 24 Ky. L. R. 699, 69 S. W. 794; Hauptmann v. Hauptmann, 91 App. Div. [N. Y.] 197.

79. Safe Deposit & Trust Co. v. Turner [Md.] 55 Atl. 1023. In compensation received for labor done by them as partners. Miller v. Hale, 96 Mo. App. 427, 70 S. W. 258.

80. Hoaglin v. C. M. Henderson & Co., 119 Iowa, 720, 94 N. W. 247.

81. Under Code Iowa, §§ 3904, 3977, 3978. Hoaglin v. C. M. Henderson & Co., 119 Iowa, 720, 94 N. W. 247.

82. Standard Wagon Co. v. Few [Ga.] 46 S. E. 109.

In **Louisiana** by virtue of art. 2872 of the civil code, members of an ordinary partnership have no authority to bind each other unless authorized either specially or by the articles of partnership. Jamison v. Cullom, 110 La. 781. And in order to hold a member of such a partnership liable as such on a contract by another member, the plaintiff must show the partnership, that the defendant authorized the contract, was benefited by it, or was estopped to deny it. Id.

83. In reference to facts involving a liability for damages for trespass. Caris v. Nimmons, 92 Mo. App. 66.

84. A secret partner, or his assignee, may recover partnership funds from a third person where it is not shown that the latter gave exclusive credit to the ostensible partner. Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106.

85. Lyons v. Lyons [Pa.] 56 Atl. 54.

86. A partner will be estopped to deny the validity of a note bearing the firm name as an accommodation indorser, though made after dissolution, where he knows that co-partner has been so using the firm name

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But the firm is not bound by the acts or contracts of a partner beyond the scope of the partnership business, of which fact persons dealing with the partner are bound to take notice,[87] unless such unauthorized acts or contracts have been subsequently ratified by the firm.[88] A release of individual claims by a partner does not release firm claims against the same party in which such partner is jointly interested.[89]

Whether or not a particular act or contract was entered into by a partner within the scope of firm business is a question for the jury.[90]

On contracts.—Before dissolution, each partner is the agent of the others and the firm will be bound by any contract, made by a partner within the scope of partnership business,[91] in the absence of special restrictions on the partner's powers, of which one dealing with him has notice.[92] A partner may bind his co-partners by an agreement to share compensation due to the firm,[93] or by a compromise;[94] or by a contract of insurance,[95] or by assigning a chose in action,[96] or other firm property,[97] and even by an assignment to pay an individual debt, if consented to by his co-partners.[98]

or did not give notice of dissolution to the parties giving credit to the firm name. Bank of Monongahela Valley v. Weston, 172 N. Y. 259, 64 N. E. 946. An individual partner will be estopped from claiming title to his individual property included in a firm deed which he signs, if the purchaser has good reason to believe that it is included in the firm sale. Newson v. Brazell, 118 Ga. 547. A secret partner may be estopped, by an ostensible partner's representations, to deny that the latter was the only member of the firm. Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106.

87. A person dealing with a partnership is bound to take notice of the character of the firm business as conducted. Standard Wagon Co. v. Few [Ga.] 46 S. E. 109. Where a person takes a note from a partner signed by him in the firm name the payee is bound to know whether the transaction, in which the note was given, is within the scope of firm business. Id.

88. An unauthorized signing of a lease in the firm name is ratified by the firm entering into possession, paying the rent, and using the property according to lease, and by the other firm collecting the rents, etc. Golding v. Brennan, 183 Mass. 286, 67 N. E. 239. Accepting and depositing to the firm's credit proceeds of a discounted note, renders a partner liable for his co-partner's act in indorsing the firm name on the note whether authorized or not. Mechanics' & T. Bank v. Oppenheim, 38 Misc. [N. Y.] 763. The fact that the individual names of the members of the firm are not set out in a contract is immaterial if it is subsequently ratified. Golding v. Brennan, 183 Mass. 286, 67 N. E. 239.

89. Smith v. Williams, 85 N. Y. Supp. 506.

90. It is a question for the jury to determine whether a debt was created by a partner within the usual course of firm business. Under Civ. Code Mont. §§ 3231, 3250, providing for the authority of a general partner to bind the firm. Hefferlin v. Karlman [Mont.] 74 Pac. 201.

91. Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176. For board furnished employes. Wyckoff v. Lyse, 67 N. J. Law, 218.

92. Partners may bind each other by contracts made with third persons who have no notice of any special restrictions of the partnership powers, if the transaction is within the general scope of partnership business. Standard Wagon Co. v. Few [Ga.] 46 S. E. 109. It is no defense to an action against the members of a partnership to enforce a firm obligation that the business was not conducted in the manner prescribed by the articles of partnership, if the third party had no notice thereof. Moore v. May, 117 Wis. 192, 94 N. W. 45.

93. To share with another for services rendered, compensation due to the partnership under another agreement is binding on the firm. Boice v. Jones, 86 App. Div. [N. Y.] 613.

94. Where a partner compromises a firm claim for a certain consideration and upon an agreement that he should pay certain notes both partners are bound by such agreement. Wade v. Foster, 24 Ky. L. R. 1292, 71 S. W. 443; Wade v. Bent, 24 Ky. L. R. 1294, 71 S. W. 444.

95. A policy of insurance on firm property in the name of one of the members is valid notwithstanding a condition that it shall be void if the insured's interest be other than unconditional and sole ownership. McGrath v. Home Ins. Co., 84 N. Y. Supp. 374.

96. As money due the firm. Sullivan v. Visconti, 68 N. J. Law, 543.

97. Columbia Finance & Trust Co. v. First Nat. Bank, 25 Ky. L. R. 561, 76 S. W. 156. An assignment of firm property by a single member need not mention the name of the firm; parol evidence may be introduced to identify the subject-matter. Sullivan v. Visconti, 68 N. J. Law, 543. An assignee of partnership property, assigned by one partner with the concurrence of the other partners, has a right to the property superior to a subsequent assignee thereof from one partner. Ulrich v. McConaughey [Neb.] 96 N. W. 645.

98. An assignment, by a partner of part of firm funds to pay an individual debt, with the consent of the other partners, is as valid as though made by the firm. Columbia Finance & Trust Co. v. First Nat. Bank, 25 Ky. L. R. 561, 76 S. W. 156. A member of a firm cannot use part of firm funds deposited

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But a partner cannot bind his firm by an instrument under seal, except by the previous authority or subsequent ratification of his co-partners.[99] A firm deed in order to be binding on it should be executed, or consented to, by all the partners,[1] and the firm is not bound by unauthorized sale of all of the firm property;[2] nor by any contract not authorized by the partnership agreement, of which the third party has notice.[3] The mere fact that a contract is made in the firm name does not make it a firm contract where credit is not given to the firm,[4] nor can a firm be held liable for the individual debts of a partner.[5]

Partners are liable in damages for a breach of a firm contract,[6] as for breach of a contract not to engage in a certain business within a certain territory, made upon a sale of the firm good will.[7] An action therefor may be maintained against the surviving members of the partnership, where the partnership is continued by the provisions of a deceased partner's will to which they assented.[8]

Partnership bills and notes.—In trading partnerships, the partners may bind each other by bills or notes executed in the firm name,[9] or in the names of the individual partners,[10] as a renewal note,[11] or a judgment note in the firm name, with their assent;[12] but not by a note given by a partner for his own private benefit,[13]

in a bank, to pay an individual debt to the bank without the other partner's consent. Id.

99. Pollock v. Jones [C. C. A.] 124 Fed. 163; Gordon v. Funkhouser, 100 Va. 675. A chattel mortgage signed by a partner without authority, and without the knowledge and consent of his co-partner, and not accepted by the mortgagee until after dissolution of the firm is not binding on the other partner. Meyer v. Michaels [Neb.] 95 N. W. 63.

1. The fact that a member of a nontrading firm does not join in the execution of a mortgage to secure a loan to the firm does not make the mortgage invalid, if it is not shown that he did not consent to its execution. Matthies v. Herth, 31 Wash. 665, 72 Pac. 480. And in an action to determine the validity of such a mortgage, in the absence of a finding that the partner did not consent to its execution, it will be presumed to be an authorized firm act. Id.

2. One partner alone is prohibited, by statute in some jurisdictions, from disposing of all the firm property at once, without his co-partners' consent, unless it consists entirely of merchandise, or unless his co-partners have wholly abandoned the business to him, or are incapable of acting [Laws Okl. 1893, c. 58, art. 3, § 4, subds. 3, 4]. Phillips v. Thorp [Okl.] 73 Pac. 268. A purchaser at such a sale of all the firm property by one partner alone, with knowledge of the firm's interest, or of facts sufficient to put him on inquiry, acquires no title to the interests of the nonconsenting partners. Id.

3. Where one partner is to furnish or be liable for certain articles or labor and the other is not to be liable therefor, with knowledge of which one contracts with the partner whose power is so limited, he cannot hold the other partner. Barwick v. Alderman [Fla.] 35 So. 13.

4. The fact that a loan was made under a firm name does not show that the loan was made to a partnership where the lender believed that the individual and firm were the same. Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106.

5. A partnership claim cannot be garnished for the debt of an individual partner. Raley v. Smith [Tex. Civ. App.] 73 S. W. 54.

6. Lincoln v. Orthwein [C. C. A.] 120 Fed. 880.

7. Where partners sell their retail grocery business with an agreement not to engage in the same business within a certain time and area, they are liable if they serve customers within such time and area though they have no place of business or residence therein. Love v. Stidham, 18 App. D. C. 306. A breach of such agreement is made if only one of the partners engages in the business, and for which they may all be liable in damages. Id.

8. Lincoln v. Orthwein [C. C. A.] 120 Fed. 880.

9. Where a partner of a trading firm borrows money professedly for the firm, and executes therefor a negotiable instrument in the firm name, it binds all the partners, whether the borrowing were really for the firm or not, or whether he diverts or misapplies the funds or not, provided the lender is not a party to the intended fraud; and the burden is not on the lender to prove value or lack of knowledge of the fraud. Pettyjohn v. Nat. Exchange Bank [Va.] 43 S. E. 203.

10. A note signed by the individual partners may be shown to be a partnership obligation though under seal, and may be proved against the partnership estate in bankruptcy. Note given for money lent and used in partnership business. Davis v. Turner [C. C. A.] 120 Fed. 605.

11. By a managing partner in renewal of a note on which the partners were liable as indorsers. Citizens' Commercial & Sav. Bank v. Platt [Mich.] 97 N. W. 694.

12. Myers v. Sprenkle, 20 Pa. Super. Ct. 549.

13. Such act is not within the scope of firm business. Standard Wagon Co. v. Few [Ga.] 46 S. W. 109.

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unless it is authorized or ratified by the other partners.[14] But in nontrading partnerships one partner cannot bind his co-partners by the execution of promissory notes, unless authority is expressly given or recognized by all the parties, or implied from their general business habits;[15] and the burden of proof to establish such authority is on the plaintiff.[16]

Partners indorsing a renewal note before delivery are joint makers.[17] The burden of proof is on partners, denying the validity of a renewal note, to show that the first note was not protested, and that they were discharged as indorsers thereon.[18]

Notes, signed by a bankrupt firm, including claims on which one of the partners is not primarily liable, are prima facie debts provable against the firm in bankruptcy proceedings.[19]

Appointment of agents.—A partnership may appoint an agent to do acts which it might do itself,[20] and it may expressly or impliedly ratify the acts of such agent, where previously unauthorized.[21] Or one partner may appoint an agent to represent him in firm affairs.[22]

Notice to one as notice to all.—Notice to one member of the firm, in reference to firm matters, is notice to all the members.[23]

Nature of partnership liability.—Partners are jointly and severally liable for partnership debts,[24] and this may be so declared by statute.[25] Upon the death of a partner, the firm liability may be enforced against a surviving member alone.[26] A partner is not entitled to be discharged from firm debts by filing an individual petition in bankruptcy, which discloses individual and firm debts, but not firm assets and liabilities, and the firm creditors are not notified.[27]

Liability for torts.—A partnership, and therefore all the members, are liable for the torts of a co-partner in the course of partnership business as the carrying away and using in partnership business property of a third person.[28] But it is not liable for the willful or negligent tort of a partner outside the scope of his authority, though to some extent connected with firm business, unless his co-partners

14. Standard Wagon Co. v. Few [Ga.] 46 S. E. 109.

15, 16. Teed v. Parsons, 202 Ill. 455, 66 N. E. 1044.

17, 18. Citizens' Commercial & Sav. Bank v. Platt [Mich.] 97 N. W. 694.

19. Under Bankrupt Act, 30 St. 562, § 63 (U. S. Comp. St. 1901, p. 3447), providing for the proving and allowing against a bankrupt fixed liabilities evidenced by a statement in writing absolutely owing at the time the petition is filed. Merchants' Bank v. Thomas [C. C. A.] 121 Fed. 306.

20. To make promissory notes. Rosenthal v. Hasberg, 84 N. Y. Supp. 290.

21. By accepting the proceeds of a note made in the firm name by one purporting to be its agent. Rosenthal v. Hasberg, 84 N. Y. Supp. 290.

22. Occupancy of premises leased by a firm by the husband of a co-partner, he representing her in firm matters, after the lease has expired is the occupancy of the firm. Webb v. Parks, 85 App. Div. [N. Y.] 621.

23. Gedge v. Cromwell, 19 App. D. C. 192. Knowledge of a member of banking firm as to a note held by the firm. Adams v. Ashman, 203 Pa. 536. Two partners cannot deny notice of foreclosure proceedings, in an action against them on a partnership obligation, where one of them was a party to the foreclosure suit. Loeb v. Stern, 198 Ill. 371, 64 N. E. 1043.

24. Wood v. Carter [Neb.] 93 N. W. 158. Partners jointly liable for firm debts by Civ. Code Mont. § 3250. Hefferlin v. Karlman [Mont.] 74 Pac. 201. Where partners, selling out business, jointly agree not to enter the same business within a certain time and area, a violation thereof by one is a violation by all for which they are jointly and severally liable. Love v. Stidham, 18 App. D. C. 306.

25. Every general partner under Laws, N. Y. 1897, c. 420, § 6. Leggat v. Leggat, 79 App. Div. [N. Y.] 141.

26. Fennell v. Myers, 25 Ky. L. R. 589, 76 S. W. 136.

27. Though the firm is dissolved and without assets and the firm debts are barred by the statute of limitations. In re Morrison, 127 Fed. 186. Where an individual partner's petition in bankruptcy, not disclosing firm assets or liabilities, seeks a discharge from firm debts, the proceedings should be amended so as to include firm's assets and liabilities and to make firm's creditors parties. Id.

28. Though other innocent partners supposed it belonged to their co-partner. Sunlin v. Skutt [Mich.] 94 N. W. 733.

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participate therein.[29] It is not liable for the acts of an individual partner in causing a false imprisonment,[30] or a malicious prosecution,[31] nor for the slander of a third person by one of its members.[32] To maintain a bill in equity against partners for fraud, the facts constituting the fraud must be shown.[33]

An action for deceit cannot be maintained by a new firm against an old firm where there is a member common to both.[34]

Rights as to third persons.—Partners may maintain an action against third persons for a wrongful conversion of their interests in the firm property,[35] or on firm contracts made by one of the partners.[36] But a partner has no claim against a bank for specific money received for the sale of firm property, and deposited in the bank in his co-partner's name, though the bank had notice that it was partnership funds.[37]

(§ 4) *B. Commencement and termination of liability. Incoming partner or firm.*—An incoming partner is not liable for the debts and obligations incurred by his co-partners, before the partnership between him and them was formed, unless he expressly assumes such liability.[38] A new firm formed by the consolidation of two firms is liable for the debts of the members of the old firms to the extent only to which it has assumed such debts.[39]

Notice of dissolution.—Except in cases of dissolution by operation of law,[40] in order that a retiring partner may be relieved from the future acts of his partners, actual notice of dissolution must be had by one who has been dealing with the partnership, and who may deal with the partner again as such;[41] but as to the pub-

29. Partners accepting and participating in the fruits of the fraud of one of the partners are liable for the fraud, the same as if they had directed or concurred in it. Levy v. Abramsohn, 39 Misc. [N. Y.] 781.

30. Under Civ. Code, Ga. § 2658. Martin v. Simkins, 116 Ga. 254.

31. Unless advised, directed, or participated in by his co-partners. Noblett v. Bartsch, 31 Wash. 24, 71 Pac. 551.

32. Unless sanctioned or consented to by his co-partners. Hendricks v. Middlebrooks, 118 Ga. 131.

33. It cannot be maintained against the members of a partnership to charge them with a judgment recovered against them as a supposed corporation, on the ground of fraud in allowing it to appear that they constituted a corporation and in defending a suit against it without showing the fact of partnership; where the complainant by due diligence could have discovered that it was not a corporation by reason of their failure to accept the charter of incorporation. Pittsburg Sheet Mfg. Co. v. Beale, 204 Pa. 85.

34. Taylor v. Thompson, 176 N. Y. 168, 68 N. E. 240.

35. Against a purchaser at an unauthorized sale of firm property, with knowledge of the partner's interest or of facts sufficient to put him on inquiry. Phillips v. Thorp [Okl.] 73 Pac. 268.

36. A law firm may sue on a contract, for services, made by one of its members. Dennis v. First Nat. Bank [Wash.] 73 Pac. 1125.

37. His only right being to an accounting against his co-partner. Bank of Overton v. Thompson [C. C. A.] 118 Fed. 798.

38. An incoming partner is not liable for money previously advanced to a partner in the absence of an agreement to assume such liability. In re Hoagland's Estate, 79 App. Div. [N. Y.] 56.

39. Assuming the debts of the individual members to the extent of the stock of goods contributed to the firm by each member. Merchants' Bank v. Thomas [C. C. A.] 121 Fed. 306. Notes given by a new firm in settlement of an indebtedness, including notes of an individual member for which it was not originally liable, in consideration of an extension of time of payment, renders it liable for the prior debt of such partner. Id. The stockholders of a corporation organized to take over the business of a partnership are not liable to creditors for an overvaluation of the firm assets innocently made; where they receive their stock as "full paid" they are not liable to creditors for the difference between the actual value of the property and the nominal value of the stock. Taylor v. Cummings [C. C. A.] 127 Fed. 108. A new firm continuing the business after the death of a partner in the old firm is not liable to a salesman for a balance of salary due by the old firm unless it renews the contract made with him. Shelton v. Baer, 90 Mo. App. 286.

40. Notice of dissolution is not necessary in case of dissolution by death of one of the partners. Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176.

41. Bank of Monongahela Valley v. Weston, 172 N. Y. 259, 64 N. E. 946. A retiring partner will be liable for a debt incurred by a lessee of the firm business, unless notice of his retirement was given to the creditor. Davenport Gas & Elec. Co. v. Reimers [Iowa] 96 N. W. 1084. A note executed by a firm after dissolution, but before notice is given to the party to whom the note is given and who had been transacting business with the firm, is binding on all the former members. Johanning v. Wilson, 86 N. Y. Supp. 7. When the fact of continuing partnership is clearly shown, and that which was done for which liability is claimed is one of many acts of the

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lic in general, notice by publication is sufficient.[42] Notice to a salesman, selling to the firm, of a partner's retirement, is sufficient,[43] though notice to an ordinary employe or a bookkeeper is not.[44]

It is no defense to an action against former members of a firm on a firm liability, created without notice of dissolution, that the firm was fraudulently organized.[45]

Novation.—A partnership may be released from its contract by substituting another party in its stead if the other contracting party consents thereto,[46] and promises to pay the debt.[47]

(§ 4) *C. Application of assets to liabilities. By partners.*—The partners may dispose of their firm and individual assets in any way they see fit, provided it is done in good faith and not in fraud of creditors.[48] They may at any time, before the firm creditors acquire a lien on the firm property, sever their joint interests by a sale from one partner to another, or by a division in severalty, though the firm was insolvent at the time;[49] and may thereafter claim the exemption allowed by statute to heads of families residing in the state.[50] But firm assets cannot be applied by an individual partner to the payment of individual debts,[51] and a trust deed by a firm can be given only for the amount of the firm debt.[52]

By the court.—Though as a rule, at law, a firm creditor may gain a priority over other firm creditors, in the firm property, by superior diligence in prosecuting his claim, yet where the firm assets of an insolvent firm are in the hands of a court

same or similar character well known to the party sought to be charged, plaintiff need not show that he knew of the continuation of the partnership, or of such party's knowledge of the particular act in question from which liability is claimed. Johnson v. Levy, 109 La. 1036. Upon dissolution of law firm unless one who has dealt with one of its members has notice thereof all the members are bound by his subsequent dealing with the member in his representative capacity. Birckhead v. De Forest [C. C. A.] 120 Fed. 645. Whether or not the subsequent dealing is had with him in his representative capacity is a question for the jury. Id.

42. Bank of Monongahela Valley v. Weston, 172 N. Y. 259, 64 N. E. 946. Permitting the use of firm stationery does not estop him from pleading the dissolution to an action for goods sold to the firm after the dissolution. Barkley v. Lewis, 90 App. Div. [N. Y.] 570.

43. Cowan v. Roberts, 133 N. C. 629.

44. To relieve a retiring partner from liability for goods subsequently purchased by the firm, he must show notice of his retirement to the seller or a person having charge of his credit department; notice to an ordinary employe of the home office or one found working on the books is not sufficient. Cowan v. Roberts, 133 N. C. 629.

45. Johanning v. Wilson, 86 N. Y. Supp. 7.

46. Whether a corporation may take over a lease of a partnership and thereby release the firm depends upon the lessor's consent thereto. Golding v. Brennan, 182 Mass. 286, 67 N. E. 239.

47. A novation is not created by a corporation taking over all the assets of a firm subject to its debts with the knowledge and acquiescence of the creditors, unless the corporation promises to pay such debts. Leggat v. Leggat, 79 App. Div. [N. Y.] 141.

48. An assignment of a judgment in favor of a surviving partner to secure firm debts and debts contracted by him in winding up the firm business is valid as against his individual creditors, notwithstanding supplementary proceedings and proceedings in bankruptcy against him at the time of the assignment. Bush Co. v. Gibbons, 87 App. Div. [N. Y.] 576. A chattel mortgage, covering firm property, given by a member of an insolvent firm within four months of its bankruptcy to secure a single creditor and without the knowledge of his co-partner, is void as delaying, hindering, and defrauding his other creditors, under Bankrupt Act 1898, c. 1, subd. 25 (Act July 1, 1898, c. 541, 30 Stat. 544, § 1 [U. S. Comp. St. 1901, p. 3430]). Pollock v. Jones [C. C. A.] 124 Fed. 163. And under Civ. Code S. C. § 2647, as making a preference between creditors. Id. A mortgage on firm property by the individual members of the firm to secure a note of a member, the property remaining in the hands of the firm to be sold in the usual line of business is in fraud of firm's creditors and void. Enck v. Gerding, 67 Ohio, 245, 65 N. E. 880. Payment of the debts of individual members by a bankrupt firm prior to its filing a petition in bankruptcy, cannot be attacked by the trustee or other creditors, on the ground of fraud, where all the creditors of the bankrupt firm were such at the time of the payment. Merchants' Bank v. Thomas [C. C. A.] 121 Fed. 306.

49, 50. Lee v. Bradley Fertilizer Co. [Fla.] 33 So. 456.

51. Loetcher v. Dillon, 119 Iowa, 202, 93 N. W. 98.

52. Where it also includes individual debts, its foreclosure may be enjoined by a firm creditor until the firm debt secured by it is ascertained. George v. Derby Lumber Co., 81 Miss. 725.

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of equity for distribution, he cannot acquire such a priority, without consent of the court.[53]

Firm assets are subject to firm creditors in preference to individual creditors.[54] But under the statute in some states, a firm creditor having a mortgage on firm property can go against firm assets, in insolvency proceedings, only for the balance of his debt.[55] The fact that a firm creditor has a mortgage on the homestead of an individual partner as additional security does not preclude him from proving the whole amount of his claim against the firm assets in insolvency proceedings, without releasing his security.[56]

Individual assets must be applied to the discharge of individual debts in preference to firm debts, but where the firm assets are insufficient to discharge the firm debts, and there is a surplus of individual assets remaining after paying individual debts, firm creditors may look to such surplus for payment of the balance due them.[57]

Firm debts and assets.—A firm debt may be defined as a debt due by the partnership as such, as distinguished from one due by a partner in his individual capacity, though the debt of an individual partner may be made a firm debt by the firm assuming it, with the consent of his creditors.[58] But a partner's individual indebtedness cannot be made a firm debt by entering it on the books as such, without the creditor's knowledge, or by firm checks being given in making payments thereon.[59] A firm debt may be for money loaned to the firm by a member thereof.[60] But money borrowed by an intending partner to pay his share of the firm capital is not a firm debt.[61]

Partnership assets may consist of any property belonging to and used by the firm and subject to its debts.[62]

53. Firm creditors by taking judgment and filing a creditor's bill cannot acquire a lien on an insolvent firm's assets in the hands of a receiver, appointed in a suit for dissolution, superior to the claims of creditors intervening in such suit. Foster v. Field [Okl.] 74 Pac. 190. Wilson's Rev. & Ann. St. 1903, § 2774, has no application, in a suit for dissolution, where the firm assets are beyond the control of the partners, and in the hands of a receiver by order of court. Id.

54. Foster v. Sargent [N. H.] 55 Atl. 423. The transfer of firm property in payment of a firm debt is not in fraud of individual creditors. Griswold v. Nichols, 117 Wis. 267, 94 N. W. 33. The fact that a partnership is not disclosed to one with whom a partner deals for the firm does not prevent the partner from claiming it so as to prevent such person from applying firm funds paid to him for a firm debt on an individual debt of the partner. Hoaglin v. Henderson, 119 Iowa, 720, 94 N. W. 247.

55. A firm creditor holding a mortgage on the individual property of a partner as additional security for a firm debt does not have a mortgage on the firm property of his debtor, so as to preclude him from claiming the full amount of his debt out of firm assets, in insolvency proceedings. Under St. Cal. 1895, § 48, providing that a creditor holding a mortgage on the property of his debtor shall be admitted as a creditor in insolvency proceedings only for the balance of his debt. In re Levin Bros.' Estate, 139 Cal. 350, 73 Pac. 159.

56. His security being on exempt property would not be available to other creditors if released. In re Levin Bros.' Estate, 139 Cal. 350, 73 Pac. 159.

57. Under Bankr. Act July 1, 1898, c. 541, § 67e, 30 St. 564 (Comp. St. 1901, p. 3449). Gray v. Brunold, 140 Cal. 615, 74 Pac. 303.

58. The transfer in good faith of a business and stock by one having sole control thereof, to a firm of which he is a member, with the consent of his creditors, the firm assuming his prior debts, constitutes such debts valid liabilities against the firm. Bartlett v. Smith [Neb.] 95 N. W. 661.

59. So as to thereby prevent the individual creditor from proving it against the individual partner's estate in bankruptcy. In re Wiseman, 123 Fed. 187.

60. A loan by a partner to his firm is sufficiently established by an unsigned memorandum of the agreement in the day book recognizing the loan, supported by testimony of a partner, though no note is given, interest charged or demand made. Evans v. Weatherhead, 24 R. I. 394.

61. A firm is not liable for money borrowed by one intending to become a member to pay his share of the capital so as to have the amount thereof paid out of firm assets, at the time a receiver is appointed to wind up firm affairs. Kroll v. Union Trust Co. [Mich.] 95 N. W. 735. Money advanced by one partner to co-partners to pay their share in a mining enterprise. Bright v. Carter, 117 Wis. 631, 94 N. W. 645.

62. Seats on exchanges owned by one of a firm of bankrupt brokers and used in the partnership business, are partnership property and thus charged by firm debts in preference to individual debts. In re Swift, 118 Fed. 348. But the fact that individual prop-

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§ 5. *Rights of partners inter se. Articles of partnership.*—The articles of partnership may contain certain stipulations which are binding on the partners, as for the distribution of assets upon the withdrawal of a member.[63]

The partners may modify the contract of partnership as between themselves,[64] but such contract is not changed by a loan of money by a partner to the partnership.[65]

If a partner fails to comply with the articles of partnership, or to perform his duties thereunder, he may thereby release his co-partners from their obligations to carry on the business, or render himself liable to them for an allowance therefor.[66] But a failure to furnish capital as agreed does not deprive a partner of his right to his share of the profits if the other partners treat him as a partner,[67] though an abandonment of the contract forfeits such right,[68] as is also true as to profits which have accrued, if he releases his co-partner from his obligation of carrying on the firm business.[69] Acquiescence in entries on the firm books as to sharing profits and losses, is conclusive of the partner's rights.[70]

Duty to observe good faith.—A partner is bound to act in good faith in reference to partnership matters, and for any injury caused to a co-partner by his failure to do so he is liable.[71]

Right to compensation.—In the absence of contract to that effect, a partner is not entitled to compensation beyond his share of the profits, for services rendered in the partnership business,[72] unless rendered under circumstances showing an expectation and understanding to receive pay therefor.[73] He is not entitled to compensation for services rendered in winding up firm affairs unless it is expressly or impliedly agreed otherwise.[74] But where a partner has expended time, labor, and skill in continuing a business, whereby the other partners are benefitted, he should receive a reasonable compensation for profits accruing to all.[75]

Right to withdraw capital.—A managing partner having a loan account with his firm may as against his co-partner withdraw from the business the amount credited to him.[76]

Firm accounts.—It is the duty of a partner, conducting firm affairs, to keep

erty is transferred by a surviving partner to discharge part of a firm debt does not raise the presumption that such property is a firm asset or that it wiped out the firm debt although it was adequate to do so. Leggat v. Leggat, 79 App. Div. [N. Y.] 141.

63. A partner is bound by a stipulation in the articles of partnership as to the distribution of assets upon the withdrawal of a member, although he waives another provision as to notice of withdrawal. Proper v. Lambert Bros. [Iowa] 95 N. W. 251. A stipulation that a retiring partner shall be entitled to a certain per cent. of his interest means his interest before liabilities are deducted. Id.

64. A partner's surrender of his right to withdraw, as provided in the articles of co-partnership, is a good consideration for a modification of the articles giving him a larger interest in its proceeds. Melville v. Kruse, 174 N. Y. 306, 66 N. E. 965.

65. Silveira v. Reese, 138 Cal. xix, 71 Pac. 515. Where he fails to make advances as provided in the articles of partnership. Snyder v. O'Beirne [Mich.] 93 N. W. 872.

66. Miller v. Hale, 96 Mo. App. 427, 70 S. W. 258.

67. If the other partner recognizes him as a co-partner until the transaction is completed; until land is purchased and sold. Stuart v. Harmon, 24 Ky. L. R. 1829, 72 S. W. 365, 75 S. W. 257. Where the other partner furnishes it all and treats him as a partner. Leonard v. Boyd, 24 Ky. L. R. 1320, 71 S. W. 508.

68. Miller v. Hale, 96 Mo. App. 427, 70 S. W. 258.

69. Snyder v. O'Beirne [Mich.] 93 N. W. 872.

70. The same as if they had been set out in an express contract. Safe Deposit & Trust Co. v. Turner [Md.] 55 Atl. 1023.

71. Wrongfully causing a dissolution. McCollum v. Carlucci, 206 Pa. 312.

72. Lamb v. Wilson [Neb.] 97 N. W. 325; Scott v. Boyd [Va.] 42 S. E. 918.

73. Hoag v. Alderman, 184 Mass. 217, 68 N. E. 199.

74. Lamb v. Wilson [Neb.] 92 N. W. 167.

75. Lamb v. Wilson [Neb.] 92 N. W. 167. Fees collected by members of a dissolved law firm on business apportioned among them on dissolution being insufficient to pay for their services and those rendered by the firm before dissolution should be apportioned between such members and the old firm. Id.

76. No one but creditors can complain thereof. Brown v. Spohr, 87 App. Div. [N. Y.] 522.

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and render correct accounts of all firm transactions, including receipts and disbursements,[77] and should not mingle the firm funds with his own or other funds.[78]

§ 6. *Actions. A. By the firm or partner.*—An action, upon a cause of action belonging to the firm, should be in the firm name,[79] and all the partners should be joined as plaintiffs.[80] An appeal by a firm must be in the firm name.[81] Proceedings for a writ of certiorari by a partnership is void unless the bond given as security is signed in the firm name, or by an authorized agent.[82]

A partner may sue alone on contracts made in his name, or where he has the sole equitable interest in the title to property.[83]

The value of property belonging to an individual partner cannot be recovered in a suit by the firm.[84]

(§ 6) *B. Against the firm or a partner.*—In actions upon a firm liability, all the partners should be joined as defendants,[85] though suit to enforce a judgment against a firm can be brought against only the partners who were parties to the original suit.[86] But the mere use of the phrase "partners," etc., after defendants' names in an action, does not make the firm a party to the action.[87] The name in which nonresident partnerships should be sued in a state is usually regulated by statute,[88] which also usually provides for service on the partners or representatives of the firm, so as to give the court jurisdiction.[89] If a member of a firm is not served with process, in a suit against the firm, he is not properly a party to the suit, and it may be dismissed as to him,[90] and after such dismissal judgment may be rendered against the firm.[91]

77, 78. Richard v. Mouton, 109 La. 465.

79. An action for deceit practiced on the members of a firm, must be brought in the firm name, not in that of an individual partner. Taylor v. Thompson, 176 N. Y. 168, 68 N. E. 240. An allegation that the plaintiff, a firm, consists of certain named persons, shows a firm action; it need not be alleged or proved that it was a partnership in the state. Chamberlain Banking House v. Noyes [Neb.] 92 N. W. 175. Alleging that a specified firm is organized and doing business in the state authorizes an action under the firm name, under Code Neb. § 24. Chamberlain Banking Co. v. Noyes [Neb.] 92 N. W. 175.

80. In an action, after dissolution, to recover a firm debt which had not been assigned to either partner in adjusting the firm affairs. Smith v. Williams, 85 N. Y. Supp. 506. Replevin to recover possession of partnership property from a stranger claiming an interest therein and taking it from the possession of one of the partners. Cinfel v. Malena [Neb.] 93 N. W. 165.

81. Kline v. Swift Specific Co., 118 Ga. 514.

82. Camp v. Bacon Fruit Co., 117 Ga. 149.

83. A partner who has purchased land at a sale for a lien which the partnership held thereon may maintain an action in his own name, without joining his co-partner, against a prior mortgagee for a surplus remaining in his hands, from a foreclosure, after satisfying his debt. Knowles v. Sullivan, 182 Mass. 318, 65 N. E. 389.

84. Newson v. Brazell, 118 Ga. 547.

85. But a partner of a director of a corporation is not a proper party to a suit against such director to recover profits illegally made by him, unless the director's estate is inadequate to meet the complainant's demand. American Spirits Mfg. Co. v. Easton, 120 Fed. 440. An action on a firm note may be maintained against one to whom the firm has sold out, the consideration for the sale being that the purchaser should assume all the firm liabilities. Bessemer Sav. Bank v. Rosenbaum Grocery Co., 137 Ala. 530.

86. A suit to enforce a judgment recovered against a firm in an action to which only one of the partners is a party cannot be brought against the other members; a new action should be brought on the original cause of action. Under Comp. Laws N. M. § 2943, providing that a judgment against the firm as such may be enforced against the firm's property, or that of such members as have appeared or been served with summons, but a new action may be brought against the other members in the original cause of action. Lewinson v. First Nat. Bank [N. M.] 70 Pac. 567.

87. It is merely descriptive. Bastian v. Adams [Neb.] 97 N. W. 231.

88. A partnership described as the Adams Express Company is properly sued in that name, under Acts Ind. 1879, p. 146 (Burns' Rev. St. 1901, § 3307). Adams Exp. Co. v. State [Ind.] 67 N. E. 1033.

89. Service on a mere traveling solicitor of a nonresident firm and not a member of the firm temporarily within the state does not confer jurisdiction over the firm. Under Code Civ. Proc. Cal. § 411, providing for service on managing or business agent, cashier, or secretary within the state of a foreign corporation, nonresident stock company or association. Booth v. Gamble-Robinson Commission Co., 139 Cal. 175, 72 Pac. 908. Where a partnership has no property subject to attachment within the state, jurisdiction over the firm or a nonresident member cannot be acquired by service on the resident member and attachment of his property and by substituted service on the nonresident member, under V. S. 1641-1643. People's Nat. Bank v. Hall & Buell [Vt.] 56 Atl. 1012.

90. Where he is a nonresident and in-

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An action of assumpsit may be maintained against a resident partner though no jurisdiction can be acquired over the nonresident partner.[92] Where an action is brought against a partner as indorser of a partnership note, a recovery must be by virtue of the note sued on, and not by virtue of any contract that might be implied from the application of the proceeds of the notes.[93] A partner may set up the defense of forgery to an action against him as indorser of a firm note.[94]

Pleading and proof of partnership.—If the partnership, as alleged in the action, is denied by some of the partners, the burden of proof is on the plaintiff to establish the joint liability of all the defendants,[95] unless he amends and dismisses the suit as to those shown not to be jointly liable.[96] An allegation as to the existence of a partnership raises only the issue of partnership.[97] If suit is brought against a partnership in a wrong name, it may be pleaded in abatement.[98]

The proof introduced by the plaintiff must be sufficient to sustain the action, whether against the firm or an individual member.[99] In an action against one partner, evidence of a statement by another partner as to the purpose of the partnership is admissible.[1]

Judgment.—In an action against a firm or partner, there may be entered a judgment by default,[2] or on the pleadings;[3] or judgment may be confessed.[4] Where in a suit upon a joint obligation but one of the partners is served, and the others do not appear, judgment may be had against the one served,[5] and the others may be brought in afterwards by scire facias.[6]

(§ 6) *C. Between partners. General rule.*—As a general rule an action at

solvent, under Rev. St. Tex. arts. 1204, 1224, 1247, 1256, 1257, 1259. Scalfi v. State, 31 Tex. Civ. App. 671, 73 S. W. 441.

91. And the surety on the bond. Scalfi v. State, 31 Tex. Civ. App. 671, 73 S. W. 441.

92. On a note signed by the firm under V. S. 1174. People's Nat. Bank v. Hall [Vt.] 56 Atl. 1012.

93. Pettyjohn v. Nat. Exch. Bank [Va.] 43 S. E. 203.

94. Though the proceeds thereof were used for partnership purposes. Pettyjohn v. Nat. Exch. Bank [Va.] 43 S. E. 203.

95. If one of the defendants to an action against a firm as surety on a bond denies that he was such when the instrument was executed, the burden is on the plaintiff to show that such party was a partner at the time and that he gave authority under seal to its execution. Gordon v. Funkhouser, 100 Va. 675. An answer and amended answer by one defendant, to an action against a named firm, alleging that he is not or never had been a member of the firm, and that the goods sued for were not delivered to him, and that he did not order them does not sufficiently deny liability as a partner. Fennell v. Myers, 25 Ky. L. R. 589, 76 S. W. 136. In an action against several as partners, some of whom deny the joint liability by a verified plea, the burden of proof is upon the plaintiff to show the joint liability of all the defendants, including those who failed to file pleas, under Practice Act § 35, and the common law. Powell v. Finn, 198 Ill. 567, 64 N. E. 1036.

96. Powell v. Finn, 198 Ill. 567, 64 N. E. 1036.

97. An averment in an action, to charge certain persons as partners on a note, that they were partners, does not raise an issue as to whether the parties other than the signer of the note, had agreed to pay for certain work for which the note was given in consideration of a certain interest on money advanced by them and a certain per cent. of the profits. Moore v. Williams, 31 Tex. Civ. App. 287, 72 S. W. 222.

98. It is not necessary in an action against a foreign copartnership in its trade-name to state that such name has been filed. Adams Exp. Co. v. State [Ind.] 67 N. E. 1033.

99. Where a complaint alleges that the defendant was carrying on business under a specified firm name and style, and the proof shows a contract with a firm composed of defendant and another, an individual cause of action against the defendant is not sustained. Holmes v. Daniels, 86 N. Y. Supp. 19.

1. On a partnership note, statement of a mother, a member, that she wished to establish her son, the other member, in business. Sheldon v. Bigelow, 118 Iowa, 536, 92 N. W. 701.

2. But not against a firm where all the partners answer individually; though the answers do not appear to be for the firm, under Rev. St. Tex. arts. 1224, 1346 (Owen v. Kuhn [Tex. Civ. App.] 72 S. W. 432), nor against the individual members, on appeal, where the action is against the firm, though the appeal bond was signed by the individual members (Williams v. Hurley, 135 Ala. 319).

3. Against a partner, in a suit against a firm on a note, where he does not deny signing the note or that it was signed by his authority. Fennell v. Myers, 25 Ky. L. R. 589, 76 S. W. 136.

4. Where an action, on a note in the firm name only, is brought in the firm name and also naming the individual partners, judgment may be confessed in that form. Myers v. Sprenkle, 20 Pa. Super. Ct. 549.

5, 6. Gormley v. Hartray, 105 Ill. App. 625.

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law will not lie by a partner or his representatives against his co-partners or their representatives upon a demand growing out of a partnership transaction until there has been a settlement of accounts and a balance struck.[7] Such an action for a balance due must allege the profits agreed upon or an account stated showing a balance due the plaintiff.[8] But this rule does not apply to an action by one person against another who had formerly been his partner, upon an indebtedness a part of which grew out of the formerly existing partnership between them.[9] A partner may maintain an action at law against his co-partner for money paid into the firm capital for the latter;[10] or for damages sustained through his bad faith in wrongfully causing a dissolution,[11] the measure of damages being the value of the partnership to the injured partner.[12] A partner's right to recover money paid on a contract of partnership induced by false representations is not waived by a settlement between the parties which is not carried out by the other partners.[13]

A partner cannot maintain a suit in equity against his co-partner where he has an adequate remedy at law.[14] But a suit in equity for an accounting need only allege the partnership and facts showing undivided profits, which have not been agreed upon.[15] An accounting may be had by one partner against his co-partners though the accounts are so confused that an accurate account cannot be taken.[16]

For fraud.—Where one partner has fraudulently made secret profits at the expense of his co-partner, the latter, unless estopped or barred by the statute of limitations, may bring an action at law for his damages, or rescind the transaction and sue to recover money paid, or sue in equity for a rescission of the transaction and an accounting, or sue in equity for an accounting.[17]

Between firms having a common member.—An action at law cannot be maintained between the members of two firms having one member common to both.[18]

§ 7. *Dissolution, settlement, and accounting. A. Dissolution by operation of law.*—A partnership is dissolved by operation of law by the death of one of the partners,[19] except where provision for its continuance, in the event of such a contingency, is made by their previous agreement,[20] or by the will of the deceased partner, with the assent of the surviving partners.[21]

7. Benton v. Hunter [Ga.] 46 S. E. 414. Where it appears that after a settlement of the firm debts had been paid, amounts due the firm had been collected and not accounted for. Saillant v. Densereau [R. I.] 52 Atl. 1085. Where on the settlement of partnership accounts, a note is given to one partner, and it is thereafter clearly proved that a charge against such partner was omitted from the firm books, which was unknown at the time the note was given, the error may be corrected and the proper credit made on the note. Barker v. Boyd, 24 Ky. L. R. 1389, 71 S. W. 528.

8. A cause of action at law for a balance due is not stated by a complaint alleging a partnership and specific profits not accounted for, but failing to allege the profits agreed upon on an account stated showing a balance due. Schulsinger v. Blau, 84 App. Div. [N. Y.] 390. The doctrine of stale claim has no application to a suit by a partner for a balance of profits due four years after a demand for a settlement, if the defendant has refused to make a statement during that time. Stuart v. Harmon, 24 Ky. L. R. 1829, 72 S. W. 365; Id., 25 Ky. L. R. 439, 75 S. W. 257.

9. After dissolution, a petition against a former partner to recover a sum consisting partly of an individual indebtedness, independent of partnership, and partly of a sum due from the partnership relation and its dissolution, not affected by any firm debt, may be maintained. Benton v. Hunter [Ga.] 46 S. E. 414.

10. As money paid for his use. Newman v. Ruby [W. Va.] 46 S. E. 172.

11. McCollum v. Carlucci, 206 Pa. 312.

12. Not his share of the profits thereafter made by the defendant carrying on the business. McCollum v. Carlucci, 206 Pa. 312.

13. Rambo v. Patterson [Mich.] 95 N. W. 722.

14. An outgoing partner cannot sue in equity for an accounting and to enforce the contract by which he sold his interest to the continuing partner and the latter assumed the firm debts. Pace v. Smith, 137 Ala. 511.

15. Though it does not ask therefor. Schulsinger v. Blau, 84 App. Div. [N. Y.] 390.

16. Where the partners against whom the action is brought was responsible for the confusion. Rowan v. Lamb [Miss.] 35 So. 427.

17. Gates v. Paul, 117 Wis. 170, 94 N. W. 55.

18. For deceit. Taylor v. Thompson, 176 N. Y. 168, 68 N. E. 240.

19. Lincoln v. Orthwein [C. C. A.] 120 Fed. 880; Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176.

20. Lincoln v. Orthwein [C. C. A.] 120 Fed. 880. Where the articles of partnership

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A partnership is also dissolved by operation of law by the insolvency of the firm.[22]

(§ 7) *B. Dissolution by act of partners.*—A partner has a right to dissolve the partnership for the misconduct of his co-partner.[23]

It may be dissolved by mutual agreement between the partners,[24] by the retirement of one of the partners,[25] or by notice of an intention to bring the contract to an end;[26] but a partnership is not dissolved by a general assignment where it effects an adjustment of claims with its creditors so as to resume business.[27]

(§ 7) *C. Dissolution by order of court.*—A dissolution cannot be granted by the court unless all necessary parties are joined in the suit.[28]

(§ 7) *D. Effect of dissolution.* 1. *In general.*—After dissolution, the general agency of each partner for the others is changed by operation of law to a special agency, and is limited to selling goods, collecting assets, paying debts, and doing other acts necessary or proper to wind up the business;[29] but in the absence of special authority, a partner, after dissolution, cannot bind his co-partners by an expensive lawsuit.[30]

Upon the dissolution of a partnership all the partners remain liable for firm debts,[31] unless the creditors of the firm by valid contracts release one or more of them;[32] nor does a dissolution ipso facto destroy the interest of the partners in the firm property[33] or affect the firm's or partner's rights[34] or liabilities[35] on subsisting contracts.

A new firm continuing to do business after the dissolution of the old firm can-

of a trading firm provide for the manner of withdrawal of a member, and there is an apparent intention to continue the firm indefinitely and for it to consist of many members it is not dissolved by the death or withdrawal of a member. Moore v. May, 117 Wis. 192, 94 N. W. 45.

21. Lincoln v. Orthwein [C. C. A.] 120 Fed. 880. A father's will authorizing his son, partner and executor to continue the business. In re Dummett, 38 Misc. [N. Y.] 477.

22. Stockdale v. Maginn [Pa.] 56 Atl. 439. But the mere fact that a declaration recites an assignment by plaintiffs and describes them as co-partners and trustees of the assignee does not show the insolvency of the firm. Cole v. Shanahan, 24 R. I. 427.

23. Where two persons act as partners in doing certain work and one is discharged for a good cause. Leonard v. Sparks, 109 La. 543.

24. Wright v. Ross, 30 Tex. Civ. App. 207, 70 S. W. 234; Saillant v. Densereau, 24 R. I. 255; White v. Sayers [Va.] 45 S. E. 747. But a contract of dissolution must not impose conditions in restraint of trade. Dissolution by a firm of physicians whereby one member agrees not to practice in a certain vicinity is invalid under Wilson's Rev. & Ann. St. Okl. 1903, §§ 819-821. Hulen v. Earel [Okl.] 73 Pac. 927.

25. Forst v. Kirkpatrick, 64 N. J. Eq. 578.

26. Where one of two persons, constituting a partnership as to work for another, is discharged by such other notice by one to dissolve the firm as to such work is sufficient. Leonard v. Sparks, 109 La. 543.

27. Consequently it is liable for promises made by its members to pay in full compromised debts. Taylor v. Hotchkiss, 81 App. Div. [N. Y.] 470.

28. Boyd v. Boyd [Tex. Civ. App.] 78 S. W. 39.

29. Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176. Where upon retirement of a partner he leaves part of the purchase price of his interest with his co-partners to pay his share of the firm debts, which they should be "compelled to pay," they may apply such amount on debts which they are legally bound to pay though they are not sued. Rosenbaum v. Rosenbaum [Miss.] 34 So. 324.

30. To which they have objected. Richard v. Mouton, 109 La. 465.

31. Dissolution by agreement. Bronx Metal Bed Co. v. Wallerstein, 84 N. Y. Supp. 924.

32. Bronx Metal Bed Co. v. Wallerstein, 84 N. Y. Supp. 924. Mere statements by a creditor's manager to a retiring partner's statement of his being out of the firm, that it was all right and he was satisfied, does not show a release by the creditor. Id.

33. Smith v. Proskey, 82 App. Div. [N. Y.] 19.

34. The dissolution of a partnership does not invalidate a policy of fire insurance in the firm name as against a partner continuing the business, notwithstanding a provision in the policy that it shall be void "if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance." Loeb v. Firemen's Ins. Co., 78 App. Div. [N. Y.] 113, 12 Ann. Cas. 343.

35. Contracts previously made, and depending upon the continuance of the partnership, are not terminated by the death of a partner, where provision is made in his will for the continuance of the partnership, with the consent of the other partner, and an action may be maintained for a breach thereof by one of the partners. Lincoln v. Orthwein [C. C. A.] 120 Fed. 880.

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not enforce an obligation due the old firm unless such right is acquired by a new contract.[36] Payments made to a new firm succeeding to a dissolved one, on accounts of the old firm carried as a running account, must be applied to the oldest items unless specially appropriated.[37]

(§ 7D) 2. *As to surviving partner.*—A surviving partner, upon the death of his co-partner, is entitled to all the assets of the partnership as trustee, for the purpose of devoting them to the discharge of its liabilities.[38] He may be held liable for services rendered at the request of a deceased partner.[39] Having the firm assets in his hands, he may do anything in winding up the firm affairs which the firm could have done,[40] as borrowing money to close up firm affairs.[41] A surviving partner's indorsing a note, taken together with a mortgage in the deceased partner's name, to a third person together with other facts, prima facie establishes ownership in the indorsee.[42] But he has no right after dissolution to make new contracts to bind the firm assets,[43] nor can he continue using the firm name unless he has purchased the firm good will.[44]

In the absence of an express agreement to that effect, a surviving partner is entitled to no extra compensation, beyond his share of the profits, for winding up the firm business.[45]

A partnership liability may be enforced against a surviving member alone, as it is joint and several.[46] After settlement of the partnership estate, firm creditors may sue surviving partners for any unpaid balance.[47]

Actions.—All actions, after dissolution, upon claims in favor of or against the firm must be brought by or against the surviving partners alone.[48] Pending statutory administration by surviving partners, limitations do not run against the creditors' right to pursue the survivors for any unpaid balance.[49] In an action against a surviving partner, an order for his examination before trial may be issued.[50]

36, 37. Forst v. Kirkpatrick, 64 N. J. Eq. 578.

38. Erick v. Gerding, 67 Ohio St. 245, 65 N. E. 880; Huggins v. Huggins, 117 Ga. 151. Notwithstanding a mortgage thereon, and breach of condition, in favor of a partner. Erick v. Gerding, 67 Ohio St. 245, 65 N. E. 880.

39. Griffiths v. Copeland, 183 Mass. 548, 67 N. E. 652.

40. Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176; Bartlett v. Smith [Neb.] 95 N. W. 661.

41. Rosenthal v. Hasberg, 84 N. Y. Supp. 290.

42. The surviving partner having continued to conduct the business without any accounting or settlement between him and the deceased partner's representatives. Grether v. Smith [S. D.] 96 N. W. 93.

43. Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176. If a surviving partner, acting as traveling salesman, sells goods which have already been sold by a resident partner, neither the firm assets nor the deceased partner's estate are liable for the failure to deliver to the purchaser from the traveling partner. Id.

44. Laws N. Y. 1897, c. 420, § 20, subd. 1, providing for the continuance of firm business does not authorize it. Slater v. Slater, 78 App. Div. [N. Y.] 9.

45. Slater v. Slater, 78 App. Div. [N. Y.] 449. A son who is surviving partner and also executor is not entitled to compensation for winding up the firm business beyond his commissions and legal share of the profits. In re Dummett, 38 Misc. [N. Y.] 477. Surviving partners acting as trustees for the interest of a deceased partner are entitled to no compensation therefor, beyond the benefit accruing from the increase in their capital by the use of such trust fund. Evans v. Weatherhead, 24 R. I. 394. A surviving partner is not entitled to compensation for services rendered in continuing the business with the deceased partner's administrator, which services he was to furnish under the articles of partnership. Hancock v. Hancock's Adm'r, 24 Ky. L. R. 664, 69 S. W. 757.

46. Fennell v. Myers, 25 Ky. L. R. 589, 76 S. W. 136.

47. Though 2 Ball. Ann. Codes & St. Wash. §§ 6188-6190 provide for administration of partnership estates by surviving partners. Brigham-Hopkins Co. v. Gross, 30 Wash. 277, 70 Pac. 480.

48. Brigham-Hopkins Co. v. Gross, 30 Wash. 277, 70 Pac. 480 (citing Shumaker, Partn. p. 438). An action to recover taxes improperly assessed on firm property is properly brought in the name of the surviving partner, on dissolution by death of one of the partners. Miller v. Kern County, 137 Cal. 516, 70 Pac. 549.

49. Brigham-Hopkins Co. v. Gross, 30 Wash. 277, 70 Pac. 480.

50. Gee v. Alvarez, 87 App. Div. [N. Y.] 157. The proper proceeding to produce firm books to refresh a surviving partner's memory is by a subpoena duces tecum and not by the order for his examination before trial. Code Civ. Proc. N. Y. § 872, subd. 7, allowing

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Liability to estate of decedent.—In all his transactions, a surviving partner must act in the most perfect good faith towards the decedent's estate,[51] and have an accounting with the deceased partner's administrator within a reasonable time;[52] but he is not required to account for the value of the good will of the firm, which he did not buy or use, and which the deceased's administrator did not order to be sold.[53] If a surviving partner continues the business beyond a reasonable time, the deceased partner's administrator is entitled to the sum due on settlement with interest from the time when settlement should have been made,[54] or to the principal sum with his share of the profits.[55] A surviving partner accounting as executor of a deceased partner cannot be compelled to account for partnership affairs where the estate of another deceased partner is not represented;[56] but he may be charged with amounts admitted by him to have been received by him as executor from himself as survivor,[57] though he cannot be allowed, as executor, charges which were liens on property at the time of conveyance by him to his testator.[58]

If, in continuing the firm business, he so mingles his own property with that of the firm that they are not able to be distinguished or separated, the whole belongs to the firm estate.[59]

(§ 7D) 3. *As to continuing or liquidating partner.*—A liquidating partner of a mutually dissolved firm occupies the position of an agent,[60] but he cannot, in the absence of special authority, bind his co-partners by a contract for which the firm assets are not bound,[61] or contract new obligations, contrary to the contract of dissolution;[62] nor can he be charged with the debt of an insolvent debtor, unless it is shown that the debt was collectible and a demand was made upon him to sue the debtor.[63] And when summoned in attachment proceedings by a co-partner, he is not bound to pay the latter his share of the firm assets until the determination of the attachment.[64] An agreement for dissolution, vesting all the firm assets in the liquidating partner, does not give him absolute title thereto, which passes to his representative on his death, but another partner may take possession thereof for the purpose of completing the liquidation.[65] A liquidating partner is

such an order refers only to the examination of an officer of a corporation. Id.

51. A surviving partner, who is also executor, may purchase the sole legatee's interest in firm property if done in good faith and after the legatee has had independent advice. The sale will not be set aside after 12 years. Littell v. Hackley [C. C. A.] 126 Fed. 309. A bond given by a surviving partner for the faithful performance of his duties is intended for the benefit of the deceased's partner's heirs or devisees, and not for that of the firm creditors, under Act May 2, 1893 (19 Del. Laws, p. 1120, c. 774). State v. U. S. Fidelity & Guarantee Co. [Del.] 56 Atl. 607.

52. Huggins v. Huggins, 117 Ga. 151. If he continues the business beyond a reasonable time, the deceased's partner's administrator may have an injunction against him, where the surviving partner is insolvent or there is other reason to expect loss to the estate. Id. But if the surviving partner is solvent and is conducting the business without a loss, and he can comply with any final decree, he will not be enjoined and a receiver appointed, although he continues the firm business beyond a reasonable time. Id. Where there is no objection, on the part of the deceased partner's representatives or creditors, to the surviving partner's failure to have a partnership settlement, and the defendant makes no defense, a judgment to quiet title should be granted to a transferee of the surviving partner. Grethe v. Smith [S. D.] 96 N. W. 93.

53. In a proceeding therefor six months after the sale of other firm property. Hutchinson v. Nay, 183 Mass. 355, 67 N. E. 601.

54, 55. Huggins v. Huggins, 117 Ga. 151.

56. For the purpose of charging him as executor with moneys in excess of those admitted by him in his account to be due from him as survivor. In re Mertens' Estate, 39 Misc. [N. Y.] 512.

57, 58. In re Mertens' Estate, 39 Misc. [N. Y.] 512.

59. Tufts v. Latshaw, 172 Mo. 359, 72 S. W. 679.

60. Smith v. Proskey, 82 App. Div. [N. Y.] 19.

61. Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176.

62. A partner, who has sold out his interest to his co-partner under an agreement that the latter may continue to use the firm name but not contract new obligations thereunder, may have an injunction and a receiver appointed where the continuing partner, who is insolvent, purchases goods in the name of the old firm. Joselove v. Bohrman [Ga.] 45 S. E. 983.

63, 64. Lyons v. Lyons [Pa.] 56 Atl. 54.

65. Smith v. Proskey, 82 App. Div. [N. Y.] 19.

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personally liable for the acts of agents appointed by him in firm affairs.[66] If such agent is also a surviving partner, his liability will depend upon whether he acted as agent or as surviving partner.[67]

The contract of dissolution may expressly provide for the continuance of the business by one of the partners, who is to collect outstanding indebtedness and assume and pay all debts owing by the firm.[68] But this assumption of debts only includes existing liabilities at the time of the dissolution.[69]

A beneficiary under a liquidating trust may invoke relief in equity to prevent the trustee from selling the firm property before the firm indebtedness is ascertained[70] and where a credit to a beneficiary appears on the books of the firm of which amount one of the partners is trustee, the latter may maintain an action against his co-partner who has taken over the firm property therefor.[71]

Compensation.—A partner acting for the partnership after dissolution cannot claim compensation for his services in the absence of an agreement to that effect.[72]

(§ 7D) 4. *As to retiring partner.*—A retiring member is not liable for past debts of the old firm where the creditor has agreed to look to the new firm for his debt,[73] nor are retiring members liable for the fraud of a remaining member practiced for his own benefit and not as agent of the firm.[74] Retiring partners are sureties as to the remaining partners of firm obligations assumed by him.[75]

Retired partners who had paid debts of the partnership while they were partners are not entitled to participate in the assets of the partnership which continued in business with new members and subsequently became insolvent.[76]

Where a retiring partner breaks his contract not to enter into the same business in the same town, his former partner must recover all of his damages, past, present, and future, in one action.[77]

(§ 7D) 5. *As to estate of deceased partner.*—The estate of a deceased partner is entitled to share in the benefits of the firm name thereof the same as in the distribution of other firm property,[78] but the trustees of a deceased partner are entitled to charge only simple interest on a firm debt to the deceased, not evidenced

66. Where a liquidating partner authorizes an agent to sell certain goods to a named person, he is personally liable to a purchaser from such agent for a breach of contract, by subsequently selling and delivering the same goods to another, though prior to the agent's sale, without revoking the agent's authority, and without notice of such sale to the agent or his purchaser. Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176.

67. Where the purchaser is ignorant of the appointment of one of the surviving partners as liquidator. Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176.

68. Dorwin v. Laughlin, 117 Wis. 617, 94 N. W. 641.

69. It does not include a liability arising subsequent to the dissolution on a contract made before it, as a subsequent failure of a title of warranty and judgment thereon against the firm. Dorwin v. Laughlin, 117 Wis. 617, 94 N. W. 641.

70. Where the firm manager had absconded taking with him the books of the firm. Deckert v. Chesapeake Western Co. [Va.] 45 S. E. 799.

71. McCarthy v. Donnelly [Minn.] 95 N. W. 760.

72. Cashier of an insolvent banking firm. Stockdale v. Maginn [Pa.] 56 Atl. 439. Where upon dissolution of a law firm, undisposed of cases are assigned to different members, services rendered by one partner to another in conducting one of such cases are presumed to be gratuitous. Lamb v. Wilson [Neb.] 92 N. W. 167.

73. Hamilton v. Smith, 120 Iowa, 93, 94 N. W. 268.

74. Taylor v. Thompson, 176 N. Y. 168, 68 N. E. 240.

75. Where partners sell out their interest to a co-partner, including a lease to the partnership, and he assumes all the obligations of the firm including the rentals, they are sureties as to the rents, as between them and him. Doxey's Estate v. Service, 30 Ind. App. 174, 65 N. E. 757.

76. Stockdale v. Maginn [Pa.] 56 Atl. 439.

77. Downs v. Woodson, 25 Ky. L. R. 566, 76 S. W. 152. An instruction, in an action against a retiring partner for his breach of contract not to engage in the same business in the same town, authorizing the jury to estimate the damages at such sum as would fairly compensate the plaintiff for the loss of profits and good will, as the natural and necessary result of the breach of contract is not objectionable, as authorizing the jury to find double damages. Id.

78. Slater v. Slater, 175 N. Y. 143, 67 N. E. 224.

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by security and upon which no interest had been charged.[79] The heirs at law of a deceased partner cannot sue for the deceased's share of unadministered firm assets.[80]

Where the articles of partnership provide for the continuance of the firm, in case of the death of one of the partners, by the surviving partner and the deceased partner's representative, the deceased partner's estate and distributees are liable for its share of the amount for which the firm is liable.[81] And where an executor of a deceased partner signs a firm note in his individual capacity together with the surviving partners, he is liable as joint maker,[82] and is liable to contribute to the payment of such note, without a partnership accounting.[83]

A firm creditor cannot proceed against the estate of a deceased partner until he has exhausted his legal remedy against the surviving partner;[84] but the return of an execution unsatisfied on a judgment against a surviving partner is an exhaustion of legal remedies against such partner and entitles the creditor to an action against the estate of the deceased partner.[85] And a plea that such execution was obtained by collusion of the plaintiff and surviving partner will not defeat the action unless complicity of the sheriff is shown.[86]

(§ 7) *E. Accounting. Right to.*—Partners may of course state their account by private agreement and such statement is binding on them.[87] But in the absence thereof they are entitled to an accounting by the court, where the firm business has been abandoned for some time,[88] and a partner may pursue such right, unless it has been defeated by his negligence or laches,[89] but a partner cannot recover where a settlement is unable to be made,[90] though he will not be prevented from recovering, by the fact that the partnership agreement does not state the proportion in which the partner's shares in the profits shall be divided,[91] nor can he claim an interest or share in the proceeds of property that belongs exclusively to an individual partner.[92]

Although, in a suit for the dissolution of an alleged partnership and an ac-

79. Though interest for part of the time was credited to it without the knowledge of the deceased or his cestui que trust. Evans v. Weatherhead, 24 R. I. 394.

80. But suit for the asset should be by the administrator, or administrator de bonis non, of the partnership. Pullis v. Pullis [Mo.] 77 S. W. 753.

81. On a note guaranteed by it. Hax v. Burnes, 98 Mo. App. 707, 73 S. W. 928.

82. Not as surety. Fitch v. Fraser, 84 App. Div. [N. Y.] 119.

83. Fitch v. Fraser, 84 App. Div. [N. Y.] 119.

84. Under Laws N. Y. 1897, c. 420, § 6, making every general partner liable to third persons jointly and severally for all the partnership obligations. Leggat v. Leggat, 79 App. Div. [N. Y.] 141. The order and judgment of the District Court of Alaska on a petition for an allowance of a claim against a deceased partner's estate may be a decree in equity settling partnership accounts where the petition contained all the averments of a bill in equity. Esterly v. Rua [C. C. A.] 122 Fed. 609.

85, 86. Leggat v. Leggat, 79 App. Div. [N. Y.] 141.

87. Where on dissolution the members have a private accounting, under an agreement which recites that conveyances to one another, of the share of each, were in full payment of the interest of each, one partner cannot thereafter recover from another partner on a book account existing at the time. Nystuen v. Hanson [Iowa] 91 N. W. 1071.

88. Schulsinger v. Blau, 84 App. Div. [N. Y.] 390.

89. A court of equity will not settle partnership accounts, where the partners have all been equally negligent in failing to keep proper accounts, and have unduly postponed a settlement, until one of them, or important witnesses, have died, or records been destroyed. Garnett v. Wills, 24 Ky. L. R. 617, 69 S. W. 695. But a waiver of a requirement in a partnership contract for annual inventories is not such laches as will defeat a partner's right to an accounting and settlement of the firm business, after five years. Petty v. Haas [Iowa] 98 N. W. 104.

90. Because of the confused condition of the books, where he does not show that the duty of keeping such books was on the other partner. Slaughter v. Danner [Va.] 46 S. E. 289.

91. Where the parties agree as to amount of plaintiff's recovery if entitled to relief. McMurtrie v. Guiler, 183 Mass. 451, 67 N. E. 358.

92. In an action for an accounting after dissolution, partners are not entitled to a share of the proceeds received by one partner from a sale of property owned and leased by him individually, and which he had leased to the firm, nor in the value of a new lease made by him, and which he sublets

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counting and distribution of assets, it is found that the contract did not constitute a partnership, the court may refuse to dismiss the complaint, and proceed to take the accounting.[93]

A partner cannot complain that a theory on which an action for an accounting is tried is erroneous, where such theory is adopted at his instance.[94]

Who may sue.—As a general rule a suit for an accounting and dissolution may be brought by any partner,[95] or his administrator,[96] and all persons who are interested may intervene and be made parties.[97]

Jurisdiction of accounting.—A court of equity has jurisdiction of a suit between partners for an accounting and dissolution,[98] but ordinarily a court of equity will not take an accounting of partnership affairs, unless the suit is brought for the purpose of dissolution,[99] though this rule will be relaxed in some cases.[1]

Remedy and pleading.—The proper form of adjusting partnership accounts is by an account rendered or a bill in equity.[2]

The pleadings in a bill for an accounting and dissolution must state the fact of partnership, a dissolution or grounds therefor, and unsettled firm accounts,[3] but an averment of a willingness to do equity is unnecessary.[4] A supplemental bill may be filed to a suit for an accounting, stating an agreement, after suit begun, as to how the partnership accounts should be stated.[5]

A pleading to impeach a partnership settlement of accounts, on the ground of fraud or mistake, must allege the particular facts constituting the fraud or mistakes.[6]

to the firm. Robertson v. Winslow, 99 Mo. App. 546, 74 S. W. 442.

93. Mack v. Shortle, 76 App. Div. [N. Y.] 586.

94. The other partner objecting. Yarwood v. Billings, 31 Wash. 542, 72 Pac. 104.

95. A married woman, contributing the services of her husband to a partnership, may sue for an accounting, though she failed to contribute the capital she agreed to. Orr v. Cooledge, 117 Ga. 195.

96. It cannot be brought by the heir of a deceased partner, in the absence of fraud, collusion, or danger of irretrievable loss, under V. S. 2445. Mason v. Hicks [Vt.] 56 Atl. 1011.

97. A legatee of a deceased member is not strictly so interested in such an action by an administrator of another deceased member, under Code Civ. Proc. N. Y. § 452. Mertens v. Mertens, 87 App. Div. [N. Y.] 295. But such a legatee is so interested in such an action against a surviving partner who is executor to the testate member and who was acting hostile to the estate. Id. An intervening creditor in a bill for an accounting, whose debt is established in the accounting, is entitled to a decree without filing a cross-bill. Kelley v. Shay, 206 Pa. 208.

98. A court of equity alone has jurisdiction of a suit for an accounting by an administrator, against a surviving partner, where the latter has mingled the partnership property with his own. Tufts v. Latshaw, 172 Mo. 359, 72 S. W. 679. The district court has jurisdiction to determine a claim, by a surviving partner against his deceased partner's estate, involving an accounting of partnership affairs under Alaska Code tit. 2, §§ 790, 791, 794, 795 (Act June 6, 1900, c. 786, 31 St. 457, 458, 462). Esterly v. Rua [C. C. A.] 122 Fed. 609. A district court has jurisdiction of an accounting, when the record of appeals shows that all the parties interested were in court, and shows that all debts except those of partners have been settled, and that a settlement in the probate court would involve unnecessary expense. Aram v. Edwards [Idaho] 74 Pac. 961.

99. Lord v. Murchison, 80 App. Div. [N. Y.] 194.

1. Where there is a dispute as to the construction of partnership agreement, as bearing upon a contract by one of the partners with a third person, it may take an accounting as to the matters in controversy. Lord v. Hull, 80 App. Div. [N. Y.] 194.

2. McCollum v. Carlucci, 206 Pa. 312.

3. A dissolution is sufficiently alleged in a complaint for an accounting, by stating that the firm business was carried on in accordance with the partnership articles, until a certain time, when it was discontinued, and the parties have ceased to do business under said agreement. Schulsinger v. Blau, 84 App. Div. [N. Y.] 390. A cause of action for dissolution and an accounting is stated by a complaint alleging that his copartner and a third person conspired to prefer a fraudulent claim against the firm, and obtained a judgment against it without his knowledge, and sold the firm assets, thereby depriving him of his interest. Green v. Tuchner, 87 App. Div. [N. Y.] 314. A petition for an accounting by the beneficiaries, under the will of a deceased partner, on the ground of a compromise between the defendants and trustees under the will, must allege facts showing an injury to plaintiffs; otherwise it is insufficient. Jones v. Proctor, 24 Ohio Circ. R. 80.

4. A petitioner in a suit for the dissolution and settlement of a partnership at will need not offer to do equity. Wright v. Ross, 30 Tex. Civ. App. 207, 70 S. W. 234.

5. McMurtrie v. Guiler, 183 Mass. 451, 67 N. E. 358.

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Time of suit.—A bill for an accounting for interest and profits cannot be maintained until the expiration of the partnership.[7] No demand is necessary before bringing an action for an accounting.[8]

The statute of limitations begins to run against an action for an accounting by one partner against his co-partner, only from the time the partnership affairs have been entirely closed.[9]

Receivers.—A receiver is not appointed as a matter of right, in a suit for an accounting and dissolution,[10] but his appointment is within the sound discretion of the court,[11] and it must be made to appear that the firm assets are in danger of being wasted, or misappropriated, by the defendant partners,[12] and it is not necessary to show as a condition thereto that the defendant partner was insolvent.[13] The appointment of a receiver may be refused, upon the execution of a bond by the defendant to comply with the judgment of the court.[14] It is within the power of the court to take such bond, in order to obviate the necessity of a receiver,[15] and where it is given the defendant is estopped to dispute the court's right to include certain matters in the judgment.[16]

The court may appoint as receivers, liquidating trustees previously appointed by the partners.[17]

A receiver may carry on the partnership business temporarily where the interests of the parties require it.[18] He should pay unpaid firm accounts out of partnership assets.[19] The rule that the receiver should not pay debts without previous order of court may be modified, and such procedure sanctioned, either by previous order or subsequent approval.[20]

An order directing the receiver to turn over the property to the partners need not be made, where the conduct of the parties has been such as to lead the receiver to consider that the whole matter has been abandoned.[21]

6. Evidence of other facts is not admissible. Anderson v. Anderson, 25 Utah, 164, 70 Pac. 608.

7. By the representative of a decedent, against a surviving partner continuing the business under the articles of co-partnership. Brew v. Hastings, 206 Pa. 155.

8. Formal notice of dissolution is not necessary to an action for the dissolution of a partnership at will. Wright v. Ross, 30 Tex. Civ. App. 207, 70 S. W. 234.

9. Weber v. Zacharias, 105 Ill. App. 640. From the termination of the partnership. Petty v. Haas [Iowa] 98 N. W. 104. In an accounting of a partnership for dealing in cattle, where the petition mentions a last sale, the statute of limitations begins to run from such sale. Bluntzer v. Hirsch [Tex. Civ. App.] 75 S. W. 326. Evidence held sufficient to show a bar, by limitation, of plaintiff's suit for dissolution, an accounting, and appointment of a receiver. Fellowes v. Johnson, 86 N. Y. Supp. 436.

10. But to preserve rights. Huggins v. Huggins, 117 Ga. 151.

11. Silveira v. Rese, 138 Cal. xix, 71 Pac. 515.

12. Where there is evidence that one of the partners is misappropriating and wasting the firm assets. Fink v. Montgomery [Ind.] 68 N. E. 1010.

13. Fink v. Montgomery [Ind.] 68 N. E. 1010.

14. Where the appointment would involve damage to both parties which would be avoided by the giving of the bond. Cary v. Dalhoff Const. Co., 126 Fed. 584. Where, in a suit for an accounting the defendant is required to give a bond to obviate the appointment of a receiver, subsequent payments made by him in partnership matters are at his peril, unless directed by the court, after notice to the complainants and opportunity given to defend. Id.

15. Cary v. Dalhoff Const. Co., 126 Fed. 584.

16. Requiring him to pay interest on partnership funds while in his hands. Cary v. Dalhoff Const. Co., 126 Fed. 584.

17. Dechert v. Chesapeake Western Co. [Va.] 45 S. E. 799.

18. Under an order authorizing him to manage, control, and dispose of the partnership property, the receiver, an experienced man, may carry on the manufacture of lumber at the request of the partnership, a saw milling firm, to fill a partially completed contract. Rochat v. Gee, 137 Cal. 497, 70 Pac. 478.

19. And they should not be credited to either party. Snyder v. O'Beirne [Mich.] 93 N. W. 872.

20. Payment of creditors threatening attachment in order to enable completion of existing contracts. Rochat v. Gee, 137 Cal. 497, 70 Pac. 478.

21. The personalty had been disposed of, nothing had been done in the premises for ten years, the saw-mill operated by the firm abandoned and allowed to become dilapidated, and there was no other property which had been used by the partners except certain realty, held under contract of purchase which

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Credits and charges.—Among other things that a partner should receive credit for, on an accounting, are the amount he has put in the firm business,[22] money advanced on a firm transaction,[23] cash turned over by him to a receiver,[24] property with which he had been erroneously charged,[25] a partial payment on a firm note,[26] money borrowed by him and used by the firm,[27] a personal check to pay a firm debt, and so applied,[28] money paid for insurance on firm property,[29] money paid for land for the firm,[30] or money paid for a watchman.[31] But he cannot be credited with property sold, unless he shows why he has not collected the purchase money,[32] with an amount due him by the firm, on a partnership accounting, but credited upon his indebtedness to the plaintiff, upon his guarantying a certain sum as the plaintiff's share of the profits,[33] with money borrowed by the firm to pay for certain articles,[34] with items for repairs and other expenses included in the estimated expenses on which the account is based,[35] with statutory damages on the amount due him.[36]

A partner should be charged for firm funds paid out for his individual debt,[37] or for his proportionate share of the loss in a transaction,[38] but he cannot be charged with money borrowed on a firm note and used in firm business,[39] nor with notes, the proceeds of which were used by the firm, and which were paid by the firm,[40] nor with money used by a partner to pay firm taxes.[41]

Among the numerous items that may be considered on the expense account, as a credit against the gross sales, in a firm accounting, are, salaries of partners,[42] an item paid to Dun's Agency by the firm,[43] and other costs of conducting the business.[44] But the cost price of property in the hands of a receiver should not be credited against the gross sales price of such property, where the accounts are taken upon the theory that the cost price was charged against the gross sales.[45] Property sold to a partner and that charged to him, should be included in the gross sales.[46] A mortgage may constitute a valid charge against the firm property.[47]

was defaulted. Brigham-Hopkins Co. v. Gross, 30 Wash. 277, 70 Pac. 480.

22. Rowan v. Lamb [Miss.] 35 So. 427.

23. Though it results in a loss. Finletter v. Baum [Pa.] 56 Atl. 941.

24, 25. Rowan v. Lamb [Miss.] 35 So. 427.

26. Where the note is finally taken up by the firm. Rowan v. Lamb [Miss.] 35 So. 427.

27. Where he borrows it on his own note, and pays it off himself, the amount thereof with legal interest should be charged to the firm. Rowan v. Lamb [Miss.] 35 So. 427.

28, 29, 30. Rowan v. Lamb [Miss.] 35 So. 427.

31. Where such expense is included in an expert's estimate, upon which the accounting is based. Rowan v. Lamb [Miss.] 35 So. 427.

32. The mere entry of the purchaser's name on his account is not sufficient. Richard v. Mouton, 109 La. 465.

33. It cannot again be credited to him as due by the firm. Barber v. Morgan [Tex. Civ. App.] 76 S. W. 319.

34. As capital on his final accounting. Rowan v. Lamb [Miss.] 35 So. 427.

35. Rowan v. Lamb [Miss.] 35 So. 427.

36. Where a decree in his favor is reversed on appeal by the other partner. Rowan v. Lamb [Miss.] 35 So. 427.

37. Hart v. Hart, 117 Wis. 639, 94 N. W. 890.

38. Finletter v. Baum [Pa.] 56 Atl. 941. It is error to exclude plaintiff's share of a loss in a particular year, where it is shown that no settlement of accounts was had for that year, and that the business was operated at a loss. Yarwood v. Billings, 31 Wash. 542, 72 Pac. 104.

39, 40. Rowan v. Lamb [Miss.] 35 So. 427.

41. For if so charged it would have to be credited to him again. Rowan v. Lamb [Miss.] 35 So. 427.

42. Where the partnership contract provides for a monthly salary to each partner, and a yearly division of the net profits. Bissell v. Hood [Va.] 44 S. E. 715.

43. Rowan v. Lamb [Miss.] 35 So. 427.

44. The costs of conducting a certain business may be based on the estimates of experts in that business, where the accounts are in such a state that such costs cannot otherwise be estimated. Rowan v. Lamb [Miss.] 35 So. 427. A commissioner, to whom the accounting of a manufacturing partnership is referred, may accept an agreement of counsel as to the cost of manufacturing a certain product. McBrayer v. Hanks' Ex'rs, 24 Ky. L. R. 1699, 72 S. W. 2.

45. Rowan v. Lamb [Miss.] 35 So. 427.

46. Where such sales are charged to him on his account. Rowan v. Lamb [Miss.] 35 So. 427.

47. A partner in a nontrading firm, plaintiff in an action for dissolution and accounting, is estopped to deny the validity of a mortgage as to his interest, where it was executed by all the members, except himself, to secure a loan of money used in the firm business. Matthies v. Herth, 31 Wash. 665, 72 Pac. 480.

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Where the firm consists of but two members, an individual claim of one partner against the other may be asserted in a partnership accounting, if it would not complicate the settlement of accounts.[48]

The trustees of a deceased partner may be allowed to deduct bad debts of the firm from the deceased's interest.[49]

Interest.—As a general rule interest will not be allowed on balances due on an accounting between partners,[50] unless it appears to be the intention of the parties to allow it,[51] though a court of equity may allow it, where, under the circumstances, it is just and equitable to do so,[52] but no interest should be allowed where the accounts cannot be correctly stated, even after the evidence is in, and the time from which it should be charged cannot be equitably fixed, and different balances were struck on appeal.[53] Where interest is allowed against a managing partner, it should be only from the time when a final balance is stated.[54]

Reference—Evidence.—Where the accounts are complicated and long, it is usually the practice to refer the same to a referee or other officer to take testimony and state the account,[55] and his finding there reported to the court.[56] The referee or other officer may hear testimony in the cause,[57] and may compel the production of books and papers.[58] Where the partners deny, in their answer, that they have the firm books or know where they are, secondary evidence of their contents may be admitted, without serving them with notice to produce the books.[59]

48. Barber v. Morgan [Tex. Civ. App.] 76 S. W. 319.

49. Evans v. Weatherhead, 24 R. I. 394.

50. Rowan v. Lamb [Miss.] 35 So. 427. Interest will not be allowed on an alleged balance overdrawn, before settlement, where there has been a settlement of partnership accounts on a certain date. Richardson v. Hatch [N. J. Eq.] 55 Atl. 1115.

51. Where the plaintiff's decedent was father of the defendants, and showed a disposition to be lenient in enforcing demands against them during his lifetime. Safe Deposit & Trust Co. v. Turner [Md.] 55 Atl. 1023.

52. Such allowance is within the discretion of the court. Rowan v. Lamb [Miss.] 35 So. 427. Interest should be allowed on an amount due a partner from the date when due, where the other partner keeps all the firm property and accounts, and refuses to render a statement when requested, or to pay him anything. Corralitos v. Mackay [Tex. Civ. App.] 72 S. W. 624. Against a partner, who retains the proceeds of sales of partnership property, from the date when so received. Powell v. Horrell, 92 Mo. App. 406. A partner of a judgment debtor, having in his possession money belonging to the execution creditors, must pay interest thereon where he seeks relief in equity. Weber v. Zacharias, 105 Ill. App. 640.

53. Rowan v. Lamb [Miss.] 35 So. 427.

54. From the time of decision of the Supreme Court where it materially modifies the judgment of the lower court. Hart v. Hart, 117 Wis. 639, 94 N. W. 890. But a referee should not be appointed to take and state accounts, upon the motion of a liquidating partner, against the other partner's objection, until the latter has had an opportunity to accept the liquidating partner's statement of accounts. Diehl v. Dreyer, 84 App. Div. [N. Y.] 247.

55. Where, in an action for an accounting, the existence of the partnership is in issue, an order of reference will not be granted under Code Civ. Proc. § 1013, until such issue has been determined. Jones v. Lester, 77 App. Div. [N. Y.] 174.

56. The finding of the referee as to amount due plaintiff in an action for an accounting, held not excessive. Aronson v. Greenberg, 78 App. Div. [N. Y.] 639. The master's giving credit to two partners, who had been accustomed to draw out their share of the profits, for the amounts shown on the books to be due them, and finding that the balance of the firm assets should be credited to a partner allowing his share of the profits to remain in the business, is not an erroneous method of accounting. Ernst v. Schmitz, 207 Ill. 604, 69 N. E. 923.

57. The testimony of experts may be admitted to show the cost of conducting a business, where no expense account had been kept by the defendant for some time, and the one which had been kept was incorrect, and to add to the amounts estimated by them, all expenses that could be shown. Rowan v. Lamb [Miss.] 35 So. 427. Evidence that shares of stock purchased by a firm were of a specified value at the time of purchase, held insufficient to sustain such finding. Reilly v. Freeman, 84 App. Div. [N. Y.] 433.

58. A partner is bound by entries in the firm books if he fails to inspect or object to any charges therein against him. Safe Deposit & Trust Co. v. Turner [Md.] 55 Atl. 1023. A book showing transactions for the firm is inadmissible, in the absence of identification or proof of its genuineness. Willson v. Morse, 117 Iowa, 581, 91 N. W. 823. Nor are statements from such a book admissible where the book is not in evidence. Id.

59. Safe Deposit & Trust Co. v. Turner [Md.] 55 Atl. 1023. Balance sheets taken from firm books by the bookkeeper, whose testimony identifies them, are admissible as secondary evidence of the contents of the books, which have been lost. Id. A partner admitting a balance due by him as shown

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The burden of proving certain matters in a partnership accounting is on the party relying upon them.[60]

Decree.—The decree must conform to the pleadings and proof.[61] The court may order a sale of firm assets.[62]

After payment of firm debts, the court may divide the property in kind,[63] or it may enter a money judgment against one of the partners, such as the state of accounts requires,[64] but it will not render a judgment on a cause for which the plaintiff has a remedy at law.[65]

Apportionment of costs.—The apportionment of costs, in a suit for an accounting and dissolution, rests in the sound discretion of the trial court, under general established rules as to what is equitable in such matters, and subject to review for abuse of judicial authority.[66] They may be compelled to be paid by one of the partners,[67] or may be apportioned equally between them all.[68] A larger per cent of the costs of appeal should be adjudged against a partner, where such costs are increased through his fault.[69]

Opening or correcting settlement.—A partner cannot demand an accounting in equity after the partnership affairs have been wound up, unless he can do so with clean hands.[70]

§ 8. *Limited partnerships. Formation.*—The formation of limited partnerships is regulated by statute as by requiring that it shall consist of not less than three partners,[71] or by requiring it to post up a sign-board containing the name and style of the firm and in addition thereto the given and surname of each member

by balance sheets produced by him, and taken from the firm books, is estopped to deny the correctness of such sheets. Id. But his statement that the balance sheets were in the bookkeeper's handwriting is not an admission of the indebtedness shown thereby, if he did not have the sheets at the time. Id.

60. The burden is on the plaintiff, in an action for an accounting, to clearly and satisfactorily show that land in the name of a partner belongs to the firm; it must be shown by more than a mere preponderance of evidence. Tregea v. Mills [Wyo.] 72 Pac. 578. The burden of proving a falling off in receipts, or increase in disbursements, is on the one alleging it, where he had wrongfully excluded his partner from the business. Aronson v. Greenberg, 78 App. Div. [N. Y.] 639.

61. Where a bill for an accounting prays that a firm agent should not pay certain moneys to the defendant, a decree in favor of the plaintiff on a general accounting may be entered; but awarding the balance in the agent's hands to the plaintiff is erroneous. McGinn v. Benner, 22 Pa. Super. Ct. 134.

62. Where such property is of such a character as to require sale before a settlement can be made, and where it appears that its sale will hasten the settlement, and it does not appear that any injury will result therefrom. Whitney v. Whitney, 25 Ky. L. R. 1142, 77 S. W. 206. A list of customers of a partnership of insurance agents, with the dates of the expiration of their respective policies, is not a firm asset which may be sold separately, on an accounting. Id., 24 Ky. L. R. 2465, 74 S. W. 194.

63. Where a sale thereof would give one of the partners an advantage in the bidding. Kelley v. Shay, 206 Pa. 208.

64. In a suit for partition of personalty and an accounting. Yarwood v. Billings, 31 Wash. 542, 72 Pac. 104. But plaintiff cannot recover a money judgment for his interest; where he testified he had sold it to defendant. Robinson v. McGinty, 84 App. Div. [N. Y.] 639.

65. In a suit in equity for an accounting, it is not error to refuse a judgment for the value of firm property alleged to have been converted by one of the partners, since the conversion is proper ground for an action at law. Yarwood v. Billings, 31 Wash. 542, 72 Pac. 104.

66. Hart v. Hart, 117 Wis. 639, 94 N. W. 890.

67. A partner, having charge of firm affairs, will be compelled to pay the costs of a suit for an accounting, if the balance is found against him, where he has withheld the firm funds, denied an account when requested, and rendered an incorrect one when sued. Richard v. Mouton, 109 La. 465.

68. The cost should be borne equally by the partners where the defendant makes no effort to have a settlement until four years after dissolution, where he sets up a counterclaim, based on such account, to an action against him on another account. Dyer v. Ballinger, 24 Ky. L. R. 1918, 72 S. W. 738.

69. Where he denies the partnership, and has kept unsatisfactory accounts in the firm books, which he agreed to keep, by reason of which voluminous testimony is required to be taken, two-thirds of the costs of appeal should be adjudged against him. Rowan v. Lamb [Miss.] 35 So. 427.

70. Where he absconds, without notice, with firm money. Hart v. Deitrich [Neb.] 96 N. W. 144. A settlement between law partners, with knowledge of a partner's new employment in a case to which he was assigned upon dissolution, will not be opened. Lamb v. Wilson [Neb.] 92 N. W. 167.

71. Sturgeon v. Apollo O. & G. Co., 203 Pa. 369.

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of the firm, under penalty of being sued for default, and of forfeiting a certain sum for each member.[72] But a limited partner's failure to file, with the proper county clerk, proof of the publication of the certificate and affidavit required by statute, does not make him a general partner.[73]

Part of the members of a limited partnership may be estopped to deny the membership of another.[74] The term "capital" means cash or its equivalent,[75] and if payable in property can be paid only in the manner prescribed by statute.[76]

Liabilities.—A limited partnership may bind itself by matters beyond its original purposes and powers.[77] Limited partners may become liable as general partners by violating the provisions of the statute regulating such members.[78] Parties attempting to form a limited partnership but failing to comply with the statute are liable only to the extent of their unpaid subscriptions.[79]

Actions.—A limited partnership having authority to sue in its association name by the statutes under which it is organized may sue in such name in the federal courts in any case where diversity of citizenship is not required to give jurisdiction.[80] Alien members of a limited partnership, organized under state laws, retain their individual rights as aliens to sue in federal courts.[81]

Voluntary dissolution.—The voluntary winding up of a limited partnership must be done in the manner prescribed by statute.[82]

Rights upon dissolution.—A member of a limited partnership is entitled to his share of the profits upon dissolution,[83] and he cannot be excluded therefrom because his name was merely used to make the third person required to form a limited partnership.[84]

72. Rev. St. S. C. 1893, § 1432; Gen. St. 1882, § 1326, providing that every mercantile partnership shall post up and keep posted up the given and surname of each member of the firm applies to limited partnerships. Kaufman v. Carter [S. C.] 45 S. E. 211.

73. Under Laws N. Y. 1897, c. 420, §§ 30, 31, 32, as the statute prescribes no penalty or liability for the failure. Buckle v. Iler, 40 Misc. [N. Y.] 214.

74. Two of three persons holding themselves out as limited partners in a limited partnership, duly created, are estopped to assert that one of them had no interest in the partnership. Id.

75. Under Code Va. 1887, § 2878. Deckert v. Chesapeake Western Co. [Va.] 45 S. E. 799.

76. Acts Va. 1901-02, p. 181, amending Code 1887, § 2878. Deckert v. Chesapeake Western Co. [Va.] 45 S. E. 799.

77. Where such is the custom of all the partners or of one or more of the managing partners with the acquiescence of the others. Woodward v. Nelligan, 19 App. D. C. 550.

78. By making a false statement in the certificate and affidavit required by statute to be filed; falsely stating the amount of money paid in by them, under Limited Partnership Law (1 R. S. 765) § 8. Hartford Nat. Bank v. Beinecke, 80 App. Div. [N. Y.] 546.

79. And not as general partners. Deckert v. Chesapeake Western Co. [Va.] 45 S. E. 799. This liability in case of partners who have contributed property is determined by deducting the cash value of the property at the time of contribution from the amount subscribed. Id.

80. For infringement of a patent. Sanitas Nut Food Co. v. Force Food Co., 124 Fed. 302.

81. Jewish Colonization Ass'n v. Solomon, 125 Fed. 994.

82. The passing of a resolution by the members of a limited partnership, on notice for a final settlement and distribution of assets, to exchange its property for stock of a corporation which is to be divided among its members, is a voluntary winding up of its affairs which must be done in the manner prescribed by statute [Comp. Laws 1897, § 6087]. Emery v. Kalamazoo & H. Const. Co. [Mich.] 94 N. W. 19. The majority stockholders cannot wind up the affairs of the partnership by exchanging its valuable property for shares of stock in a corporation and compelling a certain shareholder to accept such stock for his holding. Id. And the fact that a certain member had received pay from the corporation for a partnership note which it had assumed does not estop him from objecting to the partnership's exchanging its property for stock of the corporation. Id. And it cannot be claimed that such note is of no value, as being a debt of the partnership to itself, because the partnership owns all the issued stock of the corporation, so that a member cannot complain of the exchange of the note for more stock. Id.

83. Though he has made no actual contribution to the capital of the firm. Sturgeon v. Apollo O. & G. Co., 203 Pa. 369.

84. Where he has been held out as an actual partner. Sturgeon v. Apollo O. & G. Co., 203 Pa. 369. "Defendants cannot avail themselves of a plea that the partnership was illegal. The act of assembly requires that the number of partners shall not be less than three. They explicitly declared in the recorded articles that there were three, plaintiff being one. They cannot now be heard to say that there were but two; that plaintiff never was a partner." Id.

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PARTY WALLS.

The easement of a party wall may be acquired by grant or by prescription.[85] The right is personal and not a covenant running with the land.[86] Each owns in severalty so much of the wall as stands on his own land, subject to an easement to have it maintained as a party wall.[87] The easement ordinarily extends to the whole wall,[88] and, by implication, authorizes an increase in its height,[89] and the owner of the dominant tenement may make such changes in the wall as are to his advantage;[90] but, in the absence of agreement, thickness can be added on builder's side only,[91] and one owner cannot replace it by another containing numerous openings.[92] The easement must not be exercised to the detriment of the other owner.[93] Neither of the owners has a right to extend his front wall beyond the point in the party wall which marks the property line.[94]

Where a party wall is rebuilt in the absence of a new agreement, the "second builder" is not obligated to pay his proportion of the cost of such rebuilding,[95] and the party rebuilding must replace the adjoining building in the same condition as it was prior to such reconstruction.[96]

Equity will enjoin a threatened injury to a party wall,[97] or the continuance of any injury,[98] or the replacing of the wall with another containing numerous openings,[99] or damages may be recovered for injury to the wall.[1] But adverse possession of a party wall does not give the possessor a right of action for damages to, at the most, more than the half of the wall intended for the support of his building.[2] For projection of a front wall past the property line, ejectment will lie.[3]

The Louisiana civil code contains provisions governing the dedication of walls to common use, and their thickness and increase in same.[4]

PATENTS.

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§ 1. *Patentability.*—Only a specified means for accomplishing a result, not

85. Bright v. Allan, 203 Pa. 394.
86. Cook v. Paul [Neb.] 93 N. W. 430; Pokorny v. Pratt, 110 La. 603; Mayer v. Martin [Miss.] 35 So. 218. Where one of several joint grantors owns the adjoining lot and the party wall, the grantee is not liable on the party wall agreement even though it is declared to be a covenant running with the land. Kinnear v. Moses, 32 Wash. 215, 73 Pac. 380.
87. Johnson v. Minnesota Tribune Co. [Minn.] 98 N. W. 321.
88. Flues. Batt v. Kelly, 75 App. Div. [N. Y.] 321, 11 Ann. Cas. 467. Height. Ribet v. Howard, 109 La. 113.
89. Frowenfeld v. Casey, 139 Cal. 421, 73 Pac. 152; Bright v. Allan, 203 Pa. 394. But agreement for specified height does not give the right to build higher. Frowenfeld v. Casey, 139 Cal. 421, 73 Pac. 152.
90. Bright v. Allan, 203 Pa. 394.
91. Pokorny v. Pratt, 110 La. 609.
92. Though the other party does not intend to use his property for building purposes. Springer v. Darlington, 207 Ill. 238, 69 N. E. 946.
93. Flues. Batt v. Kelly, 75 App. Div. [N. Y.] 321, 11 Ann. Cas. 467.
94. Johnson v. Minn. Tribune Co. [Minn.] 98 N. W. 321.
95. Griffin v. Sansom, 31 Tex. Civ. App. 560, 72 S. W. 864.
96. Pokorny v. Pratt, 110 La. 603.
97. Overloading. Frowenfeld v. Casey, 139 Cal. 421, 73 Pac. 152.
98. Dicta. Bright v. Allan, 203 Pa. 394. Flues. Batt v. Kelly, 75 App. Div. [N. Y.] 321, 11 Ann. Cas. 467.
99. Springer v. Darlington, 207 Ill. 238, 69 N. E. 946.
1. Windows. Failure of proof of damage. Paul v. Cook [Neb.] 94 N. W. 997. Damages sought of one rebuilding wall must be other than those necessarily incident to the rebuilding. Pokorny v. Pratt, 110 La. 603.
2. Mayer v. Martin [Miss.] 35 So. 218.

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the result itself, is patentable,[5] and it must involve invention.[6] Invention is distinguished from mere mechanical skill,[7]—a distinction sometimes difficult to define.[8] Invention is shown by numerous unsuccessful attempts by others to attain the result accomplished by the particular device,[9] and by superiority in operation over old devices and displacement of them and the successful overcoming of difficulties and disadvantages known for many years.[10] A process old in the arts is not patentable,[11] and so with the adoption of an old and well known mechanism to an analogous use;[12] otherwise where the use is in a different art.[13] There is no invention in a method merely a part of a steady evolution and development of the art in mechanical means.[14] The mere discovery of a new property in an old combination is not patentable however beneficial.[15] Substitution of materials in an

3. Johnson v. Minn. Tribune Co. [Minn.] 98 N. W. 321.

4. Pokorny v. Pratt, 110 La. 609; Cook v. Paul [Neb.] 93 N. W. 430.

5. Nat. Meter Co. v. Neptune Meter Co., 122 Fed. 82. It is not the idea that is patented, but the particular mechanical combination devised for bringing it about. This includes, of course, all substantial equivalents but not every other method imaginable. There must be some reasonable correspondence between the two, not only in the functions performed but in the way in which it is done. Diamond Drill & Machine Co. v. Kelly, 120 Fed. 289.

6. It is not enough that a thing shall be new in the sense that in the shape or form in which it is produced it shall not have been known before and that it shall be useful, but it must amount to an invention or discovery. In re McNeill, 20 App. D. C. 294. Grant patent, No. 554,675, for rubber-tire wheel (Rubber Tire Wheel Co. v. Victor Rubber Tire Co. [C. C. A.] 123 Fed. 85); Haskell patent No. 602,179, game board (Ludington Novelty Co. v. Leonard [C. C. A.] 127 Fed. 155); Waterman patents Nos. 307,735 and 293,545, for fountain pens (Waterman v. Lockwood [C. C. A.] 125 Fed. 290); Hurlbut patent No. 441,846, covers for paper tubes (Hurlbut v. U. S. Mailing Tube Co. [C. C. A.] 124 Fed. 66), lack of patentable invention. White patent, No. 548,149, stereoscope, discloses invention and is valid. White v. Walbridge, 118 Fed. 166.

7. Lay v. Indianapolis Brush & Broom Mfg. Co., 120 Fed. 831; Waterman v. Lockwood [C. C. A.] 125 Fed. 497; Chisholm v. Anderson Foundry & Mach. Works [C. C. A.] 123 Fed. 427. There is no invention in a mere transposition involving only the exercise of ordinary mechanical skill especially where the prior art suggested such transposition. Stanley R. & L. Co. v. Ohio Tool Co. [C. C. A.] 125 Fed. 947. No invention in introducing a difference of degree in inclines on runway for return of bowling balls or a greater perfection in mechanical details. Brunswick-Balke-Collender Co. v. Klumpp, 126 Fed. 765.

8. Hanifen v. Armitage, 117 Fed. 845.

9. Peters v. Union Biscuit Co., 120 Fed. 679; Brill v. North Jersey St. R. Co., 124 Fed. 778. Scharle & Hummes patent, No. 359,636, railway track scale. Standard Scales & Supply Co. v. E. & T. Fairbanks & Co., 125 Fed. 4. The fact that a large number of processes for the separation of aluminum were patented in all of which external heat was used to fuse the ore some made after the electrical process was patented and exclusively used in both of which fusion and electrolysis were produced by the same current is strong evidence not only that the later process was not anticipated but involved invention. Electric S. & A. Co. v. Pittsburg Reduction Co. [C. C. A.] 125 Fed. 926. One criterion of invention is that others have sought and failed, even where the process is so simple, when discovered, that many believe they could have produced it if required. Hanifen v. Armitage, 117 Fed. 845.

10. Baker patent No. 472,689 for car heaters. Crane v. Baker [C. C. A.] 125 Fed. 1.

11. Wolff v. Du Pont De Nemours, 122 Fed. 944. Ordinarily no invention in "means for holding in and out of operative position" a part of a machine is common to the arts. U. S. Peg-wood, S. & Leather Board Co. v. Sturtevant [C. C. A.] 125 Fed. 378. The mere causing of pressure by the use of a spring is not patentable at this late day and it is only some mechanical device for applying such pressure in a new and useful way that is patentable. Dowagiac Mfg. Co. v. Brennad, 118 Fed. 143.

12. Cleveland Foundry Co. v. Kaufmann, 126 Fed. 658; Eames v. Worcester Polytechnic Inst. [C. C. A.] 123 Fed. 67. Mallon patent No. 583,408 for automatic mechanism for unloading and feeding sugar cane. Mallon v. Gregg, 126 Fed. 377. The application of a mechanism hitherto applied to a folding chair to a folding bed without substantial change in the manner of operation is an analogous use that will not support a patent. Antisdel v. Bent, 122 Fed. 811. If the new use of an old process be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill it is only a case of double use. Johnson v. Toledo Traction Co. [C. C. A.] 119 Fed. 885.

13. Hale & K. Mfg. Co. v. Oneonta, C. & R. S. R. Co., 124 Fed. 514; Diamond Drill & Mach. Co. v. Kelly, 120 Fed. 289. Different systems of ventilation belong in the same art though applied to different structures. Jones v. Cyphers [C. C. A.] 126 Fed. 753.

14. Nat. Tube Co. v. Spang, 125 Fed. 22. Where a number of workers adopt one well known material for another and finding it successful use it publicly and privately without any claim of exclusive right there is a presumption that they regard the substitution as a mere improvement such as would be made by a skilled workman and not an invention. Thomson-Houston Elec. Co. v. Lorain Steel Co. [C. C. A.] 117 Fed. 249.

15. Nat. Meter Co. v. Neptune Meter Co., 122 Fed. 82.

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article is not invention unless involving a new method of construction or developing new uses and properties of the article made or unless the substituted material is more efficient in action.[16] Invention is not ordinarily involved in adaptation of machine to a different power.[17] A new combination of old elements producing a new mode of operation and a beneficial result is patentable,[18] but not where they perform an old function,[19] and produce no new result.[20] There is invention where the combination accomplishes several times the result of previous machines and requires less expensive labor in its operation.[21] The validity of a patent for an article of manufacture is not affected by the fact that the article could be produced on machines previously in use and adapted to produce various articles where the article had not previously been made.[22] It is not a test of patentability that the new combination will allow the machine to be produced more cheaply.[23] Mere simplification may amount to invention when parts long in use and burdensome in character are eliminated.[24]

The question of invention is a question of fact.[25] There is a presumption of invention from the issuance of the patent.[26] Commercial success is entitled to some weight on question.[27]

Novelty[28] *and utility* are essential to patentability;[29] and where device is de-

16. White patent No. 571,102 anticipated by Parker patent No. 537,481 for a swage for dental plates. Nat. Tooth Crown Co. v. Macdonald, 117 Fed. 617. There is no invention in the substitution of a transparent gauze fabric for glass for a face plate for burial caskets in view of the prior art. Nat. Casket Co. v. Stoltz, 127 Fed. 158. The substitution of equivalents doing substantially the same things in the same way by substantially the same means with better results is not such invention as will sustain a patent. Hirsch v. Union Stove Works, 126 Fed. 189. The substitution of steel for wrought iron as the material from which a structure is made will not make the new structure patentable where the functions are performed in substantially the same way the only advantage being the difference in the material used. Drake Castle Pressed Steel Lug Co. v. The Brownell & Co. [C. C. A.] 123 Fed. 86.

17. Stilwell-Bierce & Smith-Vaile Co. v. Eufaula Cotton Oil Co. [C. C. A.] 117 Fed. 410. The substitution in a machine of a common drive shaft for other methods of driving is mechanical and does not constitute invention. U. S. Peg-wood, S. & Leather Board Co. v. Sturtevant [C. C. A.] 125 Fed. 378.

18. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co. [C. C. A.] 118 Fed. 136; Westinghouse Air Brake Co. v. Christensen Engineering Co., 123 Fed. 806; Hale & K. Mfg. Co. v. Oneonta, C. & R. S. R. Co., 124 Fed. 514; Milwaukee Carving Co. v. Brunswick-Balke-Collender Co. [C. C. A.] 126 Fed. 171; Stilwell-Bierce & Smith-Vaile Co. v. Eufaula Cotton Oil Co. [C. C. A.] 117 Fed. 410; Peters v. Union Biscuit Co., 120 Fed. 679; Anderson v. Collins [C. C. A.] 122 Fed. 461. A patent which shows a combination of elements some of which had been used in prior devices but so adapted to co-operate as to disclose a patentable invention and which stands at the head of its class, although in a well developed art, is entitled to liberal range of equivalence. Lamson Consol. Store Service Co. v. Hillman [C. C. A.] 123 Fed. 416. An arrangement of parts to produce a new and useful result though well known separately and in common use shows invention where the combination for the purpose intended was not obvious to persons of ordinary mechanical skill. Lowrie v. Meldrum, 124 Fed. 761.

19. Rodiger patent No. 649,864 for paste cup or mucilage holder having two compartments, one to hold brush and water. Rodiger v. Thaddeus Davids Mfg. Co., 126 Fed. 960. Chambers patent No. 492,913 for an electric lamp lighter for cigar lighters, shows a combination of old elements and in view of the prior art not such as to involve patentable invention. Eldred v. Kirkland, 124 Fed. 553.

20. Anthony & Savage patent No. 468,144 for faucet bushing and valve for barrels. West Coast Safety Faucet Co. v. Jackson Brew. Co. [C. C. A.] 117 Fed. 295.

21. Moore v. Schaw, 118 Fed. 602; Emerson Elec. Mfg. Co. v. Van Nort Bros. Elec. Co., 116 Fed. 974.

22. Lamb Knit Goods Co. v. Lamb Glove & Mitten Co. [C. C. A.] 120 Fed. 267.

23. Greist Mfg. Co. v. Parsons [C. C. A.] 125 Fed. 116.

24. Decoco Co. v. Gilchrist [C. C. A.] 125 Fed. 293.

25. Willis v. Miller [C. C. A.] 121 Fed. 985.

26. Brill v. North Jersey St. R. Co., 124 Fed. 778. The fact that a patent has been issued to complainants is prima facie evidence of its validity but the decision of the patent office is not conclusive and the courts are required to examine into the prior state of the art and ascertain whether in fact the patented device involves invention so as to be patentable. Mallon v. William Gregg & Co. [C. C. A.] 126 Fed. 377.

27. American Salesbook Co. v. Carter-Crume Co., 125 Fed. 499. Commercial success of a machine may be considered but is not persuasive that a single element of a complicated machine involves invention. Doig v. Morgan Mach. Co. [C. C. A.] 122 Fed. 460.

28. Waterman v. Lockwood, 123 Fed. 300. A patent may be invalid for lack of patentable novelty in view of the prior art. Morris

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signed to accomplish a useful result, it is not important that it may be put to a bad use.[30] Patentability does not depend on whether the article is more useful than other similar articles.[31] An old structure in better shape or of better material lacks novelty.[32] There is a presumption of patentable novelty from the grant of the patent.[33] Utility of an invention is demonstrated by the persistent desire of infringers to use it.[34] The commercial success of an invention may be considered only when the novelty or utility of the patent is in great doubt.[35] In determining the question of novelty, the court will take judicial knowledge of matters of common knowledge relating to the state of the art.[36] The question of the novelty is one of fact.[37]

Anticipation defeats patentability[38] and exists where the anticipatory device would infringe if invented later than the device claimed to have been anticipated.[39]

Elec. Co. v. Mayer, 123 Fed. 311. Whether the feature of novelty is the employment of a new material or a change of adaptation in other respects, the inquiry always is whether what was done involved the exercise of inventive faculty as distinguished from the ordinary skill of the calling and when the substitution has accomplished a result which those skilled in the art have vainly sought to effect the evidence that inventive skill was exercised that it generally resolves the inquiry in favor of patentable novelty. George Frost Co. v. Cohn [C. C. A.] 119 Fed. 505. Hoffman patent No. 605,056 for an abrading shoe for turning up car wheels (Wheel Truing Brake Shoe Co. v. Car Wheel Trueing Brake Shoe Co., 124 Fed. 902); the Tompkins patent No. 307,152 for devices for use on knitting machine (Tompkins v. Terwilliger, 124 Fed. 545); the Kruttschnitt design patent No. 30,627 for ornamental border on aluminum sign plates (Kruttschnitt v. Simmons, 118 Fed. 851); a design for a handhold on the inside corner of car seats for the benefit of passengers compelled to stand in the aisles of crowded cars (Hale & K. Mfg. Co. v. Lehigh Valley Traction Co., 126 Fed. 653), have patentable novelty. The Beck patent No. 647,934 for a manifolding sales book and holder backs. American Sales Book Co. v. Bullivant [C. C. A.] 117 Fed. 255. A washer for a thill coupling to be used around the spherical knuckle of the thill iron as a packing between that and the draft eye where it is concealed from sight lack novelty. Bradley v. Eccles [C. C. A.] 126 Fed. 945. A machine for ironing a turn over collar at one operation is novel and useful and shows a patentable invention. Reed Mfg. Co. v. Smith [C. C. A.] 123 Fed. 878. The Moxham patent No. 539,878 for railway switch work the principal feature of novelty being a center piece provided with hardened track surfaces shows invention. Lorain Steel Co. v. New York Switch & Crossing Co., 124 Fed. 548.

29. Waterman Co. v. Lockwood, 123 Fed. 300. Utility is entitled to weight where question of patentability is doubtful. Union Biscuit Co. v. Peters [C. C. A.] 125 Fed. 601; American Sales Book Co. v. Bullivant [C. C. A.] 117 Fed. 255.

30. Mills patent No. 613,844 a bogus coin detector for vending machines was assigned and used by manufacturers of gambling devices. Fuller v. Berger [C. C. A.] 120 Fed. 274.

31. Lamb Knit Goods Co. v. Lamb G. & M. Co. [C. C. A.] 120 Fed. 267.

32. Farmers' Mfg. Co. v. Spruks Mfg. Co., 119 Fed. 594.

33. Sample v. American Soda Fountain Co., 126 Fed. 760; Fuller v. Gilmore, 121 Fed. 129; Fairbanks, M. & Co. v. Stickney [C. C. A.] 123 Fed. 79. An appellate court will not assume that the trial court failed to give full force to the presumption of patentable novelty arising from the grant of the patent, the matter not appearing in the record. American Sales Book Co. v. Bullivant [C. C. A.] 117 Fed. 255.

34. Crown C. & S. Co. v. Ideal Stopper Co., 123 Fed. 666.

35. Waterman Co. v. Forsyth, 121 Fed. 107. On the question of patentable novelty it is not important that the article meets with increasing sales and is popular. American Sales Book Co. v. Bullivant [C. C. A.] 117 Fed. 255.

36. Farmers' Mfg. Co. v. Spruks Mfg. Co., 119 Fed. 594.

37. American Sales Book Co. v. Bullivant [C. C. A.] 117 Fed. 255.

38. In re Verley, 19 App. D. C. 597; Wilson v. Townley Shingle Co. [C. C. A.] 125 Fed. 491.

Anticipated: Wiggins patent No. 623,933 for bowling alleys. Brunswick, etc., Co. v. Klumpp, 124 Fed. 554. Parramore patent No. 629,391 for a stocking supporter fastened to the front of the corset by prior art and especially by the Banfield patent No. 197,587 and the Andrews patent No. 550,551. Parramore v. Stein, 125 Fed. 19. Lewis patent No. 607,602 for a machine for cutting shoe soles. U. S. Peg-wood, S. & L. B. Co. v. Sturtevant Co. [C. C. A.] 125 Fed. 378. Peters patent No. 621,974 for method and means of packing biscuits lacks patentable novelty in view of the prior art which showed use of both the cartons and paraffined linings. Union Biscuit Co. v. Peters [C. C. A.] 125 Fed. 601. Waldstein patent No. 607,719 for extracting precious metals from cyanide solutions by the use of zinc dust as a precipitating agent and is not made patentable by requiring the use of a "definite quantity" where the proportion is not given. De Lamar v. De Lamar Min. Co. [C. C. A.] 117 Fed. 240.

Not anticipated: Hoyt patent No. 446,230 improvement in grain drills. Dowagiac Mfg. Co. v. Minn. Moline Plow Co. [C. C. A.] 118 Fed. 136. MacWilliam patent No. 668,261 for an improvement in suspenders. MacWilliam v. Conn. Web. Co., 126 Fed. 192.

39. Elec. S. & A. Co. v. Pittsburg Reduction Co. [C. C. A.] 125 Fed. 926; Eames v.

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Prior public use by others amounts to anticipation.[40] The anticipatory device must have been operative.[41] An unsuccessful experiment by the use of entirely different materials 75 years earlier is insufficient.[42] A machine may be invalid for anticipation though the material operated on is different where the principle of operation is identical.[43] There is no anticipation in a device applicable to a different art and not adapted to perform functions of the patented machine,[44] likewise a patent for a combination in which one of the parts performs another important function in the operation of the machine is not anticipated by a machine in which a similar part was used in a different place and did not perform the same function.[45] Anticipation is not avoided by the fact that a simple element in a combination is made of one part instead of two where each performs the same functions and accomplishes the same result by means which are mechanically similar.[46] Anticipation may be substantiated by evidence of persons who saw the earlier machine operated,[47] but such evidence must be clear and convincing.[48] Anticipation is possible between patents to same patentee.[49] Applications of same inventor pending at the same time are not anticipatory of each other.[50] The patent is evidence of the state of the art at the time the drawings and specification, upon which it was afterwards granted, were made, and it is the state of the art and not the patent which constitutes anticipation.[51]

The construction of a foreign patent as an anticipation is not governed by what might have been made out of it, but what is inherent and substantially displayed.[52] An American patent describing in its claims but one form of device will not cover a different form described and claimed in a foreign patent previously granted to the inventor notwithstanding the broad language used in the specification.[53] The time of filing an application for a patent in the British patent office,

Worcester Polytechnic Inst. [C. C. A.] 123 Fed. 67.

40. U. S. Mineral Wool Co. v. Manville Covering Co. [C. C. A.] 125 Fed. 770. Rockwell patent No. 471,983 door bell void for lack of invention in view of prior art and especially the English patent to Bennett for a call bell. New Departure Mfg. Co. v. Sargent [C. C. A.] 127 Fed. 152.

41. General Elec. Co. v. Wise, 119 Fed. 922; Nat. Meter Co. v. Neptune Meter Co., 122 Fed. 82.

42. Elec. S. & A. Co. v. Pittsburg Reduction Co. [C. C. A.] 125 Fed. 926.

43. U. S. Peg Wood, S. & L. B. Co. v. Sturtevant Co., 122 Fed. 470.

44. Moore v. Schaw, 118 Fed. 602; Durfee v. Bawo, 118 Fed. 853. A patent otherwise valid is not void for anticipation because a prior patented device might be adapted to the same use where such earlier patent gives no sign that such use was contemplated and no specific directions for such construction. Canda v. Mich. Malleable Iron Co. [C. C. A.] 124 Fed. 486. Grant patent No. 513,998 for making cores is anticipated by machines for making tiles, the machinery not differing in principle. Brown v. Crane Co., 125 Fed. 34.

45. Valle and Tompkins patent No. 421,454 for combined cooker and cake former for oil meal not anticipated. Stillwell, etc., Co. v. Eufaula Cotton Oil Co. [C. C. A.] 117 Fed. 410.

46. Eames v. Worcester Polytechnic Inst. [C. C. A.] 123 Fed. 67.

47. Diamond D. & M. Co. v. Kelly Bros., 120 Fed. 295.

48. Emerson Elec. Mfg. Co. v. Van Nort Bros. Elec. Co., 116 Fed. 974. The court may accept oral evidence of anticipation as sufficient though none of the devices are produced where the testimony is of such a character as to produce conviction beyond a reasonable doubt. Rodwell Sign Co. v. Tuchfarber Co. [C. C. A.] 127 Fed. 138. Under the rule that every reasonable doubt is to be resolved in favor of the patent anticipation will not be found from the oral testimony of witnesses as to different unpatented articles seen by them many years before. Merrimac Mattress Mfg. Co. v. Brown, 122 Fed. 87. The indistinct fixing of a date of invention as a month before an occurrence some years before is not sufficient to carry date of invention back of an application for a patent filed 25 days before the time fixed for the occurrence. Bettendorf Patents Co. v. Little Metal Wheel Co. [C. C. A.] 123 Fed. 433. The testimony of a witness as to the operation of a machine many years prior to the time of giving the testimony must be corroborated. Peters v. Union Biscuit Co., 120 Fed. 679.

49. Bradley v. Eccles [C. C. A.] 126 Fed. 945; Doig v. Morgan Mach. Co. [C. C. A.] 122 Fed. 460.

50. Anderson v. Collins [C. C. A.] 122 Fed. 451.

51. In re Millett, 18 App. D. C. 186.

52. Hanifen v. Armitage, 117 Fed. 845. That the device was in part anticipated by a foreign patent will not constitute a defense where it contains a patentable improvement over the foreign device and defendant has used such improvement. Dececo Co. v. Gilchrist Co. [C. C. A.] 125 Fed. 293.

53. Durfee v. Bawo, 118 Fed. 853.

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although accompanied only by a provisional specification is to be taken as the date of the application within laws providing that no patent shall be granted here where applicant has filed for the same invention in a foreign country more than seven months before.[54]

If the appliances do not anticipate the later patent, it is not material that the description in the specifications is anticipatory.[55]

There is not a prior publication by an article based on hearsay only.[56]

Prior public use.—The exhibition of a design by the inventor to others more than two years before the filing of the application constitutes a prior public use.[57] The use of an invention for two years to the public knowledge will defeat a patent unless it is clearly shown that its use was experimental and it is not important that the use was solely by the inventor and without profit.[58] The defense of a prior public use must be established beyond a reasonable doubt.[59]

Abandonment.—There is a presumption of abandoned experiment and not a reduction to practice where the inventor did not file his application for more than two years after the alleged reduction to practice and after a rival had perfected his invention and filed his application.[60] The failure of a patentee to include a device among the claims of his own invention implies either an abandonment or that he regarded it as well known to the act.[61]

§ 2. *Who may acquire patents.*—The provision of the United States statutes requiring the inventor to make the application may not be evaded.[62] A joint patent will not issue for improvements on machines invented by separate persons without joint participation.[63] There is a presumption that the invention belongs to the employer, where conceived as a result of experiments made by him, or under his direction.[64]

§ 3. *Mode of obtaining and claiming patents.*—A patentee is not required to describe in full all the beneficial functions of his invention,[65] nor state that it extends to the thing patented, however its form or proportions may be varied.[66] Where the result is produced by the use of certain materials, but the only thing specified is that they combine to produce a certain function, and are otherwise unlimited and undefined, the patent will not be sustained.[67] It is necessary for a claim to specify the parts whose co-operative action is essential to the performance of the function, and each of such parts is an essential element of the combination, so that infringement cannot be charged against a machine eliminating one of such parts without the use of an equivalent part.[68]

Irregularities in signing the drawings filed with the application, or in wit-

54. Rev. St. U. S. § 4887. In re Swinburne, 19 App. D. C. 565.

55. Weston Electrical Instrument Co. v. Stevens, 119 Fed. 181.

56. Elec. S. & A. Co. v. Pittsburg Reduction Co. [C. C. A.] 125 Fed. 926.

57. Young v. Clipper Mfg. Co., 121 Fed. 560. The Van Depoele patent No. 390,921 for an improvement in commutator brushes or contacts, the feature of which is the use of carbon as a material for the brushes, is void for a prior public use. Thomson-Houston Elec. Co. v. Lorain Steel Co. [C. C. A.] 117 Fed. 249.

58. Thomson-Houston Elec. Co. v. Lorain Steel Co. [C. C. A.] 117 Fed. 249.

59. Durfee v. Bawo, 118 Fed. 853.

60. Adams v. Murphy, 18 App. D. C. 172.

61. In re Millett, 18 App. D. C. 186.

62. Rev. St. U. S. §§ 4886, 4888, 4892, 4895, 4896, 4920. Fuller v. Schutz, 88 Minn. 372, 93 N. W. 118. One cannot acquire by purchase from the real inventor the right to an invention, so as to receive a patent therefor in his own name, but one other than the true inventor may acquire by contract an interest in the proceeds of the patent in consideration of labor, or the making of models or drawings. Tyler v. Kelch, 19 App. D. C. 180.

63. De Laval Separator Co. v. Vermont Farm Mach. Co., 126 Fed. 536.

64. Miller v. Kelley, 18 App. D. C. 163.

65. Stilwell, etc., Co. v. Eufaula Cotton Oil Co. [C. C. A.] 117 Fed. 410.

66. Klauder-Weldon Dyeing Mach. Co. v. Steadwell Dyeing Mach. Co., 122 Fed. 640.

67. Nat. Meter Co. v. Neptune Meter Co., 122 Fed. 82.

68. Mayo Knitting M. & N. Co. v. Jenckes Mfg. Co., 121 Fed. 110.

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nessing the signatures, will be disregarded where they did not operate as a fraud on the commissioner.[69]

In interference proceedings the question of priority of invention solely is involved.[70] Priority may not be awarded to one not the inventor. The party filing the first application is the senior party, and as such, entitled to the benefit of constructive reduction to practice.[71] It is essential to priority that the invention be reduced to practice,[72] and this requires the exercise of diligence.[73] The junior applicant carries the burden,[74] and he has an additional burden where the patent office decisions have been adverse,[75] and where patent has been granted before the declaration of interference.[76] There is a sufficient reduction to practice where the machine was tested at the time, and found to be operative, and when finally put to the test of actual commercial value, it was shown that there was nothing wanting to its practicability.[77] Where the device is simple, and the purpose and object obvious, the construction of one, of a size and form intended for use, may be regarded as reduction to practice without actual use or test.[78] Where there is no satisfactory evidence of reduction to practice by either party before filing their applications, the one first to conceive the invention, and first to file is entitled to priority.[79] The rights of a party to an interference become fixed by filing application in patent office, and lack of diligence thereafter in prosecuting claims has no bearing on ques-

69. Hallock v. Babcock Mfg. Co., 184 Fed. 226.

70. Swihart v. Mauldin, 19 App. D. C. 570. And not patentability. Austin v. Johnson, 18 App. D. C. 83.

71. Tyler v. Kelch, 19 App. D. C. 180. The party to an interference, who was first to file his application, is regarded as the senior applicant, although while it was pending his rival's application went to patent. Miehle v. Read, 18 App. D. C. 128. Where the record in an interference case shows that one of the parties stated in answer to a question of his counsel, that he did not claim to be the inventor of the matter in controversy, priority cannot be awarded to him. Oliver v. Felbel, 20 App. D. C. 255.

72. Scott v. Scott, 18 App. D. C. 420; Howard v. Hey, 18 App. D. C. 142; Eastman v. Houston, 18 App. D. C. 185. It is the fact of reduction to practice, actual or constructive, or the exercise of due diligence to reach that result, that must determine the right of the inventor, and prior conception, without reduction to practice, unless there has been diligence in that direction, will not avail. Silverman v. Hendrickson, 19 App. D. C. 381. Where the device made was crude, and the inventor did not regard it as fit for practical use, there is no reduction to practice, although others made from the same pattern were successful. Lindemeyr v. Hoffman, 18 App. D. C. 1. Where there has been no fraudulent concealment or abandonment, nor unreasonable delay in applying for a patent, the device having been reduced to practice, the inventor will be protected against one putting a similar article on the market and applying earlier. Oliver v. Felbel, 20 App. D. C. 255.

73. Miehle v. Read, 18 App. D. C. 128; Oliver v. Felbel, 20 App. D. C. 255; Stapleton v. Kinney, 18 App. D. C. 394. Failure to reduce to practice for thirteen years, is not excused by search for seven years for proper material, and poverty thereafter, when it appears that the difficulty as to material was to get it more easily, and no efforts were made to interest others in a financial way. Petrie v. De Schweinitz, 19 App. D. C. 386. One will forfeit his rights in favor of a more diligent rival, where he conceals his invention after completion, without reasonable excuse, until after the grant of the patent to his rival. Thomson v. Weston, 19 App. D. C. 373. An inventor is lacking in diligence who conceives a patent, and lays it aside and is doing nothing with same, when rivals, some months later, enter the field, when he could have reduced the invention to practice either actually or constructively, by filing application at any time he desired. Austin v. Johnson, 18 App. D. C. 83.

74. Funk v. Haines, 20 App. D. C. 285, 293.

75. The junior party has an additional burden where there have been three concurrent decisions of the patent office against him, notwithstanding a dissent in the board of examiners in chief. Swihart v. Mauldin, 19 App. D. C. 570. The junior party to an interference, whose adversary holds the patent for a disputed invention, must prove priority beyond a reasonable doubt, particularly where the patent office tribunals have twice decided against him. Gedge v. Cromwell, 19 App. D. C. 192. The decisions of the expert tribunals of the patent office as to the sufficiency of the disclosure in the application to support the invention, defined in the counts of the issue of an interference, will be accepted as conclusive, on appeal, in deciding the question of priority, especially where the art to which the invention belongs is abstruse. Stone v. Pupin, 19 App. D. C. 396. Where all the patent office tribunals have concurred adversely to applicant, he is required to make a very strong case on appeal to obtain a reversal. Howard v. Hey, 18 App. D. C. 142.

76. Sharer v. McHenry, 19 App. D. C. 158.

77. Roe v. Hanson, 19 App. D. C. 559.

78. Loomis v. Hauser, 19 App. D. C. 401.

79. Lindemeyr v. Hoffman, 18 App. D. C. 1.

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tion of priority.[80] The senior party should prevail where the evidence shows that he conceived the invention, and employed the junior party to construct the models, and the latter was wanting in diligence in filing his application.[81] Evidence in interference proceedings and decision thereon cannot be used against one not a party to such proceedings.[82] The testimony must be clear and convincing.[83]

The disclosure in the sense of the patent office must be made ordinarily to persons competent to understand and appreciate the alleged invention.[84]

Abandonment is shown by the failure of an applicant for a patent to take action for nearly three years after rejection.[85] A court may properly give a certificate that an abandoned application for a patent will be received in evidence, in a suit in equity, without regard to its materiality or relevancy, if such certificate is required by the patent office as a prerequisite to the production or certification of the document or a copy thereof.[86] A second application, describing the device precisely in the language of a former application, which was abandoned by permission, will be treated as a continuation of the first.[87]

There may be no *appeal from the commissioner,* there must be a final adjudication, as there can be no interference unless there is a patentable invention.[88] The decision of the patent office will be reversed where there was no difference between the allowed claim and the one rejected as anticipated.[89]

§ 4. *Letters patent.*—An inventor may patent both the process of producing a new and useful result, and also the mechanical means by which it is produced.[90] A second patent will not issue for an element covered by a former patent as a whole.[91] A design patent will not cover the mechanical construction by which the shape of the article is produced.[92]

Limitation of claims.—Where the language of the claim is clear the patentee is limited thereby,[93] and the claim will not be enlarged, though not broad enough to cover patentee's actual invention.[94] The term "substantially as specified" cov-

80. Michle v. Read, 18 App. D. C. 128.
81. Tyler v. Kelch, 19 App. D. C. 180.
82. Westinghouse E. & M. Co. v. Roberts, 125 Fed. 6.
83. Uncorroborated testimony of one of the parties to an interference as to a prior conception, the making of drawings, and actual construction, will not be accepted, though plausible. Sharer v. McHenry, 19 App. D. C. 158. Testimony of one of the parties to an interference, as to declarations of his adversary as to the matter in controversy, is inadmissible, where the latter died before the testimony was taken. Tyler v. Kelch, 19 App. D. C. 180. Self serving declarations are incompetent to prove fact of reduction to practice. Petrie v. De Schweinitz, 19 App. D. C. 386.
84. Eastman v. Houston, 18 App. D. C. 135; Westinghouse E. & M. Co. v. Roberts, 125 Fed. 6.
85. Lay v. Indianapolis B. & B. Mfg. Co. [C. C. A.] 120 Fed. 831. The negligence of an attorney which works an abandonment does not constitute unavoidable delay. Lay v. Indianapolis B. & B. Mfg. Co. [C. C. A.] 120 Fed. 831.
86. MacWilliam v. Conn. Web Co., 119 Fed. 509.
87. Waterman Co. v. Forsyth, 121 Fed. 103.
88. Oliver v. Felbel, 20 App. D. C. 255. An appeal will not lie from an interlocutory order of the commissioner, denying a petition to reverse the order of primary examiners, requiring a division of petitioner's application. In re Frasch, 20 App. D. C. 398.
89. In re Foster, 19 App. D. C. 391.
90. Dayton F. & M. Co. v. Westinghouse E. & M. Co. [C. C. A.] 118 Fed. 562. An inventor has the right, by contemporaneous applications, to a generic and specific patent, and when he has thus applied, he does not lose the right to his generic patent because one or more of the specific patents may be issued first, nor will he lose the right by a later filing of an amended or new application, changing the specification of the generic invention, where the patent is still sought as originally claimed. Badische A. & S. Fabrik v. Klipstein & Co., 125 Fed. 543.
91. Thomson-Houston Elec. Co. v. Black River Traction Co., 124 Fed. 495.
92. Royal Metal Mfg. Co. v. Art Metal Works, 121 Fed. 128.
93. Westinghouse Air Brake Co. v. N. Y. Air Brake Co. [C. C. A.] 119 Fed. 874; Painton Electrical S. S. & C. Co. v. Elec. Boat Co., 126 Fed. 193; Moore v. Myer-Sniffen Co., 126 Fed. 191; Gordon v. Carnegie Steel Co., 126 Fed. 538; Schaum v. Riehl, 124 Fed. 320; Hewes v. Draper Co., 126 Fed. 762.
94. Schreiber & C. Mfg. Co. v. Adams Co. [C. C. A.] 117 Fed. 830. While an element may be read into a claim when necessary to prove the operativeness of the patent, it cannot be done for the purpose of making out a case of novelty or infringement. Canda Bros. v. Mich. Malleable Iron Co., 123 Fed. 95. Though the patentee may not enlarge the scope of his invention by reference to a function not mentioned in the claim, yet the actual operation may be shown by other

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ers only elements in combination having substantially the form, and constructed substantially as described in the final specifications.[95] The words "to operate substantially as described" do not bring into the claim elements described in the specification, but not mentioned in the claim.[96] The scope of the claims is not limited by verbal changes made to meet patent office objections, but not abandoning any of the essential features claimed and described in the specification,[97] nor by statements of counsel, on argument to obtain a reconsideration after rejection of application.[98] A specification may be resorted to, to aid a claim, when the claim refers to the specification for further description,[99] where the language of a claim for a combination describes an element in general terms.[1] The elements of a combination described in the specification of a patent, and covered by some of the claims, but not mentioned in a particular claim, cannot be read into such claim to increase damages for infringement.[2] Features of construction recommended by the specification do not thereby become essential parts of the patent, or limit the claims.[3] A feature added to a claim by amendment will be held essential in a suit for infringement.[4]

A pioneer invention is entitled to a liberal construction.[5] The word "pioneer," although used somewhat loosely, is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as

persons, on the question of anticipation. U. S. Peg Wood, S. & L. Co. v. Sturtevant Co., 122 Fed. 470.

95. Cramer patent, No. 271,426, sewing machine treadle. Singer Mfg. Co. v. Cramer, 192 U. S. 265.

96. General Elec. Co. v. International Specialty Co. [C. C. A.] 126 Fed. 755. Where the inventor expressly declares with regard to his invention generally, that by describing in detail any particular arrangement, he does not intend to limit himself beyond the terms of his several claims or the requirements of the prior art, there is infringement by any construction of the general character called for, which fulfills its terms notwithstanding the words "substantially as described" at the end. Boyer v. Keller Tool Co. [C. C. A.] 127 Fed. 130. A claim that "the combination with the belt, bag or other article having ends or edges to be connected, said edges each having a row of apertures or individual spiral coils extending through said apertures whereby strips are formed within each coil and a rod to be passed through and removed from the space formed by the overlapping portions of said coils" is not limited to a construction in which the strips formed by the ends or edges of the belt or material within the coils, overlap or abut each other, so as to form a complete closure. Jackson patent No. 433,791. Kelley Bros. v. Diamond D. & M. Co., 123 Fed. 882.

97. Diamond D. & M. Co. v. Kelly Bros., 120 Fed. 282.

98. Boyer v. Keller Tool Co. [C. C. A.] 127 Fed. 130.

99. Canda v. Mich. Malleable Iron Co. [C. C. A.] 124 Fed. 486. Where the identity or specific character of the thing patented is affected by the means or method of its manufacture, the rule that when the patent is for a product of manufacture, it is not material by what means or by what process it is manufactured, does not apply, and the claims are construed with reference to the specifications and drawings describing such means, and limited to the article so produced, although not so limited in terms. Lamb Knit Goods Co. v. Lamb G. & M. Co. [C. C. A.] 120 Fed. 267.

1. Stilwell, etc., Co. v. Eufaula Cotton Oil Co. [C. C. A.] 117 Fed. 410. Though an element not stated in the claim cannot be brought forward from the specifications and imported into it, yet the specifications may be resorted to, to explain the claim and give it character. Nat. Meter Co. v. Neptune Meter Co., 122 Fed. 75.

2. Penfield v. Potts & Co. [C. C. A.] 126 Fed. 475.

3. Smeeth v. Perkins [C. C. A.] 125 Fed. 285.

4. Ludington Novelty Co. v. Leonard, 119 Fed. 937.

5. An invention which oversteps the boundary of pre-existing knowledge, both as to structure and scientific principles, is given a liberal construction of descriptive specification. Stone v. Pupin, 19 App. D. C. 396. The use of the words "substantially as described" in a claim is not to limit the claim to the precise construction shown in the specification, nor to deprive patentee of benefit of doctrine of equivalents, where the invention is of a primary character. Lowrie v. Meldrum Co., 124 Fed. 761. Lange patent No. 434,153 for an incandescent lamp socket, not limited by the prior art. Bryant Elec. Co. v. Buchanan, 124 Fed. 537. Dolan patent No. 589,342 for an acetylene gas burner tip. Kirchberger v. American Acetylene Burner Co., 124 Fed. 764. Gorton patent, No. 252,470, for hose supporter. George Frost Co. v. Crandall Wedge Co. [C. C. A.] 125 Fed. 942. An invention, the first to make structures for a particular purpose a commercial art, and an improvement over all its predecessors in many particulars, is entitled to protection, and to a reasonable application of the doctrine of equivalents. Harder patent, No. 627,732, for improvements in silos. Ryder v. Schlichter [C. C. A.] 126 Fed. 487.

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distinguished from a mere improvement or perfection of what had gone before.[6] Where the patent is for a device of which there is a *prior art,* the claim will receive a narrow construction, depending on the state of such art.[7] Where an invention is meritorious, the inventor, though not a pioneer, is not cut off from a reasonable range of equivalents measured by the advances he has made over older machines.[8] The benefit of the doctrine of equivalents may be claimed, although the allowance be narrow.[9] Where the claim covers a combination of elements, without indicating their relative importance, a court may not hold any element not essential.[10] In a generic process patent every phenomenon observed during operation, and every minute detail described, is not required to be read into the claims, so that the least departure therefrom will avoid infringement.[11] The fact that the machine of a patent is capable of a method of use not referred to, nor indicated in the patent, cannot be availed of to affect the construction of the claims.[12]

§ 5. *Duration of patent right and surrender and reissues.*—Delays attributable to interference proceedings will not shorten the life of the patent.[13] The expiration of patents for improvements will not affect the validity of the basic patent.[14] Where the American patent shows an improvement of utility making it a

6. Singer Mfg. Co. v. Cramer, 192 U. S. 265.

7. And is not infringed by a machine in which any element of the patented machine is lacking. Wilson v. Townley Shingle Co. [C. C. A.] 125 Fed. 491. Thill coupling. Bradley v. Eccles [C. C. A.] 126 Fed. 945. Wells patent, No. 412,442, for eye glasses. Julius King Optical Co. v. Bilhoefer [C. C. A.] 127 Fed. 127. Brown patent, No. 450,216, for a pocket safe for coins. Little Gem Mfg. Co. v. Strauss, 124 Fed. 900. A patent for a ferrule and point, united by a dovetailed joint, for umbrellas and canes. Evans v. Newark Rivet Works [C. C. A.] 126 Fed. 492. Calvert patent, No. 651,413, for an adjustable switch rod, not infringed by Strom patent, No. 625,961. Ajax Forge Co. v. Pettibone, M. & Co. [C. C. A.] 125 Fed. 748. Beaumont patent, No. 555,033, bath water heater. Henry Huber Co. v. Mott Iron Works [C. C. A.] 125 Fed. 944. Lewis patent, No. 609,513, for veneer cutting machine. U. S. Peg-Wood, S. & L. B. Co. v. Sturtevant Co. [C. C. A.] 125 Fed. 382. Brislin and Vinnac patent, No. 345,393, for feeding mechanism for rolling mills. Carnegie Steel Co. v. Brislin [C. C. A.] 124 Fed. 213. Cramer patent, No. 271,426, support for sewing machine treadle. Singer Mfg. Co. v. Cramer, 192 U. S. 265. McMichael & Wildman patent, No. 500,151, for an automatic rib knitting machine. McMichael & W. Mfg. Co. v. Ruth, 123 Fed. 888. Kitselman patent for wire fabric machines. Kokomo Fence Mach. Co. v. Kitselman, 189 U. S. 8, 47 Law. Ed. 689. No. 532,973, for "Improvements in screw presses for forming insulators." Brookfield v. Novelty Glass Mfg. Co., 124 Fed. 551. Farwell patent, No. 493,548, for adjustable stove damper. Schreiber & C. Mfg. Co. v. Adams Co. [C. C. A.] 117 Fed. 830. Sawyer patent, No. 462,065, for a numbering machine. William A. Force & Co. v. Independent Mfg. Co., 124 Fed. 72. Sample patent, No. 498,962, for a draft tube for soda fountain. Sample v. American Soda Fountain Co., 126 Fed. 760. White patent, No. 548,149, for a stereoscope. White Co. v. Walbridge [C. C. A.] 126 Fed. 373. Claims are construed narrowly, and limited in their scope to such extent as the prior art required where earlier English patents cover substantially everything involved in the American patent. Golden Gate Mfg. Co. v. Newark Faucet Co., 124 Fed. 531. Where nail holes punched in the frame of a patented device were used for fastening it to a support, and also had a functional use in connection with the operation of the machine, they are only protected as to the latter use. Cary Mfg. Co. v. Standard Metal Strap Co. [C. C. A.] 120 Fed. 945. Nation patent, No. 521,174, duster for cleaning carpets by means of compressed air, in view of prior act disclosing like methods, not a primary invention and not infringed by the Thurman patents Nos. 634,042, 666,943 and 665,983, for cleaning carpets on floor. Wis. C. A. House Cleaning Co. v. American C. A. Cleaning Co. [C. C. A.] 125 Fed. 761.

8. Dowagiac Mfg. Co. v. Minn. Moline Plow Co. [C. C. A.] 118 Fed. 136.

9. Levy v. Harris, 124 Fed. 69.

10. U. S. Peg Wood, S. & L. B. Co. v. Sturtevant Co., 122 Fed. 476. In a claim of a patent for a combination, all the elements which the patentee has specified must be regarded as material, and there is no infringement by a device in which one of the elements is omitted, unless an equivalent element is substituted. Levy v. Harris, 124 Fed. 69.

11. Elec. S. & A. Co. v. Pittsburg Reduction Co. [C. C. A.] 125 Fed. 926.

12. U. S. Peg-Wood, S. & L. B. Co. v. Sturtevant Co. [C. C. A.] 125 Fed. 378; Id., 122 Fed. 470. A patent for a device stating that a part is preferably made of a certain material is not rendered invalid by the fact that when made of other material the device is inoperative. Kirchberger v. American Acetylene Burner Co., 124 Fed. 764.

13. Electric Storage Battery Co. v. Buffalo Elec. Carriage Co., 117 Fed. 314. Where the reissue application is involved in an interference with a patent, the application is to be regarded as a continuation of the original application and the date of the original application is the date of a constructive reduction to practice. Austin v. Johnson, 18 App. D. C. 83.

14. Electric Storage Battery Co. v. Buffalo Elec. Carriage Co., 117 Fed. 314.

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patentable invention, the American patent will not expire with the earlier British patent.[15]

A reissue will not be invalidated because the claim is broader than that of the original patent.[16] A delay of five years in applying for a reissue on the ground of inadvertence, accident, or mistake, invalidates the reissue unless excused by special circumstances.[17]

§ 6. *Titles in patent rights and license, conveyance, or transfer thereof. In general.*—Rights under patent laws cannot be affected by state statutes.[18] A patent is not rendered invalid because the patent mark is placed on the part of the article not patented.[19] An act requiring notes for patent rights to recite that fact and making it a misdemeanor to knowingly take or transfer notes for natent rights not having such recital does not invalidate notes omitting the recital or affect the rights of bona fide purchasers without notice of the considerations.[20]

Transfer.—The assignment must be supported by a consideration.[21] The invention may be sold under an oral agreement pending an application for the patent.[22] The law will imply a written assignment where necessary to pass title.[23] An instrument granting an exclusive right under a pending patent and containing an agreement to assign future patents for like machines does not legally assign patents granted on subsequent application that will support a suit by grantee for infringement.[24] An action to compel the transfer of a patent is within the jurisdiction of a state court where both parties treat the patent as valid.[25] A contract can only be enforced where the vendor possessed the rights recited.[26] A patentee refusing to assign after performance of condition by assignee may not sue for infringement.[27] The assignment by a sole patentee of all his right, title, and interest "being an entire interest therein" vests the title in the assignee.[28] A sale of the exclusive right to manufacture, use and sell for use a patented invention in a specified territory for a stated period carries with it an interest in the patent right itself and constitutes a sale of a patent right within state registry laws.[29] The anti-trust law is not violated by assignment of numerous patents for similar inventions to one of the owners to control the issuance of licenses for all.[30] A contract of assignment by which the assignee is to pay a certain amount annually as an "annuity" during the life of the patent may be enforced by assignor's legal representatives

15. Aquarama Co. v. Old Mill Co., 124 Fed. 229.

16. Fay v. Mason, 120 Fed. 506.

17. United Blue-Flame Oil Stove Co. v. Glazier [C. C. A.] 119 Fed. 157.

18. U. S. Consol. Seeded Raisin Co. v. Griffin & Skelley Co. [C. C. A.] 126 Fed. 364.

19. Rev. St. § 4901, provides a penalty for attachment of patent mark on unpatented article. Dade v. Boorum, 121 Fed. 135.

20. Brown v. Pegram [C. C. A.] 125 Fed. 577. Under an act making it a misdemeanor to take or sell a note given for a patent right without recital of that fact there can be no recovery on a note omitting the recital by one violating the statute nor by a transferee with knowledge. Pinney v. First Nat. Bank [Kan.] 75 Pac. 119.

21. Cook v. Sterling Elec. Co., 118 Fed. 45; Cowles v. Rochester Folding Box Co., 81 App. Div. [N. Y.] 414.

22. Cook v. Sterling Elec. Co., 118 Fed. 45.

23. Thourot v. Holub, 81 App. Div. [N. Y.] 634.

24. Milwaukee Carving Co. v. Brunswick-Balke-Collender Co. [C. C. A.] 126 Fed. 171.

25. Fuller v. Schutz, 88 Minn. 372, 93 N. W. 118.

26. Kent v. Addicks [C. C. A.] 126 Fed. 112.

27. The owner of a patent refusing to assign it in violation of an agreement cannot recover from his intended assignee for an infringement. Schmitt v. Nelson Valve Co. [C. C. A.] 125 Fed. 754; Id., 121 Fed. 93.

28 Canda v. Michigan Malleable Iron Co. [C. C. A.] 124 Fed. 486.

29. Pinney v. First Nat. Bank [Kan.] 75 Pac. 119. A cloud on a title may be created by matter not of record as in case of unrecorded assignments of patents. Columbia Nat. Sand Dredging Co. v. Miller, 20 App. D. C. 245.

30. Contracts by which a number of patents for similar inventions are conveyed to one of the owners to grant licenses under all to the others do not violate the federal trust laws by requiring licensor to prosecute all infringers, limiting licenses to persons agreed upon and imposing conditions on their use and prohibiting the use of others. U. S. Consol. Seeded Raisin Co. v. Griffin [C. C. A.] 126 Fed. 364.

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after his death as the term "annuity" does not intend a period terminable by assignor's death.[31] A sale induced by fraud may be rescinded.[32] One suing to rescind a contract for fraud is entitled to interest on the sum paid from the date of filing his bill to rescind,[33] and it is not required that property be returned in condition received.[34] A contract for reassignment of a patent pledged as collateral security when a certain amount of stock had been sold to be used as a working capital intends the sale of such stock for cash.[35] An inventor confiding his secret to a large purchaser may protect himself and customers against a patent procured in bad faith by such purchaser.[36] An agreement by a patentee to furnish evidence for a third person in actions against the assignees of the patentee to set aside his transfer of patents to them is against public policy.[37]

On insolvency, a patent assigned to a corporation passes to the receiver.[38]

Licenses.—The license conveys no part of the patent,[39] and the transfer of the patent will not affect rights of a prior licensee.[40] A patentee in granting a license impliedly warrants that he possesses the title to the patent right but does not warrant the validity of the letters patent.[41] Exclusive licenses are not in restraint of trade.[42] The patentee may license the use of the name in connection with the right to manufacture and sell the article.[43] The question of sufficiency of the license is a question for the court.[44] Acquiescence and construction of the parties may be followed in construing license.[45]

21. Goodyear Shoe Machinery Co. v. Dancel [C. C. A.] 119 Fed. 692. In a suit against the assignee of patentee's assignee as to the payment of an annuity during the life of the patent which defendant's assignee had agreed to pay, the complaint was fatally defective in failing to allege a contract between the patentee and defendant. Dancel v. United Shoe Machinery Co., 120 Fed. 839.

32. In an action for fraud in inducing purchaser to pay more for a third interest in a patent than the sellers asked for the entire interest, it is no defense to a suit to set the assignment aside for the fraud that the purchaser was willing to pay the amount he did. Felt v. Bell, 205 Ill. 213, 68 N. E. 794. It may not be urged as a defense that the purchaser only had an undivided third interest and could not return same. Felt v. Bell, 205 Ill. 213, 68 N. E. 794. It cannot be urged that the purchaser ratified the fraudulent sale in the absence of evidence of his knowledge thereof. Id. Suit may not be defeated on the ground that complainant could not place defendants in statu quo on account of the forfeiture of the patent under the laws of a foreign country. Id.

33. Felt v. Bell, 205 Ill. 213, 68 N. E. 794.

34. Bell v. Felt, 102 Ill. App. 218.

35. Janney v. Pancoast International Ventilator Co., 122 Fed. 535.

36. An inventor disclosing his invention to one agreeing to purchase large quantities thereof and to keep same a secret may enjoin such person having in violation of the agreement obtained a patent thereon in his own name from suing his customers for infringement and have the invalidity of the patent adjudicated. Murjahn v. Hall, 119 Fed. 186.

37. Cowles v. Rochester Folding Box Co., 81 App. Div. [N. Y.] 414.

38. Douglass v. Campbell, 24 Ohio Circ. R. 241.

39. A license neither transfers the whole or an undivided part of the patent nor the exclusive right to use the patented article and hence one withholding payment of royalty on the ground of infringement may not claim that he is the assignee. Macon Knitting Co. v. Leicester Mills Co. [N. J. Eq.] 55 Atl. 401. A grant by a patentee of the exclusive right to manufacture the patented article within a certain territory is a mere license, and gives no title to the patent in the territory, so as to sue for infringement by one using the article in the territory and made by one outside the territory. Excelsior Wooden Pipe Co. v. Seattle [C. C. A.] 117 Fed. 140.

40. Whitson v. Columbia Phonograph Co., 18 App. D. C. 565.

41. Macon Knitting Co. v. Leicester Mills Co. [N. J. Eq.] 55 Atl. 401.

42. An exclusive license for a given territory and forbidding licensee to sell a similar construction during the life thereof is not void as in restraint of trade. Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008. A contract whereby the owner of patents grants to another the exclusive right to lease the instruments to the public at specified rates within a designated territory, the property in the instruments to remain in the owner is not invalid as in restraint of trade nor as seeking to impress on personalty a qualified ownership inconsistent with freedom of transfer. Whitson v. Columbia Phonograph Co., 18 App. D. C. 565.

43. Adam v. Folger [C. C. A.] 120 Fed. 260.

44. A patent lawyer is incompetent to testify as to sufficiency. Rankin v. Sharples, 206 Ill. 301, 69 N. E. 9.

45. A license executed by the owner of a number of patents "except respecting" a certain patent will be held to exclude such patent particularly where the parties have so construed the contract for a number of years. Leonard v. Crocker Wheeler Co., 126 Fed 375. A party to a contract with the patentee for the period of its extension may ratify an agreement between the patentee and

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Corporations[46] *and firms* do not have an implied license to use inventions of officers or members.[47]

A license not expressly limited continues in force during the life of the patent unless sooner forfeited or terminated by mutual consent.[48] A contract giving one charge of the introduction of a patented article in a state reserving right to annul by written notice is not for the term of the patent.[49]

A licensee whose license is not such as to amount to an assignment of the patent is not a necessary party complainant in a suit for its infringement.[50] A licensee having the right to join the patentee in a suit for infringement with or without his consent may prosecute an appeal from an adverse decree, though the patentee declines to join, by having him summoned and his refusal entered of record.[51] An exclusive licensee within certain territory may enjoin a third person who with knowledge of the license is conspiring with licensor to violate his contract rights by selling the article in licensee's territory and the licensor is not a necessary party.[52] A contract of the patentee to protect his letters patent against attack by others imposed no duty to protect licensee from unlawful manufacture and sale of infringing devices.[53]

Where the first instalment of patented machines delivered to licensee were defective, there is a presumption that later instalments were also defective.[54] The burden of proving defects in machines is on the licensee where they have been installed and operated for a season under the supervision of the licensor.[55]

A contract between owners of related patents whereby proceeds of licenses sold by either should be divided and also moneys recovered as damages for infringement will include recovery denominated "profits" and not damages.[56]

The owner of the patent may fix the prices at which the article may be sold by dealers and a dealer selling with knowledge of the reservation will be an infringer.[57]

Royalties may not be collected where there is an eviction by proof of invalidity or infringement.[58] It must very clearly appear that the court held the patent void before the decision can be used to defeat a suit for royalties.[59] The liability of the licensee of two patents on the last expiring patent is not affected by manufacture

another for such term by acquiescence therein with knowledge though not a party thereto. American Tube Works v. Bridgewater Iron Co., 124 Fed. 782.

46. A corporation has no implied license to use inventions patented by its president though work on same is done by employes of corporation where the same was paid for out of the president's own funds. Burden v. Burden Iron Co., 39 Misc. [N. Y.] 559.

47. Burden v. Burden Iron Co., 39 Misc. [N. Y.] 559.

48. American Street Car Advertising Co. v. Jones, 122 Fed. 803.

49. Kenny v. Knight, 119 Fed. 475.

50. Peters v. Union Biscuit Co., 120 Fed. 679.

51. Excelsior Wooden Pipe Co. v. Seattle [C. C. A.] 117 Fed. 140.

52. New York Phonograph Co. v. Jones, 123 Fed. 197.

53. Kline v. Garland [Mich.] 97 N. W. 768. The fact that patentee notified infringers to stop infringement did not impose on him the duty to protect his licensee from infringement, he contracting merely to protect his letters patent against attack by others. Id.

54. Macon Knitting Co. v. Leicester Mills Co. [N. J. Eq.] 55 Atl. 401. To constitute a machine practically operative within a contract with a licensee, the operativeness must be tested by the purpose for which the machine is built, by the work of other like machines, by the quantity and quality of goods produced and the durability of the machine and its freedom from liability to get out of repair and waste material. Id.

55. Macon Knitting Co. v. Leicester Mills Co. [N. J. Eq.] 55 Atl. 401.

56. Wooster v. Trowbridge [C. C. A.] 120 Fed. 667.

57. Victor Talking Mach. Co. v. The Fair [C. C. A.] 123 Fed. 424.

58. A decree against a licensee determining the machine an infringement is an eviction of the licensee and will relieve him from the payment of royalties. Macon Knitting Co. v. Leicester Mills Co. [N. J. Eq.] 55 Atl. 401. Where a licensee receives information of infringement, he may abandon the license at once and is not required to await eviction. Id.

59. Sherbourne v. Willcox & G. Sew. Mach. Co., 119 Fed. 371. Where defenses pleaded were invalidity of patent and non-infringement and decree dismissing bill is not based specifically on either, it will not be regarded as an adjudication of invalidity in an action for royalties. Wilcox & G. Sewing Mach. Co. v. Sherborne [C. C. A.] 123 Fed. 875.

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by other parties after expiration of the first patent.[60] So long as the licensee continues to manufacture the patented article, he is presumed to do so under the license and is liable for royalties thereunder.[61] The contract may not be varied by parol without consideration.[62] Under a contract for the payment of semi-annual royalties, it will be presumed that none were due in less than six months from installation of the machine.[63] A president of a corporation inventing a device which is manufactured by the corporation is not entitled to royalties prior to issuance of the patent.[64] A contract for sale of patented articles under which the buyer was to retain a certain sum for a period to indemnify him and his guarantied vendees from consequences of possible infringements did not impose on the seller the burden of proving termination of infringement litigation against buyer and purchasers from him.[65]

A suit in equity may be maintained for the cancellation of a license and to obtain an accounting for royalties.[66] A suit for royalties by an assignee is not barred by laches where the license given by the patentee was not brought to his knowledge until after the death of his assignor.[67] The contract between the Western Union Telegraph company and the American Bell Telephone company under which the telephone interests of the former were transferred to the latter, a certain percentage of royalties received to be paid to the former established a relation of trust and gave a court of equity jurisdiction of an accounting in behalf of the Western Union company.[68] The measure of damages for breach of a royalty contract is the amount licensors would have received had the contract been complied with.[69] Under a royalty contract providing that labor should be calculated at "the average shop cost per man," it was proper to add to the actual cost of labor a certain per cent for operating expenses.[70]

§ 7. *Infringement. A. What is.*—There is an infringement where a person, without legal permission, makes, uses, or sells to another, to be used, a thing which is the subject-matter of an existing patent.[71] It is not important that party

60. Kline v. Garland [Mich.] 97 N. W. 768.

61. American Street Car Advertising Co. v. Jones, 122 Fed. 803.

62. Where the written contract fixed the amount of the royalties, licensee may not avail himself of a parol agreement that they should never exceed the lowest amount paid by other licensees. Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008. The failure of patentee to protect against infringement was a sufficient consideration for a parol modification thereof abrogating a provision thereof for payment of minimum royalty. Taylor Gas Producer Co. v. Wood [C. C. A.] 125 Fed. 337.

63. Warth v. Liebovitz, 83 App. Div. [N. Y.] 632. Under a contract for a patent machine, a first payment provided therein is not a royalty within a clause for terminating royalties by the return of the machine and payment of royalties to date. Id. A formal acceptance of proposal to install a patent machine and its installation dispensed with the necessity of signing the agreement notwithstanding a provision requiring signature. Id.

64. Steward Mfg. Co. v. Steward, 109 Tenn. 288, 70 S. W. 808.

65. Rankin v. Sharples, 206 Ill. 301, 69 N. E. 9.

66, 67. American Street Car Advertising Co. v. Jones, 122 Fed. 803.

68. Term "rentals or royalties actually received or rated as paid" covered gross sums received by the telephone company for perpetual or other exclusive licenses under the patents embraced in the contract, for which it gave no consideration except such licenses. Western Union Tel. Co. v. American Bell Tel. Co. [C. C. A.] 125 Fed. 342.

69. Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008.

70. Pleading construed not to admit the right to add cost of drawings, patterns, advertising in addition to the 60 per cent. Bates Mach. Co. v. Cookson, 202 Ill. 248, 66 N. E. 1093.

71. Cyc. Law Dict. It is essential to recovery for infringement that use of invention without patentee's consent be proved. Kilburn v. Holmes [C. C. A.] 121 Fed. 750.

Infringed: Palmer patents, No. 308,981, and No. 308,982, machines for quilting fabrics. Palmer v. Landphere, 118 Fed. 52.

Not infringed: Edison patents, Nos. 397,280, and 430,278, for phonograph reproducers infringed; No. 484,584, covering specific parts of such reproducers. National Phonograph Co. v. Fletcher, 117 Fed. 149. Johnson patent, No. 679,896, for an improvement in sound boxes for talking machines. Victor Talking Mach. Co. v. American Graphophone Co., 125 Fed. 30. Broderick patent, No. 377,706, for improvements in prepared sheets for stencils infringed. Dick v. Pom-

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did not intend to infringe,[72] nor is it important that the purchaser was the agent of the owner of the infringed article,[73] and two or more sales from stock on hand, to the agent, may justify inference of other sales and warrant a decree for an accounting.[74] The question of infringement of a design is determined by a comparison of designs, and does not depend on whether purchasers of the article were deceived.[75] The decisive test is whether the operation of the device, when in use, is the same and produces the same result, and not the possibility of a different use.[76] Substantial identity is required in the process,[77] machine,[78] or composition,[79] and infringement is not avoided by the use of new and improved apparatus,[80] or by changing proportions to increase effectiveness,[81] or by slight and immaterial departures from the drawings,[82] or by adding a nonfunctional part, or a change in the position of the parts, which does not change the method of operation.[83] There is infringing identity where the principle of operation,[84] or the form or arrangement is the same.[85]

eroy Duplicator Co., 117 Fed. 154. Thomson patent, No. 430,328, for an alternating current, claims 1 and 2. Thomson-Houston Elec. Co. v. Wagner Elec. Mfg. Co. [C. C. A.] 126 Fed. 170. Stanley patent, No. 469,809, for electrical distribution. Westinghouse Elec. & Mfg. Co. v. Stanley Elec. Mfg. Co., 117 Fed. 309. Edison patents, Nos. 382,418, and 414,761, for phonogram blanks made of wax or other soft substances are not infringed by patents for phonograms which are reproductions in celluloid by means of molds. Nat. Phonograph Co. v. Lambert Co. [C. C. A.] 125 Fed. 922. McCarthy patent, No. 478,168, for improvements in casket handles not infringed by device in Klein patent No. 559,898 there being no similarity. McCarthy v. Westfield Plate Co., 124 Fed. 897.

72. Alaska Packers' Ass'n v. Letson, 119 Fed. 599.

73. Chicago Pneumatic Tool Co. v. Phila. Pneumatic Tool Co., 118 Fed. 852.

74. Badische Anilin & Soda Fabrik v. Klipstein, 125 Fed. 543.

75. Kruttschnitt v. Simmons, 118 Fed. 851.

76. Davis v. Perry [C. C. A.] 120 Fed. 941. A machine does not infringe where it is not only structurally different, but performs the other operations in a substantially different way. Westinghouse Air Brake Co. v. New York Air Brake Co. [C. C. A.] 119 Fed. 374.

77. A process for paper board, made from newspapers, the essential feature of which is the retention of oils from printers' ink instead of its elimination, as formerly practiced, is infringed by a board made by a process having the same end in view and only colorably different by the use of a slight quantity of alkali, and the substitution of cold for hot water in one part of the process. National Newsboard Co. v. Elkhart Egg Case Co. [C. C. A.] 123 Fed. 431. A patent under a claim, as set forth in specification, that a core for packing to extend through entire length of the enclosing tube of rubber is not infringed by the use of a tubular lead dowel, only two inches in length, to unite the ends of a tubular rubber packing to form a gasket. Peerless Rubber Mfg. Co. v. White [C. C. A.] 118 Fed. 827.

78. Standard Computing Scale Co. v. Computing Scale Co., [C. C. A.] 126 Fed. 639. Infringement is not avoided where the devices consist of the same elements acting in the same manner, the differences being colorable merely. Crown Cork & Seal Co. v. Imperial Bottle Cap & Machine Co., 123 Fed. 669. There is no infringement by a device serving the same purpose as an earlier patent but substantially different in construction. Singer Mfg. Co. v. Cramer, 192 U. S. 265.

79. Substantial identity of combination is not affected by the circumstance that one of the members of the combination is adapted for connection with other parts of the machine not included in the combination. Dowagiac Mfg. Co. v. Brennan [C. C. A.] 127 Fed. 143.

80, 81. Electric Smelting & Aluminum Co. v. Pittsburg Reduction Co. [C. C. A.] 125 Fed. 926.

82. Van Epps v. International Paper Co., 124 Fed. 542. Slight mechanical substitution will not relieve from charge of infringement. Transplanting machine. Seiler v. Fuller & J. Mfg. Co. [C. C. A.] 121 Fed. 85.

83. Brislin v. Carnegie Steel Co., 118 Fed. 579.

84. Tompkins v. Terwilliger, 124 Fed. 545; Julius King Optical Co. v. Bilhoefer, 124 Fed. 521. Infringement is not avoided by improvements increasing the efficiency of the patented machine without changing the principle of operation. Brislin v. Carnegie Steel Co., 118 Fed. 579. A patent for an electric motor may be infringed by an electrical motor, where it is the same in construction and principle of operation. Westinghouse Elec. & Mfg. Co. v. Roberts, 125 Fed. 6. There is an infringement by a change in the form, or location, or sequence of elements, where they are all employed to perform the same functions, unless form, location, and sequence are essential to the result or the novelty of the claim. Adam v. Folger [C. C. A.] 120 Fed. 260. A claim for the combination of motors with any controlling device operated from a common point is infringed by a device in which the controller operated by introducing a rheostat to interrupt and waste the current, instead of reversing it. Knight patent, No. 354,793. General Elec. Co. v. Brooklyn Heights R. Co. [C. C. A.] 117 Fed. 613. There is an infringement by substitution of hand power for steam, and the operations are initiated by levers instead of automatically, the two machines embodying the same mechanism for dealing with the material and product. Campbell Printing Press & Mfg. Co. v. Wesel Mfg. Co., 124 Fed. 322.

85. Infringement is not avoided by changing the form of the parts of a patented com-

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The essential of identity extends to the result.[86] A machine is not infringed by another machine producing the same result, but by a combination of different elements.[87] There is an infringement when any substantial part of the invention is taken for any of its purposes.[88] The mere fact that the same function is accomplished in the two machines does not make a case of equivalency.[89] Infringement is strongly negatived by noninterchangeability of parts,[90] or the nonuse of any specific element of a combination claim or its equivalent,[91] or a doubling of capacity and product,[92] or where the later device differs as much from the earlier as the latter does from the prior art.[93]

Where different inventors have adopted an earlier invention, each making slight changes in the earlier device, each will be limited to his own specific form of device, and if they are different, neither device will be an infringement of the other.[94]

One may be held as a *contributory infringer*[95] as where he makes and sells a part of a structure to be completed by the purchaser, and when so completed is an

bination without varying the principle of the original invention. Dowagiac Mfg. Co. v. Minn. Moline Plow Co. [C. C. A.] 118 Fed. 136. There is an infringement by reconstruction in which new parts are substituted for those covered by the patent and old parts are used in new relations. National Phonograph Co. v. Fletcher, 117 Fed. 149.

86. Masseth v. Larkin [C. C. A.] 119 Fed. 171. The mere change in form of the product, by producing it in a granular instead of a powdered form, does not make it a new article, it remaining unchanged in composition and properties. Rumford Chemical Works v. N. Y. Baking Powder Co., 125 Fed. 231. There is an essential difference in methods of making smokeless powder, where the product in one case is a completely gelatinized grain, while in the other it is only partially gelatinized. Wolff v. Du Pont De Nemours & Co., 122 Fed. 944.

87. Hoyt patent, No. 446,230, for an improvement in grain drills not infringed by Christman & Munn patent, No. 497,864. Dowagiac Mfg. Co. v. Brennan, 118 Fed. 143. It is the structure of a machine and not its appearance which determines the infringement. Hanifen v. Armitage, 117 Fed. 845. As between mechanical improvers in an advanced art, mere priority in the production of a commercial machine or commercial success affords no reason for excluding other independent movements. Mayo Knitting Mach. & Needle Co. v. Jenckes Mfg. Co., 121 Fed. 110.

88. White v. Walbridge, 118 Fed. 166. There is an infringement by the use of a different, but mechanically equivalent, method or material to construct some of the elements of a patented combination, where the mode of operation is adopted, and the elements, when constructed, perform the same functions by the same or equivalent means to those described in the patent. Anderson v. Collins [C. C. A.] 122 Fed. 451. A mechanical equivalent must be adaptable to use as a substitute for something else and competent to perform the functions of a particular device for which it may be substituted. Alaska Packers' Ass'n v. Letson, 119 Fed. 599. The range of equivalents covered by the patent corresponds with character of the invention and includes all forms which embody the substance of the invention, and by like mechanical co-operation effect substantially the same result. Dowagiac Mfg. Co. v. Brennan [C. C. A.] 127 Fed. 143.

89. Mayo Knitting Mach. & Needle Co. v. Jenckes Mfg. Co., 121 Fed. 110.

90. American Pneumatic Tool Co. v. Phila. Pneumatic Tool Co., 123 Fed. 891.

91. American Fur Refining Co. v. Cimiotti Unhairing Mach. Co. [C. C. A.] 123 Fed. 869. Where the language of the specifications and claims, as well as the amendments of the latter in the patent office, make the essential feature of the structure to consist of a particular device, the patent is not infringed by a structure which lacks such feature. Morgan v. Pa. Rubber Co. [C. C. A.] 126 Fed. 952.

92. When the different principles result in a double working capacity and product, the conclusion that there is a difference between the two machines, in substance, as well as form, is apparent. American Fur Refining Co. v. Cimiotti Unhairing Mach. Co. [C. C. A.] 123 Fed. 869.

93. Eaton Prince and Livesey patent No. 347,778, for safety brake for elevator not infringed. Eaton v. Wadsworth, 125 Fed. 120.

94. Sander v. Rose [C. C. A.] 121 Fed. 835. Where the patents sued on are not pioneer patents, and are only improvements on the prior art, and defendant's machines can be differentiated, the charge of infringement will not be sustained. Kokomo Fence Mach. Co. v. Kitselman, 189 U. S. 8, 47 Law. Ed. 689. Where the advance toward perfection in an art consists of many intermediate steps, and several inventors form different combinations or improvements which score decided advances in the art, and accomplish the desired result with varying success, each is entitled to his own combination, so long as it differs from those of his competitors, and does not include theirs. Anderson v. Collins [C. C. A.] 122 Fed. 451.

95. One may become a contributory infringer by the sale of a machine having a peculiar provision for the incorporation therein of a patented device, where the same is incorporated therein by another, otherwise where the machine is adapted to the use of other devices known to the art. Standard Computing Scale Co. v. Computing Scale Co. [C. C. A.] 126 Fed. 639. A patentee disposing of his patent may become a contributory infringer

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infringement.[96] Those co-operating in an infringement with a vendor estopped to question validity of patent are also estopped.[97]

Manufacture without sale constitutes infringement.[98] Sale of supplies for use on a patented machine bearing a label that it was sold subject to a restriction that only supplies furnished by complainant could be used thereon does not show infringement, the machine being in the hands of the user under the license.[99] A patent for the process is not infringed by selling the product.[1]

There is an infringement where users of patented portions of machines, not in need of repair, are solicited to incorporate therein certain improvements of the solicitor, and in doing so reproduces elements of the combination specifically covered by the patent.[2]

A patentee refusing to assign after performance of conditions by assignee may not claim infringement by assignee.[3]

(§ 7) *B. Defenses.*—It is no defense that complainant is violating the anti-trust law.[4]

(§ 7) *C. Damages, profits, and penalties.*—A complainant cannot require information as to sales until infringement is shown.[5]

Only nominal damages are recoverable for infringement, where discontinued on notice, and complainant had vended article without marking it as patented.[6]

A court may increase the damages for infringement, where the infringement is palpable and persisted in after knowledge and an opportunity to settle, and party has shown a disposition to delay and cause all the expense possible.[7] A sale of infringing articles to persons procured by the owner of the patent to show sales would not be ground for damage, as they would not take the place of sales made by the owner of the patent.[8]

Profits are recoverable.[9] The seller is entitled to credit for commissions paid

by forming a new company which manufactures the infringing article claiming it to be a new and independent invention of his own. Lamb Knit. Goods Co. v. Lamb Glove & Mitten Co. [C. C. A.] 120 Fed. 267. The assignee of an unadjudicated patent is entitled to a preliminary injunction against infringement by patentee and others, where infringement is clear, and patentee immediately on sale had associated himself with the other defendants to superintend construction of infringing machine and had invested money in the enterprise. Continental Wire Fence Co. v. Pendergast, 126 Fed. 381.

96. Bishop v. Levine, 119 Fed. 363. The manufacturer who makes an essential part of an infringing structure, adapted to no other use, and sells it to another to complete the structure is a contributory infringer. Canda v. Mich. Malleable Iron Co. [C. C. A.] 124 Fed. 486. One buying and selling separate parts of infringing machines, and employed to set them up, may not avoid liability as a contributory infringer, on the ground that he merely sold his labor as a skilled workman, and having notice of the infringement may be required to account. Palmer v. Landphere, 118 Fed. 52.

97. Continental Wire Fence Co. v. Pendergast, 126 Fed. 381.

98. Carter Crume Co. v. American Sales Book Co., 124 Fed. 903.

99. Dick v. Roper, 126 Fed. 966.

1. Nat. Phonograph Co. v. Lambert Co. [C. C.] 125 Fed. 388.

2. Nat. Phonograph Co. v. Fletcher, 117 Fed. 149.

3. Schmitt v. Nelson Valve Co. [C. C. A.] 125 Fed. 754.

4. General Elec. Co. v. Wise, 119 Fed. 922. In an action for infringement it is no defense that complainants had joined in an unlawful combination in restraint of trade. Cimiotti Unhairing Co. v. American Fur Refining Co., 120 Fed. 672.

5. Lovell Mfg. Co. v. Automatic Wringer Co., 124 Fed. 971.

6. Hill Mfg. Co. v. Stewart, 116 Fed. 927.

7. Rev. St. U. S. § 4921. Nat. Folding Box & Paper Co. v. Robertson's Estate, 125 Fed. 524. The refusal of the circuit court to increase the damages demanded for infringement will not be disturbed, unless clearly warranted by the evidence. Kissinger-Ison Co. v. Bradford Belting Co. [C. C. A.] 123 Fed. 91.

8. Frank v. Geiger, 121 Fed. 126.

9. Profits on the entire article are only allowable where such article is wholly the invention of the patentee, or where its entire value is properly and legally attributable to the patented feature. Lattimore v. Hardsocg Mfg. Co. [C. C. A.] 121 Fed. 986. If the infringing machine has a special value for certain work because of a single feature therein which constitutes the infringement and no other machine without this feature could accomplish the same work, the owner is entitled to recover the entire profit realized by the infringer from the sale for that special market; but not so from sales for

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to agents,[10] and for office and factory rental and labor of production, but not for insurance, or legal services in defending previous suit in which he was successful,[11] nor profits on parts furnished gratis to replace others.[12] Where an infringer is notified of the fact before issuance of patent, and patentee promises to notify him of issuance of patent, but fails to do so, there may be a recovery of only such profits as are clearly proven.[13] Where the petition did not limit the claim to the amount due when filed, the account may be stated down to the hearing before the referee.[14]

The notice of infringement making the seller of the article liable to *statutory penalty* should distinguish the patents where they are numerous.[15]

(§ 7) *D. Remedies and procedure.*—Neither misuse nor nonuse will deprive the patentee of his right to sue for infringement.[16] The question of infringement is one of law and may be determined on a writ of error.[17] Equity is without jurisdiction where there has been a good faith abandonment of infringement after knowledge.[18] The suit will not be sustained for acts committed after filing bill.[19]

Title to support action on the patent is shown where the patent runs to patentee as assignor to plaintiff.[20]

Officers of a corporation are not individually liable for infringement of a patent by the corporation,[21] unless they have actually participated in the infringement.[22] Public officers are not liable for the use of a patented invention in a building, by the contractor, without a license from the owner of the patent, though they required its use therein.[23]

The circuit courts of the United States have full jurisdiction of patent cases.[24] The court has jurisdiction of a nonresident, where defendant had a place of business in the district, and infringement occurred therein.[25] A court is not deprived

other classes of work for which other noninfringing machines are adapted. Penfield v. Potts & Co. [C. C. A.] 126 Fed. 475. The manufacturer of an infringing article is liable for the entire net profits derived from the sale, where salability was primarily due to the patented feature. Piaget Novelty Co. v. Headley, 123 Fed. 897. Defendants selling an infringing article, bought from the manufacturers, are chargeable only with profits made by themselves above the price paid, and not with the manufacturers' profits. Kissinger-Ison Co. v. Bradford Belting Co. [C. C. A.] 123 Fed. 91. In an accounting to determine liability of infringer for profits, where his average daily production was only half the capacity of the machine, he is entitled to credit for labor for only half the amount paid the workmen. Kinner v. Shepard, 118 Fed. 48. Where the demand for a novelty had largely fallen off before issuance of patent, it will not be held that sales by an infringer at a price so low as to leave but little profit deprived patentee of an equal number of sales at the higher price demanded by him. Jennings v. Rogers Silver Plate Co., 118 Fed. 339.

10. Kissinger-Ison Co. v. Bradford Belting Co. [C. C. A.] 123 Fed. 91.

11. Piaget Novelty Co. v. Headley, 123 Fed. 897.

12. Paxton v. Brinton, 126 Fed. 541.

13. Jennings v. Rogers Silver Plate Co., 118 Fed. 339.

14. Standard Fireproofing Co. v. St. Louis Ex. M. Fireproofing Co., 177 Mo. 559, 76 S. W. 1008.

15. 3 U. S. Comp. St. 1901, p. 3398. Frank v. Geiger, 121 Fed. 126.

16. Fuller v. Berger [C. C. A.] 120 Fed. 274.

17. Singer Mfg. Co. v. Cramer, 192 U. S. 265.

18. General Elec. Co. v. New England Elec. Mfg. Co., 123 Fed. 310; Edison Gen. Elec. Co. v. New England Elec. Mfg. Co., 121 Fed. 125.

19. Humane Bit Co. v. Barnet, 117 Fed. 316. Where no infringement is shown before the filing of the bill, the fact that subsequent structural changes have transformed the device into an infringing article will not authorize a preliminary injunction. Westinghouse Air Brake Co. v. Christensen Engineering Co., 121 Fed. 558.

20. General Elec. Co. v. Wagner Elec. Mfg. Co., 123 Fed. 101.

21. Farmers' Mfg. Co. v. Spruks Mfg. Co., 119 Fed. 594; Greene v. Buckley, 120 Fed. 955. At least not unless the corporation is insolvent. Loomis-Manning Filter Co. v. Manhattan Filter Co., 117 Fed. 325.

22. Peters v. Union Biscuit Co., 120 Fed. 679.

23. Standard Fireproofing Co. v. Toole, 122 Fed. 649.

24. General Elec. Co. v. Wagner Elec. Mfg. Co., 123 Fed. 101. The circuit court of the United States has jurisdiction to enjoin an alleged infringement of a patent by the sale of the article without a license, though the determination of the question of infringement may involve the construction or validity of a license contract. Victor Talking Mach. Co. v. The Fair [C. C. A.] 123 Fed. 424.

25. Chicago Pneumatic Tool Co. v. Phila. Pneumatic Tool Co., 118 Fed. 852; Westinghouse E. & M. Co. v. Stanley Elec. Mfg. Co., 121 Fed. 101. Act Cong. March 3, 1897, c. 395, 29 Stat. 695 may be waived by appear-

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of jurisdiction to grant relief, by the failure of defendant to observe the rules and plead before the expiration of the patent, nor by any change of conditions after the filing of the bill.[26]

There is an absence of laches where owner's delay is caused by prosecution of other infringers.[27]

A bare licensee is not a necessary party complainant in a suit for infringement.[28] A former licensee cannot join in suit for infringement as having an interest in the accounting for past infringements, unless all subsequent assignees of the license are also joined.[29] Where the assignor has expressly authorized the assignee to sue for infringement, he is not a necessary party to a suit by the assignee, though the assignment is subject to reversion for nonfulfillment of terms.[30]

When a patent has once been sustained by an appellate court, a subordinate court dealing with the same patent subsequently will adhere to such holding, unless new matter is shown which would have changed the result if considered in the earlier case.[31] The courts of one circuit are not controlled by views taken with regard to a patent by the courts of another circuit.[32] The principle of res judicata is applicable in infringement suits.[33]

In a suit for infringement, the scope of the invention must be determined, and then whether the alleged infringing device comes within the invention, as thus defined.[34]

Injunctions.—A preliminary injunction will not be granted where the patent sued on has expired before the determination of the motion therefor.[35] The writ will issue the more readily where the validity of the patent has been adjudicated in other suits.[36] It should not be granted in a suit for infringement of an unadjudi-

ance. U. S. C. S. Raisin Co. v. Phoenix R. S. & P. Co., 124 Fed. 234.

26. U. S. Mitis Co. v. Detroit S. & S. Co. [C. C. A.] 122 Fed. 863.

27. The owner is not guilty of laches, as against a particular infringer, by reason of three years' delay, where his time was fully occupied with other infringers. Timolat v. Franklin Boiler Works Co. [C. C. A.] 122 Fed. 69. One is not guilty of laches where he brings his suit within six months from the termination of other litigation involving the validity of his patent. U. S. Mitis Co. v. Detroit S. & S. Co. [C. C. A.] 122 Fed. 863.

28. Peters v. Union Biscuit Co., 120 Fed. 679.

29. Victor Talking Mach. Co. v. American Graphophone Co., 118 Fed. 50.

30. Union Trust Co. v. Walker Elec. Co., 122 Fed. 814.

31. Badische A. & S. Fabrik v. Klipstein & Co., 125 Fed. 543.

32. Cimiotti Unhairing Co. v. American Fur Refining Co., 120 Fed. 672. The judgment of a court holding a patent void, though not conclusive on another court in the same circuit, is very persuasive where the same matters are again presented. Cutler-Hammer Mfg. Co. v. Hammer, 124 Fed. 222.

33. Westinghouse E. & M. Co. v. Stanley Elec. Mfg. Co., 117 Fed. 309; Wilcox & G. Sewing Mach. Co. v. Sherborne [C. C. A.] 123 Fed. 875. The prior adjudication should be on the merits, and a consent decree in which the validity and scope of the patent were not considered is not sufficient as a basis for granting a preliminary injunction against another alleged infringer. Nat. Enameling Co. v. New England Enameling Co., 123 Fed. 436. Where all the questions involved have been determined adversely to the party, on a former appeal, they will not be reviewed by a court differently constituted, the questions not differing favorably to appellant. Cimiotti Unhairing Co. v. Nearseal Unhairing Co. [C. C. A.] 123 Fed. 479. Where the validity is sustained against plea of anticipation, the same issue will not be tried in a subsequent suit in the same court, though newly discovered evidence claimed. A. B. Dick Co. v. Pomeroy Duplicator Co., 117 Fed. 154.

34. Westinghouse E. & M. Co. v. Stanley Elec. Mfg. Co., 117 Fed. 309.

35. Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co., 121 Fed. 136.

36. Where the patent has been sustained, after strong opposition, a preliminary injunction against another infringer will not ordinarily be refused on affidavits as to prior public use. Armat Moving Picture Co. v. Edison Mfg. Co., 121 Fed. 559. Where validity has been sustained a number of times, a motion to vacate a preliminary injunction against infringement, based on portions of evidence taken by defendant, will not be allowed before expiration of plaintiff's time to take proofs in rebuttal. Timolat v. Phila. Pneumatic Tool Co., 123 Fed. 899. Where the validity of a patent has been frequently upheld, a court should not exercise its discretion to deprive the patentee of his monopoly by refusing him an injunction because the patent will soon expire, or because the defendant offers bond for the damages recovered. Elec. Storage Battery Co. v. Buffalo Elec. Carriage Co., 117 Fed. 314. Where a patent has been sustained by the appellate court, the owner is entitled to

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cated patent where the question of infringement is doubtful,[37] and the defendant is responsible in damages.[38] It is within the discretion of the court to grant a preliminary injunction against infringement of an unadjudicated patent, where infringer acted for several years under a license from the patentee, and had marked the articles sold as manufactured under the patent, which was not granted until near the close of the license period.[39] The injunction may include persons who contract for the manufacture of the infringing device.[40] The patentee in the employ of the infringer may be enjoined at the suit of his assignee as well as his employer.[41] An injunction against an infringer will not be denied because the defendant is able to respond in damages,[42] unless there is a substantial doubt as to infringement.[43] Adjudication must precede grant of motion for preliminary injunction in advance of final hearing.[44] The court may award a temporary injunction against infringement after the cause is submitted on merits where satisfied that complainant is entitled to such protection.[45] Violations of injunction are punishable as contempt,[46] and it is no defense that the infringement was not obvious and that the parties had proceeded under advice of counsel.[47] Where question of infringement in violation of injunction is doubtful, it will not be determined on ex parte affidavits but only after regular hearing.[48]

Pleading.—Infringement may be averred on information and belief,[49] and where claims are numerous, particulars of infringement must be set out.[50] The bill need not be verified unless it is sought to be used as evidence on a motion for preliminary injunction.[51] A bill alleging infringement since a certain date is not to be construed as avowing that the infringement commenced on that date so as to subject it to demurrer for laches but as charging that the infringement occurred since such date.[52] A bill for infringement of different patents is not mul-

a preliminary injunction against a new infringer, notwithstanding a showing of alleged anticipatory patents not before the court in the former case, unless of such a character as would have led to a different decision. George Frost Co. v. Crandall Wedge Co., 123 Fed. 104. A prior adjudication sustaining the validity of a patent will not justify the grant of a preliminary injunction against another whose structure is different, and does not appear to be within the construed claim. Westinghouse E. & M. Co. v. American Transformer Co., 121 Fed. 560.

37. Newhall v. McCabe Hanger Mfg. Co. [C. C. A.] 125 Fed. 919. A preliminary injunction against infringement of a recent patent, and which has not been adjudicated, will not be granted where the proofs are conflicting, and a full hearing is necessary to determine the question. Pa. Globe Gaslight Co. v. American Lighting Co., 117 Fed. 324.

38. Affidavits of prior public use sufficient to overcome prima facie validity of unadjudicated patent on application for preliminary injunction, and not contradicted. Bradley v. Eccles, 120 Fed. 947.

39. Adam v. Folger [C. C. A.] 120 Fed. 260.

40. Nat. Mechanical Directory Co. v. Polk [C. C. A.] 121 Fed. 742.

41. Regent Mfg. Co. v. Penn E. & Mfg. Co. [C. C. A.] 121 Fed. 80.

42. General Elec. Co. v. Wise, 119 Fed. 922.

43. Hallock v. Babcock Mfg. Co., 124 Fed. 226.

44. George Frost Co. v. Kora Co., 127 Fed. 158. Injunction should not be granted before final hearing, where license is set up as defense to infringement, and the evidence on the hearing of the motion is so contradictory that the validity of the license cannot be determined therefrom. Armat Moving Picture Co.. v. Edison Mfg. Co. [C. C. A.] 125 Fed. 939.

45. Cimiotti Unhairing Co. v. American Fur Refining Co., 117 Fed. 623.

46. A corporation is punishable for contempt where the injunction is violated by employes through the carelessness of the officers. Westinghouse Air Brake Co. v. Christensen Engineering Co., 121 Fed. 562. Circumstantial evidence is insufficient as against a sworn denial of violation of injunction in contempt proceedings. Cimiotti Unhairing Co. v. Frolloehr, 121 Fed. 561. On a motion for contempt for violation of an injunction against infringement, doubtful questions are not to be resolved against respondent. Schlicht Heat Light & Power Co. v. Aeolipyle Co., 121 Fed. 137.

47. Paxton v. Brinton, 126 Fed. 542.

48. In re Henvis, 125 Fed. 655.

49. Murray Co. v. Continental Gin Co., 126 Fed. 533.

50. Where the patent sued on contains a large number of claims relating to different details of construction, the rule allowing allegation of infringement in general terms no longer applies and complainant may be required to particularly specify particulars of infringement. Morton Trust Co. v. American Car & Foundry Co., 121 Fed. 132.

51, 52. U. S. Mitis Co. v. Detroit Steel & Spring Co. [C. C. A.] 122 Fed. 863.

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tifarious where the things patented are capable of co-joint use,[53] so with a bill to enjoin an unauthorized person from using a patented article and also from using the generic name of the article.[54] The fact of modification of infringing structure pending suit for infringement affords no ground for a supplemental bill alleging infringement by the new structure.[55] Where the bill for infringement makes profert of the patent, it will be regarded as a part of the bill and examined on demurrer.[56] Where want of novelty is apparent on the face of the patent, the issue of validity may be determined on demurrer.[57] Whether specifications and drawings are sufficiently clear and explicit is a question of fact and will not be determined on demurrer.[58] Where defendant interposes a frivolous demurrer for purposes of delay, he will be permitted to answer only on payment of costs and reimbursement of plaintiff for unnecessary expenses to which he has been subjected.[59] A prior patent though not pleaded as a patent may be shown on question of prior art.[60] Where no claim is made against complainant's title and there is an admission in open court as to the points in dispute, the question of title cannot thereafter be raised.[61] Where anticipation is the issue, the date of the issuance of the anticipating patent controls and the party may not show an invention prior thereto. This evidence is admissible when the issue is who was the original and first inventor.[62]

Evidence.—There is a presumption of no infringement from the grant of the patent.[63] This presumption may be affected by the fact that several patents material to a just estimate of the prior art were not considered by the examiner.[64] Though the burden is on the inventor to show priority, courts are not required to go out of their way to discredit evidence thereof coming from a reliable source.[65] The rule that complainant has the burden of proof that his invention was the prior one only applies where defendant gives the statutory notice, otherwise complainant's patent is sufficient evidence prima facie of that fact.[66] The date of the invention is presumptively that of the issuance of the patent, and evidence to rebut this presumption must be clear and convincing.[67] The evidence of infringement[68] and defenses thereto must be clear and convincing.[69] Where the validity of the patent is in issue, the court will take judicial notice of other patents introduced in another suit in ascertaining the state of the art.[70] The patentee of an invention previously patented by him in a foreign country may show the date of the foreign

53. Edison Phonograph Co. v. Victor Talking Mach. Co., 120 Fed. 305.

54. Adam v. Folger [C. C. A.] 120 Fed. 260.

55. Westinghouse Air Brake Co. v. Christensen Engineering Co., 126 Fed. 764.

56. Fowler v. New York [C. C. A.] 121 Fed. 747.

57. American Salesbook Co. v. Carter-Crume Co., 125 Fed. 499.

58. Dade v. Boorum & Pease Co., 121 Fed. 135.

59. Merrimac Mattress Mfg. Co. v. Schlesinger, 124 Fed. 237.

60. Parsons v. New Home Sew. Mach. Co., 125 Fed. 386; Jones v. Cyphers [C. C. A.] 126 Fed. 753.

61. Kirchberger v. American Acetylene Burner Co., 124 Fed. 764.

62. Diamond Drill & Mach. Co. v. Kelly Bros., 120 Fed. 282.

63. Anderson v. Collins [C. C. A.] 122 Fed. 451; Brookfield v. Novelty Glass Mfg. Co., 124 Fed. 551. Where the defendant constructs his invention in accordance with a patent held by him, the presumptions of patentability are balanced and prior and subsequent patentees stand in equilibrio. American Pneumatic Tool Co. v. Phila. Pneumatic Tool Co., 123 Fed. 891.

64. Cleveland Foundry Co. v. Kaufmann Bros., 126 Fed. 658.

65. Westinghouse Elec. & Mfg. Co. v. Roberts, 125 Fed. 6.

66. Rev. St. U. S., § 4920. Fay v. Mason, 120 Fed. 506.

67. Fay v. Mason, 120 Fed. 506.

68. Scriven v. North, 124 Fed. 894. A mere vendor. Marcus v. Sutton, 124 Fed. 74.

69. Defense of prior use must be established beyond a reasonable doubt. Young v. Wolfe, 120 Fed. 956. The defense of license from one having an interest in the patent is to be made out by defendant on a fair preponderance of the evidence. Armat Moving Picture Co. v. Edison Mfg. Co., 121 Fed. 559.

70. American Sales Book Co. v. Carter-Crume Co., 125 Fed. 499.

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patent for the purpose of showing the actual date of his invention.[71] Where there is no denial under oath of sale of infringing articles, evidence establishing a strong probability thereof will make a prima facie case.[72] A prima facie case of infringement does not require proof of knowledge of assignment to complainant by infringer.[73] An incorporator may identify patent alleged to be infringed.[74] Expert testimony is admissible.[75] Proof of a sale of an article some time after the issuance does not establish the fact that it was made after the issuance of the patent.[76] In a suit for infringement, the question of the relevancy and legal effect of the evidence is reserved until the final hearing and failure to object to its introduction does not preclude objections on the hearing.[77]

Complainant will not be allowed to *discontinue* after proofs have been taken at large expense and the only ground therefor is to litigate the questions in another suit.[78]

The question of due diligence as well as materiality of evidence is for the court on application for leave to file a bill of review on the ground of newly-discovered evidence.[79] Where during the term of rendition of the decree, newly-discovered evidence authorizing a reopening of the case is presented the return of the record from the circuit court of appeals will be requested for further proceedings.[80]

Interlocutory decrees will be reopened only on showing of diligence.[81]

Appeal.—A licensee with a right to join patentee in a suit for infringement may prosecute appeal where patentee declines to join therein.[82] The only question to be considered on an appeal from an order granting a preliminary injunction against infringement of a patent is whether the legal discretion of the court was fairly exercised under the circumstances.[83] The question of validity of the patent will not be considered, that matter having been determined in prior contested litigation between the parties.[84] The legal presumption of no infringement is overcome by the finding of infringement by the trial court which will be presumed to be correct unless an obvious error of law or serious mistake of fact is disclosed.[85]

71. Badische Anilin & Soda Fabrik v. Klipstein, 125 Fed. 543.

72. Hutter v. De Q. Bottle Stopper Co., 119 Fed. 190.

73. Arnold Monophase Elec. Co. v. Wagner Elec. Mfg. Co., 118 Fed. 653.

74. Where the articles of incorporation declare that the purpose of its organization is to manufacture and lease machines evidence of one of the incorporators is admissible to show that the machines were those for which a patent had been applied for by another incorporator and the same as that alleged to be infringed. National Mechanical Directory Co. v. Polk [C. C. A.] 121 Fed. 742.

75. Testimony of a competent expert as to the identity of a chemical compound sold by defendant with that of a patent based upon an analysis and the application of the tests specified in the patent prima facie proves infringement. Badische Anilin & Soda Fabrik v. Klipstein, 125 Fed. 543. Where the patent sued on is intelligible but defendant introduces expert evidence, complainant may introduce such evidence in rebuttal. Hutter v. De Q. Bottle Stopper Co., 119 Fed. 190.

76. National Phonograph Co. v. Lambert, 125 Fed. 388.

77. Diamond Drill & Mach. Co. v. Kelly, 120 Fed. 282.

78. American Steel & Wire Co. v. Mayer, 121 Fed. 127.

79. Kissinger-Ison Co. v. Bradford Belting Co. [C. C. A.] 123 Fed. 91.

80. Nutter v. Mossberg, 118 Fed. 168.

81. What laches will defeat an application for a rehearing after an interlocutory decree finding infringement depends on the facts in each case and the effect on the rights of the parties. Pittsburgh Reduction Co. v. Cowles Elec. Smelting & Aluminum Co., 121 Fed. 556. Where defendant applies to open an interlocutory decree sustaining certain patents and finding infringement on the ground of newly-discovered anticipatory patents and for a rehearing, the application will be denied where no diligence was shown. Brill v. North Jersey St. R. Co., 125 Fed. 526.

82. Excelsior Wooden Pipe Co. v. Seattle [C. C. A.] 117 Fed. 140.

83. American Fur Refining Co. v. Cimiotti Unhairing Co., 118 Fed. 838. On the appeal from the order granting a preliminary injunction against infringement, the only question is whether the legal discretion of the trial court was improvidently exercised. Austin Mfg. Co. v. American Wellworks [C. C. A.] 121 Fed. 76.

84. Austin Mfg. Co. v. American Wellworks [C. C. A.] 121 Fed. 76.

85. Anderson v. Collins [C. C. A.] 122 Fed. 451.

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Where a preliminary injunction has been granted by a circuit court on the strength of a previous adjudication by the same court over the same patent, the case involving questions of fact as to anticipation and infringement and not ripe for a final hearing, the circuit court of appeals on an appeal from the interlocutory order should not direct a dismissal of the bill.[86] The discovery of other American patents bearing on the question of anticipation is not sufficient basis for a bill to review a decree sustaining validity of patent entered after an appeal unless unusual circumstances are shown.[87]

Operation and effect of judgments and decrees.—Where infringement is clear a decree against the seller of the infringing article is binding on the manufacturer, he having intervened.[88] A decree of infringement against a corporation is not to be avoided by the resignation of its president and his continuing the infringement by operation under another name.[89] A judgment at law for infringement against a manufacturer does not conclude a subsequent purchaser and user of the article either as to validity or infringement.[90] A judgment at law against an infringer for the manufacture of the article does not give him the right to vend the articles so made or a purchaser to use the same.[91]

PAUPERS.

Definition and status of pauperism.—The fact that an individual has a small income or a small amount of money on hand does not necessarily prevent his being regarded as a pauper.[92]

Settlements and removals of paupers.—A settlement is a residence sufficient under the law to entitle one to pauper support.[93] A settlement once acquired is presumed to continue until another is acquired,[94] hence is not lost by absence for less than the period which would fix a new settlement in the place of sojourn.[95] Supplies furnished by private subscription are not "pauper supplies" so as to prevent the recipient from getting a settlement in a town, although he had applied to the town for supplies and thought these supplies the result.[96]

A married woman's settlement is not that of her husband if her marriage was void or has been annulled.[97] A married woman cannot change her settlement by voluntarily deserting her husband,[98] nor can it be changed by a marriage to a pauper procured by municipal officers to evade the burden of her support.[99]

An emancipated minor pauper does not take subsequently acquired settlements of the parent but acquires by derivation the settlement of the parent at the time of emancipation.[1] A person of unsound mind from birth can have only the

86. Brill v. Peckham Motor Truck & Wheel Co., 189 U. S. 57, 47 Law. Ed. 706.

87. Kissinger-Ison Co. v. Bradford Belting Co. [C. C. A.] 123 Fed. 91.

88. Consolidated Rubber Tire Co. v. Finley Rubber Tire Co., 119 Fed. 705.

89. Janney v. Pancoast International Ventilator Co., 124 Fed. 972.

90. Van Epps v. International Paper Co., 124 Fed. 542.

91. Van Epps v. International Paper Co., 124 Fed. 542.

92. A woman in feeble health with three small children to house, clothe, and feed, with an income of ten dollars each month held a pauper. Saybrook v. Milford [Conn.] 56 Atl. 496. Having fifty dollars unknown to town giving aid held insufficient to prevent the liability of the town in which the pauper was settled. Palmer v. Hampden, 182 Mass. 511, 65 N. E. 817.

93. Modes of acquiring settlement at common law are stated in 1 Bl. Com. 363 cited in Cyc. Law Dict. "Settlement." "Legal settlement" of insane means same as that of paupers. Moody County v. Minnehaha County [S. D.] 96 N. W. 698, construing statute. In re Bigelow [S. D.] 96 N. W. 698.

94. Williamsburg v. Adams [Mass.] 68 N. E. 230.

95. Moody County v. Minnehaha County [S. D.] 96 N. W. 698.

96. Orland v. Penobscot, 97 Me. 29.

97. Winslow v. Troy, 97 Me. 130.

98. Essex v. Jericho [Vt.] 56 Atl. 483. But she may acquire a new settlement if her husband abandons her. Bradford v. Worcester, 184 Mass. 557, 69 N. E. 310.

99. Hudson v. Charleston, 97 Me. 17.

1. Carthage v. Canton, 97 Me. 473.

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settlement derived from his parents.[2] But where a minor non compos mentis pauper is removed by foster-parents into another county than the one in which he had a settlement by derivation and the court of the county to which he goes appoints a guardian, his settlement changes.[3] An unsuccessful attempt to annex, from one town to another, the land upon which a pauper resides has no effect upon his settlement.[4]

Liability for support.—Contributions to the support of a pauper give no claim against the town in which he is settled in the absence of statute or contract.[5] A contribution upon an unauthorized request of a county officer does not bind the county.[6] The duty of a town to give notice to another which is liable is fixed by knowledge of facts which in law fix a settlement.[7] Such notice is defective if it describe the paupers only as "children of" a named person.[8]

Care and custody of paupers.—The town agent removing a pauper is bound to take reasonable precautions to see that he is in a fit condition to be moved, to provide proper protection from the weather, and suitable means of conveyance.[9]

Administration of poor laws; Officers and districts.—County commissioners who neglect to supply accommodations for paupers, when required by the statute, may be compelled to do so by writ of mandamus.[10] In construing a statute regarding the mode of choosing a director of the poor, the court will consider contemporary practice.[11]

When a statutory mode of reviewing pauper proceedings exists, it must be followed but is confined to the cases covered by the statute.[12]

PAWNBROKERS.

The business of a pawnbroking association is regulated by statute in some states,[13] and a license is taken subject to future police regulations.[14] An ordinance requiring pawnships to close at 6 p. m. is valid.[15] A pawnbroker may sell pawned goods not redeemed within the agreed time.[16]

2. Phillips v. Boston, 183 Mass. 314, 67 N. E. 250.
3. People v. Barlow [Mich.] 96 N. W. 482.
4. Overseers of Poor v. Overseers of Poor, 20 Pa. Super. Ct. 629.
5. Conley v. Woodville, 97 Me. 240; Wilson v. Coos County [N. H.] 54 Atl. 1101. **Contra,** City furnishing aid held to have right over against county. Ogden City v. Weber County, 26 Utah, 129, 72 Pac. 433. Pauper supplies furnished to one not having a settlement in the town held chargeable to the county. Loudon v. Merrimack County, 71 N. H. 573.
6. Gish v. St. Joseph County Com'rs [Ind. App.] 68 N. E. 318.
7. Where the selectmen of a town know the facts concerning a pauper from which the law holds that his settlement is in E, the selectmen cannot excuse an omission to notify E. by saying that they did not know his settlement was there. Fairfield v. Newtown, 75 Conn. 515.
8. Thomaston v. Greenbush. 98 Me. 140.
9. Merrill v. Bassett. 97 Me. 501.
10. Com. v. Summerville, 204 Pa. 300.
11. Com. v. Paine [Pa.] 56 Atl. 317.
12. Berks County Directors v. Schuylkill County Directors, 21 Pa. Super. Ct. 627. Under Act of March 16, 1868, P. L. 46, writs of error to the courts of quarter sessions do not lie to correct decrees for the repayment of money spent for the support of paupers. Luzerne County Poor Dist. v. Jenkins Tp. Poor Directors, 22 Pa. Super. Ct. 274.
13. Laws N. Y. 1895, c. 326, providing for money lending associations on personal property, to take as security, either a pledge or a mortgage of any personal property, and to charge and receive interest or discount thereon, at a rate not exceeding three per centum per month for two months or less, and not exceeding two per centum per month for any period after two months, must be taken in connection with statutes relating to usury (1 R. S. 771 and amendments), the effect of which is to increase the rate of interest upon loans under the later statute, and to apply the penalty of forfeiture prescribed by the usury act for exceeding such rate. Lowry v. Collateral Loan Ass'n, 172 N. Y. 394, 65 N. E. 206. Upon proof that the association has exacted excessive interest and charges an action may be maintained against it to have the loan declared void, the security surrendered, and the association restrained, pendente lite, from enforcing it. Id.
14. Butte v. Paltrovich [Mont.] 75 Pac. 521.
15. It is reasonable and a proper police regulation. Butte v. Paltrovich [Mont.] 75 Pac. 521.
16. He may sell pawned pistols at private sale, under his pawnbroker's license, though

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PAYMENT AND TENDER.

§ 1. Mode and Sufficiency of Payment or Tender (1158).
§ 2. Application of Payments (1160).
§ 3. Effect of Tender (1161).
§ 4. Payment or Tender as an Issue (1161).
A. Pleading (1161).
B. Presumptions and Burden of Proof (1161).
C. Evidence (1163).

§ 1. *Mode and sufficiency of payment or tender. To or by whom.*—Payment may be made to the creditor,[17] or his agent,[18] or to a third person at the request of the creditor.[19]

Time.—Custom as to time of payment cannot control an express contract.[20]

Place.—Payment of a note at a place designated in it does not discharge it, unless the note is there to be surrendered, but it is a sufficient tender to stop interest.[21]

Medium.—Payment must be in money unless something else is accepted instead.[22] A worn coin does not cease to be legal tender unless its weight is appreciably diminished or it has lost the appearance of a coin duly issued.[23] Deposit in a bank to the credit of the creditor is not payment unless creditor consents,[24] but deposit in a bank where a note is payable is tender.[25] A check or order in the absence of agreement is not payment until paid,[26] but if the creditor neglects to present it within a reasonable time, whereby rights are lost on it, the debtor is discharged.[27] Tender of a check is insufficient.[28] A promissory note,[29] or a draft[30]

if he had been dealing in them without such license he would have been required to take out a license to sell them; and though the code (§§ 3246, 3247) requires such sales to be at public auction after published notice, where the prosecution against him is not for violating such statute. Morningstar v. State, 135 Ala. 66.

17. Payment by the maker of a note to the holder, at maturity, whose title was such that he could compel payment, satisfies the debt and entitles the debtor to the consideration for which the note was given. Johnston v. Gulledge, 115 Ga. 981.

18. Payment to an agent of an authorized insurance agent is sufficient in spite of limitation in the policy. Mauck v. Merchants' & Mf'rs' Fire Ins. Co. [Del.] 54 Atl. 952.

And see Agency, 1 Curr. Law, p. 43.

19. In re Baker, 172 N. Y. 617, 64 N. E. 1118.

20. "Cash f. o. b." requires payment before shipment. Lawder Co. v. Mackie Grocer Co., 97 Md. 1. See, also, Vendor and Purchaser as to time as of the essence.

21. Chapman v. Wagner [Neb.] 96 N. W. 412.

22. Root v. Kelley, 39 Misc. [N. Y.] 530. Tender of money of United States, unobjected to on the ground that it was not legal tender, is sufficient. Edmunds Elec. Const. Co. v. Mariotte [Ind.] 69 N. E. 396. Tender of part legal tender and part United States or national bank notes was good since unobjected to. Bristol v. Mente, 79 App. Div. [N. Y.] 67. Tender of bank stock is not good. Dils v. Hatcher, 25 Ky. L. R. 891, 76 S. W. 514. Promissory notes are payable in bonds where there is a provision on their backs to that effect. Reed v. Fleming, 102 Ill. App. 668. But in the absence of proof of tender of bonds in a suit on the notes the measure of damages is their face value. Id. Contracts calling for payments in confederate money by statute construed equitably. Conyers v. Bartow County, 116 Ga. 101.

23. Mobile St. Ry. Co. v. Watters, 135 Ala. 227. But it has been held that coin is good though so worn as to lead to honest belief that the coin was bad. Nickel tendered car conductor who ejected passenger. Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055.

24. Hill v. Arnold, 116 Ga. 45.

25. Dillingham v. Parks, 30 Ind. App. 61, 65 N. E. 300.

26. Weller Co. v. Washington Gordon & Co., 24 Ohio Circ. R. 407; Goodall v. Norton, 88 Minn. 1, 92 N. W. 445. Payment of county warrants sent by mail where bank failed before collection. Chambers v. Custer County [Idaho] 71 Pac. 113. Payment by check of a debt payable in gold, where the check was actually paid in gold, though not calling on its face for gold, is sufficient. Hooker v. Burr, 137 Cal. 663, 70 Pac. 778.

27. Brown v. Schintz, 202 Ill. 509, 67 N. E. 172. Contra (protesting certificates of deposit). Gallagher v. Ruffing, 118 Wis. 284, 95 N. W. 117. Held, a county was not damaged by delay in presenting the checks. Green v. Custer County [Idaho] 71 Pac. 115. Where certificate of deposit drew interest only if presentment was postponed, such postponement by a creditor to whom they had been indorsed by the debtor, who was paid accrued interest, whereby collection failed, was not laches barring recovery on the original debt on surrender of the certificates. Gallagher v. Ruffing, 118 Wis. 284, 95 N. W. 117.

28. Check of an authorized agent, but if accepted by a sheriff and duly paid it cannot be objected to by the creditor. Hooker v. Burr, 137 Cal. 663, 70 Pac. 778.

29. Berkshire v. Hoover, 92 Mo. App. 349; Maude v. Merchants & Mf'rs' Fire Ins. Co. [Del.] 54 Atl. 952. Acceptance of a renewal note and surrender of the original note constitute payment of the original note. Citizens' Commercial & Sav. Bank v. Platt [Mich.] 97 N. W. 694. A note is not cancelled

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or order on a third party, is not payment in the absence of explicit agreement that it is so taken and at the creditor's risk.[31] A mere transfer of credit is not payment.[32] Money, subject to a specific lien, is not a good medium of payment.[33]

Manner of proffer.—Proof that a tender was fairly made should be clear,[34] and that it was unconditional,[35] but if the condition is not prejudicial to the creditor,[36] or if the refusal to accept is not on account of the condition, the tender is not vitiated.[37] Deposit in bank in creditor's name and notice to him are not a sufficient tender.[38] Imposing an unlawful condition,[39] refusing to perform contract,[40] or an intention expressed not to accept, waives tender.[41] Absence of one to whom tender is due excuses failure to tender,[42] and one who purposely avoided giving an opportunity to another to make a tender cannot complain that it was not made.[43] To be valid, a tender after action brought, must include accrued costs,[44] interest, and any statutory attorney's fee.[45]

Keeping tender good.—A tender that creates a right of action must be kept good by payment into court, but where the right is created by contract, all that is needed to preserve rights after tender is refused is continued readiness to pay when advised that tenders will be accepted.[46]

by the giving of a new note for the same indebtedness. Meigs v. Bromley [Mich.] 91 N. W. 627. Presumption from acceptance of note is rebuttable. Bryant v. Grady [Me.] 57 Atl. 92.

30. Flannery v. Harley, 117 Ga. 483.

31. A receipt in full is not evidence of such express agreement. Colby v. Maw [Neb.] 95 N. W. 677.

32. An entry on the books of a bank charging its depositor with the amount of his check, sent by the payee's bank for collection, is payment by the drawer to the agent of the payee. Smith Roofing & Contracting Co. v. Mitchell, 117 Ga. 772. A transfer of credits on the books of a trust is a sufficient "payment in cash," though the credits were on an open account and some of the items represented drawings in advance on unascertained profits. Breck v. Barney, 183 Mass. 133, 66 N. E. 643.

33. Proceeds of forged note. Simpson v. New Orleans, 109 La. 897.

34. Under statute of Or. making written offer to pay equivalent to tender of money, there must be ability to pay. Lilienthal v. McCormick [C. C. A.] 117 Fed. 89.

35. Held, no evidence of unconditional tender. McEldon v. Patton [Neb.] 93 N. W. 938. An inquiry if a tender of an amount then unascertained would be accepted, and a refusal, do not amount to tender. Rescission of tort settlement for fraud. Niederhauser v. Detroit Citizens' St. R. Co. [Mich.] 91 N. W. 1028.

36. Tender on condition of executing a deed, when by the contract a deed was to be delivered on payment. Maris v. Masters, 31 Ind. App. 235, 67 N. E. 699. Contra, Morris v. Continental Ins. Co., 116 Ga. 53. A vendee of real estate may tender the price conditioned on tender of a deed in fee simple by the vendor. Civ. Code, § 1498. Latimer v. Capay Val. Land Co., 137 Cal. 286, 70 Pac. 82.

37. Clark v. Colfax County [Neb.] 96 N. W. 607. An unconditional payment into court waives a prior condition attached to a tender. Tilden v. Gordon [Wash.] 74 Pac. 1016.

38. Cassville Roller Mill Co. v. Aetna Ins. Co. [Mo. App.] 79 S. W. 720.

39. Demand for amount claimed under another transaction as condition of executing a release tendered under Gen. St. 1902, § 802. Buonocore v. De Feo [Conn.] 56 Atl. 510.

40. Blalock & Co. v. Clark & Bro. [N. C.] 45 S. E. 642; Walker v. Cooper, 97 Mo. App. 441, 71 S. W. 370.

41. Stock and bonds for real estate commissions. Davis v. True, 89 App. Div. [N. Y.] 319.

42. An option to extend a lease was not lost by such failure. Sizer v. Clark, 116 Wis. 534, 93 N. W. 539.

43. Connely v. Haggarty [N. J. Eq.] 56 Atl. 371.

A vendee is not at fault for not producing the money or permitting it to be counted, under Civ. Code, § 1496, where a vendor fails to accept a tender. Latimer v. Capay Val. Land Co., 137 Cal. 286, 70 Pac. 82.

An offer of judgment may be made by statute on an unliquidated claim not subject of tender, but service of the offer on plaintiff's attorney is insufficient. Maxwell v. Mo., K. & T. R. Co., 91 Mo. App. 582.

44. Lewis v. Robinson, 78 App. Div. [N. Y.] 579; McEldon v. Patton [Neb.] 93 N. W. 938. A tender after suit must include interest and accrued costs. James Reilly's Sons Co. v. Aaron, 86 N. Y. Supp. 732.

45. Chicago & S. E. R. Co. v. Woodard, 159 Ind. 641, 65 N. E. 577.

46. Murray v. Nickerson [Minn.] 95 N. W. 898. Tender before suit, pleaded in answer, is not available to the defendant unless payment into court accompanies the answer. Margulies v. Goldstein, 85 N. Y. Supp. 1024. In equity a tender need not be kept good by delivery into court but the decree will protect the rights of the parties. Heyman v. Swift, 91 App. Div. [N. Y.] 352. A mortgagor suing in equity for affirmative relief and pleading tender must keep the tender good. Not sufficient where he returned money to brother and did not produce it in court. McNeil v. Sun & E. S. Bldg. Mut. Loan A. F. Ass'n, 75 App. Div. [N. Y.] 290.

See topic Payment into Court.

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§ 2. *Application of payments.*—Debtor and creditor may agree on the application of payments when made, and may later agree to change the application thus made, but not where rights of third parties have intervened.[47] Payments, if accepted, must be applied as designated by the debtor,[48] and it is immaterial whether instructions at the time of delivery, or prior agreement, directed the application.[49] In the absence of direction it is usually held that the creditor may apply payments on any account he elects,[50] but in some jurisdictions they must be applied on the obligation first due.[51] Payments on a running account sufficient to discharge an item, and all previous items, are payment of the former.[52] A payment is to be first applied to accrued interest.[53] In the absence of instructions the creditor may apply payments on the unsecured debt.[54] But payments out of the proceeds of property on which the creditor holds a lien should be applied on the debt secured by the lien, and not on an unsecured debt,[55] and the proceeds of a draft must be applied on the debt represented thereby and not on a general account.[56] Where husband and wife owe several debts to a third person, the latter may assume that payments by the husband are with his money.[57] The application may be made at any time before suit,[58] but an application once made binds the creditor.[59] Money paid in settlement of claims, which settlement was held void for want of authority of an agent, was properly retained and applied on the debt in an action on the claims.[60] Retaining a check, and notifying a debtor that it is retained on account, is not payment of the account in full.[61] Though a written contract cannot be varied to allow recovery of an additional sum claimed under an oral agreement,

47. Application on a debt secured by mortgage could not be changed to an unsecured debt where there was a second mortgagee. Pinney v. French, 67 Kan. 473, 73 Pac. 94.

48. Payment made could have been withdrawn. Instead application was directed. Must apply as directed. Lincoln v. Lincoln St. R. Co. [Neb.] 93 N. W. 766. A creditor cannot claim a right as a matter of law, to apply to an earlier debt, payments made to protect sureties on a later debt. Huntington County L. & S. Ass'n v. Cast, 160 Ind. 709, 67 N. E. 921. Delivery of a note with instructions to apply on a specific debt discharges the debt, if sufficient in amount. Application directed on a guarantee by a third party of credit of payer to limited amount. Coxe Bros. & Co. v. Milbrath, 116 Wis. 102, 92 N. W. 560.

49. Note delivered to be applied on a limited guarantee of credit by a third party. Coxe Bros. & Co. v. Milbrath, 116 Wis. 102, 92 N. W. 560.

50. Running account otherwise barred by statute of limitations instead of on promissory note. Hanly v. Potts, 52 W. Va. 263, 43 S. E. 218.

51. Civ. Code 1479, subd. 3. Moss v. Odell, 141 Cal. 335, 74 Pac. 999. Running account. Sleet v. Sleet, 109 La. 302; McWhorter v. Bluthenthal, 136 Ala. 568; Hurd v. Wing, 86 N. Y. Supp. 907.

52. National Cash Register Co. v. Bonneville [Wis.] 96 N. W. 558. So credits on a mutual account. Factors. White v. Costigan, 138 Cal. 564, 72 Pac. 178. Where a debt has not been included in an account of dealings between debtor and creditor, a surety cannot claim that it was paid by the existence of a credit balance in the account, sufficient to meet it. Camp v. First Nat. Bank [Fla.] 33 So. 241.

53. Dickson v. Stewart [Neb.] 98 N. W. 1085.

54. In re Johnson, 125 Fed. 838; National Bank of Commerce v. Garn, 23 Ohio Circ. R. 447. But dividends paid by a receiver of an insolvent company and a receiver appointed to enforce statutory stockholders' liability should be prorated between an unsecured debt and a limited guaranteed credit. Nat. Bank of Commerce v. Garn, 23 Ohio Circ. R. 447. Payments of dues to a defunct building and loan association cannot be treated as payments of indebtedness. Andrews v. Ky. Citizens' Bldg. & Loan Ass'n's Assignee, 24 Ky. L. R. 966, 70 S. W. 409.

55. Thatcher v. Tillory, 30 Tex. Civ. App. 327, 70 S. W. 782. Contra, payment out of money recovered on judgment for conversion of property on which creditor had a lien. Scott v. Cox, 30 Tex. Civ. App. 190, 70 S. W. 802.

56. Bank of Wrightsville v. Merchants' & Farmers' Bank [Ga.] 46 S. E. 94.

57. Chason v. Anderson [Ga.] 46 S. E. 629.

58. Thatcher v. Tillory, 30 Tex. Civ. App. 327, 70 S. W. 782. Where a defaulting treasurer secretly restored a portion of the amount due, the association, on ascertaining the facts, may apply the payments on the last defalcation in spite of the objections of sureties liable on former ones. Grant County Bldg., Loan & Sav. Ass'n v. Lemmon [Ky.] 78 S. W. 874.

59. White v. Costigan, 138 Cal. 564, 72 Pac. 178.

60. Fosha v. Prosser [Wis.] 97 N. W. 924.

61. Thomas v. Gwyn, 131 N. C. 460. A check sent to pay discount for renewal of a note, though retained in spite of refusal to renew, is not satisfaction; but in an action on the note should be deducted as part payment. Kelley v. Lawrence, 78 App. Div. [N. Y.] 484.

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after payment of such sum, the payer cannot claim that it be applied on the written obligation.[62]

§ 3. *Effect of tender.*—Tender after suit, by statute in many states, bars the recovery of costs.[63] Tender by agreement may be a condition precedent to an action on notes.[64] Tender is an admission of liability, and thereafter a bill cannot be dismissed "for want of equity,"[65] but it is not an admission of liability in a capacity in which he explicitly denies liability.[66] Tender by an executrix after money had come into her hands as assets on a debt of the estate is good.[67]

§ 4. *Payment or tender as an issue. A. Pleading.*—Payment must be pleaded as an affirmative defense.[68] To set up payment by a principal obligor, a guarantor need not plead it affirmatively.[69] A plea of due tender implies that the tender has been kept good and a denial raises the issue.[70] Tender of amount of debt not necessary before suing to recover security where defendant claimed latter as his own and the plaintiff claimed the debt was paid.[71] Tender need not be alleged in an action to have defendant declared constructive trustee of land contracted for.[72]

(§ 4) *B. Presumptions and burden of proof.*—The burden is on the debtor to establish payment by a fair preponderance of the evidence.[73] In an equitable action to enforce a lien, however, the burden is on the plaintiff to prove nonpayment.[74] There is no presumption of law that notes accepted by a creditor on a book account are accepted in payment.[75] In some states the rule is the same as to acceptance of the note of a third party.[76] In other states this is presumptively payment, but indorsement thereof so as to make the debtor liable on it rebuts the pre-

62. Wear v. Schmelzer, 92 Mo. App. 314. A contract for the application of rents by a mortgagee construed to intend the continuance of such application till all arrears of the mortgage were paid. Peterson v. Phila. Mortg. & Trust Co. [Wash.] 74 Pac. 585.

63. Tender before suit renewed in the answer stops costs against the defendant. Saunders v. King, 119 Iowa, 291, 93 N. W. 272. Amount of tender of costs paid to clerk deducted from judgment for costs. Grafeman Dairy Co. v. St. Louis Dairy Co., 96 Mo. App. 495, 70 S. W. 390. An unconditional tender affects only costs and may be accepted without waiving right to sue for the balance claimed. Tilden v. Gordon [Wash.] 74 Pac. 1016. Acceptance of tender waiving interest does not waive costs. McEldon v. Patton [Neb.] 93 N. W. 938. Under Mills' Ann. Code Colo., § 281, after a tender of an amount with costs to date which with legal interest to date of judgment was not exceeded by that judgment, the judgment will be reversed if the excess be not remitted. Florence Oil & Refining Co. v. Farrar [C. C. A.] 119 Fed. 150.

64. Where tender of stock was to be made when notes fell due. Mendel v. Pickrell, 38 Misc. [N. Y.] 758.

65. Mason v. Uedelhofen, 102 Ill. App. 116.

66. Craw v. Abrams [Neb.] 94 N. W. 639.

67. Sharp v. Garesche, 90 Mo. App. 233.

68. Forbes v. Wheeler, 39 Misc. [N. Y.] 538. Payments on account. Gardner v. Avery Mfg. Co., 117 Wis. 47, 94 N. W. 292. An answer that defendant has no knowledge or information sufficient to form a belief whether the same or any part thereof has been paid or not does not entitle the defendant to the benefit of a plea of payment. Wilkinson v. U. S. Fidelity & Guaranty Co. [Wis.] 96 N. W. 560.

69. Bank of Wrightsville v. Merchants' & Farmers' Bank [Ga.] 46 S. E. 94. Mere existence of indebtedness on both sides does not make it a mutual account. Hence plea construed as set-off and not payment. Northington v. Granade, 118 Ga. 584.

70. McNeil v. Sun & Evening Sun Bldg. Mut. Loan & Accumulating Fund Ass'n, 75 App. Div. [N. Y.] 290.

71. De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813. Tender of amount borrowed was held a prerequisite to trover for goods pledged even when the pledgee has sold in violation of his duties as pledgee. Schaaf v. Fries, 90 Mo. App. 111.

72. Martin v. Bank of Fayetteville, 131 N. C. 121.

73. Davis v. Hall [Neb.] 97 N. W. 1023; Stuart v. Lord, 138 Cal. 672, 72 Pac. 142; Meyer v. Hafemeister [Wis.] 97 N. W. 165. Plaintiff must prove payment of premium in action on insurance policy. O'Connell v. Fidelity & Casualty Co., 87 App. Div. [N. Y.] 306. To establish credits claimed on the debt. Tinsley v. McIlhenny, 30 Tex. Civ. App. 352, 70 S. W. 793. Bill of sale of hay alleged payment of a note. Held, burden not sustained. Satterlund v. Beal [N. D.] 95 N. W. 518. Mere probability is not sufficient to prove payment. Sigur v. Burgueres' Ex'rs [La.] 36 So. 134.

74. Lien of a legacy. Conkling v. Weatherwax, 90 App. Div. [N. Y.] 585.

75. Hence they do not extend time of payment. U. S. v. Hegeman, 204 Pa. 438. It is not even prima facie evidence of payment. Webb v. Nat. Bank of the Republic, 67 Kan. 62, 72 Pac. 520. Entries on creditor's books and signing a receipt reciting that the note was taken in payment are not conclusive. Cady Lumber Co. v. Greater America Exposition Co. [Neb.] 93 N. W. 961.

76. Webb v. Nat. Bank of the Republic, 67 Kan. 62, 72 Pac. 520; Durfee v. Seale, 139 Cal. 603, 73 Pac. 435; Mechanics' Nat. Bank v. Kielkopf, 22 Pa. Super. Ct. 128.

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sumption and casts the burden on him to establish such agreement;[77] but if such note be given simultaneously with the contracting of the debt the presumption is that it was received in satisfaction.[78] A check payable to an attorney and endorsed by him for deposit to the credit of the client raises a presumption of payment to the attorney on account.[79] The transfer by a partner, to satisfy his half of a partnership debt, of property equal in value to the whole debt, does not raise a presumption that such transfer wiped out the debt.[80] The burden of proof is on one alleging an agreement to accept an order in payment.[81] Payment in money for services is presumed to have been contracted for in the absence of proof to the contrary.[82] A decree disallowing bonds delivered to a contractor as in excess of what he was entitled to, under a construction contract, imposed on him the burden of showing that the bonds did not pay him for certain property bought by him for the railroad.[83] A receipt for money is prima facie evidence of payment.[84] The presumption raised by a receipt can be rebutted only by proof of nonpayment,[85] not by mere proof of a custom of the creditor to issue receipts in advance of payment.[86] On acceptance of a check with a promise to credit it on account, the burden is on the creditor to show that it was returned or dishonored.[87] Payment to the holder of the amount due on a note by one not the maker and taking passession of the note will be presumed a purchase and not a discharge.[88] Lapse of time short of the period of limitations can raise only a presumption of fact of payment.[89] The burden is on the plaintiff to show that an admitted payment was properly applied on another debt than that sued on.[90] Payments are presumed to be applied on the earlier rather than later debts in the absence of proof to the contrary.[91] There is no presumption that a debtor directed application of payments on the secured debt rather than the unsecured.[92] As between secured and unsecured debts in the absence of proof as to application, payments must be deemed applied on the unsecured debt.[93] Proceeds of timber presumed to have been applied to extinguish a lien on the land from which it was cut rather than on other unsecured debts.[94] Payments on a debt carrying excessive interest will be deemed applied first on the legal interest and then on the principal so that the usurious payments will be deemed the last ones.[95]

77. Gallagher v. Ruffing, 118 Wis. 284, 95 N. W. 117.

78. Vacheron v. Hildebrant, 39 Misc. [N. Y.] 61; Blum v. Sadofsky, 86 N. Y. Supp. 22.

79. Boyd v. Daily, 85 App. Div. [N. Y.] 581.

80. Leggat v. Leggat, 79 App. Div. [N. Y.] 141.

81. Weller Co. v. Washington Gordon & Co., 24 Ohio Circ. R. 407.

82. Fell v. Fell Poultry Co. [N. J. Err. & App.] 55 Atl. 236.

83. Seacoast R. Co. v. Wood [N. J. Eq.] 56 Atl. 337.

84. Guhl v. Frank, 22 Pa. Super. Ct. 531. Insurance premiums. O'Connell v. Fidelity & Casualty Co., 87 App. Div. [N. Y.] 306. Check reciting that it was given as payment in full and cashed by creditor. Gregg v. Roaring Springs Land & Min. Co., 97 Mo. App. 44, 70 S. W. 920.

85. Mailing notice that insurance premium is due. O'Connell v. Fidelity & Casualty Co., 87 App. Div. [N. Y.] 306.

86. O'Connell v. Fidelity & Casualty Co., 87 App. Div. [N. Y.] 306. Fraud, accident, or mistake, will avoid a receipt. Guhl v. Frank, 22 Pa. Super. Ct. 531. But when a receipt in full represents a balance found due on an account stated, it can be overthrown after lapse of time only by strong proof. Id.

87. Goodall v. Norton, 88 Minn. 1, 92 N. W. 445.

88. Marshall v. Myers, 96 Mo. App. 643, 70 S. W. 927.

89. Evidence held for jury. Rosenstock v. Dessar, 85 App. Div. [N. Y.] 501. Payment of a license fee for sewer connections was presumed after the lapse of 32 years. Roberts v. Dover [N. H.] 55 Atl. 895. The presumption of payment from delay for 29 years to enforce a claim after it became demandable can be rebutted only by clear proof. Barnhart v. Barnhart, 22 Pa. Super. Ct. 206. A written acknowledgment of indebtedness will rebut the statutory presumption of payment by lapse of time. Unlike statute of limitations. Chiles v. School Dist. [Mo. App.] 77 S. W. 82.

90. Davis v. Hall [Neb.] 97 N. W. 1023.

91. Kloepfer v. Maher, 84 N. Y. Supp. 138; Kelso v. Russell [Wash.] 74 Pac. 561.

92. Powers v. McKnight [Tex. Civ. App.] 73 S. W. 549.

93. Andrews v. Ky. Citizens' Bldg. & Loan Ass'n's Assignee, 24 Ky. L. R. 966, 70 S. W. 409.

94. It was debtor's duty as trustee to insist on such application. Howard v. London Mfg. Co., 24 Ky. L. R. 1934, 72 S. W. 771.

95. Crenshaw v. Duff's Ex'r, 24 Ky. L. R. 718, 69 S. W. 962.

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(§ 4) *C. Evidence. Admissibility.*[96]—Admissions of deceased maker, entries in his private account book, and indorsements on the note by the payee, are evidence of a payment to take the note out of the statute of limitations.[97] A receipt acknowledging payment may be varied by oral evidence showing that the payment was not made, but not so far as it evidences a contract or satisfaction between the parties.[98] Evidence of prior transactions is admissible to show that checks introduced by the defendant were in payment of those rather than of the contract in suit.[99] On the issue whether paying plaintiff's traveling expenses was payment of defendant's note to plaintiff, evidence that plaintiff had been defendant's guest on prior occasions was held material.[1] Retention of a note marked "cancelled" is not evidence of payment.[2] Evidence that a deceased creditor had said that she understood certain advances by the debtor were a gift, though incompetent, when admitted without objection, and corroborated by testimony of witnesses who heard her say it, is sufficient to prove that the advances were not payment of a note.[3]

Sufficiency.—Cases considering the weight of evidence of payment are collected in the note.[4]

PAYMENT INTO COURT.

§ 1. Occasion and Propriety (1163).
§ 2. The Payment and Its Effect (1164).
§ 3. Custody and Liabilities (1164).
§ 4. Payment, Surrender, or Distribution (1164).

§ 1. *Occasion and propriety.*—Payment into court is a deposit of money with a proper officer of the court for the benefit of the adverse party and by way of a continuing tender on his demand.[5] It will not be compelled against one (a trustee) who claims the fund of right,[6] nor can the legislature deprive one of property rights

96. Forst v. Kirkpatrick, 64 N. J. Eq. 578.

97. Fowles v. Joslyn [Mich.] 97 N. W. 790. An entry by a deceased of payment of insurance premiums by notes is incompetent where the amount of the entry does not correspond with the amount of the premium. N. Y. Life Ins. Co. v. Johnson's Adm'r, 24 Ky. L. R. 1867, 72 S. W. 762.

98. Vacheron v. Hildebrant, 39 Misc. [N. Y.] 61.

99. Druss v. Rosen, 84 N. Y. Supp. 174.

1. Zane v. De Onativia, 139 Cal. 328, 73 Pac. 856.

2. Sharpe v. N. Y. Life Ins. Co. [Neb.] 98 N. W. 66.

3. Brightman v. Buffington, 184 Mass. 401, 68 N. E. 828. Cal. Code Civ. Proc. §§ 2074, 2076, providing that an offer to pay is tender and failure to object waiver, the objection creates mere rules of evidence affecting costs and the right to sue where tender is a prerequisite. Colton v. Oakland Bank of Savings, 137 Cal. 376, 70 Pac. 225.

4. Evidence held to show payment. Fleck v. Neerenberg, 85 N. Y. Supp. 379. Entries of payments by deceased in an account book not otherwise explained suffice to prove payment. Cummings v. Lynn [Iowa] 96 N. W. 857. Admissions of party held to be sufficient evidence of payment. Kelly v. Butterworth, 103 Ill. App. 87. Evidence held to show that a maker of a note was entitled to credit for payments. Barrickman's Adm'r v. Barrickman, 25 Ky. L. R. 1285, 77 S. W. 685. Plaintiff went to a bank to purchase a note. While counting out the money the cashier stamped the note paid. Plaintiff said this ought not to have been done, but took the note. Held, not enough to rebut the presumption of payment raised by the stamp or show an intent by the bank to sell. Riddle v. Russell, 117 Iowa, 533, 91 N. W. 810. Evidence of estoppel to deny payment deemed insufficient. Ayres v. Nixon [Neb.] 97 N. W. 621. Evidence held not to show that notes were received in payment, where provided for in contract. Valade v. Masson [Mich.] 97 N. W. 59. Evidence held to show no payment by delivery of a draft. Darby v. Miller, 116 Ga. 952. Evidence held insufficient to show payment, rather than purchase, of mortgage notes. Fitch v. Duckwall, 25 Ky. L. R. 1535, 78 S. W. 185. The burden of proving payment was held not sustained by records of an absconding bookkeeper of the debtor as against testimony of the creditor and her husband. In re Burk & McFetridge's Assigned Estate, 205 Pa. 332. Evidence held not to show agreement to accept an order in payment. Weller Co. v. Washington Gordon & Co., 24 Ohio Circ. R. 407. The inference from repayment by plaintiff of loans made by defendant without any deduction of plaintiff's claim, that such claim had been paid is not cogent where repayment was in work. Ran v. Torchiani, 84 N. Y. Supp. 886. Evidence held insufficient to establish that a running account against a husband was to be applied in payment of a bond due the wife, where admissions were made by an officer of the debtor that the bond was unpaid. White Hall Co. v. Hall [Va.] 46 S. E. 290.

5. Cyc. Law Dict.: "Payment Into Court."

6. An order cannot be made on interlocutory application requiring a trustee to pay trust funds into court in a suit by the beneficiaries for an accounting where he denies

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by providing for a payment into court unless it is so paid that he may take it.[7] A provision for a deposit by a bidder at judicial sale does not necessarily mean a deposit of money into court. Bidder at a master's sale allowed to deposit a check or certificate of deposit and to pay for property by crediting the amount on a decree for him.[8]

§ 2. *The payment and its effect.*—The amount must suffice to pay the claim and costs when paid in or it will not avail as a tender.[9] The payment itself unaccepted does not fix rights in the subject-matter of the demand.[10] The money is in custodia legis and not leviable in attachment.[11]

§ 3. *Custody and liabilities.*—The power of a county treasurer as to money paid into court is that of an ordinary trustee.[12] A bona fide assignee of a mortgage given a county treasurer to secure a loan from funds deposited in court takes a good title though the treasurer used the funds to replace others he had converted.[13] Deposit of such moneys in bank by the custodian with approval of the judge on proper showing is proper in Michigan though no formal order for deposit was made.[14] They are not special deposits entitled to priority on insolvency of the bank.[15]

§ 4. *Payment, surrender, or distribution.*—A law requiring surrender of a deposit only on certified copy of an order of court does not apply to transfer or assignment by the county treasurer of securities in which the funds are invested.[16] Priorities in the amount paid in will not be litigated until final judgment if there is sufficient in court to protect the objecting claimant.[17] Where collection of a judgment for money deposited in court was restrained to allow set-off of another judgment, claimants of a lien on the deposit, not parties and not intervening, cannot have their rights determined on motion and affidavits before trial.[18] If a reference had did not cover such priorities, the court may hear one in interest who does not answer or except to the master's report.[19] The fund may be applied on debts of the party entitled to another party in court,[20] and in a proper case equity will let in an offset.[21] A payment into court under a land contract, of instalments on the

liability. Blanton v. Heckscher [Va.] 42 S. E. 915.

7. A statute giving petitioner in condemnation proceedings right to an order for possession on payment into court of sum sufficient to pay for land taken or damages is unconstitutional. Code Civ. Proc. § 1254; Const. art. 1, § 14, provides that money cannot be considered as first paid into court "for the owner" unless he can take it, and the owner in condemnation cannot take it until his right is judicially determined. Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629, 59 L. R. A. 404.

8. Curtice v. Crawford County Bank, 124 Fed. 919.

9. McEldon v. Patton [Neb.] 93 N. W. 938.

10. Payment into court by plaintiff of the award in condemnation does not vest title to the easement awarded in him where defendants have appealed on other grounds than the sufficiency of the award. The deposit is merely a tender which is not accepted. Pool v. Butler, 141 Cal. 46, 74 Pac. 444. Evidence as to acceptance as including or excluding costs. McEldon v. Patton [Neb.] 93 N. W. 938.

11. Money paid into hands of the clerk cannot be attached by proceedings against the clerk, nor as against a party to whom the clerk has been ordered to pay part of the fund by attachment laid in the hands of the clerk. Dale v. Brumbly [Md.] 56 Atl. 807.

12. He may sell, transfer, and discharge securities without order of court [Code Civ. Proc. c. 8, tit. 3]. Tompkins County v. Ingersoll, 81 App. Div. [N. Y.] 344.

13. Tompkins County v. Ingersoll, 81 App. Div. [N. Y.] 344.

14, 15. Comp. Laws, §§ 420-424. Retan v. Union Trust Co. [Mich.] 95 N. W. 1006.

16. Code Civ. Proc. § 751. Tompkins County v. Ingersoll, 81 App. Div. [N. Y.] 344.

17. Where a decree restraining a judgment and allowing a set-off requires payment into court of a sum more than sufficient to satisfy an attorney's lien on the judgment, priorities of the lien and set-off need not be determined. Commercial State Bank v. Ketchum [Neb.] 96 N. W. 614.

18. Frye-Bruhn Co. v. Meyer [C. C. A.] 121 Fed. 533.

19. Butler v. Butler [S. C.] 45 S. E. 184.

20. Where a claimant of a fund in court brings in a party interested in another portion, and to whom he is indebted, the court may order the fund paid on the debt. Butler v. Butler [S. C.] 45 S. E. 184.

21. An assignee of a Washington judgment may restrain collection of an Alaskan judgment against him, for money deposited with the clerk of the Alaska district court, for purposes of off-set where defendant is insolvent or has secreted property liable to execution. Frye-Bruhn Co. v. Meyer [C. C. A.] 121 Fed. 533.

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property, will be returned when plaintiff is determined to have no title.[22] Withdrawal of the amount admitted by defendants in foreclosure from custody of the court by their attorney after its deposit under an ex parte order of permission and decree for less than the deposit was a fraud on the court and a summary order of restoration is proper.[23] If the trial court has erroneously ordered payment out of court, the appellate court may give judgment for the other in order to put them in statu quo.[24]

PEDDLING.

§ 1. Definition (1165).
§ 2. Statutory Regulation (1165).
§ 3. Prosecution (1166).

§ 1. *Definition.*—A peddler is one who has no fixed place of business but travels from place to place carrying with him a stock of goods which he offers for sale, which he sells at the time, and which he at that time delivers and receives pay for.[25]

§ 2. *Statutory regulation.*—In many states, the occupation of peddling is regulated by statute, as by imposing a tax upon them,[26] or by requiring them to take out a license and pay a license fee,[27] and by exempting certain persons from the payment of such license.[28]

Constitutionality.—But such statutes must not be in violation of the federal constitution, as by requiring a tax or license from persons in interference with interstate commerce,[29] though it is not such an interference to tax the occupation of peddling;[30] or by making an unjust discrimination between different peddlers not

22. Where plaintiff in ejectment alleged title through sale to his grantor by the Cherokee nation and admitted nonpayment of certain instalments of the purchase price, but paid them into court on express stipulation that they should be paid to the nation intervening only if plaintiff recovered, repayment to him may be ordered on sustaining a demurrer to the complaint, especially where the court also decided that plaintiff never acquired title and the nation did not show sufficient interest to permit it to intervene. Donohoo v. Howard [Ind. T.] 69 S. W. 927.

23. Brott v. Davidson, 87 App. Div. [N. Y.] 29.

24. Where the court directed payment of money, deposited in bank as payment on an unenforceable contract for sale of a partner's interest, to be paid to the clerk and afterward directed its payment to defendant in specific performance, the court on appeal will give judgment in that amount to plaintiff to place the parties where they were at commencement of the action. Horseman v. Horseman, 43 Or. 83, 72 Pac. 698.

25. In re Pringle, 67 Kan. 364, 72 Pac. 864. A traveling salesman, selling goods by sample, is not a peddler. Wausau v. Heideman [Wis.] 96 N. W. 549; Potts v. State [Tex. Cr. App.] 74 S. W. 31.

26. One selling by sample, ranges, etc., to be delivered and payment received by the firm for which the orders are taken, is not a peddler under Act (Tex.) May 12, 1899, (Laws 1899, p. 201, c. 116), requiring a person or firm peddling such goods to pay a tax. Potts v. State [Tex. Cr. App.] 74 S. W. 31. A merchant from a neighboring town selling and delivering goods in wholesale lots to various merchants is not an itinerant merchant or peddler within the meaning of a city charter imposing a privilege tax on such. State v. Ninestein, 132 N. C. 1039.

27. A city ordinance may require peddlers in the city to take out a license and regulate the amount to be paid therefor. Muskegon v. Zeeryp [Mich.] 96 N. W. 502. But such ordinances do not apply to traveling salesmen taking orders for goods by sample. Wausau v. Heideman [Wis.] 96 N. W. 549.

A statute making it a misdemeanor for peddlers, except such as are exempted, to engage in business without a license, does not apply to one engaged in interstate commerce [Pen. Code Ga. 1895, § 600]. Stone v. State, 117 Ga. 292.

28. Vt. S. c. 198, exempting honorably discharged soldiers of the civil war. State v. Shedrol, 75 Vt. 277.

29. One taking orders for goods for a merchant in another state, from whom he receives the goods in original packages, which he breaks and distributes the goods to the customers, receiving pay therefor. Stone v. State, 117 Ga. 292. One taking orders for goods from house to house, using therein a horse and wagon furnished by a corporation in another state, which also supplies the defendant with the goods, but does not know of his customers, the defendant alone delivering the goods collecting the price and retaining a commission, is not engaged in interstate commerce so as to exempt him from paying a peddler's license (Muskegon v. Zeeryp [Mich.] 96 N. W. 502); nor one taking orders for goods, purchased by him from a merchant in another state, which are delivered by him and which he is required to pay for before they are delivered to him (In re Pringle, 67 Kan. 364, 72 Pac. 864).

30. Laws N. D. 1903, c. 165, taxing the occupation of hawking and peddling is not a tax upon interstate commerce. In re Lipschitz [N. D.] 95 N. W. 157. One acting as a manufacturer's agent in taking orders for

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based upon inherent differences in the nature of their business or kind of property dealt in.[31] The license tax must not be so excessive as to amount to a prohibition.[32]

§ 3. *Prosecution.*—One peddling in violation of the law may be indicted.[33]

PENALTIES AND FORFEITURES.

§ 1. Definitions and Elements (1166).
§ 2. Rights and Liabilities to Penalties and Forfeitures and the Policy of the Law (1166).
§ 3. Remedies and Procedure (1168).

§ 1. *Definitions and elements.*—A penalty is the giving up of money for the failure to perform an obligation, while a forfeiture is the giving up of property, other than money, for failure to pay a sum of money or perform some other obligation.[34] An agreement to forfeit a large sum of money in default of paying a small sum is a penalty and will not be enforced[35] or if the damages to be paid for a breach of contract will more than compensate for loss, it will be regarded as a penalty.[36] A stipulation for liquidated damages will be enforced but courts will not regard a sum stipulated as liquidated damages, if it appears that the sum will more than compensate for loss.[37]

§ 2. *Rights and liabilities to penalties and forfeitures and the policy of the law.*—Neither penalties nor forfeitures are favored, but where a contract provides for a forfeiture[38] in clear terms, neither law nor equity will relieve against it.[39] Demand for payment is not necessary before declaring a forfeiture.[40]

Penal statutes are strictly construed,[41] and may not be so broadened by con-

stoves to be shipped from the factory, and to be delivered and set up by another employe of the manufacturer, is engaged in interstate commerce and is not a peddler within the meaning of a statute requiring an occupation tax from one peddling such goods. Harkins v. State [Tex. Cr. App.] 75 S. W. 26.

31. Laws Me. 1901, c. 277, § 4, exempting peddlers, owning and paying taxes on a stock of goods to the amount of $25 from paying a license fee, but requiring it of peddlers paying a less tax on their stock. State v. Mitchell, 97 Me. 66. Vt. S. c. 198 exempting honorably discharged soldiers from paying a peddler's license is an unjust discrimination, in violation of the fourteenth amendment. State v. Shedrol, 75 Vt. 277.

A statute requiring a peddler's license of nonresidents, doing business in the state, but not of residents is unconstitutional as not entitling citizens of each state to all the privileges and immunities of citizens in the several states [Laws Kan. 1901, c. 271]. In re Jarvis, 66 Kan. 329, 71 Pac. 576.

32. An ordinance requiring hucksters to pay $35, and their helpers $15 for each six months is not unreasonable. Kan. City v. Overton [Kan.] 75 Pac. 549.

33. An information failing to show that stoves peddled were cooking stoves or ranges is defective under act (Tex.) 1899, (G. L. 1899, p. 201, c. 116) requiring peddlers of cooking stoves or ranges to pay an occupation tax. Harkins v. State [Tex. Cr. App.] 75 S. W. 26. A motion to quash an indictment against a peddler on the ground that he was engaged in interstate commerce is properly overruled if there is nothing in the indictment and no evidence to show that fact State v. Hall, 109 La. 290.

34. A stipulation in the policy or a note for the premium, that the insurance shall be void if the premium is not paid on a certain day is valid. Manhattan L. Ins. Co. v. Wright [C. C. A.] 126 Fed. 82.

35. An agreement to forfeit, or lose money or property, much in excess of interest, during the delay on account of a failure to repay a loan on a stipulated day. Manhattan L. Ins. Co. v. Wright [C. C. A.] 126 Fed. 82. A charge imposed by a water company for cutting off a consumer's supply for failure to pay his rates is a penalty. People v. Monroe, 41 Misc. [N. Y.] 198.

36, 37. Lee v. Carroll Normal School Co. [Neb.] 96 N. W. 65.

38. Failure to make payments of investment certificates. Equitable L. & S. Co. v. Waring, 117 Ga. 599.

39. A building was erected under a contract providing for a penalty for delay, and declaring that alteration ordered by the owner in course of construction should not affect the contract, held, that the alteration clause did not bind the contractor to complete the buildings within the time specified or pay the penalty for delay so caused. Small v. Burke, 86 N. Y. Supp. 1066.

40. Under a lease providing that the lessee should pay the taxes under penalty of forfeiture. Metropolitan Land Co. v. Manning, 98 Mo. App. 248, 71 S. W. 696.

41. Penalty for **refusal to satisfy, on record**; a paid judgment applies only where the refusal was willful. Johnson v. Huber, 117 Wis. 58, 93 N. W. 826. Penalty for failure of a mortgagee to discharge a paid mortgage of record does not apply to a mortgagee, who in good faith, believed the debt was not due when the tender was made, and there was no actual acceptance of the money (Snow v. Bass, 174 Mo. 149, 73 S. W. 630), but it was no defense to an action for the penalty that the mortgagor owed him money not a part of the mortgage debt (Henry v. Orear [Mo. App.] 78 S. W. 283). Under statute

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struction as to make them cover otherwise lawful acts which are not denounced by the meaning of express terms,[42] but words receive their ordinary meanings,[43] and

the assignee of a mortgage is liable to the penalty for failure to comply with the statute. The statute does not apply to partial payments or releases of portions of the land. Penalty for failure to discharge a mortgage of record on request of the mortgagor. A request by one of two joint mortgagees is insufficient (Jowers v. Brown Bros., 137 Ala. 581), and uniting in a joint action for the penalty cannot operate as a ratification so as to make it sufficient (Id.). Forfeiture on failure of a mortgagee to discharge of record a paid mortgage does not authorize the recovery of a forfeiture where there has been only a tender of payment. Humaker v. Bynum [Ala.] 34 So. 405. Penalty for failure to discharge a mortgage of record does not apply to a case where the mortgage of record was by mistake made to secure a debt of less amount than the amount of the notes. Osborn v. Hocker, 160 Ind. 1, 66 N. E. 42. Failure of a credit man of a firm to enter payment of a mortgage on the record thereof, renders the firm liable for penalty for their failure to enter such payment on request of the mortgagor. Long Bros. v. Jennings, 137 Ala. 190. Penalty to be recovered in case of **money lost at gaming** does not apply where the loser has given notes which have not been paid. Jacob v. Clark, 24 Ky. L. R. 2120, 72 S. W. 1095. This statute applies only when the gaming occurs within the state. Id.

Penalty for the exaction of **usury**, the person who receives the usurious interest is liable for the penalty. Webb v. Galveston & H. Inv. Co. [Tex. Civ. App.] 75 S. W. 355. A note binding the maker to pay $235.00 on a loan of $200.00 is a contract within the meaning of a statute providing for a penalty for usury on written contracts. Rosetti v. Lozano, 96 Tex. 57, 70 S. W. 204. Usury must have been paid before an action can be maintained for a penalty for exacting it (Rushing v. Bivens, 132 N. C. 273), and giving a renewal note in payment of an usurious one is not sufficient (Id.).

Penalty for a **life insurance company which fails to pay** a claim within the time specified in the policy. Held, where a policy was payable in instalments, the penalty could only be computed on instalments due when the suit was brought. N. Y. L. Ins. Co. v. English [Tex. Civ. App.] 70 S. W. 440. Penalty provided by a statute for discrimination in rates charged insurants of the same class, though the discrimination was made by an agent without authority and in disobedience of the rules, the company is liable. Franklin L. Ins. Co. v. People, 200 Ill. 594, 66 N. E. 378.

Penalty for **betting on an election**, the loser's demand for his money before it had been paid over by the stakeholder revoked the bet and the money paid the winner could not be considered as money won on a bet. Gardner v. Ballard, 24 Ky. L. R. 880, 70 S. W. 196.

Penalty for the unjust discrimination of one **express company against another** the company discriminated against need not be incorporated. Adams Exp. Co. v. State [Ind.] 67 N. E. 1033.

A statute imposing a forfeiture on **railroads for charging more than the lawful rate** of fare, unless the overcharge was made through mistake not amounting to gross negligence, does not impose the forfeiture on one making an overcharge through mistake of law. Goodspeed v. Ithaca St. R. Co., 88 App. Div. [N. Y.] 147.

Penalty for failure of railroad companies to keep their right of way clear of dry vegetation. Held, that the penalty was recoverable by the party aggrieved. McFarland v. Miss. River & B. T. R. Co., 175 Mo. 423, 75 S. W. 152.

Overcharge by officers: Penalty to be recovered from a public officer who charges for his official services any greater compensation than the fees allowed by the laws of the state does not apply to a school district clerk, for whom no statutory fees are provided. Musback v. Schaefer, 115 Wis. 357, 91 N. W. 966.

A traveling optician inviting persons afflicted with dizziness and neuralgia to visit him does not come within the meaning of a statute providing a penalty for violating an act to regulate the **practice of medicine.** People v. Smith [Ill.] 69 N. E. 810.

A municipal ordinance providing a penalty for the use of defective or incorrect **weights or measures** is aimed at the use of such defective weight and not at an intentional alteration of it. New York v. Hewitt, 86 N. Y. Supp. 832. Where an ordinance prescribes a penalty for use of a false weight the court cannot dispense with the imposition of the penalty as a matter of grace, where the violation of the ordinance was proved. Id.

An advertisement for weavers to work in a village in Connecticut held not to promise employment, within the meaning of the alien contract labor law, imposing a penalty for **encouraging the immigration of aliens** into the United States. U. S. v. Baltic Mills Co., 117 Fed. 959. Penalty if a **census enumerator made false returns,** held to apply to an enumerator making corrections in his return after the expiration of the time the statute provided for doing the work. Ching v. U. S. [C. C. A.] 118 Fed. 538.

42. Providing for penalty for using engines and cars engaged in interstate commerce not equipped with automatic couplers. Johnson v. Southern Pac. Co. [C. C. A.] 117 Fed. 462. Under Greater New York Charter, providing a penalty for allowing smoke to escape or be discharged, recovery cannot be had on simple proof that smoke did escape, where it is not shown that it was detrimental to any person. Department of Health v. P. & W. Ebling Brew. Co., 38 Misc. [N. Y.] 537.

43. United States statutes providing for the seizure of goods, wares, and merchandise, subject to forfeiture, the phrase "goods, wares, and merchandise," is broad enough to include a team of mules. Pilcher v. Faircloth, 135 Ala. 311.

The criterion to be applied in determining whether a fish weir is in front of the shore of another, within the meaning of a statute providing a penalty therefor, is whether or not it causes injury to the shore owner in the enjoyment of his rights. Dunton v. Parker, 97 Me. 461. Evidence that a shore owner was damaged held sufficient

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regulations imposing penalties are presumed reasonable.[44] A forfeiture may operate though a proceeding is yet to be had to declare title. A penalty will not be enforced at the instance of one who procured the forbidden act to be done that he might collect the penalty.[45] A person suing under statutory authority must bring himself clearly within the circumstances prescribed.[46]

Where a statute punishes an act as a misdemeanor, and also imposes a penalty therefor, it is not necessary to secure a conviction before suing for the penalty.[47]

The right to collect a penalty abates with the death of the person entitled to it.[48] In actions of a penal character depending on a statute, the repeal of a statute pending appeal will deprive the appellate court of power to render a judgment by which the penalty may be enforced.[49]

§ 3. *Remedies and procedure. General practice rules.*—As a general rule a penalty cannot be enforced in an action in equity,[50] but where a forfeiture works equity and will prevent great loss it will be decreed.[51] The action to recovery a penalty is local.[52] At common law, debt was the proper action by which to recover a penalty.[53] It cannot be recovered on a purely defensive pleading,[54] but a plea is sufficient if it sets up a cross action.[55] Actions to recover penalties prescribed by

to allow the recovery of a penalty, under a statute providing therefor, for maintaining a fish weir below or beyond low-water mark in front of the shore or flats of another. Id.

44. A municipal ordinance providing a penalty for any one using an incorrect or defective weight or measure. New York v. Hewitt, 86 N. Y. Supp. 832. Under United States laws declaring animals used in the removal of spirits, with intent to defraud the government, shall be forfeited, forfeiture takes place immediately upon commission of the act, though title in the United States is not completed until condemnation; but the forfeiture avoids all intermediate sales. Pilcher v. Faircloth, 135 Ala. 311.

45. Penalty for refusal of a railroad company to redeem unused passenger tickets does not apply to one who purchased tickets only to have them redeemed, and on failure of the company to redeem, to enforce the penalty. Jolley v. Chicago, M. & St. P. R. Co., 119 Iowa, 491, 93 N. W. 555.

46. Under a statute providing that if any one lose money at gaming, and does not, without covin or collusion, sue to recover it within six months, any person may sue and recover treble damages. Held, that the "covin and collusion" means collusion between the winner and loser. Kizer v. Walden, 198 Ill. 274, 65 N. E. 116. Under the statute, an action cannot be maintained by a third person, where it appears that the suit is in the interest of the loser. In an action for treble damages, under this statute, evidence as to whether money had been lost held for the jury. Evidence admitted to show that the action, under the statute, was brought for the benefit of the loser of money lost at gaming in futures. Staninger v. Tabor, 103 Ill. App. 330. One owning the right of shooting on land can maintain an action for a penalty provided by statute for the willful entry on land, on which notices are posted, for the purpose of shooting. Payne v. Sheets, 75 Vt. 335.

47. A statute declared the burning of fallows at certain seasons a misdemeanor, and also imposed a penalty. Held, one who had been acquitted in a criminal prosecution was not immune from an action for the penalty. People v. Snyder, 90 App. Div. [N. Y.] 422. A New York law declaring the killing of game out of season a misdemeanor, and imposing a penalty therefor, subjects the offender to a civil action for the penalty in addition to criminal liability. People v. Bootman, 40 Misc. [N. Y.] 27.

48. Penalty for usury cannot be recovered by a personal representative, heir at law of assignee of a decedent. Garris v. Thomas, 66 S. C. 57. A Texas statute providing for the recovery of money paid to pools, trusts, or monopolies, held to provide for a penalty, and the right of action to recover it died with the corporation. Mason v. Adoue, 30 Tex. Civ. App. 276, 70 S. W. 347.

49. Railroad collecting excessive rates. Pensacola & A. R. Co. v. State [Fla.] 33 So. 985.

50. A claim not reduced to judgment for penalties for failure to release paid mortgages, does not furnish such a cross demand as can be used for the basis of an equitable action to cancel another mortgage between the same parties, which has not been paid. Meredith v. Lyon [Neb.] 92 N. W. 122.

51. A 99 year mining lease was declared forfeited by nonuser, where the lessee had made no explorations for 40 years, and had stood by in silence while another developed valuable mines. Negaunee Iron Co. v. Iron Cliffs Co. [Mich.] 96 N. W. 468.

52. Suit to recover treble damages for money lost at gambling in futures commenced in a county other than where the money was lost. Staninger v. Tabor, 103 Ill. App. 330.

53. In Colorado, under a statute providing for a penalty for refusal of a corporation to allow its stockholders to examine its books, the statute did not specify what court should take cognizance of the cause. Held, a justice of the peace had jurisdiction. Dwyer v. Smelter City State Bank, 30 Colo. 315, 70 Pac. 323.

54. A Texas statute provided a penalty for usury to be recovered "by action of debt." Rosetti v. Lozano, 96 Tex. 57, 70 S. W. 204.

55. Answer alleging sums paid to be usu-

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statute should be brought in the name of the state.[56] An action to recover a penalty must be brought by the injured party.[57] The fact that the "forfeiture" imposed by statute is so denominated is not controlling in determining whether the statute is penal.[58] When the process is required to bear indorsement of the statute violated, all of those violated must be so endorsed.[59]

A forfeiture prescribed by statute or imposed as punishment for crime calls for indictment.[60] The statute itself need not be pleaded.[61] Exceptions and affirmative defenses need not be negatived,[62] but the absence of conditions must be alleged.[63] The complaint cannot join two causes of action in a single count.[64]

The burden of proving a penalty or forfeiture is on him who asserts it,[65] and more than a preponderance of evidence is required to sustain a verdict for a penalty.[66] No greater degree of proof is required than the statute imposing the pen-

rious interest held sufficient. Rosetti v. Lozano, 96 Tex. 57, 70 S. W. 204.

56. Penalty for failure of a corporation to file a report as required by statute. State v. Mo. E. & L. Co., 97 Mo. App. 226, 70 S. W. 1107. This defect may be waived by failure of the corporation to object thereto, either by demurrer or answer. Id.

57. Evidence held insufficient to show that a bank owned, or had any interest in, a note on which it was alleged usurious interest had been paid. Wayne Nat. Bank v. Kruger [Neb.] 95 N. W. 476. Where a complaint in an action to enforce a penalty for violation of a game law is served with the summons, it is unnecessary to indorse a reference to the statute on the summons. People v. Bootman, 40 Misc. [N. Y.] 27. A seller of diamonds having the right to rescind the sale, because obtained by means of false representations, cannot assert such right against the right of the United States to forfeit the goods, where they were seized while attempt was being made to smuggle them into the country. 581 Diamonds v. U. S. [C. C. A.] 119 Fed. 556. In an action for a penalty for a violation of a provision of the health department, the offender loses his right of removal, given by the Municipal Court Act, to the district in which the violation occurred, unless he demands a transfer on or before joinder of issues. Department of Health v. Halpin, 40 Misc. [N. Y.] 243.

58. Forfeiture for shooting on land of another. Payne v. Sheets, 75 Vt. 335. In Florida, under a statute providing a forfeiture against an officer who willfully charges excessive fees to be recovered on motion before the court wherein the services were rendered, the circuit court has jurisdiction to determine the correctness of any charge made for costs in cases pending in said court. State v. Reeves [Fla.] 32 So. 814.

59. For a public officer willfully neglecting his duty. A moderator of a town meeting comes within the meaning of the statute. State v. Waterhouse, 71 N. H. 488. In Nebraska, penalties provided for violation of a freight rate law can only be recovered in a criminal action. State v. Union Pac. R. Co. [Neb.] 93 N. W. 222.

60. Under a New York statute providing a penalty for killing certain game out of season, the complaint need not refer to the statute, but it is sufficient to allege facts bringing the action within the statute. People v. Bootman, 40 Misc. [N. Y.] 27. A complaint in an action for a penalty for keeping and offering for sale adulterated vinegar, held sufficient under a statute providing for such penalty. State v. Windholz, 86 N. Y. Supp. 1015.

61. In a qui tam action to recover a penalty for charging excessive rates, the title of only one of two statutes providing for the penalty was indorsed on the process. Hunter v. Erie R. Co. [N. J. Law] 56 Atl. 139.

62. In New York, a complaint for a penalty for killing game out of season need not state that the case is not within a saving clause of the act imposing the penalty. People v. Bootman, 40 Misc. [N. Y.] 27.

63. Under an Indiana statute providing for a penalty for the failure of any corporation to make settlement with its employes engaged in manual labor once each month, in the absence of written contract, the complaint must aver the absence of the written contract. Baltimore & O. S. W. R. Co. v. Harmon [Ind.] 68 N. E. 589.

64. Complaint to recover a penalty for selling falsely labeled vinegar alleged that one person manufactured and sold to another, and in the next paragraph alleged that such other purchased and kept for resale. Held, that the causes of action should be separately stated and numbered. People v. Sheriff, 78 App. Div. [N. Y.] 46. A complaint to recover penalties for selling adulterated vinegar alleging that plaintiff does not know the precise number of barrels contained in each sale, but is entitled to recover the penalty for each sale, is objectionable, as alleging in a single count an indefinite number of sales, for each of which there is a cause of action. Id.

65. In a suit to recover the penalty for overcharges, consisting in the excess of interstate rate over the commission rates of Texas, the burden of proving that the shipment was a domestic one was on the plaintiff. Gulf, C. & S. F. R. Co. v. Fort Grain Co. [Tex. Civ. App.] 72 S. W. 419; Id., 73 S. W. 845. Where a contract for the construction of a building provided penalty for delay, and there was nothing to show that the parties intended the amount specified as liquidated damages, and the actual damages were susceptible of proof, the court could not take judicial notice of the fact that the rental value would amount approximately to the sum specified as a penalty, but the burden of proof was on the owner to show such fact. Small v. Burke, 86 N. Y. Supp. 1066.

66. Action for treble damages for cutting trees on the land of another. Gunkel v.

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alty specifies.[67] When a conviction for violation of an ordinance fails to set out the offense of which defendant was convicted, and the names of the witnesses sworn on the trial, the judgment will be set aside.[68] It must be entered by a court having jurisdiction,[69] and will not be set aside for errors in pleading.[70]

PENSIONS.

A claim for a pension must be supported by an affidavit, for falsity and fraud in which an indictment will lie.[71]

Attorney's fees.—The usual fee to an attorney for prosecuting a pension claim is ten dollars unless the parties contract for more not exceeding twenty-five dollars.[72]

Transfer.—A pension to become payable in the future is not assignable,[73] though a warrant for a pension is.[74]

Exemptions.—Under the United States statutes, pension money is exempt from execution until it comes into the hands of the pensioner.[75]

Bachs, 103 Ill. App. 494. In New York, in an action against a coal dealer for selling short weight tons, where the plaintiff proves that the coal was short weight, the coal dealer must show that it weighed 2,000 pounds when it left his yard. New York v. Henderson, 39 Misc. [N. Y.] 351. Under an Alabama statute providing for the forfeiture of double damages against any railroad company which should exact more than the rate specified in the bill of lading unless the rate charged had been approved by the railroad commission. Held, in an action to recover this forfeiture that the railroad company must prove that the rate charged had been allowed by the commission. Southern R. Co. v. Anniston F. & M. Co., 135 Ala. 315.

That the prosecuting attorney gave a dollar to a witness with which to buy liquor did not render the testimony of such witness incompetent in an action to recover a penalty for violating a liquor law. People v. Chipman [Colo.] 71 Pac. 1108.

Samples of milk, taken from cans from which he was delivering, were adulterated, held sufficient evidence to authorize the recovery of a penalty for selling adulterated milk. People v. Laesser, 79 App. Div. [N. Y.] 384. In an action against a street railway to recover a penalty for refusal to furnish transfers, evidence (testimony of boys) held sufficient to show willful refusal. Rosenberg v. Brooklyn Heights R. Co., 86 N. Y. Supp. 871. In a qui tam action for a penalty provided for **having quail in possession during the close season,** evidence that four persons went into a place and ordered quail, which was served to them, held insufficient to show possession. People v. Dunston, 84 N. Y. Supp. 257.

67. Where an ordinance prescribes a penalty for the use of a false balance, without any requirement of proof of intent, or guilty knowledge, such proof is not essential in an action to recover the penalty. New York v. Hewitt, 86 N. Y. Supp. 832.

68. Action to recover a penalty for violation of an ordinance in selling farm produce on the street without a license. Leek v. Kreps [N. J. Law] 56 Atl. 167.

69. In Michigan, a statute authorizes the seizure of fishing nets in unlawful use, and contemplates a trial of the action as to whether they have been taken in such use. The docket entry of the justice of the peace did not show a trial of the question involved. Held, that the judgment was coram non judice and no defense to the game warden executing it. Neal v. Morse [Mich.] 96 N. W. 14.

70. In New York, in an action to recover a penalty for violation of a liquor law, a verdict will not be set aside because, in the complaint, a subsequent provision of such clause in the statute excepting a corporation organized before a certain date was not negatived. Cullinan v. Criterion Club, 39 Misc. [N. Y.] 270.

71. But the mere fact that such affidavit is not sworn to on the date designated in the notary's certificate does not make it a false or fraudulent affidavit, constituting a crime, where the statements therein are true. Rev. St. § 4746 (U. S. Comp. St. 1901, p. 3279), making it a criminal offense to make or present a post-dated power or voucher in drawing a pension, cannot be extended thereto. U. S. v. Wood, 127 Fed. 171.

72. The judicial or quasi judicial discretion of the commissioner of pensions, or secretary of the interior on appeal from his decision, in determining whether an attorney may contract for $25 or charge only $10 for procuring a pension for a dependent father is not controllable by mandamus. U. S. v. Hitchcock, 19 App. D. C. 237, 503.

73. No contract between the state and pensioner exists by reason of the statutory provision for a pension until a warrant therefor has been issued. Gill v. Dixon, 131 N. C. 87.

74. Gill v. Dixon, 131 N. C. 87. A statute making it a misdemeanor for any person to speculate or purchase for a less sum than that to which each may be entitled, the claim of any pensioner refers only to the warrant issued for the pension and not to the right to a future pension [Laws N. C. 1889, c. 198]. Id.

75. R. S. U. S. § 4747 (U. S. Comp. St. 1901, p. 3279) providing that pension money while in the pension office or in transmission shall not be subject to process, but shall inure wholly to the benefit of the pensioner, does not prevent the consideration of such pension as part of the pensioner's resources in determining the amount of alimony he should pay. Bailey v. Bailey [Vt.] 56 Atl. 1014. The proceeds of a pension of a former soldier, discharged for insanity after enlistment is

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Pensions to policemen and firemen.—Pensions are often provided for by statutes or by charters or ordinances of municipal corporations as a recognition of faithful service or for injuries received whilst in performance of duty; as for policemen,[76] or firemen.[77]

PERJURY.

§ 1. Elements of Offense (1171). | § 2. Prosecution and Punishment (1172).

§ 1. *Elements of offense.*—To constitute perjury there must have been an oath[78] required or authorized by law,[79] and administered by a competent officer;[80] and the testimony must have been material[81] and willfully and knowingly[82] false.[83]

not subject to a claim of the United States for board and medical services furnished to him after his discharge while in the government hospital for the insane. U. S. v. Frizzell, 19 App. D. C. 48.

76. To entitle the beneficiary of a certificate on the life of a deceased policeman to the sum provided under the charter of the St. Louis Police Relief Association, the policeman must have been a member of the police force and of the association at the time of his death. Price v. St. Louis Police Relief Ass'n, 90 Mo. App. 210. The charter of Brooklyn (Laws 1888, c. 583, tit. 11, § 42) authorizing a pension to the widow of a policeman under certain conditions does not authorize a pension to the widow of a policeman who had been retired upon a pension and who had died before the enactment of the statute, the statute not being retroactive. People v. Partridge, 172 N. Y. 305, 65 N. E. 164. A statute covering such a case would be unconstitutional as an appropriation of public moneys to private purposes. Id. And the widow is not entitled to a mandamus compelling the police commissioner to revoke a revocation of a pension previously granted to her under the statute. Id. A policeman serving and being paid as a "detective sergeant" is pensionable as such though not formally appointed. Fay v. Partridge, 174 N. Y. 526, 66 N. E. 1107.

Laws N. Y. 1892, c. 241, § 2, amending Laws 1873, c. 163, and providing for the retirement and placing on the pension roll members of the police force of Yonkers, who are sixty years of age, was repealed by Laws 1898, c. 596, § 20, providing for the removal of members of the police force. People v. Police Com'rs, 79 App. Div. [N. Y.] 82. The acceptance of a pension under an order of removal from public office does not estop a police captain illegally removed from denying the appointment of his successor. Id. It is not an injustice for a peremptory writ of mandamus reinstating a police officer to direct payment of his salary less pension money paid him. Id.

77. P. L. N. J. 1897, p. 263, authorizing a pension to the widow of a fireman fatally injured whilst performing his duties does not apply to a fireman killed by a trolley car while on his way home during an hour set apart for taking his meals. Scott v. Jersey City, 68 N. J. Law, 687. Contributions to a pension fund by a member of a fire department may be a condition to his status as a member of the uniformed force, and thus to his rights to share in its benefits. Under Greater New York Charter, Laws 1897, p. 258, c. 378, § 621. Lyons v. New York, 82 App. Div. [N. Y.] 306.

78. It must appear that the witness charged with perjury had been sworn in the case where the perjury was committed. State v. Brown [La.] 35 So. 501. The form of the oath is immaterial. In California, omission of words "so help you God" from the oath, held immaterial. People v. Parent, 139 Cal. 600, 73 Pac. 423.

79. Under a statute providing that a person has committed perjury who swears falsely to an affidavit required by law, the affidavits or oaths required by another state are to be included under the general rule of comity between states. People v. Martin, 175 N. Y. 315, 67 N. E. 589. False swearing by a teacher to a monthly report made to obtain pay for services from public school fund, held indictable. Thompson v. State, 118 Ga. 330. An affidavit made as the basis of a criminal prosecution is the subject of perjury. Simpson v. State [Tex. Cr. App.] 79 S. W. 530.

80. Power to administer oaths in the trial of cases is inherent in a court, no statutory provision being necessary. State v. Townley, 65 Ohio St. 21, 65 N. E. 149.

81. State v. John [Iowa] 93 N. W. 61; People v. Ennis, 137 Cal. 263, 70 Pac. 84; State v. Brown [La.] 35 So. 501. Perjury may be predicated on the testimony of one incompetent to testify. Husband testifying against wife. State v. Moore [La.] 36 So. 100. In a prosecution for perjury before a grand jury, testimony assigned as false given after the grand jury had voted to indict is nevertheless material. State v. Faulkner, 175 Mo. 546, 75 S. W. 116; State v. Lehman, 175 Mo. 619, 75 S. W. 139. It is no defense that the false testimony would have been merely cumulative. State v. Faulkner, 175 Mo. 546, 75 S. W. 116. One who swears falsely to facts which if true, would incriminate him, is guilty of perjury. State v. Faulkner, 175 Mo. 546, 75 S. W. 116; State v. Lehman, 175 Mo. 619, 75 S. W. 139. It is perjury for one to swear falsely to anything materially affecting his credibility as a witness. State v. Carey, 159 Ind. 504, 65 N. E. 527.

82. Knowledge of the falsity is an essential ingredient of the offense. Goodwin v. State, 118 Ga. 770. It must appear that the false testimony was not made through inadvertence or mistake. McCoy v. State [Tex. Cr. App.] 73 S. W. 1057. Drunkenness rendering one incapable of appreciating the nature of his testimony is a defense to a charge of perjury. State v. Brown [La.] 35 So. 501. If the accused believed at the time he swore to the facts that they were true, he is not guilty; nor if he believed he had reasonable grounds upon which to base his

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Subornation of perjury.[84]—To establish subornation of perjury, the witness claimed to have been suborned must have committed perjury, and defendant must have known or believed that the witness would so testify, and must have induced or procured the false testimony.[85] Where a statute makes subornation of perjury a separate offense, one guilty of this crime is not an accessory but a principal, and the law relating to accessories does not apply.[86]

§ 2. *Prosecution and punishment. Jurisdiction.*—A perjury committed in naturalization proceedings in a state court is an offense against the state and in the absence of statute not punishable in the federal courts.[87]

Indictment.—An indictment should be direct and certain as to the party and offense charged, the county where offense was committed and the particular circumstances if necessary, to constitute a complete offense.[88] A general averment of the taking of the oath,[89] and a general description of the tribunal,[90] will suffice. An indictment for perjury in an affidavit need not set it out in haec verba or give the style of the case.[91] It is not necessary to expressly allege in an information that the court had jurisdiction in the case where the false testimony was given, it appearing that the court did actually have jurisdiction.[92] Materiality need not be alleged if facts stated in the information show the testimony was material.[93] On the other hand, an express allegation that the false testimony was material is usually sufficient without setting out the facts.[94] It is unnecessary in the indictment to allege the exact date when the crime was committed unless the time is an essential element of the crime.[95] Scienter must be expressly charged,[96] and the alleged perjured testimony specifically negatived.[97] A material variance between

affidavit. Luna v. State [Tex. Cr. App.] 72 S. W. 378.

83. An affidavit containing no untrue statements is not subject of perjury because it was not sworn to on the day stated in the notary's certificate. U. S. v. Wood, 127 Fed. 171. An affidavit on information and belief may be the subject of perjury. Herring v. State [Ga.] 46 S. E. 876.

84. Conviction of contempt of court for inducing a witness to swear falsely is no bar to a prosecution for subornation of perjury. Ricketts v. State [Tenn.] 77 S. W. 1076.

85. State v. Fahey, 3 Pen. [Del.] 594.

86. Stone v. State, 118 Ga. 705. Nor is a suborner an accomplice of the perjurer. Id.

87. U. S. v. Severino, 125 Fed. 949. Federal statute making it a crime to postdate an instrument used in drawing a pension will not include affidavits used in support of a pension claim. U. S. v. Wood, 127 Fed. 171. Where perjury is committed in an affidavit required by a state law in naturalization proceedings, but not required by Federal law, Federal courts have no jurisdiction, even though a statute gives the latter power to punish perjuries in naturalization proceedings committed in any court. U. S. v. Severino, 125 Fed. 949.

88. Com. v. Lashley, 25 Ky. L. R. 58, 74 S. W. 658.

89. The name of the clerk administering the oath need not be stated. Smith v. People [Colo.] 75 Pac. 914. Averments in narrative form as to administering oath held sufficient. People v. Ennis, 137 Cal. 263, 70 Pac. 84.

90. An averment of perjury in the district court of a county and state named sufficiently states the tribunal. Smith v. People [Colo.] 75 Pac. 914. Designation of the court held sufficient. People v. Ennis, 137 Cal. 263, 70 Pac. 84; Stanley v. State [Tex. Cr. App.] 74 S. W. 318.

91. Simpson v. State [Tex. Cr. App.] 79 S. W. 530.

92. State v. Douette, 31 Wash. 6, 71 Pac. 556. Under the Iowa code defining issues and trial, an indictment is sufficient on a charge of perjury if it alleges the perjury was committed on a preliminary hearing before a justice. State v. Perry, 117 Iowa, 463, 91 N. W. 765.

93. State v. Douette, 31 Wash. 6, 71 Pac. 556; State v. Brown [La.] 35 So. 501.

94. State v. Brownfield, 67 Kan. 627, 73 Pac. 925; Maroney v. State [Tex. Cr. App.] 78 S. W. 696; State v. Brown [La.] 35 So. 501. An indictment need not allege how the facts were material. People v. Ennis, 137 Cal. 263, 70 Pac. 84. In an indictment for perjury committed at the trial of another offense neither the facts constituting that offense nor the defendant's guilt should be alleged. State v. Perry, 117 Iowa, 463, 91 N. W. 765. An indictment need not allege that the affidavit was made in order to, or under circumstances that would influence or mislead any one. Gammage v. State [Ga.] 46 S. E. 409.

95. State v. Perry, 117 Iowa, 463, 91 N. W. 765.

96. Indictment held insufficient. State v. Brown, 110 La. 591. An indictment must allege that the testimony was false to defendant's knowledge. State v. Williams [La.] 36 So. 111.

97. State v. Brown, 110 La. 591. Where the perjury alleged was in a denial that defendant had seen gambling carried on within five years, the indictment must state the particular game which it was alleged he saw. Shackelford v. Com. [Ky.] 79 S. W. 192. An averment that "defendant well knew" the contrary of his testimony does

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the indictment and its proof is fatal.[98] An indictment charging that the affidavit was made before one as deputy clerk is supported by a jurat signed in the name of the clerk by such person as deputy.[99]

Admissibility of evidence is discussed in the note.[1]

Sufficiency of evidence.—Perjury may be shown by circumstantial evidence. At common law, the uncorroborated testimony of an accomplice was sufficient to convict.[2] But by statute generally, perjury must be proved by two witnesses or one witness and independent corroborating circumstances.[4] This rule does not apply, however, where proof of the crime is based on circumstantial evidence.[5]

Instructions.—Defendant is entitled to a special instruction as to variance as to the name of the officer administering the oath where it is a controverted issue.[6] Submitting to the jury the question of materiality of testimony, where the court should have instructed it was clearly material, is harmless error.[7]

PERPETUITIES.

§ 1. The Rule Against Perpetuities and Accumulations; Its Nature and Application (1173).
§ 2. Computation of the Period and Remoteness of Particular Limitations (1175).
§ 3. Operation and Effect, Complete and Partial Invalidity (1177).

§ 1. *The rule against perpetuities and accumulations; its nature and application.*[8]—A future estate is void unless so limited that by every possible contingency it will absolutely vest within the statutory period.[9] Charitable gifts are not within

not negative the truth of such testimony. State v. Gallaugher [Iowa] 98 N. W. 906. A statute providing that the indictment contain "proper allegations of falsity" requires allegations sufficient at common law. Id.

98. Thompson v. State, 118 Ga. 330, as where a written instrument set out, must be proved as laid. Where defendant was charged with having sworn falsely to knowledge of a certain transaction, held error to charge jury that he must be convicted if he had heard of the transaction. State v. Faulkner, 175 Mo. 546, 75 S. W. 116; State v. Lehman, 175 Mo. 619, 75 S. W. 139. An allegation charging a false statement as to mileage and total amount due a witness will not sustain proof of false swearing as to witness fees. Bridgers v. State [Tex. Cr. App.] 70 S. W. 767. An indictment alleged perjury had been committed "in a criminal proceeding entitled State of Iowa v. ———." The records of the court in which proceedings were had, had the same title, but the information was entitled "City of Sioux City v. ———." Held no variance. State v. Perry, 117 Iowa, 463, 91 N. W. 765.

99. Mahon v. State [Tex. Cr. App.] 79 S. W. 28.

1. Declarations of defendant contemporaneous with the affidavit on which perjury was predicated are part of the res gestae. Simpson v. State [Tex. Cr. App.] 79 S. W. 530. As showing defendant's belief (Luna v. State [Tex. Cr. App.] 72 S. W. 378), that false statements were not made through inadvertence or mistake (Stanley v. State [Tex. Cr. App.] 74 S. W. 320; McCoy v. State [Tex. Cr. App.] 73 S. W. 1057; Freeman v. State [Tex. Cr. App.] 72 S. W. 1001). Circumstantial evidence though remote to show guilt of accused, on whose trial perjury was committed. McCoy v. State [Tex. Cr. App.] 73 S. W. 1057. The record of the suit where the perjury was comitted to show jurisdiction of the court and materiality of testimony (State v. Brown [La.] 35 So. 501; Maroney v. State [Tex. Cr. App.] 78 S. W. 696); but defendant's acquittal of a crime affords no ground for claiming he did not commit perjury during the trial (State v. Carey, 159 Ind. 504, 65 N. E. 527). Under the Texas Code, a requirement that testimony given at a coroner's inquest should be reduced to writing will not exclude oral evidence of such testimony. Stanley v. State [Tex. Cr. App.] 74 S. W. 318.

2. Maroney v. State [Tex. Cr. App.] 78 S. W. 696; State v. Faulkner, 175 Mo. 546, 75 S. W. 116.

3. Though it has been a rule of practice in England to advise an acquittal where only the accomplice testifies (Stone v. State, 118 Ga. 705); but the Georgia Code has never incorporated this rule except in felony cases where the sole witness is the accomplice. (Id.).

4. Lee v. State [Tex. Cr. App.] 70 S. W. 425; State v. Faulkner, 175 Mo. 546, 75 S. W. 116.

5. People v. Doody, 172 N. Y. 165, 64 N. E. 807. The testimony of the suborned witness standing alone will not usually warrant a conviction. State v. Fahey, 3 Pen. [Del.] 594.

6. Crouch v. State [Tex. Cr. App.] 79 S. W. 524.

7. State v. Douette, 31 Wash. 6, 71 Pac. 556.

8. Construction of deed or will as to perpetuities, see Wills; Deeds.

9. Real Prop. Law, § 32 (Laws 1896, p. 565, c. 547) and Pers. Prop. Law, § 2 (Laws 1897, p. 507, c. 417). Herzog v. Title G. & T. Co., 177 N. Y. 86, 69 N. E. 283. Where a clear possibility appears that persons not the immediate issue of descendants of persons in being at time of bequest will take, the

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the rule,[10] except in those states which regard them as other trusts.[11] But a charity must not be preceded by a noncharitable limitation beyond the period,[12] though its mode or form may be postponed if the gift is absolute.[13] Trusts expressly authorized by statute are also exempt.[14] The rule does not apply to personalty.[15] The beneficiaries who will take must be definitely ascertainable within the period.[16] If the estate must vest within the period,[17] or if there is always someone who can convey the fee,[18] the rule is not violated. A direction for conversion and advantageous sale by trustees will not prevent the vesting of the estates, it will be regarded as made, and where the equitable title must vest within the period, the direction for conversion, if obnoxious to the rule, not the estates, will fail.[19] The rule applies

rule is violated. White v. Allen [Conn.] 56 Atl. 519. A trust by will of certain realty, the income to create a sinking fund to pay incumbrances and repairs, is against the statute relating to perpetuities since the time required may exceed two lives in being. Dodsworth v. Dam, 38 Misc. [N. Y.] 684.

10. A gift to trustees of a church and successors, on condition that the fund shall ever be maintained separate and the income used only for support of the pastor, and providing conditions as to maintenance and creed of the church is a charitable use and not a perpetuity. Farmers' & M. Bank v. Robinson, 96 Mo. App. 385, 70 S. W. 372.

11. A bequest for education of priests unlimited as to time is void in Minnesota [Stat. Uses & Trusts, § 11, c. 43]. In re Shanahan's Estate, 88 Minn. 202, 92 N. W. 948. The Wisconsin statute applies to charitable grants [Rev. St. 1898, §§ 2038, 2039]. Danforth v. Oshkosh [Wis.] 97 N. W. 258; Holmes v. Walter, 118 Wis. 409, 95 N. W. 380.

12. A gift for charity depending on a contingency which may not occur within a life or lives in being, and 21 years, is valid in Massachusetts, if there is no gift in the meantime for benefit of any private person or corporation. Brigham v. Peter Bent Brigham Hospital, 126 Fed. 796.

13. If the testator's intention to give to charity is absolute and the gift and the constitution of the trust are immediate, and only the form or mode of the charity is postponed, the gift is vested and not within the rule against perpetuities. Brigham v. Peter Bent Brigham Hospital, 126 Fed. 796.

14. Where the charity was accepted by the city as grantee [Gen. St. 1894, subd. 6, § 4284]. Owatonna v. Rosebrock, 88 Minn. 318, 92 N. W. 1122; Danforth v. Oshkosh [Wis.] 97 N. W. 258.

15. Danforth v. Oshkosh [Wis.] 97 N. W. 258; Holmes v. Walter, 118 Wis. 409, 95 N. W. 380.

16. The Connecticut rule requires merely that it be certain that the particular individuals in which an estate must be vested are definitely ascertainable within the period limited. They need not be so ascertainable at testator's death. Bates v. Spooner, 75 Conn. 501. A perpetual trust for a school and home for children of deceased members of a secret society violates the rule. Troutman v. De Boissiere Odd Fellows' O. H. & I. S. Ass'n, 66 Kan. 1, 71 Pac. 286. A bequest in trust for education of priests held void, under Minn. Stat. of Uses & Trusts, § 11, c. 43, because not certain, nor capable of being rendered certain as to beneficiaries. In re Shanahan's Estate, 88 Minn. 202, 92 N. W. 948. Bequest of fund to certain persons, the income to be used in aiding and maintaining a kindergarten in a city, providing that when the city should be authorized to receive and administer the trust it should be transferred to it, held valid as to definiteness of beneficiary to prevent application of the rule against perpetuities, where the statute was amended to include the purpose of the trust, and the city accepted it [Subd. 6, § 4284, Gen. St. 1894]. Owatonna v. Rosebrock, 88 Minn. 318, 92 N. W. 1122.

17. A devise of a life estate and then to widow and children of the life tenant is not a perpetuity, since the remainder must vest within 21 years after a life in being [Ky. St. § 2360]. Johnson's Trustee v. Johnson [Ky.] 79 S. W. 293. A direction by will that after conversion of the realty by the trustees it should be divided in certain parts, and each held in trust for a son, and on death of either son to go to his children, if any, otherwise to be divided between a sister and the trust for the other, vested the remotest remainder on the death of the survivor and there was no violation of the rule. Bates v. Spooner, 75 Conn. 501. If the estate vested on death of the testator, possession only being postponed, no perpetuity was created; provision of will in trust to be paid over when children of a sister reach 25. Flanner v. Fellows, 206 Ill. 136, 68 N. E. 1057.

18. Where owners of land laid out lots, parks and streets, and conveyed the parks and streets to trustees, who were to make improvements and pay taxes, and provided for vacancies among the trustees, the conveyance was not void as a perpetuity, since there were always persons by whose concurrence the fee in the streets, etc., could be conveyed. Stevens v. Annex Realty Co., 173 Mo. 511, 73 S. W. 505. A bequest of a life estate in a farm to a daughter, remainder at her death to her three sons, providing that if any sons die without legal heirs the survivors should take, vested absolutely at the daughter's death before any sons had died, and the bequest did not illegally suspend the power of alienation. Coon v. Coon, 38 Misc. [N. Y.] 693. Not where the beneficiaries are all in esse and can convey by joining. Holmes v. Walter, 118 Wis. 409, 95 N. W. 380. It does not apply to a trust where the trustees have power to sell and convey the complete title. Danforth v. Oshkosh [Wis.] 97 N. W. 258.

19. Where a will provided that the residuary estate should be held in trust for children until advantageous sale could be made by the trustees, and created remainders, it was immaterial on the issue as to the vesting of the remainders, whether the

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to the beneficial not the legal estate.[20] A mere power in trust,[21] or mere option to purchase,[22] is not invalid as a perpetuity. A perpetual condition as to use of property conveyed is not necessarily void,[23] and a condition for reversion will not offend the statute.[24] That a trust has no express termination will not make it void as a suspension of the power of alienation.[25]

Accumulations[26] except in favor of minors, to run only during minority,[27] are prohibited in New York.

§ 2. *Computation of the period and remoteness of particular limitations.*—The suspension of the power to sell must always depend on lives not years,[28] and not upon lives or years,[29] or a contingency or years,[30] in the alternative except in

bequests in remainder from the residuary estate would only be determined by full accomplishment of the conversion, since the vesting of the estate is not prevented thereby. Bates v. Spooner, 75 Conn. 501.

20. On the question whether an estate has vested under a will so as not to violate the rule, the vesting of the legal estate in the executors is immaterial, since the law follows the beneficial estate and applies to it. Bates v. Spooner, 75 Conn. 501. Continuance of a trust is not limited by law to any period of time but the beneficial interest must vest in the beneficiaries within the period limited for vesting of legal estates. Loomer v. Loomer [Conn.] 57 Atl. 167.

21. Direction of trust by will until the trustees could secure, in their judgment, most advantageous sale, then to be divided and a part given to a daughter and her heirs forever, vested in the latter at testator's decease. Bates v. Spooner, 75 Conn. 501. A bequest of income of corporate stock to the wife and married daughter, and to the survivor of them, and if the son-in-law survived both, a life estate to him, and afterward providing beneficiaries for the remainders, is a mere power in trust and does not violate the law preventing suspension of the power of alienation of personalty for more than two lives in being [Laws 1897, c. 417, § 2]. In re Conger's Will, 81 App. Div. [N. Y.] 493. Proceedings for judicial settlement in accordance with the decree. In re Conger's Estate, 40 Misc. [N. Y.] 157.

22. An agreement by stockholders of a private corporation that, on death of any one or more, remaining holders should have an option to purchase stock of the decedent at its value does not improperly restrain the power of alienation. Fitzsimmons v. Lindsay, 205 Pa. 79.

23. A condition in a deed to land in a village that no grain should ever be handled on the land or building erected for that purpose is not void. Wakefield v. Van Tassell, 202 Ill. 41, 66 N. E. 830.

24. When land was devised to trustees to be conveyed to a city for a public library under the Oshkosh charter, authorizing the city to build and maintain a library thereon, the city took the fee, and a further provision that conveyance by the trustees should contain a condition for reversion to heirs if the land ceased to be used for such purposes did not unlawfully suspend the power of limitation [Rev. St. 1898, §§ 2038, 2039]. Danforth v. Oshkosh [Wis.] 97 N. W. 258.

25. Holmes v. Walter, 118 Wis. 409, 95 N. W. 380; Dulin v. Moore, 96 Tex. 135, 70 S. W. 742.

26. Accumulation of income on a legacy to an infant until he is 25. Tobin v. Graf, 39 Misc. [N. Y.] 412. A limitation providing that income of certain realty should create a sinking fund to extinguish mortgages on the property violates statutes as to accumulations. Dodsworth v. Dam, 38 Misc. [N. Y.] 684. A devise to a daughter if her husband die before testatrix, otherwise to trustees to accumulate profits and pay to the daughter at her husband's death, and to pass to a grandson if the daughter die before her husband was void if the husband was not living at testatrix's death, if he was living it created a valid active trust not rendered invalid by the void provision for accumulation [Real Prop. Law, § 51]. Tobin v. Graf, 39 Misc. [N. Y.] 412. A devise to executors as trustees in four parcels, to receive rents and pay debts and a mortgage, then to pay residue of rent of each of the parcels to one of four surviving daughters for life, remainder in fee to their children, was void. Dresser v. Travis, 39 Misc. [N. Y.] 358. In so far as a will directs addition of surplus profits of shares of children after age and before 25, to the estate, it is an accumulation not for minor children and void. Thorn v. De Breteuil, 86 App. Div. [N. Y.] 405.

27. Real Prop. Law, § 51 (Laws 1896, c. 547). McGuire v. McGuire, 80 App. Div. [N. Y.] 63; Dresser v. Travis, 39 Misc. [N. Y.] 358; Thorn v. De Breteuil, 86 App. Div. [N. Y.] 405.

28. Suspension of the power of alienation for three years is void [Real Prop. Law, § 2, Laws 1897, c. 417]. McGuire v. McGuire, 80 App. Div. [N. Y.] 63. A devise to executors to invest the income until two years after testator's death, then to turn over to certain persons to found an asylum, was void as suspending the power of alienation [Laws 1896, c. 547]. Smith v. Chesebrough, 82 App. Div. [N. Y.] 578. In Michigan, suspension of the power of alienation in a trust deed for a particular period, not based on lives, is void and the power is suspended where there is no one in being who can convey an absolute fee in possession [Comp. Laws, § 8796, c. 237, § 14, and § 8797, c. 237, § 15]. Casgrain v. Hammond [Mich.] 96 N. W. 510. A trust for 26 years is void. Brown v. Quintard, 177 N. Y. 75, 69 N. E. 225. A trust to collect income and pay to one and on her death or at expiration of 15 years, whichever occurred last, to sell and divide between certain persons, is void as to the 15 year limitation. In re Murray, 75 App. Div. [N. Y.] 246.

29. A devise of all of an estate remaining after death of testator's wife, in perpetuity, to educate descendants of two persons named is void. Johnson v. De Pauw University, 25

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Wisconsin, where the statute permits a term not exceeding 21 years.[31] In New York, the limit is two lives in being.[32] The period of limitation by will begins at the testator's death.[33] The lives as to which the limitation applies must be in being at time of the grant.[34] The validity of particular provisions is shown in the note.[35]

Ky. L. R. 950, 76 S. W. 851. Where a trust declared that it should continue until the grantor's death, but that if she should die before expiration of 14 years it should continue for that period, and after her death, before that time, there was no one in existence who could convey the fee, it was void. Casgrain v. Hammond [Mich.] 96 N. W. 510.

30. A provision by will that realty shall not be sold or incumbered for 40 years after the testator's death and then divided among the then heirs of testator's body is void, though the limitation is removed if the land is taken into the limits of a certain city [Ky. St. 1903, § 2360]. Fidelity Trust Co. v. Lloyd [Ky.] 78 S. W. 896. A provision in a trust clause of a will that if no request is made for termination of the trust at the end of thirty years after testator's death, it shall cease, and the estate shall be held by the several beneficiaries, their heirs and assigns, is void. Loomer v. Loomer [Conn.] 57 Atl. 167.

31. Rev. St. 1898, §§ 2038, 2039. Danforth v. Oshkosh [Wis.] 97 N. W. 258.

32. Where disposition of a residuary estate is postponed by the will for 26 years, the trust inseparable therefrom is void as being measured by more than two lives in being. Brown v. Quintard, 177 N. Y. 75, 69 N. E. 225. A bequest of realty and personalty to nephews and nieces to be held in trust by executors until each becomes 25, with further provision, in case of death of any before 25, the share should go to the survivors arriving at that age, is void as to the latter provision as suspending the power of alienation for more than two lives in being at death of testatrix. Mendel v. Levis, 40 Misc. [N. Y.] 271. A codicil providing that if a daughter, not one of the youngest children, should marry a certain person she should receive a certain annuity and at her death a certain sum should be divided among her children required the trustees to retain title to the portion necessary to pay her income in event of marriage, and on her death to pay the amount to her children, and was void as suspending alienation for more than two lives in being. Herzog v. Title Guarantee & Trust Co., 177 N. Y. 86, 69 N. E. 283.

33. Matteson v. Palser, 173 N. Y. 404, 66 N. E. 110.

34. A trust for use of one and his children is invalid unless the context shows that only children in esse at death of the testator are intended to share. Towle v. Doe, 97 Me. 427.

35. Provisions held valid: A bequest in trust for masses for testator's soul is not void as a private trust against perpetuities. Coleman v. O'Leary's Ex'r, 24 Ky. L. R. 1148, 70 S. W. 1068. Gift for benefit of children and grandchildren of testator's son and daughter living at his death as not unlawfully suspending the power of alienation. Denison v. Denison, 42 Misc. [N. Y.] 295. A testamentary trust for possession and control of property during lives of the beneficiaries does not violate the rule against perpetuities. Dulin v. Moore, 96 Tex. 135, 70 S. W. 742. A provision by will that land devised shall not be sold or conveyed by the devisees until they have been in possession for 20 years will be enforced. Call v. Shewmaker, 24 Ky. L. R. 686, 69 S. W. 749. A provision by will against alienation of trust property except for reinvestment does not illegally restrain alienation. Dulin v. Moore, 96 Tex. 135, 70 S. W. 742. A provision in a gift by will, to be divided among children, that each shall have use and possession of his share on becoming 18, but no power to sell or incumber until 35, and no sale or incumbrance to be made by the daughters changing the character of their estate, but their property to be separate and sold only under the will, is valid. Smith v. Isaacs [Ky.] 78 S. W. 434. A devise in trust to pay income to testator's children for life, the share of principal of a child dying with descendants to be paid to them, otherwise to lapse into the estate for division among descendants of other children dying, does not violate the rule against perpetuities. Loyd v. Loyd's Ex'r [Va.] 46 S. E. 687. A deed of settlement excluding a husband from any interest in the estate conveyed, and providing that the wife shall not have power to "alienate, transfer or incumber," is a valid equitable life estate in her and not void as a restraint of alienation. Married Woman's Act 1869 (R. S. D. C. §§ 727-729). Fields v. Gwynn, 19 App. D. C. 99. A devise to executors to invest the income for two years after testator's death, then to turn over to certain persons to found an asylum is not void as creating a trust in perpetuity, though void as suspending the power of alienation for a term of years. Smith v. Chesebrough, 82 App. Div. [N. Y.] 578. Where the will directed a trust of the estate to support testator's children and maintain "any family" which either of them might have, until, under terms of the will, division may be had, the provision applies to education of the grandchildren during minority, and the trust is not void since it cannot endure beyond 21 years and 9 months from death of the survivor of the children. Bates v. Spooner, 75 Conn. 501. A provision by will that in case of death of testator's adopted son and residuary devisee without issue, and after death of testator's wife, to whom the estate was devised for life, the property should be liquidated, the proceeds to be divided, was not void for remoteness since the phrase "without leaving issue" means without leaving issue at time of the death of the devisee. Metzen v. Schopp, 202 Ill. 275, 67 N. E. 36. Where it does not appear that any of the beneficiaries were under 30 at the death of testatrix, a provision that her property should be divided equally among children of a dead sister, the executors to manage the estate and pay the income to the children until the youngest survivor became 30, when division was to be made among the survivors, is not invalid because the ownership

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§ 3. *Operation and effect, complete and partial invalidity.*[36]—A trust of realty, by will, when void as a perpetuity, may be disposed of as intestate estate.[37] Where a trust is invalid as to directions for accumulations, it may still be maintained by giving the income to persons entitled presumptively to the next eventual estate.[38]

From the general rule that limitations may be sustained if severable from those which are too remote, it follows that a prior estate may stand,[39] or a remainder may accelerate,[40] or a gift take effect, freed from limitations,[41] or a provision

of personalty and the power of alienation might be suspended for five lives. Matteson v. Palser, 173 N. Y. 404, 66 N. E. 110.

Provisions held invalid: A devise to a son's wife for life, and if the son survives the wife, to the son for life, remainder to the son's heirs at law, is void as to the remainder, being a perpetuity. Buck v. Lincoln [Conn.] 56 Atl. 522. Testator devised property in trust for his four daughters, A, B, C, & D, during their lives, and on the death of A or C their portion to be paid to the survivors, and on the death of B or D their share to be paid to the children, the issue of said children taking the share of any deceased parent, for the lives of all the children of A and D, and on the death of all of said children, to the grandchildren of A and D or their issue or legal representatives, according to the law of descent and distribution. Held, the gift over to the grandchildren was void as a perpetuity, and upon the death of B the trust ceased and the property must be distributed as upon an intestacy. White v. Allen [Conn.] 56 Atl. 519. A gift to lineal descendants of testator's grandchildren, in case a daughter should die leaving issue, is void. Stone v. Bradlee, 183 Mass. 165, 66 N. E. 708. Bequests in trust to bishops and successors for the education of priests are held void under the Minn. statute of uses and trusts, § 11, c. 43, because not certain, nor capable of being rendered certain, as to beneficiaries and unlimited as to time. In re Shanahan's Estate, 88 Minn. 202, 92 N. W. 948. Where it appears from the will and a codicil that the testator intended that a provision for his daughter under the codicil should not be alienable during her life, the rule that annuities do not suspend the power of alienation does not apply. Herzog v. Title Guarantee & Trust Co., 177 N. Y. 86, 69 N. E. 283. An instrument purporting to convey lands to trustees and successors in perpetual trust for a school and home for children of deceased members of a secret society violates the rule against perpetuities. Troutman v. De Boissiere Odd Fellows' O. H. & I. S. Ass'n, 66 Kan. 1, 71 Pac. 286. A direction by will setting apart a certain permanent fund, the income to be used in keeping testator's burial lot in good condition is void [Const. art. 20, § 9]. In re Gay's Estate, 138 Cal. 552, 71 Pac. 707. A trust to pay proceeds of realty on debts and a mortgage on the property, then to children, the principal on their death to go to their children, suspends the power of alienation beyond the lives in being. Dresser v. Travis, 39 Misc. [N. Y.] 358. A bequest of a life estate, income of the remainder to go to children of the life tenant until the youngest is 25, when the estate was to be divided, is void as to the remainder. Johnson's Trustee v. Johnson [Ky.] 79 S. W. 293. A trust created by a clause of a will providing for payment "of the interest, deducting expenses," to one and his children, "so long as they shall live," cannot be separated and might vest too remotely to be valid. Towle v. Doe, 97 Me. 427. A trust during lives of the youngest two of testator's children at his death, with a codicil giving one daughter an annuity on condition, and at her death a certain amount to her children or issue of such children dead, is void as to the codicil as restraining power of alienation. Herzog v. Title Guarantee & Trust Co., 177 N. Y. 86, 69 N. E. 283. A bequest of personalty to executors, the income to be paid to a daughter for life and at her death to her issue until the youngest became 21, when the whole estate was to be divided among such issue, with the further limitation that if any never became 21, the estate should be divided among certain named persons, is void as to both limitations [Laws 1897, c. 417, § 2]. Schlereth v. Schlereth, 173 N. Y. 444, 66 N. E. 130.

Accumulations: A provision by will that on death of one of the beneficiaries, the executors in one year shall divide the part of the principal held in trust for him among his heirs equally, with accrued profits thereon, is not an illegal accumulation of rents and profits. Nichols v. Nichols, 42 Misc. [N. Y.] 381.

36. Effect of provisions void as against perpetuities on other provisions of deed or will, see Deeds; Wills.

Construction of statute effecting devise of property by void wills: Laws 1894, p. 842, c. 182, releasing title of the state by escheat to property of an alien, and confirming title in his testamentary trustees, is valid, though the will violates the general rule as to suspension of the power of alienation. Richardson v. Amsdon, 85 N. Y. Supp. 342.

37. Casgrain v. Hammond [Mich.] 96 N. W. 510.

38. So by Real Prop. Law, § 51 (Laws 1896, p. 568, c. 547) and Pers. Prop. Law, § 4 (Laws 1897, p. 508, c. 417). U. S. Trust Co. v. Soher, 88 App. Div. [N. Y.] 506.

39. Where a provision in a will was invalid as unlawfully suspending the power of alienation, but it was not essential to the testator's purpose in creating prior estates, it will not avoid them. Denison v. Denison, 42 Misc. [N. Y.] 295.

40. Where three life estates in a fund are created, contrary to statute, the last will be abrogated and the remainder allowed to vest in the remaindermen [Laws 1897, c. 417, § 2]. In re Conger's Will, 81 App. Div. [N. Y.] 493. Proceedings for judicial settlement in accordance with the decree. In re Conger's Estate, 40 Misc. [N. Y.] 157.

41. Where a gift by will of a remainder in fee is accompanied by a charge on the

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for accumulation may be upheld for the period allowed by law and distribution be then made.[42]

PIPE LINES AND SUBWAYS.

Authority from the city is prerequisite to the right to run electric wires in conduits under the streets.[43] Where an electric company occupies ducts in a subway under a lease, it is entitled to a temporary injunction against interference with its occupancy but not to a mandatory injunction pendente lite compelling the allowance of additional ducts.[44] Where a landowner granted a license for the maintenance of a pipe line, an extension thereof will not be enjoined at his suit if no additional burdens are imposed,[45] and the violation of a statute in the operation of the pipe line gives no right to injunction if complainant is not injured thereby.[46]

PLEADING.[47]

§ 1. **Principles Common to All Pleadings (1179).** Requisites, Materiality, Singleness, Certainty, Directness, Consistency (1179). Captions, Addresses, and Conclusions (1182). Signing, Verifying, and Indorsing (1182). Interpretation and Construction in General (1183). Technical Phraseology (1183).

§ 2. **The Declaration, Consent, Complaint, or Petition (1183).** Title, Venue, and Commencement (1183). Statement of the Cause of Action (1184). Bill of Particulars and Exhibits (1190). Joinder, Splitting and Severance (1193). Election (1195).

§ 3. **The Plea or Answer (1196).** General Principles (1196). Formal Parts and Framework of Plea or Answer (1196). Bill of Particulars (1198). Denials and Traverses (1198). Admissions by Answer (1199). Defenses in General (1200). Matter of Abatement (1201). Matters Which Must be Specially Pleaded (1202). Confession and Avoidance (1203).

§ 4. **Replication or Reply and Subsequent Pleadings (1204).** Pleadings After Plea and Occasion for Them (1204). Requisites and Sufficiency of Such Pleadings (1204).

§ 5. **Demurrers (1206).** Nature and Kinds and Grounds for Each (1206). Form, Requisites, and Sufficiency (1209). Issues Made by Demurrer (1209). Hearing and Decision on Demurrer (1210).

§ 6. **Cross Complaints and Answers (1212).**

§ 7. **Amendments (1213).** Amendment of Course (1213). Leave to Amend and How Obtained (1214). Discretion of Court (1214). Terms of Amendment (1215). Time for Amendment (1216). Matter of Amendment (1217). Statement and Verification (1221). Effect of Amendment (1222).

§ 8. **Supplemental Pleadings (1223).** Propriety and Allowance (1223). Matters of Supplement and Mode of Pleading (1223).

§ 9. **Motions Upon the Pleadings (1223).**

§ 10. **Mode of Asserting Defenses and Objections, Whether by Demurrer, Motion, Etc. (1225).** Matters of Substance (1225). Matters of Form (1228).

§ 11. **Waiver of Objections and Cure of Defects (1229).** Waiver by Failure to Object, by Responsively Pleading, or by Going to Trial of Issues (1229). Cure by Other Pleadings or Proof (1234). Aider by Verdict (1234).

§ 12. **Time and Order of Pleadings (1236).** General Rules (1236). Pleading Out of Time and Leave to so Plead (1236).

§ 13. **Filing, Service, and Withdrawal (1237).**

§ 14. **Issues Made, Proof, and Variance (1239).** Completion of Issues (1239). The General Issue and General Denial (1239). Special Issues and Special Denials (1240). Allegations Requiring Proof (1240). Variance (1241).

The name given a pleading is immaterial.[48] An affidavit of defense[49] or mo-

remainder of a trust, invalid under the rule against perpetuities, the donee takes the remainder in fee. Towle v. Doe, 97 Me. 427.

42. Where an accumulation of income until children arrive at 25 was valid to the time of their majority only, a present distribution of the income subsequently accruing should be made at that time. Thorn v. De Breteuil, 86 App. Div. [N. Y.] 405. A provision for accumulation of income on a legacy to an infant until he is 25 is valid until he becomes of age, when he is entitled to the income. Tobin v. Graf, 39 Misc. [N. Y.] 412. A provision by will that part of the estate shall be allowed to accumulate for benefit of grandchildren, and equally divided among them when a certain grandchild, two years old at testator's death, should reach 35, does not violate the rule against perpetuities, though the accumulation cannot be enforced beyond 21 years after testator's death, when it will be distributed. Hussey v. Sargent, 25 Ky. L. R. 315, 75 S. W. 211.

43. Purnell v. McLane [Md.] 56 Atl. 830.

44. West Side Elec. Co. v. Consolidated Tel. & E. Subway Co., 87 App. Div. [N. Y.] 550.

45, 46. Chicago, I. & E. R. Co. v. Ind. Nat. Gas & Oil Co. [Ind.] 68 N. E. 1008.

47. In particular actions or proceedings is treated under the topics relating to them, e. g., Account; Assumpsit; Attachment; Bankruptcy; Case, Action On; Deceit; Debt; Habeas Corpus; Trespass; Trover, and the like. In courts not of record, see Justices of the Peace. On appeal, see Appeal and Review, etc. In equity, see Equity, and special topics, such as Discovery and Inspection; Cancellation of Instruments; Specific Performance, and the life.

48. Common-law forms regulating equity pleading are not in force in Missouri. Lilly

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tion to strike an affidavit for interpleader is not a pleading.[50] The file mark on a complaint is no part of it.[51]

§ 1. *Principles common to all pleadings. Requisites, materiality, singleness, certainty, directness, consistency.*—The allegations must be relevant and pertinent,[52] specific,[53] and definite.[54] Matters judicially noticed[55] need not be alleged.[56] Duplicity,[57] evasion,[58] frivolity,[59] immateriality, redundancy, impertinence,[60] and

v. Menke, 92 Mo. App. 354. An additional pleading filed under leave to amend the answer called an "additional answer" will be regarded as an amendment. Lange v. Union Pac. R. Co. [C. C. A.] 126 Fed. 338.

49. It merely prevents summary default. Muir v. Preferred Acc. Ins. Co., 203 Pa. 338.

50. Meyer v. Bloch [Ala.] 35 So. 705.

51. It is not conclusive evidence that the pleading was seasonably filed (Rev. St. U. S. § 2636); action to determine adverse claims to mining location. Hopkins v. Butte Copper Co. [Mont.] 74 Pac. 1081.

52. Allegations in complaint by father for loss of services of minor son are immaterial and irrelevant and subject to motion to strike out. Daly v. Everett Pulp & Paper Co., 31 Wash. 252, 71 Pac. 1014. Allegations in an answer that defendant allowed default because informed by his counsel that there was no defense are irrelevant and impertinent. Thompson v. Williamson [N. J. Eq.] 54 Atl. 453. Where plaintiff seeks to avoid a state statute as violating the federal constitution, an allegation of unconstitutionality in the complaint is not irrelevant. McRoy Clay Works v. Naughton, 84 App. Div. [N. Y.] 477. Propriety and materiality of allegations in complaint for injuries to passenger riding on platform of a car from having his hand caught in door closed by brakeman. Trumbull v. Donahue [Colo.] 72 Pac. 684. Admissions in defenses in an answer will be stricken out as irrelevant [Code Civ. Proc. § 545]. Sanford v. Rhoads, 39 Misc. [N. Y.] 548. Defendant's answer as to a certain fact cannot be stricken out as irrelevant and impertinent where it is material and complainants asked discovery as to it. Thompson v. Williamson [N. J. Eq.] 54 Atl. 453. Matter alleged in answer in libel as irrelevant and malicious so that it will be stricken out. Dinkelspiel v. N. Y. Evening Journal Pub. Co., 91 App. Div. [N. Y.] 96. Matter in answer in action by corporation for libel as not irrelevant so as to justify motion to strike out. American Farm Co. v. Rural Pub. Co., 78 App. Div. [N. Y.] 268. Where both a separate defense and a counterclaim in an answer begin with reiteration of previous admissions and denials in the answer, such reiterated denials are irrelevant and redundant. Blaut v. Blaut, 41 Misc. [N. Y.] 572.

53. A bare allegation that a statute is inoperative, null and void, is not sufficiently specific. Whitehurst v. Jones, 117 Ga. 803.

54. Complaint in action on lease as indefinite as to manner of execution of the lease entitling defendant to have it made more definite. Rockey v. Haslett, 91 App. Div. [N. Y.] 181. The point where allegations of a petition become inherently too vague and indefinite to admit of proof is variable and not subject to definite rule. In re Sprowl's Will, 109 La. 352. An allegation in a complaint for servant's injuries stating only that defendant had a certain employe at a certain place is properly ordered to be made definite and certain [Code Civ. Proc. § 546]. Donovan v. Cunard S. S. Co., 85 N. Y. Supp. 1113. An averment in a declaration that plaintiff's injuries were caused solely by defendant's negligence is insufficient as to certainty. Minnuci v. Phila. & R. R. Co., 68 N. J. Law, 432. Where the allegations of a complaint are jumbled and without relation to each other or to one cause of action it cannot be upheld by picking out independent allegations without relation to each other. Phillips v. Sonora Copper Co., 90 App. Div. [N. Y.] 140. Counts of a complaint alleging merely possible or probable profits as damages, incapable of proof to any degree of certainty, are demurrable. Nichols v. Rasch [Ala.] 35 So. 409. A complaint for personal injuries must aver with certainty and definiteness to a common intent what the injuries were; that they were "serious" and that plaintiff suffered "both in body and mind" is insufficient. City Delivery Co. v. Henry [Ala.] 34 So. 389. Answer alleging that injuries were caused by carelessness, negligence, and fault of the deceased, may be required to be made more definite. McInerney v. Virginia-Carolina Chemical Co., 118 Fed. 653.

55. See Evidence, § 1, 1 Curr. Law p. 1137.

56. Cronan v. Woburn [Mass.] 70 N. E. 38.

57. Definition of duplicity. Orr v. Cooledge, 117 Ga. 195.

Pleadings not double: Equitable petition for accounting and settlement of partnership. Orr v. Cooledge, 117 Ga. 195. A replication pleading new matter as necessary inducement to the denial is not objectionable for duplicity. Belknap v. Billings [Vt.] 56 Atl. 174.

58. A denial by answer, on information and belief, of allegations in the complaint clearly within defendant's knowledge or which are matters of public record within his reach, is an evasion. Peacock v. U. S. [C. C. A.] 125 Fed. 583.

59. An answer controverting no material allegation of the complaint and setting up no defense is frivolous. Soper v. St. Regis Paper Co., 76 App. Div. [N. Y.] 409. Submission of ten pages of brief in support of an order to strike an answer from the files as frivolous shows argument within the rule preventing the striking of a frivolous answer. Zimmerman v. Meyerowitz, 77 App. Div. [N. Y.] 329, 12 Ann. Cas. 271. An allegation in defense of an action to recover money paid by mutual mistake that the payment was voluntary and not under duress is frivolous. Jaeger v. New York, 39 Misc. [N. Y.] 543. Where a complaint on a note alleged protest and notice to defendants, an answer denying knowledge sufficient for belief except such allegations is not frivolous since it does not admit delivery to plaintiff nor more than the reasonable import of allegations in the complaint. Maccarone v. Hayes, 85 App. Div. [N. Y.] 41.

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prolixity,[61] must be avoided, and mere epithets will be stricken out.[62] Facts not conclusions must be alleged.[63] A pleading otherwise sufficient is not bad for plead-

60. Averments in an answer of oral conversations of parties to a contract before execution thereof, the contract being alleged in the answer, are properly stricken out as redundant and immaterial, the conversations being merged in the written contract. Jordan v. Coulter, 30 Wash. 298, 70 Pac. 257. An answer setting up ignorance of the law, and failure to read papers signed, is immaterial and impertinent. Peacock v. U. S. [C. C. A.] 125 Fed. 583.

61. A law preventing a prolix method of pleading is not unconstitutional because applied to actions of one kind only [Acts 1896, p. 89, No. 121]. Hersey v. Northern Assur. Co. [Vt.] 56 Atl. 95. Parts of a complaint for negligence, in 53 paragraphs on 35 closely printed pages, consisting of extracts from public statutes and private contracts and matters merely evidence, should be stricken out as prolix. Parsons v. McDonald, 88 App. Div. [N. Y.] 552.

62. Words in a complaint to set aside a default stating that complainant's counsel acted "cunningly and designedly and with a view to take undue advantage of complainant on account of the absence of her attorney," are mere epithets. Harlow v. First Nat. Bank, 30 Ind. App. 160, 65 N. E. 603.

63. Cochise County v. Copper Queen Consol. Min. Co. [Ariz.] 71 Pac. 946. Facts not general terms must be pleaded. McCullough v. Colfax County [Neb.] 95 N. W. 29. Facts constituting the bar of limitations must be set out in pleading the bar. Satterlund v. Beal [N. D.] 95 N. W. 518. Affidavit of defense in assumpsit. Reynolds v. Fahey [Del.] 55 Atl. 221. Specifications objecting to discharge of a bankrupt must allege particular acts of the bankrupt. In re Peck, 120 Fed. 972. Complaint alleging negligent and unlawful acts must state facts showing the acts to be unlawful. Payne v. Moore, 31 Ind. App. 368, 67 N. E. 1005. Facts constituting invalidity of instruments alleged to be clouds on a title must be alleged. McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795. A petition merely stating plaintiff's "information and belief" and not the facts is insufficient where attacked on that ground. Robinson v. Ferguson, 119 Iowa, 325, 93 N. W. 350. Facts constituting fraud as ground of an action must be alleged so that their character as fraudulent may be determined by the court. Knowles v. New York, 176 N. Y. 430, 68 N. E. 860.

Allegations held conclusions. Boyer v. Western Union Tel. Co., 124 Fed. 246. General allegation of breach of contract insufficient. Picker v. Weiss, 39 Misc. [N. Y.] 22. Averments as to parliamentary procedure in a city council. Landes v. State, 160 Ind. 479, 67 N. E. 189. Allegations in cross complaint for injunction as conclusions of fact. Chicago & I. E. R. Co. v. Ind. Nat. G. & O. Co. [Ind.] 68 N. E. 1008. In action for goods sold, a denial that defendant is indebted in any sum is a conclusion. Guenther v. American Steel Hoop Co., 25 Ky. L. R. 795, 76 S. W. 419. In allegations of answer to sheriff's interpleader action in execution. Lackmann v. Kearney [Cal.] 75 Pac. 668. Complaint in action for injuries to servant. Blanchard-Hamilton Furniture Co. v. Colvin [Ind. App.] 69 N. E. 1032. Averment in a plea that goods sold were impliedly warranted to be properly packed. Troy Grocery Co. v. Potter [Ala.] 36 So. 12. Plea averring that a surety bond did not apply to a certain clause in a contract secured. U. S. Fidelity & Guaranty Co. v. Dampskibsaktieselskabet Habil [Ala.] 35 So. 344. An allegation of willingness, readiness, and ability to purchase land, is an allegation of fact not a mere conclusion of the pleader. Wilson v. Clark [Tex. Civ. App.] 79 S. W. 649. A statement in an affidavit of defense that a person was "duly notified" is an insufficient averment of notice. Stephenson v. Supreme Council, A. L. H., 127 Fed. 379. Allegation in an answer that the cause of death was not injury from external, violent, or accidental means. Dezell v. Fidelity & Casualty Co., 176 Mo. 253, 75 S. W. 1102. Plea of limitations stating merely the clauses of the statute invoked. Murray v. Barden, 132 N. C. 136. Allegation in a petition that a plat did not contain a dedication of land for streets. Bellevue Imp. Co. v. Kayser [Neb.] 95 N. W. 499. Allegations that location on public lands and issuance of a patent were fraudulent. Heil v. Martin [Tex. Civ. App.] 70 S. W. 430. Conclusions in complaint by servant against master for injuries. Indianapolis & G. R. T. Co. v. Foreman [Ind.] 69 N. E. 669. Replications asserting the legal effect of a payment under a decree and denying that defendant's liability was thereby discharged allege mere conclusions. Strauss v. Denny, 95 Md. 690. Affidavit of defense averring no residence of a pauper in a borough because her legal settlement was that of her husband in another state. Juniata County v. Overseers of Poor, 22 Pa. Super. Ct. 187. Allegation in an answer that a certain grantor never had any right, title, or interest in certain land. Jones v. Sanders, 138 Cal. 405, 71 Pac. 506. Allegations of fraud in a complaint without stating facts. Peckham v. Watsonville, 138 Cal. 242, 71 Pac. 169. An averment that defendant became indebted to plaintiff on a special contract without statement of facts out of which the debt might arise will not legally sustain a promise by defendant to pay. Taylor v. New Jersey T. G. & T. Co. [N. J. Law] 56 Atl. 152. Averment that a transfer of goods by a debtor was covinous and void. Green v. Emens, 135 Ala. 563. Complaint for injury to realty from excavations under party wall. Payne v. Moore, 31 Ind. App. 360, 66 N. E. 483. Allegation of option in bill of foreclosure. Jocelyn v. White, 201 Ill. 16, 66 N. E. 327. Allegation that one was duly appointed to office. Stott v. Chicago, 205 Ill. 281, 68 N. E. 736. Conclusions in bill in equity to prevent collection of a judgment. Bitzer v. Wahburn [Iowa] 96 N. W. 978. Allegation in a narr. that one wrongfully killed was "lawfully" on defendant's car. State v. Western Md. R. Co. [Md.] 56 Atl. 394. Allegations in action for injuries as to medical treatment furnished by defendant. Haggerty v. St. Louis, K. & N. W. R. Co., 100 Mo. App. 424, 74 S. W. 456. Allegations that allowance of claims by county officers were fraudulent, collusive, or in breach of trust. Wallace v. Jones, 83 App. Div. [N. Y.] 152. Allegation that a

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ing conclusions of law,[64] and the court may refuse to strike a legal conclusion where facts on which it is based are fully pleaded.[65] An allegation constituting a false deduction from facts pleaded is not such a false statement as to constitute fraud or imposition on the court.[66] Evidence need not be pleaded.[67] Matters of law should not be pleaded.[68] Essential facts must be unequivocally pleaded,[69] and scandalous matter avoided.[70] Matters in avoidance of allegations made need not be pleaded in anticipation.[71] Pleadings may be stricken out as sham only when they show no merit,[72] or when their statements as to inability of the party to plead properly are manifestly untrue.[73] The court cannot strike out a pleading as sham on answers of the party to interrogatories propounded to him on his examination before trial,[74] and matter cannot be stricken from a verified pleading as sham.[75]

certain license tax is unequal, unjust, and disproportionate to others. Covington v. Herzog, 25 Ky. L. R. 938, 76 S. W. 538. Averment in a petition of ownership of certain property arising out of a certain transaction. Blaisdell v. Citizens' Nat. Bank, 96 Tex. 626, 75 S. W. 292. Allegation in a complaint to set aside a default that the court would not have entered judgment if it had been advised of the facts. Harlow v. First Nat. Bank, 30 Ind. App. 160, 65 N. E. 603. Replication in an action on an insurance policy alleging waiver of conditions without stating facts constituting the waiver. Cassimus v. Scottish U. & N. Ins. Co., 135 Ala. 256. Allegation in a petition on a guardian's bond that an accounting from or with the guardian cannot be obtained in the exercise of the power of the probate court, its jurisdiction being ineffectual for that purpose. Wegner v. Wiltsie, 23 Ohio Circ. R. 302. Averment in an amended petition to recover profits of a partnership that there had been no settlement up to the time of the action and that the partnership continued to a certain date. Bluntzer v. Hirsch [Tex. Civ. App.] 75 S. W. 326. An answer merely denying a debt sued for but not denying the facts of the petition alleges a mere conclusion of law and does not raise an issue of fact. Jackson v. Green [Okl.] 74 Pac. 502. Allegation in a petition to recover for property taken by defendants, that the conduct of defendants in the taking was coarse and brutal and calculated to injure, intimidate, and humiliate the petitioner. Rylle v. Stammire [Tex. Civ. App.] 77 S. W. 626. Allegation in a complaint on a judgment of another state against a corporation, that a certain officer was legally authorized to receive service for the corporation. Old Wayne M. L. Ass'n v. Flynn, 31 Ind. App. 473, 68 N. E. 327. Allegations that injuries to a servant were received because of the master's negligent and defective rules and mode of directing work. Indianapolis & G. Rapid Transit Co. v. Foreman [Ind.] 69 N. E. 669. Averment in a complaint on a benefit insurance certificate that deceased was a member of the order at his death and entitled to rights of a member. Grand Lodge, A. O. U. W., v. Hall, 31 Ind. App. 107, 67 N. E. 272.

Allegations held not conclusions: An allegation in an action on an accident policy that "plaintiff is and will continue to be totally disabled." Clark v. Brotherhood of Locomotive Firemen, 99 Mo. App. 687, 74 S. W. 412. A statement in a complaint for recovery of lands that plaintiff is the only heir. Ricknor v. Clabber [Ind. T.] 76 S. W. 271. Word "mistake" in a pleading alleging a contract different from the one reduced to writing because of mistake. Smelser v Pugh, 29 Ind. App. 614, 64 N. E. 943. Statements in a complaint to recover land that plaintiff had lawful title, that defendants were in possession and were unlawfully withholding possession, are not conclusions of law. Livingston v. Ruff, 65 S. C. 284.

64. Petition. Nourse v. Weitz, 120 Iowa 708, 95 N. W. 251.

65. State Bank v. Showers, 65 Kan. 431, 70 Pac. 332.

66. Ruppin v. McLachlan [Iowa] 98 N. W. 153.

67. A declaration for injuries need not describe their serious character, their permanency being a matter of evidence. Springer v. Schultz, 105 Ill. App. 544; Guthrie v. Finch [Okl.] 75 Pac. 288. Petition as pleading evidence. Jaques v. Dawes [Neb.] 92 N. W. 570.

68. Thomas v. Wheeling Electrical Co. [W. Va.] 46 S. E. 217. Petition for nuisance. Powell v. Brookfield Pressed Brick & T. Mfg. Co. [Mo. App.] 78 S. W. 646.

69. Atchison, T. & S. F. Ry. Co. v. Atchison Grain Co. [Kan.] 70 Pac. 933.

70. Scandalous matter raising no issue and only serving to injure the reputation of parties at whom it is aimed may be expunged by the court. Morrison v. Snow, 26 Utah, 247, 72 Pac. 924.

71. Larson v. First Nat. Bank [Neb.] 92 N. W. 729.

72. An answer alleging fraud in an action by an inventor against a manufacturer for royalties shows a defense so that the court could not resort to a previous answer alleging a test of the machine in order to strike out the present answer as a sham. Zimmerman v. Meyerowitz, 77 App. Div. [N. Y.] 329. A defense will not be struck out as frivolous if it requires argument and careful examination to answer it. Dominion Nat. Bank v. Olympia Cotton Mills, 128 Fed. 181.

73. An answer denying knowledge sufficient to form a belief as to material allegations of the complaint cannot be stricken out as sham, nor can the court say it is untrue because the party presumably had sufficient knowledge to deny the allegations if untrue. Nichols v. Corcoran, 38 Misc. [N. Y.] 671.

74. Burns' Rev. St. 1901, §§ 385, 517. Stars v. Hammersmith, 31 Ind. App. 610, 67 N. E. 554.

75. Rev. St. 1898, § 2682. Moore v. May, 117 Wis. 192, 94 N. W. 45.

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Surplusage in pleading does not vitiate.[76] Clerical errors,[77] and errors and defects not affecting any substantial rights of the parties,[78] will be disregarded. Recitals in an instrument incorporated into a pleading are not averments and tender no issue.[79] A party is not precluded from a claim because inconsistent with a claim previously asserted but not successfully maintained.[80] In an action by a corporate manager on a contract for benefit of the corporation, the pleadings need not describe him as "manager."[81]

Captions, addresses, and conclusions.—A plea setting up new matter should conclude with a verification and not to the country.[82]

Signing, verifying, and indorsing.—An unverified answer confesses the petition.[83] Verification of a pleading need not follow exactly the statute but only in substance.[84] An answer may be verified by one co-defendant.[85] Where plaintiff supports the declaration with an affidavit of claim, defendant's plea must be supported by an affidavit of meritorious defense.[86] Specification of objections to discharge of a bankrupt is not a pleading requiring verification.[87] A petition in mandamus on relation of a public officer may be verified by him in his individual capacity.[88] Defendant in quo warranto desiring to contest allegations of fact on which the petition is based must make a positive denial under oath.[89] An affidavit to a plea stating that there is a good defense on the merits is not an affidavit that the plea of nonassumpsit is true.[90] "Instrument" as used in a pleading imports a writing, so that a verification by an attorney in an action on an instrument need not state expressly that it is in writing.[91] A mere allegation of agency in presenting a contract to plaintiffs does not require a denial under oath when signing by defendants is not alleged.[92] An affidavit verifying defendant's plea should deny execution of instruments sued on or state that the plea on nonassumpsit is not true in order to require plaintiff to prove execution.[93] Verification of a complaint to the effect that the allegations are true except as to matters alleged on information and belief which are believed to be true is equivalent to an unqualified verification that the allegations are true where all the allegations are positive.[94] An unverified answer in an action by an indorsee against the maker of a note puts in issue the allegation of the complaint of the transfer by the payee to the indorsee.[95] An affidavit of verification of a petition by an attorney showing that he is more familiar with the facts than petitioner and that they are almost wholly in

76. Thomas v. Wheeling Electrical Co. [W. Va.] 46 S. E. 217.

77. Error in a petition in using "proper" for "improper." Haggerty v. St. Louis, K. & N. W. R. Co., 100 Mo. App. 424, 74 S. W. 456. Where use of a word in a description of land in a complaint is manifestly a clerical error, a demurrer raising the defect is properly overruled. Crossen v. Grandy, 42 Or. 282, 70 Pac. 906.

78. Okl. St. 1893, § 4018. Blackwell v. Hatch [Okl.] 73 Pac. 933. If a declaration in tort show a legal duty, injury, and negligence by sufficient facts, though inartistically drafted, demurrer will not lie. Davey v. Erie R. Co. [N. J. Law] 54 Atl. 233. Technical defect in petition will not render it insufficient to arrest limitations. Wolf v. New Orleans Tailor-Made Pants Co., 110 La. 427.

79. Omaha Sav. Bank v. Rosewater [Neb.] 96 N. W. 68.

80. Lackmann v. Kearney [Cal.] 75 Pac. 668.

81. McKee v. Needles [Iowa] 98 N. W. 618.

82. Elsbree v. Burt, 24 R. I. 322.

83. Action on life policy. Weber v. Ancient Order of Pyramids [Mo. App.] 78 S. W. 650.

84. Abbott v. Campbell [Neb.] 95 N. W. 591.

85. Code Civ. Proc. § 446. Butterfield v. Graves, 138 Cal. 155, 71 Pac. 510.

86. Rev. St. c. 110, § 37. Blizzard v. Epkens, 105 Ill. App. 117.

87. Bankr. Act 1898, § 18c. In re Jamieson, 120 Fed. 697.

88. Baltimore & O. S. W. R. Co. v. State, 159 Ind. 510, 65 N. E. 508.

89. Whitehurst v. Jones, 117 Ga. 803.

90. Reed v. Fleming, 102 Ill. App. 668.

91. Abbott v. Campbell [Neb.] 95 N. W. 591.

92. Tex. & P. R. Co. v. Byers [Tex. Civ. App.] 73 S. W. 427.

93. Reed v. Fleming, 102 Ill. App. 668.

94. Kieley v. Barron & C. H. & P. Co., 87 App. Div. [N. Y.] 317.

95. Civ. Code 1877, § 62. Gumaer v. Sowers [Colo.] 71 Pac. 1103.

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his knowledge shows verification not to have been made by petitioner.[96] Where suit was brought in the county court on an open account properly sworn to by plaintiff, an unverified plea of payment should have been stricken out on plaintiff's motion.[97] The sufficiency of verifications on information and belief is treated in the note.[98]

Interpretation and construction in general.—Pleadings are to be construed most strongly against the pleader,[99] but the rule applies only when they are attacked by motion or demurrer.[1] After judgment[2] and on appeal[3] they will be liberally construed, and whatever is necessarily implied in, or is reasonably to be inferred from, an allegation, is to be taken as if directly averred.[4] In the nisi prius courts and courts of similar jurisdiction they are liberally construed because often oral.[5] As between two constructions, one lawful in import the other unlawful, the former will be given.[6] General averments are always controlled by the specific allegations of fact in a pleading.[7] Separate pleas as to interests of several persons for whose benefit an action of debt was brought instead of one plea combining all defenses will be construed together.[8] In testing matters of defense in one of several paragraphs of an answer, the facts alleged therein are to be considered in the light of allegations in other paragraphs relating to the same defense.[9]

Technical phraseology.—"Understanding and agreement" in a pleading imports an oral agreement.[10]

§ 2. *The declaration, count, complaint, or petition. Title, venue, and commencement.*—Entitling a declaration as for the wrong action will make it defective after verdict;[11] but in Missouri it has been held generally that the title given a

96. In re Mahoney's Estate, 84 N. Y. Supp. 329.

97. Acts 1901, p. 55. Columbia Drug Co. v. Goodman [Ga.] 46 S. E. 647.

98. Verification by the attorney for objecting creditors "to the best of his knowledge and belief" is sufficient. In re Peck, 120 Fed. 972. A business manager of a corporation verifying an affidavit of defense by the corporation need not set forth his information and belief. Andrews v. Blue Ridge Packing Co., 206 Pa. 370. A verification that "affiant has read the same and knows the contents thereof, that the facts set forth therein of his knowledge are true and that those stated on information and belief he believes to be true," is insufficient [Code 1883, § 258]. Carroll v. McMillan, 133 N. C. 140. An allegation that the pleader has not "sufficient information on which to base a belief" is insufficient where the statute requires a denial on information and belief to allege that the pleader has "not knowledge or information upon which to base a belief." Downing North Denver Land Co. v. Burns, 30 Colo. 283, 70 Pac. 413.

99. Osborne v. Gaar, 103 Ill. App. 372; Chicago Board of Trade v. Weare, 105 Ill. App. 289; Herrin v. Brown [Fla.] 33 So. 522. Complaint for recovery by surety on an official bond of funds misapplied. Fidelity & Deposit Co. v. Jordan [N. C.] 46 S. E. 496. If a complaint does not charge that a trust relied on is in writing, it will be assumed to be in parol and arising by implication of facts averred. Alexander v. Spaulding, 160 Ind. 176, 66 N. E. 694.

1. Lampman v. Bruning, 102 Iowa, 167, 94 N. W. 562. An answer not attacked for defect or insufficiency will be liberally construed so as to state a defense. Harnett v. Holdrege [Neb.] 97 N. W. 443. If no demurrer is filed to the declaration it must be construed most favorably to plaintiff at trial. Stern v. Knowlton, 184 Mass. 29, 67 N. E. 869. A petition unassailed will be liberally construed. Brown v. Helsley [Neb.] 96 N. W. 187; Marsh v. State [Neb.] 96 N. W. 520. Every reasonable intendment will be drawn in favor of the complaint where no objection is made until evidence is given. Prescott v. Puget Sound Bridge & Dredging Co., 31 Wash. 177, 71 Pac. 772. After issue joined and trial without objection to the petition it will be construed liberally. Sorensen v. Sorensen [Neb.] 94 N. W. 540; Lampman v. Bruning, 120 Iowa, 167, 94 N. W. 562. Construction of petition for injunction where the return of defendant admitted the allegations. State v. Earle, 66 S. C. 194.

2. Milner v. Harris, 120 Neb. 231, 95 N. W. 682.

3. Vivion v. Robertson, 176 Mo. 219, 75 S. W. 644; Cronan v. Woburn [Mass.] 70 N. E. 38.

4. Malloy v. Benway [Wash.] 75 Pac. 869.

5. In the Municipal Court of New York. Scheuer v. Monash, 40 Misc. [N. Y.] 668.

6. Where a contract is pleaded so as to admit of two interpretations, one valid as to acts and motives of the parties, the other immoral and criminal, on demurrer the former interpretation will be given. Atchison, T. & S. F. R. Co. v. Atchison Grain Co. [Kan.] 70 Pac. 933.

7. Malloy v. Benway [Wash.] 75 Pac. 869.

8. Probate Court v. Potter [R. I.] 55 Atl. 524.

9. Antognoli v. Miller, 116 Ga. 621.

10. Franklin v. Browning [C. C. A.] 117 Fed. 226.

11. A declaration counting in trespass, when it and the writ are entitled in case,

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pleading is immaterial.[12] Entitling a petition "In the district court" instead of the county court is an amendable defect.[13] Statements as to plaintiff's capacity in the caption may be aided by the body of the complaint.[14]

Statement of the cause of action.—The complaint must allege every fact essential to plaintiff's cause of action.[15] Negligence relied on must be alleged.[16] If sufficient facts are given, failure to allege mere circumstantial details is not fatal.[17] Causes of an action not alleged are not thereby abandoned.[18] The allegations must connect defendant with the cause of action,[19] and must be connected by proper averments with the cause of action.[20] A complaint insufficient as to one of two plaintiffs is bad as to both.[21] Allegations may be made in alternative form,[22] but allegations in nature of one cause of action cannot be treated as if in nature of another.[23] Allegations of damage need not be broader than the basis of the action.[24] Allegations of a declaration containing only one count, repugnant to and inconsistent with each other, neutralize each other.[25] Material matter of each separate cause of suit stated in a pleading must be complete in itself,[26] but different items of the same cause of action need not be alleged separately.[27] The action may be stated in different counts to conform the pleadings to every possible state of proof.[28] Counts must not be inconsistent with each other.[29] Separate paragraphs of a complaint are not bad, as independent pleadings, because the same things are alleged therein.[30]

is ground for arrest after verdict for plaintiff. Niles v. Brown [R. I.] 56 Atl. 1030.

12. Lilly v. Menke, 92 Mo. App. 354.

13. It will not prevent jurisdiction where proper summons is made, the defect amended, and defendant pleads to the amended petition. Rosewater v. Horton [Neb.] 93 N. W. 681.

14. Though the word "administrator" appearing in the caption was insufficient to show plaintiff's representative capacity, it was obviated by a statement in the body of the complaint showing such capacity. Bryant v. Southern R. Co., 137 Ala. 488.

15. Evansville & I. R. Co. v. Huffman [Ind. App.] 70 N. E. 173.

16. Toledo, St. L. & W. R. Co. v. Beery, 160 Ind. App. 566, 68 N. E. 702. A complaint for damages for tearing down an adjoining tenement, which belonged to defendant, so as to expose plaintiff's property and injure it is insufficient if negligence is not alleged. Fisher v. Seaboard Air Line R. Co. [Va.] 46 S. E. 381; Western Wheel Works v. Stachnick, 102 Ill. App. 420. A complaint in an action for wrongful death must state precisely the acts or omissions of defendant constituting negligence, or demurrer will lie; it is further defective if it appears therefrom that a fellow-servant caused the injury without showing that he was a vice-principal. State v. Schwind Quarry Co., 97 Md. 696.

17. Taylor v. N. J. Title Guarantee & Trust Co. [N. J. Law] 56 Atl. 152.

18. A litigant need not include all money demands against his debtor under pain of having abandoned those not included [Code Prac. art. 156]. In re Dimmick's Estate [La.] 35 So. 801.

19. A complaint for damages to live stock in transit is insufficient where it fails to show that the injuries resulted from the acts of defendant. Toledo, St. L. & W. R. Co. v. Beery, 31 Ind. App. 556, 68 N. E. 702.

20. Minnuci v. Phila. & R. Co., 68 N. J. Law, 432.

21. Frankel v. Garrard, 160 Ind. 209, 66 N. E. 687.

22. In an action for injuries received in a sawmill, a complaint alleging negligence in alternative form, either in failure to remedy a defect in the appliances or the timber used, is proper. Covington Sawmill & Mfg. Co. v. Clark, 25 Ky. L. R. 569, 76 S. W. 348. An averment in the complaint, in the alternative, that an assignment was wrongfully obtained without consideration or was made as security for a loan, did not make the complaint bad. Hasberg v. Mut. Life Ins. Co., 81 App. Div. [N. Y.] 199.

23. A complaint alleging injury from defendant's negligence cannot be treated as for assault and battery on proof of intentional injury. Greathouse v. Croan [Ind. T.] 76 S. W. 273.

24. In an action for damages to one piece of clothing special damage to the whole suit need not be alleged. Harsburg v. Southern R. Co., 65 S. C. 539.

25. Fla. Cent. & P. R. Co. v. Ashmore, 43 Fla. 272.

26. Moore v. Halliday, 43 Or. 243, 72 Pac. 801. Plaintiff suing for negligent injury to person and property must state separately and number the facts constituting the cause of action for injury to each [Code Civ. Proc. § 483]. Powers v. Sherin, 89 App. Div. [N. Y.] 37.

27. In an action on an official bond to recover money due the county, each item need not be alleged in a separate paragraph of the complaint. Nowlin v. State, 30 Ind. App. 277, 66 N. E. 54.

28. Hess v. Gansz, 90 Mo. App. 439.

29. A count alleging indebtedness on a fire insurance policy and occurrence of a loss and another alleging a promise to pay if a loss occurred and that no loss occurred are inconsistent and liable to general demurrer. Hersey v. Northern Assur. Co., 75 Vt. 441.

30. Lake Erie & W. R. Co. v. Holland [Ind.] 69 N. E. 138.

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A count in assumpsit is not good at common law as a general count.[31] Succeeding counts may refer to previous counts for necessary allegations,[32] but independent counts will not aid each other.[33] Whenever an entire verdict is to be given on several counts in the declaration, a defective count is immaterial where one or more counts are sufficient.[34] Where a declaration contains two counts, one based on affirmance of a contract, the other on its disaffirmance, plaintiff after relying on both through the trial may strike out the first and rely on the second at close of the evidence.[35]

Specific terms need not be used if the facts are sufficiently pleaded.[36] Generally defenses are not to be anticipated;[37] however, there are exceptions to the rule.[38] That a complaint otherwise good sets out the defense will not make it bad if it gives sufficient matter in avoidance.[39] Matters of law need not be alleged,[40] though foreign statutes relied on may be pleaded as to substance and effect.[41] A petition sufficiently stating a statutory cause of action need not mention the statute.[42] Estoppel,[43] and special damages, must be specially pleaded,[44] but not punitive damages.[45] Performance of conditions precedent must be alleged[46] specifically,[47] un-

31. Hersey v. Northern Assur. Co., 75 Vt. 441.

32. Introductory matter in a complaint of more than one count need not be repeated after the first count; such as partnership capacity of parties. Hefferlin v. Karlman [Mont.] 74 Pac. 201. A count in conversion is not defective for failure to describe the goods where it referred to a previous count sufficiently describing them. Wilson v. Hoffman, 123 Fed. 984. Each count of a declaration is distinct and must be independent except that later counts may incorporate allegations of prior counts by express reference. Bryant v. Southern R. Co., 137 Ala. 488.

33. An independent count is not aided by statements in a prior count that plaintiff sued in a representative capacity for wrongful death of another where the independent count does not show who the decedent was. Bryant v. Southern R. Co., 137 Ala. 488.

34. Ill. Cent. R. Co. v. Leiner, 103 Ill. App. 438.

35. Brown v. Woodbury, 183 Mass. 279, 67 N. E. 327.

36. A duty need not be charged in specific terms in an action for injuries to a servant, the facts out of which the duty springs being sufficient. Illinois Steel Co. v. McNulty, 105 Ill. App. 594.

37. Plaintiff seeking to enforce a vendor's lien need not negative existence of facts amounting to a waiver of the lien. Mulky v. Karsell, 31 Ind. App. 595, 68 N. E. 689. Warranties or conditions subsequent need not be alleged in declaring on an insurance policy there being matters of defense which plaintiff need not anticipate. Ellis v. Liverpool & L. & G. Ins. Co. [Fla.] 35 So. 171.

38. A count for work and labor must allege nonpayment though payment is an affirmative defense. Bacon v. Chapman, 85 App. Div. [N. Y.] 309. In an action on a promissory note in Pennsylvania, plaintiff may anticipate the defense by alleging that a former judgment recovered was on one of a series of similar notes. Amshel v. Hosenfeld, 20 Pa. Super. Ct. 376.

39. Lake Erie & W. R. Co. v. Holland [Ind.] 69 N. E. 133.

40. A petition for a nuisance need not allege that the acts complained of were unlawfully done. Powell v. Brookfield Pressed Brick & Tile Mfg. Co. [Mo. App.] 78 S. W. 646.

41. Plaintiff suing in Arkansas for wrongful death occurring in Louisiana may plead merely the substance and effect of the Louisiana statute. St. Louis, I. M. & S. R. Co. v. Haist [Ark.] 72 S. W. 893.

42. Bair v. Heibel [Mo. App.] 77 S. W. 1017.

43. Union State Bank v. Hutton [Neb.] 95 N. W. 1061.

44. Injury to kidneys from confinement because of broken leg. Kircher v. Larchwood, 120 Iowa, 578, 95 N. W. 184.

45. In an action for negligence and willful tort, plaintiff need not allege punitive damages claimed but only the willfulness and the damages from the negligence and the willful tort [Act 1898, 22 Stat. p. 693]. Stembridge v. Southern Ry. Co., 65 S. C. 440. See, also, Damages, 1 Curr. Law, p. 833.

46. The complaint in an action against a village for injuries must allege that the statutory period had elapsed since filing the claim [Laws 1897, p. 453, c. 414, § 322]. Thrall v. Cuba, 84 N. Y. Supp. 661. A complaint for injuries to a servant should allege notice of the accident to the master [Laws 1902, p. 1748, c. 600]. Johnson v. Roach, 83 App. Div. [N. Y.] 351. Allegations of complaint as to performance of conditions precedent as against general demurrer. Gummer v. Mairs, 140 Cal. 535, 74 Pac. 26. Allegations of performance of conditions by plaintiff in complaint on benefit insurance certificate under Burns' Rev. St. 1901, § 373. Grand Lodge A. O. U. W., 31 Ind. App. 107, 67 N. E. 272.

47. By facts and not in general terms. Action against county to recover for sheep killed by dogs under Comp. St. 1901, § 18, art. 1, c. 4. Imposition of the proper tax by the county board must be alleged. McCullough v. Colfax County [Neb.] 95 N. W. 29. Performance of conditions cannot be pleaded generally where it extends to matters under contracts of indemnity constituting the very loss for which the insurer is liable. Taylor v. New Jersey Title, G. & T. Co. [N. J. Law] 56 Atl. 152.

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less waived,[48] or unless it depends on unperformed acts of defendant.[49] The meaning of technical terms of trade should be explained if their technical meaning is essential to the cause of action.[50]

A technical defect will not render a petition insufficient to interrupt the running of limitations.[51] Unnecessary allegations amount to a defect[52] but that a complaint states more than is necessary will not render defective where only one cause of action is stated and that sufficiently.[53] Misnomer of defendant is fatal where limitations have run before amendment,[54] or in an action against a corporation.[55] Impertinent allegations in a complaint so interwoven with pertinent allegations that to strike them out would weaken the force of facts sought to be stated will not be stricken where defendant is sufficiently apprised as to the action.[56] Defects in a complaint or petition cannot be supplied by an answer of specific denials[57] or admissions.[58] A prayer for some relief is essential.[59]

The prayer of a petition is no part of it.[60] A prayer for general relief coupled with one for special relief cannot be extended so as to warrant relief not comprehended by allegations of fact in the petition.[61] Where only actual or punitive damages are sued for, nominal damages cannot be had though the party would be entitled to them.[62] A prayer for general relief in a bill in equity will sustain a personal judgment.[63] The sufficiency of the prayer in particular pleadings is treated in the note.[64]

48. Plaintiff may assume that conditions precedent which have been waived will not be relied on so that allegations of such waiver are not inconsistent with the requirement that performance of such conditions must be pleaded in an action on contract. Insurance policy [Code Civ. Proc. § 128]. German Ins. Co. v. Shader [Neb.] 93 N. W. 972.

49. Performance of a building contract by an owner suing a contractor. Ramlose v. Dollman, 100 Mo. App. 347, 73 S. W. 917.

50. A petition alleging a sale of goods "f. o. b. cars in St. Louis" is not fatally defective for failure to allege the meaning of the phrase. Vivion Mfg. Co. v. Robertson [Mo.] 75 S. W. 644. Where a petition on a contract for sale of cotton alleges that two kinds of bales were sold and that the parties agreed verbally as to the price, and fails to allege the trade meaning of the bales as to weight or the price, it affirmatively appears that the contract is partly parol and the petition is insufficient. Beacham v. Kea, 118 Ga. 406.

51. Wolf & Sons v. New Orleans Tailor-Made Pants Co., 110 La. 427.

52. Unnecessary allegations as to negligence in action for injuries to brakeman as denunciatory and inflammatory rendering petition liable to demurrer. Galveston, H. & S. A. R. Co. v. Appeal [Tex. Civ. App.] 77 S. W. 635.

53. Blakemore v. Roberts [N. D.] 96 N. W. 1029. A special count in a declaration for interest on the amount claimed as principal is not an improper pleading liable to demurrer though not necessary. Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 So. 228.

54. A petition misnaming defendant will not arrest limitations, without service of citation or entry of appearance, so as to allow an amended petition after the statute had run. Martinez v. Dragna [Tex. Civ. App.] 73 S. W. 425.

55. Use of "the" in a declaration before the title of defendant corporation is a misnomer so that plea in abatement will lie where the corporate title contains no such word. Lapham v. Phila., B. & W. R. Co. [Del.] 56 Atl. 366.

56. Gowans v. Jobbins, 90 App. Div. [N. Y.] 429.

57. An answer of merely specific denials will not aid a materially defective complaint. Nye v. Bill Nye Mill. Co., 42 Or. 560, 71 Pac. 1043.

58. Where a petition is defective as pleading a breach of contract without pleading the contract, allegations of a contract in the answer admitted by the replication do not supply the defect where such contract could not have been broken as alleged in the petition. Currell v. Hannibal & St. J. R. Co., 97 Mo. App. 93, 71 S. W. 113. Failure of a complaint in partition to allege possession is not cured by an answer alleging that the lands were part of the lands involved in a former suit between the parties where the reply denied this and plaintiff offered evidence in support of the denial. Sterling v. Sterling, 43 Or. 200, 72 Pac. 741.

59. Not enough to ask for declaration of rights. Southern R. Co. v. State, 116 Ga. 276.

60. Relief may follow the facts stated regardless of the prayer. Smith v. Smith, 67 Kan. 841, 73 Pac. 56.

61. Vila v. Grand Island E. L., I. & C. S. Co. [Neb.] 97 N. W. 613; Mann v. German-American Inv. Co. [Neb.] 97 N. W. 600.

62. Civ. Code 1895, § 3801, construing pleading most strongly against the pleader. Haber. B., B. Hat Co. v. Southern Bell Tel. & T. Co. [Ga.] 45 S. E. 696.

63. American T. & S. Co. v. Gottstein [Iowa] 98 N. W. 770.

64. An allegation in a petition that plaintiff is "endamaged to the amount of one thousand dollars" is sufficient to support inquiry as to actual damages when the cause

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After three petitions held insufficient, final judgment is properly entered for defendant.[65] A statutory motion by a receiver of a corporation for a judgment for money is a compliance with a direction "to institute suits at law."[66]

Not all instruments or records sued on need be made a part of the pleading,[67] but contracts constituting the basis of the action must be pleaded[68] in their proper character.[69] Statement of the legal effect only is necessary.[70]

What are necessary allegations,[71] and sufficiency of allegations,[72] in particular pleadings, are assembled in the notes.

of action is admitted by demurrer. Disosway v. Edwards [N. C.] 46 S. E. 501.

65. Rev. St. 1899, § 623. Tapana v. Shaffray, 97 Mo. App. 337, 71 S. W. 119.

66. Notice thereof takes the place of writ and declaration. Reed v. Gold [Va.] 45 S. E. 868.

67. A judgment sued on is not a written instrument which must be made a part of the complaint. Kelley v. Houts, 30 Ind. App. 474, 66 N. E. 408. A certificate of stock in a loan association pledged to it by a borrowing member need not be set out in an action to foreclose the mortgage or exhibited with it, it not being the basis of the cause of action. Coppes v. Union N. S. & L. Ass'n [Ind. App.] 67 N. E. 1022.

68. Under the Indiana statute requiring that when a pleading is founded on a written instrument, the writing, or a copy thereof, must be filed with the pleading, a copy in the body of the pleading is sufficient. Miller v. Wayne International B. & L. Ass'n [Ind. App.] 70 N. E. 180. Where an instrument sued on is copied in the pleading, the legal effect of the instrument need not also be set out. Miller v. Wayne International B. & L. Ass'n [Ind. App.] 70 N. E. 180. A petition which pleads failure of defendant to do a certain thing as a breach of contract without pleading or setting out the contract is insufficient. Currell v. Hannibal & St. J. R. Co., 97 Mo. App. 93, 71 S. W. 113. One suing on a contract ambiguous when applied to the subject of litigation must point out the uncertainty and aver a definite construction. Johnson v. Kindred State Bank [N. D.] 96 N. W. 588.

69. An allegation in a complaint setting out an instrument as of a different character from that which it plainly appears to be, is insufficient though not denied. Saling v. Bolander [C. C. A.] 125 Fed. 701. Under Practice Act, cls. 7 and 8, a count on an account annexed, includes by intendment, with respect to the item stated in the account, all the allegations contained in the common counts. Mass. M. L. Ins. Co. v. Green [Mass.] 70 N. E. 202.

70. A written instrument sued on need not be set out in haec verba, nor need a copy be attached, but it is sufficient if the complaint states its legal effect. Bank of Timmonsville v. Fidelity & Casualty Co., 120 Fed. 315.

71. Sufficiency of petition as against general demurrer. Horne v. Mullis [Ga.] 46 S. E. 663.

Jurisdiction: In pleading a federal judgment in bankruptcy, facts showing jurisdiction need not be alleged. Bailey v. Gleason [Vt.] 56 Atl. 537. Facts on which jurisdiction is based need not be alleged in pleading the judgment of a county court. Com'rs of Highways v. Big Four Drainage Dist., 207 Ill. 17, 69 N. E. 576. A complaint in the county court in New York to recover on the bond of a city officer must show on its face that the surety is a resident of the county. Perlman v. Gunn, 41 Misc. [N. Y.] 166. Plaintiff's claim or right of jurisdiction in a particular court must be shown and allegations that defendant intends to assert a defense cognizable only in such court is insufficient. Joy v. St. Louis, 122 Fed. 524.

Fraud: A petition alleging that defendant secured signatures to a note falsely representing that they were those of certain persons, thereby inducing plaintiff to advance him money is good on general demurrer though it does not allege that defendant knew the representations were false. Commercial Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 77 S. W. 239. A petition on the ground of fraud is demurrable which shows that the action was not commenced within four years, and fails to show when the fraud was discovered. Newman Grove State Bank v. Linderholm [Neb.] 94 N. W. 616. Knowledge of fraud by a grantee in a deed need not be alleged or proved where the conveyance was voluntary and prima facie fraudulent as to creditors. Spear v. Spear, 97 Me. 498.

Demand or payment: Complaint on injunction bond must allege failure to pay damages. Van Horn v. Holt [Mont.] 75 Pac. 680. A complaint alleging an agreement in writing to pay plaintiff a certain sum each year and its breach, and the amount due, is sufficient without alleging a demand [Rev. St. §§ 2646, 2668, 2675]. Gall v. Gall [Wis.] 97 N. W. 938. A complaint on a municipal order setting it out and alleging refusal of payment need not allege a demand. Rochford v. School Dist. No. 11 [S. D.] 97 N. W. 747.

Title or right in property: Insufficiency of complaint for injury to party wall in that it failed to allege existence of an easement for support in the adjoining lot. Payne v. Moore, 31 Ind. App. 360, 66 N. E. 483. An averment that one owns certain described property is permissible and the manner of acquiring ownership need not be alleged. George Adams & F. Co. v. South Omaha Nat. Bank [C. C. A.] 123 Fed. 641. In suing for damages to crops plaintiff need not allege an assignment to him where he held an interest before the injury. Hovey v. Grand Trunk Western R. Co. [Mich.] 97 N. W. 398.

Personal injuries: A petition in an action for injuries to a passenger from defects in appliances is liable to demurrer where it does not specify the particular appliances causing the injury and how it was received. Newton v. People's R. Co. [Del.] 55 Atl. 2. A complaint for personal injuries to a servant must allege that he had no knowledge of recklessness and incompetency of a neg-

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ligent fellow-servant. Indianapolis & G. Rapid Transit Co. v. Foreman [Ind.] 69 N. E. 669. Exemplary damages cannot be recovered where the complaint does not allege willfulness. Harmon v. W. U. Tel. Co., 65 S. C. 490. The declaration for injuries against a master need not state that his employes, whose negligence caused the accident, were not fellow-servants of plaintiff. Mott v. Chicago & M. El. R. Co., 102 Ill. App. 412.

Other particular matters: A complaint good at common law or under the code must state clearly all facts necessary for plaintiff to prove in the first instance on an answer of general denial. Lake Erie & W. R. Co. v. Holland [Ind.] 69 N. E. 138. A petition in an action on an appeal bond must allege that supersedeas was issued by the clerk after execution of the bond. Hoskins v. Southern Nat. Bank, 24 Ky. L. R. 2250, 73 S. W. 786. Complaint in an action on a fidelity bond; necessity of alleging several items of loss and evidence in support thereof. Bank of Timmonsville v. Fidelity & Casualty Co., 120 Fed. 315. Particular words and acts need not be alleged in the complaint in an action for alienation of affections, the alienation and the intent being alleged. Jenkins v. Chism, 25 Ky. L. R. 736, 76 S. W. 405. A petition in an action for damages against a telegraph company for failure to deliver a message, stating that but for the delay plaintiff would have reached his son 12 hours before his death is not defective for not stating the hour of his death [Civ. Code, § 134]. Howard v. W. U. Tel. Co., 25 Ky. L. R. 828, 76 S. W. 387. Where a complaint on a lease void unless in writing does not state whether it is in writing, defendant is entitled to have it made more definite in that regard. Rockey v. Haslett, 91 App. Div. [N. Y.] 181. Where plaintiff alleged that he was deprived of money through conspiracy of defendants through officers, agents, and servants, defendants were entitled to a restatement of the allegation so as to show the identity of those engaged in the conspiracy. Riker v. Erlanger, 87 App. Div. [N. Y.] 137.

72. Walling v. Bown [Idaho] 72 Pac. 960. A declaration setting out the cause of action with sufficient definiteness to enable defendant to understand its nature and to plead is sufficient. Sun Life Assur. Co. v. Bailey [Va.] 44 S. E. 692. Complaint in action to set aside a default. Harlow v. First Nat. Bank, 30 Ind. App. 160, 65 N. E. 603. An allegation, in an action for damages to land from water flowing from a sewer, that defendant owed plaintiff the duty of preventing flowage upon the land, is insufficient, no facts being stated. Neinaber v. Weehawken [N. J. Law] 57 Atl. 267.

Declaration in case. Niles v. Brown [R. I.] 56 Atl. 1030. Petition as showing bar of limitations on its face. Merrill v. Suing [Neb.] 92 N. W. 618. Plea of intervention in nature of creditor's bill in action to cancel conveyance. Blackwell v. Hatch [Okl.] 73 Pac. 933. Complaint to show liability of a foreign corporation. Anderson v. War Eagle Consol. Min. Co. [Idaho] 72 Pac. 671. Complaint by mortgagor against mortgagee to require certificate of discharge and for damages and penalty under Rev. Civ. Code, § 2061. Mader v. Plano Mfg. Co. [S. D.] 97 N. W. 843.

Time: An allegation of time "on the day and year aforesaid" is sufficient where a precise day is stated in the clause immediately preceding. Taylor v. New Jersey Title, G. & T. Co. [N. J. Law] 56 Atl. 152.

Damages: If a complaint states a cause of action it is not demurrable because it referred to damages only in the prayer for relief. Livingston v. Ruff, 65 S. C. 284.

Parties and character thereof: Allegation of partnership as sufficient to authorize action under the firm name under Code. § 24. Chamberlain Banking House v. Noyes [Neb.] 92 N. W. 175. Sufficiency of description of alien complainants to bring suit within 25 Stat. 433, c. 866, giving jurisdiction to federal district courts. Hennessy v. Richardson Drug Co., 189 U. S. 25, 47 Law. Ed. 697; Hennessy v. Moise, 189 U. S. 35, 47 Law. Ed. 698.

Actions against several defendants: Allegations in complaint joining causes of action against different directors of a corporation to connect all with the acts alleged to constitute deceit. Warner v. James, 88 App. Div. [N. Y.] 567.

Fraud: Allegations of fraud in action by widow to set aside judgment for negligent death of her husband recovered by his minor heirs acting in collusion with the railroad company. De Garcia v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 77 S. W. 275. Complaint against vendor for false representations in sale of land, as stating cause of action. Koepke v. Winterfield, 116 Wis. 44, 92 N. W. 437.

Negligence: Personal injuries. Consumers' Elec. L. & St. R. Co. v. Pryor [Fla.] 32 So. 797; Grijalva v. Southern Pac. Co., 137 Cal. 569, 70 Pac. 622; Shepherd v. Southern Pine Co., 118 Ga. 292. Declaration in action against master for injuries to servant. Peter v. Middlesex & S. Traction Co. [N. J. Law] 55 Atl. 35. Demurrer in action for personal injuries on ground that complaint shows contributory negligence. Burns v. Southern R. Co., 65 S. C. 229. A petition for personal injuries alleging disability to work substantially alleges loss of time. Brake v. Kan. City, 100 Mo. App. 611, 75 S. W. 191. Petition in second action for personal injuries as demurrable for want of diligence of plaintiff in discovering fraud in settling first action or undue delay in rescission of the accord and satisfaction given defendant. Savannah, F. & W. R. Co. v. Pollard, 116 Ga. 297. Allegations for injuries to servant to recover for value of time lost because of the injuries. General Elec. Co. v. Murray [Tex. Civ. App.] 74 S. W. 50. A petition showing jurisdiction, alleging a duty of defendant to plaintiff and the facts from which it arose, a breach of the duty, and damages, is good on general demurrer. North Augusta E. & I. Co. v. Martin, 118 Ga. 622. Where a complaint for personal injuries merely alleges that plaintiff was lawfully in front of the building which the answer denied, there was no issue as to his precise position at time of the accident. Waterhouse v. Jos. Schlitz Brew. Co. [S. D.] 94 N. W. 587. Narration in action for wrongful death. State v. Western Md. R. Co. [Md.] 56 Atl. 394. Allegations as to cause of injury and negligence in action for wrongful death. Consol. Stone Co. v. Morgan, 160 Ind. 424, 66 N. E. 696. Complaint for injuries against a street railroad company and its successor as sufficient to show a cause of action against the second company. Citizens' St. R. Co. v. Shepherd, 30 Ind. App. 193, 65 N. E. 765. Complaint for negligent

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killing of brakeman by railroad, under Burns' Rev. St. 1901, § 7083. Chicago, I. & L. R. Co. v. Barnes [Ind.] 68 N. E. 166. Complaint for damages from fire set by a railroad as to negligence. Wabash R. Co. v. Lackey, 31 Ind. App. 103, 67 N. E. 278. Complaint in action for damages from fire set by passing railroad engine. Johnson v. Great Northern R. Co. [N. D.] 97 N. W. 546. Complaint for negligent burning of cotton stored on a railroad platform. Southern R. Co. v. Wilson [Ala.] 35 So. 561. Sufficiency of complaint for recovery of damages to live stock; propriety and sufficiency of separate paragraphs. Lake Erie & W. R. Co. v. Holland [Ind.] 69 N. E. 138.

Torts in general: Complaint as showing intimidation of manufacturers by an association of wholesale jobbers so as to prevent sales of goods to plaintiff. Park & Sons Co. v. Nat. Wholesale Druggists' Ass'n, 175 N. Y. 1, 67 N. E. 136. Allegations of a petition for damages to property from location of a pest-house. McKay v. Henderson, 24 Ky. L. R. 1484, 71 S. W. 625. Petition for abandonment by husband and maintenance as stating cause of action. Munchow v. Munchow, 96 Mo. App. 553, 70 S. W. 386. Complaint for deceit against directors of a corporation. Warner v. James, 88 App. Div. [N. Y.] 567. Allegations of complaint for damage to realty. Ohio Oil Co. v. Griest, 30 Ind. App. 84, 65 N. E. 534. Complaint in conversion. Kramer v. N. W. Elevator Co. [Minn.] 98 N. W. 96. Allegations of complaint for conversion of corporate stock. Rockwell v. Day, 84 App. Div. [N. Y.] 437. Complaint stating an action for joint tort not separable. Fogarty v. Southern Pac. Co., 123 Fed. 973.

Collection of taxes: Petition in action to enforce lien of special tax bill as alleging ordinance under which it was issued. Welch v. Mastin, 98 Mo. 273, 71 S. W. 1090. Complaint in action to collect street assessment. Deane v. Ind. Macadam & Construction Co. [Ind.] 68 N. E. 686. Complaint pleading a street assessment in action to foreclose a lien under requirements of Code Civ. Proc. § 456. Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445.

Actions against municipalities: Complaint by taxpayers to have a municipal contract declared void as showing the contract to have been authorized. Peckham v. Watsonville, 138 Cal. 242, 71 Pac. 169. Complaint in action to restrain collection of a tax. Cochise County v. Copper Queen Consol. Min. Co. [Ariz.] 71 Pac. 946. Complaint in action by taxpayer for allowance of illegal claims by county officers to state cause of action. Wallace v. Jones, 83 App. Div. [N. Y.] 152. Complaint in action for damages from breach of contract with town commissioners under Laws 1900, p. 1119, c. 451. Holroyd v. Indian Lake, 85 App. Div. [N. Y.] 246. Complaint for recovery of reward. Board of Com'rs Clinton County v. Davis [Ind.] 69 N. E. 680. Petition in action for injuries from defective sidewalk, showing diligence so as to avoid limitations under Code § 3455. Cepriey v. Paton, 120 Iowa, 559, 95 N. W. 179. Petition as showing that the fee to streets was in a village. Bellevue Imp. Co. v. Kayser [Neb.] 95 N. W. 499. A motion to make a petition more specific as to the nature of a defect in a sidewalk will not lie where the defect is specifically described in a personal injury action. Brown v. Chillicothe [Iowa] 98 N. W. 502.

Contracts in general: Accident policy. Fidelity & Casualty Co. v. Brown [Ind. T.] 69 S. W. 915. Action for rent. Linam v. Jones, 134 Ala. 570. Breach of contract. Cutting Fruit Packing Co. v. Canty [Cal.] 75 Pac. 564. Allegations of a contract in an action for breach to admit evidence. Prescott v. Puget Sound Bridge & Dredging Co., 31 Wash. 177, 71 Pac. 772. Complaint for breach of contract not demurrable as showing an agreement against public policy. Culver v. Caldwell, 137 Ala. 125. Complaint in action for breach of covenant of warranty in a deed. Kavenel v. Ingram, 131 N. C. 549. Petition for damages for breach of contract of carriage. Brown v. Ga. C. & N. R. Co. [Ga.] 46 S. E. 71. Complaint for breach of warranty in sale of horse [Rev. St. 1898, 2668]. Klipstein v. Raschein, 117 Wis. 248, 94 N. W. 63. Petition for breach of marriage promise. Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024. Sufficiency to show heirs liable for fees of attorneys alleged to have been employed by the executor. In re Bruning's Estate [Iowa] 96 N. W. 780. Complaint in action to recover value of heat furnished. Boston Clothing Co. v. Garland [Minn.] 97 N. W. 433. Allegations in complaint to recover for merchandise sold to employes of defendant as to original promise of defendant to pay therefor. Hefferlin v. Karlman [Mont.] 74 Pac. 201. Complaint for specific performance of decedent's contract against administrators as stating the making and character of the agreement. Hall v. Gilman, 77 App. Div. [N. Y.] 458. Complaint as demurrable because disclosing termination of the contract sued on before commencement of suit. Keene v. Newark Watch Case Mfg. Co., 81 App. Div. [N. Y.] 48. Allegations of indemnity terms in contract as against demurrer. Seaboard Air Line R. Co. v. Main, 132 N. C. 445. Allegations as to business usage and as to contract with reference thereto. Hendricks v. Middlebrooks Co., 118 Ga. 131. Statement in assumpsit on a book account for merchandise sufficient to require an affidavit of defense. Bridgeman Bros. Co. v. Swing, 205 Pa. 479. Sufficiency of petition in action to recover commissions for sale of realty, as against special exception, to show authority to agree to pay plaintiff the alleged compensation. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227. A petition in an action to recover for grain sold, setting forth correspondence of the parties, may be said to plead evidence, but where the terms of the contract are shown from the correspondence, though no particular grain is mentioned, the omission is not a failure to state a cause of action, where delivery was also alleged. Jaques v. Dawes [Neb.] 92 N. W. 570.

Consideration: Complaint on contract as to allegations of consideration. Holtz v. Hanson, 115 Wis. 236, 91 N. W. 663.

Descriptions of land: Petition for annexation of territory to a town as describing territory by map or plat attached as exhibit and duly verified by affidavit. McCoy v. Trustees of Cloverdale, 31 Ind. App. 331, 67 N. E. 1007. Description of land in complaint in foreclosure. Kelly v. Houts, 30 Ind. App. 474, 66 N. E. 408. Description of lands in petition. Tichenor v. Wood, 24 Ky. L. R. 1109, 70 S. W. 837.

Actions for services: Pleadings as basis of verdict in action to recover for services under contract with defendant's intestate.

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Bill of particulars and exhibits.[74]—The object of a bill of particulars is to apprise defendant of the exact nature and extent of the demand.[75] Defendant must request a bill[76] before pleading to the merits.[77] In many actions where the pleadings of plaintiff are not full or specific enough to show the basis of the action, a bill of particulars may be required.[78] It cannot be required of plaintiff as to matters peculiarly

Hatcher v. Dobbs, 133 N. C. 239. Complaint in action for wages as to performance of services. Nye v. Bill Nye Gold Mill. Co., 42 Or. 560, 71 Pac. 1043. Complaint in action for wages as charging fraudulent transfer of property by debtor. Smith v. Tate, 30 Ind. App. 367, 66 N. E. 88.

Actions on negotiable instruments: Petition on note as against general demurrer. Guthrie v. Treat [Neb.] 92 N. W. 595. Petition on promissory note. Omaha Brew. Ass'n v. Tillenburg [Neb.] 96 N. W. 107. Petition on promissory note given by partnership. Kelly v. Strouse, 116 Ga. 872; Bessemer Sav. Bank v. Rosenbaum Grocery Co., 137 Ala. 530. Petition to show usury. Lexington Bank v. Marsh [Neb.] 95 N. W. 341. Allegations of complaint under the rule of liberal construction in an action on a note to show plaintiff's ownership and that the note was delivered to him on behalf of a firm named [Code Civ. Proc. 519]. Maccarone v. Hayes, 85 App. Div. [N. Y.] 41.

Actions on official or other bonds: Petition on sheriff's bond. Hill v. Ragland, 24 Ky. L. R. 1053, 70 S. W. 634. Petition in action on contractor's bond. Fidelity & Deposit Co. v. Parkinson [Neb.] 94 N. W. 120. Complaint on contractor's bond as showing a breach thereof and stating a cause of action. Fidelity & Deposit Co. v. Robertson, 136 Ala. 379. Complaint on forfeited recognizance. State v. Bongard, 89 Minn. 426, 94 N. W. 1093. That plaintiff in a suit on an attachment undertaking did not allege in terms that the damages were unpaid, will not entitle defendants to judgment on the pleadings where they allege no payment and the evidence shows no payment. Waller v. Deranleau [Neb.] 94 N. W. 1038.

Accounting: Complaint asking conveyance of an interest in an invention and for an accounting. Merrill v. Miller [Mont.] 72 Pac. 423. Equitable petition for accounting and settlement of a partnership. Orr v. Cooledge, 117 Ga. 195. Complaint against a corporation for accounting and other relief. Phillips v. Sonora Copper Co., 90 App. Div. [N. Y.] 140. Bill by stockholder and director asking receiver and accounting. Case v. Hudson Co., 41 Misc. [N. Y.] 51.

Recovery of property: Vagueness of petition in recovery of property given under an alleged will. In re Sprowl's Will, 109 La. 352. Allegations of title in complaint to remove cloud on title. McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795. Complaint as showing plaintiff to be owner of equitable title to judgment sued on. McCardle v. Aultman Co., 31 Ind. App. 63, 67 N. E. 236. Petition as stating cause of action to recover for land taken by railroad company. St. Louis & S. F. R. Co. v. Yount, 67 Kan. 396, 73 Pac. 63. Allegations of nonpayment in action to recover money. Rawlinson v. Christian Press Ass'n Pub. Co., 139 Cal. 620, 73 Pac. 468. Petition to quiet title as alleging an estate in plaintiffs suing jointly as members of town council. Tracy v. Grezand [Neb.] 93 N. W. 214. Complaint in action by surviving husband of one of testator's children to recover his share of the estate, under Burns' Rev. St. 1901, §§ 3396, 3398. Alexander v. Spaulding, 160 Ind. 176, 66 N. E. 694. Complaint in ejectment as stating cause of action relating to a mining location under Rev. St. U. S. § 2322. Davis v. Shepherd [Colo.] 72 Pac. 57. Complaint to have defendant adjudged trustee of part of a mining claim as stating a cause of action. Canfield v. Jeannotte [Colo.] 72 Pac. 1062. Complaint in foreclosure under Code Civ. Proc. § 1629, as stating whether any other action has been brought to recover any part of the debt. Schieck v. Donohue, 77 App. Div. [N. Y.] 321. Petition by chattel mortgagee to recover proceeds of sale of mortgaged property after conversion. George Adams & F. Co. v. South Omaha Nat. Bank [C. C. A.] 123 Fed. 641. An averment in a petition to recover land as an heir, that defendant knew before purchasing that plaintiff was an heir is insufficient as an allegation of heirship. Craig v. Welch-Hackley Coal & Oil Co., 25 Ky. L. R. 232, 74 S. W. 1097. A mere allegation of ownership of a cause of action, as heir of another, is insufficient; statement of proceedings vesting title being necessary. Buttles v. De Baun, 116 Wis. 323, 93 N. W. 5. An averment in a declaration that one purchased at a tax sale and ever afterward lawfully held land against plaintiff is not legally equivalent to a statement that plaintiff was evicted by the sale. Taylor v. N. J. Title, G. & T. Co. [N. J. Law] 56 Atl. 152. Petition by executor against heirs at law of testator and all parties interested though involving individual transactions of plaintiff [Civ. Code § 4000]. Gaines v. Gaines, 116 Ga. 476.

Quo warranto: Application by Attorney General in quo warranto to determine whether a corporate combination exists, for attendance of witnesses desired under Rev. St. 1899, § 8984. State v. Continental Tobacco Co., 177 Mo. 1, 75 S. W. 737.

74. Bill of particulars with counterclaim or cross complaint, see post, § 6.

75. American Hide & Leather Co. v. Chalkley & Co. [Va.] 44 S. E. 705.

76. Defendant cannot object that plaintiff filed no bill of particulars, where defendant sought no order requiring it. Kearns v. N. Y. & Q. C. R. Co., 86 N. Y. Supp. 179.

77. American Hide & Leather Co. v. Chalkley & Co. [Va.] 44 S. E. 705.

78. **Action by common counts:** Where an action is commenced by common counts, default cannot be entered or judgment rendered, until plaintiff has filed a bill of particulars. Price v. Takash, 75 Conn. 616.

Actions on contract: Where a complaint alleges a contract for commission on all sales made by plaintiff, and alleges large sales to many persons, defendant is entitled to a bill of particulars giving the names of customers to whom goods were sold. Zeigler v. Garvin, 84 App. Div. [N. Y.] 281. Where a complaint alleged that defendant owed plaintiff for money paid out and loaned, and on de-

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in the knowledge of defendant which plaintiff alleges he cannot state in detail,[79] unless plaintiff is allowed to obtain the necessary information on defendant's consent.[80] One of several defendants may move for a bill.[81] Where plaintiff allows an order for a bill to be made by default, he must comply, though merely required to repeat information in the complaint.[82] Where, in an action sounding in tort, but on contract alleging an account, defendant demanded a bill of particulars, a motion by plaintiff to strike the demand was properly decided within ten days, there being some doubt as to the propriety of the demand.[83] A bill of an account is not a part of the complaint,[84] and cannot supply necessary allegations.[85] A bill furnished before answer is not a part of the complaint to which defendant must specifically plead.[86] A bill annexed to a declaration or delivered pursuant to demand, limits the generality of the pleading for purposes of trial.[87] Recovery is restricted to

mand defendant furnished plaintiff's receipt, showing a balance due to plaintiff, the latter was properly directed to furnish a bill of particulars [Code Civ. Proc. § 531]. Beirne v. Sanderson, 83 App. Div. [N. Y.] 62. Where defendant in an action to recover a balance on collections made by him for plaintiff, admitted that he collected money and deducted his compensation, but denied collecting the amount claimed and failure to pay the amount due, plaintiff could not be required to serve a bill of particulars. Heidenreich v. Hirsh, 85 App. Div. [N. Y.] 319. In a suit on contract for services in selling mines and organizing a corporation for development, a bill of particulars may be required to show whether the agreements were oral, their date, and whether made by agent of defendant. Treadwell v. Greene, 87 App. Div. [N. Y.] 289.

Actions on account: Sufficiency of statement of account in action thereon under Code Civ. Proc. § 531, so as not to require a further account and bill of particulars. Seed v. Fairchild, 83 App. Div. [N. Y.] 629.

Recovery of property: Allegations in complaint for conversion of corporate stock, held to defendant's advantage rather than prejudice, by limiting plaintiff's proof and rendering bill of particulars unnecessary. Rockwell v. Day, 84 App. Div. [N. Y.] 437.

Designation of agents: Where it was alleged that fraud was effected through defendant or his duly authorized agent or agents, a bill of particulars could be required setting out the name or names of such agent or agents. Riker v. Erlanger, 87 App. Div. [N. Y.] 137.

Actions for tort in general: A law requiring a bill of particulars as to items in several accounts does not apply to a complaint setting up separate causes of action in tort [Cut. Comp. Laws Nev. § 3151]. Eisele v. Oddie, 120 Fed. 695.

Action for personal injuries: Plaintiff required on motion of defendant to furnish bill of particulars under New York statute, where he had previously obtained extensions of time to serve such bill. McFarland v. Consolidated Gas Co., 125 Fed. 260. A tenant suing for injuries from a defective stairway may be required to furnish a bill of particulars as to the defects, where the landlord states by affidavit, that he is ignorant of the defects and could not learn as to them by diligent inquiry. Robinson v. Stewart, 84 App. Div. [N. Y.] 594. Requiring bill of particulars in action for injuries on a railroad track where many trains ran daily. Bogard v. Ill. Cent. R. Co., 25 Ky. L. R. 624, 76 S. W. 170. Where, in an action for personal injuries plaintiff alleges that she believes the injuries to be permanent, a bill of particulars may be required as to the length of time she was confined at home. O'Neill v. Interurban St. R. Co., 87 App. Div. [N. Y.] 556.

Criminal conversation: Plaintiff alleging various acts of criminal conversation may may be required, in the discretion of the court, to furnish a bill of particulars giving place, time, and date of each act she intends to prove. Gary v. Eaton Circuit Judge [Mich.] 92 N. W. 774.

79. Gowans v. Jobbins, 90 App. Div. [N. Y.] 429. A widow suing her husband's administrator for money collected for her use by deceased will not be required to give a further bill of particulars, where no reply is made to her affidavit that deceased kept all the accounts, and that defendant's attorneys have the books without which she cannot give a further bill. Wait v. Dauchy, 77 App. Div. [N. Y.] 646.

80. Where a complaint for wrongful death contains only general and indefinite charges of negligence, and on demand for a bill of particulars, plaintiff asserts that she has no actual information, that being in the personal knowledge of defendant, plaintiff may be required to obtain the information on defendant's consent, and then make the complaint more specific or file a bill of particulars [Code Civ. Proc. §§ 870, et seq.]. Rosney v. Erie R. Co., 124 Fed. 90.

81. Where a complaint against several defendants for attorney's services merely alleges that all were owing plaintiff for services rendered, one appearing separately and entering denial may require a bill of particulars. Dempsey v. Gazzam, 77 App. Div. [N. Y.] 633.

82. Quinn v. Fitzgerald, 87 App. Div. [N. Y.] 539.

83. Code Civ. Proc. § 531. Main v. Pender, 88 App. Div. [N. Y.] 237.

84. Saxton v. Musselman [S. D.] 95 N. W. 291.

85. When the complaint failed to allege that the claim sued upon was assigned to plaintiff, on application to join the assignor as co-plaintiff, the bill of particulars filed before such count and stating the assignment was properly stricken from the files. Kelsey v. Punderford [Conn.] 56 Atl. 579.

86. Chamberlain v. Loewenthal, 138 Cal. 47, 70 Pac. 932.

87. Prac. Act, §§ 236, 237 (Gen. St. p. 2572).

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damages specified in the bill.[88] Where a bill of particulars was not served in the required time, but was served over a month before trial, and was not objected to as defective, it was not an abuse of discretion to refuse to exclude the evidence.[89] An order allowing service of a further bill of particulars by plaintiff, as required by a former order, is allowable, though plaintiff has been guilty of great laches, where he claimed negotiations for a settlement as his excuse, and defendant had made no determined effort to bring the cause to trial.[90] Sufficiency of signature to a bill,[91] and sufficiency of particular bills is treated in the note.[92] Where a declaration counted on a foreign judgment, and afterward plaintiff filed without leave, an amended declaration like the original, except that it was accompanied by notice of certain notes, and on the same day a bill of particulars was filed setting up the judgment and notes as a cause of action, it was proper to allow use of the amended declaration to complete the bill of particulars, though an objection to it was valid.[93]

An exhibit will not supply necessary allegations,[94] especially if no reference is made to it,[95] though defects as to description of parties in the complaint will be cured, in Kentucky, by the exhibit.[96] Exhibits referred to as filed with a pleading, or writing sued on, will not aid it unless so filed.[97] The exhibit and the allegations relating thereto must agree.[98] If they differ the exhibit controls.[99] Where allegations of a pleading cover all material facts shown in exhibits annexed they may be stricken out.[1] Sufficiency of particular exhibits will be found in the note.[2]

Kent v. Phenix Art Metal Co. [N. J. Law] 55 Atl. 256.

88. Colwell v. Brown, 103 Ill. App. 22.

89. Code Civ. Proc. 162. Silva v. Bair [Cal.] 75 Pac. 162.

90. Romer v. Kensico Cemetery, 79 App. Div. [N. Y.] 100.

91. Where defendant had moved for a bill of particulars but no order therefor was entered, a bill produced by defendant as voluntarily supplied by plaintiff's attorneys and signed by them should be admitted in evidence, though one attorney whose signature appeared had no recollection of the signing, considerable time having elapsed. American C., B. & L. Works v. Galland-Burke Brew. & Malt. Co., 30 Wash. 178, 70 Pac. 236.

92. Sufficiency of bill of particulars by defendant asking set-off in action on account. Boody v. Pratt, 68 N. J. Law, 295. Sufficiency of bill of particulars in action against railroad company for damages by burning of trees. MacDonald v. New York, N. H. & H. R. Co., 25 R. I. 40. Sufficiency of particular statements as to personal injuries in compliance with an order for bill of particulars by plaintiff in an action for such injuries. Quinn v. Fitzgerald, 87 App. Div. [N. Y.] 539.

93. Ontario Powder Works v. Powell [Mich.] 93 N. W. 1075.

94. A complaint alleging that certain defendants claimed to own all nonexempt property of a debtor defendant, without alleging a transfer to them or describing the property, except by reference to an exhibit, does not charge a fraudulent conveyance; the exhibit can not be considered. Smith v. Tate, 30 Ind. 367, 66 N. E. 88. An exhibit filed with and referred to in a petition is insufficient to supply omission of a material fact. Altemus v. Asher, 24 Ky. L. R. 2401, 2416, 74 S. W. 245.

95. A writing annexed to a pleading but not referred to therein cannot enlarge or limit its averments [Prac. Act, § 123, 2 Gen. St. p. 2554]. Shelmerdine v. Lippincott [N. J. Law] 54 Atl. 237.

96. A deed attached to a petition in breach of covenant as an exhibit, correctly describing the defendant railroad company, cures any defect in that regard in the petition. Chicago, St. L. & N. O. R. Co. v. Wilson, 25 Ky. 525, 76 S. W. 138.

97. A complaint on a note will not support a default judgment where it alleges that a copy of the note is filed with the complaint, but it is not filed. Erhardt v. Pfeiffer, 29 Ind. App. 570, 64 N. E. 885. Failure to append to his statement of claim a copy of the writing sued on may defeat judgment for want of sufficient affidavit, and may subject plaintiff to rule for more specific statement or demurrer. Athens Car & Coach Co. v. Elsbree, 19 Pa. Super. Ct. 618. An exhibit referred to in a reply but not annexed is a part thereof, though no copy was furnished defendant before trial by a justice. New Idea Pattern Co. v. Whelan, 75 Conn. 455.

98. Where an exhibit attached to a petition on account and for damages showed checks which no allegation of the petition shows that defendants had cashed or accepted, more specific allegations may be required on special exception. Malin v. McCutcheon [Tex. Civ. App.] 76 S. W. 586.

99. Johnson v. Kindred State Bank [N. D.] 96 N. W. 588.

1. Noah v. German-American Bldg. Ass'n, 31 Ind. App. 504, 68 N. E. 615.

2. An exhibit in a complaint for goods sold showing the parties, and the date of the transaction, and the amount, kind and price of goods, is sufficient to authorize admission of evidence. Brierre v. Cereal Sugar Co., 103

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Joinder, splitting and severance.—Misjoinder of counts in the same declaration is a mispleading.[3] Where there is doubt whether a complaint sets up one or several causes of action, plaintiff cannot be required on motion to state separately, and number the causes.[4] Causes of complaint though similar in tendency and result should be pleaded separately unless they appear to be the same or are founded on a joint right.[5] Tort should not be counted on jointly and also severally in one pleading.[6] Disconnected counts in tort and in contract cannot be joined in the same pleading,[7] nor causes in tort with causes for recovery of property.[8] The rule applies to distinct torts.[9] Causes growing out of the same subject of action may be joined in many states,[10] though legal and equitable,[11] or tortious and based on contract,[12] the rule applying to causes arising out of tort,[13]

Mo. App. 622, 77 S. W. 111. Deeds or other papers referred to in the petition by allegations of inducement, and as to which no relief is asked need not be exhibited to the petition [Civ. Code § 4963]. Horne v. Mullis [Ga.] 46 S. E. 663.

3. Hurd's Rev. St. 1899, p. 142, § 6. Chicago & A. R. Co. v. Murphy, 198 Ill. 462, 64 N. E. 1011.

4. Woods v. McClure, 42 Misc. [N. Y.] 8.

5. Coatesville & D. St. R. Co. v. West Chester R. Co., 206 Pa. 40. Complaint in action for conspiracy as uniting several causes of action. Emerick v. Sweeney Cattle Co. [S. D.] 96 N. W. 93.

6. Chicago & A. R. Co. v. Murphy, 198 Ill. 462, 64 N. E. 1011. A complaint alleging in a single count unlawful detention of realty, destruction and unlawful detention of personalty, assault and injury to the person, and threatened expulsion from a town, and praying damages in a lump sum is demurrable [Cut, Comp. Laws Nev. § 3159]. Eisele v. Oddie, 120 Fed. 695.

7. A declaration alleging a cause of action ex contractu in the first count, and a cause ex delicto in the second count, misjoins causes of action. Hazlehurst v. Cumberland Tel. & T. Co. [Miss.] 35 So. 951.

8. An action for unlawful maintenance of a fence constituting a nuisance, and an action for recovery of realty and to quiet title cannot be joined. Giller v. West [Ind.] 69 N. E. 548.

9. An action against a corporation for injuries from negligence of employes cannot be joined with one against the corporation and its president for libel. Brooks v. Galveston City R. Co. [Tex. Civ. App.] 74 S. W. 330.

10. The causes must all arise out of the same transaction, or transactions, and be connected with the same subject of action. Harrod v. Farrar [Kan.] 74 Pac. 624. A complaint may unite a cause of action against decedent's administrators for breach of his contract with a cause against the heirs. Hall v. Gilman, 77 App. Div. [N. Y.] 458. Express contract of employment and contract of guaranty may be joined. Dudley v. Duval, 29 Wash. 528, 70 Pac. 68. An action by members of a firm, after dissolution, on a firm note given by one could be united with an action by the firm, in the name of such person, on a note given to him which he had pledged as security for the first note [Code Prac. § 83]. Crews v. Yowell, 25 Ky. L. R. 598, 76 S. W. 127. A cause of action to recover the reasonable value of personalty sold defendant may be joined with another to recover on a contract for the sale of the same property to be paid for in stock of a certain corporation [Rev. St. 1898, § 2647]. Badger Tel. Co. v. Wolf River Tel. Co. [Wis.] 97 N. W. 907.

11. Causes of action arising out of the same transaction, or transactions, connected with the subject of the action may be united in one petition, though legal and equitable. Tootle v. Kent [Okl.] 73 Pac. 310. An action against the widow of a surviving partner to recover life insurance received by her on his life, from policies secured by firm funds as security for debts, may be joined with an action to foreclose liens of the same debts, on firm property and stock of such partner. First Nat. Bank v. Valenta [Tex. Civ. App.] 75 S. W. 1087. A complaint by a stockholder for appointment of a receiver for the corporation, and an accounting between it and another corporation it had agreed to finance is not demurrable for misjoinder of causes. Case v. Hudson Co., 41 Misc. [N. Y.] 51. An equitable action to dissolve a partnership, have a receiver appointed, and for an accounting, may be joined in a petition with a legal cause for damages for depreciation in value of property, loss of profits, and destruction and impairment of business and credit, resulting from fraud and malice. Tootle v. Kent [Okl.] 73 Pac. 310. In one action, in Missouri, plaintiff may seek to abate a nuisance, pray injunction, and recover damages from the nuisance. Baker v. McDaniel [Mo.] 77 S. W. 531. Election is not required between counts of a petition seeking an accounting as to partnership matters and a sale of the partnership property to pay debts. Goff v. Young, 25 Ky. L. R. 786, 76 S. W. 383. An alleged heir may unite a cause of action to set aside deeds from her foster father to her foster mother, for undue influence and incapacity, with an action against a purchaser, with notice, from the mother, of land similarly conveyed by the mother. Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820.

12. Foreclosure of a chattel mortgage may be joined with an action for conversion of the mortgaged property. Cassidy v. Willis [Tex. Civ. App.] 78 S. W. 40. Vendor sued in one action for breach of covenant of seisin and misrepresentations. Koepke v. Winterfield, 116 Wis. 44, 92 N. W. 437. Breach of contract and conversion of materials furnished under it may be joined in one complaint [2 Ball. Ann. Codes & St. § 4992]. McCorkle v. Mallory, 30 Wash. 632, 71 Pac. 186.

13. A widow's cause of action to set aside

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and to equitable causes,[14] but generally the separate causes should be separately stated and numbered.[15] Legal and equitable causes cannot be joined in the federal courts, nor either with a cause in admiralty.[16] Where the causes of action affect different plaintiffs,[17] or different defendants, there can be no joinder.[18] A count against two defendants should not be joined with separate counts against each.[19] A petition for divorce cannot join an action to settle property rights not arising from the marriage relation.[20] A complaint to recover a penalty for sale of vinegar cannot by implication allege an indefinite number of sales in one count,

a fraudulent judgment in an action for negligent death of her husband, is properly joined with her action for his negligent death. De Garcia v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 77 S. W. 275. Several negligent acts resulting in a single injury, do not constitute separate causes of action, so as to require separate statement and numbering. (Negligent dentistry, resulting in disease. Brown v. Cady, 86 N. Y. Supp. 959. An action against a railroad company for diversion or obstruction of a stream may be joined with an action for damages from fire set by an engine along the right of way. Jackson v. Mo., K. & T. R. Co. [Tex. Civ. App.] 78 S. W. 724. Plaintiff suing in one court on an undertaking in attachment for damages in suing out the writ, and another for damages for malicious prosecution in procuring its issuance cannot be required to elect [Mills' Ann. Code, § 49]. Rucker v. Omaha & G. Smelting & Refining Co. [Colo. App.] 72 Pac. 682. Injuries to a house from removal of an adjoining house, by a railroad company, to make room for its tracks, and from noise, smoke, and other results of operation of the road may be joined in one declaration. Fisher v. Seaboard Air Line R. Co. [Va.] 46 S. E. 381. Personal injuries and injuries to a vehicle are joinable under Code Civ. Proc. § 484, subd. 9, as so arising though not joinable as actions for "personal" injuries or for injuries "to property." Eagan v. N. Y. Transp. Co., 39 Misc. [N. Y.] 111. Where plaintiff charges both willful and negligent acts defendant cannot require a separate statement or an election [Code Civ. Proc. § 186a]. Schumpert v. Southern R. Co., 65 S. C. 332.

14. A cause of action for infringement of a trade mark and labels, and for unlawful competition, may be joined in a suit in equity. Jewish Colonization Ass'n v. Solomon, 125 Fed. 994. Joinder of suits for accounting as proper under Code Civ. Proc. § 484, subd. 9, and § 1815. Rogers v. Wheeler, 89 App. Div. [N. Y.] 435. An action to set aside deeds of realty as in fraud of creditors may be united with one to have a certain transaction, whereby a debtor alters his statutory homestead, declared fraudulent as to creditors and subject the land to a judgment lien. Hunt v. Dean [Minn.] 97 N. W. 574. Proceedings to set aside a former decree relating to the same matter and a suit to foreclose a mortgage may be brought in one action. Cushing v. Schoeneman [Neb.] 96 N. W. 346. A pleading is multifarious which asserts two inconsistent rights of action as two distinct and inconsistent rights to a preferential lien set up. State Trust Co. v. Kan. City, P. & G. R. Co., 128 Fed. 129. Where a bill is multifarious, the court requires the complainant to elect between the two claims, and dismiss the bill as to the other. State Trust Co. v. Kan. City, P. & G. R. Co., 128 Fed. 129.

15. A cause of action for ejectment and damages for withholding possession cannot be jointly stated in a complaint with one for damages for breach of covenant for quiet enjoyment and eviction, it being necessary to state and number them separately [Code Civ. Proc. § 483]. Rockey v. Haslett, 91 App. Div. [N. Y.] 181. Two causes of action should not be joined in a single count. Murphy v. St. Louis Transit Co., 96 Mo. App. 272, 70 S. W. 159. Declaration in action for wrongful death as misjoining causes of action. Chicago City R. Co. v. O'Donnell, 207 Ill. 478, 69 N. E. 882. Substantial compliance with the rule that the petition should "set forth the cause of action in orderly and distinct paragraphs numbered consecutively" will prevent a dismissal of the petition [Civ. Code Ga. 1895, § 4961]. Separate paragraph for each distinct act of negligence suggested. Atlanta, K. & N. R. Co. v. Smith [Ga.] 46 S. E. 853.

16. Bruce v. Murray [C. C. A.] 123 Fed. 366.

17. Harrod v. Farrar [Kan.] 74 Pac. 624. Where the allegations of a complaint joining several causes of action show relief as to only one plaintiff in one cause of action, demurrer will lie [Code, § 83]. New v. Smith [Kan.] 74 Pac. 610.

18. Harrod v. Farrar [Kan.] 74 Pac. 624. Misjoinder of causes of action in complaint against three defendants. Racine Wagon & Carriage Co. v. Legeois [Wis.] 98 N. W. 218. A cause of action against an association which does not affect any of its officers cannot be joined with a cause against one of its directors, which does not affect the association or any other of its officers. Case v. N. Y. Mut. Sav. & Loan Ass'n, 88 App. Div. [N. Y.] 538. A cause of action against directors of a corporation, for deceit, cannot be joined with a cause against other directors, who were not such when the acts alleged to constitute the deceit were done and were not connected therewith [Code Civ. Proc. § 484]. Warner v. James, 88 App. Div. [N. Y.] 567. A complaint in an action to quiet title and to cancel instruments affecting title is bad for misjoinder of causes when the first cause stated shows no interest in one joint plaintiff, and the second shows interest in both plaintiffs, and it cannot be made good by considering the allegations of the latter cause to show interest of both in the first cause [Code Civ. Proc. § 144]. First Nat. Bank v. Johnson Land Mortg. Co. [S. D.] 97 N. W. 748.

19. A count against two defendants cannot be joined with counts against each of them separately. Chicago & A. R. Co. v. Murphy, 198 Ill. 462, 64 N. E. 1011.

20. Reed v. Reed [Neb.] 98 N. W. 73; Id., 76.

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for any one of which an action lies,[21] but an action for a penalty may cover a sale of several objects jointly.[22] An action for three several penalties incurred by defendant to owners of three several lots of goods cannot be consolidated, though plaintiff is the authorized agent of the several owners.[23] Where individual and partnership causes of action are joined in the complaint, after demurrer sustained to the latter, the complaint is good as to the other.[24] Particular cases as to misjoinder are assembled in the note.[25]

A single and entire cause of action cannot be divided and pleaded in separate actions.[26] Where plaintiff sued on two causes of action, and defendant denied the first while admitting the second, and plaintiff accepted an offer of judgment generally in the amount of the second claim with costs, he thereby settled the action and could not have a severance.[27]

Election.—Plaintiff may be required to elect as between inconsistent theories of action;[28] hence he need not where a single cause is split into two counts,[29] nor where each states the same cause.[30]

21. People v. Sheriff, 78 App. Div. [N. Y.] 46.

22. Sale of several cans of impure milk at one time and place should be alleged as one cause of action in a complaint to recover a penalty [Agricultural Law, §§ 22, 23]. People v. Buell, 85 App. Div. [N. Y.] 141.

23. Bell v. Keppler [N. J. Law] 57 Atl. 257.

24. Hatzel v. Moore, 120 Fed. 1015.

25. **Causes not misjoined:** A complaint to enforce a mechanic's lien alleging that plaintiff, as trustee in bankruptcy, had filed a lien for materials furnished by the bankrupts, and that the latter had filed a lien which they had assigned to plaintiff, shows but one cause of action. Davis v. Fidelity & Deposit Co., 75 App. Div. [N. Y.] 518. A complaint on an attachment bond does not improperly join actions ex contractu and ex delicto by asking damages for goods not returned, together with expenses in dissolving the attachment, loss of time, and attorney's fees in the action on the bond. Voss v. Bender, 32 Wash. 566, 73 Pac. 697. Petition for malicious use of bail process in trover as not setting forth distinct causes of action. Woodley v. Coker [Ga.] 46 S. E. 89. In an action by a servant because of sickness caused by negligence of her employer to repair the house, an allegation to excuse her failure to leave the employment is not a second cause of action in the count. Collins v. Harrison [R. I.] 56 Atl. 678. Petition on bond given by gas company to city as containing a single cause of action. Omaha Gas Co. v. Omaha [Neb.] 98 N. W. 437. An equitable action to prevent payment of fraudulent county orders by the treasurer, joining the county board, the holders of the orders, and a former county treasurer, is not misjoinder [Rev. St. 1898, § 2647]. Carpenter v. Christianson [Wis.] 98 N. W. 517.

Misjoinder: Misjoinder of causes of action in complaint for allowance of illegal claims by county officers. Wallace v. Jones, 83 App. Div. [N. Y.] 152. A joint tenant or tenant in common out of possession cannot sue for partition against his co-tenants holding adversely, without joining a cause of action for possession. Moorehead v. Robinson [Kan.] 75 Pac. 503.

26. Tootle v. Kent [Okl.] 73 Pac. 310. A wrongful levy of execution on several chattels constitutes one cause of action only and cannot be split so as to bring the value of the property within jurisdiction of an inferior court. Hesser v. Johnson [Okl.] 74 Pac. 320. Separate suits cannot be maintained by filing a mechanic's lien for the contract price only, and then suing for extras furnished at request of the owner, the contract for building being indivisible. Mallory v. Dawson Cotton Oil Co. [Tex. Civ. App.] 74 S. W. 953.

27. Code Civ. Proc. § 511. Walsh v. Empire Brick & Supply Co., 90 App. Div. [N. Y.] 498.

28. In a suit for sale of goods and on notes given therefor, plaintiff cannot be required to elect whether he will sue on the contract or the notes. Strickland v. Parlin, 118 Ga. 213. Allegations of a willful holding over under a lease and of repudiation by accepting a lease from another are not so inconsistent in a complaint as to require election in unlawful detainer. Gossett v. Devorss, 98 Mo. App. 641, 73 S. W. 731. Election cannot be required between counts for malicious prosecution in securing issuance of an attachment and another for damages sustained from its wrongful suing out. Mills' Ann. Code, § 49. Rucker v. Omaha & G. Smelting & Refining Co. [Colo. App.] 72 Pac. 682. A count alleging only partial account by defendant on the contract and false statements by defendant and asking an accounting is not inconsistent with one alleging misrepresentation by defendant as to his ability to fill the contract and failure to account and asking cancellation, so as to require election by plaintiff. Gowans v. Jobbins, 90 App. Div. [N. Y.] 429.

29. Where a complaint is defective in separating into two causes what under the statute is one cause of action, plaintiff cannot be required to elect on pain of dismissal where as a whole the pleading is sufficient under the statute [2 Ballinger's Ann. Codes & St. §§ 5500, 5508]. Brown v. Calloway [Wash.] 75 Pac. 630.

30. He is not required to elect between two counts of a petition stating the same cause of action; counts in action for injury while trying to board street car as stating same cause of action. Maguire v. St. Louis Transit Co. [Mo. App.] 78 S. W. 838.

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§ 3. *The plea or answer. General principles.*—It is immaterial whether the answer is good or bad where the complaint is bad or plaintiff fails to make out a case.[31] Omission to make defenses at the proper time will waive them.[32] A plea which neither traverses, nor confesses and avoids the declaration, but seeks by indirection and inference to avoid the cause of action is demurrable.[33] Where one defendant refuses to plead further after a demurrer to his plea in abatement is sustained, an offer of the other defendants to file a general denial to an amended complaint on his behalf is properly refused.[34] A party cannot claim that an answer was filed without his knowledge or consent as ground for repudiating it after several hearings where no affidavit or evidence was offered in support of his claim.[35] On transfer of foreclosure proceedings in Connecticut to the superior court by appeal of part of defendants, a defense pleaded by only a part of defendants and substantially admitted by the answer inured for benefit of all.[36] Where a stranger to an action, cited at instance of defendant, entered a plea of personal privilege and, further in reply to defendant's answer, denied under oath her submission to the jurisdiction, the reply supplied any defect in the plea in not making such denial.[37] If any material facts of a petition are not admitted but denied either directly or argumentatively, plaintiff has the right to open and close; a denial in affirmative form will not give it to defendant.[38]

Cases determining sufficiency of particular pleas, answers, or pleadings of defense, are assembled in the notes.[39]

Formal parts and frame work of plea or answer.—A demurrer to the petition

31. Alexander v. Spaulding, 160 Ind. 176, 66 N. E. 694.

32. If defendant sued on a contract purposely omits to make the defense of fraud, he cannot raise it in an action to set aside the judgment against him. Cannon v. Castleman [Ind.] 69 N. E. 455. Filing a plea in abatement attacking the jurisdiction is an abandonment of any defense of the merits in the discretion of the court; and where interposed after the same question had been determined on motion to quash service, for delay only, the court will not relieve defendant. Audenried v. East Coast Mill. Co., 124 Fed. 697.

33. Engelke & Feiner Mill. Co. v. Grunthal [Fla.] 35 So. 17.

34. Diamond Flint Glass Co. v. Boyd, 30 Ind. App. 485, 66 N. E. 479.

35. Whetstone v. McQueen, 137 Ala. 301.

36. Matz v. Arick [Conn.] 56 Atl. 630.

37. Sites v. Lane [Tex. Civ. App.] 72 S. W. 873.

38. Sorensen v. Sorensen [Neb.] 94 N. W. 540.

39. A plea to the jurisdiction of the court need not designate another court which would have jurisdiction. Hill v. Nelson [N. J. Law] 57 Atl. 411. Answer as against demurrer. Omaha Sav. Bank v. Rosewater [Neb.] 96 N. W. 68. Answer in action on accident policy. Fidelity & Casualty Co. v. Brown [Ind. T.] 69 S. W. 915. Answer in action to quiet title. Butterfield v. Graves, 138 Cal. 155, 71 Pac. 510. Answer in action on note. Berry v. Barton [Okl.] 71 Pac. 1074; Harnett v. Holdrege [Neb.] 97 N. W. 443. Affidavit of defense in suit on note. Brown v. Ohio Nat. Bank, 18 App. D. C. 598. Affidavit of defense by a corporation in an action on a note. Andrews v. Blue Ridge Packing Co., 206 Pa. 370. Answer pleading commencement and dismissal of foreclosure suit as defense by indorser on a note secured by the mortgage. Pekin Plow Co. v. Wilson [Neb.] 92 N. W. 176. Plea of res judicata. Fenn v. Roach [Tex. Civ. App.] 75 S. W. 361. Answer in action against sureties on a constable's bond. Moore v. Rooks [Ark.] 76 S. W. 548. Answer in action to recover street assessment as alleging fraud in acceptance of the work by the council; allegations therein as constituting a collateral attack on proceedings of the council instead of a defense; sufficiency of allegations in general, admissions, and liability to demurrer. Lux & T. Stone Co. v. Donaldson [Ind.] 68 N. E. 1014. Answer under oath in scire facias on bail bond, as against demurrer, under various statutes applying to Indian Territory. Simon v. U. S. [Ind. T.] 76 S. W. 280. Plea of limitations in action for services. Bacon v. Chapman, 85 App. Div. [N. Y.] 309. Answer in suit to set aside conveyances as fraudulent as sufficient in absence of demurrer. Walker v. Harold [Or.] 74 Pac. 705. Allegations in separate paragraph of answer alleging new matter in an action for balance due on contract. Eells v. Dumary, 84 App. Div. [N. Y.] 105. Answer stating defense of breach of warranty to authorize introduction of evidence. Maugh v. Hornbeck, 98 Mo. App. 389, 72 S. W. 153. An answer containing a separate defense and a counterclaim is insufficient where both begin with a reiteration of previous admissions and denials in the answer since such reiterated denials are irrelevant and redundant. Blaut v. Blaut, 41 Misc. [N. Y.] 572. Where matter alleged by defendant in his answer both as a defense and a counterclaim was neither, judgment for plaintiff is properly rendered on the pleadings. Rensberger v. Britton [Colo.] 71 Pac. 379.

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is not a proper part of the answer, in Nebraska.[40] A paragraph of an answer may be stricken out where the remaining paragraphs fully cover the same defense.[41] A defense which does not contain new matter is insufficient in law on its face.[42] A denial must not be mingled with a defense,[43] but must be stated before and separate from affirmative allegations of the answer.[44] Separate and distinct defenses should be separately stated.[45] Allegations of a defense in an answer cannot be treated as a denial, however inconsistent they may be with those of the complaint.[46] That certain allegations in his second defense to the first cause of action were stricken out on motion as irrelevant and immaterial will not prevent defendant from inserting, in the other defenses mentioned, the allegations thus stricken out.[47] Matters of defense and counterclaim cannot be combined.[48] More than one defense may be made by the answer but generally joint defenses must be consistent;[49] in Montana, however, defendant may plead and rely upon as many defenses by answer as he may wish though inconsistent with each other.[50] Facts supporting objections to sufficiency of an amended complaint and the grounds of each must be specified.[51] An affidavit stating that every plea is true, and all of plaintiff's claim is disputed, is sufficient though it does not state the amount due or that plaintiff can give evidence as to the part disputed.[52] Plaintiff cannot have the answer stricken at the trial term for failure to answer each paragraph of each count of the petition where it follows the petition and adopts its numbering.[53] Where a joint plea is filed in an action on an unconditional contract in writing, but is verified by one defendant only and no effort is made by the other to amend, judgment must be given against him though plaintiff did not object to the plea at the return term.[54]

40. Code Civ. Proc. 99. Fidelity & Deposit Co. v. Parkinson [Neb.] 94 N. W. 120.

41. Houston & T. Cent. R. Co. v. Bell [Tex. Civ. App.] 73 S. W. 56.

42. Code Civ. Proc. §§ 494, 500. George v. New York, 42 Misc. [N. Y.] 270.

43. Jaeger v. New York, 39 Misc. [N. Y.] 543; Leonorovitz v. Ott, 40 Misc. [N. Y.] 551. Affirmative matter pleading defendant's version of the contract sued on is properly stricken from an answer of general denial. Simpson v. Carr, 25 Ky. L. R. 849, 76 S. W. 346; Royer Wheel Co. v. Dunbar, 25 Ky. L. R. 746, 76 S. W. 366.

44. Code Civ. Proc. §§ 500, 507. Carpenter v. Mergert, 39 Misc. [N. Y.] 634.

45. This is true though each is a pro tanto plea. Knight v. Dunn [Fla.] 36 So. 62.

46. Jaeger v. New York, 39 Misc. [N. Y.] 543.

47. Edison v. Press Pub. Co., 85 App. Div. [N. Y.] 376.

48. Gen. St. § 612. New Idea Pattern Co. v. Whelan, 75 Conn. 455. Allegations of a paragraph in an answer, constituting merely evidence of other facts alleged, or which, if intended as a counterclaim, do not state facts for its allowance to defendant, will be stricken out, it being improper to plead a counterclaim in the same paragraph with the defense. Bennett v. Lutz, 119 Iowa, 215, 93 N. W. 288.

49. General denial and plea of contributory negligence are not inconsistent. Leavenworth Light & Heating Co. v. Waller, 65 Kan. 514, 70 Pac. 365. Pleas of general denial and release in bankruptcy are not inconsistent. Ruff v. Milner, 92 Mo. App. 620. Defenses in an action on a note that the signatures were not genuine and that, if they were, they were procured by fraud, are not inconsistent. Bank of Glencoe v. Cain [Minn.] 95 N. W. 308. An answer denying execution of a note and pleading payment does not state inconsistent pleas. Bay v. Trusdell, 92 Mo. App. 377. Defendant in an action on a note cannot be required to elect whether he will rely on failure of consideration or breach of warranty. Mallory Commission Co. v. Elwood, 120 Iowa, 632, 95 N. W. 176. Defenses that land was acquired by accession or as relicted land and that it was acquired as dry land within boundaries of an original purchase are conflicting and cannot be made together. Hall v. Bossier Levee Dist. Com'rs [La.] 35 So. 976. In an action for the price of goods sold, defendant may plead that he did not buy and rescission of the contract [Code, § 3620]. Cole v. Laird [Iowa] 96 N. W. 744. In an action against a trustee for a balance remaining after execution of a trust to sell realty and pay debts, a plea that plaintiff had notice of defendant's sales to others for a period longer than that of the limitations is not defective as inconsistent with a denial of the trust and a claim of absolute ownership as plaintiff's vendee. Irwin v. Holbrook, 32 Wash. 349, 73 Pac. 360. A general denial is not in conflict with the special defense that the contract sued on was ultra vires and against public policy. Morgan City v. Dalton [La.] 36 So. 208.

50. Ball v. Gussenhoven [Mont.] 74 Pac. 871.

51. Code Civ. Proc. §§ 488, 499. Nellis v. Rowles, 41 Misc. [N. Y.] 313.

52. Baltimore Charter, § 812. Codd Co. v. Parker, 97 Md. 319.

53. Green v. Hambrick, 118 Ga. 569.

54. Riley v. Southern Female College, 118 Ga. 849.

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Bill of particulars.—Where defendant sets up an affirmative defense or a counterclaim he may be required to furnish a bill of particulars.[55] An affidavit by plaintiff's attorney in support of a motion for a bill of particulars, on information and belief, and failing to show that he had any personal knowledge of the facts alleged therein is insufficient.[56]

Denials and traverses.—A plea purporting to answer three assignments of breach of contract in a count of a declaration but failing to answer one is liable to demurrer.[57] A plea of non est factum is proper to deny execution of an instrument under seal, and a plea that defendant did not covenant as alleged is inapplicable and may be stricken on motion.[58] The answer of one defendant to a bill charging a new promise by such defendant made for himself and the other defendants as agent operates as a denial by the other defendants without their appearance.[59] An answer in the New York municipal court that defendant has no knowledge sufficient to form a belief as to any of the allegations in the complaint is a denial.[60] An affidavit of defense in assumpsit must state the facts on which the denial of debt is based.[61] Denials as specific as the allegations they are intended to meet, or which oppose the spirit and substance of the complaint, or literally deny parts of it, suffice to raise issues.[62] The sufficiency of particular denials in particular actions are treated in the note.[63]

55. Requiring defendant in action to set aside transfer of an interest in an estate to furnish bill of particulars. Toomey v. Whitney, 81 App. Div. [N. Y.] 441. Answer in action for breach of a contract of employment rendering unnecessary a bill of particulars. Spitz v. Heinze, 77 App. Div. [N. Y.] 317. Where defendant in an action for damages for discharge of a bookkeeper alleged failure to account, errors, omissions, erasures, and falsifications in defendant's books, plaintiff was entitled to a bill of particulars of the various items thus changed, and an alternative order directing the bill, or the placing of the books at plaintiff's inspection was insufficient. Clemons v. Wortman, 85 N. Y. Supp. 444. Where defendant alleges a counterclaim for breach of a contract, setting up the payment for services and materials, plaintiff is entitled to a bill of particulars. Engineer Co. v. Senn, 86 N. Y. Supp. 1115. The court may require a set-off to be accompanied by a bill of particulars. Knight v. Dunn [Fla.] 36 So. 62.

56. Toomey v. Whitney, 81 App. Div. [N. Y.] 441.

57. U. S. Fidelity & Guaranty Co. v. Dampskibsaktieselskabet Habil [Ala.] 35 So. 344.

58. Tillis v. Liverpool & L. & G. Ins. Co. [Fla.] 35 So. 171.

59. Findley v. Cunningham [W. Va.] 44 S. E. 472.

60. Laws 1902, p. 1538. Gilmour v. Kenny, 84 N. Y. Supp. 502.

61. Reynolds v. Fahey [Del.] 55 Atl. 221.

62. Moore v. Murray [Mont.] 75 Pac. 515.

63. **Sufficiency of particular denials:** Denials in answer in an action to foreclose a tax lien. Leavitt v. Bartholomew [Neb.] 93 N. W. 856. Mere denial that plaintiffs, or either of them, can sue raises no issue of fact. Chamberlain Banking House v. Noyes [Neb.] 92 N. W. 175. An answer is insufficient which merely groups the allegations of the petition and denies them as a whole. Stephens v. Wilson, 24 Ky. L. R. 1832, 72 S. W. 336. A sufficient denial of an allegation of the complaint is not objectionable because it ends with the words "other than as hereinafter set forth" and the pleader does not afterward refer to it. Anderson v. War Eagle Consol. Min. Co. [Idaho.] 72 Pac. 671. An answer merely stating that defendant was informed and believed that the allegations of the complaint were not true and denying them will not raise an issue, a direct denial being necessary. Code § 243 (1). Avery v. Stewart [N. C.] 46 S. E. 519. An answer denying "each and every other allegation in said petition not specifically admitted" is neither a general nor special denial and is of no value. Dezell v. Fidelity & Casualty Co., 176 Mo. 253, 75 S. W. 1102. An answer that defendant "states and alleges that he denies each and every allegation" of the petition is a good general denial though in bad form. Reiss v. Agrubright [Neb.] 92 N. W. 988. An allegation in an answer that defendant has no knowledge or information of the matter in the petition is not a denial under the Nebraska Code. Wilson v. Neu [Neb.] 95 N. W. 502. An answer denying knowledge and information sufficient to form a belief as to allegations in specified paragraphs of the complaint which are all the essential paragraphs is sufficient as a denial [Code Civ. Proc. § 500.] Hidden v. Godfrey, 88 App. Div. [N. Y.] 496. An answer setting up several affirmative defenses and concluding with the statement that, "further answering, defendant denies each and every allegation, matter, fact, and thing in the petition alleged not herein expressly admitted," is indefinite and uncertain and motion will lie on that ground [Rev. St. 1899, § 604]. Ritchey v. Home Ins. Co., 98 Mo. App. 115, 72 S. W. 44. A denial in an answer that defendant is a nonresident on whom substituted service may be made is immaterial since answering waives insufficiency of service. Guenther v. American Steel Hoop Co., 25 Ky. L. R. 795, 76 S. W. 419. A general denial of each charge and allegation in the complaint except as afterward specifically admitted, explained or qualified, was not a

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Admissions by answer.—Allegations of the complaint, petition, or declaration not denied by the answer, are admitted.[64] The plea of the general issue admits the capacity in which defendant is sued.[65] The character of answers in particular actions as admitting allegations by plaintiff and the extent of such admissions are treated in the note.[66] Where admissions by answer are qualified by further state-

denial of an allegation in a complaint by an heir to recover lands as to the death of the person under whom she claimed [Mansf. Dig. § 5033; Ind. T. Ann. St. 1899, § 3238]. Ricknor v. Clabber [Ind. T.] 76 S. W. 271. In an action of unlawful detainer and restitution an oral plea of not guilty is sufficient to prevent the case from being tried as on default [Gen. St. 1894, c. 84]. Berryhill v. Healey, 89 Minn. 444, 95 N. W. 314. A general denial of a paragraph in a complaint by an assignee averring ownership by bona fide assignment, while it admitted execution and delivery of the assignment, puts in issue plaintiff's right to sue. Uncas Paper Co. v. Corbin, 75 Conn. 675, 55 Atl. 165. Where a complaint alleges that defendants were and still are doing business under a certain name, an answer three weeks later denying the allegation is bad. Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440. Denials by answer of material allegations of the complaint under words, "For a second, (or third or fourth) further, separate and distinct defense," are sufficient so long as not misleading. Hopkins v. Meyer, 76 App. Div. [N. Y.] 365. Where the opening paragraph of an answer states it to be an answer to the petition, a subsequent paragraph denying "each allegation not herein admitted" refers sufficiently to the petition. Warren v. Wales [Neb.] 95 N. W. 610. Denial in action for ejection from train. Tex. & P. R. Co. v. Lynch [Tex.] 75 S. W. 486. An answer alleging that injuries causing death arose from carelessness, negligence and fault of the deceased may be required to be made more definite. McInerney v. Virginia-Carolina Chemical Co., 118 Fed. 653. A plea of non est factum failing to deny execution of notes sued on, but averring that the amount shown by the notes was placed there by mistake without consideration is inconsistent as to the issue of execution. Bitzer v. Utica Lime Co., 25 Ky. L. R. 479, 76 S. W. 20. A denial by answers of "the third allegation of the complaint" on a bond, that the condition of the bond has not been complied with, and that the amount alleged is due plaintiffs from defendants, is sufficient to prevent judgment on the pleadings. Rosenberg v. Hyman, 84 N. Y. Supp. 171. A denial on information and belief that defendant purchased goods of plaintiff is insufficient. Raphael Weill & Co. v. Crittenden, 139 Cal. 488, 73 Pac. 238. Denial of signature to a note in an affidavit to a plea, in an action thereon under the Baltimore charter, suffices to require proof of execution though no denial appears in the plea. Horner v. Plumley, 97 Md. 271. A denial in an action for goods sold that defendant agreed or promised to pay therefor is no defense where allegations of delivery at defendant's request set out in the petition are not denied. Guenther v. American Steel Hoop Co., 25 Ky. L. R. 795, 76 S. W. 419. Denials of answer and amended answer in action on insurance policy as waiver of proofs of loss. Pa. Fire Ins. Co. v. Young, 25 Ky. L. R. 1350, 78 S. W. 127.

64. Turner v. Gilliland [Ind. T.] 76 S. W. 253; Barson v. Mulligan, 77 App. Div. [N. Y.] 192; Louisville & N. R. Co. v. Brooks, 25 Ky. L. R. 1307, 77 S. W. 693; White v. Costigan, 138 Cal. 564, 72 Pac. 178; Young v. Beckham, 24 Ky. L. R. 2135, 72 S. W. 1092; Triska v. Miller [Neb.] 91 N. W. 870. An answer not denying existence of a contract pleaded by the petition but averring that defendant has no knowledge thereof admits the contract. Howard v. Maysville & B. S. R. Co., 24 Ky. L. R. 1051, 70 S. W. 631. Allegation in complaint as to delivery of goods in an action for the contract price is admitted where not controverted by defendant [Mills' Ann. Code, § 71]. Oil Creek Gold Min. Co. v. Fairbanks [Colo. App.] 74 Pac. 543. Where a petition is founded on a writing charged to have been executed by the other party, failure to file a plea of non est factum confesses execution so that proof thereof is unnecessary. Love v. Central Life Ins. Co., 92 Mo. App. 192. A defective allegation of partnership in the complaint is cured by an answer admitting the relation though denying all other allegations. Hefferlin v. Karlman [Mont.] 74 Pac. 201.

65. Stewart v. Smith, 98 Me. 104. Where an insurance company changed its name after issuance of the policy sued on, a plea of general issue admitted the capacity in which defendant was sued, together with the change of name and assumption of liability alleged in the declaration. Ill. Life Ass'n v. Wells, 200 Ill. 445, 65 N. E. 1072.

66. Admissions by answer of bankrupt alleging new matter. Brinkley v. Smithwick, 126 Fed. 686. Admissions by answer as to tools used in action by servant for negligent injuries of master. Hackett v. Masterson, 84 N. Y. Supp. 751. Answer in action on note against a corporation as pregnant with an admission that defendant used the money. Agle v. Standard Drug Co. [Mont.] 74 Pac. 135. An admission of partial liability by answer and evidence will not support a verdict for plaintiff generally. Virginia-Carolina Chemical Co. v. Kirven, 65 S. C. 197. Answer in action to recover money in possession of defendant as admitting possession alleged in the complaint. Yank v. Bordeaux [Mont.] 74 Pac. 77. Failure to deny under oath an allegation that a certain act was done by agent is not an admission that it was done by the principal. Leavenworth Light & Heating Co. v. Waller, 65 Kan. 514, 70 Pac. 365. Answer by plaintiff to defendant's motion to set aside an execution, admitting issuance and levy of the execution relieving defendant from proof thereof. Meyer Bros. Drug Co. v. Bybee [Mo.] 78 S. W. 579. An answer alleging that a paragraph of the complaint was so uncertain and confused as to false and true statements that they could not be distinguished and denying all allegations not admitted does not admit any facts in the paragraph

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ments, plaintiff cannot take advantage of them by separating them from the accompanying qualifying statements, especially where they are detrimental to plaintiff's claim.[67] An admission by answer becomes an admitted fact in evidence and can be given to the jury by reading the pleadings or in argument.[68]

Defenses in general.[69]—Affidavits of defense need only allege facts indicating, with reasonable distinctness and precision, a substantial legal defense, and show defendant's good faith.[70] Facts pleaded in the answer, tending to negative falsity of

so characterized. Turner v. Turner [Wash.] 74 Pac. 55. Admission by answer as preventing defendant from proving that the amount of goods furnished was less than the amount charged in the complaint. Epstein v. Hankinson, 84 N. Y. Supp. 583. Where, after insured had attempted to change the beneficiary in a life policy, the company interpleaded the beneficiary and paid the amount of the policy into court, it thereby admitted the validity of the policy and that the person interpleaded was the proper beneficiary. Sanguinitto v. Goldey, 84 N. Y. Supp. 989. An answer reciting that defendant admitted the contract set forth in the complaint to have been the one made between the parties does not admit anything beyond the written contract, where an additional verbal modification was alleged in the complaint. American C., B. & I. Works v. Galland-Burke Brew. & Malt. Co., 30 Wash. 178, 70 Pac. 236. An answer alleging that a claim sued on grew out of membership in a certain benevolent association and not otherwise admitting the claimant's allegation that he was a creditor of the association. Lackmann v. Supreme Council [Cal.] 75 Pac. 583. Admission by answer merely that a contract was "executed" includes acknowledgment where necessary to a valid contract, though it is otherwise if the term is limited by the contest. Solt v. Anderson [Neb.] 93 N. W. 205. Where an answer to an action for damages to goods shipped pleaded the contract of carriage and there was no reply, the execution of the contract was admitted but not the legal effect claimed by defendant. Bowring v. Wabash R. Co., 90 Mo. App. 324. Where a complaint alleged assault on plaintiff by defendant's conductor, and the answer denied generally, and defendant pleaded specially that plaintiff refused to pay his fare and the conductor removed him gently from the car, there was no admission in the answer which plaintiff could urge as showing assault where he failed to prove the assault. De Waltoff v. Third Ave. R. Co., 75 App. Div. [N. Y.] 351. An answer in an action for death of a pedestrian killed by a train denying that the engineer by exercise of care could have seen decedent's perilous position and avoided killing him does not admit that decedent could not see the train or was unaware of its approach. Pharr v. Southern R. Co. [N. C.] 45 S. E. 1021. Where defendants are fully advised of the exact nature of a claim by plaintiff's bill of particulars and admit the receipt of the money sought to be recovered in their answer, but allege that it was properly paid out, that the money was not recoverable by plaintiff as alleged will not prevent recovery the defense of payment not being sustained. U. S. v. Fidelity Trust Co., 121 Fed. 766. A general denial in an answer in criminal conversation followed by an allegation of knowledge and consent of plaintiff concerning whatever relations were had with plaintiff's wife is not an admission of fact for the trial, but only for purpose of pleading. Rudd v. Dewey [Iowa] 96 N. W. 973. An answer admitting defendant to be the owner of certain premises and then, on information and belief denying "each, all and every the other allegations in said complaint contained," held to admit ownership at time alleged in complaint. Keating v. Mott, 86 N. Y. Supp. 1041.

67. Clark v. Missouri, K. & T. R. Co. [Mo.] 77 S. W. 882.

68. Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972.

69. **Sufficiency of particular defenses:** Affidavit of defense to the common counts for goods sold and delivered. Kenworthy v. Hirst, 124 Fed. 995. Sufficiency of plea of fraud and timely offer to rescind in action on note. Farkas v. Monk [Ga.] 46 S. E. 670. Action for money had and received. McCormick Harvesting Mach. Co. v. Stires [Neb.] 94 N. W. 629. Allegations of defense in action for services. Kraus v. Agnew, 80 App. Div. [N. Y.] 1. Action for personal injuries. Uggla v. Brokaw, 77 App. Div. [N. Y.] 310. Allegations of defense in action to recover damages for false representations in sale of mining property. Stratton's Independence v. Dines, 126 Fed. 968. Sufficiency of answer as setting up defense in action on note. Farkas v. Monk [Ga.] 46 S. E. 670. Pleading defense of debts or other obstacles to administration, in action against administrator. Scott v. Seaboard A. L. R. Co., 118 S. C. 463. A plea against a holder of a negotiable note, alleging fraud in procuring the signature, must allege notice to the holder before he acquired the note. Tower v. Whip, 53 W. Va. 158. A demurrer to pleas alleging alteration of a contract after execution, without knowledge of sureties, may be sustained where that issue is made on other pleadings, so that the surety is entitled to all evidence he could present under the former pleas. U. S. Fidelity & Guaranty Co. v. Dampskibsaktieselskabet Habil [Ala.] 35 So. 344. An answer pleading discharge in bankruptcy as a defense to an action on contract must show in what federal court the petition was filed, and allege facts showing jurisdiction of such court, in order to admit proof of the discharge. Bailey v. Kraus, 81 N. Y. Supp. 492. Sufficiency of answer pleading limitations jointly and severally for each of defendants, so as to allow them to prove limitations separately as to the particular portions of the entire tract sued for in trespass to try title. Henning v. Wren [Tex. Civ. App.] 75 S. W. 905.

70. Rule 73 of the lower court. Brown v. Ohio Nat. Bank, 18 App. D. C. 598.

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representations as charged in the complaint, are proper matters of defense.[71] That a paragraph of the answer purports to be only a partial answer does not make it insufficient as to such part, if sufficient facts are alleged to constitute a defense.[72] A demurrer must be sustained to a defense, in an answer containing a general denial and matter pleaded as a defense, where the only issue raised is that made by the denial.[73] A state court must take notice of a discharge in bankruptcy where properly pleaded as a defense.[74] An order will not lie making absolute a rule for judgment for want of sufficient affidavit of defense, where defendant sets up fraud, and want of consideration and general denial, though the affidavit is wanting in definiteness.[75] Where plaintiff sought damages for transfer to him of a spurious note and mortgage, defendants could allege facts, occurring after commencement of the action, tending to validate the instruments, as a partial defense in reduction of damages.[76] An administrator's answer pleading limitations to a demand against the estate goes to the defense of both real and personal assets.[77] A plea, puis darrein continuance, setting up a release of the interest of one of several for whose benefit a suit in debt was brought is a substantial defense as to his interest.[78] In an action for knowingly keeping a vicious dog which bit plaintiff, allegation by answer that plaintiff was trespassing on defendant's premises when bitten is not an affirmative defense.[79] A defense in an action for use of a horse, that defendant was to keep it for its use, whether made by general denial, or specially, in confession and avoidance, is the affirmation of a new fact.[80] In an action by the assignee of a chose in action, defendant can only make such defenses as existed against the assignor before notice of the assignment.[81] Where one count in a complaint for injuries was in case, for negligence, and the others in trespass, for wantonness, a demurrer will lie to pleas of contributory negligence directed to the whole complaint, they being bad as to the latter counts.[82] Defenses to a petition for distribution under a will, alleging that cross petitioner was omitted from the will by mistake, and that provision is made for her in the third clause, are inconsistent, and the county court may require an election.[83]

Matter of abatement.[84]—A law authorizing brief statement of special matter in defense does not supersede pleas in abatement for setting up dilatory defenses.[85] Every plea in bar to the whole action must be sufficient in averments, if true, to defeat the whole action.[86] One pleading in abatement must usually stand on the judgment and cannot plead to the merits without waiving objections to the jurisdiction.[87] A plea of res judicata in bar must set up enough of the pleadings or pro-

71. Stratton's Independence v. Dines, 126 Fed. 968.
72. Clinton County Com'rs v. Davis [Ind.] 69 N. E. 680.
73. Jaeger v. New York, 39 Misc. [N. Y.] 543.
74. Wood v. Carr, 24 Ky. L. R. 2144, 73 S. W. 762.
75. Lengert v. Chaninel, 205 Pa. 280.
76. Code Civ. Proc. §§ 507, 508. Gabay v. Doane, 77 App. Div. [N. Y.] 413.
77. Findley v. Cunningham, 53 W. Va. 1.
78. Probate Court of Westerly v. Potter [R. I.] 55 Atl. 524.
79. Leonorovitz v. Ott, 40 Misc. [N. Y.] 551.
80. Palmer v. Smith [Conn.] 56 Atl. 516.
81. Code, § 3461. Petersen v. Ball [Iowa] 97 N. W. 79.
82. City Delivery Co. v. Henry [Ala.] 34 So. 389.
83. Bollinger v. Knox [Neb.] 92 N. W. 994.
84. Sufficiency of plea of abatement in statutory action, for penalty for seduction or bastardy, as giving plaintiff a better writ. State v. Lannoy, 30 Ind. App. 335, 65 N. E. 1052. In a suit to enforce a vendor's lien against several tracts of land, a plea in abatement as to the tract against which the lien should go, and its sufficiency to meet the lien, is insufficient, where it fails to state that lien was released as to the other parcels, and where it sought relief against other parties as to a matter not appearing on the face of the complaint. Diamond Flint Glass Co. v. Boyd, 30 Ind. App. 485, 66 N. E. 479.
85. Stewart v. Smith, 98 Me. 104.
86. Action by city on contractor's bond. Newark v. New Jersey Asphalt Co., 68 N. J. Law, 458.
87. Farrand v. Kavanaugh [Mich.] 93 N. W. 1083.

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ceedings in the former suit to show that the same point was in issue,[88] but is not required to set forth the pleadings and judgment in the other case, and where the action is on contract, it need not plead that the contract is indivisible,[89] and need not show affirmatively that no appeal was taken from the judgment.[90] A defense, in assumpsit, that defendant is not executor, the capacity in which he is sued, is waived, unless pleaded in abatement.[91] A promise set up in a plea in bar in an action of contract must be averred to be in writing, if a writing is required.[92] A highly penal statute set up as a bar to an action on contract must be applied by precise averment of facts to bring the case within it.[93] A plea of personal privilege, alleging residence in a different county, need not state affirmatively that the pleader has not submitted to the jurisdiction.[94] An averment that the cause of action arose in another county, where plaintiff could have sued, complied with the rule requiring a plea in abatement to give plaintiff a better writ.[95] Where a stranger asked leave to intervene and afterward withdrew her motion, on leave, without filing a plea of intervention, and defendant filed no plea against her until after the term, her right to plead personal privilege on ground of residence in another county remained on her citation into court at instance of defendant.[96] In an action for goods sold and retained, defendant cannot plead in bar the contract and its breach.[97] An averment by answer that "more than three years have elapsed since the date of the alleged promise before this action was brought" sufficiently pleads the bar of limitations.[98] An exception, pleading limitations, is sufficient for dismissal of a petition, where the amount of the claim not barred is insufficient to give jurisdiction.[99] Where defendant answered in abatement for misnomer alleging its true name, judgment cannot be entered on the merits against defendant, but plaintiff should amend or the action should be abated.[1] A plea in abatement for failure of service on a corporation, because the process was served on one who could not receive it, must allege that he was not a proper person at time of service instead of at the time of filing.[2] An answer seeking to set up another pending action as a bar is liable to demurrer, where it does not plead that the other action was brought without leave of court.[3]

Matters which must be specially pleaded.—Special pleas of matter provable under the general issue are properly stricken out,[4] or demurrer sustained to the

88. Keen v. Brown [Fla.] 35 So. 401.
89. Sufficiency of plea in general. Mallory v. Dawson Cotton Oil Co. [Tex. Civ. App.] 74 S. W. 953.
90. Fenn v. Roach & Co. [Tex. Civ. App.] 75 S. W. 361.
91. Stewart v. Smith, 98 Me. 104.
92, 93. Allegheny Co. v. Allen [N. J. Err. & App.] 55 Atl. 724.
94. Sites v. Lane [Tex. Civ. App.] 72 S. W. 873.
95. Tex. & P. R. Co. v. Lynch [Tex.] 75 S. W. 486.
96. Sites v. Lane [Tex. Civ. App.] 72 S. W. 873.
97. Dalton v. Bunn, 137 Ala. 175.
98. Code, § 138. Pipes v. N. C. Mica Mineral & Lumber Co., 132 N. C. 612.
99. Roller v. Zundelowitz [Tex. Civ. App.] 73 S. W. 1070.
1. Code Civ. Proc. §§ 671, 774, 777. Clark v. Or. Short Line R. Co. [Mont.] 74 Pac. 734.
2. Ohio Oil Co. v. Griest, 30 Ind. App. 84, 65 N. E. 534.
3. Code Civ. Proc. § 1628. Schieck v. Donohue, 77 App. Div. [N. Y.] 321.
4. Southern R. Co. v. Wilson [Ala.] 35 So. 561; Moore v. Crothwait, 135 Ala. 272; Bolton v. Mo. Pac. R. Co., 172 Mo. 92, 72 S. W. 530; Jenkins v. Chism, 25 Ky. L. R. 736, 76 S. W. 405. Additional pleas amounting only to the general issue. Consumers' E. L. & St. R. Co. v. Pryor [Fla.] 32 So. 797. In trespass defendant may be refused leave to file pleas setting up facts proper to be shown under the general issue of not guilty. Engelke & F. Mill. Co. v. Grunthal [Fla.] 35 So. 17. A special plea in an action for injuries, alleging that defendant's employes did all in their power to prevent the accident, alleges matter provable under the general issue. Montgomery St. R. v. Hastings [Ala.] 35 So. 412. A plea to a declaration in ejectment following a plea of general issue, and denying possession of the entire tract should be stricken out, all evidence on possession being admissible under the general issue. Crandall v. Lynch, 20 App. D. C. 73. Separate defenses in an action against a city for salary as city clerk, alleging abolition of the office and absence of employment, failure of plaintiff to report for duty or to perform duties of the office, may be stricken out on motion, as they are provable under

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pleas.[5] Sustaining a demurrer to answer alleging matter constituting a defense, but which might have been proved under a general denial is not prejudicial,[6] though such special defense is allowable in Colorado.[7] Exclusion of pleas averring facts as to which issue is raised by other pleas is proper.[8] Illegality of a contract,[9] where it does not appear on the face of the instrument pleaded,[10] invalidity of an ordinance,[11] payment,[12] accord and satisfaction,[13] estoppel,[14] the statute of frauds,[15] except in an action before a justice in Missouri,[16] or in Iowa, where demurrer will lie,[17] the bar of limitations,[18] discharge in bankruptcy,[19] the ultra vires character of acts of associations,[20] and contributory negligence,[21] as defenses, must be specially pleaded. New matter in avoidance of terms of a contract, execution of which is admitted by defendant, and happening after execution, must be specially pleaded by answer.[22] If plaintiff pleads part payment to avoid limitations, defendant need not specially plead the statute, but a general denial puts the burden on plaintiff.[23] Where defendant intends to rely on a fact not included in the allegations necessary to the declaration, he must allege it precisely in the answer.[24] A plea alleging failure of consideration must allege the facts showing failure.[25] An answer pleading a former judgment in bar must allege that it is in full force and effect.[26] A plea of fraud in representations must show that they were false.[27] A plea of rescission of contract in a suit thereon must allege facts constituting a rescission good at law.[28] A plea averring that a contractor employed to do work in a certain time was delayed by acts of the employer, must state the extent of the delay, or that it equalled the delay in completing the work after the period.[29]

Confession and avoidance.[30]—A plea in confession and avoidance confessing

the general denial. Cooley v. New York, 85 App. Div. [N. Y.] 107.

5. U. S. Fidelity & Guaranty Co. v. Dampskibsaktieselskabet Habil [Ala.] 35 So. 344. Nowlin v. State, 30 Ind. App. 277, 66 N. E. 54; Payne v. Moore, 31 Ind. App. 360, 66 N. E. 483; Maris v. Masters, 31 Ind. App. 235, 67 N. E. 699.

6. Goode v. Elwood Lodge, 160 Ind. 251, 66 N. E. 742; Hedrick v. Robbins, 30 Ind. App. 595, 66 N. E. 704.

7. Matter provable under the general issue may be pleaded by special defense. Stratton's Independence v. Dines, 126 Fed. 968.

8. U. S. Fidelity & Guaranty Co. v. Dampskibsaktieselskabet Habil [Ala.] 35 So. 344.

9. Horton v. Rohlff [Neb.] 95 N. W. 36.

10. Hillsboro Oil Co. v. Citizens' Nat. Bank [Tex. Civ. App.] 75 S. W. 336.

11. Weaver v. Cannon Sewer Co. [Colo.] 70 Pac. 953.

12. Action on attachment undertaking. Waller v. Deranleau [Neb.] 94 N. W. 1038. Where there is no plea of payment in an action for services, defendant cannot complain that deductions were not properly made for payments. Gardner v. Avery Mfg. Co., 117 Wis. 47, 94 N. W. 292.

13. Fogil v. Boody [Conn.] 56 Atl. 526.

14. Union State Bank v. Hutton [Neb.] 95 N. W. 1031; Read v. Citizens' St. R. Co., 110 Tenn. 316, 75 S. W. 1056; George B. Loving Co. v. Hesperian Cattle Co., 176 Mo. 330, 75 S. W. 1095; Leschen & Sons Rope Co. v. Craig [Colo.] 71 Pac. 885.

15. St. Louis, I. M. & S. R. Co. v. Hall [Ark.] 74 S. W. 293; Kramer v. Kramer, 90 App. Div. [N. Y.] 176. A motion to dismiss an action for breach of an oral contract should not be allowed because the contract is within the statute of frauds, where defendant pleaded the general denial only. Banta v. Banta, 84 App. Div. [N. Y.] 138.

16. Young v. Ledford, 99 Mo. App. 565, 74 S. W. 443.

17. Marr v. Burlington, C. R. & N. R. Co. [Iowa] 96 N. W. 716.

18. Rev. Codes 1899, § 5184. Satterlund v. Beal [N. D.] 95 N. W. 518; Cone v. Hyatt, 132 N. C. 810; Anderson v. McNeal [Miss.] 34 So. 1. Proc. Act, May 25, 1887. Barclay v. Barclay, 206 Pa. 307. It will not avail to plead the wrong statute. Blakely v. Ft. Lyon Canal Co. [Colo.] 73 Pac. 249.

19. Bailey v. Kraus, 81 N. Y. Supp. 492.

20. Building association. Williams v. Verity, 98 Mo. App. 654, 73 S. W. 732; Weber v. Ancient Order of Pyramids [Mo. App.] 78 S. W. 650.

21. Ball v. Gussenhoven [Mont.] 74 Pac. 871; Southern R. Co. v. Shelton, 136 Ala. 191; McInerney v. Virginia-Carolina Chemical Co., 118 Fed. 653.

22. England v. Denham, 93 Mo. App. 13.

23. Good v. Ehrlich, 67 Kan. 94, 72 Pac. 545.

24. Supreme Tent, K. of M. v. Stensland, 105 Ill. App. 267.

25. Meyer v. Bloch [Ala.] 35 So. 705.

26. Hornick v. Holtrup, 25 Ky. L. R. 1030, 76 S. W. 874.

27. Reed v. Gold [Va.] 45 S. E. 868.

28. Beck Duplicator Co. v. Fulghum, 118 Ga. 836.

29. U. S. Fidelity & Guaranty Co. v. Dampskibsaktieselskabet Habil [Ala.] 35 So. 344.

30. Sufficiency of plea of confession and avoidance in action for fraud in sale of land. Baker v. Sherman, 75 Vt. 88.

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nothing and making only hypothetical admissions is insufficient.[31] Failure to aver, in a plea of payment to another than plaintiff, that proofs of loss had been filed with an insurance company, as required in a policy, is immaterial since the company could waive the conditions.[32] Where after a denial an answer confesses and avoids, the latter plea will be taken as true, and plaintiff will be entitled to judgment for the amount determined by the pleading.[33] An answer to a petition declaring on a judgment, which admits the jurisdiction of the court that rendered the judgment, and its rendition, and pleads limitations, stating that the judgment accrued more than 10 years before the action was commenced, confesses the judgment as pleaded.[34]

§ 4. *Replication or reply and subsequent pleadings. Pleadings after plea and occasion for them.*—The proper method to object to a plea of set-off as improper, under the statute, is by replication.[35] New matter alleged in the answer must be taken as true in absence of a replication,[36] or reply,[37] unless it states no defense or might have been raised under the general denial.[38] When defendant does not appear and no one appears for him at trial, it cannot proceed with a plea unanswered.[39] One replication only can be filed to a plea.[40] A similiter may be added even after verdict.[41] After general denial by defendant, plaintiff cannot take advantage of an admission in a special plea as if made generally.[42] A general allegation of title by defendant in partition gives him the right to prove any facts showing such title so that plaintiff may assail it on any ground without special plea in avoidance.[43] A denial in a reply, on information and belief, of affirmative matter in the answer suffices to prevent judgment on the pleadings for want of a reply.[44]

Requisites and sufficiency of such pleadings.[45]—A reply cannot be entitled as

31. Action against carrier for loss of baggage. Saleeby v. Cent. R. of N. J., 40 Misc. [N. Y.] 269.

32. Brooks v. Metropolitan L. Ins. Co. [N. J. Law] 56 Atl. 168.

33. Bank of Monett v. Stone, 93 Mo. App. 292.

34. Price v. Clevenger, 99 Mo. App. 536, 74 S. W. 894.

35. Hall v. Greene, 24 R. I. 286.

36. Brinkley v. Smithwick, 126 Fed. 686.

37. **Matter calling for reply:** Answer as stating new matter under Code Civ. Proc. § 516, requiring a reply. Burr v. Union Surety & Guaranty Co., 86 App. Div. [N. Y.] 545. Where defendant answered a complaint to recover possession of realty, alleging that plaintiff was a minor and that his equity of redemption had been cut off by foreclosure sale at which defendant purchased, plaintiff was required to reply to prevent surprise to defendant. Timble v. Russell, 41 Misc. [N. Y.] 577. A claim that defendants are estopped from defending on the ground of fraud or recovering their counterclaim alleged must be pleaded or it is not available. Pratt v. Hawes, 118 Wis. 603, 95 N. W. 965.

Matter not requiring reply: A defense to a complaint in the ordinary form for recovery of possession of realty, that the only title of plaintiffs was from tax sales void because the taxes were invalid, is not new matter requiring a reply. Cuenin v. Halbouer [Colo.] 74 Pac. 885. Where part of an answer is insufficient within itself or by reference to other parts to constitute a separate defense, but is merely a repetition of other parts, no specific denial is needed. Boucher v. Powers [Mont.] 74 Pac. 942. Where defendant in partition alleged title in a certain grantor at a certain time, such allegations were denied though plaintiff did not reply [Rev. St. 1895, art. 1193]. Kuteman v. Carroll [Tex. Civ. App.] 70 S. W. 563.

38. Laws 1899, p. 152. Babcock v. Maxwell [Mont.] 74 Pac. 64.

39. Moreland v. Bebber, 102 Ill. App. 572.

40. Templeman's Adm'r v. Pugh [Va.] 46 S. E. 474.

41. Winterburn v. Parlow, 102 Ill. App. 368.

42. De Waltoff v. Third Ave. R. Co., 75 App. Div. [N. Y.] 351.

43. Kuteman v. Carroll [Tex. Civ. App.] 70 S. W. 563.

44. Walton v. Wild Goose M. & T. Co. [C. C. A.] 123 Fed. 209.

45. **Sufficiency of particular pleadings:** Replications in action on fire insurance policy. Cassimus v. Scottish Union & Nat. Ins. Co., 135 Ala. 256. Replication in action for breach of contract demurrable as neither denial nor confession and avoidance of the plea. Louisville & N. R. Co. v. Johnson, 135 Ala. 232. A general denial, to an answer pleading res judicata, setting out with particularity the pleadings, issues, and judgment, alleging that parties and issues are not identical, does not put in issue the plea of res judicata as it does not deny all of the allegations set forth in the answers. Small v. Reeves, 25 Ky. L. R. 729, 76 S. W. 395. A replication to defendant's plea alleging a verdict in a prior suit on the claim made by plaintiff, which merely alleged that plaintiff's plea of recoupment in the former suit was directed only to special counts in the complaint which were not submitted to

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a defense.[46] It should show specifically the allegations of the answer it denies.[47] It must not amount to a departure from the complaint.[48] New matter can be pleaded in reply only when the answer contains new matter.[49] Denials separately paragraphed may be joined in the same reply with matters of avoidance.[50] A reply to a defense in the answer cannot be divided into two separate pleadings and one be denominated a "second defense."[51] Plaintiff replying to a double plea must reply to each distinct material matter.[52] Plaintiff, in one pleading entitled "Reply and demurrer," may raise issues of law as to part of the defense in the answer and issues of fact as to the remainder.[53] A denial in a reply that plaintiff "alleges that he denies, all and singular, the allegations in said answer which set up a counterclaim," is sufficient.[54] A reply denying each and every allegation of the answer inconsistent with statements in the petition is insufficient on motion to make more specific.[55]

All well pleaded facts in a reply are taken as true in absence of a rejoinder, and in absence of evidence all allegations of the answer denied by the reply are

the jury and failing to show that the plea was withdrawn or disallowed or deny a finding for plaintiff extinguishing the claim against defendant, was insufficient on demurrer. Fidelity & Deposit Co. v. Robertson, 136 Ala. 379. Where the complaint alleged an amended application for life insurance and the answer denied this setting up affirmatively the whole transaction and the reply did not put in issue such affirmative matter but alleged an estoppel to plead it, the signing of the amended application was not in issue after demurrer sustained to the reply. Hughes v. N. Y. L. Ins. Co., 32 Wash. 1, 72 Pac. 452.

46. Church v. Pearne, 75 Conn. 350.

47. Western Mattress Co. v. Potter [Neb.] 95 N. W. 841.

48. Sufficiency of reply as to allegations of answer and whether objectionable as departure from complaint in action on fire insurance policy. Franklin Ins. Co. v. Feist, 31 Ind. App. 390, 68 N. E. 188.

Pleadings held departure: Reply in suit for cancellation of bonds as departure from complaint. Union St. R. Co. v. First Nat. Bank [Or.] 72 Pac. 586. A reply, in quieting title, alleging that plaintiff joined in a deed from defendant's grantor the premises by express agreement to be held in trust for plaintiff, states a new cause of action where the petition alleges legal title in plaintiff. Elder v. Webber [Neb.] 92 N. W. 126. Reply in action for breach of contract as setting up a different contract from the one alleged in the complaint. McCorkle v. Mallory, 30 Wash. 632, 71 Pac. 186.

Pleadings held not departure: Allegations of replication in action on quantum meruit as merely explaining plaintiff's denial of the answer not as stating a new cause of action entitling defendant to judgment on the pleadings. Cook v. Gallatin R. Co. [Mont.] 73 Pac. 131. A replication alleging a waiver of condition subsequent in an insurance policy or a forfeiture on a breach of the policy is not a departure though the declaration did not plead the condition that being a matter of defense. Tillis v. Liverpool & L. & G. Ins. Co. [Fla.] 35 So. 171. Where plaintiff recites that defendant is a fraternal beneficiary association under a name by which it issued a policy, it is nevertheless no departure to deny that it is such an association pleading the statutes of its organization where defendant answers that such is its character. Baltzell v. Modern Woodmen, 98 Mo. App. 153, 71 S. W. 1071. Where a petition alleged that deceased was a member of a beneficial association in good standing at his death, and the answer alleged suspension for nonpayment of dues, allegations in the reply that he was unconscious when the last dues were payable, that the association had written notice of his sickness, and that it was its duty to pay the dues, is not a departure requiring the reply to be stricken out. Smith v. Sovereign Camp of Woodmen [Mo.] 77 S. W. 862. Where defendant had pleaded a counterclaim and asked affirmative relief and plaintiff's amended petition was stricken because it changed the cause of action in the original petition, plaintiff, after dismissing the original petition, could file a replication to defendant's answer denying defendant's counterclaim and pleading the cause of action in the amended petition as a counterclaim to defendant's counterclaim; he was not barred from relief under the rule that no recovery can be had on a cause of action first alleged in the reply not within the general scope of the petition [Rev. St. 1899, § 4499]. Morrison Mfg. Co. v. Roach [Mo. App.] 78 S. W. 644.

49. Sexten v. Shriver [Neb.] 95 N. W. 594; Snyder v. Johnson [Neb.] 95 N. W. 692. New matter cannot be pleaded in a reply to set out a new cause of action not charged in the petition or to aid its averments. Kliment v. Torpin Grain Co. [Neb.] 97 N. W. 587. New matter in the reply may be stricken out though it might be a valid counterclaim against the counterclaim in the answer if pleaded as an original cause of action. Snyder v. Johnson [Neb.] 95 N. W. 692. Where an answer is only a traverse a reply should not set out new matter. McKay v. Henderson, 24 Ky. L. R. 1484, 71 S. W. 625.

50, 51. Church v. Pearne, 75 Conn. 350.

52. Jackson v. Pa. R. Co. [N. J. Law] 54 Atl. 532.

53. Church v. Pearne, 75 Conn. 350.

54. Perry v. Levenson, 82 App. Div. [N. Y.] 94.

55. Gross v. Scheel [Neb.] 93 N. W. 418.

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taken as untrue.[56] Where a general denial and a special answer stating facts barring recovery were filed to a complaint and a reply of confession and avoidance was filed to the answer, judgment was properly given for defendant on the pleadings because plaintiff refused to plead further after a demurrer was sustained to the reply.[57]

§ 5. *Demurrers.*[58] *Nature and kinds and grounds for each.*—The causes for demurrer fixed by statute are exclusive.[59] Demurrer will lie only for a defect apparent on the face of a pleading,[60] and cannot be aided by facts appearing in other parts of the record.[61] If any cause of action or defense appears the remedy will not lie,[62] or where the pleading shows sufficiently what the adverse party is required to answer.[63] General demurrer will not reach a defect in form.[64] Ambiguity and argumentativeness are formal defects at common law and ground for special demurrer, but such demurrers are abolished in Florida.[65] Whether the amount given in a complaint as necessary to redemption by a junior incumbrancer includes improper sums cannot be raised by demurrer.[66] A demurrer to a complaint, against a city for services rendered, on the ground that defendant had no authority to employ plaintiff except by resolution or ordinance, will not lie, the defense being presentable on trial.[67]

Demurrer will lie to a declaration containing repugnant allegations in the same count.[68] General demurrer will not lie to a petition, declaration, or com-

56. Gray v. U. S. Sav. & Loan Co., 25 Ky. L. R. 1120, 77 S. W. 200.

57. Hibberd v. Trask, 160 Ind. 498, 67 N. E. 179.

58. Mode of objection as between demurrer and other remedy, see post, § 10.

59. Mader v. Piano Mfg. Co. [S. D.] 97 N. W. 843.

60. Citizens' E. L. & P. Co. v. Gonzales W. P. Co. [Tex. Civ. App.] 76 S. W. 577. General demurrer will lie only for defects clearly appearing in a pleading. Everett v. O'Leary [Minn.] 95 N. W. 901. Petition failing to ask any relief. Southern R. Co. v. State, 116 Ga. 276. Complaint showing on its face that a lien sought to be foreclosed has expired. Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290. Estoppel may be raised by demurrer where the essential facts appear in the petition. Stone v. Cook [Mo.] 78 S. W. 801. Defense of res judicata may be made by demurrer where facts in support appear from the bill of complaint. Keen v. Brown [Fla.] 35 So. 401. An objection to the jurisdiction in an action on contract on the ground that it was to be performed in another county cannot be raised by demurrer where the petition does not disclose that fact. Currie Fertilizer Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268. A demurrer to a petition in divorce on the ground that it shows condonation will not lie unless the statements of the petition plainly show acts amounting to condonation. Diedrich v. Diedrich [Neb.] 94 N. W. 536. Demurrer will lie to a complaint alleging acts which defendant had the right to do and alleging no negligence in the performance. Fisher v. Seaboard A. L. R. Co. [Va.] 46 S. E. 381.

61. Brooks v. Metropolitan L. Ins. Co. [N. J. Law] 56 Atl. 168. Demurrer will not lie to a complaint because of matter not appearing therein but in a note to which it refers and which plaintiff offers to produce. Davison v. Gregory, 132 N. C. 389.

62. Picker v. Weiss, 39 Misc. [N. Y.] 22. Demurrer to complaint for breach of transportation contract. Seaboard A. L. R. Co. v. Main, 132 N. C. 445. If a complaint for wrongful death states a cause of action on any theory, demurrer will not lie. Chicago. I. & L. R. Co. v. Barnes [Ind.] 68 N. E. 166. A demurrer to an answer is sufficient only when the answer in fact contains no defense. The rule applies to pleadings in mandamus. Finley v. Ter. [Okl.] 73 Pac. 273. If a complaint states a cause of action in any amount demurrer will not lie though it does not warrant the full amount claimed. Ingham v. Ryan [Colo.] 71 Pac. 899. If a petition is so defective that recovery cannot be had, an oral motion to dismiss in the nature of a general demurrer will lie at any time. Kelly v. Strouse, 116 Ga. 872. A complaint to set aside conveyances is not demurrable because it cannot be determined therefrom what ground plaintiff will rely upon. Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820. Where a complaint states a cause of action on a note, it cannot be objected by demurrer that plaintiff is not entitled to recover costs and attorney's fees. Bessemer Sav. Bank v. Rosenbaum Grocery Co., 137 Ala. 530. While an averment in a complaint by a member of a corporation that he was possessed of title in common with other members to its property was a conclusion of law, it will not render the complaint demurrable where it avers sufficient facts to entitle plaintiff to prove his cause. Williamson v. Wager, 90 App. Div. [N. Y.] 186.

63. Code 1883, § 260. Seaboard A. L. R. Co. v. Main, 132 N. C. 445.

64. Belknap v. Billings [Vt.] 56 Atl. 174; Malberti v. United Elec. Co. [N. J. Law] 54 Atl. 251.

65. State v. Jennings [Fla.] 35 So. 986.

66. Kelley v. Houts, 30 Ind. App. 474, 66 N. E. 408.

67. Burns' Rev. St. 1901, § 342, subd. 5. Greenfield v. Johnson, 30 Ind. App. 127, 65 N. E. 542.

68. Fla. Cent. & P. R. Co. v. Ashmore, 42 Fla. 272.

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plaint containing one good count or paragraph.[69] Matters of defense cannot be raised by general demurrer.[70] Exceptions to an amended answer in equity, because it does not set up any defense, are in the nature of a special demurrer.[71] Pleading conclusions not facts will be cause for demurrer,[72] but otherwise as to too broad a prayer,[73] or as to too broad allegations of damage where no recovery is sought thereunder.[74] A demurrer may be sustained to certain paragraphs of a pleading where any evidence admissible thereunder is admissible under other issues in the case.[75]

Pleading specially matter provable under the general issue pleaded is ground for demurrer,[76] except in Mississippi.[77] Demurrer will not be sustained to a defective answer where the complaint is insufficient.[78] A complaint stating a cause of action against one of several defendants is good against a joint demurrer.[79] Separate demurrer of one co-defendant challenges the complaint as to him as though he were sole defendant.[80] Demurrer by one of several defendants to a complaint for failure to state a cause of action, and improper joinder of causes of action, cannot be sustained where the complaint is sufficient as to him, however de-

69. Wolf v. Alton, 103 Ill. App. 587; Lake Erie & W. R. Co. v. Charman [Ind.] 67 N. E. 923; Hudson v. Hudson [Ga.] 46 S. E. 874. Where a complaint separately states two causes of action, if either statement contains facts sufficient to constitute a cause of action, the complaint is good as against a general demurrer directed to it as a whole. Hindle v. Holcomb [Wash.] 75 Pac. 873. A demurrer to a complaint setting up two causes of action will be overruled where one cause is sufficient, and the other cause will be stricken. Crosby v. Lehigh Valley R. Co., 128 Fed. 193. A demurrer to the whole petition is properly overruled when only one paragraph is defective. Albin Co. v. Kuttner, 25 Ky. L. R. 1100, 77 S. W. 181. A demurrer to the whole complaint will be overruled if one paragraph states a cause of action. Bagley v. Weaver [Ark.] 77 S. W. 903. A demurrer to the second count of a complaint is not improperly overruled where each count embraces the same cause of action and the first one is sufficient. Rawlinson v. Christian Press Ass'n Pub. Co., 139 Cal. 620, 73 Pac. 468. Where one of three counts of a petition is voluntarily stricken by plaintiff, a demurrer to the whole petition will not lie if either remaining count sets up a good cause of action. Hay v. Collins, 118 Ga. 243. Too general averments in one count in a complaint are not reached by demurrer to it and another count sufficiently specific. Southern R. Co. v. Wilson [Ala.] 35 So. 561. Where a petition states a good cause of action for debt and foreclosure of a lien that attorney's fees asked cannot be recovered will not make it so defective that general demurrer to the whole petition will lie. Savage v. Dinkler [Okl.] 72 Pac. 366.

70. Delay as destroying right to enforcement of a contract is a matter of defense. Gummer v. Mairs, 140 Cal. 535, 74 Pac. 26. Where an answer in a suit on notes alleged that they were payable only out of certain profits which had not accrued, it cannot be objected on demurrer to the answer that the agreement was verbal and could not be proved against the notes. Hatzel v. Moore, 125 Fed. 828.

71. Yates v. Continental Ins. Co., 207 Ill. 512, 69 N. E. 779.

72. Failure of a plea alleging failure of consideration to show the facts constituting failure. Meyer v. Bloch [Ala.] 35 So. 705.

73. That a declaration claims other or greater damages than plaintiff is entitled to under the case made is not ground for demurrer. It is the proper pleading to test the extent of recovery. Tillis v. Liverpool & L. & G. Ins. Co. [Fla.] 35 So. 171.

74. That a count in a declaration sets up elements not entering into the measure of damages is not ground for demurrer where it does not allege a cause of action for damages proper to be recovered thereunder. Cline v. Tampa Waterworks Co. [Fla.] 35 So. 8, 9.

75. Noah v. German-American Bldg. Ass'n, 31 Ind. App. 504, 68 N. E. 615. Demurrer will lie to a paragraph of an answer where the facts pleaded may be shown under another paragraph. Field v. Campbell [Ind. App.] 67 N. E. 1040.

76. U. S. Fidelity & Guaranty Co. v. Dampskibsaktieselskabet Habil [Ala.] 35 So. 344. Demurrer will lie to a pleaded defense when issue should have been taken by denial. George v. New York, 42 Misc. [N. Y.] 270. Demurrers to special answers are properly sustained where the matter pleaded is admissible under the general denial. Maris v. Masters, 31 Ind. App. 235, 67 N. E. 699; Nowlin v. State, 30 Ind. App. 277, 66 N. E. 54; Hedrick v. Robbins, 30 Ind. App. 595, 66 N. E. 704; Goode v. Elwood Lodge No. 166 K. P., 160 Ind. 251, 66 N. E. 742; Payne v. Moore, 31 Ind. App. 360, 66 N. E. 483. A demurrer will lie to a paragraph of an answer in an action for alienation of affections, alleging that separation was due to plaintiff's fault since that can be shown under the general denial if competent. Jenkins v. Chism, 25 Ky. L. R. 736, 76 S. W. 405.

77. Merchants' & F. Bank v. Calmes [Miss.] 35 So. 161.

78. State v. Wheatley, 160 Ind. 183, 66 N. E. 684.

79. Rochford v. School Dist. No. 11 [S. D.] 97 N. W. 747. Joint demurrer will not lie to a complaint where it states a cause of action good against either defendant. Warner v. James, 88 App. Div. [N. Y.] 567.

80. Frankel v. Garrard, 160 Ind. 209, 66 N. E. 687.

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fective as to the other defendants.[81] A demurrer for defect of facts will lie unless the complaint states a cause of action in favor of all plaintiffs.[82] The rule applies to cross complaints.[83] That averments in a petition are in the alternative will not be ground for special demurrer.[84] A counterclaim may be tested by demurrer,[85] but an objection that it is insufficient in law on its face is not ground for demurrer.[86]

Demurrer will not lie to a motion to strike an affidavit for interpleader.[87] Demurrer to a return to an alternative writ of mandamus is treated as a demurrer in other actions at law in Florida.[88]

Misjoinder of parties is not generally ground for demurrer,[89] but nonjoinder of parties is a demurrable "defect" in South Dakota[90] and Colorado.[91] And defect of parties plaintiff, apparent on the face of a petition, may be ground of demurrer.[92] Misjoinder of causes of action in a pleading, count, or paragraph, is ground for demurrer,[93] in which all defendants may join,[94] special demurrer being the remedy in Illinois for joinder of two causes in a single count.[95] Failure of the complaint to show jurisdiction of the parties will not warrant demurrer in New York,[96] except in the municipal court.[97] It will lie to a petition where the only amount recoverable under its allegations is insufficient to give the court jurisdiction.[98] The absence of right to sue a municipality or municipal officers may be raised by demurrer.[99] The defense of usury cannot be raised by demurrer to a bill or complaint to foreclose a mortgage for both principal and interest where it affects only the interest.[1] Departure in pleading is a matter of substance and general demurrer is the remedy,[2] but that a party is surprised or placed at disadvantage by

81. Shilling Co. v. Reid & Co., 42 Misc. [N. Y.] 94. Where a cause of action is stated against a defendant he cannot demur for misjoinder of parties defendant [Code Civ. Proc. § 488]. Hall v. Gilman, 77 App. Div. [N. Y.] 458.

82. Halstead v. Coen, 31 Ind. App. 302, 67 N. E. 957.

83. A demurrer will lie to a paragraph of a joint cross-complaint failing to state a cause of action in favor of both cross-complainants. Deane v. Indiana Macadam & Const. Co. [Ind.] 68 N. E. 686.

84. Personal injury case. San Antonio v. Potter [Tex. Civ. App.] 71 S. W. 764.

85. Blaut v. Blaut, 41 Misc. [N. Y.] 572.

86. Code Civ. Proc. § 495. Hudson River W. P. Co. v. Glens Falls G. & E. L. Co., 90 App. Div. [N. Y.] 513.

87. It is not a pleading. Meyer v. Bloch [Ala.] 35 So. 705.

88. State v. Jennings [Fla.] 35 So. 986.

89. Frankel v. Garrard, 160 Ind. 209, 66 N. E. 687. An objection that there are too many plaintiffs cannot be made by demurrer [Burns' Rev. St. 1901, § 342]. Frankel v. Garrard, 160 Ind. 209, 66 N. E. 687. A demurrer to the complaint for misjoinder of parties is not within a statute allowing demurrer for defect of parties [Rev. Code Civ. Proc. § 121]. Mader v. Plano Mfg. Co. [S. D.] 97 N. W. 843.

90. Rev. Code Civ. Proc. § 121. Mader v. Plano Mfg. Co. [S. D.] 97 N. W. 843.

91. A special demurrer for defect of parties will lie for nonjoinder of those only without which a decree cannot be rendered [Civ. Code, § 51]. Blakely v. Ft. Lyon Canal Co. [Colo.] 73 Pac. 249.

92. It may be waived by answering without demurrer. Stewart v. Miles [Mo. App.] 79 S. W. 988.

93. Reed v. Reed [Neb.] 98 N. W. 76; Id. 73; Thomas v. Dabblemont, 31 Ind. App. 146, 67 N. E. 463. Where a declaration contains only one count embracing two causes of action [Pub. St. c. 167, § 2, cl. 4]. Shattuck v. Marcus, 182 Mass. 572, 66 N. E. 196.

94. Uniting causes of action against four persons, three residents and one nonresident of the county, the action against the latter being equitable and one in which the other defendants are not interested, is ground for joint demurrer by all defendants. Townsend v. Brinson, 117 Ga. 375.

95. Chicago City R. Co. v. O'Donnell, 207 Ill. 478, 69 N. E. 882.

96. Demurrer will not lie because the complaint does not show that none of the parties lived in the county. Hall v. Gillman, 77 App. Div. [N. Y.] 464.

97. Failure of a complaint in the city court to recover on a city officer's bond to show that the surety resides in the county is ground for demurrer. Perlman v. Gunn, 41 Misc. [N. Y.] 166.

98. Gaddis v. W. U. Tel. Co. [Tex. Civ. App.] 77 S. W. 37.

99. The right to sue a town for unliquidated damages from breach of contract with water commissioners may be raised by demurrer [Laws 1900, p. 1119, c. 451]. Holroyd v. Indian Lake, 85 App. Div. [N. Y.] 246. A complaint against county commissioners for trespass is demurrable since a county cannot be sued for tort in the absence of statute allowing such action. Hitch v. Edgecombe County Com'rs, 132 N. C. 573; 1. Petterson v. Berry [C. C. A.] 125 Fed. 902.

2. Tillis v. Liverpool & L. & G. Ins. Co. [Fla.] 35 So. 171. That a reply to a traverse sets up new matter is ground for demurrer. McKay v. Henderson, 24 Ky. L. R. 1484, 71

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an amendment to a petition is not ground for demurrer in Georgia.[3] Special demurrer will not lie to a petition for failure to exhibit deeds and other papers where the allegations therein referring to them were mere matters of inducement and the cause of action was not based on them nor any relief asked entirely as to them.[4]

Form, requisites, and sufficiency.[5]—A demurrer on the ground that the petition shows no personal liability of defendants is too general,[6] but one "for the reason that said complaint does not state a cause of action" is sufficient in form.[7] A demurrer for misjoinder of causes of action in the language of the statute is insufficient.[8] Where two replications are filed to a plea, a demurrer failing to state to which replication it is directed is insufficient.[9] The defects in a pleading specially demurred to should be pointed out specifically.[10] Demurrer will lie to a plea of contributory negligence, addressed to a complaint in three counts, two of which were in trespass.[11] General demurrer setting up the plea of limitations goes to the entire petition and will be sustained, if the facts alleged show the bar, though special exceptions to particular allegations are not well taken.[12] A demurrer to four paragraphs of a reply, for failure to state facts sufficient for a defense or reply to the answer, and a demurrer to another paragraph for failure to constitute a reply to the answer, are not in proper statutory form.[13] Where paragraphs of a reply were addressed separately to paragraphs of the answer, a demurrer will not lie, on the ground that neither of the paragraphs sufficed to avoid "both" paragraphs of the answer.[14] An oral motion to be permitted to demur at the trial term without stating grounds of the demurrer is properly overruled.[15] Refusal to permit defendants to demur to a complaint after the jury is sworn is proper, where they state no ground, and offer no written demurrer, and the complaint seems sufficient.[16]

Issues made by demurrer.—A demurrer searches the record,[17] unless excep-

S. W. 625. If an amendment to petition materially changes the cause demurrer to the whole petition will lie at that time. Kelly v. Strouse, 116 Ga. 872. That a supplemental complaint bringing in defendant's trustee in bankruptcy merely alleges the latter's representative capacity and prays judgment as in the original complaint is not ground for demurrer when there is an answer filed [Code Civ. Proc. § 1207]. Latimer v. McKinnon, 85 App. Div. [N. Y.] 224.

3. Wells v. Wells, 118 Ga. 812.

4. Horne v. Mullis [Ga.] 46 S. E. 663.

5. **Sufficiency** of demurrer to alternative writ of mandamus in Florida. State v. Jennings [Fla.] 35 So. 986. Special demurrer to petition as denying title shown by it to exist. Horne v. Mullis [Ga.] 46 S. E. 663. Special demurrer to plea of fraud and offer to rescind in action on note. Farkas v. Monk [Ga.] 46 S. E. 670.

Certificate accompanying demurrer. 21 Laws Del. p. 269, c. 126, requiring a demurrer to be accompanied by certificate of counsel that he believes it good in law and that it is not made for delay is not repealed by 21 Laws Del. p. 582, c. 303. Newton v. People's R. Co. [Del.] 55 Atl. 2.

6. Harris-Emery Co. v. Pitcairn [Iowa] 98 N. W. 476.

7. Toledo, St. L. & W. R. Co. v. Beery, 31 Ind. App. 556, 68 N. E. 702.

8. Code Civ. Proc. § 488, subd. 7. Davis v. New York, 75 App. Div. [N. Y.] 518.

9. Fidelity & Deposit Co. v. Robertson, 136 Ala. 379.

10. A special demurrer must specify the ground on which it is based [Civ. Code, § 51]. Blakely v. Ft. Lyon Canal Co. [Colo.] 73 Pac. 249. A demurrer not specifically pointing out the defect in the complaint may be overruled [Code Civ. Proc. § 490]. Leonard v. Donoghue, 79 App. Div. [N. Y.] 632. Demurrer to the complaint for ambiguity and uncertainty is insufficient where it does not specify the defects. Canfield v. Jeannotte [Colo.] 72 Pac. 1062. A special demurrer founded on terms of a contract neither set out in, nor made a part of, the petition, will not be considered. Haber, etc., Hat Co. v. Southern Bell Tel. & T. Co. [Ga.] 45 S. E. 696.

11. City Delivery Co. v. Henry [Ala.] 34 So. 389.

12. Bluntzer v. Hirsch [Tex. Civ. App.] 75 S. W. 326.

13. Burns' Rev. St. § 360 (Horner's Rev. St. 1901, § 357). Sovereign Camp Woodmen v. Haller, 30 Ind. App. 450, 66 N. E. 186.

14. Franklin Ins. Co. v. Wolf, 30 Ind. App. 534, 66 N. E. 756.

15. Kelly v. Strouse, 116 Ga. 872.

16. Cook v. Gallatin R. Co., 28 Mont. 340, 72 Pac. 678.

17. It relates back to the first defect in substance in the pleadings. Massey v. People, 201 Ill. 409, 66 N. E. 392. Demurrer to a plea will be carried back to a defect in the petition. Stott v. Chicago, 205 Ill. 281, 68 N. E. 736. Demurrer to the answer should be carried back to the petition if the latter is defective. Hoskins v. Southern Nat. Bank, 24 Ky. L. R. 2250, 73 S. W. 786. A demurrer to plaintiff's reply is properly carried back

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tion is not taken after overruling a demurrer to a complaint, when the court may properly refuse to carry a demurrer to the answer back, and sustain it as a demurrer to the complaint.[18] It admits all material facts well pleaded in the pleading to which it is addressed,[19] but not conclusions of law,[20] nor facts not well pleaded.[21] It admits the truth of allegations attacked only for the purpose of determining their legal effect.[22] Whether a complaint contains irrelevant or redundant matter will not be considered on demurrer for failure to state a cause of action.[23] A demurrer for defect of parties plaintiff raises only the question whether other persons should be brought in as plaintiffs, and does not affect the right of the plaintiff in court.[24] A demurrer for want of legal capacity to sue reaches only personal disability, or want of title to the character in which plaintiff sues, but does deal with sufficiency of the complaint as stating a cause of action.[25] Where an answer consisted of two parts, a general denial, and matter pleaded as a defense, a demurrer "to the defense set up in the answer" is not made to the denial, but to the defense.[26] A demurrer to a complaint on contract, for indefiniteness and uncertainty of the contract, goes to plaintiff's right of action, and the propriety of the specific claim for damages cannot be considered.[27] A demurrer for want of sufficient facts will not reach misjoinder of causes.[28]

Hearing and decision on demurrer.[29]—A demurrer should be disposed of before a decree on the main issues.[30] Refusal to consider a demurrer in effect overrules it.[31] After demurrer sustained there is no cause pending on which a finding

to the first paragraph of defendant's answer, and sustained as to it, if insufficient. Chesapeake & O. R. Co. v. Riddle's Adm'x, 24 Ky. L. R. 1687, 72 S. W. 22.

18. Ricknor v. Clabber [Ind. T.] 76 S. W. 271.

19. Demurrer admits the truth of all facts stated in the complaint. Budd v. Howard Thomas Co., 40 Misc. [N. Y.] 52. On demurrer to the complaint for failure to state a cause of action all facts alleged therein and all to be inferred by reasonable intendment are admitted. Hall v. Gilman, 77 App. Div. [N. Y.] 458. Defenses set up by answer will be taken as true on demurrer, though they deny insufficiently the allegations of the complaint. Saleeby v. Cent. R. of N. J., 40 Misc. [N. Y.] 269. On demurrer to part of an answer alleging new matter as defense, allegations of the complaint, not denied in such defense, will be treated as admitted. Eells v. Dumary, 84 App. Div. [N. Y.] 105. A demurrer to a plea alleging an agreement by plaintiff's attorney with defendant's attorney for a settlement admits the authority of the former to make the agreement. Strattner v. Wilmington City Elec. Co., 3 Pen. [Del.] 453. An allegation in a complaint, that defendant railroad company owed a certain duty as to carriage of live stock, is admitted by demurrer. Toledo, St. L. & W. R. Co. v. Beery, 31 Ind. App. 556, 68 N. E. 702. Where a complaint alleged injuries from negligence of another, describing the fire causing the injury, and stating that the person injured tried to put out the fire as was her duty, a demurrer admitted the duty as stated, so that contributory negligence could not be charged. Burnett v. Atl. Coast Line R. Co., 132 N. C. 261.

20. Fish v. McGann, 205 Ill. 179, 68 N. E. 761. General demurrer. State v. Porter [Neb.] 95 N. W. 769. Mere conclusions in complaint by servant against master for injuries as not admitted by demurrer. Indianapolis & G. R. T. Co. v. Foreman [Ind.] 69 N. E. 669. Negligence alleged as the proximate cause of an injury. Prokop v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 79 S. W. 101. Allegations that defendants are conspiring to obtain exclusive control of a certain business, to control prices, and to destroy competition, are mere conclusions of law. Park & Sons Co. v. Nat. Wholesale Druggists' Ass'n, 175 N. Y. 1, 67 N. E. 136. A demurrer to a complaint, admitting an allegation therein as to the construction of statutes and decisions of another state, will not conclude the court as to the proper construction of such laws and decisions. Finney v. Guy, 189 U. S. 335, 47 Law. Ed. 839.

21. A matter which the courts cannot consider is not well pleaded. Gillette v. Peabody [Colo. App.] 75 Pac. 18. A demurrer to a pleading does not admit facts not well pleaded, as facts which cannot be shown by parol to contradict recitals in the instrument sued on. Bower v. Chess & W. Co. [Miss.] 35 So. 444.

22. Jacobs v. Vaill, 67 Kan. 107, 72 Pac. 530.

23. Budd v. Howard Thomas Co., 40 Misc. [N. Y.] 52.

24, 25. McKenney v. Minahan [Wis.] 97 N. W. 489.

26. Jaeger v. New York, 39 Misc. [N. Y.] 543.

27. Kenny v. Knight, 119 Fed. 475.

28. Shroyer v. Pittenger, 31 Ind. App. 158, 67 N. E. 475.

29. Overruling demurrer to plea as harmless, where defense relied on could not have affected plaintiff's right to recover. Bullock, etc., Elec. Co. v. Coleman, 136 Ala. 610.

30. Deckert v. Chesapeake Western Co. [Va.] 45 S. E. 799.

31. Fidelity & Casualty Co. v. Brown [Ind. T.] 69 S. W. 915.

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can be made.[32] Overruling a demurrer to the petition will not prevent a finding of no cause of action after the evidence.[33] Dismissal may follow after a demurrer is sustained to the petition, unless plaintiff asks leave to amend.[34] A law allowing pleading over after demurrer overruled, merely allows the attack, in other ways, on the pleading, during trial and not on appeal.[35] After overruling a demurrer to a statement in assumpsit, judgment may be entered against defendant without allowing him to file an affidavit of defense.[36] A general demurrer by defendant, unnecessarily assigning grounds therefor, may be sustained, though for a ground not assigned.[37] If a rejoinder to a replication only raises an issue already made plaintiff is not prejudiced by overruling a demurrer to it.[38] Where pleas of contributory negligence in an action for personal injuries were eliminated on demurrer, no charge on that ground can be given.[39] A case may be decided on the pleadings, after sustaining a demurrer to the answer, without allowing plaintiff to introduce the answer as his own evidence.[40] Parts of an amendment to an answer based on an untenable theory may be stricken on demurrer, though the demurrer did not raise that precise objection.[41] A paragraph of an answer consisting of allegations of new matter must be considered on demurrer apart from preceding admissions and denials.[42] Where a complaint fails to state a cause of action, a demurrer to the answer as pleading a defense, when denial was the way to take issue, will be overruled.[43] Where the contract, in a suit thereon, shows no cause of action, on demurrer to the petition the exhibit will be considered.[44] A complaint demurred to ore tenus at trial cannot be added by the answer, but must be liberally construed.[45] Without specific allegations of damage suffered and no proof of damage taken, judgment cannot be rendered on overruling a demurrer to the complaint, for the full amount of the bond sued on.[46] Where defendant filed a cross complaint, after an order had been entered sustaining a demurrer to the complaint by a co-defendant, but before judgment on the demurrer, and plaintiff answered the cross complaint before entry of judgment on the demurrer, the latter judgment could be entered before disposing of issues on the cross complaint.[47] Overruling a demurrer to a complaint on an indemnity contract, because it alleged expenses paid by plaintiff to the sheriff, in caring for property which should not have been joined, is not prejudicial to defendant, since the claim may be taxed as costs, to be paid by the losing party.[48] Judgment on demurrer unreversed concludes the parties as to all questions necessarily raised by the demurrer,[49] and is conclusive of facts admitted thereby, where defendant elects to abide by the demurrer.[50]

32. Cardwell v. Stuart, 92 Mo. App. 586.
33. Sporer v. McDermott [Neb.] 96 N. W. 232.
34. Gaddis v. W. U. Tel. Co. [Tex. Civ. App.] 77 S. W. 37.
35. Acts 25th Gen. Assembly, c. 96. Buchanan v. Blackhawk Coal Works, 119 Iowa, 118, 93 N. W. 51.
36. Bridgeman Bros. Co. v. Swing, 205 Pa. 479.
37. Granite Bldg. Co. v. Saville's Adm'r [Va.] 43 S. E. 351.
38. Pope v. Glenn Falls Ins. Co., 136 Ala. 670.
39. City Delivery Co. v. Henry [Ala.] 34 So. 389.
40. Yates v. People, 207 Ill. 316, 69 N. E. 775.
41. Fidelity & Deposit Co. v. Nisbet [Ga.] 46 S. E. 444.
42. Code Civ. Proc. § 500. Eells v. Dumary, 84 App. Div. [N. Y.] 105.
43. George v. New York, 42 Misc. [N. Y.] 270.
44. Gardner v. Continental Ins. Co., 25 Ky. L. R. 426, 75 S. W. 283.
45. Sufficiency of complaint in ejectment. Wis. L. I. & C. Co. v. Pike & N. L. Ice Co., 115 Wis. 377, 91 N. W. 988.
46. Disosway v. Edwards [N. C.] 46 S. E. 501.
47. Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290.
48. Clark's Code (3d Ed.) § 466. Seaboard A. L. R. Co. v. Main, 132 N. C. 445.
49. Georgia N. R. Co. v. Hutchins [Ga.] 46 S. E. 659.
50. Fish v. McGann, 205 Ill. 179, 68 N. E. 761. Dates, though given under a videlicet in a pleading, must be taken to be correct on hearing a demurrer to the pleading, where the pleader announces that he will stand by them, and does not elect to amend after

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§ 6. *Cross complaints and answers.*[51]—Defendants cannot recoup damages where they gave no notice of the defense.[52] Allegations purely defensive in character will not sustain a counterclaim.[53] The items of damages claimed by way of recoupment or set-off must be averred.[54] All facts necessary to show the right must be pleaded as in a complaint or petition.[55] A joint cross complaint must state a cause of action in favor of both cross complainants.[56] A judgment cannot be set off under a plea of payment for use and benefit.[57] A set-off cannot be granted where defendant asks no affirmative relief.[58] An answer setting up a counterclaim is substantially a petition and a reply to it is likewise an answer to a petition; both claims being established, judgment must go for the excess shown.[59]

Until plaintiff has served his reply, he cannot require a bill of particulars as to a counterclaim to prepare for trial, it not being needed to prepare the reply;[60] but defendant filing a counterclaim may be required to file a bill of particulars,[61] unless the necessary information is in possession of plaintiff and he refuses to give it.[62] A stock certificate pledged by plaintiffs to defendant for a loan is not the foundation of a cross complaint asking foreclosure of a mortgage for balance due in an action against a building and loan association to compel satisfaction of the mortgage, and need not be made an exhibit.[63]

The particular subjects of cross complaint, counterclaim or set off, are treated in a particular topic,[64] but some of the cases have been collected here as illustrating the character of, and manner of, urging the right.[65] A cross petition may only be

demurrer sustained. Parliament of Prudent Patricians v. Marr, 20 App. D. C. 363.

51. Statutes construed. Code Civ. Proc. §§ 2938, 2945, 501, 502 and Consolidation Act § 1347 (Laws 1882, c. 410) as to counterclaims in district courts of New York construed. Lundine v. Callaghan, 82 App. Div. [N. Y.] 621.

Sufficiency of particular pleadings: Counterclaim in action against agent as showing right to commission. Picker v. Weiss, 39 Misc. [N. Y.] 22. Counterclaim in action for goods sold. Guenther v. American Steel Hoop Co., 25 Ky. L. R. 795, 76 S. W. 419. Answer in action for breach of contract as constituting a counterclaim. Punteney-Mitchell Mfg. Co. v. Northwall Co. [Neb.] 91 N. W. 863. Cross complaint for injunction and allegations therein as mere conclusions of fact. Chicago, I. & E. R. Co. v. Ind. Natural Gas & Oil Co. [Ind.] 68 N. E. 1008. Where a bill to quiet title questions defendant's claim to the property, a cross bill setting up his mortgage and asking foreclosure is not a departure. Jenkins v. Jonas Schwab Co. [Ala.] 35 So. 649. An answer in foreclosure setting up a judgment lien of one defendant and asking affirmative relief, duly served on all co-defendants, will be treated as a cross complaint to support the judgment enforcing the lien. Hibernia Sav. & Loan Soc. v. London & L. Fire Ins. Co., 138 Cal. 257, 71 Pac. 334. An answer in an action to recover for services to defendant's intestate under a contract, alleging that plaintiff and deceased entered into a different contract which deceased fully performed and under which plaintiff received property of greater value than his services was not a counterclaim entitling defendant to judgment on plaintiff's failure to reply. Hatcher v. Dabbs, 133 N. C. 239.

52. Action for goods sold. Fredrick Mfg. Co. v. Devlin [C. C. A.] 127 Fed. 71.

53. Stewart v. Gorham [Iowa] 98 N. W. 512.

54. Beck Duplicator Co. v. Fulghum, 118 Ga. 836. An item of offset cannot be recovered unless pleaded. Waller v. Deranleau [Neb.] 94 N. W. 1038.

55. Allegations in an answer state no set-off or counterclaim to a complaint for services where they state that plaintiff received property without stating whether as a purchase, loan, gift, or payment, or whether the property had been returned. Bennett v. Lutz, 119 Iowa, 215, 93 N. W. 288.

56. Deane v. Ind. Macadam & Const. Co. [Ind.] 68 N. E. 686.

57. Sayles' Rev. Civ. St. art. 751, requires a plea setting up a counterclaim to state distinctly its nature. Staggs' Heirs v. Piland [Tex. Civ. App.] 71 S. W. 762.

58. Hillman v. Edwards [Tex. Civ. App.] 74 S. W. 787.

59. Turney v. Baker [Mo. App.] 77 S. W. 479.

60. Fidelity Glass Co. v. Thatcher Mfg. Co., 88 App. Div. [N. Y.] 287.

61. Where the answer denied that plaintiffs had fully performed the contract sued on as alleged in the complaint with a specified exception, and as counterclaim alleged a breach by plaintiff and asked damages, plaintiffs were entitled to a bill of particulars specifying the instances of the breach and the damages. Hopper v. Weber, 84 App. Div. [N. Y.] 266.

62. Mendelson v. Frankel, 84 N. Y. Supp. 586.

63. Coppes v. Union Nat. Sav. Loan Ass'n [Ind. App.] 69 N. E. 702.

64. Set-off and Counterclaim.

65. Unliquidated damages which cannot be the subject of set-off are those arising out of tort. Lloyd v. Manufacturers & M. W. Co., 102 Ill. App. 551. Orders on a property owner to laborers, given by a contractor

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instituted by leave of the court.[66] Leave to file an amended answer does not authorize the filing of a cross petition.[67]

§ 7. *Amendments.*[68] *When allowed.*—Amendments which cure merely formal defects in a pleading,[69] and amendments which are clearly in furtherance of

in removal of buildings, are proper subjects of counterclaim in an action by the contractor or his assignees to foreclose a lien for the removal [Code Civ. Proc. § 691]. Boucher v. Powers [Mont.] 74 Pac. 942. A counterclaim for breach of warranty in sale of live stock is not bad because consisting of items for care of the stock. Mallory Commission Co. v. Elwood, 120 Iowa, 632, 95 N. W. 176. A claim originating in tort may be set up by way of recoupment as a defense to a claim originating in contract where both arise from the same subject-matter and may be settled in the same action. Lloyd v. Manufacturers' & M. Warehouse Co., 102 Ill. App. 551. A cause of action for negligence of plaintiff in employing a dishonest servant who stole goods of defendant cannot be set up as a counterclaim in an action for work done and materials furnished by plaintiff [Code Civ. Proc. § 501]. Lundine v. Callaghan, 82 App. Div. [N. Y.] 621. In action by administrator for price of goods purchased at administrator's sale, debts due defendant from intestate could not be pleaded as counterclaim. Hancock v. Hancock's Adm'r, 24 Ky. L. R. 664, 69 S. W. 757. Where it was agreed in an action against a receiver that matters of set off and counterclaim could be shown under a general denial, the court, at conclusion of the evidence, could direct the receiver to file an additional answer of set off and counterclaim founded on the same items and facts so that judgment could be given thereon for the receiver. Whitcomb v. Stringer, 160 Ind. 82, 66 N. E. 443. In an action for admeasurement of dower in realty of which plaintiff alleged that her husband was seized during coverture and which he conveyed without her joinder to another, a claim for damages against her as her husband's devisee cannot be made the subject of counterclaim [Code Civ. Proc. § 501]. Burnett v. Burnett, 86 App. Div. [N. Y.] 386. Where a suit was brought by a grantor to set aside a deed for fraud, a plea by defendant of a prior fraud of plaintiff against him in purchase by defendant from a third person of farm lands for which defendant conveyed the property covered by plaintiff's deed was not a counterclaim [Civ. Code § 57]. Rensberger v. Britton [Colo.] 71 Pac. 379. Defendant in a suit to restrain distributing of water to others which is claimed by plaintiff under a contract made by defendant with plaintiff and a third person may file a cross complaint alleging illegality of the contract and join the third person with plaintiff as party defendant thereto [Code Civ. Proc. § 442]. Goodell v. Verdugo Canon Water Co., 138 Cal. 308, 71 Pac. 354. Where defendants counterclaimed in action for goods sold for price of new tools required because of defects in the goods purchased, and it was proved that the tools could not be used for any other purpose, the counterclaim could not be allowed. Fredrick Mfg. Co. v. Devlin [C. C. A.] 127 Fed. 71.

66, 67. Bullitt v. Eastern Ky. Land Co. [Ky.] 79 S. W. 217.

68. Right to file amended answer in action on insurance policy. Pa. Fire Ins. Co. v. Young, 25 Ky. L. R. 1350, 78 S. W. 127.

On appeal: Amendment of plaintiff's cause of action in the appellate court under Rev. St. 1899, § 4079. Corson v. Waller [Mo. App.] 78 S. W. 656.

69. The complaint may be amended by writing changed dates on it. Chamberlain v. Lowenthal, 138 Cal. 47, 70 Pac. 932. A technical defect in an answer in the municipal court may be amended when not calculated to mislead [Code Civ. Proc. § 2232]. Van Deventer v. Foster, 87 App. Div. [N. Y.] 62. A writ may be amended to insert an ad damnum clause or other formal claim for damages [Gen. St. 1902, § 643]. Vincent v. Mutual Reserve Fund Life Ass'n, 75 Conn. 650. After verdict and judgment, a petition may be amended in the federal circuit court to show citizenship of plaintiff where his residence was already alleged [Rev. St. § 964]. Mexican Cent. R. Co. v. Duthie, 189 U. S. 76, 47 Law. Ed. 715. In an action against two defendants on notes, plaintiff may amend allegation as to execution of the notes by inserting "them" for "him." Thompson F. & Mach. Works v. Glass, 136 Ala. 648. Contest of an answer in garnishment may be amended to cure failure to specify in what respect the answer is untrue [Code, 2196]. Curtis v. Parker, 136 Ala. 217. An amendment striking the words "suing for the use" of another from a declaration in tort is properly allowed it being only a matter of form. Chicago & A. R. Co. v. Murphy, 198 Ill. 462, 64 N. E. 1011. A clerical error in the declaration which could not have misled defendant may be amended at the close of plaintiff's case. McTiver v. Grant Tp. [Mich.] 91 N. W. 736. A demurrer to a complaint using the wrong christian name of a testator may be amended as to the name. Blum v. Dabritz, 78 N. Y. Supp. 207. After issues joined in an action for injuries from a defective sidewalk, on objection that the petition did not show where the injury occurred, plaintiff may amend his petition by adding the name of the city and county, where the petition shows the action to be against such city and sufficiently locates the place of accident by streets. Guthrie v. Finch [Okl.] 75 Pac. 288. Where, during trial, plaintiff objects to evidence for defendant for formal defect in the answer, defendant should be allowed to amend as to such defect. Ward v. Davis [Neb.] 97 N. W. 437. Where plaintiff declared on the common counts according to the state practice but failed to allege an assignment to him of the claim sued upon, he may be allowed afterward to file a count alleging assignment [Pub. Acts 1899, p. 1062, c. 139 and Prac. Act, original rule 2, § 1, as changed by Gen. St. 1902, § 639]. Kelsey v. Punderford [Conn.] 56 Atl. 579. Defendant pleading usury alleging the transaction as of a certain date may amend the answer to conform to proof of a different date. Kleimer v. Covington Perpetual Bldg. & Loan Ass'n, 24 Ky. L. R. 735, 70 S. W. 41. A complaint by an administrator for death of

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justice,[70] should be allowed. In the latter instance, the court may even order an amendment of its own motion.[71] An amendment to a petition embracing only matter set out in another amendment previously allowed should be allowed.[72] A defective plea filed before bar of a claim by limitation will prevent the bar since the plea may be amended.[73]

The federal courts are not governed by state laws or practice in allowing amendments to pleadings.[74]

Great liberality will be allowed in amendments.[75] Good faith must appear in presenting the cause in the first instance,[76] and the amendment must not be asked for purpose of delay.[77] An amendment to a pleading is properly refused when it is not presented and there is no means of determining its propriety.[78] Notice of an application to amend the summons and complaint to remedy misnomer is to be construed as notice of intention to apply for such amendment wherever the misnomer appears in the pleadings.[79] An order directing a supplemental complaint to allege bankruptcy of defendants and appointment of a trustee, "and other proper and necessary allegations" gives leave to serve such complaint in addition to, not in place of, the original complaint.[80] Where the plaintiff has been ordered to amend the complaint to make it more definite and defendant moves further amendment in compliance with the order, and the court finds the complaint sufficient except as to one particular which was specified, an order for amendment in that particular is proper whether or not the original order was right.[81] A party against whom a demurrer has been sustained may amend or plead over as a matter of course at any time before the opposing party moves for judgment.[82]

Discretion of court.—Amendments not of course are generally discretionary.[83]

intestate may be amended to correct the name of intestate, as it is not substitution of a new party or a departure. Mobile & O. R. Co. v. Logan, 136 Ala. 173. Where a defendant corporation incorrectly named in summons and complaint answers to the merits and also files a plea of misnomer, jurisdiction is acquired so that the correct name may be inserted by amendment. Sentell v. Southern R. Co. [S. C.] 45 S. E. 155. A declaration making a tender of more goods than is alleged to have been sold may be amended at bar. American Hide & Leather Co. v. Chalkley & Co. [Va.] 44 S. E. 705.

70. Amendment of answer on new trial after appeal. Jones v. Western Mfg. Co., 32 Wash. 375, 73 Pac. 359. The pleadings may always be amended before final judgment to show a complete defense to the action. Randolph v. Hudson [Okl.] 74 Pac. 946. An amendment to the pleadings in furtherance of justice must be allowed though it involves a new cause of action or a new defense [Code, § 2944, applied by Laws 1882, p. 348, c. 410, § 1347, to municipal courts before or during trial]. Morton v. Lederer, 84 N. Y. Supp. 132. The municipal court must allow an answer to be amended to set up the defense of usury [Laws 1902, p. 1542, c. 580, § 166]. Steinhardt v. Eisen, 84 N. Y. Supp. 232.

71. Where the court has jurisdiction of defendant it may order correction of a misnomer in the pleadings of its own motion in furtherance of justice. Sentell v. Southern R. Co. [S. C.] 45 S. E. 155.

72. Wright v. Roberts, 116 Ga. 194.

73. Southern Cold Storage & Produce Co. v. Dechman [Tex. Civ. App.] 73 S. W. 545.

74. Rev. St. U. S. § 954. Lange v. Union Pac. R. Co. [C. C. A.] 126 Fed. 338.

75. Rev. St. 1887, §§ 4228, 4229. Kroetch v. Empire Mill Co. [Idaho] 74 Pac. 868.

76. An amendment to a second petition for personal injuries in an action brought within six months of the first action in other respects good is not demurrable because apparent lack of good faith in alleging defendant's negligence in the first action without knowledge of its existence. Savannah, F. & W. R. Co. v. Pollard, 116 Ga. 297.

77. On the question whether an amended answer was filed in good faith and not for delay, facts relating to a proposition for compromise containing a threat by defendant to use dilatory tactics may be considered though inadmissible on trial [Code Civ. Proc. § 542]. Naylor v. Loomis, 79 App. Div. [N. Y.] 21.

78. Dilcher v. Schorik, 207 Ill. 528, 69 N. E. 807.

79. Sentell v. Southern R. Co. [S. C.] 45 S. E. 155.

80. Code Civ. Proc. § 544. Latimer v. McKinnon, 85 App. Div. [N. Y.] 224.

81. Pike v. Spartanburg, R. G. & E. Co., 65 S. C. 409.

82. Redhead v. Iowa Nat. Bank [Iowa] 98 N. W. 806.

83. Ledwith v. Campbell [Neb.] 95 N. W. 838; Lord v. Nat. Protective Soc. [Mich.] 96 N. W. 443; Madisonville v. Pemberton's Adm'r, 25 Ky. L. R. 347, 75 S. W. 229; Tanner v. Harper [Colo.] 75 Pac. 404; Lange v. Union Pac. R. Co. [C. C. A.] 126 Fed. 338.

Answer. Westinghouse v. Remington Salt Co., 89 App. Div. [N. Y.] 126. Leave to file an amended rejoinder. Guthrie v. Guthrie, 25

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Leave to amend specifications objecting to discharge of a bankrupt can only be granted by the judge.[84] An amendment to a pleading allowed by the court cannot be stricken by an auditor on reference.[85] In cases tried by the court, the duty of deciding the propriety of amendments when asked is the same as in jury cases, the parties having a right to know the state of the pleadings at all times.[86] Where plaintiff's counsel failed to appear to argue motions for judgment by defendant and for leave to amend by plaintiff, the amendment was properly refused in the discretion of the court, it appearing that allowance would work injustice.[87]

Terms for amendment.—The terms for amendment to a petition are discretionary.[88] A motion that the amending party be taxed all costs prior to amendment is too broad.[89] A pleading cannot be amended to increase the prayer for recovery to conform to the verdict without setting aside the latter and granting a new trial on payment of costs.[90] Amendment at trial entitles the adverse party to a postponement only not a continuance.[91] An amendment of a defense should always be allowed on terms so as to admit proof thereof where there is no claim of surprise.[92] Leave to amend "without prejudice to proceedings already had" cannot be granted so as to permit testimony taken in support of the action as first tried to stand.[93] Particular terms for amendment and manner of allowance are treated in the notes.[94]

Ky. L. R. 1701, 78 S. W. 474. Amendment of the answer which states an insufficient denial. Avery v. Stewart [N. C.] 46 S. E. 519. Allowance of amendment of special matter in defense is proper unless abuse of the court's discretion appears [V. S. 1148]. Chase v. Watson [Vt.] 56 Atl. 10. Where evidence is inadmissible under a plea because it is not verified, the court in its discretion may allow verification and hear the evidence. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227. That affidavits supporting a motion for leave to amend a complaint merely referred to the proposed amended complaint for facts on which it was based and such facts were there stated on information and belief without stating the source of the information will not affect the discretion to allow amendment. Meeks v. Meeks, 79 App. Div. [N. Y.] 49.

During trial: Amendments at any time during trial. Neb. Land & Feeding Co. v. Trauerman [Neb.] 98 N. W. 37. Amendments after the issues are made up. Abuse of discretion. Southern Pine Lumber Co. v. Fries [Neb.] 96 N. W. 71. Allowing an amendment to pleadings near the close of the case. Brady v. Pinal County [Ariz.] 71 Pac. 910. Allowance of amendments to plaintiff after he has rested and defendant has moved to dismiss. Jaroszewski v. Allen, 117 Iowa, 632, 91 N. W. 941. Amendment of pleadings at close of the evidence to conform to the proof. Mont. Ore-Purchasing Co. v. Boston, etc., Min. Co., 27 Mont. 288, 70 Pac. 1114. Allowance of an amendment to the petition after the testimony is closed. Lewis v. Hoeldtke [Tex. Civ. App.] 76 S. W. 309. Amendments to the complaint, not changing the cause of action, after evidence taken and submission of the cause. Hancock v. Board of Education of Santa Barbara, 140 Cal. 554, 74 Pac. 44. Amendment of a petition pending trial to increase the claim for damages. Smith v. Sioux City, 119 Iowa, 50, 93 N. W. 81. Allowing an amendment at trial merely to add an item of damages to the complaint. Barnes v. Berendes, 139 Cal. 32, 72 Pac. 406.

After trial: Amendments on retrial after reversal. Parke v. Boulware [Idaho] 73 Pac. 19. Amendment of answer in action appealed from a justice to the district court. Hartford Fire Ins. Co. v. Warbritton, 66 Kan. 93, 71 Pac. 278. Amendment of complaint to conform to the findings two or three months after judgment is discretionary [Rev. St. §§ 2830, 2832]. Hansen v. Allen, 117 Wis. 61, 93 N. W. 805. The allowance of amendments to an answer is not an abuse of discretion even though the answer has been demurred to for lack of the supplied allegation and the demurrer overruled, and objection has been made to the evidence, where there is evidence to support the amendments and the other party has been permitted to introduced additional proof without objection. Dickenson v. Columbus State Bank [Neb.] 98 N. W. 813.

84. In re Peck, 120 Fed. 972.

85. Rusk v. Hill, 117 Ga. 722.

86. Rev. Codes 1899, § 5630. Satterlund v. Beal [N. D.] 95 N. W. 518.

87. White v. Strong, 75 Conn. 308.

88. Suckstorf v. Butterfield [Neb.] 96 N. W. 654. Allowance of costs on leave to amend pleadings on the third trial of a cause. Scheuer v. Monash, 40 Misc. [N. Y.] 668. The court has discretion to fix costs of a continuance to be paid by defendant on amending his answer. Gabriel v. Tonner, 138 Cal. 63, 70 Pac. 1021.

89. Burns' Rev. St. 1901, § 397. McCoy v. Board of Trustees of Cloverdale, 31 Ind. App. 331, 67 N. E. 1007.

90. First Nat. Bank v. Calkins [S. D.] 93 N. W. 646.

91. Amendment of a pleading at trial does not entitle the adverse party to a continuance but at most to postponement for a time reasonable in discretion of the court for him to prepare for trial on the amended pleading [Act Md. 1785, c. 80]. Crandall v. Lynch, 20 App. D. C. 73.

92. Defense of discharge in bankruptcy. Bailey v. Kraus, 39 Misc. [N. Y.] 845.

93. Laws 1900, p. 1326, c. 591, amending

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Time for amendment.—Pleadings may be amended as to formal defects during trial,[95] or to conform to the evidence,[96] or to show absence of defendant from the county after proper service,[97] or in the district court of New Jersey, as to parties,[98] or even to change the cause of action, in Wisconsin, if the form of action be not changed.[99] But material amendments are not generally allowable after introduction of evidence,[1] unless to plead defenses shown by the evidence,[2] nor after submission of the cause to the jury.[3] Prejudice may be obviated by giving the adverse party option of a continuance.[4] Generally amendments are not allowable after judgment,[5] unless in furtherance of justice,[6] or merely to insure jurisdiction on ap-

Code Civ. Proc. § 723. Lindblad v. Lynde, 81 App. Div. [N. Y.] 603.

94. Payment of costs: On leave to amend, a plaintiff who cannot recover on his complaint as it stands should be taxed with all costs and disbursements after service of the complaint. Lindblad v. Lynde, 81 App. Div. [N. Y.] 603. Where a complaint in the supreme court stated a cause of action for accounting against an executor properly cognizable by the surrogate, an amendment alleging fraud to bring the case within the jurisdiction of the supreme court will be allowed on payment of accrued costs [Code Civ. Proc. § 723]. Meeks v. Meeks, 79 App. Div. [N. Y.] 49. Where on plaintiff's application, a juror was withdrawn and he was allowed to amend the complaint within a certain time on payment of costs, defendants to have judgment of dismissal and costs on his failure to pay costs and serve the amended complaint within the period, such judgment was properly entered on his default. Morris v. Thomas, 80 App. Div. [N. Y.] 47. That defendant did not object to the introduction of evidence will not show his intention to waive inadmissibility where his objection to prior evidence similar in character was overruled, and on amendment of the complaint so as to allow such evidence on a second trial, plaintiff should be required to stipulate for deduction of costs of the appeal from any recovery by him. Page v. Del. & H. Canal Co., 81 App. Div. [N. Y.] 638. $50 costs allowed on amendment to the complaint not materially changing the cause of action held sufficient. Perry v. Levenson, 82 App. Div. [N. Y.] 94. A complaint may be amended as to material facts after answer to the merits by defendant familiar with the facts on payment of costs of the motion and $10 [Code Civ. Proc. § 723]. Mooney v. Valentine, 79 App. Div. [N. Y.] 41.

Payment of costs and additional time to answer amendment: Where an original complaint is found defective on trial, an amendment stating in effect a new cause of action should only be allowed on granting defendant a trial fee in addition to costs, and 20 days to answer and the case should take its regular place on the calendar. Diebold v. Walter, 83 App. Div. [N. Y.] 254.

Allowance of jury trial: A complaint should not be amended to change the issue from a fictitious one in contract to one in tort without allowing defendant a jury trial if he waived the right by not demanding it when the first issue was joined [Code Civ. Proc. § 2994]. Reese v. Baum, 83 App. Div. [N. Y.] 550.

95. A formal amendment not prejudicial to a party objecting, may be allowed during trial. Donovan v. Hibbler [Neb.] 92 N. W. 637. A claim for damages less than the amount shown by allegations of goods delivered in the complaint may be amended during trial. Prince v. Takash, 75 Conn. 616. After the jury had been impaneled, the court allowed the reply to be amended by adding a general denial of matter already, in effect, specifically denied in the reply. Held, defendant not prejudiced. Bergman v. London & L. Fire Ins. Co. [Wash.] 75 Pac. 989. Refusal of the court to permit an amendment after trial had progressed several days was not an abuse of discretion. Altgeld v. Alamo Nat. Bank [Tex. Civ. App.] 79 S. W. 582. An amendment to an answer may be permitted, even on the eve of the trial, in the discretion of the court. McClurg v. Brenton [Iowa] 98 N. W. 881.

96. Plaintiff may be permitted during trial to amend his complaint to conform to the evidence. Vinson v. Palmer [Fla.] 34 So. 276.

97. If the summons is duly issued and served, and defendant is found absent from the county, the complaint may be amended at trial to show the absence. Berryhill v. Healey, 89 Minn. 444, 95 N. W. 314.

98. Pleadings in the district court may be amended at trial by striking out, on plaintiff's motion, one of two defendants sued jointly. Lambeck v. Stiefel [N. J. Law] 56 Atl. 132.

99. A complaint may be amended on trial, or at any time before final judgment, though the cause of action be changed, if the form from tort to contract, or law to equity, or vice versa, be not changed [Rev. St. 1898, §§ 2669, 2670, 2830, 2829, as to amendments]. Gates v. Paul, 117 Wis. 170, 94 N. W. 55.

1. Where a petition by an administratrix for death of her intestate alleged that he was a resident of the county in which the suit was brought, at time of his death, an application at trial to amend the answer to deny the residence is too late, after introduction of evidence raising a doubt on that issue. Chesapeake & O. R. Co. v. Riddle's Adm'x, 24 Ky. L. R. 1687, 72 S. W. 22.

2. Where defendant in an action on a note pleaded the ownership of a note made by plaintiffs by way of counterclaim, plaintiffs may be allowed to amend their reply to plead limitations, after introduction of the note, surprise to defendant not being shown. Thomas v. Price [Wash.] 74 Pac. 563.

3. Hall v. Greene, 24 R. I. 286.

4. A surety's plea may be amended at trial to show that he signed on condition, plaintiff having option of a continuance and electing to proceed. People v. Sharp [Mich.] 94 N. W. 1074.

5. Application to amend the petition after entry of final judgment of dismissal is too late. Stanbury v. Storer [Neb.] 97 N. W. 805. After judgment the bill of particulars

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peal.[7] However, they are sometimes allowed to conform to the findings on proper terms,[8] and where a defect in a complaint is such that an amendment might have been made at the trial as of course, the amendment will, on appeal, be regarded as made.[9] The right to amend may be lost by delay unexplained;[10] especially to introduce new issues,[11] or where the defect has been previously brought to the party's notice.[12] Failure to amend before the issues are made up may waive the right.[13]

Matter of amendment.—Pleadings showing no cause of action are not amendable.[14] Where a complaint fails to state separately and number two separate causes

cannot be amended to introduce a new issue and secure reversal of the judgment. Kent v. Phenix Art Metal Co. [N. J. Law] 55 Atl. 256. Where the answer was not amended nor a motion to amend made on trial, defendant cannot claim the matter of amendment on appeal. McPherson v. Julius [S. D.] 95 N. W. 428. An amendment to the complaint presenting issues which, if proper, should have been presented with other issues in the case is too late, after judgment fixing the rights of the parties. Bohannon v. Clark [Ky.] 78 S. W. 479. Failure to move for amendment of answers, or to take any steps to allege a defense of laches, until after reversal of judgment in favor of defendants will warrant denial of their application to amend. Guttentag v. Whitney, 82 App. Div. [N. Y.] 145. Where a judgment sustaining a demurrer and dismissing a petition has been affirmed on appeal, the trial court has no power to permit an amendment to the petition. Craig v. Welsh-Hackley C. & O. Co. [Ky.] 78 S. W. 1122. Leave to amend will not be granted after a judgment sustaining a general demurrer is affirmed on appeal. But such allowance is discretionary with the court. Atlanta Trust & Banking Co. v. Nelms [Ga.] 46 S. E. 851.

6. An answer may be amended on new trial after appeal. Jones v. Western Mfg. Co. [Wash.] 73 Pac. 359. It is not error to permit an amendment to a pleading after trial when necessary to a proper determination of the cause. Brown v. Brown [Neb.] 98 N. W. 718. Where the merits of the case are tried, an amendment permitted to be made before verdict, but not in fact made and allowed until after verdict, will be treated as made when permission was given therefor. Cronan v. Woburn [Mass.] 70 N. E. 38.

7. An amendment to the complaint to insure jurisdiction and not changing the cause of action may be made in the supreme court [Code Civ. Proc. § 723]. Meeks v. Meeks, 79 App. Div. [N. Y.] 49.

8. The complaint may be amended in the discretion of the court, to conform to the findings two or three months after judgment, on payment of costs [Rev. St. §§ 2830, 2832]. Hansen v. Allen, 117 Wis. 61, 93 N. W. 805.

9. Gallamore v. Olympia [Wash.] 75 Pac. 978.

10. Amendment of the petition is properly refused after the issues, having been made up for a year, during which time defendant had died and his administrator was managing the case. Marks v. Hardy's Adm'r [Ky.] 78 S. W. 864. Permission to amend an answer in an action appealed from a justice to the district court may be refused, when more than seven months passed after appeal, and the application was made on trial without excusing delay. Hartford F. Ins. Co. v. Warbritton, 66 Kan. 93, 71 Pac. 278. Defendant after answer and shortly before trial asked leave to amend to set up a new counterclaim which was denied for laches, and then sued plaintiff on his counterclaims, including the one omitted from the answer, but the case was never tried. He was not entitled after reversal of judgment against him to discontinue his action and amend by setting up the omitted counterclaim and defenses waived on the first trial. Henry v. Talcott, 89 App. Div. [N. Y.] 76.

Excuse for delay in moving to amend complaint to show defendant to be a joint stock company, and not a corporation, and to amend summons. Blackburn v. American News Co., 89 App. Div. [N. Y.] 82. Right to file amended answer before reply under Ky. St. 1899, § 2524 and Civ. Code, §§ 39, 132, 134. Louisville & N. R. Co. v. Hall, 24 Ky. L. R. 2487, 74 S. W. 280. In an action by the assignee of a contract, made while the assignor and defendant sustained the relation of attorney and client, where the case was on the calendar several times and postponed by defendant, his right to amend at a time after the date for which the case had been peremptorily set was not lost by laches. Goldberg v. Goldstein, 87 App. Div. [N. Y.] 516.

11. Plaintiff cannot file an amendment to a demurrer to defendant's plea at the trial term setting out new and distinct grounds of objection [Code 1895, §§ 5045, 5047]. Farkas v. Monk [Ga.] 46 S. E. 670.

12. Where a defect in a complaint is specifically pointed out on trial and the court was not asked to amend, the right to amend is waived. Page v. Del. & H. Canal Co., 76 App. Div. [N. Y.] 160, 12 Ann. Cas. 18.

13. A plea to the jurisdiction on the ground that the allegations of the petition were fraudulently made cannot be made first by exceptions in the second amended answer, and filed after answer to the merits. Price v. Garvin [Tex. Civ. App.] 69 S. W. 985. Amendment to answer in action for injuries to servant as too late. Louisville & N. R. Co. v. Pointer's Adm'r, 24 Ky. L. R. 772, 69 S. W. 1108.

14. An answer to an action on notes and a contract cannot be amended by filing a plea, non est factum, which does not deny, but admits execution of the contract. National Comp. Scale Co. v. Eaves, 116 Ga. 511. In an action on a void contract the court properly refused to allow amendment of a petition since no cause of action could be made. Troy Buggy Works Co. v. Fife [Tex. Civ. App.] 74 S. W. 956. A petition setting forth no cause of action cannot be amended by an altogether different statement of facts. Shepherd v. Southern Pine Co., 118 Ga. 292.

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of action, an order for an amended complaint may be made.[15] The cause of action or defense stated in a pleading cannot be changed by amendment.[16] Amend-

15. People v. Sheriff, 78 App. Div. [N. Y.] 46.

16. **Amendments constituting departure:** Petition. Cobb v. Everett Clark Co. [Ga.] 45 S. E. 305; Atwater v. Hannah, 116 Ga. 745. Amendment to complaint in action for personal injuries as stating new cause of action. Chicago & E. I. R. Co. v. Wallace, 202 Ill. 129, 66 N. E. 1096. Held, in this case, the proposed amendment did not state a new cause of action and should have been allowed. Coyle v. Davidson, 86 N. Y. Supp. 1089; Brackin v. Bainbridge [Ga.] 46 S. E. 828. One test for determining whether a proposed amendment states a new cause of action is whether a recovery, under the original complaint, would bar any further recovery under the proposed amendment. Coyle v. Davidson, 86 N. Y. Supp. 1089. An amended complaint pleading part performance of a contract, and excuse for nonperformance of the remainder, does not change the cause of action, where the original complaint alleged full performance. Barnum v. Williams, 86 N. Y. Supp. 821. Amendments merely amplifying the original petition and not introducing a new cause of action are allowed. Woodward v. Miller [Ga.] 46 S. E. 847; Coleman v. Himmelberger, etc., L. & L. Co. [Mo. App.] 79 S. W. 981. Amendment not allowed. Southern R. Co. v. Parramore [Ga.] 46 S. E. 822; Moyer v. Ramsay-Brisbane Stone Co. [Ga.] 46 S. E. 844. Amendment of petition on new trial in action on a contract as stating a different cause of action. Simpson v. Carr, 25 Ky. L. R. 849, 76 S. W. 346. Amended petition in an action on account as stating a new cause of action, so as to be barred by limitation. Burton-Lingo Co. v. Beyer [Tex. Civ. App.] 78 S. W. 248. A petition for breach of contract cannot be amended to abandon the contract and set up another and different one. Lamar v. Lamar, etc., Drug Co., 118 Ga. 850. Amendment to petition in action to recover real property. Venable v. Burton, 118 Ga. 156. Plaintiff suing for negligence resulting in injury cannot amend his complaint on trial so as to recover for a nuisance. Moniot v. Jackson, 40 Misc. [N. Y.] 197. Petition in an election contest filed in time, but stating no grounds of contest, cannot be amended after time, since any amendment sufficient to give jurisdiction would make a new and different petition. Dilcher v. Schorik, 207 Ill. 528, 69 N. E. 807. An amendment to a suit for goods sold and delivered, seeking to recover for failure to deliver goods bought by plaintiff from defendant, is not allowable. Chapman v. Americus Oil Co., 117 Ga. 881. Amendment to a suit to recover damages for, and restrain trespass, adding a new party alleged to be the principal of the original defendant. Roberts v. Atlantic Real Estate Co., 118 Ga. 502. Amendment of complaint for trespass on mining property as presenting new issues. Mont. Ore-Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co., 27 Mont. 288, 70 Pac. 1114. Amendment to second petition for personal injuries in action brought within six months after dismissal of the first action. Savannah, F. & W. R. Co. v. Pollard, 116 Ga. 297. Plaintiff cannot amend his petition after verdict so as to set up facts and present issues not submitted to the jury nor referred to in the court's charge. Huron Dock Co. v. Swart, 24 Ohio Circ. R. 504. A complaint cannot be amended by allegations showing liability of a defendant against whom the original complaint showed no liability, and its allegations are directly contrary. Coker v. Monaghan Mills, 119 Fed. 706. Where defendant pleaded only the general issue in an action for work and labor, and asked leave, after close of plaintiff's evidence, to plead payment as to an item not previously claimed as payment, the amendment will be refused. Leek v. Flint [Miss.] 33 So. 494. An amended petition changing the cause of action cannot be allowed, though the cause of action stated therein does not differ from that stated in a prior amended petition, not objected to as stating a new cause of action, but as to which a demurrer was sustained. Purdy v. Pfaff [Mo. App.] 78 S. W. 824. Where in an action on contract, defendant set up a breach of a particular clause and trial was had after stipulation that facts stated in the answer were true, and the case was submitted without application by plaintiff to amend the complaint, or withdraw a juror, he could not have judgment directed for defendant set aside, and amend the complaint to set up a different cause of action. Elec. Boat Co. v. Howey, 88 App. Div. [N. Y.] 522. A complaint alleging willful tort cannot be amended to allege also a cause of action based on mere negligence: Rule not changed by Act 1898, § 2 (22 Stat. p. 693). Proctor v. Southern R., 64 S. C. 491. That contractors and owners of improvement warrants were made parties to a suit to restrain reassessment of property for street improvements will not authorize plaintiff to change the theory of the suit to one by taxpayers to cancel illegal warrants. Kadderly v. Portland [Or.] 75 Pac. 222. Where defendant unqualifiedly admits execution of a contract sued upon, and pleads a general denial or special defense, in no way questioning the validity of the contract, or the identity of the other party, an amended answer alleging that the contract was induced by fraud, and that defendant thought he was contracting with another, will not make evidence thereof admissible over proper objections. Jamison v. Cullom & Co., 110 La. 781. Substitution of allegations of waiver for general denial with respect to a defense of breach of conditions precedent does not change plaintiff's cause of action. German Ins. Co. v. Shader [Neb.] 93 N. W. 972. Right to file an amended reply may be refused in the district court, where it changes issues made up in the county court, where the case was first tried, and where the new matter alleged is barred by limitations. Johnston v. Chicago, B. & Q. R. Co. [Neb.] 97 N. W. 479. An amendment to the answer offered after close of the trial which would present a new issue may be refused in the court's discretion. Barnes v. Berendes, 139 Cal. 32, 69 Pac. 491, 72 Pac. 406. In an action for death of an employe on a construction train against the railroad company and the contractor, the answer could not be amended during trial to give facts showing

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ments changing the form of action cannot be made.[17] An amendment must not

that the contractor defendant was not operating or controlling the train. Pierce v. Brennan, 88 Minn. 50, 92 N. W. 507.

Amendments not departure: Amendment to petition. Gosnell v. Webster [Neb.] 97 N. W. 1060. Petition in action for injuries to servant. Louisville & N. R. Co. v. Pointer's Adm'r, 24 Ky. L. R. 772, 69 S. W. 1108. Amendment of complaint on contract between parents of illegitimate child for support thereof, amplifying the allegations as to consideration as not changing cause of action under Code Civ. Proc. § 723. Rosseau v. Rouss, 91 App. Div. [N. Y.] 230. Amendment alleging an express in lieu of an implied contract. Gunther Bros. & Co. v. Aylor, 92 Mo. App. 161. An amended complaint constituting a mere repetition of the primary cause of action, and enlarging on the facts is not a departure. Hasler v. Ozark L. & L. Co., 101 Mo. App. 136, 74 S. W. 465. Amendment to petition for divorce as not uniting different and distinct causes of action. Wells v. Wells, 118 Ga. 812. An amendment to the complaint after denial of a motion for nonsuit on plaintiff's evidence and before judgment, changing no issue and working no hardship to defendant may be allowed. Merrill v. Miller, 28 Mont. 134, 72 Pac. 423. An amendment correcting defects in the statement of the cause of action in the declaration is not a change of the cause of action, and is not amenable to limitations. Mott v. Chicago & M. El. R. Co., 102 Ill. App. 412. An amended petition is not a departure from the original, where the same evidence supports both, and the same judgment is to be rendered as to both. Boeker v. Crescent B. & P. Co., 101 Mo. App. 429, 74 S. W. 385. An amendment to a complaint to foreclose a mechanic's lien to set out specifically the alterations made, under the terms of the contract under which work on a building was done, did not embody a new cause of action and was allowable [Code Civ. Proc. §§ 723, 1018]. Perry v. Levenson, 82 App. Div. [N. Y.] 94. Amendment of a petition in an action for damages to add the name of a party plaintiff. Hucklebridge v. Atchison, T. & S. F. R. Co., 66 Kan. 443, 71 Pac. 814. An amended petition for personal injuries asking for greater damages and adding to the allegations of negligence and causation. Gulf, B. & K. C. R. Co. v. O'Neill [Tex. Civ. App.] 74 S. W. 960. An amendment to an equitable petition to trace trust funds, striking a prayer for recovery of land and substituting a prayer for accounting and money judgment, with a special lien on the land, does not set up a new and distinct cause of action. Jordan v. Downs, 118 Ga. 544. An amendment averring presentment of coupons to the commissioners' court and refusal of payment does not state a new cause of action, in an action on county bonds alleging a demand for payment. Martin County v. Gillespie County, 30 Tex. Civ. App. 307, 71 S. W. 421. Where a petition to recover possession of land alleged ownership in plaintiff under written evidence of title, an amendment alleging equitable ownership and right to possession at commencement of the action did not allege a new and distinct cause of action. McCandless v. Inland Acid Co., 115 Ga. 968. An amendment to a complaint for injuries received while employed in a mine, alleging defects in the condition of the ways, works, and machinery used in the mine, and incompetency of the superintendent, did not change the cause of action, where the complaint alleged defective construction of the works and appliances, and negligent operation. Tanner v. Harper [Colo.] 75 Pac. 404. Where the original complaint in an action for damages from fire set by a railroad engine alleges that the fire was caused by negligence of the railroad employes or defects in the engines, an amendment alleging that defendant carelessly allowed fire to burn material permitted to accumulate along its right of way, and negligently failed to supply its engines with spark arresters, does not state a new cause of action. Simpson v. Enfield Lumber Co., 133 N. C. 95. An amendment to a complaint for reassignment of stock, so as to allege fraud and mutual mistake, and ask reformation and cancellation of the original assignment, does not plead a new cause of action, so as to require defendant to pay all costs before amendment. Miller v. Carpenter, 79 App. Div. [N. Y.] 130, 12 Ann. Cas. 367. Where a complaint alleged that plaintiff was appointed as special prosecutor or prosecuting attorney in a criminal case, an amendment inserting "to assist the district attorney" instead of "as special prosecutor" is not a departure. Board of Com'rs of Hinsdale County v. Crump [Colo.] 70 Pac. 159. Amendment of a complaint on a written contract, so as to state a cause of action on quantum meruit is properly refused, after both parties have rested, and a motion for a directed verdict has been argued, the claim not being embraced in the action and being such as may require defendant to bring evidence from a distance. Jacobson v. Tallard, 116 Wis. 662, 93 N. W. 841. Where a claim in the county court for money paid and expended for defendants is met by general denial, and an allegation of payment by plaintiff, as guarantor of a note signed by defendants, and altered without their knowledge, and paid without request, an amendment in the district court alleging that one defendant was surety only, the money being paid for the other defendant, raises no new issue. Ball v. Beaumont [Neb.] 92 N. W. 170. A complaint for breach of contract in failing to pay an instalment due, no other obligations being due, may be amended to ask damages for breach of the whole contract, the amendment showing the contract to have been executory, and alleging that it was repudiated by defendant before suit. Northrop v. Mercantile T. & D. Co., 119 Fed. 969. Where an answer in an action on contract alleges that the contract was oral and invalid for that reason, and plaintiff fails to show a written contract as required by statute, the answer may be amended to change the admission of the contract into a denial [Contract of agency to sell realty invalid under Civ. Code § 1624, subd. 6]. Jamison v. Hyde, 141 Cal. 109, 74 Pac. 695.

17. Slater v. Fehlberg, 24 R. I. 574. A count for a tort cannot be added by amendment to a declaration on the common counts. Doyle v. Pelton [Mich.] 96 N. W. 483.

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surprise the adverse party.[18] An amendment is allowable where it merely amplifies the original petition by giving additional facts explanatory of the cause of action.[19]

Causes of action arising after commencement of the action, and out of the same transaction, may be brought in by amendment,[20] even though new parties are brought in,[21] but otherwise where they are independent causes of action.[22] Allegations shown necessary by the proof,[23] or other parties necessary to determination of the cause,[24] may be brought in by amendment, or to conform the pleading to the judgment.[25] Amendments cannot be made against the evidence already given.[26] A complaint may be amended to conform to jurisdiction as shown by the summons.[27] The prayer for recovery may be increased after proof.[28] That limitations have run will not prevent an amendment to a complaint amounting substantially to a restatement of the same cause of action, though in different form.[29] Plaintiff cannot be required to amend as to matters of defense.[30] Co-defendants in default cannot be

18. An amendment to the complaint after answer and general denial is not misleading and surprising to defendants, where it alleges a waiver of tender of balance due on a note, defendants having interposed a demurrer ore tenus, raising a failure of complainants to make the tender. Martin v. Bank of Fayetteville, 131 N. C. 121.

19. Woodley v. Coker [Ga.] 46 S. E. 89.

20. A petition to recover fire insurance may be amended to recover for additional injury to the same property by a subsequent fire [Civ. Code § 134]. Scottish Union & Nat. Ins. Co. v. Strain, 24 Ky. L. R. 958, 70 S. W. 274. On death of plaintiff's wife, pending his action for her injuries, an amendment to the petition alleging a cause of action for her death is proper. International & G. N. R. Co. v. Boykin [Tex. Civ. App.] 74 S. W. 93.

21. In a suit by husband and wife for her personal injuries, where she died pending suit, an amendment alleging a cause of action for her death, joining minor children, is not improper for misjoinder of parties. International & G. N. R. Co. v. Boykin [Tex. Civ. App.] 74 S. W. 93.

22. A complaint for breach of contract cannot be amended to allege a second breach occurring after commencement of the action and ask damages. Northrop v. Mercantile Trust & Deposit Co., 119 Fed. 969.

23. A complaint alleging a resulting trust may be amended to conform to proof tending to show an express trust. Kilham v. Western Bank & Safe Deposit Co., 30 Colo. 365, 70 Pac. 409. An allegation in a divorce complaint that plaintiff was a bona fide resident of the state is sufficient to confer jurisdiction, so that after verdict the complaint may be amended to conform to proof of residence in the county [Civ. Code §§ 75, 78]. Johnson v. Johnson, 30 Colo. 402, 70 Pac. 692. Where a complaint sought recovery on a five-year contract and the proof showed employment from year to year, the complaint may be considered amended to conform to the proof [Code Civ. Proc. § 723]. Brightson v. Claflin Co., 84 App. Div. [N. Y.] 557. Plaintiff may be permitted to amend his complaint by inserting other allegations material to the cause [Code, § 273]. Fidelity & Deposit Co. v. Jordan [N. C.] 46 S. E. 496. Where both parties to a contract introduced evidence on the question of agency of defendant for a third person, he may amend his answer to plead his agency. Cole v. Laird [Iowa] 96 N. W. 744. Petition and affidavit in replevin alleging special ownership of the property may be amended to allege general ownership. Suckstorf v. Butterfield [Neb.] 96 N. W. 654. A complaint against a city for personal injuries may be amended on trial to show that the statutory notice of intention to sue was given the corporation counsel [Laws 1886, p. 801, c. 572]. Shaw v. New York, 83 App. Div. [N. Y.] 212.

24. Another party plaintiff may be joined before answer on plaintiff's request [Burns' Rev. St. 1901, §§ 397, 399]. Frankel v. Garrard, 160 Ind. 209, 66 N. E. 687. Where a suit is brought by a guardian not qualified for an infant, another person may be substituted as next friend by amendment. St. Louis, I. M. & S. R. Co. v. Robertson [Ark.] 72 S. W. 893.

25. After a judgment awarding restitution of premises to plaintiff with reasonable rent while defendant was in possession, plaintiff may amend his petition to recover such rent. Fisher v. Musick's Ex'r, 24 Ky. L. R. 1913, 72 S. W. 787.

26. Where evidence in an action against a county for physician's services to the poor showed a contract with the board of trustees, services for the time claimed, and no bad faith appears, the answer cannot be amended to show that the trustees had not properly certified the account. Bay v. Monroe County [Iowa] 96 N. W. 854. Permission to amend a complaint by adding another count is properly refused where plaintiff's evidence shows no right to recover. Nash v. Southern R. Co., 136 Ala. 177.

27. Where the summons in a case of which the superior court has jurisdiction is returnable at chambers, but the complaint shows a cause necessary to be heard at term, it may be amended to bring the case within jurisdiction at chambers [Code §§ 623, 256, and 255 as amended by Laws 1887, p. 518, c. 276]. Ewbank v. Turner [N. C.] 46 S. E. 508.

28. After conclusion of the testimony in a personal injury case the complaint may be amended to increase the claim for damages. Clark v. Brooklyn Heights R. Co., 78 App. Div. [N. Y.] 478, 12 Ann. Cas. 333. Amendment of complaint enlarging cause of action allowed after interlocutory order adjudging that plaintiff was entitled to recover in action to compel delivery of shares of capital stock. Wilson v. Standard Asphalt Co., 81 App. Div. [N. Y.] 102.

29. Stoner v. Erisman, 206 Pa. 600.

30. Where plaintiff demanded less dam-

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brought in by amendment by defendant who appeared.[31] Insufficient denials in the answer may be amended.[32] Where the last of three paragraphs in a complaint for services merely claimed a balance due and prayed judgment, the answer need not be amended so as to deny it.[33] A petition stating a cause of action against defendants is sufficient to support amendment.[34]

The character of particular amendments is treated in the note.[35]

Statement and verification.[36]—Amendments should be made by rewriting the pleading, omitting and inserting allegations as may be necessary to make it a complete instrument.[37] An amendment to a count in assumpsit to supply the contract for items of account annexed is too faulty to be allowed where no promise by defendants is directly and positively asserted.[38] That an additional pleading filed under leave to amend the answer was called an "additional answer" will not prevent it from being regarded as an amendment to the answer filed.[39] An amended petition filed after demurrer is sustained to the petition may be stricken where it contains substantially the same averments as the original.[40] Leave to amend a pleading is not in itself an amendment,[41] nor discontinuance at trial of a count for mesne

ages than the amount of goods alleged to have been delivered defendant, as shown by the bill of particulars, he cannot be required to amend showing whether part payment had been made. Prince v. Takash, 75 Conn. 616.

31. Where one of several defendants files a plea in his own name he cannot thereafter amend to join his co-defendants in default. Burch v. Swift, 116 Ga. 595.

32. An answer, insufficient as a denial, because merely alleging that defendant was informed and believed that the allegations of the complaint were not true, and denying them, may be amended in the discretion of the court on proper application. Avery v. Stewart [N. C.] 46 S. E. 519.

33. Fogil v. Boody [Conn.] 56 Atl. 526.

34. Fidelity & Deposit Co. v. Nisbet [Ga.] 46 S. E. 444.

35. Particular amendments: Sufficiency of amendment of complaint for injuries from negligence on proof of intentional injury. Greathouse v. Croan [Ind. T.] 76 S. W. 278. Amendment of equitable action under Rev. St. 1899, §§ 663, 666. Cohn v. Souders, 175 Mo. 455, 75 S. W. 413. Amendment of answers merely that defendants may obtain the right to open and close. Bannon v. Ins. Co. of North America, 115 Wis. 250, 91 N. W. 666. Amendments to complaint by stockholders against receivers of a corporation to enforce a cause of action vested in the corporation and effect of orders relating to amendments. Craig v. James, 80 App. Div. [N. Y.] 16. Defendant in an action of quantum meruit for physician's services may amend an answer by adding a counterclaim based on allegations of misrepresentations by plaintiff that the services were necessary [Rev. St. 1898, § 2656]. Ladd v. Witte, 116 Wis. 35, 92 N. W. 365. Amendment of petition, filed without leave of court, in action against partnership, concerning realty, to show amounts of money furnished the firm to buy the land, and asking personal judgment against the members of the firm. Moorman v. Schmidt [Ohio.] 69 N. E. 617. A petition for abatement of a liquor nuisance on relation of a city superintendent of police may be amended by substituting the state solicitor, and denominating the proceeding an information for violation of the liquor law [Pub. St. c. 222, §§ 7, 8, 11]. State v. Lynch [N. H.] 55 Atl. 653. A petition by a town for annexation of territory may be amended, on appeal to the circuit court, to omit part of the lands originally included. McCoy v. Board of Trustees of Cloverdale, 31 Ind. App. 331, 67 N. E. 1007. Where in an action against a physician the complaint charged unskillful treatment in one paragraph, together with allegations of unnecessary exposure and improper liberties with plaintiff's person, plaintiff was properly permitted to file a second paragraph setting up an assault. Thomas v. Dabblemont, 31 Ind. App. 146, 67 N. E. 463. That a petition for personal injuries against a railroad company affirmatively alleges defendant's negligence, will not estop plaintiff from amending a second petition, in renewal of the action, within six months after dismissal, so as to allege that plaintiff did not know of the existence of negligence until after the first action was brought, and on account of such ignorance had been fraudulently induced by an agent of the company to make a settlement with it. Savannah F. & W. R. Co. v. Pollard, 116 Ga. 297. In an action to recover for misrepresentations as to the amount of land conveyed by defendants to plaintiff, a trial amendment, after close of the evidence, alleging that if defendants' representations were not fraudulent both parties were honestly mistaken and plaintiff was entitled to an abatement of the price, was properly allowed in discretion where the court gave defendants an opportunity to give additional testimony and they did not request leave to withdraw their announcement of ready for trial. Lewis v. Hoeldtke [Tex. Civ. App.] 76 S. W. 309.

36. Amendment to petition for divorce not demurrable as uniting different and distinct causes of action. Wells v. Wells, 118 Ga. 812.

37. Satterlund v. Beal [N. D.] 95 N. W. 516.

38. Brown v. Starbird [Me.] 56 Atl. 902.

39. Lange v. Union Pac. R. Co. [C. C. A.] 126 Fed. 388.

40. McKee v. Ill. Cent. R. Co. [Iowa] 97 N. W. 69.

41. Landt v. McCullough, 103 Ill. App. 668.

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profits in a declaration of ejectment.[42] Merely granting leave to amend is not amendment. If the pleading is not redrawn the amendment is deemed abandoned.[43]

The affidavit of an attorney cannot be accepted in lieu of that of his client on application for leave to amend an answer for matters of defense unknown to defendant at the filing unless it is shown that the motion must be made before the client's affidavit can be secured.[44] The affidavit of the attorney who had no personal knowledge of the facts could not be taken instead of that of the party on an application to amend the answer because of a defense unknown to defendant when the answer was filed.[45] That an affidavit filed with a motion for leave to amend a complaint was made by the managing clerk of plaintiff's attorney instead of plaintiff is no ground for objection where there is no laches of plaintiff to be excused under the nature of the amendment.[46] Where defendant is present at the trial, a plea setting up new facts cannot be permitted without requiring an affidavit that the omission was not made from the original plea for delay and that the amendment was not offered for delay.[47]

Effect of amendment.—Amendment of a pleading allowed relates back to the original,[48] and supersedes it,[49] operating as an abandonment or withdrawal of it,[50] unless it changes the cause of action;[51] but it does not change the trial term.[52] An amendment to a declaration stating a different cause of action is amenable to the statute of limitations.[53] A claim first made in an amended petition, filed after time to sue thereon has expired, is barred.[54] A complaint cannot be objected to because it alleges a release given before the injury occurred where an amendment

42. Act Md. 1785, c. 80. Crandall v. Lynch, 20 App. D. C. 73.

43. Satterlund v. Beal [N. D.] 95 N. W. 518.

44. Mut. Loan Ass'n v. Lesser, 81 App. Div. [N. Y.] 138.

45. Henry v. Talcott, 89 App. Div. [N. Y.] 76.

46. Kent v. Aetna Ins. Co., 88 App. Div. [N. Y.] 518.

47. Bass Dry Goods Co. v. Granite City Mfg. Co. [Ga.] 45 S. E. 980.

48. Petition. Wells v. Wells, 118 Ga. 812. An amended complaint speaks from the filing of the original complaint. Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042. Amendment to petition in action for injuries to servant held to relate back to filing of petition and service of summons. Louisville & N. R. Co. v. Pointer's Adm'r, 24 Ky. L. R. 772, 69 S. W. 1108. An amendment to a petition for damages adding the name of a party plaintiff more than two years after the cause accrued relates back to the commencement of the action. Hucklebridge v. Atchison, T. & S. F. R. Co., 66 Kan. 443, 71 Pac. 814. Amendment by leave of court of a petition not signed when filed will relate back to the date of filing where defendants appeared and answered at the succeeding term waiving issuance and service of citation. Vitkovitch v. Kleinecke [Tex. Civ. App.] 75 S. W. 544.

49. Filing an amended complaint carries the original and rulings thereon out of the record. Hershberger v. Kerr, 159 Ind. 357, 65 N. E. 4. An amended complaint becomes the only complaint in the case and is as effectual as though filed at the commencement of action. Meeks v. Meeks, 87 App. Div. [N. Y.] 99. An amended complaint, complete in itself, and not referring to or adopting the original complaint as a part of it, supersedes the other. U. S. v. Gentry [C. C. A.] 119 Fed. 70. Where an amended statement in an action, filed by leave of court, gives facts sufficient to remove the bar of limitations shown by the original, the amended statement is the only one before the court and a demurrer will not lie because it is inconsistent with the original. Barclay v. Barclay, 206 Pa. 307. An original declaration, to which an amended declaration has been filed, remains a part of the record. Abbott v. Bowers [Md.] 57 Atl. 538.

50. Where defendant under leave to amend files a new plea of the same number as the original, the latter is considered withdrawn. Medairy v. McAllister [Md.] 55 Atl. 461. On death of plaintiff's wife pending his action for her injuries, an amendment to the petition alleging a cause of action for her death operates as an abandonment of the first action. International & G. N. R. Co. v. Boykin [Tex. Civ. App.] 74 S. W. 93.

51. An amendment amounting merely to a restatement of the original cause of action relates back to the filing of the original complaint; it is otherwise as to one stating a new cause of action. Shroyer v. Pittenger, 31 Ind. App. 158, 67 N. E. 475.

52. An amendment allowed to a petition does not change the trial term. Wells v. Wells, 118 Ga. 812.

53. Shroyer v. Pittenger, 31 Ind. App. 158, 67 N. E. 475. Amended petition as showing transaction of parties beginning the statute of limitations. Bluntzer v. Hirsch [Tex. Civ. App.] 75 S. W. 326.

54. Fisher v. Musick's Ex'r, 24 Ky. L. R. 1913, 72 S. W. 787.

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changing the date of the release was allowed.[55] Where there is no answer to an amended complaint which states a good cause of action, judgment cannot be rendered for defendants.[56] An answer may be ordered to be made more definite as to allegations admitted and denied, and the order will not prevent defendant from setting up additional defenses in his amended answer.[57] A petition in action for price of goods brought in the county of the seller's residence, failing to allege that the contract was made in writing in the county where the action was brought, the buyer residing elsewhere, is cured by an amendment that after settlement of the balance due he contracted in writing to pay the money sued for at the county seat of the county where the action was brought.[58]

§ 8. *Supplemental pleadings. Propriety and allowance.*—Supplemental answer may be allowed as well after as before judgment.[59] Permission to file a supplemental answer,[60] or an additional plea,[61] is discretionary. Where a supplemental petition was stricken for failure to serve notice on defendant, leave may be given immediately thereafter to file the petition.[62] A supplemental answer setting out new matter arising after the cause is on the calendar and ready for trial must only be allowed on full indemnity to plaintiff.[63]

Matter of supplement and mode of pleading.[64]—Where a defense set up by affidavit is presumably good though insufficiently stated, a supplemental affidavit may be allowed.[65] A supplemental complaint cannot set up a different and subsequent cause of action to that in the original complaint.[66] Where the insured dies pending an action to reform a policy, the assignee of the interest thereunder may file a supplemental complaint after his substitution asking reformation and recovery on the policy.[67] If it does not clearly appear that a judgment set up by supplemental answer would not amount to a defense, the court at special term should not refuse leave to serve the answer but should remit to the trial court the questions involved in determining the effect of the plea.[68] Where an underwriter sued by a manager of Lloyd's set up as defense a judgment against him in excess of his liability to Lloyd's, a modification of the judgment on subsequent appeal before answer filed may be set up in the answer as a partial defense, a supplemental answer being unnecessary.[69]

§ 9. *Motions upon the pleadings.*—A motion to strike out all or part of a bill of complaint is in the nature of a demurrer.[70] Allowance of motions on the pleadings is generally discretionary.[71] Where a claim against an estate is tried in

55. Seaboard A. L. R. Co. v. Main, 132 N. C. 445.

56. Thompson v. Morgan [Ind. T.] 69 S. W. 920.

57. Morgan v. Sammons, 66 S. C. 388.

58. Flynt v. Eagle Pass C. & C. Co. [Tex. Civ. App.] 77 S. W. 831.

59. State v. Dist. Ct. of Ramsey County [Minn.] 97 N. W. 581.

60. McDaniels v. Gowey, 30 Wash. 412, 71 Pac. 12.

61. Pierpont v. Johnson, 104 Ill. App. 27.

62. Diedrich v. Diedrich [Neb.] 94 N. W. 536.

63. Terms of supplemental answer as costs and disbursements of action to time of motion and leave to plaintiff to discontinue without costs at his election. Pickrell v. Mendel, 87 App. Div. [N. Y.] 163.

64. Supplemental answer in suit to enforce mortgage as stating defense. May v. Ball, 24 Ky. L. R. 875, 70 S. W. 196.

65. Andrews v. Blue Ridge Packing Co., 206 Pa. 370.

66. Smith v. Bach, 82 App. Div. [N. Y.] 608.

67. No new cause of action is made [Code Civ. Proc. § 544]. Hunt v. Provident S. L. Assur. Soc., 77 App. Div. [N. Y.] 338.

68. Rio Tinto Copper Min. Co. v. Black, 85 N. Y. Supp. 1116.

69. Code Civ. Proc. § 544. Burke v. Rhoads, 39 Misc. [N. Y.] 208, 82 App. Div. 325.

70. Rule 213. Stevenson v. Morgan, 63 N. J. Eq. 707.

71. Motion to strike a plea because filed without leave is discretionary. Lester v. Johnston, 137 Ala. 194. A motion to strike off an entry of satisfaction of a judgment is addressed to the discretion of the court. Shoup v. Shoup, 205 Pa. 22. Where several pleadings filed raise no new issue or plead no new matter, the court has discretion to strike them from the files. Woolley v. Louisville, 24 Ky. L. R. 1357, 71 S. W. 893.

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the probate court, refusal of a motion to make the petition more definite and certain after appeal to the district court is not prejudicial.[72]

Time of motion.—Motions to strike an answer for defect in form must be made before the trial term.[73] If a petition is so defective that recovery cannot be had, a motion to dismiss in nature of a general demurrer may be made at any time before verdict.[74] A motion before trial to exclude evidence as to items in the bill of particulars because not in the complaint will be refused.[75] A motion to conform the pleadings to the proof cannot be made after close of the evidence where the evidence when offered was objected to because it did not support the pleading.[76] Where plaintiff declares in separate counts on two instruments making inconsistent allegations as to the relations of the parties to the instruments, a motion to compel plaintiff to elect comes too late after pleading to the declaration.[77]

Grounds of motion.—A motion for judgment on the pleadings will not lie where an issue is framed.[78] A motion to strike out applies to evasive, ambiguous, or uncertain parts of a pleading.[79] A motion to strike irrelevant matter from a pleading will not lie when, under any possible circumstances, evidence of the facts pleaded therein can have any bearing on the subject-matter of litigation.[80] Traverse of an officer's return of service may be stricken where he is not made a party and has no notice of the filing of the traverse.[81] Where a party believes that answers to interrogations warrant a larger verdict for him than is given by the general verdict, he may move for judgment non obstante veredicto.[82] The various grounds assigned in the cases for motions addressed to the petition, complaint or declaration,[83] the answer,[84] the plea,[85] or the reply,[86] are assembled in the notes.

72. Bonebrake v. Tauer, 67 Kan. 827, 72 Pac. 521.

73. Green v. Hambrick, 118 Ga. 569.

74. Kelly v. Strouse, 116 Ga. 872.

75. The objection is proper at trial. Chamberlain v. Loewenthal, 138 Cal. 47, 70 Pac. 932.

76. Rowe v. Gerry, 86 App. Div. [N. Y.] 349.

77. Dives v. Fidelity & Casualty Co., 206 Pa. 199.

78. Moore v. Murray [Mont.] 75 Pac. 515. A motion for judgment on the pleadings should be denied where they raise a question of fact to be tried. Noland v. Owens [Okl.] 74 Pac. 954. Where the complaint pleads overdue bond coupons, the answer avers payment, and the reply denies payment, there is an issue presented which plaintiff is entitled to have submitted to a jury. Kimber v. Gunnell Gold Min. & Mill Co. [C. C. A.] 126 Fed. 137.

79. Peacock v. U. S. [C. C. A.] 125 Fed. 583.

80. Dinkelspiel v. N. Y. Evening Journal Pub. Co., 91 App. Div. [N. Y.] 96.

81. O'Connell Bros. v. Friedman, 118 Ga. 831.

82. Wood v. Wack, 31 Ind. App. 252, 67 N. E. 562.

83. Motion to make petition on contract more specific as to sales made denied. Currie Fertilizer Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268. A declaration may be stricken out on notice as defective though demurrer will not lie [Prac. Act, § 132, 2 Gen. St. p. 2555]. Malberti v. United Elec. Co. [N. J. Law] 54 Atl. 251. Merely pleading evidence will not warrant striking an allegation from a complaint on motion. Vogt v. Vogt, 86 App. Div. [N. Y.] 437. A motion to strike a contract exhibited to the summons will not lie when it is a part of each of the notes sued upon. Nat. Computing Scale Co. v. Eaves, 116 Ga. 511. Motions to strike out allegations from the complaint will never lie unless they prejudice the moving party. Rockwell v. Day, 84 App. Div. [N. Y.] 437. A motion to strike a paragraph for impertinence or irrelevancy fails if any portion is relevant or responsive. Thompson v. Williamson [N. J. Eq.] 54 Atl. 453. A motion to make a petition more specific in certain particulars is overruled without error where plaintiff's proof did not prove or vary in proof from the allegations in those particulars. Brown v. Chillicothe [Iowa] 98 N. W. 502. One defendant cannot move to strike allegations from the complaint not essential as to him but material against the other defendants [Code Civ. Proc. § 545]. Brown v. Fish, 76 App. Div. [N. Y.] 329. While a decision on demurrer to the petition sustaining the latter is unreversed, defendant cannot question the sufficiency of the petition by oral motion to dismiss. Ga. Northern R. Co. v. Hutchins [Ga.] 46 S. E. 659. A motion to strike allegations from a complaint is properly refused where the effect would be to change the cause of action. Klipstein v. Raschein, 117 Wis. 248, 94 N. W. 63. A motion to strike out an amended supplemental petition aimed at it as a whole is a general exception so that if any part presents a valid replication to any part of the answer it is properly overruled. San Antonio Traction Co. v. Bryant, 30 Tex. Civ. App. 437, 70 S. W. 1015. Where plaintiff on his own motion files a first and second amended petition and corrects clerical errors in the amendments, a motion to strike out his petition will not lie. Antonelli v. Basile, 93 Mo. App. 138. Where plaintiff again inserts the objectionable matter in his petition after a

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Sufficiency of motion.—A motion to strike a paragraph from a complaint as irrelevant and redundant must show prejudice.[87] A motion for direction of verdict for variance must show specifically in what the variance consists.[88] On motion to require a petition to be made more specific, defendant should show that he does not possess the desired knowledge, by affidavit or otherwise.[89] A notice of a motion by a receiver of a corporation for judgment against stockholders is sufficient though it does not state that they reside in the county.[90]

Decision on motion.—A motion to make a complaint more specific does not present an issue of law to be determined before issues of fact.[91] Where objection that the complaint does not state a cause of action is not taken until the trial, greater latitude of presumption is allowed than on demurrer.[92] Motion for judgment on the pleadings not only admits the truth of allegations of his adversary but also the untruth of his own allegations denied by the adversary.[93] Judgment for defendant may be entered after overruling plaintiff's motion for judgment on the pleadings where plaintiff did not proceed on the merits but stood on his motion.[94] Where facts specially pleaded in defense were repeated by way of counterclaim which did not warrant affirmative relief, a finding to that effect obviates any error in refusing to strike out the counterclaim.[95]

§ 10. *Mode of asserting defenses and objections whether by demurrer, motion, etc. Matters of substance.*—The remedies for defects in pleading in North Dakota are distinct and must be applied exclusively; if one is used when the other applies the latter should not be granted.[96] Preliminary objections, such as denial of the right to sue, or want of capacity in either party, must be urged before the

demurrer has been sustained for misjoinder of causes of action, a motion will lie to strike such allegations from the pleadings. Reed v. Reed [Neb.] 98 N. W. 73. Where two separate and well pleaded causes of action are united in one petition and a general denial filed together with a good plea of former adjudication as to one cause, a motion for judgment on the pleadings as to both causes cannot be sustained. Fouts v. Pettigrew [Kan.] 74 Pac. 1107. In an action based on a township warrant for goods sold, a motion to make the complaint more definite and certain will not lie because the complaint did not state that the goods were necessary and suitable, and their probable value, where it showed the organization of the county board as auditors of the warrants and every step required in the audit of the warrant sued on. Mitchelltree School Tp. v. Hall [Ind. App.] 68 N. E. 919.

84. Where the answer is frivolous plaintiff may move for judgment on the pleadings though he has filed a reply. Soper v. St. Regis Paper Co., 76 App. Div. [N. Y.] 409. Where a motion to make an answer more definite and certain only affected the part of the answer containing a denial, the affirmative defenses remained intact and plaintiff should have replied thereto. Ritchey v. Home Ins. Co., 98 Mo. App. 115, 72 S. W. 44. A motion to strike out a matter of defense in an answer in the district court because not in issue in the county court on first trial will not lie where such matter was pleaded below and only set out more fully in the district court. Martens v. Pittock [Neb.] 92 N. W. 1038. In an action against an owner of a building for injuries received because of part of the structure blowing from the roof into the street in a wind storm, an allegation in the answer that the cause was solely plaintiff's negligence is not ground for motion to strike [Code Civ. Proc. § 545]. Uggla v. Brokaw, 77 App. Div. [N. Y.] 316.

85. That a plea was similar to another plea in the defense will not be ground for a motion to strike, where its object is recoupment and the other plea is only in defense, and additional facts are set up. Troy Grocery Co. v. Potter [Ala.] 36 So. 12.

86. A motion to strike matter from a reply is properly overruled where it includes matter both proper and improper for reply. German Ins. Co. v. Stiner [Neb.] 96 N. W. 122. Where a reply sets up new matter in avoidance of the defense in the answer, amounting fairly to a departure from the petition, a motion to strike out such matter will lie. Merrill v. Suing [Neb.] 92 N. W. 618.

87. Vogt v. Vogt, 86 App. Div. [N. Y.] 437.

88. Ill. Cent. R. Co. v. Behrens [Ill.] 69 N. E. 796.

89. Howard v. Western Union Tel. Co., 25 Ky. L. R. 828, 76 S. W. 387.

90. Code §§ 3244, 3260. Reed v. Gold [Va.] 45 S. E. 862.

91. Mills' Ann. Code, §§ 171, 174. Cerussite Min. Co. v. Anderson [Colo. App.] 75 Pac. 158.

92. Holtz v. Hanson, 115 Wis. 236, 91 N. W. 668.

93. Walling v. Bown [Idaho] 72 Pac. 960.

94. Code Civ. Proc. § 741. Moore v. Murray [Mont.] 75 Pac. 515.

95. Dwyer v. Rohan, 99 Mo. App. 120, 73 S. W. 884.

96. Remedies given by Rev. Codes, 1899, §§ 5282, 5284. Johnson v. Great Northern R. Co. [N. D.] 97 N. W. 546.

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merits are reached.[97] Objection to a plea of set off as improper under the statute should be made by replication.[98] If counts in a declaration are bad, defendant must demur or move in arrest of judgment.[99] Objection that no cause of action appears by the petition may be made at any stage of the action,[1] but if the petition is first attacked after answer by objection to introduction of evidence instead of by demurrer, it will be liberally construed.[2] If plaintiff is not limited by an order regulating the form of his complaint, the special term in New York cannot strike out a whole cause on motion; whether there is a cause of action can only be determined on trial after filing of demurrer or answer.[3] After default an objection that the complaint does not state a cause of action may be made by motion to set aside but not by oral demurrer.[4] An order to strike out allegations of a pleading should be made only when they are clearly immaterial or irrelevant and cannot justify admission of evidence; if any doubt exists, the remedy is demurrer or other objection at the proper time.[5] Pleas neither frivolous, irrelevant, nor prolix cannot be stricken on motion but demurrer must be filed.[6] Where an answer contains allegations amounting to both a defense and a counterclaim; whether it sets forth both defenses, and the right to assert a counterclaim if properly alleged, may be raised by demurrer instead of motion to strike out.[7] Failure of a complaint for injuries against a village to allege that the statutory period had elapsed since filing the claim may be raised by demurrer, the complaint not stating a cause of action.[8] The remedy for allegation in a complaint of damages barred by limitation, and also damages which must have arisen after commencement of suit, is by motion to strike out and not demurrer.[9] Where plaintiff's statement of cause of action shows that he cannot avoid the bar of limitations, it may be raised by demurrer in Connecticut.[10] Where the complaint shows that an action is brought prematurely, demurrer will lie; if the defect does not so appear it must be raised by answer in abatement.[11] If a petition on contract does not show the contract illegal, an objection to introduction of evidence cannot be made on that ground.[12] Motion for judgment on the pleadings will not lie to settle important questions of law or dispose of the merits, demurrer being the remedy.[13] A motion ne recipiatur if regarded as one not to receive pleas, or to strike out, will not lie to pleas already received and filed, the proper motion being to rescind the order of leave to file and to strike out.[14] An exhibit referred to in a reply but not annexed thereto, no copy being furnished defendant until trial before a justice, is a part of the reply so that defendant's remedy for inspection was by motion.[15] Where each of several defenses in an answer denies material allegations of the complaint, and the denials might have been

97. Stewart v. Smith, 98 Me. 104.

98. Hall v. Greene, 24 R. I. 286.

99. Ill. Cent. R. Co. v. Leiner, 103 Ill. App. 438.

1. Tracey v. Grezaud [Neb.] 93 N. W. 214. Failure of an heir at law seeking to recover personalty of the ancestor at time of death to plead facts regarding the transmission of the property cannot be reached by demurrer for want of capacity to sue or defect of parties plaintiff; the defect goes to the cause of action and may be raised at any time. McKenney v. Minahan [Wis.] 97 N. W. 489. A petition so defective that after verdict a motion in arrest of judgment would be sustained may be dismissed at trial. Brown v. Ga. C. & N. R. Co. [Ga.] 46 S. E. 71.

2. George Adams & Frederick Co. v. South Omaha Nat. Bank [C. C. A.] 123 Fed. 641.

3. Craig v. James, 80 App. Div. [N. Y.] 16.

4. Code, § 195. Gillian v. Gillian, 65 S. C. 129.

5. John Church Co. v. Parkinson, 86 App. Div. [N. Y.] 163.

6. Dalton v. Bunn, 137 Ala. 175.

7. John Church Co. v. Parkinson, 86 App. Div. [N. Y.] 163.

8. Laws 1897, p. 453, c. 414, § 322. Thrall v. Cuba, 88 App. Div. [N. Y.] 410.

9. Crossen v. Grandy, 42 Or. 282, 70 Pac. 906.

10. Davis v. Mills [C. C. A.] 121 Fed. 703.

11. Burns' Rev. St. 1901, § 342, cl. 5, and § 346. Middaugh v. Wilson, 30 Ind. App. 112, 65 N. E. 555.

12. Horton v. Rohlff [Neb.] 95 N. W. 36.

13. Jones v. Procter, 24 Ohio Circ. Ct. R. 80.

14. Horner v. Plumley, 97 Md. 271.

15. New Idea Pattern Co. v. Whelan, 75 Conn. 455.

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stricken on motion, a demurrer will not lie while they remain though other matter pleaded does not amount to a defense.[16] A general demurrer will not lie against a declaration stating separable demands, some good and some bad, the remedy, since abolition of special demurrers, being by motion to strike out.[17] A general objection to evidence under the complaint because it fails to state a cause of action without specifying wherein the pleading is insufficient will not be entertained.[18]

Uncertainty or indefiniteness in particular allegations as to the cause of action or defense must generally be raised by motion to make definite and certain, or to make more specific,[19] or by motion for bill of particulars;[20] but not by motion to strike out,[21] except in New Jersey,[22] nor on trial by a request for direction of verdict at close of plaintiff's evidence.[23] The lack of necessary allegations cannot be raised by motion to make more definite.[24] Failure of a complaint to determine an adverse claim to a mining location to allege that suit was brought within the statutory period is not a jurisdictional defect and can be raised only by demurrer.[25] Insufficiency of a plea is ground for demurrer not motion to strike.[26] Objections to sufficiency of an amended complaint taken by answer are subject to demurrer.[27] Objection to inconsistent defenses must be by motion to strike and cannot be raised by a requested instruction.[28] The sufficiency of new matter in a pleading filed in

16. Code Civ. Proc. § 545. Uggla v. Brokaw, 77 App. Div. [N. Y.] 310.

17. Peter v. Middlesex & S. Traction Co. [N. J. Law] 55 Atl. 35. An averment stating an alternative liability should be demurred to, the defect not being available under a general denial. Cronan v. Woburn [Mass.] 70 N. E. 38.

18. Pine Tree Lumber Co. v. Fargo [N. D.] 96 N. W. 357.

19. Uncertainty of a petition can only be raised by motion to make more specific. Baltimore & O. R. Co. v. State, 159 Ind. 510, 65 N. E. 508. Remedy for uncertainty in a complaint is motion to make more specific. Blanchard, etc., Furniture Co. v. Colvin [Ind. App.] 69 N. E. 1032. Defective statement of a material fact in a complaint is ground for motion to make more specific, not for demurrer. Mulky v. Karsell, 31 Ind. App. 595, 68 N. E. 689. If allegations of a complaint are indefinite and uncertain the remedy is by motion to make definite and certain [Code Civ. Proc. § 546]. People v. Buell, 85 App. Div. [N. Y.] 141. If allegations in the complaint in the alternative render it uncertain, the remedy is by motion to make definite and certain and not by demurrer. Hasberg v. Moses, 81 App. Div. [N. Y.] 199. Where facts in one paragraph of the complaint taken with other facts therein make a cause of action, greater particularity can be secured by motion to make definite and certain and not by general demurrer. Weiser v. Holzman [Wash.] 73 Pac. 797. Motion to make more definite and not demurrer is the remedy where the complaint states that acts were done both willfully and negligently. Schumpert v. Southern R. Co., 65 S. C. 332. Where a complaint for possession of land fails to state the nature of plaintiff's title the remedy is by motion to make more definite. Livingston v. Ruff, 65 S. C. 284. Where a pleading is too indefinite to enable the other party to understand the precise nature of its allegations, the remedy is by motion to make more definite. Seaboard A. L. R. Co. v. Main, 132 N. C. 445. Defects in an answer which as a whole sets up a good defense should be corrected by motion to make more definite and certain. Moore & Co. v. Rooks [Ark.] 76 S. W. 548. A motion is a proper remedy to require a complaint to be made more definite and certain and defendants are not limited to a demand for a bill of particulars. Viner v. James, 92 App. Div. [N. Y.] 542.

20. Where the pleadings are definite and certain as to the nature of the charge or defense but further particulars are required for further pleading or preparation for trial a bill of particulars should be asked. Johnson v. Great Northern R. Co. [N. D.] 97 N. W. 546. A complaint alleging that rock fell upon plaintiff from the side wall while working in defendant's mine cannot be required to be amended to show the part of the mine from which the rock fell, by motion to make definite and certain the remedy being by bill of particulars [Code Civ. Proc. §§ 546, 158]. Dumar v. Witherbee, 88 App. Div. [N. Y.] 181.

21. Computing Scales Co. v. Long, 66 S. C. 379.

22. Lack of certainty in the cause of personal injuries as stated in the declaration is not ground for general demurrer but for motion to strike out the declaration. Minnuci v. Phila. & R. R. Co., 68 N. J. Law, 432.

23. Harrison v. Self [Mo. App.] 77 S. W. 91.

24. Where a complaint for damages from fire set by a railroad engine fails to state the time of day when the engine passed, a motion to make more definite and certain is not the proper remedy. Johnson v. Great Northern R. Co. [N. D.] 97 N. W. 546.

25. Rev. St. U. S. §§ 2325, 2326; Code Civ. Proc. Mont. § 1322. Hopkins v. Butte Copper Co. [Mont.] 74 Pac. 1081.

26. Troy Grocery Co. v. Potter [Ala.] 36 So. 12.

27. Code Civ. Proc. § 498. Nellis v. Rowles, 41 Misc. [N. Y.] 313.

28. Harper v. Fidler [Mo. App.] 78 S. W. 1034.

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place of one to which a demurrer has been sustained cannot be tested by a motion to strike.[29]

A defect of parties not appearing on the face of the petition must be raised by answer not demurrer.[30] Generally misjoinder of parties cannot be raised by demurrer,[31] except in Missouri[32] and Georgia; in the latter state special demurrer will lie.[33] Notice of misjoinder is the remedy in New Jersey.[34] Misjoinder of parties defendant not being new matter cannot be raised by answer in New York.[35] Misjoinder of causes of action must be raised by demurrer.[36] The statute of limitations is waived if not pleaded by answer.[37] The defense of statute of frauds must be raised by demurrer, not answer, in Iowa;[38] it may be made by answer in Arkansas[39] or in New York.[40]

Matters of form.—Failure to verify an answer is not ground for demurrer though it may be stricken on motion.[41] Objections to formal defects in a pleading must be raised by motion to make more specific and definite and not by demurrer.[42] Where more than one cause of action is stated in one paragraph of a complaint, the remedy is by motion to separate or by demurrer for misjoinder.[43] Demurrer will not lie to a defense containing a general denial though other matter pleaded is no defense, but such other matter will be stricken out on motion.[44] Where a denial in an answer does not comply with the statute, motion may be made, or the allegation may be treated as not tendering an issue.[45] A motion to strike out not demurrer is the remedy where matter alleged as a separate defense could be proved under the general denial.[46] Allegations in an action for fire insurance that plaintiff refused to be examined concerning the loss as required in the policy cannot be pleaded in abatement but must be set up by answer.[47] Misjoinder either of actions or parties must be raised by plea in abatement, or, where it appears on the face of the petition, by special exception in the nature of such plea.[48] Duplicity is ground for

29. Watkins v. Iowa Cent. R. Co. [Iowa] 98 N. W. 910.

30. Guthrie v. Treat [Neb.] 93 N. W. 595.

31. Misjoinder of parties is not ground for demurrer but motion should be made for abatement of the suit as to the party improperly joined [Acts 1895, 1896, p. 452, c. 423]. Riverside Cotton Mills v. Lanier [Va.] 45 S. E. 875. Demurrer will not lie for misjoinder of parties defendant [Code Civ. Proc. § 488]. Adams v. Slingerland, 87 App. Div. [N. Y.] 312. Demurrer to the evidence will not reach misjoinder of parties plaintiff. Groenmiller v. Kaub, 67 Kan. 844, 73 Pac. 100.

32. Misjoinder of parties must be raised by demurrer. Doyle v. St. Louis Transit Co. [Mo. App.] 77 S. W. 471.

33. Misjoinder of plaintiffs must be raised by special demurrer in due time. Rusk v. Hill, 117 Ga. 722.

34. Misjoinder of a wife with her husband as plaintiff must be raised by notice of misjoinder [Prac. Act, Gen. St. 2539]. Peterson v. Christianson [N. J. Err. & App.] 56 Atl. 288.

35. Code Civ. Proc. § 500. Adams v. Slingerland, 87 App. Div. [N. Y.] 312.

36. Teague v. Collins [N. C.] 45 S. E. 1035. Whether there is a misjoinder of causes of action in a complaint cannot be considered on a motion for remand after removal of the causes. Fogarty v. Southern Pac. Co., 123 Fed. 973.

37. Rev. Codes 1899, § 5184. Satterlund v. Beal [N. D.] 95 N. W. 518; Cone v. Hyatt, 132 N. C. 810; Anderson v. McNeal [Miss.] 34 So. 1. The defense of limitations must be pleaded and cannot be raised by demurrer [At common law or under Proc. Act, May 25, 1887, P. L. 271]. Barclay v. Barclay, 206 Pa. 397.

38. Marr v. Burlington, C. R. & N. R. Co. [Iowa] 96 N. W. 716.

39. St. Louis, I. M. & S. R. Co. v. Hall [Ark.] 74 S. W. 293.

40. Kramer v. Kramer, 90 App. Div. [N. Y.] 176; Banta v. Banta, 84 App. Div. [N. Y.] 138.

41. Butterfield v. Graves, 138 Cal. 155, 71 Pac. 510.

42. Grant v. Commercial Nat. Bank [Neb.] 93 N. W. 185.

43. Blanchard, etc., Furniture Co. v. Colvin [Ind. App.] 69 N. E. 1032.

44. Code Civ. Proc. § 545. Blaut v. Blaut, 41 Misc. [N. Y.] 572.

45. Downing North Denver Land Co. v. Burns, 30 Colo. 283, 70 Pac. 413.

46. Code Civ. Proc. § 500, subd. 2. Kraus v. Agnew, 89 App. Div. [N. Y.] 1. Where an answer contains several counts each of which sets up as a defense matter which is not new because not extrinsic to the matter of the complaint and which is capable of proof under former denials, a motion to strike the redundant matter and not a demurrer is the proper remedy [Code Civ. Proc. § 545]. Uggla v. Brokaw, 77 App. Div. [N. Y.] 310.

47. Scottish Union & Nat. Ins. Co. v. Strain, 24 Ky. L. R. 958, 70 S. W. 274.

48. Brooks v. Galveston City R. Co. [Tex. Civ. App.] 74 S. W. 330.

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special demurrer at common law; under New Jersey statute practice for motion to strike out.[49] Objection to form or sufficiency of summons cannot be taken by answer.[50]

§ 11. *Waiver of objections and cure of defects. Waiver by failure to object, by responsively pleading, or by going to trial of issues.*—Failure to raise objections by the proper method or at the proper time generally amounts to a waiver,[51] except

49. Karnuff v. Kelch [N. J. Law] 55 Atl. 163.

50. Nellis v. Rowles, 41 Misc. [N. Y.] 313.

51. Fla. Cent. & P. R. Co. v. Ashmore, 43 Fla. 272. A motion to strike or to make more definite is waived by pleading over and going to trial on the merits. Port Townsend v. Lewis [Wash.] 75 Pac. 982. Where a counterclaim is one which cannot lawfully be interposed to plaintiff's claim, a reply thereto, instead of a demurrer, does not waive objection to evidence to sustain the counterclaim. Story v. Richardson, 91 App. Div. [N. Y.] 381. An exception to an adverse ruling upon a motion to strike is waived by answering and going to trial upon the merits. Scribner v. Taggart [Iowa] 98 N. W. 798. Where an exception is taken to a ruling sustaining a demurrer to a pleading, error in the ruling is not waived by filing an amended pleading which is but a repetition of the first. The rule holds whether filing the amended pleading be considered a pleading over or not. Watkins v. Iowa Cent. R. Co. [Iowa] 98 N. W. 910. If no exception is made to the form or style of a pleading, it is sufficient for consideration. Baker v. Hamblen [Tex. Civ. App.] 75 S. W. 362. A plea in abatement instead of in bar admits plaintiff's capacity to sue. Romy v. State [Ind. App.] 67 N. E. 998. Going to trial on the merits under pleas in bar filed with pleas in abatement without asking trial on the latter waives them. Maupin v. Scottish U. & N. Ins. Co., 53 W. Va. 557. Proceeding to trial without objection that replies were not filed to special pleas waives failure to reply. Ill. Life Ass'n v. Wells, 200 Ill. 445, 65 N. E. 1072. Sufficiency of an affidavit to a plea denying agency is beyond objection after judgment. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227.

Objections to the jurisdiction: By appearing and filing a demurrer defendant waives objections to the jurisdiction of the person. Westinghouse Air Brake Co. v. Christenson Engineering Co., 126 Fed. 764. Appearance and joinder in motion for a new trial on other grounds waives objections to jurisdiction for defects of service on nonresident defendants. Clark v. Brotherhood of Locomotive Firemen, 99 Mo. App. 687, 74 S. W. 412. General appearance and answer to the merits, after motion to vacate order for summons overruled, waives questions of jurisdiction. San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299. A motion to require plaintiff to paragraph his petition before raising the question of jurisdiction is an appearance by defendant. Royer Wheel Co. v. Dunbar, 25 Ky. L. R. 746, 76 S. W. 366. Where a plea of privilege by two defendants did not deny allegations of the petition that they acted with other defendants in converting goods, they thereby consented to join issue on the merits, in the court where the suit was brought, and submitted to the jurisdiction. Gulf, C. & S. F. R. Co. v. North Tex. Grain Co. [Tex. Civ. App.] 74 S. W. 567.

Objections to petition or other pleading of cause of action: In an action by a servant for injuries, failure to demur or to move to make the complaint more definite because of a failure to directly allege employment waives the objection, and it cannot be made on introduction to the evidence. Brower v. Timreck, 66 Kan. 770, 71 Pac. 581. Objections to pleadings not made before judgment are waived. Turner v. Turner [Wash.] 74 Pac. 55; Pittsburg, C., C. & St. L. R. Co. v. Robson, 204 Ill. 254, 68 N. E. 468. Omission to plead venue cured by answer. Evans v. Maysville & B. S. R. Co., 25 Ky. L. R. 1258, 77 S. W. 708. Objection to verification of a petition cannot be made after judgment. In re Mahoney's Estate, 84 N. Y. Supp. 329. A defect in a petition to recover for lumber, in failing to show that defendant agreed to pay for it, or that it was delivered at her request, is cured by answer putting these matters in issue. Ware v. Long, 24 Ky. L. R. 696, 69 S. W. 797. General allegations of negligence of a master causing injuries to a servant are sufficient, no objection being taken before trial or on admission of evidence. Gayle v. Mo. C. & F. Co., 177 Mo. 427, 76 S. W. 987. Failure of the petition in an action for services to allege a promise to pay is cured by answer and reply raising the direct issue of the services as a gratuity. Dearing v. Moran, 25 Ky. L. R. 1545, 78 S. W. 217. Traversing a petition without moving to make it more definite waives defects in the statement of losses incurred by plaintiff. Ill. Cent. R. Co. v. Beauchamp, 25 Ky. L. R. 1429, 77 S. W. 1096. Defects in a declaration because joining two causes of action in one count are waived unless raised by special demurrer. Chicago City R. Co. v. O'Donnell, 207 Ill. 478, 69 N. E. 882. An objection that a suit was brought in plaintiff's initials, instead of his full christian name, is too late after judgment. Fisk v. Gulliford [Neb.] 95 N. W. 494. Going to trial in ejectment without objection that plaintiff should have been required to amend his abstract of title to correspond with his claim of presumption of a grant waives the objection. Jenkins v. McMichael, 21 Pa. Super. Ct. 161. After filing a general denial defendant cannot object that there is no evidence of the demand alleged in the petition. Antonelli v. Basile, 93 Mo. App. 138. An objection that an allegation is omitted from the petition will not lie at trial if the petition can fairly be construed as implying what should have been expressly averred. Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024. By procuring from plaintiff's attorney a stipulation extending the time to answer, without reserving right to object to the complaint for scandalous matter, redundancy, and failure to state separately and number the causes of action, defendant waives the objections. Sherman v. McCarthy, 90 App.

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as to the objection of failure to state a cause of action,[52] or want of jurisdiction of

Div. [N. Y.] 542. An objection that a complaint does not specify the court is waived by failure to raise before appeal [Horner's Rev. St. 1901, §§ 338, 398]. Citizens' St. R. Co. v. Shepherd, 30 Ind. App. 193, 65 N. E. 765. A complaint failing to allege jurisdictional facts necessary to rendition of the judgment and to sustain an attachment in the original suit is sufficient in absence of a plea denying jurisdiction since it will be presumed. Kilham v. Western Bank & S. D. Co., 30 Colo. 365, 70 Pac. 409. Failure to demur and pleading to the merits waives the right to demur for or raise defects in the complaint. Romaine v. N. Y., N. H. & H. R. Co., 87 App. Div. [N. Y.] 569. A party accepting all issues tendered by the petition and going to trial thereon waives any inconsistency in theories of the case presented by the petition. Provident Loan Trust Co. v. McIntosh [Kan.] 75 Pac. 498. An allegation in a petition for injuries in the alternative, that the person injured was pushed from a train by railroad employes or by sleeping car employes, said employes working for different masters, cannot be objected to after answer [Code Civ. Proc. §§ 85, 86]. Louisville & N. R. Co. v. Kimbrough, 24 Ky. L. R. 2409, 74 S. W. 229. After answer and issues joined no objection can be made to the petition or amendments thereto on mere technical grounds. Guthrie v. Finch [Okl.] 75 Pac. 288. Failure to allege in a complaint in an action for nondelivery of cotton, plaintiff having accepted an option for sale, that he was ready and able to pay is merely a defective statement of a good cause of action, and is waived by failure to demur or answer [Clark's Code (3d Ed.) § 242]. Blalock & Co. v. Clark & Bro. [N. C.] 45 S. E. 642. Ambiguity in a petition which fails to show whether the cause is in contract or tort will not avail a defendant properly served who fails to plead in time, where the cause is treated as in tort, and the pleadings together show plaintiff's intention to sue in tort for damages from a breach of contract. Southern Bell Tel. & T. Co. v. Earle, 118 Ga. 506. Failure to demur waives improper joinder of parties plaintiff, if the defect will not prevent judgment, and objection by answer in a motion for a new trial will not remove the waiver. Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890. Waiver of objections to petition by answering and failing to object to introduction of evidence. Albin Co. v. Kuttner, 25 Ky. L. R. 1100, 77 S. W. 181. Defendant by pleading to the merits waives objections to the petition. Strauss v. St. Louis Transit Co., 102 Mo. App. 644, 77 S. W. 156. Objection to a complaint for want of verification cannot be made after judgment [Sand. & H. Dig. § 5776]. Randall v. Sanders [Ark.] 77 S. W. 56. Failure to raise misjoinder of causes by motion to strike waives the objection. Campbell v. Spears, 120 Iowa, 670, 94 N. W. 1126. Statement of facts in a petition on information and belief are sufficient if no motion is made attacking the petition on that ground. Robinson v. Ferguson, 119 Iowa, 325, 93 N. W. 350. Objection that the declaration was filed too late cannot first be made after verdict. Piche v. Robbins, 24 R. I. 325. Filing an answer denying matters alleged in "complaint and bill of particulars" waives any objections to the bill, no motion being made to correct or make more specific. Brown v. Woodward, 75 Conn. 254. Where no demurrer was filed to the declaration for insufficiency in allegations denied by the answer, objection cannot be made after judgment on the merits, the allegations not being so uncertain as to amount to no statement of fact. Whitlock v. Uhle, 75 Conn. 423. After issue joined and trial without objection to the petition, it will be construed liberally. Sorensen v. Sorensen [Neb.] 94 N. W. 540; Lampman v. Bruning, 120 Iowa, 167, 94 N. W. 562. Where a general allegation of waiver of suspension in an action on an insurance policy is not objected to, its insufficiency is waived though it is a mere legal conclusion. Barrett v. Des Moines M. H. & C. Ins. Ass'n, 120 Iowa, 184, 94 N. W. 473. After answer to the merits, defendant in ejectment cannot question the sufficiency of the complaint as to the designation of the land. Davis v. Shepherd [Colo.] 72 Pac. 57. Pleading to the merits without raising misjoinder or defect of parties waives the defect [Ann. Code 1901, § 96]. Edney v. Baum [Neb.] 97 N. W. 252. Defendants by jointly answering waived misjoinder of causes of action; demurrer was the remedy. Teague v. Collins [N. C.] 45 S. E. 1035. Omission to allege in a complaint for trespass by county officers that the entry was unlawful or wrongful, or that any injury occurred, is waived by defendant's failure to move for more specific statements or to demur for the defects. Hitch v. Edgecombe County Com'rs, 132 N. C. 573. A defective statement of ouster in a declaration for breach of covenant of warranty in a deed is waived where defendant does not demur or take any special exception. Ravenel v. Ingram, 131 N. C. 549. Failure to demur waives failure of a complaint in libel to allege special damages where the publication is not libelous per se. Harrison v. Garrett, 132 N. C. 172. Failure to move to strike out inappropriate allegations in the complaint waives defendant's right to object to their consideration. Burns v. Southern R. Co., 65 S. C. 229. Failure to object that a complaint contains three distinct causes of action that should be alleged separately will waive the defect after judgment. Smith v. Jones [S. D.] 92 N. W. 1084. Failure to object to a formal and amendable defect in a state of demand, in the district court of New Jersey, waives the objection. Ellis Co. v. Eyth [N. J. Law] 55 Atl. 54. Pleading the general issue or not guilty admits the sufficiency of the counts in the declaration. Ill. Cent. R. Co. v. Leiner, 103 Ill. App. 438. Where evidence showing jurisdiction in divorce, by residence of plaintiff in the state at time of defendant's adultery, is given mostly on cross-examination of plaintiff's witnesses and no objection is made, failure of the complaint to allege such fact is waived. Harris v. Harris, 83 App. Div. [N. Y.] 123. Failure to demur or object otherwise before trial waives failure of a complaint, for injuries to a servant, to aver notice of the accident to the master [Laws 1902, p. 1748, c. 600]. Johnson v. Roach, 83 App. Div. [N. Y.] 351. Failure to demur waives misjoinder of causes [Code Civ. Proc. §§ 499, 488]. Shaw v. New York, 83 App.

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the subject-matter,[53] or incapacity of plaintiff to sue,[54] or improper joinder of par-

Div. [N. Y.] 212. Going to trial on answer putting in issue the merits of the complaint waives failure to offer in the complaint to deliver up a mortgage, in an action in the nature of rescission of contract. Brown v. Gillett [Wash.] 74 Pac. 386. Defects, in a complaint stating a cause of action, which are ground for motion or demurrer are waived on appeal. Hefferlin v. Karlman [Mont.] 74 Pac. 201. A general denial waives an objection to a defect of parties defendant which does not appear on the face of the petition. Dunnaway v. O'Reilly [Mo. App.] 79 S. W. 1004.

Objections to plea or answer: A defect in a plea of res judicata in failing to allege that the judgment pleaded was final, unreversed, and unmodified, is waived by a reply alleging a pending appeal from the judgment by plaintiff. Small v. Reeves, 25 Ky. L. R. 729, 76 S. W. 395. Where, after exclusion of evidence controverting the cause of action because a plea of discharge in bankruptcy puis darrein continuance was filed, plaintiff withdrew his objection and offered to admit the evidence, but defendant refused to give it, he waived any error in the ruling. Crawford v. Burke, 201 Ill. 581, 66 N. E. 833. Defects in the answer are waived by agreement of plaintiff that the judge shall find the facts and render judgment. Early v. Early [N. C.] 46 S. E. 503. If an answer would be sufficient after verdict, failure to demur for its failure to state a defense waives the objection, so that it will not be ground for objection to introduction of the evidence. Maugh v. Hornbeck, 98 Mo. App. 389, 72 S. W. 153. Failure to plead an estoppel may be waived by plaintiff by proceeding with the trial without objection as if it had been pleaded. McDonnell v. De Soto S. & B. Ass'n, 175 Mo. 250, 75 S. W. 438. Going to trial on answer will waive objections to the sufficiency of the answer after judgment. Hartford F. Ins. Co. v. Enoch [Ark.] 77 S. W. 899. An objection to an answer in that it claims damages for a breach of contract, and also attempts to plead a rescission, is waived unless a motion is made to require defendant to elect. McCormick Harvesting Mach. Co. v. Hiatt [Neb.] 95 N. W. 627. By joining issues on defendant's pleas and going to trial plaintiff waived a motion for judgment for want of a proper plea. Farmers' & M. Bank v. Hunter, 97 Md. 148. Where plaintiff, by failing to demur, had waived objection to an answer pleading res judicata, and only objected generally to evidence given thereunder, the court could not reject the evidence after final submission, and determine the cause without such defense, because insufficiently pleaded. Abilene v. Cornell University [C. C. A.] 118 Fed. 379. By taking issue on pleas of set-off, limitations, and accord and satisfaction, in an action by scire facias, plaintiff waives the right to move to strike out the pleas. Star Loan Ass'n v. Moore [Del.] 55 Atl. 946. An objection to a denial in an answer in the words, "Denies each and every other material allegation of the said second cause of action," was too late after plaintiff had ceased its evidence in chief. Appelman v. Broadway Ins. Co. [Colo. App.] 70 Pac. 451. Failure to demur waives defects in an answer containing new matter which on its face does not constitute a defense [Code, § 248]. Queen City Printing & Paper Co. v. McAden, 131 N. C. 178. Failure to make certain allegations is cured by an answer making such allegations. Wilhoit v. Musselman, 24 Ky. L. R. 2011, 72 S. W. 1112. Where in an action to recover a legacy the will is not made a part of the complaint by exhibit or otherwise, the objection is waived by failure to demur. Coulter v. Bradley, 30 Ind. App. 421, 66 N. E. 184. Objection to an affidavit filed with a petition against an administrator and heirs on a note of decedent that it did not state that no set-off existed as required by statute is waived if not made before submission. Tichenor v. Wood, 24 Ky. L. R. 1109, 70 S. W. 837.

Objections to reply or replication: A defendant who goes to trial and submits the cause to a jury without objection to pleadings or evidence, thereby accepts the issues and waives departure of the reply from the petition. Consol. Kan. City S. & R. Co. v. Osborne, 66 Kan. 393, 71 Pac. 838. Objection that a new cause of action is stated in the reply is waived where the parties and the court treat the issue as regularly formed. Elder v. Webber [Neb.] 92 N. W. 126. Failure to raise defects in a reply by motion to make more specific will waive its insufficiency on going to trial. Gross v. Scheel [Neb.] 93 N. W. 418. Where defendant did not move for judgment for want of a replication to his plea of set-off until both parties had given evidence to the jury, and plaintiff had moved to exclude defendant's evidence, failure to file a replication was waived. Slaydon v. McDonald [Miss.] 34 So. 357.

Objections to cross-petition, set-off, or counterclaim: Filing an answer thereto waives objection to maintenance of a cross-petition. Stuart v. Harmon, 24 Ky. L. R. 1829, 72 S. W. 365; Id., 24 Ky. L. R. 439, 75 S. W. 257. By joining issue on a plea of set-off in a claim against an intestate, the administrator waived an objection that the set-off was improper, that being ground for replication. Hall v. Greene, 24 R. I. 286. An objection that a counterclaim was improper under the statute is waived if not raised by demurrer [Code Civ. Proc. § 495]. Hudson River W. P. Co. v. Glens Falls G. & E. L. Co., 90 App. Div. [N. Y.] 577. Failure to object on trial by demurrer or otherwise that facts alleged in the answer did not constitute a proper counterclaim waives the objection. Ennor v. Raine [Nev.] 74 Pac. 1.

Objections to amendments: Error in allowing amendment of the petition is waived by defendant's failure to show surprise. Royer Wheel Co. v. Dunbar, 25 Ky. L. R. 746, 76 S. W. 366. Error in allowing an amendment is waived by failure to object to the amendment. Perry v. Cobb [Ind. Ter.] 76 S. W. 289. Where plaintiff was allowed to amend and give evidence after he had rested and defendant moved to dismiss, but defendant did not avail himself of the option of taking a continuance at plaintiff's cost, he waived any objection to the ruling. Jarozewski v. Allen, 117 Iowa, 632, 91 N. W. 941. An allegation, in an amended complaint for specific performance of demand for a deed was made, failing to state that demand was made before commence-

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ties, where the petition is insufficient for judgment.[55] Voluntary going to trial with a plea unanswered waives the answer.[56] Variance between writ and declaration may be raised at any time and filing a plea is not a waiver.[57] Error in requiring a plaintiff to elect, who was entitled to proceed on two separate causes of action,

ment of the suit is at most an inadequate averment, cured by failure to object. Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042. Failure to except to amendment of a petition pending suit waives any error therein. Lowery v. Idelson, 117 Ga. 778. Where defendant appeared and answered without objecting to the filing of an amended complaint, and the cause went to issue as upon complaint and supplemental complaint, it cannot be objected that the judgment includes claims not due when the original action was brought. Pitzele v. Reuping [Ind. App.] 68 N. E. 603. One claiming surprise by an amendment to a pleading cannot object afterward, where he asked no continuance to meet the amendment. Bennett's Estate v. Taylor [Neb.] 96 N. W. 669. Where a defendant was present when an order allowing amendment of the complaint was granted, and the trial proceeded without objection for failure to file or serve the amended complaint or a motion for continuance, the requirement was waived [Code Civ. Proc. § 432]. Daly v. Ruddell, 137 Cal. 671, 70 Pac. 784. Irregularity in bringing in new parties in tort by amendment is waived by failure to object. Farrand v. Kavanaugh [Mich.] 93 N. W. 1083. Filing an answer to an amended declaration filed without leave waives the objection that it was so filed. Harte v. Fraser, 104 Ill. App. 201. Waiver of amendment to complaint by written statement of fact between the parties. Butte County v. Merrill, 141 Cal. 396, 74 Pac. 1036. Proceeding to trial on an amended complaint waives any departure from the original. Boeker v. Crescent B. & P. Co., 101 Mo. App. 429, 74 S. W. 385.

Objections to motions: A purchaser of goods from defendant pending sequestration proceedings, who filed an answer to plaintiff's motion for execution against him, cannot afterward complain that the motion was irregular. Crawford v. Southern R. I. Plow Co. [Tex. Civ. App.] 77 S. W. 280.

Objections to proof as variance: Failure to object to a variance, and requesting instructions based on the evidence introduced, waives the variance. Ill. Life Ass'n v. Wells, 200 Ill. 445, 65 N. E. 1072. Evidence introduced without objection may be considered though not authorized by the pleadings. Louisville & N. R. Co. v. Walden, 25 Ky. L. R. 1, 74 S. W. 694. Objection for variance is waived unless made, except where the adverse party has been misled to his prejudice [Rev. St. 1899, § 655]. Hayes v. Continental Casualty Co., 98 Mo. App. 410, 72 S. W. 135. Defendant cannot object to evidence given by plaintiff as variance when he gave evidence on the same issue. San Antonio & A. P. R. Co. v. Griffith [Tex. Civ. App.] 70 S. W. 438. Where evidence of negligence in other particulars was received without objection under an allegation of negligence in operation of a switch engine, defendant could not afterward object that there was a variance. Albin v. Chicago, R. I. & P. R. Co. [Mo. App.] 77 S. W. 153. Defendant failing to plead surprise on introduction of evidence at variance with the claim waives the variance after verdict. Kirchner v. Smith [Pa.] 56 Atl. 947. One who fails to avail himself of a statutory provision for amendment on variance waives it [Rev. St. 1899, § 655]. Kan. City v. Ferd Heim Brew. Co., 98 Mo. App. 590, 73 S. W. 302. Objection to evidence for failure of the petition to allege certain material facts is waived unless made at time of introduction. Baden v. Bertenshaw [Kan.] 74 Pac. 639. All the pleadings in a cause will be considered on objection to the evidence, where no motion or demurrer has tested their sufficiency, and if a cause of action can be found the objection will be overruled. Marshall v. Homier [Okl.] 74 Pac. 368.

52. Strauss v. St. Louis Transit Co., 102 Mo. App. 644, 77 S. W. 156. Ann. Code 1901, § 96. Edney v. Baum [Neb.] 97 N. W. 252; Pittsburg, C., C. & St. L. R. Co. v. Robson, 204 Ill. 254, 68 N. E. 468; Fla. Cent. & P. R. Co. v. Ashmore, 43 Fla. 272. Insufficiency of the petition as stating a cause of action may be raised after trial, though no demurrer is filed. Welch v. Mastin, 98 Mo. App. 273, 71 S. W. 1090. Failure to demur to a complaint which does not state a cause of action will not waive the defect [B. & C. Comp. § 72]. Moore v. Halliday, 43 Or. 243, 72 Pac. 801. Failure of the complaint to state facts constituting a cause of action is not waived by failure to demur [Code Civ. Proc. § 434]. Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445. Failure to demur does not confess the action either in law or fact. Kelly v. Strouse, 116 Ga. 872. Failure to demur will not waive substantial defects in the declaration making it insufficient to sustain a judgment. Sherwood v. Rieck, 104 Ill. App. 368. Nothing can waive failure of the declaration to state a cause of action. Western Wheel Works v. Stachnick, 102 Ill. App. 420. Answers may be withdrawn and a general demurrer filed, if the petition fails to state a cause of action, though the case had four trials, where no objection has previously been made to the complaint. Edney v. Baum [Neb.] 97 N. W. 252. Where defendant passes over a fatally defective petition without demurring, he may still make an oral motion to dismiss at any time before verdict, or after verdict, by motion in arrest, writ of error, or motion to set aside. Kelly v. Strouse, 116 Ga. 872.

53. Strauss v. St. Louis Transit Co., 102 Mo. App. 644, 77 S. W. 156; Turner v. Turner [Wash.] 74 Pac. 55. Ann. Code 1901, § 96. Edney v. Baum [Neb.] 97 N. W. 252.

54. Where plaintiffs have no authority to sue on an official bond, failure to demur to the complaint is not a waiver of the objection. Ulysses v. Ingersoll, 81 App. Div. [N. Y.] 304.

55. Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890. Joinder of an improper or unnecessary party plaintiff cannot be waived, where the petition is insufficient to support a judgment. Id.

56. Moreland v. Bebber, 102 Ill. App. 572.

57. Slater v. Fehlberg, 24 R. I. 574.

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is not waived by going to trial.[58] Failure to object to a complaint by demurrer on the ground that it shows the action to have been brought prematurely is not a waiver of the objection.[59] Failure to demur specially waives objection to the manner of stating facts in the complaint, but not relating to omission of any material fact.[60] Submitting to assignment of a cause for trial without an amendment by the opposite party, which on a previous appeal, was held necessary by the Supreme Court, is not a waiver of the amendment.[61] A plea, puis darrein continuance, setting up a release as to one of several for whose benefit the suit was brought waived all previous pleas as to his interest.[62] Exception to a refusal of nonsuit at close of plaintiff's evidence is waived by introduction of evidence.[63] Where no demurrer is filed to the declaration it must be construed most favorably to plaintiff after trial.[64]

Pleading over after demurrer overruled waives objections raised thereby,[65] except the objection that the complaint, or other pleading, does not state a cause of action,[66] and except, in Kentucky, where the court was not advised that the party elected to stand on the demurrer.[67] It also waives objections raised by motion to

58. Rucker v. Omaha & G. S. & R. Co. [Colo. App.] 72 Pac. 682.

59. Burns' Rev. St. 1901, § 346. Middaugh v. Wilson, 30 Ind. App. 112. 65 N. E. 555.

60. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564.

61. Norris Safe & Lock Co. v. Clark [Wash.] 74 Pac. 1019.

62. Probate Ct. of Westerly v. Potter [R. I.] 55 Atl. 524.

63. Ratliff v. Ratliff, 131 N. C. 425.

64. Stern v. Knowlton, 184 Mass. 29, 67 N. E. 869. A petition assailed after judgment will be liberally construed. Brown v. Heisley [Neb.] 96 N. W. 187; Marsh v. State [Neb.] 96 N. W. 520. The objection to introduction of evidence, because the complaint fails to state a cause of action, will not lie unless the complaint cannot be sustained after every reasonable intendment is drawn in its favor. Prescott v. Puget Sound B. & D. Co., 31 Wash. 177, 71 Pac. 772.

65. Error in sustaining a demurrer to a petition is waived by filing an amended and substituted petition. Redhead v. Iowa Nat. Bank [Iowa] 98 N. W. 806. Demurrer to the petition. Nystuen v. Hanson [Iowa] 91 N. W. 1071. Filing an answer waives all former objections raised by demurrer to the petition. Rogers v. Western H. T. M. F. Ins. Co., 93 Mo. App. 24. Answering over and going to trial waives misjoinder of causes. Antonelli v. Basile, 93 Mo. App. 138. Filing an amended complaint waives error in sustaining a demurrer to the original. Prescott v. Puget Sound B. & D. Co., 31 Wash. 177, 71 Pac. 772. Leave to amend after a demurrer is sustained to a pleading waives any error in sustaining the demurrer. Berry v. Barton [Okl.] 71 Pac. 1074. Where, after a demurrer was sustained to a plea, plaintiff filed a replication to the plea, and a demurrer to the replication was overruled, plaintiff waived his demurrer. Louisville & N. R. Co. v. Johnson, 135 Ala. 232. Answer over after demurrer for failure of the petition to state a cause of action overruled waives the objection. Failure of petition for breach of marriage promise to allege that plaintiff requested defendant to perform. Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024. Pleading to the merits after demurrer overruled waives improper joinder of parties plaintiff, if the defect will not prevent judgment, and objection by answer in a motion for a new trial will not remove the waiver. Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890. Answer to the merits after demurrer for misjoinder of parties overruled is a withdrawal of the demurrer [Rev. St. 1899, § 602]. Strauss v. St. Louis Transit Co., 102 Mo. App. 644, 77 S. W. 156. Answering after demurrer to bill overruled waives error in overruling the demurrer. Kesner v. Miesch, 204 Ill. 320, 68 N. E. 405. After election to plead over, plaintiff cannot urge error in sustaining a demurrer to his petition; the waiver attaches to an amended petition filed after demurrer, which contains no matter different from the original. First Nat. Bank v. Farmers' & M. Bank [Neb.] 95 N. W. 1062. Error in overruling a demurrer to an answer is waived by subsequent reply. Emery v. Hanna [Neb.] 94 N. W. 973. Filing an amended answer after demurrer sustained to the original answer waives any error in sustaining the demurrer. Burke v. Wright [Conn.] 55 Atl. 14. Trial on the merits will waive any error in overruling a demurrer for misjoinder of plaintiffs, where no substantial right of a defendant has been invaded. Daly v. Ruddell, 137 Cal. 671, 70 Pac. 784. Filing an amended petition waives any error in sustaining a demurrer to the petition. Morrill v. Casper [Okl.] 73 Pac. 1102. Where defendant goes to trial on the issue made by petition and answer, without insisting on a ruling on his special demurrer filed, he waives any rights under the demurrer. Americus Grocery Co. v. Brackett & Co. [Ga.] 46 S. E. 657.

66. Pleading over does not waive an objection made by demurrer that the complaint does not state a cause of action. Van Horn v. Holt [Mont.] 75 Pac. 680. By going to trial on an issue of fact after demurrer to the declaration for a defect of substance not cured by verdict, overruled, defendant does not waive error in overruling the demurrer. Middleby v. Effler [C. C. A.] 118 Fed. 261.

67. Going to trial on issues framed by other pleadings after demurrers are sustained to his pleading will not waive error in overruling the demurrer, though the party did not ask leave to amend, or to plead over, where he did not advise the court in

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strike out, which was overruled.[68] Filing an amended answer waives error in striking matter from the answer,[69] or in a motion to make more specific.[70] A motion for nonsuit is waived by introduction of evidence after it is overruled.[71] Filing an amended complaint will not waive error in sustaining a demurrer, in Idaho,[72] Indiana,[73] and Iowa,[74] but it is otherwise in Washington.[75] Filing an amended answer waives error in sustaining a motion to strike matter from the answer.[76] Filing an answer to an amended petition and going to trial waives error in the ruling on a motion to dismiss, made after allowance of the amendment.[77] Where defendant moved to strike affirmative defenses from the answer, and elected to stand on the motion after denial, without proving allegations of the complaint covered by a general denial, such denial will be taken as true.[78]

Cure by other pleadings or proof.[79]—If a plea on which issue is joined is proved, the issue must be determined for defendant, whether the plea is good or bad.[80] An omission in the complaint may be supplied in the answer,[81] but failure to state a cause of action in the petition cannot be cured by averments in the reply.[82] Error in overruling a demurrer to defendant's plea in abatement, and a motion to strike, was cured by overruling the plea and denying the motion.[83]

Aider by verdict.—All defects in a complaint or other pleading stating a cause of action are cured by verdict,[84] except failure to state a cause of action.[85] The

any manner, that he elected to stand on his pleading. Bennett v. Union Cent. L. Ins. Co., 203 Ill. 439, 67 N. E. 971.

68. Corrigan v. Kan. City, 93 Mo. App. 173.

69. Walker v. Evans, 98 Mo. App. 301, 71 S. W. 1086. Error in permitting an amended petition is waived by pleading over after the motion to strike out is overruled. Cohn v. Souders, 175 Mo. 455, 75 S. W. 413. Reply, after motion to strike out new matter in an answer as both defense and counterclaim is overruled, waives the objection. Dwyer v. Rohan, 99 Mo. App. 120, 73 S. W. 384.

70. A stipulation between the parties, that defendant's motion to make the complaint more specific should be overruled, works a waiver of the motion, where defendant afterward answers. Cerussite Min. Co. v. Anderson [Colo. App.] 75 Pac. 158. Error in denying a motion to make the petition more specific is waived by answer. Ida County Sav. Bank v. Seidensticker [Iowa] 92 N. W. 862. Where an amended petition is filed after a motion to the petition is overruled and exception taken, answer by defendant without renewing his motion waives any error in overruling the motion. Hunter v. Lang [Neb.] 98 N. W. 690.

71. Walton v. Wild Goose M. & T. Co. [C. C. A.] 123 Fed. 209.

72. Corcoran v. Sonora M. & M. Co. [Idaho] 71 Pac. 127.

73. Where a demurrer to a complaint of one paragraph is sustained, a pleading filed by plaintiff, purporting to be "his amended second paragraph of complaint" filed under leave to file such a pleading, will be treated as a complete amended complaint superseding the original, and a waiver of error in sustaining the demurrer [Burns' Rev. St. 1901, §§ 345, 662]. Worl v. Republic I. & S. Co., 31 Ind. App. 16, 66 N. E. 1021.

74. An election to amend the petition after demurrer sustained waives error in sustaining the demurrer. Davis v. Boyer [Iowa] 97 N. W. 1002. Filing an amended and substituted petition on leave, after demurrer to the petition is sustained, waives any error in the ruling. McKee v. Ill. Cent. R. Co. [Iowa] 97 N. W. 69.

Contra, plaintiff's taking leave to amend after a demurrer was sustained to the petition did not waive error in the ruling on the demurrer, and he may be allowed to withdraw the leave and stand on the petition, where the leave to amend was withdrawn by the court and election entered to stand on the petition. Farmers' & M. State Bank v. School Tp., 118 Iowa, 540, 92 N. W. 676.

75. Obtaining leave to file and filing an amended complaint waives error in sustaining demurrer to the original complaint. Reed v. Parker [Wash.] 74 Pac. 61.

76. Taking leave to file and filing a further amended answer waives any error in striking matter from the amended answer. Ott v. Elmore, 67 Kan. 853, 73 Pac. 898. Filing an amended answer waives any error in striking paragraphs from the answer. Rawlings v. Casey [Colo. App.] 73 Pac. 1090.

77. Powell v. Brookfield Pressed B. & T. Mfg. Co. [Mo. App.] 78 S. W. 646.

78. Petersen v. Ball [Iowa] 97 N. W. 79.

79. Answer in action on accident policy as waiving the defense of neglect to give notice of accident and proof of loss. Dezell v. Fidelity & Casualty Co., 176 Mo. 253, 75 S. W. 1102. Defects in an answer in action to recover damages for cutting timber, as cured by judgment for defendant on certain proof given. Bryant v. Main, 25 Ky. L. R. 1242, 77 S. W. 680.

80. Culver v. Caldwell, 137 Ala. 125.

81. Where the complaint did not set out the technical words of negotiability, the answer incorporating the note, which contained the words "or order," supplied the omission. Johnson v. Hibbard [Utah] 75 Pac. 737.

82. Covey v. Henry [Neb.] 98 N. W. 434.

83. Wulff v. Lindsay [Ariz.] 71 Pac. 963.

84. Ill. Steel Co. v. Stonevick, 199 Ill. 122, 64 N. E. 1014. Sufficiency of complaint after verdict for money. Ferguson v. Reiger

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pleading will be liberally construed to maintain it.[86] Failure to file a contract or copy thereof with the cross complaint thereon is cured by verdict for cross complainant.[87] Failure of a complaint against executors to compel payment of a legacy to allege that there is realty charged with its payment, or that there is sufficient personalty to pay it, is not cured by findings and judgment for plaintiff.[88] After verdict an answer to which no demurrer was filed is good.[89] If an insufficient reply is not assailed by motion, it is good after verdict.[90] Plaintiff's failure

[Or.] 73 Pac. 1040. Sufficiency of declaration after verdict in action for injuries to servant. Ill. Steel Co. v. Stonevick, 199 Ill. 122, 64 N. E. 1014. Failure to set out a written contract sued on is cured by verdict. Coppes v. Union Nat. S. & L. Ass'n [Ind. App.] 67 N. E. 1022. A petition on an insurance policy liable to demurrer for failure to state value and ownership of the property is cured by verdict. Gustin v. Concordia F. Ins. Co., 90 Mo. App. 373. Formal defects but not absence of necessary allegations in a complaint will be cured by findings of the court; they are a verdict under B. & C. Comp. § 159. Ferguson v. Reiger, 43 Or. 505, 73 Pac. 1040. Joinder in issue on title and judgment cures any defect in a petition as to title by adverse possession. Hall v. Roberts, 24 Ky. L. R. 2362, 74 S. W. 199. Failure to allege in a complaint for money lent, a promise in direct terms to repay, or a breach thereof, is cured by a verdict for plaintiff. Kitchen v. Holmes, 42 Or. 252, 70 Pac. 830. Meager averments in a petition as to the cause of injury proven on trial are cured by verdict. Covington S. & Mfg. Co. v. Clark, 25 Ky. L. R. 694, 76 S. W. 348. Defects in a petition against a city for injuries from a defective street, in failing to aver notice of the defect to the city, are cured by a verdict for plaintiff where the question was given to the jury. Louisville v. Brewer's Adm'r, 24 Ky. L. R. 1671, 72 S. W. 9. An allegation that a city negligently permitted defects to remain in a sidewalk is sufficient, after verdict, as an allegation of knowledge of the defect for sufficient time, reasonable for its repair. McLean v. Kan. City [Mo. App.] 75 S. W. 173. A complaint of an incompetent by guardian alleging an order of appointment and qualification is sufficient, after verdict, though it fails to plead issuance of letters of guardianship. Elizalde v. Elizalde, 137 Cal. 634, 70 Pac. 861. Lack of essential averments in a declaration in assumpsit is cured by the verdict, if the evidence was sufficient to support the verdict, and no objection was made that there was a variance. Nashua Sav. Bank v. Anglo-American L., M. & A. Co., 189 U. S. 221, 47 Law. Ed. 782. Where a petition alleges that plaintiff is the mother of the person injured, that he is a minor, and that his father was dead at time of the injury, and that she has lost, and will lose his services and earnings, the verdict cures any defect in stating the relation of master and servant between herself and son. Scamell v. St. Louis Transit Co. [Mo. App.] 77 S. W. 1021. An objection that a complaint did not allege a fact is not available after verdict, evidence of the fact having been received without objection. Gallamore v. Olympia [Wash.] 75 Pac. 978; Yazoo & M. V. R. Co. v. Schraag [Miss.] 36 So. 193; Dunekake v. Beyer [Ky.] 79 S. W. 209. Special damages not alleged but proved without objection. Abbitt v. St. Louis Transit Co. [Mo. App.] 79 S. W. 496. A defective pleading which might have been amended is sufficient after verdict and judgment. Action for damages in injury caused by defective walk; failure to allege notice cured by verdict. Doherty v. Kan. City [Mo. App.] 79 S. W. 716; Gerber v. Kan. City [Mo. App.] 79 S. W. 717.

85. Ill Steel Co. v. Stonevick, 199 Ill. 122, 64 N. E. 1014; Fla. Cent. & P. R. Co. v. Ashmore, 43 Fla. 272. Defects in a petition stating a cause of action within the jurisdiction of the court are cured by verdict [Rev. St. 1899, § 629]. Strauss v. St. Louis Transit Co., 102 Mo. App. 644, 77 S. W. 156. Failure of the complaint to state facts constituting a cause of action is not cured by verdict or judgment [Code Civ. Proc. § 434]. Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445. A defective statement of the cause of action is aided by the verdict, but not a statement of a defective cause of action. Western Wheel Works v. Stachnick, 102 Ill. App. 420; Sherwood v. Rieck, 104 Ill. App. 368; Chicago v. Selz, S. & Co., 104 Ill. App. 376. Joinder of improper or unnecessary parties plaintiff is not cured, where the petition is insufficient to support judgment. Jones v. Kan. City, Ft. S. & M. R. Co. [Mo.] 77 S. W. 890. Defects and omissions in a pleading which would have been fatal on demurrer are cured at common law by verdict, if proof of the facts defectively stated was necessary to the verdict; as now applied, the rule requires the defective allegations must raise a fair inference of the necessary facts, otherwise the pleading fails to state a cause of action, and objection may be made at any time. Munchow v. Munchow, 96 Mo. App. 553, 70 S. W. 386.

86. Brown v. Helsley [Neb.] 96 N. W. 187; Marsh v. State [Neb.] 96 N. W. 520; Milner v. Harris [Neb.] 95 N. W. 682. A petition will be given every reasonable inference to be drawn in support of the judgment after verdict. Rogers v. Western H. T. M. F. Ins. Co., 93 Mo. App. 24. Failure of the petition to aver a fact necessary to the verdict is cured by the verdict if its existence can be gathered by reasonable intendment from facts definitely averred. Haggerty v. St. Louis, etc., R. Co., 100 Mo. App. 424, 74 S. W. 456. After verdict for plaintiff in libel, where the answer supplied any defects in the petition, the language alleged will be construed as libelous, to support the verdict, if possible. Berea College v. Powell, 25 Ky. L. R. 1235, 77 S. W. 381.

87. Coppes v. Union N. S. Loan Ass'n [Ind. App.] 69 N. E. 702.

88. Coulter v. Bradley, 30 Ind. App. 421, 66 N. E. 184.

89. Vapereau v. Holcombe [Iowa] 98 N. W. 279.

90. Western Mattress Co. v. Potter [Neb.] 95 N. W. 841.

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to reply, thereby failing to completely make up the issues, cannot be raised after verdict.[91] A judgment by the judge of a city court, in Georgia, without a jury, has all the force of a verdict as amending defects in pleadings.[92]

§ 12. *Time and order of pleadings. General rules.*[93]—A petition for removal of a cause should be filed before defendant is required to file an affidavit of defense.[94] Failure to plead or demur to an amended declaration within ten days places the cause at issue.[95] Pleas in abatement and bar may be filed simultaneously; the plea in abatement to be first tried.[96] Defendant must put in or file his plea and the record must show the filing and the character of the plea on which issue is joined before jury trial can be had in a common law action.[97] Pleas in abatement or exceptions to the petition in the nature of such a plea must be filed before answer to the merits whether the answer raises issues of law or of fact.[98] Allowance of the statutory period to defendant to file pleas to a count added to the declaration is discretionary where no new cause of action is added.[99] If plaintiff fails to file an affidavit with his declaration in assumpsit, he cannot file such affidavit after defendant has appeared and filed a plea of nonassumpsit, and have defendant's plea stricken because not accompanied by affidavit.[1] Before Acts 1902, p. 117, failure to file a defense in the city court of Atlanta on or before the first day of the term to which the suit was returnable prevented any defense even by leave of court.[2] Generally all demurrers to petitions must be filed at the first term.[3] Special demurrers not filed at the appearance term cannot be considered.[4] If the petition is so defective that recovery cannot be had, an oral motion to dismiss in the nature of a general demurrer may be made at any time before verdict.[5] A motion to strike a cause from the short cause calendar must be made in apt time.[6] A motion to quash service of a citation showing on its face that it was filed subject to defendant's plea of privilege is not in due order of pleading.[7]

Pleading out of time and leave to so plead.[8]—Extension of time to answer,[9] or to file plea,[10] or to present an amended affidavit of merits, is discretionary;[11]

91. 1 Starr & C. Ann. St. c. 7, § 6. Ill. Life Ass'n v. Wells, 200 Ill. 445, 65 N. E. 1072.

92. Civ. Code 1895, § 5365. Davis v. Bray [Ga.] 46 S. E. 90.

93. Time of filing plea of res judicata. Mallory v. Dawson Cotton Oil Co. [Tex. Civ. App.] 74 S. W. 953.

Propriety in action against receiver of allowing him to file counterclaim before an intervener moved for dismissal of his petition of intervention. Whitcomb v. Stringer, 160 Ind. 82, 66 N. E. 443.

Civ. Code, § 364, providing that equitable actions shall stand for trial at any term if the pleadings have been or should have been completed 60 days before commencement of the term, is not repealed by Act Dec. 30, 1892, § 22. Hornick v. Holtrup, 25 Ky. L. R. 1030, 76 S. W. 874.

94. Muir v. Preferred Acc. Ins. Co., 203 Pa. 338.

95. Cir. Ct. Rule No. 10. Marvin v. Bowlby [Mich.] 98 N. W. 399.

96. Maupin v. Scottish U. & N. Ins. Co., 53 W. Va. 557.

97. Stevens v. Friedman, 53 W. Va. 79.

98. Brooks v. Galveston City R. Co. [Tex. Civ. App.] 74 S. W. 330.

99. U. S. Fidelity & Guaranty Co. v. Dampskibsaktieselskabet Habil [Ala.] 35 So. 344.

1. Phoenix Assur. Co. v. Fristoe, 53 W. Va. 361.

2. Southern Bell Tel. & T. Co. v. Earle, 118 Ga. 506; Cheatham v. Brown-Catlett Furniture Co., 118 Ga. 420.

3. Kelly v. Strouse, 116 Ga. 872.

4. Brown v. Ga., C. & N. R. Co. [Ga.] 46 S. E. 71. Special demurrers to a declaration must be filed at the first term to which the case is returnable though a plea to the jurisdiction has been filed [Civ. Code 1895, § 5047]. Ross v. Mercer, 118 Ga. 905.

5. Kelly v. Strouse, 116 Ga. 872.

6. Winterburn v. Parlow, 102 Ill. App. 368.

7. Rev. St. art. 1262; Rule 7, Court Civil Appeals. Tex. & P. R. Co. v. Lynch [Tex. Civ. App.] 73 S. W. 65.

8. Validity of orders in general by supreme court justices extending time to answer in the county court. Edwards v. Shreve, 83 App. Div. [N. Y.] 165.

9. Pike v. Spartanburg R., G. & E. Co., 65 S. C. 409; Wilmington v. McDonald, 133 N. C. 548.

10. Baltimore City Charter, § 312 (Acts 1898, p. 392, c. 123). Horner v. Plumley, 97 Md. 271. Where a cause was pending for four years before trial and at issue for three years, refusal to allow filing of a plea of limitations instanter during trial was proper. Chicago v. Cook, 204 Ill. 373, 68 N. E. 538.

11. Blizzard v. Epkens, 105 Ill. App. 117.

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likewise grant or refusal to rescind an order allowing pleas to be filed.[12] Defendant, against whom judgment cannot be rendered until issues are determined between plaintiff and other defendants, is properly permitted to answer after expiration of the time to answer.[13] A rule extending defendant's time to plead may be revoked for good cause shown but only on notice unless necessity demands otherwise.[14] On vacation of a rule extending his time to plead, defendant has the rest of the day to file a plea.[15] An answer filed after time without leave is properly stricken out though it was error to refuse leave to file it.[16] Appearance by defendant, thirty days after service, for purpose of dismissing the suit, is insufficient, without plaintiff's consent, to give him an extension of the statutory period, to appear and plead in the action.[17] That amended pleas, orally ordered by the court on trial to be filed as necessary to raise the issues, were not filed, under a rule entered nunc pro tunc, until after judgment on the verdict, will not avoid the judgment.[18] Where defendant postponed filing a plea of accord and satisfaction until the second trial was called and then interposed it for delay or to place plaintiff at a disadvantage, it was properly stricken on motion.[19] In a suit in a county court an ex parte order from a supreme court justice extending time to answer 20 days is valid.[20] Leave to file a plea of limitations during trial may be refused though a plea in writing is presented where it is not supported by an affidavit or other showing of excuse for not filing earlier.[21] Delay of nearly a year before demurring to an answer filed warrants refusal of the application, the right to demur having expired.[22] The sufficiency of excuses for default in pleading is shown in the note.[23] An agreement between parties for extension of the time to plead is enforceable,[24] but, if without consideration, is revocable at will.[25]

§ 13. *Filing, service, and withdrawal. Filing.*—Failure of the clerk to mark exhibits "Filed" as was his duty will not prejudice the filing party.[26] A paper filed by lodging it with the clerk is filed though the clerk's indorsement is not given where the clerk and court have treated it as filed.[27] Giving an answer to the adverse party is equivalent to filing where he afterward uses it.[28] Filing of a complaint stating facts sufficient to authorize judgment for plaintiff will give jurisdiction though there is no prayer for money judgment.[29] Incorporation of the

12. Horner v. Plumley, 97 Md. 271.

13. Clark's Code, § 283. Mauney v. Hamilton, 132 N. C. 295.

14, 15. Lucke v. Kiernan, 68 N. J. Law, 281.

16. Rule 4 of the circuit court as to leave to file pleadings out of time is reasonable. Rigdon v. Ferguson, 172 Mo. 49, 72 S. W. 504.

17. Under Code Civ. Proc. Cal. § 1054, allowing extension of time for pleading on good cause shown, to thirty days, without consent of the adverse party. Kennedy v. Mulligan, 136 Cal. 556, 69 Pac. 291.

18. Murphy v. Watson, 67 N. J. Law, 221.

19. El Paso Elec. R. Co. v. Galliher [Tex. Civ. App.] 78 S. W. 7.

20. Code Civ. Proc. § 354. Edwards v. Shreve, 83 App. Div. [N. Y.] 165.

21. Chicago v. Cook, 105 Ill. App. 353.

22. Davis v. Boyer [Iowa] 97 N. W. 1002.

23. Where age and feebleness prevented a respondent from pleading to a motion until the term succeeding the motion, it should be allowed to be filed. Answer to motion under St. § 1689. Wilson v. Flanders, 24 Ky. L. R. 1302, 71 S. W. 426. Where an original return of service properly made was amended so as to set out defendant's name correctly, defendant was not excused by the error from pleading within the required time. Southern Bell Tel. & T. Co. v. Earle, 118 Ga. 506.

24. To file affidavit of defense. Muir v. Preferred Acc. Ins. Co., 203 Pa. 338.

25. An agreement, without consideration, by plaintiff to consider a plea and demurrer, filed by defendant after expiration of his time to plead, as filed on the first day of the term is revocable at plaintiff's will. Southern Bell Tel. & T. Co. v. Earle, 118 Ga. 506.

26. Woolley v. Louisville, 24 Ky. L. R. 1357, 71 S. W. 893.

27. Day & C. Lumber Co. v. Mack, 24 Ky. L. R. 640, 69 S. W. 712.

28. The handing by defendant's attorney of an answer to plaintiff's attorney in the judge's chambers with the statement that the original would be filed is sufficient as a general appearance whether filed or not where it was afterward used by defendant's counsel in moving for discharge of a receiver previously appointed in the action. Powell v. Nat. Bank of Commerce [Colo. App.] 74 Pac. 536.

29. Mills' Ann. Code, §§ 32, 44. Powell v. Nat. Bank of Commerce [Colo. App.] 74 Pac. 536.

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agreement constituting the cause of action into the body of declaration filed at commencement of the suit is a filing of it.[30]

Service.[31]—An order striking out parts of an answer so that it is materially reformed should direct service of the amended answer.[32] Where, before an additional defendant was brought in, the complaint had been amended, an order for publication directing service of the amended and supplemental summons and of the amended complaint on such defendant is proper.[33] Where defendant in New York served his answer by mail, he may serve an amended answer in less than 40 days thereafter,[34] and plaintiff has 40 days in which to serve an amended complaint.[35] Where defendants failed to appear in the statutory time or demand a copy of the complaint until after twenty days from service of summons, they were not entitled to an order compelling service of the complaint, their remedy being to open their default.[36] Service of a reply to an amended answer should not be directed when the order granting leave to serve the amended answer ordered that the trial should not be delayed thereby and most of the facts and defenses in the answer, as well as plaintiff's contentions concerning them were presented in a former proceeding.[37] A want of fulness as to nature of plaintiff's demand in a citation is not prejudicial to defendant where a copy of the petition was attached and made a part thereof.[38] Where one is made defendant and duly served, he is charged with notice of answer by his co-defendants if it is filed within the legal period.[39]

Withdrawal.—Pleadings may be withdrawn in proper cases to allow other pleadings, on terms prescribed by the court.[40] Withdrawal of an admission in a pleading is sufficiently shown for later proceedings by entry on the judge's calendar; withdrawal before trial nullifies its conclusiveness though it does not destroy its force as evidence.[41] An order allowing withdrawal of an answer and filing of another merely eliminated the first as a pleading. It cannot be taken from the

30. Charter Baltimore, § 313. Smith v. Hallwood Cash Register Co., 97 Md. 354.

31. Sufficiency of compliance with rule that a proposed amendment to a pleading must be served on the adverse party before allowance. Kent v. Aetna Ins. Co., 88 App. Div. [N. Y.] 518.

Laches in making motion to serve supplemental answer setting up judgment of a sister state as defense. Rio Tinto Copper Min. Co. v. Black, 85 N. Y. Supp. 1116.

Notice of defense on the ground of fraud is necessary on appearance in the circuit court on appeal from the justice court in Michigan under Cir. Ct. Rule 7, (3). Ward v. Reed [Mich.] 96 N. W. 438.

32. Dinkelspiel v. N. Y. Evening Journal Pub. Co., 42 Misc. [N. Y.] 74.

33. Meeks v. Meeks, 87 App. Div. [N. Y.] 99.

34. Bates v. Plasmon Co., 41 Misc. [N. Y.] 16. Defendant has an absolute right to serve an amended answer within 20 days after service of the reply, though he had been served with notice of trial, unless the amendment was for delay or would deprive plaintiff of benefit of the term [Code Civ. Proc. § 542]. Naylor v. Loomis, 79 App. Div. [N. Y.] 21.

35. Code Civ. Proc. §§ 798, 542. Bucklin v. Buffalo, A. & A. R. Co., 41 Misc. [N. Y.] 557.

36. Code Civ. Proc. §§ 421, 479. Stokes v. Schildknecht, 85 App. Div. [N. Y.] 602.

37. Code Civ. Proc. § 516. Hallenborg v. Greene, 87 App. Div. [N. Y.] 259.

38. Scalfi & Co. v. State, 31 Tex. Civ. App. 671, 73 S. W. 441.

39. Koehler v. Reed [Neb.] 96 N. W. 380.

40. Leave to withdraw demurrer and to answer on payment of costs. Cowen v. Rouss, 84 App. Div. [N. Y.] 641. Uses for whom a suit was brought by another may enter a restraxit and withdraw from the case if nothing appears in the answer preventing such action. Fidelity & Deposit Co. v. Nisbet [Ga.] 46 S. E. 444. Where an application by defendant to withdraw his demurrer and answer that he may object to technical irregularity of service, will only delay the trial, it will be refused. Barnes v. W. U. Tel. Co., 120 Fed. 550. Withdrawal of a plea to the merits is properly refused for the purpose of interposing a plea insisting on the statutory privilege of being sued in another county. Little Bros. F. & P. Co. v. Wilmott [Fla.] 32 So. 808. Where a defendant's motion granted to strike out allegations of the complaint was reversed for failure to join her co-defendants, she should be allowed to withdraw her answer to the complaint as it stood after the motion was granted and be given a reasonable time to answer the complaint as reinstated, requiring defendant to give information concerning her co-defendants so that they may be brought into court. Brown v. Fish, 40 Misc. [N. Y.] 573.

41. Caldwell v. Drummond [Iowa] 96 N. W. 1122.

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files but may be shown against defendants as to admissions contained therein.[42] Sustaining a demurrer to a count in a declaration containing three assignments of breach of contract because of failure to answer one is not affected by later withdrawal of such assignment.[43] Where no action is taken on a plea in abatement, it will be considered abandoned.[44] Abandoned pleadings containing admissions against interest are admissible against the pleader though neither signed nor verified.[45]

§ 14. *Issues made, proof, and variance. Completion of issues.*[46]—Where the petition does not fully cover issues submitted but the answer specifically covers them and is denied by plaintiff, the issues are properly made.[47] A cause may be submitted without waiting for issues to be formally completed where the action had long been pending, the parties had ample time to prepare and no one was prejudiced.[48]

The general issue and general denials.—Any evidence tending directly to contradict averments of the pleading to which it is opposed may be admitted under a general denial.[49] Where plaintiff's counsel allowed a certain issue to be litigated, it is immaterial that the issue was not set out in the notice attached to the plea of general issue.[50] Matters provable under the general issue or denial in particular causes have been collected in the notes.[51]

42. Wyles v. Berry, 25 Ky. L. R. 606, 76 S. W. 126.

43. U. S. Fidelity & Guaranty Co. v. Dampskibsaktieselskabet Habil [Ala.] 35 So. 344.

44. Word v. Kennon [Tex. Civ. App.] 75 S. W. 334.

45. Tex. & P. R. Co. v. Coggin [Tex. Civ. App.] 77 S. W. 1053.

46. Issues as properly made in action to establish and enforce a parol trust. Avery v. Stewart [N. C.] 46 S. E. 519.

47. Fitzhugh v. Connor [Tex. Civ. App.] 74 S. W. 83.

48. Civ. Code, §§ 364, 134. Woolley v. Louisville, 24 Ky. L. R. 1357, 71 S. W. 893.

49. Hanson v. Diamond Iron Min. Co., 87 Minn. 505, 92 N. W. 447. Evidence tending to contradict allegations of the complaint. Loftus-Hubbard Elevator Co. v. Smith-Alvord Co. [Minn.] 97 N. W. 125.

50. Sommers v. Myers [N. J. Law] 54 Atl. 812.

51. **Matters provable:** Set-off must be pleaded or interposed under notice but recoupment may be had under the general issue. Lloyd & Co. v. Manufacturers' & M. W. Co., 102 Ill. App. 551. In an action for wrongful death, the plea of "not guilty" puts in issue all the essential averments of the declaration. This plea held not to admit defendant's negligence in construction or maintenance of wires. Cumberland Tel. & T. Co. v. Floyd [Tenn.] 79 S. W. 795. All evidence tending to show no cause of action, including a release, may be given under the general issue in actions ex delicto. Mattoon G. L. & C. Co. v. Dolan, 105 Ill. App. 1. Invalidity of a contract because of the statute of frauds may be shown under the general denial. Ind. Trust Co. v. Finitzer, 160 Ind. 647, 67 N. E. 520. In an action for injuries received while accompanying live stock on a train, a provision in the contract of carriage requiring plaintiff to ride in the caboose, if a defense, may be shown under the general denial. Bolton v. Mo. Pac. R. Co., 172 Mo. 92, 72 S. W. 530. In an action by a trustee in bankruptcy to recover alleged preferential payments, defendant may show that the payments were made by his wife out of her separate estate, under a general denial. Goode v. Elwood Lodge No. 166, 160 Ind. 251, 66 N. E. 742. Where a lessor alleged an oral lease for a year and the lessee pleaded a general denial and an indefinite hiring, the general denial put in issue the question whether the rent was due under a yearly lease. Anhalt v. Lightstone, 39 Misc. [N. Y.] 822. Evidence that the signature is a forgery may be shown under the general issue in an action on a note. Farmers' & M. Bank v. Hunter, 97 Md. 148. A special reply to an answer of adverse possession in foreclosure that a new promise had been made preventing the limitation is demurrable since such matter could be proved under plaintiff's denial in the reply. Northrop v. Chase [Conn.] 56 Atl. 518. Where the general issue was pleaded in assumpsit before adoption of rule 7, evidence of a release before commencement of the action is admissible. Cir. Ct. Rule 7, providing that release must be set forth by notice attached to defendant's plea. Cleveland v. Rothschild [Mich.] 94 N. W. 184. Invalidity of a contract sued upon under the statute of frauds may be shown under a general denial. Riif v. Riibe [Neb.] 94 N. W. 517. The defense of the fellow-servant rule can be made without a special plea. Vinson v. Morning News, 118 Ga. 655. Defendant may urge the invalidity of the contract sued upon as appearing from plaintiff's evidence though he pleaded only the general denial. McClure v. Ullman, 102 Mo. App. 697, 77 S. W. 325. Evidence that plaintiff received rents and profits of decedent's land to which the latter was entitled may be shown under the general denial in an action against his estate for money received. Dunton v. Dawley [Iowa] 98 N. W. 307.

Matters not provable: The issue of failure of consideration is not raised under a general denial. Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124. An offer in evidence of an

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Special issues and special denials.—Special damages resulting from an injury may be shown where alleged in the petition.[52] Estoppel in pais not being pleaded, an agreement to make no claim on which defendant relied is inadmissible.[53] Testimony competent to sustain either of two causes of action in the petition is admissible.[54] Testimony responsive to an allegation of a pleading may be admitted though the allegation was improperly allowed to remain in the pleading.[55] Particular issues and their proof are shown in the notes.[56] The rule that allegations of the complaint not admitted, denied, or explained are to be taken as true does not apply to amendments to the complaint during the trial.[57]

Allegations requiring proof.[58]—Items of damages unproved cannot be recovered

abandoned count declaring on a contract of defendant to insure goods stored is properly excluded as immaterial where the issue was on a count for goods sold and a general denial. Brierre v. Cereal Sugar Co., 102 Mo. App. 622, 77 S. W. 111. A defense in trespass de bonis asportatis of settlement with defendant's co-trespasser cannot be shown under the general issue. Sunlin v. Skutt [Mich.] 94 N. W. 733.

52. Injury to kidneys resulting from confinement because of a broken leg. Kircher v. Larchwood, 120 Iowa, 578, 95 N. W. 184. In an action for personal injuries, evidence of nurse hire is admissible under an allegation in the petition, that plaintiff was compelled to hire nurses though damages were claimed in a lump sum only. Moore v. S. W. Mo. Elec. R. Co., 100 Mo. App. 665, 75 S. W. 176. Under a complaint for personal injuries alleging certain injuries to an arm and a foot and that plaintiff received other dangerous and permanent injury, evidence of injury to his nerves is admissible. Kappus v. Metropolitan St. R. Co., 82 App. Div. [N. Y.] 13. Proof of rheumatic neurosis resulting from concussion, or the shock, or from fright is admissible under a complaint for personal injuries alleging bruises to the limbs, wrenching and spraining of the back, and a severe contusion of the muscles and nerves. Maynard v. Or. R. Co., 43 Or. 63, 72 Pac. 590. Where plaintiff in an action for injuries alleges internal injuries about his head and other pains, he may show that his eye has been affected since the action. Stembridge v. Southern R. Co., 65 S. C. 440.

53. Wis. Farm Land Co. v. Bullard [Wis.] 96 N. W. 833.

54. Lyons v. Berlau, 67 Kan. 426, 73 Pac. 52.

55. Young v. W. U. Tel. Co., 65 S. C. 93.

56. Evidence admissible in action for damages from fire by railroad company under issue as to cause of fire. MacDonald v. N. Y., N. H. & H. R. Co. [R. I.] 54 Atl. 795. Complaint in action for damage to live stock in carriage as setting out delays by defendant causing injury with such particularity as to prevent proof by plaintiff of other delays. San Antonio & A. P. R. Co. v. Griffith [Tex. Civ. App.] 70 S. W. 438. That a lease not alleged in the complaint is alleged in the replication as a part of the same transaction does not make it admissible without proof of execution. Thompson F. & M. Co. v. Glass, 136 Ala. 648. Allegations in a petition that both plaintiffs entered into the contract sued on will prevent their denial thereof. Cousins v. Bowling, 100 Mo. App. 452, 74 S. W. 168. Where a petition for injuries inflicted by a street railway alleges unlawful and excessive speed in violation of an ordinance, the ordinance is admissible. San Antonio Traction Co. v. Bryant, 30 Tex. Civ. App. 437, 70 S. W. 1015. A verified plea denying execution of a written instrument is not necessary to render admissible a contemporaneous letter explaining the contract; Prac. Act, § 34 (Hurd's Rev. St. 1901, p. 1341, c. 110) dispensing with proof of execution of an instrument declared on unless execution is denied by a verified plea. Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896. Where defendant denies execution of a promissory note sued on, expert evidence may be given as to the signature and the signatures on defendant's pleadings. Tower v. Whip, 53 W. Va. 158. Where verbal negotiations between parties are afterward reduced to writing and are pleaded in a reply as defense to an answer, evidence of fraud or mistake will be received without further pleading. Martens v. Pittock [Neb.] 92 N. W. 1038. Where the issue tendered by the answer and made by the pleadings was that decedent's direct employer was an employe of defendants, in an action for death, who operated the train, and therefore deceased was a fellow-servant of the train men, evidence could be given to show that the contractor defendant was not operating the train. Pierce v. Brennan, 88 Minn. 50, 92 N. W. 507. A petition for injuries from a defective sidewalk, charging that the city allowed it to become out of repair and to remain so is sufficient on general denial to admit proof either of actual notice of the defect by the city or of such length of time as to impute notice. Guthrie v. Finch [Okl.] 75 Pac. 288. Where an answer in an action to recover property sold on execution against a bankrupt admitted its value in a certain amount, plaintiff may show that it brought less than that amount on the execution sale. Gabriel v. Tonner, 138 Cal. 63, 70 Pac. 1021. Where in action for rent, defendant pleaded payment to a third person, plaintiff replied specially ignoring the plea, and defendant without demurring joined issue on the replication, the plea of payment was no longer in issue so that evidence thereunder could be excluded. Linam v. Jones, 134 Ala. 570.

57. Hudson v. Hudson [Ga.] 46 S. E. 874.

58. **Particular allegations requiring proof:** Sufficiency of evidence to show defendant to be a street railway company under allegations of petition. Johnson v. Metropolitan St. R. Co. [Mo. App.] 78 S. W. 275. Illegality of a contract (Horton v. Rohlff [Neb.] 95 N. W. 36; Hillsboro Oil Co. v. Citizens' Nat. Bank [Tex. Civ. App.] 75 S. W. 336), or payment as a defense must be proved.

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though alleged.[59] An averment laid under a videlicet need not be proved precisely as laid.[60] An answer in avoidance of tort puts defendants to the burden of proof.[61] Where an answer denies all allegations of a complaint except those specifically admitted therein, plaintiff must prove an allegation not admitted.[62] Where three of six counts of a declaration for personal injuries charged general negligence that other counts charged special negligence which was not proved is immaterial.[63] An allegation unnecessary to plaintiff's action will not be ground for direction of verdict for defendant because not sustained by proof since it may be rejected as surplusage.[64] To entitle a party to a verdict or finding on a plea tendering an immaterial issue, every fact alleged in such plea must be proved as alleged.[65]

Variance.—The proof must substantially conform to the averments made.[66] Plaintiff need not prove all facts pleaded in the petition but only enough to constitute a cause of action.[67] Plaintiff stating a good cause of action in his declaration and sustaining it by evidence cannot be nonsuited.[68] Where evidence showing

Action on attachment undertaking. Waller v. Deranleau [Neb.] 94 N. W. 1038. A petition alleging fraud fails when no fraud is proven. Wright v. Roberts, 116 Ga. 194. A servant suing his master for injuries must prove the relation at the time of injury. Western Wheel Works v. Stachnick, 102 Ill. App. 420. Negligence must be proved in an action for injuries from negligence. Id. The representative capacity of defendant need not be proved where not put in issue by special plea. Harte v. Fraser, 104 Ill. App. 201. Defendant in an action on a note, setting up a counterclaim for fraud and deceit, must prove the falsity of plaintiff's representations and the latter's knowledge thereof. Halliwell Cement Co. v. Stewart [Mo. App.] 77 S. W. 124.

59. International & G. N. R. Co. v. Boykin [Tex. Civ. App.] 74 S. W. 93.

60. Galt v. Woliver, 103 Ill. App. 71.

61. Dovey v. Lam, 25 Ky. L. R. 1157, 77 S. W. 383.

62. Baker v. Warner [S. D.] 92 N. W. 393.

63. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087.

64. Chicago & A. R. Co. v. Wise, 206 Ill. 452, 69 N. E. 500.

65. Camp v. First Nat. Bank [Fla.] 33 So. 241.

66. Hennessy v. Anstock, 19 Pa. Super. Ct. 644; Hartford F. Ins. Co. v. Warbritton, 66 Kan. 93, 71 Pac. 278; Hinote v. Brigman [Fla.] 33 So. 303; Lee v. Hughes, 25 Ky. L. R. 1201, 77 S. W. 386; Ayers v. Wolcott [Neb.] 92 N. W. 1036; Martinek v. Swift & Co. [Iowa] 98 N. W. 477; Wonderly v. Christian, 91 Mo. App. 158; Lake St. El. R. Co. v. Shaw, 203 Ill. 39, 67 N. E. 374. Alleged contract was to deliver a message to a person in a certain town; held, evidence of a contract to deliver it 2½ miles therefrom inadmissible. W. U. Tel. Co. v. Byrd [Tex. Civ. App.] 79 S. W. 40. Held, error for court to instruct the jury that they might find for the plaintiff on a cause of action substantially different from that alleged. Louisville & N. R. Co. v. Guyton [Fla.] 36 So. 84. But petition held to sufficiently state the cause of action sued upon. York v. Farmers' Bank [Mo. App.] 79 S. W. 968. Evidence of certain facts are not admissible where there were no corresponding averments in the pleadings. Morton v. Morris, 27 Tex. Civ. App. 262, 66 S. W. 94. Plaintiff must recover only on the allegations of his complaint as originally made or as amended. Child v. N. Y. El. R. Co., 89 App. Div. [N. Y.] 598. Defenses cannot be made unless pleaded. Hall v. Bossier Levee Dist. Com'rs, 111 La. 913; Hall v. Small [Mo.] 77 S. W. 733. Defense of breach of a contract not pleaded. Brown Banking Co. v. Baker, 99 Mo. App. 660, 74 S. W. 454. Material facts of defense not pleaded are presumed not to exist and evidence is inadmissible to show them. Tower v. McFarland [Neb.] 96 N. W. 172. Evidence of special injuries not pleaded. Cronin v. Metropolitan St. R. Co., 82 App. Div. [N. Y.] 227; Brown v. Manhattan R. Co., 82 App. Div. [N. Y.] 222. Defense that permanency of injury, in an action for injuries, resulted from plaintiff's walking too soon after the accident. Louisville, H. & St. L. R. Co. v. McCune, 24 Ky. L. R. 1637, 72 S. W. 756; Id., 24 Ky. L. R. 2119, 72 S. W. 1094. Sufficiency of allegation of personal injury to admit evidence of hernia. Connersville v. Snider, 31 Ind. App. 218, 67 N. E. 555. Sufficiency of evidence as conforming to complaint in action to recover for heat furnished. Boston Clothing Co. v. Garland [Minn.] 97 N. W. 433. Where a petition predicates right of recovery on one of two grounds of an action, proof of the other is insufficient. Recovery of penalty from surety company for withdrawal from suretyship under Acts 1897, p. 247, c. 165, § 10. Robinson v. Nat. Surety Co., 31 Tex. Civ. App. 629, 73 S. W. 26. After plea and issue joined on a statement of claim, failure to append a copy of the writing sued on will not prevent admission of the original writing if properly proven at trial. Athens C. & C. Co. v. Elsbree, 19 Pa. Super. Ct. 618. Defendant cannot deny plaintiff's averments of a good cause of action and then defeat it by confession and avoidance by proof of new matter without notice thereof by pleading or in the course of the trial. Castle v. Persons [C. C. A.] 117 Fed. 835. Proof cannot be given outside the matters set forth in the bill of particulars. Lester v. Clarke, 40 Misc. [N. Y.] 688; Colwell v. Brown, 103 Ill. App. 22.

67. Palmer v. Kinloch Tel. Co., 91 Mo. App. 106.

68. Beck Duplicator Co. v. Fulghum, 118 Ga. 836.

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assumption of risk in an action for injuries to a servant was given by plaintiff and admitted without objection, defendant may avail himself of it without pleading it.[69] Failure of the petition to allege a necessary fact will not prevent proof thereof where the objection was waived by answering over after demurrer overruled.[70] A variance amounts to failure of proof only when the allegation is unproved in its entire scope and meaning.[71] There is a complete variance where the allegations to which plaintiff's proof is directed are unproved in their entire scope and meaning.[72] A variance between pleadings and proof is not shown merely because proof of essential averments is not extended to unnecessary averments made in connection with them.[73] Surprise as ground of nonsuit cannot be urged as to evidence following allegations of the answer.[74] Where defendant did not show by affidavit how he was misled by variance between the petition and the proof, it was immaterial.[75] Where a variance does not amount to a failure of proof and no objection is made at the trial, the variance is waived.[76] An objection as to variance between the declaration and the proof will be overruled where it fails to point out the variance.[77] Particular instances of variance are collected in the notes.[78]

69. Ehrenfried v. Lackawanna I. & S. Co., 89 App. Div. [N. Y.] 130.

70. Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

71. Code Civ. Proc. § 541. Plass v. Weil, 39 Misc. [N. Y.] 777.

72. Moran v. Kent, 87 App. Div. [N. Y.] 610.

73. Bailey v. Gatewood [Kan.] 74 Pac. 1117.

74. Meals v. De Soto Placer Min. Co. [Wash.] 74 Pac. 470.

75. Rev. St. 1899, § 655. White v. Farmers' M. F. Ins. Co., 97 Mo. App. 590, 71 S. W. 707.

76. White v. Gilleland, 93 Mo. App. 310.

77. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087.

78. It is error to try and submit a case on the theory that a certain question was an issue, where the evidence on the point was objected to, and the issue was not made by the pleadings. Kitchen Bros. Hotel Co. v. Dixon [Neb.] 98 N. W. 816.

Proof held variant: Variance in action to enforce materialman's lien. Wilcox Lumber Co. v. Ritteman, 88 Minn. 79, 92 N. W. 472. Variance between proof and declaration containing common counts for money had and received and special count alleging breach of warranty. Stearns v. Drake, 24 R. I. 272. Proof of a mere breach of warranty will not support a counterclaim for fraud and deceit. Halliwell Cement Co. v. Stewart [Mo. App.] 77 S. W. 124. An allegation of performance of a contract will not support proof of defendant's waiver of performance. Burr v. Union S. & G. Co., 86 App. Div. [N. Y.] 545. A declaration in trespass after suing out a writ in case is a fatal variance between writ and declaration. Slater v. Fehlberg, 24 R. I. 574. A general release of defendants cannot be shown without averments of payment or discharge in the answer. Rosenthal v. Rudnick, 84 App. Div. [N. Y.] 611. Recovery cannot be had on a declaration on a joint obligation where the proof shows one not liable. Spann v. Grant [Miss.] 35 So. 217. Evidence that notes were signed in the lower left-hand corner is inadmissible under an admission of execution. Baker v. Warner [S. D.] 92 N. W. 393. Where a complaint alleges injury from negligence recovery cannot be had on proof of intentional injury. Greathouse v. Croan [Ind. T.] 76 S. W. 273. Allegation in a complaint for personal injuries that plaintiff suffered concussion of the spine will not admit evidence of injury to the sexual organs. Page v. Delaware & H. Canal Co., 76 App. Div. [N. Y.] 160, 12 Ann. Cas. 18. Where the guaranty is of a particular debt, proof that another debt between the same debtor and creditor is unpaid will not make the guarantor liable. Leman v. Penn Tobacco Co., 116 Ga. 911. Evidence of impaired hearing is inadmissible under a complaint for injuries not averring such special injury. Piltz v. Yonkers R. Co., 83 App. Div. [N. Y.] 29. Where an answer in an action to recover money in possession of defendant admitted the possession, evidence that defendant had parted with custody is inadmissible. Yank v. Bordeaux [Mont.] 74 Pac. 77. Without amendment of the complaint to conform to the proof recovery cannot be had for personal injuries on proof of negligence wholly outside the complaint where objection was seasonably made. Davis v. Broadalbin Knitting Co., 90 App. Div. [N. Y.] 567. Where a complaint on a building contract alleged performance according to terms, evidence tending to show excuse for failure to perform cannot be given over objection. Rowe v. Gerry, 86 App. Div. [N. Y.] 349. Allegation of a note "payable at Central National Bank, New York City," is not sustained by production of a note "payable at the Lowery Banking Co., Atlanta, Ga." N. Y. L. Ins. Co. v. McPherson, 137 Ala. 116. An allegation of negligence in violently starting a train just as plaintiff was about to alight is not supported by proof that the train started slowly and smoothly while the gates were open and before plaintiff had time to alight. Lake St. El. R. Co. v. Shaw, 203 Ill. 39, 67 N. E. 374. A foreign statute making a corporation personally liable for taxes on its property in the state, which was not pleaded by the corporate trustees as part of a counterclaim to recover taxes so paid against a purchaser of property, cannot be considered to establish that the payment was voluntary. Janeway v. Burn, 91 App. Div. [N. Y.] 165. Allegations in a complaint to recover for merchandise sold to defendant's employes under a promise by defendant to pay therefor are not supported by proof of money paid

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PLEDGES.

§ 1. Definition and Nature (1243).
§ 2. Right to Make (1244).
§ 3. Property Subject to be Pledged (1245).
§ 4. The Contract and Its Requisites (1245)
§ 5. Rights, Duties, and Liabilities of Pledgor (1247).
§ 6. Rights, Duties, and Liabilities of Pledgee (1248).

§ 1. *Definition and nature.*—A pledge is a delivery of personal property as security for a debt or engagement. Unlike a lien, a pledge gives the right not

out in cashing time checks for defendant and such evidence cannot be admitted. Hefferlin v. Karlman [Mont.] 74 Pac. 201. Testimony of a different contract than the one pleaded in the answer is properly disregarded in directing verdict for plaintiff where defendant did not request an amendment to conform to the proof. Winchester v. Joslyn [Colo.] 72 Pac. 1079. Plaintiff cannot, over objections, prove an unconditional promise to pay an entire debt with interest under an allegation that defendant offered to pay the debt without interest. Civ. Code, art. 1805. Martin Davie & Co. v. Carville, 110 La. 862. Proof that defendant was to give something in addition to property and received in consideration other property in addition to plaintiff's premises is a variance when the count of the declaration relies on an exchange of property between the parties. Cassem v. Williams, 104 Ill. App. 504. Mere proof that a broker secured a customer able and willing to purchase will not support an action on a contract for commissions for sale of land. McDonnell v. Stephenson [Mo. App.] 77 S. W. 766. Proof of a shipment under a special contract will not sustain a complaint for breach of the common-law duty of a carrier in carriage of live stock. Lake Erie & W. R. Co. v. Holland [Ind.] 69 N. E. 138. In a suit for damages ex contractu accrued at time of suit, evidence of subsequent damages cannot be shown unless an amendment to the pleadings has been allowed. Jamison v. Charles F. Cullom & Co., 110 La. 781. Proof that conveyances were made before debts were incurred will not sustain a decree on a petition alleging that they were in fraud of existing creditors. Ayers v. Wolcott [Neb.] 92 N. W. 1036. Where defendants in assumpsit against several as partners filed no plea denying the partnership alleged, error in admitting evidence denying the partnership was not cured by the statute of jeofails. Stony Creek Lumber Co. v. Fields [Va.] 45 S. E. 797.

Proof held not variant or immaterial: Allegation of redemption and proof of purchase of the certificate of sale not material variance. Whittern v. Krick, 31 Ind. App. 577, 68 N. E. 694. In pleading a judgment it is no variance to omit portions vacated on appeal. State v. Clinton County Com'rs [Ind.] 68 N. E. 295. A declaration on quantum meruit for goods sold is supported by proof of an express contract. Brierre v. Cereal Sugar Co., 102 Mo. App. 622, 77 S. W. 111. Proof that a dog killed by defendant was part fox and part beagle is not variance from an allegation that it was "a beagle hound dog." O'Neil v. Newman [Mich.] 93 N. W. 1064. Proof that the fire box exploded is not a variance from an allegation that the boiler exploded. Ill. Cent. R. Co. v. Behrens [Ill.] 69 N. E. 796. A claim for damages in a less sum than is shown by allegations of goods sold is an immaterial variance. Prince v. Takash, 75 Conn. 616. Proof that a fence was broken by defendant's cattle is no variance from an allegation that he broke the fence in action for damages. Perry v. Cobb [Ind. T.] 76 S. W. 289. Allegations respecting "Thompson Foundry & Machine Works" will admit proof of notes signed "Thompson F. & M. Wks." Thompson F. & M. Co. v. Glass, 136 Ala. 648. Proof that plaintiff was injured by a lurch in an elevated train while stepping from the car to the platform supports a declaration that the train was suddenly started whereby plaintiff was thrown to the platform. Lake St. El. R. Co. v. Shaw, 203 Ill. 39, 67 N. E. 374. Where a complaint for money lent alleged a loan in 1898, proof showing a loan in 1896 is an immaterial variance where the fact of the loan was admitted ownership only of the fund being in controversy. Kitchen v. Holmes, 42 Or. 252, 70 Pac. 830. Where a complaint was on a quantum meruit, proof that labor and materials were furnished under an express contract is not ground for dismissal, defendant's counsel disclaiming misleading prejudice [Code Civ. Proc. § 2943]. Lundine v. Callaghan, 82 App. Div.]N. Y.] 621. Variance between the terms of a contract sued on as given in the complaint and as shown by a copy attached is only an ambiguity which is removed by a finding that the contract was as set out in the copy. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564. Where plaintiff alleged total destruction of his property by poisonous fumes from a smelter, he may recover for partial destruction without variance [Ballinger's Ann. Codes & St. § 4949]. Sterrett v. Northport M. & S. Co., 30 Wash. 164, 70 Pac. 266. Variance between petition and deeds in breach of covenant by stating the name of a railroad company as G. R. Railroad company instead of G. R. Branch Railroad company in the deeds held immaterial [Code, §§ 129, 130]. Chicago, St. L. & N. O. R. Co. v. Wilson, 25 Ky. L. R. 525, 76 S. W. 138. Where a declaration states that plaintiff sues for his own benefit as trustee and the action is on a written contract between the parties, there is no variance since the statement as to benefit of plaintiff as trustee was surplusage. Consumers' Ice Co. v. Jennings, 100 Va. 719. A complaint on a fire insurance policy describing the property as a certain lot in M's addition, while the policy described it as "on" a lot of the same number on M's fifth addition, is good though the variance may be ground for objection to introduction of the policy. Franklin Ins. Co. v. Feist, 31 Ind. App. 390, 68 N. E. 188. Under a declaration for personal injuries alleging that plaintiff was a carpenter and contractor, evidence of his general earning capacity before the accident may be shown. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087. Where a petition misrecites a contract and the answer recites it truly, the trial proceeding on the latter re-

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only to retain the property but also to sell it upon default.[79] It differs from a chattel mortgage in that it merely gives a special property in the nature of a lien on the thing pledged while the title remains in the pledgor.[80] A contract in writing is not necessary for its creation; and there must be a delivery and continued possession of the subject-matter.[81]

§ 2. *Right to make.*—A pledge may be made not only by the owner of the property, but by a third person with his consent,[82] or without the owner's assent if he has given the pledgor the indicia of title and apparent authority to pledge,[83] or if he afterwards ratifies the unauthorized pledge.[84] One having a partial interest may pledge that interest if he is in a position to make a proper delivery of the thing pledged,[85] and a pledgee, having an interest in the property pledged to the extent of the debt thereby secured, may pledge his interest subject to the pledgor's right to redeem.[86] But while the pledgor need not have the absolute ownership, he must have possession of the property in order to create a valid pledge.[87] Even where a pledge is invalid through a lack of title or want of authority in the pledgor, the attempted pledge may, under certain circumstances, establish a lien in favor of the pledgee.[88]

cital with plaintiff's acceptance so that defendant is not misled, variance between the petition and proof is immaterial [Code, § 138]. Chicago House Wrecking Co. v. Stewart Lumber Co. [Neb.] 92 N. W. 1009. Negotiations between the parties for delay in performance of a contract proved by defendant in an action on the contract do not so modify it as to prevent recovery by defendant on his counterclaim for failure of defendant to perform part of the contract as agreed. Hartman v. Frost-Trigg Lumber Co., 96 Mo. App. 288, 70 S. W. 157.

79. Bell v. Mills [C. C. A.] 123 Fed. 24.

80. Cumming v. McDade, 118 Ga. 612.

81. Commercial Bank v. Flowers, 116 Ga. 219; Storts v. Mills, 93 Mo. App. 201.

82. Springfield Co. v. Ely [Fla.] 32 So. 892. A wife may pledge her property to secure her husband's debt, but a mere statement of a husband that he is authorized to pledge his wife's stock is insufficient to prove his authority to do so. Just v. State Sav. Bank [Mich.] 94 N. W. 200. The fact that a party authorized to pledge another's certificate of stock for payment of a specific debt due by him also pledges the same for other debts due by him to the pledgee does not affect the validity of the pledge for the authorized debt. Springfield Co. v. Ely [Fla.] 32 So. 892. A trustee under a testamentary trust which provides that the trustee shall, as far as practicable, allow the cestui to have the management and possession of the personal property, has authority to entrust shares of stock to the cestui with power to pledge them for a loan for the benefit of the estate. Freeman v. Bristol Sav. Bank [Conn.] 56 Atl. 527.

83. The owner of a note who by written assignment and actual transfer has clothed the bailee with apparent ownership for the purpose of suing thereon is estopped to question the validity of such bailee's pledge of the note. May v. Martin [Tex. Civ. App.] 73 S. W. 840. Where the assignor of a chose in action delivers the same to another for the purpose of securing a loan for the assignor's benefit, he has clothed the person to whom he has entrusted the chose in action with authority to agree upon the terms and conditions of the pledge and he is bound thereby. In re Phillips' Estate, 205 Pa. 531. Where the owner of a certificate of stock signed a transfer in blank thereon and delivered it to another so that he might pledge it for a loan, such unrestricted endorsement and delivery without any attempt for a long period of time to regain possession or assert control amounted to an agreement that it might be continually held by the person to whom it was given for such use as he might make of it in a renewal or increase of the loan or otherwise. Cox v. Dowd, 133 N. C. 537.

84. A cestui que trust's pledge of stocks to borrow money is ratified by the trustee's subsequent account, in which he credits himself with the stocks as delivered to the cestui for investment. Freeman v. Bristol Sav. Bank [Conn.] 56 Atl. 527.

85. Owner of property subject to an option may pledge it subject to the rights of the option holder. Page v. Boggess, 41 Misc. [N. Y.] 46.

86. Tompkins v. Morton Trust Co., 91 App. Div. [N. Y.] 274; Cumming v. McDade, 118 Ga. 612; Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800. A pledge of stock held on margin by a broker in order to raise the money to carry out the contract of purchase he has made on behalf of his customer is not a conversion of the stock, though the broker pledged the stock for more than its owner owed to redeem it. Tompkins v. Morton Trust Co., 91 App. Div. [N. Y.] 274.

87. Commercial Bank v. Flowers, 116 Ga. 219. Collateral notes which are not in the possession of either pledgor or pledgee and are owned by a third person cannot be pledged to secure an existing debt, since possession is the essence of a pledge. Storts v. Mills, 93 Mo. App. 201.

88. Where a loan was made in good faith for the benefit of an estate on the security of a pledge of stocks, the pledgee cannot be held liable for conversion of the stocks, without repayment of the loan, though the pledge was not valid. Freeman v. Bristol Sav. Bank [Conn.] 56 Atl. 527. Where one who has no title thereto pledges a bond of a corporation as security for a private debt and on foreclosure of a mortgage against the corpora-

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§ 3. *Property subject to be pledged.*—Every kind of personal property in existence and capable of delivery may be pledged. A pledge may therefore be made not only of ordinary goods and chattels, but of unsecured promissory notes,[89] mortgage notes,[90] shares of stock,[91] corporate bonds,[92] an insurance policy,[93] a contract of indemnity,[94] or a chose in action.[95]

§ 4. *The contract and its requisites.*—A pledge is created by a delivery of property as security for a debt. No writing is necessary, as, in the absence of an express written contract, the law will imply a contract.[96] In case of any ambiguity in the contract, the nature of the transaction and the intention of the parties shall determine whether or not it shall be construed as a pledge.[97] Though the property is conveyed by a written assignment absolute on its face, it is competent to show by parol evidence that the instrument was in fact intended as a pledge.[98] But where an unambiguous written instrument shows that the transaction was a pledge, parol evidence that the property was sold absolutely will not be admitted.[99] A pledge to secure a loan bearing a usurious rate of interest is valid to the extent of the debtor's lawful indebtedness, but otherwise will be treated as a nullity.[1] The validity of the contract of pledge must be determined

tion is entitled to a portion of the proceeds, his attempted pledge of the bond will be treated as an assignment pro tanto of his share of the proceeds of the foreclosure sale. Georgetown Water Co. v. Fidelity T. & S. V. Co. [Ky.] 78 S. W. 113.

89. Johnston v. Gulledge, 115 Ga. 981; Johnson v. Zweigart, 24 Ky. L. R. 1323, 71 S. W. 445.

90. Meyer v. Moss, 110 La. 132.

91. Thornton v. Martin, 116 Ga. 115; Hall v. Cayot, 141 Cal. 13, 74 Pac. 299; Freeman v. Bristol Sav. Bank [Conn.] 56 Atl. 527.

92. Field v. Sibley, 174 N. Y. 514, 66 N. E. 1108; Georgetown Water Co. v. Fidelity T. & S. V. Co. [Ky.] 78 S. W. 113.

93. Mechanics' Nat. Bank v. Comins [N. H.] 55 Atl. 191; Scottish Union & Nat. Ins. Co. v. Field [Colo. App.] 70 Pac. 149; Clarke v. Adam, 30 Tex. Civ. App. 66, 69 S. W. 1016.

94. Jenckes v. Rice, 119 Iowa, 451, 93 N. W. 384.

95. In re Phillips' Estate, 205 Pa. 531.

96. Mercantile Nat. Bank v. Peabody [Colo. App.] 72 Pac. 611; Memphis City Bank v. Smith, 110 Tenn. 337, 75 S. W. 1065; Louisville Banking Co. v. Thomas & Son's Co., 24 Ky. L. R. 811, 69 S. W. 1078; Storts v. Mills, 93 Mo. App. 201; Field v. Sibley, 174 N. Y. 514, 66 N. E. 1108; Meetz v. Mohr, 141 Cal. 667, 75 Pac. 298; Crews v. Yowell, 25 Ky. L. R. 598, 76 S. W. 127; Cumming v. McDade, 118 Ga. 612; Wilkins v. Redding [Neb.] 97 N. W. 238.

97. The relation between a broker and a customer who buys stock on margin is that of pledgor and pledgee. Rothschild v. Allen, 90 App. Div. [N. Y.] 233. Where a guarantor guaranteed to a bank the face of all drafts for certain goods drawn by a certain shipper with bill of lading attached, it was for the jury to determine from all the facts of the case whether the contract of guaranty meant that all bills of lading accompanying the drafts should be transferred to the bank as a pledge of the goods against which the drafts were drawn. First Nat. Bank v. Bowers, 141 Cal. 253, 74 Pac. 856. On the issues whether there was an indebtedness and whether the delivery of certain mortgage notes was by way of pledge to secure the said indebtedness or merely an accommodation lending, a contemporaneous written promise to deliver the notes as collateral is very strong corroborative evidence of the existence of a debt and of a delivery by way of pledge. Meyer v. Moss, 110 La. 132. A deposit of money to be drawn against by the depositor, with an agreement for a return of the unexpended balance or for the application of the same as part payment of the purchase price of certain property in case the same should be bought by the depositor from the depositary of the fund, was intended merely as security for the payment of the purchase price, and not as an additional sum to be paid in excess of the purchase price. Leupold v. Weeks, 96 Md. 280. In case of dispute it is for the jury to determine whether a voucher in possession of a bank was held as collateral for a note. Bank of Staten Island v. Silvie, 89 App. Div. [N. Y.] 465. Where a bank advanced money to a dealer for the purchase of certain property which was afterwards consigned to a broker for sale, the bank, as against the dealer and all persons having notice, was entitled to the net proceeds of the sale as security for its advances. First State Bank v. Thuet, 88 Minn. 364, 93 N. W. 1. Where a bank agreed to pay checks drawn by a purchaser of cotton for the purchase price upon receipt of the bill of lading therefor it had a lien on the cotton as pledgee for the sum advanced and was entitled to the extent of such lien to receive the proceeds of the sale of the cotton. First Nat. Bank v. San Antonio & A. P. R. Co. [Tex.] 77 S. W. 410.

98. Assignment of life insurance policy. Clarke v. Adam, 30 Tex. Civ. App. 66, 69 S. W. 1016. Bill of sale of steel billets. First Nat. Bank v. Pa. Trust Co. [C. C. A.] 124 Fed. 968. An instrument reciting the sale and delivery of certain promissory notes with a provision for their return to the vendor after a certain sum has been collected thereon is evidence that the transaction was a pledge of the notes and not an absolute sale. Johnson v. Zweigart, 24 Ky. L. R. 1323, 71 S. W. 445.

99. Pledge of promissory notes. Johnson v. Zweigart, 24 Ky. L. R. 1323, 71 S. W. 445. 445.

1. Bell v. Mulholland, 90 Mo. App. 612.

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by the laws of the state where the pledged property is situated,[2] and an action for the performance or enforcement of the contract must also be brought in that state.[3] A delivery of the pledged property and its possession by the pledgee is essential to the validity of a contract of pledge.[4] In the case of heavy cumbersome property, setting apart or symbolical delivery is sufficient.[5] Where a third person agrees to hold possession of the property as agent for the pledgee, there is a sufficient delivery to create a pledge,[6] though such agent is an employee of the pledgor, and though the goods remain on the premises of the pledgor, if they are under the agent's control.[7] A constructive delivery, which will be as effectual as an actual manual delivery of the goods, may be made by the delivery of a document of title which puts the pledgee in possession of the goods, such as a bill of lading[8] or a warehouse receipt.[9] Incorporeal property such as negotiable instruments, stocks in corporations, and choses in action generally, being incapable of actual manual delivery can not generally be pledged without a written transfer of title.[10] Unless a transfer of stock is required on the books of the corporation,[11]

2. Where a corporation of one state with its principal place of business therein issues, as contracts of pledge, warehouse receipts for certain grain in its own elevators in another state, the laws of such other state where the grain is situated must determine whether a pledge of grain by the issuance of a warehouse receipt by a warehouseman for his own grain to secure his own debt is valid. In re St. Paul & K. C. Grain Co., 89 Minn. 98, 94 N. W. 218.

3. In re St. Paul & K. C. Grain Co., 89 Minn. 98, 94 N. W. 218. An action to set aside a pledge of mortgage notes may be brought in the court within whose jurisdiction the pledgor and the mortgaged property are found, though the pledgee resides in another state and retains the notes in his keeping. Meyer v. Moss, 110 La. 132. But it has been held that the sale of pledged railroad stocks need not be made in the county where the railroad is situated, especially if the note secured by the stocks is dated and made payable in another county, where also the maker resides. Thornton v. Martin, 116 Ga. 115. A pledgee seeking in equity to recover a debt due him from one party by the sale of property of another pledged for its payment is not obliged to make the debtor a party defendant where he is beyond the jurisdiction of the court and no relief is prayed against him. Springfield Co. v. Ely [Fla.] 32 So. 892.

4. Storts v. Mills, 93 Mo. App. 201.

5. Where the intention to transfer is also evidenced by a bill of sale, and if the signs are removed without the pledgee's knowledge and subsequently replaced, and if no rights of third parties have intervened, the pledgee's lien is not lost. First Nat. Bank v. Pa. Trust Co. [C. C. A.] 124 Fed. 968. But a mere agreement to transfer property by way of pledge where the property remains on the premises of the debtor, and no steps are taken by the attachment of placards or otherwise, to apprise the community of any change in the title is ineffectual to constitute a pledge. Chitwood v. Lanyon Zinc Co., 93 Mo. App. 225. An attempted pledge of certain property, which is ineffective through a lack of proper delivery does not invalidate the title of a subsequent vendee taking with notice of the prior transaction. Id. Delivery of warehouse receipt to pledgee sufficient. Proctor v. Shotwell [Mo. App.] 79 S. W. 728.

6. Pig iron set apart and identified on the land of the pledgor's lessee. Ky. Furnace Co.'s Trustee v. City Nat. Bank, 25 Ky. L. R. 28, 75 S. W. 848. Promissory notes deposited with the cashier of a bank as collateral for the benefit of certain creditors. Mercantile Nat. Bank v. Peabody [Colo. App.] 72 Pac. 611. Where the pledgor desires to secure several creditors and delivers the property to one of the number to hold the same as security for his own claim and those of the other creditors, the pledgeholder takes the property as the agent of all such creditors, and the pledge is valid as to all. Hoffman House v. Foote, 172 N. Y. 348, 65 N. E. 169.

7. A pledge so made is valid as against the assignee in insolvency of the pledgor. Dunn v. Train [C. C. A.] 125 Fed. 221.

8. First Nat. Bank v. San Antonio & A. P. R. Co. [Tex.] 77 S. W. 410; First Nat. Bank v. Bowers, 141 Cal. 253, 74 Pac. 856.

9. Millhiser Mfg. Co. v. Gallego Mills Co. [Va.] 44 S. E. 760. But such a receipt conveys to the intended pledgee no interest in the property when the same is not in possession of the warehouseman or the party who undertakes to pledge it. Commercial Bank v. Flowers, 116 Ga. 219. In some states it is provided by statute that the warehouse receipt must be given by a public warehouseman other than the pledgor, in order to constitute a proper delivery by way of pledge. Kentucky Furnace Co.'s Trustee v. City Nat. Bank, 25 Ky. L. R. 28, 75 S. W. 848. Construing statutes of other states. In re St. Paul & K. C. Grain Co., 89 Minn. 98, 94 N. W. 218. But in other states a warehouseman's delivery of receipts for his own property stored in his warehouse as collateral for his own debts constitutes a valid pledge. Millhiser Mfg. Co. v. Gallego Mills Co. [Va.] 44 S. E. 760; In re St. Paul & K. C. Grain Co., 89 Minn. 98, 94 N. W. 218.

10. And in an action by the pledgee such written transfer must be proved, when it is neither admitted nor denied in the defendant's pleadings. Thornton v. Martin, 116 Ga. 115.

11. And even where such a statute exists, the corporation alone can take advantage of it, and the lien of a pledgee of stock transferred to him by endorsement and delivery is

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a pledge of stock by a delivery of the certificate with a power of attorney to make a transfer upon the books of the corporation, or with an endorsement of the certificate, will be valid.[12] And a pledge of stock by mere delivery of the certificate without endorsement or other written assignment, though ineffectual as against the intervening rights of third parties, is valid as against the pledgor.[13] After delivery, possession must be retained by the pledgee, but the pledgee does not, as against the pledgor, lose possession of the property by making a subpledge of it,[14] or by employing the pledgor as his agent to sell the goods held in pledge.[15]

§ 5. *Rights, duties, and liabilities of pledgor.*—The pledgor retains the general property in the thing pledged, and if it is unlawfully sold he can avoid the sale and resume title.[16] The right to vote pledged shares of stock remains in the pledgor until foreclosure.[17] The pledgor upon payment or tender of the debt, or satisfaction of the engagement secured by the pledge, is entitled to the return of the property.[18] And when the pledgee has wrongfully applied the property to the discharge of another creditor's claim, the pledgor is entitled to be subrogated to the rights of the creditor whose indebtedness has been paid from the proceeds of the pledgor's property.[19] A bill to redeem the property must be brought within a reasonable time, as the pledgor's rights will be barred by laches.[20]

therefore good as against subsequent attaching creditors of the pledgor. Mapleton Bank v. Standrod [Idaho] 71 Pac. 119 (construing Idaho Rev. St. § 2611).

12. American B. & T. Co. v. Pac. B. & M. Co. [Wash.] 74 Pac. 826; Just v. State Sav. Bank [Mich.] 94 N. W. 200; Lyman v. State Bank, 81 App. Div. [N. Y.] 367; Cox v. Dowd, 133 N. E. 537.

13. Hall v. Cayot, 141 Cal. 13, 74 Pac. 299.

14. Meyer v. Moss, 110 La. 132.

15. First Nat. Bank v. C. A. Andrews & Co. [Tex. Civ. App.] 77 S. W. 956. See, also, § 6.

16. Where certain notes payable to the husband of a married woman were deposited as additional collateral for a debt due by her, and where such notes were afterwards seized in the hands of the pledgee and sold by a creditor of the husband, it was competent for the wife to prove by a fair preponderance of evidence that the notes though payable to the husband really belonged to her, and thereby to render the sale void and resume her title to the notes. Sallinger v. Perry [N. C.] 45 S. E. 360.

17. And where the pledgee appears as the owner of the stock on the books of the corporation, a court of equity may enjoin the pledgee from voting the shares pledged in prejudice of the rights of the pledgor. Haskell v. Read [Neb.] 93 N. W. 997.

18. Nor is the validity of the pledge affected by the fact that the pledgee's agent fails to give any receipt to the pledgor. Dunn v. Train [C. C. A.] 125 Fed. 221. The pledgor is not entitled to a reconveyance from the original or sub grantee of the property pledged until payment in full of the debt thereby secured. Cumming v. McDade, 118 Ga. 612. The relation between the broker and a customer who buys stock on margin is that of pledgor and pledgee, and the customer is entitled to immediate delivery of the stock on payment of all advances by the broker. Rothschild v. Allen, 90 App. Div. [N. Y.] 233. Where bonds are deposited as collateral for notes in which no provision is made for a pro tanto release of the collateral upon partial payment, the pledgor is not entitled to the return of any portion of the collateral until the whole debt is paid. Goepper & Co. v. Phoenix Brew. Co., 25 Ky. L. R. 84, 74 S. W. 726. Where a sum is deposited by one as a pledge of good faith in the making of a lease, he is entitled to recover it when, upon inspection, he refuses to execute the lease. Aquelina v. Provident Realty Co., 84 N. Y. Supp. 1014. Where the pledgee of certain bonds agreed to cancel the debt and return the bonds in consideration of services rendered and to be rendered by the pledgor, a demand for the return of the bonds was essential to make the pledgee's retention thereof a conversion. Scrivner v. Woodward, 139 Cal. 314, 73 Pac. 863. The pledgor in order to recover in an action of replevin must tender the full amount of his debt and keep the tender good. Wilkins v. Redding [Neb.] 97 N. W. 238. Where the pledgee refused to deliver the property pledged except upon payment of certain debts not thereby secured, and the pledgor was able and willing to pay the debts secured by the pledge, a tender of the amount due on the debts so secured was waived. Memphis City Bank v. Smith, 110 Tenn. 337, 75 S. W. 1065. When the sum due by the pledgor is not in dispute, a tender by him of that sum is not bad because coupled with a demand for the return of the property; but where the sum due is in dispute a tender of any sum less than that claimed by the pledgee, though equal to the amount actually due is not good if coupled with a condition for the return of the property. Wilkins v. Redding [Neb.] 97 N. W. 238. Where in an action to recover the proceeds of a policy pledged by plaintiff and her deceased husband to a firm, plaintiff averred that she had executed an assignment to E. & Co. to secure certain debts of her husband to the firm, it was not variance when the proof was of an assignment to E. one of the members of the firm to secure debts due the firm. Clarke v. Adam, 30 Tex. Civ. App. 66, 69 S. W. 1016.

19. Plaintiff furnished securities to the

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§ 6. *Rights, duties, and liabilities of pledgee.*—The pledgee is entitled, until the debt secured has been paid, to have possession of the property pledged,[21] but is bound to use ordinary care and diligence in the care and custody thereof,[22] and has the right to collect the interest, dividends and income accruing therefrom as trustee for the pledgor to whom he must account for the same upon the redemption of the pledge.[23] In the case of tangible property or non-negotiable securities, as the pledgee acquires only such interest therein as was possessed by the pledgor, the lien of the pledgee is subject to prior equities against the pledgor.[24] But a pledgee of negotiable instruments or quasi-negotiable instruments such as certificates of stock, taking the same before maturity,[25] and for value[26] without notice,[27] is a bona fide holder, and is not affected by the equities between the original parties.[28] A pledgee taking securities for a pre-existing debt, unless they are

cashier of a bank, the insolvency of which was concealed from her, to be pledged as security for a note of the cashier, the proceeds of which were placed to the credit of such bank with the reserve bank. A portion of such proceeds was applied to the payment of an overdraft due the reserve bank, and the remainder stood to the credit of the insolvent bank and came into the hands of the receiver. Held, that plaintiff, having paid the note to release her securities, was entitled to recover the portion of the proceeds which came into the receiver's hands, and, as to the remainder, was entitled to be subrogated to the right to dividends of the reserve bank, whose indebtedness it paid. Hallett v. Fish, 123 Fed. 201.

20. A bill by the owner to redeem certain property pledged, on the ground that the debt has been paid, which is not brought until 26 years from the time the right of action accrued, cannot be sustained, though the delay was owing to the plaintiff's difficulty in establishing the title to the property as against a third person. Kase v. Burnham, 206 Pa. 330.

21. Commercial Sav. Bank v. Hornberger, 140 Cal. 16, 73 Pac. 625. Where property was pledged to a corporation to secure it and indemnify others who became the pledgor's sureties on the faith of the pledge, it could bring suit to reclaim the property pledged from the pledgor, who had appropriated it to his own use, if any of the obligations for which the pledge was made remained undischarged. Hoffman House v. Foote, 172 N. Y. 348, 65 N. E. 169. Where bills of lading were pledged to secure advances made to the purchaser of the goods, and on the bankruptcy of the purchaser a part of the goods covered by the bill of lading was in the possession of a carrier, its refusal to deliver the property to the pledgee except on surrender of the bill of lading was a conversion of the property. First Nat. Bank v. San Antonio & A. P. R. Co. [Tex.] 77 S. W. 410.

22. Where the pledgee of property conveys the same to a third person who by reason of an outstanding record title in himself is enabled to convey a title to an innocent purchaser, thereby defeating the pledgor's right to redeem, the pledgee in the absence of any knowledge of the subgrantee's intent to defraud is not responsible for the damage to the pledgor. Cumming v. McDade, 118 Ga. 612. Where a note is given as collateral security, failure to present it for payment and give notice of dishonor does not operate as a payment of the amount thereof on the principal debt, but is only ground for damages against the pledgee for negligence in losing the endorser's liability. Coleman v. Lewis, 183 Mass. 485, 67 N. E. 603. Where a pledgee of bank stock, relying on the advice of his attorney and acting in good faith, made no defense to an action of replevin for the pledged stock, he used the ordinary care and diligence of a prudent man in the care and custody of the thing pledged, and was not liable for its loss, even though the replevin action was barred by limitations. Loomis v. Reimers, 119 Iowa, 169, 93 N. W. 95.

23. McCrea v. Yule, 68 N. J. Law, 465.

24. Pledge of coupon bonds. Georgetown Water Co. v. Fidelity T. & S. V. Co. [Ky.] 78 S. W. 113. It has, however, been held that a statutory lien on the property of a corporation in favor of persons furnishing supplies to it does not apply to goods deposited in a warehouse by the corporation and pledged, by delivery of the warehouse receipt, as collateral security for a loan. Millhiser Mfg. Co. v. Gallego Mills Co. [Va.] 44 S. E. 760.

25. Where the agent of the owner of a note on the date of its maturity extended it without authority and thereafter wrongfully pledged it for his personal debt, the pledgee took it after maturity and acquired no title as against the rightful owner. Merchant Loan & Trust Co. v. Welter, 205 Ill. 647, 68 N. E. 1082.

26. If a promissory note owned by a wife is pledged to secure a debt which is in part hers and in part that of her husband, it is a valid pledge as security for the part of the debt due by her, and the pledgee takes the note as a bona fide purchaser and may recover from the maker, on maturity, the full amount of the note. Johnston v. Gulledge, 115 Ga. 981. Where a pledgee of certain property to secure a loan then made and any other debts that might be subsequently contracted by the pledgor, upon receiving part payment of the original loan, made, in good faith, a new loan within four months prior to the pledgor's bankruptcy, the transaction was not a preference under the bankruptcy law, and the lien of the pledgee was good both for the subsequent debt and the unpaid balance of the original debt. First Nat. Bank v. Pa. Trust Co. [C. C. A.] 124 Fed. 968.

27. A pledgee of stock subject to an option of which he has notice takes the stock subject to the rights of the option holder. Page v. Boggess, 41 Misc. [N. Y.] 46.

28. Where an owner has clothed a bailee

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given for an extension of time,[29] does not take for value, and is not a bona fide purchaser.[30] Where pledged stock is transferred to the pledgee on the books of the corporation a notice to the corporation that he holds as pledgee will relieve him from liability for the debts of the corporation.[31] Where a promissory note is pledged, the pledgee may collect the same on its maturity, and hold the proceeds as security for his claim against the pledgor.[32] The pledgee has a lien on the property pledged,[33] or on its proceeds,[34] or on other property substituted for

with apparent ownership and the bailee thereupon wrongfully pledges the property, the pledgee may sell such property in satisfaction of the debt due him by the bailee unless the rightful owner tenders to the pledgee the amount of the bailee's debt. May v. Martin [Tex. Civ. App.] 73 S. W. 840. Where the articles of association of a bank give it a lien on the stock of persons indebted to the bank, and the cashier, being so indebted, pledges his stock with a stockholder of the bank as security for a debt, and there is nothing on the face of the stock certificate in regard to the provision for a lien and the pledgee has no knowledge of the facts, he is a bona fide holder with a lien superior to that of the bank. Lyman v. State Bank, 81 App. Div. [N. Y.] 367. Neither a by-law of a bank prohibiting a transfer of its stock by a stockholder indebted to the bank, nor an agreement by a stockholder that the bank should have a lien on his stock for his indebtedness to the bank could bind a bona fide pledgee for value of the stock without notice thereof. Just v. State Sav. Bank [Mich.] 94 N. W. 200. But where the pledgee of a note secured by a mortgage as collateral for a limited obligation by the pledgor fraudulently obtains written authority from the pledgor to dispose of the collateral for his own use, a subpledgee having no knowledge of such written instrument and taking the collateral as security for an advance to the pledgee is subject to the equities between the original parties and his lien covers the interest of the original pledgee only. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800.

29. An extension of time granted by a creditor in consideration of a pledge of stock by the debtor as security for the debt makes the creditor a bona fide holder for value of the stock. Just v. State Sav. Bank [Mich.] 94 N. W. 200.

30. A pledge by a debtor, who is clearly insolvent, of certain shares of stock as collateral for a pre-existing debt constitutes a preference under the bankruptcy law which must be given up before the debt secured thereby can be proved. In re Busby, 124 Fed. 469. A bona fide vendee of chattels which remain in the possession of the vendor has a right superior to that of a creditor who subsequently obtains them in pledge to secure a pre-existing debt. Dexter v. Citizens' Nat. Bank [Neb.] 94 N. W. 530.

31. But in the absence of such notice a record holder, though in fact a pledgee, will be liable. Hurlburt v. Arthur, 140 Cal. 103, 73 Pac. 734. Notice to the corporation of a pledge of stock by a stockholder is sufficient to protect the pledgee against subsequent claims against the stock in favor of the corporation, though he makes no demand for transfer of the stock on the books of the corporation. Just v. State Sav. Bank [Mich.] 94 N. W. 200.

32. Where a note made by a third party to the pledgor, is delivered as collateral security for a debt, the pledgee is not bound to sell the same and apply the proceeds to the debt but can sue and collect the note and use the name of the pledgor for that purpose. Crews v. Yowell, 25 Ky. L. R. 598, 76 S. W. 127. If the payee of a promissory note pledges the same, and the maker on demand from the pledgee bona fide pays it, he is entitled to the performance of the obligation which the pledgor undertook as the consideration for the note, and is not concerned with the proper application of the proceeds of the note by the pledgee. Johnston v. Gulledge, 115 Ga. 981.

33. Where a life policy was assigned to secure notes, the beneficiary under the policy was estopped to assert that it was released from the pledge by a renewal of such notes to which he assented. Mechanics' Nat. Bank v. Comins [N. H.] 55 Atl. 191. A pledgee does not forfeit his lien by an unsuccessful contention that the equity of redemption has been extinguished by contract and that he has acquired the property outright. Wilkins v. Redding [Neb.] 97 N. W. 238. By subpledging and redeeming the subpledge, the pledgee does not acquire a new title to the pledged property but merely continues his original tenure. Meyer v. Moss, 110 La. 132. Under a statute providing that a lien is extinguished by the lapse of the time within which an action can be brought upon the principal obligation, a merger of the original debt in a judgment in favor of the pledgee before limitations had run against the debt will keep the lien alive and enforceable against the pledgor and the assignee of his equity. Commercial Sav. Bank v. Hornberger, 140 Cal. 16, 73 Pac. 625.

34. Where the cashier of a bank made an agreement within the apparent scope of his authority with the owner of certain notes deposited in the bank for collection that such notes should be held as collateral for the benefit of certain parties upon certain specified terms, the bank having collected the collateral and retained the proceeds was estopped to deny the authority of the cashier and was bound by the terms of his agreement. Mercantile Nat. Bank v. Peabody [Colo. App.] 72 Pac. 611. Where the pledgor of certain cotton, with the consent of the pledgee sold to a prior creditor a portion of the cotton pledged under an agreement of which the pledgee had no knowledge, that the creditor might deduct the amount of his claim from the purchase price, the fact that the pledgee, through a mistake in regard to the purchase price induced by the creditor, credited the latter with the amount of his claim against the pledgor does not estop the pledgee, upon discovery of the mistake, from cancelling such credit and holding the entire proceeds which were less than the amount of the pledgee's advances. First Nat.

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the original pledge,[35] for the full amount of the debt secured, but not for other claims against the pledgor.[36] Upon default by the pledgor in payment of the secured debt at its maturity, unless the time of payment has been extended,[37] the pledgee, after demand,[38] may sell the property pledged,[39] after notice to the

Bank v. Andrews & Co. [Tex. Civ. App.] 77 S. W. 956. Where notes are deposited as collateral to secure the pledgee from any liability as surety on a bond, the pledgee is entitled to retain from the proceeds of the notes an amount sufficient to pay all possible liability he may incur on the bond but he is not entitled to hold the excess, as against a subsequent pledgee, until his liability on the bond has terminated. Mercantile Nat. Bank v. Peabody [Colo. App.] 72 Pac. 611.

35. Where a husband with the written authority of his wife pledged certain certificates of stock belonging to her as security for a loan to him, and the wife after a divorce from her husband substituted, with the consent of the pledgee, other certificates in place of those originally pledged, the pledgee was entitled to subject the substituted certificates to payment of his debt. Springfield Co. v. Ely [Fla.] 32 So. 892.

36. On a hypothecation of certain goods as security for future advances by the pledgee, the latter could not tack on to his advances other advances made by his agent in his individual capacity so as to make them a lien upon the property. Backhaus v. Buells, 43 Or. 558, 72 Pac. 976, 73 Pac. 342. Where a pledgee asserted the right to hold the property pledged for debts for which it had not been pledged, and refused to deliver the property except on payment of such debts in addition to those secured, such refusal constituted a conversion of the property. Memphis City Bank v. Smith, 110 Tenn. 337, 75 S. W. 1065. A subsequent pledgee for an advance of money part of which is applied to the discharge of the claim of a prior pledgee cannot be subrogated to the rights of the prior pledgee if he has acted as a volunteer and not for the protection of any interest held by him in respect of the matter concerning which the advance is made. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800.

37. Where a note is secured by collateral, and upon maturity of the note the pledgee bank notified the pledgor that it would carry the loan as long as the pledgor paid the interest, failure to pay the interest and notice of such nonpayment to the pledgor terminated the extension, and the pledgee could then proceed to dispose of the collateral. Louisville Banking Co. v. W. H. Thomas & Sons Co., 24 Ky. L. R. 811, 69 S. W. 1078. If the pledgee notifies the pledgor that he wants to collect the note made by the pledgor within a short time, a reply by the pledgor that he is ready to pay whenever the pledgee wishes is insufficient evidence of an agreement to defer sale until further notice. Thornton v. Martin, 116 Ga. 115. The fact that a debtor pledged certain securities for advances to him does not extend the time of payment or suspend the pledgee's right of action where the securities were not taken in lieu of or in discharge of the debt. Bright v. Carter, 117 Wis. 631, 94 N. W. 645. Where a pledgee held property as security for an advance of money to the pledgor and also as protection from liability on account of his endorsement of certain notes of the pledor, he was not obliged to wait until the indorsed notes were paid by the makers or himself before he could realize on the security held by him for the money actually advanced by him, upon failure to pay the same by the pledgor. Meetz v. Mohr, 141 Cal. 667, 75 Pac. 298. A pledgee bank is not bound by an agreement made by its president to extend the time of payment by the pledgor or to refrain from selling the pledged property in liquidation of the debt, where the president had no express or implied authority to make such agreement and the same was never ratified by the bank. Arbogast v. American Exch. Nat. Bank [C. C. A.] 125 Fed. 518.

38. A statutory requirement for demand upon a pledgor, if he can be found, before sale of a pledge and for notice to him of such sale, is satisfied, in case of the death of the pledgor, by demand and notice to his executors. Bell v. Mills [C. C. A.] 123 Fed. 24.

39. Under a statute providing that a stockholder may pledge his stock by endorsement and delivery and still represent and vote on the same at stockholders' meetings, the pledgee's remedy to subject the stock to the payment of the debt is by a bill in equity to foreclose or by a sale without any judicial proceedings after notice to the pledgor and a bill by the pledgee to compel a transfer of the stock on the books of the corporation will not be allowed. American B. & T. Co. v. Pac. B. & M. Co. [Wash.] 74 Pac. 826. Where the power to sell a pledge is conferred by statute, and is a power coupled with an interest which may be exercised by the pledgee in his own name, it is not revoked by the death of the pledgor though the title to the property remains in the pledgor and his legal representatives. Bell v. Mills [C. C. A.] 123 Fed. 24. Where a note is secured by a pledge, and the contract of pledge does not require the note to be sold at maturity, the pledgee, in the absence of any demand on him to sell the pledge, is not liable to the pledgor for the amount of depreciation in the value of the pledge between the dates of maturity of the note and institution of suit. Adoue & Lobit v. Hutches [Tex. Civ. App.] 75 S. W. 41. Where the pledgee, upon nonpayment of the note, is authorized to sell the stocks pledged without giving any notice, the sale is valid though made without demand or notice and long after the maturity of the note if there has been no valid extension of the note. Thornton v. Martin, 116 Ga. 115. Where a written contract consisted of an executory agreement for the sale of hops and a hypothecation of the crop as security for the seller's performance of his contract, on a breach of the seller's contract, the buyer was not entitled to possession of the crop, as the damages for the breach were unliquidated and too vague, uncertain, and indefinite to constitute the basis of a mortgage lien enforceable by power of sale. Backhaus v. Buells, 43 Or. 558, 72 Pac. 976, 73 Pac. 342.

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pledgor,[40] or bring a bill in equity for its foreclosure or the enforcement of his lien,[41] or collect it, if it is in the form of a promissory note or chose in action,[42] or may recover the amount of his debt from the pledgor by an independent suit without foreclosing the pledge.[43] As the pledgee, in the sale of the pledged property, is acting as a trustee for the pledgor, he is bound to get the highest price possible,[44] and after applying the proceeds to the satisfaction of his claim together with the necessary expenses of the sale or collection[45] must pay over the balance to the pledgor.[46] In case of an unauthorized sale by the pledgee, the pledgor, un-

40. Under a statutory requirement for the sale of pledged property in the manner and upon notice usual at the place of sale, it is not necessary that the notice of sale shall state that the property is pledged or the property of the pledgor, where that is not shown to be usual at the place of sale. Bell v. Mills [C. C. A.] 123 Fed. 24.

41. American B. & T. Co. v. Pac. B. & M. Co. [Wash.] 74 Pac. 826. Where an agreement pledging securities to a trustee for the payment of interest on certificates provided that in case of default, the trustee might institute such proceedings as might be advised by counsel, the trustee, upon default, was entitled to resort to a court of equity to enforce the agreement, though the agreement provided for a mode of enforcement without the intervention of the court. Land Title & Trust Co. v. Asphalt Co. of America, 121 Fed. 192. The holder of bonds as collateral security on default in their payment may, instead of selling them, collect them by a foreclosure of the mortgage securing them, the proceeds of the sale becoming a trust fund in lieu of the original security. Field v. Sibley, 174 N. Y. 514, 66 N. E. 1108. The owner of stock in a foreign corporation deposited it with a bank to hold the same subject to the option of a third party to receive certain shares by a certain date at a specified price, failing which the bank was to return such shares to the owner. The owner thereafter pledged all the stock as collateral for a debt. Upon default by the pledgor, the pledgee could maintain an action against the depository bank and the option holder to have his lien established subject to the rights of the option holder. Page v. Boggess, 41 Misc. [N. Y.] 46. A bill by a trustee for the sale of securities pledged to secure a debt by the pledgor should not be dismissed because it may not be necessary to sell all the securities and because it asks for more relief than the court may, upon final hearing, adjudge the complainant entitled to. Land Title & Trust Co. v. Asphalt Co., 121 Fed. 192.

42. Crews v. Yowell, 25 Ky. L. R. 598, 76 S. W. 127; Dudley v. Minor's Ex'r, 100 Va. 728. Where a fire insurance policy pledged as collateral for a debt contained a provision that the insurance as to the interest of the pledgee should not be invalidated by any act or neglect of the owner, the pledgee was not bound by an agreement between the pledgor and the company as to the amount of the loss. Scottish U. & N. Ins. Co. v. Field [Colo. App.] 70 Pac. 149. Where a contract of indemnity was pledged as security for a debt, a sale of such contract by the pledgee did not vest absolute title in the purchaser, but only the interest which the pledgee held as security for the debt, as the authority of a pledgee to sell tangible chattels does not extend to choses in action or commercial paper, other than stocks and bonds, which would generally be sold at a sacrifice. Jenckes v. Rice, 119 Iowa, 451, 93 N. W. 384.

43. Commercial Sav. Bank v. Hornberger, 140 Cal. 16, 73 Pac. 625. Action may be maintained on a demand note without a preliminary demand of payment, even though the note is secured by collateral, to be delivered to the debtor on payment of the note. Field v. Sibley, 174 N. Y. 514, 66 N. E. 1108. Where notes given for land were pledged as security and secured by a mortgage, the pledgee in a suit on certain of them was entitled to a decree for full payment and was not obliged to realize first from the sale of the land mortgaged. Dudley v. Minor's Ex'r, 100 Va. 728.

44. Even at an authorized private sale without notice. Schaaf v. Fries, 90 Mo. App. 111. In case of conflicting testimony as to the relations between the pledgee and the purchaser at the pledgee's sale it is for the jury to determine whether the purchase was in effect a purchase by the pledgee which would invalidate the sale. Cammann v. Huntington, 89 App. Div. [N. Y.] 99. An unauthorized sale by the pledgee for an amount much less than the value of the property was not justified on the ground that the amount bid was insufficient to pay the debt of the pledgor, as the pledgee still retained a claim against the pledgor for the unpaid balance. Memphis City Bank v. Smith, 110 Tenn. 337, 75 S. W. 1065.

45. The pledgor of collateral is liable to the pledgee for the necessary expenses of its collection. Bank of Staten Island v. Silvie, 89 App. Div. [N. Y.] 465. A holder of bonds as collateral security, entitled to charge the pledgor with the expense of collecting the collateral, is not guilty of conversion by agreeing that the bonds may be charged with their proportion of the expense of foreclosing a mortgage securing such bonds and other bonds. Field v. Sibley, 174 N. Y. 514, 66 N. E. 1108.

46. Where the depositor in an assigned bank, after the assignment, took certain notes belonging to the bank as collateral security for advances made by him and collected such notes so as to be owing the bank an excess, he could not offset his deposit in the bank against such excess, but must pay the same to the assignee and take his ratable portion of the assets. Storts v. Mills, 93 Mo. App. 201. Where the pledgee of certain notes sues the makers, if the sum due from the makers is not sufficient to satisfy the pledgee's claim, it is proper to enter a decree for the amount of the notes without directing an account of the sum due the pledgee. Dudley v. Minor's Ex'r, 100 Va. 728. The pledgee of a note in an action against the maker need not credit money received by

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less he elects to ratify the sale,[47] can recover damages for the injury actually incurred thereby but he cannot replevy the pledge or recover its value in an action for its conversion until he pays or tenders the full amount he owes to the pledgee.[48]

POISONS.[49]

Criminal poisoning.[50]—The statute of Texas[51] forbids the mixing of "any other noxious potion or substance with any drug, food, or medicine" with intent to kill or injure.[52] It is held that the phrase, "noxious potion or substance," means poison of some kind,[53] and that it is not necessary that a fatal dose should be administered.[54]

Evidence sufficient to show violation is stated in the note.[55]

him from a person who was only secondarily liable on a guaranty of payment of the pledgor's debt. Brown v. Pegram [C. C. A.] 125 Fed. 577. Where the pledgor of certain mortgage notes instructed the pledgee to foreclose the mortgage, to bid in the property for its value, and take judgment against the makers of the notes for the deficiency, and the pledgee bought in the property for the full amount of the notes, interest, and costs, which was more than its value, having bid more than he was authorized, he was bound to account to the pledgor to the extent of the purchase price. Minneapolis Trust Co. v. Mather, 85 N. Y. Supp. 510.

47. Winchester v. Joslyn [Colo.] 72 Pac. 1079. As against a pledgee selling pledged securities without notice and giving the pledgor credit therefor, the credit is binding until the pledgor objects to the sale. Colton v. Oakland Bank of Savings, 137 Cal. 376, 70 Pac. 225. Where the pledgee, after selling pledged security without notice and giving the pledgor credit for the proceeds, assigns all his claims against the pledgor, the construction given by the parties to the assignment, that it included only the claims remaining after the pledgor had been credited with the proceeds of the sale, should prevail as against the claim of a stranger that the assignment covered the whole sum originally owed by the pledgor. Id.

48. Schaaf v. Fries, 90 Mo. App. 111. The contract of pledge is not extinguished by a wrongful sale but merely broken, and the pledgee or his vendee may retain the pledge until the debt is satisfied or satisfaction offered, notwithstanding such breach. Id. When the collateral security for a debt is purchased by the pledgee at an unauthorized sale, the pledgor can elect to ratify or disaffirm the sale but cannot treat it as a conversion as the pledgee has not put it out of his power to restore the pledged property. Winchester v. Joslyn [Colo.] 72 Pac. 1079. An unlawful dealing with the pledge by the pledgee constitutes a breach of contract and the pledgor may bring an action of replevin for the recovery of the pledge or trover for its conversion. Schaaf v. Fries, 90 Mo. App. 111. Where the pledgee of stock wrongfully pledges it to a third party, and the pledgor subsequently pays the sum advanced to him by the pledgee, and files a claim against the pledgee's assignee in insolvency for the full value of the stock, the allowance of this claim and the payment of a dividend thereon estops the pledgor to deny that his title to the stock passed to the pledgee by conversion. Colton v. Oakland Bank of Savings, 137 Cal. 376, 70 Pac. 225. A holder of bonds as collateral security is not guilty of conversion by agreeing to a foreclosure of the mortgage securing the bonds, and that they might be applied in payment at the foreclosure sale, unless they are so applied. Field v. Sibley, 174 N. Y. 514, 66 N. E. 1108. Where the president of the pledgee bank agreed with the pledgor to sell the pledged property to him for the price bid therefor at a sale, and the bank refused to carry out the agreement of the president but kept the property which had been purchased for less than its value, the bank was liable for conversion of the property since it took the benefit of the agreement made by the president even if the latter was not authorized to make such agreement. Memphis City Bank v. Smith, 100 Tenn. 337, 75 S. W. 1065. A suit to redeem certain pledged stock which was alleged to have been sold by the pledgee bank at an inadequate price, where it appeared that the president of the bank but none of the other officers or directors engaged in a campaign to bear the stock, will not be allowed as the pledgor has an adequate remedy at law by an action for damages against the persons who depreciated the market value of the stock. Arbogast v. American Exch. Nat. Bank [C. C. A.] 125 Fed. 518. Where a pledgee holding certain stock endorsed in blank as collateral for a loan and certain other stock similarly endorsed as a depositary for safe keeping wrongfully pledged it all on his own account to a subpledgee, and the owner of the stock held as collateral did not redeem it from the original pledgee, or make any attempt to reclaim it until after its sale by the subpledgee, though the owner of the deposited stock prevented a sale of his stock by timely notice to the subpledgee, the owner of the collateral stock could not claim contribution from the owner of the deposited stock. Tompkins v. Morton Trust Co., 91 App. Div. [N. Y.] 274.

49. See, also, Medicine and Surgery, 2 Curr. L. 887, for regulation of drug business.

50. Homicide by poison, see Homicide, 2 Curr. L. 223.

51. Pen. Code 1895, art. 645.

52. The word "other" before "noxious" may be rejected. Runnels v. State [Tex. Cr. App.] 77 S. W. 458.

53, 54. Runnels v. State [Tex. Cr. App.] 77 S. W. 458.

55. Evidence sufficient to show that poison was mingled with syrup. Runnels v. State [Tex. Cr. App.] 77 S. W. 458. Evidence held to sustain conviction of a saloon keeper of

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Negligent sale.[56]—One knowingly selling poisoned articles of food,[57] or giving poison when a harmless drug is called for[58] is liable for resultant damages. One sending a bottle marked carbolic acid to have it filled with arnica is not contributorily negligent in not ascertaining the nature of the contents[59] nor is the negligent failure of plaintiff's physician to discover it imputable to plaintiff.[60] One buying grain knowing that it had been damaged by water but not that it had been impregnated with poison is not guilty of contributory negligence.[61] One taking morphine, knowing its character, without ascertaining the proper dose, is guilty of contributory negligence.[62]

POSSESSORY WARRANT.

The remedy lies against an agent to whom property was given for use, and who retains it after demand.[63] The warrant must so describe the property as to identify it.[64] Evidence bearing on identity of chattels or right to possession is not objectionable, as tending to show title.[65] The officer who has taken custody under such a warrant keeps it in his own way, but at his own peril, until final judgment.[66] Hence, for a mere misuse of it, a claimant has no relief in equity, unless he shows equitable grounds.[67] On certiorari to a justice, in such a case, it may be finally disposed of, at discretion of the reviewing court,[68] but where plaintiff's possession was lawfully derived from an apparent owner, and was forcibly or fraudulently overcome by defendant, judgment should be for plaintiff, and title should be relegated to another action.[69]

POSTAL LAWS.

§ 1. The Federal Postal System and Its Administration (1253).
§ 2. Mails and Mail Matter (1254).
§ 3. Postal Crimes and Offenses (1254).

§ 1. *The Federal postal system and its administration. Postal officers and employes.*—The official position of a post office clerk must be determined by the office roster, approved by the postmaster general.[70] A mail carrier on his route and returning home after delivering his mail is not a United States civil officer in the discharge of his official duty, within the exception of a law against carrying concealed weapons.[71]

A letter carrier is not entitled to extra pay for short intervals of exclusion from office, where not required to be in uniform, though subject to duty at any time.[72] The postmaster general cannot allow rent to some postmasters of the second and third class and refuse it to others.[73]

mixing poison with liquor with intent to kill. Gables v. State [Tex. Cr. App.] 72 S. W. 377.

56. A druggist filling a bottle with carbolic acid when arnica was ordered is liable; his negligence was the proximate cause of injury to one using it supposing it to be arnica. Peterson v. Westmann [Mo. App.] 77 S. W. 1015. Sale of copperas instead of salts for horses. Kennedy v. Plank [Wis.] 97 N. W. 895.

57. One knowingly selling poisoned oats is liable for death of cattle from eating them. Provost v. Cook, 184 Mass. 315, 68 N. E. 336.

58, 59, 60. Peterson v. Westmann [Mo. App.] 77 S. W. 1015.

61. Provost v. Cook, 184 Mass. 315, 68 N. E. 336.

62. Fowler v. Randall, 99 Mo. App. 407, 73 S. W. 931.

63. Sheriff v. Thompson, 116 Ga. 436.

64. "One bale of cotton, weight 496 pounds, No. 366 or 367 marked T. C.," held sufficient. Miteham v. Cochran [Ga.] 45 S. E. 989. Especially so when it was pointed out at the time. Id.

65. Miteham v. Cochran [Ga.] 45 S. E. 989.

66, 67. Sumner v. Bell, 118 Ga. 240.

68. Sheriff v. Thompson, 116 Ga. 436.

69. Broadhurst v. Carswell [Ga.] 46 S. E. 658.

70. A clerk designated as "money order and stamp clerk" cannot be made chief clerk by the postmaster, nor will performance of the duties of the office entitle him to the salary. Barrett v. U. S., 37 Ct. Cl. 44.

71. Code 1883, § 1005. State v. Boone, 131 N. C. 1107.

72. Act May 24, 1888; construction of Act Feb. 26, 1900, in connection with Act June 27, 1898, and Act June 27, 1898, amending Act March 3, 1887, as restoring an action by

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That the United States furnished the building and safe which he was required to use, will not relieve a postmaster from liability for post office funds lost through burglary.[74]

§ 2. *Mails and mail matter. Carriage of mails.*—A railroad company carrying mail is not liable for torts or negligence of its employes, if ordinary care was used in their selection.[75] A reasonable speed limit of trains, prescribed by a city, is not an interference with United States mail, though mail trains are affected.[76]

Use of mails and matter mailable.—The postmaster general cannot add to or take from the statutes determining the classification of mails, and a publisher may enforce admission of mails by mandamus.[77] A weekly publication by an incorporated business college conducted for private gain is not second class matter.[78] The mails cannot be used for lottery purposes.[79] Laws giving the postmaster general power, on evidence satisfactory to him, to prohibit delivery of mail to one conducting a lottery, are not unconstitutional as an invasion of personal rights.[80] The postmaster general cannot prohibit delivery of mail to a corporation assuming to heal through mental influence, and his determination may be reviewed by the courts.[81]

§ 3. *Postal crimes and offenses.—Obscene letters,* or mail matter, which it is a crime to mail are such as tend to excite impure thoughts or desires.[82] It must

a letter carrier for extra compensation, to jurisdiction of the district courts, where he had already recovered judgment, and writ of error had been sued out by the United States. U. S. v. McCrory [C. C. A.] 119 Fed. 861.

73. The statute providing that the postmaster general may allow rents to postmasters of the second and third classes prohibits such allowance by other officers but does not prevent judicial remedy for a postmaster. Rev. St. § 3860. Moffett v. U. S., 37 Ct. Cl. 499.

74. Action on bond under Rev. St. § 3834; liability fixed by Rev. St. §§ 3918, 3919, 3846, 3847, and regulations. U. S. v. Fordyce, 122 Fed. 962.

75. The company is not a common carrier but a public agent performing a governmental function. Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. S. M. R. Co. [C. C. A.] 117 Fed. 434. Sufficiency of complaint. Id. The duty of a railroad company in carrying mails, whether arising under contract or created by statute, is to the government; it is not a bailee of mail matter, nor does the relation of master and servant exist between it and its employes so as to render it liable to an individual for their negligence in case of a switch resulting in the loss of mails; the liability, if at all, can only be based on neglect of the corporation itself. The interest of the addressee in a contract for carrying mail is too indirect to make him a privy so that he may sue thereon; the company is not a carrier but a public agent not liable to an individual for breach of official duty; Rev. St. §§ 4001, 4002, and 1 Supp. Rev. St. pp. 245, 250. Boston Ins. Co. v. Chicago, R. I. & P. R. Co., 118 Iowa, 423, 92 N. W. 88, 59 L. R. A. 796.

76. Chicago & A. R. Co. v. Carlinville, 200 Ill. 314, 65 N. E. 730.

77. 20 Stat. 355; Postal laws & regulations § 276 is invalid in so far as it conflicts with the former act. Payne v. U. S., 20 App. D. C. 581.

78. Meaning of "institutions of learning" within Act Cong. July 16, 1894. U. S. v. Payne, 20 App. D. C. 606.

79. A scheme for an association of members, each paying an initiation fee and monthly dues, to be held uninvested for five years, to then be returned, save 10 per cent, to remaining members, together with a like amount of dues from new or lapsed members, so that the amount above dues received depended on getting in new members, and certain ones would receive no money if no new members were obtained, is a lottery prohibited from the mails; Rev. St. § 3929, amended Sept. 19, 1890 (26 Stat. 466), and Rev. St. § 4041, approved by act Mch. 2, 1895, c. 191. (28 Stat. 963). Public Clearing House v. Coyne, 121 Fed. 927. An offer of prizes for guesses on the number of cigarettes on which tax is paid in a certain month, to be accompanied by coupons, is not a lottery prohibited from the mails; Rev. St. 3894, amended 1 Supp. Rev. St. 803. U. S. v. Rosenblum, 121 Fed. 180.

80. Public Clearing House v. Coyne, 121 Fed. 927.

81. Rev. St. §§ 3929, 4041, and act Cong. March 2, 1895, § 4 (28 Stat. at L. 963, 964, c. 191) were intended to prevent actual fraud, and the effectiveness of such treatment is a mere matter of opinion; injunction may be granted where the act was unauthorized. American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 47 Law. Ed. 90.

82. Mailing a private sealed letter directed to and making indecent charges against the mother of the writer is not an offense; the tendency of a letter to corrupt the morals of the addressee so as to constitute an offense in sending depends on circumstances, the import, and presumed motive, and not upon its mere terms. (Under Rev. St. § 3893, as amended by 25 Stat. 496; a letter may violate the law when sent to one person and not if sent to another.) U. S. v. Wroblenski, 118 Fed. 495. It is an offense to mail a letter naturally calculated to excite impure thoughts or desires in the mind of the addressee. U. S. v. Wyatt, 122 Fed. 316.

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be shown that such matter was in the mails and was delivered,[83] but there is no need of an averment that it was enclosed or wrapped.[84]

Use of the mails in furtherance of a scheme to defraud others includes blackmailing schemes,[85] and is not limited but enlarged by the amendment designed to cover "green goods" transactions.[86] An intent to gain is not essential but only the intent to defraud,[87] and the letters need not be sent out.[88] The crime does not exist where full value is given for money received in a mail transaction,[89] but it makes no difference to whom, or by whom, the letters are mailed,[90] so long as they further the scheme.[91] Each letter mailed is a separate offense.[92] A postal car is a post office within the statute.[93] One may be a principal though not present at the mailing.[94]

The indictment[95] must charge that the letters were mailed in pursuance of a fraudulent scheme,[96] the pre-existence of the scheme,[97] a purpose to effect it by use of the mails.[98] The words "in conjunction with" will charge a participa-

83. A conviction for deposit of unmailable matter in the mails will not be sustained, where it is not shown that the matter had been in the mails, and it did not appear that the recipient received it from the mails; Rev. St. § 3893. Harvey v. U. S. [C. C. A.] 126 Fed. 357.

84. An indictment for mailing an obscene letter need not allege that it was enclosed in an addressed envelope or wrapper; Rev. St. § 3893, as amended by act July 12, 1876, c. 186 (19 Stat. 90) and act June 18, 1888 (25 Stat. 496). U. S. v. Harris, 122 Fed. 551.

85. Mailing letters for "blackmailing" purposes is the offense of mailing letters in furtherance of a scheme to defraud. Rev. St. 5480, as amended Mar. 2, 1889; sufficiency of indictment. U. S. v. Horman, 118 Fed. 780.

86. The amendment of Rev. St. § 5480, against fraudulent use of the mails, by act March 2, 1889, § 5480, was to include schemes to sell counterfeit money but not to limit the statute to such acts. Milby v. U. S. [C. C. A.] 120 Fed. 1.

87. Defendant's intention to obtain benefit of a fraud which he used the mails to accomplish, or to convert money obtained, is not an element of the offense. Kellogg v. U. S., 126 Fed. 323. The only issue in a prosecution for use of the mails to defraud is the intent to defraud by that means. Bass v. U. S., 20 App. D. C. 232.

88. Hume v. U. S. [C. C. A.] 118 Fed. 689.

89. Where the retail price of goods sent was equal to money received from letters soliciting trade, there is no offense. O'Neil v. U. S. [C. C. A.] 120 Fed. 236.

90, 91. Use of the mails in furtherance of a scheme to defraud is an offense, without regard to whom letters are addressed, or by whom mailed, the gist of the offense is that the use of the mails is a material part of the fraudulent scheme; sending letters between different members of a conspiracy to defraud, merely for information to each other as to the progress of the scheme, is not an offense. (Rev. St. 5480, as amended by act March 2, 1889, c. 393, 25 Stat. 873.) U. S. v. Ryan, 123 Fed. 634.

92. Rev. St. § 5480. U. S. v. Clark, 125 Fed. 92.

93. A railway postal car is a branch postoffice, within a statute against mailing letters in furtherance of a scheme to defraud. Hanley v. U. S. [C. C. A.] 123 Fed. 849. Evidence sufficient to prove mailing on postal car. Hanley v. U. S. [C. C. A.] 127 Fed. 929.

94. If the offense of mailing fraudulent letters is a felony, one who is a party to the scheme or performs part of it is a principal, though not present at the mailing. Hume v. U. S. [C. C. A.] 118 Fed. 689.

95. Sufficiency in general of indictment. Stewart v. U. S. [C. C. A.] 119 Fed. 89. Sufficiency of indictment as including all letters mentioned therein. Hume v. U. S. [C. C. A.] 118 Fed. 689. Sufficiency of count in indictment. Milby v. U. S. [C. C. A.] 120 Fed. 1. One indictment cannot charge the sending of many letters. U. S. v. Clark, 125 Fed. 92.

The indictment is sufficient, though **not entirely grammatical,** if the offense is substantially charged and defendant is protected against a second prosecution. Hume v. U. S. [C. C. A.] 118 Fed. 689.

Duplicity. An indictment for conspiracy to defraud may charge in the same count that defendant conspired to defraud "by dealing and pretending to deal" in "green articles" and "spurious treasury notes." Lehman v. U. S. [C. C. A.] 127 Fed. 41. An indictment charging a fraudulent scheme to be effected by use of the mails, and by inciting correspondents to negotiate with, a certain concern is not double. Kellogg v. U. S. [C. C. A.] 126 Fed. 323. Counts for using the mails to defraud (R. S. § 5480) and for conspiracy to commit the offense (R. S. § 5440) based on the same transaction may be joined in one indictment; unnecessary allegations relating to consummation of the scheme, may be rejected as surplusage. U. S. v. Clark, 125 Fed. 92.

Joinder of counts. An indictment cannot charge three offenses not committed within the same six months. Bass v. U. S., 20 App. D. C. 232.

96. Rev. St. § 5480. U. S. v. Clark, 125 Fed. 92.

97. An indictment charging the mailing of fraudulent letters on a certain date, in pursuance of a scheme "theretofore fraudulently devised," charges that the scheme was formed before that date; the date given is only material as to the bar of limitation and to show that the offense was committed before presentation. Hume v. U. S. [C. C. A.] 118 Fed. 689.

98. An indictment alleging that the scheme was to be effected by use of the

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tion.[99] The mode in which the fraud was to be wrought must be particularized.[1] The persons who were intended victims may be designated in a general way, when no particularization is possible.[2] The fraudulent scheme must be proved substantially as laid.[3] Where an indictment charges mailing of a fraudulent letter in Kansas, to an address in Missouri, without alleging that it was taken from the mails by the latter, or any defendant, if the court could assume that it was so taken, the offense was committed in Missouri.[4]

The ordinary rules of evidence[5] and instructions[6] apply.

If three indictments are consolidated one sentence follows,[7] but it may equal the full penalty for each.[8]

Abstracting letters.—That ownership which is essential to larceny does not enter into the offense of abstracting mail matter.[9] Wrongful intent in so doing is averred by alleging that defendant "stole."[10]

Annoying letters.—The effect and purpose of a letter, not the mental operations of the sender, determine whether the sending amounts to the statutory offense of sending a letter with "intent thereby to cause annoyance."[11]

Conspiracy.—A conspiracy to defraud an individual is not one to defraud, or commit an offense against, the United States, though the mails are used.[12] An indictment for conspiracy[13] must with certainty set forth the crime which was to have been committed.[14]

mails, is sufficient. Kellogg v. U. S. [C. C. A.] 126 Fed. 323. The indictment must show that the scheme was to be effected through use of the mails; actual use must be charged and proved. U. S. v. Clark, 121 Fed. 190. An allegation in an indictment that the purpose was to defraud by inducing the addressee to put counterfeit money in circulation is sufficient as to intent to defraud, though the addressee could not have been defrauded. Milby v. U. S. [C. C. A.] 120 Fed. 1.

99. An indictment charging defendant with mailing a fraudulent letter, for himself and "in conjunction with," another charges the latter with participation. Hume v. U. S. [C. C. A.] 118 Fed. 689.

1. Held insufficient. Dalton v. U. S. [C. C. A.] 127 Fed. 544.

2. Dalton v. U. S. [C. C. A.] 127 Fed. 544.

3. Where it was alleged that three articles were fraudulently promised for a certain consideration, conviction could not be supported on proof of an offer which might be construed as offering only two, even though those two were not equal to the offer. Flachskamm v. U. S. [C. C. A.] 127 Fed. 674.

4. Rev. St. § 5480. Stewart v. U. S. [C. C. A.] 119 Fed. 89.

5. Evidence. Admissibility. Bass v. U. S., 20 App. D. C. 232. Sufficiency of evidence to carry the case to the jury. Milby v. U. S. [C. C. A.] 120 Fed. 1. Sufficiency to sustain conviction for conspiracy to defraud by use of the mails by pretending to deal in "green articles" and "spurious treasury notes." Lehman v. U. S. [C. C. A.] 127 Fed. 41. Sufficiency to establish that use of the mails was contemplated in a scheme to defraud. Kellogg v. U. S. [C. C. A.] 126 Fed. 323.

6. Instructions in prosecution for fraudulent use of the mails under Rev. St. 5480, as amended March 2, 1889, questioned as placing on defendant the burden of rebutting inferences arising from evidence of guilt. Melton v. U. S. [C. C. A.] 120 Fed. 504. Where the evidence clearly shows a scheme to defraud, by sale of counterfeit money through the mails, an erroneous charge that the court had so determined in a former trial, is not prejudicial. Milby v. U. S. [C. C. A.] 120 Fed. 1.

7. Where three indictments charging each a single offense, under a statute against use of the mails to defraud, are consolidated under Rev. St. § 1024, and conviction is had of three offenses committed within the same six months, the result is as if the charge was in one indictment, and a single sentence only can be imposed. Hanley v. U. S. [C. C. A.] 123 Fed. 849.

8. Three indictments, each charging a separate offense for use of the mails to defraud, all committed in six months will warrant a sentence for each on conviction for all. Hanley v. U. S. [C. C. A.] 126 Fed. 944. Sentence to full extent of penalty for each offense held proper when three postal prosecutions were consolidated. Id., 127 Fed. 929.

9. Hence ownership of the mail matter taken need not be alleged. U. S. v. Trosper, 127 Fed. 476, citing cases to overthrow Jones v. U. S., 27 Fed. 447.

10. "Steal," used in indictment for taking letters, imports wrongful intent. U. S. v. Trosper, 127 Fed. 476.

11. Under Pen. Code, § 559, as amended by Laws 1891, p. 288, c. 120. People v. Loveless, 84 N. Y. Supp. 1114.

12. Rev. St. § 5440. U. S. v. Clark, 121 Fed. 190.

13. Sufficiency of indictment for conspiracy to effect a postal fraud under Rev. St. § 5440. In re Runkle, 125 Fed. 996.

14. Indictment for conspiracy to retard mails must allege that conspiracy was to "knowingly and willfully" obstruct them (R. S. § 3995). Conrad v. U. S. [C. C. A.] 127 Fed. 798. It does not supply this to aver a knowing and willful conspiracy or that "knowingly and willfully" one of them committed an overt act pursuant to the conspiracy. Id.

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A provision for recovery of half of penalties by the informer does not entitle him to sue the government for part of a sum paid in compromise.[15]

POWERS.[16]

§ 1. Nature and Kinds (1257).
§ 2. Creation, Construction, Validity, and Effect (1257).
§ 3. Execution of Powers (1258).

§ 1. *Nature and kinds.*—A power is the right to limit a use[17] or to designate the taker of a use.[18] In several states the statute has defined what shall be a power.[19] It is not essential to a naked power that the donee have a beneficial interest.[20] A devise of a life estate with power to sell, and a remainder limited on the unsold portion, confers a power in gross.[21]

§ 2. *Creation, construction, validity, and effect.*—A grant of a power of sale of the fee added to a life estate is not inconsistent with a remainder created by the same deed,[22] the power being construed to have effect according to the true import of the words creating it.[23]

In determining the scope of a power conferred by an unskillfully drawn instrument, that fact will be judicially considered.[24] How "much" may be disposed[25] and whether a power is limited to the donee's beneficial estate or extends to the fee[26] is to be read in the terms of the whole instrument creating it.

Where a power of sale is conferred, to be exercised if a necessity arises, the judgment of the donee as to the necessity is conclusive in absence of fraud.[27] The power of a life tenant to sell and dispose of the estate is not a general power but one upon trust where the proceeds are simply to take the place of the land.[28]

Where the power of appointment is unlimited and the donee is at liberty to appoint his executor to execute it, he may empower his executor to collect and distribute the fund according to the terms of his will.[29] Where, by the falling in of a legacy, the whole estate is cast to a donee, it is a fee of which he can dispose in any manner.[30]

15. Leathers v. U. S., 127 Fed. 776.

16. Includes only powers under the statute of uses and the modern equivalents of them. Powers of attorney, see Agency, 1 Curr. Law, p. 43.

17. Cyc. Law Dict., "Powers," citing 4 Kent, Comm. 334.

18. Id. citing Co. Litt. 271b, Butler's Note.

19. Power to sell, devise, or mortgage in fee to one who was given life estate held an absolute power. Auer v. Brown [Wis.] 98 N. W. 966.

20. Hammond v. Croxton [Ind.] 70 N. E. 368.

21. A husband devised to his wife a life estate with power to sell any or all the property; at her death it was to be sold and the proceeds divided. Young v. Sheldon [Ala.] 36 So. 27.

22. Dickey v. Barnstable [Iowa] 98 N. W. 368.

23. A deed granted land to a mother for life with power to sell the absolute title, and reinvest the proceeds, with remainder to her daughter. Dickey v. Barnstable [Iowa] 98 N. W. 368.

24. A will drawn by a woman, not a lawyer. Ward v. Stanard, 82 App. Div. [N. Y.] 386.

25. An estate for life "with power to dispose of so much as she saw fit" held to be limited to so much as was reasonably necessary for use of the donee during life, and not to refer to the entire estate. Terry v. St. Stephens Protestant Episcopal Ch., 79 App. Div. [N. Y.] 527.

26. A testator devised all his property to his wife for life, with power to dispose of it as she saw fit; after her death the residue to go to the children. Held, that the power only referred to the life estate. In re Bauernschmidt's Estate, 97 Md. 35. A devise of an estate to one "to be hers during her natural life, to use and enjoy as she may see proper" confers a power to dispose of the land in fee. Underwood v. Cave, 176 Mo. 1, 75 S. W. 451.

27. A will gave a widow property for life with power to sell for the benefit of the family in case of necessity. Matthews v. Capshaw, 109 Tenn. 480, 72 S. W. 964.

28. Weinstein v. Weber [N. Y.] 70 N. E. 115; Weinstein v. Weber, 78 App. Div. [N. Y.] 645.

29. A wife had power to dispose by will of $30,000.00. By her will she disposed of it and appointed an executor to carry it out. The executors of the donor refused to turn over the fund to her executor. Long v. Long's Ex'r, 24 Ky. L. R. 677, 69 S. W. 804.

30. An estate for life, with a portion of it limited in remainder, and the balance to be disposed of by the life tenant, by will, held to confer a power of disposal during the life of the life tenant where the remainderman

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Where a life tenant has power to divide among the heirs "in the manner in which she may decide" she may appoint nominal sums in her discretion but the heirs take a vested remainder subject to this discretion.[31]

§ 3. *Execution of powers.*—The law of the domicile of the donor of a power governs its execution.[32] If an estate of realty and personalty be at donee's "entire disposal" he may execute it by a will legal at the place of his domicile.[33] The intention to execute a power must be apparent and clear.[34] It is shown when the donee executes a conveyance of the fee,[35] even though it does not refer to the instrument creating the power.[36] Where unrestricted discretion is conferred on the donee, his appointments will not be molested.[37] In order that a court may interfere with the execution of a power, it must be shown that the donee is abusing it,[38] if this is shown the court will interfere.[39] A power of appointment whether acquired before or during coverture may be executed by a married woman without her husband joining in the conveyance.[40] The simple execution of a power will pass only the interest of the donor.[41]

A deed purporting to be executed under a power, but in reality in excess thereof will convey the grantor's interest. A warranty deed not referring to the will will effectively, though not technically, execute an absolute power.[42] Where a power has been executed in a manner void under the laws of the state where the power was conferred, equity will carry out the intention of donee of the power.[43] The doctrine of illusory appointment will not be adopted to invalidate the execution of a power of appointment under which merely nominal shares were given to several of the objects of the power, which left what each should take to the donee's discretion,[44] and it is no objection to the execution that no person was specifically required to pay the nominal sums appointed she having directed them to be paid out of the remainder.[45]

PRIZE FIGHTING.

A fight with fists for a wager by previous arrangement is a prize fight.[46] It it none the less so because the reward is to be equally divided between the con-

died first. Ward v. Stanard, 82 App. Div. [N. Y.] 386.

31. Hawthorn v. Ulrich, 207 Ill. 430, 69 N. E. 885.

32. The donee of a power executed it in accordance with the law of his domicile which was void under the law of the domicile of the donor. Lane v. Lane [Del.] 55 Atl. 184.

33. Ward v. Stanard, 82 App. Div. [N. Y.] 386. But a defective execution by will may be aided in equity. Id.

34. Attempt by a donee of a power to execute it by a testamentary clause disposing of all his property held ineffectual. Lane v. Lane [Del.] 55 Atl. 184.

35. Young v. Sheldon [Ala.] 36 So. 27. A deed by one having a life estate, with power to dispose of the fee, purporting to convey the fee will be ascribed to the power and not to the life estate. Underwood v. Cave, 176 Mo. 1, 75 S. W. 451.

36. A deed by the donee of a power is not invalid because it fails to state that it was exercised under the power. Matthews v. Capshaw, 109 Tenn. 480, 72 S. W. 964.

37. The donee had power to divide property as she thought proper. She devised the real estate to two and created a charge thereon in favor of a third, postponing the legacy for one, two, three, and four years. Allder v. Jones [Md.] 56 Atl. 487.

38. Dickey v. Barnstable [Iowa] 98 N. W. 368.

39. A life tenant with power to sell and invest the proceeds for the benefit of the remainderman was shown to have no intention of reinvesting and was conspiring to defraud the remainderman. Dickey v. Barnstable [Iowa] 98 N. W. 368.

40. A father devised property to his wife with power to sell and dispose of as she thought fit. She remarried and executed a conveyance. Young v. Sheldon [Ala.] 36 So. 27.

41. It was contended that the donee's absolute estate passed under the execution of a power by will. Heinemann v. De Wolf [R. I.] 55 Atl. 707.

42. So as to bar remainders over on non-execution. Auer v. Brown [Wis.] 98 N. W. 966.

43. Power conferred in New York and executed in Virginia in a manner void in New York. Ward v. Stanard, 82 App. Div. [N. Y.] 386.

44, 45. Hawthorn v. Ulrich, 207 Ill. 430, 69 N. E. 885.

46. State v. Patton, 159 Ind. 248, 64 N. E. 850.

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testants or because gloves are used,[47] or because no ring was marked off or it did not appear what rules were in vogue.[48] The statutes ordinarily punish aiders and abettors as well as principals.[49] An indictment alleging acts constituting a prize fight is sufficient without using the statutory phrase "Engage in a prize fight."[50]

A statute authorizing courts to "suppress and prevent" prize fights authorizes an injunction at the suit of the commonwealth.[51]

PROCESS.[52]

§ 1. Nature and Kinds, Form and Requisites (1259).
§ 2. Issuance (1261).
§ 3. Extraterritorial Effect or Validity (1261).
§ 4. Actual Service (1262).
A. Personal (1262).
B. Substituted (1267).
C. The Server and His Qualifications (1268).
§ 5. Constructive Service (1268).
A. In General (1268).
B. By Publication (1269). When Proper (1269). Procedure to Authorize (1269). How Made (1270). Personal Service in Lieu of Publication (1271).
§ 6. Return and Proof (1271). Official Return—By Unofficial Persons (1271). On Corporations (1272). Amendment of Return (1273). Impeachment or Contradiction (1273). Proof of Service by Publication (1274).
§ 7. Defects, Objections, and Amendments (1274). Waiver of Irregularities (1275).
§ 8. Privilege and Exemptions from Service (1276).
§ 9. Abuse of Process (1277).

§ 1. *Nature and kinds, form and requisites. In general.*—Process in general is the means by which a court compels the defendant to appear before it, or to comply with its commands. Process for commencing an action may be of various kinds, though in their effect they are the same. The usual process for commencing a suit is a writ of summons, commanding the officer to summon the defendant to appear,[53] or citation,[54] though on a motion for a money judgment notice is the proper process.[55]

Where the statute prescribes a particular process by which an action shall be commenced, it cannot be commenced by any form of process.[56]

Designation of court and parties.—The process must designate the proper court in which the complaint will be filed, otherwise it acquires no jurisdiction.[57]

It must also, in general, properly describe all the parties to the suit or action,[58] but where it gives the full names of the parties, it is not necessary that it

47. Evidence held to show that an advertised fight would constitute a prize fight within Ky. St. § 1289. Com. v. McGovern, 25 Ky. L. R. 411, 75 S. W. 261.

48. Combat by rounds before audience resulting in a knock out held a prize fight. People v. Finucan, 80 App. Div. [N. Y.] 407.

49. Evidence held to corroborate an accomplice as to aiding and abetting. People v. Finucan, 80 App. Div. [N. Y.] 407.

50. State v. Patton, 159 Ind. 248, 64 N. E. 850.

51. Ky. St. § 1289. Com. v. McGovern, 25 Ky. L. R. 411, 75 S. W. 261.

52. Summons under the Code, though not technically process, is included.

See, also, titles Attachment, 1 Curr. Law, p. 239; Executions, 1 Curr. Law, p. 1178.

53. Code Va. § 3223. Furst v. Banks [Va.] 43 S. E. 360. Process to commence a suit in equity or action at law is a writ commanding the officer receiving it to summon defendant to answer the bill or action. Geiser Mfg. Co. v. Chewning, 52 W. Va. 523. Proc. Act 1887, authorizing the filing and service of the statement of the claim with the writ, or at any time thereafter, does not substitute the service of the statement of the claim for the summons. Com. v. Bangs, 22 Pa. Super. Ct. 403.

54. R. S. Tex. art. 1602. Carpenter v. Anderson [Tex. Civ. App.] 77 S. W. 291.

55. Notice on a motion for a money judgment is of the same effect as a writ and declaration, and must summon the party to a certain and fixed day [Code Va. 1887, § 3211]. Tench v. Gray [Va.] 46 S. E. 287.

56. An attempt by a justice of the peace to commence an action against nonresidents, by a notice instead of a citation, is ineffectual, under R. S. Tex. arts. 1602, 1647, 1230. Carpenter v. Anderson [Tex. Civ. App.] 77 S. W. 291.

57. A summons reciting that the complaint will be filed in the office of the clerk of the district court does not give the circuit court jurisdiction; there being no district court. Under Ann. St. (S. D.) 1901, § 6095, requiring that if a copy of the complaint is not served with the summons, the latter must state where the complaint will be filed. Eggleston v. Wattawa, 117 Iowa, 676, 91 N. W. 1044.

58. Process issued on the president of the "Louisville Safety Vault & Trust Co." as the "L. S. V. & T. Co." is insufficient; especially

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should give a party's full name every time reference is made thereto.[59] Process against a defendant corporation need not state that the defendant is a corporation, if it sets forth the full corporate name.[60]

Signing and sealing.—Sealing a copy of the original process is not necessary, where the original is required to be sealed.[61]

It may be required that the summons shall be subscribed by the plaintiff, or his attorney or agent.[62] The subscription of a summons by one on behalf of another is presumed to be authorized.[63]

Indorsement.—A summons in a money action should be indorsed with the amount for which judgment will be rendered in case of default.[64] Without such indorsement, it gives the court jurisdiction of the person and subject-matter, but a judgment thereon by default is voidable.[65]

Stating nature or cause of action.—The process should in some states contain a general statement of the nature of the plaintiff's cause of action.[66] This is sometimes required by statute, a failure to comply with which makes the process defective,[67] which defect is not cured by a reference therein to an accompanying petition,[68] though if the process makes a partial statement of the demand, it is not prejudicial, where there is such reference.[69]

In Nebraska, it is not necessary to state the nature of a cause of action in a summons from a county court, in cases above a justice's jurisdiction, nor is it necessary in a district court summons,[70] though in a summons from a justice's court, it is necessary to designate the plaintiff's cause of action in a general way.[71]

To whom directed.—If the sheriff is a party to the suit, the process should be directed to the coroner of the county and to the sheriffs of adjoining counties.[72]

where the plaintiff asked judgment against the "F. T. S. & V. Co.," a different corporation. Patton v. Campbell's Trustee, 25 Ky. L. R. 275, 74 S. W. 1092. A citation not naming both defendants, in a suit on a joint note, as required by statute, is fatally defective and will not authorize a judgment by default. Del. Western Const. Co. v. Farmers' & M. Nat. Bank [Tex. Civ. App.] 77 S. W. 628.

59. A citation will not be quashed for failing to give the defendant's full name every time it is referred to. Mo., K. & T. R. Co. v. Bodie [Tex. Civ. App.] 74 S. W. 100.

60. Snyder v. Phila. Co. [W. Va.] 46 S. E. 366.

61. Where the published copy contains the clerk's certificate that the original was sealed. Heisen v. Smith, 138 Cal. 216, 71 Pac. 180.

62. Ball. Ann. Codes & St. Wash. §§ 4870, 4872. Wagnitz v. Ritter, 31 Wash. 343, 71 Pac. 1035. A summons in the statutory form and subscribed by an authorized attorney, with his post-office address within the state, is sufficient, where objected to for the first time on appeal. Under Ball. Ann. Codes & St. Wash. §§ 4870-72. Id. Subscribed "L., Agent for S.," with his place of residence within the state, is sufficient under act March 20 (Wash.) 1901, § 1 (Sess. Laws, 1901, p. 384, c. 178). In an action to foreclose delinquent taxes. Smith v. Newell, 32 Wash. 369, 73 Pac. 369.

63. For a holder of a certificate for delinquent taxes. Smith v. Newell, 32 Wash. 369, 73 Pac. 369.

64. Lawton v. Nicholas [Okl.] 73 Pac. 262

65. An execution to enforce such judgment cannot be enjoined. Lawton v. Nicholas [Okl.] 73 Pac. 262.

66. Commanding arrest of one said to be insane, to be brought and "dealt with according to law," does not show nature of proceeding. Kelly v. Gardner, 25 Ky. L. R. 924, 76 S. W. 531.

67. A citation should state the nature of the plaintiff's demand, as required by statute, and a statutory provision that a certified copy of the petition shall accompany the citation, where the defendant lives out of the county, does not change this requirement [Batts' Ann. Civ. St. Tex. art. 1215]. Del. Western Const. Co. v. Farmers' & M. Nat. Bank [Tex. Civ. App.] 77 S. W. 628.

68. A reference, in the citation, to an accompanying certified copy of the petition is not a sufficient statement of the plaintiff's demand, where the citation makes no statement whatever of the plaintiff's demand. Del. Western Const. Co. v. Farmers' & M. Nat. Bank [Tex. Civ. App.] 77 S. W. 628.

69. A citation not fully stating the plaintiff's demand is not prejudicial, where there is attached thereto a copy of the petition, which by reference is made a part of the citation. Scalfi & Co. v. State, 31 Tex. Civ. App. 671, 73 S. W. 441.

70. Summons "for $415.50, with interest thereon at 10 per cent. from the 19th day of February, 1897," held sufficient. Farmers' B. & L. Co. v. Mauck [Neb.] 97 N. W. 835.

71. Code Civ. Proc. Neb. § 910. Farmers' B. & L. Co. v. Mauck [Neb.] 97 N. W. 835.

72. Civ. Code Ga. 1895, § 4993. Hillyer v. Pearson, 118 Ga. 815.

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If it is directed to the sheriff and his deputies, in such case, it, and the service, is void.[73]

Return day.—The time within which process should be made returnable is regulated by statute, and it must be made returnable within the prescribed time from the date of its service,[74] or from the date of its issue.[75]

Process returnable on a legal holiday is not void, but the return day will be the first day thereafter, in which the court may legally transact business.[76]

Parol evidence is admissible to show a mistake of the clerk in naming a wrong return term in the process issued by him.[77]

Supplemental process.—A supplemental summons to bring in a new defendant must be issued directed to him in the same form as the original, except that in the body thereof it must require the defendant to answer the original or the amended complaint, and the supplemental complaint, or either of them as the case requires.[78]

In Arkansas and Kentucky, provision is made for a warning order, warning the defendant to appear, where it is shown that summons cannot be served.[79]

§ 2. *Issuance.*—The word "issued" imports the idea of delivery, in reference to the issuance of process,[80] and issuance usually means the delivery by the clerk, of properly executed process, to the plaintiff's attorney.

Process may be issued by a de facto clerk, though no jurat is attached to his oath of office.[81]

New process may be issued by the court at any time, within the time the original process could have been served, although the clerk was precluded from issuing an alias.[82] The issuance of process, to be served by publication, is in sufficient time if it is issued before the publication is commenced.[83] The date of a writ to commence a suit or action is prima facie evidence of the time of its issuance.[84]

§ 3. *Extraterritorial effect or validity.*—It is provided by statute that where one of several real defendants resides in the county where the action is brought, and service is had therein upon him, process may be issued to, and served in another county, upon his codefendants.[85] But in such cases the defendant, who may be sued in the county where the action is brought, must be a necessary, and

73. Hillyer v. Pearson, 118 Ga. 815.

74. Although, if reckoned from the date of the process, it would not be within such time. 2 Ball. Ann. Codes & St. (Wash.) § 5332, requiring a return within a prescribed time from the date of the summons, means the date of its service. Morris v. Healy Lumber Co. [Wash.] 74 Pac. 662.

75. A summons returnable more than ten days after issue is sufficient if the answer day fixed therein is twenty days after the return day; under a statute requiring return within ten days from the date of its issue, and the answer due twenty days thereafter. Lawton v. Nicholas [Okl.] 73 Pac. 262.

76. If served in time to require the defendant to appear on such day it is sufficient. Strowbridge v. Miller [Neb.] 94 N. W. 825.

77. Returning to December instead of April term. Patterson v. Yancey, 97 Mo. App. 681, 71 S. W. 845.

78. Code Civ. Proc. N. Y. § 453. Meeks v. Meeks, 87 App. Div. [N. Y.] 99.

79. Sand. & H. Dig. § 5679. Beidler v. Beidler [Ark.] 74 S. W. 13. A warning order is defective, where it fails to name an attorney to defend for the non-residents, and in not being signed by the clerk of the court in which the action is pending. Jones v. Griffin, 25 Ky. L. R. 117, 74 S. W. 713.

80. Though in other respects it may have other meanings. Heman v. Larkin [Mo. App.] 70 S. W. 907.

81. Citation issued by a deputy district clerk, who was regularly appointed, subscribed the oath of office, and recognized by the court in the performance of his duties as such officer. Calvert, W. & B. V. R. Co. v. Driskill, 31 Tex. Civ. App. 200, 71 S. W. 997.

82. A new summons may be issued by the court at any time, within three years, though the clerk could not issue an alias summons after a year from the commencement of the action under Code Civ. Proc. Cal. § 408. Hibernia S. & L. Soc. v. Cochran, 141 Cal. 653, 75 Pac. 315.

83. Order of publication of citation to compel a guardian to account, made on Aug. 18, and issued by the clerk on Aug. 19, the return day being Nov. 27. Heisen v. Smith, 138 Cal. 216, 71 Pac. 180.

84. When the bill or declaration is filed it relates back to such issuance. Geiser Mfg. Co. v. Chewning, 52 W. Va. 523.

85. Code Civ. Proc. Neb. § 60. Stewart v. Rosengren [Neb.] 92 N. W. 586; Wood v. Carter [Neb.] 93 N. W. 158.

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not a sham defendant, joined solely for the purpose of bringing in the defendants served in another county.[86] If the defendant against whom the action is brought in one county has no real or bona fide interest in the controversy, process against a real defendant cannot be issued to and served in another county in which he resides,[87] and a subsequent proper service on such nonresident on appeal does not cure the defect.[88]

But this rule is not confined in its operation to transitory actions, in which at least one of the defendants has been properly served with process in the county in which the action is brought, but where an action is rightfully brought in any county, a summons may be issued to and served in any other county, although there be but a single defendant.[89] Personal service outside the state, in cases where service by publication is permitted, is a nullity, in the absence of an affidavit for service by publication.[90]

§ 4. *Actual service.*[91] *A. Personal. In general.*—Service of process must be personal when practicable,[92] and when required by statute.[93] A service otherwise than as prescribed by statute is not invalid, if the process reaches the defendant.[94] Process commanding an arrest is not well served by copy.[95]

Dispensing with personal service, when such service is practicable and usual, in cases to quiet title or settle private adverse rights, is sometimes prohibited.[96]

Service procured by fraud is unlawful and may be disregarded by the defendant.[97] He need not appear specially and move to quash such service,[98] though he may have the service set aside on motion.[99]

Where there are several defendants process should be served on all of them,

86. Siever v. Union Pac. R. Co. [Neb.] 93 N. W. 943. There must be an actual right to join the resident and nonresident defendants. Stull Bros. v. Powell [Neb.] 97 N. W. 249. Service against the real defendant, in another county, gives the court no jurisdiction over him under Code Civ. Proc. Kan. § 36. New Blue Springs Milling Co. v. De Witt, 65 Kan. 665, 70 Pac. 647.

The true test is whether the defendant, served in the county where suit is brought, is a bona fide defendant to that action; whether his interest in the result of the action is in any manner adverse to that of the plaintiff, with respect to the cause of action against the other defendant and in equity actions may be added the inquiry as to whether or not plaintiff can obtain full, suitable, and satisfactory relief without joining such party, and binding him by the terms of the judgment or decree. Siever v. Union Pac. R. Co. [Neb.] 93 N. W. 943.

87. To bring him to such other county. Under Code Civ. Proc. Neb. § 60. Stewart v. Rosengren [Neb.] 92 N. W. 586. And it is immaterial in such case that the resident defendant has a distinct controversy with the plaintiff, if the other defendant has no real or bona fide interest therein. Id. Action on contract against nonresident defendant and against resident defendant for infringement of plaintiff's right. Johnson v. Brafford, 24 Ky. L. R. 864, 70 S. W. 193.

88. But gives the appellate court jurisdiction over him only to the extent that he was before the lower court. Johnson v. Brafford, 24 Ky. L. R. 864, 70 S. W. 193.

89. Under Code Civ. Proc. Neb. § 65, c. 1, title 4. Neb. M. H. Ins. Co. v. Meyers [Neb.] 92 N. W. 572. Attachment against a nonresident may be directed to the sheriff of any county in the state. Clements v. Utley [Minn.] 98 N. W. 188.

90. Boden v. Mier [Neb.] 98 N. W. 701.

91. For necessity of service to confer jurisdiction over the defendant see title Jurisdiction.

92. Bear Lake County v. Budge [Idaho] 75 Pac. 614.

93. In all divorce cases there should be personal service on defendant. Sheriff should make return of non est, where he cannot make personal service. Palmer v. Palmer [Del.] 57 Atl. 533. A defendant sued by the initial letters of his name must be served personally or make an appearance, otherwise a binding judgment or decree cannot be rendered against him, under Code Civ. Proc. Neb. § 148. Gillian v. McDowell [Neb.] 92 N. W. 991.

94. Eisenhofer v. New Yorker Zeitung Pub. & Print. Co., 91 App. Div. [N. Y.] 94.

95. A sheriff's return on a warrant of arrest for an insane person, as executed by delivering a true copy thereof, is not notice of the time and place of trial of such person's mental capacity; it must show nature of proceeding. Kelly v. Gardner, 25 Ky. L. R. 924, 76 S. W. 531.

96. By Const. Idaho, § 13, art. 1. Bear Lake County v. Budge [Idaho] 75 Pac. 614.

97. Fraudulently procuring defendant to go into a jurisdiction other than that of his residence, in order to serve process upon him, even though he may have gotten out such jurisdiction before the process was served. Jaster v. Currie [Neb.] 94 N. W. 995.

98. Jaster v. Currie [Neb.] 94 N. W. 995.

99. Saveland v. Connors [Wis.] 98 N. W. 933.

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and if only a portion of them are served, judgment cannot be entered against those that have not been served.[1]

Upon nonresidents or their agents.—Service of process upon nonresidents beyond the jurisdiction of the court whose process is to be served does not confer jurisdiction in personam.[2] In many jurisdictions, however, by statutory provisions, service may be had upon a nonresident by serving the process against him upon his duly appointed resident agent, attorney, or representative, and this service is considered the same as a personal service upon the defendant,[3] though in some jurisdictions it is held that such a statute is unconstitutional so far as it applies to actions in personam.[5]

Where the pleading is required to be served with the process, and an amended pleading is issued, service of the process and original pleading is sufficient.[6]

The term "resident" is generally synonymous with "inhabitant" in the law of process and service.[7] A state statute authorizing a cross action against a nonresident plaintiff who has brought suit in the state courts, and authorizing service of the writ in the cross action, on the attorney of the plaintiff in the original action, is valid,[8] and will be followed by the federal courts.[9]

Upon domestic corporations.[10]—Service of process upon corporations is regulated by statutes, which vary more or less in the different states.[11] According to these statutes, service on a domestic corporation may be made by delivering a copy

1. Not against a railroad company, upon a verdict in the plaintiff's favor in an action against the company and its receivers jointly, but the railroad company not being served or not appearing. Ault v. Cowan, 20 Pa. Super. Ct. 628.

2. Service of summons on one of two nonresident codefendants in the county in which the plaintiff resides, the suit being brought in that county, the defendant residing in another county, and subsequently on the other defendant in his own county, is insufficient to confer jurisdiction over the defendants' persons under R. S. Mo. 1899, § 562, and a default judgment thereunder is void. Roberts v. Stone, 99 Mo. App. 425, 73 S. W. 388. Service of an order to show cause on persons not parties to bankruptcy proceedings, and without the district, does not confer jurisdiction in personam. In re Waukesha Water Co., 116 Fed. 1009; Gorman v. Stillman, 25 R. I. 55.

3. Service upon a nonresident executor by service upon a resident agent appointed under G. L. 1896, c. 212, § 45, requiring nonresident executors, before entering upon their trusts, to appoint resident agents, and to agree that service upon such agent shall be the same as service upon the executor within the state. Watkins v. Hopkins County [Tex. Civ. App.] 72 S. W. 872. Notice of condemnation proceedings may be served on a resident agent of a nonresident landowner [Civ. Code Ga. § 4975]. Service of an ancillary petition in an equitable proceeding. Vizard v. Moody, 117 Ga. 67. Service may be made on the attorney representing him, but service of an attachment against a nonresident's property, by leaving a copy of the process and complaint with the property attached, for the defendant, and not for the person in possession, is void under R. S. Conn. 1902, § 828, providing for a service of an attachment against a nonresident, by leaving a copy of the process and complaint, together with a return describing the property attached, with a resident agent or attorney, or if there is none, with one in possession of the property. Munger v. Doolan [Conn.] 55 Atl. 169. The fact the person in possession of the defendant's property was the plaintiff in the attachment suit does not excuse service on the plaintiff as one in possession. Id.

5. A statute authorizing the service of summons against a nonresident doing business within the state, to be served on a manager or agent in charge of such business, is unconstitutional, so far as it applies to actions in personam. Civ. Code Prac. (Ky.) § 51, subsec. 6, in violation of Const. (U. S.) art. 4, § 2, and the fourteenth amendment. Moredock v. Kirby, 118 Fed. 180.

6. Where the citation on an original petition is returned "not found," and an amended petition filed, due service of a citation to another county and the original petition, on the defendant, is sufficient, though the amended petition is not served. Calvert, W. & B. V. R. Co. v. Driskill, 31 Tex. Civ. App. 200, 71 S. W. 997.

7. Atkinson v. Wash. & J. College [W. Va.] 46 S. E. 253.

8, 9. Arkwright Mills v. Aultman & T. Mach. Co., 128 Fed. 195.

10. See title Corporations, 1 Curr. Law, p. 732, and Clark & M., Corp., p. 675, where a full citation of cases will be found.

11. Laws N. Y. 1895, p. 176, c. 349, amending Code Civ. Proc. § 2881, authorizing a service of summons in a justice's court upon a local agent of an insurance company where no other person resides in the county upon whom service can be made, and no person has been designated to receive service, applies to the city court of Elmira under the city charter (Laws 1894, p. 1384, c. 615, §§ 103, 105, 111), giving it the same jurisdiction as justices' courts of towns and authorizing the issuance of process therein by the law applicable to justices' courts. Murray v. American Casualty Ins. Co., 88 App. Div. [N. Y.] 224.

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of the process to the cashier,[12] or to the state superintendent of insurance,[13] but process against the corporation cannot be served on one who has no interest in the corporation,[14] nor on an agent who is interested in the suit against the corporation,[15] nor on a former agent no longer in its employ,[16] nor on the secretary and president as individuals,[17] nor on the president or other officer after his resignation, though there is no successor,[18] except where by the by-laws his term of office continues until the election and qualification of a successor.[19]

Where a statute provides various classes on whom service of process against a corporation may be made, absence of the first mentioned class is necessary to validity of service on the second class.[20] Such alternative service may be made in case of absence from the county, though not from the state.[21]

The official capacity of a person as secretary and general manager of a corporation cannot be inferred for the purpose of supporting a service of process by the fact that he did not state that he did not possess such capacity at or after the time process was served.[22]

Upon foreign corporations.[23]—In many states the service of process upon a foreign corporation is regulated by statute. These statutes usually require, as a condition precedent to doing business within the state, the appointment of a resident agent upon whom service of process against the corporation may be made. Where a foreign corporation accepts the benefit of such a statute by allowing its agents to do business in a state, it impliedly agrees to its terms, and will be bound by service of process upon its agent in accordance with the statute.[24] Or the statutes may prescribe certain persons within the state upon whom such service may be made where the foreign corporation fails to appoint or designate an agent.[25]

12. Code Civ. Proc. § 431. Eisenhofer v. New Yorker Zeitung Pub. & Print. Co., 91 App. Div. [N. Y.] 94.

13. A notice of garnishment delivered to the state superintendent of insurance, together with a summons to the company to appear as garnishee, is sufficient service. Reid v. Mercurio, 91 Mo. App. 673.

14. Other than his mere right to receive pay for papers sold by him in one of its departments, under Code Civ. Proc. N. Y. § 431. Eisenhofer v. New Yorker Zeitung Pub. & Print. Co., 91 App. Div. [N. Y.] 94.

15. Service on the agent of a corporation, in an action assigned by the agent to the plaintiff, is not good against the corporation. White House Mountain G. Min. Co. v. Powell, 30 Colo. 397, 70 Pac. 679.

16. Where, after a transfer of railroad property, a former ticket agent of the old is retained by the new owner, service on him is not good as against the old corporation if he no longer represents it in any way (Thomson v. McMorran Mill. Co. [Mich.] 94 N. W. 188), and provisions that the consolidation of railroad companies shall leave all the rights of creditors unimpaired, do not make the new corporation agent of the old for the purpose of receiving service (Id.).

17. Kirkpatrick Const. Co. v. Central Elec. Co., 159 Ind. 639, 65 N. E. 913.

18. Under Code Civ. Proc. N. Y. § 431, requiring service on a domestic corporation to be made on a general officer, director or managing agent. Yorkville Bank v. Henry Zeltner Brew. Co., 80 App. Div. [N. Y.] 578.

19. Colo. Debenture Corp. v. Lombard Inv. Co., 66 Kan. 251, 71 Pac. 584.

20. R. S. Fla. § 1019. The officer's return must show such absence affirmatively. Drew Lumber Co. v. Walter [Fla.] 34 So. 244. A sheriff's return that the president or other chief officer of a corporation is not found authorizes service upon an inferior officer [Civ. Code Kan. § 68]. Colo. Debenture Corp. v. Lombard Inv. Co., 66 Kan. 251, 71 Pac. 584.

21. R. S. Fla. § 1019. Fla. Cent. & P. R. Co. v. Luffman [Fla.] 33 So. 710.

22. The fact that one served with process as secretary and general manager of a corporation fails to object, in his deposition, that he was not secretary or manager at or after the time of the service, does not justify the inference that he was such secretary or manager. Scott v. Stockholders' Oil Co., 120 Fed. 698.

23. See, also, title Foreign Corporations, 1 Curr. Law, p. 49; Clark & M. Corp., p. 2747.

24. Owyhee Land & Irr. Co. v. Tautphas [C. C. A.] 121 Fed. 343. Service against a foreign insurance company may be served upon the auditor or upon a designated agent. under Sand. & H. Dig. Ark. § 4137. Collier v. Mut. R. F. Life Ass'n, 119 Fed. 617. The stipulation of a foreign insurance company designating such an agent or officer is irrevocable as to its outstanding liabilities arising in the state while the stipulation or its renewal was in force. Magoffin v. Mut. R. F. Life Ass'n, 87 Minn. 260, 91 N. W. 1115.

25. R. S. Tex. art. 1223. Westinghouse Elec. Mfg. Co. v. Troell [Tex. Civ. App.] 70 S. W. 324. Upon either of the officers, agents, or employes of the company, under Code Va. § 1105. New River Mineral Co. v. Seeley [C. C. A.] 120 Fed. 193. The phrase "any local agent" in the statute permitting citations on foreign corporations to be served on certain officers or any local agent within the state means an agent at a certain place or within

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Under these statutes, process against a foreign corporation may be served, within the state, upon its managing agent,[26] except where it has no property within the state,[27] upon its president and vice-president while within the state,[28] though present on private business,[29] an assistant secretary whose duties in fact make him a local secretary of the corporation,[30] an insurance commissioner,[31] the secretary of state,[32] the superintendent of a branch office of a commission company,[33] or on the agent of a foreign insurance company, who issued the policy sued on, though he was not in the company's employ at the time of the service.[34] But the service must be made on an officer authorized by statute.[35] An unauthorized service cannot be sustained by a showing that there was a representative of the company upon

a given district, not an agent for the state [Rev. St. Tex. 1895, art. 1223]. Western Cottage P. & O. Co. v. Anderson [Tex.] 79 S. W. 516. A broker making sales may be regarded as an agent under Civ. Code Prac. Ky. § 51, subsec. 6, authorizing service on a manager or agent of a nonresident asociation or joint stock company. Nelson, Morris & Co. v. Rehkopf & Sons, 25 Ky. L. R. 352, 75 S. W. 203. The collection of a single renewal premium by the cashier of a local bank for a foreign insurance company does not make him an agent of the company within the state subject to service of process against it. Frawley v. Pa. Casualty Co., 124 Fed. 259.

26. Brown v. Chicago, M. & St. P. R. Co. [N. D.] 95 N. W. 153. Code Civ. Proc. N. Y. § 432, subd. 3. Fontana v. Post Print. & Pub. Co., 87 App. Div. [N. Y.] 233. The manager of an agency established by a foreign railroad company to solicit traffic in a state is a managing agent under a statute authorizing service of process against the company on such agents. Fremont, E. & M. V. R. Co. v. N. Y., C. & St. L. R. Co. [Neb.] 92 N. W. 131, 59 L. R. A. 939. On a railroad station agent authorized to sell passenger tickets, receive and deliver freight and collect for freight shipments, under Rev. Codes N. D. 1899, § 5252. Brown v. Chicago, M. & St. P. R. Co. [N. D.] 95 N. W. 153. But an agent to solicit advertisements for a foreign corporation is not a managing agent under Code Civ. Proc. N. Y. § 432 (Fontana v. Post Print. & Pub. Co., 87 App. Div. [N. Y.] 233), nor one collecting premiums from a local branch and transmitting them to the central organization of a fraternal insurance company, under Code Civ. Proc. N. Y. § 432, subd. 2 (Moore v. Monumental M. L. Ins. Co., 77 App. Div. [N. Y.] 209).

27. Under Code Civ. Proc. N. Y. § 432, subd. 3, authorizing service on a managing agent within the state, if no person has been designated by the corporation to receive service or certain officers cannot be found within the state, and it has property within the state, or the cause of action arose therein. Fontana v. Post Print. & Pub. Co., 87 App. Div. [N. Y.] 233.

28. Mississippi contract to buy goods f. o. b. at New Orleans and service on the president in New Orleans. Payne v. East Union Lumber Co., 109 La. 706. Service on the president and vice-president of a foreign corporation may be at the office of another corporation, of which they are members, and at which place they are settling up their affairs preparatory to cessation of business [Code Civ. Proc. N. Y. § 432]. American Locomotive Co. v. Dickson Mfg. Co., 117 Fed. 972.

29. If the statute allows service on the president if it can be made personally on him within the state [Code N. C. § 217, subd. 1]. Jester v. Baltimore Steam Packet Co., 131 N. C. 54.

30. Colo. Debenture Corp. v. Lombard Inv. Co., 66 Kan. 251, 71 Pac. 584.

31. Service on an insurance commissioner is good service on the company under Ky. St. 1899, § 631, though such commissioner had canceled the company's right to do business in the state, where the service is in an action which arose before such cancellation. Mut. R. F. Life Ass'n v. Phelps, 190 U. S. 147, 47 Law. Ed. 987. Where a foreign insurance company has not complied with the statute, by filing stipulations authorizing service of process on it, by serving the insurance commissioner or a designated agent, service on the insurance commissioner is sufficient to bind it. Old Wayne M. Life Ass'n v. Flynn [Ind. App.] 66 N. E. 57.

32. Subsequent process against a foreign insurance company may be served on the secretary of state, under Acts Tenn. 1875, c. 66, although repealed by Acts 1895, c. 160, § 49, and § 9, subd. 3, providing for such service on the state treasurer or insurance commissioner, where the company withdrew from the state before the latter act went into effect, it being sued on a liability arising before it withdrew. D'Arcy v. Conn. M. L. Ins. Co., 108 Tenn. 567, 69 S. W. 768.

33. Under Civ. Code Proc. Ky. § 51, subd. 6, where the superintendent maintained an office and took orders for trades, the money received being deposited to the corporation's credit, and the superintendent's share paid by the corporation's checks, the corporation maintaining a private wire to the superintendent's office. Boyd Commission Co. v. Coates, 24 Ky. L. R. 730, 69 S. W. 1090.

34. Under Code Miss. c. 65, §§ 2323, 2327, providing that on failure of such company to have an agent on whom process may be served in the state, the person who solicits insurance or transmits applications shall be its agent as to all duties and liabilities imposed by law. Pervangher v. Union C. & S. Co., 81 Miss. 32.

35. Service on the deputy insurance commissioner, though made at the commissioner's office, is not sufficient under a statute providing for service on the insurance commissioner. Old Wayne M. L. Ass'n v. Flynn [Ind. App.] 66 N. E. 57.

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whom proper service could have been made, but was not.[36] Service on an agent of a first carrier is insufficient in an action against the last connecting carrier.[37]

It is essential that the corporation shall have been actually and substantially transacting business within the state, and the process must have been served on one who is truly representative of the corporation, transacting its business within the state.[38] But merely sending agents through a state to solicit advertisements is not doing business within the state so as to warrant service of process on such agent.[39]

Whether a foreign corporation has subjected itself to the laws of other states so as to be bound by service of process therein is a question to be determined on principles of general jurisprudence.[40]

Where the corporation has not appointed an agent for service, it is not entitled to protection of provisions for the service of nonresident defendants.[41] Where suit is brought against nonresidents as a corporation, and later changed to suit against them as partners, a judgment based on the amended petition, against defendants and a garnishee, could not be sustained without the appearance of defendants or service on them without the state.[42]

Upon infants and insane persons.—Service on an infant is not necessary.[43] The appointment of a guardian ad litem takes its place.[44]

Process against an insane person cannot be served on his physician, unless it appears from such physician's certificate, attested by the serving officer, that a personal service would be injurious to the one insane.[45]

Time of service.—Service must be made the number of days prescribed by statute, at least, before the return day.[46] An original summons may be served at any time within three years.[47] Service of a writ of garnishment on a legal holiday is void.[48]

Waiver of actual service.—Actual service of process may be waived by an ac-

36. Moore v. Monumental M. L. Ins. Co., 77 App. Div. [N. Y.] 209.

37. Civ. Code Proc. Ky. § 51, subsecs. 3, 4, allowing process against a railroad to be served on its passenger or freight agent stationed at or nearest the county seat where suit is brought, means only an agent in the employ of that company. Louisville & N. R. Co. v. Chestnut & Bro., 24 Ky. L. R. 1846, 72 S. W. 351.

38. Frawley v. Pa. Casualty Co., 124 Fed. 259. Under R. S. Mo. 1899, § 570, subd. 4, cl. 2. Zelnicker Supply Co. v. Miss. Cotton Oil Co. [Mo. App.] 77 S. W. 321. Service upon an agent of a foreign corporation is not sufficient unless it is doing business in the state where the agent is served, and he is appointed to act for it there. Cent. G. & S. Exch. v. Board of Trade [C. C. A.] 125 Fed. 463. The fact that a person in the state holds a policy of insurance issued by a foreign corporation, or that such corporation collects a renewal premium on such policy through the cashier of a local bank, does not constitute doing business within the state. Frawley v. Pa. Casualty Co., 124 Fed. 259.

39. An employe sent into the state as traveling solicitor of advertisements is not such an agent. Boardman v. McClure Co., 123 Fed. 314.

40. Not according to what may be held sufficient in any particular locality either by statute or judicial decision. Frawley v. Pa. Casualty Co., 124 Fed. 259.

41. Code N. C. § 874; Pub. Laws 1901, c. 5. Williams v. Iron Belt B. & L. Ass'n, 131 N. C. 267.

42. Perry-Rice Grocery Co. v. Craddock Grocery Co. [Tex. Civ. App.] 78 S. W. 966.

43, 44. Code W. Va. 1899, c. 125, § 13. Ferrell v. Ferrell, 53 W. Va. 515.

45. Dinkelspiel v. Cent. Ky. Asylum for Insane, 24 Ky. L. R. 2240, 73 S. W. 771.

46. Service two days before return day is void under Code Civ. Proc. Neb. § 911, requiring it to be served at least three days before the time set for trial before a justice of the peace. Strowbridge v. Miller [Neb.] 94 N. W. 825. Notice on a motion for a money judgment must be served fifteen days before the day when the motion is to be made, under Code Va. 1887, § 3211. If served within less than that time before the first day or term, on which day the motion is to be made, it is insufficient, although the term does not actually begin until beyond that time. Tench v. Gray [Va.] 46 S. E. 287. Under the law requiring process to be served at least six days before the return day, there must be six days exclusive of the return of service [22 Del. Laws, p. 305, c. 167]. State v. Bay State Gas Co. [Del.] 57 Atl. 291.

47. Though an alias summons cannot be issued after a year from the commencement of the action. Under Code Civ. Proc. Cal. § 408. Hibernia S. & L. Soc. v. Cochran, 141 Cal. 653, 75 Pac. 315.

48. Under R. S. Mo. 1899, § 4683. Decker v. St. Louis & S. R. Co., 92 Mo. App. 50.

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ceptance or acknowledgment of service indorsed on the process.[49] In the absence of evidence to the contrary, an acknowledgment of due and legal service will be presumed to have been authorized.[50] But plaintiff cannot be compelled to accept service of notice of appearance and answer by one summoned as agent of defendant, but who denied that he was such agent.[51] Nor can acceptance of service be made by an agent or employe of a foreign corporation in the absence of a statutory provision or special authority to that effect.[52] In divorce cases, acceptance of service by the attorney for the defendant is bad practice.[53]

To question the authority of an attorney to indorse an acknowledgment for a defendant, the latter must do so by affirmative proof.[54]

Presumption of proper service.—In serving process, an officer will be presumed to have performed his duty, where the process is acted on by the court, as that he returned the process to the first day of the next term,[55] and in the absence of some showing to the contrary, that it was served upon the defendant named in the complaint.[56]

(§ 4) *B. Substituted.*—The manner of making a substituted service is prescribed by statute, which must be strictly observed and complied with.[57] These statutes usually provide that the service shall be made by leaving a copy of the process at the defendant's usual place of abode with some person of the family of a certain age or over, and informing such person of the contents thereof.[58] Leaving the process at the defendant's former place of residence is not sufficient, although it is immediately forwarded to him.[59] An application for substituted service on a defendant in divorce proceedings will not be granted unless service by publication cannot be made.[60]

Substituted service cannot be made on one who is only temporarily within the state.[61] There must be proof of residence within the state,[62] though for the purpose of process the presumption is that a permanent residence once acquired continues until it is shown that another has been acquired,[63] and for this purpose a defendant's place of abode cannot be changed by his mere statements that he was leaving with the intention of locating elsewhere.[64] A married man's house of usual abode for the purpose of service of process is where his wife and family reside.[65]

49. And it is not material that the indorsement was not made within the time prescribed for the service of the process—a citation for a mechanic's lien. Hawkins v. Boyden, 25 R. I. 181.

50. Indorsement by an attorney of an acknowledgment of due and legal service for the defendant named therein. Purcell v. Bennett, 68 N. J. Law, 519.

51. Steinhaus v. Enterprise Vending Mach. Co., 39 Misc. [N. Y.] 797.

52. New River Mineral Co. v. Seeley [C. C. A.] 120 Fed. 193.

53. Where personal service is impracticable, the return of "Service waived" should be signed by the attorney. Palmer v. Palmer [Del.] 57 Atl. 533.

54. Otherwise the acknowledgment will be valid. Purcell v. Bennett, 68 N. J. Law, 519.

55. Calvert, W. & B. V. R. Co. v. Driskill, 31 Tex. Civ. App. 200, 71 S. W. 997.

56. Union Traction Co. v. Barnett [Ind. App.] 67 N. E. 205.

57. New River Mineral Co. v. Seeley [C. C. A.] 120 Fed. 193.

58. R. S. Ill. § 11, c. 22. Kline v. Kline, 104 Ill. App. 274. R. S. Mo. 1899, § 570. Feurt v. Caster, 174 Mo. 289, 73 S. W. 576. 2 Ball. Ann. Codes & St. Wash. § 4875, subd. 12. N. W. & P. H. Bank v. Ridpath, 29 Wash. 687, 70 Pac. 139. Leaving process with defendant's son does not constitute a service if the sheriff's return does not allege that it was left with a member of his family or at his usual place of residence, or that he was not to be found in the county of his residence. Thornily v. Prentice [Iowa] 96 N. W. 728.

59. Under R. S. Ill. § 11, c. 22. Kline v. Kline, 104 Ill. App. 274.

60. Under Code Civ. Proc. N. Y. §§ 435, 436, 438. Maiello v. Maiello, 42 Misc. [N. Y.] 266.

61. To carry out a temporary employment. Under R. S. Wyo. 1899, § 3514. Honeycutt v. Nyquist [Wyo.] 74 Pac. 90.

62. Under Code Civ. Proc. N. Y. 1063. Lynch v. Eustis, 85 N. Y. Supp. 1063.

63. N. W. & P. H. Bank v. Ridpath, 29 Wash. 687, 70 Pac. 139.

64. He may be out of the state and still have his place of residence therein, and the plaintiff can only judge by appearances. N. W. & P. H. Bank v. Ridpath, 29 Wash. 687, 70 Pac. 139.

65. N. W. & P. H. Bank v. Ridpath, 29 Wash. 687, 70 Pac. 139.

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By statute substituted service may be had on nonresident individuals doing business within a state, by service on their managers or agents within the state.[66] To sustain substituted service on a nonresident, it is not necessary to show that he was out of the state at the time of service, as nonresidents are presumed to be without the state.[67]

It is provided by statute in some states that leaving process at defendant's dwelling house in the presence of a member of his family over a certain age shall be taken and held to be personal service.[68] But this provision authorizes this mode of service in cases of service within the state only.[69]

(§ 4) *C. The server and his qualifications.*—As a rule process may be served by the sheriff or any other person not a party to the action.[70] But an officer who is also a party to the action is disqualified from making service of process in that action,[71] as is also his deputy.[72]

A constable or bailiff may make service of process directed to the coroner of the county and sheriffs of the adjoining counties where the sheriff is a party to the suit,[73] or he may serve process to which the sheriff is not a party, where the latter is sick and has no deputy.[74] The statute providing that whenever any party shall file an affidavit of prejudice against the sheriff, the clerk shall direct process to the coroner, is mandatory.[75]

§ 5. *Constructive service. A. In general.*—Constructive service is regulated by statute and one of the methods sometimes allowed is by posting a copy of the process in some conspicuous part of the defendant's last and usual place of abode. But this manner of constructive service will not be granted in divorce proceedings,[76] unless service by publication cannot be made.[77] Constructive service provided as to foreign corporations doing business within the state will not confer jurisdiction of one not doing business therein.[78]

Constructive service cannot be legally made unless some necessity therefor appears.[79] It can only be made when personal service is impracticable.[80]

Constructive service confers jurisdiction only for the purpose named in the bill.[81]

66. Civ. Code Ky. § 51, subd. 6, authorizing such service is not invalid as providing insufficient notice (Guenther v. American Steel Hoop Co., 25 Ky. L. R. 795, 76 S. W. 419) nor is such statute in violation of Const. U. S. art. 4, § 2 (Id.).

67. Under Civ. Code Ky. § 51, subd. 6. Guenther v. American Steel Hoop Co., 25 Ky. L. R. 795, 76 S. W. 419.

68. Over 14 years of age [Comp. Laws N. D. 1887, § 4898]. First Nat. Bank v. Holmes [N. D.] 94 N. W. 764.

69. First Nat. Bank v. Holmes [N. D.] 94 N. W. 764.

70. Comp. Laws S. D. § 4899. Piano Mfg. Co. v. Murphy [S. D.] 92 N. W. 1072. Service by the agent of the plaintiff to an action is valid; he is not a party to the action under Comp. Laws S. D. § 4899. Id.

71. An execution. In re Stephanian [R. I.] 56 Atl. 1034.

72. A deputy sheriff cannot serve process on the sheriff in a case in which he is a party defendant, under Civ. Code Ga. 1895, § 4986. Hillyer v. Pearson, 118 Ga. 815. Nor can a deputy sheriff serve process on the administrator of a deceased co-defendant of the sheriff; where the deceased had not appeared or waived service, a scire facias so served is void, under Civ. Code Ga. 1895, § 5017. Id.

73, 74. Civ. Code Ga. 1895, § 4986. Hillyer v. Pearson, 118 Ga. 815.

75. Litch v. People [Colo. App.] 75 Pac. 1083.

76. Service of process, in divorce proceedings, by posting notice on the door of a residence in which the plaintiff and defendant lived, is insufficient where it appears that the defendant has run away. Maiello v. Maiello, 42 Misc. [N. Y.] 266.

77. Service of summons by leaving a copy at the defendant's residence, or by affixing the same to the door and mailing a copy to defendant at such residence, will not be granted in divorce proceedings unless service by publication cannot be made, under Code Civ. Proc. N. Y. §§ 435, 436, 438. Maiello v. Maiello, 42 Misc. [N. Y.] 266. Where it is not shown that the defendant is a person residing within the state, and that his place of sojourn cannot be ascertained, or, if he is within the state that he avoids service, under Code Civ. Proc. N. Y. §§ 435, 436, 438. Id.

78. Cady v. Associated Colonies, 119 Fed. 420.

79, 80. Bear Lake County v. Budge [Idaho] 75 Pac. 614.

81. Service by publication, on a bill to subject lands to plaintiff's debts, does not confer jurisdiction to make the bill one for

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(§ 5) *B. By publication. When proper.*—Another form of constructive service is service by publication. Statutes in many states provide for service by publication of the summons or other process in a newspaper of proper circulation for a certain length of time, where after due diligence the person on whom process is to be served cannot be found within the state.[82] Service of summons by publication is proper against a nonresident,[83] as a foreign corporation,[84] or a foreign mutual benefit association;[85] but publication is unnecessary for such of nonresident defendants as enter a general appearance,[86] nor can publication be ordered, on a nonresident defendant, where plaintiff is also a nonresident.[87] A supplemental summons and amended complaint to bring in a new defendant may be served by order of publication.[88]

By some statutes, this mode of service is authorized where the defendant has been absent for a certain length of time,[89] or where he is temporarily absent.[90]

Where an *insane person* is served by publication, a subsequently appointed committee, before the service is complete, will not be permitted to vacate the process on the ground that no leave had been obtained to sue it where the vacation would destroy an absolute right, but the committee should be made a defendant.[91]

Procedure to authorize.—To obtain service by order of publication, the statute in reference thereto must be strictly followed.[92] If this is done, the right to the order is absolute.[93]

As a condition precedent to the court's granting an order of publication, the complaint should be duly verified and filed;[94] and this with the plaintiff's affidavit should show to the satisfaction of the court that a proper cause of action exists for a service by publication, that the defendant after due diligence could not be found in the state, and stating the placing of the process in the hands of an officer and his inability to serve the same as evidenced by his return;[95] and in ac-

specific performance. McGaw v. Gortner, 96 Md. 489.

82. Allen v. Richardson [S. D.] 92 N. W. 1075. If the defendants are in reality unknown, or if known and reside outside or cannot be found within the state, publication of summons must, of necessity, be sufficient, as provided by statute. Bear Lake County v. Budge [Idaho] 75 Pac. 614.

83. To bring him into the action. Mack v. Austin, 67 Kan. 36, 72 Pac. 551.

84. Under Civ. Code Ga. § 4976, service by publication may be had on a foreign corporation in an action to remove a cloud from the title of stock in a domestic corporation held by it. People's Nat. Bank v. Cleveland, 117 Ga. 908.

85. A suit on a mutual benefit certificate praying that the judgment be a lien on all assessments is a suit to establish a lien within R. S. 1899, § 575. Clark v. Brotherhood of Locomotive Firemen, 99 Mo. App. 687, 74 S. W. 412.

86. McClung v. Sieg [W. Va.] 46 S. E. 210.

87. An order on papers not showing plaintiff to be a resident will be vacated under Code Civ. Proc. N. Y. §§ 1780, 439. Haight v. Le Foncier De France Et Des Colonies, 84 N. Y. Supp. 135.

88. Under Code Civ. Proc. N. Y. § 453. Meeks v. Meeks, 87 App. Div. [N. Y.] 99.

89. Six consecutive weeks under B. & C. Comp. Or. § 56. McFarlane v. Cornelius, 43 Or. 513, 73 Pac. 325, 74 Pac. 468.

90. In divorce proceedings on the defendant temporarily without the state, though the affidavit does not negative the possibility of a substituted service. McFarlane v. Cornelius, 43 Or. 513, 73 Pac. 325, 74 Pac. 468.

91. Attachment. Carter v. Burrall, 80 App. Div. [N. Y.] 395.

92. Wilson v. Lange, 40 Misc. [N. Y.] 676.

93. Whether or not the complaint and affidavit are based on true allegations. Gallun v. Weil, 116 Wis. 236, 92 N. W. 1091.

94. R. S. Wis. §§ 2639, 2640. Gallun v. Weil, 116 Wis. 236, 92 N. W. 1091. Comp. Laws S. D. § 4900, subd. 5. Allen v. Richardson [S. D.] 92 N. W. 1075.

95. Under Comp. Laws S. D. § 4900. Allen v. Richardson [S. D.] 92 N. W. 1075. The affidavit must show to the satisfaction of the court or justice that the case is within its jurisdiction [Code Civ. Proc. N. Y. § 3170]. Wilson v. Lange, 40 Misc. [N. Y.] 676. An affidavit stating that summons had been placed in the hands of the sheriff of the county for service, that he had returned it indorsed, that the defendant could not be found in the county, and that the affiant did not know the defendant's residence, is sufficient. Weis v. Cain, 140 Cal. xvii, 73 Pac. 980. An affidavit stating that plaintiff is unable with due diligence to serve the summons on the defendant, and stating the placing of the summons in the hands of an officer and his inability to serve the same as evidenced by his return is not insufficient as a matter of law to support an order of publication under a statute requiring that it shall be made to appear that plaintiff is unable with due diligence to serve the summons on the defendant. Gallun v. Weil, 116

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tions in rem that the defendant has property within the state.[96] The affidavit should also contain the venue, and disclose the official county of the officer taking it,[97] and, by statute, in some jurisdictions, must show the issuing of a warrant of attachment;[98] though in others the issuance of a writ of attachment or the seizure of property thereunder is not a requisite.[99] Publication for the purpose of substituted service made before the filing of an affidavit for publication is invalid,[1] but failure to file the affidavit and order for publication is immaterial.[2]

The affidavit may be executed by the plaintiff, his agent, or attorney.[3]

The insufficiency of the affidavit for an order of publication is immaterial if the defendant is afterwards personally served with an alias.[4]

A statute providing for publication without a supporting affidavit is unconstitutional.[5]

How made.—Service by publication is made by publishing the process in a newspaper of proper circulation for a certain length of time as prescribed by statute,[6] and when the name and post office address of the defendant is known, by mailing a copy of the summons and complaint to him.[7] Service by publication in a weekly newspaper issued on Sunday is good.[8]

Service by publication is not complete until the expiration of the time of publication,[9] which must be before the return day.[10]

Wis. 236, 92 N. W. 1091. Affidavit held sufficient. Barnes v. Boston Inv. Co. [Neb.] 94 N. W. 101. Affidavit for service of publication under G. S. Minn. 1894, § 5204, held sustained by the evidence. Fowler v. Jenks [Minn.] 96 N. W. 914. Affidavit held insufficient, under Code Civ. Proc. Cal. §§ 412, 446. Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445, 71 Pac. 498.

An affidavit that defendant had absconded from his usual place of abode in the state does not authorize an order of publication on the ground that he is a nonresident, under R. S. Mo. 1899, §§ 9303, 575, allowing service by publication where the plaintiff or one for him deposes that part of defendants are nonresidents or have absconded or absented themselves from their usual abode. Parker v. Burton, 172 Mo. 85, 72 S. W. 663.

96. R. S. Wis. §§ 2639, 2640. Gallun v. Weil, 116 Wis. 236, 92 N. W. 1091. Allegation in the petition and an affidavit for publication, in foreclosure proceedings, that the owner is unknown is sufficient where collaterally attacked. Butler v. Copp [Neb.] 97 N. W. 634.

97. Albers v. Kozeluh [Neb.] 94 N. W. 521, judgment adhered to in Id., 97 N. W. 646.

98. Under Code Civ. Proc. N. Y. § 3170, providing that an order directing service of summons by publication may be granted by the city court of New York but only where a warrant of attachment has been issued. Wilson v. Lange, 40 Misc. [N. Y.] 676. The fact that an attachment has been issued cannot be subsequently shown by an affidavit read in opposition to a motion to vacate and set aside the order of publication and judgment. Id.

99. Gallun v. Weil, 116 Wis. 236, 92 N. W. 1091.

1. Guinn v. Elliott [Iowa] 98 N. W. 625.

2. Allen v. Richardson [S. D.] 92 N. W. 1075.

3. An affidavit for order of publication showing that it was made by one of plaintiff's attorneys is sufficient, though he did not sign the complaint as one of plaintiff's attorneys, under 2 Ball. Ann. Codes & St. Wash. § 4877, authorizing an order of publication on affidavit of plaintiff, his agent or attorney, that according to his belief defendant is not a resident of the state. Swanson v. Hoyle, 32 Wash. 169, 72 Pac. 1011.

4. McKibbin v. McKibbin, 139 Cal. 448, 73 Pac. 143.

5. Provisions for service of summons by publication without an affidavit and order under Act March 11, 1903 (Sess. Laws, 1903, p. 223), in reference to irrigation rights, held unconstitutional. Bear Lake County v. Budge [Idaho] 75 Pac. 614.

6. Two publications in each successive seven days, for four of such periods, from the date of the order of publication, is a sufficient publication, though there was but one publication in the last calendar week of such period, under Act Congress, June 8, 1898 (30 Stat. 434, c. 394, § 6), requiring such publication in District of Columbia at least twice a week for at least four weeks. Leach v. Burr, 188 U. S. 510, 47 Law. Ed. 567.

7. Bear Lake County v. Budge [Idaho] 75 Pac. 614. Mailing a copy of a summons by order of court to the defendant's "last known address" without the state, as stated in the complainant's affidavit, is a sufficient service, under California Pol. Code, § 52 and Code Civ. Proc. §§ 412, 413. San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299. The word "residence" as used in some of these statutes includes a temporary residence, and service may be made by an order of publication by mailing a copy of the summons and complaint to the defendant at the place of such residence, under B. & C. Comp. Or. §§ 56 & 57. McFarlane v. Cornelius, 43 Or. 513, 73 Pac. 325, 74 Pac. 468.

8. Code Civ. Proc. Cal. § 134, does not prohibit the doing of ministerial acts on Sunday. Heisen v. Smith, 138 Cal. 216, 71 Pac. 180.

9. Under 2 Ball. Ann. Codes & St. Wash. § 4878. Woodham v. Anderson, 32 Wash. 500, 73 Pac. 536.

10. Code Civ. Proc. N. Y. § 2524, does not

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Sufficiency of order and publication.—The order and publication must show the names of the parties and the subject-matter of the litigation,[11] and must sufficiently specify a proper return day,[12] and must be of process which has been issued, unless issuance is waived.[13]

The court may deny plaintiff's motion to file proof of publication of summons nunc pro tunc.[14] The publication of a warning order in Arkansas is not a valid service, unless the clerk makes such order on the complaint.[15]

Personal service in lieu of publication.—In some jurisdictions it is expressly provided that personal service on the defendant without the state shall be equivalent to service by publication, in divorce and other proceedings.[16] But it is not required that copies of the affidavit and order should be served with the summons,[17] except in divorce cases, when the order of publication must be served therewith.[18]

An affidavit supporting such personal service must be in the form prescribed by statute; otherwise the service confers no jurisdiction over the defendant.[19] In some jurisdictions, the affidavit required in publication of process is not necessary;[20] though in other jurisdictions it is otherwise.[21]

§ 6. *Return and proof. Official return. By unofficial persons.*—An officer's return of process must affirmatively show everything necessary to constitute a valid service.[22] It must show a service of a true copy of the process on each of the defendants[23] by himself in person, and not by and through a private person.[24]

require it to be complete more than eight days before. In re Denton, 40 Misc. [N. Y.] 326. Section 2520, requiring a service eight days before, applies only to personal service. In re Denton, 86 App. Div. [N. Y.] 359.

11. Otherwise it gives no jurisdiction of the person of the defendant. Donaldson v. Nealis, 108 Tenn. 638, 69 S. W. 732.

12. An order of publication for six consecutive weeks and requiring the defendant to appear and answer on or before the last day prescribed for publication sufficiently specifies the time to appear and answer. McFarlane v. Cornelius, 43 Or. 513, 73 Pac. 325, 74 Pac. 468. A service by publication requiring appearance sixty days after service is insufficient under Laws 1901, p. 384, c. 178, § 1, subd. 2, requiring appearance within sixty days after date of first publication, exclusive of such day. Smith v. White, 32 Wash. 414, 73 Pac. 480. Requiring appearance within sixty days from the date of the first publication does not give the court jurisdiction to enter judgment. Woodham v. Anderson, 32 Wash. 500, 73 Pac. 536. But where the summons is nearly complete before such statute goes into effect, it is not affected thereby and if such summons requires an appearance within sixty days after the date of first publication, instead of after completion of publication, it is insufficient, under 2 Ball. Ann. Codes & St. § 4878. Id.

13. An order for the publication of process, which has not been issued, or issuance waived, does not give the court jurisdiction; publication of notice of attachment and summons, which is merely filled out but not issued. Under Code N. C. §§ 199, 161, 348, 219, & 352. McClure v. Fellows, 131 N. C. 509.

14. Where the judgment roll contained no proof of the service of the summons by publication. Stai v. Selden, 87 Minn. 271, 92 N. W. 6.

15. Under Sand. & H. Dig. Ark. § 5679, providing that where summons cannot be served, the clerk shall make an order on the complaint warning the defendant to appear. Beidler v. Beidler [Ark.] 74 S. W. 13.

16. 2 Ball. Ann. Codes & St. Wash. § 4879. Jennings v. Rocky Bar G. Min. Co., 29 Wash. 726, 70 Pac. 136. R. S. Mo. 1899, § 582. Hedrix v. Chicago, R. I. & P. R. Co. [Mo. App.] 77 S. W. 495. Leaving the summons and complaint in attachment proceedings at defendant's dwelling house in another state, in the presence of a member of his family over fourteen years of age, is not a personal service out of the state equivalent to service by publication, under Comp. Laws N. D. 1887, § 4900, providing for such service. First Nat. Bank v. Holmes [N. D.] 94 N. W. 764.

17. Allen v. Richardson [S. D.] 92 N. W. 1075.

18. A statute requiring the order of publication to be served personally with the summons in divorce cases does not apply to other cases [Laws S. D. 1893, c. 75, § 1]. Allen v. Richardson [S. D.] 92 N. W. 1075.

19. Under R. S. Mo. 1899, §§ 582 and 575, an affidavit omitting the phrase "in the state" is void. Hedrix v. Chicago, R. I. & P. R. Co. [Mo. App.] 77 S. W. 495.

20. Under 2 Ball. Ann. Codes & St. Wash. §§ 4877, 4879. Jennings v. Rocky Bar G. Min. Co., 29 Wash. 726, 70 Pac. 136.

21. Service on a nonresident under the provisions of Laws Minn. 1901, p. 68, c. 63, § 1, by sending the summons to the county in which the defendant resides is simply a substitute for service by publication, and must be predicated upon a strict compliance with the provisions of G. S. 1894, § 5204, in reference to publication. Spencer Co. v. Koell [Minn.] 97 N. W. 974.

22. An officer's return of service on a railroad company in garnishment proceedings must show service on the nearest station or freight agent. Antonelli v. Basile, 93 Mo. App. 138.

23. Showing delivery to C. R. and M. R.,

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Where the service was on minors and guardians, a return showing such service but without designating the guardian as such, is sufficient.[25] In case of a substituted service, it should show that all the statutory requirements have been complied with, as that a copy of the petition was served with the summons,[26] or that in divorce proceedings a copy of the notice of an order to appear was mailed to the defendant "prepaid" and that the proper inquiries as to the defendant's residence were made;[27] but it need not state the name of the member of the family with whom the copy was left.[28]

The sheriff's return must be made within the time prescribed by statute.[29]

In case of service by unofficial persons, the return is by an affidavit showing the facts necessary to constitute the service.[30]

Though the acts of a sheriff in making service must be evidenced by his own return and not by testimony of third parties,[31] yet such testimony is admissible, to support the service, to show collateral facts independent of the sheriff's return, and not involving his actions.[32]

Return of service on corporations.—A proper return of service on a corporation should set out a service on a proper officer or agent at the office or place of business of the corporation in the county, or, if not so served, then the facts should be affirmatively returned which will bring the service within some of the methods prescribed by statute.[33] Where served upon a subordinate officer or agent, it must show that service upon a superior officer could not be had,[34] and must show in-

the within defendants, is insufficient. Russell v. Butler [Tex. Civ. App.] 71 S. W. 395.

24. A return showing service of a citation on a corporation by and through an officer thereof is insufficient to show proper service. Tex. H. M. F. Ins. Co. v. Bowlin [Tex. Civ. App.] 70 S. W. 797.

25. Melcher v. Schluter [Neb.] 98 N. W. 1082.

26. Under R. S. Mo. 1899, § 570. Feurt v. Caster, 174 Mo. 289, 73 S. W. 576.

27. Under 1 Gen. St. N. J. p. 405, § 172, and chancery rule 59, if the affidavit as to service does not show prepayment of a copy of the notice of the order to appear, and only shows inquiry of the complainant's relatives as to the defendant's residence, and it does not appear from the papers that the defendant received notice in fact, the service is insufficient. Barker v. Barker, 63 N. J. Eq. 593.

28. Box v. Equitable Securities Co. [Ark.] 73 S. W. 100.

29. It is no defense for a failure to do so that he was under the impression that the process was returnable at a later date, and that he was trying to obtain service. Bell v. Wycoff, 131 N. C. 245.

30. Stating in an affidavit by one other than the sheriff serving the summons, that he had served it by leaving a copy of it and of the complaint at the defendant's usual place of abode in a certain city does not import that the defendant has any other residence, and raises no presumption that such verified service is not sufficient. N. W. & P. H. Bank v. Ridpath, 29 Wash. 687, 70 Pac. 139. And since the sheriff's return in such case, that he was unable to make personal service on the defendant because he could not be found in the county, and that on information he believed his residence to be in another state, raises no conclusive presumption of nonresidence, the affidavit will not be overthrown thereby. Id. Testimony of one making service that he left true copies of the summons and complaint at defendant's house, supplies omissions in this respect in his affidavit of the service. Id.

31. Baham v. Stewart Bros. & Co., 109 La. 999.

32. Citation. Baham v. Stewart Bros. & Co., 109 La. 999.

33. Park Bros. & Co. v. Oil City Boiler Works, 204 Pa. 453. A sheriff's return of service on a railroad company showing delivery of the process to a person in charge of a business office on the company's line, without stating that it was the defendant company's office, shows insufficient service. Vickery v. Omaha, K. C. & E. R. Co., 93 Mo. App. 1. Reciting that he had served the defendant, a certain corporation, by serving its superintendent, naming him, is sufficient. Southern Bell Tel. & T. Co. v. Earle, 118 Ga. 506. A return showing service on the "vice-president and managing agent" of a corporation was sufficient, where the person served was the managing agent but was no longer vice-president. Coast Land Co. v. Or. Pac. Colonization Co. [Or.] 75 Pac. 884. Where service was required to be at the usual place of abode or principal office of the corporation, service at the dwelling of the president, "in the presence of a certain white adult person" and also on defendant president of the company in the same manner, was held sufficient. State v. Bay State Gas Co. [Del.] 57 Atl. 291.

34. Where the statutes provide that service may be had by leaving a copy with the person in charge of any business office of the corporation in case the president or chief officer cannot be found, but that the absence of such officer must be expressed in the return, such statement in the return is jurisdictional in case service is not on the chief officers [R. S. Mo. §§ 995, 996]. Rixke v. W. U. Tel. Co., 96 Mo. App. 406, 70 S. W. 265.

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formation other than the mere statement of the person on whom it was served that he was the corporation's agent.[35]

A return of service against a foreign corporation must show the facts warranting the service and the manner in which it was served, as that the corporation, whose officer or agent is served, was at the time doing business in the state,[36] and that the officer upon whom the process was served is an inhabitant of the district or has become subject to the jurisdiction of the court.[37] But it need not show all the facts required by statute to authorize service of summons on any agent; they may be shown in the record.[38]

Amendment of return.—The insufficiency of a return of service is not ground for abatement since amendable.[39] The sheriff with aid of a written memorandum may be allowed to amend his return,[40] within any length of time,[41] upon proof of facts that he had made a wrong return and that the amended return should have been made in the first instance.[42] The right to amend may be established by matter in pais.[43]

The allowance of such amendment is a matter of judicial discretion.[44]

Impeachment or contradiction of return.—A sheriff's regular return in some jurisdictions is conclusive as to the facts therein stated as against parties to the action in which the process was served and cannot be overcome in collateral proceedings;[45] though in other jurisdictions it is considered merely as prima facie evidence of such facts, and may be rebutted.[46] But in a direct attack the return is considered as prima facie evidence only, and parol evidence is admissible to impeach it,[47] as in an action to restrain the collection of a default judgment,[48] or on a

35. White House Mountain G. Min. Co. v. Powell, 30 Colo. 397, 70 Pac. 679.

36. Under R. S. Mo. 1899, § 570, subd. 4, recital of delivery of copy of the summons to the president without showing the nonexistence of an office or place of business in the state, is not sufficient. Zelnicker Supply Co. v. Miss. Cotton Oil Co. [Mo. App.] 77 S. W. 321; Cent. G. & S. Exch. v. Board of Trade [C. C. A.] 125 Fed. 463.

37. A return that the secretary and general manager of a foreign corporation was served is not sufficient if it does not state that defendant is an inhabitant of the district or has become subject to the jurisdiction of the court, and such facts do not appear from the record. Scott v. Stockholders' Oil Co., 122 Fed. 835.

38. Civ. Code Proc. Ky. § 51, subd. 6. Nelson Morris & Co. v. Rehkopf & Sons, 25 Ky. L. R. 352, 75 S. W. 203.

39. On proper showing of facts; against a foreign corporation. Zelnicker Supply Co. v. Miss. Cotton Oil Co. [Mo. App.] 77 S. W. 321. An officer's amendment, of his return of service on a citation for a mechanic's lien, which shows a return within the prescribed time justifies a denial of a motion to dismiss on the ground that the citation was not served within the prescribed time. Hawkins v. Boyden, 25 R. I. 181.

40. State v. Jenkins, 170 Mo. 16, 70 S. W. 152.

41. It may be amended after ten years. Judd v. Smoot, 93 Mo. App. 289.

42. By referee. Camp v. First Nat. Bank [Fla.] 33 So. 241.

43. It need not be based on the record. Judd v. Smoot, 93 Mo. App. 289.

44. The court may use its sound discretion in amending or refusing to amend a sheriff's return after judgment, under R. S. Mo. 1899, §§ 657, 660. Feurt v. Caster, 174 Mo. 289, 73 S. W. 576. It is not an abuse of such discretion for the court to refuse, after judgment, to amend the sheriff's return of a substituted service where he cannot remember with whom he left the process. Id.

45. A sheriff's return of constructive service is not overcome by an affidavit of the defendant and his wife, upon whom the service was made five years after, that such service was not made; especially where the defendant had previously made affidavits in the action stating that he was defendant therein. Ill. Steel Co. v. Dettlaff, 116 Wis. 319, 93 N. W. 14. A marshal's return of personal service cannot be controverted by an affidavit that such service was not made. Long Branch Pier Co. v. Crossley, 40 Misc. [N. Y.] 249.

46. It is the settled law of Nebraska that a false return of service of process may be impeached by extrinsic evidence, and that where the attempted service fails to reach the party to be served in any way a judgment founded thereon is absolutely void and open to collateral attack. Baldwin v. Burt [Neb.] 96 N. W. 401.

47. In an action in a district court to set aside a justice's judgment. Carpenter v. Anderson [Tex. Civ. App.] 77 S. W. 291.

48. Patterson v. Yancey, 97 Mo. App. 681, 71 S. W. 845. It may be shown in law or equity to be untrue. Kochman v. O'Neill, 102 Ill. App. 475. A judgment founded thereon should not be set aside for failure of service except upon clear and satisfactory proof. N. W. & P. H. Bank v. Ridpath, 29 Wash. 687, 70 Pac. 139.

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motion to vacate a judgment for want of service.[49] An officer's return is conclusive in certiorari.[50]

Proof to overcome a sheriff's return must be clear and satisfactory.[51]

Parol evidence may be admitted to explain the return, where there are more than one person, in the community, of the name against which the process is directed.[52]

Traverse of return in Georgia.—In this state the statutes expressly provide that an official return may be contradicted by a traverse, to which proceeding the official making the return must be a party;[53] otherwise the defendant cannot testify to the untruth of the sheriff's return.[54] Plaintiff has no concern with, and cannot object to, the manner in which an officer whose return of service has been traversed, is made a party.[55]

Proof of service by publication.—Proof of service by publication should be made by affidavit of the printer of the newspaper in which the process is published, within the prescribed time,[56] and by a certificate of the clerk that he mailed, within the prescribed time, a copy of the order of publication to the defendant, where such mailing is required.[57]

§ 7. *Defects, objections, and amendments. In general.*—Jurisdiction may sometimes be conferred by a defective service,[58] but no jurisdiction can be conferred where there is no service.[59]

Defects in an officer's return must not be confused with defects in the process. Greater jurisdictional weight is attached to the latter than to the former, and consequently greater latitude is allowed in correcting defects in the return, than in the process itself.[60] The process itself is the important legal fact upon which the validity of a judgment rests, while the return is simply evidence in respect to that fact.[61]

Alterations—Amendments.—The change or alteration of a summons after it is issued renders it void.[62]

Where an original process is defective by an omission, the court may allow it to be amended.[63] If the amendment is filed within the time prescribed by statute,

49. And evidence is produced to show whether or not service was made. Parker v. Van Dorn Iron Works, 23 Ohio Circ. R. 444.

50. And the defendant cannot excuse a failure to appeal on the ground that the summons was not in fact regularly served. McAnaney v. Quigley, 105 Ill. App. 611.

51. Kochman v. O'Neill, 102 Ill. App. 475; N. W. & P. H. Bank v. Ridpath, 29 Wash. 687, 70 Pac. 139.

52. An officer, serving the process, may point out in court the person upon whom he served it. This does not contradict his return. Reid v. Mercurio, 91 Mo. App. 673.

53. The service of a copy of a traverse, to the sheriff's entry of service, on the sheriff by a private individual, does not make him a party thereto; where an affidavit of illegality is filed. Parker v. Medlock, 117 Ga. 813. Such a traverse may be stricken where the officer is not made a party nor given notice of its filing. O'Connell Bros. v. Friedman, K. & Co., 118 Ga. 831.

54. Though an affidavit of illegality on the ground that the defendant had not been served is also filed. Parker v. Medlock, 117 Ga. 813.

55. Branan v. Nashville, C. & St. L. R. Co. [Ga.] 46 S. E. 882.

56. Failure of a printer to make affidavit to the publication of process in his newspaper within the time prescribed by statute does not prevent the court from rendering judgment, if the affidavit is made before decree. B. & C. Comp. [Or.] § 788, requiring such affidavit within six months after publication is directory only. McFarlane v. Cornelius, 43 Or. 513, 73 Pac. 325, 74 Pac. 468.

57. A certificate of the clerk that he mailed copies of the order of publication to the address of the defendant is not sufficient proof of service upon either of two nonresident defendants, under R. S. Fla. § 1445; and § 1413, 2; Acts 1893, c. 4129. Wylly v. Sanford L. & T. Co. [Fla.] 33 So. 453.

58, 59. Vickery v. Omaha, K. C. & E. R. Co., 93 Mo. App. 1.

60. A citation is a matter separate and distinct from the sheriff's return. A citation may be thoroughly legal, while the return may fail in making the recitals the sheriff ought to make; and on the other hand, the return may be beyond criticism and yet the fact be that no legal citation has been made. Baham v. Stewart Bros. & Co., 109 La. 999.

61. Baham v. Stewart Bros. & Co., 109 La. 999.

62. Strowbridge v. Miller [Neb.] 94 N. W. 825.

63. Where a writ omits to state the damages claimed in the ad damnum clause. Under act Conn. 1889 (Pub. Acts 1889, p. 61, c.

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the plaintiff is entitled to it as a matter of right,[64] but a void process is not amendable.[65]

An amendable process is of the same effect in reference to acts already done as if amended.[66]

When objections made.—Objection to the validity of process should be made before confirmation of a default.[67]

How objections made.—Objections to process for defects or irregularities may be made by a special appearance to object to the jurisdiction of the court.[68] For defects that do not appear on the face of the process or return, the proper form of objecting is by plea in abatement,[69] and not a motion to quash.[70] But for defects that are apparent on the face of the process or return, the proper remedy is a motion to set aside the process or judgment.[71] Irregular service of process on a corporation may be set aside on rule.[72] A defect in the service or sheriff's return is no ground for quashing process or abating the suit;[73] the motion should be to set aside the service.[74] But an objection to the form or sufficiency of the process cannot be taken by answer.[75]

Waiver of irregularities.—Since the only use of process is to bring the parties into court, an irregularity of service of process is waived by the defendant's voluntary appearance in court, and answering to the merits of the case,[76] and the court

110; G. S. 1902, § 643). Sanford v. Bacon, 75 Conn. 541. By the omission of the clerk's signature. Aultman & T. Mach. Co. v. Wier, 67 Kan. 674, 74 Pac. 227. A summons inadvertently made returnable on Sunday may be amended so as to make it returnable on the Monday following. Lawrence Harbor Colony v. American Surety Co. [N. J. Law] 57 Atl. 390. A copy of the summons served on defendant was dated February 26, and made returnable February 10. When served, plaintiff's clerk offered to correct the return date. Held, the court acquired no jurisdiction of person of defendant. Mut. Alliance Trust Co. v. Greenberger, 86 N. Y. Supp. 729.

64. Within the first 30 days of the court; under G. S. 1902, § 639. Sanford v. Bacon, 75 Conn. 541.

65. Neal-Millard Co. v. Owens, 118 Ga. 670.

66. Writ of execution. Brann v. Blum, 138 Cal. 644, 72 Pac. 168.

67. It cannot be reserved as grounds for an action of nullity. Baham v. Stewart Bros. & Co., 109 La. 999.

68. A special appearance to contest jurisdiction is sufficient to contest an affidavit's sufficiency for an order of publication. Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445, 71 Pac. 498. But see Barnes v. Boston Inv. Co. [Neb.] 94 N. W. 101.

69. A sheriff's return of service valid on its face. Lamb v. Russel, 81 Miss. 382.

70. A sheriff's return, in an action in which the defendant's name is not given correctly, cannot be quashed, for that reason, on an affidavit not giving his true name. Plea in abatement showing the true name is the proper remedy in such case. Wilhite v. Convent of Good Shepherd, 25 Ky. L. R. 1375, 78 S. W. 138.

71. Notice of a motion to set aside an order of publication for irregularities need not state them, if they are merely jurisdictional imperfections; that the affidavit on which the order was granted did not show that an attachment had been issued. Wilson v. Lange, 40 Misc. [N. Y.] 676. Where process served on a defendant names a wrong return day, and he acts on the belief that the day given is the right one, and authorizes no one to appear for him, a default judgment as to him thereon should be set aside. Patterson v. Yancey, 97 Mo. App. 681, 71 S. W. 845. The legal sufficiency of a service, upon a return and facts shown by the record, may be questioned in a motion to set aside the return. Scott v. Stockholders' Oil Co., 122 Fed. 835. Evidence held insufficient to establish an agency of a fraternal insurance company upon whom service could be made, on a motion to set aside a service upon one, as the managing agent of such company. Moore v. Monumental M. L. Ins. Co., 77 App. Div. [N. Y.] 209.

72. Plea in abatement is not necessary. Park Bros. & Co. v. Oil City Boiler Works, 204 Pa. 453.

73. Summons ad respondendum. Silver Springs, O. & G. R. Co. v. Van Ness [Fla.] 34 So. 884.

74. Summons ad respondendum. Engelke & F. Mill. Co. v. Grunthal [Fla.] 35 So. 17.

75. Summons. Nellis v. Rowles, 41 Misc [N. Y.] 313.

76. Department of Health v. Babcock, 84 N. Y. Supp. 604. Entering a special appearance to deny jurisdiction, and four days later filing a general demurrer and a full answer to the merits. Barnes v. W. U. Tel. Co., 120 Fed. 550. An appearance and answer by attorney waives a defect in the summons returnable at a wrong term. Patterson v. Yancey, 97 Mo. App. 681, 71 S. W. 845. And a denial in an answer that defendant is a nonresident upon whom substituted service may be had under Civ. Code Ky. § 51, subd. 6, is immaterial. Guenther v. American Steel Hoop Co., 25 Ky. L. R. 795, 76 S. W. 419. Where he appears in person and by attorney and agrees to a continuance. Honeycutt v. Nyquist, Peterson & Co. [Wyo.] 74 Pac. 90. Where he files a motion to quash and dismiss, and states that he has not been sued by his true name, giving it. Id. Caveators appearing and going to trial in a proceeding to probate a will waive a defect in

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cannot make an ex parte order permitting the defendant to withdraw such appearance.[77] Illegality in service is waived only by a plea to the merits, without insisting upon the illegality.[78] As to what constitutes a general appearance sufficient to amount to a waiver see the footnote.[79]

But irregularity in service of process is not waived by a special appearance to object to jurisdiction acquired by such service,[80] nor where he thus specially appears by an answer to the merits, after a motion to set aside the service is denied,[81] nor by appealing from a decree entered by the court upon the merits, but withholding its judgment upon its jurisdiction;[82] nor does defendant waive such defects by pleading to the merits, in the same paper in which he excepts to the process.[83] The mere fact that the defendant makes, what he calls a special appearance, does not make it so, if matters are thereby brought into issue involving the merits of the case.[84]

§ 8. *Privilege and exemptions from service.*—A person brought into a state by extradition on a criminal charge is privileged from service of process in a civil suit against him in the jurisdiction in which he is tried.[85] But he may waive this privilege.[86]

As a rule members of state legislatures are exempt from service of process while going to, attending, and returning from the sessions. But in Nebraska, no distinction is made, as to the service of process, between members of the legislature and any other person.[87]

Parties to an action are generally exempt from service in the jurisdiction to which they go to attend the trial of the cause.[88] The same is true of a nonresident

notice of publication. Leach v. Burr, 188 U. S. 510, 47 Law. Ed. 567. Technical defects in a summons are of no consequence after the party has appeared in court. Stryker v. Pendergast, 105 Ill. App. 413.

Appearance, 1 Curr. Law, p. 201.

77. Insurance T. & Agency v. Failing, 66 Kan. 336, 71 Pac. 826.

78. Cent. G. & S. Exch. v. Board of Trade [C. C. A.] 125 Fed. 463.

79. Filing answer after motion to quash summons is overruled. Morris v. Healy Lumber Co. [Wash.] 74 Pac. 662. Nonresident defendants voluntarily coming into court after decree, and joining in a motion for a new trial, on other grounds than the defective service. Clark v. Brotherhood of Locomotive Firemen, 99 Mo. App. 687, 74 S. W. 412. Appeal to a reviewing court. Louisville & N. R. Co. v. Chestnut & Bro., 24 Ky. L. R. 1846, 72 S. W. 351. The prosecution of a writ of error from a judgment rendered on defective service, upon a remanding of the cause to the lower court. Drew Lumber Co. v. Walter [Fla.] 34 So. 244. An appearance will be presumed to have been authorized, on appeal. Department of Health v. Babcock, 84 N. Y. Supp. 604.

But appearance is not established by a motion to quash service and strike out the suggestion of damages filed by the plaintiff, where it is clear that such was not the intention of defendant's attorney (Thomson v. McMorran Mill. Co. [Mich.] 94 N. W. 188), nor by the mere filing by a corporation of an affidavit made by a trustee where he had not been served with process (Taylor & Co. v. Southern Pac. Co., 122 Fed. 147); nor by acceptance of service by the defendant's attorney of a motion for an order to sell attached property (Honeycutt v. Nyquist, Peterson & Co. [Wyo.] 74 Pac. 90).

80. Cent. G. & S. Exch. v. Board of Trade [C. C. A.] 125 Fed. 463; Drew Lumber Co. v. Walter [Fla.] 34 So. 244; Linton v. Heye [Neb.] 95 N. W. 1040.

81, 82. Cent. G. & S. Exch. v. Board of Trade [C. C. A.] 125 Fed. 463.

83. Under R. S. Tex. art. 1262, allowing defendant to plead as many several matters as he thinks necessary for his defense, and are pertinent, provided he files them all at the same time. Pyron v. Graff, 31 Tex. Civ. App. 405, 72 S. W. 101.

84. Where made on the grounds that the action was one in personam and that the judgment, the basis of the action, had become dormant. Thompson v. Pfeiffer, 66 Kan. 368, 71 Pac. 828.

85. R. S. Ohio, § 5457. White v. Marshall, 23 Ohio Circ. R. 376. Where, after giving bail, voluntarily returned for trial, and was acquitted, and intended to return to his home on the first train leaving the place of trial. Murray v. Wilcox [Iowa] 97 N. W. 1087.

86. Which he does by filing a motion for bail, upon which an issue of fact is raised as to a complete defense to the action. White v. Marshall, 23 Ohio Circ. R. 376.

87. A legislator may be served with summons while in the state capital to attend the legislature. Berlet v. Weary [Neb.] 93 N. W. 238.

88. But the managing officer of a corporation, within the state to attend a sale of land under a decree of the federal court, is not exempt from service of process, as in attendance on a judicial proceeding, though the corporation was a party to the action under which the sale was had. Greenleaf v. People's Bank, 133 N. C. 292.

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attorney, in the state to represent his client, when they are actually in attendance in court in the due course of their employment as attorneys.[89]

A nonresident witness brought into a jurisdiction by a subpoena is generally exempt from service of process in another proceeding,[90] though not where he appears voluntarily.[91] But this rule does not apply where the process is served on the witness, merely as the agent of another.[92]

§ 9. *Abuse of process.*—An action for the malicious abuse of legal process will lie for the improper use of legal process, after it has been issued,[93] not for maliciously causing it to be issued,[94] nor for a regular and legitimate use of it, though with a bad motive.[95] Process is assumed to be regular and legal in form in an action for its abuse.[96]

An action for abuse of process may be barred by the statute of limitations, the statute beginning to run from the time the acts constituting the abuse were committed.[97]

Punitive damages may be recovered for the malicious abuse of civil process.[98]

89. Under Code N. C. §§ 641, 1367, 1735. Greenleaf v. People's Bank, 133 N. C. 292.

90. While going to, returning from, or during attendance in court, in obedience to the subpoena [Civ. Code Prac. Ky. § 542]. Currie Fertilizer Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268.

91. Currie Fertilizer Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268. As a person voluntarily in the state to testify as a witness in an appeal which he had taken from a judgment. Lewis v. Miller, 24 Ky. L. R. 2533, 74 S. W. 691.

92. It does not prevent service of process, in an action against a corporation, on an officer thereof attending court as a witness. Currie Fertilizer Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268.

93. Bonney v. King, 201 Ill. 47, 66 N. E. 377. Extorting money from defendant, under arrest, and inducing him to procure a release of certain litigation by his father against the plaintiff, under fear of being taken to another county on the warrant of arrest, is an improper abuse of process. Foy v. Barry, 87 App. Div. [N. Y.] 291. Entering a house, the doors of which were locked, through a closet door on the porch and swinging windows, and serving summons in a civil action on a person, while sick in bed, is an abuse of process. Foley v. Martin [Cal.] 71 Pac. 165. Petition held to sufficiently set forth a cause of action for malicious abuse of bail process. Woodley v. Coker [Ga.] 46 S. E. 89. An averment that a person made the affidavit upon which the process was issued, but there is no charge that he either instigated or had cognizance of the acts averred, or that the process was to be used for such purpose, does not state a cause of action for abuse of process against him. Warrant of arrest. Foy v. Barry, 87 App. Div. [N. Y.] 291. Honestly making use of garnishment proceedings in another state, by assignment of the claim, in order to evade exemption laws of his own state does not constitute an abuse of process by the defendant. Before Laws 1893 (Wis.) c. 57, prohibiting such a transfer. Leeman v. McGrath, 116 Wis. 49, 92 N. W. 425. A creditor ignoring a gratuitous promise to grant indulgence, and suing for a balance due, does not abuse legal process, though he knowingly sues for a greater amount than is due, provided he does not sue maliciously. Hendricks v. Middlebrooks Co., 118 Ga. 131. An inference of malice is warranted by his knowingly and grossly overstating the amount of his claim, in an affidavit for an attachment. Tamblyn v. Johnston [C. C. A.] 126 Fed. 267.

In Georgia, there may be an action for malicious use of process, in a civil suit, where the defendant is arrested or his property attached. Woodley v. Coker [Ga.] 46 S. E. 89. A judgment of a court of competent jurisdiction, unless obtained by fraud, and though reversed by a higher court, is conclusive evidence of probable cause for the issue of process, in an action for malicious abuse of legal process. Ga. L. & T. Co. v. Johnston, 116 Ga. 628. Where a judgment creditor causes successive garnishments to be served attaching exempt earnings of the debtor, with the purpose of harassing the debtor's employer and causing his discharge, knowing such earnings to be exempt, and the debtor is finally discharged, such creditor is liable for malicious abuse of process. Cooper v. Scyoc [Mo. App.] 79 S. W. 751.

94. Bonney v. King, 201 Ill. 47, 66 N. E. 377. Process may be wrongfully issued without necessarily being unlawful, so as to entitle the one injured to damages. Rogers v. O'Barr [Tex. Civ. App.] 76 S. W. 593. It is not necessary to aver, in an action for abuse of process, that the process was taken out willfully and intentionally, for an improper purpose, or that it was wrongfully and willfully used for such purpose. Warrant of arrest. Foy v. Barry, 87 App. Div. [N. Y.] 291.

95. Bonney v. King, 201 Ill. 47, 66 N. E. 377. "Two elements are necessary to an action for the malicious abuse of legal process; first, the existence of an ulterior purpose, and, second, an act in the use of the process not proper in the regular prosecution of the proceeding." Id.

96. Smith v. Jones [S. D.] 92 N. W. 1084.

97. Montague v. Cummings [Ga.] 45 S. E. 979.

98. Woodley v. Coker [Ga.] 46 S. E. 89. Exemplary damages for wrongfully suing out a process can be recovered only where actual damages are shown; writ of sequestration. Rogers v. O'Barr [Tex. Civ. App.] 76 S. W. 593.

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PROHIBITION, WRIT OF.

§ 1. Nature, Function and Occasion of Remedy (1278).
§ 2. The Right to the Writ (1278).
§ 3. Practice and Procedure (1279).

§ 1. *Nature, function and occasion of remedy.*—The writ of prohibition is an extraordinary process to restrain illegal acts of inferior courts or the judges thereof.[1] It cannot be issued to bodies not exercising judicial or quasi-judicial power,[2] or contemplating any judgment or other judicial act.[3] The writ cannot be used in the place of a bill of equity to prevent a corporation from proceeding under a void city ordinance,[4] nor in place of quo warranto to prevent the unlawful exercise of an office.[5] Prohibition does not lie where adequate relief could have been obtained by appeal.[6] Where the object of the writ of prohibition becomes impossible of attainment pending the proceedings through petitioner's neglect, the writ is denied.[7] It does not lie where the harm, if any, has already been done.[8] Prohibition will not issue in limine where review by other methods may be adequate.[9] The writ is premature if respondent court has taken no steps by issuance of a citation to gain jurisdiction of the relator.[10]

§ 2. *The right to the writ.*—A writ of prohibition to restrain proceedings on an information will not lie at the instance of one not interested therein.[11] If

1. The writ has been used to restrain a justice of the peace from compelling the attendance of witnesses to investigate an illegal information (People v. Tuthill, 79 App. Div. [N. Y.] 24); to restrain court from punishing disobedience of void order (Koehler v. Snider, 177 Mo. 546, 76 S. W. 1032); from assuming jurisdiction of a matter already under consideration by another court in the same jurisdiction (Clark County Ct. v. Warner, 25 Ky. L. R. 857, 76 S. W. 828); from proceeding in a case where the service as appeared from the return was defective and where it was admitted that the proceeding was in the nature of an in rem proceeding, the res not being within the state (Pa. R. Co. v. Rogers, 52 W. Va. 450). It lies to prevent action by a judge disqualified by interest (State v. Fort [Mo.] 77 S. W. 741), even where his interest would also have been available after the termination of the suit as ground for writ of error (Forest Coal Co. v. Doolittle [W. Va.] 46 S. E. 238). Finding of no bias. Talbot v. Pirkey, 139 Cal. 326, 73 Pac. 858.

2. Miller v. Davenport [Idaho] 70 Pac. 610. A ministerial act of an officer cannot be prevented by prohibition. Issue of bonds by governor of state. Stein v. Morrison [Idaho] 75 Pac. 246. Arrest of relator by deputy sheriff. State v. Aucoin, 111 La. 51. The same rule applies to a judge acting ministerially. State v. Bradley, 134 Ala. 549.

3. Lodge v. Fletcher, 184 Mass. 238, 68 N. E. 204.

4. Campbellsville Tel. Co. v. Patteson, 24 Ky. L. R. 832, 69 S. W. 1070.

5. Board of Education v. Holt [W. Va.] 46 S. E. 134.

6. In re Gates, 117 Wis. 445, 94 N. W. 292; State v. Bazille, 89 Minn. 440, 95 N. W. 211; Aichele v. Johnson, 30 Colo. 461, 71 Pac. 367; People v. District Ct., 30 Colo. 488, 71 Pac. 388; State v. Neal, 30 Wash. 702, 71 Pac. 647; Sanford v. District Ct. [Ariz.] 71 Pac. 906; Valentine v. Police Ct., 141 Cal. 615, 75 Pac. 336; Holly Shelter R. Co. v. Newton, 133 N. C. 132; State v. Superior Ct., 32 Wash. 498, 73 Pac. 479. Constitutional provisions. State v. Superior Ct., 31 Wash. 96, 71 Pac. 722.

The fact that an appeal is impossible because of the smallness of the amount involved will not be sufficient ground for prohibition (State v. Superior Ct., 30 Wash. 156, 70 Pac. 230), notwithstanding that the appellate procedure involves extra delay and expense and that the error is jurisdictional (State v. Superior Ct., 30 Wash. 700, 71 Pac. 648). But the facts that an appeal from a tribunal acting beyond its jurisdiction was not allowed as matter of right, and that such an appeal would have caused such delay as to prevent an effectual adjudication of the controversy, were held sufficient grounds for a writ of prohibition. People v. District Ct. [Colo.] 74 Pac. 896. But prohibition has been allowed in some cases where an appeal seems to have been possible. Lower court wrongfully attempted to retain possession of property by receiver. State v. Superior Ct., 31 Wash. 481, 71 Pac. 1095; Forest Coal Co. v. Doolittle [W. Va.] 46 S. E. 238. In this case the point that there was a remedy by appellate proceedings was not taken and the court denied the writ on the merits. State v. Evans, 176 Mo. 310, 75 S. W. 914. Appeal lies where the statutory procedure on arrest and binding over was not followed, but the trial court proceeded. State v. Third Judicial Dist. Ct. [Utah] 75 Pac. 739.

7. Appeal bond not filed, and appeal which it was desired to protect thereby, invalidated. State v. Superior Ct., 32 Wash. 143, 72 Pac. 1040.

8. Sanford v. Dist. Ct. [Ariz.] 71 Pac. 906; State v. Ausherman [Wyo.] 72 Pac. 200; Ex parte Joins, 191 U. S. 93; Klingelhoefer v. Smith, 171 Mo. 455, 71 S. W. 1008. Applicant had been summoned as witness and dismissed. People v. Mayer, 41 Misc. [N. Y.] 289.

9. E. g., on appeal from mayor's court for violation of ordinance. State v. Miller, 109 La. 704.

10. State v. Ryan [Mo.] 79 S. W. 429.

11. A witness. People v. Mayer, 41 Misc. [N. Y.] 289.

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the petitioner for prohibition cannot be harmed by the illegal proceeding threatened, no writ of prohibition will issue.[12] If he is a stranger to the proceedings complained of, the granting of the writ is a matter discretionary with the trial judge.[13]

§ 3. *Practice and procedure.*—As a rule, objection to jurisdiction must be made in the court complained of before applying for prohibition.[14] The prescribed notice and proof thereof must be shown.[15] A body which institutes contempt proceedings before a court in assistance of its powers is not a necessary respondent to prohibition against the court from entertaining the contempt case.[16] The applicant for a writ of prohibition cannot by his affidavit controvert the return of the magistrate and the record.[17] Since prohibition does not reach mere errors, the decision of the lower court on the facts that it has jurisdiction defeats the writ.[18] Where the person whose official acts are complained of ceases pending the proceedings to hold office and the application is dismissed on that ground, no costs will be given.[19]

PROPERTY.[20]

Definition and nature.—Property is the right and interest which a man has in lands and chattels to the exclusion of others,[21] and the right of disposition is essential.[22] This is probably somewhat broadened by the constitutional[23] and statutory[24] uses of the term.

Realty or personalty.—If a right is to land, it is realty.[25] Immovability, in the legal sense, gives to property its character as real, rather than personal,[26] and whether it is immovable is tested by the intention found in all the facts and circumstances.[27] A chattel real so far partakes of realty that it is not capable of

12. Gibson v. Superior Ct., 139 Cal. 4, 72 Pac. 348.

13. Applicant inhabitant of town through which R. R. commissioners authorized construction of railway. Kilty v. Railroad Com'rs, 184 Mass. 310, 68 N. E. 236.

14. Knight v. Zahnhiser, 53 W. Va. 370; State v. Superior Ct., 31 Wash. 410, 71 Pac. 1100; Lindley v. Superior Ct., 141 Cal. 220, 74 Pac. 765; State v. Foster, 111 La. 241; State v. Eby, 170 Mo. 497, 71 S. W. 52; Calibreath v. District Ct., 30 Colo. 486, 71 Pac. 387; People v. District Ct., 30 Colo. 488, 71 Pac. 388.

15. An affidavit of notice to the presiding judge of the court below or his counsel is required by a rule of the supreme court of Louisiana. State v. Couvillon, 109 La. 267.

16. State v. Ryan [Mo.] 79 S. W. 429.

17. State v. Aucoin, 110 La. 959.

18. A tribunal, the jurisdiction of which in a particular case depends upon a fact such as joint ownership of the parties, may determine that fact so as to bar a writ of prohibition. State v. Ausherman [Wyo.] 72 Pac. 200.

19. People v. Sherman, 171 N. Y. 684, 64 N. E. 1124.

20. Scope of title. Of necessity this title must be limited to matters of definition and such specific property rights as have been here treated. The numberless questions which may arise will suggest the subject-matter to which they relate, and the titles treating of such subject-matter should be consulted. What is property within the due process clause is discussed in Constitutional Law, 1 Curr. L. 591.

21. Cyc. Law Dict., "Property," citing 6 Bin. [Pa.] 98; 4 Pet. [U. S.] 511; 17 Johns. [N. Y.] 283; 59 N. Y. 192; 31 Cal. 637.

22. Id., citing 13 N. Y. 396; 70 Mich. 537. Mining location is assignable property. Worthen v. Sidway [Ark.] 79 S. W. 777. A pledgor's equity in stocks held abroad is "property" within the state. Kidd v. N. H. Traction Co. [N. H.] 56 Atl. 465.

23. The right to let weeds grow on one's land is not property. St. Louis v. Galt [Mo.] 77 S. W. 876.

24. The right to work is not within "property" defined as money, goods, chattels, things in action, and evidences of debt [Pen. Code, § 7]. In re McCabe [Mont.] 73 Pac. 1106. An assignable interest in a pending action may be "property," though the right of action was not. Under Bankruptcy act. Cleland v. Anderson [Neb.] 96 N. W. 212. But a right of action for tort, even though pending, is not. Cleland v. Anderson [Neb.] 98 N. W. 1075.

25. Ground rent is. McCammon v. Cooper [Ohio] 69 N. E. 658.

26, 27. Water service pipes and meters laid in streets held to be personalty. Mulrooney v. Obear, 171 Mo. 613, 71 S. W. 1019. Second story of a building is realty, though owned separately from the land, and first story. Madison v. Madison, 206 Ill. 534, 69 N. E. 625. Hence where a building is expressly made personal, buying a ground lease does not merge the building into the fee. Sweet v. Henry, 175 N. Y. 268, 67 N. E. 574.

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conversion.[28] Property which is real, because fixed to the land, cannot be made personal by mere agreement without severance.[29]

Formulae, processes, plans, information, literary, musical and dramatic productions.—Formulae, secret processes, and plans are property until published,[30] irrespective of patentability.[31] A disclosure necessary to protect such rights is not a publication,[32] but one necessary to use seems to be,[33] and if plans are made for a price such property is in the employer.[34] A formula may be sold,[35] but as against a subsequent purchaser, no right of action arises in favor of a prior one, unless out of fraud or breach of contract.[36] Literary property published by one holding a contract for concert rights and publication rights for all countries, but not acting rights,[37] is made free by publication of a complete copy and promiscuous sale thereof,[38] and a printed notice on the title page forbidding "production on the stage," has no effect to curtail the legal consequences of such a publication.[39] Such consequences are fixed by the law of the place of such sale, and not of its origin.[40] Information, though publicly accessible, becomes property by prompt collection and compilation, so that it has a commercial value,[41] and it does not become free by communication to subscribers, under an agreement to use it for their own business only, and not to divulge it.[42] Whether it is eligible to copyright makes no difference.[43]

Lost or abandoned property, or treasure trove, belongs to the finder rather than to his employer, or the land owner.[44]

PUBLIC CONTRACTS.

§ 1. Power of Government and Authority of Its Officers to Contract (1281).
§ 2. How Initiated (1284).
A. By the Public; Preliminary Statutes or Ordinances; Advertisements; Proposals; Opening and Examination of Bids (1284).
B. By the Other Party (1286).
§ 3. How Closed (1287).
§ 4. Essential Provisions in, and Conditions Pertaining to, Public Contracts (1289).
§ 5. Interpretation and Effect of Public Contracts, and Performance and Discharge (1290).
§ 6. Remedies and Procedure (1293).
A. Of Aggrieved Bidders (1293).
B. Against Bidders (1293).
C. On the Contract Proper (1293).
D. On the Bond (1294).
E. Under Lien Laws (1295).

Matters common to private contracts,[45] or peculiar to particular public bodies,[46] or to particular public works,[47] are specifically treated elsewhere.

28. Goldschmidt v. Maier, 140 Cal. xvii, 73 Pac. 984.

29. Buildings. Beeler v. Mercantile Co. [Idaho] 70 Pac. 942.

30. Process. Stone v. Goss [N. J. Err. & App.] 55 Atl. 736; Wright v. Eisle, 86 App. Div. [N. Y.] 356.

31. Medical formula. Stewart v. Hook, 118 Ga. 445.

32. The disclosure, necessarily made in court, of a secret process does not make a publication of it. Stone v. Goss [N. J. Err. & App.] 55 Atl. 736.

33. Filing architect's plans as required in the building department publishes them. Wright v. Eisle, 86 App. Div. [N. Y.] 356.

34. Architect's plans. Wright v. Eisle, 86 App. Div. [N. Y.] 356.

35, 36. Stewart v. Hook, 118 Ga. 445.

37. Contracts construed and a retransfer of such rights held not to have taken place by a later contract (the opera Parsifal). Wagner v. Conried, 125 Fed. 798.

38. Dramatic production not enjoined. Wagner v. Conried, 125 Fed. 798.

39, 40. Wagner v. Conried, 125 Fed. 798.

41. Information for contractors respecting contemplated works and improvements. Dodge Co. v. Const. Information Co., 183 Mass. 62, 66 N. E. 204. Ticker service is property. Board of Trade v. Christie G. & S. Co., 116 Fed. 944; Nat. Tel. News Co. v. W. U. Tel. Co. [C. C. A.] 119 Fed. 297.

42. Dodge Co. v. Const. Information Co., 183 Mass. 62, 66 N. E. 204, citing many cases.

43. Dodge Co. v. Const. Information Co., 183 Mass. 62, 66 N. E. 204; Nat. Tel. News Co. v. W. U. Tel. Co. [C. C. A.] 119 Fed. 297.

44. Buried money found in clearing away debris. Danielson v. Roberts [Or.] 74 Pac. 913. This case discusses the law of treasure trove as compared with that of lost goods.

45. See Building and Construction Contracts.

46. See Counties; Municipal Corporations; States; Towns; United States.

47. See Highways and Streets; Sewers and Drains.

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§ 1. *Power of government and authority of its officers to contract.*—It is a general principle that the powers of municipal or public corporations are limited to those expressly granted, and those fairly implied from, or incidental to, their granted powers, and a reasonable doubt of the existence of a power is fatal to its being.[48] Any contract, therefore, of a municipal corporation for which there is no express statutory authority,[49] or which is beyond the scope of its powers,[50] or entirely foreign to its purpose,[51] or which, not being legislatively authorized, is against public policy,[52] is void.[53] Such a contract cannot be validated by subsequent assent or ratification,[54] though mere lack of authority in the contracting officer may be,[55] and since persons who deal with public corporations are charged with notice of the limits to their powers,[56] equity will not aid in the enforcement of unau-

48. Ft. Scott v. Eads Brokerage Co. [C. C. A.] 117 Fed. 51. Paving contracts. Hipp v. Houston, 30 Tex. Civ. App. 573, 71 S. W. 39. Sewer contract. Lamson v. Marshall [Mich.] 95 N. W. 78.

49. Balch v. Beach [Wis.] 95 N. W. 132; South Covington Dist. v. Kenton Water Co. [Ky.] 78 S. W. 420; Caxton Co. v. School Dist. No. 5 [Wis.] 98 N. W. 231; Mo. & S. W. Land Co. v. Quinn, 172 Mo. 563, 73 S. W. 184. Negative words in a statute show an intent to make its provisions imperative. The words "not otherwise" held rendered a statute granting a municipality the power to contract, imperative. Pac. Elec. Co. v. Los Angeles, 118 Fed. 746. Where authority exists at the time the contract was entered into, it is sufficient. Paving contract, advertised for bids for paving with brick, asphalt, or trap rock, trap rock bid the lowest, asphalt next. On the day contract was let petition of requisite number of property owners was on file asking for asphalt. Held, contract for asphalt was valid, though some petitioners changed later. Kronsbein v. Rochester, 76 App. Div. [N. Y.] 494.

50. Brokerage contract. Ft. Scott v. Eads Brokerage Co. [C. C. A.] 117 Fed. 51. The doctrine that only the state can challenge the right of a corporation to exercise power beyond the scope of its charter, has no application to municipal corporations. Schneider v. Menasha, 118 Wis. 298, 95 N. W. 94. The contract of a village, having no power to employ a supervising engineer for a definite time, being void, a city succeeding such village is not liable for a breach thereof. Mack v. New York, 87 Misc. [N. Y.] 371.

51. Entertainment of citizens and guests. Com. v. Gingrich, 21 Pa. Super. Ct. 286.

52. Stifling competition. Pendleton v. Asbury [Mo. App.] 78 S. W. 651. An agreement whereby one on behalf of a county undertakes to investigate and discover taxable property in such county, which through fraud or otherwise has been omitted from taxation, is not against public policy. Shinn v. Cunningham, 120 Iowa, 383, 94 N. W. 941. A contract for aid in the discovery of unlisted property being authorized and made, an independent and additional contract thereafter made, for making investigations, seeing delinquents, etc., being part of the work of discovery, is wholly unauthorized and void. Under Acts 28th Gen. Assem. p. 33, c. 50, the county board of supervisors may contract for assistance to its proper officers in the discovery of property not listed and assessed as required by law. Heath v. Albrook [Iowa] 98 N. W. 619.

53. The rule that an ultra vires contract is void and unenforceable at law or in equity, is, for obvious reasons, of more imperative application to acts of municipal, than to those of private, corporations. Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250, 91 N. W. 1081.

54. Murphy v. Clinton, 182 Mass. 198, 65 N. E. 34; Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250, 90 N. W. 746; Id., 118 Iowa, 234, 91 N. W. 1081; Peck-Williamson H. & V. Co. v. Steen School Tp., 30 Ind. App. 637, 66 N. E. 909; Wenk v. New York, 82 App. Div. [N. Y.] 584. There may be ratification, however, where there was power to contract, but the power was irregularly exercised. Boulton v. Kolkmeyer, 97 Mo. App. 530, 71 S. W. 539; Bartlett v. Boston, 182 Mass. 460, 65 N. E. 827; Saline County v. Gage County [Neb.] 97 N. W. 583. The acceptance and use of a sewer by a municipality, with knowledge that it is expected to pay the costs of its construction, is equivalent to original authorization in fixing its liability. Contoocook Fire Precinct v. Hopkinton, 71 N. H. 574; Akers v. Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536. But where there is sufficient to show a contrary intention, a contract will not be foisted upon the municipality. Howell Elec. L. & P. Co. v. Howell [Mich.] 92 N. W. 940.

55. Appointment of architects before Laws 1896, p. 751, c. 626. Withers v. New York, 86 N. Y. Supp. 1105.

56. Ft. Scott v. Eads Brokerage Co. [C. C. A.] 117 Fed. 51; South Covington Dist. v. Kenton Water Co. [Ky.] 78 S. W. 420; Jewell Belting Co. v. Bertha [Minn.] 97 N. W. 424; Danville, D. R. & L. Turnpike Road Co. v. Lincoln County Fiscal Court, 25 Ky. L. R. 1162, 77 S. W. 379; Moss v. Sugar Ridge Tp. [Ind.] 68 N. E. 896. Rule applied to a grantee in a deed from the city. Knickerbocker Ice Co. v. Forty-second St. & G. St. Ferry R. Co., 176 N. Y. 408, 68 N. E. 864. A contractor claimed that the city, by a course of dealing or custom, had held out an official as having certain powers of contract. Wormstead v. Lynn, 184 Mass. 425, 68 N. E. 841. While property owners may challenge the legality of municipal acts and contracts, on the ground that proper legal steps have not been taken, persons who enter into a contract with the city stand in a different position. Such a person cannot even make the defense of ultra vires or total lack of power on the part of the corporation to make the contract. Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097. One who enters into a contract with a public

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thorized contracts, though in case the contract is not expressly prohibited, one may obtain relief so far as his money or property shall have been used by the municipality for legitimate corporate purposes.[57] And a municipal corporation which has retained the benefits of a contract invalid, not because it was beyond the scope of its powers, but because in the making or performance of the agreement, the power of the municipality was illegally exercised, may be estopped from denying the validity of the contract, as against an innocent party who has changed his position in reliance upon the action of such municipality.[58] But no such estoppel can arise in favor of one who knowingly agrees to assist the municipality in the illegal exercise of its power,[59] or from a violation of duty on the part of public officials.[60] And while municipal corporations, like individuals, ought, upon principles of natural justice, to pay for what they receive,[61] they will not be compelled to do so when the claimants have expressly contracted that the municipality shall not be bound.[62]

It is the policy of the law to encourage the abandonment of illegal projects,[63] and a municipality having embarked upon an ultra vires undertaking may properly refuse to permit the contractor to proceed.[64] The contracts of a municipality must not increase its debt beyond the constitutional limit,[65] and previous provision for payment is sometimes required.[66] Authority to contract for work necessary to the public health is implied,[67] and a municipality has ordinarily power to contract for the lighting of its streets,[68] for fire hydrants,[69] and power to supply water,

officer who undertakes to act for, and to bind a municipal corporation, or other body politic, is bound to ascertain the extent of the authority of the public officer with whom he deals. Wormstead v. Lynn, 184 Mass. 425, 68 N. E. 841.

57. Balch v. Beach [Wis.] 95 N. W. 132; Beaser v. Barber Asphalt Pav. Co. [Wis.] 98 N. W. 525. Even where the element of prohibition is present, it seems a recovery may be had, it appearing the contract was entered into in good faith. Clark v. Lancaster County [Neb.] 96 N. W. 593. Where a county has the right to enter into a contract for the creation of a public work and does so, but said contract is not made in a lawful manner, one who in good faith furnishes labor and material is entitled to recover their reasonable value. Cass County v. Sarpy County [Neb.] 97 N. W. 352.

58. Ft. Scott v. Eads Brokerage Co. [C. C. A.] 117 Fed. 51; Marion Water Co. v. Marion [Iowa] 96 N. W. 883; Cass County v. Sarpy County [Neb.] 97 N. W. 352; Moss v. Sugar Ridge Tp. [Ind. App.] 67 N. E. 460; Ocorr & R. Co. v. Little Falls, 77 App. Div. [N. Y.] 592.

59. Ft. Scott v. Eads Brokerage Co. [C. C. A.] 117 Fed. 51.

60. Officer with no authority to so do had previously for 11 years entered into similar contracts which the municipality had recognized as binding. Held municipality not estopped to deny contract made by him. Wormstead v. Lynn, 184 Mass. 425, 68 N. E. 841.

61. Moss v. Sugar Ridge Tp. [Ind. App.] 67 N. E. 460.

62. Park Ridge v. Robinson, 198 Ill. 571, 65 N. E. 104.

63. Fairbanks, M. & Co. v. North Bend [Neb.] 94 N. W. 537.

64. McKee v. Greensburg, 160 Ind. 378, 66 N. E. 1009. Where it appears that a municipality has made payments upon a contract, which payments were unauthorized and in direct violation of law, they may be recovered back. Heath v. Albrook [Iowa] 98 N. W. 619. The rule that money paid voluntarily cannot be recovered applies to a public corporation which has paid for publications in excess of the statutory allowance. Vindicator Print. Co. v. State, 68 Ohio St. 362, 67 N. E. 733.

65. Contract for sewer held not to increase municipal debt beyond constitutional limit. Redding v. Esplen Borough [Pa.] 56 Atl. 481.

66. Where a city contracts for a public utility for a period of years at an annual cost, this does not constitute a present indebtedness, within the meaning of statutory prohibitions against contracting indebtedness in excess of a given sum. Cain v. Wyoming, 104 Ill. App. 538. In Louisiana, contracts whereby municipal corporations undertake to make provision, in advance, for such prime necessities as light and water, and incur obligations therefor, to be met, from time to time, as those necessities are furnished, from current revenues, do not fall within the restrictive operation of the statute which prohibits such corporations from contracting debts, without providing in the ordinances by which they are contracted, for their payment. Blanks v. Monroe, 110 La. 944.

67. Independent of statutory provisions a municipality has power to construct sewers, so far as needed to put and keep highways in suitable condition for public travel. "This power is incident to the power granted to lay out, build, and repair highways." Contoocook Fire Precinct v. Hopkinton, 71 N. H. 574. So also to contract for the removal of garbage to protect its inhabitants from pestilence and disease. Kelley v. Broadwell [Neb.] 92 N. W. 648.

68. The power to provide lights for streets, necessarily implies the power to pur-

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light, and other facilities to its citizens,[70] and to lease wharves for the promotion of commerce has been granted.[71] Counsel may be employed when necessary.[72]

A common council cannot delegate to a member or committee thereof functions of a legislative or administrative character, or involving the exercise of judgment and discretion, and the contract of such committee is therefore void,[73] and a subordinate officer of a city has no power to change or modify a contract; the contract, having been made by vote of the common council, can only be altered or annulled by the same authority.[74]

The relation of members of a municipal council to the municipality is one involving trust and confidence, and its members, therefore, cannot make contracts with themselves relating to public affairs.[75]

chase it from others, and to enter into a contract for such services. Davenport G. & E. Co. v. Davenport [Iowa] 98 N. W. 892. A city being granted the power to contract for lights for 25 years, a contract for their supply for such period, is valid. Code 1873, § 473, as amended by Acts 22d Gen. Assem. c. 11, p. 16, gives a city such power. Id.

69. A contract by a city to pay rentals for fire hydrants, at stated times in the future, is one for a current expenditure. Hence does not create an indebtedness of the kind contemplated by the provision of the Iowa constitution limiting municipal indebtedness. Centerville v. Fidelity Trust & Guaranty Co. [C. C. A.] 118 Fed. 332.

70. A grant of power to acquire, own, and operate street railways, telephone and telegraph lines, gas, and other works for light and heat, and to permit the laying of tracks for street railways, in the public streets, carries with it power to contract for a supply of electricity to be used for any such purposes. Riverside & A. R. Co. v. Riverside, 118 Fed. 736. And where it has contracted for a supply of electricity to be used in any way it saw fit, a subcontract to furnish a portion of such supply to a company, for the operation of a street railway to be constructed by the company, is not on its face ultra vires. Id. A city may purchase a system of waterworks subject to an incumbrance payable in the future. A law that a city cannot mortgage or give a lien upon such property does not change the above rule. State v. Topeka [Kan.] 74 Pac. 647. In Iowa, in order that a town may enter into a contract for the construction of waterworks, there must be a vote taken by ayes and nays. In the absence of such a vote a contract entered into cannot be ratified. Marion Water Co. v. Marion [Iowa] 96 N. W. 883.

71. Morgan City v. Dalton [La.] 36 So. 203.

72. The board of supervisors, under a statute of Mississippi, had power to employ special counsel, although at the time it had already in its employment counsel at an annual salary [Code 1892, c. 123]. Warren County v. Dabney, 81 Miss. 273. A county board has no power to employ counsel in a proceeding to which the county is not a party. Williams v. Broadwater County Com'rs, 28 Mont. 360, 72 Pac. 755.

73. Jewell Belting Co. v. Bertha [Minn.] 97 N. W. 424. A board of aldermen in procuring a public improvement and letting the contract therefor act not in a legislative but in an administrative or business capacity. Field v. Barber Asphalt Pav. Co., 117 Fed. 925. However, where a city council in such a matter acts through a committee, a modification of the contract by only two members of the committee, the third having no notice of the meeting, is void. Burge v. Rockwell City, 120 Iowa, 495, 94 N. W. 1103. The rule that a city cannot exercise its governmental authority outside its limits does not apply to the exercise of a right of a purely business nature. A city bought adjacent land from which to obtain stone for manufacturing crushed rock for city purposes. Schneider v. Menasha, 118 Wis. 298, 95 N. W. 94. The St. Louis city charter provided that the assembly should have no power directly to contract for any public work, but that the board of public improvements should let out such contracts. An ordinance was passed placing power in the board of health to contract for the removal and disposal of city garbage. Held, that this was a public work, and a contract let by the latter board was a nullity. State v. Butler [Mo.] 77 S. W. 560.

74. Directions by a superintendent of streets as to the performance of a contract of grading. Becker v. New York, 176 N. Y. 441, 68 N. E. 855. Normile v. Ballard [Wash.] 74 Pac. 566. But it is otherwise, where the legislature in creating a board of public works has evinced a purpose to confer on such board the power to carry out in detail an improvement which the council has directed in general terms. Barber Asphalt Pav. Co. v. Gaar, 24 Ky. L. R. 2227, 73 S. W. 1106.

75. Suit by a taxpayer to recover money paid to a member of council on his contract to superintend the extension of a water plant. Stone v. Bevans, 88 Minn. 127, 92 N. W. 520. By statute in Texas, they may not contract for or become interested in any claim or demand against the municipality. Tex. Anchor Fence Co. v. San Antonio, 30 Tex. Civ. App. 561, 71 S. W. 301. Where a county contracts to pay one, not a county official, a certain percentage for the collection of a claim due to it, the mere fact that county officials performed part of the work and were paid out of the percentage for doing it will not render the contract void. Contra Costa County v. Soto, 138 Cal. 57, 70 Pac. 1019. A member of the legislative body of a city is a city officer, within the meaning of a statute making it a misdemeanor for a city officer to be interested in a contract with the city. State v. Kelley [Mo. App.] 77 S. W. 996. **Contra,** People v. Mayer, 41 Misc. [N. Y.] 368. A determination by a city council in a specific case based upon the finding

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A municipality in the letting of contracts acts as the statutory attorney in fact of property holders, and is responsible for its acts as such, but its liability is not fixed until loss falls upon such property holders.[76]

In Kentucky, it is made the duty of the board of commissioners, and not the superintendent, to contract for insurance on the buildings and furniture of all charitable institutions.[77]

§ 2. *How initiated. A. By the public; preliminary statutes or ordinances; advertisements; proposals; opening and examination of bids.*—In every case of public contract, there must be a full compliance with charter or statutory provisions in order to charge corporate liability,[78] and the prescription by a statute, under which a municipality is organized or acting, of the manner in which it shall exercise one of its powers, limits the right to exercise it to that method, and its use in any other way is ultra vires of the corporation and void.[79]

Where a statute or ordinance requires the performance by public officers of a certain specified act, or that it shall be performed in a certain specified manner, there must be at least substantial compliance with these requirements to render their acts valid,[80] but such a statute or ordinance is not required to be literally performed in unessential particulars, and a substantial compliance is sufficient.[81]

of that body in a matter in which a discretionary judgment was reposed in it, is so far judicial in character as to be voidable if any one of the quasi judges who participated was at the time disqualified by private interests, at variance with the impartial performance of his public duty. Member of the council also a stockholder in successful competitive bidder for public printing. Drake v. Elizabeth [N. J. Law] 54 Atl. 248. Under § 51, art. 1, c. 18, Comp. St. 1903, prohibiting county officers from having any pecuniary interest in contracts of the county, an officer undertaking to perform extra official services cannot recover from the county upon a contract to pay for same. Wilson v. Otoe County [Neb.] 98 N. W. 1050.

76. A city, on the application of an accepted bidder, who had given a bond with solvent surety, released him. The bid accepted on a second advertisement, though the lowest then made, was higher than that of the released contractor. Affected property owners were permitted to recover over against the city the difference between the cost of the improvement, under the bid of the released contractor, and the increased cost under the subsequent bid. Louisville v. Ky. & L. Bridge Co., 24 Ky. L. R. 1087, 70 S. W. 627.

77. Civ. Code, § 224. Furnish v. Satterwhite, 24 Ky. L. R. 1723, 72 S. W. 309.

78. Pass Christian v. Wash., 81 Miss. 470; Murphy v. Clinton, 182 Mass. 198, 65 N. E. 34; Moss v. Sugar Ridge Tp. [Ind.] 68 N. E. 896; Perry County v. Engle, 25 Ky. L. R. 813, 76 S. W. 382; Peck-Williamson H. & V. Co. v. Steen School Tp., 30 Ind. App. 637, 66 N. E. 909. Failure of city official to certify necessity of purchases. Keane v. New York, 88 App. Div. [N. Y.] 542. To approve bond for faithful performance. Camp v. McLin [Fla.] 32 So. 927. To observe requirements as to sealed bids and specifications of the work. Leflore County v. Cannon, 81 Miss. 334. A public corporation has power to limit its liability by contract to pay only out of a particular fund. Park Ridge v. Robinson, 198 Ill. 571, 65 N. E. 104. In the absence of such an express limitation, however, a general liability attaches. Louisville v. McNaughton, 24 Ky. L. R. 1153, 70 S. W. 841. Mode is the measure of power, and aside from the designated mode, there is no power. Where a statute provided that in case of the failure of the highest bidder to pay according to law, the franchise should be sold to the next highest bidder. Upon a failure by the highest bidder to so pay, a contract let to any but the next highest is void. Pac. Elec. Co. v. Los Angeles, 118 Fed. 746.

79. Ft. Scott v. Eads Brokerage Co. [C. C. A.] 117 Fed. 51; Wadsworth v. Concord, 133 N. C. 587; De Soto v. Showman, 100 Mo. App. 323, 73 S. W. 257. Where a statute prescribes the terms upon which the state is to be bound by a contract, executed by a public officer in its behalf, and declares that a failure to comply with such terms will result in no contract, such statute is mandatory and constitutes a limitation upon the power of the officer to bind the state. Camp v. McLin [Fla.] 32 So. 927. Provision requiring writing, approval by city attorney and council, and signature of mayor, held mandatory. Times Pub. Co. v. Weatherby, 139 Cal. 618, 73 Pac. 465. A petition of persons representing more than one-half of the taxable property of a town meets the requirements of the statute and furnishes a proper basis for the purchase of a road machine. Siegel v. Liberty, 118 Wis. 599, 95 N. W. 402. Contracts by public bodies must be let according to the statute. Rev. St. 1898, § 432, provides that contracts of a school board must be voted on at a meeting. Held, evidence short of this with no explanation for failing to introduce this evidence failed to show a contract. Mendel v. School Dist. No. 6 [Wis.] 98 N. W. 932.

80. Marion Water Co. v. Marion [Iowa] 96 N. W. 883.

81. People v. McDonough, 173 N. Y. 181, 65 N. E. 963. Where, by statute, the price of public printing is not to exceed a given price, this is to be taken as a maximum, and a council in designating an official newspa-

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The passage of a valid ordinance authorizing a public improvement or contract[82] duly passed at a meeting of the legislative body of the municipality, and entered upon the minutes of such meeting,[83] is usually a charter prerequisite to a valid contract, and an ordinance creating contractual obligations must go through the same process in matter of its adoption as others.[84] A popular vote is sometimes required.[85]

Where a charter provides that a public improvement may be initiated either upon the petition of benefited property owners or when the common council shall deem it a public necessity, a determination by such council is final unless it is made to appear that its action is arbitrary or the result of fraud or mistake.[86]

As a rule a valid contract can be made by the municipality only after it has given notice or advertised for bids in some newspaper,[87] and then only with some

per has power to contract for a less price. Wooster v. Mahaska County [Iowa] 98 N. W. 103. Delay of one day in opening bids held not fatal. McCord v. Lauterbach, 91 App. Div. [N. Y.] 315.

82. Paxton v. Bogardus, 201 Ill. 628, 66 N. E. 853; Wormstead v. Lynn, 184 Mass. 425, 68 N. E. 841. An order for widening a public way does not, without more, enable an officer of the town to enter into a contract on its behalf to have the street widened. Id. A city council has the power to advertise for bids and contract for paving a street before passing an ordinance ordering the work to be done if such steps were taken by proper resolution. Smith v. Westport [Mo. App.] 79 S. W. 725.

83. Fayette County v. Krause, 31 Tex. Civ. App. 569, 73 S. W. 51. Code 1873, § 471, is complied with when four-fifths of a city council vote in favor of granting to an individual the right to establish a system of waterworks on the terms proposed by him. Marion Water Co. v. Marion [Iowa] 96 N. W. 883. The approval of the majority of the committee authorized to order the improvement, no vote being taken, is insufficient. Wormstead v. Lynn, 184 Mass. 425, 68 N. E. 841.

84. Capdevielle v. New Orleans & S. F. R. Co., 110 La. 904. When a charter requires that a city shall by resolution declare the determination to make a public improvement, a resolution approving a proposed enabling bill to be presented to the legislature is a sufficient compliance. Kundinger v. Saginaw [Mich.] 93 N. W. 914. Where publication of a proposed ordinance must be made for five consecutive days, it is not fatal that the last day of publication was Sunday. Barber Asphalt Co. v. Muchenberger [Mo. App.] 78 S. W. 280.

85. The city or town must by vote contract for the work, or authorize some one else to do so in its behalf. Wormstead v. Lynn, 184 Mass. 425, 68 N. E. 841. Where it is necessary that a contract be voted on before the council executes the same, such a contract is not invalidated by the fact that it differs from the one submitting the matter to a vote, where there are no wide departures and the changes do not indicate bad faith. Contract for erection of waterworks under § 639, McClain's Code. Centerville v. Fidelity T. & G. Co. [C. C. A.] 118 Fed. 332.

86. Diamond v. Mankato, 89 Minn. 48, 93 N. W. 911.

87. A provision of a city charter that "all contracts for the erection and construction of public improvements shall be let to the lowest responsible bidder" has no application to the employment of an engineer to supervise the work of the contractor. Newport News v. Potter, 122 Fed. 321. A requirement that "notice shall be given thirty days before the work is finally let by advertisement in one or more newspapers" does not contemplate that the notice shall be published daily for the specified time. Id. A newspaper published daily except Sunday and legal holidays is nevertheless a daily newspaper. Puget Sound Pub. Co. v. Times Print. Co. [Wash.] 74 Pac. 802. When the conditions imposed in the advertisement for bids are such that only the patentee of an article can supply it, there can be no fair competition, and a contract let under such circumstances would be void. Patented pavement. Diamond v. Mankato, 89 Minn. 48, 93 N. W. 911; Rose v. Low, 85 App. Div. [N. Y.] 461; Fineran v. Cent. Bitulithic Pav. Co., 25 Ky. L. R. 876, 76 S. W. 415; Barber Asphalt Pav. Co. v. Wilcox, 90 App. Div. [N. Y.] 245. But see Field v. Barber Asphalt Pav. Co., 117 Fed. 925, where the fact that a contract called for Trinidad asphalt which was controlled by a single corporation was held insufficient to invalidate the contract. And this principle has been applied to a case where at the time of advertising for bids an ordinance existed requiring that all city printing bear the union label so-called. Marshall v. Nashville, 109 Tenn. 495, 71 S. W. 815. But it is otherwise where opportunity is given to bid as between a patented article and other classes of the same article. Pavement. Barber Asphalt Pav. Co. v. Willcox, 41 Misc. [N. Y.] 574. Bridge. Kundinger v. Saginaw [Mich.] 93 N. W. 914. A charter requirement for the letting of contracts by advertisement is not complied with if the contract as advertised is on its face null and void. State v. King, 109 La. 799. But the mere fact that an advertisement calls for alternative bids on two different kinds of pavement does not invalidate the subsequent contract. Barber Asphalt Pav. Co. v. Gaar, 24 Ky. L. R. 2227, 73 S. W. 1106; Trowbridge v. Hudson, 24 Ohio Circ. R. 76; Trapp v. Newport, 25 Ky. L. R. 224, 74 S. W. 1109. A newspaper which gives prominence to legal news is within the meaning of a charter provision requiring city printing to be let to a newspaper of "general circulation" in the city. Puget Sound Pub. Co. v. Times Print. Co. [Wash.] 74 Pac. 802. A fence is a building within the terms of a statute that all

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person in accordance with the bid tendered by him in response to such advertisement;[88] and where a statute requires that drawings and specifications be adopted in advance of the letting of a contract, the advertisement and bids should be based upon such plans.[89] But designations upon a plan and made a part of the contract cannot overcome the plain language of the contract.[90] "Additional" work can be contracted for without advertising for new bids.[91] Irregularities in complying with provisions made for the benefit of a city may, to some extent at least, be waived by it when it is clearly for its benefit to do so, and when no damages will be inflicted upon or wrong done to others thereby.[92]

(§ 2) *B. By the other party. Form and substance of offer.*—To form the basis of a valid contract, the bid must conform to the proposal as advertised,[93] and substantially conform to the statutes and ordinances directing their submission. A substantial performance, however, is sufficient,[94] and a bidder may ignore

buildings must be erected by contract let to the lowest bidder after notice. Swasey v. Shasta County, 141 Cal. 392, 74 Pac. 1031. Specifications in an advertisement for bids for erecting a bridge prescribing the character of the steel, and requiring that the bidder should have had a plant in operation for one year are proper. Meyers v. Pa. Steel Co., 77 App. Div. [N. Y.] 307. A city council which votes that it at once close a contract with an individual for a waterworks upon terms named does not authorize the mayor to enter into such a contract on behalf of the town. Marion Water Co. v. Marion [Iowa] 96 N. W. 883.

88. Leflore County v. Cannon, 81 Miss. 334; Fairbanks, M. & Co. v. North Bend [Neb.] 94 N. W. 537; Inge v. Board of Public Works, 135 Ala. 187; LeTourneau v. Hugo [Minn.] 97 N. W. 115; Gillette v. Peabody [Colo. App.] 75 Pac. 18.

89. Clark v. Lancaster County [Neb.] 96 N. W. 593. Where officers of a city prepared general plans for a bridge which were thereafter modified in detail only and regularly approved and the contract let, this constituted a valid letting. Sanborn v. Lindenthal, 41 Misc. [N. Y.] 564. Where, in the proposed construction of a sewer, an advertisement stipulates that bidders must satisfy themselves by personal examination of the accuracy of an engineer's estimates, a contractor may not rely on a drawing as to the depth at which rock will be encountered. Kelly v. New York, 87 App. Div. [N. Y.] 299. A requirement that the bidder furnish with his bid a plan of the bridge he proposes to construct, instead of requiring him to bid upon a particular style of bridge, is proper, the charter not requiring a letting to the lowest bidder. Kundinger v. Saginaw [Mich.] 93 N. W. 914. So, also, provisions in specifications requiring a particular kind of material, and that the bidder should have had a plant in operation for a year. Knowles v. New York, 176 N. Y. 430, 68 N. E. 860; Meyers v. Pa. Steel Co., 77 App. Div. [N. Y.] 307. A provision in the specifications for paving a street that the contractor will keep it in repair without expense to the city for a period of eight years does not place the cost of repairing upon adjacent property holders, but is a guaranty as to the quality and character of the pavement. People v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802.

90. Cunningham v. New York, 39 Misc. [N. Y.] 197. Contractors sought to recover for pumping water out of sewer, the plans apparently showing a sewer which had it really existed would have carried off surplus water. Id.

91. See definition of "additional work" in 22 N. Y. Supp. 1020. Tenders and clusters of piles above and below the bridge are not necessary parts of the bridge and must be advertised for. Marion County v. Foxworth [Miss.] 36 So. 36.

92. The fact that the sureties offered in a bid by a contractor did not come up to the requirements of the law may be waived where the contractor is a responsible party and can furnish other sureties and the bid is for the benefit of the city. McCord v. Lauterbach, 91 App. Div. [N. Y.] 315.

93. Leflore County v. Cannon, 81 Miss. 334; Fairbanks, M. & Co. v. North Bend [Neb.] 94 N. W. 537. The bid must correspond substantially to the terms and specifications upon which bids were invited. Le Tourneau v. Hugo [Minn.] 97 N. W. 115. If it contains a material change, and therefore a departure from the basis of the bidding, and becomes an element or consideration in the determination of who is the lowest bidder, it will invalidate the contract entered into (Inge v. Board of Public Works, 135 Ala. 187); and where a bid, filed within the time fixed by the advertisement for receiving bids, is substantially changed and modified after such time, it is to be regarded as a new bid, received after other competitors had a right to presume that the contest was closed, and a contract based upon such a bid is void (Fairbanks, M. & Co. v. North Bend [Neb.] 94 N. W. 537). The statement in a proposal that the bidder if awarded the contract will cause the work to be done within the state and by union labor does not violate the principle that there must be free and open competition. Gillette v. Peabody [Colo. App.] 75 Pac. 18.

94. Inge v. Board of Public Works, 135 Ala. 187. Bids for "mason, steel and iron" deposited in a box marked "plumbing." McCord v. Lauterbach, 91 App. Div. [N. Y.] 315. A statute required a satisfactory guaranty by the bidder for proper performance. A bid which offered to "contract in compliance with said proposals and give the necessary security" is a sufficient compliance with the statute. People v. McDonough, 76 App. Div. [N. Y.] 257.

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void legislation,[95] such as a requirement of the use of the union label,[96] the observance of the eight-hour law, alien labor law, and the like.[97]

As in private contracts, so also in public contracts, an offer made to a municipality is open to acceptance until withdrawn,[98] and where an official of a snow melting company, in pursuance of preliminary negotiations with the street commissioner of a city, submitted a written communication, offering to remove snow at a specified compensation, the city had a right to regard such communication as an offer, which, upon acceptance, constituted a valid contract.[99]

§ 3. *How closed. Acceptance of bid or offer; approval or enabling law or ordinance; notification of bidder; bond and approval; execution and delivery of formal contract.*—It is almost a universal provision, where statutes prescribe for a competitive bidding, that the contract shall be let to the lowest responsible bidder.[1] A provision of this kind is mandatory, and unless the requirements imposed by the statute are complied with, the contract is void.[2] Responsibility of the bidder may be considered,[3] and the determination of who is the lowest bidder, with the qualification of responsibility, rests, not in the exercise of an arbitrary, unlimited discretion of the officer or board awarding the contract, but upon the exercise of a bona fide judgment, based upon facts tending reasonably to the support of such determination.[4] In deciding upon the responsibility of bidders, it is the duty of the board or officers, not only to take into consideration their pecuniary ability to perform the contract, but also to ascertain which ones, in point of skill, ability, and integrity, would be most likely to do faithful, conscientious work, and to fulfill the terms of the contract.[5] After determining who are responsible bidders and who are not, from among those bidding,[6] it becomes a matter of the amounts bid, and the law imposes the plain duty of selecting the bid lowest in amount.[7] A provision, however, that the contract shall be let upon

95. License fee. Barber Asphalt Pav. Co. v. Gaar, 24 Ky. L. R. 2227, 73 S. W. 1106.

96. Marshall v. Nashville, 109 Tenn. 495, 71 S. W. 815.

97. Eight-hour law. Cleveland v. Clements Bros. Const. Co., 67 Ohio St. 197, 65 N. E. 885, 59 L. R. A. 775. Alien labor. Inge v. Board of Public Works, 135 Ala. 187.

98. Defendant company offered to light plaintiff borough at a stated price, the offer to remain open a specified time. Meanwhile plaintiff advertised for bids for the same lighting, but rejected all of them. Held, by so doing, plaintiff did not lose its right to accept defendant's offer. Lansdowne v. Citizens' Elec. L. & P. Co., 206 Pa. 188.

99. Snow melting Co. v. New York, 88 App. Div. [N. Y.] 575.

1. The purpose of this requirement is of a twofold nature; to secure the lowest reasonable price by inviting competition and to prevent anything like favoritism on the part of the officers, and to secure fairness in the bidding. Inge v. Board of Public Works, 135 Ala. 187; Fairbanks, M. & Co. v. North Bend [Neb.] 94 N. W. 537. Awarding bodies have the power to reject all bids. Trapp v. Newport, 25 Ky. L. R. 224, 74 S. W. 1109. Where a charter requires that a contract be let to the lowest responsible bidder, the authorities cannot arbitrarily reject the lowest bidder and accept a higher one. Construing § 283 of the revised charter of the city of Buffalo. People v. Buffalo, 84 N. Y. Supp. 434.

2. Inge v. Board of Public Works, 135 Ala. 187; State v. King, 109 La. 799. It is unimportant whether an additional stipulation contained in the contract awarded to one who is not the lowest responsible bidder be in itself an advantage to the city or not. Inge v. Board of Public Works, 135 Ala. 187.

3. Not bound to make awards to the lowest bidders, but responsibility may be considered. Phila. v. Pemberton [Pa.] 57 Atl. 516. The "lowest bidder" is not necessarily the lowest in price (Trapp v. Newport, 25 Ky. L. R. 224, 74 S. W. 1109), nor the "lowest and best" bidder (Id.). A board of chosen freeholders is not obliged to award a contract to the lowest bidder. Middle Valley T. R. & M. Co. v. Board of Chosen Freeholders [N. J. Law] 57 Atl. 258.

4. Inge v. Board of Public Works, 135 Ala. 187. The action of a printing board, in passing over an "unbalanced bid" which appears to be lowest, and accepting one which in reality is lowest, is proper and will not be set aside (People v. McDonough, 85 App. Div. [N. Y.] 162), but an arbitrary letting to one not the lowest bidder is subject to judicial review (Puget Sound Pub. Co. v. Times Print. Co. [Wash.] 74 Pac. 802).

5. Trapp v. Newport, 25 Ky. L. R. 224, 74 S. W. 1109; Inge v. Board of Public Works, 135 Ala. 187. Other matters than the mere pecuniary responsibility of the bidder may be considered. Phila. v. Pemberton [Pa.] 57 Atl. 516.

6. Inge v. Board of Public Works, 135 Ala. 187.

7. Chicago v. Hanreddy, 102 Ill. App. 1; Diamond v. Mankato, 89 Minn. 48, 93 N. W. 911; Le Tourneau v. Hugo [Minn.] 97 N. W.

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"terms most advantageous to the state and public,"[8] or where bids in the alternative are called for, lodges in the awarding officials a discretion, and a bid which meets the requirements of the selection made may be accepted, though not the lowest in actual figures.[9]

Courts should proceed with great caution, when asked to interfere with the discretion conferred by law upon municipal officers, in regard to such matters,[10] and, in the absence of fraud or gross abuse, they will not interfere.[11] The authorization of the works, and the contract awarded, must receive the sanction of the public bodies whose approval is required.[12]

A charter which provides that the acceptance of a bid for a public utility by the common council, shall be by ordinance, resolution, or by-law, must be complied with, and acceptance by motion is fatal to the contract.[13]

Rights gained under an accepted bid may be transferred to another.[14] The fact that bids are not opened immediately after the time limited for their receipt, as required by the rules of the board, but were opened after an adjournment of one day, does not invalidate the contract.[15] The placing of bids for "mason, steel, iron," etc., in a box marked "plumbing," does not invalidate a contract let to one of the bidders.[16]

Where notice sent to contractor to commence work is not received by him until after the time appointed in the notice for the commencement, he must begin within a reasonable time thereafter.[17]

It is not necessary that the whole of a public improvement specified in a resolution of intention be awarded as one contract, especially if in widely separated districts, or if differing in character.[18] One who files his contract and bond within 10 days after publication of an ordinance accepting the bid and providing that it should be in force from and after approval by the mayor and publication, files the same within 10 days from the acceptance of his bid.[19]

In Georgia, where a bond was given at the time of the original construction of a bridge, the law did not require a bond for the repair of such bridge, when the cost of the repairs was less than $500.[20]

The absence of the corporate seal is not fatal to the valid execution of a contract,[21] and an agreement may be binding, though a formal contract has not been

115; Marsh v. State [Neb.] 96 N. W. 520; People v. Scannell, 40 Misc. [N. Y.] 297. Where bids are made to furnish two different kinds of material and the more expensive is selected, it being the kind advertised for, and the kind the taxpayers had petitioned for, held, the contract was let to the lowest bidder within a charter requiring it to be so let. Paving brick. Sisson v. Buffalo, 41 Misc. [N. Y.] 236.

8. Gillette v. Peabody [Colo. App.] 75 Pac. 18.

9. Trowbridge v. Hudson, 24 Ohio Circ. R. 76. Where a city advertises for bids for a pavement to be constructed of brick, asphalt, or trap rock, it may award the contract to the lowest bidder for asphalt, though there was a lower bid for trap rock (Kronsbein v. Rochester, 76 App. Div. [N. Y.] 494), and where bids were called for upon three kinds of pavement, one of which was brick, the particular kind of brick being specified, it was proper to accept a bid for the brick specified, although a bid was made for a different kind of brick at a less price (Sisson v. Buffalo, 41 Misc. [N. Y.] 236).

10. Trapp v. Newport, 25 Ky. L. R. 224, 74 S. W. 1109.

11. Inge v. Board of Public Works, 135 Ala. 187; Gillette v. Peabody [Colo. App.] 75 Pac. 18. The fact that a contract was not awarded to the lowest bidder does not of itself indicate fraud. Peckham v. Watsonville, 138 Cal. 242, 71 Pac. 169.

12. Contract for bridge under the provisions of the charter of Greater New York. Sanborn v. Lindenthal, 41 Misc. [N. Y.] 564.

13. Broderick v. St. Paul [Minn.] 97 N. W. 118.

14. Herring v. White [Ga.] 45 S. E. 697.

15. Contract for school building to be let by board of education. McCord v. Lauterbach, 91 App. Div. [N. Y.] 315.

16. McCord v. Lauterbach, 91 App. Div. [N. Y.] 315.

17. Masterson v. New York, 84 N. Y. Supp. 312.

18. Bates v. Twist, 138 Cal. 52, 70 Pac. 1023.

19. Springfield v. Mills, 99 Mo. App. 141, 72 S. W. 462.

20. Paxton v. Berrien County, 117 Ga. 891.

21. City St. Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916.

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executed,[22] but under a charter provision that "all contracts relating to city affairs shall be in writing, signed, and executed in the name of the city," no liability arises until a written contract is duly executed.[23]

§ 4. *Essential provisions in, and conditions pertaining to, public contracts.*—Statutes or ordinances which infringe upon the freedom of contract to which every citizen is entitled, or which tend to stifle competition by requiring that eight hours shall constitute a day's labor,[24] that no alien or convict labor shall be employed,[25] that all stone used shall be dressed within the territorial limits of the state,[26] and that all public printing shall bear the union label, so called,[27] are void, and while a valid statute regulating contracts is, by its own force, read into and made a part of such contracts, it is otherwise as to invalid statutes.[28] The provisions of such a statute or ordinance do not become obligatory, or of binding force upon the parties, because by them incorporated in the contract.[29] A taxpayer, however, cannot defeat the collection of a tax, because these or similar provisions are incorporated in a contract, without showing that such clauses affected the bidding or limited competition.[30] And the fact that such provisions were embodied in a contract will not preclude recovery by the contractor, even though it be shown that competition was influenced thereby, in the absence of a showing of fraud or bad faith.[31]

Assent on the part of a municipality is often made a condition to the construction of an improvement affecting the public,[32] and under the charter of a city which gives to an official control of the construction of subways by a contractor, and requires his permit therefor, he may, as a condition to such permit, stipulate that all reasonable expense of inspection be borne by such contractor.[33]

It is not fatal to a contract for building sidewalk, that it was let before the expiration of the time in which the owner had permission himself to build.[34]

A public contract is not invalidated because embodying a condition that the contractor's pay shall be deferred until collections have been made from the tax-

22. Lansdowne v. Citizens' Elec. L. & P. Co., 206 Pa. 188.

23. Smart v. Phila., 205 Pa. 329; Times Pub. Co. v. Weatherby, 139 Cal. 618, 73 Pac. 465. Under a statute of California, a contract for the disposition of garbage may be made by an order of the board of supervisors, and the mayor's signature is not essential to its validity [St. 1863, p. 540, c. 352]. Cal. Reduction Co. v. Sanitary Reduction Works [C. C. A.] 126 Fed. 29.

24. Cleveland v. Clements Bros. Const. Co., 67 Ohio St. 197, 65 N. E. 885, 59 L. R. A. 775. A statute, making it a criminal offense for a contractor on a public work to permit or require an employe to perform labor upon that work in excess of eight hours each day, does not violate the freedom of contract, guaranteed by the 14th amendment of the constitution of the United States. Construing §§ 3827-3829 Kansas Gen. St. (Akin v. Kan., 191 U. S. 207), nor does it deny the contractor the equal protection of the laws (Id.).

25. Inge v. Board of Public Works, 135 Ala. 187.

26. St. Louis Q. & C. Co. v. Frost, 90 Mo. App. 677.

27. Marshall v. Nashville, 109 Tenn. 495, 71 S. W. 815.

28. Cleveland v. Clements Bros. Const. Co., 67 Ohio St. 197, 65 N. E. 885, 59 L. R. A. 775; People v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802.

29. Marshall v. Nashville, 109 Tenn. 495, 71 S. W. 815; Cleveland v. Clements Bros. Const. Co., 67 Ohio St. 197, 65 N. E. 885, 59 L. R. A. 775; Knowles v. New York, 176 N. Y. 430, 68 N. E. 860. But the enforced compliance of a contract provision restricting laborers to eight hours a day will not warrant a recovery of damages. Thilemann v. New York, 82 App. Div. [N. Y.] 136.

30. Sweet v. People, 200 Ill. 536, 65 N. E. 1094; McChesney v. People, 200 Ill. 146, 65 N. E. 626; St. Louis Q. & C. Co. v. Frost, 90 Mo. App. 677; Wells v. Raymond, 201 Ill. 435, 66 N. E. 210; De Wolf v. People, 202 Ill. 73, 66 N. E. 868; Glover v. People, 201 Ill. 545, 66 N. E. 820; Thompson v. People, 207 Ill. 334, 69 N. E. 842; Gage v. People, 207 Ill. 61, 69 N. E. 635.

31. Knowles v. New York, 176 N. Y. 430, 68 N. E. 860.

32. A vault under a sidewalk having existed without objection from the public authorities, for more than twenty years, the presumption arises, in the absence of proof to the contrary, that it was constructed with their assent. Deshong v. New York, 176 N. Y. 475, 68 N. E. 880.

33. People v. Monroe, 85 App. Div. [N. Y.] 542.

34. Springfield v. Mills, 99 Mo. App. 141, 72 S. W. 462.

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payers applicable to the particular purpose.[35] In the absence of fraud or collusion, a contract with a public body will not be held void, on the ground of excessive compensation.[36]

§ 5. *Interpretation and effect of public contracts, and performance and discharge.*—Agreements which tend to stifle or eliminate competition are against public policy and void.[37] But in public contracts, as in others, where the contract is severable and one part or provision is void or unenforceable, the void provision may be rejected and the contract enforced as to the remainder.[38]

Public contracts should be liberally construed in favor of the public,[39] and should be so construed that all parts may stand together, if they are capable of such an interpretation.[40] The rule of contemporaneous construction by officers charged with the enforcement of statutes is not always controlling,[41] and can have no application where the construction of a general statute, having uniform operation throughout the state, appears to have been construed only by the officers of one county.[42]

Where a contractor was obligated to begin operations within one week after written notice, and complete them within two months, a fulfillment within two months of the last day allotted by the notice for commencement is a sufficient compliance.[43] Where a notice to commence work is received after the time set therein, the contractor should commence work within a reasonable time.[44]

Where, under a contract to build a state road the contractor was to receive as compensation a given quantity of swamp land in a designated county, then valued at $1.25 per acre, and at the completion of the contract there was not in such county sufficient of the land contemplated, a subsequent appropriation of the requisite quantity in another county, valued at $8 per acre, was a sufficient

35. Kronsbein v. Rochester, 76 App. Div. [N. Y.] 494.

36. Contract to discover property hid from taxation. Fleener v. Litsey, 30 Ind. App. 399, 66 N. E. 82.

37. Two newspaper publishers, having the only plants of the kind in the county, agreeing that each should bid the maximum rate for county printing upon an equal division of the proceeds. Pendleton v. Asbury [Mo. App.] 78 S. W. 651. A contract stipulated that alien or convict labor should not be employed. Inge v. Board of Public Works, 135 Ala. 187. It is not an unreasonable requirement on the part of a city, that the contractor shall guaranty the contract for a period of years, and shall maintain in the city during such period a permanent plant. Barber Asphalt Pav. Co. v. Gaar, 24 Ky. L. R. 2227, 73 S. W. 1106; Williamsport v. Hughes, 21 Pa. Super. Ct. 443. Such a requirement does not tend to stifle competition. Barber Asphalt Pav. Co. v. Gaar, 24 Ky. L. R. 2227, 73 S. W. 1106.

38. Valparaiso v. Valparaiso City Water Co., 30 Ind. App. 316, 65 N. E. 1063; Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250, 90 N. W. 746; Id. 118 Iowa, 234, 91 N. W. 1081; Marshall v. Nashville, 109 Tenn. 495, 71 S. W. 815; Knowles v. New York, 176 N. Y. 430, 68 N. E. 860. A public contractor cannot be deprived of his contract rights merely because some of the conditions imposed have subsequently been declared illegal. Action by taxpayer to enjoin execution dismissed. Meyers v. Pa. Steel Co., 77 App. Div. [N. Y.] 307. Provision that public printing must bear union label held void. Marshall v. Nashville, 109 Tenn. 495, 71 S. W. 815.

39. A street railway company, required by its charter to transfer passengers free of charge, cannot exact an additional fare in territory thereafter added to the city. Ind. R. Co. v. Hoffman [Ind.] 69 N. E. 399. The term "gas," in a contract, construed to embrace but manufactured gas, because the only kind known at time of contract, and an injunction to restrain a natural gas company from competing denied. Circleville L. & P. Co. v. Buckeye Gas Co. [Ohio] 69 N. E. 436.

40. Covenant for repair and maintenance. O'Keeffe v. New York, 173 N. Y. 474, 66 N. E. 194. A general covenant in a paving contract to keep the pavement in repair is limited by one requiring him to make repairs when notified in writing by the commissioner of public works. Id.

41. People v. Buffalo, 84 N. Y. Supp. 434. Variances that have been treated by both parties at the time as immaterial cannot thereafter be treated as departures from the contract. City engineer directed the laying of a sewer in running water, held, though an improper way to construct the same, the contractor could recover, though the contract read that he should not be relieved from responsibility though the engineer might assent to special means of prosecuting the work. Lamson v. Marshall [Mich.] 95 N. W. 78.

42. Vindicator Print. Co. v. State, 68 Ohio St. 362, 67 N. E. 733.

43. Wheless v. St. Louis, 90 Mo. App. 106.

44. Masterson v. New York, 87 App. Div. [N. Y.] 622.

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compliance, the contractor not objecting.[45] A contractor having followed the specifications and directions, but the desired results not being obtained, on being ordered to reconstruct, and so doing, he is entitled to recover therefor,[46] but where a contractor relies on figures given by a city official who is not bound to give them, and the contractor might have obtained them elsewhere, the official is his agent, and the city is not liable.[47]

Under a charter provision that each selectman shall receive a certain fixed compensation and his "necessary expenses," a city is not liable *to third persons* for things furnished to such official, even though used in the performance of a public duty.[48] Delays caused by the city,[49] or waived by it,[50] do not constitute a breach. Enforcement of a provision in a contract of a municipal corporation, for the construction of a sewer, requiring that the laborers should not be required to work more than eight hours a day, does not entitle the contractor to recover damages for delay to the work caused thereby.[51] Recovery on a quantum meruit is sometimes allowed.[52]

It not infrequently happens that some municipal officer is made the arbiter of controverted matters. The decision of the official under such circumstances, in the absence of fraud or palpable error, is usually final and binding on all parties.[53] And a decision by such officials cannot be unreasonably withheld,[54] nor

45. Olds v. State Land Office Com'r [Mich.] 96 N. W. 508.

46. Following the specifications was a clause to the effect that the work should be water-tight. Held, that the contractor's undertaking was to make the work water-tight only as far as a construction in accordance with the plans would produce such result. Dwyer v. New York, 77 App. Div. [N. Y.] 224.

47. Contractor had city surveyor give him grades, they were erroneous. Held, agent of contractor and city not liable. Becker v. New York, 176 N. Y. 441, 68 N. E. 855.

48. Meals furnished to a board of registration. Heublein Bros. & Co. v. New Haven, 75 Conn. 545.

49. As to penalties for overtime. Thilemann v. New York, 82 App. Div. [N. Y.] 136; Ocorr & R. Co. v. Little Falls, 77 App. Div. [N. Y.] 592.

50. A city does not waive its right to damages for delay, by permitting the contractor to begin and complete the work after the time limit in the contract has expired. Hipp v. Houston, 30 Tex. Civ. App. 573, 71 S. W. 39. A resolution, by the city council to wait until a contract was finished before settling as to stipulated damages, etc., is not an extension of time. Lamson v. Marshall [Mich.] 95 N. W. 78. The record of the committee or board showing the authorization of the contract, and referring to a written agreement which it authorized its president to make, incorporates that written agreement as part of the contract. Written agreement excusing delay of contractor. Marion County v. Foxworth [Miss.] 36 So. 36. The city council has no power to waive a contractor's default in the terms of his contract. Attempted to waive the element of time, it being made an essential provision thereof. Smith v. Westport [Mo. App.] 79 S. W. 725.

51. Thilemann v. New York, 82 App. Div. [N. Y.] 136.

52. A contractor failing in the performance of his contract is entitled to recover the reasonable value of the work done by him, the benefit of which the city has accepted, less the payments made to him on account of the contract added to the amount reasonably paid by the city to complete the works (Sherman v. Connor [Tex. Civ. App.] 72 S. W. 238), and such contractor is entitled to recover such amount, though the funds procured by bonds made chargeable with the amount due the contractor are used in completing the works (Id.).

53. O'Connor v. New York, 174 N. Y. 517, 66 N. E. 1113; Com. v. Pittsburg, 204 Pa. 219; Id., 206 Pa. 379. The action of a board of audit, in passing upon a claim, is in its nature judicial and cannot be reopened. People v. Clarke, 79 App. Div. [N. Y.] 78. An estimate is binding, if honestly made. It is not binding if it does not accord with the honest judgment of the engineer making it, and the burden to prove dishonesty is upon the party attacking the estimate. Lamson v. Marshall [Mich.] 95 N. W. 78. A clause in a contract referring the question of the fulfillment of the contract to the city engineer cannot, by implication, be enlarged so as to include the right to determine what shall be paid by way of damages for nonfulfillment. (Somerset Borough v. Ott [Pa.] 56 Atl. 1079), and a provision in a contract that the work in question should be presented at the times, and in the manner directed by the resident engineer, had reference to the manner of carrying on the work and did not contemplate or vest in the engineer authority to discontinue or abandon it (Baker v. State, 77 App. Div. [N. Y.] 528). Under Laws 1896, p. 751, c. 626, work done under the authority thereby given must be approved by the board of estimate and apportionment before recovery can be had therefor. Withers v. New York, 86 N. Y. Supp. 1105. Where the contract provides that the decision of a certain officer shall be final as to the sufficiency of all work done thereunder, and he has signed and approved an estimate of the work, the city comptroller has no authority to refuse to pay for it. Com. v. Pittsburg, 204 Pa. 219;

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action indefinitely delayed without conferring a right of action.[55] The certificat of the city engineer in approval of the work will not release the surety on th bond, where the contract does not make the certificate conclusive as to the prope performance of the work.[56] Neither will acceptance and payment for the worl by the city, unless done with knowledge of the defective condition of the work.[5

"Extra" work is that which arises outside and entirely independent of the con tract, something not required in its performance, while "additional" work is some thing which is necessarily required in the performance of the contract and tha without which it could not be carried out.[58] As a general rule the governing bod of a municipal corporation has the power, if vested rights are not thereby inter fered with, and the rights of third parties have not intervened, to rescind actio previously taken.[59]

Id., 206 Pa. 379. Engineers and other city or county officers cannot unreasonably refuse to approve work of a contractor. Work was completed substantially according to terms of contract. Ross v. New York, 85 App. Div. [N. Y.] 611.

54. Refusal by engineer to certify performance of contract. Ross v. New York, 85 App. Div. [N. Y.] 611. Where the defective condition of a sewer is due solely to an improper method of construction lawfully ordered by an engineer in charge, the contractor is entitled to recover notwithstanding the engineer withholds the estimate. Lamson v. Marshall [Mich.] 95 N. W. 78. Where a contractor agrees to erect, on the land of a municipal corporation, a garbage furnace, according to plans and specifications, to be paid for when completed and tested according to the satisfaction of the committee of the town's council, and the contractor fully performs the contract, the committee cannot defeat the contractor's right of recovery by capriciously and unreasonably refusing to express its satisfaction of the work. Parlin & Orendorff Co. v. Greenville [C. C. A.] 127 Fed. 55. It is a question for the jury whether or not a certificate of overtime was actuated by bad faith. Where a sum is withheld as damages for delay, and such delay, or a part thereof, arose through no fault of the contractor, but through matters allowed by the city, held, a question for the jury whether or not certificate of overtime was actuated by bad faith. Masterson v. New York, 87 App. Div. [N. Y.] 622. Where a building contract requires an architect's certificate as a condition precedent to payments thereon, the city having declared the contract forfeited and the performance of the work thereunder abandoned, and having taken possession of the building for the purpose of completing the same, it is not necessary for the builder to furnish the architect's certificate to maintain an action to recover for work done. An agreement that an engineer's estimate shall be final is binding if honestly made. Ocorr & R. Co. v. Little Falls, 77 App. Div. [N. Y.] 592.

55. Johnson v. Albany, 86 App. Div. [N. Y.] 567. Where a board unreasonably delays the determination of the amount due, the contractor may sue. Delay from May 26 until September 5th held unreasonable. Id.

56, 57. Newark v. New Jersey Asphalt Co., 68 N. J. Law, 458.

58. Shields v. New York, 84 App. Div. [N. Y.] 502. Where an engineer directed that a ditch be sheathed, which necessitated extra excavation and extra concrete, held extr work. Johnson v. Albany, 86 App. Div. [N Y.] 567. Where a sewer properly construc ted settles and is relaid, pursuant to the cit engineer's order, such work is within a con tract, requiring that if alterations increas the amount of the work, such increase shal be paid for according to the quantity actu ally done, and at the price fixed by the con tract. Allen v. Melrose, 184 Mass. 1, 67 N. E 1060. The fact that allowance is made fo delay does not prevent contractor from re covering for extra work. In construction o sewer contractor had to remove extra fill ing, placed upon the line of his work b preceding grading contractors. Thilemann v New York, 82 App. Div. [N. Y.] 136. Wher a contract provides that no claims shall b allowed for extra work in the absence of written instruction from the engineer, fail ure to obtain such written instruction pre cludes the contractor from recovering fo such extra work. Johnson v. Albany, 86 App Div. [N. Y.] 567. Removing filling placed i street by preceding grading contractors, b one engaged in constructing a sewer, is extr work. Thilemann v. New York, 82 App Div. [N. Y.] 136. Nonexistence of an allege adjoining sewer does not entitle a contracto constructing a sewer to recover for extr expense in pumping, where he had an oppor tunity, and did view the place, and coul have seen that no sewer existed. Id. Provi sions as to furnishing plans of details an that anything omitted in the specification and shown in the drawings or vice vers should be done without extra charge or ex pense does not authorize the architect t change the plans. Dwyer v. New York, 7 App. Div. [N. Y.] 224. Contractors sue fo value of extra work claiming by plans the could have drained the water in the ditche into a sewer shown on plans, but that as th sewer did not exist they had to pump i Held, from the facts, that they should hav known of its nonexistence and cannot re cover. Cunningham v. New York, 39 Mis [N. Y.] 197. Where a contract for the con struction of a sewer fixes prices for excava tions to a depth much greater than require by the profiles on file when made, excavat ing to such extra depth is within the term of the contract and the prices fixed therei Allen v. Melrose, 184 Mass. 1, 67 N. E. 106 Changes and additions contemplated an provided for in the original contract whe made become a part of it. Sherman v. Con nor [Tex. Civ. App.] 72 S. W. 238. Where contract required a written agreement fo

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§ 6. *Remedies and procedure. A. Of aggrieved bidders.*—An unsuccessful bidder may institute proceedings, by certiorari, to have the action of the awarding body reviewed,[60] or he may apply for an injunction to restrain the officials from awarding the contract to another.[61] If, however, the work has already been begun, the only remedy is a decree enjoining the contractor from proceeding further with the work, setting aside the award, and referring the matter back to the officials,[62] and if the work is completed, there is but one remedy, and that is an action for damages.[63]

A bidder who has deposited a sum of money as a guaranty that he will enter into a contract, and whose bid is such that it cannot lawfully be accepted, may recover the deposit.[64] The decision of the board of awards in letting a contract to a bidder will be reviewed by the courts, where fraud is shown.[65] The ordinance under which bids are advertised for, providing that the council should have the power to reject any and all bids, a bidder cannot complain of its action in so doing.[66]

(§ 6) *B. Against bidders.*—A taxpayer may seek the aid of a court of equity and relief, by injunction, to enjoin the improper creation of a debt.[67]

(§ 6) *C. On the contract proper.*—Where the contract is that payment is to be made only out of special assessments, or a particular fund, when, and as the same shall be actually collected, the contractor taking the risk of their validity, no general liability on the part of the city arises,[68] unless the improvement is such that the city has no power to assess the cost against adjacent property,[69] or where there has been some wrongful act, negligence, or default on the part of the corporation which injuriously affects the rights of a claimant.[70]

The requirement by a city that a contractor abide by a contract provision restricting laborers to eight hours a day does not confer a right of action,[71] and in California, a recovery may not be had against the state, for services rendered a state board, in the absence of an appropriation by the legislature out of which the claim can be paid.[72]

An action on a public contract must be timely brought.[73] In Kentucky, an

extra work, the board of commissioners, having ordered such work, was estopped from objecting that there was no written agreement. Dwyer v. New York, 77 App. Div. [N. Y.] 224.

59. Where town trustees have caused final estimate of the total cost of an improvement and the engineer's report to be made, as required by Burns' Rev. St. 1901, § 4293, it has power to rescind and set aside its action in causing the estimate and report to be made on the ground that the work has not been completed according to contract. Greenwood v. State, 159 Ind. 267, 64 N. E. 849. A contract let in the statutory mode can only be repealed or annulled in the same manner. Commissioner of public works has no authority to change or modify a paving contract. Becker v. New York, 176 N. Y. 441, 68 N. E. 855.

60. People v. McDonough, 76 App. Div. [N. Y.] 257.

61. Puget Sound Pub. Co. v. Times Printing Co. [Wash.] 74 Pac. 802.

62, 63. Akron v. France, 24 Ohio Circ. R. 63.

64. Fairbanks, M. & Co. v. North Bend [Neb.] 94 N. W. 537.

65. Smith v. Hayes [Md.] 57 Atl. 535.

66. Trapp v. Newport, 25 Ky. L. R. 224, 74 S. W. 1109.

67. Inge v. Board of Public Works, 135 Ala. 187.

68. Park Ridge v. Robinson, 198 Ill. 571, 65 N. E. 104; Farrell v. Chicago, 198 Ill. 558, 65 N. E. 103; Roter v. Superior, 115 Wis. 243, 91 N. W. 651; Dalton v. Poplar Bluff, 173 Mo. 39, 72 S. W. 1068.

69. Louisville v. Bitzer, 24 Ky. L. R. 2263, 73 S. W. 1115.

70. Pine Tree Lumber Co. v. Fargo [N. D.] 96 N. W. 357. Where in a contract for a sewer a city limits its liability to a particular fund, which it alone has power to create and secure, and through the negligence of one of its officials such fund fails, the city is liable to the contractor in damages for breach of contract. O'Hara v. Scranton, 205 Pa. 142. Diversion of fund raised by selling bonds. Sherman v. Connor [Tex. Civ. App.] 72 S. W. 238.

71. Thilemann v. New York, 82 App. Div. [N. Y.] 136.

72. Polk v. State, 138 Cal. 384, 71 Pac. 435.

73. A cause of action accrues, so that limitations commence to run, where a city failed to properly assess benefits, by reason of which plaintiffs were enjoined from completing their contract, at the time when, by the injunction, plaintiffs were informed of the city's failure in precedent performance. Ash v. Independence [Mo. App.] 77 S. W. 104.

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action to enforce payment of the contract price, the contract being in writing, will not be barred until after fifteen years.[74]

In the absence of statutory provisions it is a general rule that all actions brought by, or prosecuted in behalf of, a county must be by authority of the board of supervisors.[75]

Contract rights and obligations growing out of a franchise granted by a city to a water company may be adjudicated by the courts, in the same manner, and by the same proceedings, which obtain between litigants in general.[76]

In an action against a city, the declaration need not allege that the city had power to make the contract; this, as well as that such authority was properly exercised, will be presumed, the contract being valid on its face and within the scope of the general powers of the city,[77] but complainants who do not show that they sustain a special or peculiar relation to the matters in controversy cannot challenge the validity of a contract,[78] and where a method of procedure in entering into a contract is not exclusive, a complaint which fails to state that the other methods were not followed is defective.[79] Where a municipality brings suit to recover money alleged to be due under a contract which has been practically executed upon its part, a citizen and a taxpayer has no interest to defeat such recovery on the ground that the contract was unauthorized.[80]

A defendant who wishes to urge the illegality of a contract must plead such defense in his answer.[81]

In an action for the value of wood furnished to a town school district, the record of a vote of the annual town meeting to pay the claim is admissible in evidence.[82]

It is error to nonsuit a plaintiff in an action to recover for salary as an attorney for a county, where the evidence does not show that plaintiff was unable or incompetent to perform his contract.[83] The damages a city is entitled to recover on a breach of contract by a contractor is the difference, if any, between the contract price plus the value of extra materials furnished by the contractor, and the amount reasonably paid by it to complete the works plus the sum paid to the contractor, on account of the contract.[84]

(§ 6) *D. On the bond.*—A surety on a bond given by a contractor to a city for faithful performance, the contract being expressly made a part of the bond,

74. Louisville v. Gleason, 24 Ky. L. R. 1491, 71 S. W. 880.

75. Suit begun at instance of prosecuting attorney. Contra Costa County v. Soto, 138 Cal. 57, 70 Pac. 1019; Vindicator Print. Co. v. State, 68 Ohio St. 362, 67 N. E. 733.

76. Plaintiff company claimed that the question as to whether it lawfully exercised the right to charge for water could only be raised by the state in quo warranto proceedings. Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250, 90 N. W. 746; Id., 118 Iowa, 234, 91 N. W. 1081.

77. Newport News v. Potter [C. C. A.] 122 Fed. 321.

78. Wilkins v. Chicago, St. L. & N. O. R. Co., 110 Tenn. 422, 75 S. W. 1026.

79. Peckham v. Watsonville, 138 Cal. 242, 71 Pac. 169. In California a defect in a complaint to foreclose the lien of a street assessment, the allegations showing that the board of supervisors acquired jurisdiction to pass its resolution of intention, but that the resolution passed was void and insufficient to confer on the board jurisdiction to make its subsequent orders and award, is not cured by an allegation that the resolution of intention was "duly passed and made" under Code Civ. Proc. § 456. Buckman v. Hatch [Cal.] 70 Pac. 221.

80. Morgan City v. Dalton [La.] 36 So. 208.

81. Ocorr & R. Co. v. Little Falls, 77 App. Div. [N. Y.] 592.

82. Currier v. Town School Dist. [Vt.] 56 Atl. 1016.

83. Plaintiff at the time of his contract was also postmaster, and was removed because the commissioner feared the duties of the two offices would conflict. Hancock v. Craven County Com'rs, 132 N. C. 209.

84. Contract for erection of waterworks. Sherman v. Connor [Tex. Civ. App.] 72 S. W. 238. Where there is no evidence that a city has sustained loss of profits by reason of the breach of a contract, the city is not entitled to recover damages, if the amount reasonably expended by the city to complete the contract did not exceed the contract price plus the value of the extra materials furnished by the contractor. Id.

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cannot assert the failure to execute a given power in a statutory way in the letting of the contract,[85] and sureties cannot avoid liability on the ground of want of knowledge of the subletting of the contract, there being no condition in the contract against subletting,[86] nor will the payment by a city on work accepted by it, under an honest belief that it was done in the manner required by the contract, release the surety.[87]

(§ 6) *E. Under lien laws.*—In Illinois, where a lien for material or labor, upon proper notice, is given against the fund, the remedy on the bond of an official for his failure to retain money is not exclusive,[88] and in New York, a material man may foreclose a lien although a prior lien had been filed upon the same claim, and though the sureties in the undertaking given on a discharge of the lien, were not made parties.[89] A lienor who unsuccessfully contests the lien of other claimants is liable only for such costs as are incurred in litigating the claim.[90]

A bond conditioned for the payment of labor and material claims affords protection to day laborers,[91] but it does not include materials and articles not actually used in and as a part of the construction under contract, and which, though employed in doing the work in question, survive its performance,[92] and a surety cannot set up the violation of a provision, both of law and the contract, forbidding the employment of alien labor by the principal as a defense in an action on such a bond.[93]

PUBLIC LANDS.

§ 1. Property Rights in the Public Domain (1295).
§ 2. Lands Open for Settlement and Lands Granted or Reserved (1296).
A. Federal (1296).
B. State (1298).
C. Who May Locate and Acquire (1299).
§ 3. Mode of Locating and Acquiring Title (1300).
A. Federal (1300).
B. State (1306).
§ 4. Interest and Title of Occupants, Claimants and Patentees (1314).
A. On Federal Lands (1314).
B. State Lands (1319).
§ 5. Leases of Public Lands and Rights Thereunder (1322).
§ 6. Spanish and Other Grants Antedating Federal Sovereignty (1324).
§ 7. Regulations and Policing, and Offenses Pertaining to Public Lands (1326).

This topic includes both state and Federal lands. For obvious reasons the treatment of each is separate from the other within each section; but many principles common to both may be found. Hence the reader is likely to profit by a careful examination of both.

§ 1. *Property rights in the public domain.*—Riparian and littoral lands with-

85. Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097.

86. Hines v. Consol. C. & L. Co., 29 Ind. App. 563, 64 N. E. 886.

87. Newark v. New Jersey Asphalt Co., 68 N. J. Law, 458.

88. Nat. Bank of La Crosse v. Petterson, 200 Ill. 215, 65 N. E. 687. Such lien may be established in equity unless the law has provided some other mode. West Chicago Park Com'rs v. Western Granite Co., 200 Ill. 527, 66 N. E. 37.

89. McDonald v. New York, 89 App. Div. [N. Y.] 131.

90. Hall Incorporated Co. v. Jersey City, 64 N. J. Eq. 766.

91. Phila. v. McLinden, 205 Pa. 172. But a bond for faithful performance does not inure to the benefit of laborers and materialmen, even though it contain a clause that the contractor shall pay the claims of such persons, and even though it appear that no special bond was given for their benefit. The bond is for the protection of the city, the additional stipulation as to the pay of laborers and materialmen being merely an incident. Lancaster v. Frescoln, 203 Pa. 640. A contract having stipulated among other things that the contractor should pay all labor and material claims, in a suit on the accompanying bond the unpaid labor and material men are proper parties. Gastonia v. McEntee-Peterson Engineering Co., 131 N. C. 363.

92. Tools and implements. Beals v. Fidelity & Deposit Co., 76 App. Div. [N. Y.] 526. Steam lighter hired to transport material. U. S. v. Fidelity & Deposit Co., 86 App. Div. [N. Y.] 475. Lumber used in constructing forms to hold concrete in place while hardening. Kennedy v. Com., 182 Mass. 480, 65 N. E. 828.

93. Phila. v. McLinden, 205 Pa. 172.

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in a state are the property of the state rather than the Federal government,[94] a title is held in trust for the inhabitants and not as a private proprietor.[95] T public right to use such lands extends to all lands not occupied, but not so as prevent passage of boats and action of the tide.[96]

Rights in public lands or as against the public can only be acquired by virt of a statute.[97] An estoppel cannot arise,[98] and an avulsion will not change t boundary previously fixed between the states.[99] After incorporation of a town the state reserved lands in Maine, title to the lands and timber vests in the tow

Proceeds of lands granted for a specified purpose.—The surplus of moneys fr sale of public lands granted by the United States to Michigan to build the S Mary's canal, in excess of the cost, are held in trust by the state for the Unit States, and was not released from such character by an offer by the United Stat or acceptance by the state, for a transfer of the canal without liability for debts claims.[2] Laches is no defense to a suit by the United States to recover surpl moneys from sale of public lands by Michigan.[3]

§ 2. *Lands open for settlement and lands granted or reserved. A. Feder Lands and the classes thereof open to location and settlement.*—When any pa of the public domain has been opened to settlement, it is subject to existing gran or patents,[4] entries or sales or locations,[5] reservations[6] or withdrawals.[7] A hom stead entry, valid on its face, segregates the land from the public domain un canceled or forfeited.[8] Public lands heavily covered with timber may be enter

94. On admission as a state, Alabama acquired soil below high water under navigable waters within the state not previously granted. Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 Law. Ed. 266. Citing Pollard v. Hagan, 3 How. 212, 11 Law. Ed. 565.

95. Tide lands below high water. Rhode Island Motor Co. v. Providence [R. I.] 55 Atl. 696. Bed of river ceded to city. Knickerbocker Ice Co. v. 42d St., Etc., Ferry Co., 176 N. Y. 408, 68 N. E. 864.

96. Rhode Island Motor Co. v. Providence [R. I.] 55 Atl. 696.

97. The right of way over Texas school lands is not given railroads by statute [Sayles' Rev. Civ. St. art. 4167, construed with Const. 1876, art. 7, §§ 2, 4, 5]. Tex. Cent. R. Co. v. Bowman [Tex. Civ. App.] 75 S. W. 556. A law of Washington permitting the United States to condemn land of individuals or corporations does not include state lands [Laws 1889-90, p. 459 and Laws 1891, p. 31]. State v. Calvert, 33 Wash. 380, 74 Pac. 573. Adverse possession of public lands see post, § 5.

98. Statements of the register of the land office of Louisiana will not estop the state nor a levee board from claiming title to lands. McDade v. Bossier Levee Board, 109 La. 625.

99. Cut of new channel. Stockley v. Cissna [C. C. A.] 119 Fed. 812.

1. St. 1850, p. 193, c. 196. State v. Mullen, 97 Me. 331.

2. Federal statutes: 10 Stat. 35, c. 29; 21 Stat. 189, c. 211; Mich. St. Act Feb. 5, 1853, and Pub. Acts 1881, Act No. 17, construed. U. S. v. Mich., 190 U. S. 379, 47 Law. Ed. 1103.

3. Act Aug. 26, 1852 (10 Stat. 35, c. 92), for building ship canal at St. Mary's Falls. U. S. v. Mich., 190 U. S. 379, 47 Law. Ed. 1103.

4. Mineral claims cannot be located in the bed of a nonnavigable stream after issuance of a patent to bordering government lands, since no title is left in the government to the bed of the stream. Kirby v. Pott 138 Cal. 686, 72 Pac. 338.

5. Mines cannot be located on lands a ready sold under Laws 1887, c. 99, setti them apart for charitable and education institutions. Heil v. Martin [Tex. Civ. Ap 70 S. W. 430.

6. Reservation of public lands on Amel island, Florida, by executive order of t president removed the lands from the pub domain so that a patent to an individual certification to the state as swamp lands the general land office is void and open any attack. Fla. Town Imp. Co. v. Bigals [Fla.] 33 So. 450. In ejectment, a court m declare a patent or certification of lands the general land office, void because of executive order setting aside the lands as military reservation, where documentary ev dence is on file in the land office showi the reservation. Id.

7. Approval by the secretary of interi of selection of public land in lieu of scho sections by an alleged agent of the ter tory is, at least, a withdrawal of such la from private entry until approval of the s lection is set aside. Johanson v. Wash., 1 U. S. 179, 47 Law. Ed. 1008. The secretary the interior could not withdraw lands wit in indemnity limits of the grant to the Ca fornia and O. railroad, from operation the settlement laws on mere acceptance the map of definite location [Act July 1866, c. 242, (14 Stat. 239)]. Or. & C. R. C v. U. S., 189 U. S. 103, 47 Law. Ed. 726.

8. After cancellation or forfeiture the la again becomes subject to entry. McMichs v. Murphy [Okl.] 70 Pac. 189; Hodges Colcord [Okl.] 70 Pac. 383. The right entry given by Act of Congress (21 St 141) to a contestant who procures the ca cellation of a homestead entry inures to t benefit of one who induced the relinquis

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under the timber lands act, though after removal of the timber they will be arable.[9] Those open to occupancy and settlement, chiefly valuable for petroleum or other mineral oils, may be entered under the placer mining claim laws.[10] Lands obtained by treaty from the Comanches, Kiowas and Apaches in Oklahoma were classed as agricultural, but subject to Federal mineral laws.[11]

Reservations.—Lands in the public domain may be reserved therefrom by executive order for any lawful purpose.[12] "Public lands" available for forest reservation do not include existing Indian reservations.[13] A proclamation for a forest reservation from public lands need not be signed by the president, but when made by the secretary of the interior, will be presumed to have been directed by the president.[14]

Swamp land grants.—In the absence of fraud, a state cannot sell swamp lands patented by the United States before admission of the state.[15] School sections are not included in the swamp lands.[16]

Railroad grants.—A grant may include lands within city limits.[17] Lands embraced in other grants are within terms of reservation, exception and the like,[18] but if both grants are to the same company, this rule fails.[19]

Lands excluded from a grant cannot be taken as indemnity selections to make up such grant.[20] Bona fide prior settlers within limits of such grants will be protected,[21] thus where for lack of a survey no application could have been sooner

ment of a homestead entry made by an alien, although a settlement was made between the homestead entry and the initiation of the contest. Hodges v. Colcord, 193 U. S. 192.

9. Act June 3, 1878 (20 Stat. 89, c. 151). Thayer v. Spratt, 189 U. S. 346, 47 Law. Ed. 845.

10. The value of the land for oil is a question of fact to be proved by one alleging its mineral character as against homestead entry and to be determined by the land department. Bay v. Okl. S. G., O. & Min. Co. [Okl.] 73 Pac. 936.

11. Bay v. Okl. S. G., O. & Min. Co. [Okl.] 73 Pac. 936.

12. The president, by executive order in 1842 and 1849, could reserve part of the public domain on Amelia island as a military reservation. Fla. Town Imp. Co. v. Bigalsky [Fla.] 33 So. 450, citing many cases.

13. The fifteen townships in the Bitter Root valley, formerly occupied by the Flathead Indians, cannot be set apart by presidential proclamation for a forest reserve. Under Act June 5, 1872 (17 Stat. 226, c. 308) removing the Indians, they are not "public lands" in the sense of being a part of the public domain, and not subject to reserve under Act March 3, 1891, § 24 (26 Stat. 1103, c. 561). U. S. v. Blendauer, 122 Fed. 703.

14. Act March 3, 1891, § 24 (26 Stat. 1103, c. 561). U. S. v. Blendauer, 122 Fed. 703.

15. Enabling Act, Feb. 22, 1889, c. 180, § 4 (25 Stat. 676), and Washington Const. art. 26, § 1, and art. 17, § 2. Jones v. Callvert, 32 Wash. 610, 73 Pac. 701. Lands patented by the United States before formation of the state of Washington, and afterward included by proclamation in an Indian reservation cannot be sold by the state. Id.

16. Act of Congress, September 28, 1850, c. 84 (9 Stat. 519) and Act of Congress, March 3, 1857, c. 117, are construed not to apply to or embrace the sixteenth section granted to the state of Florida by Act of Congress of March 3, 1845, c. 48 (5 Stat. 742) for school purposes. State v. Jennings [Fla.] 35 So. 986.

17. United States statutes granting the U. C. Railroad Company a right of way over public lands between Ogden and Salt Lake City was not limited to a right of way to the city limits, but extended to land within the city. Moon v. Salt Lake County [Utah] 76 Pac. 222.

18. No lands within the 30 mile limit of the grant to the Atlantic & Pacific company by act July 27, 1866, passed to the Southern Pacific by grants made to that company by the joint resolution of June 28, 1870, or the the act of March 3, 1871 [14 Stat. 292; 16 Stat. 382; 16 Stat. 573]. U. S. v. Southern Pac. R. Co., 117 Fed. 544. Lands within the 20 mile limit of the Texas Pacific Railroad grant were excepted from the grant to the Southern Pacific Railroad [Act March 3, 1871, c. 122, § 9 and § 23 (16 Stat. 573)]. Southern Pac. R. Co. v. U. S., 189 U. S. 447, 47 Law. Ed. 896.

19. No reservation of lands within a portion of the grant to the Northern Pacific Railway Company which was forfeited to the United States was effected by the transmission to the secretary of the interior of a map of the general line of the road which was not authorized by the company nor accepted by the government. U. S. v. Northern Pac. R. Co., 193 U. S. 1.

20. The Southern Pacific cannot make indemnity selections within indemnity limits of its grant, but also in the forfeited place limits of the Texas Pacific grant [Act March 3, 1871, c. 122, §§ 3, 9 (16 Stat. 573)]. Southern Pac. R. Co. v. U. S., 189 U. S. 447, 47 Law. Ed. 896.

21. Bona fide homestead settlers could enter alternate odd-numbered sections within the exterior limits of the general route of the Northern Pacific Railroad before definite location of the road [North. Pac. grant; Act July 2, 1864, c. 217, §§ 3, 6 (13 Stat. 365)]. Nelson v. Northern Pac. R. Co., 188 U. S.

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made;[22] but settlements wholly abandoned which cannot be perfected may be t taken, though a "donation notification" remains uncanceled.[23] A reservation c "mineral lands" includes those which are chiefly valuable for stone quarries.[24]

Forfeited land grants inure to the government which may grant anew,[25] an not by implication to later grantees.[26]

A right of way grant does not include lands subject to an uncanceled entry c homestead,[27] but it does imply that no adverse claim shall ripen and defeat such grant.[28]

(§ 2) *B. State.*—When a constitutional appropriation is made, no law ca divert the land.[29] Lands cannot be settled or purchased until they are opened b the necessary statutory acts, and the right is subject to prior grants for specific pu poses[30] and prior claims and locations.[31] Location or private appropriation cannc be made of lands set apart for sale.[32] One seeking to purchase lands must sho

108, 47 Law. Ed. 406. Selection of lands within indemnity limits of the grant to the California and O. Railroad to supply deficiencies in place limits will not affect rights of a bona fide settler occupying previously within intention of acquiring title under the homestead laws on survey of the lands [Act July 25, 1866, c. 242]. The company could acquire no interest before actual and approved selection. Or. & C. R. Co. v. U. S., 189 U. S. 103, 47 Law. Ed. 726.

22. A bona fide settler on an odd-numbered section within indemnity limits of the California & O. Railroad grant is prior in right to the company on its subsequent selection of such land to supply deficiencies in place limits, though it afterward appears that all such sections within the indemnity limits were necessary to supply such deficiencies; (Act July 25, 1866, c. 242). He has no notice of such fact until by filing a map of the line etc., such deficiency becomes legally known. Or. & C. R. Co. v. U. S., 189 U. S. 103, 47 Law. Ed. 726.

23. Lands settled without the required residence or proof under the Oregon donation act and the amendatory act of Congress, Feb. 14, 1853, fifteen years before their selection as lieu lands by the Oregon C. railroad company within indemnity limits of its grant were not "reserved" from sale within meaning of the grant [9 Stat. 496, c. 76, and 10 Stat. 158, c. 69, construed with Oregon Central R. grant, July 25, 1866 (14 Stat. 239, c. 242)]. Or. & C. R. Co. v. U. S., 190 U. S. 186, 47 Law. Ed. 1012.

24. Lands solely or chiefly valuable for granite quarries are within an exception of "mineral lands" in the Northern Pac. R. grant, July 2, 1864 (13 Stat. 365, c. 217). Northern Pac. R. Co. v. Soderberg, 188 U. S. 526, 47 Law. Ed. 575.

25. Forfeiture of unearned Federal lands granted to states to aid railroads reinvested the United States with the legal title so that they may be conveyed [Act Congress, Sept. 29, 1890 (26 Stat. 496-499, c. 1040)]. Doe v. Pugh [Ala.] 34 So. 377.

26. Forfeiture of lands in a railroad grant inures to the benefit of the United States and not to benefit of a grantee in a later grant; lands within indemnity limits of the Atlantic and Pacific railroad grant did not pass to the Southern Pacific railroad, though within place limits of the grant to the Texas and Pacific railroad, the rights to which vested in the Southern Pacific [Act July 27, 1866 (4 Stat. 292, c. 278), forfeiture act c July 6, 1886 (24 Stat. 123, c. 637), and Ac March 3, 1871 (16 Stat. 573, c. 122)]. Sa Jose L. & W. Co. v. San Jose Ranch Co., 18 U. S. 177, 47 Law. Ed. 765.

27. Or. S. L. R. Co. v. Fisher, 26 Utah, 17 72 Pac. 931.

28. A grant by Congress of a right c way for construction of a railroad is on im plied condition preventing acquisition of an part thereof by an individual or corporatio McLucas v. St. Joseph & G. I. R. Co. [Neb. 97 N. W. 312.

29. The constitution of New Jersey ap propriates lands under water belonging t the state for support of public schools, an a law allowing riparian commissioners t convey these lands to cities is unconstitu tional. Henderson v. Atlantic City, 64 N J. Eq. 583. Texas constitution does not pro hibit the legislature from granting to rail ways a right of way over lands belongin to the state. (School lands). Tex. Cen R. Co. v. Bowman [Tex.] 79 S. W. 295. I Texas, railroad corporations have the righ of way over sections surveyed for and ap propriated to the public school fund. Id.

30. Preemption rights in Louisiana ca only be acquired as to state lands and no lands donated by the state to a state leve board [Act No. 89, 1892 and Act No. 21, 1886 McDade v. Bossier Levee Board, 109 La. 62

31. An award of school lands, void be cause the applicant was not an actual set tler, does not remove the land from sal Briggs v. Key, 30 Tex. Civ. App. 565, 71 S W. 43.

32. Gen. Laws 1879, c. 52, withdrawin from location tracts of land in organize counties, applied to counties subsequentl organized as well as those organized whe the law was enacted. McCaleb v. Recto [Tex. Civ. App.] 78 S. W. 956. Concedin that a county organized in 1880 was no within the provisions of Gen. Laws 1879, c 52, withdrawing from private appropriatio certain lands in organized counties, it wa brought within the provisions of that ac by its re-enactment March 11, 1881. Id. Ge Laws 1879, c. 52, providing for certain land in organized counties to be appropriated an set apart for sale, withdrew the land em braced in the reservation from private ap propriation by a colonist or certificate holde and rendered locations made thereon voi Id.

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that they are in the tract opened for sale by statute.[33] Lands purchased by one who fails to reside thereon are not open to resale until there has been declared a forfeiture.[34] Hence a subsequent purchaser cannot show such forfeiture as against a certificate issued to the first settler.[35] It is against public policy to grant lands in the beds of navigable streams to private persons,[36] and a law for sale of "vacant" lands will not include a river bed which has emerged by an avulsion, unless it clearly means such lands.[37]

School lands in Texas cannot be bought until notice of classification and appraisement has reached the county clerk.[38] Such lands are "detached" and subject to sale when all adjoining lands have been sold but one section for which application is pending.[39] Leased public school lands in Texas cannot be purchased, though the lessee is ineligible as a purchaser,[40] or though there is a void sale to the assignee of the lessee.[41] The register and receiver of the Louisiana land office are judges of the fact whether land sought to be entered was subject to regular tidal overflow.[42]

(§ 2) *C. Who may locate and acquire.*—Officers, clerks and employes in the general land office of the United States cannot purchase public mineral lands.[43] A state corporation is a citizen within Federal laws regulating purchase of public lands excepted from railroad grants.[44]

Purchasers and occupants of other lands may buy additional school lands in Texas,[45] including minors who are actual settlers,[46] if they intend to make the lands their home;[47] but mere occupants are ineligible to purchase.[48] One not an actual settler on Texas school lands cannot purchase them.[49] If such lands are leased,

33. Laws 1900, p. 29, c. 11, § 6. Moore v. Rogan, 96 Tex. 375, 73 S. W. 1.

34. Rev. St. 1895, art. 4218(1); Act April 19, 1901, §§ 3, 9, placing forfeited lands on sale, is not retrospective so as to place on sale lands forfeited under the act of 1895 without a declaration of forfeiture. Bates v. Bratton, 96 Tex. 279, 72 S. W. 157.

35. Rev. St. art. 4218j. Lamkin v. Matsler [Tex. Civ. App.] 73 S. W. 970.

36, 37. A grant of dry land in the channel of the Mississippi, resulting from a sudden change of channel, by the land department of Tennessee as "vacant lands" is void. It is not expressly within the "vacant land act" [Acts 1847, c. 20]. Stockley v. Cissna [C. C. A.] 119 Fed. 812.

38. Corrigan v. Fitzsimmons [Tex. Civ. App.] 76 S. W. 68; Ford v. Brown, 96 Tex. 537, 74 S. W. 535; Thompson v. Gallagher [Tex. Civ. App.] 75 S. W. 567; Anderson v. Walker [Tex. Civ. App.] 70 S. W. 1003; Boswell v. Terrell [Tex.] 78 S. W. 4. Proof of actual settlement is unavailing in the absence of classification and appraisement. In an action to recover school land awarded to another, evidence of classification and appraisement was ruled out. Smithers v. Lowrance [Tex. Civ. App.] 79 S. W. 1088.

39. Hamilton v. Votaw, 31 Tex. Civ. App. 684, 73 S. W. 1091.

40. Pruitt v. Scrivner [Tex. Civ. App.] 77 S. W. 976.

41. An application to purchase lands already sold to an assignee of the lease covering them cannot be granted. If the sale is void, the lease is still in existence and leased land cannot be sold to a third person. Carothers v. Rogan, 96 Tex. 113, 70 S. W. 18.

42. A title derived on such decision will be recognized by the state until canceled for error or fraud [Act No. 197, p. 159, of 1859, which was not repealed by Act No. 267, p. 205, of 1861]. Louisiana Sulphur Min. Co. v. Krause, 110 La. 690.

43. Rev. St. U. S. §§ 452 and 2319, includes mining surveyors of the government and deputy mining surveyors. Lavagnino v. Uhlig, 26 Utah, 1, 71 Pac. 1046.

44. Act Congress, March 3, 1887, § 5 (24 Stat. 557). Ramsay v. Tacoma Land Co., 31 Wash. 351, 71 Pac. 1024.

45. The purchaser of a section of Texas school land classified as grazing land may purchase additional land. Laws 1895, p. 63, c. 47, §§ 3, 5, 8, do not restrict the purchase to purchasers of agricultural sections. Trevey v. Lowrie [Tex. Civ. App.] 78 S. W. 18. An actual occupant must also be a bona fide purchaser to acquire additional school land [Rev. Civ. St. 1897, art. 4218f]. Id. Persons owning and occupying lands other than those bought from the state of Texas may buy lands from the state school lands, regardless of the amount, character, or source of title of their lands [Sayles' Civ. St. 1897, § 4218f, 4218fff]. Roddy v. White [Tex. Civ. App.] 75 S. W. 358.

46. White v. Watson [Tex. Civ. App.] 78 S. W. 237. A sale of Texas state lands to a minor, though formerly void, is validated by statute. Sale in 1898 [Gen. Laws 1899, p. 259, c. 150]. Johnson v. Bibb [Tex. Civ. App.] 75 S. W. 71.

47. Mahoney v. Tubbs [Tex. Civ. App.] 77 S. W. 822.

48. Rev. Civ. St. 1897, art. 4218f. Trevey v. Lowrie [Tex. Civ. App.] 78 S. W. 18.

49. Laws 1895, p. 66. Spence v. Mitchell, 96 Tex. 43, 70 S. W. 73; Witcher v. Wiles [Tex. Civ. App.] 75 S. W. 889; Mann v. Greer [Tex. Civ. App.] 77 S. W. 34; Lewis v. Schar-

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they cannot be sold to other than the lessee without his consent,[50] except to an assignee of the lessee.[51] After the lease has terminated for sixty days, the lessee has a prior right of purchase for thirty days.[52] Transfer of the lease forfeits the lessee's preferential rights to purchase after expiration of the lease.[53] Where a lease is canceled for arrears of rent, and a new lease made to the lessee without payment of arrears, another may purchase regardless of the new lease.[54] The assignee of a lease of land in the absolute lease district cannot purchase during the continuance of the lease.[55] The statutory provision that leased lands be kept on sale for a certain period after expiration of the leases, where improvements to a certain amount are on the land, applies only to the one making the improvements,[56] and entitles him to apply to purchase but not to prevent sale by applying for a new lease.[57] Hence, if contemporaneous applications be made by a stranger to purchase and by the lessee to re-lease, the applicant to purchase is preferred.[58] One's right to purchase detached lands is not affected by the fact that he procured a purchase which caused them to be detached.[59]

§ 3. *Mode of locating and acquiring title. A. Federal. By settlement, entry and claim.*—Generally all the prescribed conditions respecting the mode of competing for, locating, and entering lands must be observed and the statutory mode followed. Accordingly one making a claim before that kind of location was authorized[60] or going into a country[61] before the time set in order to outrun others can gain no rights thereby.

Entry must be in good faith for the entryman's own benefit,[62] and without

bauer [Tex. Civ. App.] 76 S. W. 225; Ford v. Brown [Tex. Civ. App.] 75 S. W. 893; Briggs v. Key, 30 Tex. Civ. App. 565, 71 S. W. 43; Roberson v. Sterrett, 96 Tex. 180, 71 S. W. 385, 73 S. W. 2.

Sufficiency of settlement, see post, § 3B.

50. Smith v. McLain, 96 Tex. 568, 74 S. W. 754; Martin v. Terrell [Tex.] 76 S. W. 743; Moore v. Rogan, 96 Tex. 375, 73 S. W. 1; Tolleson v. Rogan, 96 Tex. 424, 73 S. W. 520; West v. Terrell, 96 Tex. 548, 74 S. W. 903; Valentine v. Sweatt [Tex. Civ. App.] 78 S. W. 385.

51. Fields v. Davis [Tex. Civ. App.] 74 S. W. 52; Mitchell v. Johnson [Tex. Civ. App.] 74 S. W. 48; Walker v. Marchbanks [Tex. Civ. App.] 74 S. W. 929.

52. Valentine v. Sweatt [Tex. Civ. App.] 78 S. W. 385.

53. The privilege of a lessee to purchase in sixty days after expiration of the lease is personal and is lost by transfer of his lease, and is not revived by quitclaim of the assignee to him after expiration of the lease. Adkinson v. Porter [Tex. Civ. App.] 73 S. W. 43.

54. Laws 1895, p. 72, c. 47, § 22. Kitchens v. Terrell, 96 Tex. 527, 74 S. W. 306.

55. Laws providing that a lessee may purchase during continuance do not apply. Mandamus will not lie to compel the land commissioner to approve an application of an assignee of a lease of free school lands to purchase the lands during continuance of the lease, no rent being in arrears [Laws 1901, p. 292, c. 125, §§ 4, 5]. Martin v. Terrell [Tex.] 76 S. W. 743.

56, 57, 58. Act April 19, 1901, § 5 (Laws 1901, p. 295). Taylor v. Rose, 30 Tex. Civ. App. 471, 70 S. W. 1022.

59. Maney v. Eyres [Tex. Civ. App.] 77 S. W. 428.

60. Only those awarded the right to homestead entry after Aug. 6, 1901, could occupy the lands acquired by treaty in Oklahoma from the Comanches, Kiowas, and Apaches, to discover oils or make mineral locations before Oct. 5, 1901. 31 Stat. 680, 1093, and president's proclamation opening such lands to settlement. Bay v. Okla. S. G., O. & Min. Co. [Okl.] 73 Pac. 936. A placer mining claim, located on Aug. 8, 1901, on lands acquired by treaty with the Comanches, Kiowas and Apaches in Oklahoma, is in violation of law and ineffective as against a homestead entryman. Id.

61. The president's proclamation opening a 100 foot strip for occupancy by prospective settlers, on the land ceded by the Cherokee nation, before the opening of the tract for settlement referred to 100 feet within the exterior boundary of the Cherokee lands [Proc. Aug. 19, 1893; Act 1893 (27 Stat. 640, 643, c. 209)]. Winsbrenner v. Forney, 189 U. S. 148, 47 Law. Ed. 754. One who entered the Osage reservation before noon, Sept. 16, 1893, and ran for lands in the Cherokee outlet opened that day, is not disqualified from homestead entry therein. McClung v. Penny [Okl.] 70 Pac. 404. One without territory in Oklahoma opened for settlement by acts of March 1 and 2, 1889, and the proclamation of March 23, 1889, is not disqualified to compete for the land because within the prohibited period he was within the territory; it was not shown that he acquired any manifest advantage over competitors. Potter v. Hall, 189 U. S. 292, 47 Law. Ed. 817.

62. Bass v. Smith [Okl.] 71 Pac. 628. That a lumber company lent money without security to enable persons to enter and pay for land under the stone and timber act, expecting to buy the timber on title being given the entrymen, will not make entries

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notice of prior rights,[63] but a contract made after final proof will not defeat the entry.[64] An entry for a particular purpose is not efficient to acquire any rights not incident to it but open to claim of a different sort.[65] Only mineral lands or those on which minerals are "discovered" can be located as mining claims.[66]

The "actual occupation" by a homesteader means residence on the land,[67] at a time when it was not segregated from the public domain by some other entry.[68] It must be followed by a seasonable entry of the claim,[69] but delay due to the fact that no survey was made has been excused.[70] Transfer of possessory right to lands segregated from the public domain by an Indian citizen to a United States citizen is not abandonment rendering lands public domain open to possession by another Indian.[71]

Application for a soldier's additional homestead is not under homestead laws, but the grant is in nature of a bounty.[72] Local land officers cannot determine sufficiency of an application for vacant lands in lieu of lands relinquished in a forest reservation.[73] A notary public may take affidavits on application for a soldier's additional homestead.[74] It is within the power of the secretary of the interior to deny an application to make a homestead entry made by a person who has no equities in the land when injustice would be done to an allottee under an Indian allotment erroneously made.[75] A valid homestead entry of agricultural lands may be divested at any time before final proof, payment and receipt, by a showing that the land is more valuable for minerals than agriculture.[76]

Commutative rights.—The fourteen months before which a homestead can be commuted is reckoned from entry not from a settlement on which a conflicting

void for fraud where there was no agreement for sale prior to the entries; nor are the entries void as made on "speculation," the entrymen intending to sell the timber for their own benefit. U. S. v. Detroit T. & L. Co., 124 Fed. 393.

63. Sufficiency of notice of prior rights of an assignee of a land warrant issued to a Mexican war officer under Act Congress, Feb. 11, 1847 (9 Stat. 125, c. 8) to charge a subsequent entryman where the register had failed to return the warrant to the general land office. Johnson v. Fluetsch, 176 Mo. 452, 75 S. W. 1005.

64. Doll v. Stewart, 30 Colo. 320, 70 Pac. 326.

65. Townsite entry will not pass subsequently discovered mineral rights [Rev. St. U. S. § 2392]. Callahan v. James, 141 Cal. 291, 74 Pac. 853.

66. Mere surface indications of mineral oil do not amount to discovery sufficient for a location. Bay v. Okl. S. G., O. & Min. Co. [Okl.] 73 Pac. 936. See full treatment in Mines and Minerals, 2 Curr. Law, p. 893.

67. Act March 2, 1889 (25 Stat. 1008). One merely going on land and partly constructing a building with intention to acquire title but who remained a resident and voter elsewhere is not an actual occupant. Edwards v. Begole [C. C. A.] 121 Fed. 1. A residence to vote elsewhere than in the precinct of the land will preclude residence on the land for homestead purposes. Small v. Rakestraw, 28 Mont. 413, 72 Pac. 746.

68. Land was covered by the allotment entry of another. Baldwin v. Keith [Okl.] 75 Pac. 1124.

69. Mere occupation and cultivation of land without entry at the local land office within three months will not show homestead rights as against rights of a railroad company to indemnity lands under its grant. Sjoli v. Dreschel [Minn.] 95 N. W. 763.

70. Continuous occupation of public land, with bona fide intention to acquire it under homestead laws, as soon as surveyed, is a "claim" on the land within the Northern Pacific Land grant where begun before definite location of the road, and the occupier may perfect his title under the homestead laws as soon as the land is surveyed [Act Congress, July 2, 1864, c. 217, § 3 (13 Stat. 365); Act Congress, May 14, 1880, c. 89, § 3 (21 Stat. 140)]. Nelson v. Northern Pac. R. Co., 188 U. S. 108, 47 Law. Ed. 406.

71. The transferee receives sufficient title to maintain ejectment against another Indian citizen claiming to take it as such because of his Indian citizenship. Williams v. Works [Ind. T.] 76 S. W. 246.

72. Rev. St. § 2306. U. S. v. Lair, 118 Fed. 98.

73. The selector gets no equitable title because of their acceptance of his relinquishment and new selection [Act June 4, 1897 (30 Stat. 36, c. 2)]. Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 47 Law. Ed. 1064; Pac. L. & I. Co. v. Elwood Oil Co., 190 U. S. 316, 47 Law. Ed. 1073.

74. Act July 1, 1890 (26 Stat. 209). U. S. v. Lair, 118 Fed. 98.

75. Baldwin v. Keith [Okl.] 75 Pac. 1124.

76. Bay v. Okl. S. G., O. & Min. Co. [Okl.] 73 Pac. 936. A contestant for a mining claim or location is not entitled to joint or adverse possession as against a homestead entryman, though a valid prior mining settlement will give right of possession as against him. Id.

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entry was canceled,[77] hence, one whose time for entry after successful contest was not ripe will have only a preference.[78]

Sale of town lots.—Under the Federal law authorizing sale of townsite lots according to the laws of the state or territory to be prescribed, a judge proceeding to sell unsurveyed lands must strictly follow the mode found in the state statute.[79]

Under land grants.—Formal conveyance was unnecessary to title in lands granted in praesenti to the state,[80] but the lands must first have been legally determined to be of the class granted, e. g., swamp lands.[81] A determination so made is not rebuttable by parol.[82] Where the lands granted can be identified only by the line of a road, it must be definitely located before they will vest.[83] The selection of lands is governed by general law except in such cases as a special law covers.[84] A selection regularly made is effective despite the disapproval of land officers illegally made,[85] and an approval by an unauthorized officer is good when ratified by congress.[86] Selection of lands, under the Federal swamp land grants, by the state and approval by the Federal land department, will vest title in the levee board on

77, 78. Commutation under Rev. St. U. S. § 2301, as amended by Act June 9, 1880, c. 164 (21 Stat. 169). McCord v. Hill, 117 Wis. 306, 94 N. W. 65.

79. A district judge in Montana has no jurisdiction to sell an unsurveyed part of a townsite to one not claiming as an occupant when the site was entered, before survey and platting of the lands and the laying out of streets. Act Congress, March 2, 1867 (14 Stat. 541) and Act July 1, 1870 (16 Stat. 183) construed with Comp. St. 1871-72, p. 546 and Pol. Code Mont. § 5117, requiring such conditions precedent. State v. Webster, 28 Mont. 104, 72 Pac. 295.

80. The congressional grant of swamp lands to the various states was in praesenti [Act Congress Sept. 28, 1850, 9 Stat. 519]. Simpson v. Stoddard County, 173 Mo. 421, 73 S. W. 700.

Construction of Federal letters patent to the state of Indiana under the swamp land act, Sept. 28, 1850, c. 84 (9 Stat. 520). Kean v. Calumet C. & I. Co., 190 U. S. 452, 47 Law. Ed. 1134.

81. Or a state obtained no title to land, under the swamp land grant of 1850. Carr v. Moore, 119 Iowa, 152, 93 N. W. 52. A purchaser of overflowed lands granted to Arkansas takes subject to confirmation by the secretary of the interior of the selection of such lands made by the state. Williamson & Bro. v. Baugh [Ark.] 76 S. W. 423. The swamp land acts of Congress, 1849 and 1850, were not intended to operate against the will of the state, and the state having failed to select and the secretary of the interior having failed to approve certain lands as falling within the terms of those statutes, and such lands having been certified to, and accepted by, the state under act of Congress (11 Stat. 18), granting lands in aid of railroads, the title acquired by the railroads cannot be defeated by an individual claiming to have purchased the lands as swamp lands and whose title has been annulled at the suit of the state. Vicksburg, S. & P. R. Co. v. Tibbs [La.] 36 So. 223.

82. The decision of the secretary of the interior as to character of land under the grant of swamp and overflowed land to a state cannot be defeated by parol evidence. Act Congress, Sept. 28, 1850, c. 84 (9 Stat. 519). Contest between claimant under the state and homestead claimant. Williamson & Bro. v. Baugh [Ark.] 76 S. W. 423.

83. The alternate odd numbered sections within the exterior limits of the general route of the Northern Pacific Railway were not vested in the company by filing a map of the general route and a withdrawal order thereon so as not to be open to bona fide homestead settlers before definite location of the road under Northern Pac. grant; Act July 2, 1864, c. 217 (13 Stat. 365) § 6 and § 3. Nelson v. Northern Pac. R. Co., 188 U. S. 108, 47 Law. Ed. 406.

84. Provisions by Federal statutes for selection of public land in lieu of school sections applied to Washington territory as to any other territory in cases not provided for by special provisions of Act March 2, 1853 [Act Feb. 26, 1859 (11 Stat. 385, c. 58), and Act March 2, 1853 (10 Stat. 179, c. 90, § 20), R. S. § 1947]. Johanson v. Wash., 190 U. S. 179, 47 Law. Ed. 1008.

85. Illegal action of the land officers in rejecting indemnity selections of a railroad company under its grant will not affect the rights to such lands where the company had done all required by law to perfect its title. Sjoli v. Dreschel [Minn.] 95 N. W. 763. Hence a prior settlement on which application was not timely filed avails nothing against such selection. Id.

86. Past approval, as well as future, of selection of public lands in lieu of school sections by the secretary of the interior was covered by the act of Dec. 18, 1902 (32 Stat. 756, c. 5), confirming title of state of Washington to lands thus selected. The secretary of the treasury was not designated as the officer to select public lands in lieu of school sections under the act of Feb. 26, 1859; his approval, however, of a selection by a territorial agent of Washington is conclusive on the transfer of title, unless some direction of congress manifestly has been violated (Act Feb. 26, 1859 and Act May 20, 1826 [4 Stat. 179, c. 83], construed with Act March 3, 1849 [9 Stat. 395, c. 108]); the provisions and the transfer of supervising power to him simply describe the general mode of procedure. Johanson v. Wash., 190 U. S. 179, 47 Law. Ed. 1008.

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conveyance to it by the state.[87] Mere clerical misdescriptions in proceedings to select and acquire lands may be disregarded.[88] The grant of 1849 carried title to shallow lakes and overflowed swamps, though not surveyed.[89]

Patents or certificates.—When there is a grant in the terms of an act, no patent is necessary, but only such survey or description as will identify the land.[90] A patent to land is presumed to be valid and to pass the legal title,[91] hence mining locators after entry of a townsite and issuance of a patent cannot attack the patent collaterally.[92]

Defective titles and confirmation thereof.—A bona fide purchaser from a railroad grantee,[93] if without notice that the lands were excepted from its grant,[94] may claim a preferential right to purchase the land where the grantee is unable to make title, but not as against a location or claim prior to his purchase.[95] If an entry is relinquished because of contest, a stranger cannot enter and thus defeat the contestant's preference.[96]

Settlement must have been made at a time when land is public and open to settlement or it will not be cured.[97] An exception from a reservation of lands "settled" pursuant to law covers lands occupied and improved in good faith awaiting a survey when entry could be made[98] and an unauthorized or improper withdrawal from

87. Grants of 1849 (9 Stat. 352, c. 87) and 1850 (9 Stat. 519, c. 84). McDade v. Bossier Levee Board, 109 La. 625.

88. A statement in an adjustment list of a grant of lands in aid of a railroad, showing a grant to the "C. & T." company (shown not to be in existence) will be regarded as a clerical misstatement by which the "T. & C." railroad company was meant. Galloway v. Doe, 136 Ala. 315.

89. Beds of shallow lakes on state lands are lands under the Louisiana statute (Act No. 247 of 1855); permanently overflowed swamps or shallow lakes destined to become dry are land under and passed by the swamp land grants of 1849 to the states (9 Stat. 352, c. 87). Failure of a survey to traverse a water covered area in the tract or in computation of its acreage will not prevent the selection by the state or approval by the general government. McDade v. Bossier Levee Board, 109 La. 625. Act of Congress, 1849, c. 87 (9 Stat. 352) and Act 1850, c. 84 (9 Stat. 519), granting a subdivision of land to the state carried with it all land in the subdivision whether dry or overflowed. Hall v. Board of Com'rs, 111 La. 913.

90. Act of Congress, March 3, 1845, c. 48 (5 Stat. 742) is in the nature of a compact between the state and the United States and when, by survey, a sixteenth section is ascertained to exist in any township, the grant immediately attaches thereto, without a patent. State v. Jennings [Fla.] 35 So. 986. A survey and acts of the surveyor general showing the existence of fractional section 16 and its acreage were sufficient to cause a grant to attach to said fractional section as school land. Id.

91. On introduction by defendant, plaintiff must show its invalidity or that proceedings under which it issued were void. Hooper v. Young, 140 Cal. 274, 74 Pac. 140.

92. Rev. St. U. S. 2392, preventing acquisition of mines or valid mining claims under the townsite law. Board of Education v. Mansfield [S. D.] 95 N. W. 286.

93. Where land in a section granted to a railroad company and afterward excepted because of prior preemption, which was abandoned before the grant, was sold by the company to a bona fide purchaser, the latter acquired a prior right to purchase from the United States [Act Cong. March 3, 1887 (24 Stat. 557) § 5]. Ramsay v. Tacoma Land Co., 31 Wash. 351, 71 Pac. 1024.

94. A person seeking to bring settlers on lands excepted from a railroad grant is entitled to preferential right of purchase given by statute to bona fide purchasers from the company, where he had a written agreement with the company giving him right to purchase indemnity lands of the company for himself and others when the company has acquired title, but the preference will not cover a subsequent settlement on such lands with knowledge that they were withdrawn from entry and reserved to supply deficiencies within place limits of the company [Act March 3, 1887 (24 Stat. 556, c. 376)]. Gertgens v. O'Connor, 191 U. S. 237.

95. Entry of public land and construction of a pipe line under claim of a water right will give vested ditch and water rights against later purchasers from a railroad company claiming right of purchase from the government given by act of Congress to purchasers of forfeited railway lands [Act July 26, 1866 (14 Stat. 251, c. 262), construed with Act March 3, 1887 (24 Stat. 556, c. 376)]. San Jose L. & W. Co. v. San Jose Ranch Co., 189 U. S. 177, 47 Law. Ed. 765.

96. Where, after entry, a homesteader relinquishes his filing because of a contest by another, the preference right of the latter is not defeated by adverse settlement of a third person after entry of the homesteader. Hodges v. Colcord [Okl.] 70 Pac. 383.

97. Lands are not "public," the title to which is vested in the state for a railroad grant though the grant is afterwards forfeited under its terms [Act May 14, 1880, § 3 (21 Stat. 141)]. Edwards v. Begole [C. C. A.] 121 Fed. 1.

98. Occupancy by a settler intending to make it his home and to enter it under preemption or homestead laws when sur-

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entry will not defeat the right to perfect the claim.[99] The right may be lost by abandonment before residence is complete.[1] One entitled under the statute to confirmation of title, he having by mistake but without fraud proved too soon, does not lose it by subsequent fraud in supplemental proofs.[2] The fact that a provision is made to protect bona fide grantees of a patentee will not import a confirmation of an erroneous patent.[3] A curative act may prevent any inquiry into fraud in the original entry or proofs.[4]

Cancellations and forfeitures.—The United States may sue to cancel grants to states, the purpose having failed,[5] or patents to individuals for fraud,[6] if the fraud is sufficient,[7] or where issued to the wrong claimant,[8] unless rights of third persons will be affected,[9] or after great lapse of time.[10] The suit cannot be instituted for benefit of third persons.[11] Federal lands erroneously patented to a railroad company or their value may be recovered,[12] and subsequent grantees have no greater rights than the original one,[13] unless protected as a bona fide purchaser.[14] The

veyed gives him a possessory claim, entitling to preference when the land is open for entry. Holmes v. U. S. [C. C. A.] 118 Fed. 995.

99. Holmes v. U. S. [C. C. A.] 118 Fed. 995.

1. The act of Congress, July 26, 1894, gave no right to perfect claims under the Oregon donation act, Sept. 27, 1850, as to lands abandoned before completion of requisite residence [28 Stat. 122, c. 163, construed with 9 Stat. 496, c. 76]. Or. & C. R. Co. v. U. S., 190 U. S. 186, 47 Law. Ed. 1012.

2. Act Cong. June 3, 1896, c. 312 (29 Stat. 197). The certificate must not have been canceled or the land re-entered. McCord v. Hill, 117 Wis. 306, 94 N. W. 65.

3. The law of March 2, 1896, amending prior acts respecting suits to recover lands erroneously patented under railroad grants, confirming title of bona fide purchasers from the grantee, but compelling payment by the purchaser or the company, does not confirm the title of the company or increase its rights. U. S. v. Southern Pac. R. Co., 117 Fed. 544.

4. Though local land officers in Wisconsin did not pass on an entry of public lands as to original proofs but refused the claim for fraud in supplemental proofs, which decision was never reversed, and afterward the entryman was declared entitled to a patent under a special act, the validity of the patent cannot be contested by another claimant for bad faith in the original proofs [Act Cong. June 3, 1896, c. 312 (29 Stat. 197)]. McCord v. Hill, 117 Wis. 306, 94 N. W. 65.

5. Where the special purpose for which a state granted lands was defeated, it may have the patents canceled and recover the land. Grant by Texas for school purposes defeated by decision of U. S. supreme court that the county receiving the land was a part of Oklahoma. Greer County v. State, 31 Tex. Civ. App. 223, 72 S. W. 104.

6. The United States may sue in equity to cancel a patent to public lands for fraud in representations or conduct of the patentee, in the substitution of another for the patentee, or in securing lands not subject to patent. Lynch v. U. S. [Okl.] 73 Pac. 1095.

7. A mere suspicion of fraud of patentees will not suffice to set aside a patent of Federal lands. U. S. v. Clark, 125 Fed. 774.

8. Where a patent is issued to land to which an individual had a prior homestead right, the United States is entitled to sue to cancel the patent because of its obligation to convey to the rightful claimant, though the suit involves no public right or interest. U. S. v. Chicago, M. & St. P. R. Co. [C. C. A.] 116 Fed. 969.

9. The United States cannot sue to cancel a patent to public lands for fraud where the land has been platted as a townsite and is sold and occupied by many innocent holders whose rights will be materially affected. Lynch v. U. S. [Okl.] 73 Pac. 1095.

10. Patents to government lands will not be canceled after great lapse of time and death of many patentees, except on clear and full proof of all facts regarding the preemptions. Evidence by witness, old and ignorant, and uncertain in memory, improvement of land by patentees. U. S. v. Stinson [C. C. A.] 125 Fed. 907. Thirty years' delay is laches preventing suit to cancel a patent to United States lands. U. S. v. Chicago, M. & St. P. R. Co. [C. C. A.] 116 Fed. 969.

11. The United States cannot sue in equity to set aside a patent to lands for bribery or perjury, where no Federal injury or benefit appears, or solely for benefit of third persons. Lynch v. U. S. [Okl.] 73 Pac. 1095.

12. The United States may sue in equity to set aside patents erroneously issued to a railroad company for lands under a grant and determine the rights of alleged bona fide purchasers, and require an accounting by the company for lands sold [Acts March 3, 1887; Feb. 12, 1896, and March 2, 1896 (24 Stat. 556; 29 Stat. 6; Id. 42)]. U. S. v. Southern Pac. R. Co., 117 Fed. 544. That an error in issuing patents to a railroad company was made by the land department is no legal or equitable defense to a suit by the United States to recover the lands or their value where sold, especially where the company obtained all lands it was granted. Id.

13. Mortgagees of the Southern Pacific railroad have no better rights than the company in land erroneously patented or certified under its grant. U. S. v. Southern Pac. R. Co., 117 Fed. 544.

14. The land department may hold one an innocent purchaser from a railroad company of land within its grant, though it failed to complete its grant, where no one was in possession when he purchased [Act Cong. March 3, 1887 (24 Stat. 556)]. Brett v. Meisterling, 117 Fed. 768.

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government may fix the measure of recovery at the lowest regular price[15] and thereby waive recovery of the full amount received.[16] A suit under the statute to recover the minimum government price of land erroneously patented to a railroad company under a grant may be brought where the proof shows a basis for one, though the bona fide purchaser has not presented his claim to the department.[17] Every person interested in land included in a patent is an indispensable party to a suit to cancel it,[18] unless the rights of many are identical.[19] Cancellation of a timber entry certificate will not conclude a transferee without notice or hearing as to original validity of the entry.[20] A petition to annul a patent for fraud must be sufficient as a bill in equity.[21] One alleging fraud in a suit to cancel a patent to Federal lands must prove it.[22]

Laches and estoppel to claim rights.—Laches cannot be charged against a claimant to lands for delay during an attempt to obtain an adjustment by the land department.[23] A claimant to public land excepted generally from an order of the general land commissioner confirming a claim to another is guilty of laches for not moving for 30 years.[24] Where the unsuccessful claimant to public lands before the interior department, for a consideration, agreed in writing with the grantee of the successful entryman to make no further claim, he was estopped to claim title under a previous settlement because of bad faith and fraud in possession and proofs of the entryman.[25] Acquiescence in an adverse ruling by the land department and filing a new application to enter the land as public land because the prior entry was invalid is an abandonment of the original claim so that suit cannot be brought thereon.[26]

Contests and lis pendens.—Personal notice on parties known to be interested and publication have been held sufficient to affect a purchaser pending proceedings.[27]

Repayment of purchase price on cancellation.—A mortgagee who has foreclosed and bought in is an "assign" of the entryman and entitled to recover purchase price under the Federal statute.[28] In such a case surrender of the duplicate receipt will be presumed from land department findings importing a relinquishment of claim in regular form.[29]

Jurisdiction of land officers and courts.—The Federal land department or officers generally have power to determine rights in lands and their decisions are binding on state or Federal courts,[30] unless title has passed from the United States,

15, 16. A law requiring a railroad company receiving land under patents erroneously issued, and selling it to bona fide purchasers to pay the minimum government price if it has received as much, is valid and waives the right of the government to recover full price [Act March 2, 1896]. U. S. v. Southern Pac. R. Co., 117 Fed. 544.

17. U. S. v. Or. & C. R. Co., 122 Fed. 541.

18. Lynch v. U. S. [Okl.] 73 Pac. 1095.

19. All of a large number of purchasers of land from a railroad company, occupying the same position, need not be made parties to a suit by the United States to determine rights as to land erroneously patented under a grant to the company. U. S. v. Southern Pac. R. Co., 117 Fed. 544.

20. Timber act June 3, 1878 (20 Stat. 89, c. 151). Thayer v. Spratt, 189 U. S. 346, 47 Law. Ed. 845.

21. Oklahoma Code. Lynch v. U. S. [Okl.] 73 Pac. 1095.

22. U. S. v. Detroit T. & L. Co., 124 Fed. 393.

23. Hodge v. Palms [C. C. A.] 117 Fed. 396.

24. Male v. Chapman [Mich.] 96 N. W. 582.

25. McCord v. Hill, 117 Wis. 306, 94 N. W. 65.

26. Edwards v. Begole [C. C. A.] 121 Fed. 1.

27. Male v. Chapman [Mich.] 96 N. W. 582.

28. U. S. v. Com. T. I. & T. Co., 193 U. S. 651.

29. Finding that the secretary of the interior ordered repayment and that claims to the land had been relinquished. U. S. v. Com. T. I. & T. Co., 193 U. S. 651.

30. The extent of investigation by the secretary of the interior, his knowledge of points involved and his methods of determination in contest proceedings, will not be reviewed. De Cambra v. Rogers, 189 U. S. 119, 47 Law. Ed. 734. Courts cannot determine controversies between claimants to public lands before patent issued. Northern Lumber Co. v. O'Brien, 124 Fed. 819. The department has full jurisdiction of patent rights under act June 4, 1897 (30 Stat. 36, c. 2), as to public lands in lieu of lands relinquished in

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when the courts take jurisdiction,[31] however, the authorities seem to differ as to review by the courts of questions of fact decided by the land department.[32] Decisions of the Federal land department may be reviewed in equity for fraud, mistake or other equitable grounds,[33] but should not be overruled unless clearly erroneous, even though not binding on the courts.[34] State courts may determine the right to possession before patent issued in so far as will not impinge on the question of title.[35] Pending contest or proceedings, courts may interfere to preserve the property by injunction.[36] The Federal circuit courts have full authority to determine all questions in a suit by a claimant to an allotment given by statute to persons of Indian blood.[37] Where, in a suit for realty, plaintiff's title depends on interpretation of an exception of mineral lands in a railroad grant by the United States, the Federal circuit court has jurisdiction regardless of citizenship.[38]

(§ 3) *B. State. Survey.*—In order to segregate and identify lands, there

a forest reservation. Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 47 Law. Ed. 1064; Pac. L. & I. Co. v. Elwood Oil Co., 190 U. S. 316, 47 Law. Ed. 1073. A determination by the land department in a homestead contest as to the date of actual occupancy of one of the parties is of fact binding on the courts. Edwards v. Begole [C. C. A.] 121 Fed. 1. The decision of the land department allowing an entry on homestead lands is conclusive on the courts and gives title to the land and all growing thereon, even as to crops sowed by another claimant. Reservation State Bank v. Holst [S. D.] 95 N. W. 931. Definition of limits of a railroad grant by the land department is final as between claimants of land within the limits. Brett v. Meisterling, 117 Fed. 768. A general exception in a confirmation of a claim for land by the commissioner of the general land office, construed with the statute, will not leave the claim open to contest in the courts [Act Cong. Sept. 26, 1850, c. 69 (9 Stat. 469), providing for settlement of land at Sault St. Marie]. Male v. Chapman [Mich.] 96 N. W. 582. The courts will not review decisions of the interior department as to validity of homestead residence. Small v. Rakestraw, 28 Mont. 413, 72 Pac. 746. State courts cannot compel conveyance of lands subject to homestead under Federal laws to one denied the right of such entry by the Federal land department. McDonald v. Union Pac. R. Co. [Neb.] 97 N. W. 440. Courts of Nebraska cannot determine validity of homestead entries allowed by officers of the Federal land department. Tiernan v. Miller [Neb.] 96 N. W. 661.

31. State courts may determine a contest for Federal lands after title has passed from the United States. Johnson v. Fluetsch, 176 Mo. 452, 75 S. W. 1005.

32. The decision of the Land department that one who was in Oklahoma territory during the prohibited period before opening for settlement had acquired no advantage over others competing for the land is one of fact not reviewable by the courts. Land opened by acts March 1 & 2, 1889, and President's proclamation of March 23, 1889. Potter v. Hall, 189 U. S. 292, 47 Law. Ed. 817. Findings of fact by the secretary of the interior in a land contest are conclusive on the courts in absence of the record or a copy showing the facts; where the court can say the findings are reasonably supported by evidence on the hearing and the facts uphold the conclusions of law, a resulting trust will not be declared in favor of the losing party. Forney v. Dow [Okl.] 73 Pac. 1101. Findings of fact by the Land department conclude the courts as the verdict of a jury, and the only question on review is as to the presence of any evidence to support the findings. Jordan v. Smith [Okl.] 73 Pac. 308. Findings of fact by the commissioner of the general land office, approved by the secretary of the interior, are mere conclusions of law subject to revision by the courts. Buffalo L. & E. Co. v. Strong [Minn.] 97 N. W. 575. Local land officers in Wisconsin may decide as to good faith of entry, length of residence, and proofs, in contest between claimants to Federal public lands, subject to appeal or other review. McCord v. Hill, 117 Wis. 306, 94 N. W. 65.

33. Estes v. Timmons [Okl.] 73 Pac. 303.

34. Lavagnino v. Uhlig, 26 Utah, 1, 71 Pac. 1046.

35. The supreme court of Wyoming in a land contest between one claiming as entryman and a claimant under a Federal certificate of purchase may determine the right to possession, but not the title, no patent having issued from the U. S. land office [R. S. § 4104]. The land department cannot be controlled by the courts in issuance of patents. Laramie Nat. Bank v. Steinhoff [Wyo.] 71 Pac. 992.

36. The possession of parties of public land will be protected pending a contest of preemption entries before the land department. Reservation State Bank v. Holst [S. D.] 95 N. W. 931. Removal of timber from public lands will be restrained pending determination of conflicting claims before the land department, though the court cannot determine such claims, no patent having issued. Northern Lumber Co. v. O'Brien, 124 Fed. 819. Until the character of public agricultural lands, alleged to be mineral as against homestead entry, is settled by the land department, the courts will protect possession by legal occupants by restraining continued trespass. Bay v. Okl. S. G., O. & Min. Co. [Okl.] 73 Pac. 936.

37. Act Aug. 15, 1894 (28 Stat. 305) amended by Act Feb. 6, 1901 (31 Stat. 760). Sloan v. U. S., 118 Fed. 283.

38. Northern Pac. land grant act, July 2, 1864 (13 Stat. 365, c. 217). Northern Pac. R. Co. v. Soderberg, 188 U. S. 526, 47 Law. Ed. 575.

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must be a survey[39] or its equivalent, made by the proper authority,[40] and approved, accepted or returned as the statute requires.[41] The want of a return may be cured by a resurvey,[42] which may also annul the original one if the patent follows the new one.[43] A regularly issued patent to Texas lands is valid, though the survey was made by a surveyor outside his regular district.[44]

Classification and appraisement.—A railroad is not an "improvement" under the Washington statute which necessitates an appraisement.[45] When lands are forfeited back into the state domain, the statutory procedure e. g. advertisement, must be had anew.[46] A new classification and appraisement are not within provisions for a "revised list" of lands.[47] There is no presumption from the fact of a sale or award that the requisite classification and appraisement were made.[48]

An actual settlement is essential to an applicant for Texas school lands not detached,[49] or to buy additional land[50] which settlement is good if the settler's wife makes it pending his arrival.[51] Settlement is of no avail if no survey has ever been

39. An applicant for Texas state lands is bound to see that the proper survey is made and filed as against third persons. Robles v. Cooksey [Tex. Civ. App.] 70 S. W. 584.

40. The district surveyor of one county cannot survey state lands in another county attached to another land district. Houston & T. C. R. Co. v. De Berry [Tex. Civ. App.] 78 S. W. 736. Locations of land certificates by the land surveyor of Jack and Hardeman counties appointed in 1871, and of Hardeman county appointed in 1872, are void for want of authority in the appointment [Act 1866, and Act May 25, 1871, construed]. Olcott v. Smith, 30 Tex. Civ. App. 350, 70 S. W. 343.

41. An entry on school lands by an applicant who had caused a survey to be made before approval of the notes or classification of the land by the commissioner is a trespass against a lessor from the commissioner of the general land office [Act 1900, as amended by Act April 15, 1901, § 6]. Adair v. Hays, 31 Tex. Civ. App. 446, 72 S. W. 256. A survey of the lands need not be marked "accepted" in Pennsylvania. Lehigh Val. Coal Co. v. Beaver Lumber Co., 203 Pa. 544. Survey of state lands made in 1846 under a bounty certificate, valid, though certificate was not actually filed in the surveyor's office [Pasch. Dig. art. 4573]. Houston & T. C. R. Co. v. De Berry [Tex. Civ. App.] 78 S. W. 736.

42. Though no return was made of a survey under which commonwealth lands were warranted in Pennsylvania, the title remains good on a resurvey confirming the first survey, no rights of third parties having intervened. Reilly v. Mountain Coal Co., 204 Pa. 270.

43. Annuls title to land omitted from second survey, though such was not his intention. Montgomery County v. Angier [Tex. Civ. App.] 74 S. W. 957.

44. It will prevail against one claiming under an alleged prior conflicting patent uncertain in description. Witherspoon v. Olcott [C. C. A.] 119 Fed. 175.

45. Laws 1897, p. 231, c. 89, § 5. The railroad does not pass to the purchaser, but the carrier may proceed to condemn a right of way. Lake Whatcom Logging Co. v. Callvert, 33 Wash. 126, 73 Pac. 1128.

46. Rev. St. 1895, art. 4218g. Boswell v. Terrell [Tex.] 78 S. W. 4.

47. Gen. Laws 1901, p. 292. Briggs v. Key, 30 Tex. Civ. App. 565, 71 S. W. 43.

48. That land officers sell school lands will not raise a presumption that they have been classified and appraised. Corrigan v. Fitzsimmons [Tex. Civ. App.] 76 S. W. 68; Thompson v. Gallagher [Tex. Civ. App.] 75 S. W. 567. That the commissioner awarded school land to an applicant raises no presumption of classification; the presumption of official regularity will not apply to sale of state lands by agents or officers. Anderson v. Walker [Tex. Civ. App.] 70 S. W. 1003. Evidence that school land was classified at one time does not show that such was true four months prior thereto. Id.

49. A virtual or constructive settlement will not support an award of public free school land in Texas. Lewis v. Scharbauer [Tex. Civ. App.] 76 S. W. 225. The purchaser of land not detached must actually settle upon it [Gen. Laws 26 Leg. pp. 32, 33, and Gen. Laws 27 Leg. p. 254]. Witcher v. Wiles [Tex. Civ. App.] 75 S. W. 889.

Evidence: Sufficiency of evidence to show that a purchaser of Texas school lands was an actual settler in good faith for purpose of a home under Sayles' Ann. Civ. St. 1897, art. 4218f. Mann v. Greer [Tex. Civ. App.] 77 S. W. 34. Long continued use and retention of his existing home by an applicant for school lands is strong evidence, though not conclusive that he did not intend to make the latter his home. Anderson v. Walker [Tex. Civ. App.] 70 S. W. 1003. An offer by a settler to sell free public school land awarded to him, and his statements that he could not afford to live on it, that he had all the land in the county he wanted, and that he never intended to live there again, may be shown on the issue of his settlement in good faith. Lewis v. Scharbauer [Tex. Civ. App.] 76 S. W. 225.

Instructions on conflicting evidence as to abandonment of settlement by one awarded free public school lands in Texas. Lewis v. Scharbauer [Tex. Civ. App.] 76 S. W. 225.

50. To claim the right to buy additional lands, an actual settler on Texas school lands must intend to make it his home. Mahoney v. Tubbs [Tex. Civ. App.] 77 S. W. 822.

51. There was a settlement of surveyed school lands by both husband and wife where he sent her out with an outfit for settlement, though he remained behind to

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made to bring the lands on the market.[52] Possession begun by a trespass suffices if it continues and becomes rightful before application.[53] Actual settlement will not be prejudiced by the fact that the house occupied was in reality across the line,[54] or that the settler had no supply of provisions.[55] Under a Utah statute, giving a pre-emptive right to persons who had "occupied," actual residence was held not necessary.[56] Lease by one who had given a bond reciting sale of Texas school lands and binding the purchaser to make title after acceptance of three years' occupancy is not an abandonment of the land by him where he reserved use of the land and continued to reside thereon.[57]

Application cannot be made until the statutory classification, appraisement and notice have been made,[58] and the land is on the market,[59] but a premature application may be sustained where settlement was made before filing,[60] or where lands came into market before the application could be acted on.[61]

It is immaterial that the affidavit was made shortly before the land became open to purchase,[62] or that a mistake was made in the price.[63]

One may apply at either of two places where the land is subject to entry.[64]

Simultaneous delivery of numerous applications and the proper fees is a filing of all of them at that time, though the filing marks were not immediately added.[65] The filing will not be compelled as of a date when the application was delivered

make and file his application, intending then to join her. Willingham v. Floyd [Tex. Civ. App.] 73 S. W. 831.

52. That one was an actual settler prior to the time land was appropriated to the school fund cannot avail him where a statute provides that surveys must have been made before such time. Homestead applicant for Texas school lands claiming benefits of Laws 1899, p. 123, c. 81, and Laws 1900, p. 29, c. 11. Burkhead v. Bush [Tex. Civ. App.] 75 S. W. 67.

53. Entry on a Texas home section before expiration of a lease by an applicant to purchase additional school lands, though amounting to trespass, will not avoid the sale where the lease had expired at time of application and he was in rightful possession. McGee v. Corbin, 96 Tex. 35, 70 S. W. 79.

54. Evidence conflicting as to the location of the house. Settler in good faith believed it on the land located. Prier v. Bates [Tex. Civ. App.] 74 S. W. 608.

55. Entering on land with a quilt and an extra pair of pants but no provisions is an actual settlement. Price v. Bates [Tex. Civ. App.] 74 S. W. 608.

56. Under Utah statute providing that settlers who had occupied land granted to the state for school purposes should have a preference right to purchase the same, it is not necessary that a person should actually reside on the land. Twiggs v. State Board of Land Com'rs [Utah] 75 Pac. 729. This statute was not repealed by a subsequent act of the legislature, nor did the subsequent act operate retroactively to the prejudice of parties who had filed on school lands. Id.

57. Witcher v. Wiles [Tex. Civ. App.] 75 S. W. 889.

58. An application cannot be made until after notice of classification and appraisement has reached the county clerk. Corrigan v. Fitzsimmons [Tex. Civ. App.] 76 S. W. 68. An application before notice is not prior to one after notice [R. S. 1895, arts. 4218f, 4218g]. Ford v. Brown, 96 Tex. 537, 74 S. W. 535.

59. A lease executed Aug. 26, 1899, for two years expires midnight, Aug. 25, 1901, at which time the land is on the market and the first applicant has priority. McChristy v. Jackson [Tex. Civ. App.] 71 S. W. 569.

60. It is immaterial that an application to buy school land as an actual settler was made shortly before settlement, where he settled before the application was filed. Allen v. Frost, 31 Tex. Civ. App. 232, 71 S. W. 767.

61. Where a lease on the lands expired before the application reached the land office. Patterson v. Terrell, 96 Tex. 509, 74 S. W. 19. An applicant filing before expiration of a lease to another and receiving an award of the land after expiration of the lease is prior in right to applicants filing after the award. Smith v. Zesch, 30 Tex. Civ. App. 444, 70 S. W. 775.

62. An application is not void because the accompanying affidavit was made an hour before expiration of a lease making the land open to sale. McGee v. Corbin, 96 Tex. 35, 70 S. W. 79.

63. Correction of the obligation for remainder of purchase money before award will suffice to validate the sale. Faucett v. Sheppard [Tex. Civ. App.] 75 S. W. 538.

64. Where land located on the line of two counties was on the market, it could be sold on application in either county. Different parties had made application for the same land with the clerks of different counties. The one who failed to get the award controverted the award to the other on the ground that the land commissioner had not given notice of classification and value in both counties. Davis v. Burnett [Tex. Civ. App.] 79 S. W. 105.

65. The first one only was indorsed on receipt where the others were indorsed later in the same manner. McGee v. Corbin, 96 Tex. 35, 70 S. W. 79.

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without such fees.[66] The rejection for prematurity of an application by an actual settler does not let in an applicant for additional purchase not a settler.[67] In certain circumstances a preference is given certain persons regardless of priority.[68]

Certificate and award.—Where the right to a certificate is property, it may be valid, though issued after claimant's death[69] or to his transferee.[70] A transfer of a certificate must with certainty describe it.[71] A void award does not remove lands from sale.[72] Acceptance of an application and issuance of a certificate does not under Texas laws conclusively prove as against one asserting a hostile claim that there was a legal settlement,[73] but it has been so held as against application made after certificate.[74]

Sale and payment.—Officers may sell only when regularly exercising authority so to do.[75] When state lands have been granted to counties, the county officers have the power to sell.[76]

Payment of purchase money will be presumed from conveyance of town site lots platted on public lands in California.[77] If the description in the obligation for payment for such lands describes a different tract than the application, it is void, but a variance in the grantee's name is immaterial.[78] Payment of the first instalment by an original purchaser will inure to a substituted purchaser standing as equitable assignee.[79] The state may recover for value of the excess of land sold by description, but cannot resell the land.[80]

66. Pol. Code, § 3574, and Act March 20, 1889 (St. 1889, p. 434, c. 281). Buttle v. Wright, 139 Cal. 624, 73 Pac. 454.

67. Ford v. Brown [Tex. Civ. App.] 75 S. W. 893.

68. See ante, § 2C.

69. Under the statute (Act Dec. 14, 1837), the certificate was valid, though issued after the death of the one entitled to it, and running to his heirs. Whisler v. Cornelius [Tex. Civ. App.] 79 S. W. 360.

70. The purchaser of a certificate issued under this act became entitled to acquire land under it. Whisler v. Cornelius [Tex. Civ. App.] 79 S. W. 360.

71. A transfer of a certificate issued in lieu of a headright sufficiently identified the certificate by stating the county in which the certificate was issued, the amount of land covered and the person to whom it was issued. Simmonds v. Simmonds [Tex. Civ. App.] 79 S. W. 630.

72. Void because no settlement. Briggs v. Key, 30 Tex. Civ. App. 565, 71 S. W. 43.

73. A certificate of occupancy from the general land office of Texas after accrual of another's rights therein and beginning of his action to recover is not conclusive against him where he claims under settlement and application to purchase. May v. Hollingsworth [Tex. Civ. App.] 74 S. W. 592; Franklin v. Kerlin [Tex. Civ. App.] 74 S. W. 592; White v. Watson [Tex. Civ. App.] 78 S. W. 237. Original acceptance of an application to buy additional school lands and proof of occupancy to the commissioner made after commencement of an action to try title by another will not prevent plaintiff from questioning actual settlement on the home section at time of application. Ford v. Brown [Tex. Civ. App.] 75 S. W. 893; Boswell v. Terrell [Tex.] 78 S. W. 4. Evidence tending to illustrate the character of the settlement and that it was never actual within the meaning of the law was wrongly excluded in an action of trespass to try title. Lewis v. Scharbauer [Tex. Civ. App.] 76 S. W. 225. An applicant to purchase public lands, whose application is made before a prior applicant has made his proofs of occupancy and become entitled to a certificate showing that fact, may litigate the questions of such prior applicant's occupancy, notwithstanding the latter's proofs have been accepted by the land commissioner [Rev. St. 1895, art. 4218j.] Forester v. Berry [Tex. Civ. App.] 79 S. W. 591. An actual settler of school lands, complying with the statute in attempting to purchase, may show invalidity of a previous award within less than three years before his application and settlement for noncompliance with requirements of actual settlement at time of application, though a certificate of occupancy has been issued. Lamkin v. Matsler [Tex. Civ. App.] 73 S. W. 970.

74. The sufficiency of proof of occupancy of a prior purchaser of school lands cannot be questioned by another applicant after acceptance by the commissioner and issuance of certificate. Harper v. Dodd, 30 Tex. Civ. App. 287, 70 S. W. 223.

75. Parish school boards in Louisiana cannot sell timber on sixteenth sections. Under Rev. St. 1870, §§ 2958-2960, 2962, it cannot be sold without the approval of a majority of the legal voters of the township. State v. Stark, 111 La. 594.

76. The county court of Missouri could sell swamp lands of a Federal grant to the state, which were granted by the state to counties at private sale for less than $1.25 an acre [Various acts of Congress and statutes construed]. Simpson v. Stoddard County, 173 Mo. 421, 73 S. W. 700.

77. St. 1867-68, p. 696, § 24. Callahan v. James [Cal.] 71 Pac. 104.

78. Rev. St. 1895, art. 4218j. Hamilton v. Votaw, 31 Tex. Civ. App. 684, 73 S. W. 1091.

79. Sale to a substituted purchaser cures any invalidity in prior sales and renders unnecessary payment of the original instal-

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The office of the caveat is to determine which of two claimants is entitled to have a patent issued.[81]

Grants and patents.—If a legislative grant is not in presenti, it must be followed by a conveyance or equivalent.[82] The state cannot refuse to issue a patent to an assignee of the settler when the latter has stipulated of record that it may be done.[83] A grant is not void because of immaterial irregularities in registration of documents.[84] A patent and the record thereof will not be constructive notice if substantially deficient.[85] A deed by the commonwealth of Pennsylvania for land owned by it, in its name and under its great seal, before the act of Mar. 14, 1846, could be recorded without acknowledgment.[86]

A state patent[87] or a deed issued by the state[88] is analogous to a United States patent and is not subject to collateral attack, except for invalidity on the face of it,[89] or in the proceedings whereon it rests.[90] The state only can attack a purchase of Texas school lands as collusive where it is regular.[91] It is prima facie title when purporting to be regular,[92] and it is presumed that patentee was the same person as he of the same name who procured survey and award.[93] A patent possibly for too much has been sustained where the terms of a statute fixing the maximum acreage were doubtful.[94] A mistake in the patentee's name not producing uncertainty will not avoid the patent.[95]

ment by the substitute purchaser, statute not requiring substituted purchaser to make first payment as in case of an original purchaser [Rev. St. 1895, art. 4218k]. Johnson v. Bibb [Tex. Civ. App.] 75 S. W. 71.

80. Willoughby v. Long, 96 Tex. 194, 71 S. W. 545.

81. Combs v. Duff [Ky.] 80 S. W. 165.

82. Especially so where the act so prescribed. McDade v. Bossier Levee Board, 109 La. 625.

83. Stipulation was made in a suit by execution purchasers of school lands to compel issuance of patents to them instead of the original purchaser, agreeing that the interest of the latter could be sold under execution and that it passed to plaintiffs. Brooke v. Eastman [S. D.] 96 N. W. 699. One who purchased a possessory right from an original settler is entitled to the same benefits and privileges as his grantor would have been had he continued in possession. Twiggs v. State Board of Land Com'rs [Utah] 75 Pac. 729.

84. The registration of a grant from the state after describing the land stated that the grant was in the same form as another named registered grant. Held, registration not defective because of failure to copy entire grant. Weeks v. Wilkins [N. C.] 47 S. E. 24.

85. Sufficiency of state land patent and record to give notice to a second patentee under Const. art. 14, § 2. Tex. & N. O. R. Co. v. Barber, 31 Tex. Civ. App. 84, 71 S. W. 393.

86. Reilly v. Mountain Coal Co., 204 Pa. 270.

87. Patent to a California homestead entryman as for agricultural land is a judgment establishing the character of the land. Paterson v. Ogden, 141 Cal. 43, 74 Pac. 443. A state patent to Arkansas swamp lands cannot be collaterally attacked and is conclusive except on a direct proceeding in equity to set aside for fraud or mistake. Boynton v. Haggart [C. C. A.] 120 Fed. 819.

88. Lands sold by the state as second class tide lands: a claim by a subsequent applicant to purchase a portion thereof as oyster lands, that the deed did not include the lands applied for, is a collateral attack. Welsh v. Calvert [Wash.] 75 Pac. 871.

89. A Kentucky state patent, for lands under the act of 1852, for more than 200 acres, showing only a single survey, is void and may be collaterally impeached. Defendant may attack the validity by demurrer without showing an interest in the land where complainant claims under it and asks affirmative relief. Lockhard v. Asher Lumber Co., 123 Fed. 480.

90. One issued on certificate by the clerk of court, or a duplicate, to a claimant whose name has not been returned in the list of successful claimants, is void [Act Feb. 4, 1841, §§ 1, 2, 3, 6]. Kempner v. State, 31 Tex. Civ. App. 363, 72 S. W. 888.

91. Maney v. Eyres [Tex. Civ. App.] 77 S. W. 969. Texas statute requiring purchaser of additional land to make oath that he is not acting in collusion with others and also that he desires to purchase for a home and has settled on the land. The affidavit of an ignorant old man by mistake recited that he was an actual settler, when in fact he was owner and resident on contiguous land. He made the cash payment and paid the annual interest. Held, as against a collateral attack of a subsequent applicant, he was entitled to the land. Weckesser v. Lewis [Tex. Civ. App.] 79 S. W. 355.

92. A patent to Texas school lands purporting to issue by purchase and payment under a certain law gives the patentee a prima facie right to the land. Burkhead v. Bush [Tex. Civ. App.] 75 S. W. 67.

93. Sufficiency of evidence to overcome presumption that the grantee in a patent was the person of the same name who secured the survey and had the patent made. Huff v. Miniard, 24 Ky. L. R. 2272, 73 S. W. 1036.

94. Statutes limiting area of land to be purchased were published in different languages. English text read 160 acres. French

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A second patent of state land is void,[96] but a patent is not void because prior grants excluded are not specifically described therein.[97]

Priority is determined by the issuance of the grant and not by the time of entry.[98] An entry followed by grant is senior to a hostile entry during the interim followed in its turn by grant posterior to that of the first enterer.[99] If there was any fraud in obtaining the first grant, the state and not the junior grantee must assail it.[1] Persons claiming under junior entries but senior grants to state lands issued before two hiatuses, during which the statutes made no provision for carrying entry into grant, are prior in right to claimants under special entry whose grant was not obtained until after intervention of the hiatuses.[2]

A patent from the state, uncertain in terms, will be construed strictly against the grantee.[3] Priority of conflicting patents issued on the same day may be shown by the dates of the surveys on which they were based.[4]

Curing defects in sale.—Sales invalid from the beginning cannot be validated by other sales or resale in a different manner,[5] nor can the facts making such invalidity be concluded in a claimant's favor by land office recitals not addressed to him and on which he had no right to rely.[6] There cannot be an innocent purchaser as against the state under an invalid patent.[7] Mistakes in the application may be corrected at any time before rights intervene.[8] An award below appraised value may be cured by reducing the appraisement.[9] Invalid sales of Texas lands have, in some instances, been made valid by statute,[10] and of Vermont lands by the

text not more than 260 acres. The land officials permitted an entry of 199 acres, which the state afterward issued a patent for. Title was sustained. La. Sulphur Min. Co. v. Krause, 110 La. 690.

95. Writing a patentee's name "Doorley" instead of "Dooley" will not avoid a patent to Texas school lands. N. Y. & T. Land Co. v. Dooley [Tex. Civ. App.] 77 S. W. 1030.

96. Combs v. Combs, 24 Ky. L. R. 1691, 72 S. W. 8; Stewart v. Keener, 131 N. C. 486; Crate v. Strong, 24 Ky. L. R. 710, 69 S. W. 957; Hays v. Earls, 25 Ky. L. R. 1299, 77 S. W. 706. A Kentucky grant issued after a patent by the governor of Virginia. Combs v. Duff [Ky.] 80 S. W. 165.

97. Helton v. Cent. T. & S. D. Co., 24 Ky. L. R. 628, 69 S. W. 720.

98. Where the younger entry is made, and the elder grant is issued upon it before a hiatus, such title will prevail over an older entry and a younger grant, where the latter is issued after the hiatus. Sheafer v. Mitchell, 109 Tenn. 181, 71 S. W. 86.

99. Code, §§ 2780, 2786. Henry v. McCoy, 131 N. C. 586.

1. Henry v. McCoy, 131 N. C. 586, in which case payment was made by and patent issued to the entryman's surviving sister.

2. Sheafer v. Mitchell, 109 Tenn. 181, 71 S. W. 86. The auditor and governor of Arkansas constitute a quasi-judicial tribunal to settle claims to swamp lands granted to the state by congress and to issue state patents or deeds to rightful claimants free from collateral attack. Boynton v. Haggart [C. C. A.] 120 Fed. 819.

3. A call for a stake "near Cumberland Gap" will not be construed "in" such place. Creech v. Johnson, 25 Ky. L. R. 656, 76 S. W. 185.

4. Hall v. Blanton, 25 Ky. L. R. 1400, 77 S. W. 1110.

5. Subsequent invalid sale of a connecting section will not validate the sale of two sections as isolated which were not so. A purchase of school lands on the ground of isolation which were not isolated cannot be supported as a purchase by an actual settler, the application not being made on that ground nor the affidavit of residence filed. Burnam v. Terrell [Tex.] 78 S. W. 500.

6. Where lands not in fact isolated were purchased as such, the purchaser is not protected by the fact that in abstracts of taxable lands the land office showed such lands to be isolated. The abstracts were not made for guidance of purchasers. Burnam v. Terrell [Tex.] 78 S. W. 500.

7. Kempner v. State, 31 Tex. Civ. App. 363, 72 S. W. 888.

8. Mistakes as to description of the lands [Batts' Ann. Civ. St. art. 4218fff]. Nesting v. Terrell [Tex.] 75 S. W. 485.

9. An award on an application to purchase Texas school lands at a lower price than the appraised value is valid where the appraisement is reduced to the price of sale. Threadgill v. Butler [Tex. Civ. App.] 77 S. W. 43.

10. Sales of school lands before Jan. 1, 1899, under which the purchasers complied with the law were expressly validated by Act May 27, 1899. Bates v. Bratton, 96 Tex. 279, 72 S. W. 157. Sales of school lands before Jan. 1, 1899, without settlement on the lands, but where settlement was made within six months after application, are expressly validated by Act May 27, 1899. Id. Act 1899, validating purchases of school lands to persons in default of settlement or payment of the first instalment of the price will not apply to one making settlement but failing to make the payment in the prescribed period; nor to a purchaser of additional school lands, no settlement being required. Spence v. Mitchell, 96 Tex. 43, 70 S. W. 73. Gen. Laws 1889, p. 106, and Gen. Laws 1891, p. 130, do not require of an original purchaser's assignee that he shall have made actual

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constitution,[11] and in Missouri, a 30-years holding by bona fide purchasers of swamp lands cures defects.[12] A curative act passed pending appeal from a judicial attack on a sale is available.[13]

Rescissions, cancellations and forfeitures.—In Texas, a purchaser of additional school lands who sells before his occupancy is complete to one not an actual settler does not forfeit his rights, but the sale is void.[14] If he be a purchaser not of school lands and buys school lands additional to his purchase, his sale to one not an actual settler is good provided occupancy and ownership continue for the necessary time.[15] The state only, not an adverse claimant, can urge that a purchaser of Texas school lands acted in collusion with another.[16] Mistakes of land officers are not "fraud" in procuring a certificate wherefor it may be revoked.[17] The commissioner in Texas cannot cancel a sale of school lands for a mistake in classification.[18] Inadvertent sale of Texas lands not subject to sale may be rescinded by the commissioner making it, or his successor.[19] Where the commissioner inadvertently sold lands previously leased, while the lease was in force, he may cancel the sale.[20]

The state's petition to recover lands for fraud must affirmatively allege the fraud.[21] An allegation that the certificate holder did not improve is a negative pregnant that they may have been improved when he applied.[22] The remedy provided by

settlement before Jan. 1, 1889, in good faith, save where the law required actual settlement of the original purchaser. Hence, an assignee's title to grazing land may be cured of a sale in the wrong county, though he was not an "actual settler in good faith," such settlement being required only of agricultural lands. Walraven v. Farmers' & M. Nat. Bank, 96 Tex. 331, 74 S. W. 530. Fraud of the original purchaser in describing the land in his application held not within these statutes, and accordingly no obstacle to curing the assignee's title of the defective sale. Id.

11. Preamble of Vt. Const. 1777, applies only to lands held under New Hampshire grants, not those granted by New York, which were never a part of New Hampshire. Davis v. Moyles [Vt.] 56 Atl. 174.

12. The county is barred by laches in Missouri from claiming invalidity of a conveyance of swamp lands from the state after purchase by bona fide purchasers without notice of defects who exercised full ownership for over 30 years [Laws 1901, p. 202]. The statute did not impair the county's vested rights, but was a valid exercise of the state's power to validate sales made in good faith. The trust for the school funds relating to sale of Missouri school lands applies only to "net proceeds of sales" and not to the land so as to charge a bona fide purchaser with misapplication of proceeds by the county; and where record, proceedings and order of sale are regular on their face, he cannot be charged with defects for which the sale might have been set aside [Act March 27, 1868, § 6 (Laws 1868, p. 68) and Act March 10, 1869 (Sess. Laws 1869, p. 66)]. Simpson v. Stoddard County, 173 Mo. 421, 73 S. W. 700.

13. A statute curing defects in sales of Missouri swamp lands by county courts, passed pending appeal in an action to quiet title to such lands on such grounds, may be applied by the appellate court. Simpson v. Stoddard County, 173 Mo. 421, 73 S. W. 700.

14. 2 Batts' Ann. Civ. St. § 4218fff. Roberson v. Sterrett, 96 Tex. 180, 71 S. W. 385, 73 S. W. 2.

15. Sale by a purchaser of additional lands before completion of the term of occupancy to one not an actual settler on the land will not forfeit title; sale may be made to one not a settler [Batts' Ann. Civ. St. § 4218fff]. Nesting v. Terrell [Tex.] 75 S. W. 485. Additional purchase of school lands by the owner of other than school lands will entitle him to sell to another not an actual settler before occupancy, where he continues to occupy and own the lands which were the basis of the purchase [Batts' Civ. St. 1895, art. 4218fff]. Miller v. Halliford [Tex. Civ. App.] 78 S. W. 239.

16. Hamilton v. Votaw, 31 Tex. Civ. App. 684, 73 S. W. 1091.

17. The showing that the commissioner of the land office committed error in deciding a question of fact is not sufficient to allow a state to recover school land in the hands of an innocent purchaser on the ground of fraud in procuring the certificate of occupancy. State v. Hughes [Tex. Civ. App.] 79 S. W. 608.

18. Laws 1897, p. 184, c. 129, and Rev. St. arts. 4218e, 4218f, 4218l. Harper v. Terrell, 96 Tex. 479, 73 S. W. 949.

19. Burnam v. Terrell [Tex.] 78 S. W. 500.

20. Moore v. Rogan, 96 Tex. 375, 73 S. W. 1.

21. A petition by the state to recover school lands on the ground of fraud in procuring the certificate of occupancy must allege that the commissioner of the land office did not know of the facts as they existed and was misled by the proof of occupancy or acted otherwise than in good faith. State v. Hughes [Tex. Civ. App.] 79 S. W. 608.

22. A petition by the state to recover school lands in the hands of an innocent purchaser on the ground of fraud in procuring the certificate of occupancy must allege that the land was not already improved when the application to purchase was made as well as that the person who obtained the certificate had failed to improve them. State v. Hughes [Tex. Civ. App.] 79 S. W. 608.

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the Code of North Carolina (sec. 2786), authorizing a suit by any one aggrieved by the issuance of a patent by the state, in certain cases, is open only to the senior against a junior grantee,[23] since the junior patentee cannot be aggrieved.[24]

The acceptance of payment for lands waives previous forfeiture for nonpayment.[25] An unauthorized, inadvertent forfeiture by the commissioner for abandonment may be set aside.[26] The state can only be estopped from asserting her right to her own property by legislative enactment.[27] Neither mistake[28] nor fraud of officials will vest in a patentee title to land not patented to him.[29]

Adjudication of title by courts.[30]—Jurisdiction of courts to hear and determine claims as against the state is confined to the statute conferring it; hence a confirmation suit begun too late is not aided by a law extending time in those begun at a certain time.[31]

In trespass to try title to Texas school lands, a petition must allege facts showing complainant's right to lands,[32] and fraud must be pleaded in particular and not as a conclusion.[33] All of the facts necessary to make out complainant's right to the land must be proved,[34] and the burden of proving that defendant's title never ripened is on plaintiff.[35]

23, 24. Henry v. McCoy, 131 N. C. 586.

25. Where an applicant to purchase a tract of less than 640 acres under the act of 1870, for sale of Oregon swamp and overflowed lands, received a certificate on payment of 20 per cent. of the price without proof of reclamation in 1872, forfeiture incurred by failure of proof and payment was waived by payment and acceptance of the remainder by the commissioners ten years later [Laws 1870, p. 55, §§ 3, 4; Laws 1878, pp. 41, 46; Laws 1887, p. 10, § 2]. Miller v. Wattier [Or.] 75 Pac. 209.

26. Rev. St. 1895, art. 4218l. Johnson v. Bibb [Tex. Civ. App.] 75 S. W. 71.

27. State v. Paxson [Ga.] 46 S. E. 872. The state may bring an application for an injunction under Civ. Code, § 4927, by attaching to the petition, as an abstract of title, a statement setting forth that the land in controversy has never been granted. Id. The state may bring an equitable action in the nature of the common-law proceeding by information of intrusion for recovery of land title to which is in the state, and in aid of such action obtain an injunction to restrain a trespass. The petition in the present case can be construed as an action of that character (Per Cobb, J., dissenting). Id.

28. A mistake of the county surveyor in recording a survey could not operate to vest in the patentee title to land not patented to him. Bryant v. Kendall [Ky.] 79 S. W. 186.

29. Courses and distances set forth in a plat of an official survey and referred to in patents from the United States, which show the meander line of one lake as the boundary control, as against the actual boundary of the lake, where the survey was grossly fraudulent and the lake never existed within half a mile of the point indicated on the plat and where to fix the lake as the boundary would give the patentees an area of land vastly in excess of their patents and what they paid for. Security L. & E. Co. v. Burns, 193 U. S. 167.

30. Bills to charge trusts on patentees, see post, § 4.

31. Jurisdiction of district courts and validity of judgments as to land claims against the state under Act Feb. 11, 1860 (Gen. Laws 1860, p. 109, c. 78); Act April 4, 1881 (Gen. Laws 1881, p. 105, c. 92), and Act Aug. 15, 1870 (Gen. Laws 1870, p. 201, c. 83), amending the first act above. State v. O'Connor, 96 Tex. 484, 73 S. W. 1041.

32. A petition to recover Texas school lands must allege actual settlement on the land or that petitioner owns and is an actual settler on other lands within five miles radius. Sterling v. Self, 30 Tex. Civ. App. 284, 70 S. W. 238. Pleadings sufficient to put in issue the fact of prior occupancy of school lands in trespass to try title. Corrigan v. Fitzsimmons [Tex. Civ. App.] 76 S. W. 68.

Issues in suit by applicant to recover additional school lands awarded to another; whether the application was properly made and priority thereof are the only questions. Coody v. Harris, 31 Tex. Civ. App. 169, 71 S. W. 607. Issues in trespass to try title to school land by one claiming under an application to purchase as an actual settler [Sayles' Rev. St. art. 1331]. Allen v. Frost, 31 Tex. Civ. App. 232, 71 S. W. 767.

33. An allegation that a location on school lands and issuance of a patent were fraudulent is a legal conclusion not admitted by demurrer. Heil v. Martin [Tex. Civ. App.] 70 S. W. 430.

34. It must be shown in trespass to try title to school lands that the lands were classified when the application to purchase was made. Anderson v. Walker [Tex. Civ. App.] 70 S. W. 1003. In a suit to recover state school lands, plaintiff must show that the commissioners had no power to award the land to defendant, where his pleadings do not specifically show the award and rejection of plaintiff's application, though the evidence does disclose them. Landers v. Boliver [Tex. Civ. App.] 73 S. W. 1075. A purchaser of Texas school lands trying to recover in trespass to try title must prove classification and appraisement. Sufficiency of evidence. Corrigan v. Fitzsimmons [Tex. Civ. App.] 76 S. W. 68. Prior possession will not support a judgment for plaintiff in trespass to try title to school lands, where title is admittedly in the state. Id.

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A canceled state warrant does not alone prove erroneous location, nullity of patent, or that the warrant was returned to the locator, though the cancellation so states.[36]

A purchaser of leased school lands in Washington cannot recover possession as against purchasers from the state without showing payment of assessed value of lessee's improvements.[37]

Official acts and decisions are reviewable[38] when ministerial,[39] but not when discretionary[40] or final.[41] Ordinary rules of review[42] and of trial thereafter[43] apply.

§ 4. *Interest and title of occupants, claimants and patentees. A. On Federal lands. Possessory rights.*—The sufficiency of acts to give a right of possession to public lands depends upon peculiar conditions, such as character and locality of the land and the purpose of the occupation; but the acts must always show dominion and control of the claimant.[44] A mere occupant of public lands has a possessory right therein coeval with the continuance of his occupancy,[45] but one settling on

Sufficiency of evidence in contest for Texas school lands to carry to the jury the question whether the **land was appraised** and was on sale when the second award was made to plaintiff by the commissioner prior to defendant's application. Bowerman v. Pope, 25 Tex. Civ. App. 79, 75 S. W. 1093.

Evidence as to time when public free school lands of Texas were **placed on the market** in trespass to try title. Binion v. Harris [Tex. Civ. App.] 74 S. W. 580.

35. Where defendant, in an action to recover land alleged by plaintiff to have been public free school lands when he settled and applied for purchase, was an actual settler and had applied to purchase, plaintiff has the burden of proving his failure to complete the purchase or forfeiture of his rights before plaintiff's application; and where he failed to do so, admission in evidence of the commissioner's certificate that defendant was an actual settler and had been awarded the land on application to purchase was harmless. Boaz v. Powell, 96 Tex. 3, 69 S. W. 976.

36. Slattery v. Heilperin, 110 La. 86.

37. Brummett v. Campbell, 32 Wash. 358, 73 Pac. 403.

38, 39. Errors on appeal in suit to recover Texas school lands. Sterling v. Self, 30 Tex. Civ. App. 284, 70 S. W. 238. The decision of the commissioner that sections of state school lands are isolated and subject to sale is a ministerial act and inconclusive [2 Batts' Rev. St. 1895, art. 4218y]. Burnam v. Terrell [Tex.] 78 S. W. 500.

40. Where boards of appraisers have discretionary power, their decision cannot be reviewed in mandamus. A statute read "that if the board shall be satisfied that the land on being resold would not sell for 25 per cent. more." Their decision was not interfered with at the suit of one who offered 25 per cent. more. State v. Bridges, 30 Wash. 268, 70 Pac. 506. The decision of the Oregon State Land Board is final as to application to purchase school land claimed to have been forfeited by another by his default in payment of the purchase price for which the board refused to issue the subsequent applicant a certificate of purchase. Robertson v. State Land Board, 42 Or. 183, 70 Pac. 614. Resale of Washington school lands is discretionary and cannot be controlled by the courts. State v. Bridges, 30 Wash. 268, 70 Pac. 506. The decision of the Oregon state land board as to forfeiture and resale of lands will not be reviewed by the courts. Robertson v. State Land Board, 42 Or. 183, 70 Pac. 614.

41. The granting of a certificate of purchase of swamp and overflowed land necessarily implies a finding by the state board of commissioners that the purchaser has the necessary statutory qualifications which is not subject to review by the courts. (Action between the certificate holder and a subsequent grantee from the commissioners [Laws 1870, p. 55, § 3]). Miller v. Wattier [Or.] 75 Pac. 209. Contests for purchase of state lands between alleged "actual settlers" and other claimants must be decided by the register of the land office, and his discretion cannot be controlled by mandamus; if he refuses to consider the contest because the lands are not open to purchase, an appeal will lie to the court. State v. Smith, 111 La. 319.

42. On appeals from the state board of land commissioners, documentary evidence not transmitted as a paper in the case or as evidence below may be excluded where no notice was given for its introduction [Rev. St. 1899, § 812]. Baker v. Brown [Wyo.] 74 Pac. 94.

43. A ruling of the supreme court of Wisconsin on demurrer to the complaint in a contest between claimants to Federal public lands, as to validity of the entry and residence, is binding on a subsequent appeal where the evidence is the same on another trial as that given the land officers. McCord v. Hill, 117 Wis. 306, 94 N. W. 65.

44. Sufficiency of acts giving mill owner right to possession of land on which he deposited ore tailings. Ritter v. Lynch, 123 Fed. 930.

45. Persons who, with their grantors, have occupied and used public lands adjacent to the Alaskan coast, since prior to Act May 17, 1884, including a small strip of tide lands used for drawing salmon seines will be protected as against others asserting a common right to fish thereon [Sec. 8 of the act (23 Stat. 24)]. Heckman v. Sutter [C. C. A.] 119 Fed. 83. United States statutes establishing a civil government for Alaska protects possessory rights exercised over tide lands by occupants of adjoining uplands against those who assert a common right to fish thereon. Heckman v. Sutter [C. C. A.] 128 Fed. 393.

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land covered by homestead entry of another acquires no rights.[46] An entryman's possession is exclusive,[47] whence he can maintain forcible entry and detainer against one whose claim has been canceled by the land department.[48] Proof of prior peaceable possession under a claim of right will support an action to recover land, the title to which was in the state, as against all but the true owner.[49] An unsuccessful contestant for a townsite lot, making valuable improvements in good faith during pendency of the contest, and in possession at end of the contest, cannot hold possession until such improvements are appraised and paid for under an occupying claimant's law.[50]

Adverse possession will not give title to possession as against the government,[51] though it may suffice as against grantees or patentees.[52]

A right of way granted by the United States has been held not subject to adverse possession.[53]

An interest in the lands vests when final certificate is made[54] and not before.[55] A mere claimant of lands claimed by the land department as unsurveyed cannot prevent a survey.[56] Instituting a contest against an Indian allotment does not of itself vest any right in the contestant.[57]

A contract after final proof to sell the lands is not an entry for another.[58] A contract to settle for another is against public policy.[59]

The provision that when father and mother are both dead leaving minor children, a homestead entry shall vest in the minor, applies for the exclusive benefit of the minor only when there are no other heirs.[60]

By reason of the statute requiring affidavit that he has not alienated his lands, a homestead entryman's sale[61] or lease[62] before final proof and patent issued is un-

46. He has no legal or equitable rights. McMichael v. Murphy [Okl.] 70 Pac. 189.

47. Reservation State Bank v. Holst [S. D.] 95 S. W. 931. An entryman on homestead lands is entitled to possession and cannot be enjoined by one exercising a prior possession without right. Tiernan v. Miller [Neb.] 96 N. W. 661. One entitled to preempt land or take up a timber claim, and allowed by the land officers to file on lands open to preemption, takes it and all permanent improvements with exclusive possession free from claims of all persons except the United States. Hill v. Pitt [Neb.] 96 N. W. 339.

48. Several parties made entry on the same land and the land office awarded the land to plaintiff. Hackney v. McKee [Okl.] 75 Pac. 535.

49. Proof of actual occupation and use to exclusion of others is sufficient, though no barriers sufficient to turn stock existed. Smith v. Hicks, 139 Cal. 217, 73 Pac. 144.

50. Cook v. McCord [Okl.] 75 Pac. 294.

51. No claim of adverse possession can be made as to the bed of a dried-up body of water owned by the Federal government. Carr v. Moore, 119 Iowa, 152, 93 N. W. 52.

52. Adverse possession, sufficient under a state statute, within the 10-mile limit of the Central Pacific grant carried title, though no patent was issued to the railroad company [Act Congress, July 1, 1862 (12 Stat. 489, c. 120) as amended by Act July 2, 1864 (13 Stat. 356, c. 216)]. Toltec Ranch Co. v. Cook, 191 U. S. 532. Title to lands forfeited from state grants to the United States will not vest in a purchaser until certificate has issued so that limitations will not run in favor of adverse possession before that time. Doe v. Pugh [Ala.] 34 So. 377.

53. McLucas v. St. Joseph & G. I. R. Co. [Neb.] 97 N. W. 312.

54. Adams v. Church, 42 Or. 270, 70 Pac. 1037, 59 L. R. A. 782.

55. Application was denied and the entry never made. Baldwin v. Keith [Okl.] 75 Pac. 1124.

56. Equity will not relieve a claimant against a survey of lands by the Federal land department claimed by it as unsurveyed public lands, where no material injury will result from the survey and the interested parties are few and assert separate rights; the courts will not interfere with executive administration of the department. Kirwan v. Murphy, 189 U. S. 35, 47 Law. Ed. 698.

57. Contest did not result in cancellation of allotment entry. Baldwin v. Keith [Okl.] 75 Pac. 1124.

58. A contract by an entryman on Federal lands after final proof to sell to another and obtain the patent for the latter, followed by giving possession, is not in violation of the prohibition of entry of lands for benefit of another. Doll v. Stewart, 30 Colo. 320, 70 Pac. 326.

59. Organic Act, § 24. Bass v. Smith [Okl.] 71 Pac. 628.

60. On the death of a homestead entryman before final proof his rights descend to his heirs. Deceased was mother of three bastard children. Her rights were divided equally between her husband and living children and child of a deceased child. Holloman v. Bullock [Miss.] 34 So. 355.

61. A contract for sale of a homestead

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enforceable. State courts will not disturb a lessee under an entryman.[62] Conveyance of a water right, by one afterward acquiring the land on which it was situated as a homestead, is not a conveyance of "land" within laws prohibiting conveyance by homestead entrymen.[64] An entryman's deed conveying part of the waters of a stream and a right of way over the land to obtain such water, not made in contemplation of the entry, is not prohibited by homestead laws forbidding entry for another.[65] A conveyance of timber on a homestead by the entryman before final proof is valid, except as against the United States.[66] Rights of a bona fide purchaser for value may accrue to a purchaser of timber before patent issued.[67]

A mortgage given as security on a homestead before patent issued is not a "debt before patent" within the Federal law.[68]

A contract by a tree claim entryman, of whom such affidavit as prescribed in case of homesteads is not required, to convey his claim as soon as a patent was issued is valid,[69] and title when perfected by patent will inure to the grantee.[70] Rights in a tree claim though partnership assets are not liable for debts before issue of final certificate[71] or subject to antecedent mortgage.[72]

A contract by a pre-emptor of Federal lands to pay another one-fourth the amount of a sale of the lands at proper value after title secured in consideration of one-fourth the expenses of final proof is valid.[73]

A certificate or warrant to a Mexican war officer may be assigned after issuance so that the assignee may locate in his own name; and if the assignee proceeds regularly, he is not affected by failure of the register to report his location to the general land office.[74]

A discoverer of mineral signs may assign the prospective discovery to one who may pursue it until entitled to a patent.[75]

Transferees pending contest[76] or with notice of a prior transfer[77] can have no better claim than their grantor.

No suit to assert a private title lies until the lands have vested in the adverse

by an entryman before final proof and patent issued cannot be enforced [U. S. Comp. St. 1901, p. 1389, § 2290 and p. 1390, § 2291]. Horseman v. Horseman, 43 Or. 83, 72 Pac. 698.

62. On grounds of public policy. Millikin v. Carmichael, 134 Ala. 623.

63. Tiernan v. Miller [Neb.] 96 N. W. 661.

64. Rev. St. U. S. §§ 2290, 2291; Cal. Civ. Code, §§ 658-660, 662. Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. 826.

65. Rev. St. U. S. §§ 2290, 2291. Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. 826.

66. Conveyance of merchantable timber before final proof and another conveyance thereof after final proof. The first grantee had title by estoppel. Andrews v. Wilder [Miss.] 35 So. 875.

67. U. S. v. Clark, 125 Fed. 774.

68. Not within Rev. St. U. S. § 2296, forbidding liability of land for debts before patent. Klempp v. Northrop, 137 Cal. 414, 70 Pac. 284.

69. One who had made entry agreed to convey to the partnership of which he was a member as soon as patent issued. Adams v. Church, 193 U. S. 510.

70. Civ. Code, § 947, subd. 4. Bernardy v. Colonial & U. S. Mortg. Co. [S. D.] 98 N. W. 166.

71. One who entered and perfected a tree culture claim and afterward agreed with a partner to convey to the firm as soon as he got title, held an undivided half interest therein not liable to firm or individual debts before final certificate, but where, after the partner's death, he refused to perform at suit of the partner's representatives the land was decreed firm property [20 Stat. 114, § 4] held constitutional. Adams v. Church, 42 Or. 270, 70 Pac. 1037, 59 L. R. A. 782.

72. Adams v. Church, 42 Or. 270, 70 Pac. 1037, 59 L. R. A. 782.

73. Preemption act [Rev. St. U. S. § 2262]. Gross v. Hafeman [Minn.] 97 N. W. 430.

74. Act Cong. Feb. 11, 1847 (9 Stat. 125, c. 8). Johnson v. Fluetsch, 176 Mo. 452, 75 S. W. 1005.

75. Bay v. Okl. S. G., O. & Min. Co. [Okl.] 73 Pac. 936. See Mines and Minerals, § 4, 2 Curr Law, p. 897.

76. Personal notice on parties known to be interested in a land claim and publication is sufficient in a contest under the act of 1850 to render the decision of the land officers binding on those purchasing after pendency of the proceedings [Act Cong. Sept. 26, 1850, c. 69 (9 Stat. 469)]. Male v. Chapman [Mich.] 96 N. W. 582.

77. Sufficiency of notice of rights of purchaser from entryman of Federal lands to prevent purchase thereafter from entryman by third person. Doll v. Stewart, 30 Colo. 320, 70 Pac. 326.

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party,[78] hence, townsite trustees who merely convey the government title to town lot occupants are not suable by a homesteader.[79] Two years from the date of a patent is not an unreasonable delay in prosecuting suit against a patentee who through fraud had secured the right to purchase.[80] Payment of interest on the mortgage by the true owner of the occupant right will not estop him from contesting the validity of the mortgage.[81] A statute limiting the time for suits by the United States to annul or cancel patents does not apply to a partition suit by heirs of a homestead entryman.[82] Plaintiff must show his right to a patent and that defendant was not so entitled in order that the latter may be declared a trustee for plaintiff because of an erroneous ruling of the land department.[83] The holder of the duplicate final receipt of the receiver of the land office for a homestead may bring an action, in the nature of ejectment, for possession.[84]

Patentees or purchasers take the public title free from any charges save those binding on the public.[85] To entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee.[86]

No title or equity can pass in a grant never earned[87] or in lands never selected nor approved,[88] nor under a fraudulent patentee.[89] Bona fide purchasers of forfeited railroad lands, not in possession and without attempt to exercise their statutory rights, cannot sue to quiet title against claimants of adverse interests.[90]

A grant for a particular purpose, e. g., schools,[91] cannot be diverted from that purpose, but a patent to a city may be absolutely alienated, though entered under law for a cemetery.[92] Grants for aid of state institutions need not be apportioned

78. An action to declare a resulting trust by an occupant of public land will not lie against a successful contestant until title has passed from the government to the latter. Demurrer to petition showing that no patent has issued properly sustained. Jordan v. Smith [Okl.] 73 Pac. 308. A complaint to hold a patentee of public land a trustee, alleged that application to purchase the land was made and applicant went into possession and improved it, but that another filed a forged relinquishment of his rights and a patent was issued to him. Held not to state a cause of action because not alleging that plaintiff did not make voluntary relinquishment by failure to prosecute work or make seasonable proof and payment. Gebo v. Clarke Fork Coal Min. Co. [Mont.] 75 Pac. 859.

79. A claimant under the Federal homestead laws cannot sue Oklahoma townsite trustees to divest them of title under the law for townsite occupants [Act May 14, 1890 (26 Stat. 109, c. 207)] until the land is conveyed to the occupant under the act, title remains in the United States. Bockfinger v. Foster, 190 U. S. 116, 47 Law. Ed. 975.

80. A lessee who had represented herself as the owner of the occupant right. Whitlock v. Cohn [Ark.] 80 S. W. 141.

81. Whitlock v. Cohn [Ark.] 80 S. W. 141.

82. Holloman v. Bullock [Miss.] 34 So. 255.

83. Homestead claim. Small v. Rakestraw, 28 Mont. 413, 72 Pac. 746.

84. St. 1893, § 4492. McClung v. Penny [Okl.] 70 Pac. 404.

85. Lands belonging to the United States and sold to another cannot be made liable to irrigation assessments where included in an irrigation district without assent of the government or the purchaser. Nev. Nat. Bank v. Poso Irr. Dist., 140 Cal. 344, 73 Pac. 1056.

86. A petition in an action to declare a resulting trust in land patented to another did not state facts sufficient to show this. Baldwin v. Keith [Okl.] 75 Pac. 1124.

87. A lease of railroad grant lands which were given as bounty lands to a railroad which was never completed will not support ejectment whether real or a fiction. Act Cong. June 3, 1856 (11 Stat. 17), granting the land to the state for railroad aid, requires construction of the road before passing title. Galloway v. Doe, 136 Ala. 315.

88. A homesteader had settled on land which had been selected as indemnity, but the selection had not been approved. Sage v. Maxwell [Minn.] 99 N. W. 42.

89. A mortgage given by a patentee on land, the patent to which was secured by fraud, cannot be enforced against the land in the hands of the true owner. The owner of an occupant claim leased it. The lessee presented her claim to the commissioner as owner of the occupant right and was awarded the privilege of purchasing, which she did and received the patent. She then mortgaged. Whitlock v. Cohn [Ark.] 80 S. W. 141.

90. Act Cong. March 3, 1887, § 5 (24 Stat. 556, c. 376). San Jose L. & W. Co. v. San Jose Ranch Co., 189 U. S. 177, 47 Law. Ed. 765.

91. A grant for school purposes vests title in the board of education subject to their exclusive control. Act of March 3, 1845, c. 48 (5 Stat. 742), granting school lands, passed the exclusive control and disposition thereof to the state board of education and a grant of such lands by the state to a railroad company or a patent thereof by the executive officers of the United States to a state as swamp lands is void. State v. Jennings [Fla.] 35 So. 986.

92. A patent conveying land to the "mayor in trust for said city and his successors,"

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equally among them,[93] and the making of a special grant for one does not negative its right to share in a general grant.[94] When lands are granted simply to the state,[95] they do not pass into any particular fund except as the state laws declare.[96] A grant in trust on condition precedent to the beneficiary's title will prevent the ripening of any title against the trustee.[97]

Area acquired and boundaries.—A state survey under which a patent was issued will control as to the boundaries over a government grant by subdivision.[98] Where one purchased land according to the field notes of an original survey, his purchase includes all the lands described,[99] and the state may recover for the excess, but cannot resell it.[1] A patent excluding certain surveys from the grant will pass title to all the land not included in those surveys.[2] Boundaries cannot be extended beyond meander lines except by accretion.[3] Government lots bordering on a nonnavigable stream are bounded by the thread of the stream and not by the meander line on the bank.[4]

Mode of proving title.—Office copies of patents[5] and certified maps[6] may be received subject to the usual rules of documentary evidence.[7] A prima facie title may be made out by proof of acts from which in regular course a patent must have issued.[8]

under an act authorizing the mayor of Denver to enter land for a cemetery, carries to the city an absolute alienable title [Act Cong. May 21, 1872, c. 187 (17 Stat. 140)]. Wright v. Morgan, 191 U. S. 55.

93. Under a law granting lands generally for state institutions, one institution may be given more than its appropriate share [Enabling Act, § 17 (Act Feb. 22, 1889, c. 180; 25 Stat. 681)]. State v. Callvert [Wash.] 74 Pac. 1018.

94. A special law granting certain lands to the state university of Washington does not preclude it from benefits [Enabling Act, § 14 (Act Feb. 22, 1889, c. 180 [25 Stat. 680]), and § 17]. State v. Callvert [Wash.] 74 Pac. 1018.

95, 96. Lands granted by the United States to Nebraska by the enabling act were not placed among educational lands by the state constitution giving "proceeds" of such lands or "other" lands to the school fund. The Board of Educational Lands and Funds has no control over saline lands of such grant [Enabling Act, § 11, and Const. 1875, art. 8, §§ 3, 4]. McMurtry v. Engelhardt [Neb.] 98 N. W. 40. Lands acquired under 9 Stat. 352, 519, were subject to be disposed of by the legislature, and shallow lakes, not navigable, could be disposed of only after their area had been ascertained by surveys recognized by the state. Hall v. Board of Com'rs, 111 La. 913. A party acquiring a tract bordering on a shallow lake could not acquire title to the bed of the lake by accretion. Id.

97. Where the Federal government granted land to a state as trustee for aid of railroads, to be conveyed to the companies after construction, limitations will not run against the state until title has vested in the railroad company. The road must be completed before the limitations would run [Act Cong. June 3, 1856 (11 Stat. 17), and Code Ala. § 2794]. Galloway v. Doe, 136 Ala. 315.

98. Inconsistency between state and Federal surveys as affecting boundaries of patented lands. Miller v. Grunsky, 141 Cal. 441, 75 Pac. 48.

99. A later survey showed that the tract contained 960 acres instead of 640. Willoughby v. Long, 96 Tex. 194, 71 S. W. 545.

1. Will entitle the state only to demand payment for the excess, and in default thereof, to a partition thereof; but one applying to purchase can acquire no rights against the purchaser [Act March 22, 1889]. Willoughby v. Long, 96 Tex. 194, 71 S. W. 545.

2. A description in a patent concluding with the words "Plotting out of the surveys all lands heretofore surveyed," older surveys were excluded from the grant, but the patent was valid as to all land embraced within it not theretofore surveyed. Bryant v. Kendall [Ky.] 79 S. W. 186.

3. The owners of patents to lands abutting on meandered waters cannot extend their rights beyond the meander line on drying up of the waters except by accretion or reliction. Meander of a body of water in the government survey which should not have been meandered fixes the boundary of land given by patent to abutting owners. Carr v. Moore, 119 Iowa, 152, 93 N. W. 52

4. U. S. Rev. St. §§ 2396, 2397. Kirby v. Potter, 133 Cal. 686, 72 Pac. 338. The local state law controls all courts in determining the limits of grants of government lands abutting on lakes, rivers or waters. In re Valley, 116 Fed. 983.

5. A land office copy of a Virginia patent is evidence of title in ejectment, though the lesser seal of the commonwealth was not shown to appear on the original. Va. C. & I. Co. v. Keystone C. & I. Co. [Va.] 45 S. E. 291.

6. Certified maps by the acting commissioner of the general land office of a Federal grant to a state in aid of railroads may be shown in ejectment to recover the land. The maps showed the limits of the grant, that the lands were vacant when granted, that they were subject to grant, and that lands within an adjustment list were within conflicting limits of grants to certain companies. Galloway v. Doe, 136 Ala. 315.

7. See Evidence, 1 Curr. Law, p. 1136.

8. Actual settlement on an agricultural

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Mineral rights.—A townsite entry does not pass mineral rights even unknown at the time of entry.[9] A reservation of lodes or veins which intersect or penetrate has been held to cover only those which apex outside the tract.[10]

Water rights.—One who saw appropriation of spring waters from public lands without making a claim of prior appropriation is estopped to make such claim.[11]

Indian allotments.—Since Indians are subject to the laws of congress and have no several rights in tribal lands, allotment may be made to persons not previously regarded as members of the tribe.[12] A lease by an Indian of his land allotment, without approval of the secretary of the interior, is invalid.[13] Execution of two powers of attorney regarding Sioux half-breed scrip, one to locate and the other to convey when located, together or separately, are not an assignment or transfer of the scrip.[14]

(§ 4) *B. State lands.—Possessory rights* must rest on a physical dominion within definite limits.[15]

The state is not subject to adverse possession,[16] though claimants may be.[17]

Property rights before grant or patent.—Land which has been awarded, and the proofs of occupancy of which have been accepted or contract issued by the state is the subject of sale, seizure on execution and mortgage;[18] and the mortgagor is estopped to set up his after-acquired title from the state.[19] Adverse possession may run from the time title is earned.[20] The grantee of an occupant[21] or original purchaser acquires only the original purchaser's title.[22] Hence also a title bond by a

section of school land on application to purchase it and other lands as additional, and award of all lands on application, makes a prima facie title. Walker v. Marchbanks [Tex. Civ. App.] 74 S. W. 929.

9. Rev. St. U. S. § 2392. Callahan v. James, 141 Cal. 291, 74 Pac. 853.

10. A condition in a patent to agricultural land that it shall be subject to proprietary rights in a lode or vein if one should be found to "penetrate or intersect" means only a lode, the apex of which was without the land and in its course ran into the land. Surface mining rights are therefore not reserved. Paterson v. Ogden, 141 Cal. 43, 74 Pac. 443.

11. Orient Min. Co. v. Freckleton [Utah] 74 Pac. 652.

12. The statutes providing allotments from the Omaha Indian lands repealed all previous legislation and referred to the tribe as it then existed, and rights to allotment were not confined to members of the tribe at time of a former treaty [Act Aug. 7, 1882 (22 Stat. 34), construed with Treaty March 7, 1865]. Sloan v. U. S., 118 Fed. 283. Allotments of Indian lands of Omaha tribe: who entitled under Act Aug. 7, 1882 (22 Stat. 341). Id. See title Indians, 2 Curr. Law, p. 304, for exhaustive treatment.

13. Reservation State Bank v. Holst [S. D.] 95 N. W. 931.

14. Buffalo L. & E. Co. v. Strong [Minn.] 97 N. W. 575.

15. Natural barriers suffice to support a claim of prior peaceable possession of lands, title to which is in the state, as against all but the true owner, and the claimant may avail himself of barriers enclosing other lands in his possession as well as the state lands, though such other lands belong to third persons. Smith v. Hicks, 139 Cal. 217, 73 Pac. 144.

16. Slattery v. Heilperin, 110 La. 86. No claim of adverse possession can be made as to the bed of a dried-up body of water owned by the state government. Carr v. Moore, 119 Iowa, 152, 93 N. W. 52.

17. Sufficiency of evidence of adverse possession where two Kentucky state patents overlap. Hall v. Blanton, 25 Ky. L. R. 1400, 77 S. W. 1110. A judgment of adverse possession against heirs to whom a certificate of state lands was issued, showing their ancestor to be dead, gives a complete title in the holder and his successors to the certificate. Houston & T. C. R. Co. v. De Berry [Tex. Civ. App.] 78 S. W. 736.

18. A mortgage executed before deed was received from the state. Logue v. Atkeson [Tex. Civ. App.] 80 S. W. 137. A purchaser who made the first payment on South Dakota school lands and received a contract of sale from the commissioners had an interest therein subject to execution [Const. art. 8, §§ 5, 6, construed with Laws 1890, p. 296, c. 136, and Code Civ. Proc. 1903, § 336]. Brooke v. Eastman [S. D.] 96 N. W. 699.

19. Logue v. Atkeson [Tex. Civ. App.] 80 S. W. 137.

20. Where an applicant's title to state lands accrued, if at all, at expiration of his three years' occupancy and another entered under a deed from a subsequent entryman recorded eleven years later, the latter's possession for seven years barred the applicant under the five years' limitation. Robles v. Cooksey [Tex. Civ. App.] 70 S. W. 584.

21. A title under purchase from one who was awarded lands by the commissioner of the land office is worthless where the grantor was not a settler on the land at time of application and the commissioner did not issue the necessary certificate of occupancy. Nowlin v. Hall [Tex. Civ. App.] 77 S. W. 419.

22. A subsequent grantee of an entryman of Texas state lands, who acquired no superior or different title, takes subject to defects in the entryman's title. Walraven v. Farmers' & M. Nat. Bank, 96 Tex. 331, 74

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prospective purchaser to "vacant" lands is void.[23] Since a pendente lite purchaser takes subject to the suit, one purchasing free school lands pending mandamus to compel award thereof to a prior claimant cannot intervene in the proceedings.[24]

An unlocated land certificate is a chattel which will pass by verbal sale and delivery followed by continued possession and control until witnesses of the supposed sale are dead,[25] hence a husband's sale of his wife's certificates passes her interest.[26] The holder of a certificate issued to one since deceased must in a regular way acquire rights of minor heirs or his patent will not cut them off.[27]

A duplicate land certificate issued instead of a lost one confers only the rights of the original.[28] A preemptive right founded on mere possession passes to the possessor's transferee.[29] A bounty land certificate to a Texas volunteer is not a gratuity but a grant based on consideration of service.[30] Location of confederate land scrip and survey of the land will merge the scrip in the land, though no patent has issued.[31] A single man's certificate to Texas lands vests a property right alienable when earned.[32] The grant of lands by Louisiana to the Bossier levee district did not become effective until formal conveyance to the levee board by the state auditor and register of the land office, and until then it could not collect rents from the land.[33]

Patents and grants.—The grant conveys only such title as the state has.[34] Recitals in a grant by statute do not conclude one claiming adversely to the chain of title derived from the grant.[35] A grant relates back to entry and will support ejectment commenced before the grant but after entry.[36] Registration of a grant is constructive notice thereof.[37] The statute of limitations against actions to test the validity of a grant begins to run on its registration.[38] In proper cases[39] a trust may be charged on the patentee. An action for public lands, by one claiming under the junior grantee, against claimants under the senior grantee, is barred where not

S. W. 530. An assignee of an original purchaser of Texas state school lands can avail himself of the curative statutes to remedy a defect in the assignor's title to grazing land because the sale was not made in the county of the land, though the assignee was not an actual settler in good faith. Curative statutes, Gen. Laws 1889, p. 106, & Gen. Laws 1891, p. 130, related only to bona fide settlers of agricultural lands. Id.

23. It necessitates a false affidavit by him [Laws 1900, p. 29, c. 11, as amended by Laws 1901, p. 253, c. 88]. Mahoney v. Tubbs [Tex. Civ. App.] 77 S. W. 822.

24. Sherrod v. Terrell [Tex.] 76 S. W. 442.

25. Lochridge v. Corbett, 31 Tex. Civ. App. 676, 73 S. W. 96. The husband's title to the wife's certificates becomes absolute when he reduces them to possession. Ward v. Cameron [Tex.] 80 S. W. 69. His sale of them reduces them to possession. Id.

26. A contract containing no words of conveyance, but reciting the giving of certain notes in consideration of land certificates. Ward v. Cameron [Tex.] 80 S. W. 69.

27. Payment by one of fees to obtain a state patent on a land certificate issued to a deceased person gave him no interest against minor children without a contract by a proper guardian. Ellis v. Le Bow, 30 Tex. Civ. App. 449, 71 S. W. 576.

28. Kempner v. State, 31 Tex. Civ. App. 363, 72 S. W. 888.

29. Twiggs v. State Board of Land Com'rs [Utah] 75 Pac. 729.

30. Joint resolution of 1st Cong. of republic of Texas, Nov. 24, 1836. Halstead v. Allen [Tex. Civ. App.] 73 S. W. 1068.

31. So that a deed will pass title. Watts v. Bruce, 31 Tex. Civ. App. 347, 72 S. W. 258.

32. Act Dec. 14, 1837, giving a single man a certificate for 640 acres of land to be selected from the public domain. Whisler v. Cornelius [Tex. Civ. App.] 79 S. W. 360.

33. Act No. 89, 1892. McDade v. Bossier Levee Board, 109 La. 625.

34. Davis v. Moyles [Vt.] 56 Atl. 174. A state act granting the city of Mobile the shore and soil under a tidal stream within the city limits did not disturb vested rights of landowners adjacent to the stream [Act Jan. 31, 1867]; it merely granted rights possessed by the state to the city. Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 Law. Ed. 266. A purchaser of overflowed lands granted to a state takes subject to confirmation by the secretary of the interior of the selection of such lands made by the state. Williamson & Bro. v. Baugh [Ark.] 76 S. W. 423.

35. They are only binding as an estoppel. Davis v. Moyles [Vt.] 56 Atl. 174.

36. Stockley v. Cissna [C. C. A.] 119 Fed. 812.

37, 38. Ritchie v. Fowler, 132 N. C. 788.

39. Demurrer to evidence in action by junior grantee of public lands against alleged claimants under the senior grantee, to have latter declared trustees of plaiptiff and for conveyance of title claimed by them. Ritchie v Fowler, 132 N. C. 788.

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brought within ten years after registration of the senior grant.[40] The rule that a settlement under a junior patent will not give possession as against an older patent where the settlement is without the lap has no application to strangers to the title, but is only for the benefit of the holders of the elder title.[41] One paying for lands to save his interest is subrogated to rights of the state to a lien against the nominal certificate holder.[42] Since 1895, mineral rights in Texas lands have been confirmed in patentees, notwithstanding reservations in the patent.[43]

Purchase money held subject to the purchaser's right to earn a return of it is a trust.[44]

Area and boundaries.—A patent by the state referring to a map made by the state designating blocks and streets carries title in fee to the center of the street, though it is not opened or used.[45] Where a state patent, in absence of marked lines or corners, embraced lands in adjoining states, and would include a town with public buildings and grounds, the location which will give about the quantity of land called for is properly adopted.[46] Title to lands embraced in patents under the swamp land act are not affected by a resurvey of land covered with water when the original survey was made, and patents under the resurvey to lands under the original water line.[47] Change of the Mississippi river channel by avulsion works no change in the boundary of lands of an adjoining owner, but title to the abandoned channel remains in the state of Tennessee.[48] The rule as to state patents that where the junior patentee settles within the lap before settlement by his senior, his possession is not confined to his close but extends to his patent boundaries, applies, though the junior patentee settled before he made his survey.[49]

Mode of proving title.—Certificates which are ancient are admissible.[50] If

40. Code 1883, § 158. Ritchie v. Fowler, 132 N. C. 788.

41. Suit between lessees of patentees for possession. The lessee under the elder patent did not clearly connect himself with the patent. Bush v. Coomer, 24 Ky. L. R. 702, 69 S. W. 793.

42. Where two persons purchased saline lands from the state, the certificates of purchase being issued to one who signed as security on notes applied in payment and who gave his individual notes on long time for the remainder of the price, and who, on default of the original purchasers, paid interest and principal in arrears and received a deed for the land, the security was entitled to be subrogated to rights of the state and to foreclosure of his lien. Griffith v. Lehman [Neb.] 96 N. W. 991.

43. A locator on state lands, receiving a patent under Laws 1887, c. 99, owns the minerals under Rev. St. 1895, art. 4041, though they were reserved at time of patent. Laws 1883, c. 97, reserving minerals in state lands to the state, if not impliedly repealed by Laws 1887, c. 99, was expressly repealed by Rev. St. 1895, expressly repealing all laws of general nature not included or continued in force. Laws 1887, c. 99, repealing all conflicting land laws and making no provision regarding minerals on state lands, impliedly repeals reservation of minerals in such lands so that a locator thereunder could claim them as against the state. Heil v. Martin [Tex. Civ. App.] 70 S. W. 430.

44. Under statutes providing for the sale of swamp land and on reclamation thereof by the purchaser, the purchase price or moneys expended in reclamation to be refunded to him, the state holds the purchase money in trust so limitations do not begin to run until the trust is repudiated. Miller v. Batz [Cal.] 76 Pac. 42.

45. Gere v. McChesney, 84 App. Div. [N. Y.] 39.

46. Location of corner within five miles of Cumberland Gap as "near" that place within meaning of a state patent. Creech v. Johnson, 25 Ky. L. R. 656, 76 S. W. 185.

47. Kean v. Calumet C. & I. Co., 190 U. S. 452, 47 Law. Ed. 1134.

48. By state law riparian lands on a navigable river extend to ordinary low water mark. Stockley v. Cissna [C. C. A.] 119 Fed. 812.

49. Altemus' Assignee v. Potter, 24 Ky. L. R. 795, 69 S. W. 1083.

50. Evidence that the transfer of a certificate had been forged held insufficient to disqualify its admission in evidence as an ancient instrument. Ward v. Cameron [Tex. Civ. App.] 76 S. W. 240. An original transfer of a certificate issued in lieu of a headright which came from proper custody and under which the land had been claimed for years with no circumstances casting suspicion on it was properly admitted in evidence in an action of trespass to try title. Simmonds v. Simmonds [Tex. Civ. App.] 79 S. W. 630. Transfer of a state land certificate in Texas with grantee's name left blank which was afterward inserted so that the procedure appeared from the instrument will not render it suspicious as an ancient instrument in evidence in trespass to try title. Ward v. Cameron [Tex. Civ. App.] 76 S. W. 240.

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land is "vacant," possession raises no inference of ownership.[51] Mistake in a patent is provable by field notes.[52] A certificate of payment will prove payment.[53]

§ 5. *Leases of public lands and rights thereunder.*—The statutes authorizing leases of public lands within which the powers of land officers must be found frequently repose a large discretion in them, e. g. as to the necessity of advertisement,[54] and as to the propriety of renewing or leasing to another.[55] Mandamus will lie to compel the land commissioner to recognize a lease and accept rent thereunder.[56] Adoption of rules and regulations by land officers is not a condition precedent under the Texas laws.[57] Conditions and terms prescribed cannot be varied.[58]

Application for a new lease before time for cancellation of the old will not prevent the commissioner from canceling and reletting at the proper time.[59] Evidence of a prior lease by an applicant to purchase is not conclusive that the lease is in force.[60]

The term of a lease of Texas school lands begins at midnight of the day of execution, no other intention appearing.[61] Acceptance of a lease by an applicant amounts to acquiescence in a ruling of the commissioner as to expiration of the lease, where the statute regulating leases does not imperatively require a different construction.[62] One attacking the validity of the commissioner's ruling as to time of expiration of a lease has the burden of proof.[63] A lessee who attempted to purchase, the sale being rescinded before expiration of the lease, is not a lessee from the time of sale, though his payments exceeded the rents.[64]

Rent.—A small deficiency in acreage should not abate a rent in gross for named sections.[65] Default in rent does not of itself work a forfeiture, hence payment at any time before cancellation is good.[66] A tender may be good without a description of the lands, that not being required by statute.[67]

Rights under the lease.—A state law giving the United States "use" of state tide lands does not include tide lands held under private lease from the state.[68] The lessee of Texas university lands cannot recover damages caused by sheep in grazing while being moved expeditiously through the lands.[69]

51. Proof that land is a part of the Texas vacant public domain rebuts the inference of ownership from possession. Austin v. Espuela L. & C. Co. [Tex. Civ. App.] 77 S. W. 830.

52. Mistake in a patent as to the grantee's name. N. Y. & T. Land Co. v. Dooley [Tex. Civ. App.] 77 S. W. 1030.

53. State treasurer's certificate of payment of the price is admissible to prove payment by the patentee [Rev. St. 2308]; it cannot be objected to on the ground that payment of the money into the state treasury was no evidence of right to the land. Robles v. Cooksey [Tex. Civ. App.] 70 S. W. 584.

54. **Texas. The advertisement** for leases is discretionary with the commissioner. "May" advertise [Rev. St. 1895, art. 4218r]. West v. Terrell, 96 Tex. 548, 74 S. W. 903.

55. **In Wyoming** may lease anew to another person offering more than the former lessee in two applications, though he asked the board for a valuation of the lands [Rev. St. 1899, § 812]. Baker v. Brown [Wyo.] 74 Pac. 94.

56. Ballinger's Ann. Codes & St. § 5755. State v. Callvert, 33 Wash. 380, 74 Pac. 573.

57. **Rules and regulations** need not be adopted by the commissioners before selling or leasing. West v. Terrell, 96 Tex. 548, 74 S. W. 903.

58. The commissioner cannot receive less than a year's rent. Receipt of less will not keep the lease in force. Sherrod v. Terrell [Tex.] 76 S. W. 916.

59. West v. Terrell, 96 Tex. 548, 74 S. W. 903.

60. Anderson v. Walker [Tex. Civ. App.] 70 S. W. 1003.

61. Patterson v. Terrell, 96 Tex. 509, 74 S. W. 19.

62. Lease made Aug. 26, 1899, held to expire at midnight Aug. 25, 1901, so that the land was then open for sale. McGee v. Corbin, 96 Tex. 35, 70 S. W. 79.

63. McGee v. Corbin, 96 Tex. 35, 70 S. W. 79.

64. Burnam v. Terrell [Tex.] 78 S. W. 500.

65. People v. Terrell [Tex.] 76 S. W. 432.

66. Laws 1895, p. 72, c. 47; Laws 1901, p. 292, c. 125. People v. Terrell [Tex.] 76 S. W. 432.

67. Laws 1895, p. 72, c. 47. People v. Terrell [Tex.] 76 S. W. 432.

68. Laws 1889-90, p. 428, and Laws 1897, p. 243, construed. State v. Callvert, 33 Wash. 380, 74 Pac. 573.

69. Lease under Act April 1, 1887 (Pen. Code, art. 508), permitting the passage of sheep when necessary. Acrey v. McKenzie, 30 Tex. Civ. App. 255, 70 S. W. 367.

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Texas state school lands under lease cannot be sublet without consent of the state,[70] nor sold during the term to other than the lessee,[71] unless the lessee waives his right to undisturbed possession, the provision being merely for his benefit.[72] The assignee of the lease may purchase during the lease,[73] unless the land is in the absolute lease district.[74] After expiration of a lease, the original lessee has 30 days' preference right to renewal after the land is open for sale 60 days.[75] The statute determining priority of right to purchase lands and fixing leasehold rights does not determine the interest under an undetermined lease.[76]

Forfeiture, cancellation and re-lease.—Laws for cancellation of public land leases must be strictly construed.[77] An oil lease requiring exploration may be forfeited for failure to prospect.[78] Default in payment does not work an ipso facto forfeiture.[79] The execution of a new lease before the expiration of the 60 days after the rent was due will not operate as a cancellation of an old lease of the same lands.[80] A law of Washington giving the United States the right to operate a ship canal over state lands is not an attempt to convey lands leased from the state, so as to annul the lease.[81] Certain leases invalid for want of record have been cured by statute in Texas.[82]

Where the right to cancel a lease exists, it may be canceled informally if all parties acquiesce,[83] otherwise forfeiture must be clearly shown.[84] Though it is not

70. Rev. St. art. 3250, prohibiting subletting of premises without the landlord's consent applies in absence of provisions in the land laws. Adkinson v. Porter [Tex. Civ. App.] 73 S. W. 43.

71. Smith v. McLain, 96 Tex. 568, 74 S. W. 754. Proof of applications for purchase of state school land is overcome by proof of a lease to another in force at the time. Valentine v. Sweatt [Tex. Civ. App.] 78 S. W. 385. Lands in the "absolute lease district" and under lease are not subject to sale regardless of the lease [Act 1900 (Acts 26th Leg., First called Sess. p. 29, c. 11) and Id. p. 31, c. 11]. West v. Terrell, 96 Tex. 548, 74 S. W. 903.

72. Laws 1897, p. 186, c. 129, and Laws 1887, p. 83, c. 99; Laws 1895, p. 63, c. 47. Tolleson v. Rogan, 96 Tex. 424, 73 S. W. 520. Only on written consent of the lessee and then only to the person designated in such consent; if the attempted purchase is void the lease continues in force. Smith v. McLain, 96 Tex. 568, 74 S. W. 754. A certified copy of a written release by the lessee filed in the commissioner's office is admissible as showing a right to purchase Texas school lands which had been leased [Rev. St. 1895, §§ 4218n, 4218p, 2315]. Trevey v. Lowrie [Tex. Civ. App.] 78 S. W. 18.

73. Fields v. Davis [Tex. Civ. App.] 74 S. W. 52. Assignment of a lease of Texas school lands will not bar the assignee, after surrender, from purchasing the leased lands. Walker v. Marchbanks [Tex. Civ. App.] 74 S. W. 929. Assignment of an outstanding lease of a school section in Texas to the purchaser and homestead occupant of an adjacent section will prevent the lease from being an obstacle to his purchase of the land. Mitchell v. Johnson [Tex. Civ. App.] 74 S. W. 48.

74. Laws 1895, § 23 (Gen. Laws 24th Leg. p. 63, c. 47). Martin v. Terrell [Tex.] 76 S. W. 743.

75. Acts 1901, p. 295, c. 125, § 5. Valentine v. Sweatt [Tex. Civ. App.] 78 S. W. 385.

76. Acts 26th Leg., First called Sess. p. 33, c. 11. West v. Terrell, 96 Tex. 548, 74 S. W. 903.

77. Laws 1897, p. 243, § 25, providing for cancellation for nonpayment of rent, will not allow the commissioner to cancel for any other reason. State v. Callvert, 33 Wash. 380, 74 Pac. 573. A commissioner cannot cancel an existing lease in good standing, and release to the original lessee. Validity of new leases after cancellation or expiration of previous leases. Blevins v. Terrell, 96 Tex. 411, 73 S. W. 515. Cancellation of a lease by the commissioner at mere request of the lessee and release for a longer term is void. Act 1895 prescribes the only causes for cancellation. Newland v. Slaughter, 30 Tex. Civ. App. 228, 70 S. W. 102.

78. Rights under an oil lease of state lands were forfeited for failure to make diligent search for oil during four years, after searching unsuccessfully for two years. The lessee's title was for exploration only. Florence O. & R. Co. v. Orman [Colo. App.] 73 Pac. 628.

79. Act April 4, 1895; Laws 1901, p. 292, c. 125. People v. Terrell [Tex.] 76 S. W. 432.

80. At the expiration of the 60 days, an application to purchase was made and the land sold. This action was to reinstate the lease. Denied. Fish Cattle Co. v. Terrell [Tex.] 80 S. W. 73.

81. Laws 1901, p. 7. State v. Callvert, 33 Wash. 380, 74 Pac. 573.

82. Acts 1897, p. 186, c. 129 (Rev. St. art. 4128s) validated leases void for want of record under Acts 1895, p. 69, c. 47 (Rev. St. art. 4218r). Irwin v. Mayes, 31 Tex. Civ. App. 517, 73 S. W. 33.

83. West v. Terrell, 96 Tex. 548, 74 S. W. 903.

84. The presumption that official acts are regular will not extend to acts concerning forfeiture of a lease of state school lands, and proof that rights have been granted another will not render proof of legal forfeiture of the former lease unnecessary; a

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shown that a lease has been canceled, it is presumed that the award by the commissioner of a patent to another during the time covered by the lease was regular.[85] Sale of leased lands by the commissioner to the assignee of the lease will not estop the state from denying cancellation of the lease by such sale.[86] The statement of the register of the board of land commissioners of Colorado, that an oil lease of state lands was not subject to forfeiture under the statutes, will not bind the commissioners.[87]

Subsequent tender of rent is not payment which will remove the disqualification of a lessee, whose lease was canceled for arrears in rent, to lease anew.[88]

§ 6. *Spanish and other grants antedating Federal sovereignty.*—Spanish and Mexican grants to be valid must be susceptible of identification,[89] and if identifiable may be confirmed,[90] and when legally confirmed, the title is valid.[91] A Spanish grant in Florida, whether perfect or not, must have been confirmed by commissioners appointed by congress to adjudicate such claims, or by the courts.[92] Lands of a perfect Spanish-Mexican grant may be taxed, though the grant has been submitted to the court of private land claims for confirmation and no patent has issued.[93] A valid grant of public lands by Mexican authorities in 1833, pursuant to a concession, vested title in the grantee in the absence of evidence that it was not accepted, or after acceptance was abandoned,[94] and a subsequent grant under the same concession was absolutely void.[95] A law authorizing issuance of certificates or scrip to holders of deferred land claims confirmed under treaty of cession of Louisiana, redeemable in land by the United States, applies to a grantee of land

certificate from the commissioner that no prior lease exists is insufficient under Rev. St. art. 4218s. Irwin v. Mayes, 31 Tex. Civ. App. 517, 73 S. W. 33. An existing lease cannot be disregarded and a new one awarded alone on the statutory certificate that none exists of record [Rev. St. art. 4218s must be strictly construed]. Id. One seeking to establish forfeiture of leased lands for failure to record the lease must prove the statutory certificate showing no such lease of record [Rev. St. art. 4218s]. Id. The supreme court cannot determine proper cancellation of a lease on a disputed question of fact [Rev. St. 1895, art. 4218v]. West v. Terrell, 96 Tex. 548, 74 S. W. 903. That a lease can only be canceled by the commissioner will not prevent proof of cancellation by his certificate that pursuant to the lessee's release he had canceled the lease as to the land in question [Laws 1895, p. 63, c. 47]. Trevey v. Lowrie [Tex. Civ. App.] 78 S. W. 18. The record of the county clerk is evidence of cancellation of a lease [Acts 1901, pp. 294, 295, c. 125, §§ 4, 5]. Valentine v. Sweatt [Tex. Civ. App.] 78 S. W. 385.

85. Davis v. Tillar [Tex. Civ. App.] 74 S. W. 921. A new trial will not be granted a lessee, claimant as against a patentee during the time of the lease where he did not excuse failure to prove that the lease was still in force. Id.

86. If the sale is invalid, the commissioner had exceeded his powers. Carothers v. Rogan, 96 Tex. 113, 70 S. W. 18.

87. He was without authority to render such opinion [2 Mills' Ann. St. p. 1950, § 3630]. Florence O. & R. Co. v. Orman [Colo. App.] 73 Pac. 628.

88. Laws 1895, p. 72, c. 47, § 22. Kitchens v. Terrell, 96 Tex. 527, 74 S. W. 306. A lease made to him without this is void and no obstacle to a sale. Id.

89. An alcalde grant is void where the description is insufficient to identify the property; a map of vara lots not referred to in the grant will not render it sufficient. Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851.

90. The report of the commissioner of public lands in favor of a claim under a Spanish land grant will not render applicable provisions of the treaty of 1819 with Spain, to confirm the grant, where no survey existed and the description was indefinite. The grant alleged gave the area in arpents and stated that it was on the Mobile river. Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 Law. Ed. 266.

91. The courts are concluded by an act of congress confirming a claim for land under a Mexican grant [Act June 21, 1860 (12 Stat. 71, c. 167)]. Catron v. Laughlin [N. M.] 72 Pac. 26. Declaration by the surveyor general of New Mexico that a Mexican land grant is valid, and confirmation by congress on his recommendation, amount to a declaration of valid title. The courts can go back to the original grant only to determine the scope of title intended by the confirmation, since that was an adjudication of perfect title where the grant gives complete title. Id.

92. Under various acts of congress. Fla. Town Imp. Co. v. Bigalsky [Fla.] 33 So. 450.

93. Ter. v. Delinquent Tax List [N. M.] 73 Pac. 621.

94. October 4, 1833, an alcalde, in pursuance of proper concession for eleven leagues and the consent of the empressarios issued the final title and gave possession. Peaslee v. Walker [Tex. Civ. App.] 78 S. W. 980.

95. October 22, 1833, title to eleven leagues of land in a different locality was issued under the same concession. Peaslee v. Walker [Tex. Civ. App.] 78 S. W. 980.

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previously located under such a claim as to which the location failed because of prior grant or location.[96] State officers cannot sell pueblo lands.[97] Under Mexican laws, pueblo lands were held in trust for municipal purposes subject to control of the Mexican government. California succeeded to the sovereignty of Mexico and had authority to authorize and confirm the sale of such lands.[98] Where the evidence shows trustees of Monterey to be at least de facto officers, it will be presumed in absence of other evidence, in an action to quiet title to Monterey pueblo lands sold by the city, that they were regularly appointed; it may be shown that the persons signing the deeds were commonly reported to be city trustees.[99] Where a city confirms an alcalde grant by ordinance, its conveyance should follow to make a record title.[1] A supposition, by a claimant alleging under a Spanish land grant, that the grant existed and was lost, is not evidence of an actual grant.[2] Abandonment of lands by descendants of grantees in a Spanish land grant nine years before the treaty of 1848 with Mexico, without renewal or attempt to assert possession fifty years thereafter, will prevent confirmation of the grant in the court of private land claims.[3] After confirmation of a claim under a Mexican land grant by congress, forfeiture must have taken place before the land became American territory as appearing by official action of the former government.[4]

Recent holdings under state grants to towns,[5] confirmatory acts[6] and invalidating laws,[7] are collated below.

A writ of error from the United States supreme court to a state court to review a judgment against a claimant under a Spanish grant of 1819 and a Federal patent will lie where the Federal questions are meritorious.[8] A finding of the court of private land claims as to sufficiency of evidence as to settlement and occupation

96. Act June 2, 1858. Hodge v. Palms [C. C. A.] 117 Fed. 396.

97. Title to pueblo lands cannot be conveyed by deed of state tide land commissioners in California. United Land Ass'n v. Pac. Imp. Co., 139 Cal. 370, 72 Pac. 988.

98. California ratified a sale of the pueblo lands of Monterey alleged to have been made when the trustees of the city were incompetent to act on account of physical disability. Held, that such act cured defects in the sale, and in the conveyance that did not have the corporate seal affixed. City of Monterey v. Jacks, 139 Cal. 542, 73 Pac. 436. Such confirmation cured an alleged defect in a conveyance by the trustees of Monterey in that the corporate seal was not affixed. Confirmation of sales by city of Monterey [Act Congress March 3, 1851, c. 41 (9 Stat. 631) and Cal. St. 1850, p. 131, c. 50; St. 1857, p. 55, c. 57, and St. 1865-66, p. 835, c. 607 construed]. Id.

99. Lands acquired from Mexico, sale of which was confirmed by the state. City of Monterey v. Jacks, 139 Cal. 542, 73 Pac. 436.

1. One in possession of city lands under an alcalde grant on Jan. 1, 1855, whose title was confirmed by ordinance, did not have a title deducible of record where he did not obtain a transfer of the city's interest. Confirmation of title by Van Ness ordinance; transfer of city's interest authorized by Act March 14, 1870 (St. 1869-70, p. 353, c. 249). Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851.

2. Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 Law. Ed. 266.

3. Sena v. U. S., 189 U. S. 233, 47 Law. Ed. 787.

4. The confirmation was applicable to such grantees as had not forfeited by noncompliance with the grant; one alleging forfeiture must prove it. Catron v. Laughlin [N. M.] 72 Pac. 26.

5. The colonial patent, Oct. 30, 1676, to the town of Southold, Long Island, does not give the town title to lands under water in Peconic and Gardiner bays. Town of Southold v. Parks, 41 Misc. [N. Y.] 456. Each town of Rhode Island was authorized by the act of 1707 to settle waters bordering on their respective townships [4 Col. Rec. 24]. N. Y., N. H. & H. R. Co. v. Horgan [R. I.] 56 Atl. 179.

6. The Federal statute confirming the "Corkran Grant" in Louisiana acted retrospectively so as to cover and protect claims of third persons to the property prior to its date, as if the land belonged to Corkran or his heirs when the claims arose [Act Congress, Feb. 10, 1897 (29 Stat. 517, c. 213)]. Corkran O. & D. Co. v. Arnaudet, 111 La. 563. Liability of Corkran grant land in Louisiana to taxation. Id. Conveyance by a citizen of Coahuila in 1834, of his right as a colonist to locate land, was recognized by the constitution of the Texas republic and Act Dec. 1837. Stone v. Crenshaw, 30 Tex. Civ. App. 394, 70 S. W. 582.

7. Grants by the government of New York of lands originally granted by the governor of the province, and which were never a part of New Hampshire are not invalidated by the preamble to the Constitution of 1777. Davis v. Moyels [Vt.] 56 Atl. 174.

8. Spanish grant perfected under treaty with Spain [Feb. 22, 1819 (8 Stat. 252)]. Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 Law. Ed. 266.

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of a tract purporting to have been granted will be adopted on appeal by the United States supreme court.[9]

§ 7. *Regulations and policing, and offenses pertaining to public lands.*—The United States may exclude the public from use of reservations or prescribe regulations for their use which cannot be interfered with by the courts as unreasonable or oppressive.[10] While congress may delegate power to the secretary of the interior to regulate such use, exercise of his power must rest on express or implied delegation by statute.[11] A rule of the secretary of the interior, prohibiting pasturage of sheep and goats on forest reservations except by special permit, is a proper exercise of his authority; since the sundry civil appropriations act, authorizing him to regulate and preserve forest reservations and prescribing a penalty for violation of such regulations, is not unconstitutional as a delegation of legislative power to an administrative officer.[12] A preliminary injunction will issue to prevent pasturage of sheep on forest reservations on an allegation of irreparable injury to timber, undergrowth and water supply.[13]

Cutting timber on public lands.—Laws permitting removal of timber from Federal mineral lands for building, agricultural, mining and other domestic purposes authorizes removal from mining claims and from lands in close proximity to such claims having the general character of mineral lands.[14] Location of mineral claims on unsurveyed mineral lands will not prevent recovery by the United States for timber cut by other than the locators.[15] The secretary of the interior cannot enlarge or restrict the purposes for which timber may be taken for mining purposes from public mineral lands.[16] A homesteader may cut timber for his home before making entry[17] or during his residence,[18] or may contract with another to cut timber.[19] The right to take building material from "adjacent" lands does not extend to lands 20 miles distant.[20] One sued for value of timber cut from the

9. Spanish land grant. Sena v. U. S., 189 U. S. 233, 47 Law. Ed. 787.

10. Arkansas Hot Springs Reserve. The government has the same right as a private owner to regulate use of the waters. Van Lear v. Eisele, 126 Fed. 823.

11. Validity of regulations requiring registry and qualification of physicians prescribing baths and of prohibition against bathing by person not a patient of a registered physician. Van Lear v. Eisele, 126 Fed. 823.

12. Act June 4, 1897 (30 Stat. 35). Dastervignes v. U. S. [C. C. A.] 122 Fed. 30.

13. A bill by the United States against several defendants to prevent pasturage is not multifarious merely because it alleges that two bands of sheep were pasturing in the lands. It shows no different interests in the several defendants. Dastervignes v. U. S. [C. C. A.] 122 Fed. 30.

14. Act June 3, 1878 (20 Stat. 88) § 1. U. S. v. Basic Co. [C. C. A.] 121 Fed. 504. Act June 3, 1878, allowing the cutting of timber from public mineral lands under certain regulations of the secretary of the interior and for certain purposes, must be liberally construed, and the regulations reasonable so as not to prevent or limit its effect. U. S. v. Mullan Fuel Co., 118 Fed. 663.

15. Powers v. U. S. [C. C. A.] 119 Fed. 562.

16. Act June 3, 1878 (20 Stat. 88), 1 Supp. Rev. St. 166. Timber taken from public mineral lands for "roasting" ore is for a "mining" purpose. U. S. v. United Verde Copper Co. [Ariz.] 71 Pac. 954.

17. Though local land office had previously been ordered by the land department not to accept filing on such land. U. S. v. Blendauer, 122 Fed. 703.

18. The United States cannot recover the value of timber cut by a homesteader during residence which continued until he was entitled to a patent, or where he obtained title by locating scrip thereon, relinquishing the homestead entry. U. S. v. Ellis, 122 Fed. 1016. Issue of a final certificate to a homestead entryman will estop the government from recovering from him or his grantee for removal of timber, or waste, during pendency of the entry; but after cancellation of the certificate for fraud, recovery may be had from the grantee or his vendees with notice of the fraud for logs or ore converted before cancellation. Potter v. U. S. [C. C. A.] 122 Fed. 49.

19. Payment of the price for government lands vests the purchaser with the equitable title to the land as of the date of application, including timber cut after that date, so that one cutting timber after application under agreement with the applicant is not liable as a trespasser. Teller v. U. S. [C. C. A.] 117 Fed. 577.

20. Lands 20 miles distant from the right of way are not "adjacent" within the meaning of 18 St. at L. 482, granting railroad companies the right to take materials for the construction of its road from adjacent public lands. U. S. v. St. Anthony R. Co., 192 U. S. 524.

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public domain must show compliance with regulations for cutting.[21] Obtaining a written contract for sale and delivery of timber taken from the public domain is not a compliance with a regulation that one so taking timber from mineral lands must not sell without taking a contract from the purchaser requiring its use for the purposes prescribed by law for such removal.[22] Release by a government agent of ties cut by a trespasser, after seizure, on agreement of the trespasser to pay the appraised value, vests title in him.[23] The United States cannot sue when title has passed from the government.[24] Intent to purchase or custom in beginning cutting of timber before purchase is no defense.[25] Defendant must plead the defense of good faith if he desires to show it in mitigation of damages.[26] Proof of government ownership of lands, of the cutting, possession, and taking away by a railroad company, and of the value of the timber, is sufficient in trover by the United States, though under special laws the company may take timber from the public lands for certain purposes.[27] Where the only evidence as to the quantity of timber taken was testimony of scalers who made estimates from the land several years after removal of the timber, every presumption reasonable under the evidence may be indulged in favor of the United States.[28]

The measure of damages[29] is the value at the time and place where the cutting was done,[30] excluding the added value of timber due to labor and expense.[31] Exemplary damages may be recovered; but defendant may show under his plea of good faith that he acted on the advice of counsel.[32]

The right to cut timber on reserved state lands in Maine is terminated by incorporation of a town including such lands.[33] The trust title in the state has ceased and it cannot maintain trespass for the cutting.[34]

Offenses in applications by settlers.—Proof of forgery of transfer papers of additional homestead will not support an indictment for transmitting them to a land office.[35] A false application for a soldier's additional homestead, supported by proofs and affidavits taken before a notary, is the offense of presenting false evidence in support of a claim against the United States, if done willfully and fraudulently.[36]

21. Act June 3, 1878, §§ 1, 3 (20 Stat. 88). U. S. v. Basic Co. [C. C. A.] 121 Fed. 504; U. S. v. Gentry [C. C. A.] 119 Fed. 70; U. S. v. Mullan Fuel Co., 118 Fed. 663.

22. Act June 3, 1878 (20 Stat. 88). U. S. v. Gentry [C. C. A.] 119 Fed. 70.

23. Teller v. U. S. [C. C. A.] 117 Fed. 577.

24. An action to recover for removal of timber from unsurveyed lands within limits of a railroad grant cannot be brought by the United States when a survey would bring the land within a tract as to which the government had parted with title. U. S. v. Mullan Fuel Co., 118 Fed. 663.

25. Teller v. U. S. [C. C. A.] 117 Fed. 577.

26. Code Civ. Proc. Mont. 700. U. S. v. Mullan Fuel Co., 118 Fed. 663.

27. The railroad must prove that the purposes were within the permitting acts [17 Stat. 339, c. 354, and 19 Stat. 405, c. 126]. U. S. v. Denver & R. G. R. Co., 191 U. S. 84.

28. Because of uncertainty in the estimates and because defendants presumably could have produced better evidence but did not. Sauntry v. U. S. [C. C. A.] 117 Fed. 132.

29. Measure of damages for removal of timber from homestead lands by one entering for purpose of obtaining the timber. Potter v. U. S. [C. C. A.] 122 Fed. 49.

30. The value of timber unlawfully cut from the public domain at the time and place where it is cut is the measure of damages where the cutting was done on the advice of counsel that the lands from which it was cut was "adjacent" within the meaning of 18 Stat. 482. U. S. v. St. Anthony R. Co., 192 U. S. 524.

31. One unlawfully removing timber from public mineral lands is not liable for the added value of the timber due to his labor and expense where his failure to keep the record required by the general land office was due to ignorance and he believed he was a resident in the state within the law allowing removal of timber for certain purposes. Powers v. U. S. [C. C. A.] 119 Fed. 562.

32. U. S. v. Mullan Fuel Co., 118 Fed. 663.

33, 34. St. Me. 1850, p. 193, c. 196. State v. Mullen, 97 Me. 331.

35. The three offenses prescribed by Rev. St. 5421, for forgery or transmission of forged writings to defraud the United States are separate and distinct. U. S. v. Fout, 125 Fed 625.

36. Under Act July 1, 1890, and Rev. St. § 5438. U. S. v. Lair, 118 Fed. 98.

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PUBLIC WORKS AND IMPROVEMENTS.

§ 1. **Definition and Scope of Title (1328).**
§ 2. **Power, Duty and Occasion to Order or Make Improvements (1328).**
§ 3. **Funds for Improvement and Provision for Cost (1330).**
§ 4. **Proceedings to Authorize Making (1332).**
A. By Whom and How Initiated (1332).
B. The Ordinance or Public Act of Approval (1335).
§ 5. **Proposals and Contracts for Work (1336).** Security to Laborers and Materialmen (1339).
§ 6. **Injury to Property and Compensation to Owners (1341).**
A. In General (1341).
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§ 7. **Local Assessments (1344).**
A. Equality and Uniformity (1344).
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K. Remedies by Injunction or Other Collateral Attack, and Grounds for Them (1358).
L. Appeal and Other Direct Review (1360). Appeal (1360). Certiorari (1361).

§ 1. *Definition and scope of title.*—This topic includes public works and improvements of all kinds and assessments general and local therefor, and contracts therefor.[1] The taking of property for public use,[2] the construction and operation of particular public works,[3] and matters peculiar to the powers and fiscal affairs of particular public bodies,[4] are specifically treated elsewhere. A local improvement is a public improvement, which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality.[5] Whether a sewer is public and taxable to the public generally, or district and taxable to the property benefited, does not depend upon the action of the council, but on the nature of the sewer itself. If it is open and available to the whole city, then it is public, otherwise not;[6] and where tax bills for a district sewer are assailed on the ground that the district sewer did not connect with any public or district sewer, the main sewer is sufficiently shown to be public by its acceptance and use as such by the city regardless of how it was originally established.[7]

§ 2. *Power, duty and occasion to order or make improvements.*[8]—The power of municipalities to order or make public improvements, either at the general public expense,[9] or at the expense of the owners of property supposed to be benefited thereby,[10] is purely statutory, and no improvements are authorized except such as are clearly within the terms of the statute,[11] or necessary to a full enjoyment of the power actually granted.[12]

1. Public Contracts, 2 Curr. Law, p. 1280.
2. See Eminent Domain, 1 Curr. Law, p. 1002.
3. See Highways and Streets, 2 Curr. Law, p. 177; Sewers and Drains; Waters and Water Supply.
4. See Counties, 1 Curr. Law, p. 816; Municipal Corporations, 2 Curr. Law, p. 940; States; Towns.
5. Chicago v. Hanreddy, 102 Ill. App. 1.
6. South Highland L. & I. Co. v. Kan. City, 172 Mo. 523, 72 S. W. 944; Prior v. Buehler & C. Const. Co., 170 Mo. 439, 71 S. W. 205.
7. Akers v. Kolkmeyer, 97 Mo. App. 520. 71 S. W. 536. See, also, the topic Sewers and Drains.
8. See, also, Public Contracts, § 1, 2 Curr. Law, p. 1281.
9. Statutory authority to city to build city building held only permissive, not mandatory, and proceedings taken under it rescindable at any time saving intervening rights. Staples v. Bridgeport, 75 Conn. 509.
10. There are two methods provided by the Indiana Statutes for the improvement of county line highways at the expense of the benefited property [Burns' 1901, §§ 6792 et seq., 6914 et seq]. Sefton v. Howard County Com'rs, 160 Ind. 357, 66 N. E. 891.

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When the power is granted, however, the duty of determining the occasion or necessity of the improvement being legislative is usually conferred upon some local legislative body such as a city council, county board or board of public works, and its discretion in the matter is final and cannot be controlled by the courts in the absence of fraud,[12] unless the board has so abused its discretion in that regard that the ordinance authorizing it may be declared void,[14] and the determination of material for street paving is a matter of legislative discretion, lodged with the council, and cannot be usurped by a ministerial officer.[15] Similarly, improvement boards in Arkansas are not mere agents of the city council, but have an independent existence and the council cannot interfere with the build-

11. Statutes authorizing improvement of streets and assessment of benefits, held to authorize the opening of a proposed street to constitute an extension of another street [Act Mch. 24, 1899, p. 283, c. 135, as amended by Act Mch. 20, 1901, p. 145, c. 70, § 59]. Rowe v. Com'rs of Assessments of East Orange [N. J. Law], 55 Atl. 649. Authority to build sidewalks will not authorize the building as one improvement of a sidewalk and curb, the curb being at a distance from the walk and in no sense a part of it. Boals v. Bachmann, 201 Ill. 340, 66 N. E. 336. Under statutory authority to order streets "graded and paved," a city has no authority to order grading without paving. Taylor v. Patton, 160 Ind. 4, 66 N. E. 91. The charter of Yonkers does not empower it to improve private property as a private road by grading and laying stone steps therein for the use of the public and assess the cost thereof on a restricted assessment district. Culver v. Yonkers, 80 App. Div. [N. Y.] 309. After a park board in Illinois has taken control of and improved the side adjoining the park of a street running longitudinally along such park, it has, under the statute, full control over such street and the city authorities have no further right to improve it at the expense of the abutting owners. Chicago v. Carpenter, 201 Ill. 402, 66 N. E. 362. Under authority to levy a tax for the repair of a drain, the drainage commissioners cannot assess property owners of the district for deepening an existing ditch. People v. McDougal, 205 Ill. 636, 69 N. E. 95. Where a city has ordered a street paved without petition of the property owners, and thereby deprived itself of charging the cost on the abutting property, it may nevertheless order curbing put in and assess its cost on the property. Omaha v. Gsanter [Neb.] 93 N. W. 407. The gravel and macadamized road act of Indiana is valid [Acts 1903, p. 255, c. 145]. Bowlin v. Cochran [Ind.] 69 N. E. 153. Boards of trustees of incorporated towns can exercise only the powers in respect to sidewalks and street improvements conferred by statute. Clay City v. Bryson, 30 Ind. App. 490, 66 N. E. 498. A statute giving a council power to cause "the whole width of the street to be graded and paved" does not give them power to "grade or pave" the street. Taylor v. Patton, 160 Ind. 4, 66 N. E. 91.

12. A town in New Hampshire under its general authority over highways has power to construct sewers so far as needed to put and keep its highways in suitable condition, and the fact that house drains are connected with a sewer does not show that it is not needed to render the highway suitable for public travel. Contoocook Fire Precinct v. Hopkinton, 71 N. H. 574. Though a city has no power to construct a sewer for general purposes under cover of a street improvement, it may construct a storm drain in connection with paving where the cost of it is but a small portion of the cost of the whole improvement, and is necessary for the benefit of the street. Gates v. Grand Rapids [Mich.] 95 N. W. 998. The drainage act of Indiana does not authorize the building of a levee where it is not a mere incident of the drain, but is rather the principal improvement. Royse v. Evansville & T. H. R. Co., 160 Ind. 592, 67 N. E. 446. The uniting of two or more sewer districts with a joint district does not exhaust the power of the council of Kansas City in that respect, but several such joint districts may be united to form a larger joint district as often as the development of the city makes such course necessary. South Highland L. & I. Co. v. Kan. City, 172 Mo. 523, 72 S. W. 944.

13. Matkin v. Marengo County, 137 Ala. 155; Akers v. Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536; Duker v. Barber Asphalt Pav. Co., 25 Ky. L. R. 135, 74 S. W. 744; Louisville v. Bitzer, 24 Ky. L. R. 2263, 73 S. W. 1115; Haman v. Franklin, 99 Mo. App. 346, 73 S. W. 314. A determination by the public improvement commission to replace a blue stone curb with one of granite on the ground that the former becomes watersoaked and disintegrates from frost is the determination of a question of fact, not reviewable on certiorari. People v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802. The power to determine whether public necessity requires the making of a public improvement is committed to the city council, the decision of which is final. Diamond v. Mankato, 89 Minn. 48, 93 N. W. 911.

14. Walker v. Chicago, 202 Ill. 531, 67 N. E. 369. Sidewalk. Pierson v. People, 204 Ill. 456, 68 N. E. 383. Where the good faith of a board of levee commissioners in locating a levee and taking land under the power of eminent domain is not impugned, the courts will not attempt to dictate or control their actions on the ground that they may have acted hastily or unwisely. Ham v. Board of Levee Com'rs [Miss.] 35 So. 943.

15. City engineer substituted a substantially different gravel for that called for by the ordinance. Held, tax bills, based on the work, void. Kan. City v. Askew [Mo. App.] 79 S. W. 483. Under Ky. St. 1894, § 2826, where a city council has directed an improvement in general terms, the board of public works has power to prescribe the details of the work. Barber Asphalt Pav. Co. v. Gaar, 24 Ky. L. R. 2227, 73 S. W. 1106.

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ing of an improvement ordered by the board on the ground that it is impracticable or that a majority of the property owners do not desire it.[16] It has been held, however, that the board of aldermen of a city in ordering street improvements and letting contracts therefor act not in a legislative but an administrative or business capacity, and their acts are reviewable on the ground of fraud or corruption.[17]

Where it appears that the work requested on a public highway as repairs would be in fact the making of a new road, and that public necessity and convenience do not require the improvement, the county commissioners may deny the application.[18]

The reasonableness of a proposed scheme or system of sewerage involves the consideration of the situation and condition of the whole of the territory to be reached by the sewers and cannot be determined alone in view of the situation of the property of certain objectors.[19] A sewer ordinance is not unreasonable in providing for two house slants for each corner lot, one on each street.[20]

The fact that a street has been before improved does not deprive the municipality of authority to require it to be improved again in a proper case at the expense of the abutting property owners,[21] but a reimprovement before a reasonable time has passed, and while the original improvement is in good repair is illegal as being unreasonable, and taxes levied therefor are uncollectible.[22]

Under power to build sidewalks and assess their cost on abutting owners, an ordinance may authorize the owners to build the walks themselves,[23] and where the law does not require the city to give the lot owner opportunity to build his own sidewalk, giving it to him will not invalidate the ordinance, nor can he complain that the opportunity given him was insufficient;[24] but the fact that the property owner has constructed a walk in front of his own property where not authorized so to do will not relieve him from paying his pro rata share of the expense of building the walks in the district.[25] It is within the police power of the state to authorize a city to abate a nuisance within its limits and assess the expense against the property benefited.[26]

§ 3. *Funds for improvement and provision for cost.*—The power to raise money for public improvements, either by general taxation or by the issue of bonds, must, as in the case of raising money generally, be strictly pursued,[27] and

16. Board of Improvement v. Earl [Ark.] 71 S. W. 666.

17. Field v. Barber Asphalt Pav. Co., 117 Fed. 925; People v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802.

18. Appeal of Goodspeed, 75 Conn. 271.

19. Washburn v. Chicago, 198 Ill. 506, 64 N. E. 1064.

20. Duane v. Chicago, 198 Ill. 471, 64 N. E. 1033.

21. Lux & T. Stone Co. v. Donaldson [Ind.] 68 N. E. 1014.

22. Field v. Barber Asphalt Pav. Co., 117 Fed. 925; Chicago v. Brown, 205 Ill. 568, 69 N. E. 65.

23. Zalesky v. Cedar Rapids, 118 Iowa, 714, 92 Mo. 657.

24. Eversole v. Walsh, 25 Ky. L. R. 784, 76 S. W. 358.

25. Heman Const. Co. v. McManus, 102 Mo. App. 649, 77 S. W. 310.

26. City authorized to fill in lots to prevent stagnant water thereon, and assess expense against the lots filled. Patrick v. Omaha [Neb.] 95 N. W. 477.

27. A certificate of drainage commissioners failing to state the items of expense necessary for the ensuing year, and merely stating a sum in gross, will not authorize spreading the tax. People v. Glenn, 207 Ill. 50, 69 N. E. 568. Where a village is proceeding to build sidewalks to be paid for by an issue of bonds, as prescribed by statute, no certificate of the clerk that the village is in funds available for the purpose is necessary [Rev. St. §§ 2702, 2330b]. Trowbridge v. Hudson, 24 Ohio Circ. R. 76. After bonds have been voted for the expense of a highway improvement, the character of which has been previously determined, the town board may change the details of the plans, so long as the character of the work is not changed and the authorized limit of expenditure is not exceeded. Campau v. Highway Com'r of Grosse Pointe [Mich.] 93 N. W. 879. Under the provision of the Ohio statutes for the submission of the question of constructing county roads to the voters, the vote must be on the question of constructing particular roads, and not general authority to the commissioners to build such as they deem necessary. Gallia County Com'rs v. State, 67 Ohio St. 412, 66 N. E. 524.

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can be exercised only when expressly granted,[28] and in favor of only such improvements as are authorized by statute.[29] But a liability on the part of a city to pay for public improvements actually constructed may arise in favor of the person doing the work, though the intention was that only the property benefited should be charged,[30] though, where a contractor agrees to take pay only out of special assessments made, or to be made, for the improvement, and to take the risk of their invalidity, he has no right of action against the city, in case of failure to collect the assessment,[31] except in cases where the city by its own act prevents the collection.[32] The city may also become liable to the property owner, where he has been compelled to pay a higher price than necessary for the work, by reason of the city's neglect.[33]

In those states where the practice is for the city to pay for the improvement primarily, and assess its cost against the benefited property, it is frequently provided that in case the special assessment cannot be collected, the city shall have an action against the property owners for the value of the improvement.[34] Such a provision, however, will not support an action for an improvement the city had no authority to make.[35] Where a property owner refuses to pay an assessment for a sidewalk, proper in amount, but void, and the municipality by its charter is charged with the care of public property, and empowered to lay sidewalks and levy assessments, it can remove the sidewalk,[36] but a municipality which imbeds flag stones, for a sidewalk, in the soil of the highway, thereby affixing them to the realty, cannot remove them on a successful resistance by the abutting owner of a special tax levied to pay for them.[37] The amount of special tax assessable to any

28. A village in New York, operating under a special charter, has power, under the general village law, to borrow money on bonds to pave its streets. Canandaigua v. Hayes, 85 N. Y. Supp. 488.

29. The power to borrow money and issue bonds, conferred upon highway commissioners in Illinois by section 20 of the Road and Bridge Act, is only available where extraordinary obstructions to travel at certain places are to be overcome, and cannot be used to raise money simply for building macadamized or other hard roads. St. Louis, A. & T. H. R. Co. v. People, 200 Ill. 365, 65 N. E. 715.

30. Pine Tree Lumber Co. v. Fargo [N. D.] 96 N. W. 357; Alton v. Job, 103 Ill. App. 378. If, having power to make the improvement, it had no power to assess the cost on abutting property, the city is liable. Property not benefited. Louisville v. Bitzer, 24 Ky. L. R. 2263, 73 S. W. 1115. Where bonds, issued in Nebraska, to pay for local improvements contain no stipulation limiting the recourse of their holders to the special taxes levied for such improvements, they create a general liability of the city issuing them, enforceable by mandamus. U. S. v. Saunders [C. C. A.] 124 Fed. 124.

31. Roter v. Superior, 115 Wis. 243, 91 N. W. 651. Sidewalks. Park Ridge v. Robinson, 198 Ill. 571, 65 N. E. 104. Sewer. Alton v. Foster, 207 Ill. 150, 69 N. E. 783; Dalton v. Poplar Bluff, 178 Mo. 39, 72 S. W. 1068. Except to mandamus to compel a reassessment in case of invalidity. Paving. Farrell v. Chicago, 198 Ill. 558. 65 N. E. 103. The rule of caveat emptor applies to a sale of property in default of payment of a special tax, and the buyer is generally not entitled to recover from the city or county in case he is unable to enforce the lien. Concordia L. & T. Co. v. Douglas Co. [Neb.] 96 N. W. 55; Elder v. Fox [Colo App.] 71 Pac. 398.

32. If the city collect and divert the proceeds of special assessments, it is liable to the contractor in damages. Pine Tree Lumber Co. v. Fargo [N. D.] 96 N. W. 357. Where, after letting a contract, the council repeals the ordinance authorizing the improvement, it is liable to the contractor for the price, though the contract provides that he will make no claim against the city except for the special taxes levied against the property benefited. Alton v. Job, 103 Ill. App. 378.

33. Louisville v. Ky. & I. Bridge Co., 24 Ky. L. R. 1087, 70 S. W. 627.

34. An adjudication of the invalidity of special assessments is not conclusive as to the right of the city to recover of abutting owners, on a quantum meruit, for the improvement to their property by the paving [Iowa Code 1873, §§ 478, 479]. Davenport v. Allen, 120 Fed. 172. A city charter, making no provision other than reassessment for reimbursement of the city in case an assessment for local improvements is declared invalid, is not unconstitutional for failure to limit the amount of indebtedness the city may incur by local improvement. Kadderly v. Portland [Or.] 74 Pac. 710.

35. Where the statutory remonstrance of the owners of more than one-half the adjacent property has been filed and ignored, and the assessments for the work been vacated, the city cannot recover from the lot owners under the statute authorizing recovery, where an assessment is invalid or uncollectible. Portland v. Or. Real Estate Co., 43 Or. 423, 72 Pac. 322.

36. Platt v. Oneonta, 40 Misc. [N. Y.] 42.

37. Platt v. Oneonta, 84 N. Y. Supp. 699.

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property in a given year is frequently limited to a certain percentage of the value of the property,[38] and where a municipality attempts to assess the whole cost of an improvement on abutting owners, with the result that a greater percentage of the value of the property is assessed to it than the law allows, its course is to reassess the amount allowed by law upon the abutting owners, and the deficit upon the property of the municipality generally.[39]

A direction, by the trustees of a village, to a property owner to construct a walk at his own expense does not amount to a consent by the village, so as to entitle him to recover from the village one half the cost thereof, under the Village Law of New York.[40]

The burden of mere repairs, as distinguished from original construction, of pavements, is generally placed by statute upon the general public,[41] and it is not infrequently provided that repavements shall not be at the expense of the abutting property, where it has once paid for pavement.[42]

§ 4. *Proceedings to authorize making. A. By whom and how initiated. Petition and notice.*—The power to make or order public improvements at the expense of property owners, being purely statutory, and being regarded as particularly burdensome to them, the statutory requirements must be strictly pursued,[43] and jurisdiction shown at every step.[44] Where noncompliance with the statute amounts to a mere irregularity, proceedings thereunder will not be invalidated by such irregularity.[45]

A petition of property owners in substantial compliance with the law is a necessary prerequisite in most states,[46] as well as notice to them by publication

38. Mound City Const. Co. v. Macgurn, 97 Mo. App. 403; Nowlen v. Benton Harbor [Mich.] 96 N. W. 450.

39. Corliss v. Highland Park [Mich.] 93 N. W. 254; Id., 93 N. W. 610; Id., 95 N. W. 416.

40. Laws 1897, c. 414, § 162. Sanford v. Warwick, 83 App. Div. [N. Y.] 120.

41. Repavement held not repairs. Barber Asphalt Pav. Co. v. Muchenberger [Mo. App.] 78 S. W. 280. Top dressing of old macadam road held an improvement such as may be assessed upon property owners and not a mere repair. Field v. Chicago, 198 Ill. 224, 64 N. E. 840.

42. Where the statute provides that repavement shall be at the expense of the public generally, a widening of the original paved roadway and a repavement of the whole, as widened, is clearly for the benefit of the public, no part of the cost of which is assessable to the property owner (Wreford v. Detroit [Mich.] 93 N. W. 876); but in Kentucky, a tearing up of an old pavement and the laying of another of different material is an original construction chargeable to the property owner and not a reconstruction chargeable to the public (Catlettsburg v. Self, 25 Ky. L. R. 161, 74 S. W. 1064). Repairs on an old turnpike road after it is taken into the corporate limits of a city are not an original construction so as to relieve property owners of the expense of paving it. Wymond v. Barber Asphalt Pav. Co., 25 Ky. L. R. 1135, 77 S. W. 203. A statute relieving property owners who have once paid for pavement of the expense made necessary by any subsequent change of grade, does not relieve them of the expense of repaving, where a slight change of grade is made because of the use of a different kind of pavement. Auditor General v. Chase [Mich.] 94 N. W. 178.

43. Leflore County v. Cannon, 81 Miss. 334. The proceedings required by statute to be taken before adoption of a special assessment ordinance are jurisdictional, and without them no valid ordinance can be passed or assessment made. Bickerdike v. Chicago, 203 Ill. 636, 68 N. E. 161. Where the statute provides for the correction of errors by the council and courts in proceedings to enforce payment of special taxes, the rule of strict construction against the taxing power does not apply as to that statute. Lexington v. Woolfolk [Ky.] 78 S. W. 910.

44. The record in street improvement cases must show jurisdiction (Sedalia v. Scott [Mo. App.] 78 S. W. 276), but need not specifically state that the street to be improved is within the corporate limits, as the city will be presumed to be acting within its charter powers (Kan. City v. Block, 175 Mo. 433, 74 S. W. 993). Under the Local Improvement Act of Illinois the recommendation of the local improvement board is prima facie evidence that all preliminary requirements of the law have been complied with. Departures from statute must be willful. McChesney v. Chicago, 205 Ill. 611, 69 N. E. 82. The record need not recite the facts relative to the giving of the statutory notice. Chicago Union Traction Co. v. Chicago, 202 Ill. 576, 67 N. E. 383; Wells v. Chicago, 202 Ill. 448, 66 N. E. 1056.

45. Failure to state value of land, or what land benefited, in commissioners' report on opening of a street. Pittsburgh, C., C. & St. L. R. Co. v. Wolcott [Ind.] 69 N. E. 451.

46. Donovan v. Oswego, 39 Misc. [N. Y.] 291; Morse v. Omaha [Neb.] 93 N. W. 734; South Omaha v. Tighe [Neb.] 93 N. W. 946;

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or otherwise, of the intention to improve.[47] A preliminary resolution or ordinance declaring the necessity of the improvement,[48] describing it,[49] and containing an

Jones v. South Omaha [Neb.] 94 N. W. 957; Hawkins v. Horton [Minn.] 97 N. W. 1053. Executors and trustees are "owners." Husband may sign for wife if authorized. Portsmouth Sav. Bank v. Omaha [Neb.] 93 N. W. 231. General manager of corporation cannot sign without authority of directors. Trephagen v. South Omaha [Neb.] 96 N. W. 248. Signers must be residents as well as property owners. Board of Improvement v. Cotter [Ark.] 76 S. W. 552. Statute requiring petition held not to include relaying of sidewalk. State v. Dist. Ct., 89 Minn. 292, 94 N. W. 870. Street sprinkling. Borgman v. Antigo [Wis.] 97 N. W. 936. In municipalities having a population of less than 10,000, a petition of the owners of at least one-half of the abutting property, and of a majority of the resident property owners affected by the proposed improvement, is essential to the jurisdiction of the improvement board, and the enactment of a valid ordinance. Vennum v. Milford, 202 Ill. 423, 66 N. E. 1040. Where an ordinance based on such a petition is held invalid on confirmation, it cannot be again used as a basis for action, as the ownership of the property may have materially changed since the petition was circulated. Vennum v. Milford, 202 Ill. 423, 66 N. E. 1040. Certiorari will not lie, at the suit of a remonstrant, to determine whether a petition to establish a free gravel road was signed by the requisite number of freeholders. Gifford v. Jasper County Com'rs, 160 Ind. 654, 67 N. E. 509.

47. The statutory notice is necessary to the jurisdiction of the council to pass a valid ordinance ordering an improvement. Joyce v. Barron, 67 Ohio St. 264, 65 N. E. 1001. The property owner cannot be charged with the expense of building a sidewalk, where he was not given the statutory notice to build it himself. Waukesha v. Randles [Wis.] 98 N. W. 237; Walden v. Relyea, 89 App. Div. [N. Y.] 241. Power to a city to provide for street improvements at the cost of abutting owners implies power to fix the character of the notice to be given them, and prescribe the manner of its service. Zalesky v. Cedar Rapids, 118 Iowa, 714, 92 N. W. 657. An assessment including the cost of both sidewalks and curbs, ordered by separate resolutions of intention, creates no lien, where the owners of a majority of the frontage objected to the one, and were given no opportunity to be heard, though the other was not objected to. Gray v. Burr, 138 Cal. 109, 70 Pac. 1068. One owner cannot object that others did not have notice (Kan. City v. Block, 175 Mo. 433, 74 S. W. 993), and the owner of a fractional interest cannot object to the payment of his proportion of the tax, though he was served as sole owner and his coowners had no notice (La. v. McAllister [Mo. App.] 78 S. W. 314). One who is present and participates at an election, and votes on the question of the sum to be raised without protest, cannot question the regularity of the election on the ground that the statutory notice was not given. Brown v. Street Lighting Dist. No. 1 [N. J. Law] 55 Atl. 1030. Where sufficient notice of the first meeting has been given the board may adjourn from time to time without further notice. McChesney v. Chicago, 201 Ill. 344, 66 N. E. 217. Six days' notice is sufficient, under a statute providing for reasonable notice. Field v. Chicago, 198 Ill. 224, 64 N. E. 840. So is five days. McChesney v. Chicago, 201 Ill. 344, 66 N. E. 217.

Contents: A published notice to property owners is not bad for not naming them. Portsmouth Sav. Bank v. Omaha [Neb.] 93 N. W. 231. The notice of public hearing need not contain the statement that if the board deem the improvement desirable, it will adopt a resolution therefor, and prepare and submit an ordinance to the council providing for the construction of the improvement. Gage v. Chicago, 201 Ill. 93, 66 N. E. 374; Walker v. Chicago, 202 Ill. 531, 67 N. E. 369. Where the resolution of intention contains several different improvements, the notices posted on a street need include only such improvements as are contemplated for that street. Bates v. Twist, 138 Cal. 52, 70 Pac. 1023. A notice of intention to pave and lay granite curbs, where not already laid, will include gutters, but will not include removal of curbs and replacing with granite. City St. Imp. Co. v. Taylor, 138 Cal. 364, 71 Pac. 446. A notice describing a taxing district wholly within a city, by giving the numbers of the city blocks, sufficiently describes its boundaries. St. Louis v. Koch, 169 Mo. 587, 70 S. W. 143.

Persons entitled: Notices held mailed to persons who paid the general taxes for the last preceding year as provided by statute. Field v. Chicago, 198 Ill. 224, 64 N. E. 840. Notice personally served upon the executor, where an estate is in process of settlement, is sufficient, where the land involved is in his sole possession as such and the ultimate owners are undeterminable until the death of successive life tenants. Peck v. Bridgeport, 75 Conn. 417.

Service: Where the ordinance provides for notice only by publication, personal notice is invalid. Zalesky v. Cedar Rapids, 118 Iowa, 714, 92 N. W. 657. Where notice by publication is provided for, but not made exclusive, personal notice is valid. Peck v. Bridgeport, 75 Conn. 417. That the last of the five consecutive days during which the publication was made was Sunday is no objection. Barber Asphalt Pav. Co. v. Muchenberger [Mo. App.] 78 S. W. 280.

48. Kirksville v. Coleman [Mo. App.] 77 S. W. 120. Resolution therefor void when statute required an ordinance. Bourgeois v. Ocean City [N. J. Law] 57 Atl. 262. Under Burns' Rev. St. 1901, § 4404, the town board of trustees may appoint commissioners to appraise damages and benefits, without having passed a formal resolution declaring that public convenience required the opening of a street. Pittsburgh, C., C. & St. L. R. Co. v. Wolcott [Ind.] 69 N. E. 451. A city council has power to advertise for bids and contract for paving a street, under a proper resolution, before passing an ordinance ordering the work done. Smith v. Westport [Mo. App.] 79 S. W. 725.

49. The first resolution for an improvement need not describe the improvement with the certainty required in the ordinance, it being sufficient, if the property owner can

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estimate of its cost,[50] is also generally provided for.[51] And in Illinois, the improvement must originate by resolution or recommendation of the improvement board.[52]

A remonstrance, by a sufficient number of property owners, generally deprives the board of further authority in the matter,[53] and the subsequent withdrawal of a portion of them will not reconfer it.[54]

Unless so provided by the statute, however, a public hearing on the necessity or propriety of the improvement is not necessary,[55] nor is the board limited to the precise improvement discussed thereat.[56]

determine therefrom the character and estimated cost of the improvement. Walker v. Chicago, 202 Ill. 531, 67 N. E. 369; Gage v. Chicago, 207 Ill. 56, 69 N. E. 588. The resolution of intention in California may include two or more distinct improvements. Bates v. Twist, 138 Cal. 52, 70 Pac. 1023. Before a city council can order a street paved it must pass a resolution declaring that it deems the improvement necessary, which resolution should state the kind of paving proposed to be used, and where the resolution also provides for bringing the street to grade at the expense of the property owners it must describe the work necessary. Kirksville v. Coleman [Mo. App.] 77 S. W. 120. An ordinance providing for the construction of a sidewalk "in accordance with said ordinance" is a sufficient compliance with a statute providing that such work should "in all respects conform to the requirements of such ordinance." Storrs v. Chicago [Ill.] 70 N. E. 347. That a recommendation and estimate described only a cement walk, did not invalidate an ordinance based thereon, providing for a cinder, cement, concrete, torpedo, sand, and limestone walk. Id.

50. A statutory provision that the engineer's itemized written estimate of the cost of the proposed improvement shall be made a part of the record of the first resolution is for the information and protection of the property owners and must be complied with. Statement of amount in gross is not sufficient. Bickerdike v. Chicago, 203 Ill. 636, 68 N. E. 161. A mere reference is insufficient. Kilgallen v. Chicago, 206 Ill. 557, 69 N. E. 586; Becker v. Chicago [Ill.] 69 N. E. 748; Moss v. Fairbury [Neb.] 92 N. W. 721. Evidence held insufficient to show that estimate was filed. De Soto v. Showman, 100 Mo. App. 323, 73 S. W. 257. Estimate made after first resolution is not sufficient. Kirksville v. Coleman [Mo. App.] 77 S. W. 120. A resolution appointing commissioners to estimate the cost of an improvement passed by way of amendment to the ordinance which omitted such appointment is invalid. Paxton v. Bogardus, 201 Ill. 628, 66 N. E. 853.

51. After an objection of owners to a street improvement has been allowed by the council, in a case where the allowance is discretionary, it cannot afterwards order the work done at their expense without a new resolution of intention (Pac. Pav. Co. v. Sullivan Estate Co., 137 Cal. 261, 70 Pac. 86; City St. Imp. Co. v. Babcock, 139 Cal. 690, 73 Pac. 666), but the adoption of the report of a committee that an objection filed legally bars further proceedings, when in fact it has no such effect, does not oust the jurisdiction of the council to order the work done (City St. Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916; City St. Imp. Co. v. Rontet, 140 Cal. 55, 73 Pac. 729).

52. The signing of a recommendation for a public improvement, in Illinois, by a majority of the members of the improvement board, is sufficient, the statute not requiring its signature by the president and secretary. Dodge v. Chicago, 201 Ill. 68, 66 N. E. 367. The improvement will be presumed to have originated with the improvement board, notwithstanding a resolution of the council ordering it to prepare an ordinance therefor, since such resolution should be treated by the board as a mere petition. Walker v. Chicago, 202 Ill. 531, 67 N. E. 369; Gage v. Chicago, 207 Ill. 56, 69 N. E. 588. An ordinance which has been held to be defective in matters of description may be the basis for a new one for a new assessment for the completed work. Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786. A special assessment ordinance, passed under the law as it existed prior to the Local Improvement Act of 1897, if subsequently held to be defective, may, under section 58 of such act, be corrected by passing a new ordinance and making a new assessment. Groton v. Chicago, 201 Ill. 534, 66 N. E. 541. A public hearing was had on a proposed scheme of improvement. A resolution was then adopted by the board of local improvements, changing the scheme in such a way as to reduce the cost, but estimated cost was not mentioned. There was no further public hearing. Held, a sufficient compliance with the statute. Chicago v. Kerfoot & Co. [Ill.] 70 N. E. 349.

53. Portland v. Or. Real Estate Co., 43 Or. 423, 72 Pac. 322; Pac. Pav. Co. v. Sullivan Est. Co., 137 Cal. 261, 70 Pac. 86; City St. Imp. Co. v. Babcock, 139 Cal. 690, 73 Pac. 666; City St. Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916; City St. Imp. Co. v. Rontet, 140 Cal. 55, 73 Pac. 729.

54. Knopfl v. Gilsonite R. & P. Co., 92 Mo. App. 279; Sedalia v. Scott [Mo. App.] 78 S. W. 276.

55. A statute providing for the laying or renewing of sidewalks and not providing for a public hearing is constitutional. Gage v. Chicago, 203 Ill. 26, 67 N. E. 477.

56. The right to public hearing being purely statutory, a statute authorizing a change in the proposed scheme without a further hearing is within the power of the legislature. Washburn v. Chicago, 198 Ill. 506, 64 N. E. 1064. Where a hearing is had upon a notice signifying the intention to pave with brick, and the commissioners subsequently decide to use asphalt, the proceedings are not invalid for failure to give further opportunity for a hearing before such decision. People v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802. A statute authoriz-

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(§ 4) *B. The ordinance or public act of approval.*—An ordinance providing for the particular work is the very foundation of the improvement, whether it is to be paid for by a special tax[57] or by the city at large, and if there be no ordinance providing for it, the city cannot be bound by a ratification of the work by the council after it has been done.[58]

If the ordinance fails to sufficiently specify the nature, character, locality and description of the improvement, it, as well as all subsequent proceedings, are invalid.[59] An ordinance providing that the roadway of streets shall be graded need not specifically state that the low places shall be filled and the high places cut down, as the word "grade" naturally includes such action.[60] An ordinance sufficiently specifies the width of roadways to be paved which declares that they shall extend a certain number of feet upon each side of the center line of the street,[61]

ing the board of local improvements, at a public hearing, to adopt a new resolution changing the former proposed scheme, without a further public hearing, provided the change does not increase the estimated cost to exceed 20 per cent, authorizes a change which decreases the cost [Laws 1901, p. 104, § 8]. Washburn v. Chicago, 198 Ill. 506, 64 N. E. 1064; McChesney v. Chicago, 205 Ill. 611, 69 N. E. 82. An ordinance predicated on a recommendation increasing the cost after public hearing, and without hearing as to the increase is void, and the court has no jurisdiction to confirm an assessment based thereon. Chicago v. Walsh, 203 Ill. 318, 67 N. E. 774.

57. Alton v. Job, 103 Ill. App. 378; Paxton v. Bogardus, 201 Ill. 628, 66 N. E. 853; American H. & L. Co. v. Chicago, 203 Ill. 451, 67 N. E. 979. An ordinance or resolution is necessary to the establishment or change of grade of a street or the improvement thereof in an incorporated town in Iowa. Eckert v. Walnut, 117 Iowa, 629, 91 N. W. 929; Zalesky v. Cedar Rapids, 118 Iowa, 714, 92 N. W. 657. Work on a public improvement is begun before the final passage of the ordinance authorizing it, where it is begun before the passage of an amendment making a material change in the improvement. Paxton v. Bogardus, 201 Ill. 628, 66 N. E. 853. The final resolution for an improvement may be adopted by a majority of the board. McChesney v. Chicago, 201 Ill. 344, 66 N. E. 217. The lapse of more than a year between the date when an ordinance is introduced into the city council on the recommendation of the board of local improvements and the date of its passage will not invalidate it, the statute not providing any limitation in that respect. McLaughlin v. Chicago, 198 Ill. 518, 64 N. E. 1036. Deferring action on a recommendation does not preclude the council from passing a subsequent ordinance including the deferred improvement with other work, since the later recommendation superseded the prior one. Chicago Union Traction Co. v. Chicago, 202 Ill. 576, 67 N. E. 383.

58. Clay v. Mexico, 92 Mo. App. 611. But where a city by resolution (not ordinance), established a public sewer and borrowed money and paid for its construction, and accepted and used it as a public sewer, it was as much a public sewer as though originally established by ordinance. Akers v. Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536.

59. Paxton v. Bogardus, 201 Ill. 628, 66 N. E. 853; Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290. Sidewalk, held sufficiently described. Gage v. Chicago, 203 Ill. 26, 67 N. E. 477. Paving brick held sufficiently described. Chicago v. Singer, 202 Ill. 75, 66 N. E. 874. Description of fire hydrants, crosses, tees, and supply pipes as "City of Chicago Standard," held insufficient. Washburn v. Chicago, 202 Ill. 210, 66 N. E. 1033. Specifications as to sewer held sufficient. Walker v. Chicago, 202 Ill. 531, 67 N. E. 369. Cubic yards of back filling behind curbstone need not be specified. McChesney v. Chicago, 205 Ill. 611, 69 N. E. 82; Gage v. Chicago, 207 Ill. 56, 69 N. E. 583. Macadam paving held sufficiently described. Perry v. People, 206 Ill. 334, 69 N. E. 63. Length of house drains held not sufficiently specified. Wetmore v. Chicago, 206 Ill. 367, 69 N. E. 234. Quality of asphalt for paving held sufficiently described. Gage v. Chicago, 207 Ill. 56, 69 N. E. 583. Height of curbs held sufficiently specified. Chicago Union Traction Co. v. Chicago, 207 Ill. 544, 69 N. E. 849. Sidewalk ordinance held sufficient. Heman Const. Co. v. Loevy [Mo.] 78 S. W. 613. Presumption that plans and specifications were on file held not overthrown. Button v. Gast, 24 Ky. L. R. 2284, 73 S. W. 1014. Failure to specify kind and quality of material of sidewalk invalidates the ordinance. People v. Birch, 201 Ill. 81, 66 N. E. 358. A sidewalk ordinance is void in Illinois which grants a discretion to the commissioner of public works as to the kind and quality of material which shall be used. Id.

60. McChesney v. Chicago, 201 Ill. 344, 66 N. E. 217.

61. McChesney v. Chicago, 201 Ill. 344, 66 N. E. 217. Grade of street and thickness of pavement held sufficiently indicated. Id. Variance between ordinance and notices as to description of paving at street intersections held immaterial. Gage v. Chicago, 201 Ill. 93, 66 N. E. 374. Specifications as to material to be used in pavement, held sufficiently certain. Id. An ordinance authorizing the construction of a sewer and providing for the insertion of slants therein at street intersections is not indefinite for failure to designate at which side of the intersecting street they are to be placed, as it will be presumed that the middle of the street was meant. Duane v. Chicago, 198 Ill. 471, 64 N. E. 1033. An ordinance providing for grading a street "full width to the curb grade" does not provide for grading the sidewalk, and hence is not invalid for failure to apportion the expense between sidewalk and street. Burghard v. Fitch, 24 Ky. L. R. 1983, 72 S. W. 778.

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but if it is sufficient to challenge the attention of the court, the judgment of confirmation, however erroneous, is not void nor subject to collateral attack,[62] and a reference to another ordinance from which the specifications may be obtained is sufficient.[63]

A special tax for the construction of a sidewalk is invalid where the grade for such walk is not established by the ordinance,[64] but a paving ordinance requiring that the pavement when completed be at "the established grade" of the street is not void, and the judgment of confirmation cannot be attacked upon application for sale on the ground that a grade had not been established when the ordinance was passed, though such objection would have been fatal if urged at confirmation.[65]

§ 5. *Proposals and contracts for work.*[66]—The rule that the statutory requirements in matters relating to public improvements must be strictly pursued applies particularly to the proceedings for letting the contract. Statutes requiring that the work be done by contract are regarded as mandatory,[67] as are the directions therein as to what the contracts shall contain by way of description of the work.[68]

Advertisements for proposals must be published as the law directs,[69] and contain or refer to plans and specifications sufficient to enable the bidders to form an intelligent conception of the work,[70] and the proposals or bids must be submitted[71] and received conformably to the law,[72] and be bona fide competitive.[73]

62. Shepard v. People, 200 Ill. 508, 65 N. E. 1068; Walker v. People, 202 Ill. 34, 66 N. E. 827; Perry v. People, 206 Ill. 334, 69 N. E. 63.

63. Pierson v. People, 204 Ill. 456, 68 N. E. 383. Where a general sewer system was adopted by ordinance and provision was made that all future work should conform to the plans and specifications then on file, the dimensions and materials for a subsequently established district were sufficiently indicated without special provision. Akers v. Kolkmeyer & Co., 97 Mo. App. 520.

64. McDowell v. People, 204 Ill. 499, 68 N. E. 379; People v. Smith, 201 Ill. 454, 66 N. E. 298; Burget v. Greenfield, 120 Iowa, 432, 94 N. W. 933.

65. Shepard v. People, 200 Ill. 508, 65 N. E. 1068; Walker v. People, 202 Ill. 34, 66 N. E. 827; De Soto v. Showman, 100 Mo. App. 323, 73 S. W. 257.

66. See, also, the topic Public Contracts, 2 Curr. Law, p. 1280.

67. Where the statute directs the work to be done by contract let to the lowest bidder, the town cannot do it by hiring day laborers and charge the cost on abutting property. Clay City v. Bryson, 30 Ind. App. 490, 66 N. E. 493. A statutory provision that all contracts for the making of any public improvement when the expense exceeds $500 must be let to the lowest responsible bidder prohibits the city from doing such work without contract by employing day laborers directly. Chicago v. Hanreddy, 102 Ill. App. 1. A contract for the rebuilding of a sidewalk which contemplates extensive grading to conform to a general improvement of the street constructed at the same time is not a mere repair, but a permanent improvement, entitling lot owners to insist that it be let with the other work on the street. Waukesha v. Randles [Wis.] 98 N. W. 237.

68. Contract let without plans. De Soto v. Showman, 100 Mo. App. 323, 73 S. W. 257. Changes in the details of the plans and specifications for paving are within the discretionary power of the board of public works in Kentucky. Barber Asphalt Pav. Co. v. Gaar, 24 Ky. L. R. 2227, 73 S. W. 1106.

69. A charter provision for 30 days' notice by advertisement of the letting of a contract does not require publication every day, a single publication being sufficient. Newport News v. Potter [C. C. A.] 122 Fed. 321. A charter provision for 30 days' notice by advertisement before letting does not invalidate a contract where only 29 days elapse between publication and opening bids, where the contract is not let for several weeks. Id.

70. Where the advertisement for bids for building a sidewalk referred for specifications to an ordinance which made no mention of such walk or specifications, the property was not subject to a lien. La. v. Schaffner [Mo. App.] 78 S. W. 287. Where there is no provision that the contract shall be let to the lowest bidder, an advertisement for proposals containing plans, specifications and prices is not objectionable. Kundinger v. Saginaw [Mich.] 93 N. W. 914. That the advertisement calls for alternative bids on two different kinds of pavement will not invalidate the contract. Barber Asphalt Pav. Co. v. Gaar, 24 Ky. L. R. 2227, 73 S. W. 1106.

71. A bid changed after the time limited for their receipt is in effect a new bid and can give rise to no liability on the part of either party. Fairbanks, M. & Co. v. North Bend [Neb.] 94 N. W. 537.

72. Proposals to do street work are "publicly declared" within the meaning of the statute when they are opened and read in open session of the council. City St. Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916.

73. Where within the knowledge of the council there is but one bona fide bid, the requirement that the contract be let to the

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The contract must not be let before the final passage of the ordinance authorizing it,[74] nor before the time authorized by law,[75] and no contract can be entered into at a price exceeding the estimate of the probable cost of the work.[76] The contract must be for the precise improvement contemplated by the ordinance,[77] embrace substantially the terms of the proposals,[78] and include no work other than that chargeable by law on the property owners, if it is intended to assess its cost upon them. A paving contract, however, requiring the contractor to keep the paving in repair for a stipulated period, is merely a guarantee of good work and is not obnoxious to the rule that requires the expense of maintenance of streets to be borne by the municipality by general taxation and limits the right of special assessment to the original cost of paving,[79] though if the contract can be properly construed to require the contractor to make repairs for a considerable term regardless of the cause making them necessary, it is objectionable[80] to the extent at least of the added expense to the property owner by reason of the obligation to repair.[81]

It is a material and important right of a property owner assessed for a local improvement that there shall be free competition in bidding, unrestricted by illegal conditions, the natural tendency of which is to increase the amount of the bids,[82] and the incorporation of such provisions as that the contractor make a guaranty deposit of money,[83] that he restrict his laborers to 8 hours work per day,[84] that the wages paid shall not be less than the prevailing rate,[85] that the workmen be paid in cash and not in store orders,[86] that preference of employment shall be given citizens of the state or United States,[87] that convicts shall not be employed,[88]

lowest and best bidder is not fulfilled. Fineran v. Cent. Bitulithic Pav. Co., 25 Ky. L. R. 876, 76 S. W. 415.

74. Subsequent confirmation is ineffectual. Paxton v. Bogardus, 201 Ill. 628, 66 N. E. 853.

75. Newport News v. Potter [C. C. A.] 122 Fed. 321. A property owner who has not availed himself of his right to build his own sidewalk is not prejudiced by the letting of the contract to build it before the time within which he had the right to build had expired, work not having been begun within that time. Springfield v. Mills, 99 Mo. App. 141, 72 S. W. 462.

76. De Soto v. Showman, 100 Mo. App. 323, 73 S. W. 257.

77. Where the resolution of intention in California contains two or more distinct improvements, they need not all be let in one contract or to one person. Bates v. Twist, 138 Cal. 52, 70 Pac. 1023.

78. Diamond v. Mankato, 89 Minn. 43, 93 N. W. 911; Inge v. Board of Public Works, 135 Ala. 187; Le Tourneau v. Hugo [Minn.] 97 N. W. 115.

79. One year. St. Louis Q. & C. Co. v. Frost, 90 Mo. App. 677. Eight years. People v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802. Seven years. Williamsport v. Hughes, 21 Pa. Super. Ct. 443; La Veine v. Kan. City, 67 Kan. 239, 72 Pac. 774.

80. Ten years. Erie v. Grant, 21 Pa. Super. Ct. 461.

81. Five years. Young v. Tacoma, 31 Wash. 153, 71 Pac. 742.

82. McChesney v. People, 200 Ill. 146, 65 N. E. 626; Sweet v. People, 200 Ill. 536, 65 N. E. 1094; Inge v. Board of Public Works, 135 Ala. 187; Glover v. People, 201 Ill. 545, 66 N. E. 820. Specifications as to paving brick held not unreasonable. Chicago v. Singer, 202 Ill. 75, 66 N. E. 874. Requirement that contractor shall keep pavement in repair 5 years and keep plant in city during that period held not to stifle competition. Barber Asphalt Pav. Co. v. Gaar, 24 Ky. L. R. 2227, 73 S. W. 1106.

83. St. Louis Q. & C. Co. v. Frost, 90 Mo. App. 677; Wells v. People, 201 Ill. 435, 66 N. E. 210.

84. McChesney v. People, 200 Ill. 146, 65 N. E. 626; Sweet v. People, 200 Ill. 536, 65 N. E. 1094; St. Louis Q. & C. Co. v. Frost, 90 Mo. App. 677; Glover v. People, 201 Ill. 545, 66 N. E. 820; Gage v. People, 207 Ill. 61, 69 N. E. 635; Wells v. People, 201 Ill. 435, 66 N. E. 210; People v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802; De Wolf v. People, 202 Ill. 73, 66 N. E. 868.

85. People v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802.

86. A provision incorporated in the specifications that the workmen be paid in cash and not in store orders as provided by the labor law will not be held unreasonable on appeal in certiorari where the constitutionality of the labor law was not attacked below. People v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802.

87. McChesney v. People, 200 Ill. 146, 65 N. E. 626; Sweet v. People, 200 Ill. 536, 65 N. E. 1094; Inge v. Board of Public Works, 135 Ala. 187; Glover v. People, 201 Ill. 545, 66 N. E. 820; Gage v. People, 207 Ill. 61, 69 N. E. 635; Doyle v. People, 207 Ill. 75, 69 N. E. 639; Wells v. People, 201 Ill. 435, 66 N. E. 210; De Wolf v. People, 202 Ill. 73, 66 N. E. 868; People v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802.

88. Inge v. Board of Public Works, 135 Ala. 187.

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and that materials used shall be produced or manufactured within the state,[89] is illegal, though required by express statute, and if shown to have influenced the letting by stifling or restraining competition in bidding, invalidates the contract.[90] In the absence of a showing of prejudice to the public, however, contracts are not invalidated by the inclusion of such clauses,[91] and a showing that such provisions, though included in the contract, were not a part of the specifications on which the bidding was based,[92] and a showing that such provisions of the statute having been declared unconstitutional clauses in the contracts founded thereon are invariably disregarded by contractors and the public authorities overcomes the presumption that they influenced the bids.[93] A contract containing such a clause is not void as against public policy, though the clause is a nullity,[94] and conversely, a contract failing to include such provisions is valid, the statute directing their inclusion being unconstitutional.[95]

That a paving contract called for a particular kind of paving wholly within the control of the contractor will not invalidate the contract in some states,[96] though it will in others,[97] and in New York City there is an express charter provision against the use of patented pavements, except under conditions permitting competition.[98]

Where there has been a substantial departure in completing a contract for a public improvement, the special tax bills or assessments levied therefor cannot be collected;[99] but when objected to for that reason as a ground of opposition to a judgment of sale, it must appear that the construction so deviated from the ordinance as to amount to another and different improvement than that provided for,[1] or if the objection be delay in completion, the delay must be such as to amount to a substantial noncompliance with the contract,[2] and an acceptance by the municipal

89. St. Louis Q. & C. Co. v. Frost, 90 Mo. App. 677.

90. Property owners must show that such provisions actually entered into the competition in some way to the detriment of the public, but they need not show that such provisions actually increased the cost of the work. McChesney v. People, 200 Ill. 146, 65 N. E. 626; Sweet v. People, 200 Ill. 536, 65 N. E. 1094. An objection on application for judgment of sale setting up such facts and alleging that by reason thereof, competition in bidding was unduly restricted, states a prima facie case. Glover v. People, 201 Ill. 545, 66 N. E. 820.

91. McChesney v. People, 200 Ill. 146, 65 N. E. 626; Sweet v. People, 200 Ill. 536, 65 N. E. 1094; St. Louis Q. & C. Co. v. Frost, 90 Mo. App. 677; Wells v. People, 201 Ill. 435, 66 N. E. 210. Notwithstanding the invalidity of the statute requiring such specifications. People v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802.

92. Wells v. People, 201 Ill. 435, 66 N. E. 210; De Wolf v. People, 202 Ill. 73, 66 N. E. 868.

93. Gage v. People, 207 Ill. 61, 69 N. E. 635; Doyle v. People, 207 Ill. 75, 69 N. E. 639; Thompson v. People, 207 Ill. 334, 69 N. E. 842.

94. Doyle v. People, 207 Ill. 75, 69 N. E. 639.

95. Cleveland v. Clements Bros. Const. Co., 67 Ohio St. 197, 65 N. E. 885, 59 L. R. A. 775.

96. Field v. Barber Asphalt Pav. Co., 117 Fed. 925. See, also, Diamond v. Mankato, 89 Minn. 48, 93 Mo. 911.

97. Fineran v. Cent. Bitulithic Pav. Co., 25 Ky. L. R. 876, 76 S. W. 415.

98. Rose v. Low, 85 App. Div. [N. Y.] 461; Barber Asphalt Pav. Co. v. Willcox, 41 Misc. [N. Y.] 574; Barber Asphalt Pav. Co. v. Wilcox, 90 App. Div. [N. Y.] 245.

99. Paving not completed in time. Shoenberg v. Heyer, 91 Mo. App. 389; Heman v. Gilliam, 171 Mo. 258, 71 S. W. 163. Sidewalk improperly built. Heman v. Franklin, 99 Mo. App. 346, 73 S. W. 314. Macadamized road built of mixture of clay, gravel, limestone and slag unable to sustain an ordinary load. Gage v. People, 200 Ill. 432, 65 N. E. 1084. Pavement not complying with specifications. Heman v. Gerardi [Mo. App.] 69 S. W. 1069; Hill-O'Meara Const. Co. v. Hutchinson, 100 Mo. App. 294, 73 S. W. 318. Under a contract requiring the work to begin within one week after notice and be completed within two months thereafter, work completed two months after the last day upon which it might be begun is in time, though work was in fact begun before the last day. Wheless v. St. Louis, 90 Mo. App. 106.

1. Brand of Portland cement held not shown to be so inferior as to invalidate assessments. Wells v. Raymond, 201 Ill. 435, 66 N. E. 210.

2. Hill-O'Meara Const. Co. v. Hutchinson, 100 Mo. App. 294, 73 S. W. 318. Four days not sufficient. Boulton v. Kolkmeyer, 97 Mo. App. 530, 71 S. W. 539. Extensions and interference by public authorities. Sparks v. Villa Rosa Land Co., 99 Mo. App. 489, 74 S. W. 120. Where some property owners take advantage of their right to build their own sidewalks, their failure to complete them in time cannot prejudice the contractor's right to recover for such as he built. Springfield v. Mills, 99 Mo. App. 141, 72 S. W. 462.

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authorities is, in the absence of fraud, conclusive that the work was performed in compliance with the contract.[3]

Where a departure from the ordinance or contract authorizing a public improvement is being made to the detriment of the taxpayers, such as the use of inferior material or defective work, the municipality may be restrained by injunction or compelled by mandamus to complete the improvement in compliance with the terms of the ordinance.[4]

Proceedings of a public improvement commission in awarding a contract for a public improvement are not judicial nor quasi judicial, and hence not subject to review by certiorari.[5] It has been held, however, that, since such boards act not in a legislative, but in an administrative or business capacity, their acts may be reviewed by the courts on the grounds of fraud and corruption.[6]

Where a city releases an accepted bidder and his solvent surety from the performance of the contract and on readvertisement accepts the lowest bid, higher than that of the bidder released, property owners on being compelled to pay the apportionment can recover over from the city the difference between the amount paid and the amount they would have had to pay on the original bid.[7]

Security to laborers and materialmen.—Since the mechanic's lien law does not apply to public property,[8] statutes in many states provide by way of security to laborers and materialmen either for a bond by the contractor for their benefit,[10] or

3. Eversole v. Walsh, 25 Ky. L. R. 784, 76 S. W. 358; Barker v. Tennessee Pav. Brick Co., 24 Ky. L. R. 1524, 71 S. W. 877; Downey v. People, 205 Ill. 230, 68 N. E. 807; Lux & T. Stone Co. v. Donaldson [Ind.] 68 N. E. 1014.

4. Wells v. Raymond, 201 Ill. 435, 66 N. E. 210; Miller v. Bowers, 30 Ind. App. 116, 65 N. E. 559.

5. People v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802.

6. Field v. Barber Asphalt Pav. Co., 117 Fed. 925.

7. Louisville v. Ky. & I. Bridge Co., 24 Ky. L. R. 1087, 70 S. W. 627.

8. See Mechanic's Liens, 2 Curr. Law, p. 869. In the absence of a statute, a mechanic is not entitled to a lien for work done on property belonging to a municipal corporation, and used for public purposes. Albany v. Lynch [Ga.] 46 S. E. 622. In the absence of a lien, a mechanic cannot recover a general judgment against a municipality for money due him by a contractor for public improvements; their being no privity of contract between him and the city. Id.

10. Where there is no stipulation in a bond that it should be for the use of the laborers or the material-men, no action is thereafter maintainable on the bond in the name of the city for the use of the laborers or the materialmen. Lancaster v. Frescoln, 203 Pa. 640. A city is not obliged to take a bond for the protection of laborers or materialmen. This is so, even though such a bond is required of the contractor by an ordinance. Id. In an action upon a bond by a city to the use of the men employed on the work given under an ordinance requiring that a bond shall be given conditioned that the contractor will pay all persons supplying him with labor or materials, it is no defense that the use plaintiffs are day laborers [Ordinance of March 30, 1896 of the city of Phila.]. Phila. v. McLinden, 205 Pa. 172. It is no defense to an action on a municipal contractor's bond conditioned that the contractor will pay all persons supplying him with labor or material that there was a violation of the law and of the contract forbidding the employment of alien labor. Id. It is no defense to an action on a bond of a municipal contractor conditioned that the contractor will pay all persons supplying him with labor or material that the city paid the contractor after notice. Id. The mere filing with the financial officer of a city of a claim for materials furnished to a contractor for a city building creates no lien upon the money which may be due the contractor. Under the New Jersey statute such officer is not thereby justified in withholding payment of the same longer than the 90 days given the claimant within which to commence suit, and give notice thereof to the city. Third Nat. Bank v. Atlantic City, 126 Fed. 413. Where a subcontractor can take advantage of a bond for labor or materials furnished, his creditors for the said labor or materials may recover thereon. Hines v. Consol. C. & L. Co., 29 Ind. App. 563, 64 N. E. 886. The word "materials" as used in a bond binding the contractor and surety to pay for all "materials" used in the execution of the contract does not include tools, appliances, and articles with which to construct an improvement, which did not enter into it, but remained after its construction, such as shovels, wheelbarrows, manilla rope, hose, mattocks, sledge handles, belting, wrenches, steam pipes, chains, axes, rubber boots, etc. Beals v. Fidelity & Deposit Co., 76 App. Div. [N. Y.] 526. The beneficiary of a contract, though not a party or privy thereto, can maintain an action thereon. A clause in bond of contract for a public improvement to pay for all labor and material. Held, laborers and materialmen could sue thereon. Gastonia v. McEntee-Peterson Engineering Co., 131 N. C. 363. Where a statute gives one a cause of action on the bond of an official who pays the contractor for a public improvement after

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for a lien on the proceeds of the assessment,[11] and it has been held that a municipality may without statutory authority require such a bond.[12]

notice of a lien for materials furnished, such action is not exclusive, but, the statute failing to provide a remedy for the enforcement of the lien, the lien may be established in equity. Construing 2 Starr & C. Ann. St. 1896, p. 2572, § 24. Nat. Bank of La Crosse v. Petterson, 200 Ill. 215, 65 N. E. 687. Where a contractor for a public improvement executes a bond conditioned on his paying for labor and materials furnished him, laborers and materialmen may sue on the bond as a contract made for their benefit. Buffalo Forge Co. v. Cullen & S. Mfg. Co. [Mo. App.] 79 S. W. 1024. A clause in such bond authorizing its assignment and stipulating that, if assigned, the bond shall inure to the benefit of all laborers and materialmen, does not preclude a single materialman, the sole creditor of the contractor, from suing thereon. Id. In Massachusetts, only those who would be entitled to a lien if the property was private can recover on such bond. Kennedy v. Com., 182 Mass. 480, 65 N. E. 828.

11. Hall Incorporated Co. v. Jersey City, 64 N. J. Eq. 766. Under Laws 1897, p. 520, c. 418, § 12 (which is not to be read with § 9, p. 518), does not require notice of liens on account of public improvements to be verified. Clapper v. Strong, 85 N. Y. Supp. 748. The complaint in an action to foreclose a mechanic's lien for services performed for a contractor for a public improvement must allege that plaintiff's services were performed on a contract between the contractor and the municipality and that something is due from the municipality. Id. A statute which gives laborers and materialmen a lien on the money due a contractor for a public improvement is not void because the contractor has no lien for his labor and materials. West Chicago Park Com'rs v. Western Granite Co., 200 Ill. 527, 66 N. E. 37. Where a statute gives a subcontractor a lien, equity will enforce it. Id. In New Jersey, the statutory lien for labor and materials furnished for a public improvement attaches from the time of filing the notice with the proper officer whether the whole work be then completed by the contractor or abandoned by him. Pierson v. Haddonfield [N. J. Eq.] 57 Atl. 471. Such lien becomes a charge not only on what is due the contractor at the time of filing the lien but also on what may thereafter come to be due him under the contract. Id. The rights of lien claimants for labor and materials for a public improvement will not be divested by subrogating the surety of the contractor to the remedies against such contractor, which the municipality might have had under the contract. Id. Under Gen. St. 2078, being an act to secure the payment of mechanic's liens on public improvements, where a claimant asserts his own claim, and unsuccessfully contests that of any other claimant, he should bear the cost of that litigation but nothing more. Hall Incorporated Co. v. Jersey City, 64 N. J. Eq. 766. First contract, subcontractor waived statutory lien on money in hands of city for payment of work on a public improvement, and agreed to look to such moneys for payment as were in the hands of the construction company. By another contract, the subcontractor was entitled to payment only on a written certificate from chief engineer of construction company. Held, refusal of engineer to issue certificate did not avoid waiver of mechanic's lien. McCabe v. Rapid Transit Subway Const. Co., 127 Fed. 465. Where a subcontractor waives his lien on moneys due from the city for public improvements, he has no right of action against the city either at law or in equity. Id. A subcontractor may waive his statutory lien on money becoming due for public improvements. Express agreement. Id. A complaint under Act Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523] is demurrable where it fails to set out that the contractor should promptly make payments to all persons supplying labor and materials in the prosecution of the work, and does not make the contract and bond part of the complaint. U. S. v. American Surety Co., 127 Fed. 490. Act Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523] provides for a suit in the name of the United States only in cases where the person or persons for whose use and benefit the suit is brought has supplied the contractor "labor and materials in the prosecution of the work provided for in such contract." Id. The mere filing of an unverified notice will not give the claimant an unqualified right to the fund, nor justify the municipality in withholding it from the contractor longer than the statutory 90 days allowed the claimant to bring suit for it. Third Nat. Bank v. Atlantic City, 126 Fed. 413. Notice actually brought to the attention of the board charged with the duty is sufficient in Illinois (West Chicago Park Com'rs v. Western Granite Co., 200 Ill. 527, 66 N. E. 37); but in New York, it must be filed with the particular officer designated by the statute (Terwilliger v. Wheeler, 81 App. Div. [N. Y.] 460; Hawkins v. Mapes-Reeves Const. Co., 82 App. Div. [N. Y.] 72; Westgate v. Shirley, 42 Misc. [N. Y.] 245), and a statement filed with the county clerk as in case of a private improvement will create no lien on the fund furnished to pay for a public improvement, as in such case the statute should be filed with the board having charge of the work (Terwilliger v. Wheeler, 81 App. Div. [N. Y.] 460). Failure of the public officer to withhold payment after notice subjects him to liability on his bond, but the remedy thus provided is not exclusive, and a lien on the improvement bonds may be enforced in equity. Nat. Bank of La Crosse v. Petterson, 102 Ill. App. 501; West Chicago Park Com'rs v. Western Granite Co., 200 Ill. 527, 66 N. E. 37. By express provision of the statute in New York, funds provided by the public to pay for public improvements are subject to a lien in most respects similar to that allowed against private buildings. Terwilliger v. Wheeler, 81 App. Div. [N. Y.] 460. Where, under an agreement between the contractor and a construction company, his assignee, of the money to become due and a subcontractor, the latter waived his statutory lien on money becoming due from the city and agreed to look to money in the hands of the construction company for payment, the subcontractor has an adequate remedy at law and cannot sue in equity. McCabe v.

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§ 6. *Injury to property and compensation to owners. A. In general.*[11]—Injuries arising to adjoining owners from the exercise of the police powers of a city are *damnum absque injuria*,[14] the unauthorized erection of structures injurious to individuals may be enjoined, however,[15] and whenever the property of an individual is taken for public use,[16] or property not actually taken is injured by the construction of an improvement designed merely for public convenience, a cause of action in favor of the property owner arises,[17] entitling him to the recovery of such actual damages as are the direct and unavoidable consequences of the act of building, if in excess of the special benefits accruing to the owner or his land by reason of the existence of the improvement.[18] Ultra vires is not a defense to such an action,[19]

Rapid Transit Subway Const. Co., 127 Fed. 465.

12. With or without special statutory authority, a municipality can make provision by a bond for the security of those who, by their labor done or materials furnished by them, aided the contractors for a public improvement. Hines v. Consol. C. & T. Co., 29 Ind. App. 563, 64 N. E. 886.

13. Taking of property for public use, see Eminent Domain.

14. Such as the building of a police station, jail, or hospital. Chicago v. McShane, 102 Ill. App. 239. A city is not liable to abutting owners for requiring the elevation of railroad tracks by ordinance. Chicago v. Webb, 102 Ill. App. 232.

15. Shanks v. Pearson, 66 Kan. 168, 71 Pac. 252. The unauthorized erection of a tower on a public square may be enjoined by an abutting lot owner. Fessler v. Union [N. J. Eq.] 56 Atl. 272.

16. Omaha v. Clarke [Neb.] 92 N. W. 146. Where land is tortiously taken by a city for a street, the owner is not obliged to look solely to the special assessment subsequently levied against abutting property, for the payment of the judgment rendered in his favor. Omaha v. State [Neb.] 94 N. W. 979.

17. Permission to an individual to grade a street, and build a retaining wall therein, does not entitle him to damages on a subsequent removal of the wall by the city. South Highland L. & I. Co. v. Kan. City, 100 Mo. App. 518, 75 S. W. 383. No action will lie for the escape of the natural flow of surface water from a highway onto adjacent land, caused by the filling in of the highway (O'Donnell v. White, 24 R. I. 483), but where a change of grade results in an accumulation of water damaging an abutting owner, that may be considered one of the elements of damage to be assessed (Cooper v. Scranton City, 21 Pa. Super. Ct. 17). Question for jury. Board of Councilmen v. Howard, 25 Ky. L. R. 111, 74 S. W. 703. And if a highway officer change the direction of the flow of water without legal authority, and for the benefit of his own adjoining land, he is liable. Daum v. Cooper, 103 Ill. App. 4. Likewise, if the proposed repair to a public road is not in fact made for the benefit of the public, but is made to subserve private ends and will operate as a special injury to an abutting owner, it will be enjoined. Shanks v. Pearson, 66 Kan. 168, 71 Pac. 252. A land owner is entitled to his damages arising from being cut off from access to a street while it is in process of relocation and improvement, such access being necessary to the enjoyment of his property, though it does not abut on the street. Munn v. Boston, 183 Mass. 421, 67 N. E. 312. A city is liable to the owner of adjacent property for damages caused by the closing of an alley, his damages being of a different kind, and imposing on him a burden different in kind from that imposed on the general public. Chicago v. Webb, 102 Ill. App. 232. The owner of a well outside the prescribed boundaries of the district named in the metropolitan water board act, may have damages for its draining by the operations of the board. McNamara v. Com., 184 Mass. 304, 68 N. E. 332. Where public work is directed by commissioners appointed under authority of a statute, the expense being borne by the abutting property owners, the municipality, having no power over the improvement nor any duty with reference thereto, is not liable for any neglect or nonperformance on the part of the commissioners. Astoria Heights Land Co. v. New York, 89 App. Div. [N. Y.] 512.

18. See, also, post, § 7D. If, when an entire improvement is taken into consideration, a benefit rather than a loss has been the result, there can be no recovery in the absence of an actual taking of property, though a portion of the improvement, considered apart from the remainder, results in damage. Chicago v. Webb, 102 Ill. App. 232; Chicago v. Anglum, 104 Ill. App. 188. In a street opening case the jury may take into consideration testimony that the market value of the land may be injuriously affected, by reason of the cost of street improvements that may be charged upon it, but cannot give a verdict for such improvements as a substantive item of damages. De Benneville v. Phila., 204 Pa. 51. Damages recoverable by an adjoining landowner from the construction of a sewer are such as are the direct, immediate, and necessary or unavoidable consequences of the act of eminent domain itself, irrespective of care or negligence. Deprivation of lateral support to house lot by digging in street. Fyfe v. Turtle Creek Borough, 22 Pa. Super. Ct. 292. Where an abutting owner seeks damages arising from closing an alley by raising the tracks of a railway, the danger to plaintiff and his family, by reason of the passing of railway trains at grade, should be considered as an element of benefit from the improvement to be offset against his damages. Chicago v. Webb, 102 Ill. App. 232.

19. Where a city damages property beyond its own borders by the construction of a sewer, it cannot defend an action for the injury by alleging its want of authority to build. Langley v. City Council of Augusta, 118 Ga. 590. A city in possession of, and using land for street purposes will not be

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nor is the landowner's right to damages dependent on his having filed a claim therefor,[20] but suit must be timely brought,[21] and the right of action may be waived.[22]

Where an abutting owner pays the assessment on his land, in a street opening case, under the belief that the municipality has acquired the right as to all abutters to open the street to its full length, on subsequently learning that it has not acquired such right, he is entitled to mandamus to require it to proceed as to the other owners.[23] Property owners in New York are not entitled to object to the report of commissioners appraising their damages prior to its confirmation, but after confirmation the owners of specific property may object, and have the confirmation set aside as to such property, or referred back to the commissioners for correction.[24]

(§ 6) *B. Establishment or change of grade of street.*[25]—An abutting owner is not entitled to compensation at the common law, nor generally by statute, for damages arising from the original establishment of the grade of a street,[26] even though his property may have been improved with reference to the natural lay of the land,[27] but for grading work done without an ordinance establishing or changing the grade,[28] and for a change of grade, operating oppressively on those who have improved their property with reference to the established grade, there is generally a statutory liability in their favor,[29] though the land injured lies beyond the territorial limits of the municipality,[30] and though the street may not have been all worked up to the established grade.[31]

permitted to allege its own irregularities in procedure in defense of an action for damages for taking the land. Omaha v. Clarke [Neb.] 92 N. W. 146.

20. In Nebraska. Omaha v. Clarke [Neb.] 92 N. W. 146. Though it is in Georgia; but plaintiff need not set up notice in his complaint. Columbus v. McDaniel, 117 Ga. 823; Langley v. City Council of Augusta, 118 Ga. 590.

21. An action on an award of damages for taking land for street purposes is not barred before 5 years from the confirmation of the award. Omaha v. Clarke [Neb.] 92 N. W. 146. Limitations do not begin to run against the landowner's right to the appointment of a jury to assess his damages in a street opening case, until the notice provided by the ordinance has been properly served on him. In re Whitby Ave., 22 Pa. Super. Ct. 526.

22. A waiver of damages from the laying out of a highway is effectual, though the highway is not actually opened until after the territory has been annexed to an incorporated town. Lake Shore & M. S. R. Co. v. Whiting [Ind.] 67 N. E. 933.

23. Barnert v. Board of Aldermen [N. J. Law] 54 Atl. 227.

24. In re Ft. Wash. Ridge Road, 82 App. Div. [N. Y.] 163.

25. See, also, Highways, § 6.

26. People v. Stillings, 76 App. Div. [N. Y.] 143; O'Donnell v. White, 24 R. I. 483; Reilly v. Ft. Dodge, 118 Iowa, 633, 92 N. W. 887.

27. Reilly v. Ft. Dodge, 118 Iowa, 633, 92 N. W. 887; Wilber v. Ft. Dodge, 120 Iowa, 555, 95 N. W. 186; People v. Phillips, 88 App. Div. [N. Y.] 560; In re Opening East 187th St., 78 App. Div. [N. Y.] 355; Ross v. Cincinnati, 24 Ohio Circ. R. 43.

28. Wilber v. Ft. Dodge, 120 Iowa, 555, 95 N. W. 186. But the fact that the work of bringing the street to the established grade was begun or prosecuted without the adoption of a resolution directing it to be done will not create a cause of action where none otherwise existed (Id.), and a city is not liable for damages where the work was done by the street committee and street commissioner without authority (Clay v. Mexico, 92 Mo. App. 611; Gardner v. St. Joseph, 96 Mo. App. 657, 71 S. W. 63).

29. Chicago v. McShane, 102 Ill. App. 339; Barrington v. Meyer, 103 Ill. App. 124; Torge v. Salamanca, 176 N. Y. 324, 68 N. E. 626. Change of grade resulting in accumulation of water. Cooper v. Scranton, 21 Pa. Super. Ct. 17; Wilber v. Ft. Dodge, 120 Iowa, 555, 95 N. W. 186. A statute, declaring that an injury to property by a change of the grade of a street is a taking thereof for public use to the extent of the injury, is within the legislative power [N. Y. Laws 1897, p. 420, c. 414, § 159]. In re Comesky, 83 App. Div. [N. Y.] 137. Under statutory authority to selectmen to recompense abutting owners for injuries, where there is a change of grade of over 3 feet, only that portion of the damages arising from the change in excess of three feet may be allowed [V. S. 3357, 3358]. Fairbanks v. Rockingham, 75 Vt. 221. A statute authorizing the recovery of damages, for change of grade, from a "city, borough, or town corporate" will not authorize their recovery from a village [Gen. St. p. 2820, § 71]. Bellis v. Flemington [N. J. Err. & App.] 55 Atl. 300. A municipality which changes a street grade by authority of the statute cannot question the constitutionality of remedies given injured landowners thereby. In re Comesky, 83 App. Div. [N. Y.] 137.

30. Where the center of a road forms the boundary line between a borough and a township and the borough authorities, with the consent of the township, change the grade of the whole road, property owners of the township may recover from the borough any damages occassioned by the change. Rothwell v. Cal. Borough, 21 Pa. Super. Ct.

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The liability exists, however, only in favor of private[32] owners[33] who are abutters,[34] and where the lot owner builds with notice of the intended change of grade there is no liability;[35] but that the plaintiff purchased the property with knowledge that the order establishing the grade had already been made,[36] or that the damages previously assessed for a corner lot on the grading of one of the intersecting streets, if properly expended in bringing the lot to grade, would have prevented further damage by the grading of the other street, is no defense.[37] In case of a change of grade the measure of damages is the difference in the value of the property affected before and after the change, taking into consideration the increased value of the whole improvement to the property itself,[38] not considering general benefits or injuries shared by the public in general,[39] and the fact that the improvement results in a net benefit to the property, all things being considered, is a defense to the action,[40] but in considering that question, benefits from paving which the owner has already paid for in special assessments should not be included, unless of greater amount than the amount assessed, and then only as to the excess.[41] The cost of regrading plaintiff's lot is a proper element of damages,[42] but depreciation of rental and market values from the diversion of customers, is not,[43] and the benefits that may be applied in reduction of damages are not private improvements subsequently made by plaintiff's neighbors, but only those local and peculiar benefits received by him by the change.[44] The right to damages may be waived,[45] and lost by laches,[46] or lapse of time.[47] References to New York cases arising under statutes peculiar to that state are collected in the note.[48]

234; Haggart v. Borough of Cal., 21 Pa. Super. Ct. 210.

31. In re Comesky, 83 App. Div. [N. Y.] 137.

32. Where a city changes the grade of a street to carry it over railroad tracks and thereby damages property held by it for municipal purposes, it is not entitled to an award of damages therefor, for the purpose of compelling contribution by the railroad. In re Grade Crossing Com'rs, 171 N. Y. 685, 64 N. E. 1121.

33. One holding land under an unrecorded agreement of purchase, under which he is to have a deed when the price is half paid, is not an "owner" entitled to damages for a change of grade. In re Fifth St., 22 Pa. Super. Ct. 214.

34. And not in favor of one whose lot only corners on the section of the street changed, and contentions that his right of ingress and egress is impaired, and that he has been deprived of lateral support are immaterial. Gardner v. St. Joseph, 96 Mo. App. 657, 71 S. W. 63.

35. But the rule does not extend to a case where the city lies by for seventeen years after giving notice. In re Opening of Tiffany St., 84 App. Div. [N. Y.] 525.

36. Pickles v. Ansonia [Conn.] 56 Atl. 552.

37. Robinson v. St. Joseph, 97 Mo. App. 503, 71 S. W. 465.

38. Chicago v. McShane, 102 Ill. App. 239; Barrington v. Meyer, 103 Ill. App. 124; Chicago v. Anglum, 104 Ill. App. 188; Wheeler v. Bloomington, 105 Ill. App. 97.

39. Meridian v. Higgins, 81 Miss. 376; Robinson v. St. Joseph, 97 Mo. App. 503, 71 S. W. 465; Columbus v. McDaniel, 117 Ga. 823.

40. Chicago v. McShane, 102 Ill. App. 239. The defense of special benefits need not be specially pleaded and proved as a special defense. Pickles v. Ansonia [Conn.] 56 Atl. 552.

41. Carroll v. Marshall, 99 Mo. App. 464, 73 S. W. 1102.

42. Pickles v. Ansonia [Conn.] 56 Atl. 552.

43. Chicago v. McShane, 102 Ill. App. 239.

44. Pickles v. Ansonia [Conn.] 56 Atl. 552.

45. A waiver of damages for a change of the established grade does not waive damages arising from the actual grading of the street, to bring it to the grade as established by the change. Fairbanks v. St. Joseph, 102 Mo. App. 425, 76 S. W. 718. A grant of land for a street does not imply consent to cut it down and destroy the grantor's access to his abutting property, where such cut is not necessary to the proper improvement of the street, but is done by the city for its own convenience in building an economical bridge. Bartels v. Houston [Tex. Civ. App.] 74 S. W. 326. By securing a modification of a proposed change of grade an abutting owner does not lose his right to such damages as accrue to him from the change actually made. Klaus v. Jersey City [N. J. Law] 54 Atl. 220. But where after securing a stoppage of work because no provision is made for damages to abutting owners, plaintiff allows a resumption, on the agreement of the contractor to bring the grade of his lot to that of the street without expense to him, plaintiff cannot subsequently recover from the city, though the contractor failed to perform and is insolvent. Carson v. St. Joseph, 91 Mo. App. 324.

46. Laches barring relief held not shown. Klaus v. Jersey City [N. J. Law] 54 Atl. 220.

47. A statute limiting the time within which claims for damages from a change of grade of a street may be made is not invalid, since the property owner had no remedy at common law. People v. Stillings, 76 App.

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§ 7. *Local assessments. A. Equality and uniformity. General principles.*— The right of a municipality to lay a burden on private property for a public improvement rests upon the theory that such property derives a benefit equal to the burden imposed,[49] but whether property is benefited by the construction of an improvement,[50] what estates receive special benefits and where the special benefits stop,[51] and whether or not the assessment was laid according to benefits, are questions of fact,[52] within the exclusive jurisdiction of the legislative branch of government which cannot be reviewed by the courts in the absence of fraud[53] or special circumstances disclosing a lack of proportion between benefit and assessment.

In some states, in order to sustain an assessment for benefits arising out of a street improvement, it must affirmatively appear that the assessment is not in excess of the benefits conferred upon the land,[54] but in others it is held that while such assessments rest upon the basis of benefits or presumed benefits to the property assessed, it is not essential to their validity that actual enhancement in value or other benefits to each owner be shown; the judgment of the city council being conclusive as to the propriety of the improvement,[55] but where owing to extraordinary facts the presumption on which the rule rests does not apply, as in a case where the property after the improvement is worth no more than the amount of the assess-

Div. [N. Y.] 143. An amendment increasing claimant's claim will not be allowed after his right has been lost by lapse of time, his original claim having been invalid for insufficient description. People v. Stillings, 75 App. Div. [N. Y.] 569.

48. Where the grade of a village street is changed to comply with an order of the railroad commission to avoid a grade crossing, the abutting owner is entitled to compensation under the general law, notwithstanding the village law providing a similar remedy when the street is within the exclusive control of the village [Laws 1883, p. 100, c. 113; Laws 1897, c. 414, pp. 420, 456, §§ 159, 342]. Torge v. Salamanca, 176 N. Y. 324, 68 N. E. 626. The grade crossing commissioners of the city of Buffalo have no jurisdiction except to apply for the appointment of commissioners to appraise the damages to abutting owners, on the presentation of a prima facie case. They cannot fix the damages themselves, nor refuse to apply on the ground that the damages are trivial [Laws 1888, c. 345, as amended by Laws 1890, c. 255]. People v. Adams, 83 App. Div. [N. Y.] 620. Commissioners appointed to assess damages have no power, after dismissal of a claim, to vacate the dismissal though their action was erroneous. People v. Leonard, 87 App. Div. [N. Y.] 269. A landowner who has not appeared before the commissioners is not estopped to object to the confirmation of their report. In re Opening of Tiffany St., 84 App. Div. [N. Y.] 525. A judgment of the appellate division dismissing a proceeding for the assessment of damages arising from the change of grade of a street is a final order from which an appeal lies to the court of appeals. Torge v. Salamanca, 176 N. Y. 324, 68 N. E. 626. Certiorari will not lie to review the action of the board of revision of assessment under a statute which authorizes them to act within their discretion [Laws 1899, p. 1547, c. 711]. People v. Phillips, 88 App. Div. [N. Y.] 560. An award based on competent evidence will not be set aside because of the admission of incompetent evidence. In re Comesky, 83 App. Div. [N. Y.] 137.

49. Morse v. Omaha [Neb.] 93 N. W. 734; Klein v. Nugent Gravel Co. [Ind. App.] 66 N. E. 486; White v. Gove, 183 Mass. 333, 67 N. E. 359. An assessment of unequal amounts on property similarly situated cannot be sustained. In re Grant Ave., 76 App. Div. [N. Y.] 87. Local assessments for local improvements can be imposed only where special benefits have been conferred on the property assessed, and only to the extent of the benefits. Phila. v. Pemberton [Pa.] 57 Atl. 516. So in the case of street paving only the first cost can be charged, since repaving and repairing are for the benefit of the general public and not to the special advantage of the abutting property owner. Id.

50. Prior v. Buehler & C. Const. Co., 170 Mo. 439, 71 S. W. 205. That a lot assessed for benefits from a storm sewer did not need artificial drainage and would not sell for more on account of it is immaterial, since the benefit might accrue indirectly from the future improvement of the surroundings. Minneapolis & St. L. R. Co. v. Lindquist, 119 Iowa, 144, 93 N. W. 103.

51. Tileston v. Street Com'rs, 182 Mass. 325, 65 N. E. 380.

52. Dean v. Paterson, 68 N. J. Law, 664; Hibben v. Smith, 191 U. S. 310.

53. Prior v. Buehler & C. Const. Co., 170 Mo. 439, 71 S. W. 205; Louisville v. Bitzer, 24 Ky. L. R. 2263, 73 S. W. 1115; Hibben v. Smith, 191 U. S. 310. A city need not show the cause of the exemption of certain property on the line of an improvement in order to support the validity of a special assessment of other property. Storrs v. Chicago [Ill.] 70 N. E. 347.

54. Rosell v. Neptune City, 68 N. J. Law, 509; White v. Gove, 183 Mass. 333, 67 N. E. 359; Harwood v. Street Com'rs, 183 Mass. 348, 67 N. E. 362; Inge v. Board of Public Works, 135 Ala. 187. And the rule applies as well to municipal property assessable as to private property. In re New York, 38 Misc. [N. Y.] 600.

55. Louisville v. Bitzer, 24 Ky. L. R. 2263, 73 S. W. 1115; Hibben v. Smith, 191 U. S. 310.

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ment and to force the owner to pay for the improvement would be to confiscate his property without compensation, it is spoliation and will not be enforced.[56]

The selection of methods, however, for making special assessments is primarily a matter for the legislature, and it is only when its decision is plainly one that will be likely to result in taxation that is either disproportional or unreasonable that the courts can interfere.[57] The rule most frequently used for determining the amount chargeable to each piece of property fronting on the street improved is known as the "front-foot rule" and consists in assessing to each lot a certain amount for each foot of its frontage on the street. In those states where a just proportion between benefits and assessments is required to affirmatively appear, the front-foot rule cannot be applied unless the benefits are equal and uniform;[58] but in other states it is held that a statute or ordinance authorizing the assessment of the cost of a street improvement by the front-foot rule is not in violation either of the state or Federal constitution,[59] and generally, the use of the front-foot rule as a guiding basis will not invalidate an assessment where it is not applied arbitrarily and no showing is made but that the special benefits are fairly and justly apportioned thereby,[60] or that the assessment does not exceed the special benefit to the land,[61] and where it is formally and specifically found by the council that the land is benefited to an amount equal to the tax assessed, it is immaterial that the front-foot rule has been used in apportioning the tax.[62] An assessment made under an unconstitutional statute is void;[63] but where there is nothing in a statute that affords reason for the contention that the benefits resulting from an improvement shall not be substantially commensurate with the burdens imposed, it is not invalid,[64] and a statutory provision that a property owner shall be reimbursed for paving assessments by rebates out of subsequent general road taxes is not unconstitutional as

56. Louisville v. Bitzer, 24 Ky. L. R. 2263, 73 S. W. 1115. Where a part only of a lot is taxable, the value of that part and not of the whole lot is the basis of reasonableness. Pfaffinger v. Kremer, 24 Ky. L. R. 2368, 74 S. W. 238. Tax held not so great as to amount to spoliation. Duker v. Barber Asphalt Pav. Co., 25 Ky. L. R. 135, 74 S. W. 744.

57. White v. Gove, 183 Mass. 333, 67 N. E. 359.

58. Morse v. Omaha [Neb.] 93 N. W. 734; Friedrich v. Milwaukee, 118 Wis. 254, 95 N. W. 126; Appeal of Wheeler, 39 Misc. [N. Y.] 484. Pavement extending from business portion of city to suburbs. Donovan v. Oswego, 39 Misc. [N. Y.] 291. Where property fronting on a street is urban and uniform in character, and no previous attempt has been made to improve or pave the highway, as a street, the front-foot rule may be applied in assessing the properties for paving. Franklin v. Hancock, 18 Pa. Super. Ct. 398. A statute providing for front-foot assessments as to all the sewers in a city is invalid. Smith v. Worcester, 182 Mass. 232, 65 N. E. 40, 59 L. R. A. 728; White v. Gove, 183 Mass. 333, 67 N. E. 359; Harwood v. Street Com'rs, 183 Mass. 348, 67 N. E. 362. Where the legislature is passing a law of general future application and when therefore it cannot be supposed to have compared the local benefit with the cost, the only mode in which it can be made certain, apart from the police power, that constitutional rights are preserved, is by limiting each assessment upon an estate to the benefit received by that estate. But when the legislature has contemplated a certain region and may be supposed to have acted in view of a specific scheme, there is no doubt that within reasonable limits it may determine that the cost of an improvement shall fall upon a designated district and may fix the principles upon which the cost shall be apportioned. It may deal with the whole improvement as a unit and charge those assessed with a share of the total expense. Smith v. Worcester, 182 Mass. 232, 65 N. E. 40, 59 L. R. A. 728.

59. Deane v. Ind. M. & C. Co. [Ind.] 68 N. E. 686; Heman v. Gilliam, 171 Mo. 258, 71 S. W. 163; Prior v. Buehler & C. Const. Co., 170 Mo. 439, 71 S. W. 205; Minneapolis & St. L. R. Co. v. Lindquist, 119 Iowa, 144, 93 N. W. 103; St. Charles v. Deemar, 174 Mo. 122, 73 S. W. 469.

60. Bassett v. New Haven [Conn.] 55 Atl. 579; Beck v. Holland [Mont.] 74 Pac. 410.

61. Shoemaker v. Cincinnati [Ohio] 68 N. E. 1; Adams v. Roanoke [Va.] 45 S. E. 881.

62. Morse v. Omaha [Neb.] 93 N. W. 734; Portsmouth Sav. Bank v. Omaha [Neb.] 93 N. W. 231; John v. Connell [Neb.] 98 N. W. 457.

63. Harwood v. Street Com'rs, 183 Mass. 348, 67 N. E. 362. The New Jersey statute authorizing the assessment of benefits against lands held in trust by an officer of the state for the benefit of any person is valid [Act approved Apr. 1, 1898, P. L. 203]. Chancellor v. Elizabeth, 66 N. J. Law, 688.

64. Kan. City v. Gibson, 66 Kan. 501, 72 Pac. 222.

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lacking uniformity, but tends to promote it by refunding to the individual what he originally paid for the benefit of all.[65]

An assessment of property for local improvements is not within a constitutional provision requiring an equal rate of assessment and taxation,[66] and where the statute provides that before proceeding to assessment, it must be determined that benefits are equal to or exceed the cost of the work[67] and provides for a hearing by landowners before assessments become final, it does not deprive them of their property without due process of law, nor is there any excess of the taxing power,[68] nor denial of the equal protection of the law.[69]

Where an ordinance provides that the apportionment of the cost of an improvement shall be made as the statute directs, it means the statute then in force, and subsequent changes in the law prior to the making of the assessment do not affect it.[70]

No benefit can be assessed to a lot owner for a sewer built on private property in such a way as to furnish the lot owner no access to it without trespassing on private property,[71] and neither the expense of paving that portion of a public street which a street railway is under legal obligation to pave,[72] nor that portion of the cost of a street improvement necessitated by the transformation of the street into a subway under a railroad bridge, can be assessed to abutting owners.[73] A city cannot assess against property benefited the expense of abating a nuisance caused by its own negligence,[74] but it is no objection to a sewer assessment that property outside the drainage district and not entitled to the benefits of it was omitted.[75]

A special tax cannot be levied to pay for improvements already made.[76]

(§ 7) *B. Assessing and levying officers.*[77]—Village or town trustees are not disqualified to vote in confirmation of a special assessment, by reason of their owning land in the assessment district,[78] and neither a brother-in-law of an owner whose property was not assessed, nor one who has business transactions with an interested railroad company, nor one holding an official position, is incompetent on the ground of interest.[79]

65. Franklin v. Hancock, 18 Pa. Super. Ct. 398.

66. Kadderly v. Portland [Or.] 74 Pac. 710. The legislature has power to create special taxing districts and to charge the cost of a local improvement, in whole or in part, to the property in such district by special assessments, either according to valuation, area, or frontage. Meier v. St. Louis [Mo.] 79 S. W. 955. Constitutional provisions requiring taxes to be uniform and to be levied in proportion to value are not applicable to such assessments for local improvements. Id.

67. Stone v. Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405; Hibben v. Smith, 191 U. S. 310.

68. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841. A statute authorizing local assessments which provides for reasonable notice and opportunity to appear and contest the assessment before it is finally determined upon provides for due process of law, though notice of each step in the proceedings is not provided for (Adams v. Roanoke [Va.] 45 S. E. 881; Mound City L. & S. Co. v. Miller, 170 Mo. 240, 70 S. W. 721, 60 L. R. A. 190), and there is no provision for review by the courts (Hibben v. Smith, 191 U. S. 310).

69. A statute providing for street improvements in towns is not invalid for failure to give the same right of appeal that is given in similar cases in cities. Deane v. Ind. M. & C. Co. [Ind.] 68 N. E. 686.

70. Reed v. Bates, 24 Ky. L. R. 2312, 74 S. W. 234.

71. State v. Dist. Ct. [Minn.] 97 N. W. 425.

72. Wales v. Warren [Neb.] 92 N. W. 590. A paving ordinance which includes as a part of the cost to be assessed on the property owners portions of the street which a railroad company is under duty to maintain is void. Chicago v. Nodeck, 202 Ill. 257, 67 N. E. 39; American H. & L. Co. v. Chicago, 203 Ill. 451, 67 N. E. 979; Wells v. Chicago, 202 Ill. 448, 66 N. E. 1056.

73. Kreiger v. Gosnell, 24 Ky. L. R. 1095, 70 S. W. 683.

74. Patrick v. Omaha [Neb.] 95 N. W. 477.

75. Duane v. Chicago, 198 Ill. 471, 64 N. E. 1033.

76. Alton v. Job, 103 Ill. App. 378.

77. The fact that an assessment roll was made by a superintendent of special assessments, appointed by the court, does not invalidate the act [Hurd's Rev. St. 1899, p. 370, c. 24, § 38]. Storrs v. Chicago [Ill.] 70 N. E. 347.

78. Corliss v. Highland Park [Mich.] 93 N. W. 254. Determination of state court binds supreme court of the United States. Hibben v. Smith, 191 U. S. 310.

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(§ 7) *C. Persons, property, and districts liable.*—Generally speaking, all lands benefited by an improvement are subject to assessment for its cost, regardless of their character,[80] or by whom owned.[81] Thus, lands owned by private corporations, such as street railway[82] and railroad companies, are assessable the same as the property of natural persons.[83] Property of the city of New York held for municipal purposes is assessable.[84] And in Illinois, the property of a public school district is subject to special tax,[85] though an exception in favor of school property exists in some states.[86] Lands granted by the United States to the states for school purposes are held in trust by the state, and are not subject to local assessment,[87] nor are lands belonging to the public domain.[88]

Religious, charitable, and quasi public corporations and associations are frequently exempted by special act,[89] but a general exemption from taxation will not exempt from special assessments.[90]

Under authority to tax property "contiguous" to the street to be improved, only that abutting thereon can be taxed,[91] but in New Jersey, benefits may be assessed upon lands not on the line of the street improved,[92] and nonabutting property within the district permitted to drain into a sewer may be assessed for its con-

79. Rowe v. Com'rs of Assessments [N. J. Law] 55 Atl. 649.

80. Agricultural lands within the limits of a city may be assessed in a proper case for street improvements. Barber Asphalt Pav. Co. v. Gaar, 24 Ky. L. R. 2227, 73 S. W. 1106; Duker v. Barber Asphalt Pav. Co., 25 Ky. L. R. 135, 74 S. W. 744.

81. Where a street forming the boundary of a city is paved, and the city subsequently extends its boundary, the lots thus taken into the corporation may be assessed their share of the cost of the work by a new assessment, though they have changed owners in the interim. Hollister v. Rochester, 41 Misc. [N. Y.] 559. Under the New Jersey statute, authorizing the assessment of benefits against lands held by an officer of the state, in trust for the benefit of any person, the tax may be assessed, and is a lien against lands held in trust for the benefit of a certain beneficiary for life and after his death for the benefit of persons not determinable until that time [Act approved Apr. 1, 1898, P. L. 203]. Chancellor v. Elizabeth, 65 N. J. Law, 483.

82. The fact that the state may compel a corporation to sell real estate, which it is not using for corporate purposes, does not preclude the assessment of such property for local improvements, if benefited the same as if owned by an individual. Chicago Union Traction Co. v. Chicago, 202 Ill. 576, 67 N. E. 383. Where the charter of a street railway company requires it to keep that portion of the street between its tracks in good repair, it is not required to pay for repaving them with a new kind of pavement adopted by the city. Williamsport v. Williamsport Pass. R. Co., 206 Pa. 65.

83. The road bed and right of way of a railroad is liable to an assessment for a local improvement, the same as other property. Minneapolis & St. L. R. Co. v. Lindquist, 119 Iowa. 144, 93 N. W. 103; Chatham County Com'rs v. Seaboard A. L. R., 133 N. C. 216; Figg v. Louisville & N. R. Co., 25 Ky. L. R. 350, 75 S. W. 269; Louisville & N. R. Co. v. Barber Asphalt Pav. Co., 25 Ky. L. R. 1024, 76 S. W. 1097. As are lands of a railroad not used for railroad purposes, but land, the loss of which would dismember the road, cannot be sold as ordinary property. Minneapolis & St. L. R. Co. v. Lindquist, 119 Iowa, 144, 93 N. W. 103. The fact that a proposed street crosses a railroad does not alone defeat an appropriation of the railroad land for the street. Pittsburgh, C., C. & St. L. R. Co. v. Wolcott [Ind.] 69 N. E. 451.

84. Laws 1897, c. 378, § 995. In re New York, 38 Misc. [N. Y.] 600.

85. Chicago v. Chicago, 207 Ill. 37, 69 N. E. 580.

86. Pittsburg v. Sterrett Subdist. School, 204 Pa. 635. Street sprinkling. Butte v. School Dist. No. 1 [Mont.] 74 Pac. 869.

87. Drainage case. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841. See, also, Chicago v. Chicago, 207 Ill. 37, 69 N. E. 580.

88. Public lands not being properly included in an irrigation district, they are exempt, in the hands of a subsequent purchaser, from assessments to pay irrigation bonds issued while the land belonged to the United States. Nev. Nat. Bank v. Poso Irr. Dist., 140 Cal. 344, 73 Pac. 1056.

89. A law exempting religious corporations from special assessments for three certain years does not exempt them from assessments for work begun during the three years, but not assessed until later. In re Opening of East 176th St., 85 App. Div. [N. Y.] 347.

90. A constitutional or statutory provision exempting the property of agricultural and horticultural societies from taxation for state, county, city, and other municipal purposes does not exempt it from special assessments for local improvements [Const. art. 10, § 6; Rev. St. 1889, § 7505]. Kan. City Exposition Driving Park v. Kan. City, 174 Mo. 425, 74 S. W. 979.

91. Lots originally fronting on the street but divided by a line parallel thereto, and the rear ends improved as one lot fronting on a cross street, do not, as to such rear ends abut on the improved street. Langlois v. Cameron, 201 Ill. 301, 66 N. E. 332.

92. P. L. 1898, p. 399, as amended, P. L. 1899, p. 171. Allison Land Co. v. Tenafly [N. J. Law] 55 Atl. 39.

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struction, though future legislation will be necessary before it can be benefited.[93] The limits of special assessment districts should be so fixed that the property to be taxed should receive some benefit from the proposed improvement.[94]

Power to fix the extent of the assessment district is generally confided in the body given power to order the improvement, and spread the tax,[95] and a corner lot may be included in two assessment districts for improvements on the two streets on which it abuts.[96] Lots on both sides of a street should be assessed for a pavement lying entirely on one side of the center of the street.[97] The separate assessment of the two sides of a lot, owned by a railroad company, is not invalid, the sides being separated by the railroad.[98]

The lots in each quarter of a city square, in Kentucky, are chargeable with the cost of improving streets and alleys adjacent to, or within such quarters,[99] and where the property has not been divided into squares, the council may prescribe the depth on both sides of the street to be assessed for an improvement.[1]

(§ 7) *D. Amount of individual assessment, and offsetting of benefits and damages.*—As stated above, the rule or plan upon which assessments for benefits are to be levied is, within certain limits, one for the legislature to prescribe, and the apportionment of the benefits, so long as the statutory rule is followed is likewise a matter of legislative or administrative discretion,[2] and a street or alley assessment will not be disturbed, unless it affirmatively appears that under a proper method of assessment the defendant would be charged materially less.[3] The statute must be strictly complied with, however,[4] and the assessment itself must be reasonable,[5] be levied with reference to all circumstances properly affecting its

93. Walker v. Chicago, 202 Ill. 531, 67 N. E. 369.

94. An ordinance providing for one special assessment for sidewalks on streets so located that the walks on one could not benefit property on another would be void. Storrs v. Chicago [Ill.] 70 N. E. 347. But in the absence of evidence showing the relative locations of the streets, it will be presumed that the council has not abused its discretion in this respect. Id.

95. The provision of the "one mile assessment law" of Ohio, limiting the taxing district to one-half the distance between the proposed road and an existing road, only applies where the roads are parallel and not more than two miles apart, and does not apply where the roads cross, whatever the angle. Cornell v. Franklin County Com'rs, 67 Ohio St. 335, 65 N. E. 998. In North Carolina, an order assigning for the construction of a new road all the hands liable to road duty, and living within a specified distance thereof, is not objectionable, the statute not requiring that all hands in the county be ordered out [Laws 1899, p. 337, c. 338]. State v. Yoder, 132 N. C. 1111.

96. But the whole tax assessed to it cannot exceed the statutory limitation of 5 per cent. of its value. Nowlen v. Benton Harbor [Mich.] 96 N. W. 450.

97. Klein v. Nugent Gravel Co. [Ind. App.] 66 N. E. 486.

98. Minneapolis & St. L. R. Co. v. Lindquist, 119 Iowa, 144, 93 N. W. 103.

99. Button v. Kremer, 24 Ky. L. R. 1193, 71 S. W. 332; Wagner v. Gast, 24 Ky. L. R. 1401, 71 S. W. 533; Burghard v. Fitch, 24 Ky. L. R. 1983, 72 S. W. 778. Determination of quarter of square not a regular parallelogram. Park & Co. v. Cane, 24 Ky. L. R. 2294, 73 S. W. 1121; Zender v. Barber Asphalt Pav. Co., 24 Ky. L. R. 2279, 74 S. W. 201. Land lying in acute angle of two intersecting streets. Louisville R. Co. v. S. W. Alcatraz A. & C. Co., 24 Ky. L. R. 2380, 74 S. W. 237.

1. Barber Asphalt Pav. Co. v. Gaar, 24 Ky. L. R. 2227, 73 S. W. 1106; Schuster v. Barber Asphalt Pav. Co., 24 Ky. L. R. 2346, 74 S. W. 226. Improvement of street at unequal distance from parallel streets. Wymond v. Barber Asphalt Pav. Co., 25 Ky. L. R. 1135, 77 S. W. 203. Property not fronting on the street improved may be assessed. Pfaffinger v. Kremer, 24 Ky. L. R. 2368, 74 S. W. 238.

2. Ante, § 7a.

3. Schuster v. Barber Asphalt Pav. Co., 24 Ky. L. R. 2346, 74 S. W. 226; Zender v. Barber Asphalt Pav. Co., 24 Ky. L. R. 2279, 74 S. W. 201; Button v. Gast, 24 Ky. L. R. 2284, 73 S. W. 1014; Barber Asphalt Pav. Co. v. Gaar, 24 Ky. L. R. 2227, 73 S. W. 1106; Snyder v. Barber Asphalt Pav. Co., 24 Ky. L. R. 2348, 73 S. W. 1118.

4. Trephagen v. South Omaha [Neb.] 96 Mo. 248; Farmers' L. & T. Co. v. Hastings [Neb.] 96 N. W. 104. Under a statute directing the assessment of abutting property, for the cost of a sewer, by the front foot rule, the assessment of it according to area is not fatal, where the lots are of the same depth. Minneapolis & St. L. R. Co. v. Lindquist, 119 Iowa, 144, 93 N. W. 103. That the council, in assessing property for a sewer, under authority to assess proportionately to benefits, considered the area of the lots, will not invalidate the assessment, since the area may have some effect on the benefits. Id.

5. Excessiveness of assessment in comparison with other lands, held not shown. In re Opening of East 176th St., 85 App. Div. [N. Y.] 347.

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amount,[6] and not exceed the statutory authority as to the amount assessable against any particular lot or tract.[7] The sum of the assessments must not exceed the amount properly assessable for the whole improvement.[8] And only such items, as are allowed by the statute to be included in that amount, can be considered.[9] The practice of setting off benefits arising from the improvement, against the damages resulting from it, obtains in assessment proceedings[10] and if the improvement results in any damage to the property owner, for which he has not been compensated, its amount should be allowed him as an offset to the benefits assessed.[11] A deed to a city of land for a street, conditioned on saving the grantor harmless from all special assessments for benefits in constructing improvements thereon, is binding when accepted by the city,[12] and inures to the grantor's successors in title;[13] likewise a contract containing similar provisions.[14]

(§ 7) *E. The assessment roll or report, and objections to or approval or confirmation thereof.*—Notice to the owners of property against which assessments for benefits are to be assessed is essential,[15] but notice of every step in the proceed-

6. In assessing the expense of building sewers the commissioner should consider the question whether the property to be assessed is vacant or improved, and the extent and value of the improvements. Appeal of Wheeler, 39 Misc. [N. Y.] 484. The use to which the owner actually puts his property is immaterial on the question of benefits; the rule being the effect of the improvement on its general or market value. Chicago Union Traction Co. v. Chicago, 207 Ill. 607, 69 N. E. 803; Id., 207 Ill. 544, 69 N. E. 849. Benefits from paving a street, to property owned by a street railway company and leased to tenants for private business purposes, are not confined to the use of the property for railroad purposes but are the same as in the case of other private property, notwithstanding the leases may be cancelled on notice. Chicago Union Traction Co. v. Chicago, 202 Ill. 576, 67 N. E. 383; Id., 204 Ill. 363, 68 N. E. 519.

7. Nowlen v. Benton Harbor [Mich.] 96 N. W. 450; Corliss v. Highland Park [Mich.] 93 N. W. 254, 610; Id., 95 N. W. 416. A statutory provision that special assessments shall not exceed 25 per cent. of the value of the property, means the value of the land with its improvements. Mound City Const. Co. v. Magurn, 97 Mo. App. 403, 71 S. W. 460.

8. Where the statute provides that assessments shall not exceed the cost of the work, but that the cost of a main sewer into which another empties may be considered, the fact that the assessments on a lateral, in a certain street, were $100 more than the cost in that street will not invalidate them, nor are they excessive [Sp. Laws, pp. 1139, 1150, §§ 85, 135]. Bassett v. New Haven [Conn.] 55 Atl. 579.

9. Where the owner of land taken for a street is entitled to interest on the award, the amount paid may be included in the benefits assessed upon property benefited. In re East 158th St., 39 Misc. [N. Y.] 598. A statute authorizing the costs of condemnation proceedings to be levied as a part of the cost of the improvement against the property benefited does not include the value of the services of an expert, employed by the city, to estimate the damages accruing to landowners in such cases. Chicago v. Cook, 105 Ill. App. 353. The cost of improving a street intersection cannot be assessed to the property abutting on the streets improved, in Kentucky [St. § 2833] (Button v. Kremer, 24 Ky. L. R. 1193, 71 S. W. 332), but may in Washington (Young v. Tacoma, 31 Wash. 153, 71 Pac. 742). Cost of paving between street railroad tracks cannot be considered. Wales v. Warren [Neb.] 92 N. W. 590; Chicago v. Nodeck, 202 Ill. 257, 67 N. E. 39; American H. & L. Co. v. Chicago, 203 Ill. 451, 67 N. E. 979; Wells v. Chicago, 202 Ill. 448, 66 N. E. 1056. Cost of transforming street into subway under railroad track. Kreiger v. Gosnell, 24 Ky. L. R. 1095, 70 S. W. 683.

10. Ante, § 6.

11. In assessing land for benefits from a drain, it is error not to consider the damages for the land taken for the drain, and to land not taken. Jurinall v. Jamesburg Drainage Dist., 204 Ill. 106, 68 N. E. 440. Under the statute in Illinois, in a street opening or widening case, where an abutting owner has previously dedicated all or a portion of the street, the value of the land so dedicated is to be allowed him as an offset to the benefits assessable to his remaining land [Local Improvement act of 1897, § 17]. Espert v. Chicago, 201 Ill. 264, 66 N. E. 212. That the lot owner's damages resulting from the paper or record grade, were assessed, under the statute, before any physical change in the street was made, does not bar the city from subsequently assessing him with his proper share of the actual expense of making the physical change. In re Greentree Ave., 21 Pa. Super. Ct. 177. Where in opening a street only part of an owner's land is condemned, the jury in assessing damages may consider the benefit to that which remained. Pittsburgh, C., C. & St. L. R. Co. v. Wolcott [Ind.] 69 N. E. 451.

12. Bartlett v. Boston, 182 Mass. 460, 65 N. E. 827.

13. Browne v. Palmer [Neb.] 92 N. W. 315.

14. Bell v. Newton, 183 Mass. 481, 67 N. E. 599.

15. State v. Dist. Ct. [Minn.] 96 N. W. 737. Where a party after lying by for six years after beginning proceedings for the assessment of his damages has a new jury appointed, benefits assessed against another owner who had no notice of the revival of the proceedings cannot be sustained. In re

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ings is not necessary,[16] and one who actually has notice and appears cannot object to the precariousness of the kind of notice provided for by the statute.[17]

The assessment roll or report must express the free judgment of the commissioners or board authorized to make it,[18] must describe the property assessed,[19] and the improvement,[20] and contain all necessary jurisdictional recitals.[21]

A street assessment against too much land is void.[22]

A judgment confirming a special assessment is in rem against the land itself, and the benefits assessed cannot be apportioned against the leasehold and the remainder in fee as separate estates and separate judgments entered as to each.[23]

A charter provision that ordinances must receive a two-thirds vote does not apply to a resolution fixing an assessment district for a street improvement and determining the taxes to be paid by the different owners.[24]

If the entire cost of building a sidewalk is to be apportioned to the lots abutting thereon, according to their frontage, all the walk provided for in the ordinance must be built before the bill of costs is filed,[25] but the rule does not apply where

Upsal St., 22 Pa. Super. Ct. 150. A property owner who has succeeded in having his property omitted from the commissioner's report as not benefited is not bound by any further notices, and any assessment against him is void as beyond the council's jurisdiction. Spring S. F. & W. Co. v. Anderson [Ind. App.] 69 N. E. 404. Service on executor held sufficient. Peck v. Bridgeport, 75 Conn. 417. The notice of confirmation need not mention particular lots, tracts, or parcels of ground, nor state the names of their owners. Spring S. F. & W. Co. v. Anderson [Ind. App.] 69 N. E. 404. Under St. Louis city charter, a property owner is not estopped to contest the legality of the formation of an assessment district in a suit to set aside a special tax bill by the fact that he allowed the work to proceed because no provision is made for an objection of that kind to be heard previously. Collier's Estate v. Western P. & S. Co. [Mo.] 79 S. W. 947.

16. Adams v. Roanoke [Va.] 45 S. E. 881; Mound City L. & S. Co. v. Miller, 170 Mo. 240, 70 S. W. 721, 60 L. R. A. 190; Erickson v. Cass Co., 11 N. D. 494, 92 N. W. 841; Hibben v. Smith, 191 U. S. 310. Where a street railway company is duly notified of the inception of assessment proceedings in a street pavement case, which in legal contemplation are one proceeding from their beginning to their conclusion, and later becomes a party to them, it cannot object that it was not properly notified. Fair Haven & W. R. Co. v. New Haven, 75 Conn. 442. Where a township is joined as a party in a drainage proceeding because of benefits to its highways, it is not entitled to notice of the filing of the final report of the commissioners. Pleasant Tp. v. Cook, 160 Ind. 533, 67 N. E. 262. Due process of law in the levy of local assessments does not require the giving of notice in regard to those matters which the legislature itself determines or delegates to municipal authorities. Meier v. St. Louis [Mo.] 79 S. W. 955.

17. Rowe v. Com'rs of Assessments [N. J. Law] 55 Atl. 649.

18. A report which does not express the free judgment of commissioners but was made in deference to the erroneous legal advice of corporation counsel and on his threat to procure their removal will not be confirmed. In re New York, 87 App. Div. [N. Y.] 52. Commissioners in a street opening case may alter or amend the plan of assessment by extending the area of assessment. Id. It is no objection that the assessing board acts only after reference of the matter to the bureau of compensation, where the board in fact adopts the report of the bureau. Bassett v. New Haven [Conn.] 55 Atl. 579.

19. On confirmation, the council cannot assess property not reported by the commissioners. Spring S. F. & W. Co. v. Anderson [Ind. App.] 69 N. E. 404. Where a civil township is joined as a party to drainage proceedings because of benefits to the highways, the highways need not be described because the benefits assessed against the township are not a lien on the highways, but a debt payable by the township. Pleasant Tp. v. Cook, 160 Ind. 533, 67 N. E. 262.

20. The bill of cost of a sidewalk must show in separate items the cost of grading, materials, laying down and supervision. People v. Cash, 207 Ill. 405, 69 N. E. 904. A variance between the details of the improvement as reported by the board of public works and as adopted by the ordinance is not available as an objection to confirmation of the assessment unless willful and substantial. Field v. Chicago, 198 Ill. 224, 64 N. E. 840; McChesney v. Chicago, 201 Ill. 344, 66 N. E. 217.

21. Assessment for paving tax held sufficient in form as against both property and owner. Franklin v. Hancock, 18 Pa. Super. Ct. 398. A report by commissioners which does not show that they have ever determined the value of lots upon which they have imposed assessments, or that the assessments are not in excess of the statutory limit of one-half their value, is illegal and should be sent back to them for further consideration. In re New York, 83 App. Div. [N. Y.] 513.

22. Benson v. Bunting, 141 Cal. 462, 75 Pac. 59.

23. Chicago Union Traction Co. v. Chicago, 204 Ill. 363, 68 N. E. 519.

24. Auditor General v. Hoffman [Mich.] 93 N. W. 259.

25. People v. Latham, 203 Ill. 9, 67 N. E. 403; People v. Grover, 203 Ill. 24, 67 N. E. 165.

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the cost of the walk in front of each lot is levied upon such lot independently of all others.[26]

It is error to include the cost of making and collecting a special assessment in the judgment of confirmation entered after the act of 1901, prohibiting such course, took effect;[27] but after reversal on that ground, the trial court may permit the roll to be recast, excluding that item without a new ordinance, estimate and proceeding.[28] Where a paving ordinance is void for the inclusion in the estimates of a part of the street which a railroad company is bound to maintain, the court cannot eliminate the cost of paving such space on application for confirmation, order the assessment recast and enter judgment of confirmation.[29]

A former judgment confirming an assessment for the same improvement under a previous ordinance afterwards repealed may be urged as a defense to the confirmation of an assessment under a second ordinance.[30]

A proceeding to levy a special assessment to pay a condemnation award is collateral to the condemnation suit, but the question of jurisdiction to enter the condemnation judgment may be determined therein.[31] Proceedings to confirm an assessment must conform to the statutory requirements,[32] but the burden is upon objectors to show grounds for nonconfirmance,[33] and evidence material only on the question of the necessity of the improvement is not admissible.[34] In New York, where written objections to an assessment are presented to the board of assessors, the objections, together with the proposed assessment, must be sent to the board of revision of assessments for final disposition.[35] Trial by jury in such cases is provided for by statute or constitution in some states,[36] in which the ordinary rules for the conduct of jury trials apply.[37] A judgment of confirmation once entered is a finality,[38] and subject to vacation only for fraud or want of jurisdiction.[39]

26. Pierson v. People, 204 Ill. 456, 68 N. E. 383.

27. McChesney v. Chicago, 201 Ill. 344, 66 N. E. 217.

28. McChesney v. Chicago, 205 Ill. 528, 69 N. E. 38; Gage v. People, 207 Ill. 377, 69 N. E. 840; Thompson v. People, 207 Ill. 334, 69 N. E. 842.

29. American H. & L. Co. v. Chicago, 203 Ill. 451, 67 N. E. 979.

30. People v. Fuller, 204 Ill. 290, 68 N. E. 371.

31. Bass v. People, 203 Ill. 206, 67 N. E. 806.

32. Confirmation held sufficient as to regularity of proceedings. Auditor General v. Hoffman [Mich.] 93 N. W. 259.

33. Since the Local Improvement Act makes the recommendation of the improvement board prima facie evidence of compliance with all preliminary requirements of the statute, the burden is on the objector to show a noncompliance. Lack of itemized estimate of cost and lack of notice to property owners held not shown. Wells v. Chicago, 202 Ill. 448, 66 N. E. 1056; Chicago Union Traction Co. v. Chicago, 202 Ill. 576, 67 N. E. 383.

34. On application for judgment confirming a special assessment for water supply pipes, evidence tending to show that a private company could have been compelled to lay pipes in the territory is inadmissible. Gordon v. Chicago, 201 Ill. 623, 66 N. E. 823. An ordinance requiring a street railway company to maintain a portion of the pavement of a street is properly excluded as evidence before the jury in a hearing on the question of benefits. Wells v. Chicago, 202 Ill. 448, 66 N. E. 1056.

35. People v. McCue, 173 N. Y. 347, 66 N. E. 15.

36. The provision of the Drainage Act of Illinois that when the court so orders the commissioners may assess damages and benefits in lieu of a jury violates the provision of the constitution requiring compensation for private property taken or damaged for public use to be ascertained by a jury [Const. art. 2, § 13]. Juvinall v. Jamesburg Drainage Dist., 204 Ill. 106, 68 N. E. 440. Unless the property owner in a drainage proceeding specifically objects to the denial of the right of trial by jury on the question of benefits and damages, the objection is waived and the judgment of confirmation is conclusive of that point. Id. All objectors appearing and opposing a confirmation, though represented by different counsel, are one party and entitled only to three peremptory challenges, the manner of imposing which is discretionary with the court. Gordon v. Chicago, 201 Ill. 623, 66 N. E. 823.

37. Refusal to require a real estate expert for the city to state how his income from his real estate business compared with the amount he has stated he received from the city the previous year as fees in such cases is not an improper restriction of cross-examination. Gordon v. Chicago, 201 Ill. 623, 66 N. E. 823.

38. Where a special assessment has been confirmed an order vacating it on motion of the city and without consent of the taxpayers interested is void, and the assessment stands as though the order had never been

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(§ 7) *F. Equalization.*—Notices of the meetings of boards of equalization must be given as the law directs,[40] and the board must be in session during the time stated in the notice,[41] but the board acts judicially upon matters within its jurisdiction, and its action is not open to collateral attack.[42]

(§ 7) *G. Reassessment and additional assessments.*—Provision is generally made whereby an assessment, invalid for some formal defect, may be remedied by a reassessment.[43] Such statutes are unobjectionable,[44] but power to reassess cannot be used to correct jurisdictional errors affecting the power to order the improvement,[45] nor to revive a lien lost by failure to observe a jurisdictional requisite to its preservation.[46] A statute providing for a reassessment, whenever a special assessment is invalid or questioned, is not limited in its operation to assessments, made before it was enacted,[47] nor to those made under the existing law.[48] A reassessment is authorized whenever an original assessment is declared void by the court,[49] though no judgment was ever entered on the decision so declaring,[50] and where a confirmation judgment is annulled on appeal, a new assessment should be made, whether the cause is remanded or not.[51] The fact that paving assessments, as originally laid, were defective or illegal, affords no ground of relief from

entered, and authorizes the collection of the taxes thereon. McChesney v. People, 200 Ill. 146, 65 N. E. 626. The board of estimate and apportionment in New York cannot revise and reverse a determination of its own after the same has been made and announced. Richards v. Low, 38 Misc. [N. Y.] 500. The board of estimate and apportionment of New York city has no authority to amend a resolution of its predecessor, the board of public improvements, in a street opening case by changing the proportion of the cost to be assessed to benefited property. In re Opening of Quarry Road, 84 App. Div. [N. Y.] 418.

39. A confirmation judgment cannot be vacated and the proceeding dismissed at the motion of the city after collection of the assessment has begun, but where the judgment is void for fraud or want of jurisdiction, it may be vacated at any time. Chicago v. Nodeck, 202 Ill. 257, 67 N. E. 39; Chicago v. Walsh, 203 Ill. 318, 67 N. E. 774.

40. Where publication is required in three daily papers, it may be in two printed in English and one in German, these being all the dailies in the city. John v. Connell [Neb.] 98 N. W. 457. That one of the days of publication was Sunday is no objection to a six-day notice of a meeting held on the 13th, the publication days being from the 6th to the 12th inclusive. Portsmouth Sav. Bank v. Omaha [Neb.] 93 N. W. 231. Notice of the time and place of meeting of a board of equalization, when required by statute, is an indispensable prerequisite to a valid levy. Curtis v. South Omaha [Neb.] 93 N. W. 743.

41. An equalization is not invalidated by the board's taking a recess during their sitting, the clerk or a member being present to receive complaints during the time. John v. Connell [Neb.] 98 N. W. 457. Where the notice specified the hours of three certain days and a certain place, meetings on the first and third days, at a different place, invalidated the levy. Curtis v. South Omaha [Neb.] 93 N. W. 743.

42. Portsmouth Sav. Bank v. Omaha [Neb.] 93 N. W. 231.

43. Where a village attempts to assess the whole cost of an improvement on the abutting owners, and the result is an assessment for a greater percentage of the value of the property than is allowed by law, a reassessment may be made for the legal amount. Corliss v. Highland Park [Mich.] 93 N. W. 254.

44. A statute authorizing a reassessment of a special assessment invalid because of the work having been done "without authority of law" is not invalid as authorizing an illegal assessment, as the quoted phrase will be construed to have reference to mere defects in the original proceedings [Rev. St. 1898, § 1210d, as amended Laws 1901, p. 92, c. 9]. Schintgen v. La Crosse, 117 Wis. 158, 94 N. W. 84.

45. Zalesky v. Cedar Rapids, 118 Iowa, 714, 92 N. W. 657; Schintgen v. La Crosse, 117 Wis. 158, 94 N. W. 84.

46. Where the contractor fails to return his warrant within the statutory period there is not a defect remediable by a reassessment, but a total loss of the lien. City St. Imp. Co. v. Emmons, 138 Cal. 297, 71 Pac. 332.

47. Acts 22nd Gen. Assembly, c. 44, § 1. Gill v. Patton, 118 Iowa, 88, 91 N. W. 904.

48. A reassessment may be made by a city, of a tax originally made under a prior charter. Kadderly v. Portland [Or.] 74 Pac. 710.

49. Gill v. Patton, 118 Iowa, 88, 91 N. W. 904. A certificate holder for a street improvement has no right of action against a city for failing to make a reassessment, where the original assessment was set aside for failure of the contractor to comply with the contract. Crawford v. Mason [Iowa] 98 N. W. 795. Under the statute permitting a council to correct an invalid special assessment, the council has no power to make a reassessment on a quantum meruit, where a contractor cannot recover on his original contract, and hence the original assessment has been set aside. Id.

50. Young v. Tacoma, 31 Wash. 153, 71 Pac. 742.

51. Gorton v. Chicago, 201 Ill. 534, 66 N. E. 541.

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their reassessment under statutory authority,[52] and a new assessment levied in pursuance of a mandamus from the supreme court, after a decision that the original assessment was invalid, cannot be objected to on the ground that the objectors were not parties to the mandamus suit.[53]

A reassessment, like an original, must be based on benefits,[54] but interest from the date of delinquency of the original assessment may be added.[55]

In making a new assessment for an improvement already completed, the city is not required to do unnecessary things, such as the appointing of commissioners to make an estimate of cost.[56]

Where a reassessment is made, the statute of limitations in force at the time of making applies, it having been changed during the existence of the original assessment, and the period begins to run at the confirmation of the reassessment.[57]

Where a supplemental or additional assessment is required, because the original assessment was for too small a sum, it is no objection that the original assessment has been adjudicated and collected, unless it appear that in the original case, upon proper issue made, it was specifically found that the property would be benefited no more than was originally assessed against it.[58] The petition need not contain a statement of the cost of the original improvement, the amount collected and expended under the original assessment, and the amount of the deficit, nor can the city be required to make an accounting with reference to the original assessment.[59] No notice to the property owners is required, because not beneficial to them.[60]

(§ 7) *H. Maturity, obligation, and lien of assessments.*—Special assessments do not become liens save as so made by statutory authority,[61] and no lien for street improvements can be enforced until an assessment is properly made against the property.[62] The failure of the city clerk to register tax bills will not defeat them;[63] but if suit is not commenced within the statutory period the lien expires.[64]

The lien of special assessments is superior to any other lien except the lien for general taxes,[65] but a purchaser of land on which a lien for a special assessment

52. Martin act, P. L. 1886, p. 149, c. 112. Hayday v. Ocean City [N. J. Law] 54 Atl. 813.

53. Johnson v. People, 202 Ill. 306, 66 N. E. 1081.

54. Kadderly v. Portland [Or.] 74 Pac. 710

55. Young v. Tacoma, 31 Wash. 153, 71 Pac. 742.

56. Gorton v. Chicago, 201 Ill. 534, 66 N. E. 541.

57. Young v. Tacoma, 31 Wash. 153, 71 Pac. 742.

58. Cody v. Cicero, 203 Ill. 322, 67 N. E. 859.

59. Cody v. Cicero, 203 Ill. 322, 67 N. E. 859. Testimony of a contractor that he has received warrants to the full amount of his work, and sold them and received the money does not show that the amount levied by the original assessment was sufficient to pay the entire expense of the improvement. Id.

60. Stone v. Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405.

61. Cemansky v. Fitch [Iowa] 96 N. W. 754. The lien attaches with the filing with the county auditor of copies of the proceedings as provided by the statute. Id.

62. Laakmann v. Pritchard, 160 Ind. 24, 66 N. E. 153; Hall v. Moore [Neb.] 92 N. W. 294; Heman v. Farish, 97 Mo. App. 393, 71 S. W. 382.

63. The statute requiring it being merely directory. Field v. Barber Asphalt Pav. Co., 117 Fed. 925.

64. Two years in St. Louis. Heman v. Larkin [Mo. App.] 70 S. W. 907. The lien of a tax bill for all its installments continues for a year after the last installment becomes due on its face though it became due earlier by reason of default in payment of previous installments. Barber Asphalt Pav. Co. v. Meservey [Mo. App.] 77 S. W. 137. The act of July 26, 1897, reviving municipal liens, applies to the city of Philadelphia and makes valid a claim for a sewer assessment filed within six months after the assessment, though more than six months after the doing of the work. Phila. v. Hey, 20 Pa. Super. Ct. 480. The lien of a special tax bill is limited to two years, unless issued payable in installments, in which case the lien lasts two years from the time the last installment falls due. Welch v. Mastin, 98 Mo. App. 273, 71 S. W. 1090. The statute begins to run against a lien on land for the construction of a drainage ditch thereon only from the time the county surveyor accepts the work and issues his certificate for the amount due, under Ky. St. 1899, § 2400. Dixon v. Labry [Ky.] 78 S. W. 430.

65. The holder of a general tax delinquency certificate is not obliged to pay a delinquent special assessment to protect his

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exists, but which is not recorded, takes his title free from the lien,[66] and a mortgage on the property and franchises of a street railway company takes precedence over the lien of special assessments of paving taxes, except such as were assessed for paving already done, or in contemplation, at the time it was recorded.[67] Authority to issue special tax bills in installments must be by ordinance.[68]

(§ 7) *I. Payment and discharge.*—The statute authorizing suit by a taxpayer to recover taxes illegally assessed upon him, and paid under protest, applies to special assessments.[69] The single circumstance that plaintiff has received benefit from an improvement cannot defeat his right to recover back a payment made under duress, but where he had full knowledge of the invalidity of the assessment, and made the payment under protest, there is no duress.[70]

(§ 7) *J. Enforcement and collection.*—A special assessment against real estate creates no personal liability[71] unless specially provided by statute;[72] but the legislature has power to grant to municipalities a remedy for collection of taxes against property by a personal action against the owner,[73] though the cases in which a special assessment for benefits peculiar to property resulting from a public improvement may be collected in a personal action against the owner are exceptional, and when a city resorts to this remedy, it must show that every requirement of the statute on which it relies has been complied with.[74]

Enforcement against property.—The well nigh universal procedure for the collection of these taxes is by enforcement of the lien given by the assessment against the land, and, as is the rule when the enforcement of tax liens generally is sought, the lien holder's right of recovery depends upon the regularity of the proceedings under which he claims.[75] No recovery can be had on a special tax bill without an assessment,[76] and the contractor cannot recover by showing an improvement other than his tax bill describes, though the improvement described was beyond the power of the city to make, and the improvement actually made was not.[77] Denial of recovery on the ground of premature action, the contract not having been performed, and also on the ground of irregularity of the proceedings, is not a bar to a subsequent action after performance.[78] But tax bills,[79] tax sale certificates and receipts for taxes and special assessments are prima facie evidence of the validity of the taxes they represent.[80]

rights. Keene v. Seattle, 31 Wash. 202, 71 Pac. 769. The lien of the special assessment for local improvements is superior to a preexisting mortgage on the land, the law under which it was levied having been in existence when the mortgage was taken. Kirby v. Waterman [S. D.] 96 N. W. 129.

66. Elder v. Fox [Colo. App.] 71 Pac. 398.

67. Lien as affected by consolidation of companies. Lincoln v. Lincoln St. R. Co. [Neb.] 93 N. W. 766.

68. Welch v. Mastin, 98 Mo. App. 273, 71 S. W. 1090.

69. Omaha v. Hodgskins [Neb.] 97 N. W. 346.

70. Haven v. New York, 173 N. Y. 611, 66 N. E. 1110.

71. Omaha v. State [Neb.] 94 N. W. 979; Heman Const. Co. v. Loevy [Mo.] 78 S. W. 613; Schern v. Short, 25 Ky. L. R. 1108, 77 S. W. 357.

72. In re Elsner, 86 App. Div. [N. Y.] 207. An assessment by a municipality for paving a street is a tax and cannot be collected as an ordinary debt by a common-law action, unless such remedy is given by statute. Franklin v. Hancock, 204 Pa. 110. Under legislative authority to proceed by "an action at law" to recover paving assessments, the municipality may proceed in assumpsit. Franklin v. Hancock, 18 Pa. Super. Ct. 398.

73. Franklin v. Hancock, 18 Pa. Super. Ct. 398.

74. Franklin v. Hancock, 18 Pa. Super. Ct. 398. A property owner cannot object to being held personally liable for a paving tax because the resolution after completion of the work ordered the tax spread on the property instead of on the property and owners. Id.

75. Before a judgment of sale can be rendered on a delinquent special tax for building a sidewalk, it is necessary to prove that a grade for such walk had been established. People v. Smith, 201 Ill. 454, 66 N. E. 298.

76. Heman v. Farish, 97 Mo. App. 393, 71 S. W. 382.

77. Sedalia v. Abell [Mo. App.] 76 S. W. 497.

78. Barker v. Tenn. Pav. Brick Co., 24 Ky. L. R. 1524, 71 S. W. 877.

79. Heman v. Larkin [Mo. App.] 70 S. W. 907; Heman v. Farish, 97 Mo. App. 393, 71 S. W. 382.

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Defenses of a collateral nature not going to the jurisdiction[81] or that have been raised and overruled,[82] or could have been raised at confirmation, and do not go to the jurisdiction of the court to confirm the assessment,[83] cannot be urged, though where a defense is first available in the action to foreclose the lien, it may be there interposed,[84] and in an action by drainage commissioners against commissioners of highways to recover assessments made against an alleged public road, the highway officers are not estopped to deny that it was a public road because they did not raise the question in the assessment proceedings.[85]

Waiver and estoppel to urge defenses.—Under the local improvement act of Illinois,[86] the voluntary payment of any instalment of an assessment is deemed an assent to confirmation of the roll and waives objections to the application for judgment of sale and order of sale for the remaining instalments; but such it seems is not the rule in the absence of express statutory provision.[87] An abutting landowner who has full knowledge that an improvement is being made in reliance on the assumption that the proceedings authorizing it are valid, and stands by without objection until large sums of money are expended thereon, is estopped to deny the authority on which the improvement is made;[88] but the principle does not

80. Wales v. Warren [Neb.] 92 N. W. 590.

81. A defense that the ordinance was invalid for want of a proper certificate of election of the trustees is not available to an action to collect an assessment authorized by the ordinance. Deane v. Ind. M. & C. Co. [Ind.] 68 N. E. 686. If there is not an entire failure to specify the nature of the improvement, the fact that the ordinance may be lacking in some particulars affecting the ability of the commissioners or bidders to make an intelligent estimate of the cost does not furnish ground for objection on application for judgment of sale. Shepard v. People, 200 Ill. 508, 65 N. E. 1068.

82. The provision of the Kansas City charter, cutting off all defenses to tax bills not raised by filing objections with the board of public works, applies as well to jurisdictional defenses as to mere irregularities. State v. Smith, 177 Mo. 69, 75 S. W. 625. One who has appealed to the city council from the decision of the superintendent of streets in approving work on which an assessment is based and been defeated cannot afterwards defend an action to foreclose the assessment on the ground that the contract was not properly performed. Lambert v. Bates, 137 Cal. 676, 70 Pac. 777. Where the property owner does not appeal in a condemnation suit to open a street, he cannot afterwards in a suit to enforce payment of the benefits assessed to him in that proceeding avail himself of the defense that no benefits were assessed therein against the public. St. Louis v. Annex Realty Co., 175 Mo. 63, 74 S. W. 961.

83. Invalidity of ordinance goes to jurisdiction. Walker v. People, 202 Ill. 34, 66 N. E. 827. Amendatory paving ordinance held not invalid. Johnson v. People, 202 Ill. 306, 66 N. E. 1081. Sidewalk ordinance held not invalid. Chew v. People, 202 Ill. 380, 66 N. E. 1069. Objection of want of jurisdiction to enter condemnation judgment must be raised on confirmation. Bass v. People, 203 Ill. 206, 67 N. E. 806. Former judgment of confirmation for same improvement under prior ordinance being ground for objection to confirmation cannot be pleaded in bar of application for judgment of sale. People v. Fuller, 204 Ill. 290, 68 N. E. 871. Rule applied in mandamus to town officers to compel levy of tax for drainage assessment. Com'rs of Highways v. Big Four Drainage Dist., 207 Ill. 17, 69 N. E. 576. Absence of itemized estimate of cost from first resolution. Gage v. People, 207 Ill. 61, 69 N. E. 635; Ryan v. People, 207 Ill. 74, 69 N. E. 638; Gage v. People, 207 Ill. 377, 69 N. E. 840; Thompson v. People, 207 Ill. 334, 69 N. E. 842. Want of two-thirds vote in favor of improvement; application of front-foot rule. Brown v. Cent. Bermudez Co. [Ind.] 69 N. E. 150. One who has been in sole possession of property for years and paid taxes thereon assessed to him as owner and appeared as owner before the council and sought to be relieved temporarily from the assessment cannot object that he is part owner only in the premises and not liable for the full tax. La. v. McAllister [Mo. App.] 78 S. W. 314.

84. City St. Imp. Co. v. Taylor, 138 Cal. 364, 71 Pac. 446. On application for judgment of sale for a special tax levied under the sidewalk act in Illinois, the property owner may object that the ordinance is void for insufficient description of the improvement, since he has no earlier opportunity to be heard. Failure to specify kind and quality of material. People v. Birch, 201 Ill. 81, 66 N. E. 358.

85. Com'rs of Big Lake Drainage Dist. v. Com'rs of Highways, 199 Ill. 132, 64 N. E. 1094.

86. Starr & C. Ann. St. Supp. 1902, c. 24, par. 103. Treat v. Chicago, 125 Fed. 644; Downey v. People, 205 Ill. 230, 68 N. E. 807; McDonald v. People, 206 Ill. 624, 69 N. E. 509.

87. Yost v. Toledo & O. C. R. Co., 24 Ohio Circ. R. 169.

88. Taylor v. Patton, 160 Ind. 4, 66 N. E. 91; Lux & T. Stone Co. v. Donaldson [Ind.] 68 N. E. 1014; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; Auditor General v. Hoffman [Mich.] 93 N. W. 259; Gates v. Grand Rapids [Mich.] 95 N. W. 998; Nowlen v. Benton Harbor [Mich.] 96 N. W. 450; Hill-O'Meara Const. Co. v. Hutchinson, 100 Mo. App. 294, 73 S. W. 318; Turnquist v. Cass County Drain Com'rs, 11 N. D. 514, 92 N. W. 852; Barber Asphalt Pav. Co. v. Gaar, 24

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extend to cases where there has been no attempt to comply with the statute.[89] One taking property by deed subject to special assessment is not estopped to deny the validity of such assessments,[90] especially those of which he had no knowledge and which were not considered when he paid the consideration for the land.[91]

Counterclaim.—Defendant cannot counterclaim for damages arising from failure to perform the work according to contract.[92]

Accrual of cause of action.—Failure of the property owner to pay an instalment of an assessment when due matures the whole series and authorizes foreclosure of the lien, notwithstanding it was paid soon after due and before proceedings to foreclose were begun.[93]

The general limitation act does not apply to these proceedings in Illinois,[94] nor does the special act referring to them have a retrospective effect.[95]

Parties.—Suit on a tax bill is properly brought against a purchaser of the lot acquiring title under a tax deed after the special tax lien accrued,[96] and where a municipal lien for paving was filed against one who was neither owner nor registered owner, but the true owner and the registered owner were added as defendants at the trial, a verdict against them was sustained.[97] In Ohio, after a street improvement assessment has been certified to the county auditor and placed on the tax list, the right of action for the collection of it rests alone in the county treasurer.[98]

Notice to the owner of proceedings to enforce the lien is necessary,[99] and it must be reasonable,[1] but it may be by publication[2] where the statutory grounds for

Ky. L. R. 2227, 73 S. W. 1106; Wilson v. Woolman [Mich.] 94 N. W. 1076. Objections that contractor was a foreign corporation not authorized to do business in state, and that city had already exceeded its debt limit held waived. Beaser v. Barber Asphalt Pav. Co. [Wis.] 98 N. W. 525. Estoppel bars successors in title. Cummings v. Kearney, 141 Cal. 156, 74 Pac. 759.

89. Laakmann v. Pritchard, 160 Ind. 24, 66 N. E. 153; Clay City v. Bryson, 30 Ind. App. 490, 66 N. E. 498; Walden v. Relyea, 89 App. Div. [N. Y.] 241; Morse v. Omaha [Neb.] 93 N. W. 734; Hall v. Moore [Neb.] 92 N. W. 294.

90. Omaha v. Gsanter [Neb.] 93 N. W. 407.

91. Gill v. Patton, 118 Iowa, 88, 91 N. W. 904.

92. Lux & T. Stone Co. v. Donaldson [Ind.] 68 N. E. 1014.

93. Marion Bond Co. v. Blakely, 30 Ind. App. 374, 65 N. E. 291. But the lien is not lost by forbearance until the last assessment is due on the face of the tax bill. Barber Asphalt Pav. Co. v. Meservey [Mo. App.] 77 S. W. 137.

94. An application for judgment of sale for a delinquent special assessment is not a "civil action not otherwise provided for" within the meaning of section 16 of the Limitation Act, requiring such actions to be begun within 5 years; nor is there any statute limiting the time for making such application. Shepard v. People, 200 Ill. 508, 65 N. E. 1068.

95. The limitation of five years in the Illinois Local Improvement Act of 1897 does not apply to special assessments confirmed before that act was passed, so as to bar, after five years, an application for judgment of sale thereon. Walker v. People, 202 Ill. 34, 66 N. E. 827; Mecartney v. People, 202 Ill. 51, 66 N. E. 873.

96. Excelsior Springs v. Henry, 99 Mo. App. 450, 73 S. W. 944.

97. Phila. v. Kehoe, 22 Pa. Super. Ct. 320.

98. Cent. Ohio R. Co. v. Bellaire, 67 Ohio St. 297, 65 N. E. 1007.

99. Where all proceedings resulting in the sale of lands to enforce collection of levee taxes were had during the lifetime of the owner, objections by his heirs based on want of notice to them are immaterial. Johnson v. Hunter, 127 Fed. 219.

1. The place of a nonresident owner's residence cannot affect the validity of a statutory provision as to notice. Johnson v. Hunter, 127 Fed. 219. A provision for four weeks' notice by publication in the case of nonresident owners is not so unreasonably short as to invalidate proceedings in rem against the land where it is expressly provided that no personal judgment can be taken. Id. There is no discrimination against nonresidents where the statute provides four weeks' notice by publication as to them and 20 days as to residents, nor because provision for longer notice to nonresidents is made in other cases, and they are granted two years in which to vacate the decree and make defense. Id.

2. Unless the statute requires the last publication to be a certain time before the hearing, it is sufficient that the first publication be the required time before the rendition of the decree or judgment. Johnson v. Hunter, 127 Fed. 219. Failure of the clerk to indorse an order for publication on the complaint and enter it on the records of the court is not jurisdictional where not so provided by the statute. Id. Two publications of the notice of application for judgment for street sprinkling assessments in St. Paul, Minn., are required. Hawes v. Fliegler, 87 Minn. 319, 92 N. W. 223.

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service in that manner exist.[3] The notice must contain all necessary jurisdictional averments,[4] but a general appearance waives nonjurisdictional defects.[5]

The complaint must state a cause of action and show that the proceedings on which it is founded were regular;[6] but it need not set forth all the matters necessary to be stated in the resolutions and ordinances authorizing the improvement,[7] nor file copies of them as exhibits.[8] If plaintiff relies on an estoppel of the property owner, he must plead the facts constituting it fully and distinctly.[9]

Evidence.—The original ordinance under which a special tax was levied is admissible in evidence on identification of the city clerk.[10]

The judgment must be for a sum certain,[11] including the amount of the assessment,[12] and fees and costs accruing subsequent to advertisement may be included.[13]

Costs are allowable as in other cases,[14] and a statutory provision for the allowance of an attorney's fee is valid.[15]

Sale.—The lien is against the land itself and not against the owners, and the lienholder is entitled to a sale of the whole estate irrespective of the interests of life tenants and remaindermen.[16] Where, upon sale, the sheriff refuses to issue a certificate of purchase and the purchaser acquiesces, he acquires no title;[17] but grantees under deeds issued on tax sales based on ditch certificates are, on failure of their deeds, entitled to liens in the same manner as the holders of other void tax deeds.[18] On failure of the title of the purchaser, he is entitled in St. Paul to recover of the city the amount paid for the deed.[19] Provision for redemption is sometimes made.[20]

3. Where the sworn complaint avers that the owner is a nonresident, it is sufficient to authorize service by publication without a separate affidavit of nonresidence. Johnson v. Hunter, 127 Fed. 219.

4. Failure to give the owner's name in the advertised list, if known to the collector, renders the notice bad, and the fact that he gave the name correctly in the delinquent list is sufficient evidence that he knew it; but the fact that it appeared on the original assessment roll is not. Gage v. People, 205 Ill. 547, 69 N. E. 80. An advertisement which gives the number of each warrant and the date when certified for collection sufficiently states the date when the assessment is legally due, since it is due when the warrant is issued and not before. Gage v. People, 205 Ill. 547, 69 N. E. 80.

5. An objection that the collector's notice of application for judgment of sale was defective in failing to give the year in which the assessment was due is waived where the parties appear and make no objection upon that ground, nor to admission of the notice in evidence. Bass v. People, 203 Ill. 206, 67 N. E. 806.

6. Sufficiency of complaint in action to enforce lien for building sidewalk. Gaertner v. Louisville Artificial Stone Co., 24 Ky. L. R. 940, 70 S. W. 293. Where the complaint showed that the resolution of intention passed by the board of supervisors was void and insufficient to confer on the board jurisdiction to make the award, it is bad, notwithstanding a general allegation that all the proceedings were regular [Code Civ. Proc. § 456]. Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445. A petition to enforce a contractor's lien for the construction of a drainage ditch, though defective for failure to fill blanks left in the statement of the amount certified by the surveyor, is sufficient if not objected to where it contains allegations sufficient to support a judgment for the amount claimed. Dixon v. Labry, 24 Ky. L. R. 697, 69 S. W. 791.

7. Deane v. Ind. M. & C. Co. [Ind.] 68 N. E. 688.

8. Baltimore & O. R. Co. v. Daegling, 30 Ind. App. 180, 65 N. E. 761.

9. Taylor v. Patton, 160 Ind. 4, 66 N. E. 91.

10. People v. Smith, 201 Ill. 454, 66 N. E. 298.

11. Form of judgment for delinquent special assessment. Gage v. People, 205 Ill. 547, 69 N. E. 80; Id., 207 Ill. 377, 69 N. E. 840.

12. Upon application for judgment of sale the county court has no power to reduce the assessment against the lots of an objector on the ground that such reduction had been agreed upon by the parties in the assessment proceeding and an order to that effect prepared which the circuit court neglected to enter. Bass v. People, 203 Ill. 206, 67 N. E. 806.

13. Gage v. People, 205 Ill. 547, 69 N. E. 80.

14. Liability of city for interest and costs on reapportionment between city and property owners. Louisville v. Selvage, 24 Ky. L. R. 947, 70 S. W. 276. Liability of contractor for costs for multiplying suits by bringing separate action against each property owner. Kreiger v. Gosnell, 24 Ky. L. R. 1095, 70 S. W. 683.

15. Brown v. Cent. Bermudez Co. [Ind.] 69 N. E. 150.

16. Duker v. Barber Asphalt Pav. Co., 25 Ky. L. R. 135, 74 S. W. 744.

17. Davis v. Evans, 174 Mo. 307, 73 S. W. 512.

18. Skelton v. Sharp [Ind.] 67 N. E. 535.

19. The purchaser or holder of a certifi-

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(§ 7) *K. Remedies by injunction or other collateral attack, and grounds for them.*—Relief from the burden of local improvements is sometimes sought by attempting to restrain the levy of the assessment, and it is held in some states that the making of a special assessment may be enjoined,[21] on grounds going to the jurisdiction of the assessing body,[22] though not upon the ground of lack or insufficiency of benefits,[23] but injunction will not issue to restrain the passing of an ordinance fixing such assessments, though it is invalid for noncompliance with charter provisions.[24]

In other cases, relief is sought after the tax has been spread by action to set it aside,[25] and in New York, it is held that where the legality of an assessment can be proved only by extrinsic evidence, an objector is entitled to review it by a suit in equity and is not limited to certiorari.[26] It is, however, within the power of the legislature to limit or absolutely prohibit the maintenance of an action to set assessments aside,[27] and actions not timely brought are barred.[28]

Relief in other cases is sought by action to restrain collection of the tax, but such bills will not lie, in some states,[29] and in others, to warrant the interference of equity, there must be some peculiar ground of equity jurisdiction,[30] and relief is refused where the ground alleged is nonjurisdictional and one that could have been urged against the confirmation, or in direct review.[31] The lack or inadequacy

cate of sale in St. Paul is not entitled to appear in the original proceedings and by motion have the judgment opened and vacated on the ground that it is void; as between him and the city such judgment and sale are deemed to be valid, and the amount of the purchase price can be refunded only when judgment is adjudged void in an action between the purchaser and the owner of the land. In re Grading Jessamine St. [Minn.] 97 N. W. 878.

20. Under Ky. St. 1903, § 3187, when a tax bill for street improvements is bid in by the city, the owner of the property has no right of redemption, though he would have in case the purchaser were one other than the city. Lexington v. Woolfolk [Ky.] 78 S. W. 910. Where such sale of tax bills is required to be advertised for and to take place on a certain day, the fact that the sale was not so advertised and made does not invalidate the purchase of such bills by the city. Id. Penalties and compound interest are not imposed for nonpayment of tax bills when due, where the city bids in the bills at the public sale. Id. In a suit by a city to enforce a lien for unpaid assessments, the petition referred to certain ordinances and recited that they were filed and made a part of the petition. Held, pleading sufficient, though copies of such ordinances were not in fact filed. Id.

21. Entire failure to give the notice of the proposed improvement to abutting owners is ground for injunction against the assessment. Joyce v. Barron, 67 Ohio St. 264, 65 N. E. 1001.

22. A bill to enjoin the making of a special assessment will lie only when on the face of the record some jurisdictional fact is wanting. Bemis v. McCloud [Neb.] 97 N. W. 828.

23. The determination of the assessing board as to the benefits accruing to the lands liable to assessment for an improvement, in the absence of fraud, is not open to collateral attack. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; Turnquist v. Cass County Drain Com'rs, 11 N. D. 514, 92 N. W. 852.

24. Kadderly v. Portland [Or.] 74 Pac. 710.

25. Where a city wrongfully entered upon a private way, and in fitting it for public use destroyed an abutting owner's access to his premises therefrom, and assessed a portion of the cost to him, he can maintain suit in equity to set aside the assessment, to restore the way to its previous condition and for damages. Culver v. Yonkers, 80 App. Div. [N. Y.] 309.

26. Donovan v. Oswego, 90 App. Div. [N. Y.] 397.

27. Loomis v. Little Falls, 176 N. Y. 31, 68 N. E. 105.

28. In computing the 30 days within which an attack on the validity of assessments for sewers must be made, the day on which the assessment is ascertained and apportioned is to be included (Kan. City v. Gibson, 66 Kan. 501, 72 Pac. 222), and where a supplemental petition is filed after sustaining a demurrer to a premature one, the date of filing the supplemental petition is the beginning of suit (Holmquist v. Anderson, 67 Kan. 861, 74 Pac. 227).

29. Highway. Greenwood v. MacDonald, 183 Mass. 342, 67 N. E. 336. Special assessments for the construction of sewers being collected in the same manner as other taxes, in Minnesota, and the same remedies being applicable that are applicable in case of other taxes deemed illegal, an action in equity cannot be maintained in equity to restrain the collection of such a tax. Fajder v. Aitkin, 88 Minn. 445, 92 N. W. 332.

30. Lanning v. Chosen Freeholders, 64 N. J. Eq. 161.

31. Collection of a tax properly assessed to reimburse a city for the expense of abating a nuisance will not be enjoined, where it appears that the owner, after due notice, has failed to abate such nuisance. Patrick v. Omaha [Neb.] 95 N. W. 477. The overassessment of a tract of land for a macadam road, resulting from a mistake by the commissioners as to the number of acres in the tract, being an irregularity which may be corrected on certiorari, is not ground for an in-

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of other remedy, and the exhaustion of such other remedies as were open to the property owner, must clearly appear,[32] and he must bring in all necessary parties,[33] and show grounds of both jurisdictional,[34] and equitable nature.[35]

Again, relief is frequently sought by bill to set aside the tax deed or assessment lien as a cloud on the property owner's title. A purchaser at a delinquent tax sale is bound to know, at his peril, that the property owner is in fact delinquent in the payment of a valid tax, legally assessed against the property,[36] and any defect affecting the legality of the tax itself is available in such a proceeding, notwithstanding the owner's failure to object to the entry of judgment of sale against the property,[37] and neither repayment to the purchaser of the amount paid by him at the tax sale, nor the amount paid by him on subsequent assessments, is a condition precedent to the owner's right to relief, where the tax was illegal and void.[38] Such a suit, however, is a collateral attack,[39] and non-jurisdictional defects cognizable on appeal, or other direct review of the earlier proceedings, such as the inclusion of too much or too little land in the description,[40] the inequity of the assessment as measured by the benefits,[41] and the regularity of the proceedings to enforce the lien of the tax, cannot be inquired into,[42] and a nonresident who did not

junction to restrain collection of the excess. Lanning v. Chosen Freeholders, 64 N. J. Eq. 161.

32. Astoria Heights Land Co. v. New York, 89 App. Div. [N. Y.] 512. Property owners who neither appeared before the council at the assessment, nor appealed from its decision, cannot allege no benefit, as a ground to enjoin enforcement of collection. Minneapolis & St. L. R. Co. v. Lindquist, 119 Iowa, 144, 93 N. W. 103. A bill for an injunction on the ground that complainant had no notice of the confirmation of the assessment until after the expiration of the statutory period allowed for certiorari, should show that he has applied for certiorari, since the court has jurisdiction to disregard the limitation in particular cases. Lanning v. Chosen Freeholders, 64 N. Y. Eq. 161.

33. Property owners cannot, in a suit against the municipality alone, enjoin the collection of special tax certificates that have been sold, on the ground that the improvement for which they were levied has not been completed, their remedy being by action for damages. Astoria Heights Land Co. v. New York, 89 App. Div. [N. Y.] 512.

34. A finding that property is benefited "to the full amount in each case of said proposed levies" is not so defective in not finding the property assessed to be benefited proportionally to its frontage, as to warrant an injunction against collecting a tax levied on that basis. Portsmouth Sav. Bank v. Omaha [Neb.] 93 N. W. 231; John v. Connell [Neb.] 98 N. W. 457.

35. Collection of a special assessment will not be enjoined on the ground of the invalidity of the statute under which it was made, where a similar statute had been previously upheld by the supreme court, though long afterwards the same court held similar legistion to be in violation of the constitution. Shoemaker v. Cincinnati [Ohio] 68 N. E. 1. Landowners who petition for an improvement and consent therein that the cost may be assessed upon their property are estopped to enjoin the collection of the assessments on the ground of lack of benefit. Hendrickson v. Toledo, 23 Ohio Circ. R. 256.

36. Langlois v. Cameron, 201 Ill. 301, 66 N. E. 332; Boals v. Bachmann, 201 Ill. 340, 66 N. E. 336.

37. Failure of the owner of property to object to the entry of judgment of sale for a special tax, levied under an ordinance which the city had no power to pass does not preclude him from attacking the validity of the tax and judgment of sale collaterally. Boals v. Bachmann, 201 Ill. 340, 66 N. E. 336.

38. Langlois v. Cameron, 201 Ill. 301, 66 N. E. 332; Boals v. Bachmann, 201 Ill. 340, 66 N. E. 336.

39. A bill to remove cloud from title, consisting of deeds based on sales to enforce levee taxes, where the assessing board is not made a party, is a collateral attack, and not a direct proceeding to avoid the tax proceedings. Johnson v. Hunter, 127 Fed. 219.

40. That the tax bill is invalid for covering only a part of the depth of the lot, or included more frontage than the defendant owned, should be availed of at the action on the tax bill, and is not ground to set aside the execution. Barber Asphalt Pav. Co. v. Kiene, 99 Mo. App. 528, 74 S. W. 872.

41. Whether the board adopted a wrong rule of assessment, and the land was benefited by the improvement, can only be inquired into on appeal from the assessment, and not in a proceeding to remove the lien of the assessment as a cloud on title. Peck v. Bridgeport, 75 Conn. 417.

42. Where the decree recites that notice by publication was duly given, the recital is conclusive against collateral attack. Johnson v. Hunter, 127 Fed. 219. Allowance of excessive fees to master who made sale is not ground for collateral attack. Id. Whether the complaint in a tax case sets forth a cause of action is within the jurisdiction of the trial court to determine, and any error in that respect is reviewable only by direct proceedings, not by collateral attack. Id. That the record in tax sale proceedings fails to set forth all the jurisdictional facts does not subject the decree to collateral attack, where the proceedings conform to the regular course of chancery proceedings and the court is one of general equity jurisdiction. Id.

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appear and protest after notice cannot afterwards defeat the tax bills, on the ground that the statute limiting the right of protest to resident owners is unconstitutional.[43]

(§ 7) *L. Appeal and other direct review. Appeal.*—An appeal from the confirmation of special assessments is generally provided for the landowner,[44] and sometimes for the public in case of a dismissal of the proceedings,[45] but provision for review is not always provided for either party,[46] nor is it necessary.[47]

Only those parties to the record who are injured by the error are privileged to allege it,[48] and errors may be waived,[49] and parties estopped to allege them as in other cases.[50]

An appeal lies only from a confirmation of the report of commissioners, and not from any intermediate order.[51]

Questions of law only are reviewable, and not questions of fact,[52] nor matters of discretion.[53] Where, in confirmation proceedings, the trial judge, by consent of the parties, views the street to be improved for the purpose of determining its necessity and reasonableness, his finding will not be reviewed in the absence of a showing of error.[54]

On appeal from an order of drainage commissioners classifying lands, jurisdiction is not lost because the summons is made returnable to the law term.[55]

Where there is no bill of exceptions stating what objections to confirmation were urged upon the county court, it will be presumed that all defects within the

43. Field v. Barber Asphalt Pav. Co., 117 Fed. 925.

44. A landowner feeling aggrieved at the assessment made by commissioners, under the Farm Drainage Act of Illinois, may appeal to three supervisors, notwithstanding the amendment allowing an appeal to the county court. People v. Glassco, 203 Ill. 353, 67 N. E. 499.

45. The city may appeal, in Illinois, from a judgment dismissing its petition for confirmation. Chicago v. Singer, 202 Ill. 75, 66 N. E. 874; Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786.

46. No appeal lies to the circuit court, in Indiana, from a judgment of dismissal rendered by the court of county commissioners, upon a negative report of reviewers, in a proceeding to establish a ditch [Burns' Rev. St. 1901, § 5655]. Oathout v. Seabrooke, 159 Ind. 529, 65 N. E. 521. Where in a drainage proceeding the court has jurisdiction of the parties and the subject-matter, the judgment confirming the report of the commissioners is final and conclusive. Pleasant Tp. v. Cook, 160 Ind. 533, 67 N. E. 262.

47. Hibben v. Smith, 191 U. S. 310

48. A lessee is not entitled to appeal from a judgment confirming a special assessment against leased premises, where the judgment expressly excepts his leasehold interest, including improvements from liability, notwithstanding he has covenanted to pay all taxes or assessments levied on the premises. Weise v. Chicago, 200 Ill. 339, 65 N. E. 648. That the act under which assessments were made is unconstitutional as to certain persons of whom prosecutor is not one, is no ground on which he can urge the invalidity of his assessment. Zeliff v. Bog & F. Meadow Co. [N. J. Law] 56 Atl. 302.

49. Objections not made before the council cannot be reviewed on appeal. Young v Tacoma, 31 Wash. 153, 71 Pac. 742.

50. A prosecutor in certiorari seeking to be relieved of his assessment will not be heard to object that his own petition for the improvement was informal or lacking in due particularity. Rowe v. Com'rs of Assessments [N. J. Law] 55 Atl. 649. The landowner who has stood by without objecting, until a street improvement in front of his land has been completed at public expense, will not be heard, upon certiorari afterwards brought to review an assessment for benefits, to question the validity of the ordinance and contract under which the improvement was made. Rosell v. Neptune City, 68 N. J. Law, 509.

51. Newark v. Weeks [N. J. Law] 56 Atl. 118. An owner of abutting property is not entitled to appeal from the appointment of commissioners to assess benefits from the change of grade of the New York & Harlem Railroad, before any assessment has been imposed upon his property, but can appeal only from a confirmation of the commissioner's report. In re Park Ave. Viaduct Assessment, 77 App. Div. [N. Y.] 136.

52. Newark v. Weeks [N. J. Law] 56 Atl. 118. The finding, by the confirming court, that assessments have been laid according to benefits, is the finding of a fact which will not be reviewed in the appellate court if the record shows any proof to sustain it. Dean v. Paterson, 68 N. J. Law, 664; Bassett v. New Haven [Conn.] 55 Atl. 579; Beck v. Holland [Mont.] 74 Pac. 410; Jones v. Chicago, 206 Ill. 374, 69 N. E. 64.

53. Where the council has acted in good faith in the exercise of the discretion conferred upon them by law to fix the district benefited by the opening and construction of a new street, it is quite clear that the courts possess no power to review such discretion, but where they have acted in bad faith the rule is otherwise. Harriman v. Yonkers, 82 App. Div. [N. Y.] 408.

54. Wells v. Chicago, 202 Ill. 448, 66 N. E. 1056.

55. Frahm v. Com'rs of Craig Drainage Dist., 200 Ill. 233, 65 N. E. 649.

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general objection were relied on,[56] but on appeal from a judgment of confirmation, the supreme court will not search through the specifications to find support for general objections that the ordinance is defective in its description of the improvement.[57]

Where a judgment of confirmation is reversed for a formal error in its entry, the reversal is not res judicata as to the merits on a subsequent appeal.[58] On appeal from the confirmation of a new assessment for the completed work, made under a new ordinance, having for its basis an ordinance held to be defective in matters of description, no objections will be heard against the original ordinance which might have been urged against it on the first appeal.[59]

Under a statute providing that the appellant shall pay the costs in case an assessment is sustained, the costs cannot be taxed where the assessment is not sustained.[60]

Certiorari is the remedy afforded, in some states, for the review of special assessments, but it lies only from a confirmed assessment to correct an error in law, if an erroneous principle is adopted in laying the assessment,[61] and not to review the finding of facts.[62]

It must be timely brought,[63] but the court, in New Jersey, has power to relieve from the effect of the statute of limitations in certain instances.[64]

Where appeal is the statutory remedy for all errors affecting the amount of the award, certiorari will not lie, on the ground that irreparable injury will be inflicted by allowing the award to become a lien and exist during the several months before a decision can be reached on the appeal.[65]

QUESTIONS OF LAW AND FACT.

Scope of topic. This topic includes only the general rules as to the province of court and jury and some illustrative applications thereof, the propriety of taking a case from the jury being elsewhere treated.[66] Whether particular facts or issues are questions of law or fact is considered as germane to the particular subject involved, and is treated in the topic referring thereto, the treatment thereof in this topic being designed to be merely illustrative of the general rules, and no effort being made at exhaustiveness in respect to either subjects or citations.

Province of court and jury in general.—Generally speaking, all issues of fact are for the jury, and all questions of law for the court,[67] and neither can invade the province of the other.[68] When there is no jury, either the court or a master

56. Gage v. Chicago, 201 Ill. 93, 66 N. E. 374.

57. Gorton v. Chicago, 201 Ill. 534, 66 N. E. 541.

58. Gage v. People, 207 Ill. 61, 69 N. E. 635.

59. Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786.

60. Pub. Acts Mich. 1899, No. 272, p. 459, § 6. Huxtable v. Kirby [Mich.] 97 N. E. 391.

61, 62. Newark v. Weeks [N. J. Law] 56 Atl. 118.

63. Certiorari for a mere irregularity will not be allowed after seven years (Zeliff v. Bog & F. Meadow Co. [N. J. Law] 56 Atl. 302), nor after the statutory limitation. Defect in commissioners' report of assessments. United New Jersey R. & C. Co. v. Gummere [N. J. Law] 54 Atl. 520. A statutory provision forbidding the allowance of a certiorari to set aside an ordinance for a public improvement, after the contract therefor has been awarded, is held, under the circumstances of the particular case, to be reasonable. Rosell v. Neptune City, 68 N. J. Law, 509.

64. Lanning v. Chosen Freeholders, 64 N. J. Eq. 161.

65. State v. Superior Ct., 31 Wash. 32, 71 Pac. 601.

66. See Directing Verdict and Demurrer to Evidence, 1 Curr. Law, p. 925; Dismissal and Nonsuit, 1 Curr. Law, p. 937.

67. It is the exclusive province of the court to decide all questions of law arising upon a trial, and to instruct the jury as to the law. Vocke v. Chicago [Ill.] 70 N. E. 325. See Blashfield, Inst. to Juries, Vol. 1, p. 4.

68. Instructions must submit the facts to the jury but not determine what they prove. See Instructions, 2 Curr. Law, p. 461. So on the other hand the verdict may be vitiated if the jury has illegally included determina-

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or referee[69] is also the trier of facts, the findings upon which are distinct from the findings of law and of somewhat the same force as a verdict.[70] By procuring the court to take the case from the jury, all questions of fact may be eliminated and the issue become solely one of law.[71] Conversely one is bound by procuring submission of a law question to the jury.[72] The interpretation of the pleadings and ascertainment of the issues is for the court.[73] If the evidence on one side of an issue[74] or respecting part of co-parties either fails[75] or is so slight that no reasonable mind could infer the fact,[76] or on the other hand is undisputed,[77] or if the facts are clearly established by the evidence,[78] a question of law is presented. Immaterial issues need not be submitted,[79] but material issues on conflicting evidence are questions of fact,[80] if any evidence tends to support the issue,[81] or where

tions of law. See New Trial and Arrest of Judgment, 2 Curr. Law, p. 1037; Verdict, etc.

Illustration: Comments on the evidence by the judge in instructions are not error where the jury are left to determine all issues of fact. Freese v. Kemplay [C. C. A.] 118 Fed. 428. An instruction merely pointing out the legal consequence of certain facts, of which there is evidence should the jury find them, is proper. Schmuck v. Hill [Neb.] 96 N. W. 158.

69. See Masters in Chancery, 2 Curr. Law, p. 867; Reference.

70. See Verdicts and Findings; Masters in Chancery, 2 Curr. Law, p. 867; Reference; Appeal and Review, § 13, 1 Curr. Law, p. 155.

71. Where both parties move for direction of a verdict, the questions of fact and credibility of witnesses are left to the court. Dearman v. Marshall, 84 N. Y. Supp. 705. Where defendant introduces evidence after his demurrer to the evidence is overruled, the propriety of submitting the case is to be determined from the whole case. Oglesby v. Mo. Pac. R. Co., 177 Mo. 272, 76 S. W. 623. See, also, Directing Verdict and Demurrer to Evidence, 1 Curr. Law, p. 925.

72. Where a party submits and obtains instructions on the theory that an issue is for the jury, he cannot afterward complain that it should have been decided by the court on the evidence. Gayle v. Mo. C. & F. Co., 177 Mo. 427, 76 S. W. 987. See many cases in titles Harmless and Prejudicial Error, 2 Curr. Law, p. 159; Saving Questions for Review.

73. Where pleadings are involved and technical, it is the duty of the court to evolve therefrom the true issues of fact arising thereupon, and submit such issues to the jury. Bering Mfg. Co. v. Femelat [Tex. Civ. App.] 79 S. W. 869.

74. See Instructions, 2 Curr. Law, p. 461; Directing Verdict and Demurrer to Evidence, 1 Curr. Law, p. 925.

75. Denver Jobbers' Ass'n v. Rumsey [Colo. App.] 71 Pac. 1001; Tague v. John Caplice Co., 28 Mont. 51, 72 Pac. 297; Webb v. Hicks, 117 Ga. 335; Hinson v. Postal Tel. Cable Co., 132 N. C. 460.

76. Vogeler v. Devries [Md.] 56 Atl 782. Proximate cause of injury. Cole v. German S. & L. Soc. [C. C. A.] 124 Fed. 113.

77. Where in partition some defendants limited their answers of defense by a claim of title through a specific source which utterly failed, the question of title cannot be given to the jury as embracing all defendants. Laufer v. Powell, 30 Tex. Civ. App. 604, 71 S. W. 549; West Seattle L. & I. Co. v. Novelty Mill Co., 31 Wash. 435, 72 Pac. 69. Where the necessary inference from undisputed facts is very strong. Sovereign Camp Woodmen v. Hruby [Neb.] 96 N. W. 998. Negligence. Thomas v. Wheeling Elec. Co. [W. Va.] 46 S. E. 217. Ownership by a certain person of an interest in a certain tract of land or its sale by him with covenants of warranty. Laufer v. Powell, 30 Tex. Civ. App. 604, 71 S. W. 549. The question of usual and customary charge for exchange is for the court where the evidence is all one-sided and the petition alleges that plaintiff agreed to pay such rates. Sullivan & Co. v. Owens [Tex. Civ. App.] 78 S. W. 373. In action for damages for injuries received at a railway crossing, testimony of plaintiff that he looked and did not see the approaching train, held under the circumstances not to raise an issue of fact for the jury. Blumenthal v. Boston & M. R. R., 97 Me. 255.

78. Brockenbrow v. Stafford [Tex. Civ. App.] 76 S. W. 576; Midville, S. & R. B. R. Co. v. Bruhl, 117 Ga. 329. Contributory negligence. Benjamin v. Metropolitan St. R. Co., 84 N. Y. Supp. 458. Negligence may be determined by the court, where conceded facts admit of only one inference. Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035. A verdict will not be directed when it cannot be said that a jury could not, reasonably, conclude differently. Standard L. & A. Ins. Co. v. Sale [C. C. A.] 121 Fed. 664; Cain v. Gold Mountain Min. Co., 27 Mont. 529, 71 Pac. 1004.

79. Stokes v. Stokes, 172 N. Y. 327, 65 N. E. 176.

80. Alexander v. Von Koehring [Tex. Civ. App.] 77 S. W. 629; Seidschlag v. Antioch, 207 Ill. 280, 69 N. E. 949; New Omaha Thompson-Houston E. L. Co. v. Rombold [Neb.] 97 N. W. 1030; Reid v. Detroit Ideal Paint Co. [Mich.] 94 N. W. 3. On open account. Griffin v. Brock [Miss.] 33 So. 968. Negligence. Behl v. Phila., 206 Pa. 329. Execution of deed. Glover v. Gasque [S. C.] 45 S. E. 113. Where mailing of a letter is asserted by the sender, but receipt is denied by the addressee, its receipt is a question of fact. Lee v. Huron Indemnity Union [Mich.] 97 N. W. 709. Evidence of age of party. Hancock v. Catholic Benev. Legion [N. J. Err. & App.] 55 Atl. 246. Where there is evidence upon which either of two theories might be sustained, the question is for the jury. Question as to whether plaintiff was thrown or jumped from car. Lucas v. Marquette City & P. I. R. Co. [Mich.] 98 N. W. 980.

81. Chesapeake & N. R. Co. v. Ogles, 24 Ky. L. R. 2160, 73 S. W 751; Morrow v. Pull-

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different inferences may fairly be drawn from the evidence.[82] More than a scintilla of evidence for plaintiff requires submission of the issue.[83] The weight of testimony,[84] or preponderance of evidence,[85] or credibility of witnesses or evidence, must be determined by the jury,[86] unless the evidence is such as to require the interpretation of the court.[87] Questions of fact depending on interpretation to be given disputed facts and inferences are for the jury.[88] Materiality of evidence is a question of law,[89] and when the competency of evidence depends on certain preliminary facts, such facts are for the court.[90]

Particular facts or issues.—From the application of these rules it follows that the existence of a contract,[91] the character of a contract as conscionable,[92] the breach of a contract,[93] and its cancellation by mutual consent,[94] are questions of fact, unless determination of the breach involves interpretation of the contract, when it is a question of law.[95] Execution of an instrument on controverted facts is for the jury.[96] The legal effect of a writing or instrument,[97] its interpretation without extraneous evidence,[98] or latent ambiguity[99] is a question of law, but if the language is capable of more than one inference, and the inferences de-

man Palace Car Co., 98 Mo. App. 351, 73 S. W. 281. Evidence tending to show negligence in personal injuries will carry the issue to the jury. Anderson v. Pierce [Kan.] 74 Pac. 638.

82. Hagan v. Sone, 174 N. Y. 317, 66 N. E. 973; Allen v. Cerny [Neb.] 94 N. W. 151; Wager v. Lamont [Mich.] 98 N. W. 1. That evidence of a party is conflicting will not warrant refusal to submit it to the jury where it is sufficient to require submission. Chicago Union Traction Co. v. Browdy, 206 Ill. 615, 69 N. E. 570.

83. Coble v. Huffines, 132 N. C. 399. Sufficiency of evidence as to the cause of an accident to a brakeman. Oglesby v. Missouri Pac. R. Co., 177 Mo. 272, 76 S. W. 623. Sufficiency of evidence as to claim to ownership of property. Brown v. Bayer [Minn.] 97 N. W. 736. Some evidence of a claim in an action for wages is sufficient to take the case to the jury. McCrystal v. O'Neill, 86 N. Y. Supp. 84.

84. Van Gaasbeek v. Staples, 85 App. Div. [N. Y.] 271; Nickey v. Zonker, 31 Ind. App. 88, 67 N. E. 277. Inconsistencies between testimony of a witness on a former trial and the present trial are for the jury. Galveston, H. & S. A. R. Co. v. Butchek [Tex. Civ. App.] 78 S. W. 740.

85. Morrow v. Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281. On circumstantial evidence, the jury must choose as between two equally plausible conclusions. Chicago, R. I. & P. R. Co. v. Wood, 66 Kan. 613, 72 Pac. 215.

86. Hinson v. Postal Tel. Cable Co., 132 N. C. 460; Nickey v. Zonker, 31 Ind. App. 88, 67 N. E. 277. Of motorman who has run a car into a wagon. Fisher v. Union R. Co., 86 App. Div. [N. Y.] 365.

87. Dalton v. Poplar Bluff, 173 Mo. 39, 72 S. W. 1068.

88. Molloy v. U. S. Exp. Co., 22 Pa. Super. Ct. 173.

89. Nickey v. Zonker, 31 Ind. App. 88, 67 N. E. 277.

90. Snooks v. Wingfield, 52 W. Va. 441.

91. Legal sale of liquors. McWhorter v. Bluthenthal, 136 Ala. 568; Muller v. Kelly [C. C. A.] 125 Fed. 212. Whether there is a contract for sale of lands in an action by the prospective vendee to recover money deposited with persons conducting the negotiations. Alexander v. Von Koehring [Tex. Civ. App.] 77 S. W. 629. Where there was some evidence of a contract and the parties tried the case on the theory that a certain writing did not contain all the contract, the case will not be taken from the jury. Johnson v. San Juan F. & P. Co., 31 Wash. 238, 71 Pac. 787. The existence of a contract for services with one deceased is for the jury, whether the evidence is contradicted or not. Speck v. Berliner, 85 N. Y. Supp. 370. Whether a note is placed in an attorney's hands so as to entitle him to fees. Rogers v. O'Barr [Tex. Civ. App.] 76 S. W. 593.

92. Muller v. Kelly [C. C. A.] 125 Fed. 212.

93. Alexander v. Von Koehring [Tex. Civ. App.] 77 S. W. 629. Whether the escape of smoke and sewer gas into a leased apartment was an eviction, and the cancellation of the lease and surrender of the premises are fact. Call v. Case, 84 N. Y. Supp. 166.

94. Whether a contract under which plaintiffs were to procure insurance for defendant was canceled by mutual consent is held, on facts stated. McDonnell v. Keller Mfg. Co. [Minn.] 96 N. W. 785.

95. Whether failure of a party to a contract to buy all stock owned by another is a breach thereof is a pure question of law. Stokes v. Stokes, 172 N. Y. 327, 65 N. E. 176.

96. Glover v. Gasque [S. C.] 45 S. E. 113.

97. Eddy v. Bosley [Tex. Civ. App.] 78 S. W. 565. Sufficiency of deeds to embrace lands and to pass title. Rountree v. Thompson, 30 Tex. Civ. App. 595, 72 S. W. 69. Whether certain correspondence between parties discloses a settlement at a certain time is for the court. Dobbs v. Campbell, 66 Kan. 805, 72 Pac. 273.

98. Snooks v. Wingfield, 52 W. Va. 441. Papers admitted in evidence must be construed by the court and the jury instructed as to their meaning and effect. Schilansky v. Merchants' & M. F. Ins. Co. [Del.] 55 Atl. 1014.

99. Ashcraft v. Cox, 25 Ky. L. R. 1303, 77 S. W. 718. The nature of a contract free from ambiguity and clearly showing the intention of the parties cannot be submitted. Russell & Co. v. McSwegan, 84 N. Y. Supp. 614.

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pend on controverted facts,[1] or where parol conflicting evidence was given without objection to explain its terms,[2] or where the contract is ambiguous in terms, the issue must be submitted to the jury.[3] Application of a description in a deed is for the jury.[4] The terms of an oral contract will be determined as facts.[5] Where there are no terms as to particular items the jury may settle the terms.[6]

The existence of a partnership,[7] whether a certain place is a highway,[8] whether certain acts constituted a nuisance,[9] the existence of fraud or misrepresentation,[10] the title or ownership of property,[11] the status of persons as licensees or trespassers,[12] notice actual or imputed,[13] the payment of an obligation,[14] the competency of a person to make a will,[15] the existence of an agency,[16] the extent of an agent's authority,[17] or the ratification of an agent's acts,[18] are questions of fact; but whether goods were purchased from one as principal or agent cannot be submitted on evidence of agency only.[19] The existence of a settlement is a question of fact,[20] unless it involves interpretation of writings.[21] Whether a prosecu-

1. Glover v. Gasque [S. C.] 45 S. E. 113. Where conclusions are to be drawn from correspondence in connection with other facts and circumstances, the issue is properly given to the jury, though the construction of written instruments is ordinarily for the court. Rankin v. Fidelity Ins., T. & S. D. Co., 189 U. S. 243, 47 Law. Ed. 792. Whether a pledgee of national bank stock is estopped to deny personal liability as a shareholder, by statements as to such relation in letters to the bank officers who understood the pledge, is for the jury. Id. As distinguished from the rule requiring courts to determine the meaning of documentary evidence. Carp v. Queen Ins. Co. [Mo. App.] 79 S. W. 757.

2. Rochester & P. C. & I. Co. v. Flint, 84 N. Y. Supp. 269.

3. Durand v. Heney [Wash.] 73 Pac. 775.

4. Snooks v. Wingfield, 52 W. Va. 441.

5. Whether defendant insurance company is entitled to credit for application fees in an action by an agent under oral contract of employment to recover balance of salary. Lee v. Huron Indemnity Union [Mich.] 97 N. W. 709.

6. Where there is no agreement fixing wages shown in a suit for services, the value thereof in each of different kinds of employment is a question of fact. Leidigh v. Keever [Neb.] 97 N. W. 801.

7. In an action against several as partners, whether defendant's failure to deny connection with the firm was an admission of membership is for the jury. Sumner v. Gardiner, 184 Mass. 433, 68 N. E. 850. And see Partnership.

8. On conflicting evidence as to user and dedication. Seidschlag v. Antioch, 207 Ill. 280, 69 N. E. 949. And see Highways and Streets.

9. A display of fireworks by a city. Landau v. New York, 90 App. Div. [N. Y.] 50.

10. Whether statements of a bank cashier to a fidelity company in negotiating for a bond are true. First Nat. Bank v. U. S. F. & G. Co. [Tenn.] 75 S. W. 1076. Fraud depending on circumstances, motive, intent, and inferences from circumstantial evidence is a question of fact under proper instructions. Brown v. Bayer [Minn.] 97 N. W. 736. And see Fraud and Undue Influence.

11. Sufficiency of possession for the period to constitute adverse possession. Johnson v. Brown [Wash.] 74 Pac. 677; Kelly v. Palmer [Minn.] 97 N. W. 578. The question of intestate's ownership of property in view of an assignment by him, on uncontradicted testimony of defendant's wife, to declarations of another, and admissions of intestate, was for the jury. Van Gaasbeek v. Staples, 85 App. Div. [N. Y.] 271.

12. The status of a brakeman injured while in the caboose of his train waiting for it to be made up in the yards, while not that of a trespasser or licensee, is for the jury where his duties do not begin until his train is made up. Chicago, R. I. & T. R. Co. v. Oldridge [Tex. Civ. App.] 76 S. W. 581.

13. Time sufficient to charge a city with notice of a defect in a street is ordinarily a question of fact. Holitsa v. Kan. City [Kan.] 74 Pac. 594.

14. Whether a certificate of deposit had been paid 26 years after date or the presumption of payment in all cases where limitations do not apply must be determined by the jury. Rosenstock v. Dessar, 85 App. Div. [N. Y.] 501. The payment of an insurance premium is a question of fact on conflicting evidence as to payment and cancellation of the policy. O'Connell v. Fidelity & Casualty Co., 87 App. Div. [N. Y.] 306.

15. Where a delusion existed in the mind of a testator before making a will, whether the will was executed in consequence of the delusion. Safe Deposit & Trust Co. v. Lange [Pa.] 56 Atl. 1081. And see Wills.

16. Wilson v. Huguenin, 117 Ga. 546. And see Agency, 1 Curr. Law, p. 43.

17. Agent's authority under power conferred. Anderson v. Adams, 43 Or. 621, 74 Pac. 215. The extent of a selling agent's authority to accept other payment than money is fact on evidence tending to show such authority. New Orleans Coffee Co. v. Cady [Neb.] 95 N. W. 1017.

18. Wilson v. Huguenin, 117 Ga. 546.

19. New Orleans Coffee Co. v. Cady [Neb.] 95 N. W. 1017.

20. The settlement in good faith of a judgment against a contractor and a city by the city is fact in an action on the contractor's bond. New York v. Baird, 176 N. Y. 269, 68 N. E. 364.

21. Dobbs v. Campbell, 66 Kan. 805, 72 Pac. 273.

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tion is malicious is a question of fact,[22] though ordinarily, whether certain facts showed probable cause for arrest is a question of law.[23]

The presence of negligence,[24] or contributory negligence,[25] in personal injury cases, the proximate cause of the injury,[26] or assumption of risk by a servant,[27]

22. Whether a writ of sequestration was wrongfully or maliciously sued out is fact. Rogers v. O'Baw [Tex. Civ. App.] 76 S. W. 593. More than a scintilla of evidence in favor of plaintiff in malicious prosecution requires submission to the jury. Coble v. Huffines, 132 N. C. 399. And see Malicious Prosecution, 2 Curr. Law, p. 767.

23. But where defendants have requested special findings substantially including the issue, they cannot complain of its submission. Bank of Miller v. Richmon [Neb.] 94 N. W. 998.

24. Anderson v. Pierce [Kan.] 74 Pac. 638; City Trust, S. D. & S. Co. v. Fidelity & Casualty Co., 58 App. Div. [N. Y.] 18; Economy L. & P. Co. v. Hiller, 203 Ill. 518, 68 N. E. 72; Jones v. Bunker Hill & S. M. & C. Co., 124 Fed. 675; Thomas v. Wheeling Elec. Co. [W. Va.] 46 S. E. 217. Negligence of master. Gandle v. Northern Lumber Co. [Wash.] 74 Pac. 1009. Where ordinary minds could differ, the questions of negligence and contributory negligence are ones of fact for the jury. Question as to whether or not there was negligence in allowing, and contributory negligence in prematurely alighting from train. Baltimore & P. R. Co. v. Jean [Md.] 57 Atl. 540. Negligence of a city as to care of its streets where evidence as to the cause of death of a traveler is conflicting. Behl v. Phila., 206 Pa. 329. The question whether or not a stump has remained in a street so long a time that the municipal authorities should have taken notice of its presence there is one of fact for the jury. Huntington v. Lusch [Ind. App.] 70 N. E. 402. The question as to whether or not a stump in a street is such a thing as is liable to frighten a horse is a question of fact for the jury. Id. Whether ice was an obstruction on a street making it unsafe for travel so as to make the city liable for injuries is for the jury on evidence of ice formed thick on the sidewalk from water flowing from an eavespout on an adjoining house. Quinlan v. Kan. City [Mo. App.] 78 S. W. 660. Collision on highway. Neal v. Randall, 98 Me. 69; Morgan v. Pleshek [Wis.] 97 N. W. 916. Negligence of a motorman in running an electric car so as to strike a truck and injure a person sitting on the platform. Seller v. Market St. R. Co., 139 Cal. 268, 72 Pac. 1006. Whether failure to give warning at an overhead railroad crossing is negligence. Chesapeake & N. R. Co. v. Ogles, 24 Ky. L. R. 2160, 73 S. W. 751. Whether the jerk of a mixed train was unusual or unnecessary is fact in an action for injuries to one while riding in the baggage car. Chesapeake & O. R. Co. v. Jordan, 25 Ky. L. R. 574, 76 S. W. 145. Whether a railroad company was negligent in keeping live stock on cars for 32 hours without an opportunity to unload and care for them. St. Louis S. W. R. Co. v. Dolan [Tex. Civ. App.] 77 S. W. 415. In an action for damages to live stock from delay in shipment, where the necessity of the delay was left to the jury at defendant's request, the verdict for plaintiff on that issue was conclusive. McCrary v. Mo., K. & T. R. Co., 99 Mo. App. 518, 74 S. W. 2. See, also, Negligence, 2 Curr. Law, p. 996; Master and Servant, 2 Curr. Law, p. 801.

25. Hartrich v. Hawes, 202 Ill. 334, 67 N. E. 13; South Omaha v. Taylor [Neb.] 96 N. W. 209. Of servant. Gaudie v. Northern Lumber Co. [Wash.] 74 Pac. 1009. Where want of ordinary care is not clearly established, the question of contributory negligence is for the jury. Defective sidewalk. Strack v. Milwaukee [Wis.] 98 N. W. 947. Whether danger from use of an appliance was so apparent as to warn a person of ordinary prudence with knowledge of its condition is for the jury where a servant knew the condition of an appliance with which he was working. Hartrich v. Hawes, 202 Ill. 334, 67 N. E. 13. Issue as to whether or not the plaintiff was of such immature years and so wanting in intelligence as that he could not appreciate the danger of getting upon and riding on the front platform of a trolley car, held an issue of fact, and properly submitted to the jury. Denison & S. R. Co. v. Carter [Tex. Civ. App.] 79 S. W. 320. Of an employe familiar with rules of the shop requiring inspection of appliances and places for work. Galveston, H. & S. A. R. Co. v. Butchek [Tex. Civ. App.] 78 S. W. 740. Where the question whether a servant's injury is due to his own negligence or to the condition of the place for work, and, if the latter, whether the master is required to take precautions to protect the servant, are open to doubt, the jury's verdict is conclusive. Jones v. Bunker Hill & S. M. & C. Co., 124 Fed. 675. Collision in highway. Morgan v. Pleshek [Wis.] 97 N. W. 916. In driving on railroad track. International & G. N. R. Co. v. Ives [Tex. Civ. App.] 78 S. W. 36. As to injuries from electric wires. Economy L. & P. Co. v. Hiller, 203 Ill. 518, 68 N. E. 72. In getting on a moving elevated train, or of negligence of the employes in starting the train. Brown v. Manhattan R. Co., 82 App. Div. [N. Y.] 222. In riding on the platform of an overcrowded railroad car, where the passenger's ticket is good only for that train and the evidence as to the sufficiency of accommodations by the company is conflicting. Pa. Co. v. Paul [C. C. A.] 126 Fed. 157. Of a boy of 14 under certain conditions. Anderson v. Pierce [Kan.] 74 Pac. 638. Of a boy of 13 in sitting on the platform of an electric car, resting his foot on the lower step. Seller v. Market St. R. Co., 139 Cal. 268, 72 Pac. 1006. In alighting from street car and passing behind it in front of car going in opposite direction. Reed v. Metropolitan St. R. Co., 87 App. Div. [N. Y.] 427. Sufficiency of a barrier along a city viaduct to warn passers of increased danger so as to make plaintiff guilty of contributory negligence. Feldkamp v. Kan. City [Kan.] 75 Pac. 464. Care of child killed by train. O'Brien v. Wis. Cent. R. Co. [Wis.] 96 N. W. 424. Sufficiency of evidence to carry case to jury. Benjamin v. Metropolitan St. R. Co., 84 N. Y. Supp. 458. And see Negligence, 2 Curr. Law, p. 996; Master and Servant, 2 Curr. Law, p. 801.

26. Where a pedestrian was injured by slipping while stepping around a hole in a plank sidewalk. Brown v. Chillicothe [Iowa]

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the relation of fellow-servants,[28] or the sufficiency of precautions by master against injury to servants under statutory requirements,[29] are questions of fact. The rule applies to negligence and contributory negligence in loss of goods.[30]

QUIETING TITLE.

§ 1. Chancery and Statutory Remedies and Rights (1366).
§ 2. What is a Cloud or Conflicting Claim (1369).
§ 3. Procedure (1370).
A. Quieting Title and Statutory Equivalents (1370).
B. Determination of Conflicting Claims to Real Property (1375).

§ 1. *Chancery and statutory remedies and rights. Nature and office. Form or nature of proceedings.*—The procedure to quiet title was originally a suit in equity to remove a cloud and this form of remedy is still preserved in many states, but it has generally been extended in its scope by statutes prescribing a remedy which is in effect the equivalent of the chancery proceeding, and in some states an entirely new form has been adopted in the nature of an action to determine conflicting claims. Besides these distinct forms, in proper cases a cloud may be removed or an adverse claim determined, as incidental to some other equitable or statutory proceeding.[31] Equity will in proper cases afford relief against what might become a cloud if allowed to proceed,[32] but such is not a proceeding to remove clouds. One in possession under writ of restitution is not a "tenant" against whom the remedy does not lie to procure an eviction.[33] In some jurisdictions, a special statutory remedy is given for the adjudication of conflicting claims to water rights.[34] Equitable relief against an invalid deed does not depend on fraud, accident or mistake.[35] The statutory remedies are usually cumulative.[36] An action for damages for obstruction of plaintiff's canal running through defendant's land is not one to quiet title.[37]

98 N. W. 502. But the burden being on plaintiff, a verdict may be directed where there is no substantial evidence. Cole v. German S. & L. Soc. [C. C. A.] 124 Fed. 113. Collision on highway. Neal v. Randall, 98 Me. 69.

27. Gaudie v. Northern Lumber Co. [Wash.] 74 Pac. 1009.

28. The question of whether certain employes were fellow-servants is for the jury unless the evidence is undisputed, when the court may determine. Gayle v. Mo. C. & F. Co., 177 Mo. 427, 76 S. W. 987.

29. The sufficiency of couplings on a car used in interstate commerce under requirements of a Federal law [Act Cong. Mar. 2, 1893, c. 196, 27 St. 531]. Kan. City, M. & B. R. Co. v. Flippo [Ala.] 35 So. 457.

30. Loss of belongings by passenger on sleeping car. Morrow v. Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281. Whether an ordinance is unreasonable and oppressive under existing circumstances and contemporaneous conditions is for the court. Chicago v. Brown, 205 Ill. 568, 69 N. E. 65.

31. A cloud on the title may be removed in a suit to declare title because of destruction of records. South Chicago Brew. Co. v. Taylor, 205 Ill. 132, 68 N. E. 732. As incidental to creditor's bill to set aside fraudulent conveyance. Spear v. Spear, 97 Me. 498. In partition, the court, having statutory power to determine conflicting titles, is not limited to the chain of title of claimants, but may consider other claims of title derived from other sources alleged to be clouds on their title [Partition Act, § 39 (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 2925)]. Glos v. Carlin, 207 Ill. 192, 69 N. E. 928. See, also, Partition, 2 Curr. Law, p. 1097.

32. See Injunction, 2 Curr. Law, p. 397; Cancellation of Instruments, 1 Curr. Law, p. 413; Reformation of Instruments; Taxes; Executions, 1 Curr. Law, p. 1178; Judgment, 2 Curr. Law, p. 581, and the like.

33. The issuance of a so-called writ of restitution does not render one in possession and against whom an action to quiet title and recover possession is brought a tenant within the exception of 2 Ball. Ann. Codes & St. § 5500. Snyder v. Harding [Wash.] 75 Pac. 812.

34. See Waters and Water Supply; Bear Lake County v. Budge [Idaho] 75 Pac. 614.

35. Complainant had quit-claim deed and grantor had afterwards given warranty deed to defendant. McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491.

36. The statutory remedy to quiet title in Pennsylvania is not exclusive but cumulative and either party may sue in equity or the vendee may sue in ejectment or for damages for breach of contract [Act June 10, 1893 (P. L. 415)]. Ullom v. Hughes, 204 Pa. 305. The statutory remedy for cancellation of a lis pendens in Washington is cumulative only and the owner of property against which it has been filed may also sue to remove it as a cloud on title [2 Ball. Ann. Codes & St. §§ 4487, 5521]. King v. Branscheid, 32 Wash. 634, 73 Pac. 668.

37. Under Const. art. 6, § 5, requiring such actions to be commenced in the county

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Who may sue.—Unless it be held that his possession or interest is not sufficient, suit to quiet title may be brought by an administrator or executor[38] or by a trustee.[39] A reversioner may sue in equity.[40] A city may sue to quiet title to streets.[41] All parties in interest may join.[42] An equitable action to quiet title may be maintained by any one in actual possession of the premises when the suit is instituted.[43] An administrator may sue to determine adverse claims,[44] but claimant under a void deed cannot sue in his own name.[45]

Possession is necessary to the suit in equity to quiet title,[46] but not where extrinsic evidence is necessary to establish invalidity of an adverse claim,[47] and an exception is sometimes made in the case of wild, unoccupied or unimproved land,[48] and the rule has been held not to apply where defendant unlawfully obtained possession after death of the owner.[49] The requirement may be waived.[50] Generally, statutes prescribing a remedy equivalent to the equitable suit to quiet title require possession,[51] but such statutory requirement may be dispensed with where the suit could be brought in equity by one not in possession.[52] In the statutory proceeding

where the land is situated. Miller v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836.

38. Pending administration, an executor or administrator entitled to possession may sue to quiet title to lands of decedent. Blakemore v. Roberts [N. D.] 96 N. W. 1029.

39. Bryan v. McCann [W. Va.] 47 S. E. 143. That a deed to one in his own name is actually in trust for another will not prevent the grantee from suing to remove a cloud from the title. McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491.

40. Having no right to possession, he has no legal remedy. Keyes v. Ketrick [R. I.] 56 Atl. 770.

41. Under a statute allowing cities to sue and be sued and to establish, lay out, etc., streets, a city may maintain an action to recover possession of and quiet title to land claimed as a public street [1 Ball. Ann. Codes & St. §§ 925, 938, subd. 4]. City of Port Townsend v. Lewis [Wash.] 75 Pac. 982.

42. Where a husband and wife own property as a community and the community owns it jointly with another, all may join to recover possession of and quiet title to land. Snyder v. Harding [Wash.] 75 Pac. 812.

43. Mitchell v. Einstein, 42 Misc. [N. Y.] 358.

44. An administrator entitled to possession and control of realty and to receive rents and profits for administration may sue to determine adverse claims to the realty [B. & C. Comp. §§ 516, 1147]. Ladd v. Mills [Or.] 75 Pac. 141.

45. But the grantor may sue for the grantee's use. The deed was invalid under Rev. Code, § 7002; the grantor is the real party in interest under Rev. Codes, § 5221. Galbraith v. Paine [N. D.] 96 N. W. 258.

46. Cocke v. Copenhaver [C. C. A.] 126 Fed. 145; Clem v. Meserole [Fla.] 32 So. 783; Sansom v. Blankership, 53 W. Va. 411; Ellis v. Feist [N. J. Eq.] 56 Atl. 369. A bill of equity to quiet title or to remove a cloud therefrom is not generally maintainable by one having a legal title, but who has been ousted of possession. Cahill v. Cahill [Conn.] 57 Atl. 284. Bona fide purchasers of lands forfeited by a railroad company, not in possession or who have not asserted their rights, under the Federal statutes to purchase the lands, cannot sue to quiet title against adverse claimants. Right of purchase under Act March 3, 1887 (24 Stat. 556, c. 376). San Jose L. & W. Co. v. San Jose Ranch Co., 189 U. S. 177, 47 Law. Ed. 765. A claimant out of possession, after conveying his title to the holder of the adverse title in possession, cannot sue the grantor of the adverse title in equity to remove the title as a cloud on the title he conveyed. Zinn v. Zinn [W. Va.] 46 S. E. 202. An execution purchaser out of possession cannot sue in equity as against one in possession to set aside a prior conveyance by the judgment debtor, fraudulent against creditors. Ropes v. Jenerson [Fla.] 34 So. 955. There is an adequate remedy at law. Neff v. Ryman, 100 Va. 521; Ellis v. Feist [N. J. Eq.] 56 Atl. 369.

47. Casgrain v. Hammond [Mich.] 96 N. W. 510.

48. Clem v. Meserole [Fla.] 32 So. 783.

49. Letson v. Letson, 81 App. Div. [N. Y.] 556.

50. Stipulation by defendant for trial before a master waives the objection that plaintiff was not in possession. Sanders v. Riverside [C. C. A.] 118 Fed. 720. Where defendant in an action to quiet title answered, setting up paramount title in himself and failed to sustain the claim on trial, he is estopped to deny plaintiff's right to sue for want of possession. Mosier v. Momsen [Okl.] 74 Pac. 905.

51. Meeker v. Warren [N. J. Eq.] 57 Atl. 421. Statutory bill to determine claims to land and to quiet title [Code 1896, §§ 809-813]. Smith v. Gordon, 136 Ala. 495. An action to quiet title will not lie in New York unless plaintiff or his grantor is shown to have been in possession for a year before suit (Code Civ. Proc. §§ 1638, 1639); nor can a suit to determine an adverse claim to land be sustained as a suit to remove a cloud without such possession where the title is all of record and extrinsic evidence is unnecessary. Lewis v. Howe, 174 N. Y. 340, 66 N. E. 975, 1101.

52. Where plaintiff cannot show invalidity of a trust in land in which she was interested as heir of the grantor, except by evidence outside the record, she could sue to remove the trust as a cloud on her title, though not in actual possession. The statute

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to determine adverse claims, possession is not usually required.[53] A state statute cannot give a Federal court jurisdiction when defendant is in possession.[54]

Actual physical possession is not necessary,[55] but one must be rightfully in possession.[56]

Title in complainant is a prerequisite in both the suit in equity and the statutory equivalents thereof,[57] except as otherwise provided by statute,[58] and the same rule applies in action to determine adverse claims.[59]

extends rather than limits the jurisdiction [Rev. St. 1878, § 3186]. Casgrain v. Hammond [Mich.] 96 N. W. 510.

53. **Missouri.** Field v. Barber Asphalt Pav. Co., 117 Fed. 925.

New York, where plaintiff holds the legal title and sues to determine adverse claims [Code Civ. Proc. § 1638]. Whitman v. New York, 85 App. Div. [N. Y.] 468; Mitchell v. Einstein, 42 Misc. [N. Y.] 358.

Connecticut. Gen. St. 1902, § 4053, providing for actions to determine adverse claims to real estate, does not authorize the maintenance of such an action while a suit in ejectment to obtain possession of the same property is pending in the same court between the same parties. Cahill v. Cahill [Conn.] 57 Atl. 284.

54. U. S. Rev. St. § 723, prevents jurisdiction on bill and answer, where the bill alleges possession which the answer denies and alleges possession in defendants. Giberson v. Cook, 124 Fed. 986. Averment of possession in complainant is necessary to a bill to quiet title in the Federal courts, though one not in possession may sue in the state court. Boston & M. Consol. C. & S. Min. Co. v. Mont. Ore Purchasing Co., 188 U. S. 632, 47 Law. Ed. 626; Id., 188 U. S. 645, 47 Law. Ed. 634; Same v. Chile Gold Min. Co., Id. But see Field v. Barber Asphalt Pav. Co., 117 Fed. 925.

55. Plaintiff need not actually live on or be on the land. Maggs v. Morgan, 30 Wash. 604, 71 Pac. 188. One having a contract for sale and in possession to build on the property holds possession analogous to that of a tenant, so that the owner may sue [2 Ball. Ann. Codes & Sts. § 5521]. Bigelow v. Brewer, 29 Wash. 670, 70 Pac. 129.

56. Wrongful forcible possession is insufficient. Hughey v. Winborne [Fla.] 33 So. 249.

57. Cocke v. Copenhaver [C. C. A.] 126 Fed. 145; South Chicago Brew. Co. v. Taylor, 205 Ill. 132, 68 N. E. 732. Possession by defendant irrespective of title is sufficient defense in a suit to quiet title where plaintiff shows no title in himself. White v. McGilliard, 140 Cal. 654, 74 Pac. 298.

Sufficiency: One filing a homestead claim and in possession but without title cannot quiet the title as against one claiming an interest. Moore v. Halliday, 43 Or. 243, 72 Pac. 801. One entitled to redeem from a tax sale has sufficient title to sue to set aside the sale or deed on offer to pay tax, penalties and interest. South Chicago Brew. Co. v. Taylor, 205 Ill. 132, 68 N. E. 732. The wife may defend her statutory inchoate interest in her husband's realty in an action against both to quiet title. Interest under Gen. St. 1894, § 4471; this though she might not sue to recover such interest before the husband's death. Minneapolis & St. L. R. Co. v. Lund [Minn.] 97 N. W. 452. Title derived for purpose of bringing suit held sufficient. McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491. Complainant need only show a title good as against the holder of the cloud. South Chicago Brew. Co. v. Taylor, 205 Ill. 132, 68 N. E. 732. Where defendant set up paramount title and the parties did not claim from a common source, plaintiff cannot recover without showing that he deraigned title from the government. Weeks v. Cranmer [S. D.] 95 N. W. 875.

Equitable title is sufficient. Assignee for creditors has the equitable title and may recover, though the acknowledgment of his deed bore no seal of the notary and was not certified [1 Ball. Ann. Codes & St. §§ 4528, 5508]. Bloomingdale v. Weil, 29 Wash. 611, 70 Pac. 94. Interest as trustee is sufficient title. McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491.

Sufficiency of evidence of plaintiff's title. White v. McGilliard, 140 Cal. 654, 74 Pac. 298; Garland v. Foster County State Bank, 11 N. D. 374, 92 N. W. 452. Evidence in action to quiet title to a spring on government land, to show plaintiff's prior appropriation. Orient Min. Co. v. Freckleton [Utah] 74 Pac. 652. To support findings that a deed on which the action was brought was without consideration, was, in fact, executed a day after it purported to be, and was not made in good faith as against a lis pendens. Bigelow v. Brewer, 29 Wash. 670, 70 Pac. 129. To show adverse possession by plaintiff and to entitle him to a decree. City of South Omaha v. Ford [Neb.] 98 N. W. 665; City of South Omaha v. Meehan [Neb.] 98 N. W. 691.

Adverse holding by plaintiff. Flanagan v. Mathieson [Neb.] 97 N. W. 287. Proof of a parol gift of land from father to son followed by immediate possession and of adverse possession based thereon will rebut a presumption that, because of the relation of the parties, possession was permissive. Malone v. Malone, 88 Minn. 418, 93 N. W. 605. Payment of purchase money for a townsite lot on public lands will be presumed from conveyance [St. 1867-68, p. 696, § 24]. Callahan v. James [Cal.] 71 Pac. 104. Complaint cannot be dismissed in a suit to quiet title to mortgaged premises where plaintiff had prima facie ownership in the note and mortgage because of partnership transactions, there was no objection by creditors or the administrator of the deceased partner to the failure to settle the partnership, and defendant claimed no interest in the note and mortgage. Grether v. Smith [S. D.] 96 N. W. 93. Evidence of performance of an oral family settlement held insufficient. Nordman v. Meyer, 118 Iowa, 508, 92 N. W. 693. A finding in an action to quiet title that a lost deed from a patentee to the plaintiff covered the land was proper where it was not produced but loss was shown, and it was proven that plaintiff and his grantor claimed title for nearly fifty years without objection from the pat-

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Defenses.—Defendant may set up paramount title,[60] or that he is a bona fide owner.[61] Defendant is not guilty of laches where he defended his title as soon as assailed and made no delay which does not as well apply to plaintiff.[62]

§ 2. *What is a cloud or conflicting claim.*—A cloud has been defined to be "the semblance of a title, either legal or equitable, or a claim of an interest in lands appearing in some legal form, but which is in fact unfounded or which would be inequitable to enforce";[63] but a mere claim which might be asserted is not a cloud where it does not appear that there is anyone in being who might assert it.[64] Judgments which are apparently liens are clouds.[65] A title derived through judicial proceedings which are merely erroneous but not void is not a cloud, but is good as against one assailing it collaterally.[66] Void sheriff's deeds are clouds,[67] where the invalidity does not appear on the face.[68] Similar rules apply to tax deeds[69] or certificates.[70] Conveyances and incumbrances beyond the power of the maker to

entee or his heirs. Combs v. Combs, 24 Ky. L. R. 1691, 72 S. W. 8. To show land was plaintiff's homestead. Best v. Grist [Neb.] 95 N. W. 836. A deed regular in form to plaintiff as administrator, purporting to be in lieu of a deed delivered to the testator in his lifetime, but lost before record, is sufficient evidence of title in an action to determine the adverse claim of one who does not claim a valid title. Ladd v. Mills [Or.] 75 Pac. 141.

58. A clear legal and equitable title is necessary to bring a suit in equity to remove a cloud on title unless the statute provides otherwise. Alleged necessity for accounting will not give jurisdiction. Bearden v. Benner, 120 Fed. 690.

59. One holding an executory contract to buy land cannot secure its construction by the court by a statutory action to determine adverse claims [Code Civ. Proc. § 738]. Cooper v. Birch, 137 Cal. 472, 70 Pac. 291.

Sufficiency: A deed from one out of possession or not shown to be the owner will not establish title in an action to determine adverse claims; reliance being placed on proof of proper title, the chain must be from the original patentee. Cartwright v. Hall, 88 Minn. 349, 93 N. W. 117. Sufficiency of powers of attorney, in action to determine adverse claims to constitute assignment or transfer of Sioux half-breed scrip. Buffalo L. & E. Co. v. Strong [Minn.] 97 N. W. 575. One claiming under void deed has not sufficient title. Galbraith v. Paine [N. D.] 96 N. W. 258.

60. **Sufficiency of evidence.** Collier v. Alexander [Ala.] 36 So. 367; Ward v. Tallman [N. J. Eq.] 55 Atl. 225; Callahan v. James [Cal.] 71 Pac. 104. To sustain finding that defendant claimants were not heirs of deceased through whom plaintiffs claim title. Kosmerl v. Mueller [Minn.] 97 N. W. 660. Adverse possession. South Chicago Brew. Co. v. Taylor, 205 Ill. 132, 68 N. E. 732.

61. **Sufficiency of evidence.** Blair v. Whittaker, 31 Ind. App. 664, 69 N. E. 182; Beckfelt v. Donohue [Minn.] 97 N. W. 127; Scott v. Hay [Minn.] 97 N. W. 106.

Where the complaint shows that deeds executed by those under whom plaintiff claims were on nominal consideration, and that defendant buying afterward paid full value, the latter has the burden of showing want of notice or facts obviating notice. McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491.

62. Equitable action to quiet title. Nordman v. Meyer, 118 Iowa, 508, 92 N. W. 693.

63. Griffiths v. Griffiths, 198 Ill. 632, 64 N. E. 1069.

64. The apparent cloud was an agreement giving a mining right which had been entered into in 1810, was never asserted and the party to whom the right was given was believed to have been dead for over 50 years, his heirs or devisees if he had any being unknown. Hill v. Henry [N. J. Eq.] 57 Atl. 554.

65. Where validity of the lien of a judgment depends on actual notice to a purchaser. Wicks v. Scull [Va.] 46 S. E. 297. Judgment amended nunc pro tunc to show the real name of defendant. Bernstein v. Schoenfeld, 81 App. Div. [N. Y.] 171. A bill to quiet possession will lie by a purchaser under a decree to prevent enforcement of a judgment against his tenant in unlawful entry and detainer as to which he was not a party, though the judgment holder would be entitled to possession on a proper action to determine the right. Cope v. Payne [Tenn.] 76 S. W. 820.

66. A decree in tax foreclosure by a county is not void, and, unappealed from, will divest title, though the sale by the county treasurer was irregular. Russell v. McCarthy [Neb.] 97 N. W. 644.

67. Hendon v. Delvichio, 137 Ala. 594. Under execution for criminal costs where no judgment was rendered for costs. Id. Advantage may be taken in an action to quiet title to land sold under execution on a void justice's judgment, of defects appearing on the face of the transcript, since in such case the sheriff's deed is a cloud. Purdy v. Law [Mich.] 94 N. W. 182.

68. But if the invalidity does appear from the deed or the evidence, the deed is not a cloud within the relief of equity. Simmons v. Carlton [Fla.] 33 So. 408.

69. A tax deed by the governor and secretary of state may be declared void in equity where the assessment was void because not made by the assessor and the land was returned in a fictitious name [Tax Laws, Acts 1891, cc. 4010, 4011]. Hughey v. Winborne [Fla.] 33 So. 249. Equity may declare a tax deed void as a cloud on title where its invalidity does not appear on its face, and will not appear necessarily from evidence which its holder must introduce to prove title thereunder. Id.

70. A tax certificate may be declared void

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execute[71] or by one who had no title to convey,[72] or fraudulent as to creditors,[73] or void under statutes or because against public policy,[74] constitute clouds, but not a deed invalid because of incompetency of parties.[75] An action to quiet title may be maintained against one claiming only a future or contingent interest in realty.[76] An unexercised option to purchase may be removed as a cloud.[77] A lis pendens in a suit to which plaintiff is not a party is a cloud.[78]

§ 3. *Procedure. A. Quieting title and statutory equivalents. Jurisdiction, venue and place of trial.*—Suit may be brought in the court of general equity jurisdiction.[79] The venue is determined by the fact that the nature of the relief sought or the statutory modifications have[80] or have not[81] localized the action. On a hearing by the master in a suit to remove a cloud from title, he may adjourn to the recorder's office where the deeds in plaintiff's claim of title are recorded.[82]

in a suit against the holder to quiet title where a deed, issued on the certificate, would not suffice in a suit to recover possession because title was acquired by adverse possession after issuance of the certificate. Crocker v. Dougherty, 139 Cal. 521, 73 Pac. 429.

71. Contract to convey lands made on behalf of the owner by one without authority, not showing the lack of authority on its face. Kesner v. Miesch, 204 Ill. 320, 68 N. E. 405. An accommodation note and mortgage assigned to the state treasurer by an insurance company will be removed where the company never properly qualified to do business [Act March 19, 1891, St. 1891, p. 126, c. 116]. Stevens v. Reeves, 138 Cal. 678, 72 Pac. 346.

72. A conveyance to school trustees of land previously conveyed to them and also to the grantor, with condition for reversion on cessation of school use, is a cloud on the title of the trustees, which they may have removed, where they were not aware of their rights under the original deed. Murphy v. Metz, 25 Ky. L. R. 1124, 77 S. W. 191. A state patent void because land previously patented. Combs v. Combs, 24 Ky. L. R. 1691, 72 S. W. 8.

73. Spear v. Spear, 97 Me. 498.

74. Though a deed is void for an illegal or immoral consideration, if it is prima facie valid and grantee may recover prima facie by proof of possession in the grantor, it is a cloud on the title of one entitled to recover on prior possession. Watkins v. Nugen, 118 Ga. 375. A conveyance of land held adversely by another under color of title, by one not in possession or who has not received rents for a year prior, is void as to the adverse possessor. Schneller v. Plankinton [N. D.] 98 N. W. 77. Deeds by a grantor who was not in possession and did not take the rents and profits for a year preceding are void as against one in possession for two or three years before execution of the deeds, who claimed under tax deeds [Rev. Codes, § 7002]. Galbraith v. Paine [N. D.] 96 N. W. 258.

75. A deed invalid for insanity at time of execution is not a cloud on title within the meaning of equity. Boddie v. Bush, 136 Ala. 560.

76. Rev. St. 1899, § 650. Ball v. Woolfolk, 175 Mo. 278, 75 S. W. 410. Title of ownership under a will subject to the life estate of another is not a cloud on the latter's title. Griffiths v. Griffiths, 198 Ill. 632, 64 N. E. 1069.

77. An owner who has given an option on his land which he claims has not been fully exercised may sue to quiet title [Act June 10, 1893, P. L. 415]. Ullom v. Hughes, 204 Pa. 305. Where the vendor in a contract for sale of land afterward conveys to a third person, and the first vendee refuses to carry out the latter contract, he is presumed to elect to pursue his remedy against his vendor, and the second vendee may sue to have the record of the first contract removed as a cloud on his title. Meyers v. Markham [Minn.] 96 N. W. 787.

78. And he need not await determination of the suit before proceeding to quiet his title [2 Ball. Ann. Codes & St. § 5521]. King v. Branscheid, 32 Wash. 634, 73 Pac. 668.

79. One heir claiming to have acquired title of another at sheriff's sale may sue in the district court to quiet title while administration was pending where his claim was disputed. Such action does not infringe upon the jurisdiction of the probate court. Altgelt v. McManus, 30 Tex. Civ. App. 382, 70 S. W. 460. A county court in Colorado has jurisdiction of a suit to quiet title to land worth not more than $2,000 [Const. art. 6, § 23, and 1 Mills' Ann. St. p. 272, § 395; Const. art. 6, § 11, and 1 Mills' Ann. St. p. 265, § 383; 1 Mills' Ann. St. p. 834, § 1054]. Arnett v. Berg [Colo. App.] 71 Pac. 636. A Federal court may take jurisdiction to determine validity of a state tax of railroad property and remove the lien as a cloud on title by injunction if the tax is illegal. Kan. City, Ft. S. & M. R. Co. v. King [C. C. A.] 120 Fed. 614.

80. In California, the action is brought in the county in which the land is situated. The answer cannot be considered in determining whether the action is one to quiet title to land, within a constitutional provision requiring such actions to be brought in the county where the land is situated. Const. art. 6, § 5, refers only to the time of commencement of the action, and makes the question of jurisdiction depend upon the condition of the record at that time. Miller v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836.

81. In Kentucky, a suit to quiet title against mortgages executed by plaintiff, for fraud, is transitory and may be brought in the county of defendant's residence [Ky. St. § 11]. Shouse v. Taylor, 24 Ky. L. R. 1842, 72 S. W. 324.

82. Glos v. Woodard, 202 Ill. 480, 67 N. E. 3.

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Service of process.—In New Jersey, the general statute providing for service by publication in chancery suits does not apply.[83]

Time of suit.—The statute of limitations does not commence to run until execution of the deed constituting the cloud.[84] Action begun within statutory time after discovery of cloud has been held sufficient.[85]

Parties.—The plaintiff must be the person or persons in whom is the cause of action.[86] All persons must be made defendant who assert or appear to have the beclouding claim.[87]

Sufficiency of bill, complaint or petition.[88]—The bill must contain all the averments required by the statute under which it is brought.[89] The title of the party suing must be alleged,[90] and his possession,[91] or that the land is wild, un-

83. Rev. 1902, P. L. p. 514, sec. 10, providing for publication against unascertained heirs, devisees or personal representatives in chancery suits, and a decree against them by their class designation only, does not apply to actions to quiet title [Gen. St. p. 3486]. Quaere whether such would be "due process of law" if statute did apply. Hill v. Henry [N. J. Eq.] 57 Atl. 554.

84. Judgment was taken but did not become a lien as against plaintiff's homestead until execution of sheriff's deed thereon. Best v. Grist [Neb.] 95 N. W. 836. Limitations will not run against a suit to quiet title for fraud in execution of deeds until execution of the instruments actually tainted with fraud, though other conveyances are made in the transactions [2 Mills' Ann. St. p. 1641, § 2911]. Arnett v. Berg [Colo. App.] 71 Pac. 636.

85. Complainant was ignorant and did not learn that a life estate only had been conveyed to her, for ten years after conveyance. Lampman v. Lampman, 118 Iowa, 140, 91 N. W. 1042.

86. See ante, § 1. Who may sue.

87. A claimant of an interest in property is entitled to be a party defendant in a suit by one claiming as owner in fee to remove a deed executed by the latter. Ackley v. Croucher, 203 Ill. 530, 68 N. E. 86. An owner of land who sold standing timber to plaintiff's vendor, and afterwards sold it to another is a proper defendant in an action to quiet title to the timber. Larson v. Allen [Wash.] 74 Pac. 1069. In an action by an owner of an undivided interest in land once a homestead to set aside a sheriff's deed of the interest of an heir of a former owner of the homestead, a stranger holding judgment against the former owner cannot be brought in by cross bill and compelled to collect judgment from other property. Dinsmoor v. Rowse, 200 Ill. 555, 65 N. E. 1079.

88. Andersen v. Andersen [Neb.] 96 N. W. 276; Curran v. Hagerman [Neb.] 92 N. W. 1003; Davies v. Cheadle, 31 Wash. 168, 71 Pac. 728. As to description of premises. Bynum v. Stinson, 81 Miss. 25. Bill by reversioner insufficient because of repugnancy. Keyes v. Ketrick [R. I.] 56 Atl. 770. Petition by members of city council suing jointly to quiet title, where one of them is one of the persons alleged to constitute the council. Tracey v. Grezaud [Neb.] 93 N. W. 214. Complaint with allegations that defendant held a fraudulent and forged deed, held to make fraud and forgery the only issues on trial. Halk v. Stoddard [S. C.] 45 S. E. 140.

89. A bill to compel one claiming an interest in complainant's lands to specify his title must allege disjunctively that respondent claimed or was reputed to claim a lien or incumbrance thereon. Otherwise a demurrer will lie [Act 1892 (Code 1896, §§ 809-813)] (Weaver v. Eaton [Ala.] 35 So. 647). And that no suit is pending to enforce or test the validity of such title, claim, or incumbrance. Under Code 1896, § 809, an allegation that no suit is pending between complainant and defendant is not sufficient. Moore v. Ala. Nat. Bank [Ala.] 35 So. 648.

90. **Sufficiency of allegations of title:** A complaint in a suit to remove a cloud alleging that plaintiff is absolute owner of the property "as shown by abstract of title attached, etc.," together with the abstract, is an allegation of title from the source shown in the abstract and is sufficient. McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491. Allegations that plaintiff is the owner in fee simple of the lands described therein are sufficient allegations of ownership and not objectionable as conclusions under Wis. Rev. St. 1898, § 3186. Mitchell I. & L. Co. v. Flambeau Land Co. [Wis.] 98 N. W. 530. A bill to confirm title claiming title by adverse possession, need only aver the possession and continuance thereof for the statutory period. Bynum v. Stinson, 81 Miss. 25. In an action by a municipality to recover possession of and quiet title to land claimed by it as a public street, allegations showing it to be a public street are sufficient, though there is no allegation in the complaint to the effect that the respondent is the owner of or entitled to the possession of the street in question. City of Port Townsend v. Lewis [Wash.] 75 Pac. 982. In a suit for a mining claim in the Federal courts it must be alleged that complainant's title has been successfully tried at law. Boston & M. Consol. C. & S. Min. Co. v. Mont. Ore Purchasing Co., 188 U. S. 632, 47 Law. Ed. 626; Id., 188 U. S. 645, 47 Law. Ed. 634; Same v. Chile Gold Min. Co., Id. A complaint which merely alleges that plaintiff's grantor deeded the land to her without any allegation of ownership on her part or on the part of such grantor, is insufficient on demurrer under Rev. St. 1898, § 3186, providing that plaintiff must have legal title, and at common law. Van Hessen v. Chippewa Valley Mercantile Co., 115 Wis. 443, 91 N. W. 1008. A complaint to cancel a lease, showing that the lease expired before action brought, and showing no title in plaintiff or adverse claim by defendant, is insufficient for quieting title. Ind. Natural G. & O. Co. v. Sexton, 31 Ind. App. 575, 68 N. E. 692. A complaint to quiet title alleging that

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occupied or unimproved,[92] and an adverse claim by defendant must be shown.[93] The bill may be amended to conform to the proof[94] or to supply statutory allegations,[95] but the cause of action cannot be changed.[96]

A bill giving a history of complainant's claim must be answered or demurred to as a whole.[97] Where complainant, claiming under a state patent, seeks to quiet title, defendant may attack the validity of the patent on demurrer without showing an interest in the land.[98]

Answer is sufficient which alleges legal title in defendants,[99] and must not be stricken out when it shows a claim to some extent adverse to plaintiff.[1] It need not be stated that defendant is entitled to possession.[2]

A *cross bill* will lie where a defendant claims an interest in the land,[3] though

plaintiff owns the right to purchase the property of defendant, is insufficient as to facts, since the allegation is a conclusion of law and demurrer will lie. Cooper v. Birch, 137 Cal. 472, 70 Pac. 291.

91. Smith v. Gordon, 136 Ala. 495; Boddie v. Bush, 136 Ala. 560. When title is a legal one, otherwise demurrer will lie for want of equity. Clem v. Meserole [Fla.] 32 So. 783; Simmons v. Carlton [Fla.] 33 So. 408. Complaint as alleging plaintiff's actual possession. Maggs v. Morgan, 30 Wash. 604, 71 Pac. 188. To maintain a bill under the statute (Code Ala. 1896, §§ 809-813) to compel the determination of claims to land and to quiet title, possession, actual or constructive, is essential and must be definitely and unequivocally alleged. An averment which is the mere statement of a conclusion by the pleader is not sufficient, where the facts alleged do not show possession. Smith v. Gordon, 136 Ala. 495.

92. Clem v. Meserole [Fla.] 32 So. 783; Simmons v. Carlton [Fla.] 33 So. 408. An allegation sufficiently denies that defendant was acting as owner of the property by reciting that the lands were "unseated, unimproved, and unoccupied" [B. & C. Comp. § 326]. McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491.

93. Ind. Natural G. & O. Co. v. Sexton, 31 Ind. App. 575, 68 N. E. 692. The complaint need not set out specifically the title or describe the character of the claim on which defendant relies. Schlageter v. Gude, 30 Colo. 310, 70 Pac. 428. Under rule requiring allegation of facts constituting invalidity of the instruments casting the cloud on the title. McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491. An averment that a tax on the corporate stock and franchises of a corporation is a cloud upon title cannot be sustained in the absence of a showing that it owns real estate and that the tax is a lien thereon. Ind. Mfg. Co. v. Koehne, 188 U. S. 681, 47 Law. Ed. 651. Allegation that defendants make claims which are clouds is sufficient and not objectionable as conclusion, under Wis. Rev. St. 1898, § 3186. Mitchell L. & L. Co. v. Flambeau Land Co. [Wis.] 98 N. W. 530. A complaint which alleges that certain tax deeds are a cloud on plaintiff's title, but does not allege that they are invalid, is demurrable. Wis. Rev. St. 1898, § 1176, providing that a tax deed vests an absolute title in fee simple and is presumptive evidence of the regularity of prior proceedings. Id. A complaint alleging that certain intermediate grantors in plaintiff's chain of title were corporations need not allege that they were duly incorporated unless they are parties to the action [Rev. St. 1898, §§ 3186, 3205]. Arpin Hardwood Lumber Co. v. Carmichael, 115 Wis. 441, 91 N. W. 965.

94. But such amendments operate to set aside previous defaults in answering. South Chicago Brew. Co. v. Taylor, 205 Ill. 132, 68 N. E. 732.

95. Where complainant's peaceable possession with claim of ownership is admitted and the issues are understood [Act March 2, 1870, 3 Gen. St. p. 3486]. Ward v. Tallman [N. J. Eq.] 55 Atl. 225.

96. A bill presenting merely errors of law in issuance of a patent cannot be amended to include questions of estoppel and limitations. Complainant was in possession and could defend on such grounds in any action by defendant for possession. Brett v. Meisterling, 117 Fed. 768. Amending a bill from one to remove a cloud from title to mineral rights in land to one to determine claims and quiet title to the mineral rights is not a departure [Code 1896, §§ 809-813]. Smith v. Gordon, 136 Ala. 495.

97. As a whole, it either does or does not show title, and it is improper to demur to a part and answer a part. Catchot v. Ocean Springs [Miss.] 34 So. 145.

98. Lockhard v. Asher Lumber Co., 123 Fed. 480.

99. Though it alleges that they hold as trustees, without description of the trust, and that plaintiff is not connected with the trust. Butterfield v. Graves, 138 Cal. 155, 71 Pac. 510. The exact nature of his title need not be shown. McCroskey v. Mills [Colo.] 75 Pac. 910.

1. Colburn v. Dortic [Colo.] 70 Pac. 151.

2. In an action to quiet title under Mills' Ann. Code, c. 22, where both the defendant's answer and cross complaint state facts showing that his title is superior to plaintiff's, he need not allege that he is entitled to possession of the premises. Where facts are stated from which it appears that he is the owner and entitled to the possession of the premises, and that the plaintiffs wrongfully withhold such possession from him, there is a sufficient compliance with the Colorado code. McCroskey v. Mills [Colo.] 75 Pac. 910.

3. A cross bill will lie to foreclose defendant's mortgage on the property; and where the bill questions defendant's claim to the property, the cross bill is not a departure [Code 1896, §§ 809, 811]. Jenkins v. Jonas Schwab Co. [Ala.] 35 So. 649. In an action by the owner of an undivided interest in premises, once a homestead, to set aside a

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plaintiff did not have possession.[4] A cross petition which does not ask to have any cloud on the title removed, and which raises no new or different issues may be stricken from the files.[5]

Plaintiff may set up adverse possession as against defendant by replication after answer setting up title specifically.[6]

Dismissal and judgment on the pleadings.—A dismissal is improper, after answer, and determination that defendant's title was inferior.[7] Judgment on the pleadings cannot be given in plaintiff's favor, where defendants assert title.[8]

A *jury trial* cannot be had as of right.[9]

Burden of proof.—In a suit for the removal of a tax deed as a cloud on his title, the burden of proof is upon complainant, and he must show the invalidity of the deed.[10] Complainants in a statutory action, in peaceable possession, need not establish their title until defendant has shown prima facie his adverse title or interest.[11]

Evidence.—It may be shown that plaintiff authorized his attorney to try to buy defendant's interest.[12] A writing inadmissible as a contract may be admitted as a declaration.

Variance.—A plea of title is sustained by proof of prescriptive title.[13]

Findings.[14] *Decree or judgment.*—A decree in vacation is void.[15] The court

sheriff's deed of an interest of an heir of a former owner of the homestead, the holder of the deed may seek partition and assignment of dower by cross bill. Dinsmoor v. Rowse, 200 Ill. 555, 65 N. E. 1079. A contract giving defendant no right or interest in land by way of lien or to a specific performance cannot be subject of cross complaint or of counterclaim. Cross complaint, Code Civ. Proc. § 442; Counterclaim, Code Civ. Proc. § 438. Meyer v. Quiggle, 140 Cal. 495, 74 Pac. 40. In an action to quiet his title, brought by a senior mortgagee, who had obtained a deed to and possession of the premises under a foreclosure suit in which a second mortgagee had not been joined as party, the answer of the second mortgagee, claiming the right to redeem, but disclosing the fact that his claim against the mortgagors had been barred by the statute of limitations, states neither a cause of action for redemption nor a bar to plaintiff's suit. Donald v. Stybr, 65 Kan. 578, 70 Pac. 650.

4. A cross bill alleging defendant's possession, and asking that his title be quieted, gives jurisdiction to determine title, though plaintiff's lack of possession would have prevented jurisdiction on the original bill. Sanders v. Riverside [C. C. A.] 118 Fed. 720.

5. Burnt Records Act, § 13; Hurd's Rev. St. 1899, c. 116, gives defendant the right to file a cross complaint only when he claims an ante fire title. South Chicago Brew. Co. v. Taylor, 205 Ill. 132, 68 N. E. 732.

6. Code, § 255. Schlageter v. Gude, 30 Colo. 310, 70 Pac. 428.

7. A decree in an action to quiet title is based on the bill and the answer [Ala. Code 1896, § 811]. Hence a decree ordering a dismissal of the bill is improper. Collier v. Alexander [Ala.] 36 So. 367.

8. Minneapolis & St. L. R. Co. v. Lund [Minn.] 97 N. W. 452. In an action to quiet title, held that the uncontroverted facts pleaded in the complaint did not estop defendants from asserting their interest in at least a part of the land in question, and hence judgment should not have been granted on the pleadings. Where, in an action to quiet title, the defenses pleaded by defendant constitute a complete defense to plaintiff's claim, the fact that his denials are insufficient does not entitle plaintiff to a judgment on the pleadings. McCroskey v. Mills [Colo.] 75 Pac. 910.

9. Defendant is not entitled to a jury trial [Const. art. 1, § 17, and B. & C. Comp. §§ 516, 326, 390]. McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491. An action to quiet title to mining property under the code is equitable and neither party has a right to a jury trial [Code Civ. Proc. § 1310 and the Const.]. Mont. Ore-Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co., 27 Mont. 288, 70 Pac. 1114.

10. This rule applies to a bill for partition in which complainant seeks to have a cloud upon his title removed under 3 Starr & C. Ann. St. 1896 (2d Ed.) p. 2995. Glos v. Carlin, 207 Ill. 192, 69 N. E. 928.

11. 3 Gen. St. p. 3486. Ward v. Tallman [N. J. Eq.] 55 Atl. 225.

12. Testimony to that effect should not be stricken out on the assumption that such was an attempt to make a compromise. Hughes v. Rowan, 27 Mont. 500, 71 Pac. 764. A writing signed by a deceased person showing a contract with plaintiff to devise a farm to her in consideration of care during life, though inadmissible as the contract, may be shown as a declaration of deceased concerning the oral contract to convey. Davies v. Cheadle, 31 Wash. 168, 71 Pac. 728.

13. Under Civ. Code, § 1007, one occupying for a time sufficient to bar an action gains a prescriptive title good against all. Harris v. Duarte [Cal.] 70 Pac. 298.

14. A finding that claimant under a tax deed had no right in the land is in effect a finding that the deed was a cloud on complainant's title. Glos v. Carlin, 207 Ill. 192, 69 N. E. 928. A finding that defendant's predecessor was never in possession of any part of the land is not a finding that he was not an occupant or that he could have received a conveyance [St. 1867-68, p. 696, § 15.]

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should not undertake to settle the rights of persons not parties,[16] but where the parties are properly in court, their various rights should be adjudicated.[17] Plaintiff is entitled to decree for part found to be his,[18] but should not be granted further relief.[19] Decree may be refused where title was perfected in complainant before trial.[20] The decree should provide for reimbursement to the party divested of title,[21] unless no proof thereof was offered,[22] and a deposit to cover such reimbursement may be required,[23] but the losing party cannot be allowed for improvements made after suit was commenced.[24] Defendant is bound as to matters which he failed to bring up.[25]

Damages cannot be allowed unless clearly proven.[26] In an action for slander

Callahan v. James [Cal.] 71 Pac. 104. Omission to find that defendant's predecessor paid for a townsite lot is immaterial where it appears that another paid for him. Id.

15. Sufficiency of showing that decree was rendered in vacation. Biffle v. Jackson [Ark.] 72 S. W. 566.

16. Bryan v. McCann [W. Va.] 47 S. E. 143. Where plaintiff in a suit to quiet title claimed title to a tract of land, and defendant admitted that plaintiff owned the lower half thereof, plaintiff then amended by alleging that the claim that he owned the entire tract was a mistake, that he had sold the larger part thereof and then owned only a part of the half conceded to him by defendant, held that a decree adjudging to plaintiff that part and not attempting to settle the rights of defendant and plaintiff's grantee was proper. Hewitt v. Hensley [Ky.] 79 S. W. 254.

17. Having taken jurisdiction of a suit to remove an alleged cloud upon the title to property, the court should go farther, and ascertain the liens thereon, with the amounts thereof, provided the proper parties are before it upon sufficient pleadings for that purpose. Bryan v. McCann [W. Va.] 47 S. E. 143. In a suit to quiet title to land, where defendant claimed title by answer as authorized by statute, a decree that he had superior title was not objectionable, as granting him affirmative relief without a cross bill. Under Ala. Code 1896, § 811, authorizing bills in chancery to compel the determination of claims to land and to quiet titles. Collier v. Alexander [Ala.] 36 So. 367. Where buildings were sold under foreclosure of a mechanic's lien, deed being given, the court, in an action between the purchaser of the land and the owner of the buildings, cannot fix the amount due under the lien and authorize removal of the buildings merely on default in payment by the owner of the land within a stipulated time. Under Rev. St. 1899, § 650, giving the court power to define and adjudge the title, estate and interest of the parties severally in and to such real property, and § 4205 giving mechanic's liens preference over other incumbrances, and providing that buildings to which they attach may be sold and the purchaser may remove them within a reasonable time. Wilson v. Lubke, 176 Mo. 210. 75 S. W. 602. A mortgage set up by defendant in a suit to quiet title, invalid for defective acknowledgment should not be enforced [Code 1896, § 809]. Jenkins v. Jonas Schwab Co. [Ala.] 35 So. 649.

18. Where there was a finding for plaintiffs as to part of the property, the complaint cannot be dismissed on a finding for defendant as to the part particularly contested. Sweatman v. Bathrick [S. D.] 95 N. W. 422.

19. Plaintiff may be denied further relief where neither party shows right or title and title was quieted in plaintiff to part of the land. Smith v. Thomas, 120 Iowa, 12, 94 N. W. 259. Where a bill to set aside a tax deed alleges ownership of certain land and the proof shows ownership as to only a part thereof, the deed cannot be set aside as to the entire tract; nor can it be set aside as to other lands than such tract which it includes. Glos v. Adams, 204 Ill. 546, 68 N. E. 398.

20. A vendor suing his vendee to remove defects in title arising from irregular probate proceedings is not entitled to a decree for rescission of the conveyance, where the title is perfected before trial. Mock v. Chalstrom, 121 Iowa, 411, 96 N. W. 909.

21. A conveyance by defendant to complainant cannot be ordered, nor can tax deeds be set aside without requiring repayment of taxes, interest and costs, and giving execution therefor. Glos v. Woodard, 202 Ill. 480, 67 N. E. 3. On purchase of an interest in land, consisting of a right to conveyance on payment of the balance of purchase money, at judgment sale, and subsequent conveyance by the original vendors to one suggested by the vendor of such interest on receipt of the balance from the grantee, the latter will not be divested of title until he is reimbursed with interest. Nourse v. Collis, 119 Iowa, 38, 93 N. W. 85.

22. Where defendant in a suit to remove a tax deed made no proof as to taxes and disbursements, the court may declare the deed void without requiring plaintiff to reimburse defendant. Hughey v. Winborne [Fla.] 33 So. 249.

23. In an action to remove the cloud of void tax certificates, plaintiff may be required by the decree to deposit sufficient funds to repay the holders the amounts paid on the certificates, with interest [Mills' Ann. St. §§ 3904, 3905]. Pueblo Realty Trust Co. v. Tate [Colo.] 75 Pac. 402.

24. Biffle v. Jackson [Ark.] 72 S. W. 566.

25. In a suit in a Federal court to cancel deeds to a mining claim and to determine adverse claims, and asking a receiver and an injunction pendente lite, the court can determine the whole controversy and defendants must make their complete defense. Hanley v. Beatty [C. C. A.] 117 Fed. 59. See, also, Former Adjudication, 2 Curr. Law, p. 60.

26. A finding, in an action to quiet plaintiff's title to a spring, assessing damages in plaintiff's favor, is erroneous where he proved that he had suffered loss by reason of de-

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of title and for damages under the Louisiana practice, it is improper to award damages founded on a finding that defendant has no title and also to decree that he shall litigate his claim.[27]

Costs.—Plaintiff may be required to pay costs where he did not make a sufficient tender to defendants.[28] Where it is conceded plaintiff had a cause of action, he should not be taxed with necessary costs.[29] Costs cannot be awarded to either party where defendants had an equity requiring judgment for sale and a right to the surplus above plaintiff's claim.[30] Where a cross bill asks foreclosure of a mortgage which could be denied until plaintiff's title was perfected, foreclosure may be permitted without costs and attorney's fees.[31]

Rehearing and review.—Rehearing will not be allowed to permit defendant to introduce further evidence, the character of which is not shown and where there was negligence in production of testimony.[32] In Illinois, appeal lies to the appellate court, where a contract to convey is sought to be canceled as a cloud.[33] On appeal from a judgment quieting title to and awarding possession of land, the supreme court tries the case de novo in so far as the findings have been excepted to.[34] The judgment will not be reviewed where no objection thereto was made in the trial court.[35]

Enforcement of decree.—A mandatory injunction is the proper remedy to enforce a decree in equity quieting the title to real estate as against one in possession.[36]

(§ 3) *B. Determination of conflicting claims to real property.*—Persons who do not claim an interest need not be cited to appear.[37]

Pleading; sufficiency of complaint.[38]—A complaint based on a tax lien need not aver that the lien was based on a regular levy and assessment,[39] and does not state more than one cause of action by setting forth several tax liens.[40]

On complaint alleging possession, ownership in fee, and adverse claim by defendants, and answer alleging ownership of fee, the court has jurisdiction to determine the adverse claims of the parties.[41]

fendant's acts in interrupting the flow therefrom, but failed to prove, with reasonable certainty, the amount of such loss. Orient Min. Co. v. Freckleton [Utah] 74 Pac. 652.

27. Handlin v. Dodt, 110 La. 936.

28. To set aside tax deeds and a quit-claim deed. Glos v. Woodard, 202 Ill. 480, 67 N. E. 3; Glos v. Adams, 204 Ill. 546, 68 N. E. 398; South Chicago Brew. Co. v. Taylor, 205 Ill. 132, 68 N. E. 732.

29. The record was confused and the pleadings voluminous. The plaintiff had mixed up his causes of action but no complaint was made thereof. Each party was compelled to pay his own copy and witness fees and all other costs down to time of entry of decree were assessed against a defendant who was sued on breach of warranty [Code, § 4226]. Mock v. Chalstrom, 121 Iowa, 411, 96 N. W. 909.

30. Jones v. Levering, 75 App. Div. [N. Y.] 539.

31. Mock v. Chalstrom, 121 Iowa, 411, 96 N. W. 909.

32. South Chicago Brew. Co. v. Taylor, 205 Ill. 132, 68 N. E. 732.

33. Title to a freehold is not in issue. Kesner v. Miesch, 204 Ill. 320, 68 N. E. 405.

34. Hence it will disregard any evidence which it finds inadmissible, so that error in the admission of evidence is not available to appellant. City of Port Townsend v. Lewis [Wash.] 75 Pac. 982.

35. A judgment quieting title in defendant in fee, where he asked that it be quieted subject to a life estate in plaintiff, is merely erroneous, not void; but it cannot be corrected in an action to review the judgment where no motion was made to modify it and no objection or exception in the trial court. Williams v. Manley [Ind. App.] 69 N. E. 469.

36. Whitaker v. McBride [Neb.] 98 N. W. 877.

37. Where, in an action under Gen. St. 1902, § 4053, providing for actions to determine adverse claims in real estate, it is alleged in the complaint that certain persons have an apparent legal title to the property, but claim no right, title or interest therein, it is not error to deny a motion to cite such persons to appear in the action. Cahill v. Cahill [Conn.] 57 Atl. 284.

38. Buffalo L. & Exp. Co. v. Strong [Minn.] 97 N. W. 575.

39, 40. Laws 1901, c. 5, p. 9. Blakemore v. Roberts [N. D.] 96 N. W. 1029.

41. Bell. & C. Ann. Codes & St. § 516, authorizing any person claiming an interest in property not in the actual possession of another to maintain a suit in equity against anyone claiming an adverse interest therein, for the purpose of determining such adverse claim. Winchester v. Hoover, 42 Or. 310, 70 Pac. 1035.

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Allegations of answer as to occupancy do not waive objections to allegation in complaint that land is unoccupied where the defendant does not ask for affirmative relief but merely seeks a dismissal.[42]

Dismissal and nonsuit.—In a statutory action against one claiming an adverse title to realty, plaintiff may take a voluntary nonsuit on defendant's request for dissolution of the injunction against his trespass being granted.[43]

Findings,[44] *judgment or decree.* The decree should conform to the statutory provisions.[45] Rights of persons not made parties cannot be determined.[46]

New trial as of right.—A party is entitled to a new trial as of right where a determination of the issues necessarily involves the title to the land, irrespective of the form of the action,[47] but not when the suit is an ordinary one to set aside a fraudulent conveyance.[48]

42. Defendant alleged ownership and possession of one lot in himself, and as to the other, in a third person, with a mortgage thereon to himself. Defendants did not ask, directly or indirectly, that their alleged interest in the property be determined. They demanded no affirmative relief, nor did they offer evidence as to the validity of their asserted rights, interest, or title. Mitchell v. McFarland, 47 Minn. 535, is relied upon by plaintiff's counsel in support of his contention that the answering defendants waived, by their answers, the necessity of proofs that the premises were vacant and unoccupied. But in that case the defendant not only set forth in his answer the source of his own title, but pointed out defects in plaintiff's alleged title. A trial was had upon the issues made by the pleadings and the merits, with a decision and judgment for defendants, not of dismissal, but a final determination on the merits. Said the court: "It must be assumed that, when defendant denies plaintiff's title, sets forth his own title, and what he supposes to be plaintiff's claim of title, and his objections thereto, he does it for the purpose of an adjudication upon the matters so set forth." Not so in the case at bar. The court was not asked, either in the answer or by means of proofs at the trial, to determine and dispose of defendant's title or interest in and to the lots in question. On the contrary, at the very first opportunity attention was called to the failure of proof, and the court was asked to dismiss the action, as authorized by Gen. St. 1894, § 5408, subd. 3. Cartwright v. Hall, 88 Minn. 349, 93 N. W. 117.

43. Pub. Laws 1893, p. 37, c. 6. Olmsted v. Smith, 133 N. C. 584.

44. Findings that plaintiff is the owner and entitled to possession, and that defendant is without claim or right to possession will support a judgment of title and possession to plaintiff. Chaffee-Miller Land Co. v. Barber [N. D.] 97 N. W. 850.

45. A decree in an action under the New York Code, §§ 1638-1650, in favor of plaintiffs should provide that defendant be forever barred from all claim to any estate in the property or to any interest or easement therein or lien or encumbrance thereon. Whitman v. New York, 85 App. Div. [N. Y.] 468.

46. In an action against the City of New York to determine its right to land on the East river, between the original high water mark and the harbor commissioners' line, which had been conveyed to it, it was improper to insert in the decree that the rights of plaintiffs to improve the property awarded to them were subject to the regulations of congress, when the United States government was not a party to the action. Whitman v. New York, 85 App. Div. [N. Y.] 468.

47. Krise v. Wilson, 31 Ind. App. 590, 68 N. E. 693. A complaint, which in the first paragraph alleges a cause of action in equity against the grantee of plaintiffs' ancestor to have the conveyances canceled because the grantor was of unsound mind, in the second alleges a cause of action in equity to have them canceled for want of delivery, and in the third avers that plaintiffs were the owners of an interest in the land as tenants in common and that defendants claimed some interest therein, which was without right and a cloud on plaintiffs' title, and asks that plaintiffs' title be quieted, involves the title to the land in each paragraph, since any relief plaintiff can secure must come by overthrowing defendants' title acquired by the deeds sought to be canceled, and defendants are entitled to a new trial as a matter of right. Id. The case made by the pleadings and tried by the parties determines the nature of the action irrespective of the form of the action or the prayer for relief. Id.

48. A suit by creditors to set aside a conveyance as fraudulent, and to subject the land to the payment of a debt, is not a case where a new trial as of right is allowed by statute. But where the parties attacking the conveyance are not creditors, but heirs, of the grantor, who is deceased, who seek, by setting the deed aside, to recover the land, a new trial may be claimed as of right by either party. In the case at bar the suit is between heirs. Any relief appellants may secure must come through overthrowing the title of appellees acquired by the deeds. If the deeds are set aside, appellees' title through the deeds is devested. It must revest in some one. Under the facts pleaded, it would vest in appellants and appellees. It is manifest, we think, that the title to the land is involved in the litigation, and that a new trial as of right was properly granted. Krise v. Wilson, 31 Ind. App. 590, 68 N. E. 693.

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QUO WARRANTO.

§ 1. Nature, Function, and Occasion of the Remedy (1377).
§ 2. Parties and the Right to Prosecute (1378).
§ 3. The Information or Complaint (1380).
§ 4. Answers and Other Pleadings, and Motions to Quash or Dismiss (1380).
§ 5. Trial and Judgment (1381).
§ 6. New Trial and Review (1381).

§ 1. *Nature, function, and occasion of the remedy.*—The ancient writ of quo warranto was a prerogative writ, intended for the use of the sovereign alone, but it has long since lost that character to a considerable extent,[1] and all the relief which could be obtained by the writ is now attainable by an information in the nature of quo warranto, or, in some states, by a civil action, which is brought, however, in the name of the state or of the attorney general.[2] Quo warranto is a legal proceeding to oust the defendants from an usurped office or franchise.[3] It issues only as against one in possession[4] of an office[5] or franchise to which he is not entitled.[6] It does not lie to compel official action,[7] to relieve against misconduct not working a forfeiture of office,[8] or to induct one into an office not adversely occupied,[9] though it will lie if the office is filled by one appointed pro tem.[10] Quo warranto generally will lie only where no other remedy would afford the required relief.[11] Conversely, where it does lie it is exclusive. It is the only

1. Lane v. Otis, 68 N. J. Law, 656.

2. Fordyce v. State, 115 Wis. 608, 92 N. W. 430; State v. McLean County, 11 N. D. 356, 92 N. W. 385.

3. State v. Toledo, 23 Ohio Circ. R. 327.

4. In order to justify the action, there must be something more, on the part of the defendant, than a mere claim. There must be some holding or exercising of the franchise or office. It seems that a formal acceptance of a franchise by a public service company is sufficient. State v. Milwaukee, B. & L. G. R. Co., 116 Wis. 142, 92 N. W. 546.

5. Quo warranto to test title to office does not lie to oust a person who is a mere employe. The respondent must be or claim to be a public officer. Quo warranto may be maintained to oust a school director alleged not to possess the statutory qualifications (State v. Fosse [Mo. App.] 71 S. W. 745), or the members of a board of trustees of a school appointed under an unconstitutional statute (Ellis v. Greaves [Miss.] 34 So. 81), or a judge who, at the expiration of his term, illegally holds over on the ground that his successor has not qualified (People v. Campbell, 138 Cal. 11, 70 Pac. 918), or a police captain who did not, when appointed, possess the required qualifications (People v. Ogden, 41 Misc. [N. Y.] 246), or, it seems, a physician at a state reformatory, appointed after an illegal removal of his predecessor (Marshall v. Board of Managers, 103 Ill. App. 65), or a county superintendent of schools who does not possess the statutory qualifications (Fordyce v. State, 115 Wis. 608, 92 N. W. 430). Under some statutes regulating political parties, the general committeemen of a party may be regarded as public officers. Rabbitt v. Garand, 89 App. Div. [N. Y.] 119. Under the law of Louisiana the writ does not issue to state officers, but a sewerage and water board created by statute, at the request of the inhabitants of a particular city, the mayor of which appoints the members, is a municipal and not a state agency. State v. Kohnke, 109 La. 838. In the absence of statutory definition, no one should be considered such whose duties do not pertain to the exercise of sovereignty or governmental functions in some department. An engineer of a city hall is not such an officer, nor a street laborer, a bookkeeper, a janitor nor a watchman. State v. Gray, 91 Mo. App. 438.

6. Quo warranto is also the proper remedy to restrain an officer, validly elected for one locality, from acting in another place; accordingly a bill in equity to enjoin such acts cannot be maintained. Deemar v. Boyne, 103 Ill. App. 464.

7. It is never directed to an officer as such, nor does it ever command him to do anything. It is always directed to a person holding an office or franchise, for the purpose of ascertaining whether he is rightfully entitled to it. State v. Broatch [Neb.] 94 N. W. 1016.

8. State v. Scott [Neb.] 97 N. W. 1021.

9. Where an official has been illegally removed from office and the vacancy has not been filled, quo warranto is inapplicable, and mandamus will be allowed to compel a reinstatement. People v. Ogden, 41 Misc. [N. Y.] 246.

10. It seems that when an official, pending an investigation into his qualifications, with a view to his removal, is illegally suspended from his office, and another person exercises his functions temporarily, quo warranto may be maintained against such person to determine the validity of the suspension. Hartwig v. Manistee [Mich.] 96 N. W. 1067.

11. So also when there is a contest as to title to an elective office, based on alleged fraud committed by the election inspectors in counting ballots, and proceedings are begun before either party has gone into possession of the office, or received a certificate of election, it is not necessary, even if it is possible, to resort to quo warranto. Summary jurisdiction of justices, under New York statute, sustained. Rabbitt v. Garand, 89 App. Div. [N. Y.] 119. It has been held that, though mandamus will lie only when there is no adequate remedy at law, quo warranto will lie only when there is no ade-

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proper proceeding where one person is in possession of an office under color of right, and another claims it, even where there is no serious doubt as to the title.[12] It is the proper proceeding to try the right of a corporation to exist as such.[13] It may also be resorted to for the purpose of restraining a corporation, the legal existence of which is not in question, from exercising a particular franchise to which it is not legally entitled.[14] It is held that a municipal corporation may be restrained by quo warranto from extending its governmental authority beyond its true boundaries.[15]

§ 2. *Parties and the right to prosecute. Who may institute.*—There is a fundamental distinction between information ex officio and those not ex officio, The former were originally brought by the sovereign through his attorney general, and are now filed by the latter in his sole discretion, and, according to some authorities, without securing leave of court in cases wherein public interests are involved, but he cannot maintain such an information where merely private rights are in question.[16] In the former case it is the duty of the attorney general to

quate remedy at law or in equity. Information brought by the attorney general to restrain county surveyor from acting, as county engineer, under color of an unconstitutional statute, dismissed on the ground that relief could be had by injunction. State v. Scott [Neb.] 97 N. W. 1021. When a constitution declares that the legislature shall provide for the trial of contested elections, and the legislature has made no law applicable to township officers, the courts have jurisdiction to give relief by quo warranto. State v. Conser, 24 Ohio Circ. R. 270. But where a statutory procedure is provided for the regulation of a particular matter, as, for instance, the charges of railroads, and a commission is created to give redress in such cases, the common-law remedy by quo warranto is superseded. State v. Atchison, T. & S. F. R. Co., 176 Mo. 687, 75 S. W. 776.

12. Mandamus to compel superior authorities to reinstate police captain refused, where another person had taken up the duties of the office. People v. Board of Police Com'rs, 79 App. Div. [N. Y.] 82. Taxpayers' suit to enjoin payment of salaries cannot be maintained under the New York statutes, where there is an actual dispute, depending upon extraneous proof, over a title to office which is regular on its face and presumptively valid. Greene v. Knox, 175 N. Y. 432, 67 N. E. 910. Bill in equity by physician removed from position at state reformatory dismissed. Marshall v. Board of Managers, 103 Ill. App. 65. Act of civil service commissioners, purporting to remove police captain, after an inquiry, held void, and reinstatement compelled by mandamus, since he could legally be removed only by quo warranto. People v. Ogden, 41 Misc. [N. Y.] 246.

13. School district. School Dist. No. 4 v. Smith, 90 Mo. App. 215. Thus when there exists a corporation de facto by virtue of a bona fide attempt to organize under a statute, and a user of corporate powers, the legality of its organization may be ascertained by the state by quo warranto or scire facias, but cannot be attacked collaterally by private parties in a suit in equity. Business corporations. Lincoln Park Chapter 177 v. Swatek, 105 Ill. App. 604. And so also where it is contended that the organization of a municipal corporation is invalid because the proceedings for its formation were begun by persons not authorized to do so, quo warranto is the proper remedy, and not a proceeding against officials charged with duties in carrying out the organization. Velasquez v. Zimmerman, 30 Colo. 355, 70 Pac. 419.

14. State v. Atchison, T. & S. F. R. Co., 176 Mo. 687, 75 S. W. 776. Thus abutters may restrain the construction and operation of an elevated street railway, by a railroad company which has, without lawful authority, accepted a franchise granted by a city council. State v. Milwaukee B. & L. G. R. Co., 116 Wis. 142, 92 N. W. 546. It has likewise been held that when a statute, by virtue of which a company acquires a street railway franchise, contains a condition prohibiting the charging of fares above a certain rate, and it is alleged that this condition is being broken, quo warranto may be maintained by the state on the relation of the attorney general, and the court will so mould the relief as to require the company to desist from charging illegal fares. State v. Toledo R. & L. Co., 23 Ohio Circ. R. 603. But where there is no condition in the charter or statute to prevent the imposition of an illegal or unreasonable charge by a railroad for the performance of a certain extra service in a particular city, it is a private matter between the carrier and the persons affected, and quo warranto will not lie to prevent it. State v. Atchison, T. & S. F. R. Co., 176 Mo. 687, 75 S. W. 776. Quo warranto is not the proper remedy to restrain a mere excess of powers on the part of a corporation, the commission of ultra vires acts, or a breach of trust, unless the unauthorized acts go so far as to constitute encroachments on the powers of the sovereign. Maintenance by a city of a polytechnic school alleged to be beyond the scope of the trust on which the funds employed were held. Demurrer to petition sustained. State v. Toledo, 23 Ohio Circ. R. 327. Constitutionality of statute under which gas companies were consolidated may be tried. People v. People's G. & C. Co., 205 Ill. 482, 68 N. E. 950.

15. State v. McLean County, 11 N. D. 356, 92 N. W. 385. See, as to quo warranto to test the legal existence of a city, People v. South Park [Wash.] 75 Pac. 636.

16. Day v. Lyons [N. J. Law] 56 Atl. 153; State v. Atchison, T. & S. F. R. Co., 176 Mo.

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file an information. Any other person attempting to represent the state will generally be regarded as an intermeddler.[17] Informations not ex officio are brought by private persons, acting only nominally in the sovereign's name. Accordingly, it has been held, in proceedings brought to test title to a municipal office, that the attorney general need not have consented to the proceedings, nor even have been notified.[18] A municipality is a proper relator in quo warranto to oust a city policeman.[19] Leave of court, however, to file an information not ex officio is generally necessary,[20] and grant thereof is discretionary.[21] The information may be resorted to by a private relator for the purpose of trying the title to an office or franchise which exists de jure or de facto, but not for the purpose of attacking the legal existence of the office or franchise. The latter question can be raised only in proceedings brought by the attorney general in his public capacity as the representative of the state. It may, however, be involved collaterally in proceedings properly brought by a private relator.[22] To test the title to a municipal office, the interest of a citizen and taxpayer is generally held to be sufficient.[23] In Wisconsin, by statute, quo warranto may be brought by any person in the name of the state when the attorney general refuses to act.[24] Where it is provided by statute that an information may be filed by a private person only when he claims an interest in the office or franchise, the interest must be special and not merely that possessed by the general public.[25] Where quo warranto is brought by a claimant of the office, he must show his interest therein, and an intrusion by the other party upon that office.[26] There appears to be some question as to how far a claimant, in order to qualify himself to maintain quo warranto, must fulfill the conditions ordinarily required before the exercise of the office can be assumed.[27]

687, 75 S. W. 776. Where the duty of bringing such proceedings is vested by statute in the prosecuting attorney, the attorney general is excluded. The lack of authority in the latter officer cannot be waived by the other party, and a proceeding brought by the former must be dismissed on the merits. State v. Seattle G. & E. Co., 28 Wash. 488, 70 Pac. 114.

17. Nevertheless, in rare cases, the court, in its discretion, may take jurisdiction at the instance of a private relator, even, it seems, against the objection of the attorney general. State v. McLean County, 11 N. D. 356, 92 N. W. 385.

18. Day v. Lyons [N. J. Law] 56 Atl. 153.

19. Beverly v. Hattiesburg [Miss.] 36 So. 74.

20. Originally by Stat. 4 and 5 Wm. & M. c. 18. Day v. Lyons [N. J. Law] 56 Atl. 153.

21. State v. Kohnke, 109 La. 838; Tillyer v. Mindermann [N. J. Law] 57 Atl. 329. This discretion was formerly exercised only in allowing the information to be filed. It is now exercised after a hearing on the merits. The courts have come to exercise it even in suits by the state on the relation of a state official. Quo warranto to test validity of organization of a city. State v. Mansfield, 99 Mo. App. 146, 72 S. W. 471. Right to exercise powers of a county in certain territory. State v. McLean County, 11 N. D. 356, 92 N. W. 385. Facts held to warrant denial of application for leave to bring. Clark v. Searing [N. J. Law] 57 Atl. 331; Tillyer v. Mindermann [N. J. Law] 57 Atl. 329.

22. Moore v. Seymour [N. J. Law] 55 Atl. 91; Holloway v. Dickinson [N. J. Law] 54 Atl. 529; State v. Kohnke, 109 La. 838. Quo warranto against members of water and sewerage board. State v. Kohnke, 109 La. 838. Quo warranto against town officials. Whitehurst v. Jones, 117 Ga. 803.

24. State v. Milwaukee, B. & L. G. R. Co., 116 Wis. 142, 92 N. W. 546. The relator, unless he represents the interests of the state, must have some interest more than that of the rest of the community, but the interest of a taxpayer in the existence of an illegal municipal corporation is sufficient. State v. Leischer, 117 Wis. 474, 94 N. W. 299.

25. Information to try title of police commissioners filed by resident taxpayer on the ground that the statute constituting them was unconstitutional, dismissed on demurrer. State v. Reardon [Ind.] 68 N. E. 169. A statute provided that on the occurrence of a lynching, the office of the sheriff should be vacated, and his duties should be performed by the coroner until another sheriff should be elected or appointed. In the present case, a lynching had occurred, but the sheriff refused to relinquish his office. No successor having been appointed, the coroner brought quo warranto. Dismissed on demurrer. State v. Dudley [Ind.] 68 N. E. 899.

26. Thus one who has been validly elected one of the justices of the peace for a certain township and is in the exercise of the office cannot maintain quo warranto against another who claims to have been validly elected also, although the information alleges damages. State v. Tancey [Ind.] 69 N. E. 155. But see Deemar v. Boyne, 103 Ill. App. 464.

27. In consequence of an election contest, the proper authorities refused to issue election certificates, and the previous incumbents

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Joinder of parties.—Where a sewerage and water board is legally constituted and afterwards additional members are added to it by a statute, the constitutionality of which is assailed, the title of the new members may be tried in a quo warranto proceeding against them alone. The other members of the board are neither necessary nor proper parties.[28] In quo warranto, to determine the legal existence of a corporation, some courts hold that the members or officers are the only proper parties. Others hold that the corporation must be joined.[29] Quo warranto, to test the legal existence of a city, should not be brought against the city in its corporate name,[30] nor should one whose title to office is questioned be sued as an officer.[31]

§ 3. *The information or complaint.*—An information in the nature of a quo warranto is governed by the same general rules of pleading as other civil proceedings.[32] When it is brought by a private person for the purpose of ousting the person in possession of an office and obtaining it himself, the claimant must allege in his complaint the facts essential to show his own title.[33] A general allegation in the complaint that an act of incorporation is inoperative owing to a contradiction between two sections named is too vague to require an answer.[34]

§ 4. *Answers and other pleadings, and motions to quash or dismiss.*—The defendant, if he answers, must either disclaim or justify.[35] If he justifies, he must state facts which, if true, will invest him with a good legal right.[36] If the allegations of the petition are denied, it must be positively and unequivocally and not on information and belief.[37] It is sufficient if the plea possesses such certainty that the substantial facts constituting the defense can be put in issue.[38] In averring title, it is necessary to allege the fulfillment of all conditions precedent.[39] A plea need not, however, negative facts which, if true, would cause a forfeiture of the office. This would be anticipating the pleadings, which is neither necessary nor proper.[40] A demurrer opens the whole record and is to be taken as a demurrer to that pleading which contained the first fatal defect in a matter of substance.[41] Matters of form can be reached only by a special demurrer.[42] The

held over. Quo warranto was brought against the latter by one of the claimants, who had fulfilled the other requirements, and appeared to be elected on the face of the returns. Held, that he must first secure the issuance of election certificates by mandamus. Scales v. Faulkner, 118 Ga. 152. Where, in a city election, a mayor is elected but the previous holder of the office refuses to give it up on the ground that there is no legal authority for the election of a new mayor, the claimant may maintain quo warranto without first taking the oath of office, etc., since these acts would be useless before his right is determined. Gilbert v. Craddock, 67 Kan. 346, 72 Pac. 869.

28. State v. Kohnke, 109 La. 833.

29. Quo warranto brought by a taxpayer against the officers of a village, the existence of which was denied on the ground that a majority of voters had not voted in favor of its incorporation. State v. Leischer, 117 Wis. 474, 94 N. W. 299. School-district. State v. Van Huse [Wis.] 97 N. W. 503.

30. The legal existence is admitted by suing it in its corporate name. People v. South Park [Wash.] 75 Pac. 636.

31. State v. Broatch [Neb.] 94 N. W. 1016.

32. Information held good after verdict. Bishop v. People, 200 Ill. 33, 65 N. E. 421.

33. State v. Wheatley, 160 Ind. 183, 66 N. E. 684. General averments will not save a petition whose specific allegations do not show a cause of action. People v. Goodrich, 92 App. Div. [N. Y.] 445.

34. Whitehurst v. Jones, 117 Ga. 803.

35. Bishop v. People, 200 Ill. 33, 65 N. E. 421.

36. A general allegation that he was duly elected at a certain election is bad on demurrer. Massey v. People, 201 Ill. 409, 66 N. E. 392; Bishop v. People, 200 Ill. 33, 65 N. E. 421.

37. Whitehurst v. Jones, 117 Ga. 803.

38. Allegations of election of alderman and result of a contest over election. Massey v. People, 201 Ill. 409, 66 N. E. 392.

39. Taking oath of office as county assessor. State v. Wheatley, 160 Ind. 183, 66 N. E. 684. Accordingly, a plea which sets up the valid organization of a municipal corporation under a general statute, but fails to allege a compliance with certain conditions expressly prescribed by the statute, is bad on demurrer. Soule v. People, 205 Ill. 618, 69 N. E. 22.

40. Taking oath of office as alderman within a certain time under local statute. Massey v. People, 201 Ill. 409, 66 N. E. 392.

41. Massey v. People, 201 Ill. 409, 66 N. E. 392; State v. Wheatley, 160 Ind. 183, 66 N. E. 684.

42. Massey v. People, 201 Ill. 409, 66 N. E. 392.

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objection that the information was filed without leave of court may be raised at the proper time, by a motion to dismiss or otherwise, but not after appearing and pleading to the merits.[43]

§ 5. *Trial and judgment.*—It is proper practice on the filing of a petition for leave to institute quo warranto proceedings and the appearance of the respondent, to receive affidavits and counter-affidavits as to the facts relied on in seeking and opposing the application.[44] Where quo warranto is brought to test the validity of a consolidation of public service companies, and it is alleged in respondent's affidavits that the proceedings are taken merely in the interest of private parties, an affidavit by the state's attorney that he is satisfied that the statute under which the consolidation took place is unconstitutional, and that his action was taken merely in the public interest is sufficient, but it seems that the petition must show that the public would be benefited in some way by the judgment of ouster.[45] In quo warranto by the state to test title to an office, the burden of proof is on the defendant.[46] Issues of fact are tried by jury.[47] The defendant may invoke the doctrines of estoppel and laches not only against a private relator, but against the state, and even in cases in which the right to exercise extensive political powers is involved.[48] A decision that persons who claim an office for a specified term by appointment from one authority are not entitled to it as against persons holding appointments from another source is not res judicata in subsequent proceedings relating to a different term in the same office, though the rival claimants derive their title from the same appointing powers.[49] In quo warranto to test the title of additional members added, by a statute alleged to be unconstitutional to a public board, the decree must merely determine the right to membership and cannot deal with any question as to the organization or proceedings of the board.[50] In proceedings between a claimant and an incumbent of a public office, the court inquires into the title of both, and by its decree awards the office to the party entitled to it.[51]

Costs.—A private relator is liable for costs.[52]

§ 6. *New trial and review.*—Since quo warranto is a proceeding at law, final judgments therein are reviewable by writ of error.[53] Under the Florida practice, as under the doctrine recognized by the United States supreme court, a writ of error may, when the proper conditions are fulfilled, operate as a supersedeas. It will suspend further action under or relative to the judgment, and will relate to the status of the parties as existing at the time the writ becomes operative.[54] Since leave to file an information rests in the sound discretion of the court, its action thereon will not be reversed except in case of an abuse of its legal discretion.[55]

43. Bishop v. People, 200 Ill. 33, 65 N. E. 421.

44, 45. People v. People's G. & C. Co., 205 Ill. 482, 68 N. E. 950.

46. State v. Fasse [Mo. App.] 71 S. W. 745.

47. Greene v. Knox, 175 N. Y. 432, 67 N. E. 910.

48. Exercise by county of governmental powers over a certain territory for ten years without any objection. State v. McLean County, 11 N. D. 356, 92 N. W. 385. Neglect to question validity of organization of municipal corporation for twenty-eight years, during which rights had been acquired under it. Soule v. People, 205 Ill. 618, 69 N. E. 22. A delay of a year and a half in bringing quo warranto against the members of a school board to test the constitutionality of the act by which the board was created is not so unreasonable as to bar the action. Attorney Gen. v. Lowrey [Mich.] 92 N. W. 289.

49. State v. Broatch [Neb.] 94 N. W. 1016.

50. State v. Kohnke, 109 La. 838.

51. P. L. 1895, p. 82. Lane v. Otis, 68 N. J. Law, 656.

52. Hull v. Eby [Iowa] 98 N. W. 774.

53. Simonton v. State, 43 Fla. 351. A judgment sustaining a demurrer of the relator to pleas filed by the respondent is a final judgment under the Florida practice. Simonton v. State, 43 Fla. 351. Under Georgia practice, a judgment overruling a demurrer to the petition is not a final judgment, since it does not dispose of the case. Sayer v. Harding, 118 Ga. 642.

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RAILROADS.[54]

§ 1. Railroad Companies (1383).—Creation and Existence (1383). Certificate of Convenience (1383). Public Aid (1383). Private Aid (1385). Powers (1385). Contracts. Representation by Officers (1385). Bonus and Earnings Taxes (1386). Foreign Corporations (1386). Process (1387). Venue (1387). Control by Railroad Commissions (1387).

§ 2. Location of Road, Terminl and Stations (1388).—Filing, Location (1388). Alterations and Changes (1388). Compulsory Maintenance (1388).

§ 3. Interest in Lands and Right of Way (1389).—Public Grants and Franchises (1389). Grants in Highways and Streets (1390). Consents of Abutters (1391). Public Land (1391). Eminent Domain (1391). Private Grants (1392). Conditions and Reservations (1392). Enforcement (1393). Subsequent Grantees (1393). Disposal or Use of Right of Way (1394). Abandonment (1394). Adverse Possession (1394). Taking for Other Public Use (1395). Assessment or Compensation for Public Improvement (1396).

§ 4. Construction and Maintenance (1396).—Private and Farm Crossings (1396). Public Crossings (1397). Damages from Negligent Construction (1398). Establishment of Crossings (1398). Abolition of Grade Crossings (1398). Crossings with Other Railroads (1400). Duty to Make Transfer Connections (1401). Cattle Guards (1401). Fences (1402). Drainage (1402). Obstruction of Watercourses (1402). Miscellaneous Matters (1403). Construction Contracts (1404)

§ 5. Sales, Leases, Contracts and Consolidation (1404).—Lease or Joint Use of Privileges (1404). Consolidation (1405). Rights Passing With Sale (1405). Duties and Liabilities After Sale or Lease (1405). Contracts with Bridge Companies (1406).

§ 6. Indebtedness, Liens and Securities (1407). Mechanics' Liens (1407). Mortgages (1407). Property Covered (1407). Priorities (1407). Operating Expenses (1408). Foreclosure (1408). Sale (1409). Receivership (1409). Appointment for Lessee Road (1410). Enforcement of Judgments (1410).

§ 7. Operation of Railroad (1410). A. Duty to Operate, Statutory and Municipal Regulations and Care Required in Moving Trains in General (1410).—Keeping Stations Open (1411). Operation on Sunday (1411). Equipment of Cars (1411). Speed Regulations (1411). Precautions at Highway Crossings (1412). Obstruction of Crossings (1412). Stops at Railroad Crossings (1413).

B. Injuries to Licensees and Trespassers (1413).—General Rules (1413). Persons Carried as Employes of Independent Contractor (1414). Persons at Stations (1414). Persons with Relation to Passengers (1415). Persons Loading and Unloading Cars (1415). Children on Tracks (1416). Adults Walking on Tracks (1418). Along or Between Tracks (1420). Standing, Sitting, or Lying on Track (1421). On Bridges and Trestles (1422). Near Crossings (1422). Crossing at Other than Established Crossing (1423). In Switch Yards (1423). Under Cars (1424). Stealing Rides (1424). Persons Using Handcars or Tricycles (1425).

C. Accidents to Trains (1425).

D. Accidents at Crossings (1426). 1. Care Required on Part of Company (1426).—General Rules (1426). Towards Whom Care Must be Exercised (1427). Signals (1427). Speed (1428). Gates (1429). Flagmen (1429). Headlights (1429). Switching and Backing (1429).

2. Contributory Negligence (1430).—General Rules (1430). Who May be Charged (1431). Acts Required of Traveller (1432). Duty Where View is Obstructed (1432). Parallel Tracks, Reliance on Signals (1433). Switching Standing and Backing Trains (1434). Intoxication (1435). Racing with Train (1435). Acts after Discovery of Danger (1435).

3. Procedure (1435).—Pleading (1435). Burden of Proof (1436). Admissibility of Evidence (1436). Instructions (1437). Directing Verdict (1438). Special Findings (1438).

E. Injuries to Persons on Highway or Private Premises near Tracks (1438).—Derailed Trains (1438). Frightened Horses (1438).

F. Injuries to Animals on or Near Tracks (1440).—Extent of Liability (1441). Place of Entry (1441). Fences (1442). Gates (1443). Guards (1443). Contributory Negligence of Owner (1443). Pleading (1444). Burden of Proof (1444). Evidence (1445). Instructions (1445). Special Findings (1445). Damages and Attorney's Fees (1445).

G. Fires (1446). Equipment and Operation of Engines (1446). Contractual Exemptions (1447). Contributory Negligence (1447). Pleading (1448). Burden of Proof and Presumptions (1448). Admissibility of Evidence (1449). Sufficiency of Evidence (1450). Instructions (1451). Special Findings (1452). Damages (1452).

§ 8. Offenses Against Railroads and State (1452).

The duties and liabilities of railroad companies as common carriers,[57] their liabilities to employes,[58] and matters common to all corporations,[59] are elsewhere treated.

54. Simonton v. State, 43 Fla. 351.

55. Denial of petition of state's attorney affirmed on the ground that the contention on which he wished to rely in the proceedings, that a certain statute authorizing a consolidation of gas companies was unconstitutional, was unsound. People v. People's G. & C. Co., 205 Ill. 482, 68 N. E. 950; Tenn. River L. & T. Co. v. Butler [N. C.] 45 S. E. 956; Sweeny v. Adams, 141 Cal. 558, 75 Pac. 182.

56. See Taxation for taxation of railroads for general purposes; Street Railroads; Carriers, 1 Curr. Law, p. 421; Master and Servant, 2 Curr. Law, p. 801; Eminent Domain, 1 Curr. Law, p. 1002.

57. See Carriers, 1 Curr. Law, p. 421.

58. See Master and Servant, 2 Curr. Law, p. 801.

59. See Corporations, 1 Curr. Law, p. 710.

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§ 1. *Railroad companies.*[60] *Creation and existence.*—The articles of association must comply with the statutes.[61] In case other remedies are provided, a failure to exercise powers will not terminate corporate existence.[62] Existence under a special charter continues until its repeal.[63] An unauthorized charter amendment may be ratified and validated by unanimous vote of the stockholders,[64] or a defective amendment by a subsequent statute.[65]

Certificate of public convenience.[66]—The action of a board of railroad commissioners in certifying that public convenience and necessity require the construction of a railroad is not subject to judicial revision.[67] The board has a very wide discretion as to the evidence which it will receive,[68] and may grant a certificate, though another road which has for some time possessed a legal right to build through the same territory opposes the application and shows ability and readiness to build.[69] On certiorari to review its decision, the board cannot be compelled to return statements made to it as to the financial character of promoters.[70] The board has no power to require the route to be over private land instead of over a highway.[71]

Public aid.—By statute, municipal corporations are in many states permitted to aid the construction of railroads;[72] such aid is not regarded as a mere gratuity,[73] but the road acts as a trustee in its expenditure.[74] The road may be simply a de

60. See article Corporations, 1 Curr. Law, p. 710, for questions not peculiar to the operation of railroads.

61. Must show from their face that the requisite amount of stock per mile has been subscribed. Kinston & C. R. Co. v. Stroud, 132 N. C. 413.

62. Failure to equip a railroad to carry freight is not a ground for denying the corporation powers created by statute where a statute authorizes the collection of damages by a person injured [Burns' Rev. St. 1901, § 5190]. Demaree v. Bridges, 30 Ind. App. 131, 65 N. E. 601.

63. Though all the property has been sold under a mortgage and the corporation has ceased to hold meetings or elect officers or directors. Williard v. Spartanburg, U. & C. R. Co., 124 Fed. 796.

64. Ga. R. & B. Co. v. Maddox, 116 Ga. 64.

65. Acknowledgment before a notary public is validated by Acts 1901, p. 179, c. 118. Tenn. Cent. R. Co. v. Campbell, 109 Tenn. 655, 73 S. W. 112.

66. The railroad law of 1890 is not excluded from its operation over New York City by the rapid transit act of 1891. It is more than a mere codification of preexisting laws and gives the authority for the construction of railroads in New York City without reference to the provisions of the act of 1860. Construing statutes. People v. Board of R. Com'rs, 81 App. Div. [N. Y.] 242.

67. Laws 1892, p. 1395, c. 676, § 59. People v. Board of R. Com'rs, 81 App. Div. [N. Y.] 242.

68. People v. Board of R. Com'rs, 81 App. Div. [N. Y.] 237.

69. A road which does not show in itself a right to build cannot object to the issuance of a certificate to another company. People v. Board of R. Com'rs, 81 App. Div. [N. Y.] 237.

70. People v. Board of R. Com'rs, 76 App. Div. [N. Y.] 302, 39 Misc. 1.

71. New York statutes providing for the determination by Railroad Commissioners of the necessity of a proposed route give such commissioners no authority to issue a certificate to effect that public convenience requires the construction of a road between two points provided the road be built "upon private right of way and not in the highway except in cities and villages." People v. Board of R. Com'rs, 92 App. Div. [N. Y.] 126.

72. See Counties, 1 Curr. Law, p. 816; Municipal Corporations, 2 Curr. Law, p. 940; Municipal Bonds, 2 Curr. Law, p. 931.

General statutory permission for the issuance of aid bonds is applicable to a subsequently incorporated community. Gen. St. § 2771 applies to the Village of Red Lake Falls (Sp. Laws 1881, p. 253, c. 40). Schmitz v. Zeh [Minn.] 97 N. W. 1049. A statute providing the period in which railroad aid bonds may be redeemable does not repeal a former statute providing the time in which the principal shall be made payable. Laws 1887, c. 77, § 1, does not repeal Laws 1876, c. 107, § 13. Little River Tp. v. Board of Com'rs, 65 Kan. 9, 68 Pac. 1105.

73. The road and taxpayers are in a quasi contract relation. James v. Ark. Southern R. Co., 110 La. 145.

74. Where a county subscribes money "to be expended when found necessary on the work on said road in the county and not out of it in the right of way in grading and in the necessary masonry," the company acts as trustee and where it has done the acts provided for cannot be charged with a breach of trust in buying ties and rails necessary to put the road in operation. Marion County v. Louisville & N. R. Co. [Ky.] 78 S. W. 437. The claim of a county for breach of trust in the application of a subscription cannot be enforced after the expiration of twenty years and after the road has passed into the hands of a new company without notice. Id.

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facto corporation,[75] and may be required to be a domestic corporation.[76] Bonds issued by a municipality in excess of the amount authorized by statute are void only as to the excess.[77]

The character of the aid is controlled by the petition and notice of the election at which it is voted.[78] It may be a stock subscription, in which case the subscriber stands in the relation of other stockholders.[79] Such subscription may be made by a local officer.[80] Conditions are usually imposed on the aided road.[81]

Purchasers of bonds are bound by matters of public record.[82] They acquire no inviolable contract right through adjudications of the validity of enabling statutes.[83] A clerical error in the taxpayer's petition is not fatal.[84] The taxpay-

75. It cannot be urged that the companies named in the petition are not legally organized and existing where they were de facto corporations existing sufficiently to construct, equip and put into operation the road which the taxpayers desired to have made. James v. Ark. Southern R. Co., 110 La. 145.

76. Evidence held insufficient to show that in the issuance of bonds a town was dealing with a corporation of the same name incorporated under the laws of a foreign state with which the local corporation was consolidated, though the application was signed by one as general manager who prior to the consolidation had been general manager of the foreign corporation. Municipal Trust Co. v. Johnson City [C. C. A.] 116 Fed. 458.

77. Schmitz v. Zeh [Minn.] 97 N. W. 1049.

78. Where the petition for a special election specifies the aid as a donation or taking of stock, and the election notice states that the vote is to be taken on the question of aiding the road by donation, and the order of election and collection of tax designates it as an appropriation, the aid to be extended is regarded as a donation. State v. Board of Com'rs [Ind.] 68 N. E. 295.

79. The county may be estopped from denying the right of a corporation to stop interest on its stock by the declaration of a stock dividend, by acquiescence in subsequent cash dividends on the basis that the interest was so stopped, and by representation by its sinking fund commissioners. Louisville & N. R. Co. v. Hart County, 25 Ky. L. R. 395, 75 S. W. 288. The presumption that county bonds delivered in payment of stock subscriptions were delivered on the day of their date may be overcome in part by evidence that other counties delivered their bonds after date in similar cases. Id. Where it is provided that the holders of stock issued to the holders of tax receipts for taxes to defray interest on county aid bonds shall be entitled to all the rights and privileges of stockholders, such holder of the tax receipts is entitled to stock equal to its face together with all cash and stock dividends declared thereon [Acts 1851-52, p. 742, c. 429, § 15; 1 Acts 1855-56, p. 188, c. 20, § 4]. Id.

80. The county court may direct the clerk to make the subscription to railroad stock on behalf of the county, and such being a direction to do merely a ministerial act is not an invalid delegation of the power. Green County v. Shortell, 25 Ky. L. R. 357, 75 S. W. 251.

81. The company does not forfeit its right to aid by buying an existing narrow gauge road traversing a small portion of its mileage and transforming it into a standard gauge road. Bradley Ramsey Lumber Co. v. Perkins, 109 La. 317. An agreement by a corporation to establish its repair shop and roundhouse at a particular place requires it to maintain but one such building, and the character of the buildings is governed by the necessities of the road. Agreement in consideration of grant of aid. Id. Construction of 4½ miles within a county by a successor of the aided corporation is not fulfillment of a condition for the construction through the county of a road to be built entirely across a state. Green County v. Shortell, 25 Ky. L. R. 357, 75 S. W. 251. Where the question as submitted at the election made the issuance of the bonds conditional on the exoneration of the county from a stock subscription to another road, such exoneration is a condition precedent after which the bonds could be issued subject to invalidation by the failure of the road to construct its line in accordance with another provision. Id. The police jury in respect to taxes authorized to be levied by them under special consent in Louisiana serve exclusively as an agency of the will of the taxpayers and cannot impose heavier conditions on the road which is aided than the taxpayers impose in their petition, and when the jury declares that the work shall be commenced and completed within a certain designated time, the petition having made no provision, the jury may waive such condition or penalty. James v. Ark. Southern R. Co., 110 La. 145.

82. Where railroad aid is authorized by a charter in exception to the general laws of the state, a purchaser of the bonds is bound by conditions appearing of record in the county court but not printed in the bonds. Green County v. Shortell, 25 Ky. L. R. 357, 75 S. W. 251.

83. Where an act of incorporation is held unconstitutional on the ground that its title does not express a provision for the transfer to the corporation of municipal subscriptions in aid of another railroad, a purchaser of the railroad aid bonds issued by a county has no contract rights which the Federal constitution will protect, though his purchase was on the faith of adjudications that municipal subscriptions to railroad stock need not be specifically mentioned in the title of the incorporating act. Zane v. Hamilton County, 189 U. S. 370, 47 Law. Ed. 858.

84. Error in the designation of the corporation which is immediately corrected cannot be made the basis of a collateral at-

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ers or municipality may be estopped to contest the validity of aid by acquiescence.[85] or by recitals in bonds issued.[86] In the absence of such recitals, bonds may be defended,[87] though interest has been paid for some years.[88]

Mandamus is a proper remedy to secure collection of an aid tax, its validity having been adjudicated.[89]

Private aid. Subscriptions.—The terms of a written subscription are conclusive in the absence of fraud or mistake.[90]

Powers.[91]—The power to hold property may be limited to that needed and used in operation of the road.[92] A portion of railroad property may be leased as a public warehouse.[93] An authority to build branches or extend into certain towns permits the purchase for a branch of a road already constructed.[94] The right to hold stock in other corporations must be specially granted.[95] An employe's relief association is not contrary to public policy or ultra vires.[96]

Execution of contracts and representation by officers.[97]—Statutory provisions

tack, the identity of the corporation not being questioned. James v. Ark. Southern R. Co., 110 La. 145.

85. Where taxpayers have had ample opportunity to repudiate the acts of a police jury concerning an election for aid, they must not delay until the company has placed itself in a position rendering a placing in statu quo impossible. James v. Ark. Southern R. Co., 110 La. 145. Where a county accepts stock, taxes a railroad and pays interest on bonds issued in payment, it may be estopped as against a bona fide holder for value to deny facts precedent to a statutory power to issue such bonds, such as necessity of subscription or interest of the citizens of the county under Code N. C. 1883, § 1996. Board of Com'rs of Stanley County v. Coler [C. C. A.] 113 Fed. 705. Where there is not a total lack of power to issue railroad aid bonds, the taxpayers may be estopped to deny their validity in the hands of third persons holding in good faith and without notice of irregularities by long continued levy and payment of taxes to meet accruing interest. Schmitz v. Zeh [Minn.] 97 N. W. 1049.

86. A recital in the bonds of facts precedent to their issuance which county officers are to determine estops the county as against a bona fide holder. Wilkes County Com'rs v. Coler [C. C. A.] 113 Fed. 725.

87. Recitals as to the authority of officers issuing them or as to the performance of preliminaries requisite to their issue. Green County v. Shortell, 25 Ky. L. R. 357, 75 S. W. 251.

88. Green County v. Shortell, 25 Ky. L. R. 357, 75 S. W. 251.

89. As where an order directing the board of county commissioners to order the enforcement of a tax levy is reversed as to the direction on account of a defect in parties, though the validity of the tax is affirmed, so also where a county board has made an order for the collection of an aid tax, and subsequently made an order suspending the original order, mandamus will lie to compel the entry of a new order and a person interested is not bound to proceed on the original order or appeal from the second order suspending it. State v. Board of Com'rs [Ind.] 68 N. E. 295. The burden is on the board to show any later orders. Only the form of proceedings for the collection of the tax may be considered. One who is a taxpayer at the beginning of the proceeding may maintain it.

90. A subscription for the purpose of securing a railroad cannot be recovered on the ground that it was made with the intention of securing competition and that competition has ceased, where the contract is in writing and makes no mention of such consideration and at the time of subscription there was no road with which competition could have been had. Sims v. Greenfield & N. R. Co. [Mo. App.] 74 S. W. 421.

91. Authority to employ counsel to answer confessing a bill is immaterial where complainant would be entitled to a default and a decree pro confesso had no answer been filed. Foreclosure. Cent. Trust Co. v. Wash. County R. Co., 124 Fed. 813.

92. The upper story of a depot, though separately leased as a public warehouse, is not within the meaning of a constitutional provision requiring a corporation to dispose of its land within a certain time if not in use, according to the purpose of its charter. State v. New Orleans Warehouse Co., 109 La. 64.

93. State v. New Orleans Warehouse Co., 109 La. 64.

94. Cent. Trust Co. v. Wash. County R. Co., 124 Fed. 813.

95. Cannot subscribe for stock in a land company even by the intervention of trustees. McCampbell v. Fountain Head R. Co. [Tenn.] 77 S. W. 1070.

96. State v. Pittsburg, C., C. & St. L. R. Co., 68 Ohio St. 9, 67 N. E. 93.

97. A consent to a street railroad to cross the company's track is not sufficiently evidenced by a paper signed by the vice-president without the corporate seal or signature of the secretary, though a place for such signature appeared and also an affidavit for the secretary to make which did not appear to have been made. Ballston Terminal R. Co. v. Hudson Val. R. Co., 76 App. Div. [N. Y.] 184. The corporation is not estopped by a statement of its president and general manager that its engine set a fire. Cheek v. Oak Grove Lumber Co. [N. C.] 46 S. E. 488. Acceptance of rent by the comptroller of the company will not show waiver of notice to quit in the absence of evidence of intention or authority. Western Union Tel. Co. v. Pa. R. Co. [C. C. A.] 123 Fed. 33.

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that branches in excess of a certain length must be authorized by a resolution of the stockholders do not apply to branches of less length.[98] A resolution by the board of directors to construct, conferring authority on the president and secretary to execute papers necessary to procure ordinances, is sufficient authority to the president and secretary to accept an ordinance fixing the route and affix the corporate seal.[99]

Bonus and earnings taxes.—A railroad created by special charter is not relieved from the obligations imposed by its charter through its acceptance of the general railroad law,[1] and conversely railroad companies specially authorized to increase their capitalization to a certain amount without payment of bonus are not affected by a subsequent general statute imposing such a condition,[2] nor are corporations formed by a merger of such companies.[3]

A charter obligation to turn earnings over a fixed per cent. to the state after the stockholders have realized a specified sum cannot be added to by subsequent legislation, though remedies may be provided for its enforcement.[4] Payment may be compelled though the legislature does not exercise its power to regulate charges after the earnings have reached the sum to be repaid shareholders.[5] Earnings cannot be capitalized as against the state to diminish the percentage of surplus.[6] The obligation is not removed by a subsequent special act relieving the company from constructing part of the contemplated road, and creating a new corporation to construct such portion.[7] An action to recover surplus earnings for the school fund under a charter obligation is not to be regarded as on a contract not in writing and as a simple claim of money barred by the corresponding statute of limitations.[8] It is not barred by laches on the part of state officers.[9] It may be referred to a master,[10] and if enough items sued for are sustained to equal the amount of plaintiff's recovery and the finding is general, the question of whether revenue taxes paid the national government were paid as an excise on the earnings and so a charge against the corporation, or as a tax on the dividends declared and so a charge against the stockholders, becomes immaterial.[11]

Foreign corporations.[12]—On compliance with statutory requirements, foreign corporations are usually permitted to become domestic so far as to exercise the right of eminent domain,[13] but compliance for such purpose does not render them citizens in the sense the term is used in fixing jurisdiction of the federal courts.[14]

98. Acts 1897-98, p. 172, c. 168. Zircle v. Southern R. Co. [Va., 45 S. E. 802.

99. In the absence of other evidence, the acceptance so signed and sealed would moreover be presumed to be the authorized act of the corporation. Mercer County Traction Co. v. United N. J. R. & C. Co. [N. J. Eq.] 56 Atl. 897.

1. Terre Haute & I. R. Co. v. State, 159 Ind. 438, 65 N. E. 401.

2. The act of June 4, 1883, Pub. Laws, 67, is not repealed by Act Feb. 9, 1901, so that a railroad increasing its capital stock pursuant to the later statute is not required to pay the bonus tax provided by Act May 3, 1899, Pub. Laws, 189. Com. v. Buffalo & S. R. Co., 207 Pa. 154.

3. Com. v. Buffalo & S. R. Co., 207 Pa. 154. A Pennsylvania corporation merged with a New York corporation prior to the enactment of a statute requiring a bonus on the increase of capital stock may increase its stock without payment of such bonus, the rights being held by the individual companies and transferred to the merger. Com. v. Buffalo, R. & P. R. Co., 207 Pa. 160.

4. Acts 1897, pp. 8, 59, 145 are unconstitutional unless appealed to merely as providing a remedy for enforcing charter obligations imposed on the Terre Haute & Richmond R. Co., chartered by Local Laws 1847, p. 77. Terre Haute & I. R. Co. v. State, 159 Ind. 438, 65 N. E. 401.

5. Terre Haute & I. R. Co. v. State, 159 Ind. 438, 65 N. E. 401.

6. Local Laws 1847, p. 82, § 23. Terre Haute & I. R. Co. v. State, 159 Ind. 438, 65 N. E. 401.

7. Terre Haute & I. R. Co. v. State, 159 Ind. 438, 65 N. E. 401.

8. Action based on Local Laws 1847, p. 77, is not barred by the 15 year statute of limitation but the 20 year statute is applicable, the act being regarded as a written contract. Terre Haute & I. R. Co. v. State, 159 Ind. 438, 65 N. E. 401.

9, 10, 11. Terre Haute & I. R. Co. v. State, 159 Ind. 438, 65 N. E. 401.

12. See generally article Foreign Corporations, 2 Curr. Law, p. 40.

13. Act March 13, 1889; Acts 1889, p. 43, c.

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Taxes required of foreign corporations as a condition to doing business may be collected from a road but partially constructed prior to their imposition, though not from corporations which have already built their lines of railroad into or through the state.[15]

Process.—Service of process on railroad corporations, whether domestic or foreign, is largely controlled by statute.[16] Variance between the summons and return in showing service on a "railway" in place of a "railroad" company is fatal on appeal in the absence of a showing of identity.[17]

Venue.[18]—A statement in the charter as to the location of the principal place of business is not controlling as to venue,[19] nor does the principal office fix the residence.[20] Venue may be confined to a particular county by statute[21] and may be governed by the statute applicable to local parties,[22] hence a statutory provision that an action may be brought in any county through which a railroad runs does not allow a plaintiff to elect in which county suit may be brought in contravention of general Code provisions.[23] An action for personal injuries is transitory.[24]

Control by railroad commissions.—Railroad commissions may inquire into matters concerning public comfort and convenience.[25] May assess a penalty for violation of its orders subject to final action of the court,[26] and may make their

14. Russell v. St. Louis S. W. R. Co. [Ark.] 75 S. W. 725.

14. Davis' Adm'r v. Chesapeake & O. R. Co., 25 Ky. L. R. 342, 75 S. W. 275.

15. The tax is to be based on the amount of capital employed in the construction of the portion of the line lying within the state less the amount constructed before the enactment of the statute [Rev. St. 1899, § 1025; Laws 1891, p. 75]. State v. Cook, 171 Mo. 348, 71 S. W. 329.

16. The sheriff's return must state that a copy of the summons was left with a person in charge of an office of defendant company. Vickery v. Omaha, K. C. & E. R. Co., 93 Mo. App. 1. In garnishment the return must show service on the nearest station or freight agent. Antonelli v. Basile, 93 Mo. App. 138. Where service may be on the managing agent of a foreign corporation, it is properly made on a station agent authorized to sell and collect for passenger tickets and to receive and deliver freight and to collect for freight shipments. Brown v. Chicago, M. & St. P. R. Co. [N. D.] 95 N. W. 153. Jurisdiction of a foreign railroad cannot be obtained by service on an advertising agent without power to sell tickets or contract. Not a doing of business within the meaning of Ball. Ann. Codes and St. § 4875. Rich v. Chicago, B. & Q. R. Co. [Wash.] 74 Pac. 1008. Provision for service on a passenger or freight agent found nearest the county seat of the county where action is brought does not authorize service on the agent of a first carrier in an action against the last of connecting carriers [Civ. Code Prac. § 51, subsecs. 3, 4]. Louisville & N. R. Co. v. Chestnut & Bro., 24 Ky. L. R. 1846, 72 S. W. 351.

17. Vickery v. Omaha, K. C. & E. R. Co., 93 Mo. App. 1.

18. Foreign railroad companies may be sued in Georgia on causes of action arising within the state either by attachment or in personam. Hazlehurst v. Seaboard A. L. R., 118 Ga. 858. In Kentucky, an action for malicious prosecution may be instituted against a railroad company in a county through which defendant was transported on defendant's railroad after his arrest [Civ. Code, §§ 72-74]. Evans v. Maysville & B. S. R. Co., 25 Ky. L. R. 125, 77 S. W. 708.

19. Action may be maintained at another point where the only important officers of the company doing business within the state reside and have their offices. Boyd v. Blue Ridge R. Co., 65 S. C. 326. See Malicious Prosecution, 2 Curr. Law, p. 767, for liability of railroad to such action.

20. A county in which a railroad operates its road and carries on a large part of its business, though its principal office is in another county, may be regarded as the county of its residence for the purpose of venue. Poland v. United Traction Co., 88 App. Div. [N. Y.] 281.

21. Civ. Code 1895, § 2334; Act 1892, p. 95. Hazlehurst v. Seaboard A. L. R., 118 Ga. 858.

22. Mitchell v. Southern R. Co., 118 Ga. 845.

23. Act 1889, p. 362; Civ. Code 1895, § 2334, action cannot be brought in C. county for an injury in F. county. Le Croix v. Western & A. R. Co., 118 Ga. 98.

24. May be brought in any county in Texas in which defendant is operating its road for an injury occurring in New Mexico where defendant was a foreign corporation. Atchison, T. & S. F. R. Co. v. Keller [Tex. Civ. App.] 76 S. W. 801.

25. The authority and duty is not limited to matters concerning public safety or health. Morgan's La. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 247. Complaints as to abuse of discretion by directors of a railroad company in the operation of trains may be made to the board of railroad commissioners. People v. Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788.

26. Railroad Commission of La. v. Kan. City Southern R. Co., 111 La. 133. The supreme court in settling disputes between railroads and the railroad commission acts as a judicial body and not as an administrative board supervisory of the acts of the

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orders executory after reasonable notice to the parties concerned.[27] A board of railroad commissioners has not jurisdiction to allow the taking of the right of way of one company on an intersection by another so as to exclude the first from the territory taken.[28]

§ 2. *Location of road, termini and stations.*—In the absence of exact and definite location in the charter, discretion is vested in the company.[29] In the absence of statute, the line need not be located by the directors.[30]

Filing, location, profile, etc.—Attestation by the proper officer shows that a location was legally and properly made,[31] and immaterial or formal defects are not fatal.[32] In the absence of a definite description of the location in the map filed by the company or in a grant of a right of way by an abutter, rights are limited to the track established at the time of the grant.[33] A judgment declaring proceedings for an extension invalid for the want of proper consents to the original route by abutters leaves the description of the original as filed, unaffected.[34] There is no legal presumption that consents were given in reference to a defective map.[35]

Alteration and changes.—A statute permitting the altering or changing of a route does not authorize an extension past the original terminals.[36] A railroad chartered to run between two points will not after having located its station and terminal facilities be permitted to call another point its terminus because the location is technically within the meaning of the charter.[37]

Compulsory maintenance of stations, sidings, etc.[38]—A railroad commission has not in the absence of statute authority to require the location of a station and

commission. Morgan's La. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 247.

27. Railroad Commission of La. v. Kan. City Southern R. Co., 111 La. 133.

28. Laws 1901, c. 286, § 14. Atchison, T. & S. F. R. Co. v. Kan. City, M. & O. R. Co., 67 Kan. 569, 70 Pac. 939.

29. A road is not rendered a belt line not authorized by its charter by failure to select the most direct route between its termini, where its circuitous nature arises from physical features and typography. Tenn. Cent. R. Co. v. Campbell, 109 Tenn. 655, 73 S. W. 112. A charter provision locating a road "near" a certain village does not prevent the road from passing through such village. Hill v. Southern R. [S. C.] 46 S. E. 486.

30. Location by the president on suggestion or advice of the general manager and engineers is sufficient. Tenn. Cent. R Co. v. Campbell, 109 Tenn. 655, 73 S. W. 112.

31. Clerk of board of county commissioners. Nicholson v. Me. Cent. R. Co., 97 Me. 43.

32. Omission of date where approval by county commissioners shows its timeliness or variance between certificate of approval of location and date of communication from the president of the road with regard thereto where there can be no confusion or insufficient evidence as to the authority of a corporate officer to file where his act has been acquiesced in for nearly 30 years. Nicholson v. Me. Cent. R. Co., 97 Me. 43.

33. The company has no power without the property owner's consent or by condemnation proceedings to build additional tracks, switches or sidings. Stephens v. N. Y., O. & W. R. Co., 175 N. Y. 72, 67 N. E. 119. A map showing a proposed railroad by a single line without indication as to whether the line is the center or exterior line of the route or of its width, or of the amount of land to be taken, is an insufficient compliance with Gen. Railroad Act 1850 [Laws 1850, p. 211, c. 140] requiring a map and profile of the route adopted. Id.

34. The company may procure new consents and fresh ordinances authorizing construction of the route. Mercer County Traction Co. v. United N. J. R. & C. Co. [N. J. Eq.] 56 Atl. 897.

35. A map showing the termini with the route between, but not indicating the termini of the various courses, is so insufficient that notwithstanding its filing the petitioner may begin proceedings de novo, and under Pub. Laws 1893, p. 206, § 6, consents of abutters may be validly executed before the description and map is filed in the office of the secretary of state. Mercer County Traction Co. v. United N. J. R. & C. Co. [N. J. Eq.] 56 Atl. 897.

36. Greenwich & J. R. Co. v. Greenwich & S. Elec. R., 75 App. Div. [N. Y.] 220. A change in terminus for the sole purpose of increasing the road's business is not authorized by statute authorizing a road to be located in a county adjoining any county named in the certificate of incorporation in case the directors believe that the line will be improved thereby [Laws 1890, c. 565]. Greenwich & J. R. Co. v. Greenwich & S. Elec. R., 172 N. Y. 462, 65 N. E. 278.

37. State v. Northern Pac. R. Co., 89 Minn. 363, 95 N. W. 297.

38. Maintenance of train service, see post, § 7A. Const. §§ 15, 22, against discriminations by railroads in transportation facilities and against monopolies is not self-executing, and a statutory provision to the same effect (Ball. Ann. Codes & St. § 4322),

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the erection of a depot at a particular point.[39] Where such authority is given, it must be exercised with regard to the rights of both the road and the public.[40] A railroad commission may be authorized to prevent the removal or abandonment of a spur track already established which is in use and in the use of which the public has an interest,[41] but maintenance should not be arbitrarily compelled.[42] Under statutes against discrimination, a road is not bound to permit sidetracks to be connected with its track unless it has permitted such connection by particular individuals, in which case it must accord similar provisions to all,[43] nor can it be compelled to extend its track to reach a warehouse over property not its own.[44]

§ 3. *Interest in lands and right of way. Public grants and franchises.*— Competitive bidding for a municipal franchise is sometimes but not invariably required.[45] A duty to permit concurrent public use may be imposed.[46] Grants may be for uses other than for tracks.[47] Property granted may have been dedicated to public use.[48] An enlargement of powers under a franchise does not in itself carry an extension of the franchise.[49] To retain a grant of terminal rights,

must be regarded in determining what is a discrimination. N. W. Warehouse Co. v. Or. R. & N. Co., 32 Wash. 218, 73 Pac. 388. A railroad company is not deprived of its right to manage or control its property nor is its property taken without due process of law by a statute imposing on it the burden of proving in proceedings to compel it to provide a station at an incorporated village that the establishment of such station is unreasonable and unnecessary. Minneapolis & St. L. R. Co. v. Minn., 193 U. S. 53.

39. Under Code 1896, p. 974, c. 95, art. 2, §§ 3451-3453, the commissioners have no authority to require a railroad company to change its stations or to erect and maintain depot buildings for the storage of freight, nor is such power conferred by section 3490, which confers general supervisory powers on the commissioners with authority to recommend to the railroads the adoption of such measures as the commissioners may deem conducive to public safety and interests. Nashville, C. & St. L. R. Co. v. State, 137 Ala. 439.

40. The extent to which the rights of the public will be affected may overcome questions of expense in the operation of the station or diminution of profit secured therefrom. Facts held sufficient to authorize an order of the railroad commission re-establishing a station at a point where it has been located for fifteen years. State v. Northern Pac. R. Co. [Minn.] 96 N. W. 81. The station need not be remunerative at the spot where it is ordered, though the ability of the railroad in view of its entire business to establish and maintain it should be regarded and the situation at a special locality will not govern. Morgan's La. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 247. Facts held sufficient to sustain an order directing the reopening and maintenance of a passenger and freight station as previously conducted. State v. Northern Pac. R. Co., 89 Minn. 363, 95 N. W. 297.

41. Under Const. art. 284, the commission may order that a spur or switch be not removed, subject to review by the court. Railroad Commission of La. v. Kan. City Southern R. Co., 111 La. 133.

42. Order of the railroad commission requiring the maintenance of a spur held erroneous where the spur was dangerous to operate and no longer of use. Railroad Commission of La. v. Kan. City Southern R. Co., 111 La. 133.

43. A demand for an extension of a line to a warehouse over property not belonging to the company, accompanied by an offer to accept a lease of a stated portion of the road's grounds contiguous to an existing sidetrack, is not a sufficient demand to compel the execution of a lease, even if the road was bound to execute it. N. W. Warehouse Co. v. Or. R. & N. Co., 32 Wash. 218, 73 Pac. 388.

44. N. W. Warehouse Co. v. Or. R. & N. Co., 32 Wash. 218, 73 Pac. 388.

45. A municipality under certain considerations and restrictions may grant a use to a railroad without first advertising it for sale to the highest bidder. Capdevielle v. New Orleans & S. F. R. Co., 110 La. 904. An electric road between two cities is to be regarded as a trunk railroad for the purpose of determining its rights to a franchise from a city under Const. § 164, providing that cities shall not grant franchises to street railways save to the highest and best bidder, but that such provisions shall not apply to a trunk railway. Diebold v. Ky. Traction Co., 25 Ky. L. R. 1275, 77 S. W. 674.

46. A corporation granted the right to use designated tracks may be required to permit other roads to come on such tracks on the same terms and without discrimination, and such a grant is held not prejudicially perpetual or damaging to any substantial rights of the municipality and not a parting with the police power. Capdevielle v. New Orleans & S. F. R. Co., 110 La. 904.

47. Railroad stations. Capdevielle v. New Orleans & S. F. R. Co., 110 La. 904.

48. Capdevielle v. New Orleans & S. F. R. Co., 110 La. 904. A city may grant the right to build bridges across her basins to the extent that she is concerned. Id.

49. Where the original ordinance grants a company with limited powers permission to operate a dummy railroad, permission to a company with general railroad powers in

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the road need not as to all portions of its line have complied with a statute prescribing the amount of road to be completed each year.[50]

Grants in highways and streets.[51]—A constitutional provision that any association organized for that purpose may construct a road between any points within the state does not repeal a statute preventing the occupation of streets without municipal consent.[52] By statute, a joint consent to the use of a street or highway may be required where a city and a county or township are in joint control.[53] A public street cannot be granted for a private and permanent switch track.[54]

Abandonment of a highway to a railroad is a question of intent.[55] A mere grant by public authority of permission to a railroad company to use and occupy a portion of a public street or highway does not confer an exclusive right or deprive the public of the right to use the same in any way not inconsistent with its use by the railroad company.[56] The railroad by laying tracks in a street under such authority does not acquire a perpetual easement.[57] Acceptance of a grant to occupy a street may be evidenced by occupancy of a portion.[58] The use is limited to the grant.[59] Where a corporation is limited by its charter to one right of way and is required to give at least a week's notice of intention to make application to the city council therefor, the council has no power to make a grant by implication or acquiescence.[60]

A conditional grant of a right of way cannot be revoked by a city without notice.[61] Right to build under a grant is lost by nonuser.[62]

a subsequent ordinance to operate a suburban passenger railroad is not free from the time limit fixed by the former. Chicago T. T. R. Co. v. Chicago, 203 Ill. 576, 68 N. E. 99.

50. Rev. St. art. 4558. Denison & S. R. Co. v. St. Louis S. W. R. Co., 96 Tex. 233, 72 S. W. 161.

51. The assent by a town council to a railway company authorizing the occupation of the streets under section 10, c. 52, Code 1899 is not a franchise within the meaning of chapter 29, p. 82, Acts 1901, but a grant of an easement. Belington & N. R. Co. v. Alston [W. Va.] 46 S. E. 612.

52. Const. 1874, art. 17, § 1 does not repeal Act Apr. 4, 1868, § 12, Pub. Laws, 62. Pittsburg v. Pittsburg, C. & W. R. Co., 205 Pa. 13.

53. Traction Act 1893, § 1; 3 Gen. St. p. 3235; Acts 1894, 3 Gen. St. p. 3247, and Act 1896, P. L. 1896, p. 329. Woodbridge Tp. v. Raritan Traction Co., 64 N. J. Eq. 169.

54. Cereghino v. Or. Short Line R. Co., 26 Utah, 467, 73 Pac. 634. A private citizen specially damaged may have an injunction. Id. A railroad company having lawfully laid its tracks in the streets of a town, an injunction will lie to prevent the tearing up and removing of the tracks by the town authorities. Belington & N. R. Co. v. Alston [W. Va.] 46 S. E. 612.

55. Turney v. Southern Pac. Co. [Or.] 75 Pac. 144.

56. An order of the county court granting a right to use and occupy a portion of the county road will not be so construed, nor does a subsequent order defining more specifically the duty of the company with regard to the repair of the road indicate an intention to abandon any portion of such road or relinquish the county's control, nor does a still subsequent order intended to change the traveled way to the opposite side of the track. Turney v. Southern Pac. Co. [Or.] 75 Pac. 144. Neither the railroad nor the public has an exclusive right of occupancy but each may use the whole, subject to a reciprocal duty of diligence in the avoidance of probable danger. Southern R. Co. v. Crenshaw, 136 Ala. 573.

57. Chicago T. T. R. Co. v. Chicago, 203 Ill. 576, 68 N. E. 99. A resolution granting a railroad company permission to lay its tracks in a street on condition that the permission might be revoked at the pleasure of the city, and the railroad company laid its tracks by virtue of such permission, the city had a right thereafter to revoke the permission and remove the tracks. Del., L. & W. R. Co. v. Oswego, 86 N. Y. Supp. 1027.

58. Denison & S. R. Co. v. St. Louis S. W. R. Co., 96 Tex. 233, 72 S. W. 161.

59. A limitation as to the distance a road shall be located from the curb line of a street is not abrogated by the erection of a levee in the street and the granting of permission to the road to construct its tracks on top of the levee. City of Alexandria v. Morgan's La. & T. R. & S. S. Co., 109 La. 50. An ordinance granting permission to construct a single track in a street cannot by construction be enlarged to permit the construction of two. Klosterman v. Chesapeake & O. R. Co., 24 Ky. L. R. 1183, 71 S. W. 6. If a railroad having a right to construct one track wrongfully constructs an additional track, the cause of action to an adjoining owner for damages is barred by a limitation of five years save as to the damages sustained by reason of the construction of two tracks which would not have been sustained by the construction and prudent operation of one track. Id.

60. Klosterman v. Chesapeake & O. R. Co., 24 Ky. L. R. 1183, 71 S. W. 6.

61. The power is judicial and the railroad company cannot be deprived of its vested rights by a forfeiture. City of Alex-

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Consent of abutting owners to the location of a single track road does not bar recovery of damages from the construction of additional tracks.[63] Though the consent may release the interest in the soil of the street, the extent of use granted depends on the circumstances contemporaneous to the agreement.[64]

Rights in public lands.—A railroad's title to its right of way is superior to a mining claim located subsequently to the filing of articles of incorporation and proofs of organization, though its profile map has not been accepted because the lands are unsurveyed.[65] On abandonment of a mining claim, it becomes public land to which a railroad right of way may attach and a relocation is subject to the easement.[66]

Right of eminent domain.[67]—The power cannot be exercised to effectuate an illegal control of parallel lines.[68] The discretion of railroads in the condemnation of property will not be controlled where not clearly abused.[69] A right of way may be condemned to reach the property of an individual.[70] Land within the right of way which has formerly been purchased subject to a condition subsequent and of which the grantor has recovered possession on failure of performance may be condemned.[71] Payment of the award is a condition precedent to the divesting of title.[72] Under constitutional provisions that payment must be made before a right of way shall be appropriated, statutes cannot be enacted authorizing a railroad to enter into possession pending condemnation proceedings.[73] A judgment of ejectment against the railroad which will operate harshly may be suspended by a court of equity for a period sufficient to allow rights to be acquired by condemnation.[74]

Where a railroad appropriates a highway under a statutory provision allowing

andria v. Morgan's La. & T. R. & S. S. Co., 109 La. 50.

62. A railroad company had acquired permission from a city, on two different occasions, to lay its tracks in a street, but failed to do so. Seven years thereafter it obtained permission to lay its tracks there on certain conditions. Held, that the road had abandoned all the rights it acquired under the first permission. Del., L. & W. R. Co. v. Oswego, 86 N. Y. Supp. 1027.

63. Stephens v. N. Y., O. & W. R. Co., 175 N. Y. 72, 67 N. E. 119.

A grant on consideration that there shall be no unnecessary obstruction does not confer a right to utilize the street for as many sidings and switches as it may deem necessary after a single track has been constructed in conformity with a map filed showing its route by a single line. Id. As to additional burdens, see generally Eminent Domain, 1 Curr. Law, p. 1002.

64. Stephens v. N. Y., O. & W. R. Co., 175 N. Y. 72, 67 N. E. 119.

65. 18 Stat. 482, § 1. Pa. M. & I. Co. v. Everett & M. C. R. Co., 29 Wash. 102, 69 Pac. 628.

66. Act Cong. March 3, 1875, §§ 1, 4; 18 Stat. 482, 483, c. 152. Bonner v. Rio Grande S. R. Co. [Colo.] 72 Pac. 1065.

67. This subject is fully treated in the article Eminent Domain, 1 Curr. Law, p. 1002, where all questions relating to the right to take, procedure and compensation are discussed. Nothing but the bare right to so acquire property is treated here.

68. Under Illinois statute giving a foreign corporation which has control of a railroad situated within the state power to exercise the right of eminent domain, but not permitting any railroad company to purchase competing lines, a company which purchased a parallel line on the opposite side of the Mississippi river in another state could not exercise the power of eminent domain (Ill. State Trust Co. v. St. Louis, I. M. & S. R. Co., 208 Ill. 419, 70 N. E. 357); and the owner of the land could raise the question in condemnation proceedings brought by such foreign corporation and need not resort to quo warranto. (Id.).

69. Zircle v. Southern R. Co. [Va.] 45 S. E. 802. Under Gen. St. 1901, § 1359, a railroad company may condemn a tract of some 20 acres separate and apart from its right of way for the purpose of a water station. Dillon v. Kan. City, Ft. S. & M. R. Co., 67 Kan. 687, 74 Pac. 251. Pennsylvania constitution held not to repeal an exemption of dwelling houses from condemnation by railroad companies provided in an earlier statute. Weigold v. Pittsburg, C. & W. R. Co. [Pa.] 57 Atl. 188.

70. Not a taking for private use if the track is for the use of the road and third parties who might wish to patronize the road. Zircle v. Southern R. Co. [Va.] 45 S. E. 802.

71. Act March 25, 1881. Bouvier v. Baltimore & N. Y. R. Co. [N. J. Law] 53 Atl. 1040.

72. Code, § 1079. Southern R. Co. v. Gregg [Va.] 43 S. E. 570.

73. Const. art. 1, § 14; Code Civ. Proc. § 1254. Steinhart v. Superior Ct., 137 Cal. 575, 70 Pac. 629, 59 L. R. A. 404.

74. Griswold v. Minneapolis, St. P. & S. S. M. R. Co. [N. D.] 97 N. W. 538.

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it to construct its road on highways, the county may bring an action for any resulting damages.[75]

Private grants.[76]—An agreement to donate land for right of way is sufficiently supported by the enhanced value of land retained[77] or by the partial building of the road,[78] which may also work an estoppel.[79] Such an agreement is not a license revocable at will.[80] The grantor cannot thereafter establish streets across the right of way by dedication.[81] Rights under a dedication by a lessee terminate with the lease.[82]

Construction without objection from the owner gives a right of way by estoppel.[83]

Conditions and reservations in private grants.[84]—Maintenance of a station may be made a condition,[85] but a condition against such maintenance within a limited distance may be against public policy.[86] A reservation may be valid, though not mentioned in a guardian's order of sale.[87]

Covenants to fence, to provide crossings and switches run with the land.[88] A subsequent purchaser of the road's property is bound.[89] The grantor does not lose his right to enforce them by conveying all of his land except a narrow strip along the right of way.[90] The road must not obstruct its right of way so as to interfere with a right of way reserved by its grantor.[91] A duty not to alter the grade of the roadbed will not be implied,[92] unless plainly shown by the circum-

75. Appropriation under Rev. St. 1895, art. 4426. St. Louis, S. F. & T. R. Co. v. Grayson County [Tex. Civ. App.] 73 S. W. 64. The measure of damages is the amount required to put the new road in as good condition as the old one appropriated. Id. Where the railroad has built a new road to take the place of a highway appropriated by it, evidence of the condition of the old road and of the new road at times remote from that of the taking should be excluded. Id. An instruction should be given excluding evidence of an excavation adjacent to a new road built by the company in place of the highway from the consideration of the jury on the question of damages. Id.

76. A description of a right of way as a strip 40 feet in width from the center line of the road measured on the north side of said railroad, the grantor to have the privilege of fencing within 20 feet of the center line after completion, amounts to a reservation of a license to cultivate the outside 20 feet. Chicago & S. E. R. Co. v. Wood, 30 Ind. App. 650, 66 N. E. 923.

77. Cadiz R. Co. v. Roach, 24 Ky. L. R. 1761, 72 S. W. 280.

78. Being a detriment to the promisee. Cadiz R. Co. v. Roach, 24 Ky. L. R. 1761, 72 S. W. 280.

79. Cadiz R. Co. v. Roach, 24 Ky. L. R. 1761, 72 S. W. 280.

80. After occupancy of the right of way by the road and the expenditure of money, a mortgage to a third person does not revoke the agreement. Ill. Southern R. Co. v. Borders, 201 Ill. 459, 66 N. E. 382.

81. State v. Morgan's La. & T. R. & S. S. Co., 111 La. 120.

82. City of Durham v. Southern R. Co., 121 Fed. 894.

83. Omaha B. & T. R. Co. v. Whitney [Neb.] 94 N. W. 513. A landowner who stands by and sees a railroad constructed on his farm and makes no protest is estopped to recover possession of his land after the railroad is completed and the interest of the public in the road has become fixed (Ind. R. Co. v. Morgan [Ind.] 70 N. E. 368), and the fact that the company had not the power of eminent domain is immaterial (Id.)

84. Description held sufficient to manifest an intention of the grantor to reserve. Porter v. Kan. City & N. C. R. Co. [Mo. App.] 77 S. W. 582.

85. A condition for a reversion of a grant of a right of way in case of failure to maintain a depot at a certain point as a condition subsequent is not void as to public policy, causes the title and right of possession to revert on breach, and may be asserted by the grantors in ejectment either against the railroad or the public. Griswold v. Minneapolis, St. P. & S. S. M. R. Co. [N. D.] 97 N. W. 538. A condition for a depot is not complied with by the furnishing of a sidetrack on which trains are stopped. Ark. Cent. R. Co. v. Smith [Ark.] 71 S. W. 947.

86. A covenant not to build a depot within three miles of one established, especially where the railroad commission determines the necessity of a depot within such distance. Beasley v. Tex. & P. R. Co., 191 U. S. 492.

87. Reservation of right of way. Porter v. Kan. City & N. C. R. Co. [Mo. App.] 77 S. W. 582.

88, 89, 90. Chicago, St. L. & N. O. R. Co. v. Wilson, 25 Ky. L. R. 525, 76 S. W. 138.

91. Porter v. Kan. City & N. C. R. Co. [Mo. App.] 77 S. W. 582.

92. A duty to maintain a grade at the point established when abutting owners erect improvements will not be implied in the absence of express agreement, though it is possible the railroad might be responsible for arbitrarily changing its grade without due reference to public necessity. Lie-

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stances.[93] A mining right must be so exercised as not to undermine the surface support or let down the tracks unless such right is reserved by express words or by necessary implication.[94]

Enforcement of conditions.—The grantor is in most cases confined to an action for damages.[95] Demand of performance is unnecessary where the right is denied.[96] For the sufficiency of demand in a particular case, see the footnotes.[97]

In an action on a covenant in a right of way deed, the omission of the word "branch" from the name of the company as constituting a variance from the description in the covenant is immaterial.[98] In an action for the breach of an agreement to remove a track to permit mining, it is not necessary to allege the amount of mineral which plaintiffs were prevented from mining or the possibility of defendants complying with the notice alleged.[99]

The measure of damages for breach of an agreement to move tracks to permit mining is the value of the mineral that cannot be mined without injury to the surface of the right of way or lowering the tracks.[1] For breach of a contract to build a station on certain land, it is the difference in value with and without the station.[2]

Rights as against subsequent grantees.—A prior right of way grant is superior to a subsequent right of quarry, and the construction of the road cannot be enjoined by the quarry owner.[3] Occupancy affords notice to subsequent grantees,[4] though it has been held that an agreement to convey on request within a specified time does not give the company a right of possession as against a subsequent

del v. Northern Pac. R. Co., 89 Minn. 284, 94 N. W. 877.

93. A grant of right of way does not confer the right to erect a track above grade where the permission is to operate a road substantially as erected in a certain street over which a surface line was built. Lane v. Mich. Traction Co. [Mich.] 97 N. W. 354.

94. Silver Springs, O. & G. R. Co. v. Van Ness [Fla.] 34 So. 884.

95. Action to recover possession will not lie. Southern Cal. R. Co. v. Slauson, 138 Cal. 342, 71 Pac. 352. A deed providing for the removal of tracks on the right of way granted to permit mining construed to contain a covenant and not a reservation, limitation or condition subsequent so that an action for damages would lie. Silver Springs, O. & G. R. Co. v. Van Ness [Fla.] 34 So. 884. On breach of an agreement to erect a retaining wall to preserve the wall of an abutting building parallel to a cut, an action may be brought in tort or on contract. Rector, etc., of Church of Holy Communion v. Paterson Extension R. Co., 68 N. J. Law, 399. On the erection of a track above the surface, the owner is confined to mere pecuniary damages and cannot have the track torn up and the route abandoned. Lane v. Mich. Traction Co. [Mich.] 97 N. W. 354. Where a railroad abandons a contract settling a claim of damages for right of way after a lapse of fifteen years, the landowner may institute suit on the basis of a permanent appropriation of the land and recover damages as on a proceeding by condemnation. It is proper to seek further a judicial determination that the contract no longer measures the rights of the parties. St. Louis & S. F. R. Co. v. Yount, 67 Kan. 396, 73 Pac. 63.

96. Plaintiff need not demand the construction of a private switch and crossing covenanted for in consideration of a right of way grant where the defendant by its pleadings denies his right of action to enforce such covenant. Chicago, St. L. & N. O. R. Co. v. Wilson, 25 Ky. L. R. 525, 76 S. W. 138.

97. Under an agreement, on notice, to remove a track to permit the mining of minerals by the grantor, the notice need not designate a place to which the track may be removed. Silver Springs, O. & G. R. Co. v. Van Ness [Fla.] 34 So. 884. Written notice to remove a track for the purpose of allowing the mining of phosphate deposits held sufficient where a more specific one was not requested and there was no claim that the company was ignorant of the location of the deposits. Id.

98. Chicago, St. L. & N. O. R. Co. v. Wilson, 25 Ky. L. R. 525, 76 S. W. 138. The defective allegation is corrected by the deed which is attached as an exhibit. Id.

99. Silver Springs, O. & G. R. Co. v. Van Ness [Fla.] 34 So. 884.

1. Such damages may be based on evidence of a system of rodding, boring and pitting to ascertain the extent of the deposits. Silver Springs, O. & G. R. Co. v. Van Ness [Fla.] 34 So. 884.

2. Evidence held not to demand the setting aside of a verdict for nominal damages as inadequate in an action for breach of a contract to erect a station. Brooklyn Hills Imp. Co. v. N. Y. & R. B. R. Co., 80 App. Div. [N. Y.] 508.

3. Coyne v. Warrior Southern R. Co., 137 Ala. 553.

4. Consumers' G. T. Co. v. American P. G. Co. [Ind.] 68 N. E. 1020. Grading and bridge work or possession. Ill. Southern R. Co. v. Borders, 201 Ill. 459, 66 N. E. 382.

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grantee, though it has constructed its road and maintained possession for several years.[5]

Disposal of or use of right of way by company.[6]—After construction of a road, a railroad may without intention to abandon, sell for similar purposes premises acquired by it for railroad purposes.[7] A conveyance of a right of way to a railroad does not authorize the maintenance of a telegraph line for general commercial purposes, nor can the road grant an easement in its right of way for such purpose, and an attempt to do so creates a license as against the company without affecting the owner of the land,[8] but where the road has the right to construct a telegraph line upon its right of way, the purpose for which it intends using such telegraph line cannot be considered in injunction by it to prevent interference with its erection.[9]

Abandonment of right of way.[10]—Only the state or city can insist on a forfeiture of a right of way by failure to complete a track.[11] An agreement to use the property for railroad purposes is usually implied.[12] If a deed to another company may be regarded as evidence of an intention to abandon a right of way, it may be taken advantage of only by the fee owner.[13] An injunction of a prior grantee against use by a subsequent grantee amounts to a decision that there has been no abandonment.[14]

Adverse possession by or against railroad.[15]—A right of way may be acquired by prescription,[16] but merely an easement, not the fee, is acquired.[17] Possession of a highway under permission is not adverse to the public.[18] The road may tack its possession to that of its grantor for the purpose of acquiring title by adverse possession.[19] A railroad making and using a cut continues in possession of all

5. Comp. Laws, § 6234 authorizes railroad companies to acquire rights of way by purchase, voluntary grant and donation, and to take possession and hold and use such land. Wilson v. Muskegon, G. R. & I. R. Co. [Mich.] 93 N. W. 1059.

6. Under Code 1896, § 1170, a railroad may convey to a connecting line a portion of its right of way in aid of its construction. Coyne v. Warrior Southern R. Co., 137 Ala. 553.

7. Garlick v. Pittsburgh & W. R. Co., 67 Ohio St. 223, 65 N. E. 896; Garlick v. Pittsburgh, Y. & A. R. Co., 67 Ohio St. 239, 65 N. E. 896.

8. An action to recover damages is not barred until the expiration of the period after the transferee has erected its poles and wires. A witness cannot be asked as to whether the use of the telegraph line was necessary to the operation of the road. Where permanent damages are awarded, damages to crops during the preceding period of limitations cannot be allowed. Hodges v. Western Union Tel. Co., 133 N. C. 225.

9. Pa. R. Co. v. Lilly Borough, 207 Pa. 180.

10. Failure to use a small portion of a right of way granted for 14 years does not show an abandonment. Denison & S. R. Co. v. St. Louis S. W. R. Co., 96 Tex. 233, 72 S. W. 161. Where there is a license to cultivate the outside portion of a right of way granted, the erection of a fence excluding such strip does not show an abandonment thereof. Chicago & S. E. R. Co. v. Wood, 30 Ind. App. 650, 66 N. E. 923. The fact that the company leases the pond to a fishing and boating club, reserving a right to cancel the lease on short notice, does not constitute an abandonment of a water station. Dillon v. Kan. City, F. S. & M. R. Co., 67 Kan. 687, 74 Pac. 251.

11. A subsequent grantee of the same right of way cannot assert the forfeiture. Denison & S. R. Co. v. St. Louis S. W. R. Co., 30 Tex. Civ. App. 474, 72 S. W. 201.

12. Where a railroad company acquires land by a deed, on its face conveying a fee, it does not lose its title by nonuser of the land for railroad purposes. Watkins v. Iowa Cent. R. Co. [Iowa] 98 N. W. 910.

13. City of Durham v. Southern R. Co., 121 Fed. 894. Where the right of way has been acquired by warranty deed, nonuser or abandonment will not allow one to whom the grantor subsequently quitclaims to maintain ejectment. Hull v. Kan. City & O. R. Co. [Neb.] 98 N. W. 47.

14. Dennison & S. R. Co. v. St. Louis S. W. R. Co., 96 Tex. 233, 72 S. W. 161.

15. See also article Adverse Possession, 1 Curr. Law, p. 30.

16. A railroad company with charter power to acquire a right of way which enters upon lands with the consent of the owner, builds its tracks and runs its trains for forty years, acquires a right of way by prescription. Louisville & N. R. Co. v. Smith [C. C. A.] 128 Fed. 1.

17. One holding land over which the road passes under a gas lease may enjoin the sinking of a gas well on the railroad's land. Consumers' G. T. Co. v. American P. G. Co. [Ind.] 68 N. E. 1020.

18. Authority of county court. Turney v. Southern Pac. Co. [Or.] 75 Pac. 144.

19. Where it has a right to acquire title by eminent domain. Covert v. Pittsburg & W. R. Co., 204 Pa. 341.

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space occupied by the cut, but its possession does not widen with the enlargement of the excavation by the gradual washing in of the sides.[20]

By statute in some states, title to the right of way cannot be acquired against a railroad by adverse possession[21] or the right denied on the ground that the road is a public highway.[22] In others title may be a question for the jury on evidence of inconsistent adverse use[23] or a presumption of grant of a right of way of the statutory width may be overcome by adverse occupancy.[24]

Appropriation of right of way for other public use.[25]—Property taken for one public use cannot be taken for another without legislative authority clearly expressed or necessarily implied.[26] Land of a railroad not needed or used may be taken, but public exigency must demand the taking,[27] and the future needs of the railroad should be fully considered.[28] So a telegraph line may appropriate a portion of a right of way not occupied for railroad purposes,[29] unless the land is necessary to the operation of the railroad or other lines of telegraph already erected,[30] though the road is declared to be a post road of the United States,[31] and though the line could be erected on an adjacent highway.[32] Telephone lines have similar rights.[33] A railroad right of way, however, is not considered a highway as the term is used in a grant of the right of eminent domain to such companies.[34] One railroad may take the right of way of another on a showing that it is practical, necessary and reasonably safe,[35] and a statute permitting the appropriation of a longitudinal portion of a right of way in certain cases does not exclude appropriation in all other cases,[36] but a statute authorizing interurban street railroads to construct their line on any railroad which their route shall intersect does not authorize a longitudinal appropriation of a railroad right of way.[37] In Kansas, a railroad cannot condemn,

20. Youree v. Vicksburg, S. & P. R. Co., 110 La. 791. The court cannot take judicial notice of the space necessary for the repair of a telegraph necessary to the operation of a railroad. Id.

21. Code N. C. § 150. City of Durham v. Southern R. Co., 121 Fed. 894.

22. Const. art. 11, § 4. McLucas v. St. Joseph & G. I. R. Co. [Neb.] 93 N. W. 928.

23. Hill v. Southern R. [S. C.] 46 S. E. 486.

24. Maintenance of fence without objection for 25 years. Cedar Rapids Canning Co. v. Burlington, C. R. & N. R. Co., 120 Iowa, 724, 95 N. W. 195.

25. Under Act Feb. 24, 1871, c. 67, 16 Stat. 430, and Act July 25, 1866, c. 246, 14 Stat. 244, the Union Pac. railroad is bound to permit the use of its bridge between Council Bluffs and Omaha by all companies alike for a reasonable compensation. Mason City & F. D. R. Co. v. Union Pac. R. Co., 124 Fed. 409.

26. Western Union Tel. Co. v. Pa. R. Co., 120 Fed. 362. In the absence of a showing of a public necessity for a reservoir of a water company, the fact that the right of way occupies a convenient spot for such reservoir does not authorize its condemnation. Id.

27. Const. art. 15, § 8. Denver P. & I. Co. v. Denver & R. G. R. Co., 30 Colo. 204, 69 Pac. 568.

28. Western Union Tel. Co. v. Pa. R. Co., 120 Fed. 362.

29. Code Civ. Proc. p. 3, tit. 7. Postal Tel. Cable Co. v. Or. Short Line R. Co., 114 Fed. 787. Rev. St. U. S. 1878, §§ 3964, 5263. Postal Tel. Cable Co. v. Chicago, I. & L. R. Co., 30 Ind. App. 654, 66 N. E. 919.

30. Union Pac. R. Co. v. Colo. Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564.

31. Postal Tel. Cable Co. v. Or. S. L. R. Co., 114 Fed. 787.

32. Unless bad faith, malicious motive or great loss is shown. Union Pac. R. Co. v. Colo. Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564.

33. 23 Stat. p. 61, permitting condemnation of the right of way of railroad companies by telephone companies is not unconstitutional as depriving of due process of law, though it does not provide for the making of all persons having an interest in the land parties or that the telephone company shall help to maintain the right of way [23 Stat. p. 61]; nor is it a denial of the equal protection of laws because it allows a proceeding in one county to condemn a way in many counties. South Carolina & G. R. Co. v. American Tel. & T. Co., 65 S. C. 459. Under the Texas statutes, a telegraph and telephone company may condemn a right of way over the property of a railroad in the same way as over private property [Rev. St. art. 698, 699]. Ft. Worth & R. G. R. Co. v. S. W. Tel. & T. Co., 96 Tex. 160, 71 S. W. 270, 60 L. R. A. 145.

34. Act Pennsylvania, March 24, 1849, Pub. Laws, 239, § 5. Western Union Tel. Co. v. Pa. R. Co. [C. C. A.] 123 Fed. 33.

35. Seattle & M. R. Co. v. Bellingham Bay & E. R. Co., 29 Wash. 491, 69 Pac. 1107. Real estate not in actual and necessary use. Atchison, T. & S. F. Co. v. Kan. City, M. & O. R. Co., 67 Kan. 569, 70 Pac. 939.

36. 2 Ball. Ann. Codes & St. § 5647. Seattle & M. R. Co. v. Bellingham Bay & E. R. Co., 29 Wash. 491, 69 Pac. 1107.

37. Act 1901, p. 461, Burns' Rev. St. 1901,

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for a right of way, land of another railroad corporation in actual and necessary use.[38]

Assessment or compensation on public improvement.—A right of way is a lot within the meaning of a statute imposing liability to assessments for street improvements,[39] but cannot be assessed unless it is benefited as a right of way.[40]

The temporary employment of an overhead crossing erected off the line of the original public highway does not allow the railroad to base a claim for compensation on the ground of an interest in the fee on the compulsion of a crossing at the intersection of the previously established highway,[41] and though a railroad company is a landowner on each side of a turnpike where its road crosses, it is not an abutting owner having a right to complain of the imposition of an additional servitude by reason of the laying of a street railroad track on the turnpike.[42]

§ 4. *Construction and maintenance.*[43] *Private and farm crossings.*—Statutory regulations as to the right of passage between portions of intersected farms are not applicable to previously acquired and fenced rights of way.[44] They may become applicable when lands separately held on opposite sides of the right of way pass into single ownership.[45] The right terminates on a severance of ownership.[46] The statute may be broad enough to compel a crossing to allow access to a highway, though the road does not divide a farm.[47] Similar rights may arise from prescription[48] or conditions in the right of way grant;[49] but where, on an understanding that they are to have a new road, complainants have allowed a railroad to lower a crossing at great expense, they may be estopped from afterwards seeking its restoration.[50] Construction of a bridge may be required.[51] The damages paid

§ 5464a, subd. 5. Such right cannot be held to be inferred by implication on the ground that the street railroad should be allowed the privilege of such occupancy for the reason that otherwise the construction and operation of its line would be rendered hazardous, dangerous and impracticable. Indianapolis & V. R. Co. v. Indianapolis & M. R. T. Co. [Ind. App.] 67 N. E. 1013.

38. Where such land is included in an attempted condemnation, the proceedings are void as an entirety. Atchison, T. & S. F. R. Co. v. Kan. City, M. & O. R. Co., 67 Kan. 580, 73 Pac. 899.

39. Figg v. Louisville & N. R. Co., 25 Ky. L. R. 350, 75 S. W. 269; Orth v. Park & Co. [Ky.] 79 S. W. 206.

40. Paving of street which it parallels. Village of River Forest v. Chicago & N. W. R. Co., 197 Ill. 344, 64 N. E. 364.

41. Great Northern R. Co. v. Viborg [S. D.] 97 N. W. 6.

42. Cannot enjoin the use of a bridge conducting the pike over its tracks where the street car company strengthens it to make it serviceable, though it originally erected the bridge and none of its rights or franchises are injured or invaded. North Pa. R. Co. v. Inland Traction Co., 205 Pa. 579.

43. See Eminent Domain, 1 Curr. Law, p. 1002, for abutting owners' action for damages in general.

44. Rev. St. art. 4427. Owazarsak v. Gulf, C. & S. F. R. Co., 31 Tex. Civ. App. 229, 71 S. W. 793.

45. Rev. St. 1899, § 1105. Quantock v. Mo., K. & T. R. Co. [Mo. App.] 74 S. W. 1034.

46. Thompson v. Louisville & N. R. Co., 25 Ky. L. R. 529, 76 S. W. 44.

47. Statute providing that openings for crossings were to be made in fences running "through, along, or adjoining the land." Quantock v. Mo., K. & T. R. Co. [Mo. App.] 74 S. W. 1034.

48. After the maintenance of a farm crossing for 35 years, and it is used by the owners under a claim of right, its continuance may be compelled. Louisville & N. R. Co. v. Brooks, 25 Ky. L. R. 1307, 77 S. W. 693. A crossing established for the convenience of an individual, by a sectionhand, and soon taken up, need not be maintained. Thompson v. Louisville & N. R. Co., 25 Ky. L. R. 529, 76 S. W. 44. Where a railroad has maintained a farm crossing for 35 years, which successive owners have used during that time under a claim of right and it is indispensable to the beneficial use of the land, the present owner is entitled to its maintenance. Louisville & N. R. Co. v. Brooks, 25 Ky. L. R. 1307, 77 S. W. 693. Continuance of a pass for over thirty years is evidence that it was legally established originally. Farwell v. Boston & M. R. R. [N. H.] 56 Atl. 751. Temporary closing of a cattle pass by the owner is not conclusive of an intent to abandon. Id.

49. Where the railroad covenants to provide a crossing in consideration of a right of way across a farm, the company after the owner has selected a crossing and used it for several years at a point where the road is nearly at grade cannot destroy the crossway by an embankment, but must open a passage and bridge it. It is not important that the expense would be great, and the right is not forfeited by delay for a few months before bringing action or consideration without acceptance of propositions for another crossing or a money compensation. Speer v. Erie R. Co., 64 N. J. Eq. 601.

50. Louisville & N. R. Co. v. Smith, 25 Ky. L. R. 1459, 78 S. W. 160.

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on location of a right of way do not prevent a recovery for the obstruction of a right of way over the railroad right of way reserved to the landowner.[52] Procedure to enforce such rights is governed by statute, and the cases are treated in the footnotes.[53]

Public crossings.[54]—A railroad acquires its right of way subject to the right of the state to extend its public highways and streets across it.[55] A railroad company may be required to place a bridge over its road or to grade approaches thereto for a highway crossing it, though the railroad was in operation many years before the highway was laid out;[56] but it has been held that a charter requiring a railroad to preserve any street that it may cross will not be regarded as referring to any and all streets that may be established in the future by individuals or municipalities.[57] The public cannot acquire a right to cross by prescription.[58] The control of highway crossings is frequently vested completely in the board of railroad commissioners.[59]

A railroad in constructing a highway crossing must take all reasonable precautions to lessen the danger to the public.[60] Public use imposes the duty,[61] but after a railroad has laid out a crossing, it does not by acquiescence in the use of

51. A bridge over a ditch made by a railroad company, reasonably necessary for safety and convenience in crossing, is included within the meaning of Rev. St. 1899, § 1105, requiring the companies to build necessary farm crossings, or become liable for their cost when built by proprietors after five days' notice to company. Birlew v. St. Louis & S. F. R. Co. [Mo. App.] 79 S. W. 490.

52. Porter v. Kan. City & N. C. R. Co. [Mo. App.] 77 S. W. 582.

53. In Iowa, one owning land on both sides of a railway track may maintain mandamus to compel the company to construct an undercrossing, without first presenting the matter to the railroad commissioners. Swinney v. Chicago, R. I. & P. R. Co. [Iowa] 98 N. W. 635.

The circuit court of Kentucky has jurisdiction to entertain a suit to compel a railroad company to restore a farm crossing. Damages would not afford adequate relief. Louisville & N. R. Co. v. Brooks, 25 Ky. L. R. 1307, 77 S. W. 693. Injunction to restrain defendant from interfering with the grade of a track at a railway crossing, held properly granted, and parties remanded to board of public works to have the issue between them determined. Southern R. Co. v. Wash., A. & Mt. V. R. Co. [Va.] 46 S. E. 784. Where there is a remedy in damages, an injunction cannot be had to compel the restoration of a crossing. Louisville & N. R. Co. v. Smith, 25 Ky. L. R. 1459, 78 S. W. 160. Where an existing cattle pass is obstructed wrongfully, the matter is within the general jurisdiction of the courts [Pub. St. 1901, c. 204, § 4]. Farwell v. Boston & M. R. R. [N. H.] 56 Atl. 751. Question of whether a pass was abandoned and as to whether objections to the continuance of an obstruction were seasonably made, held for the jury. Id. Complaint held insufficient to show an obligation to maintain an opening under a trestle or to construct another crossing. Owazarzak v. Gulf, C. & S. F. R. Co., 31 Tex. Civ. App. 229, 71 S. W. 793. $718 held excessive damages for the obstruction of a passway. Louisville & N. R. Co. v. Carter, 25 Ky. L. R. 759, 76 S. W. 364.

54. Blocking crossings by trains, see post, § 7 A.

55. The right of a town to use a section line highway as a village street is not removed by the construction of a railroad track across it. Great Northern R. Co. v. Viborg [S. D.] 97 N. W. 6.

56. Ill. Cent. R. Co. v. Swalm [Miss.] 36 So. 147. Burns' Rev. St. 1901, § 5153, subd. 5. Baltimore & O. S. W. R. Co. v. State, 159 Ind. 510, 65 N. E. 508. Where no appeal was taken from the judgment of a county board ordering the laying out of a highway, the judgment cannot, because of mere irregularities, be attacked in an action to compel the railway company to grade approaches or build a bridge over its track. Ill. Cent. R. Co. v. Swalm [Miss.] 36 So. 147.

57. State v. Morgan's La. & T. R. & S. S. Co., 111 La. 120.

58. By adverse public use. Chapin v. Me. Cent. R. Co., 97 Me. 151.

59. Chapin v. Me. Cent. R. Co., 97 Me. 151. The decision of railroad commissioners in Maine as to the manner of construction and maintenance of railroad crossings is final in the absence of an appeal. They have no authority to modify a decree once made except on a new application, notice and hearing, and they cannot before appeal make a temporary decree which does not purport to represent their sound judgment and discretion. Boston & M. R. v. Saco Valley Elec. R., 98 Me. 78. Such question cannot be decided in an injunction proceeding. People v. Del. & H. Co., 81 App. Div. [N. Y.] 335. The matter is to be determined either by the railroad commissioners under the grade crossing law, §§ 60-69, or by the railroad under Laws 1897, c. 754. Id.

60. Chicago, R. I. & P. R. Co. v. Sporer [Neb.] 94 N. W. 991.

61. Where a road is in public use, liability exists whether it is public or private if a railroad leaves approaches to its tracks in a condition dangerous for travel by teams managed with ordinary care. Yazoo & M. V. R. Co. v. Watson [Miss.] 33 So. 942.

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another path assume the duty to keep it in repair.[62] Not only the portion of the highway occupied by the tracks must be kept in safe condition, but also approaches constructed by the road,[63] but it is not bound to remedy defects existing prior to the construction of the approach, where such construction does not render the highway more dangerous.[64] The charter of the road or contracts which it has entered into may have a direct bearing on the duties as to crossings.[65] Mandamus may be a proper remedy to enforce such duties.[66]

Damages from negligent construction.—It is a question for the jury whether a crossing and its approaches are so constructed as to be dangerous for those in the exercise of due care.[67] Want of knowledge of a defective crossing is prima facie negligence,[68] and proof of the accident makes a prima facie case.[69] Negligence should be alleged in the complaint.[70]

Establishment of crossings.—A state law requiring notice to the railroad of intention to lay out a street crossing controls a provision for proceedings without notice in a city charter.[71] Actual notice of proceedings to lay out a highway crossing need not be given.[72] Where, after constructive notice of proceedings to establish a highway, the road does not appear, it cannot, on mandamus to compel the placing of a crossing in repair, assert that expense will be entailed.[73] Where a petition is offered for the establishment of a railroad crossing, evidence as to a way by dedication or prescription not presented by the petition is inadmissible.[74]

Abolition and prevention of grade crossings.[75]—Under the New York statutes, the railroad commissioners must determine the impracticability of other crossings before a road can change its route so as to cross a village street at grade.[76] Injunction is the proper remedy where a right to cross at grade is wrongfully granted in case there is no adequate remedy at law.[77]

62. San Antonio & A. P. R. Co. v. Montgomery, 31 Tex. Civ. App. 491, 72 S. W. 616.

63, 64. Whitby v. Baltimore, C. & A. R. Co., 96 Md. 700.

65. A requirement that streets shall be restored to their former state of usefulness gives no right to materially lessen the width of the street. Elyria v. Lake Shore & M. S. R. Co., 23 Ohio Circ. R. 482. A provision in a charter that the safe and convenient use of any highways crossed should not be obstructed imposes the duty of maintaining a proper crossing. Town of Clarendon v. Rutland R. Co., 75 Vt. 6. A contract with a town allowing the laying of switch tracks on certain streets which obligates the road to maintain all crossings traversed by its tracks will not be construed to cover all crossings throughout the town. State v. Morgan's La. & T. R. & S. S. Co., 111 La. 120.

66. Where a road crosses a street, it may be compelled by mandamus to lower its grade to that of the street where the existing grade exposes the city to the danger of damage suits, and it is without remedy against the railroad on account of its insolvency. Evidence held sufficient to authorize mandamus under Burns' Rev. St. 1901, § 5153, subd. 5, § 5172a. Chicago & S. E. R. Co. v. State, 159 Ind. 237, 64 N. E. 860.

67. Whitby v. Baltimore, C. & A. R. Co., 96 Md. 700. Facts held not to impose liability for an accident resulting from the stumbling or shying of a horse at a crossing. Leo v. Tex. & P. R. Co., 110 La. 213.

68. In a complaint for injury caused by a board in a plank crossing breaking, there need be no averment of notice of the condition. Wabash R. Co. v. De Hart [Ind. App.] 65 N. E. 192.

69. Wabash R. Co. v. De Hart [Ind. App.] 65 N. E. 192.

70. Burns' Rev. St. 1901, § 5172, cl. 5, § 5172a. Complaint held sufficient where an injury was occasioned by defective board. Wabash R. Co. v. De Hart [Ind. App.] 65 N. E. 192.

71. Laws 1897, c. 754 is applicable to a petition acted on after its passage, though filed before. In re Opening of Ludlow St., 172 N. Y. 542, 65 N. E. 494.

72. A refusal to award damages on compulsion of a highway crossing on constructive notice is not a taking of property for public use without compensation. Violation of Const., § 21. Baltimore & O. S. W. R. Co. v. State, 159 Ind. 510, 65 N. E. 508.

73. Baltimore & O. S. W. R. Co. v. State, 159 Ind. 510, 65 N. E. 508.

74. Rev. St. c. 51, § 31. Chapin v. Me. Cent. R. Co., 97 Me. 151.

75. See Highways and Streets, 2 Curr. Law, p. 177, for vacation of street to avoid crossing.

76. Laws 1890, p. 1082, c. 565, as amended by Laws 1897, p. 794, c. 754, §§ 59, 60. Such determination cannot be by the trustees of the village or by the court, and an action by the trustees of the village will not estop the village. Village of Bolivar v. Pittsburg, S. & N. R. Co., 84 N. Y. Supp. 678.

77. Village of Bolivar v. Pittsburg, S. & N. R. Co., 84 N. Y. Supp. 678. Under Massachusetts statutes providing for damages to be recovered for property injured by the abolition of certain grade crossings, the

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Statutory provisions regulating crossings should be rigidly enforced, and in determining the practicability of an overhead crossing, regard will not be paid to the expenses, damages or local sentiment,[78] although a general power to regulate must be exercised with regard to particular conditions.[79] A provision that grade crossings shall not in future be constructed prevents a grade crossing incidental to a relocation of an existing highway.[80] A provision for bridges at highways applies to a highway laid out after the building of the road,[81] and until legal discontinuance of operation of a track, a bridge may be ordered for its support.[82] The provisions of a charter may be such as to authorize a railroad to elevate a highway, in which case the local authorities cannot interfere on the ground that other crossings have been improperly constructed. Such crossings must be kept continuously in repair.[83] A general authority to change the location of highways to avoid or improve a railroad crossing does not permit a board of railroad commissioners to lay out a new highway,[84] but where a new road is laid to avoid a grade crossing under proper authority to the commissioners, it cannot be discontinued by town authorities under a power to discontinue highways except such as laid out by court or general assembly.[85] Courts cannot review the discretion as to the necessity for the removal of railroad tracks at a grade crossing.[86] The length of a highway constructed by the railroad commissioners for such purpose is within their reasonable discretion.[87]

Procedure for the elevation and depression of tracks is a matter of statutory regulation.[88] Grade crossing acts may provide that the general plan adopted shall

owner of property taken for improvement has a remedy at law and is not entitled to equitable relief. Lancy v. Boston [Mass.] 70 N. E. 88. The authority of a court of quarter sessions to authorize a grade crossing under the act of 1836 (Pub. Laws, 560, 561) must be attacked by direct proceedings in the nature of an injunction and not by appeal. In re Mifflinville Bridge, 206 Pa. 420.

78. Evidence held to authorize an injunction of a grade crossing by a street railroad company under act June 19, 1871 (Pub. Laws, 1360). Baltimore & O. R. Co. v. Butler Pass. R. Co., 207 Pa. 406.

79. In Indiana, it is held that under a general power of a city council to protect the safety of citizens at railroad crossings, all railroads operating within the corporate limits cannot be required to elevate their tracks within a specified district without regard to the conditions or circumstances of particular crossings [Burns' Rev. St. 3794; Indianapolis City Charter, § 23]. State v. Indianapolis Union R. Co., 160 Ind. 45, 66 N. E. 163.

80. Act 1901 [Pub. Laws, 531). In re Mifflinvile Bridge, 206 Pa. 420.

81. Code 1892, § 3555. Ill. Cent. R. Co. v. Copiah County, 81 Miss. 685.

82. Appeal of N. Y., N. H. & H. R. Co., 75 Conn. 264.

83. Charter provisions imposing a duty to construct and keep in repair bridges over or under the road where highways cross it and to alter or grade such highways so as not to impede passage confer the power to alter the grade so as to carry the highway over the track by a bridge if reasonable cause exist. (Charter of Camden and Atl. Railroad Co. [P. L. 1852, p. 268, § 9] authorizes such construction at a crossing over which trains pass at 70 miles an hour.) West Jersey & S. R. Co. v. Waterford Tp., 64 N. J. Eq. 663.

84. The laying out of a new highway from a substituted highway to a new railroad station is governed by Pub. St. 1891, cc. 67, 68 and not c. 159. Leighton v. Concord & M. R. R. [N. H.] 55 Atl. 938.

85. Construing Gen. St. 1888, §§ 3489, 2708 (Gen. St. 1902, §§ 3713, 2056). Town of Meriden v. Bennett [Conn.] 55 Atl. 564.

86. Moved under contract with a city. Swift v. Del., L. & W. R. Co. [N. J. Eq.] 57 Atl. 456.

87. Town of Meriden v. Bennett [Conn.] 55 Atl. 564.

88. The change of grade for the purpose of avoiding accidents and facilitating the use of the road under Laws 1890, p. 1088, c. 565, though affecting a highway crossing, is not within the grade crossing law (Laws 1897, p. 796, c. 754), but the obligation is that prescribed by the old law to restore the highway as far as practicable, and of such restoration the corporation must bear the expense. People v. Del. & H. Co., 177 N. Y. 337, 69 N. E. 651. Where a petition to abolish a grade crossing has proceeded to the appointment of commissioners, the petitioners have no longer the right to discontinue [St. 1890, c. 428; St. 1891, c. 262; St. 1892, c. 374; St. 1895, c. 491]. In re Directors of N. Y., N. H. & H. R. Co., 182 Mass. 439, 65 N. E. 815. The report of an auditor in proceedings to abolish grade crossings under St. 1890, c. 428 is to be dealt with as the report of a master. In re Selectmen of Norwood, 183 Mass. 147, 66 N. E. 637. In proceedings for the depressing of a surface crossing, proposals for the building of such a crossing made by defendant before the proceedings were commenced cannot be admitted. State v. Minneapolis, St. P. & S. S. M. R. Co. [Minn.] 95 N. W. 581.

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not be amended, save in matters of detail or extended beyond the general plan, and that constructions made with companies may be changed only by an agreement between the contracting parties.[89] As to matters which may be included in the costs or made a basis of compensation, see the footnotes.[90]

Crossings with other railroads.—One road has no right to cross the tracks of another without compensation fixed either by contract or condemnation proceedings.[91] An agreement may be made after condemnation proceedings have been begun.[92]

In New York, proceedings to determine the compensation for the privilege of intersecting an old road are not regarded as under the condemnation law.[93] Provisions giving railroad commissioners authority to determine the manner of intersections do not oust the supreme court of authority to order a temporary crossing.[94] In general, the matter of crossing is a subject of judicial review.[95]

89. The Buffalo grade crossing acts, Laws 1888, p. 601, c. 345; Laws 1890, p. 469, c. 255; Laws 1892, c. 353, p. 732, do not allow the commission to compel an elevation of tracks upon an iron or stone structure together with the reconstruction of terminals, sidings and switches of a subsequently adopted plan. Lehigh Valley R. Co. v. Adam, 176 N. Y. 420, 68 N. E. 665.

90. In proceedings to abolish a grade crossing under St. 1890, c. 428, expenses of gutters not included in the commissioner's report better than the usual standard of street construction cannot be included, nor can expenses for proceedings in court and fees paid ex parte witnesses at court hearings not shown to have been incurred in carrying into effect the changes prescribed by the commissioner's report, nor can expenses for plans and surveys to be presented to commissioners, services of civil engineers at the hearing, entry fees of petitions brought by the town, witness' fees before a master, or expenses of printing counsel's brief on argument for the town on appeal taken by the railroad company from the commissioner's report. In re Selectmen of Norwood, 183 Mass. 147, 66 N. E. 637. The cost of a new passenger station may be allowed without limiting the company to the actual cost of reproducing the old station in substantially as good condition as it was in the old location. Where it would have been necessary to have moved the old station thirteen hundred feet, the new station was of practically the same size as the old and the cost thereof was fair and reasonable. In re Selectmen of Westboro [Mass.] 68 N. E. 30. The town is not entitled to be credited with land from which a station was moved and rendered unnecessary for railroad purposes, where such land had been owned by the company for many years, and it had the right, subject to restrictions on which it held it, to use it for any purpose it saw fit. Id. Where expert and counsel fees are incurred in disputing at a former hearing on an accounting, items in the account presented by the railroad company cannot be regarded as part of the costs of alterations or of the costs of the hearing before the commission. Id. Sums paid in settlement of land damages after the claim was barred by statute and without suit or petition by the landowner cannot be allowed as part of costs. Id. New York statute relative to the removal from Atlantic avenue of a steam railroad and providing the apportionment of expense to be borne by the city and the railroad does not create a liability for a commissioner's compensation enforceable directly against railroad company in the absence of any showing that the claim has ever been passed on by the board. Linton v. Long Island R. Co., 86 N. Y. Supp. 903. Under statute providing that a commission should apportion the expense of the abolition of a certain grade crossing, the commission ordered certain alterations in this crossing and the abolition of a crossing on another street and assessed as part of the cost the cost of the abolition of this crossing. This was held proper. In re City of Taunton [Mass.] 70 N. E. 48.

91. Atlantic & B. R. Co. v. Seaboard A. L. R., 116 Ga. 412. A right to cross another road may be obtained by eminent domain proceedings, though there is no statute allowing one railroad to appropriate the property of another. Houston & S. R. Co. v. Kan. City, S. & G. R. Co., 109 La. 581. A subsequent statute authorizing condemnation of a right of way across another road may be taken advantage of by the company whose original charter authorizes it to acquire such a right of way only by contract, lease or purchase [Civ. Code, § 2167]. Atlantic & B. R. Co. v. Seaboard A. L. R., 116 Ga. 412.

92. Construing Burns' Rev. St. 1901, § 5153, subds. 5, 6, § 5158a (Acts 1897, p. 237). Baltimore & O. R. Co. v. Wabash R. Co., 31 Ind. App. 201, 67 N. E. 544. An agreement to submit to commissioners the question of whether a crossing should be at grade or overhead does not authorize the moving company to acquire the rights to pass under the tracks of the other. Id.

93. In a proceeding under the Railroad Law, § 12 (Laws 1890, p. 1082, c. 565, as amended by Laws 1892, p. 1382, c. 676), the petition may be accompanied by an order to show cause returnable in less than 8 days, and need not state the matters required by the condemnation law in a proceeding to acquire title to land. Petition held sufficient. Oneonta, C. & R. S. R. Co. v. Cooperstown & C. V. R. Co., 85 App. Div. [N. Y.] 284.

94. Construing statutes. Olean St. R. Co. v. Pa. R. Co., 75 App. Div. [N. Y.] 412. A decision by the board of railroad commission-

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A new company constructing a grade crossing over the line of the old should pay the expenses incidental to safe construction.[96] One road contracting with another for a sub-crossing is not liable for damages occasioned by the other in its construction.[97]

Duty to make transfer connections.[98]—Commissioners, in order to enforce an order compelling intersecting roads to make transfer connections, must allege the performance of every material condition precedent in the proceedings had before them, such proceedings being purely statutory.[99]

Bridges.—A contract by a municipality releasing a railroad from its duty to maintain a bridge is not unlawful, since it is merely an assumption of the exclusive and undisputed control over its highway.[1]

Cattle guards.[2]—To prevent damage to crops by cattle entering over the right of way, the company is bound to provide only such stock guards as are as well adapted for the purpose of turning stock as it is practicable to make them in connection with the safe occupation of the road.[3] Cattle guards need not be constructed where they will interfere with the safety of employes or the handling of trains[4] or where land is unenclosed.[5] Adjoining owners acquire no prescriptive

ers as to a permanent crossing does not bar the granting of an order for a provisional or temporary crossing. Construing statutes. Laws 1893, p. 463, c. 239, § 1 is not repealed by Laws 1897, p. 794, c. 754, as amended by Laws 1900, p. 1590, c. 739 (Railroad Law, § 68). Oneonta, C. & R. S. R. Co. v. Cooperstown & C. V. R. Co., 85 App. Div. [N. Y.] 284. An order for a temporary crossing may be granted without regard to a consent filed after the grant of the order to show cause why a temporary crossing should not be permitted where the consent was that the engineer of the board of railroad commissioners or any engineer it might designate should determine the point of crossing, such consent to be without prejudice. Id. It cannot be contended that a temporary crossing was permitted without compliance with conditions imposed by the determination of the state board of railroad commissioners for the permanent crossing and guard where the special term required a bond conditioned on full and faithful performance by the petitioner of all conditions which might be imposed on it by said board pursuant to statute. Id.

95. But see Cincinnati, R. & M. R. Co. v. Wabash R. Co. [Ind.] 70 N. E. 256. Where intersecting roads cannot agree as to precautions against collisions, precautionary equipment may be ordered by the court. Either an interlocking signal system or an interlocking signal and derailing system according to which may seem best fitted. Jersey City, H. & P. St. R. Co. v. N. Y., S. & W. R. Co., 62 N. J. Eq. 390. In Missouri, the determination of commissioners appointed under a statute as to the point and manner of crossing other roads is open to review by the court [Rev. St. 1899, §§ 1035, 1268]. State v. Dearing, 173 Mo. 492, 73 S. W. 485. In New Jersey, where it is shown that a railroad company and an electric road have easements of way over the same place, usable by each according to its grant and its necessary implication, and that at the crossing of that spot there is danger of obstruction or impairment of the easement of one by the manner in which another uses or proposes to use its easement, or danger to the traveling public, the court of chancery has jurisdiction to regulate the manner of use. West Jersey & S. R. Co. v. Atlantic City & S. Traction Co. [N. J. Eq.] 56 Atl. 890. An intersection may be enjoined until the rights are adjusted. Ohio River Junction R. Co. v. Freedom & C. Elec. St. R. Co., 204 Pa. 127. Under Indiana statutes, providing that an award of a commission appropriating a right of way across another railroad shall be reviewable to affect the amount of compensation only, an award requiring a defendant railroad to straighten its line for a certain distance on each side of the crossing when such award was not demanded was voidable only and could only be attacked on appeal. Cincinnati, R. & M. R. Co. v. Wabash R. Co. [Ind.] 70 N. E. 256.

96. West Jersey & S. R. Co. v. Atlantic City & S. Traction Co. [N. J. Eq.] 56 Atl. 890.

97. Lane v. Mich. Traction Co. [Mich.] 97 N. W. 354.

98. See Carriers, 1 Curr. Law, p. 421, for duty to afford accommodation to connecting carriers.

99. State v. Chicago, M. & St. P. R. Co. [S. D.] 94 N. W. 406. As a basis for the action, the railroads complained against must be called on to satisfy the complaint or answer within a specified time; furnishing copies of the complaint is not sufficient [Laws 1897, p. 275, c. 110, §§ 16, 17]. Id. To be enforceable by mandamus, the order should be specific as to the accommodations to be furnished [Laws 1897, p. 287, c. 110, § 39]. Id.

1. Hicks v. Chesapeake & O. R. Co. [Va.] 45 S. E. 888.

2. See for liability for killing stock, post, § 7F.

3. An instruction authorizing recovery if the guard was improperly constructed or was insufficient and by reason thereof stock came over the guard and destroyed plaintiff's crops is erroneous. Choctaw & M. R. Co. v. Vosburg [Ark.] 72 S. W. 574.

4. Need not be located so near to switches as to have such result. Hurd v. Chappell, 91 Mo. App. 317.

5. A statute requiring erection of cattle

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right preventing removal of guards erected where there is no duty to do so.[6] The owner is not bound to put in guards.[7]

Statutory penalties for failing to provide sufficient guards for turning stock are in lieu of damages for crops destroyed.[8] Notice to construct guards is a requisite.[9]

Fences.[10]—A road need not be operated regularly and constantly to impose a duty to fence.[11] It is usually unnecessary to fence within city limits.[12] Where a highway parallels the track and is on the right of way, a fence on the outer edge of the right of way and of the highway is insufficient.[13] The road is not liable for injury from a lawfully constructed fence.[14] The landowner is sometimes allowed to recover the cost of fencing on failure of the company to do so,[15] but, to recover for such a fence it must be placed as near as practicable on the line.[16] In the absence of opportunity to guard against a defective fence, the owner cannot be charged with negligence.[17]

Damage and disposal of surface water.[18]—The right to cast surface water is as

guards at the entry points of enclosed land does not require the erection of guards at the entry points of unenclosed parcels forming portions of a larger enclosed parcel, though the small parcels are held by individual tenants [Code, § 3561]. Gibbons v. Yazoo & M. V. R. Co. [Miss.] 33 So. 5.

6. Ky. St. 1793. Cattle guards erected where the road entered and left a farm, there being no terminal point of a right of way fence or at a pass way where the owner has not borne half of the expenses. Payton v. Louisville & N. R. Co., 24 Ky. L. R. 1896, 72 S. W. 346.

7. Not contributory negligence preventing recovery for crops destroyed by stock entering through openings in a fence made by a railroad to fail to put in cattle guards or make repairs. Houston & T. C. R. Co. v. Dugger [Tex. Civ. App.] 77 S. W. 1046.

8. Sand. & H. Dig. §§ 6238, 6239. Choctaw & M. R. Co. v. Vosburg [Ark.] 72 S. W. 574.

9. Notice held sufficiently definite as to the place of construction of cattle guards. St. Louis, I. M. & S. R. Co. v. Mendenhall [Ark.] 71 S. W. 269. Evidence of the landowner that he served notice on the company to construct cattle guards under Sand. & H. Dig. §§ 6238, 6239 cannot be contradicted by the sheriff's return on the notice. Id. A notice to erect a cattle guard "where your line of road crosses said line" is a sufficient description of the point under Civ. Code, § 2243. Fenn v. Ga. Northern R. Co., 116 Ga. 942.

10. See post, § 7F, for liability for injuring stock. Statutory provisions requiring fencing and authorizing construction of fences by adjoining owners on failure of the railroad to do so on notice and collect the expense with the reasonable attorney's fees from the railroad are a proper exercise of the police power, and do not divest the railroad of property without due process of law [Burns' Rev. St. 1901, §§ 5323-5325]. Terre Haute & L. R. Co. v. Salmon, 161 Ind. 131, 67 N. E. 918.

11. Road constructed by a mining and lumber company is within Rev. St. 1889, § 1105. Webb v. Southern Mo. & A. R. Co., 92 Mo. App. 53.

12. Hurd v. Chappell, 91 Mo. App. 317.

13. Rev. St. art. 4528. Ft. Worth & D. C. R. Co. v. Roberts, 29 Tex. Civ. App. 566, 69 S. W. 985.

14. Since a railroad may lawfully erect a barb-wire fence on its own land near a road, it is not liable for an injury occasioned by one accidentally riding into it, though it has not cleared underbrush away so that the fence may be readily seen, and though the course of the road has been recently changed, or though the land inclosed has long been uninclosed and used by the public generally. Bishop v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 75 S. W. 1086. An averment that a fence is built within fifty feet of defendant's track, warrants an inference that it incloses a right of way. Id.

15. The 30 day notice required to be given railroad companies before the owner of abutting lands may build a fence along the right of way, on failure of the company to do so, is not a proper exhibit in an action to recover the cost of such fence. Evansville & I. R. Co. v. Huffman [Ind. App.] 70 N. E. 173. A complaint in an action to recover for the building of a fence along a railroad company's right of way, on its failure to do so, must allege that the fence was built on the side of the right of way or give some excuse for not so doing. Id. It must also allege the date on which entry on the right of way to build the fence was made and the day on which it was completed. Id.

16. Burns' Rev. St. 1901, §§ 5323, 5324. Chicago & S. E. R. Co. v. Wood, 30 Ind. App. 650, 66 N. E. 923.

17. It is not contributory negligence to fail to move cotton or make the pen in which it is stored stock proof where the evidence does not show that the owner had an opportunity to do so before the cattle entered through a breach in the right of way fence and destroyed it. Houston & T. C. R. Co. v. Dugger [Tex. Civ. App.] 77 S. W. 1046.

18. A statute may provide for the removal of vegetation and undergrowth from the right of way and also for the proper disposition of surface water without containing more than one subject. Acts 1883, p. 51 does not violate Const. art. 4, § 28. Cox v. Hannibal & St. J. R. Co., 174 Mo. 588, 74 S. W. 854.

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that of a private owner,[19] and in the absence of statute, railroads are governed by the common-law rule as to surface water,[20] though a right to flow land with surface water from a railroad constitutes an easement entirely distinct from the grant of the right of way.[21] If the track is located in a street there is no liability for diverted surface water where there is no law requiring the track to be maintained at the established grade,[22] but the construction of a siding in a city street altering its grade and casting surface water on plaintiff's land as well as interfering with access thereto may be enjoined where done without authority of a city council and in violation of ordinance.[23]

A railroad is not bound to ditch as against water not injurious to contiguous lands or the public,[24] and provisions for summary proceedings for the draining of the right of way are unconstitutional where not providing for notice to the company.[25] Under statutes requiring the railroad to construct ditches to carry off surface water obstructed by its roadbed, overflow water which is surface water must be taken care of as well as water from rain falls and melting snow.[26] An action for damages may be maintained by any person injured by reason of failure.[27]

Obstruction of watercourses.—A railroad cannot acquire a prescriptive right to maintain a culvert where the culvert sinks from time to time, thus presenting a greater impediment to the flow of water.[28] Damages from overflow occasioned by the negligent construction of a bridge in a navigable stream may be recovered by riparian owners.[29]

Miscellaneous matters.—The road may elevate its tracks on its right of way without rendering itself liable in damages to adjacent owners.[30] An abutting owner cannot recover for annoyance consisting of noise, smoke, etc., unless the annoyance is the result of negligence in the operation of a railroad.[31]

19. The right is not increased through a duty to passengers or shippers to protect the roadbed. Chorman v. Queen Anne's R. Co., 3 Pen. [Del.] 407.

20. Cox v. Hannibal & St. J. R. Co., 174 Mo. 588, 74 S. W. 854. Evidence held sufficient to go to the jury on the question of whether a discharge of surface water was due to an unprecedented rain. Childers v. Louisville & N. R. Co., 24 Ky. L. R. 2375, 74 S. W. 241.

21. Is an additional servitude which, if undisclosed to a purchaser, warrants his recovery of the purchase price under an agreement for perfect title. Earhart v. Cowles [Iowa] 97 N. W. 1085. A grant of a right of way does not authorize the construction of the road so as to cast surface water on the grantor. Childers v. Louisville & N. R. Co., 24 Ky. L. R. 2375, 74 S. W. 241.

22. McClosky v. Atlantic City R. Co. [N. J. Law] 56 Atl. 669.

23. On a bill to prevent the construction of a siding other than on an established grade, the question of whether the city has authority to grant permission to construct the siding cannot be considered. Zook v. Pa. R. Co., 206 Pa. 603.

24. Rev. St. § 3342 is valid only so far as accumulated water is injurious. Chicago & E. R. Co. v. Keith, 67 Ohio St. 279, 65 N. E. 1020, 60 L. R. A. 525.

25. Rev. St. §§ 3343-3346. Chicago & E. R. Co. v. Keith, 67 Ohio St. 279, 65 N. E. 1020, 60 L. R. A. 525.

26. Cox v. Hannibal & St. J. R. Co., 174 Mo. 588, 74 S. W. 854.

27. Cox v. Hannibal & St. J. R. Co., 174 Mo. 588, 74 S. W. 854. Where the construction of a railroad causes the collection of water, damages cannot be recovered both for the value of the land rendered unfit for cultivation and also damages to crops not planted. Yazoo & M. V. R. Co. v. Darden [Miss.] 34 So. 386.

28. Corwin v. Erie R. Co., 84 App. Div. [N. Y.] 555.

29. Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 188. A right of way grant from a riparian owner, though implying consent to the construction of a railroad bridge over a stream, does not excuse the road from the consequences of defective construction, and damages for an unprecedented flood may be recovered if such as would not have occurred save for the negligent construction of a bridge. Id. The defendant has the burden of proving that damages were from an unprecedented flood. Id.

30. City of Chicago v. Webb, 102 Ill. App. 232. Evidence held to show that a change in grade was within the general authority conferred by law and that the consequences complained of were natural and unavoidable. The defendant's road was not on public property and plaintiff was not an abutting or adjoining owner, and was separated from the railroad by one-half the width of a street. Bennett v. Long Island R. Co., 89 App. Div. [N. Y.] 379.

31. Fisher v. Seaboard A. L. R. Co. [Va.] 46 S. E. 381. Where railroads are not operated negligently or improperly and injuries suffered were not other than those caused by the regular operation of the roads, the establishment of a railroad yard is not a

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Where, in the construction of its road, a railroad unnecessarily and negligently obstructs access to leased premises, the lessee may recover damages, though he had knowledge that the road was to be built and though he could have terminated the lease at any time.[32] Where a road has been authorized to occupy a subway and has acquired such right as against abutting owners, it is not liable to such owners for damages resulting from a change of grade and the erection of a viaduct compelled by a subsequent statute.[33]

A cause of action for the negligent destruction of an adjoining tenement by a railroad may be joined to a cause of action for injuries from smoke and noise resulting from negligent operation[34] or a cause of action for pollution of a spring to an action for fire.[35] A railroad company cannot prevent obstruction of a private way in order to permit public access to a depot.[36]

Construction contracts.—A contract to build a road so as to be successfully operated when complete and to have it in operation within a stated time requires an equipment with sufficient engines and cars for successful operation.[37]

§ 5. *Sales, leases, contracts and consolidation. Lease or joint use of privileges.*[38]—Mutual traffic agreements for the joint use of terminals, yards and other facilities of benefit to the general public are valid.[39] Though statutes do not in terms authorize joint sidings or a lease of sidings for joint use, such acts are not illegal and are regarded as in furtherance of statutes requiring an interchange of business.[40] Where a railroad depot is constructed by one company for the joint use of itself and another, the builder may require the other company to remove from its use where it becomes insufficient for increasing business.[41]

Rent cannot be recovered for operation under a lease which is ultra vires and also against public policy.[42] Taxes paid by the lessee may be deducted from the rent where so agreed.[43] Failure to record a lease is sometimes made penal.[44]

basis of recovery of damages for a nuisance and will not be restrained. Friedman v. N. Y. & H. R. Co., 89 App. Div. [N. Y.] 38.

32. International & G. N. R. Co. v. Capers [Tex. Civ. App.] 77 S. W. 39. It is immaterial whether plaintiff was lessee for a year or by the month if he remained in occupancy during the time for which damages are recovered Id. The measure of damages is the loss of profits and not the difference in rental value. Id.

33. Laws 1892, c. 339. Muhlker v. N. Y. & H. R. Co., 173 N. Y. 549, 66 N. E. 558.

34. Fisher v. Seaboard A. L. R. Co. [Va.] 46 S. E. 381.

35. Jackson v. Mo., K. & T. R. Co. [Tex. Civ. App.] 78 S. W. 724.

36. West v. Louisville & N. R. Co., 137 Ala. 568. Compare 2 Curr. Law, p. 208, n. 28.

37. Flanagan Bank v. Graham, 42 Or. 403, 71 Pac. 137, 790.

38. Effect of receivership on rights under lease, see post, § 6. Under Civ. Code, § 2179, a belt line company may lease its road, property and franchises to another company with whose road it connects or forms a continuous line. Atlanta & West Point R. Co. may lease property, road and franchises of the Atlanta Belt Line Company. Ga. R. & B. Co. v. Maddox, 116 Ga. 64.

39. Under Acts 1833, pp. 262, 263, §§ 12, 14, the Georgia Railroad Company may lease the right to maintain terminal yards. Ga. R. & B. Co. v. Maddox, 116 Ga. 64.

40. Construing Rev. St. arts. 4535, 4536, 4539 and 4440, and holding the owner of a siding not liable for the frightening of a horse by a side tracked car left in the street by servants of a lessee company, Mo., K. & T. R. Co. v. Jolley, 31 Tex. Civ. App. 512, 72 S. W. 871.

41. The ejected company's right to exappropriate lands of plaintiff for a depot are reserved. McCormick v. La. & N. W. R. Co., 109 La. 764.

42. Cox v. Terre Haute & L. R. Co., 133 Fed. 439.

43. Under an agreement by which the lessee of a road was to deduct taxes from the rent, taxes on land purchased by the lessee outside the location of lessor's road on which the lessee has constructed sidings and buildings cannot be deducted. Title was taken in the lessee's name and the lessee paid the taxes for 23 years. Lewiston & A. R. Co. v. Grand Trunk R. Co., 97 Me. 261. They cannot be deducted in a lump sum after neglect for several years to make the provided deductions. Id. A franchise tax which must be regarded either as on the franchise of the lessee alone or on its franchise, and the franchise of its leased roads is incapable of apportionment so that it cannot be deducted. Id.

44. Indictment held sufficient to charge the operation of a railroad under a lease without record of the same in the office of the secretary of state and the office of the county clerk of every county in which the road lay [Ky. St. §§ 791, 793]. Com. v. Chesapeake & O. R. Co., 24 Ky. L. R. 1880, 72 S. W. 359.

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Consolidation.—A penalty is frequently imposed against purchase of stock of a competing line.[45]

A shareholder is not bound to attend a meeting at which a merger is arranged to oppose a contract illegally depriving him of the value of his stock,[46] and where the new corporation fails to pursue a statutory remedy against dissenting shareholders, they cannot be accused of laches in not proceeding to secure the exchange of their stock until they have actual notice or knowledge of the merger.[47] They are not estopped, though the new corporation has assigned its unissued stock to another.[48]

An agreement for the sale of the roadbed, rolling stock and other property of a railroad must be in writing.[49] An option given by individual shareholders to transfer their stock is an independent transaction from such an agreement.[50]

Rights passing with sale.[51]—A purchaser of the franchises of a railroad at foreclosure sale acquires the right to use a city street, though the predecessor in title had not availed itself of such right in its entirety,[52] and though the charter of the purchasing company compels it to obtain the city's consent to the use of streets, it is not bound to surrender its right acquired by purchase and reacquire it under its charter.[53]

A limitation as to the jurisdiction of justice court over actions against a railroad does not pass as a part of the property and franchises of the company.[54]

Duties and liabilities after sale or lease.[55]—A railroad remains liable for the proper discharge of its duty towards the public even after a lawful sale or lease, and the purchaser or lessee is also liable where the liability arises from its acts of omission or commission.[56] The rule appears to be otherwise where the original owner is not a public railroad corporation.[57] Where there is an actual sale, the purchaser does not take charged with the existing liabilities of its grantor,[58] and

45. Act 1894 (21 Stat. p. 812), is not repealed by Const. 1895, art. 9, § 8, relating to the consolidation of railroad lines. Edwards v. Southern R., 66 S. C. 277. An act of the Mississippi legislature authorizing a railroad corporation to purchase a portion of a competing line held unconstitutional in that no law for the benefit of a corporation existing at the time the constitution was adopted could be passed except on condition that such corporation should thereafter hold its charter subject to the provisions of the constitution. Yazoo & M. V. R. Co. v. Southern R. Co. [Miss.] 36 So. 74. Violation of anti-trust laws, see Combinations and Monopolies, 1 Curr. Law, p. 535.

46. His rights are protected by statute. Douglass v. Concord & M. R. R. [N. C.] 54 Atl. 883.

47. Facts held to show no laches. Douglass v. Concord & M. R. R. [N. C.] 54 Atl. 883.

48. Evidence in an action to compel an exchange of stock of a consolidated corporation for stock of one of the merged corporations held to sustain a finding that the stockholder had never refused to accept the new stock. Douglass v. Concord & M. R. R. [N. H.] 54 Atl. 883.

49. Not sufficiently evidenced by a resolution authorizing the president of the corporation to consummate a sale at a certain price. Cumberland & O. V. R. Co. v. Shelbyville, B. & O. R. Co., 25 Ky. L. R. 1265, 77 S. W. 690.

50. Cumberland & O. V. R. Co. v. Shelbyville, B. & O. R. Co., 25 Ky. L. R. 1265, 77 S. W. 690.

51. Under a description of all property used for and pertaining to the operation of said railroad, is not included property only temporarily used for railroad purposes which it is the intention to subdivide into lots to be sold to employes. Pardee v. Aldridge, 189 U. S. 429, 47 Law. Ed. 883.

52, 53. Denison & S. R. Co. v. St. Louis S. W. R. Co., 96 Tex. 233, 72 S. W. 161.

54. Laws 1865, p. 89, § 3. Sublette v. St. Louis, I. M. & S. R. Co., 96 Mo. App. 113, 69 S. W. 745.

55. Where a covenant to keep a fence has been made, both the covenantor and its lessee is liable thereon. Howard v. Maysville & B. S. R. Co., 24 Ky. L. R. 1051, 70 S. W. 631.

56. Hawkins v. Cent. of Ga. R. Co. [Ga.] 46 S. E. 82.

57. Failure to register a transfer of the road in the jurisdiction where a tort was committed or to have the property assessed in the name of the transferee will not impose liability for a tort on the transferring company. Goodwin v. Bodcaw Lumber Co., 109 La. 1050.

58. Hawkins v. Cent. of Ga. R. Co. [Ga.] 46 S. E. 82. A purchase in good faith and for value of a road does not impose on the purchaser the duty to respond to the liability whether in tort or on contract of the selling corporation. Burge v. St. Louis, M. & S. E. R. Co., 100 Mo. App. 460, 74 S. W. 7.

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an agreement to pay current liabilities does not include a claim for previous personal injuries,[59] but on merger of railroads, the consolidated corporation is liable for debts of the absorbed companies to the extent at least of the value of the property received.[60] The new company is liable for the continuance of the nuisance.[61] The grantee has no greater duty to maintain a track than its grantor.[62]

An agreement by a railroad which has sold its property to another road that all claims against it should be discharged before the price should be paid is personal to the purchasing company and cannot be enforced for the benefit of the bondholders of the selling company.[63] An order discharging a receiver, stating that a new company had agreed to pay all claims against the receivership and directing the property to be turned over to it, does not make the transferee liable for claims which have not been presented to or allowed by the receiver.[64]

A lessor is liable for the wrongful or negligent acts of its lessee.[65] Both companies are equally liable.[66] The grantee company is regarded as the acting servant or agent of the owner.[67] Especially where the owner has reserved absolute control of the train and engine crews of the grantee while on its lines,[68] but a lessor cannot be charged with negligence of the lessee toward its employes.[69]

As to the rights of a grantor or lessor to become a party to an action to oust the Federal courts of jurisdiction, see the notes.[70]

Contracts for use of bridges.—Such contracts are subject to the same rules as to interpretation and modification by the parties as others.[71]

59. Hawkins v. Cent. of Ga. R. Co. [Ga.] 46 S. E. 82.

60. Hawkins v. Cent. of Ga. R. Co. [Ga.] 46 S. E. 82. By statute, a judgment for damages for injuries may be binding on a purchasing company, though not a party to the action [Act April 2, 1891, Gen. Laws 22d Leg. p. 128; Act April 16, 1891, Sp. Laws 22d Leg. p. 120]. Mo., K. & T. R. Co. v. Warner, 30 Tex. Civ. App. 280, 70 S. W. 365. Limitations do not run in favor of the purchasing company until entry of judgment. Id. Where there is an apparent inconsistency under the statutes in the manner of enforcing a judgment against a selling company after a sale, an injunction against an execution sale need not be dissolved and damages awarded. Id.

61. Though there has been no notice or demand for abatement. Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 188.

62. Where a railroad company abandons a track believing that it has not acquired a right of way, its grantee cannot be compelled to maintain such track by one who has constructed a private track connecting therewith for his own convenience, the place where the connection is sought to be maintained being owned neither by him nor by defendant railroad company. Schneider v. Knickerbocker Ice Co. [Wis.] 96 N. W. 542.

63. Randall v. Detroit & N. W. R. [Mich.] 96 N. W. 567.

64. Outstanding judgment against the old company. Ferguson v. Toledo, A. A. & N. M. R. Co., 85 App. Div. [N. Y.] 352.

65. Chicago & G. T. R. Co. v. Hart, 104 Ill. App. 57; Chicago Union Traction Co. v. Stanford, 104 Ill. App. 99; Brown v. Atlanta & C. A. L. R. Co., 131 N. C. 455; Hawkins v. Cent. of Ga. R. Co. [Ga.] 46 S. E. 82. In the absence of statutory authority to absolve itself from liability. Mo., K. & T. R. Co. v. Owens [Tex. Civ. App.] 75 S. W. 579.

66. Operation under trackage agreement. Pa. Co. v. Greso, 102 Ill. App. 252.

67. Anderson v. West Chicago St. R. Co., 200 Ill. 329, 65 N. E. 717.

68. Doctrine of respondeat superior. Decker v. Erie R. Co., 85 App. Div. [N. Y.] 13.

69. Williard v. Spartanburg, U. & C. R. Co., 124 Fed. 796.

70. See generally, Removal of Causes; Jurisdiction, 2 Curr. Law, p. 604. After sale of its property and franchises and its disposition under a valid mortgage, a railroad is not a proper party to an action by an employe of the lessee of the purchaser. Williard v. Spartanburg, U. & C. R. Co., 124 Fed. 796. The lessor is not an indispensable party to enforce by injunction a decree giving a railroad the right to construct a grade crossing against a lessee company in possession and will not be permitted to become a party to oust a Federal court of jurisdiction. Baltimore & O. R. Co. v. Wabash R. Co. [C. C. A.] 119 Fed. 678.

71. A contract to pay a sum equal to a six per cent semi-annual dividend is to be regarded as modified by a long continued acceptance of a smaller amount after a threat to withdraw if a reduction was not made. Pittsburg, C., C. & St. L. R. Co. v. Dodd, 24 Ky. L. R. 2057, 72 S. W. 822. An agreement not in excess of enough to authorize a six per cent dividend on capital stock of the bridge company may by payment of the requisite amount for 24 years be so construed by the parties as to bind them to pay six per cent, though the agreement was for payment not in excess of such sum. Id. Where it is provided that a right to use may be terminated on two years' notice, a contract is terminated by such notice acted on by the parties, though the road continues its use on the same terms. Id. Where the contract requires payment of an amount ade-

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§ 6. *Indebtedness, liens and securities. Mechanics' and materialmen's liens.*[72] —Statutes conferring mechanics' liens are not retroactive.[73] There must be privity to support a lien.[74] A civil engineer is not entitled to a lien as a mechanic, laborer or operative.[75] A proceeding to enforce a laborer's lien is not barred until the expiration of the limited time after wages payable in the future become due.[76]

Mortgages.[77]—A trustee is liable to the bondholders for failure to carry out the provisions of the mortgage as to the issuance of bonds and payment of the proceeds.[78] After long acquiescence, it cannot be objected that construction bonds represent more than the actual cost of construction and should be scaled down.[79]

Possession of mortgaged personalty taken by receivers or the purchaser at foreclosure is as effectual to cure any defect in the record of the instrument as possession taken by the mortgagee.[80]

Property covered by mortgages.[81]—An after-acquired property clause covers land subsequently deeded to the mortgagor for a railroad right of way, railroad, stockyards and grounds[82] or an appropriate branch for the main line,[83] but not a road subsequently purchased and not connected at the time of its purchase with the mortgagor[84] or property not used in its business as a railroad.[85] A switch track constructed at private expense does not pass on foreclosure.[86]

Unless earnings and rents are included in the mortgage, the mortgagee cannot reach a fund earned while the property is in the possession of the mortgagor.[87]

Priorities.—Holders of the bonds applied to the purchase of specific property

quate to all necessary repairs and expenses of maintenance, changes in the bridge under orders of the war department requiring the construction of a new draw span and fender piers are not included where they could not have been required by the conditions existing or in contemplation of the parties at the time of entering into the contract. Id.

72. The word provisions in Gen. St. 1901, § 5864, requiring a bond to be taken by a railroad from construction contractors for the protection of laborers, mechanics, materialmen and others, includes corn, oats and bran. Kan. City, Ft. S. & M. R. Co. v. Graham, 67 Kan. 791, 74 Pac. 232.

73. Act March 31, 1899, does not confer a lien for material furnished under a contract executed prior to its passage. Choctaw & M. R. Co. v. Speer Hardware Co. [Ark.] 71 S. W. 267.

74. Act March 31, 1899, does not confer a lien for supplies furnished employes of subcontractors. Choctaw & M. R. Co. v. Speer Hardware Co. [Ark.] 71 S. W. 267. Under Rev. St. art. 3312, giving a lien to laborers, mechanics or operatives performing labor or working with tools and teams does not confer a lien on subcontractors or in favor of those whose teams a contractor uses. Eastern Tex. R. Co. v. Foley, 30 Tex. Civ. App. 129, 69 S. W. 1030.

75. Rev. St. art. 3312, Gulf & B. V. R. Co. v. Berry, 31 Tex. Civ. App. 408, 72 S. W. 1049.

76. Rev. St. art. 3315. Gulf & B. V. R. Co. v. Berry, 31 Tex. Civ. App. 408, 72 S. W. 1049.

77. See also article Mortgages, 2 Curr. Law, p. 905.

78. Provisions authorizing the payment of proceeds only where the railroad company has acquired sufficient property to support the mortgage security. Rhinelander v. Farmers' L. & T. Co., 172 N. Y. 519, 65 N. E. 499.

79. Cent. Trust Co. v. Wash. County R. Co., 124 Fed. 813.

80. State Trust Co. v. Kan. City, P. & G. R. Co., 120 Fed. 398.

81. Where the general manager of a road is also a contractor for its construction, engines purchased by him in his own name will be deemed delivered to the railroad company and subject to a mortgage lien when he places them in use on the road. Flanagan Bank v. Graham, 42 Or. 403, 71 Pac. 137, 790.

82. St. Joseph, St. L. & S. F. R. Co. v. Smith, 170 Mo. 327, 70 S. W. 700.

83. Cent. Trust Co. v. Wash. County R. Co., 124 Fed. 813.

84. The clause was "all corporate rights, franchises and property of any kind now possessed, or that may hereafter be acquired * * * connected with or issuing from or relating to the said railroad." Murray v. Farmville & P. R. Co. [Va.] 43 S. E. 553.

85. Property leased for a barber shop, grocery and similar uses. Chicago, I. & L. R. Co. v. McGuire, 31 Ind. App. 110, 65 N. E. 932.

86. Where, after the execution of a mortgage, a person pays the cost of constructing a switch on the railroad right of way under an agreement that he should be repaid should the company, its successors or assigns desire to take possession of the switch, he may recover the cost of construction from a grantee of the purchaser at foreclosure proceedings to which he has not been made a party on his ouster. Kan. City N. W. R. Co. v. Frohwerk [Kan.] 74 Pac. 1124.

87. Rumsey v. People's R. Co., 91 Mo. App. 202.

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have no superior lien thereon as against other bondholders of the same issue.[88] Where a railroad contractor accepts bonds in payment for construction and executes a chattel mortgage to cover after-acquired property, one who sells the contractor equipment and takes bonds in payment has a lien superior to the chattel mortgage.[89] A statutory authority to issue bonds secured by a mortgage on a bridge to be built, carrying with it certain conditions, is binding on mortgagees, being in fact a charter amendment,[90] and where the mortgagees have been made parties and it has been determined that the bridge mortgage is a first lien, a purchaser at foreclosure sale takes subject thereto.[91]

Priorities between mortgages and operating expenses.—Owing to the quasi-public character of a railroad, claims for labor and supplies necessary to keep it a going concern are entitled to precedence in payment from earnings in the hands of a receiver, and in some instances from the corpus of the property in the absence of earnings over the claims of mortgage creditors.[92] The services or supplies must have been necessary to preserve the mortgage security.[93] Earnings must have been diverted from current operating expenses.[94] An amount set aside from the earnings by receivers for operating expenses, but not actually expended, cannot be deducted in computing the net earnings.[95]

A transfer of the personalty to preferred creditors by a receiver in consideration of their procuring discharges of all preferred claims gives them no lien on earnings in the hands of the receiver for the difference between the amount bid for the personalty and the amount they paid for the discharges as against other preferred creditors, though the decree under which sale was had made the claims of the purchasers a lien on the net earnings to the extent of any deficit resulting from sale of the personalty.[96]

Foreclosure of mortgages.—Stock and bondholders may intervene on foreclosure.[97] General creditors as such, having no lien on the property, cannot intervene after foreclosure sale on the ground that receivers took possession of property not

88. Murray v. Farmville & P. R. Co. [Va.] 43 S. E. 553.

89. Bond taken without knowledge of the chattel mortgage, though it was recorded. Flanagan Bank v. Graham, 42 Or. 403, 71 Pac. 137, 790.

90, 91. Mason City & F. D. R. Co. v. Union Pac. R. Co., 124 Fed. 409.

92. Supplies must be of the ordinary character necessary to keeping the railroad a going concern, the person furnishing them must not have relied on the personal responsibility of the railroad, and the debt must have been contracted shortly before the appointment of receivers and left unpaid on account of the sudden action of the court in making such appointment. Southern R. Co. v. Ensign Mfg. Co. [C. C. A.] 117 Fed. 417. Services rendered in a logging business which was the principal concern of a railroad are not entitled to a priority. Security S. & T. Co. v. Goble, N. & P. R. Co. [Or.] 74 Pac. 919. Jack screws purchased nearly a year prior to receivership for use on leased road not covered by the mortgage and of which the receivers did not take possession are not entitled to preference over the mortgage debt. Southern R. Co. v. Chapman Jack Co. [C. C. A.] 117 Fed. 424. A claim for stationery and printing is not entitled to preference as for services rendered and material furnished to keep a road in repair [Vt. Stat. 3803]. Bell v. St. Johnsbury & L. C. R. Co. [Vt.] 56 Atl. 105.

93. It is immaterial that the earnings were more than sufficient to pay the operating expenses including the labor claims. Security S. & T. Co. v. Goble, N. & P. R. Co. [Or.] 74 Pac. 919. As against mortgagees whose mortgages do not include a leased road, one furnishing supplies for such road is not entitled to a preference where the receivers on foreclosure do not take possession of or operate the leased road. Car wheels. Southern R. Co. v. Ensign Mfg. Co. [C. C. A.] 117 Fed. 417.

94. There is a reimbursement where money has been borrowed from banks on the railroad's notes secured by mortgage bonds as collateral, the borrowed money being checked out to pay current expenses and not borrowed to pay particular debts. Gregg v. Metropolitan Trust Co. [C. C. A.] 124 Fed. 721. Money paid into the current income funds from the sale of mileage books on the account of other roads and not accounted for then is not to be regarded as ordinary current income such as is primarily devoted to ordinary current operating expenses. Id.

95. A sum necessary to keep fences in repair. Bell v. St. Johnsbury & L. C. R. Co. [Vt.] 56 Atl. 105.

96. Bell v. St. Johnsbury & L. C. R. Co. [Vt.] 56 Atl. 105.

97. Cent. Trust Co. v. Wash. County R. Co., 124 Fed. 813.

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covered by the mortgage,[98] or on the ground that the purchaser being in fact a reorganization of the mortgagor corporation is liable for its debts,[99] or on the ground that at the time of appointment of receivers, no default had occurred allowing the trustees to take possession of the property.[1]

Sale.[2]—Opinions that a larger price may be obtained on a resale will not justify setting aside of the sale.[3] Bondholders who have opposed the confirmation of a sale and participated in further bidding are estopped to object that the property should have been readvertised and sold.[4]

Under statutory provisions that all holders of the same class of securities are entitled to have equal rights in purchases at judicial sale in which payment is affected by surrender of securities entitled to receive the purchase money, all holders of railroad bonds of the same class are entitled to membership in a pool formed to purchase the property, and bondholders wrongfully excluded from a pool are entitled to an accounting as to the profits realized.[5] Confirmation will not be refused for the reason that purchase was for the second bondholders rather than for a company formed pursuant to a reorganization agreement, where it is not shown that loss accrued to the stockholder objecting.[6]

Receivership.—On foreclosure, where insolvency is alleged and the existence of a large floating debt, a receiver may be placed in custody of the entire estate including unmortgaged assets.[7] A limitation as to where the trustees shall have the right to take possession does not prevent an earlier foreclosure and receivership.[8]

Receivers in charge of the business of a railroad company under order of court may contract for transportation beyond their line and assume liability for the entire distance over connecting lines.[9] Where the operating expenses are about equalling the income, a temporary receiver in sequestration proceedings cannot issue certificates to pay the interest on first mortgage bonds and prevent foreclosure where the trustee and majority bondholders object thereto.[10]

Operating expenses are properly paid.[11] A vendor's lien for material of which the receiver has taken possession cannot be enforced as against his certificates.[12]

98. State Trust Co. v. Kan. City, P. & G. R. Co., 120 Fed. 398.

99. Such would be an impeachment of the decree, the sale having been confirmed. State Trust Co. v. Kan. City, P. & G. R. Co., 120 Fed. 398.

1. Where the company was insolvent and unable to discharge its public or contractual obligations. State Trust Co. v. Kan. City, P. & G. R. Co., 120 Fed. 398.

2. Where a road was capable of earning 4 per cent on two million five hundred thousand dollars, two hundred thousand dollars was deducted to meet the expenses of converting it into a dividend paying property and an upset price on foreclosure fixed at two million three hundred thousand dollars. Cent. Trust Co. v. Wash. County R. Co., 124 Fed. 813.

3. Blanks v. Farmers' L. & T. Co. [C. C. A.] 122 Fed. 849.

4. Del., L. & W. R. Co. v. Devore [C. C. A.] 122 Fed. 791.

5. Ky. St. § 771. Evidence held to show that a signature of a bondholders' pool agreement by agents of certain bondholders rendered them members of the pool so that a subsequent withdrawal of their names on other members objecting to their becoming members did not affect their rights. Reed v. Schmidt, 24 Ky. L. R. 1889, 72 S. W. 367.

6. Is not alleged that less than the value of the property was obtained or that after payment of the first mortgage there would be any surplus for the second mortgage bondholders, or that the objecting stockholder had ever accepted reorganization plan. Cent. Trust Co. v. Peoria, D. & E. R. Co. [C. C. A.] 118 Fed. 30.

7. Rumsey v. People's R. Co., 91 Mo. App. 202.

8. State Trust Co. v. Kan. City, P. & G. R. Co., 120 Fed. 398.

9. Farmers' L. & T. Co. v. Northern Pac. R. Co. [C. C. A.] 120 Fed. 873.

10. Townsend v. Oneonta, C. & R. S. R. Co., 84 N. Y. Supp. 427.

11. Where the receiver is ordered to pay supply accounts incurred in the operation of the road within six months, jack screws purchased within six months prior to the appointment are included. Southern R. Co. v. Chapman Jack Co. [C. C. A.] 117 Fed. 424. Receivers cannot deduct as operating expenses, litigation arising from matters prior to their appointment with which they had nothing to do as receivers. Bell v. St. Johnsbury & L. C. R. Co. [Vt.] 56 Atl. 105.

12. Royal Trust Co. v. Washburn, B. & I. R. R. Co. [C. C. A.] 120 Fed. 11.

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A sum realized from the sale of property not covered by the mortgage over and above the expenses of the receivership not incident to the foreclosure should be distributed among general creditors, including the mortgagee.[13]

Effect of appointment for lessee road.—Where a mortgagee allows the receiver of a lessee of the road to continue its operation at a loss, paying expenses from other funds of the receivership, the mortgagee is not entitled to recover rents pending foreclosure from the receiver.[14] Where a road has been operated in connection with an insolvent road, first under a lease and afterward under an agreement for the benefit of the leased road, stockholders of the leased road are entitled to a dividend from a portion of the amount realized on sale set apart as belonging to the leased road only for such time as it was operated by the insolvent road prior to the abrogation of the lease.[15]

Enforcement of judgments.[16]—In Texas, all property of a railroad company of whatever nature or character is subject to execution sale.[17] Where a railroad company acquires its right of way with constructive notice of a lien, the lienholder may subject the detached portion of the road on which he has a lien to its payment by a sale thereof.[18] Such a sale is not against public policy.[19] A sale under a decree to satisfy a judgment has the effect of a sale on the judgment.[20] Where stock is exchanged for municipal aid bonds which are void, a contractor to whom the bonds are conveyed in lieu of the stock due him under his contract for construction is entitled to the stock and his right may be asserted by his assignees, and in an action to compel the issuance, brought by the assignees against the corporation, complainant cannot be required to bring into court interest paid on the void bonds, and their right to relief is not affected by notice of the void character of the bonds, there being no bad faith.[21]

Statutory methods for collection of judgments against railroad companies under the Indiana statute are regarded as so much in the nature of garnishment that until a writ has been issued, there is no res within the court's jurisdiction sustaining a judgment authorizing an agent to pay from funds coming into his hands.[22]

§ 7. *Operation of railroad.*[23] *A. Duty to operate, statutory and municipal regulations and care required in moving trains in general.*—Where a road is chartered to run between two points, it is not bound to operate all its passenger trains without exception over the same line, but any reasonable adjustment of the trains may be made which will serve the public interests, such adjustment being a question of fact.[24] Where such adjustment of a changed train service has not been had on application to the railroad commissioners, it is proper on mandamus for the

13. Security S. & T. Co. v. Goble, N. & P. R. Co. [Or.] 74 Pac. 919.

14. Cox v. Terre Haute & I. R. Co., 123 Fed. 439.

15. Farrar v. S. W. R. Co., 116 Ga. 337. Where the lessor allows a receiver of the lessee to operate the road for the lessor's benefit, the lease will be regarded as abrogated, the court having decided that the lessor should be notified as to the condition of the property, and should manifest whether it desired the property to remain in the hands of the receiver, with a claim on its part to the net results of the operation of its property to the extent of the rental contract or whether it desired to receive the surrender of the leasehold interest. Id.

16. See generally Executions, 1 Curr. Law, p. 1178, and allied titles.

17. Rev. St. 1895, § 4543. San Antonio & G. S. R. Co. v. San Antonio & G. R. Co. [Tex. Civ. App.] 76 S. W. 782.

18. Fulkerson v. Taylor [Va.] 46 S. E. 309.

19. Flanary v. Kane [Va.] 46 S. E. 312.

20. The whole interest of the company, including its franchises, passes and may be held by the purchaser against a mortgage executed subsequent to the judgment. (In this case it was also held that the mortgages were barred by laches.) Gunnison v. Chicago, M. & St. P. R. Co., 117 Fed. 629.

21. Citizens' S. & L. Ass'n v. Belleville & S. I. R. Co. [C. C. A.] 117 Fed. 109.

22. Burns' Rev. St. 1901, § 834a. Chicago & S. E. R. Co. v. Witt, 160 Ind. 680, 67 N. E. 519.

23. See Master and Servant, 2 Curr. Law, p. 801, for the liability of roads using the same tracks as to the employes of each other.

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court to authorize the original system of running to be re-established.[25] A statute requiring railroads to stop all trains carrying passengers at a junction with other roads and prescribing a penalty of $25 a day for failure to comply therewith is penal, and will be strictly construed so as not to enlarge the liability imposed.[26]

The question of punitive damages in failing to stop at a flag station may be for the jury.[27]

Keeping stations open a specified time before departure of trains is made a duty by some states.[28] Failure in such a duty is negligence per se.[29]

Operation on Sunday is sometimes made penal.[30]

Equipment of cars engaged in interstate commerce has been a matter of Congressional legislation.[31] A statute requiring railroads to equip railroads with automatic couplers does not apply to electric cars or roads in process of construction and cars in use for that purpose.[32] Use in interstate commerce of cars not equipped in accordance with such legislation renders the company guilty of negligence per se.[33]

Railroads transferring cars under an agreement are both bound to exercise reasonable care to see that they are in proper repair, and an employe injured by a defect existing at the time of transfer may sue both companies.[34]

Speed regulations.[35]—A regulation by ordinance of speed within city limits is presumably a reasonable exercise of legislative authority.[36] A statute limiting

24, 25. State v. Northern Pac. R. Co., 89 Minn. 363, 95 N. W. 297.

26. State v. St. Louis & S. F. R. Co. [Mo. App.] 79 S. W. 714. This statute (Rev. St. 1899, § 1075) required trains to stop at junctions long enough to permit transfer of passengers, baggage, mail or express. Held, to establish a case thereunder, it must be shown that on the day specified there was a passenger, baggage, mail or express to be transferred. Id.

27. Where the engineer sees the signal and does not stop, malice, willfulness and wantonness in his acts is a question for the jury. Yazoo & M. V. R. Co. v. White [Miss.] 33 So. 970.

28. Rev. St. art. 4521. A statute requiring the keeping of a depot open an hour after the departure of passenger trains does not require the station agent to allow a passenger to leave his wife and children in a waiting room at one o'clock in the morning while he travels some 4½ miles for a conveyance and returns. International & G. N. R. Co. v. Pevey, 30 Tex. Civ. App. 460, 70 S. W. 778.

29. International & G. N. R. Co. v. Lister [Tex. Civ. App.] 72 S. W. 107. See Carriers, 1 Curr. Law, p. 421, for duties as to stations generally.

30. Under a provision making the superintendent of transportation or the officer in charge of that department liable to indictment for the operation of freight trains on Sunday, no other officers are liable. Indictment against the "superintendent" and the "master of trains" jointly is defective under Pen. Code, § 420, though it is alleged that they had charge of the business pertaining to the running of trains. Vaughan v. State, 116 Ga. 841.

31. See Master and Servant, 2 Curr. Law, p. 801, for duties imposed on railroad as employer by the "safety appliance" acts. The safety appliance act covers tenders [Act Cong. March 2, 1893, c. 196, § 2 (27 Stat. 531)]. Phila. & R. R. Co. v. Winkler [Del.] 56 Atl. 112. Locomotives unengaged in interstate commerce need not be equipped with automatic couplers. Johnson v. Southern Pac. Co. [C. C. A.] 117 Fed. 462. A dining car is not engaged in interstate traffic while it is being turned on a turntable to be used on a train in interstate traffic. Id. Where the cars are loaded and started on their journey to other states, they are used in moving interstate commerce and must be equipped with automatic couplers whether in yards or on sidetracks or in trains, otherwise when vacant on sidetracks or in repair shops or in trains not used in interstate commerce. Id.

32. Rev. St. § 3365-23. Cleveland & E. R. Co. v. Somers, 24 Ohio Circ. R. 67. Couplers must be in condition to be used automatically. Phila. & R. R. Co. v. Winkler [Del.] 56 Atl. 112.

33. Phila. & R. R. Co. v. Winkler [Del.] 56 Atl. 112.

34. Hoye v. Great Northern R. Co., 120 Fed. 712.

35. A power conferred upon trustees of an incorporated town over highways and bridges therein and to regulate nuisances and things tending to endanger persons and property authorizes the regulation of the speed of trains [Burns' Rev. St. 1901, §§ 4404, 4357, cl. 4, 6, 9, 16]. Baltimore & O. R. Co. v. Whiting, 161 Ind. 228, 68 N. E. 266.

36. Chicago & A. R. Co. v. Carlinville, 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391. Requirement of reduction of speed to 10 miles an hour within limits of a city of 3,600 held reasonable, though its effect was injurious to a railroad's competition with other trains of another road. Id. Ordinance limiting speed to six miles in a city of two thousand held reasonable where there were numerous crossings and the track ran through a cut in a curve [Rev. St. 1899, §

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speed to a certain rate where crossing gates are constructed does not obviate the effect of a statute limiting speed to a lower rate in the absence of such gates.[37] The benefit of an ordinance requiring a reduction of speed within corporate limits may be claimed by any person within its protection and is not confined to those crossing the tracks.[38]

Precautions at highway crossings.[39]—A provision that a bell should be sounded for a certain length of time by an engine at a standstill before passing a crossing requires the ringing of a bell for such length of time before a train standing across a highway is moved.[40] Under provisions that a bell must be rung after reaching a certain distance from a public crossing, the bell must be continuously sounded during switching operations in which the engine never reaches a greater distance from such crossings.[41] A bell signal is not only for the benefit of those who are on or about to cross the track, but for those who are lawfully using teams near the track.[42]

An ordinance requiring the lowering of gates is designed to make the gates a warning as well as a visible obstruction, and where a person is between the tracks, it may be liable for misleading him through its failure to lower the gates.[43] The road is not liable for an unforeseen interference with gates by a stranger.[44]

The discharge of steam in the neighborhood of crossings may be prohibited.[45]

Obstruction of crossings.—The right to leave cars standing across a highway is limited to such short periods as are necessary in the reasonable conduct of business.[46] Obstructions are punishable by fine under appropriate statutes[47] and may also be made a basis of individual recovery for damages sustained.[48] All unnecessary obstruction by different trains within the period of limitations cannot be punished under one indictment.[49] The indictment should definitely describe the street or highway.[50]

5963] (City of Plattsburg v. Hagenbush, 98 Mo. App. 669, 73 S. W. 725); but such ordinance is unreasonable in a portion of a city which was scantily settled and the slow speed would necessitate double heading heavy trains. (Id.)

37. Rev. St. 1898, § 1809, requiring a reduction of speed to six miles an hour, is not obviated by section 1809a, providing that 15 miles an hour shall not be exceeded where crossing gates have been constructed. Schroeder v. Wis. Cent. R. Co., 117 Wis. 33, 93 N. W. 837.

38. Martin v. Chicago, R. I. & P. R. Co., 118 Iowa, 148, 91 N. W. 1034, 59 L. R. A. 698.

39. See post, this section D.

40. Civ. Code, § 2132. Brown v. Southern R. Co., 65 S. C. 260.

41. Code, § 2072. Mitchell v. Union Terminal R. Co. [Iowa] 97 N. W. 1112.

42. Mitchell v. Union Terminal R. Co. [Iowa] 97 N. W. 1112.

43. Chicago & A. R. Co. v. Wise, 206 Ill. 453, 69 N. E. 500.

44. Where a gateman has fastened the gates and left them, the company is not liable for the act of a third person in unfastening them and allowing them to fall on a passing wagon, where it is not shown that any similar interference had ever taken place or that the experience of the defendant indicated the probability of such occurrence. Tuohy v. Long Island R. Co., 89 App. Div. [N. Y.] 198.

45. Rev. Code Chicago, art. 2, § 1736. Pittsburg, C., C. & St. L. R. Co. v. Robson, 204 Ill. 254, 68 N. E. 468. The question of whether a crossing is at a street within the meaning of an ordinance prohibiting the discharge of steam is for the jury, as is whether the escape of steam is wrongful under the ordinance. Id. Instruction that defendant had the right to create such smoke and steam as were usual and customary held erroneous on the evidence. Id.

46. Chicago, B. & Q. R. Co. v. Roberts [Neb.] 91 N. W. 707.

47. A municipal ordinance punishing the obstruction of a street by cars or trains for more than a certain length of time is void in so far as it conflicts with a statute of the state punishing a less obstruction [Kan. St. 1903, § 768]. Louisville & N. R. Co. v. Com., 25 Ky. L. R. 1452, 78 S. W. 124.

48. Where a statute prohibits the blocking of a crossing more than five minutes in order to permit recovery for injury to health occasioned by detention at a crossing, such detention must exceed five minutes and must occasion the damage [Code, § 3551]. Anderson v. Ala. & V. R. Co., 81 Miss. 587. Leaving a train over a crossing for six days consecutively, depriving plaintiff of the use thereof, furnishes a cause of action under a Code provision requiring the maintenance of convenient and suitable crossings for necessary roads [Code, § 3561]. Ill. Cent. R. Co. v. Denham [Miss.] 33 So. 839. Where one to pass around a crossing obstructed by defendant's work takes a path on the right of way, the obstruction of the crossing is not the proximate cause of an injury sustained by stepping into a hole in the path. De La Pena v. International & G. N. R. Co. [Tex. Civ. App.] 74 S. W. 58; Texas & P. R. Co. v. Kelly [Tex. Cr. App.] 78 S. W. 372.

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Stops at railroad crossings.—Requirements as to stops at railroad crossings need not be observed in a switch yard, the tracks belonging to the same company.[51] A statute imposing a penalty on an engineer and also on the company for failing to stop at a grade railroad crossing is not unconstitutional as punishing one person for an offense committed by another.[52] Under such statute, liability does not exist for an unavoidable failure.[53]

(§ 7) *B. Injuries to licensees and trespassers.*—Since the place of injury is always an important if not a controlling factor in actions for injuries to either trespassers or licensees, frequently fixing their status as such as well as indicating the degree of care devolving on both parties, all questions germane to this subdivision have, after treatment of a few general rules, been grouped with reference thereto.

General rules.—There is little if any difference in the duty of a railroad toward a trespasser or a mere licensee; in either case it must merely refrain from active misconduct[54] or wanton and willful injury.[55] A railroad is not absolutely relieved from anticipating their presence and taking precautions against their injury.[56] Ordinary care must be exercised after the danger is discovered,[57] though they have been contributorily negligent;[58] but in absence of knowledge, there is no liability for even gross negligence.[59] Where trespassers are on the track at places not frequented by the public by right or permission, the company owes them no duty until their peril has been discovered,[60] nor can the principle of responsibility for negligence occurring subsequently to plaintiff's negligence be applied.[61]

A railroad owes a greater duty toward one on its premises by implied invitation in a matter in which it is interested than to a mere licensee.[62]

Liability may be imposed by maintenance of a dangerous place attractive to children. Allowing a pile of wood attractive to children to remain with knowledge of the character of the ground and jarring effect of the trains passing near it

49. Louisville & N. R. Co. v. Com., 25 Ky. L. R. 1452, 78 S. W. 124.

50. Insufficient to describe it as one crossing near a depot. Louisville & N. R. Co. v. Com., 25 Ky. L. R. 1452, 78 S. W. 124.

51. St. Louis Nat. Stock Yards v. Godfrey, 198 Ill. 288, 65 N. E. 90.

52. State v. Chicago, M. & St. P. R. Co. [Iowa] 96 N. W. 904.

53. Code, § 2073. Engineer was not at fault, but brakes failed to work in usual manner. State v. Chicago, M. & St. P. R. Co. [Iowa] 96 N. W. 904. The burden of proof is not shifted by proof that the train did not stop. The state is not bound to prove the offense beyond a reasonable doubt. Id.

54. Meneo v. Cent. R. Co., 84 N. Y. Supp. 448. Mere licensee need not be warned of dangers of jerking. Wencker v. Mo., K. & T. R. Co., 169 Mo. 592, 70 S. W. 145. An instruction allowing recovery by a licensee on proof of mere negligence is not cured by instruction given for defendant requiring willful or wanton injury. Ill. Cent. R. Co. v. Eicher, 202 Ill. 556, 67 N. E. 376.

55. Licensee. Griswold v. Boston & M. R. R., 183 Mass. 434, 67 N. E. 854. Trespasser. Belt R. Co. v. Banicki, 102 Ill. App. 642. Trespasser on a railroad bridge. Chicago T. T. R. Co. v. Gruss, 200 Ill. 195, 65 N. E. 693. In an action for an injury to a trespasser, it must affirmatively appear from the petition that after discovery the company's employes acted so as to indicate a willful and wanton disregard for the trespasser's safety. Nashville, C. & St. L. R. Co. v. Priest, 117 Ga. 767.

56. Ashworth v. Southern R. Co., 116 Ga. 635, 59 L. R. A. 592. Servants must use due care to discover their presence in a position of danger, when circumstances exist putting a man of average prudence on inquiry. Myers v. Boston & M. R. R. [N. H.] 55 Atl. 892.

57. Chicago T. T. R. Co. v. Gruss, 200 Ill. 195, 65 N. E. 693; Davis' Adm'r v. Chesapeake & O. R. Co., 25 Ky. L. R. 342, 75 S. W. 275. A railway company is liable where its employes fail to warn a person who is seen by them to place himself in a position of peril, even though he was negligent. Cent. Tex. & N. W. R. Co. v. Gibson [Tex. Civ. App.] 79 S. W. 351. It is necessary to show actual knowledge imputable to the company. Erie R. Co. v. McCormick, 69 Ohio St. 45, 68 N. E. 571.

58. Humphreys' Adm'x v. Valley R. Co., 100 Va. 749.

59. Person stealing ride. Crawleigh v. Galveston, H. & S. A. R. Co. [Tex. Civ. App.] 67 S. W. 140.

60. Goodman's Adm'r v. Louisville & N. R. Co., 25 Ky. L. R. 1086, 77 S. W. 174.

61. Burns v. Louisville & N. R. Co., 136 Ala. 522.

62. One who for many years has carried meals to railroad mail clerks. Ill. Cent. R. Co. v. Hopkins, 200 Ill. 122, 65 N. E. 656. A child on a freight caboose to leave lunches for employes under an arrangement between his parents and the trainmen. Wencker v.

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may render a railroad liable for an injury to a child shaken under its train without regard to the ownership of the ground on which the pile of wood was placed.[63]

Where a trespasser is injured without the fault of the company, the employes are under no legal duty to take charge and care for him, but it is otherwise where he is injured by the negligence of the employes.[64]

Persons carried as employes of independent contractor.—The position of one being carried to and from his work in the employ of an independent contractor with the company is analogous to that of a servant of the railroad.[65] A railway company owes a volunteer, riding on a train gratuitously, though with permission, only the duty of ordinary care not to injure him.[66] The railroad may by contract exempt itself from liability to an express messenger for injuries proximately caused by the ordinary negligence of the employes of the company,[67] or may take advantage of his contract with his employer.[68]

Persons at stations.—While the railroad is not held to the same degree of care toward licensees coming on its premises at stations as towards its passengers, it must exercise ordinary prudence toward them,[69] unless the time of their approach excludes the implication of invitation.[70] The company is not bound to make it im-

Mo., K. & T. R. Co., 169 Mo. 592, 70 S. W. 145.

63. Evidence held sufficient to go to the jury. Kan. City, Ft. S. & M. R. Co. v. Matson [Kan.] 75 Pac. 503.

64. Union Pac. R. Co. v. Cappier, 66 Kan. 649, 72 Pac. 281. The company is not liable where one of its servants does not use his best judgment in affording the necessary assistance to persons injured while on the tracks without invitation, whether regarded as trespassers, mere licensees or persons on the tracks by mere sufferance. Ill. Cent. R. Co. v. Eicher, 202 Ill. 556, 67 N. E. 376.

65. An employe of an independent contractor for railroad construction who rides on a gravel train by permission of the employes in charge and with the acquiescence of the road-master, superintendent and general manager is not a trespasser. Gulf, C. & S. F. R. Co. v. Lovett [Tex. Civ. App.] 74 S. W. 570. He is contributorily negligent in riding on the footboard of an engine between it and the cars. Id. A sudden check of a gravel train necessary to avoid a collision is not negligence. Id. Evidence held to show that a person injured jumped from a train and was not thrown therefrom by a sudden jar. Id.

66. An employe of a contractor doing railway work rode on the gravel train to and from work and fell off the engine. Held, not a passenger or employe, and company owed him only ordinary care. Lovett v. Gulf, C. & S. F. R. Co. [Tex.] 79 S. W. 514.

67. He is not a passenger for hire. Peterson v. Chicago & N. W. R. Co. [Wis.] 96 N. W. 532.

68. Peterson v. Chicago & N. W. R. Co. [Wis.] 96 N. W. 532.

69. Smoak v. Savannah, F. & W. R. Co., 65 S. C. 299. A railroad is bound to the exercise of ordinary care toward one near its depot in good faith to meet for a business consultation one whom he had reason to believe was to take a train. Klugherz v. Chicago, M. & St. P. R. Co. [Minn.] 95 N. W. 586. Where one properly at the station was injured by the breaking of a cable in the process of unloading a gravel train, evidence of the manner of starting the engine and as to the character of the rope in issue is admissible. Id.

Defective platform: Where it has been a custom to permit the public to pass through a train shed for access to defendant's terminal dock, persons so passing are to be regarded as licensees and may recover for negligent maintenance of the shed. Fitzgerald v. N. Y. Cent. & H. R. R. Co., 84 App. Div. [N. Y.] 59. Evidence held sufficient to demand submission to the jury of whether a skid over which plaintiff stumbled was left in its position by defendant's employes. Ill. Cent. R. Co. v. Hopkins, 200 Ill. 122, 65 N. E. 656. Evidence of use of steps of a platform is admissible in an action for injury to a licensee to show their adoption as a part of defendant's accommodation for the public. Smoak v. Savannah, F. & W. R. Co., 65 S. C. 299. In order to show notice of a condition of a station platform, statements of a member of a railroad commission to officials of the company are admissible. Id.

Negligent handling of mail bags: A railroad company is responsible in permitting a mail agent to pursue a course of conduct with reference to the throwing off of mail bags at stations which is dangerous to bystanders, where it has been continued for a sufficient length of time so that the railway company is presumed to have had knowledge. There is no distinction between passengers and other persons rightfully on the platform at a railway station. Carver v. Minneapolis & St. L. R. Co., 120 Iowa, 346, 94 N. W. 862. A bag need never have been thrown off at the exact point on the platform where the injury occurred. Id. Plaintiff is not bound to assume that such negligent conduct will be continued, and is not held to assume the risk of being struck by a mail bag thrown from the train by the mere existence of a custom so to throw them unless he has appreciated the danger involved. Facts held insufficient to show such assumption. Id.

70. Such time should be considered. Klugherz v. Chicago, M. & St. P. R. Co. [Minn.] 95 N. W. 586. One going to the station to meet her husband who she presumed was there on business with the com-

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possible for one to injure himself.[71] The question of whether one by the advice of the conductor, using a trestle to reach a train, is a trespasser, is one of fact.[72]

Persons having relation to passenger, who accompany them on trains or to stations, are entitled to nearly as high a degree of care.[73] They are entitled to an opportunity to alight,[74] where their presence is known,[75] and their intention to alight.[76] It has been held that one who accompanies his wife to a station without an intention of becoming a passenger himself, being a mere licensee, cannot recover for the acts of a disorderly person allowed to remain in the station.[77]

Persons loading and unloading cars are entitled to the exercise of reasonable care and skill on the part of the railroad.[78]

Cars received from through companies must be inspected to ascertain whether they are reasonably safe for those about them.[79] It is for the jury to determine whether a proper inspection of a car would be feasible without breaking the seal.[80]

pany goes on the station platform at her peril where the station is closed and there is no invitation to the public to approach. Sullivan v. Minneapolis, St. P. & S. S. M. R. Co. [Minn.] 97 N. W. 114.

71. Evidence held to show contributory negligence on the part of one falling from a railroad platform at night through failure to take a lantern. Sweet v. Union Pac. R. Co., 65 Kan. 812, 70 Pac. 883. One sitting on a station platform at a point where liable to be struck by a train is contributorily negligent in going to sleep or becoming oblivious to his surroundings. Zumault v. Kan. City S. B. R. Co., 175 Mo. 288, 74 S. W. 1015. Wanton and willful disregard of human life is not shown where the engineer applies the brakes immediately on discovering the danger, though he failed to see plaintiff until within 10 or 15 feet, and there was nothing to obstruct his view except that plaintiff was in the shade of a station platform. Id.

72. Chicago T. T. R. Co. v. Kotoski, 199 Ill. 383, 65 N. E. 350.

73. One getting on a train to assist his wife and small children in getting properly seated, having notified the conductor of his purpose, is properly on the train. Tex. & P. R. Co. v. Funderburk, 30 Tex. Civ. App. 22, 68 S. W. 1006.

74. Where plaintiff with knowledge of the conductor entered the train to assist his wife to a seat and is injured by a sudden jolt of the car while attempting to get off, the train having stopped but a very short time, his negligence is for the jury. Tex. & P. R. Co. v. Funderburk, 30 Tex. Civ. App. 22, 68 S. W. 1006. One who boards a freight caboose to make inquiries of the conductor as to the presence of his wife on the train may recover where, the train having started, the conductor demanded that he pay his fare or get off, refuses to stop the train and locks him on the platform, whence he is thrown by the lurching of the car. Great Northern R. Co. v. Bruyere [C. C. A.] 114 Fed. 540. Where the evidence is that an injury was caused by the sudden jerk of the train, the jury should be instructed that the starting before plaintiff alighted was not the proximate cause of the injury. Saxton v. Mo. Pac. R. Co., 98 Mo. App. 494, 72 S. W. 717.

75. Where plaintiff was injured while attempting to leave the train on which he had gone to seat his family, other witnesses may testify that they had boarded the train for similar purposes in order to show a custom and knowledge of the trainmen. Tex. & P. R. Co. v. Crockett, 27 Tex. Civ. App. 463, 66 S. W. 114.

76. The carrier is not liable to one accompanying passengers on the train who attempts to get off after it begins to move, the employes not having knowledge that he was not going on the train. The train had made a sufficient stop at the station. Oxsher v. Houston, E. & W. T. R. Co., 29 Tex. Civ. App. 420, 67 S. W. 550. Evidence held to show that person jumping from a moving train after having boarded it while stopping for the purpose of seeking his child was not negligent. Tex. & P. R. Co. v. Crockett, 27 Tex. Civ. App. 463, 66 S. W. 114. Instruction as to notice to a brakeman that one having accompanied his family upon a train was intending to alight, held improper, as giving undue prominence to a portion of the facts. Saxton v. Mo. Pac. R. Co., 98 Mo. App. 494, 72 S. W. 717.

77. Houston & T. C. R. Co. v. Phillio, 96 Tex. 18, 69 S. W. 994.

78. When a person enters on the car or train of a railroad company to deliver his property for transportation, with the knowledge and assent of the company and according to a custom so to do, or where he enters with the company's knowledge, assent, acquiescence and approval and according to said custom, or where he enters on the invitation and at the request of the railroad company to deliver his property for shipment, the railroad company is bound to the exercise of prudence, reasonable care and skill to see that he is not injured. State v. Western Md. R. Co. [Md.] 56 Atl. 394. Where plaintiff was loading a car at the time it was derailed, an instruction under Civ. Code, § 2321, as to the liability of a railroad for all damages done by the running of its locomotives and trains should be given. Atlanta, K. & N. R. Co. v. Roberts, 116 Ga. 505.

79. Inspection reasonably well calculated to discover defects. Tateman v. Chicago, R. I. & P. R. Co., 96 Mo. App. 448, 70 S. W. 514. The fall of a door while an attempt is being made to open it is evidence of a defective condition. Id. Though a road receiving a sealed car from another is not liable for its defective condition occasioning an injury to one unloading it, where it has no control over it or right to open it to ascertain its condition and no knowledge of its condition,

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Ordinary care in switching cars towards persons engaged in work in or about cars on sidings is not sufficient.[81] Failure to notify persons unloading cars of an intention to strike such cars with others is negligence,[82] but there is no duty upon switch crews to avoid striking standing freight cars or to see that men at work in such cars and aware of the approach of moving cars should get off before the cars come in contact.[83] Where one is rightfully working in the car of a railroad company, ignorance of the railroad's servants will not relieve it from liability for their negligence,[84] and they are not relieved by a notice to his employer to have him leave the train at a certain time.[85]

The owner of an elevator and his employes are mere licensees of the railroad right of way, and in loading cars are subject to the rights of the company to handle its trains and use the track for switching purposes in the ordinary and usual way.[86] Particular cases on the question of negligence are cited in the notes,[87] as are illustrations of contributory negligence.[88]

Where the cars are billed out and the train is being made up, an employe of the shipper continuing work is a mere licensee,[89] and where his duty has terminated, a trespasser.[90]

Children on tracks.—Though the trespasser is a child of tender years, no duty is owed until his presence is actually discovered;[91] but thereafter exercise of due

White v. N. Y., N. H. & H. R. Co., 25 R. I. 19. Allegation held to be equivalent to one of knowledge or means of knowledge of defective condition of a car door. Tateman v. Chicago, R. I. & P. R. Co., 96 Mo. App. 448, 70 S. W. 514.

80. Tateman v. Chicago, R. I. & P. R. Co., 96 Mo. App. 448, 70 S. W. 514.

81. Kan. City Southern R. Co. v. Moles [C. C. A.] 121 Fed. 351.

82. Copley v. Union Pac. R. Co., 26 Utah, 361, 73 Pac. 517. Making a flying switch without warning. Kan. City Southern R. Co. v. Moles [C. C. A.] 121 Fed. 351. Ringing of a locomotive bell is not notice of intention to back onto a siding. Copley v. Union Pac. R. Co., 26 Utah, 361, 73 Pac. 517.

83. Rock Island & P. R. Co. v. Dormady, 103 Ill. App. 127.

84, 85. Cent. of Ga. R. Co. v. Duffy, 116 Ga. 346.

86. Chicago, B. & Q. R. Co. v. Giffen [Neb.] 96 N. W. 1014.

87. Kicking cars on the sidetrack so as to injure an elevator employe engaged in moving a partly filled car with a pinch bar. Chicago, B. & Q. R. Co. v. Giffen [Neb.] 96 N. W. 1014. Moving a car without allowing sufficient time to disconnect a chute employed in unloading. Hartford v. N. Y., N. H. & H. R. Co., 184 Mass. 365, 68 N. E. 835. A person was moving freight from a car in a railroad yard when the car was moved and he was injured by a radiator falling on him. Held, that the railroad company was guilty of negligence, though the moving of the car was due to failing of a car which was being moved to follow the switch track and it was derailed and drawn against the car in which plaintiff was at work. Fisher v. N. Y. Dock Co., 91 App. Div. [N. Y.] 526. Backing into a car on a sidetrack. Atlanta, K. & N. R. Co. v. Roberts, 116 Ga. 505. Making a gravity switch. Louisville & N. R. Co. v. Logsdon, 24 Ky. L. R. 1566, 71 S. W. 905. Evidence held insufficient to support an instruction that if the conductor warned persons engaged in unloading a freight car of the approach of moving cars, and that such act amounted to the exercise of ordinary care for their safety, the finding should be for defendant. St. Louis S. W. R. Co. v. Brown [Tex. Civ. App.] 69 S. W. 1010.

88. One attempting to pass between standing cars which he was employed in loading is not negligent per se. Copley v. Union Pac. R. Co., 26 Utah, 361, 73 Pac. 517. Or to get between them to move them. Chicago, B. & Q. R. Co. v. Giffen [Neb.] 96 N. W. 1014. One engaged in cleaning a freight car acts within his rights in going to the door when the car is moved without his knowledge of the reason, though there is danger attending his so doing, but he must not unnecessarily place himself in peril. Instructions held to properly submit the questions of negligence to the jury. Cincinnati, N. O. & T. P. R. Co. v. Vaught [Ky.] 78 S. W. 859. Men working on freight cars in the yards are bound to protect themselves from jolts if they see that switching is being done. Rock Island & P. R. Co. v. Dormady, 103 Ill. App. 127. One knowing that it was about time for a switch engine to couple to cars which he is crossing is contributorily negligent in walking across them on a narrow plank standing perfectly erect and with his hands occupied. Ill. Cent. R. Co. v. Broughton [Ky.] 78 S. W. 876. Acts done in attempting to avoid injury may, by the circumstances, be relieved from negligence, such as jumping from a car which he was loading after it was derailed by being run into by a freight train. Atlanta, K. & N. R. Co. v. Roberts, 116 Ga. 505.

89. Chicago, I. & L. R. Co. v. Martin, 31 Ind. App. 308, 65 N. E. 591.

90. Where one engaged about cars after the termination of his duty attempts to climb on them for his own convenience, he is a trespasser and the duty of the company is limited to refraining from injuring him after his danger is discovered. Ill. Cent. R. Co. v. Broughton [Ky.] 78 S. W. 876.

91. Nashville, C. & St. L. R. Co. v. Priest, 117 Ga. 767. A railroad may assume that no

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care is not sufficient,[92] and to discover his presence on or near the track the railroad must use ordinary care by keeping reasonable lookout.[93] It cannot be assumed that it will remain in or seek a place of safety.[94] A rule as to the nonliability of the railroad for the sudden impulse of a person running on the track under the influence of fright is not applicable.[95]

A failure to fence against stock cannot be shown as evidencing negligence, especially where not the proximate cause of injury to a child.[96] The question of whether an unlawful rate of speed was the proximate cause of the injury and death of a child is for the jury.[97] Where the only negligence complained of is in not having a watchman on the rear of cars which are being backed to make a coupling, it must be shown that such watchman if present could have averted the accident with ordinary care.[98]

A child may be of sufficient discretion to be negligent[99] or negligence may be imputed to their custodians.[1] General rules of evidence are applicable.[2]

children are playing about or under its cars, and unless it knows or has reasonable grounds to anticipate their presence, it is not bound to look out for them. Wagner v. Chicago & N. W. R. Co. [Iowa] 98 N. W. 141. Failure to comply with statutory requirements as to giving signals and checking the speed of the train in approaching a public crossing held not relative to a child not on a crossing an act of negligence. Combs v. Ga. R. & B. Co., 115 Ga. 1020.

92. Child of 3½ years. Livingston v. Wabash R. Co., 170 Mo. 452, 71 S. W. 136. Where a child is of such tender years that a presumption does not arise that she will leave the track before the train reaches her, the train must be stopped if it can be done by the exercise of the highest degree of care. Mo., K. & T. R. Co. v. Hammer [Tex. Civ. App.] 78 S. W. 708. An abstract instruction as to the duty to stop on discovering a child on the track is not misleading where the law is properly stated in another instruction applying it to the facts. Id. Railroad held not liable where a child was directed to and did sit down by the side of the track on the approach of the train, but starts across it when the train is very near. Southern R. Co. v. Eubanks, 117 Ga. 217.

93. Failure to keep such a look out is negligence per se. Mo., K. & T. R. Co. v. Hammer [Tex. Civ. App.] 78 S. W. 708. Failure to stop an engine until after the accident, though the position of decedent was seen, authorizes the submission of failure to exercise proper care. Tex. & P. R. Co. v. Ball [Tex. Civ. App.] 73 S. W. 420. Liability is imposed where the engineer sees or could have seen by the exercise of ordinary care in time to avoid the accident, a child running across a depot platform so as to indicate to a person of ordinary prudence that it would run onto the track. Livingston v. Wabash R. Co., 170 Mo. 452, 71 S. W. 136. An instruction that the degree of care to discover children would vary with the known possibility of danger along different portions of the road is not injurious as conveying the idea that the care to be used is other than ordinary care. Mo., K. & T. R. Co. v. Hammer [Tex. Civ. App.] 78 S. W. 708. If children are in the habit of playing in a switch yard with knowledge and acquiescence of the company and its employes, ordinary care must be used to avoid injury toward them and to discover their presence. Ollis v. Houston, E. & W. T. R. Co. [Tex. Civ. App.] 73 S. W. 80. Evidence held sufficient to require submission of discovery of danger of a minor on the track in time to avoid striking him. Tex. & P. R. Co. v. Yarbrough [Tex. Civ. App.] 73 S. W. 844. Evidence held insufficient to show negligence in failing to discover the presence of an 11 year old child picking up coal in a cut 7 or 8 feet in depth and 230 yards from a private crossing. Goodman's Adm'r v. Louisville & N. R. Co., 25 Ky. L. R. 1086, 77 S. W. 174.

94. Mo., K. & T. R. Co. v. Hammer [Tex. Civ. App.] 78 S. W. 708; Louisville & N. R. Co. v. Vanarsdell's Adm'r, 25 Ky. L. R. 1432, 77 S. W. 1103. Where a child of 3½ is seen running across a depot platform, it cannot be assumed that he will stop before crossing it. Livingston v. Wabash R. Co., 170 Mo. 452, 71 S. W. 136.

95. Child ran 50 feet diagonally across a depot platform in a way showing that it was trying to reach a platform on the other side. Livingston v. Wabash R. Co., 170 Mo. 452, 71 S. W. 136.

96. Rev. St. 1892, § 3324. Opening in a fence held not the proximate cause of injury to a boy six years of age attempting to catch hold of a passing car. Lake Shore & M. S. R. Co. v. Liidtke, 69 Ohio St. 384, 69 N. E. 653.

97. O'Brien v. Wis. Cent. R. Co. [Wis.] 96 N. W. 424. Evidence held to authorize an instruction as to the effect of discovery of a boy in imminent peril in time to have avoided injuring him had not the engine been running at an unreasonable and dangerous speed. Tex. & P. R. Co. v. Ball [Tex. Civ. App.] 73 S. W. 420.

98. Mo. Pac. R. Co. v. Jaffi, 67 Kan. 81, 72 Pac. 535.

99. Question of contributory negligence of child held for the jury where he was injured in climbing out of a ditch after being caught under a train without defendant's fault. Anna v. Mo. P. R. Co., 96 Mo. App. 542, 70 S. W. 398. A boy trespasser, 10 years old, of average intelligence, fair hearing and good eyesight, familiar with the locality; the approaching train being in view for several hundred feet; is guilty of contributory negligence. Le Duc v. N. Y. Cent. & H. R. R. Co., 92 App. Div. [N. Y.] 107. A boy of 14, familiar with the dangers of the sur-

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Adults walking on tracks.—Habitual or occasional use of the track by pedestrians is not sufficient to cause them to become more than mere licensees if not trespassers.[3] An invitation to the public is not shown by the fact that tracks are so ballasted as to prevent injury to employes,[4] and where a path is provided, the road may assume that the public will confine itself thereto.[5] Some jurisdictions hold that where the presence of persons on the track is to be anticipated, diligence after discovery of peril will not discharge the railroad's duty.[6] Towards a trespasser there is no duty except to use reasonable care after discovering their peril,[7] though roads are by statute made public highways.[8] As to what is such care, see footnotes.[9] This rule may be modified by antecedent negligence, such as excessive

roundings, who, without looking about him, is struck by a train on another track while he is looking under a standing train in search of a companion, is contributorily negligent. Cleveland, C., C. & St. L. R. Co., v. Gahan, 24 Ohio Circ. R. 277. A boy 7 years of age, intelligent, resident in the neighborhood of the railroad and acquainted with the movement of trains, may be capable of contributory negligence. Givens v. Louisville & N. R. Co., 24 Ky. L. R. 1796, 72 S. W. 320. A boy of 11 may by reason of undeveloped judgment not sufficiently appreciate the imprudence of attempting to cross in front of an engine so as to be contributorily negligent, though he knows the danger of the condition. Tex. & P. R. Co. v. Ball [Tex. Civ. App.] 73 S. W. 420. The question held for the jury where the train was being run without warning and in violation of a speed ordinance. Id.

1. Evidence held insufficient to show negligence imputable to the father of a child killed. Corbett v. Or. S. L. R. Co., 25 Utah, 449, 71 Pac. 1065. Evidence held sufficient to present a question for the jury as to the contributory negligence of a father of a child twenty-five months old in permitting it to get on a railroad track. O'Brien v. Wis. Cent. R. Co. [Wis.] 96 N. W. 424.

2. Where a minor was struck while crossing the tracks, evidence as to his connection with brass stolen from a school building is inadmissible; or his mother's declaration that she was capable of taking care of her minor child, that she did not think that he had been on defendant's right of way, and that the police had no business to monkey with him, as are statements of his parents to one who warned the minor from jumping on trains. One who made measurements after the accident may testify that he was shown the place by persons who were present, and such persons may testify that they have shown the place to different parties. Over v. Mo., K. & T. R. Co. [Tex. Civ. App.] 73 S. W. 535.

3. Use to reach dwellings. Griswold v. Boston & M. R. R., 183 Mass. 434, 67 N. E. 354. Occasional use of a deep cut reached by passing an iron cattle guard is trespass. Goodman's Adm'r v. Louisville & N. R. Co., 25 Ky. L. R. 1086, 77 S. W. 174. A person walking on a railroad track outside the limits of a town or city, there being no roadway for the use of the public, is a trespasser. Chesapeake & O. R. Co. v. See's Adm'x [Ky.] 79 S. W. 252. Mere acquiescence of the company in such use of its tracks does not amount to a license to so use them. Id. Where, with the company's knowledge, a right of way had been used as a passway for many years, though there was a sign warning people off, one using the right of way for such purpose is not a trespasser. Murrell v. Mo. Pac. R. Co. [Mo. App.] 79 S. W. 505.

4. Ill. Cent. R. Co. v. Eicher, 202 Ill. 556, 67 N. E. 376.

5. A child under the cars or between the rails is to be regarded as a trespasser. Wagner v. Chicago & N. W. R. Co. [Iowa] 98 N. W. 141.

6. Where the track is unfenced and there are dwellings on each side so that it is quite generally used as a highway, the railroad is bound to reasonable diligence to prevent injury. Corbett v. Or. S. L. R. Co., 25 Utah, 449, 71 Pac. 1065.

7. Such a person cannot allege that it was negligence to fail to give signals on approach to either a public or a private crossing. Davis' Adm'r v. Chesapeake & O. R. Co., 25 Ky. L. R. 342, 75 S. W. 275; Chesapeake & O. R. Co. v. See's Adm'x [Ky.] 79 S. W. 252. Where a railroad company had left its fences down on each side of a not extensively used path across its tracks, held not to show a license so as to impose on the company the duty of using reasonable care in running its trains so as to protect persons using the path. Le Duc v. N. Y. Cent. & H. R. R. Co., 92 App. Div. [N. Y.] 107. A person using such path is a trespasser. Id.; Cleveland, C., C. & St. L. R. Co. v. Gahan, 24 Ohio Circ. R. 277.

8. Const. art. 272, providing that railways are public highways does not impose a duty to use due care and diligence to discover a person on the track and refrain from injuring him when such person except for the provision would have been a trespasser [Const. art. 272]. Evidence held to require the exercise of ordinary care to discover an intoxicated trespasser and to justify a recovery, though plaintiff was contributorily negligent. McClanahan v. Vicksburg, S. & P. R. Co., 111 La. 781.

9. Failure of an engineer of a train on a sidetrack to warn a person walking on a parallel track, in the absence of a showing that the engineer knew of the approach of another train, or of plaintiff's purpose, was not negligence on the engineer's part. Gregory v. Louisville & N. R. Co. [Ky.] 79 S. W. 238. Evidence held not to show that an engineer was negligent in failing to sound a whistle after discovering plaintiff's intestate instead of reversing the engine, applying the sand and air-brakes, he being unable to do both. Humphreys' Adm'x v. Valley R. Co., 100 Va. 749.

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speed[10] or failure to keep a lookout.[11] The engineer or train crew may presume until the contrary appears that one on the track will take ordinary precautions for his own safety.[12]

Contributory negligence prevents recovery,[13] save in states which have adopted what is termed the "last clear chance" doctrine.[14] See the footnotes for illustrations of contributory negligence,[15] burden of proof,[16] presumptions,[17] admissibility

10. A mere licensee cannot recover, though speed is in excess of a city ordinance. Ill. Cent. R. Co. v. Eicher, 202 Ill. 556, 67 N. E. 376. Failure to obey a city ordinance limiting the rate of speed is negligence. Murrell v. Mo. Pac. R. Co. [Mo. App.] 79 S. W. 505. When running through the country, at places where there are no houses, roads or crossings, the rate of speed or lack of signals cannot be negligence as to trespassers on the track, whose presence is unknown. Gregory v. Louisville & N. R. Co. [Ky.] 79 S. W. 238.

11. Use of every reasonable means to prevent injury after discovery of a pedestrian on the tracks is not an excuse for negligence in running the train at an unlawful speed or in failing to keep a proper lookout. Where the pedestrian is not a trespasser or guilty of contributory negligence. Kroeger v. Tex. & P. R. Co., 30 Tex. Civ. App. 87, 69 S. W. 809. The issue of the company's negligence in failing to keep a proper lookout should not be rejected by the instructions. Mo., K. & T. R. Co. v. Hammer [Tex. Civ. App.] 78 S. W. 708.

12. Humphreys' Adm'x v. Valley R. Co., 100 Va. 749; Shetter v. Ft. Worth & D. C. R. Co., 30 Tex. Civ. App. 536, 71 S. W. 31; Givens v. Louisville & N. R. Co., 24 Ky. L. R. 1796, 72 S. W. 320; Carrier v. Mo. Pac. R. Co., 175 Mo. 470, 74 S. W. 1002. The fact that persons on the track remain does not charge one operating a handcar with notice that they cannot or do not intend to leave the track. Wright v. Southern R. Co., 132 N. C. 327. Where a licensee stepped on the track within a hundred feet of an approaching train, willful or wanton injury is not shown, the engineer's view being obstructed by the engine. Ill. Cent. R. Co. v. Eicher, 202 Ill. 556, 67 N. E. 376.

13. In Nebraska, the doctrine that the railroad is liable to a person negligently walking on its tracks without ability to save himself from injury, if those in charge of the train could, by the exercise of ordinary care, have discovered the peril in time to avoid the injury, is not followed. Chicago, B. & Q. R. Co. v. Lilley [Neb.] 93 N. W. 1012. Nor is recovery permitted if the railroad employes were negligent, notwithstanding there was concurrent contributory negligence of the person injured. Id. Where plaintiff walked on the track when he might have walked between tracks or on the highway, he was guilty of contributory negligence. Gregory v. Louisville & N. R. Co. [Ky.] 79 S. W. 238. The defense of contributory negligence is not precluded by the fact that a railroad did not comply with statutory regulations. Dunworth v. Grand Trunk W. R. Co. [C. C. A.] 127 Fed. 307. Where the facts disclose contributory negligence as a matter of law, it is the duty of the court to direct a verdict. A street car conductor went on the railroad track to see if it was clear. He saw a train approaching on one track and stepped over onto another track without looking and stood waiting for the train to pass when he was struck by a train coming from the opposite direction and which he could have seen had he looked. He was guilty of contributory negligence as a matter of law. Id. A licensee is charged with the duty of exercising ordinary care. On a wharf belonging to a railroad company and used for switching. Nichols v. Gulf & S. I. R. Co. [Miss.] 36 So. 192. Where a licensee in railroad yards saw a train backing down and endeavored to pass between it and some cars standing on the track, but was caught and killed, he was guilty of contributory negligence. Id.

14. **Texas:** Liability exists toward a negligent pedestrian guilty of contributory negligence, unless the railroad servants after discovery of the danger use every reasonable means consistent with the safety of the trains to prevent injury. Kroeger v. Tex. & P. R. Co., 30 Tex. Civ. App. 87, 69 S. W. 809. One walking on the tracks need not prove absence of contributory negligence by the preponderance of the evidence. Id. Instruction held erroneous as in effect stating that a pedestrian walking over a portion of the roadbed with the consent of the company was guilty of contributory negligence. Id. Contributory negligence will not bar a recovery when the injured party's peril was seen by the company's servants, or might have been seen with ordinary care. Murrell v. Mo. Pac. R. Co. [Mo. App.] 79 S. W. 505. To overcome the defense of contributory negligence, it must be shown that by exercise of ordinary care the railroad company might have avoided the consequences of decedent's negligence. Dunworth v. Grand Trunk W. R. Co. [C. C. A.] 127 Fed. 307.

15. **Held negligent:** Trespasser who had he looked behind him could have seen an approaching train for 400 yards. Carrier v. Mo. Pac. R. Co., 175 Mo. 470, 74 S. W. 1002. Attempting to walk along a track without looking behind him. Gulf, C. & S. F. R. Co. v. Miller, 30 Tex. Civ. App. 122, 70 S. W. 25. Person on tracks to pick up coal. Chinn's Adm'x v. Chesapeake & O. R. Co., 24 Ky. L. R. 2350, 74 S. W. 215. Walking on track while encumbered with a heavy load obstructing his sight and hearing. Carlson v. Atchison, T. & S. F. R. Co., 66 Kan. 768, 71 Pac. 587. Being on a track for the purpose of soliciting trade and failing to look and listen, though familiar with the surroundings. Hill v. Indianapolis & V. R. Co., 31 Ind. App. 98, 67 N. E. 276. Walking on track by one subject to epilepsy. Marks v. Atlantic C. L. R. Co., 133 N. C. 89. Walking on track with knowledge of a train approaching from rear while a companion stepped off and was not injured. Bessent v. Southern R. Co., 132 N. C. 934. A deaf man walking on a track at the time a train is due, though the track was constantly used by the

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of evidence,[18] sufficiency of evidence,[19] to require a charge on discovered negligence,[20] pleading[21] and instructions.[22]

Persons along or between tracks.—The railroad is not bound to anticipate the presence of a person on a path along its tracks, or to use ordinary care to discover his presence, unless it knows of the public use of the track or the facts necessarily charge it with knowledge.[23] Such use will not raise a license in the absence of express or implied consent.[24] The railroad is not bound to maintain a path in a

public as a pathway. Roach v. Atlanta, K. & N. R. Co. [Ga.] 45 S. E. 963. Failing to look and listen before leaving a safe position between the tracks and stepping on a track. Pharr v. Southern R. Co., 133 N. C. 610. Walking up a track on the cross-ties when train might have been seen over a mile away, though the person is on the track to attend switch lights, his employer having a contract with the railroad company for such purpose. Ill. Cent. R. Co. v. Jones [Miss.] 35 So. 193.

16. Plaintiff has the burden of showing that a stop might have been made after discovery of his peril. Thornton v. Louisville & N. R. Co., 24 Ky. L. R. 854, 70 S. W. 53.

17. The fact that a person was killed by defendant's train raises no presumption of negligence, and it is not sufficient to show that defendant's intestate was seen going in the direction of the railroad track in the nighttime intoxicated and a short time before the passage of a train. Clegg v. Southern R. Co., 133 N. C. 303.

18. **Held admissible:** Evidence of use of track by pedestrians is admissible if alleged. Jones v. Charleston & W. C. R. Co., 65 S. C. 410. Speed ordinance under an allegation of violation. Id. As bearing on negligence at a point other than at crossing, failure to observe ordinance as to speed across streets. Id. Presence of other means not used to stop the train. Carver v. Chicago, P. & St. L. R. Co., 104 Ill. App. 644.

Not admissible: Evidence that a locomotive of a kind used years previously could be stopped at a certain distance when running at a certain speed. Id.

19. **Held sufficient:** Ill. Cent. R. Co. v. Jernigan, 198 Ill. 297, 65 N. E. 88. To show that by the exercise of due care and prudence defendant could have avoided injuring one in an epileptic fit on its track. Marks v. Atlantic C. L. R. Co., 133 N. C. 89. To show that deceased was seen in time to permit stopping of train. Purcell v. Chicago & N. W. R. Co., 117 Iowa, 667, 91 N. W. 933. To demand submission of the issue of discovered peril. Texas & P. R. Co. v. Meeks [Tex. Civ. App.] 74 S. W. 329. Wanton negligence may be found from allowing detached cars to run at a speed from three to fifteen miles an hour, the brakes being out of order, over a portion of a track within town limits where it was known that many persons were accustomed to pass on foot. Fixing liability towards a trespasser. Ala. G. S. R. Co. v. Guest, 136 Ala. 348.

Held insufficient: Non-suit demanded where there was no testimony as to the manner of killing and all inference had to be drawn from the fact that decedent was found lying by the side of a track with bruises from which it might be inferred that he had been knocked from the track by defendant's engine. Clegg v. Southern R. Co., 132 N. C. 292. To show negligence of the company where plaintiff's intestate was last seen on the track, a train some 150 yards behind him, the circumstances being such that he could have been plainly seen and the train stopped within 40 or 50 yards. Southern R. Co. v. Hall's Adm'r [Va.] 45 S. E. 867. To show that the defendant's servants discovered plaintiff's danger in time to have avoided his injury by the use of the means at their command. Gulf, C. & S. F. R. Co. v. Miller, 30 Tex. Civ. App. 122, 70 S. W. 25. To show wanton negligence toward a trespasser on the right of way, though he was in view for 400 yards and no signals were given. Carrier v. Mo. Pac. R. Co., 175 Mo. 470, 74 S. W. 1002. To impose liability on the ground of conduct recklessly disregarding the safety of others and showing willingness to inflict injury in the case of a person on the track under an implied license at a time when persons were likely so to be during a rain with a raised umbrella, one of the windows on the engine being obstructed and no warning signal being given, but where the speed was no greater than usual and it did not appear that the person injured was seen. Manlove v. Cleveland, C., C. & St. L. R. Co., 29 Ind. App. 694, 65 N. E. 212. To show unreasonable delay in releasing plaintiff from a position under a tender. Griswold v. Boston & M. R. R., 183 Mass. 434, 67 N. E. 354.

20. Shetter v. Ft. Worth & D. C. R. Co., 30 Tex. Civ. App. 536, 71 S. W. 31.

21. In an allegation of wanton injury, an averment that a great many people passed on foot as was well known to defendant's agents and servants is improperly stricken. Ala. G. S. R. Co. v. Guest, 136 Ala. 348. An action for damages to a trespasser, the specific allegations of which negative a general allegation of negligent, careless and wanton killing, is demurrable. Seaboard A. L. R. v. Shigg, 117 Ga. 454. A denial that the engineer could have seen the perilous position of the decedent does not amount to an admission that decedent could not see the engineer or the approaching train. Pharr v. Southern R. Co., 133 N. C. 610.

22. Where a charge as to the care necessary towards persons on the track is applicable to either trespassers or licensees, a charge stating the distinction between such classes of persons need not be given. Smith v. International & G. N. R. Co. [Tex. Civ. App.] 78 S. W. 556. An instruction as to the duty required of plaintiff held erroneous as argumentative. Mo., K. & T. R. Co. v. Owens [Tex. Civ. App.] 75 S. W. 579. The ownership and operation of a train by defendant may be assumed in the instruction, where there is no issue raised in the evidence. Id.

23. Reichert v. International & G. N. R. Co. [Tex. Civ. App.] 72 S. W. 1031.

24. A provision of walks rebuts a pre-

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safe condition, though generally used by the public with its knowledge and acquiescence,[25] unless such use has been sufficient to establish a right by prescription.[26] As to persons on a public way located entirely on its right of way, the railroad is bound to exercise the care required toward licensees only.[27] Walking between the tracks is contributory negligence, though they are located in a public street, if there is room to walk outside them and in a place of safety.[28]

Trainmen are not bound to assume that a person not on the track will get on it when it will be dangerous to do so.[29]

For questions of pleading,[30] instructions[31] and sufficiency of evidence, see cases cited in the notes.[32]

Persons standing, sitting or lying on track.[33]—A license to use a track for sleeping or sitting purposes cannot be inferred from a license to use it as a highway.[34] As to persons so situated the sole duty of the company is to use all means in its power to keep from injuring them after they are discovered.[35]

sumption of assent to the use of a space between the tracks for public travel. Wagner v. Chicago & N. W. R. Co. [Iowa] 98 N. W. 141.

25. De La Pena v. International & G. N. R. Co. [Tex. Civ. App.] 74 S. W. 58.

26. On acquiescence in the use of its track by foot passengers for a long time, those using it are licensees, and the company is liable to one injured by reason of a defect in the path of which he has no notice. Matthews v. Seaboard A. L. R. [S. C.] 46 S. E. 335. Where one road makes an excavation of the tracks of two others, all three are jointly liable towards a person injured through a defect thus occasioned in the path between the two latter. Id.

27. Meinrenken v. N. Y. Cent. & H. R. R. Co., 81 App. Div. [N. Y.] 132.

28. Atchison, T. & S. F. R. Co. v. Schwindt, 67 Kan. 8, 72 Pac. 573.

29. Evidence held insufficient to impose liability on a person starting to cross a track over which a train was switching at a point other than a regular crossing. Shetter v. Ft. Worth & D. C. R. Co., 30 Tex. Civ. App. 536, 71 S. W. 31. May presume that a boy sitting on a tie will get off and the company is not liable for injuries if the boy stumbles and falls when it is too late to stop the train. Givens v. Louisville & N. R. Co., 24 Ky. L. R. 1796, 72 S. W. 320. There must be negligence shown to allow recovery for injury of a person lying by a railroad. Lloyd v. East La. R. Co., 109 La. 446.

30. A complaint must show that there was a duty toward plaintiff's intestate, since otherwise it will be presumed that he was a trespasser. Action for failure to keep track in repair, permitting a car to fall upon plaintiff's intestate. White v. Nashville, C. & St. L. R. Co., 108 Tenn. 739, 70 S. W. 1030. Where the ultimate fact pleaded is the striking of plaintiff by a stick of wood from its train, the complaint need not be made definite as to whether the stick fell or was thrown from the train. Turney v. Southern Pac. Co. [Or.] 75 Pac. 144. Where the person injured was standing between tracks, the failure of the petition to allege the sufficiency of the space does not establish contributory negligence. Atchison, T. & S. F. R. Co. v. Keller [Tex. Civ. App.] 76 S. W. 801.

31. Instruction that there was no evidence as to the engineer's knowledge that deceased was unable to leave a perilous position by the side of the track held properly refused. Ala. G. S. R. Co. v. Hamilton, 135 Ala. 343. Instruction as to the duty of the railroad toward a person seated on the ties and as to the effect of an attempt to jump on or off a train in motion, held not prejudicial to plaintiff, though inaptly expressed. Givens v. Louisville & N. R. Co., 24 Ky. L. R. 1796, 72 S. W. 320.

32. Held sufficient to authorize submission of issue of willful or wanton negligence as to a person by the track, apparently asleep. Ala. G. S. R. Co. v. Hamilton, 135 Ala. 343. To show that an accident was due to intestate's negligence, he being deaf and walking beside the track, the engine having whistled loudly to scare cattle off the track, and the train running into the cattle before striking intestate, thus causing the engineer not to see intestate's danger in time to avoid striking him. Turner v. Yazoo & M. V. R. Co. [Miss.] 33 So. 283. To render contributory negligence of persons standing between the tracks, a question for the jury. Atchison, T. & S. F. R. Co. v. Keller [Tex. Civ. App.] 76 S. W. 801.

Held insufficient to show negligence toward one beside the track struck by a projecting timber on a train. Reichert v. International & G. N. R. Co. [Tex. Civ. App.] 72 S. W. 1031.

33. Lying on a railroad track is contributory negligence per se. Evidence held sufficient to show that decedent was lying on the railroad track when struck. Gulf, C. & S. F. R. Co. v. Matthews [Tex. Civ. App.] 73 S. W. 413. One standing on a track with his back to stationary freight cars some 50 feet distant is contributorily negligent, though he was waiting for a train to pass on another track. Zirkle v. Mo. Pac. R. Co., 67 Kan. 77, 72 Pac. 539. The question of contributory negligence in bending over a track to tie a shoe is for the jury. Over v. Mo., K. & T. R. Co. [Tex. Civ. App.] 73 S. W. 535.

34. Smith v. International & G. N. R. Co. [Tex. Civ. App.] 78 S. W. 556.

35. Smith v. International & G. N. R. Co. [Tex. Civ. App.] 78 S. W. 556. An intoxicated person injured after falling on the track has the burden of showing that defendant's employes discovered his danger in time to avoid his injury. Luna v. Mo., K. & T. R. Co. [Tex. Civ. App.] 73 S. W. 1061.

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Persons on bridges and trestles.—A custom of the public to use a bridge, of which the railroad has notice, may create a license without positive consent.[36] Though notices forbidding passage are sufficient to remove a duty to give highway signals.[37] A lookout need not be kept to discover trespassers,[38] and failure of an engineer to see them does not amount to negligence.[39] Persons in charge of a handcar are not held to the same diligence as those in charge of a locomotive.[40] An engineer must not presume that a child will leave a bridge and therefore neglect precautions to avoid injuring it.[41] The question of whether a person is a trespasser is for the jury,[42] as may be that of whether there was willfulness or wantonness.[43]

The going on a railroad bridge while not negligence per se is evidence of contributory negligence.[44] As to sufficiency of evidence[45] and instructions, see cases cited in the notes.[46]

Persons near crossings.—One on a highway crossing is not a trespasser,[47] but becomes so on leaving it and loitering on the tracks,[48] or passing along tracks to reach it.[49] Statutory signals may be relied on by one not precisely on the crossing.[50]

36. Jones v. Charleston & W. C. R. Co., 65 S. C. 410.

37. A bridge marked with notices to keep off and on which no plank has been laid to accommodate foot passengers is not a traveled place at which signals must be given, though persons have been accustomed to pass over it for 20 years. Ringstaff v. Lancaster & C. R. Co., 64 S. C. 546.

38. Instruction as to the duty to keep a lookout toward persons on a bridge held not to be on the weight of the evidence. McCowen v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 73 S. W. 46.

39. Purcell v. Chicago & N. W. R. Co., 117 Iowa, 667, 91 N. W. 933. As toward an intoxicated man asleep on a trestle over a highway, the same care is not required as if he were upon the highway, and the servants of the railroad company cannot be expected to discover his position in the nighttime so as to avoid injuring him. Dugan's Adm'r v. Chesapeake & O. R. Co., 24 Ky. L. R. 1754, 72 S. W. 291.

40. After discovery of persons on a trestle. Wright v. Southern R. Co., 132 N. C. 327.

41. Louisville & N. R. Co. v. Vanarsdell's Adm'r, 25 Ky. L. R. 1432, 77 S. W. 1103.

42. Where a large number of passengers on an excursion train, including plaintiff, had walked across a railroad bridge and returned thereon. Chicago T. T. R. Co. v. Gruss, 200 Ill. 195, 65 N. E. 693.

43. Where a brakeman on a rear car of a backing train warns passengers on a trestle, but makes no effort to stop the train. Chicago T. T. R. Co. v. Gruss, 200 Ill. 195, 65 N. E. 693. Evidence held sufficient to show a failure to use the appliances at hand to stop immediately on discovering decedent's danger on a railroad bridge. Gulf, C. & S. F. R. Co. v. Brown [Tex. Civ. App.] 76 S. W. 794.

44. It is proper to instruct the jury that decedent's failure to do what an ordinarily prudent and skillful person would have done under the circumstances should be considered. Harris v. Atlantic C. L. R. Co., 132 N. C. 160. The railroad is not liable to a person who jumps from a trestle, believing that he will be run down, where the train stops before the person jumps and does not go on the trestle until afterward. Weeks v. Wilmington & W. R. Co., 131 S. C. 78.

45. Evidence held sufficient. Harris v. Atlantic C. L. R. Co., 132 N. C. 160. Evidence held to sustain a verdict for plaintiff in an action for an injury received on a combination railroad and wagon bridge maintained by defendant company, where plaintiff drove on the approach with notice because of the position of the gate, that the bridge was open and safe for travel, and was injured by a train being drawn out of the bridge backward. Sutliff v. Pa. R. Co., 206 Pa. 267.

46. An instruction that the train was only 75 yards distant when plaintiff went on the bridge, and that it could have been seen had she been at all careful, held properly refused as not based on the evidence. Harris v. Atlantic C. L. R. Co., 132 N. C. 160. Where there is a finding that an injury resulted from defendant's negligence and that decedent was not contributorily negligent, the issue of the last clear chance need not be submitted. Id. Instruction held to restrict the jury to the issue of discovered peril. Gulf, C. & S. F. R. Co. v. Brown [Tex. Civ. App.] 76 S. W. 794. Error in allowing a verdict for defendant, though a trespasser was discovered before he was knocked off a bridge and no effort was made to prevent the injury, is not cured by a subsequent correct charge. McCowen v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 73 S. W. 46.

47. Southern R. Co. v. Crenshaw, 136 Ala. 573.

48. Over v. Mo., K. & T. R. Co. [Tex. Civ. App.] 73 S. W. 535.

49. Gunther v. N. Y. Cent. & H. R. R. Co., 81 App. Div. [N. Y.] 606.

50. Mo., K. & T. R. Co. v. Taff [Tex. Civ. App.] 74 S. W. 89. Failure to give a signal for a crossing as required by statute does not impose liability for striking a person several hundred feet past the crossing while attempting to cross the railroad tracks on the company's private grounds, where there was a custom to cross. Lake Shore & M. S. R. Co. v. Harris, 23 Ohio Circ. R. 400.

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An allegation that plaintiff's intestate was killed at or near a private crossing should be construed that she was killed at a place on the track other than the crossing.[51]

Persons crossing tracks away from established crossings.—Where both the railroad company and the person injured are on the premises of another by invitation, the person injured is bound to exercise ordinary care in passing over the tracks.[52] At a place where the public are permitted to cross by permission, their rights are subordinate to those of the railroad company.[53] The company must acquaint its employes with the fact that a path over its tracks is customarily used.[54] A custom to use a path across the track with notice to the company may create a license without express consent.[55] The rule that precautions must be taken where persons are accustomed to cross is especially applicable where the crossing is in a populous locality within city limits.[56] One otherwise a licensee does not become a trespasser because a fight was the occasion of his coming to the place.[57] The railroad must refrain from wanton injury.[58] Away from established crossings, failure to signal is not negligence per se.[59] Contributory negligence prevents liability.[60] Instructions must conform to the pleadings and proof.[61]

Persons in switch yards.—A railroad company is entitled to the undisturbed use of its private switch yards and is not bound to take special precautions to avoid injury to any unauthorized person who goes therein for his own convenience until the presence of such person in a position of danger has been discovered.[62] Where the railroad has provided a safe way of approach to its yards, it is not liable to a licensee injured through his adoption of another means of approach.[63] A boy

51. Davis' Adm'r v. Chesapeake & O. R. Co., 25 Ky. L. R. 342, 75 S. W. 275.

52. Pittsburgh, C., C. & St. L. R. Co. v. Selvers [Ind.] 67 N. E. 680.

53. Ground never dedicated or condemned as a street. Garrett v. Ill. Cent. R. Co., 126 Fed. 406.

54. Over v. Mo., K. & T. R. Co. [Tex. Civ. App.] 73 S. W. 535.

55. Tex. & P. R. Co. v. Ball [Tex. Civ. App.] 73 S. W. 420. A custom of numerous persons to use a private passage across tracks without disapproval of the company may bind the employes in charge of trains to anticipate the presence of persons on the tracks at that place and take precautions. Bullard v. Southern R. Co., 116 Ga. 644. Complaint held sufficient in an action for death while crossing tracks at a point where persons were accustomed to cross with knowledge of the company. Id.

56. Bullard v. Southern R. Co., 116 Ga. 644.

57. Tex. & P. R. Co. v. Ball [Tex. Civ. App.] 73 S. W. 420.

58. Speed of 50 miles an hour in the outskirts of a city is not of itself evidence of wantonness. Peters v. Southern R. Co., 135 Ala. 533. Evidence held insufficient to show wantonness in the absence of evidence that the engineer knew of plaintiff's presence or of the existence of a path used over the railroad tracks. Id.

59. A charge is erroneous which removes from the jury the question of whether a failure to ring a bell or blow a whistle is negligence. St. Louis S. W. R. Co. v. Eitel [Tex. Civ. App.] 72 S. W. 205.

60. Instructions as to the duty of the company toward licensee held erroneous as ignoring contributory negligence. St. Louis S. W. R. Co. v. Eitel [Tex. Civ. App.] 72 S. W. 205. The duty to look and listen while not applying in all strictness as to persons customarily engaged about the tracks is applicable when they are not engaged in work demanding their attention. Pittsburgh, C., C. & St. L. R. Co. v. Selvers [Ind.] 67 N. E. 680. Evidence held to show contributory negligence per se where a driver was injured in attempting to cross several tracks at a place where the right to cross was permissive on the part of the railroad company, he not having stopped and looked. Garrett v. Ill. Cent. R. Co., 126 Fed. 406. Liability cannot be imposed on the ground that though plaintiff was contributorily negligent his injuries could have been prevented, in a case where there was no reason for thinking plaintiff would attempt to cross in front of an approaching train and the employes acted promptly and efficiently. Id. Evidence held insufficient to show contributory negligence per se of one crossing a track who had looked but a short time before and was injured because of unlawful speed and failure to ring bell and keep lookout. Mo., K. & T. R. Co. v. Owens [Tex. Civ. App.] 75 S. W. 579.

61. Where the only negligence alleged is in failing to have lights on a train, negligence in failing to have lights or signals of danger at the place of injury should not be submitted. St. Louis S. W. R. Co. v. Eitel [Tex. Civ. App.] 72 S. W. 205. Proof tending to show the existence of a street at the place of injury should not be ignored in the instruction. Ill. Cent. R. Co. v. Jernigan, 198 Ill. 297, 65 N. E. 88.

62. Chinn's Adm'x v. Chesapeake & O. R. Co., 24 Ky. L. R. 2350, 74 S. W. 215.

63. Persons about to unload horses at

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crossing a freight yard after having been engaged in gathering coal along the tracks is a trespasser.[64] Negligence in allowing cars to float over a path which the public used by custom and acquiescence in railroad yards is for the jury.[65] Contributory negligence bars recovery.[66]

Persons under cars.—An implied license to cross a track is revoked by occupancy of the track by cars.[67] There is no liability toward one going under a car to escape the rain unless his danger is discovered in time to prevent the injury.[68]

Persons stealing rides.—A trespasser stealing a ride on a train assumes the risk, and the duty of the company is confined to refraining from willfully, wantonly or intentionally injuring him.[69] Children fall within this rule, apparently without regard to whether they are of sufficient discretion to be contributorily negligent.[70] Failure to remonstrate against prior trespasses does not amount to an invitation.[71] But where children have been in the habit of riding on engines, the employes of the railroad owe them a duty to prevent injury and should ascertain whether or not they are on the train.[72]

night injured by falling from a jog in a freight house platform. Hathaway v. N. Y., N. H. & H. R. Co., 182 Mass. 286, 65 N. E. 387.

64. Riordan v. N. Y. Cent. & H. R. R. Co., 41 Misc. [N. Y.] 399.

65. Instruction as to backing cars without an engine attached held to withdraw negligence in failure to ring a bell or blow a whistle. Over v. Mo., K. & T. R. Co. [Tex. Civ. App.] 73 S. W. 535. Where cars are kicked back suddenly and swiftly according to a signal by the yard master who knows that licensees are crossing tracks, a verdict may be had on the theory of active negligence. Meneo v. Cent. R. Co., 84 N. Y. Supp. 448.

66. Shetter v. Ft. Worth & D. C. R. Co., 30 Tex. Civ. App. 536, 71 S. W. 31. A railroad engaged in switching is not liable, notwithstanding it ran its car at a greater speed than usual and failed to have a brakeman on the front car. Pittsburgh, C., C. & St. L. R. Co. v. Seivers [Ind.] 67 N. E. 680.

67. No liability exists toward a child killed while attempting to crawl under such cars. Wagner v. Chicago & N. W. R. Co. [Iowa] 98 N. W. 141.

68. Kendall v. Louisville & N. R. Co., 25 Ky. L. R. 793, 76 S. W. 376.

69. Morgan v. Or. S. L. R. Co. [Utah] 74 Pac. 523; Ill. Cent. R. Co. v. Leiner, 202 Ill. 624, 67 N. E. 398; Wilson v. Atchison, T. & S. F. R. Co., 66 Kan. 183, 71 Pac. 282; Johnson v. N. Y. Cent. & H. R. R. Co., 173 N. Y. 79, 65 N. E. 946. One who intrudes himself on a freight train against the will and without the consent of employes, the rules prohibiting carriage of passengers on such trains, is a trespasser. St. Louis S. W. R. Co. v. Mayfield [Tex. Civ. App.] 79 S. W. 365. One who pays a brakeman to allow him to ride on a train and follows the brakeman's directions to keep away from the conductor is a trespasser, and the carrier is not liable for his injuries received in alighting. Sands v. Southern R. Co., 108 Tenn. 1, 64 S. W. 478. Recklessness and wantonness is not to be inferred from the mere use of language intended to influence a trespasser's voluntary action in getting off a moving train. Bjornquist v. Boston & A. R. Co. [Mass.] 70 N. E. 53. Not sufficient to hold company for gross negligence that trespasser was riding in reasonably safe place on a train, where knowledge or invitation is not shown. Crawleigh v. Galveston, H. & S. A. R. Co., 28 Tex. Civ. App. 260, 67 S. W. 140. In the absence of knowledge that one is attempting to board a rapidly moving freight train, no duty exists to see that he boards in safety. Cook's Adm'r v. Louisville & N. R. Co., 24 Ky. L. R. 1967, 72 S. W. 729. Where a person is riding on the footboard of an engine as a trespasser, a switchman may assume that he will get off when and where he may safely do so, and is not charged with knowledge that he will step on the track, and is not bound to look and see what he actually does. Myers v. Boston & M. R. R. [N. H.] 55 Atl. 892.

70. Harris v. Southern R. Co., 25 Ky. L. R. 559, 76 S. W. 151. Facts held insufficient to show negligence toward an eight-year-old child attempting to climb on a freight train. Seaboard & R. R. Co. v. Hickey [Va.] 46 S. E. 392. Liability does not exist towards a child of six who, after an engine has passed him at a crossing, attempts to climb on the attached freight cars and is killed, where his danger could not have been discovered in time to have prevented his death, though the child could not be charged with contributory negligence. Green's Adm'r v. Maysville & B. S. R. Co [Ky.] 78 S. W. 439. A boy 9 years old living near a railroad track, familiar with trains, was injured in jumping off a slowly moving train at the order of the brakeman, "Get off, or I'll break your neck." Held, this language did not show a wanton and reckless disregard for harmful consequences. Bjornquist v. Boston & A. R. Co. [Mass.] 70 N. E. 53. Liability toward a trespassing boy of weak mind injured by a fall of freight in a freight car does not arise from negligent construction of the track causing the freight to fall or from the fact that the boy's mother asked defendant's agent not to let him ride. Elkins v. S. C. & G. R. Co., 64 S. C. 553. A boy 12 years old may be guilty of contributory negligence in getting off and on a moving train. Wilson v. Atchison, T. & S. F. R. Co., 66 Kan. 183, 71 Pac. 282.

71. Previous acts in jumping on and off cars. Wilson v. Atchison, T. & S. F. R. Co., 66 Kan. 183, 71 Pac. 282.

72. Where children between the ages of

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A railroad may stop a train and eject trespassers with the exercise of such force in a reasonable way under the circumstances as is necessary to accomplish that object.[73] It is liable for an unreasonable method adopted by an employe in the ejection of a trespasser calculated to increase his danger and the proximate cause of injury.[74] Such acts are usually held within the scope of the employe's authority.[75] Liability toward a boy who alights from a train in motion, on the instruction of employes, exists where he has been on the train at their invitation, unless an ordinarily prudent person of his age would not have incurred the risk.[76] The burden is on the trespasser to show wanton and reckless misconduct.[77] For cases as to admissibility[78] and sufficiency of evidence, see the footnotes.[79]

Held insufficient to show possibility of stopping train, it being confined to testimony that the speed was from 12 to 15 miles on an up grade.[80]

Persons using handcars or railroad tricycles are trespassers, unless it is shown that the use is authorized.[81] Scheduled time of trains must be noted.[82]

(§ 7) *C. Accidents to trains.*—Railroads have equal rights on crossings in

six and fifteen were accustomed to riding on trains passing over a sidetrack through their playground with knowledge of the employes. Ashworth v. Southern R. Co., 116 Ga. 635, 59 L. R. A. 592.

73. Morgan v. Or. S. L. R. Co. [Utah] 74 Pac. 523.

74. Whether throwing coal at a trespasser was a proper means of ejection is for the jury, as well as whether it was the proximate cause of injury. Hill v. Baltimore & N. Y. R. Co., 75 App. Div. [N. Y.] 325, 11 Ann. Cas. 418. Liability exists towards a trespasser who is hit with a lump of coal by the engineer and caused to fall to the ground. Polatty v. Charleston & W. C. R. Co. [S. C.] 45 S. E. 932. Where a trespasser offers to get off a train if it is stopped, an instruction as to the duty to refrain from intentional or willful injury is authorized in case the brakeman knocks him off. Lewis v. Norfolk & W. R. Co., 132 N. C. 382. Evidence held insufficient to show that plaintiff, a trespasser, was kicked from the train. Johnson v. N. Y. Cent. & H. R. R. Co., 173 N. Y. 79, 65 N. E. 946. Evidence held insufficient to authorize a finding that a boy was either kicked off a train or so frightened that he jumped off. Ga. R. & B. Co. v. Frazier [Ga.] 46 S. E. 451. Evidence held insufficient to show a casual connection between an ejection and death. Morgan v. Or. S. L. R. Co. [Utah] 74 Pac. 523.

75. It is part of the duty of a brakeman to put a trespasser off of trains, and the railroad is not excused by the fact that he exceeded his authority or acted contrary to a rule forbidding him from ejecting a passenger from a moving train. Curtis v. Chicago, R. I. & P. R. Co., 99 Mo. App. 502, 73 S. W. 1103. A beating administered by a conductor to a trespasser who has been twice ejected from the train is within the scope of his authority. Hamilton v. Chicago, M. & St. P. R. Co., 119 Iowa, 650, 93 N. W. 594. The question of whether the act of an engineer in striking a trespasser with a lump of coal is acting within the scope of his employment is for the jury. Polatty v. Charleston & W. C. R. Co. [S. C.] 45 S. E. 932.

76. Harris v. Southern R. Co., 25 Ky. L. R. 559, 76 S. W. 151.

77. Boy trespasser jumping from moving train at the command of a brakeman. Bjornquist v. Boston & A. R. Co. [Mass.] 70 N. E. 53.

78. Where the defense is that plaintiff jumped on a moving train, evidence as to the habit of the plaintiff in so doing in the vicinity is admissible. Pittsburgh, C., C. & St. L. R. Co. v. McNeil [Ind. App.] 66 N. E. 777. Where a boy is injured while riding on a freight train contrary to the rules, a custom of allowing boys to ride between stations cannot be shown. Sands v. Southern R. Co., 108 Tenn. 1, 64 S. W. 478.

79. Held sufficient to show contributory negligence either in jumping off a moving train or in sitting on a cross-tie while the train approached. Givens v. Louisville & N. R. Co., 24 Ky. L. R. 1796, 72 S. W. 320. To show that the act of a licensee in attempting to leave a fast moving train was the proximate cause of his injury. Thornton v. Louisville & N. R. Co., 24 Ky. L. R. 854, 70 S. W. 53. To render it a question of fact whether a minor was thrown down by a railroad car or fell therefrom while he was stealing a ride. Monahan v. Chicago, M. & St. P. R. Co., 88 Minn. 325, 92 N. W. 1115. To sustain a verdict for defendant in action for injuries to a trespasser. Holston v. Southern R. Co., 116 Ga. 656.

80. Person alighting from boxcar. Thornton v. Louisville & N. R. Co., 24 Ky. L. R. 854, 70 S. W. 53.

81. One who borrows a handcar for use on the road from an employe without either actual or apparent authority to lend it is a trespasser and not a licensee. Louisville & N. R. Co. v. Wade [Fla.] 35 So. 863. In an action for the killing of intestate while riding a railroad tricycle, evidence of permission of defendant's railroad superintendent to intestate to use the tricycle is inadmissible, where the authority of the superintendent to permit such use or license to so use the track is not pleaded. Dilas' Adm'r v. Chesapeake & O. R. Co., 24 Ky. L. R. 1347, 71 S. W. 492.

82. It is contributory negligence to ride in a fog before daybreak on a railroad tricycle, preventing recovery for a collision with a passenger on schedule. Dilas' Adm'r v. Chesapeake & O. R. Co., 24 Ky. L. R. 1347, 71 S. W. 492.

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the absence of statute or agreement.[83] Each will be held to have knowledge of the time trains on the other are due.[84]

Though a road is negligent in occupying a crossing at the time the trains of another are due, the negligence of the second is the proximate cause of the injury, where its servants saw or might have seen the danger by the exercise of ordinary care in time to avoid the accident.[85]

A rule requiring the placing of torpedoes and the sending back of a flagman when a train is stopped at an unusual place is not applicable to a train in the yards.[86] For specific instances of negligence,[87] evidence[88] and instructions, see the footnotes.[89]

(§ 7) *D. Accidents at crossings.* 1. *Care required on part of company. General rules.*—Travelers on a highway and the railroads crossing it are bound to the same degree of care,[90] and if in the exercise of due care otherwise, a railroad commits no wrong by running its trains across a highway in front of teams.[91] The railroad's negligence must be the proximate cause of the accident to impose liability.[92] Hence, where a person is rendered insane by a crossing accident, his subsequent willful and voluntary act of suicide is a new cause, he knowing the purpose and physical effect of his act.[93]

An engineer is bound to exercise ordinary care to ascertain if the track is about to be crossed by a person lawfully entitled to cross the same, and if he could have discovered the proximity of the person, should be charged with knowledge.[94]

83. Mo. Pac. R. Co. v. Chicago G. W. R. Co., 98 Mo. App. 214, 71 S. W. 1081.

84. Rev. St. 1899, § 1075 requires railroad companies to give public notice of the time of starting, running and arrival of trains. Mo. Pac. R. Co. v. Chicago G. W. R. Co., 98 Mo. App. 214, 71 S. W. 1081.

85. Mo. Pac. R. Co. v. Chicago G. W. R. Co., 98 Mo. App. 214, 71 S. W. 1081.

86. As where a train switching was run into because of another train passing a semaphore in a fog. Streets v. Grand Trunk R. Co., 76 App. Div. [N. Y.] 480.

87. Backing a train toward a crossing occupied by another train without due care to give warning is negligence. Wabash R. Co. v. Billings, 105 Ill. App. 111. Running a double header down grade at a speed from 15 to 18 miles an hour, where another train was likely to be met, may be a willful determination not to perform a known duty. Ill. Cent. R. Co. v. Leiner, 103 Ill. App. 438. Where an injury was occasioned by an engine passing a semaphore, the rate of speed is not an element of liability where it did not contribute to the injury. Streets v. Grand Trunk R. Co., 76 App. Div. [N. Y.] 480. Evidence held insufficient to show negligence in the selection of an engineer who occasioned an accident by passing a semaphore. Id. Where an engineer has no notice of a rule, and it is shown to have been habitually disregarded, it is not negligence per se for him to take a train in a switch yard in violation thereof. St. Louis Nat. Stock Yards v. Godfrey, 198 Ill. 288, 65 N. E. 90.

88. Where a collision occurred in a yard, evidence of the usual manner of conducting business and of the surroundings is competent on the question of negligence. St. Louis Nat. Stock Yards v. Godfrey, 198 Ill. 288, 65 N. E. 90.

89. Instructions held not erroneous as limiting the time in which plaintiff was required to use due care to the moment of the injury; not misleading as to the province of the jury in determining negligence; not to assume that plaintiff was in the exercise of ordinary care during a portion of the time; and to state the law as to disregard of the defendant's rules by plaintiff correctly. St. Louis Nat. Stock Yards v. Godfrey, 198 Ill. 288, 65 N. E. 90.

90. Chicago, B. & Q. R. Co. v. Roberts [Neb.] 91 N. W. 707. Instructions as to the duty of the public and of the railroad at a public crossing approved. Riley v. Mo. Pac. R. Co. [Neb.] 95 N. W. 20.

91. It has the superior right of passage. Chicago, B. & Q. R. Co. v. Roberts [Neb.] 91 N. W. 707. Company held free from negligence as a matter of law, where a horse was not seen in time to avoid an accident, though the engineer was on the lookout and stopped within a train's length. Baltimore & O. R. Co. v. Roming, 96 Md. 67.

92. Savannah, F. & W. R. Co. v. Cozens [Fla.] 35 So. 398. Instructions in a crossing accident should not impose liability on defendant without regard to whether such negligence contributed to the accident. Butts v. Atlantic & N. C. R. Co., 133 N. C. 82. Held, that the condition of a crossing was not the proximate cause of an injury in an action for injuries from collision with a train. Kemp v. Northern Pac. R. Co., 89 Minn. 139, 94 N. W. 439. Insufficient to establish that a runaway was caused by a collision with defendant's engine. Hintz v. Mich. Cent. R. Co. [Mich.] 93 N. W. 634.

93. Such death is not by the negligence of the company within Pub. St. 1882, c. 112, § 213. Daniels v. N. Y., N. H. & H. R. Co., 183 Mass. 393, 67 N. E. 424.

94. McGrew v. St. Louis, S. F. & T. R. Co. [Tex. Civ. App.] 74 S. W. 816. Where a man is seen on a crossing 75 ft. distant.

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The fact that crossing travelers will use due care to ascertain the approach of the train may be assumed,[95] but where danger of a person at a crossing is discovered, due care must be exercised.[96] Special precautions must be taken toward particularly dangerous crossings.[97] The fact that a train is being run out of its schedule time is not of itself negligence.[98]

Towards whom care must be exercised.—The fact that one is walking diagonally over a crossing does not make him a trespasser,[99] and a trespasser passing along the right of way may cease to be a trespasser while using a highway crossing the right of way as an exit from the grounds.[1]

Duty to signal.—Failure to give statutory signals for a crossing is negligence,[2] imposing a liability in the absence of gross contributory negligence.[3] It is not excused, though an accident could not be averted by the stopping of the train[4] or though there is no collision.[5] Usual and customary signals of approach to street crossings must be given.[6]

In the absence of statutes, failure to ring the bell or sound the whistle on approaching a public crossing is at least evidence of negligence,[7] and statutory warnings do not dispense with all others if special circumstances arise.[8] A handcar need not signal.[9]

which a train is approaching at the rate of four miles an hour, sonding a bell and with a headlight burning, caution with reference to his presence is not demanded at that instant. Southern R. Co. v. Shelton, 136 Ala. 191. Degree of care which an ordinarily prudent person "could" have used is not required. Chicago, R. I. & T. R. Co. v. James [Tex. Civ. App.] 75 S. W. 930. It is not negligence for the fireman to leave the lookout to attend his duties while the engineer remains on the lookout on his side of the train. O'Brien v. Wis. Cent. R. Co. [Wis.] 96 N. W. 424. Evidence held to require submission of defendant's negligence in the employment of an engineer with defective eyesight, and in failure to keep a proper lookout and to give proper signals. Shoemaker v. Tex. & P. R. Co., 29 Tex. Civ. App. 578, 69 S. W. 990. Where cattle approaching a grade crossing were seen for a distance within which the train could have been readily stopped, but the train continued at a high rate of speed, a recovery was justified. Beall v. Chicago & A. R. Co., 97 Mo. App. 111, 71 S. W. 101.

95. Gosa v. Southern R. [S. C.] 45 S. E. 810. Where a heavily loaded team is driven on a track at a point where an approaching train could be seen for 700 feet, the engineer may presume that an attempt will not be made to cross in front of him. Guyer v. Mo. Pac. R. Co., 174 Mo. 344, 73 S. W. 584.

96. One injured may recover if defendant's servants having discovered his peril failed to exercise every means within their power, consistent with the safety of the train, to avoid the injury. St. Louis S. W. R. Co. v. Matthews [Tex. Civ. App.] 79 S. W. 71.

97. As where obstructions cut off the view of the engineer. Ortolano v. Morgan's L. & T. R. & S. S. Co., 109 La. 902.

98. Hajsek v. Chicago, B. & Q. R. Co. [Neb.] 97 N. W. 327.

99. Louisville & N. R. Co. v. Price's Adm'r, 25 Ky. L. R. 1033, 76 S. W. 836.

1. Monahan v. Chicago, M. & St. P. R. Co., 88 Minn. 325, 92 N. W. 1115.

2. Mobile & O. R. Co. v. Dugan, 103 Ill. App. 371. Such statute (Rev. St. 1895, art. 4507) was intended for the benefit of pedestrians as well as to prevent collisions of trains. St. Louis S. W. R. Co. v. Matthews [Tex. Civ. App.] 79 S. W. 71. It is negligence to back a railroad train over a street without signals or lookout. Smith v. Pere Marquette R. Co. [Mich.] 98 N. W. 1022. Where a detached car was sent across a populous street, it was held negligence not to give warning of the approach of the car. Cent. Tex. & N. W. R. Co. v. Gibson [Tex. Civ. App.] 79 S. W. 351. Facts held to impose an imperative duty to give statutory signals on the approach to a crossing. Northern Pac. R. Co. v. Spike [C. C. A.] 121 Fed. 44. Failure to observe statutory provisions as to warnings is negligence. Violation of Code, § 3440. Peters v. Southern R. Co., 135 Ala. 533. A municipal ordinance requiring the signal that a street crossing is free from danger to be given by a member of the crew operating the approaching train is unreasonable. Cent. R. of N. J. v. Elizabeth [N. J. Law] 57 Atl. 404.

3. Burns v. Southern R. Co., 65 S. C. 229. Instructions held to properly charge as to the statutory liability. Mercer v. Southern R., 66 S. C. 246.

4. Ortolano v. Morgan's L. & T. R. & S. S. Co., 109 La. 902.

5. Question of engineer's negligence may be for the jury where, without ringing the bell or sounding his whistle, he stopped his train so as to narrowly avoid a collision with a crossing streetcar which caused plaintiff to jump from the street car and be injured. Robson v. Nassua Elec. R. Co., 80 App. Div. [N. Y.] 301.

6. Sights v. Louisville & N. R. Co., 25 Ky. L. R. 1548, 78 S. W. 172; Reed v. Queen Anne's R. Co. [Del.] 57 Atl. 529.

7. Butts v. Atlantic & N. C. R. Co., 133 N. C. 82.

8. Ortolano v. Morgan's L. & T. R. & S. S. Co., 109 La. 902. View of track obscured by woods and an embankment. Reed v. Queen Anne's R. Co. [Del.] 57 Atl. 529.

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A failure to slacken the speed of a train or to give signals at the approach to private crossings is not negligence.[10] But one crossing may rely on the proper signals being given for an adjacent public crossing.[11]

The question of whether failure to give signals is a proximate cause of injury is for the jury,[12] as where there is evidence that the approach of the train was known.[13]

The charge should not impose a stricter duty as to signals than fixed by statute.[14]

Cases in which the evidence of failure to signal is considered are grouped in the notes.[15]

Speed.—With regard to the rate of speed, the safety of persons traveling on the highway across the tracks in the exercise of ordinary care must be considered, though high speed is not negligence per se,[16] unless in violation of ordinance or

Statutes fixing the distance at which whistles must be sounded before reaching a crossing do not remove the common-law necessity of signaling from a greater distance. Where demanded by reasonable caution, the speed of the train or the dangers of the crossing. Kinyon v. Chicago & N. W. R. Co., 118 Iowa, 349, 92 N. W. 40.

9. Louisville & N. R. Co. v. Howerton, 24 Ky. L. R. 1905, 72 S. W. 760.

10. Davis' Adm'r v. Chesapeake & O. R. Co., 25 Ky. L. R. 342, 75 S. W. 275. No common-law or statutory duty in Iowa. Defrieze v. Ill. Cent. R. Co. [Iowa] 94 N. W. 505. Where not customary and the view of the track is not obstructed. Early's Adm'r v. Louisville, H. & St. L. R. Co., 24 Ky. L. R. 1807, 72 S. W. 348.

11. Defrieze v. Ill. Cent. R. Co. [Iowa] 94 N. W. 505.

12. Defrieze v. Ill. Cent. R. Co. [Iowa] 94 N. W. 505; Chicago & A. R. Co. v. Corson, 198 Ill. 98, 64 N. E. 739. Evidence held sufficient to show that failure to ring a bell on approaching a crossing was not the proximate cause of injury where plaintiff's intestate stumbled and fell toward the track. Bryant v. Southern R. Co., 137 Ala. 488. To justify a finding that negligence in failing to give a warning was the proximate cause of injury. Cooper v. Los Angeles T. R. Co., 137 Cal. 229, 70 Pac. 11.

13. Where there has been a failure to give statutory signals, a peremptory instruction for defendant is unauthorized in case it is found that the traveler knew of the approaching train, since the omission of the signals might have changed the conduct. Profit v. Chicago G. W. R. Co., 91 Mo. App. 369. Proper to instruct jury that if the approach of the train is heard, failure to signal cannot be held to have contributed to the injury. Gosa v. Southern Ry. [S. C.] 45 S. E. 810. A failure to give signals is not important where the person injured was warned in time to escape injury. Atchison, T. & S. F. R. Co. v. Judah, 65 Kan. 474, 70 Pac. 346.

14. Charge requiring the whistle to be blown "at 80 rods from crossing" is erroneous under Rev. St. art. 4507, requiring the whistle to be blown "at a distance of at least 80 rods." International & G. N. R. Co. v. Ives, 31 Tex. Civ. App. 272, 71 S. W. 772. Instruction held not to require that a signal must be sounded at the exact distance established as the minimum distance from the crossing. Galveston, H. & S. A. R. Co. v. Tirres [Tex. Civ. App.] 76 S. W. 806. Under Rev. St. § 4507, the bell must be rung, though a train is within eighty rods from the crossing when it starts. Ft. Worth & R. G. R. Co. v. Greer [Tex. Civ. App.] 75 S. W. 552. A train backing from a switch not 80 rods from a crossing is not required to give the crossing signal required by Rev. St. art. 4507. Tex. & P. R. Co. v. Berry [Tex. Civ. App.] 72 S. W. 423.

15. Westervelt v. N. Y. Cent. & H. R. R. Co., 86 App. Div. [N. Y.] 316; Kuntz v. N. Y., C. & St. L. R. Co., 206 Pa. 162; Frank v. Pa. R. Co. [N. J. Law] 55 Atl. 691; Galveston, H. & S. A. R. Co. v. Tirres [Tex. Civ. App.] 76 S. W. 806; Daniels v. N. Y., N. H. & H. R. Co., 183 Mass. 393, 67 N. E. 424; Shoemaker v. Tex. & P. R. Co., 29 Tex. Civ. App. 578, 69 S. W. 990; Erickson v. Kan. City, O. & S. R. Co., 171 Mo. 647, 71 S. W. 1022. Sounding of whistle and gong held for jury. Dalton v. N. Y., N. H. & H. R. Co., 184 Mass. 344, 68 N. E. 330. Crossing obscured by hill and a sharp curve. Louisville & N. R. Co. v. Walden, 25 Ky. L. R. 1, 74 S. W. 694. The question of whether a bell was rung may be for the jury, though five of seven witnesses swore positively it was rung but all of them were in the employment of defendant. Burke v. Brooklyn Wharf & Warehouse Co., 86 App. Div. [N. Y.] 296. Evidence of one, one hundred and fifty feet distant from a crossing, that he did not hear a bell or whistle, is sufficient to take the case to the jury over the evidence of the engineer and fireman, though he stated that he was not paying attention to the bell. Browne v. N. Y. Cent. & H. R. R. Co., 87 App. Div. [N. Y.] 206. Compare Glennon v. Erie R. Co., 86 App. Div. [N. Y.] 397. Plaintiff's evidence that no whistle was sounded cannot be assumed to be false in order to support a contention that since the whistle was sounded at a certain distance from the crossing and was not heard, negligence cannot be alleged for failure to sound it at a greater distance. Kinyon v. Chicago & N. W. R. Co., 118 Iowa, 349, 92 N. W. 40.

16. Boyd v. Chicago, B. & Q. R. Co., 103 Ill. App. 199; Reed v. Queen Anne's R. Co. [Del.] 57 Atl. 529. Forty to fifty miles an hour where view of track is unobstructed. Atchison, T. & S. F. R. Co. v. Judah, 65 Kan. 474, 70 Pac. 346. 25 to 30 miles outside of municipal limits. Hajsek v. Chicago, B. & Q. R. Co. [Neb.] 97 N. W. 327.

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statute,[17] or accompanied by failure to signal,[18] fog,[19] or peculiar conditions rendering crossings dangerous to travelers.[20] An ordinance prohibiting any person from running an engine or car at greater than certain speed is binding on the railroads as well as the persons operating the trains.[21] After violation of a speed ordinance, the relation of the excessive speed to the injury and the question of plaintiff's contributory negligence must not be ignored.[22]

Gates.—Where a railroad has placed gates across a highway and stationed a watchman there to protect travelers, it may run its trains at high speed, though the point be within municipal limits or in a populous district.[23] There is negligence in failing to lower gates as required by ordinance, though the gateman sees no one approaching the tracks.[24] Statutes sometimes require gates at dangerous crossings.[25]

Flagmen.—Failure to place a flagman at a crossing is not negligence per se, though it may be considered.[26] A statute requiring consent to construction of grade crossings removes the necessity of stationing a flagman at an unauthorized crossing, though imposed as to other crossings.[27] Where the duty of protecting a crossing by a flagman is assumed, it must be performed with reasonable care without regard to the existence of the duty.[28] A flagman at a point where the company is not compelled to maintain one need not warn persons crossing outside the limits of the street.[29]

Headlights.—Failure to have a headlight burning at the time of a collision is not negligence where it would have been of no avail on account of fog.[30]

Switching and backing trains.[31]—Where switching operations are customary

17. City ordinance. Mo., K. & T. R. Co. v. Owens [Tex. Civ. App.] 75 S. W. 579. The speed, in the absence of ordinance, would have warranted a finding of negligence, there being no notice of the approach of the train given, and its headlight being extinguished. Southern R. Co. v. Aldridge's Adm'x [Va.] 43 S. E. 333. The Wisconsin statutes should be construed together and require a railroad passing through an incorporated city to operate its trains over street crossings not to exceed six miles per hour, where gates have been erected. O'Brien v. Wis. Cent. R. Co. [Wis.] 96 N. W. 424. Finding that a speed was in excess of ordinance held supported. Colo. Midland R. Co. v. Robbins, 30 Colo. 449, 71 Pac. 371.

18. 40 miles per hour. Chesapeake & O. R. Co. v. Clark's Adm'r, 25 Ky. L. R. 150, 74 S. W. 705. Without warning signals. Shatto v. Erie R. Co. [C. C. A.] 121 Fed. 678. Failing to ring a bell or sound a whistle when running 50 miles an hour. Swart v. N. Y. Cent. & H. R. R. Co., 81 App. Div. [N. Y.] 402. High rate of speed without signals and in violation of ordinance, no gates being provided. McAuliffe v. N. Y. Cent. & H. R. R. Co., 84 N. Y. Supp. 607.

19. Running at 18 miles an hour. Denton v. Brooklyn Heights R. Co., 75 App. Div. [N. Y.] 619.

20. Kinyon v. Chicago & N. W. R. Co., 118 Iowa, 349, 92 N. W. 40; Chicago, R. I. & P. R. Co. v. Sporer [Neb.] 94 N. W. 991; Cleveland, C., C. & St. L. R. Co. v. Stewart, 161 Ind. 242, 68 N. E. 170.

21. Mo., K. & T. R. Co. v. Owens [Tex. Civ. App.] 75 S. W. 579.

22. Chicago, B. & Q. R. Co. v. Appell, 103 Ill. App. 185.

23. Custer v. Baltimore & O. R. Co., 206 Pa. 529.

24. Chicago & A. R. Co. v. Wise, 206 Ill. 453, 69 N. E. 500.

25. Under New Jersey statute, it is only necessary that conditions exist at a crossing which make it reasonably necessary for the protection of the public, in order that provision for protecting such crossing shall be erected may be decreed by a court of chancery. It is not necessary that the condition shall have been caused by the company. Exkert v. Perth Amboy & W. R. Co. [N. J. Err. & App.] 57 Atl. 438.

26. Seifred v. Pa. R. Co., 206 Pa. 390. Temporary crossing. Harrington v. Erie R. Co., 79 App. Div. [N. Y.] 26. A railroad is not negligent in failing to keep a flagman at a crossing unless it is an exceptionally dangerous one. Cent. Tex. & N. W. R. Co. v. Gibson [Tex. Civ. App.] 79 S. W. 351.

27. Gen. Laws 1896, c. 834, § 2, and c. 187, § 47. McGoran v. N. Y., N. H. & H. R. Co. [R. I.] 55 Atl. 929.

28. On a conflict of evidence, the question of whether a flagman was negligent is for the jury. Wolcott v. N. Y. & L. B. R. Co., 68 N. J. Law, 421.

29. Evidence held insufficient to show that plaintiff was injured while on the street. Strickland v. N. Y. Cent. & H. R. R. Co., 84 N. Y. Supp. 655.

30. Dilas' Adm'r v. Chesapeake & O. R. Co., 24 Ky. L. R. 1847, 71 S. W. 492.

31. The question of whether defendant's employes were negligent in not stopping a train which they were switching on seeing that a horse was about to back upon the track in front of them, held for the jury. Labarge v. Pere Marquette R. Co. [Mich.] 95 N. W. 1073.

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and in plain view, the switchman, though seeing an approaching traveler, may assume that he will guard against the danger and need not suspend operations until he crosses.[32] It is not wantonness and reckless disregard of life to move a switch train toward a crossing at the rate of four miles an hour.[33] Warning must be given before trains are backed[34] or the track seen to be clear.[35] As a general rule, the making of a flying switch is negligence,[36] especially where in violation of ordinance.[37]

(§ 7D) 2. *Contributory negligence. General rules.*—One intending to cross at a highway crossing must make reasonable use of his senses.[38] The care required of him is proportionate to the dangers of the crossing.[39] The same care is required of bicycle riders as of pedestrians.[40] The duty is not removed by a statutory provision as to the burden of proof of contributory negligence.[41] The traveler cannot be held responsible for the failure of what he does to accomplish its purpose.[42] His negligence must be contributory.[43] The doctrine of assumed risk does not

32. Van Bach v. Mo. P. R. Co., 171 Mo. 338, 71 S. W. 358.

33. Gaynor v. Louisville & N. R. Co., 136 Ala. 244.

34. The person crossing is not required to exercise extraordinary care and is not bound to assume that the train will be backed if it is at a stand. Meeks v. Ohio River R. Co., 52 W. Va. 99. It is gross negligence to back over a crossing in the track without signal immediately after passing it. The crossing was much traveled. Louisville & N. R. Co. v. Price's Adm'r, 25 Ky. L. R. 1033, 76 S. W. 836. An ordinance requiring the bell to be sounding when a train is running backward, and that a lookout be stationed on the rear end, is applicable when a portion of a train cut in two at a street crossing is pushed backward over the crossing without warning in order to couple it with the section on the opposite side. Pittsburgh, C., C. & St. L. R. Co. v. McNeil [Ind. App.] 69 N. E. 471. Neither the speed nor the distance is material where the train moves backward far and fast enough to inflict the injury complained of. Id. Evidence held to show negligence in switching without a brakeman on the rear of a backing train and without a lookout at the crossing. Schleiger v. Northern Terminal Co., 43 Or. 4, 72 Pac. 324. Negligence in backing across a street to make a coupling is shown by failure to observe a city ordinance as to a lookout and the sounding of a bell. Pittsburgh, C., C. & St. L. R. Co. v. McNeil [Ind. App.] 66 N. E. 777. Evidence held not to show negligence in the operation of backing a train toward a crossing. Gaynor v. Louisville & N. R. Co., 136 Ala. 244.

35. It is negligence to force cars on a crossing while making a coupling without seeing that the crossing is clear. St. Louis S. W. R. Co. v. Bowles [Tex. Civ. App.] 72 S. W. 451.

36. The making of a running switch over a prominent street crossing contrary to a company's rule when the switch could have been avoided with a little more care and time is gross negligence. Mitchell v. Ill. Cent. R. Co., 110 La. 630. Negligence in making a flying switch without a brakeman on the moving or standing cars is for the jury, notwithstanding the bell on the locomotive is ringing. Chicago Junction R. Co. v. McGrath, 203 Ill. 511, 68 N. E. 69. Failure of a brakeman stationed at a crossing to give warning of a flying switch is negligence. Mitchell v. Ill. Cent. R. Co., 110 La. 630. Though there is a known custom to make such switches over the crossing. Vance v. Ravenswood, S. & G. R. Co., 53 W. Va. 338.

37. Making a flying switch in violation of ordinance over a crossing traversed by a street railroad and not protected by safety appliances is sufficient to render the question of wantonness or intentional injury for the jury. Birmingham Southern R. Co. v. Powell, 136 Ala. 232.

38. Passman v. West Jersey & S. R. Co., 68 N. J. Law, 719. The rule of ordinary care is to be measured not by the great caution of one or the extreme carelessness of another, but according to the standard fixed by the consensus of common sense based on human experience. Crossing at night. Smith v. N. Y. Cent. & H. R. R. Co., 177 N. Y. 224, 69 N. E. 427. Where a person injured at the joining of two ways could have chosen the safe one by the exercise of common sense, his negligence is a question of law. Chicago, B. & Q. R. Co. v. Lilley [Neb.] 93 N. W. 1012. Instruction that if circumstances were such as to induce a reasonably prudent man to believe he could use the crossing with safety without precautions, their omission was not negligence, is error. Defrieze v. Ill. Cent. R. Co. [Iowa] 94 N. W. 505.

39. Barnhill v. Tex. & P. R. Co., 109 La. 43.

40. As to crossing. Passman v. West Jersey & S. R. Co., 68 N. J. Law, 719.

41. Wabash R. Co. v. Keister [Ind.] 67 N. E. 521.

42. It is erroneous to state that plaintiff would be guilty of negligence if a man of ordinary care stopping where he stopped and listening for a train would have heard the approach of the train. Kan. City, M. & B. R. Co. v. Weeks, 135 Ala. 614.

43. An instruction that a failure to stop cattle and investigate as to approach of a train prevents recovery is erroneous, as omitting to charge that the negligence must have contributed to the injury. Kinyon v. Chicago & N. W. R. Co., 118 Iowa, 349, 92 N. W. 40. Instructions as to contributory negligence held proper. Mercer v. Southern R., 66 S. C. 246. Charge held erroneous, as allowing the jury to infer that if plain-

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enter in the absence of contractual relation.[44] A wife is not charged with knowledge of danger of which her husband has information unless it is disclosed to her.[45]

Where plaintiff has been contributorily negligent, he cannot recover, though the railroad has also been negligent,[46] unless the injury is willful or wanton,[47] though certain states do not follow this rule, unless the negligence of the company is subsequent in order of causation,[48] though the company was willfully and wantonly negligent in running a train at an excessive speed over the crossing.[49] As to what is sufficient to show wanton injury, see the footnotes.[50]

Who may be charged.—Contributory negligence is not excused by the fact that the person is in the relation of a passenger to the railroad company.[51] Plaintiff need not have control over the vehicle in which he is riding,[52] but his precautions in such case need not be so great.[53] The question of implied negligence as between a driver and passengers of a vehicle is immaterial where the railroad is free from negligence.[54] It has been said that there is no question for the jury as to the contributory negligence of a minor when his safety could be secured by means plain to the immature judgment.[55] As to capacity of children of various ages, see cases cited in the notes.[56]

tiff could have seen the train in time to have stopped and avoided the accident he could not recover, though in attempting to cross he was not guilty of contributory negligence. Caraway v. Houston & T. C. R. Co., 31 Tex. Civ. App. 184, 71 S. W. 769.

44. Chicago & E. I. R. Co. v. Randolph, 199 Ill. 126, 65 N. E. 142.

45. Where a husband sues for injuries to his wife, an instruction holding the wife responsible for knowledge of the husband is erroneous where they are not driving together, and it is not shown that he knew she was going to drive. Whitby v. Baltimore, C. & A. R. Co., 96 Md. 700.

46. Railroad is not liable where, after discovery of danger, intestate might have avoided the accident by the exercise of reasonable and ordinary vigilance and caution. Day v. Boston & M. R. R., 97 Me. 528. The doctrine of comparative negligence is not recognized in Nebraska. Riley v. Mo. Pac. R. Co. [Neb.] 95 N. W. 20. Where the person injured has been guilty of contributory negligence, defendant is not negligent where he did not see plaintiff in time to avoid the accident. Northern Cent. R. Co. v. McMahon, 97 Md. 483; Mo., K. & T. R. Co. v. Eyer, 96 Tex. 72, 70 S. W. 529. Though running at an unlawful rate of speed and without signals. Lake Shore & M. S. R. Co. v. Landphair, 23 Ohio Circ. R. 435; Barnhill v. Tex. & P. R. Co., 109 La. 43. The failure of the road to keep a lookout. Oliver v. Iowa Cent. R. Co. [Iowa] 97 N. W. 1072. Instruction authorizing a recovery in case the fireman running the engine did not exercise reasonable care in looking ahead, though plaintiff did not exercise such care for his own safety as might have been expected of a boy of his age, if the injury could have been avoided, notwithstanding plaintiff's negligence, had the fireman exercised reasonable care, held erroneous. Cleveland, C., C. & St. L. R. Co. v. Morton [C. C. A.] 120 Fed. 936.

47. Cent. of Ga. R. Co. v. Partridge, 136 Ala. 587; Birmingham S. R. Co. v. Powell, 136 Ala. 232.

48. Otherwise there is no liability for gross negligence. Labarge v. Pere Marquette R. Co. [Mich.] 95 N. W. 1073.

49. Sego v. Southern Pac. Co., 137 Cal. 405, 70 Pac. 279.

50. Passing a crossing without signal at a prohibited rate of speed under circumstances authorizing a finding that plaintiff was seen or might have been seen and the injury prevented. Cent. of Ga. R. Co. v. Partridge, 136 Ala. 587; Southern R. Co. v. Shelton, 136 Ala. 191. It need not be shown that defendant's engineer had knowledge of the conditions of the crossing, since it will be presumed that he was informed by the company. Cent. of Ga. R. Co. v. Partridge, 136 Ala. 587. No wantonness is shown where the bell is being sounded, the headlight is burning brightly and the speed is not in excess of five miles an hour, though failure to have a flagman on the front of an engine is made negligence by reason of an ordinance. Southern R. Co. v. Shelton, 136 Ala. 191.

51. Stepping in front of an engine in plain sight and hearing and in close proximity. Steber v. Chicago & N. W. R. Co., 115 Wis. 200, 91 N. W. 654.

52. Mo., K. & T. R. Co. v. Bussey, 66 Kan. 735, 71 Pac. 261.

53. A woman not driving and holding a baby is not contributorily negligent per se in failing to look around the driver to observe the approach of a train which could be seen only for about sixty feet before the track was reached. Heater v. Del., L. & W. R. Co., 85 N. Y. Supp. 524.

54. Atchison, T. & S. F. R. Co. v. Judah, 65 Kan. 474, 70 Pac. 346.

55. Anderson v. Cent. R. Co., 68 N. J. Law, 269.

56. **Question of fact.** Monahan v. Chicago, M. & St. P. R. Co., 88 Minn. 325, 92 N. W. 1115. 11 year old boy walking in front of a train backing about as fast as a man could walk and moving with but little noise. Schleiger v. Northern Terminal Co., 43 Or. 4, 72 Pac. 324. Boy of 7. Pittsburgh, C., C. & St. L. R. Co. v. McNeil [Ind. App.] 69 N. E.

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Acts required of traveler.—The intending crosser, as the rule is frequently stated, must stop, look and listen[57] at the most advantageous place.[58] A constant lookout for a train is not required.[59] A failure to stop is not in all cases negligence per se.[60] The traveler must as a rule both look and listen,[61] though failure may be excused by the surroundings or by acts misleading him.[62] Failure to look is negligence,[63] especially where the danger might have been seen.[64] Plaintiff's

471. Child of 3½. Dennis v. New Orleans & N. E. R. Co. [Miss.] 32 So. 914.

Held negligent: 10 year old boy who attempted to run across the track. International & G. N. R. Co. v. Wear [Tex. Civ. App.] 77 S. W. 272. Boy of nine killed at a crossing wherewith he was familiar and at which over a distance of 50 feet before reaching the track, he had an unobstructed view for a long distance. Anderson v. Cent. R. Co., 68 N. J. Law, 269.

Held not negligent: 8 year old child killed in running switch over a highway. Wells v. N. Y. Cent. & H. R. R. Co., 78 App. Div. [N. Y.] 1.

57. Lake Shore & M. S. R. Co. v. Harris, 23 Ohio Circ. R. 400; Barnhill v. Tex. & P. R. Co., 109 La. 43; McGoran v. N. Y., N. H. & H. R. Co. [R. I.] 55 Atl. 929; Seifred v. Pa. R. Co., 206 Pa. 399.

Evidence held to demand a new trial. Kan. City, M. & B. R. Co. v. Weeks, 135 Ala. 614. Sufficient to show contributory negligence. Peters v. Southern R. Co., 135 Ala. 533. Facts held to show contributory negligence per se in going on a track without stopping to look or listen with knowledge that two trains were about due, the train carrying an electric headlight throwing a reflection a quarter of mile, but not whistling. St. Louis S. W. R. Co. v. Branom [Tex. Civ. App.] 73 S. W. 1064.

In Kentucky, the rule as to stopping, looking and listening is not followed. Louisville & N. R. Co. v. Price's Adm'r, 25 Ky. L. R. 1033, 76 S. W. 836.

58. Newman v. Del., L. & W. R. Co., 203 Pa. 530. Must not wait until on the track. Burns v. Louisville & N. R. Co., 136 Ala. 522. Looking out 200 feet distant from a crossing is not sufficient. McAuliffe v. N. Y. Cent. & H. R. R. Co., 85 App. Div. [N. Y.] 187. The place at which one should stop to look and listen is for the jury. Chicago, I. & L. R. Co. v. Turner [Ind. App.] 69 N. E. 484.

59. It is necessary to exercise only such ordinary prudence as a reasonable man should exercise under like circumstances. Defrieze v. Ill. Cent. R. Co. [Iowa] 94 N. W. 505. The question of contributory negligence in failing to stop and look a second time before crossing a track, held for the jury. Louisville & N. R. Co. v. Summers [C. C. A.] 125 Fed. 719.

60. As where one familiar with the locality and knowing no train was due attempted to cross in the absence of a watchman required to be present and was injured by a train running over the crossing at a high rate of speed without headlight or signal of approach. Southern R. Co. v. Aldridge's Adm'x [Va.] 43 S. E. 333. Evidence held to show contributory negligence in driving on a track without stopping. Shatto v. Erie R. Co. [C. C. A.] 121 Fed. 678.

61. Gosa v. Southern R. [S. C.] 45 S. E. 810; Hines v. Tex. & P. R. Co. [C. C. A.] 119 Fed. 157. Failure to look and listen for a train while they were passing over about a hundred feet during which time the train moved half a mile held negligence. Hajsek v. Chicago, B. & Q. R. Co. [Neb.] 97 N. W. 327. Person run over by a switch train. Gaynor v. Louisville & N. R. Co., 136 Ala. 244. Question held for the jury. Ward v. N. Y. Cent. & H. R. R. Co., 78 App. Div. [N. Y.] 402. Facts held to show negligence. Chicago, St. P., M. & O. R. Co. v. Rossow [C. C. A.] 117 Fed. 491. Where it is shown that decedent did not look or listen, and that there was nothing to prevent his discovering danger if he had, the issue of contributory negligence should be submitted. Lumsden v. Chicago, R. I. & T. R. Co., 31 Tex. Civ. App. 604, 73 S. W. 428.

62. Ill. Cent. R. Co. v. Finfrock, 103 Ill. App. 232. Evidence held insufficient to show negligence. Northern Pac. R. Co. v. Spike [C. C. A.] 121 Fed. 44; Galveston, H. & S. A. R. Co. v. Tirres [Tex. Civ. App.] 76 S. W. 806; Schroeder v. Wis. Cent. R. Co., 117 Wis. 33, 93 N. W. 837. Held to show negligence. Schooler v. N. Y. Cent. & H. R. R. Co., 81 App. Div. [N. Y.] 646. The question of whether there is negligence in view of all the surroundings is for the jury. Evidence held to demand submission of such question where death was the result of a flying switch. Chicago Junction R. Co. v. McGrath, 203 Ill. 511, 68 N. E. 69. As where plaintiff testifies that she was listening and could have heard the statutory signals had they been given and the question of her possibility to see the train was disputed. Selensky v. Chicago G. W. R. Co., 120 Iowa, 113, 94 N. W. 272. Evidence held for the jury. Smith v. N. Y. Cent. & H. R. R. Co., 177 N. Y. 224, 69 N. E. 427; Chicago & E. I. R. Co. v. Beaver, 199 Ill. 34, 65 N. E. 144.

63. Mo., K. & T. R. Co. v. Bussey, 66 Kan. 735, 71 Pac. 261; Dwajakowski v. Cent. R. Co. [N. J. Law] 55 Atl. 100. A deaf person walking against wind and rain attempting to cross a track without looking up cannot recover, though a lookout was not maintained by defendant. Hackney v. Ill. Cent. R. Co. [Miss.] 33 So. 723.

Evidence held to show negligence. Ill. Cent. R. Co. v. Finfrock, 103 Ill. App. 232; Fleschhut v. Lehigh Valley R. Co., 206 Pa. 348; Hatch v. N. Y. Cent. & H. R. R. Co., 89 App. Div. [N. Y.] 152; Swart v. N. Y. Cent. & H. R. R. Co., 81 App. Div. [N. Y.] 402; Kemp v. Northern Pac. R. Co., 89 Minn. 139, 94 N. W. 439. Boy engaged in driving cattle over a crossing in failing to look before going on the track, though he stopped and listened. Snell v. Minneapolis, St. P. & S. S. M. R. Co., 87 Minn. 253, 91 N. W. 1108.

Evidence held insufficient. Chesapeake & O. R. Co. v. Clark's Adm'r, 25 Ky. L. R. 150, 74 S. W. 705; Stone v. Boston & M. R. R. [N. H.] 55 Atl. 359. The question of contributory negligence may be for the jury, though the driver testifies that he did not

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evidence as to failure to see a train may be so improbable as to present no question to the jury.[65] The fact that plaintiff looks in one direction without looking in the other establishes negligence.[66]

Duty where view of track is obstructed.—Failure to alight in order to reach a point at which a view may be had of the track may be contributory negligence per se.[67] As where there is a fog[68] or storm,[69] the vehicle is closed,[70] or natural objects obstruct the view.[71] The traveler should wait until smoke clears away.[72] Where the view is obstructed, it is contributory negligence to fail to listen before crossing.[73]

Parallel tracks impose the necessity of greater precaution.[74]

Right to rely on crossing signals, stops, gates, flagmen, etc.—An individual approaching a crossing cannot rely exclusively on the railroad company doing its duty as to giving signals.[75] One using a private crossing in the vicinity of a public

look until his horse was on the track, but immediately qualifies it by saying that he had looked before, but did not see the train until he got on the crossing. Reis v. Long Island R. Co., 84 N. Y. Supp. 881.

64. Raymond v. N. Y., N. H. & H. R. Co., 182 Mass. 337, 65 N. E. 399. Where contributory negligence is pleaded, the defendant is entitled to an instruction that deceased was bound to use such precaution to learn of the approach of trains before attempting to cross the track as a man of ordinary prudence would use under like circumstances, the facts being that when deceased turned to cross the track he was in a position to see the approaching engine. Tex. & P. R. Co. v. Huber [Tex. Civ. App.] 75 S. W. 547.

65. Blumenthal v. Boston & M. R. R., 97 Me. 255. Where the evidence is that if plaintiff had looked intelligently he would have seen the train, though he testifies that he looked but did not see. Swart v. N. Y. Cent. & H. R. R. Co., 81 App. Div. [N. Y.] 402. The person injured could have seen but did not see until his horses were on the track. Northern Cent. R. Co. v. McMahon, 97 Md. 483. Whistle was sounded, there was an unobstructed view of the track and the train was within a hundred yards from the crossing when the horse went on the track. Martin's Adm'r v. Richmond, F. & P. R. Co. [Va.] 44 S. E. 695. The track was open for a long distance and the evidence that plaintiff looked out for trains was either untrue or showed that the observations were perfunctory or careless. Beeg v. N. Y., S. & W. R. Co. [N. J. Law] 56 Atl. 169. Plain from the evidence that if plaintiff had looked he could have seen the approaching danger while still in a place of safety. Diele v. Erie R. Co. [N. J. Law] 56 Atl. 156.

66. Corcoran v. Pa. R. Co., 203 Pa. 380; Pittsburgh, C., C. & St. L. R. Co. v. Seivers [Ind.] 67 N. E. 680.

67. Where the driver cannot see down the track, he should stop, look and listen, and if necessary get out of his wagon and lead his horses. Kinter v. Pa. R. Co., 204 Pa. 497. In determining the question of whether a person was negligent in not alighting and going forward, the fact that he was not driving may be considered. Kan. City, M. & B. R. Co. v. Weeks, 135 Ala. 614.

68. The jury should not be instructed that in case of a fog so dense as to prevent a train from being seen or heard in time to avoid injury from the driver's seat, he must get off and go in advance of the team or otherwise there can be no recovery. Chicago, I. & L. R. Co. v. Turner [Ind. App.] 69 N. E. 484.

69. Where plaintiff stopped within five feet of the tracks to ascertain whether a train was approaching and a storm prevented his seeing more than 50 or 100 feet, and made his progress more difficult, the question of whether he exercised proper care under the circumstances is for the jury. Kuntz v. N. Y., C. & St. L. R. Co., 206 Pa. 162.

70. Facts held to prevent recovery where plaintiff drove onto the track at full speed in an enclosed buggy. Keesey v. Lake Erie & W. R. Co., 104 Ill. App. 619.

71. Where the plaintiff stopped, looked and listened, though unable to see on account of obstructions, but heard nothing, the question of his contributory negligence may be for the jury if there is additional evidence that no signals were given for the crossing. Cowen v. Grabow [C. C. A.] 120 Fed. 258.

72. Baltimore & O. R. Co. v. McClellan, 69 Ohio St. 142, 68 N. E. 816; Meinrenken v. N. Y. Cent. & H. R. R. Co., 81 App. Div. [N. Y.] 132. Question of whether plaintiff was negligent in failing to wait until smoke cleared held for the jury. Dalton v. N. Y., N. H. & H. R. Co., 184 Mass. 344, 68 N. E. 830.

73. Sulder v. Pa. R. Co. [N. J. Law] 56 Atl. 124.

74. A person standing on the track of a passenger train with knowledge that it is due, awaiting a freight train to pass on another track, is guilty of contributory negligence where his sight is obscured by smoke from the freight train and his hearing prevented by its noise. Meinrenken v. N. Y. Cent. & H. R. R. Co., 81 App. Div. [N. Y.] 132. Evidence held to support a finding that decedent looked and listened before going on a crossing and had knowledge of a freight train approaching on the first track which he crossed, and that he was not negligent in failing to take precautions against an engine running backward on a second track in the same direction as the freight and obscured by it. Brown v. N. Y. Cent. & H. R. R. Co., 83 N. Y. Supp. 1028.

75. Sights v. Louisville & N. R. Co., 25 Ky. L. R. 1548, 78 S. W. 172; Gosa v. Southern R. [S. C.] 45 S. E. 810. Failure to stop, look and listen furnishes a good defense to

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crossing may rely on the giving of proper signals by defendant at the public crossing.[76]

Where a flagman has been stationed at a public crossing, the public have the right to rely on him to a reasonable extent to give proper notice and warning of danger,[77] and so instructions as to the duty to stop, look and listen should not ignore an implied assurance of safety from open gates.[78] Where, with the knowledge of one attempting to cross, gates are usually kept down at night without regard to passing trains, contributory negligence cannot be attributed to a person injured from the mere fact that the gates are down.[79]

A custom to sidetrack a train at a station does not impose liability toward one struck at a crossing beyond the station, where there has been a failure to sidetrack, though the custom was known to the person injured.[80]

Where a duty is imposed by statute that a street car be stopped a certain distance from a crossing, a street car conductor may assume that trains will be stopped at the same distance unless circumstances indicate the contrary.[81]

Duties as to standing, switching and backing trains.[82]—Travelers may assume that city ordinances will be obeyed.[83] Cutting a train in two at a crossing on a sidetrack does not authorize a dispensing with ordinary precautions,[84] but where an injury results from detached freight cars being shoved on a crossing by an engine suddenly backing against them, a mere failure to look toward the engine before crossing the track cannot be held negligence per se.[85] It is not necessarily contributory negligence to attempt to pass between box cars of a train standing over a crossing.[86]

an allegation of failure to give warning signals at a crossing. Cent. of Ga. R. Co. v. Freeman, 134 Ala. 354. Where the headlight was in plain view and less than two hundred feet distant, one going on the track is contributorily negligent, though the train did not give the customary signals. McAuliffe v. N. Y. Cent. & H. R. R. Co., 84 N. Y. Supp. 607. Failure to look and listen is not excused by the failure of defendant to sidetrack a train according to its custom or a failure to sound signals. Rich v. Evansville & T. H. R. Co., 31 Ind. App. 10, 66 N. E. 1028. Where cattle drivers rely on their sense of hearing and knowledge of the train's schedule, instead of looking, their contributory negligence must be submitted. Brunick v. Ann Arbor R. Co. [Mich.] 93 N. W. 433.

76. Question of negligence held for jury. Defrieze v. Ill. Cent. R. Co. [Iowa] 94 N. W. 505.

77. Rule adhered to under the facts of a particular case but not announced generally. Mitchell v. Ill. Cent. R. Co., 110 La. 630. Boy of 12 held not contributorily negligent in attempting to cross the track after an engine had passed over it without looking to see approaching detached cars, the engine being engaged in making a flying switch and a flagman being stationed at the crossing. Id.

78. Evidence held to show absence of contributory negligence in failing to stop before crossing tracks at a point where safety gates were maintained and which were not closed. Baltimore & O. R. Co. v. Stumpf, 97 Md. 78. Where a railroad has been negligent in leaving its gates open and in backing a train over the crossing without signals, the question of plaintiff's contributory negligence must be left to the jury. Jenkins v. Baltimore & O. R. Co. [Md.] 56 Atl. 966. The failure to look may be for the jury where plaintiff was watching the gateman who had signaled him to go on. Gray v. N. Y. Cent. & H. R. R. Co., 77 App. Div. [N. Y.] 1. One who stops on the track without looking is contributorily negligent, though the gate was not lowered and the bell was not rung. Boutell v. Mich. Cent. R. Co. [Mich.] 95 N. W. 568.

79. Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461.

80. Rich v. Evansville & T. H. R. Co., 31 Ind. App. 10, 66 N. E. 1028.

81. Birmingham S. R. Co. v. Powell, 136 Ala. 232. Where a conductor attempts to cross without stopping and without knowing that the way is cleared, he is guilty of contributory negligence if his car becomes stalled and he is injured by cars being switched over the crossing [Code 1896, § 3441]. Id.

82. Question held for the jury as to contributory negligence of one passing within a few feet of standing cars and injured by other cars being kicked into them. St. Louis S. W. R. Co. v. Bowles [Tex. Civ. App.] 72 S. W. 451. Evidence held not to establish contributory negligence as a matter of law in attempting to pass behind a switch engine unengaged in switching. Chicago & E. I. R. Co. v. Randolph, 199 Ill. 126, 65 N. E. 142.

83. Pittsburgh, C., C. & St. L. R. Co. v. McNeil [Ind. App.] 69 N. E. 471.

84. Passman v. West Jersey & S. R. Co., 68 N. J. Law, 719.

85. Stoy v. Louisville, E. & St. L. Consol. R. Co., 160 Ind. 144, 66 N. E. 615.

86. A complaint alleging injury in such

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Intoxication actually contributing to an injury at a crossing prevents recovery.[87]

Racing with train in an attempt to cross is an indication of negligence[88] or an attempt to cross in disobedience to a warning of the flagman.[89]

Acts after realization of danger.—Where plaintiff has not been negligent in placing himself in danger, he is not negligent in the exercise of bad judgment in the means taken to extricate himself,[90] but where his perilous situation is the result of his own negligence, he cannot recover, though after discovering it he exercises ordinary care under that set of circumstances.[91]

(§ 7D) 3. *Procedure. Pleading.*[92]—Under general allegations of negligence, negligence in any form may be proved.[93] In some states the complaint need not negative contributory negligence,[94] but though it is provided by statute that plaintiff shall not allege or prove freedom from contributory negligence, the complaint must not disclose such negligence.[95] Where a plaintiff cannot be required to give the number of the train causing the injury, or the names of the employes, he may, in the discretion of the court, be required to furnish a bill of particulars as to the

manner is not demurrable on the ground of showing gross contributory negligence. Burns v. Southern R. Co., 65 S. C. 229.

87. Mercer v. Southern R., 66 S. C. 246. Facts held to show contributory negligence of intoxicated driver. Baltimore & O. R. Co. v. State, 96 Md. 67. Evidence held to present a question for the jury as to contributory negligence in driving on a crossing, it being contended on the one side that plaintiff was either drunk or asleep and on the other that defendant failed to give the statutory signals. International & G. N. R. Co. v. Ives [Tex. Civ. App.] 78 S. W. 36.

88. Hurrying a team in an attempt to cross ahead of a train. Green v. Southern Cal. R. Co., 138 Cal. 1, 70 Pac. 926. Trying to cross on miscalculation of speed. Day v. Boston & M. R. R., 97 Me. 528. Negligence in the continuance of crossing of nine tracks after seeing the headlight of an approaching train is for the jury. Wolcott v. N. Y. & L. B. R. Co., 68 N. J. Law, 421. A nonsuit is properly directed where from the facts it appears that plaintiff failed to look and listen or else looked and took a chance of safely crossing. Blumenthal v. Boston & M. R. R., 97 Me. 255.

89. Westervelt v. N. Y. Cent. & H. R. R. Co., 86 App. Div. [N. Y.] 316.

90. Where plaintiff would have succeeded in his endeavor to turn his horses from the track had the train not been running at an excessive rate of speed, it is proper to find an absence of negligence on his part. Colo. Midland R. Co. v. Robbins, 30 Colo. 449, 71 Pac. 371. Instruction as to acts done under impulse of sudden danger approved. Riley v. Mo. Pac. R. Co. [Neb.] 95 N. W. 20. Question of negligence after getting on the right of way held for the jury. Chicago & A. R. Co. v. Corson, 198 Ill. 98, 64 N. E. 739.

91. A finding that due care was exercised in trying to pass in front of a train, after discovering it, held not to control facts showing contributory negligence in failing to discover the danger sooner. Wabash R. Co. v. Keister [Ind.] 67 N. E. 521.

92. See Negligence, 2 Curr. Law, p. 996; Pleading, 2 Curr. Law, p. 1178, and related practice titles for general questions. Count held insufficient to aver liability of defendant for servant's negligence. Cent. of Ga. R. Co. v. Freeman, 134 Ala. 354. Complaint construed to state a cause of action at common law and not for failure to give statutory signals at a crossing. Cooper v. Charleston & W. C. R. Co., 65 S. C. 214. A petition alleging negligence in failure to give a statutory signal and also in failure to signal in reasonable time to give the necessary warning of a train's approach is sufficient to authorize a recovery on the common-law duty to signal approach of trains at a reasonable distance Kinyon v. Chicago & N. W. R. Co., 118 Iowa, 349, 92 N. W. 40. An averment that a public crossing was near a private one is not sufficient to permit the inference that signals given on approach to the public crossing could have been heard at the private crossing. Davis' Adm'r v. Chesapeake & O. R. Co., 25 Ky. L. R. 342, 75 S. W. 275. Averments held to sufficiently charge negligence in running at a high rate of speed where the presence of persons on crossings should have been anticipated. Southern R. Co. v. Crenshaw, 136 Ala. 573. Averments held to sufficiently charge that defendant willfully or wantonly caused the intestate's death. Id.

93. Tex. & P. R. Co. v. Meeks [Tex. Civ. App.] 74 S. W. 329. Complaint held sufficiently definite. Boyd v. Chicago, B. & Q. R. Co., 103 Ill. App. 199. A general allegation of negligence is sufficient without allegations that the engineer was warned in time to stop or that he could have seen the danger in time to stop by the exercise of reasonable care. Davidson v. Chicago & A. R. Co., 98 Mo. App. 142, 71 S. W. 1069. Where the issue is as to the use of ordinary care by plaintiff's intestate, willows may be shown to have been along the right of way, though not charged as negligence on the part of the company. Chicago & E. I. R. Co. v. Beaver, 199 Ill. 34, 65 N. E. 144.

94. Southern R. Co. v. Crenshaw, 136 Ala. 573.

95. Negligence in plaintiff's intestate [Acts 1899, p. 58, c. 41]. Rich v. Evansville & T. H. R. Co., 31 Ind. App. 10, 66 N. E. 1028

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time and place of the accident and whether inflicted by a freight or passenger train.[96] A replication to the effect that after the peril of plaintiff's intestate was discovered, the proper efforts to stop the train were not used, is not a departure as imputing that the injury was inflicted wantonly or intentionally.[97]

Burden of proof.—A rule as to the burden of proof of contributory negligence, applicable to all jurisdictions, cannot be laid down.[98] Statutes making contributory negligence matter of defense are applicable to actions commenced after their passage on causes accruing before.[99] Facts requiring a signal in addition to the statutory one must be established by plaintiff.[1]

Admissibility of evidence is controlled by the customary rules as to competency, materiality, etc. In the footnotes some peculiar decisions are noted,[2] as well as a few cases bearing on opinion evidence.[3] If it is admitted that decedent stopped

96. Bogard v. Ill. Cent. R. Co., 25 Ky. L. R. 624, 76 S. W. 170.

97. Southern R. Co. v. Crenshaw, 136 Ala. 573.

98. Rule in Federal courts: Where evidence to the contrary is not offered, the presumption that a crossing traveler was in the exercise of due care will support a recovery. Northern Pac. R. Co. v. Spike [C. C. A.] 121 Fed. 44. It is presumed that a pedestrian stopped, looked and listened. Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461.

Illinois: Plaintiff has the burden of proving ordinary care, though the railroad was disregarding statutes and ordinances as to signals and speed. Crossing injury. Imes v. Chicago, B. & Q. R. Co., 105 Ill. App. 37. Instruction as to the burden of proof of negligence of defendant and absence of contributory negligence on the part of plaintiff held proper. Chicago, B. & Q. R. Co. v. Appell, 103 Ill. App. 185.

In Indiana, the doctrine is that when a person in crossing a railroad track is injured by collision with the train, the fault is prima facie his. Pittsburgh, C., C. & St. L. R. Co. v. Seivers [Ind.] 67 N. E. 680. The fact that a collision occurs on a crossing does not show that sufficient precaution was not taken by the person injured. Chicago, I. & L. R. Co. v. Turner [Ind. App.] 69 N. E. 484.

Kentucky: Verdict held properly directed for defendant where there was no evidence as to the manner in which decedent came on the track and the view of the track was unobstructed. Early's Adm'r v. Louisville, H. & St. L. R. Co., 24 Ky. L. R. 1807, 72 S. W. 848.

Maryland: The burden of showing contributory negligence is on the defendant. Baltimore & O. R. Co. v. Stumpf, 97 Md. 78.

New York: The burden is on plaintiff to show freedom from contributory negligence. Meinrenken v. N. Y. Cent. & H. R. R. Co., 81 App. Div. [N. Y.] 132. Where circumstances point as much to negligence of deceased as to its absence, or point in neither direction, a nonsuit must be granted. McAuliffe v. N. Y. Cent. & H. R. R. Co., 85 App. Div. [N. Y.] 187. After the fact that plaintiff looked out some distance from the track is established, it will not be presumed therefrom that he continued to observe as he approached the crossing, where, had he done so, he would have avoided the injury. Id.

Pennsylvania: Where it is shown that owing to darkness an engine could not be seen, that signals could not be seen, that it carried no light and could not be heard, raises a presumption that decedent stopped, looked and listened. Blauvelt v. Del., L. & W. R. Co., 206 Pa. 141.

99. Burns' Rev. St. 1901, § 359a. Wabash R. Co. v. Du Hart [Ind. App.] 65 N. E. 192.

1. Siracusa v. Atlantic City R. Co., 68 N. J. Law, 446.

2. See articles Evidence, 1 Curr. Law, p. 1136; Examination of Witnesses, 1 Curr. Law, p. 1165.

Held admissible: Absence of gates. Cohen v. Chicago & N. W. R. Co., 104 Ill. App. 314. The absence of a flagman, though there was no duty imposed to have a flagman at the crossing. Harrington v. Erie R. Co., 79 App. Div. [N. Y.] 26. Evidence that plaintiff after glancing in the opposite direction kept his attention toward the direction from which he understood danger was to be anticipated. International & G. N. R. Co. v. Ives, 31 Tex. Civ. App. 272, 71 S. W. 772. Evidence of passengers who were not observing that they did not hear the whistle. Stone v. Boston & M. R. R. [N. H.] 55 Atl. 359. On the question of care, that decedent previously had remarked on the dangerous character of the crossing and taken precautions against collision. Id. Time at which decedent's watch stopped as showing darkness and whether train was on time. Id. Speed of train over the crossing at times before and after the accident is admissible. Id. Observations of strength of headlight after accident. Id.

Held inadmissible. Experiments after the accident. Chesapeake & O. R. Co. v. Riddle's Adm'x, 24 Ky. L. R. 1687, 72 S. W. 22. Negligence in plaintiff's conduct at previous crossings. International & G. N. R. Co. v. Ives, 31 Tex. Civ. App. 272, 71 S. W. 772. A witness may testify as to his familiarity with the usual speed of trains within the town as bearing on the question of contributory negligence in connection with an ordinance prohibiting excessive speed. Caraway v. Houston & T. C. R. Co., 31 Tex. Civ. App. 184, 71 S. W. 769.

3. Opinion evidence that a crossing is dangerous is inadmissible, where the circumstances and situation was fully and adequately described. Siefred v. Pa. R. Co., 206 Pa. 399. A nonexpert witness may testify as to whether statutory signals would have been heard under the circumstances. Gosa v. Southern R. [S. C.] 45 S. E. 810.

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to look and listen before attempting to cross a track, error in the admission of evidence that on previous occasions decedent had stopped is harmless.[4]

Instructions must conform to the issues,[5] be supported by the evidence,[6] should not withdraw issues of fact,[7] or give undue prominence to particular facts or otherwise invade the province of the jury.[8] As to whether requested instructions are sufficiently covered by those given,[9] or erroneous instructions are cured, see the footnotes,[10] as well as decisions as to form and wording.[11]

4. Louisville & N. R. Co. v. Summers [C. C. A.] 125 Fed. 719.

5. **Pleadings held insufficient** to support an instruction that the evidence failed to show an unlawful or reckless rate of speed. Cooper v. Los Angeles T. R. Co., 137 Cal. 229, 70 Pac. 11. The duty to stop need not be incorporated where pleadings charge only a failure to look and listen. International & G. N. R. Co. v. Ives, 31 Tex. Civ. App. 272, 71 S. W. 772. The issue of discovered peril should not be submitted where not raised by the pleadings. Tex. & P. R. Co. v. Knox [Tex. Civ. App.] 75 S. W. 543. An instruction that if signals were given by plaintiff to defendant in sufficient time to enable it to stop the train so as to avoid the injury, plaintiffs may recover, is not broader than an allegation of negligence in conducting a locomotive and train by which they were caused to run into plaintiff's threshing machine while crossing the track. Davidson v. Chicago & A. R. Co., 98 Mo. App. 142, 71 S. W. 1069.

6. An instruction as to the duty to give additional cautionary signals held unsupported. Siracusa v. Atlantic City R. Co., 68 N. J. Law, 446.

7. Dangerous character of speed. Cooper v. Los Angeles T. R. Co., 137 Cal. 229, 70 Pac. 11. Error to state absence of negligence on the part of defendant or presence of contributory negligence. Kinyon v. Chicago & N. W. R. Co., 118 Iowa, 349, 92 N. W. 40. What conduct is imprudent or negligent. Pittsburg, C., C. & St. L. R. Co. v. Banfill, 206 Ill. 553, 69 N. E. 499. An instruction omitting the element of a watchman's absence, though attempting to hypothetically state the facts is properly refused. Southern R. Co. v. Aldridge's Adm'x [Va.] 43 S. E. 333. Where the question of whether a crossing was public is controverted, an instruction should not be given that ordinances as to the obstruction of crossings do not apply to defendant's yards. Burns v. Southern R. Co., 65 S. C. 229. Error to submit solely a failure to signal for a crossing. Kinyon v. Chicago & N. W. R. Co., 118 Iowa, 349, 92 N. W. 40.

8. **Instructions held erroneous** as withdrawing evidence to show negligence of defendant. Scholze v. Sloss-Sheffield S. & I. Co. [Ala.] 35 So. 321. As contrary to the statute as to whistling for crossings and removing from the jury the question of whether a repetition of the signal would have alarmed plaintiff. Profit v. Chicago G. W. R. Co., 91 Mo. App. 369. Where there was evidence that plaintiff had previously looked along the track, an instruction giving undue prominence to a failure to look during the actual crossing. Caraway v. Houston & T. C. R. Co., 31 Tex. Civ. App. 184, 71 S. W. 769.

9. Where a flagman at a street crossing was injured, an instruction which may be construed that it was plaintiff's duty to disregard trains under his control at the time of the accident in order to care for his own safety is properly refused where the jury is properly instructed as to the measure of care required of plaintiff. Erickson v. Kan. City, O. & S. R. Co., 171 Mo. 647, 71 S. W. 1022. Submission of the question of presence of "any want of ordinary care" covers "a slight want of ordinary care." Schroeder v. Wis. Cent. R. Co., 117 Wis. 33, 93 N. W. 837. General instruction is given that if plaintiff saw or heard a train in time to avoid a collision, she cannot recover is sufficient to cover a special instruction as to the effect of plaintiff's admission that she heard the train, but thought she could cross. Selensky v. Chicago G. W. R. Co., 120 Iowa, 113, 94 N. W. 272.

10. Instruction imposing a duty to both sound a bell and blow a whistle is not cured by other instructions stating the duty in the alternative. Edwards v. Atlantic C. L. R. Co., 132 N. C. 99. Error in omitting the question of contributory negligence from an instruction may be cured by other instructions. Holland v. Or. S. L. R. Co., 26 Utah, 209, 72 Pac. 940.

11. Instruction held not by reference to engine and cars to assume as a matter of fact that they were near a public highway. Brown v. Southern R. Co., 65 S. C. 260. Instruction held properly to state the duties of both parties as to a dangerous crossing. Chesapeake & O. R. Co. v. Riddle's Adm'x, 24 Ky. L. R. 687, 72 S. W. 22.

Negligence of railroad: The instruction should not require elements of negligence to be concurrently proved where proof of a portion of them would be sufficient. Erickson v. Kan. City, O. & S. R. Co., 171 Mo. 647, 71 S. W. 1022. Instruction held erroneous as permitting the jury to speculate as to what defendant should have done and because they might have been permitted to find negligence not alleged. Smith v. Lehigh Val. R. Co., 77 App. Div. [N. Y.] 43. Instruction as to the duty to maintain gates at a grade crossing under an ordinance held not erroneous as omitting the theory of contributory negligence or the causal connection between the violation of the ordinance and the accident. Baltimore & O. R. Co. v. Stumpf, 97 Md. 78. Use of both "signals" and "warnings" in an instruction as to the care required does not impose too great a degree of care or mislead the jury. Louisville & N. R. Co. v. Price's Adm'r, 25 Ky. L. R. 1033, 76 S. W. 836.

Contributory negligence: Instruction held not erroneous as confining question of plaintiff's care to the precise moment of the accident. Chicago & A. R. Co. v. Corson, 198 Ill. 98, 64 N. E. 739. Instruction approved. Riley v. Mo. Pac. R. Co. [Neb.] 95 N. W. 20.

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Directing verdict.[12]—If the evidence establishes plaintiff's contributory negligence as a matter of law, such issue need not be submitted to the jury.[13] In the Federal court, a verdict will not be directed where there is evidence from which it may be found that defendant in a crossing accident was at fault in case there is a statute providing that contributory negligence shall go in mitigation of damages and not in bar of recovery.[14]

Special findings.[15]—Interrogations as to evidentiary and inconclusive facts may be refused.[16] A special finding that plaintiff was not guilty of negligence is no stronger than a general verdict in favor of plaintiff.[17] In general, the special findings control.[18]

(§ 7) *E. Injuries to persons on highway or private premises near tracks.*—Where a railroad track is laid upon a street, the road must give full warning of the approach of trains to teams progressing in a parallel direction, and one using the track in front of an approaching train while bound to give way and not obstruct its progress is entitled to reasonable warning and reasonable time to get out of the way, and the employes are bound to keep the train under proper control and have no right to run into plaintiff either on the track or while in the act of leaving it.[19]

Accidents from derailed trains.—Where a train leaves a track at a point where the danger of its doing so and the presence of an injury to persons in nearby premises should be anticipated, the company is liable for an injury occasioned.[20] The fact that a car leaves a right of way evidences negligence without proof of antecedent negligence.[21] See footnotes for admissibility of evidence.[22]

Injuries from frightened horses.—The railroad is not liable for injuries resulting from frightening of horses by the ordinary operation of a train[23] or handcars,[24] though it may be liable for the result of unnecessary noises[25] or the erection

Instruction held properly refused as throwing the burden of proving absence of contributory negligence on plaintiff. Baltimore & O. R. Co. v. Stumpf, 97 Md. 78. Instruction held to substitute a requirement of actual knowledge that no train was approaching for due care to ascertain such fact. Id.

12. See article Directing Verdict and Demurrer to Evidence, 1 Curr. Law, p. 925. The question of whether the person was run over by a runaway car or by an express train is for the jury on evidence from which reasonable men might draw different conclusions. Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461.

13. St. Louis, S. W. R. Co. v. Branom [Tex. Civ. App.] 73 S. W. 1064.

14. Louisville & N. R. Co. v. Summers [C. C. A.] 125 Fed. 719.

15. A special finding that plaintiff had no control over the vehicle in which she was riding, together with one that she did not see the train until immediately before the accident, will not warrant a presumption that the time was too short to warn the driver. Mo., K. & T. R. Co. v. Bussey, 66 Kan. 735, 71 Pac. 261.

16. Interrogatory as to whether plaintiff could have heard had he stopped and listened held properly refused. Schroeder v. Wis. Cent. R. Co., 117 Wis. 33, 93 N. W. 837.

17. Mo., K. & T. R. Co. v. Bussey, 66 Kan. 735, 71 Pac. 261.

18. Special findings showing plaintiff's familiarity with the location and failure to take precaution held to control a general finding for plaintiff. St. Louis & S. F. R. Co. v. Karns, 66 Kan. 802, 72 Pac. 234. Special findings held insufficient to show contributory negligence controlling a general verdict. Chicago, I. & L. R. Co. v. Turner [Ind. App.] 69 N. E. 484.

19. Holt v. Pa. R. Co., 206 Pa. 356.

20. Evidence held for the jury in a case where a child playing between racks of staves was killed by a derailed car pushing the staves over. Ill. Cent. R. Co. v. Watson's Adm'r, 25 Ky. L. R. 1360, 78 S. W. 175.

21. West Virginia Cent. & P. R. Co. v. State, 96 Md. 652. Railroad held liable where a train on a grade broke in two and the rear cars ran back, striking a car of another train, leaving a siding, throwing such car off the right of way and killing a person lawfully standing on the land of an adjacent owner. Id. Instruction held not reversible error, though very general as to the liability of defendant. Id.

22. It cannot be shown that cars got off the track now and then at other places. Ill. Cent. R. Co. v. Watson's Adm'r, 25 Ky. L. R. 1360, 78 S. W. 175. Where deceased was not on a crossing, the absence of a watchman from the crossing is immaterial. Id. The answer of an engineer after the accident in response to a remark of a bystander is immaterial when it contains no statement of facts. Id.

23. Hendricks v. Freemont, E. & M. V. R. Co. [Neb.] 93 N. W. 141.

24. Chicago, B. & Q. R. Co. v. Roberts

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of startling objects,[26] or the negligence of flagmen and gatemen.[27] Though the road has never been legally established as a public road, reasonable care must be taken to avoid fright from freight cars in unusual positions,[28] and though the traveler might have reached his destination by traveling over a legally established public road.[29] The fact that cars are so left as to obstruct the view of a crossing does not impose liability, but fixes a greater degree of care on both the railroad and the crossers.[30] Where one driving parallel with a track without intention to cross it is injured through his horses being frightened, liability is not imposed by the fact that the company did not make statutory crossing signals,[31] nor can negligence be alleged for failure to give signals at the place of accident.[32] The negligence of the road must be shown to be the proximate cause of injury.[33]

Where the road crosses a highway on a trestle, there is no common-law duty to signal unless danger is known or reasonably to be apprehended,[34] and the conduct of an engineer in sounding a whistle while a horse is under a bridge may be grossly culpable.[35]

The fact that a horse runs away is not sufficient to show contributory negligence of the driver,[36] or the fact that the best means of escape from imminent danger is not adopted.[37] It is not negligent to hold horses by the bridles[38] or to attempt so to seize them after they are frightened.[39]

[Neb.] 91 N. W. 707; Louisville & N. R. Co. v. Howerton, 24 Ky. L. R. 1905, 72 S. W. 760.

25. Whistle sounded unnecessarily under circumstances indicating to a person of ordinary prudence that sounding it might and would result in the fright of a horse. McGrew v. St. Louis, S. F. & T. R. Co. [Tex. Civ. App.] 74 S. W. 816. Evidence held to show negligence in backing a train toward horses being led in the vicinity of the track and allowing steam to escape from the engine in such manner as to frighten them. Pittsburg, C., C. & St. L. R. Co. v. Robson, 204 Ill. 254, 68 N. E. 468. In order to recover for the frightening of a horse by the letting off of steam, it must be shown that the letting off of such steam was unnecessary. Louisville & N. R. Co. v. Lee, 136 Ala. 182.

26. The company is liable for the erection of a mail crane near a highway calculated to frighten a horse of ordinary gentleness. Cleghorn v. Western R. of Ala., 134 Ala. 601, 60 L. R. A. 269.

27. The question of negligence of a crossing gateman in suddenly lowering the gates and frightening a horse after having beckoned the driver to come on is for the jury. Gray v. N. Y. Cent. & H. R. R. Co., 77 App. Div. [N. Y.] 1. A flagman is not limited solely to the duty of giving notice to prevent collisions, but should give notice so as to avoid danger from fright to horses occasioned by suddenly coming into the immediate vicinity of engines. Sights v. Louisville & N. R. Co., 25 Ky. L. R. 1548, 78 S. W. 172.

28, 29. Pecos & N. T. R. Co. v. Bowman [Tex. Civ. App.] 78 S. W. 22.

30. Chicago, B. & Q. R. Co. v. Roberts [Neb.] 91 N. W. 707.

31. Where the crossings were a quarter of a mile behind the traveler and the other a half a mile ahead. Melton v. St. Louis & S. F. R. Co., 99 Mo. App. 282, 73 S. W. 231.

32. Melton v. St. Louis & S. F. R. Co., 99 Mo. App. 282, 73 S. W. 231.

33. Negligence in leaving cars standing on a crossing longer than necessary in a reasonable conduct of business. Chicago, B. & Q. R. Co. v. Roberts [Neb.] 91 N. W. 707. Excessive speed held proximate cause when plaintiff would have been able to have turned his team, frightened at the approach of the train, into a side street, had the train been running at a proper rate of speed. Colo. Midland R. Co. v. Robbins, 30 Colo. 449, 71 Pac. 371. Where a frightened horse runs into a pile of sewer pipes in a street, the act frightening the horses, and not the pile of pipes is the proximate cause. Chicago G. W. R. Co. v. Bailey, 66 Kan. 115, 71 Pac. 246. Defendant's negligence causing a mud hole in a street from an overflowing water tank held not the proximate cause of an injury resulting from a runaway, though the horse was originally frightened by defendant's engine. Neely v. Ft. Worth & R. G. R. Co., 96 Tex. 274, 72 S. W. 159. The fact that a person driving a team of mules at a distance of about thirty feet from the track could have been seen for two hundred feet does not warrant a recovery for injuries received from the frightening of the mules by the sounding of a whistle in the absence of facts showing that the whistle was negligently sounded or that the mules were frightened by it. Houston & T. C. R. Co. v. Dallas [Tex. Civ. App.] 78 S. W. 525.

34. Cooper v. Charleston & W. C. R. Co., 65 S. C. 214. Negligence in failing to give a warning at an overhead crossing is a question for the jury. Chesapeake & N. R. Co. v. Ogles, 24 Ky. L. R. 2160, 73 S. W. 751.

35. Cleveland, C., C. & St. L. R. Co. v. David, 105 Ill. App. 69.

36. St. Louis, I. M. & S. R. Co. v. Boback [Ark.] 75 S. W. 473. The question of negligence in attempting to drive a horse around a caboose partially blocking a crossing, causing the horse to become frightened, is for the jury. International & G. N. R. Co. v. Mercer [Tex. Civ. App.] 78 S. W. 562.

37. Plaintiff jumped from a buggy fearing that her horse which was frightened by a train on an overhead crossing would

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Where plaintiff was injured in trying to hold his frightened team, it cannot be said his failure to have tied the team before beginning the work of loading his wagon is contributory negligence per se,[40] and a city ordinance against the leaving of a team in a street without its being securely fastened or guarded does not prevent the leaving of a team at a stand while the driver is working around the wagon in unloading it.[41] The railroad is not responsible for acts done by plaintiff in an attempt to save his property.[42]

See the footnotes for miscellaneous questions of pleading,[43] evidence[44] and instructions.[45]

(§ 7) *F. Injuries to animals on or near tracks.*—The maintenance by a railroad of a place dangerous to stock cannot be held negligence per se.[46] It is liable for wanton injury to stock,[47] though wrongfully on the right of way.[48] The railroad is bound to keep a constant and careful lookout and use ordinary and reasonable care.[49] High speed alone is not sufficient to establish negligence imposing liability for cattle killed at a point where there was no notice that they were likely to be on the track.[50] Where a horse is running parallel with the track, the fact that it suddenly wheels when steam escapes from the engine and breaks its neck by

jump over a bluff. Chesapeake & N. R. Co. v. Ogles, 24 Ky. L. R. 2160, 73 S. W. 751.

38. St. Louis, I. M. & S. R. Co. v. Boback [Ark.] 75 S. W. 473. Evidence held to show due care on the part of plaintiff in leading horses over railroad crossings. Pittsburg, C., C. & St. L. R. Co. v. Robson, 204 Ill. 254, 68 N. E. 468.

39, 40, 41. Mitchell v. Union Terminal R. Co. [Iowa] 97 N. W. 1112.

42. Evidence held to warrant submission to the jury of the question of whether plaintiff's acts were done to save his property from injury, thus preventing recovery for injuries which might otherwise have been avoided. Colo. Midland R. Co. v. Robbins, 30 Colo. 449, 71 Pac. 371.

43. Complaint held to charge negligence in running at a speed in excess of that imposed by a city ordinance, notwithstanding there were allegations as to noise and escaping steam frightening the plaintiff's team. Colo. Midland R. Co. v. Robbins, 30 Colo. 449, 71 Pac. 371.

44. Where the action is for the frightening of a horse at a crossing, another person may testify that his horse was frightened at the same time. International & G. N. R. Co. v. Mercer [Tex. Civ. App.] 78 S. W. 562. Where a horse was frightened by escaping steam, introduction of an ordinance forbidding the unnecessary letting off of steam within city limits is not reversible error. Chicago G. W. R. Co. v. Bailey, 66 Kan. 115, 71 Pac. 246. In an action for frightening a team with a hand car, injuring plaintiff, plaintiff may testify how close the hand car was to the team as it passed in front of them. Henze v. International & G. N. R. Co. [Tex. Civ. App.] 75 S. W. 822.

45. An instruction that violation of a speed ordinance of itself constitutes negligence is not prejudicial, where no attempt was made to excuse excessive speed, though it was contended that the ordinance was not violated. Colo. Midland R. Co. v. Robbins, 30 Colo. 449, 71 Pac. 371. Evidence held to authorize an instruction that the exercise of bad judgment at a moment of danger does not of itself prove negligence. Id. An instruction as to the duty of a flagman to warn drivers should not assume that a train was near enough to require a warning. Bell v. Tex. & P. R. Co. [Tex. Civ. App.] 70 S. W. 573. Instruction that the burden of proving contributory negligence is on defendant is not prejudicial where the evidence is insufficient to present an issue of contributory negligence. Tex. & N. O. R. Co. v. Wright, 31 Tex. Civ. App. 249, 71 S. W. 760.

46. It is error to allow witnesses to testify that a place was "dangerous" and that it could be closed up by a fence constructed in a particular manner. Southern Kan. R. Co. v. Cooper [Tex. Civ. App.] 75 S. W. 328.

47. Spencer v. Mo., K. & T. R. Co., 90 Mo. App. 91.

48. Norfolk & W. R. Co. v. Perrow [Va.] 43 S. E. 614.

49. **Negligence held for the jury.** Rafferty v. Portland, V. & Y. R. Co., 32 Wash. 259, 73 Pac. 382. Striking horse near a crossing. Bowen v. Mobile & O. R. Co. [Miss.] 33 So. 441.

Evidence held sufficient to show negligence. St. Louis, I. M. & S. R. Co. v. Norton [Ark.] 73 S. W. 1095. After discovery the train could have been checked. Buckman v. Mo., K. & T. R. Co., 100 Mo. App. 30, 73 S. W. 270. Horses on the track entangled in a buggy harness were seen at a distance of 600 feet. Johnson v. Chicago, M. & St. P. R. Co. [Iowa] 98 N. W. 312.

Evidence held insufficient: Cattle did not get on the track until too late to avoid striking them. Ala. & V. R. Co. v. Stacy [Miss.] 35 So. 137. Only evidence of negligence was the fact of death, and the plaintiff's engineer testified that while running forty miles an hour, the night being dark, he discovered the cattle at a distance of two hundred feet under conditions, where to attempt to stop the train, would be to throw it from the track. Chicago, R. I. & P. R. Co. v. Huggins [Ind. T.] 69 S. W. 845.

50. Galveston, H. & S. A. R. Co. v. Cassinelli & Co. [Tex. Civ. App.] 78 S. W. 247. Evidence of negligence in failure to lessen speed held for the jury. Mo. Pac. R. Co. v. McCullough, 65 Kan. 860, 70 Pac. 864.

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falling into a ditch, does not show willful wantonness or lack of reasonable care.[51] The status of a dog as falling within this rule depends on the respect with which he is regarded in the various states.[52]

A fence law requiring owners to restrain stock does not relieve the road from ordinary care and diligence in looking out for and anticipating the presence of stock on its right of way.[53]

How far liability extends.—The bailee of an animal may bring an action for its injury.[54]

Where one whose land adjoins the right of way permits the use of such land by a contiguous owner, there being no fence between the parcels, the contiguous owner may enforce the railroad's duty to maintain a lawful fence.[55]

Under the generality of statutes, liability exists, though stock do not come on the right of way over the land of the owner.[56] Where it is provided that the railroad may compensate the owner for the expense of necessary fencing, such defense may be urged only against the compensated landowner and the railroad is not relieved from the duty of fencing as to others. Such statutes are a valid exercise of the police power, and the railroad cannot defend on the ground that the stock was trespassing.[57]

Where a statutory action is given as to animals injured on a line passing through or along the property of the owner, a right vests in the lessee.[58]

Though the statute requires that the animals shall have been frightened or run into the place of injury by a passing locomotive or a train of cars, recovery may be had if an animal died from injuries received, either by collision with the cars or by being scared into a trestle.[59]

Place of entry on right of way.[60]—It is the place where the animal gets on the

51. Lowe v. Ala. & V. R. Co., 81 Miss. 9.

52. An action cannot be maintained against a railroad company for the negligent killing of a dog. Strong v. Ga. R. & Elec. Co., 118 Ga. 515. Liability imposed where evidence was sufficient to show that a dog on the track should have been seen or was seen, rendering a failure to whistle carelessness so gross as to amount to design. Kan. City, M. & B. R. Co. v. Hawkins [Miss.] 34 So. 323.

53. Seaboard A. L. R. v. Collier, 118 Ga. 463. The company is bound to exercise diligence to discover the presence of stock at or near the track at crossings. Spencer v. Mo., K. & T. R. Co., 90 Mo. App. 91.

54. Sand. & H. Dig. § 6352 provides for such action in favor of one having special ownership, and the full value may be recovered in the amount expended in feeding and caring for the animal. St. Louis, I. M. & S. R. Co. v. Morton [Ark.] 73 S. W. 1095.

55. Brown v. Mo., K. & T. R. Co. [Mo. App.] 78 S. W. 273.

56. Where cattle escape from their enclosure by reason of a defective division fence, liability exists when they then get on the track through a defective right of way fence [Rev. St. § 1105]. Growney v. Wabash R. Co., 102 Mo. App. 442, 76 S. W. 671. The danger to be averted is not only that to the adjoining owner's cattle lawfully on the premises, but to any others which may be there either lawfully or as trespassers, and liability exists for cattle which get on the track through an intervening field. Atkinson v. Chicago & N. W. R. Co. [Wis.] 96 N. W. 529. Under the Virginia statute, a road is liable for stock killed, though the owner holds no land either on the place where the stock goes on the track or where it is killed [Code 1887, § 1258, as amended by Acts 1897-98, c. 283]. Sanger v. Chesapeake & O. R. Co. [Va.] 45 S. E. 750.

Contra, where plaintiff's land does not abut on the track, the railroad is not liable for killing cattle which have broken from plaintiff's inclosure into one adjoining the track and escaped upon the right of way through an open gate in the railroad fence, where the stock law had been adopted. Tex. & P. R. Co. v. Huffmann [Tex. Civ. App.] 71 S. W. 779. There can be no recovery where stock gets on the track from the unfenced land of a person other than the owner [Vt. St. 3874-3877]. Delphia v. Rutland R. Co. [Vt.] 56 Atl. 279.

57. Code 1887, § 1258, as amended by Acts 1897-98, c. 283. Sanger v. Chesapeake & O. R. Co. [Va.] 45 S. E. 750.

58. Civ. Code, § 485. Walther v. Sierra R. Co., 141 Cal. 288, 74 Pac. 840.

59. Doughty v. St. Louis, I. M. & S. R. Co., 92 Mo. App. 494.

60. Evidence held to overcome an engineer's statement that stock was struck on a highway and not after it had passed cattle guards. Paul v. Chicago, M. & St. P. R. Co., 120 Iowa, 224, 94 N. W. 498. Question of whether stock was killed on the right of way held for the jury over evidence of the engineer that it came from the highway. Kimball v. St. Louis & S. F. R. Co., 99 Mo. App. 335, 73 S. W. 224.

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track and not that where it is killed that fixes the liability of the road.[61] Where it enters at a place where the statute does not impose a duty to fence or maintain cattle guards, damages cannot be recovered.[62]

Duty to maintain fences.—Failure to fence as required by statute creates a liability for cattle injured, though the statute does not impose such liability,[63] and a statute imposing liability for failure to erect a fence includes a failure to maintain it through neglect of duty.[64] Laws requiring stock to be restrained from running at large do not alter such obligations.[65] A notice required in order to impose a penalty for default in the erection of a fence is not necessary to fix the liability in case of injury to cattle.[66] Where the company proceeds to construct a fence without statutory notice, such notice is regarded as waived and liability exists for allowing the fence to get out of repair.[67] Where by construction of two fences the road forms a lane along its right of way, the one nearer the track is to be regarded as a railroad fence, the end of the lane having been left open to a highway.[68]

The sufficiency of a fence is a question of fact unless otherwise provided by statute.[69] To relieve the road from liability, it is not sufficient that the landowner should voluntarily erect a fence unless it is shown to have been sufficient and in a fair state of repair.[70]

The company is entitled to reasonable time to discover that fences are out of repair and a reasonable time after discovery to make repairs.[71]

Where an animal is killed where the company is not required by law to fence, there must be proof of negligence in addition to that of the killing.[72] Failure to fence within an unincorporated town where the fencing would seriously discommode

61. Bumpas v. Wabash R. Co. [Mo. App.] 77 S. W. 115; Doughty v. St. Louis, I. M. & S. R. Co., 92 Mo. App. 494. Though the stock has wandered from the right of way to a public road and thence to the railroad crossing, the road is responsible for double damages. Evidence held not to afford a presumption that the stock went on the track at the point where it was found. Kimball v. St. Louis & S. F. R. Co., 99 Mo. App. 335, 73 S. W. 224.

62. Under Rev. St. 1899, § 1105, where the animals entered within the town limits or at a place outside the limits where the duty was not imposed. Hurd v. Chappell, 91 Mo. App. 317.

63. Parish v. Louisville & N. R. Co., 25 Ky. L. R. 1524, 78 S. W. 186.

64. Gen. Railroad Act, § 32; Gen. St. p. 2646. Hendrickson v. Phila. & R. R. Co., 68 N. J. Law, 612.

65. Growney v. Wabash R. Co., 102 Mo. App. 442, 76 S. W. 671.

66. Ky. St. 1903, §§ 1790, 1791. Parish v. Louisville & N. R. Co., 25 Ky. L. R. 1524, 78 S. W. 186.

67. Laws 1893, §§ 1047-1049. Road constructed through fenced land. Choctaw, O. & G. R. Co. v. Deperade [Okl.] 71 Pac. 629.

68. Cattle straying in such lane are running at large within Code, § 2055. Dailey v. Chicago, M. & St. P. R. Co., 121 Iowa, 254, 96 N. W. 778.

69. The company must not only build a fence of the proper height with posts firmly set, but the fence must be sufficiently strong to resist horses, cattle, swine and live stock. Colyer v. Mo. Pac. R. Co., 93 Mo. App. 147. Natural barriers which, though competent for the purpose, are not used as a fence cannot be held to constitute a fence. Taylor v. Spokane Falls & N. R. Co., 32 Wash. 450, 73 Pac. 499. Leaving a space between the fence and the cattle guard sufficiently wide for the passage of cattle is failure to provide suitable connecting fences and cattle guards. Johnson v. Detroit & M. R. Co. [Mich.] 97 N. W. 760. Though the statute requires a fence of five wires, a fence of four wires is not as a matter of law insufficient. Rev. St. 1898, § 1810 provides that a fence of not less than 5 barbed wires shall be deemed a good and sufficient fence. Perrault v. Minneapolis, St. P. & S. S. M. R. Co., 117 Wis. 520, 94 N. W. 348.

70. Craig v. Wabash R. Co., 121 Iowa, 471, 96 N. W. 965.

71. Colyer v. Mo. Pac. R. Co., 93 Mo. App. 147. It may be question for the jury of whether a permitted use of adjacent land requires more frequent inspection as to the sufficiency of a fence than would be required under ordinary circumstances. Hendrickson v. Phila. & R. R. Co., 68 N. J. Law, 612. Proof of a recent break in the fence of which actual knowledge is not had and which would not be disclosed by an inspection required by reasonable care is insufficient to go to the jury. Id. The destruction of even an insufficient fence by trespassers so recently as to preclude repair is a defense. Perrault v. Minneapolis, St. P. & S. S. M. R. Co., 117 Wis. 520, 94 N. W. 348.

72. Such proof is not confined to negligence of the train operatives alone. Southern Kan. R. Co. v. Cooper [Tex. Civ. App.] 75 S. W. 328.

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the public and greatly interfere with the operation of the road is not negligence,[73] or within switch limits or station grounds.[74]

Gates.[75]—The company cannot be excused for an entire failure to provide fastenings for gates that lead from a public highway over a farm crossing, though the owner may not require strict compliance with the statute.[76]

Cattle guards.[77]—The question of whether absence or defect of guards is a proximate cause of injury is for the jury. By reason of affording an additional inducement for the colts killed to follow horses which had passed, a defective guard is a question for the jury,[78] as is the question of the feasibility of placing guards at railroad crossings without endangering the lives and safety of the employes.[79] Permitting a cattle guard to be filled with snow and ice so that stock can readily pass over it is a failure to maintain a proper and sufficient guard within the meaning of a statute.[80] Where cattle guards are allowed to remain out of repair for over two months, there is negligence as a matter of law.[81] Recovery cannot be had by reason of failure to maintain a guard where cattle pass over a part which was not defective.[82]

Contributory negligence of owner.—The negligence of the owner in turning cattle loose when he knows that fences are defective is a defense,[83] or in leaving a gate open,[84] it is immaterial that the gate was not shut for the reason that the adjacent fence was out of repair,[85] but where a horse escaped from a field inclosed by a safe and sufficient fence and got on the right of way through an open gate, the owner was held not contributorily negligent in having failed to close the gate

73. Rev. St. 1899, p. 730, § 2867, provides that the owner of cattle killed other than on public crossings does not have the burden of proof of negligence where the right of way is not enclosed by a lawful fence. Hillman v. Gray's Point T. R. Co., 99 Mo. App. 271, 73 S. W. 220.

74. Whether proximate cause of killing was absence of a fence and whether they were killed at a point reasonably required as a part of depot grounds or switch yard is a question of fact for the jury. Evidence held to require submission of such question. Snell v. Minneapolis, St. P. & S. S. M. R. Co., 87 Minn. 253, 91 N. W. 1108. Where the evidedge of their habit of going onto the track within switch limits or station grounds within a town, a charge on the duty of fencing the right of way need not be given. Southern Kan. R. Co. v. Cooper [Tex. Civ. App.] 75 S. W. 328.

75. Where there is evidence that a gate has been opened for 10 or 15 days prior to the injury to stock and that on account of the accumulation of snow it could not be closed, such evidence warrants an instruction as to the duty of defendant in case the gate had been open for a sufficient length of time to enable defendant with the exercise of ordinary care to have discovered such fact. Bumpas v. Wabash R. Co. [Mo. App.] 77 S. W. 115. The question of whether a section foreman is negligent in failing to close a gate in a right of way fence when he sees it open and people working in the adjoining field who to his knowledge had been accustomed to leave the gate open on their departure is for the jury. Atkinson v. Chicago & N. W. R. Co. [Wis.] 96 N. W. 529.

76. Bumpas v. Wabash R. Co. [Mo. App.] 77 S. W. 115.

77. Ky. St. 1903, § 1793 does not limit the necessity of maintaining guards to public and private crossings. Parish v. Louisville & N. R. Co., 25 Ky. L. R. 1524, 78 S. W. 185.

78. Paul v. Chicago, M. & St. P. R. Co., 120 Iowa, 224, 94 N. W. 498. Whether the defective condition of a cattle guard was the occasion of cattle being on the inclosed portion of the right of way. Black v. Minneapolis & St. L. R. Co. [Iowa] 96 N. W. 984.

79. The opinion of the railroad company is not controlling. Gilpin v. Mo., K. & T. R. Co. [Mo. App.] 77 S. W. 118. Evidence held insufficient to sustain a finding that guards could have been erected without endangering the lives of employes in performing their necessary duties. Id.

80. Code, §§ 2022, 2055. Paul v. Chicago, M. & St. P. R. Co., 120 Iowa, 224, 94 N. W. 498.

81, 82. Johnson v. Detroit & M. R. Co. [Mich.] 97 N. W. 760.

83. Perrault v. Minneapolis, St. P. & S. S. M. R. Co., 117 Wis. 520, 94 N. W. 348. A plaintiff who turns his cattle out in defiance of a law prohibiting them being at large into a place of known danger with knowledge of their habit of going on to the track is contributorily negligent. Wright v. Minneapolis, St. P. & S. S. M. R. Co. [N. D.] 96 N. W. 324.

Contra, an adjacent owner is not guilty of contributory negligence in permitting cattle to remain in a pasture after discovering the insufficiency of a fence. Chicago, P. & St. L. R. Co. v. Bourne, 105 Ill. App. 27.

84. Horses lead by plaintiff were frightened by a passing train and escaped from him through the gate on the right of way and was killed. Dickinson v. Wabash R. Co. [Mo. App.] 77 S. W. 88.

85. Dickinson v. Wabash R. Co. [Mo. App.] 77 S. W. 88.

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when he took his horse to the field from which it escaped, the gate having been closed several times during the interval.[86] So negligence is a question for the jury, where one in charge of a horse turns it loose with knowledge of the approach of a train and that the horse would probably cross the track,[87] or where a horse is allowed to stand unhitched within a few feet of a track, and with no way of escape except along or across it.[88]

Pleading.[89]—A general averment of negligence in running a train covers negligence for failure to keep a proper lookout for live stock.[90]

Burden of proof.—Plaintiff has the burden of proof throughout where the accident occurred, where a right of way was unfenced,[91] but it is also held that the railroad has the burden of showing due care.[92] By statute, the establishment of the ownership of cattle, their value and the fact that they were killed by defendant's train, may make a prima facie case.[93] A prima facie case of negligence cannot be made out without showing that the animal was injured by the running of defendant's trains,[94] but a verdict for plaintiff cannot be supported merely by the presumption arising from the killing of stock if it is rebutted by uncontradicted evidence.[95]

The burden of proof is on the company that in getting on its right of way stock came through a gate in a fence separating its right of way from an adjoining field.[96]

The fact that an adjoining owner maintains a fence does not raise an inference that the landowner has agreed to erect the right of way fence or keep it in repair.[97]

86. Atkinson v. Chicago & N. W. R. Co. [Wis.] 96 N. W. 529.

87. Choctaw, O. & G. R. Co. v. Ingram [Ark.] 75 S. W. 3.

88. Tex. Cent. R. Co. v. Harbison [Tex. Civ. App.] 75 S. W. 549. Evidence held insufficient to show the negligence of defendant in killing a horse left unhitched close to the track which became frightened and ran in front of the engine. Id.

89. Allegation that cattle were run against by a locomotive and cars managed by defendant's servants is insufficient as not alleging that defendant ran its locomotive or ran against plaintiff's cattle. Cleveland, C., C. & St. L. R. Co. v. Wasson [Ind. App.] 66 N. E. 1020. Complaint alleging that "defendant in operating a train on said railroad in said county negligently and carelessly and wrongfully struck and killed a certain heifer "then and there the property of plaintiffs of the value," held sufficient. Jones v. Great Northern R. Co. [N. D.] 97 N. W. 535.

90. Complaint held sufficient over a demurrer on the ground that it did not show in what the negligence consisted or how defendant killed the animal. Cent. of Ga. R. Co. v. Edmondson, 135 Ala. 336.

91. Mo., K. & T. R. Co. v. Kennedy [Tex. Civ. App.] 76 S. W. 943. Killing of cattle at a siding. Galveston, H. & S. A. R. Co. v. Cassinelli & Co. [Tex. Civ. App.] 78 S. W. 247.

92. St. Louis, I. M. & S. R. Co. v. Norton [Ark.] 78 S. W. 1095.

93. Rev. Codes 1899, § 2987. Wright v. Minneapolis, St. P. & S. S. M. R. Co. [N. D.] 96 N. W. 324.

94. Kan. City, Ft. Scott & M. R. Co. v. Walker [Ark.] 71 S. W. 660. A statutory provision that proof of an injury inflicted by the running of a locomotive or cars shall be prima facie evidence of want of reasonable skill and care does not apply to a case in which a horse becomes frightened and runs parallel with the track until it jumps into a ditch breaking its neck [Ann. Code, § 1801]. Lowe v. Ala. & V. R. Co., 81 Miss. 9. Evidence of killing and that the action is commenced within the time prescribed by statute renders the question for the jury, though defendant introduces evidence tending to show that it was not negligent [Code 1883, § 2326]. Baker v. Roanoke & T. R. R. Co., 133 N. C. 31. An action of the trial court in overruling a motion for new trial on the general ground will not be reversed, where it is admitted that live stock was killed by defendant's train, the presumption being against defendant. Southern R. Co. v. Hill, 116 Ga. 470.

95. Seaboard A. L. R. v. Walthour, 117 Ga. 427. Positive and uncontradicted evidence as to ordinary diligence given by the company's employe. Macon & B. R. Co. v. Revis [Ga.] 46 S. E. 418. Where an animal goes from an open gate through a defective fence on the tracks where it is injured, a prima facie case of negligence is established and it is not sufficient to negative the case of negligence thus established to show that the animal was in a safe place on the day before. Dailey v. Chicago, M. & St. P. R. Co., 121 Iowa, 254, 96 N. W. 778.

96. Dailey v. Chicago, M. & St. P. R. Co., 121 Iowa, 254, 96 N. W. 778.

97. Craig v. Wabash R. Co., 121 Iowa, 471, 96 N. W. 965.

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Admissibility and sufficiency of evidence.—Preliminary to evidence as to condition of a fence or cattle guard after the accident, there must be evidence that there has been no change in conditions.[98] General holdings as to the admissibility[99] and sufficiency of evidence are collected in the notes.[1]

Instructions should conform to the evidence[2] and issues,[3] and should not invade the province of the jury.[4] An instruction omitting reference to the place where the horses got on the track is erroneous.[5]

Special findings.—Where, under the evidence, a horse was struck at one of two places, a special finding that he was not struck at one place is a finding that he was struck at the other.[6]

Double damages and attorney's fees.[7]—Where a notice and affidavit of a stock loss is served for the purpose of recovering double damages, they are to be construed together, and the notice cannot be ignored on account of a slight inaccuracy in the designation of the company[8] or immaterial defects in the jurat.[9] An ad-

98. Colyer v. Mo. Pac. R. Co., 93 Mo. App. 147. Error in showing the condition of a cattle guard after the accident is cured by showing that the condition was unchanged. Johnson v. Detroit & M. R. Co. [Mich.] 97 N. W. 760. Evidence of the height of a right of way fence after the accident is admissible, where no change is established. Morrison v. Chicago & N. W. R. Co., 117 Iowa, 587, 91 N. W. 793.

99. Absence of cattle guards in the vicinity of the place of accidents may be shown on the question of care required in managing the train. Rafferty v. Portland, V. & Y. R. Co., 32 Wash. 259, 73 Pac. 382. The roadmaster of defendant corporation may be asked as to the condition of the guard when he examined it as to its sufficiency to turn stock. Johnson v. Detroit & M. R. Co. [Mich.] 97 N. W. 760. A witness who has described the guard may be asked what other defects he noticed. Id. In an action for killing a horse, evidence that tracks were found on a right of way and indicated the walking, running, or jumping motion of the horse is admissible. Craig v. Wabash R. Co., 121 Iowa, 471, 96 N. W. 965. Where it was important as to the distance of the horse when struck from a cattle guard, a witness may testify that plaintiff pointed out certain depressions scooped out in the track from which he measured. Id. Where only one set of horse tracks is shown to have been on the roadbed, evidence as to the presence of other horses in an adjacent field is immaterial. Cent. of Ga. R. Co. v. Edmondson, 135 Ala. 336.

1. Evidence held sufficient to warrant an inference that a horse was frightened into a right of way fence by a passing train. Brown v. Mo., K. & T. R. Co. [Mo. App.] 78 S. W. 273. To permit an inference that defective condition of a guard caused stock to pass over it some time before the approach of a train. Paul v. Chicago, M. & St. P. R. Co., 120 Iowa, 224, 94 N. W. 498. To repel all reasonable inferences save that cattle entered through an open gate. Bumpas v. Wabash R. Co. [Mo. App.] 77 S. W. 115. To show that a horse was struck at a point on the right of way where the road was under a duty to fence. Craig v. Wabash R. Co., 121 Iowa, 471, 96 N. W. 965.

Evidence held insufficient to warrant submission to the jury of the question of whether an animal was injured by reason of the obstacle presented by fences to her escape. Colo. & S. R. Co. v. Beeson [Colo. App.] 74 Pac. 345.

2. An issue of the negligent frightening of a horse causing him to run on a railroad bridge should not be submitted in the absence of evidence. Mo., K. & T. R. Co. v. Kennedy [Tex. Civ. App.] 76 S. W. 943.

3. Where negligence in failing to give the statutory signals at a crossing is alleged to have been the cause of frightening a horse, an instruction should not be so worded as to intimate that the horse was frightened by the failure to give signals, the question being whether the failure to signal led plaintiff into a more dangerous position that she would otherwise have occupied. St. Louis, I. M. & S. R. Co. v. Boback [Ark.] 75 S. W. 473. Charge held not objectionable as allowing recovery for mere failure to maintain a fence in view of evidence and statements of the court rendering it necessary that the jury knew that the horse must have reached the track because of such failure. Morrison v. Chicago & N. W. R. Co., 117 Iowa, 587, 91 N. W. 793.

4. Instruction held not to state that defendant had not done its full duty in providing a cattle guard approved by the commissioner of railroads, unless the guard was in fact sufficient to prevent cattle passing on the track. Johnson v. Detroit & M. R. Co. [Mich.] 97 N. W. 760. Instruction in an action for killing cattle held not misleading as withdrawing from the jury evidence of what the engineer actually saw or evidence bearing on the collision. Paul v. Chicago, M. & St. P. R. Co., 120 Iowa, 224, 94 N. W. 498.

5. Morris v. Mo., K. & T. R. Co., 99 Mo. App. 455, 73 S. W. 1004.

6. Craig v. Wabash R. Co., 121 Iowa, 471, 96 N. W. 965.

7. Compensatory damages, see article Damages, 1 Curr. Law, p. 833.

8. Addressing notice to the Minneapolis & St. Louis Railway Co. instead of to the Minneapolis & St. Louis Railroad Co. held not fatal, though the first named corporation was predecessor in title to the other. Black v. Minneapolis & St. L. R. Co. [Iowa] 96 N. W. 984.

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mission of the value of stock killed is sufficient to fix the value for the purpose of determining double damages.[10]

Attorney's fees in action for stock killed are recoverable only by statute.[11]

(§ 7) *G. Fires.*[12]—Operators of private logging roads are held to the same liability for fire as public railroad companies,[13] and a railroad company is liable for the defective equipment of a logging company's engine allowed on the railroad's tracks.[14]

Statutes imposing liability for fire communicated from a right of way are constitutional,[15] and covers fires originating in depot buildings.[16] A speed ordinance is not designed for protection against fires.[17] The words "right of way" in such statutes do not refer to the title of the company.[18] A railroad is not liable for a fire communicated from land owned by it but not used for railroad purposes, which is being used by a city as public dumping grounds.[19]

Where the railroad is not negligent, it is not liable,[20] otherwise, however, under the Missouri statute.[21] Its negligence must be the proximate cause.[22] Failure to use coal least apt to throw out sparks is not in itself negligence.[23] A train crew is not negligent in failing to leave its engine to extinguish a grass fire set by the locomotive.[24]

Duty as to equipment and operation of engines.—Liability exists for operation of a defective engine or negligent operation of a properly equipped engine.[25] The care demanded in seeking appliances to prevent escape of fire and in their maintenance varies slightly in the various states. The decisions will be found in the footnotes.[26] The court will take judicial notice that no engine can be so constructed

9. Affidavit to claim held sufficient over an objection that the jurat did not show in whose presence or before whom it was sworn to or that the person signing it as notary public was a notary in and for the county within which it was sworn to. Black v. Minneapolis & St. L. R. Co. [Iowa] 96 N. W. 984.

10. Black v. Minneapolis & St. L. R. Co. [Iowa] 96 N. W. 984.

11. Acts 1891, c. 4069, § 6, providing that where a company is complying with an act requiring the fencing of tracks, it shall be liable only for the actual value of the cattle killed and reasonable attorneys' fees, authorizes recovery during the time the companies are constructing fences, though not after construction is completed. Fla. Cent. & P. R. Co. v. Seymour [Fla.] 33 So. 424.

12. Act June 25, 1836, amending the charter of the N. Y. P. & B. R. Co., makes it liable for any property destroyed by fire from its engines. Spink v. N. Y., N. H. & H. R. Co., 24 R. I. 560.

13. Simpson v. Enfield Lumber Co., 133 N. C. 95; Craft v. Albemarle Timber Co., 132 N. C. 151.

14. Jefferson v. Chicago & N. W. R. Co., 117 Wis. 519, 94 N. W. 289.

15. Brown v. Carolina Midland R. Co. [S. C.] 46 S. E. 283.

16. Though originating from a heating stove [Code Laws 1902, § 2135]. Brown v. Carolina Midland R. Co. [S. C.] 46 S. E. 283.

17. Louisville & N. R. Co. v. Sullivan Timber Co. [Ala.] 35 So. 327.

18. Question of what is right of way is for the jury under proper definition. Brown v. Carolina Midland R. Co. [S. C.] 46 S. E. 283.

19. The road maintained no control and no fires were kept for its benefit or with its consent. City of Denver v. Porter [C. C. A.] 126 Fed. 288.

20. Creighton v. Chicago, R. I. & P. R. Co. [Neb.] 94 N. W. 527.

21. Rev. St. 1899, § 1111. Wabash R. Co. v. Ordelheide, 172 Mo. 436, 72 S. W. 684.

22. A railroad which has set out a fire is not liable for an injury sustained by a property owner while endeavoring to save some of his property. Logan v. Wabash R. Co., 96 Mo. App. 461, 70 S. W. 734. Where the railroad has allowed property exposed to sparks from passing engines to become readily inflammable, it is responsible for fire communicated to buildings on the ignition of such property. Cotton bales permitted to stand on a platform until the bagging came off and the lint bulged out. Hamburg-Bremen F. Ins. Co. v. Atlantic C. L. R. Co., 132 N. C. 75. Evidence held insufficient to show that the negligence of a fire department in scattering a fire was partially responsible, rendering it necessary that plaintiff suing only one of the wrongdoers should show the particular part of the loss inflicted by the defendant. Ala. & V. R. Co. v. Sol Fried Co. [Miss.] 33 So. 74.

23. Raleigh Hosiery Co. v. Raleigh & G. R. Co., 131 N. C. 238.

24. Galveston, H. & S. A. R. Co. v. Chittim, 31 Tex. Civ. App. 40, 71 S. W. 294.

25. Norfolk & W. R. Co. v. Perrow [Va.] 43 S. E. 614.

26. Alabama: Liability does not exist where the engine is furnished with a spark arrester and other appliances of approved character to prevent the throwing of sparks

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that some sparks will not escape.[27] A mere failure to equip an engine with a spark arrester does not impose liability unless the engine is shown to have set a fire.[28]

Contractual exemptions from liability.—A condition in a contract under which a railroad builds a sidetrack that the shipper will indemnify the road from liability for loss by fire, though caused by the road's negligence, is not against public policy.[29] The construction of such a contract is for the court, and the jury cannot be left to determine whether a loss comes within it.[30] Such a contract exempts the company from liability for fire communicated by sparks from an engine entering on other tracks for the purpose of using the sidetracks in the business of the adjoining owner.[31] One not in privity with the lessee of railroad property and without knowledge of stipulations against liability for fire is not bound,[32] and the fact that by contract the road is exempt from liability for fire as to buildings erected on a leased portion of its right of way does not exempt it from liability when such buildings communicate fire to other premises.[33]

Contributory negligence.—A property owner may assume that a railroad company will not be guilty of negligence and may use his property in the ordinary and usual way without contributory negligence.[34] He is not required to keep it in such condition as to guard against negligence of the railroad in firing it,[35] or bound to use unusual care.[36] The placing of buildings on the right of way is not contribu-

and where it is properly handled. Louisville & N. R. Co. v. Sullivan Timber Co. [Ala.] 35 So. 327.

Illinois: Charging a duty to find equipment with the "most approved and safest" appliances is not prejudicial where other instructions put the duty at "the best and most approved appliances." Cleveland, C., C. & St. L. R. Co. v. Hornsby, 202 Ill. 138, 66 N. E. 1052.

Kentucky: Engines must be equipped with the best and most effectual spark arrester known to science and of practical use, properly adjusted, that will prevent as far as possible the escape of sparks. Mills v. Louisville & N. R. Co., 25 Ky. L. R. 488, 76 S. W. 29.

New York: A railroad is liable only when it has negligently used engines not so fitted with appliances as to prevent the escape of sparks of an unusual size or in unnecessary quantities. White v. N. Y. Cent. & H. R. R. Co., 85 N. Y. Supp. 497.

Texas: The duty of the company is to seek the best appliances to prevent the escape of fire and to use ordinary care to secure such appliances and keep the same in proper repair. It is not an absolute duty to have engines equipped with the most approved appliances. St. Louis S. W. R. Co. v. Goodnight [Tex. Civ. App.] 74 S. W. 583. "Best" approved appliances not required. St. Louis S. W. R. Co. v. Gentry [Tex. Civ. App.] 74 S. W. 607. "Latest and best" not required. Id. An instruction requiring the company to take all reasonable care and caution to keep the fire apparatus in good repair imposes a too great burden on the company. Id.

27. White v. N. Y. Cent. & H. R. R. Co., 85 N. Y. Supp. 497.

28. Cheek v. Oak Grove Lumber Co. [N. C.] 46 S. E. 488.

29. Mann v. Pere Marquette R. Co. [Mich.] 97 N. W. 721.

30. Where the contract stipulates against liability for the destruction of property placed in the vicinity of the track, the court should declare as a matter of law that property near the track was in the vicinity, though the fire traveled some 400 feet before igniting it over shavings which it was the duty of the property owner to clear away. Mann v. Pere Marquette R. Co. [Mich.] 97 N. W. 721. Where the adjoining owner contracts to keep his premises free from inflammable material, a fire communicated through the allowing of shavings, saw dust and small pieces of board to accumulate is due to the owner's fault. Id.

31. Negligence if any held to be that of plaintiff's foreman in directing an engine known by him to be defective to go on premises where there was great likelihood of setting fire. Mann v. Pere Marquette R. Co. [Mich.] 97 N. W. 721.

32. Tex. & P. R. Co. v. Watson, 190 U. S. 287.

33. Kan. City, Ft. S. & M. R. Co. v. Blaker & Co. [Kan.] 75 Pac. 71.

34. May use his property in a manner or maintain it in the condition that he would had there been no railroad in the vicinity. Cleveland, C., C. & St. L. R. Co. v. Tate, 104 Ill. App. 615.

35. Instruction held erroneous as imposing such duty. Ind. Clay Co. v. Baltimore & O. S. W. R. Co., 31 Ind. App. 258, 67 N. E. 704. A mere failure to comply with an ordinance as to the sweeping of a sidewalk and allowing inflammable matter to accumulate thereon is not in itself contributory negligence in the absence of knowledge of defendant's negligence in permitting its engines to emit sparks. Louisville & N. R. Co. v. Sullivan Timber Co. [Ala.] 35 So. 327.

36. Held error to refuse an instruction that he was not bound to provide waterworks for the extinguishment of fire. Ind. Clay Co. v. Baltimore & O. S. W. R. Co., 31 Ind. App. 258, 67 N. E. 704.

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tory negligence,[37] or the storing of inflammable property thereon or in the vicinity where usual and with customary precautions.[38] The owner is bound to exercise reasonable diligence to extinguish the fire or protect his property after the fire is started and cannot recover for damages he would otherwise have escaped,[39] but one seeing indications of a fire on right of way is not bound to leave his own employment without regard to how engrossing or important it may be at the time, to extinguish the fire at the risk of being barred from recovery in case such fire spreads to and destroys his own property.[40]

Pleading.[41]—The facts constituting negligence need not be stated in detail.[42] A complaint for property destroyed on defendant's platform need not allege that it was there with defendant's consent or otherwise account for its presence there.[43] It is sufficient to allege that the fire originated in consequence of the act of defendant instead of in consequence of the act of any of the defendant's authorized agents or employes.[44] The complaint need not follow the exact language of the statute.[45] It is not necessary to aver that the company negligently permitted the fire to escape from each successive tract of land after it left the right of way until it reached the land of the party complaining.[46]

An amendment stating that a fire was caused by a negligent failure to provide spark arresters does not state a new cause of action when the original complaint alleged that the fire was caused by reason of the defective construction of defendant's engines.[47]

Burden of proof and presumptions.—The burden is on plaintiff to establish the fact that the fire originated from defendant's negligence.[48] Under the statutes in

37. Kan City, Ft. S. & M. R. Co. v. Blaker & Co. [Kan.] 75 Pac. 71.

38. Storing cotton in the usual and ordinary way some ninety feet from track. Ala. & V. R. Co. v. Aetna Ins. Co. [Miss.] 35 So. 304. Storing cotton on lots adjacent to a railroad where precautions such as covering it with tarpaulins, keeping a watch with barrels of water, etc., are taken. Ala. & V. R. Co. v. Sol Fried Co. [Miss.] 33 So. 74. Placing cotton on a station platform without notice of danger arising from the equipment of locomotives. Southern R. Co. v. Wilson [Ala.] 35 So. 561. Placing timber intended for shipment on the railroad right of way pursuant to custom. San Antonio & A. P. R. Co. v. Home Ins. Co. [Tex. Civ. App.] 70 S. W. 999.

39. Louisville & N. R. Co. v. Sullivan Timber Co. [Ala.] 35 So. 327. Error to instruct that it is the duty to extinguish a fire as speedily as possible. Ind. Clay Co. v. Baltimore & O. S. W. R. Co., 31 Ind. App. 258, 67 N. E. 704.

40. Instruction held erroneous as stating the contrary, where at the time he noticed the fire, plaintiff was driving a herd of fractious cattle requiring his entire attention. Franey v. Ill. Cent. R. Co., 104 Ill. App. 499.

41. Plea setting up contributory negligence in an action for the burning of cotton held not subject to a general motion to strike as necessarily prolix, irrelevant or frivolous [Code 1896, § 3286]. Ala. G. So. R. Co. v. Clark, 136 Ala. 450. Plea held sufficient to aver contributory negligence of the owner of a building destroyed by fire. Louisville & N. R. Co. v. Sullivan Timber Co. [Ala.] 35 So. 327. An allegation that in the use of the engine defendant was negligent and careless in the operation of its railroad is not sufficient to support a finding of negligence in the use of a defective spark arrester, where there has been a motion for a more specific statement. Mo., K. & T. R. Co. v. Garrison, 66 Kan. 625, 72 Pac. 225.

42. Sufficient to state that the injury was caused "wholly by the negligence of defendant." Pittsburg, C., C. & St. L. R. Co. v. Wilson, 161 Ind. 701, 66 N. E. 899. An allegation that an engine was negligently operated so as to permit the escape of sparks admits proof of insufficient construction and equipment. San Antonio & A. P. R. Co. v. Home Ins. Co. [Tex. Civ. App.] 70 S. W. 999.

43. Such a complaint may be sufficient to show an existing duty to exercise ordinary care to prevent injury to the property of another, though insufficient to show the obligation of a common carrier or warehouseman. Southern R. Co. v. Wilson [Ala.] 35 So. 561.

44. Brown v. Carolina Midland R. Co. [S. C.] 46 S. E. 283.

45. Under Code Laws 1902, § 2135, a complaint is sufficient which alleges that defendant, whose depot is situated on its right of way, allowed fire to remain in or near said depot building, that the same caught or took fire, and such fire was communicated to plaintiff's building. Brown v. Carolina Midland R. Co. [S. C.] 46 S. E. 283.

46. Wabash R. Co. v. Lackey, 31 Ind. App. 103, 67 N. E. 278.

47. Simpson v. Enfield Lumber Co., 133 N. C. 95.

48. Creighton v. Chicago, R. I. & P. R. Co. [Neb.] 94 N. W. 527.

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most states the communication of fire is prima facie evidence of negligence.[49] Some states make the setting of the fire evidence and not merely a presumption of negligence, and as such it must be met and overcome.[50] But in Texas, a showing that a fire was communicated by the sparks from a locomotive does not make out a prima facie case of negligence, shifting the whole burden of proof to defendant.[51]

In New York, plaintiff must establish not only the setting of the fire but negligence in equipment causing the sparks to be emitted.[52]

After establishment of a prima facie case, the burden is on the defendant to show proper equipment and management.[53] Proof of proper equipment is not sufficient.[54]

Where the prima facie case is rebutted, plaintiff must prove by the preponderance of the evidence that defendant has been guilty of negligence.[55]

It is presumed that an engine being operated over the tracks of a railroad company belongs to and is being operated by the company.[56] Evidence that sparks and cinders escaped in unusual quantities may warrant the assumption that an arrester was out of order or improperly adjusted.[57] It is a legitimate conclusion that a heavily loaded freight train laboring up a grade will throw out sparks.[58]

Admissibility of evidence.—That fire was the result of negligent operation may be proved by either direct or circumstantial evidence or both.[59] Where there is no direct proof of the starting of the fire, it may be shown that the locomotive started other fires at or about that time,[60] or emitted sparks,[61] or similar conduct of other

49. An instruction that it must appear from a preponderance of the evidence that defendant was guilty of negligence in permitting sparks to escape is in contravention of such statutes. Franey v. Ill. Cent. R. Co., 104 Ill. App. 499. 3 Starr & C. Ann. St. (2d Ed.), p. 3294, c. 114, par. 123. Cleveland, C., C. & St. L. R. Co. v. Hornsby, 202 Ill. 138, 66 N. E. 1052; Id., 105 Ill. App. 67. Code, § 2056. Kennedy Bros. v. Iowa State Ins. Co., 119 Iowa, 29, 91 N. W. 831; St. Louis S. W. R. Co. v. Goodnight [Tex. Civ. App.] 74 S. W. 583.

50. Atchison, T. & S. F. R. Co. v. Geiser [Kan.] 75 Pac. 68. In Iowa, the mere happening of the fire not only shifts the burden of proof to defendant to show freedom from negligence, but stands as substantive evidence of neglect on the part of the company operating the train. West Side M. F. Ins. Co. v. Chicago & N. W. R. Co. [Iowa] 95 N. W. 193.

51. Galveston, H. & S. A. R. Co. v. Chittim, 31 Tex. Civ. App. 40, 71 S. W. 294.

52. White v. N. Y. Cent. & H. R. R. Co., 85 N. Y. Supp. 497.

53. Cleveland, C., C. & St. L. R. Co. v. Hornsby, 105 Ill. App. 67; Toledo, St. L. & W. R. Co. v. Needham, 105 Ill. App. 25; Cleveland, C., C. & St. L. R. Co. v. Hornsby, 202 Ill. 138, 66 N. E. 1052; Cleveland, C., C. & St. L. R. Co. v. Tate, 104 Ill. App. 615; Tex. S. R. Co. v. Hart [Tex. Civ. App.] 73 S. W. 833; Chicago, B. & Q. R. Co. v. Beal [Neb.] 94 N. W. 956; Tex. Midland R. R. v. Moore [Tex. Civ. App.] 74 S. W. 942. The burden is shifted to defendant to show that it used approved appliances and that the damage was from an extraordinary cause beyond its control. Raleigh Hosiery Co. v. Raleigh & G. R. Co., 131 N. C. 238.

54. Tex. S. R. Co. v. Hart [Tex. Civ. App.] 73 S. W. 833.

55. Proof that the only two engines which could be responsible for the fire were equipped with the most highly approved spark arresters and operated in a skillful manner overcomes the prima facie case. Smith v. Mo., K. & T. R. Co. [Tex. Civ. App.] 73 S. W. 22. The prima facie case is rebutted by proof of equipment with the most approved spark arrester in general use that the arrester was in good repair and the engine was being handled with ordinary care. St. Louis S. W. R. Co. v. Gentry [Tex. Civ. App.] 74 S. W. 607. It is a question for the jury where the prima facie case arising from a fire is overthrown by evidence that the engine was equipped with the latest appliances in good repair which were carefully managed. Atchison, T. & S. F. R. Co. v. Geiser [Kan.] 75 Pac. 68.

56. Brooks v. Missouri Pac. R. Co., 98 Mo. App. 166, 71 S. W. 1083.

57. Cincinnati, N. O. & T. P. R. Co. v. Caskey, 24 Ky. L. R. 2392, 74 S. W. 201.

58. Brooks v. Mo. Pac. R. Co., 98 Mo. App. 166, 71 S. W. 1083.

59. Pittsburgh, C., C. & St. L. R. Co. v. Wilson, 161 Ind. 701, 66 N. E. 899. The origin of the fire may be shown by circumstantial evidence. Kan. City, Ft. S. & M. R. Co. v. Blaker & Co. [Kan.] 75 Pac. 71. Evidence of surrounding circumstances and conditions which by a process of exclusion tends to establish that the fire could not have been caused other than by the locomotive in question is relevant. Tex. & P. R. Co. v. Watson, 190 U. S. 287.

60. Galveston, H. & S. A. R. Co. v. Chittim, 31 Tex. Civ. App. 40, 71 S. W. 294. Evidence that witnesses saw the engine charged to have set the fire throwing sparks and igniting grass in the neighborhood and on the same day. Tex. & P. R. Co. v. Scottish Union N. Ins. Co. [Tex. Civ. App.] 73 S. W. 1088. Witnesses may testify that at or about the time of the fire complained of,

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engines where the engine charged with the fire is not identified[62] or in rebuttal,[63] or where all the engines are shown to have been in substantially the same condition.[64] Opinion evidence is admissible as to efficacy of precautions.[65]

Under an allegation that fire was communicated without statement of the manner, evidence may be admitted to show that the heating apparatus in the station was defective.[66] Evidence that the right of way was covered with brush and rubbish is not admissible where negligence in such respect is not alleged.[67] It may be shown that some of defendant's own land had been burned over.[68] For miscellaneous decisions as to admissibility, see the footnotes.[69]

Sufficiency of evidence.—Where the evidence as to the cause of a fire is entirely circumstantial, expert evidence tending to show that cinders emitted by a locomotive would reach the property burned while so hot as to ignite it must be introduced.[70] The fact that a fire starts soon after the passing of an engine may be sufficient to show that it was caused by the railroad without showing the emission of live cinders,[71] but almost similar evidence has been held insufficient.[72] Circum-

and at about the time of the passing of the locomotive charged with setting the fire, other fires were observed at points not far removed from the place. Tex. & P. R. Co. v. Watson, 190 U. S. 287.

61. The volume of sparks emitted by the defendant's engine and the height to which such sparks were thrown while switching cars near to and by the warehouse at or about the time the fire occurred may be shown. Ala. G. S. R. Co. v. Clark, 136 Ala. 450.

62. Ala. & V. R. Co. v. Aetna Ins. Co. [Miss.] 35 So. 304; Noland v. Great Northern R. Co., 31 Wash. 430, 71 Pac. 1098. Not that an engine set a fire a year later at a different place. Cheek v. Oak Grove Lumber Co. [N. C.] 46 S. E. 488. Fires prior and up to the time of the fire in issue, cinders lying along the tracks, the habit of locomotives of throwing out fire and cinders, and whether of a nature to be able to ignite fires may be shown. MacDonald v. N. Y., N. H. & H. R. Co., 25 R. I. 40; Ill. Cent. R. Co. v. Scheible, 24 Ky. L. R. 1708, 72 S. W. 325. Where the engine is particularly identified, testimony that other engines emitted sparks ten minutes before the fire is not admissible. San Antonio & A. P. R. Co. v. Home Ins. Co. [Tex. Civ. App.] 70 S. W. 999. Where a fire was set April 8th, the throwing of sparks by an engine during the preceding winter cannot be shown, being too remote. Toledo, St. L. & W. R. Co. v. Needham, 105 Ill. App. 25. It may be shown that a fence as distant from the track as a house destroyed was fired a few days previously by a passing engine. Mills v. Louisville & N. R. Co., 25 Ky. L. R. 488, 76 S. W. 29.

63. Evidence as to other fires caused by sparks from the engine in controversy and recently after the fire complained of in connection with evidence that other engines passed and repassed the same place without setting out fires is relevant and competent in rebuttal of evidence as to the condition of the spark arrester and other parts of the engine after the fire. Ala. G. S. R. Co. v. Clark, 136 Ala. 450.

64. Black v. Minneapolis & St. L. R. Co. [Iowa] 96 N. W. 984.

65. One qualified by experience and observation as a locomotive engineer may testify as to whether a spark arrester in first class condition would prevent the escape of sparks that would ignite property on the right of way. Kan. City, Ft. S. & M. R. Co. v. Blaker & Co. [Kan.] 75 Pac. 71. One in special control of the portion of railroad shops having to do with spark arresters may answer a hypothetical question based on the evidence as to the condition of an engine setting frequent fires. Tex. & P. R. Co. v. Watson, 190 U. S. 287. The admission of evidence as to why a spark arrester was taken off is harmless where the instructions imposed liability in case the engine is found to have set the fire. Cheek v. Oak Grove Lumber Co. [N. C.] 46 S. E. 488.

66. Brown v. Carolina Midland R. Co. [S. C.] 46 S. E. 283.

67. Noland v. Great Northern R. Co., 31 Wash. 430, 71 Pac. 1098.

68. MacDonald v. N. Y., N. H. & H. R. Co., 25 R. I. 40.

69. Rules of the company as to employes and such rules fixing a greater degree of care than that of an ordinarily prudent man are inadmissible. Ala. G. S. R. Co. v. Clark, 136 Ala. 450. Warehouse receipts for cotton destroyed issued in the name of a third party and delivered to plaintiff without endorsement do not show legal title to be in another than plaintiff and are admissible as are similar receipts, though signed with the name of the warehouseman by another party but under his personal supervision. Id. The distance of a building from the track and the manner in which it was used and its other relation to the company may be established to show whether it was on the right of way. Brown v. Carolina Midland R. Co. [S. C.] 46 S. E. 283.

Evidence admissible for the purpose of a claim of damage before the action was instituted is not objectionable for the reason that in the absence of sufficient evidence to show that defendant's engine started the fire, it might be taken as an admission that it started the fire. Chicago, B. & Q. R. Co. v Beal [Neb.] 94 N. W. 956.

70. Gibbs v. St. Louis & S. F. R. Co. [Mo. App.] 78 S. W. 835.

71. Kan. City, Ft. S. & M. R. Co. v. Perry, 65 Kan. 792, 70 Pac. 876.

72. Peffer v. Mo. Pac. R. Co., 98 Mo. App. 291, 71 S. W. 1073.

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stantial evidence will not overcome direct,[73] and where the inferences for and against the theory that a fire was set by an engine are equally balanced, plaintiff cannot recover.[74] The fact that a slight wind was blowing away from the property destroyed does not prove that the sparks were not the cause of the fire.[75] Evidence that there was no train ordered is not conclusive that no train went out.[76] Cases in which the sufficiency of evidence has been reviewed are grouped in the notes.[77]

Instructions.—Instructions should be confined to the issues,[78] conform to the evidence,[79] not invade the province of the jury,[80] and be clear and not misleading.[81] Instructions embodied in those already given may be refused.[82]

73. Evidence of other engines not identified with the one in question having been seen emitting sparks is not sufficient as against other evidence given by disinterested witnesses as to not seeing sparks thrown by the engine in question. White v. N. Y. Cent. & H. R. R. Co., 85 N. Y. Supp. 497.

74. Bates County Bank v. Mo. Pac. R. Co., 98 Mo. App. 330, 73 S. W. 286.

75, 76. Brooks v. Mo. Pac. R. Co., 98 Mo. App. 166, 71 S. W. 1083.

77. Evidence held for the jury: As to the condition of engines and the manner of operation. Norfolk & W. R. Co. v. Perrow [Va.] 43 S. E. 614. Firing a barn. Brooks v. Mo. Pac. R. Co., 98 Mo. App. 166, 71 S. W. 1083. Condition of spark arresters and operation of engines. Ill. Cent. R. Co. v. Scheible, 24 Ky. L. R. 1708, 72 S. W. 325. Firing a stock car in its freight yards. Carter v. Pa. R. Co. [C. C. A.] 120 Fed. 663. Right of way allowed to remain covered with dead grass and combustible material. Livermon v. Roanoke & T. R. Co., 131 N. C. 527. Inflammable material was allowed to remain on the right of way and no spark arresters were furnished. Craft v. Albemarle Timber Co., 132 N. C. 151. Construction of a road without removal of underbrush and presence of fire on the right of way immediately after the passing of a train. Simpson v. Enfield Lumber Co., 133 N. C. 95. Shortly after train passed fire was found in the right of way with live coal lying there. Smith v. Long Island R. Co., 79 App. Div. [N. Y.] 171. Use of improper fuel and fire was set in an adjacent field. Glanz v. Chicago, M. & St. P. R. Co., 119 Iowa, 611. 93 N. W. 575.

Evidence held sufficient to show that a fire was set out by an engine. Chicago, B. & Q. R. Co. v. Beal [Neb.] 94 N. W. 956. To show negligence. West Side M. F. Ins. Co. v. Chicago & N. W. R. Co. [Iowa] 95 N. W. 193. To show that timber was burned by defendant's negligence. San Antonio & A. P. R. Co. v. Home Ins. Co. [Tex. Civ. App.] 70 S. W. 999. Evidence that within a few minutes after defendant's locomotive passed along the track and while a strong wind was blowing from the direction of the track towards the hay, the hay was first discovered to be on fire. Black v. Minneapolis & St. L. R. Co. [Iowa] 96 N. W. 984.

Evidence held insufficient to show defendant's negligence in setting a fire as against proof of equipment with the most modern and best appliances and careful inspection. Polacsek v. Manhattan R. Co., 84 N. Y. Supp. 140. To show that a building was fired by an engine. Ragdale v. Southern R. Co., 121 Fed. 924; Bates County Bank v. Mo. Pac. R. Co., 98 Mo. App. 330, 73 S. W. 286.

78. Charge held not open to the objection that it did not limit fires to such as originated in consequence of sparks as was pleaded. Wilson v. Southern R. Co., 65 S. C. 421. Instructions as to the duty to provide appliances, keep them in repair, and to keep the right of way free from combustibles, should not be given where negligence in such respect is not alleged. Noland v. Great Northern R. Co., 31 Wash. 430, 71 Pac. 1098. Instruction held improperly given on the theory of negligence in allowing material to accumulate on the right of way where the supporting counts had been stricken. Louisville & N. R. Co. v. Sullivan Timber Co. [Ala.] 35 So. 327. Where it is alleged that there was negligence in allowing cut grass to remain on the right of way, an instruction allowing recovery without the existence of such grass is error. Id. An instruction held not objectionable as leaving the jury to consider the original construction of the spark arrester in respect to its condition at the time of the fire. Tex. & P. R. Co. v. Watson, 190 U. S. 287. Where the contested issue is as to whether the fire originated from an engine at all, an instruction as to the burden of showing freedom from negligence being on defendant is properly refused. Duckworth v. Ft. Worth & R. G. R. Co. [Tex. Civ. App.] 75 S. W. 913.

79. Instruction as to liability for fire originated from sparks falling in the grass on the right of way held not authorized by the evidence. Louisville & N. R. Co. v. Sullivan Timber Co. [Ala.] 35 So. 327. It is not proper to instruct the jury to find for plaintiff if they found that a properly constructed and operated engine could not throw burning sparks a specified distance, when there was no evidence that an engine so constructed and operated would not throw sparks that distance, nor should such an instruction ignore evidence of a strong wind blowing at the time. Id.

80. Should not assume the negligence of defendant. St. Louis S. W. R. Co. v. Gentry [Tex. Civ. App.] 74 S. W. 607. It is not error to charge that the setting of a fire creates a prima facie case though an issue of contributory negligence is also present. Tex. & P. R. Co. v. Scottish Union N. Ins. Co. [Tex. Civ. App.] 73 S. W. 1088. An instruction held not to allow a recovery without regard to negligence in respect to the character of a spark arrester, the repair and use thereof or as placing the burden of proof of the entire case on defendant, or as on the weight of the evidence. Mo., K. &

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Special findings.—A general finding for plaintiff is not contradicted by special findings of a sufficient spark arrester and also of negligence in the operation of a locomotive.[83]

Damages.[84]—Statutes imposing a penalty and liability in damages for failure to clear combustible matter from the right of way are not regarded as taking private property for private use or without due process of law. They allow a person aggrieved to recover both the penalty and damages, but a failure in compliance is not regarded as an offense permitting the state to sue to recover the penalty in its own name.[85]

§ 8. *Offenses against railroads and state.*—The offense of obstructing a railroad track is evidenced by the placing of iron thereon of sufficient size and weight to derail a passenger car.[86] An indictment for the obstruction of a railroad must allege that the railroad was the road of a chartered company,[87] and ownership of a track must be proved as alleged.[88] Certain states have enacted statutes making the stealing of rides penal;[89] it is immaterial whether the ride stolen is a subject-matter of larceny.[90]

T. R. Co. v. Florence [Tex. Civ. App.] 74 S. W. 802.

81. Held erroneous as leading the jury to believe that it could be inferred from the fact that a fire occurred that sparks were emitted in dangerous quantities. Louisville & N. R. Co. v. Sullivan Timber Co. [Ala.] 35 So. 327. Instruction as to the burden of proof of the manner of starting the fire held argumentative. Id. Held not defective in failing to require failure to clear a right of way to be the proximate cause of plaintiff's injury. McFarland v. Miss. River & B. T. R. Co., 175 Mo. 423, 75 S. W. 152. Requiring a fire to begin "on and in the vicinity of said road" requires the jury to find that the fire began on the right of way and thence escaped to plaintiff's property. Id. An instruction held erroneous as making proof of the origin of the fire depend on the question of negligence in its emission from the locomotive. Ind. Clay Co. v. Baltimore & O. S. W. R. Co., 31 Ind. App. 258, 67 N. E. 704. Erroneous as requiring proof, both of the defective condition of an engine and of negligent use. Id. Not objectionable as instructing the jury to base their damages on the evidence regardless of their opinion as to its credibility. Hutchins v. Mo. Pac. R. Co., 97 Mo. App. 548, 71 S. W. 473. Misleading as to contributory negligence in the covering of a building. Ind. Clay Co. v. Baltimore & O. S. W. R. Co., 31 Ind. App. 258, 67 N. E. 704. Not erroneous as imposing on plaintiff the duty of proving by more than a preponderance of the evidence that a fire originated in combustible matter in the right of way from sparks from the engine, which fire communicated to plaintiff's land. Jackson v. Mo., K. & T. R. Co. [Tex. Civ. App.] 78 S. W. 724.

82. A charge that by placing property near railroad tracks the owner assumes all risks arising from a properly equipped and properly operated locomotive may be refused where the jury are expressly told to find for defendant if the locomotive was properly equipped and operated. Tex. & P. R. Co. v. Scottish Union N. Ins. Co. [Tex. Civ. App.] 73 S. W. 1088. An instruction that plaintiff assumed risks which were to be anticipated from engines properly equipped need not be given where the jury is told that there can be no recovery if defendant was not negligent in the operation and equipment of its engines. Tex. & P. R. Co. v. Watson, 190 U. S. 287.

83. Pittsburgh, C., C. & St. L. R. Co. v. Wilson, 161 Ind. 701, 66 N. E. 899.

84. All general questions of evidence and measure of damages are treated in the article Damages, 1 Curr. Law, p. 833.

Measure of damages for burning a meadow is the cost of reseeding and the reasonable rental value for the time necessary to restore the meadow less the reasonable value of the use which may be had without interfering with the restoration. Black v. Minneapolis & St. L. R. Co. [Iowa] 96 N. W. 984. Instruction that the measure of damages is the value of the grass burned and the amount to which it was injured by the fact of the fire on the turf is not erroneous as failing to state that the measure of damages as to the injury to the turf was the difference between the value of the land immediately before and after the burning. Tex. Midland R. R. v. Moore [Tex. Civ. App.] 74 S. W. 942. For burning grass is the difference of the market value of the land before and after. Jackson v. Mo., K. & T. R. Co. [Tex. Civ. App.] 78 S. W. 724. Fruit trees, either their value as a distinct part of the land or the difference in the value of the land before and after their destruction. Where evidence of both kinds is admitted, the amount of damage is for the jury. Atchison, T. & S. F. R. Co. v. Geiser [Kan.] 75 Pac. 68.

Interest may be included on the amount of the loss. Black v. Minneapolis & St. L. R. Co. [Iowa] 96 N. W. 984; Gulf, C. & S. F. R. Co. v. Sheperd [Tex. Civ. App.] 76 S. W. 800.

85. Rev. St. 1899, §§ 2391, 2614. McFarland v. Miss. River & B. T. R. Co., 175 Mo. 423, 75 S. W. 152.

86. Pen. Code, § 520. Sanders v. State, 118 Ga. 329.

87. Sanders v. State, 118 Ga. 788.

88. Blocker v. State [Tex. Cr. App.] 73 S. W. 955.

89. Under Act Dec. 21, 1897, Van Epp's Code Sup. § 6662, one concealing himself on

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Where a railroad company holds cars under lease and has cars of other companies temporarily in possession and use, it has such property as will support an action for their wrongful injury or destruction.[91]

RAPE.

§ 1. Nature and Elements (1453).
A. In General (1453).
B. Female Under Age of Consent (1454).
C. Attempts and Assault With Intent to Commit Rape (1455).
§ 2. Indictment and Prosecution (1456).
A. Indictment or Information (1456).
B. Evidence (1457).
1. Admissibility (1457).
2. Weight and Sufficiency (1460).
3. Instructions (1461).
4. Trial and Punishment (1462).

Matters of criminal law[92] and procedure[93] common to other crimes, and civil liability for ravishment are elsewhere treated.[94]

§ 1. *Nature and elements. A. In general.*—Rape at the common law is the unlawful carnal knowledge by a man of a woman, forcibly and against her will.[95] Force is a necessary ingredient of the offense, and where the female is possessed of her faculties she must resist to the uttermost, and any failure on her part to so resist robs the act of its criminality.[96] The force, however, need not be actual, but may be constructive or implied, and acquiescence obtained through duress or personal violence is constructive force.[97]

The words of the definition "against her will" means "without her consent" and where, by reason of mental incapacity, the woman is incapable of giving consent, there is rape though there is no resistance on her part.[98] So also where the woman is insensible through the administration of a drug.[99]

Whether at common law the use of deception, artifice, or fraud to obtain consent will supply the place of the force required to render the act criminal in ordinary cases, is not definitely settled, but the statutes of many states expressly provide that carnal knowledge obtained by fraud is rape.[1] And consent obtained by a sham marriage,[2] or by the administration of a drug causing an unnatural sexual desire,[3] is obtained by fraud.

a train for the purpose of avoiding payment of fare is guilty of attempting to steal a ride where he is removed before the journey begins, and of actually stealing a ride if he remains until the journey commences. Accusation held sufficient under general demurrer. Mack v. State [Ga.] 46 S. E. 437. Such statute is not unconstitutional, and a conviction is demanded by evidence of accused that he had concealed himself on a train for the purpose of the nonpayment of fare. Pressley v. State, 118 Ga. 315.

90. Pressley v. State, 118 Ga. 315.

91. City of Chicago v. Pa. Co. [C. C. A.] 119 Fed. 497.

92. See Criminal Law, 1 Curr. Law, p. 827.

93. See Indictment and Prosecution, 2 Curr. Law, p. 307.

94. See Assault and Battery, 1 Curr. Law, p. 218.

95. State v. Marsh, 132 N. C. 1000. In South Dakota, rape committed upon a female under the age of 10 years, or one incapable, through lunacy or any other unsoundness of mind, of giving legal consent, or accomplished by means of force overcoming her resistance, constitutes rape in the first degree [Comp. Laws 1887, § 6523]. State v. Hayes [S. D.] 95 N. W. 296. In all other cases, including intercourse with females under the age of 16 and over 10, it constitutes rape in the second degree. Id. The statute of Washington provides that any person is guilty of rape who (1) shall by force and against her will ravish and carnally know any female of the age of eighteen years or more, (2) shall by deceit, deception, imposition or fraud induce a female to submit to sexual intercourse, (3) shall carnally know any female under the age of 18 years. Such act was constitutionally enacted [Laws 1897, p. 19, c. 19]. State v. Scott, 32 Wash. 279, 73 Pac. 365.

96. Anderson v. State [Miss.] 35 So. 202; Bigcraft v. People, 30 Colo. 298, 70 Pac. 417.

97. Shepherd v. State, 135 Ala. 9.

98. Fredericson v. State [Tex. Cr. App.] 70 S. W. 754; State v. Trusty, 118 Iowa, 498, 92 N. W. 677; Id., 97 N. W. 989; Gore v. State [Ga.] 46 S. E. 671.

99. Ky. St. 1899, § 1154. Com. v. Lowe, 25 Ky. L. R. 534, 76 S. W. 119.

1. Tex. Pen. Code 1895, art. 633. Lee v. State [Tex. Cr. App.] 72 S. W. 1005.

2. Under a statute defining rape as the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud, and defining fraud as consisting in some strategem by which the woman is induced to believe the offender is her husband, the crime may be committed by means of a sham marriage on a single woman. Lee v. State [Tex. Cr. App.] 72 S. W. 1005.

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The intercourse must be unlawful, but where defendant obtained consent by means of a sham marriage, and never had any intention or purpose of consummating it and subsequently married another woman, there was no common-law marriage, and the intercourse was criminal.[4]

Complete penetration is not essential.[5]

A boy under 14 cannot be convicted of rape or an assault with intent to commit rape,[6] but the state is not required to show that defendant is over 14.[7] And physical capacity of an adult to commit the crime will be presumed.[8]

(§ 1) *B. Female under age of consent.*—Under the statutes of probably all of the states, and perhaps under the common law, it is a crime to carnally know a female child of tender years, either with or without her consent, the law presuming that children of less than the statutory age are incapable of consenting. The earlier statutes fixed the age at which consent by the female would be a defense at ten years.[9] This arbitrary age has been termed the "age of consent" and by recent statutes has been increased in many states.[10]

In some states the crime thus defined is denominated rape, and is subject to all the rules applicable to that crime, except such as are changed to accommodate the presumption of want of consent raised by proof of nonage.[11] Thus, consent being immaterial, it is also immaterial whether prosecutrix resisted,[12] or force was used,[13] whether defendant supplied her with or she asked him for money,[14] or whether she was previously chaste, unchastity in rape being material only on the question

3. Baldridge v. State [Tex. Cr. App.] 74 S. W. 916.

4. Lee v. State [Tex. Cr. App.] 72 S. W. 1005.

5. Kenney v. State [Tex. Cr. App.] 79 S. W. 817.

6. Ross v. State [Tex. Cr. App.] 78 S. W. 503.

7. Peckham v. People [Colo.] 75 Pac. 422.

8. People v. Row [Mich.] 98 N. W. 13; State v. Norris [Iowa] 97 N. W. 999; State v. Bailey, 31 Wash. 89, 71 Pac. 715.

9. 18 Eliz. c. 7, § 4; N. C. Code 1883, § 1101. State v. Marsh, 132 N. C. 1000.

10. **12 years in Kentucky.** Com. v. Lowe, 25 Ky. L. R. 534, 76 S. W. 119; Reed v. Com., 25 Ky. L. R. 1029, 76 S. W. 838.

14 years in Alabama [Code, §§ 5447, 5448]. Oakley v. State, 135 Ala. 15, 29; Castleberry v. State, 135 Ala. 24.

Illinois. Johnson v. People, 202 Ill. 53, 66 N. E. 877.

Missouri. State v. Allen, 174 Mo. 689, 74 S. W. 839.

Wisconsin [Rev. St. 1898, §§ 4382, 4383]. Bannen v. State, 115 Wis. 317, 91 N. W. 107, 965; Loose v. State [Wis.] 97 N. W. 526.

15 years in Iowa [Code, § 4756]. State v. Trusty, 118 Iowa, 498, 92 N. W. 677; State v. Bebb [Iowa] 96 N. W. 714; State v. Scroggs [Iowa] 96 N. W. 723; State v. Trusty [Iowa] 97 N. W. 989; State v. McKay [Iowa] 98 N. W. 510.

Texas [Pen. Code, art. 633]. Price v. State [Tex. Cr. App.] 70 S. W. 966; Carter v. State [Tex. Cr. App.] 70 S. W. 971; Danley v. State [Tex. Cr. App.] 71 S. W. 958; Wilson v. State [Tex. Cr. App.] 73 S. W. 16; Hackney v. State [Tex. Cr. App.] 74 S. W. 554; Smith v. State [Tex. Cr. App.] 74 S. W. 556; Simpson v. State [Tex. Cr. App.] 77 S. W. 819.

16 years in California. People v. Wilmot, 139 Cal. 103, 72 Pac. 838.

Michigan. People v. Elco, 131 Mich. 519, 91 N. W. 755.

Montana. State v. Peres, 27 Mont. 358, 71 Pac. 162.

Ohio [Rev. St. § 6816]. State v. Tuttle, 67 Ohio St. 440, 66 N. E. 524.

South Dakota [Comp. Laws 1887, § 6523]. State v. Hayes [S. D.] 95 N. W. 296; State v. Mulch [S. D.] 96 N. W. 101.

17 years in Arizona [Pen. Code, § 230]. Trimble v. Ter. [Ariz.] 71 Pac. 932, 934.

18 years in Colorado. Bigcraft v. People, 30 Colo. 298, 70 Pac. 417; Peckham v. People [Colo.] 75 Pac. 422.

Delaware [Laws 1889, p. 951, c. 686]. State v. Pucca [Del.] 55 Atl. 831.

Kansas. State v. Borchert [Kan.] 74 Pac. 1108.

Nebraska. Richards v. State [Neb.] 91 N. W. 878.

New York. People v. Robertson, 84 N. Y. Supp. 401.

Utah. State v. Evans [Utah] 73 Pac. 1047.

Washington [2 Ball. Code, § 7062]. State v. Roller, 30 Wash. 692, 71 Pac. 718; State v. Priest, 32 Wash. 74, 72 Pac. 1024; State v. Fetterly, 33 Wash. 599, 74 Pac. 810.

11. Tex. Pen. Code, art. 633. Price v. State [Tex. Cr. App.] 70 S. W. 966; Carter v. State [Tex. Cr. App.] 70 S. W. 971; Danley v. State [Tex. Cr. App.] 71 S. W. 958; Wilson v. State [Tex. Cr. App.] 73 S. W. 16; Knowles v. State [Tex. Cr. App.] 72 S. W. 398; Smith v. State [Tex. Cr. App.] 74 S. W. 556; State v. Allen, 174 Mo. 689, 74 S. W. 839; State v. Tuttle, 67 Ohio St. 440, 66 N. E. 524; Johnson v. People, 202 Ill. 53, 66 N. E. 877; Oakley v. State, 135 Ala. 29.

12. State v. Bebb [Iowa] 96 N. W. 714; Loose v. State [Wis.] 97 N. W. 526.

13. State v. Roller, 30 Wash. 692, 71 Pac. 718. Force, if alleged, need not be proved. State v. Scroggs [Iowa] 96 N. W. 723.

14. People v. Edwards [Cal.] 73 Pac. 416.

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of consent.[15] Neither is it material that the prosecutrix is married, she being the wife of another than defendant.[16]

In other states the carnal act is denominated a felony and as such is subject to its own rules. Thus in Utah, it is felony to carnally know a female between the ages of 13 and 18,[17] and in Missouri it is a felony for a man of 16 or over to carnally know a woman of previously chaste character over 14 and under 18.[18] Under such a statute, of course the prior unchastity of prosecutrix is material, because a complete defense, but consent being immaterial, force or violence is not an ingredient of the offense, and an assault need not be alleged.[19]

It is no defense that defendant believed prosecutrix to be over the statutory age.[20] Neither is it a defense or mitigation of the crime that defendant intended to procure a divorce and marry the prosecutrix.[21]

In some states the statute raising the age of consent also raises the age of responsibility, thus, in Ohio punishment is provided where a man of over 18 violates a woman of under 16,[22] and in Missouri it is declared to be a felony where a person over the age of 16 has carnal knowledge of a female of previously chaste character between the ages of 14 and 18,[23] while in Illinois it is rape for a man over 16 to copulate with a woman under 14,[24] and in Nebraska the crime exists where a man of 18 cohabits with a woman of 18.[25]

Analogous to the statutes punishing cohabitation with female children are those punishing indecent liberties with females of tender age,[26] and abuse of them in the attempt to have carnal knowledge.[27]

Under the statute of most states the defilement of a child under the age of consent, without force, is a crime regardless of whether she is or is not related to the accused.[28]

(§ 1) *C. Attempts and assault with intent to commit rape.*—To constitute an assault with intent to rape, the specific intent of accused to accomplish his purpose at all hazards and regardless of any resistance his intended victim may make must exist,[29] but if at any time during the assault he has the specific intent he is guilty, irrespective of what causes him to abandon his purpose.[30] To constitute an

15. Price v. State [Tex. Cr. App.] 70 S. W. 966; State v. Height, 117 Iowa, 650, 91 N. W. 935, 59 L. R. A. 437; People v. Wilmot, 139 Cal. 103, 72 Pac. 838. But see Knowles v. State [Tex. Cr. App.] 72 S. W. 398. That prosecutrix was brought up in a house of ill fame (Johnson v. People, 202 Ill. 53, 66 N. E. 877), or that prosecutrix's mother kept an unchaste woman in her house is immaterial (Smith v. State [Tex. Cr. App.] 73 S. W. 401).

16. Smith v. State [Tex. Cr. App.] 74 S. W. 556.

17. State v. Evans [Utah] 73 Pac. 1047.

18. Rev. St. 1899, § 1838. State v. Hunter, 171 Mo. 435, 71 S. W. 675.

19. State v. McCullough, 171 Mo. 571, 71 S. W. 1002.

20. Smith v. State [Tex. Cr. App.] 73 S. W. 401; State v. Scroggs [Iowa] 96 N. W. 723.

21. Smith v. State [Tex. Cr. App.] 73 S. W. 401.

22. State v. Tuttle, 67 Ohio St. 440, 66 N. E. 524.

23. Rev. St. 1899, § 1838. State v. Hunter, 171 Mo. 435, 71 S. W. 675. The statute providing a punishment where a person over the age of 16 has carnal knowledge of a previously chaste unmarried female between the ages of 14 and 18 is valid [Rev. St. Mo. 1899, § 1838]. Id.

24. Johnson v. People, 202 Ill. 53, 66 N. E. 877.

25. Richards v. State [Neb.] 91 N. W. 878.

26. The statute in Delaware provides a punishment if any person shall lewdly and lasciviously play with any female child under the age of 16 years. State v. Cook [Del.] 55 Atl. 1012.

27. Ala. Code, § 5447. The statute means only injuries to the sexual organs. Castleberry v. State, 135 Ala. 24.

28. Edwards v. State [Neb.] 95 N. W. 1038; State v. Norris [Iowa] 97 N. W. 999; People v. Row [Mich.] 98 N. W. 13; Bigcraft v. People, 30 Colo. 298, 70 Pac. 417; State v. Roller, 30 Wash. 692, 71 Pac. 718; State v. Borchert [Kan.] 74 Pac. 1108.

29. Caddell v. State [Tex. Cr. App.] 70 S. W. 91; Berry v. State [Tex. Cr. App.] 72 S. W. 170; Sirmons v. State [Tex. Cr. App.] 72 S. W. 395; Coffee v. State [Tex. Cr. App.] 76 S. W. 761; Dina v. State [Tex. Cr. App.] 78 S. W. 229; Ross v. State [Tex. Cr. App.] 78 S. W. 503; Ross v. State [Tex. Cr. App.] 78 S. W. 514.

30. State v. Mehaffey, 132 N. C. 1062.

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assault with intent to rape a girl under the age of consent, there must be a taking hold of her in such a manner as to indicate the specific intent to have carnal knowledge of her; the mere fact that the accused may have produced in her mind a sense of shame, or other disagreeable emotion or constraint, is not sufficient,[31] and an intent to procure sexual intercourse with her,[32] but the acts need not have been done against her will; as whether she consented or resisted is immaterial.[33]

§ 2. *Indictment and prosecution. A. Indictment or information.*—An indictment alleging all the legal elements of the crime, is sufficient,[34] but certain words peculiarly descriptive of this offense are necessary, unless their use has been dispensed with by statute, thus the word "ravish" is necessary at common law, though not in South Dakota,[35] and the ravishment must be alleged to have been done "forcibly" and "against her will,"[36] and an allegation that the crime was "feloniously" committed is necessary in Kentucky,[37] though in Nebraska, where the charge is statutory, the omission of that word is not fatal.[38]

Under the rule that where guilty knowledge is not an essential ingredient of the offense, or where a statement of the act itself necessarily includes a knowledge of the illegality of the act, no averment of knowledge is necessary, an indictment for rape while the woman was insensible from the administration of a drug need not charge that defendant knew her condition.[39]

Since violence is not an ingredient of the offense of having carnal knowledge of a female under the age of consent no assault need be alleged,[40] and allegations as to force may be treated as surplusage.[41] An averment that the woman was of the age of 16 years, the age of consent being 18 years, is sufficient after verdict,[42] but an indictment in Alabama not stating whether prosecutrix under 14 was over or under 10 is bad for failure to show on what statute the prosecution was based.[43]

Neither an indictment for an attempt to carnally know a female under the age of consent,[44] nor an indictment for assault with intent to rape, need allege the manner and details of the assault or attempt,[45] nor allege that the assault was committed with malice aforethought.[46]

An indictment charging that defendant assisted another to commit rape, but failing to allege that the person assisted actually committed a rape is bad.[47]

An indictment charging the commission of a rape by several different modes or means in the alternative is not duplicitous,[48] and an information charging that

31. Carter v. State [Tex. Cr. App.] 70 S. W. 971.

32. People v. Dowell [Mich.] 99 N. W. 23.

33. Liebscher v. State [Neb.] 95 N. W. 870; Loose v. State [Wis.] 97 N. W. 526.

34. Indictment for rape held sufficient. State v. Braden, 111 La. 91. Indictment for sexual intercourse with female under 18 held sufficient. People v. Robertson, 84 N. Y. Supp. 401. An indictment alleging that the defendant did then and there unlawfully and feloniously "have carnal knowledge of and abuse" prosecutrix instead of that he "did carnally know and abuse" her is sufficient. State v. Hunter, 171 Mo. 435, 71 S. W. 675. An indictment charging that defendant unlawfully, lewdly, and lasciviously, played with one G., a female child under the age of 16 years, sufficiently informs him of the nature and character of the offense. State v. Cook [Del.] 55 Atl. 1012.

35. State v. Hayes [S. D.] 95 N. W. 296.

36. State v. Marsh, 132 N. C. 1000.

37. Reed v. Com., 25 Ky. L. R. 1029, 76 S. W. 838.

38. Richards v. State [Neb.] 91 N. W. 878.

39. Com. v. Lowe, 25 Ky. L. R. 534, 76 S. W. 119.

40. Between the ages of 14 and 18. State v. McCullough, 171 Mo. 571, 71 S. W. 1002; People v. Bailey [Cal.] 76 Pac. 49.

41. State v. Fetterly, 33 Wash. 559, 74 Pac. 810; State v. Scroggs [Iowa] 96 N. W. 723.

42. State v. Fetterly, 33 Wash. 599, 74 Pac. 810.

43. Oakley v. State, 135 Ala. 15.

44. State v. Evans [Utah] 73 Pac. 1047.

45. State v. Neal [Mo.] 76 S. W. 958; Robinson v. State, 118 Ga. 32.

46. Though the statute provides that whoever "with malice aforethought" shall assault any person, etc. [Sand. & H. Dig. § 1866]. Beavers v. State [Ark.] 73 S. W. 748.

47. Trimble v. Ter. [Ariz.] 71 Pac. 934.

48. Ky. Cr. Code, § 126. Against female's will or consent, or while she was insensible or incapable of exercising her will. Com. v. Lowe, 25 Ky. L. R. 534, 76 S. W. 119.

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defendant feloniously assaulted, and feloniously ravished and carnally knew and abused, a female under the age of consent does not charge two offenses though force is not a necessary element of the offense where the female is under age.[49] Counts charging the offense in its different statutory forms are properly joined.[50]

Where several acts of intercourse with a female under the age of consent are shown, the prosecution may be required to elect on which one it will rely for a conviction,[51] but proof of previous attempts merely does not require an election, though the conviction was for assault with intent to ravish,[52] and where in different counts, rape in its various statutory forms is charged, no election is required.[53]

Under the statute providing that a conviction of any lesser degree of the offense, or of an attempt to commit the offense, may be had on an indictment charging the completed offense, a conviction of assault with intent to rape, assault and battery, or simple assault, may be had on an indictment for rape where the proof justifies it;[54] and this rule applies to a charge of statutory rape.[55] It has even been held that a conviction of assault with intent to rape may be sustained in a case where prosecutrix and defendant both testify to complete penetration and the only issue is consent vel non.[56] The true rule, however, is believed to be, that the statute should not be considered as authorizing a conviction of an assault where the evidence does not show it, and that both the state and the defendant have an interest in obtaining a verdict responsive to the issue on trial.[57] Where, on indictment for assault with intent to rape, there is no evidence of an attempt to inflict punishment generally on prosecutrix, there might be a conviction of an assault, on failure of proof of the intent to ravish, but not of assault and battery,[58] hence it is frequently held that where there is no evidence on which to base a verdict of less than rape, an instruction on an included offense is not required,[59] and in several states it is expressly provided that such convictions shall not be sustained where the evidence, if credited, shows the complete crime to have been committed.[60] The name of prosecutrix must be proved as laid.[61]

(§ 2) *B. Evidence.* 1. *Admissibility.*—Evidence, to be material, must have some tendency to prove an essential ingredient of the issue on trial,[62] and all matters having such tendency are provable[63] if testified to by competent witnesses.[64]

49. State v. Priest, 32 Wash. 74, 72 Pac. 1024.

50. Rape of female under age and rape by force. Bigcraft v. People, 30 Colo. 298, 70 Pac. 417. Rape of female under age of consent and rape of idiot. State v. Trusty [Iowa] 97 N. W. 989.

51. State v. King, 117 Iowa, 484, 91 N. W. 768; State v. Norris [Iowa] 97 N. W. 999; Price v. State [Tex. Cr. App.] 70 S. W. 966; Stone v. State [Tex. Cr. App.] 73 S. W. 956.

52. State v. Scott, 172 Mo. 536, 72 S. W. 897.

53. Rape of female under age of consent, and rape by force. Bigcraft v. People, 30 Colo. 298, 70 Pac. 417. Rape of a female under age of consent, and rape of idiot. State v. Trusty [Iowa] 97 N. W. 989.

54. Reed v. Com., 25 Ky. L. R. 1029, 76 S. W. 838; State v. Trusty, 118 Iowa, 498, 92 N. W. 677; People v. Rich [Mich.] 94 N. W. 375; Oakley v. State, 135 Ala. 29.

55. People v. Dowell [Mich.] 99 N. W. 23.

56. People v. Marrs, 125 Mich. 376, 84 N. W. 284.

57. Welborn v. State, 116 Ga. 522; State v. Mulch [S. D.] 96 N. W. 101.

58. State v. Snider, 119 Iowa, 15, 91 N. W. 762.

59. Hill v. State [Tex. Cr. App.] 77 S. W. 808; State v. King, 117 Iowa, 484, 19 N. W. 768; People v. Keith, 141 Cal. 686, 75 Pac. 304. Where the evidence of intent to ravish was clear, no instruction limiting the charge to simple assault was proper. State v. Snider, 119 Iowa, 15, 91 N. W. 762; State v. Bailey, 31 Wash. 89, 71 Pac. 715.

60. Mo. Rev. St. 1899, § 2361. State v. Scott, 172 Mo. 536, 72 S. W. 897. Ga. Pen. Code, § 19. Welborn v. State, 116 Ga. 522.

61. Proof of "Rosa Lee Ann" fatally variant from averment of "Rosa Lee Nelson." Jacobs v. State [Fla.] 35 So. 65.

62. The fact that defendant is married is immaterial. Smith v. State [Tex. Cr. App.] 74 S. W. 556. Evidence of conversations between prosecutrix and defendant relative to marriage after the alleged rape are inadmissible. Smith v. State [Tex. Cr. App.] 73 S. W. 401. That defendant ill-treated other members of his family who had no knowledge of the crime against his stepdaughter cannot be shown, as it would have no tendency to explain the delay in prosecution. Baker v. State [Miss.] 33 So.

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The testimony of medical men that after the date of the alleged offense they examined prosecutrix, a child, and found evidence that she had been violated, is admissible if not too remote.[65] And in Delaware, where a police surgeon has testified to such a state of facts, the court will, on the prisoner's request, have her examined by a competent physician, under such circumstances as will insure entire fairness.[66] The state is entitled to show that the prosecutrix made complaint, the time of making it, and to whom it was made,[67] but is not entitled to show the details of her complaint,[68] as that she stated defendant was her assailant,[69] unless so closely following the assault, and under such circumstances as to amount to res gestae, when under a familiar rule they are admissible in detail,[70] and the remoteness of her complaint is not a bar to the prosecution, nor does it tend to rebut the hypothesis of guilt,[71] nor render her testimony incompetent, but merely affects its credibility.[72] Declarations not within this rule are not admissible as original evidence.[73] The rule regarding the evidentiary effect of failure or delay to make disclosure, however, does not apply where the female is under the age of consent, the law supplying the element of nonconsent in such cases,[74] nor does it apply to the failure of the person to whom disclosure is made to make timely complaint

716. Where a negro is on trial for assault on a white child, evidence that the child's parents associated with negroes is immaterial. State v. Finger, 131 N. C. 781. The state may prove by prosecutrix that she did not want defendant indicted. Denton v. State [Tex. Cr. App.] 79 S. W. 560. Indications of struggle apparent at scene of alleged crime on the next day are admissible. Tyler v. State [Tex. Cr. App.] 79 S. W. 558. The weight and health of prosecutrix may be shown. State v. Carpenter [Iowa] 98 N. W. 775. Evidence that defendant had been reproved by others for previous conduct toward the female is not admissible, where such conduct was of doubtful significance, as it would tend to show the opinions of others as to that question. Denton v. State [Tex. Cr. App.] 79 S. W. 560.

63. Where prosecutrix locates the crime as out of town, her father may show as corroborative that he searched the town that night for her without success. Knowles v. State [Tex. Cr. App.] 72 S. W. 398. It may be shown as res gestae that when prosecutrix was being assaulted she cried out, and on her mother's going to her, was struck by defendant, but the effect of the blow is not material. Oakley v. State, 135 Ala. 15, 29. Statements by the accused to prosecutrix at the time of committing the offense as to his relations with other women are admissible as res gestae. State v. Bebb [Iowa] 96 N. W. 714. In a trial for rape by means of a sham marriage, defendant's subsequent marriage to another woman is admissible to show lack of purpose to consummate the sham marriage, but it cannot be shown that he obtained his subsequent wife by abduction. Lee v. State [Tex. Cr. App.] 72 S. W. 1005.

64. Incompetence of female held not provable by physician because of failure to qualify as expert. Fredericson v. State [Tex. Cr. App.] 70 S. W. 754. A wife cannot testify to a rape committed upon her by her husband before their marriage. State v. McKay [Iowa] 98 N. W. 510.

65. Four weeks held not too remote. Lyles v. U. S., 20 App. D. C. 559. Three months held not too remote. State v. Scott, 172 Mo. 536, 72 S. W. 897. Six weeks not too remote. State v. King, 117 Iowa, 484, 91 N. W. 768. Testimony that prosecutrix had suffered miscarriage. State v. Fetterly, 33 Wash. 599, 74 Pac. 810.

66. State v. Pucca [Del.] 55 Atl. 831; Oakley v. State, 135 Ala. 15, 29.

67. People v. Rich [Mich.] 94 N. W. 375; People v. Wilmot, 139 Cal. 103, 72 Pac. 838; Trimble v. Ter. [Ariz.] 71 Pac. 932, 934; Berry v. State [Tex. Cr. App.] 72 S. W. 170; Lyles v. U. S., 20 App. D. C. 559; Shular v. State, 160 Ind. 300, 66 N. E. 746. Complaints the next day are admissible. State v. Carpenter [Iowa] 98 N. W. 775.

68. Oakley v. State, 135 Ala. 15, 29; Carter v. State [Tex. Cr. App.] 70 S. W. 971; People v. Wilmot, 139 Cal. 103, 72 Pac. 838; Ashford v. State, 81 Miss. 414; Anderson v. State [Miss.] 35 So. 202.

69. Oakley v. State, 135 Ala. 15, 29; Anderson v. State [Miss.] 35 So. 202.

70. Berry v. State [Tex. Cr. App.] 72 S. W. 170. From 11 to 2 o'clock held not too remote. State v. Snider, 119 Iowa, 15, 91 N. W. 762. Complaint of prosecutrix held inadmissible as res gestae. Lyles v. U. S., 20 App. D. C. 559; Carter v. State [Tex. Cr. App.] 70 S. W. 971; Bigcraft v. People, 30 Colo. 298, 70 Pac. 417; State v. Pollard, 174 Mo. 607, 74 S. W. 969. Three months too remote. People v. Row [Mich.] 98 N. W. 13.

71. Hill v. State [Tex. Cr. App.] 77 S. W. 808; State v. Snider, 119 Iowa, 15, 91 N. W. 762; State v. Wolf, 118 Iowa, 564, 92 N. W. 673; People v. Keith, 141 Cal. 686, 75 Pac. 304.

72. State v. McCoy, 109 La. 682; State v. Snider, 119 Iowa, 15, 91 N. W. 762; State v. Bebb [Iowa] 96 N. W. 714; Trimble v. Ter. [Ariz.] 71 Pac. 932, 934. Evidence of complaints forming part of the res gestae are not excluded by the fact that prosecutrix is too young to testify. Kenney v. State [Tex. Cr. App.] 79 S. W. 817.

73. State v. Parker [N. C.] 46 S. E. 511.

74. Loose v. State [Wis.] 97 N. W. 526; State v. Peres, 27 Mont. 358, 71 Pac. 715; People v. Wilmot, 139 Cal. 103, 72 Pac. 838.

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to others or to the officers of the law.[75] But a mere casual statement by prosecutrix, as a matter of gossip, is not admissible, though she is under the age of consent.[76] The defendant should be allowed to bring out the details of her complaint on cross examination.[77]

The chastity of a female under the age of consent is immaterial,[78] likewise the character of her mother's house,[79] but where, in a prosecution for rape on a female under the age of consent, consent vel non not being in issue, prosecutrix has shown her pregnancy and attributed it to defendant and denied ever having intercourse with another, defendant may show that she has had intercourse with another under such circumstances that he might have been the father of her child,[80] and where proof of defendant's guilt is predicated largely on their both having a venereal disease, he may show that she had intercourse with other men who might have inoculated her.[81] Prosecutrix's reputation for chastity cannot be supported by asking her as to her relations with other men, where defendant has not assailed it.[82]

Declarations of living third persons as to prosecutrix's age are not admissible,[83] but prosecutrix is a competent witness as to her own age, and her testimony may be based on information derived from her parents, though they are in the court room,[84] and the opinion of a witness as to her age based on his observation of her may be given.[85] A physician's record may be used after his death, to prove her age,[86] and so may the family record of her parents,[87] but a fly leaf torn from a book on which the prosecutrix's father has written the date of her birth is not admissible as original evidence, he being present in court,[88] though a parent may testify as to her age basing his testimony in part on a memorandum not produced in court.[89] In a prosecution for rape previous attempts to ravish the same female[90] and subsequent friendly intimate relations may be shown,[91] but not prior offenses,[92] nor subsequent ones, though committed on the same person.[93] In some states, however, it is held that where the female is an idiot or imbecile or under the age of consent, and consented, proof of prior and subsequent acts between the parties is

75. Loose v. State [Wis.] 97 N. W. 526.
76. People v. Wilmot, 139 Cal. 103, 72 Pac. 838.
77. State v. McCoy, 109 La. 682.
78. Price v. State [Tex. Cr. App.] 70 S. W. 966; People v. Wilmot, 139 Cal. 103, 72 Pac. 838.
79. Smith v. State [Tex. Cr. App.] 73 S. W. 401.
80. Knowles v. State [Tex. Cr. App.] 72 S. W. 398.
81. State v. Height, 117 Iowa, 650, 91 N. W. 935, 59 L. R. A. 437.
82. Baker v. State [Miss.] 33 So. 716.
83. Danley v. State [Tex. Cr. App.] 71 S. W. 958. Defendant cannot prove by his brother that prosecutrix told him she was over the age of consent and that the brother told defendant. Knowles v. State [Tex. Cr. App.] 72 S. W. 398.
84. State v. Scroggs [Iowa] 96 N. W. 723; Loose v. State [Wis.] 97 N. W. 526. Prosecutrix may testify that she knew her age from the family record and from what her mother taught her, when she is asked by defendant how she knew. Knowles v. State [Tex. Cr. App.] 72 S. W. 398.
85. Simpson v. State [Tex. Cr. App.] 77 S. W. 819. Evidence that prosecutrix alleged to be under 16 years of age was larger and looked older 8 years ago than other girls of 8 years is admissible as is testimony of acquaintances that she was then 8 years old. Danley v. State [Tex. Cr. App.] 71 S. W. 958.
86. Smith v. State [Tex. Cr. App.] 73 S. W. 401.
87. Simpson v. State [Tex. Cr. App.] 77 S. W. 819.
88. Stone v. State [Tex. Cr. App.] 73 S. W. 956.
89. Loose v. State [Wis.] 97 N. W. 526.
90. State v. Scott, 172 Mo. 536, 72 S. W. 897; State v. Carpenter [Iowa] 98 N. W. 775.
91. People v. Elco, 131 Mich. 519, 91 N. W. 755.
92. Barnett v. State [Tex. Cr. App.] 73 S. W. 399; Hackney v. State [Tex. Cr. App.] 74 S. W. 554; Smith v. State [Tex. Cr. App.] 74 S. W. 556; Bigcraft v. People, 30 Colo. 298, 70 Pac. 417.
93. People v. Robertson, 84 N. Y. Supp. 401; Smith v. State [Tex. Cr. App.] 73 S. W. 401; State v. Cook [Del.] 55 Atl. 1012. Evidence of subsequent acts of intercourse between the parties is not admissible, except as it becomes pertinent to some issue raised by defendant or tends to show the offense charged. That a physician had testified to a pregnancy of prosecutrix which could not have resulted from the intercourse charged does not make such proof admissible. Henard v. State [Tex. Cr. App.] 79 S. W. 810.

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admissible, as showing their intimacy and the likelihood of the offense having been committed,[94] defendant's adulterous disposition,[95] and as corroboration of the female's testimony.[96] And where on a prosecution for rape the conviction is for an assault with intent to rape, the prior familiar relations and conduct of the parties is material on the question of intent.[97] Testimony of subsequent pregnancy is admissible.[98]

(§ 2B) 2. *Weight and sufficiency.*—A conviction of rape may be had on the uncorroborated testimony of the prosecutrix at the common law in Texas, Montana, Washington,[99] Arizona,[1] and California,[2] but not in New York,[3] Colorado,[4] or Iowa,[5] and in a prosecution for rape by carnal knowledge of a female under the age of consent, the female though consenting is not an accomplice, and the rule as to conviction on the testimony of accomplices does not apply.[6] Where corroboration is required, if there is some corroborative proof, its sufficiency is for the jury.[7]

To sustain a conviction of assault with intent to commit rape, the proof must show beyond a reasonable doubt that the accused intended to accomplish his purpose at all hazards, and regardless of any resistance his intended victim might make.[8]

Decisions in which the sufficiency of the evidence to support conviction is considered are mentioned in the note.[9]

94. State v. King, 117 Iowa, 484, 91 N. W. 768; State v. Trusty [Iowa] 97 N. W. 989; State v. Fetterly, 33 Wash. 599, 74 Pac. 810. Where it is claimed that the act was a part of a course of illicit sexual commerce between the parties. State v. Borchert [Kan.] 74 Pac. 1108. The fact that an indictment for statutory rape charges the use of force does not change the rule that prior acts of intercourse may be shown. State v. Fetterly, 33 Wash. 599, 74 Pac. 810.

95. People v. Edwards [Cal.] 73 Pac. 416. Defendant cannot be crossexamined as to his conduct with other females. People v. Dowell [Mich.] 99 N. W. 23.

96. State v. Peres, 27 Mont. 358, 71 Pac. 162.

97. Bannen v. State, 115 Wis. 317, 91 N. W. 965.

98. State v. Fetterly, 33 Wash. 599, 74 Pac. 810.

99. Starnes v. Stevenson [Iowa] 98 N. W. 312; Hill v. State [Tex. Cr. App.] 77 S. W. 808; State v. Peres, 27 Mont. 358, 71 Pac. 162; State v. Roller, 30 Wash. 692, 71 Pac. 718; State v. Fetterly, 33 Wash. 599, 74 Pac. 810.

1. Trimble v. Ter. [Ariz.] 71 Pac. 932, 934.

2. People v. Keith, 141 Cal. 686, 75 Pac. 304.

3. Pen. Code, § 283. People v. Haischer, 81 App. Div. [N. Y.] 559. Admissions of defendant as to intercourse after date charged do not corroborate. People v. Robertson, 84 N. Y. Supp. 401. Birth of child does not corroborate as to defendant's guilt. Id.

4. Bigcraft v. People, 30 Colo. 298, 70 Pac. 417; Peckham v. People [Colo.] 75 Pac. 422.

5. State v. Norris [Iowa] 97 N. W. 999.

6. Danley v. State [Tex. Cr. App.] 71 S. W. 958; Smith v. State [Tex. Cr. App.] 73 S. W. 401; State v. Tuttle, 67 Ohio St. 440, 66 N. E. 524.

7. State v. Norris [Iowa] 97 N. W. 999; State v. Roller, 30 Wash. 692, 71 Pac. 718; Peckham v. People [Colo.] 75 Pac. 422.

8. Caddell v. State [Tex. Cr. App.] 70 S. W. 91. Evidence held sufficient to show specific intent. Berry v. State [Tex. Cr. App.] 72 S. W. 170; People v. Toutant [Mich.] 95 N. W. 541; State v. Snider, 119 Iowa, 15, 91 N. W. 762; State v. Mehaffey, 132 N. C. 1062; Riddling v. State [Tex. Cr. App.] 77 S. W. 805; Shular v. State, 160 Ind. 300, 66 N. E. 746; Coffee v. State [Tex. Cr. App.] 76 S. W. 761; State v. Neal [Mo.] 76 S. W. 958. Intent not shown. Dina v. State [Tex. Cr. App.] 78 S. W. 229; Sirmons v. State [Tex. Cr. App.] 72 S. W. 395; Coffee v. State [Tex. Cr. App.] 76 S. W. 761; Ross v. State [Tex. Cr. App.] 78 S. W. 503, 514.

9. Question of prosecutrix's age held for jury, notwithstanding her and her mother's testimony that she was over the age of consent. People v. Elco, 131 Mich. 519, 91 N. W. 755. The corpus delicti is sufficiently shown, where the prosecutrix is mentally incompetent, enciente, the defendant has had opportunity and admits intercourse. Fredericson v. State [Tex. Cr. App.] 70 S. W. 754.

Conviction of assault with intent to rape supported: Identity of defendant and corpus delicti held shown. Wilson v. State [Tex. Cr. App.] 73 S. W. 16.

Conviction of attempted rape held not supported. Ashford v. State [Miss.] 35 So. 569.

Conviction of rape held not supported: Resistance not shown. People v. Feldman, 77 App. Div. [N. Y.] 639; Bigcraft v. People, 30 Colo. 298, 70 Pac. 417. Rape by fraud not shown. Administration of drug. Baldridge v. State [Tex. Cr. App.] 74 S. W. 916.

Conviction of rape on female under age of consent held supported: Defendant seen in act. Price v. State [Tex. Cr. App.] 70 S. W. 966. Imbecile female. Gore v. State [Ga.] 46 S. E. 671. Conviction sustained where defendant was connected with offense only by immediate declarations of prosecutrix, a child four years old. Kenney v. State [Tex. Cr. App.] 79 S. W. 817. Corpus delicti, age of female, previous chaste character, and presence of defendant. State v. Hunter, 171 Mo. 435, 71 S. W. 675. Penetration held shown. State v. Allen, 174 Mo. 689, 74 S. W. 839. Corpus delicti proved by cir-

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(§ 2B) 3. *Instructions.*—Instructions, as in all cases, should fairly state the law applicable to the particular facts,[10] but charges on the weight of the evidence should be avoided.[11] Instructions presenting all the issues of the case as made by the pleadings and the evidence must be given.[12] Where defendant denies the intercourse testified to by prosecutrix but does not deny the assault, it is error not to instruct on the included offenses,[13] but issues not so raised should be avoided,[14] and instructions applicable to phases of the crime which might be in issue in similar cases, though not in the one on trial, should not be given, though requested.[15] An instruction purporting to define the crime should state all the elements of that particular phase of the offense under inquiry, but where there is

cumstantial evidence. Richards v. State [Neb.] 91 N. W. 878. Corroborating circumstances with female's testimony. People v. Randall [Mich.] 95 N. W. 551; State v. Peres, 27 Mont. 358, 71 Pac. 162; State v. Bailey, 31 Wash. 89, 71 Pac. 715; State v. Roller, 30 Wash. 692, 71 Pac. 718; Peckham v. People [Colo.] 75 Pac. 422. Notwithstanding incredibility of prosecutrix's testimony as to nonconsent and resistance. State v. Bebb [Iowa] 96 N. W. 714. Discussion of age and respectability of defendant. Richards v. State [Neb.] 91 N. W. 878. The fact that conception resulted is not conclusive that the intercourse was voluntary. State v. Carpenter [Iowa] 98 N. W. 775.

Not supported. Keller v. People, 204 Ill. 604, 68 N. E. 512. Statute of limitations not avoided. State v. Kunhi, 119 Iowa, 461, 93 N. W. 342. Unsupported evidence of child held insufficient where circumstances were improbable and character of child was bad. Donoghue v. State [Tex. Cr. App.] 79 S. W. 309.

10. Instructions as to force, constructive and actual. Shepherd v. State, 135 Ala. 9. Instruction relative to conviction on unsupported evidence of prosecutrix held a fair statement of the law. Trimble v. Ter. [Ariz.] 71 Pac. 932, 934. The omission to charge that penetration must be proved beyond a reasonable doubt is not error, where a correct charge on reasonable doubt was subsequently given. Hill v. State [Tex. Cr. App.] 77 S. W. 808. An instruction failing to state the rule obtaining where the prosecutrix fails or delays to make complaint, and which excuses such failure is error. State v. Wolf, 118 Iowa, 564, 92 N. W. 673. But a charge properly stating the effect of prompt complaint is proper. Instructions held not objectionable. People v. Keith, 141 Cal. 686, 75 Pac. 304.

11. Instructions that the jury should consider the reputation and condition in life of the prosecutrix and defendant in the light of mitigating the punishment, and that they should consider the failure of the prosecutrix to make outcry as affecting her credibility, are properly refused as on the weight of the evidence. Thomas v. State [Tex. Cr. App.] 70 S. W. 93. An instruction that while prosecutrix need not be corroborated, still the jury should carefully consider her evidence, is on the weight of the evidence and properly refused. Knowles v. State [Tex. Cr. App.] 72 S. W. 398; State v. Tuttle, 67 Ohio St. 440, 66 N. E. 524.

12. Where a confession of defendant is introduced in which he said he tried to ravish the prosecutrix but could not, instructions on all the degrees of the offense are required. Reed v. Com., 25 Ky. L. R. 1029, 76 S. W. 838.

13. State v. Trusty, 118 Iowa, 498, 92 N. W. 677. Where, as in a prosecution for assault with intent to rape, proof of the specific intent is essential, the jury should be so informed. Caddell v. State [Tex. Cr. App.] 70 S. W. 91; People v. Barker, 137 Cal. 557, 70 Pac. 617. Where the testimony is not inconsistent with the possibility that limitations have run against the crime it is error not to instruct as to that point. State v. Kunhi, 119 Iowa, 461, 93 N. W. 342. Where it appears that prosecutrix weighed 145 pounds and appeared to be past majority, instructions stating that if she was under the age of consent, consent was no defense, and that it was immaterial what defendant believed as to her age are proper. State v. Scroggs [Iowa] 96 N. W. 723. Where defendant's testimony shows consent, instructions as to requisite resistence should be given. Tyler v. State [Tex. Cr. App.] 79 S. W. 558. An instruction as to the effect of complaints of prosecutrix should be given without request. State v. Parker [N. C.] 46 S. E. 511.

14. Where the only evidence is that of prosecutrix, and she denies penetration, instructions authorizing a conviction of rape are error. Ashford v. State, 81 Miss. 414. Instruction as to assault if defendant was frightened away before accomplishing purpose, error where there was no evidence to that effect. Suggs v. State [Tex. Cr. App.] 79 S. W. 307.

15. An instruction that the assault must be made with the specific intent to rape is not applicable where the issue is rape. Thomas v. State [Tex. Cr. App.] 70 S. W. 93. Especially where the prosecutrix was under the age of consent. Smitt v. State [Tex. Cr. App.] 73 S. W. 401. Where there is no pretence that the crime was committed by threats or fraud no instruction on that phase of the law is required. Reyna v. State [Tex. Cr. App.] 75 S. W. 25. And where the evidence and circumstances show that prosecutrix resisted to the uttermost no charge on feigned resistance is required. Leach v. State [Tex. Cr. App.] 77 S. W. 220. Where actual penetration was shown beyond doubt and defendant denies any character of injury on prosecutrix, a charge on aggravated assault is not required. Hill v. State [Tex. Cr. App.] 77 S. W. 808; Welborn v. State, 116 Ga. 522. And where prosecutrix was under age and consented, the only issue was rape vel non, not assault or assault and battery. State v. King, 117 Iowa, 484, 91 N. W. 768. Where prosecutrix testified to facts constituting rape or assault with intent to

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no question as to the existence of an element, particular attention need not be called to it.[16]

(§ 2B) 4. *Trial and punishment.*—Where there are two degrees of rape and the information contained no averments showing the higher degree, the verdict need not find the degree.[17]

A judgment of guilty of "statutory rape" is invalid on a conviction of carnally knowing a female under 18 years of age intrusted to defendant's care.[18]

The highest penalty for rape in Texas is death,[19] but the penalty cannot be imposed on one under 17 years of age.[20]

In Illinois the punishment may be any term of imprisonment from one year to life. The parole act merely suspended the operation of the prior law, and on the subsequent withdrawal of the crime of rape from the parole law, the prior law again became effective.[21]

REAL PROPERTY.

§ 1. Nature and Definition (1462).
§ 2. Estates and Interests (1462).
§ 3. Acquisition and Loss of Property in Land (1464).

§ 1. *Nature and definition.*—Land includes the soil of the earth and everything attached thereto, whether by the course of nature or the hand of man,[22] but not every structure in the soil is attached.[23] Ownership therein is not confined to its surface, but extends indefinitely upward and downward.[24] A house, or the upper stories of a house, may be either realty or personalty, its character in this regard being determined by the circumstances of the case and the intention of the parties.[25]

§ 2. *Estates and interests.*—Franchises relating to land or necessarily involving its use,[26] and the right to shoot and fish on certain land are an interest in

rape, and defendant denied an assault of any kind, there was no occasion for a charge on assault and battery or simple assault. State v. Bailey, 31 Wash. 89, 71 Pac. 715. Definition of common law rape on trial for statutory rape is harmless where jury were restricted to offense charged. Bryant v. State [Tex. Cr. App.] 79 S. W. 554.

16. As that prosecutrix was not defendant's wife. Hill v. State [Tex. Cr. App.] 77 S. W. 808.

17. State v. Hayes [S. D.] 95 N. W. 296.

18. State v. Hesterly [Mo.] 76 S. W. 985.

19. Thompson v. State [Tex. Cr. App.] 74 S. W. 914; Reyna v. State [Tex. Cr. App.] 75 S. W. 25.

20. Thompson v. State [Tex. Cr. App.] 74 S. W. 914.

21. People v. Murphy, 202 Ill. 493, 67 N. E. 226.

22. Madison v. Madison, 206 Ill. 534, 69 N. E. 625. The laws of California define land as the solid material of the earth and distinguish between it and real property [Civ. Code, §§ 658-660, 662]. Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. 826. A severance is necessary to make a building personalty. Beeler v. C. C. Mercantile Co. [Idaho] 70 Pac. 943. After a severance of timber, it does not pass with the land. Price & Baker Co. v. Madison [S. D.] 95 N. W. 933.

23. Pipes laid in the soil and meters attached to them by plattors to serve water to lot owners. Milrooney v. Obear, 171 Mo. 613, 71 S. W. 1019.

See Fixtures, 2 Curr. Law, p. 9.

24. Madison v. Madison, 206 Ill. 534, 69 N. E. 625.

25. Madison v. Madison, 206 Ill. 534, 69 N. E. 625. In determining the character or kind of property, all the facts and circumstances surrounding the transaction, including the intention of the parties, the size and kind of the building, the manner in which it is attached to the realty, and whether or not it can be removed without injury to the fee, must be taken into consideration. Id. The first story of a brick building was constructed by the owner of the land and the second by an opera house association. The owner of the land later conveyed to the association, by a deed without reservation or limitation, all his interest in the second story. No time was stated when the right of the grantee should expire, and there was no provision allowing the owner of the second story to remove it. Held, that the second story was real estate. Id.

26. A franchise to operate a street railroad on a certain street is real estate, both by common law and statute. A grant of such right has no relation to the company's corporate franchise and is not a franchise in the sense that it cannot be abandoned by agreement with the property owners and the city, without the consent of the state [Laws N. Y. 1899, p. 1539, c. 712] Thompson v. Schenectady R. Co., 124 Fed 274.

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the soil and not mere easements.[27] A leasehold estate in land for a term of years

27. One having such right may maintain an action in trespass, under a statute [V. S. 4626], prohibiting the entry on land for purposes of hunting and fishing without the consent of the owner, even though he is not the owner of the fee. Payne v. Sheets, 75 Vt. 335.

NOTE. Incorporeal rights which are real property. Franchises:

A franchise is in England defined as "a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject" (2 Bl. Comm. 37); and in this country as "a special privilege conferred by the government upon an individual or corporation, which does not belong to citizens of the country generally by common right" (Bank of Augusta v. Earle, 13 Pet. [U. S.] 519, 595).

Franchises, then, are neither land, nor, except perhaps in exceptional cases, rights as to the use or profits of another's land, since rights of this character cannot be created by governmental act, as franchises are created. They are, however, said by Blackstone to be incorporeal hereditaments of a "real" nature, and such seems to be the law in England at the present day (Reg. v. Cambrian Ry. Co., L. R. 6 Q. B. 427), and they have been quite frequently so regarded in this country (3 Kent, Comm. 457; Alexandria Canal, etc., Co. v. District of Columbia, 5 Mackey [D. C.] 376; Gibbs v. Drew, 16 Fla. 147; Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co., 11 Leigh [Va.] 42, 76; Sellers v. Union Lumbering Co., 39 Wis. 527; Phalen v. Commonwealth, 1 Rob. [Va.] 713; and see post, note 30).

The question, then, naturally arises, why rights of this character, which are not land nor rights therein, should be associated with land in the quality of heritability involved in the word "hereditament," or should be regarded as things real, and not as things personal. The reason for this assimilation of franchises to land seems to lie in the fact that whatever may be the nature of franchises at the present day, in former times in England they were always exercisable within the limits of lands held by their owners, or at least were exercisable at a particular place, or within certain territorial limits, and accordingly, with other things of an incorporeal nature, were regarded as in the nature of land.

The franchises which were of the greatest importance in mediaeval times possessed this element of locality to a decided extent, being generally rights granted to the great feudal landholders to exercise judicial or governmental powers within the limits of the land held by them of the crown, or similar rights granted to the members of a particular borough community (see 1 Pollock & Maitland, Hist. Eng. Law, 574, 642); or quite frequently they involved the right of hunting in a particular district (see 2 Bl. Comm. 37 et seq.; 3 Cruise, Dig. tit. 27, §§ 1-31). "The principal franchises are (1) liberties to hold courts; (2) grants of Jura Regalia and Counties Palatine; (3) grants of forest courts; (4) liberty to make a park; (5) the right of freewarren; (6) to have the goods of felons, etc.; (7) to have waifs and strays; (8) to hold a fair or market; (9) to keep a ferry." Elphinstone, Interpretation of Deeds, 581.

The same local quality attaches to franchises to maintain a ferry at a particular point, and charge tolls for the use thereof, which have been in this country, as well as in England, regarded as real hereditaments (Dundy v. Chambers, 23 Ill. 369; Gunterman v. People, 138 Ill. 518; Bowman v. Wathen, 2 McLean, 376, Fed. Cas. No. 1,740; Reg. v. Cambrian Ry. Co., L. R. 6 Q. B. 422). In this country, the statute quite frequently provides that a ferry franchise shall be granted only to a riparian proprietor, and in such cases it is an incorporeal hereditament, which will descend with or pass with a devise or deed of the land of such proprietor (Haynes v. Wells, 26 Ark. 464; Trustees of Maysville v. Boon, 2 J. J. Marsh. [Ky.] 224; Lewis v. Town of Gainesville, 7 Ala. 85), unless the riparian proprietor grants this right of maintaining the ferry to another, which it has been decided he may do (Bowman v. Wathen, 2 McLean, 376, Fed. Cas. No. 1,740. But see Haynes v. Wells, 26 Ark. 464).

In like manner, locality may be said to attach to a franchise to maintain a toll bridge. Enfield Toll Bridge Co. v. Hartford & New Haven R. Co., 17 Conn. 40, 60.

The most usual franchise at the present time is the right to exist as or form a corporation; a character of right which is sometimes spoken of as vested in the corporation itself, and sometimes as vested in the individuals composing the corporation (see 2 Morawetz, Priv. Corp. § 923 et seq.; Fietsan v. Hay, 122 Ill. 293; Memphis & Little Rock R. Co. v. Railroad Commissioners, 112 U. S. 609; Pierce v. Emery, 32 N. H. 507; Evans v. Philadelphia Club, 50 Pa. St. 107). Such franchises have been stated to be hereditaments (2 Bl. Comm. 37; Price v. Price's Heirs, 6 Dana [Ky.] 107; Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co., 11 Leigh [Va.] 42, 76), but there seems to be some impropriety in so classifying them, since, as remarked by Chancellor Kent, "they have no inheritable quality, inasmuch as a corporation, in cases where there is no express limitation to its continuance by charter, is supposed never to die, but to be clothed with a kind of legal immortality" (3 Kent, Comm. 459; and see State v. Georgia Medical Soc., 38 Ga. 608, 626, to the effect that such a franchise is not a hereditament). Furthermore, it may be said of franchises of this character, as of others, that, when granted only for a limited number of years, as is the custom in this country at the present day, they cannot be regarded as hereditaments, or "real" things in any way, they lacking the element of perpetuity necessary for this purpose. (So it was held that a ferry franchise granted for a definite number of years passed to the personal representatives of the grantee. Lippencott v. Allander, 27 Iowa, 460.)

Annuities: It is well settled in England, that if, by the terms of its creation, an annuity is granted to one "and his heirs," it will pass on the grantee's death, like real property, to his heirs, and not to his executors (Co. Litt. 2a; Stafford v. Buckley, 2 Ves. Sr. 170; Turner v. Turner, Amb. 776). An annuity so limited is known as a "personal hereditament." See Challis, Real Prop. 40; Am. Law Mag. 68. If not limited to the heirs, it passes to the executor, as other personal property does. Taylor v. Martindale, 12 Sim. 158; Parsons v. Parsons, L. R. 8 Eq. 260.

For other purposes it is regarded as

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is an interest in the land.[28] Such estates, however, are generally levied upon as personalty, but statutes in some states provide that they are to be treated as realty for such purposes.[29] A ground rent is an estate of inheritance in the rent of lands and a freehold estate.[30] A right of entry for condition broken is an estate in expectancy which is transferable.[31] The interest of an Indian, possessing lands of an Indian nation, is an interest in or concerning lands within the meaning of the statute of frauds, whether the interest is real estate or a chattel real.[32] A conveyance of a water right by an entryman is not a conveyance of land within the prohibition of the United States homestead laws.[33] Estates in fee tail general are by statute, in some states, resolved into estates in fee simple.[34] The rule in Shelley's case applies whenever the limitation over is to persons intended to take as heirs.[35] When the technical words to create an estate tail in land are used, to wit, "heirs of the body," and nothing appears to show that they were not used with that intent, they create an estate tail.[36] When a lesser estate comes into the holder of a greater one, merger takes place,[37] but merger will not carry with the land that which by agreement is a movable attached to the lesser estate.[38]

§ 3. *Acquisition and loss of property in land.*—Land is acquired and divested either by "descent," which is the devolution of title on an intestacy,[39] or by "purchase,"[40] which includes every transmutation of title by will,[41] gift,[42] adverse possession or prescription,[43] as well as by actual purchase.

personal property. Aubin v. Daly, 4 Barn. & Ald. 59, 1 Gray's Cas. 2; Radburn v. Jarvis, 3 Beav. 450.

Corporate stock: In some early cases in England, as well as in this country, it was held that each stockholder in a corporation had an estate in the corporate property, and that consequently, if that property was real, his share was also realty. Buckeridge v. Ingram, 2 Ves. Jr. 652; Price v. Price's Heirs, 6 Dana [Ky.] 107; Welles v. Cowles, 2 Conn. 567. In other and later cases the stockholder has rightly been regarded as having only a right of action for his share of the profits as dividends, and it may now be considered as settled that corporate stock is personal, and not real, property. Johns v. Johns, 1 Ohio St. 350, Finch's Cas. 14; Russell v. Temple, 3 Dane's Abr. 108; Saup v. Morgan, 108 Ill. 326; Blight v. Brent, 2 Younge & C. 268, 294; Bradley v. Holdsworth, 3 Mees. & W. 422; Lindley, Companies [5th Ed.] 451; Cook, Corporations [4th Ed.] § 12.

Summary of conclusions: Summarizing, then, the results of our inquiry into the nature of incorporeal things real, we find that the only things of this nature recognized in this country are rights as to the use or profits of another's land, and franchises, or certain classes of franchises, and consequently these, together with land and things annexed thereto (corporeal things real), are alone the subjects of real property.

—From 1 Tiffany Real Property, § 5, p. 9, et seq.

28. Reilley v. Anderson, 33 Wash. 58, 73 Pac. 799.

29. An interest in land under statutes of Wash. [2 Ball. Ann. Codes & St. § 5274]. Reilley v. Anderson, 33 Wash. 58, 73 Pac. 799. A leasehold of real estate is not the subject of an action of trover. Goldschmidt v. Maier, 140 Cal. xvii, 73 Pac. 984.

30. McCammon v. Cooper, 69 Ohio St. 366, 69 N. E. 658. It is a right to and interest in the lands within the meaning of statutes relating to descent and distribution [Ohio Rev. St. 1892, §§ 4158, 4159]. Id.

31. Bouvier v. Baltimore & N. Y. R. Co., 67 N. J. Law, 281.

32. Rowe v. Henderson [Ind. T.] 76 S. W. 250.

33. Rev. St. U. S. §§ 2290, 2291 (U. S. Comp. St. 1901, pp. 1389, 1390); Cal. Civ. Code, §§ 658-660, 662. Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. 826.

34. P. L. 368. Pifer v. Locke, 205 Pa. 616. A devise to one for and during her natural life and at her death to her children or issue in fee simple creates in her an estate in fee tail general, resolved by statute into an estate in fee simple. Id.

35. Statutes in some states provide that the rule in Shelley's case shall not embrace estate's tail. The statute of Rhode Island (Gen. Laws 1896, c. 202, § 6), providing that when lands are devised to one for life and after his death to his "heirs" in fee, the first taker will have an estate for life, with remainder in fee to his heirs, does not embrace estates tail. In re Tillinghast's Account [R. I.] 55 Atl. 879.

36. Under laws of Rhode Island (Gen. Laws 1896, c. 202, § 21), it is sufficient to use the words "in tail" or "heirs of the body." In re Tillinghast's Account [R. I.] 55 Atl. 879.

37. See Tiffany, Real Prop., Vol. I, § 32, p. 76. Power is merged in fee which is cast on donee by the falling in of a limitation. Ward v. Stanard, 83 App. Div. [N. Y.] 386. An analogous rule works the merger of a mortgage lien into the ownership where they concur in one person. See Mortgages, § 11, 2 Curr. Law, p. 922.

38. House built on leased land with right of removal. Sweet v. Henry, 175 N. Y. 268, 67 N. E. 574.

39. Descent and Distribution, 1 Curr. Law, p. 922.

40. Vendor and Purchaser.

41. Wills.

42. Gifts, 2 Curr. Law, p. 140.

43. Adverse Possession, 1 Curr. Law, p. 30; Easements (by prescription), 1 Curr. Law, p. 962.

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RECEIVERS.

§ 1. Nature, Grounds, and Subject of Receivership (1465).
§ 2. Appointment, Qualification, and Tenure of Receivers (1468).
A. Proceedings for Appointment and Qualification (1468).
B. Who May be Appointed (1469).
C. Tenure of Receiver (1470).
§ 3. Title and Rights in and Possession of the Property (1470).
A. Title in General (1470).
B. Rights as Between Receivers, Claimants or Lienors (1471).
C. Possession and Restitution (1472).
§ 4. Administration and Management of the Property (1472).
A. Authority and Powers in General (1472).
B. Payment of Claims Against Receiver or Property (1474).
C. Sales by Receiver (1476).
D. Actions by and Against Receivers (1477).
§ 5. Accounting by Receivers (1478).
§ 6. Compensation of Receivers (1479).
§ 7. Liabilities and Actions on Receivership Bonds (1480).
§ 8. Foreign and Ancillary Receivers (1480).

§ 1. *Nature, grounds, and subjects of receivership.*[44]—Receivership being purely an ancillary remedy, the suit cannot be maintained solely for that purpose,[45] and intervention merely for the purpose of obtaining the appointment of a receiver in a suit which does not seek such appointment will not be allowed.[46] The appointment may be made under petition in a suit in aid of the pending suit to recover the property.[47] Right to an injunction will not justify the appointment.[48] A receiver will not be appointed where ordinary legal remedies are effective, insolvency of defendant being generally prerequisite.[49] Right to collect rents and profits is not sufficient to prevent appointment,[50] nor is sequestration proceedings an adequate remedy,[51] nor will one be appointed where the appointment will not prevent the injury complained of.[52] Where an injunction will remedy the evil a receiver will not be appointed.[53] Where the complainant has been guilty of laches he cannot maintain a suit in equity for a receiver.[54] Insolvency.[55]

44. Appointment in bankruptcy proceedings, see Bankruptcy, 1 Curr. Law, p. 311, and in proceedings for dissolution or on insolvency of corporations, see Corporations, 1 Curr. Law, p. 710.

45. Vila v. Grand Island Elec. Light, I. & C. S. Co. [Neb.] 94 N. W. 136; Id. 97 N. W. 613. Action held one at common law for money only and receivership refused. Veit v. Collins, 39 Misc. [N. Y.] 39. An order of a district court appointing a receiver in an action where such relief is the only relief sought will be vacated for want of authority in such court to make the same. Mann v. German-American Inv. Co. [Neb.] 97 N. W. 600.

46. Hardy v. Abbott [Tex. Civ. App.] 73 S. W. 1079.

47. Troughber v. Akin, 109 Tenn. 451, 73 S. W. 118.

48. Suit concerning conflicting titles. Freer v. Davis, 52 W. Va. 35.

49. A court of equity will not appoint a receiver where there is an adequate remedy at law. Action for receiver of a "colony" company, held plaintiff could get possession of and title to lands by an action of trespass to try title. American Tribune N. C. Co. v. Schuler [Tex. Civ. App.] 79 S. W. 370. Creditors must have exhausted their legal remedies. Executions might have been levied but were not. Barnesville Mfg. Co. v. Schofield's Sons Co., 118 Ga. 664.

50. Of a receiver to collect and apply the same and keep the property in repair, it appearing that the rents accruing under an outstanding lease are insufficient for this purpose. De Benera v. Frost [Tex. Civ. App.] 77 S. W. 637. Invalidity of lease, in that it is not binding on the lessee, does not bar the right of a mortgage creditor to have a receiver appointed to collect and apply to his debts the rents and profits thereof. Id.

51. Sequestration proceedings under Rev. St. 1895, arts. 4873, 4882, is not such an adequate remedy as to render appointment unnecessary. De Benera v. Frost [Tex. Civ. App.] 77 S. W. 637.

52. That the remedy of sequestration would not prevent threatened sale is no ground for appointment where such appointment would not prevent the sale. American Tribune N. C. Co. v. Schuler [Tex. Civ. App.] 79 S. W. 370. Where appointment would not prevent forfeiture of lands no ground is stated. Id.

53. Devine v. Frankford S. & F. Co., 205 Pa. 114.

54. Vendor allowed property to go to waste and ruin, sold it, held could not have a receiver appointed for vendee. Johnson v. McKinnon [Fla.] 34 So. 272.

55. Appointment of receiver held proper where the partner who had purchased the interests of the retiring partner contracted debts in the name of the firm in violation of the contract of sale, and where the remaining partner was insolvent. Joselove v. Bohrman [Ga.] 45 S. E. 982. Where the sole purpose of the suit is to collect a debt, in the absence of an allegation of insolvency or lack of property subject to execution, the appointment will not be made. Joseph Dry Goods Co. v. Hecht [C. C. A.] 120 Fed. 760. A receiver will be appointed for an insolvent corporation at the suit of a creditor

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That the defendant was removing the property beyond the jurisdiction of the court,[56] and in suits to enforce liens, insufficiency of the security together with insolvency of the defendant,[57] excepting suits to foreclose tax liens,[58] or where there is danger of irreparable injury to the property involved if left in defendant's possession,[59] and ordinary grounds for the appointment of a receiver, as where defendants, having no interest in the land, are in possession, making crops thereon, and are insolvent,[60] or collecting and dissipating rents,[61] letting the property go to ruin,[62] and particularly when it is security for a debt.[63] Mere mismanagement by corporate officers, no irreparable injury being threatened, will not justify the appointment,[64] nor will mere deterioration in the value of property.[65] A re-

where there is no one to collect the assets and apply them to the payment of the creditors. Officers had attempted to sell and empower others as officers, had been ousted by quo warranto, receiver had been appointed and removed but held the assets as a temporary trustee. Youree v. Home Town M. Ins. Co. [Mo.] 79 S. W. 175. In a suit for the appointment of a receiver of an insolvent corporation and a full and final administration of its assets, the amount of the matter in dispute is determined by the value of the property to the administrator. So determining the amount involved in the controversy as a jurisdictional fact. Jones v. Mut. Fidelity Co., 123 Fed. 506. Insolvency, coupled with gross mismanagement of a corporation's affairs by its board of directors whose positive misconduct amounts to a breech of trust, is sufficient to justify the appointment of a receiver by a court of equity independent of any statutory authority. U. S. Shipbuilding Co. v. Conklin [C. C. A.] 126 Fed. 132. In the absence of statutory regulations unsecured creditors at law, who have not reduced their claims to judgment cannot, solely on the ground of insolvency, successfully maintain a suit for the appointment of a receiver [Construing 19 Laws Del. c. 181]. Jones v. Mut. Fidelity Co., 123 Fed. 506. A creditor is entitled to have a receiver appointed for an insolvent corporation before he has reduced his claim to judgment and procured a return of nulla bona, where the assets will probably be lost or fraudulently disposed of by improvident or corrupt officials, and the creditor has no adequate remedy at law. Ky. R. & B. Ass'n v. Galbreaith, 25 Ky. L. R. 1212, 77 S. W. 371.

56. Plaintiff claiming one half interest in the property. Clark v. Brown [C. C. A.] 119 Fed. 130.

57. Proof of insolvency is not absolutely necessary under code § 266 in mortgage foreclosure. Johnson v. Young [Neb.] 95 N. W. 497. Mortgage lien. Robertson v. Ostrom [Neb.] 95 N. W. 469. Liens to the extent of $1,000 do not justify receivership for saw-mill, eight miles of railroad and their equipments and 60,000 acres of land. First Nat. Bank v. Kirkby, 43 Fla. 376.

58. Walker v. Fitzgerald [Neb.] 95 N. W. 32; Fink v. Montgomery [Ind.] 68 N. E. 1010; Levin v. Florsheim & Co., 161 Ind. 457, 68 N. E. 1025.

59. That the defendant is drilling the land for oil without allegation of insolvency or special circumstances is not sufficient to warrant the appointment. Freer v. Davis, 52 W. Va. 35.

60. Goodwynne v. Bellerby, 116 Ga. 901.

61. Vizard v. Moody, 117 Ga. 67. Holding land without right and collecting rents and profits will justify appointment pending ejectment. Whyte v. Spransy, 19 App. D. C. 450.

62. Allegations in a complaint by a creditor of a telephone company that the latter has discontinued business and left its wires, poles, instruments, etc., to go to ruin, and that no effort was being made to care for its property or attend to its business, and that no provision was being made to pay either the interest or principal of plaintiff's mortgage, and that the board of trustees could not hold a legal meeting nor agree upon the management of its affairs. Held, sufficient to justify the appointment of a receiver. Fernald v. Spokane & B. C. Tel. & T. Co., 31 Wash. 672, 72 Pac. 462. Appointment to care for property in suit between heirs to set aside conveyances by ancestor, held improperly made where there was no allegation that the property was being wasted or improperly dealt with. Johnston v. Lippert, 96 Md. 584. Where threatened destruction is denied with evidence of equal weight the appointment is unauthorized. Alleged threats by out-going tenant to destroy crop denied by him, held appointment unauthorized. Horn v. Bohn, 96 Md. 8. Allegations insufficient under code §§ 2716, 2721, to justify appointment at instance of unsecured creditors. Reynolds & H. Estate Mortg. Co. v. Kingsbery, 118 Ga. 254.

63. That debtor is about to do away with creditor's security is sufficient to justify the appointment. Troughber v. Akin, 109 Tenn. 451, 73 S. W. 118. Under Civ. Code Proc. § 298, giving a father having a lien on land the right to have a receiver appointed, where the property is in danger of being materially injured, appointment to restrain cutting on timber land and excluding land in cultivation held proper. Dupoyster v. Ft. Jefferson Imp. Co., 24 Ky. L. R. 1782, 72 S. W. 268.

64. The fact that the board of directors exceeded their authority in making a lease, no other violation of duty or mismanagement of the property being shown, is not sufficient to obtain the appointment of a receiver. New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 Fed. 776. That directors hold over without an election, vote themselves salaries and compensation to others for services that were to be rendered free, does not justify the appointment of a receiver. Ala. C. & Coke Co. v. Shackleford, 137 Ala. 224. A complaint by a stockholder of a corporation asking for a receiver, alleging that the secretary and treasurer had concealed and refused

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ceiver will not be appointed to redeem property from a tax sale,[66] nor does liquidation of corporation constitute ground.[67] That a corporation is not as prosperous as expected is no ground for the appointment of a receiver.[68] If the mortgage pledges the rents and profits, a receiver pendente lite is proper without a showing of inadequacy of the security,[69] otherwise where the mortgagee is not entitled to the rents, and the mortgagor is not insolvent, nor the security inadequate.[70]

Under proper facts the appointment may be made in partition,[71] and where a co-tenant's interest is disputed, a receiver of his share of the profits may be appointed when necessary for the protection of all the parties.[72]

While homestead property is not generally subject to receivership,[73] if it is divisible the appointment may be made for the non-exempt part.[74]

In the absence of express statute, a receiver of corporate property cannot be appointed on grounds which would not be sufficient were the owner a natural person.[75]

Appointment is generally discretionary,[76] and will be reviewed only in case of gross abuse of discretion.[77]

The extension of receivership to cover other property is within the court's discretion.[78] In order to obtain the appointment of a receiver a party must have an interest in the property.[79] In the absence of statutory authority, a receiver cannot be appointed for corporate bodies on the application of private parties.[80] And it must be reasonably necessary to protect such party's rights,[81] but a receiver cannot be appointed at the instance of a mere mortgagee for property not covered by the

plaintiff, the president, access to the books, etc., not alleging fraud or mismanagement by any other officers or of the directors, or that the directors had been requested to institute any proceeding for the relief of the corporation, does not state a cause of action. Fallon v. U. S. Directory Co., 86 App. Div. [N. Y.] 29.

65. Kelly v. Steele [Idaho] 72 Pac. 887.

66. Torrence v. Shedd, 202 Ill. 498, 67 N. E. 168.

67. The liquidation of a corporation under § 13 of c. 56 of the Gen. St. of Ky. as amended by § 561 of the Ky. Statutes does not constitute a ground for the appointment of a receiver at the instance of a dissenting minority stockholder. Knott v. Evening Post Co., 124 Fed. 342.

68. Had to pay more for lands and sales were not as rapid as expected. American Tribune N. C. Co. v. Schuler [Tex. Civ. App.] 79 S. W. 370.

69. Sage v. Mendelson, 89 App. Div. [N. Y.] 137; Ball v. Marske, 202 Ill. 31, 66 N. E. 845. This is allowed by Rev. St. 1895, art. 1465, § 2. De Benora v. Frost [Tex. Civ. App.] 77 S. W. 637.

70. Greenwood L. & G. Ass'n v. Childs [S. C.] 45 S. E. 167.

71. Mesnager v. De Leonis, 140 Cal. 402, 73 Pac. 1052.

72. Mining property. Heinze v. Butte & B. Consol. Min. Co. [C. C. A.] 126 Fed. 1.

73. In mortgage foreclosure. Johnson v. Young [Neb.] 95 N. W. 497.

74. Sanford v. Anderson [Neb.] 95 N. W. 632.

75. Vila v. Grand Island Elec. L., I. & C. S. Co. [Neb.] 94 N. W. 136. Equitable or statutory grounds must exist to justify the appointment, consent of the parties without the consent of stockholders is not sufficient. Id.

76. St. Louis, V. & T. H. R. Co. v. Vandalia, 103 Ill. App. 363. Where defendant in divorce suit is worth $75,000 to $80,000, held abuse of discretion to appoint receiver for his property to secure alimony, where he has paid all sums ordered and been enjoined from deeding his property. Goff v. Goff [W. Va.] 46 S. E. 177. Insufficiency of security for mortgage, held, discretion did not appear to be abused. McKenzie v. Beaumont [Neb.] 97 N. W. 225.

77. Briggs v. Neal [C. C. A.] 120 Fed. 224. Unless it appears to have been improvidently made. Insolvent corporation. U. S. Shipbuilding Co. v. Conklin [C. C. A.] 126 Fed. 132.

78. Extension of receivership of cotenant's share of ore from mine to the entire property, under the facts held proper. Heinze v. Butte & B. Consol. Min. Co. [C. C. A.] 126 Fed. 1.

79. Lemker v. Kalberlah, 105 Ill. App. 445.

80. Vila v. Grand Island Elec. L., I. & C. S. Co. [Neb.] 97 N. W. 613. The holder of a contract, purporting to be for the purchase and sale of a diamond, issued by what is commonly called a "tontine company," is not a stockholder in such company, and hence not entitled to secure the appointment of a receiver. Mann v. German-American Inv. Co. [Neb.] 97 N. W. 600.

81. American Tribune N. C. Co. v. Schuler [Tex. Civ. App.] 79 S. W. 370; Le Brantz v. Conklin, 39 Misc. [N. Y.] 715; Temker v. Kalberlah, 105 Ill. App. 445. Whether a receiver will be appointed to take the place of a temporary administrator in order to bring him under the direct control of the court, quaere. Le Brantz v. Conklin, 39 Misc. [N. Y.] 715.

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mortgage,[82] nor where the creditor applying is protected.[83] On an interlocutory judgment for an accounting of a party's share in a transaction, it is not necessary to appoint a receiver to protect his rights.[84] Where an action is brought against a company, and a second company is formed to take the place of the first, and does in fact do so, it is unnecessary to bring a new action against the second company in order to appoint a receiver therefor,[85] and equity may, in lieu of appointment, accept a bond from defendant conditioned for the full performance of the final decree, and render judgment thereon for the amount of the recovery,[86] and if the appointment would occasion loss to both parties the discretion is properly exercised.[87] Order appointing receiver will not be reversed where it would result in further litigation.[88] A temporary receiver may be appointed on the death of the original appointee.[89] A temporary receivership will be continued until final hearing, where the facts are strongly in favor of plaintiff's equity.[90]

§ 2. *Appointment, qualification, and tenure of receivers.*[91] *A. Proceedings for appointment and qualification.*—Courts of one state may, when necessary for the protection of the stockholders or creditors of the corporation, appoint a receiver for the property of a foreign corporation in the said state.[92] Under certain circumstances federal courts may appoint receivers under state statutes.[93] The application cannot be made until the action is commenced,[94] and it must be made before the court where the action is triable.[95] The court first making the appointment has exclusive jurisdiction,[96] and after appointment of a receiver of all the debtor's property, and while the order is in full effect, a second appointment cannot be had.[97] An ex parte temporary appointment may be made,[98] but only under impe-

82. Vila v. Grand Island Elec. L., I. & C. S. Co. [Neb.] 94 N. W. 136.

83. Where enough money is deposited in court to pay a creditor's claim. St. John Wood-Working Co. v. Smith, 82 App. Div. [N. Y.] 348.

84. If necessary it can be made in final judgment. Spier v. Hyde, 92 App. Div. [N. Y.] 467.

85. La Junta & L. Canal Co. v. Hess [Colo.] 71 Pac. 415.

86. Twin City Power Co. v. Barrett [C. C. A.] 126 Fed. 302; Cary Bros. v. Dalhoff Const. Co., 126 Fed. 584. Code Civ. Proc. § 715 providing that a receiver appointed in an action or a special proceeding shall file a bond is applicable to a receiver appointed to take charge of the personal property of a husband against whom a judgment for alimony has been recovered. In re Spies, 86 N. Y. Supp. 1043.

87. Partnership accounting. Cary Bros. v. Dalhoff Const. Co., 126 Fed. 584.

88. Order not brought on for review until hearing of main case on appeal. Sheldon v. Parker [Neb.] 95 N. W. 1015.

89. Cogswell v. Second Nat. Bank [Conn.] 56 Atl. 574.

90. A temporary receivership to take charge of the property of a corporation pending determination of fraud of the stockholders in selling alleged controlling interest will be continued until final hearing, the facts being strongly in favor of plaintiff's equity. Frazier v. Brewer, 52 W. Va. 306.

91. In Kentucky a police judge in a town of the sixth class has no power to appoint a receiver for property of one bringing an action of forcible detainer, judgment being for the defendant. Reed v. Taylor [Ky.] 78 S. W. 892.

92. General allegations of misconduct on the part of the directors or officers is not sufficient. Phillips v. Sonora Copper Co., 90 App. Div. [N. Y.] 140.

93. Under the rule that a new equitable right created by a state statute may be enforced in a federal court where it can be done in conformity with the pleadings and practice in equity, the right given by the New Jersey statute (Revision 1896, p. 298, §§ 65, 66) to have a receiver appointed may be enforced by mortgage bondholders and stockholders of an insolvent corporation, where such court has jurisdiction by reason of diversity of citizenship and the value in dispute. U. S. Shipbuilding Co. v. Conklin [C. C. A.] 126 Fed. 132.

94. And the order is not validated by an oral understanding between counsel and judge that it shall not take effect until after commencement of the action. Popp v. Daisy Gold Min. Co. [Utah] 74 Pac. 426. A court has no jurisdiction to appoint a receiver on a mere petition not demanding a money judgment, nor any other legal or equitable remedy, when presented without the filing of a complaint or the issuance of a summons or any other process. Winona, W. E. & S. B. Traction Co. v. Collins [Ind.] 69 N. E. 998. An ex parte appointment before the filing of the petition is irregular. But no motion to vacate having been made, and the property having been subjected, the court refused to reverse. Scott v. Cox, 30 Tex. Civ. App. 190, 70 S. W. 802.

95. Knickerbocker Trust Co. v. Oneonta, C. & R. S. R. Co., 41 Misc. [N. Y.] 204.

96. McKay v. Van Kleeck [Mich.] 94 N. W. 367.

97. Nor can it be sustained as an exten-

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rious circumstances,[99] as where service of the notice is impracticable.[1] Notice given under the original complaint is sufficient though an amended and supplemental complain was filed,[2] and though the amendment was not verified in the absence of objection.[3] The pendency of a demurrer to the complaint which asked the appointment will not prevent the appointment.[4] A receiver may be appointed though no prayer therefor was made in the pleadings.[5] Before service of the process notice of application must be given, and also after service, when the appointment is sought in vacation, but not in term time when made by decree on the merits.[6] The notice of application in a pending action should be served on the attorneys,[7] though the notice may be waived by the parties entitled thereto or by their attorneys.[8] Appearance waives the objection of want of notice,[9] or any irregularity in the notice.[10]

The appointing order is not void though the determination of the sufficiency of the bill was erroneous.[11] That the order did not require a bond is not fatal in the absence of objection, a bond being actually given.[12] In collateral proceedings or actions the order can be attacked only for want of jurisdiction,[13] and not for any irregularities in the appointment,[14] or that the facts did not justify the appointment.[15]

An order appointing a receiver is appealable,[16] though made ex parte,[17] but an appeal does not supersede the order.[18] On certiorari, only the question of jurisdiction can be considered.[19]

(§ 2) *B. Who may be appointed.*—The party agreed upon is not generally binding on the court, since its discretion ultimately controls,[20] though the court will usually give favorable consideration to such party,[21] and an agreement by a

sion. Fernald v. Spokane & B. C. Tel. & T. Co., 31 Wash. 219, 71 Pac. 731.

98. H. B. Claflin Co. v. Furtick, 119 Fed. 429. The ex parte appointment for a debtor is inoperative as to creditors not assenting thereto. Creditor held not estopped to question validity of such appointment. Hutchinson v. Rice, 109 La. 29. Before service of process notice of application must be given. Batson v. Findley, 52 W. Va. 343.

99. Joseph Dry Goods Co. v. Hecht [C. C. A.] 120 Fed. 760. The appointment is temporary, though the order did not so provide where the moving papers merely asked for such appointment. Haggard v. Sanglin, 31 Wash. 165, 71 Pac. 711. The appointment before answer should be made only when necessary to protect plaintiff's rights. In actions to sequester corporate property [Code, § 1788]. Kieley v. Barron & C. H. & P. Co., 87 App. Div. [N. Y.] 317.

1. Batson v. Findley, 52 W. Va. 343.

2. Mesnager v. De Leonis, 140 Cal. 402, 73 Pac. 1052.

3. Clark v. Brown [C. C. A.] 119 Fed. 130.

4. Cogswell v. Second Nat. Bank [Conn.] 56 Atl. 574.

5. Appointment held proper. McGarrah v. Bank of S. W. Ga., 117 Ga. 556.

6. Batson v. Findley, 52 W. Va. 343. No order appointing a receiver should be granted by any court without notice to the parties in possession and those otherwise interested. Ross, etc., Foundry Co. v. Southern C. & F. Co., 124 Fed. 403.

7, 8. Murphy v. Fidelity M. F. Ins. Co. [Neb.] 95 N. W. 1022.

9. Troughber v. Akin, 109 Tenn. 451, 73 S. W. 118.

10. Robertson v. Ostrom [Neb.] 95 N. W. 469.

11. Clark v. Brown [C. C. A.] 119 Fed. 130.

12. Johnson v. Young [Neb.] 95 N. W. 497.

13. Brynjrefson v. Osthus [N. D.] 96 N. W. 261; Miller v. Brown [Neb.] 95 N. W. 797; McKay v. Van Kleeck [Mich.] 94 N. W. 367; Painter v. Painter, 138 Cal. 231, 71 Pac. 90; Mesnager v. De Leonis, 140 Cal. 402, 73 Pac. 1052.

14. McKay v. Van Kleeck [Mich.] 94 N. W. 367. In an action by the receiver to recover assets the insufficiency of his bond is not a defense. Livingston v. Eaton, 85 N. Y. Supp. 500. An irregular exercise of power cannot be reviewed on an application for a supersedeas. Troughber v. Akin, 109 Tenn. 451, 73 S. W. 118.

15. Powell v. Nat. Bank of Commerce [Colo. App.] 74 Pac. 536. That the appointment was made in an action at law or that the petition was insufficient is not ground for collateral attack. Murphy v. Fidelity M. F. Ins. Co. [Neb.] 95 N. W. 1022. On review on appeal from allowance of compensation, the court will not consider the propriety of the appointment. Campbell v. H. B. Claflin Co., 135 Ala. 527.

16. Deckert v. Chesapeake Western Co. [Va.] 45 S. E. 799.

17. Joseph Dry Goods Co. v. Hecht [C. C. A.] 120 Fed. 760.

18. Applied to receiver appointed on removal of an executor [Code, § 298]. Thompson v. Page, 25 Ky. L. R. 557, 76 S. W. 128.

19. Gibbs v. Morgan [Idaho] 72 Pac. 733.

20, 21. Polk v. Johnson, 160 Ind. 292, 66 N. E. 752.

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creditor to serve if appointed without compensation is not void as against public policy.[22] Trustees may be appointed.[23] The mere fact that one had been an officer of the corporation will not disqualify him to act as its receiver.[24] A nonresident of the state may be appointed a receiver when he has an interest in the property, and a resident is appointed as co-receiver.[25]

(§ 2) *C. Tenure of receiver.*—A removal is justified where the receiver failed to act as a prudent man would have acted in the management of his own business.[26] A receiver should be removed only on direct application therefor, and he should be given an opportunity to answer the charges.[27]

The order of appointment will not be set aside after the objects of the receivership have been fully accomplished and his duties are terminated.[28] The appointment of trustees in the place of trustees deceased operates to vacate a prior order appointing a temporary receiver.[29] Where defendant offers in writing to do everything that was endeavored to be procured by the appointment of a receiver, the receiver should be discharged.[30] A receiver should not be discharged on the filing of a bond by third parties assuming all liabilities, except on the acceptance of the bond by creditors whose claims have been allowed.[31]

After final determination of the cause and the settlement of accounts, the receivership is at an end,[32] and the filing of a supersedeas bond on appeal from the order of discharge does not reinstate the receiver.[33] Though the receivership terminated on the sale of the property, an action to establish a claim may be maintained against him where the decree of sale provided that the purchaser assume all liabilities remaining unpaid.[34]

§ 3. *Title and rights in and possession of the property. A. Title in general.*—The appointment of receivers has for its primary object the care and custody of the property which is the subject of the receivership pending the determination of the questions involved in the litigation,[35] and divests the debtor of all authority over the property,[36] and the title passes to the receiver by operation of

22. And the insolvent's consent is a sufficient consideration. Polk v. Johnson, 160 Ind. 292, 66 N. E. 752.

23. The liquidating trustees of a partnership may properly be appointed receivers. Deckert v. Chesapeake Western Co. [Va.] 45 S. E. 799. Where a trustee having no power to sell the property does so without the consent of the beneficiaries, upon the application of the latter the trustee and another may be appointed as co-receivers to sell the property subject to the confirmation of the court. Not an abuse of discretion to appoint such parties receivers. Burwell v. Farmers' & M. Bank [Ga.] 46 S. E. 885.

24. Townsend v. Oneonta, C. & R. S. R. Co., 86 App. Div. [N. Y.] 604.

25. Burwell v. Farmers' & M. Bank [Ga.] 46 S. E. 885.

26. In re Angell, 131 Mich. 345, 91 N. W. 611. The court refused to remove receiver appointed on recommendation of the majority creditors merely because his connection with the corporation was such that at some future time he would not be the proper party to enforce corporate rights. Land T. & Trust Co. v. Asphalt Co., 120 Fed. 996. The court refused to remove the receiver of a railroad on petition of a bondholder whose title was being contested by the receiver. Townsend v. Oneonta, C. & R. S. R. Co., 41 Misc. [N. Y.] 298.

27. Townsend v. Oneonta, C. & R. S. R. Co., 86 App. Div. [N. Y.] 604.

28. Popp v. Daisy Gold Min. Co. [Utah] 74 Pac. 426.

29. Loyd v. Lancaster, 117 Ga. 111.

30. Forrester v. Boston & M. C. C. & S. Min. Co. [Mont.] 76 Pac. 2.

31. Johnson v. Cent. Trust Co., 159 Ind. 605, 65 N. E. 1028.

32. State v. Superior Ct., 31 Wash. 481, 71 Pac. 1095; Harris v. Root, 28 Mont. 159, 72 Pac. 429. After lapse of ten years after settlement of the accounts, an order to surrender the property to the debtor held proper. Rochat v. Gee, 137 Cal. 497, 70 Pac. 478. The court retains jurisdiction until all matters involved are finally adjusted, including the payment of the receiver's expenses. La Junta & L. Canal Co. v. Hess [Colo.] 71 Pac. 415.

33. In such case prohibition will lie to prevent the court from punishing the defendant for interfering with the receiver's possession, since he has no remedy by appeal. State v. Superior Ct., 31 Wash. 481, 71 Pac. 1095.

34. Ohio Coal Co. v. Whitcomb [C. C. A.] 123 Fed. 359.

35. Townsend v. Oneonta, C. & R. S. R. Co., 84 N. Y. Supp. 427.

36. The insolvent cannot thereafter subject it to any legal liability as for claims of attorneys who represented him in resist-

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law[37] at the time of filing the order appointing him.[38] The funds are held by the receiver as an officer of the court,[39] and he takes only a qualified title to all the property within the court's jurisdiction,[40] and he takes subject to the debtor's exemption rights,[41] and subject to whatever rights existed against the debtor;[42] therefore, any right of setoff which existed against the debtor is available against the receiver,[43] and if an unrecorded chattel mortgage is void as to creditors, it is void as to the receiver of the mortgagor.[44] In supplementary proceedings, the receiver takes only a right of possession to realty of the debtor.[45]

(§ 3) *B. Rights as between receivers, claimants or lienors. Receivers.*—Where different actions are started in the state and Federal courts for the appointment of a receiver for the same property, the receiver first obtaining possession of the property has the right to retain it.[46] The court making the first appointment alone has jurisdiction of an action by the second receiver to determine the right to the assets.[47] A court of the United States will not dispossess the receiver of a state court by any summary order or process or otherwise than by formal proceedings taken by its own receiver or trustee for that purpose.[48] Where a receiver in bankruptcy[49] is appointed within four months of the appointment of a receiver by the state court, the latter court, upon an application by the receiver in bankruptcy for the funds of the bankrupt, in compliance with an order of the bankrupt court, will order its receiver to pay over to him such fund,[50] and the state receiver must apply to the bankruptcy court for the allowance of his commissions and expenses.[51] But the state court may upon transfer of all assets in possession to the bankruptcy court close his account, cancel his bond, and discharge him and his sureties from liability.[52]

Claimants or lienors.—An attachment on a foreign corporation's property within a state creates a right superior to the claim of a receiver of the corporation appointed in the home jurisdiction, even though such receivership is prior in point of time to the levy of the attachment, if it be levied prior to the appointment of a receiver in the state where the property is located.[53] A prior assignee of rents is entitled thereto as against a receiver of the property, irrespective of notice to him of the assignment.[54] Property subject to a chattel mortgage after conditions

ing creditors' claims. Ford v. Gilbert [Or.] 75 Pac. 138. Officers of corporation after appointment of receiver are without authority to make valid transfers. Brynjolfson v. Osthus [N. D.] 96 N. W. 261.

37. Brynjolfson v. Osthus [N. D.] 96 N. W. 261.

38. The fact that the mortgagor claimed that the mortgage was paid and suit was required to obtain possession will not postpone the receiver's title. Pickert v. Eaton, 81 App. Div. [N. Y.] 423.

39. Hudson v. Baker [Mass.] 70 N. E. 419.

40. Lewis v. American Naval Stores Co., 119 Fed. 391.

41. Levy v. T. R. Rosell & Co. [Miss.] 34 So. 321.

42. Nix v. Ellis, 118 Ga. 345.

43. But no lien can be acquired for the excess. Nix v. Ellis, 118 Ga. 345.

44. Harrison v. J. J. Warren Co., 183 Mass. 123, 66 N. E. 589. A receiver in supplementary proceedings may sue to set aside a chattel mortgage because not filed in the proper county. Brunnemer v. Cook & B. Co., 89 App. Div. [N. Y.] 406.

45. Chadeayne v. Gwyer, 83 App. Div. [N. Y.] 403.

46. Knott v. Evening Post Co., 124 Fed. 342.

47. The second appointment was for a corporation claiming to be the successor of the corporation for which the first appointment was made. McKay v. Van Kleeck [Mich.] 94 N. W. 367.

48. Ross, etc., Foundry Co. v. Southern C. & F. Co., 124 Fed. 403.

49. Rights as between receiver in bankruptcy and receiver appointed by state courts, see Bankruptcy, 1 Curr. Law, p. 311.

50. Bloch v. Bloch, 42 Misc. [N. Y.] 278. Where a receiver is appointed by a state court in a case not cognizable in the Federal Bankruptcy Court, the state receiver takes the legal title which is not divested by the appointment of a subsequent bankruptcy trustee. For a full discussion of the law on this subject see Singer v. Nat. Bedstead Mfg. Co. [N. J. Eq.] 55 Atl. 868.

51, 52. Bloch v. Bloch, 42 Misc. [N. Y.] 278.

53. Attachment by beneficiary of a life insurance policy on property of company. Nat. Park Bank v. Clark, 92 App. Div. [N. Y.] 262.

54. The tenants having had notice. Brownson v. Roy [Mich.] 95 N. W. 710.

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broken belongs to the mortgagee and not the mortgagors' receiver thereafter appointed.[55] A mortgagee cannot collect rental from the receiver of the lessee under a void lease when he does not apply for a receiver in the suit to foreclose his mortgage.[56] He is entitled to possession of funds belonging to the estate as against a depositary claiming an interest therein.[57] A receiver can be garnished by leave of the court which appointed him.[58] A receiver lawfully taking possession of the property of a corporation cannot be sued by one whose private property was by mistake turned over with the corporation's until such person obtains leave of the court or applies thereto for relief from his mistake.[59]

(§ 3) *C. Possession and restitution.*—So far as a receiver's powers are derived from a statute, or from a lawful decree of court, and the powers do not involve rights which, at the time of his appointment, were vested in the owners, he is not merely their representative but the agent of the court appointing him,[60] but as to such rights as are vested in the owners at the time of their appointment, he is simply their agent.[61] Receivers having complete control of the property are not agents of a corporation purchasing the same so as to render the latter liable for their negligence.[62] Pending appeal with stay from the appointing order, the receiver is not entitled to possession.[63] If the order directing payment to a receiver does not specify the time for payment, demand is a condition precedent to commitment.[64]

Since property in the receiver's possession is in custodia legis, process cannot then be issued against it,[65] and he may enjoin the prosecution of suits against the debtor which tended to delay his collection of the assets.[66] A chattel mortgagee may, however, foreclose as against the owner or his receiver, where neither had ever had actual or constructive possession and the mortgagee was not a party to the receivership proceedings.[67]

§ 4. *Administration and management of the property. A. Authority and powers in general.*[68]—A court cannot confer upon a receiver power outside of the territory over which it has jurisdiction.[69] Receivers of a corporation acting within the scope of their authority are clothed with substantially the same powers, and are subject to substantially the same liabilities as such receivers as those ap-

55. Rev. St. Ohio 1892, § 3206. St. Mary's Mach. Co. v. Nat. Supply Co., 68 Ohio St. 535, 67 N. E. 1055.

56. The mortgagee of a railroad who knowingly allows the receiver of the lessee thereof under a void lease to continue in possession and receive the benefits thereof until a sale under the mortgage, instead of applying for a receiver therefor in the foreclosure suit, is not entitled to recover rental for the property during such time from the receiver. Cox v. Terre Haute & I. R. Co., 123 Fed. 439.

57. The proceeds of a sale under a trust deed for the benefit of certain creditors, deposited in the bank, also a beneficiary, held that it could not claim right on the ground that the deposit was trust funds. Avery v. Preston Nat. Bank [Mich.] 93 N. W. 1062.

58. Yeiser v. Cathers [Neb.] 97 N. W. 840.

59. Case v. Duffy, 86 N. Y. Supp. 778.

60. Ross v. Sayler, 104 Ill. App. 19.

61. As such he cannot reach assets fraudulently placed beyond reach of law. Ross v. Sayler, 104 Ill. App. 19.

62. Fireman injured on railroad while in hands of receivers held cannot sue purchasing corporation. Tobin v. Cent. Vt. R. Co. [Mass.] 70 N. E. 431.

63. Receiver held guilty of only a technical contempt in failing to surrender the property. Rumney v. Donovan, 28 Mont. 69, 72 Pac. 305.

64. Gen. Elec. Co. v. Sire, 88 App. Div. [N. Y.] 498.

65. A vessel in a receiver's possession cannot be seized under process to enforce a prior lien without permission of the appointing court. The Jonas H. French, 119 Fed. 462. Debt payable in a foreign state which has passed to a receiver appointed therein cannot be attached in this state. Nat. Broadway Bank v. Sampson, 85 App. Div. [N. Y.] 320.

66. Resident creditor of insolvent bank suing in foreign state. Davis v. Butters Lumber Co., 132 N. C. 233.

67. Kidder v. Beavers, 33 Wash. 635, 74 Pac. 819.

68. Under Code Civ. Proc. § 716, a receiver acts only under the discretion of the court. Weiher v. Simon, 41 Misc. [N. Y.] 202.

69. American Tribune N. C. Co. v. Schuler [Tex. Civ. App.] 79 S. W. 370.

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plicable to the corporation,[70] and a receiver may be authorized to sue to recover assets at any time prior to his discharge.[71] A receiver pendente lite, in a petition for involuntary bankruptcy, can act only according to the rights and remedies given to ordinary receivers.[72] A receiver is not liable for authorized expenditures,[73] but he is liable for his unauthorized acts[74] paying out funds in disobedience of an order.[75] Authorization to complete works in the course of construction does not include authority to undertake new work.[76] After making the contract, the court can revoke the order authorizing it only under the same conditions that individuals may rescind contracts,[77] and the adjustment of debts created without leave of court will be made on an equitable basis,[78] and if no advantage accrues therefrom, the receiver will not be allowed therefor;[79] but if no loss or injury results to the estate, the receiver will not be charged therewith.[80] Unauthorized payments may be ratified by the court.[81]

The receiver represents all persons interested in the estate,[82] including the creditors,[83] and in the absence of restrictive statutes, may enforce the rights of creditors as well as those of the debtor.[84]

In case of joint receivership, each receiver has equal authority in the management.[85]

The receiver may carry on the business to complete unfulfilled contracts,[86] but if the estate is insufficient to pay debts, he can with the court's approval abandon a contract to purchase made by the insolvent.[87] He is not justified in continuing at a loss,[88] and if he does so without authority, he will be personally liable for resulting losses.[89] Power to sell the property should be given a temporary receiver only under the most cogent circumstances.[90] A receiver of a railroad cor-

70. Receivers authorized by the order of the court to conduct the business of common carriers may contract for transportation beyond its own route and assume liability for the entire distance over connecting lines to the same extent as over its own line. Farmers' L. & T. Co. v. Northern Pac. R. Co. [C. C. A.] 120 Fed. 873.

71. Though the estate had been sold to himself as trustee. Detroit Elec. L. & P. Co. v. Applebaum [Mich.] 94 N. W. 12.

72. Ross, etc., Foundry Co. v. Southern C. & F. Co., 124 Fed. 403.

73. In re Angell, 131 Mich. 345, 91 N. W. 611.

74. Receivers cannot justify their conduct in the management of the property by private authorization of the judge [Iowa Code, §§ 3823, 3824, 3784, 3846, 281]. State Cent. Sav. Bank & Fanning Ball-Bearing Chain Co., 118 Iowa, 698, 92 N. W. 712.

75. Proceeds of sale ordered to be held until further order, and this though used for operating expenses. State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co., 118 Iowa, 698, 92 N. W. 712.

76. State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co., 118 Iowa, 698, 92 N. W. 712.

77. Contract of lease. McAnally v. Geidden, 30 Ind. App. 22, 65 N. E. 291. Sale of personalty. Files v. Brown [C. C. A.] 124 Fed. 133.

78. Nessler v. Industrial Land Development Co. [N. J. Eq.] 56 Atl. 711.

79. Schwartz v. Rosetta G. P. & I. Co., 110 La. 619.

80. As a purchase. Ripley v. McGavic, 120 Iowa, 52, 94 N. W. 452.

81. As for expenses in completing unperformed contracts of the debtor. Rochat v. Gee, 137 Cal. 497, 70 Pac. 478.

82. A judgment against the receiver on a debt incurred in the management of a partnership estate is conclusive against the surviving partner. Painter v. Painter, 138 Cal. 231, 71 Pac. 90.

83. All creditors are presumptively interested in sustaining an appointment for a corporation. Home S. & T. Co. v. Dist. Ct., 121 Iowa, 1, 95 N. W. 522; Harrison v. J. J. Warren Co., 183 Mass. 123, 66 N. E. 589.

84. King v. Pomeroy [C. C. A.] 121 Fed. 287.

85. Declarations of one are admissible, though not made in the presence of the other. Shirk v. Brookfield, 77 App. Div. [N. Y.] 295.

86. Rochat v. Gee, 137 Cal. 497, 70 Pac. 478.

87. It will not thereby render the estate liable to a suit for damages (Wells v. Hartford Manilla Co. [Conn.] 55 Atl. 599); and it will be presumed that the abandonment was on approval of court (Id.).

88. Though he has succeeded in reducing the loss as against previous management. State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co., 118 Iowa, 698, 92 N. W. 712.

89. Accounts will be adjusted according to benefits received by the estate. State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co., 118 Iowa, 698, 92 N. W. 712.

90. Under Code Civ. Proc. § 2423, power to sell corporate nonperishable property should not be based on a forecast of the outcome of the proceedings for dissolution.

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poration can manage and operate the property, and maintain its integrity as a road and as a going business.[91] A contract by the receiver's agent is binding on the receiver,[92] and the allowances for expenses in carrying on the business are properly made to the receiver and not to the persons furnishing the supplies.[93]

The receiver does not by virtue of his appointment become the assignee of a leasehold interest but is entitled to a reasonable time to elect to surrender or retain possession, and is liable only for rent during the time of retention,[94] and the fact that the lease has a long time to run will not justify a continuance of possession.[95] A creditor who requests a receiver to sue is liable for the costs of the action.[96] Receiver's liens or certificates may be issued only when absolutely necessary for the preservation of the property pending litigation.[97]

In the management of the estate, the receiver should use such care, skill and prudence as an ordinary man would use in the conduct of his own business,[98] and for losses resulting from the negligent conduct of the estate will be personally charged,[99] as where he failed to collect claims which he could by the exercise of due diligence have collected.[1] A contract of a receiver being a contract of the court is assignable.[2] Allowance of counsel fees.[3]

(§ 4) *B. Payment of claims against receiver or property.*[4]—A receiver cannot pay his own claims in preference to other creditors'.[5] A court appointing a receiver for a railroad may, in special circumstances, give unsecured creditors priority over a mortgage.[6] The court may, in the exercise of its equity power on authorizing the receiver to accept a surrender of a lease, direct him to pay liens acquired against the property while in possession of the lessee.[7] An attorney in fact for the debtor, under power to collect and pay creditors, is not entitled to a preference or lien for such services as against the receiver of the debtor subsequently ap-

In re Malcolm Brew. Co., 78 App. Div. [N. Y.] 592.

91. Townsend v. Oneonta, C. & R. S. R. Co., 94 N. Y. Supp. 427.

92. For services to be rendered in the conduct of the business. Shirk v. Brookfield, 77 App. Div. [N. Y.] 295.

93. German Nat. Bank v. J. D. Best & Co. [Colo.] 75 Pac. 398.

94. Facts held to constitute an election to retain possession. Dayton Hydraulic Co. v. Felsenthall [C. C. A.] 116 Fed. 961; Klein v. W. A. Gavenesch Co., 64 N. J. Eq. 50.

95. State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co., 118 Iowa, 698, 92 N. W. 712.

96. Code, § 3247. May be required to pay both trial and appeal costs. Droege v. Baxter, 77 App. Div. [N. Y.] 78.

97. On appeal from order denying confirmation of sale, they will be issued when necessary and no reason appears for charging such expenses to the person challenging the sale. Poreh v. Agnew Co. [N. J. Eq.] 57 Atl. 546. Where the operating expenses of a railroad equal its income, and a larger income is not expected in the future, the receiver cannot be authorized to issue certificates of indebtedness for the purpose of paying past due interest on first mortgage bonds, and thereby prevent the bondholders from declaring the bonds due, as authorized by the mortgage, where the trustee in the mortgage and the holders of the legal title to a majority of the bonds object thereto. Townsend v. Oneonta, C. & R. S. R. Co., 84 N. Y. Supp. 427.

98. Under the evidence held that the receiver did not act negligently or in bad faith in selling assets. Ripley v. McGavic, 120 Iowa, 52, 94 N. W. 452. Laws 1902, c. 60, § 3, p. 114, which reads that a "receiver shall proceed, immediately upon appointment to convert the assets of the corporation into cash," means that he is to use reasonable diligence, and with such speed as will accord with the circumstances, and does not require him to sacrifice the assets. People v. N. Y. Bldg. L. B. Co., 41 Misc. [N. Y.] 363.

99. Pangburn v. American Vault, S. & L. Co., 205 Pa. 93.

1. In re Angell, 131 Mich. 345, 91 N. W. 611.

2. The question of personal confidence does not enter into the question. American B. & T. Co. v. Baltimore & O. S. W. R. Co. [C. C. A.] 124 Fed. 866.

3. See post, § 4, Debts created by receiver and expenses of administration.

4. Whether property in custody of receiver is subject to taxation. City of Los Angeles v. Los Angeles City Water Co., 137 Cal. 699, 70 Pac. 770.

5. If he does he will not be allowed therefor. State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co., 118 Iowa, 698, 92 N. W. 712.

6. Does not apply to a railroad engaged almost exclusively in the logging business. Security S. & T. Co. v. Goble, N. & P. R. Co. [Or.] 74 Pac. 919.

7. McAnally v. Glidden, 30 Ind. App. 22, 65 N. E. 291.

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pointed.[8] A chattel mortgage is entitled to priority over claims for wages,[9] but the mortgagee is not entitled to funds received by the receivers under a private settlement of damages for injuries to the insolvent's property.[10] Creditors cannot obtain a superior lien against the property in the receiver's hands by filing a creditor's bill.[11] Priority cannot be obtained by a contract with the receiver.[12] The right to enforce prior liens, however, may be lost by participation in the subsequent receivership proceedings.[13] An order allowing a claim cannot be attacked because of invalidity of the receiver's appointment,[14] and a judgment of the allowance of a claim does not become a lien on the assets.[15]

Debts created by receiver and expenses of administration.—A debt created by the receiver may be ordered paid without waiting for final settlement.[16] And this power is inherent in the court appointing the receiver,[17] and the debts may be satisfied out of any of the assets,[18] but application should be made for leave to enforce a judgment against the receiver on such debts,[19] but in case of insufficiency of assets,[20] or if the appointment was not warranted, the party procuring it will be charged with the expenses,[21] except when made on consent of the parties,[22] or where the defendant acquiesced in the appointment and the receiver was efficient in disposing of the property and procured a better price than the defendant could have obtained.[23] In case of improper appointment the receiver's charges are not as of course taxable against the party procuring the appointment, but he is entitled to be heard on a motion therefor,[24] and in such case the defendant is not entitled to interest on the funds while in the receiver's hands.[25] Allowances for supplies are properly made to the receiver himself and not to those who furnished the supplies.[26]

8. Alfred Richards Brick Co. v. Rothwell, 18 App. D. C. 516.

9. Whether the proceedings are under Ohio Rev. St. § 3206a or 6355. St. Mary's Mach. Co. v. Nat. Supply Co., 68 Ohio St. 535, 67 N. E. 1055.

10. Nessler v. Industrial Land Development Co. [N. J. Eq.] 56 Atl. 711.

11. Against assets of insolvent partnership in hands of receiver in dissolution proceedings. Foster v. Field [Okl.] 74 Pac. 190.

12. Contract with receiver whereby intervenor was given priority over payment of fees of receiver, held did not give him priority over other creditors. Bloomfield v. Roy [C. C. A.] 120 Fed. 502.

13. As when an attaching creditor presented his claim and appeared on the hearing for an order authorizing the receiver to sell the property. Mercantile Realty Co. v. Stetson, 120 Iowa, 324, 94 N. W. 859.

14. Painter v. Painter, 138 Cal. 231, 71 Pac. 90.

15. In the absence of a statute. Johnson v. Cent. Trust Co., 159 Ind. 605, 65 N. E. 1028.

16. Painter v. Painter, 138 Cal. 231, 71 Pac. 90.

17. Authorize receiver to execute mortgage on property to secure such indebtedness. La Junta & L. Canal Co. v. Hess [Colo.] 71 Pac. 415.

18. Painter v. Painter, 138 Cal. 231, 71 Pac. 90.

All funds and property which come into the receiver's hands are equitably subject to all proper expenses of the receivership. As where the receiver's possession of the insolvent mortgagor's property was with the consent of the mortgagees. Nessler v. Industrial Land Development Co. [N. J. Eq.] 56 Atl. 711. As where there was one receivership of several distinct funds. Cannon v. Snipes, 32 Wash. 243, 73 Pac. 379.

19. Painter v. Painter, 138 Cal. 231, 71 Pac. 90. In some courts receivers are authorized from time to time to withdraw sums of money from the general account, and its deposit to a special account for the purpose of enabling the receiver to pay current expenses without the necessity of applying to the court for authority to pay each item. For the practice in this matter in the New York Supreme Court, see People v. Manhattan F. Ins. Co., 41 Misc. [N. Y.] 611.

20. That the claimants attempted to have their claims decreed a prior lien is not an election so as to preclude them from enforcing the claims against the plaintiff. German Nat. Bank v. Best & Co. [Colo.] 75 Pac. 398. Nor need claimants have notified plaintiff that they would look to him for payment. Id.

21. Landlord held properly charged with the commissions and one half the expense of harvesting the crop. Horn v. Bohn, 96 Md. 8.

22. Sufficiency of petition by receiver for payment. Ford v. Gilbert, 42 Or. 528, 71 Pac. 971.

23. Clark v. Brown [C. C. A.] 119 Fed. 130.

24. Wills Valley M. & Mfg. Co. v. Galloway [Ala.] 35 So. 850.

25. Clark v. Brown [C. C. A.] 119 Fed. 130.

26. In case of consolidation of suits a judgment in favor of the claimant for supplies furnished the former receiver instead

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Counsel fees.—Necessary attorney's fees will be allowed and taxed as costs,[27] but the receiver will not be allowed for counsel services on accounts rendered necessary because of his misconduct in the management of the estate.[28] Fees cannot be allowed for counsel for employes of a receiver.[29]

Fees of counsel employed to resist appointment may properly be allowed.[30] Unsuccessful efforts of counsel in defending his own bill cannot be made the basis of a charge against the receiver.[31] The allowance of counsel fees is to the receiver and not to the counsel.[32]

Statutory regulations.[33] *Procedure to obtain payment.*—Claims must be presented for allowance.[34]

(§ 4) *C. Sales by receiver.*—Generally receivers should apply for leave to sell, and they will be personally charged with the proceeds when made without authority, though they were used in the conduct of the business.[35] To perform the decree the receiver may be authorized to sell.[36] Receiver in supplementary proceedings cannot sell realty.[37] The court may order a sale without right of redemption in the debtor and subject to the mortgage.[38] That the order did not describe the land does not render it void.[39] The sale should be made in the manner authorized,[40] and within the time fixed by the court.[41] A sale authorized need not be confirmed.[42] A sale is complete when the receiver reports the bid and it is accepted by the court,[43] and it will not be set aside unless the inadequacy of the price was so great as to shock the conscience,[44] nor will the failure of the purchaser to inform the receiver of the value of the property sold justify a rescission.[45] The denial of an application to set aside is reviewable by appeal only.[46] The purchaser acquires only the title of the debtor,[47] free from the claims of all parties

of in favor of such receiver for the benefit of the claimant is not reversible error. German Nat. Bank v. Best & Co. [Colo.] 75 Pac. 398.

27. Rev. St. 1899, § 755. Being costs they may be retaxed after lapse of term. State v. Active Bldg. & L. Ass'n, 102 Mo. App. 675, 77 S. W. 171; Cumberland Lumber Co. v. Clinton Hill Lumber Co., 64 N. J. Eq. 521. Contra, Pullis v. Pullis Bros. Iron Co., 90 Mo. App. 244.

28. State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co., 118 Iowa, 698, 92 N. W. 712.

29. Counsel for superintendent of a mine. Forrester v. Boston & M. C. C. & S. Min. Co. [Mont.] 76 Pac. 8.

30. Com. v. Penn. Germania B. & L. Ass'n, 204 Pa. 29. Payment of part of claim order with leave granted to make later application for balance. In re Directors of Nat. Gramophone Corp., 83 N. Y. Supp. 1087.

31. Efforts were in defending amount on a reference. In re University Magazine Co., 93 App. Div. [N. Y.] 641.

32. First Nat. Bank v. Or. Paper Co., 42 Or. 398, 71 Pac. 144, 971; German Nat. Bank v. Best & Co. [Colo.] 75 Pac. 398.

33. Laws 1902, p. 114, c. 60, § 4, providing for the approval of the attorney general to the compensation paid attorneys for receivers goes to the amount of the compensation, not to the expediency of employing counsel. Hence the attorney general cannot be compelled to approve a contract for the employment of an attorney in which the amount is not definitely fixed. Candee v. Cunneen, 86 N. Y. Supp. 723.

34. An order directing surrender of property to a newly organized corporation on its assumption of the debts of the old company did not make it liable for a judgment not presented to the receiver. Ferguson v. Toledo, A. A. & N. M. R. Co., 85 App. Div. [N. Y.] 352.

35. State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co., 118 Iowa, 698, 92 N. W. 712.

36. After decree it is not necessary that the sale be made by master in chancery. Code, § 306 should be read in connection with § 265. Buist v. Merchants' & P. Bank, 65 S. C. 487.

37. Chadeayne v. Gwyer, 83 App. Div. [N. Y.] 403.

38. Mercantile Realty Co. v. Stetson, 120 Iowa, 324, 94 N. W. 859.

39. After term of affirmance such failure is not ground for relief from the purchase. Thompson v. Brownlie, 25 Ky. L. R. 622, 76 S. W. 172.

40. Sale set aside because receiver refused to put up the property as a whole as advertised and at the request of the bidder. Patterson v. Patterson, 207 Pa. 252.

41. Morrison v. Lincoln S. B. & S. D. Co. [Neb.] 96 N. W. 230.

42. Files v. Brown [C. C. A.] 124 Fed. 133.

43. And the receiver has no more right to rescind upon any ground which is not equally available to a private party. Files v. Brown [C. C. A.] 24 Fed. 133.

44. Value of judgment with collateral held too uncertain to justify rescission of sale thereof for inadequacy of price. Files v. Brown [C. C. A.] 124 Fed. 133.

45, 46. Files v. Brown [C. C. A.] 124 Fed. 133.

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to the suit which are not accepted or reserved by the terms of the decree,[48] except in the case of a pre-existing judgment.[49] If on resale the mortgagee again purchased for the amount of the bid on the first sale which was less than the mortgage debt, the deposit of the increase guaranteed on procuring the resale is properly paid to the bidder, less a part of the expenses.[50]

(§ 4) *D. Actions by and against receivers.*[51]—While the appointment does not prevent suits against the debtor,[52] yet the receiver has the right to bring and defend actions concerning the trust estate.[53] He may sue the directors for a discovery and accounting for their wrongful acts,[54] and this may be a single suit against all the directors, though all are not equally involved nor equally liable, and damages may be recovered,[55] and he may continue prosecuting actions pending at the time of his appointment;[56] he may move to vacate a void judgment against the debtor,[57] but he cannot appeal from a decree in an action against the insolvent which merely determined the extent of a lien of the plaintiff creditor.[58]

The receiver should generally first obtain leave to sue,[59] and a decree authorizing suit is not suspended by the filing of a petition for a rehearing thereof.[60]

Authorization to sue the receiver is necessary,[61] therefore a receiver appointed by a federal court cannot be sued in a state court without leave granted by the former,[62] though failure to obtain leave is not a jurisdictional defect where the action was brought in the appointing court.[63]

47. Thompson v. Brownlie, 25 Ky. L. R. 622, 76 S. W. 172.

48. Scott v. Farmers' & M. Nat. Bank [Tex.] 75 S. W. 7. A purchaser at a receiver's sale takes subject to a judgment lien of which notice was given at the time of the sale. In re Coleman, 174 N. Y. 373, 66 N. E. 983. Judgment lien. Lienor not a party to proceedings. Denny v. Broadway Nat. Bank, 118 Ga. 221. An order to sell subject to certain liens impliedly negatives the existence of other liens. As a sale without right of redemption in the debtor and "subject to the mortgages." Mercantile Realty Co. v. Stetson, 120 Iowa, 324, 94 N. W. 859. The order of sale is not therefore void because a lienholder was not made a party. Thompson v. Brownlie, 25 Ky. L. R. 622, 76 S. W. 172.

49. A decree of sale does not divest the lien of a pre-existing judgment not referred to in the decree. In re Coleman, 174 N. Y. 373, 66 N. E. 983.

50. Bass v. McDonald, 29 Ind. App. 596, 64 N. E. 934.

51. Right of foreign receiver and receivers appointed by federal courts to sue, see post, § 8.

52. Campau v. Detroit Driving Club [Mich.] 98 N. W. 267.

53. The receiver of a railroad may be sued to recover damages for the wrongful taking of property by the company before his appointment. Ratcliff v. Baer & Co. [Ark.] 72 S. W. 896. Action cannot be maintained against a receiver for loss of the corporation prior to his appointment. McDermott v. Crook, 20 App. D. C. 465. A receiver is the "duly authorized" agent of creditors of an insolvent corporation to prove their debt against the estate of a bankrupt stockholder, within the meaning of the act of Congress of July 1, 1898, § 7, subd. 8 (30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]). Dight v. Chapman [Or.] 75 Pac. 535.

54. Wrongful acts toward corporate property thus rendering it apparently insolvent, and its stock worthless. Mabon v. Miller, 81 App. Div. [N. Y.] 10.

55. Mabon v. Miller, 81 App. Div. [N. Y.] 10.

56. Action brought pending stay on appeal from appointing order by the debtor. Boston & M. C. C. & S. Min. Co. v. Mont. Ore Purchasing Co., 27 Mont. 431, 71 Pac. 471.

57. Yorkville Bank v. Henry Zettner Brew. Co., 80 App. Div. [N. Y.] 578.

58. The unsecured creditors may appeal, or may authorize the receiver to appeal, on securing him costs and expenses. Cook v. Anderson Food Co. [N. J. Eq.] 55 Atl. 1042.

59. St. Louis, V. & T. H. R. Co. v. Vandalia, 103 Ill. App. 363.

60. Gold v Paynter [Va.] 44 S. E. 920.

61. In a suit against an association under receivership to cancel mortgages in the absence of an averment of authorization to sue the receiver a judgment against him cannot be had. Manker v. Phoenix Loan Ass'n [Iowa] 96 N. W. 982. Where the alleged owner of mortgaged chattels and his receiver had never had actual or constructive possession, leave of court is not necessary condition precedent to foreclosure. Kidder v. Beavers, 33 Wash. 635, 74 Pac. 819. And merely because the receiver as such had an interest therein, will not justify an order restraining foreclosure. Id.

62. Farmers' L. & T. Co. v. Chicago & N. P. R. Co., 118 Fed. 204. Where the assets of a corporation are sold by a decree in receivership proceedings in a federal court, a state court will not take jurisdiction of a suit to recover damages to be paid out of the assets. Suit for damages for injuries sustained by a fireman on a railroad while in the hands of receivers. Tobin v. Cent. Vt. R. Co. [Mass.] 70 N. E. 431.

63. Ratcliff v. Baer & Co. [Ark.] 72 S. W. 896.

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To actions on contracts by receivers the debtors are not necessary parties.[64]

The receiver should aver sufficient facts to show legal appointment,[65] and in case of denial by answer, the plaintiff receiver must prove his appointment and qualification.[66] The party alleging invalidity in the appointment of receivers must prove it.[67] Proceedings with reference to the removal of a receiver, had long after the appointment, are inadmissible on the question of collusion in the appointment.[68] Where the receiver of an insolvent corporation has no assets to prosecute a disputed claim whose validity is not asserted by the stockholders, he will be authorized to order an assessment upon the stockholders before bringing suit on the claim.[69] Receivers of an insolvent corporation will not be required to bring suit to ascertain and enforce the liability of the promoters, officers, and directors of the corporation for the benefit of creditors until its visible assets have been liquidated and the fact and amount of deficiency is ascertained.[70]

A judgment in favor of a receiver in his proprietary capacity cannot be enforced by contempt proceedings.[71]

§ 5. *Accounting by receivers.*—The taking of an inventory and filing a statement of liabilities are proper preliminary acts and should be done within a reasonable time after the receiver takes charge,[72] and any person interested may require the making and filing.[73] Where, in a proceeding to foreclose a mortgage, a receiver is appointed, funds realized by him from a sale of property not covered by the mortgage should be distributed among the general creditors.[74] A judgment obtained against a railroad company, after its property has been placed in the hands of receivers in a suit to foreclose a mortgage thereon for a claim arising prior to the receivership, is not entitled to a preference over the mortgage on the earnings of the receivership.[75] On insolvency of a loan association, money paid as dues by a member cannot be credited as a loan to a member, but must await the final distribution by the receiver.[76] Dividends on secured claims will be computed only on the amount actually due when the dividend is made.[77] Where a national bank is placed in the hands of a receiver, the Federal law immediately becomes the law of

64. Painter v. Painter, 138 Cal. 231, 71 Pac. 90.

65. Hagerman v. Thomas [Neb.] 96 N. W. 631. Allegations showing the appointment of receivers by a court of competent jurisdiction and a qualification under said appointment are sufficient in a collateral action. Need not set out the application for the receiver and the bond. Adams v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 79 S. W. 79. Under Rev. St. 1895, art. 1265, a plea of receivership is not required to be supported by affidavit. Id.

66. Hagerman v. Thomas [Neb.] 96 N. W. 631.

67. Uncontradicted evidence showed the appointment of the receivers and the placing of the property under their control. Action was for injuries to servant of railroad in the hands of receivers. Adams v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 79 S. W. 79.

68. Adams v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 79 S. W. 79.

69. Cumberland Lumber Co. v. Clinton Hill L. & M. Co., 64 N. J. Eq. 517. Defenses to the payment of an assessment upon corporate stock are not generally defenses to an application for an order authorizing the receiver to order such assessment. That the company never became a corporation de jure or de facto, subscriptions canceled, statute of limitations, barred by decree of court. Id. Where the application of receiver of an insolvent corporation for an order allowing him to levy an assessment on the stock shows a case which entitles him to test the status of certain parties, who claim to be stockholders, by suit the assessment should be ordered, leaving the defenses of any stockholder or alleged stockholder to be settled by suit if necessary. Id.

70. Land T. & Trust Co. v. Asphalt Co., 121 Fed. 587.

71. General Elec. Co. v. Sire, 88 App. Div. [N. Y.] 498.

72. In re Receivership of New Iberia Cotton Mill Co., 109 La. 875.

73. As a stockholder in the debtor corporation. In re Receivership of New Iberia Cotton Mill Co., 109 La. 875.

74. Security S. & T. Co. v. Goble, N. & P. R. Co. [Or.] 74 Pac. 919.

75. Hampton v. Norfolk & W. R. Co. [C. C. A.] 127 Fed. 662.

76. Roberts v. Murray, 40 Misc. [N. Y.] 339.

77. Creditor had realized on collateral. Held, dividends will be computed on unpaid balance. State Nat. Bank v. Esterly, 69 Ohio St. 24, 68 N. E. 582.

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the distribution of its assets.[78] One may become estopped from demanding the resettling of the accounts of the receiver.[79] Separate findings are not necessary on the final settlement of the accounts.[80] The report and exceptions stand as complaint and answer of the parties.[81] The filing of a supplemental report will not operate to vacate the original report so as to prevent its consideration on appeal under exceptions taken thereto.[82] An order of discharge and distribution is binding on all creditors,[83] and if without reservation as to existing claims, releases both the receiver and the property.[84]

§ 6. *Compensation of receivers.*[85]—In the absence of statute fixing the receiver's compensation, its allowance is within the court's discretion,[86] and after ex parte allowance, may reduce the amount.[87] In fixing compensation, consideration may be given only as to the value of the services to the business,[88] and in the absence of an appraisement, the sale price will be taken as the value of the property.[89] The court may grant extra allowances for extraordinary services.[90] A receiver is entitled to reasonable compensation,[91] to be recompensed for expenses necessarily incurred in the performance of his duties,[92] prior to the time when he ought to have been discharged, but is entitled to nothing after that date.[93] The receiver may waive his right to compensation.[94] Orders not allowing compensation except upon certain conditions will be construed strictly,[95] and insuffi-

78. To the exclusion of a state law. First Nat. Bank v. Selden [C. C. A.] 120 Fed. 212.

79. Attorney general knowingly allowed receiver's reports to be confirmed, then after the filing of his final account sought to question the correctness of his intermediary reports. Held that the policy owners could not have them set aside, though they had no notice of the confirmation proceedings. People v. U. S. Mut. Acc. Ass'n, 88 App. Div. [N. Y.] 597.

80. The order is sufficient. Rochat v. Gee, 137 Cal. 497, 70 Pac. 478.

81, 82. Johnson v. Cent. Trust Co., 159 Ind. 605, 65 N. E. 1028.

83. Ferguson v. Toledo, A. A. & N. M. R. Co., 85 App. Div. [N. Y.] 352.

84. Johnson v. Cent. Trust Co., 159 Ind. 605, 65 N. E. 1028.

85. See, also, ante, § 4. Debts created by receiver and expenses of administration.

86. First Nat. Bank v. Or. Paper Co., 42 Or. 398, 71 Pac. 144, 971. Allowance of 10 per cent on $26,000 disbursements made during 18 months held proper. Culver v. Allen Medical & Surgical Ass'n, 206 Ill. 40, 69 N. E. 53. Compensation of three and one-half per cent held sufficient. Silvers v. Merchants' & M. S. F. & B. Ass'n [N. J. Eq.] 56 Atl. 294. Where a receiver was in actual possession of property for 5 days and free to act as receiver for 15 days, an allowance of $200,000 is excessive. Forrester v. Boston & M. C. C. & S. Min. Co. [Mont.] 76 Pac. 2. Acts of violence against a receiver do not justify excessive fees. Id. Applies to receiver in winding up partnership affairs. Slater v. Slater, 78 App. Div. [N. Y.] 449.

87. In re Angell, 131 Mich. 345, 91 N. W. 611.

88. Stearns Paint Mfg. Co. v. Comstock, 121 Iowa, 430, 96 N. W. 869.

89. First Nat. Bank v. Or. Paper Co., 42 Or. 398, 71 Pac. 144, 971.

90. The statute fixing compensation does not prevent such allowance. Spears v. Thomas, 24 Ky. L. R. 1154, 70 S. W. 1060; In re Angell, 131 Mich. 345, 91 N. W. 611.

91. Forrester v. Boston & M. C. C. & S. Min. Co. [Mont.] 76 Pac. 2.

92. Costs on appeal. Cumberland Lumber Co. v. Clinton Hill Lumber Co., 64 N. J. Eq. 521; Forrester v. Boston & M. C. C. & S. Min. Co. [Mont.] 76 Pac. 2. The receiver of an insolvent corporation is entitled to have expenses incurred in suits, brought under the direction of the court appointing him, included in an assessment against the stockholders, even though the persons to whom the costs of such suit were paid were stockholders. Cumberland Lumber Co. v. Clinton Hill Lumber Co., 64 N. J. Eq. 521. In addition to such costs, a proper allowance for counsel and receiver's fees should be allowed, including an allowance for the probable litigation in prosecuting the assessment. Id.

93. Forrester v. Boston & M. C. C. & S. Min. Co. [Mont.] 76 Pac. 2.

94. As where a creditor agreed on his being appointed that he would act without compensation, and the creditors relying thereon consented to his appointment. The appointee cannot claim compensation on the ground that the duties were more onerous than he expected. Polk v. Johnson [Ind. App.] 65 N. E. 536. A receiver in a foreign corporation, having been compelled to substitute the corporation as nominal plaintiff, in an action commenced by him filed an intervening petition as trustee, reciting that in that capacity he had become liable for the expenses of the suits and praying that it be ordered that any recovery should inure to his benefit. Held, that he might abandon his petition in intervention and he did so by taking a final decree in favor of the corporation. East Tenn. Land Co. v. Leeson [Mass.] 69 N. E. 351.

95. Compensation only in case mine paid, did not operate mine but performed services in protecting same, held entitled to compensation. Joplin Supply Co. v. Brennerman, 99 Mo. App. 657, 74 S. W. 405.

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ciency and neglect of duty will cause a forfeiture.[96] Leave of court is necessary to allow receivers to retain lien compensation from the funds as a prior or preferred claim.[97] An appeal lies from a judgment fixing the compensation of a receiver,[98] and on appeal, the action of the court below is treated as presumptively correct.[99]

§ 7. *Liabilities and actions on receivership bonds.*—The discharge of receivers by the court under whose appointment they acted relieves them from personal liability for injuries sustained by reason of their negligent managing of the property.[1] The statutory requirements to fix the surety's liability must be followed.[2]

§ 8. *Foreign and ancillary receivers.*—A foreign receiver is not entitled to control domestic property of the insolvent as against domestic creditors,[3] and the latter are entitled to payment by the ancillary appointee before surrender to the foreign appointee.[4]

A receiver is permitted to sue in foreign jurisdictions only as a matter of comity, and where his rights will not conflict with domestic creditors;[5] but if he is not vested with any title, he cannot sue at law without the state of appointment,[6] nor in his own name.[7] The receiver of a national bank has a sufficient title to maintain action in the state courts in his own name.[8] A receiver appointed by a Federal circuit court may sue to recover assets regardless of the citizenship of the defendants or that the property was in another district.[9]

In the Federal courts ancillary jurisdiction will be exercised to assist in carrying out the purposes of the court of the domicile,[10] but such court will not make an ex parte ancillary appointment.[11]

RECEIVING STOLEN GOODS.

§ 1. Nature and Elements; Other Crimes Distinguished (1480).
§ 2. Indictment and Prosecution (1481).

§ 1. *Nature and elements; other crimes distinguished.*—To constitute this offense, four elements must exist. The property must be received;[12] it must at the time be stolen property;[13] the receiver must know that it is stolen property;[14] and his intent in receiving it must be fraudulent.[15]

96. Pangburn v. American V. S. & L. Co., 205 Pa. 93.
97. Nessler v. Industrial Land Development Co. [N. J. Eq.] 56 Atl. 711.
98. Forrester v. Boston & M. C. C. & S. Min. Co. [Mont.] 76 Pac. 2. In case of error, the court of appeals may fix the compensation. Allowance reduced. Spears v. Thomas, 24 Ky. L. R. 1154, 70 S. W. 1060.
99. Construing § 379, subsec. 4 of the Code, and Pub. Laws 1901, p. 36, c. 2, § 88. Graham v. Carr, 133 N. C. 449.
1. Fireman injured on railroad while in hands of receiver. Tobin v. Cent. Vt. R. Co. [Mass.] 70 N. E. 431.
2. Under N. Y. Code, § 715, notice of the receiver's accounting is a condition precedent to action on the bond. Stratton v. City Trust, S. D. & S. Co., 86 App. Div. [N. Y.] 551.
3. Frowert v. Blank, 205 Pa. 299. That other domestic creditors not parties would be benefited by a recovery by the receiver is not an objection against enforcement of the attachment. Lackmann v. Supreme Council of Order of Chosen Friends [Cal.] 75 Pac. 583.
4. Frowert v. Blank, 205 Pa. 299.
5. Lewis v. American Naval Stores Co., 119 Fed. 391. A foreign receiver may sue to recover a debt due from one not a resident of the state of appointment. Hallam v. Ashford, 24 Ky. L. R. 870, 70 S. W. 197.
6. As a suit to enforce stockholders' statutory liability. Hilliker v. Hale [C. C. A.] 117 Fed. 220.
7. King v. Cochran [Vt.] 56 Atl. 667.
8. Fish v. Olin [Vt.] 56 Atl. 533.
9. Bottom v. Nat. Ry. Bldg. & L. Ass'n, 123 Fed. 744.
10. Conklin v. U. S. Shipbuilding Co., 123 Fed. 913; Lewis v. American Naval Stores Co., 119 Fed. 391. Appointment ancillary to bankruptcy proceedings, see Bankruptcy, 1 Curr. Law, p. 311.
11. In bankruptcy proceedings and particularly when the property is in possession of a receiver appointed by a state court. Ross, etc., Foundry Co. v. Southern C. & F. Co., 124 Fed. 403.
12. Permitting stolen money to be deposited to one's credit in bank by the thief is a receiving thereof. People v. Ammon, 92 App. Div. [N. Y.] 205.
13. State v. Freedman, 3 Pen. [Del.] 403; Bismarck v. State [Tex. Cr. App.] 73 S. W. 965.
14. State v. Freedman, 3 Pen. [Del.] 403; Weinberg v. People, 208 Ill. 15, 69 N. E. 936; Ter. v. Claypool [N. M.] 71 Pac. 463; Pat v.

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A receiver is not indictable as an accessory after the fact as he received the goods, not the thief, and to render one an accessory after the fact the aid must be rendered to the thief personally.[16]

§ 2. *Indictment and prosecution.*—The indictment must correctly describe the property received,[17] and its ownership,[18] but need not state from whom it was received,[19] though where it does state the name of the person from whom received, it is material and must be proved.[20] An indictment charging the receiving of stolen property on the 22nd of the month is supported by evidence that it was received on the 19th.[21]

In order to convict of receiving stolen goods, it is necessary to prove that the property was stolen as laid in the indictment,[22] that it is the property of the person named in the indictment as owner,[23] that defendant knew at the time he received it that it was stolen,[24] and that he received it with fraudulent intent.[25] Knowledge that the property was stolen may be inferred from circumstances,[26] but the mere possession of the property is not sufficient to establish such knowledge though it may be considered with the other evidence,[27] and a conviction is not supported by a showing that defendant received the property not knowing its character, and on being informed of the larceny, secreted it.[28]

No presumption of fraudulent intent arises from the receipt of stolen goods with knowledge of their being stolen.[29]

Acts and declarations of the thief made at the time of, and in connection with, and tending to prove, the larceny are admissible,[30] and testimony tending to prove a conspiracy by which it was planned that another should steal the property and defendant receive it is admissible where the testimony tends to show that the particular property charged in the indictment was received by defendant in pursuance of the plan.[31]

Evidence of other receivings closely related in time from one of the parties connected with the delivery in the offence charged may be received for the purpose of proving the scienter,[32] notwithstanding the offer of direct evidence also to prove knowledge.[33]

State, 116 Ga. 92. The knowledge that the property was stolen need not be direct; it is sufficient if the circumstances cause defendant to so believe. State v. Druxinman [Wash.] 75 Pac. 814.

15. Goldsberry v. State [Neb.] 92 N. W. 906; Pat v. State, 116 Ga. 92; Bismarck v. State [Tex. Cr. App.] 73 S. W. 965. Concealment after learning of the larceny is not the offense. Pat v. State, 116 Ga. 92.

16. Clark & M. Crimes, p. 875; Whorley v. State [Fla.] 33 So. 849.

17. Brown v. State, 116 Ga. 559; Leonard v. State, 116 Ga. 559. Where a part only of the stolen property was received, that part must be described and distinguished from the whole amount stolen. Gabriel v. State [Fla.] 32 So. 779. An information alleging that defendant received certain described "stolen property" knowing it to be such is sufficient. State v. Druxinman [Wash.] 75 Pac. 814.

18. An averment that the goods were the property of "Butler Bros." is insufficient. State v. Pollock [Mo. App.] 79 S. W. 980.

19. The indictment in New Mexico for purchasing stolen live stock need not state from whom the animals were purchased; it is sufficient if it states they were bought from a person or persons not having authority to sell or dispose of them. Ter. v. Claypool [N. M.] 71 Pac. 463.

Henningberg v. State [Tex. Cr. App.] 72 S. W. 175.

21, 22, 23. State v. Freedman, 3 Pen. [Del.] 403.

24. State v. Freedman, 3 Pen. [Del.] 403; Weinberg v. People, 208 Ill. 15, 69 N. E. 936; Pat v. State, 116 Ga. 92.

25. Goldsberry v. State [Neb.] 92 N. W. 906; Pat v. State, 116 Ga. 92.

26. State v. Freedman, 3 Pen. [Del.] 403; Weinberg v. People, 208 Ill. 15, 69 N. E. 936. Evidence of scienter held sufficient. People v. Ammon, 92 App. Div. [N. Y.] 205.

27. State v. Freedman, 3 Pen. [Del.] 403; Ter. v. Claypool [N. M.] 71 Pac. 463; State v. Adams, 133 N. C. 667.

28. Pat v. State, 116 Ga. 92.

29. Goldsberry v. State [Neb.] 92 N. W 906.

30. Anthony v. State [Fla.] 32 So. 818.

31. Anthony v. State [Fla.] 32 So. 818; Ter. v. Claypool [N. M.] 71 Pac. 463.

32. Goldsberry v. State [Neb.] 92 N. W. 906. Contra, Bismarck v. State [Tex. Cr. App.] 73 S. W. 965.

33. Goldsberry v. State [Neb.] 92 N. W. 906.

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A bill of sale of live stock claimed to have been sold and purchased will be received in evidence to explain defendant's possession, though not properly witnessed and acknowledged.[34]

A conviction is not supported by evidence that defendant's wife received the property in his absence, there being no showing that he authorized her.[35] A verdict of guilty must either find guilt "as charged" or must state all the elements of the offense.[36]

RECORDS.

§ 1. What Are Records (1482).
§ 2. Keeping and Custody (1482).
§ 3. Publicity and Access (1482).
§ 4. Proof of Records (1483).
§ 5. Crimes Relating to Records (1483).

§ 1. *What are records.*—Record, in its broadest sense, is a memorial, public or private, of what has been done. It is ordinarily applied to public records only, in which sense it is a written memorial made by a public officer, judicial, legislative, or executive, authorized by law to perform that function and intended to serve as evidence of something written, said or done.[37] Papers become of record when they are filed.[38] A record may be valid, though on detached pages.[39] The report of unauthorized proceedings cannot be a record.[40] The correction of judgment records has been treated in an earlier article.[41]

§ 2. *Keeping and custody.*—A public official is the custodian of the records of his office, and is entitled to possession of them.[42] In bankruptcy, the custody of all papers after reference is in the referee.[43] The mayor of a city is in a sense custodian of its records.[44] Extra-official searches are not a public service, hence fees thereby earned are not public moneys.[45]

A rule against erasures has been limited to material ones.[46]

§ 3. *Publicity and access.*—A taxpaying citizen is entitled to examine the public records,[47] and cannot be denied this right for insufficient reasons[48] or be-

34. Ter. v. Claypool [N. M.] 71 Pac. 463.
35. Henningberg v. State [Tex. Cr. App.] 72 S. W. 176.
36. Verdict "guilty of receiving stolen goods" insufficient. State v. Pollock [Mo. App.] 79 S. W. 980.
37. Photographs and measurements of a criminal made and recorded as provided by statute constitute public records and remain so even though he may be subsequently acquitted. Hence, they cannot be surrendered to the one accused. In re Molineux, 177 N. Y. 395, 69 N. E. 727.
38. Defendant handed requests to charge to the court which were refused. The court then asked plaintiff's attorney if he desired to read them, which was objected to by defendant, who handed the requests to the court who gave them to the clerk to file. Held, that when filed they became records subject to plaintiff's inspection. Houston & T. C. R. Co. v. Turner [Tex. Civ. App.] 78 S. W. 712.
39. A survey recorded on two separate pages shown to be connected together as the recorded survey made by the surveyor held admissible in evidence under a statute providing for the record of surveys. Sherrard v. Cudney [Mich.] 96 N. W. 15.
40. The report of commissioners appointed by an inferior court to determine a county line is not admissible as evidence where there was no authority to make it and it was not under oath. Daniel v. Bailey, 118 Ga. 408.
41. See Judgments, 2 Curr. Law, p. 586.
42. The appointee of common council of a city to the office of chamberlain is entitled to the custody of records of the office as against present incumbent holding under an unconstitutional law. In re Haase, 41 Misc. [N. Y.] 114.
43. McLanahan v. Blackwell [Ga.] 45 S. E. 785.
44. The mayor of a city is custodian of its records to a sufficient extent to make it proper that a writ of mandamus to enforce a taxpayer's right to examine the books be directed to him. State v. Williams, 110 Tenn. 549, 75 S. W. 948.
45. Searching the public records for and on account of third parties is not an official duty of the register of deeds, and he is not required to account to the county for money received for such services. State v. Holm [Neb.] 97 N. W. 821.
46. A rule which provides that no erasures are to be made on any of the records of the police department, but red ink is to be used, relates only to material matters entered and not mere incidental errors in making the original record (an erasure of an entry made on the wrong line). People v. Greene, 89 App. Div. [N. Y.] 296.
47. May do so to learn facts about expenditure of municipal funds. State v. Williams, 110 Tenn. 549, 75 S. W. 948.
48. That a person is politically hostile to the administration is no excuse for refusing him access to the public records of a mu-

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cause they are officially inspected.[49] Discretion conferred by the legislature as to publication of reports of decisions cannot be judicially controlled.[50]

§ 4. *Proof of records.*—Records of another court cannot be judicially noticed.[51] The records themselves are the best evidence, but when they cannot be had, they should be proved by their legal custodian,[52] and he is the proper officer to certify to the genuineness of a court paper[53] or transcript,[54] where, by virtue of a statute a transcript is admissible.[55] A record cannot be proved by a transcript not authenticated as required by law.[56] An established copy of a lost record has all the force of the original.[57]

Journals of the legislature when competent as evidence import absolute verity and cannot be explained or altered by parol.[58]

§ 5. *Crimes relating to records.*—The stealing of records is made larceny in New York.[59] It is so, though bribery also be employed.[60] Such also constitutes unlawfully removing files.[61]

nicipality. State v. Williams, 110 Tenn. 549, 75 S. W. 948.

49. A provision of a city charter that the custodian of records shall when requested submit his books to certain officials for inspection is not exclusive so as to preclude an inspection by a person not designated in the charter. State v. Williams, 110 Tenn. 549, 75 S. W. 948. The right of a grand jury to examine books of a municipality is not exclusive so as to prevent their examination by a private individual. Id.

NOTE. Right of access to records.—At common law every person or his agent may inspect public records whether executive, legislative, or judicial. He must however have a litigable interest to which the record and the information therein may be pertinent and this interest need not be wholly private but may be one which he is entitled to assert in right of the public. Re Caswell [R. I.] 27 L. R. A. 82, with extensive note.

By reason of statutes regulating examination of public records, this rule is no longer of universal application. See Re Chambers, 44 F. 786; State v. Rachac, 37 Minn. 372; Hudson v. Eichstaedt, 60 Wis. 538; Lum v. McCarty, 39 N. J. L. 287; Newton v. Fisher, 98 N. C. 20. In Re Caswell, 27 L. R. A. 82, the court advising the clerk directed that access to the record of a divorce proceeding be denied to a newspaper which asked it for the purpose "of publication or otherwise." The reason was the public policy against dissemination of scandalous or corrupting publications.

50. The discretion vested in the commission relative to the publication of supreme court reports is not subject to control by the courts. Gillette v. Peabody [Colo. App.] 75 Pac. 18.

51. A circuit court in chancery will not take judicial notice of an old record of judgment in a probate court in determining whether an action on an administrator's bond is barred by the statute of limitations. Hall v. Cole [Ark] 76 S. W. 1076.

52. Records, where available, are the only competent evidence of their contents and when not available their contents should be proved by the legal custodian. Sykes v. Beck [N. D.] 96 N. W. 844. The absence from the county office of records or the absence from the records of material entries should be proved by the testimony of the official in charge, and not by a witness not connected with the office. Fisher v. Betts [N. D.] 96 N. W. 132.

53. McLanahan v. Blackwell [Ga.] 45 S. E. 785. Records in bankruptcy may be certified by the clerk of referee. Id.

54. In Florida, copies of records are admissible in all cases in that state when authenticated by the custodian and the seal of the court annexed. Hoodless v. Jernigan [Fla.] 35 So. 656.

55. Court records from another state not authenticated according to law are not admissible in evidence. A. Lehmann & Co. v. Rivers, 110 La. 1079. Where certified copies of records are admissible, certified copies of parts of the record are admissible. Brummer v. Galveston [Tex. Civ. App.] 77 S. W. 239. A certified copy of a certified copy of record held admissible where a statute provided that a certified copy would be admissible. Trevey v. Lowrie [Tex. Civ. App.] 78 S. W. 18. In Texas, when it is shown by affidavit that certain records are lost, a certified copy is admissible (Williamson v. Work [Tex. Civ. App.] 77 S. W. 266); but they must be proved by certified copy or substantial copies and not by testimony of the county clerk (Strohmeyer v. Wing [Tex. Civ. App.] 77 S. W. 977).

56. The clerk of court and presiding justice did not certify the copies as required by statute. They were held inadmissible as evidence. Taylor v. McKee, 118 Ga. 874.

57. McLanahan v. Blackwell [Ga.] 45 S. E. 785.

58. Town of Wilson v. Markley, 133 N. C. 616. The public record of a private law is evidence of its terms and the journal of the legislature can be resorted to for no other purpose than to ascertain if it was constitutionally enacted. Town of Wilson v. Markley, 133 N. C. 616.

59. Attempting to steal public records is an attempt to commit larceny. People v. Mills, 41 Misc. [N. Y.] 195.

60. Under a statute making it larceny to unlawfully obtain public records, one who obtains possession of them by bribery is guilty of the crime. People v. Mills, 91 App. Div. [N. Y.] 331.

61. Bribing a representative of the district attorney's office to secure possession of indictments violates the statute prohibiting the unlawful removal of a paper filed in a public office by authority of law. People v. Mills, 91 App. Div. [N. Y.] 331.

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REFERENCE.[62]

§ 1. Definitions and Distinctions, Master and Referee, Referee and Umpire or Arbitrator (1484).
§ 2. Occasion for Reference (1484).
§ 3. Time and Stage of Proceedings (1485).
§ 4. Motion and Order for Reference, and Stipulations or Consents on Voluntary Reference (1485).
§ 5. Selection and Qualifications of the Referee; His Oath and Induction into Office (1485).
§ 6. General Scope of Reference and Powers of Referees or Masters (1485).
§ 7. Appearance Before Referee, Hearing and Adjournments, Trial and Practice Thereon (1486).
§ 8. The Report, Its Form, Requisites, and Contents, and Return and Filing (1486).
§ 9. Revision of Report Before the Court (1488)—Objections and Exceptions (1488).
§ 10. Decree or Judgment on the Report (1489).
§ 11. Appellate Review (1490).
§ 12. Compensation, Fees, and Costs (1491).

§ 1. *Definitions and distinctions, master and referee, referee and umpire or arbitrator.*—The ordinary designation in actions at law is that of referee or auditor, while in proceedings in equity it is that of master.[63]

§ 2. *Occasion for reference.*—The appointment of a receiver and of special masters is a matter within the discretion of the court.[64]

Statutory reference as under Codes.—The ordering of a reference is often authorized by statute when the examination of a long[65] or "mutual"[66] account is necessary,[67] or where the issues are numerous and complex,[68] or where a claim against a decedent's estate is involved.[69]

A requested reference should not be allowed where the question involved is not of supreme importance to the parties, and the court is not much in doubt,[70] but collateral or provisional issues may be referred.[71] Whether or not a case may be

62. See Masters in Chancery, 2 Curr. Law, p. 867; United States Marshals and Commissioners, and also for reference in particular proceedings such topics as Garnishment, 2 Curr. Law, p. 130, Supplementary Proceedings, etc.

63. It is of little practical consequence whether the official designation be that of commissioner, examiner, referee, auditor, accountant, or assessor. Fenno v. Primrose [C. C. A.] 119 Fed. 801, 804. Commissioners appointed to determine amount of compensation to be paid by commonwealth for water supplied to a public building, are referees and not masters in chancery. Selectmen of Danvers v. Com., 184 Mass. 502, 69 N. E. 320.

64. Such appointment will not be reviewed unless there is a gross abuse of discretion. Briggs v. Neal [C. C. A.] 120 Fed. 224.

65. The court has the power to order a compulsory reference where the case involves the examination of a long account. Sartorius v. Gottlieb, 80 App. Div. [N. Y.] 112. A long account is one where so many separate and distinct items of account are to be litigated on trial, that a jury cannot keep the evidence in mind in regard to each of the items and give it the proper weight and application when they retire to deliberate on their verdict. Id. Examination of the books and by-laws of an association, held, not the examination of a long account. Kelly v. Oksall [S. D.] 95 N. W. 913. An account having 34 items on the debit side, and 12 material items on the credit side, held, not a long account. Sartorius v. Gottlieb, 80 App. Div. [N. Y.] 112. Where the only facts in the account that were disputed were whether or not 21 checks were forged. Held, not a long account. Kenneth Inv. Co. v. Nat. Bank of Republic, 96 Mo. App. 125, 70 S. W. 173. A suit by stockbrokers on an account stated, in which defendant pleaded fraud in the account and a counterclaim for moneys advanced for margins, and prayed an accounting and judgment for what might be found due him. Held, a long account. Ames v. French, 83 App. Div. [N. Y.] 452. Suit for attorney's services and disbursements, account contained 45 items of disbursements, 40 items for services, and credit for sums paid at 4 different times. Held, a long account. Lewis v. Snooks, 84 N. Y. Supp. 634.

66. An account may be "mutual" within a statute though it is claimed that one part is settled. Smith v. Scully, 66 Kan. 139, 71 Pac. 249.

67. To authorize a compulsory reference because a long account is involved, it must appear that an examination thereof is necessary. Necessity appeared on trial. Malone v. Sts. Peter & Paul's Church, 172 N. Y. 269, 64 N. E. 961. See, also, Jury, 2 Curr. Law, p. 633. Motion on pleadings to refer. Ewart v. Kass [S. D.] 95 N. W. 915.

68. A circuit court of the United States has this inherent power. Fenno v. Primrose [C. C. A.] 119 Fed. 801. Conflicting affidavits, reference improper. Weiss v. Schleimer, 86 App. Div. [N. Y.] 611.

69. Code Civ. Proc. N. Y. § 2718, authorizing a reference to determine disputed claims against a decedent's estate, includes the case of an alleged gift causa mortis, even though there is no other property. Dickinson v. Hoes, 84 N. Y. Supp. 152.

70. Question of residence, change of venue. Bischoff v. Bischoff, 88 App. Div. [N. Y.] 126.

71. It is proper to order a reference to take testimony as to an alleged violation of an injunction (People v. Marr, 84 N. Y. Supp. 965) and also to determine the compensation

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referred, over the objections of one or both of the parties to a suit, must be determined in each case by the pleadings and the issues raised by the parties themselves.[72] A counterclaim cannot operate to make a case referable by compulsion which otherwise would not be thus referable.[73]

§ 3. *Time and stage of proceedings.*—Where statutes fix the time or stage of proceedings at which a reference should be ordered they of course govern.[74]

Facts or independent issues upon which the request for a reference is based should first be proved, then, if necessary, a reference will be ordered.[75] A referee should not be appointed to take and state accounts, over the objection of one of the parties, until the party objecting has had an opportunity to accept the other parties' statement of accounts.[76]

§ 4. *Motion and order for reference, and stipulations or consents on voluntary reference.*—A reference may be ordered by a judge in court or at chambers.[77]

The court, upon a practice motion, has no power to order a reference to hear and determine, but can only direct a referee to take testimony and report, with his opinion thereon.[78] An objection to a reference should be specific.[79]

A consent to an order of reference includes a consent to the proper exercise of all the powers possessed by the referee.[80]

§ 5. *Selection and qualifications of the referee; his oath and induction into office. Removals and substitutions.*—Public policy requires, on the part of referees, the avoidance of even the appearance of such relations as might bias the judgment consciously or unconsciously or swerve in the slightest degree their action.[81]

§ 6. *General scope of reference and powers of referees or masters.*[82]—A referee can do no more than the order of reference prescribes.[83] If he does the court

of attorneys (Kane v. Rose, 87 App. Div. [N. Y.] 101; Cohn v. Polstein, 41 Misc. [N. Y.] 431).

72. Kenneth Inv. Co. v. Nat. Bank of Republic, 96 Mo. App. 125, 70 S. W. 173.

73. Complaint set out a cause of action on contract, this was put in issue by answer, which also set up a counterclaim requiring the examination of a long account. Held, error to order a reference of all the issues upon the motion of the plaintiff against the objection of the defendant. Kennedy v. Horikoshi, 82 App. Div. [N. Y.] 415.

74. Under Clark's Code N. C. § 421, fixing the time at which reference may be ordered, a reference cannot be ordered after ruling on demurrer before further pleadings are filed, as the cause must first be at issue. Penn Lumber Co. v. McPherson, 133 N. C. 287. Under Ohio Rev. St. §§ 5222, 6186, 6407, upon an appeal being taken to the court of common pleas, that court can refer the testimony taken and report given by a special commissioner under the authority of the probate court to a new commissioner appointed by the court for that purpose, and this reference in this state is held according to the Code of Civil Procedure. James v. West, 67 Ohio St. 28, 65 N. E. 156.

75. Issues raised by pleading should first be tried by jury, then, if accounting becomes necessary, a reference will be ordered. Malone v. Sts. Peter & Paul's Church, 172 N. Y. 269, 64 N. E. 961. In a suit under an alleged contract, by which plaintiff was to receive 1-3 of the profits for his services, held, contract should first be established in court, then court should either take the accounting or appoint a referee to do so. Weldon v. Brown, 84 App. Div. [N. Y.] 482.

76. Dissolution of partnership. Diehl v. Dreyer, 84 App. Div. [N. Y.] 247.

77. Reference ordered at chambers, case involved examination of long account. Montague v. Best, 65 S. C. 455.

78. A reference to ascertain an attorney's lien upon a motion for substitution of attorney in a pending action is not a reference to hear and determine the same, but to take evidence therein and report to the court; and hence the findings of the referee are not binding on the court. Frost v. Reinach, 40 Misc. [N. Y.] 412.

79. When an equitable counterclaim is pleaded to a purely legal action it is not error to overrule a general objection to a reference. Brown v. Keith [Neb.] 96 N. W. 59.

80. Power of amendment of pleadings. Perry v. Levenson, 82 App. Div. [N. Y.] 94.

81. Referee before report was made was appointed referee in cause in which defendant's attorneys were represented and by the advice of defendant's attorneys. Held, report would be set aside, even in absence of any evidence of influence, etc. Cronon v. Avery, 42 Misc. [N. Y.] 1.

82. Under the Constitution of Wis. art. 7, § 23, court commissioners may be vested with "such judicial powers" as are "prescribed by law" not exceeding the powers "of a judge of a circuit court at chambers," by § 2815, Rev. St. 1898, such power is given, but his orders are subject however to review by the court. Longstaff v. State [Wis.] 97 N. W. 900.

83. Order prescribed that the referee "take

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may disregard this part and proceed with the part ordered as a basis.[84] A referee is not bound to follow findings of fact by the court.[85]

§ 7. *Appearance before referee, hearing and adjournments, trial and practice thereon.*—Where a reference is ordered on the pleadings, the first day for hearing the reference is to be regarded as the beginning of the trial.[86]

A referee has full authority to make such amendments as may be necessary to make the record exhibit the facts,[87] but the amendment must not substantially change the cause of action or embrace a new one.[88] He cannot strike out an amendment to pleadings allowed by the court before the cause was referred.[89]

On the trial before a referee, who is only an aid to the court, the rules of evidence are not adhered to as strictly as in a common-law action tried by a jury.[90]

Where a referee is empowered to hear, try and determine the whole action, it is not error for such referee to proceed with an accounting required without entering an interlocutory judgment on trial of the issues.[91]

Where it is necessary to continue a pending reference a notation should be made on the trial docket.[92]

§ 8. *The report, its form, requisites, and contents, and return and filing.*—The report of the referees must show that all qualifying acted, or it will be remanded for amendment.[93] The findings of a referee are limited by the terms of the order of appointment.[94] It must be based on the evidence,[95] and must state

all the testimony and state the account between the parties." Held, did not authorize him to determine any part of the issue. Parcher v. Dunbar, 118 Wis. 401, 95 N. W. 370. The order directed the referee to take proof and report the unpaid and outstanding debts and liabilities and obligations of the firm, and the value of certain certificates. Held, the referee did not err in refusing to consider the accounts of the partners and the drawings of money from the firm by the partners. Sternbach v. Friedman, 75 App. Div. [N. Y.] 418. The referee on a reference to ascertain the amount of an attorney's lien cannot pass on the competency of the evidence, but must take what is offered, leaving its competency to the court. Frost v. Reinach, 40 Misc. [N. Y.] 412.

84. Parcher v. Dunbar, 118 Wis. 401, 95 N. W. 370.

85. Suit for the construction of a will, reference for an account of advancements. Lee v. Baird [N. C.] 46 S. E. 955.

86. Motion for amendment of complaint and the amendment is made at the trial though the motion is not decided till another day of the hearing, where the trial is to go on from day to day. Barnum v. Williams, 86 N. Y. Supp. 821.

87. An amendment of sheriff's return so as to show that the defendant therein did not reside in the county. Camp v. First Nat. Bank [Fla.] 38 So. 241.

88. Perry v. Levenson, 82 App. Div. [N. Y.] 94.

89. Rusk v. Hill, 117 Ga. 722.

90. A referee appointed in certiorari to take testimony as to the valuation of certain assessed property is only an aid to the court. People v. Rushford, 81 App. Div. [N. Y.] 298.

It is within the discretion of an auditor to allow leading questions to be propounded to a witness whenever the ends of justice may thus be subserved. Rusk v. Hill, 117 Ga. 722.

In a second trial, on a hearing before a referee, a party is entitled to introduce the record of the original trial, showing the other parties' testimony as to credits claimed and allowed. Sternbach v. Friedman, 75 App. Div. [N. Y.] 418. Where an accounting of a partnership engaged in the distilling of whisky was referred to a commissioner, the latter was entitled to accept an agreement of counsel that the cost of manufacturing whisky by the partnership was a certain price per gallon. McBrayer v. Hanks' Ex'rs, 24 Ky. L. R. 1699, 72 S. W. 2.

The right to reopen the case on motion after all the evidence has been closed, and to receive evidence in chief, is a matter for the discretion of the referee. Ocorr & R. Co. v. Little Falls, 77 App. Div. [N. Y.] 592.

Additional testimony ought not to be taken when the report of the special referee is before the court to be heard upon exceptions thereto. The proper way is to recommit the report to the referee for further testimony. Halk v. Stoddard [S. C.] 45 S. E. 140.

91. Young v. Valentine, 78 App. Div. [N. Y.] 633.

92. If the continuance is ordered but, through inadvertence, no notation is made on the trial docket, an order may be entered nunc pro tunc. Creedon v. Patrick [Neb.] 91 N. W. 872.

93. Three qualified, two signed, remanded for amendment. Hawkins v. Hall [Del.] 55 Atl. 4.

94. Where a disputed claim against decedent's estate is referred, the surrogate has no authority to render against the claimant an affirmative judgment on a counterclaim in favor of the estate. In re Wilmont's Estate. 39 Misc. [N. Y.] 686. The referee on a reference to ascertain an attorney's lien cannot award costs to the attorney against his client. Frost v. Reinach, 40 Misc. [N. Y.] 412.

Where referees are appointed to make an

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findings of fact, not conclusions of law,[96] as to all facts necessary to sustain a judgment.[97] Filing report out of time is an irregularity only.[98] After a referee's report has been taken up and filed, the referee has no further jurisdiction for the purpose of deciding any issue involved in the action,[99] but though findings exceed the scope of the reference it may be valid if no objection be made.[1]

award a full statement in the award of the principles of law on which the referees proceeded is insufficient to submit to the court the correctness of these propositions, unless it can be held as a matter of law that the correctness of such propositions have been submitted by the referees to the court. Selectmen of Danvers v. Com., 184 Mass. 502, 69 N. E. 320.

Where a referee is appointed to determine the issues in an accounting, he can state the account between the parties without an interlocutory judgment that an account is necessary. Young v. Valentine, 177 N. Y. 347, 69 N. E. 643. Where it is ordered that plaintiff recover the damages which it had sustained owing to the use of certain presses by defendant over the profits which defendant could have made on other presses, held, the referee should determine what profits could have been made by defendant on any other machine. N. Y. Bank Note Co. v. Hamilton Bank Note E. & P. Co., 92 App. Div. [N. Y.] 427.

95. Action of conversion, referee's report stated that findings as to damages were based partly on the referee's "knowledge and experience and partly on the entire record." Held, reversible error. Radway v. Duffy, 79 App. Div. [N. Y.] 116.

96. Master and servant. Master's right to discharge for breach of duty. Auditor's finding that certain matters for which discipline marks were applied were not waived under Vermont Laws, and that, until the use of the marks, master, by continuing to employ the servant with knowledge of his delinquencies, waived the same, are mere conclusions of law. Daniels v. Boston & M. R. Co., 184 Mass. 337, 68 N. E. 337.

A finding in divorce that plaintiff had been guilty of willful desertion is a conclusion of law. Fink v. Fink, 137 Cal. 559, 70 Pac. 628. A finding by a referee where the evidence is undisputed, though expressed as a finding of fact, is in effect a conclusion of law. Mt. Sinai Hospital v. Hyman, 92 App. Div. [N. Y.] 276.

Under the laws of North Carolina declaring it to be to the interest of wards that their lands should be rented publicly, a finding by a referee that the guardian rented the land of his wards privately, and that "the best interests of his wards did not require a public rental of their lands," held bad as a conclusion of law, the finding should have been as to whether such renting had resulted in injury to the wards, there being some evidence to that effect. Duffy v. Williams, 133 N. C. 195.

97. Issues under a complaint, counterclaim, and reply, were tried before a referee, his report containing no findings concerning or reference to the counterclaim, was held insufficient to sustain a judgment. La Grange v. Merritt, 84 N. Y. Supp. 1092.

It is competent for a referee, in ascertaining the facts of any case, to find what facts are proved to be true and to draw such conclusions from these facts as a jury might have drawn in discharging the same function. Action for rent, the case turning upon possession, the referee found as a fact from sufficient evidence that the defendant was in the constructive possession of the property. Held, referee's finding will not be disturbed. Feil v. John F. Betz & Son, 22 Pa. Super. Ct. 418.

Where an action was referred to commissioners to take an account between the parties, the commissioners properly allowed such claims as were undisputed, and rejected such claims as were disputed, with regard to which the pleader had the burden, and which were unsupported by proof. McBrayer v. Hanks' Ex'rs, 24 Ky. L. R. 1699, 72 S. W. 2.

98. However, the testimony must have been taken, and a decision reached on the questions submitted before the time expired. Creedon v. Patrick [Neb.] 91 N. W. 872. 90 Ohio Laws, p. 192, requiring reports of masters to be made within 90 days is directory only and retention after that period does not oust the jurisdiction. James v. West, 67 Ohio St. 28, 65 N. E. 156.

Objection to the filing of a report after the time designated in the order of appointment must be taken before, or at the time of filing a motion for a new trial, and before judgment is rendered on said report. Bradford v. Cline [Okl.] 72 Pac. 369.

A referee need not give notice of the filing of his report to a creditor of a corporation in process of dissolution, who has not appeared before said referee who has been appointed to state the account of the receiver. People v. American L. & T. Co., 87 App. Div. [N. Y.] 139. "When a case involving an inquiry into accounts is referred to an auditor as an ordinary step preliminary to the trial, on the filing of the auditor's report it is discretionary with the court to hear and settle the case either with or without the aid of a jury." Petition to enforce mechanic's lien, auditor allowed six notes on the claim, court referred to jury question as to whether or not notes were received and accepted in payment of claim, jury answered no. Court then refused to determine whether petitioners had not received benefit of notes and hence they should be allowed. Held error. Moore v. Jacobs, 182 Mass. 482, 65 N. E. 847.

99. Report directed sale of certain real estate, but said nothing as to manner or terms of sale. Held, referee had no power after filing report to include in the judgment a provision directing the property to be sold on certain credit terms. Shrady v. Van Kirk, 77 App. Div. [N. Y.] 261.

1. A report by an assessor of ultimate facts, where there has been no request to state evidence, to make rulings of law, or to find specific facts, and no exceptions to his report have been filed, said report will be confirmed. Action on guardian's bond, assessment of amount for which execution should issue. McKim v. Titus, 182 Mass. 393, 65 N. E. 806.

Where the decision of the referee is in

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§ 9. *Revision of report before the court. Objections and exceptions.*—Exceptions to be of any avail should be taken before the referee,[2] though the court may, in its discretion, permit the filing of exceptions to the report at any time before judgment,[3] and in some jurisdictions motion for new trial will reach it.[4] A referee's report which has not been excepted to is conclusive, and cannot be contradicted on trial.[5] If, upon proper exceptions, it reasonably appears that the referee's report is not sustained by sufficient evidence, or is against the evidence, it becomes the duty of the court to set aside such report. In general the findings do not become binding until they have received the approval of the court.[6] No exception need be taken in order to be heard in regard to a matter outside of the terms of the order of appointment, nor where the reference is simply to aid the conscience of the court.[7]

Exceptions must be clear and intelligible as to the ground of exception, or they will be referred back to the referee,[8] and should contain all facts and rulings

short form it is to be treated as a general verdict. Young v. Valentine, 177 N. Y. 347, 69 N. E. 643.

Where the report of a referee directs the sale of certain real estate, but is silent as to the methods or terms of sale, it will be presumed that only a cash sale was ordered. Shrady v. Van Kirk, 77 App. Div. [N. Y.] 261.

2. Auditor simply to report facts, no request to report evidence, report filed without evidence, two days later exceptions were taken. Held of no avail. Keith v. Marcus, 182 Mass. 320, 65 N. E. 421. Where a statute provides exceptions to the report of a referee within four term days, held, that where the report was filed on the day of adjournment, and defendant was given 30 days to file exceptions, and he filed them within 30 days, and before the first day of the next term, they were in time. Gibson v. Jenkins, 97 Mo. App. 27, 70 S. W. 1076.

An exception to the report of an auditor in an action for a partnership accounting, embodied in a pleading entitled "plaintiff's first amended supplemental petition," was not waived by the filing of another amended supplemental petition which did not include any exceptions to the auditor's report. Gresham v. Harcourt [Tex. Civ. App.] 75 S. W. 808.

3. Kerr v. Hicks, 131 N. C. 90. Former accounts of an administrator having been settled, final account filed and exceptions taken, and referred to a special commissioner, persons claiming to be creditors may, with consent of court, file exceptions to former accounts, and the court may refer such accounts and exceptions, together with the fact of there being creditors, to the special commissioner. James v. West, 67 Ohio St. 28, 65 N. E. 156.

4. Under Laws 1891, p. 232, c. 100, § 10, the remedy of a party dissatisfied with the referee's decision is a motion for a new trial. Neeley v. Roberts [S. D.] 95 N. W. 921.

5. Auditor's report attempted to be contradicted by county treasurer's report, no exceptions having been taken, auditor's report held conclusive. Harper v. Marion County [Tex. Civ. App.] 77 S. W. 1044; Weitnaur v. Weitnaur, 117 Iowa, 578, 91 N. W. 815; People v. American L. & T. Co., 87 App. Div. [N. Y.] 139. Under N. Y. Gen. Pract. Rule 30, report of referee to assess damages can only be reviewed by exceptions taken, and if the exceptions are overruled then a case may be served. Bates v. Holbrook, 41 Misc. [N. Y.] 129. Sayles' Civ. St. Tex. art. 1496, provides that the report of an auditor shall be admitted in evidence, but may be contradicted by evidence, where exceptions have been filed before the trial. Held, in an action by a principal to set aside settlements made with her agent and for an accounting, that evidence of items in the principal's favor was admissible under exceptions to the auditor's report, wherein she had pleaded such items, though her petition contained no such charge; the exceptions to the auditor's report becoming part of the pleadings in the case. Lumpkin v. Jaquess, 31 Tex. Civ. App. 10, 71 S. W. 618.

6. State Bank v. Showers, 65 Kan. 431, 70 Pac. 332. On the trial of exceptions before a jury it is not error to give a charge which in effect instructs the jury that, if there is not sufficient evidence to support a particular finding, their verdict should reverse that finding. Dickenson v. Moore, 117 Ga. 887. Where the evidence consists of depositions, which have been taken by the commissioner or in his presence, and is conflicting, the court will always review and weigh the evidence, and, if not satisfied with the findings, will overrule them. Tatum v. Tatum's Adm'r [Va.] 43 S. E. 184.

7. Where certain issues in a suit for the settlement of an estate were referred by the circuit court, it was authorized to hear a party interested in the distribution of a fund in court without answer or exceptions to the master's report, the equities of such party not having been one of the subjects referred. Butler v. Butler [S. C.] 45 S. E. 184. Where a reference in aid of the conscience of the court has been ordered, to take testimony and report concerning facts in dispute upon a motion pending before the court, it is not necessary to present exceptions to the report in order to contest the accuracy of the referee's findings, nor to make a formal motion to confirm the report. Frost v. Reinach, 40 Misc. [N. Y.] 412.

8. State Bank v. Showers, 65 Kan. 431, 70 Pac. 332; Hudson v. Hudson [Ga.] 46 S. E. 874.

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necessary to show error.[9] Motion and not exception is the remedy for failure of the referee to qualify.[10]

A written remonstrance, filed in the trial court, to the acceptance of a committee's report is the proper way of reaching alleged errors in rulings on offers of evidence by the committee on hearing before it.[11] Assignments of error based on the ground that an auditor improperly overruled objections urged against the admission of evidence cannot be considered, unless the evidence objected to be set forth, either literally or in substance, in the exceptions filed to his report.[12] A party objecting to the finding of a referee must except to the court's action overruling his exceptions to the report, and call attention to the alleged error in his motion for a new trial, in order to make the objection available on appeal.[13] If no valid exceptions are filed a final decree will be entered without the intervention of a jury.[14]

§ 10. *Decree or judgment on the report (confirmation or overruling, recommittal or additional findings, modification, conformity of judgment with report.)* —A report has no judicial force until confirmed by the court.[15] Upon a question of fact it is entitled to the same consideration as the verdict of a jury, and is not to be set aside unless it is clearly and palpably against the weight of the evidence.[16] Where the report is merely tentative, however, the court is not bound by its findings,[17] and this is so although no exceptions are filed.[18] A referee's conclusions of law on the facts found will be overruled if inconsistent with the facts.[19] Motion to reject and set aside the findings and conclusions of a referee should state the reasons assigned for such action.[20] The court may modify the report,[21] or correct

9. Hudson v. Hudson [Ga.] 46 S. E. 874.

10. That an auditor was not sworn according to law does not constitute a ground for an exception of fact to his report. The proper remedy in such a case is a motion in due time, to recommit the case to the auditor. Harrison v. Harrison, 115 Ga. 999.

11. Plaintiff complains, not of rulings, but only of manner in which rulings were stated in report. Held, rulings cannot be reviewed on appeal. Geary v. New Haven [Conn.] 55 Atl. 584.

12. Trentham v. Blumenthal, 118 Ga. 530; Rusk v. Hill, 117 Ga. 722.

13. Ark. Land Co. v. Ladd [Mo. App.] 77 S. W. 322.

14. Rusk v. Hill, 117 Ga. 722.

15. Court confirms part and sets aside part of report. Citizens' Bank v. Stockslager [Neb.] 96 N. W. 591. Under Rule 25 of the common law rules of the superior court of Mass. an action is not ripe for judgment until the assessor's report has been confirmed. McKim v. Titus, 182 Mass. 393, 65 N. E. 806.

Where the judge who ordered a reference to ascertain the amount of attorney's fees went out of office before the return of the testimony and report, a motion for a confirmation of the report is the proper practice in order to bring the matter again before the court. Frost v. Reinach, 40 Misc. [N. Y.] 412.

16. Helb v. Hake, 203 Pa. 626; State v. Davis [Neb.] 92 N. W. 740. Pedigrees of various claimants to an estate. In re May's Estate, 22 Pa. Super. Ct. 77; Camp v. First Nat. Bank [Fla.] 33 So. 241. Claim for services to decedent for a period of over 9 years, unsupported by written evidence. Held, even if evidence justified a doubt as to referee's findings, the advantage possessed by the referee in seeing and hearing the witness would, under the circumstances, require that his conclusions should be sustained. Hart v. Tuite, 75 App. Div. [N. Y.] 323. Under W. Va. Code 1891, § 10, c. 129, a report of account by a commissioner in an action at law, whether excepted to or not, is prima facie in its findings, but not conclusive, and may be repelled by evidence at the trial. State v. Barnes, 52 W. Va. 85. Under S. Dak. Laws 1891, p. 232, c. 100, §§ 9, 10, the circuit court has no power to modify the report of a referee, or to change his findings or his conclusions of law. Geddis v. Folliett [S. D.] 94 N. W. 431. A court has no power to set aside a referee's findings of fact on its own motion without the application of either of the parties. Neeley v. Roberts [S. D.] 95 N. W. 921.

The whole report cannot be set aside because the master did not respond therein to all the issues. Under the old chancery practice a review should be taken. In Ohio, under § 5222 Rev. St., the court may modify the report, hear testimony itself or recommit the case to the master. James v. West, 67 Ohio St. 28, 65 N. E. 156. Where there is evidence to support an auditor's findings exceptions thereto will be overruled. Weed v. Gainesville, J. & S. R. Co. [Ga.] 46 S. E. 885.

17. Parties entitled to a jury trial. Fenno v. Primrose [C. C. A.] 119 Fed. 801. Compulsory reference. Gibson v. Jenkins, 97 Mo. App. 27, 70 S. W. 1076.

18. Question of damages in an action at law. Terry v. Naylor, 125 Fed. 804.

19. Weitnaur v. Weitnaur, 117 Iowa, 578, 91 N. W. 815.

20. Neeley v. Roberts [S. D.] 95 N. W. 921. An order setting aside the report of a referee is an intermediate order which in-

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clerical errors,[22] or recommit it for further testimony.[23] In actions at law the constitutional right to a trial by jury requires that exceptions of fact to an auditor's report shall be submitted to a jury,[24] the rule is otherwise in equity cases.[25] Motion for judgment on the report of the referee should be sustained where the report is regular in all respects, and no reason is assigned in the notice of motion of either party why it should not be accepted.[26] Where a judgment of the court is at material variance with the report of the referee, the proper method of correction is by motion in such court.[27]

§ 11. *Appellate review.*—In a suit for the construction of a will refusal to order a reference for an account of advancements before construing the will can be appealed from.[28]

If a party appears before a referee and submits his evidence he cannot on appeal deny the right of the referee to try the cause.[29] Where the order of a court setting aside a referee's report affirmatively shows the reasons of the court, an appeal from the order presents a legal question, and the discretion of the lower court is not involved.[30] In order to be reviewed on appeal an exception must have been filed to the report of the referee.[31] The finding of the referee stands upon the same

volves the merits and necessarily affects the judgment within the meaning of S. D. Comp. Laws 1887, § 5237, which allows a review of such an order. Id.

21. The court has no power to add to or take away from the judgment of a referee in a material respect, and any attempt to do so is an irregularity. Shrady v. Van Kirk, 77 App. Div. [N. Y.] 261. An application to add facts to findings in the report will be denied where the facts are of a mere evidential character, and not necessary to aid the proper presentation to the court of question of law arising on the committee's report. Geary v. New Haven [Conn.] 55 Atl. 584.

22. N. Y. Bank Note Co. v. Hamilton Bank Note E. & P. Co., 92 App. Div. [N. Y.] 427.

23. The taking of additional testimony lies in the discretion of the court. Halk v. Stoddard [S. C.] 45 S. E. 140.

Where a question is not raised on a trial before commissioners acting as referees, it cannot be taken advantage of as a ground to have the case recommitted. Selectmen of Danvers v. Com., 184 Mass. 502, 69 N. E. 320.

Material facts not found by the master are presumed not to exist, but may be supplied by the court on hearing further testimony. James v. West, 67 Ohio St. 28, 65 N. E. 156.

Where facts arise which were not proved before the master, who has already reported and of the existence of which he had no notice, an order of reference will be advised to the same master to specially inquire and report as to those facts. Statute of N. J. provides that no divorce shall be granted if both parties have been guilty of adultery. Facts as to petitioner's guilt of said crime offered after report. Referred back. Knott v. Knott [N. J. Eq.] 54 Atl. 559.

Under Civ. Code of Ga. 1895, §§ 4587, 4593, it is not incumbent on trial judge of his own motion to recommit the report to the auditor when it discloses with due certainty what rulings he made with regard to the admissibility of evidence, what his findings of law and fact were. Trentham v. Blumenthal, 118 Ga. 530.

24, 25. Weed v. Gainesville, J. & S. R. Co. [Ga.] 46 S. E. 885.

26. Neeley v. Roberts [S. D.] 95 N. W. 921. The court at special term is not authorized to deny judgment in divorce cases because of errors committed by the referee in the reception and exclusion of evidence under Code Civ. Proc. § 1229, providing "that in actions of divorce judgment cannot be taken of course upon a referee's report * * * Where a reference is made in such an action the testimony and other proceedings must be certified to the court by the referee with his report; and judgment must be rendered by the court." Goldie v. Goldie, 39 Misc. [N. Y.] 389.

27. Shrady v. Van Kirk, 77 App. Div. [N. Y.] 261. An affidavit of defendant's attorney that the referee had stated that he had decided the case on its merits, and that it was by an inadvertence his report did not state that the complaint was dismissed on its merits, no affidavit by the referee himself being filed, will not warrant an order directing the amendment of his report so as to show a direction for judgment on the merits. Deagan v. King, 83 App. Div. [N. Y.] 428.

Where a case is referred to a committee to find the facts, and the court hears no evidence, it is error for it to base its judgment on a fact the contrary of which was found by the committee. Deed by non compos mentis held by lower court to be a fraud, committee expressly found contrary, true. Coburn v. Raymond [Conn.] 57 Atl. 116.

28. Lee v. Baird [N. C.] 46 S. E. 955.

29. Blanton v. Howard, 25 Ky. L. R. 929, 76 S. W. 511. Right to have issue submitted to jury waived. Montague v. Best, 65 S. C. 455. Where by stipulation a referee is appointed to give his opinion on costs, etc., to be allowed, and later by another stipulation he is given power to "hear and determine" the cause, and the first reference is merged in the second, held, defeated party is estopped to claim that referee had no authority to determine issues in first reference. Valentine v. Stevens, 86 App. Div. [N. Y.] 481.

30. Neeley v. Roberts [S. D.] 95 N. W. 921.

31. Moreland's Adm'r v. Citizens' Sav.

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footing, in respect to the evidence, as the verdict of a jury; and if supported by substantial evidence, it cannot be disturbed by an appellate court.[32] If the evidence is conflicting,[33] and the findings are approved by the trial court they will not be disturbed upon appeal.[34] In general the case will not be reversed on appeal for errors which do not prejudice the parties nor affect the merits of the cause.[35] Where the judgment of a referee is reversed by the appellate court, he has no further jurisdiction of the case after such reversal, unless it should be again referred to him by consent of parties.[36]

§ 12. *Compensation, fees, and costs.*[37]—In the absence of a statute the court has the authority and power to provide for the expense of an investigation before a referee,[38] and the discretion of the court in fixing compensation will not be reviewed.[39] Where referee's services are not paid by the parties to a suit, he is entitled to maintain an action therefor.[40] Per diem fees are reckoned in disregard of the fact that but a small part of a day may have been occupied.[41] Where the referee fixes allowances in proceedings before him or on an audit, the question of correctness of awards granted by him depends upon the facts of each case.[42] In order to take advantage of an error committed by a referee in fixing the amount of an award, such error must be specifically pointed out in the exceptions filed to the report.[43]

Bank, 24 Ky. L. R. 1354, 71 S. W. 520; Tufts v. Latshaw, 172 Mo. 359, 72 S. W. 679.

32. Ark. Land Co. v. Ladd [Mo. App.] 77 S. W. 322; Noble v. Gilliam, 136 Ala. 618; Tufts v. Latshaw, 172 Mo. 359, 72 S. W. 679. Appellant offered no evidence on points it now desires to upset. Ocorr & R. Co. v. Little Falls, 77 App. Div. [N. Y.] 592. When testimony has not been printed. Stockdale v. Maginn, 207 Pa. 226.

33. Bryan v. Bryan, 137 Cal. xix, 70 Pac. 304; Aronson v. Greenberg, 78 App. Div. [N. Y.] 639; Collins v. McGuire, 76 App. Div. [N. Y.] 443.

34. Creedon v. Patrick [Neb.] 91 N. W. 872; Rector, etc., of Mt. Calvary Church v. Albers, 174 Mo. 331, 73 S. W. 508; Malloy v. Lincoln Cotton Mills, 132 N. C. 432.

Not conclusive: "N." stated he owed "B. & Co." $8,000; master's report finds "N." instead of a debtor to be a creditor of "B. & Co." to the extent of $5,000. Held sufficient to induce appellate court to examine testimony. Briggs v. Neal [C. C. A.] 120 Fed. 224.

35. Admission of incompetent evidence. People v. Rushford, 81 App. Div. [N. Y.] 298. Order of appointment confers more authority than common. Blanton v. Howard, 25 Ky. L. R. 929, 76 S. W. 511.

The setting aside of a referee's findings is not rendered harmless by reason of the fact that the evidence reported by the referee was by consent submitted to the court for a second trial. Neeley v. Roberts [S. D.] 95 N. W. 921.

36. Camp v. First Nat. Bank [Fla.] 33 So. 241. See, also, the topics, Appeal and Review, 1 Curr. Law, p. 85; Harmless and Prejudicial Error, 2 Curr. Law, p. 159; Saving Questions for Review.

37. See, also, Costs, 1 Curr. Law, p. 808.

38. Fenno v. Primrose [C. C. A.] 119 Fed. 801. Who shall bear the expense, in the absence of a statute is a matter resting in the discretion of the court. Id. Under Mass. statute (Rev. Laws Mass. c. 165, §§ 55, 60) if parties assent to appointment and select an auditor, expense is borne by defeated party. If court in exercising inherent or statutory powers appoints an auditor, county bears expense. Id.

The cost of taking testimony before a referee or special master, which is irrelevant to the matter referred to him, will be taxed to the party introducing the same. Terry v. Naylor, 125 Fed. 804.

Where the auditor is appointed by the court, the parties not assenting, the expenses of the investigation are not the ordinary expenses of litigation and are not taxable like ordinary legal costs. Fenno v. Primrose [C. C. A.] 119 Fed. 801.

39. An order of a court allowing an auditor a certain compensation will not be reviewed on the ground that it was excessive, where the only evidence before the court as to the work is contained in the paper book. Stockdale v. Maginn, 207 Pa. 226.

40. Goldzier v. Rosebault, 84 N. Y. Supp. 240.

41. Under Code Civ. Proc. N. Y. § 3296, fixing referee's compensation at $10 per day for each day spent in the business of the reference, the referee is entitled to count each day on which he is necessarily occupied by the business of the reference, without regard to the number of hours in the day so consumed by him. Goldzier v. Rosebault, 84 N. Y. Supp. 240.

42. An allowance of $225 attorney's fees by a referee's report, where the services consisted merely in drawing an answer, making a motion for the disclosure of plaintiff's residence, and a motion for security of costs, is excessive; $100 is sufficient. Frost v. Reinach, 40 Misc. [N. Y.] 412. $50 costs by a referee on an amendment which did not materially change the cause of action stated in the complaint. Held, sufficiently liberal. Perry v. Levenson, 82 App. Div. [N. Y.] 94.

43. Rusk v. Hill, 117 Ga. 722.

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REFORMATION OF INSTRUMENTS.

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§ 1. *The remedy. A. Nature and office.*—Reformation is an ancient head of equity jurisdiction, founded upon the administration of a protective or preventive justice,[44] and is appropriate when on reducing an agreement or transaction to writing either through mistake common to both parties,[45] or through the mistake of one party accompanied by the fraud or inequitable conduct of the other[46] the written instrument fails to express the real agreement or transaction. In such case, the instrument may be corrected or reformed so as to truly represent the agreement or transaction actually made or entered upon,[47] the object sought not being to make a new agreement but to establish and perpetuate the one already determined upon.[48] In granting relief under this remedy, the court exercises a very high and delicate jurisdiction,[49] and should proceed with great caution.[50]

(§ 1) *B. Right to remedy.*—In general, a mistake of law, pure and simple, is not adequate ground for relief by way of reformation of a written instrument,[51] and if an agreement expresses the thought and intention which the parties had at the time and in the act of concluding it, no relief, affirmative or defensive, will be granted with respect to it;[52] but where the parties, in reducing an agreement to writing, fail by mistake to embody their intention in the instrument, either because they do not understand the meaning of the words used or their legal effect,[53] or where through a mistake of the parties or the draftsman, there is a failure to

44. 24 Am. & Eng. Enc. Law (2d Ed.) p. 610. "Rescission, Cancellation and Reformation."

45. Weinner v. Himmel, 200 Ill. 375, 65 N. E. 680; Stanley v. Marshall, 206 Ill. 20, 69 N. E. 58; Southern F. & W. Co. v. Ozment, 132 N. C. 839; Webb v. Hammond, 31 Ind. App. 613, 68 N. E. 916; Fierce v. Houghton [Iowa] 98 N. W. 306; Kee v. Davis, 137 Cal. 456, 70 Pac. 294; Lord v. Horr, 30 Wash. 477, 71 Pac. 23.

46. Boulden v. Wood, 96 Md. 332; Nutter v. Brown, 51 W. Va. 598; Story v. Gammell [Neb.] 94 N. W. 982; Blackburn v. Perkins [Ala.] 35 So. 250; Guthrie v. Martin, 76 App. Div. [N. Y.] 385. Where a plaintiff himself signed the instrument sought to be reformed, the presumption is that he knew its contents, and therefore was not defrauded. Cammack v. Prather [Tex. Civ. App.] 74 S. W. 354.

47. In order that there may be reformation of an instrument, the plaintiff is bound to establish either that it was executed under a mutual mistake of fact or that it was executed under a mistake upon the one side induced by fraudulent representations upon the other. Trust Co. of N. Y. v. Universal Talking Mach. Co., 90 App. Div. [N. Y.] 207. The practical construction given an instrument by all the parties thereto over a long period of years is of great weight in determining whether a mistake exists. Brown v. Ward, 119 Iowa, 604, 93 N. W. 587. So also that the grantee has never made claim to nor attempted to occupy a piece of land in excess of that actually sold, but embraced in the conveyance. Southern F. & W. Co. v. Ozment, 132 N. C. 839.

48. Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901.

49. Southern F. & W. Co. v. Ozment, 132 N. C. 839.

50. Baab v. Houser, 203 Pa. 470; McGuigan v. Gaines [Ark.] 77 S. W. 52; Drachler v. Foote, 84 N. Y. Supp. 977.

51. Atlanta T. & B. Co. v. Nelms, 116 Ga. 915; Wall v. Meilke, 89 Minn. 232, 94 N. W. 688; Lansing v. Commercial Union Assur. Co. [Neb.] 93 N. W. 756. In Iowa, a written contract which does not express the true intent of the parties thereto will be reformed by a court of equity, though the mistake was one of law. Bonbright v. Bonbright [Iowa] 98 N. W. 784.

52. Null v. Elliott, 52 W. Va. 229; Aller v. Crouter, 64 N. J. Eq. 381. Where a deed is made precisely as the parties intended it, but under a mutual mistake as to the existence of a fact which induced the contract, such mistake, while it might furnish ground for a rescission, will not warrant a decree of reformation. Farmers' L. & T. Co. v. Suydam [Neb.] 95 N. W. 867. Reformation of a certificate of indebtedness denied because petitioner knew its contents and accepted it without objection, no mistake or fraud being made to appear. Young v. Marion-Sims College, 91 Mo. App. 214.

53. Hopwood v. McCausland, 120 Iowa, 218, 94 N. W. 469; Wall v. Meilke, 89 Minn. 232, 94 N. W. 688. Where there is a misconception of the parties as to the legal import of the language used to effectuate the contract they intend to make, a court of equity will decree reformation. Lansing v. Commercial Union Assur. Co. [Neb.] 93 N. W. 756.

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express the actual contract contemplated by the parties, owing to the use of inapt words,[54] a court of equity will grant relief by reforming the instrument, even though the language be precisely that agreed upon.[55]

Under proper circumstances, equity will always reform an instrument for mistake of fact.[56] It is not enough, however, to show that one of the parties made a mistake;[57] no fraud being alleged or proven, it must be made to appear that there was a mutual mistake and that the contract as written does not express the agreement as actually intended by the parties,[58] and, where there is mistake of fact on both sides, but as to one fact by the one party and another and different fact by the other party, there is a failure of meeting of minds, and the proper remedy is not reformation but rescission.[59]

It is essential that the mistake be material,[60] and it must result without the fault or negligence of the party seeking relief,[61] for equity will not relieve against the result of complainant's own negligence, as where he signed the contract without reading it, or having it read to him, there being no extenuating circumstances,[62] though if the defendant's conduct was fraudulent,[63] or he bore a relation of confidence or trust to complainant,[64] or complainant relied on a confidential agent,[65] or the agent of defendant,[66] or the scrivener made a mistake,[67] the contract may be reformed, though complainant failed to read it before signing.

Adequate remedy at law, as usual in equity, bars relief.[68]

Suit must be timely brought and equity will not decree reformation where complainant, after knowledge, neglects for a long period to take the necessary steps,[69]

54. Richmond v. Ogden St. R. Co. [Or.] 74 Pac. 333; Schrieber v. Goldsmith, 39 Misc. [N. Y.] 381; Ferrell v. Ferrell, 53 W. Va. 515. Where, by mistake of the draftsman, a lease failed to embody an agreement that the lessor was to make repairs, the lessees were entitled, in an action for the rent, to ask for a reformation. Thomas v. Conrad, 24 Ky. L. R. 1630, 71 S. W. 903. Where parties through ignorance, inadvertence, or lack of appreciation of their acts, have made a contract different from what was intended, a court of equity will reform the instrument, evidencing it so as to conform to the agreement as made. Quitclaim deed reformed so as to except a condition as to use of premises, that being the real intention of the parties. Uihlein v. Matthews, 86 N. Y. Supp. 924.

55. Wall v. Meilke, 89 Minn. 232, 94 N. W. 688; Western Wheeled Scraper Co. v. Stickleman [Iowa] 98 N. W. 139. If the language of a written instrument, even though it be that selected by the parties when given a legal construction, fails to express or defeats their mutual intent and agreement, equity will reform it. Brown v. Ward, 119 Iowa, 604, 93 N. W. 587.

56. Describing a piece of land as the "middle" instead of the "west" acre is a mistake of fact. Wieneke v. Deputy, 31 Ind. App. 621, 68 N. E. 921. A mistake of fact is defined to be a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in, first, an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or second, belief in the present existence of a thing material to the contract which does not exist or in the past existence of such a thing which has not existed. Marshall v. Homier [Okl.] 74 Pac. 368.

57. Forester v. Van Auken [N. D.] 96 N. W. 301; Lyons v. Lyons [R. I.] 56 Atl. 680; Bowman v. Besley [Iowa] 97 N. W. 60; Jones v. Warren [N. C.] 46 S. E. 740.

58. Montgomery v. Mann, 120 Iowa, 609, 94 N. W. 1109; Bowman v. Besley [Iowa] 97 N. W. 60; McGuigan v. Gaines [Ark.] 77 S. W. 52; Stanley v. Marshall, 206 Ill. 20, 69 N. E. 58; Forester v. Van Auken [N. D.] 96 N. W. 301.

59. Wirsching v. Grand Lodge, etc., [N. J. Eq.] 56 Atl. 713.

60. The omission of a clause reserving growing crops from the operation of a warranty deed is a material matter. Marshall v. Homier [Okl.] 74 Pac. 368.

61. A mere oversight is not negligence. Marshall v. Homier [Okl.] 74 Pac. 368.

62. Youngstown Elec. Light Co. v. Butler County Poor Dist., 21 Pa. Super. Ct. 95.

63. Boulden v. Wood, 96 Md. 332; Story v. Gammell [Neb.] 94 N. W. 982.

64. So where one omits to read an instrument relying on a confidential agent, being ignorant of the significance of the terms used. Murray v. Roach, 24 Ky. L. R. 2013, 72 S. W. 807.

65. Woman selling through a neighbor who was her broker. White v. Shaffer, 97 Md. 359. Sister selling land to her brothers through the agency of one of them. Barry v. Rownd, 119 Iowa, 105, 93 N. W. 67.

66. Where one accepted a policy of fire insurance without reading. Taylor v. Glens Falls Ins. Co. [Fla.] 32 So. 887.

67. Thomas v. Conrad, 24 Ky. L. R. 1630, 71 S. W. 903; Ferrell v. Ferrell, 53 W. Va. 515; Schrieber v. Goldsmith, 39 Misc. [N. Y.] 381; Smelser v. Pugh, 29 Ind. App. 614, 64 N. E. 943.

68. Null v. Elliott, 52 W. Va. 229.

69. Laches for four years. Van Beck v. Milbrath, 118 Wis. 42, 94 N. W. 657. Delay for eight years. Sharp v. Behr, 117 Fed. 864.

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especially where the rights of third persons will be prejudiced,[70] though laches will not be imputed to complainant before discovery of the mistake or before the time when by the exercise of due diligence he should have discovered it,[71] nor, where there is dispute as to the construction of an instrument and complainant postpones asking reformation, on the advice of counsel, until an adverse decision by a competent court,[72] nor where complainant delays in the hope and belief of the success of overtures for an amicable adjustment of the controversy, which are not definitely rejected until just before the filing of the bill,[73] and where it does not appear that equal or superior rights of third persons have intervened because of delay in bringing the action, nor that the delay has worked any disadvantage or prejudice to the defendant, there is not such laches as will preclude the granting of relief.[74]

(§ 1) *C. Instruments reformable.*—Almost all written instruments may be reformed when the proper occasion is furnished;[75] thus, under proper circumstances, equity will reform an account stated,[76] a bill of lading,[77] a contract to convey land,[78] a judgment,[79] a lease,[80] a mortgage,[81] partnership articles,[82] a policy of life[83] or fire insurance,[84] promissory notes,[85] a receipt,[86] a supersedeas or other judicial bond;[87] but it is in respect of deeds of conveyance that the remedy is most often invoked.[88] Thus a warranty deed conveying land in excess of that actually sold,[89] or which describes less land than actually sold,[90] or one describing an entirely different parcel of land, are proper subjects of reformation.[91]

70. Where, though the consideration is furnished by the husband, a deed is taken in the wife's name, and the husband learning of this soon after permits the wife to deal with the property as her own until her death eleven years thereafter, equity will not decree reformation by substituting the husband's name in the conveyance. Lowry v. Lowry [Mich.] 97 N. W. 726.

71. Nutter v. Brown, 51 W. Va. 598; Wall v. Meilke, 89 Minn. 232, 94 N. W. 688; Jones v. McNealy [Ala.] 35 So. 1022.

72. Allis v. Hall [Conn.] 56 Atl. 637; Richmond v. Ogden St. R. Co. [Or.] 74 Pac. 333.

73. White v. Shaffer, 97 Md. 359.

74. Nutter v. Brown, 51 W. Va. 598; Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901; White v. Shaffer, 97 Md. 359. Diligence is required for the protection of third persons who may in their innocence suffer from unreasonable delay. One therefore who knows of an adverse claim is not in a position to invoke the doctrine of laches, especially if he is pursuing an unconscionable claim. Allis v. Hall [Conn.] 56 Atl. 637.

75. Marshall v. Homier [Okl.] 74 Pac. 368.

76. Louisville Banking Co. v. Asher, 23 Ky. L. R. 1180, 65 S. W. 133.

77. Fowle v. Pitt, 183 Mass. 351, 67 N. E. 343.

78. Wold v. Newgard [Iowa] 94 N. W. 859; Kee v. Davis, 137 Cal. 456, 70 Pac. 294. Relief denied. Roussel v. Lux, 39 Misc. [N. Y.] 508.

79. State v. Dashiell [Tex. Civ. App.] 74 S. W. 779.

80. Thomas v. Conrad, 24 Ky. L. R. 1630, 71 S. W. 903. Written lease of mill property reformed so as to permit removal of machinery at end of term by tenant. Brown v. Ward, 119 Iowa, 604, 93 N. W. 587.

81. Securing notes. Sauer v. Nehls, 121 Iowa, 184, 96 N. W. 759; Meier v. Bell [Wis.] 97 N. W. 186. Mortgage-deed reformed so that the principal of a senior mortgage be excepted from the operation of its covenants. Allis v. Hall [Conn.] 56 Atl. 637.

82. Articles of dissolution. Smelser v. Pugh, 29 Ind. App. 614, 64 N. E. 943. Release of partnership liability. Willard v. Davis, 122 Fed. 363.

83. Hunt v. Provident S. L. Assur. Soc., 77 App. Div. [N. Y.] 338.

84. Pictet Spring Water Ice Co. v. Citizens' Ins. Co., 24 Ky. L. R. 1461, 71 S. W. 514. Policy of insurance reformed so as to state name of true owner and supply description of land where building situate. Taylor v. Glens Falls Ins. Co. [Fla.] 32 So. 887; Lansing v. Commercial Union Assur. Co. [Neb.] 93 N. W. 756.

85. Evidence held to warrant a reformation importing execution in official and not private capacity. Western Wheeled Scraper Co. v. Stickleman [Iowa] 98 N. W. 139. Reformation so as to establish liability as trustee and not personally. Richmond v. Ogden St. R. Co. [Or.] 74 Pac. 333.

86. Reformed so as to read in full. Kammermeyer v. Hilz, 116 Wis. 313, 92 N. W. 1107.

87. Nourse v. Weitz, 120 Iowa, 708, 95 N. W. 251.

88. Deed reformed so as to convey fee instead of life estate only, Wiemer v. Himmel, 200 Ill. 375, 65 N. E. 680. So as to convey land without coal. Baab v. Houser, 203 Pa. 470. So as to reserve certain crops. Marshall v. Homier [Okl.] 74 Pac. 368. By introducing reservation of railroad right of way. Fierce v. Houghton [Iowa] 98 N. W. 306. By striking out trust clause and inserting another clause in a deed. Wall v. Meilke, 89 Minn. 232, 94 N. W. 688. By inserting assumption of mortgage clause. Boulden v. Wood, 96 Md. 332. By striking out assumption of mortgage clause denied. Bowman v. Besley [Iowa] 97 N. W. 60. Deed declared to be mortgage. Reese v. Rhodes [Ariz.] 73 Pac. 446.

89. Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901; Nutter v. Brown, 51 W. Va. 598; Mikiska v. Mikiska [Minn.] 95 N. W.

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A void instrument will not be reformed,[92] and where reformation is sought of a deed, a valuable, as distinguished from a good, consideration must be shown.[93]

§ 2. *Procedure. A. Jurisdiction and form of proceeding.*—In those jurisdictions where the distinction between law and equity is maintained, the remedy by reformation cannot be had, in an action at law; it must be by suit in equity;[94] but in Texas an ambiguity in a description may be explained or removed, in an action to establish a boundary line, without the aid of a court of equity,[95] and in New York an action will lie on an administrator's bond from which the amount of the penalty was omitted, without reformation.[96]

Where equity has once acquired jurisdiction to reform an instrument it may retain it and grant such other relief as the circumstances may warrant,[97] and where an action at law has been begun on a policy of insurance equity will entertain a bill asking that the action at law be stayed until a reformation of the policy can be obtained, and that after reformation, judgment be entered for the amount found to be due on the policy.[98]

Equity will not, in a collateral proceeding, grant relief by reformation.[99]

When reformation is the only relief sought a previous demand is essential,[1] but where in addition to the reformation a recovery or other relief is demanded,[2] or where a request to rectify would have been vain and useless, no prior demand is necessary.[3]

Where the object sought by a bill is achieved before trial by the execution of a new contract, there is no longer occasion for the interposition of the court.[4]

(§ 2) *B. Parties.*—In all cases of mistake in written instruments equity will interfere as between the original parties,[5] or those claiming under them, such as

910; Barry v. Rownd, 119 Iowa, 105, 93 N. W. 67. Reformation denied. McGuigan v. Gaines [Ark.] 77 S. W. 52.

90. Stanley v. Marshall, 206 Ill. 20, 69 N. E. 58; Murray v. Roach, 24 Ky. L. R. 2013, 72 S. W. 807.

91. Blackburn v. Perkins [Ala.] 35 So. 250.

92. Mortgage on wife's land to secure husband's debt. Day v. Shiver, 137 Ala. 185.

93. Love and affection do not constitute a sufficient consideration. Strayer v. Dickerson, 205 Ill. 257, 68 N. E. 767. Father to son. Ferrell v. Ferrell, 53 W. Va. 515. Daughter to mother. Enos v. Stewart, 138 Cal. 112, 70 Pac. 1005. But see where reformation at instance of donor granted. Mother to daughter. Schrieber v. Goldsmith, 39 Misc. [N. Y.] 381. But a moral obligation arising from an antecedent legal obligation, the enforcement of which has been suspended by operation of law, is a sufficient consideration. Strayer v. Dickerson, 205 Ill. 257, 68 N. E. 767.

94. Over v. Walzer, 103 Ill. App. 104. The objection in a code state, that the court is incompetent in an action at law to deal with reformation is without force. Story v. Gammell [Neb.] 94 N. W. 982.

95. Sloan v. King [Tex. Civ. App.] 77 S. W. 48.

96. McManus v. Harrigan, 41 Misc. [N. Y.] 615.

97. Specific performance decreed. Kee v. Davis, 137 Cal. 456, 70 Pac. 294; Wold v. Newgard [Iowa] 94 N. W. 859. Mortgage foreclosed. Jones v. McNealy [Ala.] 35 So. 1022. Possession of land decreed. Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901. Excessive portion in a grant directed to be reconveyed. Shelby v. Creighton [Neb.] 96 N. W. 382. Money judgment awarded. Palmer S. & I. Co. v. Heat, L. & P. Co., 160 Ind. 232, 66 N. E. 690. Enforcement of judgment enjoined. Allis v. Hall [Conn.] 56 Atl. 637. Where an action for damages had been transferred to the equity side of the court on the application of defendant for the reformation of a description in a deed, though the relief was denied yet the court retained jurisdiction and awarded damages. McGuigan v. Gaines [Ark.] 77 S. W. 52.

98. Lansing v. Commercial Union Assur. Co. [Neb.] 93 N. W. 756.

99. Plaintiff in an action for damages for cutting timber relied on a sheriff's deed to prove title. It being objected that the deed was without seal, plaintiff sought to show that it was omitted by mistake. Fisher v. Owens, 132 N. C. 686.

1, 2. Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901.

3. Lester v. Johnston, 137 Ala. 194; Jones v. McNealy [Ala.] 35 So. 1022.

4. Daugherty v. Curtis [Iowa] 97 N. W. 67.

5. Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901. Reformation at the instance of the grantor in a deed. Barry v. Rownd, 119 Iowa, 105, 93 N. W. 67; Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901; Nutter v. Brown, 51 W. Va. 598. The grantee in a deed of conveyance. Wiemer v. Himmel, 200 Ill. 375, 65 N. E. 680. Grantee of an easement in a right of way. White v. Shaffer, 97 Md. 359. The assured in a policy of life insurance. Hunt v. Provident S. L. Assur. Soc., 77 App. Div. [N. Y.] 338.

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personal representatives,[6] assignees,[7] voluntary grantees.[8] Reformation will be decreed as against a grantee and his grantees to the last one,[9] or purchasers from them with notice.[10] A purchaser from the grantor may maintain a bill to reform the grantor's prior deed to another,[11] and after death of the assured, the assignee of the beneficiaries may be substituted in a suit to reform a life insurance policy and recover its surrender value.[12] Likewise a mortgagee, or, if dead, his personal representatives are proper and necessary parties with the other beneficiaries in a suit to reform a fire insurance policy made payable under condition to the mortgagee.[13] A bill may be maintained against the assignee of one of the parties.[14]

(§ 2) *C. Pleading and evidence.*[15]—In an action to reform a written instrument it is necessary to set forth the terms of the original agreement, and also the agreement as reduced to writing, and point out with clearness wherein there was a mistake.[16] It is also necessary to aver and show that the mistake was mutual, where there is no fraud;[17] it is sufficient to plead the ultimate facts, however,[18] since the evidence should not be pleaded,[19] and it is not necessary to allege when complainant discovered the mistake,[20] nor to aver a prior demand or request to correct, if such request would have been vain and useless.[21]

In many jurisdictions reformation may be sought by way of a defense to an action on the contract,[22] and in Indiana evidence of mistake is admissible under the general denial.[23]

In New York the defense of the statute of limitations must be pleaded in strict compliance with the terms of the statute. An answer which alleges that a cause of

6. Taylor v. Glens Falls Ins. Co. [Fla.] 32 So. 887; Hunt v. Provident S. L. Assur. Soc., 77 App. Div. [N. Y.] 338; Lansing v. Commercial Union Assur. Co. [Neb.] 93 N. W. 756.

7. Barker v. Pullman's Palace Car Co., 124 Fed. 555; Thomas v. Conrad, 24 Ky. L. R. 1630, 71 S. W. 903.

8. Jones v. McNealy [Ala.] 35 So. 1022.

9. Mikiska v. Mikiska [Minn.] 95 N. W. 910; Wieneke v. Deputy, 31 Ind. App. 621, 68 N. E. 921.

10. Constructive notice. White v. Shaffer, 97 Md. 359; Sloan v. King [Tex. Civ. App.] 77 S. W. 48. Where one without notice succeeds to the rights of parties to a mistake equity will not correct such mistake to his prejudice. Adams v. Drews, 110 La. 456. Where an instrument which is susceptible of reformation has passed into the hands of an innocent party, a judgment for damages will be rendered against the wrongdoer. Story v. Gammell [Neb.] 94 N. W. 982.

11. Jones v. McNealy [Ala.] 35 So. 1022. The grantee of an easement may sue to reform the deed to another prior grantee, from the same grantor, in which the easement was reserved by erroneous description. White v. Shaffer, 97 Md. 359.

12. Hunt v. Provident S. L. Assur. Soc., 77 App. Div. [N. Y.] 338.

13. Taylor v. Glens Falls Ins. Co. [Fla.] 32 So. 887.

14. Corporation purchasing property and assuming obligations of another. Barker v. Pullman's Palace Car Co., 124 Fed. 555.

15. By setting forth defectively a cause of action for reformation of an insurance policy, the plaintiff did not lose the benefit of a good cause of action on the policy as written [Civ. Code 1895, § 4833]. Trust Co. of Ga. v. Scottish U. & N. Ins. Co. [Ga.] 46 S. E. 855.

16. Willard v. Davis, 122 Fed. 363; Keith v. Woodruff, 136 Ala. 443; White v. Shaffer, 97 Md. 359; Webb v. Hammond, 31 Ind. App. 613, 68 N. E. 916. A petition held to recite sufficient facts to make out a case of reformation. Nourse v. Weitz, 120 Iowa, 708, 95 N. W. 251. The use of the word "mistake" in a complaint is not the mere statement of a conclusion but the statement of a fact. Smelser v. Pugh, 29 Ind. App. 614, 64 N. E. 943.

17. Lyons v. Lyons [R. I.] 56 Atl. 680; Webb v. Hammond, 31 Ind. App. 613, 68 N. E. 916.

18. In Mass. where "a defendant may allege in defense any facts which would entitle him in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action," an answer which states facts showing mutual mistake is broad enough to open this defense [Rev. Laws, p. 1554, c. 173, § 28]. Fowle v. Pitt, 183 Mass. 351, 67 N. E. 343.

19. In pleading an antecedent contract it is only necessary to plead its terms positively and with certainty, so that nothing will be left to inference. A rule requiring that the exact words employed by each party to the contract should be specially pleaded would violate the rule against pleading evidence. Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901.

20. Jones v. McNealy [Ala.] 35 So. 1022.

21. Jones v. McNealy [Ala.] 35 So. 1022; Lester v. Johnston, 137 Ala. 194.

22. 1 Rev. Laws, Mass. p. 1554, c. 173, § 28. Fowle v. Pitt, 183 Mass. 351, 67 N. E. 343.

23. Ejectment and evidence of mistake in plaintiff's deed. Wieneke v. Deputy, 31 Ind. App. 621, 68 N. E. 921.

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action *is* outlawed is defective, inasmuch as it may not have been when action *was commenced.*[24]

The law presumes that a written instrument embodies the agreement in which the minds of the parties met,[25] unless the presumption is rebutted in a proceeding brought to reform the instrument;[26] and upon him who seeks to correct it rests the burden of establishing the mistake.[27]

In the absence of fraud, accident, or mistake, in the execution and delivery of a deed or other written contract, no evidence can be heard of prior or contemporaneous agreements,[28] and in general parol evidence is not admissible to vary a written instrument,[29] but it is admissible to establish the fact of a mistake, in what it consists, and to show how the writing should be corrected in order to conform to the agreement actually made.[30] Testimony of one of the parties is admissible to show the intention of the parties in making a deed,[31] and where it is sought to reform a deed absolute in form into a mortgage, evidence of the relation of the parties to each other is proper.[32]

The contract must be proven, either by being introduced or in other customary ways,[33] and the proof must relate to the time when the instrument was executed.[34]

To justify reformation the mistake must be established by proof so clear, convincing, and satisfactory, as to leave no room for doubt.[35] A mere preponderance of evidence is not sufficient,[36] though a clear preponderance is.[37] If the testimony is conflicting or of such undecisive character as to raise a substantial doubt in the

24. Code Civ. Proc. § 388. Schrieber v. Goldsmith, 39 Misc. [N. Y.] 381.

25. Barker v. Pullman's Palace Car Co., 124 Fed. 555; Southern F. & W. Co. v. Ozment, 132 N. C. 839; Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901.

26. Southern F. & W. Co. v. Ozment, 132 N. C. 839.

27. Roussel v. Lux, 39 Misc. [N. Y.] 508; Barker v. Pullman's Palace Car Co., 124 Fed. 555; Southern F. & W. Co. v. Ozment, 132 N. C. 839.

28. Anthony v. Rockefeller, 102 Mo. App. 326, 76 S. W. 491.

29. W. P. Fuller & Co. v. Schrenk, 171 N. Y. 671, 64 N. E. 1126; N. Y. Cent. Ironworks Co. v. U. S. Radiator Co., 174 N. Y. 331, 66 N. E. 967.

30. Wieneke v. Deputy, 31 Ind. App. 621, 68 N. E. 921; Forester v. Van Aukén [N. D.] 96 N. W. 301; Marshall v. Homier [Okl.] 74 Pac. 368; Story v. Gammell [Neb.] 94 N. W. 982; Western Wheeled Scraper Co. v. Stickleman [Iowa] 98 N. W. 139; McGuigan v. Gaines [Ark.] 77 S. W. 52; Kee v. Davis, 137 Cal. 456, 70 Pac. 294.

31. Southern F. & W. Co. v. Ozment, 132 N. C. 839.

32. Reese v. Rhodes [Ariz.] 73 Pac. 446.

33. Webb v. Hammond, 31 Ind. App. 613, 68 N. E. 916.

34. A father deeded a lot to each of two sons. There was testimony that some time prior thereto he made declarations exactly reversing the descriptions in the deeds. Williamson v. Carpenter, 205 Pa. 164.

35. Evidence insufficient to declare deed in form absolute a mortgage. Forester v. Van Auken [N. D.] 96 N. W. 301. To substitute husband's name for wife's in deed. Meier v. Bell [Wis.] 97 N. W. 186. To establish covenant to accept renewal insurance. Barker v. Pullman's Palace Car Co., 124 Fed. 555. Evidence sufficient to reform description in deeds. Mikiska v. Mikiska [Minn.] 95 N. W. 910. The degree of proof required is usually that stated in the text. The rule, however, is variously stated, thus "clear and satisfactory." Proof sufficient. Stanley v. Marshall, 206 Ill. 20, 69 N. E. 58; Montgomery v. Mann, 120 Iowa, 609, 94 N. W. 1109; Brown v. Ward, 119 Iowa, 604, 93 N. W. 587. Proofs insufficient to change loan from father to son into a gift. Sauer v. Nehls, 121 Iowa, 184, 96 N. W. 759. To change deed absolute into mortgage. Emery v. Lowe, 140 Cal. 379, 73 Pac. 981; Jackson v. Martin [Tex. Civ. App.] 73 S. W. 832. "Clear and convincing." Humphreys v. Shellenberger, 89 Minn, 327, 94 N. W. 1083; Wall v. Meilke, 89 Minn. 232, 94 N. W. 688; Drachler v. Foote, 84 N. Y. Supp. 977. "Clear, positive and convincing." Roussel v. Lux, 39 Misc. [N. Y.] 508; Dougherty v. Lion F. Ins. Co., 41 Misc. [N. Y.] 285. "Clear, strong and convincing." Description in deed reformed. Southern F. & W. Co. v. Ozment, 132 N. C. 839. "Clear, full and decisive." Proof insufficient to charge grantee with assumption of mortgage. Bowman v. Besley [Iowa] 97 N. W. 60. "Clear, precise and indubitable." Williamson v. Carpenter, 205 Pa. 164. Evidence held insufficient to show mutual mistake in terms of contract for sale of corporate stock. Meredith v. Holmes [Mo. App.] 80 S. W. 61. Evidence held not to show a mutual mistake so as to warrant reformation. Anderson v. Anderson Food Co. [N. J. Eq.] 57 Atl. 489. Evidence held sufficient to show mutual mistake as to property included in conveyance. Hawkins v. Blait [Miss.] 36 So. 246.

36. Bowman v. Besley [Iowa] 97 N. W. 60; Mikiska v. Mikiska [Minn.] 95 N. W. 910; McGuigan v. Gaines [Ark.] 77 S. W. 52.

37. Receipt reformed to read in full. Kammermeyer v. Hilz, 116 Wis. 313, 92 N. W. 1107.

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minds of the court the instrument as written must stand,[38] but the fact that there is a conflict of testimony or evidence will not operate to deprive one of relief if the mistake be clearly established.[39]

(§ 2) *D. Trial and judgment.*—As in other cases, instructions should respond to the issues,[40] and submit the facts as the evidence presents them.[41] The decree should be responsive to the issue presented, should be full and specific as to the correction or reformation made,[42] and, the court having jurisdiction of the subject, and all parties interested in the question being before it, is conclusive of the question.[43]

RELEASES.

§ 1. Nature, Form and Requisites (1498).
§ 2. Parties to Release (1499).
§ 3. Interpretation, Construction and Effect (1499).
§ 4. Defenses to or Avoidance of Release (1500).
§ 5. Pleading, Proof and Practice (1501).

This topic will treat of formal releases relegating settlements and the effect of the release as an accord and satisfaction to other appropriate topics.[44]

§ 1. *Nature, form and requisites.*—A writing in form a receipt may be a good release.[45] A receipt for money and a release of all claims may be joined in the same instrument.[46]

A release must be supported by a consideration.[47] If it fails, the releasor may recover on the original debt.[48] A written release imports a consideration.[49] Ac-

38. Barker v. Pullman's Palace Car Co., 124 Fed. 555; Greditzer v. Continental Ins. Co., 91 Mo. App. 534; Dougherty v. Lion F. Ins. Co., 41 Misc. [N. Y.] 285. The mere fact that a deed includes property not owned by the grantor, together with general declarations of witnesses as to the existence of a mistake is not sufficient to warrant a correction in a description. Underwood v. Cave, 176 Mo. 1, 75 S. W. 451.

39. McGuigan v. Gaines [Ark.] 77 S. W. 52.

40. Where the issue made by the pleadings and evidence is of a deed absolute or mortgage, an instruction submitting to the jury the question of a conditional sale is reversible error. Bradford v. Malone [Tex. Civ. App.] 77 S. W. 22.

41. Where it appeared from two several conversations that a deed to be executed should be security for money loaned, it was error for the trial court to instruct a jury that they were to determine the matter upon the understanding alone of the parties at the time when the deed was delivered. Grier v. Casares [Tex. Civ. App.] 76 S. W. 451.

42. Underwood v. Cave, 176 Mo. 1, 75 S. W. 451.

43. Kendall v. Crawford, 25 Ky. L. R. 1224, 77 S. W. 364.

44. Accord and Satisfaction, 1 Curr. Law, p. 8. Seaman's release, see Shipping, etc.

45. A receipt acknowledging payment in full for loss of time and medical bill incurred on account of injuries, and disclaiming liability to him on any other account is a good release in the absence of proof of fraud or other error superinducing the settlement. Kelly v. Homer Compress Co., 110 La. 983.

46. A writing acknowledging receipt of money and releasing an employer from all contracts previously entered into. Cammarata v. Pa. Coal Co., 86 N. Y. Supp. 787.

47. Voluntary release of debt just before creditor's assignment and bankruptcy. Muschel v. Austern, 84 N. Y. Supp. 956. Promise to the maker by a bona fide indorsee that the indorsee would not look to him for payment but would hold the payee. Muller v. Swanton, 140 Cal. 249, 73 Pac. 994. Release of retiring partner by creditor of firm. Bronx Metal Bed Co. v. Wallerstein, 84 N. Y. Supp. 924.

Payment of a liquidated sum unconditionally due is not sufficient consideration. Harrison v. Murray Iron Works Co., 96 Mo. App. 348, 70 S. W. 261. In this case all claims including other unliquidated ones were released.

Sufficiency of particular considerations: One dollar on an agreement to employ for a definite time held a sufficient consideration. Quebe v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 77 S. W. 442. Payment of a liquidated and undisputed claim is no consideration for a release of other liquidated claims. Woodall v. Pac. M. L. Ins. Co. [Tex. Civ. App.] 79 S. W. 1090. Giving employment for one month under a release, the consideration of which was "employment for such time only as may be satisfactory to said company," held sufficient. Carroll v. Mo., K. & T. R. Co., 30 Tex. Civ. App. 1, 69 S. W. 1004. Surrender by a bondsman of a right to compel settlement of accounts held a sufficient consideration for release of liability on the bond. German-American Bank v. Schwinger, 75 App. Div. [N. Y.] 393.

48. One who received cotton from his debtor and applied the proceeds thereof to the debt and gave a receipt, but was afterwards forced to pay such proceeds to one holding a landlord's lien on the cotton, might, notwithstanding the receipt, enforce repayment from his debtor. Ball, B. & Co. v. Sledge [Miss.] 35 So. 447.

49. Payment of their proportion of a debt after maturity by two of three joint obligors

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ceptance of part of a sum due and parol release of the balance based on no other consideration is void.[50]

§ 2. *Parties to release.*—The parties to be bound must all join in the release.[51] It is not necessary that the administrator release a cause of action accruing to next of kin, where there is only one. That one may release.[52]

§ 3. *Interpretation, construction and effect.*—Where the evidence as to a release is uncontradicted, its construction is for the court.[53]

A release takes effect from the date of execution[54] and delivery.[55] A distinct right, especially if it subsequently matures, is not release,[56] nor is a subsequent cause of action arising out of defective performance of an agreement in the release.[57] A release of the entire cause of action against one joint obligor will release all;[58] but a release to one not liable will not release the one who is liable,[59] nor does it release a distinct claim or liability arising out of the same transaction.[60] The release must be a technical one under seal to have this effect.[61] At common law, the discharge of all joint debtors is commensurate with that of any, and mere payment of part of it is not sufficient consideration for a release of the whole.[62] It has been held that unless the entire cause of action be released to one, the others remain liable.[63] A covenant not to sue one of several joint obligors is no release as to the others.[64]

The release of one joint tort feasor releases all, even though it be stipulated

is not sufficient consideration for an oral release, though a statute would give the release effect if in writing. Miller v. Fox [Tenn.] 76 S. W. 893.

50. Where one of several guarantors was released on payment of his proportionate share. Commercial & F. Nat. Bank v. McCormick, 97 Md. 703.

51. The dissolution of a partnership does not release any member from partnership debts unless there is a contract to that effect with the creditors. Bronx Metal Bed Co. v. Wallerstein, 84 N. Y. Supp. 924.

52. For unlawful death, the widow who was sole beneficiary accepted a sum of money and gave a release. Mattoon G. L. & C. Co. v. Dolan, 105 Ill. App. 1.

53. A release of all claims, when the injured party knew that his throat and breast had been hurt, held to be a release for injury to eyesight, though it was not known to exist when the release was executed. Quebe v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 77 S. W. 442.

54. A release executed on a date subsequent to the time of trial is not admissible as evidence to affect the matters in controversy. Rosenthal v. Rudnick, 84 App. Div. [N. Y.] 611.

55. Where a release in which defendant agreed to employ plaintiff so long as he saw fit was not delivered until after plaintiff went to work on defendant's oral agreement to employ him for life. Boggs v. Pac. Steam Laundry Co., 171 Mo. 282, 70 S. W. 818.

56. A release of claims from son to father held not to be a release of the son's equitable claim to land held in trust. Suit v. Suit, 97 Md. 539.

57. Release of damage caused by excavation held not to be a release for damages caused subsequently because of insufficiency of a retaining wall built under the agreement of release. Rector, etc., of Church of Holy Communion v. Paterson Extension R. Co., 68 N. J. Law, 399.

58. Plaintiff released all claim of damages for injuries caused by the joint negligence of an express company and a street car company, to the express company. Hubbard v. St. Louis & M. R. R. Co., 173 Mo. 249, 72 S. W. 1073. Plaintiff accepted money from one of several dealers who had entered into an agreement not to sell to him and done other acts to the injury of his business and gave him a release for injuries so caused. Dulaney v. Buffum, 173 Mo. 1, 73 S. W. 125. A sheriff and defendant executing a writ in an unlawful manner committed a trespass for which plaintiff compromised with the sheriff and released him. Burns v. Womble, 131 N. C. 173.

59. Where a passenger on a railroad train is hit by a bullet negligently fired from a shooting gallery. Dufur v. Boston & M. R. R., 75 Vt. 165.

60. Release of a railroad company from liability for delivering cars of grain without requiring the bills of lading does not release the party who took and converted the grain. Iddings v. Citizens' State Bank [Neb.] 92 N. W. 578.

61. Parol release of one of several joint and several makers of a promissory note consisting in an unsigned release of one joint maker indorsed on the note. Valley Sav. Bank v. Mercer, 97 Md. 458.

62. Where a creditor released one partner on payment of his proportionate share of a debt. Hatzel v. Moore, 120 Fed. 1015.

63. Where one injured by the joint act of several accepted a sum as part satisfaction and gave a release to the one making payment. Louisville & E. Mail Co. v. Barnes' Adm'r [Ky.] 79 S. W. 261.

64. A bank accepted their proportionate share from some of several guarantors and covenanted not to sue them for the balance. Commercial & F. Nat. Bank v. McCormick, 97 Md. 703.

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in such release that the others are not to be discharged.[65] Such a stipulation may defeat the release of any,[66] or may reduce the release to a mere covenant not to sue the promisee and thus give effect to it.[67] In some jurisdictions, such a reservation is legal.[68] Where a surety on appeal for one joint tort feasor pays the judgment and is subrogated to the rights of the judgment creditor, his release of one tort feasor will not be a release of the others,[69] especially where he has reserved a right to enforce the judgment against them.[70] Release of a partner individually does not release firm debts.[71]

§ 4. *Defenses to or avoidance of release.*—A release procured by fraud,[72] as by misreading it, is void,[73] unless the party was negligent[74] and need not be rescinded before bringing action.[75] Gross inadequacy of consideration imports fraud.[76] A misrepresentation as to the legal effect of a release will not avoid it.[77] Money received in consideration of a release fraudulently obtained need not be tendered back before bringing action,[78] but it has been otherwise held as to one

65. Where two of several joint tort feasors secured a release pendente lite. McBride v. Scott [Mich.] 93 N. W. 243. Where a suit was compromised with some of several joint tort feasors and a release executed on their settlement of part of the claim. Gilbert v. Finch, 173 N. Y. 455, 66 N. E. 133. Directors of the selling and those of the buying corporation are not joint tort feasors in a sale of corporate property. Id.

66. A release of one joint tort feasor on his paying his share of a judgment obtained in an action for fraud "so far as the same can be done without releasing the others" does not discharge the latter. Barnum v. Cochrane, 139 Cal. 494, 73 Pac. 242.

67. Gilbert v. Finch, 173 N. Y. 455, 66 N. E. 133, reviewing American and English cases and adopting this as the solution of the conflict as to whether such reservations are legal.

68. In **Louisiana**, a release of one codebtor releases all unless the creditor expressly reserves his rights as against the others. Moore v. Hanover Nat. Bank, 80 App. Div. [N. Y.] 67. In **New York**, the discharge of one joint debtor does not discharge the others unless such an intent affirmatively appears. Booth Bros. & H. I. Granite Co. v. Baird, 83 App. Div. [N. Y.] 495. A release to one member of a dissolved partnership on payment of his proportionate share held not to be a release of the others. Siefke v. Minden, 40 Misc. [N. Y.] 631.

69, 70. Kolb v. Nat. Surety Co., 176 N. Y. 233, 68 N. E. 247.

71. Evidence held to show that a release given by a partner was only a release of individual claims and not a release of partnership claims. Smith v. Williams, 85 N. Y. Supp. 506.

72. Release procured by representations that it was a receipt for money paid for sick expenses. Clayton v. Consol. Traction Co., 204 Pa. 536. A release procured from one lying sick in bed on representations that it did not amount to anything, but simply stated that plaintiff did not bear any ill will against defendant, whereupon plaintiff signed without reading, it was held void. Western R. v. Arnett, 137 Ala. 414. Where plaintiff executed a release on statements made by defendant's physicians that injuries sustained by his wife were slight when they knew she was seriously hurt, it was held that fraud was shown. Jones v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 73 S. W. 1082.

73. Where a receipt in full for all damages had been misread to plaintiff and he signed it without reading it. New Omaha, etc., Elec. L. Co. v. Rombold [Neb.] 93 N. W. 966.

74. Where plaintiff, after he had recovered from an injury caused by defendants' negligence, went to their office and signed a release without reading it, though he was able to read. Osborne v. Mo. Pac. R. Co. [Neb.] 93 N. W. 685. Being "somewhat hurried" is not a good excuse for signing a release without reading it (Atchison, T. & S. F. R. Co. v. Vanordstrand, 67 Kan. 386, 73 Pac. 113), but where the signature was procured by fraud, negligence in signing does not prevent the defrauded party from avoiding the release (Western R. v. Arnett, 137 Ala. 414).

75. Where plaintiff failed to return the amount received under a void release before bringing an action for damages for personal injuries sustained. Ind., D. & W. R. Co. v. Fowler, 201 Ill. 152, 66 N. E. 394; Jones v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 73 S. W. 1082.

76. $125.00 as a consideration for a release from liability for the wrongful death of a miner forty years old held so inadequate that the release would be set aside. Russell v. Dayton C. & I. Co., 109 Tenn. 43, 70 S. W. 1. Release obtained from illiterate, weakminded or distressed party under circumstances indicating artifice, undue importunity, inadequate consideration or other inequitable circumstance, may be avoided. Release obtained by misrepresentations of value of estate by one representing the interests of parties adversely interested. Mullaney v. Mullaney [N. J. Err. & App.] 54 Atl. 1086.

77. One joint tort feasor procures a release by representations that it will not affect the liabilities of the others. Jackson v. Pa. R. Co. [N. J. Law] 54 Atl. 532.

78. Release obtained by employer's protective association's agent by making false representations. Hedlun v. Holy Terror Min. Co. [S. D.] 92 N. W. 31. Where an agent turned in an account falsely representing that he had expended certain moneys held in his possession and received receipts in full, it was not necessary for the principal to return the property received in such accounting before bringing action for another

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obtained by duress.[79] One is not estopped to set up fraud in procuring a release by the mere fact that he accepted employment from the party released.[80] A joint obligor cannot in equity avoid his express promise to pay a sum and be released on the ground that it effects a contribution between tort feasors.[81]

§ 5. *Pleading, proof and practice.*—Release as a defense must be pleaded.[82] In an action of debt on an executor's bond, a release pleaded puis darrein continuance, held a waiver of all previous pleas as to this person's interest.[83] Delivery of a release[84] or whether fraud was used in procuring it is a question for the jury.[85] Evidence of fraud in procuring a release must be such as would satisfy a reasonably fair mind.[86] Validity of a release may be tried as part of the whole case in Missouri.[87] A mere admission has been held insufficient to prove a release.[88] Instructions as to effect of release are grouped in the note.[89] A release may be ad-

accounting. Price v. Stout, 84 App. Div. [N. Y.] 334. A motion for nonsuit cannot be granted on the ground that money paid for a release for personal injuries has not been repaid or tendered. Austin v. Piedmont Mfg. Co. [S. C.] 45 S. E. 135. Where plaintiff alleges that the sum paid was a gift to him, he need not return it. Western R. v. Arnett, 137 Ala. 414.

79. Cammarata v. Pa. Coal Co., 86 N. Y. Supp. 787.

80. Brakeman injured on a railroad was fraudulently induced to execute a release. He thereafter accepted employment from the company, which was no condition of the release, and was paid a full month's salary for two weeks' work. Coles v. Union Terminal R. Co. [Iowa] 99 N. W. 108.

81. Kolb v. Nat. Surety Co., 176 N. Y. 233, 68 N. E. 247.

82. Rosenthal v. Rudnick, 84 App. Div. [N. Y.] 611. In Michigan, by rule of court notice of such defense must be attached to defendant's plea, but before the rule it was otherwise held. Cleveland v. Rothschild [Mich.] 94 N. W. 184.

Contra, in case a release made after issue joined may be proved under the general issue. Papke v. G. H. Hammond Co., 192 Ill. 631, 61 N. E. 910.

83. Probate Ct. of Westerly v. Potter [R. I.] 55 Atl. 524.

84. Cleveland v. Rothschild [Mich.] 94 N. W. 184.

85. Where a passenger was injured by a railway company and in an action for damages the defendant set up a release and plaintiff claimed that it had been obtained by fraud, the court over defendant's objection submitted the facts to the jury. Griffin v. Southern R., 66 S. C. 77; Ind., D. & W. R. Co. v. Fowler, 201 Ill. 152, 66 N. E. 394.

86. Where plaintiff, an illiterate man, testified that before he signed the release the defendant read it to him incorrectly and made false representations as to its effect, the jury found fraud. Dorsett v. Clement-Ross Mfg. Co., 131 N. C. 254. Evidence held sufficient to sustain a finding of fraud in obtaining a release of claims for money paid as margins on a stock gambling contract. Wheeler v. Metropolitan Stock Exch. [N. H.] 56 Atl. 754. Evidence held sufficient to show that release of claim from son to father was obtained by fraud and misrepresentation: $2,000.00, employment at $12.00 per week and chance of succeeding to father's business, for release of over $5,000.00. Hearn v. Hearn, 24 R. I. 328. Evidence held to show that a release by a widow of her interest in her husband's estate was procured by fraudulent representations as to its value by one who had been her agent, but the evidence was sufficient to show he was acting at the time in the interest of persons adversely interested. Mullaney v. Mullaney [N. J. Err. & App.] 54 Atl. 1086. In an action for injuries, evidence held to authorize the submission of an issue to the jury whether a release had been procured by fraud and false representations by the railway company's agents that the plaintiff's attorneys were not prosecuting her case and she would not get anything unless she accepted what they offered. Hidden v. Exeter, H. & A. St. R. [N. H.] 57 Atl. 333. Where releasor's testimony was not in all respects consistent, where it was alleged the release had been procured by fraud, this fact went to the weight of the testimony and did not authorize the court to withdraw the question of fraud from the jury. Id. Parol allusions to future employment made at the time of executing a release cannot be incorporated into it, nor are they sufficient to establish fraud. Atchison, T. & S. F. R. Co. v. Vanordstrand, 67 Kan. 386, 73 Pac. 113.

Admissibility of evidence: Statements made by defendant's agent after a release was signed held admissible in an action to avoid a release obtained by fraud as having a bearing upon plaintiff's good faith in pressing her claim of fraud. Keefe v. Norfolk Suburban St. R. Co. [Mass.] 70 N. E. 46.

87. Rev. St. 1899, § 654. Goodson v. Nat. Masonic Acc. Ass'n, 91 Mo. App. 339.

88. Mere declaration that he had settled. Kehoe v. Patton, 23 R. I. 360.

89. An instruction that a release of a claim for damages was binding on plaintiff, unless when he executed it he did not understand its contents, is not erroneous in requiring a finding that he did not understand them. Galloway v. San Antonio & G. R. Co. [Tex. Civ. App.] 78 S. W. 32. An instruction that a release is binding unless defendant concealed its true import and falsely represented that it was only a receipt is not erroneous in requiring a finding of that particular misrepresentation where it is the only one charged. Id. Instruction as to the effect of a release for injuries, executed where a statute provided that any contract whereby an employe waived his right of action for injuries caused by defective machinery is void, held proper. Fleming v. Southern R. Co., 131 N. C. 476.

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missible in a collateral proceeding,[90] but a void release is not admissible for any purpose.[91]

RELIGIOUS SOCIETIES.

§ 1. Organization as a Corporation, and Status of Society (1502).
§ 2. Membership (1502).
§ 3. Ministers (1502).
§ 4. Powers and Liabilities of Society in General (1503).
§ 5. Property and Funds (1503).
§ 6. Jurisdiction of Courts (1504).
§ 7. Actions by or Against Society or Members (1505).

§ 1. *Organization as a corporation, and status of society.*—In order to constitute a society, there must be a membership of persons associated together which collectively constitute the society, with such officers as are required, or at least a definite collective body acting as a society.[92] While for certain purposes a church congregation remains in legal contemplation, the same body though its membership has changed, yet it cannot sue and be sued, contract and be liable the same as a person natural or artificial.[93] An organization for religious and social purposes, but having no business for common benefit and profit, is not a partnership.[94] The general rules of corporation law apply to a religious society when incorporated.[95] An association formed to extend aid to sick members and defray burial expenses is not a religious society.[96]

§ 2. *Membership.*—A church has the right to expel one of its members,[97] and when regularly expelled he has no longer the rights of a member.[98]

§ 3. *Ministers.*—Religious organizations have the right to try and remove ministers in accordance with the laws and ordinances of the order.[99] The power to appoint to an office includes the power to remove the incumbent so appointed, unless the power of removal is expressly lodged in some other body.[1] An appointment of a minister being silent as to length of time is an appointment at will, which may be ended on reasonable notice.[2] But, in the absence of any provision therefor, a minister employed at will is not entitled to notice that the question of

90. Evidence of release which did not refer to subject of the action held admissible in an action growing out of a transaction concerning which the release was given. Mandt Wagon Co. v. Fuller & J. Mfg. Co. [Wis.] 97 N. W. 958.

91. Where a release not delivered nor under seal, nor executed by the corporation purported to be released, was offered as evidence against the corporation reserved from its provisions. Leeds v. N. Y. Tel. Co., 79 App. Div. [N. Y.] 121.

92. A mission started by a church, at which persons attend religious services, and children attend Sunday school, but at which no society for the purpose of religious worship has been formed, the enterprise being supported by the church, does not constitute such an entity as is capable of becoming the beneficiary in a resulting trust. Marie M. E. Church v. Trinity M. E. Church, 205 Ill. 601, 69 N. E. 73.

93. Males v. Murray, 23 Ohio Circ. R. 396.

94. Organization for religious and social purposes, members put in their property, lived as one family and had everything in common. Held not a partnership. Teed v. Parsons, 202 Ill. 455, 66 N. E. 1044.

95. North La. Baptist Ass'n v. Milliken, 110 La. 1002. Statutes which provide that members of congregation shall have power to elect a number of persons, who shall constitute a body corporate on being registered as provided, make the persons so elected, not the congregation, the corporation. Acts 1802, c. 111, which provide as above stated, so construed. Stubbs v. Vestry of St. John's Church, 96 Md. 267. A church organization made a corporation by Laws of 1797, p. 474, c. 51, did not lose its character as a corporation by an abortive attempt to incorporate under a later act. Congregational Church of Chester v. Cutler [Vt.] 57 Atl. 387.

96. Within Code, § 1017, relating to misdemeanors of treasurers of such societies. State v. Dunn [N. C.] 46 S. E. 949.

97. Hatfield v. DeLong, 31 Ind. App. 210, 67 N. E. 551.

98. Cannot vote. Gipson v. Morris, 31 Tex. Civ. App. 645, 73 S. W. 85.

99. Satterlee v. U. S., 20 App. D. C. 393.

1. Under a deed of incorporation, providing that the vestry of a church shall have power to appoint the rector, there being no provision as to removal, though the congregation are expressly authorized to remove all other members of the vestry, the vestry, which is the corporation, has the power to remove the rector. Stubbs v. Vestry of St. John's Church, 96 Md. 267.

2. Two months' notice is reasonable. Stubbs v. Vestry of St. John's Church, 96 Md. 267.

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terminating his relation as minister will be considered.[3] Quo warranto is the proper remedy against persons usurping offices in a chartered church.[4]

§ 4. *Powers and liabilities of society in general.*—A religious society cannot legislate for its divisions of territorial area,[5] and this is true even though they are recognized by law as corporate or political entities.[6] Where an amount is due from an unincorporated church, the real debtors are the members of the church at the time the debt was contracted, who can be shown to have in some way sanctioned or acquiesced in its creation.[7] And though the members of a voluntary association contracting on its behalf become jointly liable, yet if the person contracting with them knows that the expenses of the association are raised by assessment on and voluntary contribution by the entire membership, the members are not liable in solido.[8] The property liable for the debt of an unincorporated church is that controlled by or held in trust for the use of the congregation at the time the debt was contracted.[9] Funds subsequently accumulated cannot be subjected to the payment of the debt.[10] A religious corporation created for temporal purposes and having no power to expel a member from the church is not liable in damages to a member expelled by the congregation.[11] The chief officer of a religious organization, which is neither a corporation nor a partnership, has no implied authority to bind the other members by a note given in pursuance of his promises.[12] Payment on such notes by such officer from the funds of the organization does not amount to ratification.[13]

§ 5. *Property and funds.*—Where a congregation voluntarily places itself under the power of an ecclesiastical organization, its property must be taken and held according to the laws of that organization,[14] and the members of such congregation may be enjoined from using such property contrary to the determination of the

3. Stubbs v. Vestry of St. John's Church, 96 Md. 267.

Under the policy of the Baptist Church, the congregation is supreme, and a majority of the members thereof may, at a regular meeting properly called, dismiss the pastor without notice or trial on charges. Morris Street Baptist Church v. Dart [S. C.] 45 S. E. 753. Under the form of government of the Presbyterian Church, giving the presbytery power to visit particular churches and to order whatever pertains to their spiritual welfare, the presbytery, on its own motion, can direct an elder to cease to act, without citing him to appear and to be heard in his own behalf. Dayton v. Carter, 206 Pa. 491.

4. Dayton v. Carter, 206 Pa. 491.

5. McEntee v. Bonacum [Neb.] 92 N. W. 633, 60 L. R. A. 440.

6. Parishes, according to the nomenclature of the Roman Catholic Church, are not corporate or political entities. McEntee v. Bonacum [Neb.] 92 N. W. 633, 60 L. R. A. 440.

7. Males v. Murray, 23 Ohio Circ. R. 396.

8. A regularly ordained preacher of the Baptist faith will be presumed to know the method customarily employed in his denomination for raising the preacher's salary. Riffe v. Proctor, 99 Mo. App. 601, 74 S. W. 409.

9, 10. Males v. Murray, 23 Ohio Circ. R. 396.

11. Reinke v. German Evangelical L. T. Church [S. D.] 96 N. W. 90.

12, 13. The chief officer of a religious organization, where the members put in their property, lived as one family and had everything in common, agreed with plaintiff when she joined that she might withdraw and have her money returned whenever she wished. Held, that on withdrawal the officers had no authority to bind the other members to pay her by a note given by them. Teed v. Parsons, 202 Ill. 455, 66 N. E. 1044.

14. Where a congregation worships according to the forms and rites of the Roman Catholic Church, but is not connected with the ecclesiastical body known as such church, and has never placed itself under the power of the head diocese and where it is alleged that the archbishop of the diocese refused to permit the congregation to purchase property for a church, and, in opposition to its refusal, it bought the property and paid for it, and employed a pastor without any knowledge that he had been assigned by the archbishop, and paid him the salary he demanded, and acted independently of the authority of the Roman Catholic Church in every respect, the court is without authority to decree that a trustee holding title to the church property for the use of the congregation shall convey it to the archbishop of the diocese. Dochkus v. Lithuanian Ben. Soc., 206 Pa. 25.

A charter creating a "Sisters of Charity" corporation, which empowered it to acquire real estate in fee simple, is a sufficient legislative sanction to its acquisition of real estate conveyed by deed, within the Declaration of Rights, art. 38, declaring void every gift, sale or devise of land to any religious sect, order or denomination without prior or subsequent legislative sanction, as to render said conveyance valid. Rogers v. Sisters of Charity, 97 Md. 550.

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governing authorities of the organization.[15] In order to convey the society's property, the persons so doing must be properly authorized.[16]

The fact that a majority of a religious society secedes from a church and organizes a new church of a different denomination does not entitle them to share in the benefits of the fund or property held in trust for the original society.[17] In an independent religious society having a congregational form of government, and owing no fealty or obligation to a higher authority, the will of the numerical majority of its members will control as to all questions of church government and as to the use of the church property.[18] Where a party has no legal right to vote, he must be challenged at the proper time.[19] A decision reached by voting cannot be set aside on the ground that a member was not allowed to vote, when, though the member was challenged, the vote was not in fact rejected.[20]

§ 6. *Jurisdiction of courts.*—Liability to an indictment and conviction in the temporal court, for the offense charged in the ecclesiastical proceeding, forms no bar in the ecclesiastical court.[21]

In order to have its decision binding upon the secular courts, the ecclesiastical court must be organized according to the constitution of the church.[22] The proceedings of ecclesiastical courts on matters within their jurisdiction will not be

15. Bonacum v. Harrington [Neb.] 91 N. W. 886. Under the rules of the Presbyterian Church, the legal title to church property is vested in the trustees of the congregation, and the session controls the spiritual welfare of the churches, but has no control over the property thereof. Held that, in the maintenance of public worship, trustees of the congregation must respect the wishes of the session as to the use of the house of worship. Dayton v. Carter, 206 Pa. 491.

16. Where the records of a church showed that a resolution authorizing the consolidation of the church with another church was adopted by a vote of five to six at a meeting held after due notice, in accordance with the rules of the church, and the resolution directed the trustees to make the conveyance of the church property, and such conveyance was also authorized by the quarterly conference of the church, a contention that the deed was executed by the trustees without authority is not well taken. Jones v. Sacramento Ave. M. E. Church, 198 Ill. 626, 64 N. E. 1018.

Under the constitution and by-laws of the Baptist Church, the trustees have no right to make any contracts affecting the real property of the church, hence an agreement by them for the sale of the church property without the consent of the congregation is invalid. Calvary Baptist Church v. Dart [S. C.] 47 S. E. 66.

17. Certain church society had the right under a deed of trust, to use a church building, and, while doing so, a majority of the society seceded and formed another church of a different denomination. Held, that the majority will be enjoined from excluding the minority from the building. Cape v. Plymouth Cong. Church, 117 Wis. 150, 93 N. W. 449; Dochkus v. Lithuanian Ben. Soc., 206 Pa. 25.

This case must be distinguished from those where the action of the majority pertain merely to the temporalities of the church. Cape v. Plymouth Cong. Church, 117 Wis. 150, 93 N. W. 449.

18. Gipson v. Morris, 31 Tex. Civ. App. 645, 73 S. W. 85.

19. Where members of a parent church had for several years permitted the members of certain chapels organized and conducted by the church to vote concerning questions relating to dispositions of current funds to which such members had contributed, and members of such chapels were permitted to vote without challenge on a resolution increasing the salaries of the pastors of such chapels, a member of the parent church was estopped to maintain a suit in equity to enjoin the carrying out of the resolution adopted by the vote of such members on the ground that they had no legal right to vote. Davie v. Heal, 86 App. Div. [N. Y.] 517.

20. Jones v. Sacramento Ave. M. E. Church, 198 Ill. 626, 64 N. E. 1018.

21. Satterlee v. U. S., 20 App. D. C. 393.

The general convention of the Protestant Episcopal Church had the right to make and has the power to enforce, through the proper diocesan court, Canon 2, of tit. 2, of the general convention, providing that every minister of the church shall be liable to presentment and trial for certain offenses, including that of crime or immorality, there being nothing in the provisions of the canon violative of or in conflict with the personal civil rights of those liable to be tried thereunder. Id.

22. Hatfield v. De Long, 31 Ind. App. 210, 67 N. E. 551. Under the constitution of a church providing that no one who participated in the trial by which a local society expelled a member shall sit as a member of the appellate tribunal, a member of the local society who attended throughout the trial, but abstained from voting because she did not want to vote, and a member who was present at the meeting, though not at the commencement thereof, but merely held up his hand in response to a request by the expelled member for all persons who did not vote to indicate it, are ineligible for the appellate tribunal. Id.

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reviewed by the civil courts,[23] but they may inquire whether the judgment was the act of the church or of persons who were not of the church, and who consequently had no power to render it,[24] and it makes no difference whether the decision is by one man or several so long as the mode of procedure is in accordance with the laws of the order.[25] Where an appeal has been taken to a higher ecclesiastical tribunal, the civil courts have jurisdiction to enjoin the enforcement of a sentence pronounced against the accused until the appellate ecclesiastical tribunal has disposed of the appeal.[26] The civil courts will interfere with churches or religious organizations when the rights of property or the civil personal rights of individuals are involved.[27] Where rules and regulations are made by the proper church functionaries, and such rules are authorized by the laws of the order, they will be enforced by the courts when not in conflict with some law bearing upon the subject contained in the rules.[28]

§ 7. *Actions by or against society or members.*—The general rules of law as to nature and grounds of action,[29] parties, pleading,[30] and evidence,[31] govern in actions by or against the society or its members.

23. Irvine v. Elliott, 206 Pa. 152; Satterlee v. U. S., 20 App. D. C. 393; Bonacum v. Harrington [Neb.] 91 N. W. 886. Civil courts have no power to revise or question ordinary acts of church discipline, or of exclusion from membership. Bonacum v. Murphy [Neb.] 98 N. W. 1030. Irregularity under the canons of the church in the organization of a diocesan court of the Protestant Episcopal Church; refusal of such a court to entertain a challenge taken by a clergyman on trial before it to one of the members of the court; supposed insufficiency of the evidence upon which the accused could be convicted, under the provisions of a certain canon, are questions of procedure, where they involve construction of the canons of the church, and depend upon the judgment of the ecclesiastical court, over which the civil courts can exercise no power of revision or control. Satterlee v. U. S., 20 App. D. C. 393.

24. Resolution of expulsion. Bonacum v. Murphy [Neb.] 98 N. W. 1030.

25. Bonacum v. Harrington [Neb.] 91 N. W. 886.

26. Bonacum v. Murphy [Neb.] 98 N. W. 1030.

27. Satterlee v. U. S., 20 App. D. C. 393; Morris Street Baptist Church v. Dart [S. C.] 45 S. E. 753. There is no vested property right in a clergyman to exercise the functions of his office to the end that he may earn and have a salary. Satterlee v. U. S., 20 App. D. C. 393.

Where the right of property in the civil courts is dependent on the question of doctrine, discipline, ecclesiastical law, rule or custom, or church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil courts will accept that decision as conclusive, and be governed by it in its application to the case before it. Id.

The power of courts to regulate and control the administration of charitable gifts including those for religious purposes is more germane to the title Charitable Gifts, Q., V., 1 Curr. Law, p. 512.

28. Alexander v. Bowers [Tex. Civ. App.] 79 S. W. 342.

29. An action will not lie by a priest of the Protestant Episcopal Church against the bishop of his diocese and a member of his congregation for trespass for malicious conspiracy, or evidence that the defendants united to charge the priest with violation of church law and forgery, and testified to the same in an ecclesiastical court, which barred plaintiff from the ministry, though the acts of defendants might to some extent have been influenced by vindictiveness. Irvine v. Elliott, 206 Pa. 152.

30. An allegation, in a pastor's suit for salary, that defendants were members "of a religious society," is not an allegation of incorporation. Riffe v. Proctor, 99 Mo. App. 601, 74 S. W. 409.

31. In an action by persons claiming to be the trustees of a church, seeking an injunction to prevent defendants from interfering with plaintiffs in the control of the church property, it being admitted that in January, 1901, a judgment was duly rendered to the effect that defendants were the legally elected trustees of the church, the burden was on plaintiffs to show that at an election regularly held since that time, they had been elected to succeed defendants. African Baptist Church v. White, 24 Ky. L. R. 646, 69 S. W. 757. In an action on a note alleged to have been executed to plaintiff's assignor for services rendered by him as pastor of defendant church the petition averred that the church, in regular meeting, authorized its directors (trustees) to execute the note. The answer alleged that the execution of the note was unauthorized and was procured by the pastor fraudulently representing that the congregation had authorized it. The reply set out in haec verba a resolution adopted by the congregation authorizing execution of note, etc. Rejoinder put all this matter in issue. Held proper to admit evidence of the adoption of the resolution, and showing the steps taken at that meeting and those previously held in regard to the settlement of the church's indebtedness to the pastor. Gladstone Baptist Church v. Scott, 25 Ky. L. R. 237, 74 S. W. 1075. Admission of secretary's books. Id.

Consult Associations, etc., 1 Curr. Law, p. 233; Corporations, 1 Curr. Law, p. 710.

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REMOVAL OF CAUSES.

§ 1. Right to Remove from State to Federal Court (1506).
§ 2. What is a "Suit" or "Action" so removable (1506).
§ 3. Nature of Controversy or Subject-Matter and Existence of Federal Question (1506).
§ 4. Diversity of Citizenship and Alienage of Party (1507).
§ 5. Prejudice and Local Influence and Denial of Civil Rights (1509).
§ 6. Amount in Controversy (1509).
§ 7. Transfers Between Courts of the Same Jurisdiction (1510).
§ 8. Procedure to Obtain and Effect the Removal (1511).
§ 9. Transfer of Jurisdiction and Other Consequences of Removal (1513).
§ 10. Practice and Procedure After Removal; Remand or Dismissal (1513).

§ 1. *Right to remove from state to Federal court.*—The primary test is that the cause must be within the original jurisdiction of the Federal court, as defined by Act of Congress,[32] both at the time of its commencement and of its removal.[33]

§ 2. *What is a "suit" or "action" so removable.*—A condemnation proceeding,[34] an appeal from an assessment therein, though required originally to be brought in a state court,[35] and a claim against a decedent,[36] are removable suits or actions; but a proceeding to open a default judgment is not removable.[37]

§ 3. *Nature of controversy or subject-matter and existence of Federal question.*—Controversies as to shipment of diseased cattle into a state,[38] rights of a homestead settler,[39] and bridges over government canals,[40] do, and controversies as to the ownership of land,[41] the collection of state taxes,[42] or penalties,[43] do not involve Federal questions, and consequently are, or are not removable. The complaint, unaided by judicial inference and notice,[44] or by the plea,[45] must clearly show[46] that the question was directly involved.[47]

32. Hyde v. Victoria Land Co., 125 Fed. 970. Where state had changed county lines and a county was in two districts, the suit might be removed to either district without regard to the location of the county seat. The boundaries of district not affected by state legislation. Id.

33. Huntington v. Pinney, 126 Fed. 237.

34. A proceeding under a Missouri statute by a railroad to condemn a right of way is a suit removable by a nonresident defendant, although the railroad could not originally have brought it in the Federal court, owing to the state statute. Union Terminal R. Co. v. Chicago, B. & Q. R. Co., 119 Fed. 209.

35. The appeal of either party from the assessment in condemnation proceedings for a railroad under Iowa Code, § 2009, is to be tried as an ordinary action, and so is a removable suit, though the action must be begun in a state court. Myers v. Chicago & N. W. R. Co., 118 Iowa, 312, 91 N. W. 1076.

36. A suit may be removed though founded on a claim originally presented to a probate court against the estate of a decedent. Schneider v. Eldredge, 125 Fed. 638.

37. Where a citizen of another state against whom a judgment had been obtained on a service by publication, applied under Iowa Code, § 3706, for a retrial, he cannot remove case as the Federal court has no power to modify or reverse a state judgment. Davis v. Harris, 124 Fed. 713.

38. An action against a carrier for shipment of diseased cattle into a state in violation of United States and state law is removable. Mastin v. Chicago, R. I. & P. R. Co., 123 Fed. 827.

39. Suit by a daughter of deceased homestead settler to recover an interest in land which after his death was patented to his widow involves Federal question of the construction of homestead law. McCune v. Essig, 118 Fed. 273.

40. A suit against U. S. officers for changing the location of a bridge over a canal they were constructing. Woods v. Root [C. C. A.] 123 Fed. 402.

41. Complaint alleging ownership of land and wrongful ouster by defendant, but not showing that it concerned a quarry on school lands granted by congress. Wash. v. Island Lime Co., 117 Fed. 777.

42. Back taxes. Yazoo & M. V. R. Co. v. Adams, 81 Miss. 90. An action by a state in a state court to collect a tax is not removable as involving a Federal question, though the petition might be demurred to as showing a tax on interstate commerce. Com. v. Chicago, I. & L. R. Co., 123 Fed. 457.

43. An action to subject a foreign corporation to penalties imposed by state statute against monopolies, and not mentioning constitution or law of the United States. South Carolina v. Virginia-Carolina Chemical Co., 117 Fed. 727.

44. Wash. v. Island Lime Co., 117 Fed. 777.

45. An action by a state official against a railroad to collect back taxes does not involve a Federal question, as it is the complaint and not defendant's plea which decides the matter. Yazoo & M. V. R. Co. v. Adams, 81 Miss. 90.

46. In a quo warranto proceeding to determine the right of defendant to be a public corporation under laws of state, an allegation that its proceedings were in violation of the U. S. constitution is too general. People v. Brown's Valley Irr. Dist., 119 Fed. 535. Where bill does not assert a right based upon any law or the constitution of the United States, or ground of relief derived

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§ 4. *Diversity of citizenship and alienage of party.*—Where the parties on one side are all citizens of states or foreign countries,[48] different from those of which any party on the other side is a citizen, or from that where suit is brought,[49] the suit is removable, unless no one resides in the district, but this last requirement may be waived.[50] Citizenship of natural persons is a question of fact,[51] to be properly alleged,[52] but in the case of corporations, the citizenship of the stockholders is regarded, and is now conclusively presumed to be that of the state where it is incorporated, and reincorporation,[53] or consolidation in another state,[54] does not affect the matter. The real,[55] or representative,[56] and not the formal,[57] nom-

from either, the case was remanded; wherever jurisdiction is doubtful such is the duty of the court. City of Wichita v. Mo. & K. Tel. Co., 122 Fed. 100.

47. It must appear that the state court could not have given judgment without deciding the Federal question to justify a removal. South Carolina v. Virginia-Carolina Chemical Co., 117 Fed. 727. A case cannot be removed from a state to a Federal court as one arising under the constitution or laws of the United States, unless plaintiff's complaint, bill, or declaration shows it to be a case of that character. Minn. v. Northern Securities Co., 24 Sup. Ct. 598, 48 Law. Ed. —. The "full faith and credit" clause of the constitution has nothing to do with the conduct of individuals or corporations. Held, invoking the rule in this case did not make a case arising under the constitution or laws of the United States. Id.

48. An action by a citizen of state where action is brought against a corporation organized in another state, and against a corporation organized in a foreign country, may be removed by joint petition, as either defendant if sued alone could have removed. Roberts v. Pac. & A. R. & Nav. Co., 121 Fed. 785. An alien defendant cannot remove a suit where he is a resident of the state in which the suit was brought [25 U. S. Stat. 434, § 2]. Eddy v. Casas, 118 Fed. 363.

49. Where a citizen of Tennessee sued a Mississippi railroad and an Illinois palace car company in Mississippi, alleging that he was injured in a car controlled by both jointly, the Illinois car company cannot remove the cause, as the railroad was a citizen of state where action was brought and the controversy was not reparable. Dougherty v. Yazoo & M. V. R. Co., 122 Fed. 205.

50. Where neither plaintiff nor defendant is a resident of the state where the suit is brought, it is not removable under judiciary act of 1887-88, but if both parties waive their objections to the jurisdiction, as by consenting to an order relating to matters in controversy, the cause will not be remanded. Foulk v. Gray, 120 Fed. 156. The defendant may remove a cause though neither party lives in district, and Federal court would not originally have had jurisdiction, as defendant may waive that provision. Duff v. Hildreth, 183 Mass. 440, 67 N. E. 356.

51. Where plaintiff, unmarried, resided in Missouri, but made a number of trips to, and proved up homestead in Oklahoma, held the facts did not establish a change of domicile so as to defeat defendant's right of removal. Corel v. Chicago, R. I. & P. R. Co., 123 Fed. 452.

52. Allegation of residence without allegation of citizenship not sufficient. Dinet v. Delavan. 117 Fed. 978.

53. A foreign railroad corporation may remove an action for local prejudice though it has complied with N. C. Laws 1899, c. 62, making a corporation a domestic one on filing its charter, as its citizenship cannot be changed so as to affect the jurisdiction of the Federal courts. Southern R. Co. v. Allison, 190 U. S. 326, 47 Law. Ed. 1078. A foreign railway company does not, because of a compliance with statutes providing that no foreign railway company shall operate its road in the state until it becomes a citizen thereof, become a domestic corporation so as to prevent it securing the removal of a cause against it to the Federal court. Ill. Cent. R. Co. v. Hibbs [Ky.] 78 S. W. 1116. A fortiori, where the company had not complied with the statute. Id.

Contra, a foreign railroad corporation which has filed its charter and acceptance under N. C. Laws 1899, c. 62, has become domesticated and cannot remove its cause to the Federal court on the ground of local prejudice. Beach v. Southern R. Co., 131 N. C. 399.

54. A railroad corporation formed in Ohio by consolidation of a Missouri railroad corporation, and railway corporations of three other states is under Mo. Rev. St. 1899, §§ 1059, 1060, still a citizen of each of the four states and not entitled to remove an action from a Missouri state court. Winn v. Wabash R. Co., 118 Fed. 55.

55. Where an administrator pro tem. was appointed to contest the claim of the administratrix, but the claim was actually contested by the heir, who took the appeal, the latter was the real party in interest and his citizenship determined the right to removal. Schneider v. Eldredge, 125 Fed. 638. Where Iowa Code, § 2009, provided that on appeal from an assessment in condemnation proceedings the landowner shall be plaintiff and the railroad defendant, contention that the railroad cannot remove because it is really plaintiff, is groundless. Myers v. Chicago & N. W. R. Co., 118 Iowa, 312, 91 N. W. 1076. An interpleader suit may be removed where the two defendants are citizens of different states, though one is a citizen of the same state as plaintiff, but the court will transpose the parties, so that they will be on opposite sides. First Nat. Bank v. Bridgeport Trust Co., 117 Fed. 969.

56. In an action against an unincorporated association consisting of several thousand members, under Ky. Civ. Code of Prac. § 25, permitting one party to sue or defend on behalf of many, the treasurer may appear, and being a citizen of another state he may remove cause. Boatner v. American Exp. Co., 122 Fed. 714.

57. Where in an action against a nonresident to set aside certain land contracts,

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inal,[58] or unnecessary[59] parties are to be considered. A plaintiff may join a citizen of the same state, with a citizen of another state, as defendants, if he has in fact a joint cause of action against them, even though his purpose is to thereby prevent a removal to the Federal court.[60]

Where a controversy is separable, as where a different state of facts must be proved as to each defendant,[61] or the negligence alleged is not joint,[62] or one is liable at law and another in equity,[63] a defendant may remove, though joined to a defendant who is a citizen of the state of which plaintiff is a citizen. The question of separability must be determined from the complaint,[64] unaided by the petition for removal.[65] Suits against a corporation and its stockholders to prevent

the register of deeds was joined for the purpose of preventing their being recorded, he was a mere formal party, and did not defeat the nonresident's right to a removal. Hyde v. Victoria Land Co., 125 Fed. 970.

58. Where a railroad seeking to condemn a right of way over another railroad, joined as defendants the latter railroad, the lessor railroad (99 years' lease) and the original owners of the land, it was held that all of the latter were merely nominal parties and did not defeat the right of the lessee railroad to remove. Seaboard A. L. Ry. v. N. C. R. Co., 123 Fed. 629. Where relief prayed was cancellation of deed under which defendant claimed, the joinder of other nominal parties will not defeat his right to remove. Wirgman v. Persons [C. C. A.] 126 Fed. 449. In an action to foreclose against the original mortgagor and its receiver and against the present holder of the equity of redemption, the former are not nominal parties, though the petition for removal showed that they had been released from all liability by a valid contract with plaintiff, as the defense was personal, nor was the controversy severable. United States Mortg. Co. v. McClure, 42 Or. 190, 70 Pac. 543.

59. Where in an ejectment suit against a foreign corporation, the resident agent, who has merely served notice on plaintiff that he will be held liable for trespass, is joined as defendant, it will not prevent a removal as he is not a proper party. Carothers v. McKinley M. & S. Co., 122 Fed. 805.

60. Gustafson v. Chicago, R. I. & P. R. Co., 128 Fed. 85; Kelly v. Chicago & A. R. Co., 122 Fed. 286; Union Terminal R. Co. v. Chicago, B. & Q. R. Co., 119 Fed. 209; Ross v. Erie R. Co., 120 Fed. 703; Free v. Western Union Tel. Co., 122 Fed. 309; Boatner v. American Exp. Co., 122 Fed. 714; Kan. City S. B. R. Co. v. Herman, 187 U. S. 63, 47 Law. Ed. 76. In a suit for the death of an employe against a lessee railroad, the joining of the lessor railroad held not to be solely for defeating the right to removal where the question of the lessor's liability was still an open one in that state. Person v. Ill. Cent. R. Co., 118 Fed. 342.

61. Where an action against a railroad and its employe is based solely on the alleged negligence of the employe, it presents a separable controversy, and the railroad may remove it. Helms v. Northern Pac. R. Co., 120 Fed. 389. A suit to quiet title against a number of defendants, where the bill does not aver that they claim through a common source, is severable, and a defendant of a different state may remove the cause as against him. Carothers v. McKinley M. & S. Co., 116 Fed. 947. A suit to set aside a conveyance between two corporations for fraud, where the directors of the grantor corporation were joined with the two corporations as defendants, presents a separable controversy as to the two corporations, and may be removed by them. Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 Law. Ed. 1122. In an action against a lessee and a lessor railroad for injuries, where by Mo. Rev. St. 1899, § 1060, the latter is declared to remain liable, there is a separable controversy which may be removed by lessee. Kelly v. Chicago & A. R. Co., 122 Fed. 286. Where an employe sues a railroad for injury due to the negligence of a fellow employe, and joins the lessor railroad, there is a separable controversy and the lessee railroad may remove the case. Willard v. Spartanburg, U. & C. R. Co., 124 Fed. 796.

Contra, an action against a lessor and a lessee railroad for death of employe of latter does not involve a separable controversy entitling the lessee to remove. Person v. Ill. Cent. R. Co., 118 Fed. 342.

62. An action against a railroad and an engineer for concurrent negligence, where there was an allegation that the railroad was negligent in not providing a careful engineer, is separable and removable as to that particular matter, and effect is to remove entire case. Southern R. Co. v. Edwards, 115 Ga. 1022. In an action against a railroad for the death of a person caused by willful and reckless acts of its servants, in which the servants were joined as defendants, but there was no allegation that the company participated in these acts, the railroad may remove as there is a separable controversy. Davenport v. Southern R. Co., 124 Fed. 983.

63. Where a remainderman sued a life tenant and an insurance company with whom the latter had insured, and then compromised a claim to recover the full amount of insurance and to hold the life tenant as trustee, there was a separable controversy as regards the insurance company. Harley v. Home Ins. Co., 125 Fed. 792.

64. Harley v. Home Ins. Co., 125 Fed. 792. Where a passenger sued engineer and conductor, citizens of the same state as himself, and a foreign railroad for injuries received from the derailment of a train, and there was only a general allegation of negligence against the former, held under S. C. Code Civ. Proc. § 163, requiring a concise statement of facts constituting cause of action, that the complaint was insufficient against the former and that the railroad could remove the case. Bryce v. Southern R. Co., 122 Fed. 709.

65. Fogarty v. Southern Pac. Co., 123 Fed. 973.

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a disposition of its property,[66] or against a railroad and its servants,[67] or receivers,[68] or a connecting railroad,[69] for concurrent acts of negligence,[70] though they are dismissed as to some defendants,[71] are not separable where all parties are served with process.[72]

§ 5. *Prejudice and local influence and denial of civil rights.*—Where prejudice or local influence is shown, any defendant who is a citizen of a different state from that of which plaintiff is a citizen, may remove a case, though some of the defendants are citizens of the same state as plaintiff,[73] or of the state where suit is brought,[74] and though there is no separable controversy.[75] That a suit involves a large loss to taxpayers,[76] unless it is transferable to another county,[77] or a prosecution against Federal officers,[78] may show local prejudice, and the fact that it is to be tried by a judge,[79] or that the prejudice is natural,[80] is immaterial.

§ 6. *Amount in controversy.*—In suits on land contracts,[81] or to enjoin injury

66. In a suit by stockholders against a corporation and its directors, and against a majority stockholder who was not an officer, to enjoin the disposing of its property, the latter cannot remove the suit as there is no separable controversy between him and complainants. Hanover Nat. Bank v. Credits Commutation Co., 118 Fed. 110. Where a stockholder of a domestic corporation sues that corporation and a foreign corporation to prevent the latter from securing control of the former, the latter cannot remove the suit, though incidental relief may be sought against it only, as the controversy is not severable, nor can the domestic corporation be aligned with complainant as it is not a party in the same interest. MacGinniss v. Boston & M. C. C. & S. Min. Co. [C. C. A.] 119 Fed. 96. In a suit by stockholders against a foreign corporation and its resident officers to prevent the former from conveying its property to another corporation, the controversy is not separable. Campbell v. Milliken, 119 Fed. 981. But as to a suit to set aside a conveyance compare Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 Law. Ed. 1122.

67. Where an employe sues railroad for injury from defective condition of cars, and other defendants for negligent operation of cars, there is no separable controversy entitling railroad to a removal. Fogarty v. Southern Pac. Co., 123 Fed. 973.

68. An action against a railroad and its receivers where both charged with negligence, does not present a separable controversy entitling the receivers to remove it. Rupp v. Wheeling & L. E. R. Co., 121 Fed. 825.

69. Where an employe sued the railroad he worked for and the connecting railroad (a corporation organized in another state) for injuries received on a defective car received from the latter, the latter cannot remove as there is no separable controversy. Hoye v. Great Northern R. Co., 120 Fed. 712.

70. In a suit against a railroad and another person where complaint alleges concurrent acts of negligence, there is no separable controversy. Weaver v. Northern Pac. R. Co., 125 Fed. 155. Where railroad is charged with negligence in accepting an insane passenger, and the conductor with negligence in not protecting the other passengers, concurrent negligence is charged and the controversy is not severable as to the railroad. Dougherty v. Atchison, T. & S. F. R. Co., 126 Fed. 239.

71. Where a railroad and its division superintendent and train dispatcher were sued, and at the close of the testimony the case was dismissed as to the two latter against plaintiff's objection, the railroad could not then remove the case, as the right was not dependent on the aspect the case developed at trial. Howe v. Northern Pac. R. Co., 30 Wash. 569, 70 Pac. 1100.

72. Where two defendants were sued on a joint and several liability, and only the nonresident one was served with process, and plaintiff elected to proceed to trial, the nonresident defendant may remove the cause, as the election operated as a severance of the controversy. Berry v. St. Louis & S. F. R. Co., 118 Fed. 911.

73. Montgomery County v. Cochran, 116 Fed. 985; Barlett v. Gates, 117 Fed. 362.

74. Seaboard A. L. R. v. N. C. R. Co., 123 Fed. 629.

75. Holmes v. Southern R. Co., 125 Fed. 301.

Contra, where a necessary defendant is a resident and a citizen of the same state as plaintiff, and there is no separable controversy, the cause cannot be removed for local prejudice by another nonresident defendant. Campbell v. Milliken, 119 Fed. 982.

76. Suit by a county against its treasurer and the surety company on his bond for a large default which involved large loss to taxpayers tending to create prejudice and local influence as prominent citizens involved. Montgomery County v. Cochran, 116 Fed. 985.

77. Local prejudice not shown by mere fact that municipal corporation was plaintiff where state judge had power to transfer to another county. Board of Water Com'rs v. Robbins, 125 Fed. 656.

78. A criminal prosecution for assault where defendant was at time making an arrest as a deputy marshal is removable under U. S. Rev. St. § 643. Com. v. De Hart, 119 Fed. 626.

79. Case may be removed for prejudice or local influence though to be tried by a judge, as his fitness cannot be inquired into. Montgomery County v. Cochran, 116 Fed. 985.

80. Though moral justification for widespread sentiment in favor of one party may be very great, yet such sentiment is ground for removal. Bartlett v. Gates, 117 Fed. 362.

81. Where land contracts sought to be set aside were alleged in complaint to be of greater value than $2,000, case was re-

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to land,[82] the value of the land is the amount in controversy, but in suits as to mortgages,[83] or liens, it is the value of these last.[84] To make an amount exceeding $2,000 different paragraphs of complaint cannot be tacked together,[85] but the complaint may be amended,[86] and where it has not been filed,[87] or is silent, the averments of the petition will control.[88]

§ 7. *Transfers between courts of the same jurisdiction.*—Under an act providing that all causes pending in a court in one town should be transferred to the same court in another town, a cause originally tried in the former town, which, when the act took effect, was awaiting determination on appeal, is, when the appeal is dismissed, within the jurisdiction of the court at the latter town.[89] Except for the purpose of determining if the case is a transferable one,[90] or where the transfer is not in due form,[91] and seasonably[92] demanded, the original court loses jurisdiction entirely,[93] and the only remedy is by appeal.[94] Irregularities in the transfer may be disregarded,[95] or waived by the parties,[96] if not objected to

movable. Hyde v. Victoria Land Co., 125 Fed. 970.

82. A suit to enjoin permanent injury to land may be removed where the value of the land exceeds $2,000, and other jurisdictional facts appear. Sheriff v. Turner, 119 Fed. 231. An action for $1,000 damages and to enjoin defendant from maintaining a nuisance is removable though there is affidavit that cost of removal will not exceed $500 as the amount involved is not measured by that solely. Amelia Milling Co. v. Tenn. C., I. & R. Co., 123 Fed. 811.

83. In a suit by owner of 1-325 of real property to cancel mortgages thereon for $475,000, the value in dispute is not the amount of the mortgages, but 1-325 thereof, but Thayer J. concurs in remanding case because there was alternative prayer for judgment for $1,509. Cowell v. City Water Supply Co. [C. C. A.] 121 Fed. 53.

84. In a suit to foreclose a judgment lien for $827 on certain lands, $827 is the amount in dispute, not the value of the lands. Wakeman v. Throckmorton, 124 Fed. 1010.

85. In an action for death of decedent where there were two paragraphs in complaint, each demanding $2,000, the sum in controversy was not $4,000, nor where the Illinois statute limited damages to $5,000 was that the sum in controversy, nor did the prayer for other and proper relief affect the matter here. Baltimore & O. R. Co. v. Ryan, 31 Ind. App. 597, 68 N. E. 923.

86. After an action for $2,250 had been removed, plaintiff filed a supplemental pleading alleging that there was an error and the amount sued for should be reduced $448 and made a motion to remand, which was granted with costs to defendant. W. T. Hughes & Co. v. Peper Tobacco Warehouse Co., 126 Fed. 687.

87. Where action for personal injuries begun by service of summons was removed before complaint was served, and the complaint since served only asked for $2,000 damages, the court refused to remand because of previous decision of which it expressed disapproval. Coffin v. Phila., W. & B. R. Co., 118 Fed. 688.

88. In an action to prevent defendant from interfering with plaintiffs' business, the petition for removal, averring that more than $2,000 was in controversy, is controlling, where the bill does not show the contrary. Duff v. Hildreth, 183 Mass. 440, 67 N. E. 356.

89. Sperling v. Stubblefield [Mo. App.] 79 S. W. 1172.

90. Where a counterclaim was interposed exceeding the jurisdiction of the municipal court, the latter had authority to determine if it was a proper one, requiring the transfer of the case. Jourdain v. Luchsinger [Minn.] 97 N. W. 740.

91. Under N. Y. Laws 1902, c. 580, § 25, subd. 4, action may be tried in municipal court where brought, though not the proper one, unless it is transferred on demand of defendant before issue is joined. A demand to transfer to "some other district" is insufficient. Fischer v. Brooklyn Heights R. Co., 84 N. Y. Supp. 254.

92. Under Greater N. Y. Charter, § 1366, providing cause could be removed from municipal court after issue joined and before an adjournment was granted on defendant's application, the right was not lost where all the adjournments were on court's own motion or on plaintiff's application. Solis v. Balbas, 40 Misc. [N. Y.] 658. Defendant does not waive his right to removal from municipal court by an adjournment before issue is joined, under N. Y. Code Civ. Proc. § 3216. Duke v. Caluwaert, 40 Misc. [N. Y.] 623. Where defendant at the call and time of filing answer moved to remove the case from the municipal court to the county court and the sureties were sworn, the former court had no authority to grant a continuance before passing on the removal. Meisen v. Rothfeld, 89 App. Div. [N. Y.] 447.

93. Act Cong. March 11, 1902, § 7, transferring all pending causes to new Southern district of Texas over which it would originally have had jurisdiction, deprives the other districts of jurisdiction to make any orders. Stillman v. Hart [C. C. A.] 126 Fed. 359. But a plea filed with district court after the case has been certified to the common pleas division, where it is turned over with the other papers, is properly filed. Wildes v. Draper, 24 R. I. 262.

94. Duty of municipal court to transfer case on motion of defendant where none of parties resided in district, and on its refusal defendant's remedy is an appeal from the judgment. Goldman v. Jacobs, 38 Misc. [N. Y.] 781.

95. Where a cause has been transferred from one circuit to another in same state because of the disqualification of the judge, the transmission of the original order of

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before trial.[97] In Rhode Island, where a cause is transferred from the district court to the common pleas for jury trial, pleas left with the clerk of the district court and by him sent over to the common pleas with the papers in the case are properly filed, though the clerk of the common pleas omitted to mark them filed.[98]

§ 8. *Procedure to obtain and effect the removal.*—Under 25 U. S. Stat. 435, the petition for removal must be filed before defendant is required to plead or answer in the state court,[99] and accordingly a petition filed after a judgment nisi,[1] or an appeal from probate court,[2] or a plea in abatement,[3] or an affidavit of defense,[4] is too late, even though plaintiff failed to file his complaint;[5] but defendant does not waive his right by taking action in state court under excusable misconceptions,[6] or where the state court has denied his petition.[7] A special appearance in a state court for the purpose of removal does not constitute a submission to the jurisdiction of the state court for any other purpose.[8] The petition, without notice,[9] where there is no separable controversy, must be made by all[10] of the original,[11] or real[12] defendants, averring clearly the jurisdictional facts.[13]

transfer, instead of a certified copy is a mere irregularity, and on collateral attack jurisdiction will be presumed. Finley v. Chamberlin [Fla.] 35 So. 1.

96. Where plaintiff after removal to city court served a reply entitled in that court, the case will not be remanded. Duke v. Caluwaert, 40 Misc. [N. Y.] 623. Where parties agreed to transfer a case from justice to circuit court, the latter had jurisdiction as under S. D. Comp. Laws 1887, § 4904, a voluntary appearance is equivalent to personal service of summons. Ramsdell v. Duxberry [S. D.] 96 N. W. 132.

97. Here error in date of filing order of transfer from district court to county court waived. Scrivener v. State [Tex. Cr. App.] 70 S. W. 214.

98. Wildes v. Draper, 24 R. I. 262.

99. Where Missouri practice act § 597 (as amended Laws 1901, pp. 85, 86) declares defendant shall demur or answer on or before the third day of the term, the defendant may file petition for removal not later than that day. Kelly v. Chicago & A. R. Co., 122 Fed. 286. Nonresident defendant may file petition of removal at time he moves for vacating a default judgment. Cady v. Associated Colonies, 119 Fed. 420. Stipulation of counsel extending the time of filing affidavit of defense extends time of removal. Muir v. Preferred Acc. Ins. Co., 203 Pa. 338.

1. Under Va. Code 1887, §§ 3260, 3284, providing that plea in abatement must be filed before demurrer or answer or judgment nisi has been entered. Fidelity & Casualty Co. v. Hubbard, 117 Fed. 949.

2. Where claim was contested in probate court in Illinois, which was a court of record, it cannot be removed from the circuit court where it was taken on appeal, though there was to be a trial de novo. Schneider v. Eldredge, 125 Fed. 638.

3. A plea in abatement is an answer within meaning of abatement statute, and filing an amended complaint does not extend the time of removal unless the action only then became removable. Pa. Co. v. Leeman, 160 Ind. 16, 66 N. E. 48.

4. Petition for removal must be filed before the time to file an affidavit of defense expires, though the latter is not a pleading in Pennsylvania, but its sole use is to prevent a judgment by default. Muir v. Preferred Acc. Ins. Co., 203 Pa. 338.

5. Defendant not entitled to extension of time to remove because plaintiff failed to file complaint, but should have moved to dismiss the action. Lewis v. Clyde S. S. Co., 131 N. C. 652.

6. Where an action against a citizen of the state and a railroad organized in another state was dismissed as to the citizen of the state, and the railroad in ignorance thereof requested a change of date of trial, it did not thereby waive its right to removal; and a petition for removal filed within 19 days of dismissal held to be filed within a reasonable time. Fogarty v. Southern Pac. Co., 121 Fed. 941. Where petition and bond for removal were filed on the last day allowed for filing answer, and the court, over objection, postponed the hearing on the application for the order, the request of counsel, in order to sustain his right of removal, of an extension of time to plead was not an appearance sufficient to confer jurisdiction. Waters v. Cent. Trust Co. [C. C. A.] 126 Fed. 469.

7. Where state court denies motion for removal defendant does not waive right by defending himself in the state court. Pa. Co. v. Leeman, 160 Ind. 16, 66 N. E. 48.

8. Paul v. Baltimore & O. R. Co. [Ind. App.] 69 N. E. 1024.

9. No notice necessary of application to remove. Muir v. Preferred Acc. Ins. Co., 203 Pa. 338.

10. Where there is no separable controversy, and one of defendants has lost his right to remove by failure to exercise it in time, the cause cannot be removed by the joint petition of all the defendants. Abel v. Book, 120 Fed. 47. All defendants should join in petition for removal because of diversity of citizenship, and failure to join cannot be obviated by a rearrangement where citizenship of some not shown. Huntington v. Pinney, 126 Fed. 237.

11. Intervenors have no right to removal, not being defendants to suit, where the original defendant lost right to remove by filing an answer. Kidder v. Northwestern M. L. Ins. Co., 117 Fed. 997.

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The petition for removal must aver the state where,[14] and the time when, and during which, an alleged foreign company was incorporated.[15] Where there has been a fraudulent joinder of resident parties to prevent the exercise of the right of removal,[16] it is to be averred,[17] and where denied, to be proved as a question of fact.[18] When the jurisdiction of the Federal court over a case removed into it from state court depends upon a question of fact, such jurisdictional fact must be well pleaded in the petition for removal;[19] and if issue is joined on such allegation, the burden is on the party removing to establish the existence of such jurisdictional fact.[20] Amendments may be allowed to correct minor errors[21] or omissions,[22] but never when the record fails to show a removable cause.[23] The order

12. Failure of husband to join in petition for removal of interpleader suit immaterial. First Nat. Bank v. Bridgeport Trust Co., 117 Fed. 969.

13. Facts to entitle party to removal, as that suit was instituted in state court, and that parties were citizens of different states, must appear affirmatively and not inferentially. Wilson v. Giberson, 124 Fed. 701. Petition for removal on ground of a separable controversy need not be verified. Harley v. Home Ins. Co., 125 Fed. 792.

14. Averment in petition that defendant corporation was a citizen and resident of another state not equivalent to averment that it was created and existed under the laws of that state, and is insufficient. Dalton v. Milwaukee Mechanics' Ins. Co., 118 Fed. 876. An allegation by a corporation that it was a citizen of another state but not stating where it was incorporated is insufficient. Lewis v. Clyde S. S. Co., 131 N. C. 652.

15. Averment that defendant "is a corporation" organized under laws of New York, "and is a citizen and resident of said state * * * and never has been or is a citizen or resident of the state of Iowa" is not sufficient to show defendant was a New York corporation when suit was brought. Dalton v. Germania Ins. Co., 118 Fed. 936.

Contra, allegation that at time of filing defendant was a corporation organized under laws of British Columbia, sufficiently shows citizenship of parties at the beginning of the action. Roberts v. Pac. & A. R. & N. Co. [C. C. A.] 121 Fed. 785.

16. In an action against a nonresident express company to recover on a contract of carriage, the joinder of local agents held manifestly fraudulent and for purpose of preventing removal. Boatner v. American Exp. Co., 122 Fed. 714.

17. A second application for removal made after verdict was directed for one of defendants over plaintiff's objection properly denied, as defendant on record failed to make out a fraudulent joinder. Kan. City S. B. R. Co. v. Herman, 187 U. S. 63, 47 Law. Ed. 76. Where petition avers that a defendant was joined solely to prevent removal, and is supported by affidavits, it tenders an issue of fact for trial by Federal court, and if not denied it stands admitted. Federal courts should be astute to protect right to removal. Kelly v. Chicago & A. R. Co., 122 Fed. 286.

18. A resident and a nonresident were made defendants in condemnation proceedings, and a removal was secured on the latter's petition alleging that the former was improperly joined to prevent removal, and on proof that plaintiff knew that the former had conveyed all of its interest in the property to the latter. Union Terminal R. Co. v. Chicago, B. & Q. R. Co., 119 Fed. 209. The nonresident of two defendants sued as employers may remove on verified petition alleging that the other defendant was fraudulently joined and never employed deceased, accompanied by affidavit of the other defendant, and where plaintiff did not traverse or offer evidence in denial. Ross v. Erie R. Co., 120 Fed. 703. Where a foreign telegraph company was sued for failure to deliver message to plaintiff, and two resident operators were joined as defendants, removal was allowed on verified petition that neither of operators had anything to do with message, supported by affidavits of operators. Free v. Western Union Tel. Co., 122 Fed. 309. Where a petition for removal alleges a joinder of defendants to be for the sole and fraudulent purpose of preventing a removal, it puts in issue the truth of allegations in the complaint intended to show a joint cause of action, which issue may be inquired into and determined on a motion to remand. Gustafson v. Chicago, R. I. & P. R. Co., 128 Fed. 55. Where allegations of a complaint, intended to show a joint cause of action against two defendants, are found to be untrue, and that this fact was or could have been known to the pleader, the court may conclude as a matter of law, that the purpose was to prevent the exercise of the right of removal by the nonresident defendant. This practice of attorneys to prevent removal of causes commented upon. Id.

19, 20. Woodson County Com'rs v. Toronto Bank, 128 Fed. 157.

21. Court may allow amendment to petition for removal for diversity of citizenship, for the purpose of correcting allegation as to plaintiff's own citizenship, to conform to plaintiff's plea in abatement. Kerr v. Modern Woodmen of America [C. C. A.] 117 Fed. 593. Where petition incorrectly designated the division of district to which removal was prayed but designated correctly the city where court was to be held, the defect was disregarded; and where the bond designated the district to which the county had formerly belonged, the court allowed amendment though the time for removal had expired, as it was not jurisdictional. Hodge v. Chicago & A. R. Co., 121 Fed. 48.

22. Circuit court may allow amendment to petition which was defective in not stating citizenship of plaintiff, where it might be fairly presumed from complaint; and nothing had been done to prejudice rights of plaintiff, and there had been no action on the merits. Kinney v. Columbia S. & L. Ass'n, 191 U. S. 78.

23. Dinet v. Delavan, 117 Fed. 978; Dalton

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may be made ex parte,[24] and after time for answer has expired,[25] in state[26] or Federal court.[27]

§ 9. *Transfer of jurisdiction and other consequences of removal.*—On proper application for removal the state court loses jurisdiction,[28] and any judgment it may render is appealable on that ground.[29] The Federal court acquires complete jurisdiction,[30] and the case stands in the same condition as it did in the state court as regards proceedings already had.[31]

§ 10. *Practice and procedure after removal; remand or dismissal.*—A cause will be remanded where the court is without jurisdiction,[32] and costs allowed,[33] if the petition is sufficiently[34] and promptly[35] traversed,[36] and evidence is adduced in support of the traverse.[37] The petition for removal is conclusive in the Federal court on the question of its jurisdiction, only in cases where that jurisdiction depends on the legal construction of plaintiff's petition as to the joint liability of the defendants, or other matters of law.[38] Where a case is removed to a Federal court, which denied a motion to remand and assumed jurisdiction, no proceedings could be taken in such action in the state court while it was pending in the Federal court.[39] Further proceedings must be in accordance with the practice of

v. Milwaukee Mechanics' Ins. Co., 118 Fed. 876; Dalton v. Germania Ins. Co., 118 Fed. 936.

24. Order for removal for prejudice or local influence may be made ex parte, though plaintiff may afterwards traverse the petition, and be heard thereon as a matter of right. Montgomery County v. Cochran, 116 Fed. 985.

25. Where petition and bond were filed before the time to plead had expired, it was immaterial that the order of removal was made after, as the state courts have only power to examine petition and record to see if the statutory requirements have been complied with subject to the final determination of the Federal courts. Vermeule v. Vermeule, 67 N. J. Law, 219.

26. Where petition and bond filed in state court October 14, and the transcript not filed before the 1st day of November term, the order for removal not having been made in state court until December 5, held, right was not lost, as it was respectful to await action of state court. Kelly v. Chicago & A. R. Co., 122 Fed. 286.

27. Certified copy of order of removal should be filed in state court as a matter of respect, though law does not require it. Bartlett v. Gates, 117 Fed. 362.

28. Pa. Co. v. Leeman, 160 Ind. 16, 66 N. E. 48. Duty of state court to accept petition and bond and proceed no further, if right to remove appears on record. Duff v. Hildreth, 183 Mass. 440, 67 N. E. 356.

29. Where defendant proceeded with cause in Federal court after erroneous denial of application to remove in state court, he is not estopped from appealing from judgment in latter court because of want of jurisdiction. Myers v. Chicago & N. W. R. Co., 118 Iowa, 312, 91 N. W. 1076.

30. Federal court may vacate a default judgment after removal where a state court could. Cady v. Associated Colonies, 119 Fed. 420.

31. Where defendant files in state court notice of intention to suffer a default and to move for a hearing in damages, and then removes the case, he need not file notices again. Johnson v. Bridgeport D. B. & M. Co., 125 Fed. 631. The order of a state court setting aside an attachment will not be reviewed in Federal court after removal, unless mistake or new facts are disclosed. Denison v. Shawmut Min. Co., 124 Fed. 860; Stevenson's Adm'r v. Ill. Cent. R. Co. [Ky.] 79 S. W. 767; DeWitt v. Chesapeake & O. R. Co. [Ky.] 79 S. W. 275; Tex. Cotton Products Co. v. Starnes, 128 Fed. 183.

32. Where action was rightfully removed, but afterwards the alias summons was quashed, the action was remanded under Act Cong. March 3, 1875, § 5, as the action did not involve a dispute or controversy within the jurisdiction of the court. Stowe v. Santa Fe Pac. R. Co., 117 Fed. 368.

33. Order remanding is in the nature of a final judgment and so under U. S. Rev. St. § 824, costs may be taxed and docket fee allowed as for a judgment rendered without a jury. Riser v. Southern R. Co., 116 Fed. 1014.

34. Where petition for removal filed Feb. 13, stated time for answer under rules of court did not expire till Feb. 14, a motion to remand alleging time to answer had expired under rules, without setting up the rules, or referring to petition, was dismissed as right to removal was supported by allegations of the petition. Randall v. New England Order of Protection, 118 Fed. 782.

35. Where a case was removed and both parties appeared, the case will not be remanded after a year though neither party was a citizen of state where suit was brought. Phila. & B. Face Brick Co. v. Warford, 123 Fed. 843.

36. Where a plaintiff merely files affidavit denying statements in petition for removal, but files no plea, the cause will not be remanded. Weaver v. Northern Pac. R. Co., 125 Fed. 155.

37. Motion to remand by removing defendant because the evidence shows a citizen of same state as plaintiff was an indispensable party, will not be considered on appeal where the evidence is not in the record. Wirgman v. Persons [C. C. A.] 126 Fed. 449.

38. Woodson County Com'rs v. Toronto Bank, 128 Fed. 157.

39. Action against a railroad company and its receivers to compel them to remove ob-

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the Federal court,[40] and the cause assigned to its law or equity side.[41] Where there is a dismissal,[42] or a nonsuit,[43] the removal is no bar to a new suit on the same subject-matter.

REPLEVIN.

§ 1. Nature and Form of Action—Distinctions (1514).
§ 2. Right of Action and Defenses (1514).
§ 3. Jurisdiction and Venue (1516).
§ 4. The Affidavit (1516).
§ 5. Plaintiff's Bond (1516).
§ 6. The Writ and Its Execution (1516).
§ 7. The Pleadings (1516).
§ 8. Trial (1516).
§ 9. Judgment (1518).
§ 10. Costs (1519).
§ 11. Review (1519).
§ 12. Liability on Bonds and of Receptors, etc. (1519).

§ 1. *Nature and form of action—distinctions.*—Replevin is an action in personam[44] to determine the right of possession[45] of personal property.[46] It does not lie where the controversy depends upon the right to hold an office and should be litigated by a writ of quo warranto.[47] An interpleader in attachment is substantially and in effect an action of replevin for the recovery of the specific property levied on under the attachment writ.[48] In order to maintain replevin against a party, he must have either constructive or actual possession at the time of the commencement of the action.[49]

§ 2. *Right of action and defenses.*—Plaintiff in replevin must recover, if at all, on strength of his own title.[50] A right to immediate possession is sufficient.[51] An executory contract of sale cannot be ground of plaintiff's title in

structions from the street. They filed a cross bill claiming title to the street and removed the cause to the Federal court which denied a motion to remand. City of Ashland v. Whitcomb [Wis.] 98 N. W. 531.

40. Failure to demand jury in state court does not affect right in Federal court. Montgomery County v. Cochran, 116 Fed. 985. Deposition inadmissible where commission issued before defendant had filed record after removal and no reason for haste shown. North American Transp. & T. Co. v. Howells, 121 Fed. 694.

41. Equitable defense is not good in an action at law though transferred from a state court. Pettus v. Smith, 117 Fed. 967. Where action from a state which abolishes forms of action is removed, it must be assigned to the law or equity side of the court, and the pleadings reframed if necessary, and if plaintiff declines to bring his case in the proper side, he is bound by his election and a dismissal is proper. Fletcher v. Burt [C. C. A.] 126 Fed. 619.

42. Rodman v. Mo. Pac. R. Co., 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704.

43. Fox v. Jacob Dold Packing Co., 96 Mo. App. 173, 70 S. W. 164.

44. Hochman v. Hauptman, 76 App. Div. [N. Y.] 72.

45. Hancock v. Schockman [Ind. T.] 69 S. W. 826; Story & C. Piano Co. v. Gibbons, 96 Mo. App. 218, 70 S. W. 168.

46. Pasterfield v. Sawyer, 132 N. C. 258. A dwelling wrongfully severed from plaintiff's land. Cutter v. Wait, 131 Mich. 508, 91 N. W. 753. A dwelling not attached to land. Page v. Urick, 31 Wash. 601, 72 Pac. 454.

47. Standard Gold Min. Co. v. Byers, 31 Wash. 100, 71 Pac. 766.

48. Torreyson v. Turnbaugh [Mo. App.] 79 S. W. 1002.

49. Redinger v. Jones [Kan.] 75 Pac. 997.

50. Bowles Live Stock Com. Co. v. Hunter, 91 Mo. App. 436; Morgan v. Jackson [Ind. App.] 69 N. E. 410; First Nat. Bank v. Hughes [Neb.] 92 N. W. 986; Cent. S. & T. Co. v. Mears, 89 App. Div. [N. Y.] 452. But it has been stated that this principle does not apply where there was no pretense of title in any third person. First Nat. Bank v. Ragsdale, 171 Mo. 168, 71 S. W. 178.

51. Possession or an immediate right to possession is necessary to maintain equitable replevin. United Shoe Machinery Co. v. Holt [Mass.] 69 N. E. 1056. Where a bailee answers the subject of the bailment, as he does in the case of an absolute sale and a transfer of the whole property, the bailment is ended and the general owner has the immediate right to possession. Id. Replevin cannot be maintained without showing a general or special, an absolute or a qualified, property in the plaintiff at the beginning of the action, together with the right of immediate possession. Hence, it is not the appropriate remedy for enforcing the forfeiture provided by Rev. St. § 4965, as amended in 1895 (U. S. Comp. St. 1901, p. 3414), relating to the infringement of copyrighted maps, prints, etc. Gustin v. Record Pub. Co., 127 Fed. 603. Where an officer properly holds property by virtue of legal process he may obtain its return when taken from him by replevin, although the owner is not party to the replevin suit. Vickborn v. Pollock [Mich.] 95 N. W. 576; Gruber v. Janns, 84 N. Y. Supp. 882. If the process is merely valid on its face. Bruce v. Squires [Kan.] 74 Pac. 1102.

Presumption of legality attaches to the possession of an officer acting under process of the court. Finnell v. Million, 99 Mo. App. 552, 74 S. W. 419.

Officer's omission of appraisal no ground for replevin by a mortgagee. Johnson v. Spaulding [Neb.] 95 N. W. 808. A note secured by fraud, deceit, etc., may be recovered

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replevin.[52] He cannot recover upon a title acquired after bringing the action.[53] Though the property sought to be replevied is already in custodia legis and not levied upon by the officer, yet if the court goes ahead under statute and gives a judgment for damages, the judgment is not void.[54] Conditions precedent to the vesting of the right of immediate possession must be complied with. Tender of the amount of a lien rightly claimed must be made. Either the taking or the detention must be unlawful,[55] and one innocently in possession of property is not liable in replevin until after demand,[56] but no demand is necessary where the defendant wrongfully took the property,[57] where he had reason to suspect a defect in the title,[58] or where he contests the case upon its merits.[59] A demand when necessary is not sufficient unless made to the person having custody or control of the property.[60] Replevin can be maintained only against the person in actual possession of the property.[61] The right of possession is the sole issue, and though equitable issues may in some jurisdictions be raised and determined in a replevin suit,[62] defendant cannot invoke the equitable jurisdiction of the court to make a decree not affecting the property in suit,[63] or institute proceedings of interpleader when the plaintiff has secured possession of the property.[64] In most jurisdic-

in an action of replevin. Gregory v. Howell & Co., 118 Iowa, 26, 91 N. W. 778.

Vendor rescinding a sale for fraud may maintain replevin to regain the goods. Stein v. Hill [Mo. App.] 71 S. W. 1107; Pekin Plow Co. v. Wilson [Neb.] 92 N. W. 176. Here detinue was form of action. Jesse French P. & O. Co. v. Bradley [Ala.] 35 So. 44.

Goods sold c. o. d. not paid for when delivered may be replevied within a reasonable time. Paulson v. Lyon, 26 Utah, 438, 73 Pac. 510.

52. La Vie v. Tooze, 43 Or. 590, 74 Pac. 210; Backhaus v. Buells, 43 Or. 558, 73 Pac. 342; Mattison v. Hooberry [Mo. App.] 78 S. W. 642; Deutsch v. Dunham [Ark.] 78 S. W. 767; Bryant v. Dyer, 96 Mo. App. 455, 70 S. W. 516; Chellis v. Grimes [N. H.] 54 Atl. 943; La Vie v. Crosby, 43 Or. 612, 74 Pac. 220.

No recovery allowed in action for 600 sheep out of a flock. Perry Live Stock Commission Co. v. Barto [Neb.] 92 N. W. 762. For an undivided share of a crop. Schnabel v. Thomas, 98 Mo. App. 197, 71 S. W. 1076.

53. Dillrance v. Murphy [Neb.] 95 N. W. 608; Rachofsky & Co. v. Benson [Colo. App.] 74 Pac. 657; Suckstorf v. Butterfield [Neb.] 96 N. W. 654; Younglove v. Knox [Fla.] 33 So. 427.

54. Fergus v. Gagnon [Neb.] 93 N. W. 146.

55. Replevin can be invoked only against a wrongful detention existing at the time the suit is commenced. Sheriff seized and sold property. Held, sheriff not having possession, replevin would not lie against him on the ground that the property was exempt. Redinger v. Jones [Kan.] 75 Pac. 997. Unlawful detention as well as unlawful taking is generally ground for replevin. Hart v. Boston & M. R. R. [N. H.] 56 Atl. 920.

Cattle held for damage done by them can be replevied only after tender of the amount of the damage. McAllister v. Wrede [Neb.] 97 N. W. 318. Where a statute provides that appraisers shall determine the amount to be so tendered, it is an implied condition that both parties shall be heard at the appraisal. Miller v. Hoffman [Mich.] 97 N. W. 759.

56. Officer rightly in possession. Hardy v. Wallis, 103 Ill. App. 141. Purchaser ignorant of defective title. Jumiska v. Andrews, 87 Minn. 515, 92 N. W. 470.

Contra, Held that an agister holding cattle under contract with a mortgagor may be liable to replevin by mortgagee without demand. Harding v. Kelso, 91 Mo. App. 607.

57. Knapp v. Mahurin [N. H.] 56 Atl. 315.

58. Log Owners' Booming Co. v. Hubbell [Mich.] 97 N. W. 157.

59. Heagney v. J. I. Case Threshing Mach. Co. [Neb.] 96 N. W. 175; Cal. Cured Fruit Ass'n v. Stelling, 141 Cal. 713, 75 Pac. 320.

60. Heinrich v. Van Wrickler, 80 App. Div. [N. Y.] 250.

61. Jenkins v. Ontario [Or.] 74 Pac. 466; Hall v. Kalamazoo, 131 Mich. 404, 91 N. W. 615. A person coming into possession of chattels lawfully and parting with them before suit commenced cannot be made a party defendant. Murray v. Lese, 86 N. Y. Supp. 581.

62. Freeman v. Lavenue, 99 Mo. App. 73. 72 S. W. 1085. Fraud upon the part of defendant in endeavoring to defeat plaintiff's lien. Roach v. Johnson [Ark.] 74 S. W. 299. It has been held that property sold under a decree of court fraudulently obtained cannot be replevied, but the remedy, if any, is in equity. Penton v. Hansen [Okl.] 73 Pac. 843. A vendor who rescinds for fraud (Hochberger v. Baum, 85 N. Y. Supp. 385; Bobilya v. Priddy, 68 Ohio St. 373, 67 N. E. 736), or one setting aside a fraudulent conveyance, cannot replevy against a purchaser for value without notice (Lowry v. Clark, 20 Pa. Super. Ct. 357).

63. Anthony v. Carp, 90 Mo. App. 387.

64. State v. District Ct., 28 Mont. 445, 72 Pac. 867.

Party to proceeding resulting in judicial sale cannot upset the sale by bringing replevin. Sieffert v. Campbell, 24 Ky. L. R. 1050, 70 S. W. 630.

By Georgia Civ. Code, § 4799, certain modes of defendant's obtaining possession are prescribed as a prerequisite to maintenance of a possessory warrant before a justice's court and plaintiff must at the trial prove that pos-

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tions defendant cannot set up set-off or recoupment,[65] but in Missouri, it is otherwise held.[66]

§ 3. *Jurisdiction and venue.*—A judgment for the return of property should not be given where the suit, because of the small amount involved, is not within court's jurisdiction.[67]

§ 4. *The affidavit.*—A preliminary affidavit is universally required to obtain the writ.[68]

§ 5. *Plaintiff's bond.*—Where, by statute, the defendant in replevin is allowed twenty-four hours from the time the bond is given to object to the sureties thereon, this does not give him the whole of the following day.[69]

§ 6. *The writ and its execution.*[70]—The officer has no right without permission to keep the goods replevied upon defendant's premises against his will until the goods are appraised, but must within a reasonable time remove them.[71] If the defendant, the owner's bailee, gives the officer a receipt for the goods, thereby becoming the officer's bailee, it is a valid levy, the goods become in custodia legis, and the bailee is thereby excused from delivering the goods to the owner.[72] Likewise, a levy will be valid when the officer replevying ponderous articles leaves them on the premises of the defendant in charge of the defendant's employe even if this employe allows the defendant to use them.[73] If joint owners bring replevin and obtain judgment, the officer satisfies the judgment by delivering the property described in the writ to one of the joint owners, even though he delivers it to him as a keeper.[74]

§ 7. *The pleadings.*—The complaint in replevin must contain allegations showing that the plaintiff at the time of commencing the action had a general or special property in the goods claimed, with the right to their immediate and exclusive possession.[75] A general denial in code pleading admits any general or special matter constituting a defense,[76] and therefore cannot be attacked by general demurrer.[77] Under a general denial, a judgment for the return of the property to the defendant may be entered without any motion on his part.[78] If property held in joint possession is sued for in replevin against one of the possessors, he waives the defect of parties by answering to the merits.[79] Estoppel to deny title must be pleaded.[80]

§ 8. *Trial.*—The plaintiff after obtaining the property cannot dismiss the

session was obtained in one of these modes. Allen v. Printup, 118 Ga. 630.

Receipt of money paid for goods by defendant does not estop owner to maintain his action when he did not know whence the money came. Gosnell v. Webster [Neb.] 97 N. W. 1060.

65. Blair v. A. Johnson & Sons [Tenn.] 76 S. W. 912.

66. McCormick Harvesting Mach. Co. v. Hill [Mo. App.] 79 S. W. 745.

67. Widber v. Benjamin, 75 Vt. 152.

68. Under § 1034 of the Code of Civil Procedure a justice of the peace has no jurisdiction to issue a writ of replevin unless an affidavit is filed containing averments in substantial compliance with such section. Where the averments are of facts with reference to who is agent of a plaintiff corporation, the affidavit is fatally defective and will not support the action. Armour & Co. v. Arres [Neb.] 98 N. W. 843. When such affidavit is so defective that it cannot be amended, a judgment for plaintiff thereon will be reversed and the action dismissed, when the insufficiency of such affidavit is urged by defendant. Id.

69. Barton v. Shull [Neb.] 97 N. W. 292.

70. Liability of officer executing: If an officer commit an assault serving a writ of replevin, he is liable unless he has complied with the statutory requirements. McKinstry v. Collins [Vt.] 56 Atl. 985.

71. Steuer v. Maguire, 182 Mass. 575, 66 N. E. 706.

72. Glass v. Hauser, 40 Misc. [N. Y.] 661.

73. Meyer v. Michaels [Neb.] 95 N. W. 63.

74. Leve v. Frazier, 42 Or. 141, 70 Pac. 376.

75. Elliot v. First Nat. Bank, 30 Colo. 279, 70 Pac. 421.

76. Iowa Sav. Bank v. Frink [Neb.] 92 N. W. 916.

77. Gila Valley G. & N. R. Co. v. Gila County [Ariz.] 71 Pac. 913.

78. Voorheis, M. & Co. v. Leisure [Neb.] 95 N. W. 676.

79. Engel v. Dado [Neb.] 92 N. W. 629.

80. Western Realty Co. v. Musser, 97 Mo. App. 114, 71 S. W. 100.

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suit,[81] nor can he then bring in other parties defendant against their will.[82] A partner or joint owner cannot maintain replevin to recover his undivided interest, but all joint owners may join in an action against a stranger.[83] A tenant in common having acquiesced in the unauthorized division of the property by the other tenant may bring replevin for his share.[84] Petitions in replevin proceedings come under the general statutory acts for amendment of pleadings.[85] If plaintiff pays no personal property tax, it is evidence that he was not the owner,[86] but the appraisal of property replevied made for the purpose of fixing the amount of the bond is not admissible evidence at the trial to prove the value of the property.[87] An alternative judgment for defendant for $60 as the value of the property replevied is erroneous, where the only evidence of such value is that that sum was what the defendant paid for the property.[88]

Verdicts.—Where the defendant in replevin both denies plaintiff's property and sets up property in a third party, a verdict that property is in plaintiff, not specifically denying the other allegation, is sufficient to allow plaintiff to recover, where no objection was taken at the trial.[89] A verdict in replevin is sufficient as to identity where there was a more particular description of the property in the pleadings to which the verdict will be referred.[90] The value of the property should be found where an alternative judgment is authorized,[91] and where different articles of property are claimed, the verdict should state the value of each article,[92] unless no question has arisen concerning such value.[93] If, however, the value is not stated the party giving up the property has no cause for complaint.[94] When a replevin suit is tried before a single judge, the findings of the court are entitled to

81. Morrill v. McNeill [Neb.] 91 N. W. 601; Cook v. Vaughn [Neb.] 95 N. W. 333.

82. Because it is too late for them to object to the sureties upon the bond. Goldstein v. Shapiro, 85 App. Div. [N. Y.] 83.

83. Cinfel v. Malena [Neb.] 93 N. W. 165.

84. Cornett v. Hall [Mo. App.] 77 S. W. 122. A wife having alleged that her husband had permanently abandoned her without her fault was authorized to prosecute alone a suit of replevin for her separate property (Word v. Kennon [Tex. Civ. App.] 75 S. W. 365), but if she is the only witness and testifies she had bought it from her husband, the jury are not, as matter of law, bound to believe her (Goppelt v. Burgess [Mich.] 92 N. W. 497).

85. Chandler v. Parker, 65 Kan. 860, 70 Pac. 868. Chattels destroyed by fire after suit brought. Bishop & B. Co. v. Keffer [N. J. Law] 54 Atl. 402.

86. Kastl v. Arthur [Mich.] 97 N. W. 711.

87. Snyder v. Anderson [Neb.] 95 N. W. 698.

88. Wagner Typewriter Co. v. Robinson, 84 N. Y. Supp. 281. The plaintiff, in order to recover, must present evidence sufficient to identify the property as his. Leavitt v. Rosenthal, 84 N. Y. Supp. 530. For what evidence is sufficient to support a verdict concerning title. Koelling v. August Gast B. N. & Lith. Co., 97 Mo. App. 664, 71 S. W. 728.

Burden of proof is not affected by fact that the defendant sets up that as partner of the plaintiff he sold the property in dispute to the other defendant. Downtain v. Ray, 31 Tex. Civ. App. 298, 71 S. W. 758. If the plaintiff shows legal right of possession he need not on that point go further and disprove that the conveyance to him was in fraud of his grantor's creditors (Zahl v. Billings, 118 Wis. 459, 95 N. W. 374), or that the property had not been seized under any legal process against him (Knoche v. Perry, 90 Mo. App. 483).

89. Thompson v. Dyer [R. I.] 55 Atl. 824.

90. Bossard v. Vaughn [S. C.] 46 S. E. 523.

91. Under Code Civ. Proc. § 1103, in an action of replevin where the verdict is for plaintiff, the jury shall also find the amount of his damages in case the property cannot be recovered, but the verdict need not be in the alternative. Under § 1193, however, the judgment in such an action must be in the alternative. Hynes v. Barnes [Mont.] 75 Pac. 523. A verdict which fixes the right of plaintiff to have the property, or its value, if he could not find it, and the right of the defendant to deliver the property rather than pay its value, if he chose to do so, held a full compliance with Code Civ. Proc. § 77. Bossard v. Vaughn [S. C.] 46 S. E. 523.

92. Dysart v. Terrell [Tex. Civ. App.] 70 S. W. 986. Where in replevin for some horses the verdict was for defendant, and the value of the horses $200, and that plaintiff was indebted to defendant for $189.10. Held, the form of the verdict was sufficient to sustain a judgment for the return of the horses to defendant to be held by him as security for $189.10, or at defendant's election that he recover such sum of plaintiff and his sureties. Kronck v. Reid [Mo. App.] 79 S. W. 1001.

93. Cotner v. McCullough [Tex. Civ. App.] 70 S. W. 344.

94. Kellar v. Van Brunt [Neb.] 95 N. W. 668; Cabell v. McKinney, 31 Ind. App. 601, 68 N. E. 601.

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the same consideration as the verdict of a jury, and will not be set aside unless clearly wrong.[95]

§ 9. *Judgment.*—In an action of replevin for various articles the plaintiff may recover judgment as to so many as he owns.[96] Judgment for possession may properly be granted him even though he has taken the property back as defendant's bailee and leased it from defendant's grantee.[97] When the jury find a verdict for damages only, judgment cannot properly be entered for possession also.[98] Judgment for damages not in the alternative has been given in a case in which the plaintiff without obtaining the property, prosecuted the suit as an action for damages,[99] and upon the election of the plaintiff where he was a seller upon conditional sale and the defendant, the buyer, wrongfully refused upon demand to give up the property.[1] Under statutes requiring an alternative judgment in replevin cases, a judgment is valid, though not in that form, where the omitted alternative would be unavailable.[2]

Damages.—When, before trial, plaintiff receives his property, he is entitled to nominal damages only,[3] and the value of the property should not enter into the damages awarded,[4] but when the defendant procures a redelivery, the measure of damages is the value of the property at the time plaintiff became entitled to its possession by seizure under the writ of replevin.[5] Where property is not returned and is usable, the damages for the taking are its usable value plus the value of its use up to the date of judgment.[6] If judgment is for the defendant (an officer claiming goods under a levy), any money judgment will be based upon the value, not of the goods but of the lien acquired by the levy.[7] Detention of property in custodia legis at the wrongful request of one falsely setting up a claim thereto is ground for damages,[8] but a successful defendant who under a statute elects to have the value of the property at the time it was taken from him instead of the property is not entitled to damages for detention of property,[9] nor for depreciation in the value of the property subsequent to his re-bonding it.[10] A defendant prevailing, but not claiming all the damages recoverable, cannot afterwards recover the damage not claimed, in a suit upon the replevin bond,[11] but has been allowed to do so in a suit against the sheriff to recover for taking the property.[12]

95. Byrnes v. Eley [Neb.] 97 N. W. 298. **Motion for direction of verdict** by both parties does not, in Wisconsin, constitute a waiver of a verdict. Nat. Cash Register Co. v. Bonneville [Wis.] 96 N. W. 558.

96. Thayer County Bank v. Huddleson [Neb.] 95 N. W. 471.

97. Benjamin v. Huston [S. D.] 94 N. W. 584.

Judgment for the restoration of coats held to be complied with by a tender of cloth cut ready to be made into coats. Monness v. Livingston, 84 N. Y. Supp. 124.

98. Hines v. Shafer [Tex. Civ. App.] 74 S. W. 562.

99. McCarthey v. Morgan [Neb.] 96 N. W. 489.

1. Hodges v. Cummings, 115 Ga. 1000.

2. Omission of part giving plaintiff possession held immaterial where nearly all had been sold. Erreca v. Meyer [Cal.] 75 Pac. 826. A judgment in replevin for the possession of property is valid in so far as it determined the rights of the parties as to the property in controversy, though there is no finding as to the value of the property as required by Rev. St. 1899, §§ 3921, 3922. Caldwell v. Ryan [Mo. App.] 79 S. W. 743.

3. Taylor v. Plunkett [Del.] 56 Atl. 384.

4. Hanlon v. Goodyear [Mo. App.] 77 S. W. 481.

5. Johnson v. Groff, 22 Pa. Super. Ct. 85.

6. State Bank v. Showers, 65 Kan. 431, 70 Pac. 332. In an action of replevin to recover the possession of the property, or the value thereof in case a return cannot be had, the plaintiff cannot be limited in his right of recovery to the price for which defendant may have sold the same. Cowden v. Finney [Idaho] 75 Pac. 765; Cowden v. Mills [Idaho] 75 Pac. 766.

7. Young v. Evans, 118 Iowa, 144, 92 N. W. 111; Nichols & S. Co. v. Bishop [Okl.] 70 Pac. 188; Ray v. Byrd, 118 Ga. 86.

8. Follett Wool Co. v. Utica T. & D. Co., 84 App. Div. [N. Y.] 151; Saling v. Bolander [C. C. A.] 125 Fed. 701.

9. Powers v. Benson, 120 Iowa, 428, 94 N. W. 929.

10. Katz v. Hlavac, 88 Minn. 56, 92 N. W. 506.

Damages for feeding other stock which were held for those detained in order to make up a car load are not recoverable, being too remote. Haas v. Tough, 67 Kan. 253, 72 Pac. 856.

11. Daniels v. Mansbridge [Ind. T.] 69 S. W. 815.

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§ 10. *Costs.*—If property is returned after suit brought, plaintiff will recover his costs.[13] The omission of a demand has been held merely to cause plaintiff to lose his costs.[14] Dismissal for lack of jurisdiction will be with costs.[15]

§ 11. *Review.*—It is too late after judgment, upon plea of general denial, to object for the first time that the petition does not contain any allegation of a demand.[16] In an action of replevin a finding by the trial court that defendant never held the property under order of the court is conclusive on the supreme court.[17]

§ 12. *Liability on bonds and of receiptors, etc.*—A party giving a bond to secure property in replevin does not thereby acquire a right to elect to keep the property and leave the other party to an action on the bond.[18] On the contrary, he cannot convey good title to the property if it afterwards appears that the property was the plaintiff's,[19] and will be enjoined from selling the same.[20] Replevin bonds have been held to bind the plaintiff to return the property without any depreciation, though due to reasonable wear and tear,[21] but not to pay as damages stenographer's and attorney's fees.[22] Redelivery bonds are commonly held to cover costs.[23] In suits on redelivery bonds to recover the value of property obtained by defendant, the value at the time of trial is the measure of damages.[24] A verdict settling the value of property, subject of replevin suit, is conclusive against sureties upon the parties' replevin bonds.[25] The sureties on a replevin bond are not liable for any damages found for defendant on his counterclaim.[26]

Breaches.—Where the plaintiff obtains his property but suffers the action to abate, it is a breach of his bond.[27] A judgment against a defendant forfeits any counterbond he may have given.[28]

Defenses.—The sureties on a replevin bond are not bound if judgment is given against two persons jointly, and the bond is conditioned to pay judgment against one alone,[29] or on a redelivery bond, if before the bond was given the property had already been redelivered.[30] But the surety on a replevin bond cannot compel a successful defendant to recover costs by first proceeding upon a subsequently given appeal bond.[31] Such a surety is, after delivery of the property, estopped to set up as a defense to the bond that there was no action pending.[32] Demand is not a condition precedent to action upon a bond.[33] Where a re-replevin bond was conditioned for the return of the property and the payment of costs and damages, the return of the property does not prevent judgment for the full

12. Johnson v. Boehme, 66 Kan. 72, 71 Pac. 243.
13. Taylor v. Plunkett [Del.] 56 Atl. 384.
14. Suit against officer. Littlefield v. Wilson [Neb.] 95 N. W. 677.
15. Widber v. Benjamin, 75 Vt. 152.
16. Taylor v. Harle-Haas Drug Co. [Neb.] 96 N. W. 182.
Bill of exceptions does not, in Alabama, present for review the overruling of a demurrer to a motion to strike out defendant's affidavit for interpleader. Meyer v. Bloch [Ala.] 35 So. 705.
17. Erreca v. Meyer [Cal.] 75 Pac. 826.
18. Koelling v. August Gast B. N. & Lith. Co. [Mo. App.] 77 S. W. 474.
19. Crawford v. Southern R. I. Plow Co. [Tex. Civ. App.] 77 S. W. 280.
20. Overton v. Warner [Kan.] 74 Pac. 651.
21. Johnson v. Mason [N. J. Law] 56 Atl. 137.
22. Gilbert v. American Surety Co. [C. C. A.] 121 Fed. 499.
23. John Church Co. v. Dorsey, 38 Misc. [N. Y.] 542; Sparks v. Hopsen [Miss.] 35 So. 446.
24. Wood v. Fuller [Tex. Civ. App.] 78 S. W. 236.
25. Parish v. Smith, 66 S. C. 424.
26. McCormick Harvesting Mach. Co. v. Hill [Mo. App.] 79 S. W. 745.
27. Verra v. Constantino, 84 N. Y. Supp. 222; Edwards v. Bricker, 66 Kan. 241, 71 Pac. 587; Rogers v. U. S. Fidelity & Guarantee Co., 84 N. Y. Supp. 203.
28. Painter v. Snyder, 22 Pa. Super. Ct. 603.
29. Webb v. Pope, 118 Ga. 627.
30. Alves v. Humphrey, 24 Ky. L. R. 764, 69 S. W. 1080.
31. Campbell v. Lane [Neb.] 95 N. W. 1043.
32. Cent. Nat. Bank v. Breschelsen, 65 Kan. 807, 70 Pac. 895.
33. Adams v. Wiesenthal [N. J. Law] 54 Atl. 516.

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penal sum of the bond for breach of one of the other conditions.[34] Under a statutory right to set up title in the plaintiff in replevin, where there was no decision upon the merits in a replevin suit, a surety upon a replevin bond who has been defaulted, without pleading that plaintiff had title, cannot set up that title except in mitigation of damages.[35]

RESTORING INSTRUMENTS AND RECORDS.

§ 1. Evidence and Proof of Loss and of Contents (1520).
§ 2. Proceedings in Equity or Otherwise to Restore Lost Papers or Instruments (1520).
§ 3. Procedure in Equity or Under Burnt Records Act to Restore Records (1521).

§ 1. *Evidence and proof of loss and of contents.*—The burden of proof to establish a lost instrument is on him who asserts a claim under it.[36]

Contents of a lost instrument must be proved by secondary evidence.[37] Proof to a reasonable certainty is all that is necessary,[38] and evidence which cannot be produced will not be required,[39] but sufficient evidence to fairly establish the loss must be introduced.[40] The manner and degree of proof is, in some states, regulated by statute.[41] A person cannot prove the contents of instruments which he has himself voluntarily destroyed,[42] nor will evidence of loss be admissible where it is not relevant and material to the cause,[43] but where it is material an established copy has the same force as the original.[44]

Reasonable search and good faith is all that is necessary to raise presumption of loss, in order to admit proof by secondary evidence.[45]

Where it is shown by public records that an official bond has been given by a public officer, but search for it is unavailing, it is presumed that it was regular and such as the law required.[46]

§ 2. *Proceedings in equity or otherwise to restore lost papers or instruments.*

34. Hendley v. McIntyre, 132 N. C. 276.

35. Magerstadt v. Harder, 199 Ill. 271, 65 N. E. 225.

In a suit against plaintiff in replevin by a surety, when the bond was lost and plaintiff obtained leave to file a copy, he cannot object to the admission of the copy as evidence against him. Fleet v. Hertz, 201 Ill. 594, 66 N. E. 858.

36. Suit in equity to establish a lost and unrecorded deed. Lloyd v. Simons [Minn.] 95 N. W. 903.

37. The attorney who drew a will testified as to its contents, and was corroborated by the witnesses. Gavitt v. Moulton [Wis.] 96 N. W. 395.

38. Proof of contents and nature of lost deed found on testimony of conveyancer who drew it, and his clerk. Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803. Evidence held sufficient to show that a lost deed had been delivered. Id. Plaintiff's evidence in an action on one of a series of lost notes held sufficient to identify it. Champenois v. Collins [Miss.] 36 So. 72. A lost will is sufficiently proved by the testimony of the attorney who drew it and the witnesses thereto. Gavitt v. Moulton [Wis.] 96 N. W. 395. Lost deed established by proof of fifty years' unquestioned occupancy. Combs v. Combs, 24 Ky. L. R. 1691, 72 S. W. 8.

39. In an action on a lost note evidence as to who has possession of it cannot be required of the plaintiff. Champenois v. Collins [Miss.] 36 So. 72.

40. That a deed is lost is not sufficiently shown by an affidavit that the original was not in the possession, power, or custody of affiant and he believed it had been lost. Cox v. McDonald, 118 Ga. 414. Evidence that a deed executed during pendency is similar to a lost deed is insufficient to prove such fact. South Chicago Brew. Co. v. Taylor, 205 Ill. 132, 68 N. E. 732.

41. In Missouri, lost papers filed in a court of record may be proved by the affidavit of any person interested, his agent or attorney. Cost bond filed and lost before judgment entered proved by affidavits of attorney. Jordan v. Vaughn [Mo. App.] 78 S. W. 316. In Missouri, lost promissory notes may be proved by affidavit of their contents set forth in substance. Warder, etc., Co. v. Libby [Mo. App.] 78 S. W. 338.

42. Promissory notes. Sturman v. Sturman, 118 Iowa, 620, 92 N. W. 886.

43. Evidence that records were burned held inadmissible, where it was not shown that the contents contained something relative to the controversy. Ellis v. Le Bow, 30 Tex. Civ. App. 449, 71 S. W. 576.

44. Certified copy of duly recorded deed not between parties litigant is admissible in evidence, when the court is satisfied of the loss or destruction of the original. Cox v. McDonald, 118 Ga. 414.

45. Search had been made in last known place of deposit and inquiry made of the only person who had access to it. Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803.

46. Treasurer's bond. Van Winkle v. Blackford [W. Va.] 46 S. E. 589.

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—Lost papers pertaining to a legal proceeding can only be established by the court which entertained that proceeding.[47] In some states the jurisdiction to establish lost papers has been conferred by statute.[48]

§ 3. *Procedure in equity or under burnt records act to restore records.*—Proceedings under the burnt records act forecloses the rights of only those who were parties.[49]

REWARDS.

§ 1. Nature and Definition (1521).
§ 2. The Offer (1521).
§ 3. Earning Reward (1521).

§ 1. *Nature and definition.*—A reward is an offer of recompense by the government or by a private person, to whoever will perform some special act. The rule as to payment of an offered reward is based on the principles applicable to contracts,[50] and the doing of a thing for which a reward is offered creates a contract;[51] but a mere offer not complied with does not.[52]

§ 2. *The offer.*—An offer of a reward is revocable at any time before the conditions are complied with. It is not open to those who, by complying with it, would take advantage of their own wrong[53] or would promote an unlawful act.[54] When made by government officials, it must be within the scope of their power,[55] but will not bind them personally if it is not.[56]

§ 3. *Earning reward.*—As a general rule, compliance with the terms of an offer of reward is all that is necessary in order to claim it;[57] but it has been held that the party offering a reward must be notified by the one doing the act that it was performed because of the offer.[58] The offer must be complied with according

47. Schedule and plat accompanying a petition to set aside land as a homestead even after being recorded by the clerk of a superior court, as directed by law, remain private papers, and where lost can be established by a superior court. Paschal v. Turner, 116 Ga. 736.

48. In Georgia, this does not apply to the schedule and plat of a homestead proceeding until it has been recorded. Paschal v. Hutchinson [Ga.] 46 S. E. 103. In Wisconsin, the probate court has power to take proof and establish wills lost or destroyed by accident or design. The petition for probate must set forth its provisions. Gavitt v. Moulton [Wis.] 96 N. W. 395.

49. Thompson v. Maloney, 199 Ill. 276, 65 N. E. 236.

50, 51, 52. Van Vlissingen v. Manning, 105 Ill. App. 255.

53. Where a statute offers a reward for persons who will furnish evidence relative to crimes, it does not hold this offer out to guilty persons. Board of Com'rs of Clinton County v. Davis [Ind.] 69 N. E. 680.

54. A person who pays another for a promise not to vote cannot collect a reward provided by statute for furnishing testimony securing a conviction of one agreeing for a consideration to refrain from voting. Board of Com'rs of Jay County v. Bliss [Ind.] 69 N. E. 1003.

55. The offer of a reward by county commissioners for the finding and identification of a missing man is in excess of their authority and can never ripen into a contract. Scheiber v. Von Arx, 87 Minn. 298, 92 N. W. 3. The police jury of a parish have power to offer a reward to prevent violation of tavern and grog shop regulations. Carnes v. Police Jury of Parish of Red River, 110 La. 1011. An offer to pay the reward to a person named as trustee for whoever earned it is valid. Cummings v. Clinton County [Mo.] 79 S. W. 1127. A reward for the "apprehension" of a criminal is pursuant to authority to offer a reward for "apprehension and arrest." Id. An offer of a reward is a county contract and must be in writing. Id. Where two judges are authorized to make the offer, an offer by one approved by the other by telephone is valid. Id.

56. Where public officials, acting in good faith, exceed their authority by offering a reward and it is accepted, they will not be personally bound. Scheiber v. Von Arx, 87 Minn. 298, 92 N. W. 3.

57. A complaint in an action to recover a reward offered by statute need not allege that the services were rendered with knowledge of the reward or with an intention to recover the same. Board of Com'rs of Clinton County v. Davis [Ind.] 69 N. E. 680. Evidence that plaintiff met a boy, for whom a reward had been offered, going in the wrong direction; that the boy asked questions showing he did not know where he was and that plaintiff kept him until delivered to his friends, held sufficient to show plaintiff entitled to the reward. Peterson v. Mark [Mich.] 96 N. W. 926. One finding a criminal and securing his arrest is entitled to the reward for his apprehension. Cummings v. Clinton County [Mo.] 79 S. W. 1127.

58. Defendant, by circular offered to divide commission on loans with parties bringing borrowers. Van Vlissingen v. Manning, 105 Ill. App. 255.

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to its terms,[59] and all who participate in such compliance are entitled to a share.[60] One who merely gives information and intentionally evades participation in the arrest is not entitled to share in the reward,[61] nor is one who attempts to take possession of a prisoner from those who have captured him,[62] nor a sheriff who makes an arrest at the instance of the person who really apprehended a criminal,[63] nor is one who is hired by another to make the arrest.[64] A public officer who complies with the offer of a reward in the course of his official duties is not entitled to recover it,[65] but if he performs an act for which a reward is offered outside the limit of his official duty, he may lawfully claim it.[66]

RIOT.

Though the agency of several persons is essential to the crime of riot,[67] it need not be shown that all named in the indictment participated, if it be charged that other persons unknown, sufficient to constitute the required number, took part.[68] Persons who by the use of arms, and by threats and curses drive others from their home, are guilty of the offense of riot, whether the act is done under claim of title to the premises or not.[69]

RIPARIAN OWNERS.[70]

§ 1. Persons Who are Riparian Owners, and Title to Lands Under Water (1522).
§ 2. Rights Attendant on Change in Bed of Stream or in Shore Line (1523).
§ 3. Rights Incidental to Riparian Ownership (1523).
§ 4. Subjection to Public Easements (1524).
§ 5. Actions for Protection of Riparian Rights (1524).

§ 1. *Persons who are riparian owners, and title to lands under water.*—To constitute one a riparian owner his land must abut on the water in question.[71] The

59. A person making an arrest knew that the offer of reward for cutting telegraph wires did not apply to dead wires, for the cutting of which an arrest was made. S. W. Tel. & T. Co. v. Priest, 31 Tex. Civ. App. 345, 72 S. W. 241.

60. One who brings information of the discovery of a criminal for whom a reward is offered and co-operates in his arrest is entitled to share as a participant in the reward. Kinn v. First Nat. Bank, 118 Wis. 537, 95 N. W. 969. One claimant of a reward for arrest after securing information from another claimant prevented that other by subterfuge from accompanying him to make the arrest. Id.

61. Kinn v. First Nat. Bank, 118 Wis. 537, 95 N. W. 969.

62. One posse had captured a criminal for whom a reward was offered; another posse attempted to take him from their possession while en route. Johnson v. Com., 25 Ky. L. R. 986, 76 S. W. 832.

63. One knowing of a reward offered for a murderer took steps to locate him; having done so, he telegraphed the sheriff to arrest him, which he did and turned him over to the party who had him arrested who elicited a confession from him on which he was convicted. Ralls County v. Stephens [Mo. App.] 78 S. W. 291.

64. A detective knowing of a reward offered for the arrest of a criminal procured another detective to arrest him for twenty dollars. Heather v. Thompson, 25 Ky. L. R. 1554, 78 S. W. 194.

65. Cornwell v. St. Louis Transit Co., 100 Mo. App. 258, 73 S. W. 305. A constable whose duty was to watch and prevent destruction of telegraph poles and wires arrested a man for cutting the wires. S. W. Tel. & T. Co. v. Priest, 31 Tex. Civ. App. 345, 72 S. W. 241.

66. A member of a sheriff's posse assisted in arresting a criminal for whom a reward was offered; after his discharge as a deputy, he assisted in the conviction by employing counsel after offer of reward for conviction was renewed. Cornwell v. St. Louis Transit Co., 100 Mo. App. 258, 73 S. W. 305. A policeman, whose duty it was to arrest a man for drunkenness, is entitled to a reward offered for his arrest as a burglar, when it is not his official duty to arrest for that offense without process. Kinn v. First Nat. Bank, 118 Wis. 537, 95 N. W. 969.

67, 68. State v. MacQueen [N. J. Law] 55 Atl. 1006.

69. Hunt v. State, 116 Ga. 615.

70. See, also, the topic Waters and Water Supply, which includes irrigation and the topics Navigable Waters, 2 Curr. Law, p. 989, and Wharves.

71. Owner of land opposite mouth of stream is not. Manigault v. Ward & Co., 123 Fed. 707. But see Yuba County v. Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049, in which a county having land near a stream was entitled to enjoin pollution.

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state holds the fee of all tide lands in trust for all its inhabitants, and not as a private proprietor.[72] A riparian proprietor of land bounded by a river takes to the center of the stream, absolutely if the river is non-navigable, and subject to the rights of the general public, if it is navigable.[73]

§ 2. *Rights attendant on change in bed of stream or in shore line.*—If a stream slowly and imperceptibly changes its course, the accretion belongs to the proprietor on that side, and erosion ceases to belong to the former owner.[74] In Minnesota, rights of reliction are determined by extending the side lines of each tract from the meander line to the center of the lake.[75]

§ 3. *Rights incidental to riparian ownership.*—Every riparian owner on a navigable stream has the right to have free access to the stream over his own lands, and the undisturbed use of these lands,[76] and, whether navigable or not, to every reasonable kind of use of the water as it passes by, having a proper regard for the rights of other proprietors on the stream below.[77] Riparian rights are property.[78] They are parcel of the land, and not rights appurtenant.[79] A riparian owner may go on land of another, further up the stream, and, with his consent, there divert water for use on his riparian land without thereby necessarily exercising any other than his riparian right.[80] Particular riparian rights may be acquired by custom and user.[81]

72. The public is entitled to use all of such land as is not occupied or obstructed. R. I. Motor Co. v. Providence [R. I.] 55 Atl. 696. The riparian owner is entitled to fill out the shore to the high-water level. Id. In New York, the state's right to tide lands in the city of New York is by statute ceded to the city. Knickerbocker Ice Co. v. Forty-Second St., etc., Ferry R. Co., 176 N. Y. 408, 68 N. E. 864.

73. The size of the river in no way affects this rule. Franzini v. Layland [Wis.] 97 N. W. 499. But where a navigable river is the boundary between two states and the dividing line is the center of the main channel of such stream, a riparian proprietor takes only to such boundary line. Id. The title of a riparian owner upon a navigable stream goes to the center thereof not by virtue of his patent or chain of title but by the mere favor or concession of the state. Id. A riparian proprietor on a river owns all islands opposite the same so far as his riparian rights extend. Id. A stream wholly within the state of South Carolina, which has no public terminus except at its outlet, is not navigable under the constitution and statutes of that state. Manigault v. Ward & Co., 123 Fed. 707. In order to make a stream wholly within a state a navigable water of the United States it must be a public highway. To be a public highway a stream must have a terminus at which the public can enter it and a terminus at which they can leave it. Mere floatability is not sufficient. Id. See, also, the topic Navigable Waters, 2 Curr. Law, p. 989.

74. Holcomb v. Blair, 25 Ky. L. R. 974, 76 S. W. 843.

75. Scheifert v. Briegel [Minn.] 96 N. W. 44. Where the lake is irregular in shape, and originally had no inlet or outlet, inequalities caused by the broken shore line should be equitably adjusted, either by disregarding such irregularities, or by treating the lake as composed of separate bodies of water, according to the conditions. Id.

76. Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 188. A riparian owner has a right of access to his land. R. I. Motor Co. v. Providence [R. I.] 55 Atl. 696.

77. Sprague v. Dorr [Mass.] 69 N. E. 344; Lawrie v. Silsby [Vt.] 56 Atl. 1106. Riparian owners, under the circumstances, held to have a right to only so much water as was reasonably necessary for use of their land. Rose v. Mesmer [Cal.] 75 Pac. 905. A riparian owner has a right to make a reasonable use of a stream for the purpose of irrigation. What is reasonable use. McCook Irr. & W. P. Co. v. Crews [Neb.] 96 N. W. 996. See, also, Waters and Water Supply. The ownership of land on a stream opposite the mouth of a creek which empties into it, carries with it no right to the navigation of the creek as a riparian proprietor. Manigault v. Ward & Co., 123 Fed. 707.

Pollution: Statutes of Mass. 1878, p. 133, c. 183; Rev. Laws, c. 75, § 124, in so far as they prevent the discharge into streams of polluting matter of such kind and amount as will corrupt or impair the quality of the water, are reasonable regulation of the exercise of private rights of property in reference to the common good, and are not an interference with property that calls for compensation to the owners. Sprague v. Dorr [Mass.] 69 N. E. 344. Pollution of stream held reasonable. Fahnestock v. Feldner [Md.] 56 Atl. 785.

78. Discharge of sewerage into a stream by a city is a taking of property requiring compensation to riparian owners damaged thereby. City of Waterbury v. Platt Bros. & Co. [Conn.] 56 Atl. 856; Cline v. Stock [Neb.] 98 N. W. 454; Doremus v. Paterson [N. J. Eq.] 57 Atl. 548.

79. Description of riparian land in the complaint in a partition suit includes the water, although not mentioned or described. Rose v. Mesmer [Cal.] 75 Pac. 905.

80. Rose v. Mesmer [Cal.] 75 Pac. 905.

81. Right to build wharves and booms. Sullivan Timber Co. v. Mobile, 124 Fed. 644.

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§ 4. *Subjection to public easements.*—The right of a riparian owner on a navigable stream to have free access to the stream over his own lands and to the undisturbed use of these lands is subject to the right of the state to improve and develop navigation.[82]

§ 5. *Actions for protection of riparian rights.*—A court of equity has power to determine, as between parties having admitted legal rights in bodies of water, the extent of their respective rights and the proper mode of exercising and enjoying them.[83]

ROBBERY.

§ 1. Nature and Elements (1524).
§ 2. Indictment and Prosecution (1525).
A. Indictment (1525).
B. Evidence (1526).
C. Instructions (1526).
D. Punishment (1527).

§ 1. *Nature and elements.*—Robbery is the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence or by putting him in fear.[84] Robbery includes larceny, and all the elements that are necessary to constitute larceny are necessary to constitute robbery.[85] Therefore, the thing taken must be the subject of larceny,[86] there must be both a taking and a carrying away of the property, and the taking must be with felonious intent, that is with intent to deprive the owner of his property without any honest claim thereto.[87] The aggravating circumstances necessary to constitute robbery, as distinguished from simple larceny, are that the taking must be from the person[88] of the owner,[89] and must not only be without the owner's consent, but it must also be accomplished either by violence or putting him in fear.[90] It is robbery, not larceny, where defendant first took prosecutor's trousers containing his money by stealth, but after their recovery by prosecutor in a scuffle retook them by force and putting in fear.[91] Stealthily filching from the person is not robbery,[92] nor is a violent effort to escape on detection,[93] nor a resistance by violence of the efforts of the prosecutor to regain his property.[94]

82. Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 188. A riparian proprietor on a navigable stream owns to the center of the stream, but such ownership is subject and subservient to the rights of the general public in such stream. Franzini v. Layland [Wis.] 97 N. W. 499. The title of the city of New York in the tideway and submerged lands of the Hudson River is not absolute and unqualified, but is held subject to the right of the public to the use of the river as a water highway. Where streets of the city of New York and navigable waters meet, the general public has a right of passage, and a highway is, by operation of law, extended over a wharf or bulkhead built at the end of a street. Knickerbocker Ice Co. v. Forty-second St., etc., Ferry R. Co., 176 N. Y. 408, 68 N. E. 864. In Michigan, it is held that a wharf at the termination of a city street is not a part of the public highway. Kemp v. Stradley [Mich.] 97 N. W. 41. Public entitled to access to docks built by riparian owner under public authority. Thousand Island Steamboat Co. v. Visger, 86 App. Div. [N. Y.] 126.

83. State v. Sunapee Dam Co. [N. H.] 55 Atl. 899. Injunction against abstraction or diversion of water by upper riparian proprietor granted. Lonsdale Co. v. Woonsocket [R. I.] 56 Atl. 448; Harper, etc., Co. v. Mountain Water Co. [N. J. Eq.] 56 Atl. 297; Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co., 118 Ga. 255. Against obstruction. Fahnestock v. Feldner [Md.] 56 Atl. 785.

84. King v. Com., 25 Ky. L. R. 713, 76 S. W. 341.

85. Owen v. Com., 25 Ky. L. R. 466, 76 S. W. 3.

86. The winner of money at gaming, if in possession, has such a property in it that robbery may be committed as against him. Fay v. State [Tex. Cr. App.] 70 S. W. 744.

87. State v. Smith, 174 Mo. 586, 74 S. W. 624.

88. Smith v. State [Miss.] 35 So. 178.

89. In Missouri, a clerk having possession of his employer's money has a sufficient ownership thereof to support an allegation of ownership in the clerk in an indictment for robbery. State v. Montgomery [Mo.] 79 S. W. 693.

90. Bradshaw v. State [Tex. Cr. App.] 70 S. W. 215; Beard v. State [Tex. Cr. App.] 71 S. W. 960; Smith v. State [Miss.] 35 So. 178; King v. Com., 25 Ky. L. R. 713, 76 S. W. 341.

91. People v. Stevens, 141 Cal. 488, 75 Pac. 62.

92. Colby v. State [Fla.] 35 So. 189; Jones v. Com., 24 Ky. L. R. 2481, 74 S. W. 263; Dawson v. Com., 25 Ky. L. R. 5, 74 S. W. 701.

93. Colby v. State [Fla.] 35 So. 189.

94. Jones v. Com., 24 Ky. L. R. 2481, 74 S. W. 263; Dawson v. Com., 25 Ky. L. R. 5, 74 S. W. 701.

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To constitute an assault with intent to rob the specific intent to rob must exist.[95]

A statute providing that any person who attempts to commit any crime but fails, or is prevented, or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, creates the crime of attempt to rob.[96]

§ 2. *Indictment and prosecution. A. Indictment.*—An indictment for robbery should contain all the allegations essential in simple larceny, and, in addition, the matter that makes larceny robbery,[97] hence it should describe the property,[98] state its value,[99] and ownership,[1] allege a taking or asportation,[3] and that the taking was from the person by violence or putting in fear.[4]

An indictment for assault with intent to rob should allege the assault and aver that it was with the intent to commit robbery, describing it,[5] but the property intended to be taken need not be described.[6]

The indictment may charge the offense in all its forms, as robbery by assault, by violence, and by putting in fear, and proof of any clause will sustain a conviction,[7] but where the indictment charges an assault with intent to rob only by means of menaces, a conviction cannot be sustained in the absence of proof of menaces, though the commission of the crime by other means is shown.[8] An indictment which states the essential facts of the crime of robbery, without stating the circumstances of aggravation, is sufficient to warrant the imposition of the penalty prescribed for the aggravated offense,[9] and ownership of the property.[10]

95. State v. Atkins [Iowa] 97 N. W. 996; People v. Burns, 138 Cal. 159, 70 Pac. 1087, 60 L. R. A. 270; Coles v. State, 23 Ohio Circ. R. 313.

96. Pen. Code, § 664. People v. Burns, 138 Cal. 159, 70 Pac. 1087, 60 L. R. A. 270.

97. Owen v. Com., 25 Ky. L. R. 466, 76 S. W. 3. Indictment for robbery in language of statute held sufficient. State v. Curtin, 111 La. 129.

98. A description of the property as seven dollars and fifty cents current money of the United States of America is sufficient. Parrent v. State [Tex. Cr. App.] 76 S. W. 474. The indictment may be amended with reference to the description of the property. Gold or silver watch. Meehan v. State [Wis.] 97 N. W. 173. The objection that an indictment for robbery did not describe the property taken with sufficient certainty is not ground for quashing the indictment. McKevitt v. People, 208 Ill. 460, 70 N. E. 693.

99. An allegation that the property taken was "lawful money of the United States" sufficiently shows that it had value. People v. Stevens, 141 Cal. 488, 75 Pac. 62. An indictment charging the property taken to have been "seventeen dollars in money, each of the value of one dollar" is good. Fay v. State [Tex. Cr. App.] 70 S. W. 744.

1. The indictment must correctly aver the ownership of the property. Money in possession of infant. Dorsey v. State, 134 Ala. 553. Merely to allege that it was taken from a certain person is not sufficient. State v. Morgan, 31 Wash. 226, 71 Pac. 723. An averment that property was taken from the person of A is sufficient without stating that it was his property. Owen v. Com., 25 Ky. L. R. 466, 76 S. W. 3.

3. An information charging the taking of a purse containing a sum of money, sufficiently charges the taking of the money as well as the purse. People v. Stevens, 141 Cal. 488, 75 Pac. 62.

4. Smith v. State [Miss.] 35 So. 178. Under Utah statutes, an indictment for robbery which fails to state that the property taken from the person of another was taken "by means of force or fear" is insufficient [Rev. St. 1898, §§ 4175, 4355, 4359, subd. 2]. State v. Davis [Utah] 76 Pac. 705.

5. Information for assault with intent to rob held sufficient. State v. Fenton, 30 Wash. 325, 70 Pac. 741.

6. An information for assault with intent to rob need not allege that the person assaulted had money or property in his possession. State v. Roberts, 67 Kan. 631, 73 Pac. 905.

7. Burns v. State [Tex. Cr. App.] 70 S. W. 24.

8. Erwin v. State, 117 Ga. 296.

9. Code, § 4753, describes the offense of robbery, while § 4754, prescribes a penalty when aggravating circumstances attend it. Indictment good under § 4753, warrants sentence under § 4754. State v. Poe [Iowa] 98 N. W. 587. An indictment charged robbery, that defendant was armed with intent to kill, and that confederates were present. The jury found him guilty of robbery "as charged in the indictment, and he was sentenced for the crime of robbery, etc." Held, that "etc." was meaningless and verdict and sentence were for robbery merely. McKevitt v. People, 208 Ill. 460, 70 N. E. 693.

10. 2 Ball. Ann. Codes & St. § 6944, provides that in the prosecution of any offense committed in stealing personal property it shall not be deemed a variance if it be proved that the actual or constructive possession, or general or special property, in the whole or a part of the personalty, was in the person alleged in the indictment to be the owner. Held, under this statute, that

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The proof must support the allegations with respect to the description,[11] but the value of the property being immaterial, an allegation thereof may be disregarded.[12]

A conviction of any included offense such as assault with intent to rob,[13] or larceny from the person may be had on an indictment for robbery,[14] but where the evidence shows that defendant either is or is not guilty of the offense charged, it is not error to omit to charge as to lower grades of the crime.[15] Under an indictment for assault with intent to rob, under the statute in Washington, defendant may be convicted of assault and battery or simple assault, but not of an attempt to rob, eliminating the assault.[16]

(§ 2) *B. Evidence.*—The admissibility of the evidence is governed by the familiar rules of criminal evidence, such as proof of matters material as res gestae,[17] declarations of accused,[18] his possession of the stolen property,[19] and the like. The nature and extent of the prosecutor's injuries may be material,[20] but the commission of other distinct offenses by accused should not be shown.[21] Cases in which the sufficiency of the evidence to support a conviction are discussed are collected in the note.[22]

(§ 2) *C. Instructions.*—Instructions should correctly state the rules of law applicable to the particular case,[23] and present all the issues raised by the plead-

under an indictment alleging ownership to be in one partner, where the proof showed the property to belong to the partnership, there was no variance. State v. Fair [Wash.] 76 Pac. 731.

11. An indictment alleging the taking of a gold watch is supported by proof that the watch was gold filled. State v. Alexander, 66 Kan. 726, 72 Pac. 227.

12. People v. Stevens, 141 Cal. 488, 75 Pac. 62.

13. State v. Atkins [Iowa] 97 N. W. 996; Burns v. State [Tex. Cr. App.] 70 S. W. 24. Though evidence show the prisoner to be guilty of robbery he still could be convicted of assault with intent to rob. People v. Blanchard [Mich.] 98 N. W. 983.

14. Reed v. State [Neb.] 92 N. W. 321.

15. State v. Atkins [Iowa] 97 N. W. 996.

16. State v. Fenton, 30 Wash. 325, 70 Pac. 741.

17. Statements made by the person robbed immediately on recovering consciousness are admissible as res gestae. State v. Ripley, 32 Wash. 182, 72 Pac. 1036. Circumstances leading up to the transaction, and inseparable from it are properly shown, though occurring several hours before. People v. Linares [Cal.] 75 Pac. 308.

18. Prior statements of accused as to how the robbery might be committed are admissible. Keating v. State [Neb.] 93 N. W. 980.

19. Where on the arrest of the proprietor of a saloon it was locked by him and kept locked until an officer searched it, evidence that the stolen property was found therein is properly admitted, though the search was several weeks after the robbery. State v. Hyatt [Mo.] 78 S. W. 601.

20. Where the evidence of the corpus delicti is circumstantial, the extent of the injuries of the person robbed may be shown for the purpose of showing that force and violence were used in the commission of the robbery. State v. Alexander, 66 Kan. 726, 72 Pac. 227.

21. The testimony of a witness as to another robbery committed on witness by defendant within a short time at a place several blocks away is admissible only for the purpose of showing defendant's presence in the locality, and not as corroboration, or as showing intent. State v. Spray, 174 Mo. 569, 74 S. W. 846.

22. Conviction held supported. Circumstantial evidence of corpus delicti and participation by accused. State v. Alexander, 66 Kan. 726, 72 Pac. 227. Evidence in corroboration of accomplice held insufficient. People v. Morton, 139 Cal. 719, 73 Pac. 609. Conviction of robbery by means of knock out drops in saloon held supported. Kincaid v. Com. [Ky.] 78 S. W. 433. Evidence that the property stolen was a $20 gold piece and some other coins sufficiently shows value. People v. Stevens, 141 Cal. 488, 75 Pac. 62.

Whether crime was robbery: Circumstances held to show intent to rob. Burns v. State [Tex. Cr. App.] 70 S. W. 24. Circumstances proved held to amount to assault with intent to rob and not completed robbery. State v. Roberts, 67 Kan. 631, 73 Pac. 905. Circumstances proved held to raise question for jury as to whether the act amounted to robbery. Beard v. State [Tex. Cr. App.] 71 S. W. 960. Circumstances held to make case for jury as to whether the taking was by such violence and putting in fear as to amount to robbery. King v. Com., 25 Ky. L. R. 713, 76 S. W. 341.

Identification of defendant held sufficient to support conviction against defense of alibi. State v. Blanchard, 88 Minn. 82, 92 N. W. 504; State v. Brafford, 121 Iowa, 115, 96 N. W. 710; Keating v. State [Neb.] 93 N. W. 980.

Defendant's participation held shown notwithstanding prosecutor's statement that defendant had nothing to do with the robbery. State v. Rowland, 174 Mo. 373, 74 S. W. 622. Evidence of defendant's participation held question for jury. State v. Hyatt [Mo.] 78 S. W. 601. Defendant's voluntary participation in crime committed by another held shown. Thomas v. State, 134 Ala. 126.

23. Where the statutory definition of robbery includes taking from the immediate presence of the owner, an instruction limiting it to a taking from the person is properly

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ings and evidence, but matters not within the issues should not be treated,[24] and matters of fact in dispute should not be assumed.[25]

(§ 2) *D. Punishment.*[26]—Under a statute fixing the penalty at not less than 10 nor more than 20 years, 17 years' imprisonment is not an excessive sentence for robbery in a public street by presenting a pistol and threatening to kill.[27]

SALES.

§ 1. Definition; Distinction From Other Transactions (1527).
§ 2. Contract Requisites of a Sale (1529).
§ 3. Modification and Mutual Rescission (1534).
§ 4. General Rules of Interpretation and Construction (1535).
§ 5. Property Sold. Amount, Kind, Nonexistence and Failure of Consideration (1535).
§ 6. Transition of Title (1536). Meaning and Effect of Contract (1536). Separation and Designation (1537). Payment (1537). Delivery and Acceptance (1538). How Proved (1539).
§ 7. Delivery Under Terms of Contract (1539).
A. Construction and Operation of Contract. Necessity, Time, Place, etc. (1539).
B. Sufficiency of Delivery; Actual, Constructive, Symbolical (1540).
C. Acceptance; Necessity; Time; What is (1541).
D. Excuses for and Waiver of Breach (1542).
§ 8. Warranties and Conditions (1543).
A. In General. What are Warranties and What Conditions. Descriptions and Representations (1543).
B. Express and Implied Warranties and Fulfillment or Breach Thereof (1544).
C. Conditions and Fulfillment or Breach (1548).
D. Conditions on a Warranty (1549).
E. Waiver of Warranties and Conditions; Excuse for Breach (1550).
F. Remedies (1552).
§ 9. Payment, Tender, and Price as Terms of the Contract (1552).
§ 10. Remedies of Seller (1554).
A. Rescission and Retaking of Goods or Action for Conversion (1554).
B. Stoppage in Transit (1556).
C. Lien (1556).
D. Resale (1557).
E. Action for Price or on Quantum Valebat (1557).
F. Action for Breach (1566).
G. Choice and Election of Remedies (1567).
§ 11. Remedies of Purchaser (1568).
A. Rescission (1568).
B. Action to Recover Purchase Money Paid (1570).
C. Actions for Breach of Contract (1570).
D. Action for Breach of Warranty (1573).
E. Recovery of Chattel; Replevin or Conversion (1575).
F. Lien for Price Paid (1576).
G. Recoupment and Counterclaim (1576).
H. Choice and Election of Remedies (1577).
§ 12. Damages for Breach of Sale (1578).
A. Breach by Seller (1578).
B. Breach by Purchaser (1578).
C. Breach of Warranty (1580).
D. Special Damages (1580).
E. Evidence as to Damages (1582).
§ 13. Rights of Bona Fide Purchasers or Other Third Persons (1583).
§ 14. Conditional Sales. Character and Formation; Rights Acquired (1584).

§ 1. *Definition; distinction from other transactions.*—The nature of the transaction, not the name given it by the parties, determines its character as a sale.[28] The distinction between an agency and a sale depends on the power of the party receiving to take title to himself.[29] The presence or absence of an

refused. People v. Stevens, 141 Cal. 488, 75 Pac. 62. An instruction purporting to define the crime is bad if it omit any essential element thereof. Intent to deprive the owner of his property. State v. Smith, 174 Mo. 586, 74 S. W. 624. An instruction correctly defining the necessary fraudulent intent need not state that the taking must have been with "felonious" intent. State v. Spray, 174 Mo. 569, 74 S. W. 846. Where the instructions in a prosecution for assault with intent to rob give the definition of the offense in substantially the terms of the statute, no particular definition of assault, for further description of robbery, is necessary. State v. Atkins [Iowa] 97 N. W. 996.

24. Where prosecutor's evidence shows unmistakable robbery, and defendant denies all guilt, errors in the instructions relating to larceny are immaterial. People v. Stevens, 141 Cal. 488, 75 Pac. 62.

25. Instructions must not assume the ownership of the property and the owner's nonconsent where not proved, but only when under the evidence there can be no controversy on those questions. Bradshaw v. State [Tex. Cr. App.] 70 S. W. 215.

26. Punishment for attempt to rob. People v. Burns, 138 Cal. 159, 70 Pac. 1087, 60 L. R. A. 270.

27. State v. Brafford, 121 Iowa, 115, 96 N. W. 710.

28. Buffum v. Descher [Neb.] 96 N. W. 352. Where a father, whose son was engaged with others in working a mine, agreed to back his son for his share of price and expenses, his sending provisions to his son was not a sale to the others. Snow v. Mastic, 138 Cal. xix, 71 Pac. 165. Conditional sale, see post, § 14.

29. If the transferee, on delivery, acquires absolute dominion, with right of disposal and becomes bound for payment, it is a sale and title passes. Buffum v. Descher [Neb.] 96 N.

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obligation to return the identical article received[30] or of an agreement to buy or merely to do work on a chattel[31] determines it to be a sale or a bailment. Bailment may exist though the bailee may be entitled to a share of the proceeds.[32] A consignment for sale by the party receiving may amount to a mere bailment.[33] A so-called lease, merely to give the seller a lien for the price, will not change the contract from a sale.[34] On a sale the general property in the article must be transferred.[35] The transferee as collateral of a bill of lading is not a party to the sale.[36] To constitute a bill of sale, absolute on its face, a mortgage, the intention in execution, must have been the giving of security.[37]

W. 352. Contract for sale of goods with secret agreement that title shall not pass until payment, held sale absolute and not agency. In re Carpenter, 125 Fed. 831. An agreement by a manufacturer to furnish engines at certain terms for a certain period and to refer all inquiries for engines from a certain territory to the other party was not a contract of agency, but gave the latter the right to purchase at the terms within such territory. Russell & Co. v. McSwegan, 84 N. Y. Supp. 614. Where wagons were ordered on conditional sale and the seller changed its terms to consignment on commission and shipped the wagons with a bill of sale showing a sale to the purchaser and reciting discounts, though stating that it was a commission contract, there was an absolute sale. A. A. Cooper Wagon & Buggy Co. v. Bailey & G. Estate, 98 Mo. App. 648, 73 S. W. 724. Construction of particular contract as absolute sale and not for delivery to sell on commission. Sutton v. Baker [Minn.] 97 N. W. 420.

30. Particular contract as bailment with right to purchase and not a sale. Donnelly v. Mitchell, 119 Iowa, 432, 93 N. W. 369. If the identical article is to be restored in the same or altered form, the contract is a bailment; if there is no obligation for such return and the receiver may return another article of equal value or the money value, it is a sale. Singer Mfg. Co. v. Ellington, 103 Ill. App. 517; Scott M. & S. Co. v. Shultz, 67 Kan. 605, 73 Pac. 903. Where a contract **in partido** in New Mexico provided that double the number of cattle should be returned at the end of five years, title to the cattle received, passed; in this case the contract necessarily excluded return of the identical cattle. Genobia Aragon De Jaramillo v. U. S., 37 Ct. Cl. 208, 243. An instrument reading "Rec'd of S. 408 bu. of wheat, to be paid for at market price on demand," will be construed as a sale not a bailment. Hagey v. Schroeder, 30 Ind. App. 151, 65 N. E. 598. Where it was agreed that mining personalty should be returned in kind or value according to an invoice made, the contract was, in nature, a sale and title passed. Scott M. & S. Co. v. Shultz, 67 Kan. 605, 73 Pac. 903. Delivery of a piano under a written agreement for a definite term at a fixed rental, payable in instalments on days certain, terminable at any time by the party delivering, with provisions that after full payment to a certain amount title should pass to the holder, that he should give up the piano on demand, and that payments should be for rent and not for purchase, is a bailment, not a conditional sale. Painter v. Snyder, 22 Pa. Super. Ct. 603.

31. Sufficiency of evidence to show a contract relating to street curbing to be one of employment only and not a sale. Ulmer v. McDonnell, 11 N. D. 391, 92 N. W. 482.

32. An agreement by which one was to cut ties from timber of another, profits to be divided on sale by the latter, gave the first no title to the ties, so that he could not sell the ties, and by delivery of the bill of lading convey title to an innocent purchaser as against the other. Padgett v. Ford, 117 Ga. 508.

33. If the person receiving goods is to sell them and account to the sender, title does not pass and the transaction is a mere bailment. Furst Bros. v. Commercial Bank, 117 Ga. 472. An agreement to receive goods and handle them on account of the owner settling at certain intervals is not a sale, but a mere consignment for sale, though the settlements were not made according to the agreement. Fleet v. Hertz, 201 Ill. 594, 66 N. E. 858. If after the time limit for delivery of lumber, the buyers receive part of it under an agreement to hold and sell to best advantage for the owner, to be paid for when sold, they are not liable for the price unless it is shown to have been sold. Heidelbaugh v. Cranston [Del.] 56 Atl. 367.

Held a sale: A debtor delivered to his surety a field of beans to be used in payment of the debt. Evidence that the creditor said he would take the beans in payment of his debt, and if there was a balance turn it over to the surety, held to show a sale. Cunningham v. O'Connor [Mich.] 99 N. W. 25.

34. Singer Mfg. Co. v. Ellington, 103 Ill. App. 517.

35. Mere transfer of possession of a chattel or a contract for that purpose is not a sale. Still v. Cannon [Okl.] 75 Pac. 284. A contract for possession of sheep for a certain term at a certain yearly rental, the party receiving them to keep the old stock good, is a lease, not a sale. Turnbow v Beckstead, 25 Utah, 468, 71 Pac. 1062. Where a certain amount per month was paid for use of a wagon under an agreement with the owner that he would sell after a certain amount was paid, the lessee cannot recover instalments paid as purchase money, such payments being rent. Stearns v. Drake, 24 R. I. 272.

36. Where the seller consigned goods to the buyer, drew a draft for the amount due, and negotiated it with the bill of lading attached to a bank, which delivered the goods and the bill and collected from the buyer, the bank was not substituted for the buyer as a party to the sale, so that it might sue for breach of warranty. German-American Sav. Bank v. Craig [Neb.] 96 N. W. 1023.

37. Long v. State [Fla.] 32 So. 870. A bill of sale provided that, on payment of the vendor's debts from the income or sale

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§ 2. *Contract requisites of a sale.*—Sales are subject to the general rules for formation of contracts respecting parties,[38] fraud,[39] and sales by or to agents.[40] There must be mutuality of assent or as sometimes put an offer and acceptance,[41] whence an offer may be recalled before acceptance,[42] even though it stipulates the contrary.[43] An option must be supported by a consideration.[44] Delay is

of the property, title to the remainder would revest in the vendor. Held, a mortgage. Haynes v. Hobbs [Mich.] 98 N. W. 978.

38. Competency of parties. Warner v. Warner, 30 Ind. App. 578, 66 N. E. 760.

Who are parties: That a receipt for part payment was given to the buyer's agent or that it was signed by the seller's agent will not constitute such agents the contracting parties; the parties proposing and accepting are the contracting parties. Jones v. Wattles [Neb.] 92 N. W. 765. Purchase of a horse by several persons, each to pay a certain part of the price for a share in ownership, in good faith, is valid and binds each purchaser to the amount of his subscription. Valade v. Masson [Mich.] 97 N. W. 59.

Where mortgaged cordwood was purchased and notes made directly to the mortgagee, it was held a question for the jury to determine who was the seller in order to set-off. First Nat. Bank v. Stringer [Mich.] 95 N. W. 712.

39. Warner v. Warner, 30 Ind. App. 578, 66 N. E. 760. Fraud as a defense in an action for the price of optical goods cannot be based on statements that the goods had qualities known to be contrary to natural laws. H. Hirschberg Optical Co. v. Michaelson [Neb.] 95 N. W. 461. That a horse was ill at the time of, or after, delivery and giving of a check for its value, is insufficient to show fraud. Citizens' State Bank v. Cowles, 89 App. Div. [N. Y.] 281. In absence of inquiry, omission to mention a debt of the corporation is not fraudulent concealment of facts in selling stock, so as to constitute a defense in an action for the price. Furber v. Fogler, 97 Me. 585. The seller of bank stock is not liable in deceit for failure to disclose the insolvent condition of the bank where he had no connection therewith and no actual knowledge of it. Kirtley's Adm'x v. Shinkle, 24 Ky. L. R. 608, 69 S. W. 723. Fraudulent statements of the seller as to latent defects and concealment, made to divert the buyer's attention and to defraud him, are fraudulent misrepresentations for which the buyer may have relief. Burnett v. Hensley, 118 Iowa, 575, 92 N. W. 678. Evidence held not to show that a purchaser of a stock of goods was persuaded by the seller to become intoxicated and then purchase at an exorbitant price. Fletcher v. Whitlow, Lake & Co. [Ark.] 79 S. W. 773.

That the buyer is insolvent and unable to pay for goods does not conclusively show that he never intended to pay so as to avoid the sale for fraud. Stein v. Hill [Mo. App.] 71 S. W. 1107. False statements to one selling personalty on credit to a corporation as to its solvency avoid the sale, though the person making them believed the debt would be paid. Fitchard v. Doheny, 86 N. Y. Supp. 964; Pier Bros. v. Doheny, 86 N. Y. Supp. 971. The purchaser is not bound to inform the seller of his insolvency, no inquiry being made, so as to avoid fraud as vitiating the sale. Stein v. Hill [Mo. App.] 71 S. W. 1107. That the vendor made an investigation, on his own account, into solvency of the purchaser will not prevent his recovery for fraud of the purchaser inducing credit. Light v. Jacobs, 183 Mass. 206, 66 N. E. 799. A contention that defendant committed a fraud in purchasing goods cannot be sustained, it appearing that the goods were purchased with the object of compelling plaintiff to credit the amount on defendant's claim of damages for breach of contract. To show fraud of purchaser in not intending to pay for them. Royal R. & E. Co. v. Gregory Grocer Co., 90 Mo. App. 53.

Mere expressions of opinion by the seller as to condition of goods sold cannot be urged as fraud in an action for the price, especially where the purchaser had opportunity to inspect the goods and offered to purchase without regard to defects, which offer the seller accepted. Vodrey Pottery Co. v. H. E. Horne Co., 117 Wis. 1, 93 N. W. 823.

40. Authority of agent in making sales, see Agency, 1 Curr. Law, p. 43.

A seller may recover for subsequent sales to an agent where he had authority to make prior sales and no notice was given of termination of such authority; but one never an agent of another cannot bind him. Waters-Pierce Oil Co. v. Jackson Junior Zinc Co., 98 Mo. App. 324, 73 S. W. 272.

A sale signed "B. & Co., Sales Agents" and "N. Co. by T.," and partly performed by the latter, is made by such company. A. B. Farquhar Co. v. New River Mineral Co., 87 App. Div. [N. Y.] 329.

Personal liability of agent failing to disclose agency, see Agency, 1 Curr. Law, p. 43.

41. Necessity: Consent of both parties is necessary, though as to either it may be inferred from facts and circumstances. Curtiss v. McCune [Neb.] 94 N. W. 984. Acceptance is necessary to an executory sale made on order. Wilson v. Belles, 22 Pa. Super. Ct. 477.

That the seller of goods is liable to his agent for commissions whether the sale is accepted or not does not make him liable to the buyer before acceptance in absence of a showing of his knowledge to that effect. Cary v. Appo, 84 N. Y. Supp. 569.

42. Cancellation of an order for future delivery before acceptance by the manufacturer prevents any contract of sale. E. Bement & Sons v. Rockwell, 86 N. Y. Supp. 876. A mere promise to buy is unilateral and may be withdrawn before it is acted upon. Alderman v. New Departure Bell Co., 75 Conn. 519. An order for a machine, subject to acceptance of the manufacturer, may be countermanded by the giver before acceptance. Durkee v. Schultz [Iowa] 98 N. W. 149.

43. A contract for an instalment purchase of books, providing against countermand, is a mere order revocable at any time before acceptance, being unilateral and without consideration and not enforceable after revocation. Cary v. Appo, 84 N. Y. Supp. 569. Where an order for goods was countermanded be-

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none.[45] The acceptance must be without condition,[46] within the time limited,[47] or extensions thereof,[48] on the terms offered,[49] and by authority if done through an agent.[50] If it vary them, it in turn becomes an offer,[51] and a different contract if any results.[52] But acceptance need not exclude the parties from supplemental contracts.[53] The minds must have met as to all the terms of the contract free from mistake[54] or uncertainty.[55] There must be mutual obligations to sell[56] and to

fore acceptance, a provision in the order against countermand is without consideration. Hallwood Cash Register Co. v. Finnegan, 84 N. Y. Supp. 154; Cary v. Appo, 84 N. Y. Supp. 569.

If on a consideration and showing equity an option may be specifically enforced. Tidball v. Challburg [Neb.] 93 N. W. 679.

44. Tidball v. Challburg [Neb.] 93 N. W. 679.

45. Baltimore & L. R. Co. v. Steel Rail Supply Co. [C. C. A.] 123 Fed. 655.

46. **Sufficiency** of unconditional acceptance of offer to sell cotton so as to complete contract and support action by the seller for breach. China & J. Trading Co. v. Davis [C. C. A.] 119 Fed. 688. Statement in an order for goods that the first payment may be made to the agent securing the order does not amount to acceptance of the order where no payment was made and the identity of the agent to receive payment does not appear. Cary v. Appo, 84 N. Y. Supp. 569.

47. An option to close on a certain day includes that day. U. B. Blalock & Co. v. Clark & Bro. [N. C.] 45 S. E. 642. Construction of contract to furnish piling to railroad company as giving the company an option to purchase at any time during the year. Reed v. Ill. Cent. R. Co., 25 Ky. L. R. 389, 75 S. W. 200. If, under a contract to deliver 200 or 300 tons of pig iron, the purchaser may require the larger amount within a certain time, his right is lost if not so exercised. A. B. Farquhar Co. v. New River Mineral Co., 40 Misc. [N. Y.] 404.

48. **An option to buy a larger amount** than was furnished, limited to a certain time, is not extended by delay of the seller in the first delivery. A. B. Farquhar Co. v. New River Mineral Co., 40 Misc. [N. Y.] 404.

49. Addition of terms to an offer of sale materially modifies the offer, operates as a rejection, and amounts to a new proposal to be accepted before completion of a contract. Stock v. Towle, 97 Me. 408. Where owners of ice accept an offer of another to sell as their agent, his subsequent acceptance of their offer to sell as a purchaser in his own right is not responsive, and no contract is made. Rogers v. French [Iowa] 96 N. W. 767. An offer to sell ice not specifying time of payment is presumed to be for cash on delivery so that an acceptance fixing later time for payment is not unconditional and will not effect a contract. Id.

50. Signature of a salesman to a contract of purchase is not acceptance by his principal where he makes a reduction in price and his authority so to do is not shown. Cary v. Appo, 84 N. Y. Supp. 569. Unconditional acceptance by telegraph of an offer for sale of goods at a certain price binds the sender, though the telegraph company makes a mistake as to the price. Postal Tel. Cable Co. v. Akron Cereal Co., 23 Ohio Circ. R. 516.

51. An offer to sell imposes no obligation without an acceptance, and an acceptance varying the terms of the offer is insufficient amounting to a new offer which must be accepted before liability results. Kileen v. Kennedy [Minn.] 97 N. W. 126. Where an offer of purchase was rejected by the seller and the latter's counter offer was accepted by the buyer with directions to deliver, with which the seller never complied, there was no contract of sale. Johnson v. Corbett, 95 Md. 746.

52. An offer of modification or condition to a proposal for sale is a rejection, and acceptance of the modification concludes the contract making the modification a part of the contract. Sloan v. Wolf Co. [C. C. A.] 124 Fed. 196.

53. Where a written proposition of offer by a contracter detailed alternate provisions for machinery in a city water plant and was incorporated in a contract with the city, there was an acceptance of the offer by the city, though supplemental contracts were made which did not affect the subject-matter of the original. City of Rockford v. Mead, 207 Ill. 423, 69 N. E. 756.

54. Mistake in the consignee will prevent the sale. Newberry v. Norfolk & S. R. Co., 133 N. C. 45. Mistake as to the amount of goods is fatal. Singer v. Grand Rapids Match Co., 117 Ga. 86. That the purchaser of goods by order signed the wrong order by mistake, where he afterward without regard to the mistake receives and accepts the goods, will not relieve him for liability for the price. Strickland v. Parlin & O. Co., 118 Ga. 213. That the purchaser is mistaken in the kind of root for drug purposes when samples are submitted by the seller will not prevent recovery of the price where no fraud was practiced. Meyer Bros. Drug Co. v. Puckett [Ala.] 35 So. 1019.

55. Certainty of terms as to time of delivery of goods to show that the minds of the parties met as to such terms. Equitable Mfg. Co. v. Allen [Vt.] 56 Atl. 87. Construction of negotiations for sale as showing that minds of parties did not meet as to terms for sale of canned corn. Rider v. Wood [Ala.] 35 So. 46. Where a purchaser directed entry of his order for goods "specifications to follow," but never sent specifications, there was no contract. A conversation between agents of the parties in which the buyer's agent said specifications would be sent or settle for failure to do so will not supplement the alleged contract, but is merely evidence of a breach. Wheeling S. & I. Co. v. Evans, 97 Md. 305. An offer and acceptance by mail is not ineffectual to create a contract because no time for delivery was specified, where the seller stated the time when he would be ready to deliver and the buyer stated when he was willing to receive. Nelson v. Hirsch & Sons' I. & R. Co., 102 Mo. App. 498, 77 S. W. 590.

56. A clause providing that "on delivery and acceptance" of goods payment would be made, did not give the purchaser the ar-

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buy[57] on terms capable of ascertainment,[58] and respecting a definable property and quantity of it,[59] but not necessarily to buy or sell a fixed predetermined quantity.[60] The sale must not be wagering[61] or offensive to public policy,[62] or statutory regulations concerning sales of the particular commodity.[63]

That custom may enter the terms of a sale it must be general, uniform and notorious,[64] and the parties must know of it.[65] It cannot change plain terms of the sale.[66]

The vendor must have title to the subject-matter.[67]

A bill of sale need not be recorded.[68]

The sale must comply with the statute of frauds,[69] which has been discursively

bitrary right to refuse goods of the required quality so as to make the contract void for want of mutuality. Lehman v. Salzgeber, 124 Fed. 479.

57. A writing signed by the seller agreeing to sell certain goods to the buyer at a certain place and price imports no consideration or promise to buy and is a mere promise which may be withdrawn before it is acted upon. Alderman v. New Departure Bell Co., 75 Conn. 519.

58. Indefiniteness and uncertainty of instrument of sale as preventing enforcement. Howie v. Kasnowitz, 83 App. Div. [N. Y.] 295. There is no contract for sale of goods where no definite agreement is made as to quality, quantity or price. Losse v. Peoria Cordage Co., 116 Wis. 129, 92 N. W. 559.

59. A contract for sale of second hand rails which had not been taken up, estimating the quantity of each grade and providing that all rails taken up in rebuilding the street railways in a city should be sold to the purchaser at a certain price for each grade, is not void for indefiniteness as to the subject-matter. Nelson v. Hirsch & Sons' I. & R. Co., 102 Mo. App. 498, 77 S. W. 590.

60. A contract of sale is void for want of consideration and mutuality, if the amount of goods is conditioned on the will, wish or want of one party. City of Ft. Scott v. Eads Brokerage Co. [C. C. A.] 117 Fed. 51. A contract to furnish an article necessary to business of the second party in such quantities as shall be consumed during a specified time is mutual and valid. A. Klipstein & Co. v. Allen, 123 Fed. 992. A contract made by one with an established business, the character and extent of which is known to the other party, to take as much of certain goods as he used in a year is not lacking in mutuality. Excelsior Wrapper Co. v. Messinger, 116 Wis. 549, 93 N. W. 459.

61. Sale of cotton for future delivery under Code S. C. 1902, §§ 2310, 2311. James H. Parker & Co. v. Moore, 125 Fed. 807. See further, Gambling Contracts. An agreement stipulating sale of all oranges produced by the seller's trees in certain years is not an aleatory contract. Losecco v. Gregory, 108 La. 648.

62. A contract to buy goods on condition that similar goods should not be sold to another dealer in the same town is not, it seems, against public policy. Arons v. Kopf, 21 Pa. Super. Ct. 123. A misrepresentation whereby a purchaser bought a preparation of zinc for white lead does not make the sale absolutely void as against public policy, since performance cannot be said to tend to injure the public. Pike's Peak Paint Co. v. Masury & Son [Colo. App.] 74 Pac. 796.

63. Compliance with law regulating sale of fertilizer requiring labels on bags, to enable seller to recover purchase price. B. F. Beard & Co. v. Goodman, 25 Ky. L. R. 1566, 78 S. W. 191.

64. Johnston v. Parrott, 92 Mo. App. 199. A contract being silent as to the place of weighing goods, a uniform trade custom in this regard may be shown. Gehl v. Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26.

65. Consumers' Ice Co. v. Jennings, 100 Va. 719. Where the purchaser accepted linseed oil for a period of 15 years and paid for it at a certain measurement, with knowledge of a custom among manufacturers to sell at that measure, he cannot recover for overpayment because of short weight or have the remainder to be furnished under the contract delivered at larger measure. Heath & M. Mfg. Co. v. Nat. Linseed Oil Co., 197 Ill. 632, 64 N. E. 732.

66. Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co., 97 Md. 1.

67. Mensinger v. Steiner-Medinger Co. [Neb.] 94 N. W. 633.

68. Stuart v. Mitchum, 135 Ala. 546. See post, § 14.

69. Under the statute of frauds, a delivery and receipt of goods must show intention of the parties to vest possession in the vendee discharged of all lien for the price, and acceptance must be as of the goods purchased, assent of the parties to the agreement being insufficient [Gen. St. 1902, § 1090]. Devine v. Warner [Conn.] 56 Atl. 562.

Sales which must be in writing: Agreement for purchase of standing timber. Kileen v. Kennedy [Minn.] 97 N. W. 126. Oral agreement for sale of corporate stock by brokers for future delivery, without note, memorandum, part payment, or delivery actual or constructive. Nichols v. Clark, 40 Misc. [N. Y.] 107. Purchase of an undivided half interest in a machine for more than $50, possession remaining in the owner of the remainder [Rev. St. 1898, § 2308]. Gerndt v. Conradt, 117 Wis. 15, 93 N. W. 804. A verbal contract to buy a claim against a third person for $845 on condition that it be reduced to judgment to be assigned by the seller is within 2 Gen. St. p. 1603, providing that sales of goods, etc., of $30 or more must be in writing. French v. Schoonmaker [N. J. Law] 54 Atl. 225. Oral contract for sale of goods above $50 in value, the goods remaining in possession and control of the vendor pending determination of price [Civ. Code, § 2693, par. 7]. Brunswick Grocery Co. v. Lamar, 116 Ga. 1.

Sales not within statute: The oral promise of a third person to complete payment of goods sold on instalments on consideration of transfer to him is not within the statute

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treated in a previous article.[70] To be valid under the statute, a sale need not be expressed in a single instrument,[71] but the several writings relied on must be so connected by mutual reference as to make the contract clear without aid of extrinsic evidence of connection.[72] Past performance[73] by delivery[74] or part payment[75] serves in lieu of a writing. Delivery to satisfy the statute implies a corresponding receipt.[76] It is not necessary to validity if there is a writing.[77] No actual change of custody is required,[78] except to avoid the inference of a fraudulent conveyance.[79]

The sufficiency of evidence as to formation of the contract depends upon the peculiar circumstances.[80] A bill of sale, executed, acknowledged and recorded, is

of frauds, whether title is in the buyer or seller. Berg v. Spitz, 87 App. Div. [N. Y.] 602. Where the consideration for personalty is paid, the sale is not within the statute. Lathrop v. Humble [Wis.] 97 N. W. 905. Contract which may be performed within a year and it does not appear that it is not to be performed and fully completed within that time. Neal v. Parker [Md.] 57 Atl. 213. Where duplicate orders for goods are executed and one retained by each party it is not necessary, to satisfy the statute of frauds, that both duplicates should show all the terms of sale. Equitable Mfg. Co. v. Allen [Vt.] 56 Atl. 87. An oral agreement on sufficient consideration for sale of an invention pending application for a patent is valid [Rev. St. U. S. § 4898]. Cook v. Sterling Elec. Co., 118 Fed. 45. Written contract for sale of a growing crop certain in terms and on which earnest money is paid. Glass v. Blazer, 91 Mo. App. 564. Promise to pay for goods furnished a third person is an original promise on sufficient consideration. Kesler v. Cheadle [Okl.] 72 Pac. 367. A contract for purchase of matting to be manufactured and delivered to the buyer is a contract for work, labor and services, not within the statute. Gross v. Heckert [Wis.] 97 N. W. 952. Sale of an appliance which when attached to a boiler would become a part of the fixtures already on the premises. Underfeet Stoker Co. v. Detroit Salt Co. [Mich.] 97 N. W. 959. That a bill was rendered for a mill, sold by a purchaser of railroad ties under a previous contract to the seller of the ties, will not estop the purchaser of the ties from claiming that it was in part payment on the ties, thus taking that contract out of the statute of frauds. Dallavo v. Richardson [Mich.] 96 N. W. 20. Oral acceptance of a written agreement to sell, signed by the seller, is sufficient. Bristol v. Mente, 79 App. Div. [N. Y.] 67.

70. Frauds, Statute of, 2 Curr. Law, p. 108.

71. The terms may be derived from letters to third persons connected with the transaction. Bristol v. Mente, 79 App. Div. [N. Y.] 67.

72. Devine v. Warner [Conn.] 56 Atl. 562.

73. Part performance of contract for purchase of feed for cattle as taking contract out of statute of frauds. Jones v. Nat. Cotton Oil Co., 31 Tex. Civ. App. 420, 72 S. W. 248. Mere notice by both parties of the sale to third persons doing business with them and orders to vendors of the seller for transmission to the buyer does not show sufficient part performance to take the sale out of the statute. Brunswick Grocery Co. v. Lamar, 116 Ga. 1.

74. Miss. Cotton Oil Co. v. Smith [Miss.] 33 So. 443. Where personalty is delivered to the purchaser, and he appropriated it to his own use. Badger Tel. Co. v. Wolf River Tel. Co. [Wis.] 97 N. W. 907. Whether delivery of a mill to one of the parties to a prior contract was a part payment taking the sale out of the statute of frauds is a question for the jury in an action of replevin by the purchaser on evidence of the negotiations. Dallavo v. Richardson [Mich.] 96 N. W. 20. Partial delivery of goods for examination, followed by acceptance of all including those received, is "acceptance and receipt" sufficient under the statute of frauds. Bristol v. Mente, 79 App. Div. [N. Y.] 67. Sale of a chose in action assigned and delivered pursuant to the contract, though it was not in writing [Laws 1897, p. 507, c. 417]. Greenberg v. Davidson, 39 Misc. [N. Y.] 796.

75. Part payment to an agent expressly authorized to sell is sufficient, especially where it is not shown that the seller was prejudiced. Jones v. Wattles [Neb.] 92 N. W. 765. Part payment on a sale of goods need not be made when the contract is made to take the contract out of the statute of frauds [Comp. Laws 1897, § 9516]. Dallavo v. Richardson [Mich.] 96 N. W. 20.

76. Not where the subject-matter was brought to the place of delivery but no one was there to receive it. Shelton v. Thompson, 96 Mo. App. 327, 70 S. W. 256.

77. Warner v. Warner, 30 Ind. App. 578, 66 N. E. 760.

78. While there may be acceptance and receipt of goods complying with the statute of frauds without actual change of custody, proof must be clear and must show an actual change of relations of the parties [Gen. St. 1902, § 1090]. Devine v. Warner [Conn.] 56 Atl. 562.

79. A sale of personalty without delivery is presumptively void only as against bona fide purchasers, in Indiana [Burns' Rev. St. 1901, § 6636]. Warner v. Warner, 30 Ind. App. 578, 66 N. E. 760.

80. Sufficiency of evidence to show sale. Oliver v. Love [Mo. App.] 78 S. W. 335. To show a sale of wheat. Potter v. Mt. Vernon Roller Mill Co., 101 Mo. App. 581, 73 S. W. 1005. Of negotiations, and offer and acceptance, to show contract by correspondence for purchase of 5,000 cords of wood. Scully v. Detroit Iron Furnace Co. [Mich.] 93 N. W. 885. Of evidence to show an agreement by one hiring a vehicle to purchase it in case he damaged it while using it. Brown v. Cuozzo, 85 N. Y. Supp. 759. In action by the purchaser for breach to show the contract of sale. Bristol v. Mente, 79 App. Div. [N. Y.] 67. To show absolute sale and not one depending on option of purchaser as to

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evidence of delivery to, and acceptance by, the purchaser, conclusive if unexplained;[81] where it passes from debtor to creditor, it is valid between them, though not acknowledged or recorded, possession having changed.[82] A writing contemporaneous with an order for goods, providing for their return if unsatisfactory, executed by the seller's agent in his behalf, as shown by its face, may be admitted as evidence of the contract, though somewhat in conflict with the order.[83]

Parol evidence is inadmissible to change a written sale complete in its terms,[84] but otherwise where the contract is incomplete,[85] or is alleged not to have been

goods he would keep. Ampel v. Seifert, 84 N. Y. Supp. 122. Introduction of a bill of sale describing property referred to in a bill of items attached and made a part thereof carries the attached inventory into the evidence and binds the purchaser who has signed it. Knoche v. Perry, 90 Mo. App. 483.

81. Knoche v. Perry, 90 Mo. App. 483.

82. Heisch v. Bell [N. M.] 70 Pac. 572.

83. Eastern Mfg. Co. v. Brenk [Tex. Civ. App.] 73 S. W. 538.

84. Atwater v. Orford Copper Co., 85 N. Y. Supp. 426; Succession of Welsh, 171 La. 801; Oil Creek G. Min. Co. v. Fairbanks, M. & Co. [Colo. App.] 74 Pac. 543; Withers v. Moore [Cal.] 71 Pac. 697; McCall Co. v. Jennings, 26 Utah, 459, 73 Pac. 639; Consumers' Ice Co. v. Jennings, 100 Va. 719; Bullard v. Brewer, 118 Ga. 918; Plano Mfg. Co. v. Eich [Iowa] 97 N. W. 1106. Where contract must be in writing under statute of frauds [Rev. St. 1898, § 2308]. Saveland v. Western Wis. R. Co., 118 Wis. 267, 95 N. W. 130. Inadmissible to vary contract as to rescission and return of chattel. McCormick Harvesting Mach. Co. v. Mackey, 100 Mo. App. 400, 74 S. W. 388. Of warranties by agent of seller outside written contract inadmissible. McCormick Harvesting Mach. Co. v. Allison, 116 Ga. 445. Evidence of a custom to give reduction of duty on foreign coal to purchaser inadmissible to vary written sale. Withers v. Moore, 140 Cal. 591, 74 Pac. 159. Written contract for sale of tomatoes giving full terms as to liability for damages for failure to furnish them. Newell v. New Holstein Canning Co. [Wis.] 97 N. W. 487. Express or implied warranties cannot be imported into a written sale by proof of prior oral conversation. Telluride Power Transmission Co. v. Crane Co., 103 Ill. App. 647. A statement in a memorandum of a sale that money given the seller was a payment is binding and it cannot be shown that it was a forfeit. Cousins v. Bowling, 100 Mo. App. 452, 74 S. W. 168. Where an unqualified written order for goods is given, evidence of a verbal agreement that the purchaser should be liable for only the amount resold varies the written instrument. Grabfelder v. Vosburgh, 85 N. Y. Supp. 633. Where the written sale provides that shipment should be made at the seller's earliest convenience and that no agreement outside the writing should bind the parties, parol evidence that the order was conditional on delivery at a certain time cannot be heard. Hess v. Liebmann, 84 N. Y. Supp. 178. In an action for price of goods bought for use of another than the purchaser, the latter cannot show that payment was to depend on acceptance of the third person, where the written offer and acceptance show no such condition. Wheeler C. & E. Co. v. R. G. Packard Co., 83 App. Div. [N. Y.] 288. Parol evidence of a contemporaneous agreement that title should pass inadmissible in an action to recover chattel sold at conditional sale. Forbes v. Taylor [Ala.] 35 So. 855. Where a contract of sale is made in writing by an agent of the vendor duly authorized, evidence of prior conversations are inadmissible to show that the sale absolute on its face was, in fact, conditional. Bass Dry Goods Co. v. Granite City Mfg. Co. [Ga.] 45 S. E. 980. Evidence as to custom of receiving and mailing notices of acceptances of contracts for purchase of machinery is inadmissible in an action for the price of machinery on a written contract. Dowagiac Mfg. Co. v. Watson [Minn.] 95 N. W. 884.

Notwithstanding a stipulation against modifications by agents, it may be shown that the agent made a **later and wholly distinct parol agreement.** Geiser Mfg. Co. v. Yost, 90 Minn. 47, 95 N. W. 584.

85. Where an order in writing for an engine does not purport to contain the contract of sale, warranty may be shown by parol. Puget Sound I. & S. Works v. Clemmons, 32 Wash. 36, 72 Pac. 465. Where letters between parties to an alleged contract show on their face that they did not constitute a contract, oral evidence is admissible to show a sale. Courtney v. Wm. Knabe & Co. Mfg. Co., 97 Md. 499. It may be shown in explaining a written contract in an action for goods sold and delivered that a certain trade custom exists among dealers in such goods in that locality. Rastetter v. Reynolds, 160 Ind. 133, 66 N. E. 612. Sufficiency of evidence to show that written agreement for sale of engine did not contain the whole contract between the parties. Huber Mfg. Co. v. Hunter, 99 Mo. App. 46, 72 S. W. 484. Where a written memorandum was not made part of a conditional sale and not signed by the parties, parol evidence may be given to explain or contradict it. Smith v. Williams, 85 N. Y. Supp. 506. Contract for sale of old iron in which the seller stipulated "to keep whatever I want of the iron." N. Y. House Wrecking Co. v. O'Rourke, 86 N. Y. Supp. 1116. An oral agreement for sale of machinery was not prohibited by a provision in a written contract against oral modification where such written contract was never accepted. Dowagiac Mfg. Co. v. Watson [Minn.] 95 N. W. 884. Where a note for conditional sale of a horse does not describe the horse, the conditional sale and the identity of the animal may be shown, in replevin, by other evidence. Young v. Salley [Miss.] 35 So. 571. Where written sale of oil is silent as to the capacity of cars in which it was to be delivered, parol evidence may be given to show an oral agreement as to such cars; letters between the parties dealing with the issue are admissible. Sherman O. & C. Co. v.

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embodied in the writing,[86] or the writing lost,[87] or where it tends to show that a sale was never made.[88] Thus a bill of sale of personalty, absolute on its face, may be shown by parol to be a chattel mortgage.[89]

§ 3. *Modification and mutual rescission.*[90]—By mutual[91] agreement[92] a sale may be modified or rescinded but an agreement between several purchasers does not modify the sale.[93] A buyer's assignment of a sale of materials to be furnished is a surrender of its buying rights, which cannot be restored by reassignment after the seller has refused to consent to the assignment.[94] If after a breach the parties agree on new terms the original contract is supplanted,[95] but an agreement de-

Dallas O. & R. Co. [Tex. Civ. App.] 77 S. W. 961. Where a deed for realty which had been sold with personalty expressed the whole consideration as applying to the land, in an action of replevin for the personalty, the buyer may show that the consideration was so expressed by parol evidence, where the seller admitted that the personalty went with the land. Lathrop v. Humble [Wis.] 97 N. W. 905. Where a contract of sale was indefinite as to the manner in which goods sold should be loaded on cars, parol evidence may be given to show the manner intended as illustrated by former loadings. Oliver v. Or. Sugar Co., 42 Or. 276, 70 Pac. 902. Oral testimony is admissible to show that there was no acceptance on the terms proposed and no delivery of the goods ordered on a general denial of the petition alleging acceptance and delivery in an action for the price, as showing that the contract was wholly different from that alleged in the petition. Humphrey v. Timken Carriage Co. [Okl.] 75 Pac. 528. Where a written sale of fruit provided for payment by sight draft with bill of lading attached, parol evidence may be given of a later agreement that the draft was to be drawn on a bank at a certain place. Town v. Jepson [Mich.] 95 N. W. 742.

86. Where the defense in an action for the price of a machine was that it was sold under an independent oral contract by local agents who claimed to own it, the provision in the written order sent plaintiff that its terms should not be varied by agents, has no force, oral evidence being admissible to show the contract as pleaded. Geiser Mfg. Co. v. Yost [Minn.] 95 N. W. 534.

87. Where a letter relating to rescission of an order for goods is lost, parol evidence of its contents is admissible. Conkling v. Nicholas [Mich.] 95 N. W. 745.

88. An instrument signed by two parties, reciting that one sold property to the other, is not conclusive evidence of a sale, where extrinsic evidence shows title at the time to have been in the alleged purchaser. Mensinger v. Steiner-Medinger Co. [Neb.] 94 N. W. 633. In an action on a contract for sale of a machine, which contract was delivered to the seller's agent, parol evidence is admissible to show that it was to be held by the agent, and not to be delivered to the seller until further orders, as it shows merely that the contract never became in force. McCormick Harvesting Mach. Co. v. Morlan, 121 Iowa, 451, 96 N. W. 976. In a suit for the price of goods purchased by the buyer's alleged agent, where the seller introduced a bill of sale made by the agent to the alleged purchaser in which the agency was recited, though the action was at law, the purchaser could prove by parol that the bill of sale was intended as a mortgage, because it was introduced only for a collateral purpose and the controversy was not between the parties to it. Pac. Biscuit Co. v. Dugger, 42 Or. 513, 70 Pac. 523.

89. Miller v. Campbell Commission Co. [Okl.] 74 Pac. 507.

90. Rescission by either party on his own account, see post, §§ 10A, 11A.

91. Failure to reply to a proposal for cancellation of a contract of sale for five weeks is not an acceptance. Baltimore & L. R. Co. v. Steel Rail Supply Co. [C. C. A.] 123 Fed. 655. A sale of goods in esse for future delivery is not cancelled by notice of cancellation by the purchaser to which the seller did not accede, the goods to be delivered being in esse. J. P. Gentry Co. v. Margolius & Co., 110 Tenn. 669, 75 S. W. 959.

92. Sufficiency of evidence to show modification of sale of fruit so as to allow storage. J. K. Armsby Co. v. Blum, 137 Cal. 552, 70 Pac. 669. Six months' time provided in an option clause of a sale was held extended by the purchaser's asking the buyer to add the time during which the purchaser's plant was closed, to which the seller assented. A. B. Farquhar Co. v. New River Mineral Co., 87 App. Div. [N. Y.] 329.

Sufficiency of evidence in action for price of goods to show **rescission** of the sale by mutual agreement. H. Hirschberg Optical Co. v. Michaelson [Neb.] 95 N. W. 461. A compromise agreement for sale of machinery requiring payments in cash and by note and the furnishing of new parts by the seller, and settlement of all accounts between the parties, is based on a **sufficient consideration.** New Haven Mfg. Co. v. New Haven P. & B. Co. [Conn.] 55 Atl. 604.

Mere notice, without cause or default of the other party, will not rescind an executory sale absolute, the terms of which are valid and complete. Backes v. Black [Neb.] 97 N. W. 321. Neither a countermand of an order for shipment nor notice by the purchaser that he will not receive the goods will amount to rescission of a written sale of goods. Okl. Vinegar Co. v. Carter, 116 Ga. 140, 59 L. R. A. 122.

93. Where purchaser of an animal merely created a tenancy in common in the purchasers, a later partnership for its management did not change the character of the contract or their liability thereon. Valade v. Masson [Mich.] 97 N. W. 59.

94. Gardiner Campbell Co. v. Iroquois Iron Co. [C. C. A.] 127 Fed. 648.

95. Where on receipt of goods bought, the purchaser notified the seller of defects and offered to take the goods at a less price without regard to defects, which offer the seller accepted, the original contract was displaced by one without warranty. Vodrey

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signed merely to protect perishable goods reserving all rights has no such effect.[96] Immaterial alterations,[97] or alteration by a third person[98] will not affect the sale.

§ 4. *General rules of interpretation and construction.*—The same general rules apply as in other contracts,[99] hence no attempt has been made in this section to present an exhaustive collection of cases. The peculiar applications of these rules will be found in subsequent sections.

A written sale relied on by both parties will be binding on them in all its terms.[1] Written will prevail over printed words.[2] A construction by parties will be adopted by the court.[3] A contract of sale sent to the purchaser in another state and there signed by him is consummated thereby and is governed by the laws of that state.[4] If no price is fixed on goods the market price prevailing at time and place of delivery controls; if no market price exists at such place, then such price at the nearest place having a market price plus or minus the difference in cost of delivery.[5]

§ 5. *Property sold. Amount, kind, nonexistence and failure of consideration.*—A thing not mature[6] or one to exist in future[7] may be sold. There is not a failure of consideration where the buyer has merely mistaken the value or suffered depreciation,[8] or has obtained or keeps something of substantial value.[9]

Destruction of the particular property sold will discharge the seller,[10] or impossibility[11] of supplying it, especially when so stipulated.

Where the seller is unable to deliver the identical goods, delivery of others equally good is sufficient,[12] but delivery of inferior goods is not compliance.[13] An

Pottery Co. v. Horne Co., 117 Wis. 1, 93 N. W. 823.

96. Where perishable goods were rejected an agreement that the purchaser should sell for the best price obtainable, waiving rights of neither party, was not a novation. Tilden v. Gordon & Co. [Wash.] 74 Pac. 1016.

97. An alteration in an order for a machine so as to make it require security for the price was not material where the purchaser had already accepted the machine and given the security, regardless of the changed order. J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 466, 92 N. W. 826.

98. Wrongful alteration of terms of an order for goods by the agent of the seller is an act of a stranger which will not render the contract invalid as between the parties. Equitable Mfg. Co. v. Allen [Vt.] 56 Atl. 87.

99. Contracts, 1 Curr. Law, p. 626.

1. Sale stipulating that rescission shall be in "full settlement" excludes other recovery for breach of warranty. McCormick Harvesting Mach. Co. v. Brown [Neb.] 98 N. W. 697.

2. Eager v. Mathewson [Nev.] 74 Pac. 404. A printed statement on an order as to claims for defects in a machine cannot change the requirement of "entire satisfaction" in the written contract of sale. Weeks v. Robert A. Johnston Co., 116 Wis. 105, 92 N. W. 794.

3. Where the parties construe a contract for sale of coal to be delivered as "required" to mean as "needed," the court will adopt the construction. Purcell Co. v. Sage, 200 Ill. 342, 65 N. E. 723.

4. Emerson Co. v. Proctor, 97 Me. 360.

5. South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165.

6. Growing crop. Glass v. Blazer, 91 Mo. App. 564.

7. Losecco v. Gregory, 108 La. 648. Sale of contract for sale of crop of oranges for two years on assumption of risks by purchaser. Id. After delivery the purchaser is estopped to assert that the sale was invalid because the subject-matter was not in esse. Logs to be cut. Ketchum v. Stetson & P. Mill Co., 33 Wash. 92, 73 Pac. 1127.

8. That the property is not worth what the buyer supposed it to be constitutes no defense. Furber v. Fogler, 97 Me. 585.

9. Cannot urge want of consideration because machine is valueless where defendant has not returned or offered to return it. Massillon E. & T. Co. v. Schirmer [Iowa] 93 N. W. 599.

That a purchaser of goods and the right to sell them in certain territory made several sales will not estop him from showing their worthlessness. Live Stock Remedy Co. v. White, 90 Mo. App. 498.

10. Destruction of a mill terminates a contract for sale of its output for a year with privilege of renewal by the purchaser, though the seller rebuilds. The contract cannot be extended to a new mill erected on the site of the old or to its output. Blodgett v. Johnson [N. H.] 54 Atl. 1021.

11. Where it was agreed that delivery might be made and damaged tobacco separated afterwards, but no disposition was made of the damaged tobacco separated from the lot, nor any further agreement about it, the seller could not recover for it in an action on the contract. Jacobson v. Tallard, 116 Wis. 662, 93 N. W. 841.

12. Walker v. Taylor [Del.] 53 Atl. 357.

13. A sale of brick of two kinds in specific proportions will not require the buyer to take other proportions, and if more of the cheaper kind is furnished, he is entitled to an abatement of the price. J. Shute & Sons v. Dickson Cotton Mills, 132 N. C. 271.

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approximation of specifications has been held good where the contract contemplated a variation.[14] If it be specified that there be no limit on certain kinds the limit applies to all others.[15] The buyer is not liable for excess,[16] and an agreement as to how it shall be disposed does not make him a purchaser as to it.[17] On a sale of not less than a minimum nor more than a maximum the seller has the right to deliver the maximum if acceptance be wrongly refused.[18] It may be shown how much there was when sale was made of the quantity as of a certain time.[19] Recent cases construing particular words relating to quantity or amount,[20] kind or quality,[21] and identity of property,[22] or interest therein,[23] are collected in the note.

§ 6. *Transition of title.*[24] *Meaning and effect of contract.*—In order to determine whether title has passed, it is necessary to find whether the sale as made was executed or executory or on condition precedent.[25] On sale of stock by a broker to a customer on margin, the legal title is in the latter, the broker being

14. Where a continuing contract recognizes that there might be some variance in the weight of paper sold, and provides that the purchaser should have the benefit thereof, the seller was bound only to good faith and to furnish paper of approximately the specified weight. Pulitzer Pub. Co. v. Rumford Falls Paper Co. [C. C. A.] 121 Fed. 519.

15. Under a contract for sale of railroad ties of white, post, and chestnut oak, providing "no limit in size of post oak and chestnut oak" the limitation of size applied only to white oak. Leonard v. Holland [Ky.] 79 S. W. 227.

16. Where the seller by mistake furnishes more goods than the contract calls for, though warned by the purchaser not to exceed the contract, the latter is not liable for the excess. Pittsburgh Plate Glass Co. v. McDonald, 182 Mass. 593, 66 N. E. 415.

17. An agreement that vessel was to proceed, the seller to do what was right and to stand any loss, did not amount to a sale of the excess, under the terms of the sale for the regular cargo. Williamson v. North Pac. Lumber Co., 42 Or. 153, 70 Pac. 387.

18. The buyer being required to give three weeks' notice for the extra amount if required, after receiving the lesser amount, refused more on the claim that the materials furnished did not comply with the contract. Ready v. Fulton Co., 86 App. Div. [N. Y.] 202.

19. Where a bill of sale covers half of ore in certain bins at a certain time it may be shown that additional ore was afterward placed in such bins to defeat the holder's claim to half the ore found in the bins. Yank v. Bordeaux [Mont.] 74 Pac. 77.

20. Construction of contract for sale of cattle as to number to be delivered. Eager v. Mathewson [Nev.] 74 Pac. 404.

The phrase **"to be taken as ordered,"** used in a contract to furnish paper at a certain price, was an undertaking by the purchaser to take the quantity specified at the stated price. Excelsior Wrapper Co. v. Messinger, 116 Wis. 549, 93 N. W. 459.

A contract for sale of oil to be placed in the buyer's tanks to contain about a certain amount, bound the seller to delivery of that amount not exceeding capacity of cars furnished, and the word "about" would not excuse him from filling the tanks to their capacity. Sherman O. & C. Co. v. Dallas O. & R. Co. [Tex. Civ. App.] 77 S. W. 961. Evidence held to show that stone was sold according to measurement on the wagon and not as being measured after being laid in a wall. Martin, M. & Co. v. Petty [Tex. Civ. App.] 79 S. W. 878.

21. Koch v. Bamford Bros. Silk Mfg. Co. [N. J. Err. & App.] 55 Atl. 271. Kind and quantity of goods included in contract. Pittsburgh Plate Glass Co. v. Kerlin Bros. Co. [C. C. A.] 122 Fed. 414. Contract for sale of oil barrels as entitling purchaser to call on seller to furnish **new instead of second hand** barrels. H. D. Williams Cooperage Co. v. Scofield [C. C. A.] 125 Fed. 916. Certain telegrams exchanged and evidence held to show that a sale of wheat by a reference to same was a sale of smutty off grade wheat, and not a sale of No. 2 wheat. Butterfield v. Butterfield [Colo. App.] 71 Pac. 639.

Where a contract for the construction of a chattel did not require it to be like any other, but of a particular design, a finding was proper that plaintiff was not bound to furnish one similar to another pointed out to him. Braun v. Hothan, 87 App. Div. [N. Y.] 611.

22. Sale of lumber as showing prima facie a sale of specific lumber and not a defined quantity of lumber out of a larger mass. State v. Wharton, 117 Wis. 558, 94 N. W. 359.

23. **Sale of corporate stock** passes not only the paper scrip, but the interest in corporate property represented by it. Oliver v. Oliver, 118 Ga. 362.

A contract by several to buy a horse, each to pay a certain sum for a share in the animal, created a tenancy in common, each owner being entitled to an undivided interest to the extent of his subscription. Valade v. Masson [Mich.] 97 N. W. 59.

Construction of sale of oranges from orchards for two years as sale of the **hope of the crops and not the crops themselves.** Losecco v. Gregory, 108 La. 648.

24. Distinctions between sale and other contracts, see ante, § 1.

25. Contract in writing construed as mere executory sale and not as passing title in praesenti. In re Schujahn [C. C. A.] 120 Fed. 938. A written contract for sale of a growing crop, certain in terms and part payment thereon, passes title in praesenti. Glass v. Blazer, 91 Mo. App. 564. **In a sale on condition precedent** the title does not pass until the contingency happens. The owner of a membership certificate in a corporation had authorized an agent to sell it. The owner sold and delivered to another on condition that if the agent had executed his power it was to be returned. His vendee

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pledgee for repayment of advances made by him in the transaction.[26] Performance of labor required as to the subject-matter or in payment may be necessary to pass title.[27]

Separation and designation of the goods is generally necessary to pass title,[28] unless they are fully identified.[29] Measurement[30] and inspection,[31] if required by terms of the contract, must be performed, unless the seller has fully performed and the buyer fails to exercise his right of inspection.[32] A separation of a part of what was sold may pass title to that.[33]

Payment[34] is necessary to pass title on a cash sale,[35] even though delivery be made as directed by the buyer,[36] unless a waiver of cash payment is shown.[37]

sold to another. Prior to the sale the agent had executed his power. Held the owner's vendee acquired no title. State v. Chamber of Commerce of Milwaukee [Wis.] 98 N. W. 930.

26. Rothschild v. Allen, 90 App. Div. [N. Y.] 233.

27. On a sale of a growing crop, to be cared for and harvested by the seller, title does not pass until such labor has been performed. La Vie v. Tooze, 43 Or. 590, 74 Pac. 210.

28. A sale of shingles, title to pass when the shingles are made, sorted, piled and counted, will be strictly construed as to passing of title. Haynes v. Quay [Mich.] 95 N. W. 1082. If the goods sold are not specific, title does not pass until appropriation of specific goods by consent of both parties. American H. & L. Co. v. Chalkley & Co. [Va.] 44 S. E. 705. Where a sale of hops required segregation by the seller from a larger amount, title does not pass until such act is performed (La Vie v. Crosby, 43 Or. 612, 74 Pac. 220), if no other intention was shown by the contract (Backhaus v. Buells, 43 Or. 558, 73 Pac. 342). Where the seller had 3,500 bushels of corn standing in the field, sold 600 bushels for future delivery by written instrument without designating any part thereof, and received part payment in advance, there was but an agreement to sell and no title passed, the corn not having been separated and delivered. Augustine v. McDowell, 120 Iowa, 401, 94 N. W. 918. Where it appears in an action for the price of rails that a larger number than was required by the contract was piled ready for delivery, but that the buyer's portion was not segregated, there was no performance. Lum v. Hale [Tex. Civ. App.] 75 S. W. 359. Sale of a certain number of tons of coal will not pass title until it is loaded ready for shipment. Taylor v. Fall River Ironworks, 124 Fed. 826. In a contract for the purchase of all lumber to be manufactured from certain standing timber it was held that title did not pass until it was loaded on the cars. Vendees not liable for taxes in township where it was piled before loaded. Grand Rapids Bark & Lumber Co. v. Inland Tp. [Mich.] 98 N. W. 980.

29. A contract of sale of specified personalty fully identified between the parties passes title, though the writing does not show the manner of identification. State v. Wharton, 117 Wis. 558, 94 N. W. 359. A sale of a lot of hay in a barn by the ton, on credit, with privilege of allowing it to remain a while, passes title so that the purchaser is liable for the price, to be determined by the best evidence, though it was burned by accident after it might have been removed and though it was to be weighed to determine its amount. Allen v. Elmore, 121 Iowa, 241, 96 N. W. 769.

30. Construction of contract for sale of trees for railroad ties as requiring measurement of white oak trees at the stump. Leonard v. Holland [Ky.] 79 S. W. 227.

31. Where lumber sold under an executory contract was to be inspected and paid for at prices fixed according to grades, title did not pass until inspection was made. Deutsch v. Dunham [Ark.] 78 S. W. 767.

32. Where the seller of railroad ties had complied with the contract in delivering, marking and piling the ties, title passed to the buyers, though inspection was not made after request by the sellers. Potter v. Holmes, 87 Minn. 477, 92 N. W. 411.

33. Where the seller pays for a certain amount of corn and a lesser amount is measured out by the parties and arrangements made for delivery, title passes thereto, nothing being left to complete the sale. Augustine v. McDowell, 120 Iowa, 401, 94 N. W. 918.

34. Payment and tender as terms of the sale in general, see post, § 9.

35. Johnston v. Parrott, 92 Mo. App. 199. Where iron bought was not to be moved after being loaded until paid for and the railroad company was warned not to give the buyer a bill of lading until payment, title never passed. Hart v. Boston & M. R. R. [N. H.] 56 Atl. 920. Where a sale was made and partial delivery made on part payment, and on failure in payment of the remainder on completion of delivery, it was agreed to give credit for an increased price, notes and chattel mortgages, the sale was for cash and title did not pass until execution of the notes and mortgages. Austin v. Welch, 31 Tex. Civ. App. 526, 72 S. W. 881. Where goods were sold for cash on delivery and earnest money paid, payment was necessary to pass title. Drake v. Scott, 136 Ala. 261.

Where payment and delivery are to be concurrent acts payment in full is necessary before the title passes. Pate v. Wyly & Co., 118 Ga. 262.

36. Delivery to carrier. Hilmer v. Hills, 138 Cal. 134, 70 Pac. 1080.

37. Paulson v. Lyon, 26 Utah, 438, 73 Pac. 510. Where the seller notified the buyer that delivery would be made c. o. d. only, but delivery was made without payment, in absence of other evidence, the buyer had a good title. Leavitt v. Rosenthal, 84 N. Y. Supp. 530. No title vests by delivery without payment unless made so as to show a waiver of payment. Hirsch v. C. W. Leatherbee Lumber Co. [N. J. Law] 55 Atl. 645.

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Waiver is negatived by circumstances showing a continued demand for immediate payment.[38] The usual custom of collecting for goods sold at a distance by draft will not affect provisions of the contract where it clearly fixes the mode of payment.[39] Particular provisions for payment are construed in the notes.[40]

Delivery and acceptance.—If the intention to pass title at once is shown, delivery is unnecessary,[41] but it does not pass title where the receiptor is to resell and account to the sender[42] or if the parties by their contract intend delivery and payment to be concurrent acts.[43] No additional act is required where a licensee sells goods to his licensor which are already on the land,[44] but in case of a sale of a chattel which may possibly be a fixture as between seller and buyer, the buyer's possession as a tenant is not enough.[45] A condition for return will not prevent the passing of title where acceptance is otherwise complete.[46] Mere transfer of possession will not pass title[47] under a cash sale,[48] but delivery passes title if the transferee then acquires absolute dominion with right of disposal and is bound for payment.[49] Delivery to a carrier may be sufficient,[50] especially where the bill

38. Where the seller demanded payment on delivery and repeatedly thereafter, finally after a month commencing replevin to recover the goods, and defendant testified that his acceptance was temporary, there was no waiver of a condition for payment on delivery so as to pass title. Paulson v. Lyon, 26 Utah, 438, 73 Pac. 510.

39. Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co., 97 Md. 1.

40. A sale of wheat, giving full terms as to delivery and stating "65½ cents Galveston," passed title on delivery to the carrier, the reference to place being one of price only. Chas. F. Orthwein's Sons v. Wichita M. & E. Co. [Tex. Civ. App.] 75 S. W. 364. Evidence that coal was shipped on promise of the consignee's agent that it would pay for it if the consignee did not pay within a reasonable time shows sufficiently that the sale was not for cash, but that title passed to the consignee before payment. Frazier v. Atchison, T. & S. F. R. Co. [Mo. App.] 78 S. W. 679. Where sale of certain coffee was "not contingent on any other" sale, and to be settled between the parties "without reference to gradings or otherwise to any other contract," there was no presumption that title was not to pass before payment. Bayne v. Hard, 77 App. Div. [N. Y.] 254.

41. An intention of parties to a sale that title should pass immediately applies, though the seller retains possession. Barber v. Thomas, 66 Kan. 463, 71 Pac. 845. Where a note was given for goods with the understanding that they were to remain in the seller's warehouse until demanded by the purchaser, title passed. Midland Nat. Bank v. Strickland [Tex. Civ. App.] 74 S. W. 588. Where sale of a certain number of bags of coffee was made, to be shipped at a certain time and the invoice to date from time the coffee was "in store" and credit allowed, title passed when it was in store and "graded" under the contract. Bayne v. Hard, 77 App. Div. [N. Y.] 251. In a bargain and sale title passes to the buyer on completion of the contract regardless of delivery. Warner v. Warner, 30 Ind. App. 578, 66 N. E. 760. Where a bill of sale of a stock of goods was executed and delivered, part payment made, and charge taken by the vendee's agent, actual delivery and possession was not necessary to pass title, the question being rather one of intention of the parties. Clark v. Shannon & M. Co., 117 Iowa, 645, 91 N. W. 923.

42. Furst Bros. v. Commercial Bank, 117 Ga. 472.

43. Sale of cotton. Flannery v. Harley, 117 Ga. 483.

44. Where timber was already on the buyer's land, a sale to him to pay his claim for stumpage required no delivery as against an unregistered chattel mortgagee. McArthur v. Mathis, 133 N. C. 142.

45. Webster Lumber Co. v. Keystone L. & M. Co., 51 W. Va. 545.

46. Where an auditor in an action for the price of an elevator found that defendant accepted it before its destruction by fire and that he agreed to waive its failure to meet the specifications if plaintiff would repair another elevator, which was done, it is no defense that title had not passed when the elevator was destroyed because of a condition in the contract for removal by plaintiff if it was not paid for. Plunger Elevator Co. v. Day, 184 Mass. 130, 68 N. E. 16.

47. Still v. Cannon [Okl.] 75 Pac. 284.

48. Johnston v. Parrott, 92 Mo. App. 199. Delivery under a contract providing that title and right of possession should remain in the seller until full payment in cash, to be made when the machine proved satisfactory, did not divest title of the seller. In re George M. Hill Co. [C. C. A.] 123 Fed. 407.

49. Buffum v. Descher [Neb.] 96 N. W. 352. Where title remains in the vendor until payment of price down and notes are given for remainder and the consideration for the notes was delivery of the goods with right to take title by payment, it cannot be urged in an action on the notes that the property was destroyed before title passed. American Soda Fountain Co. v. Vaughn [N. J. Law] 55 Atl. 54.

50. Williams v. Coleman, 117 Ga. 393. Delivery to an express company c. o. d. for the buyer passes title to liquor, though he cannot obtain possession before payment. Munsell v. Carthage, 105 Ill. App. 119; City of Carthage v. Duvall, Id. 123. Under a sale "Delivered, less New York rates freight; terms net, thirty days from shipment," title passed to the vendee on delivery to the carrier. Althouse v. McMillan [Mich.] 92 N. W. 941.

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of lading is simultaneously delivered,[51] and if so, the carrier's liability is to the buyer.[52] There is no such delivery, however, until the goods are loaded for shipment.[53] Indorsement or delivery of a bill of lading will not pass title to property except as the result of the contract between the parties.[54] Mistake as to the consignee will prevent the passing of title.[55]

How proved.—The testimony of a vendor that title passed at a certain point in the delivery is incompetent, it being only his conclusion.[56] If a purchaser of an article on trial continues to use it after the period, such use is evidence of acceptance in absence of explanation of such use, except as to such use on the day after the period when he notified the seller in writing of his rejection.[57]

§ 7. *Delivery under terms of contract. A. Construction and operation of contract. Necessity, time, place, etc.*—Apart from that delivery which passes the title,[58] the sale itself may in terms call for delivery as part of the contract. Delivery may be made at any time within a period allowed by the contract,[59] and ordinarily not thereafter,[60] especially not when time is of the essence of the sale.[61] It may be within a reasonable time if no time is fixed;[62] the seller is only required to exercise diligence and good faith in order to excuse delay,[63] and un-

51. Delivery to a carrier of wheat sold orally and delivery of the bill of lading to the purchaser passes title. Chas. F. Orthwein's Sons v. Wichita M. & E. Co. [Tex. Civ. App.] 75 S. W. 364.

Delivery without indorsement of a bill of lading for goods in hands of a carrier suffices to pass title. American Zinc, L. & S. Co. v. Markle Leadworks, 102 Mo. App. 158, 76 S. W. 668.

52. That a seller quotes prices at points on delivery does not make the carrier his agent, but the carrier remains liable to the purchaser for injuries in transit. Louis Werner Saw Mill Co. v. Ferree, 201 Pa. 405.

53. A contract made by cable for purchase of a certain number of tons of coal to be shipped by the sellers is not an absolute sale so as to pass title at once, but is executory and title will not pass until the coal is loaded for shipment. Taylor v. Fall River Iron Works, 124 Fed. 826.

54. Walker v. First Nat. Bank, 43 Or. 102, 72 Pac. 635. Hence, not where transferred with draft to which it was attached. German-Am. Sav. Bk. v. Craig [Neb.] 96 N. W. 1023.

55. Where the seller by mistake shipped goods to one notoriously insolvent, thinking that the consignee was another by a similar name and possessed of means, title did not pass. Newberry v. Norfolk & S. R. Co., 133 N. C. 45.

56. Althouse v. McMillan [Mich.] 92 N. W. 941.

57. Springfield Engine Stop Co. v. Sharp [Mass.] 68 N. E. 224.

58. See ante, § 6.

59. Where sale of cotton seed hulls by a hulling plant was for delivery "during the running season" of a certain year, the sellers could deliver as they saw fit both as to time and quantity. Hume v. S. Netter, A. Geismar & Co. [Tex. Civ. App.] 72 S. W. 865. Notice from the seller that he will not deliver is no breach until the time for delivery is past; anticipated injury is not the subject of damages. South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165. An order for goods with a request to ship at a certain time and a reply promising, on account of heavy business, that the seller would do the best he could, shows that delivery at a certain time was not required. Danziger v. Pittsfield Shoe Co., 204 Ill. 145, 68 N. E. 534.

60. Where time for delivery was settled, the buyer need not accept a later delivery not within the time, or within an extension of time agreed upon by the parties. Heidelbaugh v. Cranston [Del.] 56 Atl. 367.

61. Where the purchaser informed the seller that he wanted the goods for immediate use, and the latter must have understood terms used as requiring delivery as soon as practicable, time was of the essence and a condition precedent to the rights and obligations of the parties. "Transit car" construed as meaning car already loaded and on its way to the buyer. Stock v. Towle, 97 Me. 408. When an agreement for sale of brick provided for a beginning of delivery "about October 10, 1900," time was not of the essence of the contract. O'Brien v. Higley [Ind.] 70 N. E. 242.

62. In a time reasonable under the nature of the subject-matter, the usual course of the particular business and other relevant circumstances. Walker v. Taylor [Del.] 53 Atl. 357.

63. Where a contract for sale of steel rails required delivery "f. o. b. cars" at a certain point, the seller was not bound to furnish cars nor was he responsible for delay caused by inability to get cars when he did all in his power to obtain them promptly. Baltimore & L. R. Co. v. Steel Rail Supply Co. [C. C. A.] 123 Fed. 655.

Before a person should be held liable for an alleged failure to exercise **reasonable diligence** it should be clear, from the evidence, that there has been such a want of diligence that reasonable minds will not reasonably differ as to the fact. The contractor was unable to procure steel ordinarily procurable, obtained permission to use a different kind, and finished work, held not to show lack of diligence. Paul Hopkins & Son v. Seattle Scandinavian Fish Co., 32 Wash. 513, 73 Pac. 495.

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reasonableness of delay is a question of fact.[64] An agreement to deliver fruit f. o. b. cars at a certain place, inspection and acceptance to be made at time of delivery, means that inspection and acceptance should precede delivery and authorized delivery following acceptance.[65] Contract terms as to place of delivery will govern,[66] though in consequence a right of inspection can only be exercised after shipment.[67] If shipments are to be made as ordered within a time specified,[68] delivery must be made on order before that time[69] and orders need not be at a uniform rate unless so provided.[70] Delivery at a place directed by the buyer is good.[71]

(§ 7) *B. Sufficiency of delivery; actual, constructive, symbolical.*—The duty to deliver is not fulfilled by partial delivery under an entire contract,[72] or by an offer to deliver other than the property set apart.[73] In the absence of other terms, delivery to a carrier is delivery to the consignee[74] if sufficient to amount to delivery were it made to the purchaser himself,[75] but express terms of the sale may provide otherwise.[76] If the seller has an option as to amount, delivery of the smallest amount under the option is sufficient.[77] Where the buyer of machinery removes part of it from land of a third person leaving the remainder because he wanted it there, delivery is complete.[78]

Constructive delivery will suffice where manual delivery cannot conveniently be made, or the goods are not in personal custody of the seller.[79]

64. Whether delay of a week, claimed to be due to wet weather, after accepting an option for sale of cotton, before going after it and tendering payment, is unreasonable, is for the jury. U. B. Blalock & Co. v. Clark & Bro. [N. C.] 45 S. E. 642.

65. J. K. Armsby Co. v. Blum, 137 Cal. 552, 70 Pac. 669.

66. Contract for manufacture and sale of puzzles as requiring shipment to a certain point as condition precedent to recovery of the price. Buedingen Mfg. Co. v. Royal Trust Co., 85 N. Y. Supp. 621. Delivery at any time during month to steamship agent at St. Louis is not delivery at seaboard during that month. James v. Crown Cereal Co., 90 Mo. App. 227.

67. That the buyer had the right to inspect the goods before acceptance would not change the provision or postpone payment until delivery at buyer's residence. Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co., 97 Md. 1.

68. Where a contract provided for delivery of goods on order in twelve car lots, "two cars per month," and "three months' additional time" for acceptance if twelve cars have not been taken at the end of six months, eight carloads undelivered at the end of that time could be ordered by the purchaser at any time within nine months from date of the contract. Branower v. Independent Match Co., 83 App. Div. [N. Y.] 370.

69, 70. A contract for sale of goods, shipments to be made as ordered, but all to be shipped by a certain date, requires orders so that they may be filled before expiration of the contract, but the shipments need not be ordered at a uniform rate during the contract period. Wells v. Hartford Manilla Co. [Conn.] 55 Atl. 599.

71. Under a sale of fruit for delivery f. o. b. cars at a certain place, loading it on cars at such place after acceptance and sending them to a certain warehouse, is a sufficient delivery where the purchaser directed delivery at such warehouse. J. K. Armsby Co. v. Blum, 137 Cal. 552, 70 Pac. 669.

72. Heidelbaugh v. Cranston [Del.] 56 Atl. 867. A purchaser of a certain amount of goods under an entire contract cannot be required to accept part of them under the condition that the whole amount will not be delivered. Newell v. New Holstein Canning Co. [Wis.] 97 N. W. 487.

73. Trotter v. Tousey, 131 Mich. 624, 92 N. W. 544. But where the buyer of second hand rails contended that the contract was for first class "relayers," that the seller informed him that he had none of that grade, and that he hesitated to ship without inspection by the buyer, did not show the seller's repudiation of the contract. Nelson v. Hirsch & Sons' Iron & Rail Co., 102 Mo. App. 498, 77 S. W. 590.

74. Goods consigned to a distant place. McCullough Bros. v. Armstrong, 118 Ga. 424. Term "forwarding agent" in contract for sale of hominy to be shipped to England. James v. Crown Cereal Co., 90 Mo. App. 227.

75. A written contract providing "Goods delivered to purchaser when delivered to transportation company" does not make that a good delivery which would not have been so when made to the buyer personally. Price v. Engelke, 68 N. J. Law, 567. Goods shipped should be proper in character when delivered to the carrier. Collins, etc., Co. v. Camors, etc., Co., 118 Ga. 646. The carrier cannot render the consignee liable to the sender for misdelivery, where he did not really buy. Williams v. Coleman, 117 Ga. 393.

76. Where a conditional sale provided for shipment "via best route" and for safe delivery on cars at the buyer's place of business, delivery to a carrier in another state is not delivery to the buyer. Herring, etc., Co. v. Smith, 43 Or. 315, 72 Pac. 704, 73 Pac. 340.

77. Delivery of 200 tons is sufficient compliance with a contract to deliver 200 or 300 tons of pig iron, though the seller is bound to deliver the larger amount in the period at the seller's option. A. B. Farquhar Co. v. New River Mineral Co., 87 App. Div. [N. Y.] 329.

78, 79. Avery Mfg. Co. v. Emsweller, 31 Ind. App. 291, 67 N. E. 916.

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On failure of the seller to make full delivery, he may recover the reasonable value of that delivered if accepted and used subject to a set-off for damages to the purchaser from failure to complete the contract.[80]

(§ 7) *C. Acceptance; necessity; time; what is.*—If the contract is complete on delivery, the buyer must accept[81] within the time provided by the sale,[82] and a refusal to do so[83] or a countermand[84] is a breach of sale. That title passed before inspection will not necessitate acceptance.[85] He is not bound to accept partial delivery under an entire contract,[86] or if the goods are not of the character ordered,[87] or if they are delivered after time for delivery,[88] or an extension of such time,[89] or if shipped in a manner contrary to agreement.[90]

A reasonable time is allowed for inspection after delivery of goods sold on trial or by sample,[91] and acceptance of previous shipments of goods so sold will not prevent rejection of later shipments for failure of quality.[92] Rejection for defects cannot be made after the buyer has sold to one who accepted.[93] The buyer must accept delivery at a time fixed by his order.[94] Acceptance will not waive latent defects.[95]

Retention of the goods[96] or use of a larger quantity than was necessary for

80. Briggs v. Morgan [Mo. App.] 78 S. W. 295.

81. A buyer under a duly executed written contract showing terms of the sale cannot refuse the goods on arrival because the invoice sent with them failed to state terms of sale. Equitable Mfg. Co. v. Allen [Vt.] 56 Atl. 87.

82. Where a certain term of credit is given after delivery, examination to determine compliance of the goods with an accompanying warranty should be exercised before expiration of the term. Grabfelder v. Vosburgh, 90 App. Div. [N. Y.] 307.

83. Under a continuing contract of sale for a definite term. Parker v. McKannon Bros. & Co. [Vt.] 56 Atl. 536. Where a sale is complete as to terms and acceptance, and the vendee gives notice that he will not receive the goods, the vendor may proceed with the agreement and deliver the goods or tender delivery, and a breach will occur when the vendee refuses to receive them. Backes v. Black [Neb.] 97 N. W. 321.

84. Countermand of an order or notice by the purchaser that he will not receive the goods. Okl. Vinegar Co. v. Carter, 116 Ga. 140, 59 L. R. A. 122.

85. Though title passed on delivery to the carrier under a contract fixing prices f. o. b., the right to inspection and count to be made at the destination gave the right of rejection for noncompliance with the contract. Weil v. Stone [Ind. App.] 69 N. E. 698.

86. Under a condition that all goods will not be delivered. Newell v. New Holstein Canning Co. [Wis.] 97 N. W. 487; Price v. Engelke, 68 N. J. Law, 567. Where goods are sold in an entire lot, the amount being specified, the buyer is not bound to receive a delivery deficient in material portions. Heidelbaugh v. Cranston [Del.] 56 Atl. 367.

87. Collins, etc., Co. v. Camors, etc., Co., 118 Ga. 646. Where goods delivered with other goods ordered separately were not according to sample, they may be rejected. Hardt v. Western Elec. Co., 84 App. Div. [N. Y.] 249.

88. White, etc., Hat Co. v. Carson & Co., 25 Ky. L. R. 1230, 77 S. W. 366.

89. Under a contract providing for delivery at the buyer's option on or before a certain date, where the time was extended after an offer to deliver, the buyer was not in default unless a new offer of delivery was made at close of the extended time. Gehl v. Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26.

90. Failure of a shipper to comply with terms of a contract as to the charter party to be used was a violation of the contract releasing the consignee from the duty of acceptance. Withers v. Moore, 140 Cal. 591, 74 Pac. 159.

91, 92. Hardt v. Western Elec. Co., 84 App. Div. [N. Y.] 249.

A purchaser of an article on trial for a specific period has the full period for trial, and in absence of further stipulation, a reasonable time thereafter to signify his election. Springfield Engine Stop Co. v. Sharp [Mass.] 68 N. E. 224. Sale of a machine on four months' trial after which the buyer may return it if unsatisfactory, gives him a reasonable time after the four months for such return. Dickey v. Winston Cigarette Mach. Co., 117 Ga. 131.

But he is not required to continue a test for the full term unless necessary to a fair and reasonable test. Haney-Campbell Co. v. Preston Creamery Ass'n, 119 Iowa, 188, 93 N. W. 297.

93. Baylis v. Weibezahl, 42 Misc. [N. Y.] 178.

94. Where a contract required part delivery on a certain date and the remainder at the buyer's option after a certain later date, and the buyer directed delivery of the remainder on a certain date within the limit, his failure to receive the remainder on that day was a breach for which the seller could recover. Faddis v. Mason [C. C. A.] 122 Fed. 410.

95. Acceptance of goods will not prevent a counterclaim for defects in an action for the price where such defects could not be ascertained until the goods were used in the regular course of business. Wallace v. Knoxville Woolen Mills, 25 Ky. L. R. 1445, 78 S. W. 192.

96. Where the purchaser of a cash register retained it 12 days after the period for return or exchange and on refusal of the seller to receive it used it for six months, he ratified the sale by failure to return. Watts v. Nat. Cash. Register Co., 25 Ky. L. R. 1347,

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tests shows an acceptance,[97] but use under protest[98] or during a series of unsuccessful experiments and trials,[99] or a mere opening of packages for examination,[1] does not. Acceptance of goods sent on approval is ineffective when conditional.[2] Notice to the seller or his agent[3] of a rejection or return of the goods[4] is ordinarily necessary, but notice alone suffices,[5] and a retention of them because of the seller's refusal to reimburse the buyer for loss resulting from breach of warranty is compatible with a rejection.[6] Whether delay of the purchaser in giving notice of rejection to the seller was reasonable is a question for the jury.[7] Cases discussing sufficiency of it are cited below.[8]

(§ 7) *D. Excuses for and waiver of breach.*—Delay in delivery may be waived[9] or excused by changes in the contract,[10] but mere acceptance will not

78 S. W. 118. In an action for price of goods, evidence by the purchaser that after delivery he inspected and used the goods as a whole shows acceptance and waiver of defects. Hazen v. Wilhelmie [Neb.] 93 N. W. 920.

The effect of an acceptance cannot be avoided by disavowing the seller's title, and telling him that the goods are accepted as those of another person. It will not relieve the vendee from liability to the vendor for price or value of the latter's property received. Central Coal & Coke Co. v. George S. Good & Co. [C. C. A.] 120 Fed. 793.

97. Where a quantity of vanilla was sold to candy manufacturers under provision for a test which could be made with a small amount, use of a larger amount daily for several weeks will prevent the purchasers from rejecting it. Zipp Mfg. Co. v. Pastorino [Wis.] 97 N. W. 904.

98. Where a machine was installed under direction of the seller, under a guaranty to run satisfactorily, and the old machine removed and sold for old iron by the seller, but the purchaser refused all the time to pay for the machine, insisting that it was insufficient in size, there was no acceptance under the contract. In re George M. Hill Co. [C. C. A.] 123 Fed. 866.

99. Ice plant to give satisfaction and subject to trial before acceptance was not accepted by use while seller's agent tried to make it work nor by modification of terms of sale made to induce such trial. Creamery Package Mfg. Co. v. Benton County Creamery Co., 120 Iowa, 584, 95 N. W. 188.

1. Merely opening boxes of goods on receipt after the time specified for their delivery, to ascertain their condition, is not an acceptance where done by the purchaser's salesman and the purchaser returned them as soon as he knew of their arrival. White, etc., Hat Co. v. Carson & Co., 25 Ky. L. R. 1230, 77 S. W. 366.

2. Where a steel die was manufactured subject to approval of the purchaser, and the latter on receipt of the bill offered to approve it if the price, which had not been fixed, was reduced, acceptance was conditional on such reduction. Parr v. Northern Elec. Mfg. Co., 117 Wis. 278, 93 N. W. 1099.

3. Notice of nonacceptance by the purchaser sent to an agent. Weeks v. Robert A. Johnston Co., 116 Wis. 105, 92 N. W. 794.

4. Where the purchaser's agent, delegated to buy a machine, tested it and gave a check in payment, but the purchaser afterward stopped payment on the check, claiming the machine to be defective, but did not tender a return of the machine, the seller could recover on the check, there being no evidence of warranty. Goldstein v. Hochberg, 86 N. Y. Supp. 11.

5. Where the seller delivers goods not complying with the contract, manual return or offer to return by the buyer is unnecessary to rejection, so long as the buyer clearly signifies his nonacceptance. Rheinstrom v. Steiner, 69 Ohio St. 452, 69 N. E. 745.

6. Retention by the purchaser of a machine warranted to work satisfactorily after trial and notice to the seller, because the latter had not paid for materials spoiled in attempting to use it and for a duplicate part ordered at the seller's request, is not an acceptance. Weeks v. Robert A. Johnston Co., 116 Wis. 105, 92 N. W. 794.

7. Particular circumstances surrounding order for whisky. Grabfelder v. Vosburgh, 90 App. Div. [N. Y.] 307.

8. Where goods sold by sample were shipped direct from the manufacturer to the buyer on the seller's order, there was sufficient rejection by the buyer where he tested them on receipt and finding them unsatisfactory notified the sellers that they were held subject to their order and requested disposition of them. Hardt v. Western Elec. Co., 84 App. Div. [N. Y.] 249. Notice by the purchaser to the seller of perishable goods within a few days after receipt, that he will hold the seller for loss due to defective quality, is sufficient notice that the goods are not accepted as complying with the warranty. Northern Supply Co. v. Wangard, 117 Wis. 624, 94 N. W. 785.

9. Where the purchaser did not insist on the terms of the sale as to time when the seller notified him of a delay, but allowed the seller to continue performance, the delay did not terminate the contract. H. Krantz Mfg. Co. v. Gould Storage Battery Co., 83 App. Div. [N. Y.] 133. Where goods are shipped after the time stipulated and the seller stops them in transit refusing to deliver unless paid in cash and the purchaser assents and receives the goods without reserving his right to damages, performance of the new contract waives the right to sue for breach of the former. Poland Paper Co. v. Foote & Davies Co., 118 Ga. 458. Where the seller agreed to furnish machinery in a certain time but failed, and the buyer accepted it on subsequent tender and paid the full price, on the seller's refusal to make a reduction, with knowledge that a third person might demand damages for delay, he could not set up such damages by way of counterclaim in an action by the seller for other machinery subsequently sold. Medart Patent

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waive damages for delay.[11] A requirement for written notice of acceptance may be waived.[12] Acceptance of part delivery will bind the purchaser for value received less damages for delay.[13] The sufficiency of waiver of the right to reject[14] or of excuses for failure to deliver[15] depend on the peculiar circumstances of each case, the inability of the seller to deliver from his own stock,[16] or due to his own act,[17] being generally not an excuse; while the buyer's acts preventing delivery[18] or a wrongful refusal to accept or to make payment,[19] make delivery or tender unnecessary.

§ 8. *Warranties and conditions. A. In general. What are warranties and what conditions. Descriptions and representations.* Representations of existing[20] material facts,[21] not mere words of commendation,[22] at or before the bargain,[23]

Pulley Co. v. Dubuque T. & R. Mill Co., 121 Iowa, 244, 96 N. W. 770. Unconditional receipt and acceptance of part of goods delivered and use thereof as their own is a waiver by the buyers of the time limit and of defects in quantity as called for by the contract making them liable for reasonable value of goods received when delivered in absence of special contract. Heidelbaugh v. Cranston [Del.] 56 Atl. 867.

10. Delivery within reasonable time after period given by contract because of delay made by changes in contract. H. Krantz Mfg. Co. v. Gould Storage Battery Co., 83 App. Div. [N. Y.] 133.

11. Poland Paper Co. v. Foote & D. Co., 118 Ga. 458. Acceptance by the purchaser on tender after the period for delivery will not, of itself, waive damages for the delay, but the purchaser may insist on a reduction of the price by such damages. Medart Patent Pulley Co. v. Dubuque T. & R. Mill Co., 121 Iowa, 244, 96 N. W. 770.

12. Where the seller gave an option on coal to be delivered on written notice of acceptance, refusal of the seller to receive the written notice on information that it would be served waived further notice. Jones v. Sowers, 204 Pa. 329.

13. Where delivery of part of logs sold was made impossible until after the time for delivery, but the purchaser accepted them later and delivery of the remainder was mutually abandoned, the purchaser was bound to pay for those delivered within a reasonable time, less damages for delay. Sutton v. Clarke, 42 Or. 525, 71 Pac. 794. A seller delivering part of a designated quantity of goods under a contract, which are accepted, may recover the value thereof less damages from his failure to complete the contract. Pittsburgh Plate Glass Co. v. Kerlin Bros. Co. [C. C. A.] 122 Fed. 414.

14. Where goods were sold with the right to reject on disapproval, that the seller offered inducements to the buyer to be allowed to make changes to warrant acceptance, will not show waiver of the right to reject either by the buyer or his representative who was without authority to waive the right to reject. Hall v. Pierce, 83 App. Div. [N. Y.] 312.

15. Where the purchaser of cord wood wrote the seller, on his failure to deliver, giving the latter an opportunity to deliver a larger quantity at a later time which was not done, the offer cannot be shown as a waiver in an action for damages for breach of the contract. Scully v. Detroit Iron Furnace Co. [Mich.] 93 N. W. 885.

16. Provisions in a contract for sale of canned tomatoes for exemption from liability for failure to furnish them due to certain other causes does not include destruction of the seller's crop by frost, where the contract does not show that the tomatoes were to be furnished from his crop alone. Newell v. New Holstein Canning Co. [Wis.] 97 N. W. 487. Where a seller could not complete his contract for sale of canned tomatoes from his own crop due to frost, his efforts to replace the tomatoes at two markets only, both distant from his cannery, are not sufficient to relieve him of liability for failure to complete the contract. Id.

17. That persons to whom a broker has pledged stock, sold it on suspension of business by the broker will not relieve him from his obligation to deliver it to one who bought it from him on margin. Rothschild v. Allen, 90 App. Div. [N. Y.] 233.

18. Proof that plaintiff, in an action for breach of a sale of corporate stock, before he became entitled to it under the contract, procured an action to be brought against himself by a creditor and that all the stock, except a small amount was attached to pay his own debt, showed a good defense for failure to deliver. Kelly v. Fahrney [C. C. A.] 123 Fed. 280.

19. Statement of the vendee, on delivery of part of the goods sold under an entire contract, that he will not accept the remainder unless equal to the original sample, waives tender of the balance. Weil v. Unique Elec. Device Co., 39 Misc. [N. Y.] 527. Refusal to accept chattels because not delivered before the date set for delivery will release the seller from delivery or tender thereof. Cousins v. Bowling, 100 Mo. App. 452, 74 S. W. 168. Where no time is mentioned for delivery and the buyers rescinded before arrival of the goods for alleged delay, and the jury find delivery to have been made in a reasonable time, the sellers need not tender the goods before suing for the breach. McHenry v. Bullfant, 207 Pa. 15.

A purchaser who was given credit is not in default until the price is due, hence in refusing to anticipate payment he does not forfeit the right to recover for nondelivery. F. W. Kavanaugh Mfg. Co. v. Rosen [Mich.] 92 N. W. 788.

20. Express warranty of second hand machinery is not found in a statement that it worked when last used. Norris v. Reinstedler, 90 Mo. App. 626. Statement that cows sold were coming in in February or March next held to be a warranty that the cows

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and on which the buyer relied,[24] may constitute warranty. Merely descriptive terms will not.[25] The seller may rely, as to future sales, on a statement at time of a sale made by the purchaser to obtain credit.[26] Warranty may be found in words of quality from the fact that no inspection was to be given.[27]

(§ 8) *B. Express and implied warranties and fulfillment or breach thereof.*—The rule caveat emptor applies if the purchaser has an opportunity for inspection,[28] and relies on his own judgment,[29] or if defects are patent,[30] or discoverable in the exercise of ordinary prudence,[31] or if the property is open to inspection and no representations are made.[32] On express warranty the buyer is not required to inspect the chattel,[33] and it covers discoverable defects.[34] Express warranty of title is good though the purchaser knew that the title was not perfect.[35] Fraud by the seller prevents application of the rule of caveat emptor,[36]

were with calf and would come in at the time stated. Kilsby v. De Forest, 76 App. Div. [N. Y.] 283.

21. Representations of fact as to property of an oil corporation, its productiveness, and other conditions as to value and safety of its stock as an investment are proper elements of warranty in a sale of stock. Phillips v. Crosby [N. J. Law] 55 Atl. 814. A fraudulent misrepresentation will not be ground for rescission by the purchaser, unless it is a misrepresentation of a present continuing fact, a mere prediction of speculative results being insufficient. A representation that a patent device could be made at a certain price that would be as good as a sample held sufficient. Lederer v. Yule [N. J. Eq.] 57 Atl. 309.

22. A statement that an engine is "as good as new in every particular" is a representation of a physical fact, and not mere words of commendation. Milwaukee Rice Mach. Co. v. Hamacek, 115 Wis. 422, 91 N. W. 1010.

23. A statement before or at time of sale of a cow that she was sound, on which the buyer relied, is an express warranty. Cummins v. Ennis [Del.] 56 Atl. 377.

24. Where the seller knew the quality of the goods which were stored at a distance in his warehouse and represented them to be of a certain quality, on which representation the purchaser was compelled to rely, it amounted to a warranty. Egbert v. Hanford Produce Co., 86 N. Y. Supp. 1118.

25. A statement by the seller that mares were "thoroughbred" is descriptive and not an implied warranty. Burnett v. Hensley, 118 Iowa, 575, 92 N. W. 678. A statement in a written offer to sell roses that they were "very fine stock" is not an express warranty of quality. Stumpp v. Lynher, 84 N. Y. Supp. 912. A sale of personalty by description showing grade or quality is not a warranty for breach of which the vendee can recover or recoup damages after acceptance. Neff v. McNeeley [Neb.] 96 N. W. 150.

26. Goldsmith v. Stern, 84 N. Y. Supp. 869.

27. Where an entire crop of cane was to be delivered, "sound, ripe, and merchantable," and no opportunity was given for inspection by the buyer, there was an express warranty as to the condition of the cane. Ellis v. Riddick [Tex. Civ. App.] 78 S. W. 719.

28. In executed sales no warranty exists except that of title, nor any in cases where the buyer inspects the goods. Wilson v. Belles, 22 Pa. Super. Ct. 477. Existence of latent defects in a second hand machine not made by the seller is no defense to an action for the price, where the purchaser had an opportunity for inspection. Joy v. Nat. Exch. Bank [Tex. Civ. App.] 74 S. W. 325. Where logs sold were delivered and the purchaser's agent inspected them, no implied warranty existed as against damages to the purchaser's mill from iron imbedded in the logs. Ketchum v. Stetson & P. Mill Co. [Wash.] 73 Pac. 1127. In an action for the purchase price of paving brick, one who had accepted them without inspection, could not counterclaim the expense of removing, resetting, or hauling away defective brick. O'Brien v. Higley [Ind.] 70 N. E. 242.

29. No concealment or representations respecting quality were made. Telluride Power T. Co. v. Crane Co., 208 Ill. 218, 70 N. E. 319. Where a dealer bought grass seed in reliance on his own judgment and experience, there was no implied warranty that the seed would germinate or was fit for the purchaser's purpose. Gardner v. Winter, 25 Ky. L. R. 1472, 78 S. W. 143.

30. Where a defect in a warranted horse could easily have been discovered by looking at him, and it appears that he saw the defect, the seller is not liable for breach of a warranty made against such defect. McAfee v. Meadows [Tex. Civ. App.] 75 S. W. 813.

31. Cook v. Finch, 117 Ga. 541.

32. In sale of an existing chattel, in absence of fraud there is no implied warranty of quality or condition, but as to articles sold by description there is an implied warranty that they are of such description. Telluride Power T. Co. v. Crane Co., 103 Ill. App. 547. There is no implied warranty of a mare bought for breeding purposes, where the buyer had opportunity for inspection, and the seller did not know the purpose of the purchase. Burnett v. Hensley, 118 Iowa, 575, 92 N. W. 678. The rule of caveat emptor applies to sale of an insurance expiration register, where no representations were made as to its character, as to privacy of record, or exclusiveness of information. Kinkel v. Winne, 67 Kan. 100, 72 Pac. 548.

33. The buyer may accept an article on express warranty without inspection and offset damages for breach of warranty against the contract price. Barnum Wire & Iron Works v. Seley [Tex. Civ. App.] 77 S. W. 827.

34. Cook v. Finch, 117 Ga. 541.

35. Seller's title to newspaper plant dependent on the continued publication of the paper. Neville v. Hughes [Mo. App.] 79 S. W. 735.

36. Burnett v. Hensley, 118 Iowa, 575, 92 N. W. 678.

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and fraudulent concealment entitles the buyer to rely on statements respecting defects.[37] An agent cannot warrant in opposition to a stipulation that no other warranties than those in the written contract shall be binding.[38] All preliminary negotiations are merged in the written contract,[39] hence a warranty cannot be supplied by parol evidence.[40] The warranty may be modified after the contract.[41] An oral warranty made after the written one and to induce sale is good.[42]

Express warranty excludes implied warranty;[43] but the express warranty must have come into force.[44] A warranty of fitness is not negatived by the exclusion of the particular goods from an express warranty in a written sale.[45] And an express written warranty may concur with one found in a circular sent by the seller.[46] There can be no warranty implied against that of which one is warned.[47] In the sale of an existing chattel there is no implied warranty of quality or condition,[48] or one that existing conditions shall continue,[49] but the seller impliedly warrants the subject-matter to be suitable and fit, when he knows the purpose of its purchase,[50] unless it is purchased by sample and complies there-

37. A representation as inducement to a written sale cannot be shown by the buyer in an action for the price, unless he shows that the seller by some fraud prevented him from discovering a defect which the seller knew to exist. Telluride Power T. Co. v. Crane Co., 103 Ill. App. 647.

38. McCormick Harvesting Mach. Co. v. Allison, 116 Ga. 445.

39. No warranty of quality was expressed in the final contract, though in previous negotiations it was said the pipe was of a certain quality and would withstand a certain pressure. Telluride Power T. Co. v. Crane Co., 208 Ill. 218, 70 N. E. 319.

40. Nothing was said as to quality in the written contract. Telluride Power T. Co. v. Crane Co., 208 Ill. 218, 70 N. E. 319. Correspondence relative to certain pipe held to constitute a sale without warranty. Id.

41. Correspondence between parties to sale of machine held not to modify warranty that it should give "entire satisfaction." Weeks v. Johnston Co., 116 Wis. 105, 92 N. W. 794.

42. First warranty of a machine was signed by the buyer merely as an order to secure it for trial, and the real sale occurred after delivery. McCormick Harvesting Mach. Co. v. Arnold, 25 Ky. L. R. 663, 76 S. W. 323.

43. An express statement by the seller that animals were not warranted negatives an implied warranty. Burnett v. Hensley, 118 Iowa, 575, 92 N. W. 678. If a contract of sale is complete and certain, and contains an express warranty of certain qualities in the chattel sold, implied warranty of other qualities is excluded. Holcombe v. Cable Co. [Ga.] 46 S. E. 671.

44. Where sale of a machine provided for payment before delivery in order to vitalize an express warranty, acquiescence of the seller in a trial before payment was a waiver of the express warranty, so that the buyer could rely on an implied warranty that it would reasonably perform the service intended. Parsons B. C. & S. F. Co. v. Mallinger [Iowa] 98 N. W. 580.

45. That a printed warranty in a written sale of second-hand machinery declared that it should not apply to such machinery will not preclude an implied warranty of suitableness, where the seller knew that it was bought for a specific purpose. New Birdsall Co. v. Keys, 99 Mo. App. 458, 74 S. W. 12.

46. Where the purchasers of a gasoline engine told the manufacturers they would confirm an order for it on a guaranty that it was to be of a certain capacity and to work satisfactorily in every respect, and the offer was accepted, the acceptance being accompanied by the guaranty as to capacity and circulars stating that the engine was safe, the specific guaranty as to capacity did not prevent acceptance from constituting a guaranty of safety as expressed in the circulars. Charter Gas-Engine Co. v. Kellam, 79 App. Div. [N. Y.] 231.

47. Bad habit in a horse. Knoepker v. Ahman, 99 Mo. App. 30, 72 S. W. 483.

48. Iron pipe for conducting water. Telluride Power T. Co. v. Crane Co., 208 Ill. 218, 70 N. E. 319. It was not shown that seller undertook to sell fish otherwise than in the condition in which they were, good or bad. Troy Grocery Co. v. Potter [Ala.] 36 So. 12.

49. The vendor of the hope of future crops of oranges does not warrant the existence of the trees. Losecco v. Gregory, 108 La. 648.

50. A warranty may exist without express stipulation, as where goods are supplied for a special purpose, their fitness is warranted. Troy Grocery Co. v. Potter [Ala.] 36 So. 12.

Illustrations: If oats sold for seed are not expressly warranted the law will imply a warranty that they are free from mustard seed. Bell v. Mills, 78 App. Div. [N. Y.] 42. Where the seller of feed for cattle knows that it is to be used for that purpose, he impliedly warrants it fit and wholesome for feed, though nothing is said in the written contract. Houston Cotton Oil Co. v. Trammell [Tex. Civ. App.] 72 S. W. 244.

Knowledge of the seller that apparatus ordered was for a certain purpose raises an implied warranty of suitableness. Especially where the purchaser relied on the seller's judgment. Skinner v. Kerwin Ornamental Glass Co. [Mo. App.] 77 S. W. 1011. A seller of a machine for a certain purpose which fails to fill it cannot recover therefor, nor for materials afterward furnished to complete it. Piel v. Nat. Cooperage Co., 85 App. Div. [N. Y.] 613. Where a machine is in-

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with,[51] or it complies with a description, kind, and quality specified in the order.[52] On breach of warranty of soundness of an animal, plaintiff must prove express warranty either before or at time of sale.[53] On successive sales of goods of a kind previously bought, there is an implied warranty that the quality of previous sales will be maintained.[54] Sale by sample,[55] or by a particular description, imports a warranty of compliance therewith.[56] Whether a sale is a sale by sample is a question for the jury.[57] In executory sales a warranty exists that the article will be merchantable and of the kind ordered.[58] There is no warranty of quality implied generally in a sale of second hand machinery,[59] but fitness for a known purpose may be specially implied, even though express warranties in other respects are disavowed.[60]

A warranty will be limited to the matters imported by its terms,[61] or their

tended for a particular purpose and is adaptable to no other, an implied warranty exists that it will reasonably fill that purpose. Parsons B. C. & S. F. Co. v. Mallinger [Iowa] 98 N. W. 580. On sale of machinery for a special use of which the seller has notice, there is an implied warranty of its reasonable suitability, whether it was taken from his stock or specially manufactured. Southern Brass & Iron Co. v. Exeter Mach. Works, 109 Tenn. 67, 70 S. W. 614. Proof that appliances were worthless for any purpose whatever and that the purchaser was ignorant of the kind needed and relied on the seller's judgment is admissible on the question of implied warranty. Skinner v. Kerwin Ornamental Glass Co. [Mo. App.] 77 S. W. 1011. Implied warranty of clay pots sold by manufacturer with full knowledge that they were to be used for a certain purpose. Queen City Glass Co v. Pittsburg Clay Pot Co., 97 Md. 429.

A manufacturer of an article for a specific purpose impliedly warrants quality of material and good workmanship. Murray Iron Works Co. v. Dekalb E. Co., 103 Ill. App. 78. If an article is made to order there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily intended, or for the special purpose of the buyer if that is known to the seller. Telluride Power T. Co. v. Crane Co., 103 Ill. 647. Implied warranty that the quality of linseed oil was the same as that furnished previously, and fit for the purpose for which the seller knew it was to be used. Cleveland Linseed Oil Co. v. Buchanan & Sons [C. C. A.] 120 Fed. 906. In a suit for breach of warranty an instruction that an implied warranty exists in ordinary sales that the article is merchantable and suitable for the use intended is not error [Civ. Code 1895, § 3555]. Objection was that the sale was made in Wisconsin but the question as to the law governing this point was not raised. Wells v. Gress, 118 Ga. 566.

51. Because the buyer may have told the seller that he was purchasing the materials for a certain purpose will not raise a warranty for such purpose where the articles were true to sample. Chicago House Wrecking Co. v. Durand, 105 Ill. App. 175. Where a contract for manufacture and sale of appliances required them to be fit for a certain purpose and equal in quality to certain appliances named, and the seller knew the purpose for which they were intended, there was an implied warranty that they were merchantable which included both patent and latent defects resulting from process of manufacture or the materials used. Baylis v. Weibezahl, 42 Misc. [N. Y.] 178. Where yarn is sold by sample, the seller refusing to guaranty its strength, there is no warranty as to its quality where the purchaser selects the sample. Hardt v. Western Elec. Co., 84 App. Div. [N. Y.] 249.

52. Where a known article, definitely described, is ordered from and actually furnished by a manufacturer, no implied warranty exists that it will suit the buyer's purpose. Oil Creek Gold Min. Co. v. Fairbanks, Morse & Co. [Colo. App.] 74 Pac. 543. Where the seller delivers a machine of the kind and character agreed upon, no implied warranty exists as to its suitability for the buyer's purpose. Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113. Where machinery delivered is of the kind and quality required by the contract, the price is due, though it fails to answer the purpose for which it was bought, especially where the failure is due to a part bought under a separate contract. Dreyfus v. Mrs. William Lourd & Co. [La.] 35 So. 369.

53. No particular words are necessary. Cummins v. Ennis [Del.] 56 Atl. 377.

54. Empire State Bag Co. v. McDermott, 89 App. Div. [N. Y.] 234.

55. Sufficiency of evidence to show sale by sample and implied warranty that goods should comply as to size and quality. Tex. Fruit Co. v. Lane, 101 Mo. App. 712, 74 S. W. 400. Contract to manufacture and deliver wrenches equal to a model submitted, held not to be a sale by sample for which the vendee could recover damages because of the inferior quality of articles delivered. Ideal Wrench Co. v. Garvin Mach. Co., 92 App. Div. [N. Y.] 187.

56. Americus Grocery Co. v. Brackett & Co. [Ga.] 46 S. E. 657. The sale of a chattel of a particular description imports a warranty that the article sold is of the kind specified. Id.

57. Evidence conflicting as to whether a brick exhibited at time of sale was used as a sample or not. N. Y. Hydraulic Press Brick Co. v. Cunn, 87 N. Y. Supp. 168.

58. Wilson v. Belles, 22 Pa. Super. Ct. 477.

59. Norris v. Reinstedler, 90 Mo. App. 626.

60. That a contract for sale of second hand machinery provided against modification by the seller's agent will not prevent an implied warranty of suitableness. New Birdsall Co. v. Keys, 99 Mo. App. 458, 74 S. W. 12.

61. Where a sale of wool required it to be

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customary meaning,[62] and to the stipulated time, or to a reasonable time if none be fixed.[63] The seller's knowledge is not necessary to breach of a strict warranty.[64] General warranty as to quality or satisfactoriness includes all the subject-matter,[65] and all causes of reasonable objection,[66] but only reasonable objections,[67] and not defects obvious to the senses and known to the warrantee,[68] or owing to mismanagement of the buyer.[69]

Substantial compliance with terms of a warranty suffices.[70] Defects sufficient to the buyer personally will warrant his rejection,[71] but arbitrary rejection cannot be made.[72] It is not incumbent on the buyer to discover why a machine does not work satisfactorily.[73]

free from certain objectionable qualities, on inspection the purchaser could reject it for such qualities but not for other conditions as to quality. Davis & Son v. Allen, 25 Ky. L. R. 1424, 77 S. W. 1125. An agreement to furnish "castings to be made of steel," warrants only the character of metal to be used and not that it shall be of the best grade or suitable for the purpose intended. Fredrick Mfg. Co. v. Devlin [C. C. A.] 127 Fed. 71. Where a contract for sale of a piano distinctly relieves the seller from responsibility for tuning, he is not liable for a defect of that character. Holcombe v. Cable Co. [Ga.] 46 S. E. 671. A guaranty that oats for seeding purposes were "in good condition, choice stock, and well cleaned," does not warrant them free from mustard seed. Bell v. Mills, 78 App. Div. [N. Y.] 42. A guaranty by a seller of a filter that the filtrate would be clear and bright, and render condensed water suitable for boilers, did not mean merely that suspended matter in the water would be removed, but that the water would be made clear and bright. O. H. Jewell Filter Co. v. Kirk, 200 Ill. 382, 65 N. E. 698. An agreement by the seller of a machine to furnish new parts for those proving defective in material or workmanship for a year did not bind him to make good natural wear and tear. Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113. Sufficiency of terms of sale of a horse to amount to an express warranty of soundness. Bullard v. Brewer, 118 Ga. 918.

62. Where dust collectors bought were to be shipped in "manufactured state," failure to rivet joints of pipes before shipping was not a breach, where it appeared that the seller usually shipped in that way. Allington & Curtis Mfg. Co. v. Detroit R. Co. [Mich.] 95 N. W. 562.

63. That an ice plant would produce a certain amount of ice every 24 hours. It worked all right the first year but failed the following two years. Held sufficient performance. Danville Coal & Ice Co. v. Vilter Mfg. Co. [Ky.] 79 S. W. 225.

64. Scienter of the seller need not be proven. Becker v. Atchason [N. J. Law] 56 Atl. 172; Wood v. Anthony & Co., 79 App. Div. [N. Y.] 111. That a cow when sold had tuberculosis is a breach of warranty of soundness, whether the seller knew of the disease or not. Cummins v. Ennis [Del.] 56 Atl. 877.

65. Where several lots of eggs from as many different localities are sold on a warranty as to quality, the buyer may rely on the warranty as to all. Egbert v. Hanford Produce Co., 86 N. Y. Supp. 1118. The purchaser of an entire crop of molasses, to be of good quality, is not bound to receive a part made from frozen cane. Barrow v. Penick, 110 La. 572.

66. An agreement to remove a machine from the buyer's premises if it proves unsatisfactory for any other cause than those stated in the contract includes any other reasonable cause of dissatisfaction. Union League Club v. Blymyer Ice Mach. Co., 104 Ill. App. 106. Warranty of a gasoline engine that it is safe, reliable, and can be run without danger, is broken by explosion from an unknown cause. Charter Gas-Engine Co. v. Kellam, 79 App. Div. [N. Y.] 231.

67. Warranty to work satisfactorily requires only reasonable compliance. Lockwood Mfg. Co. v. Mason Regulator Co., 183 Mass. 25, 66 N. E. 420. That goods of small cost and not intended to be skilfully or artistically made were defective in part, is not a breach where the maker was willing to replace defective ones at all times. Buedingen Mfg. Co. v. Royal Trust Co., 90 App. Div. [N. Y.] 267.

68. Jewell Filter Co. v. Kirk, 102 Ill. App. 246.

69. Breach of warranty of a machine cannot be said to exist where failure of the machine to work was due to mismanagement. Allington & Curtis Mfg. Co. v. Detroit R. Co. [Mich.] 95 N. W. 562.

70. Breach of warranty of engravings sold. Colo. Dry Goods Co. v. Dunn Co. [Colo. App.] 71 Pac. 887.

71. On sale of a machine to be accepted if it worked satisfactorily, the buyer need exercise only the judgment and capacity he possessed, and may reject it, though a person of ordinary skill might have made it work satisfactorily. Haney-Campbell Co. v. Preston Creamery Ass'n, 119 Iowa, 188, 93 N. W. 297. Where a steel die was sold on condition that it work satisfactorily, the buyer was not bound to accept if he believed in good faith that it did not so work, though the seller could show that it did good work. Parr v. Northern Elec. Mfg. Co., 117 Wis. 278, 93 N. W. 1099.

72. Sale of a machine under guaranty and provision for removal by the seller if it proved unsatisfactory for any other reason did not warrant arbitrary rejection. Union League Club v. Blymyer Ice-Mach. Co., 204 Ill. 117, 68 N. E. 409.

73. On sale of a machine under condition that it shall work satisfactorily and a period is given for test, the seller, on objection, and not the buyer must discover particular defects. Haney-Campbell Co. v. Preston Creamery Ass'n, 119 Iowa, 188, 93 N, W. 297.

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(§ 8) *C. Conditions and fulfillment or breach.*—Whether a promise or understanding is a condition depends on whether it is a part of the contract or not.[74] Conditions being part of the sale cannot be engrafted on a written sale by parol,[75] thus where notes describe an absolute sale, parol evidence cannot be given to show a conditional sale.[76] A condition may affect the entire sale though written only on one of the purchase notes.[77] Printed conditions accompanying the thing sold must be fairly brought home to the buyer.[78] A provision in a sale of a machine that a man should be sent to remedy defects discovered is a condition precedent to the right to payment.[79] There is an implied condition that a buyer given credit and taking possession[80] is and will be solvent.

Conditions must be fulfilled in every essential,[81] but not strictly or technically, so as to work hardship,[82] or in a manner not within the import of the terms used.[83] A condition is not broken which can be fully performed in that part of the sale which remains executory.[84] Interpretations given to particular words of conditions will be found in cited cases.[85] In order to enforce it the seller

74. A writing given by the seller's agent to the purchaser of a cash register allowing a certain time for trial and return or exchange of the register if it proved unsatisfactory was a part of the contract of sale. Watts v. Nat. Cash Register Co., 25 Ky. L. R. 1347, 78 S. W. 118. Contract for sale of stock medicines as giving the purchaser the exclusive agency for sale thereof in a certain township. Sutton v. Baker [Minn.] 97 N. W. 420.

75. Sought to show that sale of newspaper plant was conditioned upon the purchaser's publishing the paper for a year. Neville v. Hughes [Mo. App.] 79 S. W. 735. When written contract was complete of itself and seller warranted the title, parol evidence was inadmissible to show that as part of the consideration the purchaser had agreed to publish the paper for a certain time which he had not done. Id.; State v. Chamber of Commerce [Wis.] 98 N. W. 930. Sought to be shown that salesman had power to bind the principal and the stipulation relative to approval was mere formality. Succession of Welsh, 111 La. 802.

76. Finnigan v. Shaw, 184 Mass. 112, 68 N. E. 35.

77. Where a warranty was indorsed as a memorandum on each of two notes given on a sale, a condition on the first note only, that breach of the warranty will avoid the note is not limited to avoidance of that note alone. Snyder v. Johnson [Neb.] 95 N. W. 692.

78. A purchaser of seed oats cannot be said to be bound to read a card found in the sacks on delivery, containing conditions of sale in small type, and to know that they were intended as terms of sale. Bell v. Mills, 78 App. Div. [N. Y.] 42.

79. McCormick Harvesting Mach. Co. v. Mackey, 100 Mo. App. 400, 74 S. W. 388.

80. Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368.

81. Substantial performance by the seller of a sale of flour with privilege of inspection is shown by evidence of shipment to order of seller with notice attached to the bill of lading and subsequent order allowing examination. Brooke v. Hill, 65 S. C. 142. Tender of goods not in transit at date of the contract but shipped three days later is not a compliance with a condition of sale by "transit car," so that refusal to receive was not a breach by the buyer. Stock v. Towle, 97 Me. 408. Provisions in sale of threshing machine for test and remedy of defects by seller. Zimmerman v. Robinson, 118 Iowa, 117, 91 N. W. 918.

Unexplained dishonor of drafts on the place agreed is a breach. Town v. Jepson [Mich.] 95 N. W. 742. In such a case the seller need not draw on another place and were the contrary true the seller is not bound by notice given by the buyer to the bank to return the drafts to the seller who should forward them to another place for acceptance and payment. Id.

82. Warranty that pumps would work satisfactorily only obliged the seller to furnish pumps complying reasonably with the warranty, and did not require approval by a particular engineer, though he knew the purchaser bought to deliver under a contract requiring acceptance by one appointed by such engineer. Lockwood Mfg. Co. v. Mason R. Co., 183 Mass. 25, 66 N. E. 420.

83. A condition in a contract to furnish goods that the buyer might renew so long as he did not "advance, loan or aid" any competitor of the seller in the business is not broken by purchasing goods from competitors, on the ground that it "aided" them, so that the seller might rescind. Underhill v. Buckman Fruit Co., 97 Md. 229.

84. An agreement by the seller of a set of books to publish a sketch and portrait of the purchaser will not prevent recovery for a part delivered without compliance, as the condition can be complied with in the remaining book. White & Co. v. Corbin, 86 N. Y. Supp. 216.

85. Where goods are sold with privilege of exchange for other goods "within 15 days from date of invoice," such date is the day of shipment, though a prior date is written on the face of the invoice. Merchants' Exch. Co. v. Weisman [Mich.] 93 N. W. 869. An executory contract to buy railroad ties for a certain period, providing for delivery of all ties purchased and handled by the seller on the railroad line, according to specifications, and to be piled and marked by the seller, for which the buyer agreed to pay a certain price within a certain time after inspection and acceptance by the railroad company, was an agreement by the buyer to

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need not know of a breach of condition by the buyer.[86] Breach of condition by the buyer will defeat his right to enforce the contract.[87]

(§ 8) *D. Conditions on a warranty* must be fulfilled[88] in all essential particulars[89] or it cannot be enforced, unless the conditions or strict performance of them be waived;[90] but a condition related to one warranty is not prerequisite to enforcement of a distinct one,[91] thus where one part of a warranty is absolute

purchase for himself, not dependent on a sale to the company, the only object of inspection being to determine that the ties met the requirements. Potter v. Holmes, 87 Minn. 477, 92 N. W. 411. A phrase in a contract of sale that it is "to be settled without reference to any other contract" does not limit assignment of the sale or the right of the buyer to resell before payment or delivery, but means that the sale is independent. Bayne v. Hard, 77 App. Div. [N. Y.] 251. Contract as requiring payment by the seller of enumerated charges and giving the purchaser no advantage of intermediate reduction of customs duties where coal was shipped from New South Wales to San Francisco. Withers v. Moore [Cal.] 71 Pac. 697. "Transit car" in a contract for delivery of goods by railroad held to mean a car already loaded and on its way to the purchaser, hence it is a breach if no car was in transit. Stock v. Towle, 97 Me. 408. Stipulation that seller of oil should be released if oil supply in the vicinity became exhausted or the seller's lessor should revoke oil leases, held to mean that only in case of revocation and exhaustion of other wells should he be released. Wilson v. Alcatraz Asphalt Co. [Cal.] 75 Pac. 787. A condition, that if a machine sold is unsatisfactory after the seller's attempts to remedy defects, a second test is to be made with another machine under the same circumstances, requires such test only on disagreement as to the quality of work done by the first machine. Zimmerman v. Robinson, 118 Iowa, 117, 91 N. W. 918. A provision "for renewal," by the buyer of a contract to furnish goods for a year, for another year if he did not aid the competitors of the seller, extended only to the renewal year and was not of unlimited duration. Underhill v. Buckman Fruit Co., 97 Md. 229.

A contract for sale of hay to the United States providing that the quantity received may be increased or decreased at option of the government within certain limits, designating daily rate of delivery "or in such quantities and at such times as ordered" is not broken by suspension of orders to receive for a certain period in compliance with such terms, though the price of hay has greatly increased in the meantime. St. Louis Hay & Grain Co. v. U. S., 24 Sup. Ct. 47. That a buyer of machinery was to have time to determine whether it was satisfactory before a note for the price became due does not render its payment at maturity conditional so that breach of a collateral agreement was a defence in an action on the note. New Haven Mfg. Co. v. New Haven Pulp & B. Co. [Conn.] 55 Atl. 604.

Repugnancy: Absolute right of rejection if not satisfactory is not defeated by a further provision for notice of defects after trial and opportunity to the seller to put it in order. McCormick v. Finch, 100 Mo. App. 641, 75 S. W. 373.

86. A condition in a sale of materials that the buyer should use them exclusively in his own trade is broken by his sale to third persons, whether done with or without the seller's knowledge. Trinidad Asphalt Mfg. Co. v. Trinidad Asphalt R. Co. [C. C. A.] 119 Fed. 134.

87. Where a buyer was bound to use materials bought exclusively in its trade, it could not recover damages for failure of the seller to fill orders intended for third persons, whether the seller knew of the buyer's contracts with such persons or not. Trinidad Asphalt Mfg. Co. v. Trinidad Asphalt R. Co. [C. C. A.] 119 Fed. 134. Where a seller rescinded the contract for failure of the purchaser to pay for previous shipments as required by the contract, and refused to consider the contract in a letter acknowledging receipt of a check for part of the sum after rescission, retention of the check was not a waiver of the breach. Eastern Forge Co. v. Corbin, 182 Mass. 590, 66 N. E. 419. Where a sale was for cash and the buyer refused to pay after part of the goods were sent, the seller is not liable for failure to send the remainder. Beacon Falls Rubber Shoe Co. v. Burns, 79 App. Div. [N. Y.] 639.

88. McCormick Harvesting Mach. Co. v. Arnold, 25 Ky. L. R. 663, 76 S. W. 323. Payment to be made before delivery in order that express warranty should become effective. The buyer refused to settle until after trial of the machine. Held, the benefit of the warranty was waived. Parsons B. C. & S. F. Co. v. Mallinger [Iowa] 98 N. W. 580. Where a machine is sold upon trial, title in the meantime remaining in the seller, and if not according to warranty, to be returned, retention and agreeing to pay for the same renders the sale absolute and waives any previous breach of warranty. Vanderbeek v. Francis, 75 Conn. 467.

89. Where fire hose sold was warranted to pass inspection by the fire department, that the department could not approve the hose after a test will discharge liability of the purchaser, though it had not been officially rejected. Eureka Fire Hose Co. v. Reynolds, 86 N. Y. Supp. 753. A contract for sale of patterns with a condition for return and exchange of discarded ones for new ones and a guaranty against loss at the end of a time certain held not to require return of all patterns on hand as precedent to put the guaranty in force. McCall Co. v. Eagan, 89 App. Div. [N. Y.] 330.

90. See post, § 8E.

91. Covenant by seller warranting title and covenant by purchaser to continue the publication for a year held separate and distinct obligations, and former may be enforced, although the latter is not performed. Neville v. Hughes [Mo. App.] 79 S. W. 735.

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and the other conditional.[92] A warranty dependent on condition precedent[93] is not binding until the condition be performed. Conditions in a printed warranty furnished by a vendor will be construed most strongly against the vendor.[94] Notice[95] of the kind[96] and to the persons[97] stipulated as a condition must be given. If return of an unsatisfactory thing is stipulated, notice that it is held for the seller will not suffice.[98] If a return is required, it must be made in a reasonable time.[99] Time for return as indicated by the words "at once" is not of the essence of the contract.[1]

(§ 8) *E. Waiver of warranties and conditions; excuse for breach.—A warranty* may be waived by a sufficient agreement[2] or matter amounting to an estoppel.[3] A new contract superseding the one with the warranty annuls it.[4] Acceptance with knowledge of imperfections does not prevent an express warranty taking effect,[5] and the giving of purchase-money notes[6] or a chattel mortgage[7]

92. Machine was warranted to be of good material, etc., and if upon trial it should not work well, notice should be immediately given and if not fixed it should be returned. Held warranty as to good materials was absolute and did not depend upon the giving of notice. McCormick Harvesting Mach. Co. v. Fields [Minn.] 95 N. W. 886. Warranty was as to the soundness and capacity of a horse, monthly reports to be rendered so as to determine whether or not guaranty as to capacity was broken, held, failure to submit such reports did not preclude action on warranty of soundness. Montgomery v. Hanson [Iowa] 97 N. W. 1081.

93. Purchaser to return all goods on hand at expiration of certain period as condition precedent. McCall Co. v. Eagan, 89 App. Div. [N. Y.] 330.

94. Parsons B. C. & S. F. Co. v. Gadeke [Neb.] 95 N. W. 850.

95. Case Threshing Mach. Co. v. Lyons, 24 Ky. L. R. 1862, 72 S. W. 356. Where notice of defects is required, it must be given. Sloan v. Wolf Co. [C. C. A.] 124 Fed. 196. Where notice is required it must be given in order to return the machine or resist payment of the purchase price because of a defect. Frick v. Morgan, 24 Ky. L. R. 836, 69 S. W. 1072. Notice required, also that continuous use for six days should be conclusive evidence of fulfillment of warranty, held, by failure to give notice and use of machine for three seasons buyer could not recover for breach of notice. Massillon E. & T. Co. v. Schirmer [Iowa] 93 N. W. 599. Under an agreement to install an evaporating apparatus the purchaser agreed to pay a certain amount in one month unless it notified the seller that the apparatus did not come up to the guaranty. The fact that the buyer expressed dissatisfaction and efforts were made to improve the apparatus did not constitute the notice required by the contract. Pa. I. W. Co. v. Hygeian I. & C. S. Co. [Mass.] 70 N. E. 427.

96. Notice must be given according to the terms of the guaranty. Northern Elec. Mfg. Co. v. Benjamin Coal Co., 116 Wis. 130, 92 N. W. 553. A notice that a machine "did not perform the work it was bought to do" is not a compliance with a contract requiring notice of its failure to comply with the warranty "stating wherein the machine was faulty." Id. Notice of defects in a machine, obtained by the seller's agent in setting it up, is not notice within a warranty expressly providing such notice to be insufficient. Heagney v. Case Threshing Mach. Co. [Neb.] 96 N. W. 175.

97. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 466, 92 N. W. 826. Where a written sale of machinery requires notice of defects to the seller and his agent, notice to the agent alone will not entitle the purchaser to rely on a breach of warranty. Case Threshing Mach. Co. v. Lyons, 24 Ky. L. R. 1862, 72 S. W. 356.

98. Mere notice to the seller that a machine is held subject to his order is not compliance with a stipulation for its return if unsatisfactory. Dickey v. Winston Cigarette Mach. Co., 117 Ga. 131. Where written sale of a machine provides for notices of defects and opportunity for the seller to perfect it, on failure of which it shall be returned and payment refunded, and that failure to return shall amount to acceptance, notice by the purchaser that the machine did not work and was held subject to the seller's order was not a compliance with the contract, where neither the seller nor his agent ever took possession. McCormick Harvesting Mach. Co. v. Allison, 116 Ga. 445.

99. 2½ months held unreasonable. Northern Elec. Mfg. Co. v. Benjamin Coal Co., 116 Wis. 130, 92 N. W. 553.

1. Under the contract of sale of a machine, the machine to be returned "at once" if not satisfactory, held, the fair interpretation was with reasonable promptness. McCormick Harvesting Mach. Co. v. Machmuller [Neb.] 95 N. W. 507.

2. Extensions of time for payment on a warranted machine are sufficient consideration for waiver of warranty by the purchaser. Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113.

3. Extending time for payment will not necessarily estop him from defending on the ground of breach of warranty in an action for the price. Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113.

4. Vodrey Pottery Co. v. Horne Co., 117 Wis. 1, 93 N. W. 823.

5. Did not waive right to damages by retaining engine and executing notes for purchase price after knowledge of imperfections. Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113. Acceptance before inspection or opportunity

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will not prevent its enforcement. A collateral warranty survives acceptance of the article under the main contract.[8] Promises to pay after receiving the machine will not waive a breach of warranty unless made with that intention,[9] nor will retention and payments after discovery of defects waive the warranty where the seller induced the retention by a promise to remedy the defects, which promise was not fulfilled.[10] A warranty is not waived by the adoption and use of the purchaser's plans,[11] but the buyer himself may impair his warranty by giving directions.[12]

An implied warranty is not waived by acceptance where the defects are latent,[13] otherwise if patent.[14] Where the defects are patent, such warranty is not waived in an executory contract by mere receipt of the goods,[15] but is waived by acceptance after reasonable opportunity to inspect[16] and test it.[17] Acceptance of part governs defects in that part only.[18]

Waiver of a condition reserving title until payment is a question of intention and hence one of fact for the trial court.[19]

Such acts as will not waive the warranty may waive the right to rescind[20] for fraudulent warranty or to enforce a warranty so called, which rests on conditions respecting dissent or disapproval,[21] or to recover back payments made after discovering breach of warranty,[22] unless made upon the express promise to remedy the same.[23]

to inspect will not waive the right to return goods for breach of warranty, especially as to latent defects. Implied and express warranty. Punteney-Mitchell Mfg. Co. v. Northwall Co. [Neb.] 91 N. W. 863. A warranty of castings against defects and as suitable for a certain use survives acceptance and payment for a reasonable time for discovery of latent defects which only use can reveal. White Mfg. Co. v. De La Vergne R. Mach. Co., 84 N. Y. Supp. 192.

6. Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113.

7. Title was to remain in seller until payment. Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113.

8. Contract to build and deliver a steamship, warranty as to speed when loaded to a certain draft held to survive acceptance. Bull v. Bath Iron Works, 75 App. Div. [N. Y.] 380.

9. Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113.

10. As a defense to a purchase-money note. Huck v. Bischoff, 84 N. Y. Supp. 173.

11. A breach of warranty of an ice plant is not excused by failure of the purchaser to provide a sufficient foundation where the seller furnished no plans as required, and, by his agent, accepted the foundation provided; nor by the fact that the purchaser prevented construction of a false ceiling where its construction was not contemplated in the contract. Creamery Package Mfg. Co. v. Benton County C. Co., 120 Iowa, 584, 95 N. W. 188.

12. An assignee of a sale of tobacco to be "prized" in a specified way was held bound by his assignor's previous directions as to how the prizing should be done; hence for that already prized he had no recovery despite an additional guaranty made by the opposite party when consenting to the transfer. Thompson v. Melton & Co., 24 Ky. L. R. 2461, 74 S. W. 192.

13. Implied warranty of yarn. Wallace v. Knoxville Woolen Mills, 25 Ky. L. R. 1445, 78 S. W. 192; Punteney-Mitchell Mfg. Co. v. Northwall Co. [Neb.] 91 N. W. 863. That a purchaser of seed oats, impliedly warranted free from mustard seed, sowed nearly all of them before discovering foreign seed among them, though he examined them carefully, will not show an acceptance waiving the warranty. Bell v. Mills, 78 App. Div. [N. Y.] 42.

14. An implied warranty against defects plainly visible does not survive acceptance. Poor workmanship, bad colors and bad assortment of sweaters. Lifshitz v. McConnell, 80 App. Div. [N. Y.] 289.

15. Merely taking potatoes from a car will not waive a warranty of quality even as to defects shown by external appearance, the purchaser having a reasonabe time for inspection. Northern Supply Co. v. Wangard, 117 Wis. 624, 94 N. W. 785.

16. Baylis v. Weibezahl, 42 Misc. [N. Y.] 178; Northern Supply Co. v. Wangard, 117 Wis. 624, 94 N. W. 785.

17. Von Dohren v. John Deere Plow Co. [Neb.] 98 N. W. 830.

18. **Defects in part accepted:** Acceptance and payment of part of goods without complaint, or rescission, and offer to return at time of delivery, waives objections as to quality, and makes the purchaser liable for the balance if equal in quality to those furnished. Weil v. Unique Elec. Device Co., 39 Misc. [N. Y.] 527.

Defect in part not accepted: That a buyer accepts the part of goods delivered which conform to the contract will not prevent his claim for damages for failure of the remainder to comply with the contract. Gilbert v. Alton, 84 N. Y. Supp. 682.

19. Albert v. Lewis Steiner Mfg. Co., 86 N. Y. Supp. 162.

20. See post, §§ 10A, 11B.

21. See ante, § 8D.

22. Nat. Computing Scale Co. v. Eaves, 116 Ga. 511. Accepting and retaining goods

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A strike is not an impossibility of performance excusing a breach of a warranty.[24]

Conditions.—Conditions may be waived by acts evincing such an intention[25] or performance in time excused by acts of the opposite party.[26] A condition subsequent must be asserted within a reasonable time after opportunity given or it is waived.[27] An agent may do so if he has authority.[28] To constitute a waiver of a condition for payment on delivery, there must be a delivery and an intent not to insist on immediate payment as a condition for passing title.[29] Breach by the seller will render the buyer's compliance with conditions unnecessary.[30] When one breach of condition is waived, the defaulting party may thereafter enforce other conditions against the waiving party.[31]

(§ 8) *F. Remedies* on the warranty and on breach of condition have been reserved for other parts of this title,[32] together with damages for breach[33] and rights of assignees and subsequent purchasers.[34]

§ 9. *Payment, tender, and price as terms of the contract.*[35]—A sale for cash on delivery is not complete until payment,[36] or effective tender[37] of the full

after knowledge of breach of warranty waives the breach so as to preclude recovery of purchase price paid. Hazen v. Wilhelmie [Neb.] 93 N. W. 920.

23. Nat. Computing Scale Co. v. Eaves, 116 Ga. 511.

24. Puget Sound I. & S. Works v. Clemmons, 32 Wash. 36, 72 Pac. 465.

25. Notice after goods were destroyed not to advertise them per condition waived it. De Witt & Co. v. Culpepper, 66 S. C. 467. Condition for return of machine, held, not waived. Zimmerman v. Robinson & Co., 118 Iowa, 117, 91 N. W. 918. That the seller acted on oral notice of defects will waive a requirement for written notice. Parsons B. C. & S. F. Co. v. Gadeke [Neb.] 95 N. W. 850.

26. Delay in delivery was caused by buyer, shipments were accepted without objection and complaint was made of too frequent shipments, held, buyer could not object that delivery was not made in time. O'Brien v. Higley [Ind.] 70 N. E. 242. Provision for return of machine within a certain time waived by promise to repair and held, such waiver carried with it the provision that continued possession for a certain time should be conclusive evidence of fulfillment of the warranty. Massillon E. & T. Co. v. Shirmer [Iowa] 98 N. W. 504. Where the vendee is induced to keep a defective machine by promises to perfect it, the seller extends the time for trial. Parsons B. C. & S. F. Co. v. Gadeke [Neb.] 95 N. W. 850.

27. Condition for inspection of railroad ties. Potter v. Holmes, 87 Minn. 477, 92 N. W. 411.

28. Where the purchaser signed a written contract of sale plainly reciting "no goods on consignment," giving the terms for time and cash and providing that alteration cannot be made by the seller's agent, he cannot plead in defense an agreement written on the back of the order, by the agent, to receive back or sell goods not sold within a certain time. Flower City Plant Food Co. v. Roberts, 81 App. Div. [N. Y.] 249.

29. Paulson v. Lyon, 26 Utah, 438, 73 Pac. 510.

Waiver by agent of condition to return in conditional warranty. McCormick Harvesting Mach. Co. v. Dodkins, 24 Ky. L. R. 2306, 73 S. W. 1129. General agent of threshing machine company is without authority to waive conditions in a conditional warranty. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 466, 92 N. W. 826. Workman of the seller sent to remedy defects cannot release purchaser from a condition in a conditional warranty. Massillon E. & T. Co. v. Schirmer [Iowa] 93 N. W. 599. Request by the seller's agent that buyer should store machine for the seller complied with, waived the buyer's obligation to return the machine under a conditional warranty. McCormick Harvesting Mach. Co. v. Dodkins, 24 Ky. L. R. 2306, 73 S. W. 1129.

30. Notice of defects or return of an engine within a reasonable time is unnecessary to recovery for fraud where the contract contemplated delivery of a new engine and by fraud an old one was imposed on the buyer. Huber Mfg. Co. v. Hunter, 99 Mo. App. 46, 72 S. W. 484.

31. The waiver of a seller's breach enables him to insist on payment before delivery to a buyer on credit since become insolvent. Pratt v. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368.

32. See post, § 10, Remedies of the seller, § 11, Remedies of the purchaser.

33. See post, § 12.

34. See post, § 13.

35. Payment as necessary to pass title, see ante, § 6c. Conditional sales, see post, § 14. **Criminal liability** for fraudulent purchase of goods on credit, see False Pretenses and Cheats, 1 Curr. Law, p. 1204.

The market price or a reasonable price is meant when none is specified. See ante, § 4.

36. Johnston v. Parrott, 92 Mo. App. 199. Where payment was a condition of transfer on sale of fruit, the buyer's unexplained refusal to pay for a part on delivery amounts to an abandonment. Town v. Jepson [Mich.] 95 N. W. 742.

37. Sufficiency of tender by purchaser of corporate stock to seller under terms of sale [Code 3061]. Hamilton v. Finnegan, 117 Iowa, 623, 91 N. W. 1039. Where the pur-

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agreed price.[38] Where the sale requires payment before delivery, the purchaser need not tender payment until the seller offers to deliver.[39] An offer by the purchaser under a credit sale to accept the goods and pay a less amount is a refusal to make payment.[40]

A sale without terms as to payment is presumed to be for cash,[41] on delivery[42] at the place of shipment.[43] Under an order for goods for future delivery on credit, the term of credit begins with delivery.[44] An unconditional promise to pay cannot be suspended by the state of the promisor's contract with others.[45] The effect of particular terms for payment is matter for construction.[46] When time has been extended, but default is made, the original agreement as to time of payment may be enforced.[47]

Payment in other goods,[48] or by way of releasing,[49] or assigning[50] a debt, or a new contract for sale of the same article, fully executed,[51] is a discharge.[52] Giving a draft or check in payment is not payment until the draft is paid,[53] unless there is undue delay in presenting it, wherefrom prejudice resulted.[54] An agreement to fix prices according to a standard,[55] or according to a varying condition, is binding, though less than cost prices are thus made,[56] or it enables the

chaser made no demand for performance or tender of purchase money until after the term of an executory sale, it was not completed and he could not recover the value of the goods. Robinson v. Thoma, 30 Wash. 129, 70 Pac. 240. Deposit of the balance due on a sale by the purchaser in a bank to the credit of the seller does not show a tender of the price. Id.

38. Where an Australian shipper drew a draft for less than the agreed price, under existing custom duties, for coal shipped to San Francisco, and advised the purchaser to that effect, leaving him to remit any reduction in duty, the draft was not in settlement for the cargo. Withers v. Moore, 140 Cal. 591, 74 Pac. 159.

39. Bussard v. Hibler, 42 Or. 500, 71 Pac. 642.

40, 41. Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368.

42. Where the contract is silent as to time of payment, it will be presumed that it was to be made on delivery so that whether title had passed at delivery, in an action for the price, was immaterial. Armsby Co. v. Blum, 137 Cal. 552, 70 Pac. 669.

43. Where a contract for cash sale provides for shipping instructions by buyer "when requested by seller—F. O. B." a certain place, payment is due on delivery on board cars at such place, though the residence of the buyer is stated to be elsewhere. Samuel M. Lawder & Sons Co. v. Albert Mackie Grocer Co., 97 Md. 1.

44. Grabfelder v. Vosburgh, 90 App. Div. [N. Y.] 307.

45. Where an owner agreed to pay for materials for a house before delivery to the contractor, the materialmen could recover therefor on account for goods sold and delivered regardless of the owner's contract with the contractor. Williamson v. Smith & Co. [Tex. Civ. App.] 79 S. W. 51.

46. Illustrations: Sale for cash. Beacon Falls Rubber Shoe Co. v. Burns, 79 App. Div. [N. Y.] 639. A contract for sale of goods, "Terms cash, less" a certain per cent. is an agreement for a cash sale at a certain price and not for a credit sale subject to discount for cash. Samuel M. Lawder & Sons Co. v. Albert Mackie Grocer Co., 97 Md. 1. Purchase of fruit trees to be paid for by their produce, time when interest begins to run. Stark v. Anderson [Mo. App.] 78 S. W. 340. Payment out of daily "receipts" as meaning gross receipts. Creamery Package Mfg. Co. v. Benton County C. Co., 120 Iowa, 584, 95 N. W. 188. A condition that goods bought for resale are "to be fully settled for within ten days" does not necessarily mean paid for, so that evidence of statements to the seller that goods sold by the purchaser would be paid for and the remainder accounted for was inadmissible. Toombs v. Stockwell, 131 Mich. 633, 92 N. W. 288. Under an agreement to sell an evaporating apparatus, held, that the purchaser was required to pay for it in one month unless he notified the seller that it did not accomplish the results guarantied. Pa. Ironworks Co. v. Hygeian I. & C. S. Co. [Mass.] 70 N. E. 427.

47. Equitable Mfg. Co. v. Biggers [Ga.] 45 S. E. 962.

48. Authority of agent to take payment for goods in other goods as defense in action for price by principal. Block v. Dundon, 83 App. Div. [N. Y.] 539.

49. It is a good defense that the seller agreed that part payment should consist of a debt of his wife to the buyer. Thieme v. Henderson, 82 App. Div. [N. Y.] 566.

50. Offer to pay by delivery of an account owed by the seller to another, which the seller refused, is not payment so as to pass title on a sale for cash on delivery. Drake v. Scott, 136 Ala. 261.

51. Poland Paper Co. v. Foote & Davies Co., 118 Ga. 458.

52. See, also, Payment and Tender, 2 Curr. Law, p. 1158.

53. "Cash sale." Flannery v. Harley, 117 Ga. 483.

54. Fritz v. Kennedy, 119 Iowa, 628, 93 N. W. 603.

55. "On basis of pure" used in a written sale of a growing crop of flax means the seed is to be clean. Glass v. Blazer, 91 Mo. App. 564.

56. That the price fixed by the competitive company was less than cost of manu-

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seller to profit by working up materials on hand and selling at an advance.[57] When the mode of determining a varying price is fixed no notice of variations is required.[58] Prices to be fixed by those of competitors will be such as they quote at the time of sale or payment.[59] The amount paid and that payable on several orders may be adjusted to equalize the price.[60]

§ 10. *Remedies of seller.*[61] *A. Rescission and retaking of goods or action for conversion. Rescission.*[62]—Failure of the purchaser to pay for goods,[63] or fraudulent statements as to his solvency,[64] though the buyer did not know them to be

facture is no defense to a demand for a reduction of the price on account of rebates made by such company. Matthews Glass Co. v. Burk [Ind.] 70 N. E. 371.

57. Vivion Mfg. Co. v. Robertson, 176 Mo. 219, 75 S. W. 644.

58. On sale of manufactured goods providing for increase or decrease in price according to price of materials from which they were made, and settlement once a year, the seller need not notify the buyer of an increase in price under such terms. Vivion Mfg. Co. v. Robertson, 176 Mo. 219, 75 S. W. 644.

59. Contract to sell output of glass at a discount five per cent lower than the lowest price made by a competitor. Payment to be made on receipt of glass. Held, the price was determined by the prices of the competitive company at time of receipt. Matthews Glass Co. v. Burk [Ind.] 70 N. E. 371.

Evidence: Circular letters by the competitive company to its customers informing them of its prices are admissible to show the price. Id.

60. An offer of an entire quantity at a price was held to inure to one who bought all in two orders; hence his price was equalized by a rebate on price paid for the previous lot he had bought. Bristol v. Mente, 79 App. Div. [N. Y.] 67.

61. Specific enforcement of contracts, see Specific Performance, 2 Curr. Law.

62. Rescission of contracts in general, see Contracts, 1 Curr. Law, p. 679. Particular grounds for rescission are specifically treated in such topics as Duress, 1 Curr. Law, p. 962; Fraud and Undue Influence, 2 Curr. Law, p. 104; Mistake and Accident, 2 Curr. Law, p. 903.

63. Where under a continuing contract for a year, shipments and payments to be made at stipulated intervals, the purchaser failed to pay for shipments as required, the seller could rescind the contract. Eastern Forge Co. v. Corbin, 182 Mass. 590, 66 N. E. 419. Where nearly all the goods were delivered and the buyer had complied with a custom as to payment on such sales, subsequent violation by him as to such custom will entitle the seller to rescind as to the balance and recover for goods delivered. Minaker v. Cal. Canneries Co., 138 Cal. 239, 71 Pac. 110. Repeated failure of the purchaser to make advance payments at regular intervals as required by the contract, where such payments are necessary to enable the seller to perform a continuing contract to furnish materials, entitles the latter to rescind. St. Regis Paper Co. v. Santa Clara Lumber Co., 85 N. Y. Supp. 1034. Where a buyer left the state without notice to the seller and without leaving funds at a bank where drafts in payment were payable under the contract, the seller could treat the sale as rescinded without notice; nor was he required to allow the drafts to remain in bank three days for acceptance before treating the contract as rescinded by the buyer. Town v. Jepson [Mich.] 95 N. W. 742. If a purchaser fails to pay the agreed price for part of coal bought, which was delivered, the seller may rescind and sue for the contract price of that delivered. Purcell Co. v. Sage, 200 Ill. 342, 65 N. E. 723. A promise by an insolvent purchaser to pay cash on delivery and a breach of such promise does not entitle the seller to rescind; there must be conduct reasonably involving a false representation. In re Lewis, 125 Fed. 143.

64. Fraudulent statements of buyer as ground of rescission by seller, the parties being in confidential relations. Sullivan v. Pierce, 125 Fed. 104. Where a sale was induced by fraudulent representations as to the buyer's solvency, the seller, on learning the fraud, may rescind and retake any goods he may find in the buyer's possession and sue for the value of those not found; but he cannot sue for all the goods under the contract and at the same time file a claim for a return of a part of the goods by the bankrupt buyer's trustee. In re Hildebrant, 120 Fed. 992. Failure to answer a question as to debts owing "to relations," in a financial statement as a basis for credit, was a concealment equivalent to a fraudulent representation, and the creditor could reclaim the goods. In re Patterson & Co., 125 Fed. 562. The confidential relation existing between partners may be presumed to continue after they have formed a corporation which took over the firm property, so as to induce one partner who sold his stock to the other to rely on statements of the other as to its value in absence of other evidence. Sullivan v. Pierce, 125 Fed. 104. Shipment of goods three months after the buyer made a financial statement misrepresenting his solvency, without further inquiries or notice of change, is not negligence debarring the seller from rescission. In re Patterson & Co., 125 Fed. 562. Whether the lapse of time since statements as to solvency of a buyer were made to a commercial agency is such that they should not be relied upon depends upon the particular circumstances of each case. George D. Mashburn & Co. v. Dannenberg Co., 117 Ga. 567.

Admissibility of evidence under pleadings in replevin by seller because of false statements of purchaser as to his solvency. Kuh, Nathan & Fisher Co. v. Glucklick, 120 Iowa, 504, 94 N. W. 1105. In a suit to rescind a sale for fraudulent statement as to credit, tax returns of the vendee during the period covered by the representations may be shown in evidence. George D. Mashburn Co. v.

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false,[65] if relied upon by the seller[66] will warrant his rescission of the contract; but fraud must be clearly shown,[67] and must relate to material matters inducing credit.[68] That the purchaser is insolvent at time of sale will not alone warrant rescission by the seller,[69] nor does receipt of an unfavorable report of the purchaser's standing from a commercial agency.[70] Refusal to receive the goods will not warrant rescission until the time for delivery is past, unless the refusal is absolute,[71] and failure of the purchaser to allow true weight of goods already delivered is not a repudiation of the contract entitling the seller to rescind.[72] Insistence by the buyer on demands variant from the contract justifies rescission by the seller.[73]

The seller cannot rescind as to part of an indivisible sale,[74] even as to goods included by mistake of the seller but accepted by the buyer without knowledge of the mistake.[75] Conversely an entire lot of goods cannot be rejected because a separable part falls below the warranted condition.[76]

Dannenberg Co., 117 Ga. 567. Where the seller sues in replevin because of fraudulent statements of the purchaser as to his solvency, the latter's petition in bankruptcy with schedules attached is admissible against the trustee who has been substituted as defendant, though the purchaser was not in possession of the property when the declarations were made. The purchaser's cash book is admissible. Proof of the fraudulent representations is a part of plaintiff's case in chief. Kuh, Nathan & Fisher Co. v. Glucklick, 120 Iowa, 504, 94 N. W. 1105. A representative of a commercial agency may testify to statements made to him by a buyer as to his solvency, in replevin by one who sold him goods, to recover them because of false representations as to solvency; judgment of record against him at time of the contract may be proven. Cowen v. Bloomberg [N. J. Law] 55 Atl. 36. In replevin of goods claimed to have been bought by fraud, the seller may show a general scheme by the purchaser to buy goods on credit without intention to pay for them. Johnson v. Groff, 22 Pa. Super. Ct. 85. Evidence of admissions by the purchaser as hearsay in replevin by the seller for alleged fraudulent statements of the purchaser as to his solvency. Bentley v. Woolson Spice Co. [Neb.] 95 N. W. 803.

Instructions in replevin of goods claimed to have been bought by fraudulent statements as to credit, as without the issues. Roberts, Johnson & Rand Shoe Co. v. Coulson, 96 Mo. App. 698, 70 S. W. 931.

65. George D. Mashburn & Co. v. Dannenberg Co., 117 Ga. 567.

66. Sullivan v. Pierce [C. C. A.] 125 Fed. 104.

67. **Sufficiency of evidence:** Where the seller on a sale represented that he would deliver only C. O. D. and testifies that he had limited the buyer to a certain credit, the claim of fraudulent representations in replevin to recover the goods is not sustained. Leavitt v. Rosenthal, 84 N. Y. Supp. 530. In action to recover property sold on credit under false representations as to the purchaser's solvency given a commercial agency, to show that the agency had no knowledge of unsatisfied judgments against the purchaser when the representations were made. Pier Bros. v. Doheny, 86 N. Y. Supp. 971.

Evidence in replevin of goods attached by the buyer's creditor as requiring submission to the jury of the question whether the purchaser, who was insolvent, never intended to pay for the goods. Stein v. Hill [Mo. App.] 71 S. W. 1107. That the purchaser failed in business more than three months after making a statement to a commercial agency showing solvency does not show falsity of the statement, or fraud in making it, so as to warrant rescission by the seller and recovery of goods in replevin. Bentley v. Woolson Spice Co. [Neb.] 95 N. W. 803.

68. To rescind a sale for fraud the seller must show that he relied on the fraudulent statements of the vendee and that those on which he did rely were of such a character as could be acted upon. George D. Mashburn & Co. v. Dannenberg Co., 117 Ga. 567. The vendor cannot rescind and recover possession for fraud, unless on proof of fraudulent representations respecting matters material to the contract and on which he relied in selling and extending credit. Moyer v. Richardson Drug Co. [Neb.] 97 N. W. 244.

69. Johnson v. Groff, 22 Pa. Super. Ct. 85.

70. Actual insolvency is necessary. Kavanaugh Mfg. Co. v. Rosen [Mich.] 92 N. W. 788.

71. Where the time for final delivery had not arrived, the fact that the purchaser had merely directed that no deliveries be made while intimating that within the period the goods would be received, was no anticipatory breach warranting rescission and suit for damages. Wells v. Hartford Manilla Co. [Conn.] 55 Atl. 599.

72. Hartnett v. Baker [Del.] 56 Atl. 672.

73. Sufficiency of evidence as to such demands and threats. Cooney v. McKinney, 25 Utah, 329, 71 Pac. 485. Refusal of a buyer to proceed under a contract unless the seller gave a guaranty against a repetition of alleged breaches which had not in fact occurred justifies rescission by the seller. Vivion Mfg. Co. v. Robertson, 176 Mo. 219, 75 S. W. 644.

74. Where the seller, suing in replevin because of the buyer's fraud, rescinded but a part of the sale, and evidence as to the separable character of the sale was conflicting, an instruction for defendants if the sale was found indivisible was proper. Hochberger v. Baum, 85 N. Y. Supp. 385.

75. Newson v. Brazell, 118 Ga. 547.

76. Where perishable goods are shipped a long distance, that a separate part of them

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If the purchaser fails to comply with an alteration extending time for payment the seller may rely on the original contract.[77]

Where both parties show no intention to insist on strict performance as to time neither can rescind without notice to the other, and reasonable chance to perform.[78]

An estoppel to assert a rescission arises against one who allows the other to perform after negotiations to reopen a rescinded sale.[79]

Recovery of chattel; replevin.—Where title never passed,[80] because payment was not made according to the contract,[81] or in case of fraud,[82] the seller may replevy the goods. Where the seller does not seek to rescind, but relies on a condition for return of the property on default in payments stipulated, he may bring claim and delivery without offering to return payments made.[83] Alteration in the purchase-money note is no defense to an action to recover a chattel, where made without knowledge or consent of the seller.[84]

(§ 10) *B. Stoppage in transit.*—On sale of property for cash the seller may stop it in transit before delivery, to secure the price.[85] The right of stoppage in transit ceases when the goods have reached their destination, been delivered to the vendee, and freight charges paid, regardless of the undisclosed mental intentions or reservations of the vendee in receiving them.[86]

(§ 10) *C. Lien.*—Retention of possession is essential to a vendor's lien.[87] A vendor has no lien against the bona fide purchaser of the vendee.[88] Reservation of title in a chattel sold as security for the price is a chattel mortgage and does not give a vendor's lien.[89] On a sale of trees to be paid for out of the fruits produced no lien attaches to the land.[90]

A vendor's privilege (recognized in Louisiana) on a movable need not be recorded.[91] It is extinguished by incorporation of the movable into immovable property.[92] It does not apply where an order for goods is taken in one state and approved and filled by segregation and shipment in another which does not recognize it,[93] but does when the sale is consummated by segregation from a stock within the same state.[94]

is damaged in transit, is not such a noncompliance with the contract as will justify refusal to receive the remainder in good condition. McHenry v. Bulifant, 207 Pa. 15.

77. Equitable Mfg. Co. v. Biggers [Ga.] 45 S. E. 962.

78. Price v. Beach, 20 Pa. Super. Ct. 291.

79. Failure to respond to a letter showing that commencement of performance estopped him to claim cancellation. Krantz Mfg. Co. v. Gould S. B. Co., 83 App. Div. [N. Y.] 133.

80. Instructions as to change of ownership or transfer of title in action by vendor to recover goods from third person. Clark v. Shannon & M. Co., 117 Iowa, 645, 91 N. W. 923. Where delivery of goods or passing of title depends on the intention of the parties, the intention is for the jury. Purchase of stock of goods where vendee's agent took possession, but the vendor retained the keys to the store. Id.

81. Pub. St. 1901, c. 241, § 2. Hart v. Boston & M. R. R. [N. H.] 56 Atl. 920.

82. Pekin Plow Co. v. Wilson [Neb.] 92 N. W. 176.

83. Dodge v. Carter, 140 Cal. 663, 74 Pac. 292.

84. Forbes v. Taylor [Ala.] 35 So. 855.

85. If a purchaser under a credit sale becomes insolvent while the goods are in transit, the seller may stop them and demand payment before delivery. Pratt v. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368. Where a consignor holds a bill of lading to secure the price, he is entitled to the property in hands of the carrier on presentation of the bill of lading. Williams & Co. v. Dotterer, 111 La. 822.

86. Smith v. Gail [Fla.] 33 So. 527.

87. Reservation of title in a chattel sold as security for the price is a chattel mortgage and no vendor's lien arises. Parlin & Orendorff Co. v. Davis' Estate [Tex. Civ. App.] 74 S. W. 951.

88. Sand. & H. Dig. §§ 4727, 4728. Roach v. Johnson [Ark.] 74 S. W. 299.

89. Parlin & Orendorff Co. v. Davis' Estate [Tex. Civ. App.] 74 S. W. 951.

90. See Vendors and Purchasers; Fixtures, 3 Curr. Law; Liens, 4 Curr. Law.

91. Swoop v. St. Martin, 110 La. 237.

92. Repair of machinery in a foundry, by taking out old parts and putting in new, incorporates the latter into the immovable property. Swoop v. St. Martin, 110 La. 237.

93. Order taken in Louisiana, and approved and filled in Illinois. Vendor's privilege did not exist in Illinois. Succession of Welsh, 111 La. 801.

Conflict of laws: Where an order for goods is taken by a salesman in Louisiana

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(§ 10) *D. Resale.*—The right to resell is not lost by refusal to allow inspection where the purchaser is standing on his refusal to accept and pay for the goods.[95] Where the vendee refuses to accept and the vendor sells them on the former's account, he cannot buy additional goods, without authority, to induce sales of those on hand and charge the vendee with loss on the whole.[96] Tender of the full price at the proper place only, will prevent resale after default in acceptance and payment.[97] The seller should give notice of his intention to resell and hold the buyer for his loss.[98] Resale may be made at auction or in any manner chosen to produce full market value; the purchaser need not be given notice of the time and place of sale though he should be given notice of the intention to sell.[99] It must be for cash, hence a larger offer on credit may be rejected by the seller without affecting validity of the sale,[1] but he may be chargeable if he rejects a cash offer.[2] The seller must be reasonably diligent in reselling.[3]

The statutory sale of a chattel given over to the buyer while sale remains conditional is pertinent to a later section of this article.[4]

(§ 10) *E. Action for price or on quantum valebat.*[5] *Right of action and conditions precedent.*—A right of action accrues when the price becomes due,[6] or when the purchaser refuses to pay after a reasonable time,[7] or refuses an inspection necessary to complete a sale,[8] or a measurement to fix the price,[9] and is renewed by a part payment though claimed to be in full.[10]

A cause of action to recover the reasonable value of personalty may be joined with an action to recover on a sale of the same property, to be paid for in capital stock of the purchaser corporation.[11] Where goods are sold at an agreed price,

subject to his employer's approval without the state, filling and shipment of the order makes the sale one of the vendor's domicile so that no vendor's privilege exists as to the goods unless by the law of the latter state; otherwise where the order is filled with goods from a stock within Louisiana. Succession of Welsh, 111 La. 801.

See, also, Liens, 2 Curr. Law, p. 736.

94. Order taken and filled in Louisiana. Succession of Welsh, 111 La. 801.

95. Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368.

96. Brunswick Grocery Co. v. Lamar, 116 Ga. 1.

97. Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368.

98. American Hide & Leather Co. v. Chalkley & Co. [Va.] 44 S. E. 705.

99, 1. Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368.

2. After refusal of the purchaser to receive, refusal by the seller of a bona fide offer of a higher price than was finally obtained on re-sale is not due diligence. Gehl v. Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26.

3. After breach by the buyer's refusal to receive, the seller is bound to exercise only reasonable diligence in selling the goods, and may recover the difference between the price received and the contract price. Baltimore & L. R. Co. v. Steel R. S. Co. [C. C. A.] 123 Fed. 655. Where delivery of grass seed was to be made on or before a certain date at the buyer's option, a wait of 10 days on a falling market after the date and until the season was nearly over before making a re-sale for failure to receive, was not due diligence. Gehl v. Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26. Re-sale by the seller after repudiation of the sale by the buyer in a month and a half from cancellation was in reasonable time, where the seller hoped to induce the buyer to complete the contract and waited for more advantageous market. Nelson v. Hirsch & Sons' Iron & Rail Co., 102 Mo. App. 498, 77 S. W. 590.

4. See post, § 14.

5. Recoupment and counterclaim by purchaser, see post, § 11D.

6. Where a sale provided that a note should be given in part payment, payable on a certain day, and that, on failure to give the note, the order should stand as such note, an action for the part of the price covered by such provision could not be brought until after the date on which such note would have matured if given. Reeves & Co. v. Lamm Bros., 120 Iowa, 283, 94 N. W. 839.

7. Sutton v. Clarke, 42 Or. 525, 71 Pac. 794.

8. Railroad ties. Potter v. Holmes, 87 Minn. 477, 92 N. W. 411.

9. Limitations begin to run against an action for price of goods sold, on agreement to pay on ascertainment of quantity at such time as the parties may determine, when after a reasonable time for measurement the purchaser repudiates the contract. Stribling v. Moore [Tex. Civ. App.] 76 S. W. 593.

10. An action on account for lumber sold and delivered is not barred where partial payment, claimed by the debtor to be in full payment, was made within six years of bringing the suit. Florence & C. C. R. Co. v. Tennant [Colo.] 75 Pac. 410.

11. Badger Tel. Co. v. Wolf River T. Co. [Wis.] 97 N. W. 907.

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recovery may be had on the common counts.[12] That a contract for sale of hay to the United States was invalid because not in writing and properly executed will not entitle the contractor to sue on a quantum valebat, after delivery and payment of the contract price, on the ground that the market value had risen after the contract was made.[13]

Action may be brought to reform the contract of sale and to recover a money judgment on it as reformed.[14]

The action must be brought by[15] and against[16] the real party in interest. A seller cannot sue a third person whom the purchaser paid on claim of title but must sue the purchaser, the latter being bound to show title in the third person.[17]

The seller cannot recover the price unless he has delivered or tendered the goods,[18] unless that has become needless,[19] and he cannot recover the price if he has assumed ownership.[20]

Defenses and election between them.—No defense can be based on the seller's default if the buyer brought it about,[21] or failed to comply with the conditions of the warranty.[22] If sales are severable breach of one does not defeat recovery on the others.[23] It is a good defense that payment was to be in goods, if defendant is willing to perform as to such payment.[24]

In an action on a written sale without warranty a collateral agreement of warranty cannot be shown in defense, but at most, only by way of counterclaim.[25] If defendant retains the goods he cannot plead in bar the contract and its breach.[26]

12. Rules of court, p. 42, § 131. Vanderbeek v. Francis, 75 Conn. 467.

13. U. S. Rev. St. § 3744. St. Louis H. & G. Co. v. U. S., 191 U. S. 159.

14. Complaint held good. Palmer S. & I. Co. v. Heat, L. & P. Co., 160 Ind. 232, 66 N. E. 690.

15. Where plaintiff in an action for price of an elevator contended that, before any work was done under a written contract between defendant and another, it was orally agreed between plaintiff and defendant that the former should do the work, being substituted for the contractor, the assignment of the contract to plaintiff by the original contractor was not necessary to plaintiff's right to sue. Plunger Elevator Co. v. Day, 184 Mass. 130, 68 N. E. 16.

16. An action on a written sale is properly brought in the name of the real seller where by a clerical error the name of another was written in as joint seller. Ware v. Long, 24 Ky. L. R. 696, 69 S. W. 797.

17. Martin v. Chouteau L. & L. Co. [Mo. App.] 78 S. W. 673.

18. A seller of corporate stock cannot recover the purchase price, on refusal of the purchaser to accept, where he brings into court only one of a larger number of shares transferable on the corporate books only on surrender of the certificate. Hamilton v. Finnegan, 117 Iowa, 623, 91 N. W. 1039. Where the deliveries under a contract for daily delivery of oysters amounted to only a small part of the quantity called for by the contract during the part of the period before rescission by the purchaser, the seller could not recover damages for refusal to continue the contract. La Vallette v. Booth, 131 N. C. 36.

19. Where a sale of stock requires that if the purchaser has not made a tender of a certain amount before a certain date he shall be obliged to accept the stock at such amount, tender of the stock was unnecessary before suing for the price. Prest v. Cole, 183 Mass. 283, 67 N. E. 246. Delay in delivery, induced partly by acts of the purchaser. Letter by buyer to seller demanding goods of a quality not specified in the contract. Nelson v. Hirsch & Sons' I. & R. Co., 102 Mo. App. 498, 77 S. W. 590. Where the seller elects to hold the goods for the buyer and sue for the price no tender is necessary. Cowan v. De Hart, 84 N. Y. Supp. 576.

20. Where the seller of corporate stock, after tender to the purchaser, assumes to be the owner, directs a sale, and gives a proxy to vote it, he cannot recover the price as against the purchaser but only the difference between the contract and market prices as damages. Hamilton v. Finnegan, 117 Iowa, 623, 91 N. W. 1039.

21. Performance of which depended on unperformed acts of the purchaser. Crocker v. Muller, 40 Misc. [N. Y.] 685.

22. Seller having contracted to keep machine in repair if returned to him, it must be returned in order to recover for breach of warranty in absence of a showing that the articles were not reasonably suited for the use intended, thus violating the implied warranty. Nat. Computing Scale Co. v. Eaves, 116 Ga. 511.

23. A sale of three cars of produce, each of which represented a specified class of cars the buyer to furnish certain cars, was severable so that the seller's refusal to accept and load one of the cars tendered would not prevent his recovery of a balance due on cars of the other classes. Oliver v. Or. Sugar Co., 42 Or. 276, 70 Pac. 902.

24. Brainerd v. Davis, 21 Pa. Super. Ct. 599.

25. Atwater v. Orford Copper Co., 85 N. Y. Supp. 426.

26. Dalton v. Bunn, 137 Ala. 175.

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Defendant cannot be required to elect whether he will rely on failure of consideration or on breach of warranty.[27]

The complaint in an action for the price of goods must allege the contract of sale in terms or according to its legal effect,[28] indebtedness, or nonpayment,[29] a delivery or proffer of delivery,[30] but defects in this regard may be cured by an answer putting these matters in issue.[31] The prayer must follow the declaration.[32] A statement in an action for a balance for goods sold and delivered, not purporting to be brought upon a book account, is sufficient where it contains averments as to debit and credit accounts and balance due.[33] The usual rules apply as to amendments changing the cause of action,[34] and as to surplusage.[35]

Answer, counterclaim and reply.—All the facts[36] essential to make out the defense must be alleged, e. g., that a warranty was made[37] and broken,[38] that a rescission was made,[39] and was entire,[40] that the fraud alleged induced defendant to accept,[41] and that offer to return because of fraud was seasonably made by a buyer claiming damages for it.[42] One claiming as a partial defense that he was to pay two-thirds of the market price at the time of delivery must allege what the then market price was.[43] Answer setting up a breach of warranty states a good defense,[44] and stating the warranty and its failure is sufficient both in an answer,[45] and in an affidavit of defense.[46] Affidavit of defense in an action by

27. Sale of diseased sheep. Mallory Comm. Co. v. Elwood, 120 Iowa, 632, 95 N. W. 176.

28. A petition on a sale "f. o. b. cars, St. Louis," is not fatally defective for failure to allege meaning of the phrase. Such phrase may be stricken out or disregarded as surplusage. D. R. Vivion Mfg. Co. v. Robertson [Mo.] 75 S. W. 644.

29. Donald v. Gearhardt, 42 Misc. [N. Y.] 269.

30. Austin Mfg. Co. v. Colfax County [Neb.] 93 N. W. 145. A petition alleging that plaintiff shipped the goods, which were to be paid for when delivered, that plaintiff fully performed but that the defendant wholly made default, sufficiently alleges delivery to the purchaser. Jaeggli v. Phears, 30 Tex. Civ. App. 212, 70 S. W. 330.

31. Petition failed to show an agreement by defendant to pay or her request for delivery. Ware v. Long, 24 Ky. L. R. 696, 69 S. W. 797.

32. Declaration for breach and prayer for "debt" and such other "relief at law" etc., is not demurrable. The general prayer covers damages. Jaeggli v. Phears, 30 Tex. Civ. App. 212, 70 S. W. 330.

33. Deacon v. Uhlman, 21 Pa. Super. Ct. 381.

34. In an action for the price of goods an amendment alleging that defendant agreed to give other goods in return states a new cause of action and is not allowable. Chapman v. Americus Oil Co., 117 Ga. 881.

35. Allegation that defendant agreed to release plaintiff from all claims, present and future, arising out of the transaction, may be rejected as surplusage. Such agreement being executory in its nature. Doyle v. Shuttleworth, 41 Misc. [N. Y.] 42.

36. An allegation that goods were impliedly warranted is a conclusion of law. Fish impliedly warranted to be properly packed. Troy Grocery Co. v. Potter [Ala.] 36 So. 12.

37, 38. Where the warranty relied on consists of statements in circulars of the seller, the purchaser must show the statements in the circulars and that the chattel did not comply with them to sustain a defense of breach of warranty. Monumental Bronze Co. v. Doty, 92 Mo. App. 5.

39. Allegations in an answer that the purchaser notified the seller that the balance of the goods was in his hands subject to the latter's order, and offering to return the same, fails to show a rescission of the contract. Troy Grocery Co. v. Potter [Ala.] 36 So. 12. A return of or offer to return the goods must be alleged. Sloan Comm. Co. v. Henry A. Fry & Co. [Neb.] 95 N. W. 862. An answer in an action for the price of sheep alleging that they were diseased, and that on discovery of the disease some time after delivery, the buyer notified the seller that he could not use them and held them subject to the latter's order, does not allege a rescission and offer to return. Steiger v. Fronhofer, 43 Or. 178, 72 Pac. 693.

40. An affidavit of defense on the ground of breach of the contract by the seller is insufficient unless it alleges facts showing the breach, and an allegation of return of the goods must show that all were returned. Arons v. Kopp, 21 Pa. Super. Ct. 123.

41. A plea alleging that the seller fraudulently shipped goods of poorer quality, for which the purchaser paid must show that payment was induced by fraud or misrepresentation. Meyer Bros. Drug Co. v. Puckett [Ala.] 35 So. 1019.

42. A plea setting up fraud and asking damages therefor in an action for the price of personalty must allege an offer to return the property within a reasonable time after discovery of the fraud. Bessemer Ice Delivery Co. v. Brannen, 138 Ala. 157.

43. In action for price of yarn. Fish v. Barr, 22 Pa. Super. Ct. 131.

44. Action for price of machine. Warder, etc., Co. v. Myers [Neb.] 96 N. W. 992.

45. Action for price of mining outfit. Maugh v. Hornbeck, 98 Mo. App. 389, 72 S. W. 153.

46. Affidavit of defense set up contract of

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trustee in bankruptcy to recover for goods sold and delivered by bankrupt, showing terms for payment in other goods and defendant's willingness to perform, is sufficient.[47] An answer averring a warranty, a breach thereof, and a request by defendant that the seller remove the chattel, is sufficient to show total failure of consideration.[48]

A denial, on information and belief, of purchasing goods is insufficient,[49] as is a denial of indebtedness in any sum.[50] A mere denial of a promise to pay is not a defense to an action as in assumpsit for goods sold and delivered.[51] Allegations recognizing the contract are inconsistent with a general denial,[52] but if the contract be admitted separate breach of warranty may be set up with a denial of all other allegations.[53] Where a plea setting up fraud in a sale does not allege that the chattel was sold for a particular purpose, averments as to its value for such purpose will be stricken out.[54] Evidence cannot be given to show that a chattel was worthless for the purpose for which it was bought where there is no allegation of any purpose for which it was sold.[55] In order to be available estoppel to urge fraud must be pleaded.[56]

Where both parties gave evidence on the question whether defendant purchased as agent for another, he could amend his answer to plead agency.[57]

The buyer's insolvency, subsequent to passing of title and transfer, is not to be counterclaimed against his tranferree of an action for breach.[58] Where a sale is for all of a certain article then unsold, approximating a certain amount, defendant cannot set up as a counterclaim damages because it did not reach that amount.[59] A counterclaim setting up payments made under a mistake in the quality of the subject-matter is demurrable, where there is no showing that the payments were induced by misrepresentation or fraud.[60] A plea of breach of warranty must allege damages, in order to recoup or set them off.[61]

A new ground of recovery should not be injected into the action by reply.[62]

Proof of the essential elements of plaintiff's cause of action may be rendered unnecessary by admissions,[63] or by failure to controvert the allegations.[64] Ac-

sale and its breach. Kenworthy v. Hirst, 124 Fed. 995. That goods did not come up to sample and were immediately rejected is a good defense. Affidavit of defense held sufficient. Simpson v. Karr, 22 Pa. Super. Ct. 8.

47. Brainerd v. Davis, 21 Pa. Super. Ct. 599.

48. As against demurrer. Smith v. Borden, 160 Ind. 223, 66 N. E. 681.

49. Raphael Weill & Co. v. Crittenden, 139 Cal. 488, 73 Pac. 238.

50. Being a conclusion of law. Guenther v. American S. H. Co., 25 Ky. L. R. 795, 76 S. W. 419.

51. Where allegations of the petition as to sale and delivery at defendant's special request and at prices named are not denied. Guenther v. American Steel Hoop Co., 25 Ky. L. R. 795, 76 S. W. 419.

52. Averments in the answer setting up the contract as understood by defendant are properly stricken out where there is a general denial. Royer Wheel Co. v. Dunbar, 25 Ky. L. R. 746, 76 S. W. 366.

53. Where the answer denies everything but the making of the contract defendant may plead separately that the sale was by sample and the goods did not comply with the sample. Such facts are not provable under the general denial. Weil v. Unique Elec. Device Co., 39 Misc. [N. Y.] 527.

54, 55. Bessemer Ice Delivery Co. v. Brannen, 138 Ala. 157.

56. Pratt v. Hawes, 118 Wis. 603, 95 N. W. 965.

57. Cole v. Laird, 121 Iowa, 146, 96 N. W. 744.

58. In an action by an assignee of the purchaser's rights to recover for breach by the seller, a counterclaim arising out of the insolvency of the purchaser is not allowable, where assignment was made before insolvency, and title had passed to the assignor before assignment. Bayne v. Hard, 77 App. Div. [N. Y.] 251.

59. Action for price of ice. Tunkhannock Ice Co. v. Franklin, 22 Pa. Super. Ct. 147.

60. Meyer Bros. Drug Co. v. Puckett [Ala.] 35 So. 1019.

61. Bessemer Ice Delivery Co. v. Brannen, 138 Ala. 157.

62. Where the warranty of property sold is indorsed as a condition upon the purchase-money notes, a petition in a suit thereon setting forth the condition without objection, explanation, or request for reformation, matter in the reply impeaching the original consideration for such condition may be stricken out, where it states that the indorsement was a condition for signing. Snyder v. Johnson [Neb.] 95 N. W. 692.

63. Admission that a certain amount is due except as to effects or settlements renders proof of delivery unnecessary. Danziger v. Pittsfield Shoe Co., 204 Ill. 145, 68 N. E. 534.

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ceptance by the buyer need not be shown it being sufficient to show delivery by the seller,[65] or acts vesting the title in the purchaser,[66] or that would have vested the title in him if he had accepted,[67] however, an exhibit in a complaint giving the date, parties, amount, brand, and price of goods sold is sufficient to admit evidence.[68] The seller cannot recover on proof of delivery of less than the contract amount without alleging and proving an excuse for nondelivery of the remainder.[69] Under a general allegation of sale by a private corporation proof may be made of a sale by its predecessor.[70]

It suffices to prove breach of warranty without showing the particular defect.[71] Defects of which defendant has not previously complained cannot be shown unless they were latent when action began.[72] Defendant cannot recover for a partial breach of warranty without showing the items of damage.[73] Testimony as to the soundness of an animal is inadmissible where there is no allegation of a warranty of soundness.[74] Defendant relying on false representations of the seller as to quality, must show their falsity, that the seller knew them to be false and intended the buyer to act thereon, and his own ignorance of their falsity.[75] Under the plea of failure of consideration it may be shown that the article was worthless.[76] On an issue of total failure of consideration the value of the chattel must be determined with reference to its adaptability and fitness for the purpose intended.[77] Under an allegation of entire failure of consideration a party is not entitled to prove partial failure,[78] but under an allegation that a machine was entirely worthless, one may show what damages he suffered, though the machine had some value.[79] The fact that a contract of sale is incomplete does not allow its admission in evidence, where proving its incomplete parts would not remove a variance from that pleaded.[80]

Under the general denial prematurity may be proved,[81] and in assumpsit, defendant may show that plaintiff by his own act prevented defendant from performing his part of the contract,[82] and where time is of the essence of the contract it may be shown that the contract was canceled after time for delivery but before shipment.[83]

Variance.—The fact that a sale is denominated a loan in plaintiff's testimony does not constitute a variance,[84] nor does failure to prove an alleged contract, which has been superseded.[85] Sale and a promise to pay is well proved by facts

64. Failure of defendant to controvert an allegation that he promised payment admits that the goods were of the quality required, his acceptance, and his liability for the remainder of the price. Wheeler C. & E. Co. v. Packard Co., 83 App. Div. [N. Y.] 288.

65, 66, 67. Rastetter v. Reynolds, 160 Ind. 133, 66 N. E. 612.

68. Brierre v. Cereal Sugar Co., 102 Mo. App. 622, 77 S. W. 111.

69. Stotesbury v. Power, 27 Mont. 469, 71 Pac. 675.

70. Herring-Marvin Co. v. Smith, 43 Or. 315, 72 Pac. 704, 73 Pac. 340.

71. An answer alleging breach of warranty, but that defendant could not find the defect, is sufficient though the defect is not shown. Lane & Bodley Co. v. City Elec. L. & W. Co., 31 Tex. Civ. App. 449, 72 S. W. 425.

72. Oakland Sugar Mill Co. v. Fred W. Wolf Co. [C. C. A.] 118 Fed. 239.

73. Gilbert v. Gossard [Tex. Civ. App.] 73 S. W. 989.

74. Bessemer Ice Delivery Co. v. Brannen, 138 Ala. 157.

75. Live Stock Remedy Co. v. White, 90 Mo. App. 498.

76. Wells v. Gress, 118 Ga. 566.

77. Parsons B. C. & S. F. Co. v. Mallinger [Iowa] 98 N. W. 580.

78. Massillon E. & T. Co. v. Schirmer [Iowa] 93 N. W. 599.

79. Massillon E. & T. Co. v. Shirmer [Iowa] 98 N. W. 504.

80. That a contract of sale was only a part of the contract really made will not admit evidence as to its date which was said to be omitted where the objection to its introduction was that it was a variance on the ground of other matters than the date. Richmond Standard S. S. & I. Co. v. Chesterfield Coal Co. [Va.] 46 S. E. 397.

81. They were sold on credit and price was not due. Waterhouse v. Levine, 182 Mass. 407, 65 N. E. 822.

82. From delivering the stock. The fact that such act amounted to a fraud need not be specially pleaded. Kelly v. Fahrney [C. C. A.] 123 Fed. 280.

83. Wilson v. Flickinger Co., 76 App. Div. [N. Y.] 399.

84. Cowan v. De Hart, 84 N. Y. Supp. 576.

85. Where it appeared on trial in an action for price of wheat, the complaint alleging a contract made in June, but actual sale and delivery in August, that the June contract was expressly superseded by a later one, failure to prove the June contract as

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equivalent in effect.[86] Under quantum meruit an express contract may be proven,[87] and evidence that goods were bought by and delivered to a third person for defendant may be admitted under a quantum valebat.[88] An allegation of delivery is met by proof that delivery was prevented by the buyer.[89] A variance as to rate and times of delivery is material.[90]

Presumptions and burden of proof.—The seller, in an action for the price, must prove the existence of the contract,[91] and that its terms are as alleged,[92] and compliance of the subject-matter with requirements of the sale,[93] or that requirements as to quality were not intended to be enforced.[94] He must show substantial performance by himself in order to maintain an action for breach of contract,[95] and hence must prove delivery or an offer to deliver.[96] Where one of two joint purchasers claims that a warranty is personal it rests upon the seller to show that the warranty was a general one.[97]

The purchaser must prove a modification of the sale claimed by him,[98] or a payment,[99] or want of title in the seller when pleaded as a defense.[1] The written sale containing neither representation nor warranty, the buyer must prove a warranty,[2] and if he pleads breach of warranty, he must prove the breach and damages capable of estimation by the jury.[3] A buyer of goods to be delivered f. o. b must prove his averment that the receptacle in which they were received was not the cause of their deterioration.[4] On a defense of fraud, the purchaser must prove that the seller had knowledge of the fraud at the time of sale.[5]

Evidence; admissibility and sufficiency.—The familiar rules of evidence[6] determine questions of relevancy and competency. Illustrations only will be given here.[7]

alleged was no variance where a general denial only was filed. Childers v. Stone Milling Co., 99 Mo. App. 264, 72 S. W. 1077.

86. That they were delivered to him and a settlement made therefor is not prejudicial. Gaar, Scott & Co. v. Brundage, 89 Minn. 412, 94 N. W. 1091.

87. Brierre v. Cereal Sugar Co., 102 Mo. App. 622, 77 S. W. 111.

88. Andresen v. Upham Mfg. Co. [Wis.] 98 N. W. 518.

89. Butler Bros. v. Hirzel, 87 App. Div. [N. Y.] 462.

90. Pleaded that two carloads of coal were to be shipped each week, proof was that it should be shipped as defendant directed. Richmond Standard S. S. & I. Co. v. Chesterfield Coal Co. [Va.] 46 S. E. 397.

91. He must show acceptance of the order. Geiser Mfg. Co. v. Yost [Minn.] 95 N. W. 584.

92. A seller claiming an absolute sale must prove it. Ampel v. Seifert, 84 N. Y. Supp. 122.

93. The burden is on plaintiff in an action to recover for milk sold to show that it complied with the statutory regulations as to quality. Copeland v. Boston Dairy Co., 184 Mass. 207, 68 N. E. 218.

94. In an action for the price of fire hose warranted to pass inspection by the fire department, plaintiff must show that the department had nominal requirements which were not enforced. Eureka Fire Hose Co. v. Reynolds, 86 N. Y. Supp. 753.

95. Proof of delivery in instalments and that none were returned as defective held sufficient to take the question to the jury. Baylis v. Weibezahl, 42 Misc. [N. Y.] 178.

96. F. C. Austin Mfg. Co. v. Colfax County [Neb.] 93 N. W. 145; Geiser Mfg. Co. v. Yost [Minn.] 95 N. W. 584.

97. One purchaser who gave notes separately claimed as a defense that warranty was personal. Snyder v. Johnson [Neb.] 95 N. W. 692.

98. That an oral contract superseded a written one. Dowagiac Mfg. Co. v. Watson [Minn.] 95 N. W. 884. On a defense that lumber was received after time for its delivery under an agreement to hold and sell for the owner to best advantage and not to be paid for until sold, the buyers have the burden of proof. Heidelbaugh v. Cranston [Del.] 56 Atl. 367.

99. To an agent. Also must show agent's authority to collect payment. Southern Pine Lumber Co. v. Fries [Neb.] 96 N. W. 71.

1. A purchaser alleging as a defense that his vendor purchased the goods on credit by means of fraudulent representations must prove that waiver of cash payment was induced by fraud. McNabb v. Whissel, 75 App. Div. [N. Y.] 626.

2. Colorado Dry Goods Co. v. W. P. Dunn Co. [Colo. App.] 71 Pac. 887.

3. Carter v. Minton [Ga.] 46 S. E. 658.

4. Prejean v. Wogan Bros., 110 La. 362.

5. Live Stock Remedy Co. v. White, 90 Mo. App. 498.

6. See Evidence, 1 Curr. Law, p. 1136. Parol evidence, see ante, § 2.

7. Where a purchaser denies the sale, his declarations that he purchased are **admissible as declarations** against interest and may be admitted without laying any predicate as an impeachment. Moore v. Crosthwait, 135 Ala. 272. History of the construc-

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The evidence must preponderate as in other civil cases to establish the sale[9]

tion of a chattel is not necessary as a **foundation** for testimony based solely on the appearance of the chattel itself. White Mfg. Co. v. De La Vergne R. M. Co., 84 N. Y. Supp. 192. Where the statement of facts in an action for goods was on a **book account**, papers not referred to therein but showing the terms as to quantity and showing an order for goods are admissible. Frank Coe Co. v. Eichenberg, 22 Pa. Super. Ct. 287.

That goods for use of another were charged to him and not defendant on the seller's books is competent, though not conclusive evidence as to whom credit was given. Kesler v. Cheadle, 12 Okl. 489, 72 Pac. 367.

Receipts of payment purporting to be signed by the seller's manager are inadmissible without proof of signing. Nye v. Daniels, 75 Vt. 81.

In an action on a written sale at a specified price, evidence that a slip was attached providing that the price was guaranteed until a future date is immaterial as it refers only to future sales. Plano Mfg. Co. v. Eich [Iowa] 97 N. W. 1106.

Evidence tending to show sale of a chattel for an agreed price payable at an agreed time or presently tends to support a count as upon **account stated.** Moore v. Crosthwait, 135 Ala. 272. What the purchaser does with goods after purchasing and receiving them is immaterial on the question of **sale or no sale.** Agent of purchaser of cotton seed mixed it with other cotton seed. Miss. Cotton Oil Co. v. Smith [Miss.] 33 So. 443.

Statements or admissions by agents if part of the res gestae of a tender, acceptance or inspection, may be shown. Statements made, by one in charge of goods to tender them to the buyer for inspection, at the time of preventing an inspection, may be shown as part of the res gestae. Pittsburgh Plate Glass Co. v. Kerlin Bros. Co. [C. C. A.] 122 Fed. 414. Admissions by the seller's agent as to matters not a part of the res gestae are not admissible as against the principal. By director of corporation who was superintending instalation of machinery. Allington & Curtis Mfg. Co. v. Detroit R. Co. [Mich.] 95 N. W. 562. Statements at the time of the test by officers of a corporation, having nothing to do with the acceptance of a machine, are not admissible. Haney-Campbell Co. v. Preston Creamery Ass'n, 119 Iowa, 188, 93 N. W. 297.

But not those having no connection with the sale proper and when not representing the buyer. The complaint in an action by the tenant against his landlord for work in making repairs is inadmissible in an action by one against the landlord for the price of the materials furnished in making the repairs. Murtaugh v. Dempsey, 85 App. Div. [N. Y.] 204.

Delivery and receipt may be inferred from the buyer's complaining of the thing sold. A letter from the purchaser stating that he would have paid for the article but for certain conditions may be used as an admission of the delivery and receipt of the chattel. "Would have paid for the books, but my ad. was not in as I ordered it." Lewis Pub. Co. v. Lenz, 86 App. Div. [N. Y.] 451. A witness cannot give his conclusion as to the place of delivery based on a price quoted. Railroad ties. Moss Tie Co. v. Huff [Ind. App.] 70 N. E. 86.

Customs as to acceptances may be shown. Custom as to mailing notices of acceptance of orders of agents is admissible to show whether contract has been accepted. As to whether a written or oral contract governed the sale. Dowagiac Mfg. Co. v. Watson [Minn.] 95 N. W. 884. But not to vary the contract. A custom of the purchaser in other cases cannot be shown in an action on a particular contract. As to inspection of railroad ties. Moss Tie Co. v. Huff [Ind. App.] 70 N. E. 86.

Quantity may be shown **by book entries.** Books of a common agent of the vendee and vendor are admissible to show amount purchased as against either. Collector of milk sold by farmer. Action for price of milk sold. Copeland v. Boston Dairy Co., 184 Mass. 207, 68 N. E. 218.

Or by bills of lading: To show number of bricks. O'Brien v. Higley [Ind.] 70 N. E. 242.

False representations made at time of sale will tend to show fraud. That a patent was not an infringement of a former patent of the inventor. Pratt v. Hawes, 118 Wis. 603, 95 N. W. 965. Purchaser may be asked whether he relied thereon or upon his own judgment. Milwaukee Rice Machinery Co. v. Hamacek, 115 Wis. 422, 91 N. W. 1010. Statements to a commercial agency are admissible. Statements of the agency must be properly authenticated. Courtney v. Wm. Knabe & Co. Mfg. Co., 97 Md. 499.

Under a defense of rescission, evidence of a tender back of the goods and that the buyer was holding them subject to the seller's order is admissible; also evidence of conversations with plaintiff's agent as to rescission at the time of the giving of an order for other goods as consideration for rescission. Osborne & Co. v. Ringland & Co. [Iowa] 98 N. W. 116.

Warranty: Where the defense is that the article was unsatisfactory, it may be shown that the guaranties were fulfilled in order to show that the machine was unsatisfactory from some other reason, for though the right was given to reject it if unsatisfactory such right is not arbitrary. Union League Club v. Blymyer Ice Mach. Co., 204 Ill. 117, 68 N. E. 409. Where the vendee contends that title to chattel never passed because it did not comply with specifications, he cannot be asked as to whether he had ever approved the chattel, that being a mere conclusion. Plunger Elevator Co. v. Day, 184 Mass. 130 68 N. E. 16.

On an implied warranty, the buyer's ignorance of the kind of appliances needed and that he relied on the seller's judgment is competent on the question of implied warranty. Skinner v. E. F. Kerwin Ornamental Glass Co. [Mo. App.] 77 S. W. 1011. The fact that in returning the goods no complaint was made as to quality may be shown on the issue as to whether or not the goods were as represented. Computing Scales Co. v. Long, 66 S. C. 379.

The subsequent or prior condition of the thing sold may be shown if properly related to the time of sale. The diseased condition of an animal several months before

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between the parties,[9] each of its terms and elements,[10] and its warranties[11] and performance or breach thereof.[12] Where the items of an account are admitted to be correct, the statement is, in the absence of mistake, conclusive evidence that prices of the articles were agreed upon.[13] Where the evidence for plaintiff is contradicted in important particulars by the defendant, a judgment for the full claim, not otherwise warranted by the evidence, is erroneous.[14]

Trial and instructions.—The general principles of trials are the subject of another article.[15] Submission of the right theory renders harmless the error of proceeding for a time on a wrong issue.[16]

The instructions must be limited to the issues made[17] or necessarily involved,[18]

and continuing until the sale is admissible to show breach of warranty of soundness and fraudulent representation by the seller. Kavanaugh v. Wausau [Wis.] 98 N. W. 550. Evidence of the value of a chattel at the time of trial is inadmissible under a defense of breach of warranty, where it has been used for fifteen months and had been altered since the sale. Milwaukee Rice Machinery Co. v. Hamacek, 115 Wis. 422, 91 N. W. 1010. Testimony of experts as to the condition of a machine at the time of delivery is not necessarily weakened by the fact that their examination was a long time subsequent to delivery. Huber Mfg. Co. v. Hunter, 99 Mo. App. 46, 72 S. W. 484.

Evidence of the amount of ore taken from a mine may be shown on the question of capacity of mining machinery. Chouning v. Parke [Mo. App.] 78 S. W. 677.

The seller may prove by expert testimony that the failure of a machine to work properly was due to causes having no connection with the machine proper. That a meter could not have been working properly. Underfeed Stoker Co. v. Detroit Salt Co. [Mich.] 97 N. W. 959.

Conditions: A contract to sell between the purchaser and a third person is admissible to show **breach of a condition** of sale that the goods were for the exclusive use of the purchaser. Trinidad Asphalt Mfg. Co. v. Trinidad Asphalt Ref. Co. [C. C. A.] 119 Fed. 134.

8. Where testimony as to whether a sale was an absolute one is directly contradicted by testimony of equal weight, the evidence is not sufficient to sustain the burden of proof. Ampel v. Seifert, 84 N. Y. Supp. 122.

Testimony by defendant that he does not remember the transaction and knows he does not owe plaintiffs anything is too vague to overcome systematic and positive proof of the sale and nonpayment. Preston v. Barber, 31 Tex. Civ. App. 383, 72 S. W. 225.

9. Evidence that goods finally came into defendant's hands and were paid for by an order drawn by him is not sufficient to constitute him a purchaser. Simpson v. Porter Bros. Co., 140 Cal. 667, 74 Pac. 286. Where it is proven that two corporations are distinct and separate entities and that the defendant corporation never purchased goods of plaintiff, testimony by plaintiff's secretary that an order was filled and shipped to defendant is insufficient to show defendant's identity as a purchaser. Bullion Milling Co. v. Gates Ironworks [Colo. App.] 72 Pac. 603. Where the contract of sale contained no reference to a certain machine, and a mortgage executed by the defendant to the plaintiff stated it was purchased from a third party, held to show a purchase from the third party, not from plaintiff. Defense breach of warranty. Case Threshing Mach. Co. v. Lyons, 24 Ky. L. R. 1862, 72 S. W. 356.

10. Where the amount due is in dispute, evidence that one offered to pay a certain sum to settle it shows an attempt at compromise, not an account stated. Coons v. Languinetti, 86 N. Y. Supp. 367. In an action for the price of goods, lack of evidence as to what the correct balance is or for what goods sold and their value renders a judgment for the amount claimed erroneous. Jefferson Bank v. Gossett, 86 N. Y. Supp. 752.

11. Where one by affidavit affirms a warranty and another by similar proof denies it, the evidence is insufficient to sustain it. Colo. Dry Goods Co. v. Dunn Co. [Colo. App.] 71 Pac. 887.

To support a finding of **sale by sample** by the jury, the evidence must show that the parties contracted with reference to the sample exhibited, understanding that the bulk of the commodity corresponded with it. A. & S. Henry & Co. v. Talcott, 175 N. Y. 385, 67 N. E. 617.

12. Evidence that a test was unsatisfactory and a second test was agreed to is sufficient to show that the second test should be the governing one. Underfeed Stoker Co. v. Detroit Salt Co. [Mich.] 97 N. W. 959. Evidence that there was a breach of warranty, an unsuccessful attempt to repair, and an offer to return is sufficient to take the question of rescission to the jury. Cole v. Laird, 121 Iowa, 146, 96 N. W. 744. That the buyer in shipping the goods wrote that he was sure that they would stand the test is sufficient evidence that they were to be judged by the weights and inspection at the place of delivery. Wheat. Carr v. Louden & Co. [Ky.] 79 S. W. 211.

13. Statement of an account in which a purchaser of logs listed them at the seller's claim is conclusive as to the price, no mistake being shown, though it included a counterclaim for damages from unsoundness. Ketchum v. Stetson & P. Mill Co., 33 Wash. 92, 73 Pac. 1127.

14. Muhlstein v. Hertzberg, 85 N. Y. Supp. 1075.

15. See Trial.

16. That the trial proceeded for some time on the theory that one of the issues was noncompliance with a warranty and was finally submitted to the jury on the real issue was not prejudicial error. Geiser Mfg. Co. v. Yost [Minn.] 95 N. W. 584.

17. Instructions on rescission, where nei-

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and correct in point of law.[19] They must not take away the province of the jury,[20] but the jury may be instructed that documentary evidence constitutes a clear and unambiguous contract of purchase and sale.[21] Where defendant pleaded deceit and breach of warranty as separate counterclaims in an action for the price, the instructions cannot withdraw the defense of deceit from the jury.[22] Where a purchaser refuses to accept the goods but for mutual convenience allows them to be placed in his yard, it is error to instruct the jury to find an acceptance without stating what would amount to an acceptance.[23] Where the evidence was that the chattel should not be considered delivered until "accepted and used," an instruction that if it was not to be paid for until "accepted for use" no recovery could be had, is not erroneous because of the phrase "accepted for use,"[24] nor is the use of the words "defect" and "defective" in an instruction having reference to the efficiency or adaptability of a machine erroneous.[25] Instructions are erroneous which mislead the jury into assuming that a name used rather than the one really meant and understood determines what was sold.[26]

Verdict should not be directed except when as matter of law no other could be sustained on the evidence.[27]

The question whether any fact or condition existed entering into a sale or breach thereof, or defense of such breach, is for the jury.[28] The following are examples—offer and due acceptance to form a contract,[29] the identity of the party making the sale,[30] whether the party receiving the goods is a purchaser or an agent of the seller,[31] the questions of delivery,[32] failure to receive goods according to the contract,[33] payment,[34] the quality of goods where the purchaser defends on the ground that they were worthless,[35] the title of the seller where he has made

ther the pleadings nor the evidence raise such an issue. Ferris v. Marshall [Neb.] 96 N. W. 602. On damages, no evidence of which was introduced. Action for balance of purchase price. McCall Co. v. Jennings, 26 Utah, 459, 73 Pac. 639.

18. It is proper though not necessary to instruct on delivery where pleadings raised no such issue. Iroquois Furnace Co. v. Bignall Hardware Co., 201 Ill. 297, 66 N. E. 237. Where an oral modification is essential to recovery, an instruction that recovery cannot be had without a finding of such modification is proper. Seller who failed to deliver in time gave evidence of an oral modification. Wilson v. Flickinger Co., 76 App. Div. [N. Y.] 399.

19. An instruction that there is a breach of warranty if the machine did not do the work regardless of the question of management is erroneous. Allington & Curtis Mfg. Co. v. Detroit Reduction Co. [Mich.] 95 N. W. 562. In action for price of goods alleged to have been bought by the purchaser's agent where the latter contended that a bill of sale given him by the agent was intended as a mortgage. Pac. Biscuit Co. v. Dugger, 42 Or. 513, 70 Pac. 523.

Sufficiency of instructions as to rescission of sale by mutual agreement, in action by the seller for failure to receive. Iroquois Furnace Co. v. Bignall Hardware Co., 201 Ill. 297, 66 N. E. 237.

20. See Instructions, 2 Curr. Law, p. 461.

21. McCullough Bros. v. Armstrong, 118 Ga. 424.

22. Sufficiency of particular instructions. Swink v. Anthony, 96 Mo. App. 420, 70 S. W. 272.

23. Courtney v. Wm. Knabe & Co. Mfg. Co., 97 Md. 499.

24. The distinction not being so marked as to mislead the jury. Florence & C. C. R. Co. v. Tennant [Colo.] 75 Pac. 410.

25. Claimed that the words complained of referred simply to some impairment or weakness that could be obviated by repair. Haney-Campbell Co. v. Preston Creamery Ass'n, 119 Iowa, 188, 93 N. W. 297.

26. Action for price of goods, right of recovery where wrong goods were shipped. Meyer Bros. Drug Co. v. Puckett [Ala.] 35 So. 1019.

27. See generally Directing Verdict, etc., 1 Curr. Law, p. 925. Where the seller testified to the facts of the sale and the buyer's agreement to pay and the buyer's evidence tended to show a want of title in the seller, a verdict for defendant will not be directed. Martin v. Williams, 96 Mo. App. 249, 70 S. W. 249. Evidence as to compliance of goods with sample. Hardt v. Western Elec. Co., 84 App. Div. [N. Y.] 249.

28. See Questions of Law and Fact, 2 Curr. Law, p. 1361.

29. Humphrey v. Timken Carriage Co., 12 Okl. 413, 75 Pac. 528.

30. Which one of two agents. Williams v. Brandt, 86 N. Y. Supp. 389.

31. Heidelbaugh v. Cranston [Del.] 56 Atl. 367.

32. Humphrey v. Timken Carriage Co., 12 Okl. 413, 75 Pac. 528.

33. Faddis v. Mason [C. C. A.] 122 Fed. 410.

34. Purchaser had executed renewal notes for purchase price. Mallory Comm. Co. v. Elwood, 120 Iowa, 632, 95 N. W. 176.

35. Live Stock Remedy Co. v. White, 90 Mo. App. 498.

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out a prima facie case,[36] whether an agreement to pay for goods is conditional,[37] and whether the condition has been fulfilled or waived,[38] whether a sale is one from description or sample,[39] whether a purchaser gave a machine a reasonable test,[40] and the seller a reasonable time to remedy the defects,[41] and whether the buyer within a reasonable time after finding it unsatisfactory returned it.[42] Whether by retaining an article after the trial period the purchaser elects to keep it,[43] waiver of a warranty,[44] or of its breach,[45] and of a breach of contract.[46]

A general finding in assumpsit on a quantum valebat of sale and delivery to defendant suffices as a finding of the promise to pay.[47]

(§ 10) *F. Action for breach.*[48]—The remedy is ordinarily at law.[49] If the vendee wrongfully breaks the contract of sale, the vendor is discharged from further performance, and may sue on a quantum valebat for compensation for partial performance.[50] In some states the trustee of an express trust may sue in his own name for a breach of a contract of sale made for the benefit of the cestui que trust.[51] Irregularities in resale by the vendor do not affect his right to recover for the vendee's breach.[52] Where there is a plea of general issue, but the principal defense is an affirmative one of rescission, the seller must make out a prima facie case.[53] In an action by a seller for refusal to receive goods the buyer must plead and prove payment.[54] There being no refusal for unsuitableness the seller is not required to prove that the goods were suitable.[55] While under the codes of most states the defendant, in an action for the breach, may plead both rescission and breach of warranty, still he cannot affirmatively recover both.[56] A special finding that the seller had suffered no damages from breach of a sale when

36. Martin v. Williams, 96 Mo. App. 249, 70 S. W. 249.

37, 38. Jewell v. Posey, 119 Iowa, 412, 93 N. W. 379.

39. Small samples shown also printed description of goods, goods failed to come up to sample. Henry & Co. v. Talcott, 175 N. Y. 385, 67 N. E. 617.

40. Haney-Campbell Co. v. Preston Creamery Ass'n, 119 Iowa, 188, 93 N. W. 297. What is a reasonable time for test of a machine. Von Dohren v. John Deere Plow Co. [Neb.] 98 N. W. 830.

41. Haney-Campbell Co. v. Preston Creamery Ass'n, 119 Iowa, 188, 93 N. W. 297.

42. Rumsey & Co. v. Bessemer, 138 Ala. 329. Reasonableness of the time within which offer to return is made. Cole v. Laird, 121 Iowa, 146, 96 N. W. 744.

43. Agreement required purchaser to discontinue use after expiration of trial period unless he desired to keep it. Springfield Engine Stop Co. v. Sharp [Mass.] 68 N. E. 224.

44. Extension of time of payment as a waiver. Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113.

45. Giving mortgage on chattel as a waiver of breach. Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113. Purchaser had executed renewal notes for purchase price. Mallory Comm. Co. v. Elwood, 120 Iowa, 632, 95 N. W. 176.

46. Faddis v. Mason [C. C. A.] 122 Fed. 410.

47. Andresen v. Upham Mfg. Co. [Wis.] 98 N. W. 518. Findings are to be so construed as that they may be upheld. Findings construed in an action for gas supplied per contract and also for additional gas surreptitiously withdrawn, and held to mean that the amount found due was for the contract service only, thereby impliedly holding against the claim for the other. Palmer S. & I. Co. v. Heat, L. & P. Co., 160 Ind. 232, 66 N. E. 690.

48. Measure of damages, see post, § 12.

49. Recovery in equity of price for goods sold on ground of preventing multiplicity of suits. Miss. Cotton Oil Co. v. Smith [Miss.] 33 So. 443.

50. Whether defendant first broke the contract, held, in this case, a question for the jury. United States v. Molloy [C. C. A.] 127 Fed. 953.

51. Under Rev. St. 1899, § 541, where plaintiff and associates secured franchises to build street railways in a city, and tore up existing tracks before incorporating, and plaintiff contracted for himself and associates to sell defendant material taken from the tracks, he could sue for the breach in his own name. Nelson v. Hirsch & Sons' I. & R. Co., 102 Mo. App. 498, 77 S. W. 590.

52. They bear only on the weight of the result of the resale as evidence of the market value of the property and the amount of the vendor's damages. Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368.

53. Must prove willingness to deliver according to the contract. Iroquois Furnace Co. v. Bignall Hardware Co., 201 Ill. 297, 66 N. E. 237.

54. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

55. Parkins v. Missouri Pac. R. Co. [Neb.] 96 N. W. 683.

56. As that would be recovering both on the rescission and affirmance of the contract. Baylis v. Weibezahl, 42 Misc. [N. Y.] 178.

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the action was brought is not a finding that suit was brought without foundation, as the right of action accrued at once on the breach.[57]

In an action for breach of contract to purchase, evidence of whether or not the warranty would have been complied with if the article had been purchased, is inadmissible.[58] A report by a packer, not the buyer's agent, to the seller, of the number of boxes shipped is inadmissible in the absence of supporting testimony.[59] A trust deed and notes are admissible to show an agreement with creditors operating as a defense.[60] The evidence must show performance by the seller.[61]

Where the theory of the case is that the goods were not up to sample, it is error to give an instruction upon an implied warranty of fitness.[62] Where it is admitted that there must be an offer of manual delivery, and there is evidence of an offer to deliver warehouse receipts, it is error to instruct that there must be an offer to deliver "in accordance with the contract."[63]

It is a question for the jury whether the offer to receive was at a reasonable or unreasonable hour.[64]

(§ 10) *G. Choice and election of remedies.*—The seller has a choice of the remedies which are concurrent,[65] and in exercising this right of election he need not consult the interests of the vendee.[66] A buyer who has been defrauded may sue for deceit,[67] or on the contract, or may rescind.[68] If the vendee refuse to accept and pay for the goods according to the contract the vendor may treat the contract as broken and may store the property for the buyer and sue for the purchase price,[69] or may keep the property as his own and recover the difference between the contract price and the market price at the time of the breach and place of delivery.[70] Where the property has been delivered the seller may waive return of the chattel, treat the contract as executed as to himself, and sue for the price,[71] or he may sell the property and recover any deficiency resulting.[72] In some states,

57. Parker v. McKinnon Bros. & Co. [Vt.] 56 Atl. 536.

58. Heating-plant, guaranty accepted, then refused to purchase. City of Ludlow v. Peck-Williamson H. & V. Co., 25 Ky. L. R. 83, 76 S. W. 377.

59. Was not offered as an aid to memory, nor was its correctness proved. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

60. Action for failure to receive. Iroquois Furnace Co. v. Bignall Hardware Co., 201 Ill. 297, 66 N. E. 237.

61. **Sufficiency of evidence** to show that a letter giving notice of shipment was mailed by the seller in accordance with the contract. Steinhardt v. Bingham, 90 App. Div. [N. Y.] 149. Proof of delivery in instalments and that none of the chattels were returned as defective is sufficient evidence to carry the issue of substantial performance to the jury. Seller must show substantial performance by himself in order to recover for breach. Baylis v. Weibezahl, 42 Misc. [N. Y.] 178.

62. Instruction complained of was that because seller knew of the purpose for which the goods were to be used he could not recover, even if up to sample, if not fit for that purpose. Chicago House Wrecking Co. v. Durand, 105 Ill. App. 175.

63. Too indefinite. Gehl v. Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26.

64. Offer to receive hogs at 8.30 p. m. Cousins v. Bowling, 100 Mo. App. 452, 74 S. W. 168.

65. See generally, Election of Remedies and Rights, 1 Curr. Law, p. 992.

66. Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368.

67. See Deceit, 1 Curr. Law, p. 873.

68. See ante, this section (§ 10A) Rescission.

69. Element of credit removed by insolvency of vendee. Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368. Title not to pass until paid for, payment refused. Ideal Cash Register Co. v. Zunino, 39 Misc. [N. Y.] 314. If he pursues this course he must give notice to the vendor. Comstock v. Price, 103 Ill. App. 19.

70. Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368. Title not to pass until paid for, payment refused. Ideal Cash Register Co. v. Zunino, 39 Misc. [N. Y.] 311; Comstock v. Price, 103 Ill. App. 19.

71. Conditional sale. Herring-Hall-Marvin Co. v. Smith [Or.] 72 Pac. 704. Goods delivered, but vendee failed to pay, there was a reservation of title in the vendor as a lien. Jaeggli v. Phears, 30 Tex. Civ. App. 212, 70 S. W. 330. The same general rule applies in **Idaho**, though under the statutes of that state attachment cannot issue upon an action for the purchase price where the vendor has security, unless it appears that the security is beyond his reach or become valueless. Mark Means Transfer Co. v. Mackinzie [Idaho] 73 Pac. 135.

72. See "Resale," ante, § 10 D.

The sale may be made at auction or in private at the convenience of the vendor,

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action for the price is the proper remedy only when the title has passed.[73] Where the vendee has possession the vendor retaining title, the latter may sue for damages for breach of the executory contract of sale.[74] If the contract is a mere agreement for sale, the seller can only sue for the breach.[75] Where the buyer in an unexecuted sale prevents performance, an action will lie only for the breach and not on the contract for the price.[76] The seller taking a promissory note for the price which is not paid at maturity is not obliged to sue thereon, but may sue on account stated for the contract price,[77] and suit being brought upon both, he cannot be required to elect upon which he will stand.[78] The vendor of goods may waive his action for conversion as against a buyer who takes from the original vendee, knowing that the latter had no title, and sue as upon an implied contract.[79] The right to retake goods will not prevent seizure on an execution on a judgment for the purchase price.[80] The vendee obtaining the goods by fraudulent representations as to solvency, the vendor may recover of the buyer's trustee in bankruptcy that portion of the goods in the latter's hands, and recover as damages the value of the goods not so found.[81] The vendor by taking, subsequent to the sale, a mortgage upon the goods sold, and others, does not thereby elect to claim under the mortgage to the exclusion of his rights under the sale.[82] A judgment for defendant in an action for the price under a special contract, because of failure to comply with requirements, will not prevent suit on the implied contract of the purchaser to pay its reasonable value where he retained it.[83]

§ 11. *Remedies of purchaser. A. Rescission.*—The buyer desiring to rescind for the seller's default[84] may do so for misrepresentation[85] or fraud of the seller,[86]

so long as the full market value of the property is obtained. No notice to the vendee of the place and time of sale is necessary, but notice of intention to sell should be given. Irregularities in making the resale do not affect the vendor's right to recover the damages. The sale must, however, be for cash. Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368. If the vendor pursues this course he must show that he sold the goods to the best advantage, and the amount he received. Comstock v. Price, 103 Ill. App. 19.

In Virginia the action is one of assumpsit on a special count to recover damages for the breach of the contract, the measure of recovery being the contract price and the price obtained at resale after deducting expenses of seller. American Hide & Leather Co. v. Chalkley & Co. [Va.] 44 S. E. 705.

73. In these states where the title has not passed resale is the proper remedy. American Hide & Leather Co. v. Chalkley & Co. [Va.] 44 S. E. 705.

74. Is not obliged to sue for the contract price. Jaeggli v. Phears, 30 Tex. Civ. App. 212, 70 S. W. 330.

75. Under an agreement to purchase hops to be grown five years later the remedy is for the breach of the contract to purchase, not for the price. Star Brewery Co. v. Horst [C. C. A.] 120 Fed. 246.

76. Herring-Hall-Marvin Co. v. Smith [Or.] 72 Pac. 704. Countermanded order. Oklahoma Vinegar Co. v. Carter, 116 Ga. 140, 59 L. R. A. 122.

77. It appeared that the purchaser had regained possession of the note. Hodges v. Smith, 118 Ga. 789.

78. They constitute the same cause of action. Strickland v. Parlin & Orendorf Co., 118 Ga. 213.

79. Can recover the reasonable value of the goods at the time of conversion. Hirsch v. Leatherbee Lumber Co. [N. J. Law] 55 Atl. 645.

80. The right to seize machinery on execution on judgment for the price is not waived by terms of the purchase notes providing that title should remain in the seller until full payment, and that he could take possession on default without legal process, since the latter rights are cumulative and not exclusive of the statutory right given by Rev. St. 1899, §§ 3170, 3413. De Loach Mill Mfg. Co. v. Latham, 99 Mo. App. 231, 72 S. W. 1080.

81. Must of course have this latter amount liquidated according to the bankruptcy act. In re Hildebrant, 120 Fed. 992.

82. First Nat. Bank v. Reid [Iowa] 98 N. W. 107.

83. Arthur Fritsch F. & M. Co. v. Goodwin Mfg. Co., 100 Mo. App. 414, 74 S. W. 136. See Former Adjudication.

84. Mutual rescission, see ante, § 2. Rescission of contracts in general, see Contracts, 1 Curr. Law, p. 679. Rescission by the seller, see ante, § 10 A.

85. False representations as to financial condition of a railroad company, and of the value and safety of its bonds as an investment, warrant rescission of a contract to buy bonds. Findley v. Baltimore T. & G. Co., 97 Md. 716. Conditions for release from performing conditions of contract for logging, purchased together with working outfit, on account of misrepresentations as to the work and condition of the outfit. Forsman v. Mace, 111 La. 28.

86. Concealment of material facts by the seller as to quality or value of the article sold which the purchaser could not have discovered by ordinary prudence is ground

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if inducing the sale,[87] or failure after notice to supply goods according to warranty,[88] but mere defects are insufficient when the seller offers to remedy them.[89] A fair trial of warranted machines is necessary before rescission.[90] If a buyer on credit, having become insolvent, refuses to accept for cash on delivery, neither an election of remedy by the seller to enforce the contract, nor its manner of enforcement, gives him a right to rescind.[91] A dispute between the seller and another as to infringement of a patent will not warrant rescission of a purchase of patented goods.[92]

Where both parties show no intention to insist on the terms of the sale as to time, neither can rescind without notice to the other and reasonable chance to perform.[93] The purchaser must restore, or offer to restore the property[94] to the seller or his authorized agent,[95] and the agent need not assent to receiving it.[96] A tender of performance[97] or a manual tender,[98] is needless where refusal to perform or to receive makes such course useless. The seller waives his right to return of the property by making it impossible.[99] A tender of return must include all the property.[1]

Rescission must be entire if the contract is entire,[2] but as to a several contract, rescission may be partial.[3] Acceptance of part does not prevent rejection of the remainder for breach of warranty.[4]

for rescission, especially where the parties are in fiduciary relations. Concealment of value of corporate stock by director purchasing from stockholder. Oliver v. Oliver, 118 Ga. 362.

87. False representations as ground of rescission of a sale must be false and relied upon to injury of the rescinding party. Korbel v. Skocpol [Neb.] 96 N. W. 1022.

88. Where the seller of milk under a contract for a year furnished milk inferior to the contract terms of which the purchaser gave notice, on failure to comply with the contract the purchaser could rescind. Grafeman Dairy Co. v. St. Louis Dairy Co., 96 Mo. App. 495, 70 S. W. 390.

89. That certain instalments of appliances delivered, under a contract to make and sell, but not returned, failed to comply with the contract will not warrant rescission and refusal to receive the remainder when the seller offered to remedy the defects and make the remainder in conformity to the contract. Baylis v. Weibezahl, 42 Misc. [N. Y.] 178.

90. Warranty of cream separators that they should "do good work." Duty of purchaser is to give machines fair trial before rejecting. Haney-Campbell Co. v. Preston Creamery Ass'n, 119 Iowa, 188, 93 N. W. 297.

91. Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368.

92. Computing Scales Co. v. Long, 66 S. C. 379.

93. Price v. Beach, 20 Pa. Super. Ct. 291.

94. Sloan Commission Co. v. Henry A. Fry & Co. [Neb.] 95 N. W. 862; Parsons B. C. & S. F. Co. v. Mallinger [Iowa] 98 N. W. 580. Sufficiency of evidence as to ability of purchaser to place seller in statu quo on rescission. Boeker v. Crescent B. & P. Co., 101 Mo. App. 429, 74 S. W. 385.

95. Sufficiency of authority of seller's agent to receive tender back of machine on rescission of contract by purchaser. Parsons B. C. & S. F. Co. v. Mallinger [Iowa] 98 N. W. 580.

96. The seller's agent need not agree to or acquiesce in a tender back of a machine on rescission by the purchaser, it being enough that he continues to represent the seller. Parsons B. C. & S. F. Co. v. Mallinger [Iowa] 98 N. W. 580.

97. Price v. Beach, 20 Pa. Super. Ct. 291.

98. Barrett v. Tyler [Vt.] 56 Atl. 534.

99. Rescission by the buyer of an executed sale cannot be defeated by the seller on the ground that the former has parted with the property and cannot return it, where the seller advised the buyer to part with it. Findley v. Baltimore T. & G. Co., 97 Md. 716.

1. Where a purchaser discovers that material was falsely represented as white lead he cannot rescind by tendering return of less than a tenth, having sold the remainder. Pikes Peak Paint Co. v. John W. Masury & Son [Colo. App.] 74 Pac. 796.

2. Sale of part of the goods and retention of the money will prevent rescission. Seattle Nat. Bank v. Powles, 33 Wash. 21, 73 Pac. 887. An entire contract for sale of a crop of molasses is indivisible so that it must be dissolved as a whole if at all; if the vendor diverts part of the crop the purchaser cannot release himself for the part furnished by an action for damages without an offer to restore that received. Barrow v. Penick, 110 La. 572.

3. Where a contract for sale of goods set out several distinct items to be delivered and the price of each, the contract was severable, and the buyer could rescind as to part and recover the price paid therefor. Weil v. Stone [Ind. App.] 69 N. E. 698.

4. An agreement to buy all of a crop of beets of a certain standard of quality will not bind the purchaser to take the remainder after acceptance of part of the crop, even though the part accepted did not fully meet the standard. Norfolk Beet Sugar Co. v. Berger [Neb.] 95 N. W. 336.

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The right may be lost by delay beyond a reasonable time,[5] or by acts amounting to waiver,[6] or affirmance.[7]

(§ 11) *B. Action to recover purchase money paid.*[8]—The price paid may be recovered on entire failure of consideration,[9] or failure as to a separable part,[10] and after rescission and return of the goods, if rightful.[11] The purchaser is entitled to recover for breach of warranty of a horse, where he tendered back the horse and demanded a return of his money on discovery of the breach.[12] A seller who resold goods after title passed cannot defeat such an action by offer to deliver other goods.[13]

The common count for money had and received is sufficient for recovery of part payment made, after breach by the seller.[14] The amount paid must be clearly alleged.[15]

Neither the law of voluntary payment,[16] nor the law of caveat emptor applies to the recovery of an overpayment alleged to have been made by reason of a mistake.[17]

(§ 11) *C. Actions for breach of contract.*[18]—The action is brought as a transitory one,[19] but must be enforceable at the place by whose laws it is gov-

5. The purchaser, desiring to rescind, must offer to restore and place the seller in statu quo as far as practicable, within a reasonable time after discovery. J. I. Case Threshing Mach. Co. v. Lyons, 24 Ky. L. R. 1862, 72 S. W. 356.

Where a fire engine bought by a city was found not to comply with the seller's representations or the city's purposes, the city had a reasonable time in which to return it. Rumsey v. Bessemer, 138 Ala. 329.

Two years' delay will prevent rescission. Kessler v. Perrong, 22 Pa. Super. Ct. 578. Must be exercised within a reasonable time. Manley v. Crescent Novelty Mfg. Co. [Mo. App.] 77 S. W. 489. Delay from October to March without explanation. Id.

6. Where the seller of a machine under an implied warranty refuses to remedy defects called to his attention, retention and use for a day and a half to finish work on hand, and keeping in a shed thereafter for 24 days, by the purchaser, will destroy his right to return it. Von Dohren v. John Deere Plow Co. [Neb.] 98 N. W. 830.

7. Where the buyer knew that a fraud had been practiced on him and sued to restrain the seller from selling to others, he lost his right to rescind. Tolman v. Coleman, 104 Ill. App. 70.

8. Former action as **res adjudicata** on question. Borches & Co. v. Arbuckle Bros. [Tenn.] 78 S. W. 266. See, also, Former Adjudication, 2 Curr. Law, p. 60.

9. Warder, Bushnell & Glessner Co. v. Myers [Neb.] 96 N. W. 992. The purchaser of bank stock cannot recover the price because of insolvency of the bank, though the stock is really worthless intrinsically, where they had a market value and another had proposed to buy at about the same price. Action for damages for fraud. Kirtley's Adm'x v. Shinkle, 24 Ky. L. R. 608, 69 S. W. 723.

10. A salesman represented that all apples were as good as samples from two barrels. All but the sample barrels proved worthless. The buyer was entitled to recover all but the price of the sample barrels. Bernstein v. Loomis & Co., 87 N. Y. Supp. 134.

11. If the buyer, without right, returns goods to the seller, he cannot recover. Loader v. Brooklyn Chair Co., 75 App. Div. [N. Y.] 621.

12. Knoepker v. Ahman, 99 Mo. App. 30, 72 S. W. 483.

13. Where the seller marked lumber on which the buyer had made a part payment "Sold," but afterward sold it to another, an offer to deliver other lumber in lieu thereof is no defense to an action to recover money paid. Testimony as to what it would have cost the seller to deliver such other lumber is immaterial. Trotter v. Tousey, 131 Mich. 624, 92 N. W. 544.

14. Wood v. Kaufman [Mich.] 97 N. W. 47.

15. A statement in an action for breach of sale and recovery of price paid for goods "By amount paid, acc't 75 cutters, charged at $2.25 each which were not according to contract" etc., was sufficient. Manley v. Crescent Novelty Mfg. Co. [Mo. App.] 77 S. W. 489.

16. As embodied in Civ. Code 1895, § 3732.

17. Mistake alleged to have been made in weighing of cotton seed bought by the ton. McRae Oil & Fertilizer Co. v. Stone [Ga.] 46 S. E. 668.

A full treatment of the right to recover money paid is given in Implied Contracts, 2 Curr. Law, p. 285.

18. **Rules of practice,** in no wise dependent on the fact that the cause of action was one on a sale, pertain to general practice titles, q. v. Jurisdiction of courts as dependent on amount in controversy, see Jurisdiction, 2 Curr. Law, p. 604; Justices of the Peace, 2 Curr. Law, p. 651. General rules of trial and pleading, see Pleading, 2 Curr. Law, p. 1178; Trial. Measure of damages, see post, § 12.

19. Westinghouse El. M. Co. v. Troell, 30 Tex. Civ. App. 200, 70 S. W. 324.

Construction of contract as to county of performance determining place of suit under Rev. St. 1895, art. 1194, par. 5. Bell County Brick Co. v. R. L. Cox & Co. [Tex. Civ. App.] 76 S. W. 607.

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erned.[20] An action though sounding in damages for nondelivery is yet one arising on a contract of sale and suable as such.[21]

A cause of action accrues when the seller refuses to further perform,[22] and one remains after negotiations for a new sale have failed by the buyer's fault.[23] Conversely the buyer who failed to pay according to established custom cannot complain of the seller's rescission.[24] False representations made to the purchaser after title has passed,[25] or that he did not hear or rely upon,[26] give him no cause of action. Action will not lie if conditions precedent are unperformed,[27] or in favor of one in default.[28] Demand is not prerequisite if it would be futile,[29] nor is tender of performance.[30] Where the seller is guilty of fraud, the buyer need not give notice of defects or return the chattel before suing for the fraud.[31]

Freight paid by mistake after a proper rescission is recoverable.[32]

Pleading.—The contract, the breach, and the damages must be pleaded.[33] If suing for breach of a sale, the buyer must allege performance, a tender of performance, or excuse for nonperformance on his part.[34] Failure to aver willingness and ability to perform is waived, if not raised by demurrer.[35] When allegations of special damages are necessary[36] they should be with due particularity.[37] A complaint for breach of warranty whereby one attempting to use a thing sold is injured sounds in tort.[38]

Rescission and no purchase may both be pleaded if inconsistent defenses are sanctioned.[39] The seller cannot show bad faith of the purchaser without special-

20. An action for breach of a sale made and to be performed in one state, where it could not be enforced, cannot be brought in another state, though, if governed by the laws of the latter state it would be enforceable. Jones v. Nat. Cotton Oil Co., 31 Tex. Civ. App. 420, 72 S. W. 248.

21. Justice's jurisdiction [Rev. Code 1852, c. 99, § 1, amended in 1893]. Gruell v. Clark [Del.] 54 Atl. 955.

22. Notice by the seller before termination of the contract that he considered it at an end and refusing to perform is a breach. Underhill v. Buckman Fruit Co., 97 Md. 229.

23. Where after the seller broke a contract for sale of the output of a coal mine for a year at a certain price, the purchaser agreed to buy the output for a certain month which offer was withdrawn, the withdrawal did not terminate the right to sue for breach of the former contract. Wilmoth v. Hamilton [C. C. A.] 127 Fed. 48.

24. Minaker v. California Canneries Co., 138 Cal. 239, 71 Pac. 110.

25. Soule v. Harrington [Mich.] 97 N. W. 357.

26. Burnett v. Hensley, 118 Iowa, 575, 92 N. W. 678.

27. The goods were not to be moved until payment which was never made (action for nondelivery). Hart v. Boston & M. R. R. [N. H.] 56 Atl. 920. Where a tombstone was sold to be partly paid for in work, and after the work was done the seller offered to furnish the stone but the purchaser failed to select it, the latter could not recover for work done. Day v. Farley, 100 Mo. App. 633, 75 S. W. 177.

28. Refusal to pay before due day not default. F. W. Kavanaugh Mfg. Co. v. Rosen [Mich.] 92 N. W. 788.

29. Where goods sold are sold again and delivered to another, the purchaser need not demand them before suing for the breach. Bussard v. Hibler, 42 Or. 500, 71 Pac. 642.

30. Lapham v. Bossemeyer Bros. [Neb.] 98 N. W. 699. Peremptory refusal of the seller to deliver because the price had gone up renders tender of cash price unnecessary to an action for damages for nondelivery. Blalock v. Clark, 133 N. C. 306. Where the seller refused to perform, tender of the price at place for delivery is unnecessary to a suit for the breach. Walker v. Cooper, 97 Mo. App. 441, 71 S. W. 370.

What tender of money in payment suffices is discussed in Payment and Tender, 2 Curr. Law, p. 1158.

31. Huber Mfg. Co. v. Hunter, 99 Mo. App. 46, 72 S. W. 484.

32. White-Branch-McConklin-Shelton Hat Co. v. Corson & Co., 25 Ky. L. R. 1230, 77 S. W. 366.

33. Sufficiency of complaint as showing contract of sale, breach by the vendor and damages to purchaser. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564.

34. Lapham v. Bossemeyer Bros. [Neb.] 98 N. W. 699.

35. Ability to pay. Clark's Code (3rd Ed.) § 242. Blalock v. Clark, 133 N. C. 306.

36. Need not be alleged in order to recover the difference between the contract and market prices of the goods. Bussard v. Hibler, 42 Or. 500, 71 Pac. 642.

37. Failure to require more definite and certain pleading by stating names of persons to whom buyer had contracted for resale of the undelivered goods held harmless because proved on trial. Currie Fertilizer Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268.

38. Wood v. E. & H. T. Anthony & Co., 79 App. Div. [N. Y.] 111.

39. Under Code, § 3620. Cole v. Laird, 121 Iowa, 146, 96 N. W. 744.

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ly pleading it.[40] A bill of particulars or notice of defense, under the general issue, should apprise the plaintiff what defense will be offered.[41]

Proof.—The buyer must prove performance on his part, or tender thereof, or excuse,[42] the facts making out a nonperformance on the seller's part,[43] leakage or diminution of contents,[44] but not ability to perform acts which the seller made it impossible to do.[45] The sufficiency of acts of rescission depends upon the terms of the sale and the circumstances.[46] Some illustrative cases showing relevancy of evidence are cited.[47] The ordinary rules as to competency of evidence apply.[48]

40. Action for breach of a contract to furnish the vendee all goods of certain kind required in his business during a certain year, because of refusal to send goods ordered. New York Cent. I. W. Co. v. U. S. R. Co., 174 N. Y. 331, 66 N. E. 967.

41. Notice of defense on general issue in action by the buyer for breach of a sale of fruit, held sufficient to let in plaintiff's abandonment of the contract by failure to make payment as agreed, and by removal from the state without notifying the seller. Town v. Jepson [Mich.] 95 N. W. 742.

42. Lapham v. Bossemeyer Bros. [Neb.] 98 N. W. 699.

43. In an action for failure to deliver all tomatoes grown on the seller's farm in a certain year, the buyer must prove that the tomatoes were grown by defendant that year. Hartnell v. Baker [Del.] 56 Atl. 672. Where under the sale delivery could be made at any time in a certain period, the purchaser had the burden of showing that the period had terminated. Hume v. S. Netter, H. Geismar & Co. [Tex. Civ. App.] 72 S. W. 865. **Sufficiency of evidence.** Branower v. Independent Match Co., 83 App. Div. [N. Y.] 370. Evidence in an action against a seller for breach of a sale, that the buyer declined to receipt for the goods and told the seller's employe that he would not take them, at the same time receipting for other goods that were acceptable, and wrote several letters rejecting them stating that they were held subject to the seller's orders, supports a finding of an offer to return the goods. Gilbert v. Alton, 88 App. Div. [N. Y.] 62.

Sale of binder. Rosso v. Milwaukee Harvester Co. [Neb.] 96 N. W. 213. Contract to sell linen batiste. Heller v. Heine, 42 Misc. [N. Y.] 188. To show that a contract for sale of paper called for all the paper that the purchaser used in his business. Excelsior Wrapper Co. v. Messinger, 116 Wis. 549, 93 N. W. 459. To show that the seller failed to deliver all goods required by the contract. Masor v. Jacobus, 84 N. Y. Supp. 589.

Direction of verdict: To show a breach so as to prevent direction of verdict for defendant. Underhill v. Buckman Fruit Co., 97 Md. 229. To warrant submission of the question whether formal execution of the contract was waived by the seller. Hocking v. Hamilton [C. C. A.] 122 Fed. 417. Verdict for defendant in an action for breach of a sale of goods is properly directed where the evidence shows no definite agreement as to quality, quantity, or price. Losse v. Peoria Cordage Co., 116 Wis. 129, 92 N. W. 559. To authorize direction of verdict because the contract required delivery within a certain time, after which, and before tender thereof, plaintiff gave notice he would not accept. Kallis v. Lissberger, 39 Misc. [N. Y.] 773.

44. Where a contract requires delivery of grain at a certain place, weights then to govern, it is presumed that the amount shipped reached the destination without proof of leakage or removal of grain from the car. Mountain City Mill Co. v. Link Mill. Co., 92 Mo. App. 474.

45. In an action for failure to deliver apples, it was shown that the buyer agreed to receive a certain amount per day but that he was prevented from receiving them by the seller. George S. Howell & Co. v. Dickerson [Mo. App.] 78 S. W. 655.

46. Where the purchaser used a part of goods received and found them defective, and immediately replaced them in the original packages and notified the seller, who sent an agent who admitted the defects and directed the purchaser to hold them, there was a sufficient rescission. Boeker v. Crescent B. & P. Co., 101 Mo. App. 429, 74 S. W. 385.

47. Evidence as to why a party representing the prospective buyer refused to join with the latter in suing to recover the purchase money paid held immaterial and as calling for a conclusion. Where the seller of materials could cancel the contract if the buyer sold to others instead of using them exclusively in its own trade, evidence as to whether the seller knew that the buyer was handling other materials is irrelevant in an action by the latter for breach of the contract by failure to deliver. Trinidad Asphalt Mfg. Co. v. Trinidad Asphalt R. Co. [C. C. A.] 119 Fed. 134. Where the seller denied the sale, evidence that the goods were not in existence or contemplation of manufacture at time of the alleged sale, but that he attempted to secure the goods, in good faith, is irrelevant. Heller v. Heine, 85 N. Y. Supp. 389. In an action for breach of a contract to furnish iron as ordered to plaintiff's foundry, an executory agreement by which the seller contracted to assign the contract to the purchaser of its plant on condition that defendant would consent, cannot be shown in evidence, though plaintiff notified defendant of a transfer of the contract, where absolute sale and assignment is not proven. Gardiner Campbell Co. v. Iroquois Iron Co. [C. C. A.] 127 Fed. 648. Admissibility of testimony as to understanding between parties to sale of oil on the question of tanks in which it was to be shipped and as to incidents and customs of shipment of oil. Sherman Oil & Cotton Co. v. Dallas O. & R. Co. [Tex. Civ. App.] 77 S. W. 961. In action by purchaser for breach of contract of sale of output of coal mine for a year. Wilmoth v. Hamilton [C. C. A.] 127 Fed. 48. Evidence that the kind of coal in question could not be procured elsewhere was admissible on the question whether, on the breach, the purchaser could buy else-

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Where a contract requires the vendor to furnish all goods of a certain kind required by the purchaser in his business during a certain year, whether orders sent by the latter were so required is a question of fact, not opinion.[49]

Questions for the jury and instructions thereon.—Quality and make of machines cannot be submitted to the jury in an action for failure to deliver, where the only breach alleged was failure to furnish certain parts of the machines as agreed.[50] Some illustrative cases upon the sufficiency and propriety of instructions are cited.[51] Acceptance of an order for machinery,[52] and whether acts of the seller were such as to cause the purchaser to incur expenses in expectation that the sale would be completed, are questions for the jury.[53]

(§ 11) *D. Action for breach of warranty.*[54]—The title must have passed[55] and every condition necessary thereto must have been performed.[56] Notice of the defect or offer to return the property to the seller is not in any respect a condition precedent to the buyer's right to maintain an action for the breach of warranty,[57] unless the warranty is conditional thereon,[58] nor is return of a separable part of goods.[59] Such a warranty is binding and suable when the seller defaults after fulfillment of conditions.[60] It is no defense that inferior goods advanced with the market becoming worth as much as proper goods would have been.[61] Judgment of foreclosure on notes and mortgage for machinery sold, though barring rescission by the buyer, will not prevent his action for breach of warranty.[62]

where and charge any excess of price to the seller. Id.

48. Evidence related to other goods not shown to have been similar. O. H. Jewell Filter Co. v. Kirk, 200 Ill. 382, 65 N. E. 698. In an action for breach of a sale of fruit, evidence as to condition of the fruit two months after handling and rejection is not competent to prove their condition when tendered. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

Evidence that after execution of a contract of sale it was modified as to shipment is admissible. Town v. Jepson [Mich.] 95 N. W. 742.

Proof of receipt of a contract sent by mail is sufficient for its admission. Cooney v. McKinney, 25 Utah, 329, 71 Pac. 485.

Answers in action for breach of sale of oil held not a conclusion. Sherman Oil & Cotton Co. v. Dallas O. & R. Co. [Tex. Civ. App.] 77 S. W. 961.

In an action for breach of an oral contract for sale of the output of a coal mine at a certain price per ton, a letter by the buyer unanswered, the day following the contract, purporting to be a memorandum of the contract as understood by the buyer's agent and corresponding to his evidence of the terms, was not inadmissible as a self serving declaration. Wilmoth v. Hamilton [C. C. A.] 127 Fed. 48. A seller who waived compliance with terms as to time and afterward refuses to perform cannot produce evidence for himself by declaring to others that he intends to perform. Price v. Beach, 20 Pa. Super. Ct. 291.

49. New York Cent. Ironworks Co. v. U. S. R. Co., 174 N. Y. 331, 66 N. E. 967.

50. Fegan v. Duvall S. & G. S. Co., 92 Mo. App. 236.

51. Hart v. Boston & M. R. R. [N. H.] 56 Atl. 920. As to modification of written sale by interlineation and its effect. Consumers' Ice Co. v. Jennings, 100 Va. 719. As to damages. Paxton & Gallagher v. Vadbouker [Neb.] 96 N. W. 378. As to cancellation of a contract of sale of the output of a coal mine and damages to the purchaser for breach by the seller. Wilmoth v. Hamilton [C. C. A.] 127 Fed. 48.

52. Elfring v. New Birdsall Co. [S. D.] 92 N. W. 29.

53. Colvin v. McCormick Cotton Oil Co., 66 S. C. 61.

54. Measure of damages, see post, § 12.

55, 56. All payments must have been made on a conditional sale. Stearns v. Drake, 24 R. I. 272.

57. Westinghouse Elec. Mfg. Co. v. Troell, 30 Tex. Civ. App. 200, 70 S. W. 324. Complainant need not offer previously to return the goods. Phillips v. Crosby [N. J. Law] 55 Atl. 814. Declaration held sufficient on the warranty and held not to be on the fraud practiced. Id. An action for breach of warranty, express or implied, of quality of goods, may be brought by the purchaser without return or offer of return of the goods. Southern B. & I. Co. v. Exeter Mach. Works, 109 Tenn. 67, 70 S. W. 614.

58. See ante, § 8. A contract of sale of a machine providing for notice of its failure to comply with the warranty, stating defects, required such notice within a reasonable time as a condition precedent to enforce the warranty. Northern Elec. Mfg. Co. v. Benjamin Coal Co., 116 Wis. 130, 92 N. W. 553.

59. Part was worthless, part good. Westinghouse Elec. Mfg. Co. v. Troell, 30 Tex. Civ. App. 200, 70 S. W. 324.

60. Where the seller delivers goods which do not comply with the warranty and fails, on the return of such goods, to furnish goods of the proper sort, the purchaser may sue for the breach. Punteney-Mitchell Mfg. Co. v. Northwall Co. [Neb.] 91 N. W. 863.

61. Americus Grocery Co. v. Brackett & Co. [Ga.] 46 S. E. 657.

62. Standefer v. Aultman & S. Mach. Co. [Tex. Civ. App.] 78 S. W. 552.

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A petition to recover money spent by a purchaser for installation and repair of a warranted machine at suggestion of the seller was an action for implied assumpsit and not for damages for breach of warranty.[63] The seller's promise to pay is essential, and especially where the purchaser stated that he would have borne it had the machine filled the warranty.[64]

The parties and those in privity of contract only can enforce a warranty.[65]

Pleading and issues.—An implied warranty requires allegations of fact which will support such a warranty.[66] Allegations as to the breach or failure of a warranty must be co-extensive therewith,[67] but if the warranty is general in its character or nature, the breach or failure may be shown by a general negation of such warranty.[68] Causes on express and implied warranties may be joined.[69] A buyer pleading and relying on a written sale in an action for breach of warranty is properly limited to warranties in such contract.[70] The requisite notice must be given in order to avail of recoupment as a defense.[71]

Evidence[72] *and trial.*—It is not relevant that other goods sold at the same time were defective,[73] but it may be shown that the thing sold produced deleterious effects in other instances,[74] or that goods made from it were defective, unsalable and unprofitable.[75] It is relevant to a warranty of title that a vendor's lien existed against the seller.[76] Evidence of inefficiency of a thing sold must be in some way related to the breach of the warranty as the cause.[77] Expert evidence is

63, 64. Griffith v. Williams Patent C. & P. Co. [Mo. App.] 77 S. W. 330.

65. A warranty of an appliance for burning gasoline can only be enforced in an action by the warrantee, and his son cannot make it the basis of an action for personal injuries from bursting of the appliance. Talley v. Beever [Tex. Civ. App.] 78 S. W. 23.

66. Sufficiency of allegations of implied warranty in complaint for breach of warranty in sale of linseed oil for a particular purpose. Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons [C. C. A.] 120 Fed. 906. An allegation by plea that fish properly packed will keep from a year to 18 months, that defendant bought fish for resale as plaintiff knew, that the fish were so carelessly packed that they spoiled in three months, will not support a claim of implied warranty. Troy Grocery Co. v. Potter [Ala.] 36 So. 12.

67, 68. Smith v. Borden, 160 Ind. 223, 66 N. E. 681.

69. Two paragraphs of a complaint, one for breach of express warranty of grass seed as to variety, and the other for breach of implied warranty as to quality of the variety ordered, are not inconsistent. Gardner v. Winter & Co., 25 Ky. L. R. 1472, 78 S. W. 143.

70. Standefer v. Aultman & T. Mach. Co. [Tex. Civ. App.] 78 S. W. 552.

71. Buyer cannot recoup damages, in an action for the price of goods, on account of purchase of tools made necessary by defects in the goods, without giving notice of such defense [Prac. Act N. J. § 129 (2 Gen. St. p. 2555)]. Fredrick Mfg. Co. v. Devlin [C. C. A.] 127 Fed. 71.

72. Sufficiency of evidence to sustain verdict for defendant in action for breach of warranty. Wells v. Gress, 118 Ga. 566. In action for breach of warranty of an animal to show seller's knowledge of defects and fraudulent concealment thereof. Burnett v. Hensley, 118 Iowa, 575, 92 N. W. 678. That fruit trees did not comply with the contract. De Foe v. Wilmas, 99 Mo. App. 24, 72 S. W. 475. A finding that a warranted horse was diseased when sold is proper where the disease was discovered within ten days, during which time he was not exposed to disease, though no positive proof appears that the disease existed when he was sold. Robinson v. Snow [Tex. Civ. App.] 74 S. W. 328.

73. In an action for damages for sale of a diseased mule at auction, it cannot be shown that other mules sold at the same time were diseased. Moulton v. Gibbs, 105 Ill. App. 104.

74. Evidence, in an action for damages for sale of unsound feed for cattle, that other cattle of other owners fed with the same food under the same conditions were made sick, though previously well. Houston Cotton Oil Co. v. Trammell [Tex. Civ. App.] 72 S. W. 244.

75. In an action for breach of an implied warranty of oil sold for special purposes of manufacture, evidence was admissible showing manufactured goods to have been returned by customers because of defects in the oil used, that goods made were unsalable, and that the purchaser was obliged to settle with customers for defects in goods due to poor oil. Cleveland Linseed Oil Co. v. Buchanan & Sons [C. C. A.] 120 Fed. 906.

76. Admissibility of evidence on the questions whether wagons had been accepted by the purchaser before they were paid for by the seller and whether a lien attached to them thus breaking seller's warranty of title. Jensen v. McCornick, 26 Utah, 142, 72 Pac. 630.

77. Deficiency in speed of a ship not shown to have been cause of inability to effect charters. Bull v. Bath Iron Works, 75 App. Div. [N. Y.] 380.

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admissible to show condition and value,[78] or defectiveness of construction[79] of a machine. A general agent may bind the seller by admissions.[80]

Questions for jury and instructions.—The existence of a warranty,[81] and the seller's breach or compliance with it,[82] reasonableness of delay by the purchaser in enforcing it,[83] and his compliance with conditions amounting to terms of the warranty,[84] are questions for the jury. Illustrative cases wherein particular instructions were discussed are cited.[85]

(§ 11) *E. Recovery of chattel; replevin or conversion.*—Replevin is proper for the purchaser to recover a crop purchased, so that title passed, while growing;[86] but not one to be cared for and harvested by the seller before title passes,[87] nor to recover goods to be segregated from a larger amount,[88] or requiring something further to prepare them for acceptance.[89] Neither will trover lie until title has passed, hence all precedent conditions must have been fulfilled.[90] It cannot be urged in replevin by a purchaser of a growing crop against the seller

78. Standefer v. Aultman & T. Mach. Co. [Tex. Civ. App.] 78 S. W. 552.

79. Expert evidence that construction of an engine was such that it was dangerous from liability to the kind of explosion which actually occurred is admissible in an action for breach of warranty, where it is shown that the engine exploded the first time it was used. Charter Gas Engine Co. v. Kellam, 79 App. Div. [N. Y.] 231.

80. Admissions by the seller's general agent that machinery sold was worthless and was not as represented or ordered are admissible in an action for breach of warranty. Standefer v. Aultman & T. Mach. Co. [Tex. Civ. App.] 78 S. W. 552.

81. Whether or not "Texas red rust-proof seed oats" described a particular variety is a question for the jury. Americus Grocery Co. v. Brackett & Co. [Ga.] 46 S. E. 657. Whether representations of the vendor as to soundness of stock were intended and relied on as a warranty. Galbreath v. Carnes, 91 Mo. App. 512.

82. Evidence in action for breach of warranty of gasoline engine as raising a question for the jury whether the engine was properly constructed. Charter Gas Engine Co. v. Kellam, 79 App. Div. [N. Y.] 231. Whether eggs comply with a warranty is a question for the jury on conflicting evidence. Egbert v. Hanford Produce Co., 86 N. Y. Supp. 1118. Whether grass seed sold is actually of a certain variety ordered is for the jury in an action for breach of warranty, where the purchaser relied on his own experience and judgment. Gardner v. Winter & Co., 25 Ky. L. R. 1472, 78 S. W. 143. Whether there is a breach of warranty in a sale by sample is a question for the jury. Conflicting evidence as to the condition of the brick when received. N. Y. Hydraulic Press Brick Co. v. Cunn, 87 N. Y. Supp. 168.

83. When fairminded men may differ as to reasonableness of delay in rescission by the purchaser for noncompliance with sample or warranty, the question is for the jury, but when the time is so long that unreasonableness is clearly shown, the court should settle it as a matter of law. Manley v. Crescent Novelty Mfg. Co. [Mo. App.] 77 S. W. 489.

84. Whether the purchaser of a machine complied with a condition to furnish friendly assistance to remedy defects is a question for the jury, where he assisted at the seller's first trial to remedy defects but refused to assist at the second. Zimmerman v. Robinson, 118 Iowa, 117, 91 N. W. 918.

85. Charge not within issues. McAfee v. Meadows [Tex. Civ. App.] 75 S. W. 813. On the warranty. Ellis v. Riddick [Tex. Civ. App.] 78 S. W. 719. Action for breach of warranty of a horse. Knoepker v. Ahman, 99 Mo. App. 30, 72 S. W. 483. Action for damages for sale of a diseased mule. Moulton v. Gibbs, 105 Ill. App. 104. Where a complaint demanding damages "for breach of warranty" of a horse alleged statements of the seller as to its suitableness for farm work when he knew them to be false, the action was for fraudulent warranty and not on contract, so that refusal to instruct that if the seller represented the horse to be suitable for the purpose to which the purchaser intended to put it, the conversation as an entirety was a warranty, was proper. Klipstein v. Raschein, 117 Wis. 248, 94 N. W. 63. Dust collectors for ore pulverizers were warranted to convey and separate. An instruction that if the machine failed to do both there was a breach was not objectionable, since a failure to do one was a failure to do both. There would be a breach on failure to do one. Allington & C. Mfg. Co. v. Detroit R. Co. [Mich.] 95 N. W. 562.

86. Glass v. Blazer Bros., 91 Mo. App. 564.

87. La Vie v. Tooze, 43 Or. 590, 74 Pac. 210. In replevin to recover a growing crop, evidence may be admitted to prove an actual symbolical delivery by the seller to the buyer's agent. Id.

88. La Vie v. Crosby, 43 Or. 612, 74 Pac. 220. Not for hops which had not been segregated and prepared for acceptance as required by the contract of sale. Backhaus v. Buells, 43 Or. 558, 72 Pac. 976, 73 Pac. 342.

89. Where, under a sale of shingles, title is to pass when the shingles are made, sorted, counted and piled, the purchaser cannot maintain replevin before such conditions precedent are fulfilled. Haynes v. Quay [Mich.] 95 N. W. 1082.

90. Where a sale was for cash on delivery, and the goods were given to a carrier designated by the purchaser before payment, the purchaser having agreed to send a draft which owing to a mistake was not done, the latter could not sue in conversion for the goods, title not having passed. Hilmer v. Hills, 138 Cal. 134, 70 Pac. 1080.

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and one buying his interest and taking possession from the purchaser after delivery that the former sale was against public policy, the action not being to enforce such contract.[91]

(§ 11) *F. Lien for price paid.*—One who bought a machine on condition that it should work satisfactorily and spoiled considerable material in attempting to use it did not waive his statutory lien for money advanced for a duplicate part at the seller's request by refusing to return the machine until the damaged material and duplicate were paid for.[92]

(§ 11) *G. Recoupment and counterclaim.*—Recoupment must relate to the contract of sale sued on.[93] In an action for the price the buyer may recoup damages from breach of warranty[94] or for failure to deliver all the goods at the time agreed upon,[95] or deficiency in quantity,[96] or may set off or counterclaim expenses entailed by such breach,[97] and loss of profits or of use of property,[98] provided they are definite and certain[99] and provided the same accrued before action brought.[1] A warranty not part of the sale is enforceable by counterclaim.[2] Damages cannot be recouped, counterclaimed or set off in replevin by the seller.[3] Failure of the purchaser to perform his part of the sale,[4] or to rescind and offer to return the property,[5] will prevent his set off or recoupment of damages in an action by the

91. Cal. Cured Fruit Ass'n v. Stelling, 141 Cal. 713, 75 Pac. 320.

92. Rev. St. 1898, § 3345. Weeks v. Robert A. Johnston Co., 116 Wis. 105, 92 N. W. 794.

93. Where all of the goods were not delivered at the agreed time and another contract was made canceling all former contracts as to such goods, the latter contract was a new and independent agreement, so that damages for failure to deliver under the former contract cannot be recouped in an action for the price of goods delivered under a notice of recoupment given under the first contract. Thorn v. Morgan & W. Co. [Mich.] 97 N. W. 43.

94. Queen City Glass Co. v. Pittsburg Clay Pot Co., 97 Md. 429. Special damages from injury to machinery and loss of time in testing yarn sold to hosiery manufacturers may be specially pleaded as a defense in an action for the price. Wallace v. Knoxville Woolen Mills, 25 Ky. L. R. 1445, 78 S. W. 192.

95. Thorn v. Morgan & W. Co. [Mich.] 97 N. W. 43.

96. Where it appears, in an action for the contract price of beef cattle delivered under a contract of sale of a herd, of which a certain number was to be beef cattle, and a deduction was to be allowed for default in the number of such beef cattle, that the contract required a specific number which was not supplied, the purchasers may set off the damages from such default against the price under the contract. McNamara v. Home L. & C. Co. [C. C. A.] 121 Fed. 797.

97. Where a boiler, part of machinery sold, burst because of defects of which the vendors should have known, defendants in an action for the price may set off expenses to put the boiler in repair and damages to other machinery, including cost of its repair and loss from stoppage of the works. Charles E. Dustin Co. v. St. Petersburg Inv. Co., 126 Fed. 816. In an action for the price of sheep, a counterclaim for breach of warranty may consist of items for care, feed and expense of keeping, the question whether breach of the warranty was the proximate cause of such damages being a matter relating to the proof, not the pleadings. Mallory Comm. Co. v. Elwood, 120 Iowa, 632, 95 N. W. 176.

98. In an action for the price of machinery for an electric plant, the purchaser could set off loss of the value of the use of the plant during a delay in delivery, including items for time and services of the manager, extra labor and loss of orders, so that such items could not be made the subject of separate claims. Charles E. Dustin Co. v. St. Petersburg Inv. Co., 126 Fed. 816.

99. Punteney-Mitchell Mfg. Co. v. Northwall Co. [Neb.] 97 N. W. 1040. In an action for price of machinery including a boiler which burst because of defects, an allegation of set off in a certain amount for extra fuel necessary to make the old boiler supply sufficient steam to run the plant was too indefinite to be allowed. Charles E. Dustin Co. v. St. Petersburg Inv. Co., 126 Fed. 816.

1. Jackson v. Hunt [Vt.] 56 Atl. 1010.

2. Cannot be used as defense to an action on a written contract of sale. Atwater v. Orford Copper Co., 85 N. Y. Supp. 426.

3. Recoupment or set off cannot be had by a vendee in a conditional sale of personalty for breach of warranty in replevin by the vendor to enforce breach of the condition for recovery of the property [Code 1858, § 2918]. Blair v. A. Johnson & Sons [Tenn.] 76 S. W. 912.

4. Where the purchaser fails to pay for coal delivered under a contract of sale, and the seller, refusing to deliver more, sues for the contract price of that delivered, the purchaser cannot recoup damages for failure to deliver the remainder. Purcell Co. v. Sage, 200 Ill. 342, 65 N. E. 723. He need not pay before maturity, though requested. Kavanaugh Mfg. Co. v. Rosen [Mich.] 92 N. W. 788.

5. Where sheep delivered were diseased but the buyer retained them without rescinding or offering to do so, he cannot in an action for the price set off expenses in caring for the sheep because of the disease.

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seller. A counterclaim must plead all damages claimed,[6] and must particularize expenses made necessary by breach.[7] There must be an allegation that expenditures were made at the seller's request.[8] The liability of a corporation buyer must be shown.[9] If damages be counterclaimed as in deceit, the instructions should submit every element of deceit to the jury.[10]

(§ 11) *H. Choice and election of remedies.*—The contract of sale may by stipulation fix the purchaser's remedy and limit his choice.[11] On a breach of warranty, the buyer may rescind or sue for damages[12] or counterclaim,[13] or defend[14] to an action for the price. Replevin will lie concurrently with an action for breach only when title has passed.[15] Where a contract for sale and shipment of goods from a foreign country stipulated that the buyer's form of charter party should be used, use of another form more onerous is not such a breach as will warrant rejection of the cargo, it being the purchaser's duty to perform and sue for damages.[16] A contract for sale of chattels is generally not the subject of a bill for specific performance,[17] and if no specific thing was sold to him, he cannot pursue it, but must sue for damages for nondelivery.[18]

Steiger v. Fronhofer, 43 Or. 178, 72 Pac. 693. Where a machine is to be returned on failure to work, the buyer cannot retain it and claim damages for breach of warranty in an action for the price. McCormick Harvesting Mach. Co. v. Arnold, 25 Ky. L. R. 663, 76 S. W. 323.

6. Defendant in an action for price of a mill cannot have expenses of its removal assessed by the jury under his counterclaim when he did not plead them. Cole v. Laird, 121 Iowa, 146, 96 N. W. 744. In claiming damages in an action for the price of goods, defendant must aver the items of damages. Beck Duplicator Co. v. Fulghum, 118 Ga. 836.

7. In an action for the price of goods, an affidavit of setoff for purchase of other goods by the buyer because of failure of plaintiff to deliver must state the seller, amount, price and place of purchase of the other goods. Wilmot & H. Mfg. Co. v. Penn. B. & N. Co., 21 Pa. Super. Ct. 490.

8. A counterclaim alleging payment of freight must show that payment was made at request of the seller and not voluntarily. Meyer Bros. Drug Co. v. Puckett [Ala.] 35 So. 1019. In an action for price of milk sold, a claim of set-off for freight on sour milk returned cannot be made without an allegation of a request for such return by plaintiff. Deacon v. Uhlman, 21 Pa. Super. Ct. 381.

9. Sufficiency of counterclaim in action for price of goods as showing liability of corporate plaintiff. Guenther v. American Steel Hoop Co., 25 Ky. L. R. 795, 76 S. W. 419.

10. Fraud in selling bad or worthless goods. The charge did not require a finding that the seller knew of it. Live Stock Remedy Co. v. White, 90 Mo. App. 498.

11. Contract of warranty of threshing machine as limiting remedy of vendee for breach to return of the machine and reclamation of consideration. Heagney v. Case Threshing Mach. Co. [Neb.] 96 N. W. 175.

12. The purchaser has two remedies for broken warranty; to return the property and one for the price or keep the property and sue for the difference between its actual and contract values. Sloan v. Wolf Co. [C. C. A.] 124 Fed. 196. Where there was an implied warranty, and no opportunity given for inspection, he need not rescind on delivery of goods of inferior quality, but may keep the goods and sue for the breach. Ellis v. Reddick [Tex. Civ. App.] 78 S. W. 719.

13. Where goods sold are warranted, in an action for the price, the purchaser may retain the goods, plead breach of warranty and counterclaim damages, or rescind the sale by returning or offering to return the goods and plead the rescission as a complete defense. Sloan Comm. Co. v. Henry A. Fry & Co. [Neb.] 95 N. W. 862.

14. On breach of an implied warranty of machinery, the purchaser need not rescind, but may retain the property and defend against recovery of the full contract price after use of the machine and part payment. New Birdsall Co. v. Keys, 99 Mo. App. 458, 74 S. W. 12.

15. Where there was no delivery under an executory sale of lumber and the seller refused to abide by the buyer's inspection, which was necessary to pass title, the latter could not sue in replevin, but only for breach of the sale. Deutsch v. Dunham [Ariz.] 78 S. W. 767. Where a written contrace was an executory agreement for sale or hops and hypothecation of the crop to secure unliquidated damages the seller might sustain from breach by the buyer, on breach by the seller, the buyer was not entitled to possession, but only to have the hops subjected to his claim after ascertainment at law. Backhaus v. Buells, 43 Or. 558, 72 Pac. 976, 73 Pac. 342.

16. Withers v. Moore [Cal.] 71 Pac. 697.

17. Dorman v. McDonald [Fla.] 36 So. 42. If it is to be exercised within a given time for a fixed price, an option will be specifically enforced where the article is not an ordinary article of merchandise. A grain elevator. Tidball v. Challburg [Neb.] 93 N. W. 679.

18. Where a contract for delivery of bonds was uncertain, in that it did not specify the particular bond to be delivered, the transferee has no enforceable interest in bonds delivered to others, but can only recover the value of those to be delivered to him as on an implied contract. Cushing v. Chapman, 115 Fed. 237.

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Resale will constitute an election not to rescind.[19] After election to rescind and return the chattel before payment, the purchaser under a written contract cannot demand damages for a breach.[20]

§ 12. *Damages for breach of sale. A. Breach by seller.—A buyer is entitled to recover the full purchase price* without deduction for depreciation after notice to seller,[21] with interest from breach[22] or with interest from demand or from bringing suit,[23] hence the market value of the goods at the time and place of delivery is immaterial.[24]

Failure to deliver.—Ordinarily and apart from special damage it is the difference between the contract price and the market price of the goods at time and place of delivery if the purchaser can buy elsewhere.[25] If there is a period for delivery, the market price on the last day governs.[26] If the buyer has resold, he may recover the value at the time of resale.[27] The measure of damages for failure to deliver shares of stock sold is its value at time of demand.[28] If no market exists at the place of delivery, the price at near markets for such goods will govern.[29]

In an action of conversion by a conditional vendor, proof of the price agreed upon is not proof of the value of the goods.[30] Where there is no proof of actual damages by breach of the seller, the buyer can recover nominal damages only.[31] Willfulness will not affect the damages.[32] In California, interest is properly allowed on damages from the time of filing the complaint.[33]

(§ 12) *B. Breach by purchaser.—If the seller elects to sue for the price* and hold the goods for the purchaser, the measure of damages is the agreed price.[34]

Interest.—It appearing that the amount of goods delivered is disputed, the seller is entitled to interest on the amount found due.[35] Where the quantity of

19. After refusal by the vendor to take back a chattel sold by fraudulent representations, sale by the vendee, without prior notice to the vendor, amounts to an election to stand on the contract, especially where he received other property in part payment. Barrett v. Tyler [Vt.] 56 Atl. 534.

20. McCormick Harvesting Mach. Co. v. Brown [Neb.] 98 N. W. 697.

21. A vendee of a patent right, who bought relying on false representations, cannot be charged, in a suit to rescind, with depreciation in the value of the right owing to lapse of time, when he had offered to return the right on discovering the fraud. Lederer v. Yule [N. J. Eq.] 57 Atl. 309.

22. **In Maine,** from date of the breach. South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165.

23. Illinois. Felt v. Bell, 205 Ill. 213, 68 N. E. 794.

24. Rescission for fraud. Weil v. Stone [Ind. App.] 69 N. E. 698.

25. Gruell v. Clark [Del.] 54 Atl. 955; Kelley, M. & Co. v. La Crosse Carriage Co. [Wis.] 97 N. W. 674; Bloom v. Americus Grocery Co., 116 Ga. 784; Hartnett v. Baker [Del.] 56 Atl. 672. Sale of output of coal mine. Wilmoth v. Hamilton [C. C. A.] 127 Fed. 48. It is immaterial that such market value includes a profit to local dealers. Coxe Bros. & Co. v. Anoka W., E. L. & P. Co. [Minn.] 97 N. W. 459. A seller defaulting in delivery by a certain time specified is liable for the difference between the contract price and the cost of obtaining the article elsewhere on short notice. Christopher & S. A., I. & F. Co. v. Yeager, 105 Ill. App. 126.

26. The measure of damages for breach of a contract to deliver goods "during" a certain month is the difference between the contract price at place of delivery on the last day of the month. Gentry Co. v. Margolius & Co., 110 Tenn. 669, 75 S. W. 959.

27. Whether plaintiff sue in trover, for conversion, or in assumpsit for breach of the contract. Trotter v. Tousey, 131 Mich. 624, 92 N. W. 544.

28. Belden v. Krom [Wash.] 75 Pac. 636.

29. O'Gara v. Ellsworth, 85 App. Div. [N. Y.] 216. An instruction as to market value of goods as measure of damages for failure to deliver machines sold is not supported by evidence of delivery at different places at certain prices, where those not delivered were to be sent to any point designated by plaintiff. Fegan v. Duvall S. & G. S. Co., 92 Mo. App. 236.

30. Mott Iron Works v. Reilly, 39 Misc. [N. Y.] 833.

31. Gruell v. Clark [Del.] 54 Atl. 955.

32. Kelley, M. & Co. v. La Crosse Carriage Co. [Wis.] 97 N. W. 674.

33. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564.

34. Cowan v. De Hart, 84 N. Y. Supp. 576. Where the goods are unwarrantably rejected, the damage recoverable is the contract price, not the value of the goods. Collins, etc., Co. v. Camors, etc., Co., 118 Ga. 646.

35. Mills' Ann. St. § 2251. Florence & C. C. R. Co. v. Tennant [Colo.] 75 Pac. 410.

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goods delivered at the time of the breach is uncertain and no demand is made for damages sustained on resale, interest on damages is properly computed from commencement of suit.[36]

For non-acceptance.—Unless it is shown that a commodity has no market value,[37] the measure of damages for refusal to receive goods is the difference between the contract price and the market price at time and place of delivery,[38] less expenses of resale and care of goods.[39] This amount must be further reduced by the cost of repairs for a certain period where the seller promised to furnish them for that period.[40] For an unexplained rejection, at least nominal damages may be had.[41] The last day of the period for delivery determines the market price.[42] A market value may exist at a certain place for a particular commodity, whether it be constantly kept there for sale or not.[43] If the property is not for resale, the measure is the difference between the contract price and the cost on delivery,[44] or if the property is used in a building the difference in value of the completed structure.[45] Where, on refusal of the buyer to accept, the seller sells to third persons, he can recover only the difference between the contract price and that so obtained,[46] and if he resells wrongfully, then only the difference between the contract price and the market at time and place of delivery.[47] Reasonable efforts of the vendor on resale to secure the best price, or obtaining a fair price, fixes the market price.[48]

In replevin because of fraud the measure of damages is the value of the chattel when plaintiff is entitled to possession under the writ.[49]

36. Nelson v. Hirsch & Sons' I. & R. Co., 102 Mo. App. 498, 77 S. W. 590.

37. Kincaid v. Price [Colo. App.] 70 Pac. 153; Belle of Bourbon Co. v. Leffler, 87 App. Div. [N. Y.] 302.

38. Houghton v. Furbush [Mass.] 70 N. E. 49. The purchaser of articles to be delivered from time to time may rescind and direct cessation of delivery when he will be liable for only the difference between the contract and market prices of articles to be delivered. McCall Co. v. Jennings, 26 Utah, 459, 73 Pac. 639. At time of the breach. Gehl v. Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26; Backes v. Black [Neb.] 97 N. W. 321; Saveland v. Western Wis. R. Co., 118 Wis. 267, 95 N. W. 130. Or within a reasonable time thereafter. Could not keep cattle six months after breach of contract of sale and charge loss at that date to vendee. First Nat. Bank v. Ragsdale, 171 Mo. 168, 71 S. W. 178.

39. American H. & L. Co. v. Chalkley & Co. [Va.] 44 S. E. 705.

40. Sale of furnace. City of Ludlow v. Peck-Williamson H. & V. Co., 25 Ky. L. R. 83, 76 S. W. 377.

41. Backes v. Black [Neb.] 97 N. W. 321.

42. On breach by the buyer of a contract for sale of a certain amount of goods in a year, to be ordered in instalments by the purchaser, the measure of damages is the difference between the contract price and the market price on the last day of the year. Duluth Furnace Co. v. Iron Belt Min. Co. [C. C. A.] 117 Fed. 138.

43. Coxe Bros. & Co. v. Anoka Waterworks, Elec. L. & P. Co. [Minn.] 97 N. W. 459.

44. The measure of damages for failure to accept materials ordered is the difference between the contract price and the cost of manufacture and erection of the materials. Winslow Bros. Co. v. Du Puy [Pa.] 57 Atl. 189. Where it appeared that the goods had no market value and depreciated in value after manufacture, and on the breach the seller sold what it could to others, it could recover the difference between such price and the contract price, and as to goods not manufactured, the difference between the contract price and the cost of manufacture. Puritan Coke Co. v. Clark, 204 Pa. 556. Where coke sold at a fixed price has no market value in ordinary times and is only manufactured on orders, and on breach by the vendee the vendor could have sold for a certain price, such price could not control in fixing damages. Id. The measure of damages for failure of a railroad company to accept piling bought is the difference between the actual cost to the contractor and the contract price. Reed v. Ill. Cent. R. Co., 25 Ky. L. R. 389, 75 S. W. 200.

45. Where bricks are bought by sample but those delivered are not equal to the sample, the buyer may show the value of his building with the defective bricks used and the value it would have been had they not been used. N. Y. Hydraulic Press Brick Co. v. Cunn, 87 N. Y. Supp. 168.

46. Blick v. Fabian, 86 N. Y. Supp. 207; Baltimore & L. R. Co. v. Steel Rail Supply Co. [C. C. A.] 123 Fed. 655.

47. Though the goods have brought less than such market price on the resale. He sold without notice. Nelson v. Hirsch & Sons' I. & R. Co., 102 Mo. App. 498, 77 S. W. 590.

48. Pratt v. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368. The market value may be fixed by prompt resale at the best price obtainable. Gehl v. Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26.

49. Johnson v. Groff, 22 Pa. Super. Ct. 85.

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(§ 12) *C. Breach of warranty.*—The measure of damages for breach by the seller of a warranty is the difference between the market value of the chattel as it is and as it was warranted to be, if the price is not yet paid,[50] or between the real value as it is and the price paid,[51] with interest.[52] The measure of damages is fixed by the price on the day of delivery, at which the buyer may retain them or resell.[53] The entire price cannot be recovered unless the chattel is worthless for any purpose.[54] The warrantor cannot recover for appliances added to fulfill the warranty.[55] The purchaser is liable for its value to him less damages for noncompliance with warranty if he retains and uses the thing as it is.[56]

(§ 12) *D. Special damages.*—Unless controlled by terms of the sale and fixed therein,[57] all damages reasonably within the contemplation of the parties at the time of sale,[58] including loss of net profits[59] on resales already made,[60] or as-

50. Bull v. Bath Iron Works, 75 App. Div. [N. Y.] 380. Machinery. Danville C. & I. Co. v. Vilter Mfg. Co. [Ky.] 79 S. W. 225. Sale of unsound cattle. Houston Cotton Oil Co. v. Trammell [Tex. Civ. App.] 72 S. W. 244. Damages for false representations as to quality of a horse are measured by the difference between its value with and without the qualities represented. Bessemer Ice Delivery Co. v. Brannen, 138 Ala. 157. The measure of damages for breach of a contract to furnish machinery, accepted and put in place by the purchaser in ignorance that it was defective, is the difference between its value had it complied with the contract and its value as it is. Florence O. & R. Co. v. Farrar [C. C. A.] 119 Fed. 150. The measure of damages for breach of a warranty of soundness of an animal which had communicated tuberculosis to other animals is the difference between the actual value of the diseased animal and its value if sound at sale. Cummins v. Ennis [Del.] 56 Atl. 377. The measure of damages for defects in yarn sold to manufacturers is the difference in its value as it was contracted to be delivered and in its condition as it was. Wallace v. Knoxville Woolen Mills, 25 Ky. L. R. 1445, 78 S. W. 192. The measure of damages for breach of warranty of eggs sold is the difference between the price on resale and the price they would have brought had they been of the quality warranted. Egbert v. Hanford Produce Co., 86 N. Y. Supp. 1118. Where a motor warranted as to quality was worthless, the purchaser may recover the entire value as warranted. Westinghouse Elec. Mfg. Co. v. Troell, 30 Tex. Civ. App. 200, 70 S. W. 324. On breach of warranty as to quality, the measure of damages is the difference between the contract price and the market price of goods delivered at time and place of delivery. Americus Grocery Co. v. Brackett & Co. [Ga.] 46 S. E. 657.

51. Smith v. Williams, 117 Ga. 782; Jewell Filter Co. v. Kirk, 102 Ill. App. 246.

52. Smith v. Williams, 117 Ga. 782.

53. Americus Grocery Co. v. Brackett & Co. [Ga.] 46 S. E. 657.

54. Small v. Bartlett, 96 Mo. App. 550, 70 S. W. 393. Where a motor warranted as to quality is wholly worthless, the purchaser may recover the entire value as warranted. Westinghouse Elec. Mfg. Co. v. Troell, 30 Tex. Civ. App. 200, 70 S. W. 324.

55. Machine warranted to a certain capacity, extra appliances supplied at his suggestion to bring the machine to its guaranteed capacity. Weeks v. Robert A. Johnston Co., 116 Wis. 105, 92 N. W. 794.

56. Arthur Fritsch F. & M. Co. v. Goodwin Mfg. Co., 100 Mo. App. 414, 74 S. W. 136.

57. Where, by the terms of a contract for sale of lumber, default in delivery of the specified amount in a year was to be offset by a deduction in the price of that delivered, the seller could recover no other damages for such default. Jackson v. Hunt, [Vt.] 56 Atl. 1010. A contract for sale of a certain amount of goods, stipulating that damages for failure to deliver less than 75 per cent should be a fixed sum if the seller notified the purchaser of his intention to furnish the smaller amount before a certain time, did not fix the damages in case such notice is not given. Newell v. New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487.

58. Punteney-Mitchell Mfg. Co. v. Northwall Co. [Neb.] 91 N. W. 863; Id., 97 N. W. 1040. Expenses claimed must have been made at request of the seller. Meyer Bros. Drug Co. v. Puckett [Ala.] 35 So. 1019. A buyer counterclaiming for breach of warranty in an action for the price of goods cannot recover expenses of examination as damages. Lifshitz v. McConnell, 80 App. Div. [N. Y.] 289. Loss of pasturage and damages for loss of flesh and growth of cattle due to lack of water cannot be recovered on a counterclaim in an action for the price of a windmill which it is alleged failed to supply sufficient water. Cole v. Laird, 121 Iowa, 146, 96 N. W. 744. In an action for failure to deliver machinery for a cotton mill, damages to cotton seed bought for manufacture, arising from expenses in cooling it after heating, are reasonably contemplated by the parties; also expenses incurred after the breach in expectation, aroused by the seller's acts, that he would complete the contract. Colvin v. McCormick Cotton Oil Co., 66 S. C. 61. Where special circumstances affecting the subject-matter are understood by both parties and damages resulting from loss of gains are reasonably contemplated, they may be recovered on nondelivery. Damages for breach of contract for sale of logs were enumerated under the terms of the contract. South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165.

59. The loss in daily sales of a purchaser in his business is not the measure of damages where no reward is had to profits or loss in the sale of the goods. Paxton v. Vadbouker [Neb.] 96 N. W. 378.

60. In an action for the price of ma-

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certainable,[61] and which might have been foreseen,[62] also necessary expense of remedying defects,[63] defending title[64] or of purchasing elsewhere,[65] or of abortive efforts to resell,[66] also loss resulting directly from the breach,[67] attorneys' fees for bringing the action for breach of warranty, will not be included where no deceit or fraud of the seller is shown.[68] Where goods rejected are in fact sound and merchantable, the buyer cannot recover damages for money expended in examination,[69] loss attributable to the buyer's own act[70] or neglect[71] is excluded. Thus

chinery sold expressly for resale to the trade, a jobber may recover profits on resales actually made and completed on a counterclaim for breach of warranty where they were evidently contemplated by the parties when the contract was made. Punteney-Mitchell Mfg. Co. v. Northwall Co. [Neb.] 97 N. W. 1040.

61. Conjectural profits cannot be recovered. Lapp v. Ill. Watch Co., 104 Ill. App. 255. Damages for nondelivery cannot include prospective profits uncertain in nature. South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165. Uncertain profits of an electric plant cannot be considered in computing damages for delay in delivery of machinery, but the measure is the value of the use of the plant for the period lost. Charles E. Dustin Co. v. St. Petersburg Inv. Co., 126 Fed. 816. Damages for delay in delivery of an ice plant to a creamery cannot include loss suffered because patrons went elsewhere when the creamery failed to open. Creamery Package Mfg. Co. v. Benton County Creamery Co., 120 Iowa, 584, 95 N. W. 188.

62. Where the seller knew nothing of the extent or exigencies of the purchaser's business, profits lost by breaking of machine cannot be added. Logging machine warranted perfect of its kind and that defective parts would be replaced. Puget Sound I. & S. Works v. Clemmons, 32 Wash. 36, 72 Pac. 465.

63. Where defendants in an action for the price of goods counterclaimed for price of new tools required to be furnished because of defects in the goods furnished, but it was not shown that the tools could not be used for any other purpose, the claim cannot be allowed. Fredrick Mfg. Co. v. Devlin [C. C. A.] 127 Fed. 71. Expenses in doctoring animals infected by animal sold. Cummins v. Ennis [Del.] 56 Atl. 377. The purchaser of stock warranted sound may recover for reasonable attempts to cure disease. Galbreath v. Carnes, 91 Mo. App. 512.

64. The measure of damages for breach of warranty may sometimes include expense incurred in defending title; as against the original warrantor, damages cannot be increased by contracts made, or liabilities or expenses afterward incurred by his vendee as to later purchasers. Smith v. Williams, 117 Ga. 782.

65. Kelley, M. & Co. v. La Crosse Carriage Co. [Wis.] 97 N. W. 674. If the purchaser is unable to obtain like goods in the open market or can obtain them only with difficulty, he may recover the amount of his loss, including profits and expenses incurred before knowledge of the breach. Kavanaugh Mfg. Co. v. Rosen [Mich.] 92 N. W. 788. Where a purchaser had resold goods before delivery and cannot purchase elsewhere, he may recover profits on such resales as damages for failure of the seller to deliver. Currie Fertilizer Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268. The measure of damages for failure to deliver is the loss resulting therefrom if the buyer cannot avoid it by purchasing elsewhere. Expenses incurred by the buyer in taking orders for sale of its manufactures in expectation that delivery would be made in time to fill such orders may be added as damages; prospective profits on such orders may be recovered; but expenses in taking orders after it became apparent that they could not be filled will not be allowed. Thorn v. Morgan & W. Co. [Mich.] 97 N. W. 43. If goods bought under a contract of sale are not to be obtained in the open market on breach by the seller, or if obtainable can be made only on special order to a manufacturer, the purchaser may recover as damages the loss of the use of his factory as caused by the breach, if the seller knew from the nature of the business that such would be the result, together with extra expense and increased cost in buying elsewhere. Kelley, M. & Co. v. La Crosse Carriage Co. [Wis.] 97 N. W. 674. If the vendor knows that goods are purchased to fill outstanding orders of the vendee, he is liable, on failure to deliver the goods, for the profits expected to be made on such orders. Lapp v. Ill. Watch Co., 104 Ill. App. 255; Thorn v. Morgan & W. Co. [Mich.] 97 N. W. 43.

66. Where goods are bought for resale, which fact is known to the vendor, and the vendee delivers them, without discovering defects, to his purchasers who reject them, the vendee may recover as damages the expenses in the sales to his customers and in returning the goods to the vendor. Punteney-Mitchell Mfg. Co. v. Northwall Co. [Neb.] 91 N. W. 863.

67. Loss from infection of other animals by the one sold and expenses in caring for such infected cattle. Cummins v. Ennis [Del.] 56 Atl. 377; Jewell Filter Co. v. Kirk, 102 Ill. App. 246. On a counterclaim by a street railway company for breach of warranty of a steam engine bought for motive power, damages may include loss of profits, and of fares due to necessity of passengers leaving the cars, excessive use of coal, injury to boilers and generator, and extra labor. People's Sav. Bank v. Waterloo & C. F. R. T. Co., 118 Iowa, 740, 92 N. W. 691. Damages to machinery from giving a fair trial to defective yarn may be recovered where the purchaser used ordinary care. Wallace v. Knoxville Woolen Mills, 25 Ky. L. R. 1445, 78 S. W. 192. In an action for breach of implied warranty, the purchaser not being negligent, the measure of damages is the loss sustained by reason of such use. Cleveland Linseed Oil Co. v. Buchanan & Sons [C. C. A.] 120 Fed. 906.

68. Smith v. Williams, 117 Ga. 782.

69. Action to recover price paid and for

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purchasers of defective machinery cannot continue to use the same indefinitely and recover for loss of profits during this indefinite period.[72] Breach of a contract of sale for a definite term entitles the seller to damages for the whole contract, prospective as well as past.[73] If the buyer has notice of the necessity for prompt delivery and the loss to come from delay, he is answerable for such delay and damages from defects and incompleteness of goods when delivered.[74] Mere notice to a seller of interest or probable action of buyer will not suffice necessarily and as a matter of law to charge the seller with special damage on that account.[75]

Damages for personal injuries directly resulting from defects may be recovered,[76] but not necessarily those from operation of a defective machine.[77]

(§ 12) *E. Evidence as to damages.*—Facts from which the measure of damages is computed must be proven.[78] Evidence relating to other times[79] or places[80] will not prove values or probable profits unless the same conditions prevailed. Where the purchaser is limited to recover under a warranty only such damages as he can prove, evidence as to the value of the machine for any purpose is material.[81] When goods are not purchasable at the place of delivery, evidence of the price at the controlling market is admissible.[82] Loss of profits may be shown by the testimony of purchasers as to the amount they would probably have used, based on past experience.[83] It may be shown that the vendee had orders for the goods purchased at the time of purchasing.[84] Any facts which tend to show what were the probable consequences and the parties' knowledge thereof[85] will be admitted.

damages for breach of the contract. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

70. "Good will" cannot be recovered as damages for breach of a sale where the property to which it is attached has been voluntarily alienated. Paxton v. Vadbouker [Neb.] 96 N. W. 378.

71. Damages to cotton seed, could recover only such damages as he could not reasonably prevent. Colvin v. McCormick Cotton Oil Co., 66 S. C. 61. Where the buyer refuses the goods and returns them, the seller is bound to make the loss as light as possible, which duty is not discharged by allowing them to remain in the street until removed by the city as a nuisance. Empire State Bag Co. v. McDermott, 89 App. Div. [N. Y.] 234.

72. Danville C. & I. Co. v. Vilter Mfg. Co. [Ky.] 79 S. W. 225.

73. Parker v. McKannon Bros. & Co. [Vt.] 56 Atl. 536.

74. Charles E. Dustin Co. v. St. Petersburg Inv. Co., 126 Fed. 816.

75. Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 47 Law. Ed. 1171.

76. Where powder for use in a flash lamp was warranted safe for use in ordinary lamps, personal injuries from explosion during such use may be recovered in an action for breach of warranty. Wood v. Anthony & Co., 79 App. Div. [N. Y.] 111.

77. Damages for personal injury received while operating a machine warranted to do good work cannot be recovered in an action on the warranty, though the machine was defective. Birdsinger v. McCormick H. Mach. Co., 86 N. Y. Supp. 781.

78. Where the measure of damages depends upon the market price at time and place of delivery evidence of such price must be given to recover actual damages. Bloom v. Americus Grocery Co., 116 Ga. 784.

79. Where, on an action upon an implied warranty, the damages are the diminished market value of the chattel, evidence that the chattels sold for the market value at a subsequent date is inadmissible in the absence of proof that the market values on the two dates were the same. Houston Cotton Oil Co. v. Trammell [Tex. Civ. App.] 72 S. W. 244.

80. In an action to recover damages for breach of a contract to furnish an article to plaintiff to sell, evidence of profits made at another place are inadmissible in the absence of evidence that the conditions at the two places are similar. Currie Fertilizer Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268.

81. Parsons B. C. & S. F. Co. v. Mallinger [Iowa] 98 N. W. 580.

82. O'Gara v. Ellsworth, 85 App. Div. [N. Y.] 216.

83. Such testimony is sufficient as a basis for damages. Consumers' Ice Co. v. Jennings, 100 Va. 719.

84. In an action by a vendee for prospective profits on sales of goods bought from the vendor who failed to deliver. Lapp v. Ill. Watch Co., 104 Ill. App. 255.

85. On breach of a contract of sale by the seller of a particular kind of carriage springs to a manufacturer, the following evidence as to damages is admissible; general knowledge of the seller how the breach affected the business of the purchaser; the custom of operating the purchaser's factory, showing its efficiency to be diminished by the delay and the effect of the breach on work, and inability to fill orders for goods after close of the season; the capacity of the factory as bearing on the question of loss; the supply of other materials to keep the factory busy; orders received before or after the contract; the existence or nonexistence of a market from which the springs could have been supplied; description of the springs to show their adapta-

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§ 13. *Rights of bona fide purchasers or other third persons.*[86]—Generally a seller can confer no better title than he has, even to a bona fide purchaser,[87] but his right to sell that title in good faith cannot be unreasonably impaired,[88] and when ownership is complete and unqualified a good title passes.[89] A sale remaining executory will not enable the purchaser to retain the goods as against a subsequent purchaser.[90] A subsequent taker with notice or for an antecedent consideration is not protected against rescission for fraud,[91] but a bona fide taker is protected,[92] unless in cases where the possession of the ostensible purchaser was gained by fraud.[93]

In some states it is a crime to fraudulently dispose of goods bought on credit.[94] A vendor's lien cannot be enforced against a bona fide purchaser of the vendee.[95] Waiver of the seller's right to retain possession until payment, by allowing shipment before payment, will prevent his recovery from a bona fide transferee of the bill of lading for value.[96] A bona fide purchaser must prove payment in good faith,[97] and without notice.[98]

bility for the purchaser's purposes; expenses incurred in getting other springs; diligence of the purchaser in that regard; but not proof of money value of time of employes lost nor profits to be made on specific vehicles sold. Kelley, M. & Co. v. La Crosse Carriage Co. [Wis.] 97 N. W. 674. In an action for the breach of a contract for the sale of chattels to be manufactured during a definite term, evidence of the nature of the contract and the circumstances surrounding and following its breach are admissible. Evidence of cost of the instruments, what portion thereof was labor, the number made per week, the extent of work or business since breach, and whether he could furnish the instruments during the remainder of the term. Parker v. McKannon Bros. & Co. [Vt.] 56 Atl. 536.

86. Necessity of record of conditional sale, see post, § 14.

87. Sale by a bailee for storage carries no title as against the owner. Ullman, Einstein & Co. v. Biddle, 53 W. Va. 415. If one send goods to another under an agreement that there is to be no sale, but the receiver is to sell the goods and then account to the sender, title does not pass. Goods sent under such an agreement not subject to receiver's mortgage. Furst Bros. v. Commercial Bank, 117 Ga. 472. Delivery of cotton "on cash sale" in Georgia by a planter or commission merchant will not pass title, and the seller may recover as against a bona fide purchaser from the vendee. Flannery v. Harley, 117 Ga. 483.

88. Since ownership implies the right to sell, acts declaring sales of stocks of merchandise out of the usual course of trade, or in bulk, void as against creditors unless a prescribed inventory was taken and the creditors notified, are unconstitutional as depriving one of property without process of law and as class legislation. Block v. Schwartz [Utah] 76 Pac. 22.

89. If property covered by a bill of sale from debtor to creditor, accompanied by change of possession, is exempt, the sale is valid against third persons though not acknowledged or recorded. Heisch v. Bell [N. M.] 70 Pac. 572.

90. Low v. E. J. Broad & Co. [Tex. Civ. App.] 77 S. W. 28. Where the vendor in a sale, void under the statute of frauds repudiates and resells to another, the latter may plead such act as a bar in replevin by the first vendee. Shelton v. Thompson, 96 Mo. App. 327, 70 S. W. 256.

91. The right of the seller to rescind for fraud is superior to rights under a mortgage securing an antecedent debt, but not as to a mortgage on a debt created after the sale without notice thereof. Geo. D. Mashburn & Co. v. Dannenberg Co., 117 Ga. 567. To rescind for fraud and reclaim the goods from the vendee's mortgagee the vendor must show that the mortgagee knew of the fraud or was secured for an antecedent debt. Id.

92. A seller cannot disaffirm a sale for fraud and recover possession from bona fide purchasers from his purchaser. Hochberger v. Baum, 85 N. Y. Supp. 385. A bona fide purchaser from one who obtained a chattel by fraud takes a good title before rescission of the sale by the original vendor. George D. Mashburn & Co. v. Dannenberg Co., 117 Ga. 567.

93. A purchaser in good faith from one who obtained possession of a chattel under fraudulent statements that he was buying for another, takes no title as against the owner. Smith Premier Typewriter Co. v. Stidger [Colo. App.] 71 Pac. 400.

94. See False Pretenses and Cheats, 1 Curr. Law, p. 1205.

95. Sand. & H. Dig. §§ 4727, 4728. Roach v. Johnson [Ark.] 74 S. W. 299.

96. American Zinc, Lead & Smelting Co. v. Markle Leadworks, 102 Mo. App. 158, 76 S. W. 668.

97. It will not be presumed. One purchasing the interest of the growers in a crop previously sold by them to another making advances, held not a bona fide purchaser. Cal. Cured Fruit Ass'n v. Stelling, 141 Cal. 713, 75 Pac. 320. A mortgagee who brings suit on his claim, attaches goods and garnishes debtors, and who, in consideration of the mortgage, dismisses such proceedings and pays costs, is a bona fide purchaser for value of the mortgaged goods as against the vendor seeking to rescind the sale for fraud, where he is not chargeable with notice. Large & Amsden Co. v. Samuel Nott & Son [Neb.] 95 N. W. 484. An assignee of the mortgagee of goods was not

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A warranty of goods sold is not negotiable or assignable and does not run with the goods.[99] A warranty of the seller's vendor will not enure to benefit of the seller's purchaser.[1] A bank which took a bill of lading attached to a draft cannot sue on the warranty.[2]

Assignment of a conditional contract of sale by the seller subrogates the assignee to the seller's rights in the conditions.[3] A bank advancing money to a vendor, taking as security and means of payment a draft on the vendee, becomes, upon the latter's refusal to honor the draft, the owner of the goods to the extent of the amount advanced.[4]

Brokers and pledgees.—A broker selling on margin has a pledge but not title.[5] An assignment of stock bought on margin from a broker carries to the assignee the right to sue the broker for conversion on his failure to deliver.[6] A vendee under a valid contract of sale, where the vendor retains possession, has a right superior to that of a creditor to whom the chattels were subsequently pledged for a pre-existing debt.[7]

§ 14. *Conditional sales. Character and formation; rights acquired.*[8]—A conditional sale is one which depends for its validity on the fulfillment of some condition.[9] Hence whenever payment or other act is prerequisite to the passing of title,[10] the sale is conditional. Such contracts are valid,[11] and a provision that title remains in the seller until the buyer, a tradesman, pays or sells in course of trade is fair on its face. The condition must be in the sale itself,[12] though in a sep-

entitled to show that he in good faith purchased the property outright. Haynes v. Hobbs [Mich.] 98 N. W. 978. The seller's administrator was entitled to recover in trover for the sale of more of the property than was sufficient to pay the debts. Id.

98. Cal. Cured Fruit Ass'n v. Stelling, 141 Cal. 713, 75 Pac. 320. One buying from a vendee with notice that the latter has not paid for the goods is required to ascertain whether the first vendee is entitled to delivery without payment. Hirsch v. C. W. Leatherbee Lumber Co. [N. J. Law] 55 Atl. 645. One purchasing from another holding under a conditional sale takes subject to the rights of the original seller where he saw and read the conditional contract. Cooper Wagon & Buggy Co. v. Barnt [Iowa] 98 N. W. 356. Where under a deed of trust property is not to be sold except upon the written consent of the trustee, public announcement by the trustee at a sale under the deed of trust that property previously sold was not included therein ratifies such sale and gives the purchaser good title. Huffman Min. & Mfg. Co. v. Georgia & A. Min. Co., 116 Ga. 701.

99. Smith v. Williams, 117 Ga. 782.

1. That a warranty in print was placed on goods by the manufacturer will not expressly bind a wholesale and retail dealer selling them in the usual course of trade without express representations. Pemberton v. Dean, 88 Minn. 60, 92 N. W. 478, 60 L. R. A. 311.

2. German-Am. Sav. Bank v. Craig [Neb.] 96 N. W. 1023.

3. Providing for re-possession on default of payment. Nye v. Daniels, 75 Vt. 81.

4. There was no agreement in case of the vendee's refusal to honor the draft to charge the amount back on the books of the bank to the vendor. Willard Mfg. Co. v. Tierney, 133 N. C. 630.

5, 6. Rothschild v. Allen, 90 App. Div. [N. Y.] 233.

7. Dexter v. Citizens' Nat. Bank [Neb.] 94 N. W. 530.

8. Parol evidence inadmissible to vary sale, see ante, § 2.

9. Cyc. Law Dict. "Sale," citing 4 Wash. C. C. [U. S.] 588; 10 Pick. [Mass.] 522; 18 Johns. [N. Y.] 141; 8 Vt. 154; 2 Rawle [Pa.] 326; 2 A. K. Marsh. [Ky.] 420; Coxe [N. J.] 292.

10. See Ante, § 6.

Sales held conditional: Where title to goods and ownership of accounts on resale by purchaser were to remain in the seller until payment. Smith v. Williams, 90 App. Div. [N. Y.] 507. Written contract for sale of household furnishings reserving title in vendor until payment. Huffard v. Akers, 52 W. Va. 21. A contract for sale of personalty, title to remain in the seller until full payment and time being of the essence of the contract so that on failure in payment the seller may take possession without legal process. Page v. Urick, 31 Wash. 601, 72 Pac. 454. A contract for sale of chattels to be paid for in work, the property to remain that of the seller until paid for. Clark v. Clement, 75 Vt. 417. A contract providing for delivery of personalty to one agreeing to pay a monthly rental for a certain period with privilege of purchasing for a nominal sum after the last payment [Gen. St. 1902, §§ 4864, 4865]. Unmack v. Douglass, 75 Conn. 633.

The sale was unconditional where an agreement for sale of hides required the buyers to give certain tanning contracts in return to the sellers only when called upon. Finnigan v. Shaw, 184 Mass. 112, 68 N. E. 35.

11. McFarlan Carriage Co. v. Wells, 99 Mo. App. 641, 74 S. W. 873.

12. Acceptance of an order for condi-

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arate writing involving other parties,[13] and if not, none can be fastened on it.[14] If anything be done inconsistent with the right to insist on the condition it is waived and the sale is then absolute.[15]

Whether a contract is a conditional sale, or a "lease" or bailment,[16] or selling agency,[17] depends on the buyer's right to have title by performing the conditions,[18] and not on the name given or terms used.[19] The intention of the parties to make a conditional sale rather than a mortgage will govern.[20] The distinguishing mark of a chattel mortgage is a debt secured,[21] but for many purposes the distinction is unimportant,[22] and in some jurisdictions all reservations of title are chattel mortgages.[23]

Where it is agreed that accounts for resales before payment should belong to the seller, moneys collected by the purchaser on resale is held in a fiduciary capacity for the seller.[24] An instrument, apparently a conditional sale, will not be regarded as a mortgage simply because the seller filed it.[25]

The interest of the conditional vendor is a lien so that the vendee, or one holding his interest, is entitled to proceeds of a sale under the lien after the latter and the expenses of sale are satisfied.[26] Transfer of the debt by the seller carries his interest as assignment of a mortgage debt carries the mortgage,[27] but he may

tional sale by terms giving title under bill of sale changed the transaction to an absolute sale. A. A. Cooper Wagon & Buggy Co. v. Bailey & George's Estate, 98 Mo. App. 648, 73 S. W. 724.

13. Where by agreement between all parties the note for price of a chattel was executed by a third person and was part of the contract the reservation of title made in the note binds the purchaser. Forbes v. Taylor [Ala.] 35 So. 855.

14. Where property was transferred at a lump sum payable unconditionally, no condition being made for payment of rent or other return for its use, the contract was a sale regardless of a condition that title should remain in the seller until full compliance. Forsman v. Mace, 111 La. 28.

15. Completed delivery of goods without payment waives terms of a sale requiring cash and reserving title to the seller until payment. Albert v. Lewis Steiner Mfg. Co., 86 N. Y. Supp. 162. Where the seller of goods knew that the purchaser bought for resale in his business, he could not assert a condition reserving title until payment. Id.

16. Delivery of piano as bailment not conditional sale. Painter v. Snyder, 22 Pa. Super. Ct. 603.

17. A contract for sale of goods on order, title to goods and ownership of accounts on resale by the purchaser to be in the seller until payment as agreed was a conditional sale and not an agency for sale. Smith v. Williams, 90 App. Div. [N. Y.] 507.

18. Whether a contract, whereby one agrees to send another goods to be sold, is a bailment or a conditional sale depends on whether the former may compel a return of the goods or latter has an option to pay for them in money. In re Galt [C. C. A.] 120 Fed. 64. A writing, in form a lease, transferring personalty for a fixed term, reserving rent, with provision for return at end of the term or on default in its terms, is not a contract for conditional sale which must be recorded [Rev. 1898, P. L. 1898, p. 699]. Singer Mfg. Co. v. D. Wolff & Co. [N. J. Law] 56 Atl. 147.

19. A contract for sale of a sewing machine called a "lease" acknowledging receipt of a third of the price and stating the remainder to be paid monthly until the lease was fully satisfied, the machine to remain the seller's property and liable to its possession on default in payments, and providing for a discount on earlier payment, is a conditional sale not a lease. Nye v. Daniels, 75 Vt. 81. A contract providing for possession of a safe, "rent" to be paid in certain instalments, and sale of the safe on payment of the last instalment for a nominal price, the owner to retake it and retain the rent on default in payment is a conditional sale not a lease. Herring-Marvin Co. v. Smith, 43 Or. 315, 72 Pac. 704. A sewing machine contract, providing that, on payment of a balance of $43, the machine was to become the property of plaintiff, but giving the right to the company to take possession on a failure to pay as agreed, is a conditional sale, though styled a "lease." Nye v. Daniels, 75 Vt. 81.

20, 21. Smith v. Hope [Fla.] 35 So. 865.

22. Retention of title in a chattel by the seller until payment held legally equivalent to a chattel mortgage, but in either case being unrecorded was void as against subsequent creditors. Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113.

23. Texas, Harling v. Creech, 88 Tex. 300, 31 S. W. 357; Parlin & Orendorff Co. v. Davis' Estate [Tex. Civ. App.] 74 S. W. 951; Hall v. Keating Implement & Machine Co. [Tex. Civ. App.] 77 S. W. 1054.

24. Smith v. Williams, 90 App. Div. [N. Y.] 507.

25. Seller agreed to manufacture machines for sale at retail, title to remain in him until payment at specified times, and he to have the right to reclaim the machines if he thought payment uncertain at any time. American Harrow Co. v. Deyo [Mich.] 96 N. W. 1055.

26. Pub. St. 1901, p. 451, c. 141, §§ 3-7. Cutting v. Whittemore [N. H.] 54 Atl. 1098.

27. The reservation of title is a retention of general property as collateral security. Cutting v. Whittemore [N. H.] 54 Atl. 1098.

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transfer without endorsing the note.[28] A conditional vendor who sells his interest in the property and the contract, subject to the rights of the vendee, which he does not disturb, is not guilty of conversion.[29] Where both title and possession are to remain in the vendor until payment of the price or a judgment therefor, payment passes both title and possession.[30]

The purchaser at conditional sale has an interest which he may mortgage,[31] the laws otherwise so admitting.[32] He may recover its full value for a conversion, though it is but partly paid.[33] If there be several purchasers they may enforce contribution against each other for clearing the title.[34]

Notice; record and filing.—Except as to those who take with notice,[35] or prior in time,[36] or who are otherwise not bona fide purchasers for value, it is, in many states, provided that certain conditional sales[37] must be publicly recorded, registered, or filed,[38] continuous possession being given the vendee;[39] otherwise if the vendee does not take possession.[40] If the possession of the buyer is in law that of the seller[41] no record is necessary. The statutes requiring record do not apply to a contract between nonresidents concerning personalty without the state, and which does not contemplate its removal within the state.[42] The sale even without

28. The vendor, holding a conditional bill of sale securing a purchase-money note, need not indorse the note or guaranty its payment in writing on assigning the note and his rights in the property and the sale in order to render the assignee's title valid. English v. Hill, 116 Ga. 415.

29. Nye v. Daniels, 75 Vt. 81.

30. Ideal Cash Register Co. v. Zunino, 39 Misc. [N. Y.] 311.

31. Friedman v. Phillips, 84 App. Div. [N. Y.] 179; Cutting v. Whittemore [N. H.] 54 Atl. 1098.

32. Encumbering personalty held under conditional purchase is made a criminal offense in Georgia. Mortgage must be given with intent to defraud vendor and mortgagor must know that title was reserved. Miley v. State, 118 Ga. 274.

33. Purchaser, on the instalment plan, being bound absolutely to pay. Messenger v. Murphy, 33 Wash. 353, 74 Pac. 480.

34. Where two persons bought a machine together giving three equal notes, one of which was paid by each, on payment of the third note by one of the purchasers and resale of the machine by him, the other could recover only half the excess of the price received over the amount of the third note. Gerndt v. Conradt, 117 Wis. 15, 93 N. W. 804.

35. Notice to corporation of conditional sale imputed where before full organization it took from corporators. Grand Rapids Furniture Co. v. Grand Hotel & O. H. Co. [Wyo.] 70 Pac. 838.

36. A chattel mortgage is not protected against a prior unrecorded conditional sale where the mortgage debt was made before the sale. First Nat. Bank v. Reid [Iowa] 98 N. W. 107.

37. Lien Law, § 112 [Laws 1897, p. 540, c. 418] rendering a provision in a conditional sale accompanied by immediate delivery, reserving ownership until payment, invalid unless filed, does not apply to a conditional contract for the sale of chattels to be manufactured by the seller. Duntz v. Granger Brew. Co., 41 Misc. [N. Y.] 177.

Writing in form of lease for term reserving rent and providing for return at expiration or on default is not conditional sale which must be recorded. Singer Mfg. Co. v. Wolff & Co. [N. J. Law] 56 Atl. 147.

Sales of household goods need not be recorded, in New York, where executed and delivered in duplicate. Gas fixtures are "household goods" within Laws 1897, p. 541, c. 418, § 115, as amended by Laws 1898, p. 1019, c. 354. Baldinger v. Levine, 83 App. Div. [N. Y.] 130; Mott Iron Works v. Reilly, 39 Misc. [N. Y.] 833.

38. **"Continuous possession"** as used in the lien law (Laws 1897, c. 418, § 112) requiring filing of a conditional sale where continuous possession of the chattel is had by the purchaser after delivery, means possession in the latter. Fairbanks, M. & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113.

39. Fairbanks, M. & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113. Not applicable to sale on condition of payment on delivery. Hirsch v. Leatherbee L. Co. [N. J. Law] 55 Atl. 645. A conditional sale is absolute as to subsequent creditors unless in writing and recorded within 30 days [Code Ga. 1895, §§ 2776, 2777]. In re Gosch, 121 Fed. 602. Where conditional sale of a piano was unrecorded and the purchaser mortgaged it, a purchaser for full value at foreclosure sale without notice of title in the seller took title, the mortgagee being also without notice. Sanger v. Jesse French P. & O. Co. [Tex. Civ. App.] 75 S. W. 39.

40. A conditional sale need not be recorded in West Virginia unless possession is given the buyer [Code, c. 74, § 3]. Webster Lumber Co. v. Keystone L. & M. Co., 51 W. Va. 545.

41. Where property sold as personalty is capable of being made a fixture on realty of the vendor, and is not to be removed until paid for, there is no delivery of possession, though the buyer as tenant has use of it, so as to render record of the sale necessary. Webster Lumber Co. v. Keystone L. & M. Co., 51 W. Va. 545.

42. Gen. St. p. 891, § 191. Hirsch v. Leatherbee Lumber Co. [N. J. Law] 55 Atl. 645.

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record or filing is valid between the parties,[43] their ordinary creditors,[44] and assignees for benefit of creditors,[45] or as against all parties but bona fide purchasers, mortgagees,[46] judgment[47] or levying creditors, and trustees in bankruptcy[48] and the like, who stand as levying creditors.

Assignment and transfer of a conditional sale need not be recorded as against an innocent purchaser from the original vendor.[49]

The recordation is constructive notice to subsequent takers,[50] if the instrument is sufficient in law,[51] and is eligible to recordation[52] by proper acknowledgment,[53] if any is required.[54] For this purpose it must be filed or recorded in the proper place,[55] and within the time limited,[56] if any. When the statute requires only a filing or lodgment with an officer, that alone seems to protect the seller, though the officer records it irregularly.[57]

Rights of parties and their enforcement.—The seller's lien may be lost by waiver, if the intention is clear,[58] or election, if he resorts to an inconsistent right.[59]

43. McFarlan Carriage Co. v. Wells, 99 Mo. App. 641, 74 S. W. 878.

44. An unrecorded contract for conditional sale accompanied by actual delivery and followed by actual change in possession, providing that title should remain in the seller until payment or other condition, is valid against ordinary creditors of the buyer; Recording Act 1889, (P. L. p. 421) amended by Act 1895 (P. L. 302), Gen. St. p. 891, applies only to judgment creditors and subsequent creditors or mortgagees. Reischmann v. Masker [N. J. Err. & App.] 55 Atl. 301.

45. Goods held do not pass to an assignee for benefit of creditors of the purchaser as against the seller though the sale is not recorded. In re Wise, 121 Iowa, 359, 96 N. W. 872.

46. Hall v. Keating I. & M. Co. [Tex. Civ. App.] 77 S. W. 1054.

47. A landlord causing distress to be levied on goods of a tenant held under conditional sale is not a judgment creditor against whom the contract of sale must be recorded. Reischmann v. Masker [N. J. Err. & App.] 55 Atl. 301.

48. So under a statute making void against purchasers "and judgment creditors" if not recorded [Comp. St. c. 32, § 26]. Logan v. Neb. Moline Plow Co. [Neb.] 92 N. W. 129. Goods purchased to be resold in due course of business cannot be reclaimed by the seller as against the purchaser's trustee in bankruptcy because of a secret, unrecorded agreement that title should not pass until payment. In re Carpenter, 125 Fed. 831. See, also, In re Fraizer, 117 Fed. 746; In re Rabenau, 118 Fed. 471; In re Kellogg [C. C. A.] 118 Fed. 1017; In re Garcewich [C. C. A.] 115 Fed. 87; In re Smith, 119 Fed. 1004; In re Galt [C. C. A.] 120 Fed. 64, and other cases cited. Bankruptcy, § 10 D, 1 Curr. Law, p. 319.

49. English v. Hill, 116 Ga. 415.

50. Record is notice to all purchasers from the vendee before his payment. Troy Wagon Co. v. Hulton, 53 W. Va. 154.

51. Where a conditional bill of sale for a mare in foal, but not so described, reserved title until payment, a purchase of the colt, a few days old, from the vendee before payment without actual notice of the seller's rights took no title as against him where the bill was properly executed and recorded. Anderson v. Leverette, 116 Ga. 732.

A lien note for conditional sale of a chattel giving the amount in the margin but omitting it in the body of the note is sufficient to give notice to a subsequent purchaser [V. S. 2290]. Kimball v. Costa [Vt.] 56 Atl. 1009.

52. Filing when unnecessary is not constructive notice. Baldinger v. Levine, 83 App. Div. [N. Y.] 130.

53. Acknowledgment may be made by a clerk of the superior court in the county, and record may be had in any county where the vendee resides at execution, and when so recorded is admissible in evidence, as a registered mortgage may be admitted. Anderson v. Leverette, 116 Ga. 732.

54. Acknowledgment is not necessary to record [Code 1899, § 3, c. 74]. Troy Wagon Co. v. Hutton, 53 W. Va. 154.

55. Filing must be had in the town, village, or city where the vendee resides when the contract is made though he may reside elsewhere when it is filed [Laws 1897, § 18, c. 292, p. 543]. Creamery Package Mfg. Co. v. Tagley [Minn.] 97 N. W. 412.

56. The 30 days given for record in Georgia run from date of the writing and not from date of delivery of the chattels. Where a conditional contract, secured by an agent subject to the seller's approval in another state, was approved by him, and the machine was delivered nearly five months later subject to the purchaser's approval, when the contract was acknowledged and recorded, it was fully completed at date of delivery and not at time of making or acceptance by the seller so that it was recorded within the 30 days required by the statute as against other creditors [Code Ga. § 2777]. In re Gosch [C. C. A.] 126 Fed. 627.

57. Leaving a bill with the clerk for record is sufficient recording "in the office of the clerk" (Code 1899, c. 74, § 3), though it is recorded in the "miscellaneous record book." Troy Wagon Co. v. Hutton, 53 W. Va. 154.

58. The taking of additional as distinguished from substituted security does not waive the lien. The lien on conditional sale of a chattel is not affected by a mortgage given to the seller by a third person on other property, reciting the mortgagor's

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Priority of an innocent mortgagee is not disturbed by a surrender of possession to the seller.[60] A vendor who regains possession and conceals the goods from a bona fide mortgagee is liable for the latter's claim.[61]

As to third persons the buyer may recover for conversion,[62] or his transferee may do so.[63] Trover ordinarily requires a precedent demand,[64] especially as against a purchaser from the vendee.[65] The buyer's right to complete the contract passes to his estate.[66]

The various remedial rights of buyer and seller which have been previously discussed[67] are, subject to some exceptions, equally applicable to conditional sales. The exceptions will appear. The seller may sue for the price as well as for damages.[68]

subsequent purchase of the property covered by the lien, and that the mortgage was given as additional security of the note for the first property, and in consideration of forbearance of foreclosure on the note. Kimball v. Costa [Vt.] 56 Atl. 1009.

59. Subsequent acceptance of a chattel mortgage on goods sold at conditional sale and other goods is not an election to claim under the mortgage to exclusion of rights under the sale. First Nat. Bank v. Reid [Iowa] 98 N. W. 107.

60. If, with notice of the mortgage he conceals the chattels after surrender, he is liable to the mortgagee for the amount of his debt with interest from date of concealment. Anderson v. Adams & Co., 117 Ga. 919.

61. Anderson v. Adams & Co., 117 Ga. 919.

62. Where a chattel is sold on execution against the purchaser, the measure of damages on suit for conversion brought by him is the value of the article at time of taking less unpaid purchase money. Friedman v. Phillips, 84 App. Div. [N. Y.] 179. Where payment is not fully made at time of conversion, the vendee can only recover value of the property at that time less the amount unpaid on the contract. In determining the amount due to find damages on conversion, value of the use of the property from date of conversion should not be deducted. Clark v. Clement, 75 Vt. 417.

63. Where a purchaser in possession, mortgaged his interest and sold all interest in the chattel to the mortgagee, the latter could bring conversion for it where it was afterward sold on execution against the purchaser. Friedman v. Phillips, 84 App. Div. [N. Y.] 179.

64. No demand is necessary in trover for goods held under conditional sale where defendant is in possession claiming title at time of the action, and defends, claiming part payment and failure of consideration, and tenders the balance he claims to be due. Scarboro v. Goethe, 118 Ga. 543.

65. The vendor of bath tubs to a plumber cannot recover for conversion as against the owner of the building where they were placed without a previous demand or attempt to remove them. Mott Iron Works v. Reilly, 39 Misc. [N. Y.] 833.

66. Wood v. Kaufman [Mich.] 97 N. W. 47.

67. See ante, §§ 10, 11.

68. Ideal Cash Register Co. v. Zunino, 39 Misc. [N. Y.] 311, and other cases cited ante, § 10 G.

NOTE. **Rights of parties to a conditional sale on default of payment.**

Vendor's rights. There appears to be a conflict of authority as to the vendor's right to collect purchase money after retaking the property under a contract of conditional sale, reserving title until payment in full. Where such retaking is construed as a rescission of the contract, it is held that the right to enforce payment is gone. Seanor v. McLaughlin, 165 Pa. 150, 32 L. R. A. 467; White v. Smith, 28 N. S. 50; White v. Solomon, 164 Mass. 516, 30 L. R. A. 537.

Some cases deny a recovery by the vendor after a retaking of the property on the ground of failure of consideration. Hine v. Roberts, 48 Conn. 267, 40 Am. Rep. 170; Scott v. Hough, 151 Pa. 630; Minneapolis Harvester Works v. Hally, 27 Minn. 495; Aultman v. Olson, 43 Minn. 409.

Other cases hold that the pursuit of the property as a security only will not defeat an action on the notes given for the purchase price. Ascue v. Aultman, 2 Tex. App. Civ. Cas. (Willson) § 497; Durr v. Replagle, 167 Pa. 347; Tanner & D. Engine Co. v. Hall, 89 Ala. 628; Dederick v. Wolfe, 68 Miss. 500.

The purchaser being in default, the seller may waive his right to retake the property and recover the purchase price; or if he has not waived his right, the seller may recover the property. White v. Solomon, 164 Mass. 516, 30 L. R. A. 537. See authorities cited in 32 L. R. A. note, pp. 459, 460, 461.

Destruction of property after delivery. The editor of the note in 32 L. R. A. 455, states that the general rule seems to be that where property in possession of the purchaser is destroyed without fault, the loss falls on the purchasers. Burnley v. Tufts, 66 Miss. 48; Tufts v. Griffin, 107 N. C. 47, 10 L. R. A. 526; Cooper v. Chicago Cottage Organ Co., 58 Ill. App. 248; Hintermeister v. Lane, 27 Hun, 497. But see, contra, Cobb v. Tufts, 2 Tex. App. Civ. Cas. (Willson) § 153, and Bishop v. Minderhout (Ala.) 52 L. R. A. 395. In the last case the conflict in the authorities is pointed out and cases cited.

Vendee's rights. As to the vendee's right to recover purchase money paid when the vendor resumes possession of the property there appears to be some conflict of authority. The decision as to such right depends largely upon the form of the contract and the construction placed by the court upon the act of resumption by the vendor. Recovery was allowed in the following cases: Simon v. Edmondson, 10 Pa. Co. Ct. R. 315;

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The right of repossession and resale by the seller must be exercised according to statutory modes,[69] and only on such default as the sale contemplates,[70] otherwise it is a tortious conversion,[71] and demand of performance should first be made even against the buyer's personal representatives.[72] A provision on conditional sale for repossession without judicial process is binding.[73] The seller may recover the chattel for default at any time after delivery from a purchaser from the vendee with notice until action is barred.[74] The assignee of a conditional sale contract becomes subrogated to the rights of his assignor thereunder, and may take possession of the property on failure of the vendee to comply with the terms of the contract.[75] Assignment of the contract leaving the possession undisturbed cannot be a conversion of the buyer's property.[76]

The seller may recover possession from an assignee of the buyer for benefit of creditors by petition of intervention in the assignment proceedings.[77] If part of the goods have not passed to the assignee, as to them the seller may prove his claim against the insolvent estate,[78] less the value of the part recovered from the assignee.[79] No demand by the seller is necessary before applying for an order of court directing surrender by the assignee.[80] The seller was not bound to return the purchase-money note until it was satisfied by a return of such chattels as the assignee had, and proof of the balance as a claim against the insolvent estate.[81]

A sale may be canceled on proof of a default.[82]

It should ordinarily be pleaded that an alleged sale is a mortgage.[83]

Snook v. Raglan, 89 Ga. 251; Hays v. Jordan, 85 Ga. 741, 9 L. R. A. 373; Preston v. Whitney, 23 Mich. 260; A. D. Puffer & Sons' Mfg. Co. v. Lucas, 112 N. C. 377, 19 L. R. A. 682; Hill v. Townsend, 69 Ala. 286. The following cases held that the purchaser could not recover: Latham v. Sumner, 89 Ill. 233, 31 Am. Rep. 79; Tufts v. D'Arcambal, 85 Mich. 185, 12 L. R. A. 446; White v. Oakes, 88 Me. 367, 32 L. R. A. 592; Humeston v. Cherry, 23 Hun, 141; Haynes v. Hart, 42 Barb. 59; Haviland v. Johnson, 7 Daly, 297. The vendee cannot recover property, or its value, in trespass, when retaken by the vendor, in accordance with the terms of a contract of conditional sale. West v. Bolton, 4 Vt. 558; Levan v. Wilten, 135 Pa. 61; Walsh v. Taylor, 39 Md. 598; Palmer v. Kelly, 56 N. Y. 637; Smith v. Lozo, 42 Mich. 6; Knox v. Perkins, 15 Gray, 529. From note to Cole v. Hines, 32 L. R. A. 455.

69. Statute providing that before the seller retakes possession under a conditional sale he shall tender the purchaser the amount paid does not apply where the vendor seized the property on an execution on a judgment for the purchase price, as the right to take under the contract was not exclusive of the statutory right. De Loach Mill Mfg. Co. v. Latham, 99 Mo. App. 231, 72 S. W. 1080.

70. Construction of conditional sale of household goods as requiring weekly payments completing the amount in 12 months and authorizing the seller to resume possession on default in either respect. Grimm v. Ferris [Conn.] 56 Atl. 494.

Evidence: Receipts for payments are inadmissible in evidence in an action based on a conditional sale contract, without proof that they were properly signed. Nye v. Daniels, 75 Vt. 81.

71. A conditional vendor taking the property on breach by the buyer where sale at auction is necessary, is guilty of conversion [V. S. 2293]. Clark v. Clement, 75 Vt. 417.

72. Where the purchaser dies before completing payment, the act of the seller in reselling the property without demanding complete payment terminates the contract and allows recovery of money paid by the purchaser's personal representative. Wood v. Kaufman [Mich.] 97 N. W. 47.

73. Henderson v. Mahoney, 31 Tex. Civ. App. 539, 72 S. W. 1019. Where it is provided that title does not pass until payment of the purchase price and the right to retake possession without resort to the court is reserved, possession may be resumed on default of payment. Id.

74. Young v. Salley [Miss.] 35 So. 571.

75. Nye v. Daniels, 75 Vt. 81.

76. Assignment of a cntract of sale conditional as to repossession by the seller on default in payment without disturbance of the buyer's possession or control did not make the seller guilty of conversion, because the purchaser having defaulted in payment the seller was bound to sell under the statute. Nye v. Daniels, 75 Vt. 81.

77, 78, 79. In re Wise, 121 Iowa, 359, 96 N. W. 872. The sale having fixed the price of articles to be returned on default in payment, evidence as to their value is immaterial. Id.

80, 81. In re Wise, 121 Iowa, 359, 96 N. W. 872.

82. An agreement of sale providing that it should be void on default in the first payment is properly canceled when no money was tendered until five months after the time set for the first payment and two days after formal notice of forfeiture. Russell v. Stewart, 204 Pa. 211.

83. On a bill to enforce a written sale, circumstances supporting the defense that it is a mortgage must be set up by plea or answer if they do not appear from the bill. Smith v. Hope [Fla.] 35 So. 865.

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SAVING QUESTIONS FOR REVIEW.

§ 1. Inviting Error (1590).
§ 2. Acquiescing in Error (1591). Change of Theory (1593).
§ 3. Mode of Objection—Whether by Objection, Motion or Request (1594).
§ 4. Necessity of Objection (1594). To Pleading (1598). To Parties (1600). To Jurisdiction (1600). Time of Objection (1601). Waiver of Error or Right to Object (1601).
§ 5. Necessity of Motion or Request (1602). In General (1602). Motion for New Trial (1603). Request for Instructions (1605). Motion for Judgment, Nonsuit, or to Direct Verdict (1606). Motion to Strike Out (1606).
§ 6. Necessity of Ruling (1607).
§ 7. Necessity of Exception (1607). To Findings of Fact or Conclusions of Law (1610). Time of Exception (1610). Waiver of Right to Except (1610).
§ 8. Form and Sufficiency of Objection (1610). To Evidence (1611).
§ 9. Sufficiency of Exception (1613). To Instructions (1614). To Judgment (1616).
§ 10. Waiver of Objections and Exceptions taken (1616).

This title comprehends those things which must be done or left undone in the lower court, if an objecting party would keep his right to challenge the error averred, on a review of the resultant judgment.

§ 1. *Inviting error.*—In accordance with the general principle that parties must abide by the consequences of their own acts, a party cannot on appeal, complain of an error in the lower court which he was instrumental in causing, or which he invited, whether the error was committed by himself alone, or by the court at his instance.[1] He cannot complain of rulings in his favor on his objections,[2] nor of an error which he adopted and acted upon at the trial,[3] nor of the sufficiency of evidence to warrant the submission of an issue, submitted at his instance.[4] Likewise he cannot complain, or take advantage, of the erroneous admission or exclusion of evidence obtained at his instance,[5] nor of the overruling of his objection to evidence of a certain transaction, where he goes fully into the details thereof in his own evidence,[6] nor of evidence admitted for adverse party, to impeach a matter

1. Summers v. Metropolitan L. Ins. Co., 90 Mo. App. 697; Dixon v. McDonnell, 92 Mo. App. 479; Richmond Traction Co. v. Clarke [Va.] 43 S. E. 618; Perrault v. Minneapolis, St. P. & S. S. M. R. Co., 117 Wis. 520, 94 N. W. 348. Parties demanding and obtaining, over objection, a jury trial cannot after verdict against them complain that the cause should not have been tried by a jury. Thorn v. Cosand, 160 Ind. 566, 67 N. E. 257. Want of reply to an answer setting up new matter cannot be taken advantage of on appeal, where it appears that leave to file was granted prior to trial, and trial had upon the issues tendered in the answer. Sanely v. Crapenhoft [Neb.] 95 N. W. 352. Defendant raising issues to a so-called supplemental petition to discharge a decree cannot object to the court's want of power to pass on issues raised subsequent to the original decree. Dunton v. McCook, 120 Iowa, 444, 94 N. W. 942. Defendant, in a partition, joining in the prayer for a sale of land cannot thereafter complain that the land should not be sold without proof that it could not be divided. Heyward v. Middleton, 65 S. C. 493. Counsel for both parties cannot object to court's reading a case, previously tried by him, as an illustration of rules and principles being enunciated by him, where they had previously read decided cases to the jury illustrating the application of the law in similar cases. Louisville & N. R. Co. v. Summers [C. C. A.] 125 Fed. 719. Where a court at the instance and request of a party makes a ruling the said party cannot on appeal object to said ruling. Snoqualmi Realty Co. v. Moynihan [Mo.] 78 S. W. 1014.

2. To questions asked a witness. Garretson v. Kinkead, 118 Iowa, 383, 92 N. W. 55.

3. Mitchell v. Wabash R. Co. [Mo. App.] 76 S. W. 647.

4. Cady v. Coates, 101 Mo. App. 147, 74 S. W. 424.

5. Ley v. Metropolitan L. Ins. Co., 120 Iowa, 203, 94 N. W. 568. An appellant cannot complain of the admission of evidence offered by himself. Pierpont v. Buchanan [Tex. Civ. App.] 79 S. W. 610. A defendant cannot take advantage of his own irregularity in introducing evidence in defense, on cross-examination of plaintiff's witness, to exclude evidence taken in rebuttal. Cimiotti Unhairing Co. v. American Fur Refining Co., 120 Fed. 672. Evidence admitted and stricken from the record at defendant's request, in the absence of the jury, without an instruction being given or requested thereon, is not available to the defendant as an error. Ellis v. Thayer, 183 Mass. 309, 67 N. E. 325. Where plaintiff on cross-examination drew out facts in reference to a memorandum, which the court had excluded on direct examination, he cannot object to the court's action in refusing to strike out the memorandum a second time. Lincoln Mill Co. v. Wissler [Neb.] 95 N. W. 857.

6. Hunter v. Helsley, 98 Mo. App. 616, 73 S. W. 719. A party cannot object that a certain matter is not the subject of expert testimony where he himself has made the same inquiry. Hamilton v. Mendota C. & M. Co., 120 Iowa, 147, 94 N. W. 282.

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put in issue by him,[7] nor of the exclusion of evidence similar to that which has been excluded on his objection.[8]

Nor can he complain of an erroneous instruction given at his request,[9] nor of an instruction given by the court substantially the same as one requested by, and given for him,[10] or induced by his requested charge,[11] or by the issue made by his pleadings,[12] nor of an instruction given at the request of the adverse party but containing the same erroneous propositions of law or assumption of facts,[13] or converse to that given for him,[14] or given on the same theory as one given for him.[15] A party cannot complain of an adverse finding on an issue submitted, or instruction given, at his request.[16]

§ 2. *Acquiescing in error.*—As a general rule a party cannot urge on appeal any question as to matters occurring in the trial court which he did not raise in such court.[17] This acquiescence may apply to a right or claim not asserted below;[18]

7. Turner v. Overall, 172 Mo 271 72 S. W. 644. Where both parties seek to impeach defendant's superintendent's estimate, defendant cannot complain that the admission of plaintiff's evidence to impeach was error. Cook v. Gallatin R. Co., 28 Mont. 340, 72 Pac. 678. Admissibility of evidence to contradict evidence erroneously admitted for adverse party, see Evidence, § 3, 1 Curr. Law, p. 1142. Where a party tenders an issue, he cannot later object to contradicting evidence on that issue as incompetent. Warden v. Tesla, 87 N. Y. Supp. 853.

8. Having procured a ruling of the court, whether correct or erroneous, excluding affirmative evidence, the appellant cannot complain of the court's exclusion of his offered negative evidence. City of Huntington v. Lusch [Ind. App.] 70 N. E. 402.

9. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863; Rumsey & Co. v. Bessemer [Ala.] 35 So. 353; Cahill v. Baird, 138 Cal. 691, 72 Pac. 342; Ready v. Peavey Elevator Co., 89 Minn. 154, 94 N. W. 442; Stoner v. Mau [Wyo.] 73 Pac. 548.

10. Ill. Cent. R. Co. v. Byrne, 205 Ill. 9, 68 N. E. 720; Kelly v. Durham Traction Co., 132 N. C. 368. A party requesting and obtaining an erroneous instruction cannot complain of the same error in another instruction. Sibley W. & S. Co. v. Durand & K. Co., 200 Ill. 354, 65 N. E. 676. Instruction which is only a modification in phraseology of one requested by the objector. Sturgis v. Baker, 43 Or. 236, 72 Pac. 744; Cleveland, C., C. & St. L. R. Co. v. Patton, 203 Ill. 376, 67 N. E. 804. Clause in an instruction given on the court's own motion, which was also in an instruction given at his request. Frank v. St. Louis Transit Co., 99 Mo. App. 323, 73 S. W. 239; Blom-Collier Co. v. Martin, 98 Mo. App. 596, 73 S. W. 729; Over v. Mo., K. & T. R. Co. [Tex. Civ. App.] 73 S. W. 535. Where a requested charge is given submitting a certain issue, the party securing such charge cannot complain of the giving of another instruction submitting such issue. Bitter v. Butchers' & S. M. Ice Mfg. Ass'n [Tex. Civ. App.] 77 S. W. 423. One requesting certain instructions cannot complain that they are conflicting. Nagel v. St. Louis Transit Co. [Mo. App.] 79 S. W. 502. Where defendant has requested an instruction embodying the theory that plaintiff was not guilty of contributory negligence, it cannot object to a previous instruction not covering that theory of the case, but authorizing a finding for the plaintiff. Richmond Traction Co. v. Clarke [Va.] 43 S. E. 618.

11. Baca v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 73 S. W. 1073. A party requesting a charge cannot upon appeal insist that no charge should have been given. Requested charge suggested charge given. St. Louis S. W. R. Co. v. Matthews [Tex. Civ. App.] 79 S. W. 71. Where instructions containing a similar error to that contained in the charge of the court are not requested by a party until after the court has charged the jury, such party is not precluded from objecting to such error on appeal. St. Louis & S. F. R. Co. v. Smith [Tex. Civ. App.] 79 S. W. 340.

12. A party cannot complain of a charge submitting an issue as made in his pleading, and a refusal to submit it otherwise. Rea v. St. Louis S. W. R. Co. [Tex. Civ. App.] 73 S. W. 555.

13. Consol. Stone Co. v. Morgan, 160 Ind. 241, 66 N. E. 696. Which is the same as that requested by him. Hewitt v. Price, 99 Mo. App. 666, 74 S. W. 414; Finnell v. Million, 99 Mo. App. 552, 74 S. W. 419; McCauley v. Brown, 99 Mo. App. 625, 74 S. W. 464.

14. Morton v. Case Threshing Mach. Co., 99 Mo. App. 630, 74 S. W. 434.

15. Spring Valley Coal Co. v. Robizas, 207 Ill. 226, 69 N. E. 925; Cady v. Coates, 101 Mo. App. 147, 74 S. W. 424. Instructions given upon his theory of the case and in substance are the same as those offered by him. Harris v. Southern R. Co., 25 Ky. L. R. 559, 76 S. W. 151. Objection cannot be urged that there is no evidence to support a proposition contained in an instruction where the objector has requested an instruction on the same theory; that the instruction submits issues not presented by the pleading nor supported by the evidence. Collier v. Gavin [Neb.] 95 N. W. 842.

16. Chicago, B. & Q. R. Co. v. Johnston [Neb.] 95 N. W. 614. That the finding thereon is not sustained by sufficient evidence. Chicago, R. I. & P. R. Co. v. Sizer [Neb.] 95 N. W. 498. Where an issue is withdrawn from the jury by an instruction given at a party's request, he cannot complain that the jury did not find on all the issues. Chinn v. Chicago & A. R. Co., 100 Mo. App. 576, 75 S. W. 375.

17. Sanders v. Stinson Mill Co. [Wash.] 75 Pac. 974; Langley v. Head [Cal.] 75 Pac. 1088; De Haven v. McAuley, 138 Cal. 573, 72 Pac. 152; Crandall v. Lynch, 20 App. D. C.

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to matters of defense,[19] unless they are to the jurisdiction of the subject-matter;[20] to the admission of evidence;[21] to the mode or manner of trial;[22] to objections by omissions in the pleading;[23] to assumptions or statements of fact by the court.[24]

73. Plaintiff's right to recover interest, in an action for damages, cannot be raised on appeal by an assignment of cross-errors. Bank of Commerce v. Miller, 202 Ill. 410, 66 N. E. 1039; Harrison v. South Carthage Min. Co. [Mo. App.] 79 S. W. 1160. As to the validity of a mortgage as affecting a defaulting defendant's interest. Bishop v. Pettingill, 115 Wis. 162, 91 N. W. 653. Of non-allowance of a counterclaim. Freedman v. Dickinson, 85 N. Y. Supp. 333. As to the invalidity of a statute on the ground that it was a regulation of interstate commerce. Fay Fruit Co. v. McKinney [Mo. App.] 77 S. W. 160. Remedy by action in equity to avoid a special tax assessment. Gill v. Patton, 118 Iowa, 88, 91 N. W. 904. A contention that certain notes to a wife constituted a gift cannot be considered for the first time on appeal, in a proceeding to garnish the same as the property of her husband. Dunning v. Baily, 120 Iowa, 729, 95 N. W. 248. Where no instruction is asked raising a certain issue, such issue cannot be raised for the first time on appeal. Redmond v. Mo., K. & T. R. Co. [Mo. App.] 77 S. W. 768. That certain persons were not agents of a railroad company. Chicago, R. I. & T. R. Co. v. Douglass [Tex. Civ. App.] 76 S. W. 449. Where all parties acquiesce in the decision on a first appeal to the State Superintendent of Public Instruction, a second appeal will be dismissed. Topping v. Douglas [Iowa] 96 N. W. 1085. Where the court treats the defendant's request to submit to the jury for answer and as a special verdict, certain questions, as a submission on those questions only, and not as an application for a special verdict, and the defendant's attorney does not thereafter indicate that it was his intention to request a special verdict, he cannot subsequently contend that such was his intention, and that the court erred in charging the jury generally to the legal effect of their answers to the questions submitted. Schmitt v. Northern Pac. R. Co. [Wis.] 98 N. W. 202. Questions not mooted in the supreme court on a writ of certiorari will not be considered by the court of errors and appeals on a writ of error to the supreme court to review its judgment. Bakely v. Nowrey, 68 N. J. Law, 732. Assignments of error must be based upon an exception during trial or included in a motion for a new trial under Laws Minn. 1901, p. 121, c. 113. City of Ely v. Conan [Minn.] 97 N. W. 737. If the trial court's attention is not called to errors in an account, and no error is manifest from an inspection of it, the supreme court will not inspect it to see if the principal and income is properly apportioned. In re Hart's Estate, 203 Pa. 492. No objections being taken to the evidence or instructions asked, the only question reviewable on appeal is the sufficiency of the evidence to support the findings. Buck v. Endicott [Mo. App.] 77 S. W. 85.

18. The fact of an excessive levy not asserted or claimed to the lower court. Glaucke v. Gerlich [Minn.] 98 N. W. 94.

19. McNabb v. Whissel, 75 App. Div. [N. Y.] 626. Defense to a foreclosure suit. Bourke v. Hefter, 202 Ill. 321, 66 N. E. 1084. To an action against a bank on paper sent to it for collection. Nat. Revere Bank v. Nat. Bank of Republic, 172 N. Y. 102, 64 N. E. 799. Estoppel and res judicata. School Dist. of Barnard v. Matherly, 90 Mo. App. 103. That subsequent payment relieved a forfeiture under a provision of a lease. Metropolitan Land Co. v. Manning, 98 Mo. App. 248, 71 S. W. 696. A defense not made in the lower court, or not called to its attention by the answer or in a motion for a new trial. City of St. Louis v. Annex Realty Co., 175 Mo. 63, 74 S. W. 961. Surprise grounded upon mistake, accident, or violation of agreement, cannot be considered on appeal, where it was not called to the attention of the trial court before the adjournment of the term at which judgment was rendered. Second Nat. Bank v. Ralphsnyder [W. Va.] 46 S. E. 206. That part of a claim is barred by limitations. In re Payne's Estate, 204 Pa. 535. That an action by a husband's heirs to recover alleged community property conveyed by his wife to her grantees was not brought within the time prescribed by statute [Act 1897]. Pryal v. Pryal [Cal.] 71 Pac. 802.

20. Houser v. McCrystal [Neb.] 97 N. W. 828. And see post, § 5.

21. Pa. R. Co. v. Palmer [C. C. A.] 127 Fed. 956. The admission in evidence of a bill of particulars is not available error on appeal where it was admitted by stipulation in open court, without suggesting that its effect should be limited, or that it was incompetent or irrelevant. Lexow v. Belding, 89 App. Div. [N. Y.] 622.

22. Where in an equitable action to subject a wife's property to a judgment against the husband she answers to the merits, and does not object to the forum she cannot contend on appeal that she had a right to trial by jury. Boss v. Jordan, 118 Iowa, 204, 92 N. W. 111. Failure to take testimony in writing is not error where the court told the jury that a stenographer was not necessary and the counsel did not then insist. Benton Harbor Terminal R. Co. v. King, 131 Mich. 377, 91 N. W. 641.

23. The question of waiver of objections to an assessment by omission of facts, from a petition for injunction, afterwards put in by an amended petition, cannot be considered for the first time on appeal from a judgment on the injunction bond. Scott v. Frank, 121 Iowa, 218, 96 N. W. 764. A material amendment to a pleading will not be allowed in the appellate court where not applied for in the lower court; amendment to a bill of particulars in order to bring about a reversal of judgment and a new trial on a different issue not allowed. Kent v. Phenix Art Metal Co. [N. J. Law] 55 Atl. 256.

24. Defendant's acquiescing in an assumption, as to the embodiment of a contract, stated by the presiding justice in the presence of the jury waives any objection thereto. Libby v. Deake, 97 Me. 377.

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Acquiescence in an error may be shown by the party's pleading,[25] or by subsequent proceedings in the case,[26] as by acquiescing in the court's ruling by amending answer[27] or petition.[28] But error in requiring plaintiff to elect on which of two separate causes of action he would proceed is not waived by going to trial.[29] An instruction not excepted to must be regarded on appeal as correctly stating the law applicable to the case.[30] Courts, however, possess the power to consider questions appearing upon the record, but not raised in the court below,[31] but are not bound to do so.[32]

Change of theory.—A party cannot urge on appeal a theory of the case not advanced at the trial, nor complain that the theory on which the case was tried was erroneous,[33] unless instructions or declarations of law were asked below.[34] Especially is this true where the party complaining brought the action himself or advanced that theory of the case.[35]

25. Where a petition to enjoin the opening of a highway fails to allege that the route reported by the jury varied from that ordered by the commissioners' court, such objection cannot be considered on appeal. McCown v. Hill [Tex. Civ. App.] 73 S. W. 850.

26. Acquiescing in an adverse finding of facts, by basing subsequent proceedings in the cause on it, precludes a party from objecting to the finding on appeal. Walsh v. Walsh [Neb.] 95 N. W. 1024.

27. Acquiescing in ruling of court rejecting certain evidence, by amending answer, waives error in rulings based on pleadings prior to amendment. Winterringer v. Warder, etc., Co. [Neb.] 95 N. W. 619.

28. Amending petition in response to adverse ruling on demurrer waives error in sustaining the demurrer. Davis v. Boyer [Iowa] 97 N. W. 1002.

29. Rucker v. Omaha & G. S. & R. Co. [Colo. App.] 72 Pac. 682.

30. Cameron v. Mut. L. & T. Co., 121 Iowa, 477, 96 N. W. 961; Town of Smithtown v. Ely, 75 App. Div. [N. Y.] 309, 11 Ann. Cas. 459; Hall v. Irvin, 78 App. Div. [N. Y.] 107.

31. Williston v. Haight [Conn.] 57 Atl. 170.

32. Question as to whether or not deed passes title. Williston v. Haight [Conn.] 57 Atl. 170.

33. Sanders v. Stimson Mill Co. [Wash.] 75 Pac. 974; Black v. Mo. Pac. R. Co., 172 Mo. 177, 72 S. W. 559; Wear Bros. v. Schmelzer, 92 Mo. App. 314; Overstreet v. Citizens' Bank [Okl.] 72 Pac. 379; Durning v. Walz, 42 Or. 109, 71 Pac. 662; Mayers v. McNeese [Tex. Civ. App.] 71 S. W. 68. Party claimed he offered proof on certain point but it was excluded, proof was in fact offered on different issue. E. H. Ogden Lumber Co. v. Busse, 86 N. Y. Supp. 1098. Where a cause has been tried upon a certain well defined theory the parties cannot change the theory upon appeal. Cause was tried as a suit in equity, in appellate court contended it was an action at law, held could not. Mares v. Dillon [Mont.] 75 Pac. 963. Authority of defendants' agents to make the contract sued on. Wilson v. Standard Operating Co., 93 Mo. App. 121. The conclusiveness of a former judgment. Kansas City v. Madsen, 93 Mo. App. 143. Of plaintiff's right to rescind a contract because it was verbal and executory. Muir v. Pratt [Colo. App.] 71 Pac. 896. Where a case is tried on the theory that notes had not been altered, plaintiff cannot on appeal object to an instruction to find for the defendant, if an alteration had been made. Paul v. Leeper, 98 Mo. App. 515, 72 S. W. 715. Where defendant's instruction at the trial did not raise the theory of whether plaintiff was a servant or independent contractor, it cannot be urged on appeal. Edwards v. Barber Asphalt Pav. Co., 92 Mo. App. 221. Where no innuendo was laid in the declaration, in an action for libel for publishing that plaintiff's property was considered by insurance companies to be peculiarly susceptible to fire, and no question raised at the trial, it cannot be urged on appeal that defendant must prove that plaintiff burned his own property in order to establish a justification. Conner v. Standard Pub. Co., 183 Mass. 474, 67 N. E. 596. The general rule that a theory of a case or an assumption of fact adopted by a trial court with the acquiescence of the parties will be followed by the appellate court, will be applied where the ground relied upon in the appellate court to support a judgment otherwise erroneous involves a question of fact not fully developed at the trial, to which attention of neither the trial court nor opposing counsel was called; and where the upholding of the judgment would probably result in a miscarriage of justice. Baker v. Kaiser [C. C. A.] 126 Fed. 317. A party relying in the trial court upon an admission of the other party in another suit as an estoppel cannot upon appeal claim that the judgment in such suit was determinative of such facts. Flannery v. Campbell [Mont.] 75 Pac. 1109. On trial litigated question as to existence of partnership cannot for the first time claim on appeal that defendant's appearance admitted the partnership. State v. McMaster [N. D.] 99 N. W. 58. Where a complaint charges gross negligence and the action is treated by the parties in the court below as one for ordinary negligence, it will be so treated on appeal. Turtenwald v. Wis. Lakes I. & C. Co. [Wis.] 98 N. W. 948. Where the issue was as to whether an original deed, which had been destroyed, had ever been delivered, a party is not entitled to claim for the first time on appeal that the destruction of the deed operated to revest the title in the grantor. Tabor v. Tabor [Mich.] 99 N. W. 4.

34. Small v. Bartlett, 96 Mo. App. 550, 70 S. W. 393.

35. Bringing action on theory of negli-

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§ 3. *Mode of objection—whether by objection, motion or request.*—Motion for a new trial is the only method of saving an error in giving modified instructions,[36] and in some jurisdictions this is the proper method of saving objections to the admission or exclusion of evidence,[37] or to a verdict on a demurrer to the evidence.[38] Motion to strike out is the proper form of objecting to an allegation of damages which must have occurred after the commencement of an action, and of damages barred by limitations,[39] or to immaterial evidence given in response to a proper question,[40] though the latter objection may also be made by a request for an instruction that the jury disregard it.[41] Objection to a pleading so defective as not to entitle the successful party to relief may be raised by motion in arrest of judgment.[42] An objection that an action is brought in wrong form should be by plea or answer in abatement, it cannot be taken for the first time on exceptions.[43] An objection that a verdict is not supported by the evidence should be made at the trial by a demurrer to the evidence,[44] motion to take the case from the jury,[45] or a motion to have the jury instructed to find for the defendant.[46]

§ 4. *Necessity of objection.*—As a general rule, in order that errors occurring at the trial or in proceedings in the lower court may be saved for consideration upon appeal, objections thereto must be taken at the time; and if not so taken, they will be deemed to be waived and will not be considered in the appellate court.[47] This

gence he cannot rely on trespass. Duerr v. Consol. Gas Co., 86 App. Div. [N. Y.] 14. A party trying an action as arising out of contract cannot insist on appeal that it arose out of tort. Herf & F. Chemical Co. v. Lackawanna Line, 100 Mo. App. 164, 73 S. W. 346. That plaintiff is entitled to recover on the ground of defective construction, where the complaint states a cause of action from a defective sidewalk, and the negligence charged was the failure to repair. Gordon v. Sullivan, 116 Wis. 543, 93 N. W. 457. Alleging that defendant signed as surety and trial is had on that theory, precludes urging on appeal that he was a guarantor. Wells v. Hobson, 91 Mo. App. 379. Where it was adopted at defendant's instance over the plaintiff's objection. Yarwood v. Billings, 31 Wash. 542, 72 Pac. 104. Defendant insisting below on the theory that the action was for breach of contract cannot on appeal urge a variance, in that the pleading was for the purchase price and the proof for breach of contract. McCall Co. v. Jennings, 26 Utah, 459, 73 Pac. 639. Cannot deny interest of one whom objector has made a party. Stenger v. Thorp [S. D.] 94 N. W. 402.

36. Citizens' St. R. Co. v. Shepherd, 30 Ind. App. 193, 65 N. E. 765.

37. Under the eighth statutory cause for a new trial [2 Wils. St. Okl. 1903, § 4493]. Glaser v. Glaser [Okl.] 74 Pac. 944; State v. Alstadt [Neb.] 93 N. W. 696.

38. Upon the ground of excessive damages. Rhule v. Seaboard A. L. R. Co. [Va.] 46 S. E. 331.

39. Crossen v. Grandy, 42 Or. 282, 70 Pac. 906.

40, 41. Payne v. Williams, 83 App. Div. [N. Y.] 388.

42. Alexander v. Grand Lodge, A. O. U. W., 119 Iowa, 519, 93 N. W. 508.

43. Action not brought against parties as former partners, the partnership having been dissolved. Johnson v. Sprague, 183 Mass. 102, 66 N. E. 422.

44, 45, 46. City of Beardstown v. Clark, 204 Ill. 524, 68 N. E. 378.

47. Santa Rita L. & M. Co. v. Mercer [Ariz.] 73 Pac. 398; Cunningham Lumber Co. v. Mayo, 75 Conn. 335; Clark v. University of Ill., 103 Ill. App. 261; Livingston v. Stevens [Iowa] 94 N. W. 925; Muth v. Booye [N. J. Err. & App.] 55 Atl. 287; Stewart v. N. Y. & C. Gas Coal Co., 207 Pa. 220. Informality, which could have been remedied, had attention been called to it. Union Book Co. v. Robinson, 105 Ill. App. 236. Validity of a codicil of a will. In re Hart's Estate, 203 Pa. 492. That affidavits of merits on motion to vacate a default judgment were defective. Headdings v. Gavette, 86 App. Div. [N. Y.] 592. To the chancellor's erroneously allowing certain items of master's fees, in a suit to foreclose. Kraft v. Holzman, 206 Ill. 548, 69 N. E. 574. That a judgment had been reversed on appeal. Bennett v. Marion, 119 Iowa, 473, 93 N. W. 558. That an acknowledgment of a deed is void. Schwartz v. Woodruff [Mich.] 93 N. W. 1067. That as the contents of the notice of protest of a note was not proven the giving of sufficient notice was not shown. Raphael v. Margolies, 42 Misc. [N. Y.] 204. Failure to apportion award between fee owner and encumbrancing easement holders is waived by failure to object to award as excessive as to fee owner. In re Trinity Ave., 81 App. Div. [N. Y.] 215. Voluntarily proceeding, after the death of the trial judge, to have a motion for a new trial heard by another judge, waives any objection to the judge's right to deny the motion. Lutolf v. United Elec. Light Co., 184 Mass. 53, 67 N. E. 1025. To notice of application for an order of sale for delinquent taxes. Quincy G. & E. Co. v. Baumann, 203 Ill. 295, 67 N. E. 807. That plaintiff had not offered to return a sum received under a release. Wheeler v. Metropolitan Stock Exch. [N. H.] 56 Atl. 754. As to legality of consideration in an action of assumpsit. Henry v. Zurflieh, 203 Pa. 440. That appellant was erroneously sued. Lauer Brew. Co. v. Chmielewski, 206 Pa. 90. An objection by an executor to a creditor's bond. Ford v. First Nat. Bank, 201 Ill. 120,

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rule applies to objections that the action is brought under the wrong statute,[48] to the manner of procedure or trial,[49] composition of jury,[50] to competency of evidence,[51] or witnesses,[52] to the relevancy or materiality,[53] sufficiency,[54] admission[55]

66 N. E. 316. That copies of an application for insurance were not attached to the policies. Snader v. Bomberger, 21 Pa. Super. Ct. 629. That state's attorney was without authority from the board of supervisors to sue for taxes. Ellis v. People, 199 Ill. 548, 65 N. E. 428. To constitutional objection to a statute. Hunter v. Bamberg County, 63 S. C. 149. To omission to bring money into court, upon a prayer for leave to rescind and return the purchase price. Lord v. Horr, 30 Wash. 477, 71 Pac. 23. That memorandum of settlement of litigation, in an action for specific performance thereof, was made without authority of defendant's attorney. Collins v. Fidelity Trust Co., 33 Wash. 136, 73 Pac. 1121. That affidavit could not present certain matters occurring at the trial, as a basis for a new trial, as they were errors of law. Pratt v. Pratt, 141 Cal. 247, 74 Pac. 742. An error in treating contributory negligence as an issue in the case, and instructing on the same. Oliver v. Columbia, N. & L. R. Co., 65 S. C. 1. That the usury statute does not apply to the note in suit. Blackwell v. McNinch [S. C.] 46 S. E. 477. To sufficiency of a sheriff's return on an attachment tacitly treated as good in the circuit court. Ware v. Long, 24 Ky. L. R. 696, 69 S. W. 797. That a notice of an administrator's sale was not published for the requisite period. Meddis v. Kenney, 176 Mo. 200, 75 S. W. 633. That two lots sold at an execution sale should have been sold separately. Allen v. Farley, 25 Ky. L. R. 930, 76 S. W. 538. That the charge for freight claimed by a railroad had not been posted in compliance with the statute. Myar v. St. Louis S. W. R. Co. [Ark.] 76 S. W. 557. Objections to an assignment for the benefit of creditors, and to the form of judgment cannot be made for the first time in the supreme court of the United States. Robinson v. Belt, 187 U. S. 41, 47 Law. Ed. 65. To overruling demurrer. English v. Randle, 29 Ind. App. 681, 65 N. E. 22; Gleason v. McGinnis, 30 Ind. App. 4, 65 N. E. 191. To granting of motion for an extra allowance, in an action for injuries by a street car. Mulligan v. Third Avenue R. Co., 87 App. Div. [N. Y.] 320. An objection to sufficiency of sureties on an appeal bond that the justification of the sureties failed to state that they were worth the amount for which they justified in property within the state under Ball. Ann. Codes & St. Wash. § 6509. Weiser v. Holzman, 33 Wash. 87, 73 Pac. 797.

In **North Carolina**, objections may be raised on the trial before the judge of the superior court that were not raised before the clerk thereof; under Code, § 255, as amended by Laws 1887, p. 518, c. 276, providing that when a proceeding before the clerk of the superior court is sent to the superior court, the judge shall hear and determine all matters in the controversy. Kinston & C. R. Co. v. Stroud, 132 N. C. 413. That a receivership should be vacated because the receiver was appointed without notice. Wills Point Mercantile Co. v. Southern R. I. Plow Co., 31 Tex. Civ. App. 94, 71 S. W. 292.

48. Action for death by wrongful act. Objection was that recovery was erroneously sought under the "Death Act" instead of the "Survival Act." Hewitt v. East Jordan Lumber Co. [Mich.] 98 N. W. 992.

49. English v. Randle, 29 Ind. App. 681, 65 N. E. 22. To a trial by jury on the ground that the action is a suit in equity and not triable by jury where the party goes to trial before a jury without objecting. Bernier v. Anderson [Idaho] 70 Pac. 1027. Where on defendant's motion, a case was postponed on several occasions and tried on the day after the last day to which it was postponed, the defendant waives an objection that it was tried out of its regular order and that the clerk had not placed it on the trial calendar. Union S. & G. Co. v. Tenney, 200 Ill. 349, 65 N. E. 688. Where a case is tried without a jury, neither party objecting nor excepting, neither can complain for the first time on appeal that the record does not show that a jury was waived. Pearce v. Albright [N. M.] 76 Pac. 286.

50. Jury of eleven. Ill. Cent. R. Co. v. Burton [Ky.] 79 S. W. 231.

51. Chicago & E. I. R. Co. v. Randolph, 199 Ill. 126, 65 N. E. 142; Caris v. Nimmons, 92 Mo. App. 66; Yoder v. Reynolds, 28 Mont. 183, 72 Pac. 417. That one was addicted to the use of morphine. Spencer v. Terry's Estate [Mich.] 94 N. W. 372. Parol evidence of contract within the statute of frauds. Marr v. Burlington, C. R. & N. R. Co., 121 Iowa, 117, 96 N. W. 716. That answer of witness was mere opinion. Tanner v. Harper [Colo.] 75 Pac. 404. To depositions for want of proper authentication or proper certification (Cheuvront v. Cheuvront [W. Va.] 46 S. E. 233), or taken without notice (Hall v. Metcalfe, 24 Ky. L. R. 1660, 72 S. W. 18). To a certified copy of a deed as evidence on the ground that the original deed was not accounted for and no notice was given of the intent to use the copies. Moody v. Ogden, 31 Tex. Civ. App. 395, 72 S. W. 253. To secondary evidence. Mensing Bros. & Co. v. Cardwell [Tex. Civ. App.] 75 S. W. 347; Meyers v. School Dist. No. 2, 96 Mo. App. 48, 75 S. W. 1120; U. S. v. McCoy, 193 U. S. 593.

52. Smith v. Trefz, 202 Ill. 587, 67 N. E. 393. Of expert witness. Parker v. McKannon Bros. & Co. [Vt.] 56 Atl. 536. That wife was incompetent to testify, in an action for divorce, concerning the husband's property and income, under Code Civ. Proc. N. Y. § 831. Valentine v. Valentine, 87 App. Div. [N. Y.] 156.

53. Reagan v. Manchester St. Ry. [N. H.] 56 Atl. 314; St. Louis S. W. R. Co. v. Hughes [Tex. Civ. App.] 73 S. W. 976.

54. Union S. & G. Co. v. Tenney, 102 Ill. App. 95; Knight v. Hawkeye L. & B. Co., 121 Iowa, 74, 95 N. W. 273; Wineman v. Fisher [Mich.] 98 N. W. 404; Fidelity M. F. Ins. Co. v. Lowe [Neb.] 93 N. W. 749; City of El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 S. W. 21. That verdict is not supported by the evidence. City of Beardstown v. Clark, 204 Ill. 524, 68 N. E. 378; Gilliland v. Dunn & Co., 136 Ala. 327. To show the agency of a person contracting for appellant, or to show that the contract was induced by agent's misrepresentations. Frank V. Strauss & Co.

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or exclusion of evidence,[56] to questions asked witnesses,[57] responsiveness of answers thereto,[58] to improper arguments or remarks by counsel,[59] or remarks by the trial judge,[60] to conduct of jurors,[61] to variance between pleading and proof,[62] unless it

v. Welsbach Gas Lamp Co., 42 Misc. [N. Y.] 184; West Shore R. Co. v. Wenner [N. J. Err. & App.] 57 Atl. 408.

55. Bath v. Houston & T. C. R. Co. [Tex. Civ. App.] 78 S. W. 993; Altgelt v. Alamo Nat. Bank [Tex. Civ. App.] 79 S. W. 582; Lapsley v. Merchants' Bank [Mo. App.] 78 S. W. 1095; Board of Sup'rs of Riverside County v. Thompson [C. C. A.] 122 Fed. 860; Schlageter v. Gude, 30 Colo. 310, 70 Pac. 428; Savannah, T. & I. of H. R. v. Grogan, 117 Ga. 461; City of Chicago v. English, 198 Ill. 211, 64 N. E. 976; Tarrant v. Burch, 102 Ill. App. 393; Voigt v. Anglo-American Provision Co., 104 Ill. App. 423; Springer v. Darlington, 207 Ill. 238, 69 N. E. 946; McCormick v. Olbinski [Mich.] 92 N. W. 499; Trotter v. Tousey, 131 Mich. 624, 92 N. W. 544; Nickerson v. Leader Mercantile Co., 90 Mo. App. 336; Akers v. Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536; Clark v. Folkers [Neb.] 95 N. W. 328; Huck v. Bischoff, 84 N. Y. Supp. 173; Carter & Co. v. Kaufman [S. C.] 45 S. E. 1017. Of prior judgments to prejudice the jury. Bennett v. Marion, 119 Iowa, 473, 93 N. W. 558. Of impeaching evidence that a proper foundation was not laid therefor. Weeks v. Hutchinson [Mich.] 97 N. W. 695. Of testimony of a physician that charges of plaintiff (a physician) for services rendered were reasonable. McKnight v. Detroit & M. R. Co. [Mich.] 97 N. W. 772. Of evidence on the ground of variance from alleged waiver of breach of warranty. Traders' M. L. Ins. Co. v. Johnson, 200 Ill. 359, 65 N. E. 634. Of evidence tending to establish facts not directly in issue. President, etc., of Ins. Co. v. Buckstaff [Neb.] 92 N. W. 755. Of a will, because of the lack of a certified copy of the order of probate. Deiterman v. Ruppel, 200 Ill. 199, 65 N. E. 707. That a transcript of evidence in a former suit, though usable to refresh the witness' memory, was inadmissible as evidence in itself. Dice v. Hamilton [Mo.] 77 S. W. 299. Evidence incompetent under the pleadings, but not detrimental to appellant's interest. Ill. Cent. R. Co. v. Crockett [Ky.] 79 S. W. 235. Amendment to pleading not allowed, but evidence on point covered by offered amendment admitted without objection, defendant's rights were not prejudiced thereby. East Jellico Coal Co. v. Golden [Ky.] 79 S. W. 291. Allowed evidence to be introduced for full amount of subcontractor's bill, held could not object for the first time on appeal that under notice of lien subcontractor could not recover that amount. Noll v. Cumberland Plateau R. Co. [Tenn.] 79 S. W. 880. Evidence introduced, in an action on a Maine policy, on a breach of warranty other than the one specially pleaded. Ryan v. Providence Wash. Ins. Co., 79 App. Div. [N. Y.] 316. Evidence of facts, presented by affidavits, tending to impeach the validity of a judgment. Baldwin v. Burt [Neb.] 96 N. W. 401. Where the introduction of a book of ordinances of a city is not objected to below, it cannot be objected on appeal that it did not appear that a certain ordinance was in force at a certain date. Mo., K. & T. R. Co. v. Owens [Tex. Civ. App.] 75 S. W. 579. In the absence of showing to the contrary, it will be presumed on appeal that evidence supporting a finding was received without objection. Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175. Failure to object to the admission of evidence establishing the defense of assumption of risk waives the right to object, on appeal, that defendant was not entitled to such defense because not pleaded. Scheir v. Quirn, 77 App. Div. [N. Y.] 624. Not objecting to the introduction of parol evidence of the proceedings of a fire district waives the right to have the question of such proceedings determined only by record. Fritz v. Crean, 182 Mass. 433, 65 N. E. 832.

56. Huck v. Bischoff, 84 N. Y. Supp. 173. Where no objection is taken to stricken testimony of a witness, after a nonsuit, an exception to such striking out cannot be considered on appeal. Guillou v. Redfield, 205 Pa. 293.

57. To question asked expert witness. Wabash Screen Door Co. v. Black [C. C. A.] 126 Fed. 721; Hedlun v. Holy Terror Min. Co. [S. D.] 92 N. W. 31. To court's interrogation of a party's witness. Indianapolis St. R. Co. v. Hockett, 159 Ind. 677, 66 N. E. 39. To form of question. Shannon v. Castner, 21 Pa. Super. Ct. 294.

58. Keefe v. Norfolk Suburban St. R. Co. [Mass.] 70 N. E. 46.

59. Chicago City R. Co. v. Handy, 208 Ill. 81, 69 N. E. 917; Consumers' Paper Co. v. Eyer, 160 Ind. 424, 66 N. E. 994; Cox v. Cohn, 29 Ind. App. 559, 64 N. E. 889; Jenkins v. Chism, 25 Ky. L. R. 736, 76 S. W. 405; Owens v. Jenkins, 25 Ky. L. R. 1567, 78 S. W. 212; Lansing v. Wessell [Neb.] 97 N. W. 815; Meyer v. Milwaukee Elec. R. & L. Co., 116 Wis. 336, 93 N. W. 6. Objectionable statements of counsel in argument may be considered on appeal, though the adverse party has not requested a charge to the jury not to consider them, if he objected to the argument at the time. Western Union Tel. Co. v. Perry, 30 Tex. Civ. App. 243, 70 S. W. 439. Where counsel for the defendant makes no motion for a mistrial, for remarks of plaintiff's counsel before the jury while asking for further information, nor asks specific instructions, it is not error for the court to fail to instruct the jury to disregard such remarks or to fail to instruct them as to their duty in finding a verdict regardless of whether it would prejudice the case of either party. Benton v. Hunter [Ga.] 46 S. E. 414.

60. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; Lanquist v. Chicago, 200 Ill. 69, 65 N. E. 681; Vollkommer v. Cody, 177 N. Y. 124, 69 N. E. 277. The court's using language of the future instead of the present tense in reserving a point on a submission of the case to the jury, or in following the words by further action. Evesson v. Ziegfeld, 22 Pa. Super. Ct. 79. Where the court alludes to a witness' explanation of contradictory statements, in such a manner as apparently to give it judicial indorsement and approval, the fact that the party prejudiced thereby has made no motion for a mistrial on the ground of the judge's remarks does not prevent him from complaining thereof after verdict, if it be adverse to him. Potter v. State, 117 Ga. 693.

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is of such a character as to materially affect the right of the matter or defeat the action entirely,[63] to a reference of the case,[64] to a master's[65] or arbitrator's report,[66] to the taxation or awarding of costs,[67] to the verdict or finding,[68] or to the judgment or decree.[69]

Matters not objected to in an intermediate court cannot be considered on appeal to the supreme court.[70] But objections or exceptions may be considered on appeal from some inferior to intermediate courts, though not taken in the inferior court.[71] If the record shows that the lower court's rulings or charges work an injustice, the appellate court may order a new trial, although no objections were taken in the lower court.[72]

Unless objections are made to questions or errors arising during the trial, ex-

61. To conduct of a juror. Doolin v. Omnibus Cable Co., 140 Cal. 369, 73 Pac. 1060.

62. Anderson v. N. Y. L. Ins. Co. [Wash.] 76 Pac. 109; Muldoon v. Meriwether [Ky.] 79 S. W. 1183; City of Denver v. Strobridge [Colo. App.] 75 Pac. 1076; Szymanski v. Blumenthal [Del.] 56 Atl. 674; Proudfoot v. Gedichsen, 102 Ill. App. 482; Winklemann v. Ill. Cent. R. Co., 103 Ill. App. 496; Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312, 67 N. E. 17; Ehlen v. O'Donnell, 205 Ill. 38, 68 N. E. 766; Ill. Cent. R. Co. v. Behrens, 208 Ill. 20, 69 N. E. 796; Pressed Steel Car Co. v. Herath, 207 Ill. 576, 69 N. E. 959; Mooneyham v. Cella, 91 Mo. App. 269; Ala. & V. R. Co. v. Pounder [Miss.] 35 So. 155. [V. S. 1630.] Brown's Ex'r v. Dunn's Estate, 75 Vt. 264. That a letter was at variance with the complaint. Lemon v. De Wolf, 89 Minn. 465, 95 N. W. 316. Objection to a pleading for variance, in a motion for a new trial, is good on appeal. Landt v. McCullough, 206 Ill. 214, 69 N. E. 107. Variance between attachment bond and affidavit. McCain Bros. v. Street, 136 Ala. 625. Allegation of ownership in fee and proof showing equitable interest is not a fatal variance when not raised in the trial court. Olson v. Seattle, 30 Wash. 687, 71 Pac. 291. Where the variance is not taken advantage of as required by statute. Randell v. Chicago, R. I. & P. R. Co., 102 Mo. App. 342, 76 S. W. 493.

63. Winklemann v. Ill. Cent. R. Co., 103 Ill. App. 496. A material and substantial variance affecting the right of the matter [V. S. 1630]. Brown's Ex'r v. Dunn's Estate, 75 Vt. 264.

64. Where he did not object below, but appeared before him and introduced testimony, and appeared and filed exceptions to his report. Blanton v. Howard, 25 Ky. L. R. 929, 76 S. W. 511.

65. Smyth v. Stoddard, 203 Ill. 424, 67 N. E. 980. That it set out merely an abstract of deeds, referring to the original record. Glos v. Woodard, 203 Ill. 480, 67 N. E. 3.

66. An objection that the umpire of an award was sworn with the arbitrators and sat with them cannot be made for the first time after the hearing. Miss. Cotton Oil Co. v. Buster [Miss.] 36 So. 146.

67. Valentine v. Sweatt [Tex. Civ. App.] 78 S. W. 385; Eaton v. Brown, 20 App. D. C. 453. To costs taxed in favor of the plaintiff without any certificate of the trial judge that plaintiff's claim was unreasonably resisted. Cunningham v. Hewitt, 84 App. Div. [N. Y.] 114. To error in taxing costs in justice and county courts not objected to in the county court. Hockaday-Gray Co. v. Jonett [Tex. Civ. App.] 74 S. W. 71.

68. To a verdict on demurrer to the evidence upon the ground of excessive damages. Rhule v. Seaboard A. L. R. Co. [Va.] 46 S. E. 331. Where no objection is made to a general finding and decree thereon, a request for a special finding will be deemed to be waived. Shroyer v. Campbell, 31 Ind. App. 83, 67 N. E. 193. To the insufficiency of the trial judge's findings of fact. Hughey v. Mosby, 31 Tex. Civ. App. 76, 71 S. W. 395.

69. The fact that a judgment is premature under Civ. Code Prac. Ky. §§ 516, 517 and 761. McHargue v. Reams, 24 Ky. L. R. 1385, 71 S. W. 526. To the decree. Boice v. Conover, 63 N. J. Eq. 273. A judgment, defective for failing to show that the case was tried on an agreed statement of facts, cannot be objected to after a motion on appeal to strike out the statement of facts has been sustained, where the judgment was submitted to appellant's counsel before being put on record and he made no objection thereto. Scott v. Cox, 30 Tex. Civ. App. 190, 70 S. W. 802. A judgment at law tried by the court will not be reviewed on appeal where no objections were made or exceptions saved on rulings on the admission of evidence, and no declarations raising propositions of law were requested. Chapin v. Stahlhuth, 102 Mo. App. 299, 76 S. W. 667. Objection that return of service would not authorize default judgment. Southern Bell Tel. & T. Co. v. Parker [Ga.] 47 S. E. 194.

70. Excessive costs in a justice's court, not objected to on a trial de novo on an appeal to a court for the trial of small causes. Wyckoff v. Luse, 67 N. J. Law, 218. A motion not renewed or presented on appeal de novo to the circuit court. Fifer v. Ritter, 159 Ind. 8, 64 N. E. 463. To the admission of evidence from appellate court to the supreme court. Grand Lodge of Locomotive Firemen v. Orrell, 206 Ill. 208, 69 N. E. 68. An issue not raised and urged in the district court and court of appeals. Neith Lodge No. 21 v. Vordenbaumen, 111 La. 213. Objection not made in the circuit court to an affidavit of replevin in the justice's court. Matthews v. Cotten [Miss.] 35 So. 937.

71. Objections or exceptions to testimony are not necessary to have it considered by the appellate term of the supreme court of New York on appeal from a judgment of the municipal court of the city of New York. Fleck v. Neerenberg, 85 N. Y. Supp. 379.

72. Ga. Pine Turpentine Co. v. Newman, 85 N. Y. Supp. 1055.

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ceptions thereto are without avail,[73] unless the exceptions are considered by the court, in which case the lack of such objections will be deemed to have been waived and cannot be considered on appeal.[74]

To pleading.—As a general rule a defect or insufficiency in pleading cannot be objected to for the first time on appeal, if the defect or insufficiency could have been corrected by being objected to below.[75] It is otherwise, however, if the defect is a vital one.[76]

Thus an objection cannot be made for first time in the appellate court to the manner of pleading;[77] to the sufficiency of the complaint,[78] or its verification,[79] unless the defect is a vital one, as that the complaint fails to state a sufficient cause of action;[80] to the sufficiency of a petition,[81] or its verification;[82] or to the sufficiency

73. There can be no exception to a question on the ground of assuming unproved facts, where no objection is made to it in that regard. Muller v. Metropolitan St. R. Co., 77 App. Div. [N. Y.] 221.

74. Exceptions to master's report, heard and sustained by the chancellor. Barney v. Board of Com'rs, 203 Ill. 397, 67 N. E. 801.

75. Strow v. Allen [Iowa] 98 N. W. 141; Clay v. Kennedy, 24 Ky. L. R. 2034, 72 S. W. 815. In failing to set out a written contract. Coppes v. Union Nat. S. & L. Ass'n [Ind. App.] 67 N. E. 1022. To raise questions presented by the evidence. Alexander v. Grand Lodge, A. O. U. W., 119 Iowa, 519, 93 N. W. 508. That denials of allegations in the pleadings were not sufficiently specific. Hemstein v. Depue, 24 Ky. L. R. 886, 70 S. W. 190. Want of material allegation waived by failure to object. Bates v. Drake, 28 Wash. 447, 68 Pac. 961. To a motion for a new trial not signed by the party or his attorney. Brookshier v. Chillicothe Town M. F. Ins. Co., 91 Mo. App. 599. That two causes of action were improperly joined. Sickman v. Wollett [Colo.] 71 Pac. 1107. That a proper issue was not made by the pleadings. Carroll v. Briggs, 138 Cal. 452, 71 Pac. 501. Objection to an allegation of service of process, for not being sufficiently specific as to time, place and manner of service. Oshinsky v. Gottlieb, 84 N. Y. Supp. 871. To an averment of a demand for a deed. Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042. To a bill of particulars tendered. Green v. Miller [Ariz.] 73 Pac. 399. To the filing of a creditor's bill without issuing a new execution in the name of the complainant, and that the assignee of the creditor was precluded by laches. Dimond v. Rogers, 203 Ill. 464, 67 N. E. 968. An objection to the form of pleadings cannot be first raised on appeal. Des Moines Sav. Bank v. Morgan Jewelry Co. [Iowa] 99 N. W. 121.

76. That the declaration is insufficient to support any verdict; a judgment thereon in favor of the plaintiff may be objected to for the first time on appeal. Western Union Tel. Co. v. Sklar [C. C. A.] 126 Fed. 295. Defective allegations in a bill will not be noticed of the court's own motion on appeal unless the bill fails to state a case for relief. Hughey v. Winborne [Fla.] 33 So. 249.

77. Robards v. Jenkins, 25 Ky. L. R. 449, 76 S. W. 10.

78. Yazoo & M. V. R. Co. v. Schraag [Miss.] 36 So. 193. That complaint did not state contract was in writing. Carroll v. Briggs, 138 Cal. 452, 71 Pac. 501. Defect in complaint is waived by failing to object by demurrer or otherwise before trial; and evidence is received without suggesting the defect. Johnson v. Roach, 82 App. Div. [N. Y.] 351. A complaint in mandamus sufficient under Burns' Rev. St. 1901, § 7916, cannot be assailed for uncertainty and insufficiency for the first time on appeal. Hart v. State [Ind.] 64 N. E. 854. That an amended complaint changed the cause of action. McIntire v. Schiffer [Colo.] 72 Pac. 1056. Where an objection that the complaint does not charge the defendant's negligence as a proximate cause, the complaint will be deemed amended to correspond to the evidence. Selby v. Vancouver W. W. Co., 32 Wash. 522, 73 Pac. 504. Objection to a complaint for stating two causes of action in the same count cannot be considered on appeal where not objected to on that ground in the lower court. Champ Spring Co. v. Roth Tool Co., 96 Mo. App. 518, 70 S. W. 506. Where no objection is made in the lower court to a complaint for defects which would have subjected it to a motion to make more specific or to a special demurrer. Hefferlin v. Karlman [Mont.] 74 Pac. 201. Objection to a complaint for want of verification cannot be taken after judgment under Sand. & H. Dig. Ark. § 5776. Randall v. Sanders [Ark.] 77 S. W. 56. A judgment rendered after appearance of defendant on a complaint incorrectly stating the title of the court but otherwise sufficient, cannot be impeached on objection first made on appeal; the title being merely a formal matter, the lower court otherwise having jurisdiction under B. & C. Comp. Or. § 67. Adams v. Kelly [Or.] 74 Pac. 399. Where a defendant fails to object to proceedings being entered by him, the court having jurisdiction, he cannot complain of a judgment rendered against him for individual indebtedness, though the complaint alleges a joint indebtedness. Patterson v. Morrell Hardware Co. [Colo. App.] 75 Pac. 592.

79. Under Ball. Ann. Codes & St. Wash. § 6535. That the verification of the complaint is insufficient. Smith v. Newell, 32 Wash. 369, 73 Pac. 369.

80. Ravenel v. Ingram, 131 N. C. 549. Objection that an action is prematurely brought, apparent on the face of the complaint, may be made on appeal on the ground that the complaint does not state a sufficient cause of action. Under Burns' Rev. St. Ind. 1901, § 346, providing that failure to object to a complaint by demurrer or answer because it does not state a sufficient cause of action does not waive the objection. Middaugh v. Wilson, 30 Ind. App. 112, 65 N. E. 555. But the failure of the complaint to state suffi-

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of a bill,[83] affidavit,[84] answer,[85] or plea;[86] or to a cross-complaint or counterclaim.[87] But the sufficiency of a cross-complaint to state a cause of action may be questioned for the first time on appeal.[88] Likewise objection cannot be made for the first time on appeal to the withdrawal of an answer;[89] to failure to file an affidavit,[90] or replication;[91] or to an allowance or refusal of an amended pleading;[92] or to failure to rule on a demurrer.[93]

But where questions are considered by the trial court as before it, they will be considered on appeal though not pleaded below, and no objection made thereto in that court.[94]

cient facts to constitute a cause of action, as urged by demurrer, which was overruled, cannot be considered on appeal from an order denying a new trial where the objection was not renewed or otherwise presented below. Code Civ. Proc. Mont. §§ 1170, 1171, subd. 7, providing for new trial. Charles Schatslein Paint Co. v. Passmore, 26 Mont. 500, 68 Pac. 1113; Campbell v. Great Falls, 27 Mont. 37, 69 Pac. 114.

81. Of an allegation in a petition, in an action for seduction. Lampman v. Bruning, 120 Iowa, 167, 94 N. W. 562. To a petition to set aside a default judgment for not alleging adjournment of term at which judgment was rendered. MacCall v. Looney [Neb.] 96 N. W. 238. To omission in petition to set aside deed of deceased of an allegation that plaintiff is an heir or has an interest in the estate. Reeves v. Howard, 118 Iowa, 121, 91 N. W. 896. Objection to a petition not raised by the demurrer thereto, cannot be considered on appeal from a judgment sustaining the demurrer. Harris-Emery Co. v. Pitcairn [Iowa] 98 N. W. 476. Where averments in a petition are specifically denied by answer and evidence introduced, without objection, in the issues thus formed it is too late on appeal to object to the sufficiency of the petition. Albin Co. v. Kuttner, 25 Ky. L. R. 1100, 77 S. W. 181. Where objection to a petition for not stating a cause of action is made for the first time on appeal, the pleading will be construed to state a cause of action if susceptible of such construction. D. R. Vivion Mfg. Co. v. Robertson [Mo.] 75 S. W. 644.

82. In re Mahoney's Estate, 88 App. Div. [N. Y.] 140.

83. Objection to the dismissal of a bill by a subsequent mortgagee cannot be made for the first time on appeal, where a cross-complaint filed in the suit to foreclose, made no objections to findings and conclusions of a master, and the decree dismissing the bill recited that the cross-complaint made no objection thereto. Roderick v. McMeekin, 204 Ill. 625, 68 N. E. 473. Neither the question of multifariousness nor misjoinder of parties can be raised for the first time on appeal from an order overruling a general demurrer to a bill for want of equity. First Nat. Bank v. Kirkby, 43 Fla. 376. To a bill of interpleader that it is not maintainable because complainant asserts an interest to extent of compensation for services. Read v. Citizens' St. R. Co., 110 Tenn. 316, 75 S. W. 1056.

84. To a plea denying agency. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227.

85. Stoy v. Bledsoe, 31 Ind. App. 643, 68 N. E. 907; Gleason v. McGinnis, 30 Ind. App. 4, 65 N. E. 191. To a lack of technical precision in pleading a defense. Standley v. Clay, etc., Co. [Neb.] 94 N. W. 140. That answer did not plead an estoppel. Beardsley v. Clem. 137 Cal. 328, 70 Pac. 175. Objection to the consideration of the question of the execution of a bond for lack of verification of the answer of a surety. North St. Louis Bldg. & L. Ass'n v. Obert, 169 Mo. 507, 69 S. W. 1044.

86. Proceeding to trial in lower court without objection and without replications to special pleas, objections thereto cannot be considered in the appellate court. Ill. Life Ass'n v. Wells, 102 Ill. App. 544. Alleged insufficiency of a general denial cannot be first raised on appeal. King v. Pony Gold Min. Co., 28 Mont. 74, 72 Pac. 309.

87. That a counterclaim was improper as not authorized by Code Civ. Proc. N. Y. § 495, where the point was not raised by demurrer in the lower court. Hudson River W. P. Co. v. Glens Falls G. & E. L. Co., 90 App. Div. [N. Y.] 513.

88. Coppes v. Union Nat. S. & L. Ass'n [Ind. App.] 67 N. E. 1022.

89. To defendant's withdrawal of answer, and right given defendant's counsel to comment thereon to the jury. Groh's Sons v. Groh, 80 App. Div. [N. Y.] 85.

90. That defendant failed to file an affidavit denying the execution of a contract sued on, as required by court rules of Michigan and of the Federal circuit courts in that state, to put plaintiff on his proof. City of Detroit v. Grummond [C. C. A.] 121 Fed. 963.

91. For alleged failure to reply to an affirmative defense, there being no motion for a judgment on the pleadings, and the case tried as if there had been a reply. Childers v. Stone Milling Co., 99 Mo. App. 264, 72 S. W. 1077.

92. To court's action in permitting amended complaint to be filed after a demurrer to the original complaint had been sustained. Chappell v. Jasper County O. & G. Co., 31 Ind. App. 170, 66 N. E. 515. On appeal from an order sustaining a demurrer to appellant's complaint, he cannot object that he was not permitted to amend where he made no application therefor in the lower court. Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290.

93. Americus Grocery Co. v. Brackett & Co. [Ga.] 46 S. E. 657.

94. The question and defense of assumption of risk being treated in the trial court as before it will be considered on appeal without regard to the pleading thereof. Kilkin v. N. Y. Cent. & H. R. R. Co., 76 App. Div. [N. Y.] 529.

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A defect in a pleading is waived by objecting to the pleading on other grounds solely.[95]

To parties.—There cannot be raised for the first time on appeal an objection to a party's capacity to sue[96] not raised by demurrer or answer in the lower court;[97] or to a defect of parties[98] not urged by demurrer or answer;[99] or to a misjoinder of parties;[1] or to orders making a person a defendant.[2]

To jurisdiction.—An objection to the jurisdiction of the trial court as a general rule cannot be made for the first time on appeal,[3] where the party voluntarily goes to trial without objection.[4] This rule applies to objection to jurisdiction because the venue was not properly laid;[5] or to objection to equity jurisdiction, because there is an adequate remedy.[6]

But in case of jurisdiction over the subject-matter objection thereto may be made on appeal though not interposed below,[7] except where a court apparently has

95. A defect in a complaint, in an action for unlawful detainer, in that it did not aver that the defendant was wrongfully detaining the premises at the institution of the action, is waived by objecting to the complaint, at the trial, on other grounds solely. Champ Spring Co. v. Roth Tool Co., 96 Mo. App. 518, 70 S. W. 506.

96. Taylor v. Weckerly [Neb.] 96 N. W. 618; San Antonio & A. P. R. Co. v. Jones, 30 Tex. Civ. App. 316, 70 S. W. 349. Suggestion of minority was ignored when offered on appeal after party had prosecuted the action for judgment as one sui juris. Johnson v. Shreveport Water Works Co., 109 La. 268.

97. Miller v. Campbell Com. Co. [Okl.] 74 Pac. 507. An objection that plaintiff could not maintain an action on account of his infancy, no guardian ad litem being appointed, is too late on appeal under Rev. St. Wis. 1898, § 2654, that such objection must be taken by demurrer or answer. Fey v. I. O. O. F. M. L. Ins. Soc. [Wis.] 98 N. W. 206.

98. Warfield v. Hume, 91 Mo. App. 541; Tapana v. Shaffray, 97 Mo. App. 337, 71 S. W. 119; Taylor v. Weckerly [Neb.] 96 N. W. 618. That a judgment appointing a receiver of a national bank on application of a stockholder was unwarranted for defect of parties. Cogswell v. Second Nat. Bank [Conn.] 56 Atl. 574. Objection that defendants were sued as individuals on a contract with a partnership, cannot be considered on appeal where not objected to below. Ames v. Farrelly [C. C. A.] 121 Fed. 820. That suit was brought in wrong name, the defendant putting in his defense on the merits. Knefel v. Pink, 104 Ill. App. 288. Condemnation proceedings by a school district, objection that proceedings should have been prosecuted in the name of the directors instead of the district. School Dist. No. 35 v. Hodgins [Mo.] 79 S. W. 148.

99. Hellams v. Prior, 64 S. C. 543. Under Rev. St. Mo. 1899, §§ 598, 602. Johnson v. St. Joseph Stock Yards Bank, 102 Mo. App. 395, 76 S. W. 699; Whitecotton v. St. Louis & H. R. Co. [Mo. App.] 78 S. W. 318.

1. Of parties plaintiff. Thompson v. Rush [Neb.] 92 N. W. 1060. The misjoinder of a wife as plaintiff cannot be considered on appeal unless the objection thereto is raised by notice of misjoinder under New Jersey Practice Act, § 37 (G. S. p. 2539). Peterson v. Christianson [N. J. Err. & App.] 56 Atl. 288.

2. Burtiss v. Lanyon Zinc Co. [Kan.] 75 Pac. 1030.

3. Where no objection is made to an omission of allegations in a bill in the circuit court of the United States showing that the jurisdictional amount was in dispute, such omission cannot be considered on appeal to the United States supreme court, raising the question of jurisdiction on another ground. Giles v. Harris, 189 U. S. 475, 47 Law. Ed. 909. To preserve for the supreme court the question of jurisdiction the appellant should present a proposition to be held or refused by the trial court under Prac. Act § 42 (Hurd's Rev. St. 1901, c. 110, § 43). Harrison v. Nat. Bank of Monmouth, 207 Ill. 630, 69 N. E. 871.

4. English v. Randle, 29 Ind. App. 681, 65 N. E. 22; Adams v. Crown C. & T. Co., 198 Ill. 445, 65 N. E. 97. Under B. & C. Comp. Or. § 72. Adams v. Kelly [Or.] 74 Pac. 399. Where parties enter into a stipulation and proceed to try the case in the lower court without objecting to the court's jurisdiction such objection cannot be made on appeal. Smith v. Olcott, 19 App. D. C. 61. A party going to trial without objection before a judge from whose jurisdiction he had obtained a change of venue, waives any disqualification of the judge by the change. Du Quoin W. W. Co. v. Parks, 207 Ill. 46, 69 N. E. 587.

5. Fields v. Daisy Gold Min. Co., 26 Utah, 373, 73 Pac. 521.

6. Where the bill shows grounds of equitable jurisdiction. Whalen v. Billings, 104 Ill. App. 281. An appellate court will not consider matters for review unless they were brought directly before the court below at the time of trial. Whether an action at law is maintainable for the wrongful conversion of property pledged when the transaction is evidenced by a bill of sale. Loftus v. Arrant [S. D.] 99 N. W. 90.

7. McMillan v. Wiley [Fla.] 33 So. 993; Mansfield v. Mansfield, 203 Ill. 92, 67 N. E. 497; Aram v. Edwards [Idaho] 74 Pac. 961; Houser v. McCrystal [Neb.] 97 N. W. 828; Fidelity & Deposit Co. v. Jordan [N. C.] 46 S. E. 496. Though not raised at the original hearing nor by the pleadings. North Braddock Borough v. Corey, 205 Pa. 35. An objection to contempt proceedings heard on a legal holiday (contrary to Rev. St. 1898, § 701) is a jurisdictional question which may be raised for the first time on appeal. David-

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sufficient jurisdiction, objection thereto cannot be made after final judgment.[8] Objection to jurisdiction may also be raised for the first time on appeal where it appears from the record that the court had no jurisdiction,[9] or on appeal from some inferior to intermediate courts.[10] This applies to objection to jurisdiction of justices of the peace.[11] Where on appeal to an intermediate court the cause is heard de novo and no objection is made to the jurisdiction of the lower court such objection cannot be made on an appeal from the intermediate to a higher court.[12]

Time of objection.—Objections should be made at first seasonable opportunity, as where the action constituting the error is taken.[13] Thus objection to a variance should be made when the evidence is offered, so as to give the plaintiff an opportunity to amend;[14] to sufficiency of pleading before trial;[15] to a question, at the time it is asked;[16] to incompetent or inadmissible evidence at the time it is offered;[17] to depositions, other than for incompetency or irrelevancy, before the commencement of the trial;[18] to the form of a verdict at the time it is rendered.[19]

Waiver of error or right to object.—A party may waive or be estopped from objecting to errors occurring at the trial by some action on his part showing an intention to do so,[20] as by a stipulation,[21] admission in open court,[22] or by defaulting.[23]

son v. Munsey [Utah] 74 Pac. 431. An objection on an appeal from an order denying a new trial that the points raised could only be heard upon an appeal from the judgment may be made for the first time on an application for a rehearing. Sharp v. Bowie [Cal.] 76 Pac. 62.

8. Where the matter is one apparently sufficient in amount to confer jurisdiction, it is too late after final judgment to inquire into the question of value. State v. Foster, 111 La. 241.

9. Furst v. Banks [Va.] 43 S. E. 260.

10. Jurisdiction of the New York City municipal court may be questioned for the first time on appeal to the appellate term of the supreme court. Stuyvesant Real Estate Co. v. Sherman, 40 Misc. [N. Y.] 205. Want of jurisdiction in the county court will be considered on appeal to the court of civil appeals though no objection thereto was made in the county court. Carothers v. Holloman [Tex. Civ. App.] 75 S. W. 1084.

11. That a justice of the peace lost jurisdiction by trying a case without a jury, when demanded. Holz v. Rediske [Wis.] 97 N. W. 162.

12. Where an appeal from a justice was heard de novo in the superior court without objection to the justice's jurisdiction. Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440. That the district court was deprived of jurisdiction of a case from a justice by an amendment increasing the claim of damages beyond the limit of the justice's jurisdiction. Groenmiller v. Kaub, 67 Kan. 844, 73 Pac. 100.

13. Cowan v. Bucksport, 98 Me. 305. Errors of court in referring to testimony, not called to his attention at the time, cannot be considered on appeal. Kuntz v. N. Y., C. & St. L. R. Co., 206 Pa. 162. In order to save an exception to a statement of opposing counsel in his argument, objection should be taken at the time the alleged improper statement is made, or within a reasonable time thereafter, and counsel taking the objection should see that it is brought to the attention of the opposing counsel and the court. Objection put in writing after argument was finished and not brought to opposing counsel's attention until after jury has retired is of no avail. Bond v. Bean [N. H.] 57 Atl. 240.

14. Columbia Mfg. Co. v. Hastings [C. C. A.] 121 Fed. 328.

15. To sufficiency of an allegation in a petition. Lampman v. Bruning, 120 Iowa, 167, 94 N. W. 562. To misjoinder of causes of action and of parties defendant. Curran v. Hagerman [Neb.] 92 N. W. 1003. That a joint judgment cannot stand because no joint cause of action was alleged cannot be made after trial and judgment under R. S. Mo. 1899, § 672. Love v. Love, 98 Mo. App. 562, 73 S. W. 255.

16. That a question does not call for the best evidence must be made to the question itself; it is too late to raise the objection by motion to strike out the answer. La Rue v. St. Anthony & D. Elevator Co. [S. D.] 95 N. W. 292. It is too late if made after the question is asked and answered. Dobson v. Southern R. Co., 132 N. C. 900.

17. Yoder v. Reynolds, 28 Mont. 182, 72 Pac. 417; Kiddell v. Bristow [S. C.] 45 S. E. 174. And the overruling of a subsequent motion to strike out is not ground for reversal. McCormick Harvesting Mach. Co. v. Carpenter [Neb.] 95 N. W. 617. It is too late after the overruling of an objection to the receipt of a copy of a written instrument in evidence, and the copy is received, to object that it was not proved to be a copy. Dearman v. Marshall, 84 N. Y. Supp. 705. Exception to an order overruling an objection to evidence will not be sustained where the objection is not made until after the evidence has been received. Beaman v. Ward, 132 N. C. 68.

18. Woodard v. Cutter [Neb.] 96 N. W. 54.

19. Whiting v. Carpenter [Neb.] 93 N. W. 926; Parsons B. C. & S. F. Co. v. Gadeke [Neb.] 95 N. W. 850; In re Cullinan, 76 App. Div. [N. Y.] 362, 12 Ann. Cas. 68.

20. Filing a verified answer objecting to the sufficiency of a petition to cancel a liquor tax certificate waives the right to object, on appeal, that the statute in reference to such cancellation was unconstitutional. Where a carrier fails to object to an instruction requiring the highest degree of care of it in a certain respect, it cannot com-

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Failure to object to evidence admitted as to certain matters waives the right to object to an instruction on such matters.[24] But defendant's putting in evidence after his demurrer to plaintiff's evidence has been overruled does not waive the right to have the ruling of the court reviewed on appeal.[25]

§ 5. *Necessity of motion or request. In general.*—In order to save certain questions or errors for review, it is necessary that the proper motion should be made thereto, at the trial; as a motion to amend an answer;[26] a motion to cause a verdict to be stated in the desired form, for irregularity in the form thereof;[27] a motion to vacate a judgment by confession;[28] a motion to correct a defect in a pleading,[29] though failure to move for the correction of a clerical error, in the lower court, does not preclude the correction of the error on appeal;[30] a motion to dismiss for failure to state a cause of action,[31] and if the motion is denied, it must be renewed at the close of the trial;[32] a motion to set aside a clerical misprision;[33] or a motion in arrest of judgment for failure of a verdict to assess damages properly,[34] or for an erroneous finding of the jury.[35] A motion to retax costs is necessary to a review of the taxation of them.[36]

In some jurisdictions, it is provided by statute that a judgment or order cannot

plain of an instruction requested by the plaintiff, requiring only ordinary care in that respect. St. Louis S. W. R. Co. v. Duck [Tex. Civ. App.] 69 S. W. 1027. Error in allowing plaintiff to amend his petition is waived by defendant's failure to show that he was surprised thereby. Royer Wheel Co. v. Dunbar, 25 Ky. L. R. 746, 76 S. W. 366.

Matters not constituting waiver: Waiving a right to the appointment of reviewers does not estop one from objecting to the jurisdiction of a board of county commissioners. Strayer v. Taylor [Ind.] 69 N. E. 145. Error in excluding evidence held not waived by a statement of counsel. Kinyon v. Chicago & N. W. R. Co., 118 Iowa, 349, 92 N. W. 40. Failure to object to a court's action in sending a commissioner abroad the second time to take testimony as to a decedent's next of kin, in an action to settle the decedent's estate, and to the manner in which the commissioner performed his duties, precludes a subsequent objection to an order of recommitment. In re Flanagan's Estate, 207 Pa. 490.

21. Action of trial court in a civil case, had by mutual agreement of the parties, cannot be complained of on appeal. Union Nat. Bank v. Touzalin Imp. Co. [Neb.] 95 N. W. 489.

22. That the reputation of a witness was good waives error in the admission of evidence as to the good character of such witness. Roberts, etc., Shoe Co. v. Coulson, 96 Mo. App. 698, 70 S. W. 931.

23. A party defaulting is precluded from objecting on appeal to a decree against him on the ground that no notice was given him, or to the execution of a certificate as not proven. Clark v. Brotherhood of Locomotive Firemen, 99 Mo. App. 687, 74 S. W. 412. And see title Defaults, 1 Curr. Law, p. 913.

24. Twelkemeyer v. St. Louis Transit Co., 102 Mo. App. 190, 76 S. W. 682.

25. Klockenbrink v. St. Louis & M. R. R. Co., 172 Mo. 678, 72 S. W. 900.

26. An error in not permitting an amendment to an answer cannot be considered on appeal where there was no motion to amend. Kuhn v. Sol. Heavenrich Co., 115 Wis. 447, 91 N. W. 994. Where, in an action to quiet title, defendant pleaded title by a certain location, and no motion to amend was made at the trial, title by another location cannot be claimed for the first time on appeal. McPherson v. Julius [S. D.] 95 N. W. 428.

27. Atchison, T. & S. F. R. Co. v. Phipps [C. C. A.] 125 Fed. 478. By substituting affirmative for negative answers to certain questions. Small v. McGovern, 117 Wis. 608, 94 N. W. 651.

28. Von Hermann v. Berry, 102 Ill. App. 658. The defendant's remedy is to enter a motion to the court rendering the judgment to vacate it, and if his motion is overruled to preserve the court's action by a proper bill of exceptions and present the same to the appellate court by a writ of error or by an appeal. Id.

29. A complaint. Pugh v. Spicknall, 43 Or. 489, 73 Pac. 1020, 74 Pac. 485.

30. Error in amount for which judgment was rendered. Poerschke v. Horowitz, 84 App. Div. [N. Y.] 443.

31. Objection to an action of ejectment for nonpayment of rent cannot be considered in the court of appeals where a motion to dismiss for failure to state a cause of action was not made in the supreme court. Jones v. Reilly, 174 N. Y. 97, 66 N. E. 649. Failure of defendant to move to dismiss admits that there is a question of fact for the jury. Minners v. Smith, 40 Misc. [N. Y.] 648.

32. Greenspan v. Newman, 37 Misc. [N. Y.] 784.

33. The premature submission of a cause before it stood for trial is a clerical misprision and not reviewable where a motion to set it aside has not been made in the lower court under Civ. Code Ky. §§ 516-518 and 763. Woolley v. Louisville, 24 Ky. L. R. 1357, 71 S. W. 893.

34. Motion in arrest of judgment calling the court's attention to the defect is necessary to a review of the failure of a verdict in an assault and battery case to assess the compensatory and punitive damages separately. Johnson v. Bedford, 90 Mo. App. 43.

35. Clark v. Porter, 90 Mo. App. 143.

36. Topping v. Douglas [Iowa] 96 N. W. 1035.

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be reversed for an error which can be corrected by motion in the lower court until such motion has been made and overruled.[37]

Motion for a new trial.—In some jurisdictions in order that errors occurring at the trial may be considered on appeal a motion for a new trial embodying them must be made in the lower court, and unless so presented they will be deemed to have been waived,[38] including objections made and exceptions taken.[39] Motion for a new trial is necessary, in some jurisdictions, to a review of the sufficiency of the evidence to sustain a verdict,[40] unless the cause is tried to the court alone,[41] or of

37. Code Iowa, § 4105. Riley v. Bell, 130 Iowa, 618, 95 N. W. 170; Mallory Com. Co. v. Elwood, 120 Iowa, 632, 95 N. W. 176.

38. Aultman, etc., Co. v. Moline [Neb.] 95 N. W. 367; Spolek Denni Hlasatel v. Hoffman, 105 Ill. App. 170; Nesbitt v. Stevens, 161 Ind. 519, 69 N. E. 256; Story & C. Piano Co. v. Gibbons, 96 Mo. App. 218, 70 S. W. 168; Fender v. Hazeltine [Mo. App.] 79 S. W. 1018; Engel v. Dado [Neb.] 92 N. W. 629; Danforth v. Fowler [Neb.] 94 N. W. 637; Woodard v. Cutter [Neb.] 96 N. W. 54; Lincoln Traction Co. v. Moore [Neb.] 97 N. W. 605; Glaser v. Glaser [Okl.] 74 Pac. 944. Whether in an equity or law case. Curran v. Hagerman [Neb.] 92 N. W. 1003. An error of the trial court not prejudicial and not argued on a motion for a new trial, will not be ground for reversing a judgment. Enders v. Hitch, 104 Ill. App. 664. The propriety of an order to interplead cannot be considered on appeal where not complained of in a first motion for a new trial, though complained of in another such motion filed ten days after the first. Richmond v. Supreme Lodge, O. M. P. [Mo. App.] 71 S. W. 736. Error in striking out matter from an answer. Simpson v. Carr, 25 Ky. L. R. 849, 76 S. W. 346; Royer Wheel Co. v. Dunbar, 25 Ky. L. R. 746, 76 S. W. 366. Errors not apparent on the record. Hughes Bros. Mfg. Co. v. Reagan [Ind. T.] 69 S. W. 940. Questions of fact on appeal from a judgment in cases tried before a jury. McNab v. Northern Pac. R. Co. [N. D.] 98 N. W. 353. Proceedings in a trial of issues of fact. Lau v. Lindsay [Neb.] 92 N. W. 642. Proceedings or errors in the district court of Nebraska. Cobb v. Hadley [Neb.] 95 N. W. 482; Norbury v. Harper [Neb.] 97 N. W. 438; Marsh v. State [Neb.] 96 N. W. 520. But motion for a new trial is not necessary to review of a judgment of district court on the hearing of an appeal from an order of a license board. Bennett v. Otto [Neb.] 94 N. W. 807. Error in assessment of amount of recovery. S. W. Cotton Seed Oil Co. v. Bank of Stroud [Okl.] 70 Pac. 205. Remarks of trial judge. Joplin W. W. Co. v. Joplin, 177 Mo. 496, 76 S. W. 960. Failure to show by affidavit, on application for new trial for abuse of discretion, an error of the court in making comments on evidence at time of admission, waives its review on appeal under Code Civ. Proc. Mont. §§ 1171, subd. 1, 1172. Coleman v. Perry, 28 Mont. 1, 72 Pac. 42. Under Code Iowa, § 4105. Mallory Com. Co. v. Elwood, 120 Iowa, 632, 95 N. W. 176. But where a court's erroneous remark has been called to his attention it need not be made a ground for a new trial. Coldren v. Le Gore, 118 Iowa, 212, 91 N. W. 1066. Erroneous finding. Assessing a gross sum on two notes, when the petition contains two counts. Clark v. Porter, 90 Mo. App. 143. A suggestion that a finding is excessive. Corrigan v. Kan. City, 93 Mo. App. 173. That verdict is contrary to the evidence (Henderson Brew. Co. v. Folden, 25 Ky. L. R. 969, 76 S. W. 520), or excessive (Turney v. Baker [Mo. App.] 77 S. W. 479). Error in overruling a motion to strike out an answer cannot be reviewed on appeal where it is not called to the trial court's attention in the motion for a new trial. Lorts v. Wash, 175 Mo. 487, 75 S. W. 95. Where a question is objected to by defendant on the ground that the witness should be permitted to testify to facts only, the objection was overruled and exception taken, and defendant subsequently moved for a new trial on the ground of errors of law at the trial, the question of the admissibility of the evidence was properly saved for review, though no objections were made to other questions on the same line. De Wald v. Ingle, 31 Wash. 616, 72 Pac. 469. Alleged error in refusing an instruction cannot be urged on appeal when it was not called to the court's attention in the motion for a new trial. Jennings v. Kan. City [Mo. App.] 78 S. W. 1041.

39. In order that objection to a referee's finding may be reviewed, the objector must except to the court's action overruling his exceptions to the report, and call the court's attention to the error in his motion for a new trial. Ark. Land Co. v. Ladd [Mo. App.] 77 S. W. 322. Errors in and exceptions to instructions. First Nat. Bank v. Tolerton [Neb.] 97 N. W. 248; Davis v. Hall [Neb.] 97 N. W. 1023; Glaze v. Mills [Ga.] 46 S. E. 99; Young v. Montgomery [Ind.] 67 N. E. 684; Minter v. Bradstreet Co., 174 Mo. 444, 73 S. W. 668; Fullerton v. Carpenter, 97 Mo. App. 197, 71 S. W. 98. If proper exceptions to an instruction have not been taken and preserved, and presented to the trial court by a motion for a new trial, they will not be considered on appeal. Glaser v. Glaser [Okl.] 74 Pac. 944. Failure to complain of instructions in the motion for a new trial waives any error in such instructions, though objected and excepted to when given under Civ. Code Ky. § 343. Harris v. Southern R. Co., 25 Ky. L. R. 559, 76 S. W. 151. Refusal of instructions. Waters-Pierce Oil Co. v. Jackson Junior Zinc Co., 98 Mo. App. 324, 73 S. W. 272. But in Illinois, the appellate court must review instructions given and rulings on instructions asked though no motion for a new trial appears in the bill of exceptions. Gerhards v. Johnson, 105 Ill. App. 65.

40. Bacon v. Jones, 117 Ga. 497; Quigley v. Mulford [Neb.] 95 N. W. 490; Valentine v. Sweatt [Tex. Civ. App.] 78 S. W. 385; Or finding of the court. Westervelt v. Baker [Neb.] 95 N. W. 793.

41. Paulson v. Lyon, 26 Utah, 438, 73 Pac. 510.

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errors in admitting or excluding evidence.[42] But in order that objections to the evidence made in a motion for a new trial may be considered, the evidence must be set out in the motion or attached thereto as an exhibit.[43]

But a motion for a new trial is not necessary to a review of matters of or errors apparent on the record,[44] or as to whether a decree is supported by the findings,[45] or if an order sustaining a motion to quash,[46] or of rulings involving the merits of the case,[47] or of a ruling on a motion to vacate an order of confirmation.[48] An objection that a judgment entered is not the correct legal conclusion from the facts found cannot be considered on an appeal from an order denying a motion for a new trial.[49]

The grounds of a motion for a new trial must be stated and the objection specifically pointed out.[50] Grounds or objections not stated in such a motion before the trial court, cannot be raised in the appellate court.[51]

In some jurisdictions as to matters adjunctive to the proceedings, a motion for a new trial is not necessary, if the matters are saved by exceptions,[52] as a motion to direct a verdict,[53] though if the matters are collateral to the proceedings, exceptions saved are not sufficient, but they must be made a ground in a motion for a new trial.[54]

42. Landt v. McCullough, 206 Ill. 214, 69 N. E. 107; Voigt v. Anglo-American Provision Co., 104 Ill. App. 423; Stoy v. Bledsoe, 31 Ind. App. 643, 68 N. E. 907; Phillips v. Jones, 176 Mo. 328, 75 S. W. 920; Saling v. Saling's Estate [Neb.] 94 N. W. 963; Kellar v. Van Brunt [Neb.] 95 N. W. 668. An exception to the admission of evidence not assigned as a ground in a motion for a new trial is waived, on appeal from the denial of the motion. McCarver v. Herzberg, 135 Ala. 542.

43. Reference made to the brief of evidence is not sufficient. Graham v. Baxley, 117 Ga. 42.

44. State v. Carroll, 101 Mo. App. 110, 74 S. W. 468. To a review of a judgment where the error is apparent on the face of the judgment roll or record. Kellog v. School Dist. No. 10 [Okl.] 74 Pac. 110. Error in overruling a demurrer to a pleading. Brought v. Cherokee Nation [Ind. T.] 69 S. W. 937. Amended petition, demurrer thereto, and judgment thereon. Dysart v. Crow, 170 Mo. 275, 70 S. W. 689. Judgment of a district court in proceedings in error. Bastian v. Adams [Neb.] 97 N. W. 231.

45. Bemis v. McCloud [Neb.] 97 N. W. 828.

46. An execution issued by the United States commissioner, where there was no trial or issuable matter before the district court. Little v. Atchison, T. & S. F. R. Co. [Ind. T.] 76 S. W. 283; Dubcich v. Grand Lodge, A. O. U. W., 33 Wash. 651, 74 Pac. 832.

47. Under 2 Ball. Ann. Codes & St. Wash. § 6520.

48. Linton v. Cathers [Neb.] 95 N. W. 1044.

49. Under Code Civ. Proc. Cal. §§ 656, 657, subd. 6, 663 and 663½. Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828.

50. Objection that the court failed to find on a particular issue cannot be urged on appeal from an order denying a motion for new trial, where the statement on the motion claimed that the judgment was against the law but failed to state the above objection. Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828. Error in striking out interrogatories must be specified in the motion for a new trial in order to be available on appeal. Noah v. German-American Bldg. Ass'n, 31 Ind. App. 504, 68 N. E. 615. Defendant does not waive his right to insist on a motion for a new trial by not urging his reasons therefor when the court says it will hear them, where upon the denial of the motion and at the same term he files his written reasons under Practice Act, § 56 (3 Starr & C. Ann. St. 1896, c. 110, par. 57). Landt v. McCullough, 206 Ill. 214, 69 N. E. 107. A ground of motion for a new trial that the court erred in charging the jury that a certain statute offered in evidence was a statute of another state, when that question should have been submitted to the jury, and that this error affects the whole charge, cannot be considered on appeal where an extract from the charge or statute referred to has not been set forth. Seaboard A. L. R. v. Phillips, 117 Ga. 98.

51. Janeway v. Burton, 102 Ill. App. 403. That the verdict is against the weight of the evidence, but not stating the special findings, does not raise the question whether such findings were contrary to the evidence. Voigt v. Anglo-American Provision Co., 202 Ill. 462, 66 N. E. 1054.

52. Where motions are mere adjuncts to proceedings. Lilly v. Menke, 92 Mo. App. 354.

53. A motion to direct a verdict may be reviewed without a motion for a new trial upon an exception to its denial. Prichard v. Deering Harvester Co., 117 Wis. 97, 93 N. W. 827. Where no objection is made to the manner of a denial of a motion to dismiss, at the close of the plaintiff's case, and the court submits a special question to the jury of its own motion, and thereafter a judgment is rendered for the defendant, on appeal the motion will be regarded as sustained and the ruling considered without a motion for a new trial. Lovejoy v. Campbell [S. D.] 92 N. W. 24.

54. Lilly v. Menke, 92 Mo. App. 354.

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On a motion for a new trial, statements, and questions presented thereby, not made in the time prescribed by statute cannot be considered on appeal.[55] Refusal of a new trial cannot be considered on appeal where the appellant has not had his motion therefor disposed of at the term at which the judgment was rendered.[56]

Request for instructions.—Instructions given cannot be objected to on appeal unless the court's attention was called to the error or defect at the time and a fuller or corrected instruction requested.[57] This rule applies to errors or defects in the instruction for failing to cover all the questions in the case,[58] or for being too general.[59] But where an instruction assuming to define the law in a case omits a material element, it may be reviewed, although a proper instruction had not been requested by the party raising the question of the defect.[60]

Failure to give instructions cannot be objected to on appeal unless such instructions were requested.[61]

55. Under Code Civ. Proc. Mont. § 1173. Wright v. Matthews, 28 Mont. 442, 72 Pac. 820.

56. Nor executed on appeal within the prescribed time. Lose v. Doran [Ariz.] 73 Pac. 443.

57. St. Louis, I. M. & S. R. Co. v. Norton [Ark.] 73 S. W. 1095; Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972; City of Denver v. Murray [Colo. App.] 70 Pac. 440; Chicago & E. I. R. Co. v. Randolph, 199 Ill. 126, 65 N. E. 142; Riley v. Bell, 120 Iowa, 618, 95 N. W. 170; Board of Councilmen v. Howard, 25 Ky. L. R. 111, 74 S. W. 703; Robards v. Jenkins, 25 Ky. L. R. 449, 76 S. W. 10; Harris v. Southern R. Co., 25 Ky. L. R. 559, 76 S. W. 151; Schmitt v. Murray, 87 Minn. 250, 91 N. W. 1116; Brace v. St. Paul City R. Co., 87 Minn. 292, 91 N. W. 1099; Rutherford v. Simpson, 87 Minn. 495, 92 N. W. 413; City of South Omaha v. Meyers [Neb.] 92 N. W. 743; Parsons B. C. & S. F. Co. v. Gadeke [Neb.] 95 N. W. 850; Memphis St. R. Co. v. Shaw, 110 Tenn. 467, 75 S. W. 713; Williams v. Galveston, H. & S. A. R. Co. [Tex. Civ. App.] 78 S. W. 45. To instruction defining negligence. Meyer v. Milwaukee Elec. R. & L. Co., 116 Wis. 336, 93 N. W. 6. To instructions given or refused. Darrah v. Juel [Neb.] 96 N. W. 166. To a charge relating to evidence introduced in support of defense without objection. Issaquah Coal Co. v. U. S. F. & G. Co. [C. C. A.] 126 Fed. 89. To an instruction stating an issue made by the pleadings and accepted and tried without objection. Parkins v. Mo. Pac. R. Co. [Neb.] 93 N. W. 197. The charge of the court in submitting an issue cannot be objected to on appeal where no request was made below to withdraw the issue (Galveston, H. & S. A. R. Co. v. Pendleton, 30 Tex. Civ. App. 431, 70 S. W. 996), or requesting a special charge presenting his view (Reichert v. International & G. N. R. Co. [Tex. Civ. App.] 72 S. W. 1031). That the word "ratification" was not defined to the jury cannot be complained of on appeal where no instruction was offered thereon, and the giving of instructions was not one of the grounds for a requested new trial. Lithgow Mfg. Co. v. Samuel, 24 Ky. L. R. 1590, 71 S. W. 906. Plaintiff cannot contend on appeal that defendant's requests to charge should be considered as abandoned because of defendant's refusal to permit him to read them before they had been filed, where he made no request to be permitted to examine them after they had been refused and filed. Houston & T. C. R. Co. v. Turner [Tex. Civ. App.] 78 S. W. 712. The question of a court's error in omitting to give certain rules of law or state certain facts in its charge, is only effectively presented by a suitable request to the trial court to embody the rules or facts omitted in its instructions; a failure to make such request is a waiver of an error inherent in the omission where there there is no error in the charge given. Frizzell v. Omaha St. R. Co. [C. C. A.] 124 Fed. 176. That trial judge presented evidence for one side more fully than for the other and that he omitted reading certain essential evidence is not sufficient where his attention was not called to such omission. O'Donnell v. Gaffney, 22 Pa. Super. Ct. 316. Failure to request the submission of an action for possession of land, under a sale, with reference to a foreclosure, waives the right to complain of the omission on appeal. Davidson v. Jefferson [Tex. Civ. App.] 76 S. W. 765. Laws Minn. 1901, c. 113, declaring that every ruling, order or decision and every instruction shall be deemed excepted to by the aggrieved party, the same as if an exception had been taken at the time, does not affect the rule that the omission of material instructions, or the insufficiency or indefiniteness of an instruction cannot be considered on appeal unless the court's attention is called to the defect at the time and further instructions requested. Applebee v. Perry, 87 Minn. 242, 91 N. W. 893.

58. Columbus R. Co. v. Ritter, 67 Ohio St. 53, 65 N. E. 613. Unless the objector offered at the trial an instruction covering the point objected to. Louisville & N. R. Co. v. Roberts, 24 Ky. L. R. 1160, 70 S. W. 833. Where the objector made no attempt to supply the omission at the trial. Galveston, H. & S. A. R. Co. v. Hubbard [Tex. Civ. App.] 76 S. W. 764; Wiley v. Lindley [Tex. Civ. App.] 76 S. W. 208.

59. Where a request for a more explicit charge was not made below. Craft v. Albemarle Timber Co., 132 N. C. 151; Parkins v. Mo. Pac. R. Co. [Neb.] 93 N. W. 197.

60. City of South Omaha v. Hager [Neb.] 92 N. W. 1017, adhered to on this point in Id., 95 N. W. 13; Louisville & N. R. Co. v. Roberts, 25 Ky. L. R. 438, 75 S. W. 267.

61. Mitchell v. Jodon, 22 Pa. Super. Ct. 304; Fosha v. Prosser [Wis.] 97 N. W. 924. Failure to give an instruction as to purpose for which testimony was admissible. Kircher v. Larchwood, 120 Iowa, 578, 95 N. W.

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Motion for a judgment or nonsuit, or to direct verdict.—Unless some questions are objected to by a motion for a judgment or nonsuit, they cannot be considered on appeal;[62] as a court's action on a motion to set aside a verdict and for a new trial,[63] unless the grounds for the new trial arose after the case was submitted.[64] But a ground for a nonsuit not raised below will not be considered on appeal.[65] A motion for a nonsuit is not waived by putting in evidence after the motion is denied.[66]

A motion to direct a verdict is also necessary, in some cases, to save a question for review;[67] as to review the sufficiency of the evidence to support a verdict;[68] though in some jurisdictions it may be reviewed on an appeal from an order denying a motion for a new trial, though no motion for a verdict or nonsuit was made,[69] and even submitting a question to the jury on the pleadings and evidence is sufficient if the evidence does not justify the verdict.[70] Such motion does not waive the right to reserve exceptions to the court's refusal of a request to send the case to the jury after such motion was denied.[71]

Motion to strike out.—A motion to strike out is necessary to save certain questions for review,[72] as an error in a ruling on an objection to a question asked,[73] or an irresponsive answer,[74] or to evidence after given,[75] though this may also be saved by a request for an instruction to the jury to disregard it.[76] But a motion to

184. Failure to refer to defendant's plea of limitations in a statement of the issues, where no request is made for an instruction on such issue. Riley v. Bell, 120 Iowa, 618, 95 N. W. 170.

62. Question of contributory negligence not made a basis for a nonsuit. Boyle v. Union Pac. R. Co., 25 Utah, 420, 71 Pac. 988. A motion for a judgment on the pleadings must specify the reasons therefor. Chicago, R. I. & P. R. Co. v. Frazier, 66 Kan. 422, 71 Pac. 831.

63. Where a motion for a judgment or nonsuit is not made by the defeated party during trial. Ruckman v. Ormond, 42 Or. 209, 70 Pac. 707. In New York, the appellate division may reverse where there is no evidence to go to the jury, though the defendant does not move for a nonsuit at the close of the evidence. McGrath v. Home Ins. Co., 88 App. Div. [N. Y.] 153.

64. A motion for a new trial for a prejudicial cause arising after the case is submitted, and which could not have been foreseen, will be reviewed, though no motion for a judgment or nonsuit was made during trial. Ruckman v. Ormond, 42 Or. 209, 70 Pac. 707.

65. Lewis v. Hinson, 64 S. C. 571; Austin v. Piedmont Mfg. Co. [S. C.] 45 S. E. 135.

66. But the defendant assumes the risk of supplying the deficiency in the plaintiff's case by testimony elicited from his witnesses. Cain v. Gold Mountain Min. Co., 27 Mont. 529, 71 Pac. 1004.

67. A question of limitation cannot be considered on appeal where there has been no request to find, though raised by answer. Wallber v. Wilmanns, 116 Wis. 246, 93 N. W. 47. A party not moving for the direction of a verdict in his favor thereby admits that there is evidence on the issues which should be submitted to the jury. Freese v. Kemplay [C. C. A.] 118 Fed. 428.

68. Where the trial court is not asked to hold, as a matter of law, that the evidence is insufficient to warrant a recovery, whether, as a matter of law, the court erred in submitting the case to the jury does not arise on appeal, and the trial and appellate courts' rulings as to the sufficiency of the evidence is conclusive. Malott v. Hood, 201 Ill. 202, 66 N. E. 247.

69. Where a verdict, in a case tried by jury, is contrary to law and evidence. Citizens' Bank v. Rung Furniture Co., 76 App. Div. [N. Y.] 471. All the evidence may be examined, to determine whether the verdict is contrary to it, although no motion was made at the close of the plaintiff's, or of all, the evidence. Glaser v. Michelson, 86 N. Y. Supp. 286.

70. Hennessy v. Anstock, 19 Pa. Super. Ct. 644.

71. One Pearl Chain v. U. S. [C. C. A.] 123 Fed. 371.

72. That record did not show that appellant was interested in the property so as to have a right to file objections to certain taxes, where no motion was made to strike the objections from the files and no question raised as to appellant's right to object. Cincinnati, I. & W. R. Co. v. People, 205 Ill. 538, 69 N. E. 40. That costs were taxed in favor of the plaintiff without any certificate of the trial judge that plaintiff's claim was unreasonably resisted cannot be reviewed where no motion was made in the court below to strike them from the judgment. Cunningham v. Hewitt, 84 App. Div. [N. Y.] 114.

73. Frederick Mfg. Co. v. Devlin [C. C. A.] 127 Fed. 71. Where the defendant did not move to strike out the testimony, but fully cross-examined the witness thereon. Sexton v. Union S. Y. & T. Co., 200 Ill. 244, 65 N. E. 638.

74. Rosenblatt v. Joseph M. Cohen House Wrecking Co., 86 N. Y. Supp. 801; Waterhouse v. Jos. Schlitz Brew. Co. [S. D.] 94 N. W. 587. Objection to part of an answer to a question as not responsive should be by motion to strike it out for that reason. Germinder v. Machinery Mut. Ins. Ass'n, 120 Iowa, 614, 94 N. W. 1108.

75. Union Ins. Co. v. Hall [Minn.] 95 N. W. 1112; Tex. Midland R. R. v. Moore [Tex. Civ. App.] 74 S. W. 942.

76. Union Ins. Co. v. Hall [Minn.] 95 N. W. 1112.

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strike out is not necessary to an appeal on the objectionable matter where a rule to file an affidavit of defense is issued and served prior to the objection.[77] A motion to strike out testimony because the witnesses were incompetent is too late after it has been admitted without objection,[78] and a motion to strike out testimony as hearsay is properly overruled where it is not all hearsay.[79]

§ 6. *Necessity of ruling.*—After an objection or motion has been made to errors in the trial court, it is further necessary that there should be a ruling thereon, or a refusal to rule, in order that the objection or question may be reserved for review by an exception;[80] unless there is such a ruling, an exception cannot be saved.[81] Instructions cannot be reviewed unless passed upon by the trial court.[82] Important and doubtful questions of law not passed on by the trial judge will not be considered.[83] The allowing of an amendment to a petition cannot be reviewed where no ruling on a motion to strike out such amendment has been had.[84]

§ 7. *Necessity of exception.*—After an objection and ruling, as a general rule, in order that the question may be saved for review, it is further necessary that an exception should be taken to the ruling, otherwise the objection will be deemed to have been waived and cannot be considered on appeal.[85] This rule applies to rul-

77. Judgment rendered on a summons issued on May 7th, returnable on May 19th, is not served until May 19th, and rule to file affidavit of defense is issued and served on May 7th. Com. v. Bangs, 22 Pa. Super. Ct. 403.

78. Slattery v. Slattery, 120 Iowa, 717, 95 N. W. 201.

79. Nicholas v. Sands, 136 Ala. 267.

80. City of South Omaha v. Meyers [Neb.] 92 N. W. 743; Cattano v. Metropolitan St. R. Co., 173 N. Y. 565, 66 N. E. 563. A decision on a motion for a new trial is necessary to a review of the sufficiency of evidence to support findings of the court or a verdict. Quigley v. Mulford [Neb.] 95 N. W. 490. Ruling must be obtained to error in permitting improper remarks by counsel. Lansing v. Wessell [Neb.] 97 N. W. 815. Right to an order in lieu of a bill of discovery not presented to or passed on by the lower court cannot be considered on appeal. In re Fulton, 75 App. Div. [N. Y.] 623. Motion to amend a reporter's notes of evidence will not be reviewed in the absence of a ruling on the motion by the trial court. Modern Brotherhood of America v. Cummings [Neb.] 94 N. W. 144. Where a ruling is reserved to an objection, but never made, it will be treated on appeal as though sustaining the objection and an exception taken. Adams v. Elwood, 176 N. Y. 106, 68 N. E. 126.

81. An exception cannot be made to evidence after admission, without an objection or motion to exclude, and a ruling of the court upon such objection or motion. Pearce v. Vittum, 104 Ill. App. 631. To a question asked a witness. Garretson v. Kinkead, 118 Iowa, 383, 92 N. W. 55.

82. German Ins. Co. v. Stiner [Neb.] 96 N. W. 122. An error in an instruction not raised by any rulings requested on the trial. Nestor v. Fall River, 183 Mass. 265, 67 N. E. 248.

83. McGarrah v. Bank of S. W. Ga., 117 Ga. 556.

84. Reed v. Cunningham, 121 Iowa, 555, 96 N. W. 1119.

85. Irwin v. N. W. N. L. Ins. Co., 207 Ill. 531, 69 N. E. 824; Steele v. Johnson, 96 Mo. App. 147, 69 S. W. 1065; Danforth v. Fowler [Neb.] 94 N. W. 637; Curran v. Hagerman [Neb.] 92 N. W. 1003; Brown v. Lockhart [N. M.] 71 Pac. 1086; Head v. Selleck [Conn.] 57 Atl. 281; Phila. & T. R. Co. v. Neshaminy El. R. Co., 206 Pa. 343. To a decree on a bill in equity. Beatty v. Harris, 205 Pa. 377. To a commissioner's report on a question of fact. Flanary v. Kane [Va.] 46 S. E. 312; Jackson v. Pleasanton [Va.] 43 S. E. 573. It is too late to except to a commissioner's report in the brief on appeal. Moreland's Adm'r v. Citizens' Sav. Bank, 24 Ky. L. R. 1354, 71 S. W. 520. To court's refusal to allow appellant to open and close the argument. Craggs v. Bohart [Ind. T.] 69 S. W. 931. To the selection of a special judge. Town of Cent. Covington v. Bellonby, 24 Ky. L. R. 1092, 70 S. W. 622. To an overruling of a motion to strike out documents admitted without objection. Erickson v. Kan. City, O. & S. R. Co., 171 Mo. 647, 71 S. W. 1022. Exceptions are necessary to an appeal of an equity case, though the appellate court hears such case de novo. Lilly v. Menke, 92 Mo. App. 354. To court's action in striking out defenses. Linn County v. Farmers' & M. Bank, 175 Mo. 539, 75 S. W. 393. To a ruling on a motion to strike part of the complaint. Culver v. Caldwell, 137 Ala. 125. To refusal of court to grant a continuance. Carlin v. Freeman [Colo. App.] 75 Pac. 26. To an order granting appellant's motion to continue the case on certain conditions. In re McMahon's Estate, 117 Wis. 463, 94 N. W. 351. To the rendition of a personal judgment against defendant's wife in an action to foreclose a lien. Spaulding v. Burke, 33 Wash. 679, 74 Pac. 829. To conduct of a juror. Doolin v. Omnibus Cable Co., 140 Cal. 369, 73 Pac. 1060. Where no exceptions are taken on the trial or to the decision stating separately the facts found, and supported by the evidence, no questions are presented for consideration on an appeal from a judgment on the decision. Dunleavey v. Dunleavey, 87 App. Div. [N. Y.] 601. Decisions of trial court. Ginsburg v. Morrall, 105 Ill. App. 213. To error of trial court in reserving decisions on motion to strike an

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ings in the Federal courts,[86] to an order denying a motion for a new trial,[87] to improper remarks or misconduct of counsel,[88] to remarks of trial court,[89] to court's action on a motion to direct a verdict,[90] to an involuntary nonsuit.[91] It also applies to objections to rulings on evidence,[92] as to its sufficiency[93] or admission,[94] though in extraordinary cases, and in the furtherance of justice, questions as to the

answer, until the final disposition of the case. Davis v. Boyer [Iowa] 97 N. W. 1002. To a ruling allowing an amendment of a petition. Reed v. Cunningham, 121 Iowa, 555, 96 N. W. 1119. Errors in a ruling permitting an amendment and overruling a demurrer. Jaroszewski v. Allen, 117 Iowa, 632, 91 N. W. 941. A question of limitation cannot be considered on appeal where there is no exception presenting it though raised by answer. Wallber v. Wilmanns, 116 Wis. 246, 93 N. W. 47. To error of court in directing jury to find for one party. Smith v. Hopkins [C. C. A.] 120 Fed. 921. Error in holding certain propositions of law. Seiberling v. Miller, 207 Ill. 443, 69 N. E. 800. To final order of confirmation of sale by an administrator. Atchison v. Arnold [Wyo.] 72 Pac. 190. To court's interrogation of a party's witness. Indianapolis St. R. Co. v. Hockett, 159 Ind. 677, 66 N. E. 39. To a ruling sustaining an objection to a question asked. Golibart v. Sullivan, 30 Ind. App. 428, 66 N. E. 188. On appeal to the supreme from the appellate court of Illinois, questions of law are not presented unless they were submitted to the trial court below in a manner provided by statute and passed upon by that court and exceptions taken thereto, and this applies as well to an agreed state of facts as to facts presented by testimony. Swain v. First Nat. Bank, 201 Ill. 416, 66 N. E. 220. To the technical form of asking submission of issues arising "on the report" instead of "on the pleadings;" where plaintiff excepted in time to a compulsory reference, and the matters are tried before a jury. Kerr v. Hicks, 133 N. C. 175. Plaintiff's excepting to a dismissal of the complaint, on the motion of the defendant alone, entitles him to a review thereof, without a request to go to the jury. Veeder v. Seaton, 85 App. Div. [N. Y.] 196. The facts cannot be reviewed on appeal from a dismissal of the complaint where no exception was taken, and no foundation laid for an appeal from denial of a motion for a new trial specifying no grounds. Collier v. Collins, 172 N. Y. 99, 64 N. E. 787.

86. It is indispensable to a review in the Federal courts of any ruling of a trial court on the admissibility of evidence that it should be challenged, not only by an objection, but by an exception taken and recorded at the time; to the end that the attention of the trial judge may be sharply called to the question presented, and that a clear record of his action and its challenge may be made. Potter v. U. S. [C. C. A.] 122 Fed. 49.

87. Evidence not objected to when offered, may be brought to the appellate court by a motion for a new trial on the ground that the finding was not sustained by the evidence and by reserving exceptions to the overruling of such motion. Schuler v. Schuler, 104 Ill. App. 463. Exceptions saved during a new trial cannot be considered on appeal where no exception is saved to the refusal of the new trial. Parsons v. John L. Clark & Co., 98 Mo. App. 28, 77 S. W. 582.

88. Jenkins v. Chism, 25 Ky. L. R. 726, 76 S. W. 405; International & G. N. R. Co. v. Mercer [Tex. Civ. App.] 78 S. W. 562; Dimon v. N. Y. Cent. & H. R. R. Co., 173 N. Y. 356, 66 N. E. 1. To ruling permitting improper remarks by counsel. Lansing v. Wessell [Neb.] 97 N. W. 815. Where no exception is taken to the misconduct of opposing counsel during trial the fact that an inexperienced attorney, representing the regular attorney during a temporary absence from the court room, failed to object to such misconduct by reason of his inexperience, does not justify its consideration on appeal. Barrall v. Quick, 24 Ky. L. R. 2393, 74 S. W. 214.

89. In ruling on an objection to evidence. Halley v. Tichenor, 120 Iowa, 164, 94 N. W. 472; Mallory Com. Co. v. Elwood, 120 Iowa, 632, 95 N. W. 176. In passing on an objection to a question asked. Furbush v. Md. Casualty Co. [Mich.] 95 N. W. 551. To improper remarks by court that it seemed to him that a witness had padded her testimony. Fritzinger v. State, 31 Ind. App. 350, 67 N. E. 1006.

90. McNab v. Northern Pac. R. Co. [N. D.] 98 N. W. 353. An exception to court's action in directing a verdict is indispensable to a review thereof. Startzer v. Clarke, [Neb.] 95 N. W. 509.

91. Carter v. O'Neill, 102 Mo. App. 391, 76 S. W. 717. Entry of a nonsuit against an alleged heir, in a proceeding to establish heirship, is an error, if any, occurring at the trial, to which exception must be taken at the time in order to be considered on appeal. In re Kasson's Estate, 141 Cal. 33, 74 Pac. 436. To ruling of court in granting a motion for a nonsuit. Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830.

92. Stryker v. Pendergast, 105 Ill. App. 413.

93. To support the verdict. Freedman v. Dickinson, 85 N. Y. Supp. 333; Klenk v. Or. Short Line R. Co. [Utah] 76 Pac. 214.

94. Board of Com'rs v. Irvine [C. C. A.] 126 Fed. 689; Altman v. Hoffman [Colo. App.] 71 Pac. 395; City of Chicago v. English, 198 Ill. 211, 64 N. E. 976; Grand Lodge Locomotive Firemen v. Orrell, 206 Ill. 203, 69 N. E. 68; McCormick v. Olbinski [Mich.] 92 N. W. 499; Chaney v. Mo. Pac. R. Co., 97 Mo. App. 541, 71 S. W. 473; Shaefer v. Mo. Pac. R. Co., 98 Mo. App. 445, 72 S. W. 154. To the admission in evidence, in an action on account of plaintiff's declaration with the statement of the account and affidavit of merits thereto. Dick v. Zimmerman, 207 Ill. 636, 69 N. E. 754. That the court, in admitting certain testimony offered by the defendant, limited it to mitigation of damages. Hinchman v. Knight [Mich.] 94 N. W. 1. To denial of opportunity to introduce evidence. First Nat. Bank v. Or. Paper Co., 42 Or. 398, 71 Pac. 144, 971. To errors in introducing evidence. Pope v. Kingman & Co. [Neb.] 96 N. W. 519. Error in overruling objection to testimony. Waterhouse v. Jos. Schlitz Brew. Co. [S. D.] 94 N. W. 587.

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admissibility of evidence may be considered on appeal, though no exception was taken to a ruling excluding it.[95] Errors in instructions given or refused must also be excepted to below in order to be considered on appeal,[96] and failure to reserve such exception is not cured by a motion for a new trial.[97] Instructions excepted to when given need not be excepted or referred to again in a motion for a new trial.[98] Exception to instructions not fully stating the correct theory of a case is not necessary to a new trial thereon.[99]

But an exception is not necessary to a review of jurisdictional errors,[1] nor of objections to matters of record,[2] as a judgment[3] or ruling on a demurrer to pleadings,[4] or dismissal of a complaint, upon appeal from an order denying a new trial.[5] Nor is an exception to a directed verdict necessary, where that question is embodied in a motion for a new trial.[6]

In some jurisdictions, by statute, rulings, decisions, orders, or instructions shall be deemed excepted to by the aggrieved party, though no actual exception is taken.[7]

An exception must be taken by the party complaining of the error.[8]

95. Alden v. Supreme Tent of K. of M., 78 App. Div. [N. Y.] 18.

96. McCormick Harvesting Mach. Co. v. Hill [Mo. App.] 79 S. W. 745; Chicago T. T. R. Co. v. Stone [C. C. A.] 118 Fed. 19; Auckland v. Lawrence [Colo. App.] 74 Pac. 794; Nichols & S. Co. v. Russell [Iowa] 91 N. W. 913; Engel v. Dado [Neb.] 92 N. W. 629; German Ins. Co. v. Stiner [Neb.] 96 N. W. 122; First Nat. Bank v. Tolerton [Neb.] 97 N. W. 248. To giving or refusal of instructions. Ish v. Marsh [Neb.] 96 N. W. 58. In giving instruction, under Mansf. Dig. § 5157 (Ind. T. Ann. St. 1899, § 3362). Hancock v. Shockman [Ind. T.] 69 S. W. 826. In modifying a requested instruction. Bryant v. Broadwell, 140 Cal. 490, 74 Pac. 33. To refusal of instructions. Atchison, T. & S. F. R. Co. v. Phipps [C. C. A.] 125 Fed. 478; Commercial & F. Nat. Bank v. McCormick, 97 Md. 703. To a charge in an action against two defendants for negligence, that the jury might find one guilty and exonerate the other or find both guilty and charge both, though the evidence does not make a case of concurrent negligence. Bopp v. N. Y. Elec. V. Transp. Co., 78 App. Div. [N. Y.] 337. To part of an instruction referring the jury to another for a definition of "proximate cause." Meyer v. Milwaukee Elec. R. & L. Co., 116 Wis. 336, 93 N. W. 6. To court's instruction directing a verdict. St. Mary's Power Co. v. Chandler-Dunbar Water Power Co. [Mich.] 95 N. W. 554. Objections to defects in instructions to which no special exception was taken. Vonderhorst v. Amrhine [Md.] 56 Atl. 833. Instructions not excepted to will be presumed sufficient. Griffin v. Cunningham, 183 Mass. 505, 67 N. E. 660. If a court refuses requested instructions not covered by its charge, an exception should be taken to the refusal. Hodge v. Chicago & A. R. Co. [C. C. A.] 121 Fed. 48. Where a charge is not excepted to, and no further charge requested, it cannot be assigned as error. American B. & T. Co. v. Baltimore & O. S. W. R. Co. [C. C. A.] 124 Fed. 866. An appeal on errors, in a charge, to which no exceptions were taken in the lower court, will be quashed. McConnell v. Pa. R. Co., 206 Pa. 370.

97. Stewart v. Guy [Ala.] 34 So. 1007.

98. Lingle v. Lingle, 121 Iowa, 133, 96 N. W. 703.

99. Gorman v. Milliken, 42 Misc. [N. Y.] 336.

1. Brown v. Lockhart [N. M.] 71 Pac. 1086.

2. As amended petition, demurrer thereto, and judgment thereon. Dysart v. Crow, 170 Mo. 275, 70 S. W. 689. To the allowance of costs to a special guardian in a decree settling an executor's accounts. In re O'Keeffe, 80 App. Div. [N. Y.] 513. An exception to a commissioner's report is not necessary to raise questions presented by the pleadings and proof. Lea v. Willis [Va.] 43 S. E. 354.

3. An exception to a judgment is not necessary, on an appeal therefrom, as the appeal itself is an exception to the judgment and other matters appearing in the record. Wilson v. Beaufort County Lumber Co., 131 N. C. 163; Baker v. Dawson, 131 N. C. 227; Cape Fear & N. R. Co. v. Stewart, 132 N. C. 248. But in Colorado, it is held that a judgment or decree upon the facts will not be reviewed in the absence of an exception to the final judgment. Jewell v. Shaw [Colo. App.] 75 Pac. 28; Altman v. Hoffman [Colo. App.] 71 Pac. 395.

4. Lloyd v. Sandusky, 203 Ill. 621, 68 N. E. 154.

5. Upon appeal by plaintiff from a judgment and from a denial of a motion for a new trial, to which denial exception was taken and formal order of denial entered, the propriety of the dismissal of the complaint may be reviewed though no exception was taken to the dismissal, or request by plaintiff to go to jury, though the printed case contains no certificate that it embraces all the evidence. Boehringer v. Hirsch, 86 N. Y. Supp. 726.

6. Where a motion for a new trial is made on the ground that the evidence was insufficient to sustain a directed verdict, upon an appeal from the order denying the motion, the sufficiency of the evidence to sustain the verdict may be reviewed, though no exception was taken to the directed verdict. Dahl v. Stakke [N. D.] 96 N. W. 353.

7. Laws Minn. 1901, c. 113. Applebee v. Perry, 87 Minn. 242, 91 N. W. 893; Olson v. Berg, 87 Minn. 277, 91 N. W. 1103; Robertson v. Burton, 88 Minn. 151, 92 N. W. 538.

8. Forrester v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 74 Pac. 1088.

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To findings of fact or conclusions of law.—As a general rule, objections to a finding of facts or conclusion of law will not be considered on appeal unless exceptions are taken in the lower court,[9] unless the failure to except has been waived;[10] and except where the finding or conclusion is a matter of record,[11] as is the case where no evidence is offered and the finding is in effect a repetition of the allegations of the complaint.[12] Findings of fact will not be reviewed for insufficiency of evidence to support them, unless excepted to[13] or unless permitted by statute.[14]

Time of taking exceptions.—Exceptions should be taken at the time of the erroneous ruling or decision,[15] whether or not a motion for a new trial is necessary to a review,[16] though a judge sitting as a chancellor may, in his discretion, allow exceptions to be filed nunc pro tunc.[17] An exception to an instruction given should be taken before the jury retires,[18] or, by statute, within twenty-four hours next following, if given in the absence of counsel,[19] though in some jurisdictions it is provided by statute that exception to the charge may be taken before the verdict is given,[20] but not after.[21] Exceptions to court's refusal to give certain instructions may be taken after the retirement of the jury but before verdict.[22] An exception that there is no evidence on a certain issue must be taken before verdict.[23]

Waiver of right to except.—Failure to move for a continuance or postponement waives the right to except to the granting of permission to amend the complaint.[24]

§ 8. *Form and sufficiency of objection.*—Objections should be made openly,

9. Santa Rita L. & M. Co. v. Mercer [Ariz.] 73 Pac. 398; Gilmore v. Harp, 92 Mo. App. 77; Donellen v. Ketchum, 78 App. Div. [N. Y.] 144; Colley v. Wood [Tex. Civ. App.] 74 S. W. 602. To findings on which a judgment follows as a matter of law. Reilley v. Anderson, 33 Wash. 58, 73 Pac. 799. That plaintiffs are not entitled to relief. Philips v. Mo [Minn.] 97 N. W. 969. An exception to conclusions of law admits the correctness of facts found. King v. Morristown F. & L. Co., 31 Ind. App. 476, 68 N. E. 310. Where no exception is taken to a referee's finding, it will be assumed on appeal from a judgment based thereon that such finding was accepted as correct, and that it was the only evidence introduced to sustain the judgment. Weitnauer v. Weitnauer, 117 Iowa, 578, 91 N. W. 815.

10. Colley v. Wood [Tex. Civ. App.] 74 S. W. 602.

11. Conclusions of law. Steele v. Johnson, 96 Mo. App. 147, 69 S. W. 1065. Conclusions of law based on conclusions of fact incorporated into the judgment. Hill v. Combs, 92 Mo. App. 242. A master's conclusions of law on the facts. Von Platen v. Winterbotham, 203 Ill. 198, 67 N. E. 843. To opinions of master on propositions of law. Williams v. Spitzer, 203 Ill. 505, 68 N. E. 49.

12. An appeal will not be dismissed for failure to except where no evidence is taken in the case, and the findings of fact are in effect a repetition of the allegations of the complaint, and no error is based thereon. Payette v. Ferrier, 31 Wash. 43, 71 Pac. 546.

13. Riddick v. Farmers' Life Ass'n, 132 N. C. 118; Steele v. Johnson, 96 Mo. App. 147, 69 S. W. 1065.

14. The sufficiency of evidence to support findings of fact may be determined on appeal without exceptions to such findings; under Comp. Laws S. D. §§ 5080 and 4756, providing that the verdict of a jury shall be deemed to have been excepted to; and that "verdict" includes findings of fact of a judge. Lone Tree Ditch Co. v. Rapid City E. & G. Co. [S. D.] 93 N. W. 650.

15. Calling attention and taking exceptions to language of counsel in summing up for the first time after instructions is not sufficient to have such objection considered on appeal. Cattano v. Metropolitan St. R. Co., 173 N. Y. 565, 66 N. E. 563. Irregularity in the form of a verdict cannot be considered on appeal as grounds for a reversal where not excepted to at the proper time in the trial court. Atchison, T. & S. F. R. Co. v. Phipps [C. C. A.] 125 Fed. 478. Exceptions not filed when conclusions of law on special findings of fact are filed, are too late. Chicago & S. E. R. Co. v. State, 159 Ind. 237, 64 N. E. 860.

16. Lilly v. Menke, 92 Mo. App. 354.

17. After ten days from a decree nisi. Hinnershitz v. United Traction Co., 206 Pa. 91.

18. To instruction allowing interest on damages. Southern Pac. Co. v. Arnett [C. C. A.] 126 Fed. 75.

19. Under Sup. Ct. Rule N. Y. 48, exception to instructions given on morning of Friday, May 30th, is not properly saved at nearly noon of the following Monday. McCoy v. Jordan, 184 Mass. 575, 69 N. E. 358; Goodrum v. Grimes [Mass.] 69 N. E. 1053.

20. Exception to a charge may be taken before verdict given, under Code N. Y. § 995. Broadway Trust Co. v. Fry, 40 Misc. [N. Y.] 680.

21. Exceptions to charge three days after verdict returned are too late, under a statute allowing such exceptions after jury retired and before verdict returned, if practicable. Sterrett v. Northport M. & S. Co., 30 Wash. 164, 70 Pac. 266.

22. Gehl v. Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26.

23. Hart v. Cannon, 133 N. C. 10.

24. Werner v. Hearst, 76 App. Div. [N. Y.] 375.

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that all the parties may hear;[25] and the question, to which objection is taken, must be raised in the lower court in such a way that the appellate court must pass on it as a question of law.[26] But where the court has entertained the objections and stated them in the hearing of all the parties, they become a part of the record notwithstanding the impropriety in not making them openly.[27]

An objection must set forth the grounds thereof, and must state specifically the errors complained of, in order that the court may have an opportunity to correct them; if it is not specific, it will not be sufficient to have the errors objected to considered on appeal.[28] A general objection is insufficient.[29] The appellate court will not consider any grounds of objection other than those raised in the lower court.[30] Objection to a hypothetical question on the ground that the facts assumed were not found in the evidence does not raise the objection that the question left out facts found in the evidence.[31] But where the constitutionality of a law is in question, additional objections thereto to those raised in the lower court may be raised on appeal,[32] and though objection to a variance between proof and pleading is not made in the lower court on this precise ground, it may be raised on appeal by an assignment of error to a charge directing a verdict for plaintiff.[33]

To evidence.—An objection to evidence should state the grounds thereof, and should point out the point relied on for the objection, and a general objection is insufficient,[34] unless the evidence objected to is palpably prejudicial, improper, and

25. The court may properly disregard objections not so made. Quincy G. & E. Co. v. Bauman, 104 Ill. App. 600.

26. Ulysses Elgin Butter Co. v. Hartford F. Ins. Co., 20 Pa. Super. Ct. 384.

27. Quincy G. & E. Co. v. Bauman, 104 Ill. App. 600.

28. Landt v. McCullough, 103 Ill. App. 668; Oliver v. Wilhite, 201 Ill. 522, 66 N. E. 837; Holdroff v. Remlee, 105 Ill. App. 671. This rule applies to hypothetical questions Chicago & E. I. R. Co. v. Wallace, 202 Ill 129, 66 N. E. 1096. Objection that a hypothetical question does not contain all the elements necessary to a proper answer must specify the elements omitted. Riverton Coal Co. v. Shepherd, 207 Ill. 395, 69 N. E. 921.

29. To a question (Oliver v. Columbia, N. & L. R. Co., 65 S. C. 1) calling for material evidence, though improper in form (Gerry v. Selbrecht, 84 N. Y. Supp. 250). To all the special questions asked by one party, without a specific objection to any particular question, when some of the questions are proper. Hartman v. Hosmer, 65 Kan. 595, 70 Pac. 598. A general objection to a particular question asked a witness is insufficient to raise the question of his competency as an expert, where he had previously testified as an expert on material matters. Summerlin v. Carolina & N. W. R. Co., 133 N. C. 550. To a court's refusal to allow a witness to answer questions on cross-examination, if there is any tenable objection to the question. Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515. That the court erred in all respects to which exceptions were taken. Banister v. Campbell, 138 Cal. 455, 71 Pac. 504, 703. By all the defendants to a judgment roll admissible against one of them. Gilfillan v. Shattuck [Cal.] 75 Pac. 646. Improper remarks of counsel in summing up should be objected to specifically, the objectionable language pointed out, and the court requested to rule thereon. Dimon v. N. Y. Cent. & H. R. R. Co., 173 N. Y. 356, 66 N. E. 1. Objection to question of variance held too general. Woodruff v. Butler [Conn.] 55 Atl. 167.

30. McCormick v. Olbinski [Mich.] 92 N. W. 499. On objection that application for insurance was returned and canceled, an objection that copies of the application were not attached to the policies will not be considered. Snader v. Bomberger, 21 Pa. Super. Ct. 629. Where only a general objection is made to the action of the court in permitting the jury to take a declaration to the jury room with them, a specific objection to one count thereof cannot be made on appeal. West Chicago St. R. Co. v. Buckley, 200 Ill. 260, 65 N. E. 708. A general objection to the introduction of commissions, to take testimony, that they did not comply with the provisions of the code, is not sufficient to a review of whether the issuing of the commissions was without proper order of the court or consent to interrogatories attached thereto. Smith v. Cowles, 81 App. Div. [N. Y.] 328. An objection directing attention only to the question whether a copy of a certificate was properly authenticated does not raise the question of its competency as evidence. First Nat. Bank v. Schmitz [Minn.] 95 N. W. 577.

31. O'Neill v. Kan. City [Mo.] 77 S. W. 64. Where the objection to a hypothetical question below was on the ground of its insufficient statement of facts to enable the witness to give an intelligent opinion, and that it was not a proper subject for expert testimony, it cannot be contended on appeal that it omitted certain facts that should have been stated and that it assumed other facts not proved. N. & M. Friedman Co. v. Atlas Assur. Co. [Mich.] 94 N. W. 757.

32. Fitch v. Board of Auditors [Mich.] 94 N. W. 952.

33. Testimony in an ejectment suit showing defendant's holding as several, while complaint charged it as joint. Townsend v. Kreigh [Mich.] 94 N. W. 732.

34. General objections to evidence pro-

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inadmissible for any purpose or under any circumstances,[35] and no grounds of objection to evidence will be considered on appeal other than those stated in the objection.[36] Thus it is insufficient to object merely that the evidence is "incompetent, irrelevant, and immaterial,"[37] unless the evidence offered is not pertinent to any issue,[38] or is inadmissible for every purpose,[39] or that it is "incompetent,"[40] or "immaterial and incompetent,"[41] or "irrelevant and incompetent,"[42] or "immaterial and irrelevant,"[43] or "immaterial,"[44] unless the evidence is generally incompetent,[45] or that it is "inadmissible,"[46] or "illegal."[47] Nor is it sufficient to object to a witness merely as incompetent,[48] or for the counsel to say "I object."[49]

posed, without stating the precise ground of objections, are vague and nugatory, and are without weight before an appellate court; to evidence or competency of witness. Hoodless v. Jernigan [Fla.] 35 So. 656. To the admission of evidence. Cowan v. Bucksport, 98 Me. 305. An objection to evidence, not irrelevant or immaterial, as incompetent should state the precise grounds of the objection. M. Groh's Sons v. Groh, 177 N. Y. 8, 68 N. E. 992. Objection to an affidavit as evidence, as a whole, insufficient where a portion of it is admissible. Leath v. Hinson, 117 Ga. 589. An objection to all the evidence of a witness is insufficient where some of the evidence is admissible. Tex. & P. R. Co. v. Hall, 31 Tex. Civ. App. 464, 72 S. W. 1052. Technical objections to evidence cannot be considered on appeal where no specific objections are made below; there being merely a motion for judgment on the evidence, which was overruled and no exceptions taken. Comer v. Statham, 173 Mo. 46, 72 S. W. 1074. Where a motion for a judgment fails to specify the insufficiency of the plaintiff's evidence, the defendant cannot afterwards claim such insufficiency. People v. Folks, 89 App. Div. [N. Y.] 171. Objection by counsel for a co-defendant to the production of a note in evidence against his client, until the latter's signature thereto is proven, is not a general objection and only excludes the note as evidence against such co-defendant. Horner v. Plumley, 97 Md. 271. A general objection to written statements offered in impeachment of a witness is insufficient on appeal to warrant an exclusion of such statements as mere opinions. Ill. Cent. R. Co. v. Wade, 206 Ill. 523, 69 N. E. 565.

35. Hoodless v. Jernigan [Fla.] 35 So. 656.

36. Hoodless v. Jernigan [Fla.] 35 So. 656; Cowan v. Bucksport, 98 Me. 305; Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124. A ground of objection not made in the motion for a new trial. San Antonio & A. P. R. Co. v. Thigpen [Tex. Civ. App.] 75 S. W. 836. Where evidence objected to for immateriality is admissible for impeachment, its exclusion cannot be sustained on appeal on the ground that no basis for impeaching had been laid. Union Trust Co. v. Leighton, 83 App. Div. [N. Y.] 568. Upon an objection below to the testimony of a handwriting expert, on the ground that he had not properly qualified, it cannot be urged on appeal that he was permitted to state matters as facts instead of giving his opinion. Englehart v. Richter, 136 Ala. 562. On an objection to the form of a question complaint cannot be made on appeal of the substance of the evidence. Cook v. Strother, 100 Mo. App. 622, 75 S. W. 175.

37. Creighton v. Modern Woodmen of America, 90 Mo. App. 373; Fox v. Jacob Dold Packing Co., 96 Mo. App. 173, 70 S. W. 164. To have reviewed an error in overruling the same. Randell v. Chicago, R. I. & P. R. Co., 102 Mo. App. 342, 76 S. W. 493. To cover the question whether it was the best evidence. Banister v. Campbell, 133 Cal. 455, 71 Pac. 504. To cover an objection, because not under seal, as inadmissible to prove a ratification of the bond, under seal. Cent. Lumber Co. v. Kelter, 201 Ill. 503, 66 N. E. 543. To raise the question of admissibility of expert testimony. Wilson v. Harnette [Colo.] 75 Pac. 395. To notes as evidence; the proof of their execution cannot be contested on appeal. Brown v. Schintz, 203 Ill. 136, 67 N. E. 767. Objection to a question asked a physician, that it was immaterial, irrelevant, and incompetent, does not raise the objection on appeal that the question was in violation of Code Civ. Proc. N. Y. § 834, prohibiting a physician from disclosing professional information. Deutschmann v. Third Ave. R. Co., 87 App. Div. [N. Y.] 503.

38. And the objection could not be made by amendment of the pleading. Morehouse v. Morehouse, 140 Cal. 88, 73 Pac. 738.

39. Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147.

40. To cover a contention on appeal that the matter was not a subject of expert testimony. Hamilton v. Mendota C. & M. Co., 120 Iowa, 147, 94 N. W. 282.

41. Citizens' G. & O. Min. Co. v. Whipple [Ind. App.] 69 N. E. 557; Brier v. Davis [Iowa] 96 N. W. 983.

42. Gayle v. Mo. C. & F. Co., 177 Mo. 427, 76 S. W. 987.

43. An objection to a certificate of judgment as not material and relevant, and that it be excluded because not shown to be a portion of the files, does not raise the question as to whether it was the best evidence. Emrich v. Gilbert Mfg. Co. [Ala.] 35 So. 322.

44. To raise the question of its competency or being prejudicial. Groh's Sons v. Groh, 80 App. Div. [N. Y.] 85. Objection to evidence, consisting of a duly verified notice with proof of service, as immaterial, does not raise the question whether the notice served was a copy or the original verified notice. McIntee v. Middletown, 80 App. Div. [N. Y.] 434. In New York, it is held that an objection to evidence as immaterial sufficiently points out the ground for its exclusion. Groh's Sons v. Groh, 177 N. Y. 8, 68 N. E. 992.

45. Union Trust Co. v. Leighton, 83 App. Div. [N. Y.] 568.

46. Not stating in what particular it is inadmissible. Bodie v. Charleston & W. C. R. Co., 66 S. C. 302. An objection to evidence as inadmissible because the matter is not

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Where evidence is once objected to, ruling had, and exception saved, it is not necessary to repeat the objection to evidence of the same class subsequently offered.[50]

A motion to dismiss at the close of a case is sufficient to raise the question of the sufficiency of evidence to sustain a finding of fact.[51]

To exclusion of evidence.—In order to reserve an available objection to the exclusion of evidence, an offer of proof must be made, showing the answer expected and the purpose of the testimony sought,[52] unless the question very clearly shows what the answer must be.[53] But the offer must be responsive to the rejected question.[54]

An exception to this rule may exist in some cases, particularly in cross-examinations, where the examining counsel may not know what the answer would be or is exercising a right to test the witness.[55] Where the court erroneously excludes evidence on a vital point, it is not necessary for the party offering it to proceed to establish other propositions in his case in order to predicate error on such ruling.[56]

§ 9. *Sufficiency of exception.*—An exception must be taken to the particular ruling complained of,[57] must be to matters raised at the trial,[58] and must specify the grounds of the objection, and point out the particular defects or errors complained of.[59] A general exception is insufficient,[60] except where it is to but one con-

one of custom and use will not cover a contention on appeal that it was not the subject of expert testimony. Hamilton v. Mendota C. & M. Co., 120 Iowa, 147, 94 N. W. 282.

47, 48. Hoodless v. Jernigan [Fla.] 35 So. 656.

49. "I object"—to the admission of certain evidence, no grounds being stated. Fullerton v. Carpenter, 97 Mo. App. 197, 71 S. W. 98.

50. Vollkommer v. Cody, 85 App. Div. [N. Y.] 57. Where incompetent evidence of a certain line was continuously objected to throughout the trial, and at intervals motions were made to strike it out, reiterated before the case was submitted to the jury, the objector is not required to renew his objection when finally, some of the incompetent evidence, highly prejudicial, is brought out. Winans v. Demarest, 84 N. Y. Supp. 504.

51. Lee v. Callahan, 84 N. Y. Supp. 167.

52. Griffin v. Henderson, 117 Ga. 382; Cox v. Cohn, 29 Ind. App. 559, 64 N. E. 889; Smith v. Tate, 30 Ind. App. 367, 66 N. E. 88; Williams v. Chapman, 160 Ind. 130, 66 N. E. 460; Moser v. South Covington & C. St. R. Co., 25 Ky. L. R. 154, 74 S. W. 1090; Phipps v. Bacon, 183 Mass. 5, 66 N. E. 414; State v. Murphy, 90 Mo. App. 548; Tague v. John Caplice Co., 28 Mont. 51, 72 Pac. 297; Boughn v. Security State Bank [Neb.] 95 N. W. 680; McKinstry v. Collins [Vt.] 56 Atl. 985; Thomas v. Wheeling Electrical Co. [W. Va.] 46 S. E. 217. But a defendant is not required to offer to prove a breach of warranty and damages therefrom, in order to obtain a reversal on appeal, where his evidence of the warranty was erroneously excluded on the ground that the answer did not sufficiently present the issue. Maugh v. Hornbeck, 98 Mo. App. 339, 72 S. W. 153.

53. Thomas v. Wheeling Elec. Co. [W. Va.] 46 S. E. 217.

54. Westervelt v. National Mfg. Co. [Ind. App.] 69 N. E. 169.

55. Griffin v. Henderson, 117 Ga. 382.

56. Gartner v. Chicago, R. I. & P. R. Co. [Neb.] 93 N. W. 1052.

57. "To which ruling" is not sufficient. Noonan v. Bell, 159 Ind. 329, 64 N. E. 909.

58. An exception on an issue not raised by the pleadings, nor referred to by the court in his charge, is not reviewable. Carter & Co. v. Kaufman [S. C.] 45 S. E. 1017.

59. Objectionable questions and answers. Louisville & C. Packet Co. v. Bottorff, 25 Ky. L. R. 1324, 77 S. W. 920. To the form of evidence. Leavitt v. New England Tel. & T. Co. [N. H.] 56 Atl. 462. To a master's report. Holdroff v. Remlee, 105 Ill. App. 671. To a verdict or decision for insufficiency of evidence must specify wherein the evidence is insufficient [Code Civ. Proc. Mont. § 1152]. Robertson v. Longley, 28 Mont. 128, 72 Pac. 423. Exception to an award of damages in condemnation proceedings held sufficient to withstand a demurrer for want of facts. Chicago, I. & E. R. Co. v. Wysor Land Co. [Ind.] 69 N. E. 546. A ruling denying a motion to dismiss on the ground that sufficient facts had not been shown to sustain the complaint, is sufficient to raise a question of the necessity of notice required by Laws 1902, p. 1748, c. 600. Johnson v. Roach, 83 App. Div. [N. Y.] 351. To a question asked a witness not showing the answer given and that it was unfavorable to the party excepting. Rio Grande Western R. Co. v. Utah Nursery Co., 25 Utah, 187, 70 Pac. 859. Not setting out the point of law involved, and wherein the lower court erred, but simply referring to certain articles of the complaint, is insufficient. Elkins v. S. C. & G. R. Co., 64 S. C. 553. An exception to the entry of a judgment is not sufficient for a review of the lower court's action in disregarding one of the special findings of the jury. Baker v. Butte City Water Co., 28 Mont. 222, 72 Pac. 617. Where plaintiff and defendant move for a directed verdict, and the defendant excepts merely to the direction, without asking to go to the jury, he cannot on appeal claim that the evidence presented a jury question on a certain issue. Dearman v. Marshall, 84 N. Y. Supp. 705.

60. Scott v. Seaboard A. L. R. Co., 118 S.

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clusion of law and that is erroneous.[61] An exception to one ruling does not raise a question as to another,[62] nor can there be considered, on approved grounds or objections other than those urged in the exceptions, or included in those urged.[63] But an exception need not point out the grounds of the objection, where they are a matter of argument.[64] Exceptions to charges in a receiver's report must contain all the evidence.[65]

In order to reserve an exception to the exclusion of evidence an offer of proof must be made at the time the question is asked,[66] otherwise no question is saved for review.[67]

In some jurisdictions the necessity and manner of taking and filing an exception is prescribed by statute.[68] Under statute, exceptions may be taken by stating to the court when a decision is signed that the party excepts, or by filing like written exceptions within the prescribed time.[69]

To instructions.—An exception to an instruction given should specifically point

C. 468. To a verdict. Libby v. Hutchinson [N. H.] 55 Atl. 547. That court erred in not allowing plaintiff to rebut the presumption of the statute, and other testimony. Hill v. Southern Ry. [S. C.] 46 S. E. 486. That the court erred in not holding acts of General Assembly passed prior to 1880, in reference to perpetuity of homesteads. Sloan v. Hunter, 65 S. C. 235. To several separately stated and numbered findings of facts. Peters v. Lewis, 33 Wash. 617, 74 Pac. 815. To findings of fact is insufficient to a review of the competency or sufficiency of evidence. Davies v. Cheadle, 31 Wash. 168, 71 Pac. 728. To the overruling of a demurrer to a complaint having several paragraphs, to question the ruling on each paragraph severally. Southern Ind. R. Co. v. Harrell, 161 Ind. 689, 68 N. E. 262. To the decision of the trial judge, and to each and every part thereof, without any specific exception to any finding or conclusion, to have a question of law considered on appeal. Colby v. Day, 177 N. Y. 548, 69 N. E. 367. A joint exception to the overruling of a demurrer in severalty for defendants, does not raise a question as to the sufficiency of the complaint on the appeal of one defendant. Home Elec. L. & P. Co. v. Collins, 31 Ind. App. 493, 66 N. E. 780. A joint exception to a ruling sustaining a demurrer to a number of paragraphs of an answer does not raise a question on appeal to part of such paragraphs if some of them are insufficient. Spriggs v. State, 161 Ind. 225, 66 N. E. 693.

61. Eckerson v. New York, 80 App. Div. [N. Y.] 12.

62. Cady v. Cady [Minn.] 97 N. W. 580. Exception to a court's refusal to give requested instructions does not raise the question of the court's error in giving other instructions. Fitzpatrick v. Graham [C. C. A.] 122 Fed. 401.

63. Cowan v. Bucksport, 98 Me. 305; Hill v. Southern R. [S. C.] 46 S. E. 486. Objections to the confirmation of a judicial sale not urged in exceptions to report of sale. Wigginton v. Nehan [Ky.] 76 S. W. 196. Objection not made in exceptions to a referee's report cannot be considered on appeal from a judgment rendered on such report. Tufts v. Latshaw, 172 Mo. 359, 72 S. W. 679. The action of a court in appointing a receiver not raised by the exceptions to the receiver's report. Chicago Horseshoe Co. v. Gostlin, 30 Ind. App. 504, 66 N. E. 514. Objection to a written notice of an injury received on a highway (under Rev. St. 1883, c. 18, § 53) offered in evidence as insufficient in contents, can be considered on this ground only on the hearing of exception. Cowan v. Bucksport, 98 Me. 305. Where exception to records offered in evidence is not on the ground that only certified copies are competent, such objection cannot be reviewed on appeal. Wagner v. Mahrt, 32 Wash. 542, 73 Pac. 675. An objection that plaintiff was not entitled to benefit of an ordinance of a city of a sister state cannot be set up on appeal under an exception to the sufficiency of the complaint. Baltimore & O. R. Co. v. Ryan, 31 Ind. App. 597, 68 N. E. 923. Excepting to the overruling of a motion to strike out a party's interplea saves an objection to a ruling making him a party. Thompson v. Morgan [Ind. T.] 69 S. W. 920.

64. To the giving of a particular instruction. Denver & R. G. R. Co. v. Young, 30 Colo. 349, 70 Pac. 688.

65. Chicago Horseshoe Co. v. Gostlin, 30 Ind. App. 504, 66 N. E. 514.

66. Farmers' M. F. Ins. Co. v. Yetter, 30 Ind. App. 187, 65 N. E. 762; Callaway v. Wilson, 141 Cal. 421, 74 Pac. 1035. It must precede the exception to the court's decision. Standish v. Bridgewater, 159 Ind. 386, 65 N. E. 189. Where the introduction of evidence is permitted after it had been excluded, the party offering it should introduce it instead of refusing and relying in his appeal on his exception to the exclusion. Strohmeyer v. Wing [Tex. Civ. App.] 77 S. W. 977.

67. Though thereafter when no question to the witness is pending, an offer of proof is made and exception to its rejection taken. Farmers' M. F. Ins. Co. v. Yetter, 30 Ind. App. 187, 65 N. E. 762.

68. Rev. St. Wis. 1898, § 2872. In re McMahon's Estate, 117 Wis. 463, 94 N. W. 351. 2 Ball. Ann. Codes & St. Wash. § 5052. Davies v. Cheadle, 31 Wash. 168, 71 Pac. 728. Code Civ. Proc. Mont. § 1114, providing for exceptions to defects in findings, applies only for deficiencies or omissions from the findings and not for matters contained therein. Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805.

69. 2 Ball. Ann. Codes & St. Wash. § 5052. Reilley v. Anderson, 33 Wash. 58, 73 Pac. 799.

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out the grounds of exception or defects therein;[70] if the exception is too general to call the trial court's attention to the specific defects, it will be insufficient to have such defects reviewed on appeal, unless the court allows the exception.[71] Only so much of a charge or such defects as are pointed out in the exception will be considered on appeal.[72] An exception to the charge or instruction, containing different and independent propositions, as a whole, or to each and all of the paragraphs thereof, is too general, and insufficient,[73] unless the whole charge was erroneous.[74]

70. Ulrich v. McConaughey [Neb.] 96 N. W. 645; Palmquist v. Mine & Smelter Supply Co., 25 Utah, 257, 70 Pac. 994. Not specifying the grounds of objection. Joines v. Johnson, 133 N. C. 487. Not specifying wherein it was erroneous. Gallman v. Union Hardwood Mfg. Co., 65 S. C. 192; Carter & Co. v. Kaufman [S. C.] 45 S. E. 1017. Referring merely to the number of each paragraph, without specifying the objectionable part, is insufficient for a review of any part of the instruction. Palmquist v. Mine & Smelter Supply Co., 25 Utah, 257, 70 Pac. 994. An exception to an instruction, giving its number, is sufficient where the instructions are written and separately paragraphed and numbered. Big Hatchet Consol. Min. Co. v. Colvin [Colo. App.] 75 Pac. 605. An exception to a modification of a requested charge, failing to show the particulars in which the modification was erroneous. Thompson v. Family Protective Union, 66 S. C. 459. Where the court refuses to allow exceptions to his instructions unless the defects are pointed out, and requests the counsel to point out such defects, which they fail to do, the law given in such instructions cannot be reviewed on appeal. Henderson v. Raymond Syndicate, 183 Mass. 443, 67 N. E. 427. Exception to the language of the court with regard to the degree of care imposed on the boy, in action for the negligent killing of a boy of tender years, sufficiently shows an error in a charge stating the degree of care required of him. McDonald v. Metropolitan St. R. Co., 75 App. Div. [N. Y.] 559. An exception to an instruction attributing language to the court not contained in the instruction, is bad. Exceptions to charges given and as modified by the court cannot be considered, where no statement is made in the bill showing that the court modified such instructions. Anderson v. Harper, 30 Wash. 378, 70 Pac. 965; Grand Lodge, A. O. U. W., v. Bunkers, 23 Ohio Circ. R. 487.

71. Where the court gives counsel permission to take exceptions to instructions after the jury retires, and after they retire the defendant's counsel requests the court to allow him "an exception, in due form, to each request which is refused, and to each request which is modified," to which the court responded "yes," an exception to the modification of a certain requested instruction is sufficient, though general in form. McKinley v. Metropolitan St. R. Co., 77 App. Div. [N. Y.] 256.

72. Robbins v. Stoughton Mills, 183 Mass. 86, 66 N. E. 417. Exception to part of a charge particularly setting out the language complained of is sufficient to challenge that part of the charge of which complaint is made. Scott v. Astoria R. Co., 43 Or. 26, 72 Pac. 594. Exception to a charge as given, in an action by a brakeman for injuries caused by a switch lantern being too close to the track, is insufficient to cover an objection that the court omitted to call attention to all the facts showing the defendant's negligence as to the situation of the switch. Morisette v. Canadian Pac. R. Co. [Vt.] 56 Atl. 1102. Exception generally to an instruction permitting an award of damages for future pain, mental and physical, on the ground that there is no proof warranting damages for future pain, does not present the question of the correctness of the instruction so far as it allows damages for future mental pain. Copeland v. Metropolitan St. R. Co., 78 App. Div. [N. Y.] 418. Error in instructions as to allowance of interest on damages is waived unless specifically excepted to, before the jury retires. A general exception to the measure of damages is not sufficient. Southern Pac. Co. v. Arnett [C. C. A.] 126 Fed. 75.

73. Lord v. Guyot, 30 Colo. 222, 70 Pac. 683; Hayden v. Fair Haven & W. R. Co. [Conn.] 56 Atl. 613; Lutz v. Anchor Fire Ins. Co., 120 Iowa, 136, 94 N. W. 274; D'Arcy v. Mooshkin, 183 Mass. 382, 67 N. E. 339; Mathews v. Daly West Min. Co. [Utah] 75 Pac. 722. Where it does not appear that every instruction given was objectionable and every instruction refused sound. York v. Nash, 42 Or. 321, 71 Pac. 59. To raise the objection on appeal that the court should have singled out a particular issue, and instructed otherwise as to that. Butte & B. Consol. Min. Co. v. Mont. Ore Purchasing Co. [C. C. A.] 121 Fed. 524. Exception to the giving of each and every instruction is not sufficient for review of error in an instruction containing more than one independent proposition, one of which is correct. City of Pueblo v. Timbers [Colo.] 72 Pac. 1059. Instructions challenged jointly in a motion for a new trial are not reviewable if some of them were good. Young v. Montgomery, 161 Ind. 68, 67 N. E. 684. A party filing a general exception to a charge as a whole, without asking a specific charge, is bound by the whole charge and cannot thereafter complain of a specific part. City of Toledo v. Radbone, 23 Ohio Circ. R. 268. It is not a compliance with Code N. C. § 550 (requiring each exception to a charge to be stated separately in articles numbered, and no exception should contain more than one proposition of law), to divide the charge into four sections, each containing many propositions and divers paragraphs, and to except seriatim to each of these four subsections to the charge. Gwaltney v. Provident S. L. Assur. Soc., 132 N. C. 925.

74. An objection and exception to the giving of an instruction as a whole is sufficient where any error in it, in view of its phraseology, will render it erroneous as a whole. Denver & R. G. R. Co. v. Young, 30 Colo. 349, 70 Pac. 688; Mathews v. Daly West Min. Co. [Utah] 75 Pac. 722.

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In some jurisdictions a general exception to the charge of the court is permitted; but such exception covers only errors in the charge as given and not omissions or failure to give further proper instructions.[75]

An exception to the refusal of a requested instruction must specify the particular points which the court erred in refusing to charge;[76] a general exception as a whole to a refusal to charge several propositions or to give several instructions is insufficient if any of the propositions or instructions were bad.[77]

To judgment.—An exception to a judgment or decree should be sufficiently specific to point out the alleged defects complained of; a mere general exemption is insufficient.[78] An objection thereto should be made pointing out the specific defects, accompanied by a motion to modify, and an exception saved on the ruling thereon;[79] objections and exceptions not so taken will not be considered on appeal.[80] An exception to a judgment is sufficient to preserve the question whether the declaration states a sufficient cause of action to sustain the judgment.[81]

§ 10. *Waiver of objections and exceptions taken.*—A party may waive his objections or exceptions taken by some action on his part indicating an intention to do so.[82] This may be shown by a subsequent stipulation;[83] by a subsequent pleading over in compliance with the ruling;[84] by his subsequently introducing evidence on his own behalf;[85] by asking an instruction on the point objected or excepted

75. Under Rev. St. Ohio, § 5298. Columbus R. Co. v. Ritter, 67 Ohio St. 53, 65 N. E. 613.

76. Arnold v. Producers' Fruit Co., 141 Cal. 738, 75 Pac. 326. Exception "to each of your honor's refusals to charge my several requests" is not sufficiently specific and definite. Benedict v. Deshel, 77 App. Div. [N. Y.] 276, 12 Ann. Cas. 240. Exception to the refusal of a requested instruction is sufficient to raise a question on appeal to the propriety of that portion of the general charge affirming the contrary of such request. Conn. M. L. Ins. Co. v. Hillmon, 188 U. S. 1131, 47 Law. Ed. 446.

77. Where some of the charges are superfluous. Hodge v. Chicago & A. R. Co. [C. C. A.] 121 Fed. 48; H. D. Williams Cooperage Co. v. Scofield [C. C. A.] 125 Fed. 916; Rastetter v. Reynolds, 160 Ind. 133, 66 N. E. 612. Unless all of them should have been given. Rarden v. Cunningham, 136 Ala. 263.

78. Kelley v. Houts, 30 Ind. App. 474, 66 N. E. 408. That court erred in rendering said judgment is insufficient. City of Wilmington v. McDonald, 133 N. C. 548.

79. Duzan v. Myers, 30 Ind. App. 227, 65 N. E. 1046; Smith v. Tate, 30 Ind. App. 367, 66 N. E. 88; Kelley v. Houts, 30 Ind. App. 474, 66 N. E. 408.

80. On a general exception to the entry of a judgment following a second verdict, inconsistent with the first, the court's directing the jury to retire a second time after a verdict cannot be considered on appeal where it was not objected to at the time. Nichols & Shepard Co. v. Russell [Iowa] 91 N. W. 913.

81. In an action tried by the court without a jury. City of Alton v. Foster, 207 Ill. 150, 69 N. E. 783.

82. Where an objection to a complaint that another action is pending for the same cause is taken by answer, it is waived by the defendant's motion striking it out during the trial under Code Civ. Proc. S. C. § 168. Kiddell v. Bristow [S. C.] 45 S. E. 174. Objection by plaintiff to papers in an accounting, by an administrator in a surrogate's court, is waived by the account being treated at the trial as if originally offered and plaintiff permitted to question the same. Magee v. Magee, 80 App. Div. [N. Y.] 637. An order for a severance of parties over the objection of one defendant, reciting that on the consent of the parties the issues between plaintiff and the defendants are to be tried by a certain judge, does not show a waiver of the objecting defendant's objection to the severance. Reed v. Provident S. L. Assur. Soc., 79 App. Div. [N. Y.] 163. Obtaining leave to amend, but not using the privilege, does not preclude one from re-reviewing a judgment of dismissal of the complaint on the merits, where a formal exception to the order directing a dismissal had been taken. Schulsinger v. Blau, 84 App. Div. [N. Y.] 390. Where the issue as to a nonsuit, on appeal, is on the merits, an objection to the motion for the nonsuit as insufficient for not specifying the ground on which it was based, will not be considered on a rehearing. Herring-Marvin Co. v. Smith, 43 Or. 315, 72 Pac. 704, 73 Pac. 340.

83. Stipulating that a second trial before another judge shall be on the evidence submitted in the former trial alone, waives any objections to the admission or exclusion of such evidence. Chapin v. Du Shane [Ind. App.] 69 N. E. 174. That an action is prematurely brought is waived by a stipulation to refer the issues. Lake v. Anderson, 76 App. Div. [N. Y.] 189. That a complaint does not state a cause of action is waived by a stipulation for reference referring specific issues different from those formed by the pleadings; and judgment rendered on issues referred. Id.

84. Error in a ruling, duly excepted to, requiring a party to make more specific allegations in his pleading, is waived by a subsequent pleading over in compliance with such ruling. Hunn v. Ashton, 121 Iowa, 265, 96 N. W. 745.

85. Exception to the rejection of a prayer questioning the sufficiency of opponent's evi-

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to;[86] by failing to object to a final ruling on the point objected to;[87] by failing to renew his objection or exception, if overruled, at the close of the case;[88] by not pressing the matter further upon an opportunity given to do so.[89] Exception to an order overruling a motion to dismiss is waived by a failure to renew the motion at the close of the evidence,[90] or to request a verdict to be directed in the objector's favor,[91] or to except to the charge.[92] But a party's exception to the erroneous exclusion of his evidence is not waived by his admission that his evidence is not the best evidence.[93] Failure to demur to an answer alleging an oral contract contradicting a written one does not waive plaintiff's objection to evidence to prove such allegation, because it tended to contradict the written contract.[94] An exception to a ruling is not waived by a failure to take another exception to a subsequent like ruling on the same point.[95] Where there are various and independent parties to the litigation and one files exceptions, the others have no vested interest therein,[96] the exception may be withdrawn and the other parties cannot complain of the dis-

dence. Consol. Gas Co. v. Getty, 96 Md. 683. Exceptions by defendant to ruling of court at close of plaintiff's testimony. Medairy v. McAllister, 97 Md. 488. Exception to an order overruling a motion for a nonsuit. Fulkerson v. Chisna Min. & Imp. Co. [C. C. A.] 122 Fed. 782. Where, upon denial of a motion for a nonsuit, defendant excepts, but puts in his evidence, and upon another denial and exception, cross-examines the witnesses of his co-defendant, such denial is waived if the evidence at the close of the case presents a question for the jury. Bopp v. N. Y. Elec. Vehicle Transp. Co., 177 N. Y. 33, 69 N. E. 122. Exception to refusal of nonsuit at close of plaintiff's evidence. Ratliff v. Ratliff, 131 N. C. 425. Introducing in evidence the whole of a paragraph of an answer waives an exception to a refusal to allow a part only of it to be introduced. Cheek v. Oak Grove Lumber Co. [N. C.] 46 S. E. 488. A defendant waives a prayer for the direction of a verdict at the close of plaintiff's case, so as to preclude an appeal thereon by reviewing evidence in his own behalf. Western Md. R. Co. v. State, 95 Md. 637. Objection to evidence is waived by the objector introducing the same character of evidence himself. Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055. Objection to admission of testimony overruled is waived by subsequent admission of similar testimony without objection. D. M. Osborne & Co. v. Gatewood [Tex. Civ. App.] 74 S. W. 72.

86. Defendant's asking an instruction, in an action for forcible entry and detainer, that "it is conceded that the plaintiff was forcibly removed * * * and is entitled to recover possession," abandons a defense justifying the trespass, and waives an exception taken to the exclusion of evidence on such defense. Stephens v. Quigley [C. C. A.] 126 Fed. 148. Objection to the introduction of a contract in evidence is waived by a subsequent request for and obtaining an instruction that while duly admitted such contract was admissible only to show the contract between plaintiff and defendant; and such objection cannot again be raised by the objector in his motion for a new trial. Reed v. Kibler, 91 Mo. App. 361. But an exception to a refusal of a demurrer to evidence is not waived by the asking of instructions as to questions of fact. Palmer v. Kinlock Tel. Co., 91 Mo. App. 106.

87. Exceptions to an overruling of objections to an answer are waived by a failure to object to the court's final ruling that the answer was received only as one of the pleadings of the case. Groh's Sons v. Groh, 80 App. Div. [N. Y.] 85.

88. Defendant's offering evidence in his own behalf after his motion for a peremptory instruction is overruled waives such instruction, and if his motion is not renewed at the close of the evidence, the question of the sufficiency of the evidence to sustain the verdict is not preserved for review as a question of law. Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N. E. 1109. Where, after excepting to a ruling of the court in refusing to give an instruction taking the case from the jury at the close of the plaintiff's testimony, the defendant proceeds with the case, and does not renew his motion in writing at the close of the evidence, it cannot be argued as a matter of law on appeal that the evidence did not tend to prove the plaintiff's case. Pittsburg, C., C. & St. L. R. Co. v. Hewitt, 202 Ill. 28, 66 N. E. 829. Failure to renew a motion to dismiss, made at the opening of the case, at the close of the plaintiff's case or at the close of all the evidence, waives the objection, so far as the court would be authorized, if the evidence warranted a judgment, to amend the complaint to conform thereto. Johnson v. Albany, 86 App. Div. [N. Y.] 567.

89. Exception to the court's ruling in sustaining an objection to a question is waived by not pressing the matter further upon the court's giving the party an opportunity to question along the same line. Wynn v. Followill, 98 Mo. App. 463, 72 S. W. 140.

90, 91, 92. Faulkner v. Cornell, 80 App. Div. [N. Y.] 161.

93. As witnesses whose testimony would be of higher value than the documentary evidence he was offering. Seidenspinner v. Metropolitan L. Ins. Co., 175 N. Y. 95, 67 N. E. 123.

94. Ruckman v. Imbler Lumber Co., 42 Or. 231, 70 Pac. 811.

95. In an action of account stated, defendant's exceptions to rulings excluding relevant evidence raise the question of its admissibility, though no further exception is taken at the close of his testimony to a refusal of the court to permit him to go into the account. Baker v. Griffin, 86 N. Y. Supp. 579.

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missal,[97] nor can they use the original exceptions as a basis for the assignment of error in the appellate court.[98]

SCIRE FACIAS.[1]

A scire facias is a writ founded on some matter of record and can be brought only in a court of law.[2] As a general rule the writ must issue from the court where the judgment was rendered, but in some instances this rule has been changed by statute,[3] and where the venue of a prosecution is changed, the court to which the cause was removed has jurisdiction to issue the writ on judgment of forfeiture there entered.[4] A writ of scire facias is not defective for failure to contain a prayer for judgment,[5] nor are clerical errors ground for reversal,[6] but the papers must be properly indorsed,[7] and the judgment nisi introduced in evidence.[8]

The service and return of the writ are governed by local statutes which must be strictly complied with.[9] Such statutes receive a fair interpretation.[10] The mere issue of the writ to revive a judgment on the last day of the five years for which the judgment had been previously revived will continue the lien of the judgment.[11] The recognizance of record and judgment of forfeiture are competent and sufficient evidence, under appropriate averments in scire facias, to authorize judgment of execution according to form, force, and effect of the recognizance.[12]

SEARCH AND SEIZURE.[13]

§ 1. What is an Unreasonable Search and Seizure (1618).
§ 2. Procedure for Issuance and Execution of Search Warrants (1619).

§ 1. *What is an unreasonable search and seizure.*—A search and seizure made without authority of law is unreasonable.[14] The search of a residence with-

96, 97, 98. Weed v. Gainesville, J. & S. R. Co. [Ga.] 46 S. E. 885.

1. See, also, Bail in Criminal Proceedings, 1 Curr. Law, p. 284; Judgment, 2 Curr. Law, p. 581.

2. A statute in Illinois held not to change the procedure on scire facias from that in force prior to its enactment. Burrall v. People, 103 Ill. App. 81.

3. The supreme court of the District of Columbia has jurisdiction to issue a writ of scire facias to revive a judgment of a justice of the peace that has been filed and regularly docketed. Section 1022, Revised Statutes of the United States, relating to the District of Columbia. Green v. Mann, 19 App. D. C. 243.

4. State v. Baughman [Mo. App.] 74 S. W. 433.

5. On a forfeited recognizance. State v. Baughman [Mo. App.] 74 S. W. 433.

6. A scire facias dated May 6, recited that indictment was returned May 12. The court record recites that scire facias was issued July 6. Burrall v. People, 103 Ill. App. 81.

7. A scire facias case on a forfeited bail bond was dismissed because the bond was not signed, the only signature being on the affidavit referring to their signatures on the bond. Nelson v. State [Tex. Cr. App.] 73 S. W. 398.

8. A scire facias case on a forfeited bond was reversed because the statement of facts failed to show that judgment nisi was introduced in evidence. Nelson v. State [Tex. Cr. App.] 73 S. W. 398.

9. A statute provided that the writ should be served on a mechanic's lien on the defendant personally and a copy left in the building. The return of the sheriff shows only service. Carswell v. Patzowski, 3 Pen. [Del.] 593.

10. A statute providing for service on certain agents of a corporation in the absence of other designated representatives means absence from the county where the suit was instituted and not absence from the state. Fla. Cent. & P. R. Co. v. Luffman [Fla.] 33 So. 710. In Missouri returns of "not found" to two successive writs is sufficient service as against the persons as to whom the returns were made. State v. Abel, 170 Mo. 59, 70 S. W. 487.

11. This is so although an agreement to revive the judgment is subsequently filed containing no reference to the scire facias. In re Campbell's Estate, 22 Pa. Super. Ct. 432.

12. Forfeited bail bond. Burrall v. People, 103 Ill. App. 81.

13. See, also, Betting and Gaming, 1 Curr. Law, p. 340, and Intoxicating Liquors, 2 Curr. Law, p. 554.

14. Search and seizure of salt used in destroying ice to be used as evidence. State v. Sheridan, 121 Iowa, 165, 96 N. W. 730.

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out a warrant is unreasonable,[15] unless the owner consents thereto,[16] but a search may be made without a warrant, if authorized by statute.[17] Statutes in the several states providing for search and seizure of things unlawfully kept have generally been held constitutional.[18] The compulsory production of documentary evidence provided for in the act creating the Interstate Commerce Commission, and amendments thereto, is not an unreasonable search and seizure.[19]

§ 2. *Procedure for issuance and execution of search warrants.*—Provisions of a statute authorizing issuance of a search warrant must be complied with.[20] A premature seizure is unlawful.[21]

A warrant of arrest and a search warrant may be in the same instrument.[22] Statutes in some states require a search warrant to be executed during the daytime.[23] A search warrant unlawfully issued may be resisted,[24] and property improperly taken may be replevied.[25]

SEDUCTION.

§ 1. Nature and Elements of the Tort (1619).
§ 2. Civil Remedies and Procedure (1619).
§ 3. The Crime (1620).
§ 4. Indictment and Prosecution (1621).

§ 1. *Nature and elements of the tort.*—It is an essential element of a cause of action of this character that the female seduced was chaste at the time of the alleged seduction.[26] The one seduced cannot maintain an action for seduction, that right belonging to the person standing to her in the relation of master.[27] Though the father's action is founded on the fiction of loss of services, his right is not dependent on his showing an actual loss of services, and he can recover, though no loss is shown.[28]

§ 2. *Civil remedies and procedure.*—It being an essential element of a cause of action of this character that the plaintiff was chaste at the time of the alleged seduction, an allegation to that effect is essential to a good complaint,[29] but plain-

15. For stolen chickens, to be used as evidence. McClurg v. Brenton [Iowa] 98 N. W. 881.

16. Question for the jury whether the owner consented to the search. McClurg v. Brenton [Iowa] 98 N. W. 881.

17. In **Colorado**, a policeman who has received information that a person is carrying concealed weapons is justified in searching such person without a warrant. Keady v. People [Colo.] 74 Pac. 892.

18. A **Minnesota** law prohibiting the keeping of blind pigs and authorizing the issuance of search warrants to search particularly described places, and seize all intoxicating liquors and fixtures there found is not unconstitutional, as being unreasonable. State v. Stoffels, 89 Minn. 205, 94 N. W. 675.

19. 24 Stat. c. 104, and 27 Stat. c. 83, expressly extends immunity from prosecution or forfeiture of estate. Interstate Commerce Commission v. Baird, 24 Sup. Ct. 563, 48 Law. Ed. ——.

20. A statute provided that search warrant would be issued on affidavit, "stating and showing." An affidavit made on "information and belief" is not sufficient. State v. McGahey [N. D.] 97 N. W. 865. It being mere hearsay. State v. Patterson [N. D.] 99 N. W. 67.

21. The seizure of bar fixtures and refrigerators used in maintaining a blind pig was unauthorized until after judgment abating the nuisance. J. D. Iler Brew. Co. v. Campbell, 66 Kan. 361, 71 Pac. 825.

22. Search and seizure of intoxicating liquor unlawfully kept and punishment of the offender. State v. Stoffels, 89 Minn. 205, 94 N. W. 675.

23. In **Delaware**, search warrants cannot be executed in the nighttime. "Nighttime" means that period during which the sun is below the horizon, and the period preceding its rising and following its setting when by its light a man's face may be distinguished. Petit v. Colmary [Del.] 55 Atl. 344.

24. Issued by court on insufficient affidavit. State v. McGahey [N. D.] 97 N. W. 865. One may resist a search warrant of which he has no notice or knowledge at the time. Id.

25. In **South Carolina**, claim and delivery may be maintained against a constable who has wrongfully seized intoxicating liquor. Moore v. Ewbanks, 66 S. C. 374.

26. Swett v. Gray, 141 Cal. 83, 74 Pac. 551; Lampman v. Bruning, 120 Iowa, 167, 94 N. W. 562.

27. Larocque v. Conheim, 42 Misc. [N. Y.] 613. Consequently the right of action does not survive the death of the one seduced. Id.

28. Snider v. Newell, 132 N. C. 614.

29. Allegations held sufficient. Swett v. Gray, 141 Cal. 83, 74 Pac. 551. An averment that plaintiff "on or about" a certain day,

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tiff need not allege willingness or ability to marry defendant.[30] In a declaration by a father, a loss of services by reason of the seduction is always alleged to satisfy the fiction of the law basing the parent's right of recovery thereon, but no loss in fact need be proved, and evidence that no loss in fact occurred will not be received.[31]

A demurrer to plaintiff's evidence presents the question whether the evidence is sufficient to base a finding of such loss of services as is necessary to maintain the action.[32]

Sufficiency of evidence.[33]—A verdict based upon evidence that the plaintiff's daughter through hypnotic influence had no knowledge of defendant's acts and became conscious of them only on being again hypnotized after the birth of her child will not be sustained.[34]

Damages.—While the right of action by a parent for the seduction of his daughter nominally rests upon the fiction of loss of services, the damages are in no wise limited by the amount of such loss, nor by the amount of the parent's loss through the wrong to himself, but such damages are recoverable as the plaintiff has sustained through the wrong done her.[35] And where plaintiff sues in her own behalf, her damages may be measured by the value of the time she has lost, her expenses, her physical suffering and mental anguish.[36]

New trial.—A subsequent criminal conviction of fornication only does not entitle defendant to a new trial.[37]

§ 3. *The crime.*—Seduction may be defined to be the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasion or wiles which are calculated to have and do have that effect, and result in her ultimately submitting her person to the sexual embraces of the person accused.[38] Illicit intercourse alone will not constitute the offense; in addition to this the prosecutrix, relying on some sufficient promise or inducement, and without which she would not have yielded, must have been drawn aside from the path of virtue which she was honestly pursuing at the time the offense charged was committed.[39] In most states the seduction must be accomplished by means of a promise of marriage,[40] and sexual intercourse induced by a promise to marry in case pregnancy results does not constitute it,[41] but a promise of that nature as one of the persuasive arts used to accomplish the seduction of a female to whom the accused is already engaged to marry will not deprive her of the protection of the law.[42] It seems that under the statute of Kansas, intercourse predicated on a promise to marry as a consideration for it will

being previously chaste, etc., was seduced, is definite enough as to her chastity at the time of the seduction, where first objected to after issue joined. Lampman v. Bruning, 120 Iowa, 167, 94 N. W. 562.

30. Swett v. Gray, 141 Cal. 83, 74 Pac. 551.

31, 32. Snider v. Newell, 132 N. C. 614.

33. Evidence examined and held to sustain a verdict for defendant. Douglass v. Agne [Iowa] 99 N. W. 550.

34. Austin v. Barker, 90 App. Div. [N. Y.] 351.

35. Willeford v. Bailey, 132 N. C. 402. A verdict for $5,000 against a man worth $125,000 for seducing girl 17 years old held not influenced by statement in charge that no amount of exemplary damages would in law be excessive. Id.

36. Lampman v. Bruning, 120 Iowa, 167, 94 N. W. 562.

37. Where a verdict and judgment have been rendered for plaintiff in a civil action for damages for seduction, the defendant is not entitled to a new trial on the ground of newly discovered evidence by reason of the fact that he was subsequently indicted and found guilty of fornication with the person seduced. Saunders v. Miller [Ga.] 47 S. E. 338.

38, 39. People v. Smith [Mich.] 92 N. W. 776.

40. Wisdom v. State [Tex. Cr. App.] 75 S. W. 22; In re Lewis, 67 Kan. 562, 73 Pac. 77; State v. Dent, 170 Mo. 398, 70 S. W. 881; Ingram v. Com., 24 Ky. L. R. 1531, 71 S. W. 908; Walton v. State [Ark.] 75 S. W. 1; Barnard v. State [Tex. Cr. App.] 76 S. W. 475; Fine v. State [Tex. Cr. App.] 77 S. W. 806.

41. People v. Smith [Mich.] 92 N. W. 776.

42. State v. Stolley, 121 Iowa, 111, 96 N. W. 707.

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support a prosecution. This view, however, results from the language of the statute of that state which does not use the word "seduce" but punishes sexual intercourse obtained by a promise of marriage;[43] and it is thought that such a promise, practically a barter, a promise for a promise, would not amount to such arts, persuasions or wiles as would amount to seduction, in any jurisdiction where the word seduce is used in defining the offense.[44]

The woman must have been chaste or of good repute at the time of the seduction,[45] and unchastity may exist without any act of actual physical incontinence, as where indecent liberties are permitted and sexual intercourse follows by reason of the passion thus aroused;[46] but where such liberties are submitted to by reason of love and affection, engendered by pretended love and affection on the part of the man, and promises of marriage, and illicit intercourse finally results, induced by passion thus aroused, and such pretenses made, it is for the jury to say whether there is prior unchastity such as to prevent the intercourse constituting seduction.[47] If the female has ever been otherwise than chaste, a reformation prior to the time laid will bring her under the protection of the law, and she may again be seduced.[48] Where prosecutrix testifies to acts of intercourse prior to the time laid in the indictment, there can be no conviction in the absence of evidence of reformation,[49] but where, after betrothal, defendant had intercourse with prosecutrix by force, she was still chaste under the law and the next subsequent act if on consent might be laid as seduction.[50] The indictment need not aver the woman was unmarried; if she was married, that is a matter of defense.[51]

The statutes of several of the states provide that marriage of the parties shall be a bar to the prosecution,[52] and under the statute of Kentucky a subsequent bona fide offer of marriage by the defendant is a complete defense, though refused by the prosecutrix;[53] but in the absence of express provision to that effect, the subsequent marriage of defendant to the girl is of no effect.[54]

Where the prosecution is instituted by the female's father, the fact that she did not desire the prosecution is of no avail to the accused.[55]

§ 4. *Indictment and prosecution.*—The indictment must allege that both the seduction and the carnal knowledge were accomplished by means of a promise of marriage,[56] and the previous chaste character of the female must be alleged, though not made essential to the crime by express provision of the statute.[57]

Where an act of intercourse is proved, prosecutrix claiming it to have been the first, there is an election and prior or subsequent acts should not be shown.[58]

Though the female's previous chaste character is presumed, the presumption is overcome by the presumption of defendant's innocence.[59]

Proof of accused's statements regarding his engagement to marry his victim and his having intercourse with her,[60] of her death and her pregnancy at the time

43. In re Lewis, 67 Kan. 562, 73 Pac. 77.
44. People v. Smith [Mich.] 92 N. W. 776.
45. State v. Dent, 170 Mo. 398, 70 S. W. 881; People v. Smith [Mich.] 92 N. W. 776; Pope v. State, 137 Ala. 56; Walton v. State [Ark.] 75 S. W. 1; Barnard v. State [Tex. Cr. App.] 76 S. W. 475.
46, 47. State v. Stolley, 121 Iowa, 111, 96 N. W. 707.
48. State v. Dent, 170 Mo. 398, 70 S. W. 881; People v. Smith [Mich.] 92 N. W. 776.
49. People v. Smith [Mich.] 92 N. W. 776; People v. Bressler, 131 Mich. 390, 91 N. W. 639.
50. Pope v. State, 137 Ala. 56.
51. Hoff v. State [Miss.] 35 So. 950.
52. State v. Dent, 170 Mo. 398, 70 S. W. 881.
53. Ky. St. § 1214. Ingram v. Com., 24 Ky. L. R. 1531, 71 S. W. 908.
54. In re Lewis, 67 Kan. 562, 73 Pac. 77.
55. State v. Stolley, 121 Iowa, 111, 96 N. W. 707.
56. Wisdom v. State [Tex. Cr. App.] 75 S. W. 22.
57. Walton v. State [Ark.] 75 S. W. 1.
58. People v. Bressler, 131 Mich. 390, 91 N. W. 639; Pope v. State, 137 Ala. 56; People v. Payne, 131 Mich. 474, 91 N. W. 789.
59. Walton v. State [Ark.] 75 S. W. 1.
60, 61, 62. Merrell v. State [Tex. Cr. App.] 70 S. W. 979.

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of her death,[61] and of accused's flight on learning of her death and the threats of her father against him, is admissible,[62] as is prosecutrix's testimony that she felt an affection for defendant and was willing to marry him.[63]

The testimony of the injured female must be corroborated to support a conviction in some states,[64] both as to the intercourse and the promise to marry.[65] Cases involving the sufficiency of the evidence otherwise to support a conviction are mentioned in the note.[66]

Where the prosecution is instituted by the female's father, it is not prejudicial for the court to refer to her as the prosecuting witness, though she did not desire the prosecution.[67]

An instruction purporting to define the offense should include all its elements; but if the several paragraphs when read together properly state the law, they are sufficient,[68] and the reading of a paragraph that fails to include the necessity of a promise of marriage is not prejudicial where other paragraphs include it.[69] An instruction requiring proof of personal chastity on the part of the female must be given when requested;[70] but where there is no evidence that prosecutrix was not of previously chaste character, an instruction stating the law applying where she is a lewd woman is properly refused.[71] An instruction including a repetition of the necessity of a promise of marriage is properly modified by striking out the repetition,[72] and instructions that there is "no duty resting on the jury either to acquit or convict to elevate the colored race" and that the question of whether that "race will be elevated by a conviction" is not before the jury are properly refused as argumentative.[73]

SEQUESTRATION.

In Texas, sequestration proceedings are provided for and governed by statute. A writ of sequestration which recites that the person making the affidavit fears that the one in possession will remove the property out of the county or dispose of it during the pendency of the suit, is not invalid, because the grounds on which it is based are stated in the alternative.[74] An affidavit for a writ of sequestration which alleged that plaintiff feared defendants would make use of possession "to waste or convert to their own use the fruits or revenues" produced by the property was held bad for duplicity.[75] Sequestration proceedings are not an adequate legal remedy which will render unnecessary the appointment of a receiver for the purpose of collecting the rents of mortgaged property and applying them on the mortgage debt, and keeping the property in repair, since defendant, in such proceedings, may give a bond and is then entitled to retain possession of the sequestrated property and need not account for the rents and revenue.[76] The statute

63. State v. Burns, 119 Iowa, 663, 94 N. W. 238.

64. Mere evidence corroborative of her credibility is not sufficient. Wisdom v. State [Tex. Cr. App.] 75 S. W. 22. Corroboration of prosecutrix held sufficient. State v. Burns, 119 Iowa, 663, 94 N. W. 238; State v. Dent, 170 Mo. 398, 70 S. W. 881. Her acts, declarations and statements subsequent to the seduction are not corroborative. Barnard v. State [Tex. Cr. App.] 76 S. W. 475.

65. Continuous association for two years is not corroboration of the promise of marriage. Fine v. State [Tex. Cr. App.] 77 S. W. 806.

66. Evidence held sufficient to go to jury. State v. Dent, 170 Mo. 398, 70 S. W. 881; State v. Maxwell, 117 Iowa, 482, 91 N. W. 772.

67. State v. Stolley, 121 Iowa, 111, 96 N. W. 707.

68. Virtue of prosecutrix and use of seductive means. Wisdom v. State [Tex. Cr. App.] 75 S. W. 22.

69. State v. Dent, 170 Mo. 398, 70 S. W. 881.

70. Walton v. State [Ark.] 75 S. W. 1.

71. Puckett v. State [Ark.] 70 S. W. 1041.

72. Walton v. State [Ark.] 75 S. W. 1.

73. Pope v. State, 137 Ala. 56.

74. Meador v. State [Tex. Cr. App.] 72 S. W. 186.

75. Clark v. Elmendorf [Tex. Civ. App.] 78 S. W. 538.

76. Rev. St. 1895, arts. 4873, 4882. De Berrera v. Frost [Tex. Civ. App.] 77 S. W. 637.

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provides that where property seized on sequestration is replevied, the condition in defendant's bond shall be that he will not waste, sell or dispose of the same, and will have it forthcoming to abide the decision of the court or pay the value thereof.[77] It further provides for satisfaction of the judgment by return of the property.[78] It is held under these statutes that the replevin bond is not a substitute for the property, but simply confers the right to retain possession during pendency of the suit, and consequently the defendant, by giving the bond, is not authorized to sell the property so as to give good title to the purchaser.[79] Where a writ of sequestration has been issued in a foreclosure action, the court, on appeal, cannot render judgment of foreclosure unless it appears what disposition has been made of the property under the writ.[80]

Damages for wrongful sequestration.—In a suit to recover personal property, where, on sequestration, defendant has retained possession under a replevin bond, the measure of damages is the market value of such property at the time of trial, and not when defendant took possession of it.[81] Damages caused by seizure of property under a writ of sequestration cannot be recovered when the writ was properly issued.[82] Damages may be recovered for the wrongful issue of the writ though such issue was not fraudulent.[83] But exemplary damages will be allowed only where such wrongful suing out of the writ was also malicious and without probable cause.[84] The verdict and judgment for wrongful sequestration should state the value of each article separately, since the statute authorizes plaintiff, if judgment goes against him, to return all or any part of the property seized, and have the value thereof credited on the judgment.[85]

In Louisiana, a judicial sequestration is a mandate of the court, ordering the sheriff in certain cases, to take into his possession and to keep a thing of which another has the possession, until after the decision of the suit, in order that it be delivered to him who shall be adjudged entitled to have the property or possession of that thing.[86] The writ of sequestration may properly issue in favor of a party whose privilege (lien) on property is about to be prejudiced by a disposal of the property by the debtor.[87] The judicial sequestration, like the ordinary sequestration, may be dissolved on bond.[88] It is competent and proper for the supreme court, under its supervisory powers, to reduce the amount of a bond given to secure the dissolution of a judicial sequestration, when it has before it the evidence on which the court below acted in fixing the amount of the bond.[89] A judicial sequestration which does not change possession of the property but simply preserves the existing status of affairs, is an interlocutory order and not appealable.[90] An interlocutory order permitting judicial sequestration to be set aside on bond, may not be suspensively appealed from unless its effect will be to work irreparable injury.[91]

77. Rev. St. 1895, art. 4874. Crawford v. So. R. I. Plow Co. [Tex. Civ. App.] 77 S. W. 280.

78. Rev. St. 1895, art. 4877.

79. Crawford v. So. R. I. Plow Co. [Tex. Civ. App.] 77 S. W. 280. In sequestration proceedings, defendant gave a replevin bond, and during pendency of the action sold the property. Judgment being for plaintiff, and execution having been returned nulla bona, it was held that plaintiff had not waived his remedy against the purchaser of the property by proceeding first against defendant. Id.

80. Henne v. Moultrie [Tex. Civ. App.] 78 S. W. 11.

81. Wood v. Fuller [Tex. Civ. App.] 78 S. W. 236.

82. Southern Grocer Co. v. Adams [La.] 36 So. 225.

83. Hines v. Shafer [Tex. Civ. App.] 74 S. W. 562.

84, 85. Lynch v. Burns [Tex. Civ. App.] 79 S. W. 1084.

86. Garland's Rev. Code Prac. La. 1894, § 269.

87. Southern Grocer Co. v. Adams [La.] 36 So. 226.

88. The bond takes the place of the property, and under its obligations the rights of the parties are conserved. State v. Allen, 110 La. 853.

89, 90, 91. State v. Allen, 110 La. 853.

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SET-OFF AND COUNTERCLAIM.

§ 1. Nature and Extent of Right (1624).
§ 2. In What Proceedings Allowed (1624).
§ 3. Claims Which May Be Set-off or Recouped (1624).
§ 4. Pleading and Practice (1627).

§ 1. *Nature and extent of right.*—Originally courts of equity alone had jurisdiction in cases of set-off, and the right did not exist at common law until introduced by statute.[92] Equitable set-off is not dependent upon statute but seeks to give effect to the rule wherever equities between parties require it,[93] even though the counterclaim is not within the letter of the statute.[94] The equitable right of set-off is not one which the debtor may at all events assert, but is governed by principles applicable to proceedings in equity.[95] A counterclaim must have a tendency to show an independent cause of action. Both parties are to a certain extent plaintiffs and defendants,[96] and if defendant's claim is in excess of the plaintiff's claim judgment may be awarded the defendant for the excess.[97]

§ 2. *In what proceedings allowed.*—In an action for the enforcement of a penalty the plaintiff will not be allowed to draw in issue a claim of set-off on his part.[98] Set-off cannot be pleaded in an action of replevin.[99]

§ 3. *Claims which may be set-off or recouped.*—The right of set-off at law is purely statutory, and its existence depends on the terms of particular statutes. It is commonly requisite that the claim set off should have arisen out of the same transaction;[1] though this requirement is not universal.[2] Damages for breach of

92. Collins v. Campbell, 97 Me. 23.
93. Crummett v. Littlefield, 98 Me. 317.
94. Debts not on their face mutual. Dubreuil v. Gaither [Md.] 56 Atl. 965; Collins v. Campbell, 97 Me. 23.
95. Insolvency of plaintiff is a fact sufficient to justify intervention of equity. Wabash R. Co. v. Bowring [Mo. App.] 77 S. W. 106; Commercial State Bank v. Ketchum [Neb.] 96 N. W. 614.
96. Turney v. Baker [Mo. App.] 77 S. W. 479; Tilton v. Goodwin, 183 Mass. 236, 66 N. E. 802. Action on note: Set off of a note to which plaintiff not a party. Carpenter v. Fulmer, 118 Wis. 454, 95 N. W. 403.
97. Lloyd v. Manufacturers' & M. Warehouse Co., 102 Ill. App. 551.
98. Irvin v. Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258.
99. Set off of one cash-register in a replevin suit for another. Nat. Cash Register Co. v. Cochran, 22 Pa. Super. Ct. 582. Replevin of wagon—set off of damages for breach of warranty. Blair v. A. Johnson & Sons [Tenn.] 76 S. W. 912. **Contra.** In replevin a counterclaim on a money demand may be set up for affirmative relief as well as to defeat the plaintiff's claim. McCormick Harvesting Mach. Co. v. Hill [Mo. App.] 79 S. W. 745.
1. In an action by administrator to recover a debt contracted to him, a debt due from the intestate cannot be set off because it did not grow out of the same transaction. Action for goods sold at administrator's sale. Hancock v. Hancock's Adm'r, 24 Ky. L. R. 664, 69 S. W. 757. In an action of ejectment and for rents and profits, a counterclaim cannot be pleaded for maintenance there being nothing to show that the claims are in any way part of the same transaction. White v. Whitney [Neb.] 94 N. W. 1012. In an action for partition and accounting of rents of real estate a counterclaim for amounts expended for plaintiff must be shown to have been derived from the real estate in question. Action by son against his mother: Counterclaim that she had expended certain amount upon his maintenance but not stated to have been money collected from the identical land in question. Williams v. Clarke, 82 App. Div. [N. Y.] 199. In an action for dower, a claim of title by devise in the defendants is not a proper matter of set-off, it not being connected with the subject of the action. Burnett v. Burnett, 86 App. Div. [N. Y.] 386. An antecedent, independent fraud cannot be interposed by way of counterclaim by a defendant in an action against him for fraud under the Colorado Code. Rensberger v. Britton [Colo.] 71 Pac. 379. Under Wisconsin statute, trespass by plaintiff cannot be set up as a counterclaim in an action of trespass against the defendant. Stolze v. Torrison, 118 Wis. 315, 95 N. W. 114. In an action to obtain an injunction to restrain violation of a contract the defendant cannot set up a counterclaim for breach of another contract. Sugden v. Magnolia Metal Co., 171 N. Y. 697, 64 N. E. 1126. In an action to recover money alleged to have been collected and converted by an agent, the alleged withholding of commissions by the agent, under a custom between the parties authorizing the agent to pay his own commissions, is so "connected with the subject of the action" as to be a proper subject of counterclaim. Benton v. Moore, 42 Misc. [N. Y.] 660.
2. Set-off as to independent demands is purely statutory. Irvin v. Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258. A bank may set-off a corporation's indebtedness against an action by a receiver to recover the corporation's deposit. Wheaton v. Daily Telegraph Co. [C. C. A.] 124 Fed. 61. In a suit to recover unpaid stock subscriptions a stockholder may set off a debt due

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contract may be set off in an action on the contract,[3] but a counterclaim for defective goods will not survive on acceptance,[4] and in an action for breach of contract defendant is not entitled to plead in set-off the value of part of the work done.[5] A judgment connected with the subject of the action is a proper basis for a counterclaim.[6] Where contracts are sufficiently related the court will allow in set off even an unliquidated demand arising from one of the contracts.[7] Claim based upon tort cannot be set off against one founded entirely upon contract,[8] even though the plaintiff is insolvent,[9] unless it arises out of the same transaction;[10]

him from the corporation. Shields v. Hobart, 172 Mo. 491, 72 S. W. 669; Gamewell Fire-Alarm Tel. Co. v. Fire & Police Tel. Co., 25 Ky. L. R. 1010, 76 S. W. 862. Mutual judgments may be set off. Judgment in favor of partnership set off against judgment against individual. Collins v. Campbell, 97 Me. 23.

3. Payne v. Amos Kent B. & L. Co., 110 La. 750; Long v. Long [Pa.] 57 Atl. 759. Breach of warranty in a deed. Thurgood v. Spring, 139 Cal. 596, 73 Pac. 456; Kinzie v. Riely's Ex'r, 100 Va. 707; Penn Lumber Co. v. McPherson, 133 N. C. 287; Queen City Glass Co. v. Pittsburg Clay Pot Co., 97 Md. 429. Suit on notes given in payment of machinery, plaintiff agreeing to allow defendant to work out payment of notes, but failing to keep agreement. Ramsey & Bro. v. Capshaw [Ark.] 75 S. W. 479; Steiger v. Fronhofer, 43 Or. 178, 72 Pac. 693. In a suit upon a written contract an independent agreement of warranty could at best be availed of only by way of counterclaim. Atwater v. Orford Copper Co., 85 N. Y. Supp. 426.

4. Miller v. Isaac H. Blanchard Co., 84 N. Y. Supp. 585. In an action for price of goods it is not sufficient to assert in counterclaim that the goods were defective and it was necessary to purchase new goods. It is necessary to prove that the goods were not good for any purpose. Fredrick Mfg. Co. v. Devlin [C. C. A.] 127 Fed. 71.

5. Shop drawings furnished by defendant under a contract to construct a building. Christopher & S. Architectural I. & F. Co. v. M. & P. Yeager, 202 Ill. 486, 67 N. E. 166.

6. Dowdell v. Carpy, 137 Cal. 333, 70 Pac. 167.

7. Spears v. Netherlands F. Ins. Co., 31 Tex. Civ. App. 567, 72 S. W. 1018. Unliquidated damages arising in contract may be the subject of set-off. Lloyd v. Manufacturers' & M. Warehouse Co., 102 Ill. App. 551. Equity may set off liquidated or unliquidated damages whether arising in contract or tort against a judgment. Fedarwisch v. Alsop, 18 App. D. C. 318. Contra, under R. I. statute an unliquidated claim for damages cannot be a matter of set-off. Breach of contract to deliver corn. Cole v. Shanahan, 24 R. I. 427.

8. Lloyd v. Manufacturers' & M. Warehouse Co., 102 Ill. App. 551. In an action of assumpsit defendant claimed set off of the value of lands fraudulently held by the plaintiff. Jenkins v. Rush Brook Coal Co., 205 Pa. 166. Quantum meruit for work done. Counterclaim of negligence in hiring a workman. Lundine v. Callaghan, 82 App. Div. [N. Y.] 621. Action for rent: damage to tenant by water. Kuhn v. Sol. Heavenrich Co., 115 Wis. 447, 91 N. W. 994. A mortgagee's lien cannot be set off against mortgagor's claim for the unlawful taking of the mortgaged property. Frapplea v. Johnson, 75 Vt. 397. Conversion of lumber. Breach of contract. Nickey v. Zonker, 31 Ind. App. 88, 67 N. E. 277. In an action to recover a street betterment assessment a defendant cannot set up a counterclaim arising out of the failure of the plaintiff to perform the work according to contract with the city. Lux & T. Stone Co. v. Donaldson [Ind.] 68 N. E. 1014. In an action to recover wages defendant cannot set off a claim for loss of goods due to a defective machine belonging to the defendant. Vroman v. Kryn, 86 N. Y. Supp. 94. In an ordinary common law suit on a promissory note the defendant cannot set up a claim arising ex delicto. Ray v. Anderson [Ga.] 47 S. E. 205. Citing Hecht v. Snook & A. Furniture Co., 114 Ga. 923, with authorities there cited. Under New York Code, in an action on notes given for stock in a corporation, a claim for damages for misrepresentation as to the assets and liabilities of such corporation in procuring said notes cannot be set up as a counterclaim. Story v. Richardson, 91 App. Div. [N. Y.] 381.

9. Tort for conversion of piano. Set-off of judgment by virtue of which piano was illegally seized. Hillman v. Edwards [Tex. Civ. App.] 74 S. W. 787. California Code authorizing a counterclaim where the cause of action arises out of the transaction set forth in the complaint, does not authorize a counterclaim for a trespass on land, and injuries to crops by plaintiff's cattle, in an action of claim and delivery to recover the cattle. Glide v. Kayser [Cal.] 76 Pac. 50.

10. Action for work done. Counterclaim for damage done while performing the work. Patterson v. Bradley [Ind. T.] 69 S. W. 821. Damages due to fraudulent misrepresentation may be subject of set off. Action on promissory notes given in payment for ranch. Nisson v. Hood, 140 Cal. 224, 73 Pac. 981. Conversion. O'Brien v. Dwyer, 76 App. Div. [N. Y.] 516. Damages paid for negligent carrying out of contract. Dunn v. Uvalde Asphalt Pav. Co., 175 N. Y. 214, 67 N. E. 439. In an action to recover a deficiency after foreclosure of a mortgage, the mortgagor may set up by way of counterclaim damages sustained by reason of waste by the mortgagee in possession. Staunchfield v. Jeutter [Neb.] 96 N. W. 642. Action upon promissory notes, defendant set up by way of counterclaim loss of collateral through negligence of plaintiff. (No comment by court.) First Nat. Bank v. Park, 117 Iowa, 552, 91 N. W. 826. Tort for sale of horse, counterclaim for feed. Gooch v. Isbell [Tex. Civ. App.] 77 S. W. 973. A bailee has a right to maintain a counterclaim of conversion of the goods against action for work and labor: Counterclaim of failure to return articles. Longfelder v. Renouf, 84 N. Y. Supp. 236. Unliquidated damages arising out of contracts

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nor can a contract liability be used as a set-off to a cause of action in tort.[11] Counterclaim not arising out of the transaction set forth in the petition must run in favor of all defendants and against all plaintiffs.[12] A claim arising,[13] or acquired by defendant after action brought[14] cannot be set off. The claims must be between the same parties.[15] In an action against partners jointly a counterclaim which is proved to be due to one of the partners only will not be upheld.[16] Defendant sued for a debt due by him personally cannot set off a demand due to him in a representative capacity.[17] In an action for conversion of exempt property a judgment cannot be set off against the claim.[18] In case of two insolvent estates each indebted to the other, the dividend to one is to be set off against the dividend to the other.[19] In an action by an administrator against a creditor for conversion of property, the creditor cannot set up a debt due him in counterclaim, and thus obtain a preference.[20] The assignee of a debt due from a corporation may set off such debt; if assigned before the appointment of a receiver, even with knowledge of the corporation's insolvency, against a debt due the corporation.[21] A statutory liability cannot be a matter of set-off where the statute provides that a set-off must be based upon a contract judgment or award.[22] A proceeding for the condemnation of an easement can never be a counterclaim as defined by the Code.[23] A defendant cannot set off a claim for which he has already recovered damages.[24]

or covenants disconnected from the subject-matter of plaintiff's claim are not such claims or demands as constitute the subject-matter of set-off under the statute. In a suit against a surety on a note, he cannot set off a claim on account due principal from plaintiff and assigned to the surety. Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575. In an action ex contractu any other cause of action ex contractu may be set up as a counterclaim, whether founded on the contract sued on by plaintiff or any other, however disconnected or independent. So wherever a tort may be waived, and implied assumpsit brought, such cause of action is properly used as a counterclaim in an action ex contractu. Crane v. Murray [Mo. App.] 80 S. W. 280. A claim for conversion of corn on which defendant had a valid landlord's lien gives rise to an implied assumpsit, and is a valid counterclaim. Id.

11. Action by county against an officer for conversion of funds. Breach of a special contract between county and officer could not be used as a set-off or counterclaim. Comer v. Board of Com'rs [Ind. App.] 70 N. E. 179.

12. Hoaglin v. C. M. Henderson & Co., 119 Iowa, 720, 94 N. W. 247.

13. Breach of contract. Jackson v. Hunt [Vt.] 56 Atl. 1010; Cook v. Gallatin R. Co., 28 Mont. 509, 73 Pac. 131. A matter upon which no cause of action has accrued is not available as a counterclaim. Schlesinger v. Burland, 42 Misc. [N. Y.] 206. Damages arising out of the issuance of an attachment cannot be pleaded by way of counterclaim to the original action. Tacoma Mill Co. v. Perry, 32 Wash. 650, 73 Pac. 801. A judgment does not constitute a set-off if not existing at the time the action was commenced. Boucher v. Powers [Mont.] 74 Pac. 942. Under N. Y. Code a claim by a defendant against an assignor cannot be set-off against an assignee unless the claim arose before the assignment. Bayne v. Hard, 174 N. Y. 534, 66 N. E. 1104.

14. Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575.

15. One of two joint obligors may set up a mutual counterclaim. Suit upon joint notes. York Mfg. Co. v. Rothwell [C. C. A.] 119 Fed. 144.

16. Hunter v. Booth, 84 App. Div. [N. Y.] 585. A debt due from two partners cannot be set off against a debt due one of the partners. Dickenson v. Moore, 117 Ga. 887. One partner cannot use a partnership demand as a set-off against a demand against himself individually. Western C. & Min. Co. v. Hollenbeck [Ark.] 80 S. W. 145.

17. Husband administrator of wife's estate. Richter v. Hanneman, 119 Fed. 471. Debts of a husband due a trustee of his wife's estate cannot be set off by the trustee against the wife's estate in his hands. Owsley v. Owsley, 25 Ky. L. R. 1194, 77 S. W. 394. Debt due a depositary on one account cannot be set off against balance due depositor on another account which depositor had as a trustee which fact the depositary knew. Jeffray v. Towar, 63 N. J. Eq. 530. A person summoned as trustee of a defendant cannot set off a debt due him in his individual capacity by the plaintiff. Howe v. Howe, 97 Me. 422.

18. Staggs' Heirs v. Piland, 31 Tex. Civ. App. 245, 71 S. W. 762.

19. Rue v. Miller [C. C. A.] 124 Fed. 208.

20. Defendant wrongfully obtained and sold collateral for notes held. Succession of Gragard, 110 La. 702.

21. Nix v. Ellis, 118 Ga. 345.

22. Payment of taxes by one of two joint owners set off in an action by other joint owner to recover a certain sum. Montgomery v. Montgomery [Ky.] 78 S. W. 465.

23. Leigh v. Garysburg Mfg. Co., 132 N. C. 167.

24. Contractor agreed to fill in certain land or to pay the defendant a certain price per cubic yard if he failed to do so. He failed to make the filling and defendant recovered from him the agreed price. In an action against the defendant for a street improved, the defendant claimed in set-off the damages to his property because of the failure of the

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§ 4. *Pleading and practice.*—Set-off must be specially pleaded.[25] A defendant's plea alleging that the items of an account set out were due him at the time of filing of the suit is manifestly one of set-off.[26] A defendant's answer, setting up a different contract from one alleged by the plaintiff and claiming a performance of it, constitutes a defense rather than a counterclaim.[27] It must generally contain all the requisites of an original claim.[28] It must not be for a sum beyond the jurisdiction of the court.[29] It may be demurred to.[30] Particulars may be demanded.[31] It must be sustained by sufficient evidence,[32] the burden being on defendant.[33] Statute of limitations is a defense to a claim in set-off where it would be a defense to an action of assumpsit on the claim.[34] Objections are raised in the same manner as to other pleadings.[35] Where counterclaim is pleaded and both parties establish their claims, judgment must be found for the

plaintiff to make the filling. Bodley v. Finley's Ex'r, 24 Ky. L. R. 2478, 74 S. W. 284.

25. Lloyd v. Manufacturers' & M. Warehouse Co., 102 Ill. App. 551. If a defendant sets up a judgment and order of sale in justification of a conversion, without asking affirmative relief he is not entitled to a set-off. Hillman v. Edwards [Tex. Civ. App.] 74 S. W. 787.

26. Northington v. Granade, 118 Ga. 584.

27. Hatcher v. Dabbs, 133 N. C. 239.

28. A defendant's answer setting up a counterclaim to a plaintiff's petition for damages does not materially differ from a petition, and the reply to this answer performs the same office as the answer to the petition. Turney v. Baker [Mo. App.] 77 S. W. 479. Where implied assumpsit is used as a counterclaim in an action ex contractu, defendant's pleading should show that he has waived the tort and elected to sue in assumpsit. Crane v. Murray [Mo. App.] 80 S. W. 280. In an action for fish sold and delivered, plea setting up a special verbal contract and alleging that the fish were supplied in different sized kits than those stipulated for, but failing to show damages from that fact, and stating that the fish were subject to the orders of the plaintiff and offering to return the same, is open to demurrer as failing to show ground for abating the price or a rescission of the contract. Troy Grocery Co. v. Potter [Ala.] 36 So. 12.

29. D. Sullivan & Co. v. Owens [Tex. Civ. App.] 78 S. W. 373.

30. Error to overrule a demurrer to a claim of set-off which shows on its face that the set-off is bad. Open accounts on their face barred by the statute of limitations. Brewer v. Grogan, 116 Ga. 60. The proper judgment upon a demurrer to a counterclaim set up in an answer containing other issues should be interlocutory. Burnett v. Burnett, 86 App. Div. [N. Y.] 386. A surety cannot raise the question as to the propriety of a trial court's action in sustaining a demurrer to his principal's plea in set-off, where both are parties defendant. Suit on bond for purchase price of land. Set-off a breach of covenant in the deed. Kinzie v. Riely's Ex'r, 100 Va. 709.

31. Defendant should sufficiently specify his damages claimed in set-off (contract for goods sold—claim damages by breach of contract). Beck Duplicator Co. v. Fulghum, 118 Ga. 836. A bill of particulars to enable the plaintiff to answer to a counterclaim will not be allowed where each of demands set up by way of counterclaim can be fully answered without the aid of facts which plaintiff seeks to ascertain. Fidelity Glass Co. v. Thatcher Mfg. Co., 88 App. Div. [N. Y.] 287. Until an issue over a counterclaim has actually been made it is premature to ask for information, by bill of particulars, necessary to prepare for trial of the same. Id.

32. Payne v. Amos Kent B. & L. Co., 110 La. 750. Where a counterclaim consists of several items, some of which are undisputed, it is error for the court to charge that the burden is on the defendant to prove each item, the verdict to be for the plaintiff for all those not thus proved. Oliver v. Love [Mo. App.] 78 S. W. 335. Evidence held to have established definitely and certainly the amount of damages to which defendant was entitled as a set-off. L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. [C. C. A.] 128 Fed. 343.

33. Western C. & Min. Co. v. Hollenbeck [Ark.] 80 S. W. 145. When an assigned contract is relied on, he must show ownership thereof at the time the action was brought. Liberty Wall Paper Co. v. Stoner Wall Paper Mfg. Co. [N. Y.] 70 N. E. 501.

34. Trustees of State Hospital for Insane v. Phila. County, 205 Pa. 336.

35. The question whether a partnership demand can be set off against a claim against one partner individually can be properly raised only by objection to the evidence. Western C. & Min. Co. v. Hollenbeck [Ark.] 80 S. W. 145. There is no waiver of an objection to the admission of evidence to sustain a counterclaim by failing to demur, but replying thereto, where the counterclaim is one which from its inherent nature cannot lawfully be interposed. Story v. Richardson, 91 App. Div. [N. Y.] 381. Under New York Code, providing for a counterclaim to be set up against the assignee of a negotiable instrument, a demand set up thereunder was not to be distinguished from any other counterclaim, and when not replied to, the defendant may take such judgment as he may be entitled to on a failure to do so. Hunter v. Fiss, 86 N. Y. Supp. 1121. But he is not entitled to an absolute dismissal of the complaint. Id. On appeal from a justice after trial in a circuit court and verdict on a counterclaim for defendant, the objection that the counterclaim fails to state a cause of action may be raised by motion in arrest of judgment. McCormick Harvesting Mach. Co. v. Hill [Mo. App.] 79 S. W. 745.

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claimant whose demand is found to be in excess.[36] Dismissal of the complaint does not dismiss a counterclaim,[37] but otherwise as to a mutual settlement.[38]

SEWERS AND DRAINS.[39]

§ 1. Independent Organizations Controlling Drainage, Reclamation and Sanitation Districts (1628).
§ 2. Municipal Control (1630).
§ 3. Taxes and Assessments (1631).
§ 4. Contracts and Construction (1633).
§ 5. Management and Operation (1636).
§ 6. Private and Combined Drainage (1638).
§ 7. Obstruction of Drains (1639).

§ 1. *Independent organizations controlling drainage, reclamation and sanitation districts. Organizations.*—Drainage districts created by statute are bodies corporate, though the corporations thus organized are strictly in invitum; they are merely subdivisions of the general powers of the state, for the purposes of governmental administration.[40] In this respect they are classified with counties, townships, school districts, road districts and other quasi involuntary corporations, as distinguished from municipal or private corporations.[41] But, though an involuntary organization, a district is liable to the extent contemplated in the law of its creation.[42]

De facto districts.—Though a drainage district be defectively organized, yet it constitutes a de facto corporation,[43] the existence of which cannot be collaterally attacked except for fraud.[44]

Validity of acts.—Statutes providing for the creation of drainage districts with power to levy assessments, elect officers, etc., are not unconstitutional as creating private corporations for the improvement of private property, and forcing private individuals to become members against their will.[45] A special act for the

36. Turney v. Baker [Mo. App.] 77 S. W. 479; Lloyd v. Manufacturers' & M. Warehouse Co., 102 Ill. App. 551.

37. In Missouri, the dismissal of a complaint in a justice court does not dismiss a counterclaim already filed. McCormick Harvesting Mach. Co. v. Hill [Mo. App.] 79 S. W. 745. In replevin for chattels mortgaged to secure payment for a binder which was subsequently taken from defendant with his consent, the answer set up a counterclaim for the value of the binder and demanded the difference between that value and the unpaid portion of the purchase price. Held, defendant was not entitled to recover the full value of the binder though plaintiff abandoned his complaint and the case was tried on the counterclaim. Id.

38. Where a suit in which a counterclaim is interposed as a defense is voluntarily settled before judgment, the court should enter judgment dismissing both complaint and counterclaim. Dr. Shoop Family Medicine Co. v. Schowalter [Wis.] 98 N. W. 940.

39. See, also, the topics Public Contracts and Public Works and Improvements, in which the principles common to all forms of public works are discussed.

40. Rood v. Claypool D. & L. Dist. [C. C. A.] 120 Fed. 207; People v. Dyer, 205 Ill. 575, 69 N. E. 70.

41. Rood v. Claypool D. & L. Dist. [C. C. A.] 120 Fed. 207.

42. Rood v. Claypool D. & L. Dist. [C. C. A.] 120 Fed. 207. A statute giving a district power to contract and be contracted with, and to sue and be sued, contemplates that the district shall not only be held to perform its contracts, but to pay damages arising from its failure to perform them. Id. In a contract between a drainage district and one who agrees to construct certain ditches for the district, there is an implied condition that the district will provide the necessary right of way, without which the contractor could not perform the contract on his part. Id.

43. People v. Dyer, 205 Ill. 575, 69 N. E. 70.

44. An order of court creating a drainage district is not subject to collateral attack except for fraud. Stone v. Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405. Accordingly, the existence of a district, organized by only one township, though it includes lands in adjoining townships, cannot be collaterally attacked by the owner of land outside of the township. People v. Dyer, 205 Ill. 575, 69 N. E. 70.

45. Nor is such a law unconstitutional as depriving one of the right of jury trial, no right to trial by jury having been accorded in such cases by the common law or constitution. Mound City L. & S. Co. v. Miller, 170 Mo. 240, 70 S. W. 721, 60 L. R. A. 190. It is further held in this case, that such statute is not invalid because of the fact that each owner of land is entitled to one vote for each acre owned by him, nor is the statute within the constitutional prohibition against taking private property for private use. The constitutional provision that no person shall be deprived of property without due process of law is not violated by the failure of an act authorizing the establishment of a drainage district, to provide for interested parties to have a day in court. St. Louis S. W. R. Co. v. Grayson [Ark.] 78 S. W. 777. Drainage laws may constitutionally provide for the taking of land in order to reclaim swamp lands by the construction of drainage ditches, due compensation to the owner of lands taken being provided for [Rev. St. 1898, c. 54,

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establishment of a drainage ditch is not invalid merely because a general statute could have accomplished the same result, but such act does not suspend the general law, nor is it impliedly repealed by the subsequent enactment of a general statute.[46] A law authorizing district courts to establish and provide for the construction of ditches to drain wet and overflowed land, where such land lies in two or more counties, is not unconstitutional on the ground that it confers legislative powers and functions on the judicial branch of the government.[47] Statutes providing for the drainage of tracts of wet and marshy land, if in the interests of public health, convenience or welfare, are held to be constitutional, though they contemplate and authorize the taking of private property.[48] An amendatory act entitled "An act to amend section * * * 1466 of the Revised Codes relating to the establishment, construction and maintenance of drains" is not unconstitutional as embracing more than one subject.[49]

Proceedings for establishing.—A proceeding, under a statute, providing for the creation of a drainage district by petition to the circuit court, notice to parties interested, trial of issues and rendition of a decision having the characteristics of a decree, is a judicial proceeding.[50] Petitions for the establishment of a drainage district should be filed as required by statute.[51] Under the Illinois law, a drainage district affecting lands lying in a single township may be organized by the commissioners of highways of that township; where the lands lie in two townships, three commissioners of each township, constitute the organization, and where the lands lie in three or more townships, the district can be organized only in the county court.[52] Under this law the commissioners of a single township have no authority to organize districts comprising lands lying in more than one township,[53] nor has the county court authority to organize a district when the lands affected lie wholly in one town-

held constitutional]. Rude v. St. Marie [Wis.] 99 N. W. 460.

46. St. Louis S. W. R. Co. v. Grayson [Ark.] 78 S. W. 777.

47. State v. Crosby [Minn.] 99 N. W. 636.

48. State v. Board of Com'rs of Polk County, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161; Burgulieres v. Sanders, 111 La. 109. A proceeding to drain land for agricultural purposes is an exercise of the right of eminent domain, the res being the defendant's right in his land, and it is immaterial in what county the lands to be drained lie, as the proceeding affects only the land over which the ditch is to be constructed. Lile v. Gibson, 91 Mo. App. 480. It is competent for the legislature to provide for the completion of a partly finished drain, although the expense is increased thereby. The increased expense must be paid by those who are benefited by the drain as a part of the cost. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841. If for purely private purposes, such statutes are unconstitutional. State v. Board of Com'rs of Polk County, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161. It is not important that drainage proceedings are commenced on petition or by one or more private citizens; nor is it controlling by any means that private interests are advanced and promoted, nor need any considerable portion of the community be directly benefited by the proposed improvement. Id.

Presumption of validity: Since the legislature has no power to provide for a drainage system in the interest of individuals for private advantage, it will be assumed that a drainage statute was intended for public and not for private benefit. State v. Board of Com'rs of Polk County, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161. The results to be derived from a drainage law and one which has for its purpose the irrigation of large bodies of land are the same as respects the public good. Mound City L. & S. Co. v. Miller, 170 Mo. 240, 70 S. W. 721, 60 L. R. A. 190. As the legislature has no authority to authorize the construction of a ditch, except for public purposes, the commissioners have no power to order one constructed for a private purpose, and the question whether a proposed ditch may be constructed at all depends primarily upon whether it will result in a public benefit. State v. Board of Com'rs of Polk County, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161.

49. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841.

50. Stone v. Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405.

51. Bishop v. People, 200 Ill. 33, 65 N. E. 421. Application for a drain, made in accordance with c. 54 of Rev. St. 1898, to "the supervisors in the town" in which petitioners reside, is made to such supervisors as governmental officers and not as a "town board," so that the provisions of Rev. St. 1898, § 3187a do not apply to such a proceeding, and the notice therein provided for is not required. Rude v. St. Marie [Wis.] 99 N. W. 460.

52. 4 Starr & C. Ann. St. 1902, c. 42, pp. 470, 471.

53. Information in quo warranto setting up such facts held good on demurrer. People v. McDonald, 208 Ill. 638, 70 N. E. 646.

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ship.[54] Where the record of the establishment of a drainage district does not show that all the acts required of the commissioners have been done, the performance of such acts cannot be presumed.[55]

Dissolution of drainage districts.—In Illinois, the dissolution of drainage districts is provided for by statute.[56]

Territory and alteration thereof.—The territory to be included in a drainage district is generally specified by the act creating such district, and the extent and boundary of the tract are defined therein.[57]

Officers and government.—The election of officers public in character for a district may be contested, and the right of the person to whom the certificate is issued to hold such office may be tried.[58] Where one member of a board of commissioners is incompetent to act, any action of the board will be void, though the other two commissioners are competent.[59] The officers of a drainage district have, in general, plenary power to keep ditches in repair, and for a failure to perform their duties in this respect, they are liable to penalties.[60]

§ 2. *Municipal control. Powers of municipality.*—The right of a municipality to construct sewers and drains, thereby benefiting its thoroughfares and protecting the health of its inhabitants, is well settled.[61] This right is independent of statute, being incidental to the general powers of a city.[62] Under the right of eminent domain, a municipality may seize private property for the construction of its drains and sewers.[63] A city council, being authorized to order construction of sewers, has discretionary power to order the construction of useful appurtenances, including connections with private premises.[64] The jurisdiction of a city for sewage and drainage purposes extends over all the territory situated within its limits.[65] A

54, 55. People v. McDonald, 208 Ill. 638, 70 N. E. 646.

56. Laws 1889, p. 119, providing for dissolution of drainage districts after notice and a hearing applies to all drainage districts, whether organized under Act May 29, 1889, or by proceedings in the county court. Cleary v. Hoobler, 207 Ill. 97, 69 N. E. 967.

57. An act providing that a district shall include the "track and roadbed" of a certain railroad includes the right of way of such railroad. St. Louis S. W. R. Co. v. Grayson [Ark.] 78 S. W. 777.

58. This was held of irrigation district officers. Under the Idaho statute, jurisdiction to try such contested elections is vested in the district courts. Hertle v. Ball [Idaho] 72 Pac. 953.

59. Incompetency because of inchoate interest. King's Lake D. & L. Dist. v. Jamison, 176 Mo. 557, 75 S. W. 679. The competency of a drainage commissioner to act may be objected to for the first time on appeal. Id. Validity of acts of only part of board where all its members are competent to act. Turnquist v. Cass County Drain Com'rs, 11 N. D. 514, 92 N. W. 852. The authority of members of a board of drain commissioners is joint. Id.

60. Under the Illinois statute, if the commissioners fail to keep a ditch in repair, the law gives petitioners a remedy by mandamus, to compel them to levy assessments and make repairs, and the commissioners are also liable to penalties for failure to perform their duties. Cleary v. Hoobler, 207 Ill. 97, 69 N. E. 967.

61. City of Valparaiso v. Kyes, 30 Ind. App. 447, 66 N. E. 175; Oathout v. Seabrooke, 159 Ind. 529, 65 N. E. 521. A power granted to cities to construct sewers and regulate their use does not authorize them to grant such right to private individuals or companies. Weaver v. Canon Sewer Co. [Colo. App.] 70 Pac. 953.

62. Contoocook Fire Precinct v. Hopkinton, 71 N. H. 574. Sewerage works are essentially matters of local municipal concern, and a board whose functions relate exclusively to them is a municipal and not a state agency. State v. Kohnke, 109 La. 838.

63. Oathout v. Seabrooke, 159 Ind. 529, 65 N. E. 521. But, being predicated upon the right of eminent domain, such seizure can only be made where some public benefit is to be subserved; hence, county commissioners have no right to construct ditches when only private interests are involved, and they must first ascertain, by the means provided by law, that some public benefit is to be promoted before acting upon the subject. Id.

Constitutionality of charter provision: A city charter authorizing the construction of sewers, and providing that the costs shall be charged proportionately on all property benefited by the contemplated improvement is constitutional. Prior v. Buehler & C. Const. Co., 170 Mo. 439, 71 S. W. 205.

64. The addition of private connections does not make the improvement a private one. Boyce v. Tuhey [Ind.] 70 N. E. 531.

65. Bishop v. People, 200 Ill. 33, 65 N. E. 421. Accordingly, where a portion of a proposed drainage district was situated within a city, which had expended a large sum of money in improving a certain creek, that formed a part of the proposed district, the city thereby acquired complete jurisdiction of the creek, which could not be appropriated by the district. Id.

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city has the right to construct ditches for the drainage of surface water from its streets into a natural watercourse, so long as it exercises reasonable care in doing the work.[66]

Officers.—Where the authority to establish and maintain all sewers and drains necessary for the public health or convenience is vested by the charter in certain municipal officers, only such officers have the legal right to incur obligations, binding upon the city, in regard to the construction of sewerage.[67] A city sewerage board having the attributes and powers of a body corporate is held to be a corporation.[68]

§ 3. *Taxes and assessments. Persons and property assessable.*—It is generally provided in sewerage and drainage laws that all property benefited by the improvement shall be assessed to defray the cost thereof, in proportion to the benefits received.[69] Towns[70] and public highways which are benefited are liable to an assessment by a drainage district in the same manner and to the same extent as private individuals.[71] But lands granted by the Federal government to a state for school purposes are held in trust, and are not subject to taxation or assessment for benefits arising from the construction of drains.[72]

Constitutionality of assessment acts.—A statute which provides for a hearing for landowners, upon notice, before assessment becomes final, is not vulnerable to the objection that it deprives such owner of property without due process of law.[73]

66. Miller v. Newport News [Va.] 44 S. E. 712. The questions of whether a drain is a natural watercourse and whether the city has altered its use are for the jury to determine under proper instructions from the court. Id.

67. Their power extends to the determination of what sewers shall be built and how they shall be constructed. Draper v. Grime [Mass.] 69 N. E. 1068.

68. State v. Kohnke, 109 La. 838.

Membership of board: Where a sewerage board is created by the constitution of a state exclusively for the benefit of a city, a statute incorporating ex officio into its membership officers not elected by the city authorities is violative of the constitution and to that extent void. State v. Kohnke, 109 La. 838. Where a writ of quo warranto is directed exclusively against certain individuals claiming membership in a city sewerage board, matters pertaining to the board itself cannot be inquired into. Id. The organization of a special board for the control of a city's sewerage system, by an act of the legislature, may be changed by a subsequent legislature. Id.

69. Walker v. Chicago, 202 Ill. 531, 67 N. E. 369; Bishop v. People, 200 Ill. 33, 65 N. E. 421; People v. Glenn, 207 Ill. 50, 69 N. E. 568; Cleary v. Hoobler, 207 Ill. 97, 69 N. E. 967; Wetmore v. Chicago, 206 Ill. 367, 69 N. E. 234. Drains cannot be constructed unless funds are provided to pay such expenses as properly enter into their construction, and no other source exists for obtaining funds than assessments of benefits. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841. Common councils of cities are expressly authorized by statute in Indiana to order the construction of sewers and to assess the cost against the real estate benefited [Acts 1889, p. 237, c. 118; Burns' Ann. St. 1901, § 4288 et seq.]. Boyce v. Tuhey [Ind.] 70 N. E. 531. These statutes contemplate that some lands would be benefited and others damaged; that some would be both benefited and injured; that the benefits might exceed the damages, or the damages exceed the benefits; and that assessment should be made of all damages and benefits, so as to do justice to all the owners of the property affected. Cleary v. Hoobler, 207 Ill. 97, 69 N. E. 967. A ditch and its branches, thus made by special assessment, cannot be said to have been voluntarily made. Bishop v. People, 200 Ill. 33, 65 N. E. 421. Property not abutting on the line of a main sewer may be assessed to the extent of its benefits if it is within the defined limits of a district having the right to drain into the sewer. Walker v. Chicago, 202 Ill. 531, 67 N. E. 369. Where a drainage ditch is wholly in one county, the circuit court thereof has authority to assess benefits to lands situated in another county but benefited by the ditch. State v. Elliott [Ind. App.] 70 N. E. 397.

70. Commissioners of Highways v. Big Four Drainage Dist., 207 Ill. 17, 69 N. E. 576.

71. Com'rs of Big Lake Drainage Dist. v. Com'rs of Highways, 199 Ill. 132, 64 N. E. 1094.

Mandamus: Mandamus will lie to compel the levy of a tax to pay a drainage assessment against a town. Com'rs of Highways v. Big Four Drainage Dist., 207 Ill. 17, 69 N. E. 576.

72. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841.

73. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; Stone v. Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405. Statutes authorizing the apportionment of taxes among the owners of land along, or in the vicinity of, a drain, are unconstitutional if they provide only for notice to abutting landowners. Beebe v. Magoun [Iowa] 97 N. W. 986. A law providing for a reassessment, without further notice, where the amount first reported by the commissioners is not sufficient, is held to be valid. Stone v. Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405. Landowners who are assessed for benefits are not deprived of their property without due process of law by the issuance of interest-bearing bonds for the construction

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The fact that a landowner is rendered liable for the assessment against his will does not affect the validity of the law authorizing such assessment.[74] No assessments can validly be made upon lands for drainage purposes, even though they be benefited thereby, except toward payment for a public ditch.[75] Assessments must be for those benefits which are special to the land, and not merely conjectural or speculative.[76] The constitutionality of particular statutes depends upon their peculiar provisions.[77]

Assessment proceedings.—In most of the states special drainage acts control assessment proceedings, and the various steps therein, such as acquisition of jurisdiction,[78] fixing of the tax lien,[79] filing of certificates,[80] confirmation of levy,[81] registry of levy,[82] and manner of collection.[83] The scope of the levy is likewise controlled

of drains, and the postponement of assessments and division thereof into as many years as the bonds have to run. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841.

74. Mound City L. & S. Co. v. Miller, 170 Mo. 240, 70 S. W. 721, 60 L. R. A. 190.

75. State v. Board of Com'rs of Polk County, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161; Mound City L. & S. Co. v. Miller, 170 Mo. 240, 70 S. W. 721, 60 L. R. A. 190. If a sewer be in fact a public one, an objection to a tax, that a district sewer connecting with it does not connect with one provided by ordinance, is of no avail. Akers v. Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536. A statute which authorizes assessments on city lots to pay for the construction of sewers is not unconstitutional, if it does not provide for charging the cost of the same on property not specially benefited. City of Kan. City v. Gibson, 66 Kan. 501, 72 Pac. 222. Where a statute provides that before proceeding to assessment it must be ascertained that the benefits to be derived will equal or exceed the cost of the work, it does not authorize the taking of property without compensation, or exceed the taxing power. Stone v. Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405.

76. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841. Incidental expenses contributing to the construction of a drain are legitimate charges. Id.

77. A law providing for the revision, after notice, of an order confirming a commissioner's report, though applicable to orders made prior to its enactment, is not unconstitutional, because of its retroactive effect. Stone v. Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405. An act providing for the allowance and taxation of an additional attorney's fee against plaintiff, in actions to enjoin drainage assessments, is unconstitutional and void, if the subject of the act is not expressed in its title. Turnquist v. Cass County Drain Com'rs, 11 N. D. 514, 92 N. W. 852.

78. Description of land in petition, as giving the court jurisdiction. Keiser v. Mills [Ind.] 69 N. E. 142.

79. Lien fixed by filing of petition. Keiser v. Mills [Ind.] 69 N. E. 142.

80. Filing of certificate of amount to be levied. People v. Glenn, 207 Ill. 50, 69 N. E. 568. Form of certificate. Id. A statute declaring that no assessment shall be considered illegal for any irregularity or informality not affecting the substantial justice of the tax does not render immaterial a failure of the certificate to conform to the statutory requirements. Id.

81. Necessity for judgment of confirmation. Com'rs of Highways v. Big Four Drainage Dist., 207 Ill. 17, 69 N. E. 576. Proceedings of city council's adopting and confirming assessments for sewers are not subject to collateral attack by property owners, unless the defect in such proceedings affected its jurisdiction. Boyce v. Tuhey [Ind.] 70 N. E. 531.

82. Registry of drainage levy. People v. McDougal, 205 Ill. 636, 69 N. E. 95. A board of supervisors, having been enjoined from levying a tax for a drainage ditch, could not avail itself of an amendment of its record, made subsequent to the decree against it. Tod v. Crisman [Iowa] 99 N. W. 686. Drainage record as evidence. People v. Glenn, 207 Ill. 50, 69 N. E. 568. Defective record. People v. McDougal, 205 Ill. 636, 69 N. E. 95.

83. Warrants for collection issued to whom. People v. McDougal, 205 Ill. 636, 69 N. E. 95. Under a statute providing that ditch assessments are to be collected in the same manner as other taxes, grantees under deeds issued on sales based on ditch certificates are, on a failure of their deeds, entitled to liens in the same manner as the holders of other void tax deeds. Skelton v. Sharp, 161 Ind. 383, 67 N. E. 535. The court, in a suit to recover benefits assessed against land, has power to correct mistakes in description of the land in the commissioners' report, and will exercise the power when properly invoked. Ager v. State [Ind.] 70 N. E. 808. A motion in arrest of judgment, in a suit to enforce the assessment of benefits for the construction of a public drain, on the ground that the description of the land was too indefinite to sustain a judgment, presents no issue which the landowner is authorized to tender. Id. But it does amount to an admission of record that there was a defect or error in the description, and the decision on the motion was not a finding that the description was correct or sufficient. Id. In Kentucky, where land is sold for an assessment for a drainage ditch and the sale is afterwards set aside for an irregularity, the purchaser at the sale has a lien on the land for the taxes paid by him and costs, with interest from the time of payment. Where the owner had actual notice, but their notices read to "the heirs" of a person, this was an irregularity within Ky. St. 1903, § 4036. (See, also, Acts 1893, p. 1502, c. 266.) Smith v. Petrie [Ky.] 79 S. W. 251.

84. A farm drainage act providing that the commissioners of a drainage district may

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by the act under which it is made.[84] There are certain principles, however, which seem to have a more general application.[85]

Especially to be noted is the principle that statutory requirements preliminary to the levy of an assessment are for the protection of the taxpayer and are mandatory; hence the provisions of the law in this respect must be strictly complied with.[86] But a statute providing for the subjection and sale of the lands of nonresidents for the payment of delinquent levee taxes need only be substantially complied with.[87] A law prescribing the mode of procedure for the establishment of drainage ditches which fails to provide for notice of the proceedings to the owners of land in the vicinity of the ditch, which is subject to assessment, is wholly void,[88] and a tax against an abutting owner, for a ditch constructed under such law, is unenforceable, though such abutting owner had the notice required by the law.[89]

Conclusiveness of orders of assessment.—Where the board has acquired jurisdiction to construct drains by the filing of proper petitions therefor, and due notice of the hearing of the review of assessments was given, the determination of the board is conclusive in the absence of fraud;[90] nor is an order of court confirming such assessments subject to collateral attack, except for fraud.[91] A landowner who is assessed for the construction of a drain and who, with knowledge that the proceedings were going on, neglects to take the statutory steps for determining their validity, is estopped to contest the collection of the assessment.[92]

Appeals from orders of assessment.—The decision of drainage commissioners in assessing a tax is generally subject to review by the courts.[93]

§ 4. *Contracts and construction.*—The manner in which sewers and drains are to be constructed is generally regulated by the law providing for the proposed improvement.

levy a tax sufficient to "keep the work or any part thereof in repair" does not authorize them to levy a tax to clean out, deepen and change the bottom of a drain. People v. McDougal, 205 Ill. 636, 69 N. E. 95. A drainage district organized by the authorities of only one township cannot make assessments upon lands in adjoining townships, which did not unite in the organization of the district. People v. Dyer, 205 Ill. 575, 69 N. E. 70. Power of improvement commission to levy assessments repealed and vested in court commissioners, but act creating commission not repealed. Bakman v. Hackensack Imp. Commission [N. J. Law] 57 Atl. 141.

85. Burden of proving authority to levy tax. People v. McDougal, 205 Ill. 636, 69 N. E. 95. No presumption of nonassessment arises from the failure of the commissioners' report to name party as beneficiary. Keiser v. Mills [Ind.] 69 N. E. 142. Conclusiveness of statement of drainage commissioners as to object of tax. People v. McDougal, 205 Ill. 636, 69 N. E. 95. Waiver of objections. Com'rs of Highways v. Big Four Drainage Dist., 207 Ill. 17, 69 N. E. 576. Absolute and exact equality in the matter of apportionment is not expected or required. City of Kan. City v. Gibson, 66 Kan. 501, 72 Pac. 222. Validity of acts of de facto engineer as affecting the legality of sewer tax. Akers v. Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536.

86. People v. Glenn, 207 Ill. 50, 69 N. E. 568; Wetmore v. Chicago, 206 Ill. 367, 69 N. E. 284. The taxpayer has the right to be informed for what purposes his property is to be taxed. People v. Glenn, 207 Ill. 50, 69 N. E. 568. A drainage tax adopted by the vote of the taxpayers of a city is subject to the conditions imposed in voting upon it. State v. Kohnke, 109 La. 838.

87. Collateral attack on proceedings. Johnson v. Hunter, 127 Fed. 219.

88, 89. Smith v. Peterson [Iowa] 99 N. W. 552.

90. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; Turnquist v. Cass County Drain Com'rs, 11 N. D. 514, 92 N. W. 852.

91. Stone v. Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405.

92. Nor can he sue in equity to test the validity of the proceedings after permitting the drain to be constructed without objection. Wilson v. Woolman [Mich.] 94 N. W. 1076. Estoppel to deny validity of law or legality of proceedings. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841. Injunction against collection of assessments. Id. Estoppel from enjoining collection of assessments. Turnquist v. Cass County Drain Com'rs, 11 N. D. 514, 92 N. W. 852.

93. People v. McDougal, 205 Ill. 636, 69 N. E. 95; People v. Glassco, 203 Ill. 353, 67 N. E. 499. Under a statute providing for an appeal, by any person aggrieved by an assessment, to the supreme court within 30 days, and that such appeal shall bring up the propriety of the amount of the assessment, it is held that an appeal is an adequate remedy for all errors at the trial which affect the amount of the award. State v. Superior Ct. of King County, 31 Wash. 32, 71 Pac. 601. Time within which the validity of assessments may be attacked under the Kansas statute. City of Kan. City v. Gibson, 66 Kan. 501, 72 Pac. 222.

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Contracts.—A municipality is liable for funds expended in the construction of a sewerage system under an implied as well as an express contract.[94] Under a contract with a city for the construction of a sewer, the contractor is not responsible for defects caused by laying pipes according to the direction of the city engineer, the contract specifying that the engineer's directions must be followed.[95] In some states it is provided that a ditch contractor shall have a lien on the property to secure the amount due him under his contract.[96]

The question of whether the construction of a particular sewer or drain will inure to the public health, convenience or welfare is a judicial one, which the legislature cannot determine to the exclusion of the courts.[97] But in respect as to whether a statute providing for a general sewage or drainage system is a public benefit is for the legislature and not for the courts to determine; hence, in the absence of fraud or oppression, the propriety of the legislative decision is not subject to judicial review.[98]

An ordinance providing for the construction of a sewer or sewers must describe the proposed improvement with reasonable certainty.[99]

A statute providing for the construction of a drainage ditch does not authorize the construction of a levee not incidental to the building of such a ditch.[1]

Proceedings for establishing.—The proceedings for the establishment of a drainage ditch are generally regulated by statute. The first step to be taken, under most of these statutes, is the giving of notice to parties interested of the proposed improvement.[2]

A petition in proper form filed as required by statute is a jurisdictional prerequisite to the authority of commissioners to entertain proceedings thereunder, but a description of a proposed ditch need not be stated with precise accuracy.[3]

94. Contoocook Fire Precinct v. Hopkinton, 71 N. H. 574. Acceptance and use of a sewer by a town with knowledge that it was expected to pay the cost of its connection, would make it liable for labor and materials put into the sewer, though it did not authorize it to be constructed in the first instance. Id. Ratification of the unauthorized construction of a sewer operates as matter in estoppel. Akers v. Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536. Proof of ratification. Id.

95. In general, however, a city engineer has no authority to modify a contract for sewerage construction. Lamson v. Marshall [Mich.] 95 N. W. 78. Engineer's estimates binding if honestly made. Burden of proving dishonesty. Id. Penalty for noncompletion of work. Stipulated damages. Waiver of stipulation. Extension of time. Id.

96. **Statute of limitations:** The statute of limitations only begins to run against an action to enforce a ditch contractor's lien, under the Kentucky statute, from the time the county surveyor accepts the work and gives a certificate of the amount due. Dixon v. Labry [Ky.] 78 S. W. 430. Sufficiency of petition to enforce contractor's lien. Dixon v. Labry, 24 Ky. L. R. 697, 69 S. W. 791.

97. State v. Board of Com'rs of Polk County, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161; Walker v. Chicago, 202 Ill. 531, 67 N. E. 369.

98. Prior v. Buehler & C. Const. Co., 170 Mo. 439, 71 S. W. 205; State v. Board of Com'rs of Polk County, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161. The determination that a sewer is necessary by the municipal assembly of a city is conclusive in the absence of fraud. Akers v. Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536.

99. Ordinance defective for failure to show with certainty the length of proposed drain. Wetmore v. Chicago, 206 Ill. 267, 69 N. E. 234. An ordinance authorizing the construction of a branch sewer, in accordance with the provisions of the main sewer, is valid. Akers v. Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536. Ordinance sufficiently designating size, dimensions and plans of sewer. Id. Sufficiency of description of proposed sewer and specifications of manholes and catchbasins. Walker v. Chicago, 202 Ill. 531, 67 N. E. 369.

1. Royse v. Evansville & T. H. R. Co., 160 Ind. 592, 67 N. E. 446.

2. Lile v. Gibson, 91 Mo. App. 480; Walker v. Chicago, 202 Ill. 531, 67 N. E. 369. Only landowners reported as being affected by proposed work need be notified. Pleasant Civil Tp. v. Cook, 160 Ind. 533, 67 N. E. 262. When notice of filing of commissioners' report and time of hearing unnecessary under Indiana statute. Id. Under a statute requiring that the court shall examine the proceeding of the drain commissioner and notify all persons whose lands are to be traversed and who have not released the right of way, a township cannot restrain the construction of a drain merely because it was not notified of the proceedings. Township of Flynn v. Woolman [Mich.] 95 N. W. 567.

3. It is sufficient if the starting point, course, and terminus be stated with approximate accuracy. State v. Board of Com'rs of Polk County, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161. Sufficiency of petition. Pleasant Civil Tp. v. Cook, 160 Ind. 533, 67 N. E. 262. A petition asking for the construction of a ditch and levee, and alleging that "the con-

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The practicability of a proposed drain is sometimes referred to commissioners or engineers, who are required to render a report thereon.[4]

Costs.—In drainage proceedings, costs are granted to the successful, against the losing party, as in ordinary suits.[5]

Jurisdiction of drainage proceedings.—The tribunals, in whom jurisdiction for the trial of drainage proceedings is vested, are generally specified in the drainage laws of the several states.[6]

Appeals.—An order of a board of commissioners for the establishment of a drainage ditch may be appealed from where objections thereto have been overruled.[7] Where a statute provides a special remedy to any person aggrieved by the actions of drain commissioners, and the time within which he must avail himself thereof, a failure to take advantage of such remedy within the time designated bars his right

struction of said work is necessary to accomplish the object of the petition," cannot be treated as sufficient for the construction of the ditch alone after holding that no levee could be constructed under the statute. Royse v. Evansville & T. H. R. Co., 160 Ind. 592, 67 N. E. 446. Though persons not named in a drainage petition, but who are affected by the proposed ditch, may file a remonstrance after the original parties have lost the right under the statute, by lapse of time, they must show that their failure to act sooner was not due to lack of diligence. Keiser v. Mills [Ind.] 69 N. E. 142.

Effect of demurrer: A demurrer, to an allegation that plaintiff's land will not be benefited by a proposed levee improvement, does not admit the truth of such allegation. St. Louis S. W. R. Co. v. Grayson [Ark.] 78 S. W. 777.

4. Time of making order by drain commissioners as to practicability of proposed drain. Township of Flynn v. Woolman [Mich.] 95 N. W. 567. Failure of record to show when minutes of survey were received by commissioners. Id. Though not marked "Filed" at the time of filing, the report of a city engineer as to the establishment of a sewer is not thereby rendered invalid. Akers v. Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536.

5. Bond for costs. Assignment of error to judgment against sureties on bond. In re Bradley, 117 Iowa, 472, 91 N. W. 780. When the statute requires that, on a petition for establishing a drain, a bond must be given for costs, the board of commissioners retains jurisdiction until the amount of the bond is fixed. Spriggs v. State, 161 Ind. 225, 66 N. E. 893. Amount of recovery on bond. Id. Suit for costs by drainage commissioners against applicant where proceedings for drainage were dismissed. Brown v. Kennedy [Mich.] 93 N. W. 1073. When judgment for costs proper. Com'rs of Highways v. Big Four Drainage Dist., 207 Ill. 17, 69 N. E. 576.

6. Strayer v. Taylor [Ind.] 69 N. E. 145; Lile v. Gibson, 91 Mo. App. 480. A wrong decision by a board of drainage commissioners, in determining as to its jurisdiction, does not oust it of authority in the premises. Strayer v. Taylor [Ind.] 69 N. E. 145. Under the Missouri statute, a proceeding before a justice of the peace to ditch land for agriculture drainage does not require any statement or petition to be filed with the justice, but a rough sketch or plat of the land to be drained or across which the drain is to be constructed, and, where such statement is in fact filed, the averments thereof cannot affect the jurisdiction of the justice. Lile v. Gibson, 91 Mo. App. 480. Objection to jurisdiction. Burden of proof. Strayer v. Taylor [Ind.] 69 N. E. 145.

7. If such order be of an administrative nature, it need not be final to give the court jurisdiction. Strayer v. Taylor [Ind.] 69 N. E. 145. On appeal, by remonstrants in proceedings for the establishment of a drainage ditch, no objections except those which go to the jurisdiction of the county commissioners over the subject-matter can be considered, unless they were raised in the commissioners' court. Id. Under a statute providing that any person not satisfied with the decision of the commissioners may appeal to the county court, by filing a bond conditioned to pay taxes and costs, etc., an appeal is fully taken, and the county court has jurisdiction of the parties and subject-matter, after the filing and acceptance of the requir-ed bond, and the issuance and service of, and return to a supersedeas. Frahm v. Commissioners of Craig Drainage Dist., 200 Ill. 233, 65 N. E. 649. Under the **Missouri** statute, appeals from an order of the county court confirming the report of drainage commissioners are not limited to the assessment of damages and benefits, but apply to the whole case. King's Lake D. & L. Dist. v. Jamison, 176 Mo. 557, 75 S. W. 679. But such an appeal cannot be had directly to the supreme court, but must be taken through the circuit court. Id. Under the **Indiana** statute, providing for the construction of drains by boards of commissioners, a finding by the board against a proposed drainage ditch is conclusive and not appealable to the circuit court, where the judgment of the board is based upon the decision of reviewers that the work is not of public benefit. Oathout v. Seabrooke, 159 Ind. 529, 65 N. E. 521. Full name of party as ground for dismissing appeal in drainage proceedings, under **Indiana** statute. Keiser v. Mills [Ind.] 69 N. E. 142. But where, after exceptions had been filed to the report of an engineer appointed to examine the construction of a public ditch, the board of county commissioners, after examining and considering the report and the exceptions, filed an order overruling the exceptions and accepting and approving the report, such order was not a final order or judgment from which the exceptant was entitled to appeal. Studebaker v. Board of Com'rs, 161 Ind. 583, 69 N. E. 256. When motion for order establishing drain need not be sustained on appeal. In re Bradley, 117 Iowa, 472, 91 N. W. 780.

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to object.[8] When the statute authorizes the rejection of any bid for contracts for sewer construction, the fact that the contract was not to the lowest bidder does not alone show fraud.[9] Where two modes of procedure are provided for the construction of sewers by cities, a complaint alleging that one mode was not followed does not show the contract to be invalid.[10]

Liability for improper construction.—A municipality is liable for negligence in the construction of a sewer or drain. Accordingly a drain so negligently constructed by a county as to cause water to back and accumulate on the land of an adjoining proprietor, to his injury, gives such owner a cause of action for damages against the county.[11] But a city is not liable for failure to anticipate and provide against an unforeseen injury resulting from the construction of a sewer.[12]

Nor is a municipality liable to landowners for injuries caused by the discharge of surface water from ditches, constructed by the municipal authorities, diverting such water from its natural course.[13] Contributory negligence of the plaintiff, in an action for damages alleged to have been caused by improper drainage from the defendant's lands, is a good defense to the action.[14]

§ 5. *Management and operation. Duty to maintain and repair.*—As a general rule, it is the duty of a municipality to maintain its sewers and drains, and keep them in such reasonably good repair as to enable them to perform their ordinary functions.[15] A city is not an insurer of the condition of its sewers, though

8. Horn v. Board of Sup'rs [Mich.] 93 N. W. 256. Where the jurisdiction of the board is established by the filing of a sufficient petition, and proper notice of hearing has been given, courts will not inquire into the correctness of their judgment upon questions within their jurisdiction. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841. Finality of judgment confirming commissioner's report under Indiana statute. Pleasant Civil Tp. v. Cook, 160 Ind. 533, 67 N. E. 262.

9, 10. Peckham v. Watsonville, 133 Cal. 242, 71 Pac. 169.

11. Todd v. York [Neb.] 92 N. W. 1040; Kent County Com'rs v. Godwin [Md.] 56 Atl. 478; City of Valparaiso v. Kyes, 30 Ind. App. 447, 66 N. E. 175. Working as a laborer upon a drain does not estop an owner of land from asserting his right to compensation for injuries to his land caused by the negligent construction of such drain. Kent County Com'rs v. Godwin [Md.] 56 Atl. 478. A city is liable for filling up a creek, which naturally drained a comparatively small area, and putting in a small sewer pipe, to drain a much larger area, which is so inadequate to carry off high water drainage as to cause a nuisance. Hentz v. Mt. Vernon, 78 App. Div. [N. Y.] 515. In constructing a street over a watercourse, a city is legally bound to construct a culvert of sufficient capacity to allow the free and unobstructed flow of said watercourse, and to keep and maintain such culvert in condition for this purpose. Lynch v. Clark [R. I.] 56 Atl. 779. While a city is not bound to establish sewers and will not be responsible to a citizen for failing to provide them for any part of its territory, it will be liable, if after establishing them, it authorizes or, with knowledge, permits them to be so negligently constructed or operated by its agents as to become a nuisance detrimental to health and property. City held liable for sickness and depreciation in property caused by dumping garbage on neighboring premises. City of Knoxville v. Klasing [Tenn.] 76 S. W. 814. A city cannot maintain sewer manholes with perforated tops unless they are so maintained and distributed as not to emit foul vapors in such quantities as that they will prove a serious discomfort to people living in the neighborhood. Kolb v. Knoxville [Tenn.] 76 S. W. 823. City, after notice, did not repair a broken sewer from which sewage flowed into plaintiff's cellar. Held, liable in damages. Betterly v. Scranton [Pa.] 57 Atl. 768.

Sufficiency of complaint alleging negligence: A complaint, charging negligence in the construction of new drains, whereby damages are sustained from overflows, is sufficient. Tyler v. Bay St. Louis [Miss.] 34 So. 215.

12. Murphy v. New York, 89 App. Div. [N. Y.] 93. Injury resulting from a statutory change in the method of constructing a drain, before the work was commenced under the original act, is damnum absque injuria. Steel v. Pollard, 101 Mo. App. 684, 74 S. W. 373.

13. Stocker v. Nemaha County [Neb.] 93 N. W. 721.

14. Sufficiency of allegation of contributory negligence. Peters v. Lewis, 33 Wash. 617, 74 Pac. 815. Whether an accident whereby personal injuries are sustained is due to the negligence of a city in constructing a drain is a question for the jury to determine. Shaughnessy v. Pittsburg, 20 Pa. Super. Ct. 609.

15. But where a city has tried to remove a defect in a sewer causing damage to private property, it will not be summarily enjoined from using the sewer. Bailey v. New York, 38 Misc. [N. Y.] 641. Insufficiency of evidence to prove failure to keep sewer in proper repair. Gulath v. St. Louis [Mo.] 77 S. W. 744. Where a sewer has been properly constructed and has a sufficient capacity under ordinary circumstances, the city is not liable for an overflow resulting from an extraordinary rainstorm, such injury being an act of God. Id. Sufficiency of evidence to show capacity of sewer to serve its ordinary

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it is bound to use reasonable care in keeping them in repair.[16] In South Carolina, property owners may have compensation for injury to their property by contamination of the waters of a stream by sewerage,[17] but a recovery for flooding lands by augmenting the flow of a stream has been denied in New York.[18]

Liability for improper operation.—It is a public nuisance for a city to contaminate a running stream by emptying sewage into it, and so pollute its water as to render it unfit for use by persons through whose property it flows.[19] A city is liable to a peremptory writ for the abatement of a nuisance created by the construction of a sewer,[20] the very purpose of a sewer being to remove, not to create, the conditions from which such nuisances arise.[21] But where a city has built and maintained a sewer adequate for all usual purposes, it is not liable for damages caused by an overflow of the sewer due to an extraordinarily violent storm.[22] A city is not liable for a nuisance caused by discharge of sewage from a private sewer.[23] It is provided in some states by statute that no sewage shall be discharged in any stream supplying water to the public for domestic use.[24]

purposes. Id. An allegation, in an action for damages for water escaping from a sewer, stating that defendant owed plaintiff the duty to keep a certain wall in repair, so as to prevent the flow of sewage upon plaintiff's land, is insufficient upon demurrer, where the facts from which the duty arose were not alleged. Neinaber v. Weehawken [N. J. Law] 57 Atl. 267. Long use of a culvert for the flow of water from the city sewers, and resolutions of the city council extending it, amount to an adoption of the culvert by the city as a part of its sewer system, and make it liable to property owners for damage caused by its collapse, negligently permitted by the city. City of Richmond v. Gallego Mills Co. [Va.] 45 S. E. 877.

16. Failure to repair hidden defects, prior to their discovery, does not of itself show negligence. Weidman v. New York, 84 App. Div. [N. Y.] 321. Nor is a city liable for failure to provide sewers to carry off surface water, or for failure to relieve a lot of burdens cast upon it by nature. Miller v. Newport News [Va.] 44 S. E. 712. A city is not liable to one who connects a sewer from his property to the city's main, with knowledge that the main is insufficient to carry off the sewage, by reason of which incapacity his property is flooded by backwater. Sheriff v. Oskaloosa, 120 Iowa, 442, 94 N. W. 904. Though a city may have the statutory power to condemn land for the construction of a sewer, yet it cannot injure lands which it has not condemned, by emptying sewage into a stream flowing therein. City of Birmingham v. Land, 137 Ala. 538. A provision in a city charter that failure to present claims against the city to the city council shall be a defense to an action on such claims applies to an action for flooding property from the clogging of a sewer. Pollard v. Cadillac [Mich.] 95 N. W. 536.

17. The statute gives the same right of compensation on condemnation of lands for waterworks, sewerage and lights as on condemnation for railway purposes [Code 1902, §§ 2008, 2012]. Matheny v. Aiken [S. C.] 47 S. E. 56. Where the property owner is given a remedy by way of compensation for injury to his property by the emptying of sewerage into a stream, that remedy is exclusive, and he cannot sue the city for tort nor to abate the nuisance. Id. Damage to property outside the city limits, caused by emptying sewerage into a stream, constitutes a private, not a public, wrong. Id.

18. A city which by its system of surface drainage and sewage has increased the flow of water in a stream is not liable to one whose lands are flooded, so long as the increase is not greater than could be accommodated by the stream in its natural condition. So where the owner had narrowed the stream, there was no recovery. Smith v. Auburn, 88 App. Div. [N. Y.] 396.

19. City of Birmingham v. Land, 137 Ala. 538. A city is liable for the pollution of water by its sewage, where the right to the use of such water free from impurities has been acquired by prescription. The remedy of such owner is an action for compensation. Doremus v. Paterson, 63 N. J. Eq. 605. A lessee of oyster beds from the state is not only entitled to an injunction against a city for discharging sewage whereby his oysters are killed, but also to damages for the loss occasioned thereby. Bailey v. New York, 38 Misc. [N. Y.] 641. Authority to construct a sewage system confers no right to construct sewers so as to discharge the sewage into a creek, to the injury of riparian owners. Sammons v. Gloversville, 175 N. Y. 346, 67 N. E. 622. A purchase of land affected by an improper discharge of sewage has the same rights as his vendor had. City of Birmingham v. Land, 137 Ala. 538.

20. Though it be built under the direction of skilled engineers. Rand Lumber Co. v. Burlington [Iowa] 97 N. W. 1096.

21. Rand Lumber Co. v. Burlington [Iowa] 97 N. W. 1096. Accordingly, a nuisance caused by the improper discharge of sewage will be enjoined. Sammons v. Gloversville, 175 N. Y. 346, 67 N. E. 622. Where one befouls or pollutes the water of a running stream rendering the water unfit for use, thereby creating a nuisance, the continuation of the acts from which such results follow will be enjoined at the suit of the person injured. Todd v. York [Neb.] 92 N. W. 1040. That the nuisance is on private property is no defense to the writ of abatement against the city. Rand Lumber Co. v. Burlington [Iowa] 97 N. W. 1096.

22. Sundheimer v. New York, 77 App. Div. [N. Y.] 53.

23. Though it has taken no steps to abate the nuisance nor passed any ordinance prohibiting such nuisances. Miller v. Newport

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Measure of damages.—The measure and elements of damage resulting from the improper discharge of sewage depend upon the circumstances of the case and the extent and nature of the injury.[25]

Limitations of actions.—Whether the statute of limitations applies, so as to bar a recovery for a nuisance caused by the improper discharge of sewage, depends very often upon whether the nuisance be a continuing one or a mere temporary injury.[26]

Statutory regulations.—In Indiana, it is provided that the cleaning and repair of drainage ditches shall be maintained by allotment among the landowners.[27]

Vacation of drains.—Proceedings for the vacation of drains are regulated by statute in some states.[28] When a city has constructed sewers or drains to carry off the surface water, it may not discontinue or abandon the same if the lot owner is thereby left in a worse condition than before the construction of such drains.[29]

§ 6. *Private and combined drainage.*—Private drains may be constructed and kept open by mutual agreement of adjoining landowners.[30]

News [Va.] 44 S. E. 712. In absence of negligence, verdict for city properly directed. Sundheimer v. New York, 77 App. Div. [N. Y.] 53. But where a culvert is built by a city under the highway, the city is not bound to maintain and keep in repair an extension of the culvert constructed on private land by an individual to facilitate the bringing of water to the culvert. Lynch v. Clarke [R. I.] 56 Atl. 779.

24. Such an act may be embraced within the title "An act to secure the purity of the public supplies of potable water." State v. Diamond Paper Mills Co. [N. J. Err. & App.] 53 Atl. 1125. Neither is the statute objectionable as being special or local, nor because it confers extraordinary jurisdiction upon the chancery court. Id. The statute is violated, so as to authorize an injunction at the suit of the board of health, if refuse, placed in a river above the point where a city takes its water supply, pollutes the water at the place where it is placed in the river, though it does not pollute the water where the city water supply is obtained, or injure the city. Id.

25. Continuing nuisances: Where a nuisance from an improper discharge of sewage by a city is a continuing one, the city is liable for all discharges within the statutory period of limitations, though the original cause of action for the establishment of the nuisance be barred. Bennett v. Marion, 119 Iowa, 473, 93 N. W. 558; Vogt v. Grinnell [Iowa] 98 N. W. 782. Measure of damages, injury to pasturage. Bennett v. Marion, 119 Iowa, 473, 93 N. W. 558. Effect of discontinuing nuisance after threatened suit. Vogt v. Grinnell [Iowa] 98 N. W. 782. In an action for damages to a farm between certain days, owing to a discharge of sewage over the land, the damages recovered cannot exceed the rental value. Bennett v. Marion, 119 Iowa, 473, 93 N. W. 558. The inconvenience of living on property which, from an overflow of sewage, has become filthy, unhealthy and almost uninhabitable, is an element of damages to be considered by the jury. Houston, E. & W. T. R. Co. v. Charwaine, 30 Tex. Civ. App. 633, 71 S. W. 401. When evidence of depreciation of value of property is harmless error. Id. Vague instruction as to measure of damages. Finley v. Williamsburgh, 24 Ky. L. R. 1336, 71 S. W. 502. Elements of damage sustained and benefit received by drainage ditch. Lile v. Gibson, 91 Mo. App. 480.

26. Each of several overflows, caused by improper drainage, constitutes a separate trespass, and the statute of limitations only begins to run from the time of each occurrence, and not from the time of construction of the drain. Finley v. Williamsburgh, 24 Ky. L. R. 1336, 71 S. W. 502. Statute of limitations as applicable to a continuing nuisance. City of Birmingham v. Land, 137 Ala. 538; Bennett v. Marion, 119 Iowa, 473, 93 N. W. 558. A nuisance caused by sewage discharge is not necessarily of a permanent nature merely because the sewer is permanent, so as not to allow the statute of limitations to attach. Vogt v. Grinnell [Iowa] 98 N. W. 782.

27. Hille v. Neale [Ind. App.] 69 N. E. 713. Notice of allotment and reallotment. Id. Voluntary acquiescence by landowners for the time being in invalid requirements as to cleaning and repairing a drainage ditch cannot bind them for the future as to void allotments. Id. The repair of ditches constructed for agricultural drainage is not cast upon the landowner. He is only required to keep the ditch open through his land, and the statute does not contemplate that the keeping of the ditch open shall be taken into consideration in assessing damages to his land. Lile v. Gibson, 91 Mo. App. 480. The right of action against a town for not maintaining and keeping in repair a public sewer or drain is given, by the Maine statute, to those only who have a right to enter the sewer. Evans v. Portland, 97 Me. 509. Public recordation of ditch improvements. Dixon v. Labry, 24 Ky. L. R. 697, 69 S. W. 791.

28. A statute requiring notice of the vacation of a drain does not necessitate notice of the mere tapping of the existing drain by a proposed drain. Township of Flynn v. Woolman [Mich.] 95 N. W. 567.

29. McAdams v. McCook [Neb.] 99 N. W. 656.

30. In Illinois, the operation of combined drainage is regulated by statute. Daum v. Cooper, 103 Ill. App. 4. Highway commissioners are governed by the same rule as ad-

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The people have power to establish and provide for district sewers entirely, or for district, joint district and private sewers.[31]

A city council cannot convert a public sewer into a district sewer, or a district sewer into a public sewer by merely changing the name.[32]

The charters of some municipalities give them the power to grant permits to private individuals to enter their sewage into the public sewer.[33]

§ 7. *Obstruction of drains.*—As a general rule, a municipality is liable for the obstruction of a drain or sewer, or for its failure to open such drain or sewer, whereby the property of adjacent proprietors is injured.[34]

The measure of damages against a city for such negligence is the injury actually sustained.[35]

But the mere omission of municipal authorities to provide adequate means to carry off the water which storms and the natural formation of the ground throw on city lots and streets will not sustain an action by an owner of land against the municipality for damages arising from the accumulation of water.[36]

Nor is a municipality liable for the obstruction of drains over which it has no control, and therefore owes no duty.[37] Where neither a city nor any of its

joining landowners in changing the courses of drains. Id.

31. Prior v. Buehler & C. Const. Co., 170 Mo. 439, 71 S. W. 205. When construction of joint sewer operates beneficially. Id. A charter provision forbidding the changing of a district after a sewer has been constructed therein is not violated by an ordinance creating a joint sewer district out of numerous districts, in order to complete the drainage system of such districts. South Highland L. & I. Co. v. Kan. City, 172 Mo. 523, 72 S. W. 944.

32. South Highland L. & I. Co. v. Kan. City, 172 Mo. 523, 72 S. W. 944. A sewer which is built in pursuance of a resolution of a city council, and paid for with municipal funds provided for the purpose, is a public sewer, though not established by ordinance. Akers v. Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536. Under a city charter providing for the construction of joint district sewers to be paid by special tax bills against property within the district, a sewer reserved for the drainage of a certain area is a joint district, and not a public sewer and the cost thereof may be assessed on the property drained. South Highland L. & I. Co. v. Kan. City, 172 Mo. 523, 72 S. W. 944. A sewer which only drains particular sewer districts is not rendered public by the fact that it is paid for out of public funds and designated by a city ordinance as a public sewer; hence a subsequent ordinance assessing the cost of completing the sewer on property within a joint district created by such ordinance is valid. Id.

33. A permit to enter a sewer upon a certain street does not authorize the entry of the sewer upon another street, not a part of nor an extension of the sewer on the former street. Evans v. Portland, 97 Me. 509. A permit from the municipal officers to enter such sewer runs with the land, but a party cannot claim under such a permit granted to one who was a stranger to the title at the time it was given. Id. Though a city, from failure to adopt the statutory provisions, may not have authority to tax the persons whose drains enter the sewer their just share of the expense of constructing it, there is no reason why it may not grant the privilege to such persons for a consideration agreed upon, or if it sees fit, without consideration. Contoocook Fire Precinct v. Hopkinton, 71 N. H. 574.

34. Evans v. Portland, 97 Me. 509; Rohrer v. Harrisburg, 20 Pa. Super. Ct. 543; Werner v. Cincinnati, 23 Ohio Circ. R. 475; Hewett v. Canton, 182 Mass. 220, 65 N. E. 42; City of Valparaiso v. Kyes, 30 Ind. App. 447, 66 N. E. 175; McCartney v. Phila., 22 Pa. Super. Ct. 257. The owner of private property owes no duty to a city requiring him, in constructing his house or maintaining his water service pipes, to anticipate and provide against a rush of water from a break in a watermain caused by the negligence of the city. Werner v. Cincinnati, 23 Ohio Circ. R. 475. Though a plaintiff may not be entitled to damages for alleged improper construction of ditches, yet he may obtain equitable relief in a proper case. Stocker v. Nemaha County [Neb.] 93 N. W. 721. Sufficiency of complaint for obstruction of drain. City of Valparaiso v. Kyes, 30 Ind. App. 447, 66 N. E. 175. Notice of obstruction as affecting liability. Lynch v. Clarke [R. I.] 56 Atl. 779.

35. McCartney v. Phila., 22 Pa. Super. Ct. 257. Such damages must be established by evidence tending to show actual injury to the property and a decrease in its rental value. Id. Damages which have accrued by the improper obstruction of a sewer, subsequent to a prior suit, may be recovered. Houston, E. & W. T. R. Co. v. Charwaine, 30 Tex. Civ. App. 633, 71 S. W. 401.

36. Cooper v. Scranton, 21 Pa. Super. Ct. 17.

37. So if landowners fill, or allow their land to be filled, so that a stream is obstructed and diverted, the city is not liable. Lynch v. Clarke [R. I.] 56 Atl. 779. Where a street railway constructed under authority of the selectmen of the town constructs a wide gutter for the conveyance of surface water, so that the water is thrown back on plaintiff's land, the town is not liable therefor. Hewett v. Canton, 182 Mass. 220, 65 N. E. 42. Liability of railroad company for obstructing drains. Baltimore & O. S. W. R. Co. v. State, 159 Ind. 510, 65 N. E. 508.

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authorities has ever assumed any control over a private culvert, or in any way converted it into a public one, the city is not liable to property owners for damages from its obstruction.[38]

SHERIFFS AND CONSTABLES.

§ 1. The Office; Election or Appointment; Qualification (1640).
§ 2. Powers, Duties and Privileges (1640).
§ 3. Compensation (1641).
§ 4. Deputies, Under Sheriffs, and Bailiffs (1642).
§ 5. Liabilities (1643).
A. In General (1643).
B. Failure to Execute Process or Insufficient Execution (1644).
C. Failure to Return Process and False Return (1645).
D. Failure to Take Security (1645).
E. Wrongful Levy or Sale (1645).
F. Misappropriation of Proceeds (1646).
§ 6. Liability on Bonds (1646).
§ 7. Actions (1647).

§ 1. *The office; election or appointment; qualification.*—The rules applicable to officers generally as treated in a former article apply also to sheriffs. Thus the fact that a section of a statute providing for the election of constables in a particular county was invalid as special and local legislation cannot be availed of by a constable to whom such section had no application.[39] One appointed to fill a vacancy caused by a sheriff's resignation holds only until the period for which his predecessor was elected has expired, and not until his successor is elected and qualified.[40] A constable's election shall not be invalidated by the fact that the township board of supervisors, by proclamation, called for the election of two officers where the law authorized but one, and where the statutes give notice of the time and place of election and the officer to be elected.[41] A deputy sheriff duly appointed, but not having filed his appointment and oath of office as required by law, is at least a de facto officer, and process served by him is valid as to defendant.[42] A sheriff who has failed to give bond within the time required by statute may be removed from office.[43] A statute vacating a sheriff's office upon the lynching of his prisoner, and providing that the coroner shall succeed to his duties, does not give the coroner such an interest in the office of sheriff that he can maintain quo warranto to oust the sheriff.[44]

§ 2. *Powers, duties and privileges.*—An officer is not justified in refusing to serve process, fair upon its face, and issuing from a court of competent jurisdiction, because of some irregularity in the judgment.[45] A sheriff may take a bond of indemnity without summoning a jury to try title,[46] or he may retain money and

38. Though the city may have extended the culvert across a street. Robinson v. Danville [Va.] 43 S. E. 337. An ordinance ordering the construction of a sewer and creating a joint sewer district for assessment purposes is not invalidated by the fact that the outlet to the proposed sewer has been obstructed, if the city has power to open a new outlet. South Highland L. & I. Co. v. Kan. City, 172 Mo. 523, 72 S. W. 944.

39. Davidson v. Von Detten, 139 Cal. 467, 73 Pac. 189.

See Officers, etc., 2 Curr. Law, p. 1069.

40. Even though the succeeding election is void and confers no title on any one to the office. Terry v. Hargis, 24 Ky. L. R. 2498, 74 S. W. 271.

41. Sanchez v. Fordyce, 141 Cal. 427, 75 Pac. 56.

42. Williamson v. Lake County [S. D.] 96 N. W. 702.

43. Rev. St. 1895, art. 4894, provides that the office shall be deemed vacant and the county commissioners shall appoint a new sheriff on failure of the elected officer to give bond within 20 days after notice of election. State v. Box [Tex. Civ. App.] 78 S. W. 982. The fact that a sheriff has previously given a bond, after appointment by county commissioners, will not preclude his removal from office for failure to give a new bond, as required by law, after his election to the office. Id.

44. State v. Dudley, 161 Ind. 436, 68 N. E. 899.

45. State v. Rainey, 99 Mo. App. 218, 73 S. W. 250; State v. Stokes, 99 Mo. App. 236, 73 S. W. 254.

46. In South Dakota a statute providing that if property attached is claimed by any person other than the defendant, the sheriff may summon a jury and try the validity of the claim, and if their verdict is in favor of the claimant he may release the attachment, unless the attaching creditor gives him a sufficient indemnity, is not mandatory, and the sheriff may take such indemnity without summoning a jury. Matheson v. Johnson Co. [S. D.] 92 N. W. 1083.

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have the claims thereto determined by the court.[47] He has the power to determine the number, within the statutory limits, of persons in his posse.[48] But neither a sheriff nor his deputy has authority to serve process to which the sheriff is a party.[49] He has no authority to break into a dwelling house for the service of civil process and to do so is an abuse of process.[50] It is his duty to execute a warrant in a lawful manner, and he must not commit a trespass by exceeding his authority. If attacked while in the discharge of his duty he may avail himself of the law of self defense, or if interfered with by others he may use all reasonable force necessary to make an arrest.[51] A sheriff has a right to amend his return, by leave of court, with the aid of written memoranda.[52] Where a statute gives the commonwealth a lien on all the real estate of a sheriff for the faithful performance of his official duties, he cannot claim a homestead exemption against the commonwealth.[53] A statute providing that whenever any party shall make and file with the clerk of the proper court an affidavit of prejudice against the sheriff, the clerk shall direct process to the coroner, is mandatory.[54]

§ 3. *Compensation.*—It is well settled that an officer can charge only such fees as are allowed by law.[55] He is not entitled to fees for services which he did

47. Where he pays out the money on being given an indemnity bond the makers thereof are entitled to contest an action against him by a claimant to the money. W. T. Rickards & Co. v. Bemis & Co. [Tex. Civ. App.] 78 S. W. 239.

48. In Kentucky a statute authorizing a county judge to order a sheriff to summon a posse, of not less than two nor more than ten, to guard certain property, gives the sheriff and not the judge discretion as to the number. Hopkins County v. St. Bernard Coal Co., 24 Ky. L. R. 942, 70 S. W. 289.

49. A return by either of them, of such process, is void. Hillyer v. Pearson, 118 Ga. 815. That a sheriff has been subpoenaed as a witness does not disqualify him from drawing the venire for the jury. Com. v. Zillafrow, 207 Pa. 274.

50. Foley v. Martin [Cal.] 71 Pac. 165.

51. Petit v. Colmary [Del.] 55 Atl. 344. A sheriff should discharge his duty impartially and it is no part of his duty to accommodate a plaintiff. Bell v. Wycoff, 131 N. C. 245. The mere fact that an officer acted honestly and in good faith and meant no disobedience to the precept of the court is no excuse for failure to perform his duty. Woodward v. McDonald, 116 Ga. 748.

52. State v. Jenkins, 170 Mo. 16, 70 S. W. 152.

53. Baker v. Fidelity & Deposit Co., 24 Ky. L. R. 2196, 73 S. W. 1025.

54. Hence the court had no discretionary power to grant or refuse a motion to have the coroner summon the jury, though counter affidavits were filed by the opposing party. Litch v. People [Colo. App.] 75 Pac. 1083. Construing Mills' Ann. St. § 869.

55. Services rendered by a sheriff, for which the statute does not expressly authorize a charge, are gratuitous. Red Willow County v. Smith [Neb.] 93 N. W. 151. The statutes of Nebraska do not authorize a sheriff to charge a county a fee for the return on a distress warrant placed in his hands by the county treasurer, "no property found." Id. In Georgia a sheriff is entitled to a fee of $2.00 for serving a writ of certiorari. McMichael v. Southern R. Co., 117 Ga. 518. He is not entitled to per diem compensation for attendance upon the commissioners' court of his county, under a constitutional provision allowing him such compensation for attendance upon the district or county court, the commissioners' court being separate and distinct from the two other courts. Robinson v. Smith County [Tex. Civ. App.] 76 S. W. 584. A sheriff cannot recover fees for poundage under a statute providing that he is entitled to fees where he makes a collection, or where a settlement is made after levy or where execution has been vacated and set aside, where he does not allege that the defendant satisfied the judgment or countermanded the levy. O'Brien v. Allen, 40 Misc. [N. Y.] 693. A sheriff is not entitled to poundage upon vacation of an execution against the person. O'Brien v. American Surety Co., 88 App. Div. [N. Y.] 526. Where an attachment is discharged by order of court upon application therefor by a defendant, and upon his giving an undertaking the sheriff may recover poundage of the defendant. B. P. Ducas Co. v. American Silk D. & F. Co., 84 N. Y. Supp. 878. Where a warrant of attachment was vacated as to part of the property attached, and the property remaining attached greatly exceeded in value any claim which the sheriff might have for poundage, he is not entitled to poundage on the property released by the partial vacating of the attachment. Plummer v. International Power Co., 88 App. Div. [N. Y.] 452. Where a sheriff is entitled to receive a fixed salary in lieu of all fees and compensation for services within the county, except for keeping and maintaining prisoners in the county jail, an allowance and payment to him of street car and railway fares of prisoners, in transporting them to and from the jail, workhouse and courts, is illegal and may be recovered by the county in an action for money had and received. Douglas County v. Sommer [Wis.] 98 N. W. 249. A constable is entitled to recover from a county money actually paid for the railroad fare of a prisoner from the place of arrest in another county to the county jail. Stryker v. Lycoming County, 20 Pa. Super. Ct.

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not render or which were not called for.[56] He must comply with all the statutory requirements before he can recover fees due him.[57] If an officer serve copies, as provided by law, he is entitled to his fees for such copies or against the opposite party, whether he or the plaintiff made them.[58] By a statute, in Wisconsin, giving county boards power to change the method of compensation of sheriffs, the board may fix a salary which shall be in addition to his lawful disbursements, as well as one which shall include all such disbursements.[59] A plaintiff who has paid a sheriff fees for the service of process is entitled to have such fees charged as costs, although the deputy serving the process was merely a de facto officer.[60] Where property is released from attachment by plaintiff before termination of the suit, the sheriff may recover directly from plaintiff his fees for keeping the property under the attachment.[61]

§ 4. *Deputies, under sheriffs, and bailiffs.*—A sheriff is liable for his deputy's acts as his own,[62] but he is not liable for the unauthorized acts of his deputy.[63] A

345. He cannot recover from a city, under a statute making cities liable for the keep of prisoners where it gets the benefit of the fine, for the keep of prisoners when a fine constitutes no part of their punishment, but he can recover for the keep of prisoners committed to his care by process regular on its face, although they should properly have been committed to the city workhouse and not to the county jail. City of Lexington v. Gentry, 25 Ky. L. R. 738, 76 S. W. 404. He is entitled to fees from the county for receiving, boarding, and discharging prisoners committed to the jail under provisions of a village charter (People v. Livingston County Sup'rs, 89 App. Div. [N. Y.] 152), and for custody of a prisoner, though confined at sheriff's request in a city jail whose officers were not obliged to keep the prisoner for him (State v. Clark, 170 Mo. 67, 70 S. W. 489). He is not entitled to recover a lump sum "paid police authorities for detention, boarding and lodging" of a prisoner in a city outside the county, where there is nothing to explain the meaning of "detention," nor what proportion of the lump sum was for "detention." Stryker v. Lycoming County, 20 Pa. Super. Ct. 345. In Idaho a person furnishing a sheriff with board for prisoners must look to the sheriff and not to the county for his pay. Mombert v. Zannock County [Idaho] 75 Pac. 239. In Louisiana the sheriff is paid a lump sum by the parish in all criminal cases, and in addition fees are allowed in certain cases recoverable as costs from convicted defendants. The statute so providing is constitutional. Parish Board of Directors v. Hebert [La.] 36 So. 497. Charges for securing and keeping attached property may be recovered by the sheriff from the plaintiff before the termination of the suit in which the attachment issued. Templeton v. Capital S. B. & T. Co. [Vt.] 57 Atl. 818. Charges incurred in securing property subsequent to the completion of the service and return of the writ of attachment may be recovered without having been indorsed thereon. Construing V. S. §§ 5366, 1111, 1103, 1105. Id. A sheriff is entitled to poundage upon service of an execution when he has been prevented from fully executing the writ by the act of interference of the plaintiff. O'Brien v. Nat. C. & Cable Co., 87 N. Y. Supp. 131. So the sheriff is entitled to poundage for service of a writ of attachment, where the attachment is annulled and vacated on plaintiff's motion, the poundage being recoverable from plaintiff. Id.

56. Attendance on court when court was not held and taking prisoners to court not his duty to so take. People v. Livingston County Sup'rs, 89 App. Div. [N. Y.] 152. A levy does not, ipso facto, entitle a constable or his appointed watchman to a fee for "receiving and keeping" property taken on execution, there must be a "receiving and keeping" of property, or some difficulty and expense about the levy beyond the mere formal service of the execution and an instant acceptance of payment from the debtor. State v. Stinebaker, 90 Mo. App. 280.

57. Must file vouchers where required by statute. Mombert v. Bannock County [Idaho] 75 Pac. 239. Where a sheriff has received fees from a county without the requisite approval of certain other public officers the county may recover the same of him. Douglas County v. Sommer [Wis.] 98 N. W. 249.

58. Williamson v. Lake County [S. D.] 96 N. W. 702.

59. State v. Erickson [Wis.] 98 N. W. 253. Under a statute authorizing a county board to change the method of compensation of the sheriff at any time before or during his term of office, and declaring the act applicable to all sheriffs, "including those now holding office," a resolution of a county board that the then "present mode of paying the sheriff a salary for work done in the county" be changed, and that he shall thereafter be paid a salary for all work, wherever done, applies to sheriffs holding office at the time of the passage of the act, to sheriffs receiving a salary for work within, and fees for work outside the county, and is not unconstitutional. Id. A county board, having power to fix the salary of a sheriff at an annual session, acts within its powers in fixing the salary at an adjourned meeting of the annual session. Douglas County v. Sommer [Wis.] 98 N. W. 249.

60. Williamson v. Lake County [S. D.] 96 N. W. 702.

61. Under V. S. 5366, allowing sheriff reasonable fees for securing property under attachment. Templeton v. Cap. S. B. & T. Co. [Vt.] 57 Atl. 818.

62. The deputy is not the agent or servant but is the representative of the sheriff. Foley v. Martin [Cal.] 71 Pac. 165. Wrongful arrest advised and requested by sheriff.

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deputy sheriff may in Nebraska perform any act for his principal in making a foreclosure sale.[64] A deputy sheriff may recover from the sheriff for his services on a quantum meruit, where there was no contract, and the statute did not regulate the deputy's fees.[65]

§ 5. *Liabilities. A. In general.*—The general rule, supported by the great weight of authority, is that when process, in due form of law, regular upon its face, and duly authenticated, from a court having jurisdiction of the subject-matter, comes into the officer's hands his only duty is to execute it in proper form, and he will be protected in so doing despite irregularity of the proceedings of the court from which the process came.[66] But he cannot claim this protection in taking the property of a stranger to the process.[67] Where the process issues from a court having no jurisdiction he is liable if he executes it.[68] In so far as he goes beyond the command of the writ he is a trespasser and liable as such to immediate action.[69] Under a statute protecting an officer in levying executions from

Stephens v. Wilson, 24 Ky. L. R. 1832, 72 S. W. 336; Stephens v. Head [Ala.] 35 So. 565. Notice to a deputy is notice to the sheriff. State v. Carter, 92 Mo. App. 86.

63. Without knowledge or consent of the sheriff his deputy wrongfully told a constable that his assistance was wanted in discovering and arresting a criminal. Maddox v. Hudgeons, 31 Tex. Civ. App. 291, 73 S. W. 414.

64. Post v. Smith [Neb.] 95 N. W. 500.

65. Mayfield v. Moore [Ala.] 36 So. 21.

66. State v. King, 30 Ind. App. 389, 66 N. E. 85; Smith v. Jones [S. D.] 92 N. W. 1084; Hols v. Rediske, 116 Wis. 353, 92 N. W. 1105; Wilbur v. Stokes, 117 Ga. 545. He will be protected in the execution of process which appears on its face to issue from a court having jurisdiction of the subject-matter and showing no other want of authority, even though the court has not in fact jurisdiction of the case. Magerstadt v. People, 105 Ill. App. 316. Contra, if the officer answers jointly with another defendant he must stand or fall with his joint defendant and cannot avail himself of the protection of process which might otherwise be a justification of his acts. Church v. Pearne, 75 Conn. 350.

67. Adamson v. Noble, 137 Ala. 668. A sheriff cannot justify a levy on grain by a writ of attachment against a former owner thereof. Cook v. Higgins, 66 Kan. 762, 71 Pac. 259. The taking of an indemnity before executing an attachment does not protect the sheriff from suit by a stranger to the writ, whose property has been wrongfully levied upon. Hill v. Ragland, 24 Ky. L. R. 1053, 70 S. W. 634. A sheriff is liable for damages in levying an execution on live stock belonging, not to the execution debtor, but to a third person, even though he returned the live stock to the owner, where such return was made without notice to or acceptance by the owner. Kieffer v. Smith [S. D.] 93 N. W. 645. Where a sheriff making a levy is notified that a bull in a herd of cattle is the property of plaintiff, but takes all away and subsequently returns the bull, the sale of the others having satisfied the execution, he is liable to nominal damages at least for the detention of the bull. State v. Carter, 92 Mo. App. 86. Where after levying on property a sheriff is notified that part of the property is owned by a person other than the defendant in the writ of attachment, it is his duty to sort out such person's property and deliver it to him and he will be liable for failure to do so. Orr & L. Shoe Co. v. Frankenthal [Ind. T.] 69 S. W. 906. A sheriff who, by his wrongful act, has set in motion the train of evil culminating in the loss of one person's property levied upon as that of another is liable therefor. Sale by receiver under order of court. Hill v. Ragland, 24 Ky. L. R. 1053, 70 S. W. 634. Where a sheriff attaches the property of one person on a writ running against another and subsequently returns the property to the rightful owner, it is no defense in action against him by such owner for the wrongful attachment that he surrendered the property without the statutory affidavit or bond being given or made. Vaughn v. Justice [Ky.] 78 S. W. 424.

68. Warrant for arrest. Stephens v. Wilson, 24 Ky. L. R. 1832, 72 S. W. 336. A sheriff and his bondsmen will be liable for acts done in excess of the authority conferred on him by writ or orders of the court. A sheriff, opening a road under orders of commissioners' court was liable for cutting fences not on the route laid out for the road. Morgan v. Oliver [Tex. Civ. App.] 80 S. W. 111. County commissioners' court and judge not liable for the sheriff's tort. Id.

69. Baum v. Turner, 25 Ky. L. R. 600, 76 S. W. 129. A sheriff is liable for levying on property under a writ directed, not to him but to another sheriff, and ordering that sheriff to levy on property in a county not within the jurisdiction of the first sheriff, and an amendment of the writ to make it conform to the sheriff's return would not legalize his wrongful levy. McArthur v. Boynton [Colo. App.] 74 Pac. 540. A sheriff is not liable for fees paid an attorney to recover from him property wrongfully seized on attachment. Vaughn v. Justice [Ky.] 78 S. W. 424. In an action of trespass for the wrongful and illegal execution of a writ of attachment, it is no defense that the damage claimed might have resulted from a lawful execution of the writ. Where damages for the loss of use of machines caused by removing the main belt in a mill were claimed, it was no defense that under a lawful execution of the writ, the machines might have been seized. Giddings v. Freedley [C. C. A.] 128 Fed. 355. In an action of trespass against officers for a wrongful and illegal execution of a writ of attachment, the ma-

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liability to claimants, unless such officer shall have received notice in writing under oath from a claimant that he owns the property, stating the nature of his interest, the receipt of the notice itself by the officer is a condition precedent to his liability.[70] An execution directing an officer to collect from a person whose first name therein given is stated to be fictitious, no judgment having ever been rendered against such fictitious person, is no protection to the officer in an action for conversion.[71] Where the appraisers of property, claimed to be exempt, did not take into account a mortgage on part of the property and the sheriff knew of their error, he cannot justify his actions by the incorrect appraisal.[72] A sheriff may lawfully proceed with the carrying out of a writ of execution until he has official notice of the superseding of the judgment on which it is issued.[73] He is liable for any cruel or unnecessary exposure of a prisoner to cold, or deprivation of suitable clothing or covering.[74] Where a sheriff acts maliciously in making an illegal attachment, he is liable for all damage sustained by plaintiff.[75] A sheriff in custody of property is not liable as an insurer but as a bailee for hire.[76] A sheriff who buys county claims at the direction of the county commissioners, solely for the benefit of the county, is not punishable under a statute making it a misdemeanor for county officers to speculate in county claims.[77]

(§ 5) *B. Failure to execute process or insufficient execution.*—A sheriff is not liable for failure to levy on property which has previously been levied upon by a constable and is therefore in the custody of the law. Nor is he liable if having levied on such property he subsequently allows the purchaser at the sale under the constable's levy to take away the property.[78] The fact that a second execution has issued before the return of the first is no excuse for a sheriff's failure to serve the later one; it is voidable only at the election of the party affected by it.[79] Where a sheriff was directed by plaintiff's attorney to levy upon a bulky article and leave it where it stood and by reason of his failure to exercise due care and diligence, he lost control of the article and so failed to sell it, he was liable to the execution plaintiff for damages sustained by such lack of care.[80] He may be excused for failure to sell property, the title to which is doubtful,[81] when he is

licious intent of the attaching creditor may be imputed to the officers, and exemplary damages recovered from them. Officers having a writ for $12,000 seized a belt worth $20 and so stopped the operation of a mill. There was other property subject to attachment. Exemplary damages recovered. Id.

70. Merely reading the notice to the officer and leaving a copy with him was held insufficient to fix his liability. Frazier v. Hill [Iowa] 98 N. W. 569.

71. Goldberg v. Markowitz, 87 N. Y. Supp. 1045.

72. Strong v. Combs [Neb.] 94 N. W. 149.

73. Western S. & I. Co. v. McDonald [Neb.] 99 N. W. 517.

74. Petit v. Colmary [Del.] 55 Atl. 344. **Refusal to give a copy of a commitment to the prisoner's attorney** is not such a refusal to give a copy to the prisoner as will make the officer liable to the statutory fine. Duff v. Carr, 91 Mo. App. 16.

75. Mental as well as material. Ahearn v. Connell [N. H.] 56 Atl. 189. A constable will be liable for exemplary damages for acts done maliciously in executing a writ of attachment. Friedly v. Giddings, 119 Fed. 433. Where a sheriff breaks into a house and forces the locked door of a bedroom to serve process on a sick person he is liable for exemplary damages. Foley v. Martin [Cal.] 71 Pac. 165.

76. Standard Wine Co. v. Chipman [Mich.] 97 N. W. 679.

77. State v. Garland [N. C.] 47 S. E. 426. The fact that county commissioners who directed a sheriff to buy county claims had no authority to delegate to him the duty of passing on the validity of such claims, does not make the sheriff criminally liable for the act. Id.

78. Camp v. Williams Bros. [Ga.] 46 S. E. 66. In proceedings against a constable for failure to sell goods levied upon by him, it is incumbent upon him to show that he parted with the possession of the property in obedience to the mandate of a court of competent jurisdiction, which he was bound to respect, or that the process placed in his hands could not legally have been enforced by him. Order from referee in bankruptcy to deliver up property. Woodward v. McDonald, 116 Ga. 748.

79. Mollineaux v. Mott, 78 App. Div. [N. Y.] 493.

80. Johns v. Robinson [Ga.] 45 S. E. 727.

81. No damage appearing to have been sustained, and the trial court finding that the complicated condition of the title justified the sheriff in refusing to sell real es-

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not indemnified.[82] A sheriff is not liable in an action for escape for his refusal to receive a debtor when brought to the jail for imprisonment and who was never legally in the sheriff's custody,[83] nor for the escape of a prisoner confined on a body execution whose liability to the execution creditor has been terminated by a discharge in bankruptcy.[84]

(§ 5) *C. Failure to return process and false return.*—An officer is liable for failure to make a return.[85] In an action against a constable for a nonreturn he is not liable for an insufficient return.[86] It is no defense to an action for failure to return a summons within the time required that it was the sheriff's impression that it was returnable at a later date.[87] An order to a sheriff to return an execution should not contain any direction as to the form of his return.[88]

(§ 5) *D. Failure to take security.*—A sheriff is liable for damages sustained by reason of the release of an attachment by his deputy on the filing of an insufficient bond,[89] but he is not a guarantor of the solvency of sureties accepted by him on a bond to dissolve attachment, and his liability for taking insufficient sureties is no greater than that of the sureties on such bond.[90]

(§ 5) *E. Wrongful levy or sale.*—A constable who is a party to illegal proceedings to issue an execution as a means of exacting costs, partly for his own benefit, is liable for damages arising from the levy.[91] A sheriff is not liable to the heir of a defendant in fieri facias for a balance in his hands arising from the sale of decedent's property.[92] An action to recover damages for the seizure and sale of exempt property is one of trespass and not one for misconduct in office.[93]

tate levied upon by execution, decree directing sale but exonerating sheriff upheld. Porter v. Trompen [Neb.] 96 N. W. 226. Where a sheriff's defense in an action for failure to levy on certain property was that it was exempt as homestead property, and such homestead was void, the sheriff is liable. Johns v. Robinson [Ga.] 45 S. E. 727.

82. Where, after a proper demand for an indemnity bond and after having waited ten days for such demand without receiving it, a sheriff is justified in releasing a levy on goods claimed by one not a party to the writ of attachment. State v. Jenkins, 170 Mo. 16, 70 S. W. 152.

An officer will be excused for failure to make a sale if mentally unsound and incapable of making it (especially if his deputy, doubting his authority to make the sale, offers to make it with the permission of the plaintiff's attorneys and they refuse such permission). Wm. R. Moore & Co. v. Rooks [Ark.] 76 S. W. 548.

83. Saffler v. Dike, 82 App. Div. [N. Y.] 485.

84. Walker v. Harder, 89 Misc. [N. Y.] 749.

85. By statute in Texas, a sheriff is liable for the full amount of a judgment for failure to return an execution unless it appears that no injury has resulted to the plaintiff and the insolvency of the judgment debtor will not absolve the creditor where it appears that such debtor owned property subject to execution within the jurisdiction of the sheriff. Hale v. Bickett [Tex. Civ. App.] 78 S. W. 531.

86. Morgan v. Betterton, 109 Tenn. 84, 69 S. W. 969. Where an officer's return fails to state all that he did, and by leave of court he amends his return so as to show that his levy became abortive by the failure of the execution creditor to give an indemnity bond, he is exonerated from liability for failure to make a return according to law. State v. Jenkins, 170 Mo. 16, 70 S. W. 152.

87. Bell v. Wycoff, 131 N. C. 245. While an officer cannot justify an attachment of goods on mesne process unless he returns the writ into court, he may justify where the return into court, although made long after the levy, was made before the paper was put in evidence. Fletcher v. Wrighton, 184 Mass. 547, 69 N. E. 313.

88. Mollineaux v. Mott, 78 App. Div. [N. Y.] 493.

89. Executed by sureties only. Bowditch v. Harmon, 183 Mass. 290, 67 N. E. 333. An action against a constable for losses sustained by his negligently taking insufficient sureties on two replevin bonds is founded on the common law and recognized by statute and decisions. Stern v. Knowlton, 184 Mass. 29, 67 N. E. 869. An action against a constable for negligently taking two replevin bonds with insufficient sureties is not an action on the bonds but for the officer's misdoing in taking them and if, as was not the case, the bonds should have run to the plaintiff, it would only be additional reason for holding defendant liable. Id. Where property taken on attachment is replevied from the attaching officer who subsequently takes the same property, in the same condition and of the same value as when replevied, on execution, such levy on execution is a complete defense in an action against the officer making the replevy for negligently approving insufficient sureties on the replevin bond. Shull v. Barton [Neb.] 93 N. W. 132.

90. Edwards-Barnard Co. v. Pflanz, 24 Ky. L. R. 2296, 73 S. W. 1018.

91. Hathaway v. Smith, 117 Ga. 946.

92. Carr v. Berry, 116 Ga. 372.

93. Strong v. Combs [Neb.] 94 N. W. 149.

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(§ 5) *F. Misappropriation of proceeds.*—In an action against a sheriff for wrongful distribution of the proceeds of a sale, the plaintiff must show not only that he had a lien on the property, but also a right to participate in the profits and the payment by the sheriff to persons not entitled to receive it.[94]

§ 6. *Liability on bonds.*—The old fine distinctions between acts done by a sheriff virtute officii and colore officii are now generally disregarded and the sureties on his bond are liable for all acts or failure to act committed by him in his official capacity,[95] and even for acts which his office gave him no authority to perform, but which he claimed as such officer to have authority to perform.[96] But the sureties on his bond during one term of office are not liable for defalcations committed by him during a prior term.[97] His bondsmen cannot be held for his failure to return an execution where he died before the time for making the return had expired,[98] for acts performed by him not in his official character,[99] nor for his failure to pay to a county tax money collected by him in excess of the constitutional limit of county taxes.[1] The validity of a bond given by a marshal of the city of Brooklyn, whose office was continued by the Greater New York charter, is not impaired by the fact that it was given before the charter took effect, where the breach arose thereafter, and such bond may be prosecuted in the municipal court of the City of New York.[2] Under the statutes in Kentucky, a suit against a sheriff and his sureties on his official bond is barred as to the sureties after seven years, but as against the sheriff is not barred for fifteen years.[3] The sureties of a

94. Dowd v. Crow, 205 Pa. 214. Where one has in writing waived his mechanic's lien, he cannot afterward hold a sheriff for a wrongful distribution of the proceeds of a sale of the property on the ground of an oral agreement that his waiver should not be binding unless joined in by all the other lienholders. Id. An action for money had and received will lie against a deputy sheriff for funds in his hands realized from a sale by agreement of attached property and which he refuses to deliver to the owner thereof. McCabe v. Maguire, 182 Mass. 255, 65 N. E. 162. For facts held to justify a judgment for defendant in an action against an officer for conversion of money accepted by him to release a levy, see Cafe Union v. Reordan, 84 N. Y. Supp. 994. A statute in Massachusetts providing that where an officer attaches mortgaged goods as the property of the mortgagor and not paying the amount of the mortgagee's claim within ten days of a written demand for such payment, the attachment shall be dissolved and the officer be liable to the mortgagee for failure thereafter to return the goods, does not prevent the officer, in an action against him for the conversion of such goods, from contesting the validity of the mortgage. Fletcher v. Wrighton, 184 Mass. 547, 69 N. E. 313.

95. Where a sheriff as a condition precedent to an attachment receives money rather than a bond as indemnity from the plaintiff in the suit, he acts by virtue of, and not merely under color of, his office, and the sureties on his official bond are liable for damages caused by his failure to account for and turn over such money. Comstock-Castle Stove Co. v. Caulfield [Neb.] 95 N. W. 783. A sheriff and his sureties are liable on his official bond to the owner of property seized on attachment under process against a third person. Hill v. Ragland, 24 Ky. L. R. 1053, 70 S. W. 634; Fohs v. Rain, 39 Misc. [N. Y.] 816. Where a constable, while executing a warrant of arrest of a person, wrongfully and negligently kills such person, rendering him liable in a statutory action for wrongful death, the sureties on his official bond are liable for damages recovered in such action. Moore v. Lindsay, 31 Tex. Civ. App. 18, 71 S. W. 298. Where a statute provides for assignment to a sheriff of all the goods of a defendant and for his recording the deed of assignment and he fails so to do to the damage of the assignor's creditors, the sureties on his official bond are liable. Huddleson v. Polk [Neb.] 97 N. W. 624.

96. Seizure of cattle without writ. Arrest without warrant. Hall v. Tierney, 89 Minn. 407, 95 N. W. 219.

Contra, sureties on a sheriff's official bond are not liable for an arrest by him without a warrant, for a misdemeanor not committed in his view. State v. Dierker, 101 Mo. App. 636, 74 S. W. 153.

97. Work v. Kinney [Idaho] 71 Pac. 477. By statute in Maryland, the sureties on a sheriff's bond are liable for any default of the sheriff during the term for which the bond is executed, whether the liability accrues before or after the execution of the bond. Baker v. Fidelity & Deposit Co., 24 Ky. L. R. 2196, 73 S. W. 1025.

98. Wm. R. Moore & Co. v. Rooks [Ark.] 76 S. W. 548.

99. Money received not as constable but under a mortgage. Baughn v. Allen [Tex. Civ. App.] 73 S. W. 1063.

1. Com. v. Stone, 24 Ky. L. R. 1297, 71 S. W. 428. A constable's bond does not answer for tax bills once in the hands of a sheriff for collection and accounted for by him, which he had put into the constable's hands for collection, unless those owing the same have promised the sheriff to pay them. Otherwise as to fee bills. State v. Barnes, 52 W. Va. 85.

2. Fohs v. Rain, 39 Misc. [N. Y.] 816.

3. Hill v. Ragland, 24 Ky. L. R. 1053, 70 S. W. 634.

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sheriff or constable are not liable for trespasses committed by such sheriff or constable not under color of office nor in the line of official duty.[4]

§ 7. *Actions.*—Where a levy by a sheriff was wrongful from the beginning, no demand for the return of the property is necessary to maintain an action against the sheriff for its conversion.[5] Where the fraudulent character of a sale of personal property found in the possession of the vendee makes its seizure by a sheriff acting under a writ of attachment rightful, neither the plaintiff in the attachment nor the trustee in bankruptcy of the vendor can, by subsequent affirmance of the sale without the sheriff's consent, estop him from maintaining the invalidity of the sale in defense of an action against him for the conversion of the property by such seizure.[6] A constable's return in one action is not conclusive evidence in another action against him,[7] but is only prima facie evidence in his favor.[8] A sheriff may sue on a bond of indemnity given him conditioned to pay him such sums as a third person "may recover" from the sheriff, as soon as judgment is entered against him and before paying such judgment[9] or after a compromise made and paid in good faith.[10] Where several bonds were given a sheriff by several different plaintiffs to indemnify him against damage for the sale of property levied upon on executions all running against the same defendants, the sheriff may join all the parties on the bonds in one action so that the court may apportion the liability of each bond, and of the several sureties thereon.[11] Where a sheriff has levied an order of attachment upon part of a stock of goods but takes and holds possession of the whole stock, a recovery in an action against him for part of such stock so wrongfully seized is a bar to a later action between the same parties to recover for the remainder of the stock, although taken and sold under subsequent attachment which was levied, however, prior to the first action against the sheriff.[12] By statute in South Dakota if a husband refuses, neglects or fails to claim the exemption of property levied upon, his wife may do so, and if the officer refuses or neglects to recognize such claim the husband may thereupon sue such officer.[13] In an action for the wrongful release of a levy of attachment, it must be shown from the record that the court rendering judgment had jurisdiction, and that the judgment is valid.[14] Lost profits cannot be recovered in an action against a sheriff for conversion of property wrongfully attached.[15]

4. A complaint alleging that a constable, acting "in his official capacity" and "without authority of law" and without right, etc., committed an assault and trespass, is insufficient in an action against sureties, as not showing the officer to be acting under color of office. Felonicher v. Stingley [Cal.] 76 Pac. 504.

5. Stevens v. Curran, 28 Mont. 366, 72 Pac. 753.

6. Carson v. Hawley [C. C. A.] 122 Fed. 55.

7. Dreese v. Keller, 66 Kan. 813, 71 Pac. 520.

8. State v. Rainey, 99 Mo. App. 218, 73 S. W. 250.

9. Teague v. Collins [N. C.] 45 S. E. 1035. Under a bond given a sheriff to indemnify him against "all damages" which he might sustain from the seizure of property on attachment claimed by a stranger to the attachment writ, the sheriff may recover attorney's fees paid in defending an action against him by such stranger, but not unless the attorney's fees have actually been paid by him. Cousins v. Paxton & G. Co. [Iowa] 98 N. W. 277.

10. McDonald v. City Trust, S. D. & S. Co., 39 Misc. [N. Y.] 552. The fact that a sheriff in an action for a wrongful levy admitted that the goods seized were of the value of $15,000, and that he had no evidence to contradict the plaintiff's claim of title thereto, is no defense to an action by such sheriff against the surety on a bond given to indemnify him against harm, etc., by reason of such levy. Dunn v. Nat. Surety Co., 80 App. Div. [N. Y.] 605.

11. Teague v. Collins [N. C.] 45 S. E. 1035.

12. Burdge v. Kelchner, 66 Kan. 642, 72 Pac. 232.

13. Thompson v. Donahoe [S. D.] 92 N. W. 27. By statute in Kentucky, a deserted wife may sue for the wrongful attachment of her husband's exempt property. Baum v. Turner, 25 Ky. L. R. 600, 76 S. W. 129. Under a statute exempting the proceeds of the sale of a homestead from execution if the debtor intends to reinvest the same in a new homestead, a sheriff is not liable for paying over such funds to the debtor unless he knew that the debtor did not intend to reinvest the same in a new homestead. State v. Hull, 99 Mo. App. 703, 74 S. W. 888.

14. Jurisdictional facts are not provable

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SHIPPING AND WATER TRAFFIC.

§ 1. Public Control and Regulation; Extent of State Jurisdiction (1648).
§ 2. Nationality, Registration and Enrollment (1648).
§ 3. Master and Officers (1648).
§ 4. Seamen (1649).
§ 5. Mortgages, Bottomry, Maritime and Other Liens on the Vessel, Craft or Cargo (1650).
§ 6. Charter Party (1650).
§ 7. Navigation and Collision (1654).
A. In General (1654).
B. Lights, Signals and Lookouts (1655).
C. Steering and Sailing Rules (1656).
D. Vessels Anchored, Drifting, Grounded, etc. (1657).
E. Tugs and Tows, Pilot Boats, Fishing Vessels, etc. (1659).
F. Liability for Collisions (1661).
G. Damages (1662).
§ 8. Carriage of Passengers (1663).
§ 9. Carriage of Goods (1664).
§ 10. Freight and Demurrage (1667).
§ 11. Pilotage, Towage, Wharfage (1669).
§ 12. Repairs, Supplies, and Like Expenses (1670).
§ 13. Salvage (1671).
§ 14. Loss and Expense—Liability—Proceedings for Limitation (1673).
§ 15. General Average (1674).
§ 16. Wreck (1674).
§ 17. Maritime Torts and Crimes (1674).

§ 1. *Public control and regulation; extent of state jurisdiction.*—The territorial sovereignty of a state extends to a vessel of the state when it is upon the high seas and state statutes creating liability for death by wrongful act take effect.[16] The implied consent of this government to leave jurisdiction over the internal affairs of foreign merchant vessels in our harbors to the nations to which those vessels belong may be withdrawn or restricted.[17] Under the statutes of Oregon, the courts of that state have jurisdiction of an action for damages to a bridge constructed upon piles driven into the bed of a navigable river between high and low tide, caused by a barge drifting against it.[18]

§ 2. *Nationality, registration and enrollment.*—A vessel belongs to the state of residence of its owner, not to that of registry.[19] The home port of a vessel is either the port where the vessel is registered or enrolled, the place in the same district where the vessel was built, or where one or more of the owners reside.[20] Vessels may be taxed at their port of registration, though the owners reside elsewhere.[21]

§ 3. *Master and officers.*—The master represents the owners in respect to the personal duties and obligations which they owe the seamen.[22] The captain of a vessel is warranted in discharging members of the crew who refuse to obey reasonable orders.[23] The master has no lien for wages.[24] A contract for services as master on the lakes "for the ensuing season" is not a contract not to be performed

by parol. State v. Cunningham [Mo. App.] 79 S. W. 1017.

15. Moravec v. Grell, 78 App. Div. [N. Y.] 146. 12 Ann. Cas. 294.

16. International Nav. Co. v. Lindstrom [C. C. A.] 123 Fed. 475.

17. Hence the Act of Congress of 21 Dec. 1898, prohibiting payment of seamen's wages in advance, applies to foreign vessels shipping sailors in our ports, and is constitutional. Patterson v. Bark Eudora, 190 U. S. 169.

18. B. & C. Comp. § 4627. Astoria & C. R. R. Co. v. Kern [Or.] 76 Pac. 14. Evidence held to show that the damage to plaintiff's bridge, caused by certain barges breaking loose and drifting against it, was due to defendant's negligence. Id.

19. Registered at New York. Owned by New York corporation. International Nav. Co. v. Lindstrom [C. C. A.] 123 Fed. 475.

20. The Act of Congress (23 Stat. 58; U. S. Comp. St. 1901, p. 2831), construing the word "port" as used in the act requiring the name of a vessel's home port to be painted on her stern (Rev. St. U. S. §§ 4178, 4334; U. S. Comp. St. 1901, pp. 2830, 2968), also changed the meaning of the word as used in the section defining what is the home port [Rev. St. § 4141; U. S. Comp. St. 1901, p. 2808]. Com. v. Ayer & L. Tie Co. [Ky.] 79 S. W. 290.

21. Com. v. Ayer & L. Tie Co., 25 Ky. L. R. 1068, 77 S. W. 686.

Ignorance of the law and failure to read the papers are no defense to an action by the U. S. to recover the penalty for making a false oath to secure the registry of a vessel. Peacock v. U. S. [C. C. A.] 125 Fed. 583.

22. The Troop [C. C. A.] 128 Fed. 856.

23. The Enterprise, 127 Fed. 765. The captain of a steamer held warranted in requiring firemen to fire a coal digger used to raise coal on sunken barges, and in discharging them for failure to do so, it appearing that it was the custom, in case of trouble, for the entire crew to assist in saving property, and that the services of the firemen were not required on board the steamer while it was engaged in raising the coal. Id.

24. Bruce v. Murray [C. C. A.] 123 Fed. 366.

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within a year within the statute of frauds.[25] Where the master is also owner, no allowance for his time in superintending repairs should be made.[26]

§ 4. *Seamen.*—One who signs shipping articles thereby becomes a member of the vessel's crew, and is thereafter subject to all the penalties imposed on seamen by the maritime laws of the United States.[27] The vessel and her owners are liable in case a seaman falls sick or is wounded in the service of the ship to the extent of his maintenance and cure and to his wages, at least so long as the voyage is continued,[28] even where medical attendance is rendered on shore.[29] He may maintain an action therefor either in rem[30] or in personam,[31] and in either the state or Federal courts.[32] Contracts for seamen's wages are exceptional in character and may be subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water.[33] The statute prohibiting the payment of seamen's wages in advance applies to Americans shipping in American ports on foreign vessels,[34] and a seaman shipped in violation of it may leave ship and recover full wages without deduction for the advance.[35] The assignment of wages by a seaman,[36] or any delay in the payment of his wages without sufficient cause, is forbidden by statute.[37] Mutiny[38] and desertion[39] of seamen are punishable under statutes.

25. De Land v. Hall [Mich.] 96 N. W. 449.

26. The McIlvaine, 126 Fed. 434.

27. The Ida G. Farren, 127 Fed. 766. The wages of a seaman, who, after having regularly signed shipping articles, leaves the vessel for a temporary purpose and by permission, and fails to return before the vessel sails, and goes to a port to which he knows the vessel will not return until the trade in which it is engaged is over for the season, are subject to forfeiture for desertion, under Rev. St. § 4596; U. S. Comp. St. 1901, p. 3113. Id.

28. The Osceola, 189 U. S. 158, 47 Law. Ed. 760. He is not entitled to recover an indemnity for the negligence of the master or any member of the crew, but is entitled to maintenance and cure, whether the injuries are a result of negligence or accident. The Troop [C. C. A.] 128 Fed. 856. Injury due to assault by master. The Matterhorn [C. C. A.] 128 Fed. 863. Cost of medicine, medical attendance, support during recovery and compensation for additional suffering due to failure to provide these. The Troy, 121 Fed. 901. Departure from the course to procure medical treatment for an injured seaman has not been held to invalidate insurance on the voyage or cargo. The Iroquois [C. C. A.] 118 Fed. 1003.

29. May recover for medical attendance on shore. Sanders v. Stimson Mill Co., 32 Wash. 627, 73 Pac. 688.

30. The Troop [C. C. A.] 128 Fed. 856. The right of a seaman to libel the ship for damages due to failure of the master to provide proper treatment after an injury is not affected by the English Shipping Act (German seaman suing English ship). The Troop, 118 Fed. 769. It is no defense to a libel for damages due to the master's failure to make port to furnish proper medical treatment to an injured sailor that he thought the leg was healing and the seaman made no demand. The Iroquois [C. C. A.] 118 Fed. 1003.

31, 32. Sanders v. Stimson Mill Co., 32 Wash. 627, 73 Pac. 688.

33. When for employment in commerce not wholly within a state, Congress may legislate under the Commerce Clause. Patterson v. Bark Eudora, 190 U. S. 169, 47 Law. Ed. 1002.

34. Act Congress of Dec. 21, 1898, is constitutional. Patterson v. Bark Eudora, 190 U. S. 169, 47 L. Ed. 1002.

35. Under Rev. St. § 4523. The Troop, 117 Fed. 557.

A seaman's right to a month's wages on discharge without cause before one month's wages are earned under Rev. St. § 4527 is waived by accepting a new place equal to the former obtained for him by his former employer. The John R. Bergen, 122 Fed. 98.

36. Rev. St. § 4536, U. S. Comp. St. 1901, p. 3082. Order to pay a certain sum out of the wages of a sailor when due, held an assignment. The George W. Wells, 118 Fed. 761.

37. 30 Stat. 756; U. S. Comp. St. 1901, p. 3077. Payment is not delayed without sufficient cause when due to the fact that the wages had previously been paid to a third party under an assignment void in law. Without sufficient cause means without reasonable cause. The George W. Wells, 118 Fed. 761.

38. Rev. St. § 5359 making punishable endeavors to make a revolt was not repealed by implication by Rev. St. § 4596, making it an offense to combine to disobey. In re Simpson, 119 Fed. 620.

39. Where a seaman hired in place of one ill, though not of the same grade as required by U. S. Comp. St. p. 3071, was yet able to satisfy the master and no complaint was then made by the other seamen, the latter were not justified in deserting and cannot recover their wages (New man was nonunion). The Moonlight, 125 Fed. 429. A side trip up the Red river from Natchez is by usage not a deviation from a trip from Pittsburg to New Orleans and return and a seaman leaving the ship at Natchez cannot recover for his fare home. The J. B. Williams, 126 Fed. 590.

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§ 5. *Mortgages, bottomry, maritime and other liens on the vessel, craft or cargo.*—A mortgage on a vessel must be recorded at the office of the collector of customs nearest the owner's residence.[40] A mortgagee of the ship not having a formal assignment of the freight is entitled to freights becoming due after he takes possession, though earned before, but subject to any arrangements respecting the same made by the owners while in possession.[41] A mortgage to secure payment for supplies is not a distinct and independent security from the lien for supplies and is not inconsistent with an intent to claim the lien.[42] There can be no recovery in rem against the ship except for services rendered the vessel proceeded against, supplies furnished in furtherance of the voyage or damages occasioned by the fault or negligence of the ship.[43] Vessels are liable only for duties implied by law from some concrete act of the vessel and therefore not under contract wholly executory,[44] nor under contracts by one not authorized to bind the ship.[45] If the owner refuses to permit the creation of a lien on the vessel and this is or ought to have been known to the materialman, no lien arises or is deemed waived.[46] The subject of the lien must be a vessel within the jurisdiction of the maritime law.[47] A lien for supplies furnished to vessels under a written contract will not be presumed, and does not exist unless upon proof it can be found that the minds of the parties met on a common understanding that such a lien should be created.[48]

§ 6. *Charter party.*—In order to make an agreement a marine contract, it must relate to navigation.[49]

If the entire vessel is let to the charterer, with a transfer to him of its possession and control over its navigation, he will generally be regarded as owner for the voyage and will be held responsible for the acts of the master and crew.[50] But if the charter party lets only the use of the vessel, and the owner retains its command and possession and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and re-

40. Recording a mortgage on inland coal barges in the county where they then are is invalid against purchasers without notice. Arnold v. Eastin's Trustee, 25 Ky. L. R. 895, 76 S. W. 855.

41. Hence charterer entitled to retain from freight advances made to master by agreement with owner. Merchant Banking Co. v. Cargo of the Afton, 125 Fed. 258.

42. The Thomas Morgan, 123 Fed. 781.

43. Hence no lien exists for the master's contract to return a tow boat in as good condition as before, regardless of negligence. The Ville de St. Nazaire, 126 Fed. 448.

44. No lien for breach of a charter for a number of cargoes on a number of vessels so far as the cargoes were not received. The S. L. Watson [C. C. A.] 118 Fed. 945. By the general maritime law, there is no lien in favor of either the ship owner or shipper for the breach of a contract wholly executory. It does not attach till part of the cargo has been put in the custody of a representative of the owner. The Energia, 124 Fed. 842.

45. Stevedore rendering services to a foreign ship under contract with other than master or owner and failing to notify master that he would look to the ship for payment has no lien if the broker he contracted with is in fact unauthorized to bind the ship (broker also charterer and bound to pay port charges). The Chicklade, 120 Fed. 1003.

46. An exhaustive historical discussion of the theory of maritime liens is contained from p. 715 to p. 758, and a valuable summary of the existing law on pp. 758, 759 of 119 Fed. by Lowell, J. The Underwriter, 119 Fed. 713.

47. Neither floating dry dock moving only vertically nor a ship on it nor both together is a vessel in navigable waters so as to give a lien for a maritime tort. The Warfield, 120 Fed. 847. Floating dock. Arnold v. Eastin's Trustees, 25 Ky. L. R. 895, 76 S. W. 855.

48. Evidence not sufficient to show such understanding when contract was made, and a subsequent conversation held not to create one. Whitcomb v. Metropolitan Coal Co. [C. C. A.] 122 Fed. 941.

49. City of Detroit v. Grummond [C. C. A.] 121 Fed. 963. A contract for the hire of a vessel to lie moored as a hospital does not relate to navigation and is not maritime. Hence provisions regarding insurance are to be construed according to the common law. Id. An agreement by the hirer of a vessel to "pay the insurance" is merely a contract to reimburse the owner for insurance to be procured by him. Id.

50. If a charter constitutes a demise passing possession and control and not a mere contract of affreightment, the master and crew are agents of the charterer and the owner is not liable for their wrongful acts. Charter held a demise. The Del Norte [C. C. A.] 119 Fed. 118.

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sponsibilities of the owner are not changed.[51] This rule, however, may be changed by contract.[52] A vessel cannot be compelled to discharge at other than the port of destination designated in the charter party.[53] Charter parties must be construed liberally,[54] in furtherance of the usages and customs of trade,[55] and in accordance with the true and reasonable intendment of the parties,[56] and the ordinary meaning of the language used.[57] The instrument should be read as a whole in so far as it may be necessary to arrive at the meaning of any particular clause.[58] Conditions beyond those expressed by the parties, which are attached by law to a contract for the purpose of practically working out what they have therein undertaken to accomplish, must be just and reasonable.[59] Fixed forms of expression cannot be modified to meet any supposed intent.[60]

51. Charterer not liable for depreciation resulting from crew's negligence, though the owner agrees to deliver the vessel to him, and he agrees to return her in as good condition as when received. Auten v. Bennett, 88 App. Div. [N. Y.] 15. The master held to represent the owner in the immediate care and custody of the ship, not merely during navigation, but during loading and discharging; and his failure to protect hatch coamings relieved charterer of liability for damage to them in loading. Worrall v. Davis C. & Coke Co. [C. C. A.] 122 Fed. 486.

52. Owner held liable for loss of ship by master's neglect where the charter-party expressly exempted the charterer from liability. McCormick v. Shippy, 119 Fed. 226. A charterer is a bailee for hire and liable only for ordinary care, and no principle of public policy as in the case of a common carrier, prevents him from stipulating against liability for negligence. McCormick v. Shippy [C. C. A.] 124 Fed. 48. Under a time charter providing that the owners shall pay the officers and crew and the charterer shall pay for coal, and the master, though appointed by the owners, shall be under the orders and direction of the charterer as regards employment agency or other arrangements, any act or omission of the officers or crew respecting the coal was as agent for the charterer. Hence charterer cannot libel owners or ship for alleged false representation of officers as to amount of coal to be paid for by charterer. The Endsleigh, 124 Fed. 858. A libellant who by knowledge of the existence of a charter is put on inquiry as to its terms has no lien against the ship for coal supplied on the order of the master even in a foreign port, if it was not a port of distress where it may be reasonably supposed that further prosecution of the voyage is for the interest of the owner as well as the charterer. The Underwriter, 119 Fed. 713. On constructive notice, see Taylor v. Fall River Iron Works, 124 Fed. 826.

53. A ship chartered to New York cannot be compelled to discharge at New Rochelle. Mitchell v. A Cargo of Lumber, 117 Fed. 189. A refusal to discharge at a certain point because outside the port of consignment is not waived by raising the added objection that the ship could not lie afloat there. Id.

54. Auten v. Bennett, 88 App. Div. [N. Y.] 15.

55. Tweedie Trading Co. v. N. Y. & B. Dyewood Co. [C. C. A.] 127 Fed. 278. To read a custom of a port into a charter-party, it must be not inconsistent with it and so notorious that persons dealing in the market must be presumed to know it. Entry at custom house before tender for loading. Bonanno v. Tweedie Trading Co., 117 Fed. 991. Since the Saturday half-holiday is optional, not compulsory by Pa. statute, and was not claimed by stevedores as a right under the statute, and since no custom was proved, demurrage allowed. Holland Gulf Steamshipping Co. v. Hagar, 124 Fed. 460. In the absence of any designation of the method of measurement in a contract for the shipment of logs, they will be measured in accordance with the custom of trade in the country where the contract was made. Contract will be presumed to have been made with reference to such custom. Peterson v. 869 Cedar Logs, 127 Fed. 868.

56. A charter-party, requiring the charterer to furnish the cargo "within reach of the ship's tackles at ports of loading and discharge where steamer can always safely lie afloat; lighterage, if any, to be at the expense and risk of cargo," construed and held that such provision was not equivalent to one that the vessel should go to the specified port, or "as near as she can safely get," and did not require the charterer to lighter a part of the cargo across a bar, or render him liable for dead freight for refusing to do so. Tweedie Trading Co. v. N. Y. & B. Dyewood Co. [C. C. A.] 127 Fed. 278. Provision that the charterer "shall maintain the yacht in a thoroughly efficient state in hull and machinery" provides only for the assumption by the charterer of wear and tear repairs which otherwise would be imposed by law on the owner. McCormick v. Shippy [C. C. A.] 124 Fed. 48.

57. A charter-party provided for certificate of condition of the vessel on tender and right of charterer to cancel if repairs took more than 10 days. Held, to refer to repairs after tender, not before. McNear v. Leblond [C. C. A.] 123 Fed. 384. A provision that if a yacht shall be "laid up for repairs for a period exceeding 7 days," the owner shall rebate pro rata "for the number of days the said yacht is so laid up for repairs," requires a rebate for the entire repair period and not merely the excess over 7 days. Dahlgren v. Whitaker, 124 Fed. 695.

58. An agreement in a charter-party for a lien on wharf property of the charterer in favor of the owner of the vessel was held sufficiently definite to give an equitable lien for a breach of the charter as against one taking with notice. In equity. Booz v. Phila. & L. Transp. Co., 124 Fed. 430.

59. Duty to load with reasonable dispatch construed liberally with reference to

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In every charter party there is an implied warranty that the vessel is seaworthy and suitable for the service in which she is to be employed.[61] Actual seaworthiness can be determined only by a survey.[62] A vessel is laid up for repairs when she is at rest having some damage made good that in a material degree impairs her ability to pursue the voyage.[63] The vessel is generally exempted from liability for loss caused by act of God, or any extraordinary circumstances beyond the control of either party.[64]

A covenant for a safe loading or discharging place implies that the port named shall be one where the vessel can safely get with her whole cargo and discharge it.[65] The provision that the vessel shall go as near to the designated port "as she can safely get," refers to the vessel's safety in going to the port of loading, and also leaving the same when loaded, and whenever she is unable to get away with the full cargo, because of reefs or bars, the charterer is held to a strict fulfillment of his undertaking.[66]

Violation of a condition precedent justifies cancellation of the charter,[67] but a charterer will not be allowed to set up a condition precedent which he prevented the owner from fulfilling.[68] A material false representation will justify rescission,[69] or the recovery of damages.[70] The breach of a stipulation may be waived.[71]

the usual facilities and methods of business of consignees. Donnell v. Amoskeag [C. C. A.] 118 Fed. 10.

60. "Loading in turn" prohibits a preference to the consignee's own vessels or to local customers regardless of any custom of the consignee. Donnell v. Amoskeag [C. C. A.] 118 Fed. 10.

61. This relates to both patent and latent defects, and if a defect is developed without apparent cause, it will be presumed to have existed when the service began. Defective gasket. Auten v. Bennett, 88 App. Div. [N. Y.] 15. An agreement to return in as good condition as when received did not extend to depreciation due to unseaworthiness. Id.

62. Neither the age of a vessel, nor the length of time she has been upon her copper, nor the fact that owing to her age insurance cannot be obtained on the cargo intended to be shipped on her, establishes that she is in fact unseaworthy for the contemplated voyage. A provision that the charterer might cancel the charter if the owners should not furnish a certificate of seaworthiness from the charterer's surveyor, while it makes the surveyor's judgment conclusive, if honestly exercised, requires an actual survey and not a decision on mere hearsay, or the rules of an insurance company, unless the failure to make the survey was the fault of the owners. Cornwall v. Moore & Co., 125 Fed. 646.

63. Though charterer still able to sleep and entertain aboard. Dahlgren v. Whitaker, 124 Fed. 695.

64. A provision in the charter party that when certain timber was received alongside and secured by the ship's dogs and chains, it was to be at the ship's risk, did not render the ship liable for the loss of timber so delivered, caused by a violent storm, and in spite of the utmost diligence on the part of the ship's crew, where the charter-party further exempted the ship from liability for loss by act of God or any extraordinary circumstance beyond the control of either party, and all and every other danger and accidents of the seas. Southerland-Innes Co. v. Thynas [C. C. A.] 128 Fed. 42.

65. Without touching the ground and without being subject to obstructions, at any stage of the tide, in a bridge opening it may be necessary to use to reach the wharf. Crisp v. U. S. & A. S. S. Co., 124 Fed. 748.

66. Tweedie Trading Co. v. N. Y. & B. Dyewood Co. [C. C. A.] 127 Fed. 278. A charter-party providing for discharge at designated ports or so near the port "as she may safely get and deliver the same always afloat" does not oblige the ship to proceed under a bridge if to do so required her to mutilate her hull or her permanent masts. Single stick steel masts too high for Brooklyn Bridge. Mencke v. A Cargo of Java Sugar, 187 U. S. 248, 47 Law. Ed. 163.

67. Time and situation of a vessel are materially essential parts of the contract of a charter-party or affreightment. Giuseppe v. Manufacturers' Export Co., 124 Fed. 663. A provision for sailing at a certain time is ordinarily a condition precedent justifying cancellation on breach, but not when followed by an express provision for cancellation on failure to arrive on a time fixed (failure to sail not known till after arrival on time). Rosasco v. Pitch Pine Lumber Co., 121 Fed. 437. A stipulation that the vessel will proceed "with all possible dispatch" to the port of loading is not merely a representation, but a condition precedent to the right of recovery. Even in the absence of such stipulation the law implies a stipulation that there shall be no unusual or unreasonable delay. Delay held unreasonable and tender of ship justifiably refused. Giuseppe v. Manufacturers' Export Co., 124 Fed. 663. A requirement in a charter-party of notice of readiness for loading to be given within certain hours is to prevent the running of demurrage at a time when the charterer could not load, and if the vessel is ready on time, cancellation is not justified because notice could not be given till later. Bonanno v. Tweedie Trading Co., 117 Fed. 991.

68. Entry at custom house before regular hours. Bonanno v. Tweedie Trading Co., 117 Fed. 991.

69. A representation as to the speed of a

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The measure of damages for breach of a charter by failure to deliver the vessel is the difference between the contract price and the market price at the place of breach of the contract.[72] Where there is no market price, resort is of necessity had to other elements of loss, and where the contract is made with reference to specific purposes or circumstances, known at the time, a different rule may result from the probable and natural consequences of a breach.[73] For refusing to accept a vessel it is the net amount that would have been earned under the charter, less the net amount earned, or which might with reasonable diligence have been earned by the vessel, during the time required for the performance of the voyage named in such charter.[74] Where a charterer sends a ship to a port different from that designated in the charter-party, the owner can recover the net freight she would have earned on a voyage to the designated port.[75] A charterer is liable as an insurer for loss sustained during deviation from the stipulated voyage.[76] The

chartered steamer made outside the charter-party, which was material and if false would have justified rescission, held not false in fact. Clydesdale Shipowners' Co. v. Brauer S. S. Co., 120 Fed. 854. Evidence held not to show false representation to justify cancelling charter made on basis of correct plans of the ship. Ansgar S. S. Co. v. Brauer S. S. Co., 121 Fed. 426. To entitle the charterer to rescind the other party must be restored so far as possible to the position he was in when the charter was made. A charterer cannot delay rescinding for false representation, till the end of a voyage which was much longer and entirely different from that with reference to which the representation was made. Clydesdale Shipowners' Co. v. Brauer S. S. Co., 120 Fed. 854.

70. A representation made by the owners of a ship as to her cargo capacity, which is a material inducement to the making of the charter, and without which it would not have been made, there being nothing inconsistent therewith in the charter, becomes a part of the contract, and the owners are liable for damages sustained by the charterers because of the failure of the vessel to carry the tonnage represented. Evidence held to show that the tonnage of a vessel was less than it was represented to be. Wood v. Sewall's Adm'rs, 128 Fed. 141. Evidence held insufficient to sustain the claim of a charterer that the vessel did not have the carrying capacity guaranteed by the charter. Hreglich v. One Thousand Tons of Coal, 128 Fed. 464. A shipper has a right against both vessel and owner for breach of a warranty of speed made with knowledge that the charterer was to engage to carry for others, the owner retaining management and control of the vessel. Whether the shipper's rights arise by bill of lading, sub-charter, or assignment of charter (sub-charter). The Astraea, 124 Fed. 83.

71. A charterer who on learning of the breach of a condition precedent did not notify the owner of his intention to cancel but relied on the owner's assurance that the vessel would arrive on time, waived the breach. Time and situation of the vessel. Giuseppe v. Manufacturers' Export Co., 124 Fed. 663. Acceptance of demurrage by the master under protest does not waive the owner's right to claim more, though for reasons different from those alleged by the master. Holland Gulf Steamshipping Co. v. Hagar, 124 Fed. 460. Strict performance of provision making freight due at once on discharge was waived by an agreement between master and charterer that the latter mail a check. Cargo of the Joseph W. Brooks, 122 Fed. 881. Where a charterer consented to substantial performance by an owner in default, the latter to avoid liability must use reasonable efforts, and delay in loading substituted vessels unless very unreasonable will not justify refusal to perform. The S. L. Watson [C. C. A.] 118 Fed. 945.

72. This rule should not be disregarded unless it is clear that some other element of damage was within the contemplation of the parties making the contract, and that the contract was made with reference to it. Richard v. Holman, 123 Fed. 734. Will not include the profits of a re-charter where it does not appear to have been contemplated by the owners at the time of the charter. Grain charters have a known market value. Id. Includes increased rate of freights on charters negotiated as soon as possible after final refusal to substitute other vessel. The S. L. Watson [C. C. A.] 118 Fed. 945.

73. Richard v. Holman, 123 Fed. 734.

74. Cornwall v. Moore & Co., 125 Fed. 646. Original charterer re-chartered at lower rate. McNear v. Leblond [C. C. A.] 123 Fed. 384. When a libellant for breach of a contract to hire a dredge had sold it during the period for which it was rented he could not recover the agreed rental for that part of the term subsequent to the sale. William H. Beard Dredging Co. v. Hughes [C. C. A.] 121 Fed. 808. Evidence held to show that barges tendered under a contract to receive freight were suitable for the purpose, and that the refusal to load them entitled the contractor to damages. Excess of coal over amount which libellant agreed to receive, not shown. Guinan v. Weaver C. & Coke Co., 128 Fed. 208.

75. Johnson v. D. H. Bibb Lumber Co., 140 Cal. 95, 73 Pac. 730. An oral agreement for an additional different voyage from those specified in a charter-party is inconsistent with it and cannot be proved. Id.

Authority of owner's agent to charter barges for a series of trips held sustained by the evidence. The S. L. Watson [C. C. A.] 118 Fed. 945.

76. A charter of a launch for use on the Hudson river was deviated from by sending it to Harlem under circumstances that led the master to go around the Battery, and the charterer was liable as an insurer for damages resulting, including the expense of

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charterer of a vessel who sends it to an unsafe place to unload, is liable for dar ages resulting therefrom, when the master thereof has no knowledge or reas to believe that the place is unsafe.[77]

An action cannot be maintained for breach of an unstamped charter-par executed while the war revenue act was in force.[78] It is the duty of one hiri a vessel to take ordinary care of it, and return it to the owner in the same co dition as received, ordinary wear and tear excepted.[79] The charterers of a ves cannot recover from the ship owner counsel fees paid by the consignee of her car and deducted from the price thereof, such fees having been rendered necessary a dispute as to demurrage between the charterers and the master, when the maste claim was reasonable and made in good faith.[80]

§ 7. *Navigation and collision. A. In general.*—Noncompliance with stat tory regulations is not prima facie evidence of negligence but may be consider by a jury.[81] Even if a steamer is found to have complied with all regulations avoid collision with another, it is negligence, if after discovering that the latt was in fault she failed to take all possible precautions.[82] When the master a vessel is confronted with a sudden peril caused by the action of another vess so that he is justified in believing that collision is inevitable, and he exercises h best judgment in the emergency, his action, even though unwise, cannot be r garded as a fault.[83] The danger of swell and suction must be allowed for passing vessels.[84] Proper appliances for navigating the vessel must be furnish and maintained.[85]

a salvage suit. Sutcliff v. Seligman [C. C. A.] 121 Fed. 803. Charterer held not liable for stranding claimed on the ground of a sub-charter without authority and for an unlawful purpose (violating neutrality). The Ely [C. C. A.] 122 Fed. 447.

77. Dailey v. New York, 128 Fed. 796.

78. 30 Stat. 452; U. S. Comp. St. 1901, p. 2292. Statute provides that it is not admissible in evidence, and there is nothing before the court to show what the contract was. Statute in relation to stamps on charter-parties construed. Wheaton v. Weston & Co., 128 Fed. 151.

79. City held liable for damages where tug hired by it, and towed to the point where it was desired to unload her, settled on a projection on the bottom when the tide receded, and was injured thereby. Dailey v. New York, 128 Fed. 796. Where libellants had purchased some scow loads of street sweepings from the city, the purchase price including the towing of the boats to and from the wharf and unloading, they were liable only for ordinary care for the protection of the boats and not for damage due to the parting of their mooring lines during a sudden and severe storm. Booth v. New York, 127 Fed. 459. For violation of the stipulation to return a vessel in as good condition as when leased, the remedy is in damages and the owner cannot refuse to receive it and treat the title as passed. City of Detroit v. Grummond [C. C. A.] 121 Fed. 963.

80. Wood v. Sewall's Adm'rs, 128 Fed. 141.

81. Failure to sound fog signals. Collision on ferry boat in fog. Schlotterer v. Brooklyn & N. Y. Ferry Co., 75 App. Div. [N. Y.] 330. The exercise of the discretion of the commander of a war vessel in time of war does not relieve the nation owning the vessel from the result of a violation of the provisions of the statutory law, where the nation has authorized a suit against itself in a court whose duty it is to apply the l (Suit by act of Congress for sinking of En lish ship by U. S. cruiser steaming in a f without lights or signals during the Spani War). Watts v. U. S., 123 Fed. 105.

82. Hampton v. Occidental & Oriental S. Co., 139 Cal. 706, 73 Pac. 579. Inevita accident is an occurrence which the par charged with the collision could not pc sibly prevent by the exercise of ordina care, caution, and maritime skill. She caused by suction of third vessel attempti to pass a tow. The Fontana [C. C. A.] 1 Fed. 853. Failure to promptly use ha steering gear on disablement of steam ge is negligence. Van Eyken v. Erie R. Co., 1 Fed. 712.

83. Privileged vessel ported at last m ment. The Queen Elizabeth [C. C. A.] 1 Fed. 406. An error "in extremis" will r relieve the other vessel from liability whe the latter's fault caused the dangerous s uation. The Delmar, 125 Fed. 130. A ferr boat originally careful held at fault for err not in extremis after an initial fault of a t In re Brooklyn Ferry Co. [C. C. A.] 121 F 741.

84. Steamers must pass docks or moorin places at such a rate of speed and distan that no harm will ensue to a vessel prope moored from swell or suction. Raft brok up. The Rotherfield, 123 Fed. 460. A cla by officers of a large steamer that her e gines were stopped when opposite a tow scows is an admission of her duty, and sin no entry of it appeared in the steamer's l and the claim was not sufficiently proved, t steamer was held liable for loss of cargo the scow owing to the swell of the steam The St. Paul, 124 Fed. 103.

85. Failure to inspect a sleeve and s screws connecting rods of the valve of ste steering gear is negligence. Van Eyken Erie R. Co., 117 Fed. 712.

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(§ 7) *B. Lights, signals and lookouts.*—Vessels must not allow their lights to be obscured by their sails, or otherwise,[86] and are bound to keep a proper and sufficient lookout.[87] The navigator cannot at the same time serve as lookout.[88] Proper signals must be given,[89] and maneuvers must be executed in accordance therewith.[90] Vessels must not proceed until signals are agreed upon and understood.[91]

86. Brigantine allowed side lights to be obscured by foresail in violation of Rev. St. § 4233. The Iberia [C. C. A.] 123 Fed. 865; Id., 117 Fed. 718.

87. Evidence sufficient to sustain finding that a collision was due to failure of ferryboat to keep proper lookout. The Bergen [C. C. A.] 128 Fed. 920. Proximate cause of a collision held to be failure of a steamer to observe unobscured lights of a schooner and steamer held liable for damages resulting therefrom. The Helen G. Moseley [C. C. A.] 128 Fed. 402. Steamer attempting to land with aid of a tug held at fault for a collision on the ground of her inattention to other vessels in the river. The Horatio Hall, 127 Fed. 620. Evidence held to show that a steamer was at fault for a collision with a crossing schooner at sea for failing to maintain an efficient lookout. The Silvia, 127 Fed. 615. Steamer and tug with car float both at fault for failure to keep good lookout at night and to stop in time. The Wallace B. Flint, 125 Fed. 426; The Transfer No. 9, 125 Fed. 426. Steamer with tows at fault for failure to see crossing schooner or her lights in the evening. Schooner also at fault for not shifting course after observing negligence of steamer. The Massassagua, 124 Fed. 97. Tug held at fault for inattention and insufficient lookout and ferryboat for proceeding after signals unanswered. The De Veaux Powell, 120 Fed. 522. Lighter held at fault for want of lookout, and tug and tow for want of proper lights on the tow. The tug and tow not having affirmatively shown that their omission did not contribute to the collision are liable. The Komuk, 120 Fed. 841. Two ferryboats colliding on converging courses without signals held both at fault for insufficient lookout. The Colorado, 117 Fed. 796.

Lookout on the bridge instead of on deck not negligence where it did not appear that lights could have been seen better from the deck. The Iberia, 117 Fed. 718. Steamer held solely liable as the burdened vessel in collision with a schooner where neither had proper lookout. The Gadsby, 120 Fed. 851. Collision held to have been the result of reckless navigation on the part of a steamer, either in running at too high a speed or in failing to see the lights of an approaching steamer. The Benjamin Franklin, 127 Fed. 457. Tug with a car float on each side held responsible for a collision with a barge in tow, on the ground that she was on the wrong side of the channel, and was negligent in failing to give proper attention to the lights and signals of the approaching vessels, or to promptly and decisively change her course as soon as they were seen. The Transfer No. 14 [C. C. A.] 127 Fed. 305.

88. Steamer at fault colliding with schooner in a draw. Though misled by sudden appearance of another schooner in the other draw, not inevitable accident. The J. C. Ames, 121 Fed. 918.

89. Steam yacht and tug both at fault for a collision nearly head on in the daytime resulting from failure to give proper signals in violation of pilot rules 1 and 6 and not stopping and reversing when danger of collision appeared. The Richmond, 124 Fed. 993. Two tugs held both in fault for a collision between their respective tows, for being too near the Battery wall, for not keeping proper lookouts, for failing to give proper signals, and for proceeding into collision with substantially unabated speed (The N. Y. Cent. No. 19, 127 Fed. 473. When the wind is on her starboard bow, a sailing vessel is on the starboard tack and the proper fog signal is one blast (Burrows v. Gower, 119 Fed. 616).

90. A pilot boat was solely at fault for assuming that a steamer that had signaled for a pilot at night had wholly stopped and for crossing her bows. The Ansgar [C. C. A.] 123 Fed. 473. Both steamers at fault for failure to change courses sufficiently according to signals. St. Clair river. The Mary C. Elphicke v. Pittsburgh S. S. Co. [C. C. A.] 123 Fed. 405. Tug with three tows abreast held solely liable in collision with steamer for failure to execute agreed signals for passing. The Valley Forge [C. C. A.] 124 Fed. 192. Steamer changing her course after timely signals that libellant was going astern is solely at fault. The Buena Ventura, 117 Fed. 988. Tug held at fault for collision with ferryboat because of change of course. The N. & W. 2, 122 Fed. 171. Steamer changing course at full speed without signalling approaching steamer was solely at fault, though the latter thinking the former only sheering also sheered in the same direction instead of keeping her course. In re Rend, 126 Fed. 564. Where a vessel changed her course when near another making collision inevitable unless one changed and the other attempted properly to change, the one responsible for the dangerous situation was solely at fault. The Mary Buhne [C. C. A.] 118 Fed. 1000.

When collision is imminent, a vessel is justified disobeying signals in an effort to avoid it. Wagner v. Buffalo & R. Transit Co., 172 N. Y. 634, 65 N. E. 1123. Steamer held solely at fault for trying to compel a schooner to change her course which she properly refused to do until in extremis. Medero v. La Compagnie Generale Transatlantique, 122 Fed. 1018. A contention that a steamer crossed a schooner's bows and then turned within a few hundred feet so as to strike at right angles was rejected as unreasonable. The Senator Sullivan, 117 Fed. 176. The excuse of navigating according to rule cannot be opposed to a claim of failure to keep proper lookout where there was a change of course even though made when in extremis. The James A. Lawrence [C. C. A.] 117 Fed. 228. Both tugs at fault for a collision of their respective tows for not passing port to port according to rules, and for changing course when so near that tows

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(§ 7) *C. Steering and sailing rules.*—The privileged vessel, in the absence of some distinct indication to the contrary, has the right to rely on the performance by the other of her duty to keep out of the way, and it is the duty of the privileged vessel to maintain her course and speed unless in extremis.[92] A vessel overtaking another is bound to keep out of her way,[93] and the presumption in all cases is that she is at fault for a collision.[94] The sole test as to what is an overtaking vessel is whether she is coming up with another vessel from a direction more than two points abaft her beam.[95] In a collision between a sailing vessel and a tug and tow, the presumption is in favor of the former.[96] A steam vessel is bound to keep out of the way of a sailing vessel,[97] and a vessel sailing free out of the way of one close-hauled.[98] There is a presumption against a vessel on the wrong side of the channel.[99] A vessel in a narrow channel failing

had no time to follow. The Edgar F. Luckenbach, 124 Fed. 947. Steamer solely at fault in collision with launches in narrow river channel for turning to port. The Dauntless, 121 Fed. 420. Passing to starboard pursuant to signals given and assented to when steamers were a mile apart and there was abundant room is not a violation of the navigation rules. Steamer not turning at once pursuant to signals assented to, held at fault. The Lakme [C. C. A.] 118 Fed. 972.

91. Any vessel backing across a channel in the way of other vessels, is bound to exercise extreme care to notify them of her maneuver. A steamer backing across a channel held to have been guilty of contributory negligence in failing to give sufficient attention to approaching steamers, or to repeat her signal that she was going astern when the action of the others indicated that it had not been heard. The Sicilian Prince, 128 Fed. 133. Both steamers held at fault, the burdened vessel for continuing her course and speed, and the other for failing to do so or give danger signals. The Straits of Dover [C. C. A.] 120 Fed. 900. Both tugs at fault for proceeding at full speed after cross signals. The Mahanoy, 126 Fed. 587. Both steamers at fault for continuing after a failure to agree on signals. The Peconic, 124 Fed. 848. A tug and a ferryboat continuing to approach on crossing courses, exchanging contrary signals, held both at fault. The Mauch Chunk, 124 Fed. 671. Both steamers at fault for not sooner agreeing by signals on crossing. Brooklyn Ferry Co. v. U. S., 122 Fed. 696. Both steamers at fault for failure to signal that they did not understand each other's courses in a fog. The Kaga Maru, 123 Fed. 139. Steamers mistaking signals in a fog and not obeying rule 3 of U. S. Comp. St. p. 2882; held both at fault. The Glenogle, 122 Fed. 503. Yacht held primarily at fault for collision for initiating improper signal and failing to promptly execute the maneuver when agreed upon. The Richmond, 124 Fed. 993.

92. Ferryboat and steamer crossing in New York harbor. The Chicago [C. C. A.] 125 Fed. 712. Steamer with tows at fault for collision with privileged ferryboat. The C. J. Reno, 121 Fed. 149.

93. Schooners tacking in narrow channel. The Rebecca [C. C. A.] 122 Fed. 619. A vessel has a right to expect that another one passing her will keep at a safe distance. The Phillip Minch [C. C. A.] 128 Fed. 578. A steamer passing down East River overtook and passed another steamer in tow, and while attempting to land at a pier, swung around and collided with one of the towing tugs. Held, that the rule requiring a vessel having another on her starboard hand to keep out of the way did not apply to the tow, but that the case was one of special circumstances, falling within art. 27 of the rules for harbors and inland waters [30 Stat. 102; U. S. Comp. St. 1901, p. 2884]. The Horatio Hall, 127 Fed. 620. Evidence held sufficient to establish liability for collision. The Phillip Minch [C. C. A.] 128 Fed. 578. Evidence held to show that the steamer and not the tug was the overtaken vessel and not in fault. The John H. Starin, 124 Fed. 744. An overtaken schooner not displaying a stern light and an overtaking steamer which had withdrawn lookouts owing to coldness of weather and freezing of spray, but continued at full speed both at fault. The Kaiserine Maria Theresia, 125 Fed. 145. Overtaken schooner held solely at fault for failure to show a stern light under art. 10 of International Navigation Rules. The Bernicia, 122 Fed. 886.

94. Overtaking vessel held to be at fault for not keeping out of the way, for being on the wrong side of the channel, and for not reducing speed. The Sicilian Prince, 128 Fed. 133. Any reasonable doubt should be resolved in favor of the overtaken vessel, when the fault of the overtaking vessel has been established. Duty of larger vessel to allow for suction. Error in extremis. The Atlantis [C. C. A.] 119 Fed. 568.

95. Under art. 24 of the inland navigation rules (30 Stat. 101; U. S. Comp. St. 1901, p. 2883). Whether the overtaking vessel is going ahead or astern is immaterial. The Sicilian Prince, 128 Fed. 133.

96. The Delmar, 125 Fed. 130. Tug held solely at fault for collision with schooner. The Triton [C. C. A.] 118 Fed. 329. Evidence held to show steamer at fault where it appeared that the schooner could not have been headed so far south as to hide a light the steamer claimed was not seen. The Helen G. Moseley, 117 Fed. 760.

97. Liable for damages resulting from failure to do so unless she can show that the sailing vessel was at fault. The Helen G. Moseley [C. C. A.] 128 Fed. 402.

98. A schooner running free held solely liable for failing to keep out of the way of a bark close hauled on a crossing course The Richard F. C. Hartley, 124 Fed. 708.

99. A tow colliding on the wrong side of the channel to rebut the presumption against her must show not merely a sheer but that

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to keep on the right-hand side of the fairway, in accordance with the inland navigation rules, is liable for damages due to a collision which would not otherwise have occurred, in the absence of a showing that special circumstances rendered such a course unsafe or impracticable.[1] The burden is on a vessel proceeding at excessive speed in violation of statute to show that the collision was not by her fault.[2] It is the duty of a steamer running through a fog to proceed only at such a rate of speed as will enable her after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent a collision from taking place.[3] Courts of admiralty incline to accept the statements of a crew as to the movements on their own vessel rather than statements coming from the crew of the other vessel.[4] Where the testimony of the crew of a vessel as to her course before a collision and the bearing of the lights of an approaching vessel cannot both be true, or the collision would not have occurred, the testimony as to the course is entitled to preference as less liable to error.[5]

(§ 7) *D. Vessels anchored, drifting, grounded, etc.*—The burden is on the moving vessel to show that she could not have prevented the injury by any practicable precautions.[6]

it could not have been guarded against by reasonable skill. Known cross-current in river. The Australia [C. C. A.] 120 Fed. 220. Tug between car-floats on wrong side of channel held primarily at fault, but tug with tow failing to reduce speed when she found her signals unanswered held also at fault. The Teaser, 118 Fed. 81. Tug with tow solely at fault for failure to keep in the middle of the channel according to the state statute and improper lookout. Steamer not at fault, since tug's sidelights were not burning. The Hartford, 125 Fed. 559. Steamer at fault for not keeping in the middle of East River as required by N. Y. statute and for keeping course and speed after her erroneous signal was unanswered and a tug failing to keep proper lookout and maintaining her speed. The Spartan Prince, 126 Fed. 885. Tugs towing a steamship held not to have been guilty of such a violation of the New York state regulation requiring vessels to keep as near the middle of East River as possible as to render them in fault for a collision caused by the plain fault of the other vessel. The Horatio Hall, 127 Fed. 620. The pilot rules (U. S. Comp. St. p. 2876) did not change the N. Y. statute requiring vessels navigating the East river to keep near the middle of the channel. The Hartford, 125 Fed. 559; The Manhattan, 125 Fed. 559. Tug with car floats. The Transfer No. 14 [C. C. A.] 127 Fed. 805.

1. Art. 25, Inland Nav. Rules (30 Stat. 96; U. S. Comp. St. 1901, p. 2883). The Alfred W. Booth, 127 Fed. 453; The Benjamin Franklin, 127 Fed. 457. Article 25 of the inland navigation rules, providing that in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel, applies to navigation in the Upper Bay of New York between Bay Ridge and Tompkinsville [30 Stat. 96; U. S. Comp. St. 1901, p. 2883]. The Alfred W. Booth, 127 Fed. 453. In narrow channels, steamers keep to that side of the channel on their starboard side when safe and practicable under art. 25 of the inland navigation rules (U. S. Comp. St. p. 2883), regardless of local custom. Artificial channel. The Acilia [C. C. A.] 120 Fed. 455.

2. The Northern Queen, 117 Fed. 906. Steamer passing log raft in St. Clair river at excessive speed and tugs not trying to head the raft away held both at fault. Hall v. Chisholm [C. C. A.] 117 Fed. 807. Rafts are "vessels" entitled to use navigable streams. The Mary, 123 Fed. 609.

3. Ten miles an hour held unreasonable speed and steamer held solely in fault for collision. The Charlotte [C. C. A.] 128 Fed. 38; The Charlotte, 124 Fed. 989. A "moderate rate of speed" within 28 Stat. 648 is such as will enable a steamer to stop after coming in view of one at anchor. The Northern Queen, 117 Fed. 906. Eight miles an hour in a fog at night 150 miles east of Sandy Hook in the transatlantic steamer track is not a moderate speed within Art. 16 of Int. Nav. Rules (U. S. Comp. St. p. 2868), even if the ship is so constructed or so light that she could not be properly or safely navigated at less speed. The Eagle Point [C. C. A.] 120 Fed. 449. Evidence held to show excessive speed in fog. In re La Bourgoyne, 117 Fed. 261. Neither steamer nor schooner held at fault for collision in fog. Dunton v. Allan S. S. Co. [C. C. A.] 119 Fed. 590. Steamer solely at fault for failing to moderate speed in a fog at night or stop on hearing fog signals of another vessel nearly ahead, whose exact position was unknown. She should maintain only such speed as will enable her to stop by reversing at full speed on seeing a vessel. The Belgian King [C. C. A.] 125 Fed. 869. Steamer at fault for entering a harbor in a thick fog, but not for having a Chinese crew. In re Pac. Mail S. S. Co., 126 Fed. 1020.

4. The Dorchester, 121 Fed. 889. Where the evidence of parties to a collision as to the respective courses of the other vessel was conflicting, it was held more probable that the schooner with a young and inexperienced helmsman on a night of light variable winds shifted her course suddenly than that the steamer did. The Senator Sullivan, 117 Fed. 176.

5. The Helen G. Moseley [C. C. A.] 128 Fed. 402.

6. The Rotherfield, 123 Fed. 460. The burden of proof of innocence on the moving vessel held not sustained. Rich v. Hamburg-

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Anchored.—A vessel going upon or passing through an anchorage ground,[7] or anchoring in a channel, is presumably at fault for a collision resulting therefrom.[8] The duty of an anchored vessel to take precautions to avoid collision depends upon circumstances.[9] The vessel last anchoring is bound to leave the other a safe berth considering all contingencies likely to arise or bear the loss of collision.[10]

Drifting.—The burden on a moving vessel applies to one drifting.[11]

Grounded.—The occasional grounding of a vessel is incidental to navigation, and other navigators must submit to reasonable delay for the owner to remove it before destroying it as a nuisance.[12]

American Packet Co., 117 Fed. 751. River steamer swinging against barge moored to bank. The Mary S. Blees, 120 Fed. 44.

7. A steam vessel which goes upon an anchorage ground and comes in collision with a vessel at anchor is presumably at fault. The Alfred W. Booth, 127 Fed. 453. A tug with tow held at fault for passing through an anchorage ground and an anchored schooner for failure to sound fog signals. The Mary Weaver, 124 Fed. 977. A collision between a disabled and an anchored steamer, otherwise accidental, held the fault of the disabled steamer because she was within the anchorage grounds. The El Cid, 124 Fed. 1009. Tug solely at fault for failure to keep proper lookout at night in a snow squall whereby a scow in tow on a long hawser struck a steamer anchored in a proper place. The Genesta, 125 Fed. 423; In re Kiernan, 125 Fed. 423; Collin v. Kiernan, 125 Fed. 423; The Adelina Corvaja, 125 Fed. 423. Steamer at fault for collision with a barge properly anchored outside the channel. The Allan Joy, 123 Fed. 344. A steamer solely at fault for allowing the tide to swing it against a dredge engaged in deepening a channel for a long time, anchored at night as usual, where vessels may but do not usually, pass, and with lights directing vessels to pass to the north. The City of Birmingham, 125 Fed. 506; Ocean S. S. Co. v. Ross, 125 Fed. 506.

8. Scow attached to a dredge anchored in channel at fault for failure to show a light as required by 30 Stat. 96 and steamer for failing to observe customary signals known to pilot and officers. Nat. Dredging Co. v. Monsen [C. C. A.] 126 Fed. 930. A schooner anchoring at night in the usual harbor channel where there are other anchorage grounds is at fault and must prove unusual precautions to avoid collision. The John H. Starin [C. C. A.] 122 Fed. 236. Schooner anchored at night in narrow channel solely at fault in collision with steamer for failure to maintain proper anchor light. The Maggie Ellen [C. C. A.] 120 Fed. 662. Steamer at fault for anchoring in channel instead of at anchorage, failure to change position when she swung across channel, and insufficient watch and moving vessel for excessive speed and failure to allow for tendency to sheer. The Caldy, 123 Fed. 802. A dredge anchored in the channel unnecessarily but with lights and a steamer colliding with her on a bright night held both at fault. The Itasca, 117 Fed. 885. Steamer on the Hudson going 8 miles an hour in a fog and lighter anchored in the channel when anchorage was near held both at fault. The Newburgh, 124 Fed. 954.

Anchoring an unloaded vessel in the anchorage for loaded ones where through ignorance of the rule of the port which was laxly enforced and where the harbor was not crowded did not, in the absence of other fault, prevent her recovery for collision. The Juniata, 124 Fed. 861. Anchoring in an emergency in the fairway where it was very wide is not fault. The Northern Queen, 117 Fed. 906.

9. Anchored barge at fault for not sounding fog signals and steam lighter for having no lookout. The Commerce, 123 Fed. 178. An anchored scow in East River held at fault for having too small a bell and a ferryboat familiar with her location and looking for her at fault in trying to cross her bows. The Annex No. 5, 117 Fed. 754. Failure to keep an anchor watch on a barge outside the channel, where not customary to maintain one, does not make her in fault for a collision in the daytime in the absence of fog with steamer off her course. Rich v. Hamburg-American Packet Co., 117 Fed. 751.

10. Loaded steamer swung by tide against the wind struck one unloaded swung against the tide in a strong wind. The Juniata, 124 Fed. 861.

11. Moving steamer solely at fault for not allowing for the tide forcing her upon a ship at anchor, though the latter did not pay out anchor chain. The Adato, 126 Fed 579. Vessel that broke from her moorings and collided with another did not sustain the burden on her to prove inevitable accident. The Andrew Welch, 122 Fed. 557. A tug solely at fault for sheering off a barge from the end of a long tow and allowing her to drift to an anchorage opposite a pier where she collided with a steamer coming out to which no danger signals had been given by the tug. The Alabama [C. C. A.] 126 Fed. 332. Sloop at fault for not anchoring when wind failed and tide was sweeping her into the course of steamers and tug with three barges abreast in tow behind for not slowing on approaching. Welch v. Phila. & R. R. Co., 125 Fed. 419.

A vessel is "under way" within art. 15, cl. "c." of the international navigation rules, though lying to in a fog but having some sails up. Burrows v. Gower, 119 Fed. 616.

12. Steamer liable for breaking a raft obstructing a draw without attempting to pull it away. The Mary, 123 Fed. 609. Owners of a sunken scow at fault for damage to passing steamer for not having a lantern at night on a buoy marking the wreck. The Mary S. Lewis, 126 Fed 848. Moving steamer solely at fault for collision with one aground. The City of Macon [C. C. A.] 121 Fed. 686.

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Moored.—A vessel moored at a breakwater may owe a duty of care.[13] A ferryboat is not entitled to appropriate waters abutting the bulkhead below the slip so as to shut out the customary manner of mooring there.[14] Where a bulkhead line of a dock has been maintained for years and before there was any statute on the subject, though beyond the line now established by law, vessels mooring there in the customary manner cannot be deemed at fault.[15] A steam lighter casting off a barge from a pier in order to get to the pier became responsible for her movements.[16]

Docking.—A steamer docking without lookout astern in a river where vessels were constantly passing was solely at fault for collision with passing tow drawn on her screw by suction.[17] A tug was solely at fault for getting under the bows of a steamer she was docking.[18]

(§ 7) *E. Tugs and tows, pilot boats, fishing vessels, etc.*—The master of a tug is bound to possess and exercise such degree of skill and judgment for the protection of his tow as might fairly be expected from his calling under the circumstances in which he was placed.[19] But this responsibility is not that of an insurer and he is not to be held at fault simply because a disaster has occurred, if being qualified, he has fairly exercised his best judgment in the emergency, and behaved as a prudent man would in similar affairs of his own.[20] He is

13. A tug fast at a breakwater in a fog where it should have expected other vessels to seek refuge was at fault in failing to answer whistles, and a tug approaching was also at fault for excessive speed. The McCaldin Brothers, 117 Fed. 779. Steamer held solely liable for collision with barges moored across the end of a pier and the statute forbidding such mooring did not apply because steamer was not entering her dock. The Buenos Aires, 119 Fed. 493. Proximate cause of injury to a stakeboat held to be the negligence of the caretaker of a scow tied thereto in leaving his boat unattended. The On-the-Level, 128 Fed. 511.

14. Scows moored abreast. Ferryboat at fault. The Harry B. Hollins, 125 Fed. 430.

15. The Harry B. Hollins, 125 Fed. 430; The Tip Top, 125 Fed. 430; The Annie L., 125 Fed. 430.

16. Liable for damage to third vessel. Claim of negligence of master of barge not sustained. The Guy G. Major, 124 Fed. 95.

17. The Northland, 125 Fed. 58. Steamer leaving wharf and colliding with approaching privileged vessel held solely at fault. The Joseph M. Clark, 119 Fed. 459. Both ferryboats at fault for a collision of one leaving a slip with one approaching on a crossing course for the adjacent slip. In re Rapid Transit Ferry Co., 124 Fed. 786. Lighter backing from a pier where she knew repairs had been made and driftwood remained should have kept watch for obstructions to propeller. The Despatch, 120 Fed. 856. Steamer at fault for stretching a hawser across a slip at night without warning. Absence of lookout not a contributing fault for he could not have seen the hawser. Erie R. Co. v. Oceanic Steam Nav. Co., 121 Fed. 440.

18. The Minnehaha [C. C. A.] 124 Fed. 210.

19. Ship liable for damages resulting from failure to discharge such duty. The Garden City [C. C. A.] 127 Fed. 298. A tug must exercise reasonable care in the conduct of her towage service, measured by the dangers she is encountering. Thompson v. Winslow, 128 Fed. 73. Tug at fault for towing in unfamiliar place and not watching tow at every point. Tow also here at fault. The Jane McCrea, 121 Fed. 932; The Delta, 125 Fed. 133. It is not enough for a tug to show that the cause of the casualty was unavoidable accident, but it must show that the consequences of the accident could not have been prevented by reasonable diligence. Failure to inspect steering gear when helm stuck and drive in key to rudder post not error in extremis. The Acme, 123 Fed. 814. A tug burdened with a heavy and unwieldy tow may, on that account, be relieved from liability for a collision in some instances, but it is her duty to take extraordinary care to keep it out of the way of other vessels. Both a tug towing a raft of logs in a narrow channel and a steamer with which she collided held at fault. The Bayonne, 128 Fed. 288. It will not be presumed that a tug with a heavy tow deliberately tried to cross the bows of an approaching steamer when they were only 300 feet apart. Id.

A tug taking up a tow knowing that its master is not aboard must see to it that his duties are properly discharged and if she delegates it to a wharf owner, she remains liable if they are not performed. Lewis v. Barber Asphalt Pav. Co., 123 Fed. 161.

20. Evidence insufficient to show that the tug was at fault for starting on her voyage or for attempting to return to port, or to show negligent navigation on the part of her master. Wreck of the tows due to faulty steering of one of them. The Garden City [C. C. A.] 127 Fed. 298. When the master of a tug exercises his judgment in good faith, to proceed with his tow, it will not be deemed a fault chargeable to the vessel if he is mistaken. Evidence held insufficient to charge tug with loss. The Covington, 128 Fed. 788. The government weather records may be considered in determining whether or not the weather was favorable for proceeding on a voyage. Id.

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bound to know the proper and accustomed waterways and channels, the depth of the water, and the nature and formation of the bottom,[21] and also the draft of the tow, and whether she can reasonably be expected to be towed through the place under consideration.[22] He is bound to exercise ordinary diligence to see that the tow is properly made up, and that the hawsers are of proper length, strong and securely fastened.[23] He is the pilot of the voyage and responsible for the navigation of both vessels.[24] The towing vessel will be held in fault for maintaining a rate of speed manifestly hazardous to the safety of the tow,[25] or for lack of power to perform the service undertaken, under conditions which might have been reasonably anticipated,[26] or for leaving or abandoning the tow,[27] in the absence of proof that it could not have been saved,[28] or that the tug was so injured or in such danger that it was impossible for her to stay or return.[29] The obligation of a towing vessel to the tow is a continuing one.[30] The master of a boat who offers her for towage represents her as sufficiently staunch and strong to encounter the ordinary perils of the voyage.[31] He is bound to exercise vigilance for the safety of his vessel, and the towing vessel is not liable for injuries resulting from his failure to do so,[32] but he is not chargeable with contributory negligence in acquiescing in its exposure to unnecessary peril by the tugboat pilot, unless the danger about to be incurred is very obvious.[33] Deviation from the course of the tug, puts the burden on tow to show excuse for collision

21. Thompson v. Winslow, 128 Fed. 73. Ordinary care makes not liable for damage from an obstruction to navigation not well known. Sunken log. The Nettie Quill, 124 Fed. 667.

22. Stranding of vessel on a bar held to be the fault of the towing tug. Thompson v. Winslow, 128 Fed. 73.

23. The Edmund L. Levy [C. C. A.] 128 Fed. 683. A high degree of care. Liable for damage to a steamer it was docking, through parting of a hawser borrowed of the steamer. Baker-Whiteley Coal Co. v. Neptune Nav. Co. [C. C. A.] 120 Fed. 247.

24. The Edmund L. Levy [C. C. A.] 128 Fed. 683. Collision of barge with a bridge pier through failure to straighten her course soon enough to get the tow in line before reaching the pier. The Cygnet [C. C. A.] 126 Fed. 742. Attempting passage of Hell Gate in a fog when there is an alternative of laying up in a safe place. The E. Luckenbach, 117 Fed. 977. Taking out a sectional barge in threatening weather. Tucker v. Gallagher, 122 Fed. 847.

25. Towing scow so fast as to swamp her. The Delta, 125 Fed. 133.

26. Lack of power to tow under conditions she ought to have anticipated. The E. T. Williams, 126 Fed. 871. Failure to take proper course and not having enough power to handle their tow (string of barges in Hell Gate). The Zouave, 122 Fed. 890.

27. Tug held grossly negligent in not observing the loss of a tow on a heavy night. The O. L. Hallenbeck, 119 Fed. 468.

28. To excuse a tug for leaving and remaining away from her tow there should be proof that the tow was sinking, or past saving, or that the tug was so injured, or in such danger, that it could not stay or return. Abandonment not breaking of hawser held proximate cause of loss. In re Moran, 120 Fed. 556. Failure to return to an assembled tow in a storm and scow at fault for having no anchor. Brown v. Cornell Steamboat Co. [C. C. A.] 121 Fed. 682. Abandonment by a tug of tows she had cut loose from is culpable in the absence of proof that efforts to save them would have been vain. Appeal of Cahill [C. C. A.] 124 Fed. 63. Tug held not liable for failure to recover a barge drifting on a lee shore, where the crew had been taken on the tug. The Carbonero [C. C. A.] 122 Fed. 753.

29. In re Moran, 120 Fed. 556.

30. Where the towline parted outside the three-mile limit and the district where the suit was brought, but the tow was afterwards seen within them, the court of such district had jurisdiction of a suit to recover damages for the wrongful death of one of her crew caused by the abandonment of the tow, it being the duty of the towing vessel to return and rescue her. Alaska Commercial Co. v. Williams [C. C. A.] 128 Fed. 362.

31. Tug not liable for damage caused by defects in the tow not obvious or known to her master. The Edmund L. Levy [C. C. A.] 128 Fed. 683; The Covington, 128 Fed. 788. Evidence insufficient to show that the sinking of a canal boat was due to negligence of the tug towing her. The Edmund L. Levy [C. C. A.] 128 Fed. 683.

32. Barge not properly steered in narrow channel. Stricker v. The Maurice, 128 Fed. 652. Evidence held to show that the sinking of a rudderless tow while passing through a drawbridge was due to the fault of the tug in failing to guide it properly. The Italian, 127 Fed. 480.

33. No contributory negligence where the master of the towed boat knew nothing in regard to the depth of the water, the nature of the bottom, or the location of the channel, but relied entirely on the tugs. Thompson v. Winslow, 128 Fed. 73. That a bark in tow had insufficient ballast was the fault of the bark and not of the tug. Williamson v. McCaldin Bros. Co. [C. C. A.] 122 Fed. 63.

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with a passing vessel.[34] A barge which consents to being towed with another abreast assumes whatever added risk arises from such method of towing.[35] A towing vessel cannot relieve itself, by contract, from liability for the failure to exercise reasonable care and skill in the performance of the service, and for the safety of the tow,[36] nor is it relieved by the fact that the tow is under charter to the owners of the tug and that the tug's service is pursuant to the charter.[37] The consignee of a cargo who is under the duty of furnishing towage cannot relieve himself from liability for the manner in which it is performed, by employing a towing company, but is liable for any damage resulting from the negligent manner in which the service is performed by such company.[38] There is no presumption from damage to a tow that the tug's negligence caused it.[39] A steamer freehanded meeting a tow is bound to expect some variation in the courses of the tow, and guard against it if possible.[40] A tug which, by her method of towing, incapacitates herself from performing her statutory duty to avoid collision, must show care commensurate with the increased risks.[41] A tugboat is not liable for damages to a seine in a fairway, unless the injury was wanton or caused by negligence.[42]

(§ 7) *F. Liability for collisions.*—The presumption is that a vessel is to blame for a collision where there are no entries in her log in regard to it, or when the entries are intentionally meager, vague, and perfunctory, or when portions of the log, presumably relating thereto, have been removed.[43] In order to make a case of apportionment of the damage resulting from a collision, where the fault of one of the vessels is obvious and inexcusable, the evidence to establish fault on the part of the other must be clear and convincing,[44] and the burden

34. Davidson v. American Steel Barge Co. [C. C. A.] 120 Fed. 250. Tug and tow held at fault for collision with a steamer, for failure of tug to keep away, and defective steering gear of tow which did not follow. The Ottawa, 124 Fed. 742. A tow unable to follow her tug through known defective steering gear held at fault for collision with anchored scow. The Alfred W. Booth, 123 Fed. 172. Steamer passing schooner in tow not changing her course as did her tug, both held at fault. The Yuma, 117 Fed. 894.

35. Stricker v. The Maurice, 128 Fed. 652.

36. Unnecessary abandonment of a tow in the open sea after the hawser parted, resulting in the loss of the vessel and the death of those on board, held not to be exercise of such care. Alaska Commercial Co. v. Williams [C. C. A.] 128 Fed. 362; The Edmund L. Levy [C. C. A.] 128 Fed. 683; Thompson v. Winslow, 128 Fed. 73; The Somers N. Smith, 120 Fed. 569.

37. The Temple Emery, 122 Fed. 180.

38. Consignees are expected to know the hazards attending towage in their own localities, and the character of the towage service which they employ. Thompson v. Winslow, 128 Fed. 73.

39. Tug held not at fault in making up tow or in navigation in shallow channel. The Thomas Wilson, 124 Fed. 649.

40. Detroit river. Mitchell Transp. Co. v. Green [C. C. A.] 120 Fed. 49. A barge in tow placed in extremis by fault of tug and meeting vessel is not at fault for a slight change in the wrong direction. The Teaser, 118 Fed. 81.

41. Towing astern in East River making backing impossible. The Teaser, 118 Fed. 81. A tug with two barges in a single line of 1,500 feet must exercise extreme care to avoid collisions. The Gertrude [C. C. A.] 118 Fed. 130. Towing with long hawsers in N. Y. bay can be justified if at all only by the tug keeping her tow exactly in line. Tug and scow without lights swinging across the channel while the tug gets ready to dock it, solely at fault for collision with tug and barge abreast. The N. Y. Cent. No. 22, 124 Fed. 750. Steamer towing 70 canal boats in tiers extending 2,200 feet on the Hudson solely at fault for collision of another steamer with the end of her tow which had swung across the river. The J. C. Austin, 124 Fed. 952. Tug solely at fault for collision of schooner with her third barge in tow on a long hawser, no evidence appearing as to the lights on the barge, for failure to keep a lookout and avoid the schooner. The Prudence, 124 Fed. 939. Ferryboat solely in fault for failing to allow room enough in passing behind a tow. The Central, 122 Fed. 747.

42. Tug held not negligent in entangling its tow in seines. The Oscar B. [C. C. A.] 121 Fed. 978.

43. The Sicilian Prince, 128 Fed. 133.

44. Proof of contributory negligence not sufficient. The Phillip Minch [C. C. A.] 128 Fed. 578. Where the primary fault for a collision is attributable to one vessel, clear proof of contributory negligence on the part of the other must be presented before she can be held to bear an equal share of the consequent damage. A tug and barge in tow held not guilty of contributory negligence because they were not sooner stopped. The Transfer No. 14 [C. C. A.] 127 Fed. 305. If one vessel is plainly in fault, any reasonable doubt as to the contributory faults

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of proof is on the vessel claiming that the damage should be divided, to show that the other did not do something she should have done under the circumstances.[45] A steamer solely at fault is liable for damages resulting from a collision that might have been avoided in handling the injured vessel, where the conduct of the latter was reasonable.[46] In a libel for collision against two vessels, although separate answers are filed and separate issues are raised, all the evidence taken is properly before the court on final hearing, to be considered on all the issues to which it is relevant, no matter by what party it is put in.[47]

(§ 7) *G. Damages.*—The measure of damages for the sinking of a vessel in collision is her market value at the time she is sunk.[48] In case of total loss by collision damages are limited to the value of the vessel with interest and pending net freight, or charter hire in the nature of freight, but prospective profits not assured by definite contract are not allowed, though they are considered in cases of demurrage or partial loss when no other method of estimating the value of the delay is afforded.[49] In case the vessel is not totally destroyed, but is afterwards raised, the owner is entitled to restitutio in integrum, and nothing more.[50] The cost of repairs, rendered necessary by a collision, is proved prima facie by testimony that they were so rendered necessary, that they were made, and at the lowest possible price, and the testimony of the ship's agents that they had paid the bills.[51] If other repairs, not made necessary by the collision, are made at the same time, the cost of the survey and the docking charges will be divided.[52] Where a vessel cannot by repairs at reasonable cost be put in as good condition as before, an allowance may be made for permanent injuries.[53] Where both vessels are at fault the damages will be divided.[54] Costs may properly be considered as a part of the damages and divided, where damages are divided because both vessels were at fault.[55] Interest on the damages for collision is allowed from the time when they commence, subject to the exercise of the court's discretion.[56] A vessel at fault cannot set up contributory fault of a third vessel

charged against the other vessel should be solved in her favor. The Sicilian Prince, 128 Fed. 133.

45. The Phillip Minch [C. C. A.] 128 Fed. 578. The burden on a vessel making a claim in collision against another held not sustained though the other was improperly manned. The Gertrude [C. C. A.] 118 Fed. 130.

46. The City of Macon [C. C. A.] 121 Fed. 686. Contractors failing to keep a light burning on the end of a breakwater under construction, where they might reasonably have anticipated that the wind would blow it out, and a vessel navigated by a local pilot charged with knowledge of obstacles were both at fault. Provisions of the contract regarding lights did not necessarily relieve them of obligations to third parties. Harrison v. Hughes [C. C. A.] 125 Fed. 860.

47. The Bayonne, 123 Fed. 288.

48. Evidence sufficient to sustain finding of commissioner as to value of a schooner sunk in collision. The Frank S. Hall, 128 Fed. 815.

49. Prospective catch of a fishing smack. The Menominee, 125 Fed. 530; The Glenogle, 122 Fed. 503. Prospective profits not recoverable. The Fontana [C. C. A.] 119 Fed. 853. Loss of value of oysters on the bed and undelivered that season because of damage to the oyster boat is too speculative and remote. The Mary S. Lewis, 126 Fed. 848.

50. Demurrage and cost of alterations made while dredge was docked for repairs necessitated by collision, and salary of superintendent who supervised repairs while dredging was suspended, were not proper items of damage for collision. The Itasca, 117 Fed. 885. Demurrage for time in repairing a yacht is not recoverable in a libel for collision, but wages and provisions of crew necessary for her care during repairs may be allowed. Fisk v. New York, 119 Fed. 256.

51. The ship's protest and the survey, together with the vouchers for repairs are competent evidence to show the amount of damage. The Bratsberg, 127 Fed. 1005.

52. The Bratsberg, 127 Fed. 1005; The John F. Gaynor, 124 Fed. 743.

53. The McIlvaine, 126 Fed. 484.

54. Owner of a yacht held guilty of contributory negligence in not moving a launch, hanging in davits, and the damages—resulting from its being struck by a water boat, which had been made fast to the yacht's side, and had broken away on account of the insufficiency of her lines, and the negligence of her master in leaving her—divided. The H. B. Moore, Jr. [C. C. A.] 127 Fed. 319.

55. The Frank S. Hall, 128 Fed. 816.

56. Same rule applies where the collision is due to the fault of both vessels and the damage is divided. The Mahoney, 127 Fed. 773. Contra, interest only recoverable from date of final decree where both vessels are at fault, and damages divided. The Itasca, 117 Fed. 885.

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unless she is cited in.[57] A libellant may by his conduct be estopped from maintaining a suit for damages resulting from collision.[58]

§ 8. *Carriage of passengers.*—The highest degree of care for the safety of a passenger is required of a ship, and where injury is sustained by the passenger the presumption of negligence is against the carrier,[59] but the carrier of passengers is not an insurer and owes no duty to warn a passenger of an obvious danger.[60] One who intends to become a passenger but has not engaged passage, if the ship's boats undertake to carry him aboard, is entitled to the care due a passenger.[61] A company operating a ferryboat, mooring it and keeping open the gate at the end of the passage gangway leading thereto, thereby invites passengers to embark, and gives assurance that it is safe to do so.[62] Mule tenders shipped under contract for a free return passage are passengers on the return trip.[63] The ship is liable for contracts, by a charterer holding under a demise, with passengers not having notice that he was not owner.[64] The vessel is bound to carry and rightly deliver passengers at their destination,[65] and to furnish them with reasonable accommodations during the voyage.[66] Landing is a part of the contract with a passenger, and liability in this regard may be limited only to such an extent as is just and reasonable, and consistent with the sound policy of the law.[67] A passenger is bound to obey the reasonable rules of the vessel, and his failure to do so may warrant removal and detention.[68]

57. Under Admiralty Rule 59. The Delta, 125 Fed. 133.

58. A libellant who was requested by the owner, pro hac vice, of a tug involved in a collision to proceed against her while in his possession if he intended to sue at all, and stated that no such suit was intended, is estopped to maintain a suit against such owner after he has surrendered possession of the tug, and after such delay as to render it doubtful whether he could recover on his policy insuring him against liability for damages by collision. The N. Y. Cent. No. 19, 127 Fed. 473.

59. Struck by timber being thrown over. Pouppirt v. Elder Dempster Shipping, 122 Fed. 983. Injured by collision of ferryboat in fog. Schlotterer v. N. Y. & B. Ferry Co., 75 App. Div. [N. Y.] 330. Ferryboat liable for failing to make a safe connection with the slip whereby a passenger was hurt on landing. The City of Portsmouth, 125 Fed. 264.

60. Passenger after watching from the bridge the dismantling of cattle pens on a freighter went down where it was going on. Held, he assumed the risk of being hit by the timbers. Elder Dempster Shipping Co. v. Pouppirt [C. C. A.] 125 Fed. 732.

61. Boarding from the beach in Alaska. In re Kimball S. S. Co., 123 Fed. 838. Steamer held liable for drowning of passengers due to overloading of a small boat sent ashore to get them, it appearing that the officer in charge requested some of them to get out and wait, but on their refusal, did not compel them to do so, and did not turn back when it became apparent that the boat was in great danger. Contributory negligence of passengers no defense. Weisshaar v. Kimball S. S. Co. [C. C. A.] 128 Fed. 397. Such negligence was with the privity and knowledge of the company, where its president accompanied the boat, and it is not entitled to a limitation of its liability for a disaster resulting therefrom under Rev. St. §§ 4283-4285 [U. S. Comp. St. 1901, p. 2944]. Id.

62. Injuries caused by gang plank not being in place. Evidence held not to show contributory negligence on plaintiff's part. Dougherty v. N. Y. Cent. & H. R. R. Co., 86 N. Y. Supp. 746.

63. Within U. S. Comp. St. p. 2931, and entitled to damages for poor food as provided at page 2935. The European [C. C. A.] 120 Fed. 776.

64. A charter of a steamer for 4 months with a privilege of extension the owner to supply and pay officers, but the charterer to pay all other expenses and give bond to protect owner from liens. The National City [C. C. A.] 117 Fed. 822.

65. Contracts for through passage to the Yukon by connecting river steamer required delivery on board a river steamer, which was not excused by loss at sea of a river steamer towed for that purpose. The National City [C. C. A.] 117 Fed. 822. An offer of free passage back on condition of release of damages for nondelivery will not relieve of liability for cost of return trip. Id.

66. Though an inspector's certificate permitting the carriage of an excessive number of passengers may relieve the owner from prosecution for the statutory penalty, it does not relieve the vessel from liability, on the contract of carriage, for damages due to insufficient accommodations and delay. Pac. Steam Whaling Co. v. Grismore [C. C. A.] 117 Fed. 68.

67. A provision printed on passenger tickets excluding landing from the contract will not relieve from liability for unreasonable delay in landing freight and baggage at Nome even though a custom exists there to make side trips when lighters are not immediately available. Pac. Steam Whaling Co. v. Grismore [C. C. A.] 117 Fed. 68. Under a contract to land as near a point as safety to the vessel would permit, the mas-

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§ 9. *Carriage of goods.*—A common carrier by sea in the absence of a special contract limiting his liability is responsible for all losses except those occasioned by act of God or the public enemy,[69] and when, at the end of a voyage, merchandise that has been received by a carrier in good condition is found damaged, the burden is on her to show an excuse therefor.[70] Both agent and principal are liable for negligent carriage and may be sued jointly.[71] Bills of lading are prima facie evidence that the goods described therein were taken on board.[72] The general rule, under the decisions in the Federal courts, is that the master of a vessel has no authority to bind the owners or the ship by a false bill of lading, either in relation to the amount of goods shipped or the date of the shipment.[73] Notice to shippers that a vessel is operated under charter does not relieve her from default in her obligation to the cargo.[74]

A bill of lading containing many limitations of liability is to be construed in favor of the shipper.[75] Under a provision that the ship's responsibility shall cease when the goods are delivered at the ship's tackles, the owner's liability as to any merchandise which has been discharged is that of a bailee only, and he is merely charged with the duty of taking ordinary care of it.[76] A provision that the ship owners shall not be liable for any claim, notice of which is not given before the removal of the goods, is a valid condition precedent to the right to recover for damage to the cargo, either against the owners personally or by a suit in rem, where under the circumstances of the case, it appears just and reasonable.[77] Such condition will be construed as requiring notice of claim to be given before the removal of the goods from the dock,[78] and the burden rests upon the libellant to prove such notice as a condition to the right of recovery, where failure to give it is set up as a defense.[79] A vessel relying on a provision exempting it from liability

ter, in the absence of bad faith, is to determine how near he can approach. Torrey v. Kelly [C. C. A.] 121 Fed. 542.

68. One dollar is insufficient compensation for the indignity of an unwarranted removal of a passenger. At law. Levy v. Providence & S. S. S. Co., 123 Fed. 347.

69. Evidence of a contrary usage in lighterage from steamer to beach at Nome held insufficient. Ames Mercantile Co. v. Kimball S. S. Co., 125 Fed. 332. A provision in a bill of lading, that the goods be received at the option of the carrier by the consignee at the ship's tackle immediately after arrival or may be landed, stored or lightered at the risk of the consignee, is for the purpose of preventing delay to the steamer and not to give it a right to lighter at the risk of the consignee when the latter is ready to receive it at the ship's tackle. Id.

70. The Wildcroft, 124 Fed. 631. Cause of damage to beams conjectural. The Patria, 125 Fed. 425. In a suit against a steamship to recover for damage to cargo caused by the escape of steam through partially open valves, evidence held insufficient to show that the valves were closed when the steamer sailed. The Manitou [C. C. A.] 127 Fed. 554.

71. Smith v. Booth [C. C. A.] 122 Fed. 626. Where an assignee of a contract for carriage was held an undisclosed principal, the carrier was allowed to set off against him claims of the carrier against his assignor arising out of prior transactions. Morris v. Chesapeake & O. S. S. Co., 125 Fed. 62.

72. The Titania, 124 Fed. 975. Evidence held not to justify submission to the jury whether goat skins or sheep skins were received aboard defendant's ship. Cunard S. S. Co. v. Kelley [C. C. A.] 126 Fed. 610. Proof that the entire cargo was delivered and that there was no opportunity for abstraction during the voyage held to make a prima facie case of delivery of the entire cargo. McLaren v. Standard Oil Co., 124 Fed. 958. Weights of mats of coffee as put up on the plantation was prima facie evidence of the weight that should have been delivered. Bags spilled by holes gnawed by rats. The Rose Innes, 122 Fed. 750.

73. Some state courts hold the contrary. This rule has not been changed by section 4 of the Harter Act [27 Stat. 445, 446; U. S. Comp. St. 1901, p. 2947]. Libel for damage caused by fall in price between date of false bill of lading and date of actual shipment. The Isola di Procida, 124 Fed. 942.

74. The Seaboard, 119 Fed. 375.

75. Smith v. Booth [C. C. A.] 122 Fed. 626.

76. Where a bill of lading provides that goods shall be delivered from the ship's tackles when the ship's responsibility shall cease, no custom can be proved to charge the owners after discharge with more than the duty of a bailee to take ordinary care. Jute stored outside after shed was full. Smith v. Britain S. S. Co., 123 Fed. 176.

77. As where the damage was known when the cargo was discharged. The Westminster [C. C. A.] 127 Fed. 680.

78. The Westminster [C. C. A.] 127 Fed. 680.

79. It is an affirmative fact peculiarly within his knowledge. The Westminster [C. C. A.] 127 Fed. 680. Failure of the ship-

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has the burden of showing that the damages complained of were the result of one of the excepted causes.[80] There is an implied warranty in all contracts of affreightment that the vessel is seaworthy for the special cargo which she undertakes to carry.[81] A contract of affreightment will be presumed to have been made in contemplation of the laws of the state in which the cargo is to be obtained.[82] It will be presumed that customs of the port[83] and customs as to the manner in which goods shall be stowed are known to the parties and are incorporated into the contract of carriage.[84] A contract for carriage on certain vessels, "all sailing" during certain months, imports a warranty that all the vessels named will sail during those months.[85] The usual rule that the terms of a written instrument cannot be varied by parol applies to contracts of affreightment.[86] Adverse weather conditions will not relieve shippers of their contract to load as fast as vessels are ready to receive.[87]

In case of loss or failure to perform the contract of shipment, the measure of damages is, in the absence of any agreement to the contrary, the value of the property at the point of destination at the time when, and in the condition in which, the ship owner undertook to deliver it, less the price to be paid for the service.[88] In case of damage, the ship is entitled to credit for the value of the damaged property at the port of destination.[89] Where a disaster is due to a combination of negligent acts, liability is established by the proof of one of these acts, and the party so charged will not be exculpated by showing that other faults for which he is not responsible contributed to produce the result.[90] If it is impossible to decide how much of the damage to cargo was caused by excepted perils and how much by negligence for which the ship is liable, the damages will be divided.[91]

owners to insist on notice of claim in other cases is not a waiver in favor of libellant, in the absence of a showing that he knew of such failure and was misled by it. Id.

80. A steamer relying on a special written contract indorsed on the bill of lading, to the effect that, as the packages were frail, it should not be liable for breakage if they were insufficiently protected, has, upon proof of breakage, the burden of showing that the damage was due to insufficient protection. Evidence insufficient to establish this fact. Doherr v. Houston [C. C. A.] 128 Fed. 594. In order to be relieved from liability for damage to cargo in transit, under the exception of perils of the sea, a shipowner is bound to prove that the injuries were the result of such untoward circumstances as could not have been anticipated and guarded against by the exercise of ordinary care and prudence. The Westminster [C. C. A.] 127 Fed. 680.

81. There is an implied warranty in all contracts of affreightment that the ship is seaworthy for the particular cargo carried. Cement, leaky ship. Neilson v. Coal, C. & S. Co. [C. C. A.] 122 Fed. 617.

82. The Energia, 124 Fed. 842.

83. Ship liable for cutting a cargo of logwood roots for stowage in excess of the amount allowed by the custom of the port. The L. F. Munson, 124 Fed. 478. Where a shipper had his contract price reduced because roots delivered were of small size and the court was in doubt whether they were delivered in small pieces or were among those cut by the master to facilitate stowage, the loss was divided. Id.

84. Upon evidence of long established custom as to carriage of goods, a jury is warranted in finding that the shipper knew it and that it became incorporated in the contract of carriage. Custom to classify oilclothing as inflammable and stow it on deck at shipper's risk under a clause in the bill of lading. A. J. Tower Co. v. Southern Pac. Co., 184 Mass. 472, 69 N. E. 348.

85. Morris v. Chesapeake & O. S. S. Co., 125 Fed. 62.

86. Morris v. Chesapeake & O. S. S. Co., 125 Fed. 62; De Sola v. Pomares, 119 Fed. 373.

87. Atlantic & M. G. S. S. Co. v. Guggenheim, 123 Fed. 330.

88. The Oneida [C. C. A.] 128 Fed. 687.

89. The Oneida [C. C. A.] 128 Fed. 687. Where a ship carried a cargo of cotton from Charleston to New York, from which place it was to be forwarded under a separate and independent contract of affreightment to Liverpool, and the cargo was damaged before it reached New York, held, that the ship was entitled to credit for the value of the damaged cotton in the latter port, and that her owners were not estopped to claim such credit by the fact that it was sold in Liverpool on recommendation of the surveyors who adjusted the loss, without objection on their part, but without their positive assent. Id.

90. Steamer at dock overweighted with snow and ice with an open port listed on partial unloading carried the port under water and sank. The Germanic [C. C. A.] 124 Fed. 1. Failure of consignees to remove goods promptly from a wharf is negligence. Waited till steamer left, though lighters could have worked before. Smith v. Britain S. S. Co., 123 Fed. 176.

91. The Musselcrag, 125 Fed. 786. Having

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The Harter Act.—In construing the Harter Act, the tendency has been leave the liability of the ship and owner as it was defined and enforced by law maritime and by the common law, unless the act plainly and unequivoc asserts a different liability.[92] Stipulations in a bill of lading cannot cut d liability of the carrier under the act.[93] A ship owner is not exempted f liability where the damage is the result of the vessel's unseaworthiness at beginning of the voyage.[94] The test of seaworthiness is whether the vessel reasonably fit to carry the cargo which she has undertaken to transport,[95] the burden of proof is on the shipowner.[96] The owner is not exempted from bility for loss occasioned by the negligence of the master unless he used diligence in his selection,[97] nor is the vessel relieved of the duty to exercise sonable care in the stowage of the cargo.[98] If the owner accepts goods know

shown that the vessel encountered storms of such violence as to reasonably account for the damage to cargo, the burden is on the libelant to show that improper stowage contributed. Claim that too much in the lower hold prevented her from rolling easily and thus started her seams. Id.

92. The Germanic [C. C. A.] 124 Fed. 1.

93. Martin v. Steamship Southwark, 24 Sup. Ct. 1, 48 Law. Ed. ——. Stipulations that the carrier will not be liable for damage to goods capable of insurance. Loss from overloading a lighter by negligence of ship's officers. The Seaboard, 119 Fed. 375.

94. 27 Stat. 445; U. S. Comp. St. 1901, p. 2946. Where ship had a list of 8 or 9 degrees, which increased because of improper loading, and she put in at an intermediate port, and the opening of a cargo port followed by a sudden lurch of the ship caused it to sink. The Oneida [C. C. A.] 128 Fed. 687. The diligence required of vessels to enable them to claim the benefit of the act with reference to due diligence is diligence with respect to the vessel, and not in obtaining surveyor's certificates [27 Stat. 445; U. S. Comp. St. 1901, p. 2946]. Evidence held to show that the necessity for the use of a part of a cargo of coal for fuel was due to the weak and defective condition of the vessel's boilers and her foul bottom, and that she was therefore liable for the coal consumed, notwithstanding the fact that she had obtained surveyor's certificates of seaworthiness at the beginning of the voyage. The Abbazia, 127 Fed. 495. Failure to test a joint in a water ballast tank before sailing by subjecting it to pressure equal to that which, after sailing, caused the leak, makes the cause of damage to cargo unseaworthiness at the commencement of the voyage due to negligence for which the owners were not exempted by the Harter Act. American Sugar Refining Co. v. Rickinson, 120 Fed. 591. But not if the subsequent pressure was extraordinary and would have affected a stronger joint than the owners were bound to furnish, and since this was caused by negligence in management, the owners under the Harter Act are not liable (sea cock left open too long). American Sugar Refining Co. v. Rickinson Sons & Co. [C. C. A.] 124 Fed. 188. Damage to cargo through the hatches held due to perils of sea rather than to unseaworthiness at commencement of voyage under the Harter Act. The Hyades, 118 Fed. 85. Evidence held not to show unseaworthiness at commencement of voyage (Recently overhauled). Davidson S. S. Co. v. 119,254 Bushels of Flaxs 117 Fed. 283. A vessel is not seaworthy a voyage where, at its inception, she little, if any, metacentric height, and a of eight or nine degrees, and her carg so distributed that her instability must crease from the consumption of coal water. The Oneida [C. C. A.] 128 Fed.

95. Includes proper condition of refri afing apparatus on a vessel undertakin carry dressed meat in cold storage. Ma v. Steamship Southwark, 24 Sup. Ct. 1, Law. Ed. ——.

96. The Oneida [C. C. A.] 128 Fed. Must show due diligence to make the ve seaworthy. Failure to make sufficient t of refrigerating apparatus which broke d soon after leaving port. Martin v. Ste ship Southwark, 24 Sup. Ct. 1, 48 L Ed. ——. The owner did not sustain burden of proof under section 3, by me showing that he furnished proper eq ment, but must show that his servants due diligence to make her in all resp seaworthy at the commencement of the age. Insufficient hatch coverings. The C. Elphicke, 117 Fed. 279.

97. Owners of a tug cannot claim exe tion under section 3 for loss of cargo barge in tow, if they did not use due gence in the selection of the master of tug. Master's conduct at the time of a dent so negligent as to throw on the ow the burden of proving that they used diligence in his selection. The Cygnet [C A.] 126 Fed. 742.

98. A ship is liable for damage to ca from negligent stowage or failure to p erly cover hatches and is not relieved stipulations to the contrary in bills of ing nor by the Harter Act. Drums of gly ine chafed through and furs were dama by leakage through hatches. The Missis pi [C. C. A.] 120 Fed. 1020. Weather more severe than was to be expected in locality at that season is not a "peril of seas" relieving of liability (cod oil lea on wool). The Orcadian, 116 Fed. 930. T if differently distributed the ship would h been more easy does not necessarily sh the cargo was negligently stowed. The M selcrag, 125 Fed. 786. Evidence held to sh that bad stowage of lumber causing sh age of cargo was due to charterer's faul piling on the wharf. The John A. Bri [C. C. A.] 120 Fed. 6. Stowing skins tea in proximity was negligent, and proximate cause of damage to the tea tho claimed to be due to closing the hold in

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that they require special care in stowage, he is bound to stow them so that they will not be injured by the ordinary contingencies of the voyage.[99] "Management" of a modern steamship within the exemption of the act must include the inspection, maintenance, and operation of the machinery by which she is moved and is enabled to carry out her contract concerning the safe carriage and delivery of the cargo.[1] The act has not changed the rule that the master cannot bind the ship or the owners by a false bill of lading.[2]

§ 10. *Freight and demurrage. Freight.*—On breach of a contract of affreightment by failure to carry all, the libellant is entitled to recover for the portion carried, less any damages sustained by shipper from the breach.[3] Prepaid freight in the absence of agreement must be refunded if the goods, through no fault of the shipper, are not carried.[4] The loss of the cargo, in the absence of any agreement to the contrary, does not relieve the shipper from liability for freight charges,[5] but where the parties agree to compute the damage, in case of loss, at the value or cost of the property at the place of shipment, the shipper is not liable for the freight charges in case the loss occurs.[6] A lien for freight is not abandoned by a conditional delivery of the cargo.[7] A shipper who retains control of the shipment until paid for by the consignee is liable for freight, whether his interest is ownership or lien.[8] The fact that a master, on shipwreck, surrendered the cargo to insurers of freight and cargo without notice to the consignor does not relieve the latter from liability for freight.[9] Under an agreement to provide a full cargo, freight can be recovered only for the amount actually shipped, in the absence of a showing that the vessel could prudently have carried more.[10] A charterer is not liable for dead freight if the ship is at fault.[11]

pectation of a storm. The Hudson, 122 Fed. 96. Charterers liable for damage to goatskins stowed near casks of citron from which brine usually leaked. Lazarus v. Barber, 124 Fed. 1007. Skins damaged by breaking of package of chloride of lime held due to excepted perils of sea. The Patria, 118 Fed. 109.

99. Packages of firecrackers marked frail in the bill of lading which excepted "loss or damage arising from the nature of the goods or insufficiency of the packages" did not mean that packages were insufficient. Doherr v. Houston, 123 Fed. 334.

1. Open cock in pump and water supply connection. The Wildcroft, 124 Fed. 631. A contract to carry a locomotive on a barge furnished by the shipper and lashed to a river steamer where a smaller barge of its own was usually lashed for which a bill of lading in the usual form was issued is a contract of affreightment, not of towage, and the owner could not be liable for loss by negligent management. Barge struck a log and dumped. The Nettie Quill, 124 Fed. 667. Failure to make the nearest port for repairs whereby damage to cargo was increased is not an error in navigation or in the management of the vessel under section 3 of the Harter Act. The Musselcrag, 125 Fed. 786. Instability brought about by the improper unloading, care and custody of the cargo is not a fault in the management of the vessel within the exemption of the act. Unloading in charge of "shore department." The Germanic [C. C. A.] 124 Fed. 1.

2. Sec. 4, 27 Stat. 445, 446; U. S. Comp. St. 1901, p. 2946. The Isola Di Procida, 124 Fed. 942.

3. Edward Hines Lumber Co. v. Chamberlain [C. C. A.] 118 Fed. 716.

4. De Sola v. Pomares, 119 Fed. 373.

5. The Oneida [C. C. A.] 128 Fed. 687. If after sinking, the cargo is delivered, the carrier may recover freight less any additional expense to the consignee in discharging her, owing to the negligence of the carrier. Aldrich v. Cargo of 246 5-20 Tons of Egg Coal, 117 Fed. 757.

6. The Oneida [C. C. A.] 128 Fed. 687.

7. Delivery of cargo of flaxseed to an elevator retaining receipt until libel filed does not abandon lien for freight. Davidson S. S. Co. v. 119,254 Bushels of Flaxseed, 117 Fed. 283.

8. Shipment to order of consignor and bills of lading and policies of insurance on cargo indorsed in blank and attached to drafts on purchasers. British & F. M. Ins. Co. v. Portland Flouring Mills Co., 124 Fed. 855.

9. He must have recourse to the insurers. British & F. M. Ins. Co. v. Portland Flouring Mills Co., 124 Fed. 855.

10. Evidence did not show that a vessel could have carried safely a larger cargo under a charter to provide a full cargo. Eikrem v. New England Briquette Coal Co., 125 Fed. 987.

11. Where, by waiting, a full cargo could probably have been carried over a bar the charterer is not liable for dead freight if the vessel did not wait a reasonable time for the river to rise. Tweedie Trading Co. v. N. Y. & B. Dyewood Co., 118 Fed. 492. Where a steamer's draught was deepened by an unusually large supply of coal carried for her own advantage, a charterer was not lia-

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Demurrage.—Where no time is fixed within which the vessel is to be unloaded, the law implies an agreement to unload it within a reasonable time,[12] and the burden is on him who seeks to recover damages for the delay to show that reasonable diligence, under the circumstances, was not exercised.[13] What is a reasonable time depends upon the circumstances of each particular case.[14] In the absence of an agreement to the contrary, the consignee is not an insurer against delay, and is not liable for demurrage for delay caused by circumstances beyond his control, and which could not have been anticipated.[15] Delay caused by vis major is excusable.[16] A mere consignee, who is not the shipper or freighter of the cargo and not interested therein, is not ordinarily liable for demurrage in the absence of an agreement to the contrary.[17] One who contracts to receive a cargo alongside and transport it to another port is entitled to demurrage from the date on which he is notified to be ready to receive it, less the lay days stipulated for in the contract.[18] A consignor of cargo who hires a vessel for its carriage is liable for demurrage on account of delay in discharging, caused by the refusal of the consignee to receive it.[19] The rate of demurrage to be paid is frequently fixed by the contract of affreightment.[20] Where no rate is agreed upon

ble for dead freight where he refused to furnish the maximum cargo for fear that she could not cross the bar. Id.

12. Marshall v. McNear, 121 Fed. 428. If there is no stipulation as to demurrage or damages for detention a vessel must be loaded or discharged with reasonable dispatch, but according to the customs of the agreed place of loading, whether both parties are chargeable with knowledge of those customs or not. Designation of a particular consignee makes "reasonable" mean with reference to the usual facilities at the docks of that consignee. Donnell v. Amoskeag Mfg. Co. [C. C. A.] 118 Fed. 10. Waiting her turn at an unfrequented port, and scarcity of labor were held reasonable, lack of wharf space for cargo at Buffalo held unreasonable. Williscroft v. Cargo of The Cyrenian, 123 Fed. 169. The general rule as to reasonable dispatch (blanks for demurrage unfilled). Price v. Morse I. & D. D. Co., 120 Fed. 445. Evidence held to show no agreement for demurrage (coal lighters in N. Y. harbor). Hagan v. Tucker [C. C. A.] 118 Fed. 731. A sub-charterer sued for detention was held to be a shipper with notice of the charter-party and liable for detention through failure to name a safe port of delivery in accordance with the principal charter, but not bound by the rate of demurrage it fixed. W. S. Keyser & Co. v. Jurvelius [C. C. A.] 122 Fed. 218. There is an implied obligation on the part of the consignee for reasonable dispatch in discharging cargo, and demurrage may be recovered for delay beyond a reasonable time, without fault on the part of the vessel. Ionia Transp. Co. v. 2,098 Tons of Coal, 128 Fed. 514.

13. Marshall v. McNear, 121 Fed. 428.

14. Ionia Transp. Co. v. 2,098 Tons of Coal, 128 Fed. 514. Evidence held to show most of delay in loading was due to strikes excepted in the charter-party. Actieselskabet Barfod v. Hilton & D. Lumber Co., 125 Fed. 137. A provision that cargo be taken from alongside at the charterer's risk and expense does not bind the charterer to find necessary labor during a strike. Marshall v. McNear, 121 Fed. 428. Delay caused by a strike of longshoremen is reasonable. Id. "Dispatch for discharging" means with reference to the custom of the port and its facilities for discharging the kind of cargo carried. Cargo of The Joseph W. Brooks, 122 Fed. 881. "Quick despatch in loading and unloading" means that there shall be no unreasonable delay. Iroquois Furnace Co. v. Elphicke, 200 Ill. 411, 65 N. E. 784.

15. Not liable for delay caused by temporary derangement of dock machinery for unloading, where no other dock available. Ionia Transp. Co. v. 2,098 Tons of Coal, 128 Fed. 514.

16. Where the evidence does not show a detention caused wholly by the actual firing of guns directly affecting the vessel and making the discharge of cargo dangerous and impossible, the charterers are liable for demurrage, though after the time when discharge should have been finished there were such interruptions. Burrill v. Crossman, 124 Fed. 838.

17. Merritt & C. Derrick & Wrecking Co. v. Vogeman, 127 Fed. 770.

18. Guinan v. Weaver C. & Coke Co., 128 Fed. 203. "Ready to unload" means ready so far as the vessel can be made by those controlling her. New Ruperra S. S. Co. v. 2,000 Tons of Coal, 124 Fed. 937. Delay due to crowded condition of wharves is not included in the exception of "other causes or accidents beyond the control of the consignees" where a fixed rate of discharge is stipulated. The Pennsylvania coal strike causing increased importation and congestion of shipping is too remote to be included in the exception of "strikes." Id.

19. In the absence of a showing that the liability was assumed by the consignee with the consent of the owner. Sheridan v. Penn Collieries Co., 128 Fed. 204.

20. A bill of lading in a form used by mistake was held not to change the rate of demurrage fixed by prior agreement. Burns v. Burns, 125 Fed. 432. The rate of demurrage fixed by the Maritime Association of New York is not necessarily the "customary" rate of the port within the meaning of a charter-party. Randolph v. Wiley, 118 Fed. 77. A charter-party fixed the rate of freight for rough lumber and provided "if any dressed lumber shipped, one-fifth off as customary." Held: In computing the lay days

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the amount of damages allowed for improper detention depends upon the circumstances of each particular case.[21] A shipper cannot set up in defense to a libel for demurrage a breach of the contract of affreightment by the vessel, for which no protest was made at the time, and from which no damage was sustained.[22] Neither delivery of cargo and acceptance of freight,[23] nor previously presenting a bill for a smaller amount, waives a claim for demurrage.[24] A ship has no lien on her cargo for demurrage in the absence of an agreement to that effect.[25] A shipowner is not entitled to demurrage from a charterer for delay in the sailing of a vessel after she is loaded, due to a claim of the master that the cargo was in excess of that actually loaded, and his refusal to sign bills of lading for the correct quantity.[26]

§ 11. *Pilotage, towage, wharfage. Pilotage.*—Pilotage is local, not national, and may be regulated by states.[27] Exemptions from pilotage are the exception rather than the rule, and the plaintiff in an action to recover for services tendered need not allege that the vessel was not within an exception in the statute.[28] A vessel is liable for the negligence of a compulsory pilot,[29] but there is no personal liability of the owner nor of the charterer where the pilot is the latter's agent.[30] The pilot is liable both to the vessel employing him and to the one injured.[31] Contracts for the employment of pilots for a reasonable time on boats engaged in making regular trips in the coastwise trade are binding on the vessel.[32] Compensatory damages may be recovered for the breach of a contract of employment as pilot, in an action in rem against the vessel,[33] but wages earned by the pilot after the breach should be deducted from the amount due under the terms of the contract.[34] The investigation to be made by the New Jersey commissioners of pilotage (under Gen. St. p. 2463) into the qualifications of an applicant for pilot's license, other than the educational examination, need not be conducted in the presence of the applicant nor with the formality required in judicial proceedings. If the commissioners, after making such investigation,

for discharging fixed at one for each 25,000 feet of lumber, the one-fifth deduction should be calculated on the measurement of dressed lumber and not on the rate, thus reducing the lay days as well as freight. Id.

21. Where a vessel is detained with full cargo and crew on board all expenses going on the earnings of the vessel furnish decided assistance in determining the damages. W. S. Keyser & Co. v. Jurvelius [C. C. A.] 122 Fed. 218.

22. Atlantic & M. G. S. S. Co. v. Guggenheim, 123 Fed. 330.

23. Iroquois Furnace Co. v. Elphicke, 200 Ill. 411, 65 N. E. 784.

24. Elkrem v. New England Briquette Coal Co., 125 Fed. 987. Letters held a waiver of right to deny liability for demurrage. Taylor v. Fall River Ironworks, 124 Fed. 826.

25. Though a ship has no lien on cargo for demurrage, it may be created by agreement, and a consignee who accepts a cargo under a bill of lading referring to a charter wherein the owners by the usual cesser clause give up any claim against the charterer and retain a lien for demurrage is bound thereby, though by his contract of purchase with the charterer the latter is bound to discharge. Taylor v. Fall Fiver Ironworks, 124 Fed. 826.

26. Wood v. Sewall's Adm'rs, 128 Fed. 141.

27. State statute imposing pilots on vessels passing between the capes and ports in Virginia which does not apply to voyages to Maryland not requiring vessels to go outside the capes and expressly exempting commerce on the Potomac does not conflict with Rev. St. § 4237, prohibiting discrimination against vessels sailing from particular states. Darden v. Thompson [Va.] 44 S. E. 755.

28. Hagan v. Townsend, 118 Ga. 682.

29. Donald v. Guy, 127 Fed. 228; Harrison v. Hughes [C. C. A.] 125 Fed. 860.

30. Steamer stuck in a draw. Libel in personam. Crisp v. U. S. & A. S. S. Co., 124 Fed. 748. If it affirmatively appears that the pilot was solely at fault. Rich v. Hamburg-American Packet Co., 117 Fed. 751.

31. This is not lost by a voluntary settlement of the employing with the injured vessel though it may affect the burden of proof. Donald v. Guy, 127 Fed. 228.

A pilot's association was treated as a partnership and all held jointly liable for the negligence of one. There is nothing in the law of Virginia to relieve them and it would be contrary to public policy if there were. Id.

32. Contract held reasonable and valid. Baton Rouge & B. S. Packet Co. v. George [C. C. A.] 128 Fed. 914.

33, 34. Baton Rouge & B. S. Packet Co. v. George [C. C. A.] 128 Fed. 914.

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determine in their discretion that he is not a fit person to be licensed, they are not compelled to examine him as to his technical knowledge.[35]

Towage.—Damages for breach of a contract for towage within a reasonable time are measured by the value of the use of the boat during delay.[36] A provision in the bill of lading to the effect that the consignee will tow vessels binds him to provide for towage, and not merely to pay for it.[37]

Wharfage.—It is the duty of a wharf owner to exercise vigilance to so maintain the bottom near his wharf that vessels authorized to go there can do so without injury, and on receiving a vessel knowing it is without a master, must assume his duty of seeing that the vessel is not harmed.[38]

§ 12. *Repairs, supplies, and like expenses.*—As a rule, in the United States, a vessel is ordinarily liable for her supplies and repairs subject to exceptions for the protection of the owner of which third parties may, however, avail themselves. If the owner refuses to permit the creation of a lien, and this is or ought to be known to the materialman, no lien arises or is deemed waived, and from certain circumstances the nonexistence or waiver of this lien is presumed.[39] By the maritime law as administered in England and this country, a lien is given for necessaries furnished a foreign vessel upon the credit of such vessel, and in this particular the several States of the Union are treated as foreign to each other.[40] No such lien is given for necessaries furnished in the home port of the vessel, or in the port in which the vessel is owned, registered, enrolled, or licensed, and the remedy in such case, though enforceable in admiralty, is in personam only.[41] A state may provide for liens in favor of materialmen for necessaries furnished to a vessel in her home port, or in a port of the state to which she belongs, though the contract to furnish the same is a maritime contract, and such liens can be enforced by proceedings in rem in the courts of the United States. The remedy thus administered in the admiralty court is exclusive.[42] The right to extend these liens to foreign vessels in any case is open to grave doubt.[43] A state statute which attempts to control the administration of the maritime law by creating and superadding conditions for the benefit of a particular class of creditors, and thereby depriving the owners of vessels of defenses to which they would otherwise have been entitled, is an unlawful interference with the exclusive jurisdiction of the United States over admiralty and maritime cases, and to that extent is uncon-

35. Dexter v. Board of Com'rs [N. J. Law] 57 Atl. 265.

36. Evidence held to prove oral contract. Leo v. Cornell Steamboat Co., 85 N. Y. Supp. 1073.

37. A bill of lading providing that a cargo should be delivered at a designated port, "consignees paying freight for the same at the rate of 90c., and discharged, and to tow vessel in and out of back bay free," held to bind the consignee to provide for towage, and not merely to pay for it, and that after the vessel arrived in port and notified the consignee, the duty and risk of the towage service rested upon him. Thompson v. Winslow, 128 Fed. 73. Evidence held to show that a towboat company in performing towage service, was acting under employment of the consignee and not of the vessel. Id.

38. Lewis v. Barber Asphalt Paving Co., 123 Fed. 161.

39. The Underwriter, 119 Fed. 713. Evidence held insufficient to show an oral contract for a lien for supplies (seller demanded other security). Whitcomb v. Metropolitan Coal Co. [C. C. A.] 122 Fed. 941.

40. The Roanoke, 189 U. S. 185, 47 Law. Ed. 770.

41. The Roanoke, 189 U. S. 185. Allegations that the owner, a Maine corporation, had its principal place of business in Boston, Mass., and that the vessel was there enrolled are insufficient to show that Boston was the home port. The New Brunswick, 125 Fed. 567. A libel for supplies furnished a vessel alleged to be domestic was barred by an adverse decision on a libel on the same facts alleging the vessel to be foreign. Maine corporation having a principal place of business in Boston, Mass., where the vessel was enrolled. Id.

42. Perry v. Haines, 24 Sup. Ct. 8, 48 Law. Ed. ——.

43. The Roanoke, 189 U. S. 185. In the absence of national laws a state may create a maritime lien and give a right to sue in rem against even a foreign ship where it will not work injustice (lien for nonperformance of charter by owners). The Energia, 124 Fed. 842.

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stitutional and void.[44] For causes of action not cognizable in admiralty either in rem or in personam, the states may not only grant liens but may provide remedies for their enforcement.[45] The right of a maritime lien depends upon the locality of the vessel at the time the supplies are furnished or the repairs made.[46] To maintain a maritime lien for supplies furnished two vessels, the libellant must distinguish the goods supplied and the credit afforded to each.[47] Materials not sold for a particular vessel give no lien on the vessel in which they were actually used.[48] If it does not appear that a purchaser is without notice he cannot set up laches in enforcing liens.[49] Maritime and statutory liens share pro rata.[50] A lien for necessary repairs of a salved vessel rank next after salvage claims, whether in a foreign or home port.[51]

§ 13. *Salvage.*—Salvage is the compensation allowed to persons by whose voluntary assistance a ship at sea, or her cargo, or both, have been saved in whole or in part, from impending sea peril.[52] It is awarded only when the vessels aided are in danger of destruction or damage,[53] but it is none the less a salvage service because the peril apprehended did not befall, or because the service rendered was insignificant and without actual risk.[54] It will not be awarded to persons working in their own interest or for services rendered by those under obligation to do so.[55] But the crew of the salvor will not be deprived of salvage com-

44. An absolute lien upon foreign vessels for work done or materials furnished at the request of a contractor and making no provision for the protection of the owner in case the contractor has been paid before the claim is presented. The Roanoke, 189 U. S. 185.

45. Perry v. Haines, 24 Sup. Ct. 8, 48 Law. Ed. ——. A contract to repair a canal boat plying on the Erie canal, an artificial waterway which is a means of communication between different states, is a maritime contract. There is a distinction between repairs on a vessel and incidental repairs made on land to articles of a ship's furniture or machinery. Repair in a dry dock is not repair on land. Id.

46. Bennett v. Beadle [Cal.] 75 Pac. 843. No lien attaches to a vessel, under the California Code (Code Civ. Proc. § 831), for materials furnished for its construction, when it is built outside that state. Lien does not attach when vessel comes to California. Id.

47. A statutory lien for supplies requiring notice of lien containing a statement of the amount due is not enforceable against two canal boats lashed together and run as a "doubleheader" where he treated both as one and did not distinguish the amount due each in the notice. The Warner Miller Co., 120 Fed. 520.

48. But if an agent of a vendor use materials for a vessel of which he was also agent it is a furnishing to the ship by the owner of the materials. Callahan v. Aetna Indemnity Co., 33 Wash. 583, 74 Pac. 693.

49. The Seaboard, 119 Fed. 375. Nine months' delay in libelling, though ship frequently in port, is not unreasonable. Id.

50, 51. The Thomas Morgan, 123 Fed. 781.

52. Cent. S. & T. Co. v. Mears, 89 App. Div. [N. Y.] 452. Salvage is a reward for meretorious services in saving property on navigable waters, in peril, and which might otherwise be destroyed, and is allowed as an encouragement to all persons engaged in business at sea or on navigable waters, and others, to bestow their utmost endeavors to save vessels and cargoes which are in imminent peril. Gilchrist Transp. Co. v. 110,000 Bushels of No. 1 Northern Wheat, 120 Fed. 432. Salvage is a reward or bounty, exceeding the actual value of their services, given to those by means of whose labor, intrepidity, and perseverance a ship or her goods have been saved from shipwreck or other dangers of the sea. The Lyman M. Law, 122 Fed. 816. A crew can become salvors only after the vessel has become a wreck without hope of recovery and the crew discharged, even though the service be extraordinary in character, arduous, perilous, and meritorious. Unloading coal on a stranded steamer. Gibraith v. Stewart Transp. Co. [C. C. A.] 121 Fed. 540.

53. Services of a tug in pumping out a barge which she had previously rescued held not of a salvage character. The Ira A. Allen, 128 Fed. 172.

54. These affect the amount of compensation, but not the principles by which it is to be measured. Pumping a beached and exposed steamer. The Apache, 124 Fed. 905. A steamer unsuccessful in taking in tow a distressed ship, on request proceeded and dispatched a tug which rescued her. Held: Steamer, officers and crew entitled to salvage. Awards cut down. The Flottbek [C. C. A.] 118 Fed. 954. Officers and crew of a tug dispatched to rescue a ship at her request, but disabled and unable to reach her and take part in the rescue are entitled to salvage (awards cut down). Id. That the peril of the salved or of the salvor was not great is not fatal to a claim for salvage. Mate of a schooner boarded a barge drifting under his bows. Fletcher v. The John I. Brady, 19 App. D. C. 174. A lighter sent to raise a tug which gave it up, but was later taken and used by the successful salvor as a part of his equipment does not entitle its owner to salvage. An element of personal service by owner or his agent is necessary. The Thomas Morgan, 123 Fed. 781.

55. Crews of life saving stations are not entitled to salvage. The Lyman M. Law, 122

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pensation merely because both ships belong to the same owners,[56] nor will tha fact preclude salvage against the cargo saved, where the peril was not cause by breach of the contract of carriage.[57] The amount to be awarded rests largel in the discretion of the court.[58] The degree of danger from which the lives o property are rescued,[59] the value of the property saved,[60] the risk incurred b the salvors,[61] the value of the property employed by the salvors in the enterpris and the danger to which it was exposed,[62] the skill shown in rendering the ser ice,[63] the time and labor occupied,[64] and the degree of success achieved, and th proportions of value lost and saved, should be considered.[65] Where all these el ments concur a large award will be given. Where none or scarcely any exist th compensation will be limited to the actual value of the service performed.[66] Th

Fed. 816. Owners of a ship at fault, whose other vessels seek to repair the loss, are working in their own interest to reduce damages and not as salvors, even if it subsequently appears that their entire pecuniary expenditure or loss would have been less had they abandoned the sunken ship as a total loss (barge lost by tug and raised by other tugs of same line). The Pine Forest, 119 Fed. 999. No salvage for providing a lighter can be allowed owners of the tug at fault for a grounding. The Somers N. Smith, 120 Fed. 569. Owners of a sunken scow at fault for damage to passing steamer cannot claim salvage for aid to the steamer. The Mary S. Lewis, 126 Fed. 848.

56. Not within the scope of their employment. Gilchrist Transp. Co. v. 110,000 Bushels of No. 1 Northern Wheat, 120 Fed. 432.

57. Extinguishing fire. Gilchrist Transp. Co. v. 110,000 Bushels of No. 1 Northern Wheat, 120 Fed. 432.

58. The Apache, 124 Fed. 905.

59. The Lyman M. Law, 122 Fed. 816. The service rendered by a tug in rescuing two barges which had been cast adrift by the vessel towing them and were drifting toward shoals, held to be one of meritorious salvage, entitling it to an award of $1,500, two-thirds to the owners and one-third to the master and crew. The Ira A. Allen, 128 Fed. 172; Scows Nos. 21 and 59, 121 Fed. 430; The Marcus Hook, 128 Fed. 813; Gilchrist Transp. Co. v. 110,000 Bushels of No. 1 Northern Wheat, 120 Fed. 432. A vessel deserted by her captain and crew with nothing to show that they retained any control over it or intend to return, will be regarded as a derelict for the purpose of fixing the amount of salvage to be awarded her rescuers. May be taken possession of without request of owners. The Pinmore, 121 Fed. 423. Salvage awarded to peculiarly meritorious salvor of ¼ the amount the ship could bring at public sale plus expenses of salving, costs and expenses of court, and costs recalking and refastening after rescue, as a continuation of the salvage service. The Thomas Morgan, 123 Fed. 781.

60. The Lyman M. Law, 122 Fed. 816. Salvage to a tug, master, and crew for picking up drifting scows and preventing their doing damage to shipping. Scows Nos. 21 and 59, 121 Fed. 430. Salvage awarded for towing to port an abandoned schooner, keeping her afloat by pumping and standing by to render aid. The Lyman M. Law, 122 Fed. 816; Gilchrist Transp. Co. v. 110,000 Bushels of No. 1 Northern Wheat, 120 Fed. 432; The Ira A. Allen, 128 Fed. 172; The Marcus Hook, 128 Fed. 813. In awarding salvage the court considers the value of th vessel and also the value of the cargo an freight saved. The Ereza, 124 Fed. 65 The Pinmore, 121 Fed. 423. Repairs in th nature of a continuance of the salvag service allowed for. The Thomas Morga 123 Fed. 781.

61. The Lyman M. Law, 122 Fed. 81 Merritt & C. Derrick & Wrecking Co. North German Lloyd, 120 Fed. 17; Gilchris Transp. Co. v. 110,000 Bushels of No. Northern Wheat, 120 Fed. 432; Scows No 21 & 59, 121 Fed. 430; The Marcus Hoo 128 Fed. 813; The Joseph Stickney, 127 Fe 763; The Pinmore, 121 Fed. 423.

62. The Lyman M. Law, 122 Fed. 816. Un der the Harter Act the value of the carg at risk cannot be considered in determinin what perils the salving vessel was oblige to encounter (section 3, 27 Stat. 445; U. Comp. St. 1901, p. 2946), providing that if vessel plying to or from a port of the Unit ed States shall be seaworthy and properl manned, equipped and supplied, at the be ginning of the voyage, she shall not be lia ble to the cargo for losses arising from sav ing or attempting to save life or propert at sea, or from any deviation in renderin such service. The Ereza, 124 Fed. 65 Services in beaching, saving lives, raisin and clearing vessels in Hoboken fire. Mer ritt & C. Derrick & Wrecking Co. v. Nort German Lloyd, 120 Fed. 17; The Ereza, 12 Fed. 659; Gilchrist Transp. Co. v. 110,00 Bushels of No. 1 Northern Wheat, 120 Fe 432; The Ira A. Allen, 128 Fed. 172; Scow Nos. 21 & 59, 121 Fed. 430; The Marcus Hoo 128 Fed. 813; The Pinmore, 121 Fed. 423.

63. The Lyman M. Law, 122 Fed. 816; Gil christ Transp. Co. v. 110,000 Bushels of N 1 Northern Wheat, 120 Fed. 432; Scows No 21 & 59, 121 Fed. 430; The Ereza, 124 Fe 659; The Thomas Morgan, 123 Fed. 781.

64. The Lyman M. Law, 122 Fed. 81 Salvage award of $600 made to two tugs fo services in towing barge to place of safet Service lasted about an hour. The Marcu Hook, 128 Fed. 813. Salvage awarded fo pulling off a stranded schooner from th surf. Fact that they were aided by natur immaterial. The Edith L. Allen, 122 Fe 729. Delay of vessel and cargo considere The Ereza, 124 Fed. 659; Gilchrist Trans Co. v. 110,000 Bushels of No. 1 Norther Wheat, 120 Fed. 432; The Thomas Morga 123 Fed. 781.

65. The Lyman M. Law, 122 Fed. 816; Mer ritt & C. Derrick & Wrecking Co. v. Nort German Lloyd, 120 Fed. 17; The Ereza, 12 Fed. 659.

66. The Thomas Morgan, 123 Fed. 781.

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amount awarded must be reasonable, measured by all the circumstances, and not alone by the emergent need for aid, nor the value of the saved property.[67] Nor should the allowance necessarily equal what the owner, in the presence of the disaster, may offer for the rescue of the vessel.[68] An exorbitant demand not followed by detention of the ship will not diminish the award.[69] The value of the services of a vessel which assists in the rescue but makes no claim for or is not entitled to salvage, must be excluded in determining the amount due the others.[70] Additional expense made necessary by the neglect of the owner and the wreckers will be divided.[71] The apportionment of salvage between the owners of the vessel rendering the assistance and the crew depends upon the circumstances of each particular case.[72] The receipt by the owners or master of a vessel, of the whole compensation awarded as salvage, necessarily imports its receipt for the benefit of all other co-salvors interested in the same service, and exonerates the saved vessel from liability to any others of the saving crew.[73] A salvor may enforce his claim by a suit against the ship or its cargo, or both.[74] He is entitled to the possession of the property saved, provided it is such personalty as may be reduced to possession, and has a lien for the salvage until his claim is satisfied.[75] To displace a claim for salvage the parties seeking the protection of any other rule of compensation must plead and prove a binding contract that the work done shall be paid for at all events.[76] A prior arrangement to tow a disabled ship cannot be construed to include the rendering of any salvage services to the cargo by extinguishing fires, or rescuing from unforeseen or extraordinary perils.[77]

§ 14. *Loss and expense. Liability. Proceedings for limitation.*—If the owner is personally at fault, he cannot limit his liability under the statute.[78]

67. Evidence held sufficient to authorize the allowance of $3,900 to two vessels for saving another from destruction by fire. The J. Emory Owen, 128 Fed. 996. $850 awarded to two tugs for saving a burning tug, which had been abandoned and cut adrift by her crew, two-thirds of this amount to go to one tug and the balance to the other. The Joseph Stickney, 127 Fed. 763. The amount should be liberal but not out of proportion to the service actually rendered. Purpose is to offer inducement to aid vessels in distress. The Lyman M. Law, 122 Fed. 816; The Ereza, 124 Fed. 659.

68. The J. Emory Owen, 128 Fed. 996.

69. The Apache, 124 Fed. 905.

70. Government vessel. The J. Emory Owen, 128 Fed. 996.

71. Merritt & C. Derrick & Wrecking Co. v. North German Lloyd, 120 Fed. 17.

72. Two-thirds of the award given to the owners and one-third to the crew. The J. Emory Owen, 128 Fed. 996.

73. If money is paid the owners as salvage compensation for the entire service it is received for the benefit of all other co-salvors, especially if the owners were authorized to act for the officers and crew. Liable to crew for their shares. Pulling steamer off beach. Not hazardous. The Managua, 126 Fed. 208.

74. Cent. S. & T. Co. v. Mears, 89 App. Div. [N. Y.] 452.

75. Cent. S. & T. Co. v. Mears, 89 App. Div. [N. Y.] 452. One rescuing from the sea cows escaped from another vessel has a lien on them for salvage, which entitles him and one with whom he has placed them to board to possession until paid. Id.

76. The Apache, 124 Fed. 905. A wrecking company may recover at law for services rendered at request, such as to raise an implied contract for payment, though the subject-matter might furnish the basis for a claim for salvage. Merritt & C. Derrick & Wrecking Co. v. Tice, 77 App. Div. [N. Y.] 326. Evidence held not to show an express contract for services in saving a stranded ship. Lewis v. Clyde S. S. Co., 132 N. C. 904. Where a steamer on fire, after the fire is under control but not entirely extinguished, hails a passing vessel and requests towage toward her port of destination, the service so rendered will be considered as a salvage service, and compensated for as such, in the absence of any agreement to the contrary. The City of Genoa, 128 Fed. 206.

77. Gilchrist Transp. Co. v. 110,000 Bushels of No. 1 Northern Wheat, 120 Fed. 432. Evidence held to show peril. The Flottbek [C. C. A.] 118 Fed. 954.

78. An owner may limit his liability for damage due to failure to inspect, where he has delegated that duty to proper persons and has no personal knowledge of his neglect, though his inability to personally inspect is due to the magnitude of his undertakings. Van Eyken v. Erie R. Co., 117 Fed. 712. Owner held not charged with knowledge of incompetence of a pilot and so could limit liability. In re Rapid Transit Ferry Co., 124 Fed. 786. Owner of tug providing hawsers sufficient for ordinary weather is not at fault and may limit his liability. In re Moran, 120 Fed. 556. Evidence held not to show failure to comply with Rev. St. § 4488, regarding sufficient supply of small boats and proper disengaging apparatus. More boats to supply all would have inter-

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The ship at fault[79] and her pending freight[80] must be surrendered into court. An owner by defending an action for personal injuries to a passenger in a state court does not waive his right to petition in admiralty for limitation of liability for the amount of the judgment, but he cannot limit his liability as respects interest and costs of the state court.[81] A judgment for the plaintiff in a state court in an action for personal injuries is conclusive of liability on a petition to limit liability in the admiralty court.[82] Proceedings to limit liability are ineffectual as to any specific party if not undertaken till after he has obtained satisfaction of his demand.[83]

§ 15. *General average.*—If the loss is the natural or inevitable result of the original and involuntary cause of danger, it is the proximate cause, but when a voluntary act with a design of serving intervenes, which in itself is a cause of loss, the latter is the proximate cause and entitles to general average.[84] The value of a rudder in its damaged condition just before it was cut away in a storm, and cost of wages and provisions of crew while constructing a jury rudder to save the ship are properly allowed in general average.[85]

§ 16. *Wreck.*—A master has authority to sell a stranded ship when a prudent man would have no doubt of its advisability.[86]

§ 17. *Maritime torts and crimes.*—The maritime law requires the usual common law elements of a tort. The damage must be a proximate consequence of the injury,[87] and there must be a duty of care toward the libellant,[88] and the

fered with management. In re La Bourgoyne, 117 Fed. 261. Knowledge of owners that rules to avoid collision in fogs were habitually violated will not bar their proceedings to limit liability, if they have done all that was practicable to secure enforcement. Id. A ferry company may limit its liability for collision with boat of a line hiring of it the next slip, and is not privy to the collision by leasing it to a line that had to cross its own, or failing to make regulations for navigation under such circumstances. In re Rapid Transit Ferry Co., 124 Fed. 786.

79. A car float attached to a tug which collides owing to fault of the tug need not be surrendered with the tug though having the same owner. Van Eyken v. Erie R. Co., 117 Fed. 712.

80. The freight is that of the pending trip only regardless of what meaning may be given to the term "voyage" in the contract between shipper and ship owner. In re La Bourgoyne, 117 Fed. 261. "Pending freight" does not include prepaid freight and passage money stipulated to be the property of the owner whether the vessel is lost or not, as this is rather insurance than freight. Id. Compensation for carrying mails under a general contract not proved to be applicable to the crossing in question need not be surrendered. Id.

81. In re Starin, 124 Fed. 101.

82. In re Starin, 124 Fed. 101. But failure of owners to invoke the jurisdiction of admiralty for limitation of liability till after an action at law for tort had been sued to judgment was held such laches that they should be ordered to pay the costs of the proceeding in the state court before they are entitled to a decree of nonliability. The Ocean Spray, 117 Fed. 971.

83. After raising a sunken barge to relieve against liability for loss the item of expense of raising her was satisfied and not an outstanding liability when proceedings to limit liability were begun. The Pine Forest, 119 Fed. 999.

84. Water overflowing as a result of stranding instead of coming through the hole on account of which the stranding was made. Norwich & N. Y. Transp. Co. v. Ins. Co., 118 Fed. 307.

85. May v. Keystone Yellow Pine Co., 117 Fed. 287.

86. Failure of owners to reply in due time to his telegram for instructions and advice of board of survey suffices though the purchaser later prove able to repair the ship at a profit. The Yarkand, 117 Fed. 336. Failure of owners to reply would not enlarge authority of master. Otherwise affirmed. The Yarkand [C. C. A.] 120 Fed. 887.

87. Rule of last intervening wrongdoer applied. The Steam Dredge No. 1, 122 Fed. 679. Stampede by passengers is not a proximate consequence of a collision of a vessel with a draw. Southern Transp. Co. v. Harper, 118 Ga. 672. Evidence in a suit in admiralty in personam, for injuries to a seaman struck by a load of sugar being lowered into a boat, held to sustain a finding that the injury was caused by the negligence of the engineer in operating the crane in prematurely lowering the sugar, and not by the roughness of the sea. Paauhau Sugar Plantation Co. v. Palapala [C. C. A.] 127 Fed. 920. Evidence held to show that the injury to a seaman caused by frost-bite was not due to the fault of the master, and that the vessel was not liable therefor. The Rutherford, 128 Fed. 189.

88. A dredge under contract requiring the presence of a government inspector owes him a duty of care. The Steam Dredge No. 1, 122 Fed. 679. A business visitor is entitled to the care due an invited person. Fender rope breaking and hitting one on wharf. Butterfield v. Arnold, 131 Mich. 583, 92 N. W. 97. A declaration that plaintiff was hurt

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rule of *res ipsa loquitur* applies.[89] There is a duty to warn employes of known defects.[90] All the members of the crew, except perhaps the master, are as between themselves fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew.[91] Longshoremen are frequently not fellow servants with the crew.[92] If not one, a gangwayman knocked into the hold by the sudden starting of a winch against orders, may recover.[93] It is the duty of the ship to provide all necessary appliances and to maintain them in good order.[94] The vessel and her owner are liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.[95] The rule of contributory negligence,[96] and assumption of

by an insecure gang plank leading from defendant's wharf to a vessel in defendant's possession and that plaintiff had business on said vessel does not state a cause of action, since plaintiff had not been invited by defendant. Grundel v. Union Ironworks, 141 Cal. 564, 75 Pac. 184. There is no duty to light passageways for a seaman returning at a late hour after a pleasure trip ashore. The Californian, 124 Fed. 99. Evidence insufficient to show negligence on the part of the ship in failing to light the hold and hatchways. The Prins Willem II, 128 Fed. 655. A city was held not negligent in failing promptly to open a draw that had got out of repair and so not liable for delay of libellant's boats. New Haven Towing Co. v. New Haven, 126 Fed. 882. That a tug, with tow coming diagonally toward a draw hit the abutment so hard as to break away the footpath and throw plaintiff, a traveler on the bridge, down to the stone foundations is evidence of negligence for the jury. McGuire v. Moran, 76 App. Div. [N. Y.] 325. A ship in the hands of contracting stevedores is not liable for the death of a stevedore, resulting from the negligence of other stevedores. Hatchway improperly replaced. Deceased guilty of contributory negligence also. Regina v. Dunlop S. S. Co., 128 Fed. 784.

89. The breaking of a wire rope in proper use and under no unusual strain is sufficient evidence that it was not safe for the purpose, and to hold the ship liable to stevedores to whom it was to furnish appliances. Band for rigging hoisting boom. Neptune Steam Nav. Co. v. Borkmann [C. C. A.] 118 Fed. 420. That a fender rope broke at a landing with such force as to fly on the dock and do damage is some evidence of negligent condition. Butterfield v. Arnold, 131 Mich. 583, 92 N. W. 97. Sending men into the fore peak to paint with a nonexplosive paint held not negligent though explosion followed. Toll v. Prince Line, 124 Fed. 110.

90. Ship negligent in failing to warn stevedore of a known defect which required especial care in dismantling a hatch. The Earl of Dunmore, 120 Fed. 858. Ship not liable for damage to stevedores in unloading due to negligence of stevedores misplacing one bag of sugar in loading and there is no duty to warn of such danger. The Beechdene, 121 Fed. 593.

91. Except as to maintenance and crew, see supra, Seamen. The Osceola, 189 U. S. 158. The master and crew are fellow servants as to matters connected with the navigation of the ship only, but the master represents the owners in respect to the personal duties and obligations which they owe the seamen. The Troop [C. C. A.] 128 Fed. 856.

92. Ship held liable for injuries to longshoremen for negligent disobedience of instructions by winchmen. The Gladestry, 124 Fed. 112.

93. Evidence insufficient. Calise v. The Cairnstrath, 124 Fed. 109. A state statute making a ship liable for all damages arising from injuries done to persons or property thereby, and that the claim shall be a lien on the ship, applies only to damage done by those in charge of a ship, with the ship as the noxious instrument, and not to damages done on board. Seaman hit by a derrick falling because a gangway was raised in a heavy wind. The Osceola, 189 U. S. 158.

94. Liable for injuries to fireman caused by defective catch on furnace door. The Watson, 128 Fed. 201.

95. The Osceola, 189 U. S. 158. A tug held liable for damage to a deckhand by the breaking of a hawser whose worn condition could have been disclosed on careful inspection. The Columbia, 124 Fed. 745. A band for rigging a hoisting boom was made three months before under the directions of ship's officers. Held, that the defect was concealed by the covering they put on and so was latent did not relieve her. Immaterial whether libellant was hit by boom, or debris, or slipped in the excitement of the effort to escape. Neptune Steam Nav. Co. v. Borkmann [C. C. A.] 118 Fed. 420. Held, that sufficient inspection had been made, if any were needed, of a part of the iron connection of a hoisting boom which broke and damaged the libellant. The Northtown, 124 Fed. 740. Evidence held not to show negligence in not discovering a defective weld in a chain. Coal hoisting apparatus. Johnston v. Turnbull, 124 Fed. 476.

96. Where injuries to a seaman are the result of both his own negligence and that of the vessel, the damages will be divided. Evidence held to show that an injury to a fireman, caused by a defective catch which should have held a furnace door open, was due both to the negligence of the ship's officers who had been notified of the defect, and to the contributory negligence of the fireman, who knew of the defect. The Watson, 128 Fed. 201. Not contributory negligence that a seaman went below for his coat after collision seemed probable (The Buena Ventura, 117 Fed. 988), or that a woman passenger walked on a slippery deck (Gillum v. N. Y. & T. S. S. Co. [Tex. Civ.

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risk[97] applies. Maritime law gives no recovery in damages for death by wrongful act on the high seas,[98] but if within state limits a statutory right will be enforced.[99] An action in tort for injuries to a seaman cannot be joined with an action on a maritime contract, express or implied, to furnish the seaman medical care, nursing, and attendance at the expense of the ship on which he was injured.[1] Under a complaint in an action for injuries to a seaman, stating a cause of action in tort only for the negligence and wrongful acts of defendants, plaintiff cannot recover for medical care, nursing, and attendance under an implied contract.[2]

SLAVES.

The condition of peonage is a condition of enforced servitude by which the servitor is restrained of his liberty and compelled to labor in liquidation of some debt or obligation, either real or pretended, against his will.[3] The system of peonage was abolished and prohibited and all laws or customs maintaining or authorizing it declared null and void by congress.[4] Every person holding, arresting, returning or causing to be held, arrested or returned, or aiding in holding, arresting or returning, any person to the condition of peonage is guilty under the statute.[5] Any person who falsely accuses another of crime and carries him before a magistrate in order that he may be convicted and put to hard labor, with purpose to hire such person or enable some other person to hire him, is guilty of "carrying away any other person with intent that such other person be sold into involuntary servitude."[6] If two or more persons conspire to effect

App.] 76 S. W. 232), or that a passenger was on the bows of a crowded pleasure barge in tow of tug (Hill v. Starin, 173 N. Y. 632, 66 N. E. 1110), or that a business visitor approached so near a steamer landing as to be hit by a breaking rope (Butterfield v. Arnold, 131 Mich. 583, 92 N. W. 97). Concurring negligence of vessel on which plaintiff was employed will not defeat his recovery for damages sustained in collision, but it may affect defendant's negligence. Grube v. Hamburg-American S. S. Co., 176 N. Y. 383, 68 N. E. 666. Passenger. Louisville & C. Packet Co. v. Mulligan, 25 Ky. L. R. 1287, 77 S. W. 704. Evidence of due care of plaintiff's steamer in collision sufficient to require submission to jury (river steamer in fog). Rees v. Joseph Walton & Co., 204 Pa. 412.

97. One who enters a small boat after warning that it is overcrowded is negligent and assumes the risk and his representative cannot recover under a statute giving damages for death by wrongful act. In re Kimball S. S. Co., 123 Fed. 838. A government inspector assumed the ordinary risk of sitting within the bight of a rope, but not of the negligence of a winchman leaving the clutch on the gear. The Steam Dredge No. 1, 122 Fed. 679. A deck hand assumes the risk of being caught in the bight of a twisted hawser. The Troy, 121 Fed. 901.

98. In re La Bourgoyne, 117 Fed. 261.

99. The Northern Queen, 117 Fed. 906. Evidence that deceased had promised to take sisters back to Norway to live some day entitles them to damages for his death. The O. L. Hallenbeck, 119 Fed. 468. See The Genesta, 125 Fed. 423. Expectancy of life of defendant next of kin may be considered in awarding statutory damages for death by wrongful act. The Dauntless, 121 Fed. 420. Damages for personal injuries to a passenger awarded, held, not excessive. Poupirt v. Elder Dempster Shipping, 122 Fed. 983. Amount of damages for death of minors considered. The Charlotte, 124 Fed. 989.

1, 2. Sanders v. Stimson Mill Co. [Wash.] 75 Pac. 974.

3. Peonage Cases, 123 Fed. 671; U. S. v. McClellan, 127 Fed. 971.

4. U. S. Comp. St. 1901, p. 1266. The statute (U. S. Comp. St. 1901, § 3715), applies everywhere, whether the system exists with or without the sanction of local law or custom. Peonage Cases, 123 Fed. 671. It is a valid exercise of the police power of Congress. U. S. v. McClellan, 127 Fed. 971. But it was held that the statute had no application to the state of Georgia, in which the system never existed. U. S. v. Eberhart, 127 Fed. 252.

5. U. S. Comp. St. 1901, p. 3715. A person who hires another or induces him to sign a contract by which he agrees during the term to be imprisoned or kept under guard, and under cover of the contract, holds such person to the service against his will (Peonage Cases, 123 Fed. 671), or a person who falsely pretends to another that he is accused of crime, and to prevent conviction, induces him to sign such a contract, and thereafter holds him to such service against his will (Id.), or any third person, for whose benefit such a contract is made, and who knows the facts (Id.), or a person who, conniving with a magistrate, induces a person to believe he has been sentenced to hard labor for a fine, and to submit to restraint of his liberty (Id.), is guilty of the offense of holding or causing to be held a person to a condition of peonage (Id.).

6. U. S. Comp. St. 1901, p. 3715. Peonage Cases, 123 Fed. 671.

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such a purpose against a citizen of the United States, they are guilty of a conspiracy to deprive him of the free exercise or enjoyment of a right or privilege secured by the constitution of the United States.[7] Where, under the Alabama statute, a person has bound himself in open court, by contract, to servitude to the surety for his fine and costs, until his labor shall have reimbursed such surety, one who extends the term of such contract beyond the payment of such fine and costs, against the will of the servitor, is guilty of holding a person to a condition of peonage.[8] Such a contract cannot be transferred without the consent of the convict.[9] A magistrate who corruptly exercises his functions to unlawfully convict a person in order that the convict's services may be obtained or sold by a surety, under such a contract, is liable criminally to the United States.[10] The act of Alabama making a breach of a written contract for labor, or the lease of lands, or to furnish labor, or labor and teams to cultivate lands, a penal offense, is unconstitutional under the state constitution, which prohibits imprisonment for debt.[11] The statute is also unconstitutional as class legislation, subjecting laborers and renters to penalties for breach of contract, which are not imposed on any other class of citizens.[12] It is also void because it violates the Federal constitution in denying to those affected the equal protection of the laws,[13] and because it violates the thirteenth amendment, which prohibits involuntary servitude except as a punishment for crime;[14] and because its enforcement establishes a system of peonage, prohibited by Federal law.[15] The Federal courts have jurisdiction of prosecutions under the Act of Congress.[16]

The validity of *slave marriages* and the legitimacy of children of such marriages is largely governed by statute.[17]

SODOMY.

An attempt to commit the crime is punishable.[18] Assault is not an element of the crime, or of an attempt to commit it, when the victim is not a human being.[19] Penetration is an essential element of the crime,[20] but it may be proven by circumstantial evidence;[21] but the extent thereof is immaterial.[22] See the note as to evidence held not to exclude every reasonable hypothesis except that of guilt.[23]

7. U. S. Comp. St. 1901, p. 3712. Peonage Cases, 123 Fed. 671.

8, 9, 10, 11, 12, 13, 14. Peonage Cases, 123 Fed. 671.

15. U. S. Comp. St. 1901, p. 1266. Peonage Cases, 123 Fed. 671.

16. Though a prosecution for kidnapping might lie under the state statutes for the same acts. U. S. v. McClellan, 127 Fed. 971.

17. In Alabama, the issue of a slave marriage which was abandoned, the husband thereafter intermarrying with another slave, is illegitimate. Harrison v. Alexander, 135 Ala. 307. Virginia Code, § 2227, making legitimate the children of colored persons who under certain conditions cohabited before February 27, 1866, applies only where such persons agreed to occupy the relation of husband and wife. Patterson v. Bingham [Va.] 43 S. E. 609. In Tennessee, the children of slaves living together as husband and wife, while in a state of slavery, are entitled to inherit from their parents, even though the marriage was terminated and the husband remarried, while a slave. The statute provides: "All free persons of color who were living together as husband and wife in this state while in a state of slavery, are hereby declared to be made man and wife, and their children legitimately entitled to an inheritance in any property heretofore acquired by said parents, as fully as though the children of white citizens." Shannon's Code, §§ 4179-4198. Carver v. Maxwell, 110 Tenn. 75, 71 S. W. 752. A common-law marriage, though not in ratification of a prior slave marriage of the parties, makes legitimate the issue of the former relation. Gilbert v. Edwards [Tex. Civ. App.] 74 S. W. 959.

18, 19. People v. Oates [Cal.] 75 Pac. 337.

20. Almendaris v. State [Tex. Cr. App.] 73 S. W. 1055; Green v. State [Tex. Cr. App.] 79 S. W. 304.

21. Almendaris v. State [Tex. Cr. App.] 73 S. W. 1055.

22. White v. Com., 24 Ky. L. R. 2349, 73 S. W. 1120.

23. Mullins v. State [Tex. Cr. App.] 76 S. W. 560.

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SPECIFIC PERFORMANCE.

§ 1. Nature and Foundation of Remedy (1678). Laches (1679).
§ 2. Subject-Matter of Enforceable Contracts (1681).
§ 3. Requisites of Contract (1682).
§ 4. Performance by Complainant (1689).
§ 5. Actions. Jurisdiction (1691). Time and Place of Bringing Suit (1691). Defenses (1691). Parties and Pleading (1692). Evidence and Witnesses (1694). Instructions and Trial by Jury (1696). Decree or Judgment; Relief Granted; Enforcement (1696). Costs and Damages (1698). Appeal and Trial de Novo (1698).

§ 1. *Nature and foundation of remedy.*—Specific performance of contracts is an equitable remedy subject to the usual rules of equitable relief. It will not lie when there is an adequate remedy at law,[24] and the right to proceed by eminent domain has been held an adequate remedy,[25] and specific performance of an agreement to partition lands will not be decreed, where a suit for partition would lie.[26] Where the damages are uncertain on account of the peculiar nature of the subject-matter,[27] or improvements and expenditures of a substantial character have been made,[28] or where greater injury will result to defendant by the enforcement of the

24. Gray v. Citizens' Gas Co., 206 Pa. 303. The acts to be done in performance of a contract must be such as are incapable of compensation in damages, if specific execution were denied. Venable v. Stamper [Va.] 45 S. E. 738. A contract for sale of ordinary lumber of specified measurements, to be made from a tract of timber, falls within the rule that there is an adequate remedy for damages for its breach, but is subject to specific enforcement under Acts 1888, p. 415, c. 263 (Code Pub. Gen. Laws, art. 16, § 199), providing that enforcement shall not be refused, though adequate remedy lies at law, where the resisting party does not show himself solvent or give a bond. Neal v. Parker [Md.] 57 Atl. 213.

25. Where an agreement by a lessor that lessee, a railroad, may purchase, is of doubtful validity, specific performance will not be decreed, since the lessee can acquire by condemnation proceedings. Baltimore & O. R. Co. v. Winslow, 18 App. D. C. 438.

26. Where tenants in common of one tract of land and like tenants of another mutually agree that all lands shall be partitioned "as if held as tenants in common," specific performance will lie on refusal by one to perform, the agreement being executory so that partition would not lie. Sumner v. Early [N. C.] 46 S. E. 492.

27. If damages are uncertain or indeterminable because of the peculiar subject of the contract it will be enforced; contract for sale of interest in business of manufacturing glass where the purchasers who were surviving partners had contributed most of the capital and would thereby be enabled to continue the business without interruption. Ralston v. Ihmsen, 204 Pa. 588. An oral contract calling for services of a peculiar nature and beyond estimate in damages will be enforced after part performance. Stellmacher v. Bruder, 89 Minn. 507, 95 N. W. 324. No remedy at law is sufficient for breach of a contract by a corporation to issue stock in payment for lands, which stock has never been sold and has no market value. Selover v. Isle Harbor Land Co. [Minn.] 98 N. W. 344. Where a contract calls for delivery of certain amount of pulp wood each year from defendant's land, and defendant agrees not to sell the land, the remedy at law is inadequate, the future price of the wood being uncertain, and possible destruction of timber by fire or the taking of the land in eminent domain preventing accurate assessment of damages. St. Regis Paper Co. v. Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967.

Specific performance of an oral contract to convey realty is the only adequate remedy where the consideration was board, lodging, and services furnished during a long period of years, whether or not an action at law will lie for compensation. Winfield v. Bowen [N. J. Eq.] 56 Atl. 728. A contract to devise lands in return for care during life will not be enforced unless the services cannot be estimated in money. Braun v. Ochs, 77 App. Div. [N. Y.] 20. A contract for purchase of a stock of merchandise in a lump sum paid will be enforced where part has been delivered, and the remainder has been canceled by the seller so that possession cannot be obtained by replevin nor the value justly estimated. Raymond Syndicate v. Brown, 124 Fed. 80. Where the vendee does not claim that the vendor's action is at law or that he has a legal remedy, he may sue for specific performance, recovery of money damages being inadequate; purchase of long lease of brick yard and appurtenances. Covert v. Brinkerhoff, 41 Misc. [N. Y.] 230. The remedy by damages for breach of a contract to build and operate a grain elevator is not adequate. Tidball v. Challburg [Neb.] 93 N. W. 679.

28. Where a lessee, under a verbal contract for a period which made it void under the statute of frauds, had made no improvements which could not be compensated for in damages, specific performance will not be decreed. Henley v. Cottrell Real Estate, Ins. & L. Co. [Va.] 43 S. E. 191. Where plaintiff had merely paid a certain amount of money which had been returned, and had expended a small amount only with a view to improvement of the premises, there was an adequate remedy at law. Charlton v. Columbia R. E. Co., 64 N. J. Eq. 631. Specific performance of a lease will not be decreed where plaintiff had never made a payment, had not entered possession or made any improvements, though she had bought plans from an architect, since any damages could be recovered at law. Id.

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contract than to complainant by remitting him to his legal remedy,[29] specific performance will not be decreed. The right does not, however, depend on damages, and will not be denied because the damages would be but nominal,[30] but to enforce a restrictive covenant by injunction it must appear that injury will result to complainant.[31]

Laches will defeat the right to the remedy[32] unless waived.[33] Abandonment of the contract[34] or rescission thereof[35] will prevent enforcement. That conditions have changed since the contract was made will not prevent enforcement where complainant is willing to do equity.[36] The allowance of the remedy is said to be dis-

29. Mistake as to boundary, requiring removal of brick building by defendant to convey small strip to complainant. McCutcheon's Heirs v. Rawleigh, 25 Ky. L. R. 549, 76 S. W. 50.

30. Land worth exactly contract price. Bradford v. Smith [Iowa] 98 N. W. 377.

31. American Fisheries Co. v. Lennen, 118 Fed. 869.

32. Hernreich v. Lidberg, 105 Ill. App. 495. No effort was made to enforce a contract for the sale of a right of way until death of vendor, one year and a half after execution of the contract and no suit to enforce it until five years after its execution. Bauer v. Lumaghi Coal Co. [Ill.] 70 N. E. 634. Contract to sell corporation stock, delay of three years before attempting to enforce, during which time the stock had quadrupled in value. Schimpff v. Dime Deposit & Discount Bank [Pa.] 57 Atl. 767. Where vendees were silent two years after time balance was due on contract, during which time land doubled in value, they were barred to assert a right to specific performance. Henderson v. Beatty [Iowa] 99 N. W. 716. Unreasonable delay in performance of his contract by the vendee and in asking relief, during which conditions have changed so as to work hardship and loss on the vendor, will prevent specific performance. Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501. A vendee out of possession under an executory contract of sale is bound to greater diligence in performance and asking enforcement than one in possession under the contract. Id. Where complainant, claiming a contract with decedent to convey, induced his widow to act to her detriment if the contract should be enforced, without disclosing the contract, he is estopped to claim enforcement. Wolfinger v. McFarland [N. J. Eq.] 54 Atl. 862. A daughter in possession of a house of her father for eleven years after his death is not guilty of laches in suing to enforce his contract to devise it to her. Sheldon v. Dunbar, 200 Ill. 490, 65 N. E. 1095. Refusal to take such conveyance as may be made with intimation of intent to abandon the contract and sue for damages, and five months' delay, will prevent specific performance. Milmoe v. Murphy [N. J. Err. & App.] 56 Atl. 292. If by the action of the parties, or for other causes, the parties cannot be placed in the position in which they would have been had the contract been promptly performed, specific performance will not be decreed, but the court will so adjust the equities of the case as to do justice to both parties. Consideration for conveyance of land was payment of notes and incumbrances, and defendant was in default. Held, court could compel a redeeding of property, or cancellation of deed, or both. Block v. Donovan [N. D.] 99 N. W. 72.

33. Purchaser consented, by acquiescence, to delay in performance. Hawes v. Swanzey [Iowa] 98 N. W. 586.

34. Milmoe v. Murphy [N. J. Err. & App.] 56 Atl. 292. Abandonment of a contract for an option on lands by notice through an agent will prevent the holder from enforcing performance. Hopwood v. McCausland, 120 Iowa, 218, 94 N. W. 469. Abandonment of a contract or assignment to one who has taken possession of land and expended money on the strength of the assignment will prevent enforcement by the original party. Wadge v. Kittleson [N. D.] 97 N. W. 856.

35. After repudiation of a contract by mutual consent neither party can enforce it. Kelly v. Short [Tex. Civ. App.] 75 S. W. 877. Entry and possession by vendor held not a rescission while the vendor retained the notes given in payment. Harris v. Greenleaf [Ky.] 79 S. W. 267. An attempted repudiation by the vendor is of no effect. A week after the contract was made the vendor told the vendee that he would not deliver possession nor accept the purchase money. Rodman v. Robinson [N. C.] 47 S. E. 19. Where either party has orally agreed to abandon or rescind a contract for the sale of land, and this is acquiesced in, he may not thereafter maintain an action for specific enforcement of such contract. Henderson v. Beatty [Iowa] 99 N. W. 716. That a purchaser brought suit to recover part of the purchase money paid by him before he refused a deed tendered will not prevent him from suing in equity for enforcement, especially where he has discontinued the former suit and paid the costs. Holt v. McWilliams, 21 Pa. Super. Ct. 137. Sufficiency of evidence of abandonment of the contract by mutual consent to prevent specific performance. Robinett v. Hamby, 132 N. C. 353.

36. When delay in offering to make payments has not been unreasonable or in bad faith, increase in value of the property since the time of making the contract will not prevent its enforcement. Harris v. Greenleaf [Ky.] 79 S. W. 267. Increase in value of the land since the making of the contract or valuable improvements by the vendee will not prevent enforcement of terms for resale to the vendor at a certain price, when the vendee wishes to sell, where the vendor offers to pay a certain sum for the improvements or to allow their removal. Peterson v. Chase, 115 Wis. 239, 91 N. W. 687. The fact that the subject-matter has increased in value may be sufficient ground for denying specific performance. Land sold at $22.00 per acre. Five years after the last payment became due it had raised to $80.00 per acre. Boldt v. Early [Ind. App.] 70 N. E. 271.

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cretionary, and this is true in the sense that it may be denied when inequitable,[37] but it cannot be refused as to a fair and valid contract.[38] Where plaintiff tendered final payment for lands, he was not required to demand a deed in order to sue for specific performance.[39] Plaintiff seeking to compel a conveyance by a husband cannot assert that a deed by the husband to the wife is void as against his creditors.[40] One not a party to a contract is not entitled to enforce specific performance of it, unless it was made for his benefit, or the parties owed him some legal or equitable obligation.[41] A vendor,[42] heirs at law,[43] and the personal representatives of a deceased party,[44] may sue for specific performance, as may a purchaser from a trustee in bankruptcy.[45] A fraudulent grantee from a party to a prior contract cannot enforce his contract against the prior grantee.[46] Where a vendee elected to take part of land embraced in his contract, in accordance with its terms, he could enforce it.[47] Where an owner of part of an undivided tract authorized his agent to sell part thereof, and afterward the owner acquired full title to the part by partition, he held title for the vendee and could enforce the contract.[48]

Married women,[49] foreign corporations,[50] heirs, devisees, and personal representatives of one of the parties,[51] or subsequent purchasers from the vendor with

37. Boldt v. Early [Ind. App.] 70 N. E. 271; Bradford v. Smith [Iowa] 98 N. W. 377; Hunter v. McDevitt [N. D.] 97 N. W. 869; Hernreich v. Lidberg, 105 Ill. App. 495; Wash. Irr. Co. v. Krutz [C. C. A.] 119 Fed. 279; Tryce v. Dittus, 199 Ill. 189, 65 N. E. 220; Engberry v. Rousseau, 117 Wis. 52, 93 N. W. 824; Hall v. Gilman, 77 App. Div. [N. Y.] 458; Hamilton v. Ryan, 103 Ill. App. 212. When contract was made vendor told vendee that he needed the money to pay his debts. The vendee failed to pay the instalments when due and was told if they were not paid in four months the land would be sold to another. No payment was made, the land rose fourfold in value when a tender was made and refused. Specific performance denied. Boldt v. Early [Ind. App.] 70 N. E. 271.

38. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414. The purchaser of land under parol contract is, on complying with the terms, entitled to a deed. Elsbury v. Shull [Ind. App.] 70 N. E. 287. If the contract is valid with no improper or fraudulent action on either side, the court has no discretion as to enforcing specific performance. Yazoo & M. V. R. Co. v. Southern R. Co. [Miss.] 36 So. 74.

39. Maris v. Masters, 31 Ind. App. 235, 67 N. E. 699.

40. Saunders v. King, 119 Iowa, 291, 93 N. W. 272.

41. A wife agreed with her husband, in consideration of being made his residuary devisee, to give all property remaining at her death to his son. The son was not an infant, and neither his stepmother nor his father owed him any obligation. Specific performance was refused the son. Wait v. Wilson, 86 App. Div. [N. Y.] 485.

42. Anderson v. Wallace L. & M. Co., 30 Wash. 147, 70 Pac. 247.

43. An oral promise by a mother to deed lands to a son, followed by his possession and valuable improvement with her knowledge and consent, may be enforced against her at suit of his heirs at law. Hadden v. Thompson, 118 Ga. 207. Where an owner agreed to devise realty to a mother for benefit of her children and the residue to be given them on attaining a certain age, the beneficiary on coming of age before death of the original owner could enforce the contract against persons afterward claiming title under the owner's will, where the mother had performed her part, and the beneficiary was the only natural heir of the original owner. Rhoades v. Schwartz, 41 Misc. [N. Y.] 648. The widow and heirs of a vendee may sue for performance though he paid no part of the price before death, but where he was in possession under the agreement for conveyance, paying taxes and holding an interest in praesenti [Code, § 3443]. Cone v. Cone, 118 Iowa, 458, 92 N. W. 665.

44. Deceased vendor [Comp. St. 1901, § 335a, c. 23]. Solt v. Anderson [Neb.] 93 N. W. 205.

45. Harriman v. Tyndale, 184 Mass. 534, 69 N. E. 353.

46. One claiming to have entered a contract to purchase land from a fraudulent grantor, with notice of the fraud, and condition that the grantee was to convey to him, cannot enforce it against the grantee or persons claiming under him. Bradt v. Hartson [Neb.] 96 N. W. 1008.

47. Watkins v. Youll [Neb.] 96 N. W. 1042.

48. Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805.

49. A married woman may be compelled to perform a contract to convey as vendee [Gen. St. p. 2017, § 1; p. 2015, § 14]. Moore v. Baker [N. J. Eq.] 55 Atl. 106. Where husband and wife join in a contract to sell realty it will be specifically enforced against her. Hazen v. Colossal Cavern Co., 25 Ky. L. R. 502, 76 S. W. 116.

50. Selover v. Isle Harbor Land Co. [Minn.] 98 N. W. 344.

51. A contract to dispose of property by will in a certain way will be enforced in equity against heirs, devisees, or personal representatives of the promisor. Spencer v. Spencer [R. I.] 55 Atl. 637. Death of one of the parties to an option to buy lands will not prevent enforcement against the heirs on proper tender of performance. Mueller v. Nortmann, 116 Wis. 468, 93 N. W. 538. On performance of a contract to care for an-

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notice of the prior contract,[52] may be compelled to perform. It is otherwise as to bona fide holders without notice.[53] A fair contract to sell, by an insolvent vendor having the right, will be enforced against rights of creditors.[54] Where the object of the contract can be accomplished in some other way, it is no defense to a bill for specific performance that the contract cannot be enforced in the precise manner stipulated therein.[55]

§ 2. *Subject-matter of enforceable contracts.*—An agreement to devise property is enforceable,[56] and contracts for personal services have been enforced,[57] though ordinarily only negative covenants against competing service, in competing business, may be enforced.[58] An agreement of two persons that a third party, to be selected by them, shall be given power to arbitrate their differences cannot be enforced.[59] Contracts involving rendition of judgments, and decrees, and the like, may be specifically enforced.[60] A contract relating to chattels will rarely be specifically enforced,[61] but the power exists and is occasionally exercised.[62] Con-

other during life, in return for a gift of stock, specific performance may be had against her executors. Le Vie v. Fenlon, 39 Misc. [N. Y.] 265.

52. A son took a conveyance from his father of land which he knew his father was under contract bound to convey to another. Handy v. Rice, 98 Me. 504. Plaintiff contracted to purchase a strip of land and went into possession. His vendor subsequently sold to another. Elsbury v. Shull [Ind App.] 70 N. E. 287. Where a purchaser from a vendor in a contract for sale of land had full knowledge of the vendee's rights under the contract, he will be compelled to convey to the vendee. Forthman v. Deters, 206 Ill. 159, 69 N. E. 97. A contract enforceable against a father will be enforced against his daughters to whom he has conveyed the land with their full knowledge of the facts. Veeder v. Horstmann, 85 App. Div. [N. Y.] 154. A conveyance may be compelled as against the holder of the title, who was a resident and took with knowledge, intending to defraud complainant, though the vendor was nonresident and had not been personally served. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414. A purchaser of land with notice of an outstanding contract of sale, but honestly believing he has a good title, may be compelled to convey in specific performance on re-imbursement of payments made to the vendor, and for permanent improvements prior to commencement of suit, where complainant made no previous objection to his possession. Hunter v. McDevitt [N. D.] 97 N. W. 869.

53. A corporation agreed to open a highway on certain land it purchased. Both vendor and vendee sold their interests. Held, that the agreement to open the highway was an executory undertaking wholly collateral to the agreement in regard to the land. Houston v. Zahm [Or.] 76 Pac. 641. A lessee in a contract to lease cannot have it enforced against a bona fide holder of the land without notice. Charlton v. Columbia R. E. Co., 64 N. J. Eq. 631.

54. Cone v. Cone, 118 Iowa, 458, 92 N. W. 665.

55. Norwood v. Tyson [Ala.] 36 So. 370.

56. Teske v. Dittberner [Neb.] 98 N. W. 57; Best v. Grolapp [Neb.] 96 N. W. 641. Enforceability of contract by uncle to will his estate to nephew, after performance by the latter, and no rights of innocent third persons intervening. McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008. A contract to devise certain lands to testator's children, on sufficient consideration made, to settle a family controversy over property may be enforced. Price v. Price, 133 N. C. 494. An oral promise to make a devise in a particular manner or to a certain person, on a valuable consideration, established by clear evidence, will be enforced where a fraud would be worked on plaintiff because performance of the conditions precedent have been fully performed. Kinney v. Murray, 170 Mo. 674, 71 S. W. 197. A contract to devise property at death on valuable consideration is enforceable, and may be enforced as to property of the promisor at death. Jordan v. Abney [Tex.] 78 S. W. 486. A contract to devise or bequeath property in a particular way may be enforced in equity by charging the property with a trust, and directing conveyance or accounting under terms of the contract. Plunkett v. Bryant [Va.] 45 S. E. 742.

57. A contract for sale of ordinary lumber by specified measurements to be made from a tract of timber does not require exercise of such skill as will render specific performance impracticable. Neal v. Parker [Md.] 57 Atl. 213. A contract for services made to avoid competition in a certain business in which defendant was an expert, including a provision against purchase of interests conflicting with those of plaintiff, and that such, if purchased, were to be held in trust for plaintiff, is enforceable. Hazen v. Colossal Cavern Co., 25 Ky. L. R. 502, 76 S. W. 116.

58. See Injunction, 2 Curr. Law, p. 397.

59. Two stockholders made an agreement whereby they were to have equal voting power, and by giving a third person one-half share each, he was to have the deciding vote when they could not agree. Kennedy v. Monarch Mfg. Co. [Iowa] 98 N. W. 796.

60. Discharge of an executor a part of the contract. Norwood v. Tyson [Ala.] 36 So. 370.

61. Dorman v. McDonald [Fla.] 36 So. 52. A court of equity will not decree specific performance of a contract relating to personalty unless the complaint shows that such decree is necessarily essential to afford a party the relief to which he is entitled.

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tract by a railroad company to establish a depot for freight and passengers on land conveyed to the company will be enforced, where the covenant was a part of the consideration.[63]

§ 3. *Requisites of contract.*[64]—The contract must be valid[65] and properly ex-

Specific performance of a contract relating to participating subscription rights in a corporation underwriting syndicate refused. Gilbert v. Bunnell, 86 N. Y. Supp. 1123.

62. Though the power to specifically enforce a contract relating to personalty is rarely exercised, it may be exercised where compensation in damages would not furnish a complete and satisfactory remedy. Contract to convey stock was not enforced because it was not shown that stock had any peculiar value, or that its value was difficult to compute, or that plaintiff had no adequate remedy at law. Bateman v. Straus, 86 App. Div. [N. Y.] 540.

63. Murray v. N. W. R. Co., 64 S. C. 520.

64. The general requisites and sufficiency of contracts is treated in the topics Contracts, 1 Curr. Law, p. 626, and Vendor and Purchaser.

65. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414. Contract for sale of lands. Steadman v. Handy [Va.] 46 S. E. 380. If the performance of a contract has been rendered illegal. Railroad company contracted to maintain a switch across a public street for use of an individual. The company's right to use the street was terminated. Swift v. Del., L. & W. R. Co. [N. J. Eq.] 57 Atl. 456. Agreement cannot be taken out of the statute and enforced against the purchaser as a trustee ex maleficio, to prevent the perpetration of a fraud, where neither party had any interest in the property and no money was advanced to the purchaser nor anything done towards carrying the contract into effect. Largey v. Leggat [Mont.] 75 Pac. 950. When specific performance has been rendered illegal the injured party is remitted to his legal remedies. An individual had a contract with a railroad company to maintain a private switch across a street. By virtue of a contract authorized by law the company lost its right to use the street. Swift v. Del., L. & W. R. Co. [N. J. Eq.] 57 Atl. 456. Where the vendor had agreed that the deed should include a release of dower, he must make every reasonable exertion to comply with his contract. Have the appropriate share of the price deposited with the clerk of court as provided by statute. Handy v. Rice, 98 Me. 504. An agreement for a mortgage on crops, not in being, after they are growing, will be enforced where definite and clear, and relief is warranted by the situation of the parties. Such a contract not being against public policy. Sporer v. McDermott [Neb.] 96 N. W. 232. A contract for sale of lands will not be enforced against the vendor where it was unfair, and the vendor was intoxicated at time of execution, so as to be incapable of intelligent assent. Moetzel v. Koch [Iowa] 97 N. W. 1079. A written contract under seal, to sell and convey realty on payment of a certain price in a specified time, acknowledging payment of one dollar consideration, is valid and enforceable, specific performance, at option of the purchaser, being the very thing contracted for. Mathews Slate Co. v. New Empire Slate Co., 122 Fed. 972. Contract between husband and wife, whose marital relations were unsatisfactory, for conveyance of lands as unenforceable and void, because of collusion in contemplation of separation or divorce. Burgess v. Burgess [S. D.] 95 N. W. 279. An executory contract to sell lands made with intent of both parties to defraud creditors will not be enforced at suit of the vendee or a purchaser from him. Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501. A contract between husband and wife for his conveyance of property, being just and reasonable, and good at law, if made by him with a trustee for her, will be enforced. Moayon v. Moayon, 24 Ky. L. R. 1641, 72 S. W. 33. Contract made on Sunday valid. Rodman v. Robinson [N. C.] 47 S. E. 19. Validity of deed by wife to convey homestead in specific performance. Epperly v. Ferguson, 118 Iowa, 47, 91 N. W. 816. Validity of contract for assignment of mining leases as affecting specific performance. Finlen v. Heinze, 28 Mont. 548, 73 Pac. 123. Where a contract for services was made to avoid defendant's competition in a certain business in which he was an expert, including a provision that he would not purchase any rights of others conflicting with plaintiff's interests, or if he did, they were to be held in trust, and transferred to plaintiff's control, it will be enforced. Hazen v. Colossal Cavern Co., 25 Ky. L. R. 502, 76 S. W. 116. A contract for the sale of an entryman's homestead right before final proof is not enforceable [U. S. Comp. St. §§ 2290, 2291]. Horseman v. Horseman, 43 Or. 83, 72 Pac. 698. A parol agreement by the husband to devise property to a third person, from a homestead, is not enforceable, though the other party has performed where it violates the homestead laws. Teske v. Dittberner [Neb.] 98 N. W. 57. A parol agreement to assign a right to obtain a patent may be enforced. Pressed Steel Car Co. v. Hansen, 128 Fed. 444.

Statute of frauds: Sufficiency of memorandum of sale of lands within statute of frauds. Anderson v. Wallace L. & Mfg. Co., 30 Wash. 147, 70 Pac. 247. Oral agreement by a purchaser at a judicial sale to take the deed in his own name and convey to another. Largey v. Leggat [Mont.] 75 Pac. 950. Parol modification of a contract sufficient under the statute of frauds, as to the price of land, will not bring it within the statute so as to prevent enforcement [Comp. St. § 3, c. 32]. Rank v. Garvey [Neb.] 92 N. W. 1025. A suit for specific performance of a contract for sale of lands will not lie without evidence of a written contract of defendant or his agent [Civ. Code, § 1238]. Moody v. Howe [S. D.] 97 N. W. 841. A lease different in terms from the one agreed upon and not signed by the owner is not sufficient for enforcement under the statute of frauds. Charlton v. Columbia R. E. Co., 64 N. J. Eq. 631. A verbal contract for conveyance of land cannot be enforced where no change of possession has occurred. Bradt v. Hartson [Neb.] 96 N. W. 1008. Performance of acts constituting the consideration of an agree-

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ecuted.[66] It must be made by persons with proper authority to contract or to act for the parties,[67] or ratified by the parties.[68] The right of enforcement being equitable, it will be denied unless the contract is fair[69] and free from fraud,[70]

ment by another to devise property to complainants will remove the transaction from the statute of frauds so as to warrant enforcement in equity. Spencer v. Spencer [R. I.] 55 Atl. 637. Without surrender of possession or valuable improvements by the purchaser an oral contract to convey lands will not be enforced, though the purchase price has been fully paid, where the agreement is void under the statute of frauds. McCarty v. May [Tex. Civ. App.] 74 S. W. 804. Where an estate was bound for value of lands conveyed by plaintiffs to another, at testator's request, because of his failure to complete an oral contract to convey to plaintiff other lands, a later written contract by the widow and executrix personally binding herself to convey the latter lands takes the husband's agreement out of the statute of frauds so that plaintiff could have specific performance. Id. Failure of a man to convey property to his wife on promise of marriage is a fraud taking the case from the statute of frauds and authorizing specific performance. Allen v. Moore, 30 Colo. 307, 70 Pac. 682. An oral contract for lease of realty for more than a year is enforceable where the lessee has entered possession and made extended improvements. Veeder v. Horstmann, 85 App. Div. [N. Y.] 154.

Contracts against public policy: A contract made on an offer to a public officer which he accepted after expiration of his term, which would have been void as against public policy if made while he was in office, is unenforceable; agreement with register of land office for services concerning a dispute as to lands before the Federal land office. Wash. Irr. Co. v. Krutz [C. C. A.] 119 Fed. 279. A widower without issue may contract to devise all his property to an adopted daughter in return for care during life without violating justice or public policy. Hall v. Gilman, 77 App. Div. [N. Y.] 458. A contract for conduct of litigation with one not interested therein, requiring him to furnish all evidence, control the litigation, and pay all expenses in consideration of a certain portion of the recovery, if not voidable under the state statute as to maintenance, is void as against public policy and will not be enforced in the Federal courts. Casserleigh v. Wood [C. C. A.] 119 Fed. 308. Though a prior contract between the parties is void as against public policy because one is a public officer, a later valid contract as to the same subject-matter, after his retirement from office, on a new consideration is valid and enforceable. Wash. Irr. Co. v. Krutz [C. C. A.] 119 Fed. 279.

66. The contract need not be signed by the vendees. The contract contained names of parties, description of the land, and price to be paid, of which the vendees had paid one third. Vance v. Newman [Ark.] 80 S. W. 574. A written contract incorrectly drawn through mistake or inadvertence of the vendor's agent cannot be enforced by the purchaser. Lacking as to reservations. Wilkin v. Voss, 120 Iowa, 500, 94 N. W. 1123. Specific performance of a contract to convey a homestead, improperly executed, will not lie at suit of either party. Solt v. Anderson [Neb.] 93 N. W. 205; Watkins v. Youll [Neb.] 96 N. W. 1042. An unacknowledged written contract of sale of lands, on sufficient consideration, signed by husband and wife, holding an undivided interest and claiming under a lease with no intention of claiming homestead rights will be enforced. Rank v. Garvey [Neb.] 92 N. W. 1025. A contract for conveyance is enforceable in equity though not signed and acknowledged. Ballinger's Ann. Codes & Sts. §§ 4517, 4518 do not apply. Anderson v. Wallace L. & M. Co., 30 Wash. 147, 70 Pac. 247. Where husband and wife signed an express agreement to convey lands, the wife to convey her statutory rights, she could not thereafter assert a homestead right, or an interest under a prior mortgage given her by her husband. Cone v. Cone, 118 Iowa, 458, 92 N. W. 665. Where a wife consented to a sale by her husband and then refused to sign the deed for inadequacy of consideration, the contract was not conditional on her acceptance and could be enforced. Donaldson v. Smith [Iowa] 98 N. W. 138. A contract by husband and wife for sale of her lands, not acknowledged for record, cannot be specifically enforced in equity nor can the wife be decreed to repay the purchase money. Amick v. Ellis, 53 W. Va. 421. Specific performance of a contract to convey will be granted where it is shown that the instrument was executed by a trustee with power to convey, though not acknowledged by him as trustee, and that complainant was allowed possession of the property under the lease containing such contract, and paid rent. Connely v. Haggarty [N. J. Eq.] 56 Atl. 371.

67. A contract by abutting owners with a street railroad company for street pavement under plans furnished by persons without authority, and not requiring the company to secure permission by ordinances cannot be enforced [1 Starr & C. Ann. St. 1896 (2d Ed.) c. 24, par. 63]. Farson v. Fogg, 205 Ill. 326, 68 N. E. 755. Authority in writing to an attorney to accept an offer for sale of land is not necessary to enforcement against the vendor. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414. Unauthorized agreement by representative of grantee, repudiated by grantee, cannot be specifically enforced. Medical College Laboratory v. N. Y. University, 76 App. Div. [N. Y.] 48.

68. A contract made by an attorney authorized will be enforced where ratified by the principal though he did not know all the terms when it was made. Rank v. Garvey [Neb.] 92 N. W. 1025. Where a county fiscal court ordered its commissioner to sell lands purchased by the county under a judgment in its favor, and ratified a sale so made, retaining the proceeds, and the commissioner gave a bond for title covenanting that the county would execute a deed, but subsequently the court sold to another without returning the consideration for the first sale, the first vendee was entitled to specific performance. Cardwell v. Hargis, 24 Ky. L. R. 1406, 71 S. W. 488.

69. Hamilton v. Ryan, 103 Ill. App. 212;

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mutual,[71] though a mere option may be enforced;[72] and the contract must be on

Hopwood v. McCausland, 130 Iowa, 218, 94 N. W. 469; Moetzel v. Koch [Iowa] 97 N. W. 1079; Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414. A contract unfair or unconscionable will not be enforced. Federal Oil Co. v. Western Oil Co. [C. C. A.] 121 Fed. 674. A contract is reasonable where the price for land is not disproportionate to its value. Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805. Where rights of an infant defendant were involved, and it was not shown that both executors empowered to sell its lands agreed to and acted on the sale, and it appeared that plaintiff purchased for much less than the value of the land, the contract will not be enforced. Lynch v. Buckley, 82 App. Div. [N. Y.] 614. A contract will not be enforced against one who dealt with one of several parties to a previous contract without knowledge of rights of the others. Booth v. Murdock [Mich.] 94 N. W. 177. A contract of insurance will not be enforced where the insurer was bound only by ratification after loss, or where more than the value of the property has been recovered from other insurers. Ins. Co. of North America v. Schall, 96 Md. 225. Where a contract for sale of an undivided interest in land to be surveyed by vendee at his own expense cannot be performed until the extent of the tract of land is ascertained by a survey, which could not be done without great hardship to the vendee, it will not be enforced. Williamson v. Dils, 24 Ky. L. R. 1792, 72 S. W. 292. A contract to convey the interest of a grandchild in her ancestor's estate, on sufficient consideration will be enforced where not procured by undue influence, and it has been partially performed by payment. Boles v. Caudle, 133 N. C. 528. Though the vendor obtained his wife's signature to the contract by duress, the purchaser may have specific performance if he was not a party to the duress. Johnson v. Weber [Neb.] 97 N. W. 585. Contract to convey land as soon as a good abstract of title could be compiled, the price to be paid being an immediate delivery of certain chattels. There was no provision in the contract for a return of the chattels if title could not be made. Goodwine v. Kelley [Ind. App.] 70 N. E. 832. Inadequacy of price, and the contract the result of fraud, mistake, or surprise. Morris v. Clark [N. H.] 57 Atl. 334.

70. A misrepresentation as to the law by one in fiduciary relations will prevent relief. Schneider v. Schneider [Iowa] 98 N. W. 159. To convey lands supposed to contain kaolin; it cannot be said the consideration was excessive. Maryland Clay Co. v. Simpers, 96 Md. 1.

71. Hamilton v. Ryan, 103 Ill. App. 212. Specific performance will not be decreed unless the right to insist thereon be mutual. Ormsby v. Graham [Iowa] 98 N. W. 724. Agreement to convey right of way whenever the other party should demand it and tender the price, not mutual. Bauer v. Lumaghi Coal Co. [Ill.] 70 N. E. 634. A written agreement to convey a grain elevator with fixtures and property used therewith at option of the vendee, certain as to time and place, and on sufficient consideration, will be enforced. Tidball v. Challburg [Neb.] 93 N. W. 679. In a contract to exchange lands at the time the contract was executed one of the parties did not have title to some of the lands he agreed to convey, though he subsequently acquired title. Specific performance denied. Gage v. Cummings [Ill.] 70 N. E. 679. Performance will not be decreed where performance by complainant is optional and he does not offer it. Federal Oil Co. v. Western Oil Co. [C. C. A.] 121 Fed. 674. A written contract to sell realty, on sufficient consideration, signed by the owner and accepted by the purchaser is mutual. Burk v. Mead, 159 Ind. 252, 64 N. E. 880. That a vendor was not able to convey at the time a contract for conveyance was made will not amount to a want of mutuality preventing enforcement, where the fact was known to both parties, the contract was made in good faith and has not been rescinded by the purchaser for that cause, and the vendor is able to convey under the decree of the court. Blanton v. Ky. D. & W. Co., 120 Fed. 318. Where both parties, at time of making a contract, refused to become bound, there was no mutuality of obligation. Tryce v. Dittus, 199 Ill. 189, 65 N. E. 220. A daughter surrendered to and adopted by her grandfather in consideration of an oral agreement with her father that she should have a fourth of the grandfather's estate, could not sue for specific performance after his death where he willed all his property to his wife; the contract is not mutual in obligation or remedy and could have been repudiated at any time by father and child leaving the grandfather no remedy. Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903. A contract for conveyance of land on delivery of a certain quantity of marketable wheat or its equivalent in money, determining the market value of the wheat at delivery, and binding the vendee to make delivery or payment, is mutual as to both obligations and remedy. Pederson v. Dibble [N. D.] 98 N. W. 411. An agreement between husband and wife, living apart because of her ground of divorce, to live together on his conveyance of property to her, is not lacking in mutuality in that he has no remedy to compel her to live with him, where before conveyance they have resumed marital relations. Moayon v. Moayon, 24 Ky. L. R. 1641, 72 S. W. 33. That time of performance is optional with the grantee in a contract to convey land will not make it lacking in mutuality if it is otherwise sufficient. Burnell v. Bradbury, 67 Kan. 762, 74 Pac. 279. A provision in a contract to reconvey to the vendor for a certain sum when the vendee wishes to sell is not void for want of mutuality. Peterson v. Chase, 115 Wis. 239, 91 N. W. 687. A contract reciting that the vendors "have sold" the premises to the vendee, and that the vendee "agrees to pay" the purchase money, accepted by the vendee, is binding on both parties and will be enforced for the vendee though signed only by the vendors. Forthman v. Deters, 206 Ill. 159, 69 N. E. 97. Contract for right of way for ditch as a mutual agreement of which time is not the essence and enforceable. Roberts v. White River Water Power Co., 30 Wash. 430, 70 Pac. 1104. An oral contract to sell land partially performed is mutual, both parties being reciprocally bound. Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805. Where a purchaser of

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sufficient consideration,[73] though the consideration need not have an ascertainable[74] value. The contract must be complete.[75]

The legal effect,[76] and the obligatory character of the contract must not be doubtful.[77] The terms[78] and subject-matter must be certain,[79] and the proof of

realty consisting of community property of husband and wife, under oral contract with the husband, enters possession and pays the price, the purchaser will be entitled to specific performance since the assent of both husband and wife is presumed. O'Connor v. Jackson, 33 Wash. 219, 74 Pac. 372. Mere want of mutuality of remedy will not prevent enforcement where the contract is otherwise fair and complete. Lamprey v. St. Paul & C. R. Co., 89 Minn. 187, 94 N. W. 555. Want of mutuality is no defense even in an action for specific performance, where the party not bound thereby has performed all the conditions of the contract and brought himself clearly within its terms. Defendant agreed to buy in plaintiff's mortgaged property at the sale, plaintiff to have the privilege of paying the debt to defendant and regaining the property, the rents and profits to apply on the debt. Plaintiff having performed fully was entitled to an accounting and redeeding of property. Dickson v. Stewart [Neb.] 98 N. W. 1085.

72. To purchase land. Hamilton v. Hamilton [Ind.] 70 N. E. 535. Contract being construed according to its practical construction by the parties, held to be an executory contract of sale and not a mere option. Murray v. Nickerson [Minn.] 95 N. W. 898.

73. Hamilton v. Ryan, 103 Ill. App. 212. Consideration to support promise to devise property to a brother. Spencer v. Spencer [R. I.] 55 Atl. 637. A promise to pay a certain sum is a sufficient consideration. Rodman v. Robinson [N. C.] 47 S. E. 19. Mere inadequacy of consideration is not sufficient reason for refusing specific performance. Contract by which a wife was to receive certain mill property and in return was to deed certain other property to another (Hamilton v. Hamilton [Ind.] 70 N. E. 535), to support agreement for payment of creditors as between them and partners and the wife of one partner, to enable the creditors to compel performance (Mechanics' Nat. Bank v. Roughead, 76 App. Div. [N. Y.] 534). Stock consideration for services to be rendered to support specific performance. Hazen v. Colossal Cavern Co., 25 Ky. L. R. 502, 76 S. W. 116. Contract to convey by widow and executrix. McCarty v. May [Tex. Civ. App.] 74 S. W. 804. Contract to give right of way for construction of railroad between certain points, as to consideration. Curry v. Ky. W. R. Co., 25 Ky. L. R. 1372, 78 S. W. 435. Assignment of mining leases. Finlen v. Heinze, 28 Mont. 548, 73 Pac. 123. Credit on indebtedness of the vendor is sufficient consideration. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414. If no consideration appears in a written contract and cannot be supplied as between the parties, the contract is mere offer and unenforceable. Tidball v. Challburg [Neb.] 93 N. W. 679. Sufficient consideration exists in a contract for reconveyance of land when the vendee wishes to sell, in the original conveyance. Peterson v. Chase, 115 Wis. 239, 91 N. W. 687. Sufficiency of contract between husband and wife living apart on account of her ground of divorce to live together in consideration of his conveyance of property to her, as to consideration, so that it is enforceable. Moayon v. Moayon, 24 Ky. L. R. 1641, 72 S. W. 33.

74. A contract for delivery of stock in hands of third persons on compliance with certain provisions will be enforced when they are fulfilled, though the stock has no ascertainable value but carries a controlling voice in management of the corporation. Rumsey v. N. Y. & P. R. Co., 203 Pa. 579. A contract by a corporation to deliver a certain amount of its capital stock in payment for work which gave such stock its value will be enforced in equity where the entire amount of stock is small and presumably without market value, even though after the bill was filed the stock was sold by defendant to others. Altoona E. E. & Supply Co. v. Kittanning & F. C. St. R. Co., 126 Fed. 559.

75. Seitman v. Seitman, 204 Ill. 504, 68 N. E. 461. Contract to devise property. Coveney v. Conlin, 20 App. D. C. 303. Sufficiency of contract to convey lands containing kaolin. Md. Clay Co. v. Simpers, 96 Md. 1. A mere agreement to enter a contract for sale of realty is unenforceable. Geer v. Clark, 88 App. Div. [N. Y.] 292. Sufficiency of offer and acceptance of a contract to give a right of way through land to a railroad company constructing a line between certain points. Curry v. Ky. W. R. Co., 25 Ky. L. R. 1372, 78 S. W. 435. An agreement on sufficient consideration, to devise or bequeath property, is enforceable; it need not be in express terms to make a will, a promise to give the property being sufficient. Teske v. Dittberner [Neb.] 98 N. W. 57. It is immaterial that a contract to convey realty is in two parts signed by defendant at different times where both related to the same transaction and are necessary to complete the contract. Maris v. Masters, 31 Ind. App. 235, 67 N. E. 699. A contract for conveyance of property subject to certain conditions cannot be enforced, where defendant never ratified the promise as to conditions, and has repudiated the conditions by proceeding contrary to their terms. Medical College Laboratory v. N. Y. University, 76 App. Div. [N. Y.] 48. Sufficiency of agreement by insolvent firm for organization of a corporation and management of business so as to pay creditors, under which conveyances were made by the partners and the wife of one of them, to enable the creditors to sue for performance. Mechanics' Nat. Bank v. Jones, 76 App. Div. [N. Y.] 534.

76. If there is doubt as to the legal effect of a poorly-drawn instrument, performance will not be decreed. Zane v. Weintz [N. J. Eq.] 55 Atl. 641.

77. Alleged parol agreement to convey not shown by certain testimony. Wolfinger v. McFarland [N. J. Eq.] 54 Atl. 862. An agreement not under seal, not requiring plaintiff either to accept a deed or pay con-

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it must be clear and specific[80] to show contract, and that alteration by agent was

sideration, and not reciting consideration is unenforceable. Geer v. Clark, 83 App. Div. [N. Y.] 292. Where a vendee purchased lots, the contract referring to a map which showed a street adjacent, he will not be compelled to perform, where it appears that a strip in the street had not been dedicated to that use and the owner refused to dedicate and the borough authorities refused to open the street. Cleveland v. Bergen B. & I. Co. [N. J. Eq.] 55 Atl. 117. An agreement for sale of a fixed amount of pulp wood from land during several years, binding defendant not to sell the land so as to prevent performance, and giving the purchaser an equitable interest in the wood for advances, will be enforced at suit of the latter. St. Regis Paper Co. v. Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967.

78. Abbott v. Kline, 33 Wash. 686, 74 Pac. 1014. A court of equity may refuse to decree specific performance of a contract when there is a mutual mistake as to a material fact. Defendant agreed to purchase realty relying upon a newspaper advertisement which gave wrong dimensions. He was not compelled to perform. McIntyre v. Harrington, 43 Misc. [N. Y.] 94. Terms indefinite and uncertain. Contract for the purchase of stock in a corporation. Patterson v. Farmington St. R. Co. [Conn.] 57 Atl. 853. Description of land where a right of way was to be laid held too indefinite. Bauer v. Lumaghi Coal Co. [Ill.] 70 N. E. 634. Contract to convey land described by metes and bounds held sufficiently definite. Rodman v. Robinson [N. C.] 49 S. E. 19. Evidence held insufficient to establish a contract between master and servant for the assignment of a right to obtain a patent. Pressed Steel Car Co. v. Hansen, 128 Fed. 444. An obligation on the part of an employe to assign to his employer patents for inventions made in the course of his employment does not arise from the relation of employer and employee. Id. Contract to will property to a niece. McKee v. Higbee [Mo.] 79 S. W. 407. To attend a sale and bid in property. The purchaser took title in his own name and refused to convey. Not shown who was to furnish the money or in whose name the title was to be taken (Largey v. Leggat [Mont.] 75 Pac. 950), or the proof thereof. To assign a right to obtain a patent. Pressed Steel Car Co. v. Hansen, 128 Fed. 444. A contract for exchange of lands indefinite as to assumption of incumbrances will not be enforced. Tryce v. Dittus, 199 Ill. 189, 65 N. E. 220. A contract to form a company for manufacture of patents to be paid for in stock will not be enforced as indefinite, where no company is organized and it cannot be determined how much stock will be required. Brown v. Swarthout [Mich.] 96 N. W. 951. A contract to devise property in return for care of defendant during life is too indefinite, where the manner of care intended is not shown. Braun v. Ochs, 77 App. Div. [N. Y.] 20. Contract for sale of lands as too vague, indefinite, and uncertain to be enforced in equity. Ensminger v. Peterson, 53 W. Va. 324. Sufficiency of contract to give right of way for construction of railroad between certain points, as to certainty of parties and description of land. Curry v. Ky. W. R. Co., 25 Ky. L. R. 1372, 78 S. W. 435. Contract must be clear and specific in terms. Burke v. Mead, 159 Ind. 252, 64 N. E. 880; Plunkett v. Bryant [Va.] 45 S. E. 742. A contract to give another a tract of land when the owner is done with it is too indefinite. Venable v. Stamper [Va.] 45 S. E. 738. A contract whereby one party agreed to dig a well for the other who was to pay for water in land at a certain price, or in cash at his option, is too indefinite for enforcement [Civ. Code, § 3390]. Meyer v. Quiggle, 140 Cal. 495, 74 Pac. 40. A contract to convey a certain amount of land "of the west end" of the land, without specifying whether from land the grantor then owned or from land he intended to acquire, is too indefinite for enforcement. Knight v. Alexander, 42 Or. 521, 71 Pac. 657.

79. Seitman v. Seitman, 204 Ill. 504, 68 N. E. 461. Contract containing patent ambiguity of description cannot be enforced. Cammack v. Prather [Tex. Civ. App.] 74 S. W. 354. Sufficiency of contract as to description of land. Maris v. Masters, 31 Ind. App. 235, 67 N. E. 699; Glos v. Wilson, 198 Ill. 44, 64 N. E. 734; Agnew v. Southern Ave. Land Co., 204 Pa. 192; Johnston v. Long Island Inv. & Imp. Co., 85 App. Div. [N. Y.] 60. Oral agreement to convey lands remaining after the shares of heirs had been taken from an estate. McCarty v. May [Tex. Civ. App.] 74 S. W. 804. The land constituting the subject-matter of a contract must be clearly identified. Higginbotham v. Cooper, 116 Ga. 741. Agreement in writing for sale of lands as so uncertain and inconclusive as to mortgages, times of payment, priority of liens, and other essential incidents, as to be incapable of specific performance. Moore v. Galupo [N. J. Eq.] 55 Atl. 628. Performance may be had where description of the property may be rendered certain by reference to the probate records. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414. A contract to convey lands will not be enforced where the exact tract intended cannot be identified. Description as "four lots 25 feet by 150 feet deep in either section 8 or 9," referring to a tract irregular in shape. Rampke v. Buehler, 203 Ill. 384, 67 N. E. 796. A contract to sell one acre out of a tract is definite after the purchaser has selected and gone into possession. Cohban v. Hecklen, 27 Mont. 245, 70 Pac. 805. The land must be sufficiently described in specific performance so that the evidence can be directed to it in identification (Acts 1891, c. 465). "Your lot," given in correspondence alleged and proved, held too indefinite a description. Farthing v. Rochelle, 131 N. C. 563.

80. The proof of the contract and its terms must be clear and convincing (Contract to will property). McKee v. Higbee [Mo.] 79 S. W. 407. The terms of the contract must be alleged and proved as stated. Patterson v. Farmington St. R. Co. [Conn.] 57 Atl. 853. Sufficiency of evidence to sustain enforcement. Pederson v. Dibble [N. D.] 98 N. W. 411; Holt v. McWilliams, 31 Pa. Super. Ct. 137; Sloan v. Rose [Va.] 43 S. E. 329.

Sufficiency of evidence in suit by heirs at

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unauthorized, so that the original contract remained enforceable,[81] especially if it is oral.[82] Invalidity of the contract may be waived.[83] Partial invalidity will not prevent enforcement as to the valid portion where separable.[84] Part performance may take a contract out of the statute of frauds and vitalize it from the beginning,[85] if sufficient.[86] Full performance of a unilateral contract by the party not

law of son to enforce promise of his mother to convey lands to him. Hadden v. Thompson, 118 Ga. 207.

81. Cable v. Jones [Mo.] 78 S. W. 780. To establish a contract by decedent to give part of his estate to an alleged adopted child. Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118. To show agreement to convey realty in consideration of services to deceased in specific performance against administrator and heirs. Winfield v. Bowen [N. J. Eq.] 56 Atl. 728. To support a finding that defendant's grantor made an oral contract to convey. Grafton Dolomite Stone Co. v. St. Louis, C. & St. P. R. Co., 199 Ill. 458, 65 N. E. 424. Contracts entered into with persons to be enforced after their death will not be enforced unless equitable and clearly proven. Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118. A contract by a deceased husband to will all his property to his wife is not enforceable against his estate on evidence consisting merely of his declarations, as to which the testimony is improbable and contradictory. Conlon v. Mission of Immaculate Virgin, 39 Misc. [N. Y.] 215. Though a suit is not strictly for specific performance of a contract but to enforce an express trust based on an oral contract, proof must be clear and failure to connect one of the parties with the contract is fatal. Kelly v. Short [Tex. Civ. App.] 75 S. W. 877. Where a verbal contract for lease of realty is claimed to be for a period of five years and is partly performed by the lessee, but the proof is hopelessly conflicting as to duration of the lease and the rent to be paid, specific performance will not be granted in disregard of the statute of frauds. Henley v. Cottrell Real Estate, I. & L. Co. [Va.] 43 S. E. 191. Sufficiency of evidence as to oral contract to warrant enforcement. Westbrook v. Hayes, 137 Ala. 572. Oral contract to devise property. Coveney v. Conlin, 20 App. D. C. 303. Proof as to the nature and character of a parol contract to devise lands must be clear. Braun v. Ochs, 77 App. Div. [N. Y.] 20. Of an oral contract for adoption of plaintiff and devise of property to her. Kinney v. Murray, 170 Mo. 674, 71 S. W. 197.

82. Verbal agreement to devise property must be proven with great clearness. Coveney v. Conlin, 20 App. D. C. 303. A parol contract must be established by convincing evidence. Seitman v. Seitman, 204 Ill. 504, 68 N. E. 461. Enforcement of alleged parol gift denied where evidence was conflicting. Stone v. Hill, 52 W. Va. 63. Contract by uncle to convey to nephew for services rendered shown only by possession of the nephew, and a proven statement of the uncle to third persons that he intended to convey to the nephew. In re Shaffer's Estate, 205 Pa. 145. Where there is evidence that the contracts for deeds are forgeries and that no memorandum of the agreement was made, parol evidence thereof being insufficient, in specific performance after the death of the vendor, judgment for the defendant heirs is proper. Turner v. Trosper, 24 Ky. L. R. 813, 69 S. W. 1089.

83. Where purchasers insist on performance after learning the truth about matters falsely represented by the vendor, they waive the right to rescind for that cause. Hawes v. Swanzey [Iowa] 98 N. W. 586.

84. Potter v. Potter, 43 Or. 149, 72 Pac. 702. A contract to convey, including homestead lands as to which it is void, may be enforced as to other lands as to which it is valid. Teske v. Dittberner [Neb.] 98 N. W. 57.

85. Cobban v. Hecklin, 27 Mont. 245, 70 Pac. 805; Spencer v. Spencer [R. I.] 55 Atl. 637. Parol agreement to convey. Shipman v. Shipman [N. J. Eq.] 56 Atl. 694. Payment of part of the price of land. Md. Clay Co. v. Simpers, 96 Md. 1. An oral contract certain in terms will be enforced after part performance, or where it calls for services, the value of which cannot be estimated. Stellmacher v. Bruder, 89 Minn. 507, 95 N. W. 324. Under a parol contract to purchase land, the vendee went into possession, paid part of the purchase money and made valuable improvements. His possession had been actual and exclusive and not as tenant. Held, he was entitled to specific performance. Ratliff v. Sommers [W. Va.] 46 S. E. 712. One who procures another to purchase property for him and goes into possession and makes valuable improvements is entitled to specific performance. Defendant's testator had purchased the property for the plaintiff and had the deed made out in the name of his agent. Platt v. Self, 207 Pa. 614. There being part performance sufficient to take the case without the operation of the statute of frauds. Paid small part of the purchase money, made some permanent improvements, furnished the building and built up a considerable patronage. Id. Evidence held to show a binding contract for sale of land, which plaintiff had so far performed that specific performance was properly decreed against defendant. Gough v. Loomis [Iowa] 99 N. W. 295.

86. Sufficient part performance to take contract out of the statute of frauds (Comp. St. 1887, Gen. Laws, div. 5, § 219) and enable specific performance. Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805. The acts proved in part performance of the contract must refer to, result from, or be made in pursuance of the agreement, and must be of such a nature as to constitute evidence of the agreement. Plunkett v. Bryant [Va.] 45 S. E. 742; Seitman v. Seitman, 204 Ill. 504, 68 N. E. 461. Mere payment of part of the consideration on a verbal sale of realty is insufficient. Shipman v. Shipman [N. J. Eq.] 56 Atl. 694. An oral agreement to sell lands will be enforced where the vendee is put in possession and has made valuable improvements. Peery v. Elliott [Va.] 44 S. E. 919; Hadden v. Thompson, 118 Ga. 207. Where a contract for lease of oil lands contemplated performance at once, mere payments without

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bound will warrant relief to him.[87] The parties must be able to perform,[88] though

operation on the lands were not such part performance as would warrant specific performance. Federal Oil Co. v. Western Oil Co. [C. C. A.] 121 Fed. 674. A contract for sale of merchandise for a lump sum paid will be enforced where it has been partly delivered and the remainder cannot be obtained by replevin or the value justly estimated. Raymond Syndicate v. Brown, 124 Fed. 80. A parol contract to devise realty in return for services during life will not be enforced unless so far executed by the prospective devisee that a refusal would work fraud upon him. Braun v. Ochs, 77 App. Div. [N. Y.] 20. Services rendered by a wife as consideration for an agreement of her husband to give her all his property, insufficient under the statute of frauds, do not amount to part performance. Conlon v. Mission of Immaculate Virgin, 39 Misc. [N. Y.] 215. Continued possession of trust land by a lessee after the lease, which covenants for renewal and payment of rent for the term of renewal are not part performance calling for specific performance of a covenant of renewal in a lease purporting to have been executed under the prior renewal clause, but invalid under the statute of frauds. Especially where the beneficiary was ignorant of the invalidity; only one of the trustees had signed the renewal lease. Baltimore & O. R. Co. v. Winslow, 18 App. D. C. 438; Winslow v. Baltimore & O. R. Co., 188 U. S. 646, 47 Law. Ed. 635. Where a father gives land to his son and he enters possession and makes valuable improvements while the father holds under a bond for title, the son may compel conveyance by the father after the latter has obtained title and ousted the son under conveyances to third persons. Hadaway v. Smedley [Ga.] 46 S. E. 96. The contract must be so far executed that refusal of enforcement would work fraud on the party suing and that compensation cannot be made in damages. Plunkett v. Bryant [Va.] 45 S. E. 742. The act of a husband in improving land of his wife while living thereon with money belonging to his ward is not part performance of a parol contract of the wife to compensate by will or otherwise. Id.

87. Rank v. Garvey [Neb.] 92 N. W. 1025. A contract for personal services will not generally be enforced, where performance rests in the will of the performing party, but performance of the services will suffice for the remedy. Teske v. Dittberner [Neb.] 98 N. W. 57. Want of mutuality in a contract is not a defense where the party seeking relief has fully performed. Burnell v. Bradbury, 67 Kan. 762, 74 Pac. 279.

88. Equity has no jurisdiction where a complainant knows that specific performance is impossible. A party having a contract for the purchase of land, knew his vendor had conveyed to an innocent purchaser. He asked to have his damages assessed in a bill for specific performance. Kerlin v. Knipp, 207 Pa. 649. Where one makes a contract for the sale of land which he has no power to convey, the other party may enforce it without tendering payments required by the contract. Vendor agreed to convey all his "right, title and interest," but being only co-tenant could not convey the entire property, which vendee supposed he would get. Vendee so electing, the court assessed damages and gave a money judgment. Conner v. Baxter [Iowa] 99 N. W. 726. Where an agreement to pave a street is made with a street railway company which has no power to control or improve it without the city's consent, a bill for specific performance by parties knowing these facts cannot be retained for the assessment of damages. Farson v. Fogg, 205 Ill. 326, 68 N. E. 755. Parties to a contract who accept it with knowledge that it cannot be enforced without the consent of a third party and that its validity depends upon the action of a third party are not entitled to specific performance thereof. Contract between street railway company and abutting property owners on a street to pave the street, the consent of the city to be obtained. Id. Specific performance of a contract to convey land, by one who had no title, will not be decreed. Southworth v. Brownlow [Miss.] 36 So. 522. The vendee, in a contract where the vendor is not vested with the title he agrees to convey, may recover his damages, if any, in an action at law, but cannot have specific performance. Vendors were heads of families with homestead rights and wives did not join in the contract. Ormsby v. Graham [Iowa] 98 N. W. 724. But if the vendee waives the defect in vendor's title, vendor having some interest in the land, partial performance, with assessment of damages or abatement from the contract price, may be decreed. Id. This right to waive the defect in vendor's title and obtain partial performance is held to exist only where vendor has some apparent right or interest in the property, or where vendee enters into the contract without knowledge of the defect in vendor's title. Id. Specific performance may be decreed where the vendor afterward becomes the owner of the property. Coleridge Creamery Co. v. Jenkins [Neb.] 92 N. W. 128. A contract by a husband for sale of the wife's lands is unenforceable without a showing of authority to sell. Saunders v. King, 119 Iowa, 291, 93 N. W. 272. If the vendor's title or power to convey is doubtful or debatable, the vendee will not be compelled to perform. Zane v. Weintz [N. J. Eq.] 55 Atl. 641. An agreement for organization of a corporation will not be enforced in equity when several proposed incorporators are insolvent. Hernreich v. Lidberg, 105 Ill. App. 495. Specific performance cannot be had of a contract to sell lands where the vendor afterward sold to another under a prior contract, no fraud or notice to the third person appearing. Flackhamer v. Himes, 24 R. I. 306. Specific performance of an option contract cannot be had where the complaint shows that it was subject to pending litigation over plaintiff's right to convey which is yet undetermined. David v. Balmat, 90 App. Div. [N. Y.] 529. Title as unmarketable and knowledge thereof by vendee as preventing enforcement, but not preventing allowance of damages to him. Snow v. Monk, 81 App. Div. [N. Y.] 206. Where the vendor's title depends on determination of a legal question unsettled by previous decisions or as to which opinions differ, there is a doubt that the vendor can

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full performance is not always necessary.[89] That the court must supervise performance will not prevent enforcement,[90] unless such supervision must be protracted.[91]

§ 4. *Performance by complainant.*—Complainant must have performed his part of the contract[92] or tendered such performance to the other party where precedent acts of the latter are necessary to performance,[93] unless the acts of both are

convey a title good against litigation; if the doubt arises in construing some poorly expressed instrument, its legal effect will not be determined. Richards v. Knight, 64 N. J. Eq. 196. A contract to transfer ownership of an invention will not be enforced by compelling defendant to assign an application for a patent where complainant testifies that the invention is his own, since defendant then has nothing to convey. Hildreth v. Thibodeau, 117 Fed. 146. Where the proposed vendors had neither title to the subject-matter nor power to sell it, specific performance cannot be decreed, though both parties believed the vendors could convey. Du Bois v. Bormann [N. J. Eq.] 55 Atl. 634. Where the title to property is defective and not marketable, a conveyance should not be directed where it was impracticable to determine the abatement in price for the defect, and the purchaser should be relieved from the contract. Felix v. Devlin, 90 App. Div. [N. Y.] 103. Where one agreeing to convey two plats to another afterward stated that he had sold one to a third person, and the first vendee paid the full price and received conveyance of the other lot, then purchased his interest from the third person, the original vendor was estopped in specific performance to deny ownership of such plat and was bound to convey. Guthrie v. Martin, 76 App. Div. [N. Y.] 385. Where the vendor defendant owned an undivided half of the land and could not convey for his co-tenant, performance will not be decreed, but damages will be given for the breach. Murray v. Nickerson [Minn.] 95 N. W. 898. That, after executing a contract for sale of realty, the vendor lost title to part of it, will not justify the court in varying the decree from the contract so as to include only the land still owned by him. Johnston v. Long Island Inv. & Imp. Co., 85 App. Div. [N. Y.] 60. Where performance of a contract depends on the issue of a suit to be prosecuted for recovery of part of the land in possession of a third person and appraisal of any part of the land to which good title could not be given, enforcement will not be decreed pending the suit nor will an appraisal and deduction be decreed. Wold v. Newgard [Iowa] 98 N. W. 640. A contract to sell land made on the express condition that it should be void if the vendor did not acquire title from another before a certain date cannot be enforced, where at that time the vendee found the title defective and refused to accept it and the vendor refused to extend the time to perfect it, since time was of the essence of the contract. Baldwin v. McGrath, 90 App. Div. [N. Y.] 199. Where the vendor's title depends on a junior grant with adverse possession, the latter not being shown, a contract of sale will not be specifically enforced. McAllister v. Harmon [Va.] 42 S. E. 920. That one who made a contract to devise property to another left a will giving all the property to his widow will not prevent enforcement of the contract. Jordan v. Abney [Tex.] 73 S. W. 486.

89. Where one contracting to sell land cannot give a perfect title, the purchaser may compel conveyance of the interest held and abatement of the price in proportion. Tobin v. Larkin, 183 Mass. 389, 67 N. E. 340.

90. A contract which needs supervision of the court in specific performance will be enforced where the court may so act and there is nothing difficult of performance necessary. Blair v. St. Louis, K. & N. W. R. Co., 93 Mo. App. 538.

91. Specific performance will not be decreed where it involves a continuous and long series of acts requiring special knowledge and skill. Digging irrigation ditch according to certain plans and specifications. Moore v. Tuohy, 142 Cal. 342, 75 Pac. 896. Equity will not enforce a contract requiring a succession of acts which cannot be completed in one transaction and necessitating protracted supervision. Hernreich v. Lidberg, 105 Ill. App. 495.

92. Costello v. Friedman [Ariz.] 71 Pac. 935; Milmoe v. Murphy [N. J. Err. & App.] 56 Atl. 292. In furnishing an abstract showing a good title. Meshew v. Southworth [Mich.] 94 N. W. 1047. Where neither party has complied with the terms of a contract, it will not be enforced. Smith v. Krall [Idaho] 75 Pac. 263. Where time is not of the essence of the contract, defendant cannot refuse to perform because all payments have not been made. Maris v. Masters, 31 Ind. App. 235, 67 N. E. 699. Defendant may prove in bar of the action that certain conditions precedent necessary to operation of the contract had never been performed. O'Connor v. Lighthizer [Wash.] 75 Pac. 643. A contract to devise property to a grand-daughter if she would live with the owner and keep house for him during life cannot be enforced where she never performed her duty under its terms. Ackerson v. Fly, 99 Mo. App. 116, 73 S. W. 706. Partition made condition precedent to a sale of land must be secured by plaintiff. Brooks v. Miller, 118 Ga. 676. A five-year lease gave lessee the privilege of buying for a certain price at any time during the term. Lessor was obliged to pay for the paving of a street ordered by city. Held, lessee, asking for specific performance of his contract of sale, must reimburse lessor for payments made on paving and assume the balance due therefor, before relief will be granted him. King v. Raab [Iowa] 99 N. W. 306.

93. Refusal of a proper offer to convey and demand for payment by a vendor will relieve him from performance. Watkins v. Youll [Neb.] 96 N. W. 1042. A vendee refusing to take the title offered by the vendor, it being as good as the latter can give, cannot insist on performance with good title without tender of consideration. Mil-

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intended to be concurrent,[94] or the other party, by his acts, has waived the requirement.[95] The sufficiency of performance[96] or tender of performance[97] depends on the particular circumstances of each case. Time is not of the essence of the contract,[98] unless made so by the terms thereof[99] or arises by implication in view of

moe v. Murphy [N. J. Err. & App.] 56 Atl. 292. There can be no right to specific performance of an agreement to sell at a specified price per acre until the number of acres in the tract has been definitely ascertained and there has been an offer to pay for the actual acreage at the price stated. Mathes v. Bell, 121 Iowa, 722, 96 N. W. 1093.

94. A purchaser under a contract calling for certain payments, execution of a deed, and giving of a note and mortgage for the balance, may enforce without tendering performance as to the note and mortgage. Kepler v. Wright, 31 Ind. App. 513, 68 N. E. 618.

95. If the grantor intentionally prevented the grantee from tendering performance, he cannot object for absence of a tender. Connely v. Haggarty [N. J. Eq.] 56 Atl. 371. A purchaser of lands, seeking performance, need not tender it formally where the vendors have repudiated the contract from the beginning. Tobin v. Larkin, 183 Mass. 389, 67 N. E. 340. The vendor of property need not tender a deed where the purchaser notifies him he will not perform. Where a contract to convey both personalty and realty required the purchaser to divide the consideration between the two deeds, forms of which it was to furnish, refusal to comply on demand will waive tender of a deed by the vendor. Blanton v. Ky. D. & W. Co., 120 Fed. 318.

96. Tender of balance of purchase price. Lamprey v. St. Paul & C. R. Co., 89 Minn. 187, 94 N. W. 555. Sufficiency of evidence of complainant's willingness and offer to perform. Forthman v. Deters, 206 Ill. 159, 69 N. E. 97. Payment by certificate of deposit and note on a contract requiring cash is not sufficient performance by plaintiff. Wilkin v. Voss, 120 Iowa, 500, 94 N. W. 1123. A cloud upon the title will warrant a party to a contract to exchange lands in refusing to receive the property of the other where the latter was required to furnish an abstract showing a good title. Tryce v. Dittus, 199 Ill. 189, 65 N. E. 220.

97. Tender of a check in payment by a vendee is sufficient where made at a bank which offers to cash it. Watkins v. Youll [Neb.] 96 N. W. 1042. Where two owners agreed, on happening of a certain event, to exchange lots, an offer by one to convey, reserving title to the bed of the street, is not such a compliance as will warrant enforcement. Pittsburg, V. & C. R. Co. v. Fischer F. & M. Co. [Pa.] 57 Atl. 191. Though tender of a deed by a vendor seeking performance is necessary, tender of an insufficient deed will not destroy his right to relief where he intended to comply with the contract. Blanton v. Ky. D. & W. Co., 120 Fed. 318. Where the vendee plaintiff tendered payment within the time given by notice of the vendor of an intention to cancel the contract, he need not keep the tender good and bring the money into court. Murray v. Nickerson [Minn.] 95 N. W. 898. Where a vendor of two plats afterward sold one to a third person and the purchaser of both agreed to take one and purchased the interest of the third person in the other, he need not tender a proportionate part of the price for both. Guthrie v. Martin, 76 App. Div. [N. Y.] 385. Where an option was given for purchase of stock and another for purchase of realty under agreement that both should be carried out, the holder must tender performance of the latter to have specific performance of the other. Reynolds v. Hooker [Vt.] 56 Atl. 988. A tender of remaining purchase money on condition that the vendor make a warranty deed, which it was agreed he should make after certain payments, is sufficient. Maris v. Masters, 31 Ind. App. 235, 67 N. E. 699. That the vendee suing for performance, knowing the vendor to be married at time of contract, offered to pay two-thirds the price on the wife's refusal to sign the deed, and to deposit the other third subject to her order when she signed the deed, does not show that he was ready and willing at all times to perform. Farthing v. Rochelle, 131 N. C. 563. Where defendant under contract to buy land plaintiff had acquired by foreclosure proceedings rejected title at the time set for performance because of defects in the foreclosure proceedings, and plaintiff offered to secure and did secure an order of court correcting the proceedings and tendered a deed, time not being considered of the essence of the contract and the condition of the parties having remained the same, performance will be decreed. Baumeister v. Demuth, 84 App. Div. [N. Y.] 394. Where one of the parties to an option to buy lands died, it was unnecessary for the other to have a special administrator appointed and tender performance to him where the tender followed the contract and the decree was conditional on payment of the price. Mueller v. Nortmann, 116 Wis. 468, 93 N. W. 538.

98. Vendees of land agreed to pay the price at certain dates. Payment on those dates is not essential to specific performance. Vance v. Newman [Ark.] 80 S. W. 574. Where the parties to a contract for exchange of properties could not complete it as to one party because of clouds on the title, in specific performance by the other party time was not of the essence of the contract as far as plaintiff's rights were concerned, and on proof of removal of the clouds the defendant to whom his co-defendant was to convey will be compelled to convey to plaintiff, though time was of the essence of the contract between the defendants. Baldwin v. McGrath, 41 Misc. [N. Y.] 39.

99. Complainant was required to dig a ditch for irrigating purposes within a certain time, when defendant was to convey him certain land. Defendant prevented complainant from digging the ditch. Specific performance not decreed. Moore v. Tuohy, 142 Cal. 342, 75 Pac. 896.

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the surrounding circumstances.[1] Time may be rendered of the essence of the contract subsequent to the making thereof.[2] Where time is of the essence of the contract, it will not be specifically enforced in favor of one who has not performed his part thereof within the specified period.[3]

§ 5. *Actions.*[4] *Jurisdiction.*—The court of general equity jurisdiction, not the probate court, has jurisdiction of enforcement of a contract for sale of a deceased partner's interest.[5] In absence of statute, specific performance may be brought by the vendor in a court having jurisdiction of the property or one with jurisdiction of defendant only.[6] That the land lies in another state will not prevent jurisdiction of equity where all defendants are personally served and defend.[7] Residence of a decedent who agreed to devise realty will not affect the right to enforcement where there was property within the jurisdiction.[8] A suit for conveyance of an alleged interest in an invention and other relief, which concerned only the question of a sale between the parties, could be tried in the state courts.[9] Specific performance of a contract for transfer of ownership in an invention will not be decreed where both parties have applications for patent pending and interference proceedings are pending before the patent office.[10] Enforcement may be had against the resident holder of the title, who took with knowledge and intent to defraud complainant, though the vendor was nonresident and had not been personally served.[11] Where a testator contracted to devise certain lands, the court may construe his will to determine whether it is an execution of the contract in a suit by a devisee for specific performance.[12]

Time and place of bringing suit.—An immediate right to sue arises where defendant after the agreement conveys to another in violation thereof.[13] Where a vendor not only repudiated his contract but placed himself in a position where he could not perform without aid of court, the purchaser could sue before the time for performance had arrived.[14] The action is properly brought in the county of the land, though defendant resides elsewhere.[15] An action to enforce a contract to convey lands without any element of trust is in personam, and must be brought in the county where defendant resides and not of necessity where the land lies.[16]

Defenses.—The vendors cannot urge an objection to performance fully obviated before commencement of the action.[17] The purchaser cannot base his right to

1. A party had an option of 10 days on a piece of land. The owner was in need of money and did not wish to give so long a time. Held, equity would not enforce performance after the 10 days. Woods v. McGraw [C. C. A.] 127 Fed. 914. A vendor had taken a trust deed back on land he sold. He foreclosed and bought in the land and gave his vendee a 10 day option to repurchase. Held, that this was not an extension of the time for him to redeem from foreclosure. Id.

2. Time for making payments was long overdue. Vendor told the vendee if he did not pay by a certain date he would sell the land to another. Boldt v. Early [Ind. App.] 70 N. E. 271.

3. Where a written contract recited that it was to be void after a certain date, and plaintiff accepted its terms in writing but did nothing else, he was not entitled to specific performance. Blanchard v. Archer, 87 N. Y. Supp. 665.

4. General equity procedure, see Equity, 1 Curr. Law, p. 1048; pleading under codes, see Pleading, 2 Curr. Law, p. 1178.

5. The Common Pleas. Ralston v. Ihmsen, 204 Pa. 588.

6. Epperly v. Ferguson, 118 Iowa, 47, 91 N. W. 816.

7. Barringer v. Ryder, 119 Iowa, 121, 93 N. W. 56.

8. Hall v. Gilman, 77 App. Div. [N. Y.] 458.

9. Merrill v. Miller, 28 Mont. 134, 72 Pac. 423.

10. Hildreth v. Thibodeau, 117 Fed. 146.

11. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414.

12. Price v. Price, 133 N. C. 494.

13. Teske v. Dittberner [Neb.] 98 N. W. 57.

14. Payne v. Melton [S. C.] 45 S. E. 154.

15. Code 1897, § 3491. Donaldson v. Smith [Iowa] 98 N. W. 138; Bradford v. Smith [Iowa] 98 N. W. 377. An action for enforcement of an agreement to devise land is properly brought in the county where part of the land is situated, though affecting personalty in that county and it does not appear that any of the parties reside there [Code Civ. Proc. §§ 982, 984]. Hall v. Gilman, 77 App. Div. [N. Y.] 464.

16. Close v. Wheaton, 65 Kan. 830, 70 Pac. 891.

17. Rank v. Garvey [Neb.] 92 N. W. 1025.

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rescind on other grounds than those assigned in his notice of rescission to the vendor.[18] One refusing to accept title after written agreement to buy must point out a substantial threatening danger not a remote possibility.[19] That it may subsequently be sold to an undesirable person is no defense against specific performance of an agreement for sale of an undivided interest in realty.[20] A subsequent agreement between the parties, ineffective because of failure to comply with its conditions, is no defense.[21] A warehouseman cannot defend in specific performance of a contract to convey a warehouse on the ground that the premises are liable for taxes on whiskey owned by others, since he has a lien on the liquor for the tax on payment thereof.[22] Objection that an assignee of the vendee gave no notice of his rights must be made when he tenders purchase money and requests a deed.[23] Where an agreement exists between parties to a contract for conveyance of realty that the purchaser shall retain money to meet possible liens on the property, he cannot defend on the ground that payment is not required at delivery of the deed.[24] Where the interpretation of a contract for sale of land as made by the parties renders it consistent, defendant in specific performance cannot urge that it contains inconsistent provisions.[25] Unauthorized renting of the land by the vendor's agent is no defense in favor of the vendee.[26] Defendant may be estopped, by his own acts, from asserting defenses to the right of enforcement.[27]

Parties and pleading.—Specific performance will not be decreed unless all persons to be affected by the decree are made parties to the suit.[28] The vendor should be made a party, though he has conveyed to another having notice of complainant's rights,[29] and in a suit by a lessee, the original lessee and a third party to whom the premises were fraudulently leased were properly joined as co-defendants.[30] All persons having an interest in the property involved, including heirs,[31]

Where a vendor had no title at the time he contracted to convey but acquired title afterwards, he cannot, in a suit for specific performance by the vendee, set up in defense that he had not a sufficient title. Harriman v. Tyndale, 184 Mass. 534, 69 N. E. 353.

18. Hawes v. Swanzey [Iowa] 98 N. W. 586.

19. Grasser v. Blank, 110 La. 493.

20. Moayon v. Moayon, 24 Ky. L. R. 1641, 72 S. W. 33, 60 L. R. A. 415.

21. McDavid v. Sutton, 205 Ill. 544, 68 N. E. 1064.

22. Blanton v. Ky. D. & W. Co., 120 Fed. 318.

23. Pa. Min. Co. v. Thomas, 204 Pa. 325.

24. Blanton v. Ky. D. & W. Co., 120 Fed. 318.

25. Rank v. Garvey [Neb.] 92 N. W. 1025.

26. Hawes v. Swanzey [Iowa] 98 N. W. 586.

27. Defendant is estopped to aver that the contract was indefinite as to parties or because plaintiff had not signed a modifying indorsement where the modification as shown by the bill is favorable to defendant. Pa. Min. Co. v. Thomas, 204 Pa. 325. Parties making a settlement of certain litigation by written memorandum and acting in accordance with its terms, benefits being received thereunder, cannot assert illegality of the settlement in specific performance. Collins v. Fidelity Trust Co., 38 Wash. 136, 73 Pac. 1121.

Acts not amounting to estoppel: For one of two persons, holding the right to elect as to which conveyance should be made under a contract to convey, to sign a bill for specific performance as solicitor is not an estoppel as against him to deny the right of complainant to have a conveyance. Farmer v. Sellers, 137 Ala. 113.

28. Contract in regard to stock and proxies. One signer and the assignee of his stock were not made parties. Kennedy v. Monarch Mfg. Co. [Iowa] 98 N. W. 796.

29. A vendor who has conveyed land to another subsequent to the making of the contract is a necessary party, though no damages are asked nor is it claimed he asserted any interest in the land. Elsbury v. Shull [Ind. App.] 70 N. E. 287.

30. Briel v. Postal Tel. Co. [La.] 36 So. 477.

31. Where one party to a contract had before death conveyed all her interest in lands to another, her sole heir and devisee was not a necessary party to a suit for specific performance against one claiming under her grantee. Grafton Dolomite Stone Co. v. St. Louis, C. & St. P. R. Co., 199 Ill. 458, 65 N. E. 424. Where one of testator's daughters had acquired the interests of the widow and other children in certain property and sued to enforce a sale against one who objected that the other heirs and complainant's children took an interest under the will, complainant's children are proper parties defendant to the cross bill and answer filed by defendant (Katzenberger v. Weaver, 110 Tenn. 620, 75 S. W. 937); but testator's other grand-children were not proper parties (Id.). The heirs of a deceased vendor must be parties to specific performance by the personal representative.

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the personal representatives of a person having such interest at the time of his death,[32] and a municipality having a power of control over the execution of the contract, should be joined.[33]

A complaint to enforce a contract to devise realty and personalty does not improperly unite a cause of action against decedent's administrators with one against his heirs.[34] Plaintiff must allege and prove performance or a tender of performance on his part, or facts excusing tender.[35] A complaint stating facts showing performance of conditions need not specifically state that plaintiff has performed.[36] An allegation in the bill that the vendee paid the principal and interest due on a mortgage will estop him as complainant from asserting a mortgage claim against the property.[37] Where a contract provides for conveyance to one of two persons as they might elect, it must be alleged and proved that election was made to convey to complainant, it being insufficient to raise an estoppel to denial of complainant's right to a conveyance.[38] Assignment of an alleged judgment that certain bonds were held in trust for a bank by its president to one claiming under a contract of sale with the bank will not be decreed where it is not shown that the bank has any interest in the judgment or that it is still in existence.[39] A complaint which alleges that a subsequent purchaser knew that plaintiff was in possession need not aver his knowledge of the contract.[40] The complaint need not allege a demand for a deed from a purchaser with notice.[41] A complaint for specific performance cannot be dismissed where it alleges plaintiff's full performance and defendant alleges an attempt to rescind for plaintiff's nonperformance.[42]

The defense of an adequate remedy at law must be pleaded.[43] Defendant in a suit to enforce a contract executed by an agent need not specially plead confessing the agency and allege excess of authority where those allegations are in issue under plaintiff's case.[44]

Admissions by answer that a contract was "executed" admits due acknowledg-

Solt v. Anderson [Neb.] 93 N. W. 205. Where an owner agreed with another to devise realty to the latter for benefit of her two children, on death of one child, the mother is a necessary party to an action by the other child to enforce the agreement. Rhoades v. Schwartz, 41 Misc. [N. Y.] 648.

32. The administrator is not a necessary party to a suit to enforce a contract by intestate to will his estate to plaintiff where the result of the action will affect only the residue after administration. McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008. In a suit for specific performance of a contract to convey land, made by a person since deceased, the administrator of decedent should be made a party. Southworth v. Brownlow [Miss.] 36 So. 522.

33. Right of one suing for title to lots of batture formation on the river front in New Orleans to cause the city and board of port commissioners to be made parties that their rights in the land might be determined. Whann v. Hiller, 110 La. 566. A contract with a street railroad company for paving a street, enforceable only with the city's consent, cannot be enforced in a suit to which the city is not a party. Farson v. Fogg, 205 Ill. 326, 68 N. E. 755.

34. Hall v. Gilman, 77 App. Div. [N. Y.] 458.

35. Fisher v. Buchanan [Neb.] 96 N. W. 339. Allegations that vendor had refused payment and that the vendee was ready and willing to do equity show equitable grounds excusing actual tender. Harris v. Greenleaf [Ky.] 79 S. W. 267; Forthman v. Deters, 206 Ill. 159, 69 N. E. 97. An actual tender is not necessary. That the complainant was ready and willing is sufficient. Harris v. Greenleaf [Ky.] 79 S. W. 267; Pomeroy, Eq. Jur. § 1407.

36. Elsbury v. Shull [Ind. App.] 70 N. E. 287.

37. Forthman v. Deters, 206 Ill. 159, 69 N. E. 97.

38. Farmer v. Sellers, 137 Ala. 112.

39. Smith v. Pac. Bank, 137 Cal. 363, 70 Pac. 184.

40, 41. Elsbury v. Shull [Ind. App.] 70 N. E. 287.

42. A distinct issue is raised. St. Regis Paper Co. v. Santa Clara Lumber Co., 178 N. Y. 149, 65 N. E. 967.

43. Le Vie v. Fenlon, 39 Misc. [N. Y.] 265. Where a vendee, knowing of a defect in the title, sues for performance and the vendor joins issue without objecting that the remedy is at law, and asks for performance and the rest of the price, the objection is waived and the court may retain the case to award damages; and defendant cannot avoid such action by withdrawing his prayer for affirmative relief. Snow v. Monk, 81 App. Div. [N. Y.] 206.

44. Staten v. Hammer, 121 Iowa, 499, 96 N. W. 964.

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ment when that is necessary, though the court may restrict their meaning from the context.[45] The pleadings and proof must agree.[46] The sufficiency of particular pleadings will be shown in the notes.[47]

Evidence and witnesses.—The burden is on the complainant to show a full and complete performance or offer to perform.[48] Plaintiff asking conveyance of the wife's lands by her husband has the burden of showing the latter's agency.[49] While a party seeking to enforce a contract must set forth the consideration, the burden

45. Solt v. Anderson [Neb.] 93 N. W. 205.

46. Complainant cannot show the contract to be different from that set out in the bill. Meshew v. Southworth [Mich.] 94 N. W. 1047. Defendant vendor cannot rely on insufficiency of tender of price where no such issue is in the pleadings. Bradford v. Smith [Iowa] 98 N. W. 377.

47. **Bill, complaint or other pleading by complainant:** Complaint to enforce a contract to take stock in a corporation to be organized. Burke v. Mead, 159 Ind. 252, 64 N. E. 880. Petition. Fisher v. Buchanan [Neb.] 96 N. W. 339. Petition by heirs at law of a son to enforce a promise of his mother to convey lands to him. Hadden v. Thompson, 118 Ga. 207. A bill by an executor for an injunction against proceedings for an accounting, setting up an agreement for a division of the estate and the giving of receipts by legatees, and that there had been a division but receipts had not been given, and asking performance of the agreement, and distribution and discharge of the executor, held good as to specific performance, but not good as to the injunction asked. Norwood v. Tyson, 138 Ala. 269. Complaint for enforcement of a contract to devise property in return for care during life as to subject-matter, stipulations, purposes, parties and circumstances, as against demurrer. Hall v. Gilman, 77 App. Div. [N. Y.] 458. Allegation in amended complaint of demand for a deed before beginning suit. Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042. Complaint for performance of a contract for care of defendant in consideration of a bequest or devise of land. Stellmacher v. Bruder, 89 Minn. 507, 95 N. W. 324. Complaint in action to compel corporation to issue stock to plaintiff. Halvorsen v. Orinoco Min. Co., 89 Minn. 470, 95 N. W. 320. Complaint to enforce a contract to convey land entered by defendant under timber culture laws. Burgess v. Burgess [S. D.] 95 N. W. 279. Complaint in action to enforce a contract by a corporation to issue 30 per cent of common stock in consideration for transfer of lands. Selover v. Isle Harbor Land Co. [Minn.] 98 N. W. 344. Complaint in action to enforce a contract to lease realty. Crawford v. Lillibridge, 89 Minn. 276, 94 N. W. 868. Allegations of bill to show that the purchase price for land was to consist of a credit on a debt due from the vendor. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414. Bill to enforce agreement by intestate, plaintiff's foster father, to make her his heir. Hall v. Bridgeport Trust Co., 122 Fed. 163. Bill by daughter to compel conveyance from her father as against the father's sister to whom he conveyed in fraud of the daughter's rights. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414. Bill and admissions by defendant to show identity of property. Claphan v. Barber [N. J. Eq.] 56 Atl. 370. Complaint as showing that right to enforcement had not yet accrued. David v. Balmat, 90 App. Div. [N. Y.] 529. Sufficiency of bill as to definiteness to show contract for sale of lumber of specified dimensions to be manufactured from a tract of timber. Neal v. Parker [Md.] 57 Atl. 213. Petition to enforce contract to devise property at death. Jordan v. Abney [Tex.] 78 S. W. 486. In a suit to obtain conveyance of an alleged interest in an invention and restrain transfer by defendant to a third person, based on an agreement to render mutual assistance in obtaining a patent, plaintiff need not allege an offer to pay a proportionate part of expense in procuring a patent. Merrill v. Miller, 28 Mont. 134, 72 Pac. 423.

A complaint is insufficient on demurrer which alleges insufficient facts to draft a decree on default. Burke v. Mead, 159 Ind. 252, 64 N. E. 880. A complaint setting up an agreement to devise in return for personal care and alleging performance need not allege acceptance of the agreement as against demurrer. Hall v. Gilman, 77 App. Div. [N. Y.] 458. It is sufficient to allege in a suit for performance of a contract of realty that when the contract was made defendant owned the land, ownership "being evidenced by contracts of sale" without stating that they were made with defendant or that he was the owner of them. Hankel v. Denison [Wash.] 74 Pac. 822. An amended complaint making a purchaser after suit brought a defendant need not allege a demand on him for a conveyance. Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042. A bill to enforce a contract made by complainant's attorney need not allege that he had written authority, such authority not being necessary to validity of the contract as against the vendor. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414.

Answer or other pleading by defendant: An answer in specific performance alleging bonds for conveyance to be forgeries is sufficient, though it fails to allege that the decedent vendor did not authorize any one to sign for him. Turner v. Trosper, 24 Ky. L. R. 813, 69 S. W. 1089. An answer alleging that a contract was obtained by fraudulent representations of plaintiff as to agency for another in a certain transaction, and his principal's business at a certain place, and alleging that the latter statement is false by allegations as definite as the nature of the knowledge will allow is sufficient against demurrer to prevent defendant from relying upon plaintiff's statement. O'Connor v. Lighthizer [Wash.] 75 Pac. 643.

48. Boldt v. Early [Ind. App.] 70 N. E. 271.

49. Saunders v. King, 119 Iowa, 291, 93 N. W. 272.

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of showing it to be inadequate is on the party resisting enforcement.[50] It will be presumed in favor of complainant's title after 23 years that a transfer of a mortgage had been made where the rest of the chain was complete but no record thereof appeared;[51] but it will not be presumed that the purchaser is to pay before examining the abstract where there is a stipulation for an abstract clear of incumbrances.[52] Parol evidence cannot be given to vary a written contract.[53] Materiality,[54] admissibility,[55] relevancy under the pleadings,[56] and sufficiency[57] of evi-

50. Code Civ. Proc. § 4417. Finlen v. Heinze, 28 Mont. 548, 73 Pac. 123.

51. Barger v. Gery, 64 N. J. Eq. 263.

52. Pa. Min. Co. v. Thomas, 204 Pa. 325.

53. Sloan v. Rose [Va.] 43 S. E. 329. Parol evidence is not admissible to describe the property intended to be included in a contract for conveyance to add to the contract. Knight v. Alexander, 42 Or. 521, 71 Pac. 657. Where two options were given, one to purchase stock and the other realty, parol evidence is admissible to show an agreement that neither was to be enforced unless the other was performed. Reynolds v. Hooker [Vt.] 56 Atl. 988. Where it appeared on cross-examination that the contract had been reduced to writing, parol testimony may be excluded and plaintiff compelled to produce the writing or show its loss or destruction. Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903.

54. In an action to enforce conveyance of two plats, it is immaterial whether or not a subsequent purchaser of one from defendant was in possession and could have compelled a conveyance from him. Guthrie v. Martin, 76 App. Div. [N. Y.] 385.

55. Where negotiations were carried on through an agent, personal letters to him cannot be made a part of the contract in order to enforce it. Character of letters. Keene v. Lowenthal [Miss.] 35 So. 341. Where a town elected to buy a water plant and sues for specific performance by the company, the master on reference to determine its value will hear evidence discovered after the election. Town of Bristol v. Bristol & W. Waterworks [R. I.] 55 Atl. 710. Plaintiff in a suit against an executor for performance of a parol gift of land made by the testator, may testify to facts admissible, which occurred after the donor's death. Walker v. Neil, 117 Ga. 733. Where the land was indefinitely described, evidence of former negotiations not connected with the contract sought to be enforced and of a deed to a third person after commencement of suit is inadmissible as evidence of location. Farthing v. Rochelle, 131 N. C. 563. In a suit by a devisee for performance of a contract to devise property, evidence as to plaintiff's possession of a certain tract, its amount, and as to when it was surveyed, may be given to locate the land given under the will. Price v. Price, 133 N. C. 494. In a suit by a devisee to compel performance of a contract to devise executed on compromise of a certain suit between testator and the devisees, the record of the original suit is not admissible. Id.

56. Whether a deed from husband to wife was properly acknowledged is immaterial in an action by another to compel the husband to convey the lands to him where he had notice of title in the wife, nor can he claim that such deed to the wife was a fraud on subsequent purchasers. Saunders v. King, 119 Iowa, 291, 93 N. W. 272. In an action to enforce a contract to sell lands, defendant under general denial without notice could introduce a bond for title by plaintiff's deceased husband conditioned on payment of certain notes and introduce the unpaid notes to show forfeiture. Bond v. Bond, 175 Mo. 112, 74 S. W. 975. In a suit for performance of a parol gift of land brought against the donor's executor, the plaintiff is shown to have been in possession at the testator's death and continued in possession, which the executor claims is purely permissive, plaintiff may show improvements to have been made by him after the donor's death to rebut the executor's claim. Walker v. Neil, 117 Ga. 733.

57. Evidence to show that certain land was included in the contract sought to be enforced by mistake. Reed v. Slocum [Wash.] 75 Pac. 629. Evidence to establish complainants' identity. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414. Evidence of delivery of written contract. Bradt v. Hartson [Neb.] 96 N. W. 1008. Evidence to show that plaintiff did not in good faith intend to perform the contract. Engberry v. Rousseau, 117 Wis. 52, 93 N. W. 824. Evidence to show intoxication rendering intelligent assent to contract impossible. Moetzel v. Koch [Iowa] 97 N. W. 1079. Evidence to show participation of parties in the contract and to show that it was not mutually abandoned by the parties. Kelly v. Short [Tex. Civ. App.] 75 S. W. 877. Evidence to show that contract sought to be enforced was signed. Marvey v. Fralinger [N. J. Eq.] 55 Atl. 818. Evidence in suit by medical college for reconveyance of property to it to support finding that conveyance was made on certain conditions made by defendant which he has repudiated, so that performance thereof has become impracticable. Medical College Laboratory v. N. Y. University, 76 App. Div. [N. Y.] 48. Evidence to show that one purchasing one of two plats from defendant after purchase of both by plaintiff was in possession and entitled to a conveyance where plaintiff afterward purchased his interest. Guthrie v. Martin, 76 App. Div. [N. Y.] 385. Evidence to show that an outstanding interest in a third person was lost by estoppel or limitation so as to entitle complainant to relief. Barger v. Gery, 64 N. J. Eq. 263. Evidence in action to enforce contract by corporation to issue common stock to pay for lands purchased. Selover v. Isle Harbor Land Co. [Minn.] 98 N. W. 344. Evidence to show that plaintiff agreed to pay taxes and defendant tendered performance. Hilgerson v. Hicks, 201 Ill. 374, 66 N. E. 360. Evidence to show abandonment of contract by son to care for parents in consideration of conveyance at their death, and to show

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dence in particular cases, is treated in the notes. An agent of a railroad company, plaintiff in specific performance against one claiming land from a grantee of a deceased person who contracted orally to convey the land to the company, may testify as to the making of the contract.[58]

Instructions and trial by jury.[59]—The court must determine the right to relief under the North Carolina practice, though the jury may inform the court as to controverted facts.[60] In a suit against devisees and executors to enforce a contract to devise lands, the court may submit to the jury whether testator devised the lands as contracted.[61] The court cannot withdraw the case from the jury and nonsuit plaintiff in North Carolina, unless he is not entitled to relief admitting the evidence and all inferences favorable to him to be true.[62]

Decree or judgment; relief granted; enforcement.[63] Where a purchaser has fully performed at demand of a deed, he is entitled to enforcement from date of his first demand for a deed.[64] The decree cannot change the contract as made by the parties.[65] It need not provide that it shall operate to transfer title to the purchaser and his heirs.[66] Defendant cannot complain that he is required to perform a contract less burdensome than the one he intended to make.[67] The decree must conform to issues made by the pleadings,[68] and the evidence,[69] and cannot be broader than the prayer in its scope of relief.[70] It cannot be modified to

failure of the son to perform. Seitman v. Seitman, 204 Ill. 504, 68 N. E. 461.

58. Rev. St. 1899, c. 51, § 2. Grafton Dolomite Stone Co. v. St. Louis, C. & St. P. R. Co., 199 Ill. 458, 65 N. E. 434.

59. **Instructions** as to abandonment of contract by mutual consent as preventing enforcement of a bond for execution of a deed. Robinett v. Hanby, 132 N. C. 353. In specific performance by a devisee of a contract to devise lands, the court may direct the jury to find that the land devised to plaintiff was that allotted to him. Price v. Price, 133 N. C. 494.

60. Boles v. Caudle, 133 N. C. 528.

61. Price v. Price, 133 N. C. 494.

62. Const. art. 4, § 1. Boles v. Caudle, 133 N. C. 528.

63. **Sufficiency of particular findings:** Finding as to demand for performance before suit. Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042. A special finding in an action to compel conveyance of land that a purchaser from defendant after suit brought "had not actual knowledge" of plaintiff's claim is not a finding that he "had not actual notice." Id. A finding in a decree that the mortgage which complainant vendee agreed to pay was paid protects the vendors and their grantee from any liability thereon. Forthman v. Deters, 206 Ill. 159, 69 N. E. 97.

64. Kepler v. Wright, 31 Ind. App. 512, 68 N. E. 618.

65. A conveyance cannot be decreed from one defendant, who made a contract for purchase with notice of complainant's rights, to another defendant, but only from such grantee to complainant. Milmoe v. Murphy [N. J. Err. & App.] 56 Atl. 292. A decree in specific performance cannot provide that the deed shall not be subject to a certain encroachment of the premises where the contract provided that it should be so subject, the encroachment was visible, plaintiff was familiar with the premises, and he admitted that he had seen it a few months before, but denied defendant's testimony that it had been considered in the negotiations. Johnston v. Long Island Inv. & Imp. Co., 85 App. Div. [N. Y.] 60.

66. Skinner v. Terry [N. C.] 46 S. E. 517.

67. Claphan v. Barber [N. J. Eq.] 56 Atl. 370.

68. Where an action to recover an interest in property was tried on issues raised by a counterclaim seeking specific performance of a contract to convey, and the answer, a decree of enforcement is proper, though defendant's answer alleges that plaintiff had forfeited all rights to the property before date of the agreement sought to be enforced. Finlen v. Heinze, 28 Mont. 548, 73 Pac. 123. Where defendant sets up a reservation in the contract alleged by plaintiff and shows the contract with reservation included to be the true one between the parties, it will be enforced as thus established. Norfolk & W. R. Co. v. McGarry, 52 W. Va. 547. Under a bill to compel performance of a contract to maintain a switch across a street, constructed at a grade, a decree for a siding other than at the grade cannot be rendered except by consent. Swift v. Del., L. & W. R. Co. [N. J. Eq.] 57 Atl. 456.

69. Judgment for performance of a contract to give a child part of any property defendant should "thereafter acquire" cannot be given in absence of evidence that property was afterward acquired by him. Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903.

70. On default by defendant, relief must be confined to that specifically demanded in the complaint, though allegations and proof would warrant other and greater relief. Halvorsen v. Orinoco Min. Co., 89 Minn. 470, 95 N. W. 320. Relief by way of enforcement of a trust under which defendant purchased cannot be had by plaintiff suing for specific performance, since the suit is not to enforce a trust. Hilgerson v. Hicks, 201 Ill. 374, 66 N. E. 360. Where performance according to the contract was sought by the bill and no offer was made to accept part performance, performance with compensation or indemnity

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include injunctive relief.[71] If a defect in title appears, part performance may be decreed with abatement of price,[72] unless the difference in value cannot be measured,[73] or unless the wife of the vendor has a dower interest and is not made a party,[74] but the fact that an outstanding inchoate right of dower cannot be extinguished does not prevent a decree for performance by the vendor.[75] If performance cannot be decreed, relief in damages may be given,[76] unless the contract is insufficient,[77] or a decree given for the money,[78] a lien declared,[79] or an accounting ordered where the purchaser has made part payment,[80] unless the unenforceable character of the contract was known to complainant.[81] Where a wife refused to sign the deed after consenting that her husband should sell, performance may be decreed protecting her contingent interest.[82] Where a contract to devise money to

cannot be had under a prayer for general relief. Milmoe v. Murphy [N. J. Err. & App.] 56 Atl. 292. A prayer for general relief in an action against husband and wife for performance of a contract by him to convey her lands or for damages if performance could not be decreed will authorize costs against the husband. Saunders v. King, 119 Iowa, 291, 93 N. W. 272.

71. Where a decree was entered in an action to recover an interest in a mine enforcing an agreement by plaintiff to convey such interest to defendant, such decree cannot afterward be modified by adding a paragraph retaining jurisdiction concerning an injunction to prevent operation of the mine. Finlen v. Heinze, 28 Mont. 548, 73 Pac. 123.

72. The vendee plaintiff should not be required to pay the full price where a wife's interest cannot be conveyed, but the vendor is not entitled to interest thereon. Bradford v. Smith [Iowa] 98 N. W. 377. Where a defect appears in the title, but the contract for sale obviates such defect, plaintiff will not be given judgment for enforcement with abatement in price for the defect. Sufficiency of contract to show terms obviating the defect. Felix v. Devlin, 90 App. Div. [N. Y.] 103.

73. Specific performance with compensation or indemnity cannot be had where a defect in title prevents absolute performance and the difference in value of the title contracted for and the title capable of conveyance cannot be measured. Milmoe v. Murphy [N. J. Err. & App.] 56 Atl. 292.

74. Where the wife of the vendor is not a party to the contract of sale and has an inchoate right of dower in the lands, and no collusion exists between the vendor and his wife, the purchaser cannot be granted performance by the vendor with abatement of price as to the wife's interest. People's Sav. Bank Co. v. Parisette, 68 Ohio St. 450, 67 N. E. 896.

75. Steadman v. Handy [Va.] 46 S. E. 380. A contract to convey land need not be joined in by the wife to entitle the vendee to performance. The wife not being a party to the action, her interest was not affected. Rodman v. Robinson [N. C.] 47 S. E. 19. A judgment requiring defendant to deliver plaintiff a warranty deed signed by himself and wife can be made though the wife was not a party. Maris v. Masters, 31 Ind. App. 235, 67 N. E. 699.

76. Where the wife of a vendor in an executory contract refuses to convey, and is not a party, and the vendor is guilty of fraud which would have made conveyance impossible had the wife been willing, an assignee of the vendee is entitled to damages against the vendor, including payment made, expenses in searching title, the difference between the contract price and the market price, and costs. Schorr v. Gewirz, 39 Misc. [N. Y.] 186. Where there is a defect in the title when a contract to convey is made, which the vendee knows, the court on refusing him performance may nevertheless retain the action and award damages. Snow v. Monk, 81 App. Div. [N. Y.] 206.

77. A bill for performance of an unenforceable contract cannot be retained to assess damages between abutting owners and street railroad company for street pavement. Farson v. Fogg, 205 Ill. 326, 68 N. E. 755.

78. Where a contract could not be enforced because of conditions precedent unperformed by the vendor plaintiff, defendant is entitled to a decree for money paid thereunder. Wold v. Newgard [Iowa] 98 N. W. 640. Where the court could not compel defendant's wife to sign a warranty deed because she was not a party, restitution of the purchase price by defendant may be ordered, and such judgment may include interest on amounts paid. Maris v. Masters, 31 Ind. App. 235, 67 N. E. 699.

79. Where performance will not be decreed because of failure of title, the purchase money paid will be made a lien on the property, though mortgages have been foreclosed which the vendee was to pay where he gave the vendor notice of the defect so that the latter could have protected himself. Cleveland v. Bergen Bldg. & Imp. Co. [N. J. Eq.] 55 Atl. 117. Where the vendee is allowed to retain one-third the price because the interest of the vendor's wife could not be conveyed, an alternative provision should give the vendor a lien on the premises on the wife's death, unless the vendee pays over the money for such interest to the clerk of court. Bradford v. Smith [Iowa] 98 N. W. 377.

80. Though a contract for sale of land will not be enforced for failure of title, the suit will be retained for an accounting where the purchaser has paid part of the price. McAllister v. Harmon [Va.] 42 S. E. 920.

81. One seeking performance of a contract by a husband to convey his wife's lands, made without her authority, cannot recover damages on refusal of enforcement where he knew the wife was to approve the contract. Saunders v. King, 119 Iowa, 291, 93 N. W. 272.

82. Donaldson v. Smith [Iowa] 98 N. W. 138.

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plaintiff was too uncertain for enforcement, but it is shown that plaintiff advanced money to the promisor, dismissal should be without prejudice to the right of recovery of such money.[83] A decree in enforcement of a contract to convey is not a conveyance as to third persons,[84] but it is binding on a subsequent purchaser on execution against the holder of the naked legal title.[85] One holding under a decree enforcing a contract to convey may bring ejectment or trespass for injury to his possession.[86] Specific performance may be decreed against the vendee by collection against his property or on execution.[87]

Costs and damages.—Costs ought not to be allowed to either party where the title was found marketable, but important facts were not disclosed by the vendor until after suit brought.[88] Where a husband who had agreed without authority to sell his wife's lands tendered a return of the price before suit and in court, costs cannot be assessed against him on judgment against plaintiff for invalidity of contract.[89] Where plaintiff by terms of the contract was compelled to take title diminished in value, he should not be charged interest from date of sale where defendants meantime had the rents.[90] After decree for performance in a suit seeking it, the court cannot enter judgment for damages and make a reference to ascertain them on the ground that performance has failed.[91]

Appeal and trial de novo.—A suit to enforce specific performance is triable de novo in the supreme court, the verdict of the jury being merely advisory.[92]

STARE DECISIS.

§ 1. The Doctrine and Its Application (1698).
§ 2. Decisions and Obiter Dicta (1699).
§ 3. Rules of Property (1700).
§ 4. Courts of Different Jurisdictions (1700).
A. Inferior and Appellate (1700).
B. Federal and State Courts (1701).
When State Courts Follow Federal Decisions (1702).
C. Different Federal Courts (1702).
D. Different State Courts (1703).

§ 1. *The doctrine and its application.*—Where a court has once laid down a principle of law as applicable to a certain state of facts, for the sake of the stability and certainty of the law, it will apply that principle to all future cases where the facts are substantially the same. This is stare decisis or the doctrine of precedent.[93] In order to overrule a former decision deliberately made, the court should

83. Conlon v. Mission of Immaculate Virgin, 84 App. Div. [N. Y.] 507.

84. A decree in specific performance of a contract to convey land in favor of one under whom plaintiff claimed, adjudging the equitable title to be in such third person, giving him the right to possession and a deed, ordering defendants to execute it, and declaring that the deed should effect transfer of the legal title, is not a conveyance within Acts 1885, p. 233, c. 147, § 1, requiring registration of conveyances as against creditors or bona fide purchasers. Skinner v. Terry [N. C.] 46 S. E. 517.

85. Without regard to whether the decree provided that it should operate as a conveyance under Code, § 426, or whether it had been recorded as directed. Skinner v. Terry [N. C.] 46 S. E. 517.

86. Skinner v. Terry [N. C.] 46 S. E. 517.

87. Anderson v. Wallace L. & Mfg. Co., 30 Wash. 147, 70 Pac. 247.

88. Barger v. Gery, 64 N. J. Eq. 263.

89. Saunders v. King, 119 Iowa, 291, 93 N. W. 272.

90. Felix v. Devlin, 90 App. Div. [N. Y.] 103.

91. Koehler & Co. v. Brady, 91 App. Div. [N. Y.] 326.

92. Alleged errors in instructions below and misconduct of attorneys in reading law to the jury are not prejudicial errors. Collins v. Fidelity Trust Co., 33 Wash. 136, 73 Pac. 1121.

93. "The doctrine of stare decisis as laid down by lexicographers and the different courts of this country and England afford a broad scope for investigation. It is a general maxim that when a point has been settled by decisions, it forms a precedent which is not afterwards to be departed from. The doctrine of stare decisis is not always to be relied upon, for courts find it necessary to overrule cases which have been hastily decided or are contrary to principle." City of Sedalia v. Gold, 91 Mo. App. 32. The unanimous decision of this court upon a question of law, arising upon a given state of facts is, until reviewed and overruled, a precedent which must be followed in any subsequent case in which the same question is raised upon the same state of facts. Fidelity & Deposit Co. v. Nisbet, 119 Ga. 316. That there can be no recovery for

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be convinced not merely that the case was wrongly decided, but that less injury will result from overruling than from following it.[94] A decision may be binding as a precedent even though no grounds for its decision were given.[95] Not every decision, however, is regarded as a binding precedent. Thus where the decision is by a divided court,[96] or made under a mistake as to the existence of a statute,[97] or where conflicting decisions have been made[98] the courts do not hesitate in overruling former decisions. In questions of procedure the principle of stare decisis may be applied, where there has been long acquiescence in a practice, though the question of its validity has never been raised.[99]

§ 2. *Decisions and obiter dicta.*—Only that part of a decision has the force of precedent which decides the issue before the court.[1] General expressions in the opinion of the court, not necessary to the decision of the issue before it, are mere dicta, and do not have the force of precedents.[2] But where the court distinctly passes upon a question for obvious reasons, even though such decision is not necessary to the decision of the case, it will have the force of precedent.[3] And where the

the killing of a dog by a railway train is settled law in Georgia. Doctrine of stare decisis applied, though the court evidently would have preferred a different decision if the question had been open. Strong v. Georgia R. & E. Co., 118 Ga. 515. Decisions discussed and held that it may be considered as stare decisis that in Colorado there may be circumstances in which water consumers from the same ditch may not be compelled to prorate with each other. Farmers' High Line Canal & R. Co. v. White [Colo] 75 Pac. 415.

94. McEvoy v. Sault Ste. Marie [Mich.] 98 N. W. 1006. Where the beneficial results to be obtained from a departure from the construction and interpretation placed by a court of last resort upon a constitutional or statutory provision will not greatly exceed the evil effects likely to flow therefrom, courts should refuse to reopen such questions. Walling v. Brown [Idaho] 76 Pac. 318. An express decision of a court will not be revised, much less overturned, except upon the fullest conviction that it is erroneous (State v. Taylor, 68 N. J. Law, 276), and even then it will not be overruled when it has been so long acquiesced in that a return to the proper principle would disastrously affect existing interests (Id.).

95. Fidelity & Deposit Co. v. U. S., 187 U. S. 315, 47 Law. Ed. 194.

96. An affirmance by a divided court establishes no precedent or principle in the Federal courts. Where therefore a patent has been held valid by the court of appeals of one circuit and invalid by the court of appeals of another, which on appeal is affirmed in the supreme court by an even division of the judges, this will not overcome the effect of the first mentioned decision, which must be regarded as controlling in that circuit. Hanifen v. Armitage, 117 Fed. 845. "Even if there is a conflict, the ruling in the case cited was by two justices only and is therefore not absolutely binding as authority." Gilbert v. State, 116 Ga. 819.

97. Decisions by a supreme court based on a statute which had in fact been repealed when the decisions were rendered cannot control subsequent decisions. Costs. Elfring v. New Birdsall Co. [S. D.] 96 N. W. 703.

98. Lonstorf v. Lonstorf, 118 Wis. 159. 95 N. W. 961.

99. Where a bill of exceptions was allowed by a judge after his term of office had expired, in accordance with a long established custom, the court refused to pass on the constitutionality of a statute permitting the practice, but applied the doctrine of stare decisis and held the settlement of the bill valid. Miller v. Enterprise C. & L. Co., 142 Cal. 208, 75 Pac. 770.

1. General expressions in the opinions of courts are not authoritative beyond the questions which they were considering and deciding when they used them. King v. Pomeroy [C. C. A.] 121 Fed. 287.

2. Lockhard v. Asher Lumber Co., 123 Fed. 480; People v. State Board of Tax Com'rs, 174 N. Y. 417, 67 N. E. 69. What is said by the court arguendo, not essential to the decision of the case, does not become the law of the case so as to preclude further investigation on such points, should they again arise. Modern Woodmen of America v. Coleman [Neb.] 96 N. W. 154; Williams v. Miles [Neb.] 96 N. W. 151. A statement in the opinion as to duty of defendant, under certain statutes, held a dictum, because not necessary to the decision of any question at issue. Mason City & F. D. R. Co. v. Union Pac. R. Co., 124 Fed. 409. Held, that the expression that a writ of mandamus should not issue where there is a serious question in regard to the title, is not entitled to the force and effect of a decision, where it is not necessary to the decision, and is clearly obiter. People v. Board of Police Com'rs of Yonkers, 174 N. Y. 450, 67 N. E. 78.

3. Unconstitutional statute. Ryan v. New York, 78 App. Div. [N. Y.] 134. Where the court has presented to it the question whether a state statute was taken from that of another state, and whether its construction of it should follow the construction placed thereon in the other state, the construction of the foreign statute will be a binding adjudication. Missouri court so construed an Iowa fellow servant law, and this construction was held to be binding in a later case where the Iowa statute was directly involved. Williams v. Chicago, R. I. & P. R. Co. [Mo. App.] 79 S. W. 1167.

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court places its decision upon more than one ground, each proposition laid down, decisive of the case, has the force of a precedent.[4] A judgment is not a precedent upon questions not raised or expressly decided.[5] A construction of a statute laid down by a court in order to determine whether or not a later statute had repealed it, by being in conflict therewith, is not obiter dictum.[6]

§ 3. *Rules of property.*—Where the decisions of the courts have established rules of property, under which property rights have become vested, they will not be overruled, even though erroneous.[7] Nor will a decision, in reliance upon which obligations have been incurred, be overruled, when the effect would be to impose other and greater obligations, under the contract.[8] Anything having a permanent value, which value rests on the decisions of cases, will be considered property.[9]

§ 4. *Courts of different jurisdictions. A. Inferior and appellate.*—Inferior courts are bound by decisions of their appellate courts.[10] In case of a conflict be-

4. "Where a court places its decision of the ultimate legal issue before it upon its decisions of two legal questions which were pertinent to the issue, debated at the bar, considered, and determined in the opinion, the decision of either one of which is sufficient to sustain the determination of the ultimate issue, the decision of each of the two questions and of every pertinent legal question decided in reaching either decision has the binding force of an adjudication, and is not a mere obiter dictum." (Syllabus by the court.) Declaration of supreme court in 163 U. S. 564, that Pacific railroad acts imposed on the Pacific company the duty of permitting the Rock Island company to use a bridge and part of the track of the former company, held a binding adjudication. Union Pac. R. Co. v. Mason City & Ft. D. R. Co. [C. C. A.] 128 Fed. 230.

5. A decision affirming a judgment does not became a precedent as to any question not argued or expressly presented to the court, and left unnoticed in the opinion, although it might have been raised, and if raised, have been decisive of the case. Larson v. First Nat. Bank [Neb.] 92 N. W. 729.

6. City of Baltimore v. Allegany County Com'rs [Md.] 57 Atl. 632.

7. Shoemaker v. Cincinnati [Ohio] 68 N. E. 1; Means v. Haley [Miss.] 36 So. 257; Logan County v. Carnahan [Neb.] 95 N. W. 812. Where the law has been settled for many years, and has become a rule of property, and titles have been vested on the strength of it, the error of the law would have to be most palpable to justify a court in overruling previous decisions. City of Sedalia v. Gold, 91 Mo. App. 32. "It may be wholly unimportant when former cases have not influenced the conduct of parties but it would be difficult to overestimate its importance when, as here, according to every presumption a disposition has been made in reliance upon the doctrine of a former case. Our duty in the present case seems to be plainly suggested by the familiar admonition that the doctrine of a former case should be adhered to if it has become a rule of property for the case under consideration. Shumaker v. Pearson, 67 Ohio St. 330, 65 N. E. 1005. Where supreme court had decided that a city was not bound by a designation indicating the uses for which dedicated property was intended by the original proprietors, and the decision had been acquiesced in for 69 years, and on faith of such decision vested rights in property had been obtained, the court will not overrule such decision. Wilkins v. Chicago, St. L. & N. O. R. Co., 110 Tenn. 422, 75 S. W. 1026. Where a statute under which improvements had been made had for many years been held valid, and improvements made thereunder legal, this decision would be held binding although a similar statute was long afterwards held invalid. The rule of property would not be changed. Shoemaker v. Cincinnati [Ohio] 68 N. E. 1. A disposition of property by will had been made in reliance upon a former decision. Shumaker v. Pearson, 67 Ohio St. 330, 65 N. E. 1005. Rule recognized but held not applicable to the case at bar. Logan County v. Carnahan [Neb.] 95 N. W. 812; Parke v. Boulware [Idaho] 73 Pac. 19. Where charter of no other institution had the same provisions in regard to exemptions from taxation as that of a certain seminary, no rule of property could arise from a decision of the supreme court in reference to exemption, hence the rule of stare decisis did not preclude the overruling of such decision. Colo. Seminary v. Board of Com'rs, 30 Colo. 507, 71 Pac. 410.

8. Contract of suretyship made in reliance on former decision. Reid v. Donovan [Mich.] 93 N. W. 914.

9. City of Sedalia v. Gold, 91 Mo. App. 32.

10. Shoenberg v. Heyer, 91 Mo. App. 389. A Federal circuit court will follow a decision of the circuit court of appeals, based on decisions of state courts, regardless of intervening state decisions on the questions. A decision by the circuit court of appeals that a matter was res adjudicata by reason of state decisions, conclusive upon the circuit court. The Fayerweather Will Cases, 118 Fed. 943; Gilmore v. Harp, 92 Mo. App. 386. The decisions of the court of appeals must be followed by the appellate division in New York. Hence, where the court of appeals had placed a different construction on a release, identical in legal effect with one construed by the appellate division, the latter must on reargument overrule its decision and make it conform to that of the court of appeals. Walsh v. Hanan, 87 N. Y. Supp. 930. See, also, Smith v. Lehigh Val. R. Co., 77 App. Div. [N. Y.] 43. In New York the special term should follow method fixed by appellate court for the distribution of a fund. People v. American L. & T. Co., 39 Misc. [N. Y.] 647. Where the appellate

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tween the Federal supreme court and a state court of last resort, an inferior state court must follow the decision of the state court of last resort.[11] By the constitution of Missouri the inferior state courts must follow the last ruling of the court of last resort,[12] and this is the rule even though rights have accrued before the last ruling, under some other ruling.[13] The force of a decision of an intermediate court is destroyed upon the holding of a higher court that the question passed upon was not involved.[14]

(§ 4) *B. Federal and state courts. When Federal courts follow state decisions.*—The construction given a state statute by state courts, not affected by any provision of the constitution or laws of the United States, is binding upon the United States courts.[15] But if the question whether such statute violates the Federal constitution arises,[16] or if the local statute is merely declaratory of the common law,[17] the construction placed thereon by the state court is not binding on the Federal courts. Where there is no state statute[18] or where the question is one of general law,[19] the Federal courts will apply their own rules of law regardless of the state decisions, unless the decisions of the state court have become rules of

division of one department of the supreme court has decided a law constitutional, that decision will be followed by the appellate term of that department, though the appellate division of another department may have decided the law unconstitutional, Charles v. Arthur, 84 N. Y. Supp. 284. The court of civil appeals of Texas must follow the decisions of the supreme court. N. Y. Life Ins. Co. v. English [Tex. Civ. App.] 79 S. W. 616. State circuit court bound by decision of state supreme court. Carson v. Southern R. Co. [S. C.] 46 S. E. 525. Holding of supreme court that defendant was entitled to the possession of a certain fund, as executor, is conclusive on the court of appeals in subsequent action by the curator of such minors to recover the fund. Gaston v. Hayden, 98 Mo. App. 683, 73 S. W. 938.

11. On policy of insurance Texas court followed the law of New York, as to its effect, following its own supreme court. Metropolitan Life Ins. Co. v. Bradley [Tex. Civ. App.] 79 S. W. 367.

12, 13. City of Sedalia v. Gold, 91 Mo. App. 32.

14. Ex parte Conley [Tex. Cr. App.] 75 S. W. 301.

15. Construction of employers' liability law of New York, requiring notice of injury within 120 days as a condition precedent to the bringing of an action, followed by Federal court. Crosby v. Lehigh Valley R. Co., 128 Fed. 193. The construction of a state statute by the state court has the force of precedent to a Federal court sitting within that state. Lockhard v. Asher Lumber Co., 123 Fed. 480. Statute of Limitations. Taylor v. Union Pac. R. Co., 123 Fed. 155; Dormidy v. Sharon Boiler Works, 127 Fed. 485. Construction of a state statute by the state supreme court in reference to practice. Manhattan Life Ins. Co. v. Albro [C. C. A.] 127 Fed. 281. Where a state statute dividing the state supreme court into divisions, and conferring separate powers and duties on such divisions, was held to be constitutional by all the justices of such court, sitting in banc in a case in which the question was directly involved, such decision is conclusive on the Federal courts. Williams v. Stearns, 126 Fed. 211. An interpretation of a statute and public policy of a state, by a state court, in regard to a foreign corporation doing business in the state will be followed by the Federal supreme court, where it is claimed that the judgment of the state court has denied full faith and credit to the public acts and records of the state where the corporation is domiciled. Interpretation by supreme court of Mississippi of a usury statute as applicable to a building and loan association domiciled in New York, followed by supreme court. Nat. Mut. Bldg. & Loan Ass'n v. Brahan, 193 U. S. 635.

16. Morenci Copper Co. v. Freer, 127 Fed. 199.

17. Damages for mutual suffering cannot be recovered where there is no averment of actual injury or willful violation of law, deciding contrary to state construction of statute on that subject. Western Union Tel. Co. v. Sklar [C. C. A.] 126 Fed. 295.

18. Where Pennsylvania had no statute designating who were fellow servants the Federal court sitting in that state applied the Federal rule. Pa. Co. v. Fishack [C. C. A.] 123 Fed. 465.

19. Keene Five Cent Sav. Bank v. Reid [C. C. A.] 123 Fed. 221. A ruling of the supreme court of a state that a suit for the cancellation of a life insurance policy cannot be maintained after the death of the insured is upon a matter of general law and is not binding on a Federal court sitting within the state. Union Life Ins. Co. v. Riggs, 123 Fed. 312. "As this question pertains to the law merchant, belonging within the larger domain of general jurisprudence, the local ruling is not binding on this court unless it be predicated of some special statutory provision defining the elements of a negotiable instrument." State Nat. Bank v. Cudahy Packing Co., 126 Fed. 543. Questions whether a case of double insurance is made out, so as to require contribution between the insurers, is one of general commercial law, the determination of which by the supreme court of the state where the question arose is not binding on the Federal courts of that jurisdiction. Meigs v. London Assur. Co., 126 Fed. 781.

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property within that state.[20] Where contracts have been entered into and rights have accrued thereon under existing state law, the Federal courts will adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state court after such rights have accrued.[21] The United States supreme court will follow the construction placed by a state court upon its own judgment.[22] The contract clause of the Federal constitution (art. 1, § 10) cannot be invoked against a change of decision by a state court.[23] A decision in the circuit court of appeals will be followed although the case under consideration cannot be appealed to that court, there being a constitutional question involved.[24] A state court may administer the common law according to its understanding and interpretation of it, being only amenable to review in the Federal supreme court where some right, title, immunity, or privilege, the creation of Federal power, has been asserted and denied.[25] A statute of a state, prescribing rules of pleading and practice under a Federal statute, in the absence of Federal rules on the subject, may properly be followed by a Federal court in determining the sufficiency of the pleadings.[26]

When state courts follow Federal decisions.—A state court is bound by the decisions of the Federal supreme court when the questions involved are Federal in their nature,[27] but as to the effect of such Federal decisions as a defense in a case properly brought in a state court, the latter may follow its own decision even when differing from the decision of the Federal court.[28] The supreme court of the United States is the final expositor of Federal statutes, and its decisions construing such statutes and determining their force and effect are conclusively binding upon the state courts.[29] Where pending an appeal to higher court from a judgment based upon a decision of such higher court in another and analogous case, the decision of the court in the latter case is reversed by the supreme court of the United States, the judgment appealed from will be reversed.[30] A decision by the Federal supreme court that the statute of limitations runs in favor of the United States, is binding on a state court, even in a case where the United States is not a party.[31]

(§ 4) *C. Different Federal courts.*—A Federal court is under no obligation to follow the decisions of other United States courts,[32] unless they be given by a court superior to it in the same circuit or by the supreme court.[33]

20. Keene Five Cent. Sav. Bank v. Reid [C. C. A.] 123 Fed. 221.

21. Federal courts held a lien law constitutional, under the state constitution, although the state court held it unconstitutional after the rights of parties had been fixed by contract. Great Southern Fireproof Hotel Co. v. Jones, 193 U. S. 532. County bonds held to be valid though not authorized under the decisions of North Carolina court rendered since the bonds were issued. Board of Com'rs of Henderson County, N. C., v. Travelers' Ins. Co. [C. C. A.] 128 Fed. 817.

22. Decision of Indiana court that an assessment for improvements was in the nature of a judgment, that in this case it was only voidable, not void, and could not be attacked collaterally, followed. Hibben v. Smith, 191 U. S. 310.

23. Nat. Mut. Bldg. & Loan Ass'n v. Brahan, 193 U. S. 635.

24. Dent v. U. S. [Ariz.] 76 Pac. 455.

25. Pa. R. Co. v. Hughes, 191 U. S. 477.

26. Tonopah Traction Min. Co. v. Douglass, 123 Fed. 936.

27. As to powers of national banks. Security Nat. Bank v. St. Croix Power Co., 117 Wis. 211, 94 N. W. 74; Hunt v. Hauser Malting Co. [Minn.] 96 N. W. 85. Held, that fact whether or not foreign court had jurisdiction to render a valid judgment was a Federal question, and that Federal supreme court must be followed. Johnston v. Mut. Reserve Fund Life Ins. Co., 87 N. Y. Supp. 438.

28. Security Nat. Bank v. St. Croix Power Co., 117 Wis. 211, 94 N. W. 74; Hunt v. Hauser Malting Co. [Minn.] 96 N. W. 85.

29. McLucas v. St. Joseph & G. I. R. Co. [Neb.] 97 N. W. 312.

30. Macfarland v. Byrnes, 19 App. D. C. 531.

31. City of El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 S. W. 21.

32. U. S. v. Adams Exp. Co., 119 Fed. 240. Federal circuit courts are courts of equal standing and authority. Cimiotti Unhairing Co. v. American F. R. Co., 120 Fed. 672; Cutler-Hammer Mfg. Co. v. Hammer, 124 Fed. 222.

33. An indictment charging the express company with carrying on the liquor traffic in Iowa, not sustained, on grounds that title

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(§ 4) *D. Different state courts.*—Decisions of one state have no force as precedents in other states,[34] though if well decided they may be followed, as a matter of comity.[35] Where a statute is adopted from another state it is adopted with the construction then given it by the highest court of that state.[36] In no case has the decision of an inferior court of a foreign state the force of precedent in any other state.[37] A decision of a foreign state which, if followed, would affect real property in local state will not be a precedent to such local state,[38] unless the local court be satisfied of the soundness of the reasoning by which it is supported.[39]

STATES.

§ 1. Boundaries and Jurisdiction (1703).
§ 2. Property (1704).
§ 3. Contracts (1704).
§ 4. Officers and Employes (1705).
§ 5. Fiscal Management (1706).
§ 6. Claims (1706).
§ 7. Actions By and Against (1706).

Scope. Many matters common to public bodies in general are elsewhere treated.[40]

§ 1. *Boundaries and jurisdiction. Boundaries.*—Long acquiescence by sovereignties in a given situation as regards the boundary between them is very strong evidence of the true position of the boundary.[41] The question of the true boundary line between two states is cognizable in the supreme court of the United States;[42] but they may be fixed by commissioners, their action being ratified by the legislatures of the respective states and approved by congress.[43] The main channel of a river constituting the boundary between states means the principal navigable channel, the one navigated by steamboats. It may be at points nearer one state than another, and it may be a shifting line. The purpose is to preserve for all time within the boundaries of each state one-half of the navigable pathway of the river, wherever located.[44] But where the river cuts an entirely new channel, changing land from one bank to another, it does not affect the boundary, which remains in the old channel.[45]

Jurisdiction.—The governmental jurisdiction of a state is co-extensive with its territorial limits, but certain jurisdiction of a juridical character may be granted

passed at once to consignee, and that the weight of authority of the United States courts announced a different doctrine made no difference. U. S. v. Adams Exp. Co., 119 Fed. 240.

34. Coveney v. Conlin, 20 App. D. C. 303. Where a contract is made in one state with a foreign corporation, a failure to adopt the construction placed on such contract by the court of the state where the corporation was created is not a denial of full faith and credit to the laws of such state, within the Federal constitution. Washington Life Ins. Co. v. Glover, 25 Ky. L. R. 1327, 78 S. W. 146. Though the laws of Mississippi hold that insured binds himself, upon taking certificate, as to all future by-laws of such society, even though it impairs his contract of insurance, this decision will not be followed in Missouri, upon suit to recover upon his contract of insurance. Campbell v. American B. C. F., 100 Mo. App. 249, 73 S. W. 342.

35. Coveney v. Conlin, 20 App. D. C. 303; Cutler-Hammer Mfg. Co. v. Hammer, 124 Fed. 222; Ancient Order of Hibernians, Division No. 1, v. Sparrow [Mont.] 74 Pac. 197.

36. The construction placed upon a statute by the court of last resort at the time when the statute is adopted by another state will control in construing the statute in the latter state, and not a construction subsequent to its adoption. Elias v. Territory [Ariz.] 76 Pac. 665.

37. Suit in equity to enjoin defendant from interfering with property of plaintiff situated in another state. Schmaltz v. York Mfg. Co., 204 Pa. 1, 59 L. R. A. 907.

38, 39. Coveney v. Conlin, 20 App. D. C. 303.

40. See Officers and Public Employes, 2 Curr. Law, p. 1069; Public Contracts, 2 Curr. Law, p. 1280.

41. Franzini v. Layland [Wis.] 97 N. W. 499.

42. Tenn. v. Va., 190 U. S. 64, 47 Law. Ed. 956.

43. State line between New York and New Jersey fixed in the middle of the Hudson River and New York Bay, in 1833. Cent. R. R. of N. J. v. Jersey City [N. J. Law] 56 Atl. 239.

44. Franzini v. Layland [Wis.] 97 N. W. 499.

45. Stockley v. Cissna [C. C. A.] 119 Fed. 812.

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over portions thereof to a neighboring state.[46] Where a navigable river is the boundary between two states, either state may grant the exclusive right to ferry from its shores and to fix the charges without the concurrence of the other.[47] States may have concurrent jurisdiction to make and execute laws on the river that flows between them as a boundary,[48] but concurrent jurisdiction between states does not imply concurrent dominion and ownership.[49] A state which upon its admission to the Union disclaimed "all title to swamp lands patented by the United States" has no jurisdiction to sell same.[50] The jurisdiction of the state over Indian lands in its boundaries extends to protecting parties who have acquired peaceable possession, until the controversy as to title is determined, which controversy is in the exclusive jurisdiction of the land department.[51] The exercise by the state of jurisdiction over certain land is conclusive on the courts as to such jurisdiction.[52]

§ 2. *Property.*[53]—Lands patented by the United States before the formation of a state government and included by proclamation within the boundaries of an Indian Reservation are not the property of that state.[54] The state can only be estopped from asserting her right to her own property by legislative enactment or resolution.[55] The lands granted to a state for school purposes and the proceeds of the sale thereof constitute a trust fund and the faith and honor of the state is pledged to its maintenance and faithful distribution.[56]

§ 3. *Contracts.*—No state may make any law impairing the obligation of its contracts, but past due bonds may be written off the books and not carried therein as debts of the state.[57] A contract with state officers or boards is in substance a contract with the state, and their determination as to whether a contract shall be kept or broken is its determination.[58] The state is not liable on contracts made by its agents or instrumentalities, unless such contracts are within their expressly conferred powers.[59] A statute prescribing the terms upon which the state is to be bound by a contract to be executed by a public officer in its behalf is mandatory.[60] The state may contract with an agent to prosecute its claims and make compensation dependent upon success.[61] Where work voted for by the legislature is apportioned under separate contracts, and the aggregate of the contracts does

46. The exclusive jurisdiction granted to New York, by New Jersey over the waters of New York Bay, does not affect the latter's right of taxation against the lands thereunder lying within New Jersey's boundary lines. Cent. R. R. of N. J. v. Jersey City [N. J. Law] 56 Atl. 239.

47. West Virginia cannot punish one acting under an Ohio ferry franchise, for charging more than is allowed by the West Virginia law for ferriage over the Ohio River. State v. Faudre [W. Va.] 46 S. E. 269.

48. Service of process from an Indiana court made on the Ohio River, on the Kentucky side of the low-water mark on the Indiana shore, is good. Wedding v. Meyler, 192 U. S. 573.

49. "Concurrent jurisdiction on the water," separating Minnesota and Wisconsin, must concern things on the water in some way connected with navigation; not ownership of the water, or land thereunder, or fish or game inhabiting the same. Roberts v. Fullerton, 117 Wis. 222, 93 N. W. 1111.

50. Jones v. Calivert, 32 Wash. 610, 73 Pac. 701.

51. Reservation State Bank v. Holst [S. D.] 95 N. W. 931.

52. Authority exercised over land up to a river, which by avulsion has changed its channel, bringing land formerly belonging to a foreign country within the apparent limits of the state. Rodriguez v. Hernandez [Tex. Civ. App.] 79 S. W. 343.

53. See, also, the topic Public Lands, 2 Curr. Law, p. 1295.

54. Jones v. Calivert, 32 Wash. 610, 73 Pac. 701.

55. Common-law rule followed as to proceeding by information of intrusion against trespassers on state lands. State v. Paxson [Ga.] 46 S. E. 872.

56. Taber v. Trustees of State Hospital for the Insane, 127 Fed. 174.

57. Smith v. Jennings [S. C.] 45 S. E. 821.

58. State v. Mortensen [Neb.] 95 N. W. 831.

59. Action against the state by an expert employed by the board of railroad commissioners is not maintainable, no appropriation having been made therefor. Polk v. State, 138 Cal. 384, 71 Pac. 435.

60. Camp v. McLin [Fla.] 32 So. 927.

61. Such a contract is not void as against public policy. Opinion of the Justices [N. H.] 54 Atl. 950.

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not exceed the amount voted for, a contractor may recover damages for abandonment of his work by the state before the amount of his contract was abandoned.[62] A state contract for employment is not held to be renewed because of the failure of the employing board to take action before the expiration of the term of such employment.[63] The right of a state to vary the work of a contractor does not imply the right to stop such work without incurring liability.[64] The statutes are the property of the state and the legislature may grant to a person the right to publish the same. That the secretary of state is directed to distribute a certain number does not in terms vest title or ownership in such distributees.[65]

§ 4. *Officers and employes.*—State officers or agents may be appointed by the legislature in cases not otherwise provided for; there is no inherent appointing power vested in the governor.[66] A state officer lawfully holding two not incompatible offices is entitled to the salaries of both.[67] It is only to enforce the performance of purely ministerial acts that mandamus will lie against state officers.[68] The actions of state officers may be quasi-judicial or merely ministerial, according to the nature of the act performed.[69] State officers cannot be held as garnishees in the absence of a statute allowing the state to be sued.[70] To bind the state on a contract made in its behalf, a public officer must possess real as distinguished from apparent authority, and cannot be held as having estopped himself from denying the validity of the contract.[71] A state officer receiving fees under a void act cannot be allowed to deny that he acted in an official capacity, when called to account by the state, though the state has no legal title to the fees.[72] State officers are not held to more than a substantial compliance with the statutes imposing duties upon them; a literal compliance in unessential particulars is not demanded.[73] The power of trustees of state instrumentalities to contract debts is limited by legislative appropriations, and when contracted, such debts are debts of the state.[74] The various boards or instrumentalities of the state, their membership and compensation, are subject to the will of the legislature, subject only to rights granted by the constitution.[75] The determination by such boards in discretionary matters is the determination of the state.[76] It is the duty of the board of commissioners to contract for insurance for a state insane asylum, and of the superintendent to certify the amount of premiums to the state auditor.[77] A clerk of a board is the agent thereof, not a trustee of its funds, and he and his bond are liable at once for any defalcation, and not at the expiration of his term.[78] Official misconduct is not established by showing that trust funds have been used by a public officer for

62. Baker v. State, 77 App. Div. [N. Y.] 528.

63. The final action refusing the re-election of the physician relates back to the meeting before the expiration of his term. Taber v. Trustees of State Hospital for the Insane, 127 Fed. 174.

64. Baker v. State, 77 App. Div. [N. Y.] 528.

65. Marsh v. Stonebraker [Neb.] 98 N. W. 699.

66. Cox v. State [Ark.] 78 S. W. 756.

67. A secretary of state acting by law in place of a deceased governor is entitled to the salaries of both offices. State v. Grant [Wyo.] 73 Pac. 470.

68. The act of a governor in relieving from command an officer of the national guard is a discretion, and not a ministerial act. State v. Jelks, 138 Ala. 115.

69. A state auditor in refusing to issue a bounty warrant on the ground of the invalidity of the act authorizing it, acts in a quasi-judicial capacity, and certiorari will lie to review his act. Minn. Sugar Co. v. Iverson [Minn.] 97 N. W. 454.

70. Even though a statute exempting state officers from garnishment had been repealed. Keen v. Smith [Or.] 75 Pac. 1065.

71. Camp v. McLin [Fla.] 32 So. 927.

72. State v. Porter [Neb.] 95 N. W. 769.

73. People v. McDonough, 173 N. Y. 181, 65 N. E. 963.

74. State v. McMillan [N. D.] 96 N. W. 310.

75. Thomas v. State [S. D.] 97 N. W. 1011.

76. People v. McDonough, 85 App. Div. [N. Y.] 162.

77. Furnish v. Satterwhite, 24 Ky. L. R. 1723, 72 S. W. 309.

78. State v. Davis, 42 Or. 34, 71 Pac. 68, 72 Pac. 317.

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the very purpose the legislature and the owners of the fund intended it should be.[79] There is no vacancy in the office of the governor or lieutenant governor, to be filled by an election for an unexpired term, where the governor dies, and the lieutenant governor performs the governor's duties.[80] The relieving a colonel of the national guard from command is not a removal from office requiring a court-martial.[81] Either house of the legislature is the sole judge of the election and qualification of its members.[82]

§ 5. *Fiscal management.*—No state has a right to emit bills of credit[83] or make any grant of public money to any individual or corporation.[84] No money should be drawn from the state treasury except in pursuance of an appropriation by law.[85] State certificates of indebtedness must be issued under a valid law or appropriation or they are void.[86] Though public revenues may be appropriated in advance of their receipt, they do not constitute a debt or liability against the state; they operate upon the incoming revenues in the nature of a cash transaction, and cannot be included in the bonded or other indebtedness limited by the constitution.[87] The annual tax to defray the "estimated expenses" of the state for each year should be limited to the amount needed to defray such expenses.[88] The direction to state officers to pay certain claims "out of any money not otherwise appropriated" renders any more specific appropriation unnecessary.[89]

§ 6. *Claims.*—A claim arising under a void law is not a moral obligation which will support a grant of public funds.[90] A liability to the state cannot be released or extinguished by the legislature.[91] In New Hampshire, claims of the state against the United States may be prosecuted by an agent appointed by the governor.[92] A claimant against the state cannot accept an amount allowed him by the decision of the auditor and then appeal from that decision.[93]

§ 7. *Actions by and against.*—Authority to sue the state must be expressed in its constitution or statutes.[94] A sovereign state cannot be sued in its own courts without its consent; most of the states have to a limited degree waived this prerogative.[95] In Illinois, the state may not be sued.[96] In Massachusetts, suit may be brought against the state in cases where a mechanic's lien could attach if against private parties.[97] The state may be sued to recover taxes illegally paid to it by a county, and the fact that repayment would create a deficiency in state revenues is

79. Fees received under an act creating a state registry of brands and marks, but declared to be unconstitutional. State v. Porter [Neb.] 95 N. W. 769.

80. State v. McBride, 29 Wash. 335, 70 Pac. 25.

81. State v. Jelks, 138 Ala. 115.

82. Corbett v. Naylor [R. I.] 57 Atl. 303; Mills v. Newell, 30 Colo. 377, 70 Pac. 405.

83. South Carolina revenue bond scrip is invalid as against her own constitution and that of the United States. Robinson v. Lee, 122 Fed. 1012.

84. An appropriation of taxes to a road district is not unconstitutional. Elting v. Hickman, 172 Mo. 237, 72 S. W. 700.

85. Boyd v. Dunbar [Or.] 75 Pac. 695.

86. The senate alone cannot extend the powers of a committee thereof beyond the session and fix the compensation. State auditor's certificates given in payment of their compensation are void. Tipton v. Parker [Ark.] 74 S. W. 298.

87. The current expenses of a state cannot accumulate or ripen into a debt. Stein v. Morrison [Idaho] 75 Pac. 246.

88. State v. Froehlich, 118 Wis. 129, 94 N. W. 50.

89. Hart v. State [Ind.] 64 N. E. 854.

90. Minnesota Sugar Co. v. Iverson [Minn.] 97 N. W. 454, citing 84 Mich. 420, 11 L. R. A. 534, and criticising 163 U. S. 427.

91. Const. art. 3, § 24. State v. Mellette [S. D.] 92 N. W. 395.

92. Opinion of the Justices [N. H.] 54 Atl. 950.

93. Weston v. Falk [Neb.] 92 N. W. 204.

94. Hollister v. State [Idaho] 71 Pac. 541. A joint resolution authorizing certain claimants to sue the state is as effective as a law on the same subject. Com. v. Lyon, 24 Ky. L. R. 1747, 72 S. W. 323.

95. Specific performance of a contract cannot be enforced against a state. State v. Mortensen [Neb.] 95 N. W. 831.

96. An application to confirm a tax assessment against lots donated by congress for the use of schools of a city is not a suit against the state, but against the board of education. City of Chicago v. Chicago, 207 Ill. 37, 69 N. E. 580.

97. Kennedy v. Com., 182 Mass. 480, 65 N. E. 828.

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no defense.[98] A general authorization to a state agency to sue and be sued does not authorize suits for damages for torts of the officers and employes thereof.[99] An action against a state officer to enjoin him from proceeding in the name of the state is a suit against the state,[100] but a suit against individuals to prevent them as officers of a state from enforcing an unconstitutional law is not a suit against the state.[101] In actions against the state or its officers, all presumptions are in favor of the due performance of official duties.[102] The state may recover costs paid in an action which she was not legally bound to pay.[103] Limitations do not run against the right of action against a state until the passage of a statute giving the right to sue.[104] In Louisiana, the statute of limitations does not run against the state.[105] Nor in Georgia.[106] In Indiana, the statute of limitations does not run against the state, except as to sureties.[107] But in Oregon, the statute of limitations applies to all actions by the state.[108]

STATUTES.

§ 1. Enactment (1707).
§ 2. Special or Local Laws (1710).
§ 3. Subjects and Titles (1717).
§ 4. Amendments and Revisions (1720).
§ 5. Interpretation (1722).
§ 6. Retroactive Effect (1732).
§ 7. Repeal (1733).
A. In General (1733).
B. Implied Repeal (1734).

§ 1. *Enactment.*—An act must receive the constitutional majority of the votes of the house attempting to pass it.[1] To become a law, a bill must be referred to a committee, acted on by it in session, and returned therefrom, which facts must affirmatively appear on the journal.[2] A bill must be introduced while there remains time to legally pass it.[3] It is usually required that a bill should be read three times, in each branch of the legislature;[4] but it need not be so read each time under an exactly identical title.[5] Amendments need not be so read; it is sufficient that they be printed and the bill as amended be passed by both houses.[6] A proposed amendment, if agreed to, must be entered on the

98. Ulster County v. State, 177 N. Y. 189, 69 N. E. 370.

99. Alabama insane asylum not liable for personal injuries resulting from its negligence. White v. Ala. Insane Hospital, 138 Ala. 479.

100. Morenci Copper Co. v. Freer, 127 Fed. 199.

101. Prout v. Starr, 188 U. S. 537, 47 Law. Ed. 584.

102. San Luis Obispo County v. Gage, 139 Cal. 398, 73 Pac. 174.

103. State v. New Orleans D. R. Co. [La.] 36 So. 205.

104. San Luis Obispo County v. Gage, 139 Cal. 398, 73 Pac. 174.

105. State v. New Orleans D. R. Co. [La.] 36 So. 205.

106. Prescription does not run in any case against the state. State v. Paxson [Ga.] 46 S. E. 872.

107. Terre Haute & I. R. Co. v. State, 159 Ind. 438, 65 N. E. 401.

108. State v. Davis, 42 Or. 34, 71 Pac. 68.

1. State v. Davis [Neb.] 92 N. W. 740.

2. A decision in committee to report a bill "without recommendation" is "action" thereon; the journal need not show the character of the action. Walker v. City Council of Montgomery [Ala.] 36 So. 23.

3. Eighty seventh day of session is too late. People v. Loomis [Mich.] 98 N. W. 262.

4. Potter v. Lainhart [Fla.] 33 So. 251. A bill to allow a county to raise money must be read three times and have the yeas and nays of last two readings entered on the journal. Where the journal does not give the names of those voting in the negative, and it does not appear affirmatively that none so voted, the bill is invalid. Debnam v. Chitty, 131 N. C. 657. It sufficiently appears that a bill had a first reading where the journals of the legislature recite that it was introduced and referred to a committee, and that it subsequently passed its second and third readings by a recorded vote, and the act was ratified by the presiding officers, who certified that it had passed three readings. Priv. Laws N. C. 1858-59, p. 212, c. 166, relating to issue of municipal bonds in aid of railroads. Board of Com'rs of Henderson County v. Travelers' Ind. Co. [C. C. A.] 128 Fed. 817.

5. Defects in the title may be cured by amendment. Richards v. State [Neb.] 91 N. W. 878.

6. Cleland v. Anderson [Neb.] 92 N. W. 306. Bills imposing a tax must be read three times before passage; but an amendment thereto, in itself imposing no tax, need not be so read. Brown v. Stewart [N. C.] 46 S. E. 741. The fact that after a bill had properly passed the house it was amended by the senate, and, after being sent to a conference committee, was adopted without being read on three several days in each

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journal of each house.[7] The substitution of a new bill by the house, instead of passing the bill which the senate had passed, can be considered by the senate an amendment, and requires only a concurrence, and not a formal call of the yeas and nays, which the constitution requires on final passage of a bill.[8] Whether an amendment to the constitution has been regularly proposed, adopted and ratified is a question for the courts and not the political department of the government.[9]

A statute ratified and confirmed by a constitutional amendment is not necessarily adopted into the constitution; it may be merely validated; but if a clause is added reserving to the legislature the right to amend, then it does go into the constitution, except as to that right.[10] A joint resolution authorizing certain claimants to sue the state is as effective as a law on the same subject.[11] Exceptions to the manner of passing bills and the time of their taking effect, resulting from emergencies, will be strictly construed, and no exception allowed beyond the one recited as necessary in the emergency.[12] One legislature possesses no power to bind a succeeding one by prescribing prerequisite conditions to the passage of bills, and a duly authenticated act cannot be held invalid because such conditions prescribed by an act of a preceding legislature were not observed.[13] The five days allowed the governor for the consideration of bills presented to him is a matter of privilege, and a bill may become a law without his signature if returned in less than five days with a notification to that effect.[14] A bill does not become law by failure of the executive to act on it if the legislature adjourns within the time allowed for his action.[15] A joint resolution vetoed by the governor may be returned by him to the House at the next session, and be considered by them, even with new members seated.[16]

Special sessions.—The powers of legislature at special sessions are limited to the matters specifically mentioned in the proclamation, and where a subject is named, general legislation thereon is proper, though it be not exactly as recommended.[17]

house, and without entering the yeas and nays on the journals on the second and third readings, does not render the act void in the absence of a showing that any of the amendments were of a kind required by the constitution (N. C. Const. art. 2, sec. 4) to be passed with such formalities. Laws 1901, p. 148, c. 9, § 91, relating to taxation of corporations, construed. State v. Armour Packing Co. [N. C.] 47 S. E. 411.

7. People v. Loomis [Mich.] 98 N. W. 262.

8. Brake v. Callison, 122 Fed. 722.

9. Kadderly v. Portland [Or.] 74 Pac. 710.

10. State v. Kohnke, 109 La. 838.

11. Com. v. Lyon, 24 Ky. L. R. 1747, 72 S. W. 323.

12. Wickes-Nease v. Watts, 30 Tex. Civ. App. 515, 70 S. W. 1001.

13. Manigault v. S. M. Ward & Co., 123 Fed. 707.

14. Arkansas Acts 1903, p. 141, authorizing certain persons to testify in certain cases, is not invalid because returned to the house without the governor's signature, in less than five days after it was sent to him, and with a statement that the bill might become a law without his signature. Hunt v. State [Ark.] 79 S. W. 769.

15. Monroe v. Green [Ark.] 76 S. W. 199.

16. Smith v. Jennings [S. C.] 45 S. E. 821.

17. Proclamation stated object to be "To provide to reduce penalties and interest on taxes to half present rates;" any legislation on the general subject of reduction is permissible. Baker v. Kaiser [C. C. A.] 126 Fed. 317. When the legislature in extraordinary session is limited by the constitution to the consideration of matters for which the session was specially called, all acts passed relating to other subjects are void. The governor may not restrict the legislature as to the mode in which the purposes of the session may be accomplished. Colo. Sess. Laws 1902, pp. 47, 48, c. 3, § 18, imposing a license fee on liquor dealers held a statute for the purpose of raising revenue and not for the regulation of the liquor traffic. Is valid, though passed at an extra session, the purpose of which was restricted by the governor's proclamation (Const. art. 4, sec. 9) to the enactment of a state revenue law. Parsons v. People [Colo.] 76 Pac. 666. But when not so limited, they are not restricted to the matters for the consideration of which the governor's proclamation states that they were convened. Wash. Const. art. 3, § 7, providing that the governor's proclamation convening the legislature in extra session shall state the purpose for which such session is called, does not limit the legislature to the consideration of matters so stated. Laws Ex. Sess. 1901, c. 6, p. 13, relating to criminal prosecutions, is valid, though its subject not included in the proc-

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The journals.—Provisions as to entries in legislative journals are mandatory. The journals are competent evidence of the procedure and their showing may rebut the presumption of regularity.[18] Journals when competent as evidence[19] import absolute verity and cannot be explained or altered by parol.[20] Where two acts are in substance identical as to the offense to be punished and bear the same date, but differ as to penalty, the last act is the one in force and the journals of the two houses may be consulted to determine which act was the last one passed.[21] If a statute is claimed to be unconstitutional as not properly passed, the trial court need not inspect the legislative journals; the party claiming it must present the facts he relies on. Nor will the appellate court inspect the journals, the facts relied on not being in the bill of exceptions.[22]

Submission to popular vote.—An act requiring a submission to popular vote is invalid until so submitted;[23] but an amendment to such an act need not be so submitted.[24] Whether a law is necessary, within the meaning of that provision of the initiative and referendum amendment to the Oregon constitution excepting from its operation laws necessary for the immediate preservation of the public peace, health, or safety, is a question for the legislature.[25]

Presumptions and evidence as to passage.—Every presumption is in favor of the legality of legislation, and evidence in rebuttal must be very clear.[26] The presumption of passage, due to the signatures of both presiding officers and the executive approval, may be rebutted by the failure of the journal of either body to show the passage of the act.[27] Immaterial verbal departures from the formal enacting clause are not fatal.[28]

Publication.—The appearance of a section in officially revised statutes is sufficient authority for treating it as the law on the subject, until shown to be incorrect by the files in the secretary of state's office.[29] The publication of a private law is evidence of its terms, and the legislative journals can only be resorted to in order to ascertain whether it was passed with the three readings the constitution requires.[30] The printing of an act by public authority is prima facie

lamation convening the session. State v. Fair [Wash.] 76 Pac. 731.

18. State v. Cahill [Wyo.] 75 Pac. 433. Journal entries held to sufficiently show bill was signed by speaker of the House. Younger v. Hehn [Wyo.] 75 Pac. 443. Where the constitution requires a bill to be passed in a particular way, which must appear in the journals, reference may be had to them to determine whether it was passed in that way. State v. Armour Packing Co. [N. C.] 47 S. E. 411.

19. Is competent to show that yeas and nays have been entered. Brown v. Stewart [N. C.] 46 S. E. 741.

20. The copy of the journal deposited with the secretary of state is not evidence for any purpose. Town of Wilson v. Markley, 133 N. C. 616. Are the only evidence admissible as to the manner in which the act was passed. Indorsements or entries on the original bill cannot be considered. State v. Armour Packing Co. [N. C.] 47 S. E. 411.

21. Derby v. State, 24 Ohio Circ. R. 304.

22. Peckham v. People [Colo.] 75 Pac. 422.

23. Presidio County v. Jeff Davis County [Tex. Civ. App.] 77 S. W. 278.

24. Dallis v. Griffin, 117 Ga. 408.

25. The legislature had power to declare the Portland charter such a necessary act, and to provide that it should go into effect immediately on its approval by the governor. Kadderly v. Portland [Or.] 74 Pac. 710.

26. Brake v. Callison, 122 Fed. 722.

27. People v. Knopf, 198 Ill. 340, 64 N. E. 842, 1127. Where the constitution requires that local notices of intention to pass be published 20 days before the introduction of local bills, and the house journal is silent as to the publication, the notice will be presumed to be given. Keene v. Jefferson County, 135 Ala. 465. Construed as not special so as to require local publication before passing. Dehon v. Lafourche Basin Levee Board, 110 La. 767. The ratification of a bill raises the presumption that it has become a law in due course of legislative procedure. State v. Armour Packing Co. [N. C.] 47 S. E. 411.

28. A resolution beginning "Be it resolved" is a sufficient compliance with the constitution requiring all laws to be enacted with the words, "Be it enacted." Smith v. Jennings [S. C.] 45 S. E. 821. An act beginning, "Be it enacted by the General Assembly" instead of the "General Assembly of Louisiana," is valid. State v. Cucullu, 110 La. 1087.

29. Langston v. Canterbury, 173 Mo. 122, 73 S. W. 151.

30. Town of Wilson v. Markley, 133 N. C. 616.

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proof that it is a law as it purports to be.[31] Printed copies of statutes purporting to be issued under the authority of the state are prima facie evidence of their passage and existence; but this may be overcome by entries in the legislative journals explicitly contradicting it.[32] Publishing an amended section of a statute in a wrong chapter does not render the section inoperative.[33] A general act which provides that it shall take effect after its publication in the "official city paper" takes effect from its publication in the official state paper, notwithstanding such provision.[34]

§ 2. *Special or local laws. In general.*—Legislation must commonly be by general laws, whenever a law of a general nature, having a uniform operation throughout the state, can be made fully to cover any given subject-matter, and local or special laws cannot be constitutionally enacted as to such subject-matter;[35] but a special act is not invalid because the same result could have been accomplished by a general act.[36] A special act is permissible where the subject is special and particular in its nature;[37] or a general law may be enacted, and the legislature is the sole judge of which is advisable.[38] The question is not affected by the fact that a general law has been passed on the same subject;[39] but whether a law is general or special in its nature is for the courts to decide and not the legislature.[40] The adoption by a city of a general law does not make it a special one, nor does the grant of a special power affect the right to the exercise of a general power.[41] The difference between a general and a special law is that a general law applies to all of a class, while a special law applies to one or to a part of a class only.[42] A local and special act passed before the adoption of the constitution cannot, after the adoption, be amended by a local act, if the constitution prohibit special laws on that subject.[43]

Classification.—All general laws should have a uniform operation throughout the state,[44] but a classification of the objects to which they may exclusively

31. Henry v. State [Ark.] 76 S. W. 1071.
32. City of Beatrice v. Edminson [C. C. A.] 117 Fed. 427.
33. Pioneer Fuel Co. v. Molloy, 131 Mich. 465, 91 N. W. 750.
34. State v. Topeka [Kan.] 74 Pac. 647.
35. The matter of schools and school districts is of a general nature, and an act creating a special school district in a particular county is local and unconstitutional. State v. Spellmire, 67 Ohio St. 77, 65 N. E. 619; Dallis v. Griffin, 117 Ga. 408; State v. Hammond, 66 S. C. 219; State v. Anslinger, 171 Mo. 600, 71 S. W. 1041; State v. Hammond, 66 S. C. 300; Galveston & W. R. Co. v. Galveston, 96 Tex. 520, 74 S. W. 537; Cleland v. Anderson [Neb.] 92 N. W. 306; Mathews v. People, 202 Ill. 389, 67 N. E. 28. An act locally fixing officer's fees does not offend the inhibition of special laws affecting matters legislated upon generally. Herbert v. Baltimore County Com'rs, 97 Md. 639. The constitution of Mississippi forbids any law for the benefit of any existing corporation except upon its holding its charter subject to the present constitution. An act empowering a railroad company (which is a private corporation under § 87), to do certain acts under its old charter, is void. Yazoo & M. V. R. Co. v. Southern R. Co. [Miss.] 36 So. 74.
36. St. Louis S. W. R. Co. v. Grayson [Ark.] 78 S. W. 777.
37. Weston v. Ryan [Neb.] 97 N. W. 347.
38. Rambo v. Larrabee, 67 Kan. 634, 73 Pac. 915. "An act fixing the time of holding court in Jefferson county" is not objectionable as a special enactment. City of Mt. Vernon v. Evans & H. Fire Brick Co., 204 Ill. 32, 68 N. E. 208; Weston v. Ryan [Neb.] 97 N. W. 347; Manigault v. S. M. Ward & Co., 123 Fed. 707.
39. City of Oak Cliff v. State [Tex. Civ. App.] 77 S. W. 24.
In some states it is expressly provided otherwise.
40. Rambo v. Larrabee, 67 Kan. 634, 73 Pac. 915; State v. Hammond, 66 S. C. 219.
41. Appleton Waterworks Co. v. Appleton, 116 Wis. 363, 93 N. W. 262.
42. City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785. To make a law general, it is not necessary that it should operate upon all cities and towns of a state, but it is sufficient if it applies to all which come within the class therein specified. Id.
43. De Hay v. Com'rs of Berkeley County, 66 S. C. 229.
44. Boise City Artesian H. & C. W. Co. v. Boise City [C. C. A.] 123 Fed. 232. "Act to provide for the organization of cities and incorporated villages," etc. Zumstein v. Mullen, 67 Ohio St. 382, 66 N. E. 140. An act excepting a city from the operation of a general law is invalid. Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250, 91 N. W. 1081; Verges v. Milwaukee County, 116 Wis. 191, 93 N. W. 44; McGinnis v. Ragsdale, 116 Ga. 245. An act authorizing a certain county to levy taxes at a certain rate is law of a

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apply is inevitable and proper. A classification should have a direct and natural reference to the purpose that gives rise to the legislation,[45] and must be based upon substantial distinctions which make one class really distinct from another.[46] The constitution defines classes in some cases, and where this has been done, no other classification is permissible;[47] otherwise the legislature may classify objects of legislation; the classification to be reasonable and not artificial or arbitrary.[48] A classification even though arbitrary may be reasonable and made with a reasonable and proper purpose.[49] A discrimination between classes is proper but not between members of a class,[50] and the arbitrary exemption of a particular class is forbidden.[51] A legislative classification, if proper, may make general a law which otherwise would be objectionable as special.[52]

Based on population.—Classifications on the basis of population are very common, and are generally valid; but where shown to be clearly intended to apply to but one community, they are sometimes declared void;[53] an opposite holding, however, is the rule more frequently adopted.[54] If broad and generally comprehensive, these classifications are permissible,[55] but a discrimination based

general nature that does not operate uniformly throughout the state and is void. Pump v. Lucas County Com'rs, 69 Ohio St. 448, 69 N. E. 666. An act authorizing set off of benefits where property is taken for public use is invalid, as constitution exempts corporations other than municipal from such a rule. Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083, 59 L. R. A. 581.

45. Classification of bodies of water according to their size is reasonable. Albright v. Sussex County L. & P. Commission, 68 N. J. Law, 523; State v. Board of Trustees [Wis.] 98 N. W. 954; Severance v. Murphy [S. C.] 46 S. E. 35.

46. Generally based on population. State v. Board of Trustees [Wis.] 98 N. W. 954. The classification must be based on some apparent natural reason; some reason suggested by necessity; by such a difference in the situation and circumstances of the subjects placed in different classes, as suggests the necessity or propriety of different legislation with respect to them. Id. There is no certain test to determine the constitutionality of such classifications, but the facts and circumstances of each particular situation must be taken into consideration. Id. The characteristics of each class should be so far different from those of other classes as to reasonably suggest the propriety, having regard to the public good, of substantially different legislation. Id.

47. Classification of the cities of a state. Love v. Liddle, 26 Utah, 62, 72 Pac. 185.

48. Act as to "written contracts between owners of land and brokers, or agents, to sell lands." Baker v. Gillan [Neb.] 94 N. W. 615; Rambo v. Larrabee, 67 Kan. 634, 73 Pac. 915.

49. An act applying to a particular class of railroad employes. Froelich v. Toledo & O. C. R. Co., 24 Ohio Circ. R. 359.

50. Ex parte Hernan [Tex. Cr. App.] 77 S. W. 225. The law must apply equally to each member of the class. State v. Board of Trustees [Wis.] 98 N. W. 954.

51. State v. Harmon, 23 Ohio Circ. R. 292.

52. Riccio v. Hoboken [N. J. Err. & App.] 55 Atl. 1109.

53. An act in regard to "counties having over 200,000 population" is void as a special law, applicable to but one county in the state. Strong v. Dignan, 207 Ill. 385, 69 N. E. 909.

54. Act applicable to cities of over 300,000 population is not invalid because applicable only to St. Louis. State v. Faulkner, 175 Mo. 546, 75 S. W. 116. The fact that at the time of its passage only one city in the state is within such class is immaterial. Wis. Laws 1899, p. 443, c. 265, establishing policemen's pension fund, not in contravention of Const. art. 4, § 31, subd. 9. State v. Board of Trustees [Wis.] 98 N. W. 954. A law relating to counties of over 150,000 population is a general law, as it embraces all counties answering the requirement, though as a matter of fact there was only one such county in the state. Verges v. Milwaukee County, 116 Wis. 191, 93 N. W. 44. An act applicable to counties of over 150,000 inhabitants is not invalid as applying to but one county in the state, since it will include other counties which may hereafter come within that class. Ex parte Loving [Mo.] 77 S. W. 508. Where the constitution defines different classes of cities according to population, a statute applying to cities of the first class is not unconstitutional as local and special, because there is but one city in that class. Woolley v. Louisville, 24 Ky. L. R. 1357, 71 S. W. 893.

55. "Cities between 23,000 and 35,000, as per last U. S. census," is not an unconstitutional classification. Evansville & T. H. R. Co. v. Terre Haute, 161 Ind. 26, 67 N. E. 686. Cities may be classified according to needs that can reasonably be said to be special to each group, and laws enacted applicable to one of such classes, in the absence of an express constitutional prohibition. State v. Board of Trustees [Wis.] 98 N. W. 954. A statute which relates to the consolidation of towns and cities, or to the change of boundaries between them, may properly classify together those towns or cities which adjoin or lie near each other, for their position in reference to each other distinguishes them from other municipalities not so situated, and constitutes a reasonable basis for classification. Ark. Acts 1903, p. 148, is not special legislation. City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785.

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on so small a range of figures as per a past census as to clearly show that but one locality could be intended is void.[56] It must not be based on existing circumstances only; that is it must not prevent additions to the members included within a class.[57] Classification may, however, be based on existing temporary circumstances, for the purpose of passing curative acts.[58]

The subject of the act may determine the reasonableness of the classification.[59] An act applying only to cities of a designated class is general.[60] Cities of a particular class may be further subclassified.[61]

A number of counties being properly in one general class, discriminations resulting from the effects of a referendum do not make the classification special.[62] An act which applies to all towns and cities except those of a designated class is general.[63]

Other classifications.—Special charter cities,[64] urban property,[65] various callings,[66] sundry other classifications, sustained as being reasonable,[67] or declared void

Cities over 50,000 may build bridge over navigable canal. Le Tourneau v. Hugo [Minn.] 97 N. W. 115. "Counties of more than 65,000 inhabitants" is a proper classification. Rambo v. Larrabee [Kan.] 72 Pac. 225. "Townships having under 6,000 population" is a proper classification. Davidson v. Von Detten, 139 Cal. 467, 73 Pac. 189. Cities between 5,000 and 10,000 valid. Beck v. St. Paul, 87 Minn. 381, 92 N. W. 328. A jury law peculiar to cities of over 100,000 population is not invalid. State v. Faulkner, 175 Mo. 546, 75 S. W. 116.

56. An act applicable to counties having a population between 15,000 and 15,050, applies to but one county and is void, as being a special law. Board of Com'rs of Owen County v. Spangler, 159 Ind. 575, 65 N. E. 743. An act applying to towns having a population between 4,545 and 4,550, as per a past census, is a local law and void. School City of Rushville v. Hays [Ind.] 70 N. E. 134.

57. State v. Board of Trustees [Wis.] 98 N. W. 954. An act which applies only to cities which are in a designated class at the time of its passage, and not to those that may come into it thereafter, is a special law. Gen. St. N. J. p. 478, placing the control of streets and water supply in certain cities in a board of commissioners, is special legislation and hence unconstitutional. In re Fagan [N. J. Law] 57 Atl. 469.

58. Acts legalizing city ordinances previously passed are not special legislation, provided they apply to all existing ordinances of a similar nature. Kan. Laws 1883, c. 34, p. 62, relating to cities of the first class, is not special legislation and is uniform in its operation. City of Leavenworth v. Leavenworth City & Ft. L. Water Co. [Kan.] 76 Pac. 451.

59. "An act concerning criminal appeals in counties with over 65,000 population" is void as being a general law not uniformly operative. Rambo v. Larrabee, 67 Kan. 634, 73 Pac. 915. Refunding of debt allowed to villages owing over $3,000. Kaiser v. Campbell [Minn.] 96 N. W. 916.

60. P. L. 1901, p. 239, regulating the sale of intoxicating liquors in certain cities, is not special legislation. Schwarz v. Dover [N. J. Law] 57 Atl. 394.

61. Subdivision of cities of first class into those having and not having a paid fire department by Wis. Laws 1899, p. 443, c. 265, providing for policemen's pension fund held proper. State v. Board of Trustees [Wis.] 98 N. W. 954.

62. Albright v. Sussex County L. & P. Commission, 68 N. J. Law, 523.

63. P. L. 1901, p. 239, regulating the sale of intoxicating liquors, is not special legislation. Schwarz v. Dover [N. J. Law] 57 Atl. 394.

64. Special charter cities constitute a class by themselves. Ulbrecht v. Keokuk [Iowa] 97 N. W. 1082. Cities under special charter do not belong to any of the classes designated according to population, and a special charter to a city in one of such classes does not divide that class into two classes. Elting v. Hickman, 172 Mo. 237, 72 S. W. 700. A law governing cities operating under special charters is a general law applicable to a valid legislative class of cities. Appleton Waterworks Co. v. Appleton, 116 Wis. 363, 93 N. W. 262; Beck v. St. Paul, 87 Minn. 381, 92 N. W. 328.

65. Classification of urban property, as distinguished from rural, is valid. Stees v. Bergmeier [Minn.] 98 N. W. 648. Alien law is not invalid as operating only on lands outside of cities. Dougherty v. Kubat [Neb.] 93 N. W. 317.

66. "Jurors summoned in criminal cases" as distinguished from other jurors is a reasonable classification. Jackson v. Baehr, 138 Cal. 266, 71 Pac. 167. Jury law applying only to counties of over a certain population is valid. Turner v. State [Tenn.] 69 S. W. 774.

Opticians and regular physicians may properly be classified separately. Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190. An act regulating the requirements of those who charge for healing or treating the afflicted is void. Patients have a right to the use of less skill in treatments than that required of a licensed physician. State v. Biggs, 133 N. C. 729.

Dentistry law is not invalid as class legislation. Gothard v. People [Colo.] 74 Pac. 890.

Barber law applies equally to all cities and is valid. State v. Sharpless, 31 Wash. 191, 71 Pac. 737. Sunday law prohibiting the business of barber-shops not connected with a hotel is valid and not an arbitrary classification. State v. Sopher, 25 Utah, 318, 71 Pac. 482, 60 L. R. A. 468; State v. Sharpless, 31 Wash. 191, 71 Pac. 737.

Journeyman plumbers in cities of over

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as being unconstitutional and improper,[68] are the subject of discussion in cases cited.

Local option laws.—Local option laws are valid and not within the objection of being local or special laws.[69] It is not essential to the uniform operation of the law that it apply to every person and every foot of territory in the state.[70]

10,000 population having a system of waterworks to take out license, master plumbers excepted. State v. Justus [Minn.] 97 N. W. 124.

Merchants' act concerning checks by merchants for wages of coal operatives. Dixon v. Poe, 159 Ind. 492, 65 N. E. 513, 60 L. R. A. 308.

Peonage law is void as subjecting laborers and renters to penalties for breach of contract, not imposed on other classes of citizens, also as denying them the equal protection of the laws. Peonage Cases, 123 Fed. 671.

Justices of the peace constitute one distinct class of judicial officers, but a classification into "justices in cities of the first class" is unconstitutional. Love v. Liddle, 26 Utah, 62, 72 Pac. 185.

67. An act applying to "insane criminals" not invalid as a special law. Napa State Hospital v. Yuba County, 138 Cal. 378, 71 Pac. 450. The enactment of laws applying to railroads and not to other corporations is pursuant to a reasonable classification. Froelich v. Toledo & O. C. R. Co., 24 Ohio Circ. R. 359. A law affecting the revenue of cities of two classes is a general law, and not a special one amending the general revenue law. Murphy v. Louisville, 24 Ky. L. R. 1574, 71 S. W. 934. A curative act authorizing the issuance of bonds notwithstanding some irregularities is not invalid because applying to only one county. Givens v. Hillsborough County [Fla.] 35 So. 88. "Act to provide for the relief and employment of the poor" is not unconstitutional as being local, as it includes all counties, though it excepts cities from its operation. Rose v. Beaver County, 204 Pa. 372.

Building associations properly classified apart. Chadron L. & B. Ass'n v. Hayes [Neb.] 95 N. W. 812. Exemption of building societies from an act relating to corporations formed for pecuniary profit does not invalidate the act. People v. Butler St. Foundry & Iron Co., 201 Ill. 236, 66 N. E. 349.

Insurance: Classification between old line insurance companies and those doing business on the assessment plan is valid. Jenkins v. Covenant M. L. Ins. Co., 171 Mo. 375, 71 S. W. 688.

Cigarette law is not invalid as not applying to jobbers doing an interstate business with customers out of the state. Cook v. Marshall County, 119 Iowa, 384, 93 N. W. 372. An act requiring candidates to be chosen by one ward to be nominated without delegates, and those by two or more wards by delegates in convention, is not void as being special. Hopper v. Stack [N. J. Law] 56 Atl. 1. Act not invalid as failing to provide for a separation of neglected from delinquent children. Ex parte Loving [Mo.] 77 S. W. 508. Separate schools for white and colored children are not against the constitutional requirement of "a uniform system of public schools." Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274. Imposing a license fee on the right to do business with a vehicle by an owner thereof who milks over five cows and exempting others is not an unreasonable classification of dairies. State v. McKinney [Mont.] 74 Pac. 1095.

68. People v. Windholz, 86 N. Y. Supp. 1015. A law classifying school districts, neither according to the common law classification of municipalities, nor any method of classification that is germane to the purposes of the act, is unconstitutional as being a local and special act. Riccio v. Hoboken [N. J. Err. & App.] 55 Atl. 1109. An act reorganizing boards of chosen freeholders is rendered special and therefore unconstitutional by the requirement that proceedings for its adoption in any county should be initiated by the existing board within three weeks from the passage of the act. Renner v. Holmes, 68 N. J. Law, 192. An act applying "to such counties as had, at the time of its passage, spent $7,000 for courthouse purposes. Hetland v. Board of Com'rs, 89 Minn. 492, 95 N. W. 305. An act requiring a majority in all counties except those of the first class. Lane v. Otis, 68 N. J. Law, 656. Authorizing **repurchase** of waterworks by cities of over 10,000 population. Thomas v. St. Cloud [Minn.] 97 N. W. 125. A trust statute exempting those dealing in articles, the cost of which is chiefly made up of wages, is void as class legislation and special. People v. Butler St. F. & I. Co., 201 Ill. 236, 66 N. E. 349. An act authorizing trust companies to be administrators in cities of the second class is void. Schumacher v. McCallip, 69 Ohio St. 500, 69 N. E. 986. Justices to receive no fees from county, unless warrants were issued with advice of district attorney, invalid. Maricopa County v. Burnett [Ariz.] 71 Pac. 908.

The Flag law, prohibiting its use as an advertisement on merchandise, but not in newspapers, stationery, jewelry, etc., is void. People v. Van de Carr, 91 App. Div. [N. Y.] 20.

69. In re O'Brien [Mont.] 75 Pac. 196; Ex parte Handler [Mo.] 75 S. W. 920; State v. Handler [Mo.] 76 S. W. 984. Local option law not invalid. Lloyd v. Dollisin, 23 Ohio Circ. R. 571. The classification of prohibition districts is a valid and proper one. Crane v. Waldron [Mich.] 94 N. W. 593. Act prohibiting and punishing the keeping of "blind pigs" in prohibition districts is valid. State v. Stoffels, 89 Minn. 205, 94 N. W. 675. Blind pig law, valid. Crane v. Waldron [Mich.] 94 N. W. 593. A prohibitory statute as to liquors is not in contravention of the U. S. constitution, as to a dealer or manufacturer on the ground that it deprives him of his property without due process of law, the sale or manufacture of intoxicating liquors not being a matter of right. August Busch & Co. v. Webb, 122 Fed. 655.

70. A local option law applicable to all municipal corporations is not invalid as not being applicable to portions of the state out-

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County affairs.—Laws regulating the internal affairs of counties usually come within constitutional prohibition, as being special,[71] but they will not be construed as so doing if such construction can be avoided.[72] No law must extend the term of any public officer after his election or appointment.[73]

Municipalities.—Special laws incorporating cities or towns or changing their charters are forbidden;[74] also local laws extending or amending the charters of private municipal corporations.[75] Limits of a city are not to be enlarged or contracted, except by a general law.[76] The provisions of a city charter are subject to and must be in harmony with the general laws of the state.[77] A law imposing the same duties and conferring the same rights as to free public schools upon any constitutional class of municipalities is general in the constitutional sense.[78]

In New York, a special act may create a school district, that being a municipal corporation.[79]

Taxation.—The test of the constitutionality of tax laws is whether the tax was proportional and reasonable.[80] Taxation cannot be authorized for other than county and municipal purposes.[81] Acts imposing taxes must operate uniformly on the same class of subjects within the state; property must be taxed according to its value,[82] and levied by general laws.[83] Special laws for the "assessment and

side of municipalities. Lloyd v. Dollisin, 23 Ohio Circ. R. 571. Local option law is not unconstitutional, as religious discrimination against Jews in their use of wine as a beverage in their mode of worship, nor in favor of those favoring prohibition and those not. Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766; August Busch & Co. v. Webb, 122 Fed. 655.

71. The building of a courthouse is "county business" and a law regulating same is local or special and invalid. Board of Com'rs of Newton County v. State, 161 Ind. 616, 69 N. E. 442.

72. Laws regulating the administration of criminal law in certain counties is not special in that it regulates the internal affairs of those counties. State v. Taylor, 68 N. J. Law, 276. "An act to authorize a certain district to issue bonds to erect a school building" is valid. State v. Brock, 66 S. C. 357; State v. Van Huse [Wis.] 97 N. W. 503.

73. Act as to judges of Cook county. People v. Knopf, 198 Ill. 340, 64 N. E. 842, 1127.

74. City of Oak Cliff v. State [Tex. Civ. App.] 77 S. W. 24; Sanford v. Tucson [Ariz.] 71 Pac. 903.

75. Little v. State, 137 Ala. 659.

76. Conklin v. Hutchinson, 65 Kan. 582, 70 Pac. 587.

77. Ex parte Loving [Mo.] 77 S. W. 508. The supplement to "Act to regulate elections," known as "Primary Election Law," applies to general elections only and is not invalid as a "special." Hopper v. Stack [N. J. Law] 56 Atl. 1. A provision in an act regarding public improvements exempting sidewalks therefrom is valid. Gage v. Chicago, 203 Ill. 26, 67 N. E. 477. An act amending charter of a city is a local bill and within the prohibition that no local bill shall embrace more than one subject which shall be expressed in the title. City of Rochester v. Bloss, 173 N. Y. 646, 66 N. E. 1105.

78. "An act to establish a system of public instruction" is not unconstitutional, because its provisions as to schools in cities differ from the provisions in other municipalities. Riccio v. Hoboken [N. J. Law] 54 Atl. 801.

79. Board of Education of Union Free School Dist. No. 6 v. Board of Education, 76 App. Div. [N. Y.] 355.

80. A special assessment imposed, in addition to a general tax, without an equivalent in benefit, is void. White v. Gove, 183 Mass. 333, 67 N. E. 359.

81. Potter v. Lainhart [Fla.] 33 So. 251; Elting v. Hickman, 172 Mo. 237, 72 S. W. 700.

82. The act, exempting liquors manufactured for export, domestic wines and alcohol, is invalid. State v. Bengsch, 170 Mo. 81, 70 S. W. 710. It is not double taxation to tax billiard tables according to their value and also charge proprietors a license tax. State v. Jones [Idaho] 75 Pac. 819. The statute is uniform upon the same class with the same territorial limits of the authority levying the tax. Elting v. Hickman, 172 Mo. 237, 72 S. W. 700; Gage v. Chicago, 203 Ill. 26, 67 N. E. 477. The imposition of the same tax on cheese manufactured for export, in fact exported, as on other cheese, is not levying a duty or tax on articles exported from a state. Cornell v. Coyne, 192 U. S. 418. The act did not vest in one municipal corporation the taxing powers belonging to another. State v. Byrne, 32 Wash. 264, 73 Pac. 394. Tax title act is a statute of limitations and not open to the objection of taking property without due process of law. St. Mary's Power Co. v. Chandler-Dunbar Water Power Co. [Mich.] 95 N. W. 554; N. W. M. L. Ins. Co. v. Lewis & C. County, 28 Mont. 484, 72 Pac. 982. An act limiting the defenses on application for judgment of sale for nonpayment of special assessments is valid. Downey v. People, 205 Ill. 230, 68 N. E. 807. The requirement of "an equal rate of assessment and taxation" does not apply to an assessment for a local improvement. Kadderly v. Portland [Or.] 74 Pac. 711. The application of a front-foot rule as to property fronting on a city street is constitutional. Franklin v. Hancock, 204 Pa. 110. Mathematical uniformity is not required in assess-

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collection of taxes" are forbidden; but an act authorizing the "levy" of a special tax is not within the prohibition.[84] A mode of special taxation made without reference to benefits received is unconstitutional.[85] Taxation must be kept strictly within the prescribed limit.[86] Tax exemptions are not favored and must be given the most rigid admissible construction.[87] The 14th amendment was not intended to compel states to adopt an iron rule of taxation, or to subvert the systems of the state as to special and general taxation.[88] The law regulating the legal rate of interest applies to contracts only, and not to the rate imposed on delinquent taxes.[89]

Courts.—Special or local laws as to practice or jurisdiction of courts are prohibited;[90] but particular subjects of litigation may necessitate special practice.[91]

Special privileges.—Laws conferring special and exclusive privileges are unconstitutional,[92] as granting monopolies,[93] as denying equal political and civil rights,[94] as being class legisation,[95] as infringing the right of private contracts,[96] as denying the equal protection of the laws,[97] as taking property without due

ments. Crozer v. People, 206 Ill. 464, 69 N. E. 489.

83. Galveston & W. R. Co. v. Galveston, 96 Tex. 520, 74 S. W. 537. The act in so far as it applies to assessments for benefits to lands from local improvements and the creation of liens therefor is constitutional and is applicable to lands, the title of which is vested in the chancellor of the state in trust. Chancellor of State v. Elizabeth, 66 N. J. Law, 687, 688.

84. Sisk v. Cargile [Ala.] 35 So. 114. A law compensating an officer, in counties of over 150,000 population, by salary instead of fees, is not a special law for the assessment or collection of taxes. Verges v. Milwaukee County, 116 Wis. 191, 93 N. W. 44.

85. Edwards v. Bruorton, 184 Mass. 529, 69 N. E. 328.

86. Under a constitutional provision forbidding debts beyond a certain amount, a law may authorize the funding of that part of the issue of bonds, authorized by a prior act, which had not been issued. Sisk v. Cargile [Ala.] 35 So. 114. Act establishing a sanitary district, sustained as within the limit allowed. Keene v. Jefferson County, 135 Ala. 465.

87. Cooper Hospital v. Camden [N. J. Law] 57 Atl. 260. An income tax law exempting private schools, etc., from its operation does not make an illegal discrimination which renders the law invalid as to other persons taxed. Income tax law of Hawaii held valid. The exemption of insurance companies from the income tax law does not make it void as to other companies, since another law imposes a tax on their premiums. W. C. Peacock & Co. v. Pratt [C. C. A.] 121 Fed. 772.

88. An act taxing vehicles, and omitting street cars and automobiles is not invalid. Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. 1027. The 14th amendment to U. S. constitution does not require taxes to be levied in uniform manner on all classes of property. W. C. Peacock & Co. v. Pratt [C. C. A.] 121 Fed. 772. Where notice of an assessment is given, an act (Drainage Law) is not bad as not giving party a day in court. St. Louis S. W. R. Co. v. Grayson [Ark.] 78 S. W. 777.

89. Galveston & W. R. Co. v. Galveston, 96 Tex. 520, 74 S. W. 537.

90. Act as to "indemnity bond on execution," not void because applicable to St. Louis county only. State v. O'Neil Lumber Co., 170 Mo. 7, 70 S. W. 121. Act not invalid because referring to Louisville, the only city of the first class. City of Louisville v. Wemhoff, 25 Ky. L. R. 995, 76 S. W. 876. Act providing that plaintiff need not allege or prove want of contributory negligence is not invalid as a special law. Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935. The classification of circuit courts according to the amount of judges' salary is invalid. Bennett v. State [S. D.] 93 N. W. 643.

91. Suit for divorce is a proceeding sui generis, and a proper subject for legislative classification. Deyoe v. Superior Court, 140 Cal. 476, 74 Pac. 28. The act as to transcripts of judgments for money due from a municipal corporation relates to a class founded on intrinsic differences and therefore not void as a local law relating to practice of courts. Ruperich v. Baehr [Cal.] 75 Pac. 782.

92. Act invalid as granting exclusive powers to certain benevolent associations. Supreme Lodge United Benev. Ass'n v. Johnson [Tex. Civ. App.] 77 S. W. 661.

93. Act regulating the practice of medicine. State v. Biggs, 133 N. C. 729.

94. An act providing that the "judge of the county court shall be learned in the law" is unconstitutional. Wilson v. State, 136 Ala. 114.

95. Act confers powers upon such corporations as were created under the act of 1886, and none others, and upon those corporations whose roads have been peaceably and continuously operated for two years without objection. Perrine v. Jersey Cent. Traction Co. [N. J. Law] 56 Atl. 374.

96. An act providing for weekly payment of wages, and that suit may be brought in name of the state against any person or corporation ten days delinquent, is not within the police powers of the state, infringes right of private contract and deprives of property without due process of law. Republic I. & S. Co. v. State, 160 Ind. 379, 66 N. E. 1005; Greenwich Ins. Co. v. Carroll, 125 Fed. 121.

97. An act prohibiting a physician, who does not practice as his principal and usual

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process of law[98] or as violating other particular constitutional inhibitions.[99] Laws granting public money to individuals or corporations or lending them the credit or money of a county, or appropriating money collected by a city for purposes outside of a city, are invalid.[1]

But the objections must have real and substantial grounds, for as against apparent, fancied or merely incidental discriminations, the laws will be sustained.[2]

Police power.—Many enactments apparently in violation of constitutional provisions or individual rights are sustained as being valid exercises of the police power,[3] even though they may contravene provisions of a private contract between individuals.[4] The well being of the individual,[5] the public health,[6] the

calling, from giving a prescription for liquor as a medicine, is invalid under the "equal protection" clause of the U. S. Constitution. Parks v. State, 159 Ind. 211, 64 N. E. 862.

98. An act as to public waters that dispensed with service of summons—void. Bear Lake County v. Budge [Idaho] 75 Pac. 614.

99. Act to create "free employment agencies" is void as against the constitutional provision that bills for the payment of state salaries shall contain provisions on no other subject. Mathews v. People, 202 Ill. 389, 67 N. E. 28. Act invalid on suspending the power to tax corporations. N. W. M. L. Ins. Co. v. Lewis & C. County, 28 Mont. 484, 72 Pac. 982.

1. Elting v. Hickman, 172 Mo. 237, 72 S. W. 700.

2. An act establishing a waterway as a public highway is not invalid as conferring special privileges, though it may benefit exclusively a certain class. In re Wilder, 90 App. Div. [N. Y.] 262. Act regulating the practice of medicine, not invalid, though it excepts nonresident physicians, legally in practice in their own state. Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190.

Game law held valid. Meul v. People, 198 Ill. 258, 64 N. E. 1106.

Mechanics' lien laws sustained. Chicago Lumber Co. v. Newcomb [Colo. App.] 74 Pac. 786.

Building associations law sustained. Julien v. Model Bldg., L. & I. Ass'n, 116 Wis. 79, 92 N. W. 561.

Insurance law held valid. Supreme Lodge United Benev. Ass'n v. Johnson [Tex. Civ. App.] 77 S. W. 661. Iowa Code 1754, prohibiting combinations between fire insurance companies as to rates, commissions, etc., is not unconstitutional. Greenwich Ins. Co. v. Carroll, 125 Fed. 121. A resolution allowing certain claimants to sue the state is not void as a special act. Com. v. Lyon, 24 Ky. L. R. 1747, 72 S. W. 323. Reimbursing a police officer for damages he paid for killing a child accidentally while in discharge of his duty is not donating public money to an individual. State v. St. Louis, 174 Mo. 125, 73 S. W. 623. Condemning lands for private roads is not taking private property for a private use, the road being open to the public. Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915. An ordinance taxing vehicles using the city streets not invalid for omitting street cars, automobiles and vehicles of nonresidents. Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. 1027. An act allowing counsel fees to complainants in equity cases to be taxed as costs is not unconstitutional as denying equal protection of laws, in that such allowance is not made to successful defendants, nor as local or special in granting an exclusive benefit to an individual. McMullen v. Doughty [N. J. Eq.] 55 Atl. 284. An act providing that a railway employe having power to direct or control another is not the fellow-servant of an employe having no such power, where they are in different departments, is constitutional. Froelich v. Toledo & O. C. R. Co., 24 Ohio Circ. R. 359. Act does not create a monopoly. People v. People's G. & C. Co., 205 Ill. 482, 68 N. E. 950. A change affecting a remedy only impairs no obligation of contract. Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274. Local option law not invalid as giving to electors the power to suspend laws. Lloyd v. Dollisin, 28 Ohio Circ. R. 571. The act concerning special verdicts and submission of special interrogatories, does not abridge the right of trial by jury. Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935. An act validating bonds issued in excess of the prescribed limit. Board of Com'rs of Owen County v. Spangler, 159 Ind. 575, 65 N. E. 743. Search and seizure of liquors when kept to violate law is not against constitutional rights (Blind pig law). Crane v. Waldron [Mich.] 94 N. W. 593. Act is not subversive of private rights. Jenkins v. State [Ga.] 46 S. E. 629; Manning v. Chesapeake & P. Tel. Co., 18 App. D. C. 191; Manley v. Mayer [Kan.] 75 Pac. 550; White v. Mears [Or.] 74 Pac. 931; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; School Dist. No. 3 v. Atzenweiler, 67 Kan. 609, 73 Pac. 927; Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274; Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083, 59 L. R. A. 581; Bowlin v. Cochran, 161 Ind. 486, 69 N. E. 153.

3. An act for the summary punishment of takers of game and fish is valid as inuring to the benefit of the public. Com. v. Hazen, 20 Pa. Super. Ct. 487.

4. Manigault v. S. M. Ward & Co., 123 Fed. 707.

5. Eight-hour law as to miners not invalid as class legislation, the health and safety of employes being the reason for it. State v. Cantwell [Mo.] 78 S. W. 569. Eight-hour law not repugnant to constitution; 14th amendment to Federal constitution. In re Boyce [Nev.] 75 Pac. 1. Act concerning miners and their wages. Com. v. Reinecke Coal Min. Co. [Ky.] 79 S. W. 287. Sunday law, as to barbers, is not an undue restraint of personal liberty. State v. Sopher, 25 Utah, 318, 71 Pac. 482, 60 L. R. A. 468;

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public safety and morals,[7] and the general benefit of the community are the foundation for it.[8] Such laws are limited in their application to the reasons that sustain them.[9]

§ 3. *Subjects and titles. In general.*—The general rule is that laws must contain but one subject and that must be expressed in the title.[10] The object of the constitutional provision is to prevent the combination in one act of several distinct and incongruous subjects, and that the legislature and the people of the state may be fairly advised of the real nature of pending legislation.[11] Such provisions should be liberally construed.[12]

The title of an act should be sufficiently definite and comprehensive to indicate the scope and purpose of the act, and if sufficiently definite for that, it will be held as including all the necessary and incidental legislation required to make the general purpose of the act operative.[13] But the title need not express the purpose of the act,[14] nor be an index of its contents; it need only be enough to reasonably lead to an inquiry into the body of the act.[15] The fact that the title specifies certain necessary incidents to effect the end in view does not limit the act to such matters, and exclude others necessary to its general purpose, un-

State v. Sharpless, 31 Wash. 191, 71 Pac. 787. Act prohibits assignment of wages to become due, and any arrangement relieving employer from paying weekly wage in full is valid. International Text-Book Co. v. Weissinger, 160 Ind. 349, 65 N. E. 521.

6. Act against selling imitation butter. Beha v. State [Neb.] 93 N. W. 155.

7. An act requiring physicians to keep without compensation a registry of births and deaths they attend and file copy in county clerk's office is valid. Com. v. McConnell, 25 Ky. L. R. 552, 76 S. W. 41. An act prohibiting the living with, or off the earnings of, a prostitute. Zenner v. Graham [Wash.] 74 Pac. 1058.

8. An act to prevent waste of gas. Com. v. Trent, 25 Ky. L. R. 1180, 77 S. W. 390.

9. An act valid as a police regulation, and applying only to cities of 2,500 inhabitants does not amend charters nor make a new class of the 4th class cities. Ex parte Handler [Mo.] 75 S. W. 920.

10. School Dist. No. 3 v. Atzenweiler, 67 Kan. 609, 73 Pac. 927; Com. v. Reinecke Coal Min. Co. [Ky.] 79 S. W. 287; State v. Jones [Idaho] 75 Pac. 819; Nystrom v. Clark [Utah] 75 Pac. 378; Zenner v. Graham [Wash.] 74 Pac. 1058; Hecht v. Wright, 31 Colo. 117, 72 Pac. 48; People v. Wright [Colo.] 71 Pac. 365; Corscadden v. Haswell, 88 App. Div. [N. Y.] 158; People v. Auburn, 83 App. Div. [N. Y.] 554; Gaare v. Board of Com'rs [Minn.] 97 N. W. 422; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; Van Duzer v. Mellinger [Neb.] 92 N. W. 738; Julien v. Model Bldg., L. & I. Ass'n, 116 Wis. 79, 92 N. W. 561; Attorney General v. Lowrey, 131 Mich. 639, 92 N. W. 289; Beebe v. Tolerton & S. Co., 117 Iowa, 593, 91 N. W. 905; Manley v. Mayer [Kan.] 75 Pac. 550; Herbert v. Baltimore County Com'rs, 97 Md. 639; Knights Templars' & M. L. Ind. Co. v. Jarman, 187 U. S. 197, 47 Law. Ed. 139; Potter v. Lainhart [Fla.] 33 So. 251; State v. Hall, 109 La. 290; Jackson v. State, 136 Ala. 96; Ellis v. Miller, 136 Ala. 185; Brass v. State [Fla.] 34 So. 307; Weber v. Com., 24 Ky. L. R. 1726, 72 S. W. 30; Shively v. Lankford, 174 Mo. 535, 74 S. W. 835; Cox v. Hannibal & St. J. R. Co., 174 Mo. 588, 74 S. W. 854; Com. v. McConnell, 25 Ky. L. R. 552, 76 S. W. 41; Ex parte Hernan [Tex. Cr. App.] 77 S. W. 225; Arbuckle Bros. v. McCutcheon [Tenn.] 77 S. W. 772; Commissioners of Queen Anne's County v. Com'rs of Talbot County [Md.] 57 Atl. 1; Sayer v. Brown [Ga.] 46 S. E. 649; Price v. Board of Liquor License Com'rs [Md.] 57 Atl. 215; Ex parte Loving [Mo.] 77 S. W. 508; Huyser v. Com., 25 Ky. L. R. 603, 76 S. W. 174; Com. v. Barney, 24 Ky. L. R. 2352, 74 S. W. 181; Elting v. Hickman, 172 Mo. 237, 72 S. W. 700; Murphy v. Louisville, 24 Ky. L. R. 1574, 71 S. W. 934; State v. Bengsch, 170 Mo. 81, 70 S. W. 710; Little v. State, 137 Ala. 659; State v. De Hart, 109 La. 570; Toney v. Macon [Ga.] 46 S. E. 80; Stapleton v. Perry, 117 Ga. 561; Dallis v. Griffin, 117 Ga. 408; State v. McKinney [Mont.] 74 Pac. 1095; Chicago Lumber Co. v. Newcomb [Colo. App.] 74 Pac. 786; Beach v. Van Detten, 139 Cal. 462, 73 Pac. 187; State v. Banfield, 43 Or. 287, 72 Pac. 1093; State v. Sharpless, 31 Wash. 191, 71 Pac. 737; State v. Courtney, 27 Mont. 378, 71 Pac. 308; Jackson v. Baehr, 138 Cal. 266, 71 Pac. 167; State v. Van Huse [Wis.] 97 N. W. 503; Logan County v. Carnahan [Neb.] 95 N. W. 812; St. Mary's Power Co. v. Chandler-Dunbar W. P. Co. [Mich.] 95 N. W. 554; Richards v. State [Neb.] 91 N. W. 878; Gage v. Chicago, 203 Ill. 26, 67 N. E. 477; Republic I. & S. Co. v. State, 160 Ind. 379, 66 N. E. 1005; Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; Baker v. Kaiser [C. C. A.] 126 Fed. 317; Rose v. Beaver County, 204 Pa. 372; State v. Diamond Paper Mills Co. [N. J. Err. & App.] 53 Atl. 1125; Franklin v. Hancock, 204 Pa. 110. The amendatory act designates the sections of the code it amends, and the title is sufficient. Ross v. Aguirre, 191 U. S. 60.

11. Md. Const. art. 3, § 29. Kafka v. Wilkinson [Md.] 57 Atl. 617.

12. Nat. L. & I. Co. v. Detroit [Mich.] 99 N. W. 880.

13. State v. Coffin [Idaho] 74 Pac. 962; Zenner v. Graham [Wash.] 74 Pac. 1058.

14. State v. Cantwell [Mo.] 78 S. W. 569.

15. Rose v. Beaver County, 204 Pa. 372; Crane v. Waldron [Mich.] 94 N. W. 593; Verges v. Milwaukee County, 116 Wis. 191, 93 N. W. 44.

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less it appears therefrom, either expressly or by necessary implication, that the incidental provisions named were the only ones to be legislated upon in order to effect the one object of the bill, as disclosed by its title.[16] The recital, however, of a number of subjects germane to one object will not vitiate the title as containing a plurality of subjects.[17] It is sufficient if the title expresses substantially the subject. It is not necessary that the most perfect expression should be adopted.[18] It is sufficient if the legislation in the body of the statute is germane to the general subject expressed in the title, the test being whether such legislation is relevant or appropriate to such subject.[19] A law embracing two subjects is invalid, though only one of them is expressed in the title.[20] The title need not contain an abstract of the act nor give its provisions in detail, but it must not be misleading by apparently limiting the enactment to a narrower scope than the body of the act is made to compass, nor be such as to divert attention from the matter contained therein.[21] The word "subject" used in the constitution when referring to the title of an act, does not mean "provision," and where different provisions of a statute refer to the same subject, and have a mutual connection, and are not foreign to the subject expressed in the title, the act is not in violation of the constitutional provision.[22] All the provisions of the act must be germane to the expressed title.[23] An immaterial change in the title of a law, whenever made, is without legal effect,[24] but a change not germane to the subject may render the bill a new one.[25] Various determinations affirming the sufficiency of titles,[26] or declaring their insufficiency.[27]

16. Board of Com'rs of El Paso County v. Board of Com'rs [Colo.] 76 Pac. 368.

17. Mexican Nat. R. Co. v. Jackson [C. C. A.] 118 Fed. 549.

18. An act abolishing the board of police commissioners, and the office of chief of police, and imposing their duties on a single commissioner comes within the single subject "reorganization of the police force." People v. Coler, 173 N. Y. 103, 65 N. E. 956. It is not necessary to include in the title specific reference to the person or officer authorized to conduct the proceedings provided for in the act. Minn. Laws 1902, c. 38, p. 90, authorizing the construction of drainage ditches held to sufficiently express its subject-matter in its title. State v. Crosby [Minn.] 99 N. W. 636.

19. Board of Com'rs of El Paso County v. Board of Com'rs [Colo.] 76 Pac. 368. Kan. Gen. St. 1868, c. 23 and acts amendatory of section 88 thereof, including Laws 1901, c. 128, p. 240, relating to corporations, not invalid because of the narrowness of their titles. Amendments introduced no subjects not germane to title of first act. City of La Harpe v. Elm Tp. G., L., F. & P. Co. [Kan.] 76 Pac. 448. Kansas Laws 1883, c. 34, p. 62, relating to the incorporation and regulation of cities of the first class construed, and its subject held to be sufficiently expressed in its title. City of Leavenworth v. Leavenworth City & Ft. L. Water Co. [Kan.] 76 Pac. 451. Sections 18 and 19, Colo. Sess. Laws 1902, pp. 47, 48, c. 3, entitled "An act in relation to revenue," which provide for the payment of an annual tax by liquor dealers, are within the title, since the said sections are for the purpose of raising revenue and not for the regulation of the liquor traffic. Parsons v. People [Colo.] 76 Pac. 666.

20. City of Shreveport v. Tidwell [La.] 36 So. 312; Nat. L. & I. Co. v. Detroit [Mich.] 99 N. W. 380.

21. Kafka v. Wilkinson [Md.] 57 Atl. 617.

22. Mexican Nat. R. Co. v. Jackson [C. C. A.] 118 Fed. 549.

23. McKnight v. McDonald [Wash.] 74 Pac. 1060; Morris v. State, 117 Ga. 1; Stapleton v. Perry, 117 Ga. 561.

24. A verbal error in a title causing no doubt, or ill effect, is not to be regarded. Richards v. State [Neb.] 91 N. W. 878. The change of a general repealing clause to one repealing the amended law is immaterial. Union Pac. R. Co. v. Sprague [Neb.] 95 N. W. 46.

25. People v. Loomis [Mich.] 98 N. W. 262.

26. **Game:** A "Game" law, including beasts, fowl, and fish, is a proper enactment as on one general subject. McMahon v. State [Neb.] 97 N. W. 1035. Act concerning "fish and game" contains but one subject. Ah King v. Police Court, 139 Cal. 718, 73 Pac. 587. An act "to acquire rights of fishing common to all fresh-water lakes in certain counties, to acquire lands adjoining thereto for public use and enjoyment therewith and to regulate the same" is valid. Albright v. Sussex County L. & P. Commission, 68 N. J. Law, 523. "Game, wild fowl and birds" includes not merely game birds but all birds ferae naturae. Meul v. People, 198 Ill. 258, 64 N. E. 1106.

Criminal law: Embezzlement is embraced in larceny. Graves v. People [Colo.] 75 Pac. 412. "An act to amend the Penal Code relating to receiving deposits in insolvent banks" covers any person or corporation so receiving "deposits." State v. Leland [Minn.] 98 N. W. 92. "An act to revise, amend and codify the statutes in rela-

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Partial invalidity.—Where there are two subjects in the body of an act and

tion to crimes and their punishments" covers the Cigarette Law. Cook v. Marshall County, 119 Iowa, 384, 93 N. W. 372. Under "An act to amend the Penal Code" the authorization of a suit to recover commissions withheld by a tax collector is within the title, though it is not a criminal statute. Butte County v. Merrill, 141 Cal. 396, 74 Pac. 1036. The subject-matter of Colorado Session Laws 1901, p. 159, c. 65, relating to the sale of intoxicating liquors is clearly expressed in the title, and the act is valid. Smith v. People [Colo.] 75 Pac. 914. "Act to punish pickpockets." State v. Dunn, 66 Kan. 483, 71 Pac. 811.

Municipalities: "Act incorporating village of Fairview." Payne v. Grosse Pointe Tp. [Mich.] 96 N. W. 1077. A law authorizing counties "to refund their outstanding indebtedness" need not indicate in its title the character of the indebtedness. Walling v. Lummis [S. D.] 92 N. W. 1063. Colo. Laws 1899, p. 359, c. 144, providing for the establishment of Teller county not repugnant to Const. art. 5, § 21. Board of Com'rs of El Paso County v. Board of Com'rs [Colo.] 76 Pac. 368. "An act concerning town officers," which gives justice powers to town clerk and regulates procedure before him, is valid as embracing but the one subject in the title. Baltimore & O. R. Co. v. Whiting, 161 Ind. 223, 68 N. E. 266. "Act concerning town officers." Peelle v. State, 161 Ind. 378, 68 N. E. 682. "An act to incorporate the city of Franklin, in Venango County," is as general as possible and includes the entire range of boundaries, organization, functions and powers of the city. City of Franklin v. Hancock, 204 Pa. 110. An act to amend part of an act entitled "An act to provide for the organization, government and powers of cities of the second class having more than 5,000 inhabitants. City of Beatrice v. Edminson [C. C. A.] 117 Fed. 427.

Building Association Law contains but one subject which is in the title. Chadron L. & Bldg. Ass'n v. O'Linn [Neb.] 95 N. W. 368.

Dentistry Law is valid as being covered by its title. Gothard v. People [Colo.] 74 Pac. 890.

Aliens: Act to "restrict nonresident aliens in their right to acquire and hold real estate," covers a power to hold city property. Dougherty v. Kubat [Neb.] 93 N. W. 317.

Gas companies: "An act in relation to gas companies" is not invalid because the title does not refer to the merging of the companies, that being a germane subject. People v. People's G. & C. Co., 205 Ill. 482, 68 N. E. 950.

Highways: "An act concerning gravel and macadamized road." The various provisions are embraced in the title. Bowlin v. Cochran, 161 Ind. 486, 69 N. E. 153.

Commerce: "Act defining transient merchants" with many regulations, and imposing license and penalty for violation is valid. Levy v. State, 161 Ind. 251, 68 N. E. 172.

Waterworks: "An act to secure the purity of the public supplies of potable waters in this state." State v. Diamond Paper Mills Co. [N. J. Err. & App.] 53 Atl. 1125.

27. In re Mansfield, 22 Pa. Super. Ct. 224; McNeeley v. South Penn Oil Co., 52 W. Va. 616; People v. Howe, 177 N. Y. 499, 69 N. E. 1114; Wabash R. Co. v. Young [Ind.] 69 N. E. 1003; City of Rochester v. Bloss, 77 App. Div. [N. Y.] 28; Wenk v. New York, 82 App. Div. [N. Y.] 584; Corscadden v. Haswell, 82 N. Y. Supp. 347; Kelly v. Pratt, 41 Misc. [N. Y.] 31; Spaulding Logging Co. v. Independence Imp. Co., 42 Or. 394, 71 Pac. 132; Hearn v. Louttit, 42 Or. 572, 72 Pac. 132; State v. Brown [Mont.] 74 Pac. 366.

Bridge: Louisiana Acts 1902, No. 201, p. 378, and Acts 1898, No. 158, p. 295, relating to the building of a certain bridge, violates the constitution (art. 31) since their objects are not expressed in their titles. City of Shreveport v. Tidwell [La.] 36 So. 312.

Procedure: "An act to provide a 'uniform procedure' for the enforcement of all laws relating to fish, game and birds, and for the recovery of penalties for violation thereof" does not cover section 17 thereof, which imposes and increases penalties; section 17 therefore is unconstitutional. Hawkins v. American Copper Extraction Co. [N. J. Law] 54 Atl. 523. The act of Michigan (Pub. Acts 1895; Act No. 186, p. 348, Comp. Laws 1897, § 10188) relating to testimony in chancery cases does not violate the constitutional provision (Const. art. 4, § 20) that no act shall contain more than one subject, which shall be expressed in its title, since it has but one general object, to which every provision therein relates. Hughes v. Love [Mich.] 98 N. W. 977. The title of "An act concerning district courts" cannot constitutionally support a change in the relative rights of landlord and tenant. The act gave a right of re-entry and removal of the tenant holding over after default in the rent. George Jonas Glass Co. v. Ross [N. J. Law] 53 Atl. 675. "Limitation of actions in certain cases." Ellinger v. Com. [Va.] 45 S. E. 807.

Poor Laws: "An act providing for the relief of needy, sick, injured, and in case of death, burial of indigent persons whose legal place of settlement is unknown," is unconstitutional as giving no notice to counties that have not county almshouses of the burdens imposed upon them by the act. Colley Tp. Overseers of Poor v. Sullivan County, 22 Pa. Super. Ct. 482; Dailey v. Potter County, 203 Pa. 593.

Crimes: "An act relating to crimes and punishments and proceedings in criminal cases" does not cover bastardy proceedings, they being civil. State v. Tieman, 32 Wash. 294, 73 Pac. 375. An act "providing for the punishment of abortion" does not cover provisions against those who advise its commission. State v. Fields [S. C.] 46 S. E. 771.

Incorporations: An act incorporating a grange, with ordinary corporate powers, does not authorize debts; they would impose a partnership liability on the members. Henry v. Simanton, 64 N. J. Eq. 572. "An act to incorporate the Blooming Grove Park Association" creates a private corporation and is unconstitutional as not expressing the subject of the act in the title, the term "Park" not being applicable to private enclosures enjoyed by a few, nor to a game and fish preserve. Com. v. Hazen, 207 Pa. 52.

Local Improvements: "An act to amend a city charter relative to expenses incident to improvements," where the body of the act legalized all assessments. City of Roches-

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only one of them in the title, the act is void only as to the one not in the title.[28] And conversely the title of an act is not defective because containing matter not legislated on in the body of the act.[29] If the provisions of one title are in conflict with those of another, those of each title must prevail as to matters arising out of the subject-matter of the title.[30] A statute may be valid in part, though a portion of it is invalid because not embraced in the title of the act.[31]

§ 4. *Amendments and revisions. Amendments.*—An amendment may contain any matter germane to the subject-matter of the original act.[32] Where the title of a bill is to amend a particular section of an act, no amendment is permissible which is not germane to the subject-matter of the original section.[33] The discrepancy may render the bill a new one.[34] An amendatory act should indicate its subject by its title, and expressly repeal the section to be amended,[35] but it need not state the date of approval of the act to be amended, if it otherwise clearly identifies it.[36]

Where an act is invalid as an amendatory act, the reference to a prior act may be treated as surplusage, and the act sustained as an independent one on the same subject.[37]

A statute is not invalidated by the fact that it purports to amend a former statute previously repealed by implication.[38]

Reference to act amended.—It is a general requirement that no act shall be revised or amended by mere reference to the title, but the act revised or title amended shall be set forth and published at full length.[39] A law may not be

ter v. Bloss, 173 N. Y. 646, 66 N. E. 1105. Nebraska Act to enforce the payment and collection of delinquent taxes and special assessments on real property (Laws 1903, c. 75, p. 480) contains only one subject which is clearly expressed in its title. Woodrough v. Douglas County [Neb.] 98 N. W. 1092.

Pure Food Law: An act to prevent the use of unhealthy substance in the preparation of food, with provisions applying those who "manufacture, sell or offer to sell," in so far as it applies to sellers who are not manufacturers is void. State v. Great Western C. & T. Co., 171 Mo. 634, 71 S. W. 1011.

28. State v. Kohnke, 109 La. 838. "Act concerning checks by merchants in payment of wages" body of act included "dealers and other persons." Held, applies to merchants only. Dixon v. Poe, 159 Ind. 492, 65 N. E. 518, 60 L. R. A. 308; State v. Courtney, 27 Mont. 378, 71 Pac. 308.

29. Nichols & S. Co. v. Loyd [Tenn.] 76 S. W. 911.

30. People v. Oates [Cal.] 75 Pac. 337.

31. Md. Acts 1902, p. 453, c. 338, relating to insurance, is invalid in so far as it attempts to enact a new section of the code to be known as section 122 B. Rest of the act is valid. Kafka v. Wilkinson [Md.] 57 Atl. 617.

32. Van Duzer v. Mellinger [Neb.] 92 N. W. 738. The act is not invalid as the reenactment of a section of an original act which had been repealed by an intervening act, but it inserts in the amendatory act a provision cognate to the subject thereof. That a like provision was in the original act is immaterial. Stone v. State, 137 Ala. 1; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841.

33. Preston v. Stover [Neb.] 97 N. W. 812. A provision in an amendatory act, repealing an act not connected with the subject of the amendment, is void, and the attempted repeal is a nullity. Where the title to an act states a general subject, coupled with a proposed repeal of laws not within such general subject, the act will be held void as to such attempted repeal, when it is clear that the provisions for the repeal were not the inducement to the general provisions of the act. Laws 1899, p. 300, c. 69, relating to educational lands, construed. State v. Sams [Neb.] 99 N. W. 544.

34. In a bill "to provide for a board of county auditors for Jackson County," the substitution of "Kent" for "Jackson" renders it a new bill. People v. Loomis [Mich.] 98 N. W. 262.

35. Godwin v. Harris [Neb.] 98 N. W. 439.

36. Stone v. State, 137 Ala. 1.

37. State v. Scott, 32 Wash. 279, 73 Pac. 365.

38. Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274.

39. Mankin v. Pa. Co., 160 Ind. 447, 67 N. E. 229; Sanchez v. Fordyce, 141 Cal. 427, 75 Pac. 56. A reference to a law by chapter and volume is not such a recital of the title or substance as is required in amendatory acts. Memphis St. R. Co. v. State, 110 Tenn. 598, 75 S. W. 730. An amending act is void if not setting out in its title the title of the act amended. Hendershot v. State [Ind.] 69 N. E. 679. It is a sufficient compliance with a constitutional provision that no act shall be amended by reference to its title only, but that the sections amended shall be reenacted and published at length, if the section amended is set forth at length, with such reference to the old law as will show for what the new law is substituted. Sections not amended need not be published in full. Local option law of Michigan (Pub.

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amended by reference to its title only, but an original act on the same subject-matter and referring to the prior act is not amendatory and not within the prohibition.[40] A complete original enactment covering the whole subject to which it relates may incidentally modify a previous statute,[41] but a law which is complete in itself and capable of enforcement will not be construed as an amendment to statutes with which it may conflict.[42]

Effect.—Where a section of a statute is amended by a new act containing the entire section amended, the section so amended must be construed as though introduced into the place of the repealed section in the original act.[43] An unconstitutional amendatory act has no effect on the act sought to be amended,[44] particularly if there is no express repealing clause.[45] An amendment does not repeal an act except in so far as it is inconsistent with the amendment.[46] When a particular section of a statute is amended by retaining some of its provisions without change, and complete in themselves, and omitting others which in no way affect the parts retained, and there is no express repeal of the original sections, the retained provisions will be deemed to have continued in force from their first enactment, and only the omitted ones to be repealed by the amendment.[47] When an amendatory act by its express terms does not apply to proceedings instituted before it took effect, in such proceedings all of the provisions of the original act are to be enforced as though not amended.[48] The amendment of a statute to cover a particular case is not a conclusive admission that it did not originally cover that case.[49]

Revisions.—Revisions of laws are usually required to re-enact and publish at length the laws as revised.[50] An act re-enacted into a subsequent revision has impressed upon it all the limitations imposed by its original title.[51]

Identification.—Where an act amended is identified as the constitution requires, and it is not certain what act is amended, the court will resort to other

Acts 1899, p. 275, No. 183) not in contravention of Const. art. 4, § 25. People v. Shuler [Mich.] 98 N. W. 986.

40. Sisk v. Cargile [Ala.] 35 So. 114. An act adding an entire section to the charter of a city, whereby territory described therein is added to the city, is not an amendment requiring a republishing of the whole charter. City of Oak Cliff v. State [Tex.] 79 S. W. 1.

41. De France v. Harmer [Neb.] 92 N. W. 159; Weston v. Ryan [Neb.] 97 N. W. 847; Eaton v. Eaton [Neb.] 92 N. W. 995. An act authorizing an additional levy to pay certain bonds is an original act and not an amendment of an existing law by its title only. Sisk v. Cargile [Ala.] 35 So. 114; City of Oak Cliff v. State [Tex. Civ. App.] 77 S. W. 24. A supplemental act, not written as an act amending a prior law, need not reproduce the prior act in extenso. Dehon v. Lafourche Basin Levee Board, 110 La. 767; State v. Scott, 32 Wash. 279, 73 Pac. 365. Words added to a statute need not be set out in full in the prefatory clause and again in the body of the act as amended. Cox v. Hannibal & St. J. R. Co., 174 Mo. 588, 74 S. W. 854.

42. Nebraska act to enforce payment of delinquent taxes (Laws 1903, c. 75, p. 480) is not open to the objection that it amends other laws without referring to them. Woodrough v. Douglas County [Neb.] 98 N. W. 1092.

43. Epperson v. N. Y. Life Ins. Co., 90 Mo. App. 432. A statute as amended is to be regarded, as to matters thereafter occurring, as if such section, instead of the one blotted out, had been a part of the original act. Russell v. State, 161 Ind. 481, 68 N. E. 1019; Manley v. Mayer [Kan.] 75 Pac. 550.

44. Barker v. State, 118 Ga. 35.

45. People v. Butler St. Foundry & Iron Co., 201 Ill. 236, 66 N. E. 349.

46. Wilson v. Head, 184 Mass. 515, 69 N. E. 317.

47. City of Fargo v. Ross, 11 N. D. 369, 92 N. W. 449.

48. In re Docker-Foster Co., 123 Fed. 190.

49. Rural Independent School Dist. No. 10 v. New Independent School Dist., 120 Iowa, 119, 94 N. W. 284.

50. An act amending 108 sections of the penal code is not a revision requiring republication of entire act as revised. People v. Oates [Cal.] 75 Pac. 337. The alteration of 58 out of 234 sections of an act is an amendment, and not a revision requiring a republication of entire act. Beach v. Von Detten, 139 Cal. 462, 73 Pac. 187.

51. State v. Nat. Biscuit Co. [N. J. Law] 54 Atl. 241. A statutory provision originally enacted under the title of "An act to prevent fraudulent elections in incorporated companies and to facilitate proceedings against them" has the limitation imposed by such title impressed upon it, notwithstanding its subsequent re-enactment in a revision under "An act concerning corporations." Id.

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means to determine; but if not so identified the court will not so resort, though the act in question would thereby be ascertained without question.[52]

§ 5. *Interpretation. In general.*—Statutes must be reasonably construed and in a manner not repugnant to common sense.[53] Where there are two reasonable constructions, that one should be chosen which sustains the validity of the statute.[54] All acts of legislature not clearly in violation of the constitution are to be adjudged valid.[55] If possible, every legislative act must be given effect by construction.[56] If the sense of a statute be doubtful, such construction should be given to it, if possible, as will not conflict with the general principles of law.[57]

Every presumption is in favor of validity.[58] Lien statutes will be construed liberally to further their efficacy and equity, when it is clear that the lien has been honestly earned, and the lien claimant is within the statute.[59] The state, including its political subdivisions, is not to be considered within the purview of a statute, however general and comprehensive its terms, unless expressly named therein.[60] Every statute is understood to contain by implication, if not by its express terms, all such provisions as may be necessary to effectuate its object and purpose, or to make effectual the powers which it grants, and also all such collateral and subsidiary consequences as may be fairly and logically inferred from its terms.[61] Unintentional omissions and apparent oversights will be supplied by implication and intendment.[62] Words cannot be changed or inserted unless it is necessary to do so in order to make that clear and intelligible which would otherwise be ambiguous or meaningless.[63] The rules for statutory interpretation as to rights apart from remedy are the same in law and equity.[64] Where words

52. Mankin v. Pa. Co., 160 Ind. 447, 67 N. E. 229.

53. Von Diest v. San Antonio Traction Co. [Tex. Civ. App.] 77 S. W. 632.

54. Rosin v. Lidgerwood Mfg. Co., 89 App. Div. [N. Y.] 245.

55. The act conferring upon a justice of the supreme court the power to appoint park commissioners is not unconstitutional, under art. 17, requiring that such justice "shall hold no other office." Ross v. Board of Chosen Freeholders [N. J. Err. & App.] 55 Atl. 310; Lloyd v. Dollisin, 23 Ohio Circ. R. 571; Com. v. Barney, 24 Ky. L. R. 2352, 74 S. W. 181; State v. Nolan [Neb.] 98 N. W. 657; In re Boyce [Nev.] 75 Pac. 1; Ex parte Loving [Mo.] 77 S. W. 508; Levy v. State, 161 Ind. 251, 68 N. E. 172. "An act enlarging a city" is not open to the objection of allowing taxation without representation, or denying equal protection of the laws, because of an interval which is inevitable between the annexation and elections. Toney v. Macon [Ga.] 46 S. E. 80.

56. "An act to provide for the widening of roads and streets in townships" is a general act; an empowering and not merely a regulating statute. Slocum v. Neptune Tp., 68 N. J. Law, 595.

57. Old Dominion B. & L. Ass'n v. Sohn [W. Va.] 46 S. E. 222.

58. Something more than mere irregularities and improprieties in declaring the result of an election, adopting a constitutional amendment, must appear to warrant a court in setting aside the solemn acts of legislature and governor after sixteen years acquiescence therein. Weston v. Ryan [Neb.] 97 N. W. 347; State v. Polk County Com'rs, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161. Gen. Laws Minn. 1901, c. 258, relating to the drainage of wet lands, held valid, notwithstanding the fact that it does not declare that the public health, convenience and welfare are intended to be promoted thereby, and no provision is made for the determination by the county commissioners of the question whether or not they will be in a particular case. Will be presumed that the legislature so intended. Id.

59. A. L. & E. F. Goss Co. v. Greenleaf, 98 Me. 436.

60. Public buildings not included within Maine mechanic's lien law (Rev. St. 1883, c. 91, § 30 et seq.). What are public buildings. A. L. & E. F. Goss Co. v. Greenleaf, 98 Me. 436.

61. State v. Polk County Com'rs, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161. Duties imposed by implication are only those necessarily connected with the subject to which the statute relates. General statute which makes it the duty of an assignee of a mortgage to release it does not, by reason of the imposition of that duty alone, authorize him to record it [Webb's Ann. St. Kan. vol. 2, c. 120, § 9, construed]. First Nat. Bank v. Nat. Live Stock Bank, 13 Okl. 719, 76 Pac. 130.

62. Such implications are as much a part of the statute as what is distinctly expressed therein. State v. Polk County Com'rs, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161.

63. State v. Armour Packing Co. [N. C.] 47 S. E. 411. Louisiana Acts 1902, No. 201, p. 378, relating to the construction of a bridge, construed. City of Shreveport v. Tidwell [La.] 36 So. 312.

64. A court of equity cannot enlarge the scope of a statute so as to include persons or subject-matter which the legislature did

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have a fixed meaning at common law and the statute nowhere defines them, they will be given their common-law meaning.[65]

Who may invoke interpretation.—Courts will not inquire into the constitutionality of statutes at the instance of those who are not affected thereby;[66] nor will the validity of an enactment be determined if not necessarily involved in the case.[67] In advance of an attempt to exercise controverted powers, the courts will not pass on the validity of separate clauses, which, if void, would not invalidate the whole act.[68]

Permissive acts.—The constitutionality of permissive acts, the proceedings under which are merely reported to congress for action, cannot be considered.[69]

Aids to interpretation. The title.—The title is no part of an act, but it may be used as a key to interpret where intent is otherwise ambiguous;[70] but the compiler's headlines to a chapter are no part of the title of an act.[71]

Marginal notes.—Marginal notes in the Revised Statutes (U. S.) may be referred to on questions of construction, as indicating the intention of congress not to alter by revision the substantial provisions of previous acts.[72]

Legislative history.—Resort may be had to the legislative history of a statute to determine legislative intent.[73]

Contemporary interpretation.—Where the meaning of an act is doubtful, either by ambiguity of expression or inconsistency arising from several acts on the same subject, contemporary interpretation should be considered in arriving at true meaning.[74] Where a statute regulating the manner of conducting an industry is ambiguous, courts will receive as an aid to the interpretation the construction which practical persons engaged in the industry generally place upon it.[75]

Official construction.—The long continued practice of officers whose duty it is to construe and execute a statute is strong evidence of its meaning, but is not controlling.[76]

Surrounding conditions.—In cases of doubtful construction, courts may look into the conditions surrounding the subject-matter when the act was passed; but unambiguous language must be given its full effect.[77]

Original act.—Though the compilers of a Code omitted certain provisions

not intend to include. A. L. & E. F. Goss Co. v. Greenleaf, 98 Me. 436.

65. Word "murder" in U. S. Statutes. Welty v. U. S. [Okl.] 76 Pac. 121.

66. Turnquist v. Cass County Drain Com'rs, 11 N. D. 514, 92 N. W. 852.

67. Sayles v. Walla Walla County, 30 Wash. 194, 70 Pac. 256; People v. Miller, 88 App. Div. [N. Y.] 218; W. C. Peacock & Co. v. Pratt [C. C. A.] 121 Fed. 772; Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766; Davidson v. Von Detten, 139 Cal. 467, 73 Pac. 189; In re O'Brien [Mont.] 75 Pac. 196. A party accused of violating a statute is without interest to attack certain of its provisions, which are entirely in the interest of the accused, and left, as to their application, to their own consent. State v. Cucullu, 110 La. 1087.

68. Toney v. Macon [Ga.] 46 S. E. 80.

69. U. S. v. McCrory [C. C. A.] 119 Fed. 861.

70. Rosin v. Lidgerwood Mfg. Co., 89 App. Div. [N. Y.] 245; Schafer v. Schafer [Neb.] 99 N. W. 482; U. S. v. McCrory [C. C. A.] 119 Fed. 861; Cornell v. Coyne, 192 U. S. 418.

71. Zenner v. Graham [Wash.] 74 Pac. 1058.

72. The marginal note reading "Resisting revenue officers rescuing or destroying seized property," the act does not cover resisting an Indian agent searching for spirituous liquors on the reservation. Mackey v. Miller [C. C. A.] 126 Fed. 161.

73. Scouten v. Whatcom, 33 Wash. 273, 74 Pac. 389; State v. St. Louis, 174 Mo. 125, 73 S. W. 623.

74. Director of poor district properly appointed by court of common pleas, and not elected. Com. v. Paine, 207 Pa. 45. United States statutes in regard to second-class mail matter construed [20 Stat. 355, 358; U. S. Comp. St. 1901, p. 2646]. Houghton v. Payne, 24 Sup. Ct. 590, 48 Law. Ed. —.

75. Himrod Coal Co. v. Stevens, 104 Ill. App. 639.

76. People v. Buffalo, 84 N. Y. Supp. 434; Houghton v. Payne, 24 Sup. Ct. 590, 48 Law. Ed. —.

77. An act "granting extra pay to United States volunteers" extends to those enlisted after the act was passed. Clark v. U. S., 37 Ct. Cl. 60.

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of a statute, the court, in construing the statute in the Code, may look to the original for aid in construction, but may not bring any omitted provision forward.[78]

Unambiguous statutes.—When a statute admits of but one meaning, it must be held to mean what it plainly expresses, and it is not permissible to interpret what stands in no need of interpretation.[79] Where language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction;[80] and it is the duty of courts to follow such construction.[81] The meaning which the words of a statute import, if plain and unambiguous, must be conclusively presumed to be the meaning which the legislature intended to convey, though such interpretation may defeat the purpose of the enactment.[82] When the meaning is plain, the statute must be carried into effect according to its language.[83] Statutes should be interpreted according to the most natural and obvious import of their language.[84] The construction must be in accordance with the language employed, if it is not ambiguous.[85] Where the language of a statute is clear and precise, and its meaning is evident, there is no room for construction.[86] Where an enactment is plain and simple, and under no meaning ascribable to the words, can apply to the case in hand, a court cannot add or omit words to make the act cover a casus omissus, though the case is plainly within the mischief sought to be remedied.[87] Plain words and phrases must be taken in their ordinary sense,[88] and are not to be extended beyond their clear import.[89] If the meaning of a statute is doubtful, the consequences will be considered in its construction, but where the meaning is plain, no consequences will be regarded, since to do so would be to assume legislative authority.[90]

Statutes adopted from foreign states.—The enactment or adoption of a statute elsewhere in force is generally presumed to be the adoption of the construction previously given to that statute by the courts whose duty it was to interpret it;[91] but this rule, though generally adopted, is not a binding one.[92]

78. Runnels v. State [Tex. Cr. App.] 77 S. W. 458.

79. The making and filing by a former owner of a stallion of the certificate required by statute (§ 61) does not inure to the benefit of any subsequent owner. Davis v. Randall, 97 Me. 36.

80. Act of 1898 makes an indorser or surety of a bankrupt a creditor. Swarts v. Siegel [C. C. A.] 117 Fed. 13. Md. Acts 1900, p. 923, c. 597, relating to taxation of corporate stock. City of Baltimore v. Allegany County Com'rs [Md.] 57 Atl. 632.

81. Pub. Acts Mich. 1887, p. 345, No. 264, relating to the liability of cities for injuries resulting from defective streets, construed. McEvoy v. Sault Ste. Marie [Mich.] 98 N. W. 1006.

82. State v. Ins. Co. [Neb.] 99 N. W. 36. A sentence imposed without taking testimony as to aggravation and mitigation of the offense, when defendant pleads guilty, is void under the Colorado Statutes (Mills' Ann. St. § 1463), though the offense charged was committed in the presence of the judge imposing the sentence. Smith v. People [Colo.] 75 Pac. 914.

83. Litch v. People [Colo. App.] 75 Pac. 1079.

84. Mills' Ann. St. Colo. §§ 2833, 4403, relating to intoxicating liquors, construed. Litch v. People [Colo. App.] 75 Pac. 1079.

85. N. C. Acts 1901, c. 9, § 91, p. 148, relating to annual franchise tax of corporations, construed. State v. Armour Packing Co. [N. C.] 47 S. E. 411.

86. Houghton v. Payne, 24 Sup. Ct. 590, 48 Law. Ed. —. Exemption applies to all the property acquired prior to the act. In re Assessment of Property of N. W. University, 206 Ill. 64, 69 N. E. 75.

87. An act covering bribery at nominating conventions and elections cannot support an indictment for fraud at a primary election. Under an act prohibiting the influencing of any election officer in the performance of the duties of his office, an indictment may be found for bribing such officer at a primary election. Com. v. Gouger, 21 Pa. Super. Ct. 217; Waldron v. Taylor [W. Va.] 45 S. E. 336.

88. "Committed suicide" applies equally to the sane and insane. Knights Templars' & M. L. Ind. Co. v. Jarman, 187 U. S. 197, 47 Law. Ed. 139.

89. McCarthy v. McCarthy, 20 App. D. C. 195. An act giving a right of action to "minor children" cannot be extended to "grandchildren." Walker v. Vicksburg, S. & P. R. Co., 110 La. 718.

90. "Tax on deposits" held to cover both commercial and savings deposits of savings banks. State v. Franklin County S. B. & T. Co., 74 Vt. 246.

91. Powers and liabilities of municipalities in Indian Territory under Chap. 29 are

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Where a code provision is taken from another state, where it had been construed before such adoption, such construction is persuasive, but not conclusive on the courts of the state adopting the provision.[93] A general reference, in an act, to a code of laws is not an adoption of that code.[94] Where an English statute is adopted by the legislature, the construction put upon it by the English courts prior to the adoption is persuasive in determining the meaning of the language used therein.[95]

State statutes in Federal courts.—State statutes are determinable by state courts, and their interpretation must be followed by the United States courts.[96] Federal courts uniformly follow the construction of the constitution and statutes of a state announced by its highest judicial tribunal, where no question of rights under United States constitution or laws, or of commercial general law is involved.[97]

Enforcement.—A statute not clear and definite as to its enforcement will not be held void unless so imperfect as to be impossible of execution.[98]

Laws in pari materia.—Laws in pari materia are part of a common policy, but not one and the same law;[99] they should be read together.[1] In the passage of each act the legislature will be presumed to have had in mind existing legislation on the same subject and to have shaped its new enactment with reference thereto.[2] Wisconsin law creating a police pension system (Laws 1899, p. 443, c. 265), construed and held that it was intended to apply to all cities of the first class having a paid fire department, although limited to cities having a population exceeding 150,000 instead of those having 150,000 or over. It should be construed in connection with Rev. St. 1898, § 925-1, such being the plain intent of the legislature,[3] and be construed so as to make both effective, and harmonize, un-

the same that such powers in Arkansas were at the time congress made that chapter the law of the territory. Blaylock v. Incorporated Town of Muskogee [C. C. A.] 117 Fed. 125. Ariz. Pen. Code, § 946, relating to a view of the premises by the jury in criminal cases, construed. Elias v. Ter. [Ariz.] 76 Pac. 605. Ariz. Rev. St. 1887, par. 397, subds. 15, 24, relating to county boards of supervisors, construed. Santa Cruz County v. Barnes [Ariz.] 76 Pac. 621. Ariz. Pen. Code, § 933, relating to burden of proof in certain cases, construed. Anderson v. Ter. [Ariz.] 76 Pac. 636. Idaho statute requiring water companies to "furnish water free in case of fire or other necessities," being taken from California, where it had been so construed, includes water for street sprinkling flushing of sewers, etc. Boise City A. H. & C. Water Co. v. Boise City [C. C. A.] 123 Fed. 232; Robinson v. Belt, 187 U. S. 41, 47 Law. Ed. 65; State v. Kohnke, 109 La. 838; Burnside v. Wand, 170 Mo. 531, 71 S. W. 337; Goble v. Simeral [Neb.] 93 N. W. 235.

92. Dixon v. Ricketts, 26 Utah, 215, 72 Pac. 947.

93. F. M. Davis Ironworks Co. v. White, 31 Colo. 82, 71 Pac. 384; State v. Mortensen, 26 Utah, 312, 73 Pac. 562, 633; Ancient Order of Hibernians v. Sparrow [Mont.] 74 Pac. 197. The Illinois statute adopting the statute of limitations of other states as to cause of action arising in those states does not apply to a case where the statute of the foreign state, where the cause of action arose, had not run in favor of the defendant, by reason of his absence from that state. Martin v. Wilson, 120 Fed. 202.

94. State v. De Hart, 109 La. 570.

95. Jarvis v. Hitch, 161 Ind. 217, 67 N. E. 1057.

96. Knights Templars' & M. L. Ind. Co. v. Jarman, 187 U. S. 197, 47 Law. Ed. 139.

97. But the finding by a state court of the terms or title of a statute held unconstitutional is not conclusive upon a Federal court in an action between other parties. City of Beatrice v. Edminson [C. C. A] 117 Fed. 427; Robinson v. Belt, 187 U. S. 41, 47 Law. Ed. 65.

98. Lloyd v. Dollisin, 23 Ohio Circ. R. 571.

99. An act making its provisions cumulative of all the laws now in force does not make the act a part of every other act on the same subject. State v. Laredo Ice Co., 96 Tex. 461, 73 S. W. 951.

1. Logan County v. Carnahan [Neb.] 95 N. W. 812; State v. Royse [Neb.] 98 N. W. 459; Meyer v. Boonville [Ind.] 70 N. E. 146. All acts upon the same general subject-matter must be construed as a part of a single plan, and later statutes are to be considered as supplementary or complementary to earlier enactments. Sections of Nebraska statutes in relation to official bonds (Code Civ. Proc. §§ 29-32 and 643 and Laws 1881, c. 13, p. 95) must be construed together. Barker v. Glendore [Neb.] 99 N. W. 548.

2. Barker v. Glendore [Neb.] 99 N. W. 548.

3. State v. Board of Trustees [Wis.] 98 N. W. 954. The provision of the constitution declaring that the salary of no municipal officer shall be changed after his election or during his term is to be read in con-

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less plainly repugnant.[4] A statute and an act supplemental thereto are, in contemplation of law, one enactment and must be construed together.[5] A statute which would be unconstitutional if standing alone may be helped out by another statute which may be read in connection with it.[6] Constitutional provisions and the laws on the same subject must be construed together.[7]

Acts of same date.—Of two acts identical in substance and bearing same date, the one last passed, according to the legislative journals is the one in force.[8]

Acts of same session.—Where two statutes on the same subject were enacted by the same legislature on different dates, the presumption is that both are operative, unless irreconcilable.[9]

Intention to be reached.—Rules of interpretation should yield to legislative intent, which should always be made effective.[10] Where the language of a statute is of doubtful import, the court may consider the purpose of the act as well as its title.[11] The reluctance of courts to construe a statute harshly must yield to plain and unequivocal indications of legislative intent.[12] In the expression of statutes, the reason and intention of the lawgiver will control the strict letter of the law, where the latter would lead to palpable injustice or absurdity.[13] Legislative enactments are not to be defeated on account of mistakes, omissions or inaccuracies of language, if the legislative intent can be ascertained from the whole act.[14] Where an act contains sections that may be in conflict with a following section, but the intention of the legislature can be arrived at by giving effect to this later section, the conflict will not render the act inoperative.[15]

Whole act to be considered.—The court must if possible give effect to all portions of a statute and yet make the enactment an harmonious whole.[16] All

nection with statute empowering to transfer from one class to another. Gilbert v. Paducah, 24 Ky. L. R. 1998, 72 S. W. 816.

4. Barker v. State, 118 Ga. 85; Twiggs v. State Board of Land Com'rs [Utah] 75 Pac. 729. In construing the District of Columbia Code, the various sections should be read together and harmonized, where the court is satisfied that the literal meaning of apparently inconsistent sections does not convey the intent of congress. Groff v. Miller, 20 App. D. C. 353. An act giving a city a general right to sue and be sued is not in conflict with an act forbidding suits on certain classes of claims until after disallowance of the claim by the city council. Morrison v. Eau Claire, 115 Wis. 538, 92 N. W. 280.

5. Gen. St. N. J. pp. 465, 468. In re Fagan [N. J. Law] 57 Atl. 469. An act explaining the meaning of the words "a majority vote of the legal voters" as used in a previous act, and taking effect immediately on its passage, becomes a part of the original act and governs an election afterwards held thereunder, though such election was called before the explanatory act was passed. Me. Act March 18, 1903, explaining Special Act Feb. 26, 1903, incorporating water district. Fay v. Gardiner Water Dist., 98 Me. 82.

6. A statute imposing a minimum but not a maximum fine may be helped out by a general law as to maximum fines. State v. Pearson, 110 La. 387.

7. The constitutional right to sue must be read with the statute requiring an interest in the suit. Board of Education of Union Free School Dist. v. Board of Education, 76 App. Div. [N. Y.] 355. A constitution "continuing all laws in force until repealed" continues in force all laws not inconsistent with it. State v. O'Neil Lumber Co., 170 Mo. 7, 70 S. W. 121.

8. Derby v. State, 24 Ohio Circ. R. 804.

9. Lincoln School Tp. v. American School Furniture Co., 31 Ind. App. 405, 68 N. E. 301; State v. Faulkner, 175 Mo. 546, 75 S. W. 116.

10. City of Springfield v. Starke, 93 Mo. App. 70; State v. Armour Packing Co. [N. C.] 47 S. E. 411. Statutes will be construed fairly and reasonably and so as to give effect to the intention of the legislature. State v. Polk County Com'rs, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161. Mich. Act relating to taking testimony in chancery cases (Pub. Acts 1895, Act No. 186, p. 348, Comp. Laws 1897, § 10188), construed. Hughes v. Love [Mich.] 98 N. W. 977. Neb. Code Civ. Proc. § 643, and Laws 1881, p. 95, c. 13, relating to actions on official bonds, construed. Barker v. Glendore [Neb.] 99 N. W. 548. Ariz. Pen. Code, § 933, relating to burden of proof in certain cases, construed. Anderson v. Ter. [Ariz.] 76 Pac. 636.

11. Kaufman v. Carter [S. C.] 45 S. E. 211.

12. Goble v. Simeral [Neb.] 93 N. W. 235; Appleton Waterworks Co. v. Appleton, 116 Wis. 363, 93 N. W. 262.

13. Kelley v. Gage County [Neb.] 93 N. W. 194; Parker v. Nothomb [Neb.] 93 N. W. 851.

14. State v. Polk County Com'rs, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161.

15. Hand v. Stapleton, 135 Ala. 156.

16. Noecker v. Noecker, 66 Kan. 347, 71 Pac. 815. The fact that the steps provided for carrying into effect a scheme for the

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parts of a law should have effect rather than any part should perish by construction.[17] In construing a statute, the court will look to the whole act, and the purpose of its makers in its enactment.[18]

All language to be effectuated.—A statute should be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant, and every sentence and word shall be given its ordinary meaning and acceptation.[19] But the legislature cannot in the title of an act use language ordinarily meaning one thing and in the body of the act declare it means the reverse.[20]

Words.—Every word should be given full effect, if possible, and if two possible constructions are warranted, the one more in accordance with the spirit and tenor of the act is to be adopted.[21] Where the constitutionality of an act involves the meaning of a word, any meaning, popular or technical, will sustain it, and the popular sense if broader than the technical one must be used, if it does not restrain or limit the general grant of power.[22] Where one word has been erroneously used in a statute for another, and the context affords means for correction, the proper word will be deemed substituted.[23] But words and language in titles cannot be held to have been inadvertently used and corrected as such solely by reference to the contents of the act.[24]

Avoiding hardship or absurdity.—In the construction of statutes, general terms and language should be so restricted in their application as not to lead to an injustice, oppression, or absurd consequence, clearly not within the intention of the act.[25]

Validating statutes.—A curative act may validate defective proceedings if the defect could have been dispensed with in the enactment of the original act.[26]

regulation of the internal affairs of certain municipalities are to be taken at the next general election is not in itself decisive of the intent that the act should apply only to cities in the designated class when such election is held. Gen. St. N. J. p. 478, establishing board of commissioners to control streets and water supply in certain cities, construed. In re Fagan [N. J. Law] 57 Atl. 469.

17. City of Springfield v. Starke, 93 Mo. App. 70.

18. Com. v. Trent, 25 Ky. L. R. 1180, 77 S. W. 390.

19. Crozer v. People, 206 Ill. 464, 69 N. E. 489.

20. "Moneys deposited out of reach of the treasurer" not deemed to be in the state treasury, though the act so declares. State v. Coffin [Idaho] 74 Pac. 962.

21. The construction may even be against the literal meaning of the words, if that meaning cause an absurdity. Old Dominion B. & L. Ass'n v. Sohn [W. Va.] 46 S. E. 222; Turnquist v. Cass County Drain Com'rs, 11 N. D. 514, 92 N. W. 852.

22. "An act to incorporate the Bloomingdale Grove Park Association" is not unconstitutional as defective in title, and under one of its provisions as to killing of deer, summary punishment may properly be dealt to an offender. Com. v. Hazen, 20 Pa. Super. Ct. 487. "Good behavior" not so uncertain as to render act invalid. Huyser v. Com., 25 Ky. L. R. 608, 76 S. W. 174. "County Seat" in the constitution refers to a legal one, not a de facto one. Presidio County v. Jeff Davis County [Tex. Civ. App.] 77 S. W. 278.

22. White v. Rio Grande W. R. Co., 25 Utah, 346, 71 Pac. 593. "Providing for unlawful levy" means "providing a remedy for unlawful levy." Western Ranches v. Custer County, 28 Mont. 278, 72 Pac. 659. A penalty of 15% for nonpayment of street improvement costs is not a tax; nor interest, though so styled in the statute imposing it. Seaboard Nat. Bank v. Woesten, 176 Mo. 49, 75 S. W. 464. An act providing that it should not apply to bankruptcy cases then pending refers to bankruptcy cases proper and not to suits by trustees to recover a preference. Pond v. N. Y. Nat. Exch. Bank, 124 Fed. 992. "May" used in a premissive, not a mandatory sense. Carlin v. Freeman [Colo. App.] 75 Pac. 26.

24. "Defendants" used for "plaintiffs." Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841.

25. A Chinese woman having lawfully entered the country prior to the passage of the exclusion act, and having married an American citizen, takes the status of her husband and cannot be deported. Tsoi Sim v. U. S. [C. C. A.] 116 Fed. 920; Logan County v. Carnahan [Neb.] 95 N. W. 812. An act cannot be construed so that one state could regulate the conveyance of lands in another state. State v. Clark [Mo.] 76 S. W. 1007. The court will look with disfavor upon a change of construction whereby parties who have contracted with the government on the faith of a former construction may be injured. Houghton v. Payne, 24 Sup. Ct. 590, 48 Law. Ed. —.

26, 27. Givens v. Hillsborough County [Fla.] 35 So. 88.

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The adjudication of invalidity by a court does not prevent curative acts by the legislature.[27]

Punctuation.—The punctuation of an act, or its title, is not controlling in construing to ascertain its real meaning.[28] The grammatical rule that where there are two words in a clause, each capable of being an antecedent, the relative pronoun refers to the latter, will not be applied where the punctuation shows that the pronoun was intended to refer to such antecedents jointly.[29]

Things excepted.—The exception of a single thing from general words shows that the legislature considered that the thing excepted would be within the general clause but for the exception.[30] Where a special act declares that a certain law, with the exception of certain sections, shall not apply to a particular county, the excepted sections are deemed embodied in the special act and are applicable to such county.[31]

The proviso.—The office of the proviso is generally to restrain the enacting clause and excepts something which otherwise would have been within it.[32] The construction given to a statute without a proviso will not apply to it after a proviso has been added.[33] An invalid proviso does not impair balance of the act.[34]

Presumption of legislative knowledge of the law.—When an act that has been judicially interpreted is re-enacted in the same terms, that construction is presumed to have the legislative sanction.[35] The omission, in an act, of powers that the supreme court said existed independently of a similar prior act, cannot be held to deprive the courts of such powers. Legislature is presumed to know of the ruling under the prior act.[36]

General and particular provisions.—The general provisions of an act must yield to subsequent special ones.[37] The several provisions should be construed together and harmonized if possible. If conflicting, general expressions must give way to special and specific provisions.[38]

Mandatory or directory acts.—Statutes providing for summoning jurors are merely directory.[39] A referendum clause is mandatory as to the submission substantially in the manner prescribed; directory as to the time of submission.[40]

Strict or liberal constructions. Statutes changing the common law.—A statute changing the common law should be strictly construed; it modifies or abrogates it no farther than the clear import of its language necessarily requires.[41] An intention to change the rule of the common law will not be inferred from doubtful legislative provisions. The statute must be clear and explicit in that direction.[42] A statute giving a right not afforded by the common law, that right

28. Quotation marks are marks of punctuation. State v. Banfield, 43 Or. 287, 72 Pac. 1093.

29. Seiler v. State, 160 Ind. 605, 67 N. E. 448.

30. Com. v. Summerville, 204 Pa. 300.

31. Gabel v. Williams, 39 Misc. [N. Y.] 489.

32. U. S. v. Macfarland, 18 App. D. C. 120.

33. Markee v. People, 103 Ill. App. 347.

34. Bennett v. State [S. D.] 93 N. W. 643.

35. Crescent Bed Co. v. New Orleans, 111 La. 124; A. L. & E. F. Goss Co. v. Greenleaf, 98 Me. 436. Where congress passes a law in conflict with another, the presumption is it was aware of the previous law and acted in view of it. Lavagnino v. Uhlig, 26 Utah, 1, 71 Pac. 1046. The construction necessarily given to a previous statute must be regarded as impressed upon one which follows it and is derived from it, in which the same collocation of words in the same connection is employed. In re Guggenheim Smelting Co., 121 Fed. 158.

36. Suit money in divorce cases. Hart v. Hart, 31 Colo. 333, 73 Pac. 35.

37. McKnight v. McDonald [Wash.] 74 Pac. 1060.

38. State v. Nolan [Neb.] 98 N. W. 657.

39. State v. Faulkner, 175 Mo. 546, 75 S. W. 116.

40. Albright v. Sussex County L. & P. Commission, 68 N. J. Law, 523.

41. Johnson v. Southern Pac. Co. [C. C. A.] 117 Fed. 462; McCarthy v. McCarthy, 20 App. D. C. 195. "Cars to be equipped with automatic couplers," does not include engines. Johnson v. Southern Pac. Co. [C. C. A.] 117 Fed. 462.

42. Rosin v. Lidgerwood Mfg. Co., 39 App. Div. [N. Y.] 245.

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may be divested by a subsequent statute.[43] A statute declaratory of the common law does not affect the exceptions to the rule it announces.[44]

Penal statutes.—Penal statutes should be strictly construed.[45] A statute defining a criminal offense must be strictly construed.[46] A statute providing for a fine for a custodian of will withholding same after a certain time, is a penal statute.[47] A statute providing that the repeal of an act shall not affect any suit or prosecution then pending, for an offense committed or for recovery of a penalty, applies only to strictly penal statutes and not to an action for the recovery of money paid on a wager.[48]

Various other strict constructions.—Statutes creating a liability where none otherwise existed are to be construed strictly.[49] So also a statute by which a person is summarily divested of his property solely by the acts of others.[50] Statutes for exemption from taxation are to be strictly construed, and doubts as to what is exempt must be resolved in favor of the state.[51] An act in the supposed interest of a medical society will be construed strongly against the society.[52] Also grants of powers to corporations.[53] The constitutional provision providing for three departments of the government and prohibiting an official of one from exercising the duties of another applies only to state government.[54] A statute cannot be extended by construction to cover a casus omissus in the criminal law; this rule does not apply in construing remedial statutes.[55]

Remedial statutes.—Remedial statutes should be liberally construed.[56]

Revisions.—In several states the provisions of a revision are to be liberally construed with a view to promote their object.[57]

43. An act to recover money lost by gambling. Wilson v. Head, 184 Mass. 515, 69 N. E. 317.

44. State v. Faulkner, 175 Mo. 546, 75 S. W. 116.

45. A penal statute may not be so broadened by construction as to authorize the punishment of acts otherwise lawful, which are not denounced by the usual meaning of its express terms. Johnson v. Southern Pac. Co. [C. C. A.] 117 Fed. 462. Must not be so extended as to include acts or cases not clearly described by the words used. 2 Webb's Ann. St. Kan. c. 120, § 9, relating to chattel mortgages construed. First Nat. Bank v. Nat. Live Stock Bank [Okl.] 76 Pac. 130; Department of Health v. Owen, 85 N. Y. Supp. 397. A statute which imposes a criminal liability and subjects a person to imprisonment for a mere breach of a private contract is void as providing imprisonment for debt, and as imposing involuntary servitude except as a punishment for crime. Peonage Cases, 123 Fed. 671.

46. State v. Butler [Mo.] 77 S. W. 560.

47. V. S. § 2359, providing for a penalty of $10 for withholding a will, is a continuation of R. L. § 2052, which provided for recovering $10 by action on the case for same neglect, and does not repeal § 2052, so as to preclude action on the case for a neglect accruing before the V. S. took effect. Richardson v. Fletcher, 74 Vt. 417.

48. Wilson v. Head, 184 Mass. 515, 69 N. E. 317.

49. Claim against heirs on account of contingent claim against deceased. Hunt v. Burns [Minn.] 95 N. W. 1110.

50. Foreclosure of collateral to secure promissory notes. Omaha Sav. Bank v. Rosewater [Neb.] 96 N. W. 68.

51. In re Walker, 200 Ill. 566, 66 N. E. 144.

52. State v. Biggs, 133 N. C. 729.

53. Grants of power to corporations which are forbidden to "possess or exercise any corporate powers not given by law, or not necessary to the exercise of the powers so given," must be strictly construed. Palmer v. Hickory Grove Cemetery, 84 App. Div. [N. Y.] 600.

54. A law constituting a town clerk a court is valid. Baltimore & O. R. Co. v. Whiting, 161 Ind. 228, 68 N. E. 266; Peelle v. State, 161 Ind. 378, 68 N. E. 682.

55. Rural Independent School Dist. v. New Independent School Dist., 120 Iowa, 119, 94 N. W. 284.

56. O'Connor v. State [Tex. Civ. App.] 71 S. W. 409. In construing a law forbidding to hold anyone "to a condition of peonage" it matters not whether the condition exists by local law, or custom, or in violation of law. Peonage Cases, 123 Fed. 671; In re Scott, 126 Fed. 981. The remedy given by a remedial statute is cumulative of the common-law remedy, unless the latter is taken away expressly or by necessary implication. Rosin v. Lidgerwood Mfg. Co., 89 App. Div. [N. Y.] 245.

57. Hyatt v. Anderson's Trustee, 25 Ky. L. R. 132, 74 S. W. 1094. The common-law rule that statutes in derogation thereof are to be strictly construed does not apply to the revision of the Kentucky Statutes, which is to be liberally construed with a view to promote its object. Dillehay v. Hickey, 24 Ky. L. R. 1220, 71 S. W. 1. Penal statutes must be construed as other laws, and untechnical words according to approved use of language. Com. v. Trent, 25 Ky. L. R. 1180, 77 S. W. 390. The rule as to construe-

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Other liberal constructions.—Liberal construction should be given to the language used by the legislature in framing the title of acts.[58] A statute allowing infants one year after coming of age to redeem from tax sales of lands is to be construed liberally in their favor.[59] A liberal construction will be given to the statute for the collection of taxes by action; a law where no forfeiture is involved.[60] Statutes imposing penalties for the invasion of the rights of the citizen in order to protect him are not subjects of disfavor in the law, and are not to be construed with the same strictness as those which regulate the exercise of a natural right.[61] Where a statute imposing a tax is susceptible of two constructions, and the legislative intent is in doubt, the doubt should, as a rule, be resolved in favor of the taxpayer.[62] A statute granting a measure of discretion is not invalid for not granting the full measure of the discretion that the constitution permitted.[63]

Time of taking effect.—An act provided that it should take effect when approved by a majority vote of the electors; a later act explained that "majority" meant "majority of those voting" at an election held under the first act. Both acts became law at the date of their approval.[64]

General powers and limitations of legislature.—A reserve power exists in the legislature to pass laws, where not restrained by the constitution,[65] and a law should be sustained that does not violate any constitutional or natural right.[66]

ing statutes in derogation of the common law does not apply to the Texas Revised statutes. O'Connor v. State [Tex. Civ. App.] 71 S. W. 409. A Revised Code being compiled to "revise and digest" existing statutes, and in construing the Code in doubtful cases, the presumption is that this was done, and that no change or alteration was intended. Sheafer v. Mitchell, 109 Tenn. 181, 71 S. W. 86.

58. State v. Coffin [Idaho] 74 Pac. 962.

59. Cain v. Brown [W. Va.] 46 S. E. 579.

60. Inhabitants of Eliot v. Prime, 98 Me. 48.

61. Peonage Cases, 123 Fed. 671.

62. McNally v. Field, 119 Fed. 445.

63. Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766. The constitutional requirement that the "prisoner must be present at the trial," does not mean when the jury visits the place of crime. State v. Mortensen, 26 Utah, 312, 73 Pac. 562, 633; Chadron L. & B. Ass'n v. O'Linn [Neb.] 95 N. W. 368; Attorney General v. Lowrey, 131 Mich. 639, 92 N. W. 289.

64. Foy v. Gardiner Water Dist., 98 Me. 82.

65. Sisk v. Cargile [Ala.] 35 So. 114.

66. An act requiring a voter at primary to state with what party he voted last violates no constitutional privilege; there is no right to a secret ballot. Hopper v. Stack [N. J. Law] 56 Atl. 1. The exercise of the right of eminent domain by a state is not inconsistent with the constitution and laws of the U. S. Maricopa County v. Burnett [Ariz.] 71 Pac. 908. The existence of prior laws permitting cities to enlarge their boundaries with the consent of the property owners in the territory to be annexed, does not deprive the legislature of power to compel annexation without such consent. Toney v. Macon [Ga.] 46 S. E. 80. The legislature may sever or combine school districts, there being no vested rights therein. St. Mary's Power Co. v. Chandler-Dunbar Water Power Co. [Mich.] 95 N. W. 554; Board of Education of Union Free School Dist. v. Board of Education, 76 App. Div. [N. Y.] 355. It is within the power of the legislature to grant to municipalities a remedy for the collection of taxes against property by a personal action against the owner. Franklin v. Hancock, 204 Pa. 110. A state may impose what powers it sees fit on a foreign corporation seeking to do business in the state. State v. Fleming [Neb.] 97 N. W. 1063. Rights created by the legislature have only such remedies as it sees fit to give. Morrison v. Eau Claire, 115 Wis. 538, 92 N. W. 280. An act making certain facts prima facie evidence in certain cases is valid. Crane v. Waldron [Mich.] 94 N. W. 593. Act as to special verdicts and submission of special interrogatories does not abridge right to trial by jury. Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935. A statute requiring answers under oath is not void as not exempting the parties answering from prosecutions in another state, or under Federal laws. People v. Butler St. F. & I. Co., 201 Ill. 236, 66 N. E. 349. The legislature may control the functions and powers of the several justices of the supreme court, as distinguished from the court itself, and in abolishing them violates no constitutional prerogative. Courts of oyer and terminer were composed of a justice of the supreme court and judges of the court of common pleas; by act of 1893 the judge of latter court, in counties of over 300,000, in absence of the supreme court justice could hold the court of oyer and terminer, sitting alone. Held valid, and not impairing the constitutional jurisdiction of the supreme court. State v. Taylor, 68 N. J. Law, 276. An act abolishing the office of chief of police is not invalid as depriving him of a pension, payable to him had he remained in office. People v. Coler, 173 N. Y. 103, 65 N. E. 956. A statute giving an informer half the fine does not infringe on governor's pardoning power.

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Laws may also be sustained by the necessities of the case,[67] or as grounded on public policy.[68] The legislative right to regulate callings that affect public interest does not depend on notice and hearing, and the legislature is presumed to act with knowledge of the facts.[69] Merely official positions, unprotected by constitutional provisions, are subject to the control of the legislature.[70]

Legislative limitations.—One legislature cannot limit the right of another legislature in governmental matters; an act having that effect would be void.[71] A statute interfering with the power of congress to regulate interstate commerce is void.[72] The legislature in creating a new court within the district occupied by an old one cannot legislate upon the bench of the new court the judge of the old one. The judge of the new court must be chosen by the people.[73] A statute not repugnant to the constitution may be held void as contrary to public policy.[74]

Excessive fines are prohibited,[75] and the laws against crime should fix both the maximum and minimum punishment.[76]

Partial invalidity.—A statute in conflict with the constitution yields only to the extent of the repugnancy.[77] An act invalid in part, may be sustained as to the parts which are valid, if the invalid part is separable,[78] and its rejection leaves the act an harmonious whole.[79] Unconstitutional provisions may be eliminated from an act only where they are interjected into an enactment otherwise valid, and are so separable that their removal will leave the constitutional features of the act substantially unaffected.[80] But where the elimination of an unconstitu-

Meul v. People, 198 Ill. 258, 64 N. E. 1106. The requirement of a bond upon second offense is not invalid as imposing double punishment. Huyser v. Com., 25 Ky. L. R. 608, 76 S. W. 174. If owner refuses to take compensation awarded for his property the township trustee may take it. Shively v. Lankford, 174 Mo. 535, 74 S. W. 835.

67. An appointment to an office as a temporary expedient to provide for a period before an election is not in conflict with the constitutional provision that such officer be elected. Neuls v. Scranton City, 20 Pa. Super. Ct. 286. A provision in a constitution as to the beginning of terms of officeholders, designed to put a new constitution into effect, is not a permanent limitation on the power of the legislature to control those terms. Hunt v. Buhrer [Mich.] 94 N. W. 589. The constitution placing the terms of justices at four years does not prevent the legislature from making the terms of the first justices longer. People v. Kent, 83 App. Div. [N. Y.] 554.

68. A law permitting the taxation as costs of an attorney's fee in judgment against insurers of real estate. Farmers' Mut. Ins. Co. v. Cole [Neb.] 93 N. W. 730. The enforcement in Arkansas of a cause of action for wrongful death accruing in Louisiana is not contrary to public policy. St. Louis, I. M. & S. R. Co. v. Haist [Ark.] 72 S. W. 893; International Text-Book Co. v. Weissinger, 160 Ind. 349, 65 N. E. 521.

69. Manning v. Chesapeake & P. Tel. Co., 18 App. D. C. 191.

70. Neuls v. Scranton, 20 Pa. Super. Ct. 286. The law-making body may legislate a person out of office, there being no vested rights thereto. Dallis v. Griffin, 117 Ga. 408.

71. People v. Coler, 173 N. Y. 103, 65 N. E. 956.

72. An act excepting from the liquor license law "sales of native wines by the makers thereof or of cider manufactured in this state." Com. v. Petranich, 183 Mass. 217, 66 N. E. 807.

73. In re Mansfield, 22 Pa. Super. Ct. 224.

74. Julien v. Model B., L. & Inv. Ass'n, 116 Wis. 79, 92 N. W. 561.

75. An act giving a wide range between maximum and minimum fines, and the latter not being excessive, is valid. State v. Laredo Ice Co., 96 Tex. 461, 73 S. W. 951.

76. "By fine not over $100, or imprisonment not over one year" is valid; the maximum being expressed and the minimum being the least subdivision recognized by law, and the least recognized subdivision of time. State v. Cucullu, 110 La. 1087.

77. Union Pac. R. Co. v. Sprague [Neb.] 95 N. W. 46.

78. Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611, 47 Law. Ed. 328.

79. Wilson v. State, 136 Ala. 114.

80. Riccio v. Hoboken [N. J. Err. & App.] 55 Atl. 1109. A general revenue law will not be held invalid, if unconstitutional discriminating features can be rejected, and the law enforced without them. State v. Fleming [Neb.] 97 N. W. 1063; State v. Laredo Ice Co., 96 Tex. 461, 73 S. W. 951; Price v. Garvin [Tex. Civ. App.] 69 S. W. 985; N. W. M. L. Ins. Co. v. Lewis & C. County, 28 Mont. 484, 72 Pac. 982; Corscadden v. Haswell, 88 App. Div. [N. Y.] 158; Birch v. Plattsburg [Mo.] 79 S. W. 475; Hunt v. Buhrer [Mich.] 94 N. W. 589; Logan County v. Carnahan [Neb.] 95 N. W. 812; Attorney General v. Lowrey, 131 Mich. 639, 92 N. W. 289; Pump v. Lucas County Com'rs, 69 Ohio St. 448, 69 N. E. 666; Edwards v. Bruorton, 184 Mass. 529, 69 N. E. 328; White v. Gove, 183 Mass. 333, 67 N. E. 359; Com. v. Petranich, 183 Mass. 217, 66 N. E. 807; August Busch & Co. v. Webb, 122 Fed. 655; W. C. Peacock & Co. v. Pratt [C. C. A.] 121 Fed. 772; State v. Nolan [Neb.] 98 N. W. 657; Galveston & W. R. Co. v. Galveston, 96 Tex. 520, 74 S. W. 537; Shively

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tional section of a statute would give the act an application not contemplated by the legislature the whole act must be held void.[81] Invalidity of one provision may invalidate entire act.[82] An act that would not have been enacted except as intended to operate as a whole is void in toto if part is invalid.[83] An unconstitutional provision which affects the whole scope of the law renders the entire act invalid.[84]

§ 6. *Retroactive effect. In general.*—The only retrospective legislation forbidden is "ex post facto laws and laws impairing the obligation of contract."[85] Laws are not to be construed retrospectively, unless it shall clearly appear that the legislature so intended, and unless such construction is absolutely necessary to give meaning to the language used.[86] Statutes will not be construed as retrospective in operation so as to injuriously affect rights previously vested, unless their language is such as to leave no doubt that such was the legislative intent.[87] A statute is not necessarily retroactive or retrospective because its operation in a given case may be dependent upon an occurrence anterior to its passage.[88]

Curative acts.—Curative acts may cure retrospectively irregularities and imperfections, but cannot validate utterly void proceedings, or give one person's property to another.[89]

Applications in various cases are collected in the note.[90]

v. Lankford, 174 Mo. 535, 74 S. W. 835; Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766; Supreme Lodge United Benev. Ass'n v. Johnson [Tex. Civ. App.] 77 S. W. 661; People v. Windholz, 86 N. Y. Supp. 1015; In re Melone's Estate, 141 Cal. 331, 74 Pac. 991; Utah S. & T. Co. v. Diamond C. & Coke Co., 26 Utah, 299, 73 Pac. 524; People v. Van De Carr, 91 App. Div. [N. Y.] 20; McLaughlin v. Kipp, 82 App. Div. [N. Y.] 413. An act which sets out at length powers and rights as to condemnation of lands is not unconstitutional and void because a portion of it extends by reference to sections of the law relating to procedure only. St. Louis & S. F. R. Co. v. S. W. Tel. & T. Co. [C. C. A.] 121 Fed. 276. Invalidity in the provision of an "act to establish parks in certain counties and to regulate the same," as to the appointment of the commissioners does not render the whole act invalid. Ross v. Board of Chosen Freeholders [N. J. Law] 53 Atl. 1042.

81. Mathews v. People, 202 Ill. 389, 67 N. E. 28.

82. Act creating additional judges, but fixing their terms and date of election contrary to the constitution, is invalid in toto. People v. Knopf, 198 Ill. 340, 64 N. E. 842, 1127; People v. Olsen, 204 Ill. 494, 68 N. E. 376.

83. State v. Bengsch, 170 Mo. 81, 70 S. W. 710.

84. State v. Harmon, 23 Ohio Circ. R. 292; Cain v. Smith, 117 Ga. 902; Conklin v. Hutchinson, 65 Kan. 582, 70 Pac. 587; Board of Com'rs of Newton County v. State, 161 Ind. 616, 69 N. E. 442; Board of Com'rs of Owen County v. Spangler, 159 Ind. 575, 65 N. E. 743.

85. Bullard v. Smith, 28 Mont. 387, 72 Pac. 761.

86. Brown v. Hughes, 89 Minn. 150, 94 N. W. 438; Curtis v. Boquillas L. & C. Co. [Ariz.] 76 Pac. 612; Cleary v. Hoobler, 207 Ill. 97, 69 N. E. 967; Bullard v. Smith, 28 Mont. 387, 72 Pac. 761; Secor v. State, 118 Wis. 621, 95 N. W. 942; Wells v. Remington, 118 Wis. 573, 95 N. W. 1094; Metcalfe v. Union Trust Co., 87 App. Div. [N. Y.] 144; People v. Potter, 88 App. Div. [N. Y.] 239; People v. Miller, 88 App. Div. [N. Y.] 218.

87. Art. 2, § 14, Const. N. C., adopted in 1868, requiring acts authorizing state or municipal indebtedness to be passed in a certain manner, did not supersede Priv. Laws 1858-59, p. 212, c. 166, authorizing an issue of bonds in aid of a certain railroad, nor render invalid bonds issued under such authority in 1873. Board of Com'rs of Henderson County v. Travelers' Ins. Co. [C. C. A.] 128 Fed. 817.

88. The obtaining of property on a false statement operated as a bar to the discharge of a bankrupt under act of Feb. 5, 1903, though obtained some months before the passage of the act. In re Scott, 126 Fed. 981.

89. Ferguson v. Kaboth, 43 Or. 414, 73 Pac. 200, 74 Pac. 466; Davidson v. Wampler [Mont.] 74 Pac. 82. An act legalizing commissions, theretofore allowed, gives an official increased compensation above that fixed by law when his term commenced, and is void. Butte County v. Merrill, 141 Cal. 396, 74 Pac. 1036.

90. **Special charters:** A provision in a constitution prohibiting special charters does not repeal special charters in existence when the constitution was adopted. State v. Fleming [Neb.] 97 N. W. 1063.

School districts: An act legalizing the attempted organization of a school district is not void as retroacting upon a past controversy not terminated in judgment before its enactment. State v. Van Huse [Wis.] 97 N. W. 503.

Taxes: The code repealing a prior law with substantially the same provisions, except that the prior law gave no remedy for the collection of taxes on omitted property, did not prevent the recovery of taxes on property omitted long before the code was enacted. Robinson v. Ferguson, 119 Iowa, 325, 93 N. W. 350.

Crimes: The amendment of a criminal statute does not affect the prosecution or

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§ 7. *Repeal. A. In general.*—The repeal of a law which is a substantial re-enactment of a prior law continues the prior law in force.[91] An act repealing an act "and all acts amendatory thereof" repeals an act actually amendatory, but not so named.[92] A repeal is sometimes effected by omission from an amendment without any express words of repeal.[93] The exemption of certain local acts from the effect of a repealing clause indicates that others not within the exception should be repealed.[94] An act repealing a previous act "except so far as herein expressly re-enacted," continues in force the provisions substantially re-enacted, notwithstanding the repealing clause, so that they could be adopted by a later act.[95]

If an act is unconstitutional, its repealing clause is also void and does not repeal a law for city government theretofore in force.[96]

Effect on vested rights.—The repeal of a statute cannot affect vested rights.[97]

Effect on penalties.—The repeal of a statute imposing a penalty remits such penalty where there is no saving clause as to violations of it, and no proceedings, appellate or original, can be had to enforce the penalty.[98]

Repeal of repealing statutes.—The repeal of a repealing statute does not revive a prior statute,[99] but the repeal of a merely amendatory one revives the original act.[1]

Effect on pending actions.—The repeal of an act does not affect actions pending at the time of the repeal.[2] When a re-enactment is construed as continuing

punishment of a crime committed before the amendment; as to such crimes the statute remains in force. Whatley v. State [Fla.] 35 So. 80.

Pending cases: An act does not affect pending cases unless manifestly so intended, as to steps already taken. Woodham v. Anderson, 32 Wash. 500, 73 Pac. 536. A statute compelling an election of remedies is inoperative upon a suit begun before it went into effect. Provident L. & T. Co. v. Brunner [Neb.] 93 N. W. 144.

Judgments: The 30-day period prescribed for appeals begins to run, as to judgments previously rendered, only from the date of the act and not the date of the judgment. The provision as to bonds applies to appeals taken after the act took effect, though from a judgment previously rendered. Rogers v. Trumbull, 32 Wash. 211, 73 Pac. 381.

Societies: An act limiting the payment of death penalties by beneficial societies to certain persons named does not affect the rights of holders of certificates issued prior to its passage. Schoales v. Order of Sparta, 206 Pa. 11.

Negligence: Statutes passed after an accident cannot affect an action for damages for a prior injury. Gallowshaw v. Lonsdale Co. [R. I.] 55 Atl. 932.

Commerce: The prohibition of doing business after a statute goes into effect is not retroactive as to that business, even though it be done in pursuance of an earlier contract. Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611, 47 Law. Ed. 328.

91. People v. Steuben County, 41 Misc. [N. Y.] 590.

92. People v. Potter, 88 App. Div. [N. Y.] 239. An act repealing a certain act "and all acts amendatory thereof" has same force as if the amendatory acts were specifically designated. People v. Potter, 40 Misc. [N. Y.] 485.

93. City of Fargo v. Ross, 11 N. D. 369, 92 N. W. 449. An act providing for dissolution of corporations for insolvency, but providing for no continuation after dissolution to wind up the affairs, repealed a prior act on same subject, which allowed two years for such purpose after dissolution. In re Stewart, 40 Misc. [N. Y.] 32.

94. Com. v. Summerville, 204 Pa. 300.

95. Act of 1896 repealed act of 1875 "except as re-enacted herein;" act of 1899 adopts the method of winding up voluntary associations as provided for in act of 1875; the provisions of 1875, being re-enacted in 1896, continued in force and could be adopted by act of 1899. Henry v. Simanton, 64 N. J. Eq. 572.

96. Galveston & W. R. Co. v. Galveston, 96 Tex. 520, 74 S. W. 537.

97. Nivens v. Nivens [Ind. T.] 76 S. W. 114. A homestead law superseding a prior such law, but containing no express repeal, does not repeal the prior law so as to destroy then existing homesteads, they being a sort of vested rights. Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046.

98. Pensacola & A. R. Co. v. State [Fla.] 33 So. 985.

99. People v. Steuben County, 41 Misc. [N. Y.] 590.

1. Haugh v. Smelser, 31 Ind. App. 573, 66 N. E. 506.

2. Wolcott v. Henninger [Neb.] 96 N. W. 612. A provision in a statute for arrest of debtors, fraudulently conveying away their property, is not affected in its application to pending suits by the passage of a repealing Code. Costello v. Palmer, 20 App. D. C. 210. The saving clause of Act of Congress of June 6, 1900 (Alaska Civ. Code, § 368 [31 Stat. 552, c. 786]) preserved the right of all persons who had commenced actions in the district court of Alaska to prosecute them to final judgment under the old law or the provisions of such act, and this right was not lost because at the time the act took ef-

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the original act, the repealing clause in the later act does not terminate liabilities under the former one.[3] But where a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must terminate wherever the repeal finds them.[4]

(§ 7) *B. Implied repeal. In general.*—Where there is a conflict between a prior and a subsequent statute, the presumption is that the latter repeals the former.[5] Where two statutes are so flatly repugnant that both cannot be executed, the latter will be deemed a repeal of the earlier;[6] but such repeals are not favored, and the earlier statute will remain in force unless the two are clearly inconsistent with and repugnant to each other, or unless in the latest statute some express notice is taken of the former, plainly indicating an intention to repeal it.[7] A special statute providing for a particular class of cases is not repealed by a subsequent general statute, although the terms of the latter are broad enough to include the cases embraced in the former, unless the intent to repeal it is manifest.[8] Laws special and local in their application are not deemed repealed by general legislation, except upon the clearest manifestation that such was the intent of the legislature.[9] A special statute on a particular matter is not affected by a subsequent general statute in regard to the same subject-matter containing different provisions.[10] The revision of statutes by the re-enactment of previous statutes operates as a continuance of the former, and not as a repeal and new enactment.[11] The enactment of a new statute covering the entire subject-

fect the action was pending in the United States supreme court to which it had been removed by writ of error. Shoup v. Marks [C. C. A.] 128 Fed. 32. Where, pending a writ of error to a supreme court of a territory from the supreme court of the United States, the territory is admitted as a state, and no provision is made saving the rights of litigants under pending writs of error or appeals, all authority for such writs of error or appeal become extinguished by the abrogation of the statutes under which the territorial courts were created, and all pending actions are thereby abated. Id.

3. Abbay v. Board of Levee Com'rs [Miss.] 35 So. 426.

4. McNabb v. President & Board of Trustees, 103 Ill. App. 156.

5. An act limiting to one year the time within which a new action must be brought, after the reversal of a judgment without a venire, is repealed by a later statute providing that suits for injuries not resulting in death must be brought within two years from the occurrence of the injury. Spees v. Boggs, 204 Pa. 504. Where it is enacted that the Political Code shall be considered as passed on the first day of the session, the provisions of any other law of that session shall prevail over conflicting provisions of the code. Mariposa County v. Madera County [Cal.] 75 Pac. 572. The act repealing "all laws in conflict" repealed all prior legislation, fixing the amount of penalty and interest. Baker v. Kaiser [C. C. A.] 126 Fed. 317. Pub. Gen. Code Md. art. 141, §§ 2, 141, and Acts 1900, p. 923, c. 597. City of Baltimore v. Allegany County Com'rs [Md.] 57 Atl. 632.

6. Section 36, Neb. revenue act (Laws 1879, p. 291), as amended (Laws 1887, p. 569, c. 66), repeals by implication section 33, c. 43, Laws 1873, in so far as the two are inconsistent. State v. Ins. Co. [Neb.] 99 N. W. 36. Pub. Gen. Code Md. art. 141, §§ 2, 141, and Acts 1900, p. 923, c. 597. City of Baltimore v. Allegany County Com'rs [Md.] 57 Atl. 632. Where two or more acts provided for the creation of a pension fund, derived from the same source for the same purpose, the earlier ones held to be repealed [Wis. Laws 1891, c. 287; Laws 1895, c. 379 repealed by Laws 1899, c. 265, p. 443]. State v. Board of Trustees [Wis.] 98 N. W. 954.

7. State v. Ins. Co. [Neb.] 99 N. W. 36; Nat. L. & I. Co. v. Detroit [Mich.] 99 N. W. 880. Only when such is the evident intent of the legislature. Section 602, Neb. Code Civ. Proc., relating to new trials not repealed by Laws 1885, p. 248, c. 49, relating to appeals in divorce cases. Schafer v. Schafer [Neb.] 99 N. W. 482.

8. The New York labor law (Laws 1897, p. 481, c. 415, § 82), giving the state factory inspector jurisdiction over fire escapes, did not, by implication, repeal the provisions of Greater New York Charter (Laws 1897, c. 378, § 647), enacted at the same session of the legislature nine days previously, granting the same power to the city superintendent of buildings. Former statute does not apply to the city. City of N. Y. v. Trustees of Sailors' Snug Harbor, 85 App. Div. [N. Y.] 355.

9. New York Tax Law (Laws 1896, p. 797, c. 908) did not repeal by implication the provision of the charter of the N. Y. University, exempting its property from taxation [Laws 1893, p. 84, c. 54, § 8]. People v. Wells, 87 N. Y. Supp. 1107.

10. The provisions of the Louisiana Code (art. 2632, Civ. Code) and the revised statutes (Rev. St. 1870, § 1481), relating to juries in expropriation were not amended or repealed by the general jury law [Acts 1898, No. 135, p. 216]. Cumberland Tel. & T. Co. v. Morgan's L. & T. R. & S. S. Co. [La.] 36 So. 852.

11. People v. Wells, 87 N. Y. Supp 1107.

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matter of a former one works a repeal of the latter, if such new statute is valid.[12] The Colorado statute requiring liquor dealers to pay an annual license fee (Sess. Laws 1902, pp. 47, 48, c. 3, § 18), is an act for the purpose of raising revenue only, and does not affect or repeal the statute authorizing municipalities to regulate the liquor traffic and to permit druggists to sell liquor (Mills' Ann. St. § 4403). The two are not inconsistent and both may stand.[13] If two inconsistent acts in regard to the same subject-matter are passed on the same day, one of which goes into effect on its passage and the other at a later date, a field of operation is given to both, and the act taking effect last will be regarded as an amendment to the statutes as amended by the act taking effect first.[14] A complete, independent act, revising the whole subject of a prior act, repeals the prior act, though there are no express words of repeal;[15] but the repeal of statutes by implication is not favored;[16] effect is to be given to both statutes, if possible,[17] and only when the later act is repugnant to the former,[18] and contains that which was clearly intended to take the place of what is repealed,[19] will it be held to repeal it.[20]

A statute cannot be held to repeal a prior act where the prior act has been substantially re-enacted at a date later than the act to which a repealing effect is sought to be given.[21]

In determining whether an act was impliedly repealed by a later act, the court may consider the fact that a third and still later act amended the first act, as indicating that the legislature did not intend the repeal of the first act by the second.[22]

Where a statute is not an amendment to another statute, but an independent one complete in itself, it cannot be repealed by implication by an earlier statute.[23]

An act amending a prior act by implication is itself repealed by the re-enactment of the prior act, omitting all mention of the amending act.[24] The rule that

12. City of Leavenworth v. Leavenworth City & Ft. L. Water Co. [Kan.] 76 Pac. 451.

13. Parsons v. People [Colo.] 76 Pac. 666.

14. Louisiana Acts 1900-1901, pp. 787, 791, were passed on the same day. The first act provided that justices of the peace in Beats 15, 21, 22, 23 should be allowed to hold their courts in either of said beats and should exercise jurisdiction in all. The latter act abolished Beats 21, 22, and 23, and provided that their territory should be added to Beat 15; but it provided that it should not take effect until a specified date, which was subsequent to the date when the first took effect. Held, that the latter act operated as an implied repeal of the former. State v. Sawyer [Ala.] 36 So. 545.

15. City of Mt. Vernon v. Evans & H. Fire Brick Co., 204 Ill. 32, 68 N. E. 208.

16. Beha v. State [Neb.] 93 N. W. 155; Julien v. Model B., L. & I. Ass'n, 116 Wis. 79, 92 N. W. 561; Price v. Board of Liquor License Com'rs [Md.] 57 Atl. 215; Hotel Registry Corp. v. Stafford [N. J. Law] 57 Atl. 145; N. W. M. L. Ins. Co. v. Lewis & C. County, 28 Mont. 484, 72 Pac. 982; State v. O'Neil Lumber Co., 170 Mo. 7, 70 S. W. 121. An act providing for appeal from appraisers within ten days is not repealed by an act affirming the right of appeal, but silent as to limitation of time. Com. v. Vetterlein, 21 Pa. Super. Ct. 587.

17. Carpenter v. Russell, 13 Okl. 277, 73 Pac. 930.

18. Lavagnino v. Uhlig, 26 Utah, 1, 71 Pac. 1046; Lincoln School Tp. v. American School Furniture Co., 31 Ind. App. 405, 68 N. E. 301; Com. v. Vetterlein, 21 Pa. Super. Ct. 587.

19. Gilbert v. Craddock, 67 Kan. 346, 72 Pac. 869. Gen. St. Ky. 1873, did not repeal act of 1870 as to admitting questions of taxation to a vote of the people, since it contains no provisions relating to the subject. Wetzell v. Paducah, 117 Fed. 647. Where the later of two statutes, not expressly repugnant, covers the whole of the subject of the first, plainly showing an intent to substitute, it repeals the earlier statute. But such acts being in pari materia must be construed together to arrive at the legislative intent. U. S. v. Macfarland, 18 App. D. C. 120.

20. State v. Courtney, 27 Mont. 378, 71 Pac. 308; St. Mary's Power Co. v. Chandler-Dunbar Water Power Co. [Mich.] 95 N. W. 554. A change in the punishment from a fine in the old law to fine and imprisonment in the new law repeals the old law. State v. Callahan, 109 La. 946. Where congress passes an act in conflict with another, the presumption is it was aware of the former law and acted in view of it. Lavagnino v. Uhlig, 26 Utah, 1, 71 Pac. 1046; De France v. Harmer [Neb.] 92 N. W. 159; People v. Steuben County, 41 Misc. [N. Y.] 590; State v. Byrne, 32 Wash. 264, 73 Pac. 394.

21. Blumenthal v. Tibbits, 160 Ind. 70, 66 N. E. 159.

22. Lincoln School Tp. v. American School Furniture Co., 31 Ind. App. 405, 68 N. E. 301.

23. Mariposa County v. Madera County [Cal.] 75 Pac. 572.

24. McNeeley v. South Penn Oil Co., 52 W. Va. 616.

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all laws amending or repealing former laws shall recite in their caption the title or substance of the law repealed, applies only to express repeals and not implied ones;[25] but under an express clause repealing "all laws in conflict," the repeal is by implication and not within the rule.[26]

General and special laws.—An act special in its nature is not repealed by a subsequent general law,[27] and a general act is not to be held as applying to cases covered by a special law on that subject.[28] The presumption is that a general act is not intended to repeal a special act, though it contains a clause repealing all acts inconsistent with it,[29] unless the general act is a revision, or unless the two are so repugnant as to show an intent to repeal.[30] A law special in its nature and provisions prevails over general provisions of the statutes.[31]

STAY OF PROCEEDINGS.

Stay pending proceedings for review in an appellate court are elsewhere treated.[32]

Grounds for stay.—Proceedings may be stayed to bring in parties defendant;[33] to await the decision of another action involving the same issues,[34] if between the same parties,[35] and the decision of which will render another trial unnecessary;[36] to await the determination of bankruptcy proceedings which would operate as a discharge;[37] but a stay pending bankruptcy will not be continued after a dis-

25. Turner v. State [Tenn.] 69 S. W. 774. A complete act, repealing another by implication, is not unconstitutional in not setting forth in full the act amended. In re Dietrick, 32 Wash. 471, 73 Pac. 506.

26. Turner v. State [Tenn.] 69 S. W. 774.

27. State v. Higgins, 121 Iowa, 19, 95 N. W. 244; St. Louis S. W. R. Co. v. Grayson [Ark.] 78 S. W. 777. A law limiting the indebtedness of cities is not changed by a law allowing a city to erect an armory in excess of the limit. Beck v. St. Paul, 87 Minn. 381, 92 N. W. 328; Ga. Empire M. Ins. Co. v. Wright, 118 Ga. 796. A general statute without negative words will not repeal provisions of a former statute unless irreconcilably inconsistent. U. S. v. Sampson, 19 App. D. C. 419; McCarthy v. McCarthy, 20 App. D. C. 195. Statutes of a general nature do not repeal by implication charters and special acts passed for particular municipalities, and if the general and special acts can stand, they will be construed accordingly. Com. v. Summerville, 204 Pa. 300.

28. Carpenter v. Russell, 13 Okl. 277, 73 Pac. 930.

29. St. Louis S. W. R. Co. v. Grayson [Ark.] 78 S. W. 777.

30. State v. Southern L. & T. Co. [Fla.] 33 So. 999; Davis v. Dougherty County, 116 Ga. 491.

31. Nebraska Act to enforce payment of delinquent taxes [Laws 1903, c. 75, p. 480]. Woodrough v. Douglas County [Neb.] 98 N. W. 1092.

32. See Appeal and Review, 1 Curr. Law, p. 124.

33. In an action to try title, when it is shown that a third party has an interest in the property, it is the duty of the court, on its own motion, to delay the proceedings, and require such third party to be made a party defendant. Latham v. Tombs [Tex. Civ. App.] 73 S. W. 1060.

34. Ogden v. Pioneer Ironworks, 91 App. Div. [N. Y.] 394. If two actions are pending in which the issues are not substantially identical, and the decision in one will not determine the right set up in another, and the judgment in one will not dispose of the controversy for both, no case for a stay is presented. Nussberger v. Wasserman, 40 Misc. [N. Y.] 120. The assignee of a contractor sued in the supreme court to foreclose a mechanic's lien in which the contractor was a defendant. Neither his subcontractors nor their trustees in bankruptcy were made parties defendant, or had ever filed a lien for the debt due by him to them. He moved to stay another action brought against him by the trustees in bankruptcy in another court for the same debt. The motion was denied because the trustees, for failure to file a lien, could not recover in the supreme court any personal judgment against the contractor, and therefore the relief in the two actions was not the same. Id.

35. Ogden v. Pioneer Ironworks, 91 App. Div. [N. Y.] 394.

36. Jenkins v. Baker, 91 App. Div. [N. Y.] 400.

37. A suit which is founded upon a claim from which a discharge in bankruptcy would be a release, and which is pending against a person at the time of filing a petition against him, will be stayed until after an adjudication or the dismissal of the petition, under the Bankruptcy Act [30 Stat. 549; U. S. Comp. St. 1901, p. 3426]. "A suit which is founded upon a claim from which a discharge would be a release and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such dis-

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charge is granted.[38] Proceedings in a Federal court will be stayed to await the action of a state court, which has previously obtained jurisdiction, in a proceeding between the same parties involving substantially the same issues.[39] Neither the institution of a new suit in the state court, after dismissal from the Federal court to which it had been removed, nor reduction of the demand to a sum below that necessary to confer jurisdiction on the Federal court, will take the case out of the statute, which prohibits a Federal court from granting an injunction staying proceedings in any state court.[40] A Federal court in one district will stay execution on a judgment obtained therein, where a Federal court in another district has enjoined plaintiff from enforcing it, pending the determination of an action therein by defendant against plaintiff.[41] An action at law for damages under a bill of sale can be stayed, pending the determination of a suit in equity, by creditors to have such bill of sale declared a mortgage.[42] Where in a partition suit brought in a Federal court, an issue is raised by the pleadings as to complainant's title, involving a question of fact, it is the duty of the court on motion to stay the suit until such issue has been determined in an action at law.[43] A suit to foreclose a mortgage will not be stayed until the conclusion of a pending action by the state against a grantee of the mortgagor, claiming an interest in the mortgaged premises, where the conveyance to the mortgagor contained no covenants of title, and the parties had notice of the state's claim.[44] A stay pending litigation of an intervenor's rights will be denied where the only question has been already passed on by a referee whose report may be reviewed by appeal.[45] A stay should not be granted in an action to recover damages for the breach of a contract, pending an action on the same contract for the contract price for labor and material.[46]

The general rule is that a stay of proceedings will be granted until plaintiff has paid the costs of a former suit between the same parties, and based on the same cause of action, in which he was nonsuited or which was voluntarily dismissed,[47] but the court may, in the exercise of his discretion, refuse such stay,

charge is determined." Sec. 11, U. S. Comp. St. 1901, p. 3426. An application to the Federal court to restrain the state court from punishing a bankrupt for contempt, in failing to appear before a referee for examination, might be treated as an application for a stay of such proceedings, no fine having been imposed, and it being evident that no actual contempt was intended. In re William E. De Lany & Co., 124 Fed. 280. **Iowa:** Where a suit is pending, from which a discharge would be a release and an answer has been filed stating that a petition in bankruptcy has been filed, the court should determine whether bankruptcy proceedings are pending, and if so should stay further action till their determination [Iowa Bankr. Act, § 11]. First Nat. Bank v. Flynn, 117 Iowa, 493, 91 N. W. 784.

38. The provision for an extension of the stay [Bankr. Act, § 11a] does not apply except while the question of discharge is open. In re Flanders, 121 Fed. 936.

39. Hennessy v. Tacoma S. & R. Co. [C. C. A.] 129 Fed. 40.

40. U. S. Rev. St. § 720. Tex. Cotton Products Co. v. Starnes, 128 Fed. 183.

41. The Federal court in an Alabama district will, through comity and the exercise of its discretion, respect an order of a Federal court in Rhode Island, restraining plaintiffs in an action brought in the former state from enforcing the judgment there obtained, pending an action in the latter court by defendant against plaintiff, and will stay proceedings until such latter action is determined. W. A. Chapman & Co. v. Montgomery Water Power Co., 127 Fed. 839.

42. Sell v. Sparks, 120 Fed. 1013.

43. Heinze v. Butte & B. Consol. Min. Co. [C. C. A.] 126 Fed. 1.

44. Cook v. Weigley [N. J. Eq.] 57 Atl. 805.

45. Farmers' L. & T. Co. v. Hoffman House, 86 App. Div. [N. Y.] 617.

46. Plaintiff is not bound to set up such damages by way of counterclaim in the first action. Ogden v. Pioneer Ironworks, 91 App. Div. [N. Y.] 394. It is immaterial that the action is brought in another county, where a speedier trial can be obtained, in order to forestall the trial of the claim on the contract by a prior trial of the claim for damages. Id.

47. Camp v. Chicago G. W. R. Co. [Iowa] 99 N. W. 735. The trial court has power to require plaintiff, as a condition precedent to the maintenance of his action, to pay costs awarded defendant in another action between the same parties and for the same cause of action, in which a compulsory nonsuit has been entered. Plumley v. Simpson, 31 Wash. 147, 71 Pac. 710. Failure to pay motion costs awarded in a former action is

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where a reasonable excuse for a failure to pay them is shown.[48] The nonpayment of the costs of a motion does not operate to stay proceedings until a copy of the order directing them to be paid has been served on the opposite party.[49]

Proceedings to obtain.—Motions for a stay of proceedings must be made to the court in which the action sought to be stayed is pending,[50] and is premature before issue joined.[51]

Waiver of stay.—If the plaintiff to an action proceeds to trial without taking advantage of a stay created by the statute, he has waived the stay.[52] A party entitled to a stay of proceedings for the nonpayment of costs waives the stay by receiving and retaining from the opposite party the notices of appeal, printed papers, and notice of argument.[53]

STEAM.[54]

As between the user of steam and an adjoining property owner the former owes the latter only "care according to the circumstances."[55] The liability of the user of steam is that of an ordinary prudent and careful man.[56] License and other regulations are sometimes imposed.[57]

no bar to the second action, the only effect being to stay proceedings in the second action. "The stay of proceedings does not deprive the court of jurisdiction when set in motion by the party resting under the stay. The only effect is to render the proceedings irregular, and when brought to the attention of the court the party violating the stay will be dealt with as may be proper" [Section 779, N. Y. Code]. Kellogg S. & S. Co. v. Glen Tel. Co., 121 Fed. 174.

48. Poverty of plaintiff and dismissal of first suit because material evidence could not be obtained. Camp v. Chicago G. W. R. Co. [Iowa] 99 N. W. 735. Stay for nonpayment of costs in a former action brought in forma pauperis is proper unless there is a showing that plaintiff's poverty continues. Fox v. Jacob Dold Packing Co., 96 Mo. App. 173, 70 S. W. 164.

49. New York Code Civ. Proc. § 779. Immaterial whether the order fixes a time within which they must be paid or not. Sire v. Shubert, 87 N. Y. Supp. 891. Under section 779 of the N. Y. Code, where costs of a motion are not paid within the time fixed for that purpose, or within ten days after service of a copy of the order, if no time is fixed, due execution may be issued, and all proceedings on the part of the party required to pay the same, except to review or vacate the order, are stayed without further direction of the court until the payment thereof. Kellogg S. & S. Co. v. Glen Tel. Co., 121 Fed. 174.

50. A court before which an action at law for damages is brought, no equitable relief being asked and no equitable powers invoked, cannot grant a stay in an action brought by defendant against plaintiff in another county. Purdy v. Baker, 86 N. Y. Supp. 1065.

51. For pendency of another action. Ogden v. Pioneer Ironworks, 91 App. Div. [N. Y.] 394.

52. Plaintiff procured a default judgment against defendant. The judgment was vacated on defendant's motion, on his paying costs and expenses. A new trial being set judgment was again rendered by default and again vacated. Defendant failed to pay costs. The cause was again set for trial, the parties appeared and trial commenced. Held, plaintiff waived the stay created by statute [N. Y. Code Civ. Proc. § 779]. Dout v. Brooklyn Heights R. Co., 84 App. Div. [N. Y.] 613.

53. Proceedings not stayed by reason of nonpayment of costs. Allen v. Becket, 85 N. Y. Supp. 192.

54. See, also, such topics as Explosives and Combustibles, 1 Curr. Law, 1197; Master and Servant, 2 Curr. Law, 801; Negligence, 2 Curr. Law, 996.

55. Anderson v. Hays Mfg. Co., 207 Pa. 106. Boiler explosion. Boiler leaked two months before explosion, officers of defendant incompetent to repair it, hired competent men to make repairs, and it was inspected by insurance agents and reported all right, no other facts shown, held, defendant not liable to adjoining property owner for injuries. Id.

56. Question is for the jury as to whether or not flues should be periodically removed and examined, and before passing on this question they should be allowed to understand the construction of the boiler, and the usual practice among those using similar ones. Merryman v. Hall, 131 Mich. 406, 91 N. W. 647. Defendants' servant held negligent in blowing off steam by which plaintiff was scalded. Houston & T. C. R. Co. v. Bulger [Tex. Civ. App.] 80 S. W. 557. Owner of boiler held negligent in not discovering defective condition thereof. Merryman v. Hall [Mich.] 99 N. W. 27.

57. Laws of New York 1901, c. 466, § 343, provides that no one shall operate steam boiler without a certificate of qualification. Section 342 provides for an inspection of boilers within the city. Held to relate only to steam boilers permanently within the city, and the fireman of a boiler on a scow temporarily within the city and engaged in removing an obstruction in the East river under contract with the United States government did not need a certificate of qualification. People v. Prillen, 173 N. Y. 67, 65 N. E. 947.

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STENOGRAPHERS.

Under the California statute authorizing the magistrate at the preliminary examination of one accused of a crime to appoint a stenographer to take down the evidence, it is not necessary that there should be a preliminary showing as to the qualifications of the person appointed,[58] nor is it necessary that he should be the official stenographer of any court, or that he be sworn.[59] He is not rendered incompetent because an employe of the district attorney.[60] A motion that the stenographer be ordered to transcribe the testimony and file the same so that a party may prepare a statement of facts, is properly denied until the party making it pays the stenographer's fees for so doing.[61] A writ of mandamus may issue to compel the court stenographer to perform a specific duty imposed upon him by statute.[62] Where the duty is imposed by order of court mandamus will not lie unless the court has refused to enforce such order.[63] He cannot avoid such duty by a contract with a third person.[64] The attorney-general may compel the court stenographer to furnish him a transcript of the evidence of a case, in which the state is a party, without prepayment of his fees under the Montana Code.[65] One who assumes to act as the official stenographer of a board of equalization, and by his conduct induces parties to a proceeding before the board to believe that he is in fact such officer, may be compelled by mandamus to deliver a transcript of the evidence to one of such parties, and is estopped to plead a private contract inconsistent with his duty to all.[66] The parties to a hearing before a referee are liable for the fees of a stenographer employed to take the testimony therein, where it appeared that the referee was not causing the services to be rendered at his personal expense.[67] A master in chancery is personally liable for the fees of a stenographer employed by him to take testimony, and has no right to demand payment of such fees from the parties, and refuse to take their evidence upon failure to comply.[68] At the hearing of a cause in admiralty the testimony should be taken down in full, and if there is no official stenographer, one should be procured by counsel under the sanction of the court.[69]

Stenographer's fees as costs.—The stenographer's fees are a part of the costs to be taxed against the losing party.[70] The statute of Missouri does not authorize the stenographer's fee for preparing a bill of exceptions to be taxed as costs.[71]

58. Pen. Code, § 869. Especially where the magistrate knows him to be competent and there is no objection on the ground that he is not. People v. Nunley [Cal.] 76 Pac. 45.

59. Code Civ. Proc. § 270, relating to the oath of the reporter of the superior court does not apply. People v. Nunley [Cal.] 76 Pac. 45.

60. People v. Nunley [Cal.] 76 Pac. 45. Denial of defendant's request to appoint a shorthand reporter to take down evidence, objections and rulings upon the hearing of a motion to set aside the information held not prejudicial. Id.

61. Under Texas Statute (Sayles' Rev. Civ. St. art. 1421) providing that each party shall be responsible to the officers of the court for the costs incurred by himself. Allen v. Hazzard [Tex. Civ. App.] 77 S. W. 268.

62. To compel him to furnish a transcript of a case, in which the state appears as a party, to the attorney-general. State v. Ledwidge, 27 Mont. 197, 70 Pac. 511.

63. State v. Ledwidge, 27 Mont. 197, 70 Pac. 511.

64. Cannot set up agreement with third person, who transcribed the stenographic notes, that no copy should be delivered until the fees therefor were paid. State v. Ledwidge, 27 Mont. 197, 70 Pac. 511.

65. Code Civ. Proc. § 1874. The stenographer cannot set up as a defense the claim that the testimony is not needed. State v. Ledwidge, 27 Mont. 197, 70 Pac. 511.

66. Secret agreement under which he was to deliver transcript to one party only. Mockett v. State [Neb.] 97 N. W. 588.

67. Deemed to have known that the referee was not entitled to make them a part of his charges. McReynolds v. Manger, 84 N. Y. Supp. 982.

68. Under Ill. St. (2 Starr & C. Ann. St. 1896, c. 90, par. 9, § 9), providing that the master's fees shall be taxed as costs. Glos v. Flanedy, 207 Ill. 230, 69 N. E. 862.

69. Neilson v. Coal, C. & S. Co. [C. C. A.] 122 Fed. 617.

70. State v. New Orleans Debenture Redemption Co. [La.] 36 So. 205.

71. Rev. St. 1899, § 10115, providing for a fee to the stenographer for a copy of the bill of exceptions after it has been settled.

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There is no necessity for a copy of the bill of exceptions so as to render the stenographer's fee therefor taxable as costs, where an appeal is taken on the short form and heard on the abstract of record.[72] That section of the Montana Code which authorizes the taxation of legal fees paid stenographers as disbursements applies only to official stenographers, and does not authorize the taxation of fees paid private stenographers who attended the trial in his place, by consent of the parties and the court.[73] The losing party should not be required to pay the fees of the stenographer who reported the evidence for the master in chancery, to whom the case was referred.[74] Stenographer's fees incidental to the conduct of a replevin suit cannot be recovered in an action on a replevin bond.[75]

STIPULATIONS.

Form and right to make.—In general, counsel in charge of a case have authority to make stipulations in regard thereto.[76]

Stipulations need not be in writing,[77] but oral stipulations will rarely be enforced unless made in open court[78] or admitted by the adverse party,[79] and a court is not bound to act upon a stipulation not on file nor of record nor called to its attention.[80]

The parties may stipulate to vary rules of practice,[81] or waive rights at the trial,[82] as to the contents of the appeal record,[83] or as to the facts,[84] that certain tes-

to be taxed as costs. Drumm-Flato Comm. Co. v. Gerlach Bank [Mo. App.] 79 S. W. 714.

72. Mo. Code Civ. Proc. § 813, when a transcript of record is necessary on appeal. Drumm-Flato Comm. Co. v. Gerlach Bank [Mo. App.] 79 S. W. 714.

73. Code Civ. Proc. § 1866. Mont. Ore Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co., 27 Mont. 288, 70 Pac. 1114.

74. Smyth v. Stoddard, 203 Ill. 424, 67 N. E. 980.

75. Gilbert v. American Surety Co. [C. C. A.] 121 Fed. 499.

76. In re Reed, 117 Fed. 358. The general attorney of a railroad. Thompson v. Ft. Worth & R. G. R. Co., 31 Tex. Civ. App. 583, 73 S. W. 29.

77. Thompson v. Ft. Worth & R. G. R. Co., 31 Tex. Civ. App. 583, 73 S. W. 29.

78. G. Ober & Sons Co. v. Thomason Grocery Co. [Ala.] 35 So. 127. A rule of court that an agreement between attorneys will not be considered unless in writing does not apply to an agreement of parties before a master during the trial. Black v. Black, 206 Pa. 116. A stipulation that judgment in one suit was to be the judgment in another held to have been made by a colloquy in open court between the court and counsel for the parties, and enforced. Brown v. Smedley [Mich.] 98 N. W. 857.

79. Rule requiring writing does not apply where the parol agreement is conceded by plaintiff, and defendant has acted and relied upon it. Allmeroth v. Bertram Cady Co., 102 Mo. App. 156, 76 S. W. 701.

80. Stipulation to take up a cause only on five days' notice. Gershenow v. West Chicago St. R. Co., 103 Ill. App. 591.

81. To extend time for filing affidavit of defense. Muir v. Preferred Acc. Ins. Co., 203 Pa. 338. Stipulation construed as waiver of notice. Cooper v. Burch, 140 Cal. 548, 74 Pac. 37.

82. Stipulation construed to operate as a waiver of jury trial and of right to except to the charge of the court. Nashville, C. & St. L. R. Co. v. Cody, 137 Ala. 597. A stipulation by a defendant in an action at law to go to trial before the court without a jury is not a waiver of his right to insist that plaintiff has no right of action at law. Goodyear Shoe Machinery Co. v. Dancel [C. C. A.] 119 Fed. 692. A stipulation by a defendant that trial is to be by the court without a jury, to assess damages, in a personal injury suit, held an admission of negligence and of the injury and at least nominal damages. Stackpole v. Northern Pac. R. Co., 121 Fed. 389. Stipulation submitting case to court construed as warranting entry of judgment for defendant if evidence disclosed a fact which in law would prevent recovery, though there were other controverted questions. Crosby v. Security M. L. Ins. Co., 86 App. Div. [N. Y.] 89.

83. Stipulations by counsel as to the parts of the record to be embodied in the transcript on appeal are to be encouraged by the court. Lamb Knit Goods Co. v. Lamb G. & M. Co. [C. C. A.] 120 Fed. 267. It is the duty of the clerk to recognize and conform to such stipulations. Id. Where parties by stipulation submit the report of a referee, with the evidence taken by him, to the court, for determination of the case on its merits, it is not error for the court to set aside the findings of the referee and substitute its own. Hodges v. Graham [Neb.] 98 N. W. 418.

84. Stipulations by counsel cannot control the court in determining questions of law arising under the agreed facts. San Francisco Lumber Co. v. Bibb, 139 Cal. 325, 73 Pac. 864. But it is the duty of the court on motion to declare whether such facts will sustain a judgment on the pleadings. Jeffries v. Robbins, 66 Kan. 427, 71 Pac. 852. A stipulation of facts, not purporting to contain all the facts, will not preclude the

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timony may be admitted,[85] or that a suit may abide the event of another.[86] But a stipulation on a question of law may be disregarded by the court.[87]

Effect.—A stipulation is binding on the parties[88] and this applies equally to

putting in of further evidence on the trial, and it is error for court to exclude evidence and enter judgment on such a stipulation of facts and the pleadings. Nat. Bank of Commerce v. Pick [N. D.] 99 N. W. 63. A stipulation of facts becomes a part of the judgment roll and the findings of the court on which its judgment rests (Conway v. Supreme Council, C. K. of A., 137 Cal. 384, 70 Pac. 223), and facts cannot be presumed contrary to those stipulated (Id.). Extradition case—stipulation construed as admission, and held to overcome every contrary presumption arising from facts stated in the warrant. People v. Hyatt, 172 N. Y. 176, 64 N. E. 825. A stipulation construed to mean that unless certain evidence disclosed the fact of notice, it was agreed that there was no notice. Grand Rapids School Furniture Co. v. Grand H. & O. H. Co. [Wyo.] 72 Pac. 687. A party cannot secure a reversal after judgment merely because a pleading, setting out a stipulated fact, is defective. Bennett v. Bennett [Neb.] 96 N. W. 994.

85. A stipulation to defer the taking of a deposition and to admit certain other testimony in lieu of it in case the deposition was never taken is valid. Thompson v. Ft. Worth & R. G. R. Co., 31 Tex. Civ. App. 583, 73 S. W. 29. A stipulation that a bill of exceptions may be read in evidence does not admit a copy of the bill, in the absence of evidence tending to show that the bill of exceptions has been lost. Thomas v. Star & C. Milling Co., 104 Ill. App. 110. Where parties by stipulation waive all objections to the evidence and empower a justice to render any judgment he sees fit, on all the evidence, no appeal will lie. Lipps v. Markowitz, 84 N. Y. Supp. 172. A stipulation that a witness is competent to testify as to a point in issue does not bar cross-examination of the witness on that point. Chankalian v. Powers, 89 App. Div. [N. Y.] 395. A stipulation that a second trial before another judge shall be only on the evidence produced in the former trial solely is a waiver of objections to the evidence. Chapin v. Du Shane [Ind. App.] 69 N. E. 174. Stipulation to admit newspaper as evidence, construed. Parker v. Atlantic C. L. R. Co., 133 N. C. 335. A stipulation that goods were received and held under a written receipt does not exclude evidence that the receipt was only a part of the contract of carriage. Force v. St. Paul F. & M. Ins. Co., 81 App. Div. [N. Y.] 633.

86. Prout v. Starr, 188 U. S. 537, 47 Law. Ed. 584. Such a stipulation held to be made orally by statements of counsel for parties and the court, assent of counsel to the court's statement being inferred. Brown v. Smedley [Mich.] 98 N. W. 857. The decree contemplated in such an agreement is the final decree to be rendered in the case. People's Bank v. Merchants' & M. Bank, 116 Ga. 279. A decree or judgment cannot be treated as final in such a case, so long as either party has a right to have it reviewed on appeal or writ of error (Id.), nor can judgment be rendered in the second case until the expiration of the time in which a writ of error may be sued out (Id.). A stipulation that judgment is to be entered in one case in accordance with the decision, on the merits, in another, entitles a party prevailing to judgment upon the entire cause of action. Abbott v. Lane [Neb.] 95 N. W. 599. Such a stipulation is not a waiver of an objection to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. Pac. Pav. Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352. Parties may stipulate as to rights to accrue to the successful party; hence a stipulation pending an ejectment suit, to rent the land, the proceeds to go to the successful party, held to give proceeds for a year to the party given that period in which to redeem from a trust deed. Dix v. Lohman [Mo. App.] 80 S. W. 51.

87. Prescott v. Brooks [N. D.] 94 N. W. 88. A stipulation that a case is to be decided by the court on a certain ground does not bar a decision on a different ground. Butler Bros. v. Hirzel, 87 App. Div. [N. Y.] 462.

88. City of Lincoln v. Lincoln St. R. Co. [Neb.] 93 N. W. 766. A stipulation of record is evidence of the fact and cannot be removed from the record or its effect as evidence taken away by one party without the consent of the other or an order of the court. General Electric Co. v. Wagner Electric Mfg. Co., 123 Fed. 101. A party to a stipulation cannot set up, on the trial, a claim inconsistent therewith. Suit by execution purchasers to compel state to issue patent to them instead of original purchaser. Brooke v. Eastman [S. D.] 96 N. W. 699; Dupree v. Duke, 30 Tex. Civ. App. 360, 70 S. W. 561. But stipulations cannot affect the rights of persons not parties, so that a stipulation of a mortgagee and trustee in insolvency to divide proceeds of the property of the debtor did not affect the rights of an attaching creditor. Cent. Trust Co. v. Worcester Cycle Mfg. Co., 128 Fed. 483.

Rights waived by particular stipulations: A stipulation that defendant city intended to construct waterworks and raise funds therefor "as provided by law" eliminates any question as to the regularity of its proceedings therefor. City of Helena v. Helena Waterworks Co. [C. C. A.] 122 Fed. 1. Evidence excluded because inconsistent with stipulation. Schroeder v. Klipp [Wis.] 97 N. W. 909. Stipulation reciting execution of deed. Fraud could not be shown. Chicago, P. & St. L. R. Co. v. Vaughn, 206 Ill. 234, 69 N. E. 113. Question of value eliminated by stipulation. Coppedge v. M. K. Goetz Brew. Co., 67 Kan. 851, 73 Pac. 908. Defense eliminated by stipulation. Sloan v. King [Tex. Civ. App.] 77 S. W. 48. After stipulating that a prior proceeding should be merged in an action tried by a referee, a party is estopped to claim that the referee had no authority to determine the issues in the first proceeding. Valentine v. Stevens, 86 App. Div. [N. Y.] 481. The rights of a party to a stipulation, who in reliance thereon has changed his situation for the worse, cannot be defeated by other parties thereto on any technical ground. Stipulation between attaching creditor, trustee in insolv-

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stipulations by the state,[89] but the court may relieve therefrom.[90] Stipulations are to be construed by the same general rules as apply to other agreements.[91] A stipulation is effective only in the action in which it was made,[92] unless it operates as an estoppel.[93] It becomes inoperative if the conditions become impossible[94] or if it is not acted on within the time fixed by its terms.[95]

STREET RAILWAYS.

By Ellery H. Clark.*

§ 1. The Franchise and Licenses to Operate a Street Railway (1742).
A. Nature of the Franchise (1742).
B. How Acquired (1743).
C. Rights and Duties Under Franchise (1745).
§ 2. Location and Construction and Equipments (1747).
§ 3. Rights of Trespassers and Licensees on Cars, and Injuries to Them (1749).
§ 4. Rights of Travelers on Highway and Injuries to Them (1750).
A. Pedestrians Run Over (1750).
B. Accidents to Drivers of Wagon (1757).
C. Bicycle Riders; Horseback Riders; Animals Run Over (1766).

The liability of street railways as to their passengers[96] and employes[97] is elsewhere treated, as are many general rules of negligence.

§ 1. *The franchise and licenses to operate a street railway. A. Nature of the franchise.*—The distinction between a street railroad and a steam railroad depends, not upon the motive power used, but upon the general character of the road.

ency, and receiver in mortgage foreclosure suit. Cent. Trust Co. v. Worcester Cycle Mfg. Co., 128 Fed. 483. A stipulation by counsel submitting a claim to an examiner in equity, and waiving "all informalities," precluded a challenge to the jurisdiction of the court (Trustees of St. Mark's Evangelical Lutheran Church v. Miller [Md.] 57 Atl. 644), or an objection to the form in which a claim was presented (Id.). Consent of parties to court's hearing a writ of inquiry to assess damages under the third count of a declaration held to amount to an abandonment of a preceding count. Consol. Coal Co. v. Peers, 205 Ill. 531, 68 N. E. 1065. A stipulation in a bill of exceptions that if the court find a certain fact to be true, a count in the pleading is to be taken as supported, precluded an objection to proof under the count. McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076. After stipulating, in an action to recover a balance due on goods sold, that the goods were purchased at an agreed price, defendants cannot set up that no joint contract by them is shown by the record. Telluride Power Transmission Co. v. Crane Co., 208 Ill. 218, 70 N. E. 319. An agreement that defendant's plea and demurrer should be filed as of an earlier date than that upon which it was in reality filed, without consideration, is revocable at will. Southern Bell Tel. & T. Co. v. Earle, 118 Ga. 506. After stipulating that an order dismissing a cause and entering judgment for defendant may be vacated and the cause reinstated on the general calendar, plaintiff may, by complying with the statute, have the cause entered on the "short-cause" calendar. Eggleston v. Royal Trust Co., 205 Ill. 170, 68 N. E. 709. Where directors of a corporation consent to a decree declaring certain acts "null and void" and a deed "null and canceled," they cannot complain of a decree declaring the deed "null and void." Forrester v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 74 Pac. 1088.

89. Stipulation that defalcation was more than six years prior to action. State v. Davis, 42 Or. 34, 71 Pac. 68, 72 Pac. 317.

90. Where a stipulation made on the trial of a cause appears to have been made improvidently and to stand in the way of substantial justice, the trial court should relieve against it. Butler v. Chamberlain [Neb.] 92 N. W. 154. See Chamberlain v. Butler, 61 Neb. 730, 86 N. W. 481, 54 L. R. A. 338. Whether a party to an agreement in regard to a stated case, transferred to the appellate court for judgment, should be relieved from his agreement and allowed to try the fact, is a question for the court from which the case was transferred. Congdon v. Nashua [N. H.] 57 Atl. 686. But relief from a stipulation will not be granted unless the application therefor is of merit and made in time. In re Reed, 117 Fed. 358.

91. Abbott v. Lane [Neb.] 95 N. W. 599. A stipulation will be construed so as to give effect to the intention of the parties at the time it was made. Tex. & N. O. R. Co. v. Taylor, 31 Tex. Civ. App. 617, 73 S. W. 1081.

92. A stipulation of facts made and used in the trial of a case, which has been finally determined, is inadmissible as evidence in another case between the same parties. Admission, however, held harmless in this case. City of Alton v. Foster, 207 Ill. 150, 69 N. E. 783.

93. See Estoppel, 1 Curr. Law, p. 1135, n. 76.

94. Where the conditions in a stipulation for entry of judgment or dismissal cannot occur, that part of the stipulation becomes inoperative. Southern Cal. Mountain Water Co. v. Cameron, 141 Cal. 283, 74 Pac. 838.

95. A stipulation that the jury might be excused and judgment entered on a directed verdict at any time during the term does not bind the parties at a subsequent term (G. Ober & Sons Co. v. Thomason Grocery Co. [Ala.] 35 So. 127), and the court cannot enter judgment on such agreement after the term over the objection of one of the parties (Id.).

96. See Carriers, 1 Curr. Law, p. 421.

97. See Master and Servant, 2 Curr. Law, p. 801.

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A street railroad operates its cars at slower speed, makes more frequent stops, does not, as a rule, carry freight, and has a more limited route. Speaking broadly, it may be said that it is the local and restricted character of the street railroad which marks the chief ground for distinction, and an electric railroad authorized to carry freight and passengers between two cities in different states and all intermediate points is a trunk or commercial railway and not a street railway within the meaning of the constitution.[98] Whether a statute with reference to railroads applies to street railroads is a question which must be decided by a reasonable construction of the statute, aided by a survey of the circumstances surrounding each case.[99] The main idea in the granting of a franchise is that it is for the benefit of the public.[1] The fact that the franchise is granted to individuals and not to a corporation is not the test of its validity. Whether the interests of the public will be served is the controlling consideration.[2]

(§ 1) *B. How acquired.*—The privilege of constructing and operating a street railway is obtained from the state,[3] and the conditions under which the franchise is granted must be at least substantially complied with.[4] As a matter of practice, the power of the state to determine upon what conditions the franchise shall be granted is to a large extent delegated to the municipal or other local authorities,[5] and, as a check upon the local authorities, the consent of a certain pro-

98. Diebold v. Ky. Traction Co., 25 Ky. L. R. 1275, 77 S. W. 674.

99. A statute relative to the taxation of railroads, excepting from taxation "superstructure and water stations," applies not merely to steam railroads, but to street railroads as well. City of Phila. v. Phila. Traction Co., 206 Pa. 35. A street railway company has been held to be a railroad company within the meaning of a provision in the constitution raising a presumption of negligence against the railroad in cases of accidents. Cordray v. Savannah, T. & I. of H. R., 117 Ga. 464. A provision that the franchise, etc., of railroads in different counties, etc., shall be taxed in proportion to the number of miles in each does not apply to street railways, the population and the character of the locality making a difference in value. San Francisco & S. M. Elec. R. Co. v. Scott [Cal.] 75 Pac. 575. Under the Ohio statutes, steam railways and electric railways are not in the same class, and statutes regulating and relating to one are not applicable to the other. Dayton & U. R. Co. v. Dayton & M. T. Co., 4 Ohio C. C. (N. S.) 329.

1. An act giving a street railway company a right to use 2,500 feet of the tracks of another street railway, on payment of damages, is unconstitutional, as an exercise of the right of eminent domain, the object being to aid the new corporation and not the general public. In re Phila., M. & S. St. R. Co., 203 Pa. 354; Com. v. Uwchlan St. R. Co., 203 Pa. 608. Under an act permitting the construction of a railroad from one point to another over such lands "as may be necessary for the public accommodation," a branch line in an intervening town for the accommodation of its inhabitants is not allowable, "public accommodation" referring to the accommodation of the general public. Attorney General v. Derry & P. Elec. R. Co., 71 N. H. 513.

2. Where a city granted permission to owners of lumber and gravel yards to lay tracks connecting with the main line of a street railway, this was held not to be improper on the ground that it was for private use. People v. Blocki, 203 Ill. 363, 67 N. E. 809.

3. Raynolds v. Cleveland, 24 Ohio Circ. R. 215. In Nebraska, the charters of all street railway companies are created by general law. Cities have no power to grant charters or impose limitations thereon. City of Lincoln v. Lincoln St. R. Co. [Neb.] 93 N. W. 766. And the law authorizing street railway companies to mortgage their property and franchises applies to companies chartered before and after the passage of the act. Id. A county court has no authority to grant a street car company the right to construct its track on a public road. Humphreys v. Ft. Smith Traction, L. & P. Co. [Ark.] 71 S. W. 662.

4. Where an act requires that the exemplification of the record of an extension must be filed, this is a condition precedent to construction. Coatesville & D. St. R. Co. v. West Chester R. Co., 206 Pa. 40. By statute, a street railway company was required to file a map and a description showing the route and the termini. The description was correct, but on the map the distance from one terminus was marked 1,462 feet "more or less." It was held that the words "more or less" might be disregarded as surplusage. Mercer County Traction Co. v. United N. J. R. & C. Co., 64 N. J. Eq. 588.

5. Where the consent of a municipality is made a condition necessary for the construction of a street railway, such consent must be obtained. Underground R. R. of N. Y. v. New York, 116 Fed. 952. Where by statute the selectmen of a town had the power in granting a location to prescribe how the tracks should be laid, what kind of rails should be used, etc., and granted a location on the condition that if a rail used at one point proved unsatisfactory it must be taken up, it was held that the company must obey when such a demand was made upon them. Selectmen of Gardner v. Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340.

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portion of the abutting owners is usually made a further condition precedent to the granting of the franchise.[6]

The condition by a borough that the company must build an extension within a year is a reasonable one. If the extension is not built, the borough can remove the tracks of the company and indulgence in commencing proceedings is not laches. Minersville Borough v. Schuylkill Elec. R. Co., 205 Pa. 394. A condition by a municipality that the company must complete the laying of its rails within a specified time is a reasonable one, and the surety on the bond of the company may be held for breach of this condition. Borough of Carlstadt v. City Trust & Surety Co. [N. J. Law] 54 Atl. 815. Where a city gave a street railway company the right to operate on certain streets to be designated by the company in its acceptance and provided that the city might designate other streets later, the franchise was held not to be bad for uncertainty, and later permission by the city was held to be merely permission to occupy new tracks and not a new franchise. Thurston v. Huston [Iowa] 98 N. W. 637. A street railway is not a public nuisance because it does not follow exactly the plan approved by a city in regard to the location of a switch, and the city has the discretionary power to ratify the change. State v. Hartford St. R. Co. [Conn.] 56 Atl. 506. Where a statute provides that the selectmen must decide on a route in writing and must file and record their decision, which shall be of no effect until this is done, voting a general location is not sufficient authority to enable the company rightfully to occupy the streets. Lenoix v. Dover, S. & R. St. R. [N. H.] 54 Atl. 1022. The public hearing required by an act may be held before or after the introduction of the municipal ordinance. A reservation of power to change a location, if illegal, vitiates the reservation only and not the ordinance; a provision for fixing compensation by arbitration is legal. Shepard v. East Orange [N. J. Law] 53 Atl. 1047. The consent of the commissioners required by St. 1902, as to extensions, held not necessary where a company filed the statement required by law at that time in 1901. N. Y. Cent. & H. R. R. Co. v. Auburn Interurban Elec. R. Co. [N. Y.] 70 N. E. 117.

6. Where a statute requires the consent of abutting owners for the construction of a street railway, this is a personal right and the owner can withhold his consent or dispose of it as he sees fit, for a valuable consideration, moving from the company if he wishes. Hamilton, G. & C. Traction Co. v. Parish, 67 Ohio St. 181, 65 N. E. 1011, 60 L. R. A. 531. Where a statute requires the consent of property owners for the construction of a street railway, the property owner can deal with this right of consent as he pleases and neither the city nor the railway has an action against one who by persuasion or money induces the owner to withhold his consent. City of Cleveland v. Cleveland City R. Co., 23 Ohio Circ. R. 373. Where the consent of an abutting owner was withdrawn before it was filed, it was held that as this right of consent was a personal and not a property right and was a statutory right arising only in connection with some application and no application was pending, a suit to enforce the consent was not maintainable. Paterson & S. L. Traction Co. v. Westbrock [N. J. Eq.] 56 Atl. 698. Where a statute provides for municipal consent on the written consent of one-half of the abutting owners being filed with the clerk of the municipality, the passage of the ordinance raises a presumption in favor of such written consent, the filing being a condition precedent to the passage of the ordinance. Mercer County Traction Co. v. United N. J. R. & C. Co., 64 N. J. Eq. 588. Where the consent of abutting owners is required to be "executed and acknowledged as our deeds," they must be sealed, and mere filing is not sufficient, but an acknowledgment that they were signed and delivered as deeds is valid without reciting the fact that they were sealed, since the sealing is implied from the acknowledgment. Id. The consent of an abutting owner is valid if given with the condition annexed "provided said railway is in operation one year from date." Failure to file consent before the introduction of the municipal ordinance does not render the consent invalid. The real owner in possession may assent although the mere legal title is in another. Shepard v. East Orange [N. J. Law] 53 Atl. 1047. A valid consent by the abutting owners, for a street car company to lay its tracks in a street, can only be given by the owner of the fee. Where the fee of certain cemetery property was in three prelates of the Catholic Church, a bishop of the diocese could not give a valid consent, though the land was held in trust for the members of that diocese. Shepard v. East Orange [N. J. Err. & App.] 57 Atl. 441. The consent of an abutting owner to the construction of a street railway line cannot be withdrawn without the consent of the general public and the company. The act of a receiver abandoning such highway does not destroy right of the company acquired under such consent. Paige v. Schenectady R. Co. [N. Y.] 70 N. E. 213. Nor the fact that a successor attempted to obtain the consent of the abutting owners of that part of the street abandoned. Id. But an abutting owner who did not give his consent may restrain such use of the street on which his property abuts. A strip of land outside the original street was subsequently acquired by the city by condemnation proceedings. Id. The remedy of abutting property owners, where a street railway is being unlawfully operated on a street is a suit to restrain such operation. Younkin v. Milwaukee L., H. & T. Co. [Wis.] 98 N. W. 215. A street railway was being lawfully operated except in so far as it cast an additional burden on the fee by the operation of an interurban service. Abutting owners sought the abatement of the road in its entirety. Held, in such suit they were entitled to the abatement of the unlawful additional servitude. Id. A consent by an abutting owner to the construction of a horse car line is not consent to the construction of an electric line. When change is made, the owner is entitled to damages for the additional servitude. Humphreys v. Ft. Smith Traction, L. & P. Co. [Ark.] 71 S. W. 662. A street railway company laid a single track on a turnpike road in such a manner as to indicate clearly an intention to construct a double track. Two years later

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(§ 1) *C. Rights and duties under franchise.*—It is settled beyond dispute that the street railway company secures certain vested rights under its franchise which cannot be arbitrarily interfered with.[7] On the other hand, the legislative power granting the franchise has the reserved power to alter, amend or repeal the charter of the company, subject to the qualification that this right is not exercised in an arbitrary manner.[8] Besides the power to alter, amend or repeal, there are certain broad powers in the nature of the police power which the legislature has the right to make use of. Where improvements are made, the company may justly be held to assume its share of the expense involved.[9] A street railway franchise may be annulled for cause by quo warranto.[10] The legislature has the power to

the other track was commenced. Held, after one-third the second track is laid, abutting owners estopped to complain. Hinnershitz v. United Traction Co., 206 Pa. 91. Act May 14, 1889, § 17 (P. L. 217), giving street railway company right to condemn turnpike on compensating owner, gives abutting owners no rights. Id. Abutting owners who consented to the construction of a car track are not necessary parties to an action by owners who did not consent, to prevent the construction. Thompson v. Schenectady R. Co., 124 Fed. 274.

7. Where a street railway company has determined on an extension, recorded the resolution and filed an exemplification of the record with the secretary of the commonwealth, in compliance with the act, it has an exclusive privilege in those streets in which the extension is to be made, and a provision in the act that there shall be no right to construct the extension for thirty days from the filing of the exemplification, merely postpones the right for 30 days. Hence, a charter permitting a second company to construct a railway over the same streets is invalid. Com. v. Uwchlan St. R. Co., 203 Pa. 608. When an act provides that the consent of the local authorities must be obtained within two years, the company cannot be disturbed in its exclusive privilege within that time. Coatesville & D. St. R. Co. v. West Chester R. Co., 206 Pa. 40. Where a company has accepted the grant of a city and taken possession of the right of way, a subsequent grant of the same premises to another road by the city's successor, the board of control, is an impairment of contract, and an injunction will be granted. Hamilton, G. & C. Traction Co. v. Hamilton & L. Elec. Transit Co., 69 Ohio St. 402, 69 N. E. 991. Where a town made certain grants which were acted upon and the town was afterwards annexed to a city, it was held that the town and the city were bound and the city could not revoke the permission given by the town. People v. Blocki, 203 Ill. 363, 67 N. E. 809.

8. Thus congress has the power to require a street railway company to which it has granted a charter to extend its tracks to connect with other railways for the convenience of the public, without regard to the consent of the company, and this is not a taking of private property for public or private use without compensation and without due process of law. Metropolitan R. Co. v. Macfarland, 20 App. D. C. 421. A city can repeal an ordinance relating to a street railway, provided such repeal is not arbitrary. Snouffer v. Cedar Rapids & M. City R. Co., 118 Iowa, 287, 92 N. W. 79. The power to alter, amend or repeal the charter cannot be exercised in an arbitrary manner. Fair Haven & W. R. Co. v. New Haven, 75 Conn. 442. It is a rule of statutory construction that when it is claimed that a later act repeals a prior one, the repugnancy must be clear. Fair Haven & W. R. Co. v. New Haven, 75 Conn. 442; Lenoix v. Dover, S. & R. St. R. [N. H.] 54 Atl. 1022; Mercer County Traction Co. v. United N. J. R. & C. Co., 64 N. J. Eq. 588. An ordinance of 1879 permitted an individual and his assigns to operate a single track dummy railway, limiting the right to April 1, 1898. An ordinance of 1881 confirmed this right in an assignee company, with limitation to July 1, 1901. An ordinance of 1887 vested the right in another company, giving them the additional right to operate a "suburban passenger railway." It was held that as to time the rights conferred by the ordinance of 1887 were governed by the ordinance of 1881. Chicago T. T. R. Co. v. Chicago, 203 Ill. 576, 68 N. E. 99. By an act of 1893, a street railway was required to keep certain parts of the highway in repair to the satisfaction of the municipal authorities, and no right of appeal was given. In 1895, a statute gave a right of appeal to the superior court. In 1901, a statute transferred most of the powers given under the act of 1893 to the railroad commissioners, and the right of appeal was transferred to the railroad commissioners. It was held that the act of 1901 did not abrogate the provisions as to the repair of the highway contained in the act of 1903. City of Hartford v. Hartford St. R. Co., 75 Conn. 471. Public Acts 1901, c. 156, did not take away the power of municipal authorities to order a street railway company to repair its part of the highway. Id. Pub. Acts 1901, c. 156 allowed a street railway company the right to appeal from orders of municipal authorities as to paving, to the railroad commissioners. Id.

9. Thus where a street railway company is required by congress to extend its tracks, and the new streets, on which the company owns no abutting property, are widened and graded, an assessment proportional to the benefit incurred may be levied on the company. Metropolitan R. Co. v. Macfarland, 20 App. D. C. 421. The state may properly require a street railway company to pay to the city the cost of paving 9 feet of the width of a street for every track situated thereon. Fair Haven & W. R. Co. v. New Haven, 75 Conn. 442.

10. Such franchise comes within the meaning of Rev. St. 1898, § 3466. State v. Milwaukee, B. & L. G. R. Co., 116 Wis. 142, 92 N. W. 546.

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tax street railway companies and may delegate this power to municipalities.[11] An agreement to pay a license fee for each car operated is not affected by a voluntary change of motive power from cable to electricity.[12] The legislature can regulate the charges of street railway companies and require them to furnish transfers, and may delegate this authority to a city.[13] As in the case of the power to alter, amend or repeal, the police power must not be exercised in an arbitrary manner.[14] In like manner, municipalities have the right to impose numerous burdens on street railway companies under a proper exercise of the police power.[15] This power of the municipality, however, is a limited one, and it is clear that under the guise of the police power the city has no right to usurp the functions of the state. A city cannot regulate the construction and operation of street railways. The power is derived from the state and the city must adhere closely to the limitations and con-

11. A traction motor company leasing and operating street railways in a city is exercising the functions of a street railway company and is subject to taxation, a statute excepting "superstructure and water stations" being construed to apply not merely to steam railroads. City of Phila. v. Phila. Traction Co., 206 Pa. 35.

12. The company insisted on a reduction in the amount of the fee which was established by the agreement at $20.00 for each car. City of New York v. Third Ave. R. Co., 42 Misc. [N. Y.] 599. Where it is provided by the code that the property of a company shall be taxed separately when part is in one town and part in another, the proper method is to tax as if on fractional parts of a money-earning whole, and not on the actual construction and equipment of the road. City Council of Marion v. Cedar Rapids & M. C. R. Co., 120 Iowa, 259, 94 N. W. 501. Where the only motive power of a street railway company, which pays to the state a tax on its capital stock, consists of horses, all of which are necessary in moving the company's cars, such horses are not subject to municipal taxation, although one or more of the horses are occasionally used in other work of the company. People's Pass. R. Co. v. Taylor, 22 Pa. Super. Ct. 156.

13. The power to regulate the charges of "hackmen, omnibus drivers, and cabmen" and "all others pursuing like occupations" gives the power to regulate the charges of street railways. Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631. New York Railroad Laws provide the method to enforce provisions of their charter. The right to transfers cannot be enforced by mandamus. People v. Interurban St. R. Co., 85 App. Div. [N. Y.] 407. Under New York statute providing for a penalty of $50.00 for every refusal to comply with the act, the passenger to whom the transfer is refused in violation of the act is the aggrieved party. Fox v. Interurban St. R. Co., 86 N. Y. Supp. 64. A minor is entitled to the penalty. Id. A provision of the railroad law as to transfers held to apply to the Interurban St. R. Co. of New York City. Blume v. Interurban St. R. Co., 41 Misc. [N. Y.] 171.

14. Fair Haven & W. R. Co. v. New Haven, 75 Conn. 442.

15. A city ordinance as to the right of way at street crossings is binding without the consent of the company. McLain v. St. Louis & S. R. Co., 100 Mo. App. 374, 73 S. W. 909. At time of a collision a car was going north and a team going east. An ordinance was in evidence providing that vehicles going north or south had right of way over those going east or west. A charge that rights of the parties at the time of the collision were equal, and refusing to charge that the car had the right of way, was error. Cushing v. Metropolitan St. R. Co., 92 App. Div. [N. Y.] 510. A city ordinance requiring those in charge of a street car to keep a vigilant watch is binding without acceptance on the part of the company. Gebhardt v. St. Louis Transit Co., 97 Mo. App. 373, 71 S. W. 448; Sepetowski v. St. Louis Transit Co., 102 Mo. App. 110, 76 S. W. 693; Nagel v. St. Louis Transit Co. [Mo. App.] 79 S. W. 502; Riska v. Union Depot R. Co. [Mo.] 79 S. W. 445. A city ordinance requiring a street railway company to clean the street between its rails is a reasonable exercise of the police power, although owing to the presence of the tracks the street is more difficult to clean. City of Chicago v. Chicago Union Traction Co., 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666. Where a city authorized the construction of a road on certain conditions in respect to the paving, it was held that this was not a contract, but legislation which could be amended, and that later, under changed conditions, the company could be made to pay a share of the cost of repaving with other materials. Binninger v. New York, 177 N. Y. 199, 69 N. E. 390. The railroad commissioners have the power to require a street railway company to pay one-half the expense of safety appliances at a grade crossing not built until after the street railway was constructed. Detroit, Ft. W. & B. I. R. v. Osborn, 189 U. S. 383, 47 Law. Ed. 860. A city ordinance requiring air or electric brakes is a proper police regulation. People v. Detroit United Ry. [Mich.] 97 N. W. 36. An ordinance providing that every car shall have a sign showing its destination, and that the company must carry passengers to any regular stop on the route without change of cars except in the case of a transfer to a connecting line going in another direction or in case of accident, is reasonable, and it is not enough to take a passenger merely as far as a certain avenue when ordinarily the car goes 30 blocks further. City of New York v. Interurban St. R. Co., 86 N. Y. Supp. 673. In an action for the violation of an ordinance requiring a car to have a sign designating its destination, held that "Flushing, via Jackson Avenue" is a sufficient compliance. City of New York v. New York & Q. C. R. Co., 89 App. Div. [N. Y.] 442.

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ditions imposed by the statute.[16] A street railway company operating freight cars without authority and in violation of law is guilty of a nuisance, and a pedestrian who is injured may recover without reference to the negligence of the company.[17] The right of an electric street railway company to occupy the street with poles, wires, etc., cannot be disconnected from the operation of the railway and transferred to one not owning the franchise, for electric lighting.[18] As a general rule, a lessor company succeeds to the rights and liabilities of its lessee.[19] A grant to maintain a line of track on a street has no relation to the franchise and can be abandoned by the company by agreement with the property owners and the city without the consent of the state.[20]

§ 2. *Location and construction and equipments.*—The rule is generally stat-

16. Raynolds v. Cleveland, 24 Ohio Circ. R. 215. An ordinance attempting to grant to a steam railroad the franchise to construct and operate a street railway is invalid, the clear intention of the legislature being to keep the two distinct. State v. Milwaukee, B. & L. G. R. Co., 116 Wis. 142, 92 N. W. 546. Where it is provided by statute that a street railway company shall not unnecessarily obstruct the streets, the city council cannot grant the company an exclusive right to the street. Russell v. Chicago & M. Elec. R. Co., 205 Ill. 155, 68 N. E. 727. Where certain privileges were allowed street railway companies by statute, a city, in granting a right to a company to carry "passengers, freight, mail and express" exceeds its powers, and permission to erect poles and wires, either those used in the operation of the street railway or additional, for the transmission of heat and light, is invalid for the same reason. Goddard v. Chicago, M. & St. P. R. Co., 104 Ill. App. 533. Where an act provided that all street railway companies should use fenders, but provided that the corporate commission could make exemptions, and all street railway companies were exempted until otherwise ordered, it was held that such action was invalid as a suspension of the statute. Henderson v. Durham Traction Co., 132 N. C. 779. Authority granted by the legislature to the county supervisors to allow street railway companies to locate their tracks on highways outside city or town limits does not confer the right to allow this privilege to individuals. Goddard v. Chicago & N. W. R. Co., 202 Ill. 362, 66 N. E. 1066. Where the charter of a street railway company provided that it must keep certain portions of the street "in good repair," it was held that the company could not be forced to repave with a new pavement adopted by the city. City of Williamsport v. Williamsport Pass. R. Co., 206 Pa. 65. Where a special act of the legislature gives a street railroad company the right to lay its tracks in a borough without municipal consent, the question of the company's exceeding its powers by leasing its tracks is for the commonwealth only, and cannot be raised by the borough. Minersville Borough v. Schuylkill Elec. R. Co., 205 Pa. 402. A city ordinance requiring a street railway company to keep in repair the street between its rails, between its tracks and for one foot outside each outer track is an assumption of the power of taxation and cannot be supported as a proper exercise of the police power. Since the primary object of such an ordinance is the relief of the city treasury, it does not confer a right of action on any member of the traveling public sustaining injury. Fielders v. North Jersey St. R. Co., 68 N. J. Law, 343.

17. Daly v. Milwaukee Elec. R. & L. Co. [Wis.] 96 N. W. 832.

18. City of Carthage v. Carthage Light Co., 97 Mo. App. 20, 70 S. W. 936.

19. A lessee company had agreed with a borough to use guard wires over its trolley wires, but the condition was not enforced for a long time, when a bill was brought to stop the running of the cars. It was held that if the lessor company would put up the wires within a reasonable time, the bill would be dismissed. Conshohocken Borough v. Conshohocken R. Co., 206 Pa. 75. When one street railway company has leased its property and franchises to another company on the terms that after-acquired railroads shall come under the lease without increase of rent, the lessor company may lawfully apply to a municipality for permission to construct, maintain and operate an extension of a street railway embraced in the lease. Shepard v. East Orange [N. J. Law] 53 Atl. 1047. A lessor street railway company is liable for negligence of a lessee road, since the company is incorporated primarily for the benefit and safety of the public. Munts v. Algiers & G. R. Co., 111 La. 423. A street railway company, chartered in 1868, was liable to pay for one-fifth of the paving. It did not use its privilege of building on certain streets until the time for so doing had expired, and a second company, bound to pave between its tracks and 2 feet on either side, did construct a railway on these streets. The first company purchased the second and was held bound by the charter of the second company as to the paving of these streets. Kent v. Common Council of Binghamton, 40 Misc. [N. Y.] 1. If a street railway buys the equipment but not the franchise contracts, etc., of another road, it is not the "successor" of the second road under a contract relating to the employment of a flagman so as to make it liable for his wages. Chicago & N. W. R. Co. v. Fox River Elec. R. & P. Co. [Wis.] 96 N. W. 541. Where a company contracted with a city to pay certain license fees, and was then leased to a second company, "subject to all debts and liabilities," it was held that the second company did not assume the payment of fees due prior to the lease. City of New York v. Third Ave. R. Co., 77 App. Div. [N. Y.] 379.

20. Thompson v. Schenectady R. Co., 124 Fed. 274.

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ed to be that a street railway is not an added burden on the highways so as to give abutting owners a right to compensation.[21] A distinction is made, however, when the street railway is constructed in the country. The construction of a street railway on an ordinary country road in a township of the first class has been held to be an added servitude, the court admitting that this would not be the case in the city, but drawing the distinction on the ground of the greater compactness of the city and the presumption that the inhabitants share more directly in the benefits conferred,[22] and it has been held that an electric road running from one city through the streets of another city to a point beyond is an added burden on the land of the abutting owners in the streets of the second city, the court taking the ground that on the country highway beyond the road would be an added burden, and that since cars crowded with through passengers would pass through the second city, the same ruling should be made in its case.[23] Where, on the question of damage to the easements of light and access of an abutting owner, a street railway company claims adverse possession, the possession must be hostile, and an admission of liability to abutting owners made during the period is fatal.[24] Under a contract between a city and a contractor by which the city was to pay for the construction of a subway and the contractor was to pay for the equipment, chambers for electricity in the sidewalls of the subway come under the head of construction and the city must pay for that.[25] The rights and duties of the company in constructing and maintaining its roads are called into question in so many different ways and under such widely different circumstances that it is wellnigh impossible to lay down general rules of law governing them. The cases are accordingly appended in two foot notes, the first containing a brief summary of the construction cases where a decision favorable to the company was reached,[26] and the second containing the similar cases where an opposite conclusion was reached.[27]

21. Austin v. Detroit, Y. & A. A. R. [Mich.] 96 N. W. 35; Parrish v. Hamilton, G. & C. Traction Co., 23 Ohio Circ. R. 527. When an act provides for compensation to the owner of a turnpike road whenever such road is taken by a street railway company, the abutting owners have no right to compensation. Hinnershitz v. United Traction Co., 206 Pa. 91. Abutters on the highway owning no part of the fee cannot complain of the construction of a street railway thereon under the lawful authority of the state. Kennedy v. Mineola, H. & F. Traction Co., 77 App. Div. [N. Y.] 484, 12 Ann. Cas. 189. An abutting owner has no right to compensation when a grade is lowered for a street railway company with the consent of the township, even although his fence and land are thus endangered. Austin v. Detroit, Y. & A. A. R. [Mich.] 96 N. W. 35. An abutting owner must show something more than mere annoyance incident to the use of the street for public travel. State v. Hartford St. R. Co. [Conn.] 56 Atl. 506. Where a street railway company seeks to lay its tracks in a part of the street not designated in its charter, an abutting owner has no right to complain unless he can show a nuisance in fact and some special damage to himself apart from that connected with the general operation of the railway. Baker v. Selma St. & S. R. Co., 135 Ala. 552. The unauthorized operation of cars within a few inches of the curb so that teams must stand on the track in constant danger presents a case of specific damage to an abutting owner and warrants the granting of an injunction, although the company, being a trespasser, is also guilty of maintaining a public nuisance. Henning v. Hudson Valley R. Co., 90 App. Div. [N. Y.] 492. A company operating a suburban electric line cannot go on the private property of an abutting owner to cut and grade, on the refusal of the owner to sell. Freud v. Detroit & P. R. Co. [Mich.] 95 N. W. 559.

See, also, the title Eminent Domain, 1 Curr. Law, p. 1002.

22. Dempster v. United Traction Co., 205 Pa. 70.

23. Younkin v. Milwaukee Light, H. & T. Co. [Wis.] 98 N. W. 215.

24. Hindley v. Metropolitan El. R. Co., 42 Misc. [N. Y.] 56.

25. In re McDonald, 80 App. Div. [N. Y.] 210.

26. When the company lays a single track so as to show a clear intent to lay a double track later and had actually constructed one-third of the double track the abutting owners were held to be estopped by laches from seeking to restrain the construction of the double track. Hinnershitz v. United Traction Co., 206 Pa. 91. Where a city makes a paving contract, and the contractor agrees to keep the street in good condition for five years, the company, although paying a share of the expense, is not liable for defects within that time. Binninger v. New York, 177 N. Y. 199, 69 N. E. 390. A village grant-

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§ 3. *Rights of trespassers and licensees on cars, and injuries to them.*—Whether a person riding upon a street car is to be regarded as a passenger or a

ed a street railway company a 25 foot right of way and later permission to construct a viaduct. The original of the latter was lost, and as copied in the records only allowed for 20 feet, while a certified copy in possession of the company allowed for 25 feet. During construction the president of the council and the village engineer both knew that the company was using more than 20 feet. It was held that after completion the village was estopped from removing all outside 20 feet. Village of Winnetka v. Chicago & M. Elec. R. Co., 204 Ill. 297, 68 N. E. 407. A street railway company made a contract with a borough by which it agreed to pave the street wherever it had sidings, when the borough paved the rest. The company gave notice of the removal of a siding prior to the ordinance authorizing paving by the borough and afterwards removed it. The company was held not liable. Shamokin Borough v. Shamokin & Mt. C. Elec. R. Co., 206 Pa. 625. A city is liable, under an agreement with a street railway company to do all paving and repairing of the pavement, to repair the foundation necessary for the support of the tracks. City of Detroit v. Detroit United R. [Mich.] 95 N. W. 736. Under a contract with a toll road a street railway company which desired to lay an additional line of track agreed to extend the roadbed if it became necessary to encroach upon it. It was held that to carry out the obvious purpose of the contract necessary encroachments were contemplated. Detroit & B. Plank Road Co. v. Oakland R. Co., 131 Mich. 663, 92 N. W. 346. Under a grant from a village authorizing "necessary sidetracks and switches" and requiring the company to run cars to the village from outside, the company can make necessary connections with a branch line running to the village. Houghton County St. R. Co. v. Common Council of Laurium [Mich.] 98 N. W. 393. Where a street railroad company obtained a right of way across certain premises and agreed to grade and pave the part not occupied by its tracks, and the location was afterwards abandoned for failure of consent by the city, it was held that no damages were recoverable for the failure to grade and pave. Hays v. Wilkinsburg & E. P. St. R. Co., 204 Pa. 488.

27. When the company got the consent of the highway commissioners to construct a track for 5 miles and filed the written consent of more than two-thirds of the property owners it was held that it could not abandon all but 3,100 feet of the road. Collins v. Amsterdam St. R. Co., 76 App. Div. [N. Y.] 249. Where the power to pave the streets was by statute granted to the city council it was held that a contract by a street railway company with abutting owners to pave the streets was ultra vires and could not be enforced. Farson v. Fogg, 205 Ill. 326, 68 N. E. 755. The fact that pending a suit a street railway company filed a bond conditioned to pay all damages will not prevent an injunction when the street is finally decided to be private property. Russell v. Chicago & M. Elec. R. Co., 205 Ill. 155, 68 N. E. 727. Where a village ordinance required tracks to be constructed on a certain day, provided the village graded the streets 60 days before that time, it was held that the failure to grade did not relieve the company from its ultimate liability to build, and that the village was not guilty of laches in not requiring construction for nine years. State v. Duluth St. R. Co., 88 Minn. 158, 92 N. W. 516. Where it is specified that a company shall construct a new line of street railway "substantially" like the one it is already operating, the erection of a trestle is improper. Lane v. Mich. Traction Co. [Mich.] 97 N. W. 354. A verbal agreement with the vice president of a company and a paper signed by him but not by the secretary and not sealed with the seal of the company is not a consent sufficient to allow another company to cross the tracks of the first. Ballston Terminal R. Co. v. Hudson Val. R. Co., 76 App. Div. [N. Y.] 184. A provision in the charter of a street railway company made it necessary for the company to build a mile of track each year or forfeit its franchise, and a receiver operating the road pending the foreclosure of a mortgage applied for permission to build the mile of road, wishing to make his certificates a lien prior to the mortgage. There was no allegation that the city would enforce the forfeiture, or that the purchaser would not have time to build. It was held that no necessity sufficient for granting the application was shown. Pueblo T. & E. Co. v. Allison, 30 Colo. 337, 70 Pac. 424. Where a street railway company maintains a drawbridge and does not open it to permit a vessel to pass through, this raises a presumption of negligence, and the company is liable in the absence of a satisfactory explanation. Clement v. Metropolitan West Side El. R. Co. [C. C. A.] 123 Fed. 271. The company must maintain its crossings in such a way as to be safe for travel. Person thrown from a carriage while crossing a track because the approach to the rails was not protected. Gray v. Wash. Water Power Co., 30 Wash. 665, 71 Pac. 206. A street car company must maintain its tracks so as to not render travel in the street dangerous. A company had permitted the street near its tracks to become worn so the rails projected above the surface. One in driving across the track was jolted from his seat and injured. Shelton v. Northern Tex. Traction Co. [Tex. Civ. App.] 75 S. W. 338. And the fact that its negligence concurs with that of a railroad company will not relieve it. Accident happened at an intersection of a street and steam railroad. Id. A charge that if the accident was caused by the striking of the wheel against the rail of the steam railway company's track, the street car company was not liable, was erroneous. Id. And was not cured by charging that if the street car company was negligent in not filling up the holes, the plaintiff should recover. Id. An instruction that if there were no planks laid along the rails as required by ordinance, one injured by being thrown from her carriage should recover, was not objectionable in view of a further instruction that if some other method of protecting the rails was used the ordinance need not be considered. Gray v. Wash. Water Power Co., 30 Wash. 665, 71 Pac. 206. Held, negligence to permit the paving between the rails to be out of

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trespasser is of the utmost importance. The company owes the passenger, with whom it has entered into contractual relations, a high degree of care.[28] To the trespasser, however, it owes no such duty and as a general rule is liable only for willful or wanton injury.[29] Although, as a general rule, a street railway company is held to a higher degree of care towards children than towards adults, it has been held that when a child of 12 was injured, his youth gave him no right to any extraordinary protection from the company.[30] A newsboy may or may not be regarded as a trespasser. As a general rule where he is allowed by custom to board the car to sell his papers he is regarded not as a trespasser but as a licensee.[31] Under certain circumstances, however, he may properly be regarded as a trespasser.[32] Even if a boy is guilty of lack of due care, and even if his lack of due care exists at or after the time of the act of the servants of the company, this will not excuse a willful or reckless act on their part, and the company is liable for such willful acts done in the course of their employment.[33] Contributory negligence will of course bar a recovery.[34]

§ 4. *Rights of travelers on highway and injuries to them. A. Pedestrians*

repair. A pedestrian caught her foot and stumbled, injuring herself. Williams v. Minneapolis St. R. Co., 88 Minn. 79, 92 N. W. 479.

28. Clark, St. Ry. Accidents (2d Ed.) §§ 1, 47.

29. The position which a would-be passenger assumes upon the car may be important in determining his status in an action against the company. Thus where a boy of 12 got on the front platform step of a moving electric car with the intention of becoming a passenger, access to the platform being barred by a closed door, and the motorman, when the boy rapped on the door, did not open the door or slacken speed, it was held that the boy was a trespasser to whom the company owed no duty except that of abstaining from willful injury. Barlow v. Jersey City, H. & P. R. Co., 67 N. J. Law, 364. A child of 7, although non sui juris, is a trespasser when riding on the step of the rear platform on the side of the car not in use, across which is a closed gate, and the company is under obligation to discover his peril. Monehan v. South Covington & C. St. R. Co. [Ky.] 78 S. W. 1106. The negligence of the conductor in ordering a boy who is stealing a ride to jump from a moving car is generally held to be a question for the jury under all the circumstances of the case. Denison & S. R. Co. v. Carter [Tex. Civ. App.] 70 S. W. 322, 71 S. W. 292; Richmond Traction Co. v. Wilkinson [Va.] 43 S. E. 622. A child six years old was clinging to the lower step at the forward end of a car as it was turning a corner from one street into another. The motorman saw him and heard him cry to be let off, but turned on the power and started the car quickly, throwing the child off under the wheels. An instruction that this was wanton and willful negligence was proper. Aiken v. Holyoke St. R. Co., 184 Mass. 269, 68 N. E. 238.

30. Barlow v. Jersey City, H. & P. R. Co., 67 N. J. Law, 364.

31. A newsboy who is allowed upon a street car is not a trespasser until his right to remain on the car is terminated by a reasonable notice, which he must hear. His due care and the negligence of the company when he is ordered to leave a moving car are questions for the jury. Indianapolis St. R. Co. v. Hockett, 161 Ind. 196, 67 N. E. 106.

32. Where a newsboy jumped on the running board of a moving car, and it appeared that his only right to be upon the car was by a contract permitting him to enter and leave by the rear platform when the car was not in motion, he was held to be a trespasser to whom the company owed no duty except to abstain from willful injury. Albert v. Boston El. R. Co. [Mass.] 70 N. E. 52. A newsboy stealing a ride on the platform outside the gate is a trespasser and whether the conductor is guilty of willful misconduct in raising his arm and frightening the boy into jumping from the car is a question for the jury. Chicago City R. Co. v. O'Donnell, 207 Ill. 478, 69 N. E. 882. Testimony of one witness held sufficient to support a recovery where a newsboy was forced to jump from a rapidly moving car and was run over and killed by a car coming from the opposite direction. Id. Where a newsboy who had not paid his fare jumped from a rapidly moving car because threatened by the conductor, and was run over by a car coming from the opposite direction, the fact that there were but two witnesses, one for plaintiff and one for defendant, and the testimony of defendant's witness was the more probable, a verdict for plaintiff was not disturbed. Id.

33. This ruling was made where a boy of 6½ was clinging to the step of a car and there was evidence that the motorman not only disregarded his entreaties, but increased the speed of his car. Aiken v. Holyoke St. R. Co., 184 Mass. 269, 68 N. E. 238.

34. In an action to recover damages for injuries to a trespasser, evidence as to the distance in which a car, different, and differently equipped from that which caused the injury could be stopped, is not admissible. Richmond Pass. & Power Co. v. Racks' Adm'r [Va.] 44 S. E. 709. Where plaintiff knew that it was customary for the motorman to sound the gong on approaching the place where he was at work, held, whether he was negligent in not looking up during one minute preceding the accident, was for the jury. Daum v. North Jersey St. R. Co. [N. J. Law] 54 Atl. 221.

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run over. Adults. Due care of plaintiff.—A pedestrian must use ordinary care in approaching and crossing street railway tracks.[35] As a general rule, where a pedestrian goes in front of a car, and there is evidence either that he did not look or that he had a clear view and could have seen the car if he had looked, he cannot recover.[36] A deaf man is under all the greater obligation to look for a car,[37] and a person whose eyesight and hearing are both poor must use greater care than a person in ordinary health.[38] Where a pedestrian swears that he looked and saw no car, but all the facts show that if he had looked he must have seen the car, his testimony may be disregarded;[39] but on the other hand, a failure to look will not prove a bar to recovery where looking would have done no good.[40] Where there is no evidence that a person did not look and listen, some cases hold that it may be inferred from the natural desire for self-preservation that he did exercise due care, and looked and listened for an approaching car.[41] Other cases expressly deny the right of the court to indulge in any such presumption.[42] Where it appears that a pedestrian did look for a car, this is generally sufficient to take the question of his due care to the jury, especially where there are other circumstances tending to show negligent operation of the car.[43] The mere fact of looking, however, does not absolve the pedestrian from the duty of taking further precautions. If he sees a car and determines to take his chances of crossing ahead of it, but miscalculates his distance, he is unable to recover,[44] and if he sees a car when he is some distance from the track and goes on the track without looking again, he is almost always held guilty of lack of due care,[45] although cer-

35. Kernan v. Market St. R. Co., 137 Cal. 326, 70 Pac. 81; Chicago City R. Co. v. Loomis, 102 Ill. App. 326. It has been held that if this general statement of the rule is made, it is unnecessary to go further and give the more specific instruction that certain acts constitute a lack of due care. Brown v. Elizabeth, P. & C. J. R. Co., 68 N. J. Law, 618. See Clark, St. Ry. Accidents (2d Ed.) §§ 86, 87, 88; Louisville R. Co. v. Poe, 24 Ky. L. R. 1700, 72 S. W. 6. In an action for injuries sustained at a crossing, question of contributory negligence being for jury, an instruction held erroneous because a virtual direction of verdict for defendant. Beers v. Metropolitan St. R. Co., 88 App. Div. [N. Y.] 9.

36. Ries v. St. Louis Transit Co. [Mo.] 77 S. W. 734; Baly v. St. Paul City R. Co. [Minn.] 95 N. W. 757; Moore v. Lindell R. Co., 176 Mo. 528, 75 S. W. 672; Du Frane v. Metropolitan St. R. Co., 83 App. Div. [N. Y.] 298; Wolf v. City & S. R. Co. [Or.] 72 Pac. 329. See Clark, St. Ry. Accidents (2d Ed.) § 88. It is not necessary that the plaintiff's conduct should be reckless; mere negligence is sufficient to bar recovery. McKinley v. Metropolitan St. R. Co., 77 App. Div. [N. Y.] 256. Where a car stood on a bridge and took up all the room on it and the plaintiff knew this and could have seen that the motorman was getting ready to start, but went on the bridge without looking, he was held not to be in the exercise of due care. Judge v. Elkins, 183 Mass. 229, 66 N. E. 708. Where a pedestrian stepped from behind a row of 5 or 6 covered wagons and was struck by a car coming in the opposite direction and there was no evidence that he looked for the car, there was held to be no sufficient evidence of due care. Ames v. Waterloo & C. F. Rapid Transit Co., 120 Iowa, 640, 95 N. W. 161.

37. Aldrich v. St. Louis Transit Co., 101 Mo. App. 77, 74 S. W. 141.

38. Casper v. Metropolitan St. R. Co., 84 App. Div. [N. Y.] 639. See Clark, St. Ry. Accidents (2d Ed.) § 87.

39. Reno v. St. Louis & S. R. Co. [Mo.] 79 S. W. 464; Brown v. Elizabeth, P. & C. J. R. Co., 68 N. J. Law, 618; Kappus v. Metropolitan St. R. Co., 82 App. Div. [N. Y.] 13; McKinley v. Metropolitan St. R. Co., 91 App. Div. [N. Y.] 153.

40. Binns v. Brooklyn Heights R. Co., 89 App. Div. [N. Y.] 359.

41. Ames v. Waterloo & C. F. Rapid Transit Co., 120 Iowa, 640, 95 N. W. 161; Kan. City-Leavenworth R. Co. v. Gallagher [Kan.] 75 Pac. 469; Riska v. Union Depot R. Co. [Mo.] 79 S. W. 445; Priesmeyer v. St. Louis Transit Co., 102 Mo. App. 518, 77 S. W. 313.

42. Du Frane v. Metropolitan St. R. Co., 83 App. Div. [N. Y.] 298; O'Reilly v. Brooklyn Heights R. Co., 82 App. Div. [N. Y.] 492.

43. Kernan v. Market St. R. Co., 137 Cal. 326, 70 Pac. 81; Mauer v. Brooklyn Heights R. Co., 87 App. Div. [N. Y.] 119; McDermott v. Brooklyn Heights R. Co., 89 App. Div. [N. Y.] 214.

44. Freeman v. Brooklyn Heights R. Co., 82 App. Div. [N. Y.] 521. It is a question for the jury whether a pedestrian who attempts to pass in front of a stationary car in full view of the motorman is guilty of contributory negligence. McLeland v. St. Louis Transit Co. [Mo. App.] 80 S. W. 30. One who attempted to cross a track in front of an approaching car held negligent. Atlanta R. & P. Co. v. Owens [Ga.] 47 S. E. 213.

45. Metz v. St. Paul City R. Co., 88 Minn. 48, 92 N. W. 502; Fanning v. St. Louis Transit Co. [Mo. App.] 78 S. W. 62; Brown v.

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tain exceptional circumstances may warrant the submission of his due care to the jury.[46] A common case is where there are double tracks, and a pedestrian, either crossing the street or having just alighted from a car, crosses in the rear of the car and is struck by a car coming in the opposite direction on the other track. Whether he is to be deemed guilty of lack of due care as a matter of law or whether his due care is to be submitted to the jury depends on all the circumstances of the case.[47] Certain other facts may tend to help the plaintiff in having the question of his due care submitted to the jury, such as the fact that the accident occurred at a crossing, where there is more to distract the pedestrian's attention,[48] or the fact that the accident occurred at night.[49] A number of cases have arisen where pedestrians have been run over while lying on the track[50] or walking along

Elizabeth, P. & C. J. R. Co., 68 N. J. Law, 618; Kappus v. Metropolitan St. R. Co., 82 App. Div. [N. Y.] 13; Lynch v. Third Ave. R. Co., 88 App. Div. [N. Y.] 604; Thompson v. Metropolitan St. R. Co., 89 App. Div. [N. Y.] 10.

46. A pedestrian waited for a car to pass and then went on the track without looking again. It appeared that the cars on this track were run from three to twenty minutes apart and that the plaintiff knew of this fact. He was struck by a car immediately following the one which had passed, and his due care was held to be a question for the jury. Moore v. St. Louis Transit Co., 95 Mo. App. 728, 75 S. W. 699. One who sees a car approaching 200 feet distant and attempts to cross in front of it is not guilty of negligence as a matter of law. Kolb v. St. Louis Transit Co., 102 Mo. App. 143, 76 S. W. 1050. Where a person approaching a crossing saw the car coming but thought he had time to cross before it reached him and was struck by it, the question of negligence was held for the jury. Klimpl v. Metropolitan St. R. Co., 92 App. Div. [N. Y.] 291. Whether one injured at a crossing was negligent in failing to look and listen, before crossing immediately after a car had passed held a question for the jury. Moore v. St. Louis Transit Co., 95 Mo. App. 728, 75 S. W. 699. Question for the jury whether one was negligent who attempted to cross a track with a car approaching half a block distant. Chicago City R. Co. v. Sandusky, 198 Ill. 400, 64 N. E. 990.

47. See Clark, St. Ry. Accidents (2d Ed.) § 90. The plaintiff was held unable to recover, under this state of facts, where he crossed without looking or listening (Indianapolis St. R. Co. v. Tenner [Ind. App.] 67 N. E. 1044) and the same ruling was made where it appeared that the plaintiff looked once but there was no clear evidence that he looked again (Little v. Third Ave. R. Co., 83 App. Div. [N. Y.] 330). Where there were double tracks, and a pedestrian, after alighting from a car at a place opposite an elevated station, much frequented by pedestrians, crossed in the rear of the car and was killed by a car coming on the other track at high speed and without warning, the case was held to be for the jury. Stevens v. Union R. Co., 75 App. Div. [N. Y.] 602. On the other hand, where the plaintiff looked for a car and the car which struck him was being driven at a crossing at the rate of 15 miles an hour, due care was held to be for the jury [Beers v. Metropolitan St. R. Co., 88 App. Div. [N. Y.] 9) and where the accident occurred at a street crossing at night, the plaintiff looked twice for a car and the car which struck him was being driven at high speed without warning and had a dim headlight, due care was also held to be properly submitted to the jury (Chicago City R. Co. v. Fennimore, 199 Ill. 9, 64 N. E. 985). A pedestrian allowed a car to pass on the track nearest him, and then started to cross without looking for a second car on that track. Stepping back to avoid a car on the further track, he went in front of a second car coming on the near track. He was held not to be in the exercise of due care. Jackson v. Union R. Co., 77 App. Div. [N. Y.] 161. In a later case under an almost exactly similar state of facts, the same ruling was made. Trauber v. Third Ave. R. Co., 80 App. Div. [N. Y.] 87.

48. Where a pedestrian was injured at a crossing by a car which came down grade at high speed and without warning and the plaintiff's attention was distracted by the ringing of the gong on another car which was racing with a boy on a bicycle, although the plaintiff only looked in one direction, his due care was held to be for the jury. Peterson v. Minneapolis St. R. Co. [Minn.] 95 N. W. 751. Pedestrian struck by a car from behind while watching, as she crossed the street, a car coming from the opposite direction, which attracted her attention by ringing the gong. Evidence held to sustain the verdict for plaintiff. Id. In like manner due care was held to be for the jury where the plaintiff crossed a track at a crossing to board another car, and was struck by a car coming at high speed without warning (Stillings v. Metropolitan St. R. Co., 84 App. Div. [N. Y.] 201) and the same ruling was made in a later trial with the added feature that the conductor called to the plaintiff to hurry (Stillings v. Metropolitan St. R. Co., 177 N. Y. 344, 69 N. E. 641). Due care is for the jury where a pedestrian was injured at a crowded crossing and there is evidence that the motorman did not slacken speed sufficiently. Mulligan v. Third Ave. R. Co., 87 App. Div. [N. Y.] 320.

49. The fact that the accident occurred at night is one circumstance to be considered in passing upon the question of a pedestrian's due care. Brown v. Elizabeth, P. & C. J. R. Co., 68 N. J. Law, 618; Kappus v. Metropolitan St. R. Co., 82 App. Div. [N. Y.] 13.

50. If a man is seen walking on or near the tracks and a short time later is run over

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it,[51] or have been injured while standing near the track.[52] Numerous cases have arisen where laborers working near the tracks or between the tracks themselves have been injured by contact with a street car.[53] In some cases the conduct of the laborer is such that the court does not hesitate to rule that he is guilty of lack of due care as a matter of law.[54] In other cases, the circumstances are such that the due care of the laborer is held to be properly submitted to the jury. Whether the laborer had a right to rely upon a custom of the street railway company in giving warning is an important circumstance.[55] Where a laborer is injured by the derailment of a car, a charge which practically makes the company an insurer by stating that it is its duty to construct its road so that its cars will not leave the tracks is error.[56] In the absence of proof, there is no presumption that a laborer working near the tracks of a street railway company is a tespasser, nor can such a presumption be indulged in with regard to his employer, a gas company.[57] One who alights from a street car becomes at once a traveler[58] charged with the duty of exercising due care.[59]

Negligence of company.—Between crossings, a street car has a superior but not exclusive right of way.[60] At crossings, however, the rights of the car and of the pedestrian are held to be equal.[61] Notwithstanding a pedestrian's lack of due care, the company may nevertheless be held liable if it could have prevented the accident by the use of ordinary care,[62] but it is a qualification of this rule as im-

while lying on the tracks and there is no further evidence as to what happened in the meantime, there is no sufficient evidence of due care. Cox v. South Shore & B. St. R. Co., 182 Mass. 497, 65 N. E. 823; Dooley v. Greenfield & T. F. St. R. Co. [Mass.] 68 N. E. 203.

51. A deaf man who walks along the track without looking back frequently is not in the exercise of due care. Shanks v. Springfield Traction Co., 101 Mo. App. 702, 74 S. W. 386.

52. A woman stood near the track in a place which would formerly have been safe, not knowing that the stopping place had been recently changed, and was struck by the rail of a car. Due care was held to be for the jury. Loder v. Metropolitan St. R. Co., 84 App. Div. [N. Y.] 591. Where a pedestrian stood on the sidewalk at a curve and the running board overlapped the sidewalk and struck him, it was held that because he stood on the sidewalk he was not thereby relieved from the necessity of using due care. Hayden v. Fair Haven & W. R. Co. [Conn.] 56 Atl. 613. Where a pedestrian was caught between two cars at a crossing, it was held that this was a hidden danger which could not have been foreseen, and that the plaintiff was in the exercise of due care. Schwartz v. New Orleans & C. R. Co., 110 La. 534.

53. See Clark, St. Ry. Accidents (2d Ed.) §§ 91, 96.

54. Where a street sweeper was standing within a few inches of the rail when he was struck, and there was no evidence that he looked or took any other precautions, he was held unable to recover. Beethem v. Interurban St. R. Co., 86 N. Y. Supp. 700. Similarly, when a laborer working near the track stepped directly in front of a car when it was only 8 or 10 feet away, there was held to be no sufficient evidence of due care. Gleason v. Worcester Consol. St. R. Co. [Mass.] 68 N. E. 225.

55. Where a laborer looked for a car and then knelt at his work when a car came around a curve 250 feet away and, contrary to custom, no gong was rung, due care and negligence were held to be for the jury. Daum v. North Jersey St. R. Co. [N. J. Law] 54 Atl. 221. Where a laborer had placed danger flags and looked before bending over, but was struck by a car coming at high speed without warning, a verdict for the plaintiff was held to be justified. Hennessey v. Forty-Second St., M. & St. N. Ave. R. Co., 84 N. Y. Supp. 158.

56. Kelly v. United Traction Co., 88 App. Div. [N. Y.] 234.

57. Daum v. North Jersey St. R. Co. [N. J. Law] 54 Atl. 221.

58. He must exercise due care. Indianapolis St. R. Co. v. Tenner [Ind. App.] 67 N. E. 1044.

59. Passing back of a car from which he has alighted and upon a track in which cars run in the opposite direction, without looking and listening is contributory negligence. Indianapolis St. R. Co. v. Tenner [Ind. App.] 67 N. E. 1044.

60. Lejoune v. Dry Dock, E. B. & B. R. Co., 86 N. Y. Supp. 749. See Clark, St. Ry. Accidents (2d Ed.) § 93. A street railway company has a right superior to others to use the street covered by its tracks, because necessarily limited to that part of the street. Di Prisco v. Wilmington City R. Co. [Del.] 57 Atl. 906.

61. Consumers' Elec. Light & St. R. Co. v. Pryor [Fla.] 32 So. 797; Sesselmann v. Metropolitan St. R. Co., 76 App. Div. [N. Y.] 336; Mulligan v. Third Ave. R. Co., 87 App. Div. [N. Y.] 320. The rule of equal rights at crossings applies to a case where the accident took place at a street intersection, but not exactly on the footwalk itself. Louisville R. Co. v. French, 24 Ky. L. R. 1278, 71 S. W. 486.

62. Barry v. Burlington R. & L. Co., 119 Iowa, 62, 93 N. W. 68; Shanks v. Springfield

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portant as the rule itself that in cases where there are no intervening facts to give rise to a new situation, the rule cannot properly be applied.[63] A motorman must exercise a degree of care commensurate with the surrounding conditions,[64] and in many cases it has been held that negligence is properly submitted to the jury where there is evidence of high speed, lack of warning or insufficient lookout,[65] and the crowded condition of the crossing is to be considered.[66] In other cases, there is evidence of negligence in the construction and maintenance of the road.[67]

Traction Co., 101 Mo. App. 702, 74 S. W. 386; Moore v. St. Louis Transit Co., 95 Mo. App. 728, 75 S. W. 699. Contributory negligence is no defense, if after becoming aware of the danger the motorman failed to use ordinary care. Di Prisco v. Wilmington City R. Co. [Del.] 57 Atl. 906.

63. Louisville R. Co. v. Colston [Ky.] 79 S. W. 243; Ries v. St. Louis Transit Co. [Mo.] 77 S. W. 734; Reno v. St. Louis & S. R. Co. [Mo.] 79 S. W. 464; Trauber v. Third Ave. R. Co., 80 App. Div. [N. Y.] 37; Poole v. Metropolitan St. R. Co., 83 App. Div. [N. Y.] 235; Richmond Traction Co. v. Martin's Adm'x [Va.] 45 S. E. 886.

64. At junction of two prominent thoroughfares. McLeland v. St. Louis Transit Co. [Mo. App.] 80 S. W. 30. The term "ordinary care and diligence" applied to the movement of electric cars means the care and discretion which the particular location and conditions require. Crowded crossings and streets. Di Prisco v. Wilmington City R. Co. [Del.] 57 Atl. 906. An instruction that it is the duty of a motorman to use ordinary care to prevent injury to persons using the street (defining what that care is) states the degree of care required toward a child. Gorman's Adm'r v. Louisville R. Co., 24 Ky. L. R. 1938, 72 S. W. 760. Evidence as to the distance a car ran after an accident is admissible as bearing on the general conduct and control of the car. Gray v. St. Paul City R. Co., 87 Minn. 280, 91 N. W. 1106.

65. Birmingham R. & E. Co. v. Jackson, 136 Ala. 279; Kernan v. Market St. R. Co., 137 Cal. 326, 70 Pac. 81; Barry v. Burlington R. & L. Co., 119 Iowa, 62, 93 N. W. 68; Priesmeyer v. St. Louis Transit Co., 102 Mo. App. 518, 77 S. W. 313; Riska v. Union Depot R. Co. [Mo.] 79 S. W. 445; Sesselmann v. Metropolitan St. R. Co., 76 App. Div. [N. Y.] 336; McDermott v. Brooklyn Heights R. Co., 89 App. Div. [N. Y.] 214. If a pedestrian has seen the car, it is not negligence to fail to sound the gong. Louisville R. Co. v. Colston [Ky.] 79 S. W. 243; Thompson v. Metropolitan St. R. Co., 89 App. Div. [N. Y.] 10. Even if there is a rule of the company that a car must stop at a certain place, to enable the plaintiff to take advantage of this it must be shown that he knew of the rule. O'Reilly v. Brooklyn Heights R. Co., 82 App. Div. [N. Y.] 492. Whether it is negligence for the motorman to become spellbound with fright after seeing the plaintiff's danger is a question for the jury. Barry v. Burlington R. & L. Co., 119 Iowa, 62, 95 N. W. 229. To propel a car at high speed is not necessarily negligence. West Chicago St. R. Co. v. Callow, 102 Ill. App. 323. Where a pedestrian with a pushcart was crossing the tracks and motioned to the driver to stop, and there was evidence that the driver either did not see or did not heed, negligence was held to be for the jury. Greenbaum v. Interurban St. R. Co., 84 N. Y. Supp. 588. The company should use more care at a crossing, and where there was evidence that a car with a dim headlight was driven at high speed and without warning at a crossing at night, negligence was held to be for the jury. Chicago City R. Co. v. Fennimore, 199 Ill. 1, 64 N. E. 985. One injured at a crossing by being run into by a street car which she testified had given no warning. A finding that the company was negligent was not disturbed. Chicago City R. Co. v. Loomis, 201 Ill. 118, 66 N. E. 348. Evidence that a motorman recklessly ran his car into persons on a trestle after he discovered their peril held to support a finding for one injured by being run over. Atlanta R. & P. Co. v. Monk, 118 Ga. 449. Action by pedestrian for injury—evidence as to failure to ring gong at other crossings was improperly admitted. Dyer v. Union R. Co. [R. I.] 55 Atl. 688.

66. Where a child was run over by a street car, evidence as to whether a great many small boys were usually gathered in the vicinity where the accident happened was admissible. Di Prisco v. Wilmington City R. Co. [Del.] 57 Atl. 906. Thronged street in densely populated portion of the city. Id.

67. Negligence was held to be for the jury where a woman stood near the track in a place which would formerly have been safe, not knowing that the stopping place had been recently changed, and was struck by a car, and the same ruling was made when a pedestrian stood on the sidewalk at a curve and running board overlapped the sidewalk and struck him. Where, however, a pedestrian was caught between two cars at a curve, it was held that this was a hidden danger which could not have been foreseen and that the company was negligent. Loder v. Metropolitan St. R. Co., 84 App. Div. [N. Y.] 591; Hayden v. Fair Haven & W. R. Co. [Conn.] 56 Atl. 613; Schwartz v. New Orleans & C. R. Co., 110 La. 534. Where an injury befell the employe of a contractor employed to paint the supporting poles of a trolley system, evidence of defective insulation was held to justify a finding of negligence. Kennealy v. Westchester Elec. R. Co., 86 App. Div. [N. Y.] 293. The company must use the highest care in the construction and maintenance of its electric wires to avoid injury to pedestrians, and the falling of a trolley wire raises a presumption of negligence. Memphis St. R. Co. v. Kartright, 110 Tenn. 277, 75 S. W. 719. In an action for wrongful death caused by a car jumping the track, an instruction that it was defendant's duty to have the track so constructed that cars would stay on it was erroneous, because it practically laid down the rule that the company is an absolute insurer against

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A street railway company which tears up the pavement to lay its tracks is bound to know whether it has restored it to its former condition,[68] and is liable regardless of notice.[69] It is generally held that in cases of injury to a trespasser on the tracks the company owes merely the duty of using reasonable care after the danger is discovered.[70] An ordinance limiting the rate of speed on streets is competent evidence on an issue whether the speed of a car was excessive.[71]

Children run over.—Whether a child is so young as to be incapable of contributory negligence is a question which has come frequently before the courts. In some cases it is held as a matter of law that the child is non sui juris.[72] In others whether or not the child is sui juris is held to be a question for the jury.[73] If it is decided that a child is not sui juris and consequently incapable of exercising due care, there is a square conflict of opinion as to whether the lack of due care of the parent or person in charge of the child may be imputed to it.[74] If a child is admitted to be sui juris, it is universally held that the standard of care for him is that degree of care which might reasonably be expected from a child of his age and capacity.[75] The attempt in New York to establish the rule that

such accidents. Man killed was working near track. Kelly v. United Traction Co., 88 App. Div. [N. Y.] 234.

68. No error to admit evidence to show that the company was notified of the condition of a crossing. Indianapolis St. R. Co. v. Hockett, 161 Ind. 196, 67 N. E. 106.

69. Failure to properly repair the pavement along a rail which had been relaid. Citizens' St. R. Co. v. Marvil, 161 Ind. 506, 67 N. E. 921. Where the company tears up the street, it is prima facie bound to restore the surface so that it is reasonably safe for travel (Kaiser v. Detroit & N. W. R., 131 Mich. 506, 91 N. W. 752), and a pedestrian has the right to act on this assumption (Union Traction Co. v. Barnett [Ind. App.] 67 N. E. 205). Where there is a dangerous pole in the track, it is not necessary to render the company liable that it should have noticed it. Citizens' St. R. Co. v. Marvil, 161 Ind. 506, 67 N. E. 921. See Clark, St. Ry. Accidents (2d Ed.) §§ 122, 123, 125. A pedestrian was injured by falling where a car company had torn up the pavement to relay its tracks. The injured party lived in the vicinity, knew the nature of the work being done, and understood the significance of the red lanterns placed about the work. Held, that a finding for her was not so inconsistent with the evidence as to necessitate a reversal. Union Traction Co. v. Barnett [Ind. App.] 67 N. E. 205. Where a pedestrian, passing in the rear of an unlighted standing car at night, tripped over the fender, there was held to be no sufficient proof of the company's negligence. Adams v. Metropolitan St. R. Co., 82 App. Div. [N. Y.] 354. See Clark, St. Ry. Accidents (2d Ed.) § 128.

70. Floyd v. Paducah R. & L. Co., 24 Ky. L. R. 2364, 73 S. W. 1122; Richmond Pass. & Power Co. v. Racks' Adm'r [Va.] 44 S. E. 709. Where, however, a weak minded pedestrian was killed in a tunnel, and there was evidence that the motorman kept a negligent lookout and that, although warning signs were displayed, the tunnel had been used by pedestrians for 5 years, it was held that notwithstanding the plaintiff was a trespasser, there was sufficient evidence of negligence to go to the jury. Fearons v. Kan. City El. R. Co. [Mo.] 79 S. W. 394. Where a pedestrian steps directly in front of a car with such suddenness that the motorman is unable to stop his car in time to prevent the accident, there is held to be no negligence on the part of the company. Kappus v. Metropolitan St. R. Co., 82 App. Div. [N. Y.] 13; Jackson v. Union R. Co., 77 App. Div. [N. Y.] 161.

71. San Antonio Traction Co. v. Upson, 31 Tex. Civ. App. 50, 71 S. W. 565.

72. Child of 21 months. Carney v. Concord St. R. [N. H.] 57 Atl. 218. Child of 5 years and 9 months. Gray v. St. Paul City R. Co., 87 Minn. 280, 91 N. W. 1106. Child of 6½. Hoon v. Beaver Valley Traction Co., 204 Pa. 369; Levine v. Metropolitan St. R. Co., 78 App. Div. [N. Y.] 426.

73. Child of 6. Lafferty v. Third Ave. R. Co., 85 App. Div. [N. Y.] 592. Child of 6½. McDermott v. Boston El. R. Co., 184 Mass. 126, 68 N. E. 34. Child of 7. Vogel v. North Jersey St. R. Co. [N. J. Law] 54 Atl. 563. Child of 7 years and 8 months. Sullivan v. Union R. Co., 81 App. Div. [N. Y.] 596. Whether a child seven years old, struck by street car, was sui juris, and whether under the circumstances guilty of contributory negligence, was for the jury. Vogel v. North Jersey St. R. Co. [N. J. Law] 54 Atl. 563.

74. The negligence of parents cannot be imputed to a child non sui juris. Carney v. Concord St. R. [N. H.] 57 Atl. 218. Contra, Lafferty v. Third Ave. R. Co., 85 App. Div. [N. Y.] 592. The negligence of a boy of 12 is imputable to a brother who is non sui juris. Levine v. Metropolitan St. R. Co., 78 App. Div. [N. Y.] 426.

75. Chicago City R. Co. v. Biederman, 102 Ill. App. 617; McDermott v. Boston El. R. Co., 184 Mass. 126, 68 N. E. 34; Lafferty v. Third Ave. R. Co., 85 App. Div. [N. Y.] 592. The parents of a boy 7 years and 8 months old are not guilty of contributory negligence in allowing him to be on the streets unattended (Sullivan v. Union R. Co., 81 App. Div. [N. Y.] 596), nor are the parents of a boy of six and a half who allow him to go into the street in charge of a brother of 12 (Levine v. Metropolitan St. R. Co., 78 App. Div. [N. Y.] 426). Where a boy of 7 years and 8 months ran after his companions who had

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a child of 12 or over must be held to the standard of care required of an adult, unless it is shown as a fact that the child does not possess such capacity,[76] seems to be discredited in a later decision.[77] It is well settled that the company must use more care towards children in the streets than towards adults.[78] The rule that notwithstanding the plaintiff's negligence the defendant may still be liable if it could have prevented the accident by the exercise of ordinary care, although admitted to be correct,[79] has been held inapplicable in a number of cases where there has been no intervention of other circumstances creating a new condition or situation.[80] Numerous rulings have been made on the question of the negligence of those in charge of the car in running it at high speed or without warning or without keeping a sufficient lookout.[81] The doctrine of discovered peril does not apply where a boy, attempting to cross a track falls in front of a car approaching 50 feet distant and is run over through the motorman's negligent failure to stop.[82] Where the action is for negligence in not having proper appliances, the test is the characters of the appliances in use at the time.[83] Similarly

taken his cap and went on a street railway track without looking for a car, due care was held to be for the jury. Sullivan v. Union R. Co., 81 App. Div. [N. Y.] 596. Evidence in an action for injury to a child who stepped on a car track a few feet in front of a car held insufficient to go to the jury on the question of the company's negligence. Csatlos v. Metropolitan St. R. Co., 87 N. Y. Supp. 302. Where a boy of 12 in charge of a younger brother saw a car a block away and there was evidence that the car came at high speed, without warning, it was held that the duty of the boy was for the jury. Levine v. Metropolitan St. R. Co., 78 App. Div. [N. Y.] 426. The ruling has also been made that it is not lack of due care as a matter of law for a child of 6½ on his way to school not to look before crossing a street railway track at a crossing McDermott v. Boston El. R. Co., 184 Mass. 126, 68 N. E. 34). Where a boy of 14 was thrown from a car, started to cross a second track with a car 125 feet distant and was killed, it was held that in the absence of evidence that he looked or listened or was so injured that he could not have heard or seen, there was no sufficient evidence of due care. Pinder v. Brooklyn Heights R. Co., 173 N. Y. 519, 66 N. E. 405.

76. Charlton v. Forty-Second St., M. & St. N. Ave. R. Co., 79 App. Div. [N. Y.] 546; McDonald v. Metropolitan St. R. Co., 80 App. Div. [N. Y.] 233.

77. Lafferty v. Third Ave. R. Co., 85 App. Div. [N. Y.] 592.

78. San Antonio Traction Co. v. Court, 31 Tex. Civ. App. 146, 71 S. W. 777; Gorman's Adm'r v. Louisville R. Co., 24 Ky. L. R. 1938, 72 S. W. 760; Forrestal v. Milwaukee Elec. R. & L. Co., 119 Wis. 495, 97 N. W. 182. Where a motorman saw that a boy on the street would probably run in front of his car it was his duty then to use all means consistent with the safety of those on the car to prevent injury to the boy, and it was not sufficient for him to wait until danger was so imminent that the injury could not have been averted. Galveston City R. Co. v. Hanna [Tex. Civ. App.] 79 S. W. 639. Ordinary care required him to lessen the speed of the car when he saw that the boy paid no attention to his hallooing or to the sounding of the gong. Id. Child six years old injured in a crowded thoroughfare; recovery not disturbed. Chicago City R. Co. v. Biederman, 102 Ill. App. 617.

79. Carney v. Concord St. R. [N. H.] 57 Atl. 218; Jett v. Cent. Elec. R. Co. [Mo.] 77 S. W. 738.

80. Phelan v. Forty-Second St., M. & St. N. Ave. R. Co., 79 App. Div. [N. Y.] 548; Ferri v. Union R. Co., 77 App. Div. [N. Y.] 301; Bortz v. Dry Dock, E. B. & B. R. Co., 78 App. Div. [N. Y.] 386; Delkowsky v. Dry Dock, E. B. & B. R. Co., 78 App. Div. [N. Y.] 632.

81. Evidence of high speed, no warning and insufficient lookout, combined in the same case, justifies a finding of negligence. Gray v. St. Paul City R. Co., 87 Minn. 280, 91 N. W. 1106; Lafferty v. Third Ave. R. Co., 85 App. Div. [N. Y.] 592. Where a motorman knew that children were apt to be at a street crossing at a certain time, but nevertheless ran his car at high speed, this was held to be evidence of negligence for the jury. Kube v. St. Louis Transit Co. [Mo. App.] 78 S. W. 55.

82. The question of contributory negligence is for the jury. McDonald v. Metropolitan St. R. Co., 87 N. Y. Supp. 699. Where there was evidence showing that a car ran through a populous street near a schoolhouse, with schoolchildren on the street, at a rate of 25 miles an hour, a verdict for plaintiff was held sustained by the evidence. Hoon v. Beaver Valley Traction Co., 204 Pa. 369. Where there is no law on the subject, whether it is negligence not to sound a gong or a bell at a street crossing is for the jury. Koenig v. Union Depot R. Co., 173 Mo. 698, 73 S. W. 637. On the question of proper lookout, it is not enough for a motorman to use due care after discovering a child's peril, if he should have discovered the danger earlier by keeping a good lookout. Carney v. Concord St. R. [N. H.] 57 Atl. 218; Meeker v. Metropolitan St. R. Co. [Mo.] 77 S. W. 58. Where a child was caught under a car, and those in charge of the car in trying to extricate the child, injured it still further, their negligence was held to be for the jury. Carney v. Concord St. R. [N. H.] 57 Atl. 218.

83. Zimmerman v. Denver Consol. Tramway Co. [Colo. App.] 72 Pac. 607.

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it has been held that the company must use the best appliances in common use and must use great care in keeping the apparatus for stopping cars in good condition.[84] Whether or not it is negligence not to have a fender is a question for the jury.[85] If a child runs suddenly in front of a car with such quickness that the motorman cannot stop in time to avoid an accident, the company is not negligent.[86]

(§ 4) *B. Accidents to drivers of wagons. Collisions between car and wagon. Due care.*—It is well settled that the driver of a wagon, in approaching and crossing street railway tracks, must use due care under all the circumstances of the case.[87] Some courts, taking into consideration the almost endless variety of circumstances which may attend each individual case, remain satisfied with this general statement of the rule, and discourage any attempt to have the rule stated with greater particularity.[88] Others believe in stating the rule more specifically, and it has been held that the defendant, in addition to the general rule as to due care, is entitled to the further instruction that it is the duty of the driver to look and listen before crossing the tracks.[89] It has been held that the rules which apply to crossing the tracks of steam railroads should apply to those of street railroads, and that a driver must stop, look, and listen before crossing,[90] or must look and listen, and under certain circumstances stop.[91] It has also been held that the duty to look is an absolute one, and that violation of it is lack of due care, as a matter of law.[92] On the other hand, it has been held in those jurisdictions which approve of the more general statement of the law that there is no absolute duty to stop before crossing the track,[93] and that failure to look and listen is not lack of due care as a matter of law.[94] If the driver of a wagon swears that he looked for a car and saw none, while all the facts go to show that if he

84. Mock v. Los Angeles Traction Co., 139 Cal. 616, 73 Pac. 455.

85. Henderson v. Durham Traction Co., 132 N. C. 779.

86. Davidson v. Metropolitan St. R. Co., 75 App. Div. [N. Y.] 426; Sciurba v. Metropolitan St. R. Co., 87 App. Div. [N. Y.] 614; Muessman v. Metropolitan St. R. Co., 76 App. Div. [N. Y.] 1. If a child playing in the street runs in front of a car and is run over before the car can be stopped, the company is not liable. Di Prisco v. Wilmington City R. Co. [Del.] 57 Atl. 906. Where the complaint alleged that the servants of the company saw a child on the track and approaching in time to stop the car, an instruction that such servants were not required to stop the car until they saw or by reasonable care might have seen, that the child was in or about to be placed in a position of peril, was good law and within the issues. Meeker v. Metropolitan St. R. Co. [Mo.] 77 S. W. 58. An instruction that it is the duty of the company's servants to take reasonable measures to avoid injuries to persons on the street is not objectionable. Child four years old killed at a crossing. North Chicago St. R. Co. v. Johnson, 205 Ill. 32, 68 N. E. 463.

87. Beerman v. Union R. Co., 24 R. I. 275; Snyder v. People's R. Co. [Del.] 53 Atl. 433; Cox v. Wilmington City R. Co. [Del.] 53 Atl. 569; Wilman v. People's R. Co. [Del.] 55 Atl. 332; Stanley v. Cedar Rapids & M. C. R. Co., 119 Iowa, 526, 93 N. W. 489.

88. Honick v. Metropolitan St. R. Co., 66 Kan. 124, 71 Pac. 265.

89. Campbell v. St. Louis & S. R. Co., 175 Mo. 161, 75 S. W. 86; Murray v. St. Louis Transit Co., 176 Mo. 183, 75 S. W. 611.

90. Heebe v. New Orleans & C. Railroad, L. & P. Co., 110 La. 970.

91. Burns v. Metropolitan St. R. Co., 66 Kan. 188, 71 Pac. 244.

92. Moser v. Union Traction Co., 205 Pa. 481.

93. Union Traction Co. v. Vandercook [Ind. App.] 69 N. E. 486; Frank v. St. Louis Transit Co., 99 Mo. App. 323, 73 S. W. 239.

94. Memphis St. R. Co. v. Riddick, 110 Tenn. 227, 75 S. W. 924; El Paso Elec. R. Co. v. Kendall [Tex. Civ. App.] 78 S. W. 1081. One familiar with a locality, approaching a crossing where his line of vision is obstructed, is bound to look for approaching cars. Failing to do so is negligence. Di Prisco v. Wilmington City R. Co. [Del.] 57 Atl. 906. Where one, had he looked, could have seen an approaching car notwithstanding certain trees and weeds, but drove onto a track without looking, he was guilty of negligence which precluded a recovery. Fellenz v. St. Louis & S. R. Co. [Mo. App.] 80 S. W. 49. An instruction that the jury, in determining whether plaintiff stopped to look and listen, might consider all the facts and circumstances and the testimony of other witnesses besides the plaintiff was proper. Frank v. St. Louis Transit Co., 99 Mo. App. 323, 73 S. W. 239. In collision case, evidence held not to support a finding that plaintiff was free from contributory negligence, because if driver had looked, he must have seen the car coming. Montenes v. Metropolitan St. R. Co., 77 App. Div. [N. Y.] 493. Whether a driver of a coal wagon who was killed at a crossing was guilty of contributory negligence held, for the jury, there being conflicting evidence as to wheth-

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had looked he must have seen the car, his testimony may be disregarded.[95] On the contrary, a failure to look will not bar recovery, where, if the driver had looked, the danger would not have been obvious.[96] While failure to look, or look and listen, will usually bar recovery,[97] as a general rule where there is evidence that the driver did look for a car, this is sufficient to take the question of his due care to the jury, especially where there is evidence of negligence on the part of the company, such as high speed, lack of warning, or failure to stop in time. The mere fact of looking once for a car, however, does not by any means absolve the driver from the duty of taking further precautions. If he sees a car coming and determines to take his chances of getting across in front of it,[98] but miscalculates his distance he is held unable to recover.[99] Similarly, it is lack of due care to look for a car when the driver is some distance from the track and then to drive upon the track without looking again.[1] Certain exceptional circumstances

er he looked out for cars before attempting to cross. Giese v. Milwaukee Elec. R. & L. Co., 116 Wis. 66, 92 N. W. 356. One who drives on a car track with a car in full sight, so near that it could not be stopped before it reached him by the exercise of ordinary care, is guilty of contributory negligence. Cushing v. Metropolitan St. R. Co., 92 App. Div. [N. Y.] 510. A traveler driving down a 3 per cent. grade approaching a street railway crossing saw a street car about 250 feet off coming at about nine miles an hour. He drove onto the track without stopping. Held, contributory negligence. Roenfeldt v. St. Louis & S. R. Co. [Mo.] 79 S. W. 706. Where a boy riding on the rear end of a wagon was injured in a collision at a crossing, and the evidence tended to show that the car was stopped in a very short distance, it was held there was nothing to show negligence on the part of the company. Summerman v. Interurban St. R. Co., 87 N. Y. Supp. 427.

95. Beerman v. Union R. Co., 24 R. I. 275; Montenes v. Metropolitan St. R. Co., 77 App. Div. [N. Y.] 493; Barrie v. St. Louis Transit Co., 102 Mo. App., 87, 76 S. W. 706; Petty v. St. Louis & M. R. R. Co. [Mo.] 78 S. W. 1003; Metropolitan St. R. Co. v. Agnew, 65 Kan. 478, 70 Pac. 345. As bearing on the question of the driver's due care, the fact that there was a signal displayed requiring the car to stop makes no difference, in the absence of evidence that the driver saw the signal or understood it. State v. United R. & E. Co., 97 Md. 73.

96. Lane v. Brooklyn Heights R. Co., 85 App. Div. [N. Y.] 85; Westerman v. Metropolitan St. R. Co., 84 N. Y. Supp. 501.

97. Schmidt v. Interurban St. R. Co., 82 App. Div. [N. Y.] 453; Beereman v. Union R. Co., 24 R. I. 275; Snyder v. People's R. Co. [Del.] 53 Atl. 433; Wilman v. People's R. Co. [Del.] 55 Atl. 332; Solatinow v. Jersey City, H. & P. St. R. Co. [N. J. Law] 56 Atl. 235. See Clark, St. Ry. Accidents (2d Ed.) § 106. Held, that facts negatived contributory negligence in an accident at a crossing. Stanley v. Cedar Rapids & M. C. R. Co., 119 Iowa, 526, 93 N. W. 489. Evidence, in a case where plaintiff was attempting to drive across a street car track and was struck, held not to show contributory negligence as a matter of law. San Antonio Traction Co. v. Upson, 31 Tex. Civ. App. 50, 71 S. W. 565. Whether an electric car sounded its gong and whistle on approaching a crossing was a question for the jury. Conflicting evidence. Dalton v. N. Y., N. H. & H. R. Co. [Mass.] 63 N. E. 830. Whether failure to have a headlight and to sound the gong as negligence, held, questions for the jury, under the evidence in this case. Frank v. St. Louis Transit Co., 99 Mo. App. 323, 73 S. W. 239.

98. Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 Pac. 624; Chicago City R. Co. v. Sandusky, 198 Ill. 400, 64 N. E. 990; Howard v. Indianapolis St. R. Co., 29 Ind. App. 514, 64 N. E. 890; Union Traction Co. v. Vandercook [Ind. App.] 69 N. E. 486; Stanley v. Cedar Rapids & M. C. R. Co., 119 Iowa, 526, 93 N. W. 489; Welty v. St. Charles St. R. Co., 109 La. 733; Schafstette v. St. Louis & M. R. R. Co., 175 Mo. 142, 74 S. W. 826; Kolb v. St. Louis Transit Co., 102 Mo. App. 143, 76 S. W. 1050; Linder v. St. Louis Transit Co. [Mo. App.] 77 S. W. 997; Hanheide v. St. Louis Transit Co. [Mo. App.] 78 S. W. 820; Moore v. Metropolitan St. R. Co., 84 App. Div. [N. Y.] 613; Carter v. Interurban St. R. Co., 84 N. Y. Supp. 134; Muller v. Interurban St. R. Co., 84 N. Y. Supp. 234; Bullman v. Metropolitan St. R. Co., 85 N. Y. Supp. 325; Binsell v. Interurban St. R. Co., 86 N. Y. Supp. 913; San Antonio Traction Co. v. Upson, 31 Tex. Civ. App. 50, 71 S. W. 565; Richmond Traction Co. v. Clarke [Va.] 43 S. E. 618. The fact that one attempts to cross a track in front of a car seen to be approaching does not of itself constitute contributory negligence. Conflicting evidence as to distance of car. The person injured while attempting to cross the track testified that it was 450 feet. A finding for injured party not disturbed. Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 Pac. 624.

99. Cogan v. Cass Ave. & F. G. R. Co., 101 Mo. App. 179, 73 S. W. 738; Ledwidge v. St. Louis Transit Co. [Mo. App.] 73 S. W. 1008; Gettys v. St. Louis Transit Co. [Mo. App.] 78 S. W. 82; Steinman v. Interurban St. R. Co., 84 N. Y. Supp. 231; Krintzman v. Interurban St. R. Co., 84 N. Y. Supp. 243; Goldkranz v. Metropolitan St. R. Co., 89 App. Div. [N. Y.] 590; Moran v. Leslie [Ind. App.] 70 N. E. 162.

1. State v. United R. & E. Co., 97 Md. 73; Carvanio v. Union R. Co., 84 N. Y. Supp. 246; Moser v. Union Traction Co., 205 Pa. 481. A driver of a buggy drove onto a street car track at a point where an approaching car could be seen 95 feet off. The car was running at 7 miles per hour

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may qualify this latter rule so that the driver is allowed to go to the jury upon the question of his lack of due care in not looking again.[2] Where there is no evidence as to whether the driver looked or not it has been held that in the absence of evidence to the contrary due care may be presumed.[3] Certain other circumstances may have to be considered upon the question of the driver's due care, such as the fact that the accident occurred in the nighttime,[4] that it occurred in the open country where the speed of cars is greater and the conditions approach more nearly those under which steam railroads are operated,[5] that the street[6] or the view[7] was obstructed, that the driver's attention was distracted at a street crossing,[8] or that a horse suddenly turned balky when on the track.[9] The company is not liable if the injury occurs through the mutual and concurrent negligence of both parties.[10]

Driving on or near tracks.—The driver of a wagon has a perfect right, not only to drive in the street where street railway tracks are situated, but to drive upon the tracks themselves, provided he uses due care,[11] and it is not lack of

and stopped just as it touched the buggy. Held, the driver guilty of contributory negligence as a matter of law. Hogan v. Winnebago Traction Co. [Wis.] 98 N. W. 928. An instruction that if the jury found that the motorman could see there was danger of a collision between a car coming from the opposite direction and a truck on the track in front of him, and still kept his car within a few feet of the truck, he was guilty of negligence is erroneous. Connor v. Metropolitan St. R. Co., 77 App. Div. [N. Y.] 384. The question of negligence was held for the jury where one was run into by a cable car at a usually crowded crossing, the car having no headlight on and running 4 to 5 miles per hour. The injured party did not look or listen immediately before crossing. Chicago City R. Co. v. Fennimore, 199 Ill. 1, 64 N. E. 985. A motorman who sees a carriage coming onto a crossing 80 feet distant, and his car is going at 6 to 8 miles per hour, and he does not attempt to slacken the speed, is guilty of negligence. Moore v. Metropolitan St. R. Co., 84 App. Div. [N. Y.] 613. Whether a van driver was guilty of negligence in driving onto a street car track, with a car coming, 100 to 125 feet distant, held for the jury. Id.

2. Thus where the driver of a wagon saw a car at a standstill at a crossing 50 or 60 feet away, his due care in not looking again was held to be for the jury (Rosenstock v. Metropolitan St. R. Co., 86 N. Y. Supp. 114), and where there were double tracks and a driver looked and saw a car on the near track a block away, and one on the far track two blocks away, and drove on the tracks without looking again for the car on the far track which was being driven at high speed, due care was held to be for the jury (Chauvin v. Detroit United R. [Mich.] 97 N. W. 160).

3. Cox v. Wilmington City R. Co. [Del.] 53 Atl. 569.

4. State v. United R. & E. Co., 97 Md. 73. Where evidence shows a car was heavily loaded and coming down grade, the question of negligence in checking and controlling speed is for the jury. Westphal v. St. Joseph & B. H. St. R. Co. [Mich.] 96 N. W. 19. Question as to whether one who attempted to cross a car track in a cloud of smoke from a passing engine was guilty of negligence, held for the jury. Dalton v. N. Y., N. H. & H. R. Co. [Mass.] 68 N. E. 830. Question of negligence held for the jury where a carriage was hit at a country crossing, where the gravel was loose and the wheels of the carriage made a grinding noise, which might have prevented hearing approach of the car which was running 18 to 20 miles per hour. Howard v. Indianapolis St. R. Co., 29 Ind. App. 514, 64 N. E. 890. Where a motorman was injured in a collision of cars of different companies, an instruction that it was the defendant's duty to use ordinary care to prevent collision and observe the ordinance which gave plaintiff's cars the right of way, held, not erroneous. McLain v. St. Louis & S. R. Co., 100 Mo. App. 374, 73 S. W. 909. Question of negligence where cars of different companies collided at an intersection, and the motorman of one was injured, held for the jury. Id. Whether car was moving at a dangerous and excessive rate of speed at a crossing, held for the jury. No ordinance governing speed. Chicago City R. Co. v. Sandusky, 198 Ill. 400, 64 N. E. 990.

5. State v. United R. & E. Co., 97 Md. 73.

6. Blum v. Metropolitan St. R. Co., 79 App. Div. [N. Y.] 611.

7. Dalton v. N. Y., N. H. & H. R. Co., 184 Mass. 344, 68 N. E. 830.

8. Plant v. Heraty, 131 Mich. 619, 92 N. W. 284.

9. Meyers v. St. Louis Transit Co., 99 Mo. App. 363, 73 S. W. 379.

10. Company was entitled to an instruction to this effect. McLeland v. St. Louis Transit Co. [Mo. App.] 80 S. W. 30; Di Prisco v. Wilmington City R. Co. [Del.] 57 Atl. 906. Failure of a street car company to provide a conductor for a car is not negligence, unless such failure prevented a motorman from doing his duty at the time a child was run over. Id.

11. Southern Elec. R. Co. v. Hageman [C. C. A.] 121 Fed. 262; Indianapolis St. R. Co. v. Darnell [Ind. App.] 68 N. E. 609; Degel v. St. Louis Transit Co., 101 Mo. App. 56, 74 S. W. 156; Toledo, F. & N. R. Co. v. Gilbert, 24 Ohio Circ. R. 181. The driver of a vehicle, who in order to pass a wagon in front of him, turns, without looking, onto a street car track in front of a car approaching from

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due care to drive upon the tracks at night.[12] It is well settled that the driver is under no absolute duty to look and listen,[13] or to look constantly behind him,[14] or even to look behind him at all,[15] but it is equally well settled that he must be on the alert in some manner, and in many cases his lack of due care has been held to be so evident as to bar recovery.[16] On the other hand various other circumstances have been held sufficient to take the question of due care to the jury, such as the fact that the street was very narrow,[17] that it was obstructed,[18] or that the driver followed the rule of the road in turning from one track onto another.[19] A mistake of judgment in driving off a street car track in the wrong direction in an effort to avoid a collision will not necessarily preclude recovery.[20] The fact that an act is illegal will not of itself bar recovery unless it appears that such act is a proximate cause contributing to the injury.[21] The standard of care

the rear in plain view, is guilty of contributory negligence. Indianapolis St. R. Co. v. Marschke [Ind. App.] 70 N. E. 494. It is error to charge that the wagon has no right to be on the tracks when the car comes up and has no right to make the car slow up. Venuta v. N. Y., W. & C. Traction Co., 87 App. Div. [N. Y.] 561. See Clark, St. Ry. Accidents (2d Ed.) § 107. The company has no right to operate its cars on the assumption that the track will be clear. Rouse v. Detroit Elec. R. [Mich.] 98 N. W. 258.

12. Klockenbrink v. St. Louis & M. R. R. Co., 172 Mo. 678, 72 S. W. 900; Twelkemeyer v. St. Louis Transit Co., 102 Mo. App. 190, 76 S. W. 682; Buren v. St. Louis Transit Co. [Mo. App.] 78 S. W. 680.

13. Rouse v. Detroit Elec. R. [Mich.] 98 N. W. 258.

14. Indianapolis St. R. Co. v. Darnell [Ind. App.] 68 N. E. 609.

15. Noll v. St. Louis Transit Co., 100 Mo. App. 367, 73 S. W. 907.

16. See Clark, St. Ry. Accidents (2d Ed.) § 107. Where a driver drove on the track at night for 850 feet, without making any attempt to discover a car, he was held not to be in the exercise of due care. Belford v. Brooklyn Heights R. Co., 86 App. Div. [N. Y.] 388. Whether a motorman was negligent in colliding with a truck which was leaving the track just in front of him, and which was forced back onto the track by a car coming from the opposite direction, held for the jury. Connor v. Metropolitan St. R. Co., 77 App. Div. [N. Y.] 384. Where the driver of a covered wagon drove on the tracks on a dark, foggy morning for over half a mile without looking back but once, he was held to be guilty of lack of due care. U. P. Steam Baking Co. v. Omaha St. R. Co. [Neb.] 94 N. W. 533. Where a driver drove on the track without looking back, having a clear view for 220 yards, and there was nothing to show that he listened and nothing to show that he could not have driven outside of the track instead, he was held not to be in the exercise of due care. Reynolds v. Larchmont Horse R. Co., 83 App. Div. [N. Y.] 189. Where a driver drove on the track in the dark without looking back for from three blocks to 440 yards, until a car was within a quarter of a block, and it appeared that he could have driven outside the tracks, he was held unable to recover. McGauley v. St. Louis Transit Co. [Mo.] 79 S. W. 461. Where a driver drove on the track in the dark with no light on his wagon, although there was room in the road, and although there was a clear view, did not look back or take any precautions, and was struck by a lighted car, he was held guilty of lack of due care. Geleta v. Buffalo & N. F. Elec. R., 88 App. Div. [N. Y.] 372. Where the driver of an unlighted covered wagon stopped on a street car track when it was nearly dark, and remained there two or three minutes without looking, he was held not to be in the exercise of due care. Watson v. Interurban St. R. Co., 84 N. Y. Supp. 556.

17. Benjamin v. Metropolitan St. R. Co., 85 N. Y. Supp. 1052. Negligence of the operatives of a car in attempting to cross a railroad track before an approaching train, held a question for the jury (Roadmaster on the train killed). Philip v. Heraty [Mich.] 97 N. W. 963. It was a question for the jury whether failure to stop a car in time to avoid injury was due to the operation of the car at a reckless rate of speed. Moore v. St. Louis Transit Co., 95 Mo. App. 728, 75 S. W. 699. Where one who had been driving on a car track for a block and a half was struck by the "Owl" car, which was going at a high rate of speed, a recovery was not disturbed. Nagel v. St. Louis Transit Co. [Mo. App.] 79 S. W. 502. Where a wagon, horse, and driver were injured by being hit in the rear by a street car, evidence held insufficient to support a verdict for the injured party. Spiro v. St. Louis Transit Co., 102 Mo. App. 250, 76 S. W. 684. Whether one riding on a wagon being driven along a street car track, and in attempting to leave the track was struck by a car coming from the opposite direction and forced back where it collided with the car, was guilty of contributory negligence, held for the jury. Connor v. Metropolitan St. R. Co., 77 App. Div. [N. Y.] 384. Traveler, driving behind a covered van at a street intersection pulled out and drove upon the car track and was struck by a car coming from opposite direction. At the time he drove on the track the car was 100 to 200 feet distant; there was no evidence that any warning was given, question of his contributory negligence held for the jury. Chicago City R. Co. v. O'Donnell, 208 Ill. 267, 70 N. E. 294.

18. Pritchard v. Brooklyn Heights R. Co., 89 App. Div. [N. Y.] 269.

19. Adams v. Camden & S. R. Co. [N. J. Err. & App.] 55 Atl. 254.

20. Kane v. Worcester Consol. St. R., 182 Mass. 201, 65 N. E. 54.

21. Thus where the driver of a milk wagon left his horse on a street railway track in violation of a city ordinance, it was held

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for a boy is that degree of care which may reasonably be expected from boys of that age.[22] In collisions between street cars and fire wagons, the fact that the latter are given the right of way either by statute[23] or by uniform custom[24] is a most important consideration. It is a fireman's duty to answer the call promptly,[25] and there is a necessity for great speed,[26] so that the driver of a fire wagon has a right to assume that the motorman will give him the right of way.[27] Whether a fireman, placed in a position of sudden peril, was negligent in not jumping, has been held to be a question for the jury.[29]

Imputed negligence.—The question as to whether a driver's lack of due care can be imputed to a person driving with him has arisen a number of times. The general rule appears to be that where the passenger has no opportunity for direction or control, the driver's lack of due care cannot be imputed to him,[30] and in another case, it has been held that the negligence of the driver may be imputed to a fellow-servant riding on the wagon with him.[31] It was held that the question of imputing the negligence of the driver of an ice wagon to his helper, once passed upon by the jury, was not open to review,[32] but in the great majority of cases, as stated above, the courts have decided squarely against the doctrine of imputed negligence.

Negligence of company.—It is well settled that between street crossings the cars of a street railway company have a superior, although not an exclusive, right of way,[33] since the cars cannot leave their tracks, and because they are being run primarily for the convenience of the public.[34] This superior right of way does not

that this would not necessarily bar recovery. Munroe v. Hartford St. R. Co. [Conn.] 56 Atl. 498.

22. Boy of 15. Campbell v. St. Louis & S. R. Co., 175 Mo. 161, 75 S. W. 86; Dubiver v. City & S. R. Co. [Or.] 74 Pac. 915. Boy of 8. Di Prisco v. Wilmington City R. Co. [Del.] 57 Atl. 906. See Clark, St. Ry. Accidents (2d Ed.) § 109.

23. Geary v. Metropolitan St. R. Co., 84 App. Div. [N. Y.] 514.

24. Hanlon v. Milwaukee Elec. R. & L. Co., 118 Wis. 210, 95 N. W. 100.

25. City of New York v. Metropolitan St. R. Co., 90 App. Div. [N. Y.] 66.

26. Hanlon v. Milwaukee Elec. R. & L. Co., 118 Wis. 210, 95 N. W. 100.

27. City of New York v. Metropolitan St. R. Co., 90 App. Div. [N. Y.] 66; Hanlon v. Milwaukee Elec. R. & L. Co., 118 Wis. 210, 95 N. W. 100.

Fire apparatus going to fires may by virtue of legislative enactment or local custom be granted the right of way at street crossings. Knox v. North Jersey St. R. Co. [N. J. Law] 57 Atl. 423. Where a street car collided with a fire apparatus at a crossing, an instruction that all that was required of the motorman at the time he apprehended danger was the use of ordinary care to bring his car to a stop was properly refused as misleading. City of New York v. Metropolitan St. R. Co., 90 App. Div. [N. Y.] 660. An instruction that ordinances regulating speed did not apply to fire apparatus going to fires but did apply to street cars, modified by a request to charge that negligence could not be predicated on the mere fact that the car was running at a high rate of speed, since there were no statutes, was proper. Id. In an action for injuries caused by collision with a hose cart, evidence of a witness sitting on the sidewalk that he had often heard the gong of the fire patrol, similar to the gong on the cart, at a distance of two blocks, was correctly admitted. Hanlon v. Milwaukee Elec. R. & L. Co., 118 Wis. 210, 95 N. W. 100.

29. Quinn v. Dubuque St. R. Co. [Iowa] 94 N. W. 476.

30. Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602, 65 N. E. 309; Louisville R. Co. v. Anderson, 25 Ky. L. R. 666, 76 S. W. 153; United R. & E. Co. v. Biedler [Md.] 56 Atl. 813; Baxter v. St. Louis Transit Co. [Mo. App.] 78 S. W. 70; Westerman v. Metropolitan St. R. Co., 84 N. Y. Supp. 501; Ciuffi v. Metropolitan St. R. Co., 84 N. Y. Supp. 918; Geary v. Metropolitan St. R. Co., 84 App. Div. [N. Y.] 514; Waters v. Metropolitan St. R. Co., 85 N. Y. Supp. 1120; Robinson v. Metropolitan St. R. Co., 91 App. Div. [N. Y.] 158.

31. Krintzman v. Interurban St. R. Co., 84 N. Y. Supp. 243.

32. Murray v. Metropolitan St. R. Co., 84 N. Y. Supp. 876.

33. Snyder v. People's R. Co. [Del.] 53 Atl. 433; Cox v. Wilmington City R. Co. [Del.] 53 Atl. 569; Wilman v. People's R. Co. [Del.] 55 Atl. 332; Chicago City R. Co. v. Mauger, 105 Ill. App. 579; Metropolitan St. R. Co. v. Rouch, 66 Kan. 195, 71 Pac. 257; Klockenbrink v. St. Louis & M. R. R. Co., 172 Mo. 678, 72 S. W. 900; McFarland v. Consol. Traction Co., 204 Pa. 423.

34. Cox v. Wilmington City R. Co. [Del.] 53 Atl. 569; Chicago City R. Co. v. Mauger, 105 Ill. App. 579.

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exist at street crossings, where the rights of the car and the wagon are held to be equal.[35] Nor does the fact that the car has a superior right of way give those in charge of it the right to operate it without due regard for the rights of travelers in teams. Both must use due care to avoid accidents, and since drivers of teams, in the exercise of due care, have a perfect right to drive across and upon the tracks of the street railway company, the rule is generally stated to be that the duty to use due care is a reciprocal one.[36] Perhaps no rule of law is more often invoked in cases of collisions between wagons and street cars than that known as the "last clear chance" rule. This rule embodies the principle that notwithstanding the plaintiff's lack of due care, if the company in the exercise of ordinary care could nevertheless have avoided the accident, it may still be held liable.[37] It should be noted, however, that while the rule is universally accepted as correct, it is not always applicable to the state of facts presented in each individual case.[38] At street crossings, the company must use greater care than when running between intersections,[39] and the jury may properly find negligence when there is evidence at crossings of high speed, lack of warning, insufficient lookout and failure to have the car under control.[40] These various acts and omissions may constitute negli-

35. Snyder v. People's R. Co. [Del.] 53 Atl. 433; Hanheide v. St. Louis Transit Co. [Mo. App.] 78 S. W. 820; Sophian v. Metropolitan St. R. Co., 38 Misc. [N. Y.] 787; Cole v. Cent. R. Co., 103 Ill. App. 160; Burns v. Metropolitan St. R. Co., 66 Kan. 188, 71 Pac. 244. At street intersections, neither vehicle nor street car has absolute right of way to the exclusion of the other. Collision between car and wagon at a crossing. Cole v. Cent. R. Co., 103 Ill. App. 160. So it is a question for the jury whether the driver of the vehicle and the motorman of the car were negligent, where each saw the other approaching. Id. If a street car, proceeding at reasonable speed, will reach a crossing first, it has the right of way. Knickerbocker Ice Co. v. Benedix, 206 Ill. 362, 69 N. E. 50. The rule as to equal rights at street crossings does not apply where a wagon and a car are coming along the same street, and the attempt to cross simply happens to be made at a street crossing. Schmedding v. N. Y. & Q. C. R. Co., 85 App. Div. [N. Y.] 24. The ends of an intersecting street need not be exactly opposite to form a street crossing, where the rights of teams and cars are equal. Freeman v. Brooklyn Heights R. Co., 87 App. Div. [N. Y.] 127. An instruction that it is the duty of drivers of vehicles to use care not to obstruct street cars was improperly refused in an action to recover damages to a wagon hit by a passing car. Chicago City R. Co. v. Mauger, 105 Ill. App. 579.

36. Southern Elec. R. Co. v. Hageman [C. C. A.] 121 Fed. 262; Cox v. Wilmington City R. Co. [Del.] 53 Atl. 569; Wilman v. People's R. Co. [Del.] 55 Atl. 332; Kennedy v. L. L. & H. St. R. Co., 184 Mass. 31, 67 N. E. 875; Schafstette v. St. Louis & M. R. R. Co., 175 Mo. 142, 74 S. W. 826; Mathiesen v. Omaha St. R. Co. [Neb.] 97 N. W. 243; Prince v. Third Ave. R. Co., 84 N. Y. Supp. 542; McFarland v. Consol. Traction Co., 204 Pa. 423. The company is only bound to the use of ordinary care. To require it to use such care that the "safety of other travelers shall be protected" is error. Perras v. United Traction Co., 88 App. Div. [N. Y.] 260. See Clark, St. Ry. Accidents (2d Ed.) § 111.

37. See Clark, St. Ry. Accidents (2d Ed.) § 111. Cox v. Wilmington City R. Co. [Del.] 53 Atl. 569; Klockenbrink v. St. Louis & M. R. R. Co., 172 Mo. 678, 72 S. W. 900; Meyers v. St. Louis Transit Co., 99 Mo. App. 363, 73 S. W. 379; Degel v. St. Louis Transit Co., 101 Mo. App. 56, 74 S. W. 156; Barrie v. St. Louis Transit Co., 102 Mo. App. 87, 76 S. W. 706; Holden v. Mo. R. Co., 177 Mo. 456, 76 S. W. 973; Kolb v. St. Louis Transit Co., 102 Mo. App. 143, 76 S. W. 1050; Linder v. St. Louis Transit Co. [Mo. App.] 77 S. W. 997; Baxter v. St. Louis Transit Co. [Mo. App.] 78 S. W. 70; Hanheide v. St. Louis Transit Co. [Mo. App.] 78 S. W. 820; Omaha St. R. Co. v. Larson [Neb.] 97 N. W. 824; Wagner v. Metropolitan St. R. Co., 79 App. Div. [N. Y.] 591; Little v. Boston & M. R. R. [N. H.] 55 Atl. 190.

38. Cogan v. Cass Ave. & F. G. R. Co., 101 Mo. App. 179, 73 S. W. 738; Ledwidge v. St. Louis Transit Co. [Mo. App.] 73 S. W. 1008. Where a motorman running at a high rate of speed saw a vehicle go onto a crossing 75 feet ahead, but could not stop the car before striking the wagon, a recovery could not be had under the "last chance" doctrine. Fellenz v. St. Louis & S. R. Co. [Mo. App.] 80 S. W. 49. Where the right to recover is based on the "last chance" rule, an instruction that if both parties were negligent it would bar a recovery was properly refused. Motorman could have seen one attempting to cross the track, 70 feet distant. Sepetowski v. St. Louis Transit Co., 102 Mo. App. 110, 76 S. W. 693. The evidence as to the distance the car was from the traveler when he drove on the track being conflicting, ranging from 50 to 108 feet, the company could not be held liable under the doctrine of discovered risk. Roenfeldt v. St. Louis & S. R. Co. [Mo.] 79 S. W. 706.

39. Snyder v. People's R. Co. [Del.] 53 Atl. 433.

40. Howard v. Indianapolis St. R. Co., 29 Ind. App. 514, 64 N. E. 890; Union Traction Co. v. Vandercook [Ind. App.] 69 N. E. 486; Stanley v. Cedar Rapids & M. C. R. Co., 119 Iowa, 526, 93 N. W. 489; Quinn v. Dubuque St. R. Co. [Iowa] 94 N. W. 476; Welty v. St. Charles St. R. Co., 109 La. 733; Searles v.

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gence as well when they take place between crossings.[41] In many cases it is ruled as a matter of law that the company is not guilty of negligence, on the ground that the driver or motorman did all in his power to avoid an accident and could not be held liable for not guarding against a danger which could not reasonably be foreseen.[42] Where a man while driving was kicked by one of the company's horses, it was held that in the absence of knowledge of vicious propensity or of

Elizabeth, P. & C. J. R. Co. [N. J. Law] 57 Atl. 134; Andres v. Brooklyn Heights R. Co., 84 App. Div. [N. Y.] 596; Strauss v. Brooklyn Heights R. Co., 85 App. Div. [N. Y.] 613; Freeman v. Brooklyn Heights R. Co., 87 App. Div. [N. Y.] 127; Bullman v. Metropolitan St. R. Co., 85 N. Y. Supp. 825; Binsell v. Interurban St. R. Co., 86 N. Y. Supp. 913; Dallas Consol. Elec. St. R. Co. v. Illo [Tex. Civ. App.] 73 S. W. 1076; Hanlon v. Milwaukee Elec. R. & L. Co., 118 Wis. 210, 95 N. W. 100. A speed of from 12 to 20 miles an hour after dark at a crossing in a narrow city street and a failure to give warning present evidence of gross negligence. Louisville R. Co. v. Teekin [Ky.] 78 S. W. 470. Where a car coming at high speed without warning, struck a lighted wagon at about daylight at a street crossing, this was held to show a prima facie case of negligence. Sophian v. Metropolitan St. R. Co., 38 Misc. [N. Y.] 787. An ordinance cannot be construed as authorizing the operation of cars at any particular rate of speed at a public crossing. Instruction precluding recovery unless a car which ran into a vehicle at a crossing was going at a speed exceeding 10 miles per hour. Holden v. Mo. R. Co., 177 Mo. 456, 76 S. W. 973. An ordinance regulating speed at crossings does not permit a car to proceed at a speed within the limit regardless of circumstances. Id. If a pedestrian sees a car coming it is not negligence not to give warning. Murray v. St. Louis Transit Co., 176 Mo. 183, 75 S. W. 611. It is no part of the duty of a conductor to keep a vigilant watch at crossings to avoid accidents. Gebhardt v. St. Louis Transit Co., 97 Mo. App. 373, 71 S. W. 448. Violation of an ordinance requiring a car to come to a full stop at a grade crossing is not negligence per se. Philip v. Heraty [Mich.] 97 N. W. 963.

41. Southern Elec. R. Co. v. Hageman [C. C. A.] 121 Fed. 262; Chicago City R. Co. v. Sandusky, 198 Ill. 400, 64 N. E. 990; Indianapolis St. R. Co. v. Darnell [Ind. App.] 68 N. E. 609; North Chicago St. R. Co. v. Rodert, 203 Ill. 413, 67 N. E. 812; South Covington & C. St. R. Co. v. McHugh, 25 Ky. L. R. 1112, 77 S. W. 202; Westphal v. St. Joseph & B. H. St. R. Co. [Mich.] 96 N. W. 19; Noll v. St. Louis Transit Co., 100 Mo. App. 367, 73 S. W. 907; Jersey Farm Dairy Co. v. St. Louis Transit Co. [Mo. App.] 77 S. W. 346; Moritz v. St. Louis Transit Co., 102 Mo. App. 657, 77 S. W. 477; Baxter v. St. Louis Transit Co. [Mo. App.] 78 S. W. 70; Adams v. Camden & S. R. Co. [N. J. Err. & App.] 55 Atl. 254; Blum v. Metropolitan St. R. Co., 79 App. Div. [N. Y.] 611; Muller v. Interurban St. R. Co., 84 N. Y. Supp. 234; Pritchard v. Brooklyn Heights R. Co., 89 App. Div. [N. Y.] 269; Toledo, F. & N. R. Co. v. Gilbert, 24 Ohio Circ. R. 181. See Clark, St. Ry. Accidents (2d Ed.) § 112. Thus, where the driver of a wagon crossed from one track to another on the signal of a car approaching from behind and was struck by a car from 250 to 275 feet away coming in the opposite direction on the second track, and there was evidence that the car was run at high speed and that the motorman was looking sideways, this presents evidence of negligence for the jury. Boyles v. Monongahela St. R. Co., 20 Pa. Super. Ct. 443. A driver while unloading a piano was obliged to let his horse stand on the track and sent a man up the track to signal approaching cars. There was evidence that a car came at unusual speed without warning and that the motorman had a clear view for 3 or 4 squares and was signalled to stop. A verdict for the plaintiff was sustained. McFarland v. Consol. Traction Co., 204 Pa. 423. Where a team was unloading near a track, it was held that it was not enough for the front end of the car to get by the team in safety, but that the conductor must keep a lookout as well as the motorman. Martin v. Interurban St. R. Co., 84 N. Y. Supp. 921. It has been held that running a car at a speed prohibited by a city ordinance is negligence per se (Kolb v. St. Louis Transit Co., 102 Mo. App. 143, 76 S. W. 1050; Meyers v. St. Louis Transit Co., 99 Mo. App. 363, 73 S. W. 879), but it also held that this is merely evidence of negligence (San Antonio Traction Co. v. Upson, 31 Tex. Civ. App. 50, 71 S. W. 565). Running a car within the limit prescribed by ordinance does not necessarily show freedom from negligence. Atherton v. Tacoma R. & P. Co., 30 Wash. 395, 71 Pac. 39. Not to have a headlight is not negligence as a matter of law. Frank v. St. Louis Transit Co., 99 Mo. App. 323, 73 S. W. 239. Where the accident occurred at night, it was held that warning should have been given or else the car should have been lighted so that it could be seen for a safe distance. Buren v. St. Louis Transit Co. [Mo. App.] 78 S. W. 680. Where a university allowed a street railway company to lay its tracks within the campus, the company agreeing to keep them in order, it was held liable for an injury to a professor's servant from a defect in the tracks. Bolster v. Ithaca St. R. Co., 79 App. Div. [N. Y.] 239.

42. Where a wagon wheel caught in the track. Ellerman v. St. Louis Transit Co., 102 Mo. App. 295, 76 S. W. 661. Where a man lying on the tracks was run over at night. Warner v. St. Louis & M. R. R. Co. [Mo.] 77 S. W. 67. Where a wagon turned suddenly in front of a car. Chicago Union Traction Co. v. Browdy, 206 Ill. 615, 69 N. E. 570; Solatinow v. Jersey City, H. & P. St. R. Co. [N. J. Law] 56 Atl. 235; Reichenberg v. Interurban St. R. Co., 84 N. Y. Supp. 523. A boy riding on the side steps of a freight car was struck by an electric car coming in the opposite direction. It was held that the motorman, who motioned to the boy to look out, was confronted by a sudden danger, and could not be held guilty of negligence. Ackerman v. Union Traction Co., 205 Pa. 477.

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previous kicking, the company was not liable.[43] A "vigilant watch" ordinance need not be accepted by a company before its provisions are binding upon it,[44] and need not be specially pleaded.[45]

Pleading.—A general allegation of negligence, in the absence of a motion to make more specific,[46] or allegations that specific acts were negligently performed, is sufficient;[47] but an allegation that the operatives failed to keep a proper lookout was held not to be.[48] That the evidence substantially proves the allegations is sufficient.[49] Common law and statutory negligence may be joined in the same count;[50] but an action for personal injuries and an action for libel cannot be joined.[51]

Evidence.—That the operatives of a car were in the habit of running it at an excessive rate of speed is not admissible to establish negligence on a particular occasion.[52] Evidence of a city ordinance regulating speed rate is admissible under a general averment of negligence,[53] if the speed of the car is in issue,[54] as are also ordinances establishing rules of the road.[55] A witness who sees a moving car and possesses a knowledge of time and distance is competent to express an opinion as to the rate of speed at which a car was moving.[56]

43. Eddy v. Union R. Co. [R. I.] 56 Atl. 677.

44. Being a police regulation which the city has power to enact. Nagel v. St. Louis Transit Co. [Mo. App.] 79 S. W. 502.

45. Sepetowski v. St. Louis Transit Co., 102 Mo. App. 110, 76 S. W. 693.

46. That a motorman negligently run the car up to and against a surrey in which plaintiff was riding. Southern Elec. R. Co. v. Hageman [C. C. A.] 121 Fed. 262.

47. Sets forth that the defendant company negligently ran its car into the plaintiff's wagon. Donohoe v. Wilmington City R. Co. [Del.] 55 Atl. 1011. That a horse became frightened at an approaching car and while unmanageable ran onto the track and was there run into by the car. Hammond, W. & E. C. Elec. St. R. Co. v. Eads [Ind. App.] 69 N. E. 555. That defendant negligently replaced a broken rail so as to leave the street in a dangerous condition, whereby plaintiff was injured while driving, etc. Citizens' St. R. Co. v. Marvil, 161 Ind. 506, 67 N. E. 921. Allegation that the company carried on the front of its car a banner calculated to frighten horses, and that it did frighten plaintiff's horse. Indianapolis & G. R. T. Co. v. Haines [Ind. App.] 69 N. E. 187. An allegation, in a special plea in an action for injury caused by a collision, that the motorman used all the appliances at hand to stop the car but could not do so, sets up matter provable under the general issue. Montgomery St. R. v. Hastings [Ala.] 35 So. 412.

48. Failed to keep a proper lookout for persons crossing the track. Koenig v. Union Depot R. Co., 173 Mo. 698, 73 S. W. 637.

49. An allegation that a car collided with the hind end of a wagon is supported by evidence that it collided with the hind wheel of the wagon. Schafstette v. St. Louis & M. R. R. Co., 175 Mo. 142, 74 S. W. 826. Declaration in one count alleged that one injured by being struck by a car was on the east track, and in another count alleged he was on the west track. The proof showed he was between the two. Held no variance to prevent a recovery. Potter v. Leviton, 199 Ill. 93, 64 N. E. 1029. The issue of contributory negligence in not driving a hack clear over the track or far enough beyond for the car to clear it, being pleaded, cannot go to the jury where evidence showed that the hack was driven clear over and as the car was about to pass, backed onto the track. El Paso Elec. St. R. Co. v. Ballinger [Tex. Civ. App.] 72 S. W. 612.

50. Gebhardt v. St. Louis Transit Co., 97 Mo. App. 373, 71 S. W. 448. In an action for injuries caused by collision of street car with vehicle. Meyers v. St. Louis Transit Co., 99 Mo. App. 363, 73 S. W. 379.

51. Injury on account of negligence of the company and libel uttered by the president of the company in regard to the claim. Brooks v. Galveston City R. Co. [Tex. Civ. App.] 74 S. W. 330.

52. Evidence that the customary rate of speed of a car at a certain place was higher than that allowed by ordinance, and a high and dangerous rate. Atherton v. Tacoma R. & P. Co., 30 Wash. 395, 71 Pac. 39. In an action for damages sustained in collision caused by car jumping the track, owing, as alleged, to excessive speed and mismanagement and uneven rails, evidence that cars had there jumped the track at other times, without a showing that circumstances were similar to those at time of accident, was inadmissible. Perras v. United Traction Co., 88 App. Div. [N. Y.] 260.

53. Omaha St. R. Co. v. Larson [Neb.] 97 N. W. 824.

54. An ordinance regulating speed is immaterial as evidence where there is no evidence as to the actual speed of the car at the time of the accident. Mathieson v. Omaha St. R. Co. [Neb.] 92 N. W. 639. But if there is evidence from which the jury might calculate the speed of the car, such an ordinance is admissible. Mathiesen v. Omaha St. R. Co. [Neb.] 97 N. W. 243.

55. In an action to recover damages sustained in a collision, a municipal ordinance on rules of the road providing that all vehicles going in a northerly or southerly direction should have the right of way over any vehicle going in an easterly or westerly direction, was admissible and it was error to exclude it. H. E. Taylor & Co. v. Metropolitan St. R. Co., 84 N. Y. Supp. 282.

56. Omaha St. R. Co. v. Larson [Neb.]

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Instructions.—Instructions must be restricted to the issues made by the pleadings.[57] Where the allegations of the complaint do not authorize recovery on the ground of discovered peril, it is error to charge the jury in regard to liability on such ground.[58] An instruction that the proof must conform to the allegations is not error.[59] The court should instruct specifically and not in general terms,[60] but an instruction in general terms is not reversible error,[61] unless it misstates the law and lays too great a burden on the company.[62] It is error to embody an ambiguous ordinance in an instruction.[63] An instruction should not assume negligence.[64]

Frightening horses.—Considering the widely different states of fact attending cases of this description, it is difficult to lay down any more specific rule than that

97 N. W. 824. Though a witness need not be an expert to be permitted to give his opinion as to the speed of a car, he must be shown to have had, and to have availed himself of, an opportunity for observation in the case at hand. Mathieson v. Omaha St. R. Co. [Neb.] 92 N. W. 639. Civil engineer of 11 years' experience, former railroad man and accustomed to time speed of cars with watch, is competent to testify as to speed of car on which he was a passenger. Fisher v. Union R. Co., 86 App. Div. [N. Y.] 365. Question whether the conductor could have stopped the car had he been on the rear platform or on trailer properly excluded as calling for an opinion. Von Diest v. San Antonio Traction Co. [Tex. Civ. App.] 77 S. W. 632.

57. Negligence assigned was starting a motionless car without signal and no averment that the casualty resulted from failure to stop the car. A qualification to an instruction "If the motorman could not have stopped the car after he saw her," etc., was error. McLeland v. St. Louis Transit Co. [Mo. App.] 80 S. W. 30.

58. Denison & S. R. Co. v. Carter [Tex. Civ. App.] 70 S. W. 322, 71 S. W. 292. An instruction truly setting forth the doctrine of discovered peril is erroneous where there was evidence that one who was contributorily negligent in going onto a track paid no further attention to an approaching car. Richmond Pass. & Power Co. v. Steger [Va.] 43 S. E. 612.

59. When injuries were caused by a horse becoming frightened at a banner carried in front of a car, an instruction that it must be proved that the horse was frightened from no other cause, and that the banner was unnecessary, is not erroneous (Indianapolis & G. R. T. Co. v. Haines [Ind. App.] 69 N. E. 187), nor is an instruction which charges that no recovery can be had if the horse was frightened at the car aside from the banner (Id.).

60. In a collision case; as to care required of the driver. Sanitary Dairy Co. v. St. Louis Transit Co., 98 Mo. App. 20, 71 S. W. 726. An instruction setting forth that it was the duty of one approaching the crossing to anticipate that cars were liable to pass, that he must make vigilant use of his senses and look in both directions, and in failing to do so was guilty of negligence barring a recovery, unless motorman saw him approaching in time to slacken the speed of his car so as to prevent a collision, held not erroneous. Honick v. Metropolitan St. R. Co., 66 Kan. 124, 71 Pac. 265.

61. An instruction that if the car operatives negligently ran the car onto a team and by ordinary care could have avoided doing so, the company is liable is not reversible error as too general. Twelkemeyer v. St. Louis Transit Co., 102 Mo. App. 190, 76 S. W. 682.

62. A charge imposing on a street railway company the duty of using all the care that the motorman could use at the time imposed upon it too great a responsibility (Klimpl v. Metropolitan St. R. Co., 92 App. Div. [N. Y.] 291), and was not cured by a subsequent charge exonerating the company if the motorman "while operating his car with ordinary care," etc., which was qualified by giving it "in connection with the charge already made" (Id.).

63. It is error to embody an ordinance requiring a motorman "to stop the car in the shortest space and time possible" to avoid a collision. The court should explain the degree of care required by the ordinance, since the words quoted are misleading. Gebhardt v. St. Louis Transit Co., 97 Mo. App. 373, 71 S. W. 448.

64. From the fact of a collision. This is a question for the jury. Atherton v. Tacoma R. & P. Co., 30 Wash. 395, 71 Pac. 39. Where one was injured in a collision, an instruction that even if the brake was not working properly, if the plaintiff crossed the track when the car was so near that though it was in good condition the car could not have been stopped, he should not recover, was properly refused as being insufficient and incorrect. Silva v. Boston El. R. Co., 183 Mass. 249, 66 N. E. 808. It was proper to refuse an instruction that deceased had no right to obstruct or interfere with the passage of cars, there being no evidence that he sought to obstruct the track. Chicago City R. Co. v. O'Donnell, 208 Ill. 267, 70 N. E. 294. Where evidence was conflicting and the jury might have found that neither the company nor a driver approaching a crossing was negligent, it was error not to charge that the company could relieve itself of the statutory presumption by showing that neither party was to blame. Atlanta R. & P. Co. v. Gaston, 118 Ga. 418. Inconsistences between a jury's answers to interrogatories, in regard to precautions taken by one who was struck by a car while crossing the track, and the general verdict held not ground for reversal. Union Traction Co. v. Vandercook [Ind. App.] 69 N. E. 486.

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the driver of the horse and the employee in charge of the car must both do what they reasonably can to avoid the danger of an accident.[65]

(§ 4) *C. Bicycle riders; horseback riders; animals run over.*—The conduct of the rider of a bicycle may be such that he is held to be guilty of lack of due care as a matter of law, and consequently unable to recover.[66] On the other hand, the circumstances may be such as to warrant the submission of the question of the rider's due care to the jury.[67] On the question of the company's negligence, it is well settled that notwithstanding the plaintiff's lack of due care, the company may still be held liable if it could have avoided the accident by the exercise of ordinary care.[68] In cases of injury to riders on horseback, the negligence or lack

65. See Clark, St. Ry. Accidents (2d Ed.) §§ 113, 114. When a young and skittish horse shows signs of fright, whether it is lack of due care not to turn off the street at once is a question for the jury (Knoxville Traction Co. v. Mullins [Tenn.] 76 S. W. 890), and to drive a horse which is afraid of street cars upon a narrow street where there is a car track is not lack of due care as a matter of law (Montgomery St. R. v. Hastings [Ala.] 35 So. 412). The motorman must do what he can to avoid injury, and if necessary must stop his car. Hammond, W. & E. C. Elec. St. R. Co. v. Eads [Ind. App.] 69 N. E. 555. Where danger is apparent the motorman should stop ringing his gong and if necessary should stop his car. Knoxville Traction Co. v. Mullins [Tenn.] 76 S. W. 890. Although the motorman need not stop every time a horse shows fright at ordinary movements of the car, he should get his car under control, slackening speed if necessary for that purpose, and later may be required by the circumstances to stop his car altogether. Danville R. & E. Co. v. Hodnett [Va.] 43 S. E. 606. A motorman running a car at a high rate of speed; he had clear view of the track; a man was leading a horse on the highway approaching the car from the opposite direction; the horse became unmanageable when about 200 feet from the car and it must have been apparent that the fright was due to the oncoming car. Held, the motorman negligent in not putting his car under control, and in running into the man. Cameron v. Jersey City, H. & P. St. R. Co. [N. J. Law] 57 Atl. 417. Where a motorman slowed down as soon as he noticed the fright of a horse and stopped his car when danger became apparent, he was held not to be negligent. Lincoln Traction Co. v. Moore [Neb.] 97 N. W. 605. Where there was evidence that a motorman saw a runaway team 230 feet away but made no effort to check the speed of his car, the question of his willful and wanton misconduct was held to be properly submitted to the jury. Wilson v. Chippewa Valley Elec. R. Co. [Wis.] 98 N. W. 536. Where the driver of a runaway horse signaled to a motorman when 100 feet away, and the motorman, who could have stopped his car within 6 or 8 feet, did not stop his car until after the collision, there was held to be evidence of negligence for the jury. Thiel v. South Covington & C. St. R. Co. [Ky.] 78 S. W. 206.

66. See Clark, St. Ry. Accidents (2d Ed.) §§ 115, 116. A bicycle rider who crossed in the rear of a car going in the same direction, where there were double tracks, and was struck by a car coming in the opposite direction on the second track, was held guilty of contributory negligence where he took no precautions to discover the second car, the street was straight, his eyesight was good, and it was daylight. Barrett v. Columbia R. Co., 20 App. D. C. 381. A bicycle rider who rode dangerously near the track without looking back for a distance of three hundred feet was held not to be in the exercise of due care. Robards v. Indianapolis St. R. Co. [Ind. App.] 66 N. E. 66. Where a bicycle rider crossed behind a car at a street crossing and went directly in front of a car coming in the opposite direction, he was held to be guilty of lack of due care. Schroder v. Metropolitan St. R. Co., 87 App. Div. [N. Y.] 624. Where a woman rode so close to the tracks that she was unable to avoid running into the conductor, who had got off to help a passenger to alight, she was held guilty of lack of due care. North Chicago St. R. Co. v. Cossar, 203 Ill. 608, 68 N. E. 88.

67. See Clark, St. Ry. Accidents (2d Ed.) §§ 115, 116. Where the rider of a bicycle turned onto the track to avoid a pile of stones, and owing to a high wind dismounted, without looking behind him, and there was evidence that the car which struck him came at high speed without warning and without sufficient lookout by the motorman, due care was held to be a question for the jury. Zolpher v. Camden & S. R. Co. [N. J. Err. & App.] 55 Atl. 249. A bicycle rider was riding north between double tracks late at night. He heard the gong of an overtaking car and the street being impassable on account of snow, and the invariable custom of the company being to run north bound cars on the east track, he turned onto the west track and was struck by a car coming north on that track at from 12 to 16 miles an hour. Due care and negligence were held to be properly submitted to the jury. North Chicago St. R. Co. v. Irwin, 202 Ill. 345, 66 N. E. 1077. It must be noted that in cases of this character it is the right to rely upon a fixed custom which is the important factor. In a similar case, where the cars were usually run in one direction on one track, but it could not be proved that there was any fixed custom, the rider of the bicycle was held not to be in the exercise of due care. Baldwin v. Heraty [Mich.] 98 N. W. 739.

68. Metropolitan St. R. Co. v. Arnold, 67 Kan. 260, 72 Pac. 857. Thus, although a bicycle rider is guilty of lack of due care in violating a city ordinance as to speed while riding in a race, if the motorman had the last clear chance to avoid the accident and did not avail himself of it, the company

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of negligence of the company is to be determined by the circumstances of each individual case.[69] It is not negligence as a matter of law for animals to be upon a street car track, and the company must use due care to avoid injury to them.[70] A motorman who discovers a peril in time to avoid an injury and does not use means at his command to do so is guilty of negligence.[71] The burden is not on the plaintiff to show that he could not have avoided the injury.[72]

SUBMISSION OF CONTROVERSY.[73]

On submission of a controversy without action on an agreed case, a prayer for judgment is not necessary, but the court may enter any judgment to which the parties are entitled.[74] A proposed submission which contains no agreement as to the facts which are admitted and from the subject of the alleged submission will be dismissed.[75] On such submission the court cannot infer facts not specifically agreed upon,[76] and the submission will be dismissed where there is an absence of parties necessary to a complete and final determination of the controversy.[77] Where a complaint is filed giving jurisdiction, and a stipulation is then filed, treated by the court and parties as amending the complaint and raising an issue, the case is not an agreed case which has to be submitted with the formalities required for the submission of controversy without action.[78] A written submission of all questions of law and fact in a cause to a special chancellor includes a submission of demurrers to the bill of complaint.[79]

is liable (Harrington v. Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15), and where a deaf rider did not understand the warnings of his companions, and there was evidence that the motorman saw that the signals were not heeded, it was held that if the motorman was guilty of negligence in the management of his car in view of the facts, the company would be liable (Bedell v. Detroit, Y. & A. A. R., 131 Mich. 668, 92 N. W. 349). Notwithstanding the universal acceptance of this rule, there are some cases where no new circumstance is introduced and no new relation established, where it is held inapplicable to the facts. Robards v. Indianapolis St. R. Co. [Ind. App.] 67 N. E. 953. It has been held that if the failure to ring a gong at a crossing is relied on as negligence, a rule or custom requiring such an observance should be shown. Barrett v. Columbia R. Co., 20 App. D. C. 381.

69. See Clark, St. Ry. Accidents (2d Ed.) § 117. Where a boy of 13 crossed in the rear of a car, where there were double tracks, and went directly in front of a second car coming in the opposite direction, there was held to be no negligence on the part of the company. Schutt v. Shreveport Belt R. Co., 109 La. 500. It is negligence to put a city street car in the care of a boy of 18 with only 20 days' experience, and where a horseback rider was injured while riding near the track on a crowded street, the company was held liable for the negligence of the motorman in not stopping his car in time. Crisman v. Shreveport Belt R. Co., 110 La. 640.

70. See Clark, St. Ry. Accidents (2d Ed.) § 118. Where a man looked for a car and then drove his herd of cows across the track, his due care was held to be for the jury, and it was held further that a requirement that a car should be properly lighted meant that it should be so lighted as to give fair notice, and that whether a headlight was necessary was a question for the jury. Ensley v. Detroit United R. [Mich.] 96 N. W. 34. Running a car at greater speed than is permitted by a city ordinance is clear evidence of negligence. Anniston E. & G. Co. v. Hewitt [Ala.] 36 So. 39. Where there is no testimony as to how quickly a car can be stopped, it cannot be assumed as a matter of common knowledge that it could have been stopped within a space of 150 feet. Kotila v. Houghton County St. R. Co. [Mich.] 96 N. W. 437.

71. Error to refuse a charge if a motorman saw a dog on the track in time to avoid injuring him and did not do so, such failure was negligence. Marshall v. Dallas Consol. Elec. St. R. Co. [Tex. Civ. App.] 73 S. W. 63.

72. One whose dog had been run over by a street car. Marshall v. Dallas Consol. Elec. St. R. Co. [Tex. Civ. App.] 73 S. W. 63.

73. Includes only submission to a court on agreed facts. Submission to arbitrators is treated in Arbitration and Award, 1 Curr. Law, p. 205.

74. N. C. Code 1883, §§ 567, 569. Williams v. Iredell County Com'rs, 132 N. C. 300.

75. A memorandum opposite the title to the effect that it is a case agreed upon without action pursuant to the Code of Civil Procedure is insufficient. Begen v. Curtis, 81 App. Div. [N. Y.] 91.

76. Wetyen v. Fick, 90 App. Div. [N. Y.] 43. Consequently, though it is agreed that defendants collected the rents and profits of premises, it cannot be inferred that there was an actual occupant thereof against whom action for dower could be maintained under the N. Y. Code [Code Civ. Proc. § 1597]. Id.

77. N. Y. Code Civ. Proc. § 1281. Schreyer v. Arendt, 83 App. Div. [N. Y.] 335.

78. Mont. Code Civ. Proc. § 2050 et seq. Bickford v. Kirwin [Mont.] 75 Pac. 518.

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SUBROGATION.

§ 1. Definition and Nature (1768).
§ 2. Right to Subrogation (1768).
§ 3. How Forfeited or Lost (1770).
§ 4. Remedies and Procedure (1770).

§ 1. *Definition and nature.*—Subrogation is the substitution of another person in place of a claimant to whose rights he succeeds in relation to the claim,[80] or as it has been defined, is an equitable assignment operated by the law itself when justice requires it; as for instance, when a surety pays the debt of a principal or where one having an interest in property or honestly believing himself to have an interest, pays an earlier incumbrance.[81] Subrogation was formerly and in some states is held to be a purely equitable remedy,[82] and operates as an equitable assignment,[83] independent of any agreement between the parties;[84] but for many years past, courts of law both in this country and in England have begun to sustain those claims properly cognizable only in courts of equity.[85] Subrogation may also arise out of contract between the parties.[86]

§ 2. *Right to subrogation.*—The general rule is that when of two or more persons each liable to a third, one ought to pay rather than the others and one of the latter does pay the indebtedness, he is thereupon subrogated so as to stand in the shoes of the creditor with all his rights and remedies against the principal, sureties and co-sureties. It is generally and most frequently applied to cases where the person advancing money to pay the debt is a surety or secondarily liable,[87] where one who has promised to pay debt of another fails to do so,[88] or where two or more are equally liable and one satisfies the entire claim.[89] The party subrogated gets all the remedies to which the creditor was entitled,[90] but

79. Henderson v. Hall, 134 Ala. 455.

80. Cyc. Law Dict. "Subrogation."

81. Dunlop v. James, 174 N. Y. 411, 67 N. E. 60. "Founded on principles of equity and benevolence." Kolb v. Nat. Surety Co., 176 N. Y. 233, 68 N. E. 247; Dunlop v. James, 174 N. Y. 411, 67 N. E. 60. "Founded on principles of natural justice." Dunsmuir v. Port Angeles Gas, W., E. L. & P. Co., 30 Wash. 586, 71 Pac. 9. "It is applied to do complete and perfect justice." State Nat. Bank v. Vicroy, 24 Ky. L. R. 892, 70 S. W. 183.

82. Wilder's Ex'x v. Wilder, 75 Vt. 178; Dunlop v. James, 174 N. Y. 411, 67 N. E. 60; Coonrod v. Kelly [C. C. A.] 119 Fed. 891.

83. Dunlop v. James, 174 N. Y. 411, 67 N. E. 60; Elliott v. Tainter, 88 Minn. 377, 93 N. W. 124; State Nat. Bank v. Vicroy, 24 Ky. L. R. 892, 70 S. W. 183.

84. Snook v. Munday, 96 Md. 514; Fidelity & Deposit Co. v. Jordan [N. C.] 46 S. E. 496.

85. Dunlop v. James, 174 N. Y. 411, 67 N. E. 60.

86. Powers v. McKnight [Tex. Civ. App.] 73 S. W. 549; Barker v. Boyd, 24 Ky. L. R. 1389, 71 S. W. 528.

87. Dunlop v. James, 174 N. Y. 411, 67 N. E. 60; Swarts v. Siegel [C. C. A.] 117 Fed. 13; Snook v. Munday, 96 Md. 514; Mendel v. Boyd [Neb.] 91 N. W. 860; Cullinan v. Union Surety & Guaranty Co., 79 App. Div. [N. Y.] 409; Roberts v. Best, 172 Mo. 67, 72 S. W. 657.

88. Walsh v. Walsh [Neb.] 95 N. W. 1025. A surety of a guardian who pays the successor for debts wrongfully released by his principal is entitled to subrogation to the rights of the ward against the debtors. Browne v. Fidelity & Deposit Co. [Tex.] 80 S. W. 593. A surety on an appeal bond who pays the judgment is not entitled to be subrogated to the rights of the judgment creditor against sureties on a bond for release from an attachment unless the appeal bond was given at the request of such sureties. Fidelity & Deposit Co. v. Bowen [Iowa] 98 N. W. 897.

89. One of several joint tort feasors pays off the whole judgment against them. Kolb v. Nat. Surety Co., 176 N. Y. 233, 68 N. E. 247. A partner pays the entire indebtedness of a firm. Schuyler v. Booth, 76 App. Div. [N. Y.] 619.

90. Right to specific performance of a land contract. Griffith v. Lehman [Neb.] 96 N. W. 991. A partner paying all liabilities is subrogated to lien of secured creditors. Schuyler v. Booth, 76 App. Div. [N. Y.] 619. An agreement of principal debtor with the creditors to compromise the claims for a fixed sum. Kolb v. Nat. Surety Co., 176 N. Y. 233, 68 N. E. 247. Subrogated surety might continue prosecution of a claim of the creditor against the principal debtor. Brown v. Fidelity & Deposit Co. [Tex. Civ. App.] 76 S. W. 944. Subrogated surety entitled to continue pending suit of the creditor against the principal. Id. Subrogated to unsatisfied judgments. W. T. Rickards & Co. v. Bemis & Co. [Tex. Civ. App.] 78 S. W. 239. Surety of sheriff subrogated to lien of the state on payment of its claim. Baker v. Fidelity & Deposit Co., 24 Ky. L. R. 2196, 73 S. W. 1025. May bring action against persons who were primarily liable for default of the principal. Gulf, C. & S. F. R. Co. v. North Tex. Grain Co. [Tex. Civ. App.] 74 S. W. 567. Surety of a defaulting trustee may recover against those confederating in the breach of trust. American Bonding Co. v. Nat. Mechanics' Bank, 97 Md. 598. Surety of a land contract on pay-

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no better right and subject to all equities of the principal debtor.[91] Subrogation is also applicable to cases where a party is compelled to pay the debt of a third person to protect some interest which might otherwise be lost.[92] Almost any interest is sufficient to give this right,[93] and so when one acts on a mistaken belief that such payment is necessary for the protection of his property, he is subrogated.[94] Where one pays money under the honest belief that it is to satisfy a lien on the property of another, and such lien is satisfied or canceled, he is none the less subrogated thereto and the lien kept alive for his benefit on the cancellation being set aside;[95] the true principle being that when money is so paid, it shall operate as an equitable assignment of the canceled lien to continue it in force to subserve the ends of justice.[96] Where one advances money to satisfy an existing lien and substitute therefor one to himself and if this latter is for any reason not effective, the person so satisfying the first lien may be subrogated thereto;[97] but such subrogation does not exist where the payment is a loan and not given to satisfy an existing lien,[98] or where it will work an injustice to any

ment is subrogated to vendee's lien. Barnes v. Barnes, 24 Ky. L. R. 1732, 72 S. W. 282. Surety of a defaulting contractor subrogated to balance due him when he completes the work. Reid v. Pauly [C. C. A.] 121 Fed. 652. A surety paying a debt of the principal due to the state is subrogated to the exemption of the state from operation of the statute of limitation. American Bonding Co. v. Nat. Mechanics' Bank, 97 Md. 598. A surety of a trust bond on payment is subrogated to rights of the creditor against those confederating in the breach of trust. Id.

91. Swarts v. Siegel [C. C. A.] 117 Fed. 13.

92. Dunlop v. James, 174 N. Y. 411, 67 N. E. 60; Elliott v. Tainter, 88 Minn. 377, 93 N. W. 124; Roberts v. Best, 172 Mo. 67, 72 S. W. 657.

93. **Intention held sufficient to entitle one to subrogation:** Purchaser at mortgage foreclosure sales. Equitable Mortg. Co. v. Gray [Kan.] 74 Pac. 614. Mortgagee of a lease. Dunlop v. James, 174 N. Y. 411, 67 N. E. 60. **Tenancy in common on failure** of cotenants to pay incumbrances. Kinkead v. Ryan [N. J. Err. & App.] 55 Atl. 730. Ownership of one of several lots subject to a common mortgage. Dayton v. Stahl [Mich.] 93 N. W. 878. A stranger in possession. Mavity v. Stover [Neb.] 94 N. W. 834. Junior lienors and second mortgagees. Bowen v. Gilbert [Iowa] 98 N. W. 273. Life tenant with an interest in the remainder. Kinkead v. Ryan, 64 N. J. Eq. 249. Second lienor. City of Lincoln v. Lincoln St. R. Co. [Neb.] 97 N. W. 255. Interest of husband in estate of wife. State Nat. Bank v. Vicroy, 24 Ky. L. R. 892, 70 S. W. 183. But see Clay v. Clay's Guardian, 24 Ky. L. R. 2016, 72 S. W. 810. Interest of one in the estate of a woman who subsequently became his wife. Dillon v. Dillon, 24 Ky. L. R. 781, 69 S. W. 1099. An execution purchaser of part of a vendee's interest. Larson v. Oisefos, 118 Wis. 368, 95 N. W. 399. When trustees under a void assignment f. b. c. pay secured creditors, they are entitled to subrogation to their liens. N. Y. Public Library v. Tilden, 39 Misc. [N. Y.] 169. But not a grantee in fraud of creditors (Greig v. Rice, 66 S. C. 171), nor purchaser at an execution sale of a prior lien (Jewett v. Feldheiser, 68 Ohio St. 523, 67 N. E. 1072).

94. One who believes he is a mortgagee pays taxes though he has in fact no lien. Dunsmuir v. Port Angeles Gas, W., E. L. & P. Co., 30 Wash. 586, 71 Pac. 9. A mistaken belief that the deed given in consideration for paying off an incumbrance is valid will entitle one to subrogation. Hutchison v. Fuller [S. C.] 45 S. E. 164. Where a tenant by curtesy, acting in the belief that he is owner in fee, pays off a mortgage. Wilder's Ex'x v. Wilder, 75 Vt. 178. But see holding contra on ground the mistake is one of law. Deavitt v. Ring [Vt.] 56 Atl. 978. Where a sale is held void, the purchaser is subrogated to liens which he has paid. Woodland Cemetery Co. v. Ellison [Ky.] 80 S. W. 169.

95. Look v. Horn, 97 Me. 283; Bowen v. Gilbert [Iowa] 98 N. W. 273; Elliott v. Tainter, 88 Minn. 377, 93 N. W. 124. But not in jurisdictions where the effect of redemption is to annul the loan. Butler v. Brown, 205 Ill. 606, 69 N. E. 44.

96. Elliott v. Tainter, 88 Minn. 377, 93 N. W. 124. One advancing money to pay a mortgage is not entitled to subrogation to the rights of the mortgagee unless the lien of the mortgage is preserved. Alvis v. Alvis [Iowa] 99 N. W. 166.

97. Where an existing second mortgage, was unknown to the party satisfying a prior lien. Elliott v. Tainter, 88 Minn. 377, 93 N. W. 124. A second mortgagee whose mortgage is invalid against some mortgagors is entitled to subrogation to the lien of the first mortgage which was paid with the proceeds of the second. Connor v. Home & S. F. Co. Bldg. Ass'n [Ky.] 80 S. W. 797. When no authority in agent to procure discharge of existing lien and execution of another. Boevink v. Christiaanse [Neb.] 95 N. W. 652. But see Gray v. Zellmer, 66 Kan. 514, 72 Pac. 228. Where valid municipal warrants paid out of proceeds of void municipal bonds. Board of Com'rs of Kearney County v. Irvine [C. C. A.] 126 Fed. 689. Failure to assign the mortgage to one who had satisfied an existing lien. Warne, Willis & Co. v. Morgan [Kan.] 75 Pac. 480. Where true wife did not execute mortgage given person ratifying prior mortgage. Gordon v. Stewart [Neb.] 96 N. W. 624. Where a deed given in consideration for the release was invalid (Hutchinson v. Fuller [S. C.] 45 S. E. 164), but not where money was loaned to pay lien on homestead (Crebbin v. Moseley [Tex. Civ. App.] 74 S. W. 815).

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innocent party.[98] Subrogation will not be granted, however, to a stranger or volunteer with no interest to protect,[1] but one who would otherwise be so regarded may obtain his right to subrogation by contract with the principal or creditor.[2] Where a creditor elects to hold his agent for wrongfully incurring the debt, the agent is subrogated to all liens held by the creditor.[3]

§ 3. *How forfeited or lost.*—The right to subrogation may be forfeited by inequitable conduct on the part of persons claiming it. The statute of limitations does not apply to the right of a person having an interest in land to which he is subrogated.[4]

§ 4. *Remedies and procedure.*—The right to subrogation was originally only had at equity, but of modern times both in America and England it has been allowed at courts of law;[5] but in some states bearing in mind its origin, it is held the equity rather than the probate court is the proper place for an executor to ask this relief.[6] Where a decree of the court has fixed the order of liens, an order for subrogation is the proper remedy.[7] The issue of subrogation to be taken advantage of must be pleaded.[8] While ordinarily the creditor is a necessary party in an action to enforce subrogation, yet where he has satisfied his claim of record he may be omitted.[9]

SUBSCRIPTIONS.

§ 1. Nature, Requirements, and Sufficiency as a Contract (1770).
§ 2. Rights and Liabilities Arising from Subscriptions (1771).
§ 3. Enforcement, Remedies, and Procedure (1772).

§ 1. *Nature, requirements, and sufficiency as a contract.*—A subscription is the act by which a person contracts, in writing, to furnish a sum of money for a particular purpose. It is of the nature of an offer and is not enforceable until acted upon, but when acted upon has all the force of a binding contract.[10] A substantial compliance is all that is necessary.[11] Where there is no fraud or mis-

98. Bigelow v. Scott, 135 Ala. 236; Berry v. Bullock, 81 Miss. 463.

99. Coonrod v. Kelly [C. C. A.] 119 Fed. 841.

1. Roberts v. Best, 172 Mo. 67, 72 S. W. 657; Deavitt v. Ring [Vt.] 56 Atl. 978; Bennett v. Chandler, 199 Ill. 97, 64 N. E. 1052; Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800; Crane v. Noel [Mo. App.] 78 S. W. 826. Subrogation not granted to agents for collection who remit amount of bill before attempting to enforce payment. Bennett v. Chandler, 199 Ill. 97, 64 N. E. 1052. An insurance agent who pays the first year's premium without knowledge of the insured is not subrogated to the rights of the insurer. Parsons v. John Hancock M. L. Ins. Co., 20 App. D. C. 263 Where a succeeding employe makes good deficit in the accounts of his predecessors, he is not subrogated. Crane v. Noel [Mo. App.] 78 S. W. 826. Where one becomes surety at the request of a surety, he is a mere volunteer and not subrogated to the creditor's rights against the principal. Anderson v. Hendrickson [Neb.] 95 N. W. 844. An agreement to pay money to enable a contractor to complete a piece of work does not operate as an equitable assignment of his compensation. Alfred Richards Brick Co. v. Rothwell, 18 App. D. C. 516. A mortgagee foreclosing and buying in at his own sale cannot recover for taxes subsequently paid by him against the mortgagor's tenant who covenanted in his lease to pay taxes. Stewart v. Parcher [Minn.] 98 N. W. 650. Where a municipal officer paid town debts without authority, he was a mere volunteer. Contoocook Fire Precinct v. Hopkinton, 71 N. H. 574.

2. Powers v. McKnight [Tex. Civ. App.] 73 S. W. 549; Jewett v. Feldheiser, 68 Ohio St. 523, 67 N. E. 1072; Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800; Barker v. Boyd, 24 Ky. L. R. 1389, 71 S. W. 528. See, also, supra.

3. Freeburg v. Eksell [Iowa] 99 N. W. 118.

4. Kinkead v. Ryan, 64 N. J. Eq. 454.

5. Dunlop v. James, 174 N. Y. 411, 67 N. E. 60.

6. Wilder's Ex'x v. Wilder, 75 Vt. 178.

7. City of Lincoln v. Lincoln St. R. Co. [Neb.] 97 N. W. 255.

8. Crebbin v. Moseley [Tex. Civ. App.] 74 S. W. 815.

9. Boevink v. Christiaanse [Neb.] 95 N. W. 652.

10. A subscription to pay a certain sum per month to protect a certain trade from frauds and leaving the person soliciting the subscriptions free to employ whatever means he deemed necessary to accomplish the object, he having incurred expense in performing his part of the agreements. Heinrich v. Mo. & I. Coal Co., 102 Mo. App. 229, 76 S. W. 674.

11. A tender of a merchantable title is a sufficient compliance with a subscription for a lot in aid of a factory, whereby the sub-

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take subscribers are bound by the acts of a committee to whom they delegate authority.[12] Where a condition is affixed to a subscription it must be performed before the subscription can be enforced,[13] and when performed constitutes a sufficient consideration to support it,[14] but one may be estopped by his conduct from taking advantage of condition broken.[15]

The accomplishment of the object in aid of which the money was promised is a sufficient consideration to support it.[16] The promise of one subscriber is a good consideration for the promise of others.[17]

A subscription is construed according to the import of the words creating it.[18] The uncertainty of party to whom the subscription is payable will not avoid it.[19]

§ 2. *Rights and liabilities arising from subscriptions.*—If money is expended or liabilities incurred on faith of a subscription the subscriber will be held, and while death of a subscriber will revoke the subscription before it has been acted upon if the subscriber dies after it has been acted upon it will be enforceable against his estate.[20] A valid subscription is binding until limitations has run.[21]

scriber is to have conveyed to him a lot by a perfect title, especially where the factory has been erected and the lot was not the sole consideration for the subscription. McCleary v. Chipman [Ind. App.] 68 N. E. 320. A subscription to purchase a lot in aid of a factory cannot be defeated because the deed comes from a third person. Id. Where a subscription to a lot in aid of a factory required the conveyance of a perfect title on payment of a certain sum, and such payment had not been made, that there were liens on the property did not constitute a breach, as the title was to be good when the deed was made and the deed was not due until a portion of the subscription had been paid. Id. A subscription to a manufacturing enterprise provided that if the owners of certain premises would procure a factory and plat the land designated into lots, each would purchase a lot. Held, if the promoters were able to convey a merchantable title to the lots, the material facts as to ownership of the land was not concealed by the promoters. Id.

12. Power had been given to a committee to accept a mill to which a subscription bonus had been given and to declare the subscriptions due and payable. Mefford v. Sell [Neb.] 92 N. W. 148. Certain persons had subscribed to purchase lots for the aid of a factory. They appointed a committee to distribute the lots in some fair manner. Held, that the subscription was not illegal on the ground that the lots were to be distributed by means of a lottery, which was against public policy. McCleary v. Chipman [Ind. App.] 68 N. E. 320.

13. A person subscribed for the construction of a church conditioned on the establishment of a congregation independent of the churches from which its membership was drawn. Before a pastor was selected the congregation split on the lines of former church government and it was agreed that the property should be divided. Leland Norwegian Lutheran Congregation v. Larson, 121 Iowa, 151, 96 N. W. 706. A subscription to the construction of a railroad to be completed on or before a certain time. Garrison v. Cooke, 96 Tex. 228, 72 S. W. 54.

14. Subscription to parish to raise a fund to pay off a debt on condition that the full amount of the debt should be raised by similar subscriptions, and that the expenses of the parish should not be materially increased during the period of five years. Robinson v. Nutt [Mass.] 70 N. E. 198.

15. One subscribed to a bonus for a factory to be erected within a certain time. He stood by and saw it constructed after the time provided without attempting to cancel his subscription. Horton v. Erie Preserving Co., 90 App. Div. [N. Y.] 255.

16. A promissory note given to secure the dissemination of religious doctrines can be enforced against the estate of a deceased maker. Woodworth v. Veitch, 29 Ind. App. 589, 64 N. E. 932.

17. Subscriptions for a railway to be constructed. Curry v. Ky. Western R. Co., 25 Ky. L. R. 1372, 78 S. W. 435.

18. A month prior to his death a testator subscribed to the payment of an indebtedness of a university, the subscription to be payable at once. Held, that devises made to the university to take effect after his wife's death did not constitute a satisfaction of the subscription. Baptist Female University v. Borden, 132 N. C. 476.

19. A promise to contribute a right of way to whoever would build a railroad between certain points. Curry v. Ky. Western R. Co., 25 Ky. L. R. 1372, 78 S. W. 435.

20. A testator made and delivered his promissory note to a charitable educational institution dependent on contributions for its support. The institution by resolution accepted the gift, and on the strength of it and other like donations incurred expense. Albert Lea College v. Brown's Estate, 88 Minn. 524, 93 N. W. 672. A testator had subscribed for the purpose of aiding in the payment of the indebtedness of a university and authorized the president to announce such subscription at a public convention, and on faith of such subscription the university employed others to solicit subscriptions and incurred liabilities for services so performed. Baptist Female University v. Borden, 132 N. C. 476.

21. A subscriber to a lot in aid of a factory which has been completed according to the contract cannot be relieved from his subscription on the ground of the laches of the trustee in failing to enforce the subscription, when for some time he had paid no attention to their demands for payment, but

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§ 3. *Enforcement, remedies, and procedure.*—Where neither fraud nor misrepresentation is practiced in securing a subscription, its terms cannot be modified by parol evidence.[22] Where funds are subscribed and paid to a third person for the benefit of another, that other may maintain an action to recover it,[23] and where subscribers appoint a committee to collect the subscriptions such committee can maintain an action therefor.[24] In some states procedure to recover subscriptions is different from that on other written instruments.[25]

SUICIDE.[26]

Attempt at suicide was a crime at common law, and is recognized as such by the statutes of many states,[27] but from the impossibility of inflicting punishment, suicide is not.[28]

SUNDAY.

§ 1. Sunday as Dies Non Juridicus (1772).
§ 2. Violation of Sunday Laws as Defense to Actions (1772).
§ 3. Sunday Laws and Prosecution for Their Violation (1773).

§ 1. *Sunday as dies non juridicus.*—A hearing of charges and expulsion of a member of a benevolent society is not an exercise of judicial power, but a work of necessity and charity, and may be done on Sunday.[29] A provision against transaction of judicial business on Sunday does not apply to service of process or the doing of other ministerial acts.[30] Under the laws of Utah, February 23d becomes a legal holiday when February 22d falls on Sunday.[31]

§ 2. *Violation of Sunday laws as defense to actions.*—A contract for labor on Sunday is not invalid, the labor not tending to disturb the peace and good order of society and not a violation of the criminal code.[32] A statute forbidding the business of one's ordinary calling does not invalidate a contract outside such ordinary calling,[33] nor is the making of a contract on Sunday against public policy.[34] Where contract itself is within agent's authority principal cannot repudiate same, it being completely executed by the agent on Sunday in violation of Sunday laws.[35]

has not paid anything nor repudiated his subscription. McCleary v. Chipman [Ind. App.] 68 N. E. 320.

22. Evidence that one who subscribed for a mill to be equipped as a first class mill understood that it was to be equipped with new machinery. Mefford v. Sell [Neb.] 92 148.

23. A committee was appointed to raise funds for a corporation's benefit; an amount was contributed and held by the treasurer of the committee on the ground that the money was to be used for furnishing the home after its completion. Commercial Travelers' Home Ass'n v. McNamara, 42 Misc. [N. Y.] 258.

24. Subscribers in aid of a factory conferred on trustees the power to collect the subscriptions. McCleary v. Chipman [Ind. App.] 68 N. E. 320.

25. In **Missouri**, a statute providing that in suits commenced before a justice, the instrument sued on shall be filed and a petition founded on an instrument in writing charged to have been executed by the other party must be accompanied with such instrument, does not apply in an action to recover on a subscription list. Heinrich v. Mo. & I. Coal Co., 102 Mo. App. 229, 76 S. W. 674.

26. See, also, Insurance, 2 Curr. Law, p. 479.

27. Statute adopting common law of crimes. State v. Carney [N. J. Law] 55 Atl. 44.

28. Royal Circle v. Achterrath, 204 Ill. 549, 68 N. E. 492.

29. Pepin v. Societe St. Jean Baptiste, 24 R. I. 550.

30. Publication of citation in Sunday paper [Code Civ. Proc. § 134]. Heisen v. Smith, 138 Cal. 216, 71 Pac. 180.

31. Rev. St. 1898, § 1145. Davidson v. Munsey [Utah] 74 Pac. 431.

32. McCurdy v. Alaska & C. Commercial Co., 102 Ill. App. 120.

33. Rodman v. Robinson [N. C.] 47 S. E. 19. A deed of gift is valid though executed on Sunday. Dorough v. Equitable Mortg. Co., 118 Ga. 178. Any one of several employments in which one habitually engages is within the statute without regard to which occupies the majority of his time. Reed v. State [Ga.] 46 S. E. 837.

34. Rodman v. Robinson [N. C.] 47 S. E. 19.

In the opinion in this case, Judge Clark cites numerous authorities in accord with this decision and says: "There are decisions

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§ 3. *Sunday laws and prosecution for their violation.*—Playing baseball on Sunday, in Nebraska, is expressly forbidden by statute.[36] Sunday laws applicable to barber shops are a proper exercise of the police power and not unconstitutional,[37] but such laws do not apply to the case of a barber entering his shop on Sunday for other purposes.[38] Fact that wheat owner had contracted to have wheat threshed on Monday did not make transportation of engine from place of repair on Sunday a work of necessity.[39] The repair of a belt necessary to the operation of a mill giving employment to 200 persons is a work of necessity.[40] Any business at which one habitually works is an "ordinary calling," though he has other business which occupies more of his time.[41] Where it appears that a material, permanent loss will result if oil well is not pumped out on Sunday, such work may be deemed a work of necessity.[42] Laws allowing sale of drugs will permit one selling drugs in connection with other business to keep open for the sale of drugs.[43]

A city may prohibit sales of liquor on Sunday.[44] Sale of liquor on prescription by a druggist authorized to sell medicine on Sunday is not a violation of the statute.[45]

A law prohibiting the keeping open of stores for sale of meat and other articles on Sunday, and allowing sale of confectionery and tobacco on that day, does not amount to an unconstitutional discrimination between occupations.[46]

Mandamus will not lie to compel a commissioner of public safety in a city of the second class, in New York, to enforce the Sunday laws.[47]

Prosecutions.—An indictment must negative the exception as to works of necessity or charity.[48] Where ordinance makes it an offense to "sell, give away, or in any manner dispose of" liquor on Sunday, an information in that language is not defective as charging more than one offense.[49] In prosecution for keeping open a barroom on Sunday sales need not be proven.[50] Under act of congress prohibiting liquor sales on Sunday, the employer is liable for sales made by his servant without his consent or authority.[51] Where Sunday law as to running of freight trains is violated, only the superintendent of transportation or like officer is liable to indictment.[52] The state has the burden of proof that the work was not a work of necessity.[53]

to the contrary but they will be found almost entirely in states where the statute, unlike ours, is not restricted to 'labor, business, or work done in one's ordinary calling,' but is extended in its terms so as to embrace the prohibition of contracts of all kinds on Sunday. In such cases, as is said in Swann v. Swann, 21 Fed. 299: 'Contracts made on the Lord's Day are not void on religious or moral grounds, but upon the familiar and established doctrine that when a statute inflicts a penalty for doing an act —no matter what that act may be—a court of justice will not enforce a contract made in violation of such statute.' The execution of a will on Sunday seems to be held valid everywhere. • • • 'What religion and morality permit or forbid to be done on Sunday is not within our province to decide.'"

35. Rickards v. Rickards [Md.] 56 Atl. 397.

36. Seay v. Shrader [Neb.] 95 N. W. 690.

37. Do not infringe personal liberty or due process provisions and are not special legislation. State v. Sopher, 25 Utah, 318, 71 Pac. 482, 60 L. R. A. 468. Is not justifiable as a work of necessity. Id.

38. To shine his own shoes. Wright v. Forsyth, 116 Ga. 799.

39. State v. Stuckey, 98 Mo. App. 664, 73 S. W. 735.

40. State v. Collett [Ark.] 79 S. W. 791.

41. Reed v. State [Ga.] 46 S. E. 837.

42. State v. McBee, 52 W. Va. 257.

43. On sale of other articles or unnecessary sale of drugs, dealer may be punished under Pen. Code Ga. 1895, § 422. Penniston v. Newnan, 117 Ga. 700.

44. Cranor v. Albany, 43 Or. 144, 71 Pac. 1042.

45. Watson v. State [Tex. Cr. App.] 79 S. W. 31.

46. Laws Minn. 1903, c. 362, p. 652. State v. Justus [Minn.] 98 N. W. 325.

47. People v. Listman, 40 Misc. [N. Y.] 372.

48. Halliburton v. State [Ark.] 75 S. W. 929.

49. Cranor v. Albany, 43 Or. 144, 71 Pac. 1042.

50. Sullivan v. D. C., 20 App. D. C. 29.

51. Act Cong. March 3, 1903. Lehman v. D. C., 19 App. D. C. 217.

52. Indictment against "superintendent" and "master of trains" jointly is demurrable. Vaughan v. State, 116 Ga. 841.

53. State v. McBee, 52 W. Va. 257.

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SUPPLEMENTARY PROCEEDINGS.

§ 1. Nature, Occasion, and Propriety (1774).
§ 2. Proceedings Necessary on Which to Base Remedy (1774).
§ 3. Application for, and Examination of Defendant and Debtors (1774).
A. Affidavit (1774).
B. Order and Citation Process or Warrant (1774).
§ 4. Relief Against Defendant or Debtors (1774).
A. Order for Payment or Delivery (1774).
B. Receivership or Other Equitable Relief (1775).
C. Contempt (1775).
§ 5. Procedure At and After Examination (1776).

§ 1. *Nature, occasion and propriety.*—Supplementary proceedings are a statutory legal remedy substituted for the creditors' bill in equity.[54] A Federal court sitting in equity will not enforce state statutes providing for supplementary proceedings, but will leave the creditor to the recognized equitable procedure.[55]

§ 2. *Proceedings necessary on which to base remedy.*—Proceedings supplementary to execution being purely statutory, the procedure in instituting and carrying on the same differs in different jurisdictions. Supplementary proceedings will be dismissed where the claim in judgment has been satisfied.[56] A valid execution is essential to the maintenance of supplementary proceedings,[57] which, in New York, can be instituted only within ten years after the return of an execution unsatisfied.[58]

§ 3. *Application for, and examination of defendant and debtors. A. Affidavit.*—In Nebraska, an order for the examination of a judgment debtor is granted on a showing that the execution was returned unsatisfied, without an affidavit that the debtor has property which he refuses to apply.[59] Where a variance between an affidavit on which an order is based, and the copy served on defendant, is such that defendant could not have been misled by it, service of the copy is sufficient to compel defendant's appearance.[60] The affidavit on which the order for examination is based must state the residence of the judgment debtor at the time of commencement of the proceedings, in order to give the court jurisdiction.[61] The residence of the judgment debtor, contemplated by the statute providing for the issue of executions, is not necessarily his permanent residence.[62]

(§ 3) *B. Order and citation process or warrant.*—An order for the examination of a judgment debtor is conclusive evidence of the regularity of the proceedings and presumptive evidence of the jurisdictional facts, and cannot be attacked collaterally.[63] Under the statute stating what judge may grant an order instituting supplementary proceedings, and authorizing others under certain conditions, an order by another judge must show the existence of conditions authorizing him to act.[64] The question of the vacation or modification of a regular and valid order rests in the sound discretion of the court.[65] Testimony of one who owes the judgment debtor may be taken under the general statute in New York.[66]

§ 4. *Relief against defendant or debtors. A. Order for payment or delivery.*—What property shall be exempt, and what can be reached by the order

54, 55. Regina Music Box Co. v. Otto & Son, 124 Fed. 747.

56. Cobb v. Edson, 84 N. Y. Supp. 916.

57. Affidavit tested by wrong judge. Shannon v. Steger, 75 App. Div. [N. Y.] 279.

58. Peck v. Dicken, 41 Misc. [N. Y.] 473.

59. English v. Smith [Neb.] 96 N. W. 60.

60. In re Wyman, 76 App. Div. [N. Y.] 292.

61. Lawyers' Title Ins. Co. v. Stanton, 84 N. Y. Supp. 468.

62. Where execution was issued to the sheriff of the county where defendant had had temporary lodging, held, sufficient to support an order for an examination. In re Rose, 87 App. Div. [N. Y.] 240.

63. Lisner v. Toplitz, 86 App. Div. [N. Y.] 1.

64. Shannon v. Steger, 75 App. Div. [N. Y.] 279.

65. Lisner v. Toplitz, 86 App. Div. [N. Y.] 1.

66. Testimony of one who, it is claimed, owes money to a debtor but who refuses to make affidavit should be taken under Code Civ. Proc. § 2280, and a motion for the appointment of a referee to take such person's deposition under § 885 was properly refused. People v. Paine, 86 N. Y. Supp. 1109.

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for payment or delivery to the receiver or judgment creditor, depends upon the statute. So it has been held that the interest of a member in the funds of an organization,[67] and shares of stock in a corporation, owned by the debtor,[68] may be reached. A seat in a stock exchange may be reached,[69] but if incumbered by preferred debts, the receiver acquires only the equity in the seat.[70] Future earnings of the debtor cannot be reached.[71] In New York, earnings in the hands of a judgment debtor must be shown to be the result of personal services, exclusively, to come within the statute exempting earnings from personal services within the preceding sixty days.[72] The income of personal property held in trust, not being exempt from execution in Wisconsin, may be reached,[73] but personalty in custodia legis cannot be reached.[74] But in New York, it was held that the interest of a beneficiary in a trust fund created by a person other than the judgment debtor cannot be reached.[75] Property in the hands of a third person holding a bill of sale thereof, is not property the right to the possession of which by a judgment debtor is "not substantially disputed."[76] Under the statute giving courts power to order debtors to pay over money in their possession to the receiver, a county court has no authority to issue such an order to a judgment creditor of the supreme court.[77]

(§ 4) *B. Receivership or other equitable relief.*—A receiver should be appointed, when demanded, even though the examination discloses no property.[78] A receiver of real property takes only the right to possession, and cannot sell and convey it.[79] A receiver may maintain an action to avoid a chattel mortgage made by the judgment debtor.[80] Under the New York statute, which provides that the receiver's title to property shall date back to the time of the order instituting the proceedings, but that the title of a purchaser in good faith without notice shall not be affected by such relation, it was held that the rights of an assignee of money due judgment creditors, in the hands of a third person, are not affected by the fact that such third person assigned after service on him of an order in supplementary proceedings, the assignment being made in good faith and for value.[81]

(§ 4) *C. Contempt.*—One who violates an order of the court,[82] or who refuses to answer questions put to him by a referee[83] in supplementary proceedings, is guilty of contempt. Contempt proceedings must be instituted in the county where supplementary proceedings were conducted, and not where judgment was recovered.[84] Claims that should have been asserted on the original hearing will not be permitted as an excuse for contempt in refusing to obey an order.[85]

67. But the member's rights under his membership certificate must not be otherwise disturbed by the court's order. Dease v. Reese, 39 Misc. [N. Y.] 659.

68. In supplementary proceedings such shares are to be regarded as in the possession of the corporation in which they are held. Ball v. Towle Mfg. Co., 67 Ohio St. 306, 65 N. E. 1015. In Ohio, the creditor acquires a lien on shares of stock in a corporation owned by the judgment debtor, after service of notice of proceedings on the corporation. Id.

69, 70. Leggett v. Waller, 39 Misc. [N. Y.] 408.

71. Dease v. Reese, 39 Misc. [N. Y.] 657.

72. Money from sale of milk produced on defendant's farm not exempt. In re Wyman, 76 App. Div. [N. Y.] 292.

73. Williams v. Smith, 117 Wis. 142, 93 N. W. 464.

74. Proceedings could not be maintained against executors to reach personalty in their hands. Williams v. Smith, 117 Wis. 142, 93 N. W. 464.

75. McKinstry v. Atwood, 76 App. Div. [N. Y.] 300.

76. Hence under Code Civ. Proc. § 2447, the court could, in its discretion, set aside an order for its delivery made without knowledge of the facts disclosed on the examination. Shannon v. Steger, 75 App. Div. [N. Y.] 279.

77. Fiss v. Haag, 75 App. Div. [N. Y.] 241.

78. Dease v. Reese, 39 Misc. [N. Y.] 657.

79. Chadeayne v. Gwyer, 83 App. Div. [N. Y.] 403.

80. Brunnemer v. Cook & B. Co., 89 App. Div. [N. Y.] 406.

81. Dienst v. Gustaveson, 85 N. Y. Supp. 371.

82. Defendant withdrew funds deposited in bank in violation of the injunctive order. Harvey v. Arnold, 84 App. Div. [N. Y.] 132.

83, 84. In re Backus, 91 App. Div. [N. Y.] 266.

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§ 5. *Procedure at and after examination.*—Discontinuance of supplementary proceedings must be by order of a judge and mere adjournment does not constitute abandonment so as to render an injunction therein ineffective.[86] On death of the debtor the proceedings should be considered against the personal representative rather than the heir at law.[87]

SURETY OF THE PEACE.

A peace bond cannot be required except as authorized by statute,[88] and the proceeding to obtain it must be in pursuance of the statute.[89] Since the Louisiana constitution of 1898, costs cannot be imposed on defendant in a peace bond proceeding.[90] In Georgia, a bond for industry and good conduct may be given in bar of sentence after conviction of vagrancy. The giving of such bond is a matter before the court and requires no action by the jury.[91]

SURETYSHIP.

§ 1. Definition and Distinctions (1776).
§ 2. Requisites of the Contract (1777).
§ 3. The Surety's Liability (1777).
§ 4. The Surety's Defenses (1779).
A. Legal Defenses to Surety's Liability (1779).
B. Defenses Based on Extinguishment or Absence of Principal's Liability (1779).
C. Defenses Based on Changes of the Contract or Novation of the Risk (1779).
D. Defenses Arising Out of Suspension of Liability of Principal (1781).
E. Defenses Based on Impairment of Surety's Secondary Remedies Against Principal or Collateral Securities (1781).
F. Defenses Based on Fraud or Concealment by Creditor of Material Facts (1782).
G. Other Defenses (1783).
§ 5. Rights of Surety Against Principal and Co-Surety (1783).
§ 6. Security Held by Surety and Rights Therein (1785).
§ 7. Remedies and Procedure (1785).

The form, execution, and sufficiency of bonds,[92] and what constitutes breach of particular bonds,[93] is elsewhere treated.

§ 1. *Definition and distinctions.*—A surety is one who, on request of another, to secure him a benefit, becomes responsible for some act of his in favor of another, or hypothecates property as security for another.[94] Suretyship is to be distinguished from guaranty in that guaranty imports a personal liability exclusively,[95] and is a collateral and secondary liability,[96] and from indemnity in that the contract is to protect the promisee from loss on a specified liability of the principal to him, while indemnity is to protect the promisee from loss arising out of an act of the principal, or a third party, whereby the promisee is injured.[97]

85. Defendant refused to pay over money and when cited in contempt, claimed money did not belong to judgment debtor. Held, claim asserted too late. In re Lewis, 67 Kan. 340, 72 Pac. 788.

86. Rothschild v. Gould, 84 App. Div. [N. Y.] 196.

87. Wilkinson v. Vordermark [Ind. App.] 70 N. E. 538.

88. Bond conditioned to abstain from illegal sale of liquors is void, the statute authorizing only one conditioned against breach of the peace. Cornett v. Com. [Ky.] 78 S. W. 858.

89. Proceeding by motion improper where statute prescribes an action. Combs v. Com., 24 Ky. L. R. 1310, 71 S. W. 504.

90. State v. Foster, 109 La. 587.

91. Coleman v. Nelms [Ga.] 46 S. E. 451. One sentenced without being afforded an opportunity to give bond will not be discharged on habeas corpus, but will be remanded for resentence on failure to give bond. Id.

92. See Bonds, 1 Curr. Law, p. 843.

93. See Indemnity (fidelity bonds), 2 Curr. Law, p. 298; Officers and Public Employes, 2 Curr. Law, p. 1069; Building and Construction Contracts, 1 Curr. Law, p. 374, and like titles.

94. Cal. Civ. Code, § 2831. Sather Banking Co. v. Arthur R. Briggs Co., 138 Cal. 724, 72 Pac. 352. "A surety is one who contracts for the payment of a debt in case of the failure of another person who is himself principally responsible for it, or, as has otherwise been expressed, is a person who, being liable to pay a debt, is entitled to be indemnified by some other person, who ought himself to have paid it before the surety was himself compelled to do so." Wm. Deering & Co. v. Veal [Ky.] 78 S. W. 886, 887.

95. Sather Banking Co. v. Arthur R. Briggs Co., 138 Cal. 724, 72 Pac. 352.

96. See Guaranty, 2 Curr. Law, p. 144.

97. See Indemnity, 2 Curr. Law, p. 298.

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§ 2. *Requisites of the contract.*—The contract must be executed in form to meet the requirements of the statute of frauds,[98] and like all contracts involves meeting of minds,[99] delivery,[1] and acceptance.[2] There must be some consideration moving to the surety at the time of his promise, or some contemporaneous consideration to the principal, sufficient to support his promise.[3] Forbearance actually given,[4] as by execution of renewal notes,[5] is sufficient to bind both principal and surety on a new contract,[6] and like any contract it must be accepted by the parties.[7]

§ 3. *The surety's liability.*—The makers of an obligation are at law, in the absence of statute, joint or several obligors,[8] and the promisee without notice may look on both as joint principals.[9] At equity always, and in many states under the Codes, one who appears to be a principal may show by parol he is in fact a surety,[10] and that the entire consideration was used and received by one joint maker tends to show the other a surety,[11] but the burden of proof is on him who would establish the suretyship relation.[12] Thus where a wife signs an obligation with her husband, if neither she nor her property receive any benefit therefrom, she is merely a surety,[13] a relation between husband and wife which is forbidden

98. See Frauds, Statute of, 2 Curr. Law, p. 108. A petition in a suit on a note alleging that it was given in renewal of another note, which defendant had signed as surety, and that it was understood that he was to sign the new note also, and that plaintiff accepted it under the mistaken belief that he had so signed it, states no cause of action against the surety. Vogelsang v. Taylor [Tex. Civ. App.] 80 S. W. 637.

99. See Contracts, 1 Curr. Law, p. 626.

1. Sureties may constitute the principal their agent for the delivery of the bond. Singer Mfg. Co. v. Freerks [N. D.] 98 N. W. 705.

2. Where sureties before executing a bond know that it will be accepted no notice of its acceptance by the obligee is required. Singer Mfg. Co. v. Freerks [N. D.] 98 N. W. 705.

3. Pearl v. Cortright, 81 Miss. 300; First Nat. Bank v. Johnson [Mich.] 95 N. W. 975; Merchants' Nat. Bank v. Ryan, 67 Ohio St. 448, 66 N. E. 426. Where surety has remained liable during the liability of the principal, the principal cannot recover back from him the consideration, because he has suffered no loss. Hanley v. U. S. Fidelity & Guaranty Co., 131 Mich. 609, 92 N. W. 107. The consideration of the contract for the performance of which a surety obligation is given is sufficient to sustain such obligation as against the surety. Pac. Nat. Bank v. Aetna Indemnity Co., 33 Wash. 428, 74 Pac. 590.

4. Hollimon v. Karges, 30 Tex. Civ. App. 558, 71 S. W. 299.

5. Hannay v. Moody, 31 Tex. Civ. App. 88, 71 S. W. 325; Stroud v. Thomas, 139 Cal. 274, 72 Pac. 1008; First Nat. Bank v. Johnson [Mich.] 95 N. W. 975; Dow-Hayden Grocery Co. v. Muncy, 24 Ky. L. R. 2255, 73 S. W. 1030.

6. A "new benefit to principal." Davis, Belau & Co. v. Nat. Surety Co., 139 Cal. 223, 72 Pac. 1001. Surrender of stocks held on security. Zuendt v. Doerner, 101 Mo. App. 528, 73 S. W. 873. Where contract recites a valuable consideration for its execution the surety is estopped to deny it. Stanley v. Evans [Tex. Civ. App.] 77 S. W. 17. And so when in form of a receipt. Thompson v. Rush [Neb.] 92 N. W. 1060.

7. Baum v. Turner, 25 Ky. L. R. 600, 76 S. W. 129.

8. Even where the word "Surety" appears after signature. Galloway v. Bartholomew [Or.] 74 Pac. 467. An agreement between the creditor and surety that the principal is to pay the note is nothing but a contract of suretyship. Rowe v. Bowman, 183 Mass. 488, 67 N. E. 636.

9. Farmers' & M. Bank v. De Shorb, 137 Cal. 685, 70 Pac. 771. Where liability is joint and several surety may be sued alone (Pac. Bridge Co. v. U. S. Fidelity & Guaranty Co., 33 Wash. 47, 73 Pac. 772), and if both are sued in an action it may be brought in county where either resides (Heard v. Tappan, 116 Ga. 930). In Nebraska sureties and principals in an action to recover damages for selling intoxicating liquor may be joined in a single action (Thorst v. Lewis [Neb.] 98 N. W. 1046), and if part or some of them do not reside or cannot be found in the county in which the action is brought, summons may be served upon them elsewhere (Id.). Both must be served to support a joint judgment. Howse v. Reeves & Co., 25 Ky. L. R. 949, 76 S. W. 513.

10. Daneri v. Gazzola, 139 Cal. 416, 73 Pac. 179. That one is a surety who appears to be a co-maker may be shown by parol. On a promissory note. Markham v. Cover, 99 Mo. App. 83, 72 S. W. 474. Order of signature entirely immaterial. Planters' B. & T. Co. v. Major, 25 Ky. L. R. 702, 76 S. W. 331.

11. Daneri v. Gazzola, 139 Cal. 416, 73 Pac. 179; Stewart v. Stewart, 207 Pa. 59; Farmers' & M. Bank v. De Shorb, 137 Cal. 685, 70 Pac. 771.

12. Marshall Nat. Bank v. Smith [Tex. Civ. App.] 77 S. W. 237.

13. Stewart v. Stewart, 207 Pa. 59; John C. Groub Co. v. Smith, 31 Ind. App. 685, 68 N. E. 1030; Johnson v. Franklin Bank, 173 Mo. 171, 73 S. W. 191; Planters' B. & T. Co. v. Major, 25 Ky. L. R. 702, 76 S. W. 331; Elliott v. Moreland [N. J. Law] 54 Atl. 224. A wife joining in a trust deed of her land to secure the husband's debt is a mere surety. McGowan v. Davenport [N. C.] 47 S. E. 27.

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at common law and under the codes of most states.[14] Where one is personally liable on a secured claim, and sells the security to a third party, who assumes the personal liability, the purchaser stands in the relation of principal debtor, and the original promisee as surety,[15] and so where property is given as security for the debt of another than the owner, it is regarded as surety for the debt and subject to the same equities.[16] As between successive sets of sureties, those on a bond at the time of the default are liable therefor,[17] and primarily so where the subsequent sureties have assumed liability for prior defaults and not merely as co-sureties,[18] and so in a suit brought subsequent to the termination of the contract the complaint is good if a breach during the existence thereof is alleged.[19] In general a surety, being one of the parties primarily liable, is not entitled to notice of the default of the principal debtor,[20] but the giving of notice may be provided for in the contract.[21] The sureties on a contractor's bond to an owner to keep free from mechanics' liens are liable to no one but the promisee, and not to those who furnish materials,[22] but by act of congress,[23] the sureties on such bonds running to the government are liable to all persons furnishing labor or materials.[24] Judgment against the principal is in some states prima facie evidence of the liability of the surety,[25] but this is not conclusive even where the surety appeared in the case as an attorney.[26] Where the surety limits his liability to a certain sum, he is liable in addition to interest and costs which accrue from time of service of the summons in an action for collection,[27] and that the costs bring the amount above the limit is no defense, for the surety could then by prolonging litigation, free himself from liability.[28] Sureties on collateral but independent bonds for the same liability are co-sureties of each other.[29] Under the Codes of some states a surety upon a fiduciary bond is entitled to be present at the accounting,[30] and no action could be brought till this was had,[31] though not necessary where the principal had absconded and left the state,[32] and generally the liability of a surety is not fixed till that of the principal is determined.[33] The principal on a bond continues lia-

14. Stewart v. Stewart, 207 Pa. 59; John C. Groub Co. v. Smith, 31 Ind. App. 685, 68 N. E. 1030; Johnson v. Franklin Bank, 173 Mo. 171, 73 S. W. 191; Planters' B. & T. Co. v. Major, 25 Ky. L. R. 702, 76 S. W. 331; Elliott v. Moreland [N. J. Law] 54 Atl. 224; Magoffin v. Boyle Nat. Bank, 24 Ky. L. R. 585, 69 S. W. 702.

15. Steele v. Johnson, 96 Mo. App. 147, 69 S. W. 1065; Westbrook v. Belton Nat. Bank [Tex.] 77 S. W. 942.

16. Johnson v. Franklin Bank, 173 Mo. 171, 73 S. W. 191.

17. Gonser v. State, 30 Ind. App. 508, 65 N. E. 764; Johnson v. Bobbitt, 81 Miss. 339; In re Guardianship of Fardette, 86 App. Div. [N. Y.] 50.

18. Gonser v. State, 30 Ind. App. 508, 65 N. E. 764.

19. Keene v. Newark Watch Case Mfg. Co., 81 App. Div. [N. Y.] 48. Complaint good when it is alleged that at a prior time and "now" plaintiff was in default. Keene v. Newark Watch Case Material Co., 39 Misc. [N. Y.] 6.

20. Bassett v. Fidelity & Deposit Co. [Mass.] 68 N. E. 205. But see Police Jury of Parish of Vernon v. Johnson, 111 La. 279.

21. When made a condition precedent to liability there must be an allegation of performance or some excuse for nonperformance. Granite Bldg. Co. v. Saville's Adm'r [Va.] 43 S. E. 351. A covenant to bring no claim against surety later than six months after death of principal is not unreasonable. Id. A delay of eleven days after default does not comply with covenant to notify immediately. Nat. Surety Co. v. Long [C. C. A.] 125 Fed. 887. Notice two days before trial insufficient when a covenant to notify of default of principal on an indemnity bond. In re Byers' Estate, 205 Pa. 66. "Immediately" means within a reasonable time—a question for the jury. Fidelity & Deposit Co. v. Robertson, 136 Ala. 379.

22. Greenfield L. & I. Co. v. Parker, 159 Ind. 571, 65 N. E. 747. But see Town of Gastonia v. McEntee-Peterson Engineering Co., 131 N. C. 363.

23. Act of Aug. 13, 1894.

24. Does not include transportation of laborers. U. S. v. Fidelity & Deposit Co., 86 App. Div. [N. Y.] 475.

25, 26. Park v. Ensign, 66 Kan. 50, 71 Pac. 230.

27. Bassett v. Fidelity & Deposit Co. [Mass.] 68 N. E. 205.

28. Held v. Burke, 83 App. Div. [N. Y.] 509.

29. Barker v. Boyd, 24 Ky. L. R. 1389, 71 S. W. 528.

30. In re Sill's Estate, 41 Misc. [N. Y.] 270.

31. Stratton v City Trust, S. D. & S. Co., 86 App. Div. [N. Y.] 551.

32. Kurz v. Hess, 86 App. Div. [N. Y.] 529.

33. In re Wiseman, 123 Fed. 185; Frazer v. Frazer, 25 Ky. L. R. 473, 76 S. W. 13.

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ble till any possibility of action is barred by the statute of limitations and till then he cannot recover security he has deposited as indemnity with the surety,[34] nor can a decree of the court discharge the liability of the surety in an action to which the obligees or creditors are not parties.[35] The statute of limitations runs in favor of the surety, a town officer, from time of defalcation and not of expiration of the term.[36] When, however, there is a series of continuing obligations, the surety may revoke his offer at any time as to future transactions.[37]

§ 4. *The surety's defenses. A. Legal defenses to surety's liability.*—Where a surety signs an instrument subject to conditions, but to be delivered by the principal, it is good in the hands of a creditor in ignorance of the conditions,[38] and the principal or co-surety, with instructions to see that conditions are complied with, may be regarded as remaining surety's agent.[39] Where the signature of surety is forged, he is not liable unless he has purposely withheld this information till after the claim against the principal ceased to be collectible.[40] The surety may set up the defense of payment by him even though judgment has been rendered against the principal.[41]

(§ 4) *B. Defenses based on extinguishment or absence of principal's liability.*—The surety may set up any defense to the claim of the creditor which the principal might use,[42] but he cannot set off an unliquidated debt of the creditor to a solvent principal for that would deprive the principal of his right to elect his remedy,[43] and surety on a fiduciary bond cannot set up as a defense that the officer or trustee was exceeding his authority,[44] and so the surety cannot set up the want of authority of creditor to make the contract when that defense is not open to the principal,[45] but that loss occurs on another contract than that to which surety is a party is a good defense.[46] The surety on a note cannot set off a claim on account due the principal by the payee assigned to the surety after the suit was brought,[47] nor is he entitled to have money owing the principal from the payee before the note matures applied to the payment of the same.[48]

(§ 4) *C. Defenses based on changes of the contract or novation of the risk.*—A surety has the right to stand on the strict terms of his agreement, and any alteration thereof without his consent operates as a new contract to which he is not a party, and he is consequently discharged, and this is true, though the surety sustains no injury, and even if the change be for his benefit.[49] Execution of a

34. Shea v. Fidelity & Casualty Co., 39 Misc. [N. Y.] 107.

35. Cook v. Casler, 76 App. Div. [N. Y.] 279.

36. Grant County B., L. & S. Ass'n v. Lemmon [Ky.] 78 S. W. 874.

37. White Sewing Mach. Co. v. Courtney, 141 Cal. 674, 75 Pac. 296.

38. Seaton v. McReynolds [Tex. Civ. App.] 72 S. W. 874. Surety signs note in which amount is left blank. Dow-Hayden Grocery Co. v. Muncy, 24 Ky. L. R. 2255, 73 S. W. 1030. Knowledge of creditor of condition makes it a good defense. Novak v. Pitlick, 120 Iowa, 286, 94 N. W. 916; Caudle v. Ford, 24 Ky. L. R. 1764, 72 S. W. 270. Name of one as co-surety, whose signature does not appear, operates as notice. City of Butte v. Cook [Mont.] 74 Pac. 67; People v. Sharp [Mich.] 94 N. W. 1074. Absence of signature of principal held to put creditor on his guard. Novak v. Pitlick, 120 Iowa, 286, 94 N. W. 916.

39. Com. v. Roark, 25 Ky. L. R. 603, 76 S. W. 140.

40. Maxwell v. Wright [Ind. App.] 64 N. E. 893.

41. American Surety Co. v. U. S. [C. C. A.] 123 Fed. 287.

42. Surety of an indemnity bond may set up the defense that no demand nor notice of default was made on principal. U. S. v. Quinn [C. C. A.] 122 Fed. 65. On sheriff's bond, that execution was properly had. W. T. Rickards & Co. v. Bemis & Co. [Tex. Civ. App.] 78 S. W. 239. The administrator and sureties may defend a suit, on a bond conditioned that the estate will be administered according to law, for failure to pay judgment debts on demand, by showing that the assets have been used according to law. McIntire v. Cottrell [Mass.] 69 N. E. 1091.

43. Kinzie v. Riely's Ex'r, 100 Va. 709.

44. Clark v. Pence [Tenn.] 76 S. W. 885; Lake County v. Neilon [Or.] 74 Pac. 212.

45. City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097.

46. State v. Weeks, 92 Mo. App. 359.

47, 48. Ewing v. Wilbor, 208 Ill. 492, 70 N. E. 575.

49. Bauschard Co. v. Fidelity & Casualty Co., 21 Pa. Super. Ct. 370; Shelton v. American Surety Co., 127 Fed. 736. The agreement of a surety is to be determined by the same

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warehouse bond covering certain liquor does not relieve the sureties upon the distiller's bond from liability.[50] The contract, however, may in terms provide or clearly contemplate such alterations, and the surety is then deemed to have given his consent in advance to such change.[51] The surety also has an additional ground for discharge from an altered contract as a novation of the surety's risk, and this is held to be a complete defense, whether or not the alteration is for his benefit.[52] The burden is on the creditor to show he has done nothing to alter the risk.[53]

canons of interpretation as are applied to other contracts without technical nicety or strained distinctions. N. K. Fairbank Co. v. American B. & T. Co., 97 Mo. App. 205, 70 S. W. 1096. Whether a guaranty clause in a contract was added subsequent to its execution was a question for the jury, where the guarantor denied that it was in the contract when he executed it and it did not appear in the copy retained by him, though it did in two other copies. U. S. Fidelity & G. Co. v. Damskibsaktieselskabet Habil, 138 Ala. 348.

Change held to be material: Trade of cattle for horses: gratuitous reduction in price of horses from $25 to $20 is not such a change as will discharge surety, but a change whereby horses of a different kind and quality were accepted and the time for delivering the cattle was extended is such an innovation as will discharge surety. Stafford v. Christian [Tex. Civ. App.] 79 S. W. 595. Building contract: leaving out a vestibule door and putting on an upper roof, though price was the same. Burnes' Estate v. Fidelity & Deposit Co., 96 Mo. App. 467, 70 S. W. 518. Building contract: payment of all money due as work progressed though contract provided for retention of 25 per cent. Wehrung v. Denham, 42 Or. 386, 71 Pac. 133. Building contract: owner to pay for all labor, etc., and pay contractor balance, subsequent valid parol modification without knowledge or consent of surety, whereby owner paid all money to contractor, he to pay bills, held surety discharged. Guthrie v. Carpenter [Ind.] 70 N. E. 486. Building contract provided that no payment should be made to the contractor until the latter had delivered to the architect copies of all bills and vouchers for work and materials, or releases of all liens, held payment without complying with this provision discharged the surety from liability. Shelton v. American Surety Co., 127 Fed. 736.

Lease: Increase of rent. City of New York v. Clark, 84 App. Div. [N. Y.] 383. Surrender of lease after fine. Ziegler v. Hallahan, 126 Fed. 788. Waiver by principal and contractor, of quality of dramatic performance. Charley v. Potthoff, 118 Wis. 258, 95 N. W. 124.

Held not to be material: Obtaining a guaranty or additional security. Anderson v. Hall [Neb.] 94 N. W. 981. Building contract: Releasing part of contract price where owners were to do part of work as sub-contractors. Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. 25. Where a contractor voluntarily does extra work making no charge for the same the surety is not discharged. Snoqualmi Realty Co. v. Moynihan [Mo.] 78 S. W. 1014. A contractor was employed to make repairs on a ship within a specified time. During such time the master of the ship had him do extra work. Held, the contractor was not excused for delay in completing his work, and a surety on bond for such performance was not. U. S. Fidelity & Guaranty Co. v. Damskibsaktieselskabet Habil, 138 Ala. 348. A plea averring that a surety bond did not apply to a six months' guaranty clause in the contract secured, held a conclusion of law, it being a question of fact whether such clause was added subsequent to the execution of the contract and bond. Id.

50. As to unpaid taxes on spirits removed from a warehouse. U. S. v. Richardson, 127 Fed. 893.

51. Bond for building contractor, provisions made for changes in plans, changes made held not to discharge the surety. Hedrick v. Robbins, 30 Ind. App. 595, 66 N. E. 704. Under such a provision and by authority of architect, cellar was not excavated to the depth contemplated, and in consequence house stood higher. Held, surety estopped to deny architect's authority and was not discharged. Snoqualmi Realty Co. v. Moynihan [Mo.] 78 S. W. 1014; Bagwell v American Surety Co., 102 Mo. App. 707, 77 S. W. 327; Burnes' Estate v. Fidelity & Deposit Co., 96 Mo. App. 467, 70 S. W. 518; Fidelity & Deposit Co. v. Robertson, 136 Ala. 379; Pac. Bridge Co. v. U. S. Fidelity & Guaranty Co., 33 Wash. 47, 73 Pac. 772; Hedrick v. Robbins, 30 Ind. App. 595, 66 N. E. 704; Travelers' Ins. Co. v. Stiles, 82 App. Div. [N. Y.] 441. Though alterations authorized a charge of 10 per cent. in contract price with complete difference in material, held, not to be contemplated. Erfurth v. Stevenson [Ark.] 72 S. W. 49.

52. Wehrung v. Denham, 42 Or. 386, 71 Pac. 133. **Held to be a change of risk sufficient to discharge surety:** Increase of credit. Koppitz-Melchers Brew. Co. v. Schultz, 68 Ohio St. 407, 67 N. E. 719. Commencing divorce proceedings after becoming surety to bond in action for nonsupport. Stendal v. Ackerman, 86 N. Y. Supp. 468. Omission of accounting at expiration of each month. Ind & O. Live Stock Ins. Co. v. Bender [Ind App.] 69 N. E. 691. Building contracts: Neglect to oversee work as agreed upon. Scarratt v. Cook Brew. Co., 117 Ga. 181. Overpayment, where on honest belief, work properly performed. City of Newark v. New Jersey Asphalt Co., 68 N. J. Law, 458. Paying more rapidly than necessary not of itself ground for release of surety. Hedrick v. Robbins, 30 Ind. App. 595, 66 N. E. 704. Delay of owner in selecting materials only excuses surety from liability for delay. Bagwell v. American Surety Co., 102 Mo. App. 707, 77 S. W. 327. **Held to be insufficient to discharge surety:** Giving employe additional duties without greater responsibilities. Foster v. Franklin Life Ins. Co. [Tex. Civ. App.]

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(§ 4) *D. Defenses arising out of suspension of liability of principal.*—Where the creditor extends the time of payment to the principal without the consent of the surety, the latter is forthwith discharged from all liability.[54] This extension must be such as to be a good defense to the principal to a suit brought against him by the creditor and hence the surety is not released if it be conditional,[55] or without consideration,[56] or if the surety consents thereto either at the time of the extension[57] or in the principal contract,[58] or where the extension is simply to the earliest possible moment for suing,[59] and this rule applies to property belonging to one and given as security for the debt of another.[60] The giving of renewal notes operates as an extension of time of payment;[61] but if these are past due, they operate as demand notes and there is no extension of time, and consequently no discharge of sureties.[62] When a surety claims an extension of time, the burden is upon him to prove it,[63] and mere failure to sue on default does not amount to an extension,[64] nor does indulgence.[65] It has been held, however, that an express agreement to give time need not be proved.[66] A new note given as collateral security and not as an extension does not release surety.[67] While the acceptance of interest after maturity is evidence of an extension, yet when a creditor believes it is to pay another debt it is not a relief.[68]

(§ 4) *E. Defenses based on impairment of surety's secondary remedies against principal or collateral securities.*—A surety may at any time pay the entire debt

72 S. W. 91. Building contracts: Waiver of certificate of a second engineer to inspect water plant. City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097. Waiver of written order of architect for alteration of contract. Cowles v. U. S. Fidelity & Guaranty Co., 32 Wash. 120, 72 Pac. 1032. Paying contract price before completion of building when no agreement to retain it. Mayes v. Lane, 25 Ky. L. R. 824, 76 S. W. 899. Paying the 15 per cent. to be retained on a building contract to obtain releases of mechanic's liens. Id. Overpayment on a contract without knowledge of surety. McNally v. Mercantile Trust Co., 204 Pa. 596; Bauschard Co. v. Fidelity & Casualty Co., 21 Pa. Super. Ct. 370. Neglect to pay promptly. Bagwell v. American Surety Co., 102 Mo. App. 707, 77 S. W. 327.

53. Stendal v. Ackerman, 86 N. Y. Supp. 468.

54. Holder of a note secured by a mortgage without the mortgagor's knowledge extended time of payment to a grantee who had assumed all indebtedness, and also released sufficient of the land to satisfy the debt. Held to discharge the mortgagor from liability, even that of surety. Brosseau v. Lowy [Ill.] 70 N. E. 901; Johnson v. Franklin Bank, 173 Mo. 171, 73 S. W. 191; Marshall Nat. Bank v. Smith [Tex. Civ. App.] 77 S. W. 237; Bauschard Co. v. Fidelity & Casualty Co., 21 Pa. Super. Ct. 370; Shuler v. Hummel [Neb.] 95 N. W. 350.

55. A conditional promise to give time no defense where promise unfulfilled. Walker v. Wash. Title Ins. Co., 19 App. D. C. 575. Extension must consequently be by the obligee and not from the beneficiary. Guaranty Co. v. Pressed Brick Co., 191 U. S. 416.

56. Steele v. Johnson [Mo. App.] 69 S. W. 1065; Snively v. Fisher, 21 Pa. Super. Ct. 56; Stroud v. Thomas, 139 Cal. 274, 72 Pac. 1008. Unenforceable check given as consideration. Bank of Morehead v. Elam, 24 Ky. L. R. 2425, 74 S. W. 209.

57. Stanley v. Evans [Tex. Civ. App.] 177 S. W. 17.

58. Winnebago County State Bank v. Hustel, 119 Iowa, 115, 93 N. W. 70; City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097; First Nat. Bank v. Wells, 98 Mo. App. 573, 73 S. W. 293. In Louisiana, where the surety binds himself "waiving rights of discussion and division" and binding himself "in solido," he is held to have waived right of discharge on extension. Moriarty v. Bagnetto, 110 La. 598.

59. Could not get into court sooner than time to which note was extended. Guerguin v. Boone [Tex. Civ. App.] 77 S. W. 630.

60. Westbrook v. Belton Nat. Bank [Tex. Civ. App.] 75 S. W. 842.

61. Westbrook v. Belton Nat. Bank [Tex. Civ. App.] 75 S. W. 842; Steele v. Johnson, 96 Mo. App. 147, 69 S. W. 1065; Parlin & O. Co. v. Hutson, 198 Ill. 389, 65 N. E. 93; White Sewing Mach. Co. v. Courtney, 141 Cal. 674, 75 Pac. 296.

62. Johnson v. Franklin Bank, 173 Mo. 171, 73 S. W. 191.

63. Columbia Finance & Trust Co. v. Mitchell's Adm'r, 24 Ky. L. R. 1844, 73 S. W. 350.

64. Hollimon v. Karger, 30 Tex. Civ. App. 558, 71 S. W. 299. Payment of interest in advance is prima facie evidence of an agreement to extend the time of payment to the time for which the interest is so paid. This presumption is one of fact, not of law, and hence does not change the burden of proof. Guerguin v. Boone [Tex. Civ. App.] 77 S. W. 630. Forbearance to sue on a note in the absence of an agreement by the payee not to do so does not amount to an extension of the time of payment. Id.

65. Steele v. Johnson, 96 Mo. App. 147, 69 S. W. 1065.

66. Revell v. Thrash, 132 N. C. 803.

67. U. S. v. Hegeman, 204 Pa. 438.

68. Swarts v. Fourth Nat. Bank [C. C. A.] 117 Fed. 1.

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and thereupon he becomes subrogated[69] to the remedies of the creditor against the principal debtor, the securities for the debt, and other sureties. Any impairment of this right by the creditor impairs his rights[70] and therefore, when the creditor by neglect permits the security of a debt to be released, lost or rendered unavailable, the surety is released pro tanto,[71] but mere neglect to appropriate the security given by a debtor does not release the surety unless he is insolvent,[72] and even when requested to do so, if the appropriation is later set aside as a fraudulent preference.[73] In the same manner a valid covenant of a creditor not to levy an execution on the property of the principal operates as a release of the surety.[74] Where temporary security is given pending signature of a surety, its release does not operate as a release of the surety,[75] but if mortgage security is foreclosed, the creditor loses all rights against the surety except for a deficiency judgment,[76] and where at such a foreclosure the sale is irregular and the property sold at a nominal value, the surety is released up to its true value.[77] Where a creditor applies payments made by the principal to a debt, the surety is released pro tanto, and he cannot subsequently withdraw this credit and apply it to another debt;[78] but if principal is overdrawn all the time, it is no defense that the creditor bank failed to apply payments he made to the renewal note.[79] That in a suit against the principal the creditor does not obtain all the remedies to which he is entitled does not operate as a release of the surety.[80] When the creditor releases several joint principals on an appeal bond, the sureties of the others are also released.[81] Generally, the release of one surety releases his co-sureties, but this rule has been changed by statute in some states.[82]

(§ 4) *F. Defenses based on fraud or concealment by creditor of material facts.*—Whenever the surety was induced to join in the contract by fraud of the creditor of the principal with connivance of the creditor, he has a good defense;[83] but the surety cannot set up as against the creditor the fraud of the principal in which he does not participate.[84] Only some act done by the creditor to the prejudice of the surety will discharge the surety.[85] The surety seeking to be relieved

69. See Subrogation.

70. A tender of the full amount by the surety and a refusal to accept the same by the creditor operates as a discharge. Danerl v. Gazzola, 139 Cal. 416, 73 Pac. 179. But not where sureties deny the existence of the debt. Craw v. Abrams [Neb.] 97 N. W. 296. Releasing security. Brosseau v. Lowy [Ill.] 70 N. E. 901.

71. Neglect to record deed of execution sale so that security is cut out by junior lienor. Hendryx v. Evans, 120 Iowa, 310, 94 N. W. 853. Release of mortgage security. C. Gotzian & Co. v. Heine, 87 Minn. 429, 92 N. W. 398. Postponement of mortgage sale whereby security was cut out by junior lienor. Mt. Sterling Imp. Co. v. Cockrell, 24 Ky. L. R. 1151, 70 S. W. 842.

72. First Nat. Bank v. Wilbern [Neb.] 93 N. W. 1002.

73. Exch. Bank of Ky. v. Thomas, 25 Ky. L. R. 228, 74 S. W. 1086, 75 S. W. 283.

74. Crook v. Lipscomb, 30 Tex. Civ. App. 567, 70 S. W. 993.

75. Pearl v. Cortright, 81 Miss. 300.

76. Westcott v. Fidelity & Deposit Co., 87 App. Div. [N. Y.] 497.

77. Ward v. McLamb, 118 Ga. 811.

78. Mitchell v. Wheeler [Iowa] 98 N. W. 152. Where a defaulter, whose peculations have covered a long period of time, returning part of the money applies it to the last year's stealings, it is conclusive on the surety. Grant County B., L. & S. Ass'n v. Lemmon [Ky.] 78 S. W. 874.

79. Lee v. Grant County Deposit Bank, 25 Ky. L. R. 1203, 77 S. W. 374.

80. Rogers v. U. S. Fidelity & Guarantee Co., 84 N. Y. Supp. 203.

81. Crook v. Lipscomb, 30 Tex. Civ. App. 567, 70 S. W. 993.

82. In an action on a note a justice recorded judgment against one surety, but released a co-surety. No appeal was taken. Held, the judgment was a bar to a suit for contribution [Miss. Code 1892, § 3276]. Ruff v. Montgomery [Miss.] 36 So. 67.

83. Where principal and creditor represent the proceeds of a loan are to be used for one purpose and it is in fact used for another, the surety has a good defense. Haworth v. Crosby, 120 Iowa, 612, 94 N. W. 1098.

84. Wilkinson v. U. S. Fidelity & Guaranty Co. [Wis.] 96 N. W. 560. Misrepresentations by a principal to his sureties do not work an estoppel as against the creditor, even though the latter sues at the request of the sureties. Principal represented to sureties that he owned land, wife owned it. Citizens' Bank v. Burrus [Mo.] 77 S. W. 748.

85. City of Newark v. N. J. Asphalt Co., 68 N. J. Law, 458. Sureties not having paid their principal's debt and having suffered no wrong cannot claim an estoppel on the

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must moreover come into equity with clean hands and he cannot ask to be discharged when he and the principal have been conspiring to injure a third party.[86] Before entering upon the contract it is the duty of the creditor or obligee to disclose all facts regarding the subject-matter of the contract, but this does not cover personal defects of an agent,[87] but covers prior dishonesty.[88] If the obligee discovers acts of dishonesty on the part of the principal and still retains him in his service without notice to the sureties, he is guilty of bad faith or fraud towards them and they will be discharged from liability for future defaults of their principal.[89] Mere indebtedness prior to the contract need not be communicated when it is not sought to charge the surety with the same,[90] and a fair answer which is neither evasive nor fraudulent will not be regarded as ground for discharge if not literally true.[91] So where the surety had the same opportunities for knowledge as the obligee, he cannot complain if prior to the contract the principal was guilty of dishonesty.[92] A representation on part of the principal that the surety "took no risk"[93] or that the principal was to pay[94] is not such as to relieve the surety from liability.

(§ 4) *G. Other defenses.*—In some states a surety is discharged to the amount of his damage if the creditor fails to sue the principal at his request,[95] and in other states this is made the rule by statute; but in those states where two courts have jurisdiction, the principal may bring suit at the first term of either,[96] and there must first be a request to sue on part of the surety.[97] Where the surety is fully discharged, no subsequent approval or waiver will estop him from showing he is released;[98] but the execution of a renewal note to one against which he has a complete defense operates as an estoppel.[99]

§ 5. *Rights of surety against principal and co-surety.*—Upon payment to the creditor of the full amount of the liability of the principal, the surety is subrogated to his rights against the principal, security, and the co-sureties for their proportional share of the indebtedness,[1] and one of several sureties paying the whole debt is entitled to contribution from his co-sureties.[2] The surety need not

ground of misrepresentation. Principal represented that he owned property when in fact his wife owned it. Citizens' Bank v. Burrus [Mo.] 77 S. W. 748.

86. Stratton v. Thomas [Mich.] 94 N. W. 1053. A surety signing a note and giving it to the principal for delivery is liable for representations made by the latter at the time of delivery. Principal made representations that surety signed as principal. Held liable as principal, and the fact that surety signed note on second line for signatures was insufficient to give notice. Wm. Deering & Co. v. Veal [Ky.] 78 S. W. 886.

87. Aetna Indemnity Co. v. Schroeder [N. D.] 95 N. W. 436.

88. Ind. & O. Live Stock Ins. Co. v. Bender [Ind. App.] 69 N. E. 691. Knowledge of dishonesty by an agent in ministerial matters only will not be imputed to the master. Aetna Indemnity Co. v. Schroeder [N. D.] 95 N. W. 436.

89. In determining the question of good faith, the fact that the principal was delinquent when the bond was executed might be considered. Union C. L. Ins. Co. v. Prigge [Minn.] 96 N. W. 917.

90. Ida County Sav. Bank v. Seidensticker [Iowa] 92 N. W. 862.

91. City Trust, S. D. & S. Co. v. Lee, 204 Ill. 69, 68 N. E. 485.

92. All parties members of same benevolent order. Court Vesper, No. 69, v. Fries, 22 Pa. Super. Ct. 250.

93. First Nat. Bank v. Johnson [Mich.] 95 N. W. 975.

94. Rowe v. Bowman, 183 Mass. 488, 67 N. E. 636.

95. Pain v. Packard, 13 Johns. [N. Y.] 174.

96. Robertson v. Angle [Tex. Civ. App.] 76 S. W. 317.

97. Burge v. Duden [Mo. App.] 78 S. W. 653; McKelvy v. Berry, 21 Pa. Super. Ct. 276.

98. Erfurth v. Stevenson [Ark.] 72 S. W. 49.

99. Baut v. Donly, 160 Ind. 670, 67 N. E. 503.

1. See Subrogation; Kolb v. Nat. Surety Co., 176 N. Y. 233, 68 N. E. 247. A party becoming a surety at the request of a co-surety is nevertheless liable to the latter for contribution. Bishop v. Smith [N. J. Law] 57 Atl. 874.

2. A surety is liable for contribution for his proportional part. Bishop v. Smith [N. J. Law] 57 Atl. 874. In determining this proportional part, the liability of the principal should not be counted. Bond executed by one principal and five sureties, held in an action for contribution that each surety was liable to his co-sureties for one-fifth of the amount, not one-sixth. Id. The right to contribution does not become enforceable until an actual payment, in whole or in part,

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wait till judgment is rendered before payment,[3] and where some co-sureties pay a judgment pro rata, they alone are subrogated to it.[4] So where the sureties of a defaulted contractor complete the work, they are subrogated to payments thereafter made,[5] and if their offer to complete is refused, the damage will be based on the lowest amount for which it could be performed plus interest.[6]

Indemnification and contribution.—Moreover, on payment of any sum as surety for the principal, the surety has a right of indemnity or may recover on an implied contract from the principal,[7] This is true though a note due in the future is given by the surety and accepted by the creditor in payment of the debt,[8] but in general this right does not arise till the surety has suffered damage.[9] Where a surety has paid a judgment rendered against himself and his principal, the latter is estopped in a suit by the surety to deny liability for the original debt.[10] When the sureties have had a judgment against the principal assigned to a third party in order to keep it alive, they have none the less a right of action against him in indemnity;[11] but where some of the sureties pay their pro rata share, they become creditors of the principal for that amount only.[12] For any payment in excess of his pro rata share, surety may recover in an action for contribution from his co-sureties which action is akin to indemnity;[13] but such recovery is limited to the pro rata liability of each unless it appears that some of the sureties are insolvent.[14] In the absence of statute, all sureties must be parties to the suit, for it is essentially an equitable action in which all parties must be joined.[15] Where a surety has property given to indemnify him against loss, he may be compelled to share it with his co-sureties;[16] but in the absence of fraud, there is no objection to a surety stipulating before he enters upon the contract for a separate indemnity.[17] But where a surety is fully indemnified by such security, he cannot compel the co-sureties to contribute since he has suffered no damage;[18] but if the security is worthless, it does not

of the common obligation has been made (Id.), or until something has been done equivalent to a discharge thereof (Id.). The giving of mortgages by sureties on their property, as part payment, and allowing judgment to be entered by confession for the remainder, the obligee giving a satisfaction for the original judgment is a sufficient payment. Id.

See Contribution, 1 Curr. Law, p. 704.

3. Howe v. White [Ind.] 69 N. E. 684.

4. Campau v. Detroit Driving Club [Mich.] 98 N. W. 267.

5. St. Peter's Catholic Church v. Vannote [N. J. Eq.] 56 Atl. 1037. In the absence of any stipulation to that effect, the refusal of owner to allow surety to complete the work of a defaulted contractor no defense. McNally v. Mercantile Trust Co., 204 Pa. 596.

6. Degnon-McLean Const. Co. v. City Trust, S. D. & S. Co., 40 Misc. [N. Y.] 530.

7. Christian v. Highlands [Ind. App.] 69 N. E. 266. A surety is entitled to recover the amount paid on a judgment and costs from an undisclosed principal, where the latter breaks the bond. (Bond for saloonkeeper, conditioned that he would keep no gambling devices. Defendant's undisclosed principal ordered nickel-in-the-slot machine placed in saloon.) City Trust, S. D. & S. Co. v. American Brew. Co., 84 N. Y. Supp. 771. A surety may purchase his principal's property at an execution sale under a judgment against both the principal and himself, though he neither asserted any claim of suretyship nor made it of record in the action. Atlee v. Bullard [Iowa] 98 N. W. 889; Mendel v. Boyd [Neb.] 91 N. W. 860.

8. Auerbach v. Rogin, 40 Misc. [N. Y.] 695.

9. Christian v. Highlands [Ind. App.] 69 N. E. 266.

10. Reed v. Humphrey [Kan.] 76 Pac. 390. If at the time a surety makes payment, he is legally bound to pay the debt, he may recover from the principal or co-surety, though at the time the payment was made the principal or co-surety was discharged. Principal discharged on the ground that the judgment against the surety had been dormant as against the principal for over one year. Id.

11. Archer v. Laidlaw [Mich.] 97 N. W. 159.

12. Campau v. Detroit Driving Club [Mich.] 98 N. W. 267.

13. Right may be enforced in law or equity. Weston v. Elliott [N. H.] 57 Atl. 336; Norwood v. Wash., 136 Ala. 657. Where such remedy is given by statute, it is cumulative merely and does not bar the remedy of surety to enforce contribution at equity. Dysart v. Crow, 170 Mo. 275, 70 S. W. 689.

14. McAllister v. Irwin's Estate, 31 Colo. 253, 73 Pac. 47.

15. Dysart v. Crow, 170 Mo. 275, 70 S. W. 689.

16. Westbrook v. Belton Nat. Bank [Tex.] 77 S. W. 942; Barker v. Boyd, 24 Ky. L. R. 1389, 71 S. W. 528.

17. McDowell County Com'rs v. Nichols, 131 N. C. 501.

18. Linder v. Snow [Ga.] 45 S. E. 732.

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operate as a bar.[19] Where some of the sureties of a forfeited bail bond are discharged by the courts as having brought the principal back, it operates as payment and does not discharge the co-sureties.[20] So the surety may compel the principal in an equitable action in the nature of specific performance to exonerate him from liability,[21] and on the same principle is entitled to have execution go first against the principal where judgment is entered,[22] and to have his lands sold even when exempt from sale for ordinary debts of similar amounts,[23] and so he may insist on resort to a fund set apart to secure the debt before recourse is had against him.[24] The contract of suretyship imposes no duty upon the sureties to defend their principals,[25] gives the latter no right to represent the sureties,[26] and gives one surety no authority in any capacity to charge his fellows by either his knowledge or his conduct;[27] but a surety may represent his co-surety in stating that the signatures are conditional.[28] Where a surety negligently allows a judgment to be recovered upon his bond, the latter being void in its inception, he cannot recover of another upon the latter's promise to indemnify him from liability thereon.[29]

§ 6. *Security held by surety and rights therein.*—Where security is given to the surety to indemnify him against loss, it may be reached in an equitable action by the creditors, the surety and principal both being parties.[30] Where this security is given by a third party, it stands in same relation as a surety and is liable to release in the same way.[31]

§ 7. *Remedies and procedure.*—The right of subrogation, exoneration and contribution are equitable, but when given by statute to be enforced in courts of law, the provision is cumulative and does not bar the equitable remedy.[32] When one is surety on a bond in a court of equity, a judgment may be rendered against him in that court, though it is a legal obligation.[33] Where the separate items sued for are all alleged breaches of the bond, it is not necessary that each item should be alleged in a separate paragraph of the complaint.[34]

19. Mason's Ex'r v. McKnight, 25 Ky. L. R. 903, 76 S. W. 509.

20. State v. Bongard, 89 Minn. 426, 94 N. W. 1093. Where a bail bond provides for liability of sureties for default of principal and for amount of his fine, imprisonment does not discharge them from liability for fine. People v. Connolly, 88 App. Div. [N. Y.] 302.

21. Alderson's Adm'r v. Alderson, 53 W. Va. 388. May have injunction to restrain insolvent principal from disposing of his property and have a receiver appointed. Sanford v. U. S. Fidelity & Guaranty Co., 116 Ga. 689.

22. Hollimon v. Karger, 30 Tex. Civ. App. 558, 71 S. W. 299.

23. Statute provides that if the income from land will pay debt in five years it shall not be sold on execution. Alderson's Adm'r v. Alderson, 53 W. Va. 388.

24. Town of Gastonia v. McEntee-Peterson Engineering Co., 131 N. C. 359.

25. Surety appearing as attorney for principal does not render judgment rendered against the principal conclusive upon him as surety in a separate suit brought against him. Park v. Ensign, 66 Kan. 50, 71 Pac. 230.

26. A surety is not concluded by a judgment in an action against principal only from using in a separate action a defense unsuccessfully urged by the principal. Park v. Ensign, 66 Kan. 50, 71 Pac. 230.

27. The fact that one surety acts as the attorney for his principal does not render the judgment in that action conclusive upon either him or his co-sureties in a separate suit brought against them. Park v. Ensign, 66 Kan. 50, 71 Pac. 230.

28. That the bond was not to be delivered until another signed it, statement made by one surety, co-surety being present and saying nothing, held statement inured to the benefit of the latter. Norris v. Cetti [Tex. Civ. App.] 79 S. W. 641.

29. Bond for selling intoxicating liquor. Gorman v. Williams, 117 Iowa, 560, 91 N. W. 819.

30. Nourse v. Weitz, 120 Iowa, 708, 95 N. W. 251; Christian v. Highlands [Ind. App.] 69 N. E. 266; Jennings v. Taylor [Va.] 45 S. E. 913; Magoffin v. Boyle Nat. Bank, 24 Ky. L. R. 585, 69 S. W. 702. But see Howse v. Reeves & Co., 25 Ky. L. R. 949, 76 S. W. 513. If power of private sale given by contract the surety incurs no liability if he sells for less than full value of the security. Iron City Nat. Bank v. Rafferty, 207 Pa. 238.

31. Westbrook v. Belton Nat. Bank [Tex. Civ. App.] 75 S. W. 842.

32. Dysart v. Crow, 170 Mo. 275, 70 S. W. 689.

33. Twin City Power Co. v. Barrett [C. C. A.] 126 Fed. 302.

34. Action against a county creditor and his sureties to recover money alleged to be due the county. Nowlin v. State, 30 Ind. App. 277, 66 N. E. 54.

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TAXES.

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§ 1. *Nature and kinds.*—Taxes are the enforced proportional contributions from persons and property levied by the state by virtue of its sovereignty, for the support of government and for all public needs.[1] Since in legal contemplation they are neither debts nor contractual obligations, but in the strictest sense of the word, exactions,[2] the only warrant for their imposition must be found in some positive law, and they cannot be enforced unless imposed in the manner authorized.[3] The power to require these contributions or exactions is an incident of sovereignty inhering in the legislative branch of the government,[4] and unless restrained by constitutional provisions, the power of the legislature as to the mode, form, and extent of taxation is unlimited.[5] While the power vested in the legis-

1. This definition applied to the Special Franchise Tax Law of New York. Heerwagen v. Crosstown St. R. Co., 90 App. Div. [N. Y.] 275. Water rates are in no sense taxes, but merely the price paid for water as a commodity. Powell v. Duluth [Minn.] 97 N. W. 450.

2. Board of Chosen Freeholders of Atlantic County v. Weymouth Tp., 68 N. J. Law, 652.

3. Queens County Water Co. v. Monroe, 83 App. Div. [N. Y.] 105. A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax. People v. Miller, 177 N. Y. 51, 69 N. E. 124; Ashe Carson Co. v. State, 138 Ala. 108. Failure to comply strictly with those provisions of the tax laws which are intended for the guidance merely of the officers in the conduct of the business devolved upon them, designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected, will not usually render the proceedings void (City of Orlando v. Equitable B. & L. Ass'n [Fla.] 33 So. 986); but where the requisites prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and a disregard of them might and generally would injuriously affect him, cannot be disregarded, and failure to observe them will render the proceedings invalid (Id.). Under c. 29, Nebraska Laws 1893, a tax cannot be levied on road districts to pay an indebtedness incurred after the approval of the act. Dixon County v. Chicago, M., St. P. & O. R. Co. [Neb.] 95 N. W. 340.

4. It is one of the drastic powers exercised by governmental bodies. Sperry v. Butler, 75 Conn. 369. The right to incur an obligation implies the right to raise money by taxation for its payment. Manning v. Devil's Lake [N. D.] 99 N. W. 51.

5. Carstairs v. Cochran, 193 U. S. 10. "While the power to tax involves the power to destroy by excessive taxation, where the tax is not imposed for that purpose, nor laid upon property, but upon the franchise of a corporation or upon the right of succession by an individual, and all property, whether exempt by Federal law or not, is treated alike by including it in the appraisal made to fix the tax, the state has the power to impose a franchise or a succession tax even if substantially all the property so appraised happens to be exempt from taxation by Federal statutes." People v. Knight, 174 N. Y. 475, 67 N. E. 65. A by-law of a city making it the duty, whenever the sidewalk fronting or adjoining any lot of land in the city shall be wholly or partially covered with ice, of the owner or occupant to cause the snow and ice to be removed is not an improper exercise of the taxing power. State v. McMahon [Conn.] 55 Atl. 591. Subject to constitutional limitations, the legislature may adopt any means it sees fit to assess and tax property for the purpose of defraying the expenses of government. State v. Eldredge [Utah] 76 Pac. 337.

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lature is plenary,[6] and limited only by the necessity of the occasion,[7] it is nevertheless subject to several limitations express and implied. Among the former may be instanced the provisions in the Federal constitution forbidding the deprivation of property without due process of law,[8] guaranteeing the equal protection of the laws,[9] and denying to the states the right to tax objects of interstate commerce;[10] likewise the provisions of the various state constitutions restricting the rate of taxation,[11] and inhibiting the levy by the state of taxes for municipal purposes.[12] The taxing power is likewise subject to several well defined implied limitations, which are also embodied in many state constitutions. The persons and property must be within the territorial limits of the taxing power;[13] the tax laid must

6. Adams v. Kuykendall [Miss.] 35 So. 830.

7. Yazoo & M. V. R. Co. v. Adams, 81 Miss. 90.

8. Mo. v. Dockery, 191 U. S. 165. A Kentucky corporation operating a ferry across the Ohio river is deprived of its property without due process of law by the action of that state in including for purposes of taxation in the valuation of the franchise derived by the corporation from Kentucky, the value of an Indiana franchise for a ferry from the Indiana to the Kentucky shore. Louisville & J. Ferry Co. v. Com., 188 U. S. 385, 47 Law. Ed. 513; Id., 188 U. S. 399, 47 Law. Ed. 519. A legislative enactment that on the failure of a grantee of state swamp land to pay all arrearages of taxes levied thereon on or before a given date, the title or interest of such grantee should be forfeited, is invalid as depriving a person of his property without due process of law. Parish v. East Coast Cedar Co., 133 N. C. 478. A statute imposing a tax on the business of advertising in street cars and that the company selling the advertising privilege shall be liable for the payment of the tax is unconstitutional, as depriving one of property without due process of law. Knoxville Traction Co. v. McMillan [Tenn.] 77 S. W. 665.

9. Mo. v. Dockery, 191 U. S. 165. The equal protection of the laws is not denied by the Alabama Code providing for the taxation of railroad stock because of the exemption of stock in domestic railroads and in others that list substantially all their property for taxation. Kidd v. Ala., 188 U. S. 730, 47 Law. Ed. 669. Kentucky statutes providing that personal property of home corporations shall be taxed in the state, though it may be situated in another state, does not deny the equal protection of the laws, though the property may be taxable in another state. Com. v. Union Refrigerator Transit Co. [Ky.] 80 S. W. 490.

10. A state may not impose a tax which is in any way a burden upon interstate commerce; but it may impose a privilege tax upon corporations engaged in interstate commerce for carrying on that part of their business which is wholly within the taxing state and which does not affect their interstate business or their right to carry it on in that state. Allen v. Pullman's Palace Car Co., 191 U. S. 171. Cars of a foreign corporation, not a railroad corporation, having its domicile in another state, which are merely in transit within the state for the purpose of bringing merchandise from another state into or through the state, are instruments of interstate commerce, and not subject to taxation within the state. In re Union Tank Line Co., 204 Ill. 347, 68 N. E. 504. The provision of a state tax law that sleeping car companies doing business in the state pay a certain sum per annum per car, and which by its terms applies to cars running through the state as well as those operated wholly within the state, is repugnant to the commerce clause of the Federal constitution. Allen v. Pullman's Palace Car Co., 191 U. S. 171. Logs which have been cut and floated down a stream and its tributaries to a boom or sorting gap from which they are to be shipped by rail as needed to a point outside the state are not while awaiting delivery to the railroad company, the subject of interstate commerce so as to be exempt from state taxation. Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 Law. Ed. 394. Goods shipped by a corporation to its distributing agent in another state, in the original package, to be kept in stock, and used to fill contracts of sale made by the company's salesmen, the agent having no authority to fix prices, are not while thus stored articles of interstate commerce, and may be taxed. American S. & W. Co. v. Speed, 110 Tenn. 524, 75 S. W. 1037.

11. In levying a state tax, the legislature is prohibited by the constitution from fixing a higher rate of taxation upon lands outside of corporate cities, towns and plantations than the rate upon lands within such municipalities. In re State Taxation [Me.] 55 Atl. 827. County authorities cannot assess a tax against a road district, which, together with the assessment for other county purposes, exceeds 15 mills on the dollar of valuation. Dixon County v. Chicago, M., St. P. & O. R. Co. [Neb.] 95 N. W. 340.

12. The Juvenile Court Act of Missouri, relating to the treatment of neglected and delinquent children and providing that the localities for whose benefit the law is enacted shall be required to pay the expenses of carrying out its provisions, is not violative of a constitutional inhibition against the levying of taxes for municipal purposes [Session Acts 1903, p. 213]. Ex parte Loving [Mo.] 77 S. W. 508. An act authorizing an extra levy of taxes for the payment of road bonds held constitutional. Sisk v. Cargile, 138 Ala. 164. The Michigan statute creating a board of state tax commissioners, and empowering it to revise the assessments of property in the townships and cities of the state, is not unconstitutional as an invasion of the right of local self-government [Act No. 154, P. A. 1899]. Detroit United R. v. Board of State Tax Com'rs [Mich.] 98 N. W. 997.

13. Carstairs v. Cochran, 193 U. S. 10.

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operate uniformly and equally throughout the taxing district.[14] The tax must be

14. Kidd v. Ala., 188 U. S. 730, 47 Law. Ed. 669; Pump v. Lucas County Com'rs, 69 Ohio St. 448, 69 N. E. 666; St. Ann's Asylum v. Parker, 109 La. 592. Exemption of small personal incomes from income tax does not discriminate against corporations. W. C. Peacock & Co. v. Pratt [C. C. A.] 121 Fed. 772. Poll tax. Elting v. Hickman, 172 Mo. 237, 72 S. W. 700. The aphorism "taxation must be equal and uniform," whatever view may be taken of its meaning and practical effect, is not a fundamental maxim of government, limiting the legislative power, unless embodied in the state constitution. State v. McMahon [Conn.] 55 Atl. 591; Appeal of Nettleton [Conn.] 56 Atl. 565. The provision of the Federal constitution that all duties, imposts and excises shall be uniform throughout the United States establishes a rule only for taxation by the Federal government, and has no application to the powers of a state or territory. W. C. Peacock & Co. v. Pratt [C. C. A.] 121 Fed. 772. Water rates are not taxes within the meaning of those constitutional provisions which require a uniformity of taxation. Powell v. Duluth [Minn.] 97 N. W. 450. When the method is prescribed, the levy must embrace all the property within the district to which the principle of the assessment applies. Beck v. Holland [Mont.] 74 Pac. 410. A statute held invalid because excepting a town from the operation of a county tax or assessment. Day v. Roberts [Va.] 43 S. E. 362; Harper v. New Hanover County Com'rs, 133 N. C. 106. In Massachusetts, the test as to the constitutionality of tax laws has always been whether the tax was proportional and reasonable. White v. Gove, 183 Mass. 333, 67 N. E. 359. A statute authorizing the assessment of the cost of a street improvement by the frontage rule is not in conflict with the constitutional requirement of uniformity. Deane v. Ind. M. & Const. Co., 161 Ind. 371, 68 N. E. 686; Beck v. Holland [Mont.] 74 Pac. 410. An ordinance imposing a license tax on vehicles using the streets of a city, but omitting street cars, automobiles and vehicles of nonresidents, is not open to the objection of invidious discrimination. Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. 1027. When the difference is deep and radical between two domains in which the same kind of property may be situated, a law which makes them one district for taxation, so that all the property of the same kind in the same district must be taxed alike, and no reasonable distinction be permitted, must be so plain and urgent that no other intention can be suggested. Foster v. Pryor, 189 U. S. 325, 47 Law. Ed. 835. The requirement of uniformity applies only to assessments and taxation, and does not control the expenditure of the money when collected. Kerr v. Perry School Tp. [Ind.] 70 N. E. 246. An act which does not discriminate in the levy of a poll tax in the road districts organized under it, but operates alike upon all male inhabitants of a certain age therein, is not in violation of the constitutional provision in reference to uniformity. Elting v. Hickman, 172 Mo. 237, 72 S. W. 700. An act changing the method of compensating a public officer from the fee to the salary system is not invalid as a statute levying a tax void for non-uniformity. Verges v. Milwaukee County, 116 Wis. 191, 93 N. W. 44.

In construing laws which impose taxes, courts will incline to that construction which will avoid double taxation; but the power, if clearly exercised, cannot be denied to the legislative body. Woodruff v. Oswego Starch Factory, 177 N. Y. 23, 68 N. E. 994. Taxation of rents reserved in lease in fee and tax on the real estate. Id. Payment by members of a co-operative insurance company of taxes on the property insured and tax on the money contributed by them for the payment of losses. German Wash. Mut. F. Ins. Co. v. Louisville [Ky.] 78 S. W. 472. Payment by such company of license for carrying on business. Id. Tax on billiard, pool, and other tables according to their value, and license tax against proprietor (State v. Jones [Idaho] 75 Pac. 819), and the taxing of tangible property to corporation and of shares of stock to the holders (Ill. Nat. Bank v. Kinsella, 201 Ill. 31, 66 N. E. 338), have all been sustained against the objection of double taxation. In Kentucky, a county may levy a poll tax on the inhabitants of a town for county purposes, although the town has at the same time levied a like tax for town purposes. Short v. Bartlett, 24 Ky. L. R. 932, 70 S. W. 283. The assessment of a building and loan association with money loaned arising from its earnings from interest and premiums does not amount to double taxation on the ground that the stockholders of the association were assessed with the same property, since only the stock itself was taxable to the stockholders. International B. & L. Ass'n v. Marion County Com'rs, 30 Ind. App. 12, 65 N. E. 297. Kentucky statutes providing that personal property of home corporations shall be taxed in the state, though it may be situated in another state is not an unjust discrimination in favor of railroads whose cars in use outside the state, are not taxed in the state, a special mode of taxation being provided for railroad companies. Com. v. Unión Refrigerator Transit Co. [Ky.] 80 S. W. 490. Kentucky statutes providing that personal property of home corporations shall be taxed in the state, though situated in another state does not contravene the state constitution providing that taxes shall be uniform on all property subject to taxation within the territorial limits of the authority levying the tax. Id. Iowa statutes providing for assessment of telephone companies held to exempt them from local taxation and therefore violative of the constitution which provided that corporate property should be taxed the same as that of individuals. Layman v. Iowa Tel. Co. [Iowa] 99 N. W. 205. In Washington, statute providing for taxation of stocks of merchandise coming into a county after March first, with a provision allowing a deduction, in the proportion the time the goods are in the county bears to the entire year, is unconstitutional as granting privileges and immunities. Nathan v. Spokane County [Wash.] 76 Pac. 521. Washington statute providing for the taxation of stocks of merchandise shipped into a county for immediate sale violates the constitutional provision that all property shall be taxed according to its value. Id. Also in that it violates the provision that no inhabitant or property

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for a public purpose;[15] and the public interest must be co-extensive with the territory from which the tax is raised.[16] In some states a special bill levying a tax is unauthorized.[17] While it is a general rule that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated, the rule has an exception in that the power to tax in some cases may be delegated to municipalities.[18] The provisions of a general tax law, valid only in part, should be sustained, if the valid portions are complete in themselves and capable of enforcement.[19] Taxes on certain forms of credits are sometimes levied for

shall be relieved from its proportionate share of taxes. Id. A tax on shell fish shipped out of the county held not to be an export tax, but a method for raising funds to protect the shell fish industry (Brooks v. Tripp [N. C.] 47 S. E. 401), and as it was not imposed for the purpose or raising revenue, it was not unconstitutional on the ground that it was not uniformly laid (Id.). The provision of the Ohio constitution that taxes shall be levied on property by a uniform rule does not require that the general revenue shall be so expended that each taxpayer shall receive benefits therefrom in proportion to the amount he has paid. City of Columbus v. Jeffrey, 2 Ohio N. P. (N. S.) 85.

15. Keeley Institute legislation unconstitutional. State v. Froehlich, 118 Wis. 129, 94 N. W. 50. The sprinkling of city streets is a public purpose justifying the levy of a tax. Maydwell v. Louisville, 25 Ky. L. R. 1062, 76 S. W. 1091. So also the erection and maintenance of a municipal electric lighting plant. State v. Allen [Mo.] 77 S. W. 868. It is not a valid objection to a tax levied against the taxable property of a particular jurisdiction for local improvement that such improvement is for the use of the public at large. Union Pac. R. Co. v. Howard County [Neb.] 92 N. W. 579. A city cannot exercise its taxing power to raise funds to construct a bridge which is not located on a street having a legal existence. Manning v. Devils Lake [N. D.] 99 N. W. 51. The taxing power of a city can only be exercised for corporate purposes. Construction of bridge outside its boundaries to promote business interests of the city will not sustain the exercise of the power. Id. Incidental and indirect benefits will not sustain the power accruing to a city from development of commercial interest promoted by building a bridge outside its corporate limits. Id.

16. A scheme of taxation for drainage purposes, which proceeds on the theory of a benefit to the whole district and upon the basis of the assessed valuation of the district without regard to the special benefit to be derived from any particular property, is proper. Burguieres v. Sanders, 111 La. 109. A legislative act making a certain county a sanitary district, establishing a sanitary commission therefor, and authorizing the commission to construct at the expense of the county a sanitary sewage system, extending over two valleys, in which about two-thirds of the population of the county lived, and draining an area containing three-fourths in value of all the property in the county is not invalid as taxing all the citizens of the county for the benefit of but a portion thereof, as the entire county is interested in the purification of watercourses and the health of the section affected, so as to prevent the spread of contagious diseases therefrom. Keene v. Jefferson County, 135 Ala. 465.

17. An act changing the method of compensating a public official from the fee system to a salary is not open to the objection that it imposes a tax. Verges v. Milwaukee County, 116 Wis. 191, 93 N. W. 44.

18. Cooley, Taxation [3d Ed.] p. 99; City of Phila. v. Phila. Traction Co., 206 Pa. 35; Adams v. Kuykendall [Miss.] 35 So. 830; In re Watson [S. D.] 97 N. W. 463; City of Norfolk v. Griffith-Powell Co. [Va.] 45 S. E. 889; City of Troy v. Harris, 102 Mo. App. 51, 76 S. W. 662; Armour Packing Co. v. City Council of Augusta, 118 Ga. 552. The power to tax conferred by the state upon one of its own municipalities is in its last analysis the mere transfer by the state to its own creature of authority to exercise part of the state's attributes of sovereignty, to be used solely for the public good. When exerted in this way, it is the power of the state that acts through the agency of the municipality. Joesting v. Baltimore, 97 Md. 589. The authority conferred by the Tennessee constitution upon the legislature to delegate power to county and municipal corporations to assess, levy and collect taxes for certain purposes is restricted to the purposes stated, and excludes all others, and any statute authorizing these subdivisions of the state to exercise the taxing power for any other purpose is unauthorized and void. Colbert v. Bond, 110 Tenn. 370, 75 S. W. 1061. Authority granted by the legislature to a county court to increase the salary of judges and to levy a tax to pay the appropriation was void. Glisson v. Calloway, 110 Tenn. 370, 75 S. W. 1061. A statute giving power to a municipal authority to levy a tax must be construed strictly. People v. Atchison, T. & S. F. R. Co., 201 Ill. 365, 66 N. E. 232.

19. Pump v. Lucas County Com'rs, 69 Ohio St. 448, 69 N. E. 666; N. W. M. L. Ins. Co. v. Lewis & C. County, 28 Mont. 484, 72 Pac. 982; State v. Fleming [Neb.] 97 N. W. 1063; Logan County v. Carnahan [Neb.] 95 N. W. 812. Yet when it is manifest that the act contemplates and provides for one general scheme or purpose, and the parts are so interdependent one upon the other that it cannot be supposed the legislature would have enacted the law with the invalid portions eliminated, the valid portion will not be sustained. Harper v. New Hanover County Com'rs, 133 N. C. 106. Act ratifying a tax levy. Birmingham Mineral R. Co. v. Tuscaloosa County, 137 Ala. 260. The exemption from local taxation being unconstitutional, vitiated the entire scheme for the taxation of telephone companies. Layman v. Iowa Tel. Co. [Iowa] 99 N. W. 205.

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the purpose of discouraging their use, such as the Federal tax on the issue of state banks and the tax on orders given for the payment of laborers.[20] Illustrative cases relative to the power to establish or alter the rate of taxation are grouped below.[21]

§ 2. *Persons, objects, and interests taxable. A. Taxable property and its classification.*—The word "property" is a generic term, and includes all property of whatever description, whether tangible or intangible;[22] thus "personal property" as employed in a tax law includes bonds, notes, credits, and choses in action.[23] The legislature has the power to classify property as personal and real for the purpose of taxation, and in such classification, it is not controlled by common-law distinctions between these classes of property.[24]

(§ 2) *B. Persons liable.*—The legislature may properly classify taxpayers in devising an equal system of taxation, and may properly authorize municipal corporations to provide different systems of taxation for different kinds of corporations.[25]

A tax law is not objectionable in that it makes an agent personally responsible for the payment of a tax levied on the property of the principal in the agent's possession,[26] and a state may tax property of a nonresident owner in the form of credits or other choses in action, where the same are held by a resident agent for the purpose of collection or renewal with a view to the carrying on of such transactions as a business.[27]

20. A paper given by a company to an employe crediting him with the full amount of wages earned and debiting him with amounts already paid to him or on his order, and showing what is due him, which balance is payable in cash, is not taxable under a provision imposing a tax on orders of a company representing the amount of wages of an employe given in payment for labor and not redeemed by payment of full face value within 30 days from issuance thereof. Com. v. Lehigh Coal & Nav. Co., 206 Pa. 641.

21. A statute imposing a rate upon unimproved realty of one-fourth of the regular levy held to have been repealed by a subsequent statute establishing the rate at one-half. Monahan v. Lewis [Del.] 55 Atl. 1. The Illinois act (Laws 1883, p. 69), authorizing the levy of a tax of three mills on the dollar for street lighting, does not apply to a city having a special charter which does not fix a less rate for such purpose. Baltimore & O. S. W. R. Co. v. People, 200 Ill. 623, 66 N. E. 246. Under Baltimore charter, § 40, the power to determine or alter the tax rate is in the mayor and council. City of Baltimore v. Robert Poole & Son Co., 97 Md. 67. In Michigan, the rate of taxation on railroad property shall be the rate which the state board of assessors shall ascertain and determine is the average rate levied upon other property, and in this duty the board acts ministerially rather than judicially. Board of Education of Detroit v. State Board of Assessors [Mich.] 94 N. W. 668. Under a similar provision in Kentucky, a turnpike aid tax cannot be collected from a railroad for years in which no assessment thereof on individual property was made. Vanceburg & S. L. Turnpike Road Co. v. Maysville & B. S. R. Co., 25 Ky. L. R. 1404, 77 S. W. 1118.

22. State v. Savage, 65 Neb. 714, 91 N. W. 716.

23. State v. Fidelity & Deposit Co. [Tex. Civ. App.] 80 S. W. 544.

24. Mo., K. & T. R. Co. v. Miami County Com'rs, 67 Kan. 434, 73 Pac. 103. The attempted exemption from taxation of purchase money notes cannot be upheld as a legislative classification of property for purposes of taxation. Adams v. Kuykendall [Miss.] 35 So. 830. The Idaho constitution recognizes other methods of raising revenue than that of a tax levy on real and personal property. Stein v. Morrison [Idaho] 75 Pac. 246. A seat in a stock exchange is not property subject to taxation within the meaning of a Bill of Rights which declares that every person holding property in the state should contribute to the public taxes according to his actual worth in real or personal property. City of Baltimore v. Johnson, 96 Md. 737. A scheme of classification in an ordinance that does not radically depart from what is reasonable is not to be subjected to judicial condemnation by facts dehors the ordinance. Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. 1027.

25. German Wash. F. Ins. Ass'n v. Louisville [Ky.] 80 S. W. 154.

26. Carstairs v. Cochran, 193 U. S. 10; Pioneer Fuel Co. v. Molloy, 131 Mich. 465, 91 N. W. 750; State v. Fleming [Neb.] 97 N. W. 1063; German Trust Co. v. Board of Equalization, 121 Iowa, 325, 96 N. W. 878.

27. Reat v. People, 201 Ill. 469, 66 N. E. 242; German Trust Co. v. Board of Equalization, 121 Iowa, 325, 96 N. W. 878; Heinz v. Board of Equalization, 121 Iowa, 445, 96 N. W. 967. Compare Tolman v. Raymond, 202 Ill. 197, 66 N. E. 1086. The agent is personally liable. German Trust Co. v. Board of Equalization, 121 Iowa, 325, 96 N. W. 878. There is no inhibition in the Federal constitution against such right (State Board of Assessors v. Comptoir Nat. D'Escompte De Paris, 191 U. S. 388), and it may be exercised by a municipal corporation; it having general statutory authority to tax property of every kind within its limits (Armour Pack-

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Personal property of deceased persons, in the hands of executors or administrators, until distributed, should be taxed to the executors or administrators.[28] But personal property is not subject to taxation while in the hands of the heirs, executors, or administrators, for the amount it should have been taxed during the life of the owner.[29] Heirs, however, take the real property of an ancestor subject to its liability for omitted taxes, the collection of which is not barred by the statute of limitations.[30]

Property of a bankrupt in the hands of the trustee is taxable to the trustee,[31] and funds and credits in the hands of a receiver are taxable to him,[32] but he is under no obligation to pay the taxes assessed to the owner on account of the owner's interest in the property.[33]

As between a landlord and his tenant the burden of paying taxes is upon the former,[34] and a purchaser at a sale whose title has not yet become perfected has at least an equitable title, and is therefore liable for taxes thereafter accruing.[35] The life tenant, where there is no stipulation to the contrary, must keep down all charges, in the form of taxes or otherwise, necessary to preserve the property to the remainderman,[36] but the rule that the holder of a limited or partial interest must pay taxes while in possession as between himself and the remainderman, does not apply to a homestead claimant in possession of a tract worth more than the homestead exemption, but not divisible pending proceedings to establish the priority of judgment and attachment liens on the surplus.[37]

In the taxation of partnership property, the firm, and not the individuals composing it, is considered the owner.[38]

Where a tax is imposed directly upon a creditor company, instead of the debtor company, the former company cannot set up the agreement of the latter company to pay the tax. The legislature having fixed the liability the creditor company can relieve itself only by payment.[39]

(§ 2) *C. Corporations.*—The state's power of taxation includes, of course, the right to tax private corporations and corporate interests within its jurisdiction.[40] The methods employed in the various states for the taxation of these in-

ing Co. v. City Council of Augusta, 118 Ga. 552).

28. Inhabitants of Elliot v. Prime, 93 Me. 48; McClellan v. Board of Review of Jo Daviess County, 200 Ill. 116, 65 N. E. 711. Curators of an estate who have failed to list the property thereof while in their possession may be proceeded against and the tax collected even after they have parted with the possession. Com. v. Riley's Curators, 24 Ky. L. R. 2005, 72 S. W. 809.

29. State v. Eberhard [Minn.] 95 N. W. 1115.

30. Com. v. Sweigart's Adm'r, 24 Ky. L. R. 2147, 73 S. W. 758. A judgment for taxes against the unknown heirs of a former owner, to which action the grantee of such former owner was not a party, is void. Green v. Robertson, 30 Tex. Civ. App. 236, 70 S. W. 345.

31. Swarts v. Hammer, 120 Fed. 256.

32. City of Los Angeles v. Los Angeles City Water Co., 137 Cal. 699, 70 Pac. 770; Board of Com'rs of Marion County v. Marion Trust Co., 30 Ind. App. 137, 65 N. E. 589.

33. Lucking v. Ballantyne [Mich.] 94 N. W. 8.

34. Hart v. Hart, 117 Wis. 639, 94 N. W. 890.

35. Bond v. Brand's Trustee, 25 Ky. L. R. 26, 74 S. W. 673.

36. Hart v. Hart, 117 Wis. 639, 94 N. W. 890.

37. Baker v. Grand Island Banking Co. [Neb.] 93 N. W. 428.

38. People v. Wells, 40 Misc. [N. Y.] 553; Id., 85 App. Div. [N. Y.] 440; School Dist. of Plattsburg v. Bowman [Mo.] 77 S. W. 880.

39. Com. v. Jarecki Mfg. Co., 204 Pa. 36.

40. 27 Am. & Eng. Enc. Law (2d Ed.) 922. City of Phila. v. Phila. Traction Co., 206 Pa. 35. Capital stock of a corporation cannot be taxed in a foreign state notwithstanding its principal business is conducted in such other state. Only its tangible property situate in the state where such business is conducted is subject to taxation therein. Foster-Cherry Comm. Co. v. Caskey, 66 Kan. 600, 72 Pac. 268. Merchandise and materials belonging to a manufacturing company having its principal office in New York, but which materials are situate at the company's mills in another state, are not taxable in New York. People v. Barker, 84 App. Div. [N. Y.] 469.

Property in several tax districts: The entire personal property of a corporation engaged in the grocery business, and owning stocks of goods in various counties, should be assessed at the place of its residence and principal place of business. Langdon-Creasy

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terests are diverse.[41] The organization tax payable to the state, which is imposed but once, and is exacted for the privilege of becoming a corporation, is frequently met with,[42] and there is generally a tax upon the real estate owned by the corporation within the state, which is assessed the same as if it were owned by an individual.[43] The personal property of the corporation is usually not directly taxed,[44] but its capital stock and surplus, after deducting the assessed value of its real estate, and sundry other deductions, is taxable,[45] and usually at its actual value.[46] The franchise, land, and chattels of a public service corporation constitute one individual thing for the purpose of taxation.[47] The easement in the land on which a turnpike is constructed, and the tangible property erected and maintained on the roadway, is "real property" for taxing purposes,[48] and the imposition

Co. v. Trustees of Owenton Common School Dist., 25 Ky. L. R. 823, 76 S. W. 381. A provision of the general tax law requiring a manufacturing corporation whose plant is situated in two or more counties to return its property in the county in which the greater part in value of its property is located, is directory to the taxpayer, and the latter's determination that the property should be returned in a certain county is final. Penick v. High Shoals Mfg. Co., 116 Ga. 819. Though the residence of a corporation is a question of fact for the jury, where the evidence is uncontradicted the court may direct a verdict. Nester v. Baraga Tp. [Mich.] 95 N. W. 722. A deposit of securities made by a foreign corporation with the state treasurer to enable it to transact business within the state is embraced within the Texas scheme of taxation. State v. Fidelity & Deposit Co. [Tex. Civ. App.] 80 S. W. 544. Texas statute providing for taxation of personal property of a moneyed corporation includes a guaranty and surety company. Id.

41. Where statutes conferring power on counties to tax railroads are not clear and explicit, the practical construction placed thereon by the county officers in taxing their real and personal property and the companies in paying the taxes will be adopted. Atlantic & D. R. Co. v. Lyons [Va.] 42 S. E. 932. As to practical construction. Cole v. Auditor General [Mich.] 93 N. W. 890.

42. The organization tax is in the nature of a license fee for the right to become a corporation. People v. Knight, 174 N. Y. 475, 67 N. E. 65.

43. Ankeny v. Blakley [Or.] 74 Pac. 485.

44. State v. Shryack [Mo.] 78 S. W. 808; People v. Knight, 174 N. Y. 475, 67 N. E. 65; People v. Lane, 41 Misc. [N. Y.] 1.

45. Where all the property of a railroad lies in one tax district the assessors cannot assess as "capital and surplus" the difference between its rental value and its real estate. People v. Feitner, 75 App. Div. [N. Y.] 527. A railroad company having no assets but its real property, which is leased to another road, is not taxable on capital or surplus. People v. Feitner, 174 N. Y. 532, 66 N. E. 1114. When manufacturing is done under letters patent purchased by stock issued therefor they may be considered as a part of the capital invested in manufacturing carried on in the state. American Mutoscope Co. v. State Board of Assessors [N. J. Law] 56 Atl. 369. By the term "capital" in a statutory provision that so much of the capital of any insurance company as might be invested in real estate upon which it was assessed and paid taxes, was to be deducted from the market value of its stock in its returns to the assessors, was intended the surplus of the company's assets over its liabilities, being the fund to which the shareholder would look for his final dividend were the company to be wound up. Appeal of Barrett, 75 Conn. 280. "Capital stock" does not mean share stock but means the actual money or property paid in and possessed by the corporation. People v. Feitner, 92 App. Div. [N. Y.] 518.

46. People v. Feitner, 39 Misc. [N. Y.] 467; People v. Knight, 174 N. Y. 475, 67 N. E. 65. The actual, not the par value of the capital stock of a corporation is the basis for computing a franchise tax. People v. Knight, 178 N. Y. 255, 65 N. E. 1102. Shares of stock of every bank in Illinois as well as the real estate must be assessed at the full fair cash value, and the assessed value of the real estate is not to be deducted from the value of the stock. Ill. Nat. Bank v. Kinsella, 201 Ill. 31, 66 N. E. 338. The tax on the shares of stock of a bank is not a tax on its capital. German-American Sav. Bank v. Council of Burlington, 118 Iowa, 84, 91 N. W. 829.

47. Town of Washburn v. Washburn Waterworks Co. [Wis.] 98 N. W. 539; Aetna L. Ins. Co. v. Coulter, 25 Ky. L. R. 193, 74 S. W. 1050; Fidelity & Casualty Co. v. Coulter, 25 Ky. L. R. 200, 74 S. W. 1053. The franchise is personal property; and all things of a proprietary nature collected therewith, whether land or movables, partake of its character, and the value of that which is created by the combination of tangible and intangible things forms the legitimate basis for taxation. Town of Washburn v. Washburn Waterworks Co. [Wis.] 98 N. W. 539. In Iowa while a street railway franchise is not assessable, the portion of the system within a town is nevertheless to be assessed as a fractional part of an organized whole, with allowances for its state of repair, and is not to be resolved for assessment purposes into its component parts. City Council of Marion v. Cedar Rapids & M. C. R. Co., 120 Iowa, 259, 94 N. W. 501. The assessment of tangible property plus the value of the franchise as a "special franchise" by the state board of tax commissioners is violative of the New York constitution. People v. State Board of Tax Com'rs, 79 App. Div. [N. Y.] 183.

48. In re President, etc., of Albany & B. Turnpike Road, 87 N. Y. Supp. 1104.

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of a tax upon the various properties of railway companies, the superstructure and water stations alone excepted, applies as well to passenger railway and traction motor companies as to steam railroads.[49]

Shares of stock are personal property, belonging to the shareholder, and are taxable to him,[50] but in Georgia shares of stock owned by citizens of the state in railroad companies, domestic or foreign, which pay taxes on their property, are not taxable.[51]

The interest of a nonresident in certificates of stock of a New York corporation indorsed in blank by the party in whose name they stand is taxable.[52]

Gross receipts for business done,[53] or the gross amount of premiums received by an insurance company, often furnish the basis.[54] And specific taxes so assessed are sometimes levied in lieu of all other taxes.[55]

A franchise tax is frequently imposed on the privilege of doing business under corporate organization.[56] This is not a tax upon property, although it is meas-

49. City of Phila. v. Phila. Traction Co., 206 Pa. 35.

50. Com. v. Chesapeake & O. R. Co., 25 Ky. L. R. 1126, 77 S. W. 186. Shares owned by a nonresident. Corry v. Baltimore, 96 Md. 310. Shares in a building and loan association. Com. v. Fayette B. and L. Ass'n, 24 Ky. L. R. 1223, 71 S. W. 5. Shares in a joint stock association. In re Jones' Estate, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476. Shares of a domestic manufacturing corporation purchased by itself and held for its benefit by a trustee residing within the commonwealth, are not taxable to the corporation or the trustee, and the city in which the trustee resides is not entitled to be paid by the commonwealth any proportion of the corporate franchise tax collected from the corporation as corresponding to the amount of the stock so held. City of Worcester v. Board of Appeal, 184 Mass. 460, 69 N. E. 330.

51. Wright v. Louisville & N. R. Co. [C. C. A.] 117 Fed. 1007.

52. In re Newcomb's Estate, 172 N. Y. 608, 64 N. E. 1123.

53. Where the gross receipts are made the basis of taxation of an electric light company, it is immaterial that some of its receipts are derived from furnishing electric power for manufacturing purposes and from the sale of electric supplies. Com. v. Brush Elec. Light Co., 204 Pa. 249. Where the tax to be levied on a corporation is a certain percent of its gross annual receipts from all its business, the tax is not to be limited to such receipts as are derived from the exercise of municipal franchises alone. Paterson & P. G. & E. Co. v. State Board of Assessors [N. J. Law] 54 Atl. 246. The gross receipts required by the provisions of a revenue law to be returned by express, telegraph, and telephone companies refers to gross receipts for business done within the state, and does not include receipts for interstate business. State v. Fleming [Neb.] 97 N. W. 1063.

54. All premiums received are included whether first year or renewal premiums. People v. Miller, 88 App. Div. [N. Y.] 218. Premiums paid for re-insurance by a fire insurance company cannot be deducted from the gross receipts in ascertaining the amount of business done. People v. Miller, 177 N. Y. 515, 70 N. E. 10. Unearned premiums returned to the insured on the cancellation of a policy of insurance do not constitute any part of the gross receipts of the company, and need not be included in its return of gross receipts. State v. Fleming [Neb.] 97 N. W. 1063. Premiums unearned and paid in advance, but refunded on cancellation of policy are not included. People v. Miller, 117 N. Y. 515, 70 N. E. 10. Compare Detroit F. & M. Ins. Co. v. Hartz [Mich.] 94 N. W. 7. An act requiring foreign insurance companies not authorized to do business in the state but insuring property within it to pay a tax on premiums received does not apply to a company which made its contract and collected its premiums within the state of its domicile. Boston Manufacturers' M. F. Ins. Co. v. Hendricks, 41 Misc. [N. Y.] 479.

55. Supplies of food for the passengers and crews of a line of boats are not taxable, especially where the company is taxed a percentage of its gross income. Pere Marquette R. Co. v. Ludington [Mich.] 95 N. W. 417. Under a statute subjecting street railway companies to a charge on their gross earnings in lieu of other taxation and exempting from taxation property owned by it, property leased by it and actually and necessarily used by it in the operation of its business is exempt from general taxation. Merrill R. & L. Co. v. Merrill [Wis.] 96 N. W. 686.

56. S. W. Tel. & T. Co. v. San Antonio [Tex. Civ. App.] 73 S. W. 859; Heerwagen v. Crosstown St. R. Co., 90 App. Div. [N. Y.] 275; People v. State Board of Tax Com'rs, 174 N. Y. 417, 67 N. E. 69; State v. Franklin County S. B. & T. Co., 74 Vt. 246; People v. Knight, 174 N. Y. 475, 67 N. E. 65. A Federal franchise held by a telegraph company cannot be taxed by a state. Western Union Tel. Co. v. San Joaquin County, 141 Cal. 264, 74 Pac. 856. In assessing the franchise tax against a railroad company, the latter is not entitled to be credited with the average amount of its rolling stock employed during the year outside of New York, but only such amount as was exclusively used outside the state during that time. People v. Miller, 89 App. Div. [N. Y.] 126. The exclusive privilege of conducting a market place is a franchise and taxable. Maestri v. Board of Assessors, 110 La. 517; Third Dist. Market Co. v. Board of Assessors, 119 La. 532. The franchise of corporate existence, when taxable at all, must be assessed to the corporation and not to the stockholders. Bank of Cal. v. City & County of San

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ured by the value of property,[57] and the amount thereof is to be determined upon such basis as the legislature may adopt.[58]

Foreign corporations.—While the franchise of a foreign corporation to be a corporation is not taxable in another state,[59] the right to do business in such other state is property, and is therefore a proper subject for taxation.[60] In New York, foreign corporations doing business within the state are taxed on the amount of capital employed; and the exercise of the right is dependent on the existence of two concurrent conditions, that the corporation shall be doing business within the state,[61] and that its capital, or some portion thereof, shall be employed within the state.[62]

Francisco [Cal.] 75 Pac. 832. The Kentucky statute imposing a franchise tax on public service corporations does not apply to a private trading company not having or exercising any special or exclusive privilege. Aetna L. Ins. Co. v. Coulter [Ky.] 74 S. W. 1050. But a corporation, in name an insurance company, but which does a guaranty or security business is liable to a franchise tax. Fidelity & Casualty Co. v. Coulter, 25 Ky. L. R. 200, 74 S. W. 1053. A traffic arrangement by which one railroad obtains the right to use the tracks of another for a certain period of time at a certain rental, in order to obtain ingress to a terminal city, is a "lease" within the meaning of a statute, rendering the company liable to a franchise tax. Jefferson County v. Board of Valuation & Assessment [Ky.] 78 S. W. 443. The tax imposed under a statute providing that all corporations incorporated under the laws of such state shall make an annual return to the state board of assessors, stating the amount of their capital stock issued and outstanding, and shall pay an annual license fee or franchise tax graduated according to the amount of stock outstanding is not a property tax. Rhode Island Hospital Trust Co. v. Tax Assessors [R. I.] 55 Atl. 877.

57. A statute providing that the real estate of an insurance company shall be deducted from its net assets above liabilities, the remainder to be the amount of personalty for which it shall be assessed, imposes a property tax and not a franchise tax. Detroit F. & M. Ins. Co. v. Hartz [Mich.] 94 N. W. 7. But the tax required by the Ohio statute to be paid by foreign insurance companies doing business in the state, based on their premium receipts therein, is a franchise tax as distinguished from a property tax. Western Assur. Co. v. Halliday, 127 Fed. 830. Tax held to be on franchise and not on property so that a trust company which had been in business but six days at the time the tax was assessed was liable for the full tax and not merely the proportionate part thereof. People v. Miller, 85 App. Div. [N. Y.] 211. See, also, People v. Miller, 88 App. Div. [N. Y.] 218, where the tax was held to be a franchise tax and imposed on the premiums received for a full year although the act did not go into effect until October.

58. State v. Franklin County S. B. & T. Co., 74 Vt. 246. A finding that certain sums of money of a street railway company held in different banks was capital on which a franchise tax should be computed was sustained. People v. Miller, 85 App. Div. [N. Y.] 178. Under the Kentucky statute providing that in the determination of the amount of a corporation's intangible property for a franchise taxation the value of all tangible property otherwise taxable shall be deducted from the value of the corporation's capital stock, ascertained by including every element contributing to value, the tangible taxable property to be deducted is not limited to such as is situated within the state. Coulter v. Weir [C. C. A.] 127 Fed. 897. In New York, the franchise tax is computed upon the basis of the amount of capital stock employed within the state. People v. Knight, 174 N. Y. 475, 67 N. E. 65; People v. Miller, 90 App. Div. [N. Y.] 588. The value of the rolling stock of a domestic railroad corporation, except that used exclusively outside of the state, is capital employed within the state. People v. Knight, 173 N. Y. 255, 65 N. E. 1102. But anticipated dividends on such stock, the amount of bills receivable for expenditures on leased lines, and the value of coal and supplies owned by the corporation without the state, constitute no part of its capital employed therein. Id. Where a trust company does not commence business until six days before the expiration of the tax year, it should be taxed according to the period during which the company exercised its corporate functions. People v. Miller, 177 N. Y. 51, 69 N. E. 124. A corporation which has been in existence for but five and a half months of the year for which it is assessed should not be required to pay franchise taxes for the full year but only for 11-24 of that time. People v. Miller, 90 App. Div. [N. Y.] 588.

59. London & San Francisco Bank v. Block, 117 Fed. 900.

60. N. W. M. L. Ins. Co. v. Lewis & C. County, 28 Mont. 484, 72 Pac. 982. Capital invested by a nonresident of the state in a seat in the New York stock exchange is property taxable in the state. In re Glendinning's Estate, 171 N. Y. 684, 64 N. E. 1121. It is proper for a superintendent of insurance to require the payment of a tax, based on the amount of premiums received on business done by a foreign insurance company, as a condition precedent to the right of the company to transact business within the state. McNall v. Metropolitan L. Ins. Co., 65 Kan. 694, 70 Pac. 604.

61. The maintenance by a foreign corporation in New York of an office solely for the purpose of enabling the directors to meet and declare dividends does not constitute "doing business" (People v. Feitner, 77 App. Div. [N. Y.] 189), nor does the having an office where an agent takes orders, to be approved by the home office, for goods to be manufactured and paid for at the home office, the corporation having no bank ac-

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Credits of a foreign corporation, payable at its home office in the state where it has its domicile, are not subject to taxation in the state in which it does business,[63] and a foreign manufacturing corporation whose officer is in possession of its real property should not be taxed as a resident.[64]

Banks.—By the Federal statute the legislature of each state may determine and direct the manner and place of taxing the shares of national banking associations located within its borders, subject to two restrictions only, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located and not elsewhere.[65] It is not difference in method of assessment which is prohibited by the national banking act, but discrimination against the holders of stock in such national banks,[66] and any system adopted for the assessment of taxes, therefore, which exacts from the owner of shares in a national bank a greater tax, in proportion to their actual value, than it does from the owner of other moneyed capital similarly invested, results in the taxation of such shares at a rate in excess of that placed on other moneyed capital, and falls within the inhibition of the law.[67] In assessing national banks real estate should be assessed to the bank,[68] while shares must be assessed not to the bank but to the shareholders.[69] But when the assessment of the shares is thus made in the names of the shareholders it is legal to make the bank pay the tax and recover it from the shareholder.[70] The national statute does not require the state to conform its system of taxation with respect to local banking corporations to that applied to national bank shares.[71]

A mere savings association is not assessable as a bank.[72]

count in the state (People v. Wells, 42 Misc. [N. Y.] 86); but nonresidents constantly maintaining a place for the sale of imported pictures, the stock being regularly replenished from abroad, are engaged in business (People v. Wells, 41 Misc. [N. Y.] 144), and designating a certain building as the principal place of business, and maintaining therein an office, sales and storage rooms, indicates an intention to do business (People v. Com'rs of Taxes & Assessments, 39 Misc. [N. Y.] 282).

62. People v. Miller, 90 App. Div. [N. Y.] 560. Money invested in securities, in their nature entirely distinct from any business transacted by the corporation, cannot be said to be capital employed within the state. People v. Morgan, 86 App. Div. [N. Y.] 577.

63. In re Union Tank Line Co. of New Jersey, 204 Ill. 347, 68 N. E. 504.

64. N. Y. Milk Products Co. v. Damon, 172 N. Y. 661, 65 N. E. 1119.

65. U. S. Comp. St. 1901, § 5219. Ankeny v. Blakley [Or.] 74 Pac. 485; Ill. Nat. Bank v. Kinsella, 201 Ill. 31, 66 N. E. 338. The expression "moneyed capital in the hands of individual citizens" signifies capital employed in the operations of banking, and otherwise used as money as a source of profit. Ill. Nat. Bank v. Kinsella, 201 Ill. 31, 66 N. E. 338; Ankeny v. Blakley [Or.] 74 Pac. 485. In Kentucky, national bank stock cannot be listed for taxation in fourth-class cities. Citizens' Nat. Bank v. Com. [Ky.] 80 S. W. 479. Kentucky statutes authorizing taxation by the county of shares of national bank stock is not violative of the National Bank Act, since this is authority delegated by the state which has power to tax. Com. v. Citizens' Nat. Bank [Ky.] 80 S. W. 158. Kentucky statutes 1900 gave no new right to tax shares of national bank stock. Id.

66. Nat. State Bank v. Burlington, 119 Iowa, 696, 94 N. W. 234. The fact that in one instance shareholders pay the taxes directly while in another it is paid through the bank does not amount to a discrimination. Ankeny v. Blakley [Or.] 74 Pac. 485.

67. Ankeny v. Blakley [Or.] 74 Pac. 485. The term "rate" as here employed has relation to the assessment as a whole and was not intended to signify the mere percentage of levy upon any valuation that the authorities might see fit to adopt. Id.

68. Ankeny v. Blakley [Or.] 74 Pac. 485.

69. First Nat. Bank v. Lampasas [Tex. Civ. App.] 78 S. W. 42; Ankeny v. Blakley [Or.] 74 Pac. 485. Stockholders of national banks are required to take notice of the law of a state providing for the assessment and taxation of their shares. Nev. Nat. Bank v. Dodge [C. C. A.] 119 Fed. 57.

70. State v. Shryack [Mo.] 78 S. W. 808; State v. Fleming [Neb.] 97 N. W. 1063.

71. Nev. Nat. Bank v. Dodge, 119 Fed. 57. Under the Missouri act of 1895 real estate of banking corporations, national or state, is to be assessed to the corporation, personal property not at all, and the shares of stock in the names of the shareholders [Laws 1895, p. 242]. State v. Shryack [Mo.] 78 S. W. 808; State v. First Nat. Bank [Mo.] 79 S. W. 943.

72. A savings associaton, which deals only with its members and which issues stock to its members, which stock with the earnings or profits thereon is payable to the stockholders on demand, is not a bank, and

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(§ 2) *D. Public property.*—Public property, Federal and state, and the various instrumentalities of government are not subject to taxation.[73] Lands held by a homestead entryman before final receipt are exempt.[74] But when the beneficial title to public lands has passed from the government they are no longer exempt.[75] The rule that public property is not subject to taxation extends to municipalities. Thus, a waterworks plant, owned and operated by a city,[76] and realty, owned by a city in an adjoining township, are not taxable.[77] United States,[78] but not generally municipal, bonds and funds are exempt.[79] Municipal bonds deposited with the state superintendent of insurance by a foreign insurance company for the protection of policy holders are taxable.[80]

the withdrawal value of the stock of the association held by its stockholders is a debt of the association which it is entitled to deduct from the amount of credits in listing the same for taxation. Board of County Com'rs of Arapahoe County v. Fidelity Sav. Ass'n, 31 Colo. 47, 71 Pac. 376.

73. A state cannot impose an income tax on the salary of a Federal judge. Purnell v. Page, 133 N. C. 125. Where property belonging to the Federal government was conveyed to petitioner for the purpose of constructing a dry dock thereon, subject to its use by the government without charge, the grantee was not entitled to an exemption from state taxation on the ground that it was an agency of the government. Baltimore S. & D. D. Co. v. Baltimore, 97 Md. 97. A state tax on the stock of goods of a licensed Indian trader located on the reservation is not a tax on an agency of the general government. Noble v. Amoretti [Wyo.] 71 Pac. 879. Federal franchises held by a telegraph company cannot be taxed by a state. Averments of complaint insufficient to bring the case within the rule. Western Union Tel. Co. v. San Joaquin County, 141 Cal. 264, 74 Pac. 856.

74. Board of Com'rs of Natrona County v. Shaffner [Wyo.] 74 Pac. 88. The fact that property held in trust by a city for school purposes cannot be sold for the purpose of collecting a special assessment against it does not defeat the assessment, since the law provides other methods by which the payment may be enforced. City of Chicago v. Chicago, 207 Ill. 37, 69 N. E. 580. A grant of land confirmed as imperfect by the court of private land claims cannot be assessed for territorial taxation until the survey of the lands has been approved by the court. Ter. v. Delinquent Tax List [N. M.] 76 Pac. 316.

75. A state may not tax lands allotted to Indians under a Federal act requiring the United States to hold such lands in trust for the allottees for 25 years. U. S. v. Rickert, 188 U. S. 432, 47 Law. Ed. 532. Deeds issued in pursuance of an assessment and sale of public lands in the hands of an entryman at a time when the land was not taxable convey no title. Campbell v. Spears, 120 Iowa, 670, 94 N. W. 1126. Lands erroneously located under a patent do not pass and are not taxable by the officers of a state. Slattery v. Heilperin, 110 La. 86. Lands embraced in a perfect Spanish-Mexican land grant are subject to taxation, notwithstanding the facts that the grant has been submitted for confirmation by the court of private land claims and patent has not been issued. Ter. v. Delinquent Tax List [N. M.] 73 Pac. 621. Lands granted to a railroad company in aid of its construction are taxable, notwithstanding the naked legal title remains in the government and that the company has but an equitable title. Chicago, M. & St. P. R. Co. v. Hemenway, 117 Iowa, 598, 91 N. W. 910. Land and buildings thereon, the property of a commonwealth, are not taxable, notwithstanding that the commonwealth has contracted to sell it. Corcoran v. Boston [Mass.] 70 N. E. 197. Lands, the title of which is vested in the chancellor of the state in trust for the benefit of A. during her life, and after her death for the benefit of persons who cannot be ascertained until she dies, are not exempt from taxation as being the property of the state. Chancellor of State v. Elizabeth, 66 N. J. Law, 687, 688.

76. The fact that water is furnished by the city to citizens and other consumers at fixed rates is not material. Board of Com'rs of Sumner County v. Wellington, 66 Kan 590, 72 Pac. 216; Styles v. Newport [Vt.] 56 Atl. 662. If owned, however, by a private company a tax may be imposed. Owensboro Waterworks Co. v. Owensboro, 24 Ky. L. R. 2530, 74 S. W. 685. Rehearing denied. Owensboro Waterworks Co. v. Owensboro, 25 Ky. L. R. 434, 75 S. W. 268; Godfrey v. Bennington Water Co., 75 Vt. 350.

77. Reading v. Berks County, 22 Pa. Super. Ct. 373. A city cannot adjudicate property to itself, take no further steps to realize its taxes, and thus defeat the right of the state to exact her revenues for subsequent years. State v. New Orleans, 110 La. 405. Where at the time land was assessed the title had not passed to the city, the owner was personally liable. Buckhout v. New York, 82 App. Div. [N. Y.] 218; Prytania St. Market Co. v. New Orleans, 110 La. 835.

78. Where it appears that United States bonds were purchased as an investment, and not for the purpose of evading taxation, a tax upon the money invested therein is illegal. Columbia Sav. Bank v. Los Angeles County, 137 Cal. 467, 70 Pac. 308.

79. Pension money paid to the guardian of an insane pensioner, and by him loaned, is in process of transmission to the pensioner and still under the control of the Federal government, and therefore exempt. Manning v. Spry, 121 Iowa, 191, 96 N. W. 873. Checks or orders drawn upon the treasurer of the United States, payable on demand, as a mode of paying an obligation of the United States are not exempt from taxation. Hibernia S. & L. Soc. v. City & County of San Francisco, 139 Cal. 205, 72 Pac. 920. If on the day of listing taxes, an officer of the Federal government has on hand cash derived from his salary received from the gov-

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(§ 2) *E. Realty.*—Taxes on land include buildings, structures and improvements affixed to the land.[81] Where a leasehold and fee are covered by the same building it is proper to tax it as one piece of property.[82] A statute the purpose of which is to tax the ownership of land cannot be extended to one who has a mere chattel interest,[83] though a mortgagee's interest in some states is taxed as an estate in land.[84] A homestead is only liable for taxes assessed against it, and cannot be made liable for tax charges that may be due by the owner thereof on other property owned by him.[85]

(§ 2) *F. Personally.*—A state has the undoubted power to tax personal property, including credits, debts and securities,[86] and may require the party in possession of the property to pay the taxes thereon.[87] The personal property must have its situs within the taxing district, however, and whether or not it is so situated is sometimes an interesting question.[88] A legacy in lieu of dower of a sum sufficient to produce a certain sum when invested in government bonds is not an annuity nor taxable as such.[89]

§ 3. *Exemption from taxation.*—The legislature has power to exempt property from taxation,[90] even retrospectively,[91] but exemption is a favor,[92] and one

during the term or which grants merely the right or privilege to mine for a term of years upon described land, conveys an interest generally not taxable separately from the freehold. Appeal of Sanford, 75 Conn. 590.

84. Adams v. Colonial & U. S. Mortg. Co. [Miss.] 34 So. 482. See, also, Fulton v. Aldrich [Vt.] 57 Atl. 108.

85. City of Marlin v. Green [Tex. Civ. App.] 78 S. W. 704.

86. 27 Am. & Eng. Enc. Law (2d Ed.) p. 637. Credits created by land contract are taxable though secured by a lien on real estate. City of Marquette v. Mich. I. & L. Co. [Mich.] 92 N. W. 934; Clark v. Horn [Iowa] 98 N. W. 148. A policy of insurance issued by a fraternal benefit society is, after the death of the insured, and before proofs thereof are made to the society, a credit subject to taxation. Cooper v. Board of Review of Montgomery County, 207 Ill. 472. ernment, the same is "cash on hand" and taxable ad valorem. Purnell v. Page, 133 N. C. 125.

90. Western Assur. Co. v. Halliday [C. C. A.] 126 Fed. 257. A general law in terms directing that all property, including "credits," be taxed does not include debts due by the state or its municipalities. State v. Board of Assessors [La.] 36 So. 91.

91. Ponderous boilers, dynamos and cranes for moving objects in a building, held to be a part of the realty. Detroit United R. v. Board of State Tax Com'rs [Mich.] 98 N. W. 997. Alfalfa being a perennial plant which produces annual crops of hay or pasturage for an indefinite number of years is part of the realty and taxable as such. Miller v. Kern County, 137 Cal. 516, 70 Pac. 549.

82. Williamson v. Lewis, 2 Ohio N. P. [N. S.) 1. Upon the sale of a leasehold for a sum insufficient to pay the taxes charged upon it, the balance remaining unpaid becomes a charge against the fee. Id.

83. Right to go upon the land to derive some profit therefrom. Ashe Carson Co. v. State, 138 Ala. 108. An instrument which purports to convey certain land at a fixed rent for a term of years, for the purpose of mining, or with the privilege of mining

69 N. E. 878. A deposit in a bank to the credit of the depositor and subject to his check is a debt and not property, and its situs for the purpose of taxation is in the state of the depositor's domicile. Pyle v. Brenneman, 122 Fed. 787. In Vermont, it makes no difference for the purposes of taxation whether deposits, as used in the statutes of that state, are commercial or of the general class on interest [V. S. 583, 584]. State v. Franklin County S. B. & T. Co., 74 Vt. 246. The phrase "money at interest" includes all forms of interest bearing securities, whether represented by bonds, notes, or otherwise, unless the contrary appears from the assessment itself. Sweetsir v. Chandler, 98 Me. 145.

87. Carstairs v. Cochran, 193 U. S. 10; Pioneer Fuel Co. v. Molloy, 131 Mich. 465, 91 N. W. 750; State v. Fleming [Neb.] 97 N. W. 1063; German Trust Co. v. Board of Equalization, 121 Iowa, 325, 96 N. W. 878.

88. Where it appears that goods are shipped in original packages to an agent to be by him assorted and delivered to customers, the major portion of whom are jobbers beyond the limits of the state, this form of dealing constitutes the goods a common mass within the state, and they are not exempt because sold in original packages. American S. & W. Co. v. Speed, 110 Tenn. 524, 75 S. W. 1037. In Kansas, tax sale certificates issued by a county treasurer of the state on sales of land for delinquent taxes, owned by a nonresident of the state, are not subject to taxation within the state. Mecartney v. Caskey, 66 Kan. 412, 71 Pac. 832. A finished manufactured product belonging to a nonresident, which had been entirely completed in the fall of one year and as to which nothing further remained to be done except to be sold when the opportunity offered, and which is stored, because not sold, until the following April, is not employed in the mechanic arts on the first day of that April for the purpose of taxation. Inhabitants of New Limerick v. Watson, 98 Me. 379.

89. Chisholm v. Shields, 67 Ohio St. 374, 66 N. E. 93.

90. Stock of and securities held by build-

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who claims exemption has the burden of showing[92] not alone its having existed, but also its continuation,[94] and that all conditions on which the exemption was based have been fulfilled.[95] The intention to exempt from taxation is never presumed, but must affirmatively appear in clear and explicit terms,[96] and laws therefore which exempt property from taxation are strictly construed against the exemption, and no property is exempt unless clearly within the exempted class;[97] but it has been held that where a statute, in terms exempting property from general taxation, is only a part of a general statutory scheme, substituting a license or other impost in lieu of general taxation, the rule of strict construction has no application,[98] and an exemption has been held to extend to property acquired prior to the passage of the act granting it.[99]

When the selection of subjects of taxation has been made and the general rule determined upon, it is customary for the legislature for reasons of general policy to make certain exemptions of either persons or property.[1] In accordance with this policy, it is the universal practice to exempt property devoted to religious,[2] charita-

ing associations. Nat. L. & Inv. Co. v. Detroit [Mich.] 99 N. W. 380, citing other cases.

91. Laws 1902, p. 461, c. 172, held to exempt property of trust companies from local taxation. This law re-enacted c. 132 of Laws 1901, which had been inadvertently repealed by c. 535, Laws 1901. In re Rochester T. & S. D. Co., 42 Misc. [N. Y.] 581.

92. Hardin v. Morgan [N. J. Law] 57 Atl. 155. A state does not infringe the rights of an individual under the Fourteenth Amendment by exempting a corporation from a tax either wholly or partially, whether such exemption results from the plain language of a statute or from the conduct of a state official under it. Mo. v. Dockery, 191 U. S. 165.

93. In re Dille, 119 Iowa, 575, 93 N. W. 571; Kan. City Exposition Driving Park v. Kan. City, 174 Mo. 425, 74 S. W. 979.

94. Yazoo & M. V. R. Co. v. Adams, 81 Miss. 90. A statutory provision that certain named associations shall be exempt applies only to such as are going concerns; the assets of an insolvent association in the hands of a receiver are taxable. Board of Com'rs of Marion County v. Marion Trust Co., 30 Ind. App. 137, 65 N. E. 589; City of Los Angeles v. Los Angeles City Water Co., 137 Cal. 699, 70 Pac. 770.

95. Yazoo & M. V. R. Co. v. Adams, 81 Miss. 90. The owner of property subject to taxation under the general terms of a statute, but which is exempt only because on some express enactment is not entitled to exemption unless he complies with a provision of such express enactment requiring a statement or list of the claimed exemptions to be furnished to the assessors. Flower Hill Cemetery Co. v. North Bergen Tp., 68 N. J. Law, 488.

96. Swarts v. Hammer [C. C. A.] 120 Fed. 256; In re Walker, 200 Ill. 566, 66 N. E. 144; State v. Amoskeag Sav. Bank, 71 N. H. 535.

97. State Council, C. K. of I., v. Board of Review, 198 Ill. 441, 64 N. E. 1104; Kan. City Exposition Driving Park v. Kan. City, 174 Mo. 425, 74 S. W. 979; City of Chicago v. Chicago, 207 Ill. 37, 69 N. E. 580. Tax exemptions are not favored and must be given the most rigid admissible construction. Cooper Hospital v. Camden [N. J. Law] 57 Atl. 260. Ambiguities in tax exemption laws operate against owners and in favor of the public. In re Walker, 200 Ill. 566, 66 N. E. 144. Railroad bonds are not included in an exemption extending to all loans secured by mortgage upon real estate, though such bonds were secured by mortgage on the real estate and other property of the roads. State v. Amoskeag Sav. Bank, 71 N. H. 535. Weather boarding, ceiling, flooring, and other like lumber products, needing to be further manipulated, are not articles of wood within the meaning of the Louisiana exemption statute. Globe Lumber Co. v. Clement, 110 La. 438. A statute exempting property, on the payment of one-third of an assessment, from any further levy or collection of the expense of an improvement, does not prevent the property from assessment for any deficiency in the general tax. People v. Feitner, 172 N. Y. 618, 64 N. E. 1124.

98. Ownership of property construed to embrace leased property. Merrill R. & L. Co. v. Merrill [Wis.] 96 N. W. 686. While a market franchise is not exempt from taxation, the market property is. Rocheblave Market Co. v. New Orleans, 110 La. 529. Personal property of railroad company held exempt by reason of payment of specific tax. Pere Marquette R. Co. v. Ludington [Mich.] 95 N. W. 417.

99. In re Assessment of Property of N. W. University, 206 Ill. 64, 69 N. E. 75.

1. Exemptions from taxation of property, real or personal, that are based, not upon any characteristic possessed by such property or upon the uses to which it is put, but upon the personal status of its owners, are void. Tippett v. McGrath [N. J. Law] 56 Atl. 134.

2. A corporation established purely for education in literature, arts and the sciences is not a religious corporation, even though it be given into the care of a religious body which appoints its trustees. State v. Westminster College Trustees, 175 Mo. 52, 74 S. W. 990. A Young Men's Christian Association is an institution entitled to exemption. Com. v. Young Men's Christian Ass'n, 25 Ky. L. R. 940, 76 S. W. 522. So also a corporation whose purpose is to establish free churches and provide clergymen for seamen though its charter permit it to keep a seaman's boarding house. In re Prall's Estate, 78 App. Div. [N. Y.] 301. Where, at the date of the annual assessment, property is exempt as

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ble,[3] and educational uses,[4] the institutions not being conducted for private gain.[5] The use, however, must be direct and immediate,[6] and except in the case of endowments of educational institutions,[7] the fact that the income derived from property not itself devoted to the exempted use is so devoted will not avail.[8]

being used for religious purposes, but shortly thereafter passes to a purchaser under whom it would be taxable, such property cannot enter into the taxable basis for the then ensuing fiscal year. City of Baltimore v. Jenkins, 96 Md. 192. In Kentucky, a portion of a lot, on which a church is built, which is practically unoccupied, but is appurtenant to the church and used with it by the congregation, is exempt. City of Louisville v. Werne [Ky.] 80 S. W. 224. Land on which a church stands, leased for that purpose only but without rent is exempt. Id. Land gratuitously leased for church purposes, but on which no church had been erected at the time of the assessment, is exempt. Id.

3. People v. Reilly, 85 App. Div. [N. Y.] 71. When an incorporated society claims exemption as a "charitable institution," it must appear that the purposes and objects to which it is bound to devote its property are charitable within the doctrine of charitable uses. Property devoted to educational purposes is within this doctrine. In re Landis' Estate [N. J. Prerog.] 56 Atl. 1039. A fraternal benefit society deriving its benefit fund from assessment of members is not a charitable institution, such as entitles it to exemption from taxation under a provision exempting property of institutions of public charity. State Council, C. K. of L. v. Board of Review, 198 Ill. 441, 64 N. E. 1104. Land devoted to the purposes stated without the payment of rent is exempt regardless of its ownership. Bancroft v. Magill [N. J. Law] 55 Atl. 103. A tent is not a building within the meaning of a statute exempting from taxation buildings used exclusively for charitable purposes with the land whereon the same are situate; nor is a frame tenement, used only for kitchen and laundry purposes in connection with the tent or camp, and under the same circumstances. Children's Seashore House v. Atlantic City, 68 N. J. Law, 385, 59 L. R. A. 947.

4. A corporation whose principal business is horse racing is not a horticultural or agricultural society within the meaning of exemption laws. Kan. City Exposition Driving Park v. Kan. City, 174 Mo. 425, 74 S. W. 979. A gift to a school district to be devoted to the education of the poor and indigent children thereof, any surplus thereof to go to the district for educational purposes, is exempt. Com. v. Pollitt, 25 Ky. L. R. 790, 76 S. W. 412. Buildings used as a college may be exempt even if in the operation of the institution income is derived from tuition fees. Linton v. Lucy Cobb Institute, 117 Ga. 678. Property of New York University held exempt from taxation under its amended charter, which was held not to be repealed by subsequent general legislation. People v. Wells, 87 N. Y. Supp. 1107. A gymnastic association where a teacher in physical culture is employed in an educational institution and exempt from taxation. German Gymnastic Ass'n v. Louisville [Ky.] 80 S. W. 201.

5. A judgment exempting property because devoted to educational purposes is not res adjudicata on the question as to subsequent years in the hands of a grantee using the property for like purposes, but for individual pecuniary profit. In re Dille, 119 Iowa, 575, 93 N. W. 571.

6. State v. Board of Equalization [S. D.] 92 N. W. 16. Where buildings together with the land on which they are situate are exempt, the exemption is confined to buildings in which the work is actually conducted, and as to the land upon which the building stands only so far as necessary for the fair enjoyment of the building. Cooper Hospital v. Camden, 68 N. J. Law, 691. The keeping of a dormitory and boarding house for students of an Institute of Technology by a literary or scientific corporation, other than the institute itself, is not an educational purpose,—and that some literary or scientific work is done in the building does not avail, if the dominant use is for a dormitory or boarding house. Phi-beta Epsilon Corp. v. Boston, 182 Mass. 457, 65 N. E. 824.

Funds of a cemetery company are not within an exemption of places of burial not held for private or corporate profit. Com. v. Lexington Cemetery Co., 24 Ky. L. R. 924, 70 S. W. 280. Whether property is exempt depends upon the immediate result of the occupation and not on the consequential benefits derived from its use. Real estate of an academy, contiguous with the school site and occupied by the residences of teachers and as playgrounds for the pupils, is exempt. Emerson v. Trustees of Milton Academy [Mass.] 70 N. E. 442.

7. Colo. Seminary v. Arapahoe County Com'rs, 30 Colo. 507, 71 Pac. 410; Rice County v. Bishop Seabury Mission [Minn.] 95 N. W. 882. Real estate as endowment. State v. Board of Trustees of Westminster College, 175 Mo. 52, 74 S. W. 990. Trust funds bequeathed for investment. Com. v. Gray's Trustee, 25 Ky. L. R. 52, 74 S. W. 702.

8. Mere ownership of land by a charitable institution does not exempt the land; the exemption depends upon the actual devotion of the land to the work of charity. Cooper Hospital v. Camden, 68 N. J. Law, 691. Real estate not used for hospital buildings and remote from the lands on which they are erected is not exempt, even though the income from the rental thereof is devoted to the support of the hospital. Cooper Hospital v. Camden [N. J. Law] 57 Atl. 260; State v. Board of Equalization [S. D.] 92 N. W. 16. See, also, Female Orphan Soc. v. Board of Assessors, 109 La. 537. But land of a religious society held avowedly for the purpose of erecting a new church not yet in the course of construction (City of Pittsburg v. Third Presbyterian Church, 20 Pa. Super. Ct. 362); likewise premises separated by a public alley from a lot occupied by a church building and rectory, upon which is a building, the lower floor of which is used for Sunday school, for meetings which cannot be held in the church auditorium and for meetings of suborganizations of the church, and the upper floor for janitor's rooms, are not

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An exemption based on the personal status of the owner rather than upon a use to which the property is put is void.[9]

States often grant exemptions as an inducement to the location of manufacturing establishments[10] or the building of railroads within their boundaries.[11] Such an exemption is available to a vendee,[12] and is not forfeited by a sale of the railroad, nor by failure of the company to complete its road within the time required,[13] but may be withdrawn by the legislature at any time, unless it has become the subject of a contract.[14]

Although property may be exempt from taxation generally, it is not necessarily exempt from special assessment,[15] even under a constitutional provision exempting it from taxation of every kind.[16]

§ 4. *Place of taxation.*—Proceedings for the assessment and collection of taxes are primarily in rem and are to be had where the property to be taxed is actually located.[17] As to the situs of realty, there can be no doubt, and it can scarcely present any difficulty;[18] but the situs of personalty for purposes of taxa-

exempt (In re Walker, 200 Ill. 566, 66 N. E. 144). Where the only use of a certain tract of land belonging to a religious corporation was to take lumber therefrom, as occasion required, for improving other portions of the corporation's grounds, such tract was not solely used for charitable and religious purposes, so as to be exempt from taxation. People v. Reilly, 85 App. Div. [N. Y.] 71.

9. A legislative enactment that the real and personal property of all persons enrolled as active members of any fire company shall be exempt from taxation to the amount of $500 are in conflict with a constitutional provision that property shall be assessed for taxes under general laws and by uniform rules (according to its true value) and void. Tippett v McGrath [N. J. Law] 56 Atl. 134.

10. Kentucky statute applied. Mengel Box Co. v. Louisville [Ky.] 79 S. W. 255. Furnishing electric light and power is not "manufacturing" within the meaning of a statute granting towns the privilege by vote to exempt for a period of years any manufacturing establishment proposed to be erected therein. Williams v. Park [N. H.] 56 Atl. 463. Assuming that certain work done at a sawmill is manufacturing, it does not give color to the capital represented by the lumber and land on which it is situated so as to exempt it as capital invested in manufacturing carried on within the state. Yellow Pine Co. v. State Board of Assessors [N. J. Law] 57 Atl. 393.

11. The power house of an electric street railway (City of Philadelphia v. Electric Traction Co. [Pa.] 57 Atl. 354), and horses used as motive power, are exempt from municipal taxation in Pennsylvania (People's Pass. R. Co. v. Taylor, 22 Pa. Super. Ct. 156). Railroad property rented to different parties for private uses is not exempt. Whitcomb v. Ramsey County [Minn.] 97 N. W. 879.

12. Louisville & N. R. Co. v. Christian County, 24 Ky. L. R. 894, 70 S. W. 180; Wis. & M. R. Co. v. Powers, 191 U. S. 379.

13. State v. Colo. Bridge Co. [Tex. Civ. App.] 75 S. W. 818.

14. Exemptions from taxation of the property of charitable institutions, not contained in the charters of the institutions, may be withdrawn at any time by legislative act or by constitutional provision. Female Orphan Soc. v. Board of Assessors, 109 La. 537. But where an exemption is part of the charter of an institution, subsequent constitutional or statutory provisions cannot limit or alter such exemptions. State v. Board of Trustees of Westminster College, 175 Mo. 52, 74 S. W. 990. Where, by the legislation of a state, a railroad company is exempted from state, county and municipal taxes for a term of years after it shall have completed its road, such grant creates a contract between the state and the company, which is impaired by the state within the inhibition of the Federal constitution by the taxing of the company by local authorities under general power conferred on them by statute. Bancroft v. Wicomico County Com'rs, 121 Fed. 874. The constitutional amendments of 1875 in New Jersey providing among other things that "property shall be assessed for taxes under general laws, and by uniform rules, according to its true value," had the effect of abrogating any special law for the assessment of taxes, and any special immunity from taxation, theretofore granted and not already accepted in such manner as to constitute a contract. Cooper Hospital v. Camden, 68 N. J. Law, 691. A provision in a general tax law that railroads thereafter building and operating a road north of a certain parallel shall be exempted from the tax for ten years, unless the gross earnings shall exceed a certain sum, is not addressed as a covenant to such railroads and does not constitute a contract with them, the obligations of which cannot be impaired consistently with the Federal constitution. Wis. & M. R. Co. v. Powers, 191 U. S. 379.

15. In re Opening of East 176th St., 85 App. Div. [N. Y.] 347; City of Chicago v. Chicago, 207 Ill. 37, 69 N. E. 580.

16. Kan. City Exposition Driving Park v. Kan. City, 174 Mo. 425, 74 S. W. 979.

17. School Dist. of Plattsburg v. Bowman [Mo.] 77 S. W. 880.

18. City of Winston v. Salem, 131 N. C. 404. The power to tax the lands under the tide water of New York Bay within the territorial limits of New Jersey is in that state. Cent. R. R. of N. J. v. Jersey City [N. J. Law] 56 Atl. 239. Where, however, things pertaining to realty are situate in more than one district, it is customary to provide that taxation shall be had in the district where the greater portion lies or is used. Water pow-

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tion from time immemorial has been a matter for the law-making power, which has undoubted power in the premises.[19] With a few exceptions, the rule is quite general that the situs of personal property for purposes of taxation is the domicile of the owner, and not the actual situs of the property itself,[20] but it is competent for the legislature to provide otherwise.[21] The property of a partnership is generally required to be taxed at the place where the partnership business is conducted,[22] and personal property in the hands of a trustee is taxable at the domicile of the trustee.[23] Moneys and credits are taxed where the owner lives,[24] even though

er. Town of East Granby v. Hartford Elec. Light Co. [Conn.] 56 Atl. 514. Turnpike. Vanceburg & S. L. Turnpike Road Co. v. Maysville & B. S. R. Co., 25 Ky. L. R. 1404, 77 S. W. 1118. Canals or water ditches for irrigating purposes, though required to be assessed at a rate per mile for that portion within the county, must be separately assessed. Kern Valley Water Co. v. Kern County, 137 Cal. 511, 70 Pac. 476.

19. City of Winston v. Salem, 131 N. C. 404; City of Baltimore v. Safe Deposit & Trust Co., 97 Md. 659; Botto's Ex'r v. Louisville [Ky.] 79 S. W. 241. When the statute is silent, the ordinary rules of law obtain. School Dist. of Plattsburg v. Bowman [Mo.] 77 S. W. 880.

20. Town of London v. Boyd, 25 Ky. L. R. 1337, 77 S. W. 931; Wren v. Boske, 24 Ky. L. R. 1780, 72 S. W. 279. Where starch has been manufactured in a town other than that in which the owner was an inhabitant and was stored in the town where manufactured until after the first day of April following, awaiting shipment by rail out of that town as the same should be sold, no sales being made or intended to be made in that town, and all of the sales and correspondence in relation to sales being made in the town where the owner lived and conducted his business, is not employed in trade for the purpose of taxation in the town where stored. Inhabitants of New Limerick v. Watson, 98 Me. 379. In a suit to collect back taxes on personalty, the owner of the property testified that she was a resident of Colorado and was only occasionally in Kentucky. No competent proof she ever resided in Kentucky. Held a judgment for taxes not supported by the evidence. McMakin v. Com. [Ky.] 80 S. W. 188. Connecticut statutes imposing a succession tax on "property within the jurisdiction of the state" which shall pass by will or inheritance applies to personal property situated in other states. Appeal of Gallup [Conn.] 57 Atl. 699. That personal property is taxed in the state of its creation is no objection to its taxation in another state where it has a situs. Securities of a foreign corporation deposited with the state treasurer. State v. Fidelity & Deposit Co. [Tex. Civ. App.] 80 S. W. 544. The legal fiction that personal property is governed by the law of the domicile of its owner does not extend to property in a foreign jurisdiction which by the exercise of its laws assumes control over it for the purpose of taxation. Id. In New York, nonresidents of the state doing business in the state are taxed on the capital invested in the business as personal property, the same as if they were residents [Laws 1896, c. 908, § 7]. People v. Wells, 42 Misc. [N. Y.] 423.

21. Western Assur. Co. v. Halliday [C. C A.] 126 Fed. 257; Carstairs v. Cochran, 193 U. S. 10; School Dist. of Plattsburg v. Bowman [Mo.] 77 S. W. 880. The home port of a vessel is its situs for taxation, though its owner resides in a different state. Com. v. Ayer & L. Tie Co., 25 Ky. L. R. 1068, 77 S. W. 686. Posts and poles kept for sale and awaiting shipment are assessable as merchant's goods at their location and not as timber at residence of owner. Valentine-Clark Co. v. Shawano County [Wis.] 97 N. W. 915. Statute requiring taxation of corporate stock at place where principal place of business was located and excepting its personal property from other assessment is within legislative power. Layman v. Iowa Tel. Co. [Iowa] 99 N. W. 205. The state may tax personal property within its jurisdiction irrespective of the domicile of its owner. Securities deposited with the state treasurer by a foreign corporation to enable it to do business. State v. Fidelity & Deposit Co. [Tex. Civ. App.] 80 S. W. 544. Municipal bonds and securities may acquire a situs for purposes of taxation other than the domicile of the owner. Id.

22. School Dist. of Plattsburg v. Bowman [Mo.] 77 S. W. 880; City of Winston v. Salem, 131 N. C. 404. The interest of members of a banking partnership is properly assessable to each member at the place where the business is conducted. State v. Lewis, 118 Wis. 432, 95 N. W. 388. On death of a property owner, his heirs formed a partnership for the management of the estate and by its articles located its principal place of business at a house in the country on one of the principal pieces of real estate belonging to the estate. It held its meetings there but the bookkeeping was done in Detroit. Held it was a resident where its principal place of business was located. City of Detroit v. Lothrop Estate Co. [Mich.] 99 N. W. 9.

23. Botto's Ex'r v. Louisville [Ky.] 79 S. W. 241. In Maine, personal property held in trust is assessed to the equitable owner in the county in which he resides. Bonds of railroad and traction companies. City of Baltimore v. Safe Deposit & Trust Co., 97 Md. 659. In Kentucky, it is taxable at the domicile of the beneficiary. Botto's Ex'r v. Louisville [Ky.] 79 S. W. 241. Under tax law (Laws 1896, c. 908, § 3), declaring that all personal property situated or owned in the state, not exempt by law, is taxable, two executors residing in the state were held taxable for the personalty of testator's estate, though a third executor resided in New Jersey. People v. Wells, 87 N. Y. Supp. 745.

24. Robinson v. Grant, 119 Iowa, 573, 93 N. W. 586. Credits composing a fund held by an executor in trust under the provisions of the will are taxable in the county where the executor resides, in the absence of proof that they had a situs elsewhere. McClellan v. Board of Review, 200 Ill. 116, 65 N. E. 711.

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they are in the actual possession of an agent who resides in another township,[25] and the situs of a debt is at the domicile of the creditor.[26] Illustrative cases on the situs of personalty are collected below.[27]

§ 5. *Assessment. A. Assessing officers.*—An assessment, in some form, is necessary,[28] which to be valid, must be made by proper officers, having competent authority and the qualifications required by law.[30] It has been found practicable to invest state boards with authority to make assessments in certain instances.[31] Action by a state board in fixing valuations, is conclusive on

Notes and mortgages are not goods and chattels within the meaning of the Indiana statute, and must be valued for taxation in the township where the owner resides [Burns' Supp. 1897, § 8421]. Stephens v. Smith, 30 Ind. App. 120, 65 N. E. 546.

25. Ellis v. People, 199 Ill. 548, 65 N. E. 428. Profits drawn out of loan agencies in different states, owned and operated by one party and deposited in a central auditing office in a foreign state, are taxable at the residence of such party in this state, notwithstanding such principal sums are reinvested by his agents and kept continuously in other jurisdictions as a part of the capital of the business. Tolman v. Raymond, 202 Ill. 197, 66 N. E. 1086. Evidence held insufficient to show that property was held in a foreign state for the purpose of transacting business of which the property was the subject-matter or stock in trade. Appeal of Borden, 208 Ill. 369, 70 N. E. 310.

26. State v. Franklin County S. B. & T. Co., 74 Vt. 246. Deposit in bank. Pyle v. Brenneman [C. C. A.] 122 Fed. 787. Where the domicile of a taxpayer is in dispute, it is a question of fact (People v. Feitner, 78 App. Div. [N. Y.] 287; Id., 40 Misc. [N. Y.] 368; Id., 90 App. Div. [N. Y.] 9), and for the jury to determine (Ovid Tp. v. Haire [Mich.] 94 N. W. 1060). But where the parties so elect, it is entirely proper to submit the matter to the decision of the court. City of Lebanon v. Biggers, 25 Ky. L. R. 1528, 78 S. W. 213. A finding that a person had fixed his domicile in a city, where he was taxed, is sustained by evidence that when he removed to the city he bought a new residence and took up his abode there, with no intention of returning to his farm. Id.

27. Property in original packages in hands of distributing agent. American S. & W. Co v. Speed, 100 Tenn. 524, 75 S. W. 1037. Tax sale certificates on land within state purchased by nonresidents. Mecartney v. Caskey, 66 Kan. 412, 71 Pac. 832. In order to sustain a tax for visible personal property, levied against an inhabitant elsewhere than at the place of his residence, it must be shown that the property was found in the taxing district on the day prescribed by law for commencing the assessment of taxes. Shillingsburg v. Ridgway [N. J. Law] 54 Atl. 531; Inhabitants of New Limerick v. Watson, 98 Me. 379.

Forest products in transit to a point outside the state may be given by the legislature a situs for the purpose of taxation at the place nearest to the last boom or sorting gap of the stream in or bordering on the state in which such products naturally will be last floated during transit. Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 Law. Ed. 394.

Live stock running on the open range is to be taxed in the county wherein the home range is located; and when the home range is located in or borders upon two or more counties the number assessed in each shall be determined by the disposition made of the stock on the home range. Swan v. Dickinson [Wyo.] 70 Pac. 1050; Cammack v. Matador L. & C. Co., 30 Tex. Civ. App. 421, 70 S. W. 454.

Steamships owned by a foreign corporation and enrolled outside of the state, but which are used mainly within the state, have their legal situs within the state. Old Dominion S. S. Co. v. Com. [Va.] 46 S. E. 783.

28. Where no assessment of a railroad company was made for a particular year because of a belief in the minds of the taxing authorities that it was not subject to taxation, the taxes for such year could not afterwards be collected in an action against the company. Thornburg v. Cardell [Iowa] 98 N. W. 791; Louisville & N. R. Co. v. Christian County, 24 Ky. L. R. 894, 70 S. W. 180.

taxes who has not had a final settlement with the town is ineligible to the office of assessor of taxes; and a tax assessed by a board, one of whose members was thus ineligible, is void and uncollectible. Inhabitants of Springfield v. Butterfield, 98 Me. 155. An order of a county judge granting authority to appoint deputy assessors and fixing their salary, is not vitiated by a proviso relating to the raising of revenue to pay their salaries. McLennan County v. Frost [Tex. Civ. App.] 75 S. W. 876. A county clerk, being a mere ministerial officer has power merely to extend the taxes as they appear upon the books. He has no right to determine whether taxes have been legally assessed or not. People v. Opel, 207 Ill. 469, 69 N. E. 838. The authority conferred by a legislative enactment upon a town to assess a tax must be exercised by the town and not by its assessors. Franklin v. Warwick & C. Water Co. [R. I.] 55 Atl. 934. In Kentucky, the duty of assessing public service corporations, in cities of the first and second classes, is imposed upon the city assessor, and not upon the board of valuation and assessment. Murphy v. Louisville, 24 Ky. L. R. 1574, 71 S. W. 934. Where tax collector of a county adopted rendition of state treasurer, the assessment became that of the collector and constituted a sufficient compliance with the law authorizing the assessor and collector to assess unrendered property. State v Fidelity & Deposit Co. [Tex. Civ. App.] 80 S. W. 544.

31. Detroit United R. v. Board of State

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state and owners alike, after the expiration of time for hearing complaints.[32] Decisions relative to the compensation of assessing officers,[33] their personal liability for errors,[34] and the liability of the county which they represent, are grouped below.[35] Their action is judicial in character, and therefore not open to collateral attack,[36] unless absolutely void.[37]

(§ 5) *B. Formal requisites.*—In making an assessment the assessors can only proceed at the time, and in the manner, pointed out by the statute,[38] but it is competent for a legislature to legalize a special session of a state board of tax commissioners held without direct authority.[39]

A proper roll or list containing generally, besides other information, a description of the taxable property, the names of the owners, and its value is essential,[40] in the making of which the classification made by the legislature should be adopted, and the different classes of property separately listed.[41] *The description*

Tax Com'rs [Mich.] 98 N. W. 997. A state board of taxation has no power or authority to assess the property of an individual owner upon the application of a taxing district. Cregar v. Committee of Lebanon Tp. [N. J. Law] 57 Atl. 129.

32. Chicago, St. L. & N. O. R. Co. v. Com., 24 Ky. L. R. 2124, 72 S. W. 1119. But a state board of valuation and assessment cannot by fixing one method of assessment for one year bind its successor to the same method. Com. v. Covington & C. Bridge Co., 24 Ky. L. R. 1177, 70 S. W. 849. The state board of tax commissioners, in New York, is not confined to the reception of purely legal evidence, but may authorize proof to be made by affidavits. People v. Priest, 90 App. Div. [N. Y.] 520. Under the constitution of California the franchises, rails, and rolling stock of a street railroad operated in more than one county must be assessed by the assessors of the several counties through which the road runs and not by the state board of equalization. San Francisco & S. M. Elec. R. Co. v. Scott [Cal.] 75 Pac. 575. The real estate of telegraph and telephone companies used in their ordinary business is taxable by the state board of equalization for the use of the state, and not by the town in which it is situate. New England Tel. & T. Co. v. Manchester [N. H.] 55 Atl. 188. It was held in Utah, that under the constitution of that state the legislature had no power to authorize the state board of equalization to assess property for taxation which is situated wholly in one county. State v. Eldridge [Utah] 76 Pac. 337. But it has power to authorize the state board to assess property situated partly in one county and partly in another, or operated in two or more counties, such assessment being fairly regarded as an act of equalization. Id.

33. An act providing that the county treasurer should be ex officio supervisor of assessments did not create a new office so as to entitle the treasurer to compensation for duties performed under the statute. Foote v. Lake County, 206 Ill. 185, 69 N. E. 47. The Indiana statute fixing the compensation of county assessors is constitutional [Acts 1895, p. 207, c. 101]. Board of Com'rs of Whitley County v. Garty, 161 Ind. 464, 68 N. E. 1012.

34. An action to recover a penalty against a member of a board of review for the wrongful omission of property from assessment rolls is a civil proceeding and the pleadings, therefore, are to be liberally construed. State v. Zillman [Wis.] 98 N. W. 543.

35. Where county officers are invested with authority to make assessments the county is only liable for the mistakes of its own officers. Kelley v. Gage County [Neb.] 93 N. W. 194. A county is not liable to a taxpayer for a mistake of a city officer in certifying city assessments to the county treasurer. Concordia L. & T. Co. v. Douglas County [Neb.] 96 N. W. 55.

36. If not corrected by some of the modes pointed out it is conclusive, whatever errors may have been committed. Ankeny v. Blakley [Or.] 74 Pac. 485. The action of listers in making an assessment and in the hearing before them is judicial, and unappealed from, constitutes a judgment. Phillips v. Bancroft, 75 Vt. 357. When the state's tax officials transcend the bounds of their authority, no estoppel results against the state from such unauthorized acts. Slattery v. Heilperin, 110 La. 86.

37. Assessment of omitted property void for want of jurisdiction. Layman v. Iowa Tel. Co. [Iowa] 99 N. W. 205.

38. City of Hannibal v. Bowman, 98 Mo. App. 103, 71 S. W. 1122. An assessment made at a later time than prescribed by law, but within such time as the right to assess and collect taxes is not barred by the statute of limitation, is regular. Botto's Ex'r v. Louisville [Ky.] 79 S. W. 241. The purpose of a provision fixing a date of assessment is to designate some definite period as the point of time in each year when the valuation or appraisement fixed upon the property actually assessed and charged upon the books to each individual would be conclusively ascertained and made binding both upon the city and the taxpayer alike. City of Baltimore v. Jenkins, 96 Md. 192, citing Hopkins v. Van Wyck, 80 Md. 15.

39. First Nat. Bank v. Isaacs, 161 Ind. 278, 68 N. E. 288.

40. A lister required to make and return a list of all new structures must include buildings which have been remodeled or reconstructed so as to substantially enhance the premises. Lewis v. State, 69 Ohio St. 473, 69 N. E. 980.

41. In New York, the assessment of the real estate of a domestic corporation entered in the "Annual Record of the Assessed Valuations of Real and Personal Estate of the Borough" is valid and need not be entered in the like record of "corporations." People

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of property on the assessment rolls must be sufficiently full to identify it,[42] and a description so faulty as not to warn the owner of the charge upon his property, or to advise possible purchasers what is to be sold, will invalidate the assessment.[43] An assessment of lands by the fractional subdivision of a quarter-section is proper,[44] and an assessment of a lot by metes and bounds is not invalidated by reason of the fact that it would be as fully identified by a description by number of the lot and block.[45] An insufficient or ambiguous description cannot be aided by extrinsic evidence,[46] but parol testimony is admissible to supply an omission or to apply a given description.[47] The burden of showing insufficiency of a description is on party claiming it.[48]

The owner.—Statutes usually require assessments to be made in the name of the owner of the property if known, otherwise as belonging to an unknown owner,[49] and an assessment of personal property to an unknown owner is as effective as a like assessment of real estate.[50] The owner of property, within the meaning of the tax laws, is the person who has the legal title thereto.[51] A mortgagor of real prop-

v. Wells, 40 Misc. [N. Y.] 555; Id., 91 App. Div. [N. Y.] 44. A note at the end of an assessment roll that "all property in the preceding pages marked 'N. R.' is held by nonresidents, and is to be considered as entered in a separate part of the assessment roll from the other assessments," the statute requiring a separate entry, constitutes an invalid assessment. Sanders v. Saxton, 89 App. Div. [N. Y.] 421. In proceedings to abate an assessment of a manufacturing plant, the machinery is to be treated as separate from the land and buildings, and though each should be valued in connection with the other, if the one be overvalued an abatement may be ordered whether the other be rightly valued or not. Hamilton Mfg. Co. v. Lowell [Mass.] 69 N. E. 1080.

42. Muller v. Mazerat, 109 La. 116. The general rule which governs in determining the sufficiency of the description is that such description is sufficient when it furnishes the means by which the property can be identified from the description itself, or by the use of extrinsic evidence to apply that description to the property. Cooper Grocery Co. v. Waco, 30 Tex. Civ. App. 623, 71 S. W. 619. An assessment of land as "W. 2-3 part of P. C. No. 331 five (5) cottages and barn (less lot deeded to J. B.)" is not void for indefiniteness of description. Harts v. Mackinac Island, 131 Mich. 680, 92 N. W. 351. The description in the tax list and abstract as "Plant of Hartford Electric Light Co., $100,000" together with the designation "Mills, stores and manufactories" is a sufficient description. Town of East Granby v. Hartford Elec. Light Co. [Conn.] 56 Atl. 514. A description such that the land might lie in any part of a larger tract mentioned was insufficient [1 Comp. Laws Utah 1888, § 2013]. Moon v. Salt Lake County [Utah] 76 Pac. 222. "N. E. 4 of S. W. 4 Sec. 4, Twp. 30, Range 6," and "N. E. ¼ S. W. ¼ Sec. 4 T. 30 R. 6" held sufficient, and the difference held not to constitute a variance in different instruments (contra cases cited). Wash. T. & L. Co. v. Smith [Wash.] 76 Pac. 267.

43. Miller v. Lindstrom [Fla.] 33 So. 521; Cooper v. Falk, 109 La. 474. "Pt. Out Lot 54, Survey 2199" is too indefinite and uncertain an assessment. State v. Burrough, 174 Mo. 700, 74 S. W. 610. The description of a franchise as "the S. W. Tel. & Tel. company franchise" is not sufficient. S. W. Tel. & T. Co. v. San Antonio [Tex. Civ. App.] 73 S. W. 859.

44. Allen v. McKay & Co., 139 Cal. 94, 72 Pac. 713; Allen v. McKay & Co. [Cal.] 70 Pac. 8. An assessment of city lots and blocks in columns designated "section," "township" and "range" held insufficient. Leavenworth v. Greenville W. & S. Co. [Miss.] 35 So. 138. Erroneous statement of range. State v. Dunn, 88 Minn. 444, 93 N. W. 306.

45. Davis v. Pac. Imp. Co., 137 Cal. 245, 70 Pac. 15. Where the whole of a tract of land is assessed by number and grant, the fact that the survey is stated 640 acres, when in reality it is 706, does not invalidate the assessment as to any part of the tract. Kenson v. Gage [Tex. Civ. App.] 79 S. W. 605.

46. Leavenworth v. Greenville W. & S. Co. [Miss.] 35 So. 138; Crawford v. McLauren [Miss.] 35 So. 209.

47. Crawford v. McLaurin [Miss.] 35 So. 949.

48. Allen v. McKay & Co., 139 Cal. 94, 72 Pac. 713.

49. An error in describing the owner, a railway company, as the Chesapeake Beach "Improvement" company is not fatal to an assessment and subsequent proceedings (Moffat v. Calvert County Com'rs, 97 Md. 266), nor describing the "Basic City Chilled Roll & Iron Works" as the "Basic City Roller & Iron Works Co." (Stevenson v. Henkle, 100 Va. 591).

50. Powell v. McKee, 81 Miss. 229. Statutes which provide that personalty must be assessed to the owner or claimant, and if he be unknown then to the unknown owner are mandatory. Birney v. Warren, 28 Mont. 64, 72 Pac. 293.

51. Chattel mortgaged property. Union Stock Yards Nat. Bank v. Thurston County Com'rs [Neb.] 92 N. W. 1022. A vendee of lumber manufactured under contract cannot be taxed for the lumber until the title passes upon delivery. Grand Rapids B. & L. Co. v. Inland Tp. [Mich.] 98 N. W. 980. A contract of sale which shows on its face an intent to convey identified property in praesenti is sufficient prima facie to preclude the assessment of the property from taxation against the vendor without further proof of actual segregation of the property being made. State v. Wharton, 117 Wis. 558, 94 N. W. 359.

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erty is deemed the owner for purposes of taxation until the mortgagee takes possession.[52] It is held that in the assessment of land, the proceedings being essentially in rem, the name of the owner is not necessary,[53] but an assessment of lands, not to the owner or occupant thereof, but to a third person is absolutely void,[54] though an assessment to one not the owner but who thereafter becomes so is valid.[55] An assessment in the name of a person, as owner, who was not living at the date of the assessment is void.[56] A supplemental assessment must be made to the same person as the original assessment was properly made to.[57]

Lists by taxpayers.—It is required in many states that persons liable for taxation make out and furnish the assessing officers a statement containing a list of their taxable property,[58] and in some jurisdictions its value.[59] Where a taxpayer fails to prepare and deliver such statement the assessors need not resort to legal proceedings to procure it, but may make an assessment on the best information available.[60] A list made by the taxpayer and the valuation placed thereon by the taxpayer are not conclusive upon the assessor,[61] nor it seems is it conclusive upon the taxpayer.[62]

The word "owner," as applied to land, has no fixed meaning which can be held applicable to every enactment, and while it usually denotes a fee simple estate, yet it may include one having the use, control or occupation of land under a claim of ownership and having a less estate than a fee. Coombs v. People, 198 Ill. 586, 64 N. E. 1056.

52. Fulton v. Aldrich [Vt.] 57 Atl. 108. The test as to ownership, under contracts for sale of real estate, is possession. Nunngesser v. Hart [Iowa] 98 N. W. 505.

53. Woodward v. Taylor, 33 Wash. 1, 73 Pac. 785, 75 Pac. 646.

54. Cottle v. Cary, 173 N. Y. 624, 66 N. E. 1106; Brown v. Hartford, 173 Mo. 183, 73 S. W. 140; Huber v. Jennings-Heywood Oil Syndicate, 111 La. 747; Western Ranches v. Custer County, 28 Mont. 278, 72 Pac. 659. **Contra,** Hertzler v. Cass County [N. D.] 96 N. W. 294; Sykes v. Beck [N. D.] 96 N. W. 844. An assessment of the wife's property to the husband is fatal. Loomis v. Semper, 38 Misc. [N. Y.] 567.

55. N. Boyington Co. v. Southwick [Wis.] 97 N. W. 903.

56. Stewart v. Bernalillo County Com'rs [N. M.] 70 Pac. 574; George v. Cole, 109 La. 816; Boagni v. Pac. Imp. Co., 111 La. 1063. An assessment is not invalid because the owner was designated as "estate of Geo. P. Gordon." Such a designation is neither the name of a person nor of a corporation and may be regarded as surplusage. Sanders v. Carley, 83 App. Div. [N. Y.] 193.

57. It must be made to him who was the owner at the date of the original assessment and not to a guardian subsequently appointed. Sweetsir v. Chandler, 98 Me. 145.

58. State v. Carr [Mo.] 77 S. W. 543. The president of a company, who exercises a general direction of its business, presiding at all its meetings, is competent to make and swear to the return of property of the company. Boston S. D. & T. Co. v. Assessors of Taxes [R. I.] 57 Atl. 301. A curator must give in for assessment the property of his ward, and failing to do so, becomes personally liable. Kan. City v. Simpson, 90 Mo. App. 50. So. also, an executor. McClellan v. Board of Review, 200 Ill. 116, 65 N. E. 711. In Mississippi, a taxpayer is required to list his land for assessment correctly described, and if he fails to list his land under a description sufficient to identify it with some degree of certainty he must suffer the loss sustained in consequence thereof, if the assessor assesses the land under an accurate description to unknown owners. Crawford v. McLauren [Miss.] 35 So. 209. In Texas, the state treasurer should render for taxation the securities deposited with him by a foreign corporation to enable it to do business within the state. State v. Fidelity & Deposit Co. [Tex. Civ. App.] 80 S. W. 544.

59. State v. Carr [Mo.] 77 S. W. 543. In making return of his taxable property the taxpayer may deduct from the credits due him all just debts by him owing at the time of such return. State v. Fleming [Neb.] 97 N. W. 1063. Where a widow entitled to dower in certain real estate conveys her interest therein in consideration of an annuity, the present worth of the annuity and not the annual payment is the amount which the widow is required to list. Com. v. Nute, 24 Ky. L. R. 2138, 72 S. W. 1090.

60. In re L. Adler Bros. & Co., 76 App. Div. [N. Y.] 571. The penalties of treble taxation prescribed by the Missouri statutes for falsely listing cannot be assessed against the estate of one who died after the statement was made and before hearing before the board of equalization. State v. Atchison, 173 Mo. 164, 72 S. W. 1075. The failure of an assessor to make out a list of property to be assessed, where the taxpayer omits to do so, does not affect the validity of the assessment. State v. Carr [Mo.] 77 S. W. 543.

61. State v. Carr [Mo.] 77 S. W. 543. An assessor has power to assess other taxable property belonging to a taxpayer who has returned a verified list of his taxable property without having first issued a subpoena. Kern Valley Water Co. v. Kern County, 137 Cal. 511, 70 Pac. 476. But if the assessor accepts an owner's schedule as correct, the board of review has no power to increase the assessment without notice to the owner. Cox v. Hawkins, 199 Ill. 68, 64 N. E. 1093.

62. If by mistake the return states the corporate stock issued and outstanding to be more than it actually is the corporation may show the truth and have the tax reduced. Arimex Consol. Copper Co. v. State

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Notice and an opportunity to be heard are generally essential to the validity of an assessment,[63] but in the taxation of shares, the corporation is treated by the statutes as representing the shareholders and notice to it is notice to each shareholder.[64]

Irregularities.—It is competent for the legislature to prescribe that irregularities in the assessment of property shall not defeat the collection of the taxes,[65] and courts will not, after the lapse of great length of time, presume illegality or insufficiency in an assessment, but on the contrary that it was correct and regular.[66] Mere informalities in an assessment not involving a departure from statutory requirements will not defeat the tax,[67] and the omission of persons or property from a personal property assessment, whether intentionally or through mistake, does not render assessment void.[68]

Board of Assessors [N. J. Law] 54 Atl. 244. A taxpayer is not estopped from questioning the validity of a tax bill by the fact that in the list furnished by him to the assessor the property was defectively described. State v. Burrough, 174 Mo. 700, 74 S. W. 610. But where the property of a railroad is rendered for taxation by its agent in a form contrary to the statute, and the form and substance of such rendition were followed in subsequent years, the company cannot take advantage of the want of statutory form in the rendition. Galveston & W. R. Co. v. Galveston [Tex. Civ. App.] 77 S. W. 269. The act of an owner of a dower interest in land in rendering the entire land for taxes is not binding on the children or remainderman. Com. v. Hamilton, 24 Ky. L. R. 1944, 72 S. W. 744.

63. Thornburg v. Cardell [Iowa] 98 N. W. 791; Loomis v. Semper, 38 Misc. [N. Y.] 567. The right of being heard being constitutional, a legislature cannot in the first instance, nor by curative statute, deprive a taxpayer of it. Godfrey v. Bennington Water Co., 75 Vt. 350. An attempted reassessment, where by decree of a competent court an assessment is set aside, is not a reassessment, but a new and original assessment, which can only be made after due notice to the landowner. Douglas v. Westchester County Sup'rs, 172 N. Y. 309, 65 N. E. 162. When property happens to be listed in the name of a person not the true owner, the law does not require that the true owner have notice as a condition to the right of the board to properly list and assess such property. Ankeny v. Blakley [Or.] 74 Pac. 485. The mere lack of a provision in a tax law for notice does not take away the jurisdiction of a taxing officer to make an assessment under any circumstances. If the tax could be imposed for a certain amount it is not void but at most voidable for the illegal amount if any. People's Nat. Bank v. Marye, 191 U. S. 272. An owner is not entitled to notice of the increase in valuation by reason of the remodeling or reconstruction of the building substantially increasing the value of his premises. Lewis v. State, 69 Ohio St. 473, 69 N. E. 980. Where there was no abstract of the individual lists lodged in the town clerk's office the taxpayer was given no opportunity to be heard. Godfrey v. Bennington Water Co., 75 Vt. 350. Washington statute providing for the taxation of stocks of merchandise coming into a county after March first, to be disposed of by sale, the owner thereof being there only temporarily, is not unconstitutional in that it provides a different mode of assessment for such property. Nathan v. Spokane County [Wash.] 76 Pac. 521. Nor does the fact that no notice to the owner before assessment is provided render it unconstitutional as being without due process since an appeal is provided for. Id. One whose property is to be assessed for a public improvement must be given notice of the proceedings and assessment. Statute failed to provide notice of proceedings to establish drainage ditches to owners of land whose property was to be assessed. A tax levied without notice to the property is void. Smith v. Peterson [Iowa] 99 N. W. 552.

64. Corry v. Baltimore, 96 Md. 310; Nev. Nat. Bank v. Dodge [C. C. A.] 119 Fed. 57.

65. Woolley v. Louisville, 24 Ky. L. R. 1357, 71 S. W. 893. The fact that a dry dock, in course of construction and practically completed, is not technically completed at the date of an annual assessment will not invalidate an assessment of taxes thereon. William Skinner & Sons S. & D. D. Co. v. Baltimore, 96 Md. 32. The failure of the county clerk to make and file a duplicate assessment roll does not affect the validity of the taxes assessed. Conklin v. Cullen [Mont.] 74 Pac. 72. An erroneous assessment is at most an irregularity of which a taxpayer cannot avail himself in a collateral proceeding. Warren v. Manwaring, 173 Mo. 21, 73 S. W. 447.

66. Cockran O. & D. Co. v. Arnaudet, 111 La. 563.

67. Directions not of the essence of the thing to be done, but having in view its orderly and prompt performance are usually construed as directory merely. Warfield-Pratt-Howell Co. v. Averill Grocery Co., 119 Iowa, 75, 93 N. W. 80. An assessment of property assessable as personalty is not void because classified as real estate. State v. Wharton, 115 Wis. 457, 91 N. W. 976. Where property is taxable irregularities in assessment do not entitle the owner to an injunction restraining collection. McCrory v. O'Keefe [Ind.] 70 N. E. 812.

68. City of New York v. Tucker, 91 App. Div. [N. Y.] 214; City of Rochester v. Bloss, 173 N. Y. 646, 66 N. E. 1105. **Contra,** A material omission from the assessment roll, which deprives the taxpayer of the right of having all subjects of taxation included in the roll, is jurisdictional, and vitiates the whole proceedings. Names of persons liable to a poll tax were omitted. Held, a material omission. Trumbull v. Palmer, 42 Misc. [N. Y.] 628.

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(§ 5) *C. Valuation.*—In assessing property for taxation, the dominant idea of the organic law is that needful revenues shall be raised by levying a tax on property by valuation in such manner that every owner of property subject to taxation shall pay taxes in proportion to the value of the property owned.[69] The presumption is that an officer or assessing body in valuing property for assessment purposes acts fairly and impartially,[70] and an assessment therefore will not be disturbed where the assessor made reasonable effort to ascertain the value and exercised his best judgment in fixing the same;[71] but where an assessing officer or board disregards well known rules for the valuation of property assessed, and refuses to consider reliable and pertinent information regarding such values, and arbitrarily assesses property at a grossly excessive or inadequate sum, such assessment may be treated as fraudulent, and as, in law, no assessment.[72] Overvaluation will not defeat a tax, there being nothing to indicate that other property was not similarly assessed,[73] unless it be shown that the valuation is so excessive as to import fraud in the assessment or amount to spoliation.[74] The methods of determining the valuation of corporate stock, franchises and property are discussed below.[75] The

69. State v. Savage, 65 Neb. 714, 91 N. W. 716. In observing the constitutional rule of uniformity, property which escapes taxes altogether cannot be taken into account in determining the standard of valuation of property actually listed, returned and assessed on which taxes are levied. Id. Where, in the assessment of property for municipal purposes in cities of the metropolitan and first class, different standards of valuation prevail than in the assessment of property generally throughout the state for general revenue purposes, and the state board of equalization cannot assess property in harmony with such different standards of valuation, it is the duty to observe the rule of uniformity of valuation of property assessed generally for revenue purposes rather than the standard prevailing in the cities of the classes mentioned. Id. An action will not lie to restrain the collection of a tax imposed on the stock of a national banking association upon the sole ground that the stock was assessed at its actual value while the real estate of the city was assessed at not more than sixty per cent. Mercantile Nat. Bank v. New York, 172 N. Y. 35, 64 N. E. 756.

70. State v. Savage, 65 Neb. 714, 91 N. W. 716; Bower v. Bainbridge, 116 Ga. 794.

71. Carlisle v. Chehalis County, 32 Wash. 284, 73 Pac. 349. Nor does the fact that the assessor did not go upon the land and assess it upon his own view, but merely accepted the assessment of the previous year, render the assessment invalid. State v. Carr [Mo.] 77 S. W. 543. After the death of an insured, and before proofs thereof are made, the value of a policy of insurance issued by a fraternal benefit society is a question of fact for the determination of the taxing officers. Cooper v. Board of Review, 207 Ill. 472, 69 N. E. 878.

72. State v. Savage, 65 Neb. 714, 91 N. W. 716. The assessment of a building at its cost is not justified where the evidence shows its present value to be much less. People v. Miller, 84 App. Div. [N. Y.] 168. Under a constitutional provision that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, an assessment of land as coal lands at $10 per acre, where other lands are assessed at $1, will be reversed, it appearing that the former have no value as coal lands. Rockhill I. & C. Co. v. Fulton County, 204 Pa. 44.

73. Odd Fellows' Hall Ass'n v. Dayton, 25 Ky. L. R. 665, 76 S. W. 181. Over-assessment is an irregularity (Collins v. Keokuk, 118 Iowa, 30, 91 N. W. 791), and cannot be collaterally attacked (City of New York v. Tucker, 91 App. Div. [N. Y.] 214).

74. City of Covington v. Shinkle, 25 Ky. L. R. 73, 74 S. W. 652.

75. Coal belonging to a Pennsylvania mining corporation and on hand in other states, where it has been shipped for purposes of sale, cannot be deducted in determining the value of the capital stock, even though taxes were paid on the coal in the states where it was stored (Com. v. Delaware, L. & W. R. Co., 206 Pa. 645), nor can unrented space be deducted in ascertaining the valuation of premises (People v. Feitner, 77 App. Div. [N. Y.] 428).

In ascertaining the value of the surplus and undivided earnings of a savings bank, the comptroller must appraise the bonds and securities on which the surplus is invested at their market value, whenever their value is below par. People v. Miller, 177 N. Y. 461, 69 N. E. 1103; Id., 84 App. Div. [N. Y.] 168.

When railroad and telegraph properties are situated in more than one state, it is necessary to consider and determine the value of the whole property, wherever situated, as an entirety, and then determine what proportion of the whole property is situated and used within the state and subject to taxation therein; the relation such part bears to the whole property as to its value being the basis on which the assessment is to be made. State v. Savage, 65 Neb. 714, 91 N. W. 716. In estimating for purposes of taxation, the value of property of a telegraph company situate within a state, it may be regarded not abstractly or strictly locally, but as part of a system operated in other states; and the taxing state is not precluded from taxing the property because it did not create the company or confer a franchise upon it, or because the company derived rights or privileges under the Act of Congress of 1866 or because it is engaged in interstate

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market value of the stock of a corporation should not be taken as the basis for determining the actual value of its gross assets.[76]

commerce. Western Union Tel. Co. v. Mo., 190 U. S. 412, 47 Law. Ed. 1116. The correct method of assessing a bridge company partly within and partly without the state is to take the entire value of its entire property in both states, deduct the value of its tangible property, and apportion the remainder according to the proportionate length of the bridge in each state. Com. v. Covington & C. Bridge Co., 24 Ky. L. R. 1177, 70 S. W. 849. The requirement that all real estate of a railroad corporation may be assessed as a unit, and the amount thus determined apportioned to the several taxing bodies through which the road runs is not in conflict with a constitutional provision that all real estate shall be taxed within the municipality where located. People v. State Board of Equalization, 205 Ill. 296, 68 N. E. 943.

A franchise: The method of arriving at the value of a corporate franchise for taxation is a matter committed to the determination of the assessor. Bank of Cal. v. City & County of San Francisco [Cal.] 75 Pac. 832. In Georgia, the comptroller general in assessing railroad property must make the assessment upon the basis of the value given by the returns. City of Atlanta v. Wright [Ga.] 45 S. E. 994. Valuations based on statistical reports by a railroad company, the railroad, believing itself exempt, having returned no report for taxation purposes, are proper. Owensboro, F. of R. & G. R. R. Co. v. Com., 24 Ky. L. R. 2178, 73 S. W. 744. Assessors failing to require an examination of officers and books are bound to assume that the value of gross assets given in a statement filed with them is correct. People v. Feitner, 82 App. Div. [N. Y.] 368. In assessing a franchise tax against a domestic corporation, it is entitled to a reduction from the value of the assets employed within the state of only such proportionate amount of liabilities as is represented by the ratio of the assets employed within the state to the entire assets of the corporation. People v. Miller, 90 App. Div. [N. Y.] 599. In estimating its value, the earning capacity of the franchise is one of the chief elements and may properly be considered. Rocheblave Market Co. v. New Orleans, 110 La. 529; State v. Savage, 65 Neb. 714, 91 N. W. 716. But dividends paid by a corporation cannot be considered. People v. Feitner, 78 App. Div. [N. Y.] 313; People v. Wells, 42 Misc. [N. Y.] 606. The assessor may also take into consideration the values of shares of corporate stock. Bank of Cal. v. City & County of San Francisco [Cal.] 75 Pac. 832. The state board of equalization in the assessment of railroad and telegraph properties should include in its assessment the value of the franchises with the tangible property assessed. State v. Savage, 65 Neb. 714, 91 N. W. 716. Where a railroad bridge is part of one system built and operated under one charter and owned by the same company as the railway line, it does not have a separate franchise value for the purpose of assessment. Chicago, St. L. & N. O. R. Co. v. Com., 24 Ky. L. R. 2124, 72 S. W. 1119. Under Colorado statutes dividing mining property into two classes, first, mines producing more than $1,000 annually and second, all others which are to be assessed by the general revenue law, it is held that unproductive mining claims may not be assessed at a higher valuation per acre than the minimum valuation per acre of productive mining claims similarly situated. Pilgrim Consol. Min. Co. v. Board of Com'rs [Colo.] 76 Pac. 364.

Corporate stock: Where shares of stock are required to be assessed at their market value, any evidence which will tend to throw light on that inquiry is competent; the opinions of witnesses qualified to answer, the price quotations contained in market reports and authentic publications, the prices established by actual sales, these are all competent. In re Proctor, 41 Misc. [N. Y.] 79. Where the shares of a joint-stock association are not listed upon the stock exchange or sold in the open market, the value of the realty may be properly considered upon an appraisal in order that their value may be established. In re Jones' Estate, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476. The market value of the stocks and bonds of a railroad company is an important factor, with other pertinent information, by which to determine the fair cash value of the property assessed, which is represented by such stocks and bonds. State v. Savage, 65 Neb. 714, 91 N. W. 716.

The value of the capital stock of a corporation is ascertained by adding together the value of its real estate and personal property, and deducting therefrom the sum of its indebtedness and the assessed value of its real estate. People v. Feitner, 39 Misc. [N. Y.] 467. "Capital stock" as used in the tax law does not mean share stock, but means the actual money or property paid in and possessed by the corporation. People v. Feitner, 92 App. Div. [N. Y.] 518.

In estimating the value of shares of stock in national, state or savings banks, the value of United States bonds owned by the banks may be considered. Nat. State Bank v. Burlington, 119 Iowa, 696, 94 N. W. 234. The cash value of shares of national bank stock for the purposes of taxation is their market and not their book value. Ankeny v. Blakley [Or.] 74 Pac. 485. In estimating the value of shares of stock in a bank for purpose of taxation, the value of United States bonds owned by it may be considered. First Nat. Bank v. Independence [Iowa] 99 N. W. 142.

76. People v. Wells, 42 Misc. [N. Y.] 606.

Deduction of debts: A corporation is entitled on an assessment for taxation to have deducted from its personal property the amount of its debts. People v. Feitner, 92 App. Div. [N. Y.] 518. Statutes providing that no greater amount of indebtedness shall be deducted than the assessed valuation of the property for which the indebtedness was contracted prohibits deduction for unsecured indebtedness which did not obtain for the debtor taxable property. Appeal of Skilton [Conn.] 57 Atl. 850. One who purchases realty subject to a mortgage, which he does not assume to pay, is not entitled to deduct the mortgage debt from the assessment of his personal property. People v. Wells, 87 N. Y. Supp. 745. Under statute providing for deduction of indebtedness from credits if

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(§ 5) *D. Reassessment; omitted property.*—Statutes exist in most states for the assessment of property which for various reasons may have been omitted from the assessment rolls,[77] but property cannot be added to the rolls because of undervaluation in previous years,[78] or because of erroneous deductions in former valuations.[79] In Iowa and Kentucky, proceedings to list omitted property must be commenced within five years from the date at which such assessment should have been made,[80] and this means a time not later than the first Monday of April in each year, such being the time provided for turning the assessment rolls over to the local board of review.[81] In proceedings brought for this purpose, the property sought to be listed and taxed must be described with sufficient particularity,[82] and the amount of taxes due must be stated.[83] Power to make a reassessment applies to a case where a former assessment has been declared irregular or void.[84]

Taxing officers or authorities are sometimes empowered by statute to enter into contracts with individuals for the ferreting out or discovery of property that has escaped taxation.[85] Such contracts are not void as being against public pol-

claimed at time of notice of assessment, a property owner was entitled to the deduction, though he failed to claim the same when he listed his property. McCrory v. O'Keefe [Ind.] 70 N. E. 812.

77. Western Assur. Co. v. Halliday, 127 Fed. 830. The duty of the proper officers upon discovery of an omission to subject the property to taxation cannot be avoided because the property may have changed ownership and for that reason individual hardship may result. Yazoo & M. V. R. Co. v. Adams, 81 Miss. 90. A supplemental assessment may be laid on property omitted by mistake in the original assessment, even though it may result in raising more money than was voted to be raised at any meeting of the town. Sweetsir v. Chandler, 98 Me. 145. Where a city has failed to enforce taxes against a corporation on the erroneous assumption that it was exempt, the city is not estopped to thereafter enforce the omitted taxes. Milster v. Spartanburg [S. C.] 46 S. E. 539. But stock in a building and loan association cannot be assessed to the holder as omitted property for the years during which, under the statute, it was exempt from taxation, even though the statute was void. In re Wilmerton's Appeal, 206 Ill. 15, 68 N. E. 1050. A proceeding to assess omitted property instituted on information furnished by a public official is not affected by his ceasing to hold office before trial. Sebree v. Com., 25 Ky. L. R. 121, 74 S. W. 716. In Iowa, the duty of assessing and listing omitted property rests with the county treasurer, and the county auditor has no authority to act in the premises. Mead's Estate v. Story County, 119 Iowa, 69, 93 N. W. 88; Thornburg v. Cardell [Iowa] 95 N. W. 239. In Mississippi, the revenue agent is authorized to have all property assessed which has heretofore escaped taxation by reason of failure to assess, and this applies to municipal taxes as well as state and county. Adams v. Kuykendall [Miss.] 35 So. 830. Where an estate was assessed for back taxes on certain bonds for the years 1886 to 1899, there being no evidence that deceased acquired or owned the bonds prior to 1889, the assessment should be reversed. Falkner v. Adams [Miss.] 33 So. 411. Under Iowa code, providing for the assessment of corporate stock, personalty situate in a county other than where the principal business was transacted could not be assessed there as omitted property, as the county had no jurisdiction thereof. Layman v. Iowa Tel. Co. [Iowa] 99 N. W. 205.

78. Parkinson v. Jasper County Tel. Co., 31 Ind. App. 135, 67 N. E. 471.

Assessors cannot cure an error in the amount of an assessment of money at interest by securing a revaluation thereof through a supplemental assessment, even though their error arose from their ignorance of the specific kinds of securities in which the money at interest was invested. Sweetsir v. Chandler, 98 Me. 145.

79. Lander v. Mercantile Nat. Bank [C. C. A.] 118 Fed. 785.

80. Jewett v. Foote, 119 Iowa, 359, 93 N. W. 364; Com. v. Hamilton, 24 Ky. L. R. 1944, 72 S. W. 744; Chicago, St. L. & N. O. R. Co. v. Com., 24 Ky. L. R. 2124, 72 S. W. 1119.

81. Siberling v. Croper, 119 Iowa, 420, 93 N. W. 494; Thornburg v. Cardell [Iowa] 95 N. W. 239.

82. A statement describing the property as "money, notes, bonds, mortgages, certificates and national bank stock" is sufficient. Com. v. Riley's Curators, 24 Ky. L. R. 2005, 72 S. W. 809. Likewise, "cash, mortgages, notes, bonds, accounts, and choses in action." Com. v. Collins, 24 Ky. L. R. 2042, 72 S. W. 819. An allegation that the owner "was possessed of a large estate consisting of notes, mortgages, choses in action and money" is sufficiently descriptive. Com. v. Sweigart's Adm'r, 24 Ky. L. R. 2147, 73 S. W. 758. An entry, "omitted personal property for the year 1889, $20,000" is not objectionable for failure to further describe the property. Brunson v. Starbuck [Ind. App.] 70 N. E. 163.

83. Arbuckle Bros. v. McCutcheon [Tenn.] 77 S. W. 772.

84. Kadderly v. Portland [Or.] 74 Pac. 710. A turnpike tax assessment, void because made by an unauthorized person, does not prevent a reassessment. Vanceburg & S. L. Turnpike Road Co. v. Maysville & B. S. R. Co., 25 Ky. L. R. 1404, 77 S. W. 1118.

85. In Iowa, the statute does not make it the duty of a county treasurer to investigate property omitted from assessment. Shinn v. Cunningham, 120 Iowa, 383, 94 N. W. 941. Under the Ohio act providing for the employment of tax inquisitors, the county au-

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icy,[86] nor, in the absence of fraud or collusion, because providing excessive compensation.[87]

§ 6. *Equalization, correction, and review.*—The purpose in reviewing the work of assessors is twofold—to examine individual assessments with a view to the correction of errors, and to examine the assessments as a whole with a view to determining whether they are relatively equal as between different parts of a taxing district. In some instances the same board or body performs both duties,[88] but a frequent practice is to commit the duty of reviewing the individual assessments to one body which may properly be called a board of review,[89] and to have the aggregate of assessments of a particular subdivision compared with those of the other subdivisions of the same district or jurisdiction by another body, which for the purpose of classification and treatment may be called a board of equalization.[90] This distinction is not recognized by the statutes, nor by the courts which indiscriminately call boards exercising either or both duties by either or both names, but it is one which in fact exists and must be kept in mind, if confusion arising from the indiscriminate use of the terms is to be avoided. The work of reviewing the individual assessment is generally, though not always, committed to some board or body of general administrative and legislative jurisdiction, such as the township board, village or city council, county commissioners, and the like;[91] while

ditor is nevertheless entitled to his fees for omitted property by him added to the tax duplicates. State v. Godfrey, 24 Ohio Circ. R. 455.

86. Disbrow v. Board of Sup'rs, 119 Iowa, 538, 93 N. W. 585.

87. Fleener v. Litsey, 30 Ind. App. 399, 66 N. E. 82. The compensation paid to one for searching for omitted or concealed property and reporting it for taxation held not to be unreasonable. Reed v. Cunningham, 121 Iowa, 555, 96 N. W. 1119.

88. County board of equalization. Sarpy County v. Clarke [Neb.] 93 N. W. 416. County board of equalization. New Jersey Zinc Co. v. Sussex County Board [N. J. Law] 56 Atl. 138. Board of county commissioners. Lexington M. & E. Co. v. Dawson County [Neb.] 96 N. W. 62. County board of review. Crozer v. People, 206 Ill. 464, 69 N. E. 489. State board of equalization. Id.

89. Town board. Ferguson v. Board of Review, 119 Iowa, 338, 93 N. W. 352; Ferguson v. Inc. Town of Rolfe [Iowa] 94 N. W. 1129. Village board. State v. Zillman [Wis.] 98 N. W. 543. City board. State v. Sackett, 117 Wis. 580, 94 N. W. 314; State v. Wharton, 117 Wis. 558, 94 N. W. 359; State v. Clarke, 68 Ohio St. 463, 67 N. E. 887. County board. International Bldg. & L. Ass'n v. Board of Com'rs, 30 Ind. App. 12, 65 N. E. 297; In re People's Bank, 203 Ill. 300, 67 N. E. 777; Gannaway v. Barricklow, 203 Ill. 410, 67 N. E. 825; Weber v. Baird, 208 Ill. 209, 70 N. E. 231. Appeal tax court of Baltimore City. Gittings v. Baltimore [Md.] 54 Atl. 253. Town board of relief. Appeal of Sanford, 75 Conn. 590. The Ohio act (Rev. St. 1892, § 2805) providing for annual city boards of equalization held to have been repealed. State v. Clarke, 68 Ohio St. 463, 67 N. E. 887.

90. State board of equalization. Mo., K. & T. R. Co. v. Miami County Com'rs, 67 Kan. 434, 73 Pac. 103. A tax levy in a township must be based upon the assessed valuation as revised and equalized by the county commissioners, and not upon the return of the assessors to the commissioners. Appeal of Plains Tp., 21 Pa. Super. Ct. 68.

91. Borough council. Borough of Woodstown v. Board of Assessors [N. J. Law] 56 Atl. 124. City council. Collins v. Keokuk, 118 Iowa, 30, 91 N. W. 791; German-American Sav. Bank v. Council of Burlington, 118 Iowa, 84, 91 N. W. 829; Mockett v. State [Neb.] 97 N. W. 588; John v. Connell [Neb.] 98 N. W. 457; City Council of Marion v. Nat. Loan & Inv. Co. [Iowa] 98 N. W. 488. County court. Com. v. Morehead [Ky.] 78 S. W. 1105. Board of supervisors. County of Cochise v. Copper Queen Consol. Min. Co. [Ariz.] 71 Pac. 946. Board of county commissioners. Lexington M. & E. Co. v. Dawson County [Neb.] 96 N. W. 62; Matador L. & C. Co. v. Custer County, 28 Mont. 286, 72 Pac 662; Western Ranches v. Custer County, 28 Mont. 278, 72 Pac. 659; Symns v. Graves, 65 Kan. 628, 70 Pac. 591; Rockhill I. & C. Co. v. Fulton Co., 204 Pa. 44; Jackson County v. Thornton [Fla.] 33 So. 291. Town or city board of review. Ferguson v. Board of Review, 119 Iowa, 338, 93 N. W. 352; State v. Sackett, 117 Wis. 580, 94 N. W. 314; State v. Wharton, 117 Wis. 558, 94 N. W. 359; State v. Clarke, 68 Ohio St. 463, 67 N. E. 887. City board of equalization. Albin Co. v. Louisville [Ky.] 79 S. W. 274. County board of equalization reviews undivided assessments in Nebraska. Sarpy County v. Clarke [Neb.] 93 N. W. 416. Oregon. Ankeny v. Blakley [Or.] 74 Pac. 485. Missouri. State v. Baker, 170 Mo. 383, 70 S. W. 872; Id., 170 Mo. 194, 70 S. W. 470. County board of review. International B. & L. Ass'n v. Board of Com'rs, 30 Ind. App. 12, 65 N. E. 297; Appeal of Havemeyer & Co., 202 Ill. 446, 66 N. E. 1044; In re People's Bank, 203 Ill. 300, 67 N. E. 777; Gannaway v. Barricklow, 203 Ill. 410, 67 N. E. 825; Weber v. Baird, 208 Ill. 209, 70 N. E. 231. Board of assessors. In re Cathedral of Incarnation, 86 N. Y. Supp. 900; People v. Rushford, 81 App. Div. [N. Y.] 298. Commissioners of taxes and assessments. People v. Wells, 84 App. Div. [N. Y.] 330; Id., 91

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the work of equalization is frequently, though not always, done by a body specially organized for that purpose, such as county and state boards of equalization, and city councils, boards of county commissioners and supervisors, and the like.[92] The duty of the board of review, by whatever name called, is not to determine whether the property of an individual has been assessed at a fair value, but whether its assessment bears a just relation to that of other similar property in the district,[93] and in making its corrections the board may add to,[94] or deduct from the valuation placed thereon by the assessor,[95] though in some states the board has jurisdiction to add to the assessment lists property omitted therefrom.[96] Likewise the duty of a board of equalization extends only to bringing the total valuation of the several taxing districts to an equality.[97]

In some states the state board, or some similar body, is made a special board of assessors for railroad and other public service companies, and is to apportion the valuation among the several counties through which the roads run.[98]

Statutes frequently provide that a board of review shall not increase the valuation of any property without notice to the taxpayer.[99] Such notice, being for the

App. Div. [N. Y.] 172; Id., 39 Misc. [N. Y.] 602; People v. Feitner, 39 Misc. [N. Y.] 474; Id., 39 Misc. [N. Y.] 463; Id., 81 App. Div. [N. Y.] 118; In re Belmont, 40 Misc. [N. Y.] 133. State board of tax commissioners. People v. Priest, 41 Misc. [N. Y.] 545, 90 App. Div. 520. State comptroller. People v. Miller, 84 App. Div. [N. Y.] 166. State board of taxation. Newark v. North Jersey St. R. Co., 68 N. J. Law, 486; Mayor of Jersey City v. State Board of Taxation [N. J. Law] 56 Atl. 135; Singer Mfg. Co. v. Morrison [N. J. Law] 56 Atl. 133.

92. Board of assessors of county. Borough of Woodstown v. Board of Assessors [N. J. Law] 56 Atl. 124. County board of equalization. Sarpy County v. Clarke [Neb.] 93 N. W. 416; New Jersey Zinc Co. v. Sussex County Board [N. J. Law] 56 Atl. 138. State board of equalization. Mo., K. & T. R. Co. v. Miami County Com'rs, 67 Kan. 434, 73 Pac. 103.

93. Sarpy County v. Clarke [Neb.] 93 N. W. 416.

94. One cannot be heard to complain that a board of equalization raised the assessed value of his property too high when he admits the valuation so made is but one-seventh the actual value. Lexington M. & E. Co. v. Dawson County [Neb.] 96 N. W. 62. In New York the comptroller has no power upon revision to increase a tax. People v. Miller, 84 App. Div. [N. Y.] 166.

95. A city is entitled to be heard before a state board of tax commissioners on an application by a corporation for the reduction of assessments on their special franchises. People v. Priest, 41 Misc. [N. Y.] 545.

96. State v. Baker, 170 Mo. 383, 70 S. W. 872. Money invested by a bank in United States bonds for the purpose of evading taxation, the bonds being left on special deposit with a distant bank and sold soon after the first of April, may be assessed by the board of review. In re People's Bank, 203 Ill. 300, 67 N. E. 777.

97. The state board of equalization does not determine the actual value of the taxable property in any county for the purpose of taxation. Its only duty is to equalize the valuation of the different counties. Mo., K. & T. R. Co. v. Miami County Com'rs, 67 Kan. 434, 73 Pac. 103. Where a state board of equalization raises the assessed value of property for any county, the board of county commissioners may use the value so fixed as a basis for making a levy for all purposes, but are not compelled to do so. Id. A notice to an assessor of a proposed increase by the board of equalization, which is insufficient in time and contents, is bad. New Jersey Zinc Co. v. Sussex County Board [N. J. Law] 56 Atl. 138.

98. New England Tel. & T. Co. v. Manchester [N. H.] 55 Atl. 188; Board of Education v. State Board of Assessors [Mich.] 94 N. W. 668. Where the entire structure used by a railroad company for railroad track and a toll bridge across a navigable stream is assessed by the state board of equalization as "railroad track," the local assessor has no authority to make an assessment upon the entire structure. People v. Atchison, T. & S. F. R. Co., 206 Ill. 252, 68 N. E. 1059. A suit to enjoin a board of valuation and assessment from certifying any part of the franchises of a railroad to various counties for the purposes of local taxation, in which the issues were decided adversely to the railroad, is not a determination adverse to the right of another county, not a party to such suit, to also tax the franchises of such railroad. Jefferson County v. Board of Valuation & Assessment [Ky.] 78 S. W. 443.

99. New Jersey Zinc Co. v. Sussex County Board of Equalization [N. J. Law] 56 Atl. 138; Ankeny v. Blakley [Or.] 74 Pac. 485. In Missouri the law does not require notice before the increase is made. That notice is to be given after the raise is made, in order that the taxpayer may appear before the board, as a board of appeals, and show cause why the raise should not stand. State v. Baker, 170 Mo. 194, 70 S. W. 470. A board of review has power, without notice to the owner, to transfer the assessment of mortgages and credits from the books of one township to those of another. Ellis v. People, 199 Ill. 548, 65 N. E. 428. A ten days' notice given on the 8th, the functions of the board expiring on the 10th, is insufficient. Matador L. & C. Co. v. Custer County, 28 Mont. 286, 72 Pac. 662. Where a bill for relief against an alteration in an assessment fails to allege that no notice was given of the purpose to change or alter the assessment,

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benefit of the taxpayer, is jurisdictional,[1] and cannot be waived by subsequent appearance.[2] In some states it is essential that the notice be served personally,[3] and in others it may be given by publication,[4] while in many jurisdictions the taxpayer is entitled to only such notice as the law gives of the existence of the board, its duties and powers, and of the time of its meetings.[5]

A taxpayer who does not avail himself of the privilege of being heard before the board cannot be heard to complain because of an overvaluation.[6]

Statutory provisions as to the time and place of meeting are as a rule held to be mandatory, and any action taken by the board after the expiration of the time limited, or elsewhere than at the place prescribed is invalid,[7] and its proceedings generally must conform to the statutory direction,[8] but failure to keep a record is not fatal.[9] The proceedings had before it are quasi judicial in character,[10] and

but on appeal the taxpayer asserts he can show such want of notice, the cause, under a code provision, will be remanded and the desired opportunity to amend given [Code Pub. Gen. Laws, art. 5, § 36]. Gittings v. Baltimore, 95 Md. 419. Failure to hold a tax meeting to hear complaints is jurisdictional and vitiates the tax levy [Village Law, Laws 1897, p. 402, c. 414, § 105]. Trumbull v. Palmer, 42 Misc. [N. Y.] 628.

1. People v. Wells, 91 App. Div. [N. Y.] 172; State v. Sackett, 117 Wis. 580, 94 N. W. 314.

2. Western Ranches v. Custer County, 28 Mont. 278, 72 Pac. 659. **Contra,** International B. & L. Ass'n v. Board of Com'rs, 30 Ind. App. 12, 65 N. E. 297; State v. Baker, 170 Mo. 383, 70 S. W. 872. Voluntary appearance, however, will waive a defective notice. Appeal of Sanford, 75 Conn. 590. Under Iowa laws authorizing a city to provide for equalization, the city provided that before an increase in the assessment the board should post notice giving date of meeting to take final action on the increase; held, presenting to the council an explanation of the assessment, and a protest against an increase was not a waiver of the posted notice. Cedar Rapids & M. C. R. Co. v. Redmond, 120 Iowa, 601, 94 N. W. 1096.

3. A service by mail is not sufficient. Hayes v. Yost, 24 Ohio Circ. R. 18.

4. The requirement of the statute that notice of the sitting of the board of equalization shall be published in three daily papers for a specified period of time is met by the publication of such notice in two daily papers printed in the English language and one daily paper printed in the German language, when these are all the daily papers published in the city where the special assessment is to be made. John v. Connell [Neb.] 98 N. W. 457. Failure to publish a notice of a tax meeting to hear complaints in two village papers, as required, was held not fatal where notice was given and it did not appear that any taxpayer was denied an opportunity to be heard. Trumbull v. Palmer, 42 Misc. [N. Y.] 628.

5. Nev. Nat. Bank v. Dodge [C. C. A.] 119 Fed. 57; State v. Wharton, 117 Wis. 558, 94 N. W. 359; State v. Baker, 170 Mo. 194, 70 S. W. 470; Ankeny v. Blakley [Or.] 74 Pac. 485.

6. Jackson County v. Thornton [Fla.] 33 So. 291; State v. Southern L. & T. Co. [Fla.] 33 So. 999; Coulter v. Louisville Bridge Co., 24 Ky. L. R. 809, 70 S. W. 29. Under a charter constituting the city council a board of equalization the remedy thus provided is exclusive, and an aggrieved taxpayer who does not apply to such board cannot thereafter complain of overassessment. Collins v. Keokuk, 118 Iowa, 30, 91 N. W. 791.

7. Where the time in which a board of equalization may act is limited to the last day of September, action upon October 1st is void. New Jersey Zinc Co. v. Sussex County Board [N. J. Law] 56 Atl. 138. In Wisconsin, provisions as to time of meeting are held directory merely. State v. Zillman [Wis.] 98 N. W. 543. A protest received by the board of review on an adjourned day is sufficient and should be considered. In re Cathedral of Incarnation in Diocese of Long Island, 90 App. Div. [N. Y.] 543. Where a board of equalization, in pursuance of a published notice, meets at the office of the city clerk, organizes, transacts business, and then takes a recess subject to the call of the chairman, before expiration of the time mentioned in the notice, it will be presumed that the city clerk remained present at his office during the time stated to receive complaints, give information, etc., in conformity with the provisions of the statute. John v. Connell [Neb.] 98 N. W. 457.

8. The resolution of a board of assessors ordering a reduction in an assessment will be set aside, the board having failed in every particular to take necessary steps. Borough of Woodstown v. Board of Assessors [N. J. Law] 56 Atl. 124. In California, by statute, no assessment or act relating thereto is rendered illegal by any informality. The minutes of a board of equalization showed a resolution to be "that the assessment stand as raised;" but reference to other minutes showed that the assessment was raised and the amounts. Held, the informality was immaterial and the raise in the assessment would stand. La Grange H. G. Min. Co. v. Carter, 142 Cal. 560, 76 Pac. 241.

9. As against one who has suffered no injury by reason of such omission, his own assessment when disturbed at all having been reduced. Auditor General v. Buckeye Iron Co. [Mich.] 93 N. W. 1089. A stenographer who enters upon his duty of taking testimony before a board of review acts in an official capacity, though privately employed by the parties, and is bound to furnish a transcript of the proceedings upon payment of the usual fees therefor. Mockett v. State [Neb.] 97 N. W. 588.

10. Western Union Tel. Co. v. Mo., 190 U. S. 412, 47 Law. Ed. 1116. A board of review has authority to assess property for the

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the good faith exercise of discretion in fixing an assessment, no matter how erroneous, is final.[11] In some states, however, an appeal to some appropriate judicial tribunal is provided;[12] though it is no objection to a tax act that on an appeal from the board of equalization no jury is provided for or allowed on the trial of such appeal.[13] The appropriate remedy to obtain a review is certiorari.[14] Decisions illustrating the procedure before boards of review and equalization are collected in the note.[15]

purpose of taxation but it has no power to levy or extend the tax. Gannaway v. Barricklow, 203 Ill. 410, 67 N. E. 825.

11. County of Cochise v. Copper Queen Consol. Min. Co. [Ariz.] 71 Pac. 946; State v. Wharton, 117 Wis. 558, 94 N. W. 359; Phillips v. Bancroft, 75 Vt. 357; Albin Co. v. Louisville [Ky.] 79 S. W. 274; Weber v. Baird, 208 Ill. 209, 70 N. E. 231. Where a taxpayer's assessment is upon personal property not subject to taxation at the place where the property is taxed, the courts may review it. Nester v. Baraga Tp. [Mich.] 95 N. W. 722. Action to correct valuations of property made by a commissioner to reassess lands of Mercer County, on the ground that the acts of the commissioner and board were void because the assessor was not appointed within the time in which the assessment should have been completed. Clark v. Mercer County Court [W. Va.] 47 S. E. 162. Courts have no power to review irregularities in assessment and equalization. A court of equity will not by injunction pass upon the action of assessors and boards of review. The taxpayers had failed to appeal from the action of the county board of review to the state tax commission, as provided by statute. Wilson v. Green [N. C.] 47 S. E. 469. Where the board of equalization assess property too low the state and county are bound by the action and the assessment cannot be remedied in judicial proceedings. Citizens' Nat. Bank v. Com. [Ky.] 80 S. W. 479.

12. A notice of appeal from the decision of the board of review assessing taxes, without more, is sufficient to confer jurisdiction of the proceeding upon the appellate tribunal. German American Sav. Bank v. Council of Burlington, 118 Iowa, 84, 91 N. W. 829. In order to make a valid appeal from the action of a board of review the record must show that jurisdiction as to the subject-matter appealed from exists. And consent of parties cannot be accepted as sufficient to take the place of a record showing the essential fact of jurisdiction. City Council of Marion v. National L. & I. Co. [Iowa] 98 N. W. 488. One appealing from the decision of a board of review in increasing his assessment must show in the record upon what property such increased assessment was based, in order that it may be determined whether such property was exempt. Appeal of Havemeyer & Co., 202 Ill. 446, 66 N. E. 1044. In Iowa, the district court has no jurisdiction to raise an assessment above the amount fixed by a town board of review. Ferguson v. Inc. Town of Rolfe [Iowa] 94 N. W. 1129. A notice, in writing, given by assessors of taxes to a petitioner for an abatement of his taxes, of their decision that the petitioner be given leave to withdraw, is a decision adverse to him, from which an appeal may be taken. Brodbine v. Inhabitants of Revere, 182 Mass. 598, 66 N. E. 607. Under a statute, limiting appeals in actions to compel the listing of omitted property for taxation to cases where the county court has decided whether the property is liable to assessment, the circuit court has no original jurisdiction on appeal to assess or value omitted property. Com. v. Morehead [Ky.] 78 S. W. 1105. It is not necessary to the validity of a statute providing for the assessment of special assessments that a right of appeal be given. The statute gave the right of appeal in cities, but denied it in the towns. Deane v. Indiana M. & Const. Co., 161 Ind. 371, 68 N. E. 686.

13. State v. Fleming [Neb.] 97 N. W. 1063.

14. 21 Enc. Pl. & Pr. 445. Where an appeal from a taxing body is provided for, errors in their action, so far as they are acting within their jurisdiction, cannot be cured by certiorari (Ferguson v. Board of Review of Rolfe, 119 Iowa, 338, 93 N. W. 352), even though fraud in the taxing board be alleged (Crawford v. Polk County, 112 Iowa, 118, 83 N. W. 825). Under a statute providing that a reduction of the apportionment of franchise taxes shall not effect any change in the current apportionment, a writ of certiorari will not be granted to review such apportionment for the current year, since its allowance would be futile. Hoboken v. Jersey City, 68 N. J. Law, 607. The contractor to pay whom the board of supervisors has ordered levy of a tax is not a necessary party to certiorari proceedings to test the validity of such order of the board. Tod v. Crisman [Iowa] 99 N. W. 686.

15. In New Jersey, to confer jurisdiction on the state board of taxation, the appeal to such state board either by the taxpayer or the city, must be made on or before the first day of April next after assessment originally made, or the assessment must have been made within one year before filing the complaint. Jersey City v. State Board of Taxation [N. J. Law] 56 Atl. 135; P. Lorillard Co. v. Jersey City [N. J. Law] 56 Atl. 135. And where an assessment is reduced by the state board on the application of a taxpayer, interest must be paid on the sum fixed by the state board from the time of the original assessment until it is paid [P. L. 1895, p. 760]. Singer Mfg. Co. v. Morrison [N. J. Law] 56 Atl. 133. A complaint before a board of equalization need not be drawn with that precision required of a pleading in a court of record. Sarpy County v. Clarke [Neb.] 93 N. W. 416. In equalizing valuations the board is not required to examine witnesses, or to resort to any particular class of evidence. Symns v. Graves, 65 Kan. 628, 70 Pac. 591. See, also, People v. Priest, 90 App. Div. [N. Y.] 520. Additional proof may be received and considered on the review. People v. Wells, 84 App. Div. [N. Y.] 330. The actual price paid at a bona fide sale of real estate is proper to be considered in reviewing an assessment. People v. Rush-

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In New York there is a special statutory proceeding to review questions of taxation, a certiorari proceeding, differing radically from the common law and code writs of certiorari, in that the hearing or review may be de novo.[16] The petition is regarded as the complaint, the return as the answer, and in deciding the issues joined thereby the court may call witnesses to its aid, whose testimony becomes a part of the proceedings upon which the determination of the court is made.[17]

In Illinois, the assessor and board of review are without power, in the years intervening between the quadrennial general assessment of real estate, to increase or decrease the assessed value of such real estate except in case of changes in the improvements.[18]

§ 7. *Levies and tax lists.*—The word "levy" as applied to taxes has various meanings. It is used indiscriminately to denote the legislative function of charging the collective body of taxpayers with the sums to be raised, and the ministerial function of extending the taxes against the individual taxpayers. The latter involves the ascertainment of the amount due from each taxpayer and is complemental of the work of the assessors.[19]

As a general rule, a levy can be made only by legislative enactment or authority[20] within legal limits;[21] hence a levy in excess of the amount authorized is void

ford, 81 App. Div. [N. Y.] 298. It is its own judge of what it will rely on in making orders, and its conduct will not be controlled by the courts in the absence of conduct amounting to fraud. Symns v. Graves, 65 Kan. 628, 70 Pac. 591. The determination of a state board of taxation upon questions of fact involved in the correction by the board of a local assessment of taxes is not reviewable on appeal. Newark v. North Jersey St. R. Co. 68 N. J. Law, 486. Where a bank pays the taxes assessed to its stockholders and then recovers from each his proportionate share it has the right to appear before the board of review and complain of the assessment. First Nat. Bank v. Independence [Iowa] 99 N. W. 142. Statutes providing that a party aggrieved by a decision of the board of review shall make a brief statement which shall be certified to the supreme court. Held, the decision of the court must be based on this statement. Appeal of Borden, 208 Ill. 369, 70 N. E. 310. Where petitioners show by their petitions to the county commissioners, to correct errors in assessment, that the property in question is assessable, the commissioners and district court have power to decide the controversy. Pilgrim Consol. Min. Co. v. Teller County Com'rs [Colo.] 76 Pac. 364. A sworn statement of the assets and liabilities of a corporation must be taken as true by the commissioners when not contradicted. People v. Wells, 42 Misc. [N. Y.] 606.

16. People v. Feitner, 81 App. Div. [N. Y.] 118; Id., 39 Misc. [N. Y.] 463. The application for the certiorari must be made by or on behalf of the person aggrieved, and may be verified by the authorized attorney of the person. In re Belmont, 40 Misc. [N. Y.] 133; People v. Leonard, 83 App. Div. [N. Y.] 643. The presentation of a petition for certiorari before the first day of November is a sufficient commencement of proceedings for review. People v. Wells, 39 Misc. [N. Y.] 602. The necessity of a prior application to have an assessment corrected before review by certiorari does not arise where the tax is void because the tax officials had no right to make it. People v. Feitner, 39 Misc. [N. Y.] 474.

17. In making return to a certiorari the comptroller need not return the grounds of his refusal to revise a franchise tax. People v. Miller, 92 App. Div. [N. Y.] 116. Where on the return to a writ of certiorari the court either vacates the assessment, corrects it, or directs a reassessment, the force of the writ is expended. If a reassessment is ordered and its correctness is disputed a new writ must be obtained. People v. Wells, 87 App. Div. [N. Y.] 284.

18. Crozer v. People, 206 Ill. 464, 69 N. E. 489.

19. 27 Am. & Eng. Enc. Law [2d Ed.] 729.

20. Where the provisions of a tax law are entirely and wholly superseded by those of a later enactment, tax officers cannot proceed under the former, though the effect is to leave the officials without authority to levy necessary taxes. Flanders v. Multnomah County, 43 Or. 583, 73 Pac. 1042. Taxes levied under a special act authorizing the levy and which is not inconsistent with the state constitution will be enforced. Kirk v. Roberson, 25 Ky. L. R. 633, 76 S. W. 183. The levy of a county tax by the legislature without levy by county authorities is valid. Dickson v Burckmyer [S. C.] 46 S. E. 343. If county commissioners have no authority to levy a tax to pay a claim against a county they have no authority to levy a tax to pay a judgment based on such claim. Atchison, T. & S. F. R. Co. v. Territory [N. M.] 72 Pac. 14. A demand upon the officers of a municipality of payment of a judgment or claim against it is a sufficient demand upon them to levy a tax to pay it, where the statute or the general law authorizes them to make provision for its payment by such a levy. U. S. v. Saunders [C. C. A.] 124 Fed. 124.

21. So long as municipalities make levies within the constitutional limits, courts of equity will not inquire into their necessity in a suit by an individual taxpayer. McInerney v. Huellfeld, 25 Ky. L. R. 272, 75 S. W. 237. Where a county board has levied the

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as to the excess.[22] It must be in the form prescribed by law,[23] and by a duly authorized and properly constituted body.[24] A levy is not invalidated by the fact that the officer did not have the tax roll and warrant with him.[25]

Mandamus lies to compel the levy of a tax for a specific purpose where the duty of the taxing officers is clear.[26] But not to compel a city council to levy a tax in excess of its legal limitation.[27] It cannot be objected to the issuance of mandamus to require a levy that the rolls are already completed and partly collected.[28]

The record should show every essential proceeding in the course of a levy,[29] by recital of the facts constituting performance of the statutory requirements, a mere statement that the statute was complied with being usually not sufficient.[30] If the tax levy was made for a specific purpose, and the officer whose duty it was to record the proceedings of the town meeting neglected to make a proper record,

full amount of tax allowed by law for a county general fund and also designedly levies a larger amount of bridge tax than is necessary for use in that fund, and immediately transfers a large part thereof to such general fund. the tax so unnecessarily levied and transferred is levied for an illegal purpose and is void. Chicago, B. & Q. R. Co. v. Lincoln County [Neb.] 92 N. W. 208. A levy of taxes in excess of the limit fixed by the constitution, to pay warrants issued for current county expenses, cannot be justified by the fact that if all the taxes assessed and levied for those years had been collected the amount of such taxes together with the other revenues actually collected would have exceeded the amount of warrants issued for such years. State v. Wabash R. Co., 169 Mo. 563, 70 S. W. 132. A tax for the support of a library is not a tax for school purposes within the scope of a constitutional limitation upon taxation except for school purposes. Brooks v. Schultz [Mo.] 77 S. W. 861. An appropriation by a city for library purposes must be included in the general appropriation bill and the tax levied therefor as other taxes. People v. Florville, 207 Ill. 79, 69 N. E. 623. A tax levy in excess of the constitutional limit is void in its entirety. Union Pac. R. Co. v. Howard County [Neb.] 97 N. W. 280.

22. Clark v. Colfax County [Neb.] 96 N. W. 607.

23. A state tax levy made by fixing a percentage of the aggregate value of the property instead of specific amounts is valid. Fisher v. Betts [N. D.] 96 N. W. 132; Sykes v. Beck [N. D.] 96 N. W. 844. The provisions of statute prescribing methods by which a city may levy taxes are for the benefit and protection of the taxpayers and must be strictly followed. People v. Florville, 207 Ill. 79, 69 N. E. 623. Taxes levied for the benefit of a sinking fund were not invalidated because made payable to the sinking fund commission, the form in which the levy was made not being prejudicial to the taxpayer. Woolley v. Louisville, 24 Ky. L. R. 1357, 71 S. W. 893. The right of a city to levy a tax upon the owner of property therein is conditioned upon the performance of the prerequisites prescribed by the laws of the state. Queens County Water Co. v. Monroe, 83 App. Div. [N. Y.] 105. An ordinance for the levy of municipal taxes must specify in detail the purposes of the appropriations and the amount appropriated for each purpose. Cincinnati, I. & W. R. Co. v. People, 207 Ill. 566, 69 N. E. 938. A tax levy ordinance passed after the appropriation ordinance is passed and signed, but before it has been published, is void. People v. Florville, 207 Ill. 79, 69 N. E. 623.

24. A county levy of taxes upon a city, not for county but for city purposes, is entirely regular. State v. Hunter [Wis.] 96 N. W. 921. Levy by electors assembled in town meeting. Cincinnati, L. & C. R. Co. v. People, 206 Ill. 387, 69 N. E. 39. A tax which may be levied by vote of the electors at a regular or special town meeting cannot be authorized by a vote of the electors at a special election held in the various precincts of the town. Cleveland, C., C. & St. L. R. Co. v. People, 205 Ill. 582, 69 N. E. 89; Chicago & E. I. R. Co. v. People, 206 Ill. 296, 69 N. E. 93.

25. Levy on personal property for taxes. Bonnin v. Zuehlke [Wis.] 99 N. W. 445.

26. One who is a taxpayer at the time of commencing mandamus to enforce the collection of a railroad aid tax has sufficient interest to maintain the action. State v. Board of Com'rs of Clinton County [Ind.] 68 N. E. 295. Where an election for the creation of an adjunct school district is void, a mandamus to compel the county board to levy a tax to carry on the business of such adjunct school district will not be awarded. State v. Board of Com'rs of Cass County [Neb.] 95 N. W. 6.

27. State v. Royse [Neb.] 91 N. W. 559; Id., 97 N. W. 473; Id., 98 N. W. 459.

28. State v. Byrne, 32 Wash. 264, 73 Pac. 394.

29. The record is the only competent evidence of the acts of the voters in voting a tax at a town meeting, and what was done at such town meeting can only be proved by such record. Cincinnati, I. & W. R. Co. v. People, 205 Ill. 538, 69 N. E. 40.

30. Specifying the purpose of the tax as for "town purposes" is not sufficient where there is nothing to show what the purposes were. Cincinnati, I. & W. R. Co. v. People, 207 Ill. 566, 69 N. E. 938; People v. Ind., I. & I. R. Co., 206 Ill. 612, 69 N. E. 575. Nor is a designation of the purpose of a town tax as "to defray the expenses of said town for the ensuing year" sufficiently definite and certain. Cleveland, C., C. & St. L. R. Co. v. People, 205 Ill. 582, 69 N. E. 89.

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the record may be corrected,[31] but it cannot be amended so as to show the particular purpose upon evidence which fails to establish that the voters understood such purpose, the motion as put to the voters being to raise money for "town purposes."[32]

The ministerial act.—The subjects of taxation having been listed, and a basis for apportionment established, nothing remains to fix liability but to form the tax roll or tax book by extending either upon the original assessment list or upon a duplicate thereof, the several proportionate amounts as a charge against the several taxables.[33] The proportionate amounts having been regularly extended, the tax roll must be duly authenticated,[34] and delivered to the officer or body designated by law, to collect the tax.[35] Mandamus will lie to correct a mathematical error in distributing a tax.[36]

§ 8. *Payment and commutation.*—Payment or tender of payment of taxes to obtain the benefits thereof or avoid the consequences of nonpayment must be made at the time,[37] and in funds provided by law.[38] Payment or tender of the valid portion of a tax in part invalid is good,[39] and in fact necessary to save the penalty on the valid portion,[40] and an unconditional tender to the proper officer of all

31. Cincinnati, I. & W. R. Co. v. People, 206 Ill. 565, 69 N. E. 628.

32. Cincinnati, I. & W. R. Co. v. People, 206 Ill. 565, 69 N. E. 628. A board of supervisors was enjoined from levying a tax because its proceedings were not in accordance with law. On certiorari, it could not avail itself of an amendment of its record made after a decision adverse to it in the injunction suit. Tod v. Crisman [Iowa] 99 N. W. 686.

33. Cooley, Taxation [3d Ed.] p. 789. The failure of a village clerk to transmit to the county a certified copy of the ordinance levying the village tax for a particular year is jurisdictional, and the county clerk was without authority to make the extension. Village of Russellville v. Purdy, 206 Ill. 142, 68 N. E. 1085. The town clerk's certificate of town tax levy is the county clerk's authority for extending the tax, and any attempt to extend the tax without such certificate is illegal. Ind., D. & W. R. Co. v. People, 201 Ill. 351, 66 N. E. 293. A certificate which states the rate at which a tax shall be extended, instead of the gross amount needed, while it may be informal, will not invalidate the tax. Chicago & A. R. Co. v. People, 205 Ill. 625, 69 N. E. 72. Where, at the time a warrant was signed, the tax rate had been fixed but the amount of tax against each person had not been specified, but was thereafter written in by the clerk, such warrant is fatally defective. Village of Upper Nyack v. Jewett, 86 App. Div. [N. Y.] 254.

34. Miller v. Kern County, 137 Cal. 516, 70 Pac. 549. The code provision of Iowa prescribing a form of oath that the assessor shall attach to the assessment roll is mandatory, and failure to take the oath invalidates the assessment [Code, § 1365]. Warfield-Pratt-Howell Co. v. Averill Grocery Co., 119 Iowa, 75, 93 N. W. 80.

35. The board of supervisors alone can grant an extension of time for the filing of an assessment roll. Bennett v. Maxwell [Miss.] 34 So. 226. The requirement of the New York city charter that the assessment roll shall be delivered to the receiver of taxes on the first day of September is directory and not mandatory and a failure to follow it does not vitiate the tax. City of New York v. Ferris, 86 N. Y. Supp. 600. Delay of 18 days in delivery of rolls to receiver of taxes. City of New York v. Watts, 40 Misc. [N. Y.] 595.

36. People v. Board of Sup'rs of Schoharie County, 39 Misc. [N. Y.] 162.

37. In New York, where the treasurer is directed to deliver to the city attorney a transcript of taxes amounting to $50 and remaining unpaid for at least three years, for the purpose of foreclosure proceedings, a taxpayer may prevent such foreclosure by keeping the amount of unpaid taxes below $50. City of Lockport v. Mangold, 78 App. Div. [N. Y.] 15. The direct-tax act of August 5, 1861, was to establish a continuing tax system with an annual tax period running from April 1st of one year to April 1st of the next year. The tax was payable at any time within the year with an abatement if paid before June 30th. State of Rhode Island v. U. S., 37 Ct. Cl. 141. To entitle a state to the abatement of 15 per cent. in the adjustment of the accounts against the United States in the court of claims, the credit must be given as of June 30, 1862, and not as of the time when it was actually given by the accounting officers of the treasury. State of Maine v. U. S., 37 Ct. Cl. 123. In the statement of account rests are to be made when payments upon account were made, and in making rests, expenditures for interest are to be allowed and brought in. State of Rhode Island v. U. S., 37 Ct. Cl. 141.

38. A tender of payment of taxes due the state of South Carolina in part in revenue bond scrip of the state is an insufficient tender to invalidate a subsequent sale of the property for such taxes. Robinson v. Lee, 122 Fed. 1012.

39. Where a tax is levied in excess of the legal limit, the taxpayer is not restricted to the statutory remedy, but may tender the amount assessed against him, less the excess. Clark v. Colfax County [Neb.] 96 N. W. 607.

40. Where the items of taxes were divisible, the fact that a part thereof was illegal did not relieve the taxpayer from paying the balance; and failing to tender the same, he

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taxes legally due discharges the lien.[41] The original receipt of the tax collector is prima facie,[42] but not conclusive evidence of payment.[43]

§ 9. *Lien and priority.*—While tax liens are a recognized part of the governmental machinery provided by law to secure public revenues,[44] they exist only by operation of positive enactment.[45] Statutes may provide when the tax becomes a lien,[46] but in the absence of other provision a tax upon land becomes a lien at the moment the amount thereof is ascertained and determined,[47] and in the case of personalty, there is no lien until seizure.[48]

A parcel of land is liable only for the particular tax assessed against it, though other tracts assessed are owned by the same owner;[49] but statutes sometimes make a lien operate generally on all property.[50]

became liable for interest and penalties. State v. Fulmore [Tex. Civ. App.] 71 S. W. 418. It being the duty of the court to ascertain and adjudge the correct amount of taxes to be paid by an owner who institutes proceedings to invalidate a tax levy, it is not necessary that the plaintiff make a tender of the amount. Pettigrew v. Moody County [S. D.] 96 N. W. 94.

41. If a person offers to pay to the proper officer the tax assessed upon a particular description of land for a particular year, or to redeem the land from a tax sale for such tax, and is informed there is no tax to be paid or sale to redeem from and he in good faith relies thereon, a tax deed based on the tax which it was endeavored to pay will pass no title. Nelson v. Churchill, 117 Wis. 10, 93 N. W. 799. Where a tender is accompanied by a condition on which the party making the tender has no right to insist, and no objection is made to the condition, but the tender is refused on the sole ground that the amount tendered is not sufficient, the accompanying condition does not vitiate the tender. Clark v. Colfax County [Neb.] 96 N. W. 607; Bitzer v. Becke, 120 Iowa, 66, 94 N. W. 287.

42. Mutual Ben. Life Ins. Co. v. Daniels [Neb.] 93 N. W. 134.

43. A statute declaring that the possession of a tax receipt shall be conclusive evidence that all prior taxes have been paid and shall be a bar to their collection is unconstitutional. Harris v. Stearns [S. D.] 97 N. W. 361. Where a defendant presents a tax receipt as evidence of payment, it is proper to admit in rebuttal evidence that the tax collector is insolvent and a defaulter. City of Georgetown v. Jones, 31 Tex. Civ. App. 623, 73 S. W. 22.

44. Sperry v. Butler, 75 Conn. 369. Tax liens held by a state are not interests in and claims upon the land on which they are a lien within the meaning of a statute for the registration of land titles. National B. & S. Co. v. Daskam [Minn.] 97 N. W. 458.

45. Board of Com'rs of Natrona County v. Shaffner [Wyo.] 74 Pac. 88. Personalty. Walsh v. Croft, 27 Mont. 407, 71 Pac. 409. A municipal tax is not a lien on the property upon which it is levied, unless made so by direct legislative enactment, or by action of the municipal corporation in pursuance of express legislative authority. Holmes v. Weinheimer, 66 S. C. 18. Where property on which taxes were assessed by a city against a bankrupt never came into the hands of the trustee, the city is not entitled to a lien on the bankrupt's assets for the payment of the taxes. City of Waco v. Bryan [C. C. A.] 127 Fed. 79. A statute providing that taxes on personal property shall be a lien on real estate owned by the person assessed will not create a lien on a homestead acquired by entry on public lands for taxes assessed on personal property to the owner before patent. Board of Com'rs of Natrona County v. Shaffner [Wyo.] 74 Pac. 88. It is within the power of the legislature to give precedence to a tax on personal property over antecedent incumbrances, but in view of possible results, the intention so to do must appear in unmistakable language. Statton v. People [Colo. App.] 70 Pac. 157. Where a city is authorized by its charter to assess and collect taxes for city purposes upon the property within its limits taxable for state and county purposes, and to that end to procure a copy of the assessment of such property from the county roll and submit the list so obtained to a committee for equalization, the effect of the assessment and levy of a tax by the city based on such list is the same as the effect of such proceedings by a county. Ross v. Portland, 42 Or. 134, 70 Pac. 373.

46. Gillmor v. Dale [Utah] 75 Pac. 932. In Vermont, a tax does not become a fixed incumbrance upon land until the officer charged with collection does some official act that indicates an intention to pursue the land. Fulton v. Aldrich [Vt.] 57 Atl. 108.

47. Gillmor v. Dale [Utah] 75 Pac. 932. Where a tax was listed on land prior to its condemnation by the city, but the assessment roll was not confirmed until after title had vested in the city under a statute, the tax did not become a lien on the land so as to render the owner liable therefor. Buckhout v. New York, 176 N. Y. 363, 68 N. E. 659.

48. 27 Am. & Eng. Enc. Law [2d Ed.] p. 737. In Iowa, the lien for taxes on stocks of merchandise attaches at the time of levy [Code, § 1400]. Larson v. Hamilton County [Iowa] 99 N. W. 133. The sale of a stock after assessment but before levy does not prevent the lien attaching (Id.), though it will not attach to the purchaser's realty. By statute the lien would have attached to the owner's realty (Id.).

49. The purchaser of several lots of land sold together at a void tax sale is not entitled to enforce a lien against one of the lots for taxes properly chargeable against it without showing the amount of the taxes chargeable against it. Faris v. Simpson, 30 Tex. Civ. App. 103, 69 S. W. 1029. Kentucky statutes were amended so as to avoid a con-

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Personal property assessed to one held out to be the owner and who actually becomes the owner before the tax is collected, becomes impressed with a lien which may be enforced against such owner,[51] and a lien for taxes levied on a stock of goods follows the goods so long as they remain in bulk.[52]

A lien not enforced within the statutory period is lost,[53] but a void sale for taxes will not discharge it.[54]

Taxes levied on land are a perpetual lien superior to all other liens created by the owner by way of security, incumbrance or otherwise;[55] but a sale of land for taxes for a particular year has not the effect to divest the property of all prior unpaid tax liens.[56] And where statutes contemplate that collection shall be made out of realty only in the event of failure of personalty, the lien of a real estate mortgage executed prior to an assessment and levy is superior to a tax deed, since only the interest of the mortgagor passes by the tax deed.[57] So where an owner or one whose duty it is to pay taxes lets the taxes go to sale and becomes purchaser, his deed is not superior to the title of an incumbrancer,[58] since he cannot obtain a tax title separate and distinct from the original title.[59]

The lien of a tax upon personal property is inferior to a chattel mortgage lien created prior to the time when the tax lien would attach.[60]

A lien for ordinary or general taxes has precedence over a lien for special assessments.[61]

Under the bankruptcy act[62] taxes due and owing by the bankrupt are entitled to preference.

struction that a lien was given on property not liable for taxes and did not change the policy of the legislature which gives a lien on all the property for all the taxes to a lien on each piece of property for its tax. Com. v. Walker [Ky.] 80 S. W. 185.

50. In Kentucky, the state has a lien on land of a taxpayer for a whisky tax assessed against him. Com. v. Walker [Ky.] 80 S. W. 185. This lien does not attach to land conveyed prior to the assessment. Id.

51. Harris Franklin & Co. v. Layport [Neb.] 95 N. W. 851.

52. But this lien is not a personal charge against the owner or his vendee. Iowa Mercantile Co. v. Blair [Iowa] 98 N. W. 789.

53. In New Jersey, the lien of taxes continues only for two years after levy, unless a tax sale be had within the two years, and hence a sale after the two years is void. Campion v. Raritan Tp. [N. J. Law] 56 Atl. 704.

54. Under a law providing that the lien of the state for taxes shall continue until payment thereof. Auditor General v. Newman [Mich.] 97 N. W. 703.

55. Mutual Ben. Life Ins. Co. v. Siefken [Neb.] 96 N. W. 603; Statton v. People [Colo. App.] 70 Pac. 157; Stevenson v. Henkle, 100 Va. 591; Kirby v. Waterman [S. D.] 96 N. W. 129; Chicago Real Estate L. & T. Co. v. People, 104 Ill. App. 290; Leigh v. Green, 64 Neb. 533, 90 N. W. 255; Butler v. Copp [Neb.] 97 N. W. 634.

56. City of Excelsior Springs v. Henry, 99 Mo. App. 450, 73 S. W. 944. A statute which vests in a tax purchaser an absolute title except such claims as the state may have for taxes contemplates liens for all taxes whether state, county, town or city. City of Rochester v. Kapell, 86 App. Div. [N. Y.] 224.

57. Middleton v. Moore, 43 Or. 357, 73 Pac. 16; Ferguson v. Kaboth, 43 Or. 414, 73 Pac. 200; Id., 74 Pac. 466.

58. Shrigley v. Black, 66 Kan. 213, 71 Pac. 301. When an owner is a purchaser under tax sale, he takes the land subject to the lien of tax bills issued subsequent to the year for the taxes of which he bought the land. City of Excelsior Springs v. Henry, 99 Mo. App. 450, 73 S. W. 944; White v. Thomas [Minn.] 98 N. W. 101.

59. Clippinger v. Auditor General [Mich.] 97 N. W. 53; Oppenheimer v. Levi, 96 Md. 296.

60. Lucking v. Ballantyne [Mich.] 94 N. W. 8. While the lien of a tax upon personal property is inferior to a chattel mortgage given after the taxes were levied, but before the tax books came into the hands of the collector, such mortgage is inferior to the lien of taxes levied and assessed against the mortgagor for subsequent years upon the property mortgaged remaining in his possession. Woolsey v. Chamberlain Banking House [Neb.] 97 N. W. 241.

61. Harrington v. Valley Sav. Bank, 119 Iowa, 312, 93 N. W. 347; City of Ballard v. Way [Wash.] 74 Pac. 1067. When the lien of the state becomes the subject of private ownership, the purchaser from the state takes it with the state's right of priority over all liens of the city for local assessment existing at the time of his purchase, but it is otherwise as to liens attaching after his purchase. White v. Thomas [Minn.] 98 N. W. 101; City of Excelsior Springs v. Henry, 99 Mo. App. 450.

62. A city is entitled to preference in the payment of assessments levied for local improvements. In re Stalker, 123 Fed. 961. A claim for taxes assessed by a municipality against property of which a bankrupt was lessee and which by his lease he contracted to pay is not entitled to preference of pay-

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The equitable principle of subrogation applies to tax liens.[63]

§ 10. *Relief from illegal taxes.*—In the absence of a statutory remedy, a court of equity has jurisdiction to enjoin the levy and collection of a tax attempted to be levied and collected illegally,[64] and such remedy may be enforced by a Federal court where the necessary jurisdictional facts exist.[65]

One seeking to enjoin the collection of a tax must overcome the presumption that the tax is legal and just,[66] and a showing of mere irregularities will not suffice;[67] but it must appear that the party has no adequate remedy by the ordinary processes of the law, or that the case falls under some one of the recognized heads of equity jurisprudence.[68] Laches will bar relief,[69] and in the absence of a showing of an especial necessity therefor, equity will not enjoin the placing of an illegal assessment upon the tax duplicate.[70]

The levy of taxes to pay bonds alleged to be invalid will not be enjoined under a general prayer of a bill which fails to implead the bondholders.[71]

A complaint to enjoin the collection of taxes cannot be considered sufficient unless all of the taxes sought to be enjoined thereby are invalid,[72] and where the amount a taxpayer should legally pay is ascertainable, he cannot maintain suit to

ment as taxes legally owing by the bankrupt. In re Broom, 123 Fed. 639.

63. Where a decree of court has established all the liens upon the property involved with their ownership and priority, the holder of any lien thus established may redeem a prior tax lien, and on motion be awarded an order of subrogation to the rights of the holder thereof, though the tax lien holder holds a subsequent tax lien. City of Lincoln v. Lincoln St. R. Co. [Neb.] 97 N. W. 255. Where the holder of a junior judgment lien purchased the land at execution sale and thereafter purchased an outstanding tax lien under which he obtained title, such last purchase would be regarded by equity as a redemption so as not to defeat the senior judgment lien. Lane v. Wright, 121 Iowa, 376, 96 N. W. 902. Where plaintiff purchased a mortgage containing no provision for the payment of taxes and assessments on the property as a part of the condition, and, by reason of the mortgagor's subsequent failure to pay such taxes, plaintiff was compelled to pay them to protect his security, he was not thereby subrogated to the state's rights or remedies for the enforcement of such tax. Sperry v. Butler, 75 Conn. 369.

64. Joesting v. Baltimore, 97 Md. 589; Collins v. Keokuk, 118 Iowa, 30, 91 N. W. 791; Penick v. High Shoals Mfg. Co., 116 Ga. 819; Arbuckle Bros. v. McCutcheon [Tenn.] 77 S. W. 772; Queens County Water Co. v. Monroe, 83 App. Div. [N. Y.] 105; Purnell v. Page, 133 N. C. 125. Injunction may be the proper remedy against an illegal tax. Proceeding to cancel railroad aid tax on the ground of nonperformance does not preclude resort to injunction to prevent its collection. State v. Board of Com'rs of Clinton County [Ind.] 70 N. E. 373. Where an assessment is unconstitutional, a tender is not a prerequisite to relief by injunction. Fargo v. Hart, 193 U. S. 490. Where the assessment is unconstitutional, the collection of taxes thereunder may be enjoined. Id.

65. Wright v. Louisville & N. R. Co. [C. C. A.] 117 Fed. 1007; Lander v. Mercantile Nat. Bank [C. C. A.] 118 Fed. 785; Kansas City, Ft. S. & M. R. Co. v. King, 120 Fed. 614; Pyle v. Brenneman [C. C. A.] 122 Fed. 787.

66. Tolman v. Raymond, 202 Ill. 197, 66 N. E. 1086; Brunson v. Starbuck [Ind. App.] 70 N. E. 163; Sykes v. Beck [N. D.] 96 N. W. 844. In a suit to enjoin the collection of a tax, the burden is on the plaintiff to show that the property was not subject to taxation or that the taxes had been paid. McCrory v. O'Keefe [Ind.] 70 N. E. 812.

67. Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 47 Law. Ed. 651. The collection of a tax which is merely erroneous and not void will not be restrained. Mercantile Nat. Bank v. New York, 172 N. Y. 35, 64 N. E. 756; Ankeny v. Blakley [Or.] 74 Pac. 485. Mere errors in valuation or any grievance which can be remedied at law do not justify restraining the collection. Cochise County v. Copper Queen Consol. Min. Co. [Ariz.] 71 Pac. 946. In an action of debt to recover a tax, it is no defense that the collector had not given an official bond. By statute this defense is not available when the action is brought by the town. Inhabitants of Verona v. Bridges [Me.] 57 Atl. 797.

68. Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 47 Law. Ed. 651. Fraud in levying a personal property tax will not confer jurisdiction in equity to enjoin the tax, where the legal remedy remains adequate. Nye, Jenks & Co. v. Washburn, 125 Fed. 817.

69. Where taxpayers who were fully advised of every step taken toward the construction of certain schoolhouses permitted them to be built, and an indebtedness to be incurred for which a tax was levied, no effort being made to resist the same until after three months of school, such taxpayers were estopped by laches from thereafter questioning the validity of the tax. Loesche v. Goerdt [Iowa] 98 N. W. 571.

70. Such a suit, being in advance of a threatened levy by the county treasurer, would be premature. Smith v. Smith, 159 Ind. 388, 65 N. E. 183.

71. Ramsey v. Marble Rock [Iowa] 98 N. W. 134.

72. Parkinson v. Jasper County Tel. Co., 31 Ind. App. 135, 67 N. E. 471.

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restrain the collection of the entire tax.[73] Replevin will lie where property is seized for a tax to which it is not subject.[74]

Recovery back of payments.—A taxpayer whose property has been illegally taxed may pay the tax under protest and sue to recover it back,[75] and he may do this without first filing his claim for allowance.[76] But a payment voluntarily made, with full knowledge of the facts and in the absence of a present threat to enforce collection, cannot be recovered,[77] though the statute imposing the tax was unconstitutional.[78] Suit must be timely brought.[79]

A person paying a tax assessed against another, though upon property he has an interest in protecting, cannot recover of the person against whom it is assessed.[80] Where the purchaser of goods in order to prevent their seizure pays taxes on them assessed to the seller, which taxes are invalid, he cannot recover of the seller.[81]

§ 11. *Collection. A. Collectors.*—The duty of collecting taxes is in many cases imposed upon collectors as such,[82] but ordinarily the treasurer of a county is made

73. Under the rule that he who seeks equity must do equity, he must first offer to pay that part of the tax which is not illegal. People's Nat. Bank v. Marye, 191 U. S. 272. And a deposit in court may be required as a condition to relief. Chippewa River Land Co. v. J. L. Gates Land Co., 118 Wis. 356, 95 N. W. 954.

74. For an extended discussion of when replevin will lie for property seized under a tax warrant, see Pioneer Fuel Co. v. Molloy, 131 Mich. 465, 91 N. W. 750, citing Forster v. Brown, 119 Mich. 86, 77 N. W. 646. Replevin cannot be maintained for property taken for the collection of a tax. That one whose property was taken paid the tax after he commenced the action and within four days after the levy did not authorize the action. Bonnin v. Zuehlke [Wis.] 99 N. W. 445.

75. Purnell v. Page, 133 N. C. 125; Western Ranches v. Custer County, 28 Mont. 278; Chicago, B. & Q. R. Co. v. Lincoln County [Neb.] 92 N. W. 208; Arbuckle Bros. v. McCutcheon [Tenn.] 77 S. W. 772; Pere Marquette R. Co. v. Ludington [Mich.] 95 N. W. 417; Nester v. Baraga Tp. [Mich.] 95 N. W. 722. The fact that after the payment of tax on an illegal valuation the boundaries of a town where changed did not relieve the town from its liability to refund. People v. Mathias, 81 N. Y. Supp. 1105. The right of one taxpayer to sue for all others similarly situated to recover an illegal tax common to the class to which he is a member is clearly recognized. But one whose interest is but three cents is not a fair representative of the class and cannot sue on behalf of the others. Sparks v. Robinson, 24 Ky. L. R. 2336, 74 S. W. 176.

76. City of Omaha v. Hodgskins [Neb.] 97 N. W. 346; City of South Omaha v. O'Rourke [Neb.] 97 N. W. 608.

77. Johnson v. Atkins [Fla.] 32 So. 879; Ostrum v. San Antonio, 30 Tex. Civ. App. 462, 71 S. W. 304; In re Mather's Estate, 41 Misc. [N. Y.] 414. A payment induced through fraud or mistake of fact can be recovered. Sufficiency of complaint. Stewart v. Board of Com'rs of Bernalillo County [N. M.] 75 Pac. 43. Money paid in good faith by an administrator to the county treasurer upon a representation that the amount was for back taxes may be recovered back, where no entry of the alleged assessment was made and the tax was not extended. Gannaway v. Barricklow, 203 Ill. 410, 67 N. E. 825. Where a taxpayer desiring to relieve his land from a tax lien makes application to the county auditor for a statement showing the amount due, he has a right to rely upon its correctness, and if the amount be in excess of that actually due he may maintain an action to recover the amount of excessive payment. Wheeler v. Board of Com'rs of Hennepin County, 87 Minn. 243, 91 N. W. 890. Such a payment is not a voluntary payment or made without any mistake of fact in the sense that a recovery will be defeated. Id. Payment of a tax against land after protest, when the tax is due and payable, though not delinquent, with notice that the taxpayer will sue to recover, is not a voluntary payment. Tozer v. Skagit County [Wash.] 75 Pac. 638. The fact that a tax is paid unwillingly or with complaint is not of any legal importance, but there must be some degree of compulsion, to which the taxpayer submits with notification of some sort, equivalent to a reservation of rights. Yates v. Royal Ins. Co., 200 Ill. 202, 65 N. E. 726; Boston Mfrs. Mut. Fire Ins. Co. v. Hendricks, 41 Misc. [N. Y.] 479.

78. The mere fact that a statute imposing a tax is unconstitutional and the tax for that reason illegal does not authorize a recovery of the amount paid, if it was paid voluntarily. Yates v. Royal Ins. Co., 200 Ill. 202, 65 N. E. 726.

79. The 30-day limitation, in Michigan, for the recovery of taxes paid under protest, does not apply to an involuntary payment. Pere Marquette R. Co. v. Ludington [Mich.] 95 N. W. 417. The bar of the statute of limitations becomes available on demurrer only when the petition shows affirmatively that the statutory period had elapsed before the action was commenced. When this does not appear, the statute must be pleaded. Marks v. Board of Com'rs of Uinta County [Wyo.] 72 Pac. 894.

80. Janeway v. Burn, 91 App. Div. [N. Y.] 165. Mortgagor and mortgagee. Fulton v. Aldrich [Vt.] 57 Atl. 108.

81. Warfield-Pratt-Howell Co. v. Averill Grocery Co., 119 Iowa, 75, 93 N. W. 80.

82. Under an act of the legislature releasing a county treasurer from liability for

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the agent of the state and its political subdivisions for the collection of taxes;[83] it is competent, however, for the legislature to provide that cities and towns shall control the collection of their own taxes.[84]

A bond of a collector of taxes, conditioned for the faithful performance of all the duties of his said office, is sufficient in form, and if the sum and sureties are satisfactory to the municipal officers, it is their duty to approve it.[85]

A city tax collector, in Kentucky, has no authority to levy on and sell the property of a waterworks company.[86] In Michigan a marshal has authority to execute a tax levy even though the warrant therefor may be addressed to the city treasurer,[87] but in Nebraska the right of action for the enforcement of a lien for personal taxes is vested in the county treasurer, or, in counties under township organization, in the township tax collector alone.[88]

When settlement is made at the time set by law it is the duty of the tax collecting officer to take notice of the law and be present.[89] The county commissioners, in Georgia, have authority to bring the tax collector to a settlement of his accounts with the county.[90] The failure of a tax collector to turn over the money collected by him does not of itself show he has converted the money,[91] but in a prosecution for embezzling taxes, the rolls delivered to the collector by the proper officials are competent evidence to show the amounts collected.[92] The county treasurer in collecting personal property taxes and turning them over to the state is not entitled to commissions thereon,[93] and it being the duty of a tax collector to collect license taxes as well as others, he is not entitled to extra compensation therefor;[94] but in the absence of fraud or mistake a settlement allowing certain commissions is conclusive.[95]

Under a statute providing that the bond of a collector shall be a lien on his real estate and that of his sureties, in the event of default by the collector such liens may be foreclosed in equity by the town supervisor.[96] Defects in or the lack of a warrant constitute no defense to the collector's bondsmen when sued for taxes he has collected and failed to pay over.[97] The sureties on a sheriff's state revenue bond are not liable for the county levy,[98] and where a city collector is made the agent for collecting a state tax, a bond given to the state for faithful performance

the whole amount of a tax duplicate, and crediting back to him the taxes if previously charged to him, charging them to a collector who was required to give bond to the county, the collector became an officer of the county. Com. v. Connor, 207 Pa. 263. Tax collectors cannot lawfully pay or purchase claims against the parish. Young v. Parish of East Baton Rouge [La.] 36 So. 547. Where tax collectors have been authorized by the police jury to pay and take up order issued for parish indebtedness they are entitled to restitution. Id. Evidence insufficient to establish validity of a claim for over payment of taxes. Id.

83. Logan County v. Carnahan [Neb.] 95 N. W. 812; Mutual Life Ins. Co. v. Martien, 27 Mont. 437, 71 Pac. 470. In Pennsylvania the treasurer of a county has a right to appoint collectors of state and county taxes in townships. Com. v. Jimison, 205 Pa. 367.

84. State v. Weston [Mont.] 74 Pac. 415.

85. Smith v. Randlette, 98 Me. 86. A collector of taxes who contracts with the town to settle with the town on or before a certain day cannot be required to give bond for the fulfillment of such contract. Id.

86. Owensboro Waterworks Co. v. Owensboro, 24 Ky. L. R. 2530, 74 S. W. 685.

87. L. A. 1897, p. 193. Pioneer Fuel Co. v. Molloy, 131 Mich. 465, 91 N. W. 750.

88. Chamberlain v. Woolsey [Neb.] 92 N. W. 181.

89. But he is not bound to take notice of proceedings at subsequent times. Com. v. Moren [Ky.] 78 S. W. 432.

90. Sayer v. Brown [Ga.] 46 S. E. 649.

91. Statute requires him to turn over money every 30 days. Lake County v. Neilon [Or.] 74 Pac. 212.

92. State v. Neilon, 43 Or. 168, 73 Pac. 321.

93. Personal property taxes being payable by the county to the state the treasurer was agent of the county. City of Philadelphia v. Moore [Pa.] 57 Atl. 710.

94. Butte County v. Merrill, 141 Cal. 396, 74 Pac. 1036.

95. A settlement by collector with county court in which he is allowed certain commissions on back taxes collected. State v. Hawkins, 169 Mo. 615, 70 S. W. 119.

96. Chatfield v. Rodger, 75 App. Div. [N. Y.] 631.

97. Lake County v. Neilon [Or.] 74 Pac. 212.

98. Com. v. Moren [Ky.] 78 S. W. 432.

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will not support an action brought by the city.[99] By the general policy and laws of Maryland commissions are to be made up out of the county and not out of state taxes.[1]

(§ 11) *B. Method.*—Taxes, when properly levied and assessed, are to be collected after some method prescribed by law. Being purely a legislative creation the special method prescribed by statute for their collection or devolution must be pursued to the exclusion of others based upon general principles of law.[2] Before the officer who is designated by law for the duty of collecting taxes can lawfully proceed to do so he must have his warrant for the purpose, in due form of law. This may be the assessment roll or list with the tax extended upon it, or it may be a duplicate of the list with a like extension, or it may be either of these with a formal warrant attached particularly indicating what are his duties under it and commanding their performance.[3] Such warrant constitutes the basis of the collector's authority and is the source of his power,[4] and usually contains directions to the collector to make due return thereof, since the return is the basis for subsequent proceedings.[5]

The revenue laws of the several states provide for the compulsory collection of taxes in divers ways. These may be resolved into two principal modes of procedure. One is by summary process against person[6] or property,[7] the other is by

99. House v. Dallas, 96 Tex. 594, 74 S. W. 901.

An auditor's agent in collecting taxes which it was the sheriff's duty to collect was, as to the tax payers, a de facto official acting under color of office, and the county could sue to compel him to pay over such tax without thereby admitting his authority to act. Shawhan v. Harrison County, 25 Ky. L. R. 734, 76 S. W. 407.

1. Under the general laws of Maryland and the special acts relating to Harford county the treasurer of that county was to pay over state taxes paid in 1898 and 1899, without deducting his commissions and the commissioners could not deduct them from the state taxes. Various statutes construed. Allen v. State [Md.] 57 Atl. 646.

2. Board of Chosen Freeholders of Atlantic County v. Inhabitants of Weymouth Tp., 68 N. J. Law, 652; Chamberlain v. Woolsey [Neb.] 92 N. W. 181.

3. Cooley, Taxation [3d Ed.] p. 793. When an original assessment of a supplementary tax is correct it is the duty of assessors to correct any erroneous transcription to the collector's book. Inhabitants of Eliot v. Prime, 98 Me. 48. A city charter requiring that there shall be annexed to the assessment roll a warrant under the hand of the mayor and seal of the city, an unsealed warrant is void. City of Rochester v. Bloss, 77 App. Div. [N. Y.] 28. A tax warrant signed by the vice president of a city council in the absence of the president is regular. City of New York v. Vanderveer, 91 App. Div. [N. Y.] 303.

4. The fact that taxes were collected by a tax collector under a defective warrant, or without a warrant, constitutes no defense to the sureties when sued for the collector's conversion of the money so collected. Lake County v. Nellon [Or.] 74 Pac. 212.

5. A tax sale is void where the collector's return of the tax warrant is not made within the time required by the statute. Campion v. Raritan Tp. [N. J. Law] 56 Atl. 704. Where the duties of tax collector devolve upon three different persons, a return of "no property found" because there was not sufficient to pay all the taxes is bad, it appearing there was sufficient at least to satisfy the warrants in the hands of one or two of the collectors. Davis v. Beers, 204 Pa. 288.

6. In Massachusetts the law requires as the foundation for an arrest for nonpayment of taxes, or for the distraint of personal property, or the sale of real estate, a demand for their payment. Hunt v. Holston [Mass.] 70 N. E. 96. A person arrested for the nonpayment of taxes has a right to require that the provisions of statute be strictly followed. A demand notice mailed to a delinquent at the town where he now lives—the statute requiring it to be sent to the town where he resided when the property was assessed—is insufficient. Id.

7. Under a statute authorizing a collector to collect delinquent taxes by distress, and providing that the delinquent tax list alone shall be a sufficient warrant for such distress, there can be no distress without such list. Noble v. Amoretti [Wyo.] 71 Pac. 879. Under a statute providing that personal property of nonresidents may be assessed to the person having control of the premises where it is located, an assessment to such person as agent of the owner will not justify a seizure of other property not belonging to such owner nor to the agent, to satisfy such tax. Pioneer Fuel Co. v. Molloy, 131 Mich. 465, 91 N. W. 750. Local taxing officers of the several counties cannot enforce the collection of taxes on the unused roadbed of a railroad company by distress warrant. Chicago, B. & Q. R. Co. v. Custer County [Neb.] 95 N. W. 859. The seizure, upon a tax warrant of $541, of merchandise of the value of from $1400 to $1800 or $2000, or more, is oppressively excessive and void. Chamberlain v. Woolsey [Neb.] 92 N. W. 181. The question whether a sheriff's levy is excessive is for the jury. Dickson v. Burckmyer [S. C.] 46 S. E. 343. In order to render a sale valid there must be a substantial compliance

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action at law,[8] though the payment of poll tax is often made a condition of the exercise of the ordinary acts of citizenship,[9] and in the city of Seattle, a city plat will not be approved unless all taxes are paid on the land.[10]

Where statutes do not provide other modes for the collection of taxes a remedy by action is available by implication.[11] An action of debt for taxes is properly brought in the name of the people,[12] must be brought in the county of the defendant's domicile, where he asserts this right,[13] and in Ohio, must be for taxes standing charged on the duplicate of the current year or the delinquent duplicate.[14] Where a city seeks to recover taxes of an individual it is unnecessary to prove demand before action brought.[15] The demand by the collector for the payment of a tax need not be in absolute words.[16] But costs are not allowed when no demand has been made.[17]

The question of the invalidity of a tax may be raised,[18] but it is no defense that the assessors have omitted from the roll persons or property taxable.[19] In New York the authority of the court to dismiss for inability of the person assessed to pay the taxes is limited to proceedings to compel payment and does not extend to actions to recover such taxes.[20]

Remedies provided for the collection of taxes are retroactive, and apply to any tax not barred by limitations,[21] and a petition to recover back taxes is sufficient though facts are stated on information and belief of the petitioner.[22] In Kentucky a proceeding to recover back taxes on an annuity is barred after five years,[23]

with the essential requirements of the law from which this power is derived. Taylor v. Forrest, 96 Md. 529. A failure by the sheriff to give the notice and make the sale in the manner and within the time prescribed by the statutes renders a sale void. Chamberlain v. Woolsey [Neb.] 92 N. W. 181. Any personal property of the owner is subject to seizure and sale, whether it be the same property upon which the tax was levied or not. Statton v. People [Colo. App.] 70 Pac. 157.

8. 27 Am. & Eng. Enc. Law (2d Ed.) 782. In Minnesota a judgment for real estate taxes may now be reviewed by appeal. State v. Lockhart, 89 Minn. 121, 94 N. W. 168.

9. It is reversible error to overrule a challenge to a juror who has not paid his poll tax for the preceding year. Carter v. State [Tex. Civ. App.] 76 S. W. 437.

10. The requirement of a municipal ordinance that no plat of any addition to the city shall be approved unless it appears that no lien for any tax or assessment exists against the property is not an unreasonable one. Hillman v. Seattle, 33 Wash. 14, 73 Pac. 791.

11. In the absence of any express provision on the subject a city has the power to bring suit for its taxes. Brummer v. Galveston [Tex.] 76 S. W. 428. A liberal construction will be given to the statute for the collection of taxes by an action at law when no forfeiture is involved. Inhabitants of Eliot v. Prime, 98 Me. 48. The law recognizes various remedies for the enforcement of taxes, one of which is a proceeding in equity to establish and enforce the lien for the tax against the property. Dobbins v. Colorado & S. R. Co. [Colo. App.] 75 Pac. 156. A county, unless it becomes the holder of a tax deed or tax sale certificate, has no trust title to the taxes due to the state, or its corporate subdivisions, and cannot sue therefor. Holt County v. Golden [Neb.] 98 N. W. 422. Taxes upon a railroad, operated in more than one county, which are due to a school district through which the railroad passes, cannot be collected by the county. San Bernardino County v. Southern Pac. R. Co., 137 Cal. 659, 70 Pac. 782. A city may sue for taxes on the collector's return of "no property found" though his term of office had not expired. Board of Councilmen of City of Frankfort v. Frankfort Safety Vault & Trust Co., 25 Ky. L. R. 46, 74 S. W. 676.

12. Ellis v. People, 199 Ill. 548, 65 N. E. 428.

13. Harrold v. State, 30 Tex. Civ. App. 524, 71 S. W. 407.

14. Hull v. Alexander [Ohio] 68 N. E. 642.

15. City of New York v. Watts, 40 Misc. [N. Y.] 595.

16. Evidence held to show that the collector had demanded payment before levying on the property. Bonnin v. Zuehlke [Wis.] 99 N. W. 445.

17. Inhabitants of Eliot v. Prime, 98 Me. 48.

18. Because of the ineligibility of a member of the board of assessors, on account of his not having had a final settlement with the town in his capacity as a tax collector. Inhabitants of Springfield v. Butterfield, 98 Me. 155.

19. City of Rochester v. Bloss, 77 App. Div. [N. Y.] 28.

20. City of New York v. McCaldin Bros. Co., 81 App. Div. [N. Y.] 622.

21. Applied to Iowa Code 1897 providing for enforcement of back taxes on property escaping taxation. Robinson v. Ferguson, 119 Iowa, 325, 93 N. W. 350.

22. Robinson v. Ferguson, 119 Iowa, 325, 93 N. W. 350.

23. Com. v. Nute, 24 Ky. L. R. 2138. 72 S. W. 1090.

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but in Texas a delinquent may not plead the statute of limitations in an action by the city.[24]

Where suit for the recovery of taxes on land of a deceased life tenant is brought against her alone, only her interest can be subjected to the payment of the taxes, since the heirs cannot be deprived of their property without being heard.[25]

The remedy by supplementary proceedings for the collection of taxes is applicable to the county of New York,[26] and is not barred by immaterial error in tax warrant, or objection that tax is excessive in amount.[27]

Cases involving the proof necessary to make a prima facie case are noted below.[28]

§ 12. *Sale for taxes. A. Pre-requisites to sale.*—The remedies provided by the legislature for the collection of taxes upon real estate being adequate and efficient are exclusive.[29] A valid tax,[30] legally due and unpaid[31] and enforceable against the particular land to be sold, is essential to a valid sale. Where remedies by distress and personal action are provided, they must be exhausted before pro-

24. Greenlaw v. Dallas [Tex. Civ. App.] 75 S. W. 812.

25. City of Louisville v. Kohnhorst's Adm'x, 25 Ky. L. R. 532, 76 S. W. 43.

26. In re Gould, 75 App. Div. [N. Y.] 576.

27. In re Adler Bros. & Co., 174 N. Y. 287, 66 N. E. 929.

28. The burden of proof is on the objector. City of New York v. Vandeveer, 91 App. Div. [N. Y.] 303. In an action of debt for taxes the collector's warrant together with the tax judgment, sale, forfeiture, and redemption record are prima facie evidence of the assessment and levy of the taxes, the years for which they were assessed and levied, and that the taxes were due and unpaid and the lands forfeited to the state. Elmwood Cemetery Co. v. People, 204 Ill. 468, 68 N. E. 500. Where in a suit to collect a tax alleged to have been duly imposed plaintiff introduced evidence of books of annual record and showed the preparation of the assessment rolls, their delivery, the computation of the tax and the delivery of the assessment rolls by the municipal assembly to the receiver of taxes, the certificate of the board of taxes and assessments, with the warrant of the municipal assembly endorsed thereon, and certified copies of the city record, together with proofs of publication, a prima facie case was made. City of New York v. Streeter, 86 N. Y. Supp. 665.

29. Logan County v. Carnahan [Neb.] 92 N. W. 984. A legislative act of Maine to make state tax sales more effectual considered and declared constitutional. Soper v. Lawrence Bros. Co., 98 Me. 268.

30. The fact that a portion of the taxes for which lands are sold is illegal does not invalidate the sale where a portion of such taxes is valid, as the sale merely operates as an assignment of the lien for taxes. Hall v. Moore [Neb.] 92 N. W. 294. A sale for taxes which includes an assessment under an unconstitutional statute is illegal and a deed thereunder gives no valid title. White v. Gove, 183 Mass. 333, 67 N. E. 359. A fraudulent tax roll is absolutely void. Auditor General v. Hughitt [Mich.] 93 N. W. 621.

31. A sale for the taxes of two years where those of one of them had been paid is void. Loomis v. Semper, 38 Misc. [N. Y.] 567. Where there are two claimants to certain unseated land, and it is assessed in the same year in the name of each, and the tax is paid by one of them, it cannot afterwards be sold so as to convey any title to the purchaser for the nonpayment of the tax assessed against it in the name of the other claimant. Albright v. Byers-Allen Lumber Co., 204 Pa. 71. Property of one cannot be sold for taxes of another. George v. Cole, 109 La. 816. Where all taxes on the north half of a section of land for a particular year have been actually paid by the different owners, but under assessments erroneous in description, this payment will defeat the power of the tax collector to sell any part of it. Kellogg v. McFatter [La.] 36 So. 112. In New York delinquent lands cannot be sold for taxes until after reassessment. Rose v. Northrup, 41 Misc. [N. Y.] 238. When the default of a taxpayer was caused by the failure of the state comptroller to render a proper statement of the unpaid taxes, a subsequent sale and deed cannot divest owner of his title. Wallace v. McEchron, 176 N. Y. 424, 68 N. E. 663. Land which on the original assessment stood assessed to the state could not be sold for taxes. Wilkinson v. Jenkins [Miss.] 33 So. 838. Where property purchased by a decedent in his lifetime under articles of agreement, after his death is conveyed to his administratrix in her representative capacity in trust for the heirs, and so registered, and afterwards the property is sold for taxes in her individual name, the tax sale was invalid as against the heirs. Baines v. Alker, 207 Pa. 234. Where taxes on unseated land were regularly assessed, and an agent of the owner bought in the land at the tax sale, and before maturity of the deed paid the taxes which were accepted by the treasurer, the agent's tax title cannot be sustained. Wheeler v. Knupp, 206 Pa. 306. Where the assessment was illegal the tax sale will be set aside; thus where no budget or estimate of expenses was made by the police jury and property was not separately assessed in name of the owner but carried on the assessment roll and in part merged in property of another taxpayer (Waggoner v. Naumus [La.] 36 So. 332), the purchaser at the tax sale must look to the state and not to the owner for reimbursement (Id.).

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ceeding against the land,[32] but in some states a tax imposed upon real estate does not create a personal obligation against the owner, but is merely a charge against the land.[33] A judicial determination of delinquency and an order of sale are generally necessary, and as in the case of other judicial proceedings, jurisdictional requirements must be observed,[34] and must appear of record,[35] these judgments being subject to the general rules of collateral attack.[36]

Some sort of notice to the owner by publication or otherwise is generally provided,[37] but the proceeding being usually considered a proceeding in rem if the law makes provision for publication in some manner reasonably calculated to bring notice to the knowledge of the parties, the proceeding will be sustained,[38] though the published notice,[39] and the judgment based thereon must identify the land.[40]

32. In Vermont taxes legally assessed upon real estate become a first lien upon the property but that lien is not enforceable if the owner has personalty from which the tax can be collected. Fulton v. Aldrich [Vt.] 57 Atl. 108. In Pennsylvania the law has established the order for liability for taxes to be, first, the personal property on the premises, second, demand on the owner individually, and lastly, the land itself; and it is only on failure to collect by the first two methods that resort can be had to the third and the land be legally sold or returned for sale. Davis v. Beers, 204 Pa. 288.

33. Hertzler v. Cass County [N. D.] 96 N. W. 294; In re Goodheart's Estate, 40 Misc. [N. Y.] 322.

34. The nonobservance of jurisdictional requirements renders the judgments of sale, and the tax deeds based thereon, void. Filing copies of newspapers containing delinquent lists with county clerk instead of office of county court. Glos v. Woodard, 202 Ill. 480, 67 N. E. 30. A judgment for taxes against the "heirs" of the owner, and the sheriff's deed in pursuance thereof, are void. Wall v. Holladay-Klotz Land & Lumber Co., 175 Mo. 406, 75 S. W. 385. A county treasurer has authority to certify to tax delinquency certificates though they were issued at a date prior to commencement of his term of office. Jefferson County v. Trumbull [Wash.] 75 Pac. 876.

35. A statute authorizing a court to render judgment of sale for taxes upon constructive notice must be construed strictly in favor of the landowner, and to sustain such judgment the record must show the court had jurisdiction. Glos v. Woodard, 202 Ill. 480, 67 N. E. 3.

36. The judgment under which a tax sale is had cannot be attacked collaterally. Simpson v. Huff [Tex. Civ. App.] 74 S. W. 49. Where the record in a tax sale shows fatally insufficient service and fails to show that the court found that it had jurisdiction the judgment is subject to collateral attack on the ground that the court had no jurisdiction. Earnest v. Glaser [Tex. Civ. App.] 74 S. W. 605.

37. In Louisiana the notice of delinquency must be served on the owner and in determining the owner the collector must be guided by the records. Pitre v. Schleslinger, 110 La. 234. Where a sale was advertised 20 days as required by law, and the owners had knowledge that the unsatisfied judgment was standing against them, and had agents in the city where the sale took place, a contention of no notice was without merit. Ross v. Drouilhet [Tex. Civ. App.] 80 S. W. 241. In Texas notice of sale for taxes need not be received by the property owner, it is sufficient if it is sent. Id.

38. Where a decree for the sale of land belonging to a nonresident recited that the defendants had been constructively summoned by publication, the decree could not be collaterally attacked for want of evidence of proof of publication. Johnson v. Hunter, 127 Fed. 219. Publication of delinquent tax lists under the Oklahoma statute need not be in the particular newspaper with which the county may have a contract for the county printing. Allen v. Board of Com'rs of Cleveland County [Okl.] 73 Pac. 286. Where a delinquent list for the current year was published in part of a newspaper, and in part—the concluding portion—in a supplement to such paper, the forfeited list, which followed the current list, and was wholly in the supplement, was legally published. Whitney v. Bailey, 88 Minn. 247, 92 N. W. 974. The Texas statute requiring the tax collector on March 31 of each year to make a list of delinquent taxes has no application to another provision declaring that taxes are delinquent on February 1 [Sayles' Ann. Civ. St. 1897, art. 5232j]. Clark v. Elmendorf [Tex. Civ. App.] 78 S. W. 538. A judicial sale of realty is not void because the owner died intestate before the entry of decree. Dunham v. Harvey [Tenn.] 69 S. W. 772.

39. Talley v. Schlatitz [Mo.] 79 S. W. 162. The description of property delinquent need not be identically the same as in the assessment roll; it is sufficient if the delinquent list gives such a general description as will identify the property and notify the owner of the land that the taxes are delinquent and that the land is to be sold. Davis v. Pac. Imp. Co., 137 Cal. 245, 70 Pac. 15; National Bond & S. Co. v. Board of Com'rs [Minn.] 97 N. W. 413; N. Boyington Co. v. Southwick [Wis.] 97 N. W. 903.

40. A judgment of sale for a delinquent special assessment is defective which fails to identify the property against which the judgment stands. Gage v. People, 207 Ill. 61, 69 N. E. 635. A tax sale under a defective description is void. Land not ascertainable from the description in the tax deed. Alleman v. Hammond [Ill.] 70 N. E. 661. And the owner of the land who procured it to be assessed is not estopped from asserting its invalidity. Not shown that he had any knowledge of the description by which the clerk attempted to describe the land or that he adopted the description. Id.

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Decisions relative to the procedure where the owner appears and defends,[41] and with reference to the formal requisites of the judgment are noted below.[42]

A notice of the sale itself is generally provided for, which must substantially comply with the statute in matter of form,[43] and state the time and place of sale,[44] together with a sufficient designation of the property to be sold and its owner.[45] The statutory requirements as to posting and publication should be followed,[46] and proof thereof made and filed.[47]

Under a statute requiring the clerk, before a judicial sale, to certify to the character of all liens upon the land, it is sufficient if their general character be stated in the certificate, and failure to particularly describe them will not invalidate the sale.[48]

(§ 12) *B. Conduct of sale.*—The sale should be held at the time and place advertised,[49] and as far as practicable, be conducted the same as upon mortgage foreclosure; unless the decree provides otherwise the tracts or lots should be ap-

41. Amendments to objections, enabling an objector to present any existing valid defense, should be allowed. Chicago, M. & N. R. Co. v. People, 207 Ill. 312, 69 N. E. 854. Reduction of an original special assessment by consent of all the property owners affected is no ground for objection, no fraud or collusion being shown. Gage v. People, 207 Ill. 377, 69 N. E. 840. The absence of an itemized estimate of cost from the record of the resolution for a special improvement cannot be shown by extrinsic evidence. Gage v. People, 207 Ill. 61, 69 N. E. 635; Ryan v. People, 207 Ill. 74, 69 N. E. 638; Gage v. People, 207 Ill. 377, 69 N. E. 840. One who appears as owner and objects to the validity of a tax, but takes no appeal from the judgment rendered, cannot attack the validity of such judgment in a subsequent action of debt, under the statute, for general taxes. Harding v. People, 202 Ill. 122, 66 N. E. 962.

42. A judgment for the sale of land for delinquent taxes should withhold the writ of possession until the expiration of the time for redemption. Ryon v. Davis [Tex. Civ. App.] 75 S. W. 59. Where a judgment for taxes includes the poll tax of one not a party to the action, and who does not own the property to be sold, this portion of the judgment will be stricken out on appeal. City of Wilmington v. McDonald, 133 N. C. 548. The provision of the general tax law of Michigan, requiring the entry of the total amount of valid taxes opposite each parcel of land, does not apply to sales under a decree of the supreme court [C. L. 1897, § 3889]. Newton v. Auditor General, 131 Mich. 547, 91 N. W. 1030.

43. Sterling v. Urquhart, 88 Minn. 495, 93 N. W. 898.

44. A notice of sale that it will be held at the court house, the law requiring that it be at the auditor's office, when in fact the auditor's office is within the court house, is sufficient. Whitney v. Bailey, 88 Minn. 247, 92 N. W. 974.

45. Talley v. Schlatitz [Mo.] 79 S. W. 162. A description of real estate in a notice of tax sale as "lot one, Col. W. Co." is too indefinite and uncertain. Brown v. Reeves & Co., 31 Ind. App. 517, 68 N. E. 604. Where in advertising property for sale the names of the owners must be in alphabetical order, placing "Harris" under the letter "H" is a sufficient compliance with the statute. In re Interstate Land Co., 110 La. 286. Failure to give the name of the owner of delinquent property in the advertised list, if known to the collector, renders the notice bad, and the fact that the collector has given the name correctly in the delinquent list is sufficient evidence that he knew it. Gage v. People, 205 Ill. 547, 69 N. E. 80.

46. The requirement that notice of tax sale be posted on the "court house door" is satisfied by posting on a bulletin board at the door. Hoskins v. Iowa Land Co., 121 Iowa, 299, 96 N. W. 977. A tax sale notice published once in each week for four consecutive weeks prior to the day of sale, although the first publication was made 25 days only before sale, complies with the Kansas statute. Tidd v. Grimes, 66 Kan. 401, 71 Pac. 844. As to the requirements in Montana as to length of publication, see Conklin v. Cullen [Mont.] 74 Pac. 72.

47. Under a requirement that the printer transmit to the county treasurer his affidavit of publication of advertisement within six days after the last publication thereof, the transmission must be made within six days from the day of the last publication. Chippewa River Land Co. v. J. L. Gates Land Co., 118 Wis. 356, 95 N. W. 954. But where there were five publications of the notice the transmission of the affidavit within 6 days of the fifth publication is fatal. Pinkerton v. J. L. Gates Land Co., 118 Wis. 514, 95 N. W. 1089. The provision of a statute requiring an affidavit showing that the notices were posted in at least four public places in the county is not fulfilled by making an affidavit which omits to state in what county such posting was had. Shepherd v. Kahle [Wis.] 97 N. W. 506. A failure to make and file affidavits of notice of tax sale is not fatal to the sale. Bertha Gold Min. & Mill. Co. v. Burr [Colo.] 73 Pac. 36.

48. Tax sale. Whelen v. Stilwell [Neb.] 93 N. W. 189.

49. A sale for taxes is not rendered invalid because made on the fourth day of July. Lumpkin v. Cureton [Ga.] 45 S. E. 729. The fact that a sale was removed from the auditor's office, a small room, to another and more commodious room, to accommodate all the persons attending the sale, in the absence of a showing of prejudice, did not render the sale invalid. For the time being the auditor's office for the purposes of the sale was removed to the larger room. Whitney v. Bailey, 88 Minn. 247, 92 N. W. 974.

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praised and sold separately,[50] but if several separate tracts are assessed as one, and judgment is so entered, they should be sold as one tract.[51] The sale of a city lot must be of the whole lot or of an undivided interest therein.[52] A sale cannot operate to convey to the purchaser more land than the taxpayer owned, nor affect the title of owners of contiguous property,[53] but accretions pass to the purchaser although not mentioned in the deed.[54]

The amount for which the sale shall be made is dependent entirely upon statute. This is usually for the taxes due,[55] together with interest or penalty,[56] and costs;[57] and a sale for an amount substantially in excess of the amount due renders the sale void.[58] Similarly, where the sale is made under execution as ordinary judgments are enforced, an excessive levy renders it void.[59] Inadequacy of price, however, is not a valid objection,[60] but a sale not made for cash is invalid;[61] and a sale of improved land as wild land under an execution which may only issue against wild land conveys no title.[62]

A court rule requiring bidders to deposit $50 with the sheriff as evidence of good faith is not unreasonable.[63]

The buyer at a sale must pay at the time of his purchase all claims which the state has against the land,[64] and the bid may be assigned by the purchaser.[65]

The county treasurer, in Nebraska, is without authority to sell at private tax sale until he has made and filed the report required by the general revenue law.[66]

In Louisiana a sale of property made at public auction by a tax collector, the state proceeding not as a creditor but as a proprietor, is not strictly a tax sale.[67]

50. Roher v. Fassler [Neb.] 96 N. W. 523.

51. National B. & S. Co. v. Board of Com'rs of Hennepin County [Minn.] 97 N. W. 413; Ryon v. Davis [Tex. Civ. App.] 75 S. W. 59. A sale of land in bulk, containing two or more parcels, under a description fixing with certainty the land intended to be sold, is not void, since the statute provides for an apportionment. Kennedy v. Auditor General [Mich.] 96 N. W. 928.

52. Old Dominion B. & L. Ass'n v. Sohn [W. Va.] 46 S. E. 222.

53. Bryant v. Kendall [Ky.] 79 S. W. 186.

54. Crill v. Hudson [Ark.] 74 S. W. 299.

55. The fact that certain lots and other property described in a tax deed only aggregated $59.55 sustains an inference that the lots alone sold for less than that amount, and the presumption prevails that each parcel, tract, or lot sold for the exact amount due thereon. Cornelius v. Ferguson [S. D.] 97 N. W. 388.

56. Woolley v. Louisville, 24 Ky. L. R. 1357, 71 S. W. 893; Galveston & W. R. Co. v. Galveston, 96 Tex. 520, 74 S. W. 537. The term "face value" means the amount named in the certificate, and due and unpaid for taxes, interest, and charges preceding the tax sale, and does not include interest up to the time of the sale of the certificate. Olson v. Tanner, 117 Wis. 544, 94 N. W. 305.

57. A fee of 25c for certificate of purchase is properly a part of such "costs." Trimble v. Allen-West Comm. Co. [Ark.] 77 S. W. 893; Chippewa River Land Co. v. Gates Land Co., 118 Wis. 345, 94 N. W. 37, 95 N. W. 954; Lewis v. Cherry [Ark.] 79 S. W. 793. A sale of land by a city for taxes and costs is void in the absence of any provision by charter or ordinance authorizing a sale for costs. May v. Jackson [Tex. Civ. App.] 78 S. W. 988. A decree authorizing sale is not subject to collateral attack because court awarded commissioner making sale greater fees than allowed by law. Johnson v. Hunter, 127 Fed. 219.

58. An excess of ¼ cent is not such a substantial excess as will avoid a sale (Cowling v. Muldrow [Ark.] 76 S. W. 424); nor will an error of $1.00 render a sale invalid (Dickson v. Burckmyer [S. C.] 46 S. E. 343). But a sale for 60 cents more than the amount lawfully due, where the total amount was only $12.03 was for an excess which was relatively appreciable, and vitiated the sale. Baker v. Kaiser [C. C. A.] 126 Fed. 317. A tax sale for five per cent more than the amount of the delinquent return is void. Pinkerton v. Gates Land Co., 118 Wis. 514, 95 N. W. 1089. But the inclusion of a collector's fee fixed by the statute at 5 per cent does not render the amount excessive. Nichols v. Roberts [N. D.] 96 N. W. 298.

59. Execution for $9.90 on a city lot valued at between $600 and $1,000, and susceptible of division into two lots, each of which would be worth more than the amount of the fi. fa. Roser v. Ga. L. & T. Co., 118 Ga. 181. Fi. fa. for $2.32 levied on land worth between $900 and $1,300. Stark v. Cummings [Ga.] 45 S. E. 722.

60. Rothchild Bros. v. Rollinger, 32 Wash. 307, 73 Pac. 367.

61. Dickson v. Burckmyer [S. C.] 46 S. E. 343.

62. Southern B. & T. Co. v. Wilcox Lumber Co. [Ga.] 46 S. E. 668.

63. Rule applying to judicial sales generally. Whelen v. Stilwell [Neb.] 93 N. W. 189.

64. Cheever v. Flint Land Co. [Mich.] 96 N. W. 933.

65. Dickson v. Burckmyer [S. C.] 46 S. E. 343.

66. Gallentine v. Fullerton [Neb.] 93 N. W. 932.

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(§ 12) *C. Proceedings after sale.*—It is generally provided that the officer making the sale shall make a report of his acts to the court,[68] confirmation, as in the case of ordinary judicial sales, being necessary.[69] The owner may appear and object to confirmation on any ground going to the validity of the sale itself,[70] but error in the proceedings prior to the sale must be availed of by appeal or error from the decree or judgment.[71] A taxpayer is estopped to assert the irregularity of the action of the auditor general in canceling a sale of land to the state and readvertising the same, where such taxpayer instead of redeeming, as he might, has recourse to proceedings to have the tax declared void.[72]

A tax sale certificate, regular on its face, is presumptive evidence of the regularity of all proceedings leading up to the sale, including the assessment and levy,[73] and a tax certificate properly assigned and in the possession of the assignee is *prima facie* evidence of ownership;[74] but the clerk's certificate, in Illinois, must be made on the date of the sale and not prior thereto.[75]

On compliance with the statutory provisions the purchaser is entitled to a deed,[76] the collector making the sale being the proper person to execute it.[77] Forms prescribed by statutes are usually directory, and slight variations therefrom are not fatal;[78] and the omission of the seal of the officer executing a deed will not invalidate it;[79] but a deed showing on its face a failure to comply with the law is

67. Leathem & S. Lumber Co. v. Nalty, 109 La. 325.

68. In Maryland the report of sale is an essential condition precedent required by the statute to be performed, and a substantial pre-requisite to the validity of the purchaser's title. Taylor v. Forrest, 96 Md. 529. But a tax sale certificate is presumptive evidence that such report was made and filed in due time. Gallentine v. Fullerton [Neb.] 93 N. W. 932. The report must be made by the collector who made the sale. Taylor v. Forrest, 96 Md. 529. In making return of his doings in selling land of a nonresident the treasurer should state facts showing that no bid could be obtained for less than the whole land; a statement merely that "it became necessary to sell the whole amount of the real estate" is the expression of an opinion. Milliken v. Houghton, 97 Me. 447. It is sufficient if the record of an officer making a sale recites that he designated the portions proposed to be sold at the time of sale. Rothchild Bros. v. Rollinger, 32 Wash. 307, 73 Pac. 367.

69. The effect of an order of ratification by the court is simply to establish a prima facie case. The regularity of proceedings under the sale, and the title of the purchaser derived from the sale, can be attacked, if the collector has failed to comply with the law. Taylor v. Forrest, 96 Md. 529. It is sufficient if the confirmation of the decree can be gathered from the entire report. Confirming a sale of land for overdue taxes. Ousler v. Robinson [Ark.] 80 S. W. 227.

70. A judgment confirming a tax sale which was void because of defective description is erroneous. Beardsley v. Hill [Ark.] 72 S. W. 372.

71. After confirmation of a tax sale the court has no jurisdiction to open the decree and set aside the sale unless there be statutory authority therefor. Blondin v. Griffin [Mich.] 95 N. W. 739. Where a decree in foreclosure proceedings, by its terms erroneously denies to the owner the time which is allowed by law to redeem, his remedy is by a direct proceeding to obtain a reversal, and not indirectly by objecting to the confirmation of a sale made in pursuance of the decree. Logan County v. McKinley-Lanning L. & T. Co. [Neb.] 97 N. W. 642.

72. Blondin v. Griffin [Mich.] 95 N. W. 739; Clay v. Bilby [Ark.] 78 S. W. 749.

73. Alling v. Woodard [Neb.] 96 N. W. 127; Pettibone v. Yeiser [Neb.] 96 N. W. 193. Where an officer is not required by law to have a seal, a certificate made under his hand without a seal is sufficient. Whelen v. Stilwell [Neb.] 93 N. W. 189. A description in a sale certificate as "balance of south part (27.04 acres) of tax lot 31" is sufficient, the owner admitting that from it he knew the property. Merrill v. Van Camp [Neb.] 96 N. W. 344. Description held insufficient. Brown v. Reeves & Co., 31 Ind. App. 517, 68 N. E. 604.

74. Leavitt v. Bartholomew [Neb.] 93 N. W. 856.

75. The certificate is the process on which the sale is made. A tax deed based on a sale under a defective certificate does not pass title. Coombs v. People, 198 Ill. 586, 64 N. E. 1056.

76. The holder of a tax certificate must pay all arrearages of taxes to entitle him to a deed. U. S. v. MacFarland, 18 App. D. C. 120. Where a person is entitled to a tax deed, it is presumed that the deed will be issued. Henry v. Vineland Irr. Dist., 140 Cal. 376, 73 Pac. 1061.

77. Not his successor in office. Taylor v. Forrest, 96 Md. 529. Compare Sheafer v. Mitchell, 109 Tenn. 181, 71 S. W. 86, where a deed was executed by the successor. A tax deed executed by a deputy, the sheriff being dead, in the name of the sheriff but by himself as deputy, is a good deed. McRee v. Swain, 81 Miss. 679.

78. Omission of name of person to whom assessment was made. Pattison v. Harvey, 81 Miss. 348.

79. Kirby v. Waterman [S. D.] 96 N. W. 129.

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void.[80] Statutes frequently prescribe that tax deeds shall contain recitals as to compliance with law in respect of the antecedent steps leading up to the sale,[81] and such a deed is made prima facie evidence of the regularity of all prior proceedings;[82] but a deed is not prima facie evidence of anything except that which is required to be stated in the certificate of purchase or deed.[83] Recitals in a deed that the sale was regular, when in fact irregular and void, are not conclusive, a statutory provision to the contrary notwithstanding,[84] nor can the recitals of a deed supply statutory power.[85] A tax deed must describe the land conveyed with such reasonable certainty as to identify it without the aid of extrinsic facts.[86] The construction of a tax deed is a question of law for the court,[87] and its validity must

80. Deed reciting that the sale was made for the taxes of the year in which the sale occurred. Bower v. Chess & W. Co. [Miss.] 35 So. 444. Deed which shows that in making the sale the collector did not comply with a statutory requirement that the collector offer for sale publicly, separately, and in consecutive order, each tract of land or town or city lot. Smith v. Williams Cooperage Co., 100 Mo. App. 153, 73 S. W. 315. Deed in the statutory form, which discloses a sale to the county as a voluntary purchaser on a competitive bid at public auction, and not because of failure to sell to an individual bidder. Thompson v. Roberts [S. D.] 92 N. W. 1079; Reckitt v. Knight [S. D.] 92 N. W. 1077. A deed wherein by one recital it is declared the lands were sold to the plaintiff and by another that the certificates were assigned to him fails to state the name of the purchaser at the tax sale and is void. Dunbar v. Lindsay, 119 Wis. 239, 96 N. W. 557.

81. A tax deed from which a statutory recital is entirely omitted is void. Horswill v. Farnham [S. D.] 92 N. W. 1082. Deed, reciting that the collector had advertised the real estate according to law, without reciting the statutory requirements. Brown v. Hartford, 173 Mo. 133, 73 S. W. 140. Where the court has jurisdiction of the parties and subject-matter it may correct a recital in a sheriff's deed by ordering the execution of a new deed. Longworth v. Johnson, 66 Kan. 733, 71 Pac. 260. It is not necessary that the tax deed recite any change in the assessment made by the state board of equalization; the recital of the original assessment is a sufficient compliance with the statute. Davis v. Pac. Imp. Co., 137 Cal. 245, 70 Pac. 15. Where a tax deed contained no recital of the name of the person assessed and from whom the taxes were due, nor any statement that the owner was unknown, the deed was void. Seaverns v. Costello [Ariz.] 71 Pac. 930.

82. Under a statute making a tax deed prima facie evidence of the regularity of all prior tax proceedings, the deed is prima facie evidence that notice of the expiration of the time for redemption was published. Fisher v. Betts [N. D.] 96 N. W. 132. The omission of a recital from a tax deed does not destroy the prima facie character of the deed. Slattery v. Heilperin, 110 La. 86. A void tax deed is not prima facie evidence of title, and furnishes no basis for affirmative relief. Seaverns v. Costello [Ariz.] 71 Pac. 930. In Tennessee, certain enumerated recitals appearing, the deed is valid evidence of title in any court, and it is immaterial whether the sheriff or his successor, thirteen years thereafter, executed the deed. Sheafer v. Mitchell, 109 Tenn. 181, 71 S. W. 86. But in Florida the deed is not sufficient evidence of title, but only of the fact of sale. Ayer v. Dillard [Fla.] 33 So. 714. And the party claiming under a sale for taxes must prove the regularity of all steps leading thereto. Griffin v. Sparks, 24 Ky. L. R. 849, 70 S. W. 30. Parties relying on tax deeds issued while the Indiana act of 1872 was in force have the burden of proving the regularity of the proceedings under the deed. Skelton v. Sharp, 161 Ind. 383, 67 N. E. 535. Where by statute it is provided that a record of the conveyance for two years in the office of the county clerk of the county where the lands are situate shall be conclusive evidence of the regularity of the sale and prior proceedings, a tax deed is admissible in evidence without proof of the regularity of the proceedings on which it is based. Baer v. McCullough, 176 N. Y. 97, 68 N. E. 129.

83. Stewart v. Pergusson, 133 N. C. 276.

84. Reckitt v. Knight [S. D.] 92 N. W. 1077; Skelton v. Sharp, 161 Ind. 383, 67 N. E. 535.

85. Failure to authenticate a list of lands furnished to the sheriff. Weiner v. Dickerson [Miss.] 33 So. 971.

86. Bell v. McLaren, 89 Minn. 24, 93 N. W. 515. A deed to the west half of the southeast quarter of a certain section of land, describing it as lying in a given county, conveyed title to the entire land, though seven acres thereof was situated in another county. Morrison v. Casey [Miss.] 34 So. 145. So a deed describing land as the "Shady Tract," but referring for particular description to other deeds of record containing accurate descriptions, is sufficient. Sheafer v. Mitchell, 109 Tenn. 181, 71 S. W. 86. But a deed which merely describes the land as "boundaries unknown" (Cooper v. Falk, 109 La. 474), and one which, while for the correct number of acres, describes other land on which taxes were paid, conveys no title (Massie v. Halstead, 127 Fed. 176). In a tax deed the area given does not control the general description. Crill v. Hudson [Ark.] 74 S. W. 299. Where a tax deed, as well as the notice of sale, described other land than that for which the execution was issued, the purchaser was without remedy, since he could not obtain a new deed under the statute, because the notice of sale erroneously described the land, and in the amended deed the sheriff could not state that he had given the proper notice. Talley v. Schlatitz [Mo.] 79 S. W. 162.

87. Error to submit it to jury. Holmes v. Weinheimer, 66 S. C. 18.

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be determined by the law in force at the time of sale.[88] Alterations are presumed to have been inserted innocently and before acknowledgment and delivery.[89] A tax deed must have been properly indexed or it is not deemed to have been recorded.[90]

§ 13. *Redemption.*—Redemption is a matter of right only when granted by statute,[91] and is governed by the law in force at the date of sale;[92] but such statutes are to be liberally construed in favor of the redemptioner.[93] But an owner may effect redemption by contract with the holder of the certificate.[94] The term "owner" as used in determining who may redeem from a tax sale has been construed to include a mortgagee[95] and his assignee,[96] a purchaser at mortgage foreclosure sale,[97] a trustee,[98] judgment creditors, and holders of contingent interests in the land affected by the sale.[99] A return of sale, together with the judgment and confirmation of sale and entry into possession, constitute sufficient title to enable a city to redeem from a county tax,[1] but a purchaser at a tax sale which conveys no title cannot redeem.[2]

A redemption, like a payment, by the owner of an interest making it his duty to pay the tax, destroys the lien,[3] as does redemption by a mere volunteer,[4] but a lienor who redeems to preserve his security is subrogated to the rights of the state.[5]

88. And if executed by virtue of such sale and valid under that law it cannot be affected by subsequent legislation. Sheafer v. Mitchell, 109 Tenn. 181, 71 S. W. 86.

89. If suspicious circumstances are present explanatory evidence may be admitted. Kalbach v. Mathis [Mo. App.] 78 S. W. 684.

90. And until it is so recorded ejectment cannot be maintained thereon. Chippewa River Land Co. v. Gates Land Co., 118 Wis. 345, 94 N. W. 37.

91. The right of a taxpayer to redeem from the state within the statutory period cannot be cut off by any action of the county. Santa Barbara County v. Savings & L. Soc., 137 Cal. 463, 70 Pac. 457. In Iowa complete authority with respect to redemption is conferred on the county auditor and treasurer, and the statutes point out precisely how this shall be accomplished [Code, §§ 1436-1439]. Everson v. Woodbury County, 118 Iowa, 99, 91 N. W. 900. Where a city buys in property sold for street improvement assessments, no one having offered the face value of the tax bills, the property owner has no redemption. City of Lexington v. Woolfolk [Ky.] 78 S. W. 910. In Michigan where land has been sold for nonpayment of taxes, and the sale set aside for any reason not affecting the validity of the tax, the only person authorized by the statute to receive the tax in redemption is the auditor general [P. A. 1899, No. 169, §§ 138, 139]. Schulte v. Auditor General [Mich.] 92 N. W. 417.

92. Collier v. Shaffer, 137 Cal. 319, 70 Pac. 177.

93. Statutes providing for possession of land acquired in tax proceedings six months after return of sheriff, and for a reconveyance six months after service, held to give right of redemption six months after return filed. Pike v. Richardson [Mich.] 99 N. W. 398. Michigan statutes construed. Held, that state tax lands purchased from auditor general at private sale or from county treasurer at annual tax sale are subject to redemption within time fixed by law. Monahan v. Auditor General [Mich.] 98 N. W. 1021.

94. It is not necessary to the validity of such an agreement that a time for redemption be fixed. Throckmorton v. O'Reilly [N. J. Eq.] 55 Atl. 56. Delay of eleven years to file a bill to enforce a verbal contract to permit complainant to redeem from a tax sale will bar relief, where complainant during such time treated the property as that of defendants, and claimed it only after it had greatly increased in value. Converse v. Brown, 200 Ill. 166, 65 N. E. 644.

95. Carley v. Bonner [Neb.] 97 N. W. 1014; Busch v. Hall, 119 Iowa, 279, 93 N. W. 356.

96. Hawks v. Davis [Mass.] 69 N. E. 1072.

97. People v. Morgan, 85 App. Div. [N. Y.] 292.

98. Clark v. McClaugherty, 53 W. Va. 376; Trosper v. Collins, 25 Ky. L. R. 113, 74 S. W. 710.

99. Lane v. Wright, 121 Iowa, 376, 96 N. W. 902.

1. Meagher v. Sprague, 31 Wash. 549, 72 Pac. 108.

2. No tax title is acquired by one who purchases at a tax sale land which on a former delinquency had been previously sold and purchased for the state. State v. Belcher, 53 W. Va. 359.

3. Mortgagor. Carley v. Boner [Neb.] 97 N. W. 1014. A widow having minor children permitted her homestead to be forfeited for nonpayment of taxes, procuring a third person to buy it in, afterward reimbursing him, he assigning his certificate to one who thereafter purchased the land from her; this constituted a scheme to get rid of the interests of the minor children, and amounted therefore to a mere redemption by the widow. Rowland v. Wadly [Ark.] 72 S. W. 994.

4. McKenzie v. Beaumont [Neb.] 97 N. W. 225.

5. Redemption from a sale for taxes by a mortgagor who has covenanted that upon his default in the payment of taxes the mortgagee may pay them will discharge the sale and the lien; redemption by the mortgagee will discharge the sale, but the lien for the redemption money will subsist for his pro-

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The statutory right must be exercised within the time prescribed by statute,[6] but upon equitable grounds the statutory period may be extended,[7] and persons under disability are permitted to redeem usually within some prescribed time after the removal of the disability;[8] a deed void on its face, however, will not set the statute in motion.[9]

An owner who seeks to redeem must repay to the tax purchaser all the money such purchaser has been compelled to advance to the state to obtain title.[10] Interest is to be computed only upon taxes due, and not upon the penalty or costs,[11] and the redemptioner is not required to pay interest on the cost of recording a tax deed, examination of title, and other intervening charges.[12]

A tender of the amount legally due, within the statutory period, will discharge the lien.[13]

tection. Carley v. Boner [Neb.] 97 N. W. 1014.

6. It can make no difference to an owner whether the certificate holder takes his deed as soon as he is entitled to it. The owner's right to redeem is fixed by statute and the time limited therein is absolute. Wood v. Coad, 120 Iowa, 111, 94 N. W. 264; State v. Cranney, 30 Wash. 594, 71 Pac. 50. An amendment to a statute of limitations may lawfully be retroactive. In re Moench's Estate, 39 Misc. [N. Y.] 480.

7. Bitzer v. Becke, 120 Iowa, 66, 94 N. W. 287; Koen v. Martin, 110 La. 242. Where redemption from a tax deed is decreed, the time within which redemption may be made is merely an incident to the enforcement of the decree, and, although the district court has been divested of jurisdiction, by an appeal, of the merits of the controversy, it still has the inherent chancery power to modify its orders relating solely to the enforcement of the decree and may extend or change the time for redemption. Swan v. Harvey [Iowa] 98 N. W. 641.

8. Under the provisions of the Iowa Code, one who is a minor when lands in which he has an interest are sold may redeem at any time within one year after his majority [Code, § 1439]. Bemis v. Plato, 119 Iowa, 127, 93 N. W. 83. The statute allowing infants one year after becoming of age in which to redeem is construed liberally in their favor. Cain v. Brown [W. Va.] 46 S. E. 579. In a suit to set aside tax deeds and redeem the land from tax sales by the heirs of the owner, it appearing that the owner was insane from a date prior to the tax sales to the time of his death, relief will be granted to such heirs on a proper showing within the prescribed time. Hawley v. Griffin [Iowa] 92 N. W. 113; Id., 121 Iowa, 667, 97 N. W. 86. The fact that one having an interest in land was an infant when it was sold for taxes may not give him a right to redeem after the period for redemption expires. West Virginia statutes providing for redemption by persons under disability does not apply to sales made to the state. Starr v. Sampselle [W. Va.] 47 S. E. 255.

9. Smith v. Williams Cooperage Co., 100 Mo. App. 153, 73 S. W. 315.

10. Subsequent taxes. Cheever v. Flint Land Co. [Mich.] 96 N. W. 933; Thomas v. Romano [Miss.] 33 So. 969; Foster v. Bender, 28 Mont. 526, 73 Pac. 121. When redemption is made interest should be added by the auditor up to that day, and also the amount of all delinquent taxes, interest and penalties, if there be any, which have accrued subsequent to the date of the notice. Midland Co. v. Eby, 89 Minn. 27, 93 N. W. 707. Where land forfeited to the state is sold for less than prior tax judgments, penalties, and costs, the amount required to redeem from such sale is the sum for which it was sold to the purchaser, with interest, costs and subsequent taxes. State v. Butler, 89 Minn. 220, 94 N. W. 688. A county board, after having purchased real estate for delinquent taxes in the manner provided by law cannot cancel or rescind the sale without the full payment of the taxes, penalties, interest, and costs on account of which the same was made. Kelly v. Dawes County [Neb.] 93 N. W. 405. A mayor's approval of a search required by provision of a statute is not his approval of the amount to be paid for the search, in order to charge that amount against a person redeeming lands sold for taxes. Lantry v. Sage [N. J.-Law] 55 Atl. 34. Whether, where there was an assessment of three lots in solido, there could be an apportionment so as to admit of a redemption as to one of them, quaere, the pleadings and proofs not being sufficient to raise the question. Christie v. Hartzell [Neb.] 95 N. W. 637. While a city is the agent of a purchaser of property at a tax sale for the purpose of receiving money paid by the property owner to redeem the same, the agency is not such as to make the purchaser in any way a party to the prior wrongful act of the city in selling the property for illegal taxes. Anderson v. Cameron [Iowa] 97 N. W. 1085.

11. Collier v. Shaffer, 137 Cal. 319, 70 Pac. 177; San Diego Inv. Co. v. Shaffer, 137 Cal. 323, 70 Pac. 179.

12. Hawks v. Davis [Mass.] 69 N. E. 1072.

13. Actual production of the money in offering to redeem is not necessary when the purchaser declines to allow redemption on the ground that the party is not entitled to redeem. Cain v. Brown [W. Va.] 46 S. E. 579. Where pending the disposition of a chancery suit plaintiff tendered the amount he claimed was due and offered to pay in redemption whatever amount the court should adjudge, such tender was the equivalent of an actual tender of the amount of taxes due. Bitzer v. Becke, 120 Iowa, 66, 94 N. W. 287. Where lands are sold for taxes and the owner tenders to the tax purchaser in redemption thereof, and within the two years, double the amount paid at the sale, as prescribed by statute, such tender is valid although made through a bank as agent and

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In some states a notice of the expiration of the period of redemption is necessary and is the last act whereby, if there be no redemption, the title of the owner is transferred to the tax purchaser,[14] but in Nebraska a purchaser can maintain an action to foreclose his lien without giving notice to redeem.[15] The notice must be given in strict compliance with the statute,[16] and due proof of service made,[17] its validity being determined by the statute in force at the time of the sale.[18]

§ 14. *Tax titles.*—Anyone not under legal or moral duty to pay the taxes for which property is being sold may become a purchaser at the sale and acquire title under such purchase. A mortgagee not in any way bound for the payment of his mortgagor's taxes may buy the latter's property at a tax sale.[19] An agent in the absence of any duty owing to his principal may become a purchaser at a tax sale of the lands of such principal.[20] A tenant of premises who is under no obligation to pay taxes thereon may lawfully acquire a tax title to the premises,[21] but a purchase by a person under the duty of paying the tax amounts to a mere payment, and gives him no title based on the sale.[22]

the tax payer did not know who the agent represented and declined for that reason. Logan's Heirs v. Logan, 31 Tex. Civ. App. 295, 72 S. W. 416. Where prior to the expiration of the time for redemption the holder of a tax lien offered to accept a given sum if paid before a certain date, and the amount was accordingly tendered and refused, this operated to avoid the tax deed. Briggs v. Boardman [Mich.] 97 N. W. 767.

14. Walker v. Martin, 87 Minn. 489, 92 N. W. 336.

15. Merrill v. Riverview Inv. Co. [Neb.] 95 N. W. 333.

16. Walker v. Martin, 87 Minn. 489, 92 N. W. 336. Where a special act prescribes notice by publication while the general tax law requires written notice, with personal or mail service, the provisions of the general law will prevail. Gabel v. Williams, 39 Misc. [N. Y.] 489. The notice must be directed to the person in whose name the lands are assessed, due proof of which must be made. Sterling v. Urquhart, 88 Minn. 495, 93 N. W. 898. In Minnesota, notice of the expiration of the period of redemption must be directed to the person in whose name the land described in the notice is assessed at the time the notice is issued. Walker v. Martin, 87 Minn. 489, 92 N. W. 336. But where the county auditor simply places unassessed land in the tax duplicate and extends the taxes thereon at a valuation therein named, a notice addressed to the person named in the tax duplicate is not sufficient. Id. When specifying the amount required to redeem, in the notice required by the Minnesota statute, the county auditor must include the total sum due, and this amount should be the sum actually due on the day the notice is dated [Gen. St. 1894, § 1654]. Midland Co. v. Eby, 89 Minn. 27, 93 N. W. 707. The affidavit making proof of service by advertisement of notice to redeem from tax sale need not refer to or have attached the original manuscript of the notice. The printed notice is sufficient. Hoskins v. Iowa Land Co., 121 Iowa, 299, 96 N. W. 877. The notice must be served on the occupant of the premises if any. People v. Miller, 90 App. Div. [N. Y.] 596.

17. Richards v. Beggs, 31 Colo. 186, 72 Pac. 1077.

18. Not at the time when it is issued. Phelps v. Powers [Minn.] 97 N. W. 136.

19. Moore v. Boagni, 111 La. 490.

20. Bemis v. Plato, 119 Iowa, 127, 93 N. W. 83.

21. Brown v. Atlanta Nat. B. & L. Ass'n [Fla.] 35 So. 403. One who acquires a tax certificate to land, and thereafter becomes a tenant of the owner, but who assumes no obligation to pay taxes on the land, and notifies the owner of his tax claim and of his intention of procuring a deed to the land if it is not redeemed, is not estopped by his tenancy from procuring such deed. Id.

22. A tenant cannot acquire a valid tax title as against his landlord, by virtue of a tax sale during the tenancy, for taxes which the tenant had agreed but failed to pay. Oppenheimer v. Levi, 96 Md. 296. An owner of an estate in land making it his duty to pay taxes thereon cannot acquire a tax lien separate and distinct from his existing title. Clippinger v. Auditor General [Mich.] 97 N. W. 53; Shrigley v. Black, 66 Kan. 213, 71 Pac. 301; City of Excelsior Springs v. Henry, 99 Mo. App. 450, 73 S. W. 944; White v. Thomas [Minn.] 98 N. W. 101. Tax title purchased by brother of owner holding subject to trust deed, held fraudulently acquired for the brother's use. New England L. & T. Co. v. Browne, 177 Mo. 412, 76 S. W. 954. A trustee cannot acquire title belonging to his cestui que trust at tax sale, and he may not as agent bid it in for another (A third person held in his own name property of a deceased which was sold for taxes under an assessment made in his name and bid in by a tutor of the heirs for the benefit of the tutor's daughter. Ingram v. Heintz [La.] 36 So. 507), and if he does the adjudication made to him at the sale inures to the benefit of the heirs (Id.). One joint owner may not acquire tax title to the property to the prejudice of his co-owner. One joint owner bid in the property at tax sale and had it adjudicated to a third person. Bossier v. Herwig [La.] 36 So. 557. A fraudulent purchase may be construed as a redemption. The purchaser at a tax sale induced a lienor not to redeem by representing that a subsequent lienor would redeem. He then assigned his sheriff's certificate to such subsequent lienor and kept it secret until the redemp-

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The general rule is that until the expiration of the time for redemption and the execution and delivery of the deed the title to land remains with the original owner and the purchaser acquires only a lien for the amount of his bid,[23] but as between the state and the original owner the title becomes absolute in the state on a regular sale.[24] The purchaser gets a title clear of all prior incumbrances, easements, or other rights,[25] except the state's claim for the taxes of prior years,[26] but no title is acquired by one who purchases land already the property of the state under a prior sale.[27] In Nebraska, a good faith tax purchaser is entitled to subrogation to all the municipality's rights in any tax paid by him in making the purchase, or subsequently, in protecting it,[28] though it is otherwise in Alabama.[29]

A purchaser is not entitled to possession until expiration of the period of redemption,[30] but in the case of wild land constructive possession is conferred by the deed.[31]

tion period had expired. Holt v. King [W. Va.] 47 S. E. 362. Where a judgment creditor redeemed from tax sale lands belonging to debtor's wife, to protect himself in case it should be decided that a conveyance to the wife by the debtor was fraudulent, and the wife later brought suit to remove a cloud from her title, it having been found there was no fraud in the conveyance to her, it was held that she must repay to defendant the taxes paid for redemption. Clark v. Knox [Colo.] 76 Pac. 372.

22. In Missouri, until actually sold for delinquent taxes, the title remains in the owner who should pay all subsequently assessed taxes. City of Excelsior Springs v. Henry, 99 Mo. App. 450, 73 S. W. 944. The holder of a certificate of sale of land for taxes or a tax deed thereunder, when the sale is not absolutely void, but merely ineffectual to transfer title through the deed, holds the lien of the state for the taxes paid by such sale. Dixon v. Elkenberry [Ind. App.] 65 N. E. 938.

24. Although the original owner has a subsequent right to redeem upon a sale of the state's interest. Hickey v. Rutledge [Mich.] 98 N. W. 974. A statute authorizing the judicial sale of lands bid in by the county at tax sale, and not redeemed, is not unconstitutional by reason of vesting in the board of commissioners discretion to determine what lands shall be offered for sale under it, and when they shall be so offered. Baker v. Atchison County Com'rs, 67 Kan. 527, 73 Pac. 70. If it is established that the lands were forfeited to the state it will be presumed that there was an offer of the property for sale and a failure to sell for want of bidders. Elmwood Cemetery Co. v. People, 204 Ill. 468, 68 N. E. 500. In New York, lands sold by the comptroller for taxes and bid in by the people, belong, at the expiration of the redemption period, to the people as equitable owners and may thereafter be sold. Raquette Falls Land Co. v. International Paper Co., 41 Misc. [N. Y.] 357. Under Mississippi statute and decisions, land held under void tax title, and a subsequent quit claim deed from the state is good as against a later patent from the state. Means v. Haley [Miss.] 36 So. 257.

25. A sale for a valid tax gives a paramount title, free from the ownership or incumbrance of rights previously existing in third persons, which have been carved out of the property by the owner, or which have been acquired in it by prescription or otherwise. Right to dig gravel for a period of years. Hunt v. Boston, 183 Mass. 303, 67 N. E. 244. A tax sale is made clear of all prior incumbrances. Stevenson v. Henkle, 100 Va. 591. Deeds executed by a city for the nonpayment of assessments for local improvements convey title superior to an existing mortgage on the property. Kirby v. Waterman [S. D.] 96 N. W. 129. If a tax deed be fair upon its face and founded on regular proceedings, it conveys a valid title in fee simple as against all the world, subject only to be divested by a tax deed based upon a subsequent tax. Cezekolski v. Frydrychowicz [Wis.] 98 N. W. 211. A tax is not invalid because a mortgagee was not recognized in the assessment, where a statute provided that if a mortgagor or mortgagee failed to bring to the assessor a statement of the amount due on the mortgage, the property could be assessed to the mortgagor. If he had the tax would have been divided. Abbott v. Frost [Mass.] 70 N. E. 478. A sale for taxes may be valid against a mortgagee and pass title free from his lien. Under statutes providing that the burden of taxation should be divided between mortgagor and mortgagee, and also providing for a sale for taxes if they remained unpaid for a certain period. Id. Under statute making taxes a lien on real estate after a certain period and providing for a sale within two years, or after expiration of two years if the estate had not been alienated prior to the notice of sale, a purchaser after the expiration of the two years obtains as good a title as if the sale had been made within that time. Id. A sale for taxes may take priority over mortgage foreclosure. Sale under power in a mortgage after notice of sale for taxes authorized by statute. Id.

26. Auditor General v. Sherman [Mich.] 98 N. W. 995; City of Rochester v. Parker, 41 Misc. [N. Y.] 514.

27. State v. Belcher, 53 W. Va. 359.

28. Leavitt v. Bartholomew [Neb.] 93 N. W. 856.

29. Tradesmen's Nat. Bank v. Sheffield City Co., 137 Ala. 547.

30. The purchaser is not entitled to be placed in possession until after the time for redemption has expired. Elrod v. Groves, 116 Ga. 468. In Texas the purchaser is not entitled to possession until the expiration of two years from the date of the deed. City of Marlin v. Green [Tex. Civ. App.] 79 S. W. 40.

31. Ashley Co. v. Bradford, 109 La. 641;

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The rule of caveat emptor applies to the purchase of real estate at a tax sale,[32] but provisions for reimbursing the purchaser on failure of title are common,[33] and the value of improvements made by a tax purchaser in good faith is recoverable.[34] Refundment can only be made, however, where there is express statutory provision therefor,[35] and in the absence of such provisions the purchaser buys at his risk.[36]

A purchaser in some states is not required to bring any further proceedings to establish his title if he can obtain possession without,[37] and generally, possession under a tax deed for the statutory period will confer an absolute title, such deed being sufficient "color."[38]

Sparks v. Farris [Ark.] 71 S. W. 945; Cezekolski v. Frydrychowicz [Wis.] 98 N. W. 211. A tax deed of vacant land, valid upon its face and duly recorded, invests the tax title holder with constructive possession of the land; and such constructive possession, when uninterrupted by actual possession of the adverse claimant, perfects the tax deed at the expiration of the statutory period of limitation as against affirmative assaults upon it for defects in the proceedings upon which it is based. Stump v. Burnett, 67 Kan. 589, 73 Pac. 894.

32. Concordia L. & T. Co. v. Douglas County [Neb.] 96 N. W. 55; Birney v. Warren, 28 Mont. 64, 72 Pac. 293; Talley v. Schlatitz [Mo.] 79 S. W. 162. In the absence of a statutory provision for refundment the purchaser buys at his risk and takes only such title as the state has. Ball v. Powers [Mich.] 95 N. W. 539. If none of the defendants at the time a judgment was rendered had any title, the purchaser at the execution sale and the grantee in his deed acquire none. Wilson v. Fisher, 172 Mo. 10, 72 S. W. 665. One who purchases at a tax sale is not entitled to have the purchase price refunded if the sale is declared void (Harding v. Auditor General [Mich.] 99 N. W. 275), unless provision for refundment is made by statute. Right of refundment acquired, held not affected by repeal of the law. Id. Right to refundment held to have been lost by failure to bring action to recover possession within five years (Id.), in which case laches cannot exist in the matter of application therefor until the right to apply for refundment has accrued (Id.).

33. Where a tax deed is set aside for defects not affecting the validity of the tax, a judgment decreeing that the party attacking the deed shall reimburse the purchaser whose claim shall be a lien on the property rendering it subject to sale on execution, is within the equitable powers of the court. McKinney v. Minnehaha County [S. D.] 97 N. W. 15. A subsequent judgment creditor of a co-partnership purchasing premises at execution sale and who, in good faith, relying upon the validity of his title, redeemed the premises from certain prior tax sales, which were liens upon the property as against an assignee thereof, is entitled to be re-imbursed for the amount so paid as a condition for the entering of judgment in an action to determine the validity of his title. Ryan v. Ruff [Minn.] 95 N. W. 1114. A purchaser of property at a tax sale for a void and illegal tax having no notice of such illegality, is entitled to retain as against such owner money paid by the latter to redeem the property, even though he knows it was paid under protest. Anderson v. Cameron [Iowa] 97 N. W. 1085. A purchaser whose deed is void because of a void assessment may recover the sum paid. Stewart v. Bernalillo County Com'rs [N. M.] 70 Pac. 574. One who buys land at an invalid tax sale under a judgment for general taxes, and thereafter pays the taxes on land as they accrue, cannot in the absence of a statutory provision therefor, when defeated by the owner of such land in an action against him, have the purchase price of the land and the taxes paid by him declared a lien against it, nor can he recover the amount so expended by him from the owner of the land. Rowe v. Current River L. & C. Co., 99 Mo. App. 158, 73 S. W. 362. A finding that plaintiff, in an action to quiet title, had paid a sum of money as taxes by reason of a tax deed, set aside. McKinley-Lanning L. & T. Co. v. Varney [Colo. App.] 74 Pac. 338.

34. Jones v. Griffin, 25 Ky. L. R. 117, 74 S. W. 713. Improvements made by one previous to the time when he claims title under a tax deed are not recoverable against a prevailing former owner. Uhl v. Grissom, 12 Okl. 322, 72 Pac. 372.

35. Wolverine Land Co. v. Auditor General [Mich.] 95 N. W. 715. A statute designed to obviate the necessity of bringing an action to determine the validity of any tax certificate, and which provides that in cases where some decision of the supreme court is decisive of the question the state auditor is empowered to authorize a refundment, must be strictly construed, and a refundment can be made by him only in such cases as come squarely within some prior decision of the court (State v. Dunn, 88 Minn. 444, 93 N. W. 306), and a similar statute, in Michigan, does not empower the auditor general to review a decree of the court of chancery (Cole v. Auditor General [Mich.] 93 N. W. 890; Flint Land Co. v. Auditor General [Mich.] 95 N. W. 543). Where the purchaser at a tax sale is required to pay taxes for years subsequent to the delinquent ones, he is, on the setting aside the sale by the auditor general, entitled to have the taxes for such subsequent years refunded. Auditor General v. Newman [Mich.] 97 N. W. 703.

36. Ball v. Powers [Mich.] 95 N. W. 539; Stewart v. Bernalillo County [N. M.] 75 Pac. 43.

37. A purchaser at tax sale is not required in every case to institute judicial proceedings to be put into possession by the sheriff. He may take possession himself when he can do so without difficulty. Muller v. Mazerat, 109 La. 116.

38. Wallace v. International Paper Co., 84 App. Div. [N. Y.] 88; St. Mary's Power Co. v. Chandler-Dunbar Water Power Co. [Mich.] 95 N. W. 554; Carey v. Cagney, 109 La. 77; Pomeroy v. McFarlain, 110 La. 338. Good faith under the 10 years' prescription is sim-

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In some states if no action is brought by the tax purchaser within a stated period the tax title is extinguished.[39]

In many states his remedy is by possessory action such as ejectment,[40] while under statutory provisions in several states the tax purchaser may resort to equity to have his title quieted and confirmed, or to an action to conclude the former owner or persons who may claim an adverse interest by a foreclosure of the tax certificate or equity of redemption.[41]

ply the absence of bad faith. Muller v. Mazerat, 109 La. 116. And it differs from the good faith, and possession which determine the rights and obligations as to fruits, revenues, and analogous claims. Leathern & S. Lumber Co. v. Nalty, 109 La. 325. The presumption does not run in favor of a void tax (George v. Cole, 109 La. 816), but mere defects in a deed do not prevent the statute running in its favor (Thompson v. Colburn [Kan.] 75 Pac. 508; Kennan v. Smith, 115 Wis. 463, 91 N. W. 986). A deed though made by one having no authority to convey is sufficient color of title to support a claim of adverse possession if the possession is in good faith. Roth v. Munzenmaier, 118 Iowa, 326, 91 N. W. 1072. A statutory provision that no suit for the recovery of land sold for taxes shall be brought unless plaintiff, or his predecessors in title, was seized of the same within two years next before bringing suit, applies to persons under disability as well as those sui juris. Sparks v. Farris [Ark.] 71 S. W. 255. Where a purchaser at a tax sale after two years, the time allowed for redemption, goes into actual possession for the requisite period, such title and holding is a bar to a recovery of the land. Butts v. Ricks [Miss.] 34 So. 354. Constructive possession is sufficient (Ashley Co. v. Bradford, 109 La. 641), and extends to entire tract though deed is void (Sparks v. Farris [Ark.] 71 S. W. 945). Actual possession by a purchaser of a small portion of a tract of land is possession of the whole tract. Butts v. Ricks [Miss.] 34 So. 354; George v. Cole, 109 La. 816; Crill v. Hudson [Ark.] 74 S. W. 299; Brown v. Hartford, 173 Mo. 183, 73 S. W. 140. If a tenant be placed in possession of a tract of land and no boundaries are inserted limiting the possession to a prescribed part of the tract the possession of such a lessee is a possession of the whole tract, although the land actually occupied may be but a small part thereof. Treece v. American Ass'n, 122 Fed. 598. If the deed, though fair on its face, be voidable for irregularities in the proceedings, it may be rendered valid by the limitation statutes, either by three years' actual possession by the grantee in the tax deed, or in case of vacant and unoccupied land, by the lapse of three years after the recording of the deed without action by the original owner. Cezekolski v. Frydrychowicz [Wis.] 98 N. W. 211. In Louisiana, privileges for state and county taxes, whether recorded or unrecorded, become prescribed in either three or five years, unless the prescription is interrupted by the pendency of suits which prevent the collection of the tax. State v. Recorder of Mortgages, 111 La. 236. The six months' limitation statute of Michigan is not confined to cases where the homesteader has obtained a deed, but extends to cases where he claims under a valid certificate [P. A. 1899, No. 107, § 131]. Semer v. Auditor General [Mich.] 95 N. W. 732.

39. Five years. Roth v. Munzenmaier, 118 Iowa, 326, 91 N. W. 1072. In Iowa, under a provision that no action for the recovery of real property sold for the nonpayment of taxes shall be brought after five years from the executing and recording of the treasurer's deed, the statute of limitations begins to run at the time when the tax-sale purchaser might have obtained his deed, that is three years from the date of sale, and if no action is brought by such purchaser within five years thereafter the tax title is extinguished. Id. A party may bring his action to foreclose a tax lien upon property at any time within five years from the end of the two years within which the owner of the property has a right to redeem from the tax sale. Western Land Co. v. Buckley [Neb.] 92 N. W. 1052; Gallentine v. Fullerton [Neb.] 93 N. W. 932. The five-year limit within which foreclosure proceedings upon a tax sale certificate must be brought does not commence to run until the expiration of the two years within which the tax debtor may redeem from the sale. Valley County v. Milford [Neb.] 97 N. W. 310; Keith County v. Big Springs L. & C. Co. [Neb.] 97 N. W. 626. Cutting and using wood from unfenced land is such a possession by the owner as will bar a tax title after five years. Clark v. Sexton [Iowa] 98 N. W. 127. When a tax sale purchaser in due time surrenders his certificate of purchase, and takes a void treasurer's deed, the issuance of the deed and the failure of title are concurrent events. Butler v. Copp [Neb.] 97 N. W. 634.

40. Unless properly recorded and indexed ejectment cannot be maintained on a tax deed. Chippewa River Land Co. v. Gates Land Co., 118 Wis. 345, 94 N. W. 37.

41. A purchaser guilty of fraud will not be aided by a court of equity in the enforcement of his rights. Pitre v. Haas, 110 La. 163. The holder of a tax deed to mortgaged premises, claiming title adverse and paramount to both mortgagor and mortgagee is not ordinarily a proper party defendant to a suit to foreclose the mortgage. Brown v. Atlanta Nat. B. & L. Ass'n [Fla.] 35 So. 403. The grantee in a tax deed to unoccupied lands, fair on its face, may after the lapse of the prescribed three years quiet title against a claimant under a subsequent tax deed, also fair on its face but voidable for irregularities, although such claimant recorded his deed prior to the expiration of the three years from the date of the recording of the first grantee's deed. Cezekolski v. Frydrychowicz [Wis.] 98 N. W. 211. It has been the uniform policy of the legislature of Nebraska, as revealed by its present and prior enactments of statutes concerning the collection of real estate taxes, to provide for an administrative sale of the property for de-

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In Nebraska an action to foreclose a tax lien cannot be begun until after the expiration of two years from the date of sale,[42] nor maintained unless based upon a tax deed or tax sale certificate.[43] All parties interested in the land must be made parties, if known,[44] and when the owner is not known the proceedings may go against the land itself.[45] The action must fail unless supported by sufficient evidence.[46] The decree should not include taxes for which no sale has been made or certificate issued,[47] and illegal taxes should not be included.[48] A first mortgagee is entitled to a lien on the surplus arising from the sale.[49]

In Washington, a tax foreclosure summons which does not conform to existing law in fixing the time within which a defendant shall appear is fatally defective.[50] In the absence of any showing to the contrary, however, the presumption will be indulged that the proceedings were in accordance with the statute.[51]

The holder of a general tax delinquency certificate is entitled to foreclose the same without being compelled to pay or tender delinquent street assessments which may be an existing lien upon the lands included in his certificate.[52] The amount due on the collector's books is prima facie evidence of the amount of taxes against the property,[53] and no appeal from judgment on foreclosure is allowed unless the party appealing deposits an amount equal to the judgment and costs.[54]

When the proceedings through which property has been subjected to sale f

linquent taxes and allow thereafter two years' time in which to redeem, in conformity with the constitutional provisions, after which an absolute sale and extinguishment of the owner's title is provided for by the issuance of a tax deed by the county treasurers, or by a foreclosure suit and sale of the land by judicial process for the satisfaction of such taxes. Logan County v. Carnahan [Neb.] 95 N. W. 812. The collection of a land tax by judicial sale, without an antecedent sale by the county treasurer, is not forbidden by the constitution, but is contrary to the provisions of the revenue law. Logan County v. Carnahan [Neb.] 92 N. W. 984. An executor or administrator of a deceased purchaser is authorized to bring an action to quiet title to real estate, pending administration of the estate. Blakemore v. Roberts [N. D.] 96 N. W. 1029. The complaint need not allege that such tax lien was based on a regular assessment and levy. Id.

42. Kelly v. Dawes County [Neb.] 93 N. W. 405.

43. Logan County v. Carnahan [Neb.] 92 N. W. 984; Id., 95 N. W. 812; Holt County v. Golden [Neb.] 98 N. W. 422; Chase County v. Meeker [Neb.] 97 N. W. 1021. A county cannot foreclose its lien for taxes without a sale first having been made by the county treasurer and a certificate of tax sale issued thereon. Valley County v. Milford [Neb.] 97 N. W. 310; Logan County v. McKinley-Lanning L. & T. Co. [Neb.] 97 N. W. 642. Where it appears that no sale for such taxes has been made by the county treasurer, a decree, while erroneous, is not void, and if unappealed from will divest the owner of his title. Russell v. McCarthy [Neb.] 97 N. W. 644.

44. A mortgagee joined as a party defendant in a suit to foreclose a tax lien may not be sued by the initial letters of his name, although so designated in the note and mortgage by virtue whereof he claims a lien upon the property in question. Proper practice pointed out. Gillian v. McDowell [Neb.] 92 N. W. 991.

45. Butler v. Copp [Neb.] 97 N. W. 684.

46. Hillers v. Yeiser [Neb.] 96 N. W. 683. See former opinions in 91 N. W. 1126, 93 N. W. 989.

47. Keith County v. Big Springs L. & C. Co. [Neb.] 97 N. W. 626.

48. Where it appears there has been an attempted tax sale and a payment in good faith by the tax purchaser of taxes, some of which are a valid charge against the land, the purchaser is entitled to foreclose his lien for so much of the tax and interest as is actually due. Medland v. Schlenter [Neb.] 95 N. W. 342. The fact that judgment upon a tax foreclosure included taxes not lawfully assessed against the property is not ground for the vacation of the judgment, where the owner has been regularly summoned to appear and has had an opportunity to defend against the legality of any portion of the tax. Swanson v. Hoyle, 32 Wash. 169, 72 Pac. 1011.

49. Brockway v. Humphrey [Neb.] 94 N. W. 625.

50. Thompson v. Robbins, 32 Wash. 149, 72 Pac. 1043; Smith v. Newell, 32 Wash. 369, 73 Pac. 369; Smith v. White, 32 Wash. 414, 73 Pac. 480; Woodham v. Anderson, 32 Wash. 500, 73 Pac. 536. Three days' delay after verifying an affidavit for publication service in proceedings to enforce a tax lien before filing the same is not fatal. Whitney v. Knowlton, 33 Wash. 319, 74 Pac. 469.

51. Wall v. Holladay-Klotz L. & L. Co., 175 Mo. 406, 75 S. W. 385. An answer which does not deny the assessment, when coupled with allegations of irregularities sufficient to avoid a tax sale leaves the burden of proof on the defendant. Medland v. Croft [Neb.] 95 N. W. 665.

52. Keene v. Seattle, 31 Wash. 202, 71 Pac. 769. Application for general tax delinquency certificate. State v. McConnaughey, 31 Wash. 207, 71 Pac. 770.

53. Chicago Real Estate L. & T. Co. v. People, 104 Ill. App. 290.

54. Schultz v. Harris, 31 Wash. 302, 71 Pac. 1009.

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taxes are materially affected with fraud or irregularity, or when the property is not subject to the tax, the owner may[55] generally, within a period prescribed by statute,[56] maintain suit to set the sale or deed aside,[57] and if the bill brings the case within some other head of equity jurisprudence, possession by complainant is not essential to jurisdiction.[58] The plaintiff must show title in himself,[59] and must allege in his bill, and prove, the invalidity which he claims exists in the title of defendant.[60] Irregularities of the collector may be cured by limitations.[61] Plaintiff should tender the amount of taxes and disbursements,[62] and the decree will award reimbursement to the purchaser on a proper showing,[63] though his claim

55. A vendor of land having a lien for the unpaid part of the purchase price is in privity with the vendee, so that a tax deed voidable as against the vendee may also be avoided by the vendor. Brown v. Lyon, 31 Miss. 438. An owner of land sold for taxes is not entitled to relief because subsequent to the sale he requested the county treasurer to give him a statement of taxes due on the premises, nothing being said about tax sales or with reference to redeeming from any sale. Conklin v. Cullen [Mont.] 74 Pac. 72.

56. The limitation of three years against an action to recover land conveyed for nonpayment of taxes, after the recording of the tax deed, does not operate in favor of a deed, void on its face. Thompson v. Roberts [S. D.] 92 N. W. 1079; Horswill v. Farnham [S. D.] 92 N. W. 1082. The prescription or bar of three years to suits to annul tax sales does not apply where the property remains in the actual or corporeal possession of the tax debtor or original owner, the purchaser making no effort to dispossess him. In re Selm, 111 La. 554. The imprescriptibility of a city tax does not preclude the owner of the property from having the inscription of the privilege therefor canceled from the books of the mortgage office, when by the terms of the constitution and the law such privilege has ceased to exist. Rousset v. New Orleans, 110 La. 1040.

57. Tax sales may be set aside because of the payment of taxes for which they have been made only when such payments shall have been made before the sales. Koen v. Martin, 110 La. 242. Language in an answer to a bill to cancel a tax certificate held not impertinent. Robertson v. Dunne [Fla.] 33 So. 530.

58. Day v. Davey [Mich.] 93 N. W. 256. In Louisiana a party asserting his ownership of real estate which he declares is illegally claimed by a named person under a tax title has the right, contradictorily with him, to attack judicially the tax title, and have its validity passed on, though neither of the parties has ever had actual possession of the property. Citizens' Bank v. Marr, 111 La. 601.

59. Glos v. Adams, 204 Ill. 546, 68 N. E. 398. A mere occupant of lands, without title, cannot question the validity of a tax deed which has ripened into title. People v. Francisco, 76 App. Div. [N. Y.] 262. Persons who are not the owners, of record or otherwise, of property assessed and sold for taxes, and who have thereafter acquired no title to the same, have no interest or standing to prosecute a suit to annul the sale. Jackson v. Mixon, 111 La. 581.

60. Glos v. Kingman & Co., 207 Ill. 26, 69 N. E. 632. A complaint which alleges that plaintiff is the owner of the land and that defendants claim under a tax deed, without alleging its invalidity, is demurrable, because affirmatively showing a defense to the action. Mitchell L. & L. Co. v. Flambeau Land Co. [Wis.] 98 N. W. 530. A petition in an action to set aside a levy on and sale of land assessed against plaintiffs' grantor which does not allege that plaintiffs' deed was recorded does not state a cause of action, since it is presumed that the record title is still in the grantor and the tax therefore properly assessed. Stites v. Short, 25 Ky. L. R. 918, 76 S. W. 518. One assailing or defending against a tax title must show that the collector failed to comply with the requirements not recited in the tax deed. In Louisiana tax deeds are prima facie evidence of a valid sale and of regularity of proceedings not recited in the deed. Simoneaux v. White Castle L. & S. Co. [La.] 36 So. 328. Evidence held insufficient to show that there had been no sale or assessment. Id.

61. In Louisiana failure of collector to offer the least quantity before selling the whole is cured by limitations. Simoneaux v. White Castle L. & S. Co. [La.] 36 So. 328. Inquiry as to notice and mode of sale was held to be barred by limitations. Id.

62. If complainant in a bill to set aside tax deeds, based upon a legal tax, as a cloud on title, fails to make sufficient tender prior to the filing of the bill it is proper upon granting relief to require him to pay costs. Glos v. Woodard, 202 Ill. 480, 67 N. E. 3. A tax is paid by a sale therefor so that one suing to set aside the deed is not required to show it had been paid by him, under a code provision that one may not question a treasurer's tax deed without showing that all taxes due have been paid by him or one under whom he claims. Knight v. Hawkeye L. & B. Co., 121 Iowa, 74, 95 N. W. 273.

63. Where a tax deed or certificate has been found to be void in a suit to remove cloud from title the decree should be conditioned to take effect only upon payment into court, for the use of the grantee in the deed, of an amount sufficient to reimburse him. Pueblo Realty Trust Co. v. Tate [Colo.] 75 Pac. 402. Where the defendant, in a proceeding in equity to declare void a deed held by him, based upon a certification of land to the state for nonpayment of taxes, makes no proof of the amount of taxes and disbursements which he claims should be refunded to him, it is not error for the court to declare void the deed without making provision for the payment to defendant of such taxes and disbursements. Hughey v. Winborne [Fla.] 33 So. 249. And where the tax purchaser had failed for a period of from 12 to 14 years to assert his liens the court quieted the owner's title without requiring him to pay the taxes, leaving the tax pur-

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may be set off against rents and profits, where he has been in possession.[64] Where a tax deed sought to be set aside includes other lands than those claimed by plaintiff, it is error to cancel the deed as to such premises.[65] A judgment dismissing a suit brought by mortgagees to annul a tax sale of the property mortgaged is not res adjudicata as against the owner of the property.[66] One who for a statutory period has been in possession of land claimed under tax title may maintain a bill to quiet title as against the holder.[67] A purchaser from one holding under a tax deed may be a bona fide purchaser if the proceedings at the tax sale were regular.[68]

§ 15. *Inheritance and transfer taxes.*—This method of taxation, variously designated as "death duties,"[69] "transfer,"[70] "inheritance,"[71] and "succession" taxes, is defined to be an exaction to be paid to the state upon the occasion of death and the consequent transfer of ownership in the property of a decedent, through the intervening custody and administration of the law, to the persons designated by the law, through the statutes regulating wills, descents, and distribution,[72] and is generally justified on the ground that inasmuch as the process by which the state assumes the care of property upon the death of its owner, and secures its distribution to the objects designated by him in his will, or to the persons designated by the law of intestacy, is the creature of statute, which the state may alter or abrogate at pleasure; therefore the power of its owner to so transfer property through his death, and of his legatee or the distributee of his estate to so receive the property is a privilege granted by the state, which may properly dictate the terms on which the privilege may be enjoyed.[73]

Statutes of like import have existed so long and have been so uniformly sustained that their constitutionality is no longer generally regarded as an open question,[74] though such statutes have been successfully attacked in Minnesota[75] and Wisconsin, on the ground that by reason of their exemptions and graduations, they are violative of the rule of uniformity,[76] and a section of the Minnesota statute has been held invalid because levying a tax in excess of the constitutional rate as applied to certain heirs.[77]

chaser to his legal rights. Crocker v. Dougherty, 139 Cal. 521, 73 Pac. 429.

64. In an action to recover the possession of real estate from one holding under a voidable tax deed, rents and profits may be set off against the taxes paid. Longworth v. Johnson, 66 Kan. 193, 71 Pac. 259. Where in an action to set aside a tax deed defendant did not object that no tender of taxes had been made before suit brought, he cannot complain of a decree setting off the rents and profits received after suit brought. Gerstle v. Vandergriffe [Ark.] 79 S. W. 776.

65. Glos v. Adams, 204 Ill. 546, 68 N. E. 398.

66. R. McWilliams v. Gulf States L. & I. Co., 111 La. 194.

67. Schneider v. Detroit [Mich.] 98 N. W. 258. Wrongful forcible possession is not such possession as the owner must have in order to maintain a bill to remove a cloud on title. Hughey v. Winborne [Fla.] 33 So. 249.

68. Mortgagors were purchasers from one holding under tax title. This is suit to foreclose the mortgage. Atlanta Nat. B. & L. Ass'n v. Gilmer, 128 Fed. 293.

69. Appeal of Nettleton [Conn.] 56 Atl. 565.

70. In re Vanderbilt's Estate, 172 N. Y. 69, 64 N. E. 782.

71. State v. Clark, 30 Wash. 439, 71 Pac. 20; State v. Bazille, 87 Minn. 500, 92 N. W. 415; Union Trust Co. v. Wayne Probate Judge, 125 Mich. 487, 84 N. W. 1101; Dixon v. Ricketts, 26 Utah, 215, 72 Pac. 947.

72. Appeal of Nettleton [Conn.] 56 Atl. 565.

73. Appeal of Nettleton [Conn.] 56 Atl. 565; Jackson v. Taller, 41 Misc. [N. Y.] 86.

74. State v. Clark, 30 Wash. 439, 71 Pac. 20; Appeal of Nettleton [Conn.] 56 Atl. 565; Union Trust Co. v. Wayne Probate Judge, 125 Mich. 487, 84 N. W. 1101; Dixon v. Ricketts, 26 Utah, 215, 72 Pac. 947. Congress has power to tax the transmission of property by legacy to states or to their municipalities. Snyder v. Bettman, 190 U. S. 249, 47 Law. Ed. 1035.

75. Drew v. Tifft, 79 Minn. 175, 81 N. W. 839, 47 L. R. A. 525, 79 Am. St. R. 446; State v. Bazille, 87 Minn. 500, 92 N. W. 415; State v. Harvey [Minn.] 95 N. W. 764. An inheritance tax law wherein transfers of property to as as to lineal descendants the tax is imposed collateral descendants are taxed to the full only upon the excess over and above a fixed value when such value exceeds $5,000, where valuation of $5,000, is void for inequality. State v. Bazille, 87 Minn. 500, 92 N. W. 415.

76. Black v. State, 113 Wis. 205, 89 N. W. 522.

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The general rule, however, is that, the tax being, not upon property, but upon the transfer,[78] the fact that statutes prescribe that estates up to a given point or amount, or devises in favor of certain heirs, shall be exempt, does not render them repugnant to constitutional inhibitions against inequality, and which stamp with invalidity laws which select any person or persons for gratuitous privileges or for arbitrary and hostile discrimination.[79]

The occasion for the imposition of a tax of the kind in question arises, under the statutes of nearly if not all the states, upon the transfer or acquisition of any property, real or personal,[80] or of any interest therein or income therefrom, in trust or otherwise,[81] either by will, by the intestate law of the state, or by sale or gift made in contemplation of death, or to take effect in use or enjoyment thereafter.[82] A transfer need not be effected by will or by the intestate laws in order to be subject to the tax. If the transfer is causa mortis, it is taxable.[83] The state has the burden of proving that property is subject to the transfer tax,[84] and the question of taxability is governed by law in force at time of decedent's death.[85]

77. State v. Harvey [Minn.] 95 N. W. 764.

78. The transfer tax is one upon the transfer or succession and not upon the property or the estate of the deceased. In re Wolfe's Estate, 89 App. Div. [N. Y.] 349. Such exaction is due and collectible during the interim that the property is in the custody of the law, that is, after death has destroyed the possession of its owner, and before final possession is given to the new owners designated by law. Appeal of Nettleton [Conn.] 56 Atl. 565. A tax is a property tax when imposed by reason of the ownership of property; a transfer tax when imposed on the method of its acquisition. In re Vanderbilt's Estate, 172 N. Y. 69, 64 N. E. 782. If the tax is laid upon the property after it has passed into the possession of the new owner, to be paid by him, it is a tax on the property itself, and not on its devolution or succession. Appeal of Nettleton [Conn.] 56 Atl. 565; Dixon v. Ricketts, 26 Utah, 215, 72 Pac. 947.

79. Appeal of Nettleton [Conn.] 56 Atl. 565. The exemption in an inheritance tax law from the provisions of the act of sums below $10,000 when the estate passes to direct heirs and kindred is not violative of the requirement of equality. State v. Clark, 30 Wash. 439, 71 Pac. 20. The California Act of 1897, exempting nephews and nieces of the deceased when residents of that state, is constitutional and valid. In re Johnson's Estate, 139 Cal. 532, 73 Pac. 424.

80. A seat in the New York stock exchange is property within the meaning of the tax law of that state, and subject to the transfer tax [L. 1896, c. 908, art. 10, § 242]. In re Hellman's Estate, 174 N. Y. 254, 66 N. E. 809; Id., 77 App. Div. [N. Y.] 355. Money loaned by a partner to the firm is invested capital and subject to transfer tax. In re Probst's Estate, 40 Misc. [N. Y.] 431. The good will of a business is property and subject to the tax. In re Dun's Estate, 40 Misc. [N. Y.] 509; Id., 39 Misc. [N. Y.] 616. An antenuptial agreement to pay a certain sum to a wife in lieu of dower constitutes a debt and is not taxable. In re Baker's Estate, 83 App. Div. [N. Y.] 530. A gift of money to a wife, but which at her death comes again into the possession of the husband by agreement with her heirs, is subject to the tax as her property. In re Anthony's Estate, 40 Misc. [N. Y.] 497. A legacy accepted by a widow in lieu of dower is taxable under the transfer tax law, being property transferred by will. In re Riemann's Estate, 42 Misc. [N. Y.] 648. Under the New York transfer tax law, the values of the realty and personalty are added together in determining the value of property taxable and determining the exemption. $10,000 in personalty and $6,500 in realty devised by testator to sister. The realty was held taxable at 1% under Laws 1896, c. 908; Laws 1903, c. 41. In re Hallock's Estate, 42 Misc. [N. Y.] 473.

81. In re Long's Estate, 22 Pa. Super. Ct. 370. The interest of a deceased shareholder in the realty of a joint stock association is personal property, and a bequest thereof is subject to the transfer tax. In re Jones' Estate, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476. Trust created by nonresident held not taxable. In re Thomas' Estate, 39 Misc. 136. Where a will, taking effect while the provisions of a collateral inheritance tax act are in force, creates a fund, the income of which is payable to a sister for life with power of appointment of the principal by her will, and she accordingly appoints her husband, the interest of the husband is taxable, though in the meantime the tax act in question is repealed, but with a saving clause. Hoyt v. Hancock [N. J. Prerog.] 55 Atl. 1004. A provision for an annuity to be paid testator's widow in pursuance of an antenuptial contract is not taxable. In re Daniell's Estate, 40 Misc. [N. Y.] 329.

82. Property acquired under a judgment of court is not subject to the tax. In re Demers' Estate, 41 Misc. [N. Y.] 470.

83. Gift of shares of stock held not to have been made in contemplation of death so as to be within the transfer tax act. In re Bullard's Estate, 76 App. Div. [N. Y.] 207. So also antenuptial agreement transferring certificates of stock. In re Miller's Estate, 77 App. Div. [N. Y.] 473. The words "in contemplation of death" do not refer to that general expectation of death which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril. In re Baker's Estate, 83 App. Div. [N. Y.] 530.

84. In re Miller's Estate, 77 App. Div. [N. Y.] 473.

85. In re Vanderbilt's Estate, 172 N. Y.

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Powers of appointment, when exercised in New York, are taxed as transfers,[86] the statute providing therefor having been sustained,[87] notwithstanding its retroactive effect,[88] it being the exercise and not the creation of the power that is taxed.[89]

Exemptions are usually provided in favor of those institutions exempted from other taxes,[90] and there is generally an exception or limitation that when property passes to certain direct heirs it shall not be taxable,[91] unless of a specified value.[92]

Jurisdiction, to impose the tax exists only where the person dying seized of the property is a resident of the state or the property is within the state.[93]

69, 64 N. E. 782; In re Meyer's Estate, 83 App. Div. [N. Y.] 381; In re Gibbes' Estate, 40 Misc. [N. Y.] 581. The taxability of interests passing under a will is determined by the law in existence at the date of the transfer of title. In re Goelet's Estate, 78 N. Y. Supp. 47.

86. A trust created by a nonresident held not to be within the tax on powers of appointment. In re Thomas' Estate, 39 Misc. [N. Y.] 136.

87. The New York statute imposing a tax whenever any person shall exercise a power of appointment, which appointment when made shall be deemed a transfer, is not violative of the state or Federal constitution. Laws 1896, c. 908, as amended by Laws 1897, c. 284, p. 150. In re Delano's Estate, 176 N. Y. 486, 68 N. E. 871.

88. The fact that there was no statute imposing a transfer tax when a power of appointment was created by will does not affect the liability of the estate to a transfer tax on the exercise of the power of appointment after the passage of an act imposing a tax on the exercise of such appointment. In re Delano's Estate, 176 N. Y. 486, 68 N. E. 871.

89. It is the exercise and not the creation of the power of appointment which effects the transfer upon which the tax is enforced. In re Rogers' Estate, 172 N. Y. 617, 64 N. E. 1125; In re Howe, 86 App. Div. [N. Y.] 286.

90. The property of a religious corporation being generally exempt from taxation, such a society is not subject to a succession tax on the devise of a dwelling house to be used as a parsonage. First Universalist Soc. v. Bradford [Mass.] 70 N. E. 204. The Illinois act of 1901 exempting from the inheritance tax law gifts to any hospital, religious or charitable society, is not self-executing, since it is provided that such exemption shall not extend to any corporation which has the right to make dividends or distribute profits among its members, and hence the county court must determine the character of the beneficiary [Laws 1901, p. 268]. Provident Hospital & T. S. Ass'n v. People, 198 Ill. 495, 64 N. E. 1031.

91. Nephews and nieces when residents of the state are exempt in California. In re Johnson's Estate, 139 Cal. 532, 73 Pac. 424. What constitutes direct relationship. In re Lane's Estate, 39 Misc. [N. Y.] 522. The exemption attaching to a child adopted conformably to law from the tax on inheritances extends to the children of such an adopted child. In re Winchester's Estate, 140 Cal. 468, 74 Pac. 10. Articles set apart as exemptions to the widow are not subject to the transfer tax, whether actually set apart to her or not. In re Page's Estate, 39 Misc. [N. Y.] 220. Where a son devised property to his mother who died previous to testator, leaving as his heirs a brother and sister, to whom the property passed directly, it was subject to the collateral inheritance tax. In re Hulett's Estate, 121 Iowa, 423, 96 N. W. 952; State v. Kiler [Iowa] 96 N. W. 952. A testatrix devised her realty in equal shares to her four children. As three of the children died in succession, each devised to the survivors. The last survivor devised the whole to her niece and nephews. Held, that the commonwealth was entitled to the collateral tax on the three-fourths interest. In re Lisle's Estate, 22 Pa. Super. Ct. 262. In Iowa, where the value of an estate, after the payment of debts, exceeds $1,000, all property passing to collateral heirs or strangers to the blood is subject to the collateral inheritance tax. Gilbertson v. McAuley, 117 Iowa, 522, 91 N. W. 788.

92. A transfer to a sister of property of less than $10,000 is exempt. In re Conklin's Estate, 39 Misc. [N. Y.] 771. Where a legacy of $500 is left to a widow, and one of $337 to an uncle, the value of the whole estate being over $500, the legacy of the uncle is subject to the 5% tax. In re Garland's Estate, 88 App. Div. [N. Y.] 380; Id., 40 Misc. [N. Y.] 579. Over $500 to sister and nephew. In re Rosendahl's Estate, 40 Misc. [N. Y.] 542.

93. The terms, "residence," "abode," "domicile" and kindred terms differ somewhat in meaning, but when used in statutes providing an inheritance tax have frequently been held to be synonymous. In re Moir's Estate, 207 Ill. 180, 69 N. E 905. The term "within the jurisdiction of this state" in the collateral inheritance tax law of Vermont, imposing a tax on all property within the jurisdiction of the state, means the probate jurisdiction of the state, and therefore the act does not impose a tax on debts due to a decedent domiciled in the state from nonresidents of the state. In re Joyslin's Estate [Vt.] 56 Atl. 281. Where a nonresident dies intestate, leaving personal property in the state of his domicile, and shortly thereafter his sister who was entitled to a share of his estate, but had not actually received it, died in the state of her domicile, her share was liable to the collateral inheritance tax imposed by the law of the domicile of the sister. In re Milliken's Estate, 206 Pa. 149. Removal from the state of one's domicile for the temporary purpose of securing medical aid will not preclude the assessment of an inheritance tax. In re Moir's Estate, 207 Ill. 180, 69 N. E. 905. Where a deposit made by a citizen of Illinois in a trust company in the city of New York remains there 14 months, the property is delayed within the jurisdiction of New York long enough to justify the finding of the state court that it was not in transitu in such a sense as to withdraw it from the power of the state if it were otherwise taxable. Blackstone v. Miller, 188 U. S. 189, 47

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When tax accrues.—As to estates of present enjoyment, whether absolute or for a term of years, the tax accrues in New York, immediately upon the death of the testator or intestate;[94] but in Tennessee, it becomes due and payable at the end of one year from the death of the decedent.[95] The authorities are not unanimous as to the time of accrual of the tax upon remainders. In the absence of express statutory provision, the better rule would seem to be that the tax is due when the property bequeathed or devised actually vests,[96] and this was the rule in regard to contingent remainders in New York prior to 1899,[97] when this provision of the statute was amended,[98] and it was held that by this amendment a change was intended making contingent estates taxable forthwith. In 1901,[99] this provision was again amended, but it is held that this amendment was of limited application, and that it was not the intention of the legislature to change the general policy of present instead of future assessments of estates of this nature.

Appraisal and collection.—Proceedings to determine the liability of an estate are usually instituted by the appointment of an appraiser whose duty it is to ascertain the value of the estate in question,[1] and in New York, the state comptroller may proceed to an appraisement notwithstanding the executor and surrogate have deposed that the estate is too small to be taxable.[2] The surrogate has no power to modify an order fixing the tax where no appeal has been taken,[3] nor on the ground that a sale of the property subsequent to the appraisement showed that the latter was too high;[4] but he may vacate a decree when it is imposed under an unconstitutional statute, though the time to appeal has expired.[5] Where one, for some undisclosed reason, voluntarily determines to ignore his absolute title to property and to submit to the imposition of a transfer tax upon a life interest purporting to be granted him by a will, such tax should not be vacated at the suit of his heirs after

Law. Ed. 439. Where a national bank does business within the state, the estate of a nonresident stockholder is subject to a transfer tax, though the certificate of stock is without the state. In re Cushing's Estate, 40 Misc. [N. Y.] 505. Bonds secured by mortgage upon realty within the state, but which are actually held without the state, are not subject to the succession tax. In re Preston's Estate, 75 App. Div. [N. Y.] 250. Bonds of foreign corporations, left on deposit with a bank in New York at the time of the nonresident testator's death, and transferred by his will, are not property left within the state. In re Gibbes' Estate, 84 App. Div. [N. Y.] 510. Stock in foreign corporations owned by a nonresident decedent are not subject to transfer taxation in New York. In re Bishop's Estate, 82 App. Div. [N. Y.] 112. Notes owing to a nonresident decedent are not subject to the transfer tax. In re Horn's Estate, 39 Misc. [N. Y.] 133.

94. In re Meyer's Estate, 83 App. Div. [N. Y.] 381; In re Bushnell's Estate, 172 N. Y. 649, 65 N. E. 1115.

95. And proceedings to test the validity of the will do not postpone the maturity of the tax. Shelton v. Campbell, 109 Tenn. 690, 72 S. W. 112. The owner of a contingent remainder interest under a will in personal property subject to the collateral inheritance tax is not required to give bond for the tax within a year after the death of decedent. Harrison v. Johnston, 109 Tenn. 245, 70 S. W. 414.

96. Where an estate subject to the succession tax does not take effect until after the expiration of a life estate, the tax thereon becomes payable upon the termination of the life estate. Harrison v. Johnston, 109 Tenn. 245, 70 S. W. 414. The payment of the tax may be postponed until the persons entitled to the property come into possession. The income was to be paid to a beneficiary during his life, remainder to nieces and nephews. Statute providing for postponement of payment held retrospective. Stevens v. Bradford [Mass.] 70 N. E. 425.

97. In re Babcock's Estate, 81 App. Div. [N. Y.] 655.

98. Laws 1899, c. 76. In re Vanderbilt's Estate, 172 N. Y. 69, 64 N. E. 782; In re Brez's Estate, 172 N. Y. 609, 64 N. E. 958; In re Dun's Estate, 40 Misc. [N. Y.] 509; In re Clark's Estate, 39 Misc. [N. Y.] 73; In re Le Brun's Estate, 39 Misc. [N. Y.] 516; In re Post's Estate, 85 App. Div. [N. Y.] 611. In re Huber's Estate, 86 App. Div. [N. Y.] 458.

99. Laws 1901, cc. 173, 493. Miller v. Tracy, 86 N. Y. Supp. 1024. Amendment given retroactive effect. In re Hosack's Estate, 39 Misc. [N. Y.] 130.

1. An executor is guilty of contempt in refusing to answer questions as to the assets of an estate. In re Bishop, 40 Misc. [N. Y.] 64.

2. In re Schmidt's Estate, 39 Misc. [N. Y.] 77.

3. In re Hamilton's Estate, 41 Misc. [N. Y.] 268.

4. In re Lowry's Estate, 89 App. Div. [N. Y.] 226.

5. In re Scrimgeour's Estate, 80 App. Div. [N. Y.] 388.

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his death.[6] A tax paid under a void statute may be recovered.[7] Cases illustrative of the rules for determining the amount taxable,[8] and the person or fund liable are collected in the note.[9]

§ 16. *License taxes.*—License taxes on occupations are ordinarily referred to the exercise of the police power, and as police regulations are not subject to the constitutional restraints upon the exercise of the taxing power, though it is otherwise where they are without regulation features. The subject has been fully treated in a recent article,[10] a duplication of which would be manifestly improper.

§ 17. *Income taxes.*—A law imposing an income tax on persons and corporations does not discriminate against the latter because it allows each person or the persons composing a family a reasonable income exempt from the tax.[11] A state cannot impose an income tax upon the salary of a Federal judge received by him from the United States.[12]

§ 18. *Distribution and disposition of taxes collected.*—It is sometimes the policy of a state to give the first fruits of taxation to the state and county in derogation of the claims of townships and cities,[13] but in Michigan, fines collected

6. In re Mather's Estate, 90 App. Div. [N. Y.] 382.

7. Where a trustee, having charge of an estate for life, before turning it over to the remainderman, paid a transfer tax exacted under an unconstitutional statute, the remainderman, in recovering back the tax from the state, was entitled to interest thereon [Laws 1899, c. 76]. In re Wood's Will, 91 App. Div. [N. Y.] 3.

8. A claim in favor of an estate advantageously settled should be taxed on the amount of proceeds received and not its face value. In re Thomas' Estate, 39 Misc. [N. Y.] 223. Where decedent directed his executor to withdraw one-half of the claims he had presented to his brother's executor, and forgave that half, this did not relieve any part of the whole sum from taxation. In re Wood's Estate, 40 Misc. [N. Y.] 155.

Deductions should be made for commissions of executors as trustees under the will (In re Silliman, 79 App. Div. [N. Y.] 98); disbursements in litigation (In re Dimon's Estate, 82 App. Div. [N. Y.] 107); the reasonable cost of a burial lot (In re Liss' Estate, 39 Misc. [N. Y.] 123); and taxes due and payable before decedent's death (Id.; In re Hoffman's Estate, 42 Misc. [N. Y.] 90). But money paid to a niece of testator as inducement to withdraw objections to will cannot be treated as expense of administration (In re Marks' Estate, 40 Misc. [N. Y.] 507), and remainders are taxable at their full value without deduction for the life estate of the widow (In re Connoly's Estate, 38 Misc. [N. Y.] 533).

A firm having a manufacturing branch in New York and a sale department in another state, the debts, whether to vendors of goods or to banks, due by the former to New York creditors, are to be deducted from the New York assets. In re King's Estate, 172 N. Y. 616, 64 N. E. 1122. When the basis of the tax cannot be fixed, the tax itself cannot be fixed. Under the statute imposing a tax on the transfer of property by will where one becomes beneficially entitled in possession or expectation to any property, etc. The residue of an estate which was to be held in trust for 20 years and then divided and if the beneficiaries died before that time, other disposition was to be made thereof, was not taxable until the expiration of 20 years. People v. McCormick [Ill.] 70 N. E. 350. Such would be the case also where the testator bequeathed his daughter $75,000.00 to purchase a home and if she did not purchase within 20 years the money was to become hers, but if she died without issue before that time, other disposition was to be made thereof. Id. $20,000.00 was to be paid each year to each of three children out of the income of an estate. If they should agree in writing this could be increased. Held each child could not be taxed for one-third of the entire income of the estate until an agreement was made. Id.

9. Where a will devised the body of the estate to executors in trust to collect the income which after paying expenses was to be divided among the heirs, the tax was to be paid from the gross income, not from the body of the estate. Applied to Pennsylvania and New York tax and United States war tax. In re Brown's Estate [Pa.] 57 Atl. 360. A will providing that the executor should pay legacies without rebate or reduction does not relieve them of the transfer tax, the will being made before any statute existed imposing such a tax. Jackson v. Tailer, 41 Misc. [N. Y.] 36. The full amount of a transfer tax upon an annuity should be paid from the income of the fund on which the annuity is charged before any portion of such income is paid to the annuitant. In re Tracy, 87 App. Div. [N. Y.] 215. Various dispositions of a trust estate, constituting legacies, held entitled to have the transfer tax paid out of the residuary estate. Isham v. New York Ass'n for Improving Condition of Poor, 177 N. Y. 218, 69 N. E. 367. Under the Massachusetts statutes, the tax must be assessed to the executor or administrator unless the estate has been distributed, of which notice must be given the assessors in every case, whether the distributees are inhabitants of that state or not. White v. Mott, 182 Mass. 195, 65 N. E. 38.

10. See Licenses, 2 Curr. Law, p. 730.

11. W. C. Peacock & Co. v. Pratt [C. C. A.] 121 Fed. 772.

12. Purnell v. Page, 133 N. C. 125.

13. This adjustment is conceived to be

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for trespasses on lands held by the state for nonpayment of taxes belongs to the state, county and township in proportion to the amount of taxes due each.[14]

When a tax is imposed to pay a claim, both the amount of tax collected and the penalty must go to the payment of the debt for which they have been assessed.[15]

Action will generally lie in favor of one municipality against another or its officers to recover its distributive share of taxes collected,[16] such suits being subject to the general limitation statutes.[17]

Moneys acquired by a county from the taxation of the properties of her taxpayers is not the private property of the county.[18]

The proceeds of a sale of property must be first applied to the payment of the costs of the proceeding.[19]

TELEGRAPHS AND TELEPHONES.

§ 1. Franchises and Licenses, Property and Contracts, and Corporate Affairs (1843).
§ 2. Construction and Maintenance of Lines, and Injuries Thereby (1848).
§ 3. Telegraph Messages (1849).
A. Duty and Care (1849).
B. Injury and Damages (1858).
C. Procedure (1856).
D. Penalties (1860).
§ 4. Telephone Service (1860).
§ 5. Quotation and Ticker Service (1861).
§ 6. Rates, Tariffs and Rentals (1861).
§ 7. Offenses (1861).

§ 1. *Franchises and licenses, property and contracts, and corporate affairs.*—A franchise to use streets is prerequisite to any right therein,[20] but the right to relief from unauthorized construction may be lost by laches.[21] The acquisition of a

necessary to exempt the state and county from bearing any part of the loss annually sustained from the deficit occurring in the collection of taxes. Ross v. Walton, 67 N. J. Law, 688. The fact that after the fixing of the quota of state and county taxes to be levied and collected within a certain borough, a part of the territory of the borough is taken for a public park, and thereby rendered exempt from taxation, does not excuse the borough collector from his duty to pay out of the first moneys collected the full quota of state and county taxes. Coe v. Englewood Cliffs, 68 N. J. Law, 559. It is no excuse for nonpayment, if sufficient amount from all the sources of the general taxation has been collected by the collector of taxes of the borough to make such payment, that the assessments of particular individuals have been reduced by the local board of appeals or by the state board of taxation, and the deficiency so made must be borne by the borough. Ross v. Walton, 67 N. J. Law, 688.

14. Board of Sup'rs of Alcona County v. Powers [Mich.] 98 N. W. 975.

15. State v. New Orleans, 109 La. 110.

16. Under a provision making it the duty of the township collector to pay the moneys collected in his township for county purposes to the county collector, an action by the county against the township for such moneys, nothing more appearing, will not lie. Board of Chosen Freeholders of Atlantic County v. Inhabitants of Weymouth Tp., 68 N. J. Law, 652. A county, being liable to towns for money illegally paid or diverted, is a proper party to recover the amount of an overpayment to the state. Ulster County v. State, 79 App. Div. [N. Y.] 277; Id., 177 N. Y. 189, 69 N. E. 370. Under the charter of plaintiff city, it was entitled to recover interest and penalties accruing and collected upon special assessments, as well as interest and penalties on taxes proper, and this, too, without filing an itemized claim thereof. City of Fergus Falls v. Board of Com'rs of Otter Tail County, 88 Minn. 346, 93 N. W. 126.

17. The statute of limitations applies to a proceeding by a county to compel the comptroller to pay to the county the extra taxes which it has been compelled to pay because of land held therein by certain railroads having been exempted from taxation. People v. Miller, 85 App. Div. [N. Y.] 145. Where a county is by law made the instrument for the levy and collection of taxes for road purposes to be used by a municipality upon the roads and highways within its corporate limits, it is held that the statute of limitations does not begin to run against such municipality until demand is made for the payment of such taxes or until the municipality has notice of the refusal of the county to pay the same, or that it claims such money in its own right. Village of Mountainhome v. Elmore County [Idaho] 75 Pac. 65.

18. Elting v. Hickman, 172 Mo. 237, 72 S. W. 700.

19. State v. Wilson, 174 Mo. 505, 74 S. W. 636.

20. A telephone company unlawfully occupying a street is not injured by an injunction against construction so as to allow recovery on injunction bond on dissolution of injunction. East Tennessee Tel. Co. v. Anderson County Tel. Co., 24 Ky. L. R. 2358, 74 S. W. 218.

21. A bill to compel removal of wires was properly dismissed for laches where streets had been occupied by the company for 21 years without objection and large sums of money had been expended by the company, and the city by various ordinances had recognized the validity of the occupancy and had used the lines for municipal purposes and

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franchise is in many states made by acceptance under general laws, and these have been held to apply to foreign as well as domestic corporations,[22] and alike to individuals or corporations seeking franchises, even though under them a corporation may have more extensive powers.[23] General enabling laws permitting erection of poles and wires in public "highways" or "roads" are held to include streets[24] and hence to dispense with municipal consent in Iowa,[25] Montana[26] and Ohio,[27] but not so in Nebraska.[28] A statute giving corporations the right to construct telephone lines within the state is not modified by subsequent legislation regarding government of cities and empowering them to regulate such lines.[29] The constitutional provision in Kentucky requiring consent of municipality to use of streets and alleys by telephone companies is mandatory,[30] and such consent must be obtained in the manner prescribed.[31] The act of congress authorizing the construction of telegraph lines over post roads and declaring streets in cities to be public roads where used for the collection of mail did not authorize the use of streets by telegraph and telephone companies except on conditions prescribed.[32]

Wherever the poles and wires are regarded as an additional servitude,[33] the rights of abutters must be acquired. It cannot be said as matter of law that the public easement in a village street is too narrow to include such use.[34] A telegraph company occupying a railroad right of way under contract of rental covenanting to remove lines and surrender possession at the end of the term acquires no equities to support a petition to condemn demised premises under power of eminent domain.[35] The Federal laws authorizing construction of lines over public domain and along military and post roads does not confer rights to exercise power of emi-

had regulated the manner of erecting the poles. City of Bradford v. New York & P. Tel. & T. Co., 206 Pa. 582.

22. Civ. Code, § 1000, authorizing the construction of telephone lines along public roads, held to apply not only to domestic companies, but also foreign corporations which have complied with the laws. State v. Red Lodge [Mont.] 76 Pac. 758.

23. A statute prescribing the manner of obtaining the consent of municipalities for the erection of electric equipment in its streets applies to individuals as well as to corporations, except in so far as the right of eminent domain is conferred. Village of London Mills v. White, 208 Ill. 289, 70 N. E. 313.

24, 25. "Public highways" as used in Code 1873, § 1324, allowing construction of telephone lines, includes streets of city. Chamberlain v. Iowa Tel. Co., 119 Iowa, 619, 93 N. W. 596.

26. A statute authorizing telephone corporations to erect lines along public roads authorizes the construction of lines along the public streets of a city. Pol. Code, § 2600, Laws 1903, p. 66, c. 44 and Civ. Code, § 1000, construed. State v. Red Lodge [Mont.] 76 Pac. 758.

27. The city may regulate mode of use. Fitzsimmons Tel. Co. v. Cincinnati, 2 Ohio N. P. [N. S.] 51.

28. The term "public roads" under the Nebraska act, giving telegraph and telephone companies a right of way therein, does not include streets and alleys of municipal corporations [Comp. St. Neb. 1901, c. 89a, § 14]. Neb. Tel. Co. v. Western I. L. D. Tel. Co. [Neb.] 95 N. W. 18.

29. A statute giving cities the right to prevent the use or obstruction of streets by telephone poles held subject to a statute authorizing construction of telephone lines along public roads. State v. Red Lodge [Mont.] 76 Pac. 758.

30. Const. Ky. § 163. East Tenn. Tel. Co. v. Anderson C. Tel. Co., 24 Ky. L. R. 2358, 74 S. W. 218.

31. Under the laws of Kentucky, a telephone franchise cannot be granted until five days have elapsed after its introduction, nor at a special meeting of the trustees [Ky. St. 1899, § 3699]. Maraman v. Ohio Valley Tel. Co., 25 Ky. L. R. 784, 76 S. W. 398.

32. Act Cong. July 24, 1866, c. 230, 14 St. 221. Postal Telegraph Cable Co. v. Newport, 25 Ky. L. R. 635, 76 S. W. 159. Act July 24, 1866. Cumberland Tel. & T. Co. v. Evansville, 127 Fed. 187.

33. See Kirby v. Citizens' Tel. Co. [S. D.] 97 N. W. 3, and other cases cited in Eminent Domain, 1 Curr. Law, p. 1002. The construction and maintenance of a telephone system on streets in such manner as not to cause unnecessary injury or inconvenience to property owners is not an additional servitude for which an abutting owner may claim compensation. Kirby v. Citizens' Tel. Co. [S. D.] 97 N. W. 3.

34. Johnson v. New York & P. Tel. & T. Co., 76 App. Div. [N. Y.] 564.

35. Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362. Property taken and held for one public use may not be taken for another without express legislative sanction. Id.; Western Union Tel. Co. v. Pennsylvania R. Co. [C. C. A.] 123 Fed. 33. A telegraph company occupying a portion of railroad right of way under lease is estopped while relation exists to deny title of railroad or deny its right to re-enter on termination of lease. Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362.

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nent domain over private property,[36] and so with the Pennsylvania act authorizing construction of telegraph lines over public highways.[37]

The municipality may in most states regulate the use of streets by telegraph and telephone companies,[38] but cannot under that guise destroy rights or question incorporation.[39] In matters delegable, it may do so through committees or the city engineer.[40] The application for a permit must be made to the officials specified,[41] and approved as the law requires,[42] but a city has the right, if the power exists, to waive formalities.[43] When a city council refuses to designate the location of telephone poles and demands that wires be laid in conduits, and a statute authorizes the erection of poles, the proper remedy is by mandamus to compel the council to designate the location of poles.[44]

A franchise for this purpose like others when duly granted and accepted,[45] or a license to erect poles and wires duly exercised[46] creates a contract irrevocable, during the time for which it runs,[47] except pursuant to reserved power or statutory mode,[48] which must be strictly followed.[49]

Such franchise is not exclusive,[50] but the franchise first exercised is superior,[51] affording protection against unreasonable interference under later franchises,[52] and

36. U. S. Comp. St. 1901, pp. 3579, 3580. Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362; Id., 123 Fed. 33.

37. Act Pa. March 24, 1849. Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362; Id., 123 Fed. 33.

38. City of New Castle v. Cent. Dist. & P. T. Co., 207 Pa. 371. Rev. Civ. Code, S. Dak. 1903, § 554. Kirby v. Citizens' Tel. Co. [S. D.] 97 N. W. 3. In Ohio, a telephone company has the right by direct legislative grant to use any and all streets within a municipality; it is the mode only of such use that is subject to agreement with the municipal authorities or of judicial determination. Fitzsimmons Tel. Co. v. Cincinnati, 2 Ohio N. P. [N. S.] 51.

39. A city may be enjoined from interfering with rights of a telephone company acting under a charter, where conduct in passage of resolution indicates a purpose to interfere with such rights. Old Colony Trust Co. v. Wichita, 123 Fed. 762. In a suit to restrain a city from interference with lines, the city cannot question validity of incorporation, the company having acted thereunder in the construction of its plant. Id.

40. City of New Castle v. Central Dist. & P. Tel. Co., 207 Pa. 371.

41. A requirement that a district telegraph company applies for a permit to a city council under regulations of a city is not complied with by an application to a subordinate official without power to grant a permit. Western Union Tel. Co. v. Toledo [C. C. A.] 121 Fed. 734.

42. A verbal approval of a general plan of locating poles does not authorize their erection at points designated without further supervision. City of New Castle v. Central Dist. & P. Tel. Co., 207 Pa. 371.

43. To waive written acceptance of ordinance granting right to use street by telegraph companies, acceptance may be shown by acts. Postal Tel. Cable Co. v. Newport, 25 Ky. L. R. 635, 76 S. W. 159.

44. State v. Red Lodge [Mont.] 76 Pac. 758.

45. The acceptance by a telephone company of a franchise duly granted by a city, and the expenditure of large sums thereunder creates a contractual relation and gives the company a vested right which cannot be impaired by a subsequent ordinance granting private rights. Northwestern Tel. Exch. Co. v. Anderson [N. D.] 98 N. W. 706. An ordinance granting a franchise binding on assignees, accepted in writing, constitutes a contract between the grantee and the city. Mahan v. Mich. Tel. Co. [Mich.] 93 N. W. 629.

46. A license to use streets for telephone equipment, when acted upon by the company, becomes a binding contract irrevocable by the municipality. A village, by resolution, gave a telephone owner the right to use its streets and alleys for poles and wires and the owner erected his system in reliance on the license. It was held that a binding contract resulted and that the village was estopped to set up that the grant should have been by ordinance, under the state laws. Village of London Mills v. White, 208 Ill. 289, 70 N. E. 313.

47. A franchise granted by a city of Kansas unlimited as to time, continues for twenty years and may not be annulled during such time in the absence of a reservation of that power. Old Colony Trust Co. v. Wichita, 123 Fed. 762.

48, 49. A provision for termination of a franchise by resolution of mayor and councilmen on six months' notice served on managing agent is not satisfied by adoption of motion six months before expiration of five years directing clerk to notify company when franchise would expire and require removal of poles and wires, and service of record of such action. Old Colony Trust Co. v. Wichita, 123 Fed. 762.

50. One telephone company cannot assert an exclusive right to the use of public streets in a city against another company enjoying the same right by permission of the city authorities. Injunction to restrain a second company from erecting its line on the same side of the street as the first denied, no unlawful damage or injury being shown to be threatened. American Tel. & T. Co. v. Morgan County Tel. Co. [Ala.] 36 So. 178.

51. In the absence of positive regulations, the company first installing its lines acquires

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injuries by other specially licensed private users of streets.[53] Danger of higher wires falling is too remote to be so regarded.[54] Where neither company has an exclusive right in the street, the court may require that wires be strung a sufficient distance from each so that there would be no unreasonable interference with the use of the wires.[55]

Consideration.—An ordinance granting a right to use streets on payment of a stipulated amount annually is not a license tax within rules requiring uniformity, but is in the nature of a consideration for the grant,[56] which the interstate character of the grantee does not avoid.[57] A company accepting such a grant may not thereafter question the reasonableness of the charges exacted.[58]

Reasonable occupation taxes on telegraph companies may be imposed, provided interstate business and business of the government of the United States is excluded.[59]

Penalties for non-exercise.—A telephone company, having deposited a sum of money as a guaranty for the completion of its system by a certain time, forfeits the whole sum, on failure to complete the system within the required time, and not simply a sum sufficient to compensate the city for damage suffered.[60]

Transfers, line contracts, leases, and mortgages.—The right of one company to acquire lines and franchises of another depends primarily on their alienability,[61] and secondarily on the legislation and policy of the states.[62] When it is invalid by such laws, a new franchise grant by a city cannot cure it.[63] The right to use streets

superior rights in the erection of poles and wires in streets which forbid interference therewith by a subsequent occupant. Rights may be impaired by placing wires under wires of earlier occupant. Northwestern Tel. Exch. Co. v. Twin City Tel. Co., 89 Minn. 495, 95 N. W. 460.

52. A grant in the streets to a telephone company, subject to power to grant like rights to other companies, protects the company only against unnecessary and unreasonable interference of later companies. Chicago Tel. Co. v. Northwestern Tel. Co., 199 Ill. 324, 65 N. E. 329. An injunction will issue to prevent harassing interference of a rival telephone company at the instance of a company granted the right to erect its poles on the same side of the street with its rival. Cumberland Tel. & T. Co. v. Louisville Home Tel. Co., 24 Ky. L. R. 1676, 72 S. W. 4.

53. A licensed house mover is liable to a telephone company, owning a franchise, for damage done its equipment in moving houses. Northwestern Tel. Exch. Co. v. Anderson [N. D.] 98 N. W. 706.

54. Injunction refused. Chicago Tel. Co. v. Northwestern Tel. Co., 199 Ill. 324, 65 N. E. 329.

55. Northern Tel. Co. v. Iowa Tel. Co. [Iowa] 98 N. W. 113.

56. Postal Tel. Cable Co. v. Newport, 25 Ky. L. R. 635, 76 S. W. 159.

57. A foreign telegraph company may not construct poles and wires on streets of a city without payment of compensation, though engaged in interstate commerce. Postal Tel. Cable Co. v. Newport, 25 Ky. L. R. 635, 76 S. W. 159.

58. Postal Tel. Cable Co. v. Newport, 25 Ky. L. R. 635, 76 S. W. 159.

59. Western Union Tel. Co. v. Wakefield [Neb.] 95 N. W. 659. The Montana act imposing a license tax on telephones is not invalid as a tax on interstate commerce, the statute being intended to apply to instruments used solely in business within the state. State v. Rocky Mountain Bell Tel Co., 27 Mont. 394, 71 Pac. 311. A telegraph company engaged in interstate commerce may be required to pay a reasonable municipal license fee for local supervision. Reasonableness a question for the jury. Atlantic & Pac. Tel. Co. v. Philadelphia, 190 U. S. 160, 47 Law. Ed. 995.

In an action to recover a license tax imposed on a telephone company, defendant has the burden of proof as to number of telephones averred to be used exclusively in interstate business. State v. Rocky Mountain Bell Tel. Co., 27 Mont. 394, 71 Pac. 311. Where reasonableness of license regulation is submitted to the jury with directions to find for the full amount, if they find the fees reasonable otherwise, to find for defendant, a verdict for a less sum will amount to a finding of unreasonableness and a judgment for plaintiff may not be entered thereon. Postal Tel. Cable Co. v. New Hope, 192 U. S. 55.

60. City of Detroit v. People's Tel. Co. [Mich.] 98 N. W. 745.

61. An ordinance granting a telephone company, "its successors and assigns" the right to maintain poles and wires in the streets grants a franchise transferable under the laws of Kansas, though words "successors and assigns" do not appear in title. Old Colony Trust Co. v. Wichita, 123 Fed. 762.

62. The laws of Wisconsin allow acquisition of privileges and franchises of other companies in the same vicinity [Rev. St. 1898, §§ 1775, 1775a]. Badger Tel. Co. v. Wolf River Tel. Co. [Wis.] 97 N. W. 907.

63. The laws of Indiana do not give a telephone company the right to sell and transfer all of its property, and such sale cannot be validated by city granting franchise [2 Burns' St. 1901, § 5517]. Cumberland T. & T. Co. v. Evansville, 127 Fed. 187.

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being largely for a public good, a city may question the validity of an attempted transfer of the franchise.[64] A railroad company canceling a lease of its line privileges in order to relet them is not under the ban against transfer to "competing lines."[65] When one company takes a transfer of the franchise and property of another, it is charged with notice of the burdens on such franchise and bound by the transferror's obligation.[66] By the terms of the transfer, it may fix a construction of such burdens.[67] Hence, having done so, it cannot repudiate its contract to connect subscribers with both systems.[68] A transfer by one telegraph company to another of all its property and contracts with an agreement not to engage in the business for 99 years amounts to a merger[69] and vests the transferee with power to modify previous contracts with grantor or to substitute others in their stead.[70] A telephone company purchasing the franchise of another company and using same is estopped to afterwards claim in an action for the purchase price, the officers were without power to make the sale.[71]

A contract between a telegraph company and a subsidized railroad, granting the latter an exclusive right to certain wires, does not infringe the Federal act against discrimination in favor of persons or corporations.[72] A parol contract between companies for erection of lines and for joint use for twenty years is indivisible and void under the statute of frauds.[73] A contract between a telegraph company and a railroad company for joint construction and use of line on right of way, fixing no time for expiration, is terminable at the option of either party on reasonable notice.[74] A grant of right of way by a railroad company to a telegraph company should be read with the service contract simultaneously made in order to find the duration of the easement.[75] A contract for the construction of a telegraph line on a railroad right of way, the railroad participating in construction, gave the telegraph company no estate or interest in the realty in the absence of express words to that effect.[76] The fact that a telegraph line is indispensable to the operation of a railway and that such lines usually follow alongside a railroad may be taken judicial knowledge of, but the space required for repair of such a telegraph is not a matter of such common knowledge that judicial notice may be taken thereof.[77]

A lease has no contractual right to continue after notice of termination of lease.[78] A telegraph company using the lines and franchise of another company under a lease terminable on notice cannot maintain a suit to determine rights of its

64. Cumberland T. & T. Co. v. Evansville, 127 Fed. 187.

65. Does not apply to a contract between a telegraph and a railroad company by which the latter is to supply the telegraph company with pole facilities for its wires on the right of way, the intention being to substitute the lines of such company for those of another company whose lease had expired [Const. Pa. art. 16, § 12]. Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362.

66. Mahan v. Michigan Tel. Co. [Mich.] 93 N. W. 629.

67, 68. Mahan v. Michigan Tel. Co. [Mich.] 93 N. W. 629. Mandamus to compel service granted. Id.

69, 70. St. Paul, M. & M. R. Co. v. Western Union Tel. Co. [C. C. A.] 118 Fed. 497.

71. Badger Tel. Co. v. Wolf River Tel. Co. [Wis.] 97 N. W. 907.

72. Act Aug. 7, 1888. U. S. v. Northern Pac. R. Co., 120 Fed. 546.

73. Bastin Tel. Co. v. Richmond Tel. Co., 25 Ky. L. R. 1249, 77 S. W. 702.

74. Western Union Tel. Co. v. Pennsylvania R. Co., 125 Fed. 67.

75. Construction of contract between railroad and telegraph company and fixing status at termination of contract at expiration thereof. St. Paul, M. & M. R. Co. v. Western Union Tel. Co. [C. C. A.] 118 Fed. 497. A contract between a railroad in course of construction and a telegraph company, conveying a right of way along the railroad without limitation as to time, did not operate as a present grant of an interest to be held by the grantees for all time independently of the provisions of the contract, but to continue only so long as the contract for "its use and purposes" should continue and was terminable by the parol contract of the parties or their successors and could not create a vested right in property not acquired. Id.

76. Western Union Tel. Co. v. Pennsylvania Co., 125 Fed. 67.

77. P. & H. H. Youree v. Vicksburg, S. & P. R. Co., 110 La. 791.

78. Western Union Tel. Co. v. Pennsylvania R. Co., 123 Fed. 33. Payment of rent pending period of removal will not amount to waiver. Id.

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lessor under a contract with a railroad, without making the lessor a party, and this though it owns a majority of the stock of the lessor.[79]

A mortgage covering after-acquired property of a telegraph company will take precedence of rights of landowner in lands on which wires and poles are attached.[80] A trust deed to secure bonds of a telephone company of all its property, real and personal, in the states mentioned, with privileges and appurtenances, will cover leasehold interests in one of the states.[81] There is no discrimination by a subsidized road receiving a message for a point beyond its line in making a small additional charge for words necessary to designate such line, such charge being customary with other lines,[82] nor does leasing its franchise reserving line privileges constitute "discrimination."[83]

Corporate affairs.—The Kansas act extending the power, jurisdiction and control of the court of visitation over telegraph companies is invalid, being inseparable from the void portions of the act relating to railroads.[84] The president of a telephone company has power to secure the services of an expert to make an affidavit as to proper construction of company's subway in a proceeding to restrain enforcement of ordinance requiring another company to use the subway, it being contended that the subway was not properly constructed.[85]

A foreign telephone company having expended vast sums in the construction of its system is entitled to sue in the state courts to protect its rights, though the object of incorporation in the foreign state was to obtain the benefit of less rigorous laws, the state making no complaint.[86]

§ 2. *Construction and maintenance of lines, and injuries thereby.*—The construction and maintenance of lines on streets must be in such manner as not to impair or endanger travel,[87] even on a portion of the street deviating from the actual legal location,[88] or infringe on rights remaining in the abutter,[89] or endanger buildings where the wires lead.[90] As to a bare licensee in such a building, it

79. Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362.

80. Monmouth County Elec. Co. v. Central R. Co. [N. J. Eq.] 54 Atl. 140.

81. Ultra vires in acquisition cannot be raised in action by trustees against city to protect franchise rights. Old Colony Trust Co. v. Wichita, 123 Fed. 762.

82. U. S. v. Northern Pac. R. Co., 120 Fed. 546.

83. Act Aug. 7, 1888. U. S. v. Northern Pac. R. Co., 120 Fed. 546.

84. Laws 1898, c. 38, p. 117. Western Union Tel. Co. v. Austin, 67 Kan. 208, 72 Pac. 850.

85. Affidavit held not a mere academic opinion. Rosewater v. Glen Tel. Co., 81 App. Div. [N. Y.] 275.

86. Cumberland Tel. & T. Co. v. Louisville Home Tel. Co., 24 Ky. L. R. 1676, 72 S. W. 4.

87. Under laws requiring poles to be placed so as not to incommode the public, the poles must not be placed in dangerous proximity to the traveled portion of the street [Rev. St. Tex. art. 698]. Alice, W. C. & C. C. Tel. Co. v. Billingsley [Tex. Civ. App.] 77 S. W. 255. By the exercise of ordinary care to keep its poles and wires in repair so that the travel in the streets will not be rendered dangerous. West Ky. Tel. Co. v. Pharis [Ky.] 78 S. W. 917.

88. Road continuously traveled by the public, though the road at that point is a deviation from the public road as laid out by the commissioners' court. Adams v. Weakley [Tex. Civ. App.] 80 S. W. 411.

89. A telegraph company is liable for injuries to trees caused by removal of branches liable to interfere with wires, where entry is made without property owner's consent. Southwestern Tel. & T. Co. v. Branham [Tex. Civ. App.] 74 S. W. 949. One whose title only extends to the street line may not enjoin maintenance of telephone poles outside the sidewalk line. Post v. Hudson River Tel. Co., 76 App. Div. [N. Y.] 621. One cutting down a telephone pole after it has stood in its position for twelve years may not claim the right to an injunction pendente lite, restraining the company from replacing pole on the ground that he desired to preserve the status quo as he had himself destroyed the status quo. Id.

The measure of damages for unreasonable cutting of trees for erection of telephone poles and wires is the difference in the value of land as it would have been if the cutting had been reasonable and what it was after the cutting and not the difference between the value before and after the cutting. Meyer v. Standard Tel. Co. [Iowa] 98 N. W. 300.

90. Leaving wires after removing instruments. Southern Bell Tel. Co. v. McTyer, 137 Ala. 601. Recovery of damages caused by injury from lightning due to negligent installment of telephone in a store permitted, but right of recovery not raised in case. Southern Bell Tel. & T. Co. v. Parker [Ga.] 47 S. E. 194.

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has been held no duty is owing and no liability ensues.[91] A competing company may complain of a mode of construction approved by the public only when oppression is thereby wrought.[92] Care required as to maintenance of wires is reasonable care proportionate to the apparent dangers of the situation known or which defendant could have known with reasonable care.[93] The negligence must be the proximate cause of the injury as illustrated in the cases cited,[94] and defendant's responsibility and duty in respect to the defective wires must be shown.[95] Physical conditions entering into the cause of the injury may be shown,[96] if concurrent or connected with it in time.[97] Negligence[98] and contributory negligence of persons injured are for the jury.[99]

In Massachusetts, telegraph and telephone companies are made liable for injuries by poles, wires or other apparatus on public ways without reference to negligence.[1] Contributory negligence will defeat recovery, even of a statutory liability which does not depend on negligence.[2]

Duties towards employes are those of a master.[3]

§ 3. *Telegraph messages. A. Duty and care.*—A telegraph company is in the nature of a common carrier, and, subject to reasonable regulations, is required to receive and promptly transmit and deliver all messages tendered in good faith.[4] It may require prepayment for messages, but if it accepts a message without such requirement, it is held to the same degree of care and diligence as if the proper charges had been paid.[5] There is no duty to transmit messages lacking the requisite stamp,[6] and the subsequent repeal of the Federal statute requiring a revenue stamp to be attached to telegraph messages does not validate an agreement previously made to send a message unstamped.[7]

91. Passerby took refuge under a porch and current of lightning ran in and killed him while leaning against iron grating. Cumberland Tel. & T. Co. v. Martin's Adm'r, 25 Ky. L. R. 787, 76 S. W. 394.

92. The placing of wires under direction of city will not be enjoined at instance of earlier company, unless power of city is abused to oppression of complainant. Chicago Tel. Co. v. Northwestern Tel. Co., 199 Ill. 324, 65 N. E. 329.

Insufficiency of evidence to show that wires of a telephone company were so strung as to amount to an unreasonable interference with the rights of an earlier company. Id.

93. Leeds v. New York Tel. Co., 79 App. Div. [N. Y.] 121. A telephone company will be liable for an injury to a traveler in the street caused by a dangerous condition of its poles and wires, when it knew or by the exercise of ordinary care might have known of the dangerous condition of the street. West Ky. Tel. Co. v. Pharis [Ky.] 78 S. W. 917.

Definition of ordinary care as applied to a telephone company in maintaining its poles held not erroneous when it was said to be that degree of care usually exercised by ordinarily prudent and "skillful" men, the word "skillful" being objected to. Cumberland T. & T. Co. v. Warner [Ky.] 79 S. W. 199.

94. Improperly placed pole and injury from contact. Alice, W. C. & C. C. Tel. Co. v. Billingsley [Tex. Civ. App.] 77 S. W. 255. Wire attached to old brick chimney on building struck by arm of derrick, causing chimney to fall, proximate cause of injury to pedestrian struck by falling chimney. Leeds v. New York Tel. Co., 79 App. Div. [N. Y.] 121. Removing an instrument and leaving wires in such condition that atmospheric electricity is conducted into the building. Fact that owner of building consented to act not a defense in action by third person injured thereby. Southern Bell Tel. & T. Co. v. McTyer, 137 Ala. 601.

95. Evidence insufficient to show that defendants owned or were in control of concealed telephone wire causing injury. Lee v. Md. Tel. & T. Co., 97 Md. 692.

96. In action for injuries caused by fall of chimney to which wire was attached which was struck by derrick arm, defective nature of mortar and appearance of brick and mortar when chimney fell is competent to show actual existing condition. Leeds v. New York Tel. Co., 79 App. Div. [N. Y.] 121.

97. In an action for injuries caused by a sagging wire, the condition of the wire at the point some months later cannot be shown. Hannum v. Hill, 52 W. Va. 166.

98. Contact with sagging wires. Friesenhan v. Michigan Tel. Co. [Mich.] 96 N. W. 501. Party injured by contact with wire thrown down by limb of decayed tree. Ensign v. Central N. Y. Tel. & T. Co., 79 App. Div. [N. Y.] 244.

99. Campbell v. Delaware & A. Tel. & T. Co. [N. J. Law] 56 Atl. 303. Fall of pole. Kyes v. Valley Tel. Co. [Mich.] 93 N. W. 623.

1. Rev. Laws, c. 122, § 15. Riley v. New England Tel. & T. Co., 184 Mass. 150, 68 N. E. 17.

2. Riley v. New England Tel. & T. Co., 184 Mass. 150, 68 N. E. 17.

3. See Master and Servant, 2 Curr. Law, p. 801. Lineman employed by a railroad held a passenger while being carried to his work. Carswell v. Macon, D. & S. R. Co., 118 Ga 826.

4, 5. Cogdell v. W. U. Tel. Co. [N. C.] 47 S. E 490.

6, 7. W. U. Tel. Co. v. Young, 138 Ala. 240.

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The contract liability of the company respecting messages runs to the sender whose agent it is.[8] The contract of transmission is made where the message is received for transmission and recovery for breach of the contract is governed by the laws of the place where made.[9] By special contract[10] it may affect the degree of its liability.

Conditions limiting liability, even though contained in another company's blank which the sender used,[11] bind him when brought home to him.[12] Wire tapping has been held not an "interruption,"[13] and failure to send not a "mistake or delay" within such conditions.[14] A mistake in misreading an obscure or illegible signature is not "gross" negligence.[15] A stipulation on the back of a blank limiting liability for unrepeated messages is inapplicable where message was negligently laid aside in the transmitting office.[16]

Transmission.—Messages need not be transmitted during hours when offices are closed and not operated under the company's rules.[17] This is no protection however if the office actually was open and able after regular hours to do so,[18] nor where the sending agent undertook absolutely to make immediate delivery,[19] or specially contracted for an extra compensation to transmit.[20]

Errors in transmission of an unrepeated message must be guarded against by ordinary care only.[21] Under a constitutional provision declaring telegraph companies to be common carriers, a telegraph company may not escape liability for negligence in erroneous transmission by stipulating against liability in case of unrepeated or cipher messages.[22] Error in transmission must be proximate cause of injury.[23]

In order to say that a delay was unreasonable, the circumstances of time and distance and the ordinary speed as well as any agreements made must be consid-

8. In the transmission of a telegraph message, the telegraph company is the agent of the sender and is not liable to the sendee for damages arising out of error in the transmission. Brooke v. W. U. Tel. Co. [Ga.] 46 S. E. 826.

9. Message being from Clarendon, Ark., to Haney Grove, Tex., the contract was made in Arkansas, and there could be no recovery for mental anguish for delay in delivery, action being brought in Texas. W. U. Tel. Co. v. Buchanan [Tex. Civ. App.] 80 S. W. 561; Bryan v. W. U. Tel. Co., 133 N. C. 603; W. U. Tel. Co. v. O'Callaghan [Tex. Civ. App.] 74 S. W. 798.

10. None shown by evidence that sender told messenger calling for telegram that it must be delivered by a certain hour and that the messenger repeated the declaration to the operator. Jacob v. W. U. Tel. Co. [Mich.] 98 N. W. 402.

11. Jacob v. W. U. Tel. Co. [Mich.] 98 N. W. 402; Young v. W. U. Tel. Co., 65 S. C. 93.

12. Stipulations on back of blank are not binding where message written by agent and not signed by sender. W. U. Tel. Co. v. Uvalde Nat. Bank [Tex. Civ. App.] 72 S. W. 232.

13. In an action for damages for payment of draft on message sent by wire tapper, stipulations as to nonliability for interruptions are inapplicable. W. U. Tel. Co. v. Uvalde Nat. Bank [Tex. Civ. App.] 72 S. W. 232.

14. And so with a condition exempting from liability for mistakes and delays where there is a total omission to send or deliver. Beatty Lumber Co. v. W. U. Tel. Co., 52 W. Va. 410.

15. Signature looked as much like that received as that actually signed. The negligence was not so gross as to destroy provision in contract limiting liability to amount paid for sending message. Altman v. W. U. Tel. Co., 84 N. Y. Supp. 54.

16. Brooks W. U. Tel. Co., 26 Utah, 147, 72 Pac. 499.

17. W. U. Tel. Co. v. Christensen [Tex. Civ. App.] 78 S. W. 744.

18. A company may not claim that its office was kept open only between certain hours, where the message in question was sent after such hours and there was an operator on hand to receive the messages and a boy to deliver them. Bright v. W. U. Tel. Co., 132 N. C. 317.

19. Where agents promised immediate delivery of an important message, without giving the sender notice of the hours of the receiving office. W. U. Tel. Co. v. Crumpton, 138 Ala. 632.

20. W. U. Tel. Co. v. Perry, 30 Tex. Civ. App. 243, 70 S. W. 439; W. U. Tel. Co. v. Cavin, 30 Tex. Civ. App. 152, 70 S. W. 229.

21. On an unrepeated telegram, the company is not liable for an error in transmitting figures unless it was due to a want of ordinary care. W. U. Tel. Co. v. Brown [Tex. Civ. App.] 75 S. W. 359.

22. Const. Miss. 1890, § 195. Postal T. & C. Co. v. Wells [Miss.] 35 So. 190.

23. "Pay net proceeds to us" sent as pay "no" proceeds to us, held not the cause of recipient's conversion of proceeds. Strahorn-Hutton-Evans Comm. Co. v. W. U. Tel. Co., 101 Mo. App. 500, 74 S. W. 876.

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ered.[24] Particular instances of delay recently passed on as unreasonable, either in fact[25] or as matter of law,[26] are cited. If there be negligent delay, the aggrieved person must not contribute to the injury by undue delay in acting to protect himself or avert the injury.[27] An action induced by a statement of an operator is not contributory.[28] Derangement of apparatus by a storm is an excuse for delay,[29] but it is no excuse that there was no messenger and the agent was not permitted to leave the office,[30] nor that an operator who had been told better sent to the wrong station bearing the same name.[31]

In the absence of instructions to repeat, a company is not liable for neglect of operator to notify sender of inability to send message through to destination on account of storms.[32]

Delivery.—It is the duty of a telegraph company to exercise ordinary and reasonable diligence to find the addressee and make delivery,[33] despite a slight variation of name,[34] and it may not always depend solely on the address as to delivery, but must use diligence to acquire fuller information;[35] but if address be to a street and number in a city, a failure to send to a residence of the addressee in a suburb is not negligence.[36] The sender is not guilty of contributory negligence in failing

24. Where a telegram ineffectual for errors was delivered on Saturday afternoon and the company agreed to resend it, they were not liable for failure to deliver corrected telegram until Monday where it was not shown when the corrected message was agreed to be sent, or the time ordinarily required for transmission and delivery or how far addressee lived from telegraph office. Altman v. W. U. Tel. Co., 84 N. Y. Supp. 54.

25. Delay of eighteen hours in delivering message whereby father was prevented from reaching bedside of sick child on an earlier train shows negligence. W. U. Tel. Co. v. Pearce [Miss.] 34 So. 152.

26. A delay of 27 hours in sending a message 22 miles is unreasonable and the jury may be told that it makes the company liable. W. U. Tel. Co. v. Parsons, 24 Ky. L. R. 2008, 72 S. W. 800.

27. Where negligent transmission of telegram announcing sickness of child gave name of a nephew and parent requested receiving operator to wire relay office and ask whether message was correct, and on receiving an affirmative reply, did not return home until next day, when he received a message announcing the death of the child, he was not guilty of contributory negligence. Efird v. W. U. Tel. Co., 132 N. C. 267. Where there was some evidence that funeral could not be delayed, there was no negligence in failing to ask a postponement. W. U. Tel. Co. v. Crawford [Tex. Civ. App.] 75 S. W. 843.

28. Recovery for failure to send telegram that could have been received at office of destination before closing hour will not be defeated by fact that sender consented to sending next day, where such consent was only given after representation of sending agent as to inability to transmit because office closed. W. U. Tel. Co. v. Seffel [Tex. Civ. App.] 71 S. W. 616. Plea of contributory negligence in not using further efforts to communicate with addressee may be rebutted by evidence that defendant's agent stated to plaintiff that message had been delivered. W. U. Tel. Co. v. Barefoot [Tex. Civ. App.] 74 S. W. 560.

29. The agent showing no partiality and acting in good faith and with diligence. Under the Missouri Statute, Rev. St. 1899, § 1255. Taylor v. W. U. Tel. Co. [Mo. App.] 80 S. W. 697.

30. W. U. Tel. Co. v. Parsons, 24 Ky. L. R. 2008, 72 S. W. 800.

31. The sender told the agent to which place the message was to be sent. W. U. Tel. Co. v. Parsons, 24 Ky. L. R. 2008, 72 S. W. 800.

32. Jacob v. W. U. Tel. Co. [Mich.] 98 N. W. 402.

33. Reed v. W. U. Tel. Co., 31 Tex. Civ. App. 116, 71 S. W. 389; Hinson v. Postal Tel. Cable Co., 132 N. C. 460. On the issue of diligence in discovering place of residence, evidence as to fact that addressee was well known and resided within a few blocks of the office is admissible, but not that of parties who did not know addressee. W. U. Tel. Co. v. James, 31 Tex. Civ. App. 503, 73 S. W. 79.

Illustrations: The company in the absence of agreement or custom is required only to use diligence to deliver message in town to which it is addressed. W. U. Tel. Co. v. Harvey, 67 Kan. 729, 74 Pac. 250. Diligence in delivering message is shown where messenger spent afternoon in trying to locate addressee and failing, and a service message was sent for more specific address. W. U. Tel. Co. v. Cross' Adm'r, 25 Ky. L. R. 268, 74 S. W. 1098.

A telegraph operator is a servant and not an agent of the company, hence his knowledge is not imputed as an agent's. Knowledge concerning addressee. W. U. Tel. Co. v. Wofford [Tex. Civ. App.] 74 S. W. 943.

34. A mistake in the spelling of the sendee's name does not relieve the company of the duty of reasonable diligence in delivering the message. Cogdell v. W. U. Tel. Co. [N. C.] 47 S. E. 490. Company held negligent and liable for not delivering to a person named "Hurlburt" a message addressed to "Hulburt." Hurlburt v. W. U. Tel. Co. [Iowa] 98 N. W. 794.

35. W. U. Tel. Co. v. Bowen [Tex. Civ. App.] 76 S. W. 613.

36. W. U. Tel. Co. v. Christensen [Tex. Civ. App.] 78 S. W. 744.

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to give exact address, where the one furnished is the fullest he could obtain by the exercise of reasonable care.[37] A person addressed only by description need not be sought for in unlikely places.[38]

A telegraph company may fix reasonable free delivery limits,[39] and hold delivery until charges outside those limits are paid or guaranteed provided the sender knew the fact[40] or a prompt demand was made on him to do so.[41] If other reason be given it is not protected by this rule,[42] nor where it has otherwise agreed.[43] There may be a recovery for failure to deliver beyond free limits where company with knowledge of that fact undertook delivery and transmission without extra charge and might with diligence have found addressee within such limits.[44] Merely telephoning to an addressee outside of free limits has been held not enough.[45]

Delivery to others for addressee.—A telegraph company does not impliedly agree to deliver message to addressee in person, but merely to make a good legal delivery.[46] Whence, if an agent for the purpose of receiving or forwarding makes a mistake, it is imputed to the addressee,[47] unless a mere volunteer undertakes to deliver for the company.[48] A telegram sent to one in care of a corporation is properly delivered to an agent of the corporation where addressee cannot be found after diligent search,[49] and it is not necessary to inform the agent of the corporation as to its contents or importance.[50] Where the person in whose care message is sent refuses to accept same, it then becomes the duty of the company to use reasonable efforts to find sendee, and on failure to do so to ask a better address.[51] Any delivery good in law as between the company and addressee is good as between company and sender.[52] The addressee may authorize delivery to another than him to whose care

37. W. U. Tel. Co v. Bowen [Tex. Civ. App.] 76 S. W. 613.

38. Addressee was described as "traveling picture man." Company showed due diligence in trying to locate him by making a canvass of hotels and boarding houses and making inquiries at picture store and another telegraph office and was not expected to look for him in a camp yard. W. U. Tel. Co. v. Cox [Tex. Civ. App.] 74 S. W. 922.

39. Roche v. W. U. Tel. Co., 24 Ky. L. R. 845, 70 S. W. 39. Rule as to delivery beyond free delivery limits without guaranty or prepayment of fee may be shown in action for delay in delivery of message. W. U. Tel. Co. v. Cross' Adm'r, 25 Ky. L. R. 268, 74 S. W. 1098.

40. Failure to deliver is not excused by fact that addressee lived beyond free delivery limits and the extra charge had not been paid, where it did not appear that sender knew of limit or that company had demanded payment of charge. Bright v. W. U. Tel. Co., 132 N. C. 317.

41. Where a telegraph company was unwilling to deliver a message beyond the free limits without its charges being paid or guaranteed, it was negligent in not writing sender to pay or guaranty same. Bryan v. W. U. Tel. Co., 133 N. C. 603.

42. It was bad faith for a company to wire "Party not known," where address was known but beyond delivery limit and delivery charges had not been paid by sender, who did not know that addressee's residence was without the free delivery limit. Bryan v. W. U. Tel. Co., 133 N. C. 603.

43. Where there is an agreement to make the delivery and collect charges from addressee. Roche v. W. U. Tel. Co., 24 Ky. L. R. 845, 70 S. W. 39.

44. W. U. Tel. Co. v. Davis, 30 Tex. Civ. App. 590, 71 S. W. 313.

45. Ordinary diligence is not exercised by messenger in telephoning fact of possession of message which he delivers the following day, where addressee lives only fifteen minutes distance from office, though beyond free delivery limits. W. U. Tel. Co. v. Pierce [Tex. Civ. App.] 70 S. W. 360.

46. Norman v. W. U. Tel. Co., 31 Wash. 577, 72 Pac. 474.

47. Addressee directing a hotel clerk to forward messages brought to him constitutes such clerk his agent for the receipt of the messages. W. U. Tel. Co. v. Barefoot [Tex.] 76 S. W. 914. A message was sufficiently delivered to a hotel clerk at addressee's regular boarding place, where the messenger handed same to him and he wrote thereon the address to which it was to be forwarded and delivered same to messenger with verbal orders to forward as directed. Id. A telegraph company is not liable for errors in telephoning message to addressee, the messenger acting as addressee's agent. Norman v. W. U. Tel. Co., 31 Wash. 577, 72 Pac. 474. An employer's refusal to accept will be imputed to the addressee and not the telegraph company. Hinson v. Postal Tel. Cable Co., 132 N. C. 460.

48. There may be a recovery for negligence where telegram is delivered to a neighbor for delivery to addressee who fails to deliver in time to enable addressee to reach bedside of child. W. U. Tel. Co. v. Below [Tex. Civ. App.] 74 S. W. 799.

49, 50. Lefler v. W. U. Tel. Co., 131 N. C. 255, 59 L. R. A. 477.

51. Hinson v. Postal Tel. Cable Co., 132 N. C. 460.

52. Norman v. W. U. Tel. Co., 31 Wash.

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the message is sent.[53] When a message cannot be delivered, it is the duty of the company to so notify the sender, stating the reason, so that the sender may supply the deficiency and secure delivery.[54]

Delivery of messages in wrong sequence.—For negligent delivery of successive messages in wrong order, the company is liable.[55] It is not liable for delivery of two messages received at different offices, in wrong order, unless it was under contract or other obligation to deliver them in the order received for transmission.[56] The sender need not indicate such order on the face of the message.[57]

Secrecy.—The company obligates itself to keep the contents of the message secret from the world,[58] but penal statutes against employes who disclose messages create no liability of the company in damages.[59]

Spurious messages.—A company is liable for negligence[60] whereby wire tappers were enabled to perpetrate a fraud by sending false messages to one who was free from contributory negligence,[61] but there is no warranty of genuineness.[62] It is not a defense that telegrams deceived agent and the company was free from fault, unless defendant shows some precautions taken to prevent perpetration of such fraud.[63]

(§ 3) *B. Injury and damages.*—There may be no recovery where no injury resulted.[64] Thus delay must have been the proximate cause of the injury or loss as illustrated in the cases cited.[65] Neither substantial nor exemplary damages are recoverable for nondelivery of social messages.[66]

577. 72 Pac. 474. The fact that the addressee told sender to address messages to him in care of a certain person so that they could be forwarded does not show a special contract to deliver the messages to such person. W. U. Tel. Co. v. Barefoot [Tex.] 76 S. W. 914.

53. W. U. Tel. Co. v. Barefoot [Tex] 76 S. W. 914. It is good as against sender acting as his agent. Id.

54. Failure to so notify a sender is of itself evidence of negligence. Cogdell v. W. U. Tel. Co. [N. C.] 47 S. E. 490.

55. Where a telegraph company receives a second message to be transmitted for the purpose of revoking a prior message, and negligently delivers the last message first so as to revoke the wrong message, it is liable for damages thereby caused. Allegation setting out such facts in substance sufficiently alleges negligence of the company. Hocker v. W. U. Tel. Co. [Fla.] 34 So. 901.

56. An allegation not stating such a duty held not to state a cause of action. Hocker v. W. U. Tel. Co. [Fla.] 34 So. 901.

57. A sender of two messages who does not indicate on the face of them which is the later is not guilty of negligence barring recovery for damages for delivery of the messages in wrong order, where he explains the facts to the company's agent, who agrees that they will be delivered in the order received. Hocker v. W. U. Tel. Co. [Fla.] 34 So. 901.

58. Actual damage—$1—allowed for divulging contents of telegram, but punitive damages refused, there being no willful wrong or gross negligence, and no damage, except actual outlay, being shown. Cock v. W. U. Tel. Co. [Miss.] 36 So. 392.

59. Code 1892, § 1301. Cock v. W. U. Tel. Co. [Miss.] 36 So. 392.

60. A telegraph company is liable for loss occasioned by wire tapping, where its operator informed the party committing the fraud what the "call" was for a certain town. W. U. Tel. Co. v. Uvalde Nat. Bank [Tex. Civ. App.] 72 S. W. 232. In an action by addressee of a forged telegram sent by a wire tapper, a prima facie case is made by proof of delivery of telegram, its forged character and resulting loss and burden of freedom from negligence rests on company. W. U. Tel. Co. v. Uvalde Nat. Bank [Tex.] 77 S. W. 603.

61. Bank not guilty of contributory negligence in paying draft to confederate of wire tapper. W. U. Tel. Co. v. Uvalde Nat. Bank [Tex. Civ. App.] 72 S. W. 232.

62. There is no absolute warranty of the authenticity of a message rendering a company free from negligence liable for loss caused, occasioned by delivery of a forged telegram sent by a wire tapper; the ground of liability is negligence. W. U. Tel. Co. v. Uvalde Nat. Bank [Tex.] 77 S. W. 603.

63. W. U. Tel. Co. v. Uvalde Nat. Bank [Tex.] 77 S. W. 603.

64. A telegram accepting offer does not show a consummated sale so as to relieve company from liability on sale to another because of delay in delivering telegram. W. U. Tel. Co. v. Snow, 31 Tex. Civ. App. 275, 72 S. W. 250. Where a transaction is complete, a telegraph company is not liable for delay in a telegram attempting to annul same. Salmons v. W. U. Tel. Co., 133 N. C. 541. There may be no recovery for delay in delivery of a telegram accepting terms of sale where there is a variance as to the terms and seller could not be required to accept. W. U. Tel. Co. v. Burns [Tex. Civ. App.] 70 S. W. 784. A telegraph company sued for a missent message by which the price of goods was quoted greatly below the market price may urge the invalidity of the contract as a defense, the purchaser knowing the market price and having grounds for belief that the message was erroneous. Germain Fruit Co. v. W. U. Tel. Co., 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575.

65. A statute making a telegraph com-

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Damages for nondelivery are determined by laws of place of contract for transmission and not of place of receipt.[67] A company is liable as for a tort committed in the state where the message erroneously transmitted from without the state was sent by addressee's agent.[68]

General and special damages.—Money paid for transmission and delivery is recoverable as actual damages in an action for nondelivery.[69] In addition all special damages may be recovered which were within the contemplation of the parties when the message was sent.[70] What these are often depends on the company's knowledge of the important character of the message,[71] and this may be shown by the message itself;[72] but a cipher message does not impart it,[73] even though the

pany liable for damages caused by neglect of operators in receiving, copying, transmitting or delivering messages makes the company liable only for damages, the proximate result of the negligence [Rev. St. 1898, § 1778]. Fisher v. W. U. Tel. Co., 119 Wis. 146, 96 N. W. 545. The court cannot say that the evidence of damages claimed is too remote where from the facts relied on, more than one inference could be drawn as to whether they were the proximate cause of the injury claimed. Marsh v. W. U. Tel. Co., 65 S. C. 430.

Resulting mental anguish. W. U. Tel. Co. v. O'Callaghan [Tex. Civ. App.] 74 S. W. 798; W. U. Tel. Co. v. McFadden [Tex. Civ. App.] 75 S. W. 352. The company is liable to a mother deprived of the privilege of attending a child's funeral by delay in delivering telegram where she could have reached the place by private conveyance or could have had the funeral postponed had she had knowledge of the death. W. U. Tel. Co. v. Parsons, 24 Ky. L. R. 2008, 72 S. W. 800. Mental anguish is proximate cause of negligence in delivery of telegram where delivery delayed until after departure of only train that could have reached child before death. W. U. Tel. Co. v. Seffel [Tex. Civ. App.] 71 S. W. 616. Where message conveying knowledge of storm assured recipient of safety of relatives and was his first knowledge thereof, the delay in delivery will not be held the proximate cause of mental anguish thereafter until recipient reached bedside, though delay prevented taking an earlier train. Gaddis v. W. U. Tel. Co. [Tex. Civ. App.] 77 S. W. 37. Humiliation of a sister by reason of the fact that a brother was buried at a distant place at the cost of strangers, he having no means, is too remote to constitute recoverable damages against a telegraph company. W. U. Tel. Co. v. McNairy [Tex. Civ. App.] 78 S. W. 969.

Resulting loss of contract: Worry causing failure to reap benefits from school course too remote. W. U. Tel. Co. v. Partlow, 30 Tex. Civ. App. 599, 71 S. W. 584. Delay in delivery of telegram purporting to terminate negotiations then pending cannot be claimed as the proximate result of loss of a contract which might subsequently have been made. Fisher v. W. U. Tel. Co., 119 Wis. 146, 96 N. W. 545. A company will be liable for one losing a purchase through delay in delivering a telegram, though if he had known of delay he could by telegraphing have prevented the loss. W. U. Tel. Co. v. Snow, 31 Tex. Civ. App. 275, 72 S. W. 250.

Concurring negligence of others: Where plaintiff received a delayed telegram at a time when only train by which he could have reached his mother's bedside was scheduled to leave, telephoned the station and was erroneously told that the train was on time when in fact it was over two hours late, the defendant's negligence was not the proximate cause of plaintiff's inability to attend the funeral. Higdon v. W. U. Tel. Co., 132 N. C. 726.

66. W. U. Tel. Co. v. Cross' Adm'r, 25 Ky. L. R. 646, 76 S. W. 162.

67. Bryan v. W. U. Tel. Co., 133 N. C. 603. Mental anguish recoverable in Texas, though message sent to a state not allowing that element. W. U. Tel. Co. v. Waller [Tex. Civ. App.] 72 S. W. 264; W. U. Tel. Co. v. Buchanan [Tex. Civ. App.] 80 S. W. 561; W. U. Tel. Co. v. O'Callaghan [Tex. Civ. App.] 74 S. W. 798; W. U. Tel. Co. v. Waller, 96 Tex. 589, 74 S. W. 751; W. U. Tel. Co. v. Anderson [Tex Civ. App.] 78 S. W. 34.

Otherwise where the laws of the state from which telegram is sent do not allow recovery in such cases. W. U. Tel. Co. v. Christensen [Tex. Civ. App.] 78 S. W. 744.

68. Postal T. & C. Co. v. Wells [Miss.] 35 So. 190.

69. W. U. Tel. Co. v. Lawson, 66 Kan. 660, 72 Pac. 283.

70. W. U. Tel. Co. v. Mellor [Tex. Civ. App.] 76 S. W. 449; W. U. Tel. Co. v. Christensen [Tex. Civ. App.] 78 S. W. 744. Damages from a parent's failure to be present at a son's funeral on account of delay in transmission of telegram announcing death are within contemplation of the parties, though a reply message from the parent would have been necessary to secure postponement to enable him to reach place of funeral in time. W. U. Tel. Co. v. Swearingin [Tex.] 78 S. W. 491. A company is liable for difference in salary earned by teacher who lost position by negligence in transmission of message, but not for lessened benefit from studies due to worry over the loss. W. U. Tel. Co. v. Partlow, 30 Tex. Civ. App. 599, 71 S. W. 584.

71. A telegram announcing death of a named person sufficiently discloses its importance to authorize recovery of damages for anguish, though relation between sender and sendee not disclosed. Bright v. W. U. Tel. Co., 132 N. C. 317. A telegram that a party's wife is at point of death signed by the husband gives sufficient notice of its importance. Meadows v. W. U. Tel. Co., 132 N. C. 40.

72. Where a message discloses enough of its nature and importance to put an ordinary and prudent man on inquiry, the company will be liable for all damage directly and proximately resulting from negligence in

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parties frequently communicated in that way.[74] When a death message did not disclose the relation of the parties, and the company had no other notice of the relation, there could be no recovery for mental anguish.[75]

The damages must be certain[76] and not speculative.[77]

Mental anguish to one in loco parentis[78] or to a grandparent,[79] but not to an uncle,[80] is an element of damages.[81] In some jurisdictions, it may be the sole element.[82] In most jurisdictions, it may not be recovered for unless accompanied with other injury.[83] In Arkansas, there can be no recovery for mental anguish caused by delay in transmission and delivery of a telegram, such anguish being the sole element of damage.[84]

A telegraph company is not liable for effects on addressee's mind different from the purpose of the message[85] or remote mental effects induced by peculiar bodily condition.[86]

Mental anguish at inability to obtain a favorite clergyman to conduct funeral may not be recovered for in an action for damages for delay in delivering message.[87]

The measure of damages for failure to send or deliver an offer to purchase lumber is not the difference between the cost of the lumber delivered at the point

transmission. Message showed it related to a commercial transaction and was conspicuously marked "rush." Held to put the company on inquiry. Brooks v. W. U. Tel. Co., 26 Utah, 147, 72 Pac. 499. A message importing a proposal to sell lumber is sufficient to charge company with knowledge of importance so as to call for prompt transmission and delivery. Beatty Lumber Co. v. W. U. Tel. Co., 52 W. Va. 410.

73. Only charges paid may be recovered for failure to transmit an unintelligible cipher message where the agent was not informed of its nature or importance. W. U. Tel. Co. v. Mellor [Tex. Civ. App.] 76 S. W. 449.

74. Notice of nature or importance is not to be presumed from the fact that sender and others engaged in the same business had sent message in cipher. W. U. Tel. Co. v. Mellor [Tex. Civ. App.] 76 S. W. 449.

75. W. U. Tel. Co. v. Wilson [Tex.] 75 S. W. 482. Message failed to show relation of addressee to dangerously sick person mentioned in message. W. U. Tel. Co. v. Wilson [Tex. Civ. App.] 76 S. W. 600.

76. Compensatory damages cannot be recovered for failure to send or deliver a mere proposal to sell lumber as they are contingent on acceptance. Beatty Lumber Co. v. W. U. Tel. Co., 52 W. Va. 410. Failure to deliver telegram to come and contract for building houses is too uncertain. Harmon v. W. U. Tel. Co., 65 S. C. 490. A son may not recover as an element of damages the expenses in making a futile trip to attend father's funeral where he was notified otherwise of the death. Alexander v. W. U. Tel. Co., 126 Fed. 445. Cost of exhuming and reburying remains may not be recovered in the absence of evidence that plaintiff incurred the cost. W. U. Tel. Co. v. Watson [Miss.] 33 So. 76.

77. Altman v. W. U. Tel. Co., 84 N. Y. Supp. 54.

78. Bright v. W. U. Tel. Co., 132 N. C. 317.

79. W. U. Tel. Co. v. Crocker, 135 Ala 492.

80. An uncle may not recover for mental anguish at inability to attend niece's funeral. W. U. Tel. Co. v. Wilson [Tex.] 75 S. W. 482.

81. Cowan v. W. U. Tel. Co. [Iowa] 98 N. W. 281.

82. Bryan v. W. U. Tel. Co., 133 N. C. 603. In North Carolina delay preventing attendance of bedside of near relative may be recovered. Meadows v. W. U. Tel. Co., 132 N. C. 40. Louisiana. Graham v. W. U. Tel. Co., 109 La. 1069. A father may recover for increased mental anguish caused by witnessing the suffering of a sick child where such anguish is caused by the negligent failure of the company to promptly deliver the father's message to a physician to come at once. W. U. Tel. Co. v. Cavin, 30 Tex. Civ. App. 152, 70 S. W. 229. Telegram announcing death and time of funeral of mother. Hurlburt v. W. U. Tel. Co. [Iowa] 98 N. W. 794. Recovered where plaintiff was prevented from reaching mother's bedside before death. W. U. Tel. Co. v. Shaw [Tex. Civ. App.] 77 S. W. 433. Failure to deliver a telegram announcing father's death. Cogdell v. W. U. Tel. Co. [N. C.] 47 S. E. 490.

83. In the Federal courts there may be no recovery for mental anguish unaccompanied by pecuniary loss or physical injury. Tennessee courts held not to have construed statutes of state as to delay to allow for mental anguish. W. U. Tel. Co. v. Sklar [C. C. A.] 126 Fed. 295. Virginia. Alexander v. W. U. Tel. Co., 126 Fed. 445. Alabama. W. U. Tel. Co. v. Blocker, 138 Ala. 484. Special damages for mental anguish recovered for failure to deliver a telegram announcing sickness and death of mother, so that plaintiff could not view the remains before burial. W. U. Tel. Co. v. Crumpton, 138 Ala. 632.

84. W. U. Tel. Co. v. Buchanan [Tex. Civ. App.] 80 S. W. 561.

85. Gaddis v. W. U. Tel. Co. [Tex. Civ. App.] 77 S. W. 37.

86. **Mental suffering aggravated by pregnancy** may not be recovered for in an action for failure to promptly deliver message from plaintiff to her husband, the company having no knowledge of this fact. W. U. Tel. Co. v. Pearce [Miss.] 34 So. 152.

87. W. U. Tel. Co. v. Arnold, 96 Tex. 493, 73 S. W. 1043

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of delivery and the fixed price, but the difference between such price and the market value of the lumber at the time when delivery would have been made if contracts had been consummated[88] or the amount for which it did sell after diligent effort.[89] Where delay prevents sale of grain at price above the market price, the measure of damages is the difference between the price that would have been received and the market price without reference to the amount actually received for the grain thereafter.[90] A party injured by delay in delivery of telegrams postponing sale is entitled to recover to the extent of his actual interest in the property, where the telegram shows he had some interest.[91]

For mental anguish the recovery should be limited to such sum as would compensate plaintiff.[92]

Exemplary damages are recoverable where delay was willful.[93] There can be no recovery of punitive damages for failure to deliver a telegram in time where there is no gross negligence, willful wrong or disregard of the sendee's rights.[94] They are not recoverable in Kentucky unless physical injuries were suffered.[95]

(§ 3) *C. Procedure.*—It is competent to stipulate for presentment of claim within a limited time,[96] and the bringing of suit is a good presentment.[97] The matters alleged in the complaint must be sufficiently stated to show all the necessary elements of the cause of action,[98] with legal certainty and specificness.[99]

88. Beatty Lumber Co. v. W. U. Tel. Co., 52 W. Va. 410.

89. Where failure to deliver results in loss of sale of property to a person who had agreed to purchase it at a certain price, the measure of damages is the difference between the amount sender would have received and the amount he did receive on a sale after use of due diligence. Brooks v. W. U. Tel. Co., 26 Utah, 147, 72 Pac. 499.

90. W. U. Tel. Co. v. Nye & S. Grain Co. [Neb.] 97 N. W. 305.

91. W. U. Tel. Co. v. Wofford [Tex. Civ. App.] 74 S. W. 943.

92. W. U. Tel. Co. v. Herning, 24 Ky. L. R. 1433, 71 S. W. 642.

Adequacy or excessiveness: $1,995 not excessive for negligent failure to deliver telegram announcing sickness of child until after death. W. U. Tel. Co. v. James, 31 Tex. Civ. App. 503, 73 S. W. 79. $1,000 is excessive for grief at inability to attend funeral of son where telegram announcing fatal sickness was delayed, but parent would have been in time for funeral if he had started on its receipt, though a later telegram announced death and told him that he need not come; the grief being more attributable to loss of son than inability to attend funeral. Verdict reduced to $500. W. U. Tel. Co. v. Bowles [Tex. Civ. App.] 76 S. W. 456. A verdict of $1,975 is not excessive where delay kept from son knowledge of death of his father for a month and caused his burial by strangers at public expense. W. U. Tel. Co. v. Bowen [Tex. Civ. App.] 76 S. W. 613. Mental anguish of a grandparent at failure to reach deathbed. A verdict for $225 not excessive. W. U. Tel. Co. v. Crocker, 135 Ala. 492.

93. Exemplary damages are recoverable against a telegraph company by the sender of a death message for nondelivery through gross negligence of company's agents. W. U. Tel. Co. v. Lawson, 66 Kan. 660, 72 Pac. 283.

Illustrations: Where messenger boy intentionally fails to deliver message, punitive damages may be allowed. Butler v. W. U. Tel. Co., 65 S. C. 510. Inquiry at office by parties who were told that there was no telegram and testimony of agent that no attempt to find plaintiff after it was found that she lived six or seven miles in the country. W. U. Tel. Co. v. Watson [Miss.] 33 So. 76.

Evidence that the telegram remained in the hands of the company for 14 hours without attempt to deliver is admissible to show reckless disregard of plaintiff's rights. Young v. W. U. Tel. Co., 65 S. C. 93.

94. Night message delivered at one o'clock next day, after search for sendee's residence, and a "service message" for better address; and the sendee did not use due diligence in answering. W. U. Tel. Co. v. Spratley [Miss.] 36 So. 188.

95. W. U. Tel. Co. v. Cross's Adm'r, 25 Ky. L. R. 268, 74 S. W. 1098.

96. A stipulation in a contract that the company will not be liable for damages in any case where the claim is not presented in writing within a certain time is valid. Sixty days. Hartzog v. W. U. Tel. Co. [Miss.] 36 So. 539.

97. Bryan v. W. U. Tel. Co., 133 N. C. 603; Phillips v. W. U. Tel. Co. [Tex. Civ. App] 69 S. W. 997; W. U. Tel. Co. v. Crawford [Tex. Civ. App.] 75 S. W. 843.

98. **Sufficiently stated** by declaration alleging that plaintiff would have reached home in ample time for funeral of sister if telegram had been promptly delivered and that delivery was not made until after funeral, and by reason of such willful negligence, plaintiff was subjected to great pain and anguish in consequence of being deprived of privilege of attending his sister's funeral. Hartzog v. W. U. Tel. Co. [Miss.] 34 So. 361.

99. A petition in an action for delay in delivering a message calling a parent to the deathbed of a son is sufficiently specific where it recites date of delivery of message for transmission, its receipt by agent at destination, his delay in delivering message where

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Thus it must show the duty owing by defendant,[1] and corresponding breach,[2] and when the action is tortwise, a negligence respecting the particular act.[3] Plaintiff need not in Iowa allege freedom from contributory negligence.[4] Special damages claimed must be pleaded,[5] and an allegation of wantonness will suffice to let in exemplary damages.[6] In a state where recovery solely for mental anguish may be had, it is necessary for defendant to affirmatively plead and prove that telegram originated in a state where that is not so.[7]

Two actions for breach of implied contract arising out of failure to deliver two different messages may properly be joined in one complaint.[8]

A defense of condition broken must be pleaded.[9] Contributory negligence in furnishing a bad address must be pleaded[10] directly and certainly.[11]

A denial of negligence in transmission, and trial on it makes that an issue, though it was alleged only in delivery.[12] Applications of the ordinary rules of proof and variance are shown in the cases cited.[13]

Plaintiff must prove the harmfulness of delay,[14] thus by showing that a lost

he knew that addressee lived within half a mile of office and that but for such delay he could have reached his son's bedside twelve hours before death though it did not state hour of son's death. Howard v. W. U. Tel. Co., 25 Ky. L. R. 828, 76 S. W. 387.

1. The complaint should show either a contract or a duty to deliver different messages in the order in which they were received for transmission. Hocker v. W. U. Tel. Co. [Fla.] 34 So. 901.

2. Under a statute making liability depend on willfulness in making delivery, a petition is demurrable which fails to allege willfulness or pecuniary damages [Shannon's Code Tenn. § 1838]. W. U. Tel. Co. v. Sklar [C. C. A.] 126 Fed. 295.

3. Negligence is sufficiently averred by allegation that a second message revoking an earlier message was delivered before the earlier message, whereby the first message reversed the last. Sender is not guilty of negligence in failing to make the messages so as to show their relative order where situation was explained to operator. Hocker v. W. U. Tel. Co. [Fla.] 34 So. 901. An allegation that a careless and incompetent agent was employed is insufficient without averment that he was careless or incompetent in the performance of the particular act. Id.

4. Cowan v. W. U. Tel. Co. [Iowa] 98 N. W. 281.

5. W. U. Tel. Co. v. Partlow, 30 Tex. Civ. App. 599, 71 S. W. 584; W. U. Tel. Co. v. Turner [Tex. Civ. App.] 78 S. W. 862. Where complaint fails to state expenses incurred in securing another position as an element of damages, there may be no recovery therefor. W. U. Tel. Co. v. Partlow, 30 Tex. Civ. App. 599, 71 S. W. 584.

6. Evidence of bodily discomfort occasioned by delay is admissible as a basis for exemplary damages under an allegation of wantonness. Young v. W. U. Tel. Co., 65 S. C. 93.

7. Damages for mental anguish being recoverable in Texas for nondelivery of a telegram, an action therefor in Texas will not be defeated by allegation that in New Mexico, where the message was filed for transmission, the common law prevails. W. U. Tel. Co. v. McNairy [Tex. Civ. App.] 78 S. W. 969.

8. Under Ala. Code 1896, § 3292, providing for joinder of causes of action on contract for payment of money. W. U. Tel. Co. v. Crumpton, 138 Ala. 632.

9. Delay in presenting claim for damages must be pleaded. Brooks v. W. U. Tel. Co., 26 Utah, 147, 72 Pac. 499.

10. The fact that a message could not be delivered after reasonable effort, because the sendee's name was misspelled should be pleaded if relied on as a defense. Cogdell v. W. U. Tel. Co. [N. C.] 47 S. E. 490.

11. A defense by a company in an action for damages for failure to deliver a message that the sendee's name was misspelled does not raise the issue of contributory negligence on the sender's part. If there is negligence on the company's part, the sender's negligence is antecedent to, and not concurrent with the company's negligence. Cogdell v. W. U. Tel. Co. [N. C.] 47 S. E. 490.

12. W. U. Tel. Co. v. Parsons, 24 Ky. L. R. 2008, 72 S. W. 800.

13. **Admissions:** Evidence that an error in transmission could have occurred without negligence is not to be refused because plaintiff admits that it could have occurred without negligence. W. U. Tel. Co. v. Brown [Tex. Civ. App.] 75 S. W. 359.

Place: Evidence of an agreement to deliver a telegram at a place 2½ miles from a certain town was inadmissible under a pleading alleging breach of an agreement to deliver at the town. W. U. Tel. Co. v. Byrd [Tex. Civ. App.] 79 S. W. 40. There is no variance between averment that a party was "at" a village and proof that he was in the country two miles from the village. W. U. Tel. Co. v. Roberts [Tex. Civ. App.] 78 S. W. 522.

Plea of contributory negligence in not sending message in care of addressee's employer will not support a finding of contributory negligence because sender failed to inform operator that addressee lived near a certain building. W. U. Tel. Co. v. James, 31 Tex. Civ. App. 503, 73 S. W. 79.

Negligence of company in care of wires whereby plaintiff was injured by contact. Cumberland Tel. & T. Co. v. Hunt, 108 Tenn. 697, 69 S. W. 729.

14. Plaintiff in action for damages for delay must show that he did not get the message in time for his purposes. Harper

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sale would have become enforceable[15] or by showing other advantageous offers.[16] The company must show diligence on its part.[17] Parol evidence is admissible to show to whom the message was agreed to be delivered.[18] One to whom a messenger was referred for information may state that he would have given information if asked.[19] The addressee's whereabouts may be shown to prove the possibility of a timely delivery.[20] Statements amounting to a conclusion that there had been a delivery may be proved as res gestae,[21] and at any rate are harmless where negligence is proved otherwise.[22] Conversations with a wire tapper's confederate are admissible as in other conspiracies.[23] All the circumstances of the transmission may be shown when intentional delay is charged.[24] It is proper to show the duration and degree of plaintiff's grief[25] by his own testimony,[26] and the degree of affection may be shown on the question of anguish;[27] but it is error to admit evidence showing the dying person's grief of mind.[28] The plaintiff may state what he would have done had the delivery been timely.[29]

v. W. U. Tel. Co., 92 Mo. App. 304. There can be no recovery of damages for delay in delivering a message without proof that the consequence complained of would not have resulted had the message been properly delivered. Where it was complained that a father was prevented by delay in delivery of a telegram from reaching his dying son's bedside while the son was conscious, it was not proven that the father could and would have reached the son before he became unconscious, and it was held there should have been no recovery. W. U. Tel. Co. v. Adams [Tex. Civ. App.] 80 S. W. 93.

15. Before there can be a recovery of damages for loss of sale by reason of failure to deliver message, plaintiff must prove that the goods were of the grade and character described in the message. Postal Tel. Co. v. Rhett [Miss.] 33 So. 412.

16. On the question of damages resulting from loss of sale of cotton by delay in delivering message, plaintiff may introduce a copy of a telegram containing an offer to purchase cotton at an advanced price. Postal Tel. Cable Co. v. Rhett [Miss.] 35 So. 829.

17. Under the laws of Iowa, the burden is on the company to prove that the mistake or delay was not due to its own negligence, and it is not necessary for plaintiff to allege freedom from contributory negligence [Code Iowa, § 2164]. Cowan v. W. U. Tel. Co. [Iowa] 98 N. W. 281.

18. Where addressed to "Dick Bryant care of John King," parol evidence was admissible to show that the company did not agree to deliver to John King. W. U. Tel. Co. v. Bryant [Tex. Civ. App.] 80 S. W. 406. Where a message was sent to "Dick Bryant care of John King" and King lived within, and Bryant without, the special delivery limits, and no contract to deliver to King, or contract of special delivery to Bryant, was shown, the special delivery fee being charged, but not tendered or paid, there could be no recovery for delay in delivery. Id.

19. Information of addressee's whereabouts. W. U. Tel. Co. v. Waller [Tex. Civ. App.] 72 S. W. 264.

20. Evidence of whereabouts of plaintiff on day of receipt of telegram is admissible in an action for delay in delivering telegram to third person for delivery to plaintiff as showing that addressee could have made a timely delivery. W. U. Tel. Co. v. Crawford [Tex. Civ. App.] 75 S. W. 843.

21. The statement of the sending agent made to the sender that he knew the telegram had been delivered because if it had not the receiving office would have notified him. W. U. Tel. Co. v. Barefoot [Tex. Civ. App.] 74 S. W. 560.

22. Where agent testified that receiving office did not notify him of its nondelivery in accordance with the company's rule, the admission of evidence that the agent told sender that message had been delivered because of this fact is harmless. W. U. Tel. Co. v. Barefoot [Tex. Civ. App.] 74 S. W. 560.

23. In an action by a bank swindled by means of a message sent by a wire tapper, a conversation between the president of the bank and the confederate is admissible as part of the res gestae. W. U. Tel. Co. v. Uvalde Nat. Bank [Tex. Civ. App.] 72 S. W. 232.

24. Admissible on the question of exemplary damages. Marsh v. W. U. Tel. Co., 65 S. C. 430.

25, 26. On questions of mental anguish at inability to attend brother's funeral, plaintiff may be asked as to duration of grief and whether it was increased by inability to attend funeral. W. U. Tel. Co. v. Simmons [Tex. Civ. App.] 75 S. W. 822.

27. Evidence of special affection between mother and son is admissible where son prevented reaching her bedside by reason of negligent delay in delivering message announcing fatal illness. W. U. Tel. Co. v. Waller [Tex. Civ. App.] 72 S. W. 264.

28. In an action for damages for mental anguish caused by failure to properly transmit and deliver a message announcing illness and death of father, it was reversible error to admit evidence that the father had said three days before his death that it was hard to die without friends or relatives about and that he wished the children informed if anything should happen to him. W. U. Tel. Co. v. Jackson [Tex. Civ. App.] 80 S. W. 649. In an action for damages for delay preventing son's presence at mother's deathbed, it may not be shown that the mother made inquiries and kept calling for her son. W. U. Tel. Co. v. Waller, 96 Tex. 589, 74 S. W. 751.

29. In an action for delay preventing an

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The sending of the telegram,[30] the question whether nondelivery was intentional or inadvertent,[31] whether delivery to a wrong person was negligence,[32] whether there was an undertaking for immediate delivery,[33] or whether a message could have been delivered by the use of reasonable diligence,[34] or plaintiff's diligence,[35] are for the jury, if there is any evidence on which they may base a finding.[36] Proof or admission that the company received a message for transmission and failed to deliver it to the sendee within a reasonable time raises a prima facie case of negligence.[37]

It is not misconduct of trial to admit proof after argument of what already appeared.[38] Statements of counsel as to why a larger amount was not demanded are not erroneous if the evidence justifies the amount of recovery.[39]

The ordinary rules respecting instructions apply.[40] Thus the jury must not

uncle from accompanying plaintiff on the train to the funeral at a distant point, the addressee could testify that he would have gone to the place of death, if the telegram had been received in time. Bright v. W. U. Tel. Co., 132 N. C. 317.

30. There is substantial conflict authorizing submission to the jury where the alleged sender testified merely that he did not remember having authorized it, and the messenger was positive that he had authorized it. Norman v. W. U. Tel. Co., 31 Wash. 577, 72 Pac. 474.

31. Where the evidence leaves it doubtful whether the failure to deliver was the result of inadvertence or intentional wrong, the question is for the jury. Marsh v. W. U. Tel. Co., 65 S. C. 430.

32. Where a telegram instead of being delivered is telephoned to a rival who exposes it to other prospective purchasers and sale is defeated, the question of negligence and consequent injury are for the jury. Barnes v. W. U. Tel. Co., 120 Fed. 550.

33. There being evidence of an agreement to send and deliver a message the night it was received, whether an ordinary rule of the company as to closing at night should apply was for the jury. W. U. Tel. Co. v. Shaw [Tex. Civ. App.] 77 S. W. 433.

34. Where sendee's name was spelled "Codgell" instead of "Cogdell," such question was for the jury. Cogdell v. W. U. Tel. Co. [N. C.] 47 S. E. 490.

35. Whether plaintiff acted with sufficient promptness on receipt of letter containing information in delayed telegram is a question for the jury. Phillips v. W. U. Tel. Co. [Tex. Civ. App.] 69 S. W. 997.

36. Sufficiency of evidence to authorize jury to find that funeral would have been delayed if telegram had been correctly transmitted. W. U. Tel. Co. v. Chambers [Tex. Civ. App.] 77 S. W. 273. The question of diligence in delivering a telegram in time to allow recipient to reach a parent's bedside before death is not raised as an issue for the jury by evidence that he could have made the trip of over eighty miles on horseback at night; where the party on receipt of the delayed telegram waited nine hours for a train. W. U. Tel. Co. v. Newnum [Tex. Civ. App.] 78 S. W. 700. The jury may be instructed that there was no evidence of contributory negligence where defendant offered no evidence and it appeared that message could have been delivered within 15 minutes after receipt and sometime before departure of train, but was not delivered for three hours and that plaintiff was physically unable to walk to his sister's bedside and could not obtain a team that night but went the following morning. Meadows v. W. U. Tel. Co., 132 N. C. 40. Company found negligent where message filed at night for transmission was not delivered until 5 p. m. next day. W. U. Tel. Co. v. Shaw [Tex. Civ. App.] 77 S. W. 433.

A verdict was properly directed for plaintiff injured by three hours' delay, whereby a sale was lost where a telegraph agent at point of delivery testified that the message should have been received and transmitted in ten minutes, though defendant introduced evidence that the message had to be repeated twice before reaching destination. Postal Tel. Cable Co. v. Rhett [Miss.] 35 So. 829.

37. And so places the burden on the company of proving facts relied on to excuse its failure to deliver. Cogdell v. W. U. Tel. Co. [N. C.] 47 S. E. 490.

38. Where evidence showed that plaintiff could have reached her mother's bedside before death if delivered without delay, there was no reversible error in allowing proof after argument as to passability of roads between addressee's residence and railroad station. W. U. Tel. Co. v. Roberts [Tex. Civ. App.] 78 S. W. 522.

39. Where recovery was for $2,000, the full amount demanded, and was justified by the evidence, the judgment will not be reversed because of statement of attorney in argument that a larger amount would have been demanded but for fear of removal to another tribunal, where recovery for mental anguish would not be allowed. W. U. Tel. Co. v. Perry, 30 Tex. Civ. App. 243, 70 S. W. 439.

40. See Instructions, 2 Curr. Law, p. 461. It is not necessary to charge that the company is not an insurer if negligence is properly charged. W. U. Tel. Co. v. Bowen [Tex. Civ. App.] 76 S. W. 613. A party may not complain at refusal of request where charge given is more favorable than request. W. U. Tel. Co. v. Wofford [Tex. Civ. App.] 74 S. W. 943. Where plaintiff sued for delay in delivery of telegram addressed to him and also for failure to deliver telegrams sent by him in answer thereto, an instruction to find for defendant if the jury found certain facts as to delay in delivery of telegrams addressed to plaintiff was erroneous as it prevented a finding for plaintiff for failure to deliver telegrams sent by him. Reed v. W. U. Tel. Co., 31 Tex. Civ. App. 116, 71 S. W. 389. Where allegations of complaint show negli-

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be so charged that it passes over the existence of proximate cause[41] or eliminates proper items of damage.[42] The charge must not assume negligence in failing to give a proper address,[43] or the existence of a free delivery district,[44] or that mental anguish was suffered.[45]

(§ 3) *D. Penalties* are strictly construed, hence one for failure to "transmit" does not include nondelivery,[46] and a statute imposing a penalty on any employe of a telegraph company who divulges the contents of a message does not authorize an action for damages against the company.[47] Under the New York act imposing a penalty for delays, the penalty may not be recovered by addressee, the right being expressly limited to the sender.[48] Under a statute allowing a recovery of a penalty and damages against a telephone company for erroneous transmission and delay in delivery of messages, the message must be written.[49] The Kansas act providing a forfeiture for failure, neglect or refusal of a telegraph company to receive, transmit and deliver messages without unnecessary delays is held invalid.[50]

§ 4. *Telephone service.*—Discrimination between telephone subscribers as sometimes forbidden does not exist from mere failure to enforce rules against some of the subscribers.[51] A complaint for discrimination must show wherein it consists.[52] In Michigan a right of a subscriber to connection through an exchange may be enforced by mandamus.[53] For refusal of a long distance connection in violation of a contract giving this right, there may be no recovery of money unnecessarily expended.[54]

gence on part of defendant company, the jury may be instructed that compensatory damages may be recovered. Young v. W. U. Tel. Co., 65 S. C. 93.

41. An instruction that the nature and importance of a telegram being apparent from its terms, no explanation is necessary to make the company liable for nondelivery, is erroneous, where the evidence does not show any proximately resulting damage. W. U. Tel. Co. v. McNairy [Tex. Civ. App.] 78 S. W. 969.

42. Where mental anguish, physical suffering and intentional wrong were alleged in one cause of action for delay preventing attendance on father's funeral, it would be erroneous to limit the damages for mental anguish to the effect of plaintiff being unable to attend the funeral and that if he attended or there was no funeral, he could have no damages for such claim. Marsh v. W. U. Tel. Co., 65 S. C. 430.

43. Instructions assuming the sender's failure to give an address was negligence is on the weight of evidence. W. U. Tel. Co. v. Bowen [Tex. Civ. App.] 76 S. W. 613.

44. The submission to the jury as to the duty of the telegraph company in certain cases to deliver messages beyond the free delivery limits of the city wherein no such limits exist and where the point to which it was contended the message should have been delivered was two miles beyond the place to which it was addressed, was misleading and erroneous. W. U. Tel. Co. v. Harvey, 67 Kan. 729, 74 Pac. 250.

45. An instruction that the jury can only allow plaintiff for mental anguish caused by being prevented from attending a funeral at the close of an instruction allowing compensation for mental anguish, if any, does not assume proof of mental anguish. W. U. Tel. Co. v. Chambers [Tex. Civ. App.] 77 S. W. 273.

46. The Missouri act providing a penalty for failure to "transmit" a paid message does not require a delivery, and has no extra territorial effect [Rev. St. Mo. § 1255]. Rixke v. W. U. Tel. Co., 96 Mo. App. 406, 70 S. W. 265.

The complaint alleging careless and negligent failure to transmit a message was sufficient under the statute, other allegations as to actual delivery being regarded as surplusage. Hill v. W. U. Tel. Co. [Mo. App.] 80 S. W. 3.

47. Code 1892, § 1301. Cock v. W. U. Tel. Co. [Miss.] 36 So. 392.

48. Laws 1890, p. 1152, c. 566, § 103. Thompson v. W. U. Tel. Co., 40 Misc. [N. Y.] 443.

49. Cumberland Tel. & T. Co. v. Sanders [Miss.] 35 So. 653.

50. W. U. Tel. Co. v. Austin, 67 Kan. 208, 72 Pac. 850.

51. Irvin v. Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258.

52. In an action against a telephone company under a statute against discrimination, the complaint must show wherein discrimination consists. Irvin v. Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258. Discrimination in failing to enforce a rule disconnecting service of other defaulting subscribers is not shown by an allegation that the rule had not been enforced against certain other patrons who "were in like situation with the plaintiff." Id.

53. Mahan v. Mich. Tel. Co. [Mich.] 93 N. W. 629.

54. Exemplary damages are not recoverable in the absence of aggravating circumstances. Haber, etc., Hat Co. v. Southern Bell Tel. & T. Co. [Ga.] 45 S. E. 696.

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§ 5. *Quotations and ticker service.*—A telegraph company and board of trade vending quotations may impose on customers a condition not to use same in conducting a bucket shop.[55] Property rights in, and contracts respecting such information have been previously discussed.[56] The Louisville ordinance punishing telegraph and telephone companies transmitting communications used in pool room business does not interfere with the legitimate business of a common carrier.[57]

§ 6. *Rates, tariffs and rentals.*—Rates legally fixed must be reasonable according to the company's property, value and expenses.[58] The mayor and council of a city having power to regulate the use of streets by telephone companies may limit the rates charged by a company for service as a condition to the use of the streets.[59] Having accepted such an ordinance, it is estopped to deny the validity on the ground that the rates fixed are not reasonable.[60] Individuals may maintain a suit to enjoin exaction of rates greater than those allowed.[61] A bill is not multifarious by reason of the fact that it shows a separate contract with each complainant.[62] A foreign telephone company doing business in the District of Columbia by sufferance only must furnish service at the rate fixed by laws of congress.[63]

Rentals and payment of same.—A subscriber cannot escape liability for rental because of bad service without giving written notice, where the contract so expressly provides.[64] Service may be discontinued where rule as to payment of tolls is violated,[65] without stating the reason,[66] and despite the company's indebtedness to the subscriber,[67] if the rule be reasonable.[68] Where a telephone is wrongfully disconnected and no pecuniary injury is shown, the measure of damages is the rent for the period of disconnection.[69] There can be no recovery of punitive damages for wrongful disconnection of telephone unless pecuniary injuries are suffered.[70]

§ 7. *Offenses.*—The penal code of Texas makes it an offense to wilfully interfere with the transmission of messages along telegraph and telephone lines, and this it is held means that an "interference" is essential.[71]

55. Sullivan v. Postal Tel. Cable Co. [C. C. A.] 123 Fed. 411.

56. Exchanges, etc., 1 Curr. Law, p. 1177.

57. City of Louisville v. Wehmhoff, 25 Ky. L. R. 995, 76 S. W. 876. The title of ordinance against pool rooms in the city of Louisville and punishing telegraphs and telephones transmitting messages does not contain a plurality of subjects. Id.

58. In considering whether rate fixed by law is destructive of property rights of an existing company, the basis of value is the reasonable, actual value of property, used in the business, cost of maintenance and expense of carrying on the business. Manning v. Chesapeake & P. Tel. Co., 18 App. D. C. 191.

59. Charles Simon's Sons Co. v. Md. Tel. & T. Co. [Md.] 57 Atl. 193. A city ordinance limiting rates charged by a telephone company held not to have been restricted to a particular kind of service by statutes regulating rates and providing for contracts as to a special service. Id.

60, 61, 62. Charles Simon's Sons Co. v. Md. Tel. & T. Co. [Md.] 57 Atl. 193.

63. Manning v. Chesapeake & P. Tel. Co., 18 App. D. C. 191.

64. Atlanta Standard Tel. Co. v. Porter, 117 Ga. 124.

65. Due process is not denied by discontinuance of service to a stockholder with line of wire entitled to exchange on prompt payment of tolls who is in default, though he claims that the corporation is indebted to him in excess of tolls claimed. Irvin v. Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258.

66. Where a company has a rule allowing discontinuance of service on failure of patron to pay within a certain time and the patron is aware of the rule, he may not object that the reason for disconnection was not told him. Irvin v. Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258.

67. Service may be disconnected for failure to pay tolls, though company is indebted to patron in an amount greater than the amount of the company's claim. The set off may not be urged in an action against company for penalty. Irvin v. Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258.

68. A rule providing for disconnection on failure to pay for service on the 5th of the month succeeding rendition is reasonable. Irvin v. Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258.

69, 70. Cumberland Tel. & T. Co. v. Hendon, 24 Ky. L. R. 1271, 71 S. W. 435.

71. Pen. Code, art. 784. Reward offered for conviction does not apply where wires are dead. Southwestern Tel. & T. Co. v. Priest, 31 Tex. Civ. App. 345, 72 S. W. 241.

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TENANTS IN COMMON AND JOINT TENANTS.

§ 1. **Definitions and Distinctions (1862).**
§ 2. **Rights and Liabilities Between Tenants (1862).** Agency (1865). Contribution and Exoneration (1866). Subrogation (1867). Rents, Profits and Proceeds of the Property (1867). Interest (1867). Trespass and Waste (1867). Conversion (1868). Actions (1868).

§ 1. *Definitions and distinctions.*—Tenants in common hold undivided interests by separate titles while joint tenants hold by a single title which passes to the survivor of them.[72] A common right of possession is essential to both.[73] Whether a grant creates a joint tenancy or a tenancy in common depends on the intent shown in the instrument of conveyance,[74] but by statute it is generally provided that they shall be regarded as tenancies in common unless the contrary appears.[75] Such a statute does not abolish joint tenancies.[76] A purchase of personalty by subscription creates a common tenancy.[77] Where tenants in common of real property sell the same, they become tenants in common of the proceeds of the sale as personal property.[78] An ownership cast on several persons by operation of law is in common.[79] The holder of a legal title may be a "tenant in common" of the equitable estate.[80] In West Virginia, since tenancies by the entirety were abolished, a deed to husband and wife makes a joint tenancy.[81] In California it is provided that husband and wife may be co-tenants.[82] In Missouri, a tenant in common may hold his interest as a homestead.[83]

§ 2. *Rights and liabilities between tenants.*—The shares of tenants in common are presumed to be equal,[84] unless at the time of purchase they contributed unequal portions of the purchase price,[85] and this is not overcome by the fact that

72. Cyc. Law Dict. "Tenant" Tiffany Real Prop. p. 376.

73. A deed to one person for life with remainder to others does not make them tenants in common. Stewart v. Robinson, 25 Ky. L. R. 66, 74 S. W. 652.

74. Evidence and circumstances held not sufficient to establish a tenancy in common. Roberts v. Decker [Wis.] 97 N. W. 519. A New York statute providing for the construction of piers, and granting to abutting proprietors a common interest in proportion to the breadth of fronting lots, construed as creating a tenancy in common between the City of New York and abutting owners. In re City of New York, 41 Misc. [N. Y.] 134. Two persons deposited money in a bank, "Account with S. or F." A joint tenancy was created. Farrelly v. Emigrant Industrial Sav. Bank, 92 App. Div. [N. Y.] 529. Evidence of survivorship. Id. A grant to persons to hold as joint tenants and not as tenants in common. Redemptorist Fathers v. Lawler, 205 Pa. 24. Tenants in common of land made a deed directly to one of the tenants and a third person as joint tenants. Colson v. Baker, 42 Misc. [N. Y.] 407.

75. In New York, unless expressly declared to be a joint tenancy. McPhillips v. Fitzgerald, 76 App. Div. [N. Y.] 15. Where land is purchased and paid for from a bank deposit to which two parties contributed equally, the deeds running to them individually, a tenancy in common is created. Levine v. Goldsmith, 83 App. Div. [N. Y.] 399.

76. Pennsylvania statutes did not make illegal the estate of joint tenancy. Redemptorist Fathers v. Lawler, 205 Pa. 24. If a contract provides for it in express terms the law will allow the contract to be enforced. Equitable Loan & Security Co. v. Waring, 117 Ga. 599.

77. A contract whereby the subscribers agree to pay so much per share for an article of personal property constitutes such subscribers tenants in common. Valade v. Masson [Mich.] 97 N. W. 59. Where a contract to purchase a horse constituted the purchasers tenants in common thereof, a subsequent partnership by some of them to manage the horse did not affect the liabilities of the parties on their contract of purchase. Id.

78. They sold to one who agreed to pay off certain incumbrances, sell the premises, and return to them one-third of the proceeds. Jackson v. Moore, 87 N. Y. Supp. 1101.

79. By statute in Oregon whenever the marriage is dissolved, the party at whose prayer the decree was made is entitled to hold one-third of the other party's real estate as tenant in common. Benfield v. Benfield [Or.] 74 Pac. 495. A husband and wife after divorce become tenants in common of the community property. Williamson v. Gore [Tex. Civ. App.] 73 S. W. 563.

80. One who holds the legal title to an estate for the benefit of himself and his children forever is in a certain sense a tenant in common with his children of an equitable interest. Deans v. Gay, 132 N. C. 227.

81. McNeeley v. South Penn Oil Co., 52 W. Va. 616. Effect of West Virginia statutes was to abolish estate by entirety. Id. Survivorship in estate was abolished in West Virginia by Code 1849, and re-established by Code 1868. Id.

82. Civ. Code, § 161. Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433.

83. Clark v. Thias, 173 Mo. 628, 73 S. W. 616. And his occupancy thereof draws to it contiguous land owned by him exclusively, so as to make it all a homestead. Id.

84. Jackson v. Moore, 87 N. Y. Supp. 1101.

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the deed was made to both generally, and one who paid the taxes charged them in equal portions to their respective interests.[86] Each of the tenants has an equal right of entry on the premises.[87] Where an heir accepted a succession and was put in possession conjointly with his co-heirs, he is in as co-owner and not as heir.[88]

All acts done by a co-tenant, and relating to or affecting the common property, are presumed to have been done by him for the common benefit of all.[89] Thus possession of one is possession of all,[90] hence one cannot hold adversely to the others until ouster,[91] of which there must be notice if it is not actual.[92] One tenant in common in a vested remainder cannot acquire title as against his co-tenants in remainder, during the life of the life tenant.[93] One tenant may recover possession from strangers,[94] if the title held in common will support the action.[95]

85. Where parties purchase land jointly and their contributions are unequal there is a presumption that each party holds a share in the property in proportion to his contribution. Bittle v. Clement [N. J. Eq.] 54 Atl. 138.

86. Where both were very ignorant men and one survived the other and charged taxes paid equally to himself and his brother's estate. Bittle v. Clement [N. J. Eq.] 54 Atl. 138.

87. A statute authorizing a majority owner of a mine to operate it does not deprive a minority owner of his right of entry. Sweeney v. Hanley [C. C. A.] 126 Fed. 97.

88. His assign is entitled in a petitory action to be recognized as owner of an undivided interest. Brian v. Bonvillain, 111 La. 441.

89. Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123. Where one of several tenants in a mining claim attempts to relocate the same, his act inures to the benefit of his co-tenants. Id. Evidence held to show that a mining claim belonging to co-tenants which had been relocated by a stranger was caused to be relocated by one of them for the purpose of defrauding the others. Id. Where the required amount of work was done on a mining claim belonging to co-owners, it is presumed that the work was done by them or some of them. Id.

90. Evidence that an administrator paid taxes on land as land of the estate, admissible to show that he held as administrator and not adversely to the other heirs. Ashford v. Ashford, 136 Ala. 631. Possession of one is possession of all. Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123.

91. One co-tenant sold the entire estate and the possession of the grantee was acquiesced in for twenty-five years, held an ouster. Blankenhorn v. Lenox [Iowa] 98 N. W. 556. Occupying the common property exclusively as sole owner, keeping up improvements, paying taxes, and receiving the rents and profits. Cochran v. Cochran [W. Va.] 46 S. E. 924; Truth Lodge No. 213, A. F. & A. M. v. Barton, 119 Iowa, 230, 93 N. W. 106. Where one tenant in common claims to own the entire estate and is in possession, such possession is adverse. Culver v. Culver's Adm'r, 25 Ky. L. R. 296, 74 S. W. 1074. Where one tenant in common openly denies the title of his co-tenants and is in possession of and claims the entire property himself by deed, such holding is adverse. The right of joint tenants to participate in the benefit of a superior claim purchased by one of them in possession is dependent on their timely offer to contribute their proportion of the money expended in procuring such superior claim. Craven v. Craven [Neb.] 94 N. W. 604. An entry by a co-tenant under a deed of the whole estate held to be an ouster and sufficient to start the statute of limitations in operation. Armijo v. Neher [N. M.] 72 Pac. 12. One who purchases and holds lands as of and in his own right, and claims the fee, is inconsistent with a holding to the use of himself and another. Soper v. Lawrence Bros. Co., 98 Me. 268. Where a husband sells land in which his wife has an interest, the possession of the vendee is adverse to her and starts the running of limitations. Rose v. Ware, 24 Ky. L. R. 2321, 74 S. W. 188. Where one gives a deed to the entire estate it is an ouster of the others. The grantee may acquire title to all by adverse possession. Merryman v. Cumberland Paper Co. [Md.] 56 Atl. 364. Where there has been an ouster of one by the giving of a deed to the entire tract, the subsequent possession of a grantee of the interest of one is that of the grantee of the entire tract, in the absence of an ouster of the latter. Id.

92. On an issue as to whether heirs had notice that their co-tenant held adversely to them, the fact that the husband of the co-tenant in possession, who was administrator, rendered the property for taxes as that of the estate was admissible. Ashford v. Ashford, 136 Ala. 631. Controlling and managing the property; collecting rents and paying taxes; mortgaging the premises. Golden v. Tyer [Mo.] 79 S. W. 143. Where a purchaser gets a deed from one co-tenant of his share and which is good as color of title to the interests of the others, and goes into possession thereunder, the record of the deed and possession thereunder are notice to the other co-tenants of his adverse claims. Street v. Collier, 118 Ga. 470.

93. Guthrie v. Guthrie [Ky.] 78 S. W. 474.

94. Husband and wife after divorce became tenants in common of the community property. She brought this action against one claiming under a void deed. Williamson v. Gore [Tex. Civ. App.] 73 S. W. 563. Squatters on a mining claim. Field v. Tanner [Colo.] 75 Pac. 916; Griswold v. Minneapolis, St. P. & S. S. M. R. Co. [N. D.] 97 N. W. 538. May maintain ejectment. Shelton v. Wilson, 131 N. C. 499.

95. A tenant in common of an equitable interest cannot maintain ejectment against

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One who occupies the premises is not liable to the others for the value of the use of the property, unless there has been an ouster, or profit was gained, or there was an agreement to pay,[96] or unless he has occupied more than his share of the land, and then only for the rent of the excess.[97]

A purchase by one will not be regarded as for the benefit of all, which therefore inures to them, when it was not hostile to them,[98] nor where a co-tenant of the equitable title buys in the legal one,[99] nor where a tenant in common of a remainder purchases the entire estate at a judicial sale against the life tenant.[1] The adjudication of the property to one at a tax sale does not devest the others of their interest.[2] When co-tenants have acquired their respective titles by different instruments at different times, and no relation of trust or confidence exists between them, one may acquire a superior outstanding title for his own benefit if it has not been created through his own default,[3] but the opposite rule prevails if a confidential relationship does exist between them.[4] In order to participate in the benefit of a purchase of title for the benefit of the estate an offer to contribute must be seasonably made.[5]

A co-tenant can contract away his own right or any part thereof in the estate[6] but a stranger who purchases a co-tenant's interest acquires only such interest as his vendee actually has,[7] where he has notice that the shares held are unequal,[8] and is bound by agreements between them respecting the property.[9] Where one conveys a part of the estate by metes and bounds the conveyance is voidable so far as it is prejudicial to the co-tenants.[10] Conditions precedent to transfer of one of the shares, of which the grantee has notice, prevent his acquiring any rights as against that tenant or share, until performance,[11] but the grantee takes by estoppel

the holder of the legal title. Nalle v. Parks, 173 Mo. 616, 73 S. W. 596.

96. In an action for partition it appeared that some of the tenants had occupied portions of the premises adversely. Willis v. Loomis, 87 N. Y. Supp. 1086.

97. Bennett v. Bennett [Miss.] 36 So. 452.

98. Where a tenant in common was sued by the holder of a superior title and his co-tenants had notice of such suit and refused to participate in it, he can claim no benefit from the transaction. Asher v. Howard, 24 Ky. L. R. 961, 70 S. W. 277; Id., 24 Ky. L. R. 2118, 72 S. W. 1105.

99. Where two parties purchased an equitable estate and one of them afterward acquired the legal title and conveyed the entire property, the former could not maintain ejectment against such grantee unless he had notice of the equities of the parties. Nalle v. Thompson, 173 Mo. 595, 73 S. W. 599. Plaintiff and defendant's grantor became co-tenants in land which was subject to prior deeds of trust. Defendant's grantor paid off these incumbrances and acquired the fee to the land at the trust sales in 1891 and 1892. Plaintiff has never offered to pay his proportion of these transactions. Held, in 1902 he would be presumed to have abandoned the benefits of the transaction. Nalle v. Parks, 173 Mo. 616, 73 S. W. 596.

1. Where one co-tenant of a remainder purchased the land at a judicial sale, a mere allegation by his co-tenants that he purchased at less than its value would not be sufficient to vitiate the sale (Francis v. Million [Ky.] 80 S. W. 486), and the fact that he sold the land within a year at an advance of $2,000.00 did not show that the original sale was fraudulent as to his co-tenants who made no application to be permitted to share in the transaction for 13 years (Id.). Where one co-tenant in remainder purchased the entire estate at a judicial sale under a collusive agreement with the life tenant, and at much less than its actual cost, it did not authorize the difference between the value of the land and the price paid to be charged against him as an advancement. Id.

2. The adjudication operates as a payment of the taxes for the benefit of the others. Bossier v. Herwig [La.] 36 So. 557.

3. Boynton v. Veldman, 131 Mich. 555, 91 N. W. 1022.

4. United N. J. R. & Canal Co. v. Consolidated Fruit Jar Co. [N. J. Eq.] 55 Atl. 46.

5. Craven v. Craven [Neb.] 94 N. W. 604.

6. One co-owner cannot affect the rights of another by contracting relative to his own interest. Sommer v. Sommer, 87 App. Div. [N. Y.] 434.

7. Gerndt v. Conradt, 117 Wis. 15, 93 N. W. 804. A married woman will not lose her right to land owned by her and her husband jointly, simply by knowledge that her husband is negotiating for a sale thereof, or has exchanged it as his own land, or by expressing casually satisfaction with the exchange after it is made. McNeeley v. South Penn Oil Co., 52 W. Va. 616.

8. One purchased the interest of a co-tenant at execution sale. The estate had been conveyed to the co-tenants generally. Bittle v. Clement [N. J. Eq.] 54 Atl. 138.

9. Agreement for some of them to improve the land of which the purchaser had notice. Turnbull v. Foster, 116 Ga. 765.

10. Kenoye v. Brown [Miss.] 35 So. 163.

11. Co-tenants made a deed which was delivered in escrow, under agreement that it

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the interest of the grantor in the plot described.[12] One cannot convey an easement in the common property without the consent of his co-tenants.[13] If the deed purports to pass the co-tenant's interest, it is an ouster upon which the grantee may found adverse possession,[14] though in case the co-tenant so ousted is covert, the coverture must be first extinguished.[15] A mere contract to sell, and entry under it, is not such a conveyance.[16]

The tenants may covenant with each other respecting the estate.[17] Where one co-tenant leases his moiety to another, the relation of landlord and tenant and not of co-tenants exists between them, and they are bound by the terms of the lease.[18]

Agency.—One co-tenant is not the agent of the others,[19] nor can he bind them by any acts beyond the authority conferred upon him by them,[20] nor lease their interest,[21] so a co-owner, who acts as manager, has no implied authority to institute criminal proceedings and charge his co-owners with the expense thereof,[22] but a sale may be ratified by suing for proceeds.[23]

The right and remedy of partition has been already treated in a separate article.[24] Between tenants in common it is a matter of right,[25] and partition in

was only to be delivered to the grantee on payment of a certain sum to one of them, which one agreed to the delivery on payment of a lesser sum. On rescission of the contract of sale such grantee could not claim a lien on such tenant's interest for the amount paid when the deed was delivered, which she never received. Dupoyster v. Ft. Jefferson Imp. Co. [Ky.] 80 S. W. 800.

12. Kenoye v. Brown [Miss.] 35 So. 163.

13. Charleston & W. C. R. Co. v. Fleming, 118 Ga. 699.

14. Such co-tenant's grantee may acquire title by adverse possession against the other co-tenants. Murray v. Quigley, 119 Iowa, 6, 92 N. W. 869; Hamerschlag v. Duryea, 172 N. Y. 622, 65 N. E. 1117. Where one of several tenants in common gives a deed to the entire property, and his grantee goes into possession, such possession is adverse to the remaining co-tenants. Merryman v. Cumberland Paper Co. [Md.] 56 Atl. 364. One who enters land under a deed from one co-tenant purporting to convey the entire estate, and disregards the rights of the other tenants in common, and sells part of the land, is in adverse possession. Rose v. Ware, 24 Ky. L. R. 2321, 74 S. W. 188.

Where one co-tenant conveys by metes and bounds a portion of the common property, the conveyance is voidable so far as it operates to the prejudice of other tenants in common. This conveyance will, however, pass the interest of the tenant in common who executes the deed to the land described but will not affect land in the same parcel not described. Kenoye v. Brown [Miss.] 35 So. 163.

15. Where husband and wife are joint tenants and the husband contracts for the sale of the entire estate, the possession of his grantee is not adverse as to the heirs of the wife until the husband's death. McNeeley v. South Penn Oil Co., 52 W. Va. 616.

16. McNeeley v. South Penn Oil Co., 52 W. Va. 616.

17. Fullington v. Kyle Lumber Co. [Ala.] 35 So. 852.

18. Gregg v. Roaring Springs Land & M. Co., 97 Mo. App. 44, 70 S. W. 920. As between co-tenants, when one is in sole possession under agreement with the other, and the relation of landlord and tenant exists between them, statutes defining the rights and duties of co-owners of mines have no application. Id.

19. One who has committed trespass on lands held by tenants in common cannot avoid liability to one by showing payment to the other, without the knowledge or consent of the former. Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433. A husband is not presumed the agent of his wife in the management of their common property from the mere fact of marriage. Id. A tenant in common may settle or release his own interest, but not the interest of his co-tenants. Proceeds of a sale of land. Jackson v. Moore, 87 N. Y. Supp. 1101.

20. Authority to deliver a deed does not authorize a tenant in common to bind his co-tenants to perform additional acts not provided for in the deed. Gillham v. Walker, 135 Ala. 459. Transfer of water for irrigating purposes. Beers v. Sharpe [Or.] 75 Pac. 717.

21. A lease executed by a guardian after some of the co-tenants attained their majority. Jackson v. O'Rorke [Neb.] 98 N. W. 1068. A husband leased an entire tract, a portion of which was owned by himself and wife as community, and the balance by the community and another jointly. Snyder v. Harding [Wash.] 75 Pac. 812.

22. Croasdale v. Von Boyneburgk, 206 Pa. 15.

23. One contended that his interest did not pass in a sale by the others. It was shown that he had received his share of the purchase price, and had indorsed the check received in payment. Whitaker v. Hicks [Iowa] 99 N. W. 575; Nalle v. Parks, 173 Mo. 616, 73 S. W. 596.

24. Partition, 2 Curr. Law, p. 1097.

25. The fact that injury will result to the property or that a lien exists on one tenant's interest does not affect it. Mylin v. King [Ala.] 35 So. 998. Right to partition not lost by laches (Brumback v. Brumback, 198 Ill. 66, 64 N. E. 741), or an agreement between all the tenants for the purchase of one tenant's interest, where such agreement had been canceled as between vendor and claim-

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specie rather than by sale is favored,[26] according to the equities of the several co-tenants.[27] Possession will be allowed to rest in the occupant pending a dispute as to the existence of the co-tenancy.[28] Where a partition has been decreed void, a co-tenant cannot claim any severable specific interest in the portion claimed by him in severalty, though he is entitled to an undivided portion of the entire tract.[29] The allowance of a claim by one against the estate of another for an excess of the purchase price paid is not a bar to a suit for partition and to enforce the lien.[30] A mortgage given on property held by the mortgagor in indivision cannot be defeated as to the mortgagor's interest by a subsequent partition.[31]

Contribution and exoneration.—The right to contribution by co-tenants arises whenever one pays for the common benefit,[32] and he is entitled to a lien on the share of the other,[33] which is not inferior to a judgment lien of other creditors,[34] and in order to be entitled to contribution he must share the rents and profits.[35]

He has such a right when he pays taxes,[36] or other moneys for the benefit of the estate,[37] though he may have done so supposing himself to be sole owner.[38] Compensation for individual services in managing the joint property is never allowed in the absence of agreement express or implied,[39] or unnecessary repairs,[40]

ant in partition (Mylin v. King [Ala.] 35 So. 998).

26. It is only when the land cannot be partitioned that a sale may be ordered. Kloss v. Wylezalek, 207 Ill. 328, 69 N. E. 863. Under Montana statutes giving co-tenants "who hold and are in possession of real property" a right to sue for partition actual physical possession is not necessary. Heinye v. Butte & Boston Consol. Min. Co. [C. C. A.] 126 Fed. 1.

27. Where one has improved a part of the estate, he is entitled on partition to have such part allotted to him. Cleared wild land. Bennett v. Bennett [Miss.] 36 So. 452.

28. One held actual possession of the entire estate, in good faith believing himself to be the owner and had made improvements and paid taxes. Brian v. Bonvillain, 111 La. 441.

29. Puckett v. McDaniel, 96 Tex. 94, 70 S. W. 739.

30. Funk v. Seehorn, 99 Mo. App. 587, 74 S. W. 445.

31. Bank of Jeanerette v. Stansbury, 110 La. 301.

32. More than his share of price. Grove v. Grove, 100 Va. 556. Where co-tenants gave notes to pay off incumbrances on property which they purchased, and afterwards the notes were paid by some of them, the payment of the notes operated as a payment of the purchase price. Funk v. Seehorn, 99 Mo. App. 587, 74 S. W. 445.

33. Even though the money was not used to extinguish an incumbrance so as to give rise to a lien by subrogation. Funk v. Seehorn, 99 Mo. App. 587, 74 S. W. 445. One who is surety on and pays a note given by co-tenants in payment of the joint property has a lien on the property for debt and interest. Barnes v. Barnes, 24 Ky. L. R. 1732, 72 S. W. 282. Where co-tenants, in order to pay incumbrances, gave notes for money which was used as a common fund to discharge incumbrances on several parcels of property, no separate account being kept for each parcel, and some of them paid the notes, they were entitled to a lien on all the parcels and were not restricted to each parcel for the amount paid on its account. Funk v. Seehorn, 99 Mo. App. 587, 74 S. W. 445.

34. Funk v. Seehorn, 99 Mo. App. 587, 74 S. W. 445.

35. Eighmey v. Thayer [Mich.] 98 N. W. 734.

36. One had paid all the taxes. Bennett v. Bennett [Miss.] 36 So. 452; McClintock v. Fontaine, 119 Fed. 448. If one of several remaindermen pay the taxes on the joint estate during the life of the life tenant, he cannot enforce contribution against his co-tenants in remainder. Downey v. Strouse [Va.] 43 S. E. 348.

37. In partition, one has a lien on the other's share for any sum to which the former is entitled, as compensation for improvements. Bennett v. Bennett [Miss.] 36 So. 452. Where a husband and wife improved the community property during marriage, at the death of the husband and on partition she was entitled to compensation from her husband's heirs for such improvements. Legg v. Legg [Wash.] 75 Pac. 130. If he defend a suit involving the estate he is entitled to contribution for expenses so incurred. This is true even though he has had no notice from his co-tenant to defend. McClintock v. Fontaine, 119 Fed. 448. **Kentucky statute allowing a recovery of costs** by one co-tenant against others who did not appear or have counsel in the case does not apply to unsuccessful suits brought by third parties but only to actions by the co-tenant. Francis v. Million [Ky.] 80 S. W. 486.

38. A co-tenant in possession erroneously claiming the entire estate is entitled to credit for taxes paid. Armijo v. Neher [N. M.] 72 Pac. 12.

39. One held possession and managed the joint property, claiming entire ownership, despite the wishes and claims of the others. He was held to account for the rents and profits. Anderson v. Northrop [Fla.] 33 So. 419. Where a tugboat was owned by several, the managing owner could not claim a salary where no salary had ever been paid, and the agents employed by him, who managed the boat and solicited the business, were paid out of the common receipts. Croasdale v. Von Boyneburgk, 206 Pa. 15.

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or for the cost of unsanctioned improvements, unless they add to the rental or permanent value of the estate,[41] and then only for his proportionate share of the added value at the time of partition and not the cost of the improvements;[42] but for improvements made by agreement, the others must contribute.[43] If in the state of nature one part was more valuable than the remainder, the others are entitled to "contribution" on a partition.[44]

This right to compel contribution may be enforced against infants as well as against adults,[45] but the amount recoverable is limited to what was expended for their benefit,[46] and must be claimed within a reasonable time.[47] The claim runs against heirs and not the estate of a deceased co-tenant who is thus liable.[48] The lien is not enforceable until partition.[49]

Subrogation.—So if one tenant in common pays off a mortgage against the estate he is entitled to be subrogated to the place of the mortgagor, but he must have the claim assigned to him and not have it cancelled.[50]

Rents, profits and proceeds of the property.—One tenant in possession,[51] or receiving the rents and profits, is bound to account to his co-tenants,[52] and for this also a lien may be had.[53] If one co-tenant defraud another of proceeds of the land, the court will give him relief.[54] In accounting where one has been in possession and has received the rents and profits and paid the expenses of keeping up the estate, the expenditures should be set off against the receipts.[55] To require accounting of rents as against co-parties in partition, they must be made adversary.[56] Where a managing co-owner fails to account, and is compelled to do so by legal proceedings, he is personally liable for the costs.[57]

Interest.—A co-tenant is entitled to interest on such payments,[58] and conversely, is liable for interest on rents and profits taken.[59]

Trespass and waste.—One co-tenant may commit trespass on another lawfully

40. Armijo v. Neher [N. M.] 72 Pac. 12.
41. Armijo v. Neher [N. M.] 72 Pac. 12; Anderson v. Northrop [Fla.] 33 So. 419.
42. A house built by one. Heppe v. Szczepanski [Ill.] 70 N. E. 737.
43. Clearing wild land, and building houses thereon. Bennett v. Bennett [Miss.] 36 So. 452. A purchaser from one of such co-tenants who takes with notice of such agreement is bound by its terms. Turnbull v. Foster, 116 Ga. 765.
44. Bennett v. Bennett [Miss.] 36 So. 452.
45. Where one tenant in common procures the release of a widow's right of dower unassigned and homestead at a reasonable price, and his co-tenants receive the benefit of it, they must contribute their proportionate share of the money necessarily spent. Case v. Case, 103 Ill. App. 177.
46. Arthur v. Arthur, 76 App. Div. [N. Y.] 330. Added value less than cost of improvements. Eighmey v. Thayer [Mich.] 98 N. W. 734.
47. Where one co-tenant with full knowledge of condition of the estate has receipted for 27 years for rentals for a certain amount he is barred from claiming a larger amount because a certain deed was declared to be a mortgage. Lancaster v. Flowers [Pa.] 57 Atl. 526.
48. De Grange v. De Grange, 96 Md. 609, 54 Atl. 663.
49. Grove v. Grove, 100 Va. 556.
50. Kinkead v. Ryan [N. J. Err. & App.] 55 Atl. 730.
51. Stephens v. Hewitt [Tex. Civ. App.] 77 S. W. 229.
52. Though he is ignorant of their title. Eighmey v. Thayer [Mich.] 98 N. W. 734.
53. In partition a co-tenant has a lien on the other's share for any rents to which he may be entitled. Bennett v. Bennett [Miss.] 36 So. 452.
54. Where the joint property is sold, the co-tenants are entitled to share equally in the proceeds, even though one presumed the property was selling for less than it really did, the true price being concealed from him. Walker v. Evans, 98 Mo. App. 301, 71 S. W. 1086.
55. Accounting between co-tenants. Barnes v. Barnes, 24 Ky. L. R. 1732, 72 S. W. 282; Eighmey v. Thayer [Mich.] 98 N. W. 734.
56. Where a defendant in partition alleged that certain co-defendants had occupied portions of the premises and collected rents and appropriated them, the issue so raised could not be determined except by service of the answer on the co-defendants. Willes v. Loomis, 87 N. Y. Supp. 1086.
57. Managing owner of a tugboat. Croasdale v. Von Boyneburgk, 206 Pa. 15.
58. Where one co-tenant holds the record title and mortgages for his own use, such incumbrance is not a lien on the interest of a co-tenant. Hanson v. Hanson [Neb.] 97 N. W. 23. One who discharges incumbrances or makes lasting improvements on the land. Id.
59. Under a New Mexico statute, a co-tenant erroneously claiming the entire estate is liable for interest on his co-tenant's share of the rents and profits received by him. Armijo v. Neher [N. M.] 72 Pac. 12.

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in sole possession.[60] What will constitute waste depends on the circumstances of each particular case.[61]

Conversion.—The mere fact that one co-tenant has the use and possession of personalty, even though it prevents the use and possession of the other, furnishes no ground for action, unless such possession develops into a destruction of the property or denies the rights of the others.[62] The plaintiff suing as a co-owner of converted personalty need not allege who is the other co-owner.[63]

Actions.—Tenants in common must join in actions ex delicto and for injuries to their real property and their remedy is not severable.[64] One may sue alone if the whole cause of action has passed to him,[65] or he is given such right by statute,[66] or where one has settled for his portion,[67] and a defendant could not object to the nonjoinder.[68] An action which suspends the running of the statute of limitations against a tenant in common in adverse possession suspends it as to co-tenants not in possession.[69] Co-tenants, in order to recover the entire damage to the estate, must show that they are sole owners, and in order to recover their proportion they must prove their interest.[70]

The question of title and right of possession cannot be adjudicated between tenants in common, none of whom is in possession.[71] Parties may join to recover possession and quiet title who are community tenants as to part and co-tenants with a third person as to part.[72]

TERRITORIES AND FEDERAL POSSESSIONS.

§ 1. Political Status (1868).
§ 2. Organization and Government (1869).
§ 3. Jurisdiction, Powers, Duties and Liabilities (1869).
§ 4. Local Laws and Practice; Territorial Courts (1870).

§ 1. *Political status.*—The District of Columbia is a part of the United States for all domestic and international purposes.[73] For purposes of customs

60. A co-tenant is a trespasser who enters during the temporary absence of the co-tenant holding possession by consent, and throws out the latter's property. Reep v. Wagner, 21 Pa. Super. Ct. 268.

61. An owner of an undivided interest in land can be restrained from cutting the timber thereon without the consent of his co-owner. Cotten v. Christen, 110 La. 444. In Massachusetts a tenant in common or joint tenant who cuts down any timber without 30 days' notice to all the others of an intent to enter and improve the land is liable for three times the amount of damages assessed. Proctor v. Proctor, 182 Mass. 415, 65 N. E. 797.

62. Conversion cannot be assumed from the fact that one co-tenant refuses to deliver to the other his portion of the property. McCarthy v. McCarthy, 40 Misc. [N. Y.] 180.

63. The defense that defendant is co-owner and is lawfully in possession of the property is not admissible on demurrer. Boley v. Allred, 25 Utah, 402, 71 Pac. 869.

64. Where defendant had made some kind of an agreement with one co-tenant, and another had knowledge of it, it is no reason for not joining all co-tenants as parties plaintiff in an action for damages. Armstrong v. Canada [Miss.] 35 So. 138. Personal property. Jackson v. Moore, 87 N. Y. Supp. 1101. Under a California statute, a husband and wife who are tenants in common may jointly sue for trespass on the lands held in common. Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433. In California a husband and wife may sue jointly for injuries to their common property. Trespass. Id.

65. If a tenant in common by his will grants to his survivor his interest in pending actions for injuries to the estate, such survivor is entitled to prosecute the actions in his own name for the full amount of damages sustained by both. McPhillips v. Fitzgerald, 76 App. Div. [N. Y.] 15.

66. In Utah a co-owner of personal property may maintain an action for conversion without joining his co-owner. Boley v. Allred, 25 Utah, 402, 71 Pac. 869.

67. Jackson v. Moore, 87 N. Y. Supp. 1101.

68. Where some had settled with one who held the joint property and received their share of the proceeds. Jackson v. Moore, 87 N. Y. Supp. 1101.

69. Possession of one being for all. Locklear v. Bullard, 133 N. C. 260.

70. Heirs bringing action for trespass did not show that they were the sole heirs. Texas & N. O. R. Co. v. Smith [Tex. Civ. App.] 80 S. W. 247.

71. A third person was in possession. Wetherington v. Williams [N. C.] 46 S. E. 728.

72. A husband and wife owning a portion of a tract as community and the remainder jointly with another may join with each other and the joint owner in a suit to recover possession and quiet title. Snyder v. Harding [Wash.] 75 Pac. 812.

73. James v. U. S., 38 Ct. Cl. 615 dictum.

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and taxation, Porto Rico is held not to be so,[74] but inhabitants thereof, though settled prior to the treaty of cession, are held not to be aliens.[75] The "foreign" status of the Philippines ceased by exchange of treaty ratifications, and the president's proclamation, and imports thereafter entered were not foreign though previously shipped.[76] Likewise respecting Porto Rico, imports from which entered at any time on the day of proclamation were not foreign.[77] Treaties do not relate back of the proclamation, however, and earlier entries are therefore foreign.[78] The constitution of the United States was not extended to the Hawaiian Islands by their annexation.[79] The courts of the United States take judicial notice that by the treaty of Paris the Philippine Islands became part of the territory of the United States.[80] Also of the existence there of a state of insurrection after that time.[81] In the case of adjoining territories, the Federal sovereignty is primary and undivided, and extraterritorial rights lawfully acquired by inhabitants of one do not become divested by erection of states and their laws.[82] The word "state" in Federal statutes does not include the territories or District of Columbia, unless such appears to be the clear intention of congress.[83]

§ 2. *Organization and government.*—For certain purposes the territorial government is distinct, and therefore officers appointed for territorial purposes under territorial acts are territorial officers, though such acts be re-enacted or approved by congress.[84]

§ 3. *Jurisdiction, powers, duties and liabilities.*—The legislative power is subordinate to that of congress, hence an act of congress cannot be amended.[85] Territorial legislative assemblies have power to make such provision as they deem proper for the care and custody of persons convicted of crimes under their laws.[86] They may create such liabilities as congress empowers them to do.[87] A grant of common-law jurisdiction to territorial courts does not limit legislative power to regulate procedure.[88] The organic act of the territory of Hawaii, extending its

74. The island of Porto Rico is not a part of the United States, within that provision of the constitution which declares that "all duties, taxes, and excises shall be uniform throughout the United States." De Pass v. Bidwell, 124 Fed. 615. Section five of the Foraker act, providing a temporary government and revenues for Porto Rico, which provides that on and after the day of its taking effect all goods, wares, and merchandise previously imported from Porto Rico for which no entry has been made, or entered without payment of duty, and under bond for warehousing, shall be subject to the duties imposed by the act upon the entry or withdrawal of the same is constitutional, though not uniform within the United States. Neither is it ex post facto, being civil not criminal. De Pass v. Bidwell, 124 Fed. 615, citing Downes v. Bidwell, 182 U. S. 244, 45 Law. Ed. 1088.

75. Gonzales v. Williams, 192 U. S. 1.

76. American Sugar Ref. Co. v. Bidwell, 124 Fed. 677.

77. Howell v. Bidwell, 124 Fed. 688.

78. Armstrong v. Bidwell, 124 Fed. 690.

79. Newland's resolution of July 7, 1898, did not substitute the 5th and 6th amendments for the criminal procedure of the islands. Hawaii v. Mankichi, 190 U. S. 197, 47 Law. Ed. 1016.

80. La Rue v. Kan. M. L. Ins. Co. [Kan.] 75 Pac. 494.

81. That for some time after December 10, 1898, the inhabitants of the islands were in a state of insurrection against the government of the United States. La Rue v. Kan. M. L. Ins. Co. [Kan.] 75 Pac. 494.

82. Prior appropriation of waters in Wyoming for consumption in Montana. Willey v. Decker [Wyo.] 73 Pac. 210.

83. In the Federal statute for the suppression of the lottery traffic (U. S. Comp. St. 1901, p. 3178), the word "state" does not include the territories or district of Columbia; consequently a shipment of lottery tickets to or through such territories or district is not prohibited by the statute. U. S. v. Whelpley, 125 Fed. 616.

84. Loan commissioners of Arizona. Schuerman v. Ariz., 184 U. S. 342, 46 Law. Ed. 580.

85. Murphy v. Utter, 186 U. S. 95, 46 Law. Ed. 1070.

86. Contract between Oklahoma's governor and Kansas authorities for use of Kansas penitentiary. Legalized by act of congress. In re Terrill, 66 Kan. 315, 71 Pac. 589.

87. Power of Arizona to issue funding bonds * * * "until Jan. 1, 1897" means that the specified debts accruing prior thereto may be funded, not that the bonds must be then issued [Act Cong. June 6, 1896]. Schuerman v. Ariz., 184 U. S. 342, 46 Law. Ed. 580. Under the same act, Pima County bonds in aid of the Arizona N. G. R. Co. may be refunded when regularly issued, though the railroad was never built. Murphy v. Utter, 186 U. S. 95, 46 Law. Ed. 1070.

88. Ariz. Rev. St. 1887, par. 837, discharging motion for new trial by operation of

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legislative power to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States, includes the power to legislate in the matter of taxation,[89] and this power is not limited by section 8, article 1, of the constitution, requiring "that all duties, imposts and excises shall be uniform throughout the United States." This is a rule applying only to taxation by the United States.[90]

The power of congress to legislate for the District of Columbia includes reasonable regulation of venders' stands,[91] of the disposal of garbage,[92] and the emission of dense smoke from chimneys.[93] It may amend charters of corporations of the District pursuant to reserved power therein.[94] Congressional power proper cannot be delegated in local regulations.[95] The commissioners are empowered to adopt certain regulations for the administration of the laws.[96] Newspaper publication of police regulations being essential to the enforcement of any penalty thereunder, it will be presumed to have been done in a prosecution for the violation of one of the regulations many years after the date of the Act of Congress authorizing them.[97] Cases arising under laws of the District relating to public works and assessments for cost of same,[98] to nuisances from smoke,[99], receive appropriate treatment in their respective topics.

§ 4. *Local laws and practice; territorial courts.*—Constitutional guaranties relating to procedure do not apply to appurtenant possessions, but only to territories that are part of the United States.[1] Where a local code has been adopted for the territory as in Alaska, practice in its courts is governed by its code and not by the rules of the Federal courts.[2] Oklahoma district courts sitting as Federal district courts follow the territorial practice and procedure as far as practicable and not in conflict with Federal laws.[3] They have jurisdiction when so sitting of all Federal crimes in Indian reservations by persons not Indians and of certain ones by Indians.[4] In the Indian Territory the United States courts have jurisdiction, since Act Cong. June 7, 1897, to enforce by foreclosure sale mortgages to white men on Cherokee Indian land improvements.[5] A private

law if not decided at end of term—upheld; especially since such jurisdiction shall be "limited by law" [U. S. Rev. St. § 1866]. James v. Appel, 192 U. S. 129.

89. Hawaiian income tax law held valid. W. C. Peacock & Co. v. Pratt [C. C. A.] 121 Fed. 772.

90. W. C. Peacock & Co. v. Pratt [C. C. A.] 121 Fed. 772.

91. Montz v. D. C., 20 App. D. C. 568.

92. Dupont v. D. C., 20 App. D. C. 477.

93. An act of Congress declaring the emission of dense smoke in the District of Columbia an offense is within the power conferred on that body to legislate for the District. Bradley v. D. C., 20 App. D. C. 169.

94. Extension of car-line ordered. Metropolitan R. Co. v. Macfarland, 20 App. D. C. 421.

95. Act of Assembly D. C. Aug. 23, 1871, regulating auctioneers' fees, held to affect power of contract, hence void. Smith v. Olcott, 19 App. D. C. 61.

96. Building regulations, § 34, requiring special permit or subdivision of a lot if block of two or more dwellings is to be erected thereon, held not a regulation. Hence building permit must issue if otherwise proper. Macfarland v. U. S., 18 App. D. C. 554.

97. Ullman v. D. C., 21 App. D. C. 241. Nothing appears as to the date upon which the regulations were passed and the court apparently assumes that they were passed at the time of the act of congress authorizing them [Act of Jan. 26, 1887 (24 Stat. 368)]. Id.

98. See Public Works, etc., 2 Curr. Law, p. 1328; Metropolitan R. Co. v. Macfarland, 20 App. D. C. 421; Fidelity & Deposit Co. v. U. S., 20 App. D. C. 376; Barnes v. D. C., 37 Ct. Cl. 342; Alfred Richards Brick Co. v. Rothwell, 18 App. D. C. 516; Macfarland v. Byrnes, 19 App. D. C. 531.

99. Sinclair v. D. C., 20 App. D. C. 344. See Nuisance, 2 Curr. Law, p. 1062.

1. Criminal procedure in Hawaii. Hawaii v. Mankichi, 190 U. S. 197, 47 Law. Ed. 1016.

2. The Code of Alaska abolishes the distinction between actions at law and suits in equity, and provides a single form of action; hence the rule of the Federal courts that both legal and equitable titles are necessary to support a suit in equity to quiet title is not applicable in Alaskan courts. Fulkerson v. Chisna Min. & Imp. Co. [C. C. A.] 122 Fed. 782. Under the Code of Alaska, a cause of action at law cannot be united with a cause of action in equity, or either with one in admiralty. Attempt to unite cause of action for foreclosure of mortgage on vessel with one to enforce liens for wages. Bruce v. Murray [C. C. A.] 123 Fed. 366.

3, 4. Welty v. U. S. [Okl.] 76 Pac. 121.

5. Such jurisdiction withheld from them by Act May 2, 1890, has been conferred by the

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individual cannot use the name of a territory in bringing a civil suit without special statutory authority.[6] Pending actions covered by a saving clause to prosecute the same to judgment do not abate by acts substituting new courts before a case is remanded to the trial court.[7] Judgments of the supreme court of Hawaii are reviewable by the United States supreme court in the same cases as are those of the state courts,[8] and similar practice is followed,[9] and its district and circuit court judgments are reviewable in like cases and manner as are those of other district and circuit courts.[10] The practice and jurisdiction on appeal is fully treated elsewhere.[11] The district courts of Oklahoma have the status of congressional courts during all of their sessions, whether at the time engaged in Federal Circuit, Federal District, or territorial business,[12] and the clerk thereof is entitled to his per diem when it so sits, whether or not business is transacted and whichever kind of cases be tried.[13] But in Arizona, it is held that the territorial legislatures may prescribe salaries for services pertaining to the territorial business of the courts, but not in cases where the United States is a party.[14] A court of the District of Columbia is a court of the United States.[15]

THREATS.

To threaten is not an offense unless by statute so declared, e. g. the crime of "extortion by threats,"[16] already discussed.[17] Coupled with other matters, a threat may be an assault,[18] or a false imprisonment,[19] or a false pretence,[20] or a postal offense,[21] or it may justify violent or forcible self protection.[22]

TIME.

In the computation of amounts where a definite period of time is the agreed standard of measurement, every intervening Sunday must be included and counted,[23] and a holiday, which is not the last day, must be included;[24] but the authorities conflict as to whether the last day being a dies non shall be excluded,[25] and the

later act. Crowell v. Young [Ind. T.] 69 S. W. 829. Such mortgage is not a "sale" void under the Cherokee Const. Id.

6. Ter. v. De Wolfe, 13 Okl. 454, 74 Pac. 98.

7. Rearrangement of Alaska courts. Shoup v. Marks [C. C. A.] 128 Fed. 32. Jurisdiction expressly declared attaches whether the courts be continuations of former ones or newly created ones. Bird v. U. S., 187 U. S. 118, 47 Law. Ed. 100.

8, 9. Equitable L. Assur. Soc. v. Brown, 187 U. S. 308, 47 Law. Ed. 190.

10. Where Federal jurisdiction is founded wholly on a constitutional question, the circuit court of appeals has no jurisdiction. Wright v. MacFarlane & Co. [C. C. A.] 122 Fed. 770.

11. See Appeal and Review, 1 Curr. Law, p. 85; Key v. Roberts, 20 App. D. C. 391.

12, 13. U. S. v. Warren [Okl.] 71 Pac. 685.

14. Martin v. Pima County [Ariz.] 73 Pac. 799.

15. Within the intent of the constitution, art. 3. James v. U. S., 38 Ct. Cl. 615. The legislation of Congress has always been upon the theory that the courts of the District are permanent tribunals, and since 1863, legislative and executive construction have uniformly treated them as established under art. 3 of the constitution. Id.

16. In re McCabe [Mont.] 73 Pac. 1106; Glover v. People, 204 Ill. 170, 68 N. E. 464.

17. Extortion, 1 Curr. Law, p. 1198.

18. Assault and Battery, 1 Curr. Law, p. 218.

19. False Imprisonment, 1 Curr. Law, p. 1201.

20. False Pretenses and Cheats, 1 Curr. Law, p. 1204.

21. Postal Law, 2 Curr. Law, p. 1253.

22. Assault and Battery, 1 Curr. Law, p. 218; Homicide, 2 Curr. Law, p. 223.

23. The amount of damages due under a contract providing for the payment of $5 per day for every car delayed in delivery after a certain time is ascertained by multiplying the total number of days, including Sundays, that the delivery of each car was delayed. Pressed Steel Car Co. v. Eastern R. Co. [C. C. A.] 121 Fed. 609.

24. Under Comp. Laws S. Dak. § 4805, providing that the first day shall be excluded and the last included, unless it is a holiday. Chicago, M. & St. P. R. Co. v. Nield [S. D.] 92 N. W. 1069.

25. When the last day within which a legal act is to be performed falls on Sunday, that day is excluded, and the act may be done on the succeeding day. Pressed Steel Car Co. v. Eastern R. Co. [C. C. A.] 121 Fed. 609.

In computing statute time, Sunday is included. The legality of the publication of a proposed ordinance for street improvements, under Rev. St. Mo. § 5661, is not affected by

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rule does not apply unless one or more Sundays must necessarily be included.[26] Where the computation is to be made from an act done, the day on which the act is done should be included.[27] A time "not less" than certain days excludes both the first and the last days.[28] Stipulated time will be computed according to the intent found in the writing.[29] The word "by" a certain date means not later than that date.[30] Where a month is referred to, it will be understood to be of the current year unless, from the connection, it appears that another is intended.[31]

TOLL ROADS AND BRIDGES.

§ 1. Franchises and Rights of Way, and Acquisition by Public (1872).
§ 2. Public Aid and Immunities (1873).
§ 3. Establishment, Construction, Location and Maintenance (1874).
§ 4. Right of Travel and Tolls (1875).

§ 1. *Franchises and rights of way, and acquisition by public.*—The legislature may extend the time of an existing franchise, even though its power to grant private charters is taken away.[32] The lease of a turnpike to a county does not terminate it.[33] The frequent passage on a toll road free of charge by the grantor of an easement shows an amicable arrangement and is a bar to a claim by the company or its successor of title by adverse possession.[34] In the absence of a showing to the contrary, a dedication of land for toll house purposes will be presumed to be only an easement.[35] Extension of city limits so as to include a portion of a private turnpike does not change the character of the roadway nor the company's right of property therein.[36]

Abandonment and forfeiture.—Failure to charge tolls will be deemed an abandonment,[37] but a failure to use a toll house after acquisition of the road by the public will not be deemed an abandonment of the house and the land on which

the fact that the last day of such publication was on Sunday. Barber Asphalt Pav. Co. v. Muchenberger [Mo. App.] 78 S. W. 280. If one or more Sundays fall within a time prescribed, they are not, even though the last day falls on Sunday, to be excluded. Sundays are included in the time within which a materialman's attachment must be made. Oakland Mfg. Co. v. Lemieux [Me.] 57 Atl. 795.

26. See Oakland Mfg. Co. v. Lemieux [Me.] 57 Atl. 795. The four days within which motions for a new trial are required to be filed by the Laws of Missouri (Rev. St. 1899, § 803) are calendar days, Sunday excepted, and not court days. Long v. Hawkins [Mo.] 77 S. W. 77.

27. Under a statute (Gen. St. Kan. 1901, § 740) providing that an attack on the validity of assessments must be made within 30 days after ascertaining the cost of the improvement, the day on which the assessment is ascertained and apportioned is to be included. Kansas City v. Gibson, 66 Kan. 501, 72 Pac. 222.

28. Code, § 2881. Williams v. Halford [S. C.] 45 S. E. 207.

29. The words "time specified," in a contract wherein a company agreed to pay a certain sum as liquidated damages in case it failed to deliver certain cars within the time specified therein, held to mean all the time specified for the delivery in the earlier part of the contract. Pressed Steel Car Co. v. Eastern R. Co. [C. C. A.] 121 Fed. 609.

30. An option given Feb. 7th, to close "by 8 February," includes the latter day. U. B. Blalock & Co. v. W. D. Clark & Bro. [N. C.] 45 S. E. 642.

31. Evidence sufficient to establish the year in which an offense was committed. Tipton v. State [Ga.] 46 S. E. 436. But where the day and the month but not the year of an offense are given in an indictment, as where it is alleged to have been committed on "the 3d of June instant," the indictment is defective. Id.

32. The constitutional prohibition of the granting of private charters does not apply to the extension of a franchise granted before such constitutional enactment, though the charter had been subsequently amended. State v. Bangor, 98 Me. 114.

33. Ky. St. 1903, § 4748, subd. 8. Vanceburg & S. L. Turnpike Road Co. v. Maysville & B. S. R. Co., 25 Ky. L. R. 1404, 77 S. W. 1118.

34. Halley v. Scott County Fiscal Court, 25 Ky. L. R. 1471, 78 S. W. 149.

35. When the property was no longer used for the purposes granted by operation of law, the right of possession revested in the grantor. Halley v. Scott County Fiscal Court, 25 Ky. L. R. 1471, 78 S. W. 149.

36. And in the absence of acquisition by eminent domain or otherwise, the city so extended is in no way bound to keep up the roadway. Columbia & Cedar Creek T. Co. v. Vivion [Mo. App.] 77 S. W. 89.

37. But the statutory period does not run against a company where the road is in the hands of county officials pending condemnation proceedings [Ky. St. 1903, § 4732]. Bardstown & L. Turnpike Co. v. Nelson County [Ky.] 78 S. W. 851.

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it stands.[38] The legislature may waive a forfeiture.[39] In Kentucky, the fiscal courts have no authority to try a litigated question of abandonment.[40]

Acquirement by public.[41]—In condemnation one county cannot be made to pay for any portion of a turnpike lying without its limits.[42] Public acquisition of a turnpike should be on the basis of its actual or real value, including that of the franchise,[43] and its market value or income are not proper criteria.[44] A taxpayer of the purchasing district may act as an appraiser,[45] and objections as to valuation must be properly raised.[46] A county cannot repudiate its contract to purchase.[47] The abolition of tolls by public acquisition does not constitute a breach of covenant that the grantor of certain privileges and his family shall be exempt from toll.[48] In Indiana, the county commissioners are the proper persons to keep in repair a road purchased pursuant to statute.[49]

§ 2. *Public aid and immunities.*—In Kentucky, turnpikes are built by public aid, the county guaranteeing the sale of a certain amount of stock, distributed over the territory tributary to the road, the taxpayers on payment of the tax assessed therefor becoming stockholders in the company. A tax authorized to "assist in building" a road cannot be used for any other purpose,[50] but upon suit for such taxes a taxpayer cannot defend on the ground of misappropriation of previous funds.[51] One claiming the benefits of a statute to prevent double taxation of property within two turnpike districts must comply with the statutory procedure.[52] A turnpike assessment, void because of lack of authority of appointee levying, is not a bar to a subsequent assessment by the county assessor.[53]

Taxation.—For taxation purposes it will be presumed that a bridge lying in two states has in each a value proportionate to its length therein.[54] A bridge

38. The property may be used by the public in any other mode it sees fit, provided it is in furtherance of the operation and management of the turnpike. Mitchell v. Bourbon County, 25 Ky. L. R. 512, 76 S. W. 16.

39. State v. Bangor, 98 Me. 114.

40. Ky. St. 1903, § 1840. Bardstown & L. Turnpike Co. v. Nelson County [Ky.] 78 S. W. 851.

41. Requisites of the statute on condemnation. In re Factoryville & A. Turnpike & Plank Road, 19 Pa. Super. Ct. 613.

42. The question of a reduction of value of the outlying portion will not be considered on certiorari, which goes only to the regularity of the proceedings. For consideration of that question, appeal is proper. In re Factoryville & A. Turnpike & Plank Road, 19 Pa. Super. Ct. 613.

43. Evidence should be admitted as to the original cost of construction, its condition when sold, its income, its probable profits and cost if constructed at time of sale. Chaplin & B. Turnpike Road Co. v. Nelson County, 25 Ky. L. R. 1154, 77 S. W. 377.

44. Where toll gate raiders prevented the collection of tolls and impaired a possible market value, some other basis of valuation must be adopted. Chaplin & B. Turnpike Road Co. v. Nelson County, 25 Ky. L. R. 1154, 77 S. W. 377; Bardstown & L. Turnpike Co. v. Nelson County [Ky.] 78 S. W. 851.

45. Such a person is not disqualified under a statute requiring "disinterested persons" for appraisers. State v. Bangor, 98 Me. 114.

46. In the absence of fraud or mistake, objections to valuation cannot be raised after appraisal as provided by law and approval by the chief justice. State v. Bangor, 98 Me. 114.

47. So held, even though the county offered to bear the expense of the abandoned condemnation. Bardstown & L. Turnpike Co. v. Nelson County [Ky.] 78 S. W. 851. Upon the necessary vote of the taxpayers, the statute on public purchase became operative and the rights became vested. State v. Bangor, 98 Me. 114.

48. Such a covenant is personal and does not run with the land. Mitchell v. Bourbon County, 25 Ky. L. R. 512, 76 S. W. 16.

49. Acts of 1904, p. 439, c. 202. State v. Board of Com'rs of Carroll County [Ind.] 70 N. E. 138; Columbia & C. C. T. Co. v. Vivion [Mo. App.] 77 S. W. 89.

50. Salt Lick E. & Mt. C. Turnpike Road Co. v. Gilfillin, 25 Ky. L. R. 1319, 77 S. W. 934.

51. When he pays his taxes and thus becomes a stockholder in the company, his complaint will be considered. Vanceburg & S. L. Turnpike R. Co. v. Maysville & B. S. R. Co., 25 Ky. L. R. 1404, 77 S. W. 1118.

52. A taxpayer seeking exoneration from a tax levied by the legislature on all the property in the taxing district will not be heard to complain unless he has applied to the fiscal court or county commissioners and obtained a judgment exempting him. Vanceburg & S. L. T. R. Co. v. Maysville & B. S. R. Co., 25 Ky. L. R. 1404, 77 S. W. 1118.

53. Vanceburg & S. L. Turnpike R. Co. v. Maysville & B. S. R. Co., 25 Ky. L. R. 1404, 77 S. W. 1118.

54. This applies to taxation of both tangible property and franchise. Com. v. Covington & C. Bridge Co., 24 Ky. L. R. 1177, 70 S. W. 849.

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company cannot complain that an assessment board adopts a different rule in determining values than a previous board.[55]

§ 3. *Establishment, construction, location and maintenance.*—A lien against a road for its construction cannot be maintained unless the statute thereon is strictly complied with.[56] One contracting with a company to construct a road is not estopped from asserting his claim because of any failure on the company's part to comply with conditions under which the county agreed to take stock in the corporation.[57]

Personal injuries.—When a road is opened and the public is invited to travel thereon, it must be kept reasonably safe[58] throughout the entire width the company permits to be used.[59] A toll bridge company has the duty of exercising not only ordinary care in making a safe passage for travelers, but a degree of care nearly akin to that required of a carrier of passengers,[60] and it is a legal duty of turnpike companies to keep their bridges safe for public travel, and they should cause such inspection to be made as ordinary care requires.[61] The question of negligence vel non is ordinarily for the jury,[62] but failure to perform a duty enjoined by statute is actionable per se.[63] If the plaintiff's negligence contributes to the injury, there can be no recovery;[64] but where the negligence of the road or bridge company proximately contributes to the injury, the concurring negligence of third persons is immaterial.[65] Evidence as to the general condition of the way should be admitted.[66] In an action against a toll bridge company for injuries while crossing an unlighted bridge by collision with a bicycle rider, the question of carelessness of the rider cannot be submitted to the jury, where there was no evidence on that point.[67]

55. Each board may adopt a different basis of assessment if the law warrants it. Com. v. Covington & C. Bridge Co., 24 Ky. L. R. 1177, 70 S. W. 849.

56. A failure to file a statement of lien within the statutory limit is fatal. Linn v. East Eagle & H. M. Turnpike Co., 24 Ky. L. R. 978, 70 S. W. 401.

57. Linn v. East Eagle & H. M. Turnpike Co., 24 Ky. L. R. 978, 70 S. W. 401.

58. Monticello & B. Turnpike Road Co. v. Jones, 24 Ky. L. R. 821, 69 S. W. 1073.

59. Entire macadamized portion Monticello & B. Turnpike Road Co. v. Jones, 24 Ky. L. R. 821, 69 S. W. 1073. The old rule required to be kept in repair only such parts of a road as the public could conveniently get along with. Ashby v. Elsberry & N. H. Gravel Road Co., 99 Mo. App. 178, 73 S. W. 229.

60. Conowingo Bridge Co. v. Hedrick, 95 Md. 669.

61. Such inspection should ascertain if the timbers are strong and suitable for the purpose intended. Pirmann v. Newport, L. & A. Turnpike Co., 24 Ky. L. R. 1341, 71 S. W. 491. Company held liable when a hole in a culvert could have been seen "by the exercise of ordinary care" on the part of its officers. Monticello & B. Turnpike Road Co., v. Jones, 24 Ky. L. R. 821, 69 S. W. 1073.

62. It is not negligence per se to allow cows to stray upon the road from cross-roads. Ashby v. Elsberry & N. H. Gravel Road Co., 99 Mo. App. 178, 73 S. W. 229. The question of negligence on the part of a toll bridge company in failing to light their bridge, whereby plaintiff was injured from colliding with another traveler, is for the jury. Conowingo Bridge Co. v. Hedrick, 95 Md. 669.

63. Failure to construct and maintain roadway of statutory width. Ashby v. Elsberry & N. H. Gravel Road Co., 99 Mo. App. 178, 73 S. W. 229.

64. A road being the way to plaintiff's home, she had a right to take it unless it was so dangerous that a person of common prudence would have declined the risk. Ashby v. Elsberry & N. H. Gravel Road Co., 99 Mo. App. 178, 73 S. W. 229. One was not guilty of contributory negligence as a matter of law by passing through an unlighted bridge with knowledge of its condition. Conowingo Bridge Co. v. Hedrick, 95 Md. 669.

65. Where it is claimed that a failure to construct a road of the statutory width was the cause of the accident, it must be shown to have been the proximate cause. But if the bad repair of a street or road proximately contributed to produce the injury, the party charged with keeping the highway is responsible, although there was another contributory cause. Ashby v. Elsberry & N. H. Gravel Road Co., 99 Mo. App. 178, 73 S. W. 229. Where a toll bridge company was negligent in failing to light their bridge, whereby a traveler was injured, that the negligence of another traveler concurred in the accident will not prevent recovery from the company. Conowingo Bridge Co. v. Hedrick, 95 Md. 669.

66. If the general appearance indicated neglect and decay, it was enough to put the company upon inquiry. Pirmann v. Newport, L. & A. Turnpike Co., 24 Ky. L. R. 1341, 71 S. W. 491.

67. Conowingo Bridge Co. v. Hedrick, 95 Md. 669.

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§ 4. *Right of travel and tolls.*—In some states, a failure to keep the road in proper condition forfeits the right to collect tolls,[68] and a statute so providing is not unconstitutional as taking property without due process of law.[69]

An agreement as to exemption from tolls will be binding on a bridge company whether it operates a bridge or a ferry,[70] and continued acquiescence of free passage will raise the presumption of such an agreement.[71] It is not an abrogation of such an agreement to make the road a free one.[72] An agreement as to the closing of a private road in consideration of exemption from tolls is not within the statute of frauds,[73] and a statutory exemption of persons living within one-half mile of a toll gate does not apply to companies operating under special charter.[74] The exemption is not waived by payment under protest,[75] but may be barred by the statute of limitations.[76]

TORTS.

§ 1. Elements of a Tort (1875).
§ 2. What is an Injury or Wrong (1876).
§ 3. What is Damage (1876).
§ 4. Parties in Torts (1877).

§ 1. *Elements of a tort.*—A tort is the commission or omission of an act by one without right whereby another receives some injury directly or indirectly in person, property, or reputation.[77]

A tort is a violation of a duty fixed by law, while a breach of contract is the violation of a duty fixed by agreement,[78] but a tort may arise from breach of duty flowing from relations created by contract.[79] There must be a wrongful act[80] violating a legal duty owed,[81] from which damage results, but even without actual

68. A portion of the road being out of repair does not prevent collection of tolls if another portion is in proper condition [Rev. St. 1899, §§ 1234, 1235]. Columbia & Cedar Creek Turnpike Co. v. Vivion [Mo. App.] 77 S. W. 89.

69. Code of Pub. Gen. Laws, § 242, art. 23, as amended by Acts of 1894, p. 607. Black River Neck Turnpike Co. v. Homberg, 96 Md. 430.

70. Dupont v. Charleston Bridge Co., 65 S. C. 524.

71. Great Western Turnpike Co. v. Shafer, 172 N. Y. 662, 65 N. E. 1121.

72. Mitchell v. Bourbon County, 25 Ky. L. R. 512, 76 S. W. 16.

73, 74. Great Western Turnpike Co. v. Shafer, 172 N. Y. 662, 65 N. E. 1121.

75, 76. Dupont v. Charleston Bridge Co., 65 S. C. 524.

77. Cyc. Law Dict. A railway company negligently running its train into an obstruction. Chicago & A. R. Co. v. Murphy, 198 Ill. 462, 64 N. E. 1011.

78. Failure of brokers to require margins on stock borrowed to cover a short sale was a breach of contract and not a tort which could be waived and suit brought in the common counts in assumpit. Morris v. Jamieson, 205 Ill. 87, 68 N. E. 742. An absolute deed was given as security for a grantee's indorsement of a grantor's note to be reconveyed on demand when the note was paid. After payment of the debt the grantee's heirs recorded the deed. Held to be a breach of covenant. Knowles v. Knowles [R. I.] 56 Atl. 775.

79. A promissory note had been paid in full, and the payee instead of sending it to the maker sent it to the bank with instructions to protest if not paid, which was done to the injury of the maker's financial standing. State M. L. & A. Ass'n v. Baldwin, 116 Ga. 855. Landlord and tenant of building allowed to fall into disrepair. Schoppel v. Daly [La.] 36 So. 322.

80. By purchasing property at public sale taken by an unlawful seizure one does not become a joint trespasser. Hoxsie v. Nodine [C. C. A.] 123 Fed. 379. A railway company's employes had smallpox. They were taken in charge by the health officer and it is not shown that the company was thereafter guilty of negligence. It was held not liable for damages for a case communicated to stranger. Mason v. Ill. Cent. R. Co., 25 Ky. L. R. 1214, 77 S. W. 375. A lienor cannot maintain trespass or trover against one who purchased encumbered property, nor will case lie unless it is shown that the purchaser had notice of the lien. Thornton v. Dwight Mfg. Co., 137 Ala. 211. Depreciation of property from operation of railroad without negligence is damnum absque injuria. Consequential damages. Smoke, etc. Cincinnati C. B. R. Co. v. Burski, 4 Ohio C. C. [N. S.] 98.

81. The holder of an unrecorded deed to land subject to a remote vendor's lien was not made a party defendant in a proceeding foreclosing the lien. She suffered damage. Held, her remedy was on the warranties of the deed and not against the remote vendor. Friend v. Means, 25 Ky. L. R. 1540, 78 S. W. 164. Railroad company violates no duty in substituting a stub pilot on an engine for a long pilot so that automatic couplers could be attached as required by Act of Congress. The engine was thereafter ditched by cattle on the track because the pilot would not throw them off. Briggs v. Chicago & N. W. R. Co. [C. C. A.] 125 Fed. 745. Mistake made by conveyancer employed by third person.

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injury nominal damages may be recovered.[82] The duty may depend on knowledge.[83] A duty may be owing not only to immediate but also to remote persons.[84]

The wrongful act must be the proximate cause of the injury,[85] and one is liable for all the consequences naturally flowing therefrom.[86] The law of the place governs in determining the right of action, the defenses, and the liability, while the remedy is that of the forum.[87]

§ 2. *What is an injury or wrong.*—There is no liability for acts done in the performance of governmental duties,[88] nor for injury caused by act of God, unless one by his wrongful acts diverts or accelerates natural forces.[89] It is wrong to do a lawful act in an unlawful manner,[90] but lawful acts lawfully done, though maliciously, are not wrongs.[91] Thus no liability is created by refusal for ulterior motives, to sell commodities to a customer, though his business be impaired.[92] Inducing and procuring a breach of contract relations between third persons is of itself a wrong,[93] but the dissuasion of one from entering into a relation as agreed has been held not to be.[94]

§ 3. *What is damage.*—A person commits a tort who does an act forbidden

Dunlap v. Gipson [Md.] 56 Atl. 863. False representations as to financial standing of a merchant made by him to a mercantile agency constitutes a fraud upon a person who acts upon it, though the merchant did not know he was a subscriber. George D. Mashburn & Co. v. Dannenberg Co., 117 Ga. 567. One member of an unlawful assembly has no cause of action against another who, negligently firing a pistol, wounds the former (charivari party). Gilmore v. Fuller, 198 Ill. 130, 65 N. E. 84, 60 L. R. A. 286.

82. Willet v. Johnson, 13 Okl. 563, 76 Pac. 174.

83. A vicious dog. Gladstone v. Brunkhurst [N. J. Law] 56 Atl. 142.

84. It is a wrong to withdraw lateral support from an adjoining owner so that natural causes will extend to and damage the land beyond. Excavation of soil on seashore exposed to waves. Murray v. Pannaci, 64 N. J. Eq. 147. A manufacturer sold a buggy to a city for the use of one of its employes. It was represented to be strong, but was defective, and the defects covered with paint. Injuries resulted in its use and the manufacturer was held liable. Woodward v. Miller [Ga.] 46 S. E. 847.

85. Leaving horses hitched to a milk wagon untied in the street, the wagon being across the street car track, may be the proximate cause of their being hit by a street car. Munroe v. Hartford St. R. Co. [Conn.] 56 Atl. 498. A trespass was committed by causing the bursting of a water pipe and the water flowing onto plaintiff's premises. The fact that the city was negligent in laying the pipe on rock did not relieve the person setting off the blast from liability. Wheeler v. Norton, 84 N. Y. Supp. 524. Proof of injuries alone does not suffice. Willet v. Johnson, 13 Okl. 563, 76 Pac. 174.

86. Three men were riding in a wagon, one of them engaged another in an altercation and fight, during which the lines were knocked from the driver's hands, and the team ran away and he was injured. Ezell v. Outland, 24 Ky. L. R. 1970, 72 S. W. 784. One party owned an engine, another a threshing machine, which they operated together. The engine having fallen through an unsafe bridge, the owner of the threshing machine could not recover for lost profits. Foster v. Board of Lyon County Com'rs [Kan.] 74 Pac. 595.

87. Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918.

88. Prosecution and conviction under a void city ordinance. Simpson v. Whatcom, 33 Wash. 392, 74 Pac. 577.

89. Destruction of crops during an unusual rain storm alleged to be the result of building a dam. Axtell v. Northern Pac. R. Co. [Idaho] 74 Pac. 1075.

90. Trimming trees extending into a highway. Meyer v. Standard Tel. Co. [Iowa] 92 N. W. 720. One who uses excessive force in repelling an assault, himself commits an assault. Street car conductor using more force than is necessary to eject a disorderly passenger. Ickenroth v. St. Louis Transit Co., 102 Mo. App. 597, 77 S. W. 162. A party assailed may be guilty of assault if he use excessive force in repelling his assailant. McNatt v. McRae, 117 Ga. 898. Excavations near a foundation causing the wall of a building to give way. Cumberland Tel. & T. Co. v. Foster, 25 Ky. L. R. 1465, 78 S. W. 150.

91. Porter v. Mack, 50 W. Va. 581. A threat of imprisonment is not duress unless the imprisonment be unlawful. A person threatened to have another's son arrested and sent to the penitentiary unless a levy of execution was released. In an action for damages for this release the complaint was held bad because it did not allege on what charge defendant claimed the son could be arrested. Boggs v. Slack & G. Grocery Co., 53 W. Va. 536. Inducing others to assert a legal right to plaintiff's detriment. Emanuel v. Barnard [Neb.] 99 N. W. 666.

92. Newspapers to a dealer who refused to abandon a competing enterprise. Collins v. American News Co., 68 App. Div. [N. Y.] 639.

93. Causing a principal to cut down the territory assigned to an agent. Raymond v. Yarrington, 96 Tex. 443, 73 S. W. 800.

94. Parent's inducing son to break contract to marry not wrong unless by false or slanderous charges. Leonard v. Whetstone [Ind. App.] 68 N. E. 197.

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by law, if that act causes another substantial loss, beyond that suffered by the rest of the public.[95]

§ 4. *Parties in torts.*—Where a joint tort is charged there can be no recovery on proof of one or more separate torts, there must be proof of concert of action,[96] but the liability is several, and either may be held,[97] or separate actions will lie against each,[98] though there can be but one satisfaction, for it discharges the cause of action. The mere payment without satisfaction of a judgment against one tort feasor is no bar to an action against the others.[99] The general rule is that joint tort feasors can have no redress against each other.[1] But an agent who becomes liable in damages by acting in good faith under his principal's directions is entitled to indemnity from the principal,[2] and a surety for one tort feasor who has paid a judgment may compel contribution from joint judgment debtors.[3] Where a tort may have been committed by one or more, independent of a conspiracy, an allegation of conspiracy is mere matter of inducement, the damage being the gist of the action.[4]

The doctrine of respondeat superior applies only where the relation of master and servant is shown to exist at the time and in respect to the very transaction out of which the injury arose,[5] and for acts of misfeasance they are jointly liable.[6]

TOWNS; TOWNSHIPS.[7]

§ 1. Creation, Organization, Status and Boundaries (1877).
§ 2. General Powers and Exercise Thereof (1878).
§ 3. Property (1878).
§ 4. Contracts (1878).
§ 5. Officers and Employes (1879).
§ 6. Fiscal Management (1880).
§ 7. Claims (1880).
§ 8. Actions By and Against (1880).

§ 1. *Creation, organization, status and boundaries.*—The word "township"

95. An undisclosed principal, by his agent, induced another to become surety on said agent's bond, and then in violation of a statute, conducted gambling on the premises and the surety was held for the penal sum of the bond. City Trust, S. D. & S. Co. v. American Brew. Co., 174 N. Y. 486, 67 N. E. 62.

96. An action was brought against township and a railroad company for damages for unlawful death, charging them as joint tort feasors, the one with failure to keep a highway in repair, and the other with maintaining obstructions in the road. There was no concerted action. Goodman v. Coal Tp., 206 Pa. 621.

97. Action for conversion. Cunningham v. O'Connor [Mich.] 99 N. W. 25.

98. Two parties on motor tricycles frightened a horse and caused a runaway. Corey v. Havener, 182 Mass. 250, 65 N. E. 69. Electric light and telephone companies jointly liable for injury caused by crossed wires. Economy L. & P. Co. v. Hiller, 203 Ill. 518, 68 N. E. 72. Allegations sufficient to charge joint tort. Jones v. Ducktown S., C. & I. Co., 109 Tenn. 375, 71 S. W. 821.

99. Separate actions were brought for a joint tort. Judgment was entered and voluntarily paid in the first action, tried and pleaded as a bar to the other. McDonald v. Nugen, 118 Iowa, 512, 92 N. W. 675.

1. One person of an unlawful charivari party was inadvertently shot by a revolver in hands of another member of the party. No recovery. Gilmore v. Fuller, 198 Ill. 130, 65 N. E. 84, 60 L. R. A. 286.

2. Hoggan v. Cahoon, 26 Utah, 444, 73 Pac. 512.

3. Surety for one on an appeal bond paid the entire judgment. Kalb v. Nat. Surety Co., 176 N. Y. 233, 68 N. E. 247.

4. Young v. Gormley, 119 Iowa, 546, 93 N. W. 565.

5. One driving his own horses and his father-in-law's wagon collided with another traveler. He was not in the employ of his father-in-law; the father-in-law said after the accident that he would settle. Held, not a servant. Thurn v. Williams, 84 N. Y. Supp. 296. A minister assuming to be acting for a church organization refused a person the right to bury his child in the church cemetery. Schaefer v. Evangelical Lutheran St. Paul's Church [Kan.] 74 Pac. 1119. Where an act is done by officers of a municipality which is within the corporate power and might have been lawfully accomplished in proceedings according to law, the municipality will be liable for the consequences of an act of such officers proceeding contrary to law or in an irregular manner. Langley v. City Council of Augusta, 118 Ga. 590. That a master may be liable for the act of his servant, the act must be within the scope of his employment. A fireman threw a piece of coal at one standing beside the track. Louisville & N. R. Co. v. Routt, 25 Ky. L. R. 887, 76 S. W. 513.

6. Master and servant are jointly liable for misfeasance of the servant acting within the scope of his employment. Schumpert v. Southern R. Co., 65 S. C. 332.

7. Scope of title: The same relative scope has been given as to the title Municipal Corporations (see ante, p. 941).

Consult Highways, etc., 2 Curr. Law, p. 177;

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may include the precincts into which a county not under township organization is divided for administrative purposes.[8] Signers of a petition for the creation of a new town may withdraw their names before the county board takes final action.[9] A precinct actually formed and organized will, for the purposes of taxation and revenue, be deemed a de facto organization, whether the meeting of the commissioners at which it was formed was lawfully held or not.[10] In Wisconsin, towns can only be vacated by the county board, after petition by the voters therein, and notice and a majority vote at the town meeting, properly certified to the county clerk.[11] The legislature may alter or change precincts or beats at will.[12] The destruction of the record evidence (field notes) of the boundaries of a precinct does not destroy the precinct, the boundaries of which can be otherwise rendered certain.[13]

§ 2. *General powers and exercise thereof.*—The granted powers, as in case of other municipalities,[14] include those necessarily incident.[15] The mode of action may be changed even as to pending matters, it not being a vested right.[16]

A town ordinance submitting to voters double question should do so in such form that voters can choose between them. Inability to do so renders the election void.[17] Parties whose property rights are affected by town ordinances are entitled to notice of the consideration of such ordinances before final action.[18] The minutes of the town meetings being required to be kept by the clerk, the town record is the only competent evidence of the acts of the voters at such meetings.[19]

§ 3. *Property.*—A town may have a beneficial interest in its own public property as against the public generally.[20] When land is detached from one township and added to another, the personal property and debts shall be reapportioned between them.[21] Where a county is dissolved, a township made up of the territory formerly included in the county succeeds to the property of the county as well as to its liabilities.[22] Leases illegally made of town property are not validated by the election of the lessee as town supervisor.[23]

§ 4. *Contracts.*—A contract ultra vires because in excess of the funds in the

Bridges, 1 Curr. Law, p. 355; **Sewers and Drains**, 2 Curr. Law, p. 1628; **Waters, etc.; Municipal Bonds**, 2 Curr. Law, p. 931; **Public Works, etc.**, 2 Curr. Law, p. 1328; **Taxes**, 2 Curr. Law, p. 1786; **Health**, 2 Curr. Law, p. 173; **Franchises**, 2 Curr. Law, p. 74; **Officers and Public Employes**, 2 Curr. Law, p. 1069, and like titles.

8. Union Pac. R. Co. v. Howard County [Neb.] 92 N. W. 579.

9. Littell v. Vermilion County Sup'rs, 193 Ill. 205, 65 N. E. 78.

10. City of South Omaha v. O'Rourke [Neb.] 97 N. W. 608.

11. The statute as to vacation of townships applies to all cases of vacation by the county board. State v. Yankee [Wis.] 93 N. W. 533.

12. State v. Sawyer [Ala.] 36 So. 545.

13. Ex parte Walton [Tex. Cr. App.] 74 S. W. 314.

14. See **Counties**, 1 Curr. Law, p. 816; **Municipal Corporations**, 2 Curr. Law, p. 940.

15. An authority to issue bonds and sell them for the purposes of street improvement implies the right to pledge the credit of the township. Grosse Pointe Tp. v. Finn [Mich.] 96 N. W. 1078.

16. Mode of issuing bonds. Webster v. White Plains, 87 N. Y. Supp. 783.

17. Town of Woodlawn v. Cain, 135 Ala. 369.

18. Notice of the time and place of considering ordinances as to changing street grades must be given to the owner of lands abutting thereon. Ackerman v. Nutley [N. J. Law] 57 Atl. 150.

19. Cincinnati, I. & W. R. Co. v. People, 205 Ill. 538, 69 N. E. 40. It was improper for the court to permit amendment of a certificate not sufficiently showing the purpose of the tax, where the record of the town meeting was not put in evidence. Cleveland, C., C. & St. L. R. Co. v. People, 205 Ill. 532, 69 N. E. 89.

20. A town has a beneficial interest in an easement of aqueduct through private land as distinguished from property acquired by it for a strictly public use, and is entitled to compensation when such property is condemned for another public use; but is not entitled thereto for an aqueduct under a public highway which has been so condemned. In re Condemnation of Land at Nahant, 128 Fed. 185.

21. Gladwin Tp. v. Bourrett Tp., 131 Mich. 353, 91 N. W. 618. The proportionate division of debts refers to the debts contracted at the time of the division, and to the cost of work done thereafter. Bulson v. Green Island, 80 N. Y. Supp. 551.

22. Garfield Tp. v. Herman, 66 Kan. 256, 71 Pac. 517.

23. Wenk v. New York, 82 App. Div. [N. Y.] 584.

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hands of the treasurer at the time of its making is void,[24] likewise one not made in writing and with bond as required[25] and recovery even on a quantum meruit is impossible.[26] A township does not become liable for a debt by substituting the fiction of an implied contract for an express contract, void for noncompliance with the statute; but it may not retain property of individuals without paying for it, where restitution cannot be made.[27] A township is not liable to a precinct for work ordered by a precinct commissioner without authority; but the acceptance and use of same by the town would make it liable to the party doing the work.[28] A town is liable for the reasonable compensation for services contracted for by its duly authorized officers.[29] Township bonds in aid of a railroad issued before the location of the line, under an act making the location a condition precedent to the issue, are invalid; no one can become a bona fide holder, and the town cannot, by any subsequent acts of its officers, ratify them, or estop itself from questioning their validity.[30]

§ 5. *Officers and employes.*—The method of electing selectmen of a town must be pursued strictly according to statute.[31] In Connecticut, the selectman whose name stands first on a plurality of ballots is first selectman and acts as agent of the town in absence of any special appointment.[32] Town officers for the preservation of health may be appointed, or the manner of their appointment be directed by the legislature.[33] The provision as to taking and filing the oath, by everyone elected to a town office, are directory only, and filing in advance of the term, and before the office is judicially declared forfeited, prevents any vacancy.[34] The terms of town officers cannot be extended except in strict compliance with statute, which must not be construed retroactively.[35] The removal from a township which disqualifies an officer thereof must be a voluntary removal and not one by operation of law resulting from a portion of the township being cut off. "Becoming incapable of serving" refers to a personal incapacity, physical or mental, and not one due to nonresidence.[36] A vacancy caused by failure of a town officer to qualify must in New York be filled by appointment and not by election at a special town meeting.[37] A town clerk may be compelled by mandamus to call a special election to fill a vacancy,[38] or in some states other officers have the power if the regular ones do not.[39] Where a township committee may appoint town officers to a vacancy, there must be an actual vacancy for a cause named in the authorizing act. Their declaration of a vacancy, contrary to fact, cannot make valid the ap-

24. The fact that the town received the benefit of plaintiff's labor under an unauthorized contract is immaterial. Huston v. Sioux Falls Tp. [S. D.] 96 N. W. 88.

25, 26. Where contracts by a township are required to be in writing, with bond given, and goods have been delivered without compliance with such requirements, recovery cannot be had on a quantum meruit (Peck-Williamson H. & V. Co. v. Steen School Tp., 30 Ind. App. 637, 66 N. E. 909), not even if the work is accepted and used by the township (Moss v. Sugar Ridge Tp., 161 Ind. 417, 68 N. E. 896).

27. Moss v. Sugar Ridge Tp. [Ind. App.] 67 N. E. 460.

28. Contoocook Fire Precinct v. Hopkinton, 71 N. H. 574.

29. The guarding of quarantined premises by order of the health officer. Keefe v. Union [Conn.] 56 Atl. 571.

30. Oswego County Sav. Bank v. Genoa, 172 N. Y. 635, 65 N. E. 1120.

31. A town which elected its selectmen for one year cannot elect one for three years without the vote of the town changing the system. Attorney General v. Hutchinson [Mass.] 69 N. E. 1048.

32. Buck v. Barnes, 75 Conn. 460.

33. Keefe v. Union [Conn.] 56 Atl. 571.

34. In re Drury, 39 Misc. [N. Y.] 288.

35. People v. Weeks, 176 N. Y. 194, 68 N. E. 251.

36. Stewart v. Riverside Tp., 68 N. J. Law, 571.

37. The justices of the peace of a town and the town clerk have power to fill by appointment a vacanoy so occurring. People v. Potter, 40 Misc. [N. Y.] 485.

38. People v. Potter, 88 App. Div. [N. Y.] 239.

39. On refusal of members of a town council to qualify, two wardens may order an election to fill the vacancy. State v. Rice, 66 S. C. 1.

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pointment.[40] When a "beat" is abolished, the officers thereof cease to be such[41] and are not transferred to the newly erected ones.[42]

Pending an action to try title to a town office, the officers de facto will not be enjoined from exercising the duties of their office.[43] An assessor elected for, and exercising his office in, four city wards forming one taxation precinct, without objection, is a de facto assessor in each ward.[44]

Payment of a constable by a town treasurer, without knowledge or approval of the town, does not show that he was employed by the authority of the town.[45] Advice by the selectmen to a tax collector as to the collection of taxes does not amount to such a control of the collector as to make the township liable for his trespass.[46] The election of a town officer to be supervisor cannot ratify the leasing of town property to him, nor can the fact that he spent much money in improving the land relying on said lease, avail him in a taxpayer's suit to set aside the lease.[47] The action of a town board of auditors whose certificate of audited accounts has been delivered to the supervisors' clerk cannot be reviewed by certiorari.[48] The report of a commissioner who enumerates the population of a township may be referred back to him, or modified by the court.[49] A town made liable for any loss sustained by default of its officers in a legally imposed duty includes his custody of school moneys.[50]

§ 6. *Fiscal management.*—Authority for township trustees to incur debts in excess of the legal limit may be conferred only by prescribed modes.[51] Where a statute authorizes a township to subscribe for the stock of a railroad company and issue bonds therefor, the prerequisite conditions must have been complied with by the company to render the bonds valid in the hands of one not an innocent purchaser.[52]

§ 7. *Claims.*—When claims against a town are rejected by the board of town auditors, a majority of them must certify that fact to the town clerk.[53] In an action for damages due to the condition of a joint road, an act changing the boundaries of the defendant town and directing a reapportionment by the supervisors of the liabilities of each town does not affect the liability of the towns as to an accident happening after the passage of the act, but before the directed reapportionment.[54]

§ 8. *Actions by and against.*—Action against a town for a claim against it must be begun only after the tax for same has been levied and paid in, and payment has been refused after demand therefor.[55] Action cannot be brought on a claim against a town until after presentation and audit by the board of supervisors.[56] The statute of limitations does not begin to run against a registered township warrant until there are funds for its payment in the treasurer's hands or until a sufficient time has elapsed for collecting them.[57]

40. Zeliff v. Whritenour [N. J. Law] 54 Atl. 560.
41, 42. State v. Sawyer [Ala.] 36 So. 545.
43. State v. Rice, 66 S. C. 1.
44. City of South Omaha v. O'Rourke [Neb.] 97 N. W. 608.
45. Murphy v. Clinton, 182 Mass. 198, 65 N. E. 34.
46. Hunt v. Eden, 75 Vt. 119.
47. Wenk v. New York, 82 App. Div. [N. Y.] 584.
48. People v. Cross, 87 App. Div. [N. Y.] 56.
49. In re Springdale Tp., 20 Pa. Super. Ct. 381.
50. The validity of his bond held immaterial. Smith v. Jones [Mich.] 99 N. W. 742.
51. County commissioners must authorize all in excess of funds on hand. Coombs v. Jefferson Tp., 31 Ind. App. 131, 67 N. E. 274.
52. Edwards v. Bates County, 117 Fed. 526.
53. People v. Board of Auditors, 89 App. Div. [N. Y.] 116.
54. Wolfgram v. Schoepke, 119 Wis. 258, 96 N. W. 556.
55. Bragg v. Victor, 84 App. Div. [N. Y.] 83.
56. Goodfriend v. Lyme, 90 App. Div. [N. Y.] 334.
57. Brannon v. White Lake Tp. [S. D.] 95 N. W. 284.

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Suit must be by the proper officer,[58] and against the town or local officers according to the nature of the liability.[59] The selectmen of a town who have power to impose the conditions of a franchise are the proper parties to bring a bill to compel observance of an order made by them to comply with their conditions.[60] Where a town has been without trustees or other officers for more than thirty-five years, one of the citizens thereof is entitled to sue for the benefit of all to restrain the obstruction of a passageway dedicated to the public.[61]

In an action against a town to set aside an illegal contract, the records of the town clerk's office as to papers filed therein is best evidence, and parol evidence thereof is inadmissible.[62] A town is prima facie liable for damages arising from the improper manner of doing work on highways, ratified by approving and paying the bills therefor.[63] Judgments against townships are conclusive and cannot be attacked in proceedings to compel the levy of a tax to pay them.[64]

TRADE-MARKS AND TRADE-NAMES.

§ 1. Definition, and Words or Symbols Available (1881).
§ 2. Acquisition, Transfer, and Abandonment (1883).
§ 3. Infringement and Unfair Competition (1883).
§ 4. Remedies and Procedure (1885).
§ 5. Statutory Registration, Regulation and Protection (1887).

§ 1. *Definition, and words or symbols available.*—The test of a technical trade mark is whether it does or does not operate as a representation that goods bearing it are those put out by him who has adopted that mark.[65] It may consist in any symbol, sign, word, or form of words,[66] with a few exceptions, to wit, geographical names, and words of locality or place as commonly used.[67] Even such may come to have a secondary meaning peculiar to one user, who in such case may protect it[68] against any unfair use in competition.[69]

Words or devices signifying grade or quality,[70] or words primarily descrip-

58. During the period the treasurer is empowered to collect taxes, his authority to bring suit therefor is exclusive, and a town supervisor cannot bring suit within that time. Decatur Tp. v. Copley [Mich.] 95 N. W. 545.

59. An action for unliquidated damages arising from breach of a contract made with water commissioners of a town cannot be maintained against the town. Holroyd v. Indian Lake, 85 App. Div. [N. Y.] 246.

60. Selectmen of Gardner v. Templeton St. R. [Mass.] 68 N. E. 340.

61. Larkin v. Ryan, 25 Ky. L. R. 613, 76 S. W. 168.

62. Siegel v. Liberty, 118 Wis. 599, 95 N. W. 402.

63. Willoughby v. Allen [R. I.] 56 Atl. 1109.

64. Appeal of Plains Tp., 21 Pa. Super. Ct. 68.

65. Bissell Chilled Plow Works v. Bissell Plow Co., 121 Fed. 357.

66. Computing Scale Co. v. Standard Computing Scale Co. [C. C. A.] 118 Fed. 965.

67. "Old Country" held a geographical term in a bill to restrain use of "Our Country's." Allen B. Wrisley Co. v. Iowa Soap Co. [C. C. A.] 122 Fed. 796. "Kentucky Club." Daviess County Distilling Co. v. Martinoni, 117 Fed. 186.

68. Signification indicative not only of the place of production but name of manufacturer or producer and excellence of article produced which enables owner to exert an exclusive right. La Republique Francaise v. Saratoga V. S. Co., 24 Sup. Ct. 145, 48 Law. Ed. ——.

A geographical name used in a fictitious sense to denote ownership and origin, independent of location may be a good trade mark. Dr. Drake's German Croup Remedy. Drake Medicine Co. v. Glessner, 68 Ohio St. 337, 67 N. E. 722. "Angostura Bitters" is good as a trade mark, the town Angostura having been known by another name for fifty years and the name being accepted by the trade as exclusive. A. Bauer & Co. v. Siegert [C. C. A.] 120 Fed. 81.

69. A. Bauer & Co. v. Distillerie de la Liqueur Benedictine [C. C. A.] 120 Fed. 74; Allen B. Wrisley Co. v. Iowa Soap Co. [C. C. A.] 122 Fed. 796; Viano v. Baccigalupo, 183 Mass. 160, 67 N. E. 641. Minnesota Business College. Rickard v. Caton College Co., 88 Minn. 242, 92 N. W. 958. "Boston Peanut Roasting Co." and "Boston Trade Peanut Roasting Co." Viano v. Baccigalupo, 183 Mass. 160, 67 N. E. 641.

70. Letters of the alphabet used by universal custom to designate the grade and quality of goods, and not ownership, cannot be made subject of trade mark. Used to designate grades and quality of linen crash. Stevens Linen Works v. William & John Don & Co. [C. C. A.] 127 Fed. 950; Id., 121 Fed. 171.

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tive,[71] or directions for use applicable to similar commodities,[72] even though expressed in foreign language,[73] are not subject to be exclusively taken, even though of commercial value. These also may take on a secondary meaning, susceptible of protection,[74] which meaning is sometimes accomplished by use of several in combination.[75]

One cannot have a technical trade mark in one's own name exclusive of others bearing that name,[76] but the surname of a person may be made a trade mark as against himself and his successors.[77] Equity will not restrain a person from using his own name, but he must use every means reasonable to distinguish his business from that of the complainant.[78] Variations of such names, or devices having for their principal object the identification of the owner of specific goods prepared and sold by him, may constitute a valid trade mark.[79]

One may appropriate a name as a trade name, which has been used before, if it acquired no particular significance and made little or no impression on the trade.[80]

A publisher or author has, either in the title of his work or in the application of his name to the work, or in the particular marks which designate it, a species of property similar to that which a trader has in a trade mark, and may claim protection from a court of equity against such use or imitation of such name.[81] Where, during the life of a monopoly created by a patent, a name has become the identifying and generic name of the thing patented, this name passes to the public with the cessation of the patent; but where another subsequently avails himself of this name, the use must be accompanied with such indications that the thing manufactured is the work of the one making it as will unmistakably inform the public of the fact.[82]

71. Vacuum Oil Co. v. Climax Ref. Co. [C. C. A.] 120 Fed. 254; Computing Scale Co. v. Standard Computing Scale Co. [C. C. A.] 118 Fed. 965; Regis v. Jaynes & Co. [Mass.] 70 N. E. 480. Roach salt. Barrett Chemical Co. v. Stern, 176 N. Y. 27, 68 N. E. 65. "Elastic Seam" applied to underdrawers is descriptive. Scriven v. North, 124 Fed. 894.

Not descriptive: . Word "Carrom," held not to be descriptive as a trade mark of a game. Ludington Novelty Co. v. Leonard, 119 Fed. 937. "Carroms." Id., 127 Fed. 155. Word "Elastic" as applied to furniture held not to be descriptive. Globe-Wernicke Co. v. Brown, 121 Fed. 185. "Club" applied to cocktails not descriptive. Heublein v. Adams, 125 Fed. 782. A person publishing a magazine under the name "Comfort" has a trade name in such title. Gannert v. Rupert [C. C. A.] 127 Fed. 962.

72. "Be sure and work the Horse" on a box of gall salve. Bickmore Gall Cure Co. v. Karns Mfg. Co., 126 Fed. 573.

73. "Conserva Di Tomate" being the Italian for "preserved tomato," "tomate" being the Italian word in use in a small territory in Italy to describe a tomato. Roncoroni v. Gross, 86 N. Y. Supp. 1112.

74. Computing Scale Co. v. Standard Computing Scale Co. [C. C. A.] 118 Fed. 965; Ludington Novelty Co. v. Leonard, 119 Fed. 937.

75. The words "Social Register" applied to a book containing the names and addresses of parties may become a trade mark, but neither "social" nor "register" alone can be protected from use in other fair combinations. Social Register Ass'n v. Murphy, 128 Fed. 116. Both "standard" and "computing" as applied to scales are descriptive, and so are they in combination. Computing Scale Co. v. Standard Computing Scale Co. [C. C. A.] 118 Fed. 965.

76. Chickering v. Chickering & Sons [C. C. A.] 120 Fed. 69. If the name of a person is adopted as a trade mark it is a natural consequence that the same name may be used by others and any damage resulting must be endured. Wyckoff v. Howe Scale Co. [C. C. A.] 122 Fed. 348; Royal Baking Powder Co. v. Royal [C. C. A.] 122 Fed. 337.

77. "Bissell" plows. Bissell Chilled Plow Works v. Bissell Plow Co., 121 Fed. 357. A corporation may be restrained from using a surname of one of its members. Bissell Chilled Plow Works v. Bissell Plow Co., 121 Fed. 357; Royal Baking Powder Co. v. Royal [C. C. A.] 122 Fed. 337; Wyckoff v. Howe Scale Co. [C. C. A.] 122 Fed. 348.

78. Defendant enjoined from making his name conspicuous. Royal Baking Powder Co. v. Royal [C. C. A.] 122 Fed. 337; Chickering v. Chickering & Sons [C. C. A.] 120 Fed. 69; Von Faber v. Faber, 124 Fed. 603. Family name used without distinguishing restrained. Von Faber v. Faber, 124 Fed. 603.

79. Plaintiff compounded a dyspepsia cure marking the boxes in which it was sold with the word "Rex" from which her family surname (Regis) was derived, and filed said trade mark according to law. Held, a valid trade mark. Regis v. Jaynes & Co. [Mass.] 70 N. E. 480.

80. Heublein v. Adams, 125 Fed. 782.

81. Sherlock Holmes. Hopkins Amusement Co. v. Frohman, 103 Ill. App. 613.

82. Horlick's Food Co. v. Elgin Milkine Co. [C. C. A.] 120 Fed. 264; B. B. Hill Mfg.

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§ 2. *Acquisition, transfer, and abandonment.*—To entitle a party to an injunction restraining another from the use of a trade mark or trade name it must appear that he adopted the name before his adversary,[82] for his own peculiar and exclusive use as a distinctive appellation for his trade, commodity, or place of business,[84] and that it was not at the time of appropriation in common or general use in connection with like businesses, commodities, buildings, or localities.[85] To acquire a trade mark there must be something connected with its use to inform the public that a right is asserted therein as a trade mark.[86] A trade mark may pass by assignment,[87] which may be implied from a transfer of that to which it pertains,[88] but an assignee or purchaser of a trade mark must indicate that he is assignee or purchaser, or he will not be protected in its use if such use of the trade mark works a deception.[89] A party does not abandon a trade mark by merely ceasing to manufacture the article.[90] Laches in failing to defend a trade name does not amount to abandonment.[91]

§ 3. *Infringement and unfair competition.*—Infringement of a trade mark occurs when the resemblance is such as to deceive an ordinary purchaser giving such attention to the same as a purchaser usually does.[92] It is no infringement to use a convenient and usual form of package.[93] Any one has the right to copy an article made by another which is not protected by patent.[94] Equity will restrain as unfair the use of indicia upon goods which are sufficient to deceive the incautious or ignorant purchaser,[95] either by use of integral parts of the mark or package,[96] similarity of name,[97] or by combinations thereof.[98] Similarity in

Co. v. Sawyer-Boss Mfg. Co. [C. C. A.] 118 Fed. 1014.

82, 84, 85. Chadron Opera House Co. v. Loomer [Neb.] 99 N. W. 649.

86. Kipling v. Putnam's Sons [C. C. A.] 120 Fed. 631.

87. Drake Medicine Co. v. Glessner, 68 Ohio St. 337, 67 N. E. 722.

88. The owner of a patent who has given his name to the patented article may transfer both the patent and the exclusive right to the name. Janney v. Pan-Coast V. & Mfg. Co., 128 Fed. 121. And see Bissell Chilled Plow Works v. Bissell Plow Co., 121 Fed. 357. Where a manufacturer engaged in business under a trade name enters into a partnership, agreeing that the place of business as well as the style of the firm should remain the same, the property in the trade name passes to the firm. Need not be distinctly enumerated that trade name passes. Moore v. Rawson [Mass.] 70 N. E. 64.

89. A. Bauer & Co. v. Distillerie de la Liqueur Benedictine [C. C. A.] 120 Fed. 74; A. Bauer & Co. v. Order of Carthusian Monks [C. C. A.] 120 Fed. 78.

90. May maintain a suit against one infringing. Janney v. Pan-Coast V. & Mfg. Co., 128 Fed. 121.

91. Thackeray v. Saxlehner [C. C. A.] 125 Fed. 911.

92. Enoch Morgan's Sons Co. v. Whittier-Coburn Co., 118 Fed. 657. It is not necessary to constitute an infringement that every word of a trade mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of an article. Gannett v. Ruppert, 119 Fed. 221.

93. Keuffel, etc., Co. v. Crocker Co., 118 Fed. 187. When the style and manner of dressing a commodity is old and in common use, such methods may be adopted without infringing the rights of others who may use the same style. De Long Hook & Eye Co. v. Francis H. & E. & F. Co., 118 Fed. 938.

94. Enterprise Mfg. Co. v. Landers, 124 Fed. 923; Scriven v. North, 124 Fed. 894; Marvel Co. v. Tullar Co., 125 Fed. 829; Globe-Wernicke Co. v. Fred Macey Co. [C. C. A.] 119 Fed. 696.

95. Similar labels. Cauffman v. Schulei, 123 Fed. 205; Drake Medicine Co. v. Glessner, 68 Ohio St. 337, 67 N. E. 722; Globe-Wernicke Co. v. Brown [C. C. A.] 121 Fed. 90.

96. One may not use the color that another has selected as a distinguishing mark of his goods or use the same arrangement of letters and marks. Enoch Morgan's Sons Co. v. Whittier-Coburn Co., 118 Fed. 657. No one may lawfully so dress his goods that he can palm them off as the goods of another manufacturer. Scriven v. North, 124 Fed. 894; A. Bauer & Co. v. Distillerie de la Liqueur Benedictine [C. C. A.] 120 Fed. 74; A. Bauer & Co. v. Order of Carthusian Monks [C. C. A.] 120 Fed. 78; Bissell Chilled Plow Works v. Bissell Plow Co., 121 Fed. 357; Postum Cereal Co. v. American Health Food Co. [C. C. A.] 119 Fed. 848.

No similiarity of labels such as amounts to fraudulent misrepresentation; hence no relief. La Republique Francaise v. Saratoga V. S. Co., 24 Sup. Ct. 145, 48 Law. Ed. —— Packages held dissimilar. Marvel Co. v. Tullar Co., 125 Fed. 829. Use of such an imitation of a manufacturer's label as will induce the public to believe they are purchasing goods manufactured by him when they are in fact buying goods manufactured by another will be enjoined. Roncoroni v. Gross, 86 N. Y. Supp. 1112.

97. "Old Mill Soap," "Old Stone-Mill Soap." Swift & Co. v. Brenner, 125 Fed. 826. Confusion between names (Bent Glass Novelty Company and Bent Glass Globe Manufactur-

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one respect is not cured by dissimilarity in another, if the likelihood of deception remains.[99] It is unfair, whether or not a manufacturer attempts to deceive the middleman or suggests deception of the consumer, if the packages do as a matter of fact deceive consumers.[1] That parties are located in different communities is immaterial, if both are engaged in selling in the open market.[2] Unfairness is not avoided by using such a mark only on business stationery and not on the commodity as offered for sale,[3] nor by the fact that sales are restricted to a small and well advised class.[4] It is no defense to a suit to restrain an infringement that the mark objected to was not originally intended as an infringement.[5] Continuing to sell the article without any change of name, shape or label, after notice of infringement, constitutes a direct and intentional infringement.[6] It is fair to purchase another's product and resell it as such in different packages or quantities.[7] But a manufacturer is not entitled to purchase worn out articles, reconstruct the same, and then sell them with the trade mark of the original manufacturer thereon, where the same can be obliterated at small cost,[8] and are not in a place calculated to prevent such reconstruction and resale.[9] Equity will not enjoin competition as unfair because of substitution due to the dishonesty of dealers.[10] That a party advertises complainant's goods for sale, and when thus obtaining a customer succeeds in selling them goods not made by complainant, does not constitute unfair competition.[11] In order to protect the public and

ing Company). Brown v. Braunstein, 83 N. Y. Supp. 1096; Phila. Trust, S. D. & I. Co. v. Phila. Trust Co., 123 Fed. 534. Restrained use of a name. Imperial Mfg. Co. v. Schwartz, 105 Ill. App. 525. The trade name "Comfort" as used for the title of a magazine is infringed by the use of the name "Home Comfort." Gannert v. Rupert [C. C. A.] 127 Fed. 962.

98. It is unfair competition to use names, labels, and wrappers, which taken together would deceive a purchaser. Keuffel & Esser Co. v. Crocker Co., 118 Fed. 187. A person cannot appropriate lines, colors, words, and size of packages in themselves, so as to preclude others from their use, but when used together in a definite combination another may be restrained from so imitating that combination as to deceive purchasers. Nat. Biscuit Co. v. Ohio Baking Co., 127 Fed. 160; Viano v. Baccigalupo, 183 Mass. 160, 67 N. E. 641. Labels sufficiently alike to deceive. Cantrell v. Butler, 124 Fed. 290; Ohio Baking Co. v. Nat. Biscuit Co. [C. C. A.] 127 Fed. 116. Peculiar color with markings. Device partly descriptive (8-day malt). Manitowoc Malting Co. v. Milwaukee Malting Co., 119 Wis. 543, 97 N. W. 389.

99. Heublein v. Adams, 125 Fed. 782. Names dissimilar though packages similar no injunction granted. Schenker v. Awerbach, 85 N. Y. Supp. 129. Complainant put up a beverage called "Limetta," defendant put up a beverage of the same color, in similar bottles, the capsules being alike, the labels different in shape, but the coloring the same though worded slightly different. Defendant called his drink "Limette." Held to constitute unfair competition. Drewry & Son v. Wood, 127 Fed. 887. Where complainant manufactured a dyspepsia cure under the trade name "Rex," the manufacturing of another dyspepsia cure in the same form under the name of "Rexall" is an infringement though the boxes and labels were dissimilar. Regis v. Jaynes & Co. [Mass.] 70 N. E. 480. The title "Social Register, Newport" having become a trade mark for a publication, publishing a similar work entitled "Newport Social Index," no deception being intended or resulting therefrom, does not constitute an infringement of the trade mark nor unfair competition. Social Register Ass'n v. Murphy, 128 Fed. 116. The assignee of a patent ventilator and the exclusive right to use the word "Pancoast" as a trade mark therefor may enjoin the use of the word "Pan-Coast" on ventilators not infringing the patents. Janney v. Pan-Coast V. & Mfg. Co., 128 Fed. 121.

1. Wyckoff v. Howe Scale Co. [C. C. A.] 122 Fed. 348; Royal Baking Powder Co. v. Royal [C. C. A.] 122 Fed. 337; Allen B. Wrisley Co. v. Iowa Soap Co. [C. C. A.] 122 Fed. 796; Enoch Morgan's Sons Co. v. Whittier-Coburn Co., 118 Fed. 657.

2. Bissell Chilled Plow Works v. Bissell Plow Co., 121 Fed. 357.

3, 4. "Eight day" malt sold only to brewers. Manitowoc Malting Co. v. Milwaukee Malting Co., 119 Wis. 543, 97 N. W. 389.

5, 6. Regis v. Jaynes & Co. [Mass.] 70 N. E. 480.

7. Defendant acquired glue of plaintiffs in bulk and put up in small packages and sold it as plaintiff's glue. The court held there was no misrepresentation and equity would not interfere. Russia Cement Co. v. Frauenhar, 126 Fed. 228.

8. Burned out electric incandescent lamps. General Elec. Co. v. Re-New Lamp Co., 128 Fed. 154.

9. Placing the trade mark inside the stem of an electric lamp is not such a place. General Elec. Co. v. Re-New Lamp Co., 128 Fed. 154.

10. Bickmore Gall Cure Co. v. Karns Mfg. Co., 126 Fed. 573.

11. Where the defendant does a mail order business it need have no stock on hand, it not appearing that the purchasers are imposed upon further than being brought

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regardless of property rights in a name,[12] equity will interfere against unfair or deceptive competition or use of a name, even though not a good trade mark, because of its proper, descriptive or geographical character.[13] Cases arising out of unfair competition, defrauding the public, are analogous to those of violation of trade mark.[14] Substantial lack of truth in a trade mark or trade label debars it from protection at the hands of a court of equity.[15]

§ 4. *Remedies and procedure.*—Courts cannot restrain infringement of trade mark or unfair competition carried on in a foreign country because of jurisdiction acquired over the parties.[16]

For violation of trade marks, redress may be had at law to recover damages or in equity to restrain infringement and to recover the gains and profits of the one violating the trade mark.[17] The recovery is not limited to what complainant would have profited,[18] and if a defendant incurs no definite added expense, he is not entitled to a deduction for expenses.[19] In case of confusion of names, the court may order all mail, bearing in the address the particular words, delivered to the injured party.[20]

To warrant equitable relief of injunction in restraint of the infringement of trade marks, there must be shown the fact of an imitation and that such imitation is made without the license or acquiescence of the owner.[21] In cases of unfair competition, the action is based on deception, unfairness and fraud, and this fraud should be generally proved and not presumed as in cases of trade mark.[22]

into correspondence with the defendant by means of the advertisement. Winchester Repeating Arms Co. v. Butler Bros., 128 Fed. 976.

12. Equity will grant an injunction, irrespective of the property rights in a name, to restrain the use of a trade mark calculated to deceive the public into the belief that an article is the product of the owner of the trade mark. Sherlock Holmes, Detective. Hopkins Amusement Co. v. Frohman, 202 Ill. 541, 67 N. E. 391.

13. A. Bauer & Co. v. Siegert [C. C. A.] 120 Fed. 81; Vacuum Oil Co. v. Climax Ref. Co. [C. C. A.] 120 Fed. 254; Globe-Wernicke Co. v. Brown, 121 Fed. 185. Persons doing business, but not incorporated, as the "American Watchman's Clock Co.," and having taken steps to incorporate by that name, will be protected as against a competitor who then takes that name and succeeds in being first incorporated. Pettes v. American Watchman's Clock Co., 89 App. Div. [N. Y.] 345. If one has used a personal or descriptive name to such an extent that his goods are known in the market by that name, the use of that name may be restrained as unfair competition. Bissell Chilled Plow Works v. Bissell Plow Co., 121 Fed. 357; Viano v. Baccigalupo, 183 Mass. 160, 67 N. E. 641; Drake Medicine Co. v. Giessner, 68 Ohio St. 337, 67 N. E. 722. Business established for the purpose of engaging in competition under same name and then incorporated by person so named and others. Wm. G. Rogers Co. v. International Silver Co. [C. C. A.] 118 Fed. 133.

14. N. K. Fairbank Co. v. Windsor, 118 Fed. 96.

15. A proprietary medicine label which falsely states that the medicine is put up by a physician will not be protected by injunction. Lemke v. Dietz [Wis.] 98 N. W. 936.

16. Vacuum Oil Co. v. Eagle Oil Co., 122 Fed. 105.

17. Fairbank Co. v. Windsor, 118 Fed. 96. Use of a trade mark by others will be restrained. Keuffel & Esser Co. v. Crocker Co., 118 Fed. 187; Computing Scale Co. v. Standard Computing Scale Co. [C. C. A.] 118 Fed. 965. Party will be restrained from purloining a rival's methods of dressing his goods. National Biscuit Co. v. Swick, 121 Fed. 1007; Enterprise Mfg. Co. v. Landers, 124 Fed. 923. An accounting will not be ordered in a suit for infringement of a trade mark, where it appears from evidence in the case that there is no rational rule by which profits realized by the defendant could be estimated. Ludington Novelty Co. v. Leonard [C. C. A.] 127 Fed. 155.

18. In a suit to recover profits, the complainant is entitled to the profits made by the defendant, whether more or less than the complainant might have made. Fairbank Co. v. Windsor, 118 Fed. 96.

19. Fairbank Co. v. Windsor, 118 Fed. 96.

20. Where defendant fraudulently adopted a similar name to that of complainant using the words "Bent Glass," the court ordered that all mail received by the defendant containing the words "Bent Glass" be turned over to complainant. Brown v. Braunstein, 83 N. Y. Supp. 1096.

21. Gaines v. Sroufe, 117 Fed. 965.

22. Von Faber v. Faber, 124 Fed. 603; Allen B. Wrisley Co. v. Iowa Soap Co. [C. C. A.] 122 Fed. 796; Daviess County Distilling Co. v. Martinoni, 117 Fed. 186; Fairbank Co. v. Windsor [C. C. A.] 124 Fed. 200. Complaint must charge simulation of marks by the defendant so as to deceive the public or that the use of the marks is fraudulent in some manner. Woodcock v. Guy, 33 Wash. 234, 74 Pac. 358.

If similarity is not plain and indisputable, the complainant must prove deception. In an action to restrain an infringement showing mere similarity of words, it is insuffi-

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Where a person dresses his goods so that it tends to deceive a purchaser into the belief that they are the goods of another and further has infringed the rights secured by a registered trade mark, it does not appear necessary to furnish specific proof of purchases by persons actually deceived.[23] Infringement will be enjoined, though the complainant suffers no monetary loss.[24] Under the statutes of some states for the protection of labels, trade marks, etc., it must be shown that defendant knew his label was a counterfeit,[25] and in order to recover profits, damages must be proven.[26] Under an act making the sale of merchandise with a counterfeit label unlawful, knowledge of the seller is immaterial.[27]

Relief will not be granted unless it appear that there was a probability of injury to complainant by which he suffered either a pecuniary loss or such embarrassment or confusion as would tend to injury.[28] A preliminary injunction will not be granted to restrain unfair competition, upon conflicting evidence, if complainant is guilty of laches,[29] but laches without more is not sufficient to interfere with a complainant's right to injunction, though it may affect his right to damages for past infringement.[30] If, however, by laches a complainant allows a trade name to become generic and indicative of the character of the goods, equity will not restrain the use of this trade name by the defendant.[31] A preliminary injunction will be granted to restrain a dealer from substituting another article similar in appearance for one called for.[32]

Where a trade mark contains false representations with respect to the article on which it is used, it will not be protected by a court of equity,[33] even though the articles are equally good.[34] A person falsely advertising goods as patented will not be granted relief in equity to restrain a person using his trade mark.[35] Where a party voluntarily makes such use of its trade mark as to cause confusion

cient without proof that the form of manufacture, names, labels, shape of boxes or receptacles in which they are sold are so similar as to raise a reasonable probability that purchasers using ordinary care will be deceived by the similarity of names. Regis v. Jaynes & Co. [Mass.] 70 N. E. 480. There being no evidence that any one was ever deluded by the use of letters of the alphabet to designate quality into the belief that he was buying complainant's goods instead of defendant's and that the buyers did not rely upon the letters as earmarks of complainant's manufacture, the plea of unfair competition fails. Stevens Linen Works v. William & John Don & Co. [C. C. A.] 127 Fed. 950. Yama-Mai and Ma-mie held not similar and no fraudulent intent was shown, hence equity would not enjoin use of name. Boessneck v. Iselin, 83 App. Div. [N. Y.] 290.

22. National Biscuit Co. v. Swick, 121 Fed. 1007; Manitowoc Malting Co. v. Milwaukee Malting Co., 119 Wis. 543, 97 N. W. 389. A person is entitled to an injunction for the infringement of his trade mark without proof of damages. Gannert v. Rupert [C. C. A.] 127 Fed. 962.

24. Regis v. Jaynes & Co. [Mass.] 70 Mass. 480.

25. Code of Iowa, § 5050. Delivery of goods, sold before such knowledge, after notification, is sufficient. Beebe v. Tolerton & Stetson Co., 117 Iowa, 593, 91 N. W. 905.

26. Code of Iowa, § 5050. Beebe v. Tolerton & Stetson Co., 117 Iowa, 593, 91 N. W. 905.

27. The statute not limiting liability to "willfully and knowingly selling." Construing New Jersey P. L. 1898, p. 83. Cigar Makers' International Union v. Goldberg [N. J. Law] 57 Atl. 141.

28. Gannett v. Ruppert, 119 Fed. 221; Kipling v. G. P. Putnam's Sons [C. C. A.] 120 Fed. 631; Brown v. Braunstein, 83 N. Y. Supp. 1096.

29. Parties active competitors for a year and a half. Burns Co. v. Burns Co., 118 Fed. 944.

30. Bissell Chilled Plow Works v. Bissell Plow Co., 121 Fed. 357. Where the complainant has been guilty of laches, a court of equity will refuse a prayer for an accounting of profits for infringing a trade mark. Allowed defendant to continue his business as an individual for three years and as a corporation for one year, the defendant all the time spending large sums in building up his business, held barred by laches to demand an accounting of profits. International Silver Co. v. William H. Rogers Corp. [N. J. Eq.] 57 Atl. 725.

31. French Republic v. Saratoga Vichy Spring Co., 194 U. S. 427.

32. N. K. Fairbanks Co. v. Dunn, 126 Fed. 227.

33. Clinton E. Worden & Co. v. Cal. Fig Syrup Co., 187 U. S. 516, 47 Law. Ed. 282. Statements of opinion not fraudulent. Newbro v. Undeland [Neb.] 96 N. W. 635.

34. Old Style Nelson County Pure Rye made in Cincinnati. Uri v. Hirsch, 123 Fed. 568.

35. Preservaline Mfg. Co. v. Heller Chemical Co., 118 Fed. 103.

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in the trade so that a competitor cannot do business without involuntarily using the other's trade mark, a court of equity will not grant a preliminary injunction.[36]

In proceedings to restrain unfair competition, a court will not go into a defense as to the merits of the article where it has become an article of commercial value.[37]

Res judicata extends only to the precise point presented by the pleadings and decided by the ruling upon a demurrer, hence new suits on a different violation may be brought.[38]

§ 5. *Statutory registration, regulation and protection.*—The act authorizing the registration of trade marks is strictly limited to lawful commerce with foreign nations and with Indian tribes.[39] The right to a trade mark does not emanate from the United States, but a registration under the statute is only prima facie evidence of such right.[40] Though the registration of a valid trade mark be void, the validity of the trade mark is not thereby nullified or injuriously affected.[41] One cannot appropriate by registration signs or symbols which have come to have well known significance in trade as indicative of quality or grade.[42]

Registered names include only what is on the registered copy.[43]

The states may enact statutes for the protection of trade marks within their constitutional limitations.[44]

In some states by statute an individual is prohibited from doing business in a firm name.[45] The purchasing or refilling of trade-marked[46] packages is criminal in Indiana if done with fraudulent intent toward the owner.[47]

36. Complainant placed its trade mark on the inside of electric light bulbs so that the defendant could not remake the lights without using the complainant's trade mark. General Elec. Co. v. Re-New Lamp Co., 121 Fed. 164.

37. Samuel Bros. & Co. v. Hostetter Co. [C. C. A.] 118 Fed. 257.

38. The sustaining of a demurrer to a bill alleging that complainant, a manufacturer of labels, had adopted numbers from 1001 to 1007 to indicate certain labels and that defendant was using the numbers 3001 to 3007 to designate the same shape labels is no bar to a second suit for unfair competition on the ground that defendant used the same numbers as complainant and the same color borders on its labels. Dennison Mfg. Co. v. Scharf Tag, L. & B. Co. [C. C. A.] 121 Fed. 313.

39. Warner v. Searle & Hereth Co., 191 U. S. 195.

40. A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co., 123 Fed. 149; Ohio Baking Co. v. National Buscuit Co. [C. C. A.] 127 Fed. 116. Where a trade mark has not been registered as required by statute, a complaint for infringement must be tested by rules of the common law. Woodcock v. Guy, 33 Wash. 234, 74 Pac. 358. Presupposes the existence of a valid trade mark which may be registered in compliance with the law. [Act Mar. 3, 1881, c. 138, 21 Stat. 502, 1 Supp. Rev. St. p. 322 (U. S. Comp. St. 1901, p. 3401)]. Edison v. Thomas A. Edison Jr. Chemical Co., 128 Fed. 1013.

41. May maintain an action for infringement. Edison v. Thomas A. Edison Jr. Chemical Co., 128 Fed. 1013.

42. "600" used in oil trade indicating heat test. Vacuum Oil Co. v. Climax Refining Co. [C. C. A.] 120 Fed. 254.

43. Where on the copy of a union label filed with the secretary of state, the place for the signature of the president was blank, the signature is not a part of the device. Hence setting up the label in a pleading without the signature is not a variance. State v. Niesmann, 101 Mo. App. 507, 74 S. W. 638.

44. Act May 11, 1901 (Hurd's Rev. St. 1901, p. 1793) is unconstitutional as special legislation. Horwich v. Walker-Gordon Laboratory Co., 205 Ill. 497, 68 N. E. 938. The New Jersey statute (P. L. 1898, p. 83), relating to the sale of merchandise with a counterfeit label, is not unconstitutional. Cigar Makers' International Union v. Goldberg [N. J. Law] 57 Atl. 141. Acts 24th Gen. Assem. c. 36 [§ 5050, Iowa Code] is not unconstitutional in that the subject is not sufficiently expressed in the title. Beebe v. Tolerton & Stetson Co., 117 Iowa, 593, 91 N. W. 905. Act May 11, 1901 (Hurd's Rev. St. 1901, p. 1793), prohibiting the selling or using of boxes, bottles, etc., bearing the registered mark of the owner without his written consent, is not a valid exercise of the police power. Horwich v. Walker-Gordon Laboratory Co., 205 Ill. 497, 68 N. E. 938.

45. Pen. Code, § 363b. Although violating the statute, he may recover for goods sold and delivered. Doyle v. Shuttleworth, 41 Misc. [N. Y.] 42. The carrying on of business by two brothers named Castle under the firm name of "Castle Bros." is not a violation of that statute. Castle Bros. v. Graham, 87 App. Div. [N. Y.] 97.

46. An indictment, under Burns' Rev. St. 1901, § 8680b, for illegally purchasing stamped bottles, should show that the original owner of the bottles had filed a written description of the stamp with the clerk of the circuit court and published said description as required by § 8678. State v. Barnett, 159 Ind. 432, 65 N. E. 515.

47. In Indiana, an indictment for refilling

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TRADE UNIONS.

§ 1. Nature of Trade Union (1888).
§ 2. The Union and the Public (1888).
§ 3. The Union and Its Members (1889).
§ 4. Members and the Union (1889).

§ 1. *Nature of trade union.*—Trade unions are voluntary unincorporated associations, whose principal object is the control or regulation by the association or combination of the individual action of its members in matters of contract or trade relating to their occupation or profession,[48] for the purpose of increasing their rate of wages and generally improving the conditions of their employment. The right of workmen to combine freely to refuse to be employed by any employer who sees fit to employ workmen of whom they disapprove or sees fit in any respect to conduct his business contrary to their views is undisputed,[49] and the right of employers to similarly combine is also undeniable;[50] but an effort on the part of a union or its members to force higher wages for its associates by unlawful interference with the right of others not associated with them to labor will be restrained,[51] and a combination by a union to prevent others from obtaining work by threats of a strike, or to prevent an employer from employing others by threats of a strike, is unlawful, though not punishable by indictment, and is in contravention of the letter and spirit of the declaration of rights.[52] So also a combination of merchants formed for the purpose of depriving another of the opportunity to buy goods and drive him out of business.[53]

§ 2. *The union and the public.*—The anti-trust statute of Nebraska is not invalid because it exempts trade and labor unions from its operation.[54] The New Jersey statute prohibiting the sale of articles bearing a counterfeit union label is valid,[55] and a scienter is not a necessary element of a cause of action for a penalty thereunder.[56] Where the purpose of an organization is to impose restrictive conditions on the individual right of contract and on the conduct of a trade, and to secure within a certain district the monopoly, so far as possible, of a particular kind of labor, equity will not interfere by injunction or otherwise to compel con-

labeled or stamped bottles must allege that it was done with intent to defraud the owner of the bottles. State v. Wright, 159 Ind. 422, 65 N. E. 289.

48. O'Brien v. Musical Mut. Protective & B. Union [N. J. Eq.] 54 Atl. 150; Atkins v. W. & A. Fletcher Co. [N. J. Eq.] 55 Atl. 1074; Erdman v. Mitchell, 207 Pa. 79; Gulf Bag Co. v. Suttner, 124 Fed. 467; Gray v. Building, Trades & Council [Minn.] 97 N. W. 663; Froelich v. Musicians' Mut. Ben. Ass'n, 93 Mo. App. 383; Burnetta v. Marceline Coal Co. [Mo.] 79 S. W. 136; United Brotherhood of Carpenters & Joiners v. Dinkle [Ind. App.] 69 N. E. 707.

49. Atkins v. W. & A. Fletcher Co. [N. J. Eq.] 55 Atl. 1074; Erdman v. Mitchell, 207 Pa. 79; Gulf Bag Co. v. Suttner, 124 Fed. 467; W. P. Davis Mach. Co. v. Robinson, 41 Misc. [N. Y.] 329; Gray v. Building, Trades & Council [Minn.] 97 N. W. 663. A bill alleging that defendant by "threats of intimidation and coercion, and otherwise, interfered with plaintiffs and others of its employes," because they united with a union, states a mere conclusion and cannot be the basis of an injunction without a statement of the facts constituting such intimidation and coercion. Boyer v. Western Union Tel. Co., 124 Fed. 246.

50. Atkins v. W. & A. Fletcher Co. [N. J. Eq.] 55 Atl. 1074.

51. Gulf Bag Co. v. Suttner, 124 Fed. 467. A bill held to show an interest entitling complainant to sue alone, and parties defendant had no such common title as to be alignable as plaintiffs to defeat jurisdiction. Carroll v. Chesapeake & O. Coal Agency Co. [C. C. A.] 124 Fed. 305. Mortgagee suing for injunction against strikers need not join mortgagor where so doing would oust jurisdiction. Ex parte Haggerty, 124 Fed. 441.

52. Common law conspiracy is not punishable in Pennsylvania. Acts 1872 (P. L. 1175), 1876 (P. L. 45), and 1891 (P. L. 300). Erdman v. Mitchell, 207 Pa. 79; Gray v. Building, Trades & Council [Minn.] 97 N. W. 663; Froelich v. Musicians' Mut. Ben. Ass'n, 93 Mo. App. 383; W. P. Davis Mach. Co. v. Robinson, 41 Misc. [N. Y.] 329.

53. Cleland v. Anderson [Neb.] 92 N. W. 306.

54. Comp. St. 1901, ch. 91a. Such unions would not be within its terms if not exempted. Cleland v. Anderson [Neb.] 92 N. W. 306.

55. P. L. 1898, p. 83. Cigar Makers' International Union v. Goldberg [N. J. Law] 57 Atl. 141.

56. Cigar Makers' International Union v. Goldberg [N. J. Law] 57 Atl. 141.

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tinuance of membership therein, and thus indirectly enforce performance of restrictive regulations amounting to an unjustifiable interference with the freedom of contract and of trade.[57] Neither is the right of such an association, engaged in supporting a strike, to freedom in the labor market, so that it can readily employ pickets and other agents in carrying on its industrial warfare, a proper subject of protection by means of injunction.[58] On the other hand, a conspiracy by a number of persons that they will by threats and strikes, deprive a mechanic of the right to work for others because he does not join a particular union, will be restrained.[59] Since, in the absence of contractual relations for service and employment for a particular time, an employer or employe may terminate the relation at any time he sees fit, with or without cause, it is not unlawful for an employer to discharge an employe, though his purpose in so doing be to disrupt a union;[60] hence such action will not be enjoined at the suit of the members of the union.[61] Nor will the keeping of a book wherein the cause for such discharge is recorded be enjoined, though it is kept open for the inspection of other employers.[62]

§ 3. *The union and its members.*—The union cannot bind its individual members by any agreement with mine operators in respect to the performance of work, and the time and manner of payment.[63] Where the union, in addition to its ordinary features, constitutes itself a mutual benefit society, it is subject, so far as forfeiture of benefits for nonpayment of dues and assessments are concerned, to the rules applicable to societies organized for that purpose alone.[64]

§ 4. *Members and the union.*—One who never was a member, nor entitled to membership in a union is not entitled to an injunction restraining his expulsion therefrom, however illegal the grounds alleged may be.[65] Equity will not attempt by injunction to control rights of membership in a voluntary unincorporated association, where no right of property is involved, and the party has not exhausted his remedies by appeal to the highest tribunal within the association,[66] but a member will be given relief against expulsion without primary resort to remedies in the union if such is impracticable or of doubtful adequacy.[67] In this respect the rights of members of associations generally are similar.[68]

TREATIES.

A nation may abrogate a treaty, as it may make a treaty, on its own motion, upon its own responsibility.[69] But a nation cannot at its pleasure abrogate one

57. O'Brien v. Musical Mut. Protective & B. Union [N. J. Eq.] 54 Atl. 150; Froelich v. Musicians' Mut. Ben. Ass'n, 93 Mo. App. 383.

58. Atkins v. W. & A. Fletcher Co. [N. J. Eq.] 55 Atl. 1074.

59. Erdman v. Mitchell, 207 Pa. 79; W. P. Davis Mach. Co. v. Robinson, 41 Misc. [N. Y.] 329. See title Conspiracy, 1 Curr. Law, p. 566.

60, 61, 62. Boyer v. Western Union Tel. Co., 124 Fed. 246.

63. Burnetta v. Marceline Coal Co. [Mo.] 79 S. W. 136.

64. United Brotherhood of Carpenters & Joiners v. Dinkle [Ind. App.] 69 N. E. 707; Froelich v. Musicians' Mut. Ben. Ass'n, 93 Mo. App. 383.

See Fraternal and Mutual Benefit Associations, 2 Curr. Law, p. 79.

65. Expelled on ground of membership in state militia. Potter v. Sheffer, 40 Misc. [N. Y.] 46.

66. O'Brien v. Musical Mut. Protective & B. Union [N. J. Eq.] 54 Atl. 150; Froelich v. Musicians' Mut. Ben. Ass'n, 93 Mo. App. 383. If incorporated, plaintiff's right would be enforceable by mandamus. O'Brien v. Musical Mut. Protective & B. Union [N. J. Eq.] 54 Atl. 150.

67. He was obliged to prosecute appeal at a great distance; papers had been refused for that purpose until he paid a fine: and the ground for expulsion was an offense against the person who was to preside over such appeal if taken. Corregan v. Hay, 87 N. Y. Supp. 956.

68. See Associations and Societies, 1 Curr. Law, p. 233.

69. The James & William, 37 Ct. Cl. 302.

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article of a treaty and leave all the other obligations in effect, binding the other power.[70] Acts of Congress supersede a former treaty,[71] but a treaty is superior to state laws.[72] Until the ratifications are exchanged it is competent for either power or both to recede and rescind its action.[73]

In so far as it affects private rights a treaty does not take effect until the exchange of ratifications,[74] nor does the doctrine of relation apply.[75] Courts will take judicial notice of the acquiring of territory by treaty.[76] The most favored nation clause in treaties relates to duties, rights, and benefits in the ports of either ally, and are not affected by a treaty of either with another nation.[77] Provisions defining what is to be regarded as contraband or noncontraband relate strictly to the procedure between the two nations in time of war.[78]

A treaty with Indians in violation of the constitution is void.[79] Congress may pass laws in conflict with, and abrogating treaties with the Indians.[80] The treaty of an Indian tribe is paramount to their laws.[81]

In construing any treaty between the United States and an Indian tribe, the treaty must be construed, not according to the technical meaning of its words to lawyers, but in the sense in which they would be naturally understood by the Indians.[82] By its treaties with the Indian tribes the United States has evinced no intention to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people.[83]

70. Treaty of 1778 with France declared that tar and turpentine "shall not be reputed contraband." Treaty with Great Britain 1795 declares tar and turpentine contraband, held, did not release France from any obligation of the treaty of 1778. The James & William, 37 Ct. Cl. 303.

71. Treaty with Greece 1837, superseded by acts of Congress. In re Ellis, 124 Fed. 637. The power of Congress to regulate immigration is superior to the treaty making power. U. S. v. Tuck Lee, 120 Fed. 989.

72. Doe v. Roe [Del.] 55 Atl. 341.

73. Armstrong v. Bidwell, 124 Fed. 690.

74. The treaty with Spain by which Porto Rico and the Philippines were ceded to the United States did not become effective for the purposes of the tariff laws until the exchange of ratifications. Armstrong v. Bidwell, 124 Fed. 690; De Pass v. Bidwell, 124 Fed. 615; American Sugar Ref. Co. v. Bidwell, 124 Fed. 677. All of that day is subject to the treaty. Howell v. Bidwell, 124 Fed. 688.

75. Armstrong v. Bidwell, 124 Fed. 690; American Sugar Ref. Co. v. Bidwell, 124 Fed. 677.

76. That the Philippine Islands became part of the United States territory under the Treaty of Paris between the United States and the kingdom of Spain. La Rue v. Kansas Mut. Life Ins. Co. [Kan.] 75 Pac. 494.

77. The James & William, 37 Ct. Cl. 303.

78. Under the treaty of 1778 with France, goods carried by a vessel of either ally which had the passport authorized thereby were free goods. The James & William, 37 Ct. Cl. 303.

79. The Atoka agreement is not void on the ground that Congress delegated its legislative powers, violating sections 1, 7, art. 1, of the constitution of the United States. Ansley v. Ainsworth [Ind. T.] 69 S. W. 884.

80. By the treaty of 1867 (Medicine Lodge treaty) with the Kiowa, Comanche, and Apache Indians, Congress was not precluded from passing a law (June 6, 1900, 31 St. at L. 677, c. 813) providing for allotments to the Indians in severalty. Lone Wolf v. Hitchcock, 187 U. S. 553, 47 Law. Ed. 299.

The adoption of the Atoka agreement by Congress and the authorization of its adoption by the Choctaw and Chickasaw Nations is valid, notwithstanding former treaties, and constitutions or contracts existing under them, to the contrary. Ansley v. Ainsworth [Ind. T.] 69 S. W. 884.

81. Section 18 of art. 7 of the constitution of the Choctaw Nation is void, being in violation of the treaty of 1855 between the Choctaw and Chickasaw Nations. Ansley v. Ainsworth [Ind. T.] 69 S. W. 884.

82. Terms "half blood" and "mixed blood" are to be given their ordinarily understood meaning, and no distinction can be drawn between those who derive their Indian blood from the mother and those who derive it from the father. Construing treaty of 1865 of the Omaha Indians with reference to allotments of land. Also treaty of 1830 by which the "Nemaha Reservation" was assigned for the use and occupancy of half breeds. Sloan v. U. S., 118 Fed. 283.

83. The above rule was not changed by the treaties of Washington (1846 and 1866) by which the United States guaranteed to the Cherokees the title and possession of their lands, and jurisdiction of their country. Nor by the treaty of New Echota (1835). Ansley v. Ainsworth [Ind. T.] 69 S. W. 884.

The words "ceded to said nation" (United States) used on the part of an Indian tribe in a treaty with the United States does not signify that the Indians had any right or title to the lands "ceded" other than the right of occupancy. The treaty of 1830 and patents of the United States in 1842 to the Choctaw Nation simply expressed what was meant by the treaty of 1820. Id.

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TRESPASS.

§ 1. Acts Constituting Trespass and Right of Action Therefor (1891).
§ 2. Actions (1895). A. At Law (1895). B. In Equity (1898).
§ 3. Damages and Penalties (1900).
§ 4. Criminal Liability (1903).
§ 5. Trespass to Try Title (1903).

§ 1. *Acts constituting trespass and right of action therefor.*—Trespass is an interference with possessory rights.[84] Thus it is a trespass to enter under a void conveyance[85] or a void lease,[86] unless the true owner received the rent.[87] It is a trespass to interfere with the possession of one holding under a valid lease[88] or if one has actual possession of land for one without title to intrude upon him,[89] as by taking possession from an officer holding as custodian in law,[90] or to enter after a license to do so has expired.[91] It is a trespass for an officer to unlawfully search a house for incriminating evidence.[92] It is a trespass to overflow the lands of another,[93] or to exceed the servitude made by an easement.[94] Trespass may be maintained for placing an obstruction upon a structure which is part of the realty.[95]

In many of the southern and western states the owner of cattle is not liable

84. One claiming damages for trespass for removing a house from her lot could not recover for the removal of so much of the house as was located on an adjoining lot which was owned by the trespasser. Jones v. Kennedy [Ala.] 35 So. 455. Where a trustee was appointed to take charge of an award of land taken for highway purposes and he wrongfully tore down buildings thereon, he was liable for trespass. Wilson v. Wilson [R. I.] 56 Atl. 773. Where one built a fence on what he claimed to be the line between himself and an adjoining owner who was in possession and also claimed to own it, he was a trespasser. Currier v. Jones, 121 Iowa, 160, 96 N. W. 766.

85. A wife owned certain land, her husband sold part of it to another but the wife refused to execute a deed, and after this the purchaser entered and cut timber on the land. Helton v. Belcher, 24 Ky. L. R. 927, 70 S. W. 295. Title bond and commissioners' deed held admissible. Id. One under parol grant buried his dead in a free part of a cemetery, and his possession thereto was quieted by ordinance. The city subsequently conveyed to another who had notice of all the facts. Such grantee was a trespasser in disturbing such possession. Wilkinson v. Strickland [Miss.] 35 So. 177.

86. A guardian leased the estate of his ward which he had no power to do. Haskell v. Sutton, 53 W. Va. 206.

87. Hendrickson v. Dwyer [N. J. Err. & App.] 57 Atl. 420.

88. Lease to public lands. Lake, Tomb & Co. v. Copeland, 31 Tex. Civ. App. 358, 72 S. W. 99.

89. One in possession claiming to a marked boundary. There were exceptions in deeds in his chain of title indicating that he had not title to all he claimed; another entered under a void patent. Crate v. Strong, 24 Ky. L. R. 710, 69 S. W. 957. To disturb a peaceable possession by force is a trespass irrespective of ownership. Dold v. Knudson [Neb.] 97 N. W. 482.

90. Property had been sequestered and while the sheriff, who had legal possession, was absent another took actual possession and secured a temporary injunction against the sheriff, which was dissolved. State v. King, 110 La. 961.

91. Where one had a right to cut and remove timber from land within 5 years, he had no right to enter after that time. Bunch v. Elizabeth City Lumber Co. [N. C.] 46 S. E. 24. And where no time is set at which the five years begins to run, it will be deemed from a reasonable time and thirteen years is unreasonable. Id. An offer to sell timber on certain land was made; there was nothing in the offer on which an assumption could be based that the offeree was to have an unusual length of time to accept, and he never did accept, but two years later went on the land and cut timber. He was a trespasser. Nickerson v. Allen Bros. & Wadley, 110 La. 194. One had a right to operate a tramway over land for 5 years; held he was a trespasser after that time. Leigh v. Garysburg Mfg. Co., 132 N. C. 167. The continuance upon the premises of water pipes laid under a parol license is a trespass against a subsequent purchaser. Jayne v. Cortland Waterworks Co., 42 Misc. [N. Y.] 263.

92. Where officers without a warrant followed bloodhounds to a house and searched it for stolen chickens, evidence as to whether or not they searched the house with the owner's permission held a question for the jury. McClurg v. Brenton [Iowa] 98 N. W. 881.

93. Contractor in blasting caused a waterpipe to burst which had been negligently laid by the city. Wheeler v. Norton, 86 N. Y. Supp. 1095. A contractor in blasting bursted a water pipe which had been laid on the rock and not on sand as required by ordinance. Wheeler v. Norton, 84 N. Y. Supp. 524.

94. Where a railroad company, having a right to maintain only a single track in a highway, without permission of abutting owners or condemnation proceedings, constructs switches and sidings in such highway, it is a trespasser and may be enjoined therefor by an abutter. Stephens v. New York, O. & W. R. Co., 175 N. Y. 72, 67 N. E. 119.

95. Hennessy v. Anstock, 19 Pa. Super. Ct. 644.

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for trespass committed by them, unless they have broken through a sufficient fence.[96] Knowledge on part of the owner of the breachy nature of the cattle is not an essential element.[97] It is not a willful trespass to turn cattle out to graze unrestrained on public land, knowing that they will wander on the unenclosed range of another;[98] but one who knowingly drives infected cattle on a range and thereby spreads disease to other cattle is a wrongdoer.[99] It is no trespass for one to put into a common pasture more cattle than his part of the land can support,[1] especially if they could pass out on the open range.[2] While an implied promise to pay for such use of the land can be presumed,[3] it could not be recovered in an action of trespass.[4]

Interfering with one's goods as by an illegal levy[5] or by exceeding contract rights to take wrongful possession[6] is a trespass. Such acts are usually remedied in trover.[7]

It is a trespass to the person if a force be set in motion which directly strikes one.[8] Such a trespass is an assault, the civil liability for which has been fully treated elsewhere.[9] It is not a trespass for a man to merely solicit a woman to have sexual intercourse.[10]

Parties in the wrong.—One who gives a license coextensive with all his right and "none other," having no rights at all, is not a trespasser by the licensee's entry.[11] A master is liable for a trespass committed by the servant within the scope of his employment,[12] even though the act be wanton or willful.[13] A municipal corporation is liable in trespass for the acts of its agents in entering on pri-

96. Perry v. Cobb [Ind. T.] 76 S. W. 289. Where cattle broke into a cornfield, the court refused to charge that cattle are to be fenced out rather than fenced in, but charged that cattle had a right to run at large and the owner was not liable unless they were breachy, and the question was whether plaintiff had a sufficient fence. Held no error. Id.

97. Perry v. Cobb [Ind. T.] 76 S. W. 289. Where cattle broke through a fence into a cornfield, evidence that the cattle were not breachy the year before was inadmissible. Id.

98. Martin v. Platte Valley Sheep Co. [Wyo.] 76 Pac. 571. In an action to enjoin the driving of cattle over plaintiff's lands, evidence held insufficient to show that there had ever been a trespass. Id.

99. Evidence held for the jury as to whether the cattle were diseased and whether the owners knew they were diseased. The cattle were driven over in the nighttime stealthily. Truskett v. Bronaugh [Ind. T.] 76 S. W. 294.

1. Both parties to this action owned land enclosed by a fence which neither had anything to do in erecting. Haskins v. Andrews [Wyo.] 76 Pac. 588. Where one turned into a common pasture more cattle than his land would support, an instruction that he was under no obligation to keep his cattle off his neighbor's land was properly refused as misleading. Id.

2. Where one put into a common pasture more cattle than his land would support, evidence that the fence was down so the cattle could pass out on the open range is admissible. Haskins v. Andrews [Wyo.] 76 Pac. 588.

3. Lazarus v. Phelps, 156 U. S. 202.

4. Haskins v. Andrews [Wyo.] 76 Pac. 588.

5. Attachment on exempt property. Ahearn v. Connell [N. H.] 56 Atl. 189. When officer executing a writ of attachment went to the debtor's house in the early hours of the morning, and seized and carried away his wife's property, evidence held to show a trespass. Hay v. Collins, 118 Ga. 243. See, also, Sheriffs and Constables, 2 Curr. Law, p. 1640. Attachment, 1 Curr. Law, p. 239; Executions, 1 Curr. Law, p. 1178.

6. A contract for construction, giving the engineer in charge the right to "take any measure he might think proper to complete the work in time," after notice to the contractor, gave no authority to the engineer or employer to take buildings and tools of the contractor without his consent. Montgomery Water P. Co. v. William A. Chapman & Co. [C. C. A.] 126 Fed. 68.

7. See Conversion as Tort, 1 Curr. Law, p. 705.

8. Where a brakeman attempted to lock some boys in a car and in closing the door shoved it violently against one of the boys, he was guilty of a trespass. Emmons v. Quade, 176 Mo. 22, 75 S. W. 103.

9. Assault and Battery, 1 Curr. Law, p. 218.

10. There was no assault. Reed v. Maley, 25 Ky. L. R. 209, 74 S. W. 1079.

11. Caughie v. Brown, 88 Minn. 469, 93 N. W. 656.

12. The master told the servant to collect the gas bill or remove the meter. The servant was acting within the scope of his employment in removing the meter by force. Reed v. New York & R. Gas Co., 87 N. Y. Supp. 810.

13. Damages for insult and invasion of privacy allowed. Reed v. New York & R. Gas Co., 87 N. Y. Supp. 810.

See full treatment Master and Servant, 2 Curr. Law, p. 801.

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vate land by order of the town council for the purpose of laying out a highway thereon.[14]

Title or right to possession is essential to the maintenance of the action,[15] not of an entire tract but of that trespassed upon.[16] In order that one not holding the legal title may maintain trespass, he must show actual possession at time the trespass was committed.[17] The holder of the equitable title[18] or one holding a leasehold interest can maintain trespass,[19] and one owning a right to shoot on land may sue for a trespass against such right;[20] but one who has neither title nor right of possession cannot,[21] nor can a grantee for a trespass committed against his grantor and which is barred by limitations,[22] and one may be estopped by his conduct to bring the action.[23]

14. Hathaway v. Osborne [R. I.] 55 Atl. 700. See Agency, 1 Curr. Law, p. 43; Municipal Corporations, 2 Curr. Law, p. 940. One buried his dead on free lots in a cemetery to which possession was quieted in him by ordinance. The city subsequently conveyed the lots to another. Wilkinson v. Strickland [Miss.] 35 So. 177. In Kentucky, an owner not in possession may maintain trespass for the cutting of timber and destruction of monuments of title. Goff v. Lowe [Ky.] 80 S. W. 219. Trespass quare clausum fregit will not lie for timber cut and removed from the land of one other than the plaintiff, although the plaintiff had purchased such timber from the owner of the land. Whitehouse Cannel Coal Co. v. Wells, 25 Ky. L. R. 60, 74 S. W. 736. Where one proved that he entered unoccupied woodland under a deed, went on the land three or four times, sent representatives on it several times, had it surveyed and never knew of any other person claiming possession for 30 years, until he learned that one was cutting wood thereon, such proof showed possession against a plea of general issue. Carpenter v. Logee, 24 R. I. 383.

15. Conflicting claims: Possession under a valid title is not disseised by possession of one claiming the same land as part of a larger tract, and having actual possession of a part of such larger tract, but no actual possession of the tract claimed by both. Kentucky Land & I. Co. v. Crabtree, 24 Ky. L. R. 743, 70 S. W. 31. Evidence showing an unbroken record title sufficient to maintain action for trespass, defendant had pleaded title by adverse possession. Cleveland, C., C. & St. L. R. Co. v. Kepler, 31 Ind. App. 1, 66 N. E. 1030. Where one's title purports to convey to him the entire tract, constructive possession will entitle him to recover against the constructive possession of one entering under title to only part of the tract until the title to the entire tract is overcome. Carpenter v. Logee, 24 R. I. 383.

Where parties having conflicting claims to uninclosed forest land are each in actual possession of but a part of their claims, the **possession of the land not actually occupied attaches to the better title.** Kentucky Land & I. Co. v. Crabtree, 24 Ky. L. R. 743, 70 S. W. 31.

Recitals in a grant that the lands had been confiscated by the grantor state held not conclusive against defendant that title was in the state. Davis v. Moyels [Vt.] 56 Atl. 174.

16. The gist of the action of trespass quare clausum is the disturbance to the possession. Either party who maintains against the other his right to that portion of the premises where the trespass was committed is entitled to judgment, without reference to the title or right of possession in the balance of the land. Profile & Flume Hotels Co. v. Bichford [N. H.] 54 Atl. 699.

17. Evidence held to show that one claiming under a contract of sale was not in actual possession. Olson v. Brooks-Scanlon Lumber Co., 89 Minn. 280, 94 N. W. 871. The burden is on the plaintiff to show that he was in possession at time of the trespass. Pennington v. Lewis [Del.] 56 Atl. 378. Where one claims title by adverse possession he must show possession to have been such at the time of the trespass. Id. Where plaintiff claimed title by adverse possession and the evidence showed nothing more than possession, it is insufficient to show trespass quare clausum fregit. Illinois Cent. R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751.

18. One holding under contract of sale. Skinner v. Terry [N. C.] 46 S. E. 517. Evidence held to show a contract to purchase. Gartner v. Chicago, R. I. & P. R. Co. [Neb.] 98 N. W. 1052. In Alabama, a contract relied on as giving one authority to take property if relied on as a defense must be specially pleaded. Montgomery Water P. Co. v. William A. Chapman & Co. [C. C. A.] 126 Fed. 68.

19. Under a North Carolina statute providing that in actions for trespass on realty the jury shall assess the entire damages to which the party aggrieved is entitled, a lessee may sue without joining the lessor. Dale v. Southern R. Co., 132 N. C. 705.

20. One who though not the owner of land has the right to fish, shoot and trap on the premises, has such an interest in the land that he may maintain trespass against another for entering such land for the purposes of shooting thereon. He may recover the penalty provided by statute. Payne v. Sheets, 75 Vt. 335.

21. The owner of timber sold it under a contract that if all the logs sawed were not paid for monthly, the contract should cease. His purchaser sold to another. Thornton v. Dwight Mfg. Co., 137 Ala. 211. Evidence did not show that the land had not been dedicated to the plaintiff city. Taylor v. Larchmont Water Co., 86 App. Div. [N. Y.] 631.

22. Railroad company entered land and constructed their road bed 30 years prior to bringing the action. Floyd v. Louisville & N. R. Co. [Ky.] 80 S. W. 204.

23. One who has laid off a strip of land for a street and recognized it as such in deeds to his grantees, though it had never been accepted by the city, cannot thereafter

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Right of entry and other matter of justification.—The law authorizes an entry under a prescriptive right,[24] or in the enjoyment of an easement;[25] but the burden is on the enterer to show such right.[26] The law authorizes one entitled to the possession of property to use lawful force to recover it.[27] It does not justify a trespass that the owner of the land has failed to comply with statutory requirements,[28] or was engaged in an illegal pool or combination,[29] or that he previously was guilty of like offenses to that for which an unlawful search and seizure was made.[30] Entry under a void license[31] or contract[32] is not justified, nor acts under advice of counsel,[33] but evidence thereof is admissible to show that it was not willful.[34]

One has a right to use such force as is necessary in repelling a trespass,[35] and it is immaterial that he acted in anger and laid violent hands on the intruder.[36]

Contributory negligence is no defense to a willful trespass to the person.[37]

A trespasser cannot avoid liability to one tenant in common by showing payment to the other.[38]

maintain trespass against one of such grantees for piling wood in such street. Davis v. Morris, 132 N. C. 435.

24. Evidence held to show right to enter land to repair a ditch. Hart v. Hoyt, 137 Cal. xix, 90 Pac. 19. That one had a right by prescription to use the land is a good defense. Pennington v. Lewis [Del.] 56 Atl. 378.

25. Where it was set up that the locus in quo was a highway, evidence held sufficient to show that it was. Schroeder v. Klipp [Wis.] 97 N. W. 909. In trespass the defense was set up that the land was a highway; evidence held to show that it was not. Arndt v. Thomas [Minn.] 96 N. W. 1125. Where it was set up in defense that the locus in quo was part of public way, evidence held sufficient to go to the jury. Clark v. Hull, 184 Mass. 164, 68 N. E. 60. Where it was set up that the locus in quo was part of a public way, a coast survey chart showing roads was admissible. Id.

26. Pennington v. Lewis [Del.] 56 Atl. 378.

27. Where a plaintiff's title was put in issue and he did not prove it, a verdict was properly directed against him. Hays v. Ison, 24 Ky. L. R. 1947, 72 S. W. 733. As between two persons, one having title but not possession and the other occupying it with a wall, the former by entering and tearing down the wall acquires possession so she may sue for the trespass and her title is a good defense against an action for trespass for the entry. Percival v. Chase, 182 Mass. 371, 65 N. E. 800. Where title was set up as a defense, evidence as to boundaries held for the jury. Rowe v. Cape Fear Lumber Co., 133 N. C. 433. Where liberum tenementum was pleaded as a defense, evidence held to show title in defendant. Kentucky Land & I. Co. v. Crabtree, 24 Ky. L. R. 743, 70 S. W. 31. In trespass for maintaining an ice runway, and taking and carrying away ice, the defendant claimed title by disseisin to the edge of the pond, and denied that plaintiff's lease covered the land under the pond. Evidence held sufficient to sustain a verdict for the defendant. Frazer v. Fuller, 184 Mass. 499, 69 N. E 217.

28. Statute provided that sale of ferry right must be made with leave of the court, that the purchaser must execute a covenant, etc., and that on failure to comply with any requirement the court shall revoke the grant. Wilson v. Sullivan, 25 Ky. L. R. 1110, 77 S. W. 193.

29. In violation of statutes. Wilson v. Sullivan, 25 Ky. L. R. 1110, 77 S. W. 193.

30. In action for forcible seizure of oleomargarine, evidence as to orders given police with respect to plaintiff's place of business and as to plaintiff's having been convicted of violating the oleomargarine law was properly excluded. Medairy v. McAllister, 97 Md. 488.

31. Permission by one whose lease of land has not gone into effect to herd horses thereon is no justification thereof, and is relevant only on the question of vindictive damages. Tucson Land & Live Stock Co. v. Everett [Tex. Civ. App.] 78 S. W. 535. A village cannot give permission to construct water mains in the street without compensation to the owners through whose soil the pipes are being maintained. Jayne v. Cortland Waterworks Co., 42 Misc. [N. Y.] 263.

32. A trespasser has no equities against the owner because he paid the owner's grantor money for a void contract to cut timber on the land. Monds v. Elizabeth City Lumber Co., 131 N. C. 20. One claiming right to cut timber under a void contract from one who afterwards deeded it to the plaintiff is estopped to deny the plaintiff's title. Id.

33. Taking oleomargarine from one who had it in his possession presumably contrary to law. Medairy v. McAllister, 97 Md. 488. Where one advised another to take oleomargarine from one who had it in his possession, if he could not buy it of him, and after being forcibly taken, the goods were taken to the advisor's place of business, evidence held sufficient to make the adviser a joint trespasser. Id.

34. U. S. v. Homestake Min. Co. [C. C. A.] 117 Fed. 481.

35. Removing rolling stock from a switch track. Pittsburg, S. & W. R. Co. v. Fiske [C. C. A.] 123 Fed. 760.

36. An intoxicated person came to the home of another and was handled roughly. State v. Crook, 133 N. C. 672.

37. A boy 12 years fell, in hurriedly getting out a car in which a brakeman had attempted to imprison him. Emmons v. Quade, 176 Mo. 22, 75 S. W. 103.

38. Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433.

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§ 2. *Actions. A. At law.*—Notice before suit for injuries due to defective highways does not apply to trespass by highway officers to abutting lands.[39]

There cannot be successive actions, where the cause of action is single and indivisible,[40] or as to matters for which recovery was allowable to the day of trial;[41] but different suits may lie for different trespasses to several tracts.[42] Trespass and condemnation proceedings cannot be consolidated,[43] hence condemnation proceeding is no bar to an action for trespass nor vice versa.[44]

Jurisdiction of trespass is often transferred or ousted by the making of an issue of title or freehold.[45] To have such effect, the issue must be well made.[46] Under the rules of common law, now prevalent in New Jersey, a court has no jurisdiction to entertain an action for damages for a trespass on land outside the state.[47]

Tenants in common must join in actions for injuries to their property.[48] Husband and wife holding as co-tenants may sue jointly.[49] Where one of two plaintiffs in trespass on land dies pending the action, his devisee cannot be made a party and recover in his stead, but his administrator must be joined.[50]

Pleading, issues and proof.—The complaint need not contain a particular description of the premises on which the trespass was committed.[51] It is not necessary to negative an exception justifying a trespass.[52] In trespass to the person, an allegation of legal violence is essential.[53] An inartificial allegation of ownership may be good,[54] and an inartificial prayer, though sounding as equitable, will not require an offer of equity.[55]

39. Rhode Island laws requiring notice in case of damage by reason of a defective highway. Hathaway v. Osborne [R. I.] 55 Atl. 700.

40. Obstruction causing overflow was of such a character that if not interfered with would continue indefinitely. One action had been maintained. Gartner v. Chicago, R. I. & P. R. Co. [Neb.] 98 N. W. 1052.

41. Under statute providing for recovery for continuing trespass down to day of trial, a subsequent cause of action arising between issue of the writ and trial cannot be brought in, though trespass is of the same character. Pantall v. Rochester & P. C. & I. Co., 204 Pa. 158.

42. One owned 60 acres, he recovered damages for subsidence of surface of 29 acres, due to improper mining. He could recover for damages to the remaining tract, though no mining had been done since that action. Pantall v. Rochester & P. C. & I. Co., 204 Pa. 158.

43. Pending an action for trespass, the railroad made an application to have the land condemned. Ga. R. & B. Co. v. Gardner, 118 Ga. 723.

44. Ga. R. & B. Co. v. Gardner, 118 Ga. 723.

45. A justice of the peace may try the fact of possession, but he has no jurisdiction to inquire into the title. Dold v. Knudson [Neb.] 97 N. W. 482. The jurisdiction of the justice of the peace over actions of trespass was not ousted by "An act constituting courts for the trial of small causes." Garcin v. Roberts [N. J. Law] 55 Atl. 43.

Appeals: Where liberum tenementum is interposed, to which a replication concluding to the country is filed, the question as to who is owner of the freehold arises so as to give the supreme and not the appellate court jurisdiction of the appeal. Ill. Cent. R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751. Title may be determined in trespass quare clausum fregit. Weidner v. Lund, 105 Ill. App. 454.

See many cases cited Appeal and Review, 1 Curr. Law, p. 85.

46. In New Jersey under an act to prevent willful trespassing on land, the defendant may plead title even in a justice court as an answer, but he must allege title in himself or another and not merely deny title in the other. Garcia v. Roberts [N. J. Law] 55 Atl. 43.

47. An inhabitant of New Jersey owned a fishery located in the Delaware river on the Pennsylvania side into which large quantities of earth were dumped. Hill v. Nelson [N. J. Law] 57 Atl. 411. Plea need not give jurisdiction where lack of it is apparent. Id.

48. In an action for wrongfully cutting trees on land of tenants in common, reason for nonjoinder was not shown. Armstrong v. Canaday [Miss.] 35 So. 138.

49. Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433. See generally, Husband and Wife, 2 Curr. Law, p. 246.

50. Rowe v. Cape Fear Lumber Co., 133 N. C. 433. Where a tenant in dower which had never been allotted sues for damages to real estate for removing lateral support, her infant son and heir of her deceased husband is not a necessary party to the action. Cumberland Tel. & T. Co. v. Foster, 25 Ky. L. R. 1465, 78 S. W. 150.

51. Not being an action for the recovery of the land. Randall v. Sanders [Ark.] 77 S. W. 56.

52. Oleomargarine unlawfully seized could under some conditions have been lawfully possessed and sold. Medairy v. McAllister, 97 Md. 488.

53. Soliciting sexual intercourse; no facts

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Answer or plea must be direct and not by inference,[56] and must go to some essential element of the cause of action.[57]

Reply is not necessary to join issue on title where answer is a denial with allegations of ownership of a tract including the close.[58]

In order to determine the issues, the pleadings will be taken to be that form of trespass which their legal effect makes out.[59] An issue of negligence is not tendered by the mere use of that word.[60]

Where the general issue is pleaded, plaintiff is only required to prove possession at time of the trespass.[61] A plea of freehold admits the possession of the plaintiff and the acts complained of and places on the defendant the burden of justifying them.[62] Where the answer admits a trespass, it admits that it was wrongful and unlawful.[63] Where, in trespass de bonis asportatis, defendant pleads justification, the burden of proof is upon him to establish same.[64] In case for buying goods with notice of plaintiff's lien thereon, plaintiff has the burden on the general issue of proving notice.[65] Estoppel must be pleaded in order that it may be proven.[66] When not admitted, there must be substantial proof as alleged of the possession or title,[67] the breaking,[68] the identity of the trespasser with defendant,[69] and the particular act alleged as the trespass.[70] Where a joint trespass is

alleged constituting an assault. Reed v. Maley, 25 Ky. L. R. 209, 74 S. W. 1079.

54. Under a penal statute giving the owner of land a right to recover a penalty from any one shooting thereon, an allegation that one was owner for the purpose of shooting was construed to mean that he was owner of the right to shoot. Payne v. Sheets, 75 Vt. 335.

55. In trespass for cutting timber, the complaint asked that plaintiff be declared the owner of the land. Held, that the action was not an equitable one so as to impose on plaintiff the duty of restoring purchase money. Bunch v. Elizabeth City Lumber Co. [N. C.] 46 S. E. 24.

56. Where a plea neither traverses nor confesses and avoids the allegations of the declaration, but seeks by inference and indirection to avoid the trespass, it is demurrable. Engelke & F. Milling Co. v. Grunthal [Fla.] 35 So. 17.

An answer alleging possession in defendant for six years past held bad. Johns v. Cumberland Tel. & T. Co. [Ky.] 80 S. W. 165.

57. Where the answer merely denied the words of aggravation, the plaintiff was entitled to a peremptory instruction. Answer did not deny the trespass, evidence showed that the company entered the land without pretending to know to whom it belonged. Johns v. Cumberland Tel. & T. Co. [Ky.] 80 S. W. 165.

58. Cravens v. Despain [Ky.] 79 S. W. 276.

59. Where the declaration follows the common law pleading as for trespass quare clausum fregit, except that instead of averring that plaintiff was the owner, it alleged that she was in adverse possession, the action is quare clausum fregit and not vi et armis, though the trespass complained of is an entry against the protest of the plaintiff. Ill. Cent. R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751. An allegation that one unlawfully entered plaintiff's place of business and forcibly took and carried away plaintiff's goods shows the ground of action to be the carrying away of the goods and not quare clausum fregit. Medairy v. McAllister, 97 Md. 488.

60. While boys were playing in a car, a brakeman ordered them out in a threatening manner and assaulted them. The use of the word "negligently" in a complaint for trespass did not tender the issue of negligence. Emmons v. Quade, 176 Mo. 22, 75 S. W. 103.

61, 62. Carpenter v. Logee, 24 R. I. 383.

63. A finding to the contrary is unsupported. Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433.

64. Shibley v. Gendron [R. I.] 57 Atl. 304.

65. Evidence insufficient. Thornton v. Dwight Mfg. Co., 137 Ala. 211.

66. That plaintiff had told defendant that title was in another and advised him to purchase it. Hilton v. Colvin [Ky.] 78 S. W. 890.

67. Where one sets up title by adverse possession, the proof must substantiate it before a recovery can be had. A plea of liberum tenementum was filed which the evidence tended to support. Ill. Cent. R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751.

Allegations that a wife was in possession of the land and proof that the husband was in sole possession constitute a fatal variance. Chorman's Adm'r v. Queen Anne's R. Co., 3 Pen. [Del.] 417.

68. Where a complaint alleged that defendant unlawfully broke down his fence and then and there with his cattle trod down and ate up his corn and the proof showed that the cattle broke down the fence, there was no variance. Perry v. Cobb [Ind. T.] 76 S. W. 289.

69. Evidence held insufficient to show that one charged therewith had trespassed. Plaintiff did not know the person whom she testified broke open her door. Kulin v. Heller [N. J. Law] 54 Atl. 519.

70. Alleging that defendant "upset buggy" will not admit of proof that he caused horses to run away. Wilhelm v. Donegan [Cal.] 76 Pac. 713.

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charged, a joint trespass must be proven.[71] Where possession is merely colorable, the rule which authorizes recovery on strength of possession alone against a trespasser disturbing without right in himself does not apply.[72] In trespass quare clausum, an allegation of title to the whole close is divisible and is sustained by proof of title to that part where the trespass occurred, even though the adverse party owns other portions of the close.[73] Allegations of conspiracy not material but merely by inducement require no proof.[74]

Evidence.—Matter impeaching plaintiff's title for fraud against the defendant may be shown on the issue of willfulness unless plaintiff is a bona fide taker,[75] and if the verdict does not exclude recovery for such trespass, the rejection of such evidence is error.[76] To prove possession, it is not necessary to show inclosure.[77] The place of the close may be proved by admissions made at the time of a survey[78] or by a proper record of a survey;[79] but records are inadmissible if title is undisputed.[80] To prove a trespass by cattle breaking a fence, it may be shown that they were breachy, though knowledge of that fact was not material.[81]

Trial.—When an equitable issue is made and decided by the court, the trial should thereafter proceed before a jury,[82] and no continuance should be granted to prepare for proof of title by merely showing that it was undisputed.[83]

Instructions on justifiable force must inform the jury that it must not be excessive,[84] and if force so alleged is proved as force used to unlawfully imprison

71. Evidence showed separate acts of trespass by the different parties. No proof of concert of action. Czinski v. Coal Tp., 206 Pa. 621. One purchased property which had been seized and sold under a void writ. He took no part in the removal of the property. Held, he could not be held jointly liable with the officer for trespass and conversion. Hoxsie v. Nodine [C. C. A.] 123 Fed. 379.

72. A sheriff wrongfully seized property from one under a writ of replevin against another. McDowell v. McCormick [C. C. A.] 121 Fed. 61.

73. Plaintiff described their close as an entire lot. The lot had been divided and the trespass was committed on the south quarter. Defendant pleaded title to the entire tract in himself. Held, only title to south quarter was in issue. Profile & F. Hotels Co. v. Bickford [N. H.] 54 Atl. 699.

74. Allegation that the defendants conspired to trespass is mere matter of inducement, and though it be not shown, a recovery may be had against those shown to have participated. Young v. Gormley, 119 Iowa, 546, 93 N. W. 565.

75. In Alabama, in an action to recover a penalty provided by statute for willfully cutting trees on land of another, where the owner claimed under a grantee of the trespasser, the fact that the deed from the trespasser was procured by fraud may be shown in defense, unless the owner was a bona fide purchaser. Shelby Iron Co. v. Ridley, 135 Ala. 513. It may be shown though neither deed nor record was produced, where it appeared that the owner had the deed. Id.

76. Where some trees were cut on land formerly owned by the trespasser, the deed to which he claimed had been procured from him by fraud, and some were cut on other land and it could not be told that the damages assessed was for trees cut from such other land, it was error to exclude evidence of the fraud. Shelby Iron Co. v. Ridley, 135 Ala. 513.

77. Plaintiffs in trespass may prove actual and exclusive possession by acts of ownership on their part, without showing that the land was inclosed. Pennington v. Lewis [Del.] 56 Atl. 378.

78. In trespass for cutting trees admission by defendant where the survey of property was made, he being one of the chainmen, was admissible. Sherrard v. Cudney [Mich.] 96 N. W. 15.

79. A survey recorded on two separate pages, if shown to be connected together as the recorded survey, was admissible. Sherrard v. Cudney [Mich.] 96 N. W. 15.

80. Records offered merely to show transfer of title, there being no question about the title, are inadmissible. Clark v. Hull, 184 Mass. 164, 68 N. E. 60.

81. Where one of the issues was whether the cattle were breachy, a question asked a witness by the court whether the cattle were breachy, and the answer that he saw them break right through the fence, that they were the worst he ever saw, was not error though knowledge of such fact was immaterial. Perry v. Cobb [Ind. T.] 76 S. W. 289.

82. Where liberum tenementum was pleaded as a defense, and it was alleged that a certain deed had been fraudulently altered and the court heard the evidence and decided this issue, held, that thereafter the cause was a common-law action and properly tried by a jury. Ky. L. & I. Co. v. Crabtree, 24 Ky. L. R. 743, 70 S. W. 31.

83. Where liberum tenementum was pleaded, and by amendment plaintiff's ownership in any of the land claimed was denied and plaintiff asked a continuance to produce certain evidence to complete its title, which, if true, showed title to land not in dispute, held no error to refuse the continuance. Ky. L. & I. Co. v. Crabtree, 24 Ky. L. R. 743, 70 S. W. 31.

84. Where a boy of 12 was assaulted by a brakeman while driving him out of a car,

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plaintiff, no such charge is proper.[85] Where deeds are submitted on the question of title, other evidence respecting boundary must not be kept from the jury.[86] The ordinary rules as to contradiction in the charge,[87] as to requests already given,[88] and instructions curing errors,[89] apply.

Unless the failure of proof of title or possession is entire, it must go to the jury,[90] likewise the existence of concert of parties[91] or of scienter.[92] Evidence which in no event can affect the result may be excluded from the jury.[93]

In trespass on realty, where there was no verdict for plaintiff for damages and no sufficient special verdict for defendant, there was a mistrial, and a judgment that defendant be barred from any estate in the premises should be vacated.[94]

(§ 2) *B. In equity.*—Equity has no inherent power to enjoin a mere trespass,[95] and when such power is conferred by statute, the statute will be strictly construed.[96] As a general rule, an injunction will not issue where there is an adequate remedy at law,[97] nor will it issue when the title[98] or possession or right

it was improper to instruct that the brakeman was authorized to drive the boy away without ordering him out of the car and without limiting the force the brakeman might lawfully use. Emmons v. Quade, 176 Mo. 22, 75 S. W. 103.

85. Where boys were assaulted while being driven from a car, an instruction that the brakeman had a right to drive them from the car was inapplicable, because the evidence showed that the brakeman's effort was to imprison the boys and not to drive them away. Emmons v. Quade, 176 Mo. 22, 75 S. W. 103.

86. An instruction that if a certain ambiguous deed included the land trespassed upon, a verdict should be for the plaintiff and, if not, for the defendant, was not objectionable as limiting the jury to the consideration of the deeds on the question of boundary. Ashcraft v. Cox, 25 Ky. L. R. 545, 76 S. W. 121.

87. General charge "wrongfully inflicted injury" does not contradict one specifying the mode of causing it, as pleaded. Wilhelm v. Donegan [Cal.] 76 Pac. 713.

88. The court having given a more favorable instruction, it was not error to refuse to instruct that the common-law rule requiring cattle to be fenced in did not prevail in Indian Territory and that an adjoining owner was not liable on account of not having a division fence. Perry v. Cobb [Ind. T.] 76 S. W. 289. An instruction that plaintiff could not recover for damage done by other cattle than the defendant's was properly refused where the court had charged substantially the same thing. Id.

89. Where the court charged that the measure of damages would be the value of the corn at time of its destruction and any evidence not throwing light on such question should not be considered, it was held to correct any error the court made in remarking that he had heard corn was worth 50 cents a bushel. Perry v. Cobb [Ind. T.] 76 S. W. 289.

90. Where it was a question for the jury as to whether one bringing action for trespass had title to the goods, it was no error to refuse to direct a verdict on the fact that an alleged sale was to defraud creditors. Kulin v. Heller [N. J. Law] 54 Atl. 519.

91. The question whether there was concert of action is for the jury, where there is conflict of testimony. Hoxsie v. Nodine [C. C. A.] 123 Fed. 379. Where a court was requested to rule that evidence was insufficient to warrant a finding against joint defendants in trespass and the court granted as to two but refused as to the other, the latter could not question the correctness of the ruling by asserting that there was evidence against the others. Medairy v. McAllister, 97 Md. 488.

92. Truskett v. Bronaugh [Ind. T.] 76 S. W. 294.

93. Jury may be confined to plaintiff's testimony, where he alone testified how it happened, the injury being admitted. Wilhelm v. Donegan [Cal.] 76 Pac. 713.

94. Hill v. McMahon, 81 App. Div. [N. Y.] 324. Where, in trespass on land for trespasses alleged to have occurred between February 13, 1898, and August, 1901, the jury found that the plaintiff owned the land and that the defendant committed no trespass after February 3, 1899, its verdict is not sufficient to sustain either a judgment for plaintiff or defendant. Id.

95. Such power conferred by statute does not give power to assess damages. McMillan v. Wiley [Fla.] 33 So. 993.

96. A statute of Florida, giving a right to enjoin trespass to one owning timbered lands, does not extend to the owner of only the turpentine in the trees with right to cut, box and scrape the trees. McDonald v. Padgett [Fla.] 35 So. 336. The owner of timber on lands is not the owner of timbered lands within meaning of statute giving such persons the right to enjoin trespasses thereon. Doke v. Peek [Fla.] 34 So. 896. The fact that timber standing on land constitutes its chief value does not give one owning the timber only a right to have its cutting enjoined. Id. Where injunction is sought on ground that trespasser is insolvent, proof of insolvency must be direct and positive. Affidavits held insufficient. Id.

97. Where one had a parol license to enter land and cut timber, he could not be restrained from going on and carrying away the timber after it had been cut and paid for, though the license had expired. Watson v. Adams [Ind. App.] 69 N. E. 696. A trespass will not be enjoined where the petition does not allege that the threatened injuries are irreparable in damages, or that defendants are insolvent, and no other cause for equitable interference being made to appear (Rogers v. Brand, 118 Ga. 494), nor

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thereto is involved in doubt,[99] or where the rights of the parties depend on disputed questions of fact,[1] or where the manifest object of the suit is to determine title;[2] but an injunction will issue to prevent a continuing trespass,[3] or the cutting of trees which would work irreparable injury,[4] or to protect possession,[5] or property rights,[6] especially if the threatened act may ripen into right,[7] or to prevent multiplicity of suits.[8] Equity will not ordinarily enjoin trespass upon personal property.[9] Equity may grant both legal and equitable relief,[10] unless in so doing they deprive the trespasser of the right of trial by jury.[11] The remedy should be as broad as the evil sought to be enjoined,[12] but that it is too broad cannot be remedied on an appeal from an order denying a new trial.[13] A mere dummy in the transaction need not be made a party.[14]

where the trespasser is solvent, and the injury is not irreparable in damages, and the petition does not allege other circumstances which render an injunction necessary or proper. Evidence showed that there was an adequate remedy at law. Woodstock Iron Works v. Leake, 118 Ga. 642.

98. Currier v. Jones, 121 Iowa, 160, 96 N. W. 766. Plaintiff's title was in dispute and the defendants were in possession under color of title. Munyos v. Filmore [Ind. T.] 76 S. W. 257. Where an injunction was sought to restrain the cutting of timber on certain land, it did not appear that one seeking the injunction was the owner, and as he was not in possession, he was not entitled to the injunction. Perkins v. Mason [Mo. App.] 79 S. W. 987.

99. One who bought trees under a verbal contract, but never entered the land, sought to restrain another who had purchased the same trees under a written contract, which it is claimed was never delivered, from taking them. Drake v. Howell, 133 N. C. 162. Evidence held to show title in one seeking to restrain a trespass. Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828. Evidence that one who traced his title back to the government and proved actual possession by a number of witnesses, held sufficient to show title against a trespasser for cutting and removing trees. Hilton v. Colvin [Ky.] 78 S. W. 890. The rule that equity will interpose to prevent a continuing trespass has no application. Stone v. Snell [Neb.] 94 N. W. 525.

1. Validity of a contract giving one the right to cut timber. Merchants' Coal Co. v. Billmeyer [W. Va.] 46 S. E. 121.

2. Defendant justified on the ground that the place was a highway. Tomasini v. Taylor, 42 Or. 576, 72 Pac. 324. Equity will not permit parties in an application for injunction to use same to settle a disputed title. Munyos v. Filmore [Ind. T.] 76 S. W. 257.

3. Where one carries on a series of petty trespasses upon the property of another, an injunction will issue. Cutting down a fence as soon as it was rebuilt. Fonda, J. & G. R. Co. v. Olmstead, 84 App. Div. [N. Y.] 127. Where it is shown that a trespass has been committed and will be repeated unless restrained. Pittsburg, S. & W. R. Co. v. Fiske [C. C. A.] 123 Fed. 760.

4. Will lie to restrain the threatened destruction of timber on land which had been conveyed, with the exception of the timber, which afforded a wind break to grantor's adjoining land. Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171.

5. One in possession under a claim of right. Pittsburg, S. & W. R. Co. v. Fiske [C. C. A.] 123 Fed. 760. One entered the land of another to build a brick wall to the exclusion of the owner. Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828. Where persons claimed a right to mine on land owned by others who were in possession, and threatened to enter and remove ore, but the owners claimed that the lease had been forfeited. Negaunee Iron Co. v. Iron Cliffs Co. [Mich.] 96 N. W. 468.

6, 7, 8. Where an upper riparian owner is threatening to divert the water from its course, an injunction should be granted, though the threatened trespass would result in no material damage to the lower owner and its commission would have greatly benefited the upper owner who, however, is a nonresident. Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co., 118 Ga. 255.

9. Fences built on government land. Ganow v. Denney [Neb.] 94 N. W. 959.

10. Where one enters under a void lease, he will be enjoined from drilling for oil or taking petroleum therefrom and the lease will be canceled. Haskell v. Sutton, 53 W. Va. 206.

11. A statute giving an equity court jurisdiction to enjoin trespasses is constitutional, but such portion of the statute as attempts to give the equity court jurisdiction to decree damages for trespasses is illegal. McMillan v. Wiley [Fla.] 33 So. 993.

12. Where cross injunctions are sought to prevent trespasses on land and irreparable injury, all the parties should be enjoined and none allowed to dissolve the injunction as to him by giving a bond. Several parties asserting conflicting rights in the same property. Wells v. Rountree & Co., 117 Ga. 839. Where plaintiff showed perfect title, but admitted a "lease" of sawmill timber to the defendant, and plaintiff's evidence showed that defendant was cutting a great deal of timber unfit for sawmill purposes an injunction should not restrain defendant from going upon the land or cutting any timber, but only from cutting any timber not included by the lease. Simmons v. McPhaul, 117 Ga. 751.

13. Highway officials were restrained from entering on any of certain premises where they might have had a right to enter at a certain place. A correction was not requested before the appeal. Arndt v. Thomas, 90 Minn. 355, 96 N. W. 1125.

14. Where one sought to be restrained held under a lease made to a company whose entire stock, etc., it owned. Negaunee

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§ 3. *Damages and penalties.*[15]—The measure of damages is the amount which will compensate for the injury done both immediate and consequential,[16] and mental damages as well as material may be given if there was malice or aggravation.[17] A trespasser is not liable for the expenses of litigation entailed by his trespass, where he acted in good faith and has not been stubbornly litigious.[18] The measure of damages for the willful taking of ore or timber from the land of another is the enhanced value of the timber or ore where it is finally converted to the use of the trespasser;[19] but if the trespass was through inadvertence or mistake, it is the value of the ore in the mine or the timber in the trees.[20] Additional wrongs which work no addition to the injury do not enhance the recovery.[21] The damages accruing after action begun and up to trial may be recovered under statutes authorizing recovery of "all" damages.[22]

Exemplary damages may be recovered for an aggravated trespass,[23] but not against a municipal corporation.[24] If the officers unlawfully searching act with malice exemplary damages may be recovered.[25]

Iron Co. v. Iron Cliffs Co. [Mich.] 96 N. W. 468.

15. Consult the general treatment of this matter. Damages, 1 Curr. Law, p. 838; Penalties, etc., 2 Curr. Law, p. 1166.

16. Ostrom v. San Antonio [Tex. Civ. App.] 77 S. W. 829. Where one operated a tramway over land after his right to do so expired, the measure of damages is the rental value of the land plus the decrease in value of the remainder of the land caused by the presence of the tramway. Leigh v. Garysburg Mfg. Co., 132 N. C. 167. Where a railroad company with a right to operate a single track in the street constructs sidings, it is liable for damages resulting therefrom. Stephens v. New York, O. & W. R. Co., 175 N. Y. 72, 67 N. E. 119. In trespass for willfully removing dirt, clay and top soil, evidence as to value of the land before and after the trespass is admissible to show the measure of damages. Brinkmeyer v. Bethea [Ala.] 35 So. 996.

The fact that the verdict exceeded the value of the articles sued on in **trespass de bonis asportatis** did not establish that the damages were excessive, for their value is not the measure. Shibley v. Gendron [R. I.] 57 Atl. 304. Where a store was closed under the foreclosure of a void chattel mortgage on the stock, the measure of damages is the depreciation in value of the goods, loss of profits and damage to credit and financial standing. Tootle v. Kent [Okl.] 73 Pac. 310.

17. One executing an illegal attachment maliciously is liable for full compensatory damages, mental as well as material. Ahearn v. Connell [N. H.] 56 Atl. 189. But it has been held that where defendant's act was willful, malicious, or accompanied by circumstances of inhumanity and oppression, an action will lie for mental anguish, whether or not physical harm was done. And substantial damages may be given. Hickey v. Welch, 91 Mo. App. 4.

18. After the action for trespass was brought, application to have the land condemned was made. Considerable litigation followed. Ga. R. & Banking Co. v. Gardner, 118 Ga. 723.

19. U. S. v. Homestake Min. Co. [C. C. A.] 117 Fed. 481. Where one purchased timber from trespassers, some being purchased before and some after notice of the trespass, the measure of damages is for the timber purchased before notice, its stumpage value, that purchased after notice, its value in the form of stave bolts. Holt & Johnson v. Hayes [Tenn.] 73 S. W. 111.

20. U. S. v. Homestake Min. Co., 117 Fed. 481. In action for cutting and carrying away timber, evidence as to value of the stumpage on the land was admissible. Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433.

21. Where property is levied on and seized under an invalid writ, the measure of damage is the difference in value at the time the attachment was levied and the time it was dissolved, and that the property was held under other writs cannot increase the damages. Engelke & Feiner Milling Co. v. Grunthal [Fla.] 35 So. 17.

22. Under statute providing that the entire amount of damages which the party aggrieved is entitled to recover shall be assessed by the jury, all damages accruing after the commencement of the action and up to time of trial may be recovered. Dale v. Southern R. Co., 132 N. C. 705.

23. Going on land of another in his absence and removing a house. Avera v. Williams, 81 Miss. 714. Where one under protection of detectives carried away goods (oleomargarine) after being warned not to do so. Punitive damages could be awarded. Medairy v. McAllister, 97 Md. 488. Where telephone company in trespassing on land, digging holes and erecting poles, acted in a malicious, highhanded and oppressive manner. Johns v. Cumberland Tel. & T. Co. [Ky.] 80 S. W. 165. Where one went on land two years after an offer had been made to sell it to him, which he never accepted, cut timber and refused to desist after notice to quit, he was liable for actual and exemplary damages. Nickerson v. Allen Bros. & Wadley, 110 La. 194.

24. Exemplary damages, while allowable in certain cases for willful injury to land, cannot be recovered against a municipal corporation save under exceptional circumstances. Ostrom v. San Antonio [Tex. Civ. App.] 77 S. W. 829. Recovery cannot be had for vexation, humiliation and annoyance against a municipal corporation. Id.

25. Some of the searching party acted in a loud and boisterous manner. McClurg v. Brenton [Iowa] 98 N. W. 881.

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Evidence that one acted in good faith[26] or that the property taken has been applied to the use of the true owner,[27] or that one had apparent right to take the property, may be shown in mitigation.[28] Even if an occupant be a trespasser, he is entitled to credit for sums received by the owner,[29] or for improvements added in good faith.[30]

Substantial damages must be pleaded and proved, else only nominal can be recovered,[31] and such damage as does not follow as a necessary result must be specially pleaded.[32] Damages cannot be apportioned between defendants if the verdict is such that it may include a tort for which all must have been liable in the whole sum.[33]

Willful trespass.—The test which determines whether one is a willful or an innocent trespasser is his belief and intention at the time of the trespass.[34] The general rule is that one who takes timber from lands belonging to the United States is a willful trespasser.[35]

Multifold damages may be had for certain statutory trespasses or degrees thereof.[36] To entitle one to treble damages provided by statute, such statute must be strictly met in the allegations,[37] and all the facts necessary to sustain it must be expressed or necessarily implied from the verdict.[38]

26. That trespass was inadvertent. U. S. v. Homestake Min. Co. [C. C. A.] 117 Fed. 481. Where one continued a tramway over land after his right to do so expired, he could not show in mitigation of damages that he hauled freight free for the landowner's tenants, it not being shown that the owner derived any benefit therefrom. Leigh v. Garysburg Mfg. Co., 132 N. C. 167.

27. Pabst Brewing Co. v. Greenberg [C. C. A.] 117 Fed. 135.

28. In Alabama, a contract relied on as giving authority to take the property may be shown in mitigation of damages. Montgomery W. P. Co. v. William A. Chapman & Co. [C. C. A.] 126 Fed. 68.

29. A lessee from a stranger to the title was sued in trespass; the amount sought to be recovered was the rental value of the land. Hendrickson v. Dwyer [N. J. Err. & App.] 57 Atl. 420.

30. Where one without claim of title took possession of land, ditched, drained and cultivated it. Sigur v. Burgueres, 111 La. 711.

31. Pennington v. Lewis [Del.] 56 Atl. 378. One who purchases with notice that water mains are being maintained thereon without authority can recover only nominal damages. Jayne v. Cortland Waterworks Co., 42 Misc. [N. Y.] 263. Evidence held sufficient to show that damage to a building was caused by removing lateral support and not by a defect in construction of the building. Cumberland Tel. & T. Co. v. Foster, 25 Ky. L. R. 1465, 78 S. W. 150. Where, in an action of trespass to recover damages for forcibly entering upon plaintiff's premises and taking therefrom certain personal property, it was shown on the trial that such property was all taken by its true owners, plaintiff cannot recover its value as an element of his damages. Pabst Brewing Co. v. Greenberg [C. C. A.] 117 Fed. 135.

32. Where officers of a town unlawfully entered on private land and laid out a highway over the same, the laying out of the highway and the tearing down of certain sea walls causing subversion of the soil and an influx of the sea, not being a necessary result of the unlawful entry, was properly alleged in aggravation of damages in an action against the town for trespass committed by such entry. Hathaway v. Osborne [R. I.] 55 Atl. 709.

33. In an action of trespass against joint defendants, the jury may apportion the damages as against the joint defendants, but where the petition contained also a count for abuse of legal process, the damages could only be apportioned in the event the jury found solely on the count of trespass. Hay v. Collins, 118 Ga. 243.

34. U. S. v. Homestake Min. Co. [C. C. A.] 117 Fed. 481. Cutting timber. U. S. v. Gentry [C. C. A.] 119 Fed. 70. A trespasser's acts or sayings at or about the time of the trespass are admissible to show the intention. Id. One who, having no interest in a certain building, but claiming an undivided interest therein, went to the premises in the owner's absence, tore down the building, removed it to his own land and erected it there, is guilty of an aggravated trespass. Avera v. Williams, 81 Miss. 714. A person who enters upon the land of another and cuts timber thereon, under circumstances justifying the conclusion that if he does not know that he is without right so to do, it is because he does not choose to know it, is a mere trespasser. Sanders v. Ditch, 110 La. 884.

35. Full compliance must be shown with statute requiring that one who takes timber from government land shall not sell it unless for building purposes in the territory; a written agreement to this effect must be made with the vendee. U. S. v. Gentry [C. C. A.] 119 Fed. 70.

36. By statute in Missouri, one purchasing from a trespasser timber cut upon land of another, with guilty knowledge of the trespass before completion of the purchase, is liable in trespass for treble damages. Carls v. Nimmons, 92 Mo. App. 66. Under New York code, treble damages could not be recovered where a landlord removed the tenant's property from his apartments during

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Penalties.—In order to recover the statutory penalty, all facts made material by the statute must be proven.[39]

Damages as realty or personalty.—Damages committed by a trespass on land in cutting and removing timber therefrom are personal to the owner and do not pass to his grantees.[40]

§ 4. *Criminal liability.*—To constitute a criminal trespass, every element found in the terms of the statute defining the crime must exist.[41] It is "malicious trespass" for one to injure another while driving in a reckless manner on a public street.[42] Within such statutes, "premises" has been held to include any real estate,[43] and a mill dam has been held an "enclosure,"[44] and lands may be "enclosed," though the fence is broken.[45] It is no "excuse" for an entry after warning that accused was doing an errand for a third person[46] or that he was prosecutor's tenant on other lands.[47] Title in accused is no defense to the crime defined in Alabama against one having actual possession and right thereto.[48] It is not criminal trespass for a husband to enter on his wife's lands.[49] In criminal trespass, intent is an essential element, therefore one entering in good faith believing himself entitled to possession is not guilty.[50] The indictment must charge everything essen-

his absence, the entry having been peaceable. Yeamans v. Nichols, 81 N. Y. Supp. 500.

37. The complaint stated a cause of action at common law, but not under the statute in that it did not allege that the defendant had no interest in the land from which gravel was taken. O'Bannon v. St. Louis & G. R. Co. [Mo. App.] 80 S. W. 321.

38. Where a landlord removed a tenant's property from his apartments, the tenant sued in trespass and conversion and the jury returned a general verdict, so it could not be determined whether they awarded anything for the trespass, treble damages could not be allowed. Yeamans v. Nichols, 81 N. Y. Supp. 500.

39. That trees were cut on his land, without his consent, within 12 months of institution of the action, by the defendant or his agent, that the cutting was willful and without proper precaution to prevent a trespass Therrell v. Ellis [Miss.] 35 So. 826. To maintain trespass for cutting trees under the statute, the plaintiff must show legal title in himself and that defendant cut them knowingly, willfully and without plaintiff's consent. Shelby Iron Co. v. Ridley, 135 Ala. 513. Evidence held insufficient to show that trees were cut recklessly or without proper precaution to determine the boundaries. Therrell v. Ellis [Miss.] 35 So. 826. Evidence held insufficient to show that trees were cut by an agent of alleged trespasser. Id. In trespass for cutting timber, the question whether patents under which plaintiffs claim, covered the land should have been submitted to the jury. Whitehouse Cannel Coal Co. v. Wells, 25 Ky. L. R. 60, 74 S. W. 736.

40. Drake v. Howell, 133 N. C. 162.

41. Georgia Pen. Code, § 219, par. 1, statute providing a penalty for criminal trespass is intended to punish only those who willfully and without claim of right trespass on the property of others. Hateley v. State, 118 Ga. 79. Georgia Pen. Code, § 220, relative to criminal trespass, does not apply to open or uncultivated real estate. Wiggins v. State, 119 Ga. 216. Under Alabama statute, "notice to leave" was properly given by the owners who were in actual possession, although other parties were also on the land by their permission under agreement to leave at their request. Wright v. State, 136 Ala. 139.

Evidence held sufficient to warrant a finding that the accused was guilty under Pen. Code, § 219, par. 3. Wilcher v. State, 118 Ga. 196.

42. One driving down a public highway in a reckless manner and running into and killing the horse of another traveler was properly convicted of criminal trespass, though he might also have been convicted of another offense (see Code 1892, § 1315). Porter v. State [Miss.] 35 So. 218.

43. The word "premises," in an Alabama statute providing a penalty in the case of one who enters on the premises of another without legal cause or good excuse and refuses to leave after being warned to do so, means any real estate and is not confined to the curtilage of the dwelling. Wright v. State, 136 Ala. 139.

44. A mill dam is an inclosure within the meaning of a statute making it a misdemeanor to gather nuts upon inclosed land without the consent of the owner, lessor or person in control. Haynie v. State [Tex. Cr. App.] 75 S. W. 24.

45. Haynie v. State [Tex. Cr. App.] 75 S. W. 24.

46, 47. Holland v. State [Ala.] 35 So. 1009.

48. In a prosecution for trespass under the Alabama statute, if the prosecutors were in actual possession of the land, under a claim of ownership, when the trespass was committed, it is no defense that the defendant had the superior title. Wright v. State, 136 Ala. 139.

49. The wife had ordered him to stay off. State v. Jones, 132 N. C. 1043.

50. One bona fide claiming to be the owner and entitled to the possession cannot be guilty of criminal trespass. Wiggins v. State, 119 Ga. 216. An agent who bona fide believes that his principal is the owner and entitled to the possession of land cannot be found guilty of a criminal trespass if he goes upon the land in obedience to the orders of his principal. Id. Where one accused of criminal trespass set up as sole de-

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tial in the offense,[51] but if it is substantially in the language of the statute, it is sufficient,[52] and want of consent as a defense need not, at least with certainty to all intents, be negatived.[53] The charge should not pretermit any of the elements of the offense.[54] Averments of title must be proved as to the particular land trespassed on.[55] Whether the action was commenced within 60 days after the notice to leave the premises, as required by statute, was a fact relative to which testimony was admissible.[56] It was not a conclusion for the witness to state that he was in possession.[57]

§ 5. *Trespass to try title. Remedial rights.*—Title to real property may be determined by a judgment in trespass quare clausum fregit.[58] In some states, notably Texas, the remedy of "trespass to try title" exists and it lies in case of disputes as to boundaries,[59] or between co-tenants.[60]

Improvements made after notice cannot be allowed.[61]

An interest in the land is necessary to maintain the action.[62] Prior possession is sufficient as against one entering without title, but it must be actual and so clearly defined as to give the claimant the exclusive control.[63] It cannot suffice where the title is admittedly in the state,[64] but when shown will not be referred to a void tax title acquired after possession began.[65] One in actual possession can maintain the action against a trespasser.[66] An equitable title will support an action of trespass to try title.[67]

fense, title to the land, evidence thereof is admissible to show the good faith of his acts. Hateley v. State, 118 Ga. 79.

51. An indictment that does not state that the trespass was committed within six months after the warning is fatally defective. Musgrove v. State [Ala.] 35 So. 884. Under Georgia Pen. Code, § 219, par. 3, an indictment for trespass need not aver that it was willful. Wilcher v. State, 118 Ga. 196. 2 Ball. Ann. Codes & St. § 7141, providing for punishment for cutting down trees, is exclusive and supersedes the statutes relative to larceny, hence the word "feloniously" should be stricken from the complaint. Tacoma Mill Co. v. Perry, 32 Wash. 650, 73 Pac. 801.

52. In a prosecution commenced by affidavit, an affidavit charging the offense substantially in the language of the statute is not objectionable for lack of a particular description of the premises trespassed upon. Holland v. State [Ala.] 35 So. 1009.

53. An information based upon a statute making it a misdemeanor to gather nuts upon inclosed land unless it is made to appear in defense that it was by the consent of the owner, lessor or person in control, which alleges that it was without the consent of the owner, need not allege the want of the consent of the lessor or person in control. Haynie v. State [Tex. Cr. App.] 75 S. W. 24.

54. It is criminal trespass in Alabama if one after entering refuses, without excuse, to go when warned. A charge that unless he was warned before entering he was not guilty was bad. Wright v. State, 136 Ala. 139.

55. Proof of a grant of lands "except certain that had been sold," and that such lands had been transferred to prosecutor is insufficient without proof that this land was not of that excepted. Jeter v. State [Ark.] 75 S. W. 929.

56, 57. Wright v. State, 136 Ala. 139.

58. Weidner v. Lund, 105 Ill. App. 454.

59. Rountree v. Haynes [Tex. Civ. App.] 73 S. W. 435.

60. Where plaintiff in trespass to try title sued for the entire interest in land while defendant was by a prior deed a co-tenant with plaintiff, he, notwithstanding this outstanding title, had sufficient interest to support the action. City of El Paso v. Ft. Dearborn Nat. Bank [Tex. Civ. App.] 71 S. W. 799.

61. Defendant in trespass to try title cannot have an allowance as for improvements in good faith, where he was holding under a void title and before making the improvements was notified that the land belonged to plaintiff. Tex. & N. O. R. Co. v. Barber [Tex. Civ. App.] 71 S. W. 393.

62. Evidence held to show that a plaintiff had no interest in the land, and that his ancestor had parted therewith. Bays v. Stone [Tex. Civ. App.] 76 S. W. 59. Evidence held insufficient to show a classification and appraisement prior to the application to purchase. Corrigan v. Fitzsimmons [Tex. Civ. App.] 76 S. W. 68. Refusal to submit the question of a sale where a witness refused to swear that he had paid anything for the land, or that he got a deed or that there was a verbal sale, was not error. New York & T. Land Co. v. Dooley [Tex. Civ. App.] 77 S. W. 1030. The owner of land conveyed it merely for convenience in making sales, it not being intended that title should pass to the grantee. The transaction created an express trust. Craig v. Harless [Tex. Civ. App.] 76 S. W. 594.

63. Evidence held sufficient to show actual possession. Lynn v. Burnett [Tex. Civ. App.] 79 S. W. 64.

64. Not against a mere trespasser. Corrigan v. Fitzsimmons [Tex. Civ. App.] 76 S. W. 68.

65. Lynn v. Burnett [Tex. Civ. App.] 79 S. W. 64.

66. Where both parties failed to show the title alleged, plaintiff, having been in pos-

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Stale demand is no defense if a plaintiff has a title, legal or equitable,[68] and where a defendant can assert an equitable title without invoking affirmative relief, the doctrine of stale demand does not apply.[69] An equitable defense cannot be maintained in an action of trespass to try title brought on the law side of a Federal court.[70]

The burden of proof as to value of improvements made in good faith by one in possession is on him who has made them, and the question cannot go to the jury unless such evidence is introduced.[71] Where plaintiffs prove long continued possession, payment of taxes and assertion of title under a recorded deed, the defendants must prove a better right.[72]

It is presumed that one in possession is the owner,[73] but this is a rule of evidence and not of property and is rebuttable.[74] To rebut the presumption of title arising from possession under a void tax title, it is incumbent to show the facts rendering the tax title void.[75] A purchaser of school lands cannot maintain trespass to try title to recover such lands without showing that the lands had been classified and appraised.[76]

Admissibility of evidence is governed by the usual rules of evidence.[77] A deed to be admissible must contain a sufficient description,[78] and in Texas, a copy of one filed by a co-defendant must be first put in by him.[79] A deed prior to the

session, was entitled to recover as against defendant, as a mere trespasser. Estes v. Turner, 30 Tex. Civ. App. 365, 70 S. W. 1007. One who has recovered judgment in a forcible entry and detainer suit cannot be regarded as a mere trespasser in an action to try title brought by his opponent. Corrigan v. Fitzsimmons [Tex. Civ. App.] 76 S. W. 68. Evidence to show actual possession as against one entering without title examined and held insufficient to warrant direction of verdict in favor of one in possession. Lynn v. Burnett [Tex. Civ. App.] 79 S. W. 64.

67. Craig v. Harless [Tex. Civ. App.] 76 S. W. 594. A bond for title, acknowledging the receipt of the purchase price, conveys to the grantee a title superior to that remaining in his grantor, and on which he may maintain or defend trespass to try title. Stipe v. Shirley [Tex. Civ. App.] 76 S. W. 307. Where in trespass to try title, plaintiffs were the heirs of one who had executed a title bond, and defendants claimed under such bond, it was immaterial whether the bond conveyed the legal or the equitable title, for if legal the plaintiffs could not recover, or if equitable they could not recover, because defendants had connected themselves therewith by deeds duly executed by the grantee's heirs. Tenzler v. Tyrrell [Tex. Civ. App.] 75 S. W. 57.

68. Where defendants had given plaintiffs a power of attorney to recover lands and a quitclaim deed for one-half of all the land they should recover. Betzer v. Goff [Tex. Civ. App.] 80 S. W. 671. In 1834, the owner of a headright conveyed to one who located lands thereunder. In 1854, the grantor got a patent and in 1900 his heirs took possession. One year later the heirs of the grantee brought this action. Held, their demand was not stale, since they had only an equitable title, and limitation would not operate until a repudiation of the trust by grantor's heirs. Yeary v. Crenshaw, 30 Tex. Civ. App. 399, 70 S. W. 579. Where plaintiff's title to public land, as against defendant, accrued, if at all, in 1882, when his three years occupancy expired, and defendant entered under a deed from a subsequent entryman, which was recorded in February, 1893, defendant's possession from that date to August 2, 1900, barred plaintiff's right to the land, under the five year statute of limitations. Robles v. Cooksey [Tex. Civ. App.] 70 S. W. 584. An action claimed to be for specific performance of a contract to convey one-half of lands that might be recovered for the grantor cannot be considered as a stale demand in absence of evidence as to when the service was rendered. Betzer v. Goff [Tex. Civ. App.] 80 S. W. 671.

69. One claiming under a wife who had transferred a land certificate which was issued after the death of her husband, but which was community property. Whisler v. Cornelius [Tex. Civ. App.] 79 S. W. 360.

70. Such defenses were by statute made available in state courts. McManus v. Chollar [C. C. A.] 128 Fed. 902.

71. Wilson v. Wilson [Tex. Civ. App.] 79 S. W. 839.

72. Lynch v. Pittman, 31 Tex. Civ. App. 553, 73 S. W. 862.

73. The prima facie inference that the possessor is the owner of the property is entirely rebutted where such property is shown to be vacant public domain. It was error to exclude evidence to show that land in controversy was vacant public domain. Austin v. Espuela Land & Cattle Co. [Tex. Civ. App.] 77 S. W. 830.

74. Lynn v. Burnett [Tex. Civ. App.] 79 S. W. 64.

75. Irregularities in sale. Lynn v. Burnett [Tex. Civ. App.] 79 S. W. 64.

76. The action of the official of the land office in making sales of school land does not support a presumption that classification and appraisement have been made. Corrigan v. Fitzsimmons [Tex. Civ. App.] 76 S. W. 68.

77. See Evidence, 1 Curr. Law, p. 1136.

78. Deed purporting to convey 1,000 acres, from the last three calls of which it would be impossible to locate the land. Ellis v. Lobow, 30 Tex. Civ. App. 449, 71 S. W. 576.

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common source from a person stranger to the line of title does not show an outstanding title.[80] If a deed offered by defendant has no tendency to disprove plaintiff's title, it may be rejected.[81] A refusal of permission to go on land is evidence of an interest in the refusing party.[82] Evidence which places the land in question outside the boundaries of grants to defendant is proper.[83] The various titles treating of the mode in which title may pass or be acquired should be consulted on questions as to how a particular title or link therein may be proven.[84] Some cases illustrating the quantum of evidence and the facts component of proof of title are cited.[85]

Pleading and procedure.—This being a statutory action, the complaint must comply with statutory requirements, and where it substantially does this, it will be sufficient.[86] The complaint must describe the land, which may be done by

79. Under Texas statute, a defendant cannot introduce a copy of a deed which has been filed by his co-defendant which has not been introduced in evidence by such co-defendant. Gann v. Roberts [Tex. Civ. App.] 74 S. W. 950.

80. Where plaintiffs had shown a common source, a deed of the same land from a third party executed prior to the deed from the common source to plaintiffs' predecessors in title, was not admissible to show an outstanding title. Gann v. Roberts [Tex. Civ. App.] 74 S. W. 950.

81. In trespass to try title, a tax deed purporting to convey to defendant's grantor land in controversy, and reciting that it was sold as the property of an "unknown owner," is not inconsistent with the claim of common source asserted by plaintiff, and, not raising an issue on that point, was properly excluded. Bonner v. Bonner [Tex. Civ. App.] 78 S. W. 535.

82. Jinks v. Mappin [Tex. Civ. App.] 80 S. W. 390.

83. Where on correction of surveys, there remained a strip between certain sections which had been patented to one in possession of the entire tract, evidence that land claimed was outside the correct boundaries was admissible. Austin v. Espuela Land & Cattle Co. [Tex. Civ. App.] 77 S. W. 830.

84. Adverse Possession, 1 Curr. Law, p. 30; Deeds of Conveyance, 1 Curr. Law, p. 908; Mortgages, 2 Curr. Law, p. 905; Foreclosure, etc. (sale), 2 Curr. Law, p. 14; Judicial Sales 2 Curr. Law, p. 601; Executions, 1 Curr. Law, p. 1178; Public Lands, 2 Curr. Law, p. 1295; Notice and Record of Title, 2 Curr. Law, p. 1053; Wills; Descent and Distribution, 1 Curr. Law, p. 922.

85. Where parties claimed from a common source, the defendants being innocent purchasers without notice of deed to plaintiff, a judgment in their favor was justified. Conner v. Downs [Tex. Civ. App.] 75 S. W. 335. Recitals in a deed that grantors conveyed land to their daughter for a consideration paid "at various times during her marriage" is sufficient to put a purchaser from her husband after her death on inquiry as to whether the land was her separate estate. O'Mahoney v. Flanagan [Tex. Civ. App.] 78 S. W. 245. Evidence held sufficient to go to the jury as to the good faith of defendants who testified that they had no notice of plaintiff's claim as heirs of the deceased wife of the grantor That they did not know the grantor had ever been married. Stipe v. Shirley [Tex. Civ. App.] 76 S. W. 307. Evidence held to show that one claiming under a gift had title to the land in controversy. Bonner v. Bonner [Tex. Civ. App.] 78 S. W. 535. Evidence held to show a title in one who claimed adversely against unknown heirs whose title had been divested by the execution of a judgment which had been obtained in an action wherein service had been obtained by publication. Houston & T. C. R. Co. v. De Berry [Tex. Civ. App.] 78 S. W. 736. Evidence held to show that a purchaser from a wife after the death of her husband obtained only a half interest in community property, though the sale was made for the purpose of obtaining necessaries for herself and children. Booth v. Clark [Tex. Civ. App.] 78 S. W. 392. Evidence held sufficient to show that a defendant's title awarded him by partition commissioners was not obtained by fraud. Johnson v. Franklin [Tex. Civ. App.] 76 S. W. 611. Evidence held to show that the land in controversy was sold to the defendant at a sheriff's sale. Buckner v. Vancleave [Tex. Civ. App.] 78 S. W. 541. Where defendants claimed under a Spanish grant, evidence held sufficient to show that they were entitled to all the land held by them under the grant. State v. Tex. Land & Cattle Co. [Tex. Civ. App.] 78 S. W. 957. The ancestor of the plaintiff's grantor had ratified a sale by suing for the purchase money and plaintiff's grantor was a party to a suit to foreclose a lien therefor of which plaintiff had notice. Held, he could not assert title. Henry v. Thomas [Tex. Civ. App.] 74 S. W. 599.

86. A petition alleging that a note sued on and described was given in part payment of certain land, that a vendor's title was retained in the note and in the deed conveying the land to defendant to secure the payment of the same, that the defendant failed to pay the note, though past due, and praying for a writ of possession and for a quieting of his title to the land was sufficient in trespass to try title. Sanders v. Rawlings [Tex. Civ. App.] 77 S. W. 41. In an action against a husband and his second wife, the children of the first wife intervened, claiming that the property was community property and had been set aside to them as their share, but without alleging their title or any defect in the title of the second wife, who had purchased from the husband, was sufficient to permit evidence showing the superiority of their title. Eddy v. Bosley [Tex. Civ. App.] 78 S. W. 565.

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reference to abstracts,[87] and should show how title was obtained;[88] but is not subject to demurrer for failing to allege that an agreement concerning land was in writing.[89]

A plea setting up title to a part of the land sued for must describe such part,[90] and such a plea is a disclaimer as to the remainder.[91] If an answer demands affirmative relief, the plaintiff cannot discontinue the cause.[92]

An intervenor cannot come in without leave of the court.[93]

The pleadings will be construed as in trespass to try title if they are so in substance.[94] An action to quiet title may become by the pleadings one in trespass to try title.[95] Under the plea of not guilty, evidence of any lawful defense except limitations may be introduced, but if the defendant pleads his title, he is confined to evidence of the title pleaded.[96] In trespass to try title, partial discrepancies between the description of the land as set forth in defendant's plea and as given in deeds offered in evidence did not raise a question of variance, but only a question of identity.[97] By introduction of evidence respecting an element of the title claimed by defendant, the same is put in issue.[98]

87. A deed of trust for the description of certain property referred to certain pages of an abstract of title made by a certain person. A petition to correct the description alleged that this was a mistake, that the abstract was prepared by another. An exception to the petition was properly overruled. Bracken v. Bounds [Tex. Civ. App.] 70 S. W. 326.

88. Evidence that one was an actual settler at the date of his application to purchase it and that the lands were awarded to him make a prima facie title. Walker v. Marchbanks [Tex. Civ. App.] 74 S. W. 929. A deed described property as a part of a certain survey and recited it was recorded. Held proper to permit the record to be read in evidence without filing a certified copy of the deed referred to. Bracken v. Bounds [Tex. Civ. App.] 70 S. W. 326.

89. New York & T. Land Co. v. Dooley [Tex. Civ. App.] 77 S. W. 1030.

90. A plea of limitations for a part only of the land sued for, this being claimed on a naked possession, was insufficient as not describing the land, where it gives only the east and south boundaries. Giddings v. Fischer [Tex.] 77 S. W. 209.

91. An answer to trespass to try title, setting up by metes and bounds the tracts claimed by defendant and praying judgment therefor, is a disclaimer as to the balance of the land, within the Texas statute as to disclaimers. Stipe v. Shirley [Tex. Civ. App.] 76 S. W. 307.

92. Special answer alleged that defendant was lawfully possessed of a certain piece of land other than that involved in plaintiff's petition, and that plaintiff unlawfully withheld it, etc. After answers were filed, plaintiff dismissed his suit. Smithers v. Smith [Tex. Civ. App.] 80 S. W. 646.

93. Defendant having deeded the land before suit by an unrecorded conveyance filed a disclaimer having previously filed a plea of not guilty. An interlocutory default judgment had been rendered against him, and while this was in force, his grantee, without leave of the court, and without an effort to serve other parties, filed an original answer. Held, he was an intervenor. Riviere v. Wilkens, 31 Tex. Civ. App. 454, 72 S. W. 608. The admission in a petition of intervention that the husband had qualified as survivor of the community estate of himself and deceased wife, brought that issue into the case and cured the answer of the second wife of its failure to allege that fact. Eddy v. Bosley [Tex. Civ. App.] 78 S. W. 565.

94. Where one claims on the theory that a debt secured by an ancient deed, accompanied by a written defeasance, is presumed satisfied, trespass to try title is not in the nature of a suit for specific performance of the defeasance, so as to be subject to the bar of the statute. Turner v. Cochran, 30 Tex. Civ. App. 549, 70 S. W. 1024.

95. Certain defendants in addition to a plea of not guilty presented a cross plea, in substance a petition in trespass to try title. Lynch v. Pittman, 31 Tex. Civ. App. 553, 73 S. W. 862.

96. Title under a common source which was junior to plaintiff's title was pleaded. Plaintiff was entitled to recover, though there was a superior outstanding title back of the common source, there being no evidence that the common source did not hold under such outstanding title. Tiemann v. Cobb [Tex. Civ. App.] 80 S. W. 250. In trespass to try title, a plea setting up improvements made in good faith, in which as an evidence of such faith, defendant states as facts the deeds under which he claims, does not prevent him from taking advantage of the defense of an outstanding title. Buckner v. Vancleave [Tex. Civ. App.] 78 S. W. 541. Where the owner of land conveyed the same under circumstances whereby the equitable title remained in him and he thereafter conveyed the land to plaintiff, who sued in trespass to try title against those claiming under the deed which created the trust, the only limitation applicable was that applying to actions for land. Craig v. Harless [Tex. Civ. App.] 76 S. W. 594.

97. Fischer v. Giddings [Tex. Civ. App.] 74 S. W. 85.

98. Where defendant claimed to have purchased the land involved as school land and plaintiff introduced evidence on the issue of occupancy, the fact of such occupancy was put in issue. Corrigan v. Fitzsimmons [Tex. Civ. App.] 76 S. W. 68.

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Where all the evidence tends to prove a fact so that there could be but one finding, it is proper for the court to take the question from the jury,[99] and a claim of title unsupported need not go to the jury,[1] but failure to charge that a fact exists is not harmful where it was assumed without dispute that it did exist.[2]

The jury having returned a general verdict after being so instructed if they found a certain line to be the true boundary, the charge could be consulted to render the verdict certain.[3] Where the verdict is merely for the plaintiff for the land and there is evidence that the value of the rents and damages is the same as the value of the improvements, it will be inferred that the jury set off one against the other.[4]

A judgment must contain a sufficient description of the land,[5] unless no issue was made by the pleadings as to the location of the land involved, in which case the court had no authority to enter judgment describing the land.[6] Under a plea of not guilty, when the plaintiff fails to appear, the defendant is not entitled to judgment for the land; the suit should be dismissed.[7] Affirmative or cross relief may be granted only when parties affected by it are in court for the purpose of defending as to it.[8] The same rule applies where a new cause is set up by amendment after default and of which no notice is given.[9] A plaintiff cannot recover beyond the extent of his title, hence defendant, though merely pleading not guilty, may have boundaries fixed.[10] Costs follow the judgment as in other cases.[11]

TRIAL.

§ 1. Joint and Separate Trials (1908).
§ 2. Course and Conduct of Trial (1909).
§ 3. Reception and Exclusion of Evidence (1912).
§ 4. Custody and Conduct of the Jury (1921).

Scope of article.—In order to intelligently treat many important and really distinct matters of trial procedure, the law relating to dockets, calendars and trial

99. All evidence tended to show that a patent was issued to Dooley. New York & T. Cattle Co. v. Dooley [Tex. Civ. App.] 77 S. W. 1030. Where one in prior possession brought action against one entering without title, a court is not authorized to direct a verdict, unless the evidence is conclusive. Lynn v. Burnett [Tex. Civ. App.] 79 S. W. 64.

1. Where adverse possession is set up as a defense and there is evidence to show it the question is for the jury and it was error not to submit it. Haigler v. Pope [Tex. Civ. App.] 77 S. W. 1039.

2. Under circumstances of trial, failure to charge that a deed had been delivered held not prejudicial error, though court said he would so charge and denied argument on that point. Wilson v. Wilson [Tex. Civ. App.] 79 S. W. 839.

3. Rountree v. Haynes [Tex. Civ. App.] 73 S. W. 435.

4. O'Mahoney v. Flanagan [Tex. Civ. App.] 78 S. W. 245.

5. In trespass to try title, a judgment for land in accordance with certain surveys as the boundaries, and calling for 160 acres, is erroneous, the north and south bounds not extending as far west as the west boundary and more than 200 acres being included, even if the west boundary was drawn at the westerly ends of the north and south boundaries. Giddings v. Fischer [Tex.] 77 S. W. 209.

6. Smithers v. Smith [Tex. Civ. App.] 80 S. W. 646. Such judgment could be reformed on appeal. Id.

7. Hill v. Friday [Tex. Civ. App.] 70 S. W. 567.

8. Where plaintiffs were minors and their attorneys were not before the court as parties and there were no pleadings warranting it, a judgment decreeing that one-half of the recovery in favor of the plaintiffs should inure to the benefit of the attorneys was erroneous. White v. Simonton [Tex. Civ. App.] 79 S. W. 621.

9. If a defendant does not appear or answer, judgment cannot be rendered against him on a new cause of action set up in an amended petition of which he had no notice. A petition required plaintiff's vendor to defend the title, and, if it failed, to respond in damages on his warranty. There was an amended petition which was not served on him claiming special damages for loss of water privileges in losing a certain portion of the land. Coreth v. McNatt [Tex. Civ. App.] 77 S. W. 33.

10. Under a plea of not guilty, a defendant, though a trespasser, may have the position of plaintiff's boundary determined, and his recovery confined to the true boundary by showing that a river which formed the boundary had changed its course. Rodriguez v. Hernandez [Tex. Civ. App.] 79 S. W. 343.

11. Dispute as to boundary having been the only issue and that found in favor of defendant, judgment against plaintiff for

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lists,[12] and continuance and postponement,[13] argument of counsel[14] and the right to open and close same, examination of witnesses,[15] objections and exceptions to evidence,[16] trial by jury,[17] questions of law and fact,[18] instructions,[19] directing verdict and demurrer to evidence,[20] dismissal and nonsuit,[21] verdicts and findings,[22] has been excluded from Trial, and in Current Law each of such subjects has its separate article, though in some works they are grouped. Other subjects like Evidence and Pleading have long been separately treated, though relatively of the same class.

§ 1. *Joint and separate trials.*—In order to consolidate actions, the parties and the issues must be identical,[23] and it does not suffice if the plaintiff is nominally the same but the issues are distinct.[24] Thus trespass and eminent domain proceedings are distinct and unlike.[25] Consolidation of actions should not be ordered where it will result in prejudice to the rights of either party.[26] The mere pendency of an action by defendant against plaintiff involving a matter constituting a counterclaim in plaintiff's action is not sufficient to authorize the consolidation of the actions, but it must be shown that the counterclaim was availed of by defendant as a defense, at the first opportunity.[27] By agreement[28] one cause may be made to abide the judgment in another. When distinct causes are tried together, they are not merged, but each retains its identity,[29] and a single judgment may be equivalent to one in each case.[30] Where the court orders two causes, one to recover pos-

costs was properly rendered. Rountree v. Haynes [Tex. Civ. App.] 73 S. W. 435.

12. 1 Curr. Law, p. 953.
13. 1 Curr. Law, p. 620.
14. 1 Curr. Law, p. 209.
15. 1 Curr. Law, p. 1165.
16. Saving Questions for Review, 2 Curr. Law, p. 1590.
17. Jury, 2 Curr. Law, p. 633.
18. 2 Curr. Law, p. 1361.
19. 2 Curr. Law, p. 461.
20. 1 Curr. Law, p. 925.
21. 1 Curr. Law, p. 937.
22. 2 Curr. Law, p. —.

23. Motion denied. Klondike Lumber Co. v. Bender Wagon Co. [Ark.] 75 S. W. 855. An action to enforce liens on certain lumber and an action in replevin brought by a third party to recover the same lumber from a party to whom it had been sold by order of the court to satisfy the liens, should not be consolidated. This notwithstanding the fact that the plaintiff in the replevin action, by whom the motion to consolidate was made, might have raised the question of the validity of the sale by filing a motion in the other case to set the sale aside. Id. It is proper to consolidate actions based on identical transactions, where the parties are the same and the issues practically so. Action at law for money had and received, for accounting, and for recovery of specific property, properly consolidated with equitable action to declare certain mortgages paid and for a decree of cancellation, and cause heard by chancellor, the equitable issues being such as to dispose of the entire controversy. Twogood v. Allee [Iowa] 99 N. W. 288.

24. Actions for three several penalties alleged to have been incurred by defendant to the owners of three several lots of cans cannot be consolidated, though plaintiff sues as the authorized agent of these owners. Bell v. Keppler [N. J. Law] 57 Atl. 257.

25. An application by a corporation for the condemnation of land does not supersede an action theretofore brought against it for trespass to the same land, and the two should not be consolidated. Ga. R. & B. Co. v. Gardner, 118 Ga. 723.

26. Where it will prejudice plaintiff in an attempt to enforce the obligation of removal bonds. Gray Lithograph Co. v. Schulman, 84 N. Y. Supp. 503.

27. Held issues between the parties would not be furthered by a consolidation, and its denial was not an abuse of discretion. A. & S. Henry & Co. v. Talcott, 89 App. Div. [N. Y.] 76.

28. A colloquy on the trial of a cause held to show an agreement that the judgment therein should be the judgment in a certain other identical case. Brown v. Smedley [Mich.] 98 N. W. 857. Consult Stipulations, 2 Curr. Law, p. 1740; Judgments, 2 Curr. Law, p. 581.

29. Where separate judgments are rendered in each case, judgment cannot be reviewed on a single bill of exceptions. Center v. Fickett Paper Co., 117 Ga. 222; Cole v. Stanley, 118 Ga. 259. Where an execution is levied upon two separate tracts of land and two different claims are filed by different persons, one claiming each tract, the trial of the two claim cases together by consent of all parties does not merge them into one. Ruling dismissing levy cannot be reviewed on single bill of exceptions. Valdosta Guano Co. v. Hart, 119 Ga. 909. An order passed upon agreement between counsel that two suits, each based solely upon a common-law cause of action in favor of different plaintiffs against the same defendants, "be consolidated and tried together" does not have the effect to merge the two cases into one, but simply to provide that the cases shall be tried together, each case, except for this purpose, preserving its complete identity. Brown v. Louisville & N. R. Co., 117 Ga. 222.

30. In such case, an order dismissing the levy as excessive is equivalent to a similar order in each case. Valdosta Guano Co. v. Hart, 119 Ga. 909.

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session of a tract of land, and the other to enjoin this and for specific performance of a contract for its sale, to be consolidated, and the order is unappealed from, the judge properly tries the issues of law and fact in both cases.[31]

Separate trials[32] and severance of actions[33] are discretionary and not of right, and cannot be granted if any party will be deprived of any of his rights or defenses.[34] The mere fact that one defendant sets up a different defense from that set up by the others does not entitle him, as a matter of right, to a separate trial.[35] An order making certain parties defendants in an action does not prevent an order at the trial severing the action.[36]

§ 2. *Course and conduct of trial.*—The court may adopt any order of procedure which may be required by justice and convenience.[37] The judge should be present in the court room during the entire trial.[38] The orderly and proper conduct of the trial is confided to his discretion.[39] A case should not be tried in the absence of the parties[40] or the pleadings.[41]

The order in which the issues involved in a case should be tried is largely in the discretion of the trial court.[42]

Any remark of the trial judge, made in the presence of the jury, in which he assumes the truth or falsity of any matter in issue,[43] or which tends to impress the

31. Chandler v. Franklin, 65 S. C. 544.

32. Black v. Marsh, 31 Ind. App. 53, 67 N. E. 201.

33. A co-defendant to a suit on a promissory note held not entitled to a severance on a plea of coverture and that the note was given for her husband's debt. Englehart v. Richter, 136 Ala. 562.

34. Joint tort feasors joined as defendants in a single suit are not entitled to separate trials. Under laws of Indiana (Burns' Rev. St. 1901, § 577), plaintiff is entitled to trial of the issue, and judgment in accordance with the proof made, either joint or several. Black v. Marsh, 31 Ind. App. 53, 67 N. E. 201. Severance of action against insurance company and parties made defendants by an order of the court so that the company could not be heard on the claim of the other defendants, and they could not be heard on the right of plaintiff to any recovery, held error, all parties being entitled to participate in the trial of any and all issues raised by the pleadings. Reed v. Provident S. L. Assur. Soc., 79 App. Div. [N. Y.] 163.

35. Haupt v. Simington, 27 Mont. 480, 71 Pac. 672.

36. Reed v. Provident S. L. Assur. Soc., 79 App. Div. [N. Y.] 163.

37. Pattee v. Whitcomb [N. H.] 56 Atl. 459. The action of the trial judge in going to the home of a witness who was physically unable to attend court and allowing her testimony to be taken in his presence there is not an abuse of discretion. Humphrey v. Humphrey [Neb.] 91 N. W. 856.

38. Where, during the argument to the jury, the judge retired to his chambers to look over requested instructions, leaving an open door between him and the court room through which he could hear and see what was going on, held not reversible error, it not appearing that the parties were prejudiced thereby. Chicago City R. Co. v. Creech, 207 Ill. 400, 69 N. E. 919. But his absence, with the consent of the parties, is not alone ground for reversal. In civil cases, in the absence of any showing to the contrary, such consent will be presumed. Gorham v. Sioux City Stock Yards Co., 118 Iowa, 749, 92 N. W. 698.

39. Wissler v. Atlantic [Iowa] 98 N. W. 131. It is for him to say, in the first instance, in the exercise of his discretionary power, whether there has been conduct prejudicial to the rights of either of the parties. Id. The arrest of a witness for laughing during the trial, where he is later released upon explaining that he was coughing and no further notice taken of his conduct, is not error. Seawell v. Carolina Cent. R. Co., 132 N. C. 856. Held not erroneous to allow one of the usees, for whose benefit an action was brought, to enter a retraxit and withdraw from the case, there being nothing in the defense set up to prevent it. Cheek v. Oak Grove Lumber Co. [N. C.] 46 S. E. 488. The fact that the court, when reading the evidence to the jury, moved to a table within the bar in front of the jury, is not ground for reversal. Seawell v. Carolina Cent. R. Co., 132 N. C. 856.

40. It is not an abuse of discretion to proceed with the trial of a case in the absence of one of the parties where his counsel has been notified of the date set for the trial. Richards v. Enlow Cattle Co. [Neb.] 98 N. W. 659.

41. Chicago Cottage Organ Co. v. Standen [Neb.] 98 N. W. 1051, 1052.

42. The refusal of a preliminary trial as to jurisdiction is not error, introduction of evidence on that issue being allowable on the trial of the cause. May set aside order for a new trial without first passing on an application for a change of venue. Watson v. Williamson [Tex. Civ. App.] 76 S. W. 793. If there are both legal and equitable issues in a case, the trial judge may first try whatever issue he believes will dispose of the controversy. Greig v. Rice, 66 S. C. 171.

43. A remark of the court, on the introduction of a copy of a written instrument, to the effect that "it was admissible for what it was worth—what it shows—just as the original would be," held not preju-

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jury with the idea that he believes that the truth of any issue involved in the trial of the case is with one side or the other,[44] or which will so influence the minds of the jury that they cannot fairly pass upon the issues before them,[45] or any comment by him upon the weight of the evidence or the credibility of witnesses,[46] or allusion to the testimony of a witness in a manner which apparently gives it judicial indorsement and approval,[47] is prejudicial error, and ground for reversal;[48]

dicial, particularly in view of subsequent testimony and instructions. Munn v. Jordan, 31 Wash. 506, 72 Pac. 124. A remark to the effect that plaintiff "had a contract," where the existence of the contract was in issue, held error. Selley v. American Lubricator Co., 119 Iowa, 591, 93 N. W. 590. In an action for injuries caused by a defective sidewalk, a comment of the court to the effect that "a generally dilapidated condition don't generally take place in a day or two," held not objectionable as expressing an opinion as to the condition of the walk. Wissler v. Atlantic [Iowa] 98 N. W. 131. In an action on a saloonkeeper's bond for selling intoxicating liquor to a drunkard, a remark made by the judge to the party to whom the liquor was sold and who had been called as a witness, to the effect that if he got drunk during the trial he would be put in jail until he got sober, held to be reversible error, as giving an impression to the jury that the court believed him to be a drunkard, that being one of the issues in the case. Wilson v. White, 29 Tex. Civ. App. 588, 69 S. W. 989. It is not error for the court, in overruling a motion to exclude certain evidence, to remark, "I don't think I ought to give my reasons for this decision. I don't want to give any intimation how I regard it. I simply say I overrule the motion to exclude the testimony." State v. Prater, 52 W. Va. 132. Where plaintiff introduced a bill of sale and defendant's attorney objected to the same, stating that it was a "manufactured piece of paper," whereupon plaintiff moved that such statement be stricken out, and the court said: "I presume this was manufactured. Sustain objection to it," held error, since the jury might have inferred that the court agreed in regarding the bill as manufactured evidence, and that the remark could not be regarded as jocular and intended to mean only that the paper on which the instrument was written was manufactured. Perkins v. Knisely, 204 Ill. 275, 68 N. E. 486. Statement by the court, in sustaining an objection to a question asked on cross-examination, to the effect that there was nothing to examine the witness about "except these interviews he has testified to and these letters," held not prejudicial in view of subsequent evidence. Dick v. Zimmerman, 207 Ill. 636, 69 N. E. 754.

44. Statement of the court during argument of counsel held prejudicial. Woodson v. Holmes, 117 Ga. 19. A remark of the court, made after overruling a number of dilatory pleas of defendant, in the absence of a jury and before the trial of the case to the effect that plaintiffs had been burned out, and had lost all they had, and that he was going to give them an early trial, held not prejudicial to defendant. Fidelity M. F. Ins. Co. v. Murphy [Neb.] 95 N. W. 702.

45. Kramer v. N. W. Elevator Co. [Minn.] 98 N. W. 96. A remark of the court: "I prefer, counsel, that, if there is to be any stealing done on technicalities, that the supreme court say so," held prejudicial error, which was not cured by a subsequent instruction to the jury to disregard it. Id. A remark of the court in ruling that a certain line of argument in regard to signed statements of witnesses, was improper, to the effect that it was proper for counsel to obtain such statements, held not reversible error. Brzozowski v. Nat. Box Co., 104 Ill. App. 338. Defendant cannot avail himself of an objection to a remark of the court to the effect that he would let a witness answer the question, but it was not pertinent, where the examination was as to a suit based on the use of an article in the sale of which defendant was not interested. Rankin v. Sharples, 206 Ill. 301, 69 N. E. 9.

46. Kroetch v. Empire Mill Co. [Idaho] 74 Pac. 868. A remark of the court in regard to the evidence, made during the trial, which would have been error if made in the formal charge, is prejudicial, and ground for reversal. Coldren v. Le Gore, 118 Iowa, 212, 91 N. W. 1066. A remark of the court to counsel, in the presence of the jury, to the effect that, "from the manner of these parties on the stand, the court does not believe" a certain fact, held prejudicial, although he afterwards warned the jury not to consider it. Davis v. Dregne [Wis.] 97 N. W. 512. The action of the trial judge in saying to a witness, "He may answer; he is evading the question," held not prejudicial, it appearing that the witness was actually doing so. Heffernan v. O'Neill [Neb.] 96 N. W. 244. A remark of the court, in the presence of the jury, after a witness had stated that he had learned of a sale from the record, that "it was a newspaper report of the sale," when there was nothing in the evidence to show that the witness had derived his information from a newspaper, held harmless error. Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515. On an objection being made to a leading question asked of a physician, a remark by the court that "the doctor ought to be able to tell without being asked questions and without telling him," was not error. Halley v. Tichenor, 120 Iowa, 164, 94 N. W. 472.

47. Complimenting a witness or commenting on the propriety of his not adhering to previous statements which he claims to have made under honest mistake of fact, held error. Potter v. State, 117 Ga. 693.

48. Such comment is ground for reversal, although no motion for a mistrial is made on account thereof. Potter v. State, 117 Ga. 693. But error cannot be based on the remarks and conduct of the court, in the absence of objections and exceptions taken at the time. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087. An objection to a remark by the court in ruling on evidence will not be reviewed on appeal, in the absence of objection and exception thereto.

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but remarks of the trial judge to the jury in explanation of his act in giving a binding instruction are immaterial.[49]

Any conduct or remarks of counsel which tend to convey to the jury information not admissible in evidence,[50] or to influence them to return an unfair verdict,[51] are generally held to be reversible error. So also are statements by counsel as to the standing of the jury, and accusations that some of their number are influenced by improper motives, made when they are in court for the purpose of reporting the result of their deliberations.[52] But remarks addressed to the court, which are not shown to have been made for their effect upon the jury, nor otherwise than in good faith, nor to have been prejudicial, are not.[53]

It is the duty of the court to see that the examination of witnesses is conducted in an orderly manner and that they are not unduly hastened,[54] to prevent such misconduct on the part of counsel toward witnesses as tends to the suppression of the truth,[55] and to protect witnesses from all unprofessional attacks of opposing counsel.[56] It is a discretionary right and duty of the trial court to rebuke

See title Saving Questions for Review; Halley v. Tichenor, 120 Iowa, 164, 94 N. W. 472.

49. Cent. Guarantee T. & S. D. Co. v. White, 206 Pa. 611. See, also, Instructions, 2 Curr. Law, p. 461.

50. A statement made by counsel in examining a talesman that he understood that the case was being defended by an insurance company, and a remark by the court, made in overruling an objection thereto, to the effect that, assuming the insurance company was interested, counsel had a right to find it out, held prejudicial error. Lipschutz v. Ross, 84 N. Y. Supp. 632. Conveying to jurors, under the guise of inquiring into their qualifications, and in the cross-examination of witnesses, information which is not admissible in evidence and which will have a tendency to influence their verdict, constitutes reversible error. Conveying information, in personal injury suit, that defendant was insured against loss in case plaintiff recovered, held ground for reversal. Lassig v. Barsky, 37 N. Y. Supp. 425. The ringing of a gong by defendant and his counsel, in the presence of the jury, in the absence of the court and during recess, where the court had previously refused to admit it in evidence and had prohibited its being rung, held ground for a new trial, though the jury was charged to disregard such ringing and affidavits were made by seven of the jurors that they had done so. Bronk v. Binghamton R. Co., 79 App. Div. [N. Y.] 269. The court should admonish the jury not to consider oral offers to prove incompetent facts made in their presence. Such admonition is sufficient protection to the rights of the adverse party. Consumers' Paper Co. v. Eyer, 160 Ind. 424, 66 N. E. 994.

51. Irrelevant comments of counsel during the progress of the case are not grounds for a new trial unless inconsistent with the legal fairness thereof. The following held not ground for new trial: "I withdraw the question if they do not care to have him answer." Guertin v. Hudson, 71 N. H. 505. Remarks of counsel held not such as to prejudice jury so as to entitle defendant to a new trial. Vowell v. Issaquah Coal Co., 31 Wash. 103, 71 Pac. 725. Misconduct of counsel in cross-examination of witnesses and argument held sufficient to justify reversal. See v. Wabash R. Co. [Iowa] 99 N. W. 106.

52. Hagen v. N. Y. Cent. & H. R. R. Co., 79 App. Div. [N. Y.] 519.

53. Statement by counsel that he understood that the jury had expressed a desire to take certain letter heads, which were in evidence, out with them, and that he was willing that they do so, held not prejudicial. Rawlings v. Anheuser-Busch Brew. Ass'n [Neb.] 95 N. W. 792. Where counsel is guilty of misconduct on trial in commenting on instructions which were to be given, and the court refused to relieve the adverse party from the effect thereof, the error is no ground for a new trial, in the absence of a motion to set aside the submission and withdraw the case from the jury. Consol. Stone Co. v. Morgan, 160 Ind. 241, 66 N. E. 696. In the absence of a request to have the jury excluded during an argument as to the admission of evidence, a statement by counsel in their presence as to what he expected to prove thereby is not error. Hedlun v. Holy Terror Min. Co. [S. D.] 92 N. W. 31. See, also, Argument of Counsel, 1 Curr. Law, p. 209; Harmless and Prejudicial Error, 2 Curr. Law, p. 159.

54. A witness claimed that counsel was trying to confuse her and asked for time to answer. The court said, "Give her time to answer it." Counsel said: "I have given her plenty of time," to which the court replied, "Sometimes you don't." Held not error. Birmingham R. & E. Co. v. Ellard, 135 Ala. 433.

55. Declarations of fact during the trial, the repetition of incompetent questions to which objections have been sustained, and comments on the evidence before argument, are not permissible. Cleveland, P. & E. R. Co. v. Pritschau, 69 Ohio St. 438, 69 N. E. 663. Its permission, on the part of counsel for the prevailing party, is ground for reversal, unless it affirmatively appears that its prejudicial tendency has been cured, by instructions from the court or otherwise. Id.

56. Reproving of counsel for attacking witness held proper. Heffernan v. O'Neill [Neb.] 96 N. W. 244.

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and in a measure suppress overzealous or overwilling witnesses.[57] A full treatment of the mode of examining witnesses is elsewhere given.[58]

Allowing the jury to view the premises in question is a matter within the discretion of the court.[59]

Delaying the trial for the purpose of allowing a party to procure further or different evidence,[60] or to give counsel time to consult, is within the discretion of the court.[61]

Under some systems of practice, where there are no disputed facts, the jury may be discharged, and the action dismissed.[62]

§ 3. *Reception and exclusion of evidence.—The order of proof* is largely discretionary with the trial court,[63] and he need not depart from the established order.[64] A party is bound to produce all his evidence before he closes his side of the case,[65] and he can afterwards, as a strict matter of legal right, produce evidence in rebuttal only.[66] Surrebuttal should be allowed when new matter is introduced

57. State v. King, 88 Minn. 175, 92 N. W. 965. He may reprimand witnesses who constantly attempt to inject evidence into the case not called for by questions put to them, and his actions in that behalf, where no reflections are cast upon the credibility of the witness, do not constitute reversible error, unless a clear abuse of discretion is shown. Id.

58. Examination of Witnesses, 1 Curr. Law, p. 1165.

59. Rickeman v. Williamsburg C. F. Ins. Co. [Wis.] 98 N. W. 960. Mont. Code Civ. Proc. § 1081. Maloney v. King [Mont.] 76 Pac. 4. Kentucky Civ. Code, § 318, authorizing a view in certain cases, is not mandatory, and view may be denied in the discretion of the court. Green's Adm'r v. Maysville & B. S. R. Co. [Ky.] 78 S. W. 439. Not error to refuse to do so where the jury informed him that a view would be of no benefit to them. Bodie v. Charleston & W. C. R. Co., 66 S. C. 302. A view is requisite only when other evidence is inadequate to fairly present the case to the jury, and it is not error to refuse to allow it unless it clearly appears that such view was necessary to a just decision, and its refusal did injury. Davis v. American Tel. & T. Co., 53 W. Va. 616. Under a statute authorizing a view of the premises in controversy in certain cases (Mills' Ann. Code Colo. § 188a), and the appointment of one guide chosen by each party, it is not error to appoint a party to the action as one of the guides. Wilson v. Harnette [Colo.] 75 Pac. 395.

60. The court is under no obligation to delay proceedings until documents can be found, where it is not claimed that any search was instituted for them until after the trial commenced. Bailey v. Warner [C. C. A.] 118 Fed. 395. Where a witness testified that it would take him thirty minutes or more to select certain pieces of goods in one inventory which were not in another, it was not an abuse of discretion on the part of the court to refuse to interrupt the examination for that length of time and to direct counsel to proceed with the examination on some other point, where he intimated that counsel might afterward renew the inquiry and did not refuse him an opportunity to do so. Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164. The adjournment of the trial, for the purpose of allowing a party to call another witness is a matter within the discretion of the court. Denial of an application to adjourn, in the absence of any proof of surprise, held not an abuse of discretion. Block v. Sherry, 87 N. Y. Supp. 160. It was not error to refuse a continuance on account of absent witnesses, where some of them afterwards appeared and testified to proved facts which the affidavit for continuance stated other absent witnesses would testify to, and the affidavit did not state what it was expected to prove by still other witnesses mentioned therein. Ill. Cent. R. Co. v. Taylor, 24 Ky. L. R. 1169, 70 S. W. 825.

61. It is not reversible error to refuse to allow counsel time in which to consult in regard to the introduction of testimony. Where counsel desired an hour and the court offered to allow them ten minutes. State v. Prater, 52 W. Va. 132. See Continuance and Postponement, 1 Curr. Law, p. 620.

62. West Seattle L. & I. Co. v. Novelty Mill. Co., 31 Wash. 435, 72 Pac. 69. Compare Dismissal, etc., 1 Curr. Law, p. 937; Directing Verdict, etc., 1 Curr. Law, p. 925.

63. Foley v. Brunswick Traction Co. [N. J. Law] 55 Atl. 803. Under Or. St. (B. & C. Comp. § 842). Jones v. Peterson [Or.] 74 Pac. 661; Western Mattress Co. v. Potter [Neb.] 95 N. W. 841; Atchison, T. & S. F. R. Co. v. Phipps [C. C. A.] 125 Fed. 478; Norfolk & A. T. Co. v. Morris' Adm'x [Va.] 44 S. E. 719. Allowing plaintiff to introduce the record of certain deeds during his cross-examination of defendant held not an abuse of discretion. Patton v. Fox [Mo.] 78 S. W. 804. May permit plaintiff to introduce evidence in chief after close of defendant's case. Seigle v. Badger Lumber Co. [Mo. App.] 80 S. W. 4.

64. Wilson v. Hoffman, 123 Fed. 984.

65. Barson v. Mulligan, 77 App. Div. [N. Y.] 192. Plaintiff has no right to withhold a part of his testimony until he has ascertained how far defendant's testimony will contradict the same, and then offer the balance of his testimony in rebuttal. Id.

66. See title Evidence, 1 Curr. Law, p. 1136. Barson v. Mulligan, 77 App. Div. [N. Y.] 192. Evidence offered in rebuttal which does not rebut any evidence offered by the other party should be excluded. Saucier v. New Hampshire Spinning Mills [N. H.] 56

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on rebuttal.[67] Defendant cannot, ordinarily, offer evidence until plaintiff has concluded his case.[68]

Allowing the reopening of a case, after a party has rested, for the purpose of receiving further testimony,[69] or testimony which has been overlooked or omitted,[70] and the admission of evidence offered in rebuttal, which should have been introduced in chief,[71] or the admission of evidence in chief, which is proper rebuttal,[72]

Atl. 545. If plaintiff pleads a legal title and defendant sets up a claim under an unrecorded sale of land it is competent in rebuttal to show that plaintiff was a bona fide taker as that proves a legal title and not an equitable title. Lee v. Wysong [C. C. A.] 128 Fed. 333. Where plaintiff fails to make out a case, but defendant introduces evidence which supplements it in the particulars in which it is lacking, plaintiff may then introduce evidence in rebuttal of defendant's proof. Crockett v. Miller [Neb.] 96 N. W. 491. Whatever testimony the propounders of a will may offer after the contestants have rested is in rebuttal, hence the admission of such testimony is not in violation of a statutory provision prohibiting a party from testifying in chief for himself after having introduced other testimony in his behalf. Savage v. Bulger, 25 Ky. L. R. 1269, 77 S. W. 717. The practice of allowing a party to identify and introduce exhibits on cross-examination of his adversary's witness is bad, and should only be allowed when the exhibit contradicts his evidence in chief or is intimately connected with his testimony. Kroetch v. Empire Mill Co. [Idaho] 74 Pac. 468.

67. Maloney v. King [Mont.] 76 Pac. 4.

68. Wilson v. Hoffman, 123 Fed. 984. It was not error to refuse to allow defendant to introduce plaintiff's answers to interrogatories, on plaintiff's cross-examination, before defendant's case had been reached; the court having stated that plaintiff might be asked whether she had not made certain responses to such interrogatories. Id. Questions held not proper on rebuttal. Sebeck v. Plattdeutsche Volksfest Verein [C. C. A.] 124 Fed. 11.

69. Allowing the reopening of a case is a matter purely within the discretion of the court. Vogel v. North Jersey St. R. Co. [N. J. Law] 54 Atl. 563. Discretion should be exercised sparingly and is not reviewable on appeal. Barson v. Mulligan, 77 App. Div. [N. Y.] 192. Permitting a party to give further testimony after having closed his case is a matter in the discretion of the trial court. Hartrich v. Hawes, 202 Ill. 334, 67 N. E. 13; Volusia County Bank v. Bigelow [Fla.] 33 So. 704. Permitting plaintiff to reopen her main case, where the court permitted defendant the same latitude and defendant availed itself thereof, held not an abuse of discretion. Bergman v. London & L. Fire Ins. Co. [Wash.] 75 Pac. 989. It is discretionary in the court to allow other testimony to be offered by plaintiff after he has announced his case through and before anything else is done. Western Union Tel. Co. v. Parsons, 24 Ky. L. R. 2008, 72 S. W. 800. Allowing a case to be reopened after a decree has been entered, and permitting the introduction of further evidence, are matters within the discretion of the trial court. Will not be disturbed unless an abuse of discretion is shown. In re Cummings' Estate, 120 Iowa, 421, 94 N. W. 1117. A motion to reopen a case, after plaintiff has closed his evidence and the court has granted a nonsuit, but before the order has been entered upon the minutes, is addressed to the sound discretion of the court, and denial will not be interfered with on appeal. Pitts v. Florida Cent. & P. R. Co., 115 Ga. 1013. Where the prosecution is allowed to introduce new evidence in chief after the evidence for the defense has been closed, defendant must be permitted to rebut such evidence, but the introduction of new evidence by defendant at that time is a matter within the discretion of the court. Keffer v. State [Wyo.] 73 Pac. 556. The admission of lettered exhibits, not offered until after the case has been closed, is within the discretion of the trial judge. Lord v. Guyot, 30 Colo. 222, 70 Pac. 683.

70. Barson v. Mulligan, 77 App. Div. [N. Y.] 192. The court may, in the exercise of its discretion, and at any stage of the case, allow the introduction of evidence which has been overlooked or omitted. Unless discretion has been abused or injury is shown to have resulted therefrom, it cannot be regarded as error. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; Id., 102 Ill. App. 202. Refusal to allow defendant to reopen his case to prove damage, held not an abuse of discretion. Jarvis v. N. Y. House Wrecking Co., 84 N. Y. Supp. 191. The provision of the Texas Statutes (Rev. St. 1895, art. 1298), authorizing the trial court, at any time before the argument is closed, to permit either party to supply an omission in the testimony, is directory merely, and a party must show that he has been injured by a disregard of the rule in order to obtain a reversal on that ground. Allowing a party to introduce evidence after argument held not reversible error, where an opportunity to rebut such evidence and to reargue was given. Western Union Tel. Co. v. Roberts [Tex. Civ. App.] 78 S. W. 522. Refusal to allow the reopening of plaintiff's case for the purpose of showing the situation at the time of the execution of certain deeds held error. Lott v. Payne [Miss.] 33 So. 948.

71. Hartrich v. Hawes, 202 Ill. 334, 67 N. E. 13; Birmingham R., L. & P. Co. v. Mullen, 138 Ala. 614; Southern R. Co. v. Wilson, 138 Ala. 510. Not error to allow counsel to make witness his own during cross-examination for purpose of asking him a question. Norfolk & A. T. Co. v. Morris' Adm'x, 101 Va. 422. The court may, in his discretion, reopen the case on rebuttal, if no injury follows to the parties by surprise or otherwise. Foley v. Brunswick Traction Co. [N. J. Law] 55 Atl. 803. Evidence held to be a part of plaintiff's case, which should have been put in before resting, under New Hampshire rule of court No. 50 (56 N. H. 589), requiring that plaintiff shall put in his whole case before resting, and shall

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are matters within the discretion of the trial court. The trial court has no authority to reopen a case on its own motion long after its submission at a previous term.[73]

The right to open and close a case is in the party having the burden of proof. If any of the material facts of a petition are not admitted, but are denied, either directly or argumentatively, the right to open and close is in the plaintiff.[74] A party cannot acquire a right to open and close by pleading a denial in affirmative form, nor by anticipating defenses and alleging what he is not obliged to prove, nor by filing an "admission" in which he assumes the burden of proving affirmatively matter amounting to a denial of plaintiff's case.[75] If plaintiff is entitled to recover upon the pleadings without any proof, the defendant has the affirmative on any defense set up in the answer, and has the right to open and close.[76] In order that defendant may acquire the right to open and close, his defense must be in the nature of a plea in confession and avoidance.[77] It is error to allow a garnishee, who presents no defensive pleading in the nature of a plea in confession and avoidance, to open and close the argument.[78] Refusal to allow party having burden of proof to open and close held error without prejudice where he was not entitled to recover under the evidence.[79] Whichever party would lose if no evidence was offered has the right to open and close.[80] In order to entitle defendant to the right to open and close, a plea of justification in an action to recover damages for the commission of a tort must admit the commission of the acts charged in the petition, as they are therein alleged. A partial admission is not sufficient.[81] One who objects to an auditor's report has the burden of proof and the right to open and close, under the laws of Georgia (Civ. Code, § 4595), although he submits to the jury all the evidence contained in such report and the other party submits none.[82] Under the Montana Code (Code Civ. Proc. § 2340), the contestants

not thereafter, save with permission of the court, put in other evidence not strictly in rebuttal. Gerrish v. Whitfield [N. H.] 55 Atl. 551; Marande v. Tex. & P. R. Co. [C. C. A.] 124 Fed. 42. Not error to admit in rebuttal testimony which is proper rebuttal evidence, merely because other evidence as to the same matter was introduced in chief. Atchison, T. & S. F. R. Co. v. Phipps [C. C. A.] 125 Fed. 478. Refusal to allow plaintiff to introduce testimony in chief on surrebuttal, on the ground that he had just learned that the witness would testify favorably to him, held not an abuse of discretion. Beyer v. Hermann, 173 Mo. 295, 73 S. W. 164. Not reviewable where discretion is not abused. Wilmoth v. Hamilton [C. C. A.] 127 Fed. 48; Honum v. McNeil, 80 App. Div. [N. Y.] 637.

72. Tague v. John Caplice Co., 28 Mont. 51, 72 Pac. 297. The refusal to permit plaintiff to introduce in chief evidence which, though relevant to the issue made by the answer, was not necessary to make out his case as alleged, is not error. Lisker v. O'Rourke, 28 Mont. 129, 72 Pac. 416, 755. It is proper to refuse to allow plaintiff to offer in chief evidence rebutting the allegations of the answer. In action for negligence where defendant alleged that negligence was that of a fellow-servant, proper to exclude evidence in contradiction thereof offered in plaintiff's main case. Turner v. Southern Pac. Co. [Cal.] 76 Pac. 384.

73. Error to receive depositions and oral testimony after such reopening. Hagerle v. Beebe [Iowa] 99 N. W. 303.

74. Neb. Code Civ. Proc. § 283. Sorensen v. Sorensen [Neb.] 94 N. W. 540.

75. New trial granted for failure to accord to petitioners the right to open and close. Sorensen v. Sorensen [Neb.] 94 N. W. 540.

76. Denial of the right to open and close is ground for reversal. Miller v. Myerhoff, 79 App. Div. [N. Y.] 532; Columbia Finance & Trust Co. v. Mitchell's Adm'r, 24 Ky. L. R. 1844, 72 S. W. 350.

77. Ferguson-McKinney Dry Goods Co. v. City Nat. Bank, 31 Tex. Civ. App. 238, 71 S. W. 604.

78. Mere admission by garnishee that plaintiff has good cause of action as set out by his pleadings, except as defeated by the facts of the answer established at the trial, is not sufficient. Ferguson-McKinney Dry Goods Co. v. City Nat. Bank, 31 Tex. Civ. App. 238, 71 S. W. 604.

79. Loy v. Rorick [Mo. App.] 71 S. W. 842. Under rule 31 of Texas district court, defendant obtains right to open and close by filing a written admission that plaintiff has a good cause of action as set forth in his petition, except so far as it might be defeated by the facts in the answer constituting a good defense. Joy v. Liverpool, L. & G. Ins. Co. [Tex. Civ. App.] 74 S. W. 822.

80. Craggs v. Bohart [Ind. T.] 69 S. W. 931.

81. Berkner v. Dannenberg, 116 Ga. 954, 60 L. R. A. 559.

82. Schmidt v. Mitchell, 117 Ga. 6.

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of a will have the burden of proof and are entitled to open and close.[83] The party first required to produce evidence is entitled to open and close the argument.[84]

The right and opportunity to cross-examine and the prescribed form for taking and certifying testimony may be waived by stipulation or by silent acquiescence in the introduction of evidence.[85] On trial of a cross complaint confessed by default, plaintiff should not be permitted to offer proofs or cross-examine.[86]

A witness may be recalled to explain statements made by him during his examination.[87]

Allowing the temporary withdrawal of a witness, is within the discretion of the court.[88]

An offer of evidence must be in presenti.[89] It is equivalent to offering a letter to so refer to it that the jury must necessarily believe that they are listening to testimony concerning the contents of a particular letter.[90] An offer to prove, made in the alternative, must be taken in the view less favorable to the offerer.[91] An offer of a certified copy of a chattel mortgage includes the certificate of the officer thereto,[92] but the mere offer of a recorded instrument in evidence does not include the filing certificate indorsed thereon by the recording officer.[93] Evidence rejected as incompetent, which is made competent by subsequent testimony, should then be offered again.[94] After offer, if the evidence be documents or exhibits, the opposite party must have opportunity for inspection.[95] It is proper for the trial court to require objections for each party to be made by a single counsel.[96] It is not error to refuse to stop a witness where it is impossible to determine beforehand

83. Farleigh v. Kelley, 28 Mont. 421, 72 Pac. 756.

84. Neb. Code Civ. Proc. § 283. Zweibel v. Myers [Neb.] 95 N. W. 597. In suit on note, principals defaulted. Surety pleaded knowledge of suretyship by payee and extension. Before announcement of ready, surety filed statutory admission. Held, prayer of surety for leave to open and close evidence and argument properly refused. Guerguin v. Boone [Tex. Civ. App.] 77 S. W. 630.

85. Of a statement or affidavit of a person. United States v. Homestake Min. Co. [C. C. A.] 117 Fed. 481. See generally, Examination of Witnesses, 1 Curr. Law, p. 1165.

86. The code makes the cross complaint stand as confessed by his default. Murphy v. Murphy, 141 Cal. 471, 75 Pac. 60. If the default is opened, he is entitled to answer the cross complaint and to findings. Id.

87. Bailey v. Seattle & R. R. Co., 32 Wash. 640, 73 Pac. 679. The admission in evidence of a second deposition, taken to show facts not stated in a former one, rests in the discretion of the court. Analogous to the recall of a witness for further examination. Fredonia Nat. Bank v. Tommel, 131 Mich. 674, 92 N. W. 348. The recalling of a witness, after the court had taken a case tried without a jury under advisement, on his own motion and over the objection of counsel, held not error, where no new evidence was elicited from him. Littlejohn v. Huff, 103 Ill. App. 284.

88. For the purpose of proving by another witness that a certain letter cannot readily be found. Bailey v. Warner [C. C. A.] 118 Fed. 395.

89. A mere statement by counsel, in conversation with the court, of what he desires to do, does not constitute an offer of evidence. Where counsel stated: "We desire to offer evidence on the question of the inspection of the cars, etc.," and the court replied: "I won't receive any evidence except as to the ownership of the line at this stage," held not an offer of, or refusal to admit, evidence on which error could be predicated. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087.

90. Lombard v. Chaplin, 98 Me. 309, 56 Atl. 903.

91. Buck v. Troy Aqueduct Co. [Vt.] 56 Atl. 285.

92. In pursuance of Neb. Code Civ. Proc. § 408, making such copies equal evidence with the originals or the records. Dillrance v. Murphy [Neb.] 95 N. W. 608.

93. Dillrance v. Murphy [Neb.] 95 N. W. 608.

94. Saucier v. New Hampshire Spinning Mills [N. H.] 56 Atl. 545.

95. Exhibits cannot be received in evidence until the opposite party has had an opportunity to examine them and to question the witness in regard to them. Under Cal. Code Civ. Proc. § 2054. Stockwell v. Mutual Life Ins. Co., 140 Cal. 198, 73 Pac. 833. The mere identification of a writing by a witness and having it marked by the reporter for purposes of identification, without allowing the opposite party to inspect it, is not prejudicial where it is not read or offered in evidence. Id.

96. Each party represented by two counsel and three of them talking at once. Simonds v. Cash [Mich.] 99 N. W. 754.

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whether the statements he is about to make will be material or immaterial.[97] Questions which are not objectionable on their face should be allowed[98] and otherwise the purpose should be stated, else the court may reject them,[99] and is warranted in so doing.[1] Evidence which is admissible for particular purposes,[2] or as to certain parties only, should be limited by the court to those purposes or parties.[3] It is not error to admit proper evidence, though offered for a wrong purpose.[4]

Admitting evidence out of order.—The court may exclude evidence upon any question until evidence tending to establish some primary material fact has been first offered and received,[5] and may receive incompetent evidence, where the party offering it states that he will thereafter make it competent by offering other evidence.[6] It is reversible error to receive bad evidence subject to objection, even if it is afterwards ruled on, the better practice being to send out the jury until the ruling be had.[7] Evidence introduced out of order will be treated as having been introduced when it should have been.[8]

Evidence of contumacious witnesses.—A witness cannot deprive a party of the benefit of his testimony by any contumacy of his, if there be no laches or connivance on the part of the person who has a right to his testimony.[9] Refusing to allow a

97. If incompetent, the remedy is by motion to instruct the jury to disregard it. Williams v. Clarke, 182 Mass. 316, 65 N. E. 419.

98. If it subsequently appears that the testimony elicited thereby is objectionable, it may be stricken out or the jury may be instructed to disregard it. Schmuck v. Hill [Neb.] 96 N. W. 158. In the absence of a motion to strike out, no error can be imputed to a ruling admitting evidence apparently competent, although on cross-examination, it is shown to be hearsay. Shealey v. South Carolina & G. R. Co. [S. C.] 45 S. E. 119.

99. The court may exclude questions which, on their face, raise an entirely immaterial issue, where he is not apprised of their purpose. Chase v. Ainsworth [Mich.] 97 N. W. 404.

1. Hutchins v. Missouri Pac. R. Co., 97 Mo. App. 548, 71 S. W. 473.

2. Gulf, C. & S. F. R. Co. v. Holt, 30 Tex. Civ. App. 330, 70 S. W. 591; Deutschmann v. Third Ave. R. Co., 87 App. Div. [N. Y.] 503. Where evidence admissible for one purpose is not relevant as to other subjects or for other purposes, an instruction limiting its effect must be asked. Chicago, R. I. & P. R. Co. v. Holmes [Neb.] 94 N. W. 1007. Objection to evidence not admissible as a basis of recovery, but admissible for other purposes, should not be taken to its admission, but by a request for instructions limiting its application. Fagan v. Interurban St. R. Co., 85 N. Y. Supp. 340. The fact that testimony was not admissible in an action for personal injuries to show an injury to plaintiff's eye as an element of damages, because not pleaded, would not preclude its admission when offered solely as a manifestation of the injuries which were pleaded. Admission not ground for reversal where court limited it to purpose for which it was offered, and it did not appear that the jury was prejudiced thereby. Bopp v. New York Elec. V. T. Co., 78 App. Div. [N. Y.] 337.

3. Gulf, C. & S. F. R. Co. v. Holt, 30 Tex. Civ. App. 330, 70 S. W. 591. See, also, Instructions, 2 Curr. Law, p. 461.

4. Fidelity & Deposit Co. v. Nisbet, 119 Ga. 316. It is not error to overrule objections to evidence which is admissible for any purpose, although not admissible for the purpose for which it is offered. Gulf, C. & S. F. R. Co. v. Holt, 30 Tex. Civ. App. 330, 70 S. W. 591.

5. Bradley v. Dinneen, 88 Minn. 334, 93 N. W. 116.

6. Saucier v. New Hampshire Spinning Mills [N. H.] 56 Atl. 545; Western Mattress Co. v. Potter [Neb.] 95 N. W. 841. Admission of secondary evidence of contents of a lost paper without preliminary proof of its loss is not error where counsel stated that he would, and actually did, thereafter introduce evidence making it competent. Haller v. Gibson, 30 Ind. App. 10, 65 N. E. 293; Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803. The fact that evidence so received was afterwards stricken out in the absence of the jury, and that their attention was not called to this fact, is not error, where the absence of the jury was not called to the attention of the court and no instruction in regard to the matter was asked for. Ellis v. Thayer, 183 Mass. 309, 67 N. E. 325. In case it is not subsequently rendered competent, counsel should move to strike out or request an instruction to the jury to disregard it. Will be presumed on appeal that the jury was so instructed. Jones v. Peterson [Or.] 74 Pac. 661.

7. Seafield v. Rohne, 169 Mo. 537, 69 S. W. 1051. It is better practice, in cases where objection is made to a party's offers of evidence, for the court to allow the jury to retire, and then hear the proposed evidence and the objections thereto. Leicher v. Keeney, 98 Mo. App. 394, 72 S. W. 145.

8. Cimiotti Unhairing Co. v. American Fur R. Co., 120 Fed. 672. Irregularity in the introduction of evidence will not be made the basis of striking out what would otherwise have been legitimate and relevant evidence. Evidence in chief introduced in cross-examination of complainant's witnesses may be rebutted. Id.

9. Clemmons v. Clemmons [Neb.] 96 N. W. 404.

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witness to testify, because he has disobeyed the rule excluding witnesses from the court room during the trial, is generally held to be reversible error;[10] but some courts hold that it is a matter within the discretion of the trial judge.[11]

Cumulative testimony may be refused where a fact has, in his opinion, been sufficiently proved,[12] e. g., further evidence in regard to the same fact in rebuttal, which the party proved in chief.[13] So the court may disallow questions which have for their object the compelling of a witness to repeat what he has already said,[14] and it is proper to exclude evidence as to matters about which there is no dispute[15] or well pleaded issue.[16] It may allow the deposition of a witness to be read after he has testified orally in court.[17] The reception of evidence tendered by defend-

10. It is error to refuse to allow a witness to testify for violating an order of the court excluding all witnesses, except the one testifying, from the court room, where he had no knowledge of the order, and neither the party by whom he was called or his attorneys knew of his presence, and it did not appear that he had been influenced by what he heard. Clemmons v. Clemmons [Neb.] 96 N. W. 404. Refusing to permit a witness to testify on rebuttal because he has disobeyed the rule for the exclusion and separation of witnesses, while permitting his testimony in chief to be contradicted, is error. Ill. Cent. R. Co. v. Ely [Miss.] 35 So. 873.

11. Texas court of appeals so held, but this doctrine is disapproved in this case. Johnson v. Cooley, 30 Tex. Civ. App. 576, 71 S. W. 34. Held an abuse of discretion to refuse to allow a witness to testify at all on the ground that he had been given certain information in regard to the case by counsel, after the witnesses had been placed under the rule; it appearing that the information could have affected his testimony on only one point, and that his testimony was vitally material on all the issues. Id. Refusing to allow a person who had not been summoned or theretofore sworn as a witness, to testify, because he had been present in court after the other witnesses were under the rule, was not error. Illinois Cent. R. Co. v. Taylor, 24 Ky. L. R. 1169, 70 S. W. 825. Not reviewable unless an abuse of discretion is shown. Crenshaw v. Gardner, 25 Ky. L. R. 506, 76 S. W. 26. Upon violation of the rule by witnesses, the case should be withdrawn from the jury and a postponement allowed, if party demands it. St. Louis & S. F. R. Co. v. Akers [Tex. Civ. App.] 73 S. W. 848. There is no abuse of discretion in refusing to relax the rule in favor of medical experts, whose assistance is claimed to be necessary to counsel in examining witnesses. Missouri, K. & T. R. Co. v. Smith, 31 Tex. Civ. App. 332, 72 S. W. 418. The manner in which the rule as to witnesses is enforced is lodged, very largely, in the discretion of the court. Permitting a witness to remain in court held not an abuse of discretion under the circumstances. M. A. Cooper & Co. v. Sawyer, 31 Tex. Civ. App. 620, 73 S. W. 992. Under the laws of Tennessee (Shannon's Code, § 5599), parties to the action are exempted from the operation of the rule excluding witnesses. Adolff v. Irby, 110 Tenn. 222, 75 S. W. 710. This statute is held to exempt one who, though not a party to the action, is interested therein as a partner of defendant, and is liable to contribution in case of recovery. Also an officer of a corporation which is a party. Id. Where, at the beginning of the trial, the witnesses for both parties were put under the rule, each side furnishing a list of its witnesses to the other, the refusal to allow a witness, not subpoenaed until the second day of the trial, when the evidence was nearly closed, to testify, was not an abuse of discretion, other witnesses having testified to the fact sought to be proved by him, and no reason being given why he had not been previously summoned. Crenshaw v. Gardner, 25 Ky. L. R. 506, 76 S. W. 26. It is proper to allow witnesses, who have been put under the rule and have violated the instructions of the court not to talk about the case, to be questioned in regard to such violations when called to testify, in the absence of a motion for the retirement of the jury during such examination. Birmingham R. & E. Co. v. Ellard, 135 Ala. 433.

12. Ragsdale v. Southern R. Co., 121 Fed. 924; Steedman v. South Carolina & G. E. R. Co., 66 S. C. 542; Tobin v. Brimfield, 182 Mass. 117, 65 N. E. 28; Campion v. Lattimer [Neb.] 97 N. W. 290; Vedder v. Delaney [Iowa] 98 N. W. 373. Where the history of a transaction has been sufficiently shown in evidence, the court may properly exclude a repetition thereof. Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124. It is not error to refuse to permit a witness to answer a question when he has already testified to the matters sought to be brought out thereby. Riser v. Southern R. Co. [S. C.] 46 S. E. 47; Hutchins v. Missouri Pac. R. Co., 97 Mo. App. 548, 71 S. W. 473. The court is the judge of the qualification of a witness as an expert, and where he has qualified to a certain extent, may, in his discretion, shut off further testimony as to competency. Brunnemer v. Cook & B. Co., 89 App. Div. [N. Y.] 406. Refusal to permit defendant to cross-examine a witness as to a document introduced in evidence, held not prejudicial, where he had previously cross-examined him as to the same matter. Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124.

13. Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498; Jones v. Western Mfg. Co., 32 Wash. 375, 73 Pac. 359.

14. Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515.

15. Hendrick v. Daniel, 119 Ga. 358.

16. It is not error to refuse to allow a party to introduce evidence under a plea which is bad in substance. (Objection to pleading raised by moving to rule out evidence.) Kelly v. Strouse, 116 Ga. 872.

17. Not ground for reversal in absence of a showing that such discretion has been abused. Not error where it is done to sus-

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ant after a decision against him on a demurrer to plaintiff's evidence is not error,[18] but the demurrer is thereby waived.[19]

The admissions of attorneys of record bind their clients in all matters relating to the trial and progress of the case;[20] but in order to do so, they must be distinct and formal, and made for the purpose of alleviating the stringency of some rule of practice or of dispensing with the formal proof of some fact at the trial.[21]

Evidence improperly admitted may, as a general rule, be withdrawn from the jury and the error thus cured.[22] The court should exclude it in express terms and it is not enough to do so by implication.[23] It is within the discretion of the court

tain the witness, the opposite party having tried to impeach him by showing that his oral answers were different from those given in the deposition. Wilson v. Wilson [Tex. Civ. App.] 79 S. W. 839. Permitting the deposition of a witness to be read when he is known to be present in court is not prejudicial, where he is subsequently called by the objecting party, and gives fully his explanation of the deposition and his testimony as to the subject to which it related. Texas & P. R. Co. v. Watson, 190 U. S. 287, 47 Law. Ed. 1057.

18. Riley v. Missouri Pac. R. Co. [Neb.] 95 N. W. 20.

19. McLain v. St. Louis & S. R. Co., 100 Mo. App. 374, 73 S. W. 909. But where defendant thereafter enters upon a trial of the matters which it is alleged plaintiff failed to prove, the status of the proof at the close of plaintiff's case is immaterial on appeal. Supreme Forest of Woodmen Circle v. Stretton [Kan.] 75 Pac. 472. A motion for nonsuit is waived by the introduction of evidence after it has been overruled. Ruling thereon cannot be assigned as error. Walton v. Wild Goose M. & T. Co. [C. C. A.] 123 Fed. 209; Ratliff v. Ratliff, 131 N. C. 425.

20. Thompson F. & M. Works v. Glass, 136 Ala. 648. A formal admission of the pleadings in evidence is not necessary in order to take advantage of admissions made therein. Page v. Life Ins. Co., 131 N. C. 115. Proof of facts may be waived by counsel during trial. A statement by counsel during trial that he was not prepared to dispute the fact that a certain mortgage was paid, held to be a waiver of further proof of payment, and of the authority of the parties making such payment. Ninde v. Union Trust Co. [Mich.] 98 N. W. 257. A party is not injured by an attempt to prove that which he afterwards admits, in open court, to be true. Roberts, J. & R. Shoe Co. v. Coulson, 96 Mo. App. 698, 70 S. W. 931.

21. Statement by counsel of what he intended to prove held not an admission. Thompson F. & M. Works v. Glass, 136 Ala. 648. A party or his counsel will not be held strictly bound by every remark made by counsel on the spur of the moment, during trial, unless there is reason to suppose that such remark or apparent concession was acted upon by the other party to his prejudice. Plaintiff, on appeal, held not estopped from claiming that it was error to exclude question of actual damages from jury, by an admission of counsel during trial that actual damage was not pleaded. Steedman v. South Carolina & G. E. R. Co., 66 S. C. 542. An acquiescence by counsel in the suggestion of the court that certain evidence, wrongfully excluded, was not the best evidence, does not deprive him of his exception to such exclusion, where he did not intend thereby to mislead the court. Seidenspinner v. Metropolitan Life Ins. Co., 175 N. Y. 95, 67 N. E. 123. Evidence of facts tending to show that a certain mistake could, by reason thereof, easily occur, should not be excluded because of an admission by the opposite party that such mistake could occur without negligence. Western Union Tel. Co. v. Brown [Tex. Civ. App.] 75 S. W. 359.

22. Bell v. Clarion, 120 Iowa, 332, 94 N. W. 907. The discharge of the jury and the granting of a retrial under such circumstances are matters within the discretion of the trial court. Where a transcript of the testimony of certain witnesses was introduced in evidence and then withdrawn, and the jury instructed not to consider it, it was not error to allow the witnesses themselves to be called, and to refuse to discharge the jury and grant a new trial before another jury, it appearing that the witnesses testified to the same facts as stated in the transcript. Id. A motion to withdraw evidence from the jury should not be general in its terms, but should set out the exact testimony sought to be withdrawn. Travelers' Ins. Co. v. Hunter, 30 Tex. Civ. App. 489, 70 S. W. 798. Error in the admission of testimony may be cured by striking it out, if it appears with reasonable certainty that the party has not been prejudiced by its introduction and will not be by striking it out. Hubner v. Metropolitan St. R. Co., 77 App. Div. [N. Y.] 290. A remark by the court in regard to evidence already received, "I expect it is objectionable," no motion being made to exclude it and no instruction given to disregard it, is not an exclusion of the evidence. It is not taken from the jury in such an authoritative way as to require them to disregard it. Crossan v. Crossan, 169 Mo. 631, 70 S. W. 136. See Harmless and Prejudicial Error, 2 Curr. Law, p. 159.

23. Louisville & N. R. Co. v. Collinsworth [Fla.] 33 So. 513. Certain evidence held to have been stricken out and not to have been before the jury. Hess v. Lucas [Iowa] 98 N. W. 466. In an action for injuries caused by a defective sidewalk, the court sustained a motion to "strike out all the testimony relative to any defect of the alleged defective place, other than that specifically set out in the petition." Held, that the ruling did not exclude all the evidence relating to the condition of the walk in the vicinity of the loose plank. Spicer v. Webster City, 118 Iowa, 561, 92 N. W. 884. Where the court stated that it would be expunged unless other testimony was introduced thereafter

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to strike improper evidence, upon motion of either party.[24] The trial court may, where the case is tried without a jury, on his own motion strike out evidence which was incompetent when received.[25] The court may, in the exercise of his discretion, allow a party to withdraw evidence introduced by him,[26] but a party cannot withdraw competent evidence introduced by him if the other party will be prejudiced thereby.[27] The mere fact that evidence is prejudicial to a party's cause is no ground for striking it out.[28] He cannot require exclusion of that which he himself introduces.[29] Answers which are obviously the result of a misunderstanding of questions should not be allowed to stand or be considered.[30] Reasons given by witnesses should not cause the rejection of their testimony where the reasons and statements are separable.[31] It is not error to refuse to strike out evidence which is competent as far as it goes, but is not sufficient to establish a case or a right to certain damages.[32] The testimony of a witness should be stricken out where the opposite party is deprived of the right to cross-examine him, unless the deprivation is the result of an act of God or of the party himself, or of some cause to which he has assented.[33] The testimony in chief of a witness should be stricken out, where he refuses on cross-examination to answer pertinent questions.[34] A litigant may not insist upon the exclusion of evidence which he allows to be introduced without objection.[35] But failure to object to a question does not waive the right to object

to render it competent, and the motion was not renewed. Bailey v. Warner [C. C. A.] 118 Fed. 395. It is prejudicial to allow improper evidence of damage, inadvertently admitted, to stand, over a motion to strike out, although the court charged correctly as to the measure of damages. Gulf, C. & S. F. R. Co. v. Ryon [Tex. Civ. App.] 72 S. W. 72. Where an answer is stricken out as not responsive, but, in answer to a subsequent question, the witness testifies that the explanation he had therein made covers his present answer better than "Yes" or "No," the matter stricken out is again put in evidence. Conner v. Standard Pub. Co., 183 Mass. 474, 67 N. E. 596.

24. Cronk v. Wabash R. Co. [Iowa] 98 N. W. 884. An objection to evidence, by motion to strike out, after cross-examination, is not seasonably made. Garr v. Cranney, 25 Utah, 193, 70 Pac. 853. Overruling of such motion not a ground for reversal unless an abuse of discretion is shown. McCormick Harvesting Mach. Co. v. Carpenter [Neb.] 95 N. W. 617; Cronk v. Wabash R. Co. [Iowa] 98 N. W. 884. Striking out of evidence after parties had rested, where permission to substitute other evidence therefor was not refused, held not prejudicial. Moody v. Dillemuth, 119 Iowa, 372, 93 N. W. 360; Oppenheimer v. Kruckman, 84 N. Y. Supp. 129.

25. Oppenheimer v. Kruckman, 84 N. Y. Supp. 129.

26. Bell v. Clarion, 120 Iowa, 332, 94 N. W. 907. An objection to the withdrawal of the testimony of a witness is insufficient unless it assigns a reason for objecting. Collin v. Farmers' Alliance Mut. Fire Ins. Co. [Colo. App.] 70 Pac. 698.

27. Competent evidence introduced by plaintiff cannot be stricken out on his motion, if it can in any way benefit defendant. Hubner v. Metropolitan St. R. Co., 77 App. Div. [N. Y.] 290.

28. Golibart v. Sullivan, 30 Ind. App. 428, 66 N. E. 188.

29. Hunnicutt v. Higginbotham, 138 Ala. 472.

30. Held not error for trial court to refuse to reverse answers to questions on the ground that witness did not understand them. Trial court and jury better able to determine this question than appellate court. Kamp v. Coxe Bros. & Co. [Wis.] 99 N. W. 366.

31. As to who was the vendor of property. Tilden v. Gordon & Co. [Wash.] 74 Pac. 1016.

32. Nokken v. Avery Mfg. Co., 11 N. D. 399, 92 N. W. 487.

33. Gallagher v. Gallagher, 92 App. Div. [N. Y.] 138.

34. The fact that the party calling him is not to blame for his refusal will not alter the rule. Gallagher v. Gallagher, 92 App. Div. [N. Y.] 138.

35. Cronk v. Wabash R. Co. [Iowa] 98 N. W. 884. It is not reversible error for the court to refuse to strike out evidence as improperly received where no objection is made to it at the time when it is offered. Bailey v. Warner [C. C. A.] 118 Fed. 395; Hunnicutt v. Higginbotham, 138 Ala. 472; National Radiator Co. v. Hull, 79 App. Div. [N. Y.] 109; Mallory Comm. Co. v. Elwood, 120 Iowa, 632, 95 N. W. 176. It is too late to object to evidence as inadmissible under the pleadings by motion to strike out. Poehlmann v. Kertz, 204 Ill. 418, 68 N. E. 467. In an action for personal injuries, held that a motion to strike out evidence in regard to an injury not alleged in the complaint should have been granted, and that defendant should have been permitted to withdraw a juror, on the ground that it had no notice of such injuries and no opportunity to show that they were not the result of the accident complained of. Brown v. Manhattan R. Co., 82 App. Div. [N. Y.] 222. Where evidence was admitted without objection, a subsequent motion to strike out on the ground that the witness was incompetent, under the statute prohibiting the testimony by interested parties in a suit by or against an executor or administrator, was too late. Statute does not apply to evidence received without objection. Slattery v. Slattery, 120

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to an answer which is irresponsive thereto and is incompetent, and such answer should be stricken out on motion,[36] although it is not error to let it stand in the absence of a motion to strike it out.[37]

The proper way to object to evidence that has been received in a case is by motion to strike it out, or by request for an instruction to the jury to disregard it.[38] A motion to strike out all of the testimony of a witness should be denied where some of it is proper,[39] or where it is properly in the case for a particular purpose.[40] Where a motion to strike out is addressed to a question and answer and the question is proper, it should be denied.[41]

The ruling out of a question after it is answered carries the answer with it.[42] It is the duty of the judge, if requested to do so, to state the facts found by him on which he bases his rulings as to the admission of evidence.[43] A ruling of the court to the effect that he would admit certain evidence for what it was worth, but that it was not going to be read to the jury, is for all practical purposes an exclu-

Iowa, 717, 95 N. W. 201. It is too late to raise the point that the question does not call for the best evidence by motion to strike out the answer. La Rue v. St. A. & D. E. Co. [S. D.] 95 N. W. 292. An objection to a question, taken after it is answered, comes too late. McCoy v. Munro, 76 App. Div. [N. Y.] 435; Birmingham R. & E. Co. v. Jackson, 136 Ala. 279; Pescia v. Societa Co-operative Corleonese Francesco Bentivegna, 91 App. Div. [N. Y.] 506; Hornum v. McNeil, 80 App. Div. [N. Y.] 637. An objection to the admission of evidence is waived by failure to make it when the evidence is offered. Ryan v. Providence Washington Ins. Co., 79 App. Div. [N. Y.] 316; Hutchinson v. Washburn, 80 App. Div. [N. Y.] 367; Kiddell v. Bristow [S. C.] 45 S. E. 174.

36. Helmken v. New York, 90 App. Div. [N. Y.] 135. The striking out of a voluntary statement made by a witness on cross-examination is without prejudice, where she has already testified to the same fact on direct examination, which testimony has not been stricken out. Butler v. Davis, 119 Wis. 166, 96 N. W. 561. Failure to strike out an answer which was a mere conclusion of the witness, held error. Redding v. American Distributing Co., 89 App. Div. [N. Y.] 204. Party has right to have irresponsive answer stricken out, though question not objected to. Birmingham R. & E. Co. v. Jackson, 136 Ala. 279; Ramsey v. Smith, 138 Ala. 333; Helmken v. New York, 90 App. Div. [N. Y.] 135; Arabian Horse Co. v. Bivens [Neb.] 96 N. W. 621; Weeks v. Hutchinson [Mich.] 97 N. W. 695. Voluntary statement wholly irrelevant. Lisker v. O'Rourke, 28 Mont. 139, 72 Pac. 416, 755. A motion to exclude the objectionable evidence is the proper remedy where a witness testifies in the narrative form, without being asked any questions. Southern R. Co. v. Crowder, 135 Ala. 417. Failure to object at the proper time waives the error except where testimony is offered which may be competent upon the showing made, and its competency is afterwards developed, either by the subsequent testimony of the witness or on his cross-examination, or when incompetent testimony is volunteered by a witness in response to a proper question, in which case it should be stricken out on motion. Yoder v. Reynolds, 28 Mont. 183, 72 Pac. 417.

37. Germinder v. Machinery Mut. Ins. Ass'n, 120 Iowa, 614, 94 N. W. 1108; Prentiss v. Strand, 116 Wis. 647, 93 N. W. 816. As to the admission and consideration of improper evidence not objected to, see Saving Questions for Review.

38. If no motion is made, the evidence will remain in the case. Union Ins. Co. v. Hall [Minn.] 95 N. W. 1112. The proper method of raising an objection to improper evidence, given in response to a proper question, is by motion to strike it out or by a request for an instruction to the jury to disregard it. In their absence, the admission of the evidence is not ground for reversal. Payne v. Williams, 83 App. Div. [N. Y.] 388. It is not error to refuse to strike out evidence which the jury has been instructed to disregard. McCoy v. Munroe, 76 App. Div. [N. Y.] 435. The remedy, in such cases, is by a request for an instruction to the jury to disregard the evidence. Id.

39. Powell v. Hudson Valley R. Co., 88 App. Div. [N. Y.] 133. A motion to strike out testimony, given under a count of the complaint to which a demurrer has afterwards been sustained, and a part of which is relevant under the remaining count, should specify the evidence deemed irrelevant under such remaining count. Jarman v. Rea, 137 Cal. 339, 70 Pac. 216; Fitz Simons & Connell Co. v. Braun, 199 Ill. 390, 65 N. E. 249; Hunnicutt v. Higginbotham, 138 Ala. 472; Nicholas v. Sands, 136 Ala. 267. A motion to strike out all the testimony of a witness, on the ground that he had testified that he had no recollection of any of the facts, is properly denied where the record shows that he did testify to certain facts from his own recollection. People v. McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48. A motion to exclude the statement of a witness, a part of which is competent, must point out the supposed objectionable part, in order to raise the question of its admissibility. Barden v. Cunningham, 136 Ala. 263. When motion based on ground that he had testified that he had no recollection of any of the facts but record showed that he did testify to certain facts from his own recollection. People v. McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48.

40. Deutschmann v. Third Ave. R. Co., 87 App. Div. [N. Y.] 503.

41. Southern Ind. R. Co. v. Davis [Ind. App.] 68 N. E. 191.

42. Consumers' Ice Co. v. Jennings, 100 Va. 719.

43. Avery v. Stewart [N. C.] 46 S. E. 519.

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sion thereof.[44] A remark of the court is not to be regarded as excluding evidence when made in answer to an inquiry which called for no such ruling.[45]

§ 4. *Custody and conduct of the jury.—During the trial* the jury should be freed from every influence which does not originate in the evidence adduced and the law relating thereto. The jury must base their verdict on the evidence regularly produced in the course of the trial,[46] and they may not take into consideration facts known to themselves personally.[47] But a casual discussion, in the jury room, of extraneous matters,[48] or the mere expression of the opinion of a juror,[49] will not vitiate the verdict, in the absence of a showing that it was influenced thereby. A mere casual inspection of the premises by one of the jurors is not, as a matter of law, ground for a new trial.[50] In condemnation proceedings, the jury may base their verdict on knowledge gained from judicial inspection of the premises, as well as upon the testimony of witnesses.[51] A verdict rendered under a misunderstanding of the instructions of the court and which shows that the jury were involved in doubt and confusion should be set aside.[52]

Conversations had by a party during the trial, in the presence and hearing of the jury, which were calculated and intended to influence them to return the verdict they did, are sufficient grounds for setting it aside and granting a new trial.[53] It will be presumed that an attempt to influence a juror has been successful,[54] but a casual conversation between a juror and a party to the action, before the jury has retired, which has no bearing on the case, will not vitiate the verdict,[55] nor will the mere fact that a juror was present at a conversation between outside parties, in which the merits of the case were discussed, when such conversation was not directed to him, and the parties did not know he was present, in the absence of a showing that he was influenced thereby.[56] That the court bailiff was

44. Rankin v. Sharples, 206 Ill. 301, 69 N. E. 9.

45. Petitioner after objection introduced the record of certain proceedings to show a certain marriage, and then moved for judgment on the ground that the question was res adjudicata, which motion was denied. Counsel then asked if the court held that the record was not evidence of the fact of marriage, and the court replied: "No; I think it is a matter to be considered." Held, that the court did not mean that the question of the admission of the record was to be considered later, and that it was in evidence. Burgess v. Stribling [Mich.] 95 N. W. 1001.

46. De Gray v. N. Y. & N. J. Tel. Co., 68 N. J. Law, 454; Falls City v. Sperry [Neb.] 94 N. W. 529.

47. To avail a party of a fact known to a juror, he must be called as a witness. De Gray v. N. Y. & N. J. Tel. Co., 68 N. J. Law, 454. A verdict will be set aside where it appears that one of the jurors had prior knowledge of the premises involved in the controversy, and that he based his own conclusion partly thereon, and used it to influence his fellow jurors. Falls City v. Sperry [Neb.] 94 N. W. 529. If a juror, at any time before a verdict is reached, makes a statement to his fellow jurors, based upon his prior personal knowledge, and having a material bearing on the subject under consideration, the verdict is vitiated thereby. Id.

48. Montgomery v. Hanson [Iowa] 97 N. W. 1081.

49. Extraneous matters introduced by jurors into their consideration of a verdict which will be sufficient to overthrow it, must be statements of prejudicial matters of fact outside the evidence, based upon the personal knowledge or claimed personal knowledge of the juror making them, which, from the nature of the statement made, the jury might accept as evidence of the fact asserted, and not the mere expression of the opinion of the juror. Hulett v. Hancock, 66 Kan. 519, 72 Pac. 224.

50. Granting new trial under such circumstances is a matter in the discretion of the court. Lyons v. Dee, 88 Minn. 490, 93 N. W. 899. A verdict will not be disturbed because of statements of a juror, made after the termination of a trial, that the jury looked out of the window of the jury room at the building, to restrain the erection of which the suit was brought. Chimine v. Baker [Tex. Civ. App.] 75 S. W. 330.

51. Groves & S. R. R. Co. v. Herman, 206 Ill. 34, 69 N. E. 36; Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515. They should not rely on knowledge so obtained without regard to the evidence, but, where there is a conflict in the testimony, they may resort to it to determine the truth. Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.

52. Champ Spring Co. v. Roth Tool Co. [Mo. App.] 77 S. W. 344.

53. Need not be shown that the verdict was in fact affected thereby. Grand Trunk R. Co. v. Davis [Vt.] 56 Atl. 982.

54, 55. Vowell v. Issaquah Coal Co., 31 Wash. 103, 71 Pac. 725.

56. Montgomery v. Hanson [Iowa] 97 N. W. 1081. After case was submitted and jury had been permitted to separate by order of

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interested in the suit and related to one of the parties will not necessarily vitiate the verdict.[57]

The conduct of jurors must be compatible with a full and fair consideration of everything addressed to them officially, but to vitiate a verdict it must have been the result of misconduct, and one which would not have been reached in its absence,[58] and the evidence of such misconduct must be clear, certain, and convincing.[59] The mere fact that a juror slept during the argument of counsel is not[60] and a party having knowledge of facts which he claims constitute misconduct on the part of a juror, should call them to the attention of the court at the first opportunity.[61] If he withholds such knowledge during the trial and allows the case to be submitted to the jury, he will be held to have waived his right to a new trial on that ground, unless he can show that the juror was, in fact, prejudiced thereby, or that his mind was in such a condition that he was unable to render an impartial verdict.[62] It is error to permit a juror to use intoxicating liquor during the trial of a case or during the deliberations of the jury thereon, unless it is done with the permission of the court, upon the prescription of a practicing physician;[63] but its use will not justify the granting of a new trial in the absence of a showing that he was thereby incapacitated for an intelligent consideration of the case.[64]

It is not an abuse of discretion to refuse to permit jurors to be examined orally in regard to their alleged misconduct.[65]

Withdrawal of a juror by direction of the court produces a mistrial.[66]

It is largely discretionary with the court to say what papers shall be sent out with the jury when they retire to consider their verdict, but, as a general rule,[67]

court. Louisville & N. R. Co. v. Davis, 24 Ky. L. R. 1415, 71 S. W. 658.

57. The mere fact that the court bailiff was related to the parties and was a witness for plaintiff did not support a contention that the verdict for plaintiff was the result of prejudice, where he did not have charge of the jury, and it did not appear that any objection was made or exception taken. McGibbons v. McGibbons, 119 Iowa, 140, 93 N. W. 55.

58. It will be presumed that the verdict was based on the evidence. Montgomery v. Hanson [Iowa] 97 N. W. 1081. The misconduct of a juror which does not affect the verdict is not ground for a new trial. Expression of opinion as to material fact during course of trial held not ground for reversal, it not appearing that the verdict was affected thereby. Supreme Forest of Woodmen Circle v. Stretton [Kan.] 75 Pac. 472.

59. Statements made by jurors not under oath, after the trial, are not competent evidence of misconduct. Walton v. Wild Goose M. & T. Co. [C. C. A.] 123 Fed. 209.

60. Not a ground for reversal where counsel failed to request the court to waken him. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863.

61, 62. Parkins v. Mo. Pac. R. Co. [Neb.] 93 N. W. 197.

63. Evidence not sufficient to justify new trial on ground that jury used intoxicating liquor. Bernier v. Anderson [Idaho] 70 Pac. 1027.

64. State v. King, 88 Minn. 175, 92 N. W. 965. Admission of a juror that he took a dose of quinine and whiskey for a cold will not alone justify the setting aside of the verdict. Gorham v. Sioux City Stock Yards Co., 118 Iowa, 749, 92 N. W. 698. The drinking of intoxicating liquors by jurors, during adjournment, in quantities not liable to produce intoxication, will not by itself vitiate the verdict. Ankeny v. Rawhouser [Neb.] 95 N. W. 1053.

65. State v. King, 88 Minn. 175, 92 N. W. 965. See, also, Verdict and Findings.

66. Juror permitted to be withdrawn against defendant's objection. Rosengarten v. Cent. R. Co. [N. J. Law] 54 Atl. 564. See, also, Dismissal, etc., 1 Curr. Law, p. 937; Jury, 2 Curr. Law, p. 633.

67. Tridell v. Munhall, 124 Fed. 802. Allowing papers introduced in evidence to be taken to the jury room rests in the discretion of the trial judge. First Presbyterian Church v. Elliott, 65 S. C. 251. The court may, in his discretion, allow the jury to take with them to their room, memoranda of the data of the evidence in the case. Not error to allow them to take a statement, made by plaintiff's counsel, showing items of loss which plaintiff claimed the right to recover under the insurance policy in litigation, where counsel had used it in his argument without objection. Rickeman v. Williamsburg City Fire Ins. Co. [Wis.] 98 N. W. 960. It is not error to send out plaintiff's statement of claim with the jury when they retire, where it has been made the basis of the court's instructions, and virtually incorporated into them. Tridell v. Munhall, 124 Fed. 802. It is not error to permit the jury to take the whole of a declaration to the jury room, where one count thereof has been withdrawn in their presence. Will be presumed that they will not be thereby misled into considering the withdrawn count. West Chicago St. R. Co. v. Buckley, 200 Ill. 260, 65 N. E. 708.

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no papers should be delivered to them except such as may properly serve to enlighten them as to the issues upon which they are to pass,[68] and it is error to allow them to take any documents bearing on the case which have not been introduced in evidence.[69] When documents introduced in evidence should be shown to the jury is a matter in the discretion of the court.[70]

After the jury has retired, there should be no interference by counsel with communications between the jury and the court.[71] They may not then present new arguments or additional requests for instructions, but may enter an exception to any act of the court which they deem prejudicial.[72] After the jury has retired, they may ask for an explanation of instructions given.[73] It is proper for the court to answer questions of the jury, during their deliberations, in explanation of the charge previously given, without sending for counsel.[74]

It is the duty of counsel to remain in attendance until the jury is discharged with reference to a verdict.[75]

Dispersion or separation.—A jury, which has retired to consider its verdict, should not, without the consent of the parties or their counsel, be permitted to disperse until their verdict has been received in open court, or the case has been withdrawn from their consideration.[76] But it is generally held that a mere separation[77] or a separation by agreement of the parties[78] is not a ground for reversal, where no prejudice is shown to have resulted therefrom. Counsel have a right to poll the jury before they have separated after reaching a verdict.[79]

Disagreement and discharge.—It is within the discretion of the court to direct the jury to hasten their verdict[80] or to inquire of them when they are likely to agree,[81] or the reason of their failure to do so.[82] But where the language or methods adopted by him to prevent a mistrial have an obvious tendency to coerce an agreement, there is an abuse of discretion and the verdict is vitiated.[83] The

68. Leaving written notice of withdrawal of attorney among papers not prejudicial, where jury was instructed to disregard such withdrawal. Palmer v. Smith [Conn.] 56 Atl. 516.

69. Alaska Commercial Co. v. Dinkelspiel [C. C. A.] 121 Fed. 318. In an action for breach of a contract for failure to renew loans, permitting the advertisement for the sale of plaintiff's property, caused thereby, to be sent to the jury after the case has been submitted to them, is error. E. H. Taylor, Jr., & Sons v. Louisville P. W. Co., 24 Ky. L. R. 1656, 72 S. W. 20; Rich v. Hayes, 97 Me. 293. Where a written statement which is inadmissible is on the same paper as a statement which has been admitted, it must be severed therefrom or obliterated before the jury may take it to their room. Id.

70. State v. Donovan, 75 Vt. 308.

71. Marande v. Tex. & P. R. Co. [C. C. A.] 124 Fed. 42.

72. Should be informed of what takes place. Marande v. Tex. & P. R. Co. [C. C. A.] 124 Fed. 42.

73. Marande v. Tex. & P. R. Co. [C. C. A.] 124 Fed. 42. See Instructions, 2 Curr. Law, p. 461.

74. Usually will not, in absence of counsel, give further instructions as to the correctness of which there can be any question. Fournier v. Pike, 128 Fed. 991.

75. Fournier v. Pike, 128 Fed. 991.

76. May not seal their verdict and disperse, without consent of parties to the action, and their doing so is ground for a new trial. The error is not cured by their afterwards reassembling and presenting their verdict to the court. Prescott v. City Council of Augusta, 118 Ga. 549.

77. A mere separation of the jury in civil cases, without the consent of the court, is not, in the absence of injury, sufficient ground for a new trial. Walton v. Wild Goose M. & T. Co. [C. C. A.] 123 Fed. 209.

78. Where some of the jurors attended a caucus, and some were on the street, and one went to his office, without being in charge of a sworn officer, but it appeared that none of them talked about the case, and that no one discussed it in their presence, the verdict will not be set aside. Iowa Sav. Bank v. Frink [Neb.] 92 N. W. 916.

79. Their dispersal after sealing their verdict deprives counsel of this right and is error. Prescott v. City Council of Augusta, 118 Ga. 549.

80. Not ground for reversal unless it appears that such action probably prejudiced the complaining party. Roach v. Moss Tie Co., 24 Ky. L. R. 1222, 71 S. W. 2.

81. It is not error for the judge to go to the jury room and inquire of the jury if they were likely to agree that night, so that he could determine whether to remain up to receive their verdict or to continue the term and retire. Willeford v. Bailey, 132 N. C. 402.

82. Rawlings v. Anheuser-Busch Brew. Ass'n [Neb.] 95 N. W. 792.

83. Action of judge held an abuse of discretion. Hagen v. N. Y. Cent. & H. R. R. Co., 79 App. Div. [N. Y.] 519. A statement by the court, to a jury that had been out

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trial court is not bound to accept the statement of jurors as to their inability to agree, but it is within his discretion to determine whether or not they should be discharged for this reason.[84]

The deliberations of the jury are secret,[85] and until the rendition and record of the verdict, the jury remain in control of it with power to alter or withdraw it.[86] But the court may, before it is recorded and the jury discharged, require a reconsideration of the verdict, not merely for the purpose of correcting error or removing obscurity therein, but to alter it substantially if the jury so agree.[87]

TRUSTS.

§ 1. Express Trusts (1924). Nature and Elements (1924). Validity of Purpose (1925). Spendthrift Trusts (1926). Declaration (1926). Necessity of Writing (1927). Extrinsic Evidence (1928). Declaration by Trustee (1928). Bank Deposits (1928). Construction (1929).
§ 2. Implied Trusts (1929).
§ 3. Constructive Trusts (1930).
A. Trusts Raised Where Property is Obtained or Held by Fraud (1930).
B. Trusts Raised by Equitable Construction in the Absence of Fraud (1932).
§ 4. Resulting Trusts (1932). General Rules (1932). Statutes (1933). The Consideration (1933). Presumption of Gift or Advancement (1934). Property Purchased with Trust Fund (1935). Public Lands (1935). Evidence 1935).
§ 5. The Beneficiary (1936). His Estate, Rights and Interest (1936). Trusts for Married Women (1936). Rights Between Beneficiaries (1936). Income and Principal (1936). Charges on Income (1936). Charges on Estate (1937). Rights of Creditors and Assignees of Beneficiary (1938). Representation by Trustee (1938).
§ 6. The Trustee. Appointment, Qualification, Resignation and Removal. Who May be Trustee (1938). Appointment by Court (1938). Resignation (1939). Removal (1939). Bonds and Rights of Sureties (1940).
§ 7. Execution and Administration (1940).
A. Nature of Trustee's Title and Establishment of Estate (1940). Receipt and Establishment of Estate (1941). Possession (1941).
B. Discretion and General Powers of Trustees and Judicial Control (1941). Instructions (1941). Payments (1942). Encroachment on Principal (1942).
C. Personal Liability of Trustee (1942).
D. Personal Dealings with Estate (1943).
E. Management of Estate and Investments (1943). Preservation of Assets (1944). Delivery to Beneficiary (1944). Estoppel of Beneficiaries (1945).
F. Creation of Charges, Mortgage and Lease of Estate (1945).
G. Sale of Trust Property (1945). Power (1945). Provisions of Deed (1946). Order of Court (1946). What may be Sold (1946). Conveyances (1947). Application of Proceeds (1947). Effect of Invalid Sale (1947).
H. Actions By and Against Trustees (1947).
§ 8. Compensation and Expenses (1948). Attorney's Fees (1949).
§ 9. Accounting and Discharge. Interest (1949). Appropriated Assets (1950). Improper Investments (1950). Credits (1950). Jurisdiction (1950). Procedure (1951). Opening (1952).
§ 10. Establishment and Enforcement of Trust and Remedies of Beneficiary (1952).
A. Express Trusts (1952). Jurisdiction (1952). Laches and Limitations (1952). Who May Sue (1952). Parties (1953). Pleading (1953). Evidence (1953). Costs (1954).
B. Constructive Trusts (1954). Venue (1954). Laches and Limitations (1954). Pleading (1954). Relief (1954).
C. Resulting Trusts (1954). Laches and Limitations (1954). Parties (1955). Pleading (1955). Evidence (1955). Relief (1955).
§ 11. Following Trust Property (1956). Right (1956). Identity of Fund (1956). Bank Deposits (1957). Bona Fide Purchasers (1957). Notice (1957).
§ 12. Termination and Abrogation of Trust (1958). Acts of Settlor (1958). Mistake (1958). Agreement of Beneficiaries (1958). Termination or Failure of Purpose (1958). Union of Equitable and Future Legal Estate (1959). Adverse Possession (1960). Procedure (1960).

§ 1. *Express trusts. Nature and elements.*—The essentials of a valid trust are a designated beneficiary,[88] a designated trustee who must not be the bene-

for some time without agreeing on a verdict, to the effect that they had failed to agree on a verdict in another case, that he had no use for juries that did not agree, and that at times men mistake stubbornness for firmness, held prejudicial error. Brooks v. Barth, 98 Mo. App. 89, 71 S. W. 1098.

84. Hagen v. N. Y. Cent. & H. R. R. Co., 79 App. Div. [N. Y.] 519.

85. Verdict and Findings.

86, 87. Champ Spring Co. v. Roth Tool Co. [Mo. App.] 77 S. W. 344.

88. Personalty. Brown v. Spohr, 87 App. Div. [N. Y.] 522. Will held sufficiently definite as to beneficiaries of trust, it being apparent that only children of testatrix and their issue should take to exclusion of connections by marriage. Harris v. Ferguy, 207 Ill. 534, 69 N. E. 844. A trust will not fail because of uncertainty in whom the fee will

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ficiary,[89] an identified trust fund or estate,[90] an actual delivery or legal assignment with intention of passing title to the trustee,[91] which need not be contemporaneous,[92] and a definite purpose,[93] but the fact that the particular manner of execution is not pointed out does not render it void for uncertainty.[94]

A consideration is unnecessary where the trust is perfectly created.[95] The conveyance may be sufficient, though the trust agreement is made after the terms of the conveyance are agreed on.[96] The rules relating to resulting trusts are inapplicable.[97]

The beneficiary must accept and ratify the trust when notified.[98]

The settlor may reserve direction and control of personalty or a power to revoke,[99] and where income is reserved to the settlor, he may change its disposition.[1]

Validity of purpose.[2]—Statutory provisions in several of the states abolish express trusts for other than specified purposes.[3] Express trusts for purposes not

vest in case the first beneficiary dies leaving issue. A testator left property to be held in trust for his daughter, and if she died without issue before her mother, it was to be held in trust for her mother, and on the death of both it was to go according as the residue of his estate had been devised. Orr v. Yates [Ill.] 70 N. E. 731.

89. Brown v. Spohr, 87 App. Div. [N. Y.] 522. A trust cannot be predicated of one who holds for life only and for his own sole use and benefit. Thompson v. Adams, 205 Ill. 552, 69 N. E. 1. Identity results in person taking legal estate under will. Tuck v. Knapp, 89 App. Div. [N. Y.] 140. A trust is not rendered void on account of the provision in the will creating it, authorizing the trustee on account of sickness or any other good reason to appoint his successor. His action in so doing would be controlled by the court. Orr v. Yates [Ill.] 70 N. E. 731.

90. Brown v. Spohr, 87 App. Div. [N. Y.] 522. A description sufficient for an ordinary conveyance is sufficient. Gates v. Paul, 117 Wis. 170, 94 N. W. 55.

91. Where it was the intention of the settlor to withdraw from a firm money to raise trusts and the firm credits the trustees with the amount of his checks, there is a sufficient delivery, though the checks are in the name of a beneficiary and the sums withdrawn thereon are immediately redeposited to the credit of the firm. Brown v. Spohr, 87 App. Div. [N. Y.] 522. In order to create a trust, there must be an absolute parting on the part of the settlor with his interest and a specific property held by the trustee. Where a father deposited funds in a bank to the credit of himself and his daughter jointly, evidence held insufficient to establish a trust for the benefit of the daughter. Taylor v. Coriell [N. J. Eq.] 57 Atl. 810.

92. Where the transaction is continuous, the money need not all be advanced on execution of the deed. Brown v. Spohr, 87 App. Div. [N. Y.] 522.

93. The mere fact that the time of termination is not mentioned does not render a trust indefinite. Holmes v. Walter, 118 Wis. 409, 95 N. W. 380. Direction permitting trustee to appoint trustee after his death "principal and interest included" does not avoid the trust for indefiniteness. Flanner v. Fellows, 206 Ill. 136, 68 N. E. 1057. A provision in a will creating a trust that the trustee may turn the property over to the beneficiary for such period as he sees fit, he ceasing to be liable for the rents and profits during such period, is not contrary to the idea of a trust. It simply vests in the trustee a discretion. Orr v. Yates [Ill.] 70 N. E. 731.

94. Where there is no indefiniteness of beneficiaries or of subject and object, the statute (Rev. St. 1898, § 2081, subd. 5) is satisfied. Holmes v. Walter, 118 Wis. 409, 95 N. W. 380. A trust is not void because the times and manner of accounting for rents and profits are not fixed. Orr v. Yates [Ill.] 70 N. E. 731.

95. A voluntary conveyance in trust must be executed or fully declared to take effect in presenti. Fisher v. Hampton Transp. Co. [Mich.] 98 N. W. 1012. The trust instrument may recite that there is no consideration. Brown v. Spohr, 87 App. Div. [N. Y.] 522. A mere volunteer may enforce a trust when made by the purchaser at or before the transition of the legal estate. Sykes v. Boone, 132 N. C. 199.

96. Trust to convey to another on payment of specified sum. Sykes v. Boone, 132 N. C. 199.

97. Express trusts in land purchased for another's benefit. Oberlender v. Butcher [Neb.] 93 N. W. 764.

98. Evidence held to show repudiation. Libby v. Frost, 98 Me. 288.

99. Brown v. Spohr, 87 App. Div. [N. Y.] 522. The settlor may reserve the right to the income of bank deposits and use of the property, and also the power to change the dispositions at any time on written notice to the trustee. Kelley v. Snow [Mass.] 70 N. E. 89.

1. Anderson v. Kemper, 25 Ky. L. R. 538, 76 S. W. 122.

2. See Perpetuities, 2 Curr. Law, p. 1173; Fraudulent Conveyances, 2 Curr. Law, p. 116.

3. Gen. St. 1894, c. 43, § 4274, abolishes charitable trusts in personalty as well as other express trusts for purposes not named in the statute. In re Shanahan's Estate, 88 Minn. 202, 92 N. W. 948. Statutory provision to sell for creditors authorizes authority to rent until sale may be advantageously made [3 Comp. Laws, § 8839]. Geer v. Traders' Bank [Mich.] 93 N. W. 437. A devise in trust to let or sell and pay income or proceeds is valid. Simmons v. Morgan [R. I.] 55 Atl. 522. A trust to convey realty cannot be created by will. In re Pichoir's Estate, 139 Cal. 694, 73 Pac. 604. A trust of realty "to apply to the uses and for the benefit" of an

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enumerated in the statutes are sometimes valid as powers in trust.[4] If valid and invalid trusts cannot be separated, the entire trust is void.[5] A trust over dependent on death of beneficiary of a void trust to convey realty without exercise of a power of testamentary disposition falls with such trust;[6] but where a trust is to convey and pay realty and personalty after a life estate, the trust as to personalty may be separated and supported.[7]

Lack of power to make a testamentary disposition will not invalidate a voluntary settlement for the settlor's benefit where the devolution of the property is left as it would have been had there been death intestate.[8] A power to change disposition by written notice to the trustee evidences that a trust is not a testamentary disposition.[9]

Invalidity of trusts created may be asserted by one who has for a long time accepted benefits thereunder.[10]

Spendthrift trusts depriving the beneficiary of all right to alienate the benefits of the trust estate are recognized in certain states,[11] though in some states they are limited to persons not sui juris.[12] The provision against alienation is essential.[13] A spendthrift trust may be raised from a conveyance to the beneficiary's father by the beneficiary and the taking back of a bond for an annuity,[14] and there must be present appointment of a trustee.[15]

Sufficiency of declaration.—The question of whether a deed or will is aptly expressed to raise a trust being one governed by the rules relative to the construction of such instruments is treated in the specific articles relating thereto.[16] A few cases of devises and directions held to raise trusts are grouped in the notes.[17] So also deeds[18] and instruments transferring personalty.[19]

ecclesiastical body is not authorized by 1 Rev. St. (1st Ed.), p. 728, pt. 2, c. 1, tit. 2, § 55. Murray v. Miller, 85 App. Div. [N. Y.] 414. Under Gen. Laws, c. 46, § 76, subd. 3, authorizing a trust to receive the rents and profits of real property and apply to the use of a beneficiary, the trustees may be authorized to sell the realty and invest the proceeds for the same purposes. McKinlay v. Van Dusen, 76 App. Div. [N. Y.] 200. As a trust to sell land for benefit of legatees (1 Rev. St. p. 728, § 55, subd. 2), a gift of realty to executors to sell and distribute proceeds is valid. Russell v. Hilton, 80 App. Div. [N. Y.] 178. A trust to invest, manage, rent or sell and invest proceeds and divide income annually is valid under Laws 1896, p. 571, c. 547, § 76, subd. 3. Nichols v. Nichols, 43 Misc. [N. Y.] 381.

4. Rev. St. 1898, § 2084. Powers of sale and conveyance. McLenegan v. Yelser, 115 Wis. 304, 91 N. W. 682. A trust for distribution only is valid as a power where there is no gift over; the trustees have no duty as to income and no period of duration is fixed. Denison v. Denison, 42 Misc. [N. Y.] 295. A deed in trust to convey, invalid as a trust, cannot be supported as a power in trust. McCurdy v. Otto, 140 Cal. 48, 73 Pac. 748.

5. Illegal accumulation to equalize shares. Dresser v. Travis, 39 Misc. [N. Y.] 358. See, also, Deeds of Conveyance, 1 Curr. Law, p. 908; Wills.

6. Hofsas v. Cummings, 141 Cal. 525, 75 Pac. 110.

7. In re Pichoir's Estate, 139 Cal. 694, 73 Pac. 604.

8. Rogers v. Rogers, 97 Md. 573.

9. Kelley v. Snow [Mass.] 70 N. E. 89.

10. Dresser v. Travis, 39 Misc. [N. Y.] 358.

11. Income for life. Jackson Square L. & Sav. Ass'n v. Bartlett, 95 Md. 661.

12. A trust in favor of a person sui juris to give him the beneficial enjoyment of property devised to him shielded from the claims of his creditors cannot be upheld. Trust for "son and family" held to pass entire estate to son. S. N. Honaker Sons v. Duff, 101 Va. 675.

13. A spendthrift trust is not created where there is no provision that either the income or the estate shall not be alienable by the beneficiary or subject to attachment by their creditors. Tilton v. Davidson, 98 Me. 55.

14. Anderson v. Kemper, 25 Ky. L. R. 538, 76 S. W. 122.

15. A provision that property is to be held not subject to debts of remaindermen, without present appointment of a trustee, is not sufficient to raise a spendthrift trust under Code, § 1335. Gray v. Hawkins, 133 N. C. 1.

16. See articles Deeds of Conveyance, 1 Curr. Law, p. 908; Wills.

17. To an executor with power to sell and convey. In re Chase's Estate, 40 Misc. [N. Y.] 616. Direction to carry on business and dispose of profits as directed. Thorn v. De Breteuil, 86 App. Div. [N. Y.] 405. Direction to maintain homestead. In re Stewart, 88 App. Div. [N. Y.] 23. Direction to invest estate comprising unimproved realty. Flanner v. Fellows, 206 Ill. 136, 68 N. E. 1057. Direction to pay monthly a certain sum to a person named and at his death to two others is void in Louisiana as

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Necessity of writing.—Written evidence of a trust in personalty is in most states unnecessary,[20] though there are exceptions,[21] and in a few states this is true of realty;[22] but the real estate trusts are usually required to be in writing[23] or at least evidenced thereby,[24] unless executed[25] or there has been part performance.[26] This rule does not prevent parol proof of an express trust as a basis of an equitable title.[27] A declaration of trust by the vendee as part of and as consideration for conveyance is not within the statute of frauds.[28]

An oral trust agreement cannot be shown where there is evidence of the existence of a written one, nor can it be based on a deed void for uncertainty.[29]

The writing need not be a single or a formal instrument,[30] but must iden-

a trust or as a fidei commissum. Succession of Ward, 110 La. 75.

18. Mere use of words "in trust" in conveyance is insufficient. Christian v. Highlands [Ind. App.] 69 N. E. 266. Words "for the benefit of" in the introductory clause and "to the only proper use, benefit and behoof," in the habendum and tenendum, are insufficient to create a trust. Mitchell v. Turner, 117 Ga. 958. A paper by which a decedent turned his property over to a brother to sell for debts and directed him to take charge of the children renders him a trustee and not an executor de son tort, and as such he may be sued by the beneficiaries. Gibson v. Draffin, 25 Ky. L. R. 1332, 77 S. W. 928.

19. Evidence held to show a transfer of securities by father to son in trust rather than an absolute sale. Martin v. Martin, 43 Or. 119, 72 Pac. 639. Instrument construed to be a sale of stocks reserving income for life and not a trust for the seller. Bloodgood v. Terry [Mich.] 96 N. W. 446.

20. Stanley's Estate v. Pence, 160 Ind. 636, 66 N. E. 51; Maher v. Aldrich, 205 Ill. 242, 68 N. E. 810; Devries' Estate v. Hawkins [Neb.] 97 N. W. 792; Martin v. Martin, 43 Or. 119, 72 Pac. 639.

21. A trust to sue on a salary claim must be evidenced in writing [Rev. St. 1899, § 3416]. State v. Hawes, 177 Mo. 360, 76 S. W. 653.

22. Trust may be shown by parol over absolute deed. Craig v. Harless [Tex. Civ. App.] 76 S. W. 594. Parol evidence which is clear and convincing will raise a trust on an absolute deed in Ohio. Contemporaneously with the deed, the beneficiary must be designated and the terms and conditions of the trust declared. Boughman v. Boughman, 69 Ohio St. 273, 69 N. E. 430.

23. Comp. St. c. 32, § 3. Elder v. Webber [Neb.] 92 N. W. 126. Code, § 2918. Byers v. McEniry, 117 Iowa, 499, 91 N. W. 797; McClenahan v. Stevenson, 118 Iowa, 106, 91 N. W. 925; Pollard v. McKenney [Neb.] 96 N. W. 679. A deed cannot be converted into an express trust by parol. Willis v. Robertson, 121 Iowa, 380, 96 N. W. 900; Holtheide v. Smith, 24 Ky. L. R. 2535, 74 S. W. 689. Parol evidence to contradict consideration not admissible. Davis v. Jernigan [Ark.] 76 S. W. 554. Where a life estate is reserved in the grantor, a parol trust will not be raised in the remainderman on the ground that there was an oral agreement by him to support the life tenant. Hall v. Small [Mo.] 77 S. W. 733. A secret parol trust cannot be asserted by a voluntary grantor, where there is no fraud, and the conveyance is not for security. Poling v. Williams [W. Va.] 46 S. E. 704.

Agreements held void: To hold land till death of grantor is void. Rogers v. Richards, 67 Kan. 706, 74 Pac. 255. By mortgagee to buy at foreclosure for use of mortgagor [Code, § 2918]. Martin v. Martin [Iowa] 94 N. W. 493. By a husband to hold title for benefit of his wife or to convey to her. Potter v. Clapp, 203 Ill. 592, 68 N. E. 81. By church trustee to convey mission property held by him to another church to hold until incorporation of the mission. Marie M. E. Church v. Trinity M. E. Church, 205 Ill. 601, 69 N. E. 73. A promise to purchase for complainant. Oden v. Lockwood, 136 Ala. 514. By a grantee at the time of conveyance to hold in trust and sell and pay proceeds is void. Marvel v. Marvel [Neb.] 97 N. W. 640.

Land outside of state. Parol evidence is not admissible in Texas to impress a trust on an absolute conveyance of land in Arkansas, in the absence of proof of the law of that state. Boyd v. Boyd [Tex. Civ. App.] 78 S. W. 39.

24. Luckhart v. Luckhart, 120 Iowa, 248, 94 N. W. 461. Rev. St. 1899, § 3416. Rector, etc., of Mt. Calvary Church v. Albers, 174 Mo. 331, 73 S. W. 508. Burns' Rev. St. 1901, § 3391; Horner's Rev. St. 1901, § 2969; Rev. St. 1881, § 2969. Nesbitt v. Stevens, 161 Ind. 519, 69 N. E. 256. Trust to permit redemption. Throckmorton v. O'Reilly [N. J. Eq.] 55 Atl. 56.

25. Purpose carried out and the beneficiary in possession. Oberlender v. Butcher [Neb.] 93 N. W. 764. May be proven in support of an executed conveyance made in pursuance thereof. Brown v. White [Ind. App.] 67 N. E. 273.

26. Greenley v. Shelmidine, 83 App. Div. [N. Y.] 559. One advanced money to purchase land for another, title being taken in name of the first party as security for the loan, under an oral agreement to convey on payment of the loan. The party for whom the purchase was made went into possession, improved the land, paid interest on the money advanced and purchased an adjoining strip in his own name. Borrow v. Borrow [Wash.] 76 Pac. 305.

27. Hamilton v. McKinney, 52 W. Va. 317.

28. Sykes v. Boone, 132 N. C. 199.

29. Boyd v. Boyd [Tex. Civ. App.] 78 S. W. 39.

30. Gates v. Paul, 117 Wis. 170, 94 N. W. 55. Letter in connection with averments of complaint held sufficient. Nesbitt v. Stevens, 161 Ind. 519, 69 N. E. 256. Entry in account book of trustee of an account as trustee is sufficient. Aller v. Crouter, 64 N. J. Eq. 381. The terms of a trust may be established by the averments of a complaint in an action by

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tify the property and disclose the terms of the trust.[31] Where the trust is disclosed in a letter, evidence of the attendant circumstances is admissible unless the letter is complete, definite and certain.[32] A contention of acknowledgment in writing is overthrown by the failure of a trustee defendant to admit the trust in his pleadings in a suit by creditors to establish the trust.[33]

Establishment by parol and extrinsic evidence.—Where an express trust is based on a verbal contract, the proof must be clear and satisfactory and both parties must be shown to have joined.[34] Clear and weighty preponderance of the evidence is sufficient to establish an express trust in land.[35] Parol evidence of a trust in land may be rebutted by parol evidence of an agreement terminating it[36] or by subsequent acts of the parties.[37]

Declarations by trustee may be sufficient to raise a trust,[38] as location of public land in name of one for use and benefit of himself and another,[39] or acceptance of assignment of a mortgage as trustee;[40] but an unexpressed intention to hold in trust will not control an absolute deed[41] or a declaration made long before it is attempted to assert the trust.[42]

An opinion that payment of a claim can be made in full does not make an officer of an insolvent corporation a trustee for the creditor to whom it is expressed.[43]

Bank deposits in trust.—A trust is evidenced by the opening of a deposit account "in trust for" another,[44] unless there is evidence of a contrary intent.[45]

the trustee. Christian v. Highlands [Ind. App.] 69 N. E. 266.

31. Letter by donee held insufficient to overcome the evidence of a gift of a bank deposit. Wickford Sav. Bank v. Corey [R. I.] 55 Atl. 684.

32. Nesbitt v. Stevens, 161 Ind. 519, 69 N. E. 256.

33. Byers v. McEnlry, 117 Iowa, 499, 91 N. W. 797.

34. **Evidence held insufficient:** Kelly v. Short [Tex. Civ. App.] 75 S. W. 877. Land. Elder v. Webber [Neb.] 92 N. W. 126. Money. Flaherty v. O'Connor, 24 R. I. 587. To show an agreement to convey land to plaintiff through a trustee. Bell v. Staacke, 141 Cal. 186, 74 Pac. 774. Statements by husband that land belonged to wife and was purchased with her money. Jesser v. Armentrout's Ex'r, 100 Va. 666.

Held sufficient: Personalty. Maher v. Aldrich, 205 Ill. 242, 68 N. E. 810. To establish oral trust in the proceeds of life insurance. Devries' Estate v. Hawkins [Neb.] 97 N. W. 792. To establish grantee as trustee to convey to grantor's wife. Gritten v. Dickerson, 202 Ill. 372, 66 N. E. 1090. Receipt of money by beneficiary's father-in-law under an agreement to hold and employ for her sole use. Owsley v. Owsley, 25 Ky. L. R. 1194, 77 S. W. 394.

35. Hamilton v. McKinney, 52 W. Va. 317.

36. Where it was claimed defendant held under a parol agreement to convey on repayment of advances, he may give parol evidence of a settlement in which plaintiff relinquished title. Phillips v. Swenson [S. D.] 92 N. W. 1065.

37. Language of the parties to an executory contract of sale of land in an agreement substituting a third person in the place of the vendee, from which an intention may be inferred to make such person a trustee for both parties, will not overcome subsequent acts indicating an intention to substitute. Title G. & T. Co. v. McDonnell, 32 Wash. 418, 73 Pac. 484.

38. Declarations by a father that he held the proceeds of a sale of land for an infant child, together with the execution of a note for the sum, is sufficient, though the father retains the note. In re Upson, 123 Fed. 807. An agreement to hold land till death of grantor and then to convey is not a gift inter vivos or causa mortis. Rogers v. Richards [Kan.] 74 Pac. 255.

39. Where both select, occupy and improve the land. Moore v. Moore [C. C. A.] 121 Fed. 737.

40. Held that, though it was originally intended by one purchasing land and satisfying a mortgage to make a gift to his wife, and though he took a satisfaction with that intent, the wife, by agreeing to a trust in the mortgage for their children, rendered the husband an equitable owner thereof, making his acceptance a valid declaration. Carter v. Carter, 63 N. J. Eq. 726.

41. Williamson v. Gore [Tex. Civ. App.] 73 S. W. 563. If a party obtains a deed without any consideration upon a parol agreement that he will hold the land in trust for the grantor, such trust will not be enforced. The deed recited as a consideration natural love and affection. Richardson v. McConaughey [W. Va.] 47 S. E. 287.

42. A grantee's declaration that he held in trust is not sufficient to overcome a consideration expressed in deed, made 11 years before an action to set aside was instituted. Holtheide v. Smith, 24 Ky. L. R. 2535, 74 S. W. 689.

43. Temple v. Bush [Conn.] 55 Atl. 557.

44. In re Bulwinkel, 42 Misc. [N. Y.] 471. Such an account in trust for a creditor creates a trust and not a discharge of the debt where an intent to pay is not established. In re Hewitt, 40 Misc. [N. Y.] 322.

45. In re Barefield, 177 N. Y. 387, 69 N. E. 732. The question is one of fact. Kelley v.

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The depositor may retain the bank book[46] and make withdrawals,[47] and need not notify the beneficiary.[48] Deposits made after the death of the beneficiary go to his estate.[49] Withdrawals by the settlor may be recovered from his estate.[50]

Construction.—A trust of personalty is governed by the laws of the state where it is to be administered.[51] On an equitable conversion, land the subject of the trust will be regarded as personalty.[52]

Where, on termination of a life the trustees are to divide the estate and hold for children, a new trust comes into existence on the happening of the contingency.[53]

A trust relation cannot by parol be changed so as to convert the conveyance under which the trustee holds legal title into a mortgage to the indemnity of the trustee on future contracts of suretyship for the beneficiary.[54] A provision that the trustee is to hold for the benefit of a specified person may be controlled by other provisions as to use by such person for another, rendering the latter the true beneficiary.[55] See the footnotes for construction of particular provisions.[56]

§ 2. *Implied trusts.*[57]—An agreement to perform acts in the future does not render the promisor a trustee,[58] unless a discretion is vested in him,[59] or a

Snow [Mass.] 70 N. E. 89. Evidence that the intent to give was based on survivorship of the beneficiary overcomes a trust. In re Smith's Estate, 40 Misc. [N. Y.] 331. Evidence held to negative trust over designation in savings deposit, where there was no notification to the beneficiary and all personal property including the deposit was otherwise disposed of by will. Cleveland v. Springfield Inst. for Savings, 182 Mass. 110, 65 N. E. 27. Evidence held insufficient to establish trust and deposit 20 years after withdrawal by depositor and in the absence of other showing of intent. Dickie v. Adams, 40 Misc. [N. Y.] 88.

46. Evidence held to establish trust in savings deposit for niece, though aunt retained book. Merigan v. McGonigle, 205 Pa. 321.

47. During 19 years mother deposited in trust for daughter. In re Biggars, 39 Misc. [N. Y.] 426.

48. Merigan v. McGonigle, 205 Pa. 321.

Notice unnecessary. In re Biggars, 39 Misc. [N. Y.] 426. Bank deposit by wife in her name in trust for husband, withdrawn by her before death. Jenkins v. Baker, 77 App. Div. [N. Y.] 509. Facts held to show trust in deposit without knowledge of beneficiary. In re Totten, 89 App. Div. [N. Y.] 368.

49. In re Bulwinkel, 42 Misc. [N. Y.] 471.

50. Though the beneficiary had no knowledge of the trust. In re Totten, 89 App. Div. [N. Y.] 368. With interest. Marsh v. Keogh, 82 App. Div. [N. Y.] 503.

Contra, In re Biggars, 39 Misc. [N. Y.] 426.

51. Mount v. Tuttle, 40 Misc. [N. Y.] 456.

52. Will forbidding executors to pass control of his share to a legatee, but permitting them to hold it in trust and pay such parts as they deem expedient for his support and at his death to pay residue to his wife and children. Russell v. Hilton, 80 App. Div. [N. Y.] 178. Devise to trustees for support for life and sale and division on death of beneficiary. McWilliams v. Gough, 116 Wis. 576, 93 N. W. 550.

53. In re New York, 81 App. Div. [N. Y.] 27.

54. Christian v. Highlands [Ind. App.] 69 N. E. 266.

55. Scofield v. Peck, 182 Mass. 121, 65 N. E. 60.

56. To a husband and wife and after death of the survivor to "joint heirs" means heirs of both at time of death of survivor. Gardiner v. Fay, 182 Mass. 492, 65 N. E. 825. Provisions of deed by a railroad conveying land in exchange for townsite land in trust for occupants of townsite held to be construed in connection with townsite laws and to be for benefit of actual occupants as against nonoccupying claimants. Gill v. Wallis [N. M.] 70 Pac. 575. Gift to city for park purposes construed to permit investment of corpus by commission and not to restrict them to income. In re Long's Estate, 204 Pa. 60. In trust for B. "for and during her natural life and after her death to such children," etc., creates no trust as to remaindermen. Tillman v. Banks, 116 Ga. 250. Provision for lienholders held to require application of sinking fund in the order of priority of original securities. U. S. v. American L. & T. Co., 120 Fed. 843.

57. Precatory words as raising an implied trust being purely a question of intent of the testator are discussed in the article Wills.

58. One holding property as consideration for agreement to support his brother is not a trustee. Hanks v. Hanks, 75 Vt. 273. An agreement in consideration of a conveyance to pay a grantor a certain sum for life and at his death to make payments to persons designated is not a trust. Dohmen v. Schlief [Mo.] 78 S. W. 799. An oral agreement by remainderman to support a life tenant will not authorize an implication that the conveyance was in trust for such purpose. Hall v. Small [Mo.] 77 S. W. 733.

59. Agreement under which a person takes and invests at his discretion funds of another creates a trust. Hitchcock v. Cosper [Ind. App.] 69 N. E. 1029. A testator bequeathed his wife the interest on a certain note, and if the note was paid a specified interest (rate) on a sum equal to the principal, so long as she lived, the sum then to be divided among specified legatees. Held, the executor

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special confidence reposed.[60] Hence, a promise to make a gift does not raise a trust,[61] nor an imperfectly executed gift,[62] but a trust may be raised from an agreement on sufficient consideration to devise land.[63] One is not rendered a trustee by an agreement to which he is not a party.[64] A conveyance to another for the purpose of saving costs and expenses in making sales raises a trust, there being no intent to pass the beneficial interest.[65]

Statutes requiring express trusts to be created by writing, but excepting those implied from conveyances, do not permit an implied trust to be raised on refusal of the trustee of a parol express trust to comply with its terms.[66]

§ 3. *Constructive trusts. A. Trusts raised where property is obtained or held by fraud.*—A grantee of a conveyance not voluntarily and understandingly made, and who has not taken title in good faith is a trustee.[67]

Writings are unnecessary to establish a constructive trust,[68] and a deed executed with the intention of raising a trust may be declared a trust, though there is a statutory provision that trusts must be executed as deeds of conveyance.[69]

Fraud is an essential element[70] of which the party seeking to assert the

held the note as trustee and could sell it and convey a good title by indorsement. Marshall v. Myers, 96 Mo. App. 643, 70 S. W. 927. A consolidation contract by which the new corporation agrees to pay royalties to the old held to create a trust cognizable in equity. W. U. Tel. Co. v. American Bell Tel. Co. [C. C. A.] 125 Fed. 342.

60. Brokers with whom a third person has placed complainant's money to be used in speculation, it being understood between complainant and such third person that he shall remain unknown, are not bound to account as trustees. McKay v. Hudson, 118 Fed. 919. An agreement to hold shares of stock and pay another a portion of the profits after realization of cost amounts to a trust enforceable against a transferee of the shares with notice. Morris v. Shepard [N. J. Eq.] 53 Atl. 172. One in whose hands money raised by a neighborhood for the purchase of articles for a schoolhouse has been placed by the committee in charge may be sued by them as trustees of express trust. They need not all be residents of the county [Rev. St. 1899, § 541]. Scribner v. Smith [Mo. App.] 79 S. W. 181. An agreement to pay purchase money and to allow another a half interest to be paid for in future and to share proceeds of timber sold therefrom creates an express trust. Flippo v. Lamb [Va.] 46 S. E. 681. An attorney was employed to defend foreclosure proceedings on two lots. Both were ordered sold. A third person wishing to buy one of them gave him more than enough money to redeem both. He secured a quitclaim from the mortgagors, transferred one lot to the third person and kept one himself, subject to the right of the mortgagor to redeem. Held, that he held this lot in trust for the mortgagor. Carson v. Fogg [Wash.] 76 Pac. 112. Understanding that wife's money in hands of husband should be paid to her children at her death, or sooner at his option, held sufficient. Stanley's Estate v. Pence, 160 Ind. 636, 66 N. E. 51.

61. A promise to buy in property at bankruptcy sale, and in case a profit could be realized on resale to share with the bankrupt, does not amount to an executed trust. Fisher v. Hampton Transp. Co. [Mich.] 98 N. W. 1012.

62. Brown v. Crafts, 98 Me. 40. A trust is not raised from an incompleted gift where the donor does not in his lifetime manifest an intention to divest himself of the equitable title. Not sufficient to execute deeds, assignments of mortgages, etc., do them up in packages and set them aside for the beneficiaries, retaining possession until death. Clay v. Layton [Mich.] 96 N. W. 458. An express trust is not to be raised from an intent by a purchasing minor to establish a home for his parents. Crowley v. Crowley [N. H.] 56 Atl. 190.

63. Best v. Grolapp [Neb.] 96 N. W. 641. Implied from purchase for one-fifth value at foreclosure with lease back and agreement to reconvey. Butler v. Stark [Ky.] 79 S. W. 204.

64. A trust cannot be raised from an agreement to purchase at partition sale to which the purchaser is not a party. Largey v. Leggat [Mont.] 75 Pac. 950.

65. The court calls it an "express" trust. Craig v. Harless [Tex. Civ. App.] 76 S. W. 594.

66. Act April 22, 1856 [P. L. 533]. Promise to hold in trust for brothers. McCloskey v. McCloskey, 205 Pa. 491.

67. Newis v. Topfer, 121 Iowa, 433, 96 N. W. 905.

68. Pollard v. McKenney [Neb.] 96 N. W. 679; Brookings L. & T. Co. v. Beltness [S. D.] 96 N. W. 97. The statute of frauds does not apply where a grantee of a deed, obtained under undue influence, promised to hold for another. McClellan v. Grant, 83 App. Div. [N. Y.] 599. One who under agreement purchases at foreclosure, at less than value, for owner of equity of redemption, cannot assert the statute of frauds. Constructive trust. Dickson v. Stewart [Neb.] 98 N. W. 1085.

69. Code, § 2918. Newis v. Topfer, 121 Iowa, 433, 96 N. W. 905.

70. Refusal to perform a parol contract to hold or convey land is not sufficient in absence of bad faith. In re Simon's Estate, 20 Pa. Super. Ct. 450. A trust ex maleficio not required to be in writing is not shown by a parol agreement by a devisee after execution of a will to hold in trust for his brothers, no fraud being shown. McCloskey v. McCloskey, 205 Pa. 491. An absolute conveyance to

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trust must be innocent,[71] though under some statutes an intent to defraud creditors is not fatal.[72]

Mere relationship will not raise a trust,[73] but one in fiduciary relationship, securing an advantage thereby, becomes a trustee,[74] and so one interested for or with another in any property or business is prohibited from acquiring antagonistic rights therein, and property acquired by means of the relation is charged with a constructive trust for the benefit of the other. The test is the fiduciary relationship and the abuse thereof.[75] After termination of the relationship the rule does not apply.[76]

A constructive trust arises in corporate property conveyed in fraud of stockholders.[77] One who accepts a conveyance, knowing that the vendor is by contract bound to sell it to another, holds the legal title in trust.[78]

Burden of proof and evidence.—To show a constructive trust the proof must be clear and convincing.[79] When the transaction is between near relatives the

place property out of the reach of creditors will not, in the absence of fraud or undue advantage, raise a constructive trust. Skahen v. Irving, 206 Ill. 597, 69 N. E. 510. A trust to hold land till the death of grantor cannot be held a trust ex maleficio, in the absence of fraud. Rogers v. Richards, 67 Kan. 706, 74 Pac. 255. Where neither party has any interest in the property an oral agreement to purchase and hold in trust cannot be taken from the statute of frauds, as establishing a trust ex maleficio, where complainant advanced no money nor did anything to carry the agreement into effect. Largey v. Leggat [Mont.] 75 Pac. 950.

71. Willis v. Robertson, 121 Iowa, 380, 96 N. W. 900.

72. Under Code Civ. Proc. § 2224, relief will be given where the conveyance is in fraud of creditors but is procured by undue influence or fraud. Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433.

73. A conveyance, by the purchaser on execution, to the daughter of the debtor does not raise a trust for the debtor. Williamson v. Gore [Tex. Civ. App.] 73 S. W. 563. An agreement between co-tenants that one should purchase the other's interest at execution sale and permit him to redeem does not raise a constructive trust. Stafford v. Stafford, 29 Tex. Civ. App. 73, 71 S. W. 984.

74. Newis v. Topfer, 121 Iowa, 433, 96 N. W. 905. Conveyance to sister to prevent grantee from being defrauded by others. Odell v. Moss, 137 Cal. 542, 70 Pac. 547. A conveyance by an old woman to a religious adviser under whose influence she was, raises a trust without allegation of actual fraud. McClellan v. Grant, 83 App. Div. [N. Y.] 599. A trust will be raised where a son, in confidential relation to his mother, secures a deed to her property with intent not to keep a promise to provide for her support. Complaint held sufficient. Becker v. Schwerdtle, 141 Cal. 386, 74 Pac. 1029. Where wife, during last illness of husband, obtained conveyance by means of promises to carry out his intention which she afterward repudiated. Pollard v. McKenney [Neb.] 96 N. W. 679. Where induced by fraud and without consideration, a wife conveys to her husband that he may dispossess a tenant. Jones v. Jones, 140 Cal. 587, 74 Pac. 143.

75. Trust established in title to land acquired by agent of real estate brokers after termination of relationship but in reliance on knowledge gained in the scope of the agency. Trice v. Comstock [C. C. A.] 121 Fed. 620. An agent to purchase at foreclosure for the owner of the notes and mortgages, who bids more than the amount agreed on is liable as a purchaser for its own benefit and subject to account for the purchase price. Minneapolis Trust Co. v. Mather, 90 App. Div. [N. Y.] 361. A purchase by an agent in his wife's name after failure to purchase for principal, but without reporting to him, raises a constructive trust. Brookings L. & T. Co. v. Bertness [S. D.] 96 N. W. 97. If an attorney acquires title to property of his client, which is in any way the subject of litigation in which he is employed he will be decreed to hold such property as trustee. An attorney with his own money, purchased mortgages against property he held in trust, foreclosed the same, and took title in his own name. Stanwood v. Wishard, 128 Fed. 499. Where a husband and wife sought to establish a trust as to the proceeds of a sale of real property predicated on an agreement of defendants to take the title at a judicial sale and hold the equity of redemption in trust, evidence held insufficient to show an agreement other than to bid in the property and furnish plaintiffs an opportunity to redeem. Mackall v. Olcott, 87 N. Y. Supp. 757.

76. Where an attorney purchases for heirs, and the sale is set aside, he is not a trustee on subsequent purchase for full value and as highest bidder. Smith v. Stevenson, 204 Pa. 194. After expiration of an option one of the joint holders, who has dissuaded the others from purchasing, may purchase without becoming a trustee for the rest. Gilbert v. Windhusen, 31 Wash. 249, 71 Pac. 717. A grantee is not charged with the burden of rebutting a constructive trust by the fact that he has acted as agent for the grantor in other transactions. Willis v. Robertson, 121 Iowa, 380, 96 N. W. 900.

77. Northwestern Land Ass'n v. Grady, 137 Ala. 219.

78. An owner gave a bond for a deed to be executed when certain notes were paid. He then deeded the property to his son who had notice of the terms of the bond. Handy v. Rice [Me.] 57 Atl. 847.

79. Use of money held for plaintiffs in purchase of land. Schwartz v. Gerhardt [Or.] 75 Pac. 698. Evidence held insufficient to establish a trust in a water right, being

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burden of showing good faith is on defendants, after establishment of a prima facie case.[80] The defendant may be declared to hold as trustee though there is a failure to establish the purchase price.[81]

(§ 3) *B. Trusts by equitable construction in the absence of fraud* may be raised in the consideration for a conveyance, if title fail,[82] or on a taking of title for security,[83] or on agreement to convey,[84] or on breach of an agreement to protest a title,[85] or on an unwarranted taking of title in that which belongs to another.[86] A conveyance on consideration of support for grantor may be enforced by declaring a trust for that purpose.[87] Such a trust will not arise against the law, hence an oral agreement to convey the homestead and the acceptance of a payment thereunder, being invalid, do not raise a trust in favor of the person making the payment.[88]

One receiving rents under a forged lease cannot be held as a constructive trustee of the owner.[89]

§ 4. *Resulting trusts.—The general rule* is that where one person pays the purchase money and the conveyance is taken in the name of another a trust results to the person furnishing the consideration.[90] Such a trust may be established by parol,[91] and cannot be based on agreement,[92] though a trust will not re-

conflicting as to whether the location certificate bore an erasure of plaintiff's name and an insertion of defendant's. Nesmith v. Martin [Colo.] 75 Pac. 590. Evidence held insufficient to show fraud or undue influence raising constructive trust in conveyance by mother to son. Schwingle v. Anthes [Neb.] 98 N. W. 676. Evidence held sufficient to establish trust in favor of children in land purchased by parents with fund inherited by the children from a grandparent. Schwartz v. Gerhardt [Or.] 75 Pac. 698. Evidence held insufficient to establish the trust. Collins v. Collins [Md.] 57 Atl. 597.

All the allegations of a bill to establish a constructive trust need not be established if sufficient allegations are. First Nat. Bank v. Leech, 207 Ill. 215, 69 N. E. 890.

80, 81. Schwartz v. Gerhardt [Or.] 75 Pac. 698.

82. Where a conveyance of a homestead is void for nonjoinder of the wife, the grantee may, on notice to one in possession of the consideration, follow it as impressed with a constructive trust. H. Stern, Jr., & Bros. Co. v. Wing [Mich.] 97 N. W. 791.

83. One taking a deed as security for advances in a purchase for others is a trustee to convey on repayment. Babcock v. Wells, 25 R. I. 30. Where creditors secured by a third trust deed furnish their trustee the money with which to pay off the note secured by the first trust deed, they are entitled to be substituted to the rights of the payee thereunder though the form of the indorsement on the note is to their trustee as trustee for the debtor. Davison v. Gregory, 132 N. C. 389.

84. Notwithstanding the right of redemption the mortgagor may make an arrangement by which one purchases for him and becomes a trustee. Coleman v. McKee, 24 R. I. 596. Evidence held to establish trust to reconvey property by purchaser on execution sale. Natter v. Turner [N. J. Eq.] 52 Atl. 1105.

Contra: An agreement by a vendor, after foreclosure of a vendor's lien, to convey to the vendee on payment of a specified sum within a specified time does not raise a trust. Foster v. Ross [Tex. Civ. App.] 77 S. W. 990. Denial or failure to fulfill a promise to hold title for another does not create a trust. Willis v. Robertson, 121 Iowa, 280, 96 N. W. 900. Where corporation stock was delivered by a stockholder to an official of the corporation under an agreement that it was to be transferred to a capitalist to induce him to give the corporation financial aid, the officer held the stock in trust for the purpose for which it was delivered, and on his failing to so use it equity had jurisdiction to compel an accounting. Slayback v. Raymond, 87 N. Y. Supp. 931.

85. Mortgagee agreeing to protect the mortgagor's title against any deficiency judgment on another mortgage becomes a constructive trustee, where the property is sold on execution and he buys from the purchaser. Chantler v. Hubbell [Wash.] 75 Pac. 802.

86. Where certain beneficiaries of a trust estate, without authority, collected from the administrator the share of a minor beneficiary, they were trustees of a constructive trust. Bridgens v. West [Tex. Civ. App.] 80 S. W. 417.

87. Keister v. Cubine, 101 Va. 768.

88. Where a husband and wife agreed to convey their homestead to their sons if they would advance them enough money to pay off a mortgage, which they did. Alvis v. Alvis [Iowa] 99 N. W. 166.

89. Brown v. Hooks [Tex. Civ. App.] 76 S. W. 606.

90. Johnson v. Johnson, 96 Md. 144; Bailey v. Dobbins [Neb.] 93 N. W. 687; Flanary v. Kane [Va.] 46 S. E. 312. Where under an agreement to purchase jointly one party takes title individually. Despard v. Despard, 53 W. Va. 443.

91. Row v. Johnston [Ky.] 78 S. W. 906; Booth v. Lenox [Fla.] 34 So. 566. Rev. St. 1899, § 3417. McMurray v. McMurray [Mo.] 79 S. W. 701. An agreement in writing is not necessary to support a trust under Gen. St. 1901, § 7882, where by an agreement and without any fraudulent intent the party

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sult against the intention of the parties,[93] and if partly performed is valid, though the act which was to entitle the beneficiaries was not to be performed within a year.[94]

Want of consideration will not raise a trust to grantor,[95] and where a consideration is recited in a deed, neither the grantor nor those claiming under them can deny it to raise a trust.[96]

A husband cannot establish a trust under a conveyance by him to his wife in fraud of creditors.[97]

The beneficiary must be capable of taking,[98] and as a resulting trust may be raised on another, may be a trustee of an express trust,[99] where a deed was made by mistake to another.[1]

After sale by a resulting trustee to a bona fide holder the representatives of the trustee may be compelled to account, where the claim is not barred.[2]

Where the beneficiary joins in a mortgage, an assignee, with notice of the resulting trust, is not subordinated thereto.[3]

Statutes in certain states abolish resulting trusts except in favor of creditors, and in certain cases where title has been taken without knowledge or assent.[4] Such a statute protects persons furnishing the consideration from liability, under an agreement in the deed to assume a mortgage debt.[5] The person furnishing the consideration has no interest subject to attachment.[6]

The consideration must be furnished by the beneficiary[7] at the time of purchase.[8] The money so furnished may, however, be advanced by another[9] as a

in whom title vested was to hold in trust for the party paying the purchase price. Lyons v. Berlau, 67 Kan. 426, 73 Pac. 52.

92. Potter v. Clapp, 203 Ill. 592, 68 N. E. 81. Cannot be based on an oral agreement to sell land and share proceeds between grantee and other creditors of grantor. Byers v. McEniry, 117 Iowa, 499, 91 N. W. 797. Will not arise on default of mortgagor to pay sum for redemption within time specified to purchaser on foreclosure. Barnes v. Morgan, 204 Pa. 185. A resulting trust must result from the transaction itself and not from any agreements or payments before or after passing of title. Williamson v. Gore [Tex. Civ. App.] 73 S. W. 563.

93. Funk v. Hensler, 31 Wash. 528, 72 Pac. 102.

94. Where under an oral contract for the purchase of land one became a resulting trustee and there was part performance sufficient to take the case out of the statute, the trustee could not contend that such trust was unenforceable because not to be performed within one year. Borrow v. Borrow [Wash.] 76 Pac. 305.

95. McClenahan v. Stevenson, 118 Iowa, 106, 91 N. W. 925.

96. Willis v. Robertson, 121 Iowa, 380, 96 N. W. 900. Parol evidence being contrary to Statute of Frauds and varying written instrument. Aller v. Crouter, 64 N. J. Eq. 381. A husband cannot deny an expressed consideration in a deed from him to his wife. Hays v. Marsh [Iowa] 98 N. W. 604.

97. See Fraudulent Conveyances, 2 Curr. Law, p. 116. Hays v. Marsh [Iowa] 98 N. W. 604. Husband's money used in purchase of property in his wife's name may be reached by his creditors pro tanto. Wolfsberger v. Mort [Mo. App.] 78 S. W. 817.

98. A mission, without independent organization, supported by a church, cannot be a beneficiary of a resulting trust. Marie M. E. Church v. Trinity M. E. Church, 205 Ill. 601, 69 N. E. 73.

99. Purchase with express intention to hold for grandchildren does not prevent purchaser from asserting trust against daughter in whose name conveyance is taken. In re Peabody [C. C. A.] 118 Fed. 266.

1. A grandmother left a fund in trust for the benefit of a bankrupt, the trustee to have full control and use it for the beneficiary as she might need from time to time. The trustee arranged to invest the fund in a homestead, the deed to be made to the trustee, but to be used by the bankrupt. By mistake the deed was made to the bankrupt. In re Spencer, 128 Fed. 654.

2. Williams v. Williams' Ex'r. 25 Ky. L. R. 836, 76 S. W. 413.

3. Fonda v. Gibbs, 75 Vt. 406.

4. Gen. St. 1901, §§ 7880, 7881. Chantland v. Midland Nat. Bank, 66 Kan. 549, 72 Pac. 230. Ky. St. 1899, § 2353. Clay v. Clay's Guardian, 24 Ky. L. R. 2016, 72 S. W. 810. Ky. St. 1899, § 2353, permits trust to result where administrator takes title to land with money of minor heir. Stone v. Burge, 24 Ky. L. R. 2424, 74 S. W. 250. Gen. St. 1894, § 4280, does not apply to executory contracts for the sale of land. Minneapolis & St. L. R. Co. v. Lund [Minn.] 97 N. W. 452. Under Rev. St. 1898, § 2077, trust does not result where owner of debt takes notes and mortgages in name of his wife. Meier v. Bell, 119 Wis. 482, 97 N. W. 186.

5. Rev. St. 1898, § 2077. Arnold v. Randall [Wis.] 98 N. W. 239.

6. Gen. St. 1901, §§ 7880, 7881. Chantland v. Midland Nat. Bank, 66 Kan. 549, 72 Pac. 230.

7. Garrett v. Garrett, 171 Mo. 155, 71 S. W. 153. Property purchased in wife's name. Cline v. Cline, 204 Ill. 130, 68 N. E. 545.

8. Where the person taking title executes his note for the purchase price a trust will

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loan.[10] In case a part only is furnished by him he is entitled to a trust pro tanto,[11] and the part furnished need not be, strictly speaking, an aliquot one.[12]

Payment may be in any manner.[13] A trust may result, though the trustee assumes the legal liability for deferred payments.[14] As to sufficiency and fact of payment see the footnotes.[15]

Presumption of gift or advancement.—Where the parties are not strangers, the presumption of a gift or advancement may overcome that of a trust, as where a husband takes title in the name of his wife,[16] or conversely,[17] save under the common law,[18] or a father in the name of a child,[19] or whenever the conveyance is in name of one for whom there is a legal or moral obligation to provide.[20] This presumption is rebuttable[21] by a preponderance of the evidence,[22] so where

not result unless the beneficiary at the time agrees to pay it. Subsequent payment will not suffice. Crowley v. Crowley [N. H.] 56 Atl. 190.

9. Where lands purchased by a husband in his own name were paid for with moneys belonging to his wife, and the wife's mother testified she gave her daughter the money with which to pay for it, a contention that the evidence showed that the money was furnished by the mother and not by the daughter was untenable. Shackleford v. Elliott [Ill.] 70 N. E. 745.

10. Where one advanced money with which real estate was purchased for another, title being taken in name of the first party for security, under an oral agreement to convey on payment of the loan, a resulting trust was created. Borrow v. Borrow [Wash.] 76 Pac. 305.

11. Crowley v. Crowley [N. H.] 56 Atl. 190; Johnson v. Johnson, 96 Md. 144.

12. The fraction need not be contained in the whole without remainder. Skehill v. Abbott, 184 Mass. 145, 68 N. E. 37.

13. By cash, or by the promise of the beneficiary or of some other person procured by him for the purpose. Crowley v. Crowley [N. H.] 56 Atl. 190.

14. Skahen v. Irving, 206 Ill. 597, 69 N. E. 510.

15. Discharge of a mortgage to protect a life estate by a life tenant not personally liable, under a mistaken belief that he was owner in fee, is not payment of purchase price. Wilder's Ex'x v. Wilder, 75 Vt. 178. Land purchased by a vendor, and held as tenant by entirety with his wife, with a sum realized from the sale of other realty cannot be reached by the vendee to satisfy an execution on judgment on breach of covenant of warranty on the theory that his money furnished the consideration [Burns' Rev. St. 1901, §§ 3396-3398]. Mercer v. Coomler [Ind. App.] 69 N. E. 202. A credit in the judgment is not sufficient consideration to enable an execution purchaser to hold against beneficiaries of a resulting trust. Record showing payment of judgment and costs is insufficient where it is not shown that the costs were not incurred by the creditor. Hicks v. Pogue [Tex. Civ. App.] 76 S. W. 786. A minor seeking to establish a resulting trust in land purchased with his earnings taken in the name of his father, must establish that he was to have the benefit of his earnings. Crowley v. Crowley [N. H.] 56 Atl. 190. Evidence held to show that lands purchased in his own name were paid for with moneys belonging to his wife. Shackleford v. Elliott [Ill.] 70 N. E. 745. On an issue whether land purchased by the husband had been paid for with money furnished by the wife, the fact that the bond given on the sale of the land recited that the husband gave his note was not conclusive as to whether such note was given or whether there was a cash payment as claimed. Id.

16. Presumption of gift controls in case of wife. Johnson v. Johnson, 96 Md. 144; Chambers v. Michael [Ark.] 74 S. W. 516; Viers v. Viers, 175 Mo. 444, 75 S. W. 395. Title taken in name of wife with remainder to heirs of her body causes presumption of gift. Clay v. Clay's Guardian, 24 Ky. L. R. 2016, 72 S. W. 810.

17. A trust results in favor of the wife where on a settlement of an estate in which a wife is entitled to share, effected by an interchange of conveyance, her share is conveyed to the husband. Condit v. Bigalow, 64 N. J. Eq. 504. Evidence held to establish a trust in favor of wife in share of her father's estate deeded by her brothers and sisters to her husband. Williams v. Williams' Ex'r, 25 Ky. L. R. 836, 76 S. W. 413.

18. Prior to married women's act a trust did not result to the wife in property purchased with her money in husband's name. Jesser v. Armentrout's Ex'r, 100 Va. 666. Under the common law the husband having title to the proceeds of sale of the wife's land, no trust resulted to her in property purchased therewith in his name. Will be presumed in the absence of evidence that common law prevailed in Ohio between 1851 and 1872 where and when wife's realty was disposed of. Hogue v. Steel, 207 Ill. 340, 69 N. E. 931.

19. Deed directly from father to son shows gift or advancement, not overcome by want of consideration in absence of fraud, or by acts of father in retaining possession, paying taxes, and mortgaging, and retaining deeds among his papers. Luckhart v. Luckhart, 120 Iowa, 248, 94 N. W. 461.

20. Bailey v. Dobbins [Neb.] 93 N. W. 687.

21. Bailey v. Dobbins [Neb.] 93 N. W. 687; Johnson v. Johnson, 96 Md. 144. Husband to wife. Lahey v. Broderick [N. H.] 55 Atl. 354. The question of advancement or trust is one of fact resting on intent. Bailey v. Dobbins [Neb.] 93 N. W. 687. Facts held to show resulting trust where it was shown to be the intention of the person furnishing consideration to hold for benefit of grandchildren, and such person had possession, paid taxes, and received rents. In re Peabody [C. C. A.] 118 Fed. 266.

22. Advancement by husband to wife. Chambers v. Michael [Ark.] 74 S. W. 516.

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a wife shows that her husband took title without her knowledge or consent a trust results to her,[23] or where she was ignorant of the legal effect of the transaction,[24] and conversely.[25] A wife may claim a resulting trust, though she has, as conservator of her insane husband, inventoried, during his life, the corpus as part of his estate.[26]

A minor son is entitled to a resulting trust where property, purchased with his funds, is taken in the name of his father to overcome the contractual disabilities of minority.[27]

Property purchased with trust funds[28] may result. A resulting trust may be asserted in property purchased with funds of another, advanced by an agent, though the purchaser did not know of the ownership of the funds.[29]

Patentee of public land.[30]—Until issuance of a patent the successful claimant cannot be held as trustee of a resulting trust, on the ground of error of law in the findings of facts.[31] The patentee must not be entitled to the patent.[32]

Evidence to establish a resulting trust must be clear, satisfactory, and unambiguous.[33] The burden is on the person asserting the trust.[34] The exact part of the consideration furnished must be established.[35] After lapse of many years a trust cannot be established by a slight preponderance of the evidence.[36] Cases in which the sufficiency of evidence has been considered are grouped in the notes.[37]

Evidence held to overcome presumption of gift by brother to sister. Dwyer v. O'Connor, 200 Ill. 52, 65 N. E. 668. Evidence held insufficient to rebut presumption of gift between husband and wife. Johnson v. Johnson, 96 Md. 144. Evidence held to rebut presumption of advancement to child. Skahen v. Irving, 206 Ill. 597, 69 N. E. 510. Husband's conduct in management as his own theory of advancement to wife does not overcome. Chambers v. Michael [Ark.] 74 S W. 516.

23. Madison v. Madison, 206 Ill. 534, 69 N. E. 625. Against his heirs. Booth v. Lenox [Fla.] 34 So. 566. Against his creditors. Cresap v. Cresap [W. Va.] 46 S. E. 582.

24. Deed in name of husband to land of which wife paid 2-5 purchase price held to raise trust, wife being ignorant of effect. Skehill v. Abbott, 184 Mass. 145, 68 N. E. 37.

25. Flanner v. Butler, 131 N. C. 155.

26. No rights of third persons intervening. Madison v. Madison, 206 Ill. 534, 69 N. E. 625.

27. Crowley v. Crowley [N. H.] 56 Atl. 190.

28. A trust will not be impressed on land purchased with a distinct fund for the reason that a person in fiduciary capacity mingled trust funds with his own. Garrett v. Garrett, 171 Mo. 155, 71 S. W. 153.

29. Bell v. Solomons, 142 Cal. 59, 75 Pac. 649.

30. See Public Lands, 2 Curr. Law, p. 1295.

31. Jordan v. Smith [Okl.] 73 Pac. 308.

32. To render the holder of the legal title under a patent to public land a trustee for claimant it must be shown that claimant was entitled to a patent; it is not sufficient that there was error in adjudging the patent to the patentee. Small v. Rakestraw, 28 Mont. 413, 72 Pac. 746. Petition to establish trust in public land must allege facts which in law should give plaintiff the patent over the patentee—must aver cultivation and residence entitling a patent on final proof. Baldwin v. Keith [Okl.] 75 Pac. 1124.

33. Must be clear and convincing. Hogue v. Steel, 207 Ill. 340, 69 N. E. 931; McClenahan v. Stevenson, 118 Iowa, 106, 91 N. W. 925. Must be clear, satisfactory and convincing. Land purchased by husband with wife's funds. Emfinger v. Emfinger, 137 Ala. 337. Must be clear, strong, unequivocal, and leave no room for doubt. Evidence held insufficient where husband took land in name of wife. Viers v. Viers, 175 Mo. 444, 75 S. W. 395. Must be clear, positive, and unequivocal. Evidence held not sufficient to show furnishing of consideration by lodger. Brinkman v. Sunken, 174 Mo. 709, 74 S. W. 963.

34. Burden held on plaintiff to show that husband purchased with wife's money. Emfinger v. Emfinger, 137 Ala. 337.

35. McClenahan v. Stevenson, 118 Iowa, 106, 91 N. W. 925.

36. Resulting trust. Evidence held insufficient, purchase in name of mother with funds of son. Malley v. Malley, 121 Iowa, 237, 96 N. W. 751.

37. Elder v. Webber [Neb.] 92 N. W. 126. To show furnishing of money in purchase of mining claim. Sing You v. Wong Free Lee [S. D.] 92 N. W. 1073. Held insufficient to raise a resulting trust under Burns' Rev. St. 1901, §§ 3396, 3398; Horner's Rev. St. 1901, §§ 2974, 2976, in a case where co-tenants conveyed to a co-tenant who mortgaged and conveyed. Brown v. White [Ind. App.] 67 N. E. 273. Held not to show that consideration was paid by a church mission causing trust to result to it. Marie M. E. Church v. Trinity M. E. Church, 205 Ill. 601, 69 N. E. 73. Held to show consideration furnished by complainant. Skahen v. Irving, 206 Ill. 597, 69 N. E. 510. Held to establish trust in action by creditor. Kilham v. Western Bank & S. D. Co., 30 Colo. 365, 70 Pac. 409.

Husband: Sufficient to show use of plaintiff's money in purchase in name of wife without plaintiff's knowledge. Flanner v. Butler, 131 N. C. 155.

Wife: Evidence held insufficient as against creditors to show that title was taken in

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§ 5. *The beneficiary. His estate, rights and interest.*—The estate of the beneficiary has been likened to an equitable lien.[38] It is not sufficient to permit him to lease, though he is in permissive possession.[39] The interest of the beneficiary of a resulting trust descends to his heirs[40] like other realty.[41]

The Statute of Uses, which is a part of the law of almost all the states, operates to convey the legal as well as the equitable title to the beneficiary of a passive trust.[42]

Rights between beneficiaries.—Beneficiaries must contribute to co-beneficiaries to make good losses from breaches induced by them or in which they profit.[43] Where one who has a common interest in a trust fund takes proceedings to protect or preserve it, he is entitled to reimbursement out of the fund itself or by contribution from those who accept the benefit of it;[44] otherwise if in the proceedings, he stands adverse to the fund.[45] Other beneficiaries are not liable for acts giving a portion of the beneficiaries an action of trespass against the trustee.[46]

Income and principal.[47]—The beneficiary of income is entitled to a stock dividend based on accumulated profits[48] or the proceeds of its sale,[49] and to an extra cash dividend;[50] but subscription rights to an increased stock issue are corpus,[51] or funds realized from sale of such rights,[52] and it is also held by perhaps better authority that where a corporation converts earnings into capital stock, dividends are corpus.[53] Proceeds of sale of stock above inventoried value is principal,[54] and premiums paid on investments are charged as principal.[55]

Profits from a purchase and sale to protect the corpus are not income, but income should not be charged with interest on a loan secured to effectuate the transaction.[56]

Charges on income.—A legacy payable in the future must be met by deduc-

husband's name under fraud or mistake [Ky. St. 1903, § 2353]. Planters' Bank & Trust Co. v. Major [Ky.] 79 S. W. 264. To show use of wife's funds in purchase in name of husband. Emfinger v. Emfinger, 137 Ala. 337.

Parent: Insufficient to establish a resulting trust on the ground that daughter had without mother's consent taken title in her own name. Smith's Guardian v. Holtheide, 25 Ky. L. R. 125, 74 S. W. 718.

Child: Evidence held to show use of daughter's money in purchase by father. Owensby v. Chewning, 171 Mo. 226, 71 S. W. 122. Evidence held insufficient to establish resulting trust on the theory of promise of father to invest for children. Withnell v. Withnell [Neb.] 96 N. W. 221. Evidence held to show resulting trust in land purchased by father with funds coming to his children as heirs. Hicks v. Pogue [Tex. Civ. App.] 76 S. W. 786.

Heirs: Facts held to establish resulting trust in land purchased by son with funds of father's estate. McMurray v. McMurray [Mo.] 79 S. W. 701.

Ward: As against wife, husband's declarations after purchase in her name that he had used guardianship funds therein is not sufficient to show resulting trust to ward. Garrett v. Garrett, 171 Mo. 155, 71 S. W. 153.

38. Shares cannot be determined until final auditing and distribution by orphan's court. In re Hart's Estate, 203 Pa. 503.

39. Trust for his life. Eckridge v. Louisville Trust Co., 29 Tex. Civ. App. 571, 69 S. W. 987.

40. A husband bought land with his wife's money. Her heirs may recover the estate from his second wife. Shackleford v. Elliott [Ill.] 70 N. E. 745.

41. See generally, Descent and Distribution, 1 Curr. Law, p. 922.

42. See Uses.

43. Newton v. Rebenack, 90 Mo. App. 650.

44. Somerset R. v. Pierce [Me.] 57 Atl. 888.

45. Where, on a bill to compel an accounting, the services of the complainant's solicitor are adverse to the trust fund, he is not entitled to an allowance therefor out of the fund. Sprague v. Moore [Mich.] 99 N. W. 377. Where one brings adversary proceedings to take possession of the property from those entitled to it, in order to distribute it to those who claim adversely, and fails in his purpose, he is not entitled to reimbursement out of the trust fund or to contribution. Somerset R. v. Pierce [Me.] 57 Atl. 888.

46. Wilson v. Wilson [R. I.] 56 Atl. 773.

47. See generally Life Estates, Reversions and Remainders, 2 Curr. Law, p. 741.

48. Lowry v. Farmers' L. & T. Co., 172 N. Y. 137, 64 N. E. 796.

49. In re Roberts' Will, 40 Misc. [N. Y.] 512.

50, 51. De Koven v. Alsop, 205 Ill. 309, 68 N. E. 930.

52. In re Roberts, 40 Misc. [N. Y.] 512.

53. De Koven v. Alsop, 205 Ill. 309, 68 N. E. 930.

54. In re Roberts, 40 Misc. [N. Y.] 512.

55. In re Penn-Gaskell's Estate [Pa.] 57 Atl. 715.

56. In re Neel's Estate, 207 Pa. 446.

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tion annually from the income of such sum as with interest will produce the amount.[57] As against a debtor beneficiary, a testamentary trustee, also executor, cannot apply income to a debt to the estate.[58]

A beneficiary of income less taxes is not to be charged in favor of the remainderman with taxes which were paid by the trustees on foreclosure of a mortgage which they had taken as an investment and which were a lien on the land when they bought it on foreclosure.[59] Inheritance taxes charged on the income must be paid before any payment to the beneficiary,[60] and those which fall on principal and income must be so apportioned and the income not all paid out leaving the principal to bear the whole burden.[61] The trustee cannot cease payment of income on accrual of taxes where they can be met in the ordinary course of administration.[62] Where a trust estate was established and the beneficiary was also given use of a dwelling, taxes, repairs, etc., are to be paid from income and not principal of the residuary estate.[63]

A loss should be apportioned in the proportion the corpus bears the unpaid interest due the life tenant.[64] The trustees cannot withhold income to make good losses for which they and their sureties are liable.[65] Money borrowed to protect stock under agreement that dividends shall be applied to the loan must be reimbursed to income.[66]

Where beneficiaries are to take the corpus on reaching majority, the first takers' shares are to be charged with a proportion of the expenses of continuing the trust, the provision being for equal shares.[67]

Claims enforceable against trust funds or estate.[68]—Dower and homestead in favor of a husband cannot be allowed from land held by the wife in trust for children by a former marriage.[69] Legacies placed in trust by the executor for the legatees may be reached by a judgment creditor of decedent who has not been paid.[70] Though a mortgage is excepted from the covenants of a trust deed, such does not indicate an intention that it should not be made a charge on other land under a general charge for payment of debts.[71] When a trust for the benefit of the settlor has been judicially declared valid in a direct attack, a creditor junior to the deed cannot reach the corpus.[72]

Where the trust estate is sold to satisfy a prior encumbrance, any surplus goes to the beneficiary, and any income of the entire estate up to time of sale which has not been applied to incumbrances as directed by testator.[73] A deposit of trust fund cannot be appropriated to the trustee's individual debt.[74]

57. U. S. Trust Co. v. Soher, 88 App. Div. [N. Y.] 506.

58. In re Bogert's Estate, 41 Misc. [N. Y.] 598.

59. Trenton T. & S. D. Co. v. Donnelly [N. J. Ch.] 55 Atl. 92.

60. In re Tracy, 87 App. Div. [N. Y.] 215.

61. In Pennsylvania, where an estate in trust for a life tenant and remainderman is sold and the trustee pays the inheritance tax but does not reimburse himself out of the income, he cannot on filing his accounts be reimbursed out of the principal. This would throw the entire burden on the remainderman. In re Penn-Gaskell's Estate [Pa.] 57 Atl. 714.

62. Where the income is sufficient to meet taxes and purposes of the trust. In re Chesterman's Estate, 75 App. Div. [N. Y.] 573.

63. In re Tracy, 87 App. Div. [N. Y.] 215.

64. Trenton T. & S. D. Co. v. Donnelly [N. J. Eq.] 55 Atl. 92.

65. In re Chesterman's Estate, 75 App. Div. [N. Y.] 573.

66. In re Hart's Estate, 203 Pa. 496.

67. Thome v. Allen, 24 Ky. L. 987, 70 S. W. 410; Id., 24 Ky. L. R. 1286, 71 S. W. 431.

68. An attachment will create no lien on the trust estate where based on a debt which the trustees had no power to make a charge. Hussey v. Arnold [Mass.] 70 N. E. 87.

69. See articles Dower, 1 Curr. Law, p. 956; Homestead, 2 Curr. Law, p. 210. Rivers v. Morris, 25 Ky. L. R. 1416, 78 S. W. 196.

70. Code Civ. Proc. § 2719. City of New York v. U. S. Trust Co., 78 App. Div. [N. Y.] 366.

71. Guild v. Walter, 182 Mass. 225, 65 N. E. 68.

72. In the absence of fraud. Fidelity Trust Co. v. N. Y. Finance Co. [C. C. A.] 125 Fed. 275.

73. Simmons v. Morgan [R. I.] 55 Atl. 522.

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Rights of creditors and assignees of beneficiary.—A beneficiary of income may assign or alienate his rights thereto,[75] unless under a spendthrift trust,[76] in which case the creditors of the beneficiary cannot reach his equitable interest,[77] and even advancements by the trustees cannot be recouped before a reasonable allowance for support is made;[78] but after income is paid over to him, it may be liable.[79]

Where the trustees are directed to pay a mortgage on the life estate from the residuary estate to the income of which the beneficiary is also entitled, his creditors may reach the proceeds of sale of the residuary estate to the extent they should have been applied to the protection of the life estate, if the trustees at the request of the beneficiary allow that property to be sold at foreclosure.[80]

Representation of beneficiary by trustee.—Persons for whose benefit property is conveyed are not liable for purchase money on the trustee's promise.[81] A husband, trustee for his wife, cannot bind her by a statement that stocks standing in her name and presumptively belonging to her were held in place of trust funds disposed of by him, unless she is shown to have acquiesced in such statements.[82]

A beneficiary after obtaining title cannot sue in his own name for rent during the years when the status of the property was in litigation between the trustee and beneficiary on a lease executed by the trustee.[83]

§ 6. *The trustee. Appointment, qualification, resignation and removal. Who may be trustee.*—Trustees under a will may also be beneficiaries,[84] but the trustee must not be the sole beneficiary.[85]

Appointment by court.—Judicial appointment will not be made in the absence of wrongdoing or neglect of trustees appointed by the donor.[86] It will be made on death of trustee where the trust is permanent,[87] or in case of incompetency.[88] A successor to a deceased trustee may be appointed on petition of any party interested in the property.[89] In New York, until recently, the supreme court would execute the trust without appointing a trustee in case of death.[90]

74. State Bank of St. Johns v. McCabe [Mich.] 98 N. W. 20.

75. Income of personalty. McCrea v. Yule, 68 N. J. Law, 465.

76. Moore v. Sinnott, 117 Ga. 1010. A trust created by a debtor and under which he is a beneficiary is not within the intent of statutes prohibiting alienation by beneficiary of rents and profits of lands. Laws 1896, c. 547, p. 572, § 83 does not prevent a mortgage on the equitable estate which may be enforced against the rents. Raymond v. Harris, 84 App. Div. [N. Y.] 546.

77. A provision that the beneficiary shall have no power to charge, encumber or anticipate income indicates an intention that the equitable interest shall not be liable for his debts. Jackson Square L. & S. Ass'n v. Bartlett, 95 Md. 661. Trust funds cannot be reached by creditors of the trustee by granishment of one to whom he has loaned, though the interest goes to the trustee for life. Bank of Odessa v. Barnett, 98 Mo. App. 477, 72 S. W. 727. Creditors held not entitled to reach excess over $100 per month [Code Civ. Proc. § 859]. Magner v. Crooks, 139 Cal. 640, 73 Pac. 585.

78. A judgment authorizing trustee of a spendthrift trust to apply one-half the net income to an advancement made by them does not authorize application of such sum before a sufficient amount has been appropriated to the beneficiary's support. Anderson v. Kemper, 25 Ky. L. R. 538, 76 S. W. 122.

79. Under a will devising land in trust to create a competence for the beneficiary and providing that no part of the rents and profits shall be liable for any debts contracted by her, such freedom from liability exists only before such income is paid to her. Orr v. Yates [Ill.] 70 N. E. 731.

80. Marshall v. U. S. Trust Co., 42 Misc. [N. Y.] 306.

81. Arnold v. Randall [Wis.] 98 N. W. 239.

82. Putnam v. Lincoln Safe Deposit Co., 87 App. Div. [N. Y.] 13.

83. Murphy v. Hopcroft, 142 Cal. 43, 75 Pac. 567.

84. Nichols v. Nichols, 42 Misc. [N. Y.] 381.

85. In re Hitchins, 39 Misc. [N. Y.] 767.

86. Held, that trustees would not be substituted by the court, for trustees appointed by an unincorporated association, in a proceeding to compel a settlement of its affairs, such trustees holding land of the association under a duty to sell for fees less than the commissions of court trustees. Clerks' Inv. Co. v. Sydnor, 19 App. D. C. 89.

87. In re Gay's Estate, 138 Cal. 552, 71 Pac. 707.

88. Where there is nothing to show that knowledge of incompetency would have altered the intention of the donor. Willis v. Alvey, 30 Tex. Civ. App. 96, 69 S. W. 1035.

89. Code, art. 16, § 79. Kennard v. Bernard [Md.] 56 Atl. 793.

90. A trust to pay income and principal

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A provision that vacancies may be filled by a designated court, "subject to the approval of the persons interested in the estate," prevents arbitrary appointment of even a qualified person. Such a provision applies to all vacancies,[91] and only the very persons whose approval is indicated may give it.[92]

The court does not lose jurisdiction to appoint a trustee to whom the executor shall pay funds in his hands at final accounting by the fact that after consent to the appointment the executor appealed from his allowance, and some time intervened before the order of appointment was entered.[93]

Resignation.—Persons who are both testamentary guardians and trustees cannot resign in one capacity and not the other.[94] An order appointing a trustee on resignation of a testamentary trustee vests the new trustee with the legal title.[95]

Trustees are charged with expenses of a voluntary motion to resign.[96]

Removal is warranted by circumstances or conduct jeopardizing the estate,[97] but not by mere irregularity in appointment[98] or causes not affecting proper discharge of the trust,[99] or on account of conduct of a co-trustee not known to or approved by him;[1] but want of harmony between trustees may be a ground.[2] The property will not be committed to a receiver if the trustee has acted with fidelity and good judgment.[3]

Proceedings for removal are presumed to be regular after lapse of a long time.[4] Where plaintiff with knowledge of the relation of would-be purchasers of the corpus fails to make them parties on commencing the action, refusal of his subsequent motion to make them defendants is discretionary.[5] The application may be in chambers.[6] It is not usual to refer a motion for removal to a master.[7] See the footnotes for authority as to evidence, issues, etc.[8]

at discretion may be exercised by the supreme court on death of the trustee, through its appointee or a substituted trustee. Button v. Hemmens, 86 N. Y. Supp. 829. On the death of testamentary trustees, the supreme court must appoint some one to carry out the trust in its behalf, but may appoint a new trustee only where there has been a resignation or removal. Real Property Law [Laws 1896, p. 574, c. 547]. Jewett v. Schmidt, 83 App. Div. [N. Y.] 276. But since Laws 1903, amending Code Civ. Proc. § 2618, the surrogate may appoint a successor to a deceased testamentary trustee. In re Chase's Estate, 40 Misc. [N. Y.] 616.

91. Cole v. Watertown, 119 Wis. 133, 96 N. W. 538.

92. A deed of trust provided that in case of the refusal or neglect of the trustee to act, the beneficiary or any holder of the notes secured "or their legal representatives" might appoint another trustee. Held, the attorney in fact of the beneficiary had no right to appoint a substituted trustee and a sale by a trustee appointed by him was void. Allen v. Alliance Trust Co. [Miss.] 36 So. 285.

93. Wallber v. Wilmanns, 116 Wis. 246, 93 N. W. 47.

94. In re Abbot, 39 Misc. [N. Y.] 760.

95. Rev. St. 1898, § 4027. Holmes v. Walter, 118 Wis. 409, 95 N. W. 380.

96. In re Abbot, 39 Misc. [N. Y.] 760.

97. Hostility to beneficiary, failure to keep books, mingling of funds and loans on security in trustee's name, held ground for removal. Gaston v. Hayden, 98 Mo. App. 683, 73 S. W. 938.

98. The fact that a trustee is also guardian for a minor beneficiary, while an irregularity is not cause for removal after their majority. In re Wallace's Estate, 206 Pa. 105.

99. Strained relations largely due to the conduct of the beneficiary are not ground for removal where the trust has been carefully and ably administered. Anderson v. Kemper, 25 Ky. L. R. 538, 76 S. W. 122.

1. Hence a report by one is not admissible against the other. Belding v. Archer, 131 N. C. 287.

2. A trustee may be removed where he has notified tenants not to pay rents to his co-trustee. In re Meyers' Estate, 205 Pa. 413.

3. Thome v. Allen, 24 Ky. L. R. 987, 70 S. W. 410; Id., 24 Ky. L. R. 1286, 71 S. W. 431.

4. After 30 years, a proper continuance will be presumed, though record shows order after rule nisi was returnable. Heath v. Miller, 117 Ga. 854.

5. Belding v. Archer, 131 N. C. 287.

6. Application for appointment and removal may, under Civ. Code, § 3164, be made to the judges of the superior court at chambers without regard to situs of property or residence, the proceedings being returnable to the clerk of the proper county. Heath v. Miller, 117 Ga. 854.

7. Evans v. Weatherhead, 24 R. I. 394.

8. Trustee may show efforts to sell property, good faith, etc., by evidence of interviews with third persons. Belding v. Archer, 131 N. C. 287. On good faith in sale may show conversations with chemist on analysis of samples of mineral earth. Id. Nonexpert held qualified to give opinion as to practicability of manufacturing timber. Id. Expert may testify as to how he spent his time in examining the property. Id. Records of

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Bonds.—By the statutes of some states, the amount of bond is discretionary with the court.[9] Sureties are in New York protected against unauthorized withdrawals by a statute requiring their consent to withdrawals and notice before an order of court may be made allowing payments from the funds.[10]

The enforcement of sureties' liabilities is largely governed by the statutes, and peculiar procedure of various jurisdictions.[11] They may be discharged by alteration of the bond.[12] They have the burden of accounting for funds, the receipt of which the trustee has acknowledged.[13] It is immaterial as to them whence the trust funds came,[14] or when or in what manner they were delivered.[15] They cannot assert that the estate was never legally distributed under the will, where the parties mutually interested have agreed to the distribution.[16] They cannot hold the beneficiary as owner of stock in which the trustee was permitted to invest and be regarded as borrowing the amount so invested.[17]

Substitutions.—A designation of an officer as substitute when annexed to words of time nominates only that person who is incumbent when the time arrives.[18] A testamentary trustee succeeding an executor who has fully administered does not succeed as executor.[19] A person whose interest if any is junior to a trust cannot question a substitution.[20]

§ 7. *Execution and administration of trust. A. Nature of trustee's title and establishment of estate.*—The trustee takes only such estate as demanded by the purposes of the trust.[21] Legal title as between the parties passes without de-

suits may be introduced, though plaintiff was not a party, to show that matters which plaintiff alleged were still open and unsettled by a previous contract had been settled and were the matters referred to in the agreement on which action was based. Id. Reasons of plaintiff for entry into trust agreement are inadmissible. Id. A report by one trustee not admissible against the other. Id. Where trustees were among other duties to pay debts to one trustee in an action to remove such trustee, it may be shown that plaintiff had offered through the cotrustee to raise his portion of the debt due the trustee. Id. Issues particularizing breaches of trust may be refused where covered by those submitted. Id.

9. Under Rev. St. 1899, §§ 4582-4587 need not be for full value of estate. Yore v. Crow, 90 Mo. App. 562.

10. Where a surety company and trustees have agreed that funds shall not be drawn without joint check, the court may make an order in favor of the beneficiary on notice to the surety under Code Civ. Proc. § 813. In re Chesterman's Estate, 75 App. Div. [N. Y.] 573. The surrogate may make the order [Code Civ. Proc. § 3347, subd. 6]. Id.

11. Sureties on the bond of a testamentary trustee need not be made parties to a compulsory accounting on revocation of his letters under Code Civ. Proc. § 2605, and an order of removal takes the place of an express revocation of the letters. In re Brinckerhoff's Will, 82 N. Y. Supp. 731. The respective rights of the executor and trustee and their sureties cannot be adjudicated on a settlement of the executor's accounts. Brigham v. Morgan [Mass.] 69 N. E. 418.

12. Evidence held insufficient to show that a provision for additional security was inserted after signature of trustee's sureties. Pogue v. Ross, 25 Ky. L. R. 187, 74 S. W. 1101.

13. The burden is on the sureties to show that fund is in existence after cessation of payments of income and death of trustee insolvent. Thompson v. Rush [Neb.] 92 N. W. 1060. Statement acknowledging receipt of fund in bond is prima facie evidence against sureties. Id.

14. Pogue v. Ross, 25 Ky. L. R. 187, 74 S. W. 1101.

15. Sureties of a trustee cannot object that instead of cash as mentioned in the deed securities were turned to the trustee from which he realized cash, time not being of the essence of the payment of the money, especially where the trustee did not deliver the instrument until he had the money. Pogue v. Ross, 25 Ky. L. R. 187, 74 S. W. 1101.

16. Thompson v. Rush [Neb.] 92 N. W. 1060.

17. Pogue v. Ross, 25 Ky. L. R. 187, 74 S. W. 1101.

18. A deed of trust stipulated that in case of absence from the county of the trustee, another person should become his successor, and in the absence of both "the then sheriff" should become successor. All three of these parties moved away and on default of payment of the interest the person who was sheriff at the time of the default sold the property. Held, he was without authority to do so. McNutt v. Mut. Ben. L. Ins. Co. [Mo.] 79 S. W. 703.

19. Cox v. Shelby County Trust Co. [Ky.] 80 S. W. 789.

20. Where defendant's claim to title in an action to quiet title was based solely on an execution against a husband who had conveyed to a trustee for his wife before judgment, he could not question the regularity of a substitution of another trustee by the court for the one named in the conveyance, who, together with the beneficiary, had conveyed the premises to plaintiffs. Ball v. Woolfolk, 175 Mo. 278, 75 S. W. 410.

21. Grant to trustee, "his heirs and as-

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livery of the property, where the trust is completely declared.[22] Trustees take the entire personalty if the bequest is of the whole, though more than sufficient to support an annuity established.[23] Where under a will the trustee takes a fraction of the entire realty individually and a fraction in trust, his title in each several parcel is so divided.[24]

Receipt and establishment of estate.—A decree, on settlement of an executor's accounts, that he holds a fund in trust establishes the trust.[25] Though receipt of trust funds is acknowledged in writing by co-executors, subsequent declarations by one of receipt individually may prevent his administrator from denying it.[26] If there has been a prior trust the prior trustee must have turned over the property.[27]

Possession by either trustee or beneficiary is not presumed to be hostile to the other.[28] A co-trustee cannot recover entire individual possession.[29]

(§ 7) *B. Discretion and general powers of trustees and judicial control.*—In addition to the express powers,[30] powers necessary to the exercise of those granted will be implied.[31] A testamentary trustee taking after full administration and discharge of an executor has only a trustee's powers, despite an appointment also as administrator de bonis non.[32] One of joint trustees cannot exercise powers entrusted to joint discretion.[33] Trustees are not bound by the individual acts of a co-trustee.[34] A ratification of his unauthorized act must be with full knowledge of all facts.[35]

Statutes allowing a surviving or continuing trustee to act unless appointment of a successor is necessary are not retroactive.[36] A successor may exercise powers not personal to the original trustee.[37]

Powers may be in some cases delegated to the beneficiary,[38] or to an agent.[39]

Judicial instructions.—The trustee may act without order or decree where such

signs forever," conveys only life estate where for benefit of married woman. Temple v. Ferguson, 110 Tenn. 84, 72 S. W. 455. A trustee cannot have an unconditional money judgment for a bequest where it is plain from the will that it is to be held under an agreement to use income and principal as necessary for maintenance of a burial lot. Kauffman v. Gries, 141 Cal. 295, 74 Pac. 846.

22. Kelley v. Snow [Mass.] 70 N. E. 89.

23. In re Pichoir's Estate, 139 Cal. 694, 70 Pac. 214, 73 Pac. 604.

24. Wales v. Sammis, 120 Iowa, 293, 94 N. W. 840.

25. In re Chase's Estate, 40 Misc. [N. Y.] 616.

26. Elizalde v. Elizalde, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861.

27. Evidence held to show that note was turned over by executors to holder as trustee for legatee. Bottom v. Barton [Colo. App.] 75 Pac. 153.

28. A trustee to distribute income cannot acquire title by adverse possession. Dresser v. Travis, 39 Misc. [N. Y.] 358. Possession by beneficiary is not hostile to trustee. McClenahan v. Stevenson, 118 Iowa, 106, 91 N. W. 925.

29. Claim and delivery. Goldschmidt v. Maier, 140 Cal. xvii, 73 Pac. 984.

30. See Wills, where are collected interpretations of words of express power.

31. A power to settle and dissolve a partnership will be implied from an authority to continue it. Jones v. Proctor, 24 Ohio Circ. R. 80. Where a trustee for creditors is not authorized to make new promise, his payment will not toll limitations. Robinson v. McDowell, 133 N. C. 182.

32. Cox v. Shelby County Trust Co. [Ky.] 80 S. W. 789.

33. On renunciation by one, the remaining trustee cannot exercise a power to terminate. In re Wilkin, 90 App. Div. [N. Y.] 324. One trustee cannot singly execute a lease with covenant to renew. Winslow v. Baltimore & O. R. Co., 188 U. S. 646.

34. Letters and communications by trustee individually are not admissible against co-trustee. Belding v. Archer, 131 N. C. 287.

35. Winslow v. Baltimore & O. R. Co., 188 U. S. 646.

36. Code Civ. Proc. § 2818 does not validate a previous unauthorized act by a single trustee. In re Wilkin, 90 App. Div. [N. Y.] 324.

37. Cox v. Shelby County Trust Co. [Ky.] 80 S. W. 789.

38. Trustee with power to mortgage may allow beneficiary to receive the proceeds and erect building on the estate. Boon v. Hall, 76 App. Div. [N. Y.] 520.

See, also, ante, § 1, as to the validity of trust where the trustee may deliver possession to the beneficiary.

39. Trustees to sell land or manufacture timber thereon to pay debts need not go on the land personally if they use sound discretion in the selection of an agent. Belding v. Archer, 131 N. C. 287. Power to invest and manage given to son held not personal. Kennard v. Bernard [Md.] 56 Atl. 793.

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order or decree would be granted on a proper showing.[40] Where he is uncertain as to a proper action he may have the direction of equity.[41] The application when not in a pending suit should be by bill.[42] Directions as to disposition of surplus income cannot be given in a proceeding to which those entitled are not parties.[43]

The courts in some states decline to give advice concerning administration of realty outside the state.[44] Equity has jurisdiction to enjoin a trustee from the misapplication of trust funds.[45]

Payments to beneficiary.—As to trust funds applied to the individual indebtedness of the beneficiary's guardian, the trustees are not entitled to credit.[46] A father-in-law, trustee for the wife, cannot charge her funds with gifts to the son without direction.[47] Trustees for support cannot give the beneficiary the immediate benefit of the fund or pay it to him except when his necessities and comfort, as indicated in the will, require it.[48]

Where the trust is for life of parents, the trustee is not bound to notify beneficiaries of their rights as they attain their majority.[49]

Encroachments on principal[50] for the necessity of the life tenant are not allowed where there is a remainder limited.[51] They cannot be authorized on the ex parte application of the trustee.[52] The court has no arbitrary discretion to apply principal to support, but there must be a showing of the necessities and circumstances of the beneficiary.[53] An allowance may be made from a directed accumulation for support or education of a minor beneficiary when so provided by statute.[54] A substituted trustee is not given authority to encroach on the principal by an order of appointment directing him to make loans and pay interest and rents to the life beneficiaries.[55]

(§ 7) *C. Personal liability of trustee to estate and third persons.*[56]—Trustees contracting without reference to any limitation of liability resulting from an ordinary contract are personally liable.[57] Personal liability exists for injuries from failure to keep the estate in repair as required,[58] and though, there being no charge to repair, the trustees are not liable as such.[59] Where a conveyance though unauthorized is not fraudulent the trustee is not liable in the first instance as for a conversion.[60]

40. In order to avoid costs, may settle a claim before it is judicially established. Stitzer v. Whittaker [Neb.] 91 N. W. 713.

41. Must show first possession of funds to be disposed of and conflicting claims or a likelihood thereof which he has no other means of determining. Stapylton v. Neeley [Fla.] 32 So. 868. Trustee for coupon holders, where money for payment is attached as property for nonresident defendant, is entitled, where he represents beneficiaries, residents of different states, and brings before the court the only claimants hostile to the trust. Holland Trust Co. v. Sutherland, 177 N. Y. 327, 69 N. E. 647. May have directions as to the title of claimants of the property. Read v. Citizens' St. R. Co., 110 Tenn. 316, 75 S. W. 1056.

42. Stapylton v. Neeley [Fla.] 32 So. 868.

43. U. S. Trust Co. v. Soher, 88 App. Div. [N. Y.] 506.

44. Refused as to Massachusetts realty. Thayer v. Fairchild [R. I.] 56 Atl. 773.

45. Paying proceeds of fraternal benefit policies to creditors. Such proceeds not being liable for debts. Coleman v. McGrew [Neb.] 99 N. W. 663.

46. Facts held to show such application. Hunting v. Safford, 183 Mass. 157, 66 N. E. 642.

47. Evidence held to show gifts and not advancements and to overcome presumption of assent. Owsley v. Owsley, 25 Ky. L. R. 1194, 77 S. W. 394.

48. Demeritt v. Young [N. H.] 55 Atl. 1047.

49. Mulford v. Mulford [N. J. Eq.] 53 Atl. 79.

50. See Life Estates, etc., 2 Curr. Law, p. 741.

51. Newton v. Rebenack, 90 Mo. App. 650.

52. Isler v. Brock [N. C.] 46 S. E. 951.

53. Button v. Hemmens, 86 N. Y. Supp. 829.

54. Laws 1897, c. 417, §§ 4, 5, applies to a will probated after its taking effect, in favor of a minor grandchild. In re Wagner, 81 App. Div. [N. Y.] 163.

55. Isler v. Brock [N. C.] 46 S. E. 951.

56. See post, § 9, for accounting.

57. Hussey v. Arnold [Mass.] 70 N. E. 87.

58. Gillick v. Jackson, 40 Misc. [N. Y.] 627.

59. Moniot v. Jackson, 40 Misc. [N. Y.] 197.

60. Where the trustee disposes of property not belonging to the estate under an erroneous order of court, he is not liable to the true owner as for conversion, unless it appears there is no remedy by recovery of

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The lien of the beneficiary on the trustee's realty for wasted funds is not superior to a prior acquired lien of a creditor of the trustee.[61]

The administrator of a trustee is not chargeable with interest on trust funds.[62] Claims for interest due at time of death of trustee must be presented by beneficiary of a specific fund against the trustee's estate.[63]

(§ 7) *D. Personal dealings with estate.*—The trustee is not permitted to derive individual profit from the estate,[64] or act in hostility to his trust,[65] and profits so gained go to the beneficiary,[66] so a trustee who, in his own name, makes a purchase while in the performance of his duties as trustee, holds for the beneficiary,[67] and the disability to purchase continues as long as the legal title rests in the trustee,[68] though such purchases will not be set aside as a matter of course at the instance of the trustee.[69] Hence a purchase from the beneficiary is voidable as to the beneficiary,[70] but the trustee need not account for the difference between the face of the beneficiary's orders to a third person and the amount for which he settles.[71]

A check on trust funds in favor of the trustee's wife is presumed to be in discharge of an obligation of the estate.[72]

A trustee seeking to foreclose prior mortgages is bound by the decree as to junior mortgages held by him individually.[73]

Inducement or ratification of unauthorized acts may prevent the beneficiary from asserting a breach of trust,[74] but the trustee must show good faith.[75] A beneficiary does not abandon stock to trustee by failing to pay assessments.[76]

(§ 7) *E. Management of estate and investments.*—With regard to investments trustees must exercise good faith and sound discretion,[77] though there is an

the property. Canfield v. Canfield [C. C. A.] 118 Fed. 1.

61. Wales v. Sammis, 120 Iowa, 293, 94 N. W. 840.

62. Civ. Code, § 2250. Elizalde v. Elizalde, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861.

63. Elizalde v. Elizalde, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861.

64. A cancellation of a mortgage, forming a trust estate, and a lien on property of the trustee's wife, to secure further credit for the wife, is illegal. Carter v. Carter, 63 N. J. Eq. 726. Cannot sell his own property to the trust. In re Long Island L. & T. Co., 92 App. Div. [N. Y.] 1.

65. One to whom mortgages are assigned in trust, for the protection of a subsequent transferee of the mortgagor, on warranties made by him on the transfer of parcels and to preserve funds realized from the sale to the satisfaction of liens, cannot foreclose as against the grantees, nor can an assignee of the trustee. The beneficiary on becoming administrator for the creator of the trust does not waive this right, by an assignment to the trustee of "any interest the deceased may have" in the mortgages. Assignment construed to create such a trust. Richtmyer v. Lasher, 77 App. Div. [N. Y.] 574. A trustee who buys property so connected with a trust property that it must be used therewith, and its independent ownership would seriously affect the use and value of the trust property, cannot retain the same for his own benefit. Railroad terminals. Seacoast R. Co. v. Wood [N. J. Eq.] 56 Atl. 337.

66. Jeffray v. Towar [N. J. Eq.] 54 Atl. 817.

67. Seacoast R. Co. v. Wood [N. J. Eq.] 56 Atl. 337. A trustee who is also a mortgagee cannot by purchase in his own interest at the foreclosure free the property from the trust so as to hold the sum realized on a later sale. Felkner v. Dooly [Utah] 75 Pac. 854.

68. Accounting required where 2 months after sale of stock the trustee before transfer bought and took a transfer directly to himself. Wing v. Hartupee [C. C. A.] 122 Fed. 897.

69. Benson v. Benson, 97 Mo. App. 460, 71 S. W. 360.

70. Butman v. Whipple [R. I.] 57 Atl. 379.

71. Not being a dealing with estate. Bush v. Webster, 24 Ky. L. R. 1884, 72 S. W. 364.

72. Griffin v. Train, 90 App. Div. [N. Y.] 16. A successor in trust may rebut the presumption that a check to the wife of a deceased trustee was in payment of a debt. Evidence held not to show a loan to the wife. Griffen v. Train, 40 Misc. [N. Y.] 290. Memoranda in writing of deceased trustee purporting to contain a list of debts of estate are admissible. Id.

73. Walsh v. Robinson [Mich.] 97 N. W. 55.

74. Newton v. Rebenack, 90 Mo. App. 650.

75. The beneficiary must fully understand his rights. Newton v. Rebenack, 90 Mo. App. 650. A release by the beneficiary to the trustee must be affirmatively shown to be fair and just. Moore v. Moore [C. C. A.] 121 Fed. 737.

76. Though worth very little with assessment unpaid. Loetcher v. Dillon, 119 Iowa, 202, 93 N. W. 98.

77. Thayer v. Dewey [Mass.] 69 N. E. 1074. A trustee for investment is liable for a loan not such as an ordinarily prudent man act-

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intention to give the trustees as full control as the settlor had had,[78] or though they are empowered to deal with the property in any way they may see fit.[79] When a sale of trust realty results merely in equitable conversion, leaving life estates stand, a re-investment is necessary.[80]

A trust company is not negligent in failing to take precautions imposed by the laws of a foreign state to protect corporate stock from the claims of creditors.[81] Though property made over to trustees is not of the kind in which trust funds are ordinarily invested, it need not be altered unless required by reasonable prudence,[82] but a testamentary trustee may become liable for improper investments by the executor by receiving the securities at the value of the fund invested and reporting them so.[83]

Investments need not be within the state in all cases.[84] As a usual rule the stock of private corporations is not a proper investment.[85]

Preservation of assets and reduction to possession.—Trustees are liable for failure to take charge of trust property unless worthless or so damaged that in their honest and best judgment it is not for the best interest of the trust,[86] they should use the care of an ordinarily careful and prudent man in his own business under the same circumstances, in keeping off squatters and trespassers.[87] Whether they take possession within a reasonable time is usually a question for the jury.[88] Failure to use best judgment and reasonable skill to raise money from estate imposes liability for sufferance of tax sale.[89]

Where the trustee has no power to prevent the beneficiary from taking possession, he is not accountable to the beneficiary for rents received while the grantor was in possession.[90]

Where a trust fund for the support of children is invested in land the trustees may allow the parents of the beneficiaries to take possession and execute mortgages to the trustees, off-setting the support of the beneficiaries against interest.[91]

Delivery of control to beneficiary.—If the trustee is directed to allow the beneficiary to participate in management, he may deliver trust stocks to the beneficiary with power to pledge to secure a loan to the estate,[92] and a pledge of trust securities by the beneficiary is ratified by the trustee by crediting himself with the stock as delivered to the beneficiary for investment.[93]

ing in his own affairs would make. Loan without security to one whose property was mortgaged in excess of its value. Hitchcock v. Casper [Ind. App.] 69 N. E. 1029. Must exercise common skill, common prudence and common caution. In re Hart's Estate, 203 Pa. 480. Where it is sought to hold a trustee for not carrying out the trust, he may show that persons who had embarked in the enterprise had failed. Belding v. Archer, 131 N. C. 287.

78. Appeal of Davis, 183 Mass. 499, 67 N. E. 604.

79. They must still exercise good faith. Spier v. Hyde, 92 App. Div. [N. Y.] 467.

80. Where a trustee held an estate for the benefit of a life tenant and a remainderman, and the estate was sold under statute (Price act), he was required to reinvest the proceeds and pay the income to the life tenant. The life tenant was not entitled to the proceeds. In re Penn-Gaskell's Estate [Pa.] 57 Atl. 715.

81. N. J. Const. Co. v. Farmers' L. & T. Co., 39 Misc. [N. Y.] 672.

82. Gen. St. 1902. § 225. Beardsley v. Bridgeport Protestant Orphans' Asylum [Conn.] 57 Atl. 165.

83. Both the executor and trustee may be charged. Brigham v. Morgan [Mass.] 69 N. E. 418.

84. There is no arbitrary fixed rule that an investment must not be in fixed property outside the state. Thayer v. Dewey [Mass.] 69 N. E. 1074.

85. Investment of more than a fourth of the funds in bonds and stock of a single railroad held unauthorized. Appeal of Davis, 183 Mass. 499, 67 N. E. 604. Investment of $10,000 in bonds of foreign manufacturing corporation held unauthorized. In re Hart's Estate, 203 Pa. 480.

86. Felled timber on estate. Belding v. Archer, 131 N. C. 287.

87. Belding v. Archer, 131 N. C. 287.

88. Power to sell or manufacture timber to pay debts. Belding v. Archer, 131 N. C. 287.

89. Belding v. Archer, 131 N. C. 287.

90. Passive trust for married woman. Perkins v. Brinkley, 133 N. C. 154.

91. Mulford v. Mulford [N. J. Eq.] 53 Atl. 79.

92. Freeman v. Bristol Sav. Bank [Conn.] 56 Atl. 527. Pledgee in good faith cannot be

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Estoppel of beneficiaries to question acts may result from acceptance of benefits,[94] but ratification of a loan is not shown by acceptance of a note without objection.[95] Beneficiaries of mortgage securities in possession of the mortgaged property cannot assert the statute of limitations against the trustee, on his attempt to foreclose, in order to hold him personally liable.[96]

(§ 7) *F. Creation of charges, mortgage and lease of estate. Power to lease.*—A trustee to manage and apply income to support may lease,[97] and under a trust to sell for creditors, a lease may be made pending sale.[98] A lease cannot be for a longer term than the trust,[99] but an excessive term is valid as long as the trust continues.[1]

Under a lease with a covenant to renew, receipt of rent by a beneficiary does not authorize specific performance on the theory of part performance, where the beneficiary does not know that the lease is invalidated by the statute of frauds and the action is unknown to the trustees who have refused to renew and with whom the lessee is dealing for continued occupancy.[2]

Mortgages.—Statutes regulating sales by trustees do not apply to mortgages under power in the deed.[3]

A power to sell does not confer a power to mortgage.[4] A mortgage may be executed to raise money to pay taxes and liens.[5] Under a power to mortgage to execute trust, unimproved lots may be mortgaged for the erection of a building thereon to make them productive.[6]

Beneficiaries are estopped from objecting to a mortgage by signing a stipulation authorizing an order of court permitting it.[7] A judgment of foreclosure will not be deemed an approval of an unauthorized mortgage, when there is no showing of its necessity or of an application of the funds to the estate.[8]

Unless so provided in the deed, the mortgagee is not required to see to proper application of funds.[9] A purchaser under a decree foreclosing mortgage is entitled to protection if the court has jurisdiction of the parties and subject-matter.[10]

(§ 7) *G. Sale of trust property.*[11]—Trustees have no power of sale unless conferred by the deed or will[12] or necessarily implied therefrom;[13] otherwise, con-

held for conversion without repayment of the loan. Id.

94. Freeman v. Bristol Sav. Bank [Conn.] 56 Atl. 527. In an action against a pledgee for conversion, a defense that the pledge was made by one with authority does not depend on priority of contract between the pledgee and the recipient of the loan. Id.

95. Acceptance of income for 29 years. Dresser v. Travis, 39 Misc. [N. Y.] 358.

96. Hitchcock v. Cosper [Ind. App.] 69 N. E. 1029.

97. Mulford v. Mulford [N. J. Eq.] 53 Atl. 79.

98. If the terms as to continuance and rental are reasonable. Hutcheson v. Bennefield, 115 Ga. 990.

99. Without express power [3 Comp. Laws, § 8839]. Geer v. Traders' Bank [Mich.] 93 N. W. 437.

1. Held that under a direction to pay income to widow for life and at her death to divide and hold portions in trust, a lease could be made only for life of widow. In re City of New York, 81 App. Div. [N. Y.] 27.

2. In re City of New York, 81 App. Div. [N. Y.] 27.

3. Winslow v. Baltimore & O. R. Co., 188 U. S. 646.

4. Ky. St. 1903, § 2356. Walter v. Brugger [Ky.] 78 S. W. 419.

4. Potter v. Hodgman, 81 App. Div. [N. Y.] 233.

5. Walter v. Brugger [Ky.] 78 S. W. 419.

6, 7. Boon v. Hall, 76 App. Div. [N. Y.] 520.

8. Potter v. Hodgman, 81 App. Div. [N. Y.] 233.

9. Ky. St. 1903, § 4846. Walter v. Brugger [Ky.] 78 S. W. 419.

10. Walter v. Brugger [Ky.] 78 S. W. 419.

11. See Foreclosure of Mortgages on Land, 2 Curr. Law, p. 14, for sale under deeds of trust to secure debts.

12. Where trustees have no power to sell, a provision for purchase by tenant is inoperative. Winslow v. Baltimore & O. R. Co., 188 U. S. 646, 47 Law. Ed. 635. Where an executor has turned over to the testamentary trustee, the property mentioned in the will and made final settlement, his office ceases, so that his resignation and the subsequent appointment of the trustee as administrator de bonis non gives the latter no authority not otherwise possessed, to convey any part of the trust property. Cox v. Shelby County Trust Co. [Ky.] 80 S. W. 789.

13. A power of sale is implied from a direction to invest realty in bonds and mortgages. Flanner v. Fellows, 206 Ill. 136, 68 N. E. 1057.

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sent of all beneficiaries is necessary to permit a sale without order of court.[14] The beneficiaries cannot force a sale to themselves.[15]

A sale by one of co-trustees entrusted with a power of sale is not a conversion.[16]

Provisions for sale may be so read as to make a power conditional or discretionary,[17] or imperative,[18] or for cash only,[19] or one to sell at private sale without order of court,[20] or, under conditions stated, to authorize private sale by one trustee like all were jointly authorized to make,[21] or to enable substitutes to sell at discretion[22] if proper administration according to the settlor's intent requires. A power to sell and a power to revoke or alter may be exercised separately.[23] A provision that the trustees shall not sell all the property unless a stated sum may be realized does not prevent sale of a portion in good faith and for a fair value, unless the sale of a portion injuriously affects the rest.[24] Where corporate stock is converted into realty by division of land constituting the corporate assets, the realty may be sold by the trustee under a power to sell the personalty.[25]

Order of court.—A sale may be under order of court as a change of investment and not in pursuance of the power in the instrument.[26] After an unauthorized sale by a trustee, the court may appoint the trustee and another receiver to sell on a bill to set aside the sale, for an accounting and a receivership to sell, it appearing that the former sale was rescinded.[27]

Statutes controlling procedure are not applicable to cases already begun.[28] Trustees for creditors and administrator of deceased grantor may join in proceedings for sale.[29] Contingent remaindermen need not be parties to authorize conveyance of a fee simple title by the trustee, where he being authorized to sell for reinvestment with consent of life tenant does so under direction of equity.[30]

What may be sold.—A contingent estate may be sold.[31] It may be in an un-

14. Civ. Code, 1895, § 3172. A power of sale cannot be engrafted on a deed to a trustee for a syndicate of bondholders by a private understanding of the equitable owners. Burwell v. Farmers' & Merchants' Bank, 119 Ga. 633.

15. Trustee to hold until beneficiaries should agree to sale and then to sell and divide proceeds may refuse to go on with sale at which sole bidder was a representative of beneficiaries who had agreed to take a conveyance as tenants in common. French v. Westgate, 71 N. H. 510.

16. Goldschmidt v. Maier, 140 Cal. xvii, 73 Pac. 984.

17. Deed held to confer a choice between a sale of timber land to pay a debt, and the manufacturing of the timber for the same purpose. Belding v. Archer, 131 N. C. 287.

18. Will construed to show a purpose to sell as a primary object of a trust and an imperative duty to sell. McLenegan v. Yeiser, 115 Wis. 304, 91 N. W. 682.

19. A provision for transfer of the corpus of the trust to a corporation on assent of a majority in interest of the beneficiaries and for division of proceeds contemplates a sale in cash. Moody v. Flagg, 125 Fed. 819.

20. Where a testamentary trustee was authorized to sell the real estate whenever it would bring a fair price, he had authority to sell at private sale without obtaining leave of the court or advertising the sale. Cox v. Shelby County Trust Co. [Ky.] 80 S. W. 789.

21. A power of private sale to co-trustees, followed by a provision that a trustee may on default in payment of sums due him have the option to enforce the instrument by a public sale by him individually, allows the co-trustees to sell at private sale for the purpose of paying the individual trustee's debt. Belding v. Archer, 131 N. C. 287.

22. Where a will directed that if a trustee therein appointed should fail or refuse to serve, the court should appoint a successor, and that all the real estate should be sold whenever it would bring a fair price, the power to sell was not limited to the trustee named, but the successor appointed by the court had like authority. Cox v. Shelby County Trust Co. [Ky.] 80 S. W. 789.

23. A valid conveyance need not "revoke" the trust. Connely v. Haggarty [N. J. Eq.] 56 Atl. 371.

24. Belding v. Archer, 131 N. C. 287.

25. Magnolia Park Co. v. Tinsley, 96 Tex. 364, 73 S. W. 5.

26. Pub. St. c. 141, § 20; Rev. Laws, c. 147, § 15. Taft v. Decker, 182 Mass. 106. Securities belonging to a trust estate of a decedent which are in danger of depreciation may be sold and the proceeds invested, by the order of the probate court. Guthrie v. Cincinnati Gas & Elec. Co., 2 Ohio N. P. (N. S.) 117.

27. Burwell v. Farmers' & Merchants' Bank, 119 Ga. 633.

28. Laws 1897, c. 136, amending Real Property Law, § 87. In re Asch, 75 App. Div. [N. Y.] 486.

29. Robinson v. McDowell, 133 N. C. 182.

30. Sale was made to apply life tenant's interest to his debts and principal was held for remaindermen. Moore v. Scott, 66 S. C. 283.

31. Laws 1896, c. 547, § 85. In re Asch, 75 App. Div. [N. Y.] 486. A trust estate con-

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divided portion of realty.[32] A remainderman subject to a power of sale in the trustee of a life estate possesses no equity superior to that of a bona fide purchaser from the trustee.[33]

Conveyances need not recite the terms of the trust nor need such terms follow the signature of the trustee.[34] When the conveyance is defective only in manner of execution, it will be aided in equity.[35] A trust to reconvey is well executed by conveyance after settlor's death to his heirs.[36]

Application of proceeds.—Purchasers under an express power are not held to see that the proceeds of sale are devoted to the purposes of the trust.[37] Where the beneficiaries are infants, statutes requiring proceeds of sale to be paid into court apply.[38] After a homestead has fallen in, a trustee for creditors may apply proceeds of its sale to debts not enforceable against it,[39] and where there is no limitation as to time of sale, to debts that are barred.[40]

Effect of invalid sale.—Persons advancing money used in improving the trust estate on the strength of a mortgage by the grantee of the estate under a deed void as in violation of the trust are entitled to a lien as against the beneficiaries and remaindermen.[41] A beneficiary may attack an unauthorized conveyance, though induced by his release to the trustee.[42] A deed executed to the purchaser by the remaindermen to cure an ineffectual conveyance by the trustee will not be set aside on an unsubstantiated claim that it was delivered without authority.[43]

(§ 7) *H. Actions by and against trustees.*[44]—The trustee has the power and duty to invoke the aid of equity to protect the trust estate independent of provisions in the deed,[45] and he is bound to prosecute actions, if in his reasonable judgment, to the best interest of the estate.[46] A foreign trustee of a decedent may sue in Washington to collect debts where not in interference with rights of local creditors.[47] As a general rule, matters concerning trust estates are of purely equitable cognizance.[48] After a trustee's account is settled, an action for money had and received will lie, but not sooner.[49]

tingent on the expiration of a life estate during minority of children of the life tenant, who were beneficiaries, passes by sale under order of court before the happening of the contingency, though the trustees do not convey. It is so though the children should all die before the life tenant. Id.

32. Where for benefit of estate. Laws 1896, c. 547, § 85. In re Asch, 75 App. Div. [N. Y.] 486.

33. Connely v. Haggarty [N. J. Eq.] 56 Atl. 371.

34. Conveyance signed individually held sufficient. Connely v. Haggarty [N. J. Eq.] 56 Atl. 371.

35. Lack of acknowledgment in terms, though it was proven. Connely v. Haggarty [N. J. Eq.] 56 Atl. 371.

36. Where a grantee accepts a conveyance on a verbal understanding to reconvey to the grantor in case he recovers from an operation, and if he dies to convey to his children, a conveyance on the grantor's death to the children will be deemed a performance of the understanding and will be upheld. Collins v. Collins [Md.] 57 Atl. 597.

37. Land devised for life with power to sell and invest proceeds [Ky. St. 1899, § 4846]. Miller v. Stagner, 25 Ky. L. R. 650, 76 S. W. 160. Devised in trust for children with power to sell and reinvest in other lands [Ky. St. 1899, § 4846]. Robinson v. Pence, 25 Ky. L. R. 733, 76 S. W. 368.

38. Payment cannot be directed to be made to the trustee under Civ. Code, § 498, and a sale under such direction does not divest infant's title where trustee does not account. Bullock v. Gudgell, 25 Ky. L. R. 1413, 77 S. W. 1126.

39, 40. Robinson v. McDowell, 133 N. C. 182.

41. Money protected estate and increased its value. Staats v. Storm, 76 App. Div. [N. Y.] 627.

42, 43. Staats v. Storm, 76 App. Div. [N. Y.] 627.

44. Actions to establish the trust and remedies of beneficiaries, see post, § 10.

45. Old Colony Trust Co. v. Wichita, 123 Fed. 762.

46. Belding v. Archer, 131 N. C. 237.

47. Fidelity Ins. T. & S. D. Co. v. Nelson, 30 Wash. 340, 70 Pac. 961.

48. A trustee who is also a beneficiary under a trust for creditors cannot maintain an action in trover for damages against a co-trustee who has disposed of the property; the remedy is in equity. Goldschmidt v. Maier, 140 Cal. xvii, 73 Pac. 984. The ultimate liability of a trust fund for assessments on the stock of an insolvent national bank cannot be determined in an action at law. Hampton v. Foster, 127 Fed. 468.

49. Spencer v. Clarke [R. I.] 55 Atl. 329.

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The trustee usually need not join the beneficiaries,[50] though they are necessary parties to a suit to quiet title.[51] The trustee cannot bring them in, in an action against him, where his right will be protected by notice to them of its commencement and pendency.[52]

A co-trustee need not be joined in an action against a trustee on an individual contract,[53] and a substituted trustee need not join resigned trustees, though there is no order finally discharging them.[54]

A complaint on an instrument by a trustee must show the nature of the trust.[55] On a bill to recover property, the trustee may set out efforts looking toward an amicable settlement as bearing on the question of costs.[56] He may set out the terms and origin of the trust,[57] and may state that he has consulted counsel and directed him to ascertain facts necessary to steps for relief.[58]

Defenses by trustee.—A trustee with legal title may, as against garnishment by a creditor of the beneficiary, set up any defense it may have against the settlor.[59]

§ 8. *Compensation and expenses.*—The amount of commissions where provision is not made is frequently statutory and reckoned on the amount collected and paid,[60] and is apportioned as one commission between co-trustees,[61] unless the statute allows each a full commission.[62] If not fixed, it is a reasonable amount in view of the service rendered and its efficiency.[63] Statutes fixing commissions for like services by personal representatives may be taken as a guide.[64] A trustee cannot apply the trust fund in payment of his services rendered prior to the creation of the trust.[65] Where the circumstances are unusual, the trust of long duration, and where the fund has been largely increased, commissions may be allowed on the principal.[66] While commissions on the principal are not ordinarily allowed before distribution, an exception may be made where numerous unforeseen necessities for sale and reinvestment have arisen, and by reason of unusual efficiency the estate

50. Burns' Rev. St. 1901, § 252. Green v. McCord, 30 Ind. App. 470, 66 N. E. 494. A trustee for judgment creditors may sue without joining the beneficiary, to set aside conflicting assignments and establish the priority of his own. Tompkins v. Tompkins, 123 Fed. 207.

51. Pyle v. Henderson [W. Va.] 46 S. E. 791.

52. Action to set aside an assignment of stock to trustee in which beneficiaries are in position of bona fide holders. Central Trust Co. v. Manhattan Trust Co., 84 App. Div. [N. Y.] 425.

53. Contract by trustee to allow commission for sale of trust property. Diamond v. Wheeler, 80 App. Div. [N. Y.] 58.

54. Action brought more than 20 years after the substitution. Fidelity Ins. T. & S. D. Co. v. Nelson, 30 Wash. 340, 70 Pac. 961.

55. School Dist. No. 42 v. Peninsular Trust Co. [Okl.] 75 Pac. 281. A complaint which in the margin describes plaintiff as trustee, but which in the body does not show what his representative capacity is, is bad on demurrer. Id.

56, 57, 58. Riley v. Fithian, 64 N. J. Eq. 259.

59. May show that judgment was obtained through collusion to defeat the trust. Fidelity Trust Co. v. New York Finance Co. [C. C. A.] 125 Fed. 275.

60. Commissions in excess of the amount for annual settlements cannot be had, though the trustees make semi-annual statements and payments of income. In re Mitchell, 41 Misc. [N. Y.] 603. Where income is payable semi-annually, semi-annual commissions are allowed. In re Roberts' Will, 40 Misc. [N. Y.] 512.

61. Under Code Civ. Proc. § 2811, but one commission may be divided among the trustees where the annual income is less than $100,000. In re Holbrook's Estate, 39 Misc. [N. Y.] 139.

62. Where the principal was more than $100,000, though the income for no one year amounted to such sum, each of three trustees may have one commission. In re Hunt's Estate, 41 Misc. [N. Y.] 72.

63, 64. Trustees are not entitled to any certain commission for changing investments, but only to just and reasonable compensation for services. Parker v. Hill [Mass.] 69 N. E. 336. 5% on income and 1½% on principal held proper where corpus of fund consisting of municipal bonds and bank stock was not changed. Central Trust Co. v. Johnson, 25 Ky. L. R. 55, 74 S. W. 663.

65. The trust deeds stated what disposition was to be made of the proceeds of the estate and nothing was said as to whether they were to be applied to the payment of this claim. Willis v. Clymer [N. J. Eq.] 57 Atl. 803.

66. Where several parcels of real estate forming a trust estate have been sold and the proceeds reinvested, and a very large profit resulted to the estate, commissions on the principal will be allowed the trustee where the trust has continued for many years. In re Penn-Gaskell's Estate [Pa.] 57 Atl. 714.

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has largely augmented.[67] When trustees do no more than hold securities and collect the interest thereon, they are not entitled to commission on the corpus.[68] They are entitled to receive commissions for the collection of accruing interest payable to the estate.[69] The transfer of an estate by executors to themselves as trustees is not a collection.[70] Where trustees have received a commission as executors, they are not entitled to another commission thereon as trustees, unless distinct and additional service is rendered.[71] A malfeasant trustee should be denied compensation,[72] and cannot be allowed expenses.[73]

Where repayment of commissions is ordered, an innocent trustee should not be charged with interest.[74] An allowance of a lump sum as compensation for services as executor and trustee by a court without jurisdiction as to the trusteeship cannot be set aside collaterally.[75]

Attorney fees and expenses.—A trustee is entitled to reasonable attorney's fees for services rendered in the execution of the trust.[76] A bequest in lieu of all commissions, etc., covers all expenses in handling the trust funds, but not attorney's fees necessary to the business of the estate.[77] A proportionate sum may be retained from a beneficiary's share to meet a reasonable attorney's fee incurred in an action brought by him to surcharge the account.[78] The trust fund should bear the expense of its administration, but is only chargeable with those expenses incurred for the benefit of all the cestuis que trustent.[79]

§ 9. *Accounting and discharge. Interest.*—Where the trustee negligently fails to invest, he should be charged with interest,[80] or where he mingles the fund with his own.[81] After possession of interest bearing securities without statement,

67. Increase from $25,000 to over $122,000 in 40 years, the estate being lands. In re Penn-Gaskell's Estate [Pa.] 57 Atl. 714.

68. They did nothing to collect or preserve the corpus. Kennedy v. Dickey [Md.] 57 Atl. 621. Where trustees purchased the testator's interest in a partnership with themselves, and the only thing they did was to comply with their contract by accounting to the estate, and distributing it to those entitled, the services were not such as entitled them to a commission thereon. Id.

69. Kennedy v. Dickey [Md.] 57 Atl. 621.

70. They are not entitled to a commission as trustees. Kennedy v. Dickey [Md.] 57 Atl. 621.

71. A testator appointed the same persons, his executors and trustees. By mere matter of bookkeeping, they transferred from themselves as executors to themselves as trustees. Kennedy v. Dickey [Md.] 57 Atl. 621. A trustee executor cannot claim full commissions on the estate in both capacities, where the functions are coexistent. In re Hitchins, 39 Misc. [N. Y.] 767.

72. Newton v. Ribenack, 90 Mo. App. 650. Denied. In re Hart's Estate, 203 Pa. 496; Hanna v. Clark, 204 Pa. 145; Fellows v. Loomis, 204 Pa. 227.

73. Where for 17 years has refused to pay income, claimed trust estate and caused litigation and accounted only under compulsion. Hanna v. Clark, 204 Pa. 145.

74. A trustee cannot be charged with interest on extra commissions which he is ordered to repay where they were first taken under express authority of decrees which are subsequently reversed on the admission into the case of another party as assignee of claims which had previously been represented by attorneys consenting in the allowances. Southern R. Co. v. Glenn's Adm'r [Va.] 46 S. E. 776.

75. Canfield v. Canfield [C. C. A.] 118 Fed. 1.

76. In sale and redemption of lands. Willis v. Klymer [N. J. Eq.] 57 Atl. 803.

77. Portion of fees for services rendered to trustee also in capacity of executor held properly charged against estate. In re Rowe, 42 Misc. [N. Y.] 172.

78. Thome v. Allen, 24 Ky. L. R. 987, 70 S. W. 410; Id., 24 Ky. L. R. 1286, 71 S. W. 431.

79. Where bondholders were divided and one part sought to wrest the estate from the others. Somerset R. v. Pierce [Me.] 57 Atl. 888.

80. Simple interest should be charged on uninvested funds where the trustee is not shown to have wasted the estate or derived a profit. Canfield v. Canfield [C. C. A.] 118 Fed. 1. In the absence of a showing that he could not loan or that he kept the trust funds separate from his own. Isler v. Brock [N. C.] 46 S. E. 951. Where notes were transferred to a son by an absolute bill of sale, but really in trust, the son cannot be charged with interest unless they are used to his profit or he is negligent in investing or not doing so. Martin v. Martin, 43 Or. 119, 72 Pac. 639. Proper to charge 6% on finding of bad faith. Brigham v. Morgan [Mass.] 69 N. E. 418.

81. Erie School Dist. v. Griffith, 203 Pa. 123. 6 per cent. charged on money of wife used by husband which was held on understanding that it should be paid her children at his death or sooner at his election. Stanley's Estate v. Pence, 160 Ind. 636, 66 N. E. 51.

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the trustee should be charged with at least simple interest from the time of receipt.[82]

As to stock wrongfully withheld, the trustee must account for all sums received thereon with interest, when it is practically converted into money by sale of all corporate assets.[83]

Appropriated assets.—Where securities are converted to personal use, trustee is chargeable with value at time of conversion as shown by actual sales at that time.[84] Where funds have been diverted first by a single trustee and then by co-trustees and property of the first has been turned over, it should be applied first to the payment of sums needful for its preservation, then to the debt of the individual trustee, and then to that of the co-trustees.[85] Where the trustee takes a trust deed as a sham to secure a loan never in fact made, he cannot be charged for a release of the deed without repayment of the loan.[86]

Improper investments.—Where the trustee makes an improper loan, he is chargeable with the amount thereof with interest at the legal rate from the time he is in default;[87] but on an unauthorized loan to a corporation of which the trustee is a stockholder, he cannot be charged with more than the interest received where there is no loss and the rate realized equals the customary rate.[88] If the trustee is also executor, he is chargeable for loss in both capacities.[89]

A trustee may be charged with rents and credited with expenditures for a building erected by his wife on the estate.[90]

The trustee may take an improper investment with which he is surcharged on making it good to the estate.[91]

Credits and charges.—The trustee should be allowed for all proper expenditures.[92] A trustee who under order later reversed has paid money to the wrong person will not be charged for refusing a refund offered subject to unreasonable conditions.[93]

Jurisdiction of accounting is in the court of general equity powers, unless the contrary has been provided by statute.[94] A Federal court will remit such relief to the proper state court, if it appears capable of better administering the remedy.[95]

82. Owsley v. Owsley, 25 Ky. L. R. 1194, 77 S. W. 394.

83. Loetcher v. Dillon, 119 Iowa, 202, 93 N. W. 98.

84. In re Hart's Estate, 203 Pa. 488.

85. Westerfield v. Rogers, 174 N. Y. 230, 66 N. E. 813.

86. Lang v. Metzger, 206 Ill. 475, 69 N. E. 493.

87. Hitchcock v. Cosper [Ind. App.] 69 N. E. 1029.

88. Cannot be held for any part of the profits or regarded as using funds in his own business. In re Rowe, 42 Misc. [N. Y.] 172.

89. Brigham v. Morgan [Mass.] 69 N. E. 418.

90. McCall v. Burk, 25 Ky. L. R. 643, 76 S. W. 177. Evidence held insufficient to charge trustee with rents where not in excess of expenditures for support. Id.

91. In re Maitland, 81 App. Div. [N. Y.] 633.

92. Evidence held not to authorize allowance to trustee of board of plaintiff on establishment of trust. Martin v. Martin, 43 Or. 119, 72 Pac. 639.

93. Where dividends were paid by a testamentary trustee to life beneficiaries as income, though subsequently determined to be principal, which payments were approved by decrees settling the trustee's final accounts, he is not liable for refusing refund tendered on condition that he sign a receipt reciting that the dividends were erroneously paid as income. In re Elting, 87 N. Y. Supp. 833.

94. See article, Jurisdiction, 2 Curr. Law. p. 604. A proceeding for accounting of testamentary trustees, which involves a cause of action for breach of duties cognizable only in court of equity and a construction of a will, who were not before the county court sitting for probate business is properly brought in the district court [Const. art. 6, 1 Mills' Ann. St. p. 265, § 11]. Currier v. Johnson [Colo. App.] 73 Pac. 882. Surrogate cannot on accounting under Code Civ. Proc. § 2743 determine effect of conveyances and releases between beneficiaries and direct a distribution accordingly, though all beneficiaries consent. In re United States Trust Co., 80 App. Div. [N. Y.] 77. Under Code Civ. Proc. §§ 2812, 2813, surrogate cannot exercise equitable powers. Id. Statutes authorizing an executor to settle the accounts of a deceased trustee in the orphans' court does not deprive chancery of its jurisdiction of a suit for an accounting brought by the beneficiary against the administratrix of a deceased trustee. Evans v. Evans [N. J. Eq.] 57 Atl. 872.

95. A Federal court will leave the matter

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Where power concurs, one exercise of it does not exclude other courts from later suits.[96] A trustee appointed by a foreign court is amenable only to that court, and the fact that his residence is in another jurisdiction will not confer authority there to control administration or require accountability;[97] but where a foreign court has surrendered possession of the fund, the trust is subject to equitable cognizance in the state in which the funds have been invested and the beneficiaries are resident.[98]

Procedure on accounting.—Where a trustee has mingled trust funds with other funds, a demand therefor is not necessary as a condition to bringing a suit for an accounting.[99] A suit to compel an accounting can be maintained against a trustee only in his representative capacity.[1] The remedy against representatives of a deceased trustee lies primarily through his estate in due course of administration;[2] but sometimes they may be joined as defendants.[3] In an action to compel an accounting, all parties interested in the fund are necessary parties.[4] Interested persons like sureties may file objections to accounts,[5] and show cause, but not after the time allowed.[6] An accounting should be taken from the date of first complaint as to the manner in which income is being applied.[7] A trustee who pays out moneys of the estate must show vouchers therefor in order to receive credit.[8] It is presumed that proceeds of timber sold are applied to reduction of a lien on the land rather than to other indebtedness due from the trustee as such.[9]

An interlocutory order compelling the trustee to pay the fund into court should not be made where he denies liability.[10]

A surrogate's decree on an accounting is not conclusive in subsequent accountings as to items erroneously allowed,[11] or matters not passed on.[12]

of stating an account to a probate court, where it appears that it can be better done in that court, on setting aside a conveyance fraudulently obtained by the trustee. Crocker v. Oakes, 117 Fed. 363.

96. The settlement of accounts of trustees in the orphans' court does not make all subsequent accountings subject to its exclusive jurisdiction. Evans v. Evans [N. J. Eq.] 57 Atl. 872.

97. Schwartz v. Gerhardt [Or.] 75 Pac. 698.

98. Decree of German court declaring a will void and directing the surrender of certain property to plaintiff's father and declaring the usufruct to be in him until their arrival at the age of 18, held to surrender custody. Schwartz v. Gerhardt [Or.] 75 Pac. 698.

99. Tax sale certificates deposited as security for certain notes, mingled with the security of other notes. Vaughn v. Rhode Island M. & T. Co., 24 R. I. 350.

1. To compel a testamentary trustee to render an interlocutory account. Leonard v. Pierce, 87 N. Y. Supp. 978.

2. Establishment of claim against estate of deceased trustee, see Estates of Decedents, 1 Curr. Law, p. 1090. Motion to compel executrix of deceased trustee to account for trust is barred in 6 years. In re Cruikshank's Estate, 40 Misc. [N. Y.] 325.

3. Where the administratrix of a deceased trustee has not accounted to the surviving trustee a suit by a beneficiary for an accounting is properly brought against them jointly. Evans v. Evans [N. J. Eq.] 57 Atl. 872. In a suit by a beneficiary for an accounting against a trustee and the administratrix of a deceased trustee, an allegation that the complainant is administrator of the other beneficiary does not render the bill multifarious. Id.

4. Where property was devised to a trustee to pay the income to a judgment debtor's mother for life, remainder to said judgment debtor and, if he died before his mother, to certain other devisees, such devisees were necessary parties to an action by the judgment debtor's receiver to compel an interlocutory account showing the condition of the fund. Leonard v. Pierce, 87 N. Y. Supp. 978.

5. Sureties of a testamentary trustee may file objections to his accounts on a voluntary accounting [Code Civ. Proc. § 2802]. In re Sill's Estate, 41 Misc. [N. Y.] 270.

6. 10 days to show cause against ratification of auditor's statement of account held sufficient as against exception on 9th day. Clarke v. O'Brien, 97 Md. 732.

7. Maher v. Aldrich, 205 Ill. 242, 68 N. E. 810.

8. A trustee was refused credit for a judgment paid against the estate, the payment of which he sought to establish by his own testimony. Willis v. Klymer [N. J. Eq.] 57 Atl. 803.

9. Howard v. London Mfg. Co., 24 Ky. L. R. 1934, 72 S. W. 771.

10. Blanton v. Heckscher, 101 Va. 42.

11. In re Hunt's Estate, 41 Misc. [N. Y.] 72. In New York, parties to the final accounting of a testamentary trustee are precluded by the decree approving the account from afterwards charging the trustee with a devastavit in failing to recover from life beneficiaries real estate dividends paid out as income, but which were afterwards determined to constitute principal of the estate. In re Elting, 87 N. Y. Supp. 833. A remainderman not in esse at the time of the decree was also precluded. Id.

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Opening account.—Equitable relief will be granted as to a fraudulent settlement acted on without knowledge of the beneficiary and of which she does not learn until too late to appeal.[13] The refusal to open an account does not estop the assertion of invalid acts of the trustee on a subsequent accounting.[14]

§ 10. *Establishment and enforcement of trust and remedies of beneficiary. A. Express trusts. Jurisdiction.*[15]—An action at law is not a proper remedy to enforce performance.[16] Equity has jurisdiction of a bill to determine whether on the face of a will a trust was created.[17]

Laches and limitations.—Laches will not be imputed in the absence of great delay or gross negligence,[18] nor when occasioned by the trustee,[19] and not until after a refusal to perform.[20]

Limitations may run in favor of the trustee unless the trust is peculiarly within equitable cognizance,[21] but do not run against a breach while the trust is valid and continuing.[22]

Who may sue.—As a rule the beneficiaries have no independent right of action until the trustee has refused to sue,[23] but a beneficiary may sue to protect his possession without his trustees,[24] though an execution sale cannot be enjoined by the beneficiaries where the trustee does not deny the trust and the execution runs against a stranger to the title.[25] The beneficiary of a trust for investment who also is the creator revokes it by demand of repayment, and may thereafter sue at law for repayment.[26] As to general sufficiency of interest to enforce trust see the footnotes.[27]

12. A decree in accounting does not estop the beneficiary from questioning a prior act of the trustee not passed on. In re Long Island Loan & Trust Co., 92 App. Div. [N. Y.] 1. The trustee must show that the question was litigated. Id. Entry in report held insufficient to estop beneficiary from objecting to a sale by the trustee. Id. The division of a testamentary trust estate into five separate trusts, disclosed in an accounting by the trustee, and approved by the surrogate, becomes res judicata. In re Elting, 87 N. Y. Supp. 833.

13. Aldrich v. Barton, 138 Cal. 220, 71 Pac. 169.

14. In re Long Island Loan & Trust Co., 92 App. Div. [N. Y.] 1.

15. A circuit court has jurisdiction of a suit involving construction of a will, a writing declared to evidence a trust and an agreement terminating it. Spencer v. Spencer, 31 Ind. App. 321, 67 N. E. 1018.

16. Civ. Code, § 853. Ejectment will not lie against trustee to enforce trust to convey. White v. Costigan, 138 Cal. 564, 72 Pac. 178.

17. The bill asserted that the trust was illegal; the defendants denied such illegality. Orr v. Yates [Ill.] 70 N. E. 731.

18. Maher v. Aldrich, 205 Ill. 242, 68 N. E. 810. Accounting in favor of grantor of trust sell and pay debts refused after 30 years where land did not exceed in value the amount of debts, though there was no sale. Person v. Fort, 64 S. C. 502. Courts will not enforce a parol trust where a great lapse of time has intervened since the absolute deed was executed and the grantee has acted as absolute owner, unless the laches is satisfactorily explained. 10 years after an absolute deed was made a trust was sought to be established. There was no explanation offered as to the reason for the delay. Richardson v. McConaughey [W. Va.] 47 S. E. 287.

19. Felkner v. Dooly [Utah] 75 Pac. 854.

20. Owsley v. Owsley, 25 Ky. L. R. 1194, 77 S. W. 394. Laches cannot be imputed before a demand for conveyance under trust to convey. White v. Costigan, 138 Cal. 564, 72 Pac. 178.

21. Merton v. O'Brien, 117 Wis. 437, 94 N. W. 340. Action for breach of trust in writing is barred in 10 years. Newton v. Rebenack, 90 Mo. App. 650. Trespass to try title by beneficiary against trustee of an express trust is barred by the limitation of actions for the recovery of land. Craig v. Harless [Tex. Civ. App.] 76 S. W. 594.

22. Trustee who purchases portion of property cannot repudiate trust thereto so as to start statute. Felkner v. Dooly [Utah] 75 Pac. 854. Statute does not run against recovery until disavowal by trustee. Maher v. Aldrich, 205 Ill. 242, 68 N. E. 810; Hitchcock v. Cosper [Ind. App.] 69 N. E. 1029.

23. Request must be made of trustees to recover property before the beneficiaries can bring an action for its value. Stock transferred to broker with notice. Robinson v. Adams, 81 App. Div. [N. Y.] 20.

24. Injunction. Cape v. Plymouth Cong. Church, 117 Wis. 150, 93 N. W. 449.

25. Brown v. Ikard [Tex. Civ. App.] 77 S. W. 967.

26. Spencer v. Clark, 25 R. I. 163.

27. Benefit of trust intended to protect land from being sold on foreclosure passes to grantees of land. Richtmyer v. Lasher, 77 App. Div. [N. Y.] 574. One to whom it is agreed there shall be a conveyance may enforce the trust. Sykes v. Boone, 132 N. C. 199. Next of kin of testatrix may enforce trust to care for burial lot [Code Civ. Proc. § 2803]. In re Sill's Estate, 41 Misc. [N. Y.] 270. A residuary legatee may sue for misuse of fund during life of life tenant, where he has an interest. Earle v. Earle, 173 N. Y. 480, 66 N. E. 398.

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Dismissal on the merits is not the proper order where beneficiaries have no right to maintain action to recover value of converted property.[28]

Parties.—Where the construction of the trust is involved all beneficiaries should be made parties,[29] but where paragraphs of a will are construed as creating separate trusts, beneficiaries and trustees under distinct paragraphs need not be joined,[30] or a testamentary guardian of a beneficiary who has never qualified.[31] Heirs and personal representatives of the settlor are not necessary parties to a suit involving income.[32] If an equitable title is sufficient subject-matter for a trust enforceable in equity, the rights thereto may be disclosed, without bringing in the legal title.[33]

One charged with holding a bond and mortgage as a trustee cannot be discharged on a mere showing of a redelivery to the settlor and of possession by the executor of the settlor.[34]

Pleading.—The usual rules are applicable.[35] The presumptions are against the pleader.[36] The bill must not be multifarious.[37] On a bill to enforce a trust and conveyance of property where the trustee by demurrer admits a liability to convey complainants are not bound to tender a reconveyance of a portion of the property which he has lawfully conveyed.[38]

Evidence.—In order to establish a trust, the evidence must be clear and satisfactory, both as to its existence and its terms and conditions.[39] The burden of establishing that funds belong to a trust is on complainant.[40] A decree admitting a will declaring the trust to probate need not be shown where the receipt of money on the trust is shown.[41] Where a trust is sought to be impressed on land conveyed without consideration, deeds of other land to defendant also without consideration are irrelevant.[42]

28. Robinson v. Adams, 81 App. Div. [N. Y.] 20.

29. Suit to enforce a trust for support. Pfefferle v. Herr [N. J. Eq.] 55 Atl. 1103.

30. Steinway v. Steinway, 78 App. Div. [N. Y.] 207.

31. Trust for support. Pfefferle v. Herr [N. J. Eq.] 55 Atl. 1103.

32. Maher v. Aldrich, 205 Ill. 242, 68 N. E. 810.

33. Error in directing conveyance of legal title held harmless. Hamilton v. McKinney, 52 W. Va. 317.

34. To be discharged as a defendant the trustee must deliver over all the property he is charged with withholding. Mason v. Rice, 85 App. Div. [N. Y.] 315.

35. Trust cannot be enforced on bill for specific performance of an agreement to devise in the absence of proper averments. Jordan v. Abney [Tex.] 78 S. W. 486. Bill held sufficient in proceeding to charge purchaser from receiver with trust. Ammon-Stivers Min. Co. v. Great Northern M. & D. Co., 119 Fed. 377. Pleadings held insufficient to establish trust for a class or to establish complainant's right to sue as members thereof. David v. Levy, 119 Fed. 799.

36. Unless a trust is alleged to be in writing or resting on agreement it will be assumed to be in parol and implied. Alexander v. Spaulding, 160 Ind. 176, 66 N. E. 694. Under statutes requiring a liberal construction of pleadings with a view to substantial justice, an allegation that a warranty deed was delivered to defendant for the purpose of satisfying certain mortgages and that defendant held in trust for such purpose is sufficient against demurrer and it will be presumed that the acceptance of the trust was in writing [Rev. Code Civ. Proc. §§ 117, 119, 136]. Swenson v. Swenson [S. D.] 97 N. W. 845.

37. May set up breaches of trust under the declaration and as a manager of an association of the beneficiaries, but an allegation of a conspiracy between the executive committee of such association and the trustee to effect an unlawful sale of the trust property is not germane. Moody v. Flagg, 125 Fed. 819.

38. Teeter v. Veitch [N. J. Eq.] 57 Atl. 160.

39. Where an insolvent sought to establish a trust for his benefit as against purchasers of his stock of goods and of judgments against him, evidence held insufficient. Lurie v. Sabath, 208 Ill. 401, 70 N. E. 323. Where it was sought to establish an express trust by oral testimony, against an absolute deed, after a lapse of 30 years, the grantee being dead, and having in his lifetime exercised complete control over the property, the evidence held insufficient. Faulkner v. Grantham [W. Va.] 47 S. E. 78.

40. In re Fague's Estate, 19 Pa. Super. Ct. 638. On a bill to declare a trust in funds, they must be shown by complainants to be still in esse or to have been disposed of in such manner as to be capable of being followed in equity. Otherwise complainants will be remitted to an action at law. Gardner v. Whitford, 24 R. I. 253.

41. Elizalde v. Elizalde, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861.

42. Ratliff v. Ratliff, 131 N. C. 425.

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Costs.—On appeal from a refusal to take jurisdiction, the court on reversal has no data on which to award or apportion costs.[43]

(§ 10) *B. Constructive trusts. Venue.*—Action is properly brought where the corpus, if realty, is situated.[44]

Laches and limitations.—The rules are similar to those governing other trusts.[45] Limitations commence to run against a cause of action for money held under a constructive trust from the time the beneficiary has notice.[46] A mere admission of the receipt of money for the benefit of another does not transform a constructive trust into a continuing one so as to postpone the running of limitations,[47] or from a repudiation where there is no actual fraud.[48] Acquiescence may bar relief.[49]

Where a constructive trust arises from a trust in favor of an ancestor, limitations run against the heir from the time they begin against the ancestor.[50]

Pleading.—A complaint seeking to establish a constructive trust must allege fraud.[51] It need not allege a consideration.[52] The averments must not establish an express trust.[53]

Relief granted.[54]—On decreeing a constructive trust, the matter of an accounting may be reserved.[55]

(§ 10) *C. Resulting trusts.*—Equity may impose a lien on land for trust funds though there is an adequate remedy at law.[56] A libel in admiralty is the proper proceeding to impress a trust on a deposit of freights.[57] Demand before suit is unnecessary where trustee admits a confusion.[58]

Laches and limitations.[59]—Delay for a short time may bar relief where rights of third parties intervene,[60] otherwise laches does not run against the beneficiary until the trustee disavows the trust,[61] or while the beneficiary is in possession.[62]

43. Currier v. Johnson [Colo. App.] 75 Pac. 1079.

44. Action to establish trust in land is triable where land is situated though defendant resides in another county and fraud is alleged [Code Civ. Proc. § 392]. Booker v. Aitken, 140 Cal. 471, 74 Pac. 11.

45. A promise by a mortgagee purchaser at a mortgage sale to sell at private sale and account to the mortgagor is barred in five years unless in writing [Act April 22, 1856, § 6 (P. L. 533)]. Freeman v. Lafferty, 207 Pa. 32. Action to recover property permitted to be sold for taxes by executor and which the executor took in his own name the tax lease is barred only in 6 years after knowledge of the facts [Code Civ. Proc. § 382, subd. 5]. Kelly v. Pratt, 41 Misc. [N. Y.] 31. Constructive trust not barred by 3 or 6 years' limitations. N. W. Land Ass'n v. Grady, 137 Ala. 219. Constructive trust is barred in two years unless delay is excused. Lide v. Park, 135 Ala. 131.

46. Where some of the distributees of a trust estate collected the share of a minor distributee who did not bring action until limitations had run. Bridgens v. West [Tex. Civ. App.] 80 S. W. 417.

47. Where some of the beneficiaries of a trust estate collected the share of a minor beneficiary and acknowledged it was for her benefit. Bridgens v. West [Tex. Civ. App.] 80 S. W. 417.

48. Newis v. Topfer, 121 Iowa, 433, 96 N. W. 905.

49. A husband after several years' acquiescence cannot assert a constructive trust in property taken in name of his wife by saying that it was under compulsion of her imperious temper. Cline v. Cline, 204 Ill. 130, 68 N. E. 545.

50. Lide v. Park, 135 Ala. 131.

51. Alexander v. Spaulding, 160 Ind. 176, 66 N. E. 694. Or aver that defendant purchased in violation of an existing trust. Id. Or aver that defendant received conveyance without fraudulent intent to hold in trust for complainant. Id. Complaint held sufficient in action to charge purchaser at foreclosure sale as trustee though it was not alleged in terms that he was complainant's agent. Coleman v. McKee, 24 R. I. 596.

52. Arnot v. Hills, 39 Misc. [N. Y.] 95.

53. Largey v. Leggat [Mont.] 75 Pac. 950.

54. An adjudication of title in a person on foreclosure is not an adjudication on the question of his status as a constructive trustee. First Nat. Bank v. Leech, 207 Ill. 215, 69 N. E. 890.

55. Schwartz v. Gerhardt [Or.] 75 Pac. 698.

56. Farrell v. Farrell, 91 Mo. App. 665.

57. Bank of British North America v. Freights, etc., of the Ansgar, 127 Fed. 859.

58. Vaughn v. Rhode Island M. & T. Co., 24 R. I. 350.

59. 20 years' delay held laches under circumstances. Quairoli v. Italian Benef. Soc., 64 N. J. Eq. 205. Delay for 12 years in asserting resulting trust in property purchased in her own name by daughter with mother's funds held fatal. Smith's Guardian v. Hotthelde, 25 Ky. L. R. 125, 74 S. W. 718. Heirs held not barred until right of entry accrued and equity suit tolled by action at law. Condit v. Bigalow, 64 N. J. Eq. 504.

60. Despard v. Despard, 53 W. Va. 443.

61. Crowley v. Crowley [N. H.] 56 Atl.

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Limitations do not run until discovery of the wrongful taking of title.[63] Possession by a resulting trustee after death of the beneficiary is presumed to be in the same capacity,[64] and an heir of a wife, beneficiary of a resulting trust in land held by the husband, is not barred by the possession of the husband as tenant by curtesy.[65]

Parties.—Where reason to the contrary is not shown, all beneficiaries should join.[66] Action may be brought against the trustee alone.[67] A corporation organized after the conveyance is not a proper complaint nor is it made so by a prayer that the property be conveyed to it as trustee its capacity to act as trustee not appearing.[68]

Pleading.[69]—The complaint must contain averments bringing the case within statutory provisions.[70]

Evidence.[71]—The existence of a trust fund cannot be established against a grantee of land into which it is sought to be traced by the admissions of the trustee after the grant or by judicial proceedings to which the grantee was not a party.[72]

A deed from the trustee of a resulting trust to the beneficiaries is immaterial in an action by them to enforce the trust against an execution purchaser of the land on judgment against the trustee.[73]

A deed from complainants to a third person describing other lands cannot be urged as a defense on the theory that it was intended to describe the land in suit.[74]

Relief granted.[75]—A cross bill is necessary to entitle a defendant to affirmative relief,[76] but a beneficiary made defendant is entitled to relief where plaintiff has set out his rights and prayed for relief for him though the beneficiary did not answer and plaintiff sued in his own behalf.[77] Defendant may be given a lien for his protection where he has acted innocently.[78]

A decree establishing the trust and declaring that the land belonged to a trust

190; Madison v. Madison, 206 Ill. 534, 69 N. E. 625.

63. Houston, E. & W. T. R. Co. v. Charwaine, 30 Tex. Civ. App. 633, 71 S. W. 401.

64. McMurray v. McMurray [Mo.] 79 S. W. 701.

65. Evidence held not to show renunciation of trust. Williams v. Williams' Ex'r, 25 Ky. L. R. 836, 76 S. W. 413.

66. Williams v. Williams' Ex'r, 25 Ky. L. R. 836, 76 S. W. 413.

67. Quairoli v. Italian Benef. Soc., 64 N. J. Eq. 205.

68. Action against wife by creditor of husband, the husband having paid a portion of the purchase money. Evans v. Staalle, 88 Minn. 253, 92 N. W. 951.

69. Quairoli v. Italian Benef. Soc., 64 N. J. Eq. 205.

70. A resulting trust in one who is also a devisee may be set up in a bill to construe the will and settle the estate. Cresap v. Cresap [W. Va.] 46 S. E. 582.

71. A complaint under Burns' Rev. St. 1901, §§ 3396, 3398, must aver that complainant furnished purchase money or that the deed was taken in defendant's name without plaintiff's consent. Alexander v. Spaulding, 160 Ind. 176, 66 N. E. 694.

72. See ante, § 4, for sufficiency. A will tending to show a bona fide sale is admissible to overcome a contention that a trust arose from a transfer by testator. Alexander v. Spaulding, 160 Ind. 176, 66 N. E. 694.

73. Lang v. Metzger, 206 Ill. 475, 69 N. E. 493.

74. Hicks v. Pogue [Tex. Civ. App.] 76 S. W. 786.

75. Fletcher v. McArthur [C. C. A.] 117 Fed. 393.

76. A decree declaring the beneficiary the owner is proper in a suit to have deeds declared void though a cancellation or reconveyance might have been ordered. Jones v. Jones, 140 Cal. 587, 74 Pac. 143. Judgment for the amount used in the purchase cannot be had against the person in whose name the purchase is made unless the pleadings are so framed. Garrett v. Garrett, 171 Mo. 155, 71 S. W. 153.

77. Skahen v. Irving, 206 Ill. 597, 69 N. E. 510.

78. McWhirter v. Bowen, 82 App. Div. [N. Y.] 144.

78. One purchasing property with funds advanced by another under an agreement to hold the property as security for notes of such person and a third, in ignorance that the funds belonged to such third person is entitled to a lien for such notes in an action by the third to enforce a resulting trust but not to a dismissal of the complaint. Where complainant has not tendered such sums, he should be charged with costs. Bell v. Solomons, 142 Cal. 59, 75 Pac. 649.

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estate of which plaintiff was beneficiary does not change the legal title until execution of conveyances as directed.[79]

Where it has been determined that property purchased with the proceeds of sale of mortgaged chattels is subject to a trust in favor of the mortgagees in the hands of the mortgagor's wife such property may be ordered sold without first determining the value of the mortgaged property applied.[80]

§ 11. *Following trust property.*—Beneficiaries may follow a trust fund into all forms of investment which it may assume,[81] and one taking with notice of an express[82] or resulting[83] or constructive trust may be held as a trustee,[84] though the trustee may pass the bare legal title.[85] A similar rule is applied in quasi trust relation.[86] To give a claim for trust funds a preference, their use must have enlarged the fund sought to be reached.[87]

Where the trust is merely implied in equity, the amount of the funds only can be recovered and not the property into which they have been converted.[88]

A trust not enforceable against land cannot be enforced against the proceeds of its conversion;[89] but where a trust may be impressed or proceeds of land sold, the trust forms a lien on the land, the purchase price not being paid.[90]

A beneficiary by election to charge with a trust one of particular tracts equally subject, releases the others;[91] but a judgment against the trustee does not affect the lien on lands into which a trust fund has been diverted,[92] or a settlement by a trustee in bankruptcy of the trustee.[93]

Identification of fund.—It must be pleaded and proved that the funds in some form are in hands of defendant.[94]

Where the trust fund is money, it may have been mingled with other funds.[95]

79. Murphy v. Hopcroft, 143 Cal. 43, 75 Pac. 567.

80. Sale held in accordance with mandate on appeal. McClellan v. Kerby [Ind. T.] 76 S. W. 295.

81. Maher v. Aldrich, 205 Ill. 242, 68 N. E. 810.

82. Brokers taking stock. Robinson v. Adams, 81 App. Div. [N. Y.] 20.

83. Lahey v. Broderick [N. H.] 55 Atl. 354.

84. A purchaser with knowledge and without consideration from a husband holding as constructive trustee for his wife may be compelled to reconvey. Jones v. Jones, 140 Cal. 587, 74 Pac. 143.

85. Deans v. Gay, 132 N. C. 227.

86. See special articles, such as Agency, 1 Curr. Law, p. 43; Attorneys and Counselors, 1 Curr. Law, p. 261; Bankruptcy, 1 Curr. Law, p. 311; Fraud and Undue Influence, 2 Curr. Law, p. 104; Estates of Decedents, 1 Curr. Law, p. 1090; Guardianship, 2 Curr. Law, p. 143. Materialman may follow into a wife's or child's property improvements made thereon in the belief that the husband or father was owner, and on his credit. Wife. Brand v. Connery [Mich.] 92 N. W. 784. Daughter. Vandervort v. Fouse, 52 W. Va. 214. Principal may follow proceeds of sale by factor. Bills v. Schliep [C. C. A.] 127 Fed. 103. One from whom money has been fraudulently obtained may follow it into property purchased by it. Citizens' Bank v. Rucker, 138 Cal. 606, 72 Pac. 46.

87. Funds mingled with partnership funds by deceased trustee held not a preferential lien on assets of entire estate of deceased trustee. Pearson v. Haydel, 90 Mo. App. 253.

88. Beneficiaries held entitled to have value of land scrip with interest and not the land located therein where the scrip was held by purchase under proceedings for settlement of an estate in which jurisdiction was not acquired. Fletcher v. McArthur [C. C. A.] 117 Fed. 393.

89. Alexander v. Spaulding, 160 Ind. 176, 66 N. E. 694.

90. Beneficiaries may have benefit of purchase money lien. Marshall v. Hall, 51 W. Va. 569.

91. Libby v. Frost, 98 Me. 288.

92. Citizens' Bank v. Rucker, 138 Cal. 606, 72 Pac. 46.

93. Welch v. Polley, 86 App. Div. [N. Y.] 260.

94. Bank deposit by trustee to his own credit. Chamberlain v. Chamberlain Banking House [Neb.] 93 N. W. 1021. Evidence held sufficient to establish trust fund invested in land. Farrell v. Farrell, 91 Mo. App. 665. Purchase by husband on foreclosure of mortgage securing note to himself and wife held sufficient to show investment of wife's funds in land. Johnston v. Johnston, 173 Mo. 91, 73 S. W. 203. Trust funds cannot be followed into property purchased by the trustee with the funds of one for whom he is acting as agent. Seacoast R. Co. v. Wood [N. J. Eq.] 56 Atl. 337. A fund recovered by the trustee in bankruptcy of the trustee in settlement of an action to recover property in which trust funds had been invested and conveyed by the trustee on the ground that the conveyance was in fraud of creditors cannot be impressed with a trust as representing a part of the beneficiary's estate, but the settlement does not affect the beneficiary's right as against the transferee. Welch v. Polley, 86 App. Div. [N. Y.] 260.

95. Where a factor has notice of a for-

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The doctrine of restoration of a trust fund after confusion usually is based on a case where the trustee still desiring to protect the beneficiaries sets apart from his own or commingled funds property which he dedicates to the trust uses.[96]

Bank deposits.[97]—A trust fund does not lose its identity because of deposit in name of trustee.[98] Where the bank has knowledge of the trust character of the fund, it must not permit its application to debts due the bank[99] or to others.[1]

Withdrawals by a trustee from a mingled deposit will be deemed to be from his own in preference to trust funds.[2]

Use of proceeds of a collection in bank's business in place of remitting does not permit assets to be held as trust fund on insolvency.[3]

A fund belonging to clients, mingled with a partnership deposit by attorneys, is not a trust fund so that it escheats, though originally funds of an estate.[4]

Bona fide purchasers[5] are protected against secret trusts,[6] and so a purchaser on execution takes free from a dry trust of which he has no notice.[7] The purchaser must show a valuable consideration.[8]

Notice of trust.—Where the circumstances place on him the duty, the depositary of a trust fund must make inquiry or satisfactorily explain his failure,[9] even though inquiry can be made only of the depositor.[10] It will be presumed against a trustee or depositary unless bona fide and without notice that a deposit in the name of an individual as trustee is of trust funds or property substituted therefor.[11] Possession by the beneficiary is notice.[12]

Where the purchaser has knowledge, it is a trustee without regard to the legal advice on which it acted or its opinions as to liability.[13] As to sufficiency of miscellaneous matters to constitute notice, see the footnotes.[14]

warder's want of title in particular shipments, the proceeds of sale may be reached in his hands after bankruptcy of the forwarder, though they have been mingled. Bills v. Schliep [C. C. A.] 127 Fed. 103.

96. Doctrine not applied where trustee instead of taking title to himself caused it to be conveyed to another and after his execution of notes and a trust deed caused a quitclaim to be made to himself and wife and conveyed to other persons, so that the title might come back and rest finally in the name of his wife. Lang v. Metzger, 206 Ill. 475, 69 N. E. 493.

97. See Banking and Finance, 1 Curr. Law, p. 289.

98. Bank of British North America v. Freights, etc., of The Ansgar, 127 Fed. 859. Deposit of a sum received from sale to individual credit of factors. Interstate Nat. Bank v. Claxton [Tex. Civ. App.] 77 S. W. 44.

99. Columbia Finance & Trust Co. v. First Nat. Bank, 25 Ky. L. R. 561, 76 S. W. 156.

1. Where a bank accepts a deposit from factors with knowledge of their insolvency and that the deposit belonged to a shipper, it is liable for a payment to other than the owner. Evidence held to establish liability. Interstate Nat. Bank v. Claxton [Tex. Civ. App.] 77 S. W. 44.

2. Bank of British North America v. Freights, etc., of The Ansgar, 127 Fed. 859.

3. G. Ober & Sons Co. v. Cochran, 118 Ga. 396.

4. Rev. St. 1899, § 7381. Union Trust Co. v. Glover, 101 Mo. App. 725, 74 S. W. 486.

5. See generally Notice and Record of Title, 2 Curr. Law, p. 1053.

6. Magnolia Park Co. v. Tinsley, 96 Tex. 364, 73 S. W. 5. Purchaser from a resulting trustee takes good title. Williams v. Williams' Ex'r, 25 Ky. L. R. 836, 76 S. W. 413.

7. Nominal consideration in deed from an agricultural society is not notice. Home Sav. & State Bank v. Peoria A. & T. Soc., 206 Ill. 9, 69 N. E. 17.

8. Payment of consideration for a wrongful conveyance is not sufficiently established as against the beneficiaries by recitals in the trustee's deed. Condit v. Bigalow, 64 N. J. Eq. 504.

9. Otherwise he is held to constructive notice. Jeffray v. Towar, 63 N. J. Eq. 530. The payee of checks, signed by one as in a fiduciary capacity, must take notice that the fund drawn on is not the property of the drawer. A guardian paid his personal debts with checks, signed by himself as "guardian." The cestui que trust could recover the amount of the check from the payee. Cohnfeld v. Tanenbaum, 176 N. Y. 126, 68 N. E. 141.

10. The depositary need not know the identity of the beneficiary. Jeffray v. Towar, 63 N. J. Eq. 530.

11. Evidence held sufficient to show notice that deposits with broker in trust account were of trust property. Jeffray v. Towar, 63 N. J. Eq. 530.

12. Of a parol trust. Oberlender v. Butcher [Neb.] 93 N. W. 764.

13. Corporation taking as security for loan to guardian a certificate of purchase of real estate purchased with guardianship funds. First Nat. Bank v. Leech, 207 Ill. 215, 69 N. E. 890.

14. Pending suit revived in wife's heirs to recover land devised her held notice to purchaser from husband. Condit v. Bigalow, 64

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§ 12. *Termination and abrogation of trust. Acts of settlor.*[15]—In the absence of a reserved power, a trust cannot be revoked[16] without consent of the beneficiaries or an action to which all persons in interest are parties,[17] hence the trustee or beneficiary is not bound by subsequent declarations of the settlor.[18] A revocation by will is void where not provided for.[19]

Mistake.[20]—Failure to insert a power of revocation is not material in a voluntary settlement for the benefit of the settlor in obedience to a desire expressed in her husband's will.[21] Beneficiaries after seeking the appointment of a trustee cannot maintain a bill to set the trust aside on the ground of mistake.[22]

Agreement of beneficiaries.—Where the legal estate is in the trustee in the absence of statute, a trust will not be dissolved where the purpose has not been accomplished or rendered impossible of execution;[23] so beneficiaries cannot arrest the continuance of a testator's business by executors under a direction to do so creating a trust,[24] merely to allow a beneficiary to carry it on,[25] but a purely passive trust may be terminated in equity by the agreement of all parties in interest.[26]

Where the final takers are undetermined, beneficiaries in esse cannot compel distribution and urge that any new beneficiaries may hold the distributees as trustees.[27] So where remaindermen not in being are provided for, the trust must be performed.[28] Possibility of issue of a woman cannot be shown to be extinct by expert evidence.[29]

Termination or failure of purpose.—Where a trust is declared in a warranty

N. J. Eq. 504. Notice of resulting trust to wife is established by recitals of nominal consideration in deed to husband and knowledge that husband's interest was derived from wife's father. Id. A bank cannot be charged with notice by knowledge of a director or a public meeting at which its officers were not present. Home Sav. & State Bank v. Peoria A. & T. Soc., 206 Ill. 9, 69 N. E. 17. The fact that a wife, beneficiary of a resulting trust in land in her husband's name, joins him in a mortgage in which she is not described as wife, or that the mortgagee knew all the husband's property had been sold in insolvency, or the warranty deed under which the husband held, held insufficient to put a subsequent mortgagee on inquiry as to the trust. Fonda v. Gibbs, 75 Vt. 406.

15. Previous declarations of trust are abrogated by a new agreement dedicating the property to different purposes and under entirely different stipulations, though there is a provision that on failure of the cotrustees to exercise a power of sale provided one trustee might be remitted to his rights under the previous agreements. Belding v. Archer, 131 N. C. 287.

16. Burns' Rev. St. § 3407. Trust to convey lands to subscribers of factory aid. McCleary v. Chipman [Ind. App.] 68 N. E. 320. An active trust executed by husband and wife for the benefit of the wife is not revocable during coverture. Fry v. Mercantile Trust Co., 207 Pa. 640. After the grantor has transferred the corpus, subject to the trust and parted with his interest, he cannot withdraw or alter it, though its creation was entirely voluntary. Mortgages assigned in trust to protect purchaser from mortgagor on covenants of warranty. Richtmyer v. Lasher, 77 App. Div. [N. Y.] 574.

17. Ground of mistake. Ottomeyer v. Pritchett [Mo.] 77 S. W. 62.

18. Perkins v. Brinkley, 133 N. C. 348.

19. Does not operate where provision is for change on written notice to the trustee. Kelley v. Snow [Mass.] 70 N. E. 89. A designation of the person to whom a saving fund is to be paid at death of a depositor creates a trust not affected by a general testamentary disposition. Pennsylvania R. Co. v. Stevenson, 63 N. J. Eq. 634.

20. Evidence held insufficient to authorize abrogation of trust at suit of grantor on the ground of fiduciary relationship, the trust being created in accord with desire expressed in her husband's will. Rogers v. Rogers, 97 Md. 573.

21. Rogers v. Rogers, 97 Md. 573.

22. Ricards v. Safe Deposit & Trust Co., 97 Md. 608.

23. Metcalfe v. Union Trust Co., 87 App. Div. [N. Y.] 144. A stipulation by a trustee that in case the court decide that a trust has been terminated, judgment that the fund be paid the beneficiary may be entered is not a consent to the destruction of the trust. Id.

24. Thorn v. De Breteuil, 86 App. Div. [N. Y.] 405.

25. Especially where being a minor neither she nor her guardian may do so. Wirth v. Wirth, 183 Mass. 527, 67 N. E. 657.

26. They being in esse and sui juris. The bill should allege such facts. Tilton v. Davidson, 98 Me. 55. Where the several beneficiaries are of age and no reason appears why they should not exercise the right of disposition of their property, the trust may be dissolved on their application. Eakle v. Ingram, 142 Cal. 15, 75 Pac. 566.

27. Godfrey v. Roberts [N. J. Eq.] 55 Atl. 353.

28. Newton v. Rebenack, 90 Mo. App. 650.

29. Ricards v. Safe Deposit & Trust Co., 97 Md. 608.

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deed expressing a valuable consideration, it does not revert on failure of the grantee to perform.[30]

After the active duties of a trust have ceased, the beneficiary is entitled to have it terminated,[31] so a trust for married woman's sole and separate use terminates on the husband's death[32] or on divorce.[33]

A spendthrift trust may be terminated on reformation[34] if its purpose is clearly expressed,[35] but though antecedent life tenants are not proper subjects of a spendthrift trust, the trust remains executory if there is one subject who under cross remainders may become entitled to income under the preceding shares.[36]

Where the interest of the beneficiary is vested and absolute, provisions postponing the payment of the principal to him after his majority are void.[37] The right cannot be denied on the theory that the trust is active.[38] For the construction of miscellaneous provisions of the trust instrument, see the footnotes.[39]

Union of equitable and future legal estate.—A New York statute formerly permitted the termination of a trust by release of the beneficiary of income on his becoming entitled to the remainder. This statute is now repealed;[40] but decisions thereunder are grouped in the notes.[41]

30. Davis v. Jernigan [Ark.] 76 S. W. 554.

31. Tilton v. Davidson, 98 Me. 55. Under a power to an executor and a trustee to manage an estate, sell the realty and personalty, pay debts and specific legacies and divide the residue, the trust ceases when the estate has been reduced to possession by the executor, the debts and legacies paid and the residue divided. Kohtz v. Eldred, 208 Ill. 60, 69 N. E. 900.

32. Title vests in her absolutely. Temple v. Ferguson, 110 Tenn. 84, 72 S. W. 455.

33. For life of husband where the intent is solely to protect her estate from his control. In re Lee's Estate, 207 Pa. 218.

34. Evidence held not to justify a discretionary termination of a spendthrift trust where it appeared that the beneficiary's habits had not improved and that the trustee was ill disposed toward the beneficiary's wife and desired to secure payment of beneficiary's debts. In re Wilkin, 90 App. Div. [N. Y.] 324.

35. Where the spendthrift trust provides for a remainder, it cannot be terminated by the information of the spendthrift, where his habits are not shown to have been the reason for the trust. Anderson v. Kemper, 25 Ky. L. R. 538, 76 S. W. 122.

36. Moore v. Sinnott, 117 Ga. 1010.

37. Under trust to keep and manage until beneficiary was 30, then to pay principal, payment may be demanded at majority, though the trust was a charge on realty and residuary legatees cannot object. Rector v. Dalby, 98 Mo. App. 189, 71 S. W. 1078.

38. It is regarded as functus officio. Rector v. Dalby, 98 Mo. App. 189, 71 S. W. 1078.

39. Under a trust to a son and wife to hold for living and after-born children, legal title vests in the beneficiaries on death of the wife and on majority of children. Ottomeyer v. Pritchett [Mo.] 77 S. W. 62. On a trust to continue until judgments against the beneficiary are discharged and then the principal to be paid the beneficiary, their discharge in bankruptcy passes the principal to the trustee in bankruptcy. Tuck v. Knapp, 89 App. Div. [N. Y.] 140. Emancipation does not terminate minority entitling beneficiary for such period to conveyance of estate. Ray v. Kelly [Miss.] 35 So. 165. "And on the decease of said trustee to turn the said estate over to the heirs, executor or administrator of said trustee," demands transfer to the executor and not to the heirs. Heintz v. Hoover, 138 Cal. 372, 71 Pac. 447.

40. Laws 1903, c. 87, p. 239. In re Gibson's Estate, 89 App. Div. [N. Y.] 157.

41. Personal Property Law (Laws 1897, p. 507, c. 417, § 3) applies only to trusts created after its passage. Metcalfe v. Union Trust Co., 87 App. Div. [N. Y.] 144. 1 Rev. St. (1st Ed.) p. 730, pt. 2, cl. 1, tit. 2, amended by Laws 1893, p. 939, c. 452, allows termination only on release of one entitled to a present vested interest in remainder free from possibility of ultimate defeasance. Cannot be done where there is a possibility of defeat by failure of survivorship. Thall v. Dreyfus, 84 App. Div. [N. Y.] 569. The interest of the beneficiary must be definite, fixed, and not contingent. In re U. S. Trust Co., 175 N. Y. 304, 67 N. E. 614. Beneficiary must be entitled to whole income. Cook v. Straiton, 41 Misc. [N. Y.] 206. A beneficiary entitled to support from income cannot release as against residual beneficiaries [Laws 1896, c. 547, § 83; Laws 1897, c. 417, § 3]. In re U. S. Trust Co., 80 App. Div. [N. Y.] 77. Where interest of beneficiary is for life or until remarriage, she cannot terminate. Metcalfe v. Union Trust Co., 87 App. Div. [N. Y.] 144. Where a remainder is subject to open to let in an after-born child or to be divested on contingency, the life beneficiary cannot terminate by securing releases from the living remaindermen. In re Gibson's Estate, 89 App. Div. [N. Y.] 157. On termination of trust by release of beneficiary of income, the surrogate must distribute as if termination was under the will [Code Civ. Proc. § 2802, et seq.; Laws 1893, p. 939, c. 452; Laws 1896, p. 559, c. 547, and Laws 1897, p. 507, c. 417]. In re U. S. Trust Co., 175 N. Y. 304, 67 N. E. 614. In such proceedings, the surrogate may determine whether they comply with the statute. Id.

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Adverse possession.—The trustee's title may be extinguished by adverse possession by the beneficiary under a deed from the trustee.[42]

Procedure to dissolve.—A bill to set aside may be barred by laches.[43]

A trustee without interest save his future compensation for services cannot resist an application by the beneficiaries for a dissolution,[44] and a decree dissolving a trust is not reversible for failure to award compensation to the trustee, where he did not answer or set up any right to compensation.[45]

UNITED STATES.

§ 1. Contracts (1960).
§ 2. Officers and Employes (1961).
§ 3. Claims (1961).
§ 4. Actions By and Against (1963).

Scope of title.—The powers of the United States are nearly if not always raised in questions of constitutional law.[46] Its political power is investigated in the same class of questions, also in cases of treaties,[47] or pertaining to territories and Federal possessions,[48] extradition,[49] and the like which obviously command a separate treatment. Property rights in the public domain have also been elsewhere treated.[50]

§ 1. *Contracts.*—Where contracts with the government are required to be in writing and signed, no action can be maintained for defendant's breach unless the statutory requirements have been complied with.[51] In such cases, the preliminary advertisements, proposals, and acceptance, must be viewed only as a part of the negotiations looking to a formal contract.[52] In contracts for public works persons supplying labor and material to the contractor may bring suit therefor in the name of the United States.[53] But where a sum of money is retained to pay for work and material, the workmen and materialmen have no enforceable lien or preference over other creditors in the distribution of the amount retained.[54] Persons dealing with officers of the government are supposed to have a legal knowledge of the extent of their powers, and are bound by the legal effects of such knowledge. No contract can be implied by the use of a patented article by subordinates where the chief of the department refused to contract for its use.[55] No public contract may be transferred by the contractor to any other party under penalty of annulment.[56] In a contract with the government, containing a provision allowing annulment in the "judgment of the engineer in charge," it is questionable whether a notice from the superior officers of the engineer can effect an annulment.[57] Medical attendance and care furnished to a soldier at request of his captain by a private hospital constitutes a valid claim against the United States on implied contract.[58] Contracts with the United States to return in good condition articles loaned a contractor to perform government work means that ordinary wear incident to the use contemplated is excepted.[59]

42. Taft v. Decker, 182 Mass. 106, 65 N. E. 507.
43. Trust in favor of grantor and wife not set aside for mistake after 12 years. Ricards v. Safe Deposit & Trust Co., 97 Md. 608.
44, 45. Eakle v. Ingram, 142 Cal. 15, 75 Pac. 566.
46. 1 Curr. Law, p. 569.
47. 2 Curr. Law, p. 1889.
48. 2 Curr. Law, p. 1868.
49. 1 Curr. Law, p. 1199.
50. Public Lands, 2 Curr. Law, p. 1295.
51. St. Louis Hay & Grain Co. v. U. S., 37 Ct. Cl. 281.
52. P. H. McLaughlin & Co. v. U. S., 37 Ct. Cl. 150.
53. U. S. v. American Surety Co., 21 Pa. Super. Ct. 153; U. S. v. Hegeman, 21 Pa. Super. Ct. 459; Id., 204 Pa. 438. The surety on government contracts is not liable for use of a lighter and crew, transporting materials to the place of work. U. S. v. Fidelity & Deposit Co., 86 App. Div. [N. Y.] 475; U. S. v. American Surety Co., 127 Fed. 490.
54. Alfred Richards Brick Co. v. Rothwell, 18 App. D. C. 516.
55. Sprague v. U. S., 37 Ct. Cl. 447.
56. But the formation of a partnership by parties holding a contract does not cause an annulment. North Pac. Lumber Co. v. Spore [Or.] 75 Pac. 890.
57. King v. U. S., 37 Ct. Cl. 423.

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§ 2. *Officers and employes.*—An auditor of the World's Columbian Commission is an employe of the United States and entitled to compensation until the completion of the work of the commission.[60] Presidential electors are state officers within the meaning of a constitutional provision that vacancies in office in a state shall be filled at the next annual election in which city, town, county, district, or "state" officers are to be chosen.[61] Where one is employed by the government, and his account is approved and paid at a designated rate of compensation, and he is continued in the employment, he has a right to infer that it will be at the same rate.[62] Where an office is established by statute and has a specific salary attached to it, the legal incumbent is entitled to the salary, but this right does not extend to cases where the appointment and salary depend upon appropriations alone.[63] An employe may sue for fees allowed and paid him, and then disallowed and deducted from his account, and the statute of limitations runs only from the time of the disallowance.[64]

United States employes are liable for the property committed to their care, even when lost through no fault of theirs.[65] The superintendents of the mint are responsible for the safe keeping of the money passing into their hands by virtue of their office.[66] An officer having money of the government in his possession is bound to exercise the care and diligence of an intelligent and faithful business man in his specialty.[67] Mere temporary employes of the government are not entitled to absence with pay.[68] Government employes serving fractional parts of a year are entitled to absence with pay.[69] A government clerk is entitled to the salary of his office during an invalid suspension.[70] A laborer or mechanic who knowingly works more than eight hours a day for the government cannot recover more than his contract calls for. The eight-hour labor law gives him no right to extra compensation, unless by express agreement.[71] The dismissal of a clerk in the classified service, upon charges made, cannot be reviewed by the judiciary. A government printer on duty at night is entitled to 20 per cent. in addition to the amount paid for day labor.[72]

§ 3. *Claims.*—Claims against the United States for salary or fees are not within the jurisdiction of the federal, district, or circuit courts. The court of claims alone can adjudicate them. A claim being once allowed and paid, the government cannot reclaim the money unless it was paid through fraud or a mistake of fact. The law allowing the revision of an account by the comptroller of the treasury applies only to pending claims.[73] Claims against the United States, if presented on false evidence, are ground for criminal prosecution.[74] All transfers or assignments of claims against the United States are void unless executed in a certain manner, but the courts may make any orders adjudicating the rights

58. Davis v. U. S., 120 Fed. 190.
59. U. S. v. McIntosh, 117 Fed. 963.
60. Butt v. U. S., 122 Fed. 511.
61. Hence, a vacancy in the office of circuit judge was to be filled at the next election at which presidential officers were to be chosen. Donelan v. Bird [Ky.] 80 S. W. 796.
62. A physician in civil life employed in hospitals. Coffin v. U. S., 37 Ct. Cl. 476.
63. Indian inspectors. Smith v. U. S., 37 Ct. Cl. 119.
64. Chinn v. U. S., 37 Ct. Cl. 521.
65. U. S. v. Smythe, 120 Fed. 30.
66. The New Orleans superintendent of the mint is liable for burned treasury notes, though the fire occurred through no fault of his, and the measure of the damages is the face value of the notes, not the cost to the United States of issuing new notes. Smythe v. U. S., 188 U. S. 156, 47 Law. Ed. 425.
67. Martin v. U. S., 37 Ct. Cl. 527.
68. Employes in government printing office. U. S. v. Barringer, 188 U. S. 577, 47 Law. Ed. 602.
69. Barringer v. U. S., 37 Ct. Cl. 1.
70. Lellmann v. U. S., 37 Ct. Cl. 128.
71. U. S. v. Moses [C. C. A.] 126 Fed. 58.
72. Louis v. U. S., 37 Ct. Cl. 81.
73. U. S. v. Olmsted [C. C. A.] 118 Fed. 433.
74. U. S. v. Lair, 118 Fed. 98; U. S. v. Fout, 123 Fed. 625.

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of parties to the claim that do not interfere with the action of the government officers in allowing or paying it.[75]

In claims for property destroyed by the Indians, the claimant must prove his title to the property according to the ordinary legal rules,[76] and must show that the tribe was in amity with the government.[77] The temporary residence of American Indians in Mexico, without the consent of the United States, does not terminate their relations or relieve the United States from the responsibility which they have assumed for their depredations.[78] The United States as guardian of the Indians deals with certain distinct entities of Indians, and not with the individual Indians composing such entities.[79]

The government is liable to a state, which raised troops in its behalf during the civil war for "expenses properly incurred," but not for damages for injury to property.[80] In a claim by a state against the United States for allowance made for troops called into service by the governor, information must be obtained in strict conformity with rules of judicial procedure and from competent evidence.[81] If, while a claim for reimbursement to a state is pending, congress directs accounting officers to reopen claims heretofore disallowed, further action by the court will be unnecessary, and the papers in the case will be returned to the secretary, who transmitted them.[82] Where the military accounts of a state for the state and of that state for the United States are mingled in one account, it cannot be regarded as the account of the principal, the United States. The state, as agent, must establish its expenditures specifically by other proof.[83]

In a claim for seizure of a vessel under "French spoliations," the citizenship of the owners and the American registry of the vessel must affirmatively appear,[84] and the illegality of the seizure established as against the presumption that the right thereto was legally exercised.[85] Where insurers of a vessel claim under the "French spoliations," the liability of France is limited to the value of the vessel, but not to the premium paid for insurance.[86]

Debts due to the United States have priority in the administration of the estates of insolvents, but not against the sureties of debtors[87] where such sureties are solvent.[88] Nor does the fact that the United States first brought suit on the bond give it such priority, but, the fund having been paid into court by the surety, the court may determine the rights of the United States, under the statute, as against other claimants.[89]

Appropriations by congress cannot be deemed to have the effect of identifying the individuals composing the class of distributees.[90] Congress may pay moral claims against the United States.[91] The Indian department of the government has

75. Sanborn v. Maxwell, 18 App. D. C. 245. An irrevocable power of attorney to collect a claim, made before allowance, is void, and an agreement therein to pay the attorney one third is not a lien on, or interest in the claim. Knut v. Nutt [Miss.] 35 So. 686.

76. Genobia Aragon De Jaramillo v. U. S., 37 Ct. Cl. 208.

77. Abrew v. U. S., 37 Ct. Cl. 510.

78. Lowe v. U. S., 37 Ct. Cl. 413.

79. The treaty obligations of the United States to the Shawnee tribe do not extend to the depredations of white men upon the property of individual members of the tribe. Blackfeather v. U. S., 37 Ct. Cl. 233.

80. State v. U. S., 37 Ct. Cl. 514.

81. Payment of the troops by the state cannot be established by the proceedings of a state military board. State v. U. S., 37 Ct. Cl. 201.

82. Com. v. U. S., 37 Ct. Cl. 524.

83. State v. U. S., 37 Ct. Cl. 141.

84. The Vandeput, 37 Ct. Cl. 396.

85. The Nancy, 37 Ct. Cl. 401.

86. The John Eason, 37 Ct. Cl. 443.

87. U. S. v. Heaton, 124 Fed. 699.

88. In such case statutes providing for priority in favor of United States do not apply. Rev. St. §§ 3466-3468, U. S. Comp. St. 1901, p. 2314 construed. U. S. v. Heaton [C. C. A.] 128 Fed. 414.

89. Action was on an insolvent contractor's bond, which secured the rights of other creditors besides the United States. U. S. v. Heaton [C. C. A.] 128 Fed. 414.

90. Buchanan v. Patterson, 190 U. S. 353, 47 Law. Ed. 1093.

91. The "debts" of the United States that

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the administration of the trust which, in legal contemplation, exists between the United States and the different tribes of Indians, and its action in deciding erroneously that a person was the one entitled to an award to "unidentified" persons is an error from which the true claimant may have relief only by congressional action.[92]

§ 4. *Actions by and against.*—The United States as suitor in a judicial tribunal has no superior rights, but is controlled by the same principles of law and rules of practice as one of her citizens.[93] Suits on claims against the United States are subject to the same rule as to appeals as other actions, which apply equally to the claimant and the United States.[94] In an action by the United States to recover money misappropriated by one of its officers during the military occupation of Cuba, the dismissal of a proceeding in the Cuban courts to punish such act is not a bar to recovery.[95] In an action by the United States, copies of bonds and contracts certified by the secretary or an assistant secretary are admissible in evidence.[96] In actions by the United States, no affirmative judgment can be rendered against the plaintiff, by reason of any set off. A balance found due the defendant is only available to the extent of the demand made by the United States.[97] The remedy by action to recover money fraudulently obtained as a pension is a common-law right, and the remedy by penal suit, given by statute, is cumulative and not exclusive.[98] In an action at law against a contractor's surety, a court of equity, in marshalling the claims of all the creditors, cannot enjoin the United States from proceeding to judgment and must admit it to a pro rata share in the fund.[99]

UNITED STATES MARSHALS AND COMMISSIONERS.

§ 1. Marshals (1963). | § 2. Commissioners (1964).

§ 1. *Marshals.*—Allowance of expense accounts and fees. The allowance by the district judge of the account of a United States marshal is prima facie evidence of the correctness of the items of the accounts.[1] The statutory fees and allowances[2] will not be refused because the services rendered might have been unnecessary,[3] nor because two services required no additional time or labor or were rendered concurrently.[4] Expense will be limited to that actually incurred,[5]

congress has the power to pay include those, which rest upon honor and moral equity, though not legally recoverable. U. S. v. Realty Co., 163 U. S. 427.

92. Pam-To-Pee v. U. S., 187 U. S. 371, 47 Law. Ed. 221.

93. Lynch v. U. S. [Okl.] 73 Pac. 1095. The issue of a final certificate of land to an entryman estops the United States from recovering from him for timber taken from the land during the pendency of the entry, unless the entry was obtained by fraud. Potter v. U. S., 122 Fed. 49.

94. No appeal allowed in circuit court of appeals after six months. Butt v. U. S., 126 Fed. 794.

95. U. S. v. Neely, 126 Fed. 221.

96. Laffan v. U. S., 122 Fed. 333.

97. U. S. v. Warren [Okl.] 71 Pac. 685.

98. Pooler v. U. S. [C. C. A.] 127 Fed. 519.

99. U. S. v. American Surety Co., 126 Fed. 811; Leman v. Baltimore & O. R. Co., 128 Fed. 191.

1. U. S. v. Nix, 189 U. S. 199, 47 Law. Ed. 775.

2. For bringing in grand and petit jurors, $2 for each venire, aggregate not to exceed $50 any term. Lovering v. U. S., 117 Fed. 565. Charges for travel and transportation and attendance in bringing poor convicts before a commissioner [Rev. St. U. S. § 1042]. Id. Customary charges at rates charged by officers of state courts for service of copies of libels in admiralty, for service on newspapers and posting, under order of the court. Id.

3. The process being duly issued and placed in his hands, a marshal may charge for service of a warrant on one already under arrest, or subpoenas on witnesses already summoned, it not being for him to determine the occasion for issuing such process. Lovering v. U. S., 117 Fed. 565. So he may charge for a commitment where defendant is already under arrest under another warrant. Id. Per diem allowed for attendance at court, opened by order of the judge, though no business transacted and judge not present. U. S. v. Nix, 189 U. S. 199, 47 Law. Ed. 775.

4. As where his deputy attends before a commissioner, though also paid as bailiff be-

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but mileage may be figured by the ordinary route, though there be a shorter one.[6] Expenses in transporting a prisoner will not be allowed where the prisoner escaped through the deputy's negligence.[7] A marshal may properly be allowed compensation, outside his statutory fees, for authorized services outside of his district.[8] Marshals must take arrested persons before the United States commissioner nearest the place of arrest or be allowed no fee therefor.[9] The law authorizing five bailiffs for each court was not repealed by the sundry civil appropriation law of 1895, providing for pay of only three bailiffs in each court.[10] Hence the marshal is entitled to an allowance for four bailiffs on days when they were employed by order of the court.[11] On days when the district and circuit courts are held by a single judge at the same time, a marshal is entitled to allowance for per diem compensation to bailiffs, in excess of three, but not exceeding six, in attendance on such courts.[12] Bailiffs are not entitled to pay for attendance on court for the same days on which they attended and earned fees as deputy marshals.[13] The statute authorizing allowance of marshal's expenses for contingencies that may arise in the courts[14] permits an allowance of the expenses of bailiffs when serving subpoenas, all the deputy marshals being otherwise employed, and the witnesses being required,[15] and for meals of officers in charge of prisoners and witnesses in custody.[16] A marshal may recover from the United States an amount twice paid in.[17]

§ 2. *Commissioners.*—The power of a United States commissioner in criminal cases is governed by the statutes of the state in which the commissioner sits.[18] A United States commissioner, having power to act as a committing magistrate in New York, has authority to issue subpoenas,[19] but has no power to punish for contempt, for disobeying a subpoena;[20] this power existing only in the court by which the commissioner is appointed.[21] A United States commissioner cannot act in extradition cases without special authority.[22] A commissioner authorized to act in extradition proceedings has jurisdiction without a preliminary requisition from the demanding government.[23]

fore Federal courts. Lovering v. U. S., 117 Fed. 565. So a charge for a discharge on the day of the commitment is allowed. Id. Transferring custody is a "discharge." Id. Where not more than two warrants on the same defendant for the same party on the same day, the marshal is allowed for travel in the service of each. Id.

5. As for transportation when in charge of defendants or witnesses. Lovering v. U. S., 117 Fed. 565.

6. Lovering v. U. S., 117 Fed. 565. But mileage will not be allowed for the distance in excess of the ordinary route, though a circuitous route was necessary. U. S. v. Nix, 189 U. S. 199, 47 Law. Ed. 775.

7. U. S. v. Nix, 189 U. S. 199, 47 Law. Ed. 775.

8. The Adula, 127 Fed. 849.

9. 28 Stat. at L. 372, c. 201. U. S. v. Nix, 189 U. S. 199, 47 Law. Ed. 775. This law did not repeal the special provision for Oklahoma, that such persons should be taken before the commissioner whose office is nearest the place where the offense was committed. Id.

10. Swift v. U. S., 128 Fed. 763.

11. Four bailiffs in charge of jury on two Sundays by court's order. Swift v. U. S., 128 Fed. 763.

12. Construing U. S. Comp. St. 1901, p. 579, and p. 2530. Swift v. U. S., 128 Fed. 763.

13. Under Rev. St. § 1765 (U. S. Comp. St. 1901, p. 1207), prohibiting additional pay to Federal officers. Swift v. U. S., 128 Fed. 763.

14. Rev. St. § 830.

15, 16. Swift v. U. S., 128 Fed. 763.

17. The marshal paid expenses out of an appropriation for civil cases, when they should have been paid by parties, and was compelled to pay them again. He recovered. Swift v. U. S., 128 Fed. 763.

18. Rev. St. U. S. § 1014. U. S. v. Beavers, 125 Fed. 778. In New York, persons are not obliged to attend as witnesses under subpoenas issued by a United States commissioner, running into another county, unless the subpoena is properly authorized by a justice of the supreme court or a court of record of that state. [Code Cr. Proc. N. Y. § 618; Rev. St. U. S. § 1014]. Id.

19. Code Cr. Proc. N. Y., §§ 607, 608; Rev. St. U. S., § 1014. U. S. v. Beavers, 125 Fed. 778.

20. U. S. v. Beavers, 125 Fed. 778.

21. The reason being that a commissioner is an officer of the court appointing him; consequently a person guilty of contempt in proceedings before such officer is guilty of contempt of the court. U. S. v. Beavers, 125 Fed. 778.

22. But a complaint in extradition proceedings may be sworn to before a commissioner authorized generally to take affidavits. Grin v. Shine, 187 U. S. 181, 47 Law. Ed. 130.

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USES.

By virtue of the statute of uses a use or trust which imposes no active duties is instantly executed so that the cestui que use or cestui que trust holds the legal title.[24] It does not obtain in California,[25] but was adopted in Colorado as part of the common law.[26] Such statute does not operate to execute invalid uses or trusts,[27] or those dealing with personalty.[28] It is sufficient that the deed be capable of acting as a feoffment.[29] A trust to hold for the sole and separate use of a married woman is active[30] and does not become executed until she is discovert.[31] But under the married women's acts even such a trust may impose no active duties.[32] In this case a trustee for a married woman, though in possession, has no title to sue to recover any interest in the realty.[33] Where by a postnuptial agreement property was conveyed to a trustee for a married woman, with power to her to dispose of it as she might choose after consultation and advice from the trustee, he must join in a conveyance or mortgage.[34] A trustee's title is not nominal so as to be executed unless the grant to him negatives the implied power of alienation,[35] and the mere fact that a beneficiary is named does not do so,[36] and the fact that an active trust is indefinite will not render it passive subject to the statute.[37] If on termination of a trust for support for life the trustees are to sell and divide lands, the ultimate beneficiaries under the instrument take no title which they may convey.[38]

22. Grin v. Shine, 187 U. S. 181, 47 Law. Ed. 130.

24. Under a devise to A in trust for B, A takes no estate [Laws 1896, p. 570, c. 547]. In re Gawne, 82 App. Div. [N. Y.] 374. A master's deed to a trustee to have and to hold for the use of third persons passes title to such persons. The lien of a judgment against the beneficiaries on the filing of such a deed for record attaches in priority to a secret parol lien between the trustee and beneficiaries [Mills' Ann. St., § 446]. Teller v. Hill [Colo. App.] 72 Pac. 811; Newton v. Rebenack, 90 Mo. App. 650. As when there is no provision against alienation. Webb v. Rockefeller, 66 Kan. 160, 71 Pac. 283. Trust to hold and pay income with powers of sale, lease and investment. Harris v. Ferguy, 207 Ill. 534, 69 N. E. 844. Intent to confer discretion on the trustee in management to meet changing circumstances. Holmes v. Walter, 118 Wis. 409, 95 N. W. 380. Trust to hold land and divide rents and profits and to sell until all of testator's children should agree that there should be a sale or division. Harris v. Harris, 205 Pa. 460. A trust to hold land and convey to subscribers of factory aid is active. McCleary v. Chipman [Ind. App.] 68 N. E. 820. Master's deed to one as trustee for certain parties reciting that he bid in for complainants on payment of costs only is passive trust. Teller v. Hill [Colo. App.] 72 Pac. 811.

25. Civil Code, title 4, § 847. McCurdy v. Otto, 140 Cal. 48, 73 Pac. 748.

26. St. 27 Henry VIII, c. 10, is part of the law of Colorado [2 Mills' Ann. St. § 4184]. Teller v. Hill [Colo. App.] 72 Pac. 811.

27. A power in trust to convey or a trust to convey real estate is void under Civil Code Cal. §§ 847, 857. McCurdy v. Otto, 140 Cal. 48, 73 Pac. 748.

28. McWilliams v. Gough, 116 Wis. 576, 93 N. W. 550.

29. Where the conveyance is a deed of feoffment, the statute of uses at once executes the legal estate in the beneficiary where these are not active duties imposed on the trustee, and where deeds contain words making them either of feoffment or bargain and sale they will be construed according to the manifest intention of the parties. Deed construed to be feoffment vesting title in beneficiary orphan asylum on delivery. Rogers v. Sisters of Charity of St. Joseph, 97 Md. 550.

30. Temple v. Ferguson, 110 Tenn. 84, 72 S. W. 455.

31. Regarded as special and active. Temple v. Ferguson, 110 Tenn. 84, 72 S. W. 455. A trust to hold and preserve property for the sole and separate use of a married woman during coverture is active though the wife has a power of disposition on consultation with the trustee. Colyar v. Wheeler, 110 Tenn. 58, 75 S. W. 1089.

32. Trust made in 1875 for grantor's wife remainder to her children by him living at her death is executed by the act of 1866, the trust being for the life estate only. Tillman v. Banks, 116 Ga. 250. Legal title vests in the wife to the life estate. Act 1866. Trust for wife with remainder to children at her death. Id. Since the married woman's acts where a trustee has no duty save to sell and invest, there is no necessity for appointment of a trustee where land is taken in exchange in the name of the beneficiary after resignation of the trustee. Snell v. Payne [Ky.] 78 S. W. 885. A trust for a wife and her children during the settler's life is executed at once as to the wife and to the children as they come of age. Thompson v. Sanders, 118 Ga. 928.

33. Tillman v. Banks, 116 Ga. 250.

34. Colyar v. Wheeler, 110 Tenn. 58, 75 S. W. 1089.

35, 36. Webb v. Rockefeller, 66 Kan. 160, 71 Pac. 283.

37. Rev. St. 1898, § 2075. Holmes v. Walter, 118 Wis. 409, 95 N. W. 380.

38. McWilliams v. Gough, 116 Wis. 576, 93 N. W. 550.

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USURY.

§ 1. Elements and Indicia (1966). Intention (1966). Loan or Forbearance (1966). Excess Over Legal Rate (1967). Discounts, Bonuses, Commissions, and Other Deductions or Charges (1967). Removal of Taint of Usury (1968). Usury Statutes (1968). Conflict of Laws (1968). Usury Laws as Applied to Building and Loan Association Contracts (1969).

§ 2. The Defense of Usury (1970). Pleading and Proof (1971).

§ 3. The Effect of Usury (1972). Forfeitures (1973). Application of Usurious Payments (1973).

§ 4. Affirmative Relief and Procedure (1973). Recovery of Usury (1973). An Action Under a Statute (1974). The Penalty (1974).

§ 1. *Elements and indicia.*—Usury consists in intentionally taking or reserving, for the use of money, interest at a greater rate than is allowed by law.[39]

There must be an intention to exact an excessive rate,[40] and in ascertaining such intention, the court will look to the substance, disregarding the form, of the transaction.[41] So that any fiction in the contract made to simulate something else than a loan or forbearance,[42] or to falsify the actual amounts,[43] will avail nothing. A forfeiture or penalty for the nonpayment of interest on a loan is unlawful,[44] but in the case of a loan on an insurance policy, it must be such as to diminish the cash surrender value.[45] A renewal note for a sum including usurious interest on the old debt is usurious, though bearing interest at the legal rate.[46]

There must be a loan or forbearance in order to offend the usury laws.[47] A

39. Wagoner v. Landan [Neb.] 95 N. W. 496. "Offense of usury" in Idaho is the taking of an unlawful or illegal rate of interest. Sanford v. Kunz [Idaho] 71 Pac. 612.

40. Where the debtor was to pay interest and taxes "on account of the mortgage or the debt" secured, but the creditor and the lender did not know the aggregate reserved would exceed the legal rate, the contract was not per se usurious. Green v. Grant [Mich.] 96 N. W. 583. Where a contract imports usury on its face, such corrupt intention is apparent. Trainor v. German American Sav. Loan & Bldg. Ass'n, 102 Ill. App. 604. Claim of usury not established where debtor merely failed to call for money left for him in agent's hands. Farm Land Co. v. St. Raynor [Neb.] 97 N. W. 330. Excess paid by mistake or to apply on principal not usury. Rushton v. Woodham [S. C.] 46 S. E. 943. An agreement for usurious interest must be shown; a mere proof of excessive payment not sufficient. Bosworth v. Kinghorn, 87 N. Y. Supp. 983.

41. The court will look to the substance, and not allow the statute to be defeated by the form of a transaction. Whinery v. Garrett, 24 Ky. L. R. 1558, 71 S. W. 855; Hagen v. Barnes [Minn.] 99 N. W. 415.

42. Sums paid as "profits" and "rent" and use of apartments, construed as realty interest, and being in addition to 6% charged constituted usury. Reich v. Cochran, 41 Misc. [N. Y.] 621. A note with an agreement to hire the lender to sell cotton at a fixed price or pay liquidated damages for failure to deliver the cotton, held a cover for usury, the "cotton contract" not being genuine. Waxahachie Loan & Trust Co. v. Turner [Tex. Civ. App.] 74 S. W. 792. An issue of corporate bonds, bearing interest at six per cent, to be sold below par, is usurious. George N. Fletcher & Sons v. Alpena Circuit Judge [Mich.] 99 N. W. 748.

43. Where, on a loan of $500, the lender took two notes, one for $500, and one for $43.48, instead of interest in advance for one year, the transaction was construed as a single one and usurious as exacting more than 8% on the loan. Howell v. Pennington, 118 Ga. 494.

A note for a greater sum than the borrower actually receives, with interest thereon at the highest legal rate, is usurious. Note for $235, interest at 10%, for loan of $200. Rosetti v. Lozano, 96 Tex. 57, 70 S. W. 204. An answer setting up that only $207.90 was received on a note given for $497.00 states a clear defense of usury and is not demurrable. Johnson v. Joyce, 90 Minn. 377, 97 N. W. 113.

44. Where an insured was to forfeit several years of extended insurance and lose interest for failure to pay a premium borrowed, the arrangement was unlawful. Mutual Ben. Life Ins. Co. v. Davis, 24 Ky. L. R. 2291, 73 S. W. 1020.

45. Mutual Ben. Life Ins. Co. v. First Nat. Bank, 25 Ky. L. R. 172, 74 S. W. 1066.

46. Where 7% on the interest due on an old note and 12% on overdrafts were included in the new note, it was usurious. Citizens' Nat. Bank v. Donnell, 172 Mo. 284, 72 S. W. 925. A surety who gives a new note to take up old usurious notes is entitled to plead usury and have the entire transaction purged of usury. Whinery v. Garrett, 24 Ky. L. R. 1558, 71 S. W. 855. A renewal or substitution is infected if the usury passes into it, leaving the rights of the parties subsisting and unchanged. See post, § 3.

47. Held, there was not a loan, but an undertaking to answer for default of others agreeing to pay. Wagoner v. Landon [Neb.] 95 N. W. 496. Contract construed as an investment through defendant, a certain interest being guaranteed, and not a loan to him, and hence usury was no defense in an action to reform a deed. Conolly v. Keenan, 42 Misc. [N. Y.] 589. A contract whereby A purported to buy B's future unearned salary for a month, and to be entitled to five percent a month for forbearing to take it, was a loan and usurious. Van Vechten v. McGuire [N. J. Law] 56 Atl. 123. Same was held as to a similar contract of sale with a revocable

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sale of accommodation paper is a loan and is usurious when discounted beyond the legal rate of interest.[48] A bona fide collateral contract will not render a loan usurious,[49] and usury laws do not apply to other transactions.[50]

The aggregate of the exactions must exceed the legal rate,[51] and collateral benefits not of the nature of payment for use of the money are excluded, e. g., payment of taxes on the security,[52] or the assumption or purchase of other obligations.[53] For a like reason, a legitimate commission, bonus or discount is permissible.[54]

Discounts, bonuses, commissions, and other deductions or charges.—The taking of interest at the highest legal rate, in advance, by way of discount on short loans, in the ordinary course of business, is not usurious.[55] But where the interest reserved and that contracted to be paid, on a long loan, aggregate a sum in excess of the legal rate, the transaction is usurious.[56]

A bonus given at the time of making the loan[57] or for a forbearance,[58] or commissions, in addition to interest,[59] may render the transaction usurious, according to their real character as fictions to cover usury or as extra consideration for additional and real benefits or services rendered. But the exaction of a commission by an agent of the lender without the knowledge or consent of the principal does not render the contract usurious as to the principal.[60] So the charging

power of attorney to the debtor to collect until default. Tolman v. Union Casualty & Surety Co., 90 Mo. App. 274. A transaction construed as a loan with pledge of note as security and a contemporaneous release of attorney's fees held void, because constituting usury. Johnson v. Zweigart, 24 Ky. L. R. 1323, 71 S. W. 445. Where plaintiffs could not procure the purchase price of land ($513.45) and defendant agreed to and did pay the vendor, and plaintiffs took title directly from vendor, and gave defendant notes and mortgages for $672.86, with interest at 7%, the transaction between plaintiffs and defendant was a loan, not a purchase and sale, and usurious. Hagen v. Barnes [Minn.] 99 N. W. 415.

48. Simpson v. Hefter, 42 Misc. [N. Y.] 482.

49. Stipulation in note that debtor would consign 100 bales of cotton during the season or pay 50 cents commission per bale not shipped did not render note usurious. Kitchen & Bro. v. Robinson Bros., 138 Ala. 419.

50. Payment in consideration of forbearing to obtain judgment by default and allowing time for preparation of defense. Alexander v. First Nat. Bank, 24 Ky. L. R. 1486, 71 S. W. 883.

51. Taking a note and mortgage for $800, due in five years with interest at 6% per annum, payable semi-annually for a loan of $676.48 due in five years with interest at 10% per annum, payable semi-annually, is not as a matter of law usurious. Commonwealth Title Ins. & Trust Co. v. Dakko, 89 Minn. 386, 94 N. W. 1088.

52. An agreement to pay interest and in addition all taxes and assessments on the security is not per se usurious, though the aggregate may exceed the legal interest rate. There must be in addition the intention to exact an illegal rate. Green v. Grant [Mich.] 96 N. W. 583.

53. Where the borrower proposes to take up the note of a third party and give his own note, for a loan, the transaction is not usurious, whether the third party's note is solvent or insolvent. Note of $200, given for loan of $235, and a note for $50 taken up. Crawford v. Benoist, 97 Mo. App. 219, 70 S. W. 1098. An agreement to pay legal interest and also pay off a judgment on which the borrower and lender were both liable is not usurious, though the judgment is one on which contribution could not be enforced. Southern Trading Co. v. State Nat. Bank [Tex. Civ. App.] 79 S. W. 644.

54. See infra this section **Discounts, bonuses, etc.**

55, 56. McCall v. Herring, 116 Ga. 235.

57. Brown v. Skotland [N. D.] 97 N. W. 543. Lender received a bonus but pretended to act as agent for a "straw-man" whose knowledge of bonus was denied. Transaction held usurious. Leipziger v. Van Saun, 64 N. J. Eq. 37. "Premiums" for a loan rendered contract usurious. Madsen v. Whitman [Idaho] 71 Pac. 152. Bonus paid the agent with knowledge of the principal. Richards v. Bippus, 18 App. D. C. 293.

58. When a note on its face bears all the interest allowed by law, a bonus for a forbearance is usury. Mo. Real Estate Syndicate v. Sims [Mo.] 78 S. W. 1006.

59. That it was customary to charge such commissions was immaterial. Cowgill v. Jones [Mo. App.] 73 S. W. 995.

60. McCall v. Herring, 118 Ga. 522; Flanagan v. Shaw, 74 App. Div. [N. Y.] 508; McWhirter v. Longstreet, 39 Misc. [N. Y.] 831. Held that bonus to agent was without authority or knowledge of lender and contract was not usurious. Hare v. Winterer [Neb.] 96 N. W. 179. Where the husband was paid $50 for securing a loan for plaintiff, the wife who loaned the money knowing nothing of such payment, and receiving no part thereof, the loan was not void for usury. Bovee v. Butters [Minn.] 99 N. W. 641. A usurious exaction by an agent, making a loan for his principal, solely for the agent's benefit, without the knowledge or sanction of the principal, and he having no reason to anticipate such action by the agent, does not render the loan usurious as to the principal. Com. Title

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of a commission by the agent procuring the loan, without the knowledge or consent of the lender, will not taint the transaction with usury.[61] Brokers negotiating loans for others may charge the borrower commissions without making loans at the full legal rate usurious.[62]

The parties may remove the taint of usury by agreement;[63] but an invalid mortgage is not rendered enforceable by the mortgagee's crediting usurious payments received as usury, on the debt, where the statute is aimed at the exaction as well as receipt of usury,[64] and an express agreement, not a cover for usury, though resulting in compound interest, may be enforced.[65]

Usury statutes do not retroact on contracts already made.[66] Statutes in some states regulate the compounding of interest.[67] Under Connecticut statutes it is held that persons other than pawnbrokers or those loaning on personal security may charge any rate of interest, and no interest paid can be recovered.[68] In California, constitutional provisions that the value of mortgaged property and of the security shall be assessed for taxes to their respective owners, and that any agreement requiring the mortgagor to pay taxes on the mortgagee's interest is void, are held to be laws against usury.[69] Florida laws make usurious any "contract, contrivance or device" whereby a rate greater than the law allows is exacted.[70] The Nebraska statute does not authorize the taking of interest for more than one year in advance, if thereby more than ten per cent. interest per annum is received.[71]

Conflict of laws.—By the weight of authority, the legality of the rate of interest depends upon the law of the place of performance of the contract,[72] usually the place of payment of a bond.[73] This is the rule, though property mortgaged as

Ins. & Trust Co. v. Dakko, 89 Minn. 386, 94 N. W. 1088.

61. Attorney procuring the loan charged $10 and defendant received $80 on a $90 note lender having no knowledge of the facts. Siegelman v. Jones [Mo. App.] 77 S. W. 307.

62. Gantzer v. Schmeltz, 206 Ill. 560, 69 N. E. 584.

63. Agreement for rebate as to unearned interest. Cowgill v. Jones [Mo. App.] 78 S. W. 995. A usurious contract may be purged by the making of a new contract eliminating usury, when no usury has been paid. Borrower then is bound to pay the legal rate on the new contract. Sanford v. Kunz [Idaho] 71 Pac. 612. A usurious contract may by agreement of the parties with knowledge of their rights be purged of its usury and validated. Trainor v. German-American Sav., L. & Bldg. Ass'n, 102 Ill. App. 604.

64. Adams v. Moody, 91 Mo. App. 41.

65. A bank and a customer orally agreed that the customer should pay 10% per annum on overdrafts, interest so accruing to be payable at the end of the month, and if not paid, to bear interest at 10% per annum. This agreement, though resulting in compound interest, held not usurious. Hillsboro Oil Co. v. Citizens' Nat. Bank [Tex. Civ. App.] 75 S. W. 336.

66. The rate agreed upon until the debt is paid may be collected, though the statute has reduced the legal rate. Mastin v. Cochran's Ex'r, 25 Ky. L. R. 712, 76 S. W. 343. The mere assumption of a contract, valid when made, will not be rendered usurious by the statutory reduction of the legal rate between the making and assumption of such contract. Adams v. Shirk [C. C. A.] 117 Fed. 801.

67. Rev. St. 1899, § 3711 prohibits compounding oftener than once a year, and compounding every six months was a violation. Citizens' Nat. Bank v. Donnell, 172 Mo. 384, 72 S. W. 925.

68. Matz v. Arick [Conn.] 56 Atl. 630.

69. Matthews v. Ormerd, 140 Cal. 578, 74 Pac. 136.

70. Laws 1891, c. 4022, p. 51. Maxwell v. Jacksonville Loan & Imp. Co. [Fla.] 34 So. 255. A provision for penalties for default in monthly payments, with additional interest and for accelerating maturity of entire obligation, held to render the contract usurious. Id.

71. Allen v. Dunn [Neb.] 99 N. W. 680. When a note for $690, with interest at 7%, was given for a loan of $600 for five years, the transaction was regarded as a device to avoid the usury law, and since more than 10% per annum was thereby agreed to be paid, the loan was usurious. Id.

72. Though security for a loan was in another state. Interstate Bldg. & Loan Ass'n v. Edgefield Hotel Co., 120 Fed. 422; Alexander v. Southern Home Bldg. & Loan Ass'n, 120 Fed. 963. Where the parties treated the contract as governed by laws of Kansas, negotiating there, land mortgaged being there, and money being paid there, it was a Kansas contract. Royal Loan Ass'n v. Forter [Kan.] 75 Pac. 484. A by-law of a loan association, providing that payments shall be made at its home office, is not conclusive evidence that that was the place of performance of the contract. Spinney v. Chapman, 121 Iowa, 38, 95 N. W. 230.

73. Gale v. Southern Bldg. & Loan Ass'n, 117 Fed. 732. Premiums paid to local agent of New York corporation in Michigan—contract of the latter state. Hoskins v. Roches-

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security is situated in another state.[74] In the absence of proof to the contrary, the place of performance of a note or mortgage is presumably the place where it is dated.[75] Where another intention can be gathered, it will not be presumed that parties contracted with reference to a law that would make the contract usurious, where there is no attempt to evade the usury law.[76] Contracts with foreign associations made in the state which is the domicile of the borrower, with association's agent therein, are governed by the laws of the state where so made.[77] The presumption being that the common law prevails in a state, there is also a presumption that there is no legal limitation on the rate of interest in that state.[78]

Usury laws as applied to building and loan association contracts.—Building and loan associations are commonly excepted from the usury laws by statute or judicial decision, because of the interest which the borrower in such an association has in the profits.[79] Such statutes are constitutional,[80] but will be strictly construed,[81] and loans must be made in the mode prescribed by them in order to preclude the defense of usury.[82] So there must be competitive bidding for loans when the statute so requires.[83] Establishing a minimum premium violates the rule requiring competitive bidding, and lets in usury as a defense.[84] But a fixed premium for loans, instead of competitive bidding, may be authorized by statute.[85] The courts may determine whether a premium fixed by the by-laws, according to the statute, is an extortionate charge for a loan.[86] In construing building and loan association contracts, the stock contract calling for premiums and monthly

ter Sav. & Loan Ass'n [Mich.] 95 N. W. 566. A note made payable in New York, with no rate of interest fixed, is governed as to interest by New York law. Simpson v. Hefter, 42 Misc. [N. Y.] 482.

74. Trower Bros. Co. v. Hamilton [Mo.] 77 S. W. 1081. Contract made and to be performed in Minnesota, lands mortgaged in Alabama, Minnesota contract. U. S. Sav. & Loan Co. v. Beckley, 137 Ala. 119.

75. New York Security & Trust Co. v. Davis, 96 Md. 81.

76. Though payable in Illinois, it was held the parties intended to contract with reference to Arkansas law, and hence there was no usury. Whitlock v. Cohn [Ark.] 80 S. W. 141.

77. National Mut. Bldg. & Loan Ass'n v. Retzman [Neb.] 96 N. W. 204. Land mortgaged also in state of his domicile. People's Bldg. Loan & Sav. Ass'n v. Parish [Neb.] 96 N. W. 243.

78. Columbian Bldg. & Loan Ass'n v. Rice [S. C.] 47 S. E. 63.

79. Stanley v. Verity, 98 Mo. App. 632, 73 S. W. 727. Loans governed by special statutes. Collins v. Cobe, 202 Ill. 469, 66 N. E. 1079. In New York, interest and premiums on such contracts do not render them usurious. Roberts v. Murray, 40 Misc. [N. Y.] 339. Contract requiring dues, interest and premiums, held not usurious. Iowa Cent. Bldg. & Loan Ass'n v. Klock [Iowa] 94 N. W. 1120. Fines and premiums, when imposed by building associations, are not usury, when reasonable under Ohio statute, § 3836-3. Spies v. Southern Ohio Loan & Trust Co., 4 Ohio C. C. (N. S.) 103.

80. Spies v. Southern Ohio Loan & Trust Co., 24 Ohio Circ. R. 40.

81. Washington Nat. Bldg. & Loan Ass'n v. Andrews, 95 Md. 696.

82. Winegardner v. Equitable Loan Co., 120 Iowa, 485, 94 N. W. 1110; Assets Realization Co. v. Wightman, 105 Ill. App. 618. Double premiums cannot be exacted under a statute permitting the borrower and association to agree on the premium. Coppes v. Union Nat. Sav. & Loan Ass'n [Ind. App.] 67 N. E. 1022. Cannot charge interest on premiums, statute not so providing. People's Bldg. Loan & Sav. Ass'n v. Marston [Tex. Civ. App.] 69 S. W. 1034. Where the loan contract was antedated and premiums retained in advance, the statutes were evaded and the contract was usurious. Hyland v. Phoenix Loan Ass'n, 118 Iowa, 401, 92 N. W. 63.

83. Skinner v. Southern Home Bldg. & Loan Ass'n [Fla.] 35 So. 67; Trainor v. German-American Sav. Loan & Bldg. Ass'n, 102 Ill. App. 604; Mutual Home & Sav. Ass'n v. Worz, 67 Kan. 506, 73 Pac. 116. No competitive bidding; hence usurious by Tennessee law. American Bldg. Loan & Tontine Ass'n v. McClellan [Ark.] 70 S. W. 463. When the statute requires competitive bidding, a loan made without such bidding is usurious if the payments, considered as interest, exceed the legal amount of interest. Moses v. Nat. Loan & Inv. Co., 92 Mo. App. 484. Premiums, considered as interest, because no bidding, held not to be usurious. Laidley v. Cram, 96 Mo. App. 580, 70 S. W. 912.

84. Arbuthnot v. Brookfield Loan & Bldg. Ass'n, 98 Mo. App. 382, 72 S. W. 132; Thudium v. Brookfield Loan & Bldg. Co., 98 Mo. App. 377, 72 S. W. 134; McDonnell v. De Soto Sav. & Bldg. Ass'n, 175 Mo. 250, 75 S. W. 438.

85. Where a member borrows at less than the premium fixed by the by-laws, as authorized by statute, he cannot assail the transaction for usury [Rev. St. 1899, § 1362]. Cover v. Mercantile Mut. Bldg. & Loan Ass'n, 93 Mo. App. 302.

86. Cover v. Mercantile Mut. Bldg. & Loan Ass'n, 93 Mo. App. 302.

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dues is regarded as separate and distinct from the loan contract calling for interest.[87] Where a loan by such an association is not a building and loan association contract, but has the characteristics of an ordinary loan, the usury laws apply.[88] The mere fact that a contract is a building and loan contract in form is not conclusive on the question whether the lender is an association entitled to the benefit of preferential statutes.[89] In some states the ordinary usury laws are applied to such contracts.[90] Where building and loan contracts are regarded as usurious, the ordinary rules as to the application[91] or recovery[92] of usurious payments control. The entire amount of the usury should be credited on the debt, regardless of the disposition made thereof by the company.[93] An assignee of the rights of a member, when recognized as a member of the association, is entitled to credit for usurious payments by his assignor.[94]

§ 2. *The defense of usury.*—The defense of usury is personal to the debtor and cannot be interposed by another without his consent and concurrence,[95] nor by the creditor.[96] So it cannot be set up by the trustee in a trust deed given to secure the debt.[97] But the defense is open to a surety.[98]

A purchaser of mortgaged property subject to a usurious mortgage cannot set up the taint of usury[99] unless authorized by his grantor.[1] But it was held that the original mortgagor, suing in his own interest and as executor of his grantee, could have the usurious mortgage canceled, when the debt was extinguished by payments by him and his grantee.[2]

87. The different payments should not be confused so that the contract will be rendered usurious. Motes v. People's Bldg. & Loan Ass'n, 137 Ala. 369.

88. Royal Loan Ass'n v. Forter [Kan.] 75 Pac. 484.

89. Hyland v. Phoenix Loan Ass'n, 118 Iowa, 401, 92 N. W. 63.

90. In Oregon, building and loan contracts are regarded as evasions of the usury laws and are held usurious. Only the rate of interest agreed upon, if legal, is recoverable, not premiums or dues. Hubert v. Washington Inv. Ass'n, 42 Or. 71, 71 Pac. 64. Usury laws apply to building and loan association contracts in South Carolina. Columbian Bldg. & Loan Ass'n v. Rice [S. C.] 47 S. E. 63. In West Virginia, it is held that a building and loan association contract requiring the payment of a fixed monthly premium on the loan for an indefinite period of time is usurious. Harper v. Middle States Loan Bldg. & Const. Co. [W. Va.] 46 S. E. 817.

91. Payments for dues upon stock as well as interest payments should be deducted from the principal of the loan. Carpenter v. Lewis, 65 S. C. 400. All payments treated as payments on an ordinary 6% loan. Kleimer v. Covington Perpetual Bldg. & Loan Ass'n, 24 Ky. L. R. 735, 70 S. W. 41. A borrower is liable only as on an ordinary loan. Interstate Bldg. & Loan Ass'n v. Holland, 65 S. C. 448. Usurious premiums, with interest thereon, should be credited on a member's loan. Gary v. Verity, 101 Mo. App. 586, 74 S. W. 161.

92. Usury paid to an association before its insolvency may be recovered. Olliges v. Kentucky Citizens' Bldg. & Loan Ass'n's Assignee, 24 Ky. L. R. 1954, 72 S. W. 747. The right to recover for usury paid cannot be taken away by a by-law. Georgia State Bldg. & Loan Ass'n v. Grant [Miss.] 34 So. 84.

93. Sixty cents per month being paid, besides interest, and ten cents per month paid operating expenses, the borrower was credited with sixty cents per month on the debt. Middle States Loan Bldg. & Const. Co. v. Baker, 19 App. D. C. 1.

94. Where a borrowing member transfers the mortgaged property and his grantee is admitted to membership in the association, such grantee is entitled to credit for usurious payments by his grantor. Middle States Loan Bldg. & Const. Co. v. Baker, 19 App. D. C. 1.

95. Harper v. Middle States Loan, Bldg. & Const. Co. [W. Va.] 46 S. E. 817. A purchaser of real estate charged with a usurious debt cannot defend against the usury unless the debtor unites with him in the defense, or his acquiescence in and consent to the defense, appears in the record. Id.

96. A creditor sued for breach of contract to forbear cannot retain the usurious bonus paid therefor and at the same time plead usury as a defense. Missouri Real Estate Syndicate v. Sims [Mo.] 78 S. W. 1006.

97. Snyder v. Middle States Loan, Bldg. & Const. Co., 52 W. Va. 655.

98. A surety may, by a proper plea of usury, prevent recovery against him of more than the principal and legal interest. Weldon v. Ayers, 116 Ga. 181.

99. A redemptioner could not recover usurious payments made to redeem. Matthews v. Ormerd, 140 Cal. 578, 74 Pac. 136. The rule applied where the grantee paid a part of the assumed usurious debt, and gave a new usurious mortgage for the balance. Defense not applicable as to the mortgage assumed. Frost v. Pacific Sav. Co., 42 Or. 44, 70 Pac. 814. The defense is not open to a purchaser of the equity of redemption who has assumed and agreed to pay the debt. People's Bldg. Loan & Sav. Ass'n v. Pickard [Neb.] 96 N. W. 337.

1. Bacon v. Iowa Sav. & Loan Ass'n, 121 Iowa, 449, 96 N. W. 977.

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The defense may be waived,[3] or the debtor barred to set it up.[4] It is not waived by consenting in the answer in foreclosure suit to a decree for sale of the property.[5] A borrower will not be estopped by the payment of instalments of usurious interest from setting up usury, when the lender has not changed his position as the result of such payments.[6] To avoid a defense of usury, one claiming as a bona fide taker must plead and prove every fact showing that he is such.[7]

The defense of usury being in the nature of penalty or forfeiture may, by the repeal of the statute, be taken away from contracts already made.[8] But it has been held that the repeal of a usury law will not deprive a debtor of his defense where he has made a tender to effectuate the same.[9] If a usurious contract is validated by statute as to the principal debtor, it is validated as to his surety.[10]

In Georgia, creditors may prevent the enforcement of a usurious claim against an insolvent debtor.[11]

Pleading and proof.—The defense of usury must be pleaded by special plea or answer.[12] It cannot be made by demurrer to bill for foreclosure of principal and interest, where the statute provides for forfeiture of the interest only, for usury.[13]

A plea of usury is sufficient where it is such that the plaintiff could not have been misled as to the defense intended.[14] It should state with whom the agreement for usurious interest was made, the time, place, and the facts which make the transaction usurious.[15] It is not sufficient to simply allege that a note, and a renewal thereof, are usurious, and that the debtor paid more than the sum actually owed.[16] But in West Virginia a defense of usury is well pleaded by pleading generally that the contract or assurance sued on called for interest at a rate greater than that allowed by law.[17] Where a plea is simply for the purpose of invalidating a deed, particularity as to amount is not required.[18] An admission of usury in the answer may cure insufficient allegations thereof in the petition.[19]

Where the defense of usury is set up as to a contract governed by the laws of

2. Epping v. Washington Nat. Bldg., Loan & Inv. Ass'n [Or.] 74 Pac. 923.

3. The debtor may waive the defense of usury by not pleading it, where the usurious contract is not made void by statute. George N. Fletcher & Sons v. Alpena Circuit Judge [Mich.] 99 N. W. 748. A usurious loan contract is voidable, and the borrower may repudiate or ratify it, or waive the defense of usury. Hubert v. Washington Inv. Ass'n, 42 Or. 71, 71 Pac. 64.

4. One who knowingly makes usurious payments of interest without protest is estopped to claim such payments were on the principal. McLean v. Bryer, 24 R. I. 599. A party to a suit in equity, owing a usurious debt, who fails to claim the benefit of a usury statute before final decree in such suit is barred from setting up the defense thereafter. It is res adjudicata. Snyder v. Middle States Loan Bldg. & Const. Co., 52 W. Va. 655. A borrowing member of a building association may be estopped to set up usury when he has settled with the association accepting profits earned by other like contracts. Cover v. Mercantile Mut. Bldg. & Loan Ass'n, 93 Mo. App. 302.

5. New York Security & Trust Co. v. Davis, 96 Md. 81.

6. Hubert v. Washington Inv. Ass'n, 42 Or. 71, 71 Pac. 64.

7. Bovier v. McCarthy [Neb.] 94 N. W. 965; Simpson v. Hefter, 42 Misc. [N. Y.] 482.

8. Contract made in Alaska in 1898 usurious under Oregon law then in force, was not subject to defense of usury under the Alaska code, since adopted (1900). Petterson v. Berry [C. C. A.] 125 Fed. 902.

9. Washington Nat. Bldg. & Loan Ass'n v. Fiske, 20 App. D. C. 514.

10. Statute legalized building and loan contracts. LeMars Bldg. & Loan Ass'n v. McLain, 120 Iowa, 527, 94 N. W. 1122.

11. Code, § 2878. Payment of the other creditor's debt is not a condition precedent to the exercise of such right. In re Miller, 118 Fed. 360.

12. Washington Nat. Bldg. & Loan Ass'n v. Westfall [W. Va.] 47 S. E. 74.

13. Petterson v. Berry [C. C. A.] 125 Fed. 902.

14. Simpson v. Hefter, 42 Misc. [N. Y.] 482.

15. Plea held sufficient. Hare v. Winterer [Neb.] 96 N. W. 179.

16. Brown v. Forbes [Neb.] 96 N. W. 52.

17. But a mere description of a building and loan contract, with no allegation of usury, is insufficient. Washington Nat. Bldg. & Loan Ass'n v. Westfall [W. Va.] 47 S. E. 74.

18. Equitable Mortg. Co. v. Watson, 116 Ga. 679. Followed in Equitable Mortg. Co. v. Watson, 119 Ga. 280.

19. But petition here held to set out plea of usury sufficiently. Lexington Bank v. Marsh [Neb.] 95 N. W. 841.

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another state, the reply denying usury should plead the statutes or laws of such other state.[20]

The party alleging usury must prove it.[21] It is not established by evidence showing that excessive interest was collected by mistake, or that excessive interest was accepted to be applied on interest at a legal rate and then on the principal,[22] or that the debtor merely neglected to call for money left in the agent's hands and placed to his credit,[23] or merely showing that excessive payments were made for some years, without proof of an agreement for usurious interest.[24] A note being made payable to a bank cashier individually, there is no presumption that the note is the bank's property, and it is not evidence of usury against the bank so as to warrant the recovery of double usury from it.[25]

§ 3. *The effect of usury.*—Where a usurious bonus is promised for a forbearance, the creditor is bound by the agreement to forbear, but cannot recover the bonus.[26] A joint maker of the original usurious note, frequently renewed, who gives his sole note on new security, is not thereby deprived of the defense of usury,[27] but a guarantor giving a new note is.[28]

A contract tainted with usury, if not thereby rendered void, is good in the hands of bona fide holders.[29] The burden is on the indorsee to prove bona fide holdership.[30]

A new and independent transaction will not be void for usury in a prior one,[31] nor will the fact that part of the debt represented by a note is usurious affect the liability of the debtor as to the balance.[32] A second or substituted contract, based on a prior usurious contract, the usury being carried into the new contract, renders it usurious.[33] All dependent rights or contracts fall with the invalidity of the principal one,[34] hence if a deed is void for usury, a power of sale therein is void also.[35] Where a mortgagee exacts usury from the mortgagor, the lien of the mortgage becomes void.[36] A chattel mortgage given to secure a usurious loan is void.[37]

The effect of usury on a contract is to be determined from the statute. In some states the contract is void only as to the usury, or interest in excess of the legal rate;[38] in others it is void as to all interest, only the principal being recoverable.[39]

20. Columbian Bldg. & Loan Ass'n v. Rice [S. C.] 47 S. E. 63.

21. Gantzer v. Schmeltz, 206 Ill. 560, 69 N. E. 584. Evidence held insufficient to sustain the plea. Raphael v. Margolies, 42 Misc. [N. Y.] 204.

22. Rushton v. Woodham [S. C.] 46 S. E. 943.

23. Farm Land Co. v. St. Raynor [Neb.] 97 N. W. 330.

24. Bosworth v. Kinghorn, 87 N. Y. Supp. 983.

25. Wayne Nat. Bank v. Kruger [Neb.] 95 N. W. 476.

26. He cannot plead usury. Missouri Real Estate Syndicate v. Sims [Mo.] 78 S. W. 1006.

27. German Ins. Bank v. Fabel, 24 Ky. L. R. 1721, 72 S. W. 329.

28. A new note given in payment of two usurious notes, by a guarantor on such notes, time being extended, is not usurious because in payment of usurious notes. Coleman v. Cole, 96 Mo. App. 22, 69 S. W. 692.

29. George N. Fletcher & Sons v. Alpena Circuit Judge [Mich.] 99 N. W. 748.

30. Evidence showing usury in the inception of a note, the burden is on plaintiff in an action thereon to show bona fide holdership. Simpson v. Hefter, 42 Misc. [N. Y.] 482.

31. The fact that a note is usurious will not render void an assignment of a bond for title as collateral security for payment of the note, if made long after the note, and if at the time the note was made there was no agreement or understanding that such security should be given. Elder v. Elder, 119 Ga. 174.

32. Lanier v. Oliff, 117 Ga. 397.

33. Usurious interest on notes being carried into notes given in a second transaction rendered such transaction usurious. Webb v. Galveston & H. Inv. Co. [Tex. Civ. App.] 75 S. W. 355.

34. Pledges and mortgages to secure usurious loans are invalid by statute, in the hands of the lender. Bell v. Mulholland, 90 Mo. App. 612.

35. Lanier v. Olliff, 117 Ga. 397.

36. It is not cured by crediting payments on the principal where the statute reaches the exaction as well as the receipt. Adams v. Moody, 91 Mo. App. 41.

37. Rev. St. 1899, § 3710. Coleman v. Cole, 96 Mo. App. 22, 69 S. W. 692.

38. Cowgill v. Jones [Mo. App.] 73 S.

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Forfeitures.—Under the national banking law, usury causes the forfeiture of all interest.[40] In Idaho, the lender forfeits all his interest and the borrower forfeits to the school fund ten per cent. per annum on the entire principal;[41] and in Oregon, a usurious contract being shown, the whole debt, without interest, is forfeited to the school fund of the county where suit is brought.[42]

Application of usurious payments.—So long as any part of the principal debt with legal interest remains due, no payment is usurious.[43] But any excess over the amount of the debt with legal interest will be usury,[44] and should be credited on the debt.[45] A buyer of property "subject" to a usurious mortgage cannot have usurious payments made by his assignor applied to the principal,[46] but is entitled to have excess interest paid by himself so applied.[47]

§ 4. *Affirmative relief and procedure. Recovery of usury.*—It is generally held that usurious interest paid by the debtor may be recovered,[48] after the debt and all usurious interest thereon have been fully paid.[49] This was a common-law right and still exists in the absence of any statute to the contrary.[50] A recovery back of usury paid will not lie on payment of less than would have been due at the legal rate,[51] nor will payments of interest made by consent to cause a delay in legal proceedings support such a recovery.[52] Where usury is sought to be recovered or set off against a claim sued on, the facts showing the amount must be set out.[53]

In an action or suit to recover usurious interest paid by a debtor, the measure

W. 995. In West Virginia usurious contracts are void as to the excess of interest over the legal rate—six per cent. Lorentz v. Pinnell [W. Va.] 46 S. E. 796. A usurious building and loan contract is not void on account of the original transaction but only as to excessive payments. Irwin v. Washington Loan Ass'n, 42 Or. 105, 71 Pac. 142. A payment of a usurious note with property generally entitles the borrower to recover the excess of the value of the property above the principal of the loan with legal interest. Paducah Banking Co. v. Ragsdale, 24 Ky. L. R. 683, 69 S. W. 796. Usurious debt paid by conveyance of realty. Usury recovered. Pike, Morgan & Co. v. Wathen, 25 Ky. L. R. 640, 76 S. W. 322.

39. Michigan, Comp. Laws, § 4857. George N. Fletcher & Sons v. Alpena Circuit Judge [Mich.] 99 N. W. 748; Green v. Grant [Mich.] 96 N. W. 583. Only the actual principal of usurious contracts can be enforced at law or in equity. Florida, Acts of 1891, c. 4022, p. 51. Lyle v. Winn [Fla.] 34 So. 158. In New Jersey the usurious contract is void as to any interest, hence, no interest accrues on such a contract and there can be no default, warranting suit on the instrument, for nonpayment of interest. Leipziger v. Van Saun, 64 N. J. Eq. 37.

40. U. S. Rev. St. § 5198 (U. S. Comp. St. 1901, p. 3493). Under this law the creditor cannot escape the result by applying the payments of usurious interest on the principal. Citizens' Nat. Bank v. Donnell, 172 Mo. 384, 72 S. W. 925. Where a long account between a creditor and debtor constitutes but one transaction, the entire transaction becomes usurious at the time a single part thereof became so, and interest on the whole was forfeited. Id.

41. Sanford v. Kunz [Idaho] 71 Pac. 612.

42. B. & C. Comp. § 4595. Beach v. Guaranty Sav. & Loan Ass'n [Or.] 76 Pac. 16.

43. Crenshaw v. Duff's Ex'r, 24 Ky. L. R. 718, 69 S. W. 962.

44. Crenshaw v. Crenshaw, 24 Ky. L. R. 600, 69 S. W. 711.

45. New York Security & Trust Co. v. Davis, 96 Md. 81. Failure to give credit for usury not prejudicial where there was overdraft unpaid. Lee v. Grant County Deposit Bank, 25 Ky. L. R. 1208, 77 S. W. 374. All payments on a building and loan contract in excess of legal interest should be applied on the debt. Epping v. Washington Nat. Bldg. Loan & Inv. Ass'n [Or.] 74 Pac. 923. Only the principal being recoverable on a usurious contract, all payments made, however designated, will be applied thereon. Estey v. Capitol Inv. Bldg. & Loan Ass'n, 131 Mich. 502, 91 N. W. 753. Payments on renewal note which includes usurious interest on the old debt must be applied on the principal debt and not on such usurious interest. Citizens' Nat. Bank v. Donnell, 172 Mo. 384, 72 S. W. 925. In Iowa twelve percent is the highest rate of interest recoverable on a building and loan contract, and any excess is credited on the debt. Bacon v. Iowa Sav. & Loan Ass'n, 121 Iowa, 449, 96 N. W. 977. Where usurious contracts are void as to the excess of interest above the legal rate, payments of such excess are credited on the principal at the date of payment. Lorentz v. Pinnell [W. Va.] 46 S. E. 796.

46, 47. Irwin v. Washington Loan Ass'n, 42 Or. 105, 71 Pac. 142.

48. In this state the usurious contract is void as to the excessive interest. Lorentz v. Pinnell [W. Va.] 46 S. E. 796.

49, 50. Harper v. Middle States Loan Bldg. & Const. Co. [W. Va.] 46 S. E. 817.

51. Though the contract rate is usurious. Alexander v. First Nat. Bank, 24 Ky. L. R. 1486, 71 S. W. 883.

52. Alexander v. First Nat. Bank, 24 Ky. L. R. 1486, 71 S. W. 883.

53. Weldon v. Ayers, 116 Ga. 181.

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of recovery is the residue after crediting all payments of usury on the principal.[54] In the absence of a statutory provision to that effect, the debtor's right to recover usurious payments does not survive to his personal representative, heir, or assign at his death.[55] It has been held that affirmative relief is barred as to a fully executed contract.[56]

In Oregon, it was held that usurious interest voluntarily paid cannot be recovered.[57] Recovery or set off of alleged excessive interest paid is prohibited by statute in Connecticut.[58]

An action under a statute to recover usury must be brought within the prescribed time.[59] The national banking act, and not local law, governs in the case of a usurious loan for the benefit of a national bank, though in form made by its president.[60]

A statutory judgment on a usurious contract bears the ordinary legal interest.[61]

The penalty for usury provided in the national banking law can be recovered only in an action brought under the statute[62] and cannot be sued by cross bill.[63] The action to recover a penalty is a "civil action,"[64] and may be recovered in the state court.[65] Interest on the penalty recoverable cannot be recovered.[66]

In Texas, the borrower may recover double the amount of usurious interest exacted[67] in an action of debt instituted within two years after payment of the usury.[68] The statute in Texas requires either an original action or a cross action, to recover the penalty, and a purely defensive pleading in a suit on the debt, will not avail for that purpose.[69] The "person, firm, or corporation" receiving the usurious interest, is alone liable for the penalty.[70] The statute giving the right of action to the payor's "legal representative" makes the claim assignable, and it passes to a trustee in bankruptcy.[71] Where the maker of a usurious note transfers property to one who assumes payment and pays it, the maker is to be deemed the real payor, and may maintain the action for the penalty.[72] A remaining partner who has assumed liability on a partnership note after the withdrawal of another, may maintain the action for a penalty against the payee.[73]

54. Lorentz v. Pinnell [W. Va.] 46 S. E. 796.

55. Garris v. Thomas, 66 S. C. 57.

56. Where three notes were given in one transaction, all usurious, and two had been fully paid more than a year before action on the third, usurious payments on the two already paid could not in such action be recovered. Carter v. Farthing, 24 Ky. L. R. 1927, 72 S. W. 745. Usury paid on notes paid and surrendered cannot be credited on the balance of the debt due. Milford v. Milford [S. C.] 46 S. E. 479. In the absence of proof of a usurious agreement, voluntary payments of interest in excess of the legal rate cannot be credited on the principal. Bosworth v. Kinghorn, 87 N. Y. Supp. 983.

57. Beach v. Guaranty Sav. & Loan Ass'n [Or.] 76 Pac. 16.

58. Matz v. Arick [Conn.] 56 Atl. 630.

59. Kentucky: The year after it is paid. Burnside v. Mealer [Ky.] 80 S. W. 785. Not from the time when the note fell due. Carter v. Farthing, 24 Ky. L. R. 1927, 72 S. W. 745.

60. Schuyler Nat. Bank v. Gadsden, 191 U. S. 451.

61. Finney v. Moore [Idaho] 74 Pac. 866.

62. Cross bill in an action by the bank not proper. Rev. St. U. S. 5198, U. S. Comp. St. 1901, p. 3493

63. First Nat. Bank v. Hunter, 109 Tenn. 91, 70 S. W. 371.

64. Within the meaning of a statute giving a chancery court concurrent jurisdiction with the circuit court in certain cases. McCreary v. First Nat. Bank, 109 Tenn. 128, 70 S. W. 821.

65. The act permits the action to be brought in any state, county, or municipal court in the county or city where the bank is located, having jurisdiction in similar cases. McCreary v. First Nat. Bank, 109 Tenn. 128, 70 S. W. 821.

66. McCreary v. First Nat. Bank, 109 Tenn. 128, 70 S. W. 821.

67. Waxahachie Loan & Trust Co. v. Turner [Tex. Civ. App.] 74 S. W. 792.

68. The statute makes no exceptions, and persons under disability can recover no more than others. Webb v. Galveston & H. Inv. Co. [Tex. Civ. App.] 75 S. W. 355.

69. But an answer alleging the payment of usury and praying for an allowance of double the amount so paid was held, in the absence of special exceptions, sufficient. Rosetti v. Lozano, 96 Tex. 57, 70 S. W. 204.

70. Webb v. Galveston & H. Inv. Co. [Tex. Civ. App.] 75 S. W. 355.

71, 72. Lasater v. First Nat. Bank, 96 Tex. 345, 72 S. W. 1057

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There must be a payment to support a recovery under the North Carolina act.[74] The giving of a renewal note to the assignee of the usurious note is not a payment of the original note so that the maker may not recover for usury from the original payee.[75]

A court of equity will not grant relief unless the borrower pays principal and lawful interest justly due.[76] The court will impute all guilt to the lender and excuse the borrower, on the ground that he was overmatched or coerced by want.[77] Where the statute makes usurious securities unenforceable by the usurer, a court of equity will grant injunctive or other relief against him.[78] The grantor in a deed of trust to secure a usurious debt, may in a suit in equity to purge the debt of usury, after conveyance of the land by him to a third party, have the sale of the land under the trust deed enjoined pending the suit.[79]

VAGRANTS.

The statutes[80] defining vagrancy have been construed to include, in addition to idleness by one able to work but without means of support,[81] the case of prostitution in violation of tenement house laws.[82] It is necessary to prove either age within the statute or inability of parents to support accused.[83] The earning of a support however meager is a defense,[84] but not the mere fact that a woman otherwise vagrant and a prostitute has at times earned a little money honestly.[85]

The Greater New York law for an increasing term of commitment to be doubled after the second is not uncertain or excessive.[86] It is often provided that

73. Lasater v. First Nat. Bank, 96 Tex. 345, 72 S. W. 1057.

Virginia: Recovery barred after one year. Washington Nat. Bldg. & Loan Ass'n v. Wendling [Va.] 46 S. E. 296.

74. **North Carolina:** Twice the amount of interest paid at a usurious rate may be recovered (Code, § 3836). But usury must have been paid in money or money's worth. Rushing v. Bivens, 132 N. C. 273.

75. Rushing v. Bivens, 132 N. C. 273.

76. This was held under a statute making usurious contracts void as to all interest. Wenham v. Mallin, 103 Ill. App. 609. When the debtor has fully paid his lawful indebtedness a court of equity will relieve him against usury. Bell v. Mulholland, 90 Mo. App. 612.

77. Bell v. Mulholland, 90 Mo. App. 612.

78. Defendant enjoined from filing with plaintiff's employer certain assignments of salary, to secure a usurious loan. Bell v. Mulholland, 90 Mo. App. 612.

79. Rorer v. Holston Nat. Bldg. & Loan Ass'n [W. Va.] 46 S. E. 1018.

80. The act of August 17, 1903, amends but does not repeal Pen. Code, § 453 (Welborn v. State, 119 Ga. 429); and is not applicable to a case made by an indictment charging acts of vagrancy on August 1, 1903, before it took effect (Baker v. State, 118 Ga. 787), and the record showing a sentence under the original act on a charge of vagrancy as of a date when it was in force will be sustained in absence of any showing when bill was returned (Id.).

81. **Georgia Pen. Code 1895, § 453.** Evidence that defendant had no property to support her, was able to work, and wandered and strolled about in idleness, is sufficient to support a conviction for vagrancy [Pen. Code 1895, § 453]. McLeod v. State, 118 Ga. 82.

82. **Vagrancy laws of New York City:** A woman who violates the tenement house act by committing prostitution in her apartment or room in a tenement house is a vagrant. People v. Fox, 39 Misc. [N. Y.] 591.

83. A conviction under the vagrancy act (Acts 1903, p. 46) is unwarranted where there is no evidence as to the age of the accused or that her parents were unable to support her. Stevens v. State, 118 Ga. 806.

84. Acts 1903, p. 46. Hartman v. State, 119 Ga. 427.

85. Where the evidence showed that defendant had no visible means of support, was able to work, and lived an idle, immoral and profligate life, the fact that she occasionally did a little work, and earned small sums of money insufficient to support her, was no defense to a charge of vagrancy [Pen. Code, 1895, § 453]. Cody v. State, 118 Ga. 784. Under a charge of vagrancy, where evidence showed defendant to be a grown woman, able to work, with no visible or known means of a fair, honorable, and reputable livelihood, who loitered around saloons, did no work, and was a street walker, the fact that she earned two small sums on two occasions was no answer [Acts 1903, p. 46]. Welborn v. State, 119 Ga. 429.

86. Section 710 of the Charter of Greater New York, 1901, providing, among other things, for the detention of vagrants for a term of five days for the first offense, twenty days for the second, and a term equal to twice the term under the previous commitment, but not exceeding the period fixed by the warrant for any subsequent offense, is constitutional; the sentence therein provided for not being void for uncertainty or disproportionate to the offense. People v. Fox, 77 App. Div. [N. Y.] 245.

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offenders may be given into charge of charitable, reformatory or protective institutions.[87] When provision of the mode for discharge is made calling for consent of the committing magistrate, it cannot be dispensed with.[88]

Averments of all the facts essential to the offense as defined will sufficiently charge it,[89] whereupon a verdict of guilty has the usual meaning.[90] An erroneous but not uncertain recital of the name of the act in the commitment is immaterial.[91] A commitment on this charge will not be reviewed on writs of habeas corpus and certiorari, where the magistrate had jurisdiction of the charge and authority to impose the sentence.[92] A person having been found guilty of vagrancy under the Georgia vagrancy act it will be presumed that an opportunity was allowed, or would have been allowed, if asked for, to give bond for future industry and good conduct for one year, before the court passed sentence.[93] In such case, even if sentence was improperly passed, defendant would not be entitled to be discharged upon habeas corpus but should be held in the custody of the sheriff to await proper sentence, in the event no bond was given.[94]

VENDORS AND PURCHASERS.

§ 1. The Contract Generally and Interpretation of It (1976).
§ 2. Title and Incumbrances (1980).
§ 3. Condition, Quantity, and Description of Property (1982).
§ 4. Rights and Liabilities Between Date of Sale and Delivery of Deed (1984).
§ 5. Waiver of Performance or of Defects (1986).
§ 6. Default and Its Effect (1987).
§ 7. Performance of the Contract (1987).
§ 8. Rescission and Reformation (1990).
§ 9. Adjustment of Rights After Conveyance or Rescission of Contract (1992).
§ 10. Enforcement Generally (1994).
§ 11. Vendor's Lien (1996).
A. Implied (1996).
B. Express Lien (1998).

§ 1. *The contract generally and interpretation of it.*—The contract to convey land must not be confused with the contract whereby land is conveyed,[95] and the rights conferred or estates created[96] by such conveyance must be distinguished from those rights which grow out of the contract to convey both before and after its performance or rescission. The contract being one for an interest in lands must be in such writing as is required by the statute of frauds,[97] and so with an agent's authority to sell;[98] but an agent may negotiate a bargain under oral authority unless the contrary be enacted.[99] Statutes relating to "conveyances" do not apply.[1] It must also be borne in mind that the contract to convey is gov-

87. Recorders in the city of New Orleans have authority to enforce the city ordinance relating to juvenile vagrants by committing girl vagrants to the House of Good Shepherd until they shall have reached the age of eighteen years. State v. Marmouget, 111 La. 225.

88. A vagrant committed to the workhouse for the first time is entitled to a discharge, in five days, by order of the commissioner of charities, only with the consent of the committing magistrate. Greater N. Y. Charter, § 710. People v. Warden of City Prison, 37 Misc. [N. Y.] 635.

89. Under Acts 1903, p. 46, an accusation charging that the accused was able to work, and had no property and had no visible or known means of a fair, honest, and reputable livelihood, set forth an offense against the penal laws of the state. Morton v. Nelms, 118 Ga. 786.

90. Means that the accused was guilty of the acts specified in the accusation. Morton v. Nelms, 118 Ga. 786.

91. Recital that she was committed under a certain title and section of the city charter instead of the same section and title of the tenement house act. People v. Fox, 39 Misc. [N. Y.] 591.

92. People v. Fox, 39 Misc. [N. Y.] 591.

93, 94. Coleman v. Nelms, 119 Ga. 307.

95. See Deeds of Conveyance, 1 Curr. Law, p. 908; Mortgages, 2 Curr. Law, p. 905.

96. See Real Property, 2 Curr. Law, p. 1462, and titles dealing with particular estates e. g. Life Estates, Reversions and Remainders, 2 Curr. Law, p. 741.

97. See Frauds, Statute of, 2 Curr. Law, p. 108.

98. Authority to an agent to sell land must be conferred by an instrument in writing when the statute so provides. A series of letters held not to have conferred authority to sell land. Lambert v. Gerner, 142 Cal. 399, 76 Pac. 53.

99. See Frauds, Statute of, 2 Curr. Law, p. 108; Brokers, 1 Curr. Law, p. 360.

1. Contracts to convey land, enforceable in equity under the statute of frauds, do not fall within the statute requiring conveyances of title to real estate or contracts creating or evidencing incumbrances there-

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erned by the rules applicable to all contracts,[2] and that the capacity of parties to take not only involves general contractual capacity[3] but also incapacity growing out of the nature of the subject-matter as being a contract for an interest in lands.[4] The rights of the parties are governed by the law of the situs of the property.[5]

on to be by deed, signed and acknowledged. [Ball. Ann. Codes & St. §§ 4517, 4518]. Anderson v. Wallace Lumber & Mfg. Co., 30 Wash. 147, 70 Pac. 247.

2. See Contracts, 1 Curr. Law, p. 626.

The contract must be mutual: Where one agreed to convey a right of way whenever another should demand it and tender the price, the contract was not mutual. Bauer v. Lumaghi Coal Co. [Ill.] 70 N. E. 634. Where time of performance is optional with the grantee, the contract is not lacking in mutuality. Either party may tender performance within a reasonable time and thereupon a right of action will accrue against the defaulting party. Time when consideration was to be paid. Burnell v. Bradbury, 67 Kan. 762, 74 Pac. 279. A declaration made by a vendor to his agent is not binding on the vendee unless communicated to him. That contracts would have to be signed and money paid by a certain date. Gough v. Loomis [Iowa] 99 N. W. 295.

Signing: A contract for the sale of land may be mutually binding, though signed only by the vendors. Vance v. Newman [Ark.] 80 S. W. 574. A contract reciting that the vendors have sold the premises to the vendee and that the vendee agrees to pay the purchaser money is binding on both parties, though signed only by the vendors and accepted by the vendee. Forthman v. Deters, 206 Ill. 159, 69 N. E. 97. The plaintiff agreed to sell land to A, B, C and D. The contract was reduced to writing and signed by the plaintiff and A, B and C, but D refused to sign it. Held no contract between the plaintiff and A, B, C and D, since it had not been fully executed. Knickerbocker v. Robinson, 83 App. Div. [N. Y.] 614.

There must be a consideration: Where the circumstances showed there was no intention to donate lands deeded, the grantee must pay therefor or surrender the conveyance. George Cheap & Son v. Jackson, 25 Ky. L. R. 55, 74 S. W. 692. A promise to pay a certain sum as purchase price is a sufficient consideration for a contract to convey. Rodman v. Robinson [N. C.] 47 S. E. 19.

Legality: A contract to convey land entered into on Sunday is not invalid as against public policy. Rodman v. Robinson [N. C.] 47 S. E. 19. Nor, if it is not an act done as a part of a usual business, is it contrary to a statute prohibiting labor, work or business of one's ordinary calling on Sunday [Code N. C. § 3782]. Id.

Offer and acceptance: An offer to sell or buy must be unconditionally accepted. An agreement to accept at the price offered, vendor to furnish an unlimited certificate of title from a title insurance company, is not such an unconditional acceptance as is required to constitute a contract. Lambert v. Gerner, 142 Cal. 399, 76 Pac. 53. A letter in which a vendee offered a certain price, to be paid at a certain time, under certain conditions, on the back of which the vendor wrote "accepted subject to a lease" and signed his name, taken in connection with subsequent conduct of the parties, submitting abstracts, formal contracts, etc., constituted a binding contract. Gough v. Loomis [Iowa] 99 N. W. 295. Where an offer to sell land was accepted by the purchaser's attorney, it was valid against the seller, though the attorney had not been authorized in writing. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414. In an action for damages for failure to convey land, it appeared from the correspondence that the owner had never definitely promised to convey, but had said he could not give a clear title but was willing to do what the other owners along a proposed railway line did. The contract was held too indefinite. Abbott v. Kline, 33 Wash. 686, 74 Pac. 1014.

Whether entire or severable: A contract between a vendee and three vendors owning separate tracts of land, construed as a severable contract. Watkins v. Youll [Neb.] 96 N. W. 1042. A contract to convey an interest in a firm and a homestead entry on which final proof had not been made construed as an entire contract and unenforceable in toto. Horseman v. Horseman, 43 Or. 83, 72 Pac. 698.

Oral preliminary arrangements are merged in a subsequent written contract. After an oral agreement for sale of a lot and giving a receipt for first payment showing terms of sale, and vendees went into possession but the vendor refused a deed on account of certain unadjusted matters, and a formal contract was drawn up adjusting such matters, their rights under the former negotiations were merged and ejectment could not be maintained against the purchasers until they failed to perform its terms. Hutchinson v. Coonley [Ill.] 70 N. E. 686.

3. See Infants, 2 Curr. Law, p. 392; Insane Persons, 2 Curr. Law, p. 454; Husband and Wife, 2 Curr. Law, p. 246, etc.

4. See Aliens, 1 Curr. Law, p. 67; Corporations, 1 Curr. Law, p. 710; Partnership, 2 Curr. Law, p. 1106, and the like.

A contract between husband and wife that they should execute papers so that property owned in fee by him should be exclusively his and property owned in fee by her should be exclusively hers is void under Oregon statute, because it is relative to dower and curtesy. Potter v. Potter, 43 Or. 149, 72 Pac. 702.

The possession of land by the filer of a homestead thereon and improvements made by him are valuable rights which may legally be conveyed. Holloway v. Miller [Miss.] 36 So. 531.

Where a contract to convey the homestead was signed only by the husband, and a deed was signed by husband and wife but acknowledged before a notary disqualified by interest, the contract to convey was not enforceable. Watkins v. Youll [Neb.] 96 N. W. 1042.

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Existence of the contract is for the jury,[6] if the evidence is sufficient[7] to support a finding.

No time of performance need be stipulated.[8] An immaterial alteration extending time does not avoid the contract.[9] The purchase price[10] must be fixed,[11] but may be shown by parol when the contract fails to state it.[12]

Whether the contract is one to convey land,[13] or one of a different nature,[14] as a conveyance[15] or a mere receipt,[16] depends on the legal effect of the instrument as made, illustrating which are the cases cited.

5. Oral contract good though made in South Dakota where required to be in writing, of lands in Iowa where not so required. Meylink v. Rhea [Iowa] 98 N. W. 779.

6. Alexander v. Von Koehung [Tex. Civ. App.] 77 S. W. 629.

7. Conflicting declaration by a father that, in consideration of his support by his daughter, he intended to give her certain real estate, is not sufficient to establish a parol agreement to convey, especially since the conduct of the parties thereafter was inconsistent with the existence of such a contract. Truman v. Raybuck, 207 Pa. 357. Correspondence held to show that the minds of the parties met on all the essential terms of the contract and to constitute a valid contract of sale. Gates v. Dudgeon, 173 N. Y. 426, 66 N. E. 116. An offer to buy and an unconditional acceptance thereof constitute a valid contract of sale. Phila. M. & T. Co. v. Hardesty [Kan.] 75 Pac. 1115. A letter, in which defendant, in response to an offer for his farm, stated, "I will sell for that price if it is not already sold. Call me up by 'phone and we will talk the matter over," held not to be a contract to sell and convey the land. Mathes v. Bell, 121 Iowa, 722, 96 N. W. 1093. Evidence held sufficient to show existence of contract. Brown v. Silver [Neb.] 96 N. W. 281.

8. Leis v. Sinclair, 67 Kan. 748, 74 Pac. 261.

9. Indorsement extending time of payment one week held not a material alteration of the contract, sufficient to avoid it, tender of payment having been in fact made in three days and before vendor was ready to perform. Johnson v. Weber [Neb.] 97 N. W. 585.

10. An executory contract for the sale of land, providing for the payment of $400 annually during the life of the vendor, and that, if he died within two years after the making of the contract, the vendee should pay $800 for the farm in four annual payments, construed, and held that the $400 payment was an annuity, and that, upon the death of the vendor within the time specified, the vendee was thereafter required to pay $800 in four annual instalments. Carpenter v. Hewitt, 42 Misc. [N. Y.] 260.

11. Arbitrators appointed to determine price failed to agree. Louis Werner Sawmill Co. v. O'Shee, 111 La. 817. An option to purchase at a price not to exceed $3,000.00 is not fatally ambiguous as to the purchase price. Heyward v. Willmarth, 87 App. Div. [N. Y.] 125.

12. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227.

13. A contract construed as a contract for future conveyance within Laws Minn. 1897, p. 431, c. 223, so that vendee's rights could be terminated only by the notice required by that statute. Lamprey v. St. Paul & C. R. Co., 89 Minn. 187, 94 N. W. 555. A contract by which one agreed to pay ten dollars an acre for land, if within 30 days the vendor furnished a good title and obligating a conveyance to any one whom the purchaser might name, is a contract for sale. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227. A writing purporting to be an express contract to convey land cannot be construed as a mere option. Anderson v. Wallace Lumber & Mfg. Co., 30 Wash. 147, 70 Pac. 247. A bond reciting the purchase of a lot, payment of a certain amount thereon, future payments to be made by parties named and that such payments being made, the lot is to be deeded, is a binding contract of sale and not a mere option. Vance v. Newman [Ark.] 80 S. W. 574.

14. Defendant agreed with three others in consideration of supplies and expenses in Alaska for a year to give them a half interest in the mines he then possessed. Held a contract of bargain and sale and not a partnership agreement or grub-stake contract, and gave no right to the three in mines subsequently owned by him. Roberts v. Date [C. C. A.] 123 Fed. 238. A note containing a stipulation on the back that it is not payable until a deed of certain land is made held not to show of itself an agreement to convey. Enlow Cattle Co. v. Gannow [Neb.] 94 N. W. 978. Where a boat captain had lived with a party on and off for 20 years, evidence held sufficient to show an agreement to devise them a house and lot. Winfield v. Bowen [N. J. Eq.] 56 Atl. 728.

15. See Deeds of Conveyance, 1 Curr. Law, p. 908. Instrument held to be an executed contract of sale or conveyance and not a mere bond for title. Yeary v. Crenshaw, 30 Tex. Civ. App. 399, 70 S. W. 579. A bond with a condition that the obligor has "sold, assigned and conveyed" land to the grantee held to pass the legal title. Roundtree v. Thompson, 30 Tex. Civ. App. 595, 71 S. W. 574; Id., 72 S. W. 69. Plaintiff delivered to defendant a deed absolute on its face, but in fact a mortgage, the consideration being stated as $40,000, with an option in the defendant to buy within a year. Defendant exercised the option and plaintiff wrote defendant that he released the land. In an action for the price, held there had been no grant of the property to defendant for which he was liable to pay, the title still remaining in the plaintiff. Reich v. Dyer, 91 App. Div. [N. Y.] 240. Facts held to show relation of mortgagor and mortgagee. English v. Rainear [N. J. Eq.] 55 Atl. 41. Evidence held to show a sale with a right to repurchase and not a mortgage. Martin v. Allen, 67 Kan. 758, 74 Pac. 249.

16. A mere receipt reciting that the per-

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Option to purchase.—Closely related to the contract to convey is the contract giving an option to purchase, which is a mere privilege depending upon election,[17] and is not in any sense a binding contract until acceptance,[18] according to its terms,[19] within the time limited therein,[20] before which time it may be revoked unless given for a valuable consideration.[21]

Failure to comply with a statutory requirement that a license be procured held not to avoid the contract.[22]

Assumption of incumbrances is sometimes promised. Where the purchaser is bound to pay off incumbrances, he is not entitled to possession until such payment is made,[23] but he does not assume any personal liability,[24] though he is liable to the vendor who is compelled to pay it.[25] An agreement guarantying that the incumbrance will be extended is indefinite where the time of extension is not stipulated,[26] and a mere attempt to secure such extension is not a compliance with the stipulation,[27] and on vendor's failure to obtain extension, the purchaser may do so. The vendor is liable for any excess of interest or charges for the use of the money over the amount stipulated in the agreement.[28]

An agreement to devise property is valid,[29] and if the promisor conveys the

son signing it has sold land for a certain amount is not a contract. Fisher v. Buchanan [Neb.] 96 N. W. 339.

17. Hopwood v. McCausland, 120 Iowa, 218, 94 N. W. 469. Writing construed as an option and not a contract. Id.; Louisville & N. R. Co. v. Gulf of Mexico Land & Imp. Co. [Miss.] 33 So. 845; Lawrence v. Pederson [Wash.] 74 Pac. 1011. Writing construed as a contract and not a mere option. Murray v. Nickerson, 90 Minn. 197, 95 N. W. 898; Wilson v. Clark [Tex. Civ. App.] 79 S. W. 649.

18. Carter v. Love, 206 Ill. 310, 69 N. E. 85. An option is a right of election in the party receiving it to exercise a privilege and only when that privilege has been exercised by acceptance does it become a contract to sell. Hopwood v. McCausland, 120 Iowa, 218, 94 N. W. 469. See note ante this section "Offer and Acceptance."

19. Dunn v. Dunn [Mich.] 93 N. W. 1072; Stearns v. Clapp [S. D.] 94 N. W. 430; Mueller v. Nortmann, 116 Wis. 468, 93 N. W. 538. An offer to sell which is rejected and a counter-offer made cannot afterward be accepted without the seller's consent. Niles v. Hancock, 140 Cal. 157, 73 Pac. 840. An offer to buy or sell real estate cannot be accepted by mailing a letter unless the offer is made by letter; but it may be accepted by actual delivery of acceptance. Scottish-American Mortg. Co. v. Davis, 96 Tex. 504, 74 S. W. 17. Offer to sell on condition that check in part payment should accompany acceptance is not accepted without the check. Pond-Decker Lumber Co. v. Wilson [Ark.] 74 S. W. 295. Offer to sell for $850 net is not accepted by an acceptance with the additional words "Send deed for collection to bank with abstract showing clear title." Richards Trust Co. v. Beach [S. D.] 97 N. W. 358. Evidence held to show no acceptance of offer. Boyd v. Woodbury County [Iowa] 98 N. W. 274. Counter offer. Hinish v. Oliver, 66 Kan. 282, 71 Pac. 520.

20. Mueller v. Nortmann, 116 Wis. 468, 93 N. W. 538. It may be accepted after the death of one who gives it. Id. A lessee held entitled to exercise an option to purchase after the lessor had sold to another. The lease by its terms was made binding on assigns. The buyer took a quitclaim and had notice of lease. Sizer v. Clark, 116 Wis. 534, 93 N. W. 539.

21. Tibbs v. Zirkle [W. Va.] 46 S. E. 701; Stigler v. Jaap [Miss.] 35 So. 948; Carter v. Love, 206 Ill. 310, 69 N. E. 85.

22. A statute requiring a real estate broker to take out a license under a penalty for not complying therewith held not to make a contract entered into by him for his principal absolutely void. Ober v. Stephens [W. Va.] 46 S. E. 195. See Licenses, 2 Curr. Law, p. 730, for discussion of the general principle involved. Star Brewery of Chicago v. United Breweries Co. [C. C. A.] 121 Fed. 713.

23. The price was fixed with reference to the incumbrances and provided for payment of an additional sum equal to the amount of the incumbrances in case the property remained incumbered at the time of the conveyance. Star Brewery v. United Breweries Co. [C. C. A.] 121 Fed. 713.

24. Lexington Bank v. Salling [Neb.] 92 N. W. 318.

25. Kirker v. Wylie, 207 Pa. 511.

26. But such defect held to have been cured by the subsequent action of the parties in recognizing and ratifying it. Leis v. Sinclair, 67 Kan. 748, 74 Pac. 261.

27. An attempt to obtain an extension of a mortgage from one having authority to extend and an offer to purchase and obtain an assignment of the debt from an owner who was unwilling to sell and transfer it, held not a compliance with an agreement guarantying an extension of the mortgage. Leis v. Sinclair, 67 Kan. 748, 74 Pac. 261.

28. Leis v. Sinclair, 67 Kan. 748, 74 Pac. 261.

29. Teske v. Dittberner [Neb.] 98 N. W. 57. A promise that the promisee shall receive the property at the death of the promisor is sufficient. The agreement need not be in express terms to make a will. Id.

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property in fraud of the promisee, an immediate action to cancel the conveyance arises.[30]

§ 2. *Title and incumbrances.*—Unless the contract otherwise provides, a purchaser is entitled to receive a "marketable title,"[31] and though the courts sometimes hold that purchaser is entitled to good title it does not appear that any less title than a "marketable" one is intended thereby.[32] A marketable title is a good title free from reasonable doubt,[33] or as it is sometimes stated one that is not "fairly debatable."[34] Where the doubt as to the vendor's title arises from ascertaining the construction of some ill-expressed instrument, the title is not marketable,[35] but a mere mistake of fact on part of the purchaser does not make title unmarketable.[36] Where it has once been judicially determined that the defect complained of does not constitute a cloud or the defect has been cured, the title is marketable,[37] or where the defect has existed for a long term of years without objection,[38] or where a possible claimant has been missing so long as to raise the presumption of death.[39]

30. Teske v. Dittberner [Neb.] 98 N. W. 57.

31. Felix v. Devlin, 90 App. Div. [N. Y.] 103; Roberts & Corley v. McFaddin, Weiss & Kyle [Tex. Civ. App.] 74 S. W. 105. Evidence held to show title marketable. Young v. Hervey, 207 Pa. 396. A vendor contracting to give good title or warranty deed must produce and tender a marketable title, free from incumbrances and unclouded unless an intention to transfer subject to defects be shown. Glassman v. Condon [Utah] 76 Pac. 343. There is an implied condition that the title shall be perfect. Wilson v. Clark [Tex. Civ. App.] 79 S. W. 649.

Inability to make title is **not a breach if the parties knew the facts** and understood that approval of the record owner was to be had. Where the husband contracted to sell land the record title to which was in the wife, the vendee, having knowledge of the facts, and there being an understanding that the contract was subject to the wife's approval, could not recover damages for the wife's failure to approve, or set up that the conveyance to the wife was in fraud of the husband's creditors or of subsequent purchasers. Saunders v. King, 119 Iowa, 291, 93 N. W. 272.

32. In an executory contract for the sale of land, in the absence of anything therein to the contrary, there is always implied the right to receive a good title, free from defects and incumbrances. Turner v. Walker, 40 Misc. [N. Y.] 379.

33. Felix v. Devlin, 90 App. Div. [N. Y.] 103; Young v. Hervey, 207 Pa. 396. It is not enough that the objections raise a remote suspicion against the title. The objections must be grave and reasonable, for few titles can be established with mathematical certainty. Hollifield v. Landrum, 31 Tex. Civ. App. 187, 71 S. W. 979.

34. Specific performances will not be enforced where the vendor's title is fairly debatable. Zane v. Weintz [N. J. Eq.] 55 Atl. 641.

35. Zane v. Weintz [N. J. Eq.] 55 Atl. 641; Richards v. Knight, 64 N. J. Eq. 196.

36. A vendee cannot refuse to take the land if his refusal is based upon a mistake of a fact in the condition of the title. Hoffman v. Colgan, 25 Ky. L. R. 98, 74 S. W. 724.

37. Where a mutual mistake in a conveyance has been corrected by a court of equity. Kendall v. Crawford, 25 Ky. L. R. 1224, 77 S. W. 364. Where there are outstanding leases, if in a previous action there was a decree that the lessee who had not appeared in the action should be barred. Dresser v. Travis, 177 N. Y. 376, 69 N. E. 736. Vendee cannot have an action for rescission if a defect in title to which he objects has been cured before trial. Mock v. Chalstrom, 121 Iowa, 411, 96 N. W. 909. Where petition for the appointment of a guardian for an infant defendant was verified before a disqualified notary, and the defect was cured by an affidavit in proceedings to correct the error. Baumeister v. Demuth, 84 App. Div. [N. Y.] 394. Plaintiff agreed to sell to defendant realty which had been pledged by plaintiff's predecessor by deed of trust to secure certain notes. The deed did not appear satisfied of record. Plaintiff agreed by his contract of sale to remedy defects of title. Later he gave defendant a warranty deed and thereafter entered into a written agreement with him providing that one of the notes given for the purchase price should be held by a third person until the notes secured by the deed of trust were produced and such person was satisfied that they had been paid and the deed of trust released. The notes could not be found and the heirs of the beneficiary in the trust deed quitclaimed the premises. Held that the purpose of the contract was only to protect defendant against the possible defect in his title, and hence, though unable to produce the note, plaintiff was entitled to receive the purchase money note, on a decree declaring the trust deed satisfied. Meyer v. Christopher, 176 Mo. 580, 75 S. W. 750.

38. Levy v. Hill, 174 N. Y. 536, 66 N. E. 1112. The vendee cannot object to a defective execution of a power of sale in the chain of title if no objection has been raised against it for 40 years. Binzen v. Epstein, 172 N. Y. 596, 64 N. E. 1118. A mortgage was assigned to A and recorded but no assignment by A was recorded. The original mortgagee assigned to B who assigned to C. B bought at foreclosure sale. 23 years thereafter one claiming under B was allowed specific performance of a contract to purchase. Barger v. Gery, 64 N. J. Eq. 263. Where in partition proceedings 70 years old it did

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Title depending upon adverse possession is marketable.[40] Building restrictions destroy marketability.[41] Title which may be divested is not marketable.[42] Outstanding claims though in fact void,[43] defective judicial proceedings,[44] failure to prove foreign will properly executed,[45] and defective acknowledgments, render the title unmarketable.[46] Encroachment of a building on an adjoining lot renders the title unmarketable,[47] but a projection into a street has been held not to affect the title.[48] Vendor need not have title at date of contract.[49]

The burden is on the purchaser to show title unmarketable, when he seeks to recover the purchase price,[50] but the vendor seeking specific performance must affirmatively show good title.[51]

The property must be free from incumbrance.[52]

Particular agreements.[53]—An agreement "to give a clear abstract of title"

not appear whether or not deceased left a widow, parent, or children. Hagan v. Drucker, 90 App. Div. [N. Y.] 28.

39. In an action for breach of a contract to convey land it appeared that the deed would not pass the interest of one X unless he was dead in 1890. He disappeared in 1879 and was never heard of again. Held there was a presumption of his death in 1886 by seven years' absence, and the buyer had shown no breach of the contract. Meyer v. Madreperla, 68 N. J. Law, 258.

40. Freedman v. Oppenheim, 80 App. Div. [N. Y.] 487; Hamerschlag v. Duryea, 172 N. Y. 622, 65 N. E. 1117. But proof of uninterrupted possession for 30 years is not enough to show a marketable title by adverse possession. Fuhr v. Cronin, 82 App. Div. [N. Y.] 210. "Good title" includes one depending on adverse possession. Hollifield v. Landrum, 31 Tex. Civ. App. 187, 71 S. W. 979.

41. Roussel v. Lux, 39 Misc. [N. Y.] 508. A contract between adjoining landowners expressly agreed to run with the land by which the depth of foundations on the dividing line is limited, and it is agreed that if either party goes lower he shall protect the wall of the other, is a cloud, justifying the vendee in refusing to take a deed. Leinhardt v. Kalchheim, 39 Misc. [N. Y.] 308.

42. Conveyance in the lifetime of devisee for life from a child passing a vested estate under 1 Gen. St. p. 1195, but subject to be divested by the death of such child leaving issue in the lifetime of the devisee for life. Lamphrey v. Whitehead, 64 N. J. Eq. 408. Doubt as to whether, on account of disability, the statute of limitations has run against a possible claimant. Baumeister v. Silver [Md.] 56 Atl. 825.

43. Oil lease. Roberts & Corley v. McFaddin, Weiss & Kyle [Tex. Civ. App.] 74 S. W. 105.

44. Irregularity in guardian ad litem proceedings. Baumeister v. Demuth, 40 Misc. [N. Y.] 22.

45. Attested record of foreign will which fails to show execution of a will according to the law of this state. Meiggs v. Hoagland, 41 Misc. [N. Y.] 4.

46. Of a power of attorney. Freedman v. Oppenheim, 80 App. Div. [N. Y.] 487.

47. And see Elinsky v. Berger, 87 App. Div. [N. Y.] 584. The immateriality of the encroachment does not change the rule. Snow v. Monk, 81 App. Div. [N. Y.] 206.

48. The fact that the stoop of a building projects several feet beyond the lot and into the street is not a defect entitling the vendee to refuse a deed or recover back the purchase money. The projection is not necessarily unlawful and the question can only arise between the municipal authorities and the owner of the building. In this case the encroachment had existed for over thirty years without objection. Levy v. Hill, 174 N. Y. 536, 66 N. E. 1112.

49. Coleridge Creamery Co. v. Jenkins [Neb.] 92 N. W. 123. The contract will generally be upheld if made in good faith and the vendor has such an interest in the land or is so situated with reference thereto that he can carry into effect the agreement at the time fixed for performance. Provident Loan Trust Co. v. McIntosh [Kan.] 75 Pac. 498. Specific performance will not be denied to the vendor if he can give a good title even if he had no title at the time the contract was made. Vendor had a parol gift of land from his father and subsequently obtained a conveyance (Hollifield v. Landrum, 31 Tex. Civ. App. 187, 71 S. W. 979), provided there has been no change in the position of the parties making performance inequitable (Baumeister v. Demuth, 84 App. Div. [N. Y.] 394).

50. Braun v. Vollmer, 89 App. Div. [N. Y.] 43.

51. McAllister v. Harman, 101 Va. 17.

52. **What is an incumbrance:** An easement of light. Denman v. Mentz, 63 N. J. Eq. 613. Right of way and right of entry. Turner v. Walker, 40 Misc. [N. Y.] 379. In an action for the purchase price it appeared that there was in the chain of title a condition that no saloon should be maintained on the premises on penalty of reverting. Held that this was not a breach of the implied covenant against incumbrances in the absence of an eviction or disturbance suffered by the vendee. Thurgood v. Spring, 139 Cal. 596, 73 Pac. 456. The unauthorized act of the vendor's agent in renting the land sold is no defense in a suit for specific performance by the vendor. Hames v. Swanzey [Iowa] 98 N. W. 586.

53. **Construction of particular agreements:** An agreement withdrawing from the sale any portion to which title cannot be perfected within a year binds the vendor to use reasonable efforts to clear the title. He cannot bring suit to set aside tax sales instead of redeeming them with money furnished by the vendee, especially as such suit would probably last beyond the year. Sykes v. Robbins [C. C. A.] 125 Fed. 433. An agreement to sell for $7,000 "net," "free of all

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or a "perfect title" is not fulfilled by giving a title depending on adverse possession,[54] nor by tender of a deed subject to encumbrances,[55] but only by conveyance of the fee.[56] Specific defects in the title need not be pointed out,[57] but a marketable title has been held sufficient after part performance.[58] Contracts to convey "by good warranty deed" do not require the release of dower,[59] but a mortgage is an incumbrance releasing the purchaser.[60]

A conveyance showing that the grantee acquired his grantor's rights under a contract of sale of all the right, title, and interest of such grantor, shows prima facie that the grantee took only such title as the grantor had.[61]

§ 3. *Condition, quantity, and description of property.*—Where there is no special duty to make full disclosure and no fraud, the rule of caveat emptor applies,[62] nor need the purchaser disclose matters which might affect the sale.[63]

commissions, taxes and all other charges," is an agreement to sell for that amount subject to the existing lien of a special assessment. Gibbs v. People's Nat. Bank, 108 Ill. 307, 64 N. E. 1060. Where one contracted to sell "all his right, title, and interest," a subsequent clause to the effect that on payment of a certain sum he would execute a warranty deed of the premises, could not be construed to enlarge the agreement. Henderson v. Beatty [Iowa] 99 N. W. 716. Where a contract called for a title free from incumbrances within a specified time during which the purchasers knew of certain park restrictions and were satisfied to take subject thereto, the existence of such restrictions did not put the vendor in the wrong in an action for damages for breach of the contract. They must show a refusal to convey subject to the restrictions. Marcus v. Clark [Mass.] 70 N. E. 433. A contract called for a title free from incumbrances. The purchasers sued for damages because the vendor had placed park restrictions on the property. The vendor introduced evidence that the purchaser had asked for an extension because of difficulty in obtaining the purchase money. Held, that it was proper to exclude evidence in rebuttal showing that the real purpose in asking for the extension was to see if they could handle the property with the restrictions. Id. A contract for the sale of land by heirs of the former owner in which they agreed to give a "good deed free from all incumbrances" imposed upon them the obligation of exonerating the land from payment of claims allowed against the estate of the ancestor. Forthman v. Deters, 206 Ill. 159, 69 N. E. 97. Where a contract provided for a title clear of incumbrances except a certain mortgage and the abstract showed an additional mortgage and a cloud on title to part of the property, it justified a refusal to comply with the contract. Tryce v. Dittus, 199 Ill. 189, 65 N. E. 220. Where vendee agreed to assume $250 of a $1,000 mortgage, the vendor to furnish a warranty deed "subject to a mortgage of $250," he was not obliged to accept a deed subject to an outstanding mortgage of $1,000. Glassman v. Condon [Utah] 76 Pac. 343. A contract provided for a title free from incumbrances and the purchasers sued for damages on the ground that prior to the contract the vendor had put park restrictions on the land. Held, though the suit was for the benefit of an assignee of the contract, evidence that the purchasers had asked for an extension of the time limit was admissible where the vendor had no notice of the assignment. Marcus v. Clark [Mass.] 70 N. E. 433.

54. Bruce v. Wolfe, 102 Mo. App. 384, 76 S. W. 723; Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851. Rescission refused to vendee where part of the land was adjudged the property of a third party, the vendee knowing that the title to a portion was in dispute, and the contract providing that the price should be reduced pro rata if adverse claims were established to any portion. Smith v. Detroit & D. Gold Min. Co. [S. D.] 97 N. W. 17.

55. Tryce v. Dittus, 199 Ill. 189, 65 N. E. 220.

56. Where one contracted to sell his interest in premises, but a subsequent clause of the contract stipulated that the purchase price should be paid on presentation of an abstract showing a good and perfect title, the contract requires the conveyance of a fee. Henderson v. Beatty [Iowa] 99 N. W. 716.

57. Where the agreement provides for an "abstract showing perfect title," the vendee need not point out specifically defects in title, in order to insist on a breach of the agreement. Lessenich v. Sellers, 119 Iowa, 314, 93 N. W. 348.

58. Where the conveyance is not the whole consideration, a merchantable title is a substantial compliance with a contract calling for a perfect title, especially where the vendor has performed by erecting a factory. McCleary v. Chipman [Ind. App.] 68 N. E. 320.

59. A contract to convey by good warranty deed does not compel the vendor to give a deed with a release of dower, unless there is a covenant against incumbrances. Peoples' Sav. Bank Co. v. Parisette, 68 Ohio St. 450, 67 N. E. 896.

60. In an action for damages for the breach of an agreement to exchange real estate, the existence of a mortgage on plaintiff's property is a defense, whether the agreement was for a warranty deed or the defendant represented the estate free from encumbrances. Godfrey v. Rosenthal [S. D.] 97 N. W. 365.

61. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863. Where the contract was for "all one's right, title, and interest," it was a contract for such interest as the vendor had and not for any particular estate or fee simple. Henderson v. Beatty [Iowa] 99 N. W. 716.

62. Purchase of oil well. Bailey v. Gib-

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Quantity.[64]—The amount may be ascertainable by election of the vendee or by such resales as he may make.[65] When the sale is not at a specified rate per acre, but for a specified tract, the vendee is entitled to the quantity within the designated boundaries without reference to the quantity described.[66] Where a certain price is fixed per acre, the area of highways in the described tract is included.[67] An agreement to convey land fronting on a public highway includes the vendor's title to the center of the highway unless a contrary intention plainly appears.[68]

Description.[69]—The description is construed liberally,[70] but it must be sufficient to identify the land.[71] Parol evidence is admissible to render the description certain,[72] or show the true acreage.[73] The uncertainty of description in an infor-

son, 20 Pa. Super. St. 429; Trenchard v. Kell, 127 Fed. 596. Vendor owes no duty to inform vendee that he had previously concluded to sell for a lower price. Morrow v. Moore [Me.] 57 Atl. 81. One who purchased a lot relying on a newspaper advertisement authorized by the owner which falsely stated the frontage to be 54 feet greater than it was and 100 feet deeper, could not be compelled to perform. McIntyre v. Harrington, 87 N. Y. Supp. 1028.

63. The vendee need not disclose the value of the land. Pratt Land & Imp. Co. v. McClain, 135 Ala. 452. The holder of an option is not bound to inform the vendor of matters which will increase the value of the property. Guaranty S. D. & T. Co. v. Liebold, 207 Pa. 399. Where an agent accepts an option in his own name and assigns it to his principal, it is not fraud on the vendor not to disclose that he is acting for a principal or what use is to be made of the land. Standard Steel Car Co. v. Stamm, 207 Pa. 419.

64. See, also, Boundaries, 1 Curr. Law, p. 346. Apportionment for deficiency, see post, § 9.

65. **Contract construed:** Vendee held not to have obligated itself to purchase the whole tract of land, but was to take no more than it could sell to third parties, unless it elected to do so and performed to that end. Title Guarantee & Trust Co. v. McDonnell, 32 Wash. 418, 73 Pac. 484.

66. Sale of 234 acres of the east half of a section, described by metes and bounds. This was 46 acres more than that described by metes and bounds. Pearson v. Heard, 135 Ala. 348. Agreement to sell which did not mention the number of acres contained in the property construed and held to provide for a sale per aversionem. A sale is perfected between the parties on the signing of the agreement under La. Rev. Civ. Code, art. 2456). Teal v. McKnight, 110 La. 256.

67. The most that the vendee could claim would be a reduction of the consideration by reason of the encumbrance of the highway. Beach v. Hudson River Land Co. [N. J. Eq.] 56 Atl. 157.

68. Pittsburg V. & C. R. Co. v. Fischer F. & M. Co. [Pa.] 57 Atl. 191.

69. See Boundaries, 1 Curr. Law, p. 346, for the rules determining which one of conflicting descriptions is to be followed.

70. Contract dated Indianapolis, Mar. 15, and land described as "Lot 30 Douglas Park." Held the description sufficiently certain. Maris v. Masters, 31 Ind. App. 235, 67 N. E. 699.

71. Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851. Description held too indefinite to be specifically enforced. Bauer v. Lumaghi Coal Co. [Ill.] 70 N. E. 634. Four acres of land * * * out of the Williams League beginning 129.72 varas north from a point where the south line of the Vercher 100 acre tract intersects the west line of the Langham survey is insufficient. Commack v. Prather [Tex. Civ. App.] 74 S. W. 354. "A tract of land known as the 'Triangle' or 'Cut off Pasture' now occupied by Booth," held a sufficient description. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227. Where land was described as belonging to A when in fact it belonged to B such description may be discarded as immaterial. Tobin v. Larkin, 183 Mass. 389, 67 N. E. 340. Where land agreed to be conveyed is to be selected by the vendee, the description offered by him is sufficient if the surveyor can locate the land. Ehrich v. Durkee [Colo. App.] 72 Pac. 814.

Description in other agreements: An agreement to convey a lot 125 feet deep is not satisfied by tendering a deed of a lot 115 feet deep with the remaining 10 feet included within a street as laid out according to a map filed by the commissioner of streets though that part was never actually laid out as a street. Ring v. Palmer, 83 App. Div. [N. Y.] 67. Vendor gave a bond to convey all that he owned of a certain strip of land referring to the records for description, "said to be 175 by 3,000 feet." Held, he was bound to convey only what he owned. Sumpter Gold Min. Co. v. Browder, 31 Colo. 269, 73 Pac. 38. A deed of a sugar plantation "with all the buildings and appurtenances thereof," with a later clause that the appurtenances included are mentioned in a schedule made a part of the deed, passes only those in the schedule, except fences which pass anyway with the land. Bagley v. Rose Hill Sugar Co., 111 La. 249. Where the vendee buys relying on plats showed him by the vendor describing the lot as bounded by natural environments, he is justified in assuming that the plat is correct and is not bound by the survey as actually laid out. Otherwise in city lots. Carlyle v. Sloan [Or.] 75 Pac. 217. Where a vendee buys land according to a plan showing proposed streets, he has a right of way over the portion described as streets to reach the public ways, when the vendor retains title to such portion. Drew v. Wiswell, 183 Mass. 554, 67 N. E. 666; Mann v. Bergmann, 203 Ill. 406, 67 N. E. 814. See, also, Easements, 1 Curr. Law, p. 962.

72. A lease gave an option to the lessee to purchase the premises "and the land of the lessor adjoining on the east" extrinsic evidence showing the unity of the entire tract rendered the description certain and

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mal contract is cured by a signing of a formal contract by the party to be charged.[74] The vendor is bound by the description written except for mistake or fraud.[75] The vendee may select land granted out of a larger tract but not set off;[76] but he need not have the land surveyed.[77]

§ 4. *Rights and liabilities between date of sale and delivery of deed.*—Under an executory contract to sell, the legal title remains in the vendor subject to the vendee's equities.[78]

If the vendee is not in possession or the vendor has not complied with all the conditions of the contract, title has not passed.[79] The law of the state in which real estate is situated governs in transfers as to when title passes.[80]

The vendor is liable for the taxes[81] and has an insurable interest in the buildings,[82] and mechanics' liens attach notwithstanding agreement to the contrary between vendor and purchaser.[83] A vendee in possession under an executory contract to sell is the equitable owner,[84] and his equity is superior to the vendor's.[85] His interest may be sold or mortgaged,[86] or leased,[87] and may be taken on execu-

was admissible. Heyward v. Willmarth, 87 App. Div. [N. Y.] 125.

73. Evidence from both parties is admissible to show the true acreage. Warden v. Tesla, 87 N. Y. Supp. 853.

74. Gough v. Loomis [Iowa] 99 N. W. 295.

75. Vendor is presumed to know description contained in contract. Cammack v. Prather [Tex. Civ. App.] 74 S. W. 354.

76. McCarty v. May [Tex. Civ. App.] 74 S. W. 804. The several contracts between vendees of lots and the vendor, by which each vendee was to select his lot in such manner as the majority should decide, and all relating to the same subject-matter construed as one contract. Morey v. Clopton [Mo. App.] 77 S. W. 467.

77. A receipt executed by an owner of land reciting that he had received a specified sum as earnest money on the purchase of certain land from him, and setting forth the price per acre and terms of payment, and stipulating for the execution of the deed and for the return of the money on the title proving unsatisfactory, does not require the purchaser to have the land surveyed. Wilson v. Clark [Tex. Civ. App.] 79 S. W. 649.

78. Olson v. Brooks-Scanlon Lumber Co., 89 Minn. 280, 94 N. W. 871; Smith v. Gordon, 136 Ala. 495. Conveys merely equitable title. Lee v. Wysong [C. C. A.] 128 Fed. 823. A woman can have no dower in land which her husband held under an executory contract to convey. Schaefer v. Purviance, 160 Ind. 63, 66 N. E. 154. A contract for the sale of land title to pass to vendee on fulfillment of certain conditions passes only the equitable title. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863.

79. A contract for the exchange of property provided that abstracts should be furnished. One party had deposited a deed in the bank stipulated, but the other party had not, completed his abstract nor paid taxes nor furnished a bill of sale of personal property as required when the hotel which was to be conveyed burned. The loss fell on the original owner. Bowdle v. Jencks [S. D.] 99 N. W. 98. In a suit to cancel a deed, where it was claimed that title had not passed because conditions were not complied with, but that the vendees had wrongfully taken it from the bank where it was deposited, evidence of the judgment roll in an action of replevin by the vendees to recover it was inadmissible. Id.

80. Evidence held to show that title to hotel property had not passed under Iowa law at the time it was burned. Bowdle v. Jencks [S. D.] 99 N. W. 98.

81. He is the owner within the meaning of a statute assessing taxes to the owner. Nunngesser v. Hart [Iowa] 98 N. W. 505.

82. He may insure a house erected by the vendee and the vendee has no interest in the amount paid the vendor by the insurance company. White v. Gilman, 138 Cal. 375, 71 Pac. 436. See, also, Dankwardt v. Prussian Nat. Ins. Co. [Iowa] 98 N. W. 603.

83. A mechanic's lien attaches to the land even though it is agreed between the vendor and a conditional vendee that improvements must be made at the cost of the vendee and that the vendor shall not be liable for labor or materials, unless notice is given. Ah Louis v. Harwood, 140 Cal. 500, 74 Pac. 41.

84. Hook v. N. W. Thresher Co. [Minn.] 98 N. W. 463; Daniel v. Garner [Ark.] 76 S. W. 1063. His interest passes to his trustee in bankruptcy. Harriman v. Tyndale, 184 Mass. 534, 69 N. E. 353. A contract to sell land confers an interest on the vendee who is to pay a certain debt and continue to occupy and pay rent for the lands, though he has paid none of the debt and has performed only in respect to the other promises. Cone v. Cone, 118 Iowa, 458, 92 N. W. 665. Gen. St. Minn. 1894, § 4280, providing that "when a grant is made to one and the consideration paid by another, no use shall result in favor of the latter," has no application to an executory contract for the sale of land. Minneapolis & St. L. R. Co. v. Lund [Minn.] 97 N. W. 452. A title bond to real estate, though insufficient to pass the legal title, gives the holder an equitable right superior to the title of a subsequent purchaser with notice. McGuire v. Whitt [Ky.] 80 S. W. 474.

85. A vendee holding a bond for title has a title superior to that remaining in the vendor. Stipe v. Shirley [Tex. Civ. App.] 76 S. W. 307.

86. Titcomb v. Fonda, J. & G. R. Co., 38 Misc. [N. Y.] 630.

87. An agreement by which the vendee shall have a deed on payment of a certain amount, and shall have the use of the land and pay taxes, repairs, etc., gives the vendee

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tion,[88] and he may maintain an action for damage to the land.[89] The rights of the vendor's judgment creditors are superior to his.[90] Subsequent purchasers must take notice of a vendee in possession under an executory contract of sale,[91] but his title is inferior to subsequent bona fide grantees.[92]

His possession is not adverse to the vendor as long as the purchase money is not paid or at least not before the vendee is entitled to demand a deed.[93] He is not a tenant and is not liable for use and occupation.[94] He cannot as against the vendor remove fixtures placed by him on the land.[95] The vendee is a necessary party to a foreclosure of a precedent mortgage.[96]

One who has contracted to sell all his interest in land may transfer his title to another, but such transfer is subject to the rights of the purchaser.[97] If the purchaser refuses to accept title from the vendor's grantee, the latter may have the contract canceled as a cloud on his title.[98]

An assignee of a contract to purchase land, who as a consideration therefor promises to pay notes given under the contract, is liable to the payee on such notes, though his promise has not been accepted by him.[99] It is no defense to an action against a vendor by the assignee of a contract of sale that the assignment was as security only.[1] The purchaser of a merely equitable title is not protected as against the equities of his grantor's vendor.[2]

an estate in the land with a right to lease it, until his rights are lost by lapse of time. Fitch v. Windram, 184 Mass. 68, 67 N. E. 965.

88. Hook v. N. W. Thresher Co. [Minn.] 98 N. W. 463.

89. It is not necessary for plaintiff to show the precise nature of his contract, if it sufficiently appears that at the time the damage accrued he was in possession under such a contract. Gartner v. Chicago, R. I. & P. R. Co. [Neb.] 98 N. W. 1052. An executed contract to convey under which vendee goes into possession of the land intended to be conveyed makes vendee the equitable owner (who may maintain action for injuries to land), though the deed misdescribes the land. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 Pac. 552.

90. Unless previous to the judgment he has obtained a perfect equitable title by payment of the whole purchase price. Fulkerson v. Taylor [Va.] 46 S. E. 309.

91. Baldwin v. Sherwood, 117 Ga. 827; Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042. See, also, Notice and Record of Title, 2 Curr. Law, p. 1053.

92. See Notice and Record of Title, 2 Curr. Law, p. 1053. Where, in an action to try title, one pleads legal title and shows a complete chain, beginning with a contract to sell, and another sets up a claim under a prior unrecorded conveyance which under the laws of that state (Texas) was void as against a subsequent bona fide purchaser, evidence is admissible to show that the first party was a bona fide purchaser. Lee v. Wysong [C. C. A.] 128 Fed. 833. Certain tracts of land in Texas were conveyed to two individuals who were at the time partners; one of them, by an act of sale in New Orleans, which was insufficient under the laws of Texas, conveyed his interest to the other. Subsequently, the sole heir of the one who conveyed sold an undivided half of such lands to an innocent purchaser. Held, that such purchaser acquired a legal title. Id. Mere inadequacy of consideration is not ground for relief to claimants under an outstanding unrecorded deed, seeking to set aside a recorded deed from their grantor to a subsequent purchaser. Booker v. Booker [Ill.] 70 N. E. 709.

93. Johnson v. Peterson, 90 Minn. 503, 97 N. W. 384; Schneller v. Plankinton [N. D.] 98 N. W. 77; Smith v. Klay [Fla.] 36 So. 54. But see contra where the vendee performed all his obligations. Richards v. Carter, 201 Ill. 165, 66 N. E. 343.

94. Belger v. Sanchez, 137 Cal. 614, 70 Pac. 738. But he is liable for occupancy prior to the sale. Woodcock v. Baldwin, 110 La. 270.

95. Selberling v. Miller, 207 Ill. 443, 69 N. E. 800. Nor is the vendor liable for improvements placed by the vendee on the land, where the contract is made by an agent without authority and the principal repudiates it. Topliff v. Shadwell [Kan.] 74 Pac. 1120. A conveyance of land to one without notice of an agreement between the vendor and his lessee, that trade fixtures might be removed, passes the fixtures. Smyth v. Stoddard, 105 Ill. App. 510.

96. Titcomb v. Fonda, J. & G. R. Co., 38 Misc. [N. Y.] 630. A vendor, who has covenanted to convey free from incumbrances, cannot, by purchasing at foreclosure sale, bring ejectment against his vendee rightfully in possession, when by failure to make the vendee a party to foreclosure proceedings, he acquired by his purchase only an assignment of the mortgage. Id.

97. Such transferee will be required to convey upon performance of the contract by the other party. Meyers v. Markham, 90 Minn. 230, 96 N. W. 335, 787.

98. Meyers v. Markham, 90 Minn. 230, 96 N. W. 335, 787.

99. Baltes Land, S. & O. Co. v. Sutton [Ind. App.] 69 N. E. 179.

1. The vendor will be protected as against the original vendee by the assignment. Ross v. Page, 11 N. D. 458, 92 N. W. 822.

2. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863.

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The purchaser's possession is good as against his assignee apparently absolute, but really for security only.[3]

§ 5. *Waiver of performance or of defects.*[4]—A party to a written contract for the sale of land may waive his rights thereunder by parol.[5] Provisions exclusively for one party's benefit are waived by his act preventing fulfillment.[6] The burden of proving a waiver is on the party alleging it.[7]

What constitutes.—A default is waived by acts showing an intention still to insist on performance.[8] A refusal to accept tendered performance, though for other reasons than that it was different from the contract, works no waiver.[9] Acceptance of payments is a waiver of default,[10] or of unauthorized assignment,[11] or breach of conditions;[12] but not of subsequent defaults.[13] The payment need not be so large as was stipulated in the contract.[14] Acceptance of deed waives objection to its form,[15] and matters affecting marketability of title,[16] but not of quantity.[17]

A purchaser failing to object in time cannot afterwards raise questions as to title,[18] nor can he do so after his own default,[19] nor can he have specific performance after he has abandoned the contract,[20] nor set up false representations in suit for specific performance after seeking rescission on ground of defective title.[21]

3. Evidence held to show that an assignment of a contract to purchase land was for security only, though absolute on its face. Fifer v. Fifer [N. D.] 99 N. W. 763.

4. Waiver of vendor's lien, see post, § 12.

5. Wadge v. Kittleson [N. D.] 97 N. W. 856. Waiver of forfeiture. Whiting v. Doughton, 31 Wash. 327, 71 Pac. 1026.

6. A provision for an action to quiet title to be prosecuted by the vendee, held to have been waived by him. Meyers v. Markham, 90 Minn. 230, 96 N. W. 835.

7. Sessa v. Arthur, 183 Mass. 230, 66 N. E. 804.

8. Where a vendor after the time limit for acceptance of a contract prepared by the vendee had expired, handed the vendee a contract which he had prepared himself and said that it and no other would do, he thereby waived the time limit. Gough v. Loomis [Iowa] 99 N. W. 295; Fulenwider v. Rowan, 136 Ala. 287.

9. Where a vendee makes no effort to perform his part of the contract, but submits a proposition entirely different from the contract, the vendor does not waive such failure to perform by the vendee by refusing to convey on other grounds. Burns v. Freling, 98 Mo. App. 267, 71 S. W. 1128.

10. Ross v. Page, 11 N. D. 458, 92 N. W. 822. Where vendor has accepted payments from time to time and has made no objection that taxes which the vendee assumed have not been paid. Kicks v. State Bank of Lisbon [N. D.] 98 N. W. 408. Evidence held to show that where the vendee made payments after the election of the vendor to declare a forfeiture, they were received for an independent indebtedness and so no waiver. Sutphin v. Holbrook [Iowa] 97 N. W. 1100. Where a contract provided that the price was to be paid in instalments and on default of payment the vendor might terminate the contract, yet when he receives irregular payments, he will be considered as treating time not of the essence of the contract and cannot terminate it without allowing a reasonable time for performance. Murray v. Harbor & Suburban B. & S. Ass'n, 91 App. Div. [N. Y.] 397.

11. Ross v. Page, 11 N. D. 458, 92 N. W. 822.

12. Provisions as to improvement by the vendee, manner of cultivation, and mode of payment, may be waived by the vendor. Ross v. Page, 11 N. D. 458, 92 N. W. 822.

13. Accepting payment of one instalment after default is not a waiver of the right to insist upon the terms of the contract after default in paying a later instalment. Keefe v. Fairfield, 184 Mass. 334, 68 N. E. 342.

14. Where a deed provides for a repurchase of the property within two years, the option survives after such time where the grantees receive remittances, though at a lower per cent. than that provided for in the deed. Connolly v. Keenan, 42 Misc. [N. Y.] 589.

15. Acceptance of a trust deed is a waiver of a right to ask for specific performance of a contract to give an absolute deed. Albrecht v. Albrecht, 121 Iowa, 521, 96 N. W. 1087.

16. Acceptance of a deed is a waiver of all matters affecting the marketability of the title. Roberts & Corley v. McFaddin, Weiss & Kyle [Tex. Civ. App.] 74 S. W. 105.

17. Deed conveyed less than purchaser contracted for. Sessa v. Arthur, 183 Mass. 230, 66 N. E. 804.

18. Specific performance will not be refused because of a defect in title to which purchaser did not object and which could have been cured had he objected. Wold v. Newgard [Iowa] 94 N. W. 859.

19. A purchaser refusing to accept a deed because of lack of funds cannot afterward object to the title. Schwartz v. Woodruff [Mich.] 93 N. W. 1067.

20. Milmoe v. Murphy [N. J. Err. & App.] 56 Atl. 292; Wadge v. Kittleson [N. D.] 97 N. W. 856. Refusing a deed when tendered. Watkins v. Youll [Neb.] 96 N. W. 1042; Milmoe v. Murphy [N. J. Err. & App.] 56 Atl. 292. Vendee went into possession and the vendor sold to a third person who brought forcible entry and detainer. Judgment was

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§ 6. *Default and its effect.*—It is a default as soon as a party intentionally disables himself to perform.[22] Inability to pay the purchase money when due, not attributable to the fault of the vendor, cannot be regarded as an excuse for failure to pay at maturity or upon demand thereafter.[23] The purchaser cannot recover after his own default.[24] If either party fails to perform his part of the agreement, the other party may notify him to do so within a reasonable time, and if he neglects to perform within such specified period, he cannot thereafter have specific performance.[25] The notice must be express, clear, distinct and unequivocal.[26] What is a reasonable time depends on the circumstances of the particular case.[27] Where a default of payment is waived, the vendor cannot declare a forfeiture without giving notice to the vendee and allowing him a reasonable time to comply with the contract.[28] The word "improvements" in an agreement for the sale of mining claims which on default become the property of the vendor refer to removable betterments.[29] The contract may stipulate the consequences of a default.[30]

§ 7. *Performance of the contract. Time for performance.*—Performance must be within a reasonable time where no time is specified.[31] The general rule is that time is not of the essence,[32] and it will not be so regarded merely because definite dates of performance are designated therein;[33] but it is of the essence where it appears that a material part of the value of the transaction is that it be done at a certain time, or that a failure to carry out the agreement within the specified time will result in damage or material inconvenience.[34] If time be of

entered for the plaintiff by consent, and that he should convey a portion to the original vendee. Held an abandonment. Robison v. Barlow, 203 Ill. 287, 67 N. E. 776.

21. Hawes v. Swanzey [Iowa] 98 N. W. 586.

22. Where there was an agreement to pay a balance due out of proceeds of a resale, and vendees sold to a corporation, formed by them, for a nominal consideration, they were liable for breach. Gutheil v. Gilmer [Utah] 76 Pac. 628.

23. Boldt v. Early [Ind. App.] 70 N. E. 271.

24. There can be no recovery by a vendee who makes payments and afterwards ceases to make them, where the vendor stands ready to perform. Keefe v. Fairfield, 184 Mass. 334, 68 N. E. 342. A considerable increase in the value of the land after default of the vendee by failure to pay an instalment of the purchase price at the time stipulated in the contract may be a sufficient reason for denying him specific performance. Boldt v. Early [Ind. App.] 70 N. E. 271.

25, 26. Boldt v. Early [Ind. App.] 70 N. E. 271.

27. Four months held reasonable. Boldt v. Early [Ind. App.] 70 N. E. 271. When the time specified in the notice is assented to by the defaulting party, either expressly or by implication, he cannot question its reasonableness. Failure to object is assent. Id. But where the buyer thereafter seeks to attach new conditions, and notifies the seller that unless they are agreed to he will not buy, this is, as to the buyer, a reopening of the negotiations, permitting the seller to impose new conditions, and the buyer cannot recover damages for the seller's refusal to convey, without showing a new agreement reached after such reopening. Philadelphia Mortg. & T. Co. v. Hardesty [Kan.] 75 Pac. 1115.

28. Graham v. Merchant, 43 Or. 294, 72 Pac. 1088; Whiting v. Doughton, 31 Wash. 327, 71 Pac. 1026.

29. Smith v. Detroit & D. Gold Min. Co. [S. D.] 97 N. W. 17.

30. A provision in a contract of sale for forfeiture of possession and all rights under the contract construed as merely a form of security. Harris v. Greenleaf [Ky.] 79 S. W. 267.

31. Coleridge Creamery Co. v. Jenkins [Neb.] 92 N. W. 123. Ordinarily, where no time is stipulated within which the contract is to be performed, it must be performed within a reasonable time, and an absence of such stipulation will not render it void. Leis v. Sinclair, 67 Kan. 748, 74 Pac. 261. Where the vendor on the day of performance offered to convey and demanded the purchase money and the vendee refused to take the land for several days, vendor was relieved from the obligation to perform. Watkins v. Youll [Neb.] 96 N. W. 1042. An acceptance by a vendee, of a contract and a return thereof to the vendor within four days of its submission to him is within a reasonable time. Gough v. Loomis [Iowa] 99 N. W. 295.

32. Fulenwider v. Rowan, 136 Ala. 287. The purchase money is a simple debt and interest is compensation for delay in payment. Wheeling Creek Gas, Coal & Coke Co. v. Elder [W. Va.] 46 S. E. 357.

33. Lapse of time after maturity before the payment of purchase money, may generally be compensated for by interest. Boldt v. Early [Ind. App.] 70 N. E. 271. Where vendee agrees to pay on certain dates, payment on those dates is not essential to preserve their rights Vance v. Newman [Ark.] 80 S. W. 574.

34. Woods v. McGraw [C. C. A.] 127 Fed. 914. Vendor informed purchaser that he was selling because he needed money to pay his debts and later fixed a time within

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the essence, the contract must be performed according to its terms,[35] unless the other party is himself unable to perform,[36] or waives compliance;[37] but time being not of the essence the vendor cannot tender a deed on the day of payment and declare the contract void,[38] and a mere failure to pay promptly will not deprive the purchaser of his rights.[39] Time to examine an abstract may run from its delivery though delivered before it was required.[40]

Extension of time[41] must be shown by the purchaser.[42]

A purchaser is not bound to take nor entitled to possession until conditions precedent are performed.[43] Where a substantial part of the consideration is paid, the covenants and undertakings are generally deemed independent and not conditions precedent.[44]

If payment to have been made in work has become impossible, an equivalent money value is a good payment.[45] A purchaser who has paid for all but has taken

which payment must be made. Boldt v. Early [Ind. App.] 70 N. E. 271. Vendor needed the money and time was fixed, after negotiation, at a date later than he desired. Woods v. McGraw [C. C. A.] 127 Fed. 914.

35. McAdams v. Felkner, 140 Cal. 354, 73 Pac. 1064. Where time is of the essence of the contract, a court of equity will not extend that fixed by the parties by enforcing specific performance after it has expired without any offer of performance. Woods v. McGraw [C. C. A.] 127 Fed. 914. Specific performance refused where vendee tendered purchase money after it was due, and time was of the essence. McKenzie v. Murphy, 31 Colo. 274, 72 Pac. 1075.

36. Specific performance granted to vendee in a contract where time was made of the essence, even though the vendee did not offer to pay on the day, if at that time the vendor could not give a good title. Wheeling Creek Gas, Coal & Coke Co. v. Elder [W. Va.] 46 S. E. 357.

37. As by continuing to recognize the contract as existing after failure to pay on day. Wheeling Creek Gas, Coal & Coke Co. v. Elder [W. Va.] 46 S. E. 357. Permitting payment of one instalment after due is not a waiver as to subsequent instalments. McAdams v. Felkner, 140 Cal. 354, 73 Pac. 1064.

38. Pennsylvania Min. Co. v. Smith, 207 Pa. 210.

39. Where the value is not precarious nor fluctuating and there is no stipulation in the contract as to forfeiture or making time of the essence, the vendee may have specific performance, even though he did not pay the balance on time. Castleberry v. Hay [Idaho] 70 Pac. 1055. An option accepted within the time stated becomes an absolute sale but failure to pay the price on the day stated will not be a revocation unless time is of the essence. Pennsylvania Min. Co. v. Smith, 207 Pa. 210. Delay of payment for a month after due is not a breach. Maris v. Masters, 31 Ind. App. 235, 67 N. E. 699.

40. Where the contract provides for an abstract within 10 days and gives 20 days for examination thereof, and the vendor in his receipt for the consideration given at the date of the contract conditions the acceptance within 20 days from the date thereof, the 20 days run from the date of the contract, if the abstract is then given. Womack v. Coleman, 89 Minn. 17, 93 N. W. 663.

41. An instrument reciting that the owner of land, sold under a power of sale in a trust deed, should have ten days in which to repay the purchase price, and on his doing so defendant would resell the land to him or cancel the sale, held to be a mere option to repurchase and not an extension of time for the payment of the debt secured by the trust deed. Woods v. McGraw [C. C. A.] 127 Fed. 914.

42. Purchaser claimed a parol agreement. Graham v. Merchant, 43 Or. 294, 72 Pac. 1088.

43. Where a vendor who had not complied with conditions of a contract when the property was burned contended that his possession was by permission of the vendee. Bowdle v. Jencks [S. D.] 99 N. W. 98. A condition requiring a vendor to show an abstract of title subject to an incumbrance of $1,000 is not satisfied where there is a trust deed securing three notes for $1,000 each and an offer to surrender two of the notes, and have interest paid on the third to date, but unaccompanied by any satisfaction signed by the grantee in the trust deed. Hutchinson v. Coonley [Ill.] 70 N. E. 686. Where a contract, adjusting matters between parties, including a sale of a lot of which the vendees were in possession, called first for the vendor to furnish an abstract showing title, this was a condition precedent, and until it was performed the vendees were under no obligation to make or keep good a tender. Id. Where one employed an attorney to purchase a lot and as compensation for his services he was to have conveyed to him a one-half interest in the lot on payment by him of a certain amount within a specified time and he never paid it but expended about $40 in connection with the transaction, he was not entitled to share in the proceeds of the sale of the lot when sold by the party for whom he purchased. Walker v. Sawyer's Estate [Ind. App.] 70 N. E. 540. An oral agreement provided that a written contract should be executed on payment of the second instalment. The execution was delayed through no fault of the vendor until after the third instalment came due. Held the vendor could refuse to execute the contract until such instalment was paid. Lysne v. Hunstad [Minn.] 99 N. W. 634. Evidence held to show that there was no agreement for an extension of the time on such third payment. Id.

44. Fulenwider v. Rowan, 136 Ala. 287.

45. A bond for a title provided that the vendee should pay the purchase price in

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a deed excluding part, because the vendor claimed he had sold it, may compel vendor subsequently getting it in to convey the excepted part without further payment or tender.[46]

Tender of performance.—The vendor must tender a deed in order to put the vendee in default,[47] unless the purchaser has refused to perform,[48] and the purchaser should tender performance[49] unless the vendor has repudiated the contract[50] or has extended the time of performance;[51] but a mere expression of willingness to perform is sufficient,[52] coupled with a condition that vendor perform his part.[53] Offer of an insufficient deed is a refusal of the tender.[54]

The purchaser need not tender payments not yet due.[55] Tenders of the purchase price sufficient in amount and properly made stop the running of interest.[56]

If action is begun tender thereafter is bad.[57]

The deed need not embody conditions collateral to the contract of sale,[58] and need not be delivered until the contract is entirely performed.[59] The contract may require conveyance on payment before the due day.[60]

work to be performed on a mill. The mill was abandoned but the vendor had him do some work on a dwelling house. Held the vendee was entitled to a deed on payment of the purchase price in cash less the value on the house. McGuire v. Whitt [Ky.] 80 S. W. 474.

46. Guthrie v. Martin, 76 App. Div. [N. Y.] 385.

47. Glos v. Wilson, 198 Ill. 44, 64 N. E. 734; Evans v. Jacobitz, 67 Kan. 249, 72 Pac. 848. A contract to convey land or to see that a third person conveys it is not performed by an indorsement by the third person on the deed to him that he conveys the property. Joines v. Johnson, 133 N. C. 487. Where all payments on an instalment contract are due, the vendor may recover all but the last without a tender. Gray v. Meek, 199 Ill. 136, 64 N. E. 1020.

48. Vendee made known to the vendor his determination not to perform the contract. Moore v. Galupo [N. J. Eq.] 55 Atl. 628.

49. Fisher v. Buchanan [Neb.] 96 N. W. 339; Newberry v. Ruffin [Va.] 45 S. E. 733; Latimer v. Capay Val. Land Co., 137 Cal. 286, 70 Pac. 82; Maris v. Masters, 31 Ind. App. 235, 67 N. E. 699; Harris v. Greenleaf [Ky.] 79 S. W. 267. The money need not be paid into court. Murray v. Nickerson, 90 Minn. 197, 95 N. W. 898. But failure to make only affects the question of costs. Murray v. Harbor & Suburban B. & S. Ass'n, 91 App. Div. [N. Y.] 397. Where the conveyance is not to be made until the balance of the purchase money is paid, the vendee, in order to recover the money paid, in the absence of a provision in the agreement for the return of the money, under other circumstances must show that he paid or tendered the balance, except in case of rescission by consent. Leach v. Rowley, 138 Cal. 709, 72 Pac. 403. A tender of a check by the vendee, and on refusal thereof, of cash, on the day of performance, entitles him to a conveyance by the vendor. Watkins v. Youll [Neb.] 96 N. W. 1042. Where a purchaser agrees to assume a certain incumbrance, a tender of a deed for execution, running to a third person, and merely reciting that it is made "subject to a certain deed of trust," is not such a tender of performance as will support an action for breach of the contract to convey against the vendor. Burns v. Freling, 98 Mo. App. 267, 71 S. W. 1128.

50. Vendor repudiates contract from the beginning, and the vendee is ready and willing to perform. Tobin v. Larkin, 183 Mass. 389, 67 N. E. 340. Where the vendee is to give a mortgage back upon receiving a deed, if the vendor refuses to give the deed, there need be no tender of the mortgage. Kepler v. Wright, 31 Ind. App. 512, 68 N. E. 618.

51. Where the vendee has paid part of the purchase money and has tendered the balance, which the vendor refuses to receive until an injunction is removed but promises to let the vendee know when it is removed, the vendee is absolved from further tender until he receives information from the vendor. Harriman v. Tyndale, 184 Mass. 534, 69 N. E. 353. Where the parties agree to advance the day of performance fixed in the contract, and the vendor cannot then perform, the vendee owes no duty to make tender of performance on the day originally agreed upon. Daly v. Bruen, 88 App. Div. [N. Y.] 263.

52. Harris v. Greenleaf [Ky.] 79 S. W. 267. Facts held to show that a lessee having an option to purchase had properly exercised the same, though he had not succeeded in his attempts to make an actual tender. Sizer v. Clark, 116 Wis. 534, 93 N. W. 539.

53. Maris v. Masters, 31 Ind. App. 235, 67 N. E. 699.

54. Where the vendee tenders the money and the vendor offers a deed not sufficient to convey a fee simple, it is a refusal of the tender. Latimer v. Capay Val. Land Co., 137 Cal. 286, 70 Pac. 82.

55. To entitle an obligee in such a bond to receive a conveyance, he need only pay or tender the amount of the principal and accrued interest at date of tender. Handy v. Rice, 98 Me. 504.

56. Lamprey v. St. Paul & C. R. Co., 89 Minn. 187, 94 N. W. 555.

57. Hutchinson v. Coonley [Ill.] 70 N. E. 686.

58. A contract to convey land and to sign a petition for a dramshop license for the vendee is not broken by the vendor's refusal to put a condition in the deed about the dramshop, it being merely personal. Reitz v. Lotz, 102 Mo. App. 672, 77 S. W. 145.

59. In an instalment contract where no time is fixed for delivery of the deed the vendee is not entitled to a deed until the

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§ 8. *Rescission and reformation.—Right to rescind* rests upon the same general rules as in the case of other contracts.[61] The right exists in case of a mutual mistake,[62] inability of the vendor to perform,[63] or for default,[64] or for failure of title;[65] but if title was warranted, there can be no rescission except in the case of actual fraud or insolvency of the warrantor.[66]

Where there is actual fraud, the purchaser may rescind or sue for damages.[67] The representation must be as to a present fact,[68] but where the parties were in fiduciary relations misrepresentations of law were held fraudulent.[69] It need not be false to the knowledge of the vendor if he ought to have known it,[70] but mere expressions of opinion, though false, are not enough.[71] Where the vendee

last payment is made. Gray v. Meek, 199 Ill. 136, 64 N. E. 1020.

60. A clause in a bond for a deed giving dates of the maturity of notes to be paid by the obligee to entitle him to a conveyance is not repugnant to a later clause requiring the obligor to convey on payment of the sum agreed upon "before or at the time the same shall become due." Handy v. Rice, 98 Me. 504.

61. See Contracts, 1 Curr. Law, p. 626, and the various topics dealing with contractual capacity. Allowed where vendor was intoxicated when the contract was made. Moetzel v. Koch [Iowa] 97 N. W. 1079. Refused where no advantage was taken of insane vendor. Scott v. Hay, 90 Minn. 304, 97 N. W. 106. Evidence held to show vendor sane. Eades v. Owens, 24 Ky. L. R. 2328, 74 S. W. 186. The vendor in a contract to convey land cannot without cause repudiate the contract without the consent of the vendee. Rodman v. Robinson [N. C.] 47 S. E. 19.

62. Rhodes v. Stone, 25 Ky. L. R. 921, 76 S. W. 533. When a misdescription so far affects the subject-matter that it may reasonably be supposed that but for such misdescription the contract would not have been made, the vendee may avoid the contract at his election. Slingluff v. Dugan [Md.] 56 Atl. 837.

63. Burke v. Schreiber, 183 Mass. 35, 66 N. E. 411. Cancellation decreed at suit of vendee under a contract by which vendee's payments could be forfeited where vendor had put it out of his power to perform. Newcomb v. Ogden Plow Co., 120 Iowa, 570, 95 N. W. 174. Rescission denied where facts showed performance by defendant. Johnson v. Cressey [S. D.] 94 N. W. 703.

64. See ante, § 6. Agreement to sell real estate, one-half the price to be paid on a certain day and the balance in one year therefrom, and on failure to make payments the agreement to be void, gives the vendor a right to the cancellation of the contract on failure to pay the first instalment. Jeffrey v. Pennsylvania Min. Co., 204 Pa. 213. Evidence held to show that the vendor had not canceled a contract for alleged defaults of the vendee. Buchholz v. Leadbetter, 11 N. D. 473, 92 N. W. 830.

65. See ante, § 2.

66. Warranty deed given—title failed. Matthews v. Crowder [Tenn.] 69 S. W. 779. Purchaser in possession under warranty deed or bond for deed with covenants. Gillham v. Walker, 135 Ala. 459.

67. Neely v. Rembert [Ark.] 71 S. W. 259; Leicher v. Keeney, 98 Mo. App. 394, 72 S. W. 145.

Rescission granted: Where the vendee bought on the representation that the land abutted on a street dedicated to the public which was not the fact. Cleveland v. Bergen Bldg. & Imp. Co. [N. J. Eq.] 55 Atl. 117. Where false representations were made by vendor as to quality, presence of timber, etc., and vendee was in another state and did not view the land. Sykes v. Reiher [Iowa] 91 N. W. 920. On the ground of fraud where vendee's agent represented that he was buying for a head of a family seeking a home, when in fact he was acting for the Roman Catholic Archbishop. Thompson v. Barry, 184 Mass. 429, 68 N. E. 674. Setting aside of sale for lesion beyond moiety under the Civil Law. Maynard v. Laporte, 109 La. 101; Bonnette v. Wise, 111 La. 855; Linkswiler v. Hoffman, 109 La. 948; Smart v. Bibbins, 109 La. 986. **Rescission refused as no false representations.** Denman v. Mentz, 63 N. J. Eq. 613; Muir v. Pratt [Colo. App.] 71 Pac. 896.

Fraud as to third person: Where the vendee assigns his contract to the plaintiff to secure a debt and afterwards the vendee obtains possession of it and burns it at the suggestion of the vendor who has knowledge of the plaintiff's claim and takes a new contract, the vendor is liable to the plaintiff for the amount of the debt due the plaintiff from the vendee. Louis C. Mittlestadt & Co. v. Gannon [Neb.] 95 N. W. 479. That the purchaser continued in possession of a saloon, and secured a renewal of the license while an action to rescind the contract of sale was pending and for eleven months after discovery of the fraud, was held no bar to relief in the suit to rescind on the ground of fraud. Keefuss v. Wellmunster, 89 App. Div. [N. Y.] 306. Where one sustaining a fiduciary relation contracted to purchase land of his client and sent to her his note, and a contract of sale to be executed but which was never executed, when the client sought to avoid the sale for fraud a tender of the note in open court and a waiver of any claim thereon, entered of record, constituted a sufficient rescission. Schneider v. Schneider [Iowa] 98 N. W. 159.

68. O'Connor v. Lighthizer [Wash.] 75 Pac. 643. Representation of value where vendee is ignorant and relies on vendor's representation to the knowledge of vendor. Custer v. Harmon, 105 Ill. App. 76.

69. Where an administrator induced decedent's sister, to whom he sustained a fiduciary relation, to sell him her share of the estate for less than its value, by false representations, on her seeking to avoid the sale, it was no defense that the representations were merely as to the law. Schneider v. Schneider [Iowa] 98 N. W. 159.

70. Neely v. Rembert [Ark.] 71 S. W. 259.

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is induced to purchase by the false representations of the vendor, he must disaffirm within a reasonable time after learning the truth or he will be deemed to have waived his rights.[72] The right is waived by insistence on performance.[73] The vendee cannot rescind on the ground of failure of title when a good title is procured and tendered within a reasonable time by the vendor, the vendee having acquiesced in the delay.[74] A tardy tender is no defense.[75] A nonconsenting coowner may affirm by accepting benefits.[76]

In Louisiana, a vendor may demand rescission of the contract if the realty is worth more than twice the price paid.[77] In such case the vendee may either restore the property or make up the just price, and is entitled to the value of improvements made by him.[78]

Where the contract is executed, there can be no rescission without a return of, or an offer to return, everything of value received.[79] Tender of the price paid is not a condition precedent to relief in an action for lesion beyond moiety.[80]

Rescission may be by consent,[81] and may be implied from conduct,[82] or the right may be reserved in the contract.[83]

71. Tryce v. Dittus, 199 Ill. 189, 65 N. E. 220. When vendee examines property, vendor's representations as to value are treated as mere opinion. McKibbin v. Day [Neb.] 98 N. W. 845.

72. Vendee took possession and spent large sums in development and remained in possession until dispossessed by the vendor a year later and made no attempt to disaffirm until his answer in a suit by the vendor to foreclose a purchase-price mortgage. Held a waiver of his right to relief. Romanoff Land & Min. Co. v. Cameron, 137 Ala. 214. Keeping and using property 9 months, making changes and taking written promises from vendors to put the property in shape. Hogan v. Tucker, 25 Ky. L. R. 1104, 77 S. W. 197. Party defrauded, after discovery of the fraud, accepted money or benefits under the contract. Provident Loan Trust Co. v. McIntosh [Kan.] 75 Pac. 498. Collecting rents, making repairs and exercising other acts of ownership. Shappirio v. Goldberg, 192 U. S. 232.

73. Vendees may be estopped from setting up false representations as a ground for rescission by calling for performance by the vendor after learning of the condition claimed to be falsely represented. Hawes v. Swanzey [Iowa] 98 N. W. 586.

74. Hawes v. Swanzey [Iowa] 98 N. W. 586.

75. In ejectment against purchasers in possession under a contract to purchase an offer by the vendor in open court to perform the terms of the contract is unavailing, since the rights to be determined are those that existed at the commencement of the action. Hutchinson v. Coonley [Ill.] 70 N. E. 686.

76. Where one partner enters into a sale contract without authority, another cannot repudiate it and escape liability thereunder after participating in benefits derived from it. Gutheil v. Gilmer [Utah] 76 Pac. 628.

77, 78. Ware v. Couvillion [La.] 36 So. 220.

79. Alaska & Chicago Commercial Co. v. Solner [C. C. A.] 123 Fed. 855; Schneider v. Schneider [Iowa] 98 N. W. 159; Bailey v. Gilman Bank, 99 Mo. App. 571, 74 S. W. 874. On a bill for rescission for breach of the covenant of seisin where the purchase money was paid and the vendor bought other land therewith, a decree ordering a sale of that land, and also of the life estate which was all the vendor had in the land he contracted to convey is proper. Matthews v. Crowder [Tenn.] 69 S. W. 779. Evidence held to show that a deposit given for an option must be returned. Bradford v. Haas, 111 La. 148. Deposit recovered by vendee where vendor not present on the day of performance. Wright v. Levy, 84 N. Y. Supp. 885. But where a mining option is rescinded the vendee cannot usually recover the payments made, unless such right is given either in the option or in the agreement to rescind. Clark v. American D. & M. Co., 28 Mont. 468, 72 Pac. 978. One who purchased a saloon relying on false representations as to receipts, and on discovery of the fraud, offers a reconveyance, and an accounting of receipts, and demands reconveyance of property conveyed as a consideration therefor, is entitled to the relief prayed for. Keefus v. Wellmunster, 89 App. Div. [N. Y.] 306. Vendors could not rescind without notice and without returning payments made where payments were overdue and land had increased in value. Vance v. Newman [Ark.] 80 S. W. 574.

80. Ware v. Couvillion [La.] 36 So. 220. See s. c. supra.

81. Even after default. Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851. Where an option to purchase land within a specified time was not complied with and by mutual consent the parties to the agreement adjusted their rights under it and the contract was abandoned, a mortgage executed two years thereafter by the party who had acquired the option gave the mortgagee no right in the land. Jefferson Loan & Bldg. Ass'n v. McHugh [Pa.] 57 Atl. 577.

82. Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851. Vendee gave up all rights under contract and vendor took possession and collected rents from other persons. Held a rescission by mutual consent. Evans v. Jacobitz, 67 Kan. 249, 72 Pac. 848. Where either party has orally agreed to abandon a contract and such agreement is acquiesced in, the contract will be deemed set aside. Silence of one party for two years will be

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Exercise of right.—The right to rescind must be exercised within a reasonable time.[84] In case of fraud, there is no laches if the period of limitation applicable has not elapsed.[85] The rescission must be absolute,[86] and the person asking for it must not be in default.[87] It may be exercised by parol,[88] and if founded on a specific ground, it cannot thereafter be supported by proof of a wholly different one.[89] Before a vendor can cancel the contract for noncompliance with its terms by the vendee, he must proceed promptly on the default to declare his election to cancel or he will be deemed to have waived his right.[90]

Reformation.—A contract for sale of land will not be reformed unless the evidence of intention is clear;[91] nor has equity jurisdiction of a bill to construe a written contract and give damages for its breach where there is no allegation of fraud or mistake or prayer for a reformation.[92] A vendor is presumed to know the contents of a contract which he signs, and misdescription therein will not be reformed save for actual fraud or mistake.[93]

§ 9. *Adjustment of rights after conveyance or rescission of contract. Deficiency in quantity.*—Where the amount conveyed is less than that contracted for, the vendee is entitled to an abatement of the purchase price in proportion to such deficiency,[94] unless the negotiations for a sale show the parties contemplated some

presumed an acquiescence. It cannot be specially enforced. Henderson v. Beatty [Iowa] 99 N. W. 716.

83. Oakes v. Gillilan [Neb.] 95 N. W. 511. A contract provided that on failure of the vendor to show good title and execute a deed he should return the amount paid under the contract. It appeared that the vendor could not furnish good title and had not taken steps pointed out in the contract for a deduction in case title to any portion should prove defective. The vendee was entitled to a decree for the amount paid under the contract. Wold v. Newgard [Iowa] 98 N. W. 640.

84. Smith v. Detroit & D. Gold Min. Co. [S. D.] 97 N. W. 17; Erwin v. Daniels [Tex. Civ. App.] 79 S. W. 61; Evans v. Duke, 140 Cal. 22, 73 Pac. 732. Refused where vendee waited until vendor tendered a deed, there being no fraud or misrepresentation. Weller v. Minnesota Land & C. Co., 87 Minn. 227, 91 N. W. 891. See, also, ante, specific paragraphs regarding rescission for fraud.

85. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863.

86. Alaska & Chicago Commercial Co. v. Solner [C. C. A.] 123 Fed. 855; Morrow v. Moore, 98 Me. 373.

87. Provident Loan Trust Co. v. McIntosh [Kan.] 75 Pac. 498.

88. Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501; Arbogast v. Mylius [W. Va.] 46 S. E. 809.

89. Where the ground for rescission in a written notice thereof is failure to procure good title, vendees cannot defend a specific performance suit on the ground of false representations as to the condition of land. Hawes v. Swanzey [Iowa] 98 N. W. 586.

90. Where a vendee had failed to crop the land or harvest the crop as required by the contract, but the vendor allowed him to go on farming for a year or two, the vendor could not insist that the vendee had lost his equities. Timmins v. Russell [N. D.] 99 N. W. 48. Where a grantor in a deed with an option to repurchase, finally refuses to make payments of interest guaranteed to the grantees on their investment claiming that he has made advances to the grantees exceeding the consideration of the deed he must at once surrender and deed the property or exercise his option. Connolly v. Keenan, 42 Misc. [N. Y.] 589.

91. Wold v. Newgard [Iowa] 94 N. W. 859; Roussel v. Lux, 39 Misc. [N. Y.] 508; Humphreys v. Shellenberger, 89 Minn. 327, 94 N. W. 1083. Reformation of title bond for mutual mistake. King v. Ballou, 24 Ky. L. R. 1946, 72 S. W. 771. Deed reformed, the quantity being inserted by mistake. Morrison v. Hardin [Miss.] 33 So. 80. Error in description. Blackburn v. Perkins, 138 Ala. 305. Contemporaneous oral agreement not given effect to on the evidence. Guaranty Safe Deposit & Trust Co. v. Liebold, 207 Pa. 399. Where A sells land to B, who after delivery includes other land of A and then makes a voluntary deed to C, taking back purchase-money notes which are assigned to a bank, the latter taking B's word as to the title, A may have relief from the deed. Gill v. Fugate [Ky.] 78 S. W. 188.

92. Clarke v. Shirk [C. C. A.] 121 Fed. 340.

93. A petition to reform the contract because of insufficient description must allege that the description was omitted by mistake. A general allegation of fraud is insufficient. Cammack v. Prather [Tex. Civ. App.] 74 S. W. 354.

94. Sufficiency of 26 acres out of 185. Hall v. Ely, 25 Ky. L. R. 954, 76 S. W. 848. 21 acres out of 146½. Lewis v. Hoeldtke [Tex. Civ. App.] 76 S. W. 309. 23 2-5 acres out of 140¾. Willard v. Sanford [Tex. Civ. App.] 77 S. W. 290. 19 acres out of 80. McGhee v. Bell, 170 Mo. 121, 70 S. W. 493, 59 L. R. A. 761. Deficiency immaterial and not worth more than $50 if considered proportionately with the rest of lot, judgment for $250 held excessive. McCutcheon's Heirs v. Rawleigh, 25 Ky. L. R. 549, 76 S. W. 50. Deficiency of 16 acres out of 125, though description by metes and bounds and the words "more or less" after the number of acres, the sale having been by the acre. Collins v. Stodghill

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deficiency.[95] A claim for compensation for deficiency is subject to the statute of limitations.[96]

Partial failure of title entitles purchaser to a pro rata recovery of the purchase price;[97] but he cannot be compelled to take such title with such compensation instead of the title he contracted for.[98] In an action by the vendee for false representations in the sale of land, the measure of damages is the difference in value between the land as it was and what it would have been worth if as represented.[99]

Rescission bars all rights under the original contract.[1] The vendee on failure of the vendor to carry out his contract may recover the purchase money,[2] and taxes paid on the land,[3] and may recover interest unless he has had possession of the land.[4] Where vendee is in default, he may on rescission by consent recover the purchase price less damages to the vendor.[5] The purchaser on rescission has a lien for his purchase money.[6] The vendee may recover for improvements,[7] unless he made such knowing he would rescind.[8] The cause of action to recover back the purchase price of land accrues when the money is paid.[9]

Contract between parties to share any rebate which might be received from the government is enforceable.[10] An agreement adjusting rents as of a certain

[Ky.] 79 S. W. 185. Where a tract of land bought is less in amount than that described by measurement in the deed, the vendor is liable for the deficiency. Favrot v. Stauffer [La.] 36 So. 307.

95. Sibley v. Hayes, 30 Tex. Civ. App. 61, 71 S. W. 404. Evidence held to show that the parties took their chances as to a deficiency and recovery therefor was refused. Sibley v. Hayes, 96 Tex. 78, 70 S. W. 538. Where the description is so many acres "more or less," a deficiency will not authorize an apportionment in the absence of fraud. Finney v. Morris, 116 Ga. 758. Where land is described by metes and bounds with the words "be said measurements more or less," specific performance may be decreed, even though title to a small fragment is defective, the words quoted qualifying the description. Felix v. Devlin, 90 App. Div. [N. Y.] 103.

96. Maxwell v. Wilson [W. Va.] 46 S. E. 349.

97. Equitable Trust Co. v. Milligan, 31 Ind. App. 20, 65 N. E. 1044; Tobin v. Larkin, 183 Mass. 389, 67 N. E. 340. The vendee by accepting a deed and giving a mortgage back acknowledges that the vendor had title and in an action by the vendor for an abatement and a cross bill for foreclosure has the burden of proving lack of title. Whitley v. Lide [Ala.] 35 So. 705.

98. Murray v. Nickerson, 90 Minn. 197, 95 N. W. 898.

99. Howe v. Coates, 90 Minn. 508, 97 N. W. 129.

1. After a judgment by the vendor against the vendee on purchase-money notes, the vendor exercised his option to rescind the contract and afterwards brought suit on the judgment in another state. Held, the vendee was not liable. Ward v. Warren [Or.] 74 Pac. 482. Upon forfeiture of a contract by consent and the sale to a third person, a judgment creditor of the original vendee obtaining judgment two years after the second sale cannot object to the forfeiture. Kuder v. Chadwick, 207 Pa. 182.

2. Crouch v. Nast, 79 App. Div. [N. Y.] 492; Bell v. Sellers, 66 Kan. 775, 71 Pac. 579.

3. Nelson v. Allen, 117 Wis. 91, 93 N. W. 807.

4. With interest if the vendor retains possession and without interest if the vendee has possession. Kicks v. State Bank of Lisbon [N. D.] 98 N. W. 408.

5. Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851.

6. Upon rescission by the vendee, the purchase money paid by him will be decreed a lien on the property, notwithstanding mortgages have been foreclosed which the vendee was to have paid, provided the vendor has notice in time to protect himself. Cleveland v. Bergen Bldg. & Imp. Co. [N. J. Eq.] 55 Atl. 117.

7. Where the vendee makes improvements and the vendor cannot give title, the vendee may rescind and recover the value of such improvements, and such right passes to his assignee. Latimer v. Capay Val. Land Co., 137 Cal. 286, 70 Pac. 82. Where the vendee has taken possession and made improvements and the vendor cannot perform, the latter cannot recover possession of the land without restoring to the vendee the value of the improvements. Crouch v. Nast, 79 App. Div. [N. Y.] 492. Where the vendee builds a house on the land and afterwards rescinds on the ground of fraud, he may move away the house. Cutter v. Wait, 131 Mich. 508, 91 N. W. 753.

8. Improvements made by vendee cannot be allowed if when made he knew or should have known that he would rescind. Neely v. Rembert [Ark.] 71 S. W. 259.

9. Vendor had no title but acted in good faith. Barden v. Stickney, 132 N. C. 416.

10. The purchaser of government land sold the same to plaintiff before final payment therefor had been made, plaintiff taking subject thereto. The vendor claimed a rebate from the government on the purchase price and agreed that plaintiff should receive one-half of any sum so remitted, and executed a mortgage to him to that effect. Held to be a valid and enforceable contract though the time when such rebate should be made was uncertain and to entitle plaintiffs to one-half the amount remitted by the gov-

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date is not broken because previous to the making of the agreement the vendor had remitted rents due from tenants after the date set.[11]

Contract to repurchase.—The purpose of such contract is to indemnify the vendee against loss and the vendor is liable only for such loss as he has actually sustained.[12] Under an agreement to repurchase land if the vendee is unable to sell it within a certain specified time, he has a reasonable time after the expiration of such period in which to elect to enforce it.[13] What is a reasonable time is ordinarily a question for the jury,[14] as is the question of reasonable efforts on the part of the vendee to sell.[15]

§ 10. *Enforcement generally.*—A vendee in possession under an executory contract to convey may, upon default of the vendor, sue for damages or have specific performance.[16] A vendor in an executory contract of sale, who retains legal title to the premises, may have strict foreclosure against a vendee who has made default in payments.[17] The remedy for a vendee's failure to perform a contract for the sale of land is an action for damages; an action for the purchase price will not lie.[18] An election to recover land may be made after suing where the purchaser has put in a defense of limitations to the price.[19]

The vendee is not bound to bring an action at law for damages for breach of the contract, but may sue for specific performance.[20] A vendee of land, the title to which is in the United States, need not await eviction, but may at once abandon possession and bring action for breach of warranty and recover the purchase price.[21] But such vendee cannot retain possession, secretly perfect title in himself, and then recover the purchase price from his vendor, retaining improvements made by the vendor.[22] A vendee may recover damages for fraudulent misrepresentations as to number of acres conveyed without rescinding the contract.[23] In Louisiana, one cannot recover price if he knew the defects, nor sue for eviction if he acquired title.[24] He may sue before time for performance has expired, where the vendor has made it impossible to perform.[25]

ernment before the final payment to it was due. Gumaer v. Day [Neb.] 93 N. W. 933.

11. In an action for a breach of an agreement in a contract for the sale of a house that rent of tenants shall be adjusted as of June 1, 1901, the plaintiff must prove that rent is actually due. No breach, if vendor agreed with the tenants in May that no rent for June and July should be charged, the vendor not being guilty of misrepresentation. Lester v. Lawton, 38 Misc. [N. Y.] 772.

12. If he has sold or disposed of part of the property and so lessened his loss, the vendor is only bound to indemnify him as to the balance. Maier v. Rebstock, 92 App. Div. [N. Y.] 587.

13. Maier v. Rebstock, 92 App. Div. [N. Y.] 587. Letters of the purchaser's brother to the vendor with reference to the land and vendor's offer to him to take back the land were admissible against the purchaser, in an action to recover the purchase price under an agreement to repurchase, the brother having acquired an interest in the land. Id.

14. Five years unreasonable as a matter of law unless the vendor has acquiesced in the delay. Maier v. Rebstock, 92 App. Div. [N. Y.] 587. Whether the vendor acquiesced in any delay in reconveying the land after the expiration of such time is for the jury. Id.

15. Maier v. Rebstock, 92 App. Div. [N. Y.] 587.

16. Sieberling v. Miller, 207 Ill. 443, 69 N. E. 800.

17. South Omaha Sav. Bank v. Levy [Neb.] 95 N. W. 603. Strict foreclosure is granted only where it would be inequitable and unjust to refuse it. It is within the discretion of courts of equity. Grove v. Dineen [Neb.] 96 N. W. 253.

18. A contract for the sale of a farm was so unequal that it could not be specifically enforced. Goodwine v. Kelley [Ind. App.] 70 N. E. 832.

19. Where a vendor sued to recover on a note given for the purchase price, and to foreclose a vendor's lien, and defendant pleaded limitations, the vendor could elect to sue for the land, and his right of recovery could be defeated only by the purchaser paying the balance of the purchase price represented by the note. Sanders v. Rawlings [Tex. Civ. App.] 77 S. W. 41.

20. Rodman v. Robinson [N. C.] 47 S. E. 19.

21, 22. Holloway v. Miller [Miss.] 36 So. 531.

23. Ludwick v. Petrie [Ind. App.] 70 N. E. 280.

24. The vendee cannot sue for failure of title under Code La. art. 2505, if he has full knowledge of the defects, nor for an eviction if he subsequently obtained a patent from the United States. Ellis v. John Crossley & Sons, 119 Fed. 779.

25. Vendor had repudiated the contract

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The measure of damages on default is the value of the land[26] in arriving at which some courts hold that the purchase price which was to have been paid is controlling,[27] or is at least prima facie evidence;[28] but in other jurisdictions the complaining party is given the benefit of any rise in the market value,[29] provided the contract was in writing, for if not, the loss of the bargain is not included and only money paid as consideration and expenses is recoverable.[30] Amounts expended in examination of title cannot be recovered back.[31] The measure of damages for breach of warranty, where vendee remains in possession and perfects title in himself, is the expense of protecting his possession and perfecting title and other damages resulting from the breach.[32] To prove value of land, it may be shown how it was used and its condition.[33]

Amounts payable for options, reckoned by the number of acres, means actual acres if description is by metes and bounds.[34]

The price may be recovered by instalments if it is so payable,[35] and if so provided, he may declare all of them due for default of one and sue at once.[36] A total or partial failure of title may be set up in an action for the purchase price, and where the vendee has paid off an incumbrance, that amount may be set off against the purchase-money notes sued upon.[37] In an action on a purchase-money note, the vendee cannot defend upon the ground of false representations, though these might entitle him to rescind;[38] but fraud may be shown to reduce the price[39] or breach of covenant in the deed may be recouped.[40] He may counterclaim for fraud.[41]

and placed himself in such a position that he could not carry it out without the aid of the court. Payne v. Melton [S. C.] 45 S. E. 154; Guthell v. Gilmer [Utah] 76 Pac. 628.

26. Krepp v. St. Louis & S. F. R. Co., 99 Mo. App. 94, 72 S. W. 479. The measure of damages in a vendor's action for the vendee's breach of a contract is the difference between the price fixed in the contract and the fair cash value at the time of the breach. The purchase price is not recoverable. Goodwine v. Kelley [Ind. App.] 70 N. E. 832.

27. Stuart v. Pennis, 100 Va. 612.

28. Where the vendor was to receive part money and part land and the vendee refused to convey the land, the measure of damages is the value of the land so refused, and the value stated in the contract is prima facie evidence thereof. Humphreys v. Shellenberger, 89 Minn. 327, 94 N. W. 1083. But see Middleworth v. Lowery, 89 App. Div. [N. Y.] 418, where evidence of value was held inadmissible under pleading setting forth damage from loss of opportunity to resell.

29. Dady v. Condit, 104 Ill. App. 507; Krepp v. St. Louis & S. F. R. Co., 99 Mo. App. 94, 72 S. W. 479.

30. Gray v. Howell, 205 Pa. 211. And see Leis v. Potter [Kan.] 74 Pac. 622, where the contract not being enforceable the vendor was refused damages for its breach.

31. Executors as such are not liable to one who agreed to buy from them, for the amount spent by him in examination of title, where the title is defective and the vendee sues for damages. Carideo v. Austin, 88 App. Div. [N. Y.] 35.

32. Holloway v. Miller [Miss.] 36 So. 531.

33. In an action against the assignee of a contract for the purchase of land, evidence that the assignee took possession of the land and removed machinery and what the land was used for was admissible. Baltes Land, S. & O. Co. v. Sutton [Ind. App.] 69 N. E. 179. In an action on a contract for sale of land and machinery, evidence of what machinery and fixtures were on the land was harmless error. Id.

34. Where one agrees to pay for an option four per cent of the purchase price, fixed at $25 per acre and describing the tract by metes and bounds, and stating that it contains 410 acres, the measure of liability is to be determined by the actual acreage and not by the number of paper acres. Warden v. Tesla, 87 N. Y. Supp. 853.

35. Where instalments of money are provided for, suit may be brought for them as they accrue. Colwell v. Fulton, 117 Fed. 931.

36. In an instalment contract containing a provision for forfeiture upon nonpayment at the option of the vendee, the vendor may waive the forfeiture and sue for the unpaid instalments, any time before the statute of limitations has run. North Stockton Town Lot Co. v. Fischer, 138 Cal. 100, 70 Pac. 1082.

37. Dahl v. Stakke [N. D.] 96 N. W. 353. A conveyance of "all one's right, title and interest in a leasehold" without warranty; there could be no abatement of purchase price on partial failure of the consideration. Scott v. Slaughter [Tex. Civ. App.] 80 S. W. 643.

38. Land worth $2 an acre; represented to be worth $8. Farmers' Nat. Bank v. St. Regis Paper Co., 77 App. Div. [N. Y.] 558.

39. But a vendee who is induced by fraudulent misrepresentations to pay more than he otherwise would for land is entitled to an abatement of the purchase price. Ludwick v. Petrie [Ind. App.] 70 N. E. 280.

40. Where the vendor agrees to give a good title and the vendee accepts the deed, he is remitted to the covenants in the deed and in an action for the purchase price may set up a breach of a covenant against en-

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Overpayments may be recovered back.[42] If the suit is in equity, it may retain it and do complete justice.[43]

Pleading and proof.—As in other contracts, plaintiff must allege performance.[44] In an action for the purchase price, failure by the vendor to perform conditions are matters of defense and cannot be taken advantage of by general demurrer.[45] Where the suit is for breach, the recovery cannot be for money paid on the price.[46]

Performance or tender of performance or facts excusing performance or tender must be proved,[47] and is not admitted by a general denial and allegations of excuse for nonperformance by the other party.[48] A purchaser who gives a note and receives a deed has the burden of showing, when sued on the note, that the sale was upon a condition which has not been fulfilled.[49] Parol evidence is admissible to show the real consideration.[50] A deed is not conclusive, when it appears that the consideration was computed on a mutual mistake as to the quantity of land conveyed.[51] Evidence of value is inadmissible under averments of loss of resale at a fixed price.[52] Whether a plaintiff suing for earnest money himself broke the contract is for the jury.[53]

Possession will be awarded under a statutory proceeding only in strict accord with the procedure fixed.[54]

§ 11. *Vendor's lien. A. Implied.*—Generally, the vendor of real estate has an implied lien thereon for the unpaid purchase money against the vendee and those who take with notice,[55] though the contract to convey was oral,[56] and though

cumbrances by way of counterclaim. Thurgood v. Spring, 139 Cal. 596, 73 Pac. 456.

41. Nisson v. Hood, 140 Cal. 224, 73 Pac. 981.

42. Where a contract provided that the price should be $50 per acre and such contract was not merged in the deed which recited a sale for a lump sum, the vendee could recover an overpayment made by reason of a mutual mistake as to the quantity of land conveyed. Butt v. Smith [Wis.] 99 N. W. 328.

43. Where a vendor brought a suit to recover the balance of the purchase price and to foreclose a vendor's lien therefor, and a demurrer to the complaint was sustained because of the defective description of the land the court had jurisdiction to render judgment for the vendee on a counterclaim for earnest money. Cammack v. Prather [Tex. Civ. App.] 74 S. W. 354. Though specific performance be refused in a suit therefor, a court of equity will retain jurisdiction where the purchaser has paid part of the purchase price, order an accounting and adjust the rights of the parties. McAllister v. Harman, 101 Va. 17.

44. The plaintiff must allege the performance of conditions precedent. Collins v. Amiss, 159 Ind. 593, 65 N. E. 906.

45. Gummer v. Mairs, 140 Cal. 535, 74 Pac. 26.

46. Where the pleadings in an action by the purchasers were on the basis of an affirmance of the contract and damages for its breach, on failing to establish the breach, they were not entitled to recover a note given in part payment. Marcus v. Clark [Mass.] 70 N. E. 433.

47. Newberry v. Ruffin [Va.] 45 S. E. 733; Fisher v. Buchanan [Neb.] 96 N. W. 339.

48. In an action for breach of a contract to convey where the complaint alleges full performance by the vendee, the plaintiff must prove his performance, though the vendor in his answer makes a general denial, and sets up inability to perform because he cannot get the title. Burns v. Freling, 98 Mo. App. 267, 71 S. W. 1128.

49. Rose v. Ware, 24 Ky. L. R. 2321, 74 S. W. 188.

50. That it was different from that expressed in the deed. Butt v. Smith [Wis.] 99 N. W. 328.

51. Butt v. Smith [Wis.] 99 N. W. 328.

52. In an action by the vendee for damages for a breach alleging as damages the difference between the contract price and the price for which he had agreed to sell to a third person, evidence of value is inadmissible. Middleworth v. Lowery, 39 App. Div. [N. Y.] 418.

53. Alexander v. Von Koehring [Tex. Civ. App.] 77 S. W. 629.

54. In Michigan, judgment must state amount, and writ of restitution cannot issue for vendor if amount and double costs be paid within five days. Lambton Loan & Inv. Co. v. Adams [Mich.] 93 N. W. 877.

55. Brown v. White [Ind. App.] 67 N. E. 273; Mulky v. Karsell, 31 Ind. App. 595, 68 N. E. 689; Ballard v. Camplin, 161 Ind. 16, 67 N. E. 505. Vendor delivered possession on vendee's promise to make such annual payments as she could. Hubbell v. Henrickson, 175 N. Y. 175, 67 N. E. 302. Vendor's privilege under the civil law. Swoop v. St. Martin, 110 La. 237; American Homestead Co. v. Karstendiek, 111 La. 884. The grantee of an unrecorded deed executed a trust deed to secure the purchase-money notes without referring to them otherwise than as ordinary notes. Held, the trust deed was not notice to a purchaser from the vendor. Hart v. Gardner, 81 Miss. 650. It attaches to land received in exchange as well as where money

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a conveyance to the purchaser is not made;[57] and it does not depend upon the transfer of a perfect legal title,[58] nor upon surrender of possession to the purchaser;[59] but does not attach where vendor remained in possession and committed waste.[60] The lien exists only on a sale of land and not on a sale of that which is to become a fixture.[61] The right to enforce the lien exists even where there is a remedy at law.[62]

Nature.—The lien is not an interest in land.[63] The parties are considered each the trustee for the other.[64]

Waiver.—The vendor may be estopped to claim his lien,[65] and it is waived by taking other security,[66] but merely taking a purchase-money note is not a waiver.[67] The lien may be enforced even after an unsuccessful suit by the plaintiff to cancel the contract and deed on the ground of fraud.[68]

Priority.—The lien is superior to that of a mortgagee with notice,[69] and has priority over assignees in bankruptcy or insolvency or an assignee for the benefit of creditors;[70] and over a receiver.[71]

Payment[72] *and enforcement.*—A purchaser of a note given as part payment for land may enforce the vendor's lien against the land for the balance of the purchase money.[73] The sale should be in the inverse order of alienation where a whole tract subject to lien is transferred in parcels.[74] On appeal, the purchaser is not liable on his supersedeas bond for occupation during extension of time by the court.[75] The lien should be satisfied out of a refunding bond and not by sale of the land.[76]

is to be paid. Johnson v. Burks [Mo. App.] 77 S. W. 133.

In Pennsylvania the vendor does not have any lien distinct from his legal title. In re Clark, 118 Fed. 358.

56. If the land is actually conveyed the lien attaches. McCoy v. McCoy [Ind. App.] 69 N. E. 193.

57, 58. Mulky v. Karsell, 31 Ind. App. 595, 68 N. E. 689.

59. The lien may be implied even when the vendor remains in possession. Johnson v. McKinnon [Fla.] 34 So. 272.

60. Vendor in possession allowed estate to depreciate and omitted to pay taxes. Johnson v. McKinnon [Fla.] 34 So. 272.

61. Vendors, under a contract for the sale of fruit trees providing that they should be entitled to certain fruit crops to be raised on trees selected by them, acquired thereby no lien on the land on which the trees sold were planted. Butler v. Stark [Ky.] 79 S. W. 204.

62. The purchaser was solvent and the deed contained a covenant of warranty. Johnson v. Burks [Mo. App.] 77 S. W. 133.

63. But is a right to demand the use of equity jurisdiction to enable the vendor to acquire an interest. Halvorsen v. Halvorsen [Wis.] 97 N. W. 494.

64. The vendor is a trustee of the land for the vendee upon payment of the purchase money and the vendee a trustee of the purchase money for the vendor, hence the statute of limitations does not begin to run until the trust relation is determined. Williams v. Young [Ark.] 71 S. W. 669; Forthman v. Deters, 206 Ill. 159, 69 N. E. 97.

65. Holder of lien present at sale told purchaser's grantee he would not look to him for payment, and refused payments offered by such grantee. North v. Rogers, 25 Ky. L. R. 1542, 78 S. W. 165.

66. Though not so acknowledged as to be entitled to rescind. Hunton v. Wood, 101 Va. 54.

67. Lyon v. Clark [Mich.] 94 N. W. 4.

68. McCoy v. McCoy [Ind. App.] 69 N. E. 193.

69. Mortgagee knew that portion of purchase price had not been paid. Harter v. Capital City Brew. Co., 64 N. J. Eq. 155.

70. Lyon v. Clark [Mich.] 94 N. W. 4.

71. Mercantile Trust Co. v. Chicago, P. & St. L. R. Co. [C. C. A.] 123 Fed. 393.

72. Evidence held to show payment in full by vendee. Yancey v. People's Bank, 101 Mo. App. 605, 74 S. W. 117.

73. But if he takes after maturity, it is subject to every defense to which it was subject in the hands of the payee. Williams v. Baker, 100 Mo. App. 284, 73 S. W. 339. In Georgia, by statute, the assignee or holder of a note given for the purchase money of land may in appropriate proceedings, subject the land to his debt [Civ. Code 1895, § 5432]. Ray v. Anderson [Ga.] 47 S. E. 205.

74. But a complaint in an action to foreclose the lien on one of the parcels is not demurrable because it does not show that such parcel was the last one sold. Diamond Flint Glass Co. v. Boyd, 30 Ind. App. 485, 66 N. E. 479.

75. The vendor foreclosed a contract for the sale of land and the vendee was given by the court until a certain day to complete his payments or deliver possession. On appeal the court extended the time. Held, the vendee was not liable prior to the extended date on his supersedeas bond conditioned to pay for use and occupation from the time of his appeal until the delivery of possession. Buckley v. Crane [C. C. A.] 123 Fed. 29.

76. Where part of land subject to a ven-

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(§ 11) *B. Express lien.*—A lien may be created by the agreement of the parties,[77] and may be retained for the benefit of a third person.[78]

Nature.—The lien is in effect a mortgage,[79] and the purchaser's grantee occupies a position similar to one taking subject to a mortgage.[80]

Waiver.—A lien expressly reserved is not waived by taking security.[81]

Priority.—The lien prevails over subsequent mortgagees[82] or purchasers who take with notice,[83] and over a subsequent mechanic's lien.[84]

Payment[85] *and release.*[86]—Release of a purchaser with no intent to release his grantee does not release the lien against such grantee.[87] One joint owner may compel contribution against the others when he has paid off the lien.[88]

Enforcement—Foreclosure.—The vendor, or his assigns, may recover back the land where the purchase price has not been paid even after the statute of limitations has run against vendor's lien notes,[89] but where there are a series of the

dor's lien is sold to pay a judgment and a refunding bond is given to pay the lien if it be adjudged valid, the balance of the land should not first be sold to satisfy the lien. Vaught v. Murray, 24 Ky. L. R. 1587, 71 S. W. 924.

77. Lien reserved in deed. Foster v. Ross [Tex. Civ. App.] 77 S. W. 990.

Liens reserved in the purchase-money notes are frequently met with. It will be seen that most of the liens hereinafter discussed are of this character.

Purchase-money mortgages, see Mortgages, 2 Curr. Law, p. 905; Foreclosure of Mortgages on Land, 2 Curr. Law, p. 14. A vendee who has given an absolute bond and mortgage to secure deferred payments cannot show by parol evidence an agreement that the bond was conditional on clearing a defect in title, unless he would not have purchased but for such agreement. Stewart v. N. Y. & C. Gas Coal Co., 207 Pa. 220.

78. And is enforceable by him as between him and the vendee, and against anyone with notice. Hurst v. Hurst, 25 Ky. L. R. 714, 76 S. W. 325.

79. Wade v. Bent, 24 Ky. L. R. 1294, 71 S. W. 444.

80. The grantee of land subject to a reserved vendor's lien is in the same position as if it were subject to a mortgage, and as to the land, and to the extent of its value he stands in the relation of principal debtor and his grantor in that of surety. Wade v. Bent, 24 Ky. L. R. 1294, 71 S. W. 444; Fox v. Robbins [Tex. Civ. App.] 70 S. W. 597.

81. Nixon v. Knollenberg, 92 Mo. App. 20.

82. Hall's Adm'r v. Hall's Adm'x, 24 Ky. L. R. 2317, 73 S. W. 1120. Where a contract to sell land may be recorded, a bond for title taken by the vendee will not prevail over a subsequent mortgage, unless the contract is recorded. Hurst v. Hurst, 25 Ky. L. R. 714, 76 S. W. 325. The holder of a junior lien cannot prevail over a vendor's lien reserved in a deed where the note is assigned and unrecorded unless he can show that he is a purchaser for value without notice and the burden is upon him, in an action on the original notes. King v. Quincy Nat. Bank, 30 Tex. Civ. App. 92, 69 S. W. 978.

83. A purchaser from a vendee who buys subject to an express vendor's lien is bound by the lien shown on the records. Malone's Committee v. Lebus, 25 Ky. L. R. 1146, 77 S. W. 180.

84. For permanent improvements placed on the land and which become part of the realty. Watson v. Markham [Tex. Civ. App.] 77 S. W. 660.

85. Evidence held to show lien had been paid. Barbour v. Huber's Ex'r [Ky.] 78 S. W. 869; Fellows v. King [Ky.] 78 S. W. 468. Evidence held to show payment of notes given in part payment of purchase money. Morris v. Hill, 25 Ky. L. R. 252, 74 S. W. 1043. The vendee paid part of the purchase price, gave vendor's lien notes for the balance, and received a deed. He afterwards conveyed the land to a third person, and subsequently paid the notes. Held, that his grantee took full title and not merely title to such proportion as the vendee's original payment bears to the whole purchase money. The purchaser by paying the notes acquired no rights against his grantee. Ford v. Boone [Tex. Civ. App.] 75 S. W. 353.

86. A guardian who sells his ward's estate taking purchase money notes therefor cannot surrender the notes to the vendee at a discount without authority from the probate court, and if the guardian converts the amount paid to his own use the vendee is still liable. Brown v. Fidelity & Deposit Co. [Tex. Civ. App.] 76 S. W. 944.

87. Where vendor reserved a lien and the vendee sells to A who assumes the note and gives another note which is assigned to plaintiff, and the vendor afterwards filed a release acknowledging payment in full and took new notes with a lien from A, intending to relieve the first purchaser but not intending to waive the lien, held this did not amount to a release giving plaintiff's lien priority. Maas v. Tacquard's Ex'rs [Tex. Civ. App.] 75 S. W. 350. Evidence held to show that two of a series of notes had not been paid and were equal liens with the rest of the series. Morris v. Hill, 25 Ky. L. R. 252, 74 S. W. 1043.

88. A money judgment may be rendered against them. Wilkerson v. Bacon [Tex. Civ. App.] 79 S. W. 348.

89. Sanders v. Rawlings [Tex. Civ. App.] 77 S. W. 41. Where plaintiff has bought in the superior title from the vendor, he may recover the land though the statute of limitations has run against the vendor's lien note held by him, the note never having been paid. Finks v. Abeel [Tex. Civ. App.] 77 S. W. 650.

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notes, he cannot rescind in part and foreclose on those not barred.[90] All lien holders should be made parties defendant,[91] but purchasers from the vendee before suit brought are not necessary parties,[92] nor is the holder of an unrecorded deed.[93]

Possession of a third party claiming title is no defense.[94] A purchaser from the vendee may set up a breach of warranty of title when sued on the purchase money notes.[95] The bona fide purchaser of vendor's lien notes takes same clear of defenses.[96] A lien reserved in a deed as security for the payment of the purchase-money notes is analogous to a mortgage and passes with a transfer of the notes.[97] The description must be sufficient to identify the land,[98] and there must be no variance.[99] The burden is on plaintiff to show amount due.[100] Judgment with stay until incumbrances are removed is proper.[101] The purchaser who buys on foreclosure of an outstanding incumbrance occupies no different position as respects the vendor's lien notes than had the incumbrance been paid by a third party.[102] A sale is usually directed.[103] The market value determines the fairness of the sale.[104] Surplus after sale belongs to the vendee.[105] The surety on

90. Where one of a series of vendor's lien notes is barred by limitations, the plaintiff cannot rescind as to the proportion of land covered by that note, and foreclose as to the balance, but must elect to rescind in toto and recover the land or else sue on the unbarred notes. Wilkerson v. Bacon [Tex. Civ. App.] 79 S. W. 348.

91. Under Civ. Code Ky. § 694, subsec. 3. Leonard v. Welch, 25 Ky. L. R. 692, 76 S. W. 338.

The various holders of a series of vendor's lien notes should be made parties defendant or they are not precluded by the decree. Soule v. Ratcliff [Tex. Civ. App.] 76 S. W. 583.

92. Talbot v. Roe, 171 Mo. 421, 71 S. W. 682.

93. Her remedy is not against the vendor but against her grantor on the warranties in her deed. Friend v. Means, 25 Ky. L. R. 1540, 78 S. W. 164.

94. It is no defense to an action on a vendor's lien that part of the land is in the possession of a third person claiming under a superior title, without showing actual adverse possession when the vendee took his deed or that the superior title has been adjudicated. Jett v. Farmers' Bank, 25 Ky. L. R. 817, 76 S. W. 385.

95. Williams v. Baker, 100 Mo. App. 284, 73 S. W. 339. In an action on vendor's lien notes the plaintiff cannot recover unless he shows that the title was good, if recovery on the notes was expressly made dependent on the validity of the title. Zimmermann v. Owen [Tex. Civ. App.] 77 S. W. 971.

96. Evidence held to show that the purchaser did not take in good faith and held insufficient to estop payee from claiming land was homestead. Lybrand v. Fuller, 30 Tex. Civ. App. 116, 69 S. W. 1005. Where a series of notes is given, each providing that failure to pay one shall mature them all, a person who takes them when one is overdue takes them with notice of defenses as to all. Id. Indorsee of a purchase-money note allowed to rely on statement of vendor's attorney that the sale was bona fide. Cochran v. Siegfried [Tex. Civ. App.] 75 S. W. 542. Where husband and wife sell land taking vendor's lien notes therefor with no recital that the land is her separate property, the wife cannot set up her claim as against a purchaser from a pledgee of the husband. Ramey v. Eskridge [Tex. Civ. App.] 76 S. W. 763.

97. Smith v. Butler [Ark.] 80 S. W. 580. A lien was reserved in a deed to secure payment of several purchase-money notes which were assigned to different persons; they were entitled to participate ratably in the proceeds of the sale if there was not enough to pay all. Id.

98. Description held sufficient which was adopted from the deed and though somewhat vague could be made certain. Tichenor v. Wood, 24 Ky. L. R. 1109, 70 S. W. 837.

99. Description in pleading "being all of abstract No. 96, cert. 1-108, grantee B. S. & F., containing 640 acres." Plaintiff introduced records "to show sale and transfer of section No. 69 cert. No. 1-104 original grantee B. S. & F., Blk. K. 7 Deaf Smith County." Variance held fatal. Wagley v. Western Union Land Co. [Tex. Civ. App.] 73 S. W. 1065.

100. The burden is on plaintiff, in an action to foreclose a lien, to show the amount due, where the notes were fraudulently made without consideration, to raise money, with a homestead as security. Harbers v. Levy [Tex. Civ. App.] 77 S. W. 261.

101. In a suit on purchase-money notes and to foreclose a vendor's lien it appeared that after the notes were due an outstanding deed of trust was discovered. Held, that judgment on the notes with a stay of execution until the release of the deed is proper. McLean v. Connerton [Tex. Civ. App.] 78 S. W. 238.

102. Heard v. Thrasher, 96 Tex. 380, 73 S. W. 893.

103. In an action to enforce a lien against a purchaser who assumed the debt, a sale of the land is proper. McBrayer v. Hanks' Ex'rs, 24 Ky. L. R. 1699, 72 S. W. 2. The fact that a 50 acre lot is of little value is no reason for refusing a sale to satisfy a vendor's lien, under Civ. Code Proc. § 694, subsec. 3, authorizing a sale "unless it appears the land is not susceptible of advantageous division." Haven v. Daugherty's Adm'r [Ky.] 79 S. W. 191.

104. In a suit to set aside a decree foreclosing a vendor's lien, the market value must be taken in determining the fairness of the sale and not that value plus its then

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the note purchasing at the foreclosure sale is a purchaser for value.[106] Title derived from the original vendor's lien notes is superior to that derived from lien notes given on a subsequent sale by the purchaser.[107]

VENUE AND PLACE OF TRIAL.

1. The Proper Venue (2000).
A. The Nature of the Action (2000).
B. Local Actions, Actions Concerning Real Estate (2000).
C. Transitory Actions (2001).
D. Special Actions and Proceedings and Equitable Proceedings (2003).
E. Suits Against Corporations (2003).
F. De Facto Counties (2004).
G. Effect of Improper Venue (2004).
§ 2. When Change is Allowable, Necessary or Proper (2004).
§ 3. Procedure for Change (2006).
§ 4. Results of Change of Venue (2008).
§ 5. Wrong Venue as Cause of Abatement (2008).

§ 1. *The proper venue. A. The nature of the action* is determined when it is begun from the complaint,[1] and if local and transitory causes be joined, one as principal and the other as ancillary, the former controls.[2]

(§ 1) *B. Local actions; actions concerning real estate.*—By the common law of England and in most of the states, an action for the recovery of damages for injury to land is local and can be brought only where the land is situated.[3] Such are actions for damages to real estate;[4] to foreclose liens and mortgages,[5] even though the mortgage note be held and is payable in another county;[6] to reclaim property on account of lesion;[7] to declare a trust in lands;[8] to set aside a deed,[9] or other instrument of title or security on land,[10] for the condemnation of lands by a city or county, though in ordinary actions the city should sue where defendant lives,[11] or actions to obtain partition of lands.[12]

unknown value as oil property. Fox v. Robbins [Tex. Civ. App.] 70 S. W. 597.

105. Where land is sold on foreclosure of vendor's lien notes, the excess of the proceeds over the amount due on the notes goes to the vendee or his heirs. Dodd v. Hewitt, 24 Ky. L. R. 708, 69 S. W. 955.

106. A surety on a purchase-money note after judgment against the principal, by purchasing at foreclosure sale by paying the amount of his bid and the balance of the judgment is a purchaser for value. Sullivan & Co. v. McLane, 96 Tex. 144, 70 S. W. 949.

107. Edwards v. Anderson, 31 Tex. Civ. App. 131, 71 S. W. 555.

1. Miller v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836.

2. In an action by a surety against the principal for the debt, also to decree the application of certain paper pledged as collateral for the surety's indemnification to which ancillary process of claim and delivery was sued out against the principal, who had regained possession of the paper, the recovery by claim and delivery was not the principal cause of action. The others fixed the venue which need not have been where the paper was situated. Woodard v. Sauls [N. C.] 46 S. E. 507. Suit for injunction, ancillary to proceeding, to declare priority of liens is not one to enjoin a judgment. D. June & Co. v. Doke [Tex. Civ. App.] 80 S. W. 402. Restraining foreclosure as ancillary to suit for fraud and cancellation. State v. Dearing [Mo.] 79 S. W. 454.

3. Peyton v. Desmond [C. C. A.] 129 Fed. 1.

4. Koorie v. Wichmann [N. J. Law] 56 Atl. 148.

Contra in Minnesota, as to trespass. Peyton v. Desmond [C. C. A.] 129 Fed. 1. While either party may, in an action of trespass to lands, insist upon a trial in the county where the land lies, the action may be prosecuted in any county where defendant may be found. Freud v. Wayne Circuit Judge, 131 Mich. 606, 92 N. W. 109.

5. Fields v. Daisy Gold Min. Co., 26 Utah, 373, 73 Pac. 521; Noyes v. Smith [Tex. Civ. App.] 77 S. W. 649.

Proceedings for a sale under a security deed do not constitute a "pending proceeding" which may be enjoined by the court of a county other than that in which the grantee resides. Meeks v. Roan, 117 Ga. 865.

6. Sherman v. Droubay [Utah] 74 Pac. 348. A third party, nonresident, having in his hands the note and mortgage, is properly brought in by publication of summons. Mack v. Austin, 67 Kan. 36, 72 Pac. 551.

7. Smart v. Bibbins, 109 La. 986.

8. On ground of fraud. Booker v. Aitken, 140 Cal. 471, 74 Pac. 11.

9. Hunt v. Dean [Minn.] 97 N. W. 574.

10. An action by a corporation against its promoters and others for personal judgment for value of property fraudulently obtained, for damages for fraud, a cancellation of notes given in payment for land, and an injunction restraining foreclosure of a trust deed, is not an action which "may affect the title to real estate" within a statute regarding the venue of such actions. State v. Dearing [Mo.] 79 S. W. 454.

11. The provision in the code that actions by city or county against citizen of another county must on motion of defendant be transferred, refers to ordinary actions and not condemnation proceedings. City of Santa Rosa v. Fountain Water Co., 138 Cal. 579, 71 Pac. 1123, 1136.

12, 13. Murphy v. Superior Court, 138 Cal.

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If the land lies in different counties, the action may be brought in any one of them.[13]

Where a cause is removed to a superior court, because title to realty is involved, defendant has not an absolute right to have "new action" transferred to the county where land lies; otherwise if originally begun above.[14]

However, an action merely for specific performance of agreement to convey land should be brought in the county of defendant's residence.[15] Similarly, a suit to cancel mortgages executed by plaintiff himself, on the ground of procurement by fraud, is transitory and not a suit to quiet title.[16] An action for damages by reason of defendant having built a canal across plaintiff's land is not one to quiet title which is local.[17]

An action to obtain permission to disinter a body from a cemetery is not necessarily triable in the county where the land lies.[18]

An action to set aside fraudulent conveyances may be begun where debtor resides, and transferee may be served at his residence in another county.[19]

Penal actions are local.[20]

(§ 1) *C. Transitory actions.*—Parties have usually the right to sue or be sued in the county of their residence, but the residence of parties in interest who are not parties to the record cannot be considered;[21] nor the fact that the cause of action originated elsewhere.[22]

A temporary residence does not suffice.[23] In Maryland, statute authorizes suit in the county of residence, or the county where party transacts business.[24]

The transitory nature of the action being determined when it is commenced is not so altered as to affect the venue by the filing of answer localizing the issues.[25]

"Domicile" when it means residence may be had in more than one county.[26]

In some states, a purely personal action for the recovery of money only must

69, 70 Pac. 1070; Hunt v. Dean [Minn.] 97 N. W. 574. Under a statute requiring suit to be brought "where subject of action is located," an action to enforce specific agreement to convey land is properly brought in county where some of the land is, though some be out of the state, and the action affects personal property in the county of the suit, and none of the parties resided there. Hall v. Gilman, 77 App. Div. [N. Y.] 464.

14. From justice to supreme court. Eaton v. Hall, 78 App. Div. [N. Y.] 542.

15. Unless there be a trust or some relief sought against the land itself. Close v. Wheaton, 65 Kan. 830, 70 Pac. 891.

16. The fact that deeds have been recorded makes no difference. Shouse v. Taylor, 24 Ky. L. R. 1842, 72 S. W. 324.

17. Miller v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836.

18. Cohen v. Congregation Sherith Israel, 85 App. Div. [N. Y.] 65.

19. First Nat. Bank v. Gibson [Neb.] 94 N. W. 965. Cancellation of fraudulent mortgage. Shouse v. Taylor, 24 Ky. L. R. 1842, 72 S. W. 324.

20. Action for treble damages. Staninger v. Tabor, 103 Ill. App. 330.

21. Motion for change. Lane v. Bochlowitz, 77 App. Div. [N. Y.] 171.

The right to sue in plaintiff's residence pertains to one suing as trustee of an express trust. Under a statute providing for trial of actions in the county in which plaintiff or defendant or any of them resides, it was held error to remove from a county where the plaintiff, trustee of an express trust, resided. Riley v. Pelletier [N. C.] 46 S. E. 734.

22. Plaintiff was directed by defendant in one county to get goods in another county on which defendant had chattel mortgage. Having to pay a judgment for so doing, he sued defendant for reimbursement. Suit was properly brought in county where both plaintiff and defendant lived. Hoggan v. Cahoon, 26 Utah, 444, 73 Pac. 512.

23. Working for several weeks in county where he was injured while at such work does not establish a "residence" in such county under the statute relating to venue for such actions. Galveston, H. & S. A. R. Co. v. Cloyd [Tex. Civ. App.] 78 S. W. 43.

24. Cromwell v. Willis, 96 Md. 260. Under Code, art. 75, § 132, authorizing one engaged in regular business or avocation to be sued in the county where his business is carried on, a nonresident who managed and received rents of his own property and also of property he owned in common with another and used an office on which his sign remained which he had used when a resident, was not within the meaning of the statute. State v. Shipley [Md.] 57 Atl. 12.

25. Miller v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836.

26. A person residing in his house in one county part of the year and on a ranch in another county the balance of the year may be sued in either county for an assault in one of them. Pearson v. West [Tex.] 77 S. W. 944. Held estopped to deny domicile, Id.

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be brought in the county where the defendant or one of several defendants resides or may be summoned.[27]

In Minnesota, actions against nonresidents of the state for the recovery of money may be brought in any county of the state, and writ of attachment issued to sheriff of any other county.[28]

Contracts are sometimes made suable where they are to be performed, as a promissory note payable in a particular county;[29] but not a mortgage note, if the suit is to foreclose on land lying in a different county.[30] When such contracts are required to be in writing,[31] a parol promise in satisfaction of the contract is outside the statute.[32] A plaintiff who renders bills calling for payment in his own county does not establish a "contract in writing" specifying performance in a particular county, unless defendant in some way assents.[33] A mere promise to remit is insufficient.[34] Actions grounded on deceit in a sale may be brought in the county where the fraud was committed, and are not on a contract in writing suable where defendant resides.[35]

Causes of action in tort for personal injuries are transitory.[36] In Minnesota, an action for damages for trespass to real estate is regarded, not as relating to the real estate, but as a personal remedy, and transitory, not local in nature.[37]

Where there are several defendants, the court cannot acquire jurisdiction over the nonresident defendant, when the resident defendant is not liable,[38] or when no substantial equitable relief is asked against him.[39] Neither can a party be impleaded who has the right to be sued in another county.[40]

Where a joint liability is asserted against several defendants to maintain an action against one or more of them in a county where some do not reside, the latter are not to be held on a different and several liability even if disclosed by the pleadings and proofs.[41] If the liability be not joint, they must not be impleaded to sue where they do not reside.[42]

Principal and surety in a promissory note, being joint promisors, may be sued as such in the county of the residence of either.[43]

Distinct causes of action.—Where there are distinct causes of action that may be joined in the same suit, venue as to one of them will not confer venue as to the others.[44]

27. McKibbin v. Day [Neb.] 98 N. W. 845.
28. Clements v. Utley [Minn.] 98 N. W. 133.
29. Fenn v. Roach & Co. [Tex. Civ. App.] 75 S. W. 361.
30. Sherman v. Droubay [Utah] 74 Pac. 343.
31. The statute now applies solely to written contracts. Borden v. Le Tulle M. Co. [Tex. Civ. App.] 74 S. W. 788.
32. Notes being discharged by parol promise of defendant, suit for a still remaining indebtedness must be brought in county of defendant's residence and not where notes were payable. Wettermark v. Burton, 30 Tex. Civ. App. 509, 70 S. W. 1029.
33. Borden v. Le Tulle Mercantile Co. [Tex. Civ. App.] 74 S. W. 788.
34. A letter written by a debtor after an adjustment of accounts stating that he would remit in a few days was not a written contract in the county of creditor's residence so as to warrant suit therein (§ 1194) instead of at county of debtor's residence. Flynt v. Eagle Pass Coal & Coke Co. [Tex. Civ. App.] 77 S. W. 831.
35. Defendant having knowingly sold diseased hogs to plaintiff, on account of the fraud, was not entitled to be sued in the county of his residence. Howe Grain & Mercantile Co. v. Galt [Tex. Civ. App.] 73 S. W. 828.
36. An action for the death of a citizen of Illinois, killed in Pennsylvania by reason of defendant's negligence, being transitory, is properly brought in Illinois. Leman v. Baltimore & O. R. Co., 128 Fed. 191.
37. Peyton v. Desmond [C. C. A.] 129 Fed. 1.
38. Ross v. Battle, 117 Ga. 877.
39. Ellis v. Farmer, 119 Ga. 238. Especially where if suit were brought in the county of the nonresident, the other defendant would be only a nominal party, if at all. Townsend v. Brinson, 117 Ga. 375.
40. In an action by a real estate broker for commissions, the purchaser that the broker found, living in another county, cannot be made a party, being entitled to be sued in the county of his residence. Scottish-American Mortg. Co. v. Davis [Tex. Civ. App.] 72 S. W. 217.
41. Penney v. Bryant [Neb.] 96 N. W. 1033.
42. McKibbin v. Day [Neb.] 98 N. W. 845.
43. Heard v. Tappan, 116 Ga. 930.

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(§ 1) *D. Special actions and proceedings and equitable proceedings. Divorce.*—Under a statute authorizing plaintiff to bring action for divorce in the county where he resides, it is not error to refuse to transfer to county of defendant's residence.[45]

Actions for penalties.—An action to recover treble money lost in gambling is for a penalty, and should be brought in the county where gambling was done and money lost.[46]

Injunctions.—Injunctions against a pending proceeding are usually to be brought where the proceeding is pending,[47] and the execution of writs may be enjoined wherever it is to be performed.[48] To enjoin enforcement of a judgment, action should be brought in the county and court where the judgment was rendered, unless rendered in the supreme court, and not in a county where a transcript has been filed.[49] This is not always true where such injunctive relief is merely ancillary.[50]

Forfeiting recognizances.—The U. S. court in which an indictment is pending has right to forfeit recognizance if defendant fails to appear, the surety being resident of another district.[51]

(§ 1) *E. Suits against corporations.*—At the common law no suit against a corporation was authorized except in county where the corporate property was in whole or part situate or where it transacted a substantial part of its business, and this rule is very generally adopted by the states.[52] Suits for equitable relief should be brought in the county fixed by the charter as the principal place of business.[53]

Private corporations are allowed by many statutes to be sued in any county where they have an agency or representative.[54] A breach of warranty by a for-

44. First Nat. Bank v. Valenta [Tex. Civ. App.] 75 S. W. 1087.

45. Bachelor v. Bachelor, 30 Wash. 639. 71 Pac. 193. Const. art. 8, § 5, providing that all civil and criminal business shall be tried in the county where it arises, the word business means "causes of action" and did not apply to statutory divorce case which did not involve a trial and is not subject to a change of venue. Gibbs v. Gibbs, 26 Utah, 382, 73 Pac. 641.

46. Staninger v. Tabor, 103 Ill. App. 330.

47. But advertising and preparing for a sale under a power in a security deed is not a "pending proceeding" and a resident agent appointed to conduct sale has no interest in the property, and court is without jurisdiction to give relief against nonresident owners. Meeks v. Roan, 117 Ga. 865.

48. Where proceedings in district court of Ga., on which execution was founded, were void, circuit court of U. S. for northern district of N. Y. has jurisdiction to restrain marshal of latter district from levying on property of debtor therein. Kirk v. U. S., 124 Fed. 324.

A suit for injunction to restrain an execution sale in favor of a county is returnable to the court of the county where the sheriff against whom it is directed has his domicile and not to a court within the county holding the judgment. Little v. Griffin [Tex. Civ. App.] 77 S. W. 635.

49. So by statute in Iowa, a transcript of a justice court judgment to district court is there treated as a judgment of that court. Brunk v. Moulton Bank, 121 Iowa, 14, 95 N. W. 238.

50. A suit to enjoin a foreclosure suit which makes no attack on the validity of the decree but is merely ancillary to a proceeding to have plaintiff's lien declared superior to lien of plaintiff in the foreclosure suit is not within the meaning of the law requiring suits to enjoin the execution of judgments to be brought in the county of their rendition. D. June & Co. v. Doke [Tex. Civ. App.] 80 S. W. 402.

51. Kirk v. U. S., 124 Fed. 324.

52. Park Bros. & Co. v. Oil City Boiler Works, 204 Pa. 453; Poland v. United Traction Co., 88 App. Div. [N. Y.] 281. Action may be brought where president and auditor have offices, in absence of evidence that its principal office is elsewhere, though the charter locates it elsewhere, and it has no track in the county of president's office. Boyd v. Blue Ridge R. Co., 65 S. C. 326. A suit for damages to property carried over two roads lies against both roads and may be brought in any county through which either road is operated, even though one of the roads has its domicile in the state and in another county. St. Louis, I. M. & S. R. Co. v. J. H. White & Co. [Tex. Civ. App.] 76 S. W. 947.

53. Etowah Milling Co. v. Crenshaw, 116 Ga. 406. The proper tribunal to restrain directors of a corporation from disposing of corporate productions and receiving debts due the corporation or from carrying on its business in any way is a court of general jurisdiction at the domicile of the corporation. Moneuse v. Riley, 40 Misc. [N. Y.] 110.

54. President of a corporation who has no office other than the county of his resi-

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eign corporation of a sale on order taken and approved without the state accrues in "part" where the order is taken and may be there sued.[55] Statutes providing that suits against railroad companies shall be brought in the county where the cause of action arose, if the company has an agent in such county, apply to foreign as well as domestic railroad corporations.[56]

For causes of action—damages, injuries, etc.—arising in the state, action must usually be brought in the county where the cause of action arose,[57] and defendant company cannot by silence give jurisdiction to the wrong court.[58] If injury is caused by negligence in one county and death results therefrom in another, action for death is maintainable in either county.[59]

For causes of action arising out of the state it is required in Georgia that the action be brought in the county where the charter locates the principal office.[60] In other states, the action is triable in any county where the defendant operates its road.[61] Statutes authorizing suit against either of connecting carriers in any county where either is or is operated have been recently construed.[62]

(§ 1) *F. De facto counties* may be the seat of venue; a de jure organization is not essential and cannot be questioned.[63]

(§ 1) *G. Effect of improper venue.*—A proviso in a certificate of a building association that actions by the holder must be brought only in a certain county affects the venue only and is no defense.[64]

§ 2. *When change is allowable, necessary or proper.*—The privilege of being sued in the county of one's residence is a mandatory cause for change,[65] if sea-

dence, and performs all his official acts there, is a "representative." Sharp v. Damon Mound Oil Co., 31 Tex. Civ. App. 562, 72 S. W. 1043. A special agent getting orders and delivering goods in a certain county has an "agency" in that county, and his principal may be sued there. Wood v. Rice, 118 Iowa, 104, 91 N. W. 902.

55. Westinghouse Elec. Mfg. Co. v. Troell, 30 Tex. Civ. App. 200, 70 S. W. 324.

56. Mitchell v. Southern R. Co., 118 Ga. 845.

57. Hazlehurst v. Seaboard Air Line Ry., 118 Ga. 858; Mitchell v. Southern R. Co., 118 Ga. 845; Culpepper v. Arkansas Southern R. Co., 110 La. 745, 34 So. 761. Statute allowing suits against a certain railroad to be brought in any county where the road runs does not give plaintiff right to select any one of those counties. Suit for damages must be brought in county where injury occurred. LeCroix v. Western & A. R. Co., 118 Ga. 98. Action against railroad for malicious prosecution and imprisonment is properly brought in county through which plaintiff was transported on defendant's road after his arrest, though he was not a resident, and defendant's chief office was located elsewhere. Evans v. Maysville & B. S. R. Co., 25 Ky. L. R. 1258, 77 S. W. 708.

58. Plaintiff stealing ride, got on in one county, was arrested and handcuffed, delivered to sheriff of next county where train stopped, and jailed, charged with stealing ride in latter county. Suit for false arrest should be brought in latter county. Summers v. Southern R. Co., 118 Ga. 174.

59. White v. Rio Grande Western R. Co., 25 Utah, 346, 71 Pac. 593.

60. Even though the principal officers are located and do business in another county. Atlanta, K. & N. R. Co. v. Wilson, 116 Ga. 189.

61. Atchison, T. & S. F. R. Co. v. Keller [Tex. Civ. App.] 76 S. W. 801. A right of action accruing in Iowa to an injured brakeman, he may recover in Missouri according to the laws of Iowa. Benedict v. Chicago Great Western R. Co. [Mo. App.] 78 S. W. 60.

62. Under a statute permitting action for injury to freight or property shipped over more than one line to be brought against any or all of the owning corporations in any county where one or more of the lines are extended or operated, one of two railroad corporations sued for injury to a shipment of live stock, cannot object that suit was brought in a county where it did not have a domicile. Tex. & P. R. Co. v. Murtishaw [Tex. Civ. App.] 78 S. W. 953. This statute applies to shipments the destination of which is beyond the state boundary. Id. The statute does not authorize suit against two railroads in a county in which neither extends, but in which the road of a third company, not sued or liable, extends. Atchison, T. & S. F. R. Co. v. Forbis [Tex. Civ. App.] 79 S. W. 1074. The act does not apply to a road not engaged in transportation within the state but which only transfers freight and baggage between it and a connecting line, the engines and cars of each reciprocally passing over the state boundary in the course of such transfer. St. Louis, I. M. & S. R. Co. v. J. H. White & Co. [Tex.] 80 S. W. 77.

63. State v. District Court of Ramsey County, 90 Minn. 118, 95 N. W. 591.

64. The remedy is by motion for transfer. Benson v. Eastern Bldg. & Loan Ass'n, 174 N. Y. 83, 66 N. E. 627.

65. Woodring v. Rooney, 121 Iowa, 595, 96 N. W. 1100.

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sonably claimed;[66] but it cannot be defeated by consent of other defendants to a trial in the county where action is begun, none of those defendants residing in that county.[67] While a foreign corporation waives jurisdictional defenses by appearing to urge such defenses, it does not thereby waive its privilege of being sued in the proper county.[68]

One of several defendants cannot have a cause removed without the consent of the other co-defendants,[69] nor can one party claim it for another aligned on the same side with him.[70] In Minnesota, where an action is against several defendants, residing in different counties, a majority of them may secure a change of venue.[71] Disqualifying prejudice or bias of the court,[72] or the fact that he was disqualified by having been of counsel,[73] ordinarily makes an absolute ground for a change. There is no conflict between such a provision and one authorizing appointment of a substitute judge.[74] If, however, the prejudice of the court be not such as to disqualify him, that ground is addressed to his discretion.[75] The prejudice or bias of the judge may be either in favor of the adversary or against the applicant.[76]

The convenience of parties,[77] or witnesses,[78] or local prejudice,[79] is a ground addressed to discretion.

The place of trial will not be changed for the convenience of a party to the action or a single witness; nor unless the witness' testimony is material and competent, and not obtainable from other witnesses in the county;[80] nor for the convenience of expert witnesses to prove value of attorney's services;[81] on such

66. By affidavit filed before pleading. Woodring v. Rooney, 121 Iowa, 595, 96 N. W. 1100. This right is a personal privilege and is lost by not objecting and by demurring to the complaint on other grounds. White v. Rio Grande Western R. Co., 25 Utah, 346, 71 Pac. 593. A party who notices a case for trial, appears and moves for a continuance, waives his right to move for a change of venue subsequently. Coleman v. Hayes, 92 App. Div. [N. Y.] 575.

67. Wood v. Herman Min. Co., 139 Cal. 713, 73 Pac. 588.

68. Atchison, T. & S. F. R. Co. v. Forbis [Tex. Civ. App.] 79 S. W. 1074.

69. Under constitution and laws of Maryland providing that on written oath of "either of the parties" that a fair and impartial trial cannot be had, the court shall remove the cause. Baltimore County Com'rs v. United R. & Elec. Co. [Md.] 57 Atl. 675.

70. Under a statute permitting nonresident garnishees to apply for a change of venue when their answer is contested, the defendant cannot object to the venue on the ground of the garnishee's nonresidence, where there is no contest and no application for change of venue by the garnishees. McCloud v. McCullers [Miss.] 36 So. 65.

71. Laws 1903, p. 627, c. 345. Grimes v. Ericson [Minn.] 99 N. W. 621.

72. The judge being a member of the bar association which instituted disbarment proceedings. State v. Smith, 176 Mo. 90, 75 S. W. 586. The judge's son was a member of a corporation, party to the suit. Smith v. Amiss, 30 Ind. App. 530, 66 N. E. 501.

73. Cutting's Comp. Laws, § 2545. Gamble v. First Judicial Dist. Court [Nev.] 74 Pac. 530.

74. The statute providing for a change of venue where judge has been of counsel is not in conflict with act of congress authorizing supreme court to designate any judge to try a case where judge of district has been of counsel. Tootle v. Kent, 12 Okl. 674, 73 Pac. 310.

75. People v. Dist. Court of Fremont Co., 30 Colo. 488, 71 Pac. 388; Doll v. Stewart, 30 Colo. 320, 70 Pac. 326.

76. Keen v. Brown [Fla.] 35 So. 401.

77. **Illustration:** Plaintiff desired change of venue because it was "too costly to get certified copies" of 58 papers on file in the other county. Defendant allowed noncertified copies and refusal was sustained. Schilling v. Buhne, 139 Cal. 611, 73 Pac. 431.

78. Belding v. Archer, 131 N. C. 287; Miller v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836.

Illustration: In a libel action where it was not alleged that the libel was published in the county where the action was brought and the only question is one of damages, change of venue to the county where the paper was published and all the witnesses except plaintiff lived should be allowed. Woolworth v. Klock, 86 N. Y. Supp. 1111.

79. Motions to change place of trial because a fair trial cannot be had in the county. Bartlett v. Smith [Neb.] 95 N. W. 661. Evidence examined. Doll v. Stewart, 30 Colo. 320, 70 Pac. 326.

Illustration: Not error to refuse change of venue because conviction and imprisonment had rendered applicant so hateful to the community that fair trial was impossible, the conviction being ground of the suit, and no special circumstances shown to support the motion. Anderson v. Broward [Fla.] 34 So. 897.

80. Lane v. Bochlowitz, 77 App. Div. [N. Y.] 171.

81. Schilling v. Buhne, 139 Cal. 611, 73 Pac. 431.

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application, the condition of the calendar and duration of the respective terms of court will be also considered.[82] A statute providing for change of venue for local prejudice where the opposite party is a corporation having more than fifty stockholders and maintaining its principal office or place of business in the county where the action is pending, is not a denial of equal protection of laws.[83] The The right of trial by jury as it existed at common law and as secured by modern constitutions includes the right to a change of venue to secure a fair and impartial trial by the prosecution as well as by the defendant.[84]

Statutes providing for changes of venue do not apply to contempt proceedings, unless specifically included.[85] Judges of a lower court brought before a higher court on writ of certiorari have no right to a change of venue.[86] In disbarment proceedings in Indiana an attorney has the same right to change of venue from court and judge as in civil actions.[87]

A county exists de facto from the date of the governor's proclamation and cannot be attacked collaterally, on a proceeding for a change to it.[88]

On appeal from inferior to superior courts.—A cause appealed from the county court to the district court stands on the docket as any other cause in respect to right to change of venue.[89]

§ 3. *Procedure for change.*—The court cannot order a change of venue of its own motion, but only on motion of a party.[90] If action be brought in a different county from that stipulated, the remedy is by motion to transfer.[91]

All parties who are adverse to applicant[92] are entitled to a seasonable[93] notice which, however, is waived by appearance.[94]

The motion or application should be timely made, usually before answer or before trial.[95] The objection to the venue cannot be urged the first time on appeal.[96]

Where one defendant has a right to change of venue, but failed to apply

82. Archer v. McIlravy, 86 App. Div. [N. Y.] 512. Place of trial will not be changed from a rural county in N. Y. to New York City or Brooklyn merely for convenience of witnesses; nor where, excluding applicants, employees and experts, application is not based on a larger number of witnesses than in original county. Quinn v. Brooklyn Heights R. Co., 88 App. Div. [N. Y.] 57. In New York, a change of venue will not be ordered for the convenience of witnesses alone where the change desired is from a rural county to the county of New York. Hirshkind v. Mayer, 91 App. Div. [N. Y.] 416.

83. The corporation not being granted the same right. Cincinnati St. R. Co. v. Snell, 193 U. S. 30.

84. Barry v. Truax [N. D.] 99 N. W. 769.

85. So held in regard to a Montana statute. State v. Clancy [Mont.] 76 Pac. 10.

86. State v. Martin, 100 Mo. App. 479, 74 S. W. 886.

87. In re Griffin [Ind. App.] 69 N. E. 192.

88. State v. District Court of Ramsey County, 90 Minn. 118, 95 N. W. 591.

89. Stone v. Byars [Tex. Civ. App.] 73 S. W. 1086.

90. State v. District Court of Deer Lodge County [Mont.] 75 Pac. 1109.

91. It is not a defense. Benson v. Eastern B. & L. Ass'n, 174 N. Y. 83, 66 N. E. 627.

92. Other defendants. Wood, Curtis & Co. v. Herman Min. Co., 139 Cal. 713, 73 Pac. 588.

93. Walker v. Evans, 98 Mo. App. 301, 71 S. W. 1086.

94. Wood, Curtis & Co. v. Herman Min. Co., 139 Cal. 713, 73 Pac. 588.

95. The ground being prejudice of the community. Anderson v. Mammoth Min. Co., 26 Utah, 357, 73 Pac. 412; Whitcomb v. Stringer, 160 Ind. 82, 66 N. E. 443; State v. Circuit Court of Waukesha County, 116 Wis. 253, 93 N. W. 16. Where relationship of judge to party to the suit was disclosed on the trial, but no application made till after decision was filed, the right to change of venue was waived. Smith v. Amiss, 30 Ind. App. 530, 66 N. E. 501. When the defendant seeks a change of venue as a matter of right on the ground that the county designated in the summons and complaint is not the proper county, the motion therefor must be made at the return term, if the complaint be then filed, or if it is not, then as soon as the complaint is filed, and before answering. Riley v. Pelletier [N. C.] 46 S. E. 734. Under statutes permitting a change of venue as a matter of right in certain cases, on motion therefor before the time for answering expires, the filing of an answer without a demand for removal (Id.), or the acceptance of a special order extending the time for answering, is a waiver of the right of removal (Id.). Under Code Civ. Proc. § 890, objection that an action in a justice's court is brought in the wrong township is waived if not taken at the trial. McGorray v. Superior Court of San Joaquin County, 141 Cal. 266, 74 Pac. 853.

96. Fields v. Daisy Gold Min. Co., 26 Utah, 373, 73 Pac. 521.

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before answering, he cannot by joining in with others whose time for answering has not expired, but who have no right to the change, obtain a transfer of the case.[97]

The filing of a general demurrer and general denial confers jurisdiction and waives all questions of venue.[98]

The right is not lost by moving to strike out parts of the complaint.[99] A motion to remove a cause must be made before a judge, and an affidavit and motion made before the clerk in vacation is invalid.[1] A motion for change of venue on the ground that the convenience of witnesses and the ends of justice would be thereby promoted may be made at any time in the progress of the cause.[2] Where a majority of several defendants residing in different counties are permitted by statute to secure a change of venue, they may secure the same by making the proper affidavit and serving a joint demand before the time for answering has expired as to any of them, or by each making a separate affidavit and demand before his time for answering expires.[3]

The affidavit must state residence as of the commencement of the action,[4] and where convenience of witnesses is sought, it must show that the testimony they will give is material,[5] or in case of local prejudice that it is detrimental to the applicant.[6] Affidavit that witnesses would testify to facts need not show that applicant talked with them and had their assurance that they would so testify.[7] Insufficiency of an affidavit is waived by a general appearance.[8]

The burden of proof is on the applicant. Thus he must show that plaintiff is not resident where he has sued.[9] Where counter-affidavits show that more witnesses reside in the county where action was brought than in the county transferred to, the order granting change is not justified.[10] Counter-affidavits may be received as to grounds which are subject to proof, time being offered for opposing affidavits.[11]

Counter-affidavits are not admissible to traverse a charge of a disqualifying interest or bias of the judge.[12]

The objection that plaintiffs are not the true parties in interest cannot be considered on a motion for change of venue.[13] The answer is not to be considered on a motion to transfer, nor proposed testimony concerning new matter in the complaint, not traversed by answer.[14]

On motion by a defendant to change to the county in which he resides, the venue of an action which has been laid in a county in which neither of the parties

97. State v. District Court of Ramsey County, 90 Minn. 427, 97 N. W. 112.

98. Galveston, H. & S. A. R. Co. v. Baumgarten, 31 Tex. Civ. App. 253, 72 S. W. 78.

99. The statute requiring that motion to change be made when defendant appears and answers. Wood, Curtis & Co. v. Herman Min. Co., 139 Cal. 713, 73 Pac. 588.

1, 2. Riley v. Pelletier [N. C.] 46 S. E. 734.

3. Laws 1903, p. 627, c. 345. Grimes v. Ericson [Minn.] 99 N. W. 621.

4. So by statute in Minnesota. State v. District Court of Pine County, 88 Minn. 95, 92 N. W. 518.

5. To get secretary of state to testify that a corporation "had not" complied with certain laws, but alleging no time, is insufficient. Lane v. Bochlowitz, 77 App. Div. [N. Y.] 171.

6. Affidavit alleging prejudice of the community, but not showing prejudice against the defendants, nor that an impartial jury could not be obtained. In this case a jury satisfactory to both parties was secured. Beavers v. Bowen, 24 Ky. L. R. 882, 70 S. W. 195.

7. Avery v. Allen, 78 App. Div. [N. Y.] 540.

8. State v. Dist. Ct. of Pine County, 88 Minn. 95, 92 N. W. 518.

9. The evidence to contradict plaintiff's positive statement as to his residence being slight, motion to change venue is properly denied. Bischoff v. Bischoff, 88 App. Div. [N. Y.] 126.

10. Avery v. Allen, 78 App. Div. [N. Y.] 540.

11. Schilling v. Buhne, 139 Cal. 611, 73 Pac. 431.

12. Interest of a son in the action. Smith v. Amiss. 30 Ind. App. 530, 66 N. E. 501.

13. Lane v. Bochlowitz, 77 App. Div. [N. Y.] 171.

14. Miller v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836.

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thereto resides, it is improper for the court to order a change of venue to the county where plaintiff resides, against defendant's objection.[15]

If change be asked on the privilege of residence, the filing of the proper affidavit as to residence and the proof of service change the place of trial ipso facto.[16]

The order granting the change need not show the ground upon which it is granted, if it is shown by the whole record. A court may, at the term at which it makes an order for a new trial, set aside the order without first passing on an application for a change of venue.[17] A transfer of a cause from one district court to another amounts to a change of venue.[18]

The clerk of the court from which change is made must transmit all papers and a transcript of proceedings to the clerk of the court to which case is transferred. The identity of the papers does not depend on the clerk's certificate, but on the fact that they were transmitted with the transcript.[19]

Mandamus will not usually lie to compel change of venue;[20] but the court must act after the proper steps are taken by the party.[21] It is the proper remedy where judge was of counsel in the case,[22] or where it is sought to have a case remanded to the first court, whence it had been illegally transferred. The second court has jurisdiction to remand.[23]

Prohibition.—Error or abuse of discretion of a district court in passing on a motion for change of venue cannot be reviewed on prohibition.[24]

§ 4. *Results of change of venue.*—The venue of a prosecution being changed, the second court has jurisdiction,[25] and the jurisdiction of second court having attached, the first court cannot by setting aside the order resume jurisdiction.[26] Exceptions cannot be allowed after the change, to rulings made before it;[27] but an act to be done within a time certain is good within that time, though after a change.[28] On appeal from an order changing place of trial, questions as to plaintiff's removal to the county of the suit solely for the purpose of bringing the action there are immaterial.[29]

§ 5. *Wrong venue as cause of abatement.*—A plea of residence of defendant in another county is a plea in abatement and must give plaintiff a better writ.[30] The facts showing that the venue is wrongly laid must be alleged in such a plea,[31] and unless the complaint shows that none of the parties reside in the county where suit is brought, the question is not raised by demurrer.[32]

15. Ferrin v. Huxley, 87 N. Y. Supp. 1005.
16. State v. District Court of Ramsey County, 90 Minn. 427, 97 N. W. 112.
17. Watson v. Williamson [Tex. Civ. App.] 76 S. W. 793.
18. Since district courts are distinct entities. State v. Clancy [Mont.] 76 Pac. 10.
19. Southern Ind. R. Co. v. Martin, 160 Ind. 280, 66 N. E. 886.
20. People v. Church, 103 Ill. App. 182.
21. State v. Dist. Ct. of Deer Lodge Co. [Mont.] 75 Pac. 1109.
22. Even though motion was informally made. Gamble v. First Judicial Dist. Ct. [Nev.] 74 Pac. 530.
23. The case was transferred while trial was pending and certiorari was improperly resorted to as a remedy. State v. Circuit Court of Waukesha County, 116 Wis. 253, 93 N. W. 16.
24. People v. District Court of Fremont County, 30 Colo. 488, 71 Pac. 388.
25. May enter judgment and issue process to the original county. State v. Baughman [Mo. App.] 74 S. W. 433.
26. Stone v. Byars [Tex. Civ. App.] 73 S. W. 1086.
27. Bowring v. Wabash R. Co., 90 Mo. App. 324.
28. It was error to strike out injunction bond filed within the required period, but after the change of venue. Laun v. Ponath [Mo. App.] 79 S. W. 729.
29. Quinn v. Brooklyn Heights R. Co., 88 App. Div. [N. Y.] 57.
30. Tex. & P. R. Co. v. Lynch [Tex.] 75 S. W. 486.
31. Action against several railroads for goods damaged by last carrier who filed plea in privilege denying that it was a resident of the county of suit, or that it was in partnership with the other roads, or acting jointly with them, and alleging an undertaking only to carry goods from connecting point to destination. Held, a denial that it acted under the alleged contract and plea was improperly overruled. Texas & P. R. Co. v. Lynch [Tex.] 75 S. W. 486.
32. Hall v. Gilman, 77 App. Div. [N. Y.] 464.

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VERDICTS AND FINDINGS.

§ 1. Definitions and Nature (2009).
§ 2. General Verdicts (2009).
§ 3. Special Interrogatories and Verdicts (2010). Requests for and Submission of Special Issues or Interrogatories (2011). Form and Requisites of Special Interrogatories (2011). Form and Requisites of Special Verdict (2012). Interpretation and Construction (2013).
§ 4. Conflicts Between Verdicts and Findings (2014).
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§ 6. Submission to Jury, Rendition and Return (2016).
§ 7. Amendment and Correction (2017).
§ 8. Recording, Entry and Effect of Verdict; Impeachment (2018).
§ 9. Findings by Court or Referee (2019).
§ 10. Objections and Exceptions (2022).

Scope of title.—The present title treats of verdicts general and special and findings of fact and of law. It does not cover the procedure anterior[33] or posterior to them.[34]

§ 1. *Definitions and nature.*—A general verdict finds generally for one of the parties.[35] A special verdict is that by which the jury find the facts only, leaving the judgment thereon to the court.[36]

§ 2. *General verdicts.*—A general verdict or its equivalent is required in all cases.[37]

It should not contain special findings and they will, if not requested, be treated as surplusage, though responsive to the issues.[38] The verdict should be based upon the evidence as introduced, and errors or omissions of the court in the statement thereof should be disregarded.[39] It should be in accordance with the instructions given,[40] and must be responsive to all the material issues,[41] and not include any claim that matured after the commencement of the suit.[42] A verdict must be certain and definite.[43] It should be definite in amount, or the court may refuse to receive it,[44] and should sufficiently identify the parties against whom it is directed,[45] unless the case itself leaves no room for doubt.[46] It is the duty of the jury, and not the court to compute the interest awarded in a verdict.[47] If in a

33. See Jury (selection and requisites), 2 Curr. Law, p. 633; Trial (conduct and custody of jury), 2 Curr. Law, p. 1907.

34. See Judgments (conformity to findings and legal sufficiency thereof and judgment non obstante), 2 Curr. Law, p. 581; New Trial and Arrest of Judgment, 2 Curr. Law, p. 1037; Appeal and Review, 1 Curr. Law, p. 85.

35. Cyc. Law Dict. "General Verdict."

36. Maxwell v. Wright, 175 Ind. 518, 67 N. E. 267.

37. Omission of a negative finding in favor of one defendant who is not liable, especially where a special finding acquitted him of liability. Lawson v. Robinson [Kan.] 75 Pac. 1012.

Hence if the facts be found specially by the jury, all material issues must be passed on and decided. See post, § 3.

38. Louisville, H. & St. L. R. Co. v. Chandler's Adm'r, 24 Ky. L. R. 998, 70 S. W. 666; Id., 24 Ky. L. R. 2035, 72 S. W. 805.

39. Mauck v. Merchants' & M. F. Ins. Co. [Del.] 54 Atl. 952.

40. Postal Telegraph Cable Co. v. New Hope, 192 U. S. 55. Where the jury find for plaintiffs in disregard of instructions to find against one of them, the defendants cannot complain because the court conformed the judgment to what must have been the intention of the jury. Chimine v. Baker [Tex. Civ. App.] 75 S. W. 330; Champ Spring Co. v. B. Roth Tool Co. [Mo. App.] 77 S. W. 344.

A verdict may not be reversed as being contrary to inapplicable instructions. Babcock v. Maxwell [Mont.] 74 Pac. 64.

41. Hamilton v. Murray [Mont.] 74 Pac. 75.

42. Felt v. Steigler [N. J. Law] 54 Atl. 243.

43. Flannery v. Harley, 117 Ga. 483; Long v. Mandell [Mich.] 98 N. W. 744.

44. A verdict "for plaintiff, the whole amount, less what was paid" is too informal and was properly returned to the jury with directions to assess the damages without further instructions. Hill Bros. v. Bank of Seneca, 100 Mo. App. 230, 73 S. W. 307. Verdict not void for uncertainty. E. R. D. Dove & Co. v. J. T. Stewart & Son, 118 Ga. 872. The verdict in a finding for plaintiff should state the amount of defendant's payments and damages. Rogers v. O'Barr & Dinwiddie [Tex. Civ. App.] 76 S. W. 593.

45. A verdict against the "M., K. & T. Ry. Co." sufficiently identifies the Missouri, Kansas & Texas Railway Company of Texas to authorize entry of judgment against it. Missouri, K. & T. R. Co. v. Cardwell, 30 Tex. Civ. App. 164, 70 S. W. 103.

46. A verdict "for the plaintiff," etc., which does not mention the defendant is sufficient to support a judgment against the only defendant in the case. Galveston, H. & S. A. R. Co. v. Holyfield [Tex. Civ. App.] 70 S. W. 221; Horner v. Plumley, 97 Md. 271.

47. Calkins v. Farmers' & Mechanics' Bank, 99 Mo. App. 509, 73 S. W. 1098.

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possessory action, it should describe the premises definitely.[48] A finding covering an issue not tendered by the parties is erroneous.[49]

The omission, in the form of verdict submitted to the jury, of matters not in issue, is not reversible error.[50]

The general verdict determines all material issues in its favor.[51] No presumptions against a general verdict can be indulged in,[52] but every presumption is in its favor.[53] Where a verdict is based on a count in the declaration which states a good cause of action, it is unnecessary to consider whether the other counts are sufficient.[54] The recovery of less than was sued for on special contract does not import an award on quantum meruit, full performance having become unnecessary.[55] The charge of the court may be consulted to render certain the verdict of the jury.[56] Where an amount expressed in written words in a verdict differs from the numerals, the written words control.[57]

§ 3. *Special interrogatories and verdicts. When proper.*—The question of the submission of special interrogatories to the jury is addressed to the discretion of the court.[58] If the answer to a special interrogatory most favorable in form to the party offering it would not render such finding irreconcilable with a verdict for the opposite party, it may be refused.[59] A special interrogatory relating to an evidentiary fact is properly refused.[60] So also one embracing a proposition concerning which there is no controversy.[61] Special interrogatories are properly refused when all the material matter in them is covered by special questions asked by the court;[62] especially where the finding answered the only question which could have been properly submitted.[63] The refusal of an interrogatory calling for

48. Ejectment. Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57.

49. Krause v. Board of School Trustees of School Town of Crothersville [Ind. App.] 66 N. E. 1010.

50. Banco de Sonora v. Bankers' Mut. Casualty Co. [Iowa] 95 N. W. 232.

51. Union Traction Co. v. Vandercook [Ind. App.] 69 N. E. 486. After a general verdict in favor of plaintiff, it will be assumed on appeal that a material fact was proven. Albany Land Co. v. Rickel [Ind.] 70 N. E. 158.

52. Indiana R. Co. v. Maurer, 160 Ind. 25, 66 N. E. 156.

53. Wabash R. Co. v. Keister [Ind.] 67 N. E. 521. A verdict in favor of one plaintiff, where two sued jointly for injuries to property, will support a judgment in favor of both, no issue being raised as to the joint ownership of the property. Chicago, R. I. & T. R. Co. v. Henderson [Tex. Civ. App.] 73 S. W. 36. In an action against two defendants, a verdict against one, not naming the other, is a finding in favor of the other, the plaintiff not objecting. Lawson v. Robinson [Kan.] 75 Pac. 1012. Where a verdict is allowed on concurrence of three-fourths of the jury, and a judgment, entered on a verdict unanimous on its face, recited that three-fourths of the jury concurred but not all, it will be presumed the court acted properly in entering the judgment. Reed v. Mexico, 101 Mo. App. 155, 76 S. W. 53.

54. Motion in arrest of judgment for insufficiency of the complaint was properly denied. Illinois Cent. R. Co. v. Scheffner, 209 Ill. 9, 70 N. E. 619.

55. $200 recovered on suit for $300. It was contended that they should have recovered the full amount or nothing. Harrison v. Murphy [Mo. App.] 80 S. W. 724.

56. Rountree v. Haynes [Tex. Civ. App.] 73 S. W. 435.

57. In a verdict "for the sum of $750, seven hundred dollars" the numerals will be disregarded. Shaefer v. Missouri Pac. R. Co., 93 Mo. App. 445, 72 S. W. 154.

58. Morrison v. Northern Pac. R. Co. [Wash.] 74 Pac. 1064; Huber Mfg. Co. v. Gotchall [Neb.] 96 N. W. 611; Johnson v. Heath [Neb.] 98 N. W. 832; Buckers Irr. Mill & Imp. Co. v. Farmers' I. D. Co., 31 Colo. 62, 72 Pac. 49. To determine whether an instruction, if erroneous, was prejudicial. McKinstry v. Collins [Vt.] 56 Atl. 985.

59. John S. Metcalf Co. v. Nystedt, 102 Ill. App. 71. A special interrogatory in case the jury are to return special findings is improper, unless a responsive answer would be inconsistent with some general verdict that might be returned. No matter how these interrogatories had been answered they would not have affected the general verdict. Illinois Cent. R. Co. v. Scheffner [Ill.] 70 N. E. 619. Where a court has charged that no duty rested on a railroad company to remove a certain bank of earth, the refusal to submit a special interrogatory whether the company was negligent for not doing so was proper. Id.

60. Nelson v. Fehd, 203 Ill. 120, 67 N. E. 828.

61. Livingston v. Stevens [Iowa] 94 N. W. 925.

62. Livingston v. Heck [Iowa] 94 N. W. 1098; Green v. Brown & Manzanares Co. [N. M.] 72 Pac. 17; Zimmer v. Fox R. V. Elec R. Co., 118 Wis. 614, 95 N. W. 957.

63. Wilson v. Onstott, 121 Iowa, 263, 96 N. W. 779.

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an evidentiary fact is proper, especially where either answer to it would not have been repugnant to the general verdict.[64] Interrogatories requiring the jury to state under which paragraph of the complaint they found their verdict are properly refused.[65]

Requests for and submission of special issues or interrogatories.—Where a case is submitted on special issues to the jury, all the material issues requested by parties must be so submitted,[66] where there is evidence as to the facts referred to.[67] It is not error to submit to the jury a special issue raised by the pleadings and evidence, though the form of the issue as presented for submission is objectionable.[68] Requests which do not contain proper statements of the conditions on which the answer shall be made are bad.[69]

A request for special findings on particular questions of fact is proper, but not a request that the jury return a special verdict answering such questions.[70] The right to ask special findings does not go to the extent of permitting a party to cross-examine the jury on the processes employed by them in reaching a verdict.[71] Where special interrogatories have to be stated in writing and submitted before argument, it is proper for the adverse party to read them to the jury and discuss the evidence in their connection, in order to convince the jury that certain answers should be returned.[72] The submission to the jury of but one issue in a case is not the authorization of a special verdict against the protest of either party.[73] Where an interrogatory is propounded by the court without any request, the court must submit it to the party to whom it is adverse.[74] The record need not show the submission of the interrogatories, if it show them returned with their answers, with the general verdict, and that court and counsel treated them as properly before the court without objection.[75]

Form and requisites of special interrogatories.—Special interrogatories should be so framed as to put the exact issue clearly before the jury.[76] They should present all the matters in controversy, to serve as a basis for a verdict.[77] They should call for a special fact and not a general finding.[78] Instructions for special verdict should be directed thereto specifically to the end that the jury may intelligently answer, having regard to the burden of proof; care being exercised not to suggest the effect of the answer,[79] but the court is not required to frame a verdict,

64. City of Beardstown v. Clark, 204 Ill. 524, 68 N. E. 378.

65. Clear Creek Stone Co. v. Dearmin, 160 Ind. 162, 66 N. E. 609; Consolidated Stone Co. v. Morgan, 160 Ind. 241, 66 N. E. 696. Burns Ann. St. 1901, § 555, authorizing the submission to the jury of interrogatories on the issues of the cause does not authorize the submission of the question whether the general verdict was based on the first or second paragraphs of a complaint and the answer to such must be treated as surplusage, that not being one of the issues of the case. Farmers' Ins. Ass'n v. Reavis [Ind.] 70 N. E. 518.

66. Allen v. Frost, 31 Tex. Civ. App. 232, 71 S. W. 767.

67. Lowe v. Ring, 115 Wis. 575, 92 N. W. 238.

68. Richards v. Minster, 29 Tex. Civ. App. 85, 70 S. W. 98.

69. The court may properly refuse to submit questions to the jury for answers as required by § 5201, Revised Statutes, unless the request therefor contains the condition that such questions shall be answered only in case a general verdict is returned. West v. Knoppenberger, 4 Ohio C. C. [N. S.] 309.

70. Aetna Life Ins. Co. v. Dorney, 68 Ohio St. 151, 67 N. E. 254.

71. Haney-Campbell Co. v. Preston Creamery Ass'n, 119 Iowa, 188, 93 N. W. 297.

72. Chicago & A. R. Co. v. Gore, 202 Ill. 188, 66 N. E. 1063.

73. Banco de Sonora v. Bankers' Mut. Casualty Co. [Iowa] 95 N. W. 232.

74. Pittsburg, C., C. & St. L. R. Co. v. Smith, 207 Ill. 486, 69 N. E. 873.

75. Life Assur. Co. v. Haughton, 31 Ind. App. 626, 67 N. E. 950.

76. Fey v. I. O. O. F. Mut. Life Ins. Soc. [Wis.] 98 N. W. 206.

77. Hatcher v. Dabbs, 133 N. C. 239.

78. In an action on a fire insurance policy where it appeared that the goods had been shipped from one place to another, a special interrogatory as to whether all the goods had been shipped was not objectionable as being equivalent to a general finding on the issue. Goldstein v. St. Paul Fire & Marine Ins. Co. [Iowa] 99 N. W. 696.

79. Schrunk v. St. Joseph [Wis.] 97 N. W. 946.

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so that the effect of particular questions on the final result will be disguised.[80] The instructions should be an explanation of the questions one by one.[81] They should call for answers determinative of the case, otherwise they may be properly refused.[82] Including undisputed matters and requiring answers thereto is however not always reversible error.[83] The jury should be told that they must answer a special question one way or another,[84] and should be told to answer every question.[85]

Issues should be submitted in such form that the answers will not be indefinite.[86] The form is very much in the discretion of the trial court.[87] The court may by a single interrogatory cover two or more proposed questions,[88] but special interrogatories tending to confuse by reason of calling for findings on several distinct propositions are properly refused.[89] A single issue may include all the forms of injury on a question of damages.[90]

The modification of an interrogatory cannot be complained of, where in either form it does not call for a finding of an ultimate fact, or a probative fact from which an ultimate fact resulted, and so was improper.[91]

Form and requisites of special verdict.—A special verdict must state facts sufficient to support a judgment.[92] Where certain of the special findings are not sustained by the evidence, it is the duty of the trial court to set them aside, and judgment cannot be entered on the remainder.[93] The special findings should be statements of fact, not mere conclusions of law[94] or general conclusions drawn from all the evidence.[95] It is only the ultimate facts, controlling the verdict, not mere evidence, that the parties have the right to have contained in special verdicts.[96] The findings should be consistent, certain, and unambiguous in order to sustain the judgment.[97] The court should not accept evasive answers to special interroga-

80. Baumann v. C. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139.

81. It was error to confine the instructions to the law applicable to the ultimate facts. Lyon v. Grand Rapids [Wis.] 99 N. W. 811.

82. Kletzing v. Armstrong, 119 Iowa, 505, 93 N. W. 500. It is proper to refuse to submit interrogatories having reference to facts not within the issues. In an action on a policy of fire insurance, interrogatories having reference to net weight of goods and size of boxes in which they were shipped. Goldstein v. St. Paul Fire & Marine Ins. Co. [Iowa] 99 N. W. 696. Interrogatories, the answers to which would not affect the general verdict, or the result of the action, need not be submitted to the jury. City of Denver v. Teeter, 31 Colo. 486, 74 Pac. 459.

83. Baumann v. C. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139.

84. Stevens v. Beardsley [Mich.] 96 N. W. 571.

85. Csatlos v. Metropolitan St. R. Co., 78 App. Div. [N. Y.] 635.

86. The issue as to whether plaintiff was injured "by the defendants, or either of them," is improper, as the answer "Yes" is indefinite. Pearce v. Fisher, 133 N. C. 333. The issue as to whether the plaintiffs "are owners of the land, or any part thereof, and, if of any part, what part?" is improper, as the answer "No," is indefinite. Rowe v. Cape Fear Lumber Co., 133 N. C. 433.

87. In an action for injuries to a traveler driving on the side track of a highway, it was proper to submit whether the sidetrack appeared to have been "traveled to a considerable extent as part of the road" and to refuse to submit whether it was "apparently as much traveled" as the main track. Hebbe v. Maple Creek [Wis.] 99 N. W. 442.

88. Bannon v. Insurance Co., 115 Wis. 250, 91 N. W. 666.

89. Brier v. Davis [Iowa] 96 N. W. 983.

90. Action for injuries to property. Pinnix v. Lake Drummond Canal & Water Co., 132 N. C. 124.

91. Chicago & A. R. Co. v. Gore, 202 Ill. 188, 66 N. E. 1063.

92. Leeman v. McGrath, 116 Wis. 49, 92 N. W. 425. Where a jury answered questions covering immaterial matters but could not answer those covering material matters whether a machine purchased was covered (by a superior patent), a verdict for a plaintiff was held error. Tew v. Young [N. C.] 47 S. E. 23.

93. Casey-Swasey Co. v. Manchester Fire Assur. Co. [Tex. Civ. App.] 78 S. W. 864.

94. Lackmann v. Kearney, 142 Cal. 112, 75 Pac. 668. A special finding that plaintiff was not a bona fide purchaser of the note for value, but took same subject to defenses as to consideration, is one of fact, and not a conclusion of law reviewable on appeal. American Nat. Bank v. Watkins [C. C. A.] 119 Fed. 545. That work was carefully done and that men engaged therein exercised ordinary care. Avery v. Nordyke & Marmon Co. [Ind. App.] 70 N. E. 888.

95. Missouri, K. & T. R. Co. v. Bussey, 66 Kan. 735, 71 Pac. 261.

96. It is not error to refuse a special finding of an evidentiary fact. City of Pekin v. Egger, 104 Ill. App. 546; City of Beardstown v. Clark, 104 Ill. App. 568.

97. Taylor v. Flynt [Tex. Civ. App.] 77 S.

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tories which if answered in the affirmative would overthrow the general verdict. The jury should be required to answer, or discharged as failing to agree.[98] The legal effect in an answer to special questions determines its sufficiency.[99]

Interpretation and construction.—Findings should be construed according to the natural import of the words used therein;[1] they are to be viewed and interpreted in light of the testimony and other proceedings,[2] and must be construed in connection with the claims of the parties to the suit.[3] Nothing can be added to a special finding or verdict by way of intendment.[4] The special verdict is not designed to elicit from the jury a mere abstract of the evidence.[5] An assumption in an interrogatory is not equivalent to a finding by the jury.[6] A special finding may be used to show the connection of the verdict with certain paragraphs of the complaint.[7] The omission of a negative finding may be construed as an affirmative one.[8] Where findings of fact are silent on a material issue, it is regarded as a finding against the party holding the affirmative, or burden of proof, on that issue.[9] A special finding which shows that the jury based their general verdict on a theory of the case not involved in the issues submitted, and not contended for by the prevailing party, is ground for reversal.[10] Special findings should be consistent with each other and not repugnant in matters material to the issues involved in order to sustain the judgment.[11] Unnecessary[12] or immaterial ones may be ignored.[13] A finding upon subjects where there is no controversy between the parties is unnecessary.[14]

W. 964; Leonard v. Holland [Ky.] 79 S. W. 227; Texas Cent. R. Co. v. Bender [Tex. Civ. App.] 75 S. W. 561.

98. Life Assur. Co. v. Haughton, 31 Ind. App. 626, 67 N. E. 950.

99. Stating that a delivery was made "to the agent of the bank" is equivalent to affirming a delivery to the bank. "We think not" is an answer in the negative. Guernsey v. Fulmer, 66 Kan. 767, 71 Pac. 578. Certain facts found held to be a finding that there was no delivery of the deed. Schaefer v. Purviance, 160 Ind. 63, 66 N. E. 154. Certain facts found, equivalent to a finding that there was a breach of contract not waived. Iroquois Furnace Co. v. Elphicke, 200 Ill. 411, 65 N. E. 784.

1. A finding that words in a contract were "attempted to be erased" does not imply that they were erased. Sullivan v. Cal. Realty Co., 142 Cal. 201, 75 Pac. 767.

2. Held not inconsistent with each other or the general verdict. Armour Packing Co. v. Howe [Kan.] 75 Pac. 1014.

3. Logsdon v. Dingg [Ind. App.] 69 N. E. 409.

4. Donaldson v. State [Ind.] 67 N. E. 1029.

5. The special verdict prescribed in Wis. Rev. St. 1898, § 2858. Zimmer v. Fox R. V. Elec. R. Co., 118 Wis. 614, 95 N. W. 957.

6. Morgan v. Jackson [Ind. App.] 69 N. E. 410.

7. Chicago, I. & L. R. Co. v. Cunningham [Ind. App.] 69 N. E. 304.

8. Where a jury was instructed that if they found there was no assumption of a certain debt by a corporation, to so state in their verdict, and there was no such statement, it will be assumed a finding that the corporation did assume the debt. Fox v. Robbins [Tex. Civ. App.] 70 S. W. 597.

9. Stotts City Bank v. Miller Lumber Co., 102 Mo. App. 75, 74 S. W. 472. Answers of "No evidence" to special interrogatories are equivalent to findings against it. Indianapolis Abattoir Co. v. Temperly, 159 Ind. 651, 64 N. E. 906. A special interrogatory answered by "Evidence not conclusive" must be treated as unanswered. Albany Land Co. v. Rickel [Ind.] 70 N. E. 158. When a jury answers a special question "We do not know," such answer is as to one on whom the burden falls, an answer in the negative that such party failed in his proof. Kalina v. Union Pac. R. Co. [Kan.] 76 Pac. 438.

10. Aultman & T. Mach. Co. v. Wier, 67 Kan. 674, 74 Pac. 227.

11. Dickerson v. Waldo, 13 Okl. 189, 74 Pac. 505. Where the special findings are mutually conflicting they are nullified. Waller v. Liles, 96 Tex. 21, 70 S. W. 17. Inconsistent findings constitute reversible error. Ward v. American Health Food Co., 119 Wis. 12, 96 N. W. 388; Atchison, T. & S. F. R. Co. v. Hamlin, 67 Kan. 476, 73 Pac. 58. "The highway was in a reasonably safe condition," and "the condition of the highway was the proximate cause of injury to the plaintiff," are answers too inconsistent to support a judgment for defendant. Fehrman v. Pine River, 118 Wis. 150, 95 N. W. 105; Union Traction Co. v. Vandercook [Ind. App.] 69 N. E. 486. Conflicting answers to interrogatories are fatal to a motion for judgment notwithstanding the general verdict. American C. & F. Co. v. Clark [Ind. App.] 70 N. E. 828.

12. If findings supported by evidence sustain the judgment, it is immaterial that there are other findings which the evidence does not support. McKibbin v. McKibbin, 139 Cal. 448, 73 Pac. 143.

13. A complaint for a servant's injuries did not charge the employment of inexperienced men. There was a finding that the men were competent. Avery v. Nordyke & Marmon Co. [Ind. App.] 70 N. E. 888.

14. Iroquois Furnace Co. v. Elphicke, 200 Ill. 411, 65 N. E. 784.

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§ 4. *Conflicts between verdicts and findings. General verdict and special findings.*—A general verdict upon issues and evidence properly submitted is presumed to have decided every fact or deduction therefrom essential to support it, while a special finding of the jury is limited by its specific terms.[15] The general verdict is conclusive unless the special findings of fact by the jury conflict with it in some vital particular, and this conflict cannot be explained by any reasonable intendment, or inference.[16] The party in whose favor it was rendered can invoke no fact in his favor under such presumption that he would not have been allowed to prove.[17] A general verdict prevails over special findings if there could have been, under the issues, proof of supposable facts not inconsistent with those specially found, sufficient to sustain the general verdict.[18] A general verdict will prevail against special findings of fact, unless so incompatible that both cannot be true.[19] But where the special finding of facts is irreconcilably in conflict with the general verdict, the former must control.[20] To sustain a motion for judgment notwithstanding the general verdict, the facts found by the special verdict must be so repugnant to the general verdict that both cannot be true under any conceivable state of facts provable under the issues. On such a motion nothing but the pleadings, the general verdict, and the answers to the special interrogatories, can be considered in determining the force of such specific facts.[21] If the special findings are such as to require a judgment to be entered thereon, notwithstanding the general verdict, a judgment entered upon the general verdict is irregular and may be set aside.[22] Special findings must be construed if possible to

15. Krumdick v. Chicago & N. W. R. Co., 90 Minn. 260, 95 N. W. 1122.

16. Princeton C. & Min. Co. v. Roll [Ind.] 66 N. E. 169; Union Traction Co. v. Vandercook [Ind. App.] 69 N. E. 486. All the elements which go to make up a party's right of recovery are found in his favor by a general verdict for him. And before special findings can overthrow the general verdict they must have determined all those elements against his right of recovery. Seeds v. American Bridge Co. [Kan.] 75 Pac. 480.

Illustration: A special finding by a jury, in a suit against a city, that a certain bridge was in a reasonably safe condition for ordinary travel entitles the city to a judgment, notwithstanding a general verdict to the contrary. City of Troy v. Brady, 67 Ohio St. 65, 65 N. E. 616.

17. That one killed on a railroad track was intently looking for a link and believed the engine would stop before it reached him, or would be switched onto another track. Lake Shore & M. S. R. Co. v. Graham [Ind.] 70 N. E. 484.

18. Evansville & T. H. R. Co. v. Clements [Ind. App.] 70 N. E. 554.

19. Chicago, I. & L. R. Co. v. Leachman, 161 Ind. 512, 69 N. E. 253; Krumdick v. Chicago & N. W. R. Co., 90 Minn. 260, 95 N. W. 1122; Wright v. Chicago, I. & L. R. Co., 160 Ind. 583, 66 N. E. 454; Davis v. Turner, 69 Ohio St. 101, 68 N. E. 819; City of Mishawaka v. Kirby [Ind. App.] 69 N. E. 481; Chicago, I. & L. R. Co. v. Turner [Ind. App.] 69 N. E. 484; Republic I. & S. Co. v. Jones [Ind. App.] 69 N. E. 191. Verdict for plaintiff for injuries while on dangerous work, with finding that the work could have been done another way. Held, it could not be presumed, as against the verdict, that the other way would have been less dangerous. Gould Steel Co. v. Richards, 30 Ind. App. 348, 66 N. E. 68. An answer of "doubtful," to special interrogatories submitted to the jury, cannot be held to contradict the general verdict. J. Wooley Coal Co. v. Bracken, 30 Ind. App. 624, 66 N. E. 775.

Findings held not irreconcilable with general verdict. Chicago & C. I. R. Co. v. Stephenson [Ind. App.] 69 N. E. 270; Union Traction Co. v. Vandercook [Ind. App.] 69 N. E. 486; Johnson v. Gehbauer, 159 Ind. 271, 64 N. E. 855; Jarvis v. Hitch [Ind. App.] 65 N. E. 608; Saar v. Chicago, B. & K. C. R. Co., 119 Iowa, 60, 93 N. W. 66; Ready v. Peavey Elevator Co., 89 Minn. 154, 94 N. W. 442; McCorkle v. Mallory, 30 Wash. 632, 71 Pac. 186; Gaudie v. Northern Lumber Co. [Wash.] 74 Pac. 1009; Buckers Irr. Mill. & Imp. Co. v. Farmers' Independent Ditch Co., 31 Colo. 62, 72 Pac. 49; Indianapolis St. R. Co. v. Hockett, 161 Ind. 196, 67 N. E. 106; Union Traction Co. v. Barnett [Ind. App.] 67 N. E. 205.

20. Hill v. Indianapolis & V. R. Co., 31 Ind. App. 98, 67 N. E. 276; Wood v. Wack, 31 Ind. App. 252, 67 N. E. 562; Indianapolis St. R. Co. v. Tenner [Ind. App.] 67 N. E. 1044. Findings held to be in conflict with general verdict in favor of plaintiff, which could not be sustained. J. Wooley Coal Co. v. Bracken, 30 Ind. App. 624, 66 N. E. 775; Robards v. Indianapolis St. R. Co. [Ind. App.] 66 N. E. 66; Hobert v. Seattle, 32 Wash. 330, 73 Pac. 383; Citizens' Bank v. Stockslager [Neb.] 96 N. W. 591. A general verdict was rendered for one after special findings to the effect that he was on the railroad track in violation of the rules; that he knew the engine by which he was struck was approaching and, though fully possessed of his senses, made no effort to avoid the danger. Lake Shore & M. S. R. Co. v. Graham [Ind.] 70 N. E. 484.

21. Ind. R. Co. v. Maurer, 160 Ind. 25, 66 N. E. 156.

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harmonize with the general verdict,[23] and may be set aside if, as construed by the court, it is not supported by the evidence.[24] All reasonable presumptions will be indulged in support of the general verdict and against the answers to the interrogatories.[25] A special finding which is in the nature of a conclusion of law will not effect a disturbance of the general verdict, though inconsistent therewith.[26] Mere inconsistency between the general findings themselves is not fatal to the general verdict.[27] The conflict is not to be determined by singling out a single finding, but all must be considered in the light of the pleadings, and if taking them as a whole the inconsistency is not necessarily implied, the general verdict must be sustained.[28] A general verdict cannot be affected by an answer to a special interrogatory of no controlling importance, especially if it is also inconsistent with the answer to another special interrogatory,[29] or because the special findings fail to show some of the material facts,[30] or on account of the failure of the jury to agree on a submitted question, an answer to which was not needed to sustain the verdict.[31]

Between special findings.—Where there is a finding inconsistent with the judgment and other findings sufficient by themselves to warrant such judgment, it should be reversed unless found to be clearly right upon the evidence.[32] The finding of an ultimate fact will be disregarded on appeal, where primary facts are found negativing it,[33] but where the ultimate facts have been found against a party, no probative fact may be permitted to control.[34] The findings of fact on special issues submitted to the jury, where warranted by the evidence, control conflicting findings instructed by the court.[35] Where there is a finding inconsistent with the judgment, and other findings by themselves sufficient to warrant the judgment, it should be reversed unless found to be clearly right upon the evidence.[36]

§ 5. *Separate verdicts as to different counts, causes of action, or parties.*—A general verdict in a suit on two causes of action will be held, in the absence of anything to show the contrary, to apply to both.[37] So that where a demurrer, overruled subject to exception, should have been sustained as to one of two counts, the verdict must be set aside.[38] The jury may not properly find specially for the

22. Seeds v. American Bridge Co. [Kan.] 75 Pac. 480.

23. Mo., K. & T. R. Co. v. Bussey, 66 Kan. 735, 71 Pac. 261. If they can be made to harmonize with the general verdict, a verdict on the special findings is properly denied. Moeser v. Lewis [Kan.] 75 Pac. 512.

24. General verdict rendered assumed fraud on part of defendant. Special finding held him guilty of fraud. This was set aside, the court meaning he was not guilty of such intentional fraud as would subject him to imprisonment, but the general verdict was upheld. Geraghty v. Randall [Colo. App.] 70 Pac. 767.

25. Wright v. Chicago, I. & L. R. Co., 160 Ind. 583, 66 N. E. 454. Where part of the special findings support the general verdict, and the others, though contradictory, show that the jury did not misunderstand the issue, the general verdict will not be disturbed. Drake v. Justice Gold Min. Co. [Colo.] 75 Pac. 912; Clear Creek Stone Co. v. Dearmin, 160 Ind. 162, 66 N. E. 609. A court would not be warranted in awarding a judgment in favor of the indorsee of a note over a general verdict, in the face of a special finding that he knew it had been procured by fraud pleaded in the answer. Winters v. Coons [Ind.] 69 N. E. 458.

26, 27, 28. Fishbaugh v. Spunaugle, 118 Iowa, 337, 92 N. W. 58.

29. Indianapolis Abattoir Co. v. Temperly, 159 Ind. 651, 64 N. E. 906; Citizens' St. R. Co. v. Batley, 159 Ind. 368, 65 N. E. 2.

30. A general verdict for injuries to a servant cannot be disturbed because the special findings failed to show either that defendant was negligent or that plaintiff had not assumed the risk. American Tin Plate Co. v. Williams, 30 Ind. App. 46, 65 N. E. 304.

31. Town of Wakefield v. Wakefield Water Co., 182 Mass. 429, 65 N. E. 814.

32. Priewe v. Fitzsimons & Connell Co., 117 Wis. 497, 94 N. W. 317.

33. Richmond Natural Gas Co. v. Enterprise N. G. Co., 31 Ind. App. 222, 66 N. E. 782.

34. Brown v. Mut. R. F. Life Ass'n, 137 Cal. 278, 70 Pac. 187.

35. Pardee v. Aldridge, 189 U. S. 429, 47 Law. Ed. 883.

36. Findings as to effect of flowage by damming lake outlet. Priewe v. Fitzsimons & Connell Co., 117 Wis. 497, 94 N. W. 317.

37. Harper, etc., Co. v. Mountain Water Co. [N. J. Eq.] 56 Atl. 297.

38. Gendron v. St. Pierre [N. H.] 56 Atl. 915. Where a suit is on two counts and the

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defendant on any particular count, if he might be liable under any of the others.[39] Separate verdicts upon separate causes of action are not improper,[40] nor is a verdict erroneous for finding a specific sum of damages separately under the several heads alleged as breaches of contract.[41] A general verdict on one count may necessarily involve a finding on another.[42]

A general verdict found in favor of the plaintiff against one of two defendants, not mentioning the other, is a general verdict in favor of the defendant not mentioned.[43] In an action against several defendants, there being recovery against only some of them, the verdict should be for the plaintiff against them and for the others against the plaintiff.[44] Damages cannot be apportioned if all defendants are wholly liable if at all.[45] A verdict should make separate findings of plaintiff's cause of action and defendant's counterclaim.[46]

§ 6. *Submission to jury, rendition and return.*—Whenever there are any questions of fact in evidence, the case must be submitted to the jury[47] under proper instructions,[48] and according to the orderly methods of trial procedure.[49]

The amount awarded must be determined by agreement on the evidence and not by the so called "quotient" process, the objectionable feature of which consists more in agreeing beforehand to abide by the result than in the fact that an average was taken[50] on which they were able to agree.[51] The burden of proof is on the party attacking the quotient verdict.[52]

The verdict must be announced by the jury in the presence of all of them,[53] and the announcement rather than a paper prepared by the jury is the real verdict.[54] If signed by jurors, as many must sign as are required to concur.[55] An-

verdict for plaintiff does not state on which one it is based, and it was subsequently determined that one count was not recoverable on, judgment will be reversed. Patton v. Wells [C. C. A.] 121 Fed. 337.

39. General finding on each count is proper. Bessemer Liquor Co. v. Tilman [Ala.] 36 So. 40.

40. Schmuck v. Hill [Neb.] 96 N. W. 158.

41. Wilson v. Freedley, 125 Fed. 962.

42. The first count having alleged that plaintiff was a passenger, a verdict for plaintiff on the second count alone, that he was carried by defendant's servants, against his protest, away from the place where he was injured, necessarily involved a finding in favor of defendant on the first count. St. Louis S. W. R. Co. v. Mayfield [Tex. Civ. App.] 79 S. W. 365.

43. Lawson v. Robinson [Kan.] 75 Pac. 1012.

44. Horner v. Plumley, 97 Md. 271.

45. A jury may apportion the damages against joint defendants in trespass, but not for abuse of legal process. Where a complaint contained a count in each, a finding of different amounts against them was erroneous where there was nothing to show that the jury found against them solely on the count in trespass. Hay v. Collins, 118 Ga. 243.

46. Marshall v. Armstrong [Mo. App.] 79 S. W. 1161.

47. Directing Verdict, etc., 1 Curr. Law, p. 925; Dismissal and Nonsuit, 1 Curr. Law, p. 937.

48. Instructions, 2 Curr. Law, p. 461.

49. Trial, 2 Curr. Law, p. 1907.

50. The quotient verdict is not objectionable if jurors do not agree before voting to be bound by the result, but accept the average only after further deliberation and as a fair and reasonable finding. Pence v. Cal. Min. Co. [Utah] 75 Pac. 934.

51. A verdict is not a quotient verdict if it is not agreed that the result of the averaging of estimates be adopted, and it was not adopted, though the jury acted on the suggestion that the estimates of damages be averaged. McElhone v. Wilkinson, 121 Iowa, 429, 96 N. W. 868; Stanley v. Stanley, 32 Wash. 489, 73 Pac. 596. Where it was agreed upon by the jurors that plaintiff was to have a verdict, but the amount was not agreed upon, it was not misconduct to render a verdict ascertained by striking an average of the sums they thought due. Bell v. Butler [Wash.] 75 Pac. 130. The fact that each juror put down on a piece of paper the amount that he thought plaintiff should recover and the total was then divided by twelve was held not to vitiate the verdict, where the jury stood ten to two for plaintiff, and the verdict returned was a majority one for a different amount, ten of the jurors agreeing thereto. Moore v. S. W. Mo. Elec. R. Co., 100 Mo. App. 665, 75 S. W. 176.

52. Pence v. Cal. Min. Co. [Utah] 75 Pac. 934.

53. A paper purporting to be a sealed verdict was ordered entered by the court, only eleven jurors were present, no announcement was made by them, nor was the paper read in their presence. Held, there was in legal contemplation no verdict, and no basis for judgment. Ellsworth v. Varnum, 105 Ill. App. 487.

54. Com. v. Houghton, 22 Pa. Super. Ct. 52.

55. Under a constitution authorizing a verdict where three-fourths of the jury concur, a verdict signed by seven jurors only is

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swers to special interrogatories must be signed by the jury as a whole or by their foreman; otherwise they cannot be considered for any purpose.[56]

The right of a party to poll the jury after rendition of the verdict exists in civil as well as in criminal cases;[57] but he may not examine them as to what they considered in arriving at the verdict.[58]

Disagreement on the answer to a special interrogatory has the same effect as a disagreement on a general verdict. The jury should be required to answer the question or discharged as failing to agree.[59]

§ 7. *Amendment and correction.*—A wrong or erroneous verdict not susceptible of amendment or correction may be set aside and a new trial granted or the judgment be arrested,[60] or judgment may be entered non obstante veredicto[61] according to the circumstances; but the court cannot amend it into a verdict that the jury did not give,[62] or change an answer where the evidence is conflicting.[63] A verdict fatally defective will not support a judgment.[64] If it be the result of prejudice or misapprehension, it should be set aside.[65] A verdict rendered under correct instructions will not be disturbed because some of the evidence was irrelevant, or because of remarks of counsel.[66]

The rule that new trial is the proper remedy is not applicable in a case where the verdict is imperfect on its face, as finding the evidentiary and not the ultimate facts.[67] The jury's finding in a special verdict must be contrary to the undisputed credible evidence to justify a directed verdict or the change of an affirmative to a negative answer.[68]

A verdict palpably wrong may be refused and the jury sent out for further deliberation;[69] but a verdict which responds to the issues and is sustained by the evidence must be received by the court.[70] Where an incomplete verdict is returned, the jury may be sent back to complete it;[71] but need not be if it is unlikely that they can or will do so.[72] If the answers to the interrogatories are indefinite, the court may of its own motion direct the jurors to make them more explicit.[73] Where the answering of an interrogatory is dependent upon the answer to a pre-

void. Marshall v. Armstrong [Mo. App.] 79 S. W. 1161.

56. City of Kingfisher v. Altizer, 13 Okl. 121, 74 Pac. 107.

57. The refusal to allow the polling is ground for a new trial. Smith v. Paul, 133 N. C. 66.

58. Houston Elec. Co. v. Robinson [Tex. Civ. App.] 76 S. W. 209.

59. Perry, etc., Stone Co. v. Wilson, 160 Ind. 435, 67 N. E. 183.

60. New Trial and Arrest of Judgment, 2 Curr. Law, p. 1037.

61. Judgments, 2 Curr. Law, p. 581.

62. A verdict returned for nominal compensatory damages and for punitive damages cannot be amended by striking out the words "punitive damages" and the amount thereof. Shayne v. White, 81 App. Div. [N. Y.] 600.

63. Strasser v. Goldberg [Wis.] 98 N. W. 554.

64. A verdict in ejectment must correctly describe the land. Hoodless v. Jernigan [Fla.] 35 So. 656.

65. Csatlos v. Metropolitan St. R. Co., 78 App. Div. [N. Y.] 635.

66. If remarks of counsel were erroneous in law, they would be deemed corrected by the instructions. Leavitt v. New England Tel. & T. Co. [N. H.] 56 Atl. 462.

67. Maxwell v. Wright, 175 Ind. 518, 67 N. E. 267.

68. Blohowak v. Grochoski, 119 Wis. 189, 96 N. W. 551.

69. Where a jury returned a verdict of one dollar, though the premises had been detained six months and their rental value was $150.50 a month, it was proper for the court to refuse to accept the verdict and after they retired and reconsidered the case, to accept their second verdict for $900.00. Ver Steeg v. Becker-Moore Paint Co. [Mo. App.] 80 S. W. 846.

70. The words "and plaintiff to pay all costs" added to a verdict are mere surplusage, the question of costs being one of law for the court. The court has no right to refuse to receive a verdict on account of such surplusage. McEldon v. Patton [Neb.] 93 N. W. 938.

71. A jury may be directed to retire and find the dates of certain credits which they had allowed in their verdict. Bond v. Wilson, 131 N. C. 505.

72. Where the jury answers "we are not able to determine," as to a special issue submitted to them on evidence which does not make the matter clear, a further answer need not be required of them. Guernsey v. Fulmer, 66 Kan. 767, 71 Pac. 578.

73. Jordan v. Downs, 118 Ga. 544.

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vious one, it is error to send the jury back to answer it, when the answer to the previous one did not require that it should be answered.[74]

An ambiguous verdict, on court's refusal to accept same, may be corrected in open court, the jury assenting thereto,[75] and not thereafter if the error be other than formal[76] or a new trial is proper.[77] An amendment to a verdict, if only a verbal unimportant change, may be made after the filing and the discharge of the jury.[78]

A verdict for damages should not be reduced by the court unless excessive. If considered to be the result of passion or prejudice, it should be set aside altogether;[79] but it is proper to announce that a new trial will be granted unless there is a remittitur.[80] It is properly set aside as excessive, where the amount found by the jury exceeds the amount claimed in the complaint, unless the plaintiff consents to a reduction to the amount claimed,[81] and the evidence would support a verdict for the correct amount.[82]

§ 8. *Recording, entry and effect of verdict; impeachment.*—A verdict is not valid and final until pronounced and recorded in open court.[83] When returned and recorded, it will not be changed on account of a juror subsequently filing an affidavit that he dissented therefrom,[84] especially in the absence of a statement of facts.[85] A writing prepared in the jury room and presented to the court forms no part of the record. The finding delivered by the jury in open court is the verdict and decides the issue and what is recorded.[86]

A verdict or special finding is conclusive as to the matters of fact litigated in the case;[87] but a verdict without a judgment will not sustain a plea of res judicata.[88] It does not decide by inference issues not involved.[89]

In equity suit, the answers to interrogatories submitted to the jury are advisory only, and error cannot be predicated on the form in which the questions were propounded.[90] The court may adopt them in whole or in part or make find-

74. Egnor v. Foster Lumber Co., 115 Wis. 530, 92 N. W. 242.

75. A clearly erroneous finding for "defendant," intended to be for "plaintiff," may be corrected as a clerical error. International & G. N. R. Co. v. Lister [Tex. Civ. App.] 72 S. W. 107.

76. A county judge is without authority to order the amendment of a verdict after the same has been returned and the jury discharged. Luft v. Hall [Neb.] 99 N. W. 494.

77. When the verdict, general or special, is imperfect by reason of some ambiguity, or by finding less than the whole matter in issue, or by not assessing damages, a venire de novo is properly granted. Maxwell v. Wright, 175 Ind. 518, 67 N. E. 267.

78. "You" changed to "we." Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57.

79. Plaunt v. Railway Transfer Co., 90 Minn. 499, 97 N. W. 433; Ruscher v. Stanley [Wis.] 98 N. W. 223.

80. If a court thinks that a new trial should be granted unless the amount of a verdict by the jury is reduced, there is nothing to prevent him from so announcing to the party in whose favor the verdict has been rendered, and afford him an opportunity to enter a remittitur. Landry v. New Orleans Shipwright Co. [La.] 36 So. 548.

81. Branower v. Independent Match Co., 83 App. Div. [N. Y.] 370.

82. Davis v. Hall [Neb.] 97 N. W. 1023.

83. Garrett v. John V. Farwell Co., 102 Ill. App. 31.

84. Even though the juror at the time of affirmance said he acquiesced under protest, the judge was not bound to hold a colloquy with him after the verdict was recorded to discover whether he assented or not. McCoy v. Jordan, 184 Mass. 575, 69 N. E. 358.

85. Dennis v. Neal [Tex. Civ. App.] 71 S. W. 387.

86. Com. v. Houghton, 22 Pa. Super. Ct. 52.

87. A verdict cannot be avoided, in a suit by plaintiff to enforce by injunction a judgment obtained at law, by additional proofs contradictory thereof. Harper, etc., Co. v. Mountain Water Co. [N. J. Eq.] 56 Atl. 297. The supreme court cannot disturb the verdict of a jury, that a ditch along a highway was an obstruction. Nelson v. Fehd, 203 Ill. 120, 67 N. E. 828. That no contract was made. Ver Steeg v. Becker-Moore Paint Co. [Mo. App.] 80 S. W. 346.

88. Harris v. Gano, 117 Ga. 934. See Former Adjudication, 2 Curr. Law, p. 60.

It is conclusive on review, see Appeal and Review, § 13, 1 Curr. Law, p. 155.

89. Where one in an action on a fire insurance policy claimed a loss of $2,000.00, a verdict in his favor for $1,200.00 does not establish the fact of fraudulent overvaluation. Goldstein v. St. Paul F. & M. Ins. Co. [Iowa] 99 N. W. 696.

90. The statute as to their framing is directory only. W. H. Taggart M. Co. v. Clack [Ariz.] 71 Pac. 925.

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ings of its own. The fact that a decree was entered in accordance with the verdict is not conclusive that the findings of the jury were adopted without modification.[91]

Statements of jurors as to mode of arriving at verdict may be received in support of the verdict;[92] but not to impeach it,[93] except for intimidation,[94] or when it was determined by chance;[95] and in some states it cannot be so impeached even for that reason.[96]

§ 9. *Findings by court or referee.—In proper cases questions of fact may be referred* both at law[97] and in equity[98] as has been shown in an earlier topic. The findings of a referee on questions of fact have all the force and effect of the verdict of a jury,[99] and similarly they must conform to the allegations and the evidence.[1] A variance of words and not of substance, in the decision of a referee, from the pleaded defenses, is not to be regarded.[2] A referee's report has no judicial force until confirmed by the court.[3]

Findings by court. What may or must be found.—The court need not make findings as to matters not in issue by the pleadings,[4] nor on facts not of a nature calculated to induce the court to reach a different result,[5] nor as to a matter stated in the pleadings and not denied; the fact admitted is treated as found by the court.[6] Parties to an action cannot insist on a finding of fact, even though material to the issues, unless it appears from the testimony that it was involved,[7] and unnecessary and immaterial findings by the court are not ground for reversal of the judgment.[8] The findings should adequately cover the allegations in the pleadings[9] so as to sustain the judgment.[10] The failure of the court to find on a question of fact alleged in the complaint is error, whether due to regarding such fact as admitted in the answer or through inadvertence;[11] but such error is not ground for reversal if no substantial rights have been injuriously affected.[12] In the absence of a finding of facts by the court as required by law, where the evidence fails to disclose with certainty the rights of the parties, there is nothing to

91. Buckers Irr. Mill. & Imp. Co. v. Farmers' Independent Ditch Co., 31 Colo. 62, 72 Pac. 49.

See Equity, 1 Curr. Law, p. 1048.

92. Affidavits of jurymen that a certain claim of defendant was allowed in full by the jury, being given to support the verdict, are competent to prove that fact. Davis v. Huber Mfg. Co., 119 Iowa, 56, 93 N. W. 78.

93. Black v. Rocky Mountain Bell Tel. Co., 26 Utah, 451, 73 Pac. 514.

94. A verdict may be impeached by evidence of intimidation by an overt criminal act; not if the intimidating act was otherwise. State v. Riggs, 110 La. 509.

95. Bernier v. Anderson [Idaho] 70 Pac. 1027; Groves & S. R. R. Co. v. Herman, 206 Ill. 34, 69 N. E. 36. The affidavit of a juror that he consented to the verdict only because he was sick and could not endure the confinement cannot be received to impeach the verdict. Dennis v. Neal [Tex. Civ. App.] 71 S. W. 387.

96. Mo., K. & T. R. Co. v. Hawk [Tex. Civ. App.] 69 S. W. 1037. In Nevada, the affidavits of jurors to the effect that the verdict was reached by averaging estimates can not be received to impeach the verdict. Southern Nev. G. & S. Min. Co. v. Holmes Min. Co. [Nev.] 73 Pac. 759.

97. Reference, 2 Curr. Law, p. 1484.

98. Masters in Chancery, 2 Curr. Law, p. 867.

99. State v. Davis [Neb.] 92 N. W. 740. On appeal they are so treated. See Appeal and Review, § 13, 1 Curr. Law, p. 155.

1. Kittel v. Schmieder, 89 App. Div. [N. Y.] 618.

2. People v. Department of Health of New York, 86 App. Div. [N. Y.] 521.

3. Citizens' Bank v. Stocksiager [Neb.] 96 N. W. 591.

4. Kent v. Richardson [Idaho] 71 Pac. 117. A trial judge is not required to specially pass on questions of fact immaterial to the issue and sufficiently answered in the general finding. Darling Milling Co. v. Chapman, 131 Mich. 684, 92 N. W. 352.

5. Walters v. Bray [Tex. Civ. App.] 70 S. W. 443.

6. State v. Rocky Mountain Bell Tel. Co., 27 Mont. 394, 71 Pac. 311.

7. Buckers Irr. Mill. & Imp. Co. v. Farmers' Independent Ditch Co., 31 Colo. 62, 72 Pac. 49.

8. Greenway v. De Young [Tex. Civ. App.] 79 S. W. 603.

9. Goldschmidt v. Maier, 140 Cal. xvii, 73 Pac. 984; Flannery v. Harley, 117 Ga. 483.

10. Cochise County v. Copper Queen Consol. Min. Co. [Ariz.] 71 Pac. 946.

11. Senior v. Anderson, 138 Cal. 716, 72 Pac. 349.

12. Farmer v. St. Croix Power Co., 117 Wis. 76, 93 N. W. 830.

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support the judgment.[13] Findings must follow the issues and are bad if outside them even though upon evidence not objected to.[14] Where the judge is required to answer requests of counsel for findings of fact and for conclusions of law, that such requests are substantially answered by the independent findings of the judge is insufficient.[15]

The findings should be statements of issuable facts, not conclusions of law;[16] ultimate facts on which the law must determine the rights of the parties, and not contain a statement of the evidence.[17] A finding should state facts clearly[18] in terms, and not by reference,[19] and a recital in a decree that material allegations are sustained by testimony is not sufficient.[20] A court need not incorporate in its finding the facts and circumstances which lead up to the result, and about which the evidence was contradictory,[21] and a finding substantially sufficient is good, except as against a motion to make it more specific.[22] A mere opinion expressed by a circuit judge, upon a question of fact in an equity case, is not a finding of facts.[23]

The findings of fact should be stated separately from the conclusions of law,[24] but failure to separate them is not always reversible error.[25]

13. Kinn v. First Nat. Bank, 118 Wis. 537, 95 N. W. 969.

14. New Idea Pattern Co. v. Whelan, 75 Conn. 455. Where a record shows no request for special findings of fact and conclusions of law, as required by statute, findings so designated in the record will be treated on appeal as general findings. Bass v. Citizens' Trust Co. [Ind. App.] 70 N. E. 400. Where facts were pleaded which are sufficient to warrant the court in declaring an estoppel, a finding thereof is not objectionable because the facts were not alleged as an estoppel. Anderson v. New York Life Ins. Co. [Wash.] 76 Pac. 109.

15. Hoyt v. Kingston Coal Co., 203 Pa. 509; Lehigh Valley Coal Co. v. Everhart, 206 Pa. 118.

16. Daniell v. Boston & M. R. R., 184 Mass. 337, 68 N. E. 337; Milwaukee Nat. Bank v. Gallun, 116 Wis. 74, 92 N. W. 567. A finding that one purchased a note in the usual course of business is a mere conclusion of law. Winters v. Coons [Ind.] 69 N. E. 458. A finding that a "party and his predecessors since a certain date has been and is the owner and entitled to the possession of premises" is a statement of an ultimate fact and not a conclusion, and the fact that it appears among the conclusions is no reason for reversing the judgment. Curtis v. Boquillas Land & Cattle Co. [Ariz.] 76 Pac. 612. A finding that one by reason of nonperformance of a contract was damaged in the sum of $6,000 was a finding of fact. Conner v. Andrews Land, H. & I. Co. [Ind.] 70 N. E. 376. Whether the possession of land is hostile or not is an ultimate fact not a conclusion of law. Logsdon v. Dingg [Ind. App.] 69 N. E. 409. A finding that a certain person and his predecessors have been and now are the owners and entitled to the possession of land is sufficient to sustain a judgment on the issue of ownership. Grogan v. Valley Trading Co. [Mont.] 76 Pac. 211. A finding by the trial court "that there are no equities with the defendants, all the equities are with the plaintiff," is but a conclusion of law, and, standing alone, is insufficient to support a verdict. Ganow v. Denney [Neb.] 94 N. W. 959. A finding of the trial court that certain conduct was negligent is a conclusion of law Warren v. Robison, 25 Utah, 205, 70 Pac. 989.

17. American Nat. Bank v. Watkins [C. C. A.] 119 Fed. 545. Where only probative facts are found, leaving the ultimate facts necessary to support the judgment, to be inferred, the judgment must be reversed or new trial ordered. Powers v. U. S. [C. C. A.] 119 Fed. 562.

18. But it may refer to items of written evidence, elsewhere properly in the record, without setting them out in full. Miller v. Wayne International Bldg. & Loan Ass'n [Ind. App.] 70 N. E. 180. A finding which states that "certain exhibits were received in evidence" and that in view of them certain conclusions of law were reached, makes them a part of the findings as though incorporated therein. Woodruff v. Butler, 75 Conn. 679.

19. A reference to goods "as having been delivered at a certain place" does not constitute a finding that they were so delivered. Cunningham Lumber Co. v. Mayo, 75 Conn 335. A special finding in which no inference is drawn, the ultimate fact not stated, the writing relied on not set out, and the circumstances attending its execution not shown, is not sufficient to sustain a conclusion of law that the claim is not barred by the statute, it appearing otherwise that the statute has run [Burns' Rev. St. 1901, § 302]. Park v. Park [Ind. App.] 70 N. E. 493.

20. Musselman v. Musselman, 140 Cal. 197, 73 Pac. 824.

21. Robson v. Price [Mich.] 96 N. W. 433.

22. A finding that "the allegations of the answer are not proven" is equivalent to a finding that the facts are not as alleged in the answer. Brown v. Roberts, 90 Minn. 314, 96 N. W. 793.

23. Hendryx v. Perkins [C. C. A.] 123 Fed. 268.

24. So by statute in Pennsylvania. Pittsburg Stove & Range Co. v. Pennsylvania Stove Co. [Pa.] 57 Atl. 77. Where a case is tried by a court without a jury under Pennsylvania statutes providing that the decision of the court shall be in writing, stating separately the facts found in answer to any points submitted and the conclusions of law, where the court fails to make sep-

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Interpretation and construction.—A general finding made by the court must stand, unless some of the special facts found are inconsistent therewith.[26] An ambiguous finding by the court may be helped out by the judge's preamble thereto, read in connection with it.[27] Special findings may set out sufficient facts to warrant a decree under part of the complaint and render an error harmless.[28] In Washington, the statute relative to findings of fact does not apply to equitable actions.[29]

Signing, filing, and entering.—The findings should be signed by the judge, and filed;[30] they should also be entered in the record, but the failure to do so affects no substantial right of a defeated party and is not ground for reversal.[31]

The amendment of findings, the time in which it may be done, and the terms imposed therefor, are matters within the court's discretion.[32] During the motion for a new trial in an action tried before the court, the general finding may be modified and part of the sum remitted; judgment being rendered for the balance.[33] The findings of the court should cover all the material facts proved, and if any be omitted the court should be requested to amend the findings and include them, before any motion for a new trial.[34] The motion to have them made specifically must indicate with sufficient clearness the further findings desired.[35]

The effect of findings in a common-law action is the same as the verdict of a properly instructed jury.[36] They are in the nature of a special verdict, and are conclusive on appeal if supported by evidence,[37] but are not so if they really amount to conclusions of law,[38] nor if by the court in an equity case.[39]

Conclusions of law.—A mere decision by the court sitting to try facts is not a conclusion of law,[40] yet where the evidence is undisputed, a finding of a referee

arate findings and conclusions, the judgment will be reversed. Carpenter v. Yeadon Borough [Pa.] 57 Atl. 837.

25. In New York the findings of fact and of law need not be separately stated. Brown v. Ontario Talc Co., 81 App. Div. [N. Y.] 273. But see Curtis v. Boquillas Land & C. Co. [Ariz.] 76 Pac. 612, where the presence of a finding of fact among conclusions of law was held not reversible.

26. Wheeler v. Metropolitan Stock Exch. [N. H.] 56 Atl. 754.

27. Milwaukee Nat. Bank v. Gallun, 116 Wis. 74, 92 N. W. 567.

28. Error in sustaining a demurrer to part of a complaint. Muncie Natural Gas Co. v. Muncie, 160 Ind. 97, 66 N. E. 436.

29. White Crest Canning Co. v. Sims, 30 Wash. 374, 70 Pac. 1003.

30. The failure of the judge to sign the last one of five volumes of findings, otherwise properly identified and connected, is not error. Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905. The failure of the judge to file the findings of fact and conclusions of law, until after the expiration of his term of office was not error, if filed during the term at which the trial was held. Storrie v. Shaw [Tex. Civ. App.] 76 S. W. 596.

31. Kerns v. Lee [Or.] 75 Pac. 140.

32. Hansen v. Allen, 117 Wis. 61, 93 N. W. 805.

33. Whitcomb v. Stringer, 160 Ind. 82, 66 N. E. 443.

34. Shuler v. Lashorn, 67 Kan. 694, 74 Pac. 264.

35. Parker v. Thomas [Tex. Civ. App.] 72 S. W. 229.

36. Planters' Bank & Trust Co. v. Major, 25 Ky. L. R. 640, 76 S. W. 331.

37. Darling Milling Co. v. Chapman, 131 Mich. 684, 92 N. W. 352. A special finding which states the ultimate facts is conclusive on the appellate court, even though it contain statements of evidence and inferences therefrom. American Nat. Bank v. Watkins [C. C. A.] 119 Fed. 545; First Nat. Bank v. U. S. F. & G. Co., 110 Tenn. 10, 75 S. W. 1076; Milwaukee Nat. Bank v. Gallun, 116 Wis. 74, 92 N. W. 567. The findings of a court on conflicting evidence orally delivered by witnesses will not be disturbed on appeal unless clearly against the preponderance of evidence (in regard to testamentary capacity). Hess v. Killebrew [Ill.] 70 N. E. 675. A jury disagreed. The parties stipulated that the case should be tried by the judge presiding, on the evidence heard by the jury, transcripts whereof should be submitted to him. His findings are entitled to the same weight as if he had heard the evidence without the intervention of a jury. Id.

38. A recital that "it appears from the face of the deed itself that all said property therein was sold for one gross sum," is a conclusion of law and not a finding of fact. Cornelius v. Ferguson [S. D.] 97 N. W. 388.

39. Hendryx v. Perkins [C. C. A.] 123 Fed. 268.

See many cases cited in Appeal, § 13, 1 Curr. Law, p. 155, on the review of findings of fact.

40. A mere verdict in favor of one or the other party to the case tried by a court under Act April 22, 1874 (P. L. 109) held not a conclusion of law within the meaning of the act. Carpenter v. Yeadon Borough [Pa.] 57 Atl. 837.

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expressed as a finding of fact is, in effect, a conclusion of law.[41] Propositions of law submitted to be held, where a cause is tried without a jury, should state the law only,[42] and should be submitted to the court before argument.[43] The conclusions of law must be justified by the findings of fact,[44] or agreed statement of facts[45] and supported thereby;[46] they do not take the place of findings of fact, except where the law gives a conclusive effect to the fact established or where the evidence is of a conclusive character.[47] The court may amend an obvious mistake in favor of a party, in a conclusion of law, with that party's consent.[48]

§ 10. *Objections and exceptions.*[49]—Like other objections, a defect in verdict or findings can be presented by none but those aggrieved,[50] and not by one who failed to ask for findings the omission whereof is assailed,[51] or who did not ask in time,[52] or waived his request.[53] A general objection to all of several distinct and separated findings of fact is insufficient;[54] the objections thereto should be definite and specific as to each question.[55] Exceptions must be made also to each alleged erroneous conclusion of law made on special findings; the judgment rendered in conformity therewith is not subject to modification therefor.[56] Such exceptions must be made promptly after their filing,[57] but the delay of the clerk in presenting the filed conclusions to the court should not prevent their being considered.[58] An omission in a verdict must be objected to at the time of its rendition;[59] so also objections relating merely to the form of the verdict.[60]

41. That certain grants were made for a good and valuable consideration. Mt. Sinai Hospital v. Hyman, 92 App. Div. [N. Y.] 270.

42. Lesh & M. Lumber Co. v. Sedlaceck, 104 Ill. App. 153. Under Illinois statutes providing that either party is authorized to submit written propositions to be held as law in the decision of the case, propositions requested which were mere requests to the court to make certain specific findings of fact were properly refused. Crerar v. Daniels [Ill.] 70 N. E. 569.

43. Refusal to give counsel time to prepare them after the case has been decided held not error. Stauffer v. Volentine, 104 Ill. App. 382.

44. Findings held to conflict with conclusion of law that defendant was liable upon the statutory assessment of stockholders. Hunt v. Seeger [Minn.] 98 N. W. 91.

45. Where an agreed statement of facts has, by statute, the effect of special findings, a conclusion of law contrary to the agreed statement will vitiate the judgment. Birney v. Warren, 28 Mont. 64, 72 Pac. 293.

46. Johnson v. Peterson, 90 Minn. 503, 97 N. W. 384.

Illustration: Where one executed to another notes in consideration of an agreement on the part of the latter to build a factory that would employ 100 men and he built a factory that employed only 11 men, a court was justified in concluding that the conditions on which the notes had been given had not been complied with. Conner v. Andrews Land, H. & Imp. Co. [Ind.] 70 N. E. 376.

47. Zachariae v. Swanson [Tex. Civ. App.] 77 S. W. 627.

48. Merrill v. Miller, 28 Mont. 134, 72 Pac. 423.

49. Consult generally, title Saving Questions for Review, 2 Curr. Law, p. 1590.

50. A verdict perfect in form as to one party does not entitle him to a venire de novo, on account of the jury failing to find on all the issues made. A verdict "We the jury find for the defendant W." does not entitle him to a venire de novo, though his two co-defendants are not named therein. Maxwell v. Wright [Ind. App.] 64 N. E. 893.

51. In Montana, no judgment can be reversed for want of a finding, at the instance of a party who has not requested findings, nor in case of defects in findings, unless exception has been made in the trial court. Grogan v. Valley Trading Co. [Mont.] 76 Pac. 211. It is too late to take advantage of the omission on appeal. Redmond v. Mo., K. & T. R. Co. [Mo. App.] 77 S. W. 768; Tenzler v. Tyrrell [Tex. Civ. App.] 75 S. W. 57.

52. A request that the court state separately in writing the findings of fact and conclusions of law must be made in due season, and the record must show affirmatively that it was made. A request made five months after trial and after verbal announcement of the decision is too late, and a recital in a motion for new trial that request was made is not a sufficient showing. First Nat. Bank v. Citizens' State Bank [Wyo.] 70 Pac. 726.

53. A general finding being made and decree rendered thereon without objection, the request will be deemed waived. Shroyer v. Campbell, 31 Ind. App. 83, 67 N. E. 193.

54. Peters v. Lewis, 33 Wash. 617, 74 Pac. 815.

55. Hartman v. Hosmer, 65 Kan. 595, 70 Pac. 598.

56. Chicago & S. E. R. Co. v. State, 159 Ind. 237, 64 N. E. 860.

57. Six days after filing is too late. Chicago & S. E. R. Co. v. State, 159 Ind. 237, 64 N. E. 860.

58. Goff v. Britton, 182 Mass. 293, 65 N. E. 379.

59. Pritchett v. Samuel Weichselbaum Co., 119 Ga. 293.

60. Verdict objected to as not containing a finding as to each cause of action separately. Whiting v. Carpenter [Neb.] 93 N. W. 926; Parsons B. C. & S. F. Co. v. Gadeke [Neb.] 95 N. W. 850.

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The proper remedy in Indiana being a motion for a new trial, it is not error to refuse to modify special findings of fact.[61] A motion to modify, change or strike out a special finding, and to make additional findings, is unauthorized and may be properly overruled,[62] and a motion for a supplemental finding does not present any question.[63] These rules do not apply where the verdict is imperfect on its face.[64]

By excepting to conclusions of law an appellant admits that the facts have been fully and correctly found.[65]

VERIFICATION.

Verification is an averment by the pleader that he is prepared to establish the truth of the facts which he has pleaded. In code pleading it is an affidavit by the party, or his agent or attorney, to the truth of a pleading.[66]

Necessity.—The necessity of verified pleadings in particular actions or defenses at law is governed by statute.[67] In some states the plea of non est factum,[68] especially when signature by defendant is alleged,[69] must be verified. In some, in an action upon a written instrument, the answer denying the same must be verified or the genuineness of the instrument is admitted.[70] The denial by verification of the execution of instruments throws the burden of proof on plaintiff.[71] In others a verified complaint requires a verified answer.[72] But one cannot after the answer is filed verify his complaint and have the answer stricken out.[73] The right to require the plaintiff to verify his petition is substantial, and, in the absence of a bill of exceptions, its omission cannot be regarded as nonprejudicial.[74]

In equity where discovery sought is only incidental to the main object of the bill, the bill need not be verified.[75] The answer must or need not be verified according as answer under oath is waived or not.[76]

61. Chicago & S. E. R. Co. v. State, 159 Ind. 237, 64 N. E. 860. Where facts are found contrary to the evidence, the remedy is by motion for a new trial. Chappell v. Jasper County O. & G. Co., 31 Ind. App. 170, 66 N. E. 515. The objection that the answers to special interrogatories are not true is properly presented by a motion for a new trial without returning them to the jury for correction. Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602, 65 N. E. 309.

The answers, if untrue, are not ground for a new trial if the general verdict could not be controlled by any answers that the evidence would warrant. Id.

62. Chappell v. Jasper County O. & G. Co., 31 Ind. App. 170, 66 N. E. 515. The modification of special findings and conclusions of law based thereon is not authorized. Conner v. Andrews Land, H. & I. Co. [Ind.] 70 N. E. 376.

63. Muncie Natural Gas Co. v. Muncie, 160 Ind. 97, 66 N. E. 436.

64. Maxwell v. Wright, 175 Ind. 518, 67 N. E. 267.

65. Conner v. Andrews Land, H. & I. Co. [Ind.] 70 N. E. 376; Miller v. Wayne International B. & L. Ass'n [Ind. App.] 70 N. E. 180; Donaldson v. State [Ind.] 67 N. E. 1029.

66. Cyc. Law Dict., "Verification."

67. Under Civ. Code Proc. § 116, a petition in an action for libel must be verified. Berea College v. Powell, 25 Ky. L. R. 1220, 77 S. W. 382.

68. A plea admitting the issuance of an insurance policy, but denying that plaintiff was the person insured, is not required to be verified. McCarty v. Hartford Fire Ins. Co. [Tex. Civ. App.] 75 S. W. 934.

69. A petition not alleging that a contract was signed by defendants does not require a denial of the execution of a written contract under oath. Texas & P. R. Co. v. Byers Bros. [Tex. Civ. App.] 73 S. W. 427.

70. Sec. 62 of Civil Code of 1877 provides that when an action is brought upon a written instrument, and the complaint contains a copy of it, its genuineness and due execution are admitted, unless the answer denying the same is verified. Held, does not apply to an action by an indorsee against the maker of a note. Gumaer v. Sowers, 31 Colo. 164, 71 Pac. 1103.

71. The verification should deny the execution of the instruments sued on, or should state that the plea of nonassumpsit is true in order to cast upon the plaintiff the burden of proof of the execution of the instruments sued on. Reed v. Fleming, 102 Ill. App. 668.

72. Under Acts 1901, p. 55, an unverified answer to a verified complaint may be struck out on plaintiff's motion. Columbia Drug Co. v. Goodman, 119 Ga. 474.

73. Declaration in assumpsit, defendant filed a plea of nonassumpsit. Phoenix Assur. Co. v. Fristoe, 53 W. Va. 361.

74. Statute requires all pleadings, with certain exceptions, to be verified. Berea College v. Powell, 25 Ky. L. R. 1220, 77 S. W. 382.

75. Montgomery Iron Works v. Capital City Ins. Co., 137 Ala. 134.

76. Equity, 1 Curr. Law, p. 1077.

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By whom.—An attorney in fact can make the necessary oath where the facts are within his own knowledge,[77] and this will be assumed where the oath is positive in its terms.[78] When verification is by an attorney, it must show why it was not made by the petitioner.[79] Statutes in some states allow verification for several defendants to be made by one,[80] and for domestic corporations to be made by officers.[81]

Form and positiveness.—A verification of a pleading need not be in the exact words of the statute; it is sufficient if the substance of the statutory requirements is fairly set forth.[82] A verification made by one upon understanding or upon information or belief should state the basis of his understanding or the sources of his information or the grounds of his belief.[83] Where all the allegations of a pleading are positive, a verification containing the words "except as to those matters alleged on information and belief" is equivalent to an unqualified verification.[84]

Defects, objections and amendments.—Lack of verification may be waived[85] or cured by permission of court,[86] or by act of parties.[87] The verification of a pleading is amendable when not affecting the merits of the controversy.[88] In most states a defect in a verification, capable of amendment, cannot be taken advantage of for the first time on appeal.[89] Where a pleading lacks a verification and one is essential, motion to strike out the pleading is the proper remedy.[90] It is not demurrable.[91]

77. Bankruptcy petition. In re Vastbinder, 126 Fed. 417.

78. In re Vastbinder, 126 Fed. 417.

A verification in which facts sworn to on knowledge are not distinguished from those sworn to on information and belief is not positive. Id.

79. In re Mahoney's Estate, 88 App. Div. [N. Y.] 140.

Where a verification by an attorney shows that all the papers are in his hands, that he is more familiar than the petitioner with the facts, and that they are such as must have been almost entirely in his personal knowledge sufficiently shows why verification was not by petitioner. Id.

Under rule 48 of the rules of the circuit court in suits in equity, it is proper to strike a plea which is sworn to by the attorney of the defendant, it not appearing that the defendant himself is absent from the state. Moore v. Clem [Fla.] 34 So. 305.

80. Under Code Civ. Proc. § 446, providing that verification must be by affidavit of a party, verification of an answer by one of several defendants is sufficient. Butterfield v. Graves, 138 Cal. 155, 71 Pac. 510.

81. Under Code Civ. Proc. § 525, verification of a pleading of a domestic corporation may be made by one of its officers. A director is an officer. Eastman v. York State Tel. Co., 86 App. Div. [N. Y.] 562.

82. The word "instrument" imports a writing. Abbott v. Campbell [Neb.] 95 N. W. 591.

Under Code 1883, § 258, requiring a verification to be that the pleading is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters, that he believes it to be true, a verification that affiant has "read the same, and knows the contents thereof, that the facts set forth therein of his own knowledge are true, and that those stated on information and belief he believes to be true," is insufficient. Carroll v. McMillan, 133 N. C. 140.

83. Gillette v. Noyes, 86 N. Y. Supp. 1062.

84. Kieley v. Barron & C. Heating & Power Co., 87 App. Div. [N. Y.] 317.

85. After a submission of specifications of objection to bankrupt's discharge upon evidence which fully sustains them, an objection to them for lack of verification is too late. In re Robinson, 123 Fed. 844.

Under Sand. & H. Dig. § 5776, an objection to a complaint for want of verification cannot be taken after judgment. Randall v. Sanders [Ark.] 77 S. W. 56.

86. Where leave is granted to a party to swear to his answer within a stated time, and within that time a sufficient affidavit is appended to the answer while on file, the mere omission of the clerk to place the file mark on such affidavit does not require the court to strike out such answer or affidavit. Jackson v. Dutton [Fla.] 35 So. 74.

87. Defect in that verification upon information or belief fails to state sources of information or grounds of belief is not cured by the joint affidavit of others that the allegations in the complaint and affidavit are true. Gillette v. Noyes, 86 N. Y. Supp. 1062.

88. Petition in bankruptcy. In verification, facts based on knowledge not distinguished from those based on information, held might be remedied by amendment. In re Vastbinder, 126 Fed. 417; Smith v. Newell, 32 Wash. 369, 73 Pac. 369.

89. Ball. Ann. Codes & St. § 6535. Smith v. Newell, 32 Wash. 369, 73 Pac. 369.

Objection to the verification of a petition that it does not appear to have been sworn to before the surrogate, the jurat signed by the surrogate, reciting merely "Subscribed to before me," cannot be made for the first time on appeal. In re Mahoney's Estate, 88 App. Div. [N. Y.] 140.

90, 91. Butterfield v. Graves, 138 Cal. 155, 71 Pac. 510.

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WAR.

The rules of international law control and regulate parties with reference to their rights on the high seas during war, and they cannot be changed by the municipal regulations of any single power.[92] Generally speaking, forts, cities and lands taken from the enemy are called conquests; movables taken on land, booty; on the high seas, prize.[93]

Rights of neutrals—On the sea.—A neutral has a right to trade with a belligerent, provided she does not force, or intend to force, a blockade or carry contraband goods,[94] but the act of carrying to an enemy articles directly useful in war is a wrong for which the injured party may punish the neutral taken in the act.[95] Authorities do not agree in defining what articles are contraband.[96] Articles or material which by their nature are fit to be used in war are generally regarded as such,[97] but as to articles of uncertain or ambiguous use there is no fixed rule.[98] One class of writers contends that all such articles are contraband, while another contends that inquiry may be made for determining their probable use in the particular instance. The latter seems to be the better rule.[99] The status of such articles is frequently fixed by treaty.[1] Such treaties are binding only on the powers making them, and are not affected by treaties of either with other powers.[2] The mere presence of contraband articles on board ship as an incident of the voyage, without proof or circumstances sufficient to justify the belief that the ship owners or their agents knew they were violating the laws of neutrality, will not justify the seizure of the ship, but only of the contraband articles.[3] Knowledge on the part of the ship owner of the presence of such articles, or conduct showing such knowledge involves the whole ship.[4] If a substantial part of the cargo consists of contraband articles, the presumption arises that the voyage was undertaken in violation of the duty of a neutral, and with intent to aid the belligerent adversary.[5] If the owners of the vessel also own the cargo and the latter is contraband, both are subject to confiscation.[6] A neutral vessel may forfeit her neutral character by the fraudulent conduct of her master, by false destination, or by resisting search.[7] A blockade runner is ab initio in delicto, and is liable to capture and condemnation not only on the outward but on the return voyage, notwithstanding the fact that her homeward-bound cargo may be innocent merchandise.[8] After reaching her home port she may resume her neutral character, and, having done so, her pre-

92. The Jane, 37 Ct. Cl. 24.

93. High seas include all waters on which a court of admiralty has jurisdiction. U. S. v. Dewey, 188 U. S. 254, 47 Law. Ed. 463.

94. The Galen, 37 Ct. Cl. 89.

95, 96, 97. The Atlantic, 37 Ct. Cl. 17.

98. The Atlantic, 37 Ct. Cl. 17. Horses may or may not be contraband of war, according to the circumstances of the case. Where they may be of service to the combatants they are, but where they are clearly for the use of noncombatants they are not. The Lucy, 37 Ct. Cl. 97.

99. The Atlantic, 37 Ct. Cl. 17.

1. The James & William, 37 Ct. Cl. 303. By the treaty between the United States and France of Feb. 6, 1778 (8 St. at L. p. 12, art. XXIV), horses were made contraband of war. The Lucy, 37 Ct. Cl. 97.

2. The most favored nation clause in treaties refers only to rights in the ports of the parties. The James & William, 37 Ct. Cl. 303. Treaty of 1778 (Pub. Treaties, p. 210, art. XXIV) declaring tar and turpentine not abrogated by treaty of France with England, 1794 (Pub. Treaties p. 278, art. XVIII). Id.

3, 4. The Atlantic, 37 Ct. Cl. 17.

5. The Atlantic, 37 Ct. Cl. 17. At the time of the seizure of a vessel by France, it was loaded with horses, which constituted a large part of the cargo, and were destined for an English port, that country being then at war with France. Horses were then considered contraband of war. Held, that France was justified in seizing the vessel and condemning it and its cargo, there being a presumption that such cargo was intended for the military use of England. French spoliation claims. Id.

6. The Lucy, 37 Ct. Cl. 97.

7. The Galen, 37 Ct. Cl. 89. Where a vessel carrying contraband was falsely documented or cleared for a false destination, or was guilty of fraud, it was liable to confiscation from the time it left the home port until it returned thereto, together with the cargo on the return voyage, though that might be innocent. A vessel clearing for a neutral port but carrying contraband to a belligerent port held subject to seizure and condemnation. The Lucy, 37 Ct. Cl. 97.

8, 9. The Galen, 37 Ct. Cl. 89.

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vious conduct is not open to inquiry.[9] The war vessels of belligerents have a right to stop and search neutral vessels on the high seas for the purpose of obtaining evidence of their neutrality and that of their cargo.[10] The deliberate and continued resistance of search renders the confiscation of the vessel justifiable.[11] The right of search is preliminary to the right of seizure and the right of seizure depends upon the result of the search.[12] A neutral vessel, properly documented, carrying an innocent neutral cargo, with no intent to run a blockade, is subject to search, but not to seizure, and must be released as soon as searched.[13] If a seizure is unjustifiable, the captors are liable in damages to the owners, and the vessel will be released.[14] A neutral vessel voluntarily sailing under belligerent convoy is subject to capture and condemnation as a part of the hostile force,[15] but when she separates from the convoy, voluntarily or involuntarily, she is no longer a part of such force and is not subject to capture as such.[16] Where a neutral vessel, seized by a belligerent, is being taken to a port to undergo prize proceedings, her rescue by her master and crew is unlawful.[17] The justifiability of the seizure is determined in the condemnation proceedings before the prize court of the power making the capture,[18] and until such proceedings are had the captors have no right of property in the captured vessel or her cargo.[19] It is the duty of the captors to preserve the captured vessel in its original condition,[20] to take it into port with reasonable dispatch, and there institute legal proceedings for the purpose of determining the lawfulness of the capture,[21] and to give the captain and the crew every opportunity to defend the vessel in such proceeding.[22] Deprivation of the latter right renders the condemnation prima facie illegal, and the alleged illegality of the voyage cannot be considered.[23] The proceedings to condemn must be in all respects legal, or the judgment will be vitiated.[24] The presumption is that a seizure is properly made, and the burden is on the seized vessel to show that it is not.[25] A protest made at the time is competent evidence to show the circum-

10. The Jane, 37 Ct. Cl. 24; The Nancy, 37 Ct. Cl. 401; The Mary, 37 Ct. Cl. 33. This right is essential to the exercise of the right of capturing enemy's property, contraband of war and vessels committing a breach of blockade. The Jane, 37 Ct. Cl. 24.

11. Act of July 9, 1798 (1 St. at L. 578), authorizing merchant vessels to carry arms could not change this rule. Seizure and condemnation of resisting neutral vessel held justifiable. The Jane, 37 Ct. Cl. 24; The Mary, 37 Ct. Cl. 33; The Galen, 37 Ct. Cl. 89. A court cannot differentiate degrees of resistance which will render a vessel so resisting liable or not liable to condemnation. The Jane, 37 Ct. Cl. 24.

12. The Nancy, 37 Ct. Cl. 401.

13. The Galen, 37 Ct. Cl. 89. Where an American vessel carried the passport or sea letter provided for by the treaty (art. XXV), it was a case of free ships make free goods (art. XXIII), and the cargo could not be condemned for want of evidence of its neutrality. The James & William, 37 Ct. Cl. 303. The register of an American vessel in the eighteenth century was conclusive evidence in French prize courts of her American character and of the nationality of her owners. Could be impeached only by application to the government issuing it. The Conrad, 37 Ct. Cl. 459.

14. The Happy Return, 37 Ct. Cl. 262; The Nancy, 37 Ct. Cl. 401.

15. The Galen, 37 Ct. Cl. 89.

16. Deprivation of the right of search while under convoy not a deprivation of anything when vessel is innocent. The Galen, 37 Ct. Cl. 89.

17. Retaking of vessel and sale at a sacrifice destroy right to compensation. The Mary, 37 Ct. Cl. 33.

18. The Happy Return, 37 Ct. Cl. 262.

19. The Sally, 37 Ct. Cl. 74.

20. Unlawful to break open the hatches and remove the cargo, and to destroy the ship's papers. The Nancy, 37 Ct. Cl. 401.

21. The Nancy, 37 Ct. Cl. 401.

22. The Nancy, 37 Ct. Cl. 401. The master of a neutral vessel, seized by a belligerent, has the right to appear and defend his ship and cargo before a prize court against the charge of illegality of the voyage. Failure to grant this right renders the proceedings prima facie illegal. Master taken aboard privateer making capture and not landed until vessel sold. The Sally, 37 Ct. Cl. 74. This right well settled in eighteenth century and that there must be a regular judicial proceeding. The Snow Thetis, 37 Ct. Cl. 470.

23. The Sally, 37 Ct. Cl. 74.

24. The Nancy, 37 Ct. Cl. 401.

25. The Nancy, 37 Ct. Cl. 401. No presumption that the required papers were on board. The Sally, 37 Ct. Cl. 542. The presumption is, where the decree is silent in regard to the appearance of the owners, and in the absence of protest or proof that they were denied a hearing, that they were given an opportunity to defend. The Snow Thetis, 37 Ct. Cl. 470.

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stances of a capture, what was done with the crew, and the fact of the sale of the vessel.[26] The inability of a master to make protest at the place where his goods were seized may be inferred, where it does not appear that he had an opportunity of doing so, and promptly made protest on the day of his return.[27] A neutral nation has nothing to do with the enforcement or consummation of a belligerent's rights, and owes to either belligerent only limited rights of hospitality.[28]

Prize money and bounty.—Captures of war inure to the government and can become private property only by its grant.[29] By the statutes of the United States, prize money or bounty is given to the vessels making the capture. In case the property is brought in and condemned as prize, the net proceeds of its sale, when the prize was of superior or equal force to the vessel or vessels making the capture, and one-half thereof when it was of inferior force, is divided among the captors, the other half, in the latter case, going to the government.[30] In case a ship or vessel of the enemy is destroyed in battle or it becomes necessary to destroy it by reason of injuries received therein, a sum called bounty is paid to the officers and crew of the ship or ships destroying it.[31] A capture is complete when the ship is brought to and boarded by her captors, even though her flag is not then hauled down or a prize crew put aboard.[32] Until condemnation, captors acquire no absolute right of property in prizes, but they are taken subject to the right of the government to restore them to their original owners.[33] Captors of vessels as prize of war, the proceeds of which prize courts have ordered restored to the claimants with damages and costs, are not liable therefor, where the libels were filed by the United States in its own behalf, praying a forfeiture to it, and alleging a capture pursuant to instructions from the president.[34] In such cases, the prize court may enter a decree against the United States for such damages and costs.[35] Naval vessels not within signal distance of a capture are not vessels making the capture, and cannot be considered in estimating the relative force of captor and prize, for the purpose of determining the proportion of the prize money to which the captor is entitled, even though their proximity may have induced the surrender of the prize to an inferior force.[36] What is signal distance must depend upon the facts in each particular case.[37] Vessels used by the navy as colliers, manned principally by unenlisted men, and armed only for purposes of defense, are not, though

26. The Sally, 37 Ct. Cl. 74.

27. The Lucy, 37 Ct. Cl. 438.

28. The Happy Return, 37 Ct. Cl. 262. In 1800, Sweden and the Netherlands by allowing American vessels to be detained in their ports while prize proceedings were prosecuted in French courts, allowed the right of asylum to be abused and violated the treaty obligations which they owed to the United States. The United States released such claims and elected to hold France alone responsible and hence must be held to have released other nations whose obligations were the same. But where a neutral nation permitted American vessels to be condemned in its own ports by French consular courts, or permitted a seizure to be made in its waters, it alone would be held responsible. Id.

29. U. S. v. Dewey, 188 U. S. 254, 47 Law. Ed. 463.

30. U. S. Rev. St. § 4630 (U. S. Comp. St. 1901, p. 3132). See U. S. Rev. St. tit. LIV, §§ 4613-4652 (U. S. Comp. St. 1901, pp. 3126-3139). U. S. v. Dewey, 188 U. S. 254, 47 Law. Ed. 463.

31. U. S. Rev. St. § 4635 [U. S. Comp. St. 1901, p. 3134). U. S. v. Dewey, 188 U. S. 254, 47 Law. Ed. 463.

32. U. S. v. Officers & Crew of U. S. S. Mangrove, 188 U. S. 720, 47 Law. Ed. 664.

33. Government is absolved from liability when this right is exercised. U. S. v. Dewey, 188 U. S. 254, 47 Law. Ed. 463.

34. U. S. v. The Paquete Habana, 189 U. S. 453, 47 Law. Ed. 900.

35. U. S. v. The Paquete Habana, 189 U. S. 453, 47 Law. Ed. 900. An exception to the findings of a commissioner as to the damages to be awarded in such cases, on the ground that they were not warranted by the evidence, raises the question as to whether or not such damages were excessive, where all the evidence is attached to the commissioner's report. Damages awarded held excessive. Id.

36. U. S. Rev. St. § 4630 (U. S. Comp. St. 1901, p. 3132). U. S. v. Officers & Crew of U. S. S. Mangrove, 188 U. S. 720, 47 Law. Ed. 664.

37. U. S. v. Officers & Crew of U. S. S. Mangrove, 188 U. S. 720, 47 Law. Ed. 664. A vessel is not within signal distance of another making a capture, when they are twelve or fifteen miles apart, and the vessel making the capture is equipped with boat flags instead of signal flags (so as to be

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within signal distance of a capture, entitled to share in the prize money.[38] Captors of vessels are entitled to prize money only when they are delivered to the proper authorities, secure from the hostile force.[39] When they are destroyed to prevent recapture,[40] or when they are raised and floated and are afterwards, by reason of injuries received in the engagement, lost in an endeavor to take them to the nearest practical port at which they can be reconstructed, the captors are not entitled to prize money, but to bounty.[41] An enemy's war vessels, run ashore in battle and sunk by their own commanders, which are afterwards raised, reconstructed and commissioned in the navy, are vessels captured and appropriated to the use of the United States, and therefore lawful prize of war for the benefit of their captors.[42] Naval stores captured at a naval station by a naval force of the United States, as a result of a naval engagement, are prize of war,[43] but barges propelled by sweeps and by poling, and nonseagoing floating derricks or wrecking boats without means of propulsion, the property of private citizens are not.[44] Property taken from vessels, for the capture or destruction of which prize money or bounty is paid, has the same legal status as that of the vessel to which it belonged.[45] The statute does not contemplate a division of the grant and an award of prize money and bounty in respect of the same transaction, unless the capture embraces distinct and separate properties.[46]

Prize courts.—The district courts of the United States are prize courts, and have jurisdiction to take cognizance of a libel for the condemnation of prizes of war, and to adjudicate the question of prize or no prize.[47] The right of appeal in such cases is direct to the supreme court of the United States, without regard to the amount in dispute.[48] The fees of the various officers having to do with the condemnation proceedings are fixed by statute.[49]

entitled to prize money under U. S. Rev. St. § 4632; U. S. Comp. St. 1901, p. 3133). Id.

38. Cannot render aid. U. S. Rev. St. § 4632 [U. S. Comp. St. 1901, p. 3133]. U. S. v. Dewey, 188 U. S. 254, 47 Law. Ed. 463.

39. The Santo Domingo, 119 Fed. 386.

40. Such destruction is not an appropriation for the use of the government within the meaning of U. S. Rev. St. §§ 4615, 4624, 4625, or order 492 of the navy department. The Santo Domingo, 119 Fed. 386.

41. U. S. Rev. St. § 4635 (U. S. Comp. St. 1901, p. 3134). U. S. v. Taylor, 188 U. S. 283, 47 Law. Ed. 477.

42. U. S. Rev. St. §§ 4624, 4625 (U. S. Comp. St. 1901, p. 3130). Have not been sunk or otherwise destroyed within the meaning of the bounty provisions of the statute. U. S. Rev. St. § 4635 (U. S. Comp. St. 1901, p. 3134), though left in such condition that they could not be floated by any of the means ordinarily possessed by a naval force. U. S. v. Dewey, 188 U. S. 254, 47 Law. Ed. 463.

43. 12 Stat. 600, c. 204, § 2; 13 Stat. 306, c. 174. Captures on land are made as prize for the benefit of the captors only when they come within the scope of prize statutes. U. S. v. Dewey, 188 U. S. 254, 47 Law. Ed. 463.

44, 45. U. S. v. Dewey, 188 U. S. 254, 47 Law. Ed. 463.

46. U. S. v. Dewey, 188 U. S. 254, 47 Law. Ed. 463. Appliances and outfit taken from an enemy's vessels of war, sunk or otherwise destroyed during battle, are not the subject of prize, but are included within the words "ship or vessel of war" within the statute awarding bounty for the destruction of such vessels [U. S. Rev. St. § 4635 (U. S. Comp. St. 1901, p. 3134)]. Id. Entire equipment, including everything necessary for the purposes of the vessel included. U. S. v. Taylor, 188 U. S. 283, 47 Law. Ed. 477. Contra, The Santo Domingo, 119 Fed. 386.

47. U. S. v. Sampson, 19 App. D. C. 419. The supreme court of the District of Columbia, sitting as a district court of the United States, has the same jurisdiction in such cases as other district courts [Rev. St. D. C. § 762]. Id.

48. Act of Congress of March 3, 1891 (26 Stat. 826). U. S. v. Sampson, 19 App. D. C. 419. An appeal from the supreme court of the District of Columbia does not lie to the court of appeals of the District, but to the U. S. supreme court. Rev. St. U. S. §§ 695, 698, and acts of Congress of March 3, 1891, § 5 (26 Stat. 826), and Feb. 9, 1893, § 7 (27 Stat. 434) construed. Id.

49. The district attorney is entitled to compensation for his services in prize cases in addition to his regular compensation or salary. Rev. St. §§ 4646, 4647 (U. S. Comp. St. 1901, p. 3138) allowing him to retain a sum not exceeding $3,000 a year in addition to his maximum compensation or salary, were not repealed by 29 Stat. 179 (U. S. Comp. St. 1901, c. 611), providing salary for such officers, nor is he required by that act to cover the allowances so made him into the treasury. The Adula, 127 Fed. 849; Id., 127 Fed. 853. A marshal may be allowed compensation ouside of his statutory fees for services rendered outside of his district in transferring a prize to another district under order of the court. Services authorized by Rev. St. U. S. § 4629 (U. S. Comp. St. 1901, p. 3132). $500 held adequate compensation. The Adula, 127 Fed. 849. The statute in re-

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French spoliation claims.—Under the treaty of September 30th, 1800, between the United States and France, the former assumed and agreed to pay certain of the claims of its citizens against the latter, arising from the seizure of American vessels during the war between England and France, and generally known as the French Spoliation Claims. By virtue of this treaty, the United States is liable only for such damages as could have been collected from France.[50] Where neither the American registry of the vessel nor the citizenship of the owners is established, there can be no recovery under the act.[51] Insurers have no higher standing in court than the owners, and if the latter cannot recover, the former cannot.[52]

WAREHOUSING AND DEPOSITS.

Who are warehousemen and depositaries.—A warehouse is a place used for the reception and storage of goods and merchandise, and a warehouseman is one who keeps it for hire,[53] holding the goods[54] under an obligation to return.[55] "Depository" and "depositary" have meanings much akin to these[56] but are commonly significant of the keeping of valuables. A carrier becomes a warehouseman under certain circumstances.[57]

Licensing and public regulation of such business is a matter of statute, applications of the statutes having been made in the cases cited.[58] The grain and warehouse statutes of Minnesota do not cover transactions had by a domestic corporation in a sister state.[59]

gard to fees to be paid prize commissioners merely fixes their maximum compensation, and does not require the court to allow them the amount specified for services rendered during the year. U. S. Rev. St. § 4647 (U. S. Comp. St. 1901, p. 3138). Id. The auctioneer selling the prize is entitled to reasonable compensation for his services. Id. Allowance of $500 each to appraisers for services completed in part of one day held reasonable and approved. Id. The clerk of the district court is not entitled to a commission on money paid on a stipulation in a prize case, where the same is by agreement of parties deposited in the registry of the court instead of with the assistant treasurer as provided by statute, but only to his ordinary costs and the fee of $25 allowed for his services in prize cases [Rev. St. U. S. §§ 4623, 4626, 828 (U. S. Comp. St. 1901, pp. 3130, 3131, 635)]. Id.

50. The Nancy, 37 Ct. Cl. 401. Where the French authorities impressed goods and gave the American owners evidence of indebtedness which the French government would acknowledge, it was a debt within art. 5 of the treaty of 1778, but where they refused to give such evidence of indebtedness, the owners are entitled to indemnity for illegal seizure. The Lucy, 37 Ct. Cl. 97. Where vessel was recaptured by English and a British court decreed half the value of the vessel to be paid to the recaptors, France was not bound thereby except as a mere measure of damages suffered by the owners of the vessel. The Nancy, 37 Ct. Cl. 401.

See also supra, as to what spoliations will support this right.

51. Condemnation justified on ground that one of the owners was a British subject. Nationality of others did not appear. The Vandeput, 37 Ct. Cl. 396.

52. The Vandeput, 37 Ct. Cl. 396.

53. Cyc. Law Dict. "Warehouse" (citing 23 Me. 47); "Warehouseman."

54. Actual change of possession is necessary. In re Rodgers [C. C. A.] 125 Fed. 169.

55. A milling corporation which stored wheat till it was milled, issuing wheat storage certificates, was held not a warehouseman nor the certificates negotiable. Wash. County Nat. Bank v. Motter, 97 Md. 545.

56. Cyc. Law Dict. "Depositary."

57. Carriers, § 10, 1 Curr. Law, p. 431.

58. **Under laws of Tennessee,** a warehouseman is not required to give a new bond on change of location [Code Tenn. §§ 3381, 2597]. Bailey v. Wood, 24 Ky. L. R. 801, 69 S. W. 1103.

Under the laws of Illinois, the management of elevators of class A is a public employment and owners are held strictly to this relation in the management of their elevators. Hannah v. People, 198 Ill. 77, 64 N. E. 776. The Illinois act allowing owners of class A elevators to store their own grain and mix it with that of others and deal in their own warehouse receipts, violates the constitution classifying public elevators and forbidding the mixing of grain [Laws Ill. 1897, p. 302; Const. Ill. § 13]. Id. The constitution does not forbid storage of owner's grain in vacant places in elevator. Id.

59. In re St. Paul & K. C. Grain Co., 89 Minn. 98, 94 N. W. 218. Grain receipts issued by a Minnesota corporation covering grain in elevators in that and other states without specifying particular elevators covers only grain in Minnesota, such receipts not being authorized by the laws of the other states. Id. Grain receipts covering grain in "the system of elevators" of the issuing corporation are not so indefinite as to the grain covered as to render them void. Id.

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A storage contract to be implied from delivery and possession in store requires proof of actual possession.[60] The statement of one that his warehouse was at a certain number did not constitute a contract to store at that number.[61] In order to prove delivery to an agent, his authority must be shown.[62]

Warehouse receipts must represent goods actually stored at time of issuance,[63] but though a partner may have perpetrated a fraud on his partner in issuing receipt in firm name, bona fide purchaser will not be affected.[64] A warehouseman may issue receipts for his own property stored in the warehouse and pledge such receipts as collateral security for his own debt.[65] It may be signed by a third person, whose signature was under the warehouseman's supervision.[66] Warehouse receipts not in accordance with the statutory requirements are admissible to prove the actual delivery of the grain.[67] Receipts for grain pledged to secure notes are to be construed independently of the notes they secure, and those covering grain in other states are to be construed according to the laws of the states where situated.[68]

At common law, the transfer of a warehouse receipt absolutely or as collateral security for a loan vests in transferee title to the property represented;[69] but to constitute a pledge by transfer of warehouse receipts, the receipts must have been issued by one in actual possession.[70] Where there was a proven deficiency of goods to meet receipts so that either they had been issued without receiving possession or the goods had been converted, the holder of the receipt must prove goods in store when the receipt issued.[71] The laws of Kentucky place warehouse receipts on the footing of bills of exchange, and negotiable character is not limited to transactions had in Kentucky with citizens thereof.[72] One taking warehouse receipts assumes risk of a landlord's prior lien.[73]

A milling company storing wheat to be manufactured into flour, the wheat in no case being withdrawn but paid for as manufactured, is not a warehouseman within an act giving a preference to holders of warehouse receipts on insolvency.[74]

Care and protection of goods stored.—A gratuitous bailee is bound to use only ordinary care in keeping and caring for deposit.[75] A warehouseman must exercise reasonable care to preserve goods from injury by contact with other goods.[76]

60. Possession of trunk by warehouseman is not shown where there is no proof on that question except an arrangement for storing over the telephone and delivery of trunk to an expressman to take to warehouse. Young v. Seattle Transfer Co., 38 Wash. 225, 74 Pac. 375.

61. Kennedy v. Portmann, 97 Mo. App. 253, 70 S. W. 1099.

62. Where there is no evidence of authority of a company's agent to receive goods from a sheriff for custody pending attachment, evidence of sheriff's deputy as to levy and entrusting to company is inadmissible. Koyukuk Min. Co. v. Van De Vanter, 30 Wash. 385, 70 Pac. 966.

63. No presumption that grain was stored in violation of statutory requirements. Milliorn v. Clow, 42 Or. 169, 70 Pac. 398. There must be an actual change of possession to constitute a warehousing. In re Rodgers [C. C. A.] 125 Fed. 169.

64. Farmer v. Etheridge, 24 Ky. L. R. 649, 69 S. W. 761. Fact that the tobacco for which receipt was issued to a son by member of firm belonged to partner issuing receipt did not invalidate same. Id.

65. Millhiser Mfg. Co. v. Gallego Mills Co., 101 Va. 579. But see supra, Hannah v. People, 198 Ill. 77, 64 N. E. 776.

66. Ala. G. S. R. Co. v. Clark, 136 Ala. 450.

67. Bailor not necessarily deprived of right to recover grain or its value by reason of evasion as to charges. Kramer v. N. W. Elevator Co. [Minn.] 98 N. W. 96.

68. In re St. Paul & K. C. Grain Co., 89 Minn. 98, 94 N. W. 218.

69. Code Va. 1887, §§ 1791, 1792, does not change rule of common law as to unlicensed warehousemen. Millhiser Mfg. Co. v. Gallego Mills Co., 101 Va. 579.

70. In re Rodgers [C. C. A.] 125 Fed. 169.

71. Failing to do so he cannot be protected. Milliorn v. Clow, 42 Or. 169, 70 Pac. 398.

72. Ky. St. § 4770. Farmer v. Etheridge, 24 Ky. L. R. 649, 69 S. W. 761.

73. Right of distress for rent good against holders of warrant. American Pig Iron S. W. Co. v. Sinnemahoning I. & C. Co., 205 Pa. 403.

74. Wash. County Nat. Bank v. Motter, 97 Md. 545.

75. Mayer v. Gersbacher, 207 Ill. 296, 69 N. E. 789.

76. Sibley Warehouse & Storage Co. v. Durand & Kasper Co., 102 Ill. App. 406. Instruction held not open to the construction that the bailee need only use reasonable diligence to prevent the grain being mixed with

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or other causes originating while they are in storage.[77] He is not charged for grain below grade spoiled by delay of depositor in acting on advice of inspectors to mix with higher grade.[78] A carrier storing goods is liable for their destruction by fire from adjoining premises, where it had knowledge of the dangers from proximity to such premises and took no steps to guard against same.[79] A liability for negligence of warehouseman turning over cotton to compress is not shown by failure to require a compress receipt according to custom between the parties.[80] An agreement to furnish any desired temperature does not dispense with all care to provide a proper one if the bailor specifies none,[81] but where the bailor merely hires space, he bears his own loss from improper care of stored goods.[82] Failure to remove vegetables from cold storage on learning that temperature was not proper does not render plaintiff guilty of contributory negligence as a matter of law.[83] Evidence[84] tending only to show whether the fire department was prompt[85] or declarations after a fire[86] are irrelevant. The unexplained collapse of a warehouse may raise an inference of negligence;[87] but the fact that goods were destroyed by fire does not.[88] It may be shown that similar goods were not affected injuriously.[89] A receipt to a warehouseman on return of the goods reciting their return "in good condition" is not conclusive on receiptor in an action for injury thereto.[90] The real owner may recover for injury through deposit made by another, the warehouseman being informed as to ownership at time of receiving articles.[91]

Insurance.—A contract to insure is not found in a mere statement in receipt: "All cotton stored with us fully insured."[92] The owner may recover where articles are deposited with the warehouseman on his statement that they would be insured under his policies, and the general policies paid to the warehouseman cover

other grain or being converted to his own use. Mayer v. Gersbacher, 207 Ill. 296, 69 N. E. 789. Instruction held not to place burden on either party as to agreement allowing substitution, that being the office of another instruction which expressly told the jury that the burden was on defendant. Id.

77. Elevator company will not be liable for injuries to grain traceable to causes antedating deposit. S. A. Trufant Com. Co. v. Yazoo & M. V. R. Co., 111 La. 633.

78. S. A. Trufant Com. Co. v. Yazoo & M. V. R. Co., 111 La. 633.

79. Liability not affected by insurance contracts of bailor. Judd v. N. Y. & T. S. S. Co. [C. C. A.] 117 Fed. 206.

80. Bashinsky & Co. v. Seals, 135 Ala. 357.

81. A cold storage receipt provided that the company would furnish any desired temperature but would not guaranty results, all goods stored at owners' risk, company not liable for loss by fire, water, leakage, etc. This did not relieve the company from preserving a proper temperature where none was specified nor from its duty to keep butter stored away from injurious odors. Rudell v. Grand Rapids Cold Storage Co. [Mich.] 99 N. W. 756.

82. Lessee of a room in a refrigerating plant operated at his own risk. Terry v. Mattoon I. & S. Co., 103 Ill. App. 265.

83. Advertisement of proprietor announcing "uniform temperature" admissible. Rettner v. Minn. Cold-Storage Co., 88 Minn. 352, 93 N. W. 120.

84. Sufficiency of evidence to go to jury on question whether there was a contract to store at a particular place. Kennedy v. Portmann, 97 Mo. App. 253, 70 S. W. 1099. Of injury to crop of prunes stored for curing purposes. Arnold v. Producers' Fruit Co., 141 Cal. 738, 75 Pac. 326.

85, 86. Where fire did not originate in warehouse, a question as to how long, judging from condition of warehouse, the fire had been burning when fire department arrived was incompetent. Lyman v. Southern R. Co., 132 N. C. 721. Likewise declarations of defendant's agent a few days after fire. Id.

87. Warehouse collapsed without any extraordinary violence or any reason outside of defects in wharf on which it was erected. This is not conclusive but subject to rebuttal. Foster v. Pac. Clipper Line, 30 Wash. 515, 71 Pac. 48. Where court charged that burden was on plaintiff to establish negligence and if evidence was evenly balanced issue should be decided by defendant, court properly refused to charge that if jury were unable to determine cause of collapse finding should be for defendant. Id.

88. Insufficiency of evidence of negligence. Lyman v. Southern R. Co., 132 N. C. 721.

89. Where butter stored in a warehouse was injured by offensive odors, evidence that other butter stored was not injured was admissible on the question of negligence. Rudell v. Grand Rapids Cold-Storage Co. [Mich.] 99 N. W. 756.

90. Comerford v. Smith, 28 App. Div. [N. Y.] 638.

91. O'Connor v. Moody, 90 App. Div. [N. Y.] 440.

92. Atwater v. Hannah, 116 Ga. 745.

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his property and exceed his loss.[93] He is entitled to insurance on goods stored without diminution, though policy taken without his knowledge;[94] but under general policies covering all goods stored must show that he has not been indemnified for the loss by other insurance.[95] Goods stored are within a policy covering goods "held in trust."[96]

Damages.—A cotton compress company losing cotton delivered to it is liable for value at time of discovery of loss and not value at time of suit.[97] The damages recoverable for conversion by licensed warehouseman is the value of the property converted.[98] Original cost may not be recovered for injury to work of art where testimony fixes value at a less amount at time of accident and the article would have some value on being restored.[99] Value of goods must be clearly shown.[1] The value of other owners' property is not admissible,[2] nor is evidence of a price which might have been obtained by one who had no right to sell.[3]

Redelivery to bailor.—The goods must be redelivered to the bailor or owner except where loss is excused.[4] A depositary of a trust fund must restore the fund to the true owner on demand, although the deposit was made by an agent or trustee, and until the demand the owner had no notice of its real character.[5] Where money of a debtor was given to a third party pending a decision as to whether it was exempt and if not exempt to be applied on a certain debt, the creditor was entitled to recover it from the depositary, it being found not exempt, though debtor was dead and his estate insolvent.[6]

Charges and lien therefor.—In order to recover charges, warehouseman must keep the grain or its equivalent in the warehouse. It is not sufficient that the amount was held in another warehouse.[7] An agreement to pay for services will not be found in acquiescence under a suggestion that it be done because anticipated benefits had not been realized.[8] His lien extends to storage services only.[9] A warehouseman has no lien as against mortgagee on property stored in violation of condition against removal.[10] The lien laws of New York give persons performing storage services a right to retain chattel until charges are paid.[11] His lien for

93. Souls v. Lowenthal, 40 Misc. [N. Y.] 186. In an action against a warehouseman to recover insurance on goods stored with him and destroyed, where he has received on two policies covering the goods money enough to pay plaintiff who sues for himself alone, the conditions of other policies running to the warehouseman are not material. Id.

94. Southern Cold Storage & Produce Co. v. Dechman & Co. [Tex. Civ. App.] 73 S. W. 545.

95. Friedman v. Woods Motor Vehicle Co. [C. C. A.] 123 Fed. 413.

96. Southern Cold Storage & Produce Co. v. Dechman & Co. [Tex. Civ. App.] 73 S. W. 545.

97. Hattiesburg Compress Co. v. Johnson, 81 Miss. 731.

98. Plaintiff may testify as to value where article has no market value. State v. Sullivan, 99 Mo. App. 616, 74 S. W. 417.

99. Speculative and conjectural damages may not be recovered. Comerford v. Smith, 82 App. Div. [N. Y.] 638.

1. Plaintiff testified to value in three different amounts. Glass v. Hauser, 38 Misc. [N. Y.] 780.

2. In an action for injuries to prunes by a curing company with exclusive right to sell, evidence of sales made by defendant's salesmen of prunes other than plaintiff's is not material. Arnold v. Producers' Fruit Co., 141 Cal. 738, 75 Pac. 326.

3. Where a prune curing contract prohibited sale by plaintiff, a question whether he could have sold the damaged prunes at the market price prior to their sale by defendant was immaterial. Likewise proof that plaintiff exhibited prunes taken from another county for purposes of comparison. Arnold v. Producers' Fruit Co., 141 Cal. 738, 75 Pac. 326.

4. Bailee for hire may excuse failure to deliver by showing seizure under valid legal process and that he gave bailor notice within a reasonable time or used due diligence to notify him. Glass v. Hauser, 40 Misc. [N. Y.] 661. See, also, Bailment, 1 Curr. Law, p. 288. He must show validity of process or that proceeds were applied for bailor's benefit and must show time of seizure or bailor's knowledge thereof. Glass v. Hauser, 38 Misc. [N. Y.] 780.

5. Union Stockyards Nat. Bank v. Campbell [Neb.] 96 N. W. 608.

6. Hathorn v. Robinson, 98 Me. 384.

7. McSherry v. Blanchfield [Kan.] 75 Pac. 121.

8. Temple v. Schultz [Fla.] 36 So. 59.

9. But not to services in cleaning an article in storage. Reidenback v. Tuck, 85 N. Y. Supp. 352.

10. Allen v. Becket, 84 N. Y. Supp. 1007

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storage, accrued prior to laws extending lien as against mortgagees and sellers on conditional sale, is not superior to such liens.[12] The fact that receipt provides for sale without notice will not dispense with a statutory requirement to that effect.[13] Balance after sale for charges is to be paid by lienor into county treasury for benefit of lawful claimant under the laws of Washington.[14]

Conversion.—A warehouseman may be guilty of conversion by delivery of goods to depositor after demand by party entitled to their possession as owner.[15] Where property held by carrier under a claim for charges is attached and thereafter held for two years and sold to satisfy its claim, the surplus being held in trust for claimant, such carrier will not be liable to the true owner for the original value.[16] There being evidence that deposit of wheat was intact at the time of an agreement to allow miller to use same provided the miller kept enough on hand to make good the deposit, it was not erroneous to omit to instruct as to a conversion by mixing before the agreement.[17]

Actions and procedure.—In suing on a bond there must be an allegation of possession[18] and of breach,[19] and even though proof fails to show a warehouse covered by the bond, it suffices as to the principal.[20]

A transferee of a receipt must plead the facts showing his title.[21] On cross-examination, he may show that a signature by a third person was authorized.[22] The amount of a storage lien must be pleaded in mitigation of damages for conversion.[23]

Crimes and penalties.—A warehouseman in Oregon, giving receipts to a depositor of grain not in the statutory form, is properly prosecuted under the statute punishing larceny by a bailee for conversion of grain instead of under special provision relating to warehousemen.[24] Criminal intent need not be proven by direct testimony.[25] The ordinary rules of criminal procedure apply.[26]

11. Services in cleaning article are not subject of lien. Claim should be determined in replevin to time of trial. Reidenback v. Tuck, 85 N. Y. Supp. 352.

12. Laws N. Y. 1902, p. 1775, c. 608. Singer Mfg. Co. v. Becket, 85 N. Y. Supp. 391.

13. Laws N. Y. 1897, p. 533, c. 418. Sand v. Rosenagel, 40 Misc. [N. Y.] 666.

14. 2 Ball. Ann. Codes & St. § 5966. Koyukuk Min. Co. v. Van De Vanter, 30 Wash. 385, 70 Pac. 966.

15. Wheeler & W. Mfg. Co. v. Brookfield, 68 N. J. Law, 478.

16. Koyukuk Min. Co. v. Van De Vanter, 30 Wash. 385, 70 Pac. 966. Sufficiency of evidence of lien. Id.

17. Mayer v. Gersbacher, 207 Ill. 296, 69 N. E. 789.

18. Possession of property is included in allegation that while owner, plaintiff delivered same to defendant for storage purposes. State v. Sullivan, 99 Mo. App. 616, 74 S. W. 417.

19. Allegation that defendant received the property and was guilty of a breach of the bond in that he converted the property to his own use. State v. Sullivan, 99 Mo. App. 616, 74 S. W. 417.

20. A joint demurrer by principal and surety to evidence will not be sustained where a good case is made against principal though it is shown that goods were stored in building not covered by bond. State v. Sullivan, 99 Mo. App. 616, 74 S. W. 417.

21. A complaint against a warehouseman by one who loaned on a warehouse receipt transferable by endorsement, because non-negotiable words were not written thereon, should allege to whom the loan was made and to whom receipt was indorsed. Bank of Dothan v. Dawsey & Co., 137 Ala. 584.

22. Where witness for defendant stated that receipts were signed by third persons, it was proper to ask whether such third persons were not authorized to sign for defendant. State v. Humphreys, 43 Or. 44, 70 Pac. 824.

23. Haebler v. N. Y. Cent. & H. R. R. Co., 84 N. Y. Supp. 509.

24. Evidence sufficient to show conversion with criminal intent, and to require submission to jury of question whether grain was sold to or deposited with the warehouseman. State v. Humphreys, 43 Or. 44, 70 Pac. 824. An information for larceny alleging that defendant being a bailee of wheat for hire, did "fail, neglect and refuse to keep or account for said wheat according to the nature of his trust," by converting same to his own use, is not bad for use of word "or" for "and," the allegation being surplusage, nor is it bad for duplicity nor for failing to aver a payment to bailee for his care of the property or a tender thereof. Id. Instructions as to conversion by one not issuing receipt in regular form held not an invasion of the province of the jury. Id.

25. State v. Humphreys, 43 Or. 44, 70 Pac. 824.

26. See Indictment and Prosecution, 2 Curr. Law, p. 307.

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WASTE.

It is waste if a particular tenant removes or destroys or injures the realty or fixtures to the injury of the estate,[27] and so with a mortgagee having a right to possession of mortgaged premises who assumes to sell them,[28] or who being in possession sells buildings.[29] A power of appointment as to a remainder will not enlarge a life estate so as to allow children of holder of life estate to recover for waste from an alienee during her life, though future waste might be prevented by injunction.[30] A mortgagee's right to redress for waste by a third person impairing the security does not depend on the mortgagor's insolvency.[31] His measure of damages is the diminution in value of the whole property or the reasonable cost of restoration if that is less than the diminution.[32] Knowledge of the mortgage is shown by proving service of summons in foreclosure prior to the acts of waste.[33] Removing steel beams and lintels in a building wastes the security.[34]

A devise of "use and full control" of realty during life, where the context shows that testator intended the devisee to have full control free from interference by remainderman, gives an estate without impeachment of waste and an injunction to restrain waste will not issue unless such control is used wantonly to the injury of the remainder.[35]

Courts of equity have jurisdiction to enjoin waste by cutting timber constituting chief value of land and incidentally for an accounting for waste previously committed.[36] Waste by a mortgagee in possession may be counterclaimed in an action for deficiency.[37]

The allowance of treble damages for waste under the California statute is within the discretion of the court and wilfulness should be shown.[38] Where treble damages "may" be given, the court has discretion to refuse them.[39] They may properly be refused where the acts of defendant have conferred benefit on the owner and a large corresponding loss on defendant.[40]

WATERS AND WATER SUPPLY.

§ 1. Definition and Kinds of Waters (2035).
§ 2. Sovereignty over Waters (2035).
§ 3. Rights in Natural Watercourses (2035).
§ 4. Rights in Lakes and Ponds (2040).
§ 5. Rights in Subterranean and Percolating Waters (2040).
§ 6. Rights in Tide Waters (2042).
§ 7. Rights in Artificial Waters (2042).
§ 8. Ice (2042).
§ 9. Surface Waters and Drainage or Reclamation; Subaqueous Lands (2042).
§ 10. Levees, Dikes, Seawalls, and Other Protective Works (2044).
§ 11. Levee, Drainage, and Reclamation Districts (2045).
§ 12. Milling and Power and Other Non-consuming Privileges; Dams, Canals and Races (2046).
§ 13. Irrigation and Water Supply. Common-law Rights and the Doctrine of Appropriation (2048).
§ 14. Irrigation Districts and Irrigation and Power Companies (2055).
§ 15. Water Companies and Water Supply Districts; Municipal Ownership (2057).
§ 16. Contracts, Grants and Licenses (2067).
§ 17. Torts Relating to Waters (2070).
§ 18. Crimes and Offenses Relating to Waters (2071).

Scope of title.—While intended to cover the law of waters, including the beneficial use or consumption thereof for domestic use, public service, irrigation

27. Removal by tenant of fixtures and appliances on premises where originally rented constitutes waste. Champ Spring Co. v. Roth Tool Co. [Mo. App.] 77 S. W. 344. If by a stranger, it is trespass q. v., 2 Curr. Law p. 1891.

28. Purchaser removed timber. Pollard v. American Freehold L. M. Co. [Ala.] 35 So. 767.

29. A mortgagee in possession by sale under power which is not authorized by laws of Nebraska, who disposes of buildings on the property and allows them to be removed by purchasers is guilty. Staunchfield v. Jeutter [Neb.] 96 N. W. 642.

30. Taylor v. Adams, 93 Mo. App. 277.

31, 32, 33, 34. E. H. Ogden Lumber Co. v. Busse, 86 N. Y. Supp. 1098.

35. Wiley v. Wiley [Neb.] 95 N. W. 702.

36. Douglas Co. v. Tenn. Lumber Mfg. Co. [C. C. A.] 118 Fed. 438.

37. Staunchfield v. Jeutter [Neb.] 96 N. W.

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and agriculture, and power or mechanical purposes, some matters pertaining to traffic navigation and commerce,[41] and fishing and fisheries[42] have been discussed in other appropriate titles.

§ 1. *Definition and kinds of waters.*—Streams are navigable and nonnavigable. In order to make a stream a navigable water of the United States, it must form, by itself or by its connection with other streams, a continuous highway over which interstate or foreign commerce may be carried on.[43] To make a stream navigable by the public, it must be a public highway, that is, it must have a terminus where the public can enter it and one where they can leave it.[44] The test of the navigability of a stream, in the legal, technical sense of the term, is whether or not it is capable of being used for purposes of commerce and is suitable for the usual purposes of navigation.[45] The question of navigability is one of fact.[46] A stream not navigable in the strict technical sense may be navigable in the common acceptation of the term if it is of sufficient depth for floatage.[47] In determining the navigability of a body of water, it must be considered in its natural condition with all the natural obstructions existing in it at the time.[48]

Where water naturally flows is a natural watercourse, though the volume changes and though at times it may run dry.[49] To constitute a watercourse, there must be a stream usually flowing in a particular direction, in a definite channel having a bed and banks, and usually discharging itself into some other stream or body of water.[50] A channel or other depression in the ground forming the bank of a river, through which water escapes and flows from the river only at times of high water, is not a natural watercourse.[51]

§ 2. *Sovereignty over waters.*—The water of navigable streams and the soil thereunder belong to the state and are under its sovereignty, in trust for the people, and are not subject to riparian claims by adjoining landowner.[52] Hence, when wharves are erected under public grant at the end of a street, it is extended over them to the water by operation of law.[53] In Tennessee, it is held that if a stream is navigable in the legal and technical sense, the soil under it and the use of the stream belong to the public, but if it is navigable only in the ordinary sense, the soil under it belongs to the riparian owners, but the public has an easement in the stream for the purposes of transportation and commerce.[54]

§ 3. *Rights in natural watercourses.*—The right of a riparian proprietor to the flow of the water of a stream is inseparably connected with the land.[55] It

642. See, also, Pollard v. American Freehold L. M. Co. [Ala.] 35 So. 767.

38. Code Civ. Proc. § 732. Isom v. Rex Crude Oil Co., 140 Cal. 678, 74 Pac. 294.

39. Code Civ. Proc. § 732. Isom v. Book, 142 Cal. 666, 76 Pac. 506.

40. Refused where recovery for $2,000 was given for oil taken and $6,000 had been spent drilling and pumping. Isom v. Book, 142 Cal. 666, 76 Pac. 506.

41. See Bridges, 1 Curr. Law, p. 355; Ferries, 1 Curr. Law, p. 1207; Navigable Waters, 2 Curr. Law, p. 989; Shipping and Water Traffic, 2 Curr. Law, p. 1648; Wharves.

42. Fish and Game Laws, 2 Curr. Law, p. 6.

43, 44. Maingault v. S. M. Ward & Co., 123 Fed. 707.

45, 46, 47, 48. Webster v. Harris [Tenn.] 69 S. W. 782, 59 L. R. A. 324.

49. Sullivan v. Dooley, 31 Tex. Civ. App. 589, 73 S. W. 82.

50. But a stream does not cease to be a natural water course because it sometimes runs dry or because in places it spreads over large areas and flows for a distance without defined banks. Blohowak v. Grochoski, 119 Wis. 189, 96 N. W. 551. A stream shown to have run continuously in a certain channel for over 50 years, except for a few months in dry seasons, and before the doing of anything to affect the natural drainage of the land, and which drains a large watershed and is supplied by living springs, is a natural watercourse. Spink v. Corning, 172 N. Y. 626, 65 N. E. 1122.

51. Obstructing the flow therein to the injury of another is damnum absque injuria. Singleton v. Atchison, T. & S. F. R. Co., 67 Kan. 284, 72 Pac. 786.

52. Crawford v. Hathaway [Neb.] 93 N. W. 781.

53. Knickerbocker Ice Co. v. Forty-second St., etc., Ferry Co., 176 N. Y. 408, 68 N. E. 864.

54. Webster v. Harris [Tenn.] 69 S. W. 782, 59 L. R. A. 324.

55. Crawford v. Hathaway [Neb.] 93 N. W. 781.

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is a property right and entitled, as such, to the same protection as are property rights generally, and, when vested, can be destroyed or impaired only in the interest of the general public, upon full compensation and in accordance with established law.[56]

Riparian owners are entitled, as against each other, to the reasonable use of the waters of a stream for domestic, agricultural, and manufacturing purposes.[57] What is a reasonable use is a question of fact depending on the circumstances of each particular case.[58] But a riparian proprietor has no right so to appropriate it as to unnecessarily diminish the quantity of its natural flow.[59] Storm or freshet waters flowing in a stream may be impounded and used by any one,[60] but their free passage through a lower estate must not be hindered.[61] An upper riparian owner has no right to divert the waters of a stream or any portion thereof and sell them to another.[62] A city which is a riparian proprietor has no right, as such, to abstract the waters of the stream for the purpose of municipal water supply.[63] The use of all the waters of a stream for ornamental purposes is unreasonable.[64] Upon the mere fact that water has long flown down to him, the lower owner can found no adverse or prescriptive rights as against an upper owner.[65] The mere continued use by a lower proprietor is not sufficient to make an adverse user, as against an upper owner, which ripens into a right.[66]

56. Crawford v. Hathaway [Neb.] 93 N. W. 781; McCook Irr. & Water Power Co. v. Crews [Neb.] 96 N. W. 996; Watauga Water Co. v. Scott [Tenn.] 76 S. W. 888. The right to take water from a spring or stream is an interest in the land itself, and is assignable, descendible, and devisable. Lawrie v. Silsby [Vt.] 56 Atl. 1106. Such right can only be lost by grant, adverse user, abandonment, prior appropriation, or the exercise of the right of eminent domain. Stenger v. Tharp [S. D.] 94 N. W. 402; Cline v. Stock [Neb.] 98 N. W. 454. The water of a river until it reaches tide is the property of the riparian owners. Doremus v. Paterson [N. J. Err. & App.] 55 Atl. 304.

57. Lawrie v. Silsby [Vt.] 56 Atl. 1106.

58. Lawrie v. Silsby [Vt.] 56 Atl. 1106; Pierson v. Speyer, 82 App. Div. [N. Y.] 556. Construction of dam in nonnavigable stream held to be reasonable. West Arlington Imp. Co. v. Mount Hope Retreat, 97 Md. 191.

59. Lonsdale Co. v. Woonsocket [R. I.] 56 Atl. 448. Artificial lateral drains into a natural watercourse although they at times increase or decrease the flow of water therein, affecting the supply and use of the water by lower riparian proprietors to their injury, are not unlawful if the stream is not thereby made to overflow its banks. Spink v. Corning, 172 N. Y. 626, 65 N. E. 1122.

60. They are such waters as flow down a stream during and after a rain storm, and which are in excess of the ordinary flow, but do not include an increased flowage occurring annually and lasting for three or four months. California P. & A. Co. v. Enterprise C. & L. Co., 127 Fed. 741. This would seem to be applicable to common-law states though it must be remembered that the common law of waters does not subsist in California. [Editor.]

Compare post, § 13, Irrigation; and see Crawford Co. v. Hathaway [Neb.] 93 N. W. 781.

61. In Riverside Cotton Mills v. Lanier [Va.] 45 S. E. 875, it was held that the upper owner could not hinder the flow of spring and surface water through the lower lands.

62. Penrhyn Slate Co. v. Granville Elec. L. & P. Co., 84 App. Div. [N. Y.] 92. Evidence insufficient to authorize injunction restraining water company from appropriating waters of a stream without compensation to riparian owners. Hey v. Springfield Water Co., 207 Pa. 38.

63. Lonsdale Co. v. Woonsocket [R. I.] 56 Atl. 448; Penrhyn Slate Co. v. Granville Elec. L. & P. Co., 84 App. Div. [N. Y.] 92, 82 N. Y. Supp. 547. In case the city is liable to a lower riparian owner only for the available amount of water actually diverted and is entitled to an allowance for such of the water as is afterwards returned to the stream. Lonsdale Co. v. Woonsocket [R. I.] 56 Atl. 448.

64. Pierson v. Speyer, 82 App. Div. [N. Y.] 556. Every riparian owner has the right to use the water of the stream passing over his land for ordinary domestic purposes. A state hospital for the insane situated on a stream may take therefrom all the water necessary for the natural wants of the inmates, although such taking results in a loss to a lower riparian owner. Filbert v. Dechert, 22 Pa. Super. Ct. 362. But the asylum cannot take water to operate a fountain or for the manufacture of ice to be sold away from the premises. Filbert v. Dechert, 22 Pa. Super. Ct. 362. As to the right of riparian proprietors to use the waters of the stream for irrigation purposes, see sec. 13, post.

65. Crawford Co. v. Hathaway [Neb.] 93 N. W. 781, 798, citing Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. 442, 77 Am. St. R. 158.

66. Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282. Persons who take water from a brook on a riparian lot do not acquire a prescriptive right to do so against the owners of an upper riparian tract, since such taking did not infringe the rights of the lat-

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A riparian owner has a right to have the water of a stream come to him in its natural purity, or in the condition in which he has been in the habit of using it for domestic or business purposes;[67] and he has the right to devote the waters of a stream to any use which he may see fit provided that he does not thereby interfere with the rights of other riparian owners therein.[68] The extent to which a riparian proprietor has a right to pollute the stream depends on the circumstances of each particular case.[69] It must not become a nuisance.[70] In many states it is specially forbidden in streams whence public water supply is taken.[71] Distance from the source of pollution is immaterial where damage results.[72] The fact that others beside defendant have contributed to a pollution of a stream does not relieve him from liability.[73] The pollution of a stream constitutes a taking of property which may not be done without compensation.[74]

A riparian owner has the right to enjoy the flow of a stream in its natural channel,[75] carrying spring and surface waters as well as ordinary flow,[76] without disturbance or interruption by any other riparian owner either to impede or backflow or to give unnatural direction and force to the current;[77] and equity will afford

ter and they therefore could not lawfully have prevented it. Lawrie v. Silsby [Vt.] 56 Atl. 1106. See, also, Irrigation, § 13, post.

67. Fahnestock v. Feldner [Md.] 56 Atl. 785.

68. Doremus v. Paterson, 63 N. J. Eq. 605.

69. Fahnestock v. Feldner [Md.] 56 Atl. 785. Pollution of stream held to be reasonable and proper use and not to prevent the granting of an injunction to restrain obstruction of the stream by lower riparian owners. Id.

70. A riparian proprietor has no right to so pollute the water of a stream as to render it unfit for domestic use. Such pollution is a nuisance and will be enjoined. West Arlington Imp. Co. v. Mount Hope Retreat, 97 Md. 191; City of Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388; Todd v. York [Neb.] 92 N. W. 1040.

71. Mass. St. 1895, ch. 488; forbidding the pollution of waters used for the supply of cities, etc., construed. Sprague v. Dorr [Mass.] 69 N. E. 344. The law of New Jersey (Act 1889, P. L. p. 73) prohibiting the discharge of polluting matter in a stream from which municipalities receive a water supply for domestic use, above the point where such water is taken, held to be constitutional and valid. State Board of Health v. Diamond Paper Mills Co. [N. J. Err. & App.] 53 Atl. 1125. This statute is violated if the water is polluted at the point where the refuse is discharged into the river though it is not polluted where the city water supply is obtained. Id.

72. Sammons v. Gloversville, 81 App. Div. [N. Y.] 332.

73. City of Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388.

74. City of Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388. A riparian owner, above tide water, has a right to an injunction restraining the pollution of a river by another riparian owner unless the latter makes just compensation to him for damage caused thereby. Doremus v. Paterson [N. J. Err. & App.] 55 Atl. 304. But this right does not extend to nonriparian lessees of the right to use water from a canal leading from the river at a point above the flow of the tide, and such lessees are improperly joined with riparian owners in a suit to restrain the pollution of such river. Id. The rights of such lessees are subordinate to the rights of a city located on the river above the intake of the canal to vent its sewage into the stream. Id.

See generally Eminent Domain, 1 Curr. Law, p. 1002.

75. A watercourse cannot be diverted from its natural channel so as to injure the land of another. Blohowak v. Grochoski, 119 Wis. 189, 96 N. W. 551.

76. A lower landowner has no right to obstruct a natural watercourse so as to prevent spring and surface water from an upper estate from flowing through it. Riverside Cotton Mills v. Lanier [Va.] 45 S. E. 875.

77. Webster v. Harris [Tenn.] 69 S. W. 782, 59 L. R. A. 324. **One who, by cutting a channel** from a stream, obstructs the old channel, and then turns the water back into it without removing the obstruction, is liable for damages resulting therefrom. Briscoe v. Young, 131 N. C. 386. One who diverts water from a stream by means of a channel and then at a lower point turns it back so that, by its own momentum, it is carried onto the lands of another, is liable for damages resulting therefrom. Id. **The construction of a dam** in a river by an individual so that the water is thereby thrown back onto the land of another is a trespass and will be restrained by injunction. Brown v. Ontario Talc Co., 81 App. Div. [N. Y.] 273. Where defendant obstructed the natural flow of a stream by erecting a dam on his land, and an adjoining owner erected a levee to keep water from being thrown on his lands thereby, defendant is liable for damages due to the washing away of the levee by water collected on account of the dam and the levee, and the consequent flooding of plaintiff's land. Coleman v. Bennett [Tenn.] 69 S. W. 734. **A proprietor may fill in** and raise the level of his ground or erect embankments or dikes upon it to protect his premises from overflow by the waters of a stream, but he may not thereby cast the waters upon the land of another to his injury. Ladd v. Redle [Wyo.] 75 Pac. 691. Where a stream overflows lands on both its banks in times of high water, but more easily overflows

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relief appropriate to this right,[78] or damages may be recovered.[79] An upper riparian owner has no right to retain the waters of a stream to an unreasonable degree for the purpose of operating machinery, and then discharge it in unreasonable and excessive quantities when the power is applied to the damage of a lower proprietor.[80] Such obstructions may become a public nuisance.[81] An estate may become servient to such interferences by a prescriptive easement[82] or by an implied one;[83] but mere lapse of time will not bar the owner of land from his right to have a stream flow through the same in its natural bed or channel, since he holds such right by the same title that he holds his land.[84] After a reliction one cannot protect his original bank if obstruction ensues.[85] One who is free from fault is not liable because his grantor negligently diverted a stream into a new channel.[86] Such acts by the public must be under the sanction of eminent domain.[87]

It is the duty of a railroad company so to construct its culverts and bridges that they will be sufficient to vent the ordinary high water of a stream.[88] It is

those on one side, the owner of the latter cannot build a levee and fill in the low places in the banks on his side so as to cause it unnaturally to overflow the lands of the other. Sullivan v. Dooley, 31 Tex. Civ. App. 589, 73 S. W. 82. See, also, Campbell v. Flannery [Mont.] 74 Pac. 450. **A landowner has no right to construct a levee** along a stream so as to cause it to unnaturally overflow the lands of another in times of high water. Sullivan v. Dooley, 31 Tex. Civ. App. 589, 73 S. W. 82.

The natural flow of water from a stream may not be interfered with by the owner of the lower estate, so as to **set back the water** onto the upper estate. Carley v. Jennings, 131 Mich. 385, 91 N. W. 634; Ballentine v. Hammond [S. C.] 46 S. E. 1000. The owner of a servient estate has no right to obstruct a natural watercourse which drains the dominant estate. Spink v. Corning, 172 N. Y. 626, 65 N. E. 1122.

78. Brown v. Ontario Talc Co., 81 App. Div. [N. Y.] 273. A court of equity held to have jurisdiction of a suit by an upper riparian proprietor against a number of lower riparian proprietors who are obstructing the stream. Fahnestock v. Feldner [Md.] 56 Atl. 785. A mandatory injunction may be granted to compel the restoration of water to its channel, where it has been wrongfully diverted therefrom, whether such channel is natural or artificial. Baumgartner v. Bradt, 207 Ill. 345, 69 N. E. 912. A court of equity is held to have jurisdiction to restrain the construction of a dam by an upper riparian proprietor, to the injury of a lower proprietor. Union Light & Power Co. v. Lichty, 42 Or. 563, 71 Pac. 1044. Evidence insufficient to entitle plaintiff to an injunction restraining defendant from permitting certain water to flow on plaintiff's lands. Campbell v. Flannery [Mont.] 74 Pac. 450.

79. Where one obstructs the natural flow of a stream causing it to overflow its banks, he is liable for damage resulting therefrom. Edwards v. Missouri, K. & E. R. Co., 97 Mo. App. 103, 71 S. W. 366.

80. Compiled Laws of S. Dak. sec. 5593, limiting time for commencing an action for damages for land overflowed by a dam does not apply to an action in equity for preventive relief. Lone Tree Ditch Co. v. Rapid City Elec. & G. L. Co. [S. D.] 93 N. W. 650.

81. The discharge of debris from a mine into a river thereby raising its bed and channel, and causing adjoining lands to be overflowed, in times of high water to their damage, constitutes a public nuisance. Yuba County v. Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049.

82. **Where the owners of a servient estate have acquiesced** in the use of a natural watercourse, as artificially deepened and enlarged, for over 40 years, they cannot close it by reason of such enlargement. Spink v. Corning, 172 N. Y. 626, 65 N. E. 1122. Where the owners of land traversed by a natural watercourse unite in enlarging the same for the purpose of preventing overflows, it will be presumed that it was done under a claim of right, and the owner of the servient estate cannot, 40 years thereafter, obstruct it on the ground that the work was done under a parol license without a showing to that effect. Id.

83. Where the owner of two adjoining tracts of land constructs a dam of a permanent character across a stream on one tract which causes the water to overflow the second tract, a purchaser of the second tract, having knowledge of the dam, in the absence of evidence of a contrary intent, takes it subject to such right of flowage. Znamanacek v. Jelinck [Neb.] 95 N. W. 28.

84. Leonard v. St. John, 101 Va. 752.

85. Where a river gradually changed its course, the owner of the land encroached on could not thereafter construct a wall where the bank originally stood, and thereby encroach on the channel and obstruct the flow of the water down the stream. Holcomb v. Blair, 25 Ky. L. R. 974, 76 S. W. 843.

86. Where a ditch is obstructed by the deposit of sediment from overflows, due to the changing of the course of a certain creek by plaintiff's grantor before defendant came into possession of the land, the obstruction does not exist by any fault or negligence on defendant's part, and he is not liable for damage, to the adjoining land of plaintiff, resulting therefrom. Brittain v. Graham, 91 Mo. App. 660.

87. A county has no right to erect a levee or dam across a stream, to the injury of landowners, except in the exercise of the right of eminent domain and upon payment of just compensation for damages inflicted thereby. Leflore County Com'rs v. Cannon, 81 Miss. 334; Berninger v. Sunbury, H. & W. R. Co., 203 Pa. 516.

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not bound to anticipate unprecedented floods such as could not have been reasonably foreseen, but must provide for such floods as may occur in the ordinary course of nature and such unusual storms as occasionally occur.[89] It is liable for damages caused by unprecedented floods where such damage would not have occurred but for the negligent construction of its bridge.[90] Whether a flood is extraordinary or unprecedented is a question of fact and the burden of proving it to be such is on the party relying on it as a defense.[91] A railroad company is not liable for damages caused by maintaining an embankment constructed by its grantor, in the absence of notice to it that it was the cause of the flooding of the lands of an adjoining owner.[92]

Every riparian owner on a navigable stream has the right to have free access to the stream over his own lands, and the undisturbed use of these lands.[93] A riparian proprietor on a navigable stream holds subject to all injury, not amounting to a taking of his land, which may result from the lawful improvement of the navigation of the stream or the construction of piers, abutments, or bridges, in the exercise of the public rights in and over the stream, in respect to such matters.[94] The ownership of land on a stream opposite the mouth of a creek gives no right in the navigation of the creek as a riparian proprietor thereon.[95]

A reservoir established by an upper riparian proprietor for his proper and

88. Schmeckpepper v. Chicago & N. W. R. Co., 116 Wis. 592, 93 N. W. 533.

See, also, full treatment in title Railroads, 2 Curr. Law, p. 1382.

89. Houghtaling v. Chicago G. W. R. Co., 117 Iowa, 540, 91 N. W. 811; Jones v. Seaboard Air Line R. Co. [S. C.] 45 S. E. 188.

90. Jones v. Seaboard Air Line R. Co. [S. C.] 45 S. E. 188. A railroad company is not liable for damages caused by the formation of an ice gorge against one of its bridges and the consequent backing up of the water so that it covered plaintiff's land, when the formation of such ice gorge was the result of an extraordinary freshet. Berninger v. Sunbury, H. & W. R. Co., 203 Pa. 516. The act of a railroad company in placing piles under a bridge across a stream resulting in the collection of driftwood and the flooding of adjoining lands in time of high water held to be negligence. Edwards v. Missouri, K. & E. R. Co., 97 Mo. App. 103, 71 S. W. 366. A railroad held liable for causing the flooding of plaintiff's land from the overflow of a river and the water of a spring by impeding the same by its embankment. Atlanta, K. & M. R. Co. v. Higdon [Tenn.] 76 S. W. 895. A railroad company held liable for damages resulting from the obstruction of the flow of freshet waters in a navigable stream, due to the negligent construction of its bridge piers therein. Jones v. Seaboard Air Line R. Co. [S. C.] 45 S. E. 188. New Hampshire Laws of 1893, ch. 229, p. 205, was not intended to authorize the making or use of the improvements mentioned therein in a negligent manner nor to provide a mode of assessing damages resulting from negligence. Gordon v. International Paper Co. [N. H.] 56 Atl. 757. Under Burns' Rev. St. Indiana 1901, sec. 5153, a railroad company is not liable for damage resulting from the filling up of a ditch or stream and thereby obstructing the flow of the water, unless the same is willfully or negligently done. Cleveland, C., C. & St. L. R. Co. v. Wisehart, 161 Ind. 208, 67 S. E. 993. Evidence held sufficient to sustain a judgment against a railroad company for damages to plaintiff's land caused by the construction of an embankment across a certain creek bottom, resulting in the overflow of said creek. San Antonio & A. P. R. Co. v. Turnham [Tex. Civ. App.] 78 S. W. 1086. Evidence held to show that the washing of plaintiff's land was caused by the holding back of the water of a river by an embankment constructed by defendant company. Illinois Cent. R. Co. v. Bom, 25 Ky. L. R. 709, 76 S. W. 352. Under the laws of Texas (Rev. Stat. art. 4436), relating to the construction of culverts by railroad companies, it is held that where a railroad company opens a drain under its roadbed, and the natural drainage is thereby interfered with, and more water is thereby caused to flow over adjoining land than would otherwise have flowed there, it is liable for damages resulting therefrom. Gulf, C. & S. F. R. Co. v. Ryon [Tex. Civ. App.] 72 S. W. 72. Where the complaint counted solely on negligence in constructing a railroad bridge causing an overflow of water to the injury of an adjoining land owner, it was held error to charge that the company would be liable for obstructing the stream, no matter how carefully it acted. Kipp v. New York Cent. & H. R. R. Co., 89 App. Div. [N. Y.] 392. It is not necessary to allege or show negligence in constructing the embankment. Orvis v. Elmira, C. & N. R. Co., 172 N. Y. 656, 65 N. E. 1120.

91. Jones v. Seaboard Air Line R. Co. [S. C.] 45 S. E. 188.

92. Orvis v. Elmira, C. & N. R. Co., 172 N. Y. 656, 65 N. E. 1120.

93. Jones v. Seaboard Air Line R. Co. [S. C.] 45 S. E. 188.

94. Salliotte v. King Bridge Co. [C. C. A.] 122 Fed. 378. The mere increase in the volume and force of the stream flowing against the land by the building of a bridge pier and the deepening of the channel of a river is not such a taking. Id.

95. Manigault v. S. M. Ward & Co., 123 Fed. 707.

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peculiar advantage is, as to lower proprietors, a gratuity, and the resulting benefit to the latter cannot be the subject of compensation to the former, nor can it be the subject of set-off by him.[96]

Nonriparian owners may acquire by grant or prescription the right to take water from a spring or stream.[97] A riparian proprietor may grant rights in the waters of a stream to third persons not riparian owners.[98]

§ 4. *Rights in lakes and ponds.*—A riparian proprietor has no right to drain a lake or reduce it below its natural level without the consent of the other riparian owners.[99] A grant of a lake or pond carries with it the right of fishing.[1] The proper remedy for an intrusion on a right of fishery is an action of trespass.[2] Where the title to a lake and the land under it are distinct, adverse possession of one gives no title to or right in the other.[3]

§ 5. *Rights in subterranean and percolating waters.*—*Waters percolating* through the ground, without definite channel, are generally considered to be a part of the realty and to belong to the owner of the land.[4]

Some courts hold that he may divert, consume or cut them off with impunity and may even waste them, though in so doing he cuts off the supply of his neighbor's well.[5]

Other courts limit his right to the amount necessary for the reasonable use of his own land, as such.[6] It is not necessary that a defined subterranean stream was interfered with or particular subterranean conditions disturbed, if the act consisted of subsurface excavations.[7]

Other courts hold that he may divert and dispose of the waters for his own beneficial use, either as a water supply for himself or others, or for the improvement and drainage of his own land.[8] But that he must not collect and wantonly waste them where they would otherwise be, or have theretofore been, appropriated

96. Lonsdale Co. v. Woonsocket [R. I.] 56 Atl. 448.

97. Such right carries with it the right to prevent pollution of the stream by upper riparian owners. Lawrie v. Silsby [Vt.] 56 Atl. 1106.

98. He may permanently abstract waters for their use without the consent of the owners above him, but may not thereby impose an additional burden upon or create a new liability against such owners. Doremus v. Paterson [N. J. Err. & App.] 55 Atl. 304.

99. Webster v. Harris [Tenn.] 69 S. W. 782, 59 L. R. A. 324.

1. Where the grantor is the sole owner of the pond and the grant is without reservation, such right of fishery is exclusive. Gibbs v. Sweet, 20 Pa. Super. Ct. 275.

2. Gibbs v. Sweet, 20 Pa. Super. Ct. 275. Evidence insufficient to establish prescriptive right of fishery. Id.

3. Gibbs v. Sweet, 20 Pa. Super. Ct. 275.

4. Huber v. Merkel, 117 Wis. 355, 94 N. W. 354. Stated in Katz v. Walkinshaw, 141 Cal. 116, 74 Pac. 766.

5. Huber v. Merkel, 117 Wis. 355, 94 N. W. 354. In Wisconsin, it is held that he may collect such waters and waste them, irrespective of the effect on his neighbors' wells, and even if he does so with malicious intent. Id.

6. East v. Houston & T. C. R. Co. [Tex. Civ. App.] 77 S. W. 646. A landowner has a right to use subterranean percolating waters and to divert the same from the land of another, but this right is limited to a reasonable use in connection with the use of his own land. Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766. He may not by excavations diminish the flow to others where such diversion is not for a reasonable purpose. Cohen v. La Canada L. & W. Co., 142 Cal. 437, 76 Pac. 47. Where parties dug tunnels which absorbed the water which was then transferred to nonriparian lands. Id. A landowner has the right to draw from his land such an amount of percolating water as may be necessary for the reasonable use of the land, as such. East v. Houston & T. C. R. Co. [Tex. Civ. App.] 77 S. W. 646. Where a railroad company dug a large well on its own land, which was fed by percolating waters, and drew therefrom water for the use of its locomotives and machine shops, resulting in the drying up of the previously constructed well of an adjoining landowner, the use of the water was held to be unreasonable. Id. He has no right to appropriate such waters by artesian wells and sell the same for the irrigation of distant lands, to the detriment of adjoining land owners. Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766. In New York, it is held that the property of a land owner in subterranean water is usufructory merely, the same as in flowing water. Westphal v. New York, 75 App. Div. [N. Y.] 252.

7. In an action for deprivation of water, it is sufficient to show that one has wrongfully been deprived of water. Cohen v. La Canada L. & W. Co., 142 Cal. 437, 76 Pac. 47.

8, 9. Stillwater Water Co. v. Farmer, 89 Minn. 58, 93 N. W. 907.

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by his neighbor for the general welfare of the people.[9] Nor will he be allowed to collect and wantonly waste them for the mere purpose of injuring his neighbor.[10]

On application of what seems to be the second rule, a city constructing a system of driven wells and a pumping station to supply its citizens with water is liable in damages where it thereby diverts and diminishes the surface or subsurface flow of water on the lands of another.[11] In such cases a plea that for more than 20 years the city had pumped water from such land held not to set up a prescriptive right to pump the land dry as a defense based on adverse user.[12] The measure of damages in such cases is the diminution in rental value by reason of the trespass.[13] Plaintiff in such cases will be allowed as damages the cost of sinking his wells to meet the lowering of the water table.[14] But he cannot recover damages for the loss of crops planted with the knowledge that they would prove a failure and that a different crop would yield a good return.[15] By accepting damages and a decree for a conveyance, the damnified owner waives the right to require condemnation proceedings.[16]

In Wisconsin, a law forbidding waste from artesian wells has been held unconstitutional.[17]

But where subterranean waters flow in a defined channel, the rules which govern the use of surface streams apply.[18] In order that there may be a subterranean stream, the water, whether moving slowly or rapidly, and whether passing through sand or gravel or porous rock, must have the characteristics of a stream, in that it has a course, and a channel with definite bounds.[19] The mere existence of the channel is not enough, but it must be known or reasonably ascertainable.[20] The presumption is that such waters are percolating until it is shown that they are supplied by a definite, flowing stream.[21] The burden of proof is upon those asserting the right to waters below the surface, on the ground that they flow in a defined and known channel, to establish the existence of such channel.[22] Where subterranean waters do not exist in the form of a stream, the landowners have no rights therein as riparian owners.[23] Waters passing through the sand and gravel constituting the bed of a stream, and the lands so nearly adjacent that the only and natural outlet would be through such channel, are not percolating waters, as ordinarily defined by the common law, but are a part of the waters of the stream, and are governed by the same rules as the surface flow.[24]

10. Barclay v. Abraham, 121 Iowa, 619, 96 N. W. 1080.

11. Rule of damages in such cases discussed. Reisert v. New York, 174 N. Y. 196, 66 N. E. 731.

12. George v. New York, 42 Misc. [N. Y.] 270.

13. Kinsey v. New York, 75 App. Div. [N. Y.] 262; Westphal v. New York, 75 App. Div. [N. Y.] 252; Dinger v. New York, 42 Misc. [N. Y.] 319; Reisert v. New York, 174 N. Y. 196, 66 N. E. 731; Id., 42 Misc. 275.

14. Reisert v. New York, 42 Misc. [N. Y.] 275. The plaintiff will not be deprived of damages sustained because direct proof of the rental value of the property affected is not given. He is entitled to damages for the diminution of the productive value of the property, on proof of the extent of his business which has been interrupted. Dinger v. New York, 42 Misc. [N. Y.] 319.

15. Westphal v. New York, 75 App. Div. [N. Y.] 252.

16. Where a landowner sues in equity to prevent a continuing trespass, consisting in the lowering of a water level by a city's adjacent pumping station, and for damages, and recovers fee damages, the judgment providing that on payment he should convey to the city the right to maintain such stations, he waives his constitutional right to condemnation proceedings and a jury trial. Such award held not objectionable on the ground that the city had given no notice of an intention to acquire their land. Westphal v. New York, 75 App. Div. [N. Y.] 252.

17. Law of Wisconsin (Laws 1901, c. 354, p. 502), forbidding the waste of water from artesian wells, is held not a valid exercise of the police power and to be unconstitutional. Huber v. Merkel, 117 Wis. 355, 94 N. W. 354.

18, 19. Huber v. Merkel, 117 Wis. 355, 94 N. W. 354.

20. Barclay v. Abraham, 121 Iowa, 619, 96 N. W. 1080.

21, 22. Huber v. Merkel, 117 Wis. 355, 94 N. W. 354; Barclay v. Abraham, 121 Iowa, 619, 96 N. W. 1080.

23. Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766.

24. Buckers Irr., Mill. & Imp. Co. v. Farmers' Independent Ditch Co., 31 Colo. 62, 72

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§ 6. *Rights in tide waters.*—Tide waters are regarded as navigable and the right to them is public, shared by all alike.[25] Tide lands are also public.[26]

§ 7. *Rights in artificial waters.*—It is presumed that the owner of land bordering on a canal has title to the center of the stream.[27] The rule as to pollution of a non-navigable stream applies to artificial watercourses.[28] Artificial waters and waterways regarded as irrigation and supply,[29] drainage[30] or milling and power[31] plants are considered in subsequent sections.

§ 8. *Ice.*—Where water becomes fixed by freezing, the ice belongs to the owner of the fee of the land over which it is found,[32] and not in the person entitled to a mill privilege which is separate from the land.[33] For this reason a trespasser has no rights in the ice as against another trespasser until he has made an appropriation of the ice itself.[34] In New York, it is held that ice formed in a state canal basin, constructed upon and entirely surrounded by state land, belongs to the state.[35] Wherefore one having the public permission to cut such ice is superior to adjoining owners.[36]

§ 9. *Surface waters and drainage or reclamation; subaqueous lands.*—Flood water of a river is not surface water unless it becomes severed from the main current or leaves the same never to return.[37]

Civil law rule.—Under the civil law, an upper proprietor is entitled to an easement over the land of a lower proprietor for the flow of surface water from his land.[38] No change or innovation in the distribution of water from a superior to an inferior tenement is material unless it operates to prejudice or injure in some way the inferior tenement.[39] The owner of the dominant estate has the right

Pac. 49. As to the use of subterranean waters for irrigation purposes, see post, § 13.

25. After a river reaches tide, the water is no longer property of riparian owners. Doremus v. Paterson [N. J. Err. & App.] 55 Atl. 304, citing Grey v. Paterson, 60 N. J. Eq. 389, 48 L. R. A. 717, 83 Am. St. R. 642.

26. See Public Lands, 2 Curr. Law, p. 1295.

27. This presumption may be rebutted. Warren v. Gloversville, 81 App. Div. [N. Y.] 291.

28. Warren v. Gloversville, 81 App. Div. [N. Y.] 291.

29. See post, §§ 13-15.

30. See post, § 9.

31. See post, § 12.

32. Green Island Ice Co. v. Norton, 42 Misc. [N. Y.] 238; Abbott v. Cremer, 118 Wis. 377, 95 N. W. 387.

33. Title to ice forming on a mill pond is in the owners of the land and not in the lessee of the mill and appurtenant water power. Abbott v. Cremer, 118 Wis. 377, 95 N. W. 387.

34. The act of a trespasser in cleaning and examining the ice on a mill pond preparatory to cutting it is not such a legal appropriation as will enable him to recover from another trespasser for its conversion. Abbott v. Cremer, 118 Wis. 377, 95 N. W. 387.

35. Green Island Ice Co. v. Norton, 42 Misc. [N. Y.] 238.

36. Under the N. Y. Statute (Laws 1894, c. 338), where the superintendent of public works gives a corporation permission to cut ice on a designated part of a state canal, it has an exclusive right to cut the same as against an adjoining landowner or a first appropriator thereof. Green Island Ice Co. v. Norton, 42 Misc. [N. Y.] 238.

37. Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 188. A lower riparian owner cannot fight off the flood water of a stream, when it has left its natural channel, as he would surface water. Ballentine v. Hammond [S. C.] 46 S. E. 1000. Flood water becomes surface water when it becomes severed from the main current of the stream, or when it leaves the stream never to return, and spreads out over the lower ground. Sullivan v. Dooley, 31 Tex. Civ. App. 589, 73 S. W. 82. If it forms a continuous body with the water flowing in the ordinary channel, or if it departs from said channel, presently to return, as by the recession of the waters, it is to be regarded as still a part of the river. Id. In Missouri, it is held that waters overflowing the banks of a stream are surface water. Edwards v. Mo., K. & E. R. Co., 97 Mo. App. 103, 71 S. W. 366.

38. Stated in Campbell v. Flannery [Mont.] 74 Pac. 450; Sullivan v. Dooley, 31 Tex. Civ. App. 589, 73 S. W. 82. The owner of the dominant estate has a servitude upon the lower land for the discharge of surface water naturally flowing on the lower land from the dominant estate. Ready v. Mo. Pac. R. Co., 98 Mo. App. 467, 72 S. W. 142; Campbell v. Flannery [Mont.] 74 Pac. 450. In North Carolina, it is held that an injunction will not be granted to restrain the threatened blocking up of a natural depression into which the water from plaintiff's land naturally drained, as he has an adequate remedy at law, either by an action for damages or by cleaning out and deepening the channel under ch. 30 of the Code. Porter v. Armstrong, 132 N. C. 66.

39. Riverside Cotton Mills v. Lanier [Va.] 45 S. E. 875. Landowners are entitled to compensation for the damming of surface water or the obstruction of natural drainage of their land by the construction of a levee. Ham v. Board of Levee Com'rs [Miss.] 25 So

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to collect water on his land and cast it on the servient estate through its natural channel more rapidly and in greater volume than in a state of nature.[40]

Common-law rule.—Under the common-law rule, surface water is the enemy of all mankind, and each owner has a right to protect his own land therefrom.[41] Owners of lands may improve them by obstructing or diverting surface water, providing the work is not done in a reckless manner resulting in an injury to others.[42] A landowner has the right to prevent surface water from an adjoining tract flowing onto his estate.[43] A county is not liable to landowners for damages to landowners caused by the discharge of surface waters from ditches constructed by the county authorities, though the water is thereby diverted from its natural course.[44]

It is held generally, in states adopting either rule, that a landowner has no right to collect the surface water from his land in a ditch or drain and discharge it on the land of another to the injury of the latter.[45] One has no right to construct a drain and thereby increase the natural flow of water onto the land of another.[46] One on whose land surface water is confined by natural barriers may

42. Evidence insufficient to entitle plaintiff to recover damages from defendant for the obstruction of a public drain, resulting in the overflowing of plaintiff's land. Caillouet v. Coguenhem, 111 La. 60.

40. Daum v. Cooper, 103 Ill. App. 4. Illinois act of 1889, §§ 1, 3, 4, relating to drains, construed and held to apply to highway commissioners. Id.

41. Campbell v. Flannery [Mont.] 74 Pac. 450; Sullivan v. Dooley, 31 Tex. Civ. App. 589, 73 S. W. 82.

42. This rule applies to railroads in the absence of statutes to the contrary. Cox v. Hannibal & St. J. R. Co., 174 Mo. 588, 74 S. W. 854. Missouri Acts 1883, p. 51, relating to the construction of ditches by railroad companies, is constitutional. Id. Under the statutes of Missouri (Rev. St. 1889, § 2614), relating to the construction of ditches by railroad companies, an action will lie by any person for damages suffered by reason of the failure of the company to construct such ditches. Id.

43. Hart v. Sigman [Ind. App.] 69 N. E. 262. He may divert it by means of dikes or dams erected on his own land. Campbell v. Flannery [Mont.] 74 Pac. 450.

44. Stocker v. Nemaha County [Neb.] 93 N. W. 721.

45. A railroad company has no rights in this regard different from those of a private owner. Chorman v. Queen Anne's R. Co., 3 Pen. [Del.] 407; Wickham v. Lehigh Valley R. Co., 85 App. Div. [N. Y.] 182; Noyes v. Cosselman, 29 Wash. 635, 70 Pac. 61; Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 188; Robertson v. Daviess Gravel Road Co., 25 Ky. L. R. 1114, 77 S. W. 189; Frisbie v. Cowen, 18 App. D. C. 381.

46. Costello v. Pomeroy, 120 Iowa, 213, 94 N. W. 490. A city which has macadamized a street and constructed catch-basins and conduits whereby the flow of water draining therefrom into a natural watercourse is increased is not liable for damages resulting from the overflow of such stream, unless the drainage is increased to an extent beyond that which could be accommodated by the watercourse in its natural condition. Smith v. Auburn, 88 App. Div. [N. Y.] 396. Where a town, while grading certain streets and lots, thereby causes a large amount of surface water to be turned into a brook, it is liable for damages to the land of a riparian proprietor resulting from the consequent overflow of such brook. Willoughby v. Allen [R. I.] 56 Atl. 1109. A person has no right to allow surface water to collect on his premises and then discharge it in a body, at one point, on the land of another. Ready v. Mo. Pac. R. Co., 98 Mo. App. 467, 72 S. W. 142. Where a railroad company in constructing its road changes the grade of a street, diverts the natural flow of the water, and carries it to the land of an adjoining owner through a box drain, from whence it is carried onto the land of a third person, it is liable to such third person for injuries sustained thereby. Dennison v. Somerset & C. R. Co., 21 Pa. Super. Ct. 248. The company's liability is not affected by the fact that the city consented to the construction of the drain, or that the owner of the land on which the water was first discharged consented thereto, or that other property owners had contributed to the damage by discharging sewage into such drain. Id. Town supervisors, in improving a highway, are not authorized to collect surface water in artificial drains or ditches, out of their natural course, and unnecessarily cause it to flow upon the lands of an adjacent proprietor, to his damage, nor in a greater volume or quantity than it would naturally otherwise do. Gunnerus v. Spring Prairie [Minn.] 98 N. W. 340. Where an owner of a tract divided it into separate lots and conveyed them to different persons, the grantees of the upper lots have, by implication, an easement for flowage of spring and surface water along natural channels over the lower lots. Riverside Cotton Mills v. Lanier [Va.] 45 S. E. 875. Evidence insufficient to show that plaintiff had an easement to have a ditch kept open by defendant. Robertson v. Daviess Gravel Road Co., 25 Ky. L. R. 1114, 77 S. W. 189. Defendant held to have waived the right to discharge water on defendant's land. Raleigh v. Clark, 24 Ky. L. R. 1554, 71 S. W. 857. A railroad company has no right to discharge water from ditches along its tracks into a depression or gully, not constituting a natural watercourse, in the land of an adjoining owner. Frisbie v. Cowen, 18 App. D. C. 381.

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not, by the construction of a ditch, cast it on the lands of another, to his material injury.[47] Where damages to property from surface water are due to the low situation of the land, it is immaterial whether the doctrine of the civil or common law be applied.[48] There can be no recovery from a municipality for property damaged by surface water simply because it lies lower than the grade of the street.[49]

A person may not allow surface water to accumulate[50] and stand in excavations on his land until it becomes stagnant, resulting in the sickness of adjoining owners. This rule applies to municipal corporations.[51]

Rights in ditches.—The general rules relating to the drainage or reclamation of lands are the subject of a separate article.[52] The uninterrupted use of a ditch as a wasteway may ripen into a prescriptive right, though such use is not exclusive of every one but the user.[53] It must be hostile and notorious as against the servient owner.[54] A bill to enjoin its use as without right will not support relief on a finding that sometimes it had been negligently kept.[55]

The right to acquire and reclaim public subaqueous or swamp lands is given by various Federal and state laws.[56]

§ 10. *Levees, dikes, seawalls, and other protective works.*—The taking of land for levee purposes,[57] or the construction of a levee along the banks of a river is a public use in aid of which the power of eminent domain may be invoked and assessments levied.[58] In constructing a levee along a river for the purpose of protecting lands from overflow during floods, a city is exercising a governmental function and hence is not liable to a property owner for failure to keep the levee in repair.[59]

47. Sullivan v. Johnson, 30 Wash. 72, 70 Pac. 246; Noyes v. Cosselman, 29 Wash. 635, 70 Pac. 61.

48, 49. Sharp v. Cincinnati, 4 Ohio C. C. (N. S.) 19.

50. See Nuisance, 2 Curr. Law, p. 1062. Adams v. Mo., K. & T. R. Co. [Tex. Civ. App.] 70 S. W. 1006. One who suffers special damage through sickness or the depreciation of his property on account of a pool of stagnant water has a cause of action against the party maintaining it, even though it is a public nuisance. Savannah, F. & W. R. Co. v. Parish, 117 Ga. 893. A railroad company is not negligent in so constructing and maintaining its road as to cause surface water to be discharged upon a portion of its own land, unless such standing water is, in itself, a nuisance. Fremont, E. & M. V. R. Co. v. Gayton [Neb.] 93 N. W. 163. Hence, where a company so constructs its roadway across its own land that surface water is collected on a portion of it, subsequent grantees of that portion cannot maintain an action against the company by reason of the maintenance of such roadway in its original condition. Id. The fact that water was already standing on land at the time of an unlawful diversion of other water onto it would not necessarily defeat recovery for damages caused by such diversion. Warner v. Chicago & N. W. R. Co., 120 Iowa, 159, 94 N. W. 490.

51. City of Ennis v. Gilder [Tex. Civ. App.] 74 S. W. 585. Where a city built a dam across a stream for the purpose of providing a reservoir for a city waterworks, thereby causing the water to back up on plaintiff's land, and the varying rainfall caused the lake so formed to rise and recede, so that pools of stagnant water remained on said land, causing sickness, it was held that such lake was a nuisance and that plaintiff was entitled to have it abated. Id.

52. Sewers and Drains, 2 Curr. Law, p. 1628. Compare Public Works, etc., 2 Curr. Law, p. 1328.

53. The term "exclusive" held to be unnecessary in an answer setting up a prescriptive right to discharge waste waters Abbott v. Pond, 142 Cal. 393, 76 Pac. 60.

54. An answer setting up a prescriptive right to discharge waste waters on plaintiff's land which alleged the maintenance and use of a waste ditch "continuously, openly, peaceably, uninterruptedly, under claim of right, and adversely," showed by implication that such use was notorious. Abbott v. Pond, 142 Cal. 393, 76 Pac. 60. The use so alleged was necessarily "hostile," and it was unnecessary to use that term in the answer. Id.

55. Where plaintiffs sue to enjoin defendants from discharging waste water on plaintiffs' land and it is found that defendants had acquired a prescriptive right to maintain and use a waste ditch for such purpose, plaintiffs are not entitled to relief in such suit, on a finding that defendants had at times been negligent in maintaining the ditch. Abbott v. Pond, 142 Cal. 393, 76 Pac. 60.

56. See Public Lands, 2 Curr. Law, p. 1295.

57. Ham v. Board of Levee Com'rs [Miss.] 35 So. 943.

58. Kansas Laws 1893, c. 104, p. 180, relating to the construction of levees not unconstitutional because it delegates legislative power to petitioners or because of dis-

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§ 11. *Levee, drainage, and reclamation districts.*—The formation of levee, drainage, and reclamation districts and the powers and duties of officers of such districts are governed by statute.[60] The validity of such legislation is supported by the governmental character of such projects and their public beneficial character,[61] and the officers administering the same are often a separate public corporation[62] endowed with power to take lands by eminent domain,[63] to locate and relocate and abandon works,[64] to issue bonds,[65] levy taxes[66] on property benefited,[67] which constitute a lien[68] enforceable by sale.[69] Such powers cannot be exercised so as to injure private property[70] and are subject to constitutional limitations.[71]

crimination in methods of assessment. Mo., K. & T. R. Co. v. Cambern, 66 Kan. 365, 71 Pac. 809.

59. Spellman v. Caledonia, 117 Wis. 254, 94 N. W. 27. Evidence held not to show that levee commissioners acted beyond their powers or arbitrarily in the construction of a ramp as an approach to and crossing over a levee. Sauter v. Vidalia, 110 La. 377. An individual cannot force the town authorities to establish a street along a river just back of the levee, nor can he compel the removal of houses so as to leave such a street, under the laws of Louisiana [Civ. Code, arts. 665-667, 700]. Id.

60. Arkansas statute (Acts 1901, p. 27), establishing a drainage district for the purpose of maintaining a particular levee, construed. St. Louis S. W. R. Co. v. Grayson [Ark.] 78 S. W. 777. Construction of Bog & Fly Meadow Act of New Jersey (Act of Feb. 20, 1811), authorizing drainage of land in the Bog & Fly Meadow. Zeliff v. Bog & Fly Meadow Co., 68 N. J. Law, 200.

61. The laws of Missouri (Rev. St. 1889, §§ 8257 et seq.), providing for the organization of drainage districts, condemnation of rights of way for ditches, the levying of assessments for benefits, etc., construed and held constitutional; also that the corporations organized thereunder to carry them into effect are public, governmental agencies, and that the benefits assessed are legal. Mound City L. & S. Co. v. Miller, 170 Mo. 240, 70 S. W. 721, 60 L. R. A. 190.

62. The laws of Mississippi (Laws 1871, p. 37, c. 1), incorporating a certain board of levee commissioners and the act (Laws 1876, p. 174, c. 108) substituting the state auditor and treasurer for the commissioners, construed, and held that the auditor and treasurer were the successors of the commissioners and could be sued. State v. Woodruff [Miss.] 36 So. 79.

63. The act of Arkansas (Acts 1883, p. 163), providing for building and repairing levees in Chicot county, which by section 18 provides that the damages sustained by a landowner shall be assessed by a sheriff's jury of six men, is therein invalid, as in violation of the constitution of that state (art. 12, § 9), requiring compensation for land condemned by a corporation to be fixed in court by a jury of twelve men. The board of levee inspectors created by the act is a corporation within the meaning of the constitution. Archer v. Board of Levee Inspectors, 128 Fed. 125.

64. Under the laws of Mississippi (Acts 1884, c. 168, p. 140), certain levee commissioners are held to have the power to abandon a levee and build a new one in place of it. Ham v. Board of Levee Com'rs [Miss.] 35 So. 943.

65. Miss. Acts 1902, p. 137, c. 83, authorizing levee commissioners to issue bonds in certain cases, construed. Ham v. Board of Levee Com'rs [Miss.] 35 So. 943.

66. Laws of Missouri (Sess. Acts 1855, p. 73, Loc. Laws & Priv. Acts 1855, p. 281), granting a levee company power to levy a tax on certain lands for the construction and maintenance of a levee, construed. State v. Winkleman, 96 Mo. App. 223, 69 S. W. 1063.

67. Section 238 of the Constitution of Mississippi, declaring that no property situated between the levee and the Mississippi river shall be taxed for levee purposes, refers only to real property or property having the qualities thereof, and hence a tax imposed under Acts 1894, c. 78, on the business of conducting a saloon in such district, is valid. Board of Levee Com'rs v. Houston, 81 Miss. 619. The laws of Louisiana (Act No. 97 of 1890 and Act No. 65 of 1894), authorizing a certain levee district to impose a local contribution on sugar, molasses, and syrup, construed and held not to apply to sugar cane. Landry v. Henderson, 109 La. 143.

68. Kentucky laws (Laws 1900, p. 110, c. 30, Ky. St. §§ 2380-2417), relating to the construction of drainage districts construed, and held that an assessment for that purpose is a lien on the land and not a claim against the owner thereof individually. Scherm v. Short, 25 Ky. L. R. 1108, 77 S. W. 357. The statute of limitations begins to run against such lien from the time the work is accepted by the county surveyor and gives the certificate provided for therein. Dixon v. Labry [Ky.] 78 S. W. 430.

69. Land acquired by the board of levee commissioners of Mississippi at a valid tax sale for levee taxes cannot be again legally sold for levee taxes while so held by the board. The three years' statute of limitations (Miss. Rev. Code 1892, § 2735) applies only to lands taxable, and therefore subject to sale when the sale occurred. Mitchell v. Bond [Miss.] 36 So. 148. Laws of Arkansas (Acts 1893, p. 172, and Acts 1895, p. 88), relating to the sale of lands by a certain levee board construed, and held that the board has power to sell timber on lands sold for nonpayment of assessments and purchased by it. Myers v. Rolfe [Ark.] 72 S. W. 52.

70. Under the laws of Texas (St. 1895, art. 4745), providing for the construction of ditches along certain roads it is held that a county is liable for injury to the drainage ditch of a landowner caused by the construction of such ditches. Voss v. Harris County [Tex. Civ. App.] 76 S. W. 600.

71. See Constitutional Law, 1 Curr. Law, p. 569.

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§ 12. *Milling and power and other nonconsuming privileges; dams, canals and races.*—The legislature of a state has power to authorize the construction of a dam across a non-navigable stream.[72] A right to flow the land of others by the erection of a dam across a stream is a right of eminent domain; it will only be granted where the court shall find that it will be of public benefit.[73] The right to flow land may be acquired by prescription.[74] Where a mill is created and water power obtained by the aid and co-operation of adjoining landowners, any right of flowage over their premises of water for the mill arranged for and contemplated by the owners, as subscribers to its construction, becomes appurtenant to the mill.[75] If one owning land traversed by a stream sells a portion thereof to another, and at the same time gives him by parol the right to overflow the remainder of the land by erecting a dam on the portion conveyed, and the purchaser, relying on such agreement, erects and maintains such dam and a mill operated by water, the parol agreement becomes enforceable.[76] A sheriff's deed of mill property, together with the appurtenances thereto belonging, passes the easements appurtenant to such property and necessary to its use and enjoyment, such as the right to maintain a dam and flow adjoining land, owned and used by the mortgagor in connection therewith.[77] An easement consisting of the right to maintain a mill pond upon the land of another does not deprive the owner of the land of any use thereof, which does not interfere with the enjoyment of the easement.[78] An easement for the maintenance of a dam is measured by its capacity as determined from its height.[79]

§ 13. *Irrigation and water supply. Common-law rights and the doctrine of appropriation. Common-law rule.*—A riparian proprietor has a right to a reasonable use of the waters of the stream flowing by his land for irrigation purposes, subject to the like right of all other riparian proprietors.[80] What is a reasonable use is largely a question of fact to be determined by the circumstances

72. Manigault v. Ward & Co., 123 Fed. 707.

73. Avery v. Vt. Elec. Co., 75 Vt. 235, 59 L. R. A. 817. In Vermont, it is held that a right to flow the land of others will not be granted under the statute in the absence of any showing of a public use, on the theory that the provision is not a right of eminent domain, but a statutory regulation of rights common to riparian owners. Id. In Massachusetts, a mill owner who flows tillage land is liable merely for damages which are recoverable only under the mill acts. Carmichael v. Henry Wood's Sons Co., 184 Mass. 73, 67 N. E. 961. In an action by the proprietor of an upper water power to abate the dam of a lower owner, evidence held sufficient to sustain a finding that defendant's dam had been raised in violation of the Wisconsin statute (Rev. St. 1898, § 3375), forbidding the erection of a dam to the injury of any existing mill. Evans v. Bacon, 113 Wis. 380, 95 N. W. 375. In Pennsylvania, it is held that, if by repairs to a dam or by the construction of a new dam to replace an old one, land be flooded to a greater extent than it had been for 21 years before, the owner of the dam is liable for the injury, although its height may not have been increased. Lynch v. Troxell, 207 Pa. 162.

74. Phillips v. Watuppa Reservoir Co., 184 Mass. 404, 68 N. E. 848. Where one maintains a dam which sets water back on the adjacent lands of other owners, there is no interruption in the continuity of the user so as to affect his right to the easement of flooding the land, though periodically and to suit his own convenience, he lets the water out to float logs. Hall v. State, 92 App. Div. [N. Y.] 96.

75. Johnson v. Sherman County Irr., W. P. & Imp. Co. [Neb.] 98 N. W. 1096.

76. If viewed as a license, the acts of the purchaser render it irrevocable, and if as an easement they take it out of the statute of frauds. Same rule applies where the land is conveyed in consideration of the erection of the mill, and the privileges given consist of other beneficial rights in connection therewith. Johnson v. Sherman County Irr., W. P. & Imp. Co. [Neb.] 98 N. W. 1096.

77. Johnson v. Sherman County Irr., W. P. & Imp. Co. [Neb.] 98 N. W. 1096. Evidence held to warrant a decree allowing plaintiff to maintain a mill race and a mill pond, and to use such quantity of water as will develop twenty horse power. Id.

78. May use water if does not prevent millowner from receiving power he is entitled to. Johnson v. Sherman County Irr., W. P. & Imp. Co. [Neb.] 98 N. W. 1096.

79. Whelchel v. Gainesville & D. Elec. R. Co., 116 Ga. 431.

80. Crawford Co. v. Hathaway [Neb.] 93 N. W. 781; Meng v. Coffey [Neb.] 93 N. W. 713; Cal. P. & A. Co. v. Enterprise C. & L. Co., 127 Fed. 741; Stenger v. Tharp [S. D.] 94 N. W. 402; McCook Irr. & W. P. Co. v. Crews [Neb.] 96 N. W. 996; Cline v. Stock [Neb.] 98 N. W. 454.

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of each particular case.[81] It depends primarily on the amount of water available for such purposes, the number of persons who so use it, the size, situation, and character of the stream, and the nature of the region.[82] In the exercise of such right, the upper owner must not waste, needlessly diminish, or wholly consume the water, to the injury of other owners, nor so as to prevent reasonable use of it by them also.[83] In case the reasonable use of the water, consistent with a like use by other riparian owners, cannot be made, the injury to a riparian owner by reason of appropriation of water by an irrigation enterprise is nominal only.[84] A riparian proprietor's right, as such, to the use of water for irrigation purposes, applies to riparian lands only, and he cannot rightfully divert to nonriparian lands water which he has a right to use on riparian land, but does not so use.[85] Such rights are a part of the land.[86] The rights of the riparian owner to the use of the water attach at the time of his settlement upon the land for the purpose of holding the same as a homestead or pre-emption.[87] A riparian proprietor is entitled only to the ordinary and natural flow of the stream, and cannot claim as against an appropriator, the flow of the flood waters of the stream.[88] A right which is riparian is not necessarily made appurtenant by a partition which attaches a water right to nonriparian lands.[89]

Prior appropriation.—In many of the western states, the doctrine of prior appropriation has taken the place of or modified the common-law rule as to the use of water,[90] and congress has recognized such doctrine, but the recognition is not an unchangeable contract with the public.[91] Legislation cannot authorize appropriator's rights to retroact on riparian rights already vested.[92]

This rule is that the right to use the waters of a stream may be acquired

81. Meng v. Coffey [Neb.] 93 N. W. 713.

82. McCook Irr. & W. P. Co. v. Crews [Neb.] 96 N. W. 996.

83. Meng v. Coffey [Neb.] 93 N. W. 713.

84. McCook Irr. & W. P. Co. v. Crews [Neb.] 96 N. W. 996.

85. Crawford Co. v. Hathaway [Neb.] 93 N. W. 781.

86. Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905. It is suggested that the extent of land to which riparian rights to the use of water for irrigation may be claimed cannot exceed the area acquired by a single entry or purchase of the government and that such area should be limited to 40 acres, but this was not decided finally. Crawford Co. v. Hathaway [Neb.] 93 N. W. 781; McCook Irr. & W. P. Co. v. Crews [Neb.] 96 N. W. 996.

87. Stenger v. Tharp [S. D.] 94 N. W. 402.

88. Crawford Co. v. Hathaway [Neb.] 93 N. W. 781. Storm or freshet waters flowing in a stream may be impounded and used by anyone. Cal. P. & A. Co. v. Enterprise C. & L. Co., 127 Fed. 741.

89. Where a tract of land to which appertained riparian rights to water for irrigation purposes was partitioned, and the land was classified, each co-tenant receiving a proportionate share of each class, and the prior right to the use of the water was attached to the first class land, each owner receiving a share of water in proportion to his share of the land, the partition held not to have changed the water right from a riparian right to a right appurtenant, although some of the first class land did not abut on the stream, but merely to have cut off all land not first class from participation in the riparian rights formerly belonging to the whole tract. Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905. After such partition, no owner was entitled to the full flow of the stream through his land, but only to so much of the water as was reasonably necessary for his use. Id.

90. Crawford Co. v. Hathaway [Neb.] 93 N. W. 781.

In Texas, it is held that in arid portions of the state the use of the waters of a stream for irrigation purposes is on an equal footing with its use for domestic purposes, while in non-arid portions its use for irrigation purposes is subordinate to the use for domestic purposes. Hall v. Carter [Tex. Civ. App.] 77 S. W. 19. By arid portions of the state is meant those portions where the rainfall is insufficient for agricultural purposes, and irrigation is therefore necessary. Id.

91. One who diverts water from a flowing stream for a beneficial purpose may have the use of it so long as he conforms to the law regulating such matters. Mohl v. Lamar Canal Co., 128 Fed. 776. But he has no contract with or grant from the government, Federal or state, in respect to his privilege. Rev. St. U. S. § 2339 (U. S. Comp. St. 1901, p. 1437), providing for the recognition of local customs regarding the diversion of water, does not create rights, but is a recognition by Congress of a pre-existing right of possession, constituting a valid claim to its continuance. Id.

92. A legislative act providing that in controversies over water rights, the rights of the parties should be determined by the dates of appropriation, applies only to public lands, not to private lands or to rights fixed before the act took effect. Sander v. Wilson [Wash.] 76 Pac. 280.

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by appropriation, and actual diversion and application to a beneficial use.[93] The right to the water is merely usufructuary.[94] Appropriators of the water of a stream have priority of rights therein in their order of appropriation, the latter appropriator being limited to rights not interfering with those of the earlier appropriator.[95] He is entitled to divert and use a quantity of water sufficient properly to irrigate his tillable land, if the cultivation thereof has been prosecuted with reasonable diligence.[96] The prior appropriator of water is entitled to all of it if necessary to irrigate his land under cultivation, and the surplus, after a reasonable use by him, should be distributed to subsequent claimants in the order of their respective appropriations.[97] If the first appropriator only takes a part of the waters of the stream for a certain period of time, subsequent appropriators may acquire a right to the whole or a part of the residue and also to the quantity of water used by the first appropriator at such times as not needed or used by him.[98] Persons claiming priorities to the water of a ditch must show in detail

93. Miller v. Rickey, 127 Fed. 573. For discussion of the doctrine of prior appropriation as defined by the courts of different states adopting it, see Willey v. Decker [Wyo.] 73 Pac. 210.

94. Salt Lake City v. Salt Lake City W. & E. P. Co., 25 Utah, 456, 71 Pac. 1069.

95. McCall v. Porter, 42 Or. 49, 70 Pac. 820. The first appropriator of the water of a natural stream has a prior right to such water to the extent of his appropriation. Wellington v. Beck, 30 Colo. 409, 70 Pac. 687; Crawford Co. v. Hathaway [Neb.] 93 N. W. 781; Willey v. Decker [Wyo.] 73 Pac. 210. Evidence held to show that plaintiff had not increased his appropriation within a reasonable time so as to be entitled to a larger amount of water. Beers v. Sharpe [Or.] 75 Pac. 717. Evidence held to sustain defendant's right to use certain water for irrigation purposes and to discharge any surplus on plaintiff's land. Durning v. Walz, 42 Or. 109, 71 Pac. 662. Evidence sufficient to warrant the granting of an injunction restraining defendants from diverting water from plaintiff's canal. Hayois v. Salt River Valley Canal Co. [Ariz.] 71 Pac. 944. Where one has appropriated water from a river and is entitled thereby to prevent another from diverting waters therefrom or from a tributary thereof, the word "tributary" is not confined in its meaning to a running surface stream, but may include seepage and percolating waters which reach the stream. Ogilvy I. & L. Co. v. Insinger [Colo. App.] 75 Pac. 598. An answer in a suit to enjoin the diversion of a stream held to show such a prior appropriation as to constitute a defense. Wellington v. Beck, 30 Colo. 409, 70 Pac. 687. Evidence held sufficient to show that plaintiff was a prior appropriator of the waters of a spring and entitled to the use thereof as against defendant. Orient Min. Co. v. Freckleton [Utah] 74 Pac. 652. Water originally appropriated for use on certain land held to have become appurtenant thereto, so that, when the right was divided, the several rights became appurtenant, respectively, to the tracts conveyed. Senior v. Anderson, 138 Cal. 716, 72 Pac. 349. Defendants held to have been the appropriators of a certain water right. Phillips v. Coburn, 28 Mont. 45, 72 Pac. 291. Evidence insufficient to sustain findings that plaintiff was entitled to use water from a certain creek either as a prior appropriator or on the ground that it had been devoted to a public use. Hildreth v. Montecito Creek Water Co. [Cal.] 70 Pac. 672. A complaint for obstruction of an easement for a water right held to state insufficient facts to show any title or right of use of the water by appropriation, and not to describe and define the easement alleged to be obstructed with sufficient definiteness. Carter v. Wakeman, 42 Or. 147, 70 Pac. 393. The waters of natural streams belong to the public, subject to the right of appropriation by anyone for beneficial use. Willey v. Decker [Wyo.] 73 Pac. 210.

96. Glaze v. Frost [Or.] 74 Pac. 336. Evidence held to show that upper owner on an irrigation canal was entitled to use all the water needed by him, and that the surplus only belonged to the lower owner. Outhouse-Cottel v. Berry, 42 Or. 593, 72 Pac. 584. The first appropriator may take the entire flow, if used in proper irrigation. Meng v. Coffey [Neb.] 93 N. W. 713. An upper riparian proprietor has a right to use the water of a stream for irrigation purposes to the exclusion of the use thereof by a lower riparian owner for the same purpose. Cornick v. Arthur, 31 Tex. Civ. App. 579, 73 S. W. 410.

97. Bolter v. Garrett [Or.] 75 Pac. 142.

98. McPhee v. Kelsey [Or.] 74 Pac. 401. A primary appropriator of water cannot complain of a secondary appropriation where it does not result in any interference with, or abridgment of, the primary use. Salt Lake City v. Salt Lake City W. & E. P. Co., 25 Utah, 456, 71 Pac. 1069. The fact that more water is lost by seepage and evaporation in the prior appropriator's ditch than would be lost in that of a later appropriator does not change the rule. Tonkin v. Winzell [Nev.] 73 Pac. 593. Rights to the use of water depending on map and statement statutes which are unconstitutional cannot be enforced against one whose rights are confessedly superior, if such statutes are inapplicable. Great Plains Water Co. v. Lamar Canal Co., 31 Colo. 96, 71 Pac 1119. In Colorado, it is held that notwithstanding the "prorating statute" there in force, there may be circumstances where water consumers from the same ditch may not be compelled to prorate with each other, but they may have different priorities in the use of the water based on the time of their several appropriations. Farmers' High Line C. & R. Co v. White [Colo.] 75 Pac. 415. In a suit by

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the facts concerning their priorities, the dates when they attached and the amount of water they claim, and the same data concerning the rights claimed to be inferior.[99] Where owners of different parcels of land conduct water across the same in an artificial channel and do not define their respective interests in the water, their rights therein are to be determined as if they were riparian owners on a natural stream.[1] Adjudication proceedings awarding priorities to waters for irrigation purposes are res adjudicata as to facts considered therein.[2] The rights of an appropriator are limited to the amount of water he actually uses for a beneficial purpose, not exceeding the carrying capacity of his canal or ditch.[3] His

consumers of water from a ditch to restrain the corporation owning it from compelling plaintiff to prorate with the stockholders of the company in the use of the water, such stockholders must be joined as parties to the action. The corporation cannot represent them. Id. It is only the actual increase resulting from the addition of water to a natural stream which would not otherwise pass down its surface or subterranean channel to the benefit of other appropriators which may be regarded as such an increase as can be diverted as against those entitled to its natural flow. Buckers' Irr., Mill. & Imp. Co. v. Farmers' Independent Ditch Co., 31 Colo. 62, 72 Pac. 49. The phrase "during the dry season of the year," in a judgment awarding certain water rights, means that season, regardless of the time of year, when resort to irrigation is necessary for the preservation and cultivation of the crops, and is not ambiguous or lacking in certainty. Daly v. Ruddell, 137 Cal. 671, 70 Pac. 784.

99. Farmers' High Line C. & R. Co. v. White [Colo.] 75 Pac. 415.

1. Outhouse-Cottel v. Berry, 42 Or. 593, 72 Pac. 584. Statutes Wyoming (Rev. St. 1899, §§ 908-914), providing a method of settling disputes of joint owners of irrigation ditches in regard to division of water, construed. State v. Ausherman [Wyo.] 72 Pac. 200. Held not a substitute for an action for damages. Stoner v. Mau [Wyo.] 72 Pac. 193. Mills' Ann. St. Colo. § 2399, relating to the jurisdiction of courts in proceedings to adjudicate water rights, does not apply to protect such rights. Buckers' Irr., Mill. & Imp. Co. v. Farmers' Independent Ditch Co., 31 Colo. 62, 72 Pac. 49. Sections 34, 35, 36, Session Laws of Utah 1903, p. 223, providing for the service of summons by publication in suits to determine water rights in certain cases, and for the payment of costs in such actions by counties, are unconstitutional. Bear Lake County v. Budge [Idaho] 75 Pac. 614. A lower riparian owner cannot enjoin an irrigation enterprise by an upper appropriator under the irrigation act of Nebraska, merely because his damages for injury to his riparian rights have not been paid. His remedy is to sue at law for such damages. McCook Irr. & W. P. Co. v. Crews [Neb.] 96 N. W. 996. A judgment restraining defendants from "taking or diverting any of the first five feet of water of plaintiff" flowing in a certain canal did not establish an exclusive ownership of such canal in plaintiff against defendants. State v. Ausherman [Wyo.] 72 Pac. 200. Where a power company is under an agreement with a city, permitted to devote water primarily appropriated by the city to a secondary use, the abrogation of the agreement by the city cannot divest rights which have become vested thereby, and thus invalidate the appropriation once complete. Salt Lake City v. Salt Lake City W. & E. P. Co., 25 Utah, 456, 71 Pac. 1069. A defendant whose rights are inferior and subsequent to plaintiffs cannot question the latter's use of the waters of a stream on the ground that others may have a right thereto superior to plaintiffs'. McCall v. Porter, 42 Or. 49, 70 Pac. 820.

2. Platte Valley Irr. Co. v. Cent. Trust Co. [Colo.] 75 Pac. 391. Such proceedings are res adjudicata as to the volume awarded to a certain ditch, so that the question of abandonment in subsequent proceedings is limited to acts subsequently done. Burden on plaintiff to show abandonment of priorities so awarded. Id. A decree giving plaintiffs the right to a perpetual flow of a certain amount of water in a stream and quieting their title thereto, giving interveners a similar right to a certain amount, and enjoining defendants from interfering in any way with such flow, but permitting them to have a modification of the decree whenever they could show that their proposed work will not interfere with the flow decreed, held just and sufficiently certain and definite. Sander v. Wilson [Wash.] 76 Pac. 280.

3. Stenger v. Tharp [S. D.] 94 N. W. 402. It is held in Colorado that the estimated capacity of a canal means the ability of the canal to supply or deliver water and that in determining this question there must be taken into consideration not only the physical capacity of the canal, but also the volume of its decreed priorities in connection with the probability of obtaining water from the stream supplying them under normal conditions during the season of irrigation. Blakely v. Ft. Lyon Canal Co., 31 Colo. 224, 73 Pac. 249. Evidence in a case for diversion of water held insufficient to sustain a decree, in that it did not show the amount of water necessary for the use of the several parties by an approved form of measurement. Lost Creek Irr. Co. v. Rex, 26 Utah, 485, 73 Pac. 660. Evidence insufficient to show an enlarged use of water from a ditch. Burden of proof on party seeking to show enlarged use to show it. Platte Valley Irr. Co. v. Cent. Trust Co. [Colo.] 75 Pac. 391. Where it is claimed that seepage returned to the river has been lessened because of the use of water upon lands other than those to which it was originally applied, no relief will be granted unless the difference in the amount of such seepage is shown with a reasonable degree of certainty. Id. Where the court found that plaintiff and defendant were each the owners of a specified fractional part of an irrigation ditch and water right, a decree to the effect that if the proportion of water

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rights are confined to his specific or particular needs.[4] A prior appropriator of water for irrigation purposes may maintain a joint suit against all junior appropriators of waters which would have otherwise reached the head of his ditch.[5]

An appropriation for irrigation purposes is effected when the water is actually applied to the land.[6] If a riparian owner diverts water above his own lands, it is a question of fact whether it is an appropriation or a riparian use.[7]

Under various statutes, an appropriation may be made by public application by one who intends to use water for irrigation and who fulfills the statutory conditions.[8] A survey and work done before obtaining a permit required by law does not tend to show an appropriation.[9] In Nebraska, one has no right to appropriate the waters of the state for irrigation purposes and to condemn a right of way therefor without a permit from the state board of irrigation to divert the water to specific lands described in his application.[10] Water may not be diverted from a natural stream in Colorado unless the right to its beneficial use has been acquired and at the time is so needed.[11]

Where the waters of a natural stream have been appropriated and put to a beneficial use, the rights thus acquired include an interest in the stream from the point where the waters are diverted to the source thereof,[12] and any interference with the stream by a party having no interest therein that materially deteriorates the water in quantity or quality is unlawful and actionable.[13]

In some states the doctrine of prior appropriation and the common-law rule as to riparian rights to the use of water are both enforced.[14] In such cases the

found to belong to any defendant should at any time be in excess of what he reasonably required, such excess should belong to plaintiff, held to be inconsistent and erroneous. Arroyo D. & W. Co. v. Dorman, 137 Cal. 611, 70 Pac. 737.

4. McPhee v. Kelsey [Or.] 74 Pac. 401.

5. Morris v. Bean, 123 Fed. 618.

6. Wellington v. Beck, 30 Colo. 409, 70 Pac. 687; Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. 826; Tonkin v. Winzell [Nev.] 73 Pac. 593; Schneider v. People, 30 Colo. 493, 71 Pac. 369; Britt v. Reed, 42 Or. 76, 70 Pac. 1029; McCall v. Porter, 42 Or. 49, 70 Pac. 820.

7. A riparian owner may go upon the land of another farther up the stream, and with his permission, there divert water for use upon his land below without thereby necessarily exercising other than his riparian right, the question of whether or not such act is an attempt to make an independent appropriation of the water being one of circumstances. Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905.

8. In Oregon, it is held that to constitute a valid appropriation of water, there must be first, an intent to apply it to some beneficial use, existing at the time or contemplated in the future; second, a diversion thereof from a natural stream; and third, an application of it within a reasonable time to some useful industry. Beers v. Sharpe [Or.] 75 Pac. 717; Carter v. Wakeman, 42 Or. 147, 70 Pac. 393. Under the Arizona statutes, an appropriator of water for irrigation is one who makes an application of public water upon lands he owns or possesses. Gould v. Maricopa Canal Co. [Ariz.] 76 Pac. 598. A canal company organized for the purpose of the diversion and carriage of water for irrigation, not being the owner of arable and irrigable land, is not an appropriator of water. Id. In Wyoming, a water right is now initiated by filing application for a permit to appropriate water and not by construction of a ditch. Whalon v. North Platte C. & C. Co. [Wyo.] 71 Pac. 995.

9. Under Rev. St. §§ 917-929, a permit is prerequisite. Whalon v. North Platte C. & C. Co. [Wyo.] 71 Pac. 995. Even if admissible on question of possession, its exclusion was harmless, there being no dispute. Id.

10. Under the laws of Nebraska (Act 1895), a person has no right to appropriate the waters of the state for irrigation purposes and to condemn a right of way therefor without a permit from the state board of irrigation to divert the water to specific lands described in his application. Castle Rock Irr., C. & W. P. Co. v. Jurisch [Neb.] 93 N. W. 690. Injunction is the proper remedy to prevent such condemnation. Id.

11. Schneider v. People, 30 Colo. 493, 71 Pac. 369.

12. Cole v. Richards Irr. Co. [Utah] 75 Pac. 376.

13. The fact that the stream rises in a lake is immaterial. Cole v. Richards Irr. Co. [Utah] 75 Pac. 376.

14. This is the case in Montana and Nebraska. Willey v. Decker [Wyo.] 73 Pac. 210; Crawford Co. v. Hathaway [Neb.] 93 N. W. 781. In Nebraska, it is held that the common-law rule and the doctrine of appropriation are not inconsistent, and that both exist concurrently in that state, and that the time when either right accrues must determine the superiority of title as between conflicting claimants. Id. In Nebraska, it is held that the right of appropriation of water for irrigation purposes has existed since the early settlement of the state, in those portions where irrigation is necessary. Id. The irrigation laws of Nebraska (Comp. St. 1901, c. 93a) abrogated the common-law rule of

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rights as at common law of individual riparian owners are recognized and applied where such rights have been acquired anterior to an appropriation in conflict therewith.[15]

The method of diverting or carrying the water or of making such application is immaterial.[16]

Appropriations may be measured by the period or time of use, as well as by the quantity employed.[17]

Appropriators may change the place or mode of diversion so long as others are not injured thereby.[18] It is not essential that the appropriator shall apply the water to riparian land, but it may be any distance from the stream;[19] the only restriction as to location being the feasibility of the diversion in view of the intended use, and the securing of a right of way over the lands of others for the ditch and works.[20] The right to use a ditch for the benefit of one's land may exist, though he can enjoy the same only by procuring a right of way to carry the water over intervening lands,[21] nor need he be a riparian owner.[22]

What may be appropriated.—The taking by a party from a ditch of water which does not belong to him, is not an appropriation within the meaning of the law regulating water rights on the public domain,[23] but water carried by a public carrier of water is public property until actually used by the appropriators and is subject to appropriation to the same extent and in the same manner as when it flowed in the natural stream.[24] Known underground streams of water, flowing in well defined channels,[25] including the underflow of surface streams, are subject to appropriation, and the rights acquired therein cannot be diverted by the wrongful act of another.[26] In the arid regions it will be presumed that water flowing in a natural channel, which reaches the banks of a stream and there disappears in the sands of the bed, augments the flow in the main stream by percolation, and the burden of proof is on the party diverting such water to show that it does not.[27]

riparian ownership of water in that state as to all rights accruing in the future, but did not affect rights already acquired. Id. The common-law rule as to the use of waters of a stream by riparian proprietors is in force in Nebraska except as modified by statute. Id.; Meng v. Coffey [Neb.] 93 N. W. 713; Cline v. Stock [Neb.] 98 N. W. 454.

15. Willey v. Decker [Wyo.] 73 Pac. 210.

16. McCall v. Porter, 42 Or. 49, 70 Pac. 820.

17. McPhee v. Kelsey [Or.] 74 Pac. 401; Craig v. Crafton Water Co., 141 Cal. 178, 74 Pac. 762.

18. Miller v. Rickey, 127 Fed. 573. Place. Craig v. Crafton Water Co., 141 Cal. 178, 74 Pac. 762. A ditch dug prior to the inception of an appropriation cannot thereafter be changed to the prejudice of such appropriator. Bolter v. Garrett [Or.] 75 Pac. 142.

19, 20. Willey v. Decker [Wyo.] 73 Pac. 210.

21. Blankenship v. Whaley, 142 Cal. 566, 76 Pac. 235.

22. Meng v. Coffey [Neb.] 93 N. W. 713.

23. Butterfield v. O'Neill [Colo. App.] 72 Pac. 807. Where an irrigation company first appropriated the waters of a ditch and plaintiff and defendant both claimed primarily through purchase of stock in the company, there could be no claim to all the water by plaintiff, based on a prior appropriation. Id.

24. Gould v. Maricopa Canal Co. [Ariz.] 76 Pac. 598. All persons owning lands, under the flow of a canal owned by a company not an appropriator, which have been irrigated by means of water furnished by such canal, become appropriators, and possessed of the rights of appropriation in the order of their priority. Id.

25. Whitmore v. Utah Fuel Co., 26 Utah, 488, 73 Pac. 764. When flowing in natural channels between well defined banks under the same rule as surface streams. Construing Rev. St. 1887, par. 3199, § 1, par. 3201, § 3, and Laws 1893, p. 135. Howard v. Perrin [Ariz.] 76 Pac. 460. The appropriator alleging that the water was taken from such a stream must prove it. Id.

26. Howcroft v. Union & J. Irr. Co., 25 Utah, 311, 71 Pac. 487; Roberts v. Krafts, 141 Cal. 20, 74 Pac. 281.

27. Howcroft v. Union & J. Irr. Co., 25 Utah, 311, 71 Pac. 487. In California, it is held that the doctrine of prior appropriation applies to percolating waters, since the common-law rule could not be equitably applied in that state on account of its peculiar physical conditions. Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766. In California, it is held that one owning land bordering upon or adjacent to a stream may not make an excavation therein in order to intercept and obtain percolating water, and apply such water to any use other than its reasonable use upon the land from which it is taken, if he thereby diminishes the stream and causes damage to parties having rights

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The doctrine of prior appropriation applies as between two appropriators from the same interstate stream who reside in different states.[28]

A water right may be obtained by adverse user and prescription.[29]—In order to create a right by prescription, the claimant's use of the water must be uninterrupted, adverse, under claim of right, and with the knowledge of the owner.[30] Hence a lower riparian owner cannot acquire a prescriptive right to receive the waters of a stream as against an upper proprietor.[31] No use of water by a subsequent appropriator can be adverse to the right of a prior appropriator unless such use deprives the prior appropriator of it when he has actual need of it.[32] Occupancy of water by stockholders cannot be regarded as adverse either to the company or to fellow stockholders,[33] nor can silence of other stockholders be an acquiescence until their supply was impaired or ceased.[34] When so obtained, it is only a right to use the quantity of water used while acquiring it.[35] Such right is superior to that of all persons subsequently acquiring an interest either as appropriators or riparian proprietors.[36]

therein. McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766. See, also, § 5, ante.

28. Willey v. Decker [Wyo.] 73 Pac. 210. Owners of land in Montana may, by prior appropriation, acquire a right to the use of the waters of a stream having its source in that state and flowing thence into Wyoming, by joining with Wyoming landowners in the construction of a ditch, and thereby diverting said waters at a point in Wyoming for the irrigation of lands. In both states, such right may be protected by the courts of Wyoming. Id. In Nebraska, it is held that the fact that plaintiff resides outside the state on a stream flowing through the state does not deprive him of any rights which the laws of Nebraska give to a lower riparian owner. Cline v. Stock [Neb.] 98 N. W. 454. One who has acquired a right to the waters of a stream flowing through the public lands by prior appropriation, in accordance with the laws of the state where the appropriation is made, is protected in such right against subsequent appropriators, although the latter withdraw the water in a different state [Rev. St. U. S. §§ 2339, 2340 (Comp. St. 1901, p. 1437)]. Morris v. Bean, 122 Fed. 618.

29. Talbott v. Butte City Water Co. [Mont.] 73 Pac. 1111; Meng v. Coffey [Neb.] 93 N. W. 713. Evidence held insufficient to establish plaintiff's prescriptive right to maintain an irrigation ditch, or to show that he had acquired, by adverse user, an easement of a designated quantity of water. Strong v. Baldwin, 137 Cal. 432, 70 Pac. 288.

30. Ennor v. Raine [Nev.] 74 Pac. 1. Must be invasion of rights such as would give cause of action. Britt v. Reed, 42 Or. 76, 70 Pac. 1029. The use of a water right under a deed is adverse to the grantor, but not necessarily so to third persons not in privity with him. Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905. The use of water by one of the tenants in common of a water right cannot be considered hostile to the rights of other owners, unless characterized by much greater manifestations of hostile intent and more serious detriment than would be necessary if he were not such tenant in common. Id. Evidence insufficient to show that a right to use the waters of a creek on certain lands had been acquired by prescription. Id. Evidence held to show a right to obstruct a ditch by a flume crossing it. Centerville & K. Irr. Ditch Co. v. Sanger Lumber Co., 140 Cal. 385, 73 Pac. 1079. Findings, in an action to restrain the obstruction of the flow of water from springs on defendant's land, that the springs were so situated and that he had used the water for domestic and irrigation purposes for 25 years, and a decree awarding him its use at all times for domestic purposes and during certain seasons for irrigation purposes, held sustained by the evidence. Town of Suisun City v. De Freitas, 142 Cal. 350, 75 Pac. 1092.

31. Crawford Co. v. Hathaway [Neb.] 93 N. W. 781; Cline v. Stock [Neb.] 98 N. W. 454; Dunn v. Thomas [Neb.] 96 N. W. 142. In Oregon, it is held that a person entitled to the use of water cannot be deprived thereof by merely seeing another constructing a ditch and making no objection thereto until the diversion is completed. Bolter v. Garrett [Or.] 75 Pac. 142. Appropriation of considerable quantities of water, in seasons when that may be done without sensible injury to lower owners, does not give a prescriptive right to divert the whole stream in dry seasons. Meng v. Coffey [Neb.] 93 N. W. 713.

32. Talbott v. Butte City Water Co. [Mont.] 73 Pac. 1111. The use by a lower proprietor of water after it has passed the upper proprietor's boundary is not adverse to the upper proprietor, so as to lay the basis for a claim thereto by adverse user, since the former is not injured thereby. Beers v. Sharpe [Or.] 75 Pac. 717.

33. Prescriptive use as against other stockholders supplied from different ditches and points of diversion. Richey v. East Redlands Water Co., 141 Cal. 221, 74 Pac. 754.

34. Richey v. East Redlands Water Co., 141 Cal. 221, 74 Pac. 754.

35. Hall v. Carter [Tex. Civ. App.] 77 S. W. 19. It is not error to adopt as a measure for determining the amount of water used in acquiring a prescriptive right the distance to which the water flowed on the lands of a lower proprietor during the period of obtaining the right. Id.

36. Britt v. Reed, 42 Or. 76, 70 Pac. 1029; McCall v. Porter, 42 Or. 49, 70 Pac. 820. It is held in Nebraska that the appropriation of

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The right of appropriation can be lost only by abandonment or by adverse possession.[37]—An abandonment of a water right occurs when the party in possession deserts the property without an intention to reclaim it.[38] The abandonment of land for the irrigation of which water is appropriated is an abandonment of the appropriation.[39]

Ditch rights of way. Eminent domain.—United States statutes (U. S. Comp. St. 1901, p. 1535), granting rights of way across public lands for the construction of canals and ditches, give the grantee a mere easement across the land for the purpose of maintaining such ditch, and he has no right to use the land for any other purpose.[40] One who acquires such land subsequent to the building of such ditch takes it subject to the easement.[41] The use of water for irrigation is a public use, and a statute providing for the condemnation of lands for canal purposes is constitutional.[42] A city may not charge to the owners the cost of recon-

water by "squatter's right" does not, by virtue of Rev. St. U. S. (U. S. Comp. St. 1901, p. 1437), give to a settler who has appropriated water in that way, in that state, for a less period than 10 years, an exclusive right as against other settlers on the same stream, but if such settler afterwards receives a patent from the government, he may count the time during which he appropriated the water as a squatter in making out the statutory period of prescription, as against other patentees from the government on the same stream. Meng v. Coffey [Neb.] 93 N. W. 713. Where one stands by and sees another preparing to appropriate the waters of a spring without making any claim thereto, he is estopped to subsequently claim the right to use such spring as a prior appropriator. Orient Min. Co. v. Freckleton [Utah] 74 Pac. 652.

37. Cannot be lost by signing a contract for the use of the water for a season, the contract stipulating that he thereby waived any and all rights to the use of water in the future, the canal company being a public carrier of water. Gould v. Maricopa Canal Co. [Ariz.] 76 Pac. 598. Nor is the right lost by abandoning the use of a ditch rendered useless as a carrier of water by reason of increased diversions from the stream. Id. The owner of land and of a water right privilege appurtenant thereto sold both, he later repurchased the land without the water right and obtained water from the canal by renting other water rights. Held an abandonment of the original water right. Brockman v. Grand Canal Co. [Ariz.] 76 Pac. 602.

38. Such intention is not shown by mere nonuser or failure to maintain. Butterfield v. O'Neill [Colo. App.] 72 Pac. 807. Evidence sufficient to sustain finding that defendants had not abandoned priorities previously awarded them in adjudication proceedings. Platte Valley Irr. Co. v. Cent. Trust Co. [Colo.] 75 Pac. 891. Evidence held to show an abandonment of a water right. Goon v. Proctor, 27 Mont. 526, 71 Pac. 1003.

39. Rutherford v. Lucerne C. & P. Co. [Wyo.] 75 Pac. 445. The subsequent acquisition of other lands in the same vicinity will not restore such right in the absence of proof that such acquisition was contemplated at the time of the appropriation. Id.

40. Whitmore v. Pleasant Valley Coal Co [Utah] 75 Pac. 748. The owner of the land may remove from the right of way material placed thereon which is intended to be used in the erection of a saloon on such right of way. Id.

41. Whitmore v. Pleasant Valley Coal Co. [Utah] 75 Pac. 748. Under U. S. Statutes (Act July 26, 1866, c. 262 [14 Stat. 251, U. S. Comp St. 1901, p. 1437]), giving the prior appropriator a right of way for conveying the water along its natural channel, and through ditches constructed prior to the time that other rights attached to the land traversed by these watercourses, all subsequent appropriators hold subject to this easement, and the prior appropriator has the right to go upon their lands and remove dams, etc., by which his flow of water is obstructed and diverted. Ennor v. Raine [Nev.] 74 Pac. 1. Facts held insufficient to entitle plaintiff to an injunction forbidding the discharge of water used in operating a placer mine, into a ditch running through his farm. McCann v. Wallace, 117 Fed. 936.

42. Nash v. Clark [Utah] 75 Pac. 371. Under the constitution and laws of California (Const. § 1, art. 14, Laws 1895, c. 115), providing that "the use of all water appropriated for sale, rental or distribution" is a public use, the word appropriation includes all water, however acquired, which is devoted to public use and is not limited to water appropriated under the provisions of the civil code. Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 Pac. 395. The construction and operation of irrigation enterprises are works of internal improvement, and private property, reasonably necessary therefor, can be taken under the power of eminent domain under the laws of Nebraska [Comp. St. 1901, c. 93a, art. 2]. Crawford Co. v. Hathaway [Neb.] 93 N. W. 781. The Nebraska Irrigation Act of 1895 (Comp. St. 1901, c. 93a), construed and held constitutional. Id. The term "domestic purposes" as used in the Nebraska irrigation act (Stat. 1901, c. 93a, art. 2, § 43) does not refer to the diversion of large quantities of water in canals or pipe lines. Id. The statutes of Utah giving individuals and companies the right to condemn rights of way for irrigation ditches (Rev. St. Utah 1898, §§ 3588, 1277, 1278) are constitutional. Nash v. Clark [Utah] 75 Pac. 371.

A public use of water must be for the general public or some portion of it. Hildreth v. Montecito Creek Water Co. [Cal.] 70 Pac. 672. Where a number of persons owning land who are each entitled to take water from a common source for use on their land, either by virtue of an appropriation under the code, or by prescription, or as riparian owners, form a corporation,

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structing a flume across a street to conform to legal specifications unless so empowered.[43]

Remedies and procedure.—A riparian proprietor, including a lessee, is entitled to an injunction to restrain the unlawful diversion of waters of a stream adjoining his land, though the injury caused thereby is incapable of ascertainment or of being estimated in damages.[44] Persons who take under the diverter are not necessary parties.[45] A general allegation of irreparable injury by reason of the diversion of waters from an irrigation ditch is not sufficient to warrant the granting of a temporary injunction, but the facts upon which the allegation is based must be shown.[46] If it be alleged that a diversion was made by enlarging the head of a branch, the answer must controvert such effect.[47] In an action for damages for the destruction of a crop by defendant's failure to furnish water for irrigation purposes, the measure of damages is the value of the crop in the condition it was before it perished.[48] Evidence of the value of the crop at maturity, less the cost of the labor, care, and attention necessary to put it in condition for the nearest market, is admissible, in connection with other testimony, to enable the jury to ascertain the amount of damages sustained.[49] Landowners may recover damages for injuries to their property caused by the faulty construction of a canal,[50] or its mismanagement or negligent maintenance.[51]

and delegate to it the work of diverting and distributing the water, reserving to themselves their rights therein, they do not thereby dedicate or appropriate to public use the water thus reserved and used by them. The water still remains the subject of individual ownership and private use. Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 Pac. 395.

43. A city ordinance requiring water for irrigation purposes to be conveyed across the streets in covered flumes construed, and defendants held not to be liable for the cost of such flumes constructed by the city. Bountiful City v. Lee [Utah] 75 Pac. 368.

44. The fact that some of the waters of the river at times overflow its banks below the point of diversion does not justify such diversion. Cal. P. & A. Co. v. E. C. & L. Co., 127 Fed. 741. Where a canal unlawfully diverts a part of the waters of a stream, an injunction will not be refused because it also diverts flood waters which may be lawfully appropriated, and, in the absence of data on which to base a different order, the entire diversion will be enjoined. Id. A suit in equity will lie to determine the rights of a number of persons claiming the right to divert or use the waters of a stream and to enjoin the infringement of rights acquired under the Nebraska irrigation act. Crawford Co. v. Hathaway [Neb.] 93 N. W. 781; McCook Irr. & W. P. Co. v. Crews [Neb.] 96 N. W. 996; Cline v. Stock [Neb.] 98 N. W. 454.

45. In a suit by a riparian owner on a main stream to enjoin enlargement of the head of a branch stream above him, and diversion of an undue amount of water for irrigation, persons using water from the branch are not necessary parties defendant. Sander v. Wilson [Wash.] 76 Pac. 280.

46. Morris v. Bean, 123 Fed. 613. Statutes of Colorado (Mills' Ann. St. §§ 2427-2429, 2432), relating to appeals in irrigation cases, construed. Needle Rock Ditch Co. v. Crawford-Clipper Ditch Co. [Colo.] 75 Pac. 424. Evidence sufficient to entitle plaintiff to damages for injuries to his land resulting from the construction of a canal. Bullock v. Lake Drummond C. & W. Co., 132 N. C. 179. A bill in equity which discloses a continuing trespass on the lands of complainant by a large number of defendants, and a constant and wrongful diversion of water from a stream thereon, which tends to depreciate the value of the land, is sufficient to entitle complainant to an injunction against such trespass. Miller v. Rickey, 127 Fed. 573. Where a canal company, in widening its canal, unlawfully deposited mud and sand on the land of another, and filled up his ditch so that water overflowed onto his land, it is liable for damages resulting therefrom. Pinnix v. Lake Drummond C. & W. Co., 132 N. C. 124.

47. In a suit to enjoin diversion of water from a stream by enlarging the head of a branch, an answer is demurrable which sets out that defendant does not claim a right to any water in excess of the natural flow, and that plaintiff claims only the natural flow in the main stream, since the issue is the effect of the intended enlargement on the flow. Sander v. Wilson [Wash.] 76 Pac. 280.

48, 49. Anderson v. Adams, 43 Or. 621, 74 Pac. 215.

50. For seepage due to faulty construction. Turpen v. Turlock Irr. Dist., 141 Cal. 1, 74 Pac. 295.

51. A corporation is liable for damage to a landowner caused by the act of its employe in charge of its irrigation canal in opening a waste gate and discharging surplus water on the land. Stuart v. Noble Ditch Co. [Idaho] 76 Pac. 255. A director of a water corporation who consents to the location, plan and method of construction cannot recover damage by seepage sustained by him when such damage might readily have been forseen (Id.), or until the company has had notice and a reasonable time to repair (Id.).

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Such damages are not included in the damages awarded in proceedings to condemn land for the canal.[52] An action for damage to land caused by the negligent construction and maintenance of an irrigation canal, lawfully built, is not an action for "waste or trespass upon land," within the meaning of a limitation statute.[53]

For interfering with a water distributer appointed by the court in a joint ditch proceeding in Wyoming, a court commissioner or judge in vacation has no power to punish one as in contempt.[54]

§ 14. *Irrigation districts and irrigation and power companies.*—The manner in which irrigation districts may be created and the duties of their officers are fixed by statute, which legislation is within state and territorial power.[55] There is ordinarily a land owner's petition or election signifying a majority assent.[56] The district is a corporation in so far at least that it is not to be collaterally attacked save on the usual grounds,[57] and that laws respecting organization are subject to legislative change retroacting on existing districts.[58] So in actions by or against it, the property owners of a district are bound by judgment.[59] Bonds may be issued only for the purposes authorized.[60] Expenses are usually borne by the regions benefited;[61] but cannot be laid upon lands owned by the United States as part of the public domain.[62] In Washington, warrants

52. Turpen v. Turlock Irr. Dist., 141 Cal. 1, 74 Pac. 295.

53. Ball. Ann. Codes & St. § 4800. Statute limiting actions of trespass to three years has no application. Governed by Sec. 4805, barring actions, not otherwise provided for, in two years. Suter v. Wenatchee Water Power Co. [Wash.] 76 Pac. 298.

54. Under the Wyoming statutes, a commissioner has no power to punish one charged with interfering with a water distributor appointed by said commissioner, nor to punish him for contempt. The trial involving an issue of fact, it could not be heard by a judge in vacation. Mau v. Stoner [Wyo.] 76 Pac. 584.

55. The laws of the United States (Act July 26, 1866 [U. S. Comp. St. 1901, p. 1437]; Act of March 3, 1877 [U. S. Comp. St. 1901, p. 1549]; Act March 3, 1891 [U. S. Comp. St. 1901, p. 1570]) do not forbid territorial or state legislation with respect to the use of public waters. Gutierres v. Albuquerque L. & I. Co., 188 U. S. 545, 47 Law. Ed. 588. Nor is the law of New Mexico (Act Feb. 24, 1887), authorizing the incorporation of irrigation companies and empowering them to take and divert surplus public waters over and above the needs of prior appropriators, inconsistent with the said acts of congress. Id.

56. In Washington, a petition for the organization of an irrigation district may be signed by less than 50 landowners, if they constitute a majority within the proposed district under 1 Ball. Ann. Codes & St. § 4166. Rothchild Bros. v. Rollinger, 32 Wash. 307, 73 Pac. 367.

57. A decree confirming the organization of an irrigation district, being obtained by fraud, may be set aside by a court of equity. Obtained by false affidavits and bribery of attorney employed to contest petition for confirmation. People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381. Where the signatures of the requisite number of freeholders could not be obtained to a petition for the formation of an irrigation district, and the promoters thereof conveyed land to parties so as to make them freeholders, they to sign the petition and then reconvey to the grantors, held fraud; and decree confirming the organization of such district would be set aside in equity. Id. Order of county board is conclusive that included lands will be benefited. Andrews v. Lillian Irr. Co. [Neb.] 97 N. W. 336. But not that all of them are irrigable. Id.

58. Act of California March 31, 1897 (Stat. 1897, c. 189), providing for the organization and government of irrigation districts, applies to existing districts organized under prior laws. Board of Sup'rs of Riverside County v. Thompson [C. C. A.] 122 Fed. 860.

59. A judgment against an irrigation district held conclusive as to all questions which were or might have been litigated therein, against not only the parties then before the court, but also against the property owners of the district and all parties who might thereafter be called upon to enforce the judgment therein rendered. Board of Sup'rs of Riverside County v. Thompsor. [C. C. A.] 122 Fed. 860.

60. Under the laws of Cal. (Stat. 1887, p. 29, §§ 12, 16, 36, 37), authorizing the directors of irrigation districts to issue bonds for the construction and purchase of canals and waterworks, it is held that bonds issued in payment of water right certificates and of warrants drawn for salaries of officers of the district are void. Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. 24.

61. In Colorado (Mills' Ann. St. §§ 2440, 2442), it is held that a county lying within the watershed of a stream mentioned in the statute creating a water division is not embraced within such division, so as to make it liable for a part of the salary of the superintendent of irrigation, where no lands within the county are irrigated from the streams mentioned. Chew v. Board of Com'rs of Fremont County [Colo. App.] 76 Pac. 764.

62. Lands belonging to the U. S. and included within the boundaries of an irriga-

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issued are payable in full in order of issue, regardless of a shortage of funds to pay all,[63] and draw interest from date of presentation.[64] The organization of a district is not the same as a proceeding to confirm it.[65] Accordingly, a limitation on suits to attack the former does not apply to suits to annul confirmation,[66] and especially not when it is a short term and fraud is urged.[67] In Nebraska, nonirrigable lands cannot be included in a district, and the statute distinguishes such from irrigable lands which for some reason should be excluded from the district and the burdens incident to it. Hence, the remedy provided as to the latter class for the purpose of detaching them while exclusive can have no application to nonirrigable lands erroneously included; and to correct this, equity will afford relief.[68] It is sufficient to show their nonirrigable character to allege that they are low, wet and swampy.[69]

Irrigation and power companies.—A company diverting water from a stream for the purpose of supplying owners and possessors of arable and irrigable land is a quasi public servant.[70] A public carrier of water is required to continue the service so long as such service is required by appropriators for the necessary irrigation of their lands, and the water is available from the common source.[71] On applications to a water company exceeding its capacity, it is the duty of the company to limit the contracts to its capacity and to those appropriations possessing the older rights of appropriation.[72] A canal company not being itself an appropriator, its only warrant for its diversion of water is that it supplies appropriators.[73] Users of water from a ditch or canal acquire such a property right as they may transfer to other lands under such ditch or canal.[74] The purchaser may transfer the water to other lands under the canal so long as the change does not interfere with the rights of others.[75] Such companies have only the powers expressly granted them by statute or those necessarily implied therefrom, or incidental thereto.[76]

tion district organized under the laws of Cal. (St. 1887, p. 29, c. 34), without the consent of the U. S. or of a subsequent purchaser, are not liable under a judgment rendered against said district in an action on its bonds and are exempt from any assessment for the payment of the bonds. Nev. Nat. Bank v. Poso Irr. Dist., 140 Cal. 344, 73 Pac. 1056.

63. Under Laws 1895, p. 145, § 7, it is held that warrants on ditch funds collected in accordance with that act are required to be paid in the order of their issue, though the earlier ones will exhaust the fund before all can be paid. State v. St. John, 30 Wash. 630, 71 Pac. 192.

64. Under Laws 1893, p. 76, such warrants issued under Laws 1889-90, p. 76, and the remedial act (Laws 1895, p. 145, § 7), curing the defects therein, draw interest from date of presentation and nonpayment thereof. State v. St. John, 30 Wash. 630, 71 Pac. 192.

65, 66, 67. The Irrigation District Act of California (St. 1887, p. 30, c. 34, as amended by St. 1891, p. 143, c. 127, § 3), declaring that the validity of the organization of irrigation districts shall not be attacked more than two years after the entry of the order of the board declaring the territory duly organized, does not apply to a suit to set aside a decree of confirmation. People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381.

68. Laws of Nebraska (Comp. St. 1903, c. 93a), relating to the establishment of irrigation districts, construed. Andrews v. Lillian Irr. Co. [Neb.] 97 N. W. 336.

69. Andrews v. Lillian Irr. Co. [Neb.] 97 N. W. 336.

70. Gould v. Maricopa Canal Co. [Ariz.] 76 Pac. 598.

71. Gould v. Maricopa Canal Co. [Ariz.] 76 Pac. 598. A corporation organized to carry on the business of supplying a portion of a valley with water for irrigation and for milling and manufacturing purposes is a public carrier of water and is not limited to service as a carrier of water to its stockholders only. Id.

72, 73. Gould v. Maricopa Canal Co. [Ariz.] 76 Pac. 598.

74. One purchased a lessee's right to a certain amount of water and brought this action to have the point of diversion from the canal changed so as to precipitate the water on other land. Hard v. Boise City Irr. & L. Co. [Idaho] 76 Pac. 331.

75. In this case only the same amount of water as was due the original lessee was asked to be diverted and it would in no way affect any other appropriator. Hard v. Boise City Irr. & L. Co. [Idaho] 76 Pac. 331.

76. A corporation organized to construct canals and ditches for the purpose of diverting certain waters for irrigation purposes is **not authorized to construct reservoirs** for storing water. Seeley v. Huntington C. & A. Ass'n [Utah] 75 Pac. 367. Statutes of Utah (Rev. St. §§ 3588, 3590, 3591), relating to the **condemnation of rights of way** for

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§ 15. *Water companies and water supply districts; municipal ownership. Private corporations and franchises.*—The general law of corporations as applied to water companies[77] and other general matters[78] have been excluded. Water companies for public service are subject to legislative and municipal control, though in some respects private corporations.[79] If local consent be required for the formation of "a" company, a slight variance in name of the company as organized is immaterial.[80] They are quasi-public corporations and as such have only the powers expressly granted or necessarily implied for the purpose of carrying out the powers expressly granted.[81] If sources of supply are enumerated, they cannot resort to others.[82] As public servants, they may be empowered regardless of municipal consent to convey water through city streets.[83] The granting of franchises when delegated to municipalities must follow the statutory methods and conditions,[84] and lacking them cannot be cured by unconstitutional special legislation.[85] An excessive term if severable will be good in part.[86] Where a corporation is granted the right to furnish water and electric lights and power, the two rights are separate and distinct and it may forfeit one of them for nonuser without affecting the other.[87] An ordinance granting a franchise to a water com-

flumes, ditches, etc., and for the connection therewith of other flumes, etc., construed, and held, that in a proceeding by a power company to condemn a right to connect its flume with the city canal, it is not necessary to show that the use to which the power company will apply it is a more necessary public use than that to which the city devotes it, the city owning a mere easement for the canal. Salt Lake City W. & E. P. Co. v. Salt Lake City, 25 Utah, 441, 71 Pac. 1067. It is held that the **constitution of Utah** (art. 11, § 6), **prohibiting the alienation of water rights**, waterworks or water supply owned by it, does not make illegal the acquisition by a power company of the right to connect its flume with the water canal of a city for the purpose of discharging water therein. Id.

As to rates, see post, § 15.

77. Corporations, 1 Curr. Law, p. 710.

78. See Taxes, 2 Curr. Law, p. 1786.

79. This rule is not changed in Idaho by the fact that such companies are called private corporations by the laws of that state. Boise City Artesian H. & C. Water Co. v. Boise City [C. C. A.] 123 Fed. 232.

80. A statute of New Jersey (Gen. St. p. 2199, §§ 2, 3), authorizing the incorporation of certain water companies, construed. Kemble v. Millville, 69 N. J. Law, 637.

81. New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 Fed. 776.

82. A water company authorized to take water from certain specified sources is confined to those sources for its supply. Smith v. Stoughton [Mass.] 70 N. E. 195.

83. Transportation corporations act of New York (Laws 1890, p. 1151, c. 556, § 82, subd. 2 as amended), granting water companies the right to use the streets of cities in certain cases, without their consent, construed. Rochester & L. O. Water Co. v. Rochester, 176 N. Y. 36, 68 N. E. 117. Under N. Y. Transportation Corporations Act (Laws 1890, c. 566, § 82, as amended), water companies have the right to lay pipes through the streets of a city between the source of supply and the town where the right to distribute the water has been obtained without the consent of such city and without being subject to regulation by its ordinances. Rochester & L. O. Water Co. v. Rochester, 84 App. Div. [N. Y.] 71.

84. Laws of Iowa (Code 1873, §§ 471, 489), relating to the right of municipalities to authorize the construction of waterworks by individuals or companies, and to the number of members of the council who must be present and vote on an ordinance authorizing such construction, and providing that ordinances passed for that purpose must contain only one subject, which must be expressed in the title, construed. Marion Water Co. v. Marion, 121 Iowa, 306, 96 N. W. 883.

85. Iowa Act of March 8, 1876, attempting to legalize a city ordinance granting a franchise to a water company for more than 25 years, contrary to § 473, Code 1873, held unconstitutional, as special legislation. Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081.

86. Under the laws of Iowa (Code 1873, § 473), providing that the right to operate waterworks for a longer period than 25 years should not be granted to a water company, an ordinance granting an exclusive right for 25 years and an equal right with other companies for 25 years thereafter is invalid as to the latter 25 years. The ordinance is severable, and the grant for the first 25 years is valid. Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081.

87. State v. Twin Village Water Co., 98 Me. 214. Where such a corporation is created under an act providing that some portion of its works must be in operation within a specified time, the completion of its water plant within that time vests it with the full chartered powers, and where the act fixes no time within which the remaining portion of the works must be put in operation, it must be done within a reasonable time. Id. The failure of such a corporation to furnish electricity, because the towns and cities which it served did not want and would not buy it, will not work a forfeiture of its charter. Id.

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pany will be construed favorably to the city,[88] and a perpetual franchise has been held invalid.[89] Pursuant to reserved power, the city may thereafter construct a plant of its own.[90] Franchises and properties may be transferred if the statute or the terms under which they are held does not forbid.[91] Laws relating to water companies formed to supply water to cities and towns apply only to corporations and not to individuals.[92]

Condemnation of property by water companies.—The power to take certain kinds of water supply excludes other kinds.[93] Compensation may include depreciation of a spring flowing into a source of supply.[94] In such ways as are private, compensation must be made,[95] else a person interested may sue for removal of mains.[96] It has been refused for temporary interruption of business.[97]

Water boards and districts.—When public water service is administered by a board possessing corporate attributes, a public corporation is formed[98] which is a municipal and not a state agency if acting in respect to service for a limited district.[99] Laws governing such are subject to legislative change within constitutional limits.[1] General authority to provide a supply is liberally construed with respect to the source and method.[2]

88. Ordinance authorizing the purchase of a waterworks by a city, construed. Valparaiso City Water Co. v. Valparaiso [Ind. App.] 69 N. E. 1018.

89. A city has no power to grant a perpetual franchise in its streets to a water company in the absence of express statutory authority. A city ordinance giving a right to lay water pipes in the streets, which does not fix any term for the privilege, is a grant of license only, revocable at the will of the city. Boise City Artesian H. & C. Water Co. v. Boise City [C. C. A.] 123 Fed. 232.

90. City of Helena v. Helena Water Works Co. [C. C. A.] 122 Fed. 1.

91. Under the laws of Indiana, a water company, organized to supply water to a city, has no power to transfer its entire property and privileges to another company by a sale or lease for the time it continues to exist as a corporation, even with the consent of such city. New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 Fed. 776. In Pennsylvania under Act April 17, 1876, § 5 (P. L. 33), a water company may sell its franchises and property to another water company. Hey v. Springfield Water Co., 207 Pa. 38.

92. Rev. St. 1887, §§ 2710-2712. Jack v. Grangeville [Idaho] 74 Pac. 969.

93. The laws of Tennessee relating to condemnation of property by water companies (Shannon's Code, §§ 1844, 2502), construed and held not to give such companies the right to condemn water from springs on their lands, which flows over adjoining lands. Acts Tenn. 1901, p. 90, c. 63, authorizing such condemnation is unconstitutional. Watauga Water Co. v. Scott [Tenn.] 76 S. W. 888. Mass. St. 1895, c. 488, § 4, relating to construction of reservoir and acquiring property liable to be submerged, construed. Board only required to take property actually submerged. West Boylston Mfg. Co. v. Metropolitan Water Board, 183 Mass. 267, 67 N. E. 241. St. 1895, p. 573, c. 488, construed. As to taking property and wells. McNamara v. Com., 184 Mass. 304, 68 N. E. 332. See, also supra, note 82, Smith v. Stoughton [Mass.] 70 N. E. 195.

94. The owner of riparian land condemned by a water company is entitled to have the value of a spring thereon considered as an element of damage, in so far as it is affected by the right of the water company to have the water from it flow undiminished through the land in the channel of the creek, as the other water does. Leiby v. Clear Spring Water Co., 205 Pa. 634.

95. A village cannot give permission to a private corporation to construct or continue water mains through streets which have never been accepted by it, without compensation to the owner of the land. Jayne v. Cortland Waterworks Co., 42 Misc. [N. Y.] 263.

96. Evidence of plaintiff's interest in a private street held to be insufficient to enable him to maintain a suit for the removal of a water main therefrom. Taylor v. Larchmont Water Co., 86 App. Div. [N. Y.] 631.

97. Not required to pay damages resulting from temporary interruption of business. Nashua River Paper Co. v. Com., 184 Mass. 279, 68 N. E. 209.

98. The sewerage and water board of New Orleans is a corporation. State v. Kohnke, 109 La. 838.

99. Boards whose functions relate exclusively to water and sewerage works are municipal and not state agencies. State v. Kohnke, 109 La. 838.

1. An act of the legislature providing for a tax for sewer and waterworks and creating a special board to have charge of them is a public law relating to a public subject within the domain of the general legislative power of the state, and involving public rights and the public welfare of the entire community affected by it, and such act can therefore be amended or changed at any time by the legislature. State v. Kohnke, 109 La. 838. Louisiana Act No. 111, 1892, creating a sewerage and water board for the city of New Orleans, construed and held unconstitutional in so far as it changes the membership of the board created by Act No. 6 of the Extra Session of 1899. Constitutional amendment ratifying tax for waterworks and sewers also construed. Id.

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Public ownership.—The legislature may grant to any municipal corporation power to construct or to purchase and maintain a system of waterworks to furnish water for municipal purposes and for the use of its inhabitants and to raise the money therefor by taxation,[3] and the fact that the acquired property may involve the supplying of persons outside the corporation does not lead to illegal taxation.[4] But no power exists beyond that granted or implied,[5] which must be strictly in the prescribed method.[6] When the issuance of bonds is contemplated, the sanction of an election is often required[7] and limitations on bonded debt are met.[8] Such elections are usually initiated by ordinance or petition,[9] and are conducted in general like other elections unless otherwise provided.[10] When an election is to be had and several modes of providing a water system are proposed, they should be separately put on the ballot.[11]

This power includes the power to furnish water to inhabitants.[12] It may be exercised in abrogation of a franchise if therein reserved.[13] Incident to the power is that of incurring debts for the cost of construction,[14] such expense being "necessary."[15] The incumbrance on a plant taken over is not reckoned as the creation of a debt.[16]

2. The authority to use driven wells to obtain a water supply is included in the general authority to secure such a supply. Westphal v. New York, 75 App. Div. [N. Y.] 252.

3. Mayo v. Dover & F. V. Fire Co., 96 Me. 539. Mass. St. 1882, p. 107, c. 145, relating to the purchase of the rights of a certain water company by a town, construed. Gardner Water Co. v. Gardner [Mass.] 69 N. E. 1051.

4. The fact that the municipality may be obliged to furnish water to a few persons residing outside its limits will not make such taxation unequal within the meaning of the Maine constitutional provision forbidding unequal taxation. Mayo v. Dover & F. V. Fire Co., 96 Me. 539.

5. A village has no power to construct or purchase a waterworks system other than that expressly given it by statute. Laws N. Y. 1875, p. 157, c. 181, as amended, and Laws 1896, c. 769, relating to boards of water commissioners construed. In re Board of Water Com'rs of Village of White Plains, 176 N. Y. 239, 68 N. E. 348.

In Oklahoma, municipal corporations having a population of not less than 1,000 may call elections to issue bonds to construct a system of waterworks [Act Cong. March 4, 1898, c. 35, § 1]. Ter. v. Whitehall [Okl.] 76 Pac. 148. Where a school district comprises other territory besides the town, the school census required by the statute before action on bonds is complied with where a census of the entire district is taken and an assessor's census of the town shows a bona fide population of over 1,000. Id.

A stipulation in a suit to enjoin a city from constructing a waterworks, that the city intended to and would if not restrained construct said works and raise the funds therefor in the manner provided by law, eliminates any question as to the legality or regularity of the proceedings taken by the city to raise funds for the work. City of Helena v. Helena Waterworks Co. [C. C. A.] 122 Fed. 1.

6. The commissioner of water supply of Greater New York has no authority to purchase land for the purpose of increasing the water supply of Brooklyn without the approval of the New York board of aldermen, and until maps of the land to be acquired have been prepared and approved in accordance with the provisions of the city charter secs. 486, 488, 489. Greater New York Charter (Laws 1901, c. 466), construed. Queens County Water Co. v. Monroe, 83 App. Div. [N. Y.] 105.

7, 8. See Municipal Bonds, 2 Curr. Law, p. 931.

9. A petition to the mayor to call an election need not go to the council. State v. Topeka [Kan.] 74 Pac. 647. See, also, Municipal Bonds, 2 Curr. Law, p. 931.

10. See Municipal Bonds, 2 Curr. Law, p. 931; Elections, 1 Curr. Law, p. 981.

11. Under Session Laws 1897, c. 82 and 1901, c. 107, authorizing cities of the first class to provide themselves with waterworks of their own, the purchase of an existing plant and the construction of a new one are distinct methods of executing such design, and a ballot submitting to the voter a proposition to issue bonds, "to purchase, procure, provide or contract for the construction of waterworks," is dual and for that reason illegal and an election carried thereby is void. City of Leavenworth v. Wilson [Kan.] 76 Pac. 400.

12. Under Burns' Rev. St. of Indiana 1901, § 3541, a city may construct works to obtain water for the use of its inhabitants. Scott v. La Porte [Ind.] 68 N. E. 278.

13. The grant of a franchise to a water company reserving to the municipality the right to construct "works or plants of a public nature" allows the city to construct a waterworks subject to statutory regulations. City of Helena v. Helena Waterworks Co. [C. C. A.] 122 Fed. 1.

14. It is held that under the laws of North Carolina (Code, §§ 3800, 3821), municipal corporations may contract debts for the purpose of building and maintaining waterworks. Fawcett v. Mt. Airy [N. C.] 45 S. E. 1029. See, also, Municipal Corporations, § 13, 2 Curr. Law, p. 978.

15. An expense incurred by a city for the purpose of building and maintaining a waterworks is held to be a necessary expense

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The power to take properties for public ownership may be limited to companies formed under the act in which it is found, and in such case, the method of fixing the valuation cannot be changed by subsequent legislation.[17] A void statute cannot be construed as authorizing the acquisition of property by payment of a value as determined by the means it provided.[18] The owner of a system of waterworks maintained under a valid city ordinance granting a franchise therefor for 20 years may enjoin the city from taking the plant in an unlawful manner notwithstanding the expiration of the period.[19] A taxpayer may restrain a city from attempting to illegally vote away this right.[20] Where a water district is authorized to acquire, by eminent domain, the entire plant of a water company, it must take all the property of said company whether named in the act or not, including the plant, real estate not connected therewith, and the franchises, rights, and privileges held by it, exercised or capable of being exercised.[21] It takes the same rights and no greater;[22] and since the franchise passes, the subsequent acts of the company do not work a forfeiture.[23] Both the plant and the franchises are to be appraised at their present value, having in view their value as property in itself and as a source of income.[24] The vote of a town to purchase the plant

within the meaning of art. 7, § 7, of the constitution of North Carolina, providing that debts may not be contracted by cities except for necessary expenses. Fawcett v. Mt. Airy [N. C.] 45 S. E. 1029.

16. State v. Topeka [Kan.] 74 Pac. 647. Laws 1901, ch. 73, does not authorize the acquirement by condemnation of any waterworks other than such as may have been constructed under a grant made under the provisions of such act. City of Leavenworth v. Leavenworth City & Ft. L. Water Co. [Kan.] 76 Pac. 451.

17. The company was to have a voice in selecting the appraisers. It was sought to be changed to a compulsory sale, the valuation to be fixed by a commission which it had no voice in selecting. City of Leavenworth v. Leavenworth City & Ft. L. Water Co. [Kan.] 76 Pac. 451.

18. Gen. St. 1901, sec. 664, intending to authorize cities to acquire waterworks by condemnation, and held void because of its defective title, cannot be construed as an attempt to require the sale of such property at a valuation to be fixed as therein provided. City of Leavenworth v. Leavenworth City & Ft. L. Water Co. [Kan.] 76 Pac. 451.

19. The method provided for fixing the valuation was by three appraisers, the method of selection of whom was fixed, which method was sought to be changed by a subsequent statute. City of Leavenworth v. Leavenworth City & Ft. L. Water Co. [Kan.] 76 Pac. 451.

20. An injunction granted to a taxpayer restraining the city council of Omaha from passing an ordinance postponing the accruing of the city's right to purchase the waterworks, such postponing being contrary to the provisions of the charter. Poppleton v. Moores [Neb.] 93 N. W. 747.

21. Kennebec Water Dist. v. Waterville, 97 Me. 185.

22. Where a municipal corporation purchases the franchises and rights of a water company, it acquires no greater rights than the corporation owned, and is limited to the same source of supply that the corporation was. Smith v. Stoughton [Mass.] 70 N. E. 195.

23. Where a town exercises its option to buy the plant of a water company by voting to purchase, the company's franchise passes to the town, and the company cannot thereafter forfeit it so as to deprive itself of the right of compensation therefor as part of the plant. Town of Bristol v. Bristol & W. Waterworks [R. I.] 55 Atl. 710.

24. Kennebec Water Dist. v. Waterville, 97 Me. 185. In fixing the value of the franchises it is proper to consider whether or not they are exclusive and irrevocable, their net earning power, present and prospective, developed and capable of development, at reasonable rates. The value to be assessed is that to the seller and not to the buyer. In considering prospective development of the use of a franchise, consideration must also be had of the fact that further investment may be necessary. Faithfulness or unfaithfulness in the duty to furnish pure water at reasonable rates shown in the past is not to be considered nor is the liability of the franchises to be forfeited on account of past acts of the company. In determining the present value of the company's plant, the actual construction cost thereof, with allowance for depreciation, may be considered; also the rates charged theretofore, and the actual earnings; the quality of water furnished, and the fitness of the plant and of the source of water supply to meet reasonable requirements in the present and the future; and the cost of reproducing the works. The cost of reproduction is evidence merely, and not conclusive. In fixing structure value appraisers should consider, among other things, the present efficiency of the system, the length of time necessary to construct the same de novo, the time necessary to develop a new system to the level of the present one in respect to business and income, and any added net income or profits which would accrue to a purchaser during the time required for such construction and development. Incidental damages to property having no relation with that taken except that of common ownership cannot be considered, nor can the impairment of the economy and efficiency of administration obtained by the combination of

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of a water company creates an absolute contract from which the town cannot afterwards withdraw.[25] The public in possession pending ascertainment of the price is bound to reasonable care and not liable for natural deterioration.[26]

Title of the public.—The right to lay water pipes under a public highway is a mere license, and not an easement in the land.[27] In laying a water pipe under a public highway, a town acts in the same capacity as a nonmunicipal water company, and its rights are no greater.[28] A town has a beneficial interest in an easement of an aqueduct acquired by it for water pipes through private land, and is entitled to compensation when such land is condemned for another public use.[29]

Inalienability of public supply.—In Utah such rights are inalienable but this does not avoid a contract to allow diversion and return of water for power purposes,[30] and the city's attempted abrogation could destroy no vested rights therein.[31]

Contracts for public supply.—The general rules in regard to the contracts of municipal corporations apply to contracts made by them with water companies.[32] A municipal corporation has only such powers to contract with water companies as are granted to it by statute[33] or implied by reasonable necessity,[34] and as to some minor organizations it is not incident.[35] But ultra vires contracts

many systems under one management. Outside property taken should be appraised at its fair market value. So far as the water system is practically exclusive, the element of good will should not be considered. Appraisers should consider the fact that the company is a going concern, with a profitable business and a permanent income assured and now being earned. Subject to these limitations, the owner is entitled to any appreciation due to natural causes. Id. The fact that franchises are to be taken does not impair their value for purposes of appraisal. The capitalization of income, even at reasonable rates, cannot be adopted as a sufficient or satisfactory test of present value, but present and probable future earnings may be considered in determining present value. If the company has received unreasonable rates in the past, the excess cannot be deducted from the amount to which the company would otherwise be entitled. Id.

25. Town of Bristol v. Bristol & W. Waterworks [R. I.] 55 Atl. 710.

26. Where a town has voted to purchase a waterworks, but the price to be paid has, by consent, been referred to a master, the company is bound to take such care of the property as a prudent man would take of his own, but not to provide against deterioration caused by time and natural wear, or to make improvements or additions thereto. Town of Bristol v. Bristol & W. Waterworks [R. I.] 55 Atl. 710.

27. In re Condemnation of Land at Nahant, 128 Fed. 185.

28. Under the law of Massachusetts, on the taking of the highway for a superior public use, neither the town nor the company is entitled to compensation for the easement. In re Condemnation of Land at Nahant, 128 Fed. 185.

29. In re Condemnation of Land at Nahant, 128 Fed. 185.

30. The Constitution of Utah (art. 11, sec. 6), prohibiting the direct or indirect alienation by a city of any water rights or water supply owned by it, does not forbid the acquisition by a power company of the right to connect its flume with the water canal of a city, for the purpose of discharging water therein. Salt Lake City W. & E. P. Co. v. Salt Lake City, 25 Utah, 441, 71 Pac. 1067.

31. The abrogation by a city of an agreement whereby a power company was permitted to divert and use the water of the city and then discharge it into the city canal, could not divest the company of any vested rights under such agreement. Salt Lake City W. & E. P. Co. v. Salt Lake City, 25 Utah, 456, 71 Pac. 1069.

32. General rule as to application of payments applied. Marion Water Co. v. Marion, 121 Iowa, 306, 96 N. W. 883. Having recognized an assignment, the city cannot defeat the assignee's right to collect rentals. Id.

33. Scott v. La Porte [Ind.] 68 N. E. 278. In the absence of express legislative authority, a contract of a city to annually levy taxes, and pay the proceeds to a water company for water, for all time to come, is ultra vires and void. Westminster Water Co. v. Westminster [Md.] 56 Atl. 990. Power of water commissioners. Holroyd v. Indian Lake, 85 App. Div. [N. Y.] 246.

34. Where a municipal corporation is given power to establish a water system of its own, it may contract with private individuals for the establishment of a water system and purchase water from them. Jack v. Grangeville [Idaho] 74 Pac. 969. A contract for water supply for a municipal corporation running 30 years is not unreasonable as a matter of law. Hurley Water Co. v. Vaughn, 115 Wis. 470, 91 N. W. 971.

35. Laws of Kentucky (2 Acts 1883-84, p. 1318, c. 1494, and 3 Acts 1887-88, p. 170, c. 1071), establishing certain civil districts construed, and held to give the trustees of such districts no authority to contract for water for fire protection. Such district is not liable for water furnished for that purpose. South Covington Dist. v. Kenton Water Co. [Ky.] 78 S. W. 420.

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may be ratified,[36] and by ratifying a revised ordinance a contract made by the original is made valid.[37] A water district contracting for a supply must, in New York, provide for the whole area of the district.[38] A municipal corporation is not liable to pay for water furnished under an ultra vires contract,[39] nor answerable for breach.[40] But where a city, empowered to authorize the construction of a waterworks system, adopts an ordinance granting to a company the right to lay mains in the streets, agreeing to pay hydrant rentals, etc., it cannot defeat the recovery of such rentals on account of any irregularity occurring in connection with the execution or adoption of the contract.[41] An original contract against public policy may be purged by a new agreement with an assignee.[42] A municipality contracting with a company to supply it with water cannot thereafter violate such contract by erecting waterworks of its own[43] if such contract is exclusive.[44]

A contract for water is not as a rule one which need be let to the lowest bidder.[45] In Idaho, it may be with an individual.[46] A contract may be formed by

36. Laws of Maine (Sp. Laws 1863, c. 262; Sp. Laws 1887, c. 260), creating a certain village fire company and ratifying a contract made by it for a water supply, construed. Mayo v. Dover & F. Village Fire Co., 96 Me. 539. A contract by a city for waterworks, void because beyond the power of the city to make, may be validated by legislative enactment. City of Leavenworth v. Leavenworth City & Ft. L. Water Co. [Kan.] 76 Pac. 451.

37. Where a city council revises an ordinance relating to the establishment of a waterworks system and then re-enacts it, and the legislature, at the instance of the city, passes a curative act legalizing the revised ordinance, the contract created by the original ordinance and all that had been done in pursuance thereof is thereby completely ratified. Marion Water Co. v. Marion, 121 Iowa, 306, 96 N. W. 883.

38. Laws of New York (Laws 1890, c. 566, § 81, as amended by Laws 1896, c. 678, § 1), providing for the establishment of water supply districts and authorizing them to contract for a water supply, construed, and held that the district to be supplied under the contract must equal in area the district as actually established. People v. Sisson, 173 N. Y. 606, 66 N. E. 1115.

39. People v. Sisson, 173 N. Y. 606, 66 N. E. 1115. A town cannot subject its taxpayers to a liability under a contract to take water from an unauthorized source. Smith v. Stoughton [Mass.] 70 N. E. 195.

40. A contract for the construction of waterworks in connection with a supply which a town had no legal authority to use is impossible of performance within limits legally permissible to the parties, and hence damages cannot be recovered for its breach. Smith v. Stoughton [Mass.] 70 N. E. 195. Where city officers connect the artesian well on the land of another with the city water mains and take water therefrom without the consent of the owner, the city is not liable for the water so appropriated. Wilson v. Mitchell [S. D.] 97 N. W. 741.

41. Marion Water Co. v. Marion, 121 Iowa, 306, 96 N. W. 883. A city having authority to contract for the construction and maintenance of a waterworks and to rent fire hydrants cannot avoid the payment of such rent on the ground that certain other provisions in the contract were beyond its authority to make and hence were void. City of Valparaiso v. Valparaiso City Water Co., 30 Ind. App. 316, 65 N. E. 1062.

Variance between contract and election: An ordinance embodying a contract with a water company is not rendered invalid because it differs in details from the one submitting the matter to a vote of the people under the Iowa Statute (McClain's Code, sec. 643), where there is no wide departure, and the changes do not appear to be detrimental to the interests of the city or indicate bad faith on the part of the council. City of Centerville v. Fidelity T. & G. Co. [C. C. A.] 118 Fed. 332.

42. Where a municipal corporation sold its waterworks and the vendee thereafter assigned its rights and the assignee entered into a contract with the city to supply it with water during the life of the franchise, which contract referred to the original contract between the city and the vendee as to hydrant rentals, the two contracts were held to be distinct and a debt of the city for hydrant rentals under the latter contract was not void because the original contract created a monopoly. City of Tyler v. L. L. Jester & Co. [Tex. Civ. App.] 74 S. W. 359.

43. Potter County Water Co. v. Austin Borough, 206 Pa. 297. Section 2 of the Pennsylvania act of assembly approved May 3, 1901 (P. L. 140), is unconstitutional, so far as it tends to avoid existing contracts. Id.

44. A water company held not to have an exclusive right to furnish water to a municipality and the latter held to have a right to contract for water with another company without purchasing the works of the first. Philipsburg Water Co. v. Philipsburg Borough, 203 Pa. 562.

45. Under the laws of Wisconsin (Laws 1883, c. 292; Laws 1879, c. 211, Rev. St. 1878, c. 40), a town has authority to contract with a waterworks company for a public supply of water and such contract need not be let to the lowest bidder. Hurley Water Co. v. Vaughn, 115 Wis. 470, 91 N. W. 971. The provisions of the Charter of the City of Oakland, providing for the letting of contracts to the lowest bidder, have no application to a contract for the furnishing of water to the municipality. Contra

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attaching hydrants to mains and accepting service at legally adopted rates.[47] A plan of streets is not always essential.[48] An ordinance granting a franchise and making a contract for hydrant service has been held double in its subject;[49] hence, expressing simply the purpose of authorizing construction of works does not include service contracts.[50] A contract may be annulled for failure to supply pure water as agreed;[51] but if the supply is merely deficient it will not be annulled until opportunity to do better; but rentals may be scaled.[52] Impurity is not a defense to action for hydrant rentals for fire protection.[53]

In Iowa a statute authorizing contracts for hydrant service and rentals has been construed to support a contract at a rate greater than the special tax levy will meet,[54] but a Nebraska court refused to compel a further levy to meet a deficiency.[55] Hydrant rentals being "ordinary" expense fall within a restriction against creation of indebtedness for such purpose,[56] but being also "current" expense may be contracted for the future.[57] It is not allowable to guarantee that

Costa Water Co. v. Breed, 139 Cal. 432, 73 Pac. 189.

46. Under the laws of Idaho (Rev. St. 1887, §§ 2230, 2710; Sess. Laws 1893, pp. 97, 34), a city may contract with an individual for a water supply, and such contract may be for a period of 30 years. Jack v. Grangeville [Idaho] 74 Pac. 969.

47. Where a city attaches fire hydrants to the mains of a water company, and by ordinance regulates the charge therefor, which is collected by the company, a contractual relation relative to the furnishing of water for fire protection is established, in the absence of a statute requiring a formal written contract to bind the city. Town of Ukiah City v. Ukiah W. & I. Co., 142 Cal. 173, 75 Pac. 773.

48. A city ordinance authorizing a contract with a water company for a water supply held not to be inconsistent in its terms and not to be invalid because of a failure to annex a plan of the streets in which it was proposed to lay the company's pipes. Kemble v. Millville, 69 N. J. Law, 637.

49, 50. Marion Water Co. v. Marion, 121 Iowa, 306, 96 N. W. 883.

51. A city ordinance granting to certain persons the privilege of constructing a system of waterworks in consideration of which the grantees agreed to furnish a certain amount of pure water, constitutes a contract, and an equitable action will lie on the part of the city to cancel the contract on the ground that the grantees have failed to furnish pure water. The right of the city is not limited to the express terms of forfeiture provided in the ordinance. City of St. Cloud v. Water, L. & P. Co., 88 Minn. 329, 92 N. W. 1112.

52. Where a water company fails, for a part of the time, to furnish pure water and sufficient pressure for fire protection as provided by the terms of a contract between it and the city, it is held that the city should only be held to pay a reasonable price for the water furnished, but that the company should have a reasonable time to comply with the terms of the contract before the same is annulled. Harrodsburg Water Co. v. Harrodsburg, 24 Ky. L. R. 2193, 73 S. W. 1032. A city, by accepting water from a water company in less quantities and at less pressure than is required by its contract, without attempting to terminate the contract or take possession of the works on that account, waives the right to insist that the contract was thereby abandoned by the company, but, in an action to recover on the contract, the city may offset the difference in value between the water actually furnished and that contracted for. Joplin Waterworks Co. v. Joplin, 177 Mo. 496, 76 S. W. 960.

53. In an action to recover hydrant rentals due under a city ordinance, an allegation that the water company furnished impure water, contrary to the terms of said ordinance, to the city's damage, is not good as a defense or counterclaim, in the absence of an allegation to the effect that the company did not furnish a proper supply for fire protection. Industrial Trust Co. v. St. Cloud, 88 Minn. 437, 93 N. W. 114.

54. Laws of Iowa (Code 1873, §§ 473, 475), relating to contracts for payment for hydrant rentals and providing for the levy of a special tax for the payment of water rents, construed. Marion Water Co. v. Marion, 121 Iowa, 306, 96 N. W. 883.

55. Statutes of Nebraska (Comp. St. 1887, c. 14, § 69, subd. 15), authorizing certain cities and villages to levy a tax of not to exceed seven mills for hydrant rentals, construed, and held a limitation on the taxing power to raise revenue for that purpose, and that the court will not compel an additional levy in excess of that amount to pay judgments on a contract for water furnished. State v. Royse [Neb.] 98 N. W. 459.

56. In Texas it is held that providing fire hydrants and water for the protection of the city, by renting the same at a stipulated price, is a matter of ordinary expenditure and the prima facie presumption is that the indebtedness incurred therefor was intended to be paid out of the current revenues, collected for current expenses, and that such indebtedness is legal although there is no compliance with the constitutional provisions (Const. art. 11, §§ 5, 7) regarding the creation of debts by cities. City of Tyler v. L. L. Jester & Co. [Tex. Civ. App.] 74 S. W. 359.

57. A contract by a city to pay rentals for fire hydrants at stated times in the future is one of current expenditure, and does not create an indebtedness of the kind contemplated by the Iowa constitution limiting municipal indebtedness. City of Centerville v. Fidelity T. & G. Co. [C. C. A.] 118 Fed. 332.

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the taxes levied for such purpose shall always produce a stipulated sum.[58] Reasonable rates apply if none are fixed.[59] Obligations to pay rentals are not necessarily extinguished by public purchase of the plant.[60] Under the New York statute, an action for unliquidated damages arising from a breach of a contract made with the water commissioners of a town cannot be maintained against the town.[61]

Right to water service.—If a right exists, it may be protected by injunction[62] provided the user is ready to pay reasonable rates.[63] An individual can acquire no vested right as against the public in the continued service of a public utility.[64]

Injuries from deficient supply or equipment and negligence.—A water company contracting with a city to furnish water for general fire protection is bound to use ordinary care to supply a sufficiency thereof;[65] but the city and its citizens have no cause of action against it for municipal property destroyed by fire through the company's failure to supply sufficient water.[66] A city owning a waterworks system is not liable to citizens whose property is destroyed by fire for failure to provide an adequate supply of water;[67] nor is a city liable in such case where it contracts with a water company to furnish the water.[68] The owner of a building cannot recover from a water company for failure to furnish sufficient water to put out a fire therein, under a contract between the company and his tenant to keep the building supplied with sufficient water for fire purposes, and the absence of proof that such tenant acted as the agent of the owner in making such contract.[69] The business of selling water by a city to its inhabitants and to street

58. A contract of a city to pay to a water company for a water supply the proceeds of an annual tax of a certain per cent on all the assessed property in the city and guaranteeing that the amount to be paid in any year shall not be lower than that produced by the present valuation of assessment is ultra vires and void. Westminster Water Co. v. Westminster [Md.] 56 Atl. 990.

59. Under a contract between a city and a water company that the company shall furnish hydrants at a yearly rental of not more than $50 each, the company, in the absence of any agreement, is entitled to recover a reasonable rental therefor, and a subsequent resolution of the council providing that only $10 rental shall be paid does not affect this right. City of Valparaiso v. Valparaiso City Water Co., 30 Ind. App. 316, 65 N. E. 1063.

60. Where a city contracted to pay certain specified hydrant rentals at specified times for a specified period to a trustee under a mortgage to be given by the water company to raise money to build waterworks, such rental to be applied exclusively to the payment of the interest and principal of the company's bonds, the fact that the city afterwards purchases the works from the company does not relieve it from continuing to pay such rentals. City of Centerville v. Fidelity T. & G. Co. [C. C. A.] 118 Fed. 332.

61. Laws 1900, c. 451. Such right may be questioned by demurrer. Holroyd v. Indian Lake, 85 App. Div. [N. Y.] 246.

62. A water company will be enjoined from cutting the connection between its main and the private pipe of a consumer entitled to use the water under a contract with said company. Edwards v. Milledgeville Water Co., 116 Ga. 201.

63. This case was that of a private purveyor under contract. Mulrooney v. Obear, 171 Mo. 613, 71 S. W. 1019.

64. Asher v. Hutchinson Water, L. & P. Co., 66 Kan. 496, 71 Pac. 813. Injunction will not lie at the suit of a private consumer of water to restrain the removal of water mains, where the city council has determined that such removal will be for the best interest of the public, even though such removal will greatly decrease the value of his property. Id.

65. Town of Ukiah City v. Ukiah W. & I. Co., 142 Cal. 173, 75 Pac. 773.

66. Town of Ukiah City v. Ukiah W. & I. Co., 142 Cal. 173, 75 Pac. 773. A water company occupying the streets of a city under an ordinance requiring it to maintain a certain number of fire hydrants to be paid for by the city is not liable for failure to furnish sufficient water for fire protection, resulting in the burning of a building. Nichol v. Huntington Water Co., 53 W. Va. 348. A taxpayer has no right of action for damages by fire on a contract of a water company with a town to pay all damage resulting from its negligence in constructing, operating, or repairing its works. Smith v. Great South Bay Water Co., 82 App. Div. [N. Y.] 427.

67. Power is legislative and governmental. Town of Ukiah City v. Ukiah W. & I. Co., 142 Cal. 173, 75 Pac. 773. In providing protection against fire to its inhabitants, the municipality exercises a power conferred solely for the public good, and from the exercise of which the municipality, as a property owner, derives the same incidental benefit that every other property owner does. Id.

68. Town of Ukiah City v. Ukiah W. & I. Co., 142 Cal. 173, 75 Pac. 773. The contract is not for the protection of any particular property, but for the general protection of

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sprinkling contractors is not an exercise of the police power.[70] A water company is liable for damages resulting from the leaking of one of its meters.[71]

Water rates.—Water companies are entitled to charge just and reasonable rates for their services,[72] which they may themselves fix or change within the limits prescribed, if any.[73]

The legislature has a general power, however, to provide for the regulation of water rates,[74] and may require water companies to supply their customers at reasonable rates, to be fixed by the legislature or by municipal authorities.[75] And it may commit such power to local authorities.[76] Having empowered local authorities to regulate rates to a certain minimum, it still retains power to make further reasonable reductions.[77] This power is superior to private contracts as to rates.[78] It has been held that a reduction of a contract rate in the exercise of such a power, if reasonable, is not offensive to the constitutional guaranties.[79]

all, and is entered into by the town as a public agency. Id.

69. Nichol v. Huntington Water Co., 53 W. Va. 348.

70. The city is not exempt from liability for negligence in maintaining such system, where it is used both for fire protection and for supplying the inhabitants with water on the ground that it is exercising a governmental function. City of Chicago v. Selz, Schwab & Co., 202 Ill. 545, 67 N. E. 386. A city is liable for damages caused by its failure to exercise proper care in maintaining the pipes of its water system in a safe condition, even though they are rendered unsafe by the wrongful or negligent acts of others. Dunston v. New York, 91 App. Div. [N. Y.] 355.

71. Louisville Water Co. v. Weis, 25 Ky. L. R. 808, 76 S. W. 356.

72. Spring Valley Water-Works v. City & County of San Francisco, 124 Fed. 574; Kennebec Water Dist. v. Waterville, 97 Me. 185.

73. Under an ordinance authorizing a water company to charge such rate to consumers as it may from time to time establish, the company may fix any reasonable rate for service to consumers not embraced in those classes for which a maximum rate is prescribed by the ordinance. Wilson v. Tallahassee Waterworks Co. [Fla.] 36 So. 63. And the temporary and experimental adoption of one rate does not debar the company from a right to increase it to another which is reasonable. Id.

74. Kennebec Water Dist. v. Waterville, 97 Me. 185.

75. City of Tampa v. Tampa Waterworks Co. [Fla.] 34 So. 631. Such companies are performing services of a public nature and their business is affected with a public interest so as to subject them to regulation by requiring them to charge reasonable rates, and such regulation does not violate the "due process" clause of the federal constitution. Id.; Wilson v. Tallahassee Water Works Co. [Fla.] 36 So. 63.

76. Under the Constitution of California (Const. 1849, art. 4, § 31), reserving to the legislature the right to alter and repeal the corporation laws, an act (Cal. Stat. 1885, p. 95, § 5), authorizing supervisors to reduce water rates below those fixed by former statutes, was not beyond the power of the legislature, provided such rates were not reduced to an unreasonable degree. Stanislaus County v. San Joaquin & K. R. C. & I. Co., 192 U. S. 201. City charter of La Crosse, Wis. (Laws 1887, c. 162), relating to the right of the city council to fix water rates and to compel consumers to furnish water meters, construed. State v. Gosnell, 116 Wis. 606, 93 N. W. 542. The power to regulate water rates is included in the authority conferred on cities of the third class by the laws of Kentucky (Ky. Stat. 1899, § 3290), to provide for water service by contract or by works of their own, and to make regulations for the management thereof, and to fix the rates to consumers, and this power is not affected by the provisions of a prior municipal ordinance granting the right to construct water works, and giving the grantee power to make all needful rules and regulations for the use of water by consumers, not inconsistent with the law. City of Owensboro v. Owensboro Waterworks Co., 191 U. S. 358.

77. Cal. Statutes 1853, p. 87, as amended by Cal. St. 1862, p. 540, providing that water companies should have power to fix rates, subject to regulation by the appropriate board of supervisors, but that such board should not reduce such rates so as to yield to the stockholders less than 1½ per cent per month on the capital invested, did not create a contract between the state and the companies to the effect that the state could not thereafter reduce rates below that amount. Stanislaus County v. San Joaquin & K. R. C. & I. Co., 192 U. S. 201.

78. Contracts between a water company and consumers are subject to whatever power the city possesses to modify rates. Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 Law. Ed. 887.

79. Under the laws of Florida (Acts 1901, c. 5070, p. 240), a city has the power to reduce water rates from a price fixed in a contract between it and a water company, to a less, but reasonable rate. City of Tampa v. Tampa Waterworks Co. [Fla.] 34 So. 631. The obligations of a contract between a city and a water company, providing that the company shall supply water to consumers at a specified rate, are not impaired by an ordinance reducing such rates, where the company was organized under a statute expressly giving power to the city to regulate such rates. Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 Law. Ed. 887.

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But it cannot prescribe rates, which, if enforced, would amount to a confiscation of the property of the company.[80]

In determining what is a reasonable rate, the circumstances in each particular case must be taken into consideration.[81] The basis by which the reasonableness of rates is to be determined is the present value of the property of the company and the value of the services rendered;[82] a rate not being regarded as unreasonable unless it is so inadequate as to virtually depreciate property, without just compensation.[83] In order that it may have just compensation, a company is entitled to demand a fair return upon the reasonable value of the property at the time it is being used for the public.[84] The reasonableness of rates may be affected, for a time, by the degree of hazard to which the original enterprise was naturally subjected, that is such hazard as may have been justly contemplated by those who made the original investment, but not unforeseen or emergency risks.[85]

In an action to have water rates declared unreasonable, the body fixing the rates is the proper party defendant, and the default of the parties who set the original proceeding in motion is immaterial, so long as it defends the case.[86]

Water rates are not taxes which must be uniform.[87]

Sometimes special rates are required for the benefit of public institutions.[88] As a condition of the franchise, water companies are in Idaho[89] required to furnish water for certain public uses free.

It is usual to grade rates according to classes of users,[90] and a minimum charge per annum may be laid on small consumers under meter service.[91]

80. Spring Valley Waterworks v. San Francisco, 124 Fed. 574. Rates unreasonably low. Tampa Waterworks Co. v. Tampa, 124 Fed. 932; Palatka Waterworks v. Palatka, 127 Fed. 161. Rates not unreasonably low. Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250, 91 N. W. 1081.

81. Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250, 91 N. W. 1081.

82. Spring Valley Waterworks v. San Francisco, 124 Fed. 574. In fixing what is a just rate, the court ought to take into consideration the cost of the plant and of its annual operation, its depreciation, and a fair profit to the company above its charges for its services, and give such weight to them as, under all the circumstances, will be just to the company and the public. Stanislaus County v. San Joaquin & K. R. C. & I. Co., 192 U. S. 201; Kennebec Water Dist. v. Waterville, 97 Me. 185. The cost of the plant, the price which it brought at foreclosure sale, and its valuation for purposes of taxation, together with its depreciation in value and in the value of services rendered by it to consumers, due to a diminution in water supply on account of a long continued drought, may be considered in determining the reasonableness of rates. San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 Law. Ed. 892. Not necessarily unreasonable because they will only yield a full return on the total value of the plant when the water company shall serve the entire area which its system will supply. Id. A reduction of water rates under Cal. St. 1885, p. 95, § 5, so as to give an annual income of 6 per cent. on the then value of the property held not unreasonable. Stanislaus County v. San Joaquin & K. R. C. & I. Co., 192 U. S. 201.

83. Courts will not declare water rates fixed by a board of supervisors unreasonable unless it appears that there has been such a flagrant attack on the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use. San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 Law. Ed. 892.

84. San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 Law. Ed. 892; Stanislaus County v. San Joaquin & K. R. C. & I. Co., 192 U. S. 201.

85. Kennebec Water Dist. v. Waterville, 97 Me. 185.

86. San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 Law. Ed. 892. Under the constitution of Idaho (art. 15, § 6), it is the duty of the legislature to provide the manner in which reasonable maximum water rates may be established, and until it does so a contract between an owner and user in regard to such rates will govern. Jack v. Grangeville [Idaho] 74 Pac. 969.

87. Water rates charged consumers by a municipality are not taxes within the meaning of those constitutional provisions which require a uniformity of taxation. Powell v Duluth [Minn.] 97 N. W. 450.

88. Mass. Acts 1898, c. 564, relating to rates to be paid to a town for water used by public institutions, construed. Selectmen of Danvers v. Com., 184 Mass. 502, 69 N. E. 320.

89. Under Rev. St. Idaho 1887, § 2711, water companies are required to furnish water for street sprinkling, etc., free of charge. It is immaterial whether such companies obtain water from public streams or from private wells. Boise City Artesian Hot & Cold Water Co. v. Boise City [C. C. A.] 123 Fed. 332.

90. The words "domestic rates," as used in a water contract, mean rates allowed to

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For nonpayment of charges, the service may be cut off, but the user must have had notice or a demand for such charges,[92] and they must be legal[93] and not in dispute;[94] but to impose a charge for so doing is a penalty and can be recovered and fixed only by due process of law and not arbitrarily.[95]

Rules and regulations of service pipes, meters and consumption.—Water companies and municipalities undertaking to furnish water to the inhabitants of a city may adopt reasonable rules for the conduct of the business and the operation of their plants.[96] Thus they may provide for tests,[97] approvals, and installations[98] of meters, require separate service pipes and meters,[99] may compel a user to abide by meter service once he has procured it,[1] and in time of drouth may scale down and pro-rate the consumption.[2] Such rules, in so far as they affect consumers, are binding on them, and may be enforced even to the extent of denying water to those who refuse to comply therewith.[3]

§ 16. *Contracts, grants and licenses.*—Water rights are property and hence assignable.[4] If appurtenant, they cease with that estate to which they appertain.[5]

be charged for domestic purposes, and include the reasonable use of water in water-closets and bath tubs of a dwelling house, and otherwise for the comfort and convenience of those residing therein. Birmingham Water Works Co. v. Truss, 135 Ala. 530. Where a waterworks company, by contract with the city, agreed to furnish water at fixed yearly **rates to dwellings**, and to charge for water furnished to others by measurement, the fact that the owner of a house used and occupied it both as a dwelling and **boarding house** did not destroy its character as a dwelling or require the owner to pay measured service rates. Id. **An ordinance fixing meter rates construed** and held that the maximum meter rate therein prescribed applied only to consumers of the class designated therein. Wilson v. Tallahassee Waterworks Co. [Fla.] 36 So. 63.

91. A minimum annual charge by a water company for meter service to small consumers, in excess of the ordinary price of the quantity of water consumed by them, is not in itself unreasonable. Wilson v. Tallahassee Waterworks Co. [Fla.] 36 So. 63.

92. Extra charge because more persons were in the family than the original rate allowed. City of Van Alstyne v. Morrison [Tex. Civ. App.] 77 S. W. 655. An ordinance prohibiting city officials from furnishing water to consumers until all their indebtedness for water previously supplied shall have been discharged is reasonable and valid. Jones v. Nashville, 109 Tenn. 550, 72 S. W. 985.

93. Failure to pay illegal water bill held to give the city no right to shut off plaintiff's water. Healy v. New York, 41 Misc. [N. Y.] 27.

94. Under New York City Charter (Laws 1901, c. 466, §§ 473, 475), the city is not authorized to shut off the water of a consumer to enforce collection for the difference between the amount of water actually used and the amount indicated by the meter. Healy v. New York, 90 App. Div. [N. Y.] 170.

95. Supply cut off for nonpayment. Greater New York Charter (Laws N. Y. 1901, c. 466, § 478), in regard to rules for use of Croton water, construed. People v. Monroe, 41 Misc [N. Y.] 198.

96. Jones v. Nashville, 109 Tenn. 550, 72 S. W. 985.

97. As to duty of commissioner of water supply of Greater New York to test water meters under the city charter (Laws N. Y. 1897, p. 165, c. 378), see People v. Monroe, 84 App. Div. [N. Y.] 241.

98. The commissioner of water supply of Greater New York cannot be compelled to allow a water meter, shown by tests of his experts to be inherently defective, to be placed in a building, though such meter is of a type approved by the board of aldermen. City Charter of Greater New York, § 475 (Laws 1897, c. 378, § 475, as amended by Laws 1901, c. 466), construed. People v. Monroe, 39 Misc. [N. Y.] 369. And as to authority to install meters see Foster v. Monroe, 40 Misc. [N. Y.] 449.

99. A rule requiring a separate pipe and meter for each house furnished with water is reasonable. Specht v. Louisville Water Co. [Ky.] 78 S. W. 142.

1. A rule providing that water meters might be installed at the pleasure of the water board or of a consumer and that after they had once been installed the consumer could not thereafter return to the flat rate, is reasonable and may be enforced, where the meter rates are reasonable and no discrimination between consumers is shown. Powell v. Duluth [Minn.] 97 N. W. 450.

2. A provision in a contract between a water company and a consumer to the effect that the company should furnish a certain amount of water, subject to such reasonable rules and regulations as the company might make gave the company a right to make a pro rata distribution of water to consumers when it was, by reason of drought, unable to furnish them with the full amount called for by their contracts. Contract construed. Souther v. San Diego Flume Co. [C. C. A.] 121 Fed. 347.

3. Jones v. Nashville, 109 Tenn. 550, 72 S. W. 985. City held not to have been justified in shutting off a citizen's water supply by the fact that he drained his waste water into the street, thereby causing a nuisance, or because he failed to pay an extra charge for using water for a bath tub, where no notice of such extra charge had been given him, or on the ground that the rate he was paying was for a family of five instead of six. City of Van Alstyne v. Morrison [Tex. Civ. App.] 77 S. W. 655.

4. A grant of a water right for mining purposes held appurtenant to the mine and

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When acted on a verbal agreement will be protected.[6] A deed of the dominant estate carries all appurtenant water rights,[7] and in California, the grant of irrigated lands may carry with it a water right.[8] A riparian owner may, in a grant of riparian land, reserve a right to use riparian water.[9] A dam passes with a grant of the bed of a stream or the banks thereof if the contrary intention be not apparent.[10] The usual rule against adverse user by one of co-tenants applies,[11] and the water right appurtenant to the estate is apportioned according to their interests.[12] A right to enter on another's premises to repair an irrigation ditch does not give a right to do anything to the ditch which will impair the use of it by others entitled thereto.[13] Rights may be gained by prescription[14] equal to the use made.[15] One who is entitled as a lessee forfeits his rights by hostile claim.[16] A license to construct an artificial ditch over the land of another may be revoked after the construction of the ditch.[17] A parol license to use water may be converted into an easement where the licensee takes possession thereunder and makes valuable improvements, relying on such license.[18] The ordinary rules of construction apply to grants and leases of, and contracts in relation to, water rights.[19] Illustrative cases are cited.[20] Where water is for a stated purpose, there is an implied war-

hence assignable. G. W. Featherston Min. Co. v. Young, 118 Ga. 564.

A conveyance of a water right is not a conveyance of land within the meaning of the United States Homestead laws (Rev. St. U. S. §§ 2290, 2291, U. S. Comp. St. 1901, pp. 1389, 1390), forbidding any alienation by an entryman. Under Cal. Civ. Code (§§ 658-660, 662), a water right is not land. Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. 826.

5. The right of a mining company to pump water from the estate of another held to be an easement appurtenant to the mine, which by its terms terminated on the abandonment of the mine. G. W. Featherston Min. Co. v. Young, 118 Ga. 564.

6. Where plaintiffs enlarged an irrigation ditch, under a verbal agreement with the owners that they are to have an interest in the water and reduce their land to cultivation, the owners may not thereafter revoke such agreement. Rights of parties owning fractional interests in canal determined. McPhee v. Kelsey [Or.] 74 Pac. 401.

7. An easement for the maintenance of an irrigation ditch held to have passed as an appurtenance to the dominant estate without specific mention in the deed conveying such estate. American Nat. Bank v. Hoeffer [Colo. App.] 70 Pac. 156. A conveyance of a lot, "with all rights, privileges, immunities and appurtenances," held not to convey water pipes in the street in front of the same, and belonging to the grantor, but only the right to obtain water through such pipes at reasonable rates. Mulrooney v. Obear, 171 Mo. 613, 71 S. W. 1019.

8. The transfer of real property on which a water right has been in part habitually used carries with it, under the laws of Cal. (Civ. Code, § 1104), to the grantee a right to use the water to the same extent as it was formerly used by the grantor. Pendola v. Ramm, 138 Cal. 517, 71 Pac. 624.

9. Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282.

10. A dam will pass as part of the bed of a stream under a grant of the land on the bank. Roberts v. Decker [Wis.] 97 N. W. 519, construing a deed. Such a construction is not repelled by a grant of a specified flow of water for power actually exceeding half the natural flow; nor by an agreement to pay half the cost of maintenance. Id.

11. Where a lower proprietor becomes under a contract a cotenant with upper proprietors in water diverted for irrigation purposes, his failure to use his entire share within a reasonable time will not affect his right thereto. Beers v. Sharpe [Or.] 75 Pac. 717.

12. A cotenant cannot transfer any greater interest in an appropriation of water for irrigation purposes appurtenant to the estate than is commensurate with his own interest. Beers v. Sharpe [Or.] 75 Pac. 717.

13. Blankenship v. Whaley, 142 Cal. 566, 76 Pac. 235.

14. The right to maintain a ditch may be acquired by prescription. Baumgartner v. Bradt, 207 Ill. 345, 69 N. E. 912. In order to acquire an easement for the maintenance of a ditch over the lands of another by adverse user, it must be maintained without material change of location for the full statutory period. Dunn v. Thomas [Neb.] 96 N. W. 142.

15. The extent of a presumed grant to swell water upon the land of an adjoining owner is measured by the land actually flooded and not by the height of the dam by which the swelling is occasioned. Lynch v. Troxell, 207 Pa. 162.

16. Tenant held to have renounced right to take water as a lessee by claiming adversely. White v. Brash [Ariz.] 73 Pac. 445.

17. Spink v. Corning, 172 N. Y. 626, 65 N. E. 1122. A parol license to a private corporation to lay water mains through land, without compensation, is revoked by a subsequent deed containing no reservation of such right. Jayne v. Cortland Waterworks Co., 42 Misc. [N. Y.] 263.

18. Moore v. Neubert, 21 Pa. Super. Ct. 144. The right of certain citizens to take water from a water main held to be a mere license which no lapse of time could convert into an easement. Louisville & N. R. Co. v. Dickey, 24 Ky. L. R. 1710, 72 S. W. 332.

19. See Contracts, 1 Curr. Law, p. 626; Deeds of Conveyance, 1 Curr. Law, p. 908.

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ranty of fitness.[21] In a grant or reservation of a water right, reference to an existing use will be considered as a measure of quantity, merely, unless a contrary intention is apparent from the language used or the surrounding circumstances.[22] A grant of what the grantor owned only will be implied.[23] A grant of a pond and lands adjoining thereto includes the land under water;[24] but where owners of a pond have conveyed it and the lands thereunder, the riparian rights become severed from the adjacent land and they cannot be subsequently revived by a deed calling for the pond as a boundary.[25] Persons who organize a corporation to take over their rights may thereby become entitled to water only under rules of the company.[26] It has been held that a similar transaction gave proportionate shares in all waters held by their corporations.[27] Where a canal is granted to a

20. Grants construed: "To develop any and all waters" includes sub-surface waters. Roberts v. Krafts, 141 Cal. 20, 74 Pac. 281. A deed conveying to a reservoir company the right to "flow and overflow" certain land held to convey an easement. Phillips v. Watuppa Reservoir Co., 184 Mass. 404, 68 N. E. 848. A grant of land in a deed for the purpose of being flowed by a pond held to be a conveyance of an easement merely. In re Brookfield, 176 N. Y. 138, 68 N. E. 138. Rights of parties to water under certain deeds and a decree of court determined. Craig v. Crafton Water Co., 141 Cal. 178, 74 Pac. 762.

Contract for the use of water for irrigation purposes, construed. McPhee v. Kelsey [Or.] 75 Pac. 713. Contract giving a party the right to divert water from a certain stream, construed. Roberts v. Krafts, 141 Cal. 20, 74 Pac. 281. Agreement to furnish other supply if diversion diminished present supply, construed. Id. A contract relating to the use of certain pipe for furnishing a water supply, construed, and delay in performance held waived. Daly v. Ruddell, 137 Cal. 671, 70 Pac. 784.

Contract for the joint use of water in an irrigation canal construed and evidence held sufficient to show that plaintiff was deprived of the water to which he was entitled by the wrongful act of defendant. Stoner v. Mau [Wyo.] 72 Pac. 193; Id., 73 Pac. 548.

Other water supply: A contract between a railroad company and a land company in relation to a private waterworks, construed and held that the railroad company had a right to abrogate it at any time. Louisville & N. R. Co. v. Dickey, 24 Ky. L. R. 1710, 72 S. W. 332. A reservation in a deed to riparian land of so much water as is necessary to work a No. 5 hydraulic ram is not void for uncertainty as to the quantity of water reserved. Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282.

Water power contracts: A purchaser of water power from a private power canal is entitled only to the amount of power which he buys. Powers v. Perkins [Mich.] 92 N. W. 790. The grant of the right to build a dam abutting on the grantor's farm, reserving to him all water rights and the right to use power from the dam, does not give the grantor the right to compel the grantee to construct gates and sluiceways therein for the use of the grantor. Harris v. Ft. Miller P. & Paper Co., 79 App. Div. [N. Y.] 225. See, also, section 15, ante. Lease of water power, construed. Channel v. Merrifield, 206 Ill. 278, 69 N. E. 32.

Logging rights: A right to maintain a log boom in a river held not to have been granted by a deed granting the use of the banks of the river for the purpose of tying logs and rafts to the trees thereon. Bowman v. Dillion, 24 Ky. L. R. 2382, 74 S. W. 240.

21. Where one contracts to deliver water to another for a particular purpose, the law implies a warranty on his part that it shall not be unfit for the purpose on account of his own conduct. Gold Ridge Min. Co. v. Tallmadge [Or.] 74 Pac. 325. One who contracts to deliver "second water" for mining purposes must remove the debris, such as soil and tailings therefrom. Id.

22. Hartford Woolen Co. v. Bugbee [Vt.] 56 Atl. 344; Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282. A deed conveying a tract of land with the mill thereon, with the right to use a certain reservoir, held, to only convey rights in the reservoir as then existing and to give to the grantee only such rights in a new reservoir, built to take its place, as would be equivalent to his rights in the old. Horne v. Hutchins [N. H.] 55 Atl. 361.

23. When land on one side is granted with an undivided share of "power," the share of the grantor's half and not the share of all is meant. He had previously granted the other side and then granted one-third and one-sixth shares of the power and the land on the hither side. Roberts v. Decker [Wis.] 97 N. W. 519.

24. Gibbs v. Sweet, 20 Pa. Super. Ct. 275. A dam passes under a grant conveying the bed of the stream. Roberts v. Decker [Wis.] 97 N. W. 519.

25. Gibbs v. Sweet, 20 Pa. Super. Ct. 275.

26. Appropriators of water in common who organized a corporation and conveyed to it their rights held to have thereby surrendered to it the control and regulation of the supply, and such a corporator, who by license of the company takes water from its ditch, thereby waives any previous right to so appropriate the water, and consents to the regulations imposed by the company. Fuller v. Azusa Irrigating Co., 138 Cal. 204, 71 Pac. 98.

27. Certificates of stock in a colonization company issued in return for water certificates in two water companies, held to entitle the holder of each share to a proportionate share of all the water of the company. Richey v. East Redlands Water Co., 141 Cal. 221, 74 Pac. 754.

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company, it does not necessarily take the water rights therein.[28] Cases wherein the sufficiency of the evidence to establish such rights has been examined are also collected.[29] Where great injury is threatened by the assertion of doubtful rights, injunctive relief to afford protection pending decision will be given.[30] The measure of damages for breach of a contract to furnish water for irrigation purposes, resulting in damage to a crop, is the difference between the amount actually realized from the crop and the amount which would probably have been realized if the water had been furnished, less the cost of raising, harvesting and marketing the same.[31]

§ 17. *Torts relating to waters.*—The measure of damages for flooding the land of another is the injury actually occasioned to the date of the suit.[32] Where the flooding of land results in permanent injuries to lands, the measure of damages is the depreciation in their market value.[33] If the reasonable cost of repairing the injuries is less than the diminution in the market value, it is the cost of repairing.[34] Where an action is for successive overflows of land, the measure of damages is the sum of the differences between the market value of the land immediately before and after the several flows.[35] In an action for damages to land

28. Deeds of water rights provided that when the estimated capacity of the canal was disposed of, the title to the canal should pass to the purchasers. Held, in a suit brought by a company organized to take the canal for the benefit of the purchasers, for the cancellation of water rights issued by the vendor, after the estimated capacity of the canal had been disposed of, that the company did not stand in the place of the vendor as regards such excess rights, but merely represented the purchasers of the rights up to the estimated capacity of the canal, and owed no obligation to purchasers of excess rights. Blakely v. Ft. Lyon Canal Co., 31 Colo. 224, 73 Pac. 249.

29. **Irrigation and other supply:** Evidence held insufficient to show a breach by defendant of a contract to furnish water for irrigation purposes. Ford v. Calcasieu River Irr. Co., 110 La. 981. Evidence held not to show any unreasonable use of or interference with the water running through certain pipes by defendant. Howard v. Howard, 88 App. Div. [N. Y.] 175. Evidence held to show that a ditch was constructed under an agreement that plaintiff was to have a perpetual right to use the water for irrigation purposes, jointly with others. Blankenship v. Whaley, 142 Cal. 566, 76 Pac. 235. Evidence in a suit to enforce an irrigation contract held to show that such contract was made with a prior owner of the land and **that a subsequent purchaser had notice** of the contract under which the ditch was constructed. Id.

30. Evidence held sufficient to entitle plaintiff to an injunction restraining defendant from destroying his head gates and ditches. One who is the first to buy and the first to use the water of an irrigation company, under a contract by which it sells him, for all time, water sufficient to irrigate 160 acres may not be subject to the same rules of distribution as those who subsequently purchase rights. Hargrave v. Hall [Ariz.] 73 Pac. 400. An injunction granted restraining the discharge of water into a tail race in such quantities as will be dangerous to plaint f's land, until the right of defendant so t do has been determined. Colonial Woolen Co. v. Trenton W. P. Co. [N. J. Eq.] 55 Atl. 993.

31. Raywood Rice, C. & M. Co. v. Langford Bros. [Tex. Civ. App.] 74 S. W. 926; Raywood Rice, C. & M. Co. v. Wells [Tex. Civ. App.] 77 S. W. 253.

32. Flood by embankment. Atlanta, K. & N. R. Co. v. Higdon [Tenn.] 76 S. W. 895. The measure of damages for temporarily obstructing a waterway to the injury of an upper estate is the loss of crops thereby occasioned. Jones v. Kramer & Bros. Co., 133 N. C. 446. Where a person is damaged by the wrongful discharge of surface water on his land, the measure of damages is the actual damage caused thereby up to the beginning of the action, without reference to the total depreciation of the value of the inheritance. Ready v. Mo. Pac. R. Co., 98 Mo. App. 467, 72 S. W. 142.

The measure of damages for the destruction of crops by the overflow of an irrigation ditch is the value of the crop destroyed, measured by the amount of crop produced on like and similar lands in the neighborhood, taking into consideration all elements as to the probable yield of the land in question. Market value, together with the cost of seeding, caring for, harvesting and marketing the crop should be considered. Catlin Consol. Canal Co. v. Euster [Colo. App.] 73 Pac. 846.

The measure of damages in trespass for injuries caused by the construction of a dam is, in addition to the value of the property actually destroyed, the cost of restoring the property to its original condition, unless such cost should equal or exceed its value, in which case the value would be the measure of damages, and in addition thereto the actual loss sustained by the owner by being deprived of the full use of the property from the time the injury was committed up to the institution of the suit. Lynch v. Troxell, 207 Pa. 162.

33. Coleman v. Bennett [Tenn.] 69 S. W. 734. Permanency means practical irremediability. Id.

34. Post v. Merritt, 85 App. Div. [N. Y.] 239.

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from the diversion of water, testimony as to the difference in its value before and after the injury is admissible.[36]

In an action for damages for failure to properly maintain a ditch, resulting in the overflowing of plaintiff's land, held that if plaintiff, by himself cleaning out the ditch could have avoided the damage, he is entitled to recover only the reasonable cost of doing so.[37] Punitive damages will not be awarded unless the injuries were committed wantonly or maliciously.[38]

§ 18. *Crimes and offenses relating to waters.*—Under the laws of Iowa, the pollution of a river may be a public nuisance and may be punished as a crime.[39] An indictment under the Colorado statute for failure to furnish water for irrigation purposes is defective unless it designates the land for which the water was demanded and that the complainant was entitled to receive water from the ditch.[40] Where a city ordinance provides a penalty against the owner of occupied premises for failure to provide a sufficient water supply, the offense is committed at the premises in question.[41]

WEAPONS.

§ 1. The Crime of Carrying or Pointing Weapons (2071).
§ 2. Other Public Regulations Concerning Weapons (2072).
§ 3. Indictment and Prosecution (2073).
§ 4. Civil Liability (2073).

§ 1. *The crime of carrying or pointing weapons.*—The right of possessing and carrying such weapons as are ordinarily used in warfare or for defense is guaranteed by the constitution of the United States and doubtless all of the states,[42] though the legislature has an undoubted right under its police power to prohibit the carrying of them concealed,[43] or unconcealed at public assemblages or similar places, where their presence would be conducive to disorder.[44] Acting upon this right, most of the states have prohibited, with certain exceptions, the carrying of deadly weapons concealed. Under such statutes a razor,[45] an ordinary pen knife, when from the manner of its use it is likely to produce death,[46] a pistol not cocked,[47] and a pistol of which the mainspring is broken, but which can be fired by striking the hammer, are deadly weapons.[48]

Certain persons are excepted from the operation of the statutes, such as travelers,[49] police,[50] and other civil officers,[51] and all persons are exempted under

35. Houston & T. C. R. Co. v. Lensing [Tex. Civ. App.] 75 S. W. 826.
36. Briscoe v. Young, 131 N. C. 386.
37. Raleigh v. Clark, 24 Ky. L. R. 1554, 71 S. W. 857.
38. Lynch v. Troxell, 207 Pa. 162.
39. Evidence sufficient to convict defendant. State v. Glucose Sugar R. Co., 117 Iowa, 524, 91 N. W. 794.
40. Laws 1887, p. 308, § 3. Schneider v. People [Colo.] 71 Pac. 369.
41. Ordinance of the city of New Orleans, construed. State v. Marmouget, 110 La. 191.
42. An ordinance or statute prohibiting the carrying of weapons within the limits of a town is repugnant to the constitutional right to bear arms, in so far as the ordinary arms of warfare and defense are concerned. State v. Rosenthal, 75 Vt. 295; In re Brickey [Idaho] 70 Pac. 609; Wilson v. State, 81 Miss. 404.
43. In re Brickey [Idaho] 70 Pac. 609; State v. Boone, 132 N. C. 1107.
44. Thus in Texas a person has no right to carry a pistol at a picnic, though he is legally in possession and control of the premises [Pen. Code 1879, arts. 320, 321]. Monson v. State [Tex. Cr. App.] 76 S. W. 570.
45. Del. Laws 1881, vol. 16, p. 716, c. 548. State v. Iannucci [Del.] 55 Atl. 336.
46. State v. Roan [Iowa] 97 N. W. 997.
47. A pistol is a deadly weapon with which an aggravated assault may be committed, though it is not cocked. Pace v. State [Tex. Cr. App.] 79 S. W. 531.
48. Fielding v. State, 135 Ala. 56; State v. Tapit, 52 W. Va. 473.
49. One who deviates from his route to quarrel with one to whom he owes a grudge loses his right as a traveler. Cruz v. State [Tex. Cr. App.] 76 S. W. 435. A railway train porter is a traveler while on the road, within the exemption of travelers from prosecution for carrying weapons. Williams v. State [Tex. Cr. App.] 72 S. W. 380. The statute exempts travelers, but in the absence of evidence that defendant had a home, or that he was going from or returning to it, evidence that he had gone a short distance from one county to another would not

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certain circumstances. For instance, in many states exception is made in favor of one who is at his own place of business,[52] or dwelling house,[53] who has purchased a pistol and is carrying it home,[54] who is returning a borrowed pistol,[55] who is carrying one to the shop for repairs,[56] who has been threatened and the threats communicated to him,[57] and in Texas, where defendant has reasonable grounds for fearing an unlawful attack upon his person and the danger is so imminent and threatening as not to admit of the arrest of the person about to make such attack on legal process, he can arm himself to protect against the danger.[58] But the mere fact that he has had a difficulty with another does not justify him in carrying a pistol when he is in no imminent danger of attack,[59] and though a party may have a right to carry a pistol home after purchasing it,[60] or to return a borrowed pistol, or to carry it while traveling, he has no right to deviate from his way for the purpose of raising a difficulty with one with whom he had had trouble.[61]

Intoxication[62] or that defendant did not intend to carry the pistol concealed is no defense.[63] Nor is it a defense that accused thought he had a right to carry it, and would have had, had the statute attempting to authorize him been constitutional.[64]

A conviction of shooting at random on the public highway bars a subsequent prosecution for flourishing a deadly weapon during the same quarrel.[65] Coming into possession of a pistol at a place of public worship is not carrying a pistol to a place of public worship.[66]

It is unlawful in Wisconsin by statute for any one to intentionally point a gun or pistol at another.[67]

§ 2. *Other public regulations concerning weapons.*—It is unlawful by stat-

entitle him to exemption. Harris v. State [Tex. Cr. App.] 77 S. W. 610.

50. State v. Tapit, 52 W. Va. 473. The exemption of a peace officer or policeman exempts him only in his bailiwick and not while in a distant part of the state where he is not authorized to serve process, though he claims to be acting as a detective searching for stolen property. Ray v. State [Tex. Cr. App.] 70 S. W. 23.

51. A person carrying the United States mail under contract, though bonded and sworn, is not a civil officer of the United States within the exception of the statute punishing the carrying of concealed weapons [N. C. Code 1883, § 1005]. State v. Boone, 132 N. C. 1107. And if he were, the statute exempting such officers while in the discharge of their official duties would not exempt him while on his way home after delivery of the mail. Id.

52. A railway train porter is at his place of business while at work with his train, within the exemption allowing persons to carry weapons while at their places of business. Williams v. State [Tex. Cr. App.] 72 S. W. 380.

53. State v. Tapit, 52 W. Va. 473.

54. Runnels v. State [Tex. Cr. App.] 76 S. W. 463; State v. Tapit, 52 W. Va. 473.

55. Cruz v. State [Tex. Cr. App.] 76 S. W. 435. The owner had left it with a prospective purchaser, and on learning that he would not buy it, took it from him to carry it home. Fields v. State [Tex. Cr. App.] 78 S. W. 932.

56. The exception of the statute allowing the owner to carry a pistol to a shop for repairs is no defense to another who so carries one at the request of the owner. State v. Tapit, 52 W. Va. 473.

57. Mendin v. State [Miss.] 33 So. 944. Evidence that the preceding night there was a disturbance in defendant's chicken coop and that two nights before a window was broken in his house is too indefinite to constitute a defense to the charge of carrying a pistol concealed in the pocket. Wilson v. State, 81 Miss. 404.

58. Williams v. State [Tex. Cr. App.] 72 S. W. 380. Under such circumstances, one need not withdraw from the place of danger, but may arm himself for protection. Cunningham v. State [Tex. Civ. App.] 78 S. W. 930.

59. Hood v. State [Tex. Cr. App.] 72 S. W. 592.

60. Runnels v. State [Tex. Cr. App.] 76 S. W. 463.

61. Cruz v. State [Tex. Cr. App.] 76 S. W. 435; Runnels v. State [Tex. Cr. App.] 76 S. W. 463.

62, 63. Fielding v. State, 135 Ala. 56.

64. Statute incorporating private police and detective agency. Swincher v. Com., 24 Ky. L. R. 1897, 72 S. W. 806.

65. Carman v. Com., 25 Ky. L. R. 1048, 76 S. W. 1078.

66. Under a statute making it a misdemeanor to carry a weapon to any place of public worship. One got possession of a pistol at a spring which was so near the church, as in legal contemplation to be at the church. Culberson v. State [Ga.] 47 S. E. 175.

67. Sanb. & B. Ann. St. § 4397. Horton v. Wylie, 115 Wis. 505, 92 N. W. 245.

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ute in Wisconsin for a minor to be armed with a dangerous weapon,[68] for any dealer or other person to sell, loan or give any pistol or revolver to a minor,[69] and for any person to use or have in possession any toy pistol, toy revolver or toy firearm.[70]

The exception of the statute punishing the discharge of firearms on or near a public highway, that they may be discharged on defendant's own premises, does not include the premises of another where defendant shot by permission.[71]

Reasonable[72] regulations or licenses on dealers in pistols and pistol cartridges will be upheld. Where a pawnbroker sells only such pistols as come to him as pledges and are unredeemed, his license as such will protect him from prosecution for selling pistols without a license.[73]

§ 3. *Indictment and prosecution.*—The indictment need not allege that the pistol carried was a deadly weapon,[74] nor negative exceptions in the statute contained in separate clauses from that defining the offense, such as that the place was not about the defendant's dwelling, nor that he was not carrying the weapon from the place of purchase to his dwelling house, nor that he was carrying it from his dwelling to a place where repairing was done, to have it repaired, nor that the defendant was not an officer,[75] and in order to convict of carrying concealed deadly weapons, it is not necessary for the prosecution to prove that the carrying was unlawful as the burden is on the defendant to prove that it was lawful;[76] but where the exception is a part of the offense itself, it is necessary to allege and prove that the case is not within the exception.[77] Evidence of the conversation and acts of third persons previous to the discovery that defendant had a pistol is immaterial,[78] but evidence that defendant took one from another and on attempting to put it in his pocket discovered his own to the bystanders is admissible as a part of the transaction.[79] Instructions should avoid comment on the evidence.[80]

§ 4. *Civil liability.*—A cause of action exists in favor of one injured by a firearm unlawfully in the hands of another, though the shooting was accidental and there was no intent on his part to injure;[81] but a father is not liable for an injury negligently inflicted by a firearm in the hands of his minor son, where his possession of it was not unlawful, and the father was not negligent in allowing him to take it.[82]

WEIGHTS AND MEASURES.

Standardization is almost entirely statutory, and in the absence of an agreed standard of weight, the standard of the place where the commodity is purchased governs.[83] Penal regulations of weights and measures are presumed to be reasonable,[84] but are construed strictly.[85] An ordinance aimed at the use of a defective

68. Sanb. & B. Ann. St. § 4397b. Horton v. Wylie, 115 Wis. 505, 92 N. W. 245.

69. Rev. St. 1898, §§ 4397, 4397b. But a Stevens 22 cal. rifle is not within the statute. Taylor v. Seil [Wis.] 97 N. W. 498.

70. Rev. St. 1898, § 4397a. But a Stevens 22 cal. rifle, capable of killing game and a human being, is not a toy. Taylor v. Seil [Wis.] 97 N. W. 498.

71. Rumph v. State, 19 Ga. 121.

72. Statute imposing a license on dealers in pistols and pistol cartridges was unconstitutional, in that the license imposed was not graduated. The dealer in pistols was to pay $125.00 and the dealer in cartridges $50.00 regardless of the amount of business done. State v. Rittenberg [La.] 36 So. 330.

73. Morningstar v. State, 135 Ala. 66.

74, 75. State v. Tapit, 52 W. Va. 473.

76. State v. Iannucci [Del.] 55 Atl. 336.

77. Shooting firearms near a public highway not in defense of self or property. Rumph v. State, 119 Ga. 121.

78, 79, 80. Mumford v. State [Tex. Cr. App.] 78 S. W. 1063.

81. Horton v. Wylie, 115 Wis. 505, 92 N. W. 245.

82. Taylor v. Seil [Wis.] 97 N. W. 498.

83. Richardson & Co. v. Cornforth [C. C. A.] 118 Fed. 325.

84. An ordinance providing a penalty for any one using an incorrect or defective weight or measure is presumed to be reasonable. City of New York v. Hewitt, 91 App. Div. [N. Y.] 445.

85. Under an ordinance imposing a penalty for use of false and defective weights

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weight does not involve the question of intentional alteration.[86] Where an ordinance does not require proof of intent or of guilty knowledge, such proof is not essential in an action to recover the penalty,[87] and in such case a court cannot as a matter of benignity suspend the operation of a statute.[88] Upon proof of defendant's violation of statute, the burden is upon him to explain it.[89]

WHARVES.

Right to erect and maintain wharves and ownership therein.—The right to construct wharves depends on the extent and character of the riparian ownership,[90] subject to public regulation by the state or its municipal delegate.[91] Under a city charter authorizing the council to establish and maintain wharves and lease land for same, the city may lease the land and authorize lessee to build wharf.[92] An act creating a harbor line commission for a city and according to littoral proprietors the right to wharf out across the shore lot, as a right appurtenant to ownership of abutting uplands, does not give the owner of the upland any rights in the way of ownership to the shore lands, though it might have a bearing on the question of their right to wharf out across the shore lot.[93] It has been held that the owner of a pier may by prescription obtain title to maintain it on public lands under water.[94] A city may be concluded by exercise of right of location under a reservation.[95]

A municipality has power to make temporary leases of public wharves in the interest of commerce.[96] When the lessee has enjoyed the benefit of such leases, he has no standing to plead that the premises were locus publicus and that the contract was ultra vires.[97] The city of New York may purchase the interest of a person in a wharf, the city being authorized to acquire title to dock property.[98]

for certain purposes, evidence that a person used false weights is not sufficient to convict. City of New York v. Spatz, 85 N. Y. Supp. 353.

Statute declares that it shall be unlawful for any factor, commission merchant, or other person or persons to employ other than the public weigher to weigh produce. Held, it did not prohibit a person engaged in storing cotton for customers, but who did not transact business as a factor or commission merchant, from weighing same for his customers. Galt v. Holder [Tex. Civ. App.] 75 S. W. 568.

86, 87. City of New York v. Hewitt, 91 App. Div. [N. Y.] 445.

88. Ordinance against using false or defective weights. City of New York v. Hewitt, 91 App. Div. [N. Y.] 445.

89. In an action against a coal dealer for the penalty imposed by Laws 1900, c. 327, § 150, for selling less than 2,000 pounds in weight to a ton of coal, where plaintiff proves that the coal only weighed 1,870 pounds at a public scale, defendant must show that the coal, when it left defendant's yard weighed 2,000 pounds. City of New York v. Henderson, 39 Misc. [N. Y.] 351.

90. See Navigable Waters, 2 Curr. Law, p. 989.

91. Under the constitution of Louisiana, the authority to consent to the building of private wharves in New Orleans is vested in the city council [Const. art. 290]. Words "council or other governing authority" refers to body having authority over river front. State v. Board of Levee Com'rs of Orleans Levee Dist., 109 La. 403.

92. Local acts Mich. 1887, p. 805. Kemp v. Stradley [Mich.] 97 N. W. 41.

Construction of municipal grant to land under waters. Hastings v. New York, 39 Misc. [N. Y.] 728. A reservation in a grant to an upland proprietor filling in lands, of so much of wharfage advantage as might accrue from so much of the street as might be appropriated by the city for the purpose of forming a slip or basin does not give grantor the right to appropriate entire bulkhead opposite premises and is void for uncertainty as covering nothing in existence or capable of identification. Reservation is subject of abandonment. Bell v. New York, 77 App. Div. [N. Y.] 437. Construction of state grants to abutting owners on navigable rivers. Thousand Island Steamboat Co. v. Visgar, 86 App. Div. [N. Y.] 126.

93. Act Feb. 28, 1887. A city is not estopped to assert title to wharves by the fact of levying taxes thereon. Turner v. Mobile, 135 Ala. 73.

94, 95. Bell v. New York, 77 App. Div. [N. Y.] 437.

96. To promote and extend the oyster and fish industry. Town of Morgan City v. Dalton [La.] 36 So. 208.

97. The condition of the lease was that he turn over to the city the oyster shells which he did not, and in an action for their value set up this defense. Town of Morgan City v. Dalton [La.] 36 So. 208.

98. Bell v. New York, 77 App. Div. [N. Y.] 437.

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Greater New York charter allows the city to proceed to condemnation of wharf property without attempting to agree with the owners as to the price.[99]

A pier may be in common as to some uses and in severalty as to others.[1]

Wharves are public[2] *and private,* public ones being open to the public use[3] without discrimination.[4] The fact that it extends beyond low water into the sea does not make it public.[5] A wharf may become public by such use like a street.[6]

Access to wharves.—Owners of abutting lands, erecting and maintaining public docks in a navigable river pursuant to a grant from the state, must allow the public the incidental right of passage over their abutting lands as far as necessary to go to and from the docks.[7] Since public wharves must be accessible, a wharf built under public grant at the end of a street is subject to the street which by operation of law is extended over it to the water,[8] but for such uses only as are compatible with wharf purposes.[9]

The right to collect wharfage is incident to ownership.[10] Where wharf extends to harbor line in navigable waters, the owner has no exclusive right to occupation of berth at all times in front of wharf and the owner may make no claim for wharfage against a vessel because while discharging at an adjoining wharf she partially overlaps his wharf at a time when he had no actual use for the space.[11] Where plaintiff under a municipal grant acquired right to wharfage from an exterior street at the time of construction, the city was held to account to plaintiff for wharfage collected by it from a bulkhead platform or pay value of plaintiff's rights on retaining bulkhead platform for its own use.[12]

Uses of public wharves.—A use inconsistent with wharfage purposes cannot be imposed by such authority.[13]

99. In re City of New York, 41 Misc. [N. Y.] 134.

1. A city and other owners of pier are as between themselves tenants in common and not owners in severalty of the pier structure, its surface use, and the wharfage from its outermost end, but own in severalty the wharfage from its sides, the pier being in front of several lots. In re City of New York, 41 Misc. [N. Y.] 134.

2. A wharf built by a railroad on which its tracks are laid making it a quasi terminal for transfer of goods is affected with public use preventing discrimination. West Coast Naval Stores Co. v. Louisville & N. R. Co. [C. C. A.] 121 Fed. 645. Railroad wharf is public. Macon, D. & S. R. Co. v. Graham & Ward, 117 Ga. 555.

3. Macon, D. & S. R. Co. v. Graham & Ward, 117 Ga. 555. One bound to erect and maintain docks for use of the public may not ask that another be restrained from using same. Thousand Island Steamboat Co. v. Visgar, 86 App. Div. [N. Y.] 126.

4. West Coast Naval Stores Co. v. Louisville & N. R. Co. [C. C. A.] 121 Fed. 645.

5. The lessee or owner of a pier, though the same extends into the waters of the ocean beyond the line of low-water mark is entitled to enjoin use by one who claims it to be a public pier since only the state could question the right to build there. Coney v. Brunswick & F. Steamboat Co., 116 Ga. 222.

6. Insufficiency of evidence of continued use sufficient to give public a right to use a wharf. Thousand Island Steamboat Co. v. Visgar, 86 App. Div. [N. Y.] 126.

7. Thousand Island Steamboat Co. v. Visgar, 86 App. Div. [N. Y.] 126.

8. New York City is without power to convey its submerged lands and a conveyance in fee of land covered by a pier gives only the right to maintain the pier and collect wharfage. Knickerbocker Ice Co. v. Forty-Second St. & G. St. F. R. Co., 176 N. Y. 408, 68 N. E. 864; Id., 39 Misc. [N. Y.] 27; Knickerbocker Ice Co. v. New York, 85 App. Div. [N. Y.] 530.

9. A wharf constructed at the end of a street under authority given cities to construct wharves and lease wharf privileges allowing free passage for persons and baggage is not a highway so as to prevent use similar to that of other wharves. Kemp v. Stradley [Mich.] 97 N. W. 41. Where a pier and the right of surface user and wharfage from the end were owned by the city and others, the several ownership of the right of wharfage from the sides of the pier was a mere incident of the joint ownership. In re City of New York, 41 Misc. [N. Y.] 134.

10. The owner of a wharf in New York City may collect charges for its occupation by merchandise for less than 24 hours, notwithstanding Greater New York Charter providing that the owner of a wharf may collect charges on merchandise after it has been left there over 24 hours. International Hide & Skin Co. v. New York Dock Co., 87 N. Y. Supp. 886; In re City of New York, 41 Misc. [N. Y.] 134.

11. The Davidson, 122 Fed. 1006.

12. Hastings v. New York, 39 Misc. [N. Y.] 728.

13. Under provisions of Greater New York Charter, § 845, the board of docks has no authority to grant a permit for the use as a dumping board of any wharf in the wa-

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Duty and care respecting wharf and injuries thereat.—The wharfinger must ascertain condition of bottom of waters adjacent to wharf and remove obstructions if possible, and if that cannot be done, to notify vessels of their existence.[14] Piers should be lighted.[15] If by negligence the wharf is allowed to become insecure and a vessel is injured, the wharfinger is liable.[16] He is not liable for injury caused by a gale of unusual severity.[17]

WILLS.

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The scope of this title is apparent from the analytical index. It does not include the law governing the rights and liabilities between successors in estate or that controlling the settlement of estates,[18] nor the law relating to the estates

ters of East River which has theretofore been used for the loading and discharging of sailing vessels employed in foreign commerce and having a draft of more than 18 feet. Brown v. New York, 78 App. Div. [N. Y.] 361. Permit for such purpose if construed as a license is revocable at pleasure. Id.

14. Hartford & N. Y. Transp. Co. v. Hughes, 125 Fed. 981. The master of a vessel invited to use a wharf did not assume the risk of collision with a hidden rock, the existence of which wharfinger should have known. Master is not required to take soundings and has a right to rely on assurances of wharfinger's agent. Garfield & P. Coal Co. v. Rockland-Rockport Lime Co., 184 Mass. 60, 67 N. E. 863. Owner of wharf must not allow passage to become so filled with obstructions that vessels may not discharge with safety without risk of grounding in low tide. Lewis v. Barber Asphalt Pav. Co., 123 Fed. 161. Evidence insufficient to show hidden obstruction at wharf causing barge to sink. McQuilkin v. Delaware River I. S. & E. Works, 124 Fed. 698.

15. Evidence insufficient to show negligence of branch pilot in failing to discover pier causing injury by collision which was unlighted in time to avoid injury. United States v. Charles G. Dunn Co., 124 Fed. 705.

16. Where a wharf was struck by a vessel, the question whether it fell by reason of the negligence of the operatives of the vessel was for the jury. It was shown that the piles had been used for some years, and that the vessel was moving slowly. Alaska S. S. Co. v. Collins [C. C. A.] 127 Fed. 937.

17. There may be no recovery for injury to vessel moored to pier where result of gale of unusual severity. Meyer v. Pennsylvania R. Co., 125 Fed. 428.

18. See Estates of Decedents, 1 Curr. Law, p. 1090; Election, etc., 1 Curr. Law, p. 992.

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which may have been created by the will except so far as the interpretation of the will involves such questions.[19]

§ 1. *Right of disposal, and contracts relating to it.*—A competent person acting freely may by will dispose of his property to whom he chooses whether wisely or the reverse, and though contrary to natural justice.[20] At common law a child may be disinherited without being mentioned in a will, unless it appeared that the omission of his name occurred through inadvertence or mistake;[21] but this rule has generally been changed by statute so as to give the omitted child a distributive share in his parent's estate unless it appears that the omission was intentional.[22] At common law, a wife's testamentary power was subject to her husband's marital rights in her property to dispose of which his consent was required,[23] but the Married Women's Acts have generally made both her real and personal estates her separate property, and thus given her the power to dispose of them by will, without his consent.[24] Neither can, save by an election,[25] defeat dower, curtesy, or other legal rights of a surviving spouse,[26] or homestead belonging to children.[27] These rules do not prevent devises from wife to husband.[28] Where the consent is necessary, a general assent to the making of a will is not sufficient, but consent to the particular will in question must be proved,[29] though it need not precede such making.[30] At common law, an estate per autre vie could

19. See Life Estates, etc., 2 Curr. Law, p. 741; Perpetuities, 2 Curr. Law, p. 1173; Trusts, and the like.

20. In re Holman's Will, 42 Or. 345, 70 Pac. 908; Wetz v. Schneider [Tex. Civ. App.] 78 S. W. 394. Validity of devises for charitable purposes, see Charitable Gifts, 1 Curr. Law, p. 510. Of community property, see Husband and Wife, 2 Curr. Law, p. 246. The right so to do is an incident of ownership and does not depend upon its judicious use. In re Holman's Will, 42 Or. 345, 70 Pac. 908; King v. Rowan [Miss.] 34 So. 325.

In certain states the amount disposable to charities is limited especially in wills made within a certain time before death (see Charitable Gifts, 1 Curr. Law, p. 510); in others certain inheritable rights are superior to testamentary disposals (see post, § 5D9, § 5F, also Descent and Distribution, 1 Curr. Law, p. 922; Election, etc., 1 Curr. Law, p. 992).

21. In re Millen's Estate [N. M.] 71 Pac. 1088. Where by decree of divorce, the testator was ordered to pay a monthly sum for the child's support the omission of such child from his will held not due to inadvertence or mistake. Id.

22. In re McMillen's Estate [N. M.] 71 Pac. 1088. A father may dispose of his estate, even as against his children, in such manner as he chooses. In re Alexander's Estate, 206 Pa. 47. He may convert debts due him from them into advancements. Cannot question correctness of advancements. Id. Statutes providing for pretermitted children are not intended to produce equality nor to diminish the power of the testator, and anything showing that the child was not forgotten prevents its application [Va. Code 1887, § 2528]. Allison v. Allison's Ex'rs, 101 Va. 537.

23. Rule not changed by Kentucky statute (Gen. St. art. 4, c. 52, § 15, Ky. St. 1899, § 2147), converting all personalty of married women into separate estate and conferring upon her power to dispose of it by will. Louisville City Nat. Bank v. Wooldridge, 25 Ky. L. R. 869, 76 S. W. 542.

24. His consent is not necessary to a will which does not interfere with his rights in her estate in case he survives her [Mass. Pub. St. 1882, c. 147, § 6.] Kelley v. Snow [Mass.] 70 N. E. 89.

25. See Election, etc., 1 Curr. Law, p. 992.

26. Mo. Laws 1895, p. 169, giving one-half the wife's estate to the husband, should be read in connection with Rev. St. 1899, § 2939, giving the wife the right to dispose of her estate by will subject to the rights of the husband. Waters v. Herboth [Mo.] 77 S. W. 305.

In Kansas one spouse may will away one-half of his or her property without the other's consent, even where no issue is left [Kan. Gen. St. 1901, c. 117 (§ 35a of the Wills Act)]. Noecker v. Noecker, 66 Kan. 347, 71 Pac. 815. In Minnesota, a husband may make testamentary disposition of personalty so as to cut off any interest of the surviving widow therein. Minn. Laws 1893, c. 116, Laws 1889, c. 46, did not change the law in above regard. In re Robinson's Estate, 88 Minn. 404, 93 N. W. 314. In California, a husband has no power to authorize by will the sale of community property except to pay debts. In re Wickersham's Estate [Cal.] 70 Pac. 1079.

27. In Florida, if testator has children he cannot make a testamentary disposition of the homestead [Fla. Const. 1885]. Palmer v. Palmer [Fla.] 35 So. 983.

28. A married woman may, in Tennessee, devise realty to her husband. Shan. Code, § 4247, giving power to devise real estate but that disposition should not affect the husband's curtesy, does not show an intent to except the power to devise to the husband. Hair v. Caldwell, 109 Tenn. 148, 70 S. W. 610.

29. Since he may revoke his consent at any time. Louisville City Nat. Bank v. Wooldridge, 25 Ky. L. R. 869, 76 S. W. 542; Kelley v. Snow [Mass.] 70 N. E. 89. Hence his consent to one will is not applicable to a second will substantially different. Id.

30. A wife's consent to her husband's dis-

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not be devised, but this rule has generally been changed by statute.[31] The right to dispose of custody of children is limited to such, if any, as is given by statute.[32]

Contracts to devise or bequeath.—The right to dispose of property by will may be the subject of contracts made during life to devise or bequeath it,[33] and such contracts are generally, if based on a valid consideration, valid and capable of being specifically enforced.[34] An action for damages in favor of the survivor is one of the remedies.[35] An agreement to make provision does not revoke a will made by the promisor disabling him to perform.[36]

§ 2. *Testamentary capacity, fraud, and undue influence. A. Essentials to capacity.*—A person who has sufficient mind and memory to understand the nature of what he is doing, and to recollect the property which he means to dispose of, the objects of his bounty, and the manner in which he wishes to distribute it, has testamentary capacity.[37] The time the will was executed is the

position of property by will may be given at any time during his life. Gallon v. Haas, 67 Kan. 225, 72 Pac. 770. No conflict between §§ 7972 and 7973 Kan. Gen. St. 1901, relating to wills of married persons. Id.

31. N. J. Gen. St. p. 3757, § 1. Folwell v. Folwell [N. J. Eq.] 56 Atl. 117.

32. In Mississippi, she is not authorized by the statute to make testamentary disposition of the custody of her children. Code 1880, § 2095, providing that the father may by will give the custody of a child to whomsoever he wishes. Edwards v. Kelly [Miss.] 35 So. 418.

33. Biggerstaff v. Van Pelt, 207 Ill. 611, 69 N. E. 804; Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118; Alerding v. Allison, 31 Ind. App. 397, 68 N. E. 185. A party may obligate himself to make his will in a particular way or to give specific property to a particular person. Stellmacher v. Bruder, 89 Minn. 507, 95 N. W. 324.

34. Teske v. Dittberner [Neb.] 98 N. W. 57; Jordan v. Abney [Tex.] 78 S. W. 486; Best v. Grolapp [Neb.] 96 N. W. 641. The contract must be complete, definite in its terms, and proved with clearness and certainty. Coveney v. Conlin, 20 App. D. C. 303. The validity and enforceability of an oral agreement to devise land depends on the nature of the contract and what has been done under it. Conlon v. Mission of the Immaculate Virgin, 87 App. Div. [N. Y.] 165. Improvements on land by a husband while living thereon with his wife, the money expended belonging to his ward, is not such part performance of an oral agreement as to obligate the wife to compensate the husband therefor by will or otherwise. Plunkett v. Bryant, 101 Va. 814. Where an uncle died intestate, having orally agreed to leave all his property by will to a nephew on certain conditions, which the nephew performed for 17 years, it was held the nephew was entitled to the estate subject only to administration. McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008. Contract to devise held not based on a sufficient consideration. Ide v. Brown [N. Y.] 70 N. E. 101. To enforce specific performance of such a contract, it must be certain and definite in all its parts. Conlon v. Mission of Immaculate Virgin, 84 App. Div. [N. Y.] 507; Price v. Price, 133 N. C. 494. Specific performance may be had of a certain and definite contract, performed by promisee, and free from objections. Rhoades v. Schwartz, 41 Misc. [N. Y.] 648. Specific performance may be enforced in a proper case by charging the property with a trust and directing a conveyance or accounting in accordance with the terms of the agreement. Plunkett v. Bryant, 101 Va. 814.

Evidence held sufficient to show contract to devise based on a consideration. In re Steglich's Estate, 91 App. Div. [N. Y.] 75. Evidence held insufficient. In re Hook's Estate, 207 Pa. 203; Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118; Winfield v. Bowen [N. J. Eq.] 56 Atl. 728. Proof must be full and satisfactory. Stellmacher v. Bruder, 89 Minn. 507, 95 N. W. 324.

Who may enforce: A contract between a husband and wife that the wife, in consideration of being made the husband's residuary legatee, will leave all her property to his son, at her death, is not enforceable by the son. Wait v. Wilson, 86 App. Div. [N. Y.] 485. Where the agreement is to devise property to a mother for the benefit of two children, on the death of one child, the mother is a necessary party to an action by the living child to enforce the agreement. Rhoades v. Schwartz, 41 Misc. [N. Y.] 648. A beneficiary under a contract to devise property, who is also the only natural heir of the original owner, and who is of the age when she was to take the property, may maintain suit to enforce it, against persons claiming subsequently under a will of the owner. Id.

Waiver of right: An appeal from the probate of the will will not bar claimant from suing to enforce the contract. Spencer v. Spencer [R. I.] 55 Atl. 637.

35. Banks v. Howard, 117 Ga. 94.

36. A promise by a wife to her husband that if he would not make a will and in case he predecease her that she would make certain provisions for his sisters does not revoke an existing will by the wife but at most creates a lien in favor of the sisters on property inherited by the wife from the husband. Hibberd v. Trask, 160 Ind. 498, 67 N. E. 179.

37. Ward v. Brown, 53 W. Va. 227; Crowson v. Crowson, 172 Mo. 691, 72 S. W. 1065; Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129; Stull v. Stull [Neb.] 96 N. W. 196. One has sufficient mental capacity to make a will when he knows the value and extent of his property, the number and names of those who are the natural objects of his bounty and their deserts with reference to their treatment of him, and has memory sufficient to carry these things in mind long enough

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time of test.[38] If there is unconsciousness,[39] physical weakness,[40] or unsoundness on any fact such as to impair this ability, capacity is lacking, whether it be from suggestion[41] or delusion.[42] It must be shown to have operated to cause the production of the will.[43]

An insane delusion is a persistent belief in supposed facts which have no real or believable existence, accompanied by conduct based thereon.[44] No belief that has any evidence, however slight, for its basis is in law such a delusion.[45]

Mere prejudice,[46] or the unequal division of the property between the children,[47] or the fact that one is disinherited, or that the will may be contrary to natural justice, is not sufficient to vitiate it, though such facts may be considered in determining the issue of testamentary capacity.[48]

to have the will prepared and executed. Walt v. Westfall, 161 Ind. 648, 68 N. E. 271; Stewart v. Lyons [W. Va.] 47 S. E. 442; Ivison v. Ivison, 80 App. Div. [N. Y.] 599. Sufficient capacity at the time of execution to make a disposition of his estate with judgment and understanding in reference to the amount and situation of his property, and the relative claims of the different persons who should be the objects of his bounty. Berry v. Safe Deposit & Trust Co., 96 Md. 45. Must be capable of comprehending all his property and all persons who reasonably come within his bounty with sufficient intelligence to understand his ordinary business and to know what disposition he is making of his property. Catholic University of America v. O'Brien [Mo.] 79 S. W. 901. Evidence held to show sufficient capacity in testator within above test. Id. Must have sufficient understanding and intelligence to transact ordinary business affairs, and to comprehend the transaction then in question, the nature and extent of his property, and to whom he is giving the same. Lorts v. Wash, 175 Mo. 487, 75 S. W. 95.

38. Though dictated during a lucid interval. Instruction held proper. James White Memorial Home v. Haeg, 204 Ill. 422, 68 N. E. 568.

39. If testator by reason of unconsciousness or mental or physical inability is unable to dissent from the attestation and to prevent the same should he so desire, the will is invalid. Ward v. Brown, 53 W. Va. 227.

40. Ward v. Brown, 53 W. Va. 227.

41. Evidence held to show that will was result of suggestions of others imposed on testator, and that he did not have testamentary capacity. In re Downing's Will, 118 Wis. 581, 95 N. W. 376.

42. A submission of the issue of whether testator was of sound and disposing mind is proper though the caveat admitted sound mind except that testator had insane delusions in respect to those who were the natural objects of his bounty. National Safe Deposit, S. & T. Co. v. Heiberger, 19 App. D. C. 506. A delusion as to the wife's infidelity based upon no grounds held to justify setting aside will making inadequate provision for the dependent wife and disposing of the property to next of kin and charities. In re Jenkins' Will, 39 Misc. [N. Y.] 618.

43. In re Calef's Estate, 139 Cal. 673, 73 Pac. 539. Proof of a delusion without proof that it controlled or affected the execution of the will is insufficient to show want of capacity. Evidence insufficient to show that delusions as to hidden treasure and a belief in spiritualism affected the execution of the will. Walt v. Westfall, 161 Ind. 648, 68 N. E. 271; Stull v. Stull [Neb.] 96 N. W. 196. The mere belief in spiritualism is not proof of insanity and without proof that such belief resulted in some insane delusion which prompted the will it will not be set aside. Evidence held insufficient to warrant setting aside will. Buchanan v. Pierle, 205 Pa. 123. Fact that testator was afflicted with senile dementia on one subject would not necessarily render him incompetent. Hamon v. Hamon [Mo.] 79 S. W. 422.

44. In re Jenkins' Will, 39 Misc. [N. Y.] 618; Schmidt v. Schmidt, 201 Ill. 191, 66 N. E. 371. Delusions must be shown to be spontaneous and firmly fixed beliefs of a diseased mind, which no argument or evidence could remove, and which a rational mind would not entertain, and not mere temporary hallucinations or unfounded dislikes or antipathies or false opinions and beliefs. In re Calef's Estate, 139 Cal. 673, 73 Pac. 539.

45. Mere belief that his relatives have ill treated him or conspired to defraud him is not an insane delusion, if there is any basis whatever therefor. Stull v. Stull [Neb.] 96 N. W. 196.

46. Prejudice against a child is not a ground for setting aside a will unless it can be explained upon no other ground than that of an insane delusion. Prejudice against son held not to amount to an insane delusion where testator after devising one fourth the remainder to such son and after giving a life estate to the widow considered the advisability of disinheriting such son. Schmidt v. Schmidt, 201 Ill. 191, 66 N. E. 371. Contestant must show that the ill feeling alleged as cause for his exclusion was groundless. Scarborough v. Baskin, 65 S. C. 558.

47. Evidence insufficient to show mental incapacity. Graham v. Deuterman, 206 Ill. 378, 69 N. E. 237.

48. The fact that testatrix bequeathed the bulk of her property to a public library to the exclusion of brothers and sisters is not evidence of lack of testamentary capacity; particularly where all lived in separate states and where there had been litigation which tended to embitter them. Instructions construed. Spencer v. Terry's Estate [Mich.] 94 N. W. 372. Where the only conclusion from direct testimony is that testator was mentally sound, the fact that he had devised his entire estate to a negro who had been his business and household companion to the exclusion of cousins does not warrant the submission of his mental soundness to a

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The mere fact that the testator was eccentric, miserly, and irrational on some subjects,[49] or that he was incapable of controlling or conducting his ordinary business affairs,[50] that he made mistakes in multiplying figures,[51] or that he was enfeebled mentally and physically with the usual infirmities of old age,[52] or from excessive use of intoxicants,[53] or tobacco,[54] does not necessarily show lack of testamentary capacity.

Insanity, once established, is presumed to continue until the contrary is shown,[55] unless the disorder is of such character as to indicate that it is probably of temporary duration.[56] An adjudication of insanity, while it remains in force, is prima facie evidence of incapacity.[57]

Declarations,[58] acts, or conduct[59] of testator which illustrate the condition of

jury. Leach v. Burr, 188 U. S. 510, 47 Law. Ed. 567. Fact that testator left his property to others than his relatives may be considered. Ward v. Brown, 53 W. Va. 227; King v. Rowan [Miss.] 34 So. 325.

49. Ivison v. Ivison, 80 App. Div. [N. Y.] 599. Evidence that testator rambled in his sleep, went to sleep in the rain behind a stump, went fishing without results, could not at all time count his money correctly, whipped his son in bed, and thought his wife was crazy, is insufficient to show testamentary incapacity. Scarborough v. Baskin, 65 S. C. 558.

50. Crossan v. Crossan, 169 Mo. 631, 70 S. W. 136; Stewart v. Lyons [W. Va.] 47 S. E. 442; England v. Fawbush, 204 Ill. 384, 68 N. E. 526; Waugh v. Moan, 200 Ill. 298, 65 N. E. 713. The question is not whether the testator had sufficient mental capacity to comprehend and transact ordinary business, but did he have such mind and memory as enabled him to understand the particular business in which he was engaged. England v. Fawbush, 204 Ill. 384, 68 N. E. 526.

If a testator has capacity to transact ordinary business, he is capable of making a will (Hess v. Killebrew [Ill.] 70 N. E. 675), though he may be lacking in contractual capacity, and the capacity to undertake the transaction of the ordinary business of life (West v. Knoppenberger, 4 Ohio C. C. [N. S.] 305). Capacity to attend to small business affairs is not convincing against testimony of insane periods. Hess v. Killebrew [Ill.] 70 N. E. 675.

51. Berry v. Safe Deposit & T. Co., 96 Md. 45.

52. Lingle v. Lingle, 121 Iowa, 133, 96 N. W. 708; Baker v. Baker, 202 Ill. 595, 67 N. E. 410; Stull v. Stull [Neb.] 96 N. W. 196; Schmidt v. Schmidt, 201 Ill. 191, 66 N. E. 271; Wallace v. Whitman, 201 Ill. 59, 66 N. E. 311. The memory may be impaired in a degree and disturbed by hallucinations or delusions, not necessarily influencing the making of a testamentary disposition of property. West v. Knoppenberger, 4 Ohio C. C. (N. S.) 305.

Evidence held to show testamentary capacity. Williams v. Williams, 204 Ill. 44, 68 N. E. 449. Evidence insufficient to show more than that testator was enfeebled with usual infirmities of old age. Baker v. Baker, 202 Ill. 595, 67 N. E. 410. Evidence insufficient to show lack of capacity. Elliott v. Elliott [Neb.] 92 N. W. 1006. Fact that his memory was imperfect, that he asked idle questions, and required a repetition of questions, immaterial. Southworth v. Southworth, 173 Mo. 59, 73 S. W. 139. Evidence of mania for young women, forgetfulness, etc., held not to show incapacity. Hamon v. Hamon [Mo.] 79 S. W. 422.

53. Evidence that testator a year and a half prior to the execution of the will failed to recognize his brother is insufficient. Haughian v. Conlan, 86 App. Div. [N. Y.] 290. Where it appears that testator though of intemperate habits was sober at the time of the execution of the will and knew what he was doing, an issue of devisavit vel non on question of testamentary capacity was properly denied. In re Tasker's Estate, 205 Pa. 455.

54. Evidence that testator was given to excessive smoking, that there was a physical weakening and that he made a possible mistake as to a sum of money borrowed many years ago held not sufficient to show lack of capacity. Borry v. Safe Deposit & T. Co., 96 Md. 45.

55. In re Knox's Will [Iowa] 98 N. W. 468; Kirsher v. Kirsher, 120 Iowa, 337, 94 N. W. 846.

56. James White Memorial Home v. Haeg, 204 Ill. 422, 68 N. E. 568. Such as may result from sickness, injury, intoxication or other transitory cause. Instruction held to exact greater proof from the defendants than the law required. Branstrator v. Crow [Ind.] 69 N. E. 668. It will not be presumed that incapacity resulting from a stroke of apoplexy continued until two years thereafter to the time of the execution of the will. Kirsher v. Kirsher, 120 Iowa, 337, 94 N. W. 846.

57. In re Wheelock's Will [Vt.] 56 Atl. 1013.

58. Conversations between witnesses and testator on the day of his death. Pattee v. Whitcomb [N. H.] 56 Atl. 459. Letter written by decedent after execution of the will showing his regard for his children held admissible. In re Van Alstine's Estate, 36 Utah, 193, 72 Pac. 942. Testimony of the attorney who drew the will as to conversations with the testator at the time of its execution are admissible. Declarations of the testator, both before and after making the will, are admissible. Roberts v. Bidwell [Mich.] 98 N. W. 1000.

59. Evidence that testator had long been engaged in gathering up and storing away rubbish in boxes is admissible as tending to establish unsoundness of mind. In re Knox's Will [Iowa] 98 N. W. 468. Acts and utterances of testatrix before and after execution of will held not such as to show that she must have been insane when it was executed. Succession of Jacobs, 109 La. 1013. Misstating amount of property. Waugh v. Moan, 200

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his mind respecting testamentary capacity,[60] whether prior or subsequent to execution, are relevant to show such condition, but not to show the truth of facts uttered.[61] Lack of testamentary capacity to execute a will at a particular time may be established by the testator's mental condition before and after the time of execution of the will, if that prior or subsequent condition may be presumed to exist at the time the will was made.[62] If there has been evidence of his insanity, facts corroborating or disproving it are admissible,[63] such as that the draughtsman was of character and capacity;[64] and in rebuttal a witness may be asked whether testator had business capacity.[65]

The will is competent evidence to be submitted to the jury.[66]

Opinions on the ultimate fact of testamentary capacity are rejected.[67] It is generally held that nonexpert witnesses may express an opinion as to testator's testamentary capacity if they first testify as to the facts on which such opinion is based,[68] and if it is the result of their own observations.[69] In some states such witnesses are confined to facts.[70]

Ill. 298, 65 N. E. 713. Where an illiterate woman went about making her will very deliberately, held she had capacity. Stewart v. Lyons [W. Va.] 47 S. E. 442.

60. Whether testator was truthful and honest is irrelevant. Wallace v. Whitman, 201 Ill. 59, 66 N. E. 311. A statement by a witness that testator "acted foolish" should have been stricken out. Id.

61. In re Knox's Will [Iowa] 98 N. W. 468.

62. Spencer v. Terry's Estate [Mich.] 94 N. W. 372. As to how far subsequently to the execution of the will a party may testify as to observations as to testator's appearance, conduct, and apparent condition, rests in the court's discretion. And where the testimony was limited to about one and a half years after execution, it was not error to refuse to permit physician to testify as to cause of death which occurred nearly three and a half years after execution. McCoy v. Jordan, 184 Mass. 576, 69 N. E. 358. Declarations of a person, four months after the making of a will, that testator was then not mentally competent to do any business, not admissible on the question of testamentary capacity. Naul v. Naul, 75 App. Div. [N. Y.] 293. Where under the evidence, testator's capacity was such as he always naturally possessed since attaining majority, evidence tending to show his mental condition within a reasonable time before reaching majority has a tendency to show capacity at the time of execution of the will. In re Wheelock's Will [Vt.] 56 Atl. 1013. The record of proceedings to appoint a guardian over testator two years after execution of his will was not admissible. Junkin v. Harvey [Iowa] 94 N. W. 559. Testimony that testatrix said certain property was hers is not admissible to show that she claimed other person's property, the issue being testamentary capacity, and there being no evidence that she was of unsound mind until three years later. Crossan v. Crossan, 169 Mo. 631, 70 S. W. 136. Evidence of facts tending to show imbecility of mind at a date prior to the execution of the will are important only as bearing on testator's mental condition at the time it was made. Ward v. Brown, 53 W. Va. 227.

63. Insanity of other members of his family is not admissible without direct proof of testator's insanity. Berry v. Safe Deposit & T. Co., 96 Md. 45.

Threats of the executor that if the will was sustained he would take away from the caveators their bequests are not admissible to impeach him, being too remote. Berry v. Safe Deposit & T. Co., 96 Md. 45.

64. Where the subscribing witnesses testify against the will which was drawn by and executed in the presence of an attorney who died before his deposition could be procured, it is proper to admit testimony of his character and capacity. Ward v. Brown, 53 W. Va. 227.

65. Where some witnesses testified that the testator was crazy, asking witnesses for the proponent as to whether or not the testator was capable of transacting business, which was answered in the negative, is not requiring too high a test. Hess v. Killebrew [Ill.] 70 N. E. 675.

66. Junkin v. Harvey [Iowa] 94 N. W. 559.

67. In Michigan it is held that such a witness may say that the testator had not sufficient intelligence to comprehend a given instrument, that he had not memory sufficient to remember the natural objects of his bounty, or his desires regarding the disposition of his property, and that he was without the mental power to carry out his intentions, but not that he was competent or incompetent to make a will, or a particular will. Held error to take opinion of commissioner of claims who saw testatrix but once. Page v. Beach [Mich.] 95 N. W. 981. In Illinois it is held to be improper to ask a nonexpert witness whether the testator had sufficient mind and memory to understand the will in question, to carry in his mind the nature and character of his property, and to understandingly execute a will. Baker v. Baker, 202 Ill. 595, 67 N. E. 410.

68. Spencer v. Terry's Estate [Mich.] 94 N. W. 372; Roberts v. Bidwell [Mich.] 98 N. W. 1000; Halde v. Schultz [S. D.] 97 N. W. 369. After detailing facts tending to prove mental soundness or unsoundness. Wallace v. Whitman, 201 Ill. 59, 66 N. E. 311; Baker v. Baker, 202 Ill. 595, 67 N. E. 410.

A person who had seen and observed testator at various times during the period of the alleged insanity may testify as to whether decedent was of sound mind, after stating facts on which the opinion is based. Kirsh-

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The testimony of medical experts as to testator's mental condition is entitled to relatively little weight,[71] unless based on their personal knowledge and observations.[72] The weight of opinions of nonexperts depends upon the facts upon which it is predicated, and the intelligence and character of the witness.[73] And, in general, evidence of facts tending to show soundness of mind at or near the time of execution of the will is entitled to greater weight than opinions based on erratic conduct and eccentricities.[74] The testimony of the physician who attended testator,[75] and of the scrivener who drew the will,[76] are entitled to great weight. The testimony of attesting witnesses is ordinarily entitled to great weight,[77] but at-

er v. Kirsher, 120 Iowa, 337, 94 N. W. 846. Declarations of sister of testator as to mental condition are not admissible unless she testifies to the facts on which her conclusion is based. Wallace v. Whitman, 201 Ill. 59, 66 N. E. 311.

69. In re Van Alstine's Estate, 26 Utah, 193, 72 Pac. 942. Persons acquainted with the testator and who had associated with him on many occasions are competent to testify as to his mental condition at or about the time the will was made. Higgins v. Nethery, 30 Wash. 239, 70 Pac. 489. One who had known testator for thirty years, had frequently talked and transacted business with him, is competent to testify to his mental capacity. Scarborough v. Baskin, 65 S. C. 558. If a witness had testified that he lived in the same house with deceased and had seen him nearly every day and had had frequent conversations with him for a year prior to his death it was not an abuse of discretion for the court to permit him to give his opinion of testator's mental soundness. In re Keegan's Estate, 139 Cal. 123, 72 Pac. 828. The observations of the wife of testator after divorce as to his habits and condition and the effect of drugs to which testator was addicted are admissible. Not excluded under Rev. St. Utah 1898, § 3414, subd. 1. In re Van Alstine's Estate, 26 Utah, 193, 72 Pac. 942.

70. In Massachusetts nonexpert witnesses cannot testify as to their opinion in regard to mental condition on issue of insanity. Question from these facts, "what do you infer as to testator's mental capacity," properly excluded. McCoy v. Jordan, 184 Mass. 575, 69 N. E. 358. May testify as to whether they had noticed any failure of memory or anything to indicate whether testator was of unsound mind, but the testimony must be confined to facts. Id.

71. The value of answers to hypothetical questions bearing on the capacity of the testator must be based solely upon the truth of the facts upon which they are based. Kirsher v. Kirsher, 120 Iowa, 337, 94 N. W. 846. Of no value where he had no personal acquaintance with the testator and the hypothetical case put to him is based on disputed facts. Evidence held insufficient to establish incapacity. In re Richmond's Estate, 206 Pa. 219. The mere opinions of expert witnesses as to mental capacity, based upon an erroneous hypothesis, cannot prevail as against facts testified to by a number of competent observers. Philips v. Philips, 77 App. Div. [N. Y.] 113. Testimony of experts in answer to hypothetical questions that testator did not have testamentary capacity is not alone sufficient to show lack of capacity at the time of execution of the will. Ivison v. Ivison, 80 App. Div. [N. Y.] 599. The question of sanity not being involved but merely whether testator was legally capable and there being positive evidence of capacity and nothing in the evidence from which an inference of incapacity could be drawn, it was not error to refuse to permit medical experts to answer hypothetical questions as to testator's mental condition based on facts in evidence. Berry v. Safe Deposit & T. Co., 96 Md. 45. Except under special circumstances, expert testimony is entitled to only such weight as the jury may deem it to have when viewed in connection with other evidence. It is error to instruct that it is entitled to great weight. Ward v. Brown, 53 W. Va. 227. If against the sanity of testator, their testimony will be viewed with suspicion. Instruction that such testimony is entitled to peculiar weight, held error. Id.

72. If the experts have also personal knowledge of testator, their testimony is entitled to greater weight than the testimony of nonprofessional persons. Ward v. Brown, 53 W. Va. 227. The testimony of experts based on observations of testator's mental weaknesses and lack of memory will not overcome evidence that at the time of making the will testator knew the nature and amount of his property, the disposition he wanted to make of it and was transacting a hotel business in his own name at the time. In re Klein's Estate, 207 Pa. 191.

73. Baker v. Baker, 202 Ill. 595, 67 N. E. 410.

74. Ward v. Brown, 53 W. Va. 227. Mere opinions of witnesses unaccompanied by testimony showing any particular act or fact evidencing incompetency do not make out a case of incompetency, when the evidence shows that the testator knew what he was doing, and to whom he was giving his property. Evidence insufficient to show lack of capacity. Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129.

75. Evidence held to show incapacity. Richardson v. Moore, 30 Wash. 406, 71 Pac. 18.

76. The testimony of the scrivener and the physician who attended testator at the time of the making of the will is of far greater weight than that of experts based on hypothetical questions. Evidence insufficient to show incapacity. In re Kane's Estate, 206 Pa. 201.

77. Ward v. Brown, 53 W. Va. 227. Evidence of witnesses present at the execution of a will is entitled to peculiar weight. Stewart v. Lyons [W. Va.] 47 S. E. 442. Entitled to no greater weight than that of any other witness who had the same opportunities for observation. King v. Rowan [Miss.] 34 So. 325.

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testation is testimony as to sanity, and testimony of attesting witnesses that the testator was incompetent will be viewed with suspicion, though admissible.[78]

Testamentary capacity must be determined from the facts of each particular case;[79] hence the jury may not be told that debility of age is progressive or permanent.[80] It is not necessarily error to submit to the jury whether testator was "sane"[81] or what the witnesses "believed."[82] If there is any substantial evidence of incompetency or undue influence, the case should be submitted to the jury, otherwise the court should direct a verdict for proponents.[83]

Insanity need not be proved beyond a reasonable doubt,[84] but by preponderance only.[85] Knowledge of contents of a will is proven by the fact that it is a re-execution of one well known to testator.[86]

(§ 2) *B. Constituents of fraud and undue influence.*—The fraud, force, or undue influence that will suffice to set aside a will, must be such as to overcome the free volition or conscious judgment of the testator, and to substitute the purposes of another instead, and must be the efficient cause, without which the will would not have been made.[87] The testator's free agency must have been destroyed and another's will substituted for his own.[88] The influence must have

78. Ward v. Brown, 53 W. Va. 277. Worthy of little belief and may be discredited. Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129.

79. In re Jenkins' Will, 39 Misc. [N. Y.] 618.

80. Whether testator's weakness of mind was progressive and permanent was a question for the jury, and a requested instruction that weakness of mind arising from old age, in connection with other causes suggested in the case, is progressive and permanent in character, was properly refused. White v. McPherson, 183 Mass. 533, 67 N. E. 643.

81. Where the word "sane" was used as synonymous with "sound mind and memory." Waugh v. Moan, 200 Ill. 298, 65 N. E. 713.

82. Use of the word "believed" instead of "believe." Waugh v. Moan, 200 Ill. 298, 65 N. E. 713.

83. Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129; Hamon v. Hamon [Mo.] 79 S. W. 422.

84. King v. Rowan [Miss.] 34 So. 325.

85. **Evidence held sufficient to show capacity.** Masterson v. Berndt, 207 Pa. 284; Beyer v. Hermann, 173 Mo. 295, 73 S. W. 164; Savage v. Bulger, 25 Ky. L. R. 763, 76 S. W. 361; Rewell v. Warden, 24 Ohio Circ. R. 344; Hanley v. Kraftczyk, 119 Wis. 352, 96 N. W. 820; Spence v. Huckins, 208 Ill. 304, 70 N. E. 289; In re Shannon's Will, 87 N. Y. Supp. 656; In re Arrowsmith's Estate, 206 Ill. 352, 69 N. E. 77; Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395. Evidence of 10 witnesses that testator was a shrewd business man and competent held sufficient to establish testator's sanity where contestant's only evidence was to the effect that he was infirm and absent minded and omitted to provide for contestant through mistake. In re Dougherty's Estate, 139 Cal. 10, 72 Pac. 358. Evidence held to show lack of disposing memory. In re Langley's Estate, 140 Cal. 126, 73 Pac. 824.

86. Uncontradicted testimony that the will was the same as a former one which the testatrix had heard read and discussed, and which she destroyed soon thereafter, and was made only for the purpose of changing executors, and that she had deposited it in a bank where it remained, held to show that she knew the nature and contents thereof. In re Mather's Will [Vt.] 56 Atl. 982.

87. In re Holman's Will, 42 Or. 345, 70 Pac. 908. Undue influence in order to vitiate the will must be such as subjugates the mind of the testator to the will of the person operating upon it. Robinson v. Robinson, 203 Pa. 400. Proof must be made of fraud practiced, threats or misrepresentations, flattery or physical or moral coercion sufficient to destroy the free agency of the testator at the time of making the will. Id. Influence or restraint is undue if it is such as has worked a wrong to some one which would not have occurred if it had not been exercised. In re Elster's Will, 39 Misc. [N. Y.] 63. Were testator's mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time when he executed the will? In re Alexander's Estate, 206 Pa. 47. That degree of importunity or undue influence which deprives a testator of his free agency, and which he is too weak to resist, and will render the instrument not his free and unconstrained act, is sufficient to invalidate it. Mullen v. McKeon [R. I.] 55 Atl. 747. It is no sufficient answer to the presumption of undue influence arising from undisputed facts that testator knew the contents of the instrument and assented to all its provisions, that being what the influence was employed to accomplish. Id. The question to be considered is whether the influence was sufficient to overcome the will of the particular testator. Robinson v. Robinson, 203 Pa. 400. Instruction on undue influence held proper under the issues. Edwards v. Millsaps [Tex. Civ. App.] 70 S. W. 357.

88. Somers v. McCready, 96 Md. 437. Must be sufficient to overcome the influence and desire of the testator. Wetz v. Schneider [Tex. Civ. App.] 78 S. W. 394; In re Townsend's Estate [Iowa] 97 N. W. 1108. Must amount to force and coercion. Stull v. Stull [Neb.] 96 N. W. 196. Evidence insufficient to sustain finding of undue influence. In re Holman's Will, 42 Or. 345, 70 Pac. 908; Crow-

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been brought to bear directly upon the testamentary act,[89] and it must have been exerted by a beneficiary or through his procurement or agency.[90] It may be exercised by physical coercion or threats of personal harm or abuse,[91] or by the insidious operation of a strong mind upon one weakened by disease or otherwise,[92] or by falsehood, importunities, or annoyances.[93] Mere persuasion or advice, however importunate, will not justify the setting aside of a will,[94] unless they are such that testator has not power to resist them, or yields to them for the sake of peace, or to escape serious distress of mind.[95] The motive of the testator is immaterial, if he was not unduly influenced.[96] Influence secured through affection is not wrongful, unless testator's free agency is destroyed.[97] Inequality in distribution,[98] advanced age, sickness and loss of memory,[99] the fact that the will is un-

son v. Crowson, 172 Mo. 691, 72 S. W. 1065. Evidence insufficient to show undue influence. Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395. Instructions approved. England v. Fawbush, 204 Ill. 384, 68 N. E. 526; Yorty v. Webster, 205 Ill. 630, 68 N. E. 1068. Evidence insufficient to show that failure to provide more fully for daughter was result of undue influence. Schwanteck v. Berner, 96 Md. 138. On a contest on ground of undue influence, instructions relative to prejudice of testatrix against grandsons not parties held not prejudicial. Lingle v. Lingle, 121 Iowa, 133, 96 N. W. 708. Evidence held insufficient where an illiterate woman devised her property to a mere stranger for whom she had shown attachment. Stewart v. Lyons [W. Va.] 47 S. E. 442. Error in instructing that if the jury found that the will was "influenced" they should find for the caveators was not ground for reversal where the law and facts had been clearly stated. Westbrooks v. Wilson [N. C.] 47 S. E. 467.

89. Stull v. Stull [Neb.] 96 N. W. 196. Instructions held proper. Mere general influence not brought to bear on testamentary act not sufficient. In re Keegan's Estate, 139 Cal. 123, 72 Pac. 828. Undue influence sufficient to invalidate a will is available though exercised at a period remote from the date of its execution. Where it was sufficient to invalidate the will it is available as to a subsequent will containing the same provisions. Powers v. Powers, 25 Ky. L. R. 1468, 78 S. W. 152. Must be connected with the will and bear directly upon the testator at the time it is made. Succession of Jacobs, 109 La. 1012. Undue influence must be such as to overcome the free agency of the testator at the time of actual execution of the will. Where a stranger to whom an illiterate woman had willed all her property had written love letters to her and it was intimated had had unlawful intercourse, evidence held insufficient. Stewart v. Lyons [W. Va.] 47 S. E. 442.

90. Evidence held insufficient to show that testator's resentment was kept alive by the suggestions of proponents. Wetz v. Schneider [Tex. Civ. App.] 78 S. W. 394. General influence not brought upon the testamentary act, however controlling, is not undue influence such as will afford ground for setting aside the will of a person of sound mind. That testator's wife exercised influence over him in home and business affairs is not evidence of the fact that she influenced him in regard to his will. In re Donovan's Estate, 140 Cal. 390, 73 Pac. 1081.

91, 92. In re Holman's Will, 42 Or. 345, 70 Pac. 908.

93. Wetz v. Schneider [Tex. Civ. App.] 78 S. W. 394.

94. Yorty v. Webster, 205 Ill. 630, 68 N. E. 1068. Merely seeking advice from one who lived with testatrix and upon whom she depended for advice, and who largely benefited by the will, even if he properly gave advice, is insufficient to show undue influence. Id. Mere advice, importunity, or suggestion, will not render it invalid. Somers v. McCready, 96 Md. 437. Persuasion, entreaty, cajolery, importunity, argument, intercession, and solicitation, are permissible. Wetz v. Schneider [Tex. Civ. App.] 78 S. W. 394. A person has a right to importune another to make a will in his favor, provided the only effect thereof is to influence his affections or sense of duty. Son may importune mother. Robinson v. Robinson, 203 Pa. 400. Evidence insufficient. Masterson v. Berndt, 207 Pa. 284. Since a testator may have been influenced by conditions of which he did not know the cause, evidence as to such conditions, outside his knowledge, might be admissible to show undue influence. Rapp v. Becker, 4 Ohio C. C. (N. S.) 139. Captation and suggestion not causes of nullity. Succession of Jacobs, 109 La. 1012.

95. Instruction approved. Robinson v. Robinson, 203 Pa. 400.

96. An instruction which in effect tells the jury in a contest on ground of undue influence that if testator made a will only for the purpose of keeping peace in the family, the verdict should be for contestants is prejudicial error. Davidson v. Davidson [Neb.] 96 N. W. 409.

97. Father and son. Schmidt v. Schmidt, 201 Ill. 191, 66 N. E. 371. Motives of natural affection and gratitude, even when accompanied by solicitations or arguments which appeal to such motives, do not constitute undue influence. Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395. A wife may influence her husband to make a will for her benefit or that of another, so long as she does not act fraudulently or extort benefits from him when he is not in condition to act as a free agent. In re Donovan's Estate, 140 Cal. 390, 73 Pac. 1081. That will is in harmony with request of testator's wife raises no presumption against it. In re Townsend's Estate [Iowa] 97 N. W. 1108.

98. England v. Fawbush, 204 Ill. 384, 68 N. E. 526. Evidence held not to show undue influence. Yorty v. Webster, 205 Ill. 630, 68 N. E. 1068. Evidence insufficient to show undue influence. Schmidt v. Schmidt, 201 Ill. 191, 66 N. E. 371. Where a testator left all his estate to a foster child with whom he lived prior to his death. Some time before

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reasonable,[1] or that the testator has distributed his property in an unnatural manner,[2] while not in themselves sufficient to avoid the will or to raise a presumption against its validity, may be considered in determining whether or not the testator was unduly influenced, or mentally incapacitated. The mere fact that knowledge of the will was confined to the subscribing witnesses is no evidence that it was procured by undue influence.[3] Mere opportunity to exert undue influence,[4] or the suspicion that it was exercised,[5] or the existence of confidential relations between the testator and beneficiary,[6] are not, in themselves, sufficient to invalidate the will. But a presumption of undue influence may arise from such relations where the testator is old and feeble and makes an unnatural disposition of his property,[7] or where the beneficiary has a controlling agency in procuring its execution.[8] There is no presumption of undue influence arising from the

his death he had been under guardianship because he was drinking excessively and wasting his property, but had been restored to capacity and four days later made the will which is contested. Evidence held insufficient to show that its execution was procured by fraud or undue influence. In re Casey's Will [Minn.] 99 N. W. 863.

99. England v. Fawbush, 204 Ill. 384, 68 N. E. 526. Weakened mental and physical condition may be considered. Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395. Neither testator's age or character, nor the extent of his property, is evidence of undue influence. Instruction disapproved. In re Wiltsey's Will [Iowa] 98 N. W. 294.

1. In re Townsend's Estate [Iowa] 97 N. W. 1108. In determining reasonableness of the will, the amount which testatrix was to receive as residuary legatee under her husband's will may be shown. Davenport v. Johnson, 182 Mass. 269, 65 N. E. 392. An instruction that in determining whether undue influence had been exercised, the jury might take into consideration "the reasonableness or unreasonableness of the will," without qualification or limitation, is reversible error. King v. Rowan [Miss.] 34 So. 325.

2. In re Holman's Will, 42 Or. 345, 70 Pac. 908; King v. Rowan [Miss.] 34 So. 325. That no provision is made for testator's minor children and all of his property is given to a married woman with whom testator lived is not affirmative evidence of undue influence. In re Eddy's Will, 41 Misc. [N. Y.] 283. All property left to last family insufficient to show undue influence. Elliott v. Elliott [Neb.] 92 N. W. 1006. The fact that the will is foolish, unnatural, or unjust, does not show that it was made under undue influence. In re Donovan's Estate, 140 Cal. 390, 73 Pac. 1081. Where a testator left all his estate to strangers who had cared for him and his invalid wife for several years, evidence held insufficient to show undue influence. In re Laugen's Will [Wis.] 99 N. W. 437.

3. Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395; Vance v. Davis, 118 Wis. 548, 95 N. W. 939.

4. Zelozoskei v. Mason, 64 N. J. Eq. 327. Mere opportunity together with an expressed intention made some time before to make a different disposition of the property are insufficient to show undue influence. Barry v. Graciette [Tex. Civ. App.] 71 S. W. 309. Mere proof that a daughter residing with the mother acquiesced in her view without proof that she knew or had reason to know that mother's prejudice was unwarranted does not establish undue influence by false statements or suggestions. Zelozoskei v. Mason, 64 N. J. Eq. 327. Evidence that proponents were the favored children and that they were more attentive to testatrix in her old age is insufficient to establish undue influence. In re Hook's Estate, 207 Pa. 203. That testatrix at the time of the execution of her will executed a deed to be delivered to her son after her death is not sufficient to show undue influence by such son. Id.

5. A mere suspicion that undue influence or pressure was brought to bear is not sufficient. In re Keegan's Estate, 139 Cal. 123, 72 Pac. 828. That the person might have unduly influenced testator and that he was named executor and his wife was a beneficiary do not raise presumption of undue influence. Refusal to so instruct held proper. Stull v. Stull [Neb.] 96 N. W. 196. Evidence tending to show only a possibility of undue influence is insufficient. Stewart v. Lyons [W. Va.] 47 S. E. 442.

6. Fact that beneficiary was testator's brother and that they had lived together and been partners for forty years does not warrant the inference of undue influence. In re Kane's Estate, 206 Pa. 204. Does not render the will invalid, where the mental capacity and volition of the testator is apparent. In re Wickes' Estate, 139 Cal. 195, 72 Pac. 902. Evidence insufficient to show undue influence. In re Brugh's Will, 41 Misc. [N. Y.] 263. Merely because the son who benefited largely by the will of testatrix acted as her attorney in her lifetime, will not shift the burden of proving absence of undue influence on him, there being no evidence that her mental faculties were impaired. In re Hook's Estate, 207 Pa. 203.

7. But there is a presumption of undue influence where the testator from bodily infirmity or age is of comparatively weak mind and the beneficiary stands in confidential relations. Robinson v. Robinson, 203 Pa. 400. That the testator made an unnatural disposition of his property and the beneficiary had confidential relationship with testator with slight evidence that he abused it is sufficient to invalidate the will. In re Holman's Will, 42 Or. 345, 70 Pac. 908. That the provisions of a will, made while testator was in a feeble condition, are manifestly unjust and unfair in discriminating in favor of certain members of the family to the exclusion of others, raises a presumption of undue influence. In re Elster's Will, 39 Misc. [N. Y.] 63.

8. The active agency of the beneficiary in

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relation of husband and wife,[9] or from the fact that the person who drew the will is a beneficiary,[10] or from the existence of meretricious relations between the parties.[11] A mistake of fact on the part of testator, in order to justify the setting aside of the will, must be shown to be a clear mistake on his part, which misled him, and not a conclusion reached by his own judgment, though different from that which the court or jury might reach on the same information.[12]

Evidence.—On trial of an issue of undue influence, it is permissible to show the relations existing between the testator and the beneficiary,[13] and the mental[14] and physical condition of testator at the time of making the will,[15] and that the beneficiary refused relatives access to testatrix.[16] Declarations of the testator, made either before or after the execution of the will, are not proof of the facts stated therein,[17] but are generally admitted for the purpose of showing his personal feelings and mental condition.[18] The conduct and declarations of those procuring

procuring the will to be made in the absence of those who have an equal claim on testator's bounty, and where the testator is enfeebled by old age and disease is a circumstance which indicates the probable exercise of undue influence. Evidence held sufficient to warrant submission to jury. England v. Fawbush, 204 Ill. 384, 68 N. E. 526. Where the party to be benefited by the will has a controlling agency in procuring its execution, it is universally regarded as a very suspicious circumstance, and one requiring the fullest explanation. Robinson v. Robinson, 203 Pa. 400. Where the party preparing or procuring a will takes a large beneficial interest thereunder, stricter proof than usual is necessary to show knowledge on the part of testator of the contents of the will. But held not to apply where the interest was an appointment as executor without bonds and a provision for the payment of a debt the evidence of which such party already held, it also not appearing that he suggested or instigated the making of the will. Woodson v. Holmes, 117 Ga. 19.

9. Evidence insufficient to show undue influence on part of wife. Succession of Jacobs, 109 La. 1012.

10. As where he received a legacy of $11,200, the estate being valued at $225,000. Haughian v. Conlan, 86 App. Div. [N. Y.] 290.

11. In re Eddy's Will, 41 Misc. [N. Y.] 283. There is no presumption of undue influence on the part of one not a beneficiary from the fact that he and testatrix held meretricious relations. In re Jones' Will, 85 N. Y. Supp. 294. The fact that one to whom testatrix devised her property was at the time unlawfully cohabiting with her will not invalidate the will nor afford a presumption of undue influence. The fact of unlawful sexual intercourse was merely hinted at. Stewart v. Lyons [W. Va.] 47 S. E. 442.

12. In re Alexander's Estate, 206 Pa. 47.

13. Page v. Beach [Mich.] 95 N. W. 981.

14. Evidence of weakness of mind in the care of testator's estate and the transaction of business admissible to show susceptibility to undue influence. Robinson v. Robinson, 203 Pa. 400. A petition filed by proponent stating that testator was mentally incompetent is admissible on an issue of undue influence. Zibble v. Zibble, 131 Mich. 655, 92 N. W. 348.

15. Lingle v. Lingle, 121 Iowa, 133, 96 N. W. 708.

16. Davenport v. Johnson, 182 Mass. 269, 65 N. E. 392.

17. Declarations of the testator made before or after the execution of the will are not proof of the truth of the fact stated therein. Davidson v. Davidson [Neb.] 96 N. W. 409. Prior declarations not evidence of undue influence. In re Wiltsey's Will [Iowa] 98 N. W. 294; In re Jones' Will, 85 N. Y. Supp. 294; Davidson v. Davidson [Neb.] 96 N. W. 409. The admission in evidence of statements made after execution of a will, to show undue influence, is error. Rapp v. Becker, 4 Ohio C. C. (N. S.) 139. In California, it is held that where a will is disputed on the ground of fraud, duress, imposition, or other like cause, not drawing into question the testator's mental capacity at the time of its execution, neither his prior nor subsequent declarations are competent evidence. In re Donovan's Estate, 140 Cal. 390, 73 Pac. 1081.

18. In re Jones' Will, 85 N. Y. Supp. 294. If there is independent proof of coercion they are admissible to show the state of the testator's mind, and to show that he was influenced by such coercion. Davidson v. Davidson [Neb.] 96 N. W. 409. The refusal of the court to charge that the declarations of the deceased could not be considered in determining the question of undue influence in view of the testimony and instructions held erroneous. Zibble v. Zibble, 131 Mich. 655, 92 N. W. 348; Wall v. Dimmitt, 24 Ky. L. R. 1749, 72 S. W. 300; In re Townsend's Estate [Iowa] 97 N. W. 1108; Zibble v. Zibble, 131 Mich. 655, 92 N. W. 348. Admissible only to show his mental condition at the time of execution and his susceptibility to influences. Wall v. Dimmitt, 24 Ky. L. R. 1749, 72 S. W. 300; Crowson v. Crowson, 172 Mo. 691, 72 S. W. 1065; Davidson v. Davidson [Neb.] 96 N. W. 409; In re Townsend's Estate [Iowa] 97 N. W. 1108. Statements of testator that he had made a will "and had left his sons * * * out and that he had to do it to keep down hell at home" are admissible. Powers v. Powers, 25 Ky. L. R. 1468, 78 S. W. 152. On contest on ground of undue influence of the wife, statements made by testator before marriage showing his feelings towards her and her relatives are too remote to be admissible. Pattee v. Whitcomb [N. H.] 56 Atl. 459. Evidence of declarations of testator and of conversations between testator, the beneficiary and contestant held properly excluded no proper foundation having been laid. Yorty v. Webster, 205 Ill. 630, 68 N. E. 1068. Inadmissible to controvert

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a will by unlawful means, tending to show their purpose, are evidence[19] unless other innocent devisees would be injured thereby. Independent declarations of a legatee as to the testamentary capacity of the testator are not admissible.[20] There is a conflict of authority as to whether or not a witness may give his opinion as to the susceptibility or nonsusceptibility of testator's mind to the influence of others.[21] In New Hampshire, such opinions are admissible if the witness is qualified by acquaintance with the testator to give them. Qualification is a question for the court.[22]

Weight and insufficiency.—Undue influence may be shown by all the facts and circumstances surrounding the execution of the will,[23] but such evidence must go to the extent of showing that the testator was dominated beyond his control and deprived of his free agency.[24] Evidence to establish undue influence over a sound, strong, and healthy mind, must be direct, clear, and positive,[25] and the feebler the mind of the testator, from whatever cause, the less evidence will be required to invalidate the will.[26] Failure of proponent to offer any testimony adds nothing to the probative force of contestant's testimony.[27] Where the will

the facts of the execution of the will or to show that it was the outcome of duress or fraud not involving her mental condition. Robinson v. Robinson, 203 Pa. 400. Statements by the testator that he had been influenced admissible. Powers v. Powers, 25 Ky. L. R. 1468, 78 S. W. 152. Letters written by testator prior to the execution of will relating to the disposition of his property are competent both to disprove the issue of undue influence and as tending to show the mental capacity of the testator. And if the substance of letters written 15 years before was repeated in those of the later date, they are also admissible. Baker v. Baker, 202 Ill. 595, 67 N. E. 410.

19. Declarations of beneficiary tending to show confidential relations between himself and testator. Robinson v. Robinson, 203 Pa. 400. Statements of the wife to whom a greater part of the estate was left tending to show ill will towards two sons, disinherited, and to the effect that she would see to it that they should get no part of testator's estate, are admissible. Powers v. Powers, 25 Ky. L. R. 1468, 78 S. W. 152. Statements of the husband of the testatrix that he would see to it that contestants would receive nothing are admissible (Wall v. Dimmitt, 24 Ky. L. R. 1749, 72 S. W. 300), and because he would have received the same estate under the statute will not change the rule that admissions and declarations of a legatee or devisee are admissible against himself and his co-legatees and devisees (Id.).

20. Robinson v. Robinson, 203 Pa. 400. It is error to admit declarations of some of the devisees made after execution of the will tending to show undue influence, since it is impossible to limit the effect thereof. Dennis v. Neal [Tex. Civ. App.] 71 S. W. 387.

21. In Illinois they are not admissible. Evidence held insufficient to show, prima facie, undue influence so as to shift the burden of proof. Michael v. Marshall, 201 Ill. 70, 66 N. E. 273.

22. The susceptibility of the testator to his wife's influence is admissible on issue of undue influence exercised by her. The adverse party, however, being the administrator, who had elected not to testify, the testimony under Pub. St. 1901, c. 224, § 6, would be incompetent since facts occurring in the lifetime of the testator would be involved in giving the opinion. Pattee v. Whitcomb [N. H.] 56 Atl. 459.

23. Mullen v. McKeon [R. I.] 55 Atl. 747. Allegations of mental incapacity and undue influence are not supported by proof of want of knowledge of the contents of the will. Swearingen v. Inman, 198 Ill. 255, 65 N. E. 80. Where an elderly woman of sound mind having no near relatives devised all her property to her pastor and his family with whom she was intimate, evidence held insufficient to show undue influence. Caughey v. Bridenbaugh, 208 Pa. 414. Evidence held sufficient to warrant submission of questions of undue influence and capacity to the jury. Gibson v. Sutton, 24 Ky. L. R. 868, 70 S. W. 188. Evidence insufficient to show undue influence. In re Calef's Estate, 139 Cal. 673, 73 Pac. 539; Rewell v. Warden, 24 Ohio Circ. R. 344. Evidence sufficient to sustain finding that testator was not unduly influenced. Hanley v. Kraftczyk, 119 Wis. 352, 96 N. W. 820.

24. In re Donovan's Estate, 140 Cal. 390, 73 Pac. 1081. Evidence insufficient to show undue influence. Id. Evidence that testator was old, feeble, and unable to read or write, and that the will was prepared and executed under the direction of a beneficiary, and that certain heirs were disinherited without apparent cause held sufficient to show undue influence. In re Elster's Will, 39 Misc. [N. Y.] 63.

25. Robinson v. Robinson, 203 Pa. 400. Strong and convincing evidence required in such case. Evidence insufficient to show undue influence of son. In re Alexander's Estate, 206 Pa. 47.

26. Evidence sufficient to authorize jury to pass on question of undue influence. England v. Fawbush, 204 Ill. 384, 68 N. E. 526. Evidence insufficient to show undue influence. Baker v. Baker, 202 Ill. 595, 67 N. E. 410. In cases of weakness of mind arising from the near approach of death strong proof is required that the contents of the will were known to testator, and that it was his spontaneous act. Mullen v. McKeon [R. I.] 55 Atl. 747.

27. Does not require submission to jury where the evidence offered by contestants, if admitted to be true, does not require it. Somers v. McCready, 96 Md. 437.

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is witnessed by persons not acquainted with the maker, the attending circumstances must be such as to preclude probability of fraud.[28]

§ 3. *The testamentary instrument or act. A. Requisites, form, and validity.* —A will is a disposition of property to take effect after death.[29] No formal words are necessary to its validity and any instrument, testamentary in character and executed in conformity to the statutes, should be admitted to probate.[30] If the instrument passes some present interest, although the right to possession and enjoyment may be postponed, it is not testamentary;[31] but if it passes no interest or right until the death of the maker,[32] and is revocable by him at any time,[33]

28. In re McAndrew's Estate, 206 Pa. 366.

29. In re Megary's Estate, 206 Pa. 260; Coulter v. Shelmadine, 204 Pa. 120. An instrument which provides only for payment of debts and the appointment of an executor may be a will though it makes no disposition of property. Leaving property to pass under statutes. Mulholland v. Gillan, 25 R. I. 87.

30. The form of the instrument is immaterial if its substance is testamentary. In re Megary's Estate, 206 Pa. 260. Writing held to show intention of deceased to thereby give his property to his brother after death and hence to constitute a will. Boatman v. Boatman's Estate, 105 Ill. App. 40. If the writing is a disposition of property to take effect after death and executed as a will it is testamentary in character though irregular in form. Particular paper held a will and entitled to admission to probate. In re Megary's Estate, 206 Pa. 260. A letter written by decedent to his wife, and not purporting on its face to be anything more than an expression of advice and recommendation, held not testamentary in character. Thurston's Adm'r v. Prather, 25 Ky. L. R. 1137, 77 S. W. 354.

31. Deed held to convey present interest. Durand v. Higgins, 67 Kan. 110, 72 Pac. 567. Trust deed held not testamentary in character. Cross v. Benson [Kan.] 75 Pac. 558. A deed of trust of personalty for distribution on death of the donor who was to retain possession during life with power to change the disposition of the property on notice to the trustee held not testamentary in character but to convey a present interest. Kelley v. Snow [Mass.] 70 N. E. 89. Deeds given to third persons to be delivered after maker's death held not testamentary. St. Clair v. Marquell, 161 Ind. 56, 67 N. E. 693; Bogan v. Swearingen, 199 Ill. 454, 65 N. E. 426. Reservation in a deed of the use of the land for life does not render it a will. Adair v. Craig, 135 Ala. 332. A deed, reserving the rents and profits of the land to the grantor for life, held to have taken effect on delivery and not to have been a testamentary disposition. Dozier v. Toalson [Mo.] 79 S. W. 420. A deed granting the property "for and during her natural life and after her death" to the grantor's heirs and on condition that grantor retain possession and control during his life, held to convey a present interest in the property and not to be testamentary in its character. Christ v. Kuehne, 172 Mo. 118, 72 S. W. 537. An instrument executed and attested as a deed and duly delivered which recites that the grantor has given the grantee certain land, "said land to belong to him at my death" held not testamentary, but to convey a present title with possession postponed until the grantor's death. Brice v. Sheffield, 118 Ga. 128. Instrument in form of and executed as a deed conveying land to be held by the grantee "after the expiration of the life estate herein reserved, in fee simple forever," held to convey an interest in praesenti, and not to be testamentary in character. Watkins v. Nugen, 118 Ga. 372. Contract for sale of realty held not testamentary in character. Cone v. Cone, 118 Iowa, 458, 92 N. W. 665. Deeds, containing no power of revocation and no reservation postponing the vesting of title until the grantor's death, which were delivered and recorded, held not testamentary in character. Evidence held not to show deeds a testamentary disposition. Phillips v. Phillips, 30 Colo. 516, 71 Pac. 363. A contract making the community property the separate property of the surviving spouse as allowed by 1 Ball. Ann. Code, & S. § 4492, is not a will, therefore such section did not repeal § 4601, Id., relating to the construction of wills. McKnight v. McDonald [Wash.] 74 Pac. 1060. A writing "For services rendered I • • • leave • • • the balance of my account in • • • which amounts to • • •" which with the bank book was delivered to the beneficiary in view of death held not a testamentary disposition of the fund. McCloskey v. Tierney, 141 Cal. 101, 74 Pac. 699.

32. Durand v. Higgins, 67 Kan. 110, 72 Pac. 567. An instrument which declares the present will of the maker as to disposal of property after his death, without attempting to declare or create any rights therein prior to such event, is testamentary in character. Instrument providing that certain notes held by maker should be void after his death held testamentary in character and revoked by subsequent will. Templeton v. Butler, 117 Wis. 455, 94 N. W. 306. Under the evidence, deeds held intended to operate as a testamentary disposition and not to pass a present interest. Wilenau v. Handlon, 207 Ill. 104, 69 N. E. 892. Deed from father to son reciting that it was on condition that the grantor should reside on the property and hold the deed in his possession until his death, when it was to be delivered to the grantee or his heirs held not to pass a present interest and to be testamentary in character. Griffin v. McIntosh, 176 Mo. 392, 75 S. W. 677. A conveyance in the form of a deed, to take effect after the death of the maker. Coulter v. Shelmadine, 204 Pa. 120. It is immaterial that the parties meant to make a deed instead of a will if the language used makes it testamentary in character. Id.

33. In re Megary's Estate, 206 Pa. 260. Delivery to beneficiary does not affect maker's right to revoke. Id.

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it is testamentary in character. In order to operate as a will, however, it must be executed in accordance with the statutes relating to such instruments.[34] If the instrument is properly signed, attested, and subscribed, a formal attestation clause is not necessary.[35]

(§ 3) *B. Execution of will.* 1. *Mode of execution.*—The laws of the domicile of the testator govern as to the validity and effect of wills of personal property,[36] and those of the place where the land is situated as to wills of real estate.[37] It is generally held that a substantial compliance with the statutes governing the execution of wills is sufficient,[38] though some states require them to be followed literally.[39] The testator must know the contents of the will.[40] It must be signed by testator,[41] or for him by some other person in his presence or under his direction,[42] and must be signed or the signature acknowledged in the presence of the required number of witnesses[43] who must sign it at his request,[44]

34. If not, it cannot operate as a will, though such was the intention of the parties and though it is testamentary in charatcer. Johnson v. Johnson, 24 R. I. 571. A direction on making deposits in a savings institution that in the event of the death of the depositor payment should be made to his wife is testamentary in character and invalid unless executed as a will. Stevenson v. Earl [N. J. Err. & App.] 55 Atl. 1091. Griffin v. McIntosh, 176 Mo. 392, 75 S. W. 677. To entitle a deed to be probated as a will it must be executed in the form of a warranty deed conveying the land described, with the intent that it shall take effect only after the maker's death, and such intent must be expressed therein. Evidence held sufficient to show lost deed was testamentary in its character. Instruction held sufficient. Lincoln v. Felt [Mich.] 92 N. W. 780.

35. Facts as to attestation may be proved by subscribing witnesses in absence of attestation clause. Williams v. Miles [Neb.] 94 N. W. 705. One not explicit may be disregarded. In re Cornell's Will, 89 App. Div. [N. Y.] 412. Okl. St. 1893, § 6173, does not require it. In its absence it can be shown by competent evidence that the will was properly attested. Ward v. Logan County Com'rs, 12 Okl. 267, 70 Pac. 378.

36. N. Y. Code Civ. Proc. § 2694. In re Barandon's Estate, 41 Misc. [N. Y.] 380; Davis v. Upson, 209 Ill. 206, 70 N. E. 602.

37. In re Barandon's Estate, 41 Misc. [N. Y.] 380. In order that a will may be of any value as a transfer of title to land, it must be executed, attested, and proved in the manner prescribed by the laws of the state where the land is located. Fenderson v. Mo. Tie & T. Co. [Mo. App.] 78 S. W. 819. As to attestation. In re Jones' Will, 85 N. Y. Supp. 294. The laws of the state where the property is situated and where the will is intended to be carried into effect will govern in determining whether it was properly executed. As to what constitutes undue influence. Succession of Jacobs, 109 La. 1012. See, also, title Conflict of Laws, 1 Curr. Law, p. 561, § 2, also p. 564, § 7.

38. Sufficient if its object and intent are reached without a violation of its express language. Savage v. Bulger, 25 Ky. L. R. 763, 76 S. W. 361; In re Jones' Will, 85 N. Y. Supp. 294; In re Palmer's Will, 42 Misc. [N. Y.] 469.

39. Must be executed precisely according to statute in Pennsylvania. In re Irvine's Estate, 206 Pa. 1.

40. May be made known by reading or explaining it to him when he cannot read English. Signing copy when original had been read and explained, held sufficient. Beyer v. Hermann, 173 Mo. 295, 73 S. W. 164. There is a presumption of knowledge of the contents arising from the fact of possession for several days before execution when testator produced it. In re Jones' Will, 85 N. Y. Supp. 294. Letters of testator tending to show his knowledge of the contents of the will are admissible. In re Wheelock's Will [Vt.] 56 Atl. 1013.

41. Order admitting to probate prima facie evidence. Higgins v. Nethery, 30 Wash. 239, 70 Pac. 489.

42. Evidence sufficient to show signature. Higgins v. Nethery, 30 Wash. 239, 70 Pac. 489. If the testator through physical weakness is unable to write, he may sign by his mark and request another to write his name. Under Ky. St. 1899, § 4828. Savage v. Bulger, 25 Ky. L. R. 763, 76 S. W. 361.

43. In re Berdan's Will [N. J. Prerog.] 55 Atl. 728; In re Kohley's Estate, 200 Ill. 189, 65 N. E. 699. Testatrix had signed her will in the absence of the attesting witnesses at end of the will but in the wrong place. It was attested by witnesses in the presence of the testatrix and acknowledged by her in their presence. Held, a due and proper execution. Estate of Nicholson, 2 Ohio N. P. (N. S.) 189. An attestation in the same room with the testator is an attestation in his presence. Savage v. Bulger, 25 Ky. L. R. 763, 76 S. W. 361. Declaration of testator that he had written entire paper held sufficient acknowledgment. In re Palmer's Will, 42 Misc.]N. Y.] 469. Where one witness signed before the testator and the other signed in such manner that he did not see the signature or know that the will was signed by testator, the will was not sufficiently attested. Will making charitable bequests or devises under Act Pa. April 26, 1855, § 11. In re Irvine's Estate, 206 Pa. 1. Evidence held to show that deceased neither subscribed nor acknowledged execution of the will in presence of attesting witnesses [B. & C. Comp. Or. § 5548]. In re Mendenhall's Will, 43 Or. 542, 73 Pac. 1033. Mere knowledge of testator's handwriting or of his signature not sufficient in case of charitable bequests under Pa. Act April 26, 1855, § 11. In re Irvine's Estate, 206 Pa. 1. Evidence sufficient to sustain finding that will was signed in the presence of the witnesses and that testator declared it to be his will. In re

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and, in some states, in his presence[45] and in the presence of each other.[46] In some states the testator must sign first,[47] but in others the order of signature is immaterial.[48] The witnesses must know that the instrument is a will,[49] but they need not know its contents.[50] A witness may sign by his mark, another person writing his name.[51] In the absence of statutory requirements to the contrary, it is immaterial upon what part of the instrument the testator[52] or subscribing witnesses[53] sign. The word "credible," as used in the statute with reference to the subscribing witnesses, means competent; that is they must not be persons disqualified by mental imbecility, interest, or crime, from giving evidence in a court of justice.[54] Therefore conviction of an infamous crime does not render one incompetent.[55] The witness is presumed to be credible.[56] Acknowledgment and privy

Cornell's Will, 89 App. Div. [N. Y.] 412. Evidence that testator signed in the presence of one witness and acknowledged his signature in the presence of the other, declared to both that it was his will, and that the two at his request signed as witnesses, held to justify its admission to probate. In re Burns' Will, 88 App. Div. [N. Y.] 611.

44. Elliott v. Elliott [Neb.] 92 N. W. 1006; In re Palmer's Will, 42 Misc. [N. Y.] 469; In re Burns' Will, 88 App. Div. [N. Y.] 611.

45. Not essential in New York whether the will was executed in that or in another state. In re Jones' Will, 85 N. Y. Supp. 295. Evidence held sufficient to show that will was signed by draftsman at the request of testator and in his presence. Elliott v. Elliott [Neb.] 92 N. W. 1006. The purpose of the statutory provisions in regard to witnesses is to require proof of the execution of the will. Ortt v. Leonhardt, 102 Mo. App. 38, 74 S. W. 423.

46. Necessary in New Jersey. In re Berdan's Will [N. J. Prerog.] 55 Atl. 728. In New York the acknowledgment need not be made at the same time to both witnesses nor need they sign in the presence of each other. 2 Rev. St. (2d Ed.) pt. 2, c. 6, tit. 1, p. 63, § 40, relating to execution does not so require. In re Diefenthaler's Will, 39 Misc. [N. Y.] 765; In re Palmer's Will, 42 Misc. [N. Y.] 469.

47. Under the New York statute. In re Cornell's Will, 89 App. Div. [N. Y.] 412.

48. In Kentucky it is held to be immaterial whether the names of the attesting witnesses or that of the testator be first subscribed if the witnesses were present when the testator either wrote his name or acknowledged it as his signature. Savage v. Bulger, 25 Ky. L. R. 763, 76 S. W. 361.

49. Rev. St. Mo. 1899, § 4604. Evidence held to show that witnesses knew the instrument was a will. Ortt v. Leonhardt, 102 Mo. App. 38, 74 S. W. 423; In re Burns' Will, 88 App. Div. [N. Y.] 611. Declaration of testator that he had written out a paper so that his matters could be attended to in case anything happened to him held sufficient declaration that it was his will. In re Palmer's Will, 42 Misc. [N. Y.] 469. A will is sufficiently executed if testator being cognizant of all that was being done, the subscribing witnesses being present, saw him make his mark and subscribed their names, though testator did not expressly acknowledge it to be his last will. Savage v. Bulger, 25 Ky. L. R. 763, 76 S. W. 361. The will is properly executed though the testator refused to inform them what the instrument was, they being aware that it was a will. Ortt v. Leonhardt, 102 Mo. App. 38, 74 S. W. 423. Statement of testatrix that the purpose of the instrument was to provide for her child held sufficient publication of the document as a will, though its character is not otherwise indicated. In re Jones' Will, 85 N. Y. Supp. 295. Testimony of subscribing witnesses that they did not see testator sign, that they signed as witnesses in his presence, but that nothing was said by testator as to its being his will is insufficient proof of due execution. In re Kohley's Estate, 200 Ill. 189, 65 N. E. 699.

50. Rev. St. Mo. 1899, § 4604. Ortt v. Leonhardt, 102 Mo. App. 38, 74 S. W. 423.

51. Appeal of Reaver's Ex'rs, 96 Md. 735. Signature was written by another in his presence and at his request or at testator's request in witnesses' presence. Mock v. Garson, 84 App. Div. [N. Y.] 65. On an issue whether the will was properly executed, evidence that testator had executed a former will is admissible with proof that he superintended its execution and had complied with the statutory requirements. Id.

52. Kolowski v. Fausz, 103 Ill. App. 528. A holographic will ending with the words "I * * * [testator's name] say this is my last will and testament" is sufficiently signed by testator. Under Va. Code 1887, § 2514, providing that a will shall be signed in such a manner that the name is intended as a signature. Dinning v. Dinning [Va.] 46 S. E. 473.

53. Sufficient when attested on the reverse side of the leaf where the granting clause was written though there were two blank lines at the foot of the granting page. In re Morrow's Estate, 204 Pa. 479.

54. Savage v. Bulger, 25 Ky. L. R. 1269, 77 S. W. 717. Using "credible" in an instruction as referring to character is erroneous but under the evidence held not prejudicial. Id.; Savage v. Bulger, 25 Ky. L. R. 763, 76 S. W. 361. A "credible" witness means one who is not for any legal reason disqualified from giving testimony generally or by reason of interest or other statutory disqualifications incompetent to testify in respect to the particular subject-matter under investigation, defining the term "credible witness" as used by a statute requiring such witnesses to a will. Boyd v. McConnell, 209 Ill. 396, 70 N. E. 649. That one is the trustee of a beneficiary, a charitable organization, does not render him incompetent as a witness to a will. Id.

55. Rev. Laws Mass. c. 175, § 23. O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788.

56. Boyd v. McConnell, 209 Ill. 396, 70 N. E. 649.

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examination is not essential to the validity of a will by a married woman under a statute authorizing them to dispose of their property by will in as full and complete a manner as though unmarried.[57] Whether or not the formalities required at the execution of the will have been complied with is a question of fact for the jury.[58]

(§ 3B) 2. *Nuncupative and holographic wills.*—Nuncupative wills are not favored by the law, and in application for their probate it must appear that every requirement of the statute has been met.[59] It must appear that the person made use of words which would amount to a testamentary disposition, that he intended to make a will, and that he indicated in some way to a sufficient number of persons present that he had such an intention, and that he desired them to bear witness to the disposition he was about to make of his property.[60] Proof must be made within the time limited, and in the manner prescribed, by statute.[61] Holographic wills must be wholly written in all their essential parts[62] by the testator.

(§ 3) *C. Revocation and alteration. Revocation in general.*—If a will offered for probate has been revoked for any reason, it is not the will of the testator, and a judgment refusing probate must be rendered.[63] As a general rule, marriage of the testator revokes all former wills.[64] In some states the birth of a child, subsequent to the execution of the will and before testator's death, operates to revoke it.[65] In order to constitute an express revocation, there must be an intention to revoke,[66] which must be carried out in some of the forms generally required by statute.[67] The tearing, cutting, or other mutilation of a will found in the testator's possession, will be presumed to have been done by testator or under his direc-

57. Shannon's Code Tenn. § 4247. Nair v. Caldwell, 109 Tenn. 148, 70 S. W. 610.

58. Davis v. Upson, 209 Ill. 206, 70 N. E. 602.

59. Strict proof is required because the opportunity for fraud and the likelihood of mistake are great. Scales v. Thornton's Heirs, 118 Ga. 93. Heirs should not be disinherited by nuncupative will unless prescribed forms for establishing it are carefully observed and strictly conformed to. O'Callaghan v. O'Brien, 116 Fed. 934.

60. Must be at least three witnesses under Georgia code [Civil Code § 3349]. Scales v. Thornton's Heirs, 118 Ga. 93. It must be proved to be genuine by evidence strong enough to create a belief in an unbiased mind that the necessary words were spoken with intent thereby to make a disposition of the testator's property. O'Callaghan v. O'Brien, 116 Fed. 934. Evidence held insufficient to establish a nuncupative will it consisting of the evidence of the beneficiary and three of her relatives. Id. Evidence insufficient to show that testatrix intended to make a will, or communicated such intention to anyone, or requested anyone to bear witness thereto. Scales v. Thornton's Heirs, 118 Ga. 93.

61. Washington statutes require proof within six months after the words are spoken, and that a citation must be issued to the next of kin. O'Callaghan v. O'Brien, 116 Fed. 934. An order directing a citation to issue immediately, and fixing the time for the widow or next of kin to appear for contest on the same day which was the day of the filing of the petition was not compliance with Bal. Ann. Codes & St. Wash. § 4606. Id.

62. That the words "My will" added as a caption were not written by the testator does not invalidate the will. Baker v. Brown [Miss.] 36 So. 539.

63. Sutton v. Hancock, 118 Ga. 436.

64. At common law the marriage of a woman and the marriage of a man, and the birth of issue, revoked their former wills. Francis v. Marsh [W. Va.] 46 S. E. 573. Marriage operates as a revocation of a will made by a single woman (Burns' Ind. Rev. St. 1901, § 2732) but held not to apply where a married woman makes a will, is divorced, and remarries (Hibberd v. Trask, 160 Ind. 498, 67 N. E. 179), or may, though made in contemplation thereof and though provision for the wife is made therein (Id.). Code 1899, c. 77, §§ 6, 8, did not impair the right of disposal of property by will but merely prescribed a reasonable regulation for the exercise thereof. Francis v. Marsh [W. Va.] 46 S. E. 573. In Massachusetts, marriage revokes a will not made in contemplation thereof, except in so far as the will is an exercise of a power of appointment [Rev. Laws, c. 135, § 9]. In case the property, in default of appointment, goes to those who would have been entitled to it had it been the property of the donee of the power, the statute applies and the will is revoked. Paine v. Price, 184 Mass. 350, 68 N. E. 833.

65. Iowa Code, § 3276. Rowe v. Rowe, 120 Iowa, 17, 94 N. W. 258.

66. In re Knapen's Will, 75 Vt. 146.

67. As burning, tearing, obliterating, etc. Mere intention to revoke not sufficient. Williams v. Miles [Neb.] 94 N. W. 705. An affidavit made by testatrix subsequent to the will that she did not make it is not admissible. In re Lawlor's Will, 86 App. Div. [N. Y.] 527; Stevens v. Stevens [N. H.] 56 Atl 916.

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tion, with the intention of revoking it,[68] and proponent has the burden of showing that it was not.[69] If partial obliterations or cancellations are made with the intention of substituting other words therefor, and such intention is frustrated, they will not work a revocation, but the will will stand as originally written.[70] A written entry of revocation on the will to be effective must either be attested as in the manner of execution of wills, or so written as to obliterate or cancel some material portion.[71] Mere naked declarations of testator that he has revoked a will do not operate as a revocation, and are not admissible to establish such fact.[72]

By subsequent will or codicil.—A will[73] or a particular bequest or devise therein[74] may be revoked by a subsequent will or codicil, either expressly or by implication.[75] The fact that the new disposition is void will not prevent a revocation, unless an implied condition to the contrary appears from a construction of both instruments.[76] The mere fact that a subsequent will was made is not sufficient of itself, and without some proof of its contents, to show revocation of a former one.[77] Courts do not favor revocation by implication and incline to such construction as will give effect to both instruments;[78] hence, the later will revokes the former one only when the two are,[79] and only in so far as they are, thoroughly and radically contradictory of, or inconsistent with, each other.[80] In such cases, revocation is a question of intention to be determined from the instruments themselves and from all the circumstances.[81]

An agreement to make a particular will does not revoke an existing one.[82]

68. Stevens v. Stevens [N. H.] 56 Atl. 916. It must appear that the will was in testator's possession and found among his papers after his decease in the condition in which it was offered. A presumption of revocation by removal of the seal is not raised by the testimony of the subscribing witnesses, who had not seen the will for 20 years that the seal was different when executed, the will produced being apparently perfect and with the seal attached. Id. The absence of any mutilation of the paper does not conclusively establish, and is not evidence that the removal of the seal was intentional. Id. Where the will produced had the testator's name erased, it will be presumed that it had been revoked without further proof of knowledge of testator of such mutilation. Cutler v. Cutler, 132 N. C. 190.

69. Cutler v. Cutler, 132 N. C. 190.

70. In re Knapen's Will, 75 Vt. 146.

71. "This, my will and testament, is of no avail and null and void" dated and signed by testator but not attested by witnesses and written in the left hand corner of the last sheet of the will and not obliterating any part thereof, held not a revocation of the will. Oetjen v. Oetjen, 115 Ga. 1004.

72. Not admissible. Stevens v. Stevens [N. H.] 56 Atl. 916; McElroy v. Phink [Tex.] 76 S. W. 753; Hamilton v. Crowe, 175 Mo. 634, 75 S. W. 389. Are mere expressions of opinion as to the legal effect of his act (In re Dake's Will, 75 App. Div. 403, 11 N. Y. Ann. Cas. 383), though accompanied by deeds conveying property disposed of by the will [Ga. Civ. Code, 1895, §§ 3341-3345] (Coffee v. Coffee, 119 Ga. 533). Cannot be shown by declarations of a testator alone. Stevens v. Stevens [N. H.] 56 Atl. 916. If subsequent will revoking a prior one is lost, then, its tenor having been shown, declarations of the testator are admissible in corroboration. Contents cannot be shown solely by declarations. Williams v. Miles [Neb.] 94 N. W. 705. But an intention to revoke in some other manner must be manifested by some act prescribed in the statute, and performed as the statute requires. Id.

73. Williams v. Miles [Neb.] 94 N. W. 705. A duly executed codicil referring to a former will operates as a revocation of an intermediate will. In re De Haven's Estate, 207 Pa. 152.

74. Devise revoked by codicil. Joynes v. Hamilton [Md.] 57 Atl. 25. Residuary clause in codicil held not to revoke specific devise in will. Griggs v. Griggs, 80 App. Div. [N. Y.] 339.

A purported codicil to a will either by reference in the body thereof to such will or by other convincing evidence must be shown to relate to the will as against which it is offered for probate. Mere fact that it was found in same bundle of papers not sufficient. In re Dake's Will, 75 App. Div. 403, 11 N. Y. Ann. Cas. 383.

75. Williams v. Miles [Neb.] 94 N. W. 705.

76. Codicil construed and held to revoke the gift. In re Scott's Will, 88 Minn. 336, 93 N. W. 109.

77, 78. Williams v. Miles [Neb.] 94 N. W. 705.

79. In re Dake's Will, 75 App. Div. 403, 11 N. Y. Ann. Cas. 383; Williams v. Miles [Neb.] 94 N. W. 705. A writing, "This is to certify that the notes held by me against * * * shall be null and void after my death," though testamentary in character, is revoked by a subsequent will disposing of all the signer's personalty. Templeton v. Butler, 117 Wis. 455, 94 N. W. 306.

80. The prior will is revoked only in so far as it is inconsistent with the later. Williams v. Miles [Neb.] 94 N. W. 705.

81. Williams v. Miles [Neb.] 94 N. W. 705.

82. An agreement by a married woman that, in consideration of her husband's in-

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A subsequent will which has the effect of revoking a prior one may be shown for the purpose of defeating probate of the prior one, although by reason of its loss or destruction the dispositions made therein cannot be shown and are incapable of execution.[83] The burden of proof in such case is on the party alleging revocation,[84] and the evidence to that effect must be clear, unequivocal, and convincing.[85]

Presumption of revocation arising from failure to find will.—If a will, shown to have been made and left in testator's possession, can not be found after his death, he will be presumed to have destroyed it animo revocandi,[86] and the burden of showing the contrary is on the party seeking to establish it.[87] Declarations of the testator and other secondary evidence are admissible for the purpose of showing the probability or improbability of its destruction by him,[88] or whether the destruction was accidental or with intent to revoke.[89] The mere fact that contestant had an opportunity to destroy the will, will not of itself overcome this presumption, but it is generally held that it may be considered in connection with other proof.[90] Where the will is last seen in the hands of another than testator, no such presumption of revocation arises.[91]

Election by testator's widow to take under the statute does not revoke the will but it must be administered so far as may be.[92]

Alterations.—Interlineations or alterations made after the execution of the will, and without a re-execution thereof,[93] are inoperative, but do not affect the validity of the instrument as originally executed.[93] The same is true of words in-

testacy, she would, by her own will, provide for his sisters, does not revoke her existing will. Hibberd v. Trask, 160 Ind. 498, 67 N. E. 179.

83. Williams v. Miles [Neb.] 94 N. W. 705. In such case, it is sufficient to prove that the lost will revoked the former one and its contents need not be shown further. Id. Declarations of testator admissible in corroboration of other evidence only. Intention to revoke must be made manifest by some act prescribed by statute. Id.

84. The parties seeking to establish revocation in such a manner will have the burden of proving either express revocation or that the terms of the second will by necessary implication revoked the first. In re Dake's Will, 75 App. Div. 403, 11 N. Y. Ann. Cas. 383.

85. Proof of actual contents of the subsequent will must be given. Williams v. Miles [Neb.] 94 N. W. 705.

86. Presumption that another had done so would be presuming a crime. Williams v. Miles [Neb.] 94 N. W. 705; Hamilton v. Crowe, 175 Mo. 634, 75 S. W. 389; Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395; Gfeller v. Lappe, 208 Pa. 48; Stetson v. Stetson, 200 Ill. 601, 66 N. E. 262.

87. Hamilton v. Crowe, 175 Mo. 634, 75 S. W. 389. Possession of decedent's papers by his wife, the contestant and who was omitted from the will and refusal to surrender until action brought sufficient to overcome such presumption. Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395. Evidence held sufficient to rebut presumption. Gfeller v. Lappe, 208 Pa. 48.

88. Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395. In a proceeding to establish a lost will, declarations of the husband of the testatrix that his wife had sent him after the will and had destroyed it is hearsay. McElroy v. Phink [Tex.] 76 S. W. 753.

89. Hamilton v. Crowe, 175 Mo. 634, 75 S. W. 389. Presumption of fact only. Williams v. Miles [Neb.] 94 N. W. 705. In proceedings to establish a lost will, evidence of declarations of testatrix that she had destroyed it, had burned it up, and had decided not to leave her property to the legatee named therein because of ill treatment, is admissible to show revocation (McElroy v. Phink [Tex.] 76 S. W. 753) but declarations seven or eight years before her death are properly excluded (Id.).

90. Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395. In Texas, such evidence is held to be immaterial. McElroy v. Phink [Tex.] 76 S. W. 753.

91. In possession of another than testator to whom it was adverse. Not changed by Tex. Rev. St. 1895, art. 1904, subd. 5, providing that before a will is admitted to probate it must be proved that it has not been revoked. McElroy v. Phink [Tex.] 76 S. W. 753. Evidence of the character of testatrix's husband, into whose possession the will had been delivered, and where last seen, not admissible, he having died without deposition taken. Id.

92. Noecker v. Noecker, 66 Kan. 347, 71 Pac. 815.

93. Will may be admitted with an express declaration of each provision annulled. In re Stickney's Will, 41 Misc. [N. Y.] 70. Cancellation of a provision that the will should not be probated or become a public record after execution by drawing a line through it will. Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129. Addition of a clause appointing an executor. Saunders v. Samarreg Co., 205 Pa. 632. Testatrix drew lines through certain bequests but not so as to obliterate them writing new clauses on the margin of the will and also drew a line through the name of one of the residuary legatees writing in the margin "de-

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troduced through fraud or mistake.[94] The burden is generally on proponent to show that alterations and interlineations in a will were made and known to testator before its execution,[95] but interlineations made in the hand writing of the scrivener are presumed to have been so made.[96] The question is one of fact to be determined on all the evidence.[97]

(§ 3) *D. Republication and revival.*—A revoked will may be revived by a duly executed codicil[98] or a re-execution thereof.[99] The execution of a codicil republishes the will in the form in which it then existed,[1] in so far as it is not changed thereby,[2] and, if properly executed, cures any defect in the execution of the will.[3] The authorities are in conflict as to whether the destruction of a subsequent will, which revokes a former one, operates to revive such former one.[4]

§ 4. *Probating, establishing, and recording wills. A. Powers of courts.*—The powers of courts in the probate and construction of wills and in subsequent actions to test their validity is fixed by statute and varies in the different states.[5]

ceased" and "share with Mrs. A. S." In re Knapen's Will, 75 Vt. 146. Insertion of the executor's name in a blank space. Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129.

The addition of a clause appointing an executor. Saunders v. Samarreg Co., 205 Pa. 632.

94. O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788.

95. Alterations held fraudulent. O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788.

96. Which is strengthened if not made conclusive by republication long after the death of the scrivener. In re Morrow's Estate, 204 Pa. 479.

97. O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788.

98. In re Noon's Will, 115 Wis. 299, 91 N. W. 670. In order that a codicil may revive a revoked will, it must show an intention so to do, either by express language or reasonable inference. The question in such case is one of intention. A codicil: "I, M., do make this codicil to my will made on the 6 day of August, 1895. I do nominate and appoint W. as one of the executors of my will and do hereby revoke the appointment of J. to said will," revives the will therein referred to, which had been revoked by marriage of testator. Francis v. Marsh [W. Va.] 46 S. E. 573.

99. The mere refiling of the former will with the county judge will not revive it, though such may have been testator's intention [Wis. Rev. St. 1898, § 2282]. In re Noon's Will, 115 Wis. 299, 91 N. W. 670.

1. And proof of the codicil establishes the will. Hubbard v. Hubbard, 198 Ill. 621, 64 N. E. 1038. A duly executed codicil operates as a new adoption of the original will so as to make it speak as of the date of the codicil. In re De Haven's Estate, 207 Pa. 152. The execution of a codicil within 30 days of decedent's death, said codicil reciting that it was executed and declared "together with the will set forth on the preceding pages to be her last will and testament," did not constitute a re-execution so as to invalidate charitable bequests. Construing Civ. Code, §§ 1313, 1287. In re McCauley's Estate, 138 Cal. 432, 71 Pac. 512.

2. Illensworth v. Illensworth, 39 Misc. [N. Y.] 194.

3. In re Douglas' Will, 38 Misc. [N. Y.] 609.

4. **In Wisconsin** it does not. Revocation takes effect immediately and renders former will totally inoperative. In re Noon's Will, 115 Wis. 299, 91 N. W. 670.

In Illinois it works a revival. 3 Starr & C. Ann. St. (2d Ed.) pp. 4044, 4045, providing that a will cannot be revoked by any writing not testamentary in character. Stetson v. Stetson, 204 Ill. 601, 66 N. E. 262.

In Nebraska, it is held that such destruction does not of itself revive the former one, but that the intention of the testator governs, and that, if there is any presumption, it is against revivor. Evidence insufficient to show intention to revive. Williams v. Miles [Neb.] 94 N. W. 705.

5. **In Connecticut,** it is held that probate courts possess only such powers as are expressly or by necessary implication conferred on them by statute and are without jurisdiction to set aside their decree admitting and approving a will, even if obtained by fraud [Conn. Gen. St. 1902, § 194]. Except ex parte orders [Gen. St. 1902, § 203]. Delehanty v. Pitkin [Conn.] 56 Atl. 881.

In Illinois, the county court has jurisdiction to set aside the probate of a will procured by fraud. Wright v. Simpson, 200 Ill. 56, 65 N. E. 628. Heir's name designedly omitted from petition for probate and statutory notice not given him. Id. Petition may be filed at a subsequent term and concurrently with a petition in chancery to set aside the will. Id.

In Kansas a proceeding to set aside the will because of uncertainty of beneficiaries and to have the property turned over to applicant, as heir at law, held an action to contest the will within Gen. St. 1901, § 7957, of which the probate court had no jurisdiction. Dean v. Swayne, 67 Kan. 241, 72 Pac. 780.

In Massachusetts, the probate court can enter a compromise decree only when all parties agree thereto, and cannot determine whether or not there has been a compromise or its nature. Hence, a decree of the supreme court on compromise of a contest is not subject to collateral attack because a prior decree of the probate court void for want of jurisdiction had not been vacated or set aside [Rev. Laws, c. 148, § 15]. Bartlett v. Slater, 182 Mass. 208, 65 N. E. 73. And on presentation of the decree of the supreme court, it was the duty of the probate court

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(§ 4) *B. Parties in will cases and the right to contest.*—Whoever has a right to offer a will in evidence or to make title under it may insist on having it proved.[6] Only parties having an interest in the estate, under the will or otherwise, may contest the will, either in the probate court, or by a subsequent proceeding.[7] Legatees under a will of personalty only cannot contest before the will is probated.[8]

The acceptance of a legacy, in the absence of fraud, estops the legatee from questioning the validity of the will,[9] unless the benefit received is thereafter paid

to enter a decree revoking the former decree and re-establishing the will. Id.

In Michigan: Probate court may establish lost will [Comp. St. §§ 650, 651]. Ewing v. McIntyre [Mich.] 95 N. W. 540.

In Montana, it is held that the jurisdiction of the district court when exercising its probate powers is limited by the statute from which they are derived. It possesses powers expressly granted and all the powers incidentally necessary to their effective execution. May on consent of all parties interested enter a compromise decree on contest. In re Davis' Estate, 27 Mont. 490, 71 Pac. 757.

In Nebraska: The county court has exclusive original jurisdiction in the probate and contest of wills, and in their construction for the purpose of administration and settlement of estates [Neb. Comp. St. 1901, c. 23, § 140]. Can only come before district court on appeal or error. Anderson v. Anderson [Neb.] 96 N. W. 276. But its construction of the will in such case is for the benefit of the administrator only, in order to advise him what course to pursue. It will protect him, but does not affect the rights of adverse claimants under the will. Id. It also has power to grant equitable relief in proper cases, including the power to revoke probate. Such power is not expressly granted, but will be inferred from the statutory grant of full, complete and exclusive jurisdiction in probate matters. Genau v. Abbott [Neb.] 93 N. W. 942.

The district court has jurisdiction in equity of actions to construe wills in cases where a trust relation exists by reason of the terms of the instrument itself, and to determine the rights of the parties thereunder, but has no original jurisdiction in an action to contest a will or set aside the probate of the same. Anderson v. Anderson [Neb.] 96 N. W. 276. Where no trust is created, neither the executor, the heirs nor devisees, who claim only a legal title in the estate, will be permitted to come into a court of equity to obtain a construction of a will. Id.

In Pennsylvania, the register of wills has no power to revoke probate. In re McAndrew's Estate, 206 Pa. 366.

In Texas, the county courts having probate jurisdiction are without jurisdiction of an application to annul a will involving title to realty. Title held not involved. Allardyce v. Hambleton, 96 Tex. 30, 70 S. W. 76. A provision stating that the entire property was community except an undivided interest of a certain sum which was bequeathed in trust for a son, is prejudicial to the widow entitling her to sue to have such provision annulled and the county court has jurisdiction. Id.

6. Person claiming title by deed from devisee and her husband, though latter has tax deed. Hanley v. Kraftczyk, 119 Wis. 352, 96 N. W. 820. The executor may propound the will for probate. In so doing he acts for every one claiming under it. Ward v. Brown, 53 W. Va. 227.

7. One who is not an heir or distributee of testator at the time of his death, and would not have been if those under whom he claims had died before testator, cannot contest probate or have probate in common form set aside for the purpose of a contest. Ligon v. Hawkes, 110 Tenn. 514, 75 S. W. 1072. Only those affected in pecuniary sense by settlement of the estate [Rev. Prob. Code, S. D. § 43]. Halde v. Schultz [S. D.] 97 N. W. 369. Claimant under alleged void clause may appeal from decree on bill to contest. Ward v. Brown, 53 W. Va. 227. A beneficiary under a prior will which was destroyed cannot contest a subsequent will. In re Rayner's Will, 93 App. Div. [N. Y.] 114. Legatees or heirs of heirs or their personal representatives may contest [Code, §§ 1663, 1664]. Waiver of widow or sale by heir of his expectancy do not estop them to contest. In re Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076. Divorced husband, though he may have an interest contingent upon the death of a minor child, cannot contest. Particularly under Rev. Civ. Code, §§ 107-127, pertaining to custody and control of minors and their property where the custody had been given to testatrix. Halde v. Schultz [S. D.] 97 N. W. 369. In a Federal court in a suit to declare invalid certain provisions of the will, which if successful would cause a part of the estate to pass as intestate property, the **legatees and distributees are indispensable parties unless special circumstances are shown** to bring the case within some recognized exception to the general equity rule as to parties [Bates' Ann. St. Ohio, §§ 5858, 5859]. Stevens v. Smith [C. C. A.] 126 Fed. 706.

A county owning a cemetery which is under the management of trustees has no financial interest in a will providing a cash legacy for building a receiving vault in the cemetery. De Witt County v. Leeper, 209 Ill. 133, 70 N. E. 760.

Only person interested or who would be benefited by setting aside the will can maintain a suit to test its validity. Code § 2653a. Niece held not entitled to maintain the action as next of kin, the estate appearing to consist only of personalty and where she alleged that testatrix left a husband surviving. Miller v. Maujer, 81 N. Y. S. 575.

8. In re Wiltsey's Will [Iowa] 98 N. W. 294. On death of contestant of a will relating to personalty only his representatives should be substituted [Code, § 3445]. Id.

9. Immaterial that acceptance was under protest or under a claim that legacy constituted only a part of what claimant was en-

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into court and no innocent persons will suffer by permitting him to do so.[10] The contesting of a will in the probate court precludes a party from thereafter instituting a suit to contest,[11] but mere participation in probate proceedings does not.[12] One opposing a caveat filed against a will is thereby estopped from contesting the will on the same grounds unless he can show that he has acquired further information which had been withheld from him by the parties complained of, and that he used reasonable diligence to acquaint himself with the facts.[13] A right to contest is not property, but is a mere right of action which cannot be assigned or inherited.[14]

(§ 4) *C. Duty to produce will.*—Statutes in some states require the person having the custody of a will to deliver it to the executor therein named or to the probate court within a specified time after knowledge of testator's death;[15] but independent thereof, action will lie for neglect or concealment.[16]

(§ 4) *D. Probate and procedure in general.*—A will must be established in court by proof before it has judicial recognition,[17] and in some states, before it is admissible in evidence.[18]

As a rule, the will may be admitted to probate in the state and county where the testator resided,[19] or where any part of his property is situated.[20] A will devising lands may be admitted to probate at any time after the death of the testator,[21] and the failure of the court to act on a petition for probate will not affect the right to file a subsequent petition.[22]

titled to by law, outside the will. Stone v. Cook [Mo.] 78 S. W. 801.

10. Mere offer to pay in or to allow the amount to be deducted from party's share in the estate not sufficient. Not allowable where executors have paid special legacies, with his knowledge, out of residuum which would go to others if will declared invalid. Stone v. Cook [Mo.] 78 S. W. 801.

11. In Alabama, a person interested in a will may contest it by a bill in chancery, where he was not a contestant before the probate thereof [Ala. Code, § 4298]. Though he assisted the contestant in the probate court and paid part of the fees. Only barred when he files allegations in writing required by Code, § 4287. Breeding v. Grantland, 135 Ala. 497.

12. Heirs are not estopped to contest by the fact that they were parties to probate proceedings. Did not set up contention in probate court and not bound to do so. Gueydan v. Montagne, 109 La. 38.

13. Petitioner estopped. Reichard v. Izer, 96 Md. 495.

14. Ligon v. Hawkes, 110 Tenn. 514, 75 S. W. 1072.

15. In Vermont, any person having the custody of the will of a deceased person must under penalty deliver it to the executor or probate court within thirty days after knowledge of the death [Vt. St. §§ 2357-2359]. The statute is penal. Richardson v. Fletcher, 74 Vt. 417; Fletcher v. Fletcher, 74 Vt. 430.

16. An action on the case will lie under R. L. 2052 for neglect accruing before Vt. St. § 2359 took effect. R. L. § 295, not repealed by Vt. St. § 2359. Richardson v. Fletcher, 74 Vt. 417. Allegations respecting Vt. St. § 2357 may be treated as surplusage as not being necessary to the offense charged. Fletcher v. Fletcher, 74 Vt. 430. Allegation that the will was in the custody and control of defendant ever after it was executed, until a certain specified date, at which time, and never prior thereto, he presented it to the probate court which had jurisdiction, held sufficient. Richardson v. Fletcher, 74 Vt. 417; Fletcher v. Fletcher, 74 Vt. 430.

17. Rev. St. Wis. 1898, § 3788. In re Downing's Will, 118 Wis. 581, 95 N. W. 876. No court can give effect to a will not probated. In re Wiltsey's Will [Iowa] 98 N. W. 294. Rev. Civ. Code La. art. 1644. Sprowl v. Lockett, 109 La. 894.

18. Sand. & H. Dig. §§ 7410, 7411. Action for recovery of possession of land, plaintiff relying solely upon a lost will, not probated or proved as authorized by statute. Myar v. Mitchell [Ark.] 80 S. W. 750. The judgment admitting the will to probate is admissible to show the fact of probate. Action against trustee under a will for maladministration of the trust. Boyd v. McConnell, 209 Ill. 396, 70 N. E. 649.

19. Evidence on question of residence of testator in determining jurisdiction to probate the will. In re Golden's Will, 40 Misc. [N. Y.] 544. The statements of residence in a holographic will are entitled to great weight, but are not controlling in a will prepared by an attorney. Id.

20. The will of a nonresident testator having property in the state may be admitted to probate. In re Barandon's Estate, 41 Misc. [N. Y.] 380. Death of the testator within the county leaving property therein is sufficient to confer jurisdiction on the probate court of such county to admit the will [2 Ball. Ann. Codes & St. § 6087]. Residence of the testator need not be averred. Petition sufficient. Higgins v. Nethery, 30 Wash. 239, 70 Pac. 489.

21. Hanley v. Kraftczyk, 119 Wis. 352, 96 N. W. 820. Right cannot be barred by limitation. Id.

22. Hanley v. Kraftczyk, 119 Wis. 352, 96 N. W. 820.

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A will is probated in solemn form when it is proved upon notice to all persons interested,[23] and in common form when no such notice is given.[24]

Ancillary relief by injunction to restrain proceedings in the probate court to probate subsequent wills,[25] and by the appointment of a receiver to protect the property, may be had.[26]

(§ 4) *E. Burden of proof and evidence on the whole case.*—Generally speaking, the law presumes testamentary capacity and that the will contains the unrestrained wishes of the testator. Hence, it is usually held that the burden is on the party attacking it on the ground of improper execution, lack of capacity, or undue influence, to prove the facts which he alleges.[27] In some states, however, the rule is that the burden is on proponent from first to last to show, by a fair preponderance of the evidence, the due execution of the will,[28] the competency of testator,[29] and that the will offered was not the result of fraud, deceit, or undue influence.[30] In others, proponents are first required to make out a prima facie

23. In re Hodnett's Will [N. J. Prerog.] 55 Atl. 75. Issue is will or no will. Sutton v. Hancock, 118 Ga. 436. In New Jersey the notice must be personal, and the decree is binding on all parties served. In re Hodnett's Will [N. J. Prerog.] 55 Atl. 75. Under Georgia Code may be probated in solemn form after due notice to all the heirs at law by the testimony of all the subscribing witnesses, or if they are dead, by proof of their signatures and that of the testator [Civ. Code, § 3282]. Sutton v. Hancock, 118 Ga. 436.

24. In re Hodnett's Will [N. J. Prerog.] 55 Atl. 75. Under Georgia Code will may be probated in common form upon the affidavit of a single subscribing witness and without notice to anyone [Civ. Code, § 3281]. Sutton v. Hancock, 118 Ga. 436. In New Jersey, probate in common form is allowed only when no caveat has been filed, but the executor may probate in solemn form whether a caveat has been filed or not [Laws 1898, p. 718]. In re Hodnett's Will [N. J. Prerog.] 55 Atl. 75. Chancellors sitting as ordinaries in the prerogative court of New Jersey have power to require an executor who has proved a will without notice to re-prove the same on notice to all parties concerned, whenever it appears that there is a fair ground for contesting it for lack of proper execution or for lack of testamentary capacity or on the ground of undue influence. Id. Facts sufficient. Petition of widow who was minor when will proved in common form. Id.

25. When testator executed three wills, the beneficiary in the first claiming that the other two were executed while testatrix was suffering from senile dementia could sue in the supreme court to enjoin probate of the will so as to have the rights of all determined in one suit. Le Brantz v. Conklin, 39 Misc. [N. Y.] 715.

26. As in an action by the beneficiary to set aside subsequent wills and transfers by beneficiaries thereunder. Le Brantz v. Conklin, 39 Misc. [N. Y.] 715.

27. **In Nebraska,** burden on contestants to show undue influence by establishing state of facts inconsistent with any other hypothesis. Evidence insufficient. Stull v. Stull [Neb.] 96 N. W. 196.

In District of Columbia, burden on caveator to prove mental unsoundness. Leach v. Burr, 188 U. S. 510, 47 Law. Ed. 567.

In Indiana, in action to contest plaintiffs must establish incapacity by a preponderance of all the evidence. Branstrator v. Crow [Ind.] 69 N. E. 668. Not done by proving insane delusion without proving that it affected the will. Wait v. Westfall, 161 Ind. 648, 68 N. E. 271.

In Iowa, burden of proving insanity on party alleging it. Kirsher v. Kirsher, 120 Iowa, 337, 94 N. W. 846.

In South Carolina, in proceedings to prove will, burden on contestants to show mental unsoundness. Evidence insufficient. Scarborough v. Baskin, 65 S. C. 558.

In Maryland: No evidence to weaken the legal presumption of sanity. Schwanteck v. Berner, 96 Md. 138.

In California, the contestant of a will has the burden of proving by a preponderance of the evidence all the issues of fact raised by him. In re Latour's Estate, 140 Cal. 414, 73 Pac. 1070. Where a petition for probate and a contest are tried at the same time, the proponent should first present his preliminary proof in support of his petition, on which he has the burden of proof. If sustained, the contestant is then required to prove the facts which he alleges [Code, § 1312]. Contestants are considered plaintiffs and have the burden of proving the issues raised by them. Id. On contest before probate, the petition and contest are independent proceedings, which are not responsive to each other. Id.

28. **In Oregon,** in a proceeding to contest, the person seeking to maintain the validity of the will has the burden of proving every essential fact necessary to authorize probate in the county court. In re Mendenhall's Estate, 43 Or. 542, 73 Pac. 1033.

29. **In Virginia,** proponent has the burden of proving testamentary capacity by clear and convincing proof. Testimony of attending physicians and others that testator was mentally incapacitated not overcome by that of the subscribing witnesses to the contrary. Gray v. Rumrill, 101 Va. 507. In Massachusetts, by fair preponderance of evidence. Fulton v. Umbehend, 182 Mass. 487, 65 N. E. 829.

30. **In Oregon,** it is held that where a will is shown to have been duly executed the law presumes the competency of the testator and that it contains his unrestrained wishes in regard to the disposition of his property. But this presumption is a disputable one, and the burden rests on the pro-

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case as to the due execution of the will and testator's mental capacity, by the testimony of the subscribing witnesses or otherwise,[31] and the burden is then upon contestants to prove their allegations by a preponderance of all the evidence.[32] In secondary proceedings to contest the validity of a will,[33] or on appeal, the judgment or decree of the probate court admitting the will to probate is generally held to be prima facie evidence of its due execution and validity, and the burden of proof in such cases is therefore on contestants.[34] It is the duty of the proponent to procure and lay before the court such evidence as may be necessary and appropriate to establish the will.[35]

When a will is offered for probate, there must first be proof that testator was of sound mind when it was made,[36] and where the happening of a contingency is necessary to its validity, proponents must establish the happening of such contingency.[37]

The custody of the will, the relations of the testator and beneficiaries, truthfulness of the witnesses, and the inherent probability of the instrument itself, are

ponent from first to last to show that the will was not superinduced by fraud, deceit or undue influence. Petition to revoke. In re Holman's Will, 42 Or. 345, 70 Pac. 908.

31. Evidence held to show prima facie that testatrix was of sound mind and memory. Ortt v. Leonhardt, 102 Mo. App. 38, 74 S. W. 423.

32. **In Illinois,** the will and testimony of subscribing witnesses given when the will was admitted to probate make out a prima facie case. Baker v. Baker, 202 Ill. 595, 67 N. E. 410. The law presumes capacity, and hence it necessarily results that upon the whole case the burden of proof rests upon the contestants to prove incapacity. Id.; Swearingen v. Inman, 198 Ill. 255, 65 N. E. 80.

In Missouri, it is held that proof that the testator was of the requisite age and sane when the will was executed makes a prima facie case, and it then devolves on contestants to establish incompetency or undue influence. Suit to contest. Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129. Absence of any presumptions from fact of confidential relations. Proceeding to contest. Instructions approved. Crossan v. Crossan, 169 Mo. 631, 70 S. W. 136. Statutory contest of will. Crowson v. Crowson, 172 Mo. 691, 72 S. W. 1065. In the Federal court, in an action to contest the validity of a probated will under the Missouri statute, it was held that the burden of establishing the will and its validity is upon the party relying upon it to the same extent as though it had never been probated. Sawyer v. White [C. C. A.] 122 Fed. 223. [Mo. Rev. St. 1899, §§ 4622, 4623.] Attacked on ground of lack of capacity and undue influence. Burden on defendant. Id.

In Montana, where grounds of opposition are filed in the probate court, contestants are plaintiffs and have the burden of proof and the right to open and close. Proponents must first make out a prima facie case, however, and it is held that the contest does not begin until this has been done [Code Civ. Proc. § 2340]. Farleigh v. Kelley, 28 Mont. 421, 72 Pac. 756.

33. **In New York,** before a will can be admitted to probate, it must appear that at the time of its execution the testator was in all respects competent to make it, and not under restraint (Code Civ. Proc. § 2623. In re Elster's Will, 39 Misc. [N. Y.] 62); but the decree of the surrogate admitting the will to probate is prima facie evidence of its validity, and hence, in an action to test the validity of a will admitted to probate, the burden of proving lack of testamentary capacity is on the contestants [Code Civ. Proc. § 2653a] (Ivison v. Ivison, 80 App. Div. [N. Y.] 599; Mock v. Garson, 84 App. Div. [N. Y.] 65). There is also a presumption that the testator had testamentary capacity. Ivison v. Ivison, 80 App. Div. [N. Y.] 599.

Evidence of incapacity insufficient to take case to jury. Philips v. Philips, 77 App. Div. [N. Y.] 113. Mere evidence that testator was miserly, eccentric and on some subjects irrational, is insufficient to sustain the burden of proof or to warrant submission of testamentary capacity to the jury. Ivison v. Ivison, 80 App. Div. [N. Y.] 599.

In Washington, it is held that, in an action to contest, where the record of a proceeding admitting a will to probate shows that the court had jurisdiction, and all facts necessary to show prima facie a valid will, the burden is on the contestants to show that the will was invalid by reason of the facts alleged. Order admitting will not conclusive, but taken as true until contrary is shown. Higgins v. Nethery, 30 Wash. 389, 70 Pac. 489. After admission of a will to probate, the burden is on contestants to show its invalidity, such admission being prima facie evidence of its validity. Hunt v. Phillips [Wash.] 75 Pac. 970.

In Louisiana, it is held that proceedings leading to the probate in common form are open to attack by those not made parties on any grounds that would be sufficient to support an action to establish the nonexistence of the will. Cox v. Lea's Heirs, 110 La. 1030.

In Pennsylvania, probate is prima facie sufficient evidence of execution. In re Amberson's Estate, 204 Pa. 397.

34. The probate is prima facie evidence of due execution of the will in subsequent proceedings to test its validity. In re Amberson's Estate, 204 Pa. 397.

35. In re Scott's Will, 80 App. Div. [N. Y.] 369.

36. Higgins v. Nethery, 30 Wash. 389, 70 Pac. 489. See ante, § 2.

37. Will directing a disposition of prop-

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circumstances from which its genuineness must be considered.[38] Declarations of the custodian at the time of producing it are res gestae.[39]

Formal execution must be proved, though admitted.[40] Proof of execution must be made by the testimony of the subscribing witnesses if they are available.[41] If absent, other evidence may be admitted as to its proper execution.[42] They are subject to the same rules as to contradiction and impeachment as other witnesses.[43] In some states all the attesting witnesses must be called.[44]

Deposition of nonresident subscribing witness may be taken.[45] The failure

erty "in case I die on my route." Laufer v. Powell, 30 Tex. Civ. App. 604, 71 S. W. 549.

38. Evidence examined and held to show that the instrument was not the will of deceased, but that it had been executed by an impostor. In re McAndrew's Estate, 206 Pa. 366.

On the contest of a will as a forgery, evidence is admissible:—That the subscribing witness claiming to have had the will in his possession furnished no information of its existence to the appraisers of the estate, though present when inquiries were made by them as to the existence of such a document. Dolan v. Meehan [Tex. Civ. App.] 30 S. W. 99. That the individual charged with promoting the fraud was associated with the beneficiaries. Id. That decedent's attorney was in the habit of attending to decedent's business and that neither he nor his partner wrote the will. Id. That decedent's feelings were hostile to the beneficiary under the alleged forged will. Id. Under an allegation that proponent had conspired with others to defraud contestants and had forged the will probated, evidence that before seeking probate proponent had procured an appointment as administratrix of the estate, falsely alleging that she was the only heir and had sold a large portion of the property to her husband is admissible. Farleigh v. Kelley, 28 Mont. 421, 72 Pac. 756. As are statements by proponent's husband to the clerk of court requesting him to write to one of the contestants to the effect that the estate had been settled and closed. Id.

39. The statement made by a subscribing witness, who had possession of the instrument, to a justice of the peace to whom he delivered it, is admissible as part of the res gestae concerning its first production, and also to corroborate witnesses. Dolan v. Meehan [Tex. Civ. App.] 30 S. W. 99. But evidence that a subscribing witness had a few years after execution of the will brought it to witness and explained his possession of it is not admissible. Farleigh v. Kelley, 28 Mont. 421, 72 Pac. 756.

40. Either in the orphan's court or it should be submitted as one of the issues. Nat. Safe Deposit, S. & T. Co. v. Heiberger, 19 App. D. C. 506.

41. When a will is contested, the subscribing witnesses must be produced and examined if present in the county and of sound mind [Mont. Code Civ. Proc. § 2343] (Farleigh v. Kelley, 28 Mont. 421, 72 Pac. 756), and they may then be cross-examined on the whole case (O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788).

42. Farleigh v. Kelley, 28 Mont. 421, 72 Pac. 756. Proof of the genuineness of the signatures of dead or absent witnesses is evidence that all the facts recited in the attestation clause actually took place as therein set forth [Mont. Code Civ. Proc. § 2343]. Id.

An attorney who witnessed the will may testify that he was requested by testator and did so after reading it over several times to testator. (Not privileged.) Elliott v. Elliott [Neb.] 92 N. W. 1006.

The calling of the attorney who drew the will as a witness by the executor is a sufficient waiver of privilege to authorize admission of his testimony. In re Cornell's Will, 85 N. Y. S. 920.

A legatee may testify as to the execution of the will. Disqualified as interested party at common law. In re Wheelock's Will [Vt.] 56 Atl. 1013.

43. Farleigh v. Kelley, 28 Mont. 421, 72 Pac. 756. Statements of subscribing witnesses, who are out of the state, contradictory to the facts in the attestation clause, and evidence of their reputation is admissible. Id. Code, § 2343 makes attestation clause evidence on identification of signatures of absent or deceased witnesses. Id. But not his statements that he had been given money by another to leave the state and that the person who had advanced the money had contracted to purchase whatever interest contestants had in certain property of deceased, the absence of such witness having been already accounted for. Id.

Evidence of contradictory statements and of character are admissible as affecting the credibility of the subscribing witnesses. The record of conviction of a subscribing witness of an infamous crime is admissible as affecting his credibility as a witness testifying in a contest of the will. O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788.

44. All must be called in Massachusetts. The court could in the exercise of his discretion require the calling of a subscribing witness in court, though the statutory number of witnesses had already testified, the will being attested by five witnesses. O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788. Not necessary in Missouri. Law does not make the proof of the will dependent on their testimony alone, or render their testimony absolutely essential. Lorts v. Wash, 175 Mo. 487, 75 S. W. 95. Under Georgia Code, a will may be proved in common form on the affidavit of one subscribing witness, but if proved in solemn form all must be called, or if they are dead, their signatures and that of testator must be proved [Civ. Code, §§ 3281, 3282]. Sutton v. Hancock, 118 Ga. 436.

45. But it is error to require bond of indemnity as security for cost, etc., from legatee applicant as a condition for permitting the issuance, since it was the executor's duty to procure such testimony as proponent

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of subscribing witnesses to remember the circumstances attending the execution will not overcome the recitals in the attestation clause.[46] Where the testimony of subscribing witnesses is in conflict, that which goes to sustain the instrument will be accepted, unless there is evidence which corroborates the other view.[47] Proper subscription and attestation raises a strong presumption of due execution.[48] Proof that testator signed the will and that a sufficient number of persons signed the attestation clause raises a presumption that it was duly executed.[49]

Declarations or admissions by legatees of a want of legal capacity of the testator or of the existence of undue influence can only be shown when made by a sole legatee under the will or by one having power to bind others thereby.[50] Admissions of devisees against their interest are generally receivable.[51] The admission of one legatee or devisee, obviously against his interest, though not entitled to the effect of an admission by all concerned in a common interest under the will, may tend to a presumption against all of them that the thing may be true.[52]

Shifting the burden.—Mere proof of opportunity to exert undue influence is not sufficient to shift the burden or require explanation.[53] But the burden may be shifted by proof that the will is unnatural and in favor of one in a position to exercise improper influence over the testator,[54] or that the beneficiaries were

of the codicil executed in a foreign country. In re Scott's Will, 80 App. Div. [N. Y.] 369. Hurd's Rev. St. 1899, c. 148. That proponent's attorney was present when deposition was taken is not ground for striking it from the files. Chap. 51, Id., does not apply. In re Arrowsmith's Estate, 206 Ill. 352, 69 N. E. 77.

46. It is not necessary to sustain the validity of a will that the subscribing witnesses testify explicitly in full measure to every detail where, owing to lapse of time, they fail to recollect them. Mock v. Garson, 84 App. Div. [N. Y.] 65; In re Gillmor's Will, 117 Wis. 302, 94 N. W. 32; In re Kohley's Estate, 200 Ill. 189, 65 N. E. 699. Testimony of one subscribing witness suggesting doubt or the want of recollection of the transaction will not justify refusal of probate if the other witness corroborates the accuracy of the attestation clause as to execution. In re Berdan's Will [N. J. Prerog.] 55 Atl. 728.

47. In re Jones' Will, 85 N. Y. Supp. 295. A finding that testator signed before the witnesses is sustained by explicit testimony of one of them and an attorney, who was present, to that effect, though the other witness testifies to the contrary, and then states that he is not sure about it. In re Cornell's Will, 89 App. Div. [N. Y.] 412.

Sufficiency of evidence: Evidence held to sustain findings that signature to will was not genuine, but a tracing. In re Rice's Will, 81 App. Div. [N. Y.] 223.

48. Fact that witness could not remember circumstances insufficient. In re Gillmor's Will, 117 Wis. 302, 94 N. W. 32. Absence of memory insufficient. Evidence held sufficient to sustain finding of due execution. Hanley v. Kraftczyk, 119 Wis. 352, 96 N. W. 820. The testimony of the attesting witnesses together with proof of the handwriting of a deceased witness held sufficient proof of execution. In re Morrow's Estate, 204 Pa. 479. Where the subscribing witnesses testify positively to the execution and the signature compares with admitted genuine signatures, a devisavit will not issue, though the will is unreasonable and several witnesses testified that the signature was not genuine. In re Malunney's Estate, 208 Pa. 21, 56 Atl. 1128. Proof that the will was made three years before testator's death, that it was executed in the presence of two witnesses who also signed at his request, is sufficient to show due execution where it appears to be valid. In re Amberson's Estate, 204 Pa. 397. Recitals in attestation clause are ineffective against positive and convincing proof to the contrary. In re Mendenhall's Will, 43 Or. 542, 73 Pac. 1033.

49. Burden thereby cast on contestants to show that it was not. Evidence insufficient. In re Berdan's Will [N. J. Prerog.] 55 Atl. 728.

In New York where the factum of the will is sufficiently established, it is the surrogate's duty to grant probate unless want of testamentary capacity, fraud, or undue influence is established **beyond a reasonable doubt.** In re Babcock's Will, 86 N. Y. S. 670.

50. Stull v. Stull [Neb.] 96 N. W. 196. Declarations of an executor who is not a sole legatee are not admissible against the rights of other legatees. Id. Declarations of the executor before qualification are not admissible. Id. Admissions of one of the tenants in common in the estate of testator that testator was incompetent are not admissible against his co-tenants. Naul v. Naul, 75 App. Div. [N. Y.] 292. The declarations of a proponent, a beneficiary under a will, are not admissible on questions of testamentary capacity and undue influence. Roberts v. Bidwell [Mich.] 98 N. W. 1000. Declarations of an executor before his qualification as such are not admissible against him as representative of the estate or binding on legatees, distributees or creditors. Berry v. Safe Deposit & T. Co., 96 Md. 45.

51. Power v. Powers, 25 Ky. L. R. 1468, 78 S. W. 152.

52. Gibson v. Sutton, 24 Ky. L. R. 868, 70 S. W. 188.

53. Zelososkei v. Mason, 64 N. J. Eq. 827.

54. Will giving all testator's property to a woman whom he had known but a week, to the exclusion of his son, made while he

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active agents in procuring its execution, where the evidence suggests undue influence,[55] or that the will was prepared or written by or under the direction of a beneficiary,[56] or when proof of opportunity to exert influence is supplemented by proof of the existence of relations of a confidential character, justifying the inference that the testator relied on the advice and assistance of the other person in business matters, or by proof that such person exerted an actual control over the testator,[57] or by the fact that a testamentary disposition is made of which those interested in decedent's property have no knowledge until after his death.[58] In some states, proof of confidential relations between the testator and the beneficiary is sufficient to place the burden of proof on him,[59] but this rule is not universal.[60] If permanent insanity has been proved, proponents have the burden of proving execution during a lucid interval.[61] Proof that testator could not articulate and could communicate only by signs does not shift the burden of proving that he understood the will and had mental capacity.[62]

(§ 4) *F. Establishment of lost will.*—A probate court of general powers may admit a lost or destroyed will to probate.[63] A petition to establish a lost will must specifically allege that it was in existence when testator died, or that it was destroyed during her lifetime without her consent, or was otherwise fraudulently disposed of.[64] In Louisiana, succession proceedings need not be set aside before institution of proceedings to establish a lost will.[65] Establishment in the probate court is a condition precedent to assertion (action of revindication) by one claiming under the will against intestate successors.[66]

The will may be proved by secondary evidence,[67] but it must be direct, clear and convincing, and will be subjected to the closest scrutiny.[68] Declarations of the

was under the influence of and weakened by drink, held result of undue influence. Mullen v. McKeon [R. I.] 55 Atl. 747.

55. Where the disposition of testator's estate is not just or reasonable, the beneficiaries are active agents in procuring its immediate execution, and the evidence in connection with the situation of the parties strongly suggests undue influence, and calls for close scrutiny, the burden is upon proponent to overcome any presumption of fact arising from such circumstances. Stull v. Stull [Neb.] 96 N. W. 196.

56. In re Elster's Will, 39 Misc. [N. Y.] 63.

57. Appeal of caveator from order allowing probate. Zelozoskei v. Mason, 64 N. J. Eq. 327; Stull v. Stull [Neb.] 96 N. W. 196.

58. Will devising one-half estate to testator's attorney which was prepared by him without outside advice and without the knowledge of testator's heirs, there being no evidence of any intention on testator's part to make a will, refused admission to probate. In re Rintelen's Will, 77 App. Div. [N. Y.] 142.

59. Where confidential relations existed between testator and the beneficiary, the burden is on the beneficiary to show that no undue influence was exercised. In re Wickes' Estate, 139 Cal. 195, 72 Pac. 902. Finding that will was not result of undue influence sustained where entire estate was left to attending physician. Id.

60. Proof of confidential relations and an unnatural disposition of property are not alone sufficient to raise a presumption of undue influence, and overcome the prima facie case made by proof of due execution. Slight evidence in addition necessary. In re Holman's Will, 42 Or. 345, 70 Pac. 908.

61. Suit to set aside. James White Memorial Home v. Haeg, 204 Ill. 422, 68 N. E. 568; In re Knox's Will [Iowa] 98 N. W. 468.

62. In re Latour's Estate, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441.

63. Comp. St. Mich. §§ 650, 651. Under a general statute conferring authority to settle wills and probate estates. Ewing v. McIntyre [Mich.] 95 N. W. 540.

64. Ind. Burns' Rev. St. 1901, § 2779. Kellogg v. Ridgely, 161 Ind. 110, 67 N. E. 929. A petition averring that there was a will among testator's papers after his death, that it went into the possession of the defendants and that it had been lost or destroyed held sufficient. In re Sprowl's Will, 109 La. 352.

65. In re Sprowl's Will, 109 La. 352.

66. Persons claiming to be heirs under a will alleged to be destroyed or lost will not be allowed to prove its existence or loss and contents in the district court when it has never been admitted to probate. Sprowl v. Lockett, 109 La. 894.

67. Williams v. Miles [Neb.] 94 N. W. 705; Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395.

68. Williams v. Miles [Neb.] 94 N. W. 705. The evidence must show that the paper sought to be established and testified to as having been seen by proponent and the one a witness testified as having witnessed are identical. Lincoln v. Felt [Mich.] 92 N. W. 780. Evidence held insufficient to establish lost will claimed to have revoked former will. Thruston's Adm'r v. Prather, 25 Ky. L. R. 1137, 77 S. W. 354.

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testator are admissible to show its existence and character,[69] though not its contents.[70]

(§ 4) *G. Judgments and decrees.*—The entry of a formal decree admitting or refusing to admit the will to probate is not necessary,[71] nor is a judgment in such case rendered invalid because not signed by the judge,[72] nor because all persons interested were not made parties to the proceeding.[73]

A presumption of probate arises from acts of the register that would be unlawful and unauthorized if the will had not been proved.[74]

The judgments of courts to which the proof of wills is confided, while unreversed, are generally held to be as conclusive and binding as those of any other courts, and not subject to collateral attack,[75] except for fraud or want of jurisdiction.[76] The decree does not conclude the legal effect of its provisions.[77]

A decree of a court of another state admitting a will to probate is conclusive on the issue of validity as against a collateral attack.[78]

(§ 4) *H. Appeals.*—Parties directly interested in the proceedings and

69. Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395.

70. Williams v. Miles [Neb.] 94 N. W. 705; Id., 96 N. W. 151. Evidence insufficient to show lost will, certain evidence not admissible as tending to show attempted bribing of witnesses. Appeal of Kirbell, 75 Conn. 301.

Statements of testatrix to her physician that she had sent for him to talk with him in relation to making a will and that she had asked him to obtain a lawyer are not privileged. Hamilton v. Crowe, 175 Mo. 634, 75 S. W. 389.

71. An adjudication will be presumed from the fact that a foreign will has been admitted to the records of the probate office. Opp v. Chess, 204 Pa. 401.

72. Beer v. Plant, 1 Neb. Unoff. 372, 96 N. W. 348.

73. Since under Ky. St. 1899, §§ 4850, 4859, 4861, presons not made parties may impeach the judgment within three years, a judgment refusing probate is not void because all persons interested were not brought in. Bohannon v. Tarbin, 25 Ky. L. R. 515, 76 S. W. 46.

74. Opp v. Chess, 204 Pa. 401.

75. See Former Adjudication, 2 Curr. Law, p. 60; Judgments, 2 Curr. Law, p. 581.

76. **In Connecticut,** can only be attacked by appeal within statutory period and not collaterally unless fraud shown under Gen. St. 1902, § 194. Delehanty v. Pitkin [Conn.] 56 Atl. 881. Statute limiting time within which appeal must be taken runs against legatee ignorant of his rights. Id.

In Georgia, probate in solemn form is conclusive upon all parties notified as to all matters raised or which could have been raised in the probate proceeding. [Ga. Civ. Code, § 3282]. Sutton v. Hancock, 118 Ga. 436. Conclusive that the paper is testator's last will, that he had capacity, that it was executed according to law, and that, at the date of the judgment, it was unrevoked. Id. Under Ga. Civ. Code, § 3283, parties may demand proof in solemn form at any time within seven years after will admitted in common form. Statute not unconstitutional as not due process of law. Id. Proof in common form is ex parte, and, when made, is prima facie only, but, after the lapse of the statutory time, is conclusive against all persons to the same extent as probate in solemn form. Id. Minors have at least four years, and if more than four years of the seven year period remains, then the balance of such period [Ga. Civ. Code, § 3283]. Id.

In Iowa, conclusive as to its due execution until set aside by an original or appellate proceeding. Kirsher v. Kirsher, 120 Iowa, 337, 94 N. W. 846.

In Kentucky, if court had jurisdiction. Ky. L. & I. Co. v. Crabtree, 24 Ky. L. R. 743, 70 S. W. 31. A judgment on appeal from an order admitting a will to probate, where the court has jurisdiction of the subject-matter and the parties, is conclusive as to the latter and cannot be questioned, except on appeal. Bohannon v. Tarbin, 25 Ky. L. R. 515, 76 S. W. 46.

In Louisiana, ex parte decrees probating wills and sending legatees into possession are prima facie valid. Thomas v. Blair, 111 La. 678; Cox v. Lea's Heirs, 110 La. 1030.

In Nebraska, the county court is presumed to have jurisdiction until the contrary appears, and its records import absolute verity and are not subject to collateral attack. Beer v. Plant, 1 Neb. Unoff. 372, 96 N. W. 348. Order of the county court admitting a will to probate conclusive unless reversed by a direct proceeding on appeal or otherwise. Andersen v. Andersen [Neb.] 96 N. W. 276.

In Oklahoma, if court had jurisdiction. Ward v. Board of Com'rs of Logan County, 12 Okl. 267, 70 Pac. 378.

In Pennsylvania, the probate of a will is conclusive as to realty if no contest is made within three years under Act June 25, 1895 (P. L. 305), which applies to foreign wills recorded. Opp v. Chess, 204 Pa. 401.

In Texas, conclusive in collateral proceeding as to happening of a contingency on which validity of the will is based. Laufer v. Powell, 30 Tex. Civ. App. 604, 71 S. W. 549.

77. The question whether the appointment by will is revoked by the subsequent marriage of the donee of a power is a question arising under the exercise of the power and is not concluded by the decree admitting the will. Paine v. Price, 184 Mass. 350, 68 N. E. 833.

78. Garvey v. U. S. F. & G. Co., 77 App. Div. [N. Y.] 391.

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aggrieved thereby,[78] including the executor named in the will,[79] are generally given the right to appeal from orders or judgments of the probate court, or from judgments in actions to contest the validity of the will.[81]

In general, on appeal from the probate court, the parties are confined to the issues raised in the lower court, which are tried de novo.[82] In some states on an appeal from an order admitting a will to probate, the parties are confined to the testimony of the subscribing witnesses,[83] while, on an appeal from an order refusing to admit, they may introduce any competent evidence.[84] A jury trial lies in discretion,[85] unless given by statute,[86] and should ordinarily be claimed.[87] Appeals from suits to contest are subject to ordinary limitations of the scope of review.[88]

(§ 4) *I. Revocation of probate.*—The court, having power to do so,[89] should, on the application of the unsuccessful party and a showing of due diligence, vacate and set aside a judgment admitting a will to probate, shown to have been

78. Under Hurd's Rev. St. Ill. 1899, p. 1749, § 14. Where a legacy in case of death of the legatee was given for the improvement of a cemetery, the petition for an allowance of appeal by the trustees of the cemetery must aver death of the legatee. People v. McCormick, 201 Ill. 310, 66 N. E. 381; Id., 104 Ill. App. 650. Petition for mandamus to compel county judge to allow appeal from order refusing to admit will to probate must show that petitioners have some interest in the will, unless such interest is shown by the record. People v. McCormick, 201 Ill. 310, 66 N. E. 381.

80. From order denying probate [N. Y. Code Civ. Proc. §§ 1294, 2568]. In re Rayner's Will, 93 App. Div. [N. Y.] 114. From decree admitting or refusing to admit. Under S. D. Rev. Prob. Code, § 346. Halde v. Schultz [S. D.] 97 N. W. 369. From a decree declaring a will void in a suit brought to impeach it. Brings up the decree as to all claiming thereunder. Ward v. Brown, 53 W. Va. 227. Parties claiming under an alleged invalid clause of will from decree declaring will void in suit to impeach. Id.

81. In California, an appeal lies from an order or judgment refusing to revoke probate [Cal. Civ. Code, § 963]. Hartman v. Smith, 140 Cal. 461, 74 Pac. 7. An order dismissing contest because not commenced within the statutory time is such an order and appealable. Not reviewable by certiorari [Code Civ. Proc. § 963, as amended, and section 1068]. Mahoney v. Sup. Ct. of San Francisco, 140 Cal. 513, 74 Pac. 13. Where there is an appeal from the judgment or order in a contest over the probate of a will, an appeal lies from an order denying the motion for a new trial therein. Hartman v. Smith, 140 Cal. 461, 74 Pac. 7.

In Oregon, it is held that a motion to dismiss the appeal in the circuit court in contest proceedings on the ground that the executor appealed in his individual and not representative capacity goes to the merits, and the decision is reviewable by the supreme court. In re Mendenhall's Will, 43 Or. 542, 72 Pac. 318.

82. In Colorado, on appeal from an order granting probate, the parties are not confined to the testimony of the subscribing witnesses. May introduce any competent testimony. Ashworth v. McNamee [Colo. App.] 70 Pac. 156.

In South Carolina, on appeal to the circuit court from the probate court in a will contest, the entire case should be tried de novo, on issues framed by the court on notice. In re Huntley's Will [S. C.] 45 S. E. 132.

In Kentucky, on appeal from an order admitting or refusing to admit a will to probate, the only question before the court is whether the instrument is or is not the last will and testament of decedent, under Ky. St. §§ 4849, 4850, 4859. Instrument cannot be construed. Leak's Heirs v. Leak's Ex'r, 24 Ky. L. R. 2217, 73 S. W. 789.

83. Illinois. In re Arrowsmith's Estate, 206 Ill. 352, 69 N. E. 77. Deposition of nonresident subscribing witness taken under Hurd's Rev. St. Ill. 1899, p. 1746, c. 148, § 4, admissible. Id. Testimony of the subscribing witness that testator "was rational and under no restraint" is equivalent to "sound mind and memory." Id.

84. In re Arrowsmith's Estate, 206 Ill. 352, 69 N. E. 77. Evidence held sufficient to sustain finding of due execution. In re Kohley's Estate, 200 Ill. 189, 65 N. E. 699.

85. In Illinois, it is not a matter of right on trial de novo on appeal from the decree admitting or refusing to admit the will. Under Const. art. 2, § 5, providing that the right to trial by jury, as heretofore enjoyed, shall remain inviolate. Moody v. Found, 208 Ill. 78, 69 N. E. 831.

In Kansas on appeal from proceedings to establish and probate a destroyed or spoliated will, a jury trial is not a matter of right. Gallon v. Haas, 67 Kan. 225, 72 Pac. 770.

86. See Jury, 2 Curr. Law, p. 633.

87. In Idaho, where written demand for a jury is made in probate court in a case involving a will contest, and such demand is filed in district court on appeal, the district court may order a jury trial without further notice [Idaho Rev. St. § 4095]. Pine v. Carlahan [Idaho] 71 Pac. 473.

88. In Indiana, it is held that the rule that the supreme court will not determine questions of fact from the weight of the evidence applies to appeals from actions to contest wills [Burns' Rev. St. 1901, § 667, and not section 2775, controls]. Wait v. Westfall, 161 Ind. 648, 68 N. E. 271.

89. As to power of probate court to revoke probate, see ante, § 3a, Powers of Courts.

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obtained by fraud or false testimony.[90] It is sufficient to allege that petitioner had no notice of the proceedings, and that he could have made a good defense, without alleging the grounds thereof.[91] Applications for such relief are to be deemed suits in equity, and are governed by the general rules of pleading applicable thereto.[92]

The right to have probate set aside may be barred by laches.[93]

(§ 4) *J. Suits to contest.*—The statutory action to contest the validity of a will can be brought only after probate.[94] Persons claiming under a prior will may contest a subsequent will without having had the prior one probated, and without proving facts sufficient to entitle it to probate.[95] The allegations of the petition must be broad and specific enough to call in question the validity of the will and the competency and sufficiency of the proof as to its execution.[96] The interest of a contestant should appear.[97] The court may, in the absence of objection, direct an issue devisavit vel non without proof of the interest of plaintiffs, unless want of interest appears on the record.[98] The only question to be decided is whether the alleged will, or any part thereof, is the will of the testator.[99] The state and condition of the instrument and all that transpired at the time of its execution may be shown by any competent witness, whether he be a subscribing witness or not,[1] and the will itself is competent evidence to be submitted to the jury.[2] A transcript of the testimony of the subscribing witnesses to the will, taken in the probate court, is admissible in a suit to contest,[3] and makes out a prima facie case.[4] The question of the jurisdiction of the probate court to admit

90. Miller v. Miller's Estate [Neb.] 95 N. W. 1010. Estopped to maintain petition where legal notice was given and he had notice of facts sufficient to put him on inquiry, if fraud alleged would have been available to defeat probate. Id.

91. Wright v. Simpson, 200 Ill. 56, 65 N. E. 628.

92. Hence, the remedy against a petition to open probate is by demurrer or answer and not by motion to strike out. Genau v. Abbott [Neb.] 93 N. W. 942. If the petition on its face states a cause of action, an order striking it from the files is not to be held error without prejudice, because the petition is obnoxious to motion with respect to form and the record in the probate proceedings discloses facts at variance with some of its allegations. Id.

93. A delay of nearly a year held not laches on the part of an heir who was not mentioned in the petition for probate and who had no notice until about the time of filing petition to set aside the probate. Wright v. Simpson, 200 Ill. 56, 65 N. E. 628.

94. Rev. St. 1892, §§ 5858-61. In such action the only issue is whether the writing is or is not the will of testator and the question whether the will was properly admitted to probate and the jurisdiction of the court cannot be inquired into. Probate of the will admitted by bringing action. Stacey v. Cunningham, 69 Ohio St. 176, 68 N. E. 1001.

95. Need not show capacity to make former will. In re Langley's Estate, 140 Cal. 126, 73 Pac. 824.

96. In re Mendenhall's Will, 43 Or. 542, 73 Pac. 1033. An allegation in the complaint in an action to test the validity of a will that it was not "witnessed as by law required, or witnessed at all in fact," held sufficient to raise the question whether it was subscribed or acknowledged in the presence of the subscribing witnesses. Id. In an action to contest a will, a demurrer to an answer setting up forfeiture of rights by contest, as not responsive, is properly sustained where the complaint tenders merely the issue as to the validity of the will, and plaintiffs claim no rights thereunder. Branstrator v. Crow [Ind.] 69 N. E. 668. The bill contesting the will setting out the statutes of the state whose law governs and averring with detail of fact that the bill was not signed or acknowledged by the deceased as required by the law of that state, and that the witnesses did not attest or witness as required by said laws, does not entitle the proponents to a judgment non obstante veredicto. Davis v. Upson, 209 Ill. 206, 70 N. E. 602.

97. Petition may be amended to conform to the proof showing interest; thus the case was opened and petitioner allowed to show that she was a beneficiary under a former will, the evidence being already on file and therefore without surprise to defendant. Richardson v. Moore, 30 Wash. 406, 71 Pac. 18.

98. Ward v. Brown, 53 W. Va. 227.

99. Whether in fact and law it was executed as and for the will of the testator. Ward v. Brown, 53 W. Va. 227. Whether a bequest actually made is valid cannot be inquired into. Properly raised upon bill to construe and expound. Id.

1. Kolowski v. Fausz, 103 Ill. App. 528.

2. In re Harvey's Will [Iowa] 94 N. W. 559.

3. Baker v. Baker, 202 Ill. 595, 67 N. E. 410.

4. Hurd's Rev. St. Ill. 1899, p. 1746. Baker v. Baker, 202 Ill. 595, 67 N. E. 410.

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the will to probate does not generally arise,[5] and the order of the court admitting the will to probate is not admissible.[6]

Contestants having the burden of proof are entitled to open and close.[7]

The contestants may voluntarily dismiss the action without prejudice,[8] and either proponent or contestant may demur to the evidence.[9]

Statutes requiring a trial by jury in actions to contest are held not to require the submission of every such case to a jury.[10] The right to a jury trial may be waived.[11]

The court, in proceedings to contest a will after probate, must find on all issues raised by contestants not submitted to the jury, whether any evidence was submitted in regard to them or not.[12]

The will being declared invalid, the probate thereof is rendered nugatory.[13]

(§ 4) *K. Suits to set aside.*—It is not within the general jurisdiction of courts of equity (in the absence of enabling statutes), to entertain bills to set aside the probate of wills on the ground that the probate court did not have jurisdiction.[14] Hence a Federal court of equity will not entertain such a suit unless it could be maintained in the state court.[15] Such an enabling statute presupposes the actual existence of the will and that its dispositions are not in contravention of public policy or morals. It applies where the nullity on which the attack is based consists of defects of form or is founded in private interest, but not where it is alleged there was in fact no will, or fraud or forgery is relied on.[16]

It is not necessary in Iowa to bring an equitable action to set aside a will; but the parties are entitled to a jury trial if they desire it.[17] The suit must be brought within the time fixed by the statute of limitations.[18]

5. Under 3 Starr & C. Ann. St. 1896, p. 4035, c. 148, par. 7, providing that in such a proceeding an issue at law shall be made up as to whether the writing produced is the will of the testator. Davis v. Upson, 209 Ill. 206, 70 N. E. 602.

6. Davis v. Upson, 209 Ill. 206, 70 N. E. 602.

7. Under Mont. Code Civ. Proc. § 2340, making contestants plaintiffs and petitioner defendant. Farleigh v. Kelley, 28 Mont. 421, 72 Pac. 756.

8. Under Kan. Gen. St. 1901, §§ 7957, 4846, the right is absolute. Wehe v. Mood [Kan.] 75 Pac. 476. Will not bar renewal within statutory time. In Indiana within three years after offer for probate [Burns' Rev. St. 1901, § 2766]. Wait v. Westfall, 161 Ind. 648, 68 N. E. 271.

9. Stewart v. Lyons [W. Va.] 47 S. E. 442.

10. N. Y. Code Civ. Proc. § 2653a, providing that the issue as to the validity of a will shall be tried by jury, does not require the submission of every such case to the jury, but whether the evidence is such as to warrant submission is a question for the court. Philips v. Philips, 77 App. Div. [N. Y.] 113; Haughian v. Conlan, 86 App. Div. [N. Y.] 290. Held, that under the facts of the case the order denying probate was sufficiently doubtful to require a jury trial of the questions of fact involved, under Code Civ. Proc. § 2588. In re Rayner's Will, 93 App. Div. [N. Y.] 114. In New York, the appellate court, when its reversal or modification of a decree on an appeal from a decree admitting a will or revoking probate is based on a question of fact, is imperatively required to order a trial by jury of the material questions of fact [Code, § 2588]. In re Hopkins' Will, 176 N. Y. 595, 68 N. E. 1113. In New York, it is held that a verdict cannot be directed in favor of one party, no matter how great the preponderance of evidence in his favor, if the evidence of the opposite party presents an issue of fact on which the jury could properly find a verdict. Philips v. Philips, 77 App. Div. [N. Y.] 113; Ivison v. Ivison, 80 App. Div. [N. Y.] 599.

11. By failure to demand it. Ky. St. 1899, §§ 4850, 4861, authorizing trial by jury when demanded by either party. Bohannon v. Tarbin, 25 Ky. L. R. 515, 76 S. W. 46. The contestee may waive jury on failure of the contestant to appeal. Shelby v. St. James Orphan Asylum [Neb.] 92 N. W. 155.

12. Under Cal. Code Civ. Proc. § 1329, providing that court must try issues of fact in same manner as on an original contest. McKenna's Estate v. Daly, 138 Cal. 439, 71 Pac. 501.

13, 14. Davis v. Upson, 209 Ill. 206, 70 N. E. 602.

15. Under the laws of Washington (2 Hill's Ann. St. & Codes, §§ 845, 872-876), the contest of a will is strictly a probate proceeding and not a suit between the parties within the general jurisdiction of the superior court of that state, or which can be maintained in a Federal court. Carrau v. O'Calligan [C. C. A.] 125 Fed. 657.

16. Cox v. Lea's Heirs, 110 La. 1030. The charge should be specifically made, however, and coupled with averments which would relieve plaintiff from laches [La. Civ. Code, art. 3542]. Id.

17. Iowa Code, §§ 3283, 3296. Kirsher v. Kirsher, 120 Iowa, 337, 94 N. W. 846.

18. The bringing in of a devisee as a

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(§ 4) *L. Costs.*—Costs and counsel fees will not be allowed contestants unless they had reasonable cause for such contest,[19] and if proponent acted in good faith in proposing the will, he should not be charged with the costs of a successful contest.[20] The counsel fees in defending a contest should not be allowed against the estate where it is insolvent and the action was between the next of kin and the legatees.[21] The award of costs in dismissing a petition for probate is discretionary with the probate court.[22] In actions to determine the validity of wills, the court may grant extra allowances in the way of costs under the New York statute.[23] In Illinois, it is held that costs will be charged against an executor in his capacity as executor.[24] Whether they shall be charged to the estate must be determined when he presents his account.[25] Costs will be allowed only against parties actually joining in the contest.[26]

(§ 4) *M. Recording foreign wills.*—Foreign wills, when probated and recorded under the statute have the same force and effect as domestic wills.[27] In Nebraska, the proof and allowance of a foreign will, if duly authenticated, will be presumed to be in accordance with the laws of such foreign state.[29] In New York, it is held that a will made by an inhabitant of that state and executed therein, where it is in writing and in existence, cannot be probated unless produced.[28]

§ 5. *Interpretation.*[30] *A. General rules.*—No construction is necessary where the language is clear, unambiguous and not impossible of fulfillment, and courts

party plaintiff after the time in which such action could be brought is permissible, the prosecution of the action not being affected by the statute of limitations after the filing of the original petition. Lyons v. Berlau, 67 Kan. 426, 73 Pac. 52.

19. If the caveatrix could not have derived any benefit had she succeeded in invalidating some of the provisions, she is not entitled to costs, even though she may be regarded as amicus curiae. Waln v. Bruere [N. J. Prerog.] 53 Atl. 822. If the appeal in a contest proceeding was without reasonable cause, the costs thereof will not be directed to be paid out of the estate, though contest may have been with reasonable cause. In re Claus' Will [N. J. Prerog.] 54 Atl. 824.

20. Lingle v. Lingle, 121 Iowa, 133, 96 N. W. 708. On setting aside the will, costs held properly charged against the estate with each party to pay his own counsel fees. Kirsher v. Kirsher, 120 Iowa, 337, 94 N. W. 846.

21. Hamilton v. Shillington, 19 App. D. C. 268. Under Ky. St. 1903, § 489, the effect of a contest by one legatee to set aside codicils being to increase the amount to be received by other legatees, the costs and expenses of the contest should be borne by the legatees who were benefited, and also by those who received less where the amount claimed by the latter before the contest was procured by their own fraud and undue influence. Louisville Pres. Theological Sem. v. Botto, 25 Ky. L. R. 2137, 80 S. W. 177.

22. Eaton v. Brown, 20 App. D. C. 453.

23. Haughian v. Conlan, 86 App. Div. [N. Y.] 290.

24, 25. Hess v. Killebrew, 209 Ill. 193, 70 N. E. 675.

26. Where a judgment admitting a will to probate and taxing costs against contestants was vacated, and subsequently another petition, original in form, was filed and another contest had, in which the contestants in the former trial took no part, they were not liable for costs thereby adjudged against contestants. Woodall v. McLendon, 137 Ala. 486.

27. 1 Smith's Laws, p. 33, Pa. Laws, 135. Opp v. Chess, 204 Pa. 401. Authenticated copies of foreign wills and the probate thereof may be recorded and admitted in evidence in Missouri in the same manner as though proved in that state. Rev. St. 1899, §§ 4634, 4635, must be proof of probate in order to prove transfer of title thereby, and authenticated record is not sufficient. Fenderson v. Mo. Tie & T. Co. [Mo. App.] 78 S. W. 819. Authenticated copies of the foreign will together with the probate must be recorded in Missouri. The authenticated record of a foreign will alone affords no presumption that it was proved [Rev. St. 1899, §§ 4634, 4635]. Fenderson v. Mo. Tie & T. Co. [Mo. App.] 78 S. W. 819. The record in New York of an exemplified copy of the record and proof of a foreign will, in order to show title in a devisee through a valid will, must show either in the attestation clause or proofs, that the witnesses became such at testator's request. Meiggs v. Hoagland, 41 Misc. [N. Y.] 4.

28. Foreign statute need not be alleged nor need the fact that the proof and allowance was in accordance therewith. Authentication sufficient [Neb. Comp. St. 1901, §§ 144-146]. Martin v. Martin [Neb.] 97 N. W. 289.

29. Under Code Civ. Proc. § 2620, providing that wills must be filed in the surrogate's office. Hence the will of a resident probated in a foreign state must be established by action, as authorized by Code, § 1861. In re Law, 80 App. Div. [N. Y.] 73.

30. Scope: This section relates to the "meaning" of wills and how the same is found. There is no attempt to treat of the "estates" which are created. That belongs to the topics dealing with such estates. But sometimes the meaning can be best stated by naming the estate created. This has been done.

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will not, under profession of construction, vary the expressed intent of the testator.[31] The expressed[32] intention of the testator, to be ascertained from the entire will,[33] must govern when not in conflict with any statute, or settled rule of law or property, or some well defined rule of public policy.[34] If possible, some effect should be given to every part of the will.[35] The general intent will control any

31. Burroughs v. Jamieson, 62 N. J. Eq. 651. Not permissible unless uncertainty of sense clearly apparent. Holmes v. Walter, 118 Wis. 409, 95 N. W. 380. Rules of interpretation are to be used only in solving uncertainties. In re Moran's Will [Wis.] 96 N. W. 367; Davis v. Davis, 39 Misc. [N. Y.] 90. Results cannot govern construction. Where children and grandchildren shared equally. Reynolds v. Reynolds, 65 S. C. 390. Technical rules must not defeat intention. Truesdell v. Darnall, 24 Ky. L. R. 2164, 73 S. W. 755.

32. Hawthorn v. Ulrich, 207 Ill. 430, 69 N. E. 885; Orr v. Yates, 209 Ill. 222, 70 N. E. 731; Cox v. Anderson's Adm'r, 24 Ky. L. R. 1081, 70 S. W. 839; Roberts v. Crume, 173 Mo. 572, 73 S. W. 662; Meiners v. Meiners [Mo.] 78 S. W. 795; Spencer v. Scovil [Neb.] 96 N. W. 1016; In re Warner's Estate, 39 Misc. [N. Y.] 432; In re Martin, 25 R. I. 1; McDuffie v. Montgomery, 128 Fed. 105; In re Moran's Will [Wis.] 96 N. W. 367; In re Stuart's Will, 115 Wis. 294, 91 N. W. 688. An interpretation different from that plainly indicated by the language used will not be given until a different intention from that expressed by the will can be found from the instrument or from extraneous circumstances. Language cannot be varied by indefinite recollections of scrivener. Wright v. Wright [Iowa] 98 N. W. 472. Intention is to be gathered from the particular provisions and the general scheme of the will, having in mind the general rules of construction as aids. Brown v. Farmer, 184 Mass. 136, 68 N. E. 32.

The question is, what is the meaning of language used. Thomas v. Scott, 24 Ky. L. R. 2031, 72 S. W. 1129; In re Clark, 38 Misc. [N. Y.] 617; Bradsby v. Wallace, 202 Ill. 239, 66 N. E. 1088. To construe and not to construct. Herzog v. Title Guarantee & Trust Co., 117 N. Y. 86, 69 N. E. 283. Construction cannot be placed thereon which puts into the mouth of the testator that which he refrained from saying. Maguire v. Maguire, 110 La. 279. The court cannot create legacies or legatees, nor can a gift by implication be inferred from absolute silence. Will not supply residuary clause. Torrey v. Peabody, 97 Me. 104. Intent must be collected from the words of the will, free from conjecture, under the guidance of precedents and rules of law, and with a view to the circumstances under which it was made. Illensworth v. Illensworth, 39 Misc. [N. Y.] 194. The legal effect of provisions plainly expressed must prevail over an implied intention. In re Melcher, 24 R. I. 575. If the will is in plain terms, it must be construed as written. Morris v. Hall, 102 Mo. App. 449, 76 S. W. 725; Wilson v. Bull, 97 Md. 128; Lawrence v. Barber, 116 Wis. 294, 93 N. W. 30. Court should put itself as nearly as possible in position of testator. Id.; Bond v. Martin's Adm'rs, 25 Ky. L. R. 719, 76 S. W. 326; Jabine v. Sawyer, 25 Ky. L. R. 1436, 78 S. W. 140.

33. Loomer v. Loomer [Conn.] 57 Atl. 167; Sumpter v. Carter, 115 Ga. 893; Griffiths v. Griffiths, 198 Ill. 632, 64 N. E. 1069; Blinn v. Gillett, 208 Ill. 704, 70 N. E. 704; Smith v. Isaacs, 25 Ky. L. R. 1727, 78 S. W. 434; Dana v. Dana [Mass.] 70 N. E. 49; Simmons v. Cabanne, 177 Mo. 336, 76 S. W. 618; Trunkey v. Van Sant, 176 N. Y. 535, 68 N. E. 946; Davis v. Davis, 39 Misc. [N. Y.] 90; In re Walker's Estate, 39 Misc. [N. Y.] 680; Curtis v. Waldron, 81 App. Div. [N. Y.] 351; Shaw v. English, 40 Misc. [N. Y.] 37; Woodruff v. Woodruff, 23 Ohio Circ. R. 408; Dulin v. Moore, 96 Tex. 135, 70 S. W. 742; Smith v. Smith, 116 Wis. 570, 93 N. W. 452. All the words, including all provisos and conditions, must be considered. A devise in fee may be limited by an explanatory clause. In this case the explanatory clause started with the words, "That is to say." Orr v. Yates, 209 Ill. 222, 70 N. E. 731. Will view will as a whole and give reasonable construction to every part. Jabine v. Sawyer, 25 Ky. L. R. 1436, 78 S. W. 140. Should be so interpreted as to carry out testator's intent when it can be plainly gathered from the whole instrument and is a legal one. Van Driele v. Kotvis [Mich.] 97 N. W. 700. Should carefully consider force of every word of the language used. Wiggins v. Wiggins [N. J. Eq.] 56 Atl. 148. As disclosed in the light of any avowed or manifest object of the testator. Emery v. Swasey, 97 Me. 136.

34. Fritsche v. Fritsche, 75 Conn. 285; Bradsby v. Wallace, 202 Ill. 239, 66 N. E. 1088; Teal v. Richardson, 160 Ind. 119, 66 N. E. 435; Roberts v. Crume, 173 Mo. 572, 73 S. W. 662; Clark v. Worrall [Ind.] 68 N. E. 699; Pate v. Bushong, 161 Ind. 533, 69 N. E. 291; Tobin v. Tobin [Ind.] 69 N. E. 440; Flynn v. Holman, 119 Iowa, 731, 94 N. W. 447; Cox v. Anderson's Adm'r, 24 Ky. L. R. 1081, 70 S. W. 839; Torrey v. Peabody, 97 Me. 104; Wilson v. Bull, 97 Md. 128; Gregory v. Tompkins [Mich.] 98 N. W. 245; In re Shanahan's Estate, 88 Minn. 202, 92 N. W. 948; Illensworth v. Illensworth, 39 Misc. [N. Y.] 194; Curtis v. Waldron, 81 App. Div. [N. Y.] 351; Shaw v. English, 40 Misc. [N. Y.] 37; Orr v. Yates, 209 Ill. 222, 70 N. E. 731; Winchester v. Hoover, 42 Or. 310, 70 Pac. 1035; Canfield v. Canfield [C. C. A.] 118 Fed. 1; In re Campbell's Estate [Utah] 75 Pac. 851. Rev. St. Mo. § 4650, provides that courts and others concerned in the execution of wills shall have due regard to the directions of the will and the true intent and meaning of the testator in all matters brought before them. Roth v. Rauschenburch, 173 Mo. 582, 73 S. W. 664; Underwood v. Cave, 176 Mo. 1, 75 S. W. 451; Morris v. Hall, 102 Mo. App. 449, 76 S. W. 725. Under Neb. Comp. St. 1901, c. 73, § 53. Albin v. Parmele [Neb.] 98 N. W. 29.

35. Smith v. Smith, 24 Ky. L. R. 1964, 72 S. W. 766; Gregory v. Tompkins [Mich.] 93 N. W. 245; Orr v. Yates, 209 Ill. 222, 70 N. E. 731; Hammond v. Croxton [Ind.] 69 N. E. 250. And no word or clause rejected to which reasonable effect can be given. Pate v. Bushong, 161 Ind. 533, 69 N. E. 291. A will

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particular intent.[36] Construction should favor validity[37] and avoid repugnancy.[38] The presumption is that wills are executed in accordance with statutes and the decisions interpreting them.[39]

If there is such repugnancy between two clauses that one or the other must fall, the later clause will prevail,[40] but the clearly expressed intention of testator will not be overborne by subsequent modifying clauses that are ambiguous and equivocal, and may justify either of two opposite interpretations. In such case

should be so construed that, while effect is given to every word and clause, all will harmonize, so as to reach the general plan or scope of the entire will. Bauernschmidt v. Bauernschmidt, 97 Md. 35. Provided an effect can be given it not inconsistent with the general intention as gathered from the entire instrument. In re Pope's Estate [Minn.] 97 N. W. 1046. A provision that real estate should be sold when the youngest child of testator's son should come of age, and that if a sale was made during the lifetime of the son, a sum should be set aside for his support, refers only to children in esse at the time of testator's death, otherwise the distribution could not be made during the son's life, and the second clause would be inoperative. Sale made on youngest child living at testator's death coming of age. Gehr v. McDowell, 206 Pa. 100. A devise to one "during her life, to use and dispose of the same as she may think proper, with remainder thereof on her decease" to others. Held, the word "same" refers to the property and not to the life estate, and that the word "dispose" includes a conveyance in fee, and that the word "remainder" is subordinate to the power of disposition. Hence, the life tenant may convey the fee in the premises and the remainder vests on testator's death, subject to be defeated on the exercise of such power. Woodbridge v. Jones, 183 Mass. 549, 67 N. E. 878.

36. Absolute devise not limited by subsequent clause as to disposition of "any left." Cox v. Anderson's Adm'r, 24 Ky. L. R. 1081, 70 S. W. 839. The general purpose of testator must prevail over obscure and doubtful language in the will, which, standing alone, might be susceptible of some other meaning. Gift of third to wife for life, followed by trusts for children, then over, and gift of other parts to trustees to pay income to children during lives and life of longest liver, held to show purpose of devoting entire estate to support of family. Demeritt v. Young [N. H.] 55 Atl. 1047.

If a general scheme can be found to have been intended and provided for in the will, it is the duty of the court to carry it into effect if it can legally do so. Holmes v. Walter, 118 Wis. 409, 95 N. W. 380.

37. Flynn v. Holman, 119 Iowa, 731, 94 N. W. 447. A devise containing a provision that the devisees shall not sell or incumber the property until they reach the age of 35 is not repugnant to a provision that if any of them die without issue his share shall revert to the others, since the reversion will be construed to expire as to each share when the devisee thereof reaches the age of 35. Smith v. Isaacs, 25 Ky. L. R. 1727, 78 S. W. 434.

38. Smith v. Smith, 24 Ky. L. R. 1964, 72 S. W. 766. All must be harmonized and given effect if possible. Gueydan v. Montague, 109 La. 38. Under one interpretation of a will, it contained a prohibited substitution (Succession of May, 109 La. 994), which will not contravene rule of law, as rule against perpetuities (Towle v. Doe, 97 Me. 427). There is nothing inconsistent or repugnant in the gift of a life estate with remainder to a life tenant, even though such remainder can never come into possession of the remainderman. Cushman v. Arnold [Mass.] 70 N. E. 43. If apparently contradictory clauses may be reconciled and accommodated by a reasonable construction so that both may stand, such construction should be adopted (In re Donner's Ex'rs [N. J. Prerog.] 55 Atl. 1104), as should a construction which will render them supplementary instead of contradictory (Id.). Specific legacies will be regarded as explanations of or exceptions to a general legacy of all testator's property, and both will stand, immaterial which comes first. A specific bequest of certain specific goods and chattels in the second clause of a will held not to be revoked by a general bequest of all of testator's property in the third clause. Id. That which will suspend power of alienation will not be sustained. Coon v. Coon, 38 Misc. [N. Y.] 693. Courts will endeavor to reconcile two inconsistent clauses rather than ignore them or declare both void and uncertain. After a specific devise of realty, a devise of all the estate to another for life will be construed to mean all the remainder. In re Willis' Will [R. I.] 55 Atl. 889. Provision giving daughter life estate in case she survives or is divorced from her husband, and provision giving her absolute title in case she outlives her husband, held not so repugnant as to abrogate the condition in the first clause on which she was to have a life estate, it appearing at the time the question arose, the contingency of the husband's death had not arisen. Ellis v. Birkhead, 30 Tex. Civ. App. 529, 71 S. W. 31 Applies to testamentary trusts as well as to any other disposition. Holmes v. Walter, 118 Wis. 409, 95 N. W. 380.

39. In relation to statute to prevent lapsing of legacies. Shumaker v. Pearson, 67 Ohio St. 330, 65 N. E. 1005.

40. Where there is an absolute devise followed by a devise in trust to another for a term of years, then to pay over to the first devisees, the later clause prevails. Harris v. Ferguy, 207 Ill. 534, 69 N. E. 844; In re Donner's Ex'rs [N. J. Prerog.] 55 Atl. 1104. Two clauses must refer to same subject-matter and be clearly inconsistent. In re Phillips' Estate, 205 Pa. 504. A discretionary power of sale for support of the devisee for life held not to control a subsequent direction to sell sufficient to pay mortgage. Dana v. Stafford [Vt.] 56 Atl. 88.

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the later clause will be so construed as to support testator's distinctly announced main intention.[41] A will or a part thereof will only be declared void for uncertainty when, after the admission of all evidence allowed by law to be admitted, the court is unable from the face of the will and the consideration of such evidence, to determine testator's intention.[42] A devise giving the same interest as the devisee would have taken by descent is void.[43]

The law favors equality among children in the distribution of estates.[44] The heir is never to be disinherited except by plain words or necessary implication.[45] Where a bequest has been made to one towards whom testator had placed himself in loco parentis, that construction must be given it which is most favorable to the donee.[46] The fact that beneficiaries under a will are not relatives does not change the ordinary rules.[47]

The construction given to a will by the members of the testator's family is entitled to weight in arriving at the true interpretation of the will.[48]

As to time.—Intention relates to time of execution.[49] The law will be applied as of testator's death.[50]

Words will be given their natural and ordinary meaning,[51] as called for by the whole instrument,[52] having respect to the legal skill of the draughtsman[53] ap-

41. In re Donner's Ex'rs [N. J. Prerog.] 55 Atl. 1104. Subsequent expression, in order to limit clearly expressed intention, must be clear. In re Campbell's Estate [Utah] 75 Pac. 851.

42. Tobin v. Tobin [Ind.] 69 N. E. 440.

43. Biggerstaff v. Van Pelt, 207 Ill. 611, 69 N. E. 804.

44. Ward v. Stanard, 82 App. Div. [N. Y.] 386. Presumption that no discrimination intended. Devise of all land above a certain line and on a certain branch held to include whole tract above such line in the vicinity of the branch, though some of it extended across a ridge onto other branches of the main stream. Hatfield v. Estep, 24 Ky. L. R. 2249, 73 S. W. 789.

45. Legacies will not be charged on the real estate in the absence of such words or implication where result would be to disinherit heir. In re Espy's Estate, 207 Pa. 459. Devise over in case of death refers to death during testator's lifetime. Kohtz v. Eldred, 208 Ill. 60, 69 N. E. 900. Interpretation preferred which approximates closest the legal order of distribution. A devise "of my three (3) unimproved lots lying next to the corner," it appearing that testatrix owned only two lots on the corner, the third being the home lot and separated from the two by an intervening lot, was under the evidence held not to include the home lot. Miller v. Hirsch, 110 La. 259. Unless court affirmatively convinced that devise intended. Young v. Quimby, 98 Me. 167. It must not only appear from the will that testator did not intend heir to take any portion of the estate, or that he intended him to take only a specified portion, but the will must also give the property to someone else. Meiners v. Meiners [Mo.] 78 S. W. 795. Estate by implication. Brown v. Quintard, 177 N. Y. 75, 69 N. E. 225. Law favors construction which will prevent disinheritance of the issue of a remainderman who may die during the existence of the precedent estate. Manhattan Real Estate & Bldg. Ass'n v. Cudlipp, 80 App. Div. [N. Y.] 532. Every presumption is against an intention to disinherit direct descendants. A testatrix devised property to any children that a 13 year old "might have." This is not construed to mean at the date of the will, but any time in the future. In re Maloney, 41 Misc. [N. Y.] 539. And see In re Vilsack's Estate, 207 Pa. 611. Remainder not disposed of goes to heirs. Shaner v. Wilson, 207 Pa. 550.

46. In re Jacoby's Estate, 204 Pa. 188.

47. Such a will need not be construed with special reference to the rights of the heirs at law. Hunt v. Phillips [Wash.] 75 Pac. 970.

48. Not controlling. Smith v. Bartlett, 79 App. Div. [N. Y.] 174.

49. In re Warner's Estate, 39 Misc. [N. Y.] 432. The fact that a contract, power of attorney and will were all executed at the same time and contained similar provisions did not require their construction as a single instrument. Spence v. Huckins, 208 Ill. 304, 70 N. E. 289. A will executed in 1895 directing payment of all direct and collateral inheritance taxes from corpus of estate, held not intended to include payment of internal revenue taxes on legacies under act Cong. June 13, 1898. In re Baker's Estate, 21 Pa. Super. Ct. 536.

50. If consistent with law at time of his death. Sumpter v. Carter, 115 Ga. 893.

51. According to common intendment. Truesdell v. Darnall, 24 Ky. L. R. 2164, 73 S. W. 755. Popular rather than technical meaning. Jabine v. Sawyer, 25 Ky. L. R. 1436, 78 S. W. 140. Should not be given technical meaning where apparent that scrivener was not acquainted with legal forms. Smith v. Smith, 24 Ky. L. R. 1964, 72 S. W. 766. Natural and reasonable meaning. In re King's Estate, 205 Pa. 416. Not applicable to formalities of execution and certain words necessary to give effect to intention. Young v. Quimby, 98 Me. 167.

52. Are to be taken in sense indicated by whole instrument. Roberts v. Crume, 173 Mo. 572, 73 S. W. 662; Underwood v. Cave, 176 Mo. 1, 75 S. W. 451; Meiners v. Meiners [Mo.] 78 S. W. 795. In the light of the circumstances of each particular case. Canfield v. Canfield [C. C. A.] 118 Fed. 1.

Words having naturally an unlimited

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parent on the face of the will.[54] Technical words will be taken in a technical sense,[55] unless a contrary intention is clear.[56] Words will be given the same meaning as elsewhere where used in the will.[57] Disinheriting clauses may be limited by the context.[58]

The ordinary rules of grammar will control,[59] unless a contrary intent appears.

Technical rules of construction may be disregarded to reach the intent,[60] and precedents may be ignored,[61] to which end "and" and "or" may be interchanged.[62] If necessary, punctuation may be disregarded or supplied,[63] words and clauses transposed,[64] and omitted words supplied,[65] or the several pages of the will read out

meaning may be given a limited one, if from the whole instrument it reasonably appears that testator so used them. In re Donner's Ex'rs [N. J. Prerog.] 55 Atl. 1104.

Illustrations: Survivors not construed as meaning others. Wilson v. Bull, 97 Md. 128. The word "also" may mean "item." A gift to wife of "all my shares in railroad or other corporations, also all notes and other securities, also all my right in and to my pew in said * * * church and to the parsonage and shed during her life, and then to go to" others, conditioned on payment of two other bequests, passes an absolute estate in the personalty on payment of the bequests, the word "also" being equivalent to "item." Twiss v. Simpson, 183 Mass. 212, 66 N. E. 795.

52. Ward v. Stanard, 82 App. Div. [N. Y.] 386.

54. Flynn v. Holman, 119 Iowa, 731, 94 N. W. 447.

55. Intention must be carried into effect unless he uses terms which have a definite and settled meaning in the law. In such case such terms must be given such meaning. Hawthorn v. Ulrich, 207 Ill. 430, 69 N. E. 885. When words are used which have a settled legal meaning, full effect must be given them unless it is perfectly clear that testator did not so intend. "Heirs of the body" construed as words of limitation. Teal v. Richardson, 160 Ind. 119, 66 N. E. 435. Heirs same as issue. Harkeroad v. Bass [Miss.] 36 So. 537. Heirs. Towle v. Doe, 97 Me. 427. "Heirs" construed as meaning those on whom law casts realty on death of ancestor, and "legal representatives" as next of kin. Howell v. Gifford, 64 N. J. Eq. 180.

56. Immaterial whether used by lawyer or layman as scrivener. Graham v. Abbott, 208 Pa. 68; Brett v. Donagle's Guardian, 101 Va. 786; Allison v. Allison's Ex'rs, 101 Va. 537.

57. Meaning of word "remainder" in one clause limited by another clause giving life estate. Biggerstaff v. Van Pelt, 207 Ill. 611, 69 N. E. 804.

58. That one excludes his heirs, stating that they are already provided for, does not warrant construction of the will precluding such heirs from inheriting in any event. Will not warrant the changing of a bequest to individuals into a bequest to a class. In re Hittell's Estate, 141 Cal. 432, 75 Pac. 53.

59. Twiss v. Simpson, 183 Mass. 212, 66 N. E. 795.

Illustrations: Residuary clause held to be operative only in case testator's wife died before him. Schumacker v. Grammer, 200 Ill. 48, 65 N. E. 722. By first clause of will testator devised land to G. "and his heirs," providing that it should not be subject to sale or liable for devisee's debts, but to descend to his bodily heirs, and in case he had none, to his brothers and sisters. By the next clause, he devised land to H., "on the same principles" as that of G., "not being subject to sale, transfer," etc. Held, that the words "on the same principles" did not refer to the words "and his heirs" in the first clause, but to the words prohibiting the sale of the land and providing for their descent. Turner v. Hause, 199 Ill. 464, 65 N. E. 445. Will giving a house and lot to widow, with household furniture, etc., also money that might be deposited to testator's account in bank "during the time of her natural life and after her death to be divided" among his heirs, construed and held that the limitation to widow's life applied only to bank accounts, and that she took a fee in the house and lot. Zimmerman v. Mechanics' Sav. Bank, 75 Conn. 645.

60. Bradbury v. Jackson, 97 Me. 449.

61. Each case must be decided on its own facts, looking at the language of the instrument and the surrounding circumstances. Emery v. Swasey, 97 Me. 136; In re Martin, 25 R. I. 1. Precedents of little value except where words have acquired definite meaning from long construction. May not be even then. Wiggins v. Wiggins [N. J. Eq.] 56 Atl. 148.

Precedents of slight weight: A devise by codicil to grandchildren of the share the deceased father would have been entitled to held subject to trust created by the will. Lawrence v. Barber, 116 Wis. 294, 93 N. W. 30.

62. If G. "and" H. shall die without children, held to mean if either G. "or" H. shall die without children. Truesdell v. Darnall, 24 Ky. L. R. 2164, 73 S. W. 755. "Or" held not to mean "and." Taylor v. Taylor, 118 Iowa, 407, 92 N. W. 71. Will not be so construed as to prevent great grandchildren from sharing equally with grandchildren. Reynolds v. Reynolds, 65 S. C. 390.

63. Flynn v. Holman, 119 Iowa, 731, 94 N. W. 447; Hauser v. Craft [N. C.] 46 S. E. 756. Must be if in conflict with the scheme of testator as gleaned from the will or if it prevents ascribing to words employed their ordinary meaning. Lewisohn v. Henry, 92 App. Div. [N. Y.] 532. The position of a comma cannot be considered in determining intention. Reynolds v. Reynolds, 65 S. C. 390.

64. In re Donner's Ex'rs [N. J. Prerog.] 55 Atl. 1104. Words transposed. Flynn v Holman, 119 Iowa, 731, 94 N. W. 447.

65. Flynn v. Holman, 119 Iowa, 731, 94 N. W. 447. If it appears from the face of

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of the order as numbered.[66] Meaningless words will be dropped rather than to supply conjectural omissions.[67]

In case of ambiguity,[68] the circumstances surrounding testator when the will was made may be considered,[69] but not later conditions which could not have been foreseen.[70] Extrinsic evidence is admissible to explain latent ambiguities,[71] but

the instrument that testator has not completely or accurately expressed his meaning, words which have clearly been omitted may be supplied, in order to carry out his evident intention. The words "without issue" inserted in a devise to one and in case of his death before arriving at a certain age then over. Dulaney v. Dulaney, 25 Ky. L. R. 1659, 79 S. W. 195; In re Pope's Estate [Minn.] 97 N. W. 1046.

66. A will is to be read in such order of pages or paragraphs as the testator manifestly intended and the coherence and adaptation of the facts clearly require. In re Morrow's Estate, 204 Pa. 479. Mere numbering of pages not conclusive as to order. In re Dake's Will, 75 App. Div. [N. Y.] 403.

67. Where testator devised his property to "such of his brothers and children" held the words "such of" will be dropped rather than supply the words "as survive my wife" or their equivalent. Child v. Child [Mass.] 70 N. E. 464.

68. Reynolds v. Reynolds, 65 S. C. 390; Harvey v. Kennedy, 81 App. Div. [N. Y.] 261; In re Martin, 25 R. I. 1. Not unless some provision or clause is so ambiguous in the language used as to make the intention of the testator doubtful. Roberts v. Crume, 173 Mo. 572, 73 S. W. 662. Environment may be considered where language not absolutely clear. Morris v. Hall, 102 Mo. App. 449, 76 S. W. 725. The court may resort to extrinsic evidence to learn the conditions under which the will was made to enable him to view the subject from testator's standpoint, but the testator's meaning must then be found from the will itself. Meiners v. Meiners [Mo.] 78 S. W. 795.

69. Roth v. Rauschenbusch, 173 Mo. 582, 73 S. W. 664; Underwood v. Cave, 176 Mo. 1, 75 S. W. 451; Simmons v. Cabanne, 177 Mo. 336, 76 S. W. 618; Tobin v. Tobin [Ind.] 69 N. E. 440; Bauernschmidt v. Bauernschmidt, 97 Md. 35; Smith v. Smith, 24 Ky. L. R. 1964, 72 S. W. 766; Flynn v. Holman, 119 Iowa, 731, 94 N. W. 447; Blinn v. Gillett, 208 Ill. 473, 70 N. E. 704. Including situation and condition of the estate, testator's relations to his family and beneficiaries, and their situation and condition. Fritsche v. Fritsche, 75 Conn. 285. The language used, the extent of the estate, the mode of life in which his family have been reared, and the means provided by him in his lifetime for their culture and happiness, are to be considered. Dana v. Dana [Mass.] 70 N. E. 49.

Illustrations: To show mistake in description of realty. Pate v. Bushong, 161 Ind. 533, 69 N. E. 291. Circumstances surrounding execution and connecting parties and property devised with the testator and the will itself. Bradbury v. Jackson, 97 Me. 449. Fact that testator had no children, that life tenant was his second wife, and that his property was not large, may be considered in determining whether she has power to convey fee in land devised. Woodbridge v. Jones, 183 Mass. 549, 67 N. E. 878. Pecuniary circumstances and family and social relations may be considered. Wiggins v. Wiggins [N. J. Eq.] 56 Atl. 148. Disposition subsequently of property referred to is admissible and material for the purpose of applying the terms of the will. Blair v. Scribner [N. J. Eq.] 57 Atl. 318.

70. Where personalty was sufficient to pay legacies when will was made, fact that it was later converted into realty cannot operate to show implied intent to charge them on realty. Harvey v. Kennedy, 81 App. Div. [N. Y.] 261.

71. Hanley v. Kraftczyk, 119 Wis. 352, 96 N. W. 820. Arising dehors the instrument. Brown v. Quintard, 177 N. Y. 75, 69 N. E. 225.

A demurrer to the complaint in an action to recover a legacy under an ambiguous will, addressed to the legal sufficiency of the will on its face and not to the absence of allegations tending to sustain the construction contended for by plaintiff should not be sustained, the determination of ambiguities being a matter for extrinsic evidence. Fritsche v. Fritsche, 75 Conn. 285.

To identify subject-matter of a bequest or devise. Stocks bequeathed. In re Frahm's Estate, 120 Iowa, 85, 94 N. W. 444. Where no such property exists or where that described does not belong to testator. In re Pope's Estate [Minn.] 97 N. W. 1046.

Descriptions of land: To show mistake in description of realty. Pate v. Bushong, 161 Ind. 533, 69 N. E. 291. Evidence to identify land "on which I now live," and the "balance of my real estate," admissible. Tobin v. Tobin [Ind.] 69 N. E. 440. By supplying number of township and range and name of state and county. Flynn v. Holman, 119 Iowa, 731, 94 N. W. 447. Will described the land as in section 21, particularly describing the boundaries, and there was no land so bounded in that section, but was in section 22, which land was owned and occupied by testator. Hanley v. Kraftczyk, 119 Wis. 352, 96 N. W. 820. Devise of "the lot adjoining with two storied frame house on it" held not to include a contiguous lot. Thomas v. Scott, 24 Ky. L. R. 2031, 72 S. W. 1129. Location of "Dickens land" and "Micajah Anderson" land to be determined by outside evidence—burden of proof. Harper v. Anderson, 132 N. C. 89. Where, in a devise of real property, the description did not cover land owned by the testator, the description was not subject to correction. In re Lynch's Estate, 142 Cal. 373, 75 Pac. 1086. A devise of "one-half the remainder of my farm including the house," is not too indefinite to be aided by parol evidence, to locate the land. Bell v. Couch, 132 N. C. 346. The question of the situation of land with reference to a dividing line mentioned in a will, in a suit to recover a devisee's share under a will, held to be for the jury. McLean v. Bullard, 131 N. C. 275.

To show whether a child was intentionally omitted: The burden of showing that omission by mistake is on the child under statute

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not to supply, contradict, enlarge, or vary the terms of the instrument.[72] Neither declarations of the testator,[73] nor a revoked former will, are admissible to show testator's intent,[74] but letters from testator to executors, explanatory of subsequent conditions, are proper.[75]

The will and codicils are to be construed as parts of the same instrument and the former should not be disturbed further than is necessary to give effect to the latter.[76] Codicils being later in time revoke inconsistent provisions in the will,[77]

providing that when it appears that child was omitted by mistake, he shall have same share he would have had if testator had died intestate [Neb. Comp. St. 1903, c. 23, § 149; Cobley's Ann. St. 1903, § 5014]. Brown v. Brown [Neb.] 98 N. W. 718.

To identify the beneficiaries designated by a will. Jay v. Lee, 41 Misc. [N. Y.] 13. Mistake of name, there being words of designation. Reformed Pres. Church of North America v. McMillan, 31 Wash. 643, 72 Pac. 502. Parol evidence that testator was a member of the Methodist Episcopal Church and had contributed to the support of the foreign missionary work carried on by that denomination is admissible to show that a bequest to the "Foreign Missionary Society" was intended for the "Missionary Society of the Methodist Episcopal Church," which is the corporate name of the society having such work in charge. In re Amberson's Estate, 204 Pa. 397. A claimant may show that while the name by which he is designated in the will is not his proper one, yet it is one by which he is known. Second United Pres. Church v. First United Pres. Church [Neb.] 99 N. W. 252. Two claimants exactly corresponding to a name used for one devisee, ambiguity may be removed by evidence of circumstances tending to show which of the two claimants the testator intended as the object of his bounty. Id.

Release of debts: To show that legacy "free from debts" intended to operate as a release of debt due testator. Sharp v. Wightman, 205 Pa. 285.

72. Extraneous facts cannot be injected for the purpose of placing a different construction thereon from that which is the plain meaning of the language used. McDuffie v. Montgomery, 128 Fed. 105. Not permissible to prove by extrinsic evidence some supposed intention not expressed in the will nor fairly implied therefrom when construed in the light of all surrounding circumstances. Hanley v. Kraftczyk, 119 Wis. 352, 96 N. W. 820. A court may not reform a will by changing the language or adding provisions not written therein. Hanley v. Kraftczyk, 119 Wis. 352, 96 N. W. 820.

Not admissible to explain ambiguities apparent on the face of the will: Smith v. Smith, 24 Ky. L. R. 1964, 72 S. W. 766. Evidence held not admissible to show that a devise for life of the "farm on which I now live" the testator did not intend to include a part of the land on which a son lived pursuant to an agreement with testator to give the same to him. Gentry v. Gentry, 25 Ky. L. R. 1433, 77 S. W. 1115. Where words used convey a fee under **rule in Shelley's case, extrinsic evidence not admissible** to show that testator intended to convey a life estate only. Deemer v. Kessinger, 206 Ill. 57, 69 N. E. 28. Not admissible to show **what kind of monument testator desired.** Will provided for "suitable and proper" one. Expense should be limited to reasonable amount in view of his position in life and extent of property. In re Smith, 75 App. Div. [N. Y.] 339. Evidence **that certain children were testator's favorites** inadmissible. Wilson v. Bull, 97 Md. 129; Reynolds v. Reynolds, 65 S. C. 390. The **special business methods or habits** of the testator are not admissible to aid the construction of his will and to show intention in making bequests. Blair v. Scribner [N. J. Eq.] 57 Atl. 318; Brown v. Quintard, 177 N. Y. 75, 69 N. E. 225.

73. Gould v. Chamberlain, 184 Mass. 115, 68 N. E. 39.

74. Brown v. Quintard, 177 N. Y. 75, 69 N. E. 225.

75. A letter written by testator to devisees, reciting that an enclosed check was to be paid certain devisees in lieu of a ground rent devised to them which had been redeemed after the will was made, though not in testamentary form or enforceable as a gift, may be considered in determining testator's intention. Joynes v. Hamilton [Md.] 57 Atl. 25.

76. Bassett v. Nickerson, 184 Mass. 169, 68 N. E. 25; Cushman v. Arnold [Mass.] 70 N. E. 43; Herzog v. Title Guarantee & Trust Co., 177 N. Y. 86, 69 N. E. 283; Cruikshank v. Cruikshank, 39 Misc. [N. Y.] 401; Griggs v. Griggs, 80 App. Div. [N. Y.] 339; Ward v. Stanard, 82 App. Div. [N. Y.] 386. Will construed and held not to include the wife of a legatee as a residuary legatee from the fact that she was mentioned in a subsequent codicil to the will which disposed of part of the residuary estate. Kehan v. Graham, 135 Ala. 585.

77. Where a will gave all the testator's property to the wife for life, with full power to dispose of it, and any undisposed residue to one son, and a codicil directed such residue to be distributed equally among all the children, held, construing will and codicil together, the wife's power over the property was not revoked by the language of the codicil. Dexter v. Gordon [Mich.] 98 N. W. 1016. A codicil giving a daughter an annuity and her children, upon her death, a certain sum, held not to supersede a devise given by the will proper. Herzog v. Title Guarantee & Trust Co., 85 App. Div. [N. Y.] 549. A codicil giving the ground rent to devisees of land devised by the will operates as a revocation of the devise, and the devisees are not entitled to the part consideration paid on the making of the lease. Joynes v. Hamilton [Md.] 57 Atl. 25. Testator devised a lot in fee to his grandchildren and later, in consideration of $500, leased it subject to a ground rent. By a subsequent codicil, he revoked the previous devise and provided that the grandchildren were to have the ground rent on the lot. Held that they were not entitled to the $500. Id. A codicil whereby testatrix ratified

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or so far modify them that both may stand.[78] They may be construed as making additional gifts.[79] Conditions on gifts in the will are not applied to gifts in the codicil.[80]

(§ 5) *B. Designations and descriptions of property or funds.*—Words referring to a specific property carry what belongs to it.[81] A devise of all "real estate" will include land in possession of testator under sheriff's certificate of sale, under execution and before expiration of time of redemption.[82] A bequest of stock in a corporation will be construed as a bequest of the particular shares owned by testator,[83] and will include dividends declared after testator's death,[84] and includes that, the certificate of which remained undelivered.[85] The will speaks as of the date of testator's death in reference to property, and until that time the specific subject of the gift is unidentified.[86] Hence a general devise of all of the estate includes after-acquired property,[87] unless a contrary intent appears.[88] Gen-

and confirmed her will "except as herein changed" left a legacy in an item of the will not mentioned in such codicil in force. Kelley v. Snow [Mass.] 70 N. E. 89. A codicil revoking the disposition of the residuary estate among persons named, omitting the name of one of the legatees under the will, controls, and such legatee is not entitled to share in the estate. In re Scott's Estate, 141 Cal. 485, 75 Pac. 44.

78. Where testator gave a legacy of a certain sum to his mother from the money "now in my safety deposit box," a codicil giving a small sum to another therefrom and "all money left in my safety box" to his wife, held not to show an intention to revoke the legacy given to the mother, but to give his wife what was left after the two legacies were paid. Hubbard v. Hubbard, 198 Ill. 621, 64 N. E. 1038.

79. Where testator devised to his wife one-third of his realty, and in a codicil gave her his rights in a particular house and lot the latter devise will be construed as being in addition to that in the will, and should also be included in the total used as a basis for calculating the wife's third. Such is the natural meaning of language used, the presumption of law and the evident intention of testator. Blakeslee v. Pardee [Conn.] 56 Atl. 503.

80. A restriction on sale of land devised by will held not to show an intent to restrict sale of different land given to same devise by codicil. Dougherty v. Wellinger, 207 Pa. 601.

81. A gift of "my farm" includes the homestead and outlying lots used in connection therewith by testator as a farm. Had referred to whole tract as "farm" when describing it to real estae agent for purposes of sale. Scoville v. Mason [Conn.] 57 Atl. 114.

82. Morgan v. Joslyn [Minn.] 97 N. W. 449.

83. Where testatrix at the time of making her will owned 20 shares of stock in a particular corporation giving the shares to each of two legatees and at her death owned but 10 shares, in the absence of evidence that she intended to give 20 shares whether she was the owner or not, the legatees will take five shares each. Drake v. True [N. H.] 56 Atl. 749.

84. Blinn v. Gillett [Ill.] 70 N. E. 704.

85. Stock held to pass under will, though certificate not delivered to testator before his death, it having been issued and appearing on the books, and having been left with the company under an agreement between testator and the company. Fact that the stock was convertible into bonds and that company had agreed to issue its promissory note therefor immaterial. In re Frahm's Estate, 120 Iowa, 85, 94 N. W. 444.

86. In re Warnes' Estate, 39 Misc. [N. Y.] 432. A gift of "all the property I possess, real and personal, movable and immovable," is a universal legacy and the legatee takes all the property owned by testatrix at her death. Thomas v. Blair, 111 La. 678. Unless contrary intent appears, legacies payable ten years after testator's death to children of a daughter at that time. Voorhees v. Otterson [N. J. Eq.] 57 Atl. 428.

87. If it reasonably appears from the will that testator so intended. Carrel v. Carrel, 24 Ohio Cir. Ct. R. 416. Where the will shows an intention to dispose of all of the estate. "I * * * devise * * * all my real * * * estate, of whatsoever nature or kind soever, and wheresoever situated" held to pass all the testator's real estate, whether acquired before or after the making of the will. Clayton v. Hallett, 30 Colo. 231, 59 L. R. A. 407, 70 Pac. 429. Whenever the intention to so provide is clear and explicit [Iowa Code, § 3271]. Where the will referred only to specific tracts of land and contained no general devise or residuary clause, realty acquired after the execution of the will passed as intestate property. Flynn v. Holman, 119 Iowa, 731, 94 N. W. 447. Depends upon the intent of testator which must be clearly manifested and not rest upon conjecture. Act Congress Jan. 18, 1887. Crenshaw v. McCormick, 19 App. D. C. 494. Policy of life insurance acquired after execution of will held to pass under general devise of all of the estate, both real and personal. Laughlin v. Norcross, 97 Me. 33. Code, § 2141 declares that a will shall be construed to read as if executed immediately before death. Where a testator devised all land lying south of a specified line, and thereafter and two years before his death purchased other lands south of such line, such lands were included in the devise. Reference to the number of acres in the tract held immaterial, and also fact that it was described as "all that tract south of said line." Brown v. Hamilton [N. C.] 47 S. E. 128. Fact that an absolute devise is followed by a particular description does not change the rule. Durboraw v. Durboraw, 67 Kan. 139, 72 Pac. 566.

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eral words preceding or following enumerated articles should be limited to things ejusdem generis, unless they occur in a general bequest in a residuary clause, or the will does not contain a residuary disposition.[89] A gift of specific articles preceding or following a general gift of all testator's personalty will be construed as an exception from the operation of the general gift.[90] Errors in the description of the property will not avoid the gift if, after rejecting such errors, enough remains to show what was intended,[91] or if it can be aided by extrinsic evidence.[92] The presumption is that testator intended to devise his own realty.[93] Particular words recently construed are collected.[94] "All my estate" may mean every sort of property,[95] but words descriptive of one kind will not include converted realty or personalty unless such an intent appears.[96]

88. A devise of "the home farm on which I now reside, known as the D. farm" does not pass land acquired after the execution of the will and added to such home farm. Contrary intent appears in such case. Pepper v. Pepper, 25 Ky. L. R. 155, 74 S. W. 253. A codicil ineffectual to pass realty held not to be resorted to to show that testator intended after-acquired property to pass by the residuary clause in the will. Crenshaw v. McCormick, 19 App. D. C. 474.

89. A bequest of "all my law business, lawbooks, papers, safe, bookcases, and office furniture and all property pertaining to my business," held not to include claims for legal services. In re Northup's Will, 87 N. Y. S. 318. A gift of a residence with all its contents, "furniture, bedding, silver, everything in and about the premises, all personal property wherever it may be," held to include tangible personalty only, such as is described, and not to include bank stocks and choses in action. Bond v. Martin's Adm'rs, 25 Ky. L. R. 719, 76 S. W. 326.

90. Flynn v. Holman, 119 Iowa, 731, 94 N. W. 447. Where by will certain described lands were devised to designated children and the testator's remaining land, which he described as being within certain bounds, was devised to his other children, held this last devise was in the nature of a residuary devise of all the remaining lands and did not limit the devise to the land lying within the designated boundary lines. Smith v. Bartlett, 79 App. Div. [N. Y.] 174.

91. False number of section rejected. Pate v. Bushong, 161 Ind. 533, 69 N. E. 291; Tobin v. Tobin [Ind.] 69 N. E. 440. A bequest of 20 shares of Carthage National Bank stock construed as 20 shares of Central National Bank stock, where the former stock had already been bequeathed and the testator made no other disposition of the latter stock owned by him. Waters v. Hatch [Mo.] 79 S. W. 916.

92. See ante, § 5a.

93. In re Pope's Estate [Minn.] 97 N. W. 1046; Pate v. Bushong, 161 Ind. 533, 69 N. E. 291.

94. A bequest of the income from all corporate stocks will not include income from railroad debenture certificates convertible into stocks at a future time and at the option of the holder. Connecticut Trust & S. D. Co. v. Chase, 75 Conn. 683. Gift of "all my moneys, **bonds**, notes and money in savings banks," held to include railroad stock and scrip, which was the product and avails of the bonds, such being testator's evident intent as gathered from the scheme of the will. Scoville v. Mason [Ga.] 57 Atl. 114. A bequest of "**household furniture**" includes silverware, but not garments and clothing. Id. A testator gave one a life estate in certain premises occupied by him, together with the use of the **furniture therein**. A portion of the premises was occupied by him as a residence and a portion by a bank paying a rental. Held, the housekeeper acquired a life estate in only that portion occupied as a residence. In re Handley's Estate [Pa.] 57 Atl. 755. The words "and **money** received by her from banks which have gone into voluntary liquidation" read into a clause by which bank stock and money arising from the sale thereof were devised. Blinn v. Gillett [Ill.] 70 N. E. 704. A gift of the **proceeds of the "sale"** of property not otherwise disposed of will not include money on deposit in a bank. City of Huntsville v. Smith, 131 Ala. 382. A purchase-money note and mortgage will not ordinarily pass under a gift of **all loans secured upon real estate.** Not loan in strict sense of term. Connecticut Trust & S. D. Co. v. Chase, 75 Conn. 683. Where **bank stock or the proceeds from the sale thereof** are devised in one way and the residue of the testator's personal property other than bank stock is devised in another, held first clause included money received from banks which had gone into voluntary liquidation. Blinn v. Gillett [Ill.] 70 N. E. 704.

A will authorizing a sale of "**building lots**" for support of testatrix's husband does not authorize a sale of property whereon a building had been erected during her lifetime. Dana v. Stafford [Vt.] 56 Atl. 88. A devise of "the **undivided** west half of the northwest quarter of the southwest, and the south half of the southwest quarter of the northwest quarter," held to pass the whole of the west half of the northwest quarter of the southwest quarter, and the whole of the south half of the southwest quarter of the northwest quarter, the word "undivided" qualifying the words "west half," though meaningless. Wright v. Wright [Iowa] 98 N. W. 472. A devise of all lands **on the west side of a stream** to one devisee and all of the testator's remaining land to other devisees, held, the first named devisee's property extended only to the west bank of the river, the land under the river passing to the last mentioned devisees. Smith v. Bartlett, 79 App. Div. [N. Y.] 174.

95. Where the will gave all the property to testator's children, a codicil executed after death of a child giving grandchildren a certain share in "all my estate" held to

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Intention to exercise power.[97]—A mere general disposal of all property does not alone include a power of appointment.[98] A reference to a power shows an intention to execute it.[99]

(§ 5) *C. Designations or descriptions of persons, purposes, etc.*—Particular words will be given such meaning as the intent shows.[1] Express purposes are limited to their common meaning.[2] A purpose wholly charitable is negatived by the exclusion of certain individuals.[3] Persons need not be named if they are ascertainable,[4] e. g., by reference to other parts of the will,[5] or to functions or characteristics.[6] A gift to a class to be ascertained is certain.[7] The words "heirs," "issue," "kindred," "children" and the like are so frequently words of limitation that the cases construing them have been collected elsewhere.[8]

Gifts to charities may be upheld in most states unless there is uncertainty in both the taker and the purpose.[9] As to the other group of states, a gift for a class

include both household goods and homestead property. Lawrence v. Barber, 116 Wis. 294, 93 N. W. 30.

96. A bequest of one-half of the personalty absolutely and one-half for life held not intended to include a part of the proceeds of realty converted into personalty for payment of legacies, the legatee having been devised realty also. In re Woodbury's Estate, 40 Misc. [N. Y.] 143.

97. See, also, post, § 5 D, 12, as to extent of power; 5 D, 2, as to whether power or some other interest was given.

98. Lane v. Lane [Del.] 64 L. R. A. 849.

Note: An exhaustive monographic note on exercise by will of powers of appointment, considering not only the intent, but also the validity and effect of appointments by will, is found in 64 L. R. A. 849.

99. Will held to execute power of appointment. Intention to do so expressed. McCook v. Mumby [N. J. Eq.] 54 Atl. 406. Words "power," "appoint" refer to execution of a power of appointment given testatrix by her father's will. Heinemann v. De Wolf [R. I.] 55 Atl. 707.

1. Where there is a devise to an unmarried woman and on failure of children to attain the age of 21 years then over to her **husband,** the first person answering to husband is entitled to take. Jossey v. Brown [Ga.] 47 S. E. 350. Upon a limitation of blended property to **heirs at law** of the testator, the persons answering that description take the entire property. A widow of the testator whom he married subsequent to the making of the will was not permitted to share in this distribution. Allison v. Allison's Ex'rs, 101 Va. 537. A devise to **"my adopted daughter,"** naming her, and giving her name before adoption, sufficiently identifies the devisee. Validity of adoption proceedings immaterial. Brack v. Boyd, 202 Ill. 440, 66 N. E. 1073. Where testator in his will described one as his nephew and not as son and his children as his "oldest daughter" and "second daughter," a devise to **"our children"** was held not to include the nephew, though he had lived with testator and been treated as an adopted son, but was never legally adopted. Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118. A legacy "to all **servants** in my employ at the time of my death" includes servants of all classes, whether menials or not. Ginters' Ex'rs v. Shelton [Va.] 45 S. E. 892.

2. A bequest for the erection of a "monument" does not authorize the erection of a "memorial or memorial building." In re Ogden [R. I.] 55 Atl. 933.

3. Charitable "or other purposes" but not to "wife or children" intends a gift not wholly charitable. Hyde's Ex'rs v. Hyde, 64 N. J. Eq. 6.

4. To persons whom the testator had designated to the trustees in his lifetime, held sufficient. Jay v. Lee, 41 Misc. [N. Y.] 13.

5. Gift of property to "said executrix" in last clause of will held to refer to the person appointed sole executrix in first clause. Gallison v. Quinn, 183 Mass. 241, 66 N. E. 961. Where will gave property to certain named trustees and after creating two trusts provided "and I hereby nominate, constitute, and appoint my said trustees residuary legatees of my estate," held that the words "my said trustees" were equivalent to specifying by name residuary legatees the persons theretofore named as trustees, and refers to them as trustees of the previously declared trusts. Trunkey v. Van Sant, 176 N. Y. 535, 68 N. E. 946.

6. A gift to "the boards of the Presbyterian Church," to be used for certain specified purposes, is a gift to the particular boards having such work in charge. Harris v. Keasby [N. J. Eq.] 53 Atl. 555. If a legacy is given to an individual by reference to certain characteristics at some particular time, instead of by name or special designation, the person having the characteristics at that time is the person entitled to the legacy and it will then vest in him. Voorhees v. Otterson [N. J. Eq.] 57 Atl. 428. Testator gave a sum of money to each employe who had been employed "as long as two years and less than five years," and a different sum to those who had been employed "for less than two years." Held, that one whose aggregate service was four years, but who had been employed continuously for a period of 16 months only, was in the first class. In re Becker, 39 Misc. [N. Y.] 756.

7. See post, § 5 D 5, as to rule of vesting in such case.

8. For meaning of words "heirs," "children," "kindred," etc., see post, § 5 D 1.

9. See Charitable Gifts, 1 Curr. Law, p. 510. A communicant of the Protestant Episcopal Church bequeathed $2,000.00 to be divided equally between "Indian and domestic missions of the United States." There was nothing to show who was to take the be-

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may be upheld where ascertainable and not including general public.[10] If one of two alternative purposes is valid, a gift for charity is certain.[11]

A misnomer or variation from the precise corporate name of the beneficiary will not render the gift void for uncertainty.[12] Characteristics may identify the one intended of two bearing the same name,[13] but will not effect a substitution of a succeeding corporation.[14]

(§ 5) *D. Words creating, defining, limiting, conditioning and qualifying the estates and interests.* 1. *Particular words and forms of expression.*—The words "heirs" and "heirs of the body" are prima facie words of limitation,[15] and "child" and "children" words of purchase.[16] The words "heirs,"[17] "heirs of the

quest nor was there any society by that name. Held, the bequest void for indefiniteness. Bowman v. Domestic & Foreign Missionary Soc. of Protestant Episcopal Church, 87 N. Y. S. 621. The Domestic and Foreign Missionary Society of the Protestant Episcopal Church could not claim it. Id.

Held sufficiently certain: A will directing disposition of property for the aid of a Bible school, for support of missionary abroad, to aid in carrying on the cause of "Bible holiness," etc., and to aid in the support of destitute ministers, held to point out with reasonable certainty the purposes of testatrix and classes of beneficiaries under Ky. St. 1903, § 317. Leak's Heirs v. Leak's Ex'r [Ky.] 78 S. W. 471. To provide home for widows and orphans is definite. Gidley v. Lovenberg [Tex. Civ. App.] 79 S. W. 831. A devise for the benefit of the unfortunate widows and orphans of a certain city is not void for failing to designate a definite class. Id. "Indigent Israelites" residing in a certain city is a sufficiently definite designation of a class to sustain a charitable devise. Id. Where executors were made "detainers" of the estate until a home for widows and orphans could be organized, a bequest for that purpose was not void for want of a trustee, or beneficiary capable of taking. Id.

10. Gift for persons suffering from "storms, floods, fires and other accidental and natural causes" is not general to the public but limited to a class. Kronshage v. Varrell [Wis.] 97 N. W. 928.

11. Where a city charter authorized the establishment of free public schools and the establishment of hospitals, a devise to the city to be used for white public schools or for a city hospital as the authorities should elect was not void for uncertainty. City of Huntsville v. Smith, 137 Ala. 382.

12. As a gift to "The city of Huntsville" instead of to "The mayor and aldermen of," City of Huntsville v. Smith, 137 Ala. 382. Evidence may be had. Second United Presbyterian Church v. First United Presbyterian Church [Neb.] 99 N. W. 252.

Intention the test: Testator devised a sum in trust to the board of directors of an alleged society; there was no society of that name or purpose in existence, but it being shown that the testator had taken a great interest in a society of a similar name which had started a fund for the purpose alleged to be the object of the society named in the will, held such society should take the devise. Reformed Presbyterian Church of North America, General Synod, v. McMillan, 31 Wash. 643, 72 Pac. 502.

13. The word "unincorporated" is sufficient to distinguish between an incorporated and an unincorporated association of the same name. Murray v. Miller, 85 App. Div. [N. Y.] 414.

14. A testatrix bequeathed property to a church corporation, which before her death consolidated with another. Held, the consolidated corporation was not identical with the original corporation so as to be entitled to take under the will. Gladding v. St. Matthew's Church [R. I.] 57 Atl. 860. The fact that she made a codicil after the consolidation, making no reference to this bequest, did not have the effect of substituting the consolidated corporation. Id. The fact that testatrix had been deeply interested and was a member of a church for deaf mutes to which she made a bequest does not entitle a new church formed by a consolidation of the legatee and another to take under the will. Id.

15. Halley v. Hengseter, 23 Ohio Cir. Ct. R. 504. So unless the will clearly shows an intention to designate a new class of beneficiaries, word "heirs" held not to mean children. Roberts v. Crume, 173 Mo. 572, 73 S. W. 662. "Heirs of the body." Teal v. Richardson, 160 Ind. 119, 66 N. E. 435. A devise to one for life with remainder over "to the heir or heirs of her body in fee simple," there being nothing in the will clearly showing an intent that the words should have any other than their strict legal meaning, passes the fee to the devisee under the rule in Shelley's case, estates tail being resolved into estates in fee by statute (Burns' Rev. St. Ind. 1901, § 3378; Rev. St. 1881, § 2958; Horner's Rev. St. 1901, § 2958). Id. The words "nearest," "lawful," "legal," or similar expressions preceding the words "heirs" does not alone change it to a word of purchase. Deemer v. Kessinger, 206 Ill. 57, 69 N. E. 28.

16. Piper v. Locke, 205 Pa. 616. So unless different interpretation is necessary to effectuate testator's evident intent. A devise to the wife for life, with a provision that at her death the property should be divided equally among testator's children to be held by them as separate estate for their support and that of their children, and that at their death it should descend to their children, held to give children a contingent remainder for life with remainder in fee to their children, which estates become vested on the death of the wife. Jabine v. Sawyer [Ky.] 78 S. W. 140. Where a remainder is given to a devisee's children, the devisee takes a life estate only. Simpson v. Reed, 205 Pa. 53. But where a remainder limited on a life estate is to go to the general or lineal heirs as pointed out by law, they are synonymous

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body,"[18] "issue,"[19] "next of kin," or "kindred,"[20] "descendants,"[21] "children,"[22]

with "heirs of the body," and, by analogy with the rule in Shelley's Case, the estate for life in the first taker is enlarged into a fee or an estate tail by implication. Pifer v. Locke, 205 Pa. 616. In a devise to a daughter for life only, with remainder over to her child or children in fee, where the daughter has no child at the time, the words "child" and "children" are not designatio personae, but comprehend a class and the daughter takes an estate tail. Simpson v. Reed, 205 Pa. 53. A devise for life and on death "to her children or issue in fee simple" creates an estate in fee tail general, which under the statute is resolved into a fee simple estate [P. L. 368]. Pifer v. Locke, 205 Pa. 616.

17. Where unexplained by the context, must be interpreted according to its technical import. Allison v. Allison's Ex'rs, 101 Va. 537. Where "heirs" is used to represent a class, includes those who would take under the statute of distributions. Lee v. Baird, 132 N. C. 755. The fact that an intermediate life estate is given to one of such heirs is not sufficient to change such meaning. In re Cowley's Will [Wis.] 97 N. W. 930. In a devise to wife for life, then to daughter for life, the portion then remaining to be divided among "my lawful heirs," held that lawful heirs meant those persons who at testator's death were entitled to inherit his intestate realty. Id. In a devise of real estate, does not include the widow. In re Raleigh's Estate, 206 Pa. 451.

May be treated as equivalent to "legatee" or "devisee"; such was clearly testator's intention. Thus where, among others, a specific bequest in trust was made to D., a grandson of testator's sister, and by the residuary clause the remainder of the estate was directed to be divided among testator's "heirs, the share of D. to be held in trust in the same manner as the specific bequest heretofore mentioned," but D. was not an heir of testator, though he might have been, he took nothing under the residuary clause. Taylor v. Perkins [N. H.] 56 Atl. 741.

May be used interchangeably with "children." Simpson v. Reed, 205 Pa. 53. In a devise to one but should he die "leaving no heirs" then the property to descend to brothers and sisters, the word "heirs" construed to mean "children," since no one can die without heirs in the strict sense of the term. Bradsby v. Wallace, 202 Ill. 239, 66 N. E. 1088.

Essentially different from the term "next of kin." May v. Lewis, 132 N. C. 115. It may include next of kin, where such was evidently the intent of the testator, as in case of gift of both realty and personalty to heirs. Hoover v. Smith, 96 Md. 393. In a bequest of personalty to one or in case of his death to his heirs, means next of kin. Trenton Trust & S. D. Co. v. Donnelly [N. J. Eq.] 55 Atl. 92.

The words "heirs" and "children" may be interpreted to mean heirs of the body. In re Vilsack's Estate [Pa.] 57 Atl. 32. Testator gave a life estate to his wife and after her death the income thereof to his sons and daughters during their natural lives, and after their death, to their "children" should they leave any, but should any of them leave no "heirs," their share was to be divided between all his grandchildren. Held, that the words "children" and "heirs" mean "heirs of the body," and the testator's children take an estate in fee tail, enlarged by statute into a fee simple. Id. In a gift to "heirs or legal representatives" will be construed as meaning those upon whom the law casts the real estate immediately upon the death of the ancestor. Presumed to have been used in technical sense. Howell v. Gifford, 64 N. J. Eq. 180. The words "heirs" and "children" held to have been used in their strict legal sense, and grandchildren included in the former but not the latter, where testatrix made separate bequests to each class. Lee v. Baird, 132 N. C. 755. A will provided that realty devised to four sons equally should not be sold until the youngest attained majority. If any died without heirs of his own the survivors to take his portion. Held, "heirs of his own" meant lineal descendants and the mother, who had been liberally provided for, did not take the share of a deceased child. Nor does this will create a perpetuity. Coleman v. Coleman [Kan.] 76 Pac. 439. Under a devise for life with remainder over to heirs of testator, the heirs surviving at the death of testator take and not those in being at the termination of the life estate. Allison v. Allison's Ex'rs, 101 Va. 537. Where by a devise, the residuary estate of a testator is to be equally divided among his lawful heirs, share and share alike, the term "lawful heirs" includes all persons answering that description at the time of the testator's death. Mooney v. Purpus [Ohio] 70 N. E. 894.

18. The words "bodily heirs" mean heirs of the body. Turner v. Hause, 199 Ill. 464, 65 N. E. 445. Where a will makes a gift to one for life and after his death to the "heirs of his body," the word "heirs" in a subsequent clause making a gift to him for life with remainder to his "heirs, if any he have" will be considered as referring to "heirs of his body." In re Tillinghast's Account [R. I.] 55 Atl. 879. Where the technical words to create an estate tail are used, to wit, "heirs of the body," and nothing appears to show that they were not used with that intent, they create an estate tail. In re Tillinghast's Account [R. I.] 55 Atl. 879.

19. "Issue" prima facie means heirs of the body. Graham v. Abbott [Pa.] 57 Atl. 178. If a devise be made to one in fee, and if he die without issue, or on failure of issue, or for want of issue, or without leaving issue, then over to another in fee, the estate of the first taker is a fee tail, which, if he has issue, passes to them ad infinitum by descent as tenants in tail. Id. When used as a word of purchase, means descendants, in the absence of anything to show a contrary intention. Wilson v. Wilson, 76 App. Div. [N. Y.] 232. A repeated use of the word "children" after a devise to a son for life, with remainder over to his "male issue," is a strong indication that the words were used with the understanding that they have a different meaning. Id. Word held to be used as meaning descendants. Id.

20. Used to signify the relatives of a person, sometimes in the sense of nearest blood relatives, and at other times in the sense of relations entitled to take under the

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"representatives," or "legal representatives,"[23] will be given their ordinary legal meaning, unless a contrary intent appears. The word "family" may include an entire household, all descended from a common stock, their husbands and wives.[24] A will takes effect at the death of the testator,[25] hence a gift to "heirs" will be construed as referring to those who are such at the time of the ancestor's death.[26] The word "children" will generally be regarded as including only children still living at the time of the execution of the will,[27] but a gift for the benefit of "our chil-

statute of distributions. "Next of kindred" held to include nephew and niece of beneficiary to the exclusion of grandnephews and grandnieces. Graham v. Whitridge [Md.] 57 Atl. 609. Kindred means blood relations. Does not include husband or wife of deceased. Tiffany v. Emmet, 24 R. I. 411.

21. "Descendants" means all persons coming from the stock or family referred to and includes all persons answering that description at the time fixed by the will for distribution. Levering v. Orrick [Md.] 54 Atl. 620.

22. Ordinarily means immediate descendants. Tiffany v. Emmet, 24 R. I. 411. In Kentucky, under a devise to one for life, and after her death to be equally divided "between my children then living," the issue of a child dying before testator are entitled to his share. Ky. St. §§ 2064, 4841, changes common-law rule of construction so as to make word "children" include grandchildren, unless a different meaning is given it by the will. Ruff v. Baumbach, 24 Ky. L. R. 1167, 70 S. W. 828. Means issue in the first degree unless a contrary intention appears on the face of the will. Brett v. Donaghe's Guardian, 101 Va. 786. A bequest to a second wife for life remainder to her children by the testator, and there was one born before he died, creates a vested remainder in such child. Allison v. Allison's Ex'rs, 101 Va. 537. Will gave real estate to four sons for life and the remainder in fee to their respective "sons." A codicil, executed after the death of one of the sons, revoked the devise to him and his "children," and gave his share to his three surviving sons and their children for the like estate and subject to the same conditions as those mentioned in the will, that is to say, "to each of my said last named sons the one-third part of my real estate for life, and to their respective children in fee simple at their decease, respectively." Held, that the codicil revoked the devise of the remainder to the grandsons and gave it to all the "children" of the surviving sons, including granddaughters of testator. In re Tibby's Estate, 207 Pa. 643. It will not be held to include grandchildren unless such a construction is necessary to give effect to the words of the will or the evident intent of the testator. Tiffany v. Emmet, 24 R. I. 411; Brown v. Brown [Neb.] 98 N. W. 718. May be used in the sense of heirs of the body or issue. Simpson v. Reed, 205 Pa. 53. The word "children" in a clause, giving an income to one and his children so long as they live, will not be construed as meaning only those in esse at the death of testator, unless such meaning is evident from the context. Towle v. Doe, 97 Me. 427.

23. Words "legal representatives" mean "executors and administrators;" may be construed as meaning next of kin. Slight circumstances may control. Howell v. Gifford, 64 N. J. Eq. 180. Words "legal representatives" in a gift to a son or "his heirs or legal representatives," after the expiration of a life estate, held to mean next of kin, since to construe them otherwise would make the personalty a part of the son's estate and liable for his debts, while the realty would not be, and it being improbable that testator intended to direct the disposition of one and not the other. Howell v. Gifford, 64 N. J. Eq. 180. Where, in such case, the bequest is to take effect immediately, the words "personal representatives" will be generally construed as meaning executors or administrators, but where a particular estate intervenes they will be construed as meaning "next of kin." Id. May mean next of kin. Jones v. Hand, 78 App. Div. [N. Y.] 56. In a devise to two brothers, "who or whose representatives or assigns are to be entitled to possession and enjoyment thereof upon and after the decease of" testator's wife, held that the word "representatives" means next of kin, and that testator intended to make a substituted gift to the children of his brother or brothers, if one or both of them died before him. Fact that in previous devise to same persons he specifically devised share of one dying during testator's lifetime to his children does not show different intent. Id. The words "legal representatives," when used in connection with a devise of realty, are to be construed as equivalent to the word "heirs" and do not include the husband or wife of the testator. In re Lesieur's Estate, 205 Pa. 119. Under a devise in trust for one during her life, with power of appointment by will of the principal, "or in default of a will, to her legal representatives," the husband of the devisee takes no share of the estate on her death without exercising the power. Id.

24. Does not include a grandchild born and always residing in a distant state. Brett v. Donaghe's Guardian, 101 Va. 786.

25. The testator making a devise to his brothers and sisters surviving him at the time of his death, he does not include therein descendants of brothers and sisters dying before himself. Ruddell v. Wren [Ill.] 70 N. E. 751.

26. Hoover v. Smith, 96 Md. 393. Provision that if any child should die before reaching the age of twenty-five leaving no children, his share should go to his "heirs at law and next of kin according to law," means heirs living at death of child. Arnot v. Arnot, 75 App. Div. [N. Y.] 230.

27. Does not include children of a child belonging to a class named in the will, who had died before the will was executed. Tiffany v. Emmet, 24 R. I. 411. Under a will making a specific bequest to one living child, and bequeathing the residue to the other four, who were specifically named, and providing that the share of any child dying during testator's lifetime shall be paid to his descendants or heirs, the heirs of a child who died before the will was made are not

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dren" includes those born after the execution of the will.[28] "Children of deceased heirs" may include children of a child of testator who died before the will was made.[29] The word "survivors" may be construed to mean the "longest liver or longest livers" of the class referred to.[30] There is certainty when a class is referred to which will be determined by operation of law.[31]

Words which in a deed would create a condition may in a will be construed as a limitation.[32] Words of survivorship are generally construed as referring to the time of testator's death, unless a specific intent to the contrary appears.[33] The words "die without issue" mean an indefinite failure of issue, in the absence of anything to show a contrary intent,[34] but slight indications are sufficient to show that a definite failure was meant.[35] The contingency of death of a devisee without children is referred to the devisee's death before testator.[36] A gift over on death ordinarily means death before testator.[37] A contingency on birth after testator

entitled to participate in the distribution of such residue. Bollinger v. Knox [Neb.] 92 N. W. 994.

28. Kidder's Ex'rs v. Kidder [N. J. Eq.] 56 Atl. 154.

29. Hoover v. Smith, 96 Md. 393.

30. In a gift to three unmarried daughters or in case either died before marriage, her share to go to the survivors, the word "survivors" held to refer only to the class named and not to include children generally. Dodge v. Sherwood, 176 Mo. 33, 75 S. W. 417.

31. A gift over, after termination of the life estate, to heirs under the intestate laws, is not void for uncertainty as to the persons who are to take. Van Driele v. Kotvis [Mich.] 97 N. W. 700. Devise to children and issue after termination of trust held not void for uncertainty. Harris v. Fergay, 207 Ill. 534, 69 N. E. 844.

32. Jossey v. Brown [Ga.] 47 S. E. 350.

33. Kohtz v. Eldred, 208 Ill. 60, 69 N. E. 900. Where a devise is made to several as a class, with words of survivorship annexed, and the gift as to enjoyment is to take effect immediately upon testator's death, the words of survivorship will be referred to that event, and considered as intended to provide against the contingency of the death of the devisee during testator's lifetime. Jackman v. Jackman, 24 Ky. L. R. 2245, 73 S. W. 776. Under a devise to children or in case any child died leaving a child surviving, the share of the child so dying to go to the surviving grandchildren, grandchildren take an interest only in case their parents died during the life of testator. Katzenberger v. Weaver, 110 Tenn. 620, 75 S. W. 937. A devise to testator's child and over to her children, but in default then to testator's "surviving children," held to mean children surviving testator. Stone v. Bradlee, 183 Mass. 165, 66 N. E. 708.

34. Stone v. Bradlee, 183 Mass. 165, 66 N. E. 708. Devise to son with provision that, should he die without issue, then "the said real estate shall revert to my lawful heirs," imports an indefinite failure of issue, and the son takes an estate tail, enlarged by statute into a fee, and that other devises to children show an intent to devise subject to a definite failure of issue in the first takers, immaterial. Graham v. Abbott [Pa.] 57 Atl. 178.

35. Where realty is devised in terms denoting an intention that the primary devisee shall take a fee on testator's death, coupled with a devise over in case of his death without issue, the words refer to death during lifetime of testator, and the primary devisee surviving testator takes an absolute estate in fee. Kohtz v. Eldred, 208 Ill. 60, 69 N. E. 900. Slight indications to show that definite failure was meant, words "die without children or lineal descendants" held to contemplate a definite failure of issue at termination of the particular estate. Stone v. Bradlee, 183 Mass. 165, 66 N. E. 708. A provision in case of death of the devisee "without leaving issue" then over means without leaving issue at the time of the death of the devisee and not at the time of the death of the testator, and does not import an indefinite failure of issue. Metzen v. Schopp, 202 Ill. 275, 67 N. E. 36.

36. A clause in a will directing what shall be done with the property in case the devisee shall die without children or other such contingency will be construed as referring to a death without children before the death of the testator, in the absence of anything in the will showing a contrary intent. Shields v. McAuley, 205 Pa. 45. A devise to certain persons, their children in the case of the death of either to have the share of the parent, is a devise in fee simple, the contingency referring to their death before that of the testator. Id. Testator devised realty to his three children in equal shares, providing that if either should die childless his share, after the death of the survivor, should descend to testator's heirs. Held, that the clause as to survivorship would be construed as contemplating a death before testator, and hence children surviving testator took an absolute estate. Jackman v. Jackman, 24 Ky. L. R. 2245, 73 S. W. 776.

37. Where there is a devise to one person in fee, and in case of his death to another, the contingency referred to is the death of the first named devisee during testator's lifetime, and if such devisee survives testator, he takes an absolute fee. Coon v. Coon, 38 Misc. [N. Y.] 693. A devise or bequest over in case "either of my children should die" will be interpreted to mean in case of death occurring during the lifetime of testator. McClellan v. Mackenzie [C. C. A.] 126 Fed. 701. Under a will devising all the estate to the wife for life and "after the death of my wife I devise and bequeath my real estate to my children, and if any of my children should die before they would be entitled to shares

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may be referred to termination of a preceding estate.[38] A contingency does not relate to testator's death where a life estate intervenes, in which case the contingency should be referred to the death of the life tenant[39] or where a particular time for the vesting is fixed.[40]

The words "at their death" in a gift to several, will generally be regarded as being used distributively.[41]

given them," then to the survivors, vests the remainder in the children on testator's death. Burke v. Barrett, 31 Ind. App. 635, 67 N. E. 552. The words "after the death of my wife" refer to the beginning of the enjoyment of the remainder and not its postponement, and the death of the children to death during testator's lifetime. Id.

38. A provision that on termination of the life estate the trustees pay legacies to such grandchildren "as may be living at my death or may be born thereafter" will be interpreted to mean such as may be born between the death of testator and the termination of the life estate. Beardsley v. Bridgeport Protestant Orphan Asylum [Conn.] 57 Atl. 165.

39. Coon v. Coon, 38 Misc. [N. Y.] 693. A devise in remainder to children and "in case of death of one or more of said children * * * their shares to be equally divided between all my living children" referred to the children dying before the life tenant and before the estate came into possession. Clements v. Reese, 25 Ky. L. R. 221, 74 S. W. 1047. Husband given a life estate, if he died without issue the property to go to other devisees, held contingency referred to was not the death of the husband during the life of the testatrix. In re Gordon's Will, 81 N. Y. S. 605. Under a devise to children, subject to a precedent life estate, with a provision that on the death of either of them without issue his share shall go to the survivors, each of such children takes a defeasible fee, subject to be defeated by his death without issue before his mother. Baxter v. Isaacs, 24 Ky. L. R. 1618, 71 S. W. 907. Under a devise for life with remainder over to children of the life tenant and in case of death of any to the survivors, the remainders vest absolutely on the death of the life tenant. Coon v. Coon, 38 Misc. [N. Y.] 693. A devise to one as a life tenant and at the latter's death to a class includes those members of the class in existence at the death of the life tenant. Thus a devise to the testator's wife and at her death to her child, not yet born, the child being born alive, though after the testator's death, takes the estate upon the death of the wife. Kesterson v. Bailey [Tex. Civ. App.] 80 S. W. 97. A devise of a remainder to surviving children means children surviving at the death of the tenant of the particular estate. Wilson v. Bull [Md.] 54 Atl. 629. The words "surviving child or children" will not include children of a deceased child. Id. Testator devised ground rents to wife for life with remainder to his children in equal parts. Upon the death of a child, his share was to go to his children absolutely, to be equally divided between them, and any issue of a deceased grandchild, who should take per stirpes. In case any such grandchild died without issue, his share was to go to his surviving brothers or sisters or their heirs absolutely. In case any of testator's children died without leaving issue or descendants, his share should go to testator's surviving children or their heirs absolutely. Held, that on death of testator's son, his interest passed to his sole surviving sister, and the descendants of a deceased child had no interest therein. Id. Where money was bequeathed in trust to pay income to wife for life, and at her death part of the principal to testator's sister, or, if she should die before receiving her share, then to her heirs, and the remainder of the principal to the heirs of testator's deceased brother, the next of kin of the sister are to be ascertained as of the date of her death and those of the brother as of the date of testator's death. Trenton Trust & S. D. Co. v. Donnelly [N. J. Eq.] 55 Atl. 92. Under Mass. Rev. Laws, c. 140, § 3, the husband or wife and the issue surviving the life tenant are the heirs, the former taking one-third and the latter two-thirds. International Trust Co. v. Williams, 183 Mass. 173, 66 N. E. 798. In a gift to heirs of a life tenant, the heirs are to be ascertained as of the date of such life tenant's death. Id. In a provision giving a legacy to remaindermen after the expiration of an estate for life, and providing that in case of the death of any of the legatees his share shall go to the others, the words "in case of death" will be construed to mean death during the continuance of the life estate. Howell v. Gifford, 64 N. J. Eq. 180. A devise to the wife for life "and after her death to be divided equally among my children who may survive" shows an intention to postpone the vesting until termination of the life estate and in those who may then survive. In Moran's Will [Wis.] 96 N. W. 367. A provision for reversion to testator's legitimate living heirs will be construed in its literal sense and applied to all heirs living at his death and at the death of the devisees. Pepper v. Pepper, 25 Ky. L. R. 155, 74 S. W. 253.

40. Coon v. Coon, 38 Misc. [N. Y.] 693. Where final distribution is to be made among a class, the benefits of the will must be confined to those persons who come within the appropriate category at the date when the distribution is directed to be made [Laws 1896, c. 547, § 38]. Schlereth v. Schlereth, 173 N. Y. 444, 66 N. E. 130.

41. The words "at their decease" in a gift to several for life and at their death to others may be deemed to have been used distributively when there is an apparent intent that the subsequent interests shall pass separately to each class as succeeding to the share of the parent or cestui que trust whom they respectively represent. Gardiner v. Savage, 182 Mass. 521, 65 N. E. 851. Where the income of a single fund is bequeathed to two or more persons for life, with remainder over "after their death," these words will be construed to mean after their respective deaths, and a present division of the fund and a distribution of the part thereof not required to produce income for the life tenants will be decreed. Collins v. Wardell [N. J.] 54 Atl. 417. Where property is given to several for

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The word "remainder" may be used in the sense of reversion.[42]

The word "vest" may be used in the sense of "payable" or "taking effect in possession."[43]

The word "or" interposed between the first legatee and the remaindermen is a word of substitution.[44]

(§ 5D) 2. *Gifts by implication, gift of ownership or use, legal or equitable ownership, trust or power.*—A devise may be held to exist by implication where the context requires it,[45] but the probability of such an intent must be so strong as to leave no hesitation in the mind of the court and permit of no other reasonable inference.[46] An expression of an intention to make a gift inter vivos cannot be construed as a bequest or devise.[47]

A devise of the interest, rents, and profits or the use and occupancy is a devise of the thing itself out of which they arise, unless there is a clear, manifest, and undisputed intention to the contrary.[48] Such a gift without limitation as to

life, and then over at their decease, and such gift over is to the issue of the life tenant per stirpes, the words "at their decease" will be construed as being used distributively, and to mean that the stock of each life tenant takes on the death of its ancestor. Where per capita refers to death of survivor. Brown v. Farmer, 184 Mass. 136, 68 N. E. 32. Under a devise to two, share and share alike, and in case of their death without issue, over to brothers and sisters of testator, on the death of either his share passes to the latter, and not to the survivor of the devisees. Truesdell v. Darnall, 24 Ky. L. R. 2164, 73 S. W. 755.

42. Life estate granted wife before testator's death and reversion referred to as remainder. Biggerstaff v. Van Pelt, 207 Ill. 411, 69 N. E. 804. Testator by contract with his wife made on the day of the execution of his will gave to her a life estate in certain realty and a life annuity in lieu of her statutory rights as widow. He referred to the contract in the will, provided that the annuity should be a charge on the realty, and devised all the "remainder" to his children in fee except that the daughters should hold their shares for life with remainder to their lawful children, held that the "remainder" includes testator's "reversion" in the property to which he had given a life estate to the wife, which could pass under the devise to the children. Id.

43. In re Phillips' Estate, 205 Pa. 504. Testator gave the income from his residuary estate to his sisters for life and upon their death the principal to his nephews and nieces, the issue of any of them who might be deceased to take his parent's share. By a subsequent clause, he provided that none of them could call the trustees under the will to account until their shares were payable and that their estates should not "vest" until such time. Held, that the word "vest" was used in the sense of "become payable," and that the estates vested in the nephews and nieces at the time of testator's death. Id.

44. Where property was given to one for life then to the testator's "children or their children, or their representatives," held, testator's children took no absolute or vesting estate during the life tenancy. Schaeffer's Adm'r v. Schaeffer's Adm'r [W. Va.] 46 S. E. 150. A devise for life and on death to testator's children "or" their heirs as the law directs does not create a vested but a contingent remainder. Words "or their heirs" are words of purchase, "or" used disjunctively and the heirs take under the will. Taylor v. Taylor, 118 Iowa, 407, 92 N. W. 71. The word "or," in a provision that an estate shall go to a party or his legal representatives, means in case of the party's death. Howell v. Gifford, 64 N. J. Eq. 180.

45. Where one given full power to dispose of property not expressly devised to her. Hammond v. Croxton [Ind.] 69 N. E. 250. So where the court finds that testator intended his property to go to a certain person and attempted to declare such intent. Lawrence v. Barber, 116 Wis. 294, 93 N. W. 30. Codicil revoked gift to deceased child and failed to expressly name any one to whom it should go. Held, taking into consideration the scheme of the whole will, that there was an implied gift of deceased child's share to survivors. Id. A bequest in trust for a son until he attains majority failed to devise to him the fee, but a further clause provided that if he died before attaining majority, the property should go to another, held to be an implied devise in fee to the son when he attained majority. Culhane v. Fitzgibbons, 86 N. Y. Supp. 710.

46. Where the executors were directed to divide the residuum into four parts (the testator left four sons) and to deduct a certain sum which had been advanced from one part, which should then be the share of a named son, but no disposition was made of the three-fourths remaining, held not to create a devise to the remaining three sons by implication. Brown v. Quintard, 177 N. Y. 75, 69 N. E. 225.

47. "This has been my intention, if I lived and I desire it carried out in case of my death," before the happening of a certain contingency, held not a bequest, where testator lived until after the contingency happened. Lane v. Albertson, 78 App. Div. [N. Y.] 607.

48. Illensworth v. Illensworth, 39 Misc. [N. Y.] 194; Mayes v. Karn, 24 Ky. L. R. 2110, 72 S. W. 1111. Depends upon the context as evincing testator's intention with reference thereto. Where the total income of the entire estate was given for the support of the only child, payable annually, a life estate was created, though the title was conveyed in trust. Johnson's Trustee v. Johnson [Ky.] 79 S. W. 293. Under a gift of "all the use and income" of the entire estate to the widow for her life,

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continuance or limit as to time will be held to pass the fund itself, whether the gift be made directly or through the intervention of a trustee,[49] and if forever passes the fee.[50] Ownership is implied from an attempt to give the largest possible property.[51]

A devise or bequest to one person, accompanied by words expressing a wish, entreaty, or recommendation that he will apply it to the benefit of others, may create a trust in their favor, if the subject and object are sufficiently certain,[52] but in order to do so, it must appear that the words were intended to be imperative.[53] An expression may be imperative in its real meaning, though the language is not

she was entitled to possession and control of the entire estate, and the executor is not thereby made a trustee, there being nothing in the will to show such an intent. Michigan Trust Co. v. Hertzig [Mich.] 95 N. W. 531. But a bequest for life of the "interest or income as it accrues" of a sum to be set apart and invested in certain stocks, the principal to go to the legatee's legal issue after her death, gives such legatee a life interest in the income only, and does not entitle her to receive the legal title to the principal. Jewett v. Schmidt, 39 Misc. [N. Y.] 502. A devise of the use and occupation of land passes an estate in the land, and in the absence of such an intent clearly appearing, is not confined to a personal use and occupation thereof. A devise that the wife "may, if she chooses, use and occupy the dwelling house," held to include the right to rent and apply the proceeds for her own use. Mayer v. Mayer [Ky.] 78 S. W. 883. No intent to vest absolute ownership of evidences of indebtedness in life tenant. In re Skinner, 81 App. Div. [N. Y.] 449.

49. Illensworth v. Illensworth, 39 Misc. [N. Y.] 194. Where the interest of a fund is bequeathed to a legatee or in trust to him without any limitation as to continuance, the principal will be regarded as bequeathed also. As where a bequest of a part of the income of one-fifth of the estate for life to a child, the balance to accumulate for the benefit of grandchildren without further disposition, the latter take the one-fifth with the accumulations. Hussey v. Sargent, 25 Ky. L. R. 315, 75 S. W. 211.

50. A gift of the proceeds or interest of an estate forever is equivalent to a gift of the fee: In re Vilsack's Estate [Pa.] 57 Atl. 32. An absolute devise of the entire rents of a named property will carry the property also. Gidley v. Lovenberg [Tex. Civ. App.] 79 S. W. 831. Devise of income, or rents and profits, or use and occupancy whether in fee or for life, depends upon testator's intention expressed or as gathered from the entire will. Simmons v. Morgan [R. I.] 55 Atl. 522. A devise in trust to pay the net income of land and moneys received from the sale of property to daughters "for and during the term of their natural lives," and after their death to their children "to hold to said children, their heirs and assigns, and one-third part to my said son, his heirs and assigns," etc., held to give to the daughters an estate for life in the entire property, and after their decease, an estate in fee in one-third of the estate to the son and in the balance to the daughters. Trust held valid. Id. A testator had devised property to his son absolutely. The son subsequently became indebted, and a codicil was added revoking such devise and giving the property to a trustee for the use of the son and his family for life, the son to will it to whom he chose. The trustee to hold the property free from the son's debts. Held, the entire estate vested in the son. Honacker Sons v. Duff, 101 Va. 675.

51. Where testator having limited power of disposal gives to a particular person in general terms all the law allows and then proceeds to give him the entire residue, held to evince an intention to give such person all that by the law he is permitted to give. Gueydan v. Montague, 109 La. 38.

52. Where property given absolutely a trust is not to be lightly imposed by mere words of trust and confidence. Russell v. United States Trust Co., 127 Fed. 445. Absolute devise accompanied by a statement that it is testator's "wish and expectation" that devisee shall "generously remember" certain persons, and "such others as she may choose," when she should make her will, held not to create a trust, the words being merely an expression of hope and confidence. Id.

53. Igo v. Irvine, 24 Ky. L. R. 1165, 70 S. W. 836. Expressions used by way of suggestion, counsel, or advice, with a view to influence but not to direct the discretion of the party not sufficient. Russell v. United States Trust Co., 127 Fed. 445; Thruston's Adm'r v. Prather, 25 Ky. L. R. 1137, 77 S. W. 354. After an absolute devise, a request that children dying without issue devise the property to testator's surviving children is insufficient. Igo v. Irvine, 24 Ky. L. R. 1165, 70 S. W. 836. Provision that in case the devisee die without issue "I earnestly request" that he give the land "or its value" to certain persons, insufficient. White v. Irvine, 24 Ky. L. R. 2458, 74 S. W. 247. It must appear from the words used that they were intended in an imperative sense, and the subject and object of the wish or recommendation must be certain. Words "I request that she shall assist any of my brothers or sisters, if they should be in need, and at her decease she should divide her property among them as she may think best," held not to create precatory trust. McDuffie v. Montgomery, 128 Fed. 105. The word "desire" may be precatory and not imperative. Thus as to a desire that a monument provided for by the will be erected in a certain square. In re Ogden [R. I.] 55 Atl. 923. A will gave all the residuary estate to the wife "absolutely," but requested that at her death she should divide the property among testator's brothers and sisters "as she may think best." Held, the wife had an absolute estate, under the will, free from any trust in favor of testator's brothers and sisters. McDuffie v. Montgomery, 128 Fed. 105.

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imperative in form.[54] The test in such cases is whether the will shows upon its face that the purpose expressed was merely the motive for making the gift, or whether it was to be used for that purpose at all events, leaving the legatees no discretion in the matter. In the latter case the gifts are in trust for such purpose.[55]

Where the first taker has the absolute power of disposal or ownership, or where a clear discretion or choice to act or not is given, equity will not construe a trust from the language employed.[56]

A trusteeship cannot be predicated of one who holds for life only, and for his own sole use and benefit, where the will also gives the remainder to others in their own right, and no duty other than that growing out of their legal relation is imposed on the life tenant,[57] nor does it, where there is no gift over, import a trust for testator's heirs.[58]

In a gift to persons "and their heirs and assigns forever," the latter words will yield to a clear, positive and valid creation of a trust or limited estate, but when the language relied on to import such trust or estate is ambiguous or uncertain, they will be given great weight.[59] A provision in a devise that it be with the condition "that the daughters' share shall be protected as their separate estate" creates a separate use trust.[60] A devise in trust for benefit of testator's sons and "in case of the death of either leaving issue," his share, both income and principal, to be paid and distributed equally to and among his said issue, held to contemplate an absolute gift to the issue and not a gift in trust.[61]

If the same person is appointed both trustee and beneficiary, the trust fails and he takes the legal estate.[62] A devise over after the termination of a trust for the payment of incumbrances passes the equitable fee.[63] A restraint on alienation

54. Russell v. United States Trust Co., 127 Fed. 445. The meaning of the word "request," standing alone, is indeterminate and depends altogether upon the context. Id. Where testator "requests" a devisee to pay his mother such sums "as may be requisite for her every comfort," word "request" held imperative. Id. If the context justifies it, the word "wish" may be equivalent to "will" or "request" or "direct." Id.

55. A devise to a bishop or his successors to be used in the education of priests in his diocese is a gift in trust, and void under the Minnesota statutes (Gen. St. 1899, § 4274). In re Shanehan's Estate, 88 Minn. 202, 92 N. W. 948. A mere statement of the motive for the gift is not sufficient. Thus a gift to enable the legatee to confer bounty on others is not a trust, but a beneficial legacy to him. Baker v. Baker, 53 W. Va. 165. Where the will clearly shows that the use of property indicated is merely the motive which leads the testator to make the gift, and if the beneficiary is not limited in his discretion as to the use he is to make of it, the gift does not impose a trust. Bequest to a wife "for charitable purposes." Id. An absolute life estate is not changed to an estate in trust by a clause to the effect that the devise was for the support of the devisee and family, and that no part should ever become liable for the payment of his debts. Wood v. Ward, 76 App. Div. [N. Y.] 567.

56. No trust can be implied from words merely indicating the motive of the gift. McDuffie v. Montgomery, 128 Fed. 105. Where a widow received, under a will, the testator's realty for life, with power to convey the fee, and the undisposed residue, if any, was given to the children, the widow received a life estate unaccompanied by any trust [Rev. St. 1898, § 2108]. Auer v. Brown [Wis.] 98 N. W. 966.

57. Where the life tenant is given sole use of all the property with the remainder over in fee, a provision appointing the life tenant trustee may be treated as surplusage. Thompson v. Adams, 205 Ill. 552, 69 N. E. 1.

58. Devise to wife for life without a provision over as to the remainder. Dillenbeck v. Pinnell, 121 Iowa, 201, 96 N. W. 860.

59. Where trusts were to pay debts and to distribute unspecified portions to unnamed persons, and trustees made residuary legatees, residue on failure of one of the trusts goes to them. Trunkey v. Van Sant, 176 N. Y. 535, 68 N. E. 946. A devise of land "to her and her heirs forever," followed by a provision "to be kept for the benefit of her and her children forever," passes to the devisee the legal title impressed with a trust for the children. Deans v. Gay, 132 N. C. 227. A provision that the person named should be "trustee to receive and control the property" is not repugnant to a previous absolute devise of the fee to such person, but creates a trust with legal title to property in trustee. Dulin v. Moore, 96 Tex. 135, 70 S. W. 742.

60. In re Samson's Estate, 22 Pa. Super. Ct. 93.

61. Sabbaton v. Sabbaton, 76 App. Div. [N. Y.] 216.

62. A trustee in bankruptcy was entitled to the principal of the trust fund so created for a bankrupt. Tuck v. Knapp, 85 N. Y. Supp. 1001.

63. A devise in trust to use the net income of the land to pay all incumbrances thereon, a part of the land then to go to

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by means of a trust may give an equitable fee which will be executed when the purpose ceases.[64] So with a remainder "without limitation" after a life estate in trust.[65] Any trust which is merely passive[66] will be executed into a legal estate.[67] A reference to a trust previously given may be sufficient to make subsequent gifts in trust.[68]

Under a bequest to personal representatives, such persons do not generally take beneficially, but in their representative capacity.[69] The mere fact that the executor is directed to sell land for the purpose of investing the proceeds and dividing them among the beneficiaries at some future time does not give him the legal title thereto.[70]

A power may be given, though words of trust be used.[71] The words "then remaining" or the like, in a devise over, do not show an intention to give the first taker power to use or dispose of the corpus of the estate,[72] nor does the fact that there is no devise over after his death. Under a provision giving to testator's son the farm "on which I now live after the death of my wife, the title of said farm to be and remain in the hands of my executors," who are to take possession whenever the son lets the property or wastes the income, and pay the profits to the son, the son takes no legal title and no title which he can convey, notwithstanding the fact that there was no devise over after the son's death.[73] A devise to a married woman, the property "to be held and used by her free from the control of her husband, and as her separate estate," gives her a sole and separate use merely, without power of disposition.[74] A gift of personalty direct to two persons to use the income for life and in case of death to another for life, all of whom were appointed

testator's son, passes to him an equitable fee, subject to the incumbrances. On foreclosure of a mortgage thereon and sale of the property, the surplus should go to the son, together with such of the net income of the entire property as has been collected and not applied to reduce incumbrances. Simmons v. Morgan [R. I.] 55 Atl. 522.

64. Will devising land in language sufficient to create a fee, but in trust for "the use and benefit" of the devisee, and without "power to dispose of the same by deed or otherwise," held in view of the whole will, to give the cestui que trust an equitable fee, and on her death the trust terminated and her heirs took the legal title under the statute of uses. Powers v. Rafferty, 184 Mass. 85, 67 N. E. 1028.

65. Where the remainder after termination of the life estate was devised to the executors to be invested for a brother's benefit during life and for the benefit of his wife and his issue after his death," without limitation as to time, the latter upon the death of the brother, took an absolute estate. Illensworth v. Illensworth, 39 Misc. [N. Y.] 194.

66. See post, § 5E.

67. See Uses, 2 Curr. Law, p. 1965.

68. Under a provision giving property to trustees for benefit of a son, a further provision giving them the share given a daughter for life in case she died without issue, "on trusts declared in this will for my said son," and a further provision that at the death of the daughters without children, their shares should go to the sons, the share of the son previously given to go to the trustees. Held, that the gifts to such first named son were on the trust. Stone v. Bradlee, 183 Mass. 165, 66 N. E. 708.

69. Strong presumption against their taking beneficially. Howell v. Gifford, 64 N. J. Eq. 180. A devise to executors in trust for certain purposes, "the balance to said trustees," held the trustees were not entitled to such funds as individuals, but as trustees of a void undisclosed trust. Trunkey v. Van Sant, 83 App. Div. [N. Y.] 272.

70. A devise to grandchildren containing a provision desiring the executor to sell land and invest the proceeds and divide between beneficiaries, when they shall have reached a certain age, does not vest the title in the executor, and he could not exercise the power after his discharge from office (Boland v. Tiernay, 118 Iowa, 59, 91 N. W. 836), but the legal title vests in the devisees which will not be defeated by the executor's failure to exercise the power of sale (Id.).

71. A direction to hold "in trust" to pay over to the issue of deceased first takers held merely a power to distribute and not a trust. Denison v. Denison, 86 N. Y. Supp. 604.

72. A devise to A. for life, and on her death the property "then remaining" to be distributed, gives no power of sale to A., nor power to use the corpus of the estate. Thompson v. Adams, 205 Ill. 552, 69 N. E. 1. A gift to executors for the purposes "hereinafter mentioned, viz.: I desire that my wife shall have the full use, benefit, and enjoyment of all my property during her natural life," and "whatever remains" after her death to go to the children, held not to give the property outright to the wife, so as to entitle her to hold money which had belonged to him. Burns v. Burns [Mich.] 93 N. W. 1077.

73. Frantz v. Race, 205 Pa. 150.

74. Shields v. McAuley, 206 Pa. 45.

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executors, creates a power in trust and not a trust within the statute against perpetuities.[75]

(§ 5D) 3. *Estates or interests created.*—In the absence of a contrary intention appearing, a devise of land without limitation passes all the estate and interest which testator had power to dispose of.[76] Technical words of estate, as of inheritance or life tenancy, have their technical meaning if no contrary intent be apparent.[77] No technical words are necessary to give personal property absolutely.[78] The use of words in relation to it, which if applied to land would create an estate tail, makes the gift absolute in the first taker.[79] Words of inheritance are not necessary to devise a fee.[80] Any words suffice which carry that intent,[81] especially if they have the sense of sole or unqualified ownership.[82] Detached sentences may be related by the word "also" to fix the estate given.[83] While remain-

75. In re Conger's Will, 81 App. Div. [N. Y.] 493.

76. Code, c. 71, § 8. A testator prior to his death had executed a trust deed, but before entry could be made thereunder an additional sum must have been paid to him for which he reserved a lien. He devised this land to certain grandchildren. Held, they took the lien. Morrison v. Clarksburg Coal & Coke Co., 52 W. Va. 331.

77. "Owner in fee" gives fee simple estate. Bowen v. John, 201 Ill. 292, 66 N. E. 357. "Fee simple, to hold and possess during her natural life after having paid all my just debts. Also desire and hereby empower my wife to act in her own way in settling up all my business of any kind and desire no administration," the wife took a fee. Smith v. Smith, 24 Ky. L. R. 1964, 72 S. W. 766.

Words of inheritance: A gift to a son for life, with remainder to testator's heirs at law, will not be construed so as to prevent the son taking as an heir. Thomas v. Castle [Conn.] 56 Atl. 854. A devise to one and his heirs forever held to give him an estate in fee, and that his children did not take title with him. Hazelwood v. Webster [Ky.] 78 S. W. 123.

78. At common law or by statute in Illinois. Griffiths v. Griffiths, 198 Ill. 632, 64 N. E. 1069. In cases of absolute bequests of personalty, the court cannot look to other parts of the will, as in case of devises of realty, to determine whether a less estate be limited by express words, construction or operation of law. Id.

79. A bequest of profits for life with the principal over to the "heirs of his body." In re Tillinghast's Account [R. I.] 55 Atl. 879.

80. Rev. St. Mo. 1899, § 4646. Simmons v. Cabanne, 177 Mo. 336, 76 S. W. 618. Under Ky. St. 1899, § 2342. Jackman v. Jackman, 24 Ky. L. R. 2245, 73 S. W. 776. Under the Statutes of Illinois (1 Starr & C. Ann. St. [2d Ed.] p. 925), every estate devised is to be deemed a fee simple, whether the technical words are used or not, unless the will limits it either expressly, or by construction or operation of law. Griffiths v. Griffiths, 198 Ill. 632, 64 N. E. 1069; Bowen v. John, 201 Ill. 292, 66 N. E. 357. Limited by words "to descend to his bodily heirs, and, in case of none, to his brothers and sisters." Turner v. Hause, 199 Ill. 464, 65 N. E. 445. Under a devise to one without the use of the words "heirs and assigns," he will take a fee, unless the will reduces it to a less estate by express words or by construction or operation of law (Hurd's Rev. St. Ill. c. 30, § 13). Metzen v. Schopp, 202 Ill. 275, 67 N. E. 36. "I wish to give all my property to my wife. My wife to have full charge of all my estate after my death, without any restrictions whatever." Held, to give fee. Becker v. Becker, 206 Ill. 53, 69 N. E. 49. In Massachusetts, the language shall be construed to convey all the estate which a testator could lawfully devise in the land mentioned, unless it clearly appears by the will that he intended to convey a less estate (Rev. St. 1836, c. 62, § 4; Gen. St. 1860, c. 92, § 5; Pub. St. 1882, c. 127, § 24; Rev. Laws, c. 135, § 22). Smith v. Rice, 183 Mass. 251, 66 N. E. 806. Devise of all residue, giving devisee full power to do with it as she might deem proper during her natural life. Bassett v. Nickerson, 184 Mass. 169, 68 N. E. 25. Words "bequeath absolutely" sufficient. Roth v. Rauschenbusch, 173 Mo. 582, 73 S. W. 664. 3 Gen. St. N. J. p. 3763. Devise to son by name without words of perpetuity or inheritance, held to pass fee in absence of devise over on his death or a contrary intent. Feit v. Richard, 64 N. J. Eq. 16. A devise to two "to be equally divided between them, and to their heirs at their death" conveys the fee to the devisees (Ohio Rev. St. § 5970). Halley v. Hengstler, 23 Ohio Cir. Ct. R. 504. A devise in trust for the benefit of the child or children of the devisee, he to have the income for life, passes a fee simple estate to the remaindermen, subject to the devisee's interest, unless they predecease the testator. Under Ky. St. 1903, § 2342, providing that a devise without words of inheritance passes the fee, or such estate as testator had. Dalmazzo v. Simmons [Ky.] 78 S. W. 179.

81. A devise to minor sons in trust for their support and education, the trustee to act also as guardian, and with **power to disinherit** under certain conditions, held to pass an equitable fee simple and not merely a life estate. Simmons v. Cabanne, 177 Mo. 336, 76 S. W. 618. Gift of proceeds forever is a fee. In re Vilsack's Estate [Pa.] 57 Atl. 32.

82. **Held to give fee.** "Owner in fee." Bowen v. John, 201 Ill. 292, 66 N. E. 357. Devise of "all my estate." Smith v. Rice, 183 Mass. 251, 66 N. E. 806. All the rest and residue of the property to one for her sole use and benefit. Gallison v. Quinn, 183 Mass. 241, 66 N. E. 961.

83. Where land was devised to a granddaughter and in the same item though after several complete sentences had intervened the will read "Also" other land "which is to be hers for her natural life only" and

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ing in some states,[84] the rule in Shelley's case has been superseded in others,[85] or reduced to a rule of construction.[86] The same result is often reached by construction.[87] It does not apply if "heirs" means "children."[88] It is applicable to personalty by analogy if no contrary intent appears.[89] When the word "heirs" is used as a word of limitation, it conclusively expresses the intention of the testator to devise an estate in fee.[90] Under statutes abolishing fees tail, words creating such[91] may result in a life estate and remainder in fee to children or in a fee.[92] A devise

should she die without children "then the property which I have given to her" to go to the rest of her heirs, held she took only a life estate in the land first devised. Hauser v. Craft [N. C.] 46 S. E. 756.

84. Testator devised lands absolutely to his son and thereafter executed a codicil "In regard to the former will in bequest to my son * * * I desire to change to read to wit: that he shall have use, benefit and control * * * during his lifetime only, and that at his death said lands shall go to his lawful heirs," held, that son took fee simple estate under rule in Shelley's case. Deemer v. Kessinger, 206 Ill. 57, 69 N. E. 28.

85. Rev. St. § 5968, abrogated the rule in Shelley's case as to wills. Halley v. Hengstler, 23 Ohio Cir. Ct. R. 504.

86. In Pennsylvania, the rule is still in existence as a rule of interpretation, but its original results as a rule of property are changed by the statute (P. L. 1855, p. 368), declaring that an estate in fee tail shall be construed as an estate in fee simple. Simpson v. Reed, 205 Pa. 53.

87. If the devise comes under the rule in Shelley's case, the words must be taken as they stand, in their strict legal signification, irrespective of testator's intent. Simpson v. Reed, 205 Pa. 53.

Any form of words sufficient to show that the remainder is to go to those whom the law points out as the general or lineal heirs of the first taker will enlarge the estate for life of the first taker to an estate in fee or estate tail by implication. Id.

Illustrations: Devise "The two houses is a lifetime lease, it cannot be taken from you nor you cannot spend it, but it is held to insure you something to live on during your lifetime, and at your decease if you have lawful heirs all will fall to them but if not, then the property to be sold," vests a fee in the devisee. McCann v. Barclay, 204 Pa. 214. Under a devise of a life estate, with remainder to the devisee's surviving sisters, and in case none survived, to his legal heirs, the devisee takes a life estate, subject to a contingent remainder in fee to the sisters, with a contingent remainder in fee, if they did not take, to his heirs, and hence on the decease of the sisters, was a fee simple, under the rule in Shelley's case. McNeal v. Sherwood [R. I.] 53 Atl. 43. A devise of all of testator's estate to his wife, with a devise of all the rest and residue of his estate to his son on condition that after the death of the wife the son should pay testator's debts and funeral charges, and erect gravestones, and providing that on the death of the son the property should go to his next of kin, gives him a life estate in the residue of the estate remaining after the wife's death, under the statute of Rhode Island, abolishing the rule in Shelley's case (Gen. Laws R. I. 1896, c. 201, § 6). In re Willis' Will [R. I.] 55 Atl. 889.

A will provided "I loan my entire interest in a tract of land to my son to be his for life and at his death to his heirs in fee, and if he die without heirs to revert back to his next of kin." The son takes a life estate only. May v. Lewis, 132 N. C. 115. Property was devised to be and inure to the use of the devisee "during his natural life, not subject to be sold or conveyed by him, but in case he should have legitimate children it should belong to them." Held, devisee had a life estate only. Millsaps v. Estes [N. C.] 46 S. E. 988.

88. A will devising a life estate to the testator's son, the land at his death to go to his heirs, if any, to be theirs in fee simple forever; and if he should die without heirs, said land to revert back to the next of kin, held, rule in Shelley's case did not apply and testator's son took only a life estate. May v. Lewis, 132 N. C. 115.

89. Where will gives an interest in personalty held in trust, which if it had been realty, would have been an estate in fee under the rule in Shelley's case, the beneficiary is entitled to the property without conveyance. Evans v. Weatherhead, 24 R. I. 502.

90. Teal v. Richardson, 160 Ind. 119, 66 N. E. 435.

91. A devise to one "not being subject to sale, transfer, or liability for debts, but to descend to his bodily heirs, and, in case of none, to his brothers and sisters." When first child of first taker is born, he takes a fee subject to the life estate, and subject to be opened to let in after-born children. Turner v. Hause, 199 Ill. 464, 65 N. E. 445.

92. Testator devised his farm to his children "and shall stay so as it is divided at present, and in case R. shall not get married and shall die without any heirs, then his part of the farm shall fall on J., and F. shall get $200 out of it." R. never married and died without issue. Held, that R. took an estate in fee tail, enlarged by statute into an estate in fee simple. Affirmed by divided court. McCafferty v. Duerr, 207 Pa. 261. A devise to a daughter for life only, remainder after her death to her child or children in fee, but if the daughter at testator's decease has neither husband, child, nor children, then she may dispose of her share as she sees proper, and a further provision that if any devisee refused to take his devise, it should revert back to the estate and be divided among testator's other "said heirs equally," gives the daughter an estate in fee tail general, which is resolved into a fee simple under the Pennsylvania statute (P. L. 1855, p. 368). Simpson v. Reed, 205 Pa. 53. Under a will giving the estate to testatrix's children, and giving them the full and unrestricted beneficial use thereof, providing that one-half of the estate was to be entailed, the income to be used for the benefit of such children, and that if any child should die without issue he could dispose of

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of "all my estate" to one, "his heirs, assigns, executors and administrators to his and their use and behoof forever," passes the estate in fee and not an estate tail.[93] A remainder in fee may be limited to the heirs at law of one to whom, by the same instrument, is given the precedent freehold.[94] It is the general policy of the courts to adopt such a construction as will give a fee to the first taker,[95] so as not to tie up property and suspend the power of alienation,[96] but unless it affirmatively appears that a greater estate was intended, a life estate only will pass, in Indiana.[97] If a fee be followed by a gift over in case of death without living issue, it will be construed to mean in case of death before testator, and the primary devisee surviving testator takes an absolute estate.[98] A specific bequest for life, of perishable chattels, may carry the absolute title,[99] but such chattels not being specified, only the use or income is devised.[1] A gift over may imply a life estate where the quantum is not expressed,[2] and this may be true even though the first gift was of a particular property and that over was of all.[3] A condition against alienation of a gift for support of wife and child may be construed as giving an estate for life to the wife with remainder to the children.[4] In case of personalty, a gift of income may imply a life estate[5] and a charge,[6] or a trust may do so if there is a gift

half his share by will, the other half to go to testatrix's heirs, held, that the children took a fee in half the property and the use and enjoyment of the other half, with remainder to the heirs of testatrix's body, creating in them a fee tail, which was also converted into a fee simple in the first taker by the statute (Ky. St. 1903, § 2343), thus giving the children a fee simple title to the whole. Dulaney v. Dulaney [Ky.] 79 S. W. 195.

93. Smith v. Rice, 183 Mass. 251, 66 N. E. 806.

94. Devise to W. for his natural life, "the fee of the land to pass to his heirs at his death, or at any time before when he shall sell or incumber" it, and providing that intention is to give him a life estate without power to sell or incumber it, held to give W. a life estate only. Albin v. Parmele [Neb.] 98 N. W. 29.

95. Bowen v. John, 201 Ill. 292, 66 N. E. 357; Kohtz v. Eldred, 208 Ill. 60, 69 N. E. 900. So unless other limiting or qualifying clauses clearly and unequivocally show a contrary intention. Devise of a fee not defeated by clause providing that estate shall go to others in case widow remarries. Becker v. Becker, 206 Ill. 53, 69 N. E. 49.

96. Bradsby v. Wallace, 202 Ill. 239, 66 N. E. 1088.

97. Burns' Rev. St. 1901, § 2787. A devise to the wife followed by a provision "After death of my dear wife * * * I give and bequeath to my only son * * *" certain described property created a life estate therein in the wife. Pate v. Bushong, 161 Ind. 533, 69 N. E. 291.

98. Teal v. Richardson, 160 Ind. 119, 66 N. E. 435.

99. Dickinson v. Griggsville Nat. Bank [Ill.] 70 N. E. 593.

1. As where the residue, after an enumeration, was devised. The property being perishable, it may be sold and the income of the proceeds paid to the life tenant. Dickinson v. Griggsville Nat. Bank [Ill.] 70 N. E. 593.

2. A devise of "the home farm" and a bequest of personalty followed by a provision that the devisee is to have all the property bequeathed to him "except the home farm shall go to my legitimate heirs should there be any at my decease, the other one-half of said farm * * * to be at his disposal to will to whom he may see fit," held to give the devisee a fee in half the farm and a life estate in the rest. Pepper v. Pepper, 25 Ky. L. R. 155, 74 S. W. 253. A devise of a house and lot, wherein he now lives, to a son, and in case he should die, to his wife "for and during her natural life and no longer," gives the son a life estate only. In re Willis' Will [R. I.] 55 Atl. 889. A gift of all the property to the wife "to sell or dispose of as shall to her seem fit and proper or to retain during her natural life for her own use, subject after her decease" to the following legacies, held to show an intention that she should take a life estate. In re Stuart's Will, 115 Wis. 294, 91 N. W. 688.

3. Clause devising all the estate, including the property described "after the decease of my wife to my children," held to create a life estate in the wife, and the fact that the one piece of property was specially designated did not make it a specific devise. Woodruff v. Woodruff, 23 Ohio Cir. Ct. R. 408.

4. A devise of the income for the support of the widow and education of the child, with a prohibition against any disposition by the wife, creates a life estate in one-half in the wife and a fee to one-half in the child with remainder over to the latter. Mayes v. Karn, 24 Ky. L. R. 2110, 72 S. W. 1111.

5. Where testator gave half his property to trustees with directions to pay the income to his son, the property to go to his issue, if any, at his death, and if none, then to the residuary legatee, held, that the son took only a life estate in such income, such being the evident intent of testator. Bradbury v. Jackson, 97 Me. 449.

6. After a bequest for life, a provision "I hereby charge and request * * * at death to leave" remainder "to our two children" is a bequest over to the children, the life tenant simply having power to use the property. In re Stickney's Will, 41 Misc. [N. Y.] 70.

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over.[7] A remainder in heirs at law is implied from a devise of a life estate without disposal of the fee.[8] To create such a limitation by implication there must be a life estate in the first taker, with no provision for devolution after termination thereof.[9] Limitations over after the death of a cestui que trust to his issue, and in absence thereof to be disposed of as in intestacy, makes contingent alternate remainders in fee.[10] A devise of all the testator's property in fee, followed by one of designated property for life, gives the devisee a fee to all the property except as to that specially limited to a life estate.[11] A provision that in case of death of the devisee without issue, his wife should not take any interest, does not show an intent to create a life estate.[12] Where an estate is given to one generally or indefinitely,[13] or for life,[14] an added power unlimited raises a fee. In the absence of a residuary clause, a gift for life with power of disposal passes an absolute estate.[15] A power of disposition will not convert an estate into a fee simple, where it appears from the whole will that only a life estate was intended to be given.[16] Words of life tenancy may be enlarged if such an intent appears,[17] but the mere invalidity of limitations over will not do so.[18] The mere presence of conditions does not do so,[19] nor does a power necessarily do so.[20] Generally, a

7. Drye v. Cunningham Medley & Co., 24 L. R. 2500, 74 S. W. 272.

8. Shaner v. Wilson, 207 Pa. 550.

9. Simmons v. Cabanne, 177 Mo. 336, 76 S. W. 618.

10. Applies both to realty and personalty, since remainders in personalty, dependent upon a life estate therein, may be created by will. Thomas v. Castle [Conn.] 56 Atl. 854.

11. Hysmith v. Patton [Ark.] 80 S. W. 151.

12. Feit v. Richard, 64 N. J. Eq. 16, 53 Atl. 824.

13. Hammond v. Croxton [Ind.] 69 N. E. 250. Where one is given an unlimited power to sell or otherwise dispose of the estate in such manner as he may think fit, he takes a fee, and the limitation over is inoperative and void by reason of its repugnance to the principal devise. Metzen v. Schopp, 202 Ill. 275, 67 N. E. 36.

14. Will gave wife life estate in all property, with power to "do and dispose of the same" as fully as testator might, and also gave expressly the right to give a warranty deed of the property. Residue after her death, if any, was to go to heirs. Held, wife received the fee and could dispose of it by will. Dills v. La Tour [Mich.] 98 N. W. 1004. If the first taker is given an estate in fee or for life, coupled with an unlimited power of disposition, the fee or absolute estate vests in him, and the limitation over is void. Under devise to husband "for and during his natural life," giving him "full and absolute and perfect possession and control thereof, with the right and authority to use, occupy, lease, sell and convey, or otherwise dispose of the same," with remainder to designated persons, the husband takes the fee. Hair v. Caldwell, 109 Tenn. 148, 70 S. W. 610.

15. Ward v. Stanard, 81 N. Y. Supp. 906.

16. Griffiths v. Griffiths, 198 Ill. 632, 64 N. E. 1069; In re Hardaker's Estate, 204 Pa. 181, 53 Atl. 761.

17. Under a devise "to be held by them during their natural lives," and on their death to go to their children and in case of death without issue to the survivor and his children, and in case of death of both without children then over, the first takers have only a life estate. Call v. Shewmaker, 24 Ky. L. R. 686, 69 S. W. 749. Will devised realty to trustees, the land to descend to the beneficiary's children, his parents to have a home thereon for themselves and for their children during minority, or as long as any of their female children were unmarried. A part of the crops was to be appropriated for the use of the beneficiary and the rest for the use of the parents of the beneficiary and their other children. Should the beneficiary die without children, then the land was to belong to the other child of his mother, "who shall have the use of it during her life as directed in this will." Held, that the parents took a life estate subject to the appropriation of crops for the use of the beneficiary, after which the surviving parent took the whole income, and on her death the beneficiary would have a life estate with remainder to his children. Webster v. Brown, 24 Ky. L. R. 1987, 72 S. W. 774.

18. A will devising certain sums to named devisees for life, with remainder over to their descendants in fee, the remainders being void, the first named devisees take life estates only. Graham v. Whitridge [Md.] 57 Atl. 609.

19. Will gave all residue of profits of his estate to his wife for life on certain conditions, and in case of a breach thereof one-third of such profits were to go to her for life and the rest to testator's daughter for life, and after the death of the wife the residue of such profits was to go to the daughter for life. After the death of both the wife and daughter, the estate was to be equally divided among the heirs of himself and his wife. Held, that the wife and daughter and the survivor of them took a life interest only in the estate. Van Driele v. Kotvis [Mich.] 97 N. W. 700.

20. A devise "to be hers absolutely during her natural life to use and enjoy as she may see proper" gives a life estate with power to dispose of the land in fee. Underwood v. Cave, 176 Mo. 1, 75 S. W. 451. After a devise for life, a provision that the devisee shall not "sell or incumber until he shall be twenty-five years of age" does not increase the es-

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devise for life with power of disposition by deed or will passes the fee, but with power of disposition by will passes only a life estate.[21] A full power of disposal as though the devise was in fee is consistent with a life estate.[22] References to portions not used or remaining after a life estate, sometimes[23] but not always[24] raise the interest to an absolute ownership. An absolute gift will not be cut down by a subsequent clause unless it clearly and decisively appears that such was testator's intention.[25] A limitation over after an absolute fee is void for repugnancy;[26]

tate to a fee. Metzen v. Schopp, 202 Ill. 275, 67 N. E. 36. A devise to the wife "to dispose of as her own as long as she shall live" then over to the children, gives her a life estate with power to dispose of such part as may be necessary for support and maintenance. Martin v. Barnhill, 25 Ky. L. R. 1384, 77 S. W. 1097. A devise for life to the wife, she to have "full use, management, control and disposal" of it "for her use, comfort and support," with remainder over, creates a life estate with limited power of disposition. Rowe v. Rowe, 120 Iowa, 17, 94 N. W. 258. A power of disposal during life does not enlarge the life estate to a fee simple estate. Podaril v. Clark [Iowa] 91 N. W. 1091. A devise to one "for her own personal use and benefit during her life, and at her death all that may remain and be left," to go to others, gives the devisee a life estate with power of disposition and the use of the proceeds. Mitchell v. Van Allen, 75 App. Div. [N. Y.] 297.

Held to pass a fee: A provision that the income of certain property shall be paid to certain persons for life, with power to dispose of the property by will, gives the life tenants the fee in respect to the rights of creditors, purchasers and incumbrancers, subject to any future estates limited thereon in case the power of disposition is not executed, and the property is not sold for the satisfaction of debts (under N. Y. Laws 1896, c. 547, § 129). In re Sturgis' Estate, 205 Pa. 436. Devise to widow for life, with general power of disposition by will, and in default of such disposition, to testator's children living at the widow's death, with right of representation in their issue, if any, held, that the widow's power of appointment will carry the fee. Id.

21. A. N. Honacker Sons v. Duff, 101 Va. 675.

22. Dana v. Dana [Mass.] 70 N. E. 49.

23, 24. Applied to nonconsumable personalty: Where the will did not expressly devise to the widow, but gave her "full power to bargain, sell * * * and after her death and not until then, the heir, if living, is to have that part * * * that may be left. * * * But if my wife survive the heir * * * she is to dispose of the whole * * * as she sees fit," held to pass a life estate to the widow with power to sell and convey the reversion, and to the heir an estate in remainder in fee in case he survived the widow. Hammond v. Croxton [Ind.] 69 N. E. 250. "The use" of evidences of indebtedness for life, and bequest over of "all the rest and residue thereof then remaining." In re Skinner, 81 App. Div. [N. Y.] 449.

25. Curtis v. Waldron, 81 App. Div. [N. Y.] 351. Doubts resolved in favor of absolute estate. McClellan v. MacKenzie [C. C. A.] 126 Fed. 701; Kohts v. Eldred, 208 Ill. 60, 69 N. E. 900. Not cut down unless by certain or express terms. Hammond v. Croxton [Ind.] 69 N. E. 250; Bradbury v. Jackson, 97 Me. 449. Not to be cut down by dubious, vague and ambiguous expressions following. Testator after granting fee cannot take therefrom quality of inheritance or right to alienate. Bowen v. John, 201 Ill. 292, 66 N. E. 357; Davis v. Davis, 39 Misc. [N. Y.] 90; Roth v. Rauschenbusch, 173 Mo. 582, 73 S. W. 664. Codicil held to show intent to change amount of income a daughter was to receive in case she married a named person and to give her children a definite sum. Herzog v. Title Guarantee & Trust Co., 177 N. Y. 86, 69 N. E. 283. Must be as clear and decisive as language used in making gift. Roberts v. Crume, 173 Mo. 572, 73 S. W. 662; Curtis v. Waldron, 81 App. Div. [N. Y.] 351.

Where words heretofore necessary to transfer a fee are not used, the court can only inquire whether an estate less than a fee is limited by express words, or devised by construction or operation of law (Hurd's Rev. St. Ill. c. 30, § 13). Metzen v. Schopp, 202 Ill. 275, 67 N. E. 36. A clause following an absolute devise without words of inheritance "to him and the heirs of his body forever" limits the devise to a life estate with remainder over to the heirs of his body. Id.

Clause expressing wish, desire, or direction for disposal after death of first taker not sufficient. Thus, devise of all testator's property to his wife, reciting that it was his intention to make her his sole residuary legatee and to provide for her for remainder of her life, but that the devise was conditioned that whatever part of the estate remained at her death was to go to their relatives, held to give the wife a fee, and that the conditional limitation after her death was void for repugnancy. Meyer v. Weller, 121 Iowa, 51, 95 N. W. 254. "Provided that when she is done with it I give it to," another, such clause being merely an expression of testator's desire. Cox v. Anderson's Adm'r, 24 Ky. L. R. 721, 69 S. W. 953.

Illustrations: Devise to three for life, and on the death of one without living issue, his share to go to the survivors, and on the death of two without issue, the whole to go to the survivor, "who shall then be sole owner in fee of all said premises and shall so continue to be the sole owner thereof during the remainder of the life of such sole survivor: provided, however, that such sole survivor may sell said premises, or any part thereof, if it should be absolutely and indispensably necessary to do so for the support of such sole survivor." Residuary clause in favor of said three devisees. Held that the survivor took the entire estate in fee. Bowen v. John, 201 Ill. 292, 66 N. E.

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but an attempted limitation over after language which might otherwise be held to convey an absolute fee may show that such an estate was not intended,[27] or the fee may be a qualified one.[28] In doubtful cases the law leans in favor of an absolute rather than a defeasible estate.[29] A reverter back to next of kin in case of death of the devisee without heirs is a valid executory devise.[30]

A gift of income of a fund includes all that accrues therefrom after testator's death.[31] "Interest" and "income" may be used synonymously.[32] A devise of the "use, rents, and interest and income" gives the life tenant the entire benefit of the usufruct of the corpus of the estate.[33] "Net income" includes extraordinary cash dividends on stock, but not stock dividends or the right to sub-

357. The use of the words "assigns, executors and administrators," in addition to the word "heirs," does not operate to cut down the estate from a fee to a life estate in the first taker. Smith v. Rice, 183 Mass. 251, 66 N. E. 806. A will gave testator's lands to his wife absolutely. A subsequent clause provided that the property should "be hers absolutely during her natural life, to use and enjoy as she may think proper, and at her death, if there should be anything left," to go to others. Held, that the wife took a life estate with power to dispose of the fee the language modifying the absolute grant being as strong or stronger than that making it, and not ambiguous. Underwood v. Cave, 176 Mo. 1, 75 S. W. 451. A devise in fee simple is not cut down to a trust by a codicil providing that the interest of the devisee should be free from the control of her husband and from any liability for his debts. Murray v. Lowrie [Pa.] 57 Atl. 44.

A devise to testator's wife, absolute in form, followed by a direction that after her death the property, "excepting such donations as my wife shall deem fit and proper to make," should go in equal shares to testator's brothers, gives the wife a life estate only. Griffiths v. Griffiths, 198 Ill. 632 64 N. E. 1069. A devise of an estate in fee cannot be lessened by words of request that the devisee convey to another. Kauffman v. Gries [Cal.] 74 Pac. 846.

26. Spencer v. Scovil [Neb.] 96 N. W. 1016. An absolute devise providing that the devisee should not alienate until she should have arrived at 33 years of age, and in case of death without issue then so much of the land as she had not alienated to go to certain named persons, passed the fee simple with power of alienation on arrival at said age, and the devise over is void for repugnancy. Id. A devise in fee held not limited by a codicil bequeathing a certain amount in trust, provided so much remained after the death of the original devisee. Bassett v. Nickerson, 184 Mass. 169, 68 N. E. 25.

27. Spencer v. Scovil [Neb.] 96 N. W. 1016. An attempted disposition over of any property not disposed of by the wife after a devise of all property to her "absolutely and forever" is ineffective, and the first devisee takes the fee [Mo. Rev. St. 1899, § 4646]. Roth v. Rauschenbusch, 173 Mo. 582, 73 S. W. 664. An absolute devise to the wife, provided that if she died without issue and without disposing of the property by will then over, passes a fee to the devisee, the directions as to the disposition of the property after her death being repugnant to the gift, and void. Channell v. Aldinger, 121 Iowa, 297, 96 N. W. 781. Testator devised his estate to wife and sister equally, they to pay a legacy out of their shares to another on his coming of age and if anything was left after both wife and sister died it was to go to such legatee. Held, as long as either wife or sister lived, the legatee was confined to the specified legacy, and that the provision as to the remainder would be rejected. Mersereau v. Camp, 86 N. Y. Supp. 568. A will providing "I give my brother and sister all I possess for their support, to be used in no other way" gives an absolute equitable estate, and a further provision if there was anything left it was to go to certain persons was void for repugnancy and uncertainty. Brown's Guardian v. Strother's Adm'r [Va.] 47 S. E. 236.

28. Subsequent provision that if the devisee marries again the estate was to be divided between the devisee and testator's brothers. Becker v. Becker [Ill.] 69 N. E. 19. Under a devise to one and her heirs forever, with the provision that if she died before her son, one-half of such property, "as it may then be," was to go to him and his heirs forever, the first taker has an absolute interest in all the estate, both real and personal, subject to a restriction against devising more than half of it away from her son. Bailey v. Pittsburg, C., C. & St. L. R. Co. [Pa.] 57 Atl. 58. A devise of the residue to have the use and control of the same, with a right to use so much as the devisee pleases, "and if there is anything left at her decease it is my request that she give" a parsonage to a certain church and one-half of the residue to testator's heirs, gives the devisee an estate in fee in the whole property, with the right to will the half of the residue left after making the bequests requested, to whomsoever she wishes. Brown v. Eastman [N. H.] 57 Atl. 96. An absolute devise of land "but the same to be a home for any of my children that may desire to live there" creates no estate or trust to the use of the children nor any limitation in the estate vested in the devisee. Le Sage v. Le Sage, 52 W. Va. 323.

29. In re Albiston's Estate, 117 Wis. 272, 94 N. W. 169; Smith v. Smith, 116 Wis. 570, 93 N. W. 452.

30. May v. Lewis, 132 N. C. 115.

31. Where property directed to be sold and proceeds invested and net income paid to certain parties for education of minor children, they are entitled to the income from date of testator's death, whether earned before or after the investment. In re Jacoby's Estate, 204 Pa. 188, 53 Atl. 768.

32. In re Murphy, 80 App. Div. [N. Y.] 238.

33. Including the profits of the business

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scribe to a new issue of stock.[34] Rents and income of land may include mineral and timber products.[35]

Retroactive legislation.—Interests referred to a state of laws existing at testator's death are not changed by subsequent legislation.[36]

(§ 5D) 4. *Legacies, annuities, support, release of debts.*—"Legacy" means money or personal property bequeathed,[37] and "bequeath" is a term by which a gift of personalty is made.[38]

It has been said that all legacies other than the residuum are either specific or general.[39]

A general legacy is one which does not necessitate delivering any particular thing or paying money out of any particular portion of the estate.[40]

A specific legacy or devise is a gift of some definite or specific thing.[41] Gifts given out of and measured by a particular fund are demonstrative legacies.[42]

as carried on by the executors without authority. In re McCollum, 80 App. Div. [N. Y.] 362.

34. DeKoven v. DeKoven, 205 Ill. 309, 68 N. E. 930.

35. It appearing that testator knew that the income from certain lands would be from a sale of timber and coal rights, the proceeds therefrom were held included in a gift of rents and income of real estate until sold. In re Fahnestock's Estate, 22 Pa. Super. Ct. 63.

36. Under a devise by a testator to his wife of such property as she would be entitled to under the statutes of a certain named state as the same might provide at the date of his death, the wife takes as the statutes provided at the date of the testator's death, though changed between that date and the date of the execution of the will. In re Johnson's Estate [Minn.] 99 N. W. 212.

37. In re Campbell's Estate [Utah] 75 Pac. 851. May refer to realty. In re Stuart's Will, 115 Wis. 294, 91 N. W. 688. Word "legacies" in a clause directing executors to pay inheritance taxes imposed on any legacies theretofore made, held to include bequests of a trust fund over which testator had power of appointment by will. Isham v. New York Ass'n for Improving Condition of Poor, 78 App Div. [N. Y.] 396. Provision for payment of mother's debts out of estate held a legacy. Ledger v. Canfield, 78 App. Div. [N. Y.] 596.

38. In re Campbell's Estate [Utah] 75 Pac. 851.

39. In re Martin, 25 R. I. 1. This definition seems to class demonstrative legacies as a species of general legacy.

40. In re Martin, 25 R. I. 1. A residuary bequest general, though particular articles are enumerated therein. Id. Gifts of stated sums of money without specifying any distinctive money in contradistinction of any other money of like amount. Id. A gift of one-third of the balance of a certain fund, where the particular fund is not in existence in a particular place and in a defined form, is not a specific legacy. In re Warner's Estate, 39 Misc. [N. Y.] 432. A legacy of a number of shares of stock in a named corporation without any other specific description. In re Lyle, 85 N. Y. Supp. 290. Particularly when the number given is greater than the number owned by testator at the time of his death and at the time when the will was made. The residuary clause giving all the rest, residue and remainder of the estate, the executor could make up the deficit in stock by purchase. Slade v. Talbot, 182 Mass. 256, 65 N. E. 374. A legacy of shares of stock given generally and without any indication that testator intended to bequeath particular stock held by him at the date of making the will or existing as part of the estate, is general, and if the shares are not in testator's possession at the time of his death, the gift is considered a direction to purchase the securities for the legatee with his general estate. Blair v. Scribner [N. J. Eq.] 57 Atl. 318. If the legacies are general, but testator directs that the executor shall not purchase the stock if it is not in the estate at the time of his death, then he expressly prevents the legacy from operating as, or being equivalent to, a direction to purchase, or to a general legacy of the amount necessary to purchase. Id. A gift of the remainder of a particular fund after payment therefrom of specific legacies is not specific. In re Barrett's Estate, 22 Pa. Super. Ct. 74.

41. May be income of specified piece of property. Uncertainty of amount is immaterial. In re Martin, 25 R. I. 1. Is a gift of a specific part of testator's estate, identified and distinguished from all other things of the same kind, and which can only be satisfied by the delivery of the particular thing. A bequest "also all my bank stock and effects in the bank of * * * valued at $6,300" is a specific legacy, though contained in a residuary clause. Dauel v. Arnold, 201 Ill. 570, 66 N. E. 846. It is specific, though contained in the residuary clause, if the specific things are so enumerated as to distinguish them from the residue, as by the use of such words as "together with," "as well as," "and also," and the like. Id. Is something distinguished from the rest of the testator's estate; it is sufficient if it can be distinguished at the time of his death. In re Campbell's Estate [Utah] 75 Pac. 851. Under Rev. St. 1898, § 2802, a phrase "Property herein specifically bequeathed" did not apply to proceeds of a sale of a mine which testator sold before his death, but was not paid until afterward. Id. Gift of "any stock" in a certain bank held specific. In re Martin, 25 R. I. 1. A gift of 82 shares of stock in a named corporation "whereof fifty shares are now pledged as collateral security" is a specific legacy. In re Lyle, 85 N.

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In deciding whether a legacy is general or special the whole will must be considered.[43] The law does not favor specific legacies.[44]

Advancements,[45] strictly speaking, are confined to cases of intestacy, but they may exist, though a will is subsequently made by the person making them, and in such case the manner in which such charges are to be considered depends upon the terms of the will. An agreement in regard to advancements may be considered in determining testator's intention in that particular.[46] If the will does not refer to advancements, the persons to whom they were made need not account for them.[47]

Y. Supp. 290. A legacy of promissory notes is specific, subject to reduction by payments made prior to the death of testatrix. Legatees receive them in condition in which they are when gift takes effect. In re Martin, 25 R. I. 1. Where a will provides that the trustee shall sell the homestead and invest the proceeds for the benefit of testatrix's son, and after his death pay the principal to ulterior donees, the bequest is specific. Id. Also where trustee is to pay over income from a certain farm to son, or, in lieu thereof, allow him to live thereon. Id. A bequest of 60 shares of stock of a certain named bank, in a single clause of a will, standing alone, is specific. Waters v. Hatch [Mo.] 79 S. W. 916. After providing for certain legacies from proceeds of an insurance policy, a will gave a son the "balance, $100." The policy brought more than its face and there was an excess after all legacies were paid. Held, the son was not entitled to the excess, the legacy being specific. Id. If the securities specified are the things which are intended to be given, and are the only source for the payment of the legacy, then it is specific, and if the security is disposed of or extinguished, the rule of ademption applies and the legacy is gone. Blair v. Scribner [N. J. Eq.] 57 Atl. 318. Will bequeathed specified number of shares of stock in named corporations. When will was made testator owned enough of the shares described to satisfy the legacies, but at his death did not. The will provided that if testator should not have all the stocks mentioned, the trustee should not be required to supply them, but should only take such as he might leave. Held that the bequests were specific, and failed in so far as they could not be satisfied by stocks of the specified kind owned by testator when he died. Id. A bequest to a legatee of all claims held by the testator against his father and all his interest in the father's estate is specific. Rogers v. Rogers [S. C.] 45 S. E. 176.

42. Direction to erect a monument to be paid for out of "the four thousand dollars advance which I made from the sale of my property" to C., held demonstrative legacy. Fund upon which they are charged first applied to their extinguishment, and the balance classed with general legacies. In re Warner's Estate, 39 Misc. [N. Y.] 432. In a bequest of bonds or securities, if it appears that they are intended merely as the primary source for the payment of a legacy of money, which is to be paid at all events, the legacy is demonstrative, and on failure of the primary source of payment, is payable out of the general estate. Blair v. Scribner [N. J. Eq.] 57 Atl. 318.

43. Blair v. Scribner [N. J. Eq.] 57 Atl. 318. Estimation by testator of the value of the securities in money for the purpose of fixing the amount of the legacy is considered as an indication that the legacy is specific. Id.

44. In re Martin, 25 R. I. 1. Where stocks, bonds and other securities are disposed of by will, which does not designate them as composing a part of the estate, and the legacy may be satisfied by delivering any securities of the kind and value or amount specified, it will if no contrary intent appears, generally be construed as a general legacy, though testator owned securities of the kind specified and corresponding exactly to the number of shares or amount bequeathed. Legacy of 230 shares of stock in a certain company held specific, though not referred to as "my" stock. Id. Clear intention must appear to make legacy specific. Blair v. Scribner [N. J. Eq.] 57 Atl. 318.

45. See generally, Estates of Decedents, 1 Curr. Law, p. 1129. Testatrix made an advancement to her son, taking a note payable out of his interest in her estate. In her will she set out the amounts to be treated as advancements to her children without referring to the note, and providing explicitly for an equal distribution of her estate, "subject to the advancements heretofore mentioned." Held to show an intent to cancel the note as an advancement, and that the estate should be distributed in accordance with the terms of the will without regard to it. In re McKibbin's Estate, 207 Pa. 1; Appeal of Real Estate Trust Co. [Pa.] 56 Atl. 62. A will provided that no charge for advancements was made unless a memorandum to such effect was found. Held, a note taken by testator from son-in-law, and a memorandum charging it to maker's wife, was a receipt for an advancement, not an obligation. Strode v. Beall [Mo. App.] 79 S. W. 1019. A will provided that children's shares should not be subject to debts which they had contracted or might contract, and that the testator desired equality among the children. Two months after making the will, testator gave a legatee $4,100 and took notes therefor. Held, the sum was an advancement. In re Neel's Estate, 207 Pa. 443. Will providing that property should descend according to statutes of distribution and expressly revoking all former wills, in some of which question of advancements had been referred to, held not to require advancements to be deducted from shares of beneficiaries. Justis v. Justis [Md.] 57 Atl. 28. Words "sums of money," referring to advancements, held to include conveyances of property. Vreeland v. Vreeland [N. J. Eq.] 56 Atl. 1089.

46. Vreeland v. Vreeland [N. J. Eq.] 56 Atl. 1089. A will directed that sums of money which testator had theretofore advanced to his children should be considered

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A legacy to a debtor does not operate as a release or extinguishment of the debt, unless it clearly appears that testator so intended.[48] A provision that a trustee should pay an obligation of testatrix's son, for which she had become liable as surety, provided that he received the stock held by the obligee as collateral held, under the circumstances, to show an intent that the estate was to be subrogated to the son's rights in the stock, and that the debt should be paid by sale of the stock.[49]

Cumulative.—Legacies given by different instruments will be regarded as cumulative, in the absence of anything signifying a different intention,[50] but where a person is mentioned in one instance as the recipient of a specific sum and also named as one of a class he takes both.[51] A like intent may be found from the varying nature and purposes of two gifts.[52]

The repetition of a clause charging an annuity on property will be disregarded where the whole will shows an intention to create one only.[53]

Annuities[54] to be paid out of funds to be reserved from the testator's personal estate during the life of the annuitants and on the death thereof to dispose of the principal fund as residuary estate are general annuities.[55]

An annuity which is a charge on the annual income of an estate is payable at the end of each year.[56] A testamentary provision requiring an annuity to be paid out of the rents and profits of a designated piece of land, after the payment of taxes, insurance and repairs, does not authorize any deficiency to be made up out of the balance of the estate or by the mortgage or sale of such property, unless a contrary intention appears from the whole will.[57] Annuities for a term[58] are not extended because of conditions differing from those contemplated by testator.

Support.—Where the beneficiary is given a right to use so much of the property as may be necessary for his comfort or support, he is sole judge as to the amount which may be necessary,[59] but he can use it only for the designated purposes.[60] A provision authorizing a sale "should circumstances or their necessities

as advancements and deducted from their shares. Held, that the will was made with reference to agreements in regard to advancements, and that the share of each child should be charged with the value of the property received by him in pursuance of such agreements. Vreeland v. Vreeland [N. J. Eq.]. 56 Atl. 1089.

47. Failure to refer to them shows intent to ignore them. Vreeland v. Vreeland [N. J. Eq.] 56 Atl. 1089.

48. Extrinsic evidence admissible to show intent. Sharp v. Wightman [Pa.] 54 Atl. 888.

49. In re Martin, 25 R. I. 1.

50. Fact that language in codicil is copied from that of will may indicate intention to substitute legacies. Codicil held, under the circumstances, to have been intended as substitutional. Gould v. Chamberlain, 184 Mass. 115, 68 N. E. 39.

51. In re Becker, 39 Misc. [N. Y.] 756.

52. Legacy of sum to be used in purchasing a home for legatee held to have been intended to be in addition to another cash legacy given to same legatee. Gregory v. Tompkins [Mich.] 93 N. W. 245.

53. Waters v. Hatch [Mo.] 79 S. W. 916.

54. Funds for payment, see post, § 5D, 10.

55. Turner v. Mather, 86 App. Div. [N. Y.] 172.

56. Henry v. Henderson [Miss.] 33 So. 960. Where an annuitant dies during the year he is not entitled to any portion thereof for that year. Id.

57. No express provision in will and no such intent can be gathered. Hopkins v. Remy, 64 N. J. Eq. 12.

58. A will provided for the payment of certain annuities "until such time, not exceeding five years from my decease, as the trustee shall deem it for the best interest of all to make final settlement," a subsequent will provided that final settlement should be made within five years. Owing to certain extraneous conditions the estate could not be closed within such time and it was extended by the probate court. Held, the annuities ceased at end of five years. Houghteling v. Stockbridge [Mich.] 99 N. W. 759.

59. Under a devise of use of property for life and any part of "the principal that may be needed for his comfort," the beneficiary is sole judge as to what amount of the principal is necessary for his support and comfort. In re Parsons, 39 Misc. [N. Y.] 126. See also Poppy v. Walker [Ind. App.] 70 N. E. 825.

60. A will provided that a wife should have the income and as much of the principal of testator's estate as she might deem proper for her support and that of her son, and that at her death the residue was to go to certain trustees to use the income and as much of the principal as they deemed necessary for the son's support, and that at his death the residue should go absolutely to the trustees. Held, the wife took only the

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require" does not give the life tenant power to sell to pay debts voluntarily incurred by himself.[61] A right to consume principal may be found in a gift over of what remains.[62]

(§ 5D) 5. *Vesting and perpetuities.*[63]—The law favors the early vesting of estates.[64] Hence, the interest will, if possible, be deemed vested in the first instance,[65] and if not, then at the earliest possible moment,[66] unless the language of the will clearly shows a different intention,[67] and devises and bequests will be regarded as vested rather than lapsed, if possible.[68] A vesting will be favored in order to avoid a disinheritance.[69] If the event which is to work a substitution has taken place, the estate vests at testator's death.[70]

When there is a devise to one, remainder over direct to others, the presumption is that testator intended to create vested remainders, nothing appearing in the will to the contrary.[71] Where the persons or the class who are to take in re-

income and so much of the principal as she deemed proper, but for the purposes—and no other—named in the will. In re Hunt, 82 N. Y. Supp. 538.

61. Mansfield v. Mansfield, 203 Ill. 92, 67 N. E. 497.

62. A devise of property to one upon the condition that it shall not be sold, assigned or transferred and upon the devisee's death the amount remaining to be paid to a designated person, held devisee entitled to use not only the income, but the principal. Russell v. Hilton, 80 App. Div. [N. Y.] 778.

63. See also post, § 5D. 8, "Conditions."

64. Cox v. Anderson's Adm'r, 24 Ky. L. R. 1081, 70 S. W. 839; Lewis v. Howe, 174 N. Y. 340, 66 N. E. 975, 1101; Curtis v. Waldron, 81 App. Div. [N. Y.] 351; Jackman v. Jackman, 24 Ky. L. R. 2245, 73 S. W. 776. Construction giving fee adopted. Smith v. Smith, 24 Ky. L. R. 1964, 72 S. W. 766.

65. The law favors the vesting of estates, and hence estates will be regarded as vested rather than contingent unless it is manifest that a contrary result was intended. Boatman v. Boatman, 198 Ill. 414, 65 N. E. 81. Testator will be presumed to have intended that the title to estates devised should vest at his death, in the absence of anything to show a contrary intent. Callison v. Morris [Iowa] 98 N. W. 780. Where a will provided for the payment of legacies, but contained no words of gift or devise, only a direction to pay on the sale of property after certain stated times, held, construing the whole will, that the legatees took a vested interest in their undistributed shares upon the testator's death. McLaughlin v. Penney, 65 Kan. 523, 70 Pac. 341. A devise in remainder to one, or in case of his death to his issue, or, in default thereof, to his heirs, vests an absolute title in the remainderman on the death of testator, subject only to the preceding life estate. Callison v. Morris [Iowa] 98 N. W. 780.

66. At earliest possible moment. Where property is devised to executors in trust until the first of two designated persons arrive at the age of 21 years, or failing to arrive at that age until the death of the survivor, when the property was to go to the testator's children, held, the children took a vested remainder subject to be divested by death during the minority of the survivor of two designated parties. Cook v. Straiton, 41 Misc. [N. Y.] 206.

67. Does not apply where language clearly shows different intention, which can be legally carried into effect. In re Albiston's Estate, 117 Wis. 272, 94 N. W. 169. Unless the language of the testator, when applied to the circumstances of the case, clearly indicates a contrary intention, such presumed to be his intention unless contrary appears. Burton v. Provost [Vt.] 54 Atl. 189. Intent must be clear and manifest and must not arise from mere inference or construction. Burke v. Barrett, 31 Ind. App. 635, 67 N. E. 552. Fact that legal title is placed in trustee and equitable title only to devisee or legatee does not affect application of rule. Kohtz v. Eldred, 208 Ill. 60, 69 N. E. 900. Courts will, in the absence of plain expressions, or an intent plainly inferable from the will, adopt the earliest time for vesting where more than one period is mentioned. Hoover v. Smith, 96 Md. 393.

68. Ballard v. Camplin, 161 Ind. 16, 67 N. E. 505.

69. And which will avoid the disinheritance of the remainderman who happens to die before the termination of the life estate. Devise to one to vest in fee upon the decease of a life tenant vests upon testator's death and goes to devisee's heirs on his death before life tenant's. Lewis v. Howe, 174 N. Y. 340, 66 N. E. 975, 1101.

70. Under a devise of property for life with remainder to testator's lawful heirs, with a provision that children of deceased heirs should inherit the proportion that their parents would have had if living, the children of a child who died before the execution of the will take a vested interest by original gift, on testator's death. Hoover v. Smith, 96 Md. 393.

71. In re Moran's Will [Wis.] 96 N. W. 367. A party giving a life estate in all his property, with remainder to another person, the title vests absolutely in the remainderman at the death of the testator, subject of course to the life estate. Where, by the will, title was to vest in the person who at the life tenant's death was the treasurer of the association for the benefit of the latter, held vested in the one who was treasurer at the time of the testator's death. Murray v. Miller, 85 App. Div. [N. Y.] 414. The validity of such a remainder depends for one thing upon the power of the devisee to take at the date of the testator's death. Id. A residuary estate devised for life, with remainder to trustees, vests in the trustees on testator's death, subject to such life estate

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mainder,[72] or the happening of the contingencies on which they are to take,[73] or

Beardsley v. Bridgeport Protestant Orphan Asylum [Conn.] 57 Atl. 165. A devise in trust for four sons provided that on the death of any, one-fourth of the principal should within one year be divided among his heirs. Such heirs took vested remainders which vested in enjoyment within one year from the death of the life beneficiary and no contingent remainder was created. Nichols v. Nichols, 86 N. Y. S. 719. A devise to two persons as trustees, the income of designated portions of the estate to be paid to designated persons until the death of both of the trustees, when each portion was to vest absolutely in the person who had received the income therefrom, held, each beneficiary took a vested interest in the principal upon the death of the testator. Ogden v. Ogden, 40 Misc. [N. Y.] 473. A devise in trust, the income to be paid to three and on death of either to the survivors, and on death of two, the trust to cease and the estate to go to the survivor, creates a contingent remainder. Thall v. Dreyfus, 84 App. Div. [N. Y.] 569. A devise for life with remainder over to children, their heirs and assigns and in case of death of a child before termination of the life estate, to his heirs, gives such children a vested remainder in fee at testator's death. Kinkead v. Ryan [N. J. Err. & App.] 55 Atl. 730.

72. As to certain described persons, as children or their descendants and not to children and their heirs generally. In re Melcher, 24 R. I. 575; Allison v. Allison's Ex'rs, 101 Va. 537. A devise to testator's wife for life and upon her decease "the property shall belong to my children, the descendants of any deceased child to take the share their parent would have taken if living, and if no descendants of mine shall survive, then the property shall belong and be delivered" to certain residuary legatees, gives the children contingent remainders only, which do not vest until the death of the life tenant. Child dying without issue before that time has no interest which he can convey. Estate was not to go to heirs, but to certain described persons whose existence at the death of the life tenant was uncertain. In re Melcher, 24 R. I. 575. Under a devise to one for life, and at his decease to his issue, should he leave issue, the children of the life tenant before his death take contingent interests only. Contingent on child surviving life tenant. Gardiner v. Savage, 182 Mass. 521, 65 N. E. 857. By will of a deceased partner, his executors were to divide the estate into three shares and pay the income of one share to the widow for life, the principal at her death to go to the children and heirs of deceased children. A deed by the heirs, widow and executors of partnership realty did not convey a fee because it could not dispose of future rights of issue of the children in whom interests might vest at the death of the widow after the death of the parent during her lifetime. Huber v. Case, 87 N. Y. S. 663. A will provided that after the death of all annuitants receiving annuities from the income of a fund, such fund should go to the youngest of the issue of one Adams, whose descent should be wholly in the male line and in default to certain others. Held, that a person answering the description, living at the death of testator, did not have a vested interest, as the fund would go to the person answering the description at the death of the last annuitant. Cronan v. Adams [Mass.] 70 N. E. 423. Under a devise of a life estate with remainder over to "her children then living and their descendants," only children or their descendants living at the time of the death of the life tenant would take in remainder. Nichols v. Guthrie, 109 Tenn. 535, 73 S. W. 107. In such case, the remainder vests in the children as a class on the death of testator, and in them individually only on death of the life tenant, and then on the contingency of their being in existence at the time. Id. A devise in remainder to a class and in case of death of any without leaving issue, his share to go to the survivors, vests and opens to let in after born. Sumpter v. Carter, 115 Ga. 893. A will provided that the surviving widow should have power to divide testator's property among the children, that if she died without having remarried, it was to be divided equally, and if any child to whom an advancement had been made died without issue, the property advanced should revert to the others. Held, this reverter must take place at time of death of wife, and where a son died without issue, after the death of the wife, there was no reverter. Lockhart v. Covington, 132 N. C. 469. Where a testatrix left a life estate to one son, remainder to be divided among her six sons which included him, he took a vested one-sixth interest in the remainder which he could devise. Robinson v. Mitchell [Md.] 57 Atl. 625. Testator devised land to each of his daughters, "for and during her natural life, and at her death the same to be divided among her children then living, in fee simple, to share equally." A subsequent clause provided that in case either of his daughters died leaving no children, the lands given her should go to the children of the surviving daughter or daughters. Held, that the will vests a life estate in each daughter and a fee in her children, if she has any at her death, and if not, the fee goes to the children of her sister or sisters. Thompson v. Jamison, 31 Ind. App. 396, 68 N. E. 176.

73. A provision that "if my wife and myself should perish at sea" makes a subsequent provision for the wife in case she survived contingent upon the happening of the event. Oetjen v. Oetjen, 115 Ga. 1004. A devise providing that if the life tenant die without children then the property to go to her heirs, held a contingent remainder and that the rule in Shelley's Case did not apply. Hauser v. Craft [N. C.] 46 S. E. 756. Under a devise to the wife for life with a provision that at her death the property should be sold and the proceeds divided among testator's children, and that, under certain circumstances, the wife might disinherit any child, and that in case any child died his issue should stand in his place, held, that the issue of a child took a contingent remainder interest only, during the lifetime of his parent. Hermann v. Parsons [Ky.] 78 S. W. 125. A will gave the widow the sole use of the property during her life, unless she remarried, in which case it was to be divided between her and her children, or the survivors of them, their heirs and legal rep-

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the shares which they shall have,[74] are uncertain, there is a contingency to which vesting is postponed. Words of contingency are so referred in time as to favor vesting[75] and may be so read that remainders will accelerate.[76] A provision giving one an income until the happening of a certain contingency gives him a vested interest therein until such event occurs.[77] The ordinary rules of real property do not apply if there is an equitable conversion.[78]

Such words of time as "after,"[79] "upon,"[80] or "at" the death of[81] and such

resentatives, and on her death, unmarried, it was to be divided between the children or the survivors of them. Held, that the remainders were contingent. Thompson v. Adams, 205 Ill. 552, 69 N. E. 1. A devise for life should the devisee survive testator with remainder over is contingent on the survival of the devisee and both fail in case of nonsurvivor of the devisee. Life estate to a wife if she survived him, remainder to a nephew. Oetjen v. Diemmer, 115 Ga. 1005. A will provided that in case of sale of a life estate one-third of the proceeds was to go to a trust fund for another beneficiary. Held, the beneficiary's interest was contingent on the sale, and a mortgage was not a sale under the power. Spencer v. Kimball [Me.] 57 Atl. 793. The money loaned upon the mortgage was not the proceeds of a sale to which the terms of the will apply. Id. The trust did not attach to the real estate. Id. A devise to a son's wife of the use of certain property, the enjoyment of which was to be continued in the son for life, in case he survived her, and the residue after such uses terminated to the son's heirs at law, held, that the remainder to the son's heirs was not contingent on the son surviving his wife, but was an independent, absolute gift. Buck v. Lincoln [Conn.] 56 Atl. 522. A daughter devised to her mother certain property in case she [the mother] did not get enough from another source to supply her needs. What was left of such property, to go to her husband. Her mother never used it. Held, the contingency never having happened, the provision never took effect, and the property went to the husband. Gooch v. French, 52 W. Va. 30.

74. A devise to trustees to pay testator's debts and for the support of his wife and children, the heirs of any deceased child to receive his parent's share of such income, with a provision that at the wife's death the property should be divided into equal shares, and the children or the heirs of any deceased child, beginning with the youngest, should each choose one of them, held to give a child a contingent interest only. In re Raleigh's Estate, 206 Pa. 451.

75. When a devise or bequest over to a third person is made contingent upon the death of the first taker, the death referred to is generally held to be death in the lifetime of the testator. When devise is of a remainder, question enlarged by inquiry whether death during lifetime of testator is referred to or death before remainder falls in. Canfield v. Canfield, 55 C. C. A. 169. A will after giving a number of specific legacies provided that the residue should be converted into money and divided among such legatees in proportion to their legacies. A codicil gave one of the legatees the use of a house for life, "at her decease said house shall fall into the rest and residue of my estate and be disposed of as is by my said will provided for the disposal of said rest and residue." Held, that the remainder, after the life estate in the house vested at testator's death, so that the life tenant was one of the remaindermen. Cushman v. Arnold [Mass.] 70 N. E. 43.

76. Will devised a life estate to the wife so long as she remained his widow and at her death to go to his children. In case of her marriage, a sale was directed and a sum of money to be paid the widow, the balance to go to the children. Held, that children took a vested estate at testator's death under Wis. Rev. St. 1878, § 2037, providing for vesting where there is a person in being having immediate right to possession on termination of preceding estate. Smith v. Smith, 116 Wis. 570, 93 N. W. 452.

77. Testator gave his wife the net income of his estate until such time as the executor should pay her a certain sum. A subsequent clause directed the executor to rent testator's farm for five years, unless, during that period, he could sell it for a certain sum, and that the farm should then be sold and the bequests provided for paid. Held, that the wife took a vested interest in all the rents of the farm, which passed to her heirs on her death before receiving such sum. Morris v. Hall, 102 Mo. App. 449, 76 S. W. 725.

78. A gift for life and on termination the remainder to be divided into "two equal parts," one share to go to one set of beneficiaries and the other to another set, provides for a conversion of the realty, and hence Rev. St. Wis. 1898, § 2037, relating to future, vested, and contingent estates in realty does not apply. In re Albiston's Estate, 117 Wis. 272, 94 N. W. 169.

79. A gift to the wife for life, with remainder "after her decease" to a brother and sister, "who shall then be living, jointly," creates a remainder contingent on their surviving the life tenant. In re Walker's Estate, 39 Misc. [N. Y.] 680. Under a bequest over "from and immediately after * * * decease" of the life tenant to children share and share alike and their descendants, the latter take the share of their ancestors by substitution as of the date of the life tenant's decease. Weymann v. Weymann, 81 N. Y. S. 959. In New Jersey, it is held that under a devise to the wife for her life and after her death to testator's children, each child takes a vested remainder in fee to his proportionate share, subject to be divested by his death before his mother's. Result not affected by provision that in case any child dies before his mother, his share is to go to his heirs on his mother's death. Can convey his interest. Kinkead v. Ryan [N. J. Eq.] 53 Atl. 1053.

80. In Rhode Island, it is held that the words "upon the decease" in a provision that the property shall go to children upon the decease of the life tenant postpones the vesting of the remainders until that time.

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words as "if living,"[82] and "then," do or do not postpone vesting, according to the sense and connection in which they are used.[83]

Limitations over on death, failure of issue, etc., of the precedent tenant, are not usually construed to make his estate contingent.[84] Limitations on lives take effect after all the lives.[85] When the death of the first taker is coupled with circumstances which may or may not take place, such as death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect upon death under the circumstances indicated, whether before or after the death of the testator.[86]

Where the words of a gift are in praesenti and the time of enjoyment is only postponed, the legacy vests immediately on the death of the testator.[87] The ab-

"Upon" or "on" the death of, means at the time of and does not imply an estate before death. In re Melcher, 24 R. I. 575.

In New York, a devise "to vest in fee upon the decease of my said wife, to have and to hold forever," vests on the death of the testator subject to the life estate and upon death of the devisee before that of the life tenant passed to his heirs at law subject to the life estate. Lewis v. Howe, 174 N. Y. 340, 66 N. E. 975, 1101.

81. In New York, a devise over "at" the death of the life tenant vests on the death of the testator, the word "at" merely designated the time of enjoyment. Manhattan Real Estate & Bldg. Ass'n v. Cudlipp, 80 App. Div. [N. Y.] 532.

82. In Rhode Island, it is held that the words "if living" in a provision that the descendants of children at the termination of a particular estate should take the share their parents, if living, would have taken, strongly implies that the parents were to take nothing unless living at the time specified, and hence that their interests are contingent. In re Melcher, 24 R. I. 575.

83. Where will directed that property should be held in trust until such time as trustees should deem it most expedient to sell it, and after such sale it should be divided and a certain share should then be given to a daughter and her heirs forever, her interest vested at testator's decease. Bates v. Spooner [Conn.] 54 Atl. 305. A will provided that legal title of lands devised should not vest until death of testatrix's husband who was to have the income for life, and it was then to be applied to the payment of legacies. Held, the devisees had no interest in the income until the legacies had been paid. Henry v. Henderson [Miss.] 33 So. 960. They were entitled to income from date of payment of the legacies. Id.

84. A devise to testator's wife and after her death to his children, providing that, in case any child died without issue, his share should be divided among the others, held to have given a child a vested interest and that, upon his death before his mother, leaving issue, his share, on the death of his mother, descended to his executor. Howell v. Gifford, 64 N. J. Eq. 189. A devise to one providing that in the event of his dying without issue, then the estate was to be divided among others vests the fee in the first taker, subject to be defeated in case of death at any time without issue. Smith v. Ballard, 25 Ky. L. R. 1290, 77 S. W. 714. Generally, a testator does not assume that legatees will not survive him, but intends, in case they do not, to make provision for the new state of affairs by a new will or codicil. Bradsby v. Wallace, 202 Ill. 239, 66 N. E. 1088. Under a devise for life with remainder over to his children, except that if any of the children die before the termination of the life estate, leaving issue, such issue to take the parent's share the children take a vested remainder with contingent remainder in the grandchildren. Rudd v. Travelers' Ins. Co., 24 Ky. L. R. 2141, 73 S. W. 759. A devise to a daughter for life, and upon her death to her issue, and in case there be no issue, her surviving, then to others, gives the child of the life tenant a vested remainder, subject however to be divested by the death of such child, leaving issue, during the life of the life tenant. Estate would then vest in issue of such child under New Jersey statutes (1 Gen. St. p. 1195, § 10). Lamprey v. Whitehead [N. J. Eq.] 54 Atl. 803.

85. A devise of property to two persons and to the survivor of them for life, and after their death to another for life with remainder to other legatees, held, the half that went to the survivor of the first two legatees as such did not vest in the third life tenant, but after the death of the survivor of the first two vested in the remaindermen. In re Conger's Will, 81 App. Div. [N. Y.] 493.

86. According to the ordinary and general meaning of the words. Bradsby v. Wallace, 202 Ill. 239, 66 N. E. 1088. A devise to son, "but if he should die leaving no heirs, then the said devised property to descend to" others, was not intended to apply only to death of devisee before that of testator, but the son took a defeasible fee, and on his death without children, the fee vested in the others. Id.

87. Burroughs v. Jamieson, 62 N. J. Eq. 651. Testator gave two legacies, one to T. and one to S., payable after the death of his wife, with provision that if S. died before the widow, her legacy was to pass to T. and that if both should so die, then the legacy should become a part of the residue. Held, that the legacy to T. was not divested by his death before the widow, but could only be divested by the death of both S. and T. before the widow. Id. Devise in trust for use and benefit of testator's brother, the trustee to control and manage the property and to turn it over to the beneficiary when he became of age, should the trustee think best and if not, then to continue to manage it until such time as he should

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sence of such words may raise a contrary implication.[88] Where the intention in favor of a charity is absolute and the gift and constitution of the trust are immediate, the gift is vested and not contingent, notwithstanding the fact that the form of the charity or the manner of its administration is dependent upon a future uncertainty.[89] Where a division is to be made between members of a class after the expiration of the particular estate, the presumption of an intention that the estates shall vest on testator's death is displaced by a presumption that testator intended to create contingent remainders.[90] Where the only gift of a fund is contained in a direction to executors to pay and divide at a future time, the vesting is postponed until the time for payment shall have arrived.[91]

Contingencies affecting only the amount or value of the estate,[92] or the time of payment of income,[93] or the postponement of enjoyment merely for the purpose of letting in a particular estate,[94] or a provision that in case of a remainderman's death his share shall go to his heirs,[95] or the fact that the remainder is referred to as a "reversionary interest,"[96] or the fact that the tenants of the preceding particular estate are given a power of sale for purposes of reinvestment, do not postpone the vesting of the remainders.[97]

An interest may vest with a restraint on power to alienate,[98] or subject to be

deem it prudent to put it under control of the beneficiary. No provision was made for the disposition of the property in case it was not turned over to the beneficiary. Held, to be testator's intention to vest estate in beneficiary, subject to right of trustee to postpone its enjoyment, and that property which had not been turned over to him vested in his heirs at his death and did not revert. Canfield v. Canfield, 55 C. C. A. 169.

88. Where a will provided for the payment of legacies, but contained no words of gift or devise, only a direction to pay on the sale of property after certain stated times, held, construing the whole will, that upon the testator's death the legatees acquired a vested interest in their undistributed shares. McLaughlin v. Penney, 65 Kan. 523, 70 Pac. 341.

89. Bequest in trust to transfer to corporation not to be created for twenty-five years. Brigham v. Peter Bent Brigham Hospital, 126 Fed. 796.

90. In re Moran's Will [Wis.] 96 N. W. 367. Testator devised property in trust to pay income and an annuity to a nephew for life, remainder to his children with share of deceased child if no issue to the survivors. Held, the distribution was to a class which could not be determined until the death of the nephew. In re Gibson's Estate, 85 N. Y. Supp. 1077. The nephew could not terminate the trust by procuring conveyances from his children. Id. A devise in remainder to several and in case of death of any without issue, to the survivors of the class, creates no estate in the issue of one dying before the life tenant. Sumpter v. Carter, 115 Ga 893. A devise to children and grandchildren and to the survivors, coupled with a direction that the realty be kept together until the youngest grandchild shall have arrived at majority, when the whole should be divided, unless the executor should think proper to make earlier distribution, does not vest an estate in fee in the heirs prior to grandchild's arrival at majority. Garman v. Hawley [Mich.] 93 N. W. 871.

91. Does not apply if postponement to let in an intermediate estate. Kundhardt v. Bradish, 39 Misc. [N. Y.] 103. Provision that in case of death of any remainderman "the share which would have gone" to him shall be equally divided between his children shows an intent on the part of the testator that the estate in remainder was not to vest until termination of the life estate. In re Albiston's Estate, 117 Wis. 272, 94 N. W. 169.

92. The vesting of estates is not to be deferred by contingencies which affect only the amount or value. Bates v. Spooner [Conn.] 54 Atl. 305.

93. A gift of the income for life is not rendered inalienable by a provision that the executors pay "at such times and in such sums" as they might deem judicious. Endicott v. University of Virginia, 182 Mass. 156, 65 N. E. 37.

94. Howell v. Gifford, 64 N. J. Eq. 180; Kundhardt v. Bradish, 39 Misc. [N. Y.] 103.

95. A provision that in case of a remainderman's death his share shall go to his heirs does not operate to postpone the vesting of his interest. Kinkead v. Ryan [N. J. Eq.] 53 Atl. 1053.

96. A devise of realty for life with "reversionary interest" to be divided equally between daughters gives the latter a vested remainder with enjoyment postponed. Burton v. Provost [Vt.] 54 Atl. 189.

97. A devise in trust for life with remainder over vests in the remaindermen on testator's death, though the trustees are given power of sale for reinvestment purposes. Will construed and held that grandson took only life interest with remainder over to testator's children. Cruikshank v. Cruikshank, 39 Misc. [N. Y.] 401.

98. A will providing that the realty should not be sold until the youngest child is 21 years of age and the title not to vest until that time, and then two-thirds in fee to the children, one-third to the wife for life with remainder to the children, held to vest the fee in the children at testator's death and to merely suspend power of alienation until

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divested,[99] or subject to a trust,[1] or subject to a preceding power.[2] Legal title vests immediately in the heirs where the life tenant takes only an equity, and the remainder thereafter is void.[3]

Perpetuities and accumulations.[4]—That construction which does not make limitations too remote should be adopted whenever such a course will prevent the intention of the testator being wholly disappointed.[5]

youngest child reaches 21 years of age. Halstead v. Coen, 31 Ind. App. 302, 67 N. E. 957.

99. A devise to the testator's children to be held in trust by their guardian until the youngest child should arrive at the age of 21 years, held, the property vested in the children a fee simple upon the youngest arriving at the designated age, and this estate is not limited by a subsequent clause providing for the distribution of the estate in case all the children died without issue. Kephart v. Hieatt [Ky.] 78 S. W. 425. Will construed and title held to have vested in nephews and nieces at death of testator, subject to life estate of widow, the title of each subject to be divested by his death without issue before that of the life tenant, in which case it went to the survivors. Curtis v. Waldron, 81 App. Div. [N. Y.] 351. Under a devise for life with remainder over to life tenant's child or children, if any, and if not, then to brothers and sisters, the brothers and sisters take a vested remainder if the life tenant is childless on testator's death, subject to be divested by the birth of a child to said life tenant, who should survive him. Boatman v. Boatman, 198 Ill. 414, 65 N. E. 81. A devise in trust to be conveyed to a corporation for the purpose of maintaining a public library, with reversion when the land should no longer be used for such purposes, vests fee in the corporation and no trust is created. Danforth v. Oshkosh, 119 Wis. 262, 97 N. W. 258. Testatrix devised one-half of her estate to one adopted grandchild, the other half was to go to the children of a 13 year-old grandchild, should she have any, and if not, this half was also to go to the first mentioned. Held, the first mentioned took one-half absolutely and the other half subject to be divested by the other having a child. In re Maloney, 85 N. Y. Supp. 77.

1. As a bequest to one "when he shall arrive at the age of 26 years * * * to be loaned * * * and interest accruing to be paid" to the legatee. Harris v. Cook, 98 Mo. App. 38, 71 S. W. 1126. A bequest of the income of certain property until the legatee's son reaches the age of twenty-one years, the principal then to go to the son, does not terminate on the death of the legatee before the expiration of the term, but the son takes a vested interest in remainder to take effect at the expiration of such particular estate for years. Given income until son reaches 21. Frazer v. Frazer, 24 Ky. L. R. 2517, 74 S. W. 259. A devise of income in trust for life with principal and surplus over in equal shares to others creates a vested interest in the latter at the time of the death of the testator. Kunhardt v. Bradish, 39 Misc. [N. Y.] 103. Under a bequest in trust for life with remainder over to testator's next of kin at the time of distribution, held the estate vested in the latter on death of the life tenant and not at the time of actual distribution. In re Lee's Will, 85 App. Div. [N. Y.] 295. A testator bequeathed to a certain person a sum of money in trust, she to have the interest and at her death the principal to be divided among her children. Held to vest a life interest in the legacy in the trustee and a right to the legacy itself in the children at her death, the children's interest being vested subject to open and let in after-born children. In re Vreeland's Estate [N. J. Prerog.] 57 Atl. 903. Testator gave his property to trustees, directing them to pay the income in stated portions to his six children. He provided that at a certain time the trust should terminate and that the trustee should convey the principal of the estate to those entitled to income, "and in such conveyance give and bequeath said trust estate so held to said several parties, their heirs and assigns forever." Held, that the children took equitable remainders or cross remainders in fee of specified undivided portions of the property, which vested immediately on his decease, and upon termination of the trust would forthwith become entitled to the legal estate. Loomer v. Loomer [Conn.] 57 Atl. 167. Will construed to determine the interest of children in a trust estate and the time when certain interests vested absolutely in beneficiaries. Lewisohn v. Henry, 87 N. Y. Supp. 325.

2. In re Weeter's Estate, 21 Pa. Super Ct. 241; Dana v. Dana [Mass.] 70 N. E. 49. Where a power enlarges a life estate, gifts over are contingent on nonexercise. In re Sturgis' Estate, 205 Pa. 436. Will giving remainder of estate of which testator might die seized to his wife for life, and providing that any property which he might thereafter acquire should also go to wife with absolute power of disposition, held to give absolute estate in all such property to wife at time of testator's death. In re Hardaker's Estate, 204 Pa. 181. A devise to the wife and on her death one-half of the property to be divided between her heirs and one-half between his heirs "in the manner in which she may decide" gives to the heirs of each a vested remainder subject to the exercise of a power of appointment by the widow as to the portion each would take. Hawthorn v. Ulrich, 207 Ill. 430, 69 N. E. 885.

3. If the will does not devise the realty or appoint any one to sell, but provides for a sale and the proceeds to be placed at interest for the wife's support for life, the wife does not take a life estate in the realty, but merely an equitable interest, and the remainder being void, the legal title vests immediately in testator's heirs at law, subject to be divested by a properly authorized sale. Baumeister v. Silver [Md.] 56 Atl. 825.

4. See Perpetuities, 2 Curr. Law, p. 1173.

5. Towle v. Doe, 97 Me. 427. Provision not contrary to rule against perpetuities. Dulin v. Moore, 96 Tex. 135, 70 S. W. 742

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A postponement or a suspension of the power of alienation for a definite period not dependent on life is void,[6] but a provision that the division is to be made within a certain time is not.[7] In New York and some other states, a provision directing accumulation of rents and profits of realty for the benefit of adults,[8] or for the payment of incumbrances, is void.[9] The fact that the use of the property is given for a fixed period does not violate the rule where the fee vests at once.[10] Where it is apparent that testator intended that a provision for his daughter in a codicil should be inalienable during her life, the rule that annuities do not suspend the power of alienation is inapplicable.[11] Provisions recently construed to determine remoteness of the time of vesting or of a period of suspension are collected below.[12] A prohibition of alienation of trust property except

Where a testator directs the carrying on of his business and after paying certain sums to his wife and children for support directs an accumulation of the surplus, he then gives his wife certain personal property and the homestead in lieu of dower, and directed that at the death of his wife and a certain daughter the business should be closed,—held, that on the death of the wife, the property given her descended to the children, and did not become a part of the working capital of the testator's estate. Thorn v. De Breteuil, 86 App. Div. [N. Y.] 405. The giving of an annuity to a daughter over and above other provisions of the will, and upon her death the sum of $300,000 to be divided among her children, held not a continuance of a trust provided for in the will, and hence not void as against the statute of perpetuities. Herzog v. Title Guarantee & Trust Co., 85 App. Div. [N. Y.] 519.

But see: In determining the validity of testamentary dispositions the will is to be construed without reference to the rule against perpetuities, and having thus arrived at the true construction of the will, the rule against perpetuities should then be applied to the ascertained objects of the testator's bounty. Graham v. Whitridge [Md.] 57 Atl. 609.

6. Devising property to executors in trust until the legatees, thirteen in number, should reach the age of 25 and if any died before that age, the deceased's share to be divided among the survivors, last provision held void as a suspension of alienation (Mendel v. Lewis, 40 Misc. [N. Y.] 271); but a provision that the property shall not be divided until the youngest child shall arrive at twenty-five years of age creates a perpetuity. Ky. St. 1903, § 2360 (Johnson's Trustee v. Johnson [Ky.] 79 S. W. 293). Provision that if no request for a termination of a trust be made at the end of 30 years from testator's decease, the trust shall be at an end, is void under the statute against perpetuities. Loomer v. Loomer [Conn.] 57 Atl. 167. A devise of realty to trustees, whereby the power of alienation is suspended arbitrarily for three years is void under the statute of perpetuities, since it may extend beyond two lives. McGuire v. McGuire, 80 App. Div. [N. Y.] 63. So also as to personalty, under Laws 1897, c. 417. Id.

7. A provision that on the death of one of the beneficiaries, the executors within one year therefrom should divide the portion of the principal held for him among his heirs with accrued interest did not provide for an illegal accumulation. Nichols v. Nichols, 86 N. Y. Supp. 719.

8. Laws 1896, c. 547, permits accumulations for minors only. McGuire v. McGuire, 80 App. Div. [N. Y.] 63.

9. A provision that the income of the trust estate be accumulated for the payment of mortgages thereon and the debts of testators during minority, and is void (1 N. Y. accumulation except for the benefit of minors during minority, and is void. (1 N. Y. Rev. St. p. 726, §§ 37, 38; Real Property Law [Laws 1896, c. 547] §§ 51, 76). Dresser v. Travis, 39 Misc. [N. Y.] 358. A provision that trustees and executors should hold the property devised until they had extinguished all incumbrances thereon violates the rule against perpetuities. Dodsworth v. Dam, 38 Misc. [N. Y.] 684. A limitation in a will providing that rents and profits of certain realty should create a sinking fund to extinguish mortgages thereon is void under New York statute relating to accumulations. Id. A trust to apply the income for the payment of mortgage liens on the trust property and the payment of testator's debts is void under the rule against perpetuities. Not limited by lives in being. Dresser v. Travis, 39 Misc. [N. Y.] 358.

10. A devise of the use of certain land for a certain period, the land then to pass to the testator's son, held not to suspend power of alienation. Shaw v. English, 40 Misc. [N. Y.] 169.

11. Herzog v. Title Guaranty & T. Co., 177 N. Y. 86, 69 N. E. 283.

12. Held too remote: Where the devise gave the property in trust to pay annuities for two lives, a codicil providing that the income of a certain sum be given a daughter, in case she, one of the annuitants, contracted a certain marriage, for her life, the principal to be divided between her children at her death, held to show an intent to create a future inalienable estate during the life of such daughter, and the vesting would not take place or the future executory limitation take effect until her death. Hence it is void. Herzog v. Title Guaranty & T. Co. [N. Y.] 69 N. E. 283. By a provision that the devisees shall not sell until they have been in possession 20 years. Call v. Shewmaker, 24 Ky. L. R. 686, 69 S. W. 749. A devise over to the heirs at law of a person then in being is void under the statute against perpetuities, since they cannot be ascertained until the death of such person, and might be other than his children. In Connecticut, 1877, by statute a devise to descendants of persons unborn at testa-

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for reinvestment purposes,[13] or a trust to keep possession and control of the property for the lives of the beneficiaries,[14] does not operate as an illegal restraint of alienation.

(§ 5D) 6. *Possession and enjoyment* accompany a present vested estate.[15] A devise made "payable" at a time in the future vests in possession then.[16] Where a vested legacy, not charged upon land, is given a minor, to be paid to him at his majority, and interest is payable thereon in the meantime, his personal representatives, if he die under age, are entitled to the immediate possession thereof,[17] but if no interest is payable thereon, they are not entitled to possession until such time as the child would have become of age had he lived.[18] The beneficiary takes possession if income for life means ownership.[19] A life tenant of money with power to impair principal is entitled to possession.[20]

tor's death was invalid. Buck v. Lincoln [Conn.] 56 Atl. 522. A trust fund created by will providing for payment of the interest to one "and his children so long as they live" is void under the rule against perpetuities, it not appearing that only children in esse at the time of testator's death were intended to share therein. Towle v. Doe, 97 Me. 427. A devise for life then over to the life tenant's widow and children is not a perpetuity. Under Ky. St. § 2360. Johnson's Trustee v. Johnson [Ky.] 79 S. W. 293.

13, 14. Dulin v. Moore, 96 Tex. 135, 70 S. W. 742. A devise of land to trustees to be conveyed to the city for the purpose of building a public library thereon, with the provision that the conveyance should contain a limitation to the title that the same should cease and revert to the heirs of testatrix when the premises should no longer be used for library purposes, does not suspend the power of alienation longer than is allowed by statute, because if the limitation is void for repugnancy, the city takes the fee, and if a fee upon condition subsequent is vested in the city, either a reversion or remainder is created, which vests immediately in the heirs of testatrix. Danforth v. Oshkosh, 119 Wis. 262, 97 N. W. 258. A bequest in trust for the benefit of children and grandchildren of a testator's brother and sister, living at his death, does not unlawfully suspend the power of alienation. Denison v. Denison, 86 N. Y. Supp. 604. A direction that the estate should be divided into certain parts, a certain number of which should be held in trust for each of two sons during their lives, on the death of either his share to go to his children or their legal representatives, if any, and if not then one-half to go absolutely to a sister and the other to become a part of the trust in favor of the other brother, if living, and if dead, to go absolutely to his heirs, only postpones the vesting of the remotest of the remainders until the death of the surviving brother, and hence does not violate the rule against perpetuities. Bates v. Spooner [Conn.] 54 Atl. 305. A provision that the property be held in trust for the support of testator's children and the maintenance of any family which either of them might have until such time as the estate should be divided and distributed under the terms of the will does not create a trust which violates the rule against perpetuities, since the provision as to families of children naturally refers to the education during minority, and could not endure longer than 21 years and 9 months after the death of the survivor of the children. Id. A devise of part of one's property in trust to pay the income to testator's children for life, the share of the principal of a child dying without descendants to lapse into the testator's estate to be divided according to the will, held, such principal did not become immediately divisible among the surviving children, but remained part of the trust fund. And such trust fund does not violate the statute of perpetities. Loyd v. Loyd's Ex'r [Va.] 46 S. E. 687. Where a will gave property in trust to collect the rents and profits to pay them to a person during his life and on his death, or at expiration of 15 years, whichever occurred last, to sell the property and divide the proceeds, it was held that the limitation of 15 years was invalid as suspending the power of alienation, and hence was to be disregarded, thus sustaining the balance of the will. In re Murray, 75 App. Div. [N. Y.] 246. A bequest in trust for life, payable over to issue surviving the beneficiary until her youngest child shall have attained 21 years, the corpus then to be divided among such issue in equal shares, manifests an intention to provide for all surviving children of the beneficiary, and to make a future and not a present gift, and the estate will not vest until the time fixed for the trustees to divide the property. Hence both limitations are void as suspending power of alienation. N. Y. Laws 1897, c. 417, § 2, relating to suspension of ownership of personal property, applies, since there is an equitable conversion. Schlereth v. Schlereth, 173 N. Y. 444, 66 N. E. 130.

15. A will devising to a niece certain realty for life, fee to her issue, or if she died without issue other provision was made, vested in the niece and her heirs title to the property, subject to the conditions of the will, immediately on testator's death. The executor had no right to hold these premises, and doing so were liable to the niece for rents. Rooney v. Bodkin, 87 N. Y. Supp. 800.

16. A devise to certain persons "payable at the age of 25 years" held payable immediately to each devisee upon his arriving at the age of 25 years. Mendel v. Lewis, 40 Misc. [N. Y.] 271.

17, 18. Savin v. Webb, 96 Md. 504.

19. Michigan Trust Co. v. Hertzig [Mich.] 95 N. W. 531. Not where income is given

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(§ 5D) *7. Individual rights in gifts to two or more.*—A devise to two or more, in the absence of an express declaration to the contrary, will be construed as creating a tenancy in common and not a joint tenancy, unless it clearly and explicitly appears from the language employed that the testator understood the nature and incidents of the different estates, and intended to create a joint tenancy.[21]

Under a devise to several, they will, in the absence of words defining their proportionate shares, share alike.[22] The use of words of equality may control a repetition of one of the names.[23] The absence of any other disposal indicates that a "third" to three means to each of them.[24]

A bequest is not a gift to a class where, at the time of making it, the number of the donees is certain, and the share each is to receive is also certain, and in no way dependent for its amount upon the members who shall survive.[25] Where, in a devise, the individuals and the class are both named, in the absence of a contrary intention appearing from the will, the persons named take as individuals, not as a class.[26] A devise over "between" several will be interpreted to mean "among,"[27] and the word "between" following the verb "divide" denotes the individuals of the class subsequently named rather than the class itself.[28] A specification of the number of individuals negatives a gift to them as a class.[29]

as it accrues. Jewett v. Schmidt, 39 Misc. [N. Y.] 502.

20. A devise directing that the proceeds of certain property be paid to a devisee she to have the use of the income and such of the principal as necessary for her support, the proceeds should be paid to such devisee unconditionally. Poppy v. Walker [Ind. App.] 70 N. E. 825.

21. Under Cal. Civ. Code, §§ 1350, 686. In re Hittell's Estate, 141 Cal. 432, 75 Pac. 53. And on death of one his share passes to his heirs [Rev. St. Ky. 1899, § 4600] Lemmons v. Reynolds, 170 Mo. 227, 71 S. W. 135. Under N. Y. real property law, § 56 (Laws 1896, c. 547), no intention to make joint tenancy shown. Jones v. Hand, 78 App. Div. [N. Y.] 56. Under a devise over to the "children" of the life tenant, they take distributively as tenants in common, and not as a class. N. Y. Laws 1896, c. 547, § 156, makes such devisees tenants in common unless expressly declared to be joint tenants. Manhattan Real Estate & B. Ass'n v. Cudlipp, 80 App. Div. [N. Y.] 532.

Word "jointly" does not show an intent to create other than a tenancy in common. Under 1 Starr & C. St. 1896, p. 916, c. 30, par. 5, providing that such estates shall be deemed tenancies in common unless expressly declared to be joint tenancies. Mustain v. Gardner, 203 Ill. 284, 67 N. E. 779. Under a devise of the residue of the estate to three persons, the property to be **equally divided between them, share and share alike,** held that the devisees took distributively and not collectively, and that a share lapsing by reason of the death of one of the devisees before testator descended as intestate property, and did not go to the survivors. (Tenancy in common under 1 N. Y. R. St. (1st Ed.) pt. 2, c. 1, tit. 2, p. 727 sec. 44). Langley v. Westchester Trust Co. 39 Misc. [N. Y.] 735. A provision that a remainder shall belong to a class **"and their children"** creates a tenancy in common. Children of a daughter living at death of the life tenant took an estate in common with their mother. Sumpter v. Carter, 115 Ga. 893. A will bequeathed one-fifth of certain stock to two grandsons of testatrix, to be held in trust for them by a trustee named, and provided that on the death of one before her death, the survivor should have the entire one-fifth. Held, under Burns' Rev. St. 1901, § 8136, providing that **joint tenants of personalty** should have the same rights of survivorship as tenants in common, unless the instrument expressly provided otherwise, the will did not create the right of survivorship in the grandsons, on the death of one of them occurring after the death of testatrix. Thieme v. Union Trust Co. [Ind. App.] 70 N. E. 276.

22. Harris v. Keasby [N. J. Eq.] 53 A. 555.

23. A devise to several designated corporations, "as tenants in common, share and share alike," held to give an equal share to each, notwithstanding the fact that one of them was mentioned twice under different names. Six names and five corporations. Sisters of Mercy in City of Baltimore v. Benzinger, 95 Md. 684.

24. A devise of an "undivided one third of all my real estate" to three sons, without any other disposition of the realty, held to pass to each an undivided one third. Meiners v. Meiners [Mo. Sup.] 78 S. W. 795.

25. Herzog v. Title Guarantee & Trust Co., 177 N. Y. 86, 69 N. E. 283.

26. A bequest to two persons (naming them) "with whom I live and whom I regard and treat as my adopted daughters," held not a bequest to a class. In re Hittell's Estate, 141 Cal. 432, 75 Pac. 53.

27. As a joint will providing that in case the survivor remarries the property to be divided between the survivor and the children, and the survivor does not take one-half. Edwards v. Kelley [Miss.] 35 So. 418.

28. In re Morrison's Estate, 138 Cal. 401, 71 Pac. 453.

29. A testatrix devised a life estate to her son remainder to her "six children" which number would include him, though

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Words of equality import a division per capita.[30] An intention to divide per capita may be inferred from the fact that the testator had previously devised, in the same will, equal legacies to each.[31] If the gift is to heirs[32] or issue of a first taker,[33] it is usually per capita. Difference in degree of relationship indicates a taking per stirpes.[34] It is per capita if differing degrees of relationship are brought into one class,[35] or if children of different persons are in equal relationship to testator.[36] Heirs or children of deceased members of a class taking by substitution take per stirpes.[37] In a bequest to descendants equally, or to all the de-

he must be dead at the time of the division, held not to justify a court in changing the will so as to exclude him. Robinson v. Mitchell [Md.] 57 Atl. 625.

30. Where a gift is to be "equally divided," the beneficiaries take per capita, unless a contrary intention is discoverable in the will. In re Walker's Estate, 39 Misc. [N. Y.] 680. Under a devise to be equally divided among testator's lawful heirs, share and share alike, such heirs take per capita and not per stirpes. Mooney v. Purpus [Ohio] 70 N. E. 894.

31. In re Morrison's Estate, 138 Cal. 401, 71 Pac. 453.

32. Under a donation "in **equal shares to my own heirs at law**" distribution should be made per stirpes and not per capita. MacLean v. Williams, 116 Ga. 257. Under a devise to **heirs jointly** "and to pay such as had received no advancements, a sum sufficient to **make them all equal,** and children of deceased heirs to take the share of the parent," the heirs take per stirpes. Children only had received advancements. Lee v. Baird, 132 N. C. 755. But children of a daughter who had received an advancement but who had died before the making of the will, take their share without such advancement being deducted. Id.

Not if "heirs" designates a single class. Testator having sisters and children of deceased sister surviving him left his estate to his "lawful heirs, to be divided equally among them." Held the term "lawful heirs" constituted a single class, so the distribution must be per capita and not per stirpes. In re Griswold, 86 N. Y. Supp. 250.

33. Under a provision that the income of an estate be paid to a son and daughter for life, and on their decease, should they leave issue, the estate to descend in fee to such issue, on the death of the daughter leaving issue the trust as to her terminated, and that half descended to her issue per stirpes. Gardiner v. Savage, 182 Mass. 521, 65 N. E. 851.

34. In a gift of income from an estate in trust, to several "and their heirs," the latter words will be construed as meaning that, in the event of the death of any beneficiary, his heirs should take his share in his stead, there being no provision for survivorship, and it being contrary to testator's general plan. Loomer v. Loomer [Conn.] 57 Atl. 167.

35. A devise for life with reverter "to his children and their children that may be living" passed to the devisee a life estate with remainder per capita to children and grandchildren of the life tenant in being at the time of his death. Reynolds v. Reynolds, 65 S. C. 390. Unless a contrary intention appears the legatees under a bequest to several and to children of another will take per capita. Children and grandchildren held to share equally in payment of certain specific bequests. Collins v. Feather, 52 W. Va. 107.

36. In case of a gift to the children of several persons as standing in a certain relation to the testator, the objects of the gifts take per capita. As a gift to be divided equally "between my Brothers Edwin and Charles' children" though testator had previously referred to them as his nieces and nephews. Silk v. Merry, 23 Ohio Cir. Ct. R. 218.

37. Testator bequeathed a certain sum to trustees to pay the income therefrom to his three children annually "during the term of their natural life and to divide after their decease the rest and residue of the trust premises aforesaid under their charge equally among my children then living, and the issue of any deceased child or children, giving to the issue of any deceased child the share to which the parent, if living, would have been entitled." Held, that each child was entitled to a third of the income for life, and on the death of each his share of the principal was to be divided among testator's children then living, and the issue of deceased children, including the issue of the life tenant whose share was being distributed, such issue taking per stirpes. Brown v. Farmer, 184 Mass. 136, 68 N. E. 32. Where testator devised his residuary estate to his wife for life, then to his brother and sister, and after their death to the children of the brother, or the survivors of them, and the children of the sister or the survivors of them, held that the children of the sister took half of the estate as representatives of the mother, and the children of the brother took the other half. In re Walker's Estate, 39 Misc. [N. Y.] 680. Under a provision that land should be held in trust for D. and on his death should be sold and proceeds paid to testatrix's children, "share and share alike," provided that in case any child died before D. the share which he would be entitled to if living should be paid to his heirs at law in equal parts to each, held that an equal part of the fund went to each child living at D.'s death, and one share to the heirs of any deceased child. McWilliams v. Gough, 116 Wis. 576, 93 N. W. 550. Under a devise, "in case of the decease of either of three sons before the decease of their mother, leaving lawful issue, the issue to take by representation the share the parent was to receive and in default of issue then to the survivors equally," held, that the issue of a son dying before his mother occupies the position his father would have occupied as to the share of a son who predeceased his mother leaving no issue. Intention was not to deal with sons as a class, but to bestow on the

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scendants of any person, or to descendants simply, all take per capita, unless a contrary intent appears.[38] Where property is left to the "issue" of the survivors of a class, the division is per capita unless the will as a whole discloses a contrary intention.[39]

(§ 5D) 8. *Conditions.*[40]—Conditions will not be implied without an intent to support it.[41] No precise words are required to constitute a condition precedent or subsequent, but the character thereof is to be governed by the intention of testator.[42] If the act must be performed or the event occur before the estate can vest, the condition is precedent.[43] If not, it is subsequent.[44] A devise to one and in case of his death without heirs of his body to his brothers, passes a fee simple estate to the devisee defeasible on condition only that he die without heirs of his body.[45] An interest should be construed as absolute, if possible, and in any event the operation of conditions rendering it defeasible should be confined to the shortest possible time.[46] Divesting conditions are not easily implied.[47]

issue of a deceased son all the rights of the father. Hendricks v. Hendricks, 177 N. Y. 402, 69 N. E. 736.

38. Levering v. Orrick [Md.] 54 A. 620. Under a bequest of the residue of an estate in trust to apply the income to testator's daughters for life, providing that on the death of a daughter her share should pass to her issue, children, or descendants, forever, or if she died without living issue then to her surviving sisters and their descendants, it being testator's declared intention that the estate should vest in the descendants of his daughters, distribution to be made per capita and not per stirpes, and such descendants to be considered as purchasers and entitled to the property from the time their rights vested; held that, upon the death of the last surviving daughter without descendants, her share should be divided per capita among all the descendants of the other two daughters living at the time of distribution. Levering v. Orrick [Md.] 54 A. 620.

39. Jay v. Lee, 41 Misc. [N. Y.] 13.

40. See ante § 5 D, 5, contingencies on vesting.

Particular conditions construed. The words "interest" and "shares" held not to include specific legacies which were free from restraints on alienation. Russell v. Hillin, 80 App. Div. [N. Y.] 178. **Conditions working substitution.** A will containing several recapitulations and subsequent clauses held to show that it was the testator's intention that if he survived his wife a certain person should have his farm, if not it was to go to another. Hopkins v. Graff, 101 Va. 377. The intent of the testator expressed in his will, or clearly deducible therefrom, must prevail if consistent with the rules of law. Intention of testatrix being that, failing husband or son surviving, her estate to go to a designated charity, it was held to take, where both testatrix and son survived the husband but both perished in a common disaster with nothing to show order of death. Young Women's Christian Home v. French, 23 S. Ct. 184, 187 U. S. 401, 47 L. Ed. 233. Under a bequest to a daughter to her separate use with power of disposition but in case she should die before testatrix to pass to legatee's husband, the legacy in remainder took effect only in case the daughter predeceased the testatrix Louisville City Nat. Bank v. Wooldridge, 25 Ky. L. R. 869, 76 S. W. 542.

41. Others may add to fund provided for erection of monument, the will not requiring the statement that it was erected by testator, and there being nothing to show that he intended the contrary. In re Ogden [R. I.] 55 Atl. 933. A bequest for the erection of a building for the keeping of a town **public library** held not to show an intention that the **building should be located** in the part of town where an existing library, which could not be moved by the terms of the gift under which it was established, was situated. Adams v. Town of Derry, 71 N. H. 544.

42, 43. Lane v. Albertson, 78 App. Div. [N. Y.] 607. Will provided that if testator died before consummation of an agreement for the disposal of the business of testator's firm, his executors should carry it out. It further provided that on the consummation thereof a part of his share therein mentioned was to go to his brother, and further stated, "This has been my intention if I lived, and I desire it carried out in case of my death previous to the consummation of said agreement." Held that the bequest was conditional on the death of testator before the consummation, and on condition precedent. Id. A gift to one in case a named person should predecease testator is rendered inoperative by such person surviving testator. Residuary clause held to be operative only in case testator's wife died before him. Schumaker v. Grammer, 200 Ill. 48, 65 N. E. 722.

44. Lane v. Albertson, 78 App. Div. [N. Y.] 607. A bequest to a church on condition that the officers or a committee of the church annually visit the grave of deceased and give it such attention "as I would give under like circumstances," is a bequest upon a condition subsequent. Congregational Church of Chester v. Cutler [Vt.] 57 Atl. 387. A gift to one with the condition that if testator's son should return, the property should go to him, passes a defeasible fee. Return of son is condition subsequent. Commonwealth v. Pollitt, 25 Ky. L. R. 790, 76 S. W. 412.

45. Code § 2180. Whitfield v. Carriss, 131 N. C. 148. See also ante, § 5D, 5, that an estate may vest subject to defeasance.

46. A devise to a son but directing executors to control and rent until testator's

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A bequest on condition that the devisee return within a certain time is valid.[48] Conditions against creditors will be void if made subsequent to a fee.[49] Conditions whereby legacies are defeated by contesting the validity of the will are valid, but are not favored, and are strictly construed.[50]

If there is no provision for forfeiture in case of nonperformance, a breach of the condition will not affect the devisee's interest in the property.[51] When divesting contingencies are conjoined, all must befall.[52] The like is true of precedent conditions.[53]

(§ 5D) 9. *Intent to require election.*—There is such an intent when the property that is disposed of belongs to the beneficiary.[54] Unless changed by statute,[55] the widow is put to an election only when the will expressly states that the provision made for her therein is in lieu of dower,[56] or when a claim of dower would be clearly inconsistent with the will.[57] The mere gift of an annuity to the widow,

debts were paid, with a provision that the issue of deceased children should receive their parents' share, passed to the son a defeasible fee, contingent on his dying without issue before the debts were paid. Under Ky. St. 1903, § 2342, providing that devise without words of inheritance shall be regarded as passing fee, or as great an estate as testator had. McAdams & Morford v. Norton's Assignee [Ky.] 78 S. W. 880. See In re Albiston's Estate, 117 Wis. 272, 94 N. W. 169.

47. A direction to the trustees to hold certain property "as a residence and home for my said grand nephew until he shall have attained the age of twenty-one years" he then to have the election to retain it as a permanent home, without any condition that he should actually occupy the house, vests the fee in him immediately on his election, in good faith, to take the house, though he subsequently abandons it as a home. In re King's Estate, 205 Pa. 416. Such condition against liability for debts. Fact that testator intended property not to be liable for devisee's debts not sufficient to prevent its being liable unless he used proper means to accomplish purpose. Mere declaration to that effect without creation of trust insufficient. Wood v. Ward, 76 App. Div. [N. Y.] 567.

48. A devise to one, with a provision that if he is not heard from in ten years the estate is to go to others, is valid, and upon the expiration of that period without the devisee having been heard from the title to the lands vests in such others. Provision is valid condition subsequent with conditional limitation over. Connor v. Sheridan, 116 Wis. 666, 93 N. W. 835.

49. Davis v. Davis, 39 Misc. [N. Y.] 90.

50. In re Barandon's Estate, 84 N. Y. Supp. 937.

51. As a devise to a daughter on condition that she provide for a son and on failure the executors were to set aside the profits of a part of the land for the support of the son. Roberts v. Crume, 173 Mo. 572, 73 S. W. 662.

52. Testator bequeathed $1,000 to insane daughter to be paid on her recovery, and if she did not recover, or died, the amount was to be divided equally among her three daughters. Held, children cannot recover the amount by action until their mother dies, before recovery. Mingo v. Huntington [Minn.] 99 N. W. 45.

53. A legacy to one, to be paid after the death of a life tenant, unless the beneficiary shall have died without issue before that time, does not lapse on the death of the beneficiary during the continuation of the life estate, leaving issue. Under a bequest of the income to the wife and after death $6,000 to A and "if on administration of my estate said A be deceased leaving no issue" then the bequest over to be void, such legatee took a vested estate expectant on termination of the life estate, subject to be divested on death without issue during the life of the life tenant. Buswell v. Newcomb, 183 Mass. 111, 66 N. E. 592.

54. Will held to require that the amount which testator's wife was entitled to receive under an antenuptial contract should be estimated as a part of the share given her by the will. Dowell v. Workman [Ky.] 78 S. W. 857. Where testator devised his property equally between his wife and children, with the exception of one son, whose share had been advanced, held, where the son's advancement was in excess of the son's pro rata share of one-half of the community property, but much less than his share of the whole community property and no intention to discriminate against this son being shown, that it was not the testator's intention to dispose of all the community property. In re Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076.

55. It has been done in many states [Editor].

56. In re Gordon, 172 N. Y. 25, 64 N. E. 753; Horstmann v. Flege, 172 N. Y. 381, 65 N. E. 202. In a will disposing of the testator's entire estate, a bequest to his wife in lieu of dower does not give her, in case she rejects the will, the right to a legacy equal to her distributive share of his personalty if he had died intestate, in addition to dower. In re Spear's Will, 86 N. Y. Supp. 448.

57. Question always is whether the will contains any provision inconsistent with the assertion of a right to demand it. Widow held not entitled to dower in addition to the provision in the will. In re Gordon, 172 N. Y. 25, 64 N. E. 753; Horstmann v. Flege, 172 N. Y. 381, 68 N. E. 202. Takes both where reasonable doubt. Id. A clause in a will gave a farm to the wife and daughter so long as they wished to manage it and provided for its sale and division of the proceeds equally between the wife and two daughters when they no longer wished to

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though charged on all the testator's property, will not.[58] The words "those taking" do not show an intent to give an option to accept or reject a devise.[59]

(§ 5D) 10. *Charges, exonerations, funds for payment.*—In order to charge a legacy or gift of support on realty, there must be a manifest intent on part of testator to do so.[60] Express direction is not essential, but in the absence thereof the intent must be clear and manifest, and fairly inferred,[61] which may be found

manage it, adding "the part given the wife to be in lieu of dower." Held, the quoted clause applied only to the conditional sale, and since the land was never sold, this was not operative, and the provisions of the will were not inconsistent with the right of dower. Kiefer v. Gillett, 120 Iowa, 107, 94 N. W. 270. A testator devised to his wife and six children all his real estate, "share and share alike." Held, the widow must elect between the provision of the will (giving her one-seventh) and dower. In re Purcell [R. I.] 57 Atl. 377. A provision in a husband's will not signed by his wife, reciting that in case she predeceased him it was her express will that testator should be her sole heir, and the fact that the wife accepted the will on testator's death in so far as it devised property to her, did not constitute an agreement on her part to comply with other provisions therein which were repugnant to the devise to her. Meyer v. Weiler, 121 Iowa, 51, 95 N. W. 254. Where a testator provides for the payment of his debts and bequeaths his wife a sum in lieu of dower, she is entitled to the payment of any debt due her in addition to the legacy. In re Spear's Will, 86 N. Y. Supp. 448. A valid trust covering all of testator's property will be construed as requiring an election. Vesting of title in trustees with absolute power to sell and reinvest, with special directions as to management and control, with directions to pay over the income to the widow and children during the continuation of the trust, held inconsistent with intention to allow dower. In re Gordon, 172 N. Y. 25, 64 N. E. 753.

58. Where the will charged a portion devised with an annuity to be paid the widow for life without any other provision for the wife, it did not show an intent to require an election by the widow. Horstmann v. Flege, 172 N. Y. 381, 65 N. E. 202.

59. In a devise in fee providing that "those taking however at the settlement of my estate * * * to account to other distributees for such lands at the rate of five dollars per acre." In re McKibbin's Estate, 21 Pa. Super. Ct. 578.

60. Lediger v. Canfield, 78 App. Div. [N. Y.] 596. There is a presumption of intent that legacies should be paid from the personalty. Clark v. Worrall [Ind. App.] 68 N. E. 699. Act Md. 1895, c. 438 changed this rule but the act did not apply to wills made before it went into effect. Ewell v. McGregor, 96 Md. 357.

61. Lediger v. Canfield, 78 App. Div. [N. Y.] 596; Daue v. Arnold, 201 Ill. 570, 66 N. E. 846. Intention not implied where there is personalty. Clark v. Worrall [Ind. App.] 68 N. E. 699.

Must be shown by the will or in certain cases by proof of extrinsic facts, such as the condition of testator's estate at the time he made the will. Lediger v. Canfield, 78 App. Div. [N. Y.] 596. The legatee has the burden of showing that testator's intention was that the personalty should not be subject to the payment of his debts. Wiggins v. Wiggins [N. J. Eq.] 56 Atl. 148.

Illustrations: A will devised realty to children subject to specified portions of a mortgage indebtedness thereon, testator supposing that he had sufficient funds to meet his other debts and give each child a specified sum. His realty and personalty were given specifically. Held, that both should abate ratably for the payment of other debts. Daue v. Arnold, 201 Ill. 570, 66 N. E. 846.

Where will directed executor to sell realty and "after the payment of" certain legacies, to pay the proceeds to others, held that the legacies should be paid out of the proceeds of such sale and the balance only divided, though testator left personalty. Clark v. Worrall [Ind. App.] 68 N. E. 699. A will after devising certain lands to parents provided for the payment of a legacy of $20.00 to be paid to the grandchildren, the money to come out of his landed estate and to be paid them by their parents. Held to carry a legacy to each child living at testator's death and to be a charge on the land devised to each parent, but did not restrict the power of sale only in event of an attempted breach of trust. Waddell v. Waddell [S. C.] 47 S. E. 375. A provision for the payment of debts of another out of "my estate" does not necessarily show an intent to charge the realty. It not appearing that testator thought his personalty insufficient and not having so charged his own debts or the legacies. Lediger v. Canfield, 78 App. Div. [N. Y.] 596. A devise of real estate to two persons, with a provision that, whenever a part of it shall be sold, one of them shall receive a certain specified sum "out of the proceeds of the sale" and that he shall be paid and receive it "from my estate or my said executors," held to create a trust or charge on the real estate in favor of the devisee. Both devisees named as executors, but the one entitled to the legacy not appointed. Hall v. Cogswell, 183 Mass. 521, 67 N. E. 644. Will construed and held not to specifically charge the realty with the payment of debts. In re Martin, 25 R. I. 1. Testator left his entire estate to his widow. The next clause of the will was to the effect that he had made provisions for the care, support and education of his grandson until he reached the age of 21, leaving the entire charge and disposition of that matter, however, in the good judgment and discretion of his wife. He had made no other provision for said grandson. Held, that the property given to the widow was charged with his care, support and education. Ellis v. Ellis, 64 N. J. Eq. 375. Under a devise of realty to three sons, providing that if they "shall accept * * * it shall be on condition that they shall pay annually an equal portion to their mother of six per cent. interest on $2,000, and if

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in a complete disposal of all personalty, leaving only realty,[62] or the complete disposal of the estate as a blended property.[63]

If the devisee is charged with the duty of paying a legacy[64] or the devise is subject thereto,[65] or if there was a direction to pay certain legacies from particular land, it makes the legacies a lien thereon.[66]

The fact that testator had no personal estate,[67] or that he knew when he made the will that his personalty was insufficient to pay legacies, may be regarded as showing an intention to charge the realty with their payment,[68] but the fact that testator did not dispose of his realty, or that he merely gave a life estate therein without disposing of the remainder, does not show such intention,[69] nor does the mere existence of a power of sale.[70]

Legacies and gifts for support may be charged on a homestead,[71] but debts will not be unless the intention is very clear.[72]

needed for her support, also the principal," shows an intention to charge the realty with the payment. In re Gumaer's Estate, 19 Pa. Super. Ct. 621. Where a will charged the estate with the support of a son during his natural life, and provided that if he survived his mother and remained unmarried, as he did, he was to have all the remaining estate for life for his support, and such property was to go equally to other heirs at his death, it was held that the son had an absolute right to support out of the estate, and one who had supported him might recover for such support from the estate. Warburton v. Williams, 116 Wis. 557, 93 N. W. 438.

62. In case of insufficiency of personalty, the residuary realty is chargeable with the payment of legacies; the residuary clause devising "all the rest and residue of my estate both real and personal." Horton v. Howell [N. J. Eq.] 56 Atl. 702. Where the will gave the husband what he would have been entitled to under the intestate laws, that is the personalty and a life use of the realty, legacies to others, were held intended to be paid from the realty. In re Hershey's Estate, 21 Pa. Super. Ct. 651.

63. If the testator obliterated all distinction between realty and personalty, devising the entire estate to one except an annuity to another, such annuity will be held a charge on the realty. Perkins v. First Nat. Bank [Miss.] 33 So. 18. Blending of realty and personalty in the residuary clause does not charge legacies on the realty, where the main object of testator's bounty was therein provided for. Harvey v. Kennedy, 81 App. Div. [N. Y.] 261. Legacy held a charge on the residuary estate, such appearing to be testator's intent. Austin v. Buckman, 118 Wis. 169, 95 N. W. 128.

64. Ewell v. McGregor, 96 Md. 357.

65. A direction that an annuity be paid out of certain realty devised "subject" thereto, and giving the annuitant power to enforce the annuity, makes it a charge on the realty and not on the rents and profits. The land may be sold to pay arrearages. Gee v. Gee, 204 Ill. 588, 68 N. E. 515.

66. Legacies payable "out of my said farm by my executor" and devise of land after payment "of above named legacies," held to create lien on land. Conkling v. Weatherwax, 173 N. Y. 43, 65 N. E. 855.

Not where it was to be paid from the "share" of one, no sale of land being directed. Held that the pecuniary legacy was not a charge on the land set off to the child out of whose share it was to be paid. Ewell v. McGregor, 96 Md. 357.

67. In re Espy's Estate, 207 Pa. 459, 56 Atl. 1005.

68. McManus v. McManus, 86 App. Div. [N. Y.] 240. Annuities payable out of personal property are not a charge upon the testator's realty, the personalty being insufficient in the absence of proof that the testator had reason to believe his personal estate insufficient at the date of the execution of the will. Turner v. Mather, 86 App. Div. [N. Y.] 172.

69. Realty will not be sold to pay legacies where testator left personalty supposed to be sufficient to pay them, though he did not refer to realty in the will except to give a life estate in a part of it, and though the will contained no residuary clause. In re Espy's Estate, 207 Pa. 459, 56 Atl. 1005.

70. At the time of the execution of the will, the testator was possessed of ample personal property to satisfy them. All real estate was specifically devised. At time of testator's death because of investments and expenditures, there was not sufficient personalty. Schmidt v. Limmer, 86 N. Y. S. 657. A charge of legacies on realty is not to be inferred from the fact that the residuary clause directs a sale to create a fund in trust. Under the condition of the estate at the time of execution of the will, the testator did not intend to so charge the realty. Harvey v. Kennedy, 81 App. Div. [N. Y.] 261. Where executors are authorized to sell realty to pay debts and legacies, the power being to aid the personalty, not to exonerate it, general legatees are not entitled to have other real estate charged with the payment of their legacies to the extent that the personalty was used in payment of debts. Turner v. Mather, 86 App. Div. [N. Y.] 172.

71. A devise of the homestead "subject, however, to the obligation to furnish a comfortable home and maintenance for my sister," creates a charge upon the land, which follows the property into the hands of every life tenant who accepts the devise, such being the evident intent of the testator. Emery v. Swasey, 97 Me. 136. Legacies given children held to be charge on homestead after wife's death, but legacies given wife for purpose of building houses for them held not charge on homestead. In re Paddock, 81 App. Div. [N. Y.] 268.

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Aside from express provision,[72] debts and expenses will be charged to personalty.[74] A charge of debts may lie in a direction to pay them.[75] Particular expense may be charged on a particular fund despite a general charge of debts.[76]

The devisee of a mortgaged estate as a general rule cannot claim exoneration out of specific legacies.[77]

A direction that all taxes on bequests shall be paid refers to present taxes only.[78] Where the direction is to pay over the net income, inheritance and transfer taxes should be paid out of the income and not out of the corpus of the estate.[79] A direction to pay legacies without any rebate or reduction will not exclude a deduction of inheritance tax, where the will was made before the statute levying such tax was enacted.[80]

Funds for payment.—A legacy in immediate juxtaposition before and after, with legacies payable out of the proceeds of a particular estate, and connected with them by the word "also," will be regarded as payable out of said estate only.[81] A bequest of specified property in trust, the income to be used for certain purposes, does not authorize the use of other funds of the estate to make up the amount necessary to carry out such purposes, the income of the property set apart being insufficient therefor.[82] A fund will not necessarily be enlarged because the amount to be produced is stated.[83]

Deductions.—Debts in favor of the estate follow a legacy or devise into the hands of one taking by substitution or succession.[84] Interest on debts to be de-

72. To charge homestead property with the payment of debts, the language employed must be unequivocal and imperative. Cross v. Benson [Kan.] 75 Pac. 558. A general devise of all testator's property "which shall remain after payment of my just debts and funeral expenses" does not charge the homestead with the payment of such debts, but does charge the rest of the realty devised. Rev. St. Wis. 1898, §§ 2983, 3862, exempts homesteads. Pym v. Pym, 118 Wis. 662, 96 N. W. 429.

73. A bequest of a specific sum of money "less expenses of administration" does not authorize commissions of representatives and transfer taxes to be deducted therefrom. In re Pray, 49 Misc. [N. Y.] 516.

74. See Estates of Decedents, 1 Curr. Law, p. 1109. A gift of all personalty of which testator should die possessed will be construed to mean less debts and administration expenses. Blakeslee v. Pardee [Conn.] 56 Atl. 503.

75. A will directing payment of debts creates a trust against the property and charges it with payment of them. Kiesewetter v. Kress, 24 Ky. L. R. 1239, 70 S. W. 1065.

76. Where it is plainly the testator's intention that the realty should be charged with the expense of converting it into personalty, equity will carry out such intention, even though there is a general provision for the payment of all debts from the personalty. Matthews v. Tyree, 53 W. Va. 298.

77. Where property devised to a daughter was after the execution of the will and before the testatrix's death, deeded to said devisee by a deed of gift, held daughter took property subject to a mortgage thereon, though no mention of the mortgage was made in either the will or deed. In re Porter, 138 Cal. 618, 72 Pac. 173.

78. Such as inheritance and succession taxes, and does not require the setting aside of a fund for the payment of future general taxes. In re Magee's Estate, 205 Pa. 37.

79. Where a will devised the body of an estate to executors in trust to collect the income, pay "all necessary expenses" and divide the "net income" among certain legatees, the inheritance, transfer, and federal war taxes were to be paid out of the gross income and not out of the principal. In re Brown's Estate [Pa.] 57 Atl. 360.

80. Jackson v. Tailer, 41 Misc. [N. Y.] 36.

81. Bequest to church held payable out of proceeds of sale of certain lot only. Connecticut Trust & S. D. Co. v. Chase, 75 Conn. 683, 55 Atl. 171.

82. Testatrix bequeathed 75 shares of stock in trust, the income to be used for certain purposes. The company was subsequently merged in another, and she received 75 shares of stock in the new company in exchange therefor, which she intended to substitute for that disposed of by will. Later she sold 25 shares and after her death the income on the balance was insufficient to pay the charges on the fund. Held, that the value of the stocks sold could not be taken from the residuary estate, but that the remaining 50 shares only could be used to carry out the purposes of the trust. Gardner v. Gardner [N. H.] 56 Atl. 316.

83. A bequest of a sum, which when invested at 6%, "will produce" certain annuities, means the sum which would produce the annuities at 6%, not the sum required at the prevailing lower interest rate. In re Sproule's Estate, 87 N. Y. Supp. 432.

84. Where testator by his will directed that all legacies should be subject to any debts owing him from the legatees, and by codicil, made after the death of his son, who was a legatee, directed that his grandson should have the share given his father in the original will, the share of the grandson was subject to the deduction of his father's debts

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ducted from legacies should be reckoned only up to the date of testator's death.[85] Debt charges on legatees will fall in by extinguishment of the debt.[86]

(§ 5D) 11. *Trust estates and interests.*[87]—The fact that no time is fixed for the duration of the trust,[88] that the trustee is given discretion to hold and dispose of the trust estate as he may think best,[89] or that there is no devise over of the corpus of the property, does not render it invalid.[90] A mere provision that legacies shall be a lien on land devised does not make the devisee a trustee of an express trust.[91]

A provision giving executors and trustees the power to manage or sell the estate, invest the proceeds and divide the income, constitutes an express trust.[92] Whether a title vests in the trustee and if so the quantum thereof depends on the duties imposed as showing the intent.[93] If a trust is single,[94] it endures till the death of all beneficiaries.

owing to testator. In re De Haven's Estate, 207 Pa. 147. Where the devisee predeceases the testator, his issue take under the statute, subject to any debt which may have existed against their deceased parent in favor of the estate. Ohio Rev. St. 1892, § 5971, providing that issue shall take in same manner as devisee would have done had he survived testator. Baker v. Carpenter [Ohio St.] 68 N. E. 577.

85. Where a will provided that a debt due testator from the husband of one of his children should be deducted from her share, interest thereon should be reckoned only until testator's death, and the amount of the notes given therefor should be reckoned in ascertaining the whole amount to be distributed. Howe v. Howe, 184 Mass. 34, 67 N. E. 639.

86. Howe v. Howe [Mass.] 67 N. E. 639. Will provided that if the daughter's husband was indebted to testatrix, the debt should be paid before the daughter received her share of the estate. At the time of testatrix's death the husband was indebted to her on a joint note made by him and his wife, which was turned over to the daughter, with other notes, in settlement of her share of the estate. Held, that the will showed no intention to benefit the husband, but contemplated payment by him of any indebtedness to the estate, and that the transaction by which the daughter received the note operated as a payment of the debt by her, which gave her a right to enforce it against him. In re Nickerson, 116 Fed. 1003.

87. As to whether a gift is in trust or otherwise or is a trust or a power, see ante, § 5D 2.

88. A provision "I give, devise, and bequeath to my wife Mary, in trust for herself and my children, all of my estates, both real and personal, with full power to continue my business if for the best interest of my estate," held to create a valid trust. Fact that no time for its duration is fixed is immaterial. Holmes v. Walter, 118 Wis. 409, 95 N. W. 380. Where the testator does not specifically fix the time for termination of the trust, his intent will govern as gathered from the entire will, and that the fee is given to the trustee does not show an intention that trust continue where the evident purpose of the trust is accomplished. When the residue was given to executors in trust to be divided equally between children, and they were directed to manage the property and sell, the trust terminates on reduction to possession, payment of debts and legacies and distribution of the remainder. Kohtz v. Eldred, 208 Ill. 60, 69 N. E. 900.

89. A bequest of personalty to the wife of the testator "to hold and dispose of as she may think best for the welfare of herself and our children" creates a trust in favor of the children and is not an absolute gift to the wife. The discretion given does not destroy the trust. Kidder's Ex'rs v. Kidder [N. J. Eq.] 56 Atl. 154.

90. Gift to trustees of estate with directions to pay over entire net income to son, providing that they should pay taxes and for repairs, and that the property should not be liable for the present or future debts of the son, creates a valid spendthrift trust, though there was no devise over of the corpus of the estate after the son's death, which should not be defeated by handing over such corpus to the son's control. In re Minnich's Estate, 206 Pa. 405.

91. Devisee not executor. Under Wis. Rev. St. 1878, § 2081. Merton v. O'Brien, 117 Wis. 437, 94 N. W. 340.

92. Laws 1896, c. 547, § 76. Nichols v. Nichols, 86 N. Y. Supp. 719. A devise to an executor, giving him the management of the estate with power to sell and convey it constitutes an express trust. In re Chase's Estate, 40 Misc. [N. Y.] 616.

93. A gift to the executors to hold until a certain time and then to distribute does not vest in them a beneficial estate, but merely creates a trust, and vests the title in the trustee for purposes of distribution. McGuire v. McGuire, 80 App. Div. [N. Y.] 63. A provision directing the executor to collect rents and hold the property to a certain time, then to convert it into cash and distribute it during the lives of certain persons, with remainder over is not a mere power of distribution, but continued absolute title in the trustee. Id. A gift of the income of a deposit to a son for life, with a provision that "the principal of his deposit shall be paid to his executor or administrator and go to his heirs," is a gift to the heirs of the son, the executor receiving it only for convenience of distribution, and holding it in trust. Thayer v. Fairchild [R. I.] 56 Atl. 773. A devise to executors to use the income for the support of a son for life with power "to use and apply the real property" for the purposes of the trust vests the title in the executors and creates a valid

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An active trust is created where the trustees are given some active duties to perform in regard to the property.[95] Where the same person is made trustee and cestui que trust, the trust is generally passive.[96] But where a testator's intent to accomplish that result is clear, a cestui que trust may be invested with the powers of a trustee.[97]

(§ 5D) 12. *Powers of appointment and beneficial powers of sale.*—A power may be found in authority to use and dispose of property.[98] The extent of the power is governed by the testator's intent.[99] A power is ordinarily limited by the

trust. Potter v. Hodgman, 81 App. Div. [N. Y.] 233. Under a writing reciting that "I * * * give and turn my property over to G. S. Gibson to sell and dispose of as he sees fit, to pay my indebtedness and take my two children to Kentucky and look after them and raise them," Gibson took the property as trustee of an express trust and not as an executor de son tort. Gibson v. Draffin, 25 Ky. L. R. 1332, 77 S. W. 928. A gift to executors, providing that in case testator's children should be minors, to invest their shares and apply the income, creates an express trust and not a power in trust only. Under N. Y. St. of Uses & Trusts (1 Rev. St. [Edmond's Ed.] pt. 2, c. 1, tit. 2), §§ 55, 58, 59, 60, as to realty, and Laws 1897, c. 417, § 2, as to personalty. Robinson v. Adams, 81 App. Div. [N. Y.] 20. Since a direction to trustees to sell operates as a conversion of realty into personalty, a devise in trust to pay income to the beneficiary for life, then to sell and divide the proceeds, does not pass any title to the remaindermen, but merely gives them a right to share in the distribution, the title vesting in the executors and trustees. Statute of uses and trusts does not apply in such case. McWilliams v. Gough, 116 Wis. 576, 93 N. W. 550. A will giving one-half the estate to husband for life, with powers of ownership in fee, and the other half to children, with certain powers in husband, construed as giving husband, as trustee for the children, legal title to property given them with power to alienate at discretion. Wiess v. Goodhue [Tex. Civ. App.] 79 S. W. 873. Devise of all testator's property in trust for his son, he to have the use, rents and profits thereof during his life, and giving trustees power to use the principal if necessary for son's support or to pay his funeral expenses, and providing that after the son's death the property should "belong absolutely" to one of two classes, creates a trust estate for the son's life only. Thomas v. Castle [Conn.] 56 Atl. 854.

94. Will construed and held to create a single trust for the benefit of testator's two children and not a trust of one-half of the estate for the benefit of each, the trust as to one-half of the property to terminate on the death of either child. United States Trust Co. v. Soher, 85 N. Y. Supp. 266. Where property was devised to the executors in trust for the testatrix's children until such time as such children should determine that the whole should be sold or divided, held, the trust could only be terminated by the consent of all of the children or their survivors. Harris v. Harris, 205 Pa. 460.

95. A devise to hold, manage, control, lease, care for and invest and reinvest from time to time for a period of years, then to pay over, creates an active trust. Harris v. Ferguy, 207 Ill. 534, 69 N. E. 844. A devise in trust for life and after death to his lawful children until 21 years of age, to be then paid to them, and in case there are no children then the property to go to sisters or their children, creates an active trust, and the beneficiary is not entitled to possession of the personalty on giving security as life tenant. In re Mooney's Estate, 205 Pa. 418.

96. Testator devised all his estate to his two daughters, who were his only heirs, with powers of investment, and to pay over to themselves all the income thereof and to dispose of the principal by will or otherwise after their death. Held, not to create a spendthrift trust, but a mere passive one, which would be terminated at the suit of the beneficiaries. Tilton v. Davidson, 98 Me. 55.

97. A will giving a certain person a sum of money in trust, she to receive the interest during her life and at her death the principal to be divided among her children, held to create a trust in her, though she was also cestui que trust, and entitle her to possession of the fund. In re Vreeland's Estate [N. J. Prerog.] 57 Atl. 903.

98. A gift of "all my estate to my wife * * * to be used and disposed of as seemeth the best to her during her natural life * * *" and after death to the children of testator, gave the wife power of disposal and a conveyance by the widow passed the fee. Simpkins v. Bales [Iowa] 98 N. W. 580. Under a devise to the wife of the testator during life or while she shall remain unmarried, for her support and the support of minor children, the property then to descend to children, the widow takes a life estate without power of sale. Intention governs. Winchester v. Hoover, 42 Or. 310, 70 Pac. 1035. A devise of a life estate in all the property, to "use and expend what may be necessary" for maintenance, gave power to dispose of the estate when necessary for support and maintenance. Barker v. Clark [N. H.] 56 Atl. 747.

99. Determining whether devisees took only life interest with full or limited power of disposal. Dana v. Dana [Mass.] 70 N. E. 49.

Particular provisions construed: Will construed as conferring an **absolute power** on the wife, within the meaning of Rev. St. 1898, § 2112. Auer v. Brown [Wis.] 98 N. W. 966. A will giving a life estate with power to sell, and providing for sale and distribution at her death, confers a **power in gross.** Young v. Sheldon [Ala.] 36 So. 27. A devise of one-third of testator's estate for life, after the death of the devisee one-third thereof to go to his children and two-thirds to hers, with full power in the devise to sell and dispose of any part of the estate, and a further devise of the re-

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estate which the donee has in the land.[1] A power conditional on death of a devisee will not be extended to a devise in fee in an earlier part of the will.[2] Words defining the extent of power are not cut down by other clauses unless such was the intent.[3] Under a discretionary power to divide an estate by will in such manner as the donee thinks proper, the quantity and quality of the estate to be devised are matters entirely within his discretion.[4] Restrictions as to appointees under a general power must be found in the will.[5] A power to dispose of property for a certain purpose as the devisee shall see fit leaves it to the judgment of the devisee to determine the amount necessary to carry out the provisions of the will.[6] A power may be imperative from the fact that it will benefit designated persons.[7] A will may confer a naked power of disposition exclusive of any beneficial interest in the donee.[8] An execution of a power under a will which is contrary to a limitation contained therein is void.[9] Execution of a discretionary power is not rendered invalid because payment of a legacy is postponed,[10] nor because a legacy to one of the beneficiaries is made a charge upon the land of the others.[11]

maining two-thirds of the estate to testator's children, share and share alike, held to create a power of sale accompanied with a trust and **not a general power of sale**, and that the children took vested remainders. Weinstein v. Weber [N. Y.] 70 N. E. 115.

1. A gift of an estate for life, with a power of disposition annexed, and with remainder over, will be construed as giving power to dispose of the life interest only, and not of the reversion, though such power is absolute in its terms. Life tenant given full power to mortgage, sell, lease, transfer and convey and to use and dispose of property in same manner as testator could have done. Bauernschmidt v. Bauernschmidt [Md.] 54 Atl. 637; Metzen v. Schopp, 202 Ill. 275, 67 N. E. 36; Mansfield v. Mansfield, 203 Ill. 92, 67 N. E. 497. The fact that after the death of the life tenant the property "then being" was given to trustees who were to pay her debts and funeral expenses and the expenses of administration of the trust, and to divide the property "then remaining," does not show a contrary intent, those words referring to the property remaining after such debts and expenses were paid. Power of disposal referred to life estate. Bauernschmidt v. Bauernschmidt [Md.] 54 Atl. 637.

2. Provision that in case testator's daughter should die leaving children or a child and issue of a deceased child, her surviving, she was empowered to divide among them in such portions as she should see fit that part of testator's estate that would come to them. Heinemann v. De Wolf [R. I.] 55 Atl. 707.

3. A will created a trust fund for the benefit of a son, to whom a life interest therein was given, and empowered the trustees to pay over to him during his lifetime any sum not exceeding $100,000, and further empowered the son to dispose of $150,000 of such fund by will to any person he might see fit. Held, that the son's power of disposition was not diminished by the amount advanced to him by the trustees, but extended to the whole amount of the fund remaining in the trust at the time of his death, not exceeding $150,000. McCook v. Mumby [N. J. Eq.] 54 Atl. 406.

4. Allder v. Jones [Md.] 56 Atl. 487. Under a devise for life with power "to will to my children as she thinks proper at my death," the donee may make an unequal distribution. Id. No appointment will be defeated, however unjust or unreasonable, or however nominal or illusory the portion received by some of the beneficiaries may be, provided that some portion of the estate passes to each of the objects of the power. Doctrine of illusory appointment not adopted in Illinois. Hawthorn v. Ulrich, 207 Ill. 430, 69 N. E. 885. The fact that no person was specifically required to pay nominal sums appointed to some of the remaindermen is not sufficient to render invalid the execution of a power of appointment, where testatrix directed that they should be paid out of the share which she had power to appoint to her heirs. Id.

5. "At her pleasure" and "without accountability" enabled donee to appoint to charity. Dana v. Dana [Mass.] 70 N. E. 49.

6. Devise of residuary estate to wife for life "with the right to use and dispose of so much of the principal thereof during her lifetime as she should see fit," held, her power of disposition was limited to what was in her judgment reasonably necessary for her use during life. Terry v. St. Stephen's Protestant Episcopal Church, 79 App. Div. [N. Y.] 527.

7. A direction to the life tenant to sell sufficient property to pay mortgages on real estate owned either by testatrix or her husband may be treated as discretionary, in so far as it relates to incumbrances on his own property, but is mandatory as to those on hers, and creates an interest in the final beneficiaries of which the donee of the power could not deprive them. Dana v. Stafford [Vt.] 56 Atl. 88.

8. Hammond v. Croxton [Ind.] 70 N. E. 368.

9. Where a widow, executrix, disregarded a provision in her deceased husband's will providing that each child should receive a certain amount. Ketchin v. Rion [S. C.] 47 S. E. 376.

10. Charge on land payable in one, two, three and four years, valid execution. Allder v. Jones [Md.] 56 Atl. 487.

11. Devise to two children and creating charge thereon in favor of another held valid execution. Allder v. Jones [Md.] 56 Atl. 487.

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(§ 5D) 13. *Lapse, failure and forfeiture.*—An intention that a legacy shall lapse will not be presumed.[12]

A legacy or devise, bestowed by testator as a mere gift or bounty, will lapse and become void in case the testator survives the legatee or devisee,[13] but this rule does not apply where the legacy has vested,[14] nor where the bequest or devise was made to discharge a duty or obligation resting upon testator,[15] nor by statute in some states, where the beneficiary is a descendant of the testator.[16] Testator may prevent a lapse by express provisions in his will or by a clear implication of intent to that effect.[17] Forfeiture for breach of condition will not be implied,[18] nor will conditions be implied so as to work forfeiture.[19]

12. In re Phillips [R. I.] 55 Atl. 696. A will provided in the residuary clause that in case any beneficiaries died before testatrix the bequest to him should determine, and further provided that if the persons named in the will did not survive and could not take in person, their heirs should not take by substitution. Held, that these provisions applied to residuary legatees, and that on the death of one of them before testatrix, his share vested in the remaining residuary legatees and did not pass as intestate estate. In re Phillips [R. I.] 55 Atl. 696. That the legacy to the wife exceeds her legitime is ground for reduction, not for nullity. Succession of May, 109 La. 994.

13. Ballard v. Camplin, 161 Ind. 16, 67 N. E. 505. Act March 29, 1887, providing in such case the property should descend to devisee's heirs does not apply where devisee died prior to its enactment. Reichle v. Steitz, 64 N. J. Eq. 789; Dorsey v. Dodson, 203 Ill. 32, 67 N. E. 395. As a legacy to one "as a reparation" for injury done her "by a scandalous charge falsely and maliciously" made. In re Sutro's Estate, 139 Cal. 87, 72 Pac. 827. Under a will providing for sale of property and distribution of proceeds, the legacy to one who died after testator, but before sale and distribution, did not lapse. Dorsey v. Dodson, 203 Ill. 32, 67 N. E. 395.

14. Ballard v. Camplin, 161 Ind. 16, 67 N. E. 505. Where testator bequeathed the income of his estate to his wife for life, and on her death a specific legacy to A, providing that, "if, on the administration of my estate, said A be deceased, leaving no issue, then this article of my will is to be inoperative and void," the legacy vested at testator's death and did not lapse on A's death, leaving issue, before the death of testator's wife. Buswell v. Newcomb, 183 Mass. 111, 66 N. E. 592.

15. Where testator intended to devise land to C., but agreed to devise it to A. in consideration of his agreeing to pay C. a certain sum, and A. executed his notes therefor, and testator then executed his will as agreed, the devise to A. did not lapse by his death before that of testator. Ballard v. Camplin, 161 Ind. 16, 67 N. E. 505.

16. This rule has been modified by statute in some states so as to prevent the lapse, and allow the heirs to take, in case the devisee is a descendant of testator (Brown's Rev. St. Ind. 1894, § 2741). Ballard v. Camplin, 161 Ind. 16, 67 N. E. 505. Under the laws of Ohio (Rev. St. § 5971), where devisees are dead at the time of making the will or die thereafter, leaving issue, such issue take in the same manner as the devisee would have taken had he survived testator. This statute applies to a devise over to children as a class, whether their parent, the first taker, died before or after the will was made. Shumaker v. Pearson, 67 Ohio St. 330, 65 N. E. 1005. Statutes for the prevention of lapses apply where the legacy is given to a class. Illinois statute (2 Starr & C. Ann. St. 1896 [2d Ed.] p. 1433, par. 11), providing that whenever a devisee or legatee who is a child or grandchild of testator, dies before him, and no provision is made for such a contingency, his issue shall take, applies where the devise is "to my beloved children as their absolute property in fee simple, to be equally divided between them." Rudolph v. Rudolph, 207 Ill. 266, 69 N. E. 834. Will be presumed that testator made his will in view of the statute, and the burden is on plaintiff to show the contrary. Burden is not lifted by proof that legacies were prompted by personal regard, as where they were given to "my beloved children." Id. Under the California statutes, a legacy to a son who was dead at the time of the execution of the will, though believed by the testator to be alive, does not preclude the child of such son from claiming and obtaining the share of the estate to which he would have been entitled if the testator had died intestate. In re Ross' Estate, 140 Cal. 282, 73 Pac. 976.

17. Ballard v. Camplin, 161 Ind. 16, 67 N. E. 505. A provision to hold a share for the taker's issue in event of the former's death held to mean simply that it should not lapse by death. Denison v. Denison, 86 N. Y. Supp. 604. Will devised estate equally to children and provided that, if child died during minority and without descendants, its share should pass to the surviving children and the descendants of those who had died leaving descendants. Held that, upon the death of a child, his share vested absolutely in the other two, and was not subject to any further devolution under the will, they taking directly from testatrix, and hence, on the death of one of the other two during minority, his share descended to his heirs under the statute. In re Clark, 38 Misc. [N. Y.] 617. A devise to children, and if any are dead then "I give the share such deceased child would have taken to the uses of his or her will" and if such child has died intestate "I give the said share to the persons and for the estates they would have taken in the same had such child been living." Held, that the expressions "to the uses of his will" and "had such child died the owner of that share" have the same meaning, viz.: that the share of such deceased child should pass in the manner in which it would have passed had he been the

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Valid portions of the will will be allowed to stand and the invalid provisions alone cut off, where the two are distinct and separable, and injustice will not be done, nor testator's intentions subverted thereby;[20] but every estate dependent on a provision which fails, fails with it.[21]

owner of it at his death. This not affected by a further provision that if any of the devisees therein before named died during testator's life, "I give so much of his or her share as does not vest in his or her issue or husband or wife by the provisions of this will, to the persons and for the estates to whom and for which the residue of my estate is devised." The will referred to therein is that of testator. In re Sturgis' Estate, 205 Pa. 435.

18. A provision that the realty devised to one of several shall not be sold without the consent of the others, without a devise over or a declaration of forfeiture in case of sale without such consent, does not affect the fee title which passed by the devise. Felt v. Richard, 64 N. J. Eq. 16.

19. Executors were to found a widows' and orphans' home from certain income after the death of life tenants. Executors died before the life tenants. Held, the devise to the home was not contingent on its organization before the executors' death, and hence did not fail. Gidley v. Lovenberg [Tex. Civ. App.] 79 S. W. 834.

20. Loyd v. Loyd's Ex'r [Va.] 46 S. E. 687. Void bequest cut off. Van Driele v. Kotvis [Mich.] 97 N. W. 700. A trust to pay an annuity out of all the testator's estate, real and personal, and at the death of the annuitant to convey the estate to others, being void in California as to the real estate, is separable and the trust as to the personalty is valid and enforceable. In re Pichoir's Estate, 139 Cal. 694, 73 Pac. 604. Devise in trust to pay income to four sisters, on the death of either of two of them their share to go to the others, and on the death of either of the other two, her share to go to her children, "the issue of such children taking the part of any deceased parent" for life, and on the death of all such children, the principal to go to the grandchildren of such sisters, or their issue or legal representatives according to the laws of descent in fee. Held, that the gift of income to the grandchildren was void under the rule against perpetuities, there being a possibility that persons not the immediate issue or descendants of persons in being at the time of making the will would take, nor can it be supported on the ground that they take by inheritance and not purchase, since they have life estates only. The gift over of the trust fund is dependent upon the precedent provisions, and hence void also. The provisions relating to the time antecedent to the death of one of the last two sisters are valid. White v. Allen [Conn.] 56 Atl. 519. Where title vested in remaindermen but possession was postponed, and power of alienation was suspended for a longer period than allowed by law, the latter provision was segregated and the balance of the will enforced. Johnson's Trustee v. Johnson [Ky.] 79 S. W. 293. Where trust in its provision for termination on certain contingency was void as a perpetuity, held, that void portion could be severed and effect given to testator's intention until death of one of the beneficiaries, when it would terminate, and the property be divided among those entitled under the will to receive it. Loomer v. Loomer [Conn.] 57 Atl. 167. Though a gift to descendants of testator's grandchildren, in case his daughter should die leaving issue, is void under the rule against perpetuities, a gift to testator's other children in case the daughter died without leaving children, not being dependent thereon, is valid. Stone v. Bradlee, 183 Mass. 165, 66 N. E. 708. Where testator devised property in trust for his daughter for life, with limitations over after her death which were void, the estate of the daughter was not affected by the invalidity, and she, being sole heir at law and next of kin, took the absolute ownership of all the property, subject to the trust for her life. Schlereth v. Schlereth, 173 N. Y. 444, 66 N. E. 130. Where the only effect of taking out of a codicil an invalid provision suspending the power of alienation beyond the time allowed by law will be to accelerate the possession of the remainder so as to take effect upon testator's death instead of two years later, such invalid provision will be expunged, and the balance of the will allowed to stand. Smith v. Cheseborough, 176 N. Y. 317, 68 N. E. 625. Where one of two trusts created by a will is void for indefiniteness, the residue of the estate, after the valid trust has been carried out, goes to the residuary legatees. Trunkey v. Van Sant, 176 N. Y. 535, 68 N. E. 946. Where the devise was in trust to pay annuities during the lives of the two youngest children, a codicil which was void because it suspended power of alienation for the life of one of the elder children did not render the original trust void. Herzog v. Title Guaranty & T. Co., 177 N. Y. 86, 69 N. E. 283. Not where it will result in one child taking both under the will and under the statute. Brown v. Quintard, 177 N. Y. 75, 69 N. E. 225. Where a trust is part of a single scheme, the principal object of which cannot be carried out, the whole scheme falls, and no effect can be given to any part of it. Where trust for preservation of residuary estate and payment of income to named beneficiaries was void as suspending power of alienation, and testator provided only for disposition of one-fourth of the estate after the termination of the estate, the whole trust and scheme for the disposition of such residuary estate will be held invalid. Id. Where provision for trust for payment of mortgage on a share of the realty is void, and the enforcement of the balance of such trust without such payment would result in inequality of distribution, thus destroying testator's primary intent, the whole trust will fall. Dresser v. Travis, 39 Misc. [N. Y.] 358. If the primary provision is valid, invalid provisions will not invalidate the entire will. Mendel v. Levis, 40 Misc. [N. Y.] 271. Under Laws 1896, c. 547, where a testator directed an invalid accumulation of rents and profits, but declared that on the death of one of the sons leaving children, one-half of the es-

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Death of the life tenant before testator will not invalidate the gift over,[22] and a subsequent execution of a codicil without revoking the gift shows an intent that it should stand.[23]

(§ 5D) 14. *Residuary clauses, substitutions and property not effectually disposed of.*—It will not be presumed that testator intended partial intestacy, unless the language used compels such construction,[24] though if the question of testacy does not alter the disposition, it need not be determined.[25] To avoid partial intestacy, a residuary clause will not be restricted by needless implications,[26] but whatever may have been his intention, property not disposed of by the will passes

tate would vest in them, and on default to the other son, the invalidity of the accumulation did not invalidate the trust. United States Trust Co. v. Soher, 85 N. Y. Supp. 266. Provision creating a specified trust unlawfully suspending the power of alienation. Denison v. Denison, 86 N. Y. Supp. 604. An invalid fidei commissum does not invalidate the donation. After declaring that he had brought $6,500 in marriage and that he had neither ascendants nor descendants, the testator made his wife universal legatee of all his property. He declared it to be his desire that at her death what remained should be divided between his and her natural heirs equally, first deducting the above sum to be paid his natural heirs; held, that the legatee is not charged to preserve for and return a thing to third persons. Dufour v. Deresheid, 110 La. 344.

Though the will shows an intention that each of the devisees should share equally in testator's estate, it will not be held invalid merely because testator attempted to devise property in which he was only tenant by curtesy. Beetson v. Stoops, 86 N. Y. Supp. 332.

21. Clauses in a will providing for the disposition of a trust fund and legacies intended to be paid only from it are inoperative where the attempted revocation of the trust by the will is void. Kelley v. Snow [Mass.] 70 N. E. 89.

22, 23. Bequest to one for life with principal to others after her death valid, though first taker died before testator. Blakeslee v. Pardee [Conn.] 56 Atl. 503.

24. Burns' Rev. St. Ind. 1901, § 2737 provides that every devise in terms denoting testator's intention to devise his entire interest in all his real and personal property shall be construed to pass all of his estate in such property. Thompson v. Jamison, 31 Ind. App. 376, 68 N. E. 176. Presumption that testator intended to dispose of his entire property. Pate v. Bushong, 161 Ind 533, 69 N. E. 291; Buck v. Lincoln [Conn.] 56 Atl. 522; Mayes v. Karn, 24 Ky. L. R. 2110, 72 S. W. 1111. Presumption is one of fact only. Young v. Quimby, 98 Me. 167, 56 Atl. 656; Simmons v. Cabanne, 177 Mo. 336, 76 S. W. 618. A testator's family consisted of a wife and invalid daughter with no expectancy of issue. His will gave his wife a life estate in certain stocks and created an annuity out of real estate in her favor. A residuary clause gave the wife all property not otherwise disposed of which was less than $1,000.00 while the estate was valued at $16,000.00. Held, the wife took an absolute rather than a life estate. Oakes v. Massey, 87 N. Y. Supp. 1118; In re Espy's Estate, 207 Pa. 459; Shaner v. Wilson, 207 Pa. 550; Canfield v. Canfield, 118 Fed. 1; Lawrence v. Barber, 116 Wis. 294, 93 N. W. 30.

The will must be construed so as to prevent intestacy with reference to any portion of the decedent's estate, if that can be reasonably done. Durboraw v. Durboraw, 67 Kan. 139, 72 Pac. 566. Devise of "undivided one-third" to several held devise of one-third to each. Meiners v. Meiners [Mo.] 78 S. W. 795; Lewis v. Howe, 174 N. Y. 340, 66 N. E. 975, 1101; Jones v. Hand, 78 App. Div. [N. Y.] 56. Under a devise of property to a son for life, and upon his death to his children in fee, a grandchild of the son, being the only "child" surviving him, takes the property. Shaw v. English, 40 Misc. [N. Y.] 37; Ward v. Stanard, 81 N. Y. Supp. 906. Where testator left four children and divided his property into four equal parts, devising one less a certain sum to one child, and leaving the other parts undisposed of, held, such parts should go to his other three children, undiminished by the special provision applicable to the one. Brown v. Brown, 81 N. Y. Supp. 918. A power to sell "my said real estate not hereinbefore mentioned" construed, and "said," since testator had not mentioned any real estate but had made bequests of certain legacies, treated as superfluity. In re Levy, 41 Misc. [N. Y.] 68; In re Phillips' Estate, 205 Pa. 504; In re Vilsack's Estate [Pa.] 57 Atl. 32; Young Women's Christian Home v. French, 187 U. S. 401, 47 Law. Ed. 233. Devise in form a life estate, with remainder over, held to be really a fee in remaindermen, hence a substitution on death of one passed a fee direct. Newton v. Odom [S. C.] 45 S. E. 105.

25. Will created a trust for life of son and provided that at his death, any balance of the property remaining should belong absolutely to the son's issue, should any survive him, and if not, it should be disposed of according to the intestate laws. The son was testator's sole heir, and died without issue. Held that, treating the concluding clause as a declaration of intestacy, the property would pass to the son's estate; construed as a gift under the will, it was void. Under the statute against perpetuities, the same result would follow, and interpreted as a gift to the general heirs at law of testator at the time of his death, the result would also be the same, there being nothing to exclude the son from taking as an heir. Thomas v. Castle [Conn.] 56 Atl. 854.

26. A gift "of all the rest, residue and remainder" is not controlled by a subsequent clause stating that the property devised and bequeathed "is my separate prop-

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as intestate property.[27] A remainder after a life estate being void, the title to the property vests in the testator's heirs at law, subject to the life estate.[28] Heirs may take to let in after-born devisees.[29]

An invalid devise passes under the residuary clause if there be one, and if not, as intestate property.[30]

In a will of personal property, the general residuary clause carries whatever is not otherwise legally disposed of,[31] but this does not apply where the bequest is of a residue, and the first disposition fails.[32]

Upon the lapse of a legacy charged upon a devise, it inures to the benefit of the devisee.[33] Not so, however, where the legacy is excepted from the devise.[34]

erty and was the community property of my first wife and myself," so as to make other property pass as intestate. Granniss v. Center, 142 Cal. 1, 75 Pac. 324.

27. After-acquired property. Franck v. Franck, 24 Ky. L. R. 1790, 72 S. W. 275. The mere fact that a residuary clause is omitted does not justify the giving of the residue to some specific legatee on a forced construction. Should be distributed under intestate laws. Omission of residuary clause disposing of realty does not show intention to make pecuniary legacies a charge thereon. In re Espy's Estate, 207 Pa. 459. By statute undisposed of accumulations under a valid provision are sometimes given to the persons entitled to the next eventual estate. Under Laws 1896, c. 547, they go to daughter when personalty is given in trust, income to accumulate till death of her husband. Tobin v. Graf, 39 Misc. [N. Y.] 412.

28. Murray v. Miller, 85 App. Div. [N. Y.] 414. Where the remainder over was void under the rule against perpetuities the devises for life were sustained and the remainder held to pass after death of life tenant as intestate property. Buck v. Lincoln [Conn.] 56 Atl. 522.

29. Where land is devised to the testator's daughter-in-law for life, remainder to her grandchildren, in default of grandchildren in esse at the time of the execution of the will or at the death of the testator, the fee vests in the testator's heirs at law for the use of any grandchildren that might be thereafter born. Holton v. Jones, 133 N. C. 399, 45 S. E. 765.

30. Applied to invalid trust. Holmes v. Waller, 118 Wis. 409, 95 N. W. 380. A will bequeathed and devised to the executors in trust $100,000 of the residue, to give and distribute five years after his death "for such religious, charitable, or educational or other purposes as they may deem advisable," provided that no part of that sum should go to his wife or children. Held, this language shows an intention to have the money distributed for other than charitable uses, if executors see fit, and hence the gift is void, and the sum will go to the widow and children according to the laws of distribution, under another clause providing for the residue. Hyde's Ex'rs v. Hyde, 64 N. J. Eq. 6.

A residuary clause held not to include property previously devised. Holton v. Jones, 133 N. C. 399. A legacy which does not vest in the lifetime of the legatee lapses into the estate out of which it was to be paid, or passes over to some other named legatee or devisee. McLaughlin v. Penney, 65 Kan. 523, 70 Pac. 341.

31. In re Wooley, 78 App. Div. [N. Y.] 224.

Lapsed legacies pass under residuary clause. Dorsey v. Dodson, 203 Ill. 32, 67 N. E. 395.

A claim against the government for property used passes under the residuary clause in the absence of a provision governing its distribution. Does not descend to the heirs at law under the statute of distributions as a mere gratuity. Camp v. Vaughan, 119 Ga. 131.

A remainder after the expiration of a life estate in personalty, which is undisposed of, goes into the residuum of the estate, and if there is no residuary clause, descends under the laws governing intestacy. Where will gave to widow the income of the estate during her life and made no disposition of the residue or remainder thereof, such remainder is intestate property, and the widow is entitled to her statutory share thereof absolutely. Torrey v. Peabody, 97 Me. 104; Manning v. Lindsley [N. J. Eq.] 55 Atl. 1043. The fact that the residuary legatee is also the tenant for life does not change this rule. Id. If the bequest for life is in such terms as to show an intent that the life tenant should have no interest in the corpus of the estate, or anything but the interest, the residuary legacy will be held to give him authority to dispose of the corpus by will. Id.

32. That part of the residue of which the disposition fails will not accrue in augmentation of the remaining parts as a residue of a residue, but will descend as intestate property. In re Wooley, 78 App. Div. [N. Y.] 224. Under a direction to executors to sell the property, and, after paying certain legacies, "to divide all the rest, residue and remainder of said property" among certain persons, lapsed legacies should not be divided among such residuary legatees, but go to next of kin. Id. Legacy lapsed by death of beneficiary before testator, and there was no provision for happening of such contingency and nothing to show contrary intent. Dorsey v. Dodson, 203 Ill. 32, 67 N. E. 395. Where will directs property to be sold and the proceeds to be divided among several beneficiaries, and the legacy to one of them lapses, his portion of the proceeds of the sale will go to the heirs. Id.

33. A devise of property to a son, "at his death I leave to his daughter $5,000, the balance of his portion of my estate at his own entire disposal," daughter died before father, held, legacy a charge upon estate devised to legatee's father. Ward v. Stanard, 81 N. Y. Supp. 906.

34. Ward v. Stanard, 81 N. Y. Supp. 906.

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The words "rest, residue and remainder" of the property are sufficiently broad to include all property not otherwise disposed of,[35] but do not always do so.[36]

The word "balance" operates as a residuary clause.[37]

Specific legacies distinct from the residuary estate do not follow the disposition of the latter.[38]

A direction for falling of unexpended balances into a residuum after payment of legacies and annuities does not mean that the legatees take an estate in the residuum, but that it comprises what is left.[39] A residuum in specific property follows it.[40]

Substitutions.—"Instead of" shows an intent to substitute one provision for another.[41] When a testator declares that property is to go from one beneficiary to another and on certain terms, thence still to others, he has indicated that each of those named is preferred over his heirs or the other objects of his bounty.[42] A substitution of persons who take specifically and as general residuary legatees takes over both shares.[43]

Gifts freed from void limitations.—Where the remainder is sought to be charged with a void trust, the remainderman takes the fee,[44] and if the life tenant's heirs be remaindermen, the fee may fall on the life tenant.[45] Where a void accumulation is provided for, the property goes to those presumptively entitled to the next eventual estate.[46] Where a power of distribution created in a will is void

35. Kelley v. Snow [Mass.] 70 N. E. 89. After a devise of the residuary estate to named persons in trust for life and appointing the trustees, a subsequent clause giving to the same persons "all the rest" etc. to be divided equally between them, held not intended as a substitute of the prior clause. McKinlay v. Van Dusen, 76 App. Div. [N. Y.] 200.

36. Where the testator owned 15 acres of land on east side of Bennock Road and devised the eastern 5 acres to his wife for life with no disposition over, and then devised to his son "the residue of my land lying on the east side of the Bennock Road," held to mean the remaining 10 acres and on death of the wife, the 5 acres descended intestate. Young v. Quimby, 98 Me. 167.

37. Where a will gives pecuniary legacies, indicating no other fund for their payment, and there is no other personalty for their payment, and then directs a farm to be sold and "after paying all my debts, the balance to go to" a daughter except certain after-named legacies, the daughter takes as residuary legatee and all legacies are payable out of proceeds of farm. Lynch v. Spicer, 53 W. Va. 426.

38. Russell v. Hilton, 80 App. Div. [N. Y.] 178.

39. Brigham v. Peter Bent Brigham Hospital, 126 Fed. 796. "Unexpended balances" used in connection with legacies held to be residuary words and not to import a precedent gift and limitation over. Id.

40. Where a testator gave a specified part of specific property to a legatee for life and then gave the rest of the said specific property to other legatees absolutely, held, upon the death of the life tenant, his part of the said specified property passed to the other legatees of the rest of that specific property and not under a residuary clause. Musgrave v. Pope's Ex'rs [Va.] 45 S. E. 809.

41. Provision in codicil giving legatees income "instead of" principal, held to give them life estate only. Cruikshank v. Cruikshank, 39 Misc. [N. Y.] 401. Will provided for trust to pay income to daughter during her life and after her death for support of her children, the principal to be paid to them at maturity, and if no issue reached maturity, then the principal was to go equally to testator's remaining children. Codicil provided "This bequest I hereby amend, by giving to said issue the income of said fund, instead of the principal." Held, that a son of the daughter took only a life estate in the principal and testator's remaining children took the remainder. Id.

42. Jossey v. Brown [Ga.] 47 S. E. 350.

43. A testator devised his property to his wife for life, at her death certain designated property to go to certain designated nephews and nieces, then by another clause, he devised the residue of his estate to the said nephews and nieces, and by the next paragraph provided that if any of the said nephews or nieces should die before his wife, without children, the others should take the deceased's share or shares; held, this clause applied to the separate devises as well as to the residuary clause. Curtis v. Waldron, 81 App. Div. [N. Y.] 351.

44. Where by will a gift is made of a remainder in fee, and in the same will there follows language showing a clear intent to charge such remainder with a trust invalid under the rule against perpetuities, the donee takes such remainder in fee. Towle v. Doe, 97 Me. 427.

45. In case of invalidity of an attempted trust to which an estate for life, with absolute power of appointment and in default thereof with remainder to the life tenant's heirs, is subject, the life tenant takes the fee. Dodsworth v. Dam, 88 Misc. [N. Y.] 684.

46. A bequest to legatees, the income up to a certain sum to be paid them and the surplus to be paid on their death to per-

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because executed contrary to provision contained in the will creating it, the property passes under the first will.[47]

(§ 5) *E. Provisions respecting administration, management, control, disposal.*—Any language adopted in a will which expressly or by fair implication clothes a given party with the authority and duties of an executor will be held equivalent to an appointment.[48] The power to appoint substitute executors is not necessarily exhausted by the first exercise.[49]

Unless the will otherwise provides, the usual rules as to the payment of debts, taxes, repairs and expenses, and the part of the estate primarily liable therefor, apply.[50]

A direction to pay legacies as soon as practicable justifies a postponement when necessary for the best interests of the estate.[51] The estate should, if possible, be administered so as to carry out testator's purposes.[52] A power of sale will be implied when necessary to carry out the provisions of the will,[53] as will other necessary powers.[54]

sons named, held, this latter being a void accumulation, goes to the persons presumptively entitled to the next eventual estate. Reeves v. Snook, 86 App. Div. [N. Y.] 303.

47. In the original will and codicil, it was provided if the wife made no will the children were to be equalized and a grandchild was to receive one-half of one share Ketchin v. Rion [S. C.] 47 S. E. 376.

48. Powers granted to one held not to show intent to constitute him executor. In re Hill's Estate, 102 Mo. App. 617, 77 S. W. 110; Strode v. Bierman, 102 Mo. App. 617, 77 S. W. 110.

49. A power "in case the trustees die or refuse the trust to appoint a successor or successors" is not exhausted by a single appointment. Burghard v. Barrett's Trustee, 24 Ky. L. R. 1313, 71 S. W. 500.

50. See Estates of Decedents, § 6, 1 Curr. Law, p. 1101, et seq. A will providing that the testator's children should be supported and educated from the surplus income of his estate until they arrived at a certain age, up to which time the executors should advance to such children such sums of money as would benefit or promote their happiness or comfort, such advances to be charged against them, held, only the amount advanced for happiness and comfort should be treated as advances. Thorn v. De Breteuil, 86 App. Div. [N. Y.] 405. Under a clause allowing the executors to set aside a fund for the use of the testator's wife and son and pay them such sums out of it as the executors deem fit, the setting aside of such sum and designation of the wife as sole beneficiary thereof does not entitle her to the whole fund. Russell v. Hilton, 80 App. Div. [N. Y.] 778.

A devise in trust "to pay such proportions * * * to such persons as the trustees may ascertain and a majority shall agree" to have been the testatrix's expressed wish, or as she might hereafter formally designate, is void for uncertainty. Trunkey v. Van Sant, 83 App. Div. [N. Y.] 272.

51. An executor was directed to pay legacies out of the income of land "as soon as practicable." If the legacies had all been paid out of the first year's crop, money would have to be borrowed to operate the lands the following year. Held, the executor was justified in postponing payment of the legacies. Henry v. Henderson [Miss.] 33 So. 960. Refers to the exigencies of the settlement of the estate, and does not confer on them arbitrary power to delay payment. Savin v. Webb, 96 Md. 504.

52. The estate should be administered so as to carry out the purposes of the testator, if consistent with the law, as they appear from the will, interpreted as a whole and in the light of the circumstances in which it was made. In a direction that the "trustee" pay a certain claim, the word "trustee" held inadvertently used for "executor," the same person being executor and trustee. In re Martin, 25 R. I. 1. A will provided "First, after all my debts are paid, I give and bequeath to my son all my real estate; second, I give to my wife all my personal property of any and all kinds of which I may die seized." Held, that testator's intention was that the debts, of which the principal one was a mortgage, held by the son on the lands devised to him, should be paid by the son. Wiggins v. Wiggins [N. J. Eq.] 56 Atl. 148.

53. Where a will gave property to executors to invest until the legatees each arrived at the age of 25 years, when it was to be paid them, held, the executors had a power of sale. Mendel v. Lewis, 40 Misc. [N. Y.] 271. Will construed and executor held to have power of sale where a subsequent clause provided that on a request of a majority of the sons the executors should sell any portion, the only effect of such was that if the executors disagreed as to sale, a majority of the sons might compel them to act. Nichols v. Nichols, 86 N. Y. Supp. 719.

54. Where a will devised unequal annuities to two sons, and a legacy to be paid each when he attained majority, the trustees should deduct from each year's income an amount which with interest would produce the legacy at the appointed time. United States Trust Co. v. Soher, 85 N. Y. Supp. 266.

A power of sale given to executors for purpose of distribution among the remaindermen after termination of the life estate does not empower a sale before the death of the life tenant. Ryan v. Dodds [N. J. Eq.] 56 Atl. 131. Testatrix gave her husband an estate for life in all her property and at his death directed it to be sold and the

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Whether powers conferred on trustees are discretionary and therefore personal or whether they are attached to the office is a question of intention, to be ascertained from a fair construction of the whole will and the nature and objects of the trust.[55]

Power to manage the estate includes power to make necessary improvements.[56] Provisions in regard to appraisement and the order in which the property is to be sold must be followed.[57] A direction in the will of a testator that his trade should be continued is valid, and the duty being imposed upon the executors, they become trustees.[58]

Where a testator directs property to be sold without expressly vesting the power in any one, and the proceeds of the sale are made a trust fund or are to be distributed by the executors, the power to sell is vested by implication in the executors.[59]

Authority to sell rented property upon certain notice to the tenant does not prohibit a sale to him.[60] Discretion as to administration and government of a charity left to the executors is binding on it.[61]

(§ 5) *F. Abatement, ademption, satisfaction.*—The doctrine of ademption only applies to specific legacies.[62]

An ademption by acts of the testator occurs only when he gives in his lifetime to a legatee what he had left him by will,[63] or where, before his death, he so deals

proceeds divided. She further gave the executor "full power to do all that is needed to the full execution thereof, to sell and convey, by deed or otherwise, real and personal property; to make all payments, divisions and dispositions herein provided." Held, that the power of sale was given merely for the purpose of distribution after the husband's death and did not authorize a sale before that time. Id.

A provision authorizing trustees "to sell and convey" property does not give them authority to mortgage (Potter v. Hodgman, 81 App. Div. [N. Y.] 233), or exchange it under a power to sell either for cash or part on bond and mortgage (Huber v. Case, 87 N. Y. Supp. 663).

55. Where testator devised property which he owned separately to trustees to invest and manage as though it were their own, and that which he owned jointly with his son to him as trustee with the same powers, the share of testator's estate in the proceeds of any sale of the joint property to go to the first named trustees, the power conferred on the son was held not a personal one, but one attached to the office of trustee. Kennard v. Bernard [Md.] 56 Atl. 793.

56. Where a will gave an executor power to manage the residuary estate for benefit of nephews until the youngest became of age, he was justified in building a gin house out of one year's crop without order of the court. Henry v. Henderson [Miss.] 33 So. 960.

57. Testator authorized executors, who were testator's sons, to sell a coal vein underlying a certain farm, and provided that when the coal was sold, the farm should be appraised, and that the executors might then take the farm if they desired, upon paying the other children their proportional shares, which were charged upon the land. Upon failure to take the farm they were authorized to sell it and distribute the proceeds. Held, that they had no authority to sell to a railroad a right of way through the farm before a sale of the coal and an appraisement as provided for. McClane v. McClane, 207 Pa. 465.

58. Thorn v. De Breteuil, 86 App. Div. [N. Y.] 405. Beneficiaries have no power to object to the continuance of the business and require an immediate division of the trust fund. Id.

59. Will construed to contemplate a sale of realty, if necessary, in 20 years, with implied power of sale in executors. Bedford v. Bedford, 110 Tenn. 204, 75 S. W. 1017. Where the will directs a sale of real estate as a part of the settlement of the estate, the implication is that testator intended the executor to make the sale. Lawrence v. Barber, 116 Wis. 294, 93 N. W. 30.

60. A will gave the executor authority to sell rented property and to settle her estate as soon as convenient, and directed that three months' notice should be given the tenant. Held, this did not prohibit a sale to the tenant. Hanbest v. Grayson, 206 Pa. 59.

61. A devise for the establishment of a college, the executors of the will "to devise and promulgate such rules and regulations as they shall deem proper for the government of the institution, and which shall be carried out and be obligatory" as though set out in the will, held, rules and regulations so drawn are binding upon the trustees of the college. Clayton v. Hallett, 30 Colo. 231, 70 Pac. 429. Where a will provided for the establishment of the college under the executors' direction within ten years of the testator's death, it to be for the benefit of a city, held it was the intention of the testator that the city should not be called upon to accept or execute the trust until after the establishment of the college by the executors. Id.

62. Rogers v. Rogers [S. C.] 45 S. E. 176.

63. Connecticut Trust & S. D. Co. v. Chase, 75 Conn. 683. Where a parent gives a legacy

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with the subject of the bequest as to render it impossible to effect the transfer or payment which the will directs.[64] A mere change of form will not work an ademption.[65]

Parol evidence is admissible to show whether or not testator intended a subsequent gift as an ademption of the legacy,[66] but not to show that the testator intended that a benefit accruing to him by the ademption should pass to the legatees in lieu of the claims adeemed.[67]

Abatement.—General legacies abate before specific ones.[68]

A legacy given in consideration of the relinquishment by the legatee of some subsisting right or interest is entitled to priority over general legacies, which are mere bounties, though the value of the legacy greatly exceeds the value of the rights relinquished.[69]

to a child without stating any particular object for which it is given, it will be regarded as a portion and any settlement by way of a portion, or any advancement thereafter made to such child by testator during his lifetime will be regarded as an ademption of the legacy either pro tanto or in full as the case may be. Legacies to be paid by trustees to a son on his going into business and to daughters on their marriages held adeemed by gifts made to them by testator during her lifetime at such times. In re Weiss, 39 Misc. [N. Y.] 71. It is only where the testator stands in loco parentis that a subsequent gift will operate as an ademption. A subsequent gift to a nephew legatee of a sum equal to the legacy is not an ademption of the legacy. Wilson v. Smith, 117 Fed. 707. Indorsement of a note to a legatee, without delivery, the note being left among testator's papers, does not constitute ademption of a bequest of the note. Waters v. Hatch [Mo.] 79 S. W. 916. The giving of a security deed acts only as a partial ademption. Carr v. Berry, 116 Ga. 372.

64. Connecticut Trust & S. D. Co. v. Chase, 75 Conn. 683. When lost, disposed of, or so substantially changed or altered as not to exist in specie when the will takes effect. A legacy of all claims of testator against his father and all interest in his father's estate is adeemed by testator's collection of the same during his lifetime by taking a bond and mortgage on land sold by order of court to pay the father's debts. Rogers v. Rogers [S. C.] 45 S. E. 176. A devise of land to a church on condition that it build a church and parsonage thereon within a certain time is revoked by a conveyance of the land by testatrix before her death, since the performance of the conditions is thereby rendered impossible. Connecticut Trust & S. D. Co. v. Chase, 75 Conn. 683. Ky. St. § 2068, providing that the conversion of money or property devised to one of testator's heirs into other property or thing, with or without testator's consent shall not be an ademption unless a contrary intention appears from the will, or by parol or other evidence, applies only when devisee is an heir of testator. Franck v. Franck, 24 Ky. L. R. 1790, 72 S. W. 275. A deed executed on the day of the execution of the will renders inoperative a devise of the same land to the grantee subject to a charge for the payment of a legacy. Marshall v. Hartzfelt [Mo. App.] 71 S. W. 1061.

65. Sale of property and taking note and mortgage as security for purchase price does not adeem legacies to be paid out of the proceeds of its sale, where a part of such purchase price is still unpaid at testator's death. Connecticut Trust & S. D. Co. v. Chase, 75 Conn. 683. An exchange by testatrix of certain bank stock bequeathed by her for stock in another bank formed by the reorganization and consolidation of four banks, of which the bank issuing the original stock was one, does not work an ademption of the legacy. Transaction an exchange and not a sale, and a small additional cash payment, made to equalize values, did not change its character. In re Pierce, 25 R. I. 34. Where, after the devise, the testator executed a lease of the land with redeemable ground rent and by subsequent codicil bequeathed the ground rent to the devisees, a redemption of the ground rent during testator's life did not operate as an ademption of the legacy where a check for the redemption money was enclosed in a letter by testator directing payment to the legatees. Joynes v. Hamilton, 57 Atl. 25. Exchange of bonds for others in same company does not work ademption. Identity required is substantial identity only. Blair v. Scribner [N. J. Eq.] 57 Atl. 318. A bequest of stocks and bonds of a particular corporation held not adeemed by a contract for its conversion into a note of the company, the conversion not yet having taken place, and the time when it should take place not having been fixed. Intention controls. In re Frahm's Estate, 120 Iowa, 85, 94 N. W. 444, Roodewig v. Steffen, 120 Iowa, 85, 94 N. W. 444.

66. Smith v. Smith, 117 Fed. 707.

67. Rogers v. Rogers [S. C.] 45 S. E. 176.

68. In California, a devise of specific property is not exempt from paying its proportionate share of the amount to which omitted issue are entitled. In re Ross' Estate, 140 Cal. 282, 73 Pac. 976. A legacy of the amount due on a bond and mortgage was given an adopted son by a widow, who gave cash in bank to certain others. Held, legacy to adopted son exempt from abatement, debts to be paid out of cash in bank. In re Brown, 87 N. Y. Supp. 247.

69. Legacy given in lieu of dower. In re Woodbury's Estate, 40 Misc. [N. Y.] 143. A bequest because of affection "and also in full satisfaction of any and all claims," such bequest being more than sufficient to settle the claim, is subject to the payment of debts of the estate. In re Thayer's Estate [Cal.] 76 Pac. 41.

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Where realty and personalty are specifically given, both should abate ratably for the payment of debts, unless the debts were expressly or impliedly charged on the realty.[70]

Satisfaction of debts by legacies.—Where one being indebted to a legatee gives him by will a sum as great or greater than the debt, it will be construed as a satisfaction, though nothing is said in the will in regard to the matter.[71] Where it is agreed that an existing indebtedness shall be paid by some benefit bestowed in the debtor's will, a testamentary disposition subsequently made in favor of the creditor will be deemed to be intended as a satisfaction.[72] Deficiency of assets may also require a legacy to be construed as a satisfaction.[73] A charge may be extinguished and a legacy pass free from it analogous to an ademption.[74]

(§ 5) *G. Bills for construction.*—The special and equitable jurisdiction to construe wills is simply an incident of the general jurisdiction over trusts.[75] Hence, a court of equity will never entertain a suit brought solely for the purpose of interpreting the provisions of a will, unless some equitable relief is sought,[76] and will never interpret a will which deals wholly with and disposes of purely legal estates and interests, and makes no attempt to create any trust relations with respect to the property donated.[77] Questions concerning the rights of persons in case of the happening of certain prospective events will not be considered,[78] nor will clauses having no bearing on the case before the court,[79] nor can such suits be

70. Dauel v. Arnold, 201 Ill. 570, 66 N. E. 846.

71. Alerding v. Allison, 31 Ind. App. 397, 68 N. E. 185.

72. Creditor may then have election, but cannot take legacy and then enforce his claim. Alerding v. Allison, 31 Ind. App. 397, 68 N. E. 185.

73. Legacy held to have been intended as a satisfaction of a claim under an oral contract to pay for services by will, though amount was less than claimed, where it appeared that assets were insufficient to pay the sum claimed and the legacies. Alerding v. Allison, 31 Ind. App. 397, 68 N. E. 185.

74. After a liquidation of the partnership by testator, whereby he assumed part of the partnership debt, held, there was nothing due him from the firm which could be deducted from a legacy charged with whatever was due testator from the firm. Howe v. Howe, 184 Mass. 34, 67 N. E. 639.

75, 76. Hughes v. Hughes, 30 Ind. App. 591, 66 N. E. 763. Will not construe for sole purpose of giving counsel and advice to parties, but only for purpose of giving directions to trustees, etc., under the will. Hoagland v. Cooper [N. J. Eq.] 56 Atl. 705. In a suit against legatees to construe a will, in which it was held that some of defendants took no interest thereunder, an injunction restraining defendants from bringing suits against the executors for their legacies denied. Parties entitled to legacies may sue and improbable that others will. Tiffany v. Emmett, 24 R. I. 411.

77. Hughes v. Hughes, 30 Ind. App. 591, 66 N. E. 763. Has no jurisdiction to entertain a bill filed by a beneficiary for the purpose of determining whether or not he has a right to sell the property devised to him. Complainant cannot vest court with jurisdiction by himself creating necessity for construction. Mansfield v. Mansfield, 203 Ill. 92, 67 N. E. 497. Where no trust is created, neither the executor nor the heirs or devisees, who claim only a legal title in the estate, will be permitted to come into equity to obtain a judicial construction of the provisions of a will, but will be referred to their remedies at law. Anderson v. Anderson [Neb.] 96 N. W. 276. Bill cannot be maintained by a beneficiary named in two clauses of the will for the sole purpose of having the court declare that the first clause is abrogated by the second, the means of forming a correct legal judgment being patent on the instrument. McKinlay v. Van Dusen, 76 App. Div. [N. Y.] 200. A will devised to a niece premises for life, fee to her issue or if she died without issue, it was further limited. Executors authorized to take charge of property not directly devised took charge of this. The niece sued them in equity. Held, equity had jurisdiction, for if the executors were usurping the duties of testamentary trustees under an erroneous construction of the will, the construction was purely a question of law and could be determined by the court in its equitable capacity. Rooney v. Bodkin, 87 N. Y. Supp. 800.

78. Hall v. Cogswell, 183 Mass. 521, 67 N. E. 644. It is only when the executor is under a present necessity of acting, or where he has reason to believe that he will soon be called upon to act under a doubtful provision, that he is entitled to instructions. Complaint alleging that defendants claim that a duty and trust is imposed on complainant as executrix to sell property and to keep buildings insured and in good repair, and that she is unable to determine her duties as executrix, held sufficient to show present duty and grounds for construction. Hughes v. Hughes, 30 Ind. App. 591, 66 N. E. 763.

79. Davis v. Davis, 86 App. Div. [N. Y.] 401. On a bill by executors for a construction of the will, the court will not direct any disposition of the realty where the executors are not charged with any trust or

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maintained by any person, executor or otherwise, unless the construction may affect his rights in person or in property or his duties under the will as executor, trustee or otherwise.[80] If the court has acquired jurisdiction to construe a will creating a trust, it will retain the case for the purpose of construing other provisions of the same will.[81]

Costs in such cases are generally payable out of the estate when the suit is beneficial to it,[82] and in some states include attorney's fees.[83]

On a bill to construe a will, legatees and distributees directly interested in the provisions to be construed are necessary parties,[84] and a decree that remainder over to grandchildren is contingent is binding both on grandchildren made parties and those subsequently born.[85]

The power of the various courts to entertain bills for the construction of wills is fixed by statute and varies in the different states,[86] as does the mode of contesting the validity of a bequest,[87] and the right to appeal,[88] and the procedure thereon.[89]

power in relation thereto. Kidder's Ex'rs v. Kidder [N. J. Eq.] 56 Atl. 154.

80. Under Me. Rev. St. c. 77, § 6. Executor held not to be entitled to construction. Burgess v. Shepherd, 97 Me. 522. Clause devising land not construed on bill for construction by administrator, in absence of showing that he will be unable to settle estate without resorting to realty. Drake v. True [N. H.] 56 Atl. 749. An executor of an executor cannot maintain an action for the construction of the will of the first testator, unless such construction is necessary to enable him to discharge the duties of his office. Has legal capacity to sue. Leggett v. Stevens, 77 App. Div. [N. Y.] 612. The representatives of a deceased legatee may maintain an action for a construction of the will of decedent's ancestor to determine conflicting claims to the unexpended balance of the legacy. Leggett v. Stevens, 77 App. Div. [N. Y.] 612. An action for the construction of a will may be maintained by one both in his individual and representative capacity, though his individual interest calls for a construction which as a representative he must resist. Complaint sufficient. Hughes v. Hughes, 30 Ind. App. 591, 66 N. E. 763.

81. Orr v. Yates [Ill.] 70 N. E. 731.

Sufficiency of complaint: A notice of application for interpretation of a particular provision relating to realty is sufficient, though describing land not mentioned in the will, but actually owned by testator, the description in the will being of property not owned by him. Woodard v. Norris [Iowa] 91 N. W. 1064. Complaint in action to construe held to state a cause of action. Hallock v. Hallock, 79 App. Div. [N. Y.] 508.

82. In suit instituted by executor and beneficial to estate. Tiffany v. Emmet, 24 R. I. 411. In Wisconsin, for costs of appeal by legatee from judgment construing will. In re Stuart's Will, 115 Wis. 294, 91 N. W. 688. When executors would inevitably have had to resort to the court for aid in construing a will, the estate should bear the costs of litigation between claimants in which that construction is ascertained. Allison v. Allison's Ex'rs, 110 Va. 537, 44 S. E. 904. A statute allowing payment of attorney's fees out of the estate incurred in construing the will does not allow them for litigation concerning the identity of the legatees. Code, § 3415, authorizing payment out of the estate of attorney's fees incurred in construing a will, where a will left property to the testator's nieces, an unsuccessful contest by the heir of a deceased niece to have the will construed as including him does not authorize the payment to him of attorney's fees incurred. In re Nicholson's Will [Iowa] 99 N. W. 300.

83. In New Jersey, counsel on both sides are entitled to a reasonable fee and to taxation of costs out of the estate. Harris v. Keasbey [N. J. Eq.] 53 Atl. 555.

84. Under Bates' Ann. St. Ohio, §§ 6198, 6202, 5963. Stevens v. Smith [C. C. A.] 126 Fed. 706. Where, in an action to construe a will, the issue of validity was presented and involved the rights of grandchildren of the testator, such grandchildren were necessary parties. Gaddess v. Norris' Ex'rs [Va.] 46 S. E. 905.

85. Made parties represent the class. Thompson v. Adams, 205 Ill. 552, 69 N. E. 1.

86. In Nebraska, the county court has jurisdiction to construe wills for purpose of administration and for the benefit of the executor alone; such construction will not affect rights of adverse claimants under will. Andersen v. Andersen [Neb.] 96 N. W. 276. Has exclusive jurisdiction of an action by the representative for a construction of the will to enable him to administer the estate properly. Const. art. 6, § 16, does not prohibit construction for such purpose, nor does such suit adjudicate any rights between adverse claimants under a devise or persons claiming adversely to the estate. Youngson v. Bond [Neb.] 95 N. W. 700.

In New York, where the action is to charge the payment of the debts of the widow against the husband's estate, which involves a construction of the will, the supreme court has jurisdiction. Hallock v. Hallock, 79 App. Div. [N. Y.] 508.

In Washington, the superior court has inherent power to construe wills to determine identity of legatee, though raised on settlement of the final accounts of the executor. Reformed Presbyterian Church of North America, General Synod v. McMillan, 31 Wash. 643, 72 Pac. 502.

87. In West Virginia, the mode of contesting the validity of a bequest is by bill to construe and expound the will. Cannot be raised by bill to contest validity of the

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§ 6. *Validity, operation and effect in general.*—There is a conflict of authority as to whether the law in force when the will was executed,[90] or that in force at the time of testator's death, controls.[91]

The law of the testator's domicile governs the construction and validity of a disposition of personalty,[92] and that of the situs a disposition of realty.[93]

Conditions in a will manifestly intended to bring about a separation between husband and wife, or a divorce, are void as against public policy,[94] but provisions for the wife in case of the happening of such contingencies are not.[95] Conditions attempting to incite murder are also void.[96]

A will is not conditional which merely states the motive for making it, unless it shows an intent that it shall become operative only on the happening of a certain contingency.[97]

Future limitations may be made by way of executory devise.[98]

will. Ward v. Brown, 53 W. Va. 227. The mode of contesting the validity of a bequest is by a bill to construe and expound the will, and not by a bill to contest its validity. Ward v. Brown, 53 W. Va. 227.

88. **In New York,** executors as such cannot appeal from a judgment of the appellate division construing a will in a controversy submitted by them and all parties interested. Isham v. New York Ass'n for Improving Condition of Poor, 177 N. Y. 218, 69 N. E. 367.

In North Carolina, in a suit to construe a will, a refusal to order a reference for an account of advancements before construing the will is appealable. Lee v. Baird, 134 N. C. 410.

89. Where the court found facts in a suit to construe a will as stated in a deposition, and no issue was made as to facts on appeal, the court, on appeal, properly considered the evidence in the deposition in construing the will. Lee v. Baird, 134 N. C. 410.

90. The law in force at the time of the making of the will controls. R. I. Gen. Laws 1896, c. 203, giving children and issue of children the right to share, where omitted by accident or mistake, does not apply to a will executed prior to Feb. 1, 1896. Roach v. Roach [R. I.] 56 Atl. 684. Under a will made in 1848, words of desire, recommendation and confidence were held to reduce the estate to life with power of appointment. In re Lisle's Estate, 22 Pa. Super. Ct. 262.

91. The statute in force at the time of testator's death governs the validity of the will. As to creation of trusts, etc. Coleman v. O'Leary's Ex'rs, 24 Ky. L. R. 1248, 70 S. W. 1068.

92. As to accumulations of income. Hussey v. Sargent, 25 Ky. L. R. 315, 75 S. W. 211. Applied where testator disposed of personalty by will under power. Ward v. Stanard, 81 N. Y. Supp. 906.

93. Rights of Notherheurecht reserved by the Swiss law to heirs can receive no recognition. In re Barandon's Estate, 84 N. Y. Supp. 937.

94, 95. Ellis v. Birkhead, 30 Tex. Civ. App. 529, 71 S. W. 31. A devise in trust to terminate "in the event my daughter be divorced from her * * * husband" is not void as against public policy, as tending to incite divorce, the will reciting that testator's intention was to secure a sustenance to the daughter against business vicissitudes and the improvidence of her husband. Extrinsic evidence to show that testator was opposed to the marriage for the purpose of showing an intent to incite divorce is not admissible. Id.

Note: As to the validity of the devise, the court cited Wright v. Mayer, 62 N. Y. S. 610; In re Haight's Will, 64 N. Y. S. 1029; O'Brien v. Barkley, 28 N. Y. S. 1049; Hawke v. Euyart [Neb.] 46 N. W. 442, 27 Am. St. R. 391; Thayer v. Spear, 58 Vt. 327; Ransdell v. Boston, 50 N. E. 111, and Born v. Horstmann, 80 Cal. 452, 22 Pac. 169.

96. A will giving a wife the income of a trust estate, the corpus of the estate to go to her on the death of her husband, if she survives him, is not void as against public policy in that it attempts to incite murder. Ellis v. Birkhead, 30 Tex. Civ. App. 529, 71 S. W. 31.

97. A will made in contemplation of a journey and beginning, "Realizing the uncertainty of life at all times and the dangers incident to travel," and then disposing of the property, is a valid testamentary disposition, though testator did not die until after return. In re Redhead's Estate [Miss.] 35 So. 761. "I am going on a journey and may not ever return, and if I do not this is my last request," is a condition precedent to the operation of the writing as a will. On proof that the writer died after return from the "journey" the writing was properly rejected. Eaton v. Brown, 20 App. D. C. 453. A holographic will beginning, "I am going on a journey and may not ever return. And if I do not, this is my last request," and ending, "All I have is my own hard earnings and I propose to leave it to whom I please," is not conditional. Eaton v. Brown, 24 Sup. Ct. 487.

98. **Illustrations:** A limitation in a will providing that if the devisee should die without heirs the estate should revert back to the next of kin is a valid executory devise. May v. Lewis, 132 N. C. 115. In a devise for life with remainder to children share and share alike, the children of a deceased child to take the share of the parent, all the children take by way of executory devise. Rutledge v. Fishburne, 66 S. C. 155. A gift for life with remainder over to children of the life tenant, and in the absence of children to brothers and sisters, creates an executory devise in the event of the tenant's death without children, to his brothers and sisters in fee. Springs v. Scott, 132 N. C. 548

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WITNESSES.

§ 1. Attendance and Fees (2163).
§ 2. Capacity and Competency of Witnesses in General (2164).
§ 3. Disqualification on Ground of Interest (2168).
§ 4. Disqualification on Death or Incompetency of Party to Communication or Transaction (2169).
§ 5. Disqualification on Account of Privileged Nature of Communication (2176).
A. Attorney and Client (2176).
B. Physician and Patient (2178).
C. Miscellaneous Relations (2179).
§ 6. Credibility, Impeachment, and Corroboration of Witnesses (2179).
A. Credibility in General (2179).
B. Character and Conduct of Witnesses (2182).
1. In General (2182).
2. Accusation and Conviction of Crime (2184).
3. Competency of Evidence as to Reputation for Veracity (2185).
4. Examination of Impeaching Witness (2186).
C. Interest and Bias of Witness (2186).
D. Proof of Previous Contradictory Statements (2187).
E. Corroboration and Sustentation of Witness (2192).
§ 7. Privilege of Witnesses (2193).

§ 1. *Attendance and fees. The subpoena.*—Whether a subpoena will issue in a given case rests in the discretion of the court.[1] United States commissioners must conform to state practice in the issuance of subpoenas.[2] Notaries cannot issue subpoenas.[3]

A witness duly served with subpoena refusing to attend or give testimony is punishable as for contempt.[4] A court cannot compel the attendance of a nonresident of the state by attachment where served with a subpoena while temporarily within the state.[5]

Subpoena duces tecum will issue on the proper showing,[6] and in a proper case.[7] An attorney may be required to produce documents of his client which the client could have been required to produce.[8]

1. The court, in the midst of a trial, may refuse to issue a subpoena for a distant witness. If his testimony is important, a postponement should be asked until the witness can be brought in. Godwin v. State [Tex. Cr. App.] 73 S. W. 804. It is not an abuse of discretion to refuse to direct issue of subpoenas to witnesses to testify on motion for change of venue. State v. Champoux [Wash.] 74 Pac. 557. In Louisiana, the summons of a witness from another parish is not a matter of right, but is within the discretion of the court on a showing as to what is to be proved by the witness. State v. Nix, 111 La. 812. Where parties were put under the rule and a list of witnesses for each side furnished opposing counsel, it was not an abuse of discretion to refuse to allow a witness subpoenaed on the second day to testify to facts fully testified to where the evidence was nearly all in and no good reason given for omission from lists. Crenshaw v. Gardner, 25 Ky. L. R. 506, 76 S. W. 26.

2. United States commissioners in New York have no power to compel the attendance of a witness by a subpoena issued by him at the instance of a defendant and served outside of the county where the hearing takes place, unless an order therefor is obtained from a Federal court or judge in conformity to the state practice. United States v. Beavers, 125 Fed. 778. The bankrupt act allows courts having charge of the administration of the bankrupt's estate to require examination of witnesses in other districts before commissioners who may compel attendance by proper process as in other cases. In re Williams, 123 Fed. 321.

3. Burns v. Superior Court of City & County of San Francisco, 140 Cal. 1, 73 Pac. 597. A notary authorized to take depositions has no power to issue a subpoena duces tecum. Dancel v. Goodyear Shoe Machinery Co., 128 Fed. 753. See, also, Depositions, 1 Curr. Law, p. 917.

4. Burns v. Superior Court of City & County of San Francisco, 140 Cal. 1, 73 Pac. 597.

5. State v. Kennan [Wash.] 74 Pac. 381.

6. Bentley v. People, 104 Ill. App. 353. A Federal court has power to issue a subpoena duces tecum. Dancel v. Goodyear Shoe Machinery Co., 128 Fed. 753. A subpoena duces tecum will not be issued by the clerk as of course, but only by the court on proper showing. Id. The mere allegation, in an application for a subpoena duces tecum, that the evidence "is material and necessary for use in said suit," is not sufficient to warrant the issue. Id.

7. It will not issue to require correspondence of seller of goods with third persons after their rejection by buyer. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162. An order for the delivery to commissioners of books of a concern carrying on business is improper where they are to be used by a witness in giving his testimony and not intended for inspection or examination. In re Randall, 87 App. Div. [N. Y.] 245. A defendant in an action in another state cannot have a subpoena set aside on the ground that no notice was given other defendants. In re Shawmut Min. Co., 87 N. Y. Supp. 1059. See, also, Discovery and Inspection, 1 Curr. Law, p. 930; Evidence, 1 Curr. Law, p. 1136.

8. Jones v. Reilly, 174 N. Y. 97, 66 N. E. 649.

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The laws of Oregon allow the transmission of a subpoena by telegraph.[9]

A court is without power to order a corporation to produce an officer beyond the jurisdiction as a witness, the corporation itself having no power and being under no legal duty to produce him.[10]

Fees and mileage.—The witness is not required to obey a subpoena unless mileage and one day's attendance are paid, if not waived.[11] A witness should be allowed fees for each case in which he testifies,[12] but is not entitled to mileage for going and returning to and from his home each day during the time the case is on call.[13] To entitle the witness to fees, he must be properly served[14] with a legal subpoena,[15] or appear by request.[16] Witnesses cannot appeal from an order disallowing fees.[17]

§ 2. *Capacity and competency of witnesses in general.*—A witness is not to be impeached by his intelligence or for the lack of it,[18] if he understands the nature of an oath,[19] nor, in most states, by disbelief in a Supreme Being or a future state of rewards and punishments.[20]

The right to examine a witness as to his competency may be waived.[21]

Children.—The competency of a child as a witness is a matter within the sound discretion of the trial judge.[22] Intelligence, ability to comprehend the meaning of an oath and the moral obligation to tell the truth, and not age, are the tests by which the competency of a child is determined.[23] Children may be ren-

9. B. & C. Comp. St. § 4762. Egan v. Finney, 42 Or. 599, 72 Pac. 133. It is apparent that a subpoena transmitted by telegraph had not been properly served where the copy had no return endorsed thereon and the sheriff's bill was for fewer words than those contained in the subpoena. Id.

10. Central Grain & Stock Exch. v. Board of Trade of Chicago [C. C. A.] 125 Fed. 463.

11. A witness in a patent contest case is not punishable for contempt for failure to obey subpoena unless traveling expenses and witness fee for one day are tendered at the time of service, unless expressly waived. Failure to object that no tender was made not an implied waiver. In re Boeshore, 125 Fed. 651. A witness is not subject to attachment for failure to appear before a referee unless mileage and one day's attendance are paid or tendered. In re Kerber, 125 Fed. 653.

12. Where three cases are tried together and each witness who testifies is sworn in each case, he is properly allowed three witnesses' fees. L. E. Waterman Co. v. Lockwood, 128 Fed. 174.

13. Chicago City R. Co. v. Burke, 102 Ill. App. 661.

14. Double mileage and per diem to a witness attending from a distance, as authorized by a statute, is not allowable unless the witness is properly served with subpoena [B. & C. Comp. St. Or. § 807]. Egan v. Finney, 42 Or. 599, 72 Pac. 133.

15. There may be no allowance of fees for attendance of witnesses subpoenaed on a subpoena in which their names had been illegally inserted by the sheriff. Manuel v. State [Tex. Cr. App.] 74 S. W. 30.

16. Witnesses appearing by request are entitled to mileage. Egan v. Finney, 42 Or. 599, 72 Pac. 133. Witnesses attending Federal court at the request of a party to the action and sworn are entitled to mileage, though not subpoenaed; but where they reside in another district, the mileage must be limited to 100 miles each way. Griggsby Const. Co. v. Louisiana & N. W. R. Co., 123 Fed. 751.

17. Witnesses in a criminal proceeding have no right of appeal from an order disallowing their fees as certified by the clerk, because they are not "parties" to the proceedings. State v. Fair [Wash.] 76 Pac. 731.

18. Chicago City R. Co. v. Biederman, 102 Ill. App. 617.

19. One entirely ignorant of the meaning of the ceremony of administering an oath is not a competent witness. Lee v. Missouri Pac. R. Co., 67 Kan. 402, 73 Pac. 110. But see State v. Burns [Nev.] 74 Pac. 983, where it was held that a witness stating that he did not know the meaning of an oath was qualified where he stated that he knew the meaning of perjury and his testimony at great length was intelligently given.

20. State v. Williams, 111 La. 179. Witness may not be interrogated as to belief in the existence of a Supreme Being. Brink v. Stratton, 176 N. Y. 150, 68 N. E. 148.

21. The right to examine a witness on his voir dire is waived where objection is made after examination by the state and the witness has commenced to give his testimony. Henderson v. State, 135 Ala. 43.

22. Ham v. State [Tex. Cr. App.] 78 S. W. 929; People v. Wilmot, 139 Cal. 103, 72 Pac. 838. Under statutes declaring children under a certain age incompetent witnesses "when they are incapable of receiving or relating just impressions of fact," the question of their competency lies in the discretion of the court. Testimony of child under 14 in prosecution for a felony committed upon her. People v. Stouter, 142 Cal. 146, 75 Pac. 780.

23. Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869. It is material that the meaning and obligation of an oath be appreciated and comprehended. State v. King, 117 Iowa, 484, 91 N. W. 768. Extent of appreciation of Christian precepts not decisive. Id.

Held competent: A child nine years old, who testified on voir dire that God made

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dered competent by instruction either before or during the progress of the trial.[24] But the mere fact that instruction as to the nature and obligation of an oath was given will not alone render a child competent.[25]

A deaf person consciously sworn is qualified, though he did not actually hear the oath administered to him along with other witnesses.[26]

Husband and wife are generally disqualified to testify for or against each other without the other's consent.[27] There is no disqualification where the spouse is not a party,[28] or if a party, not a necessary one,[29] or the action is by or against one of them in a representative capacity.[30] In some states, where husband and wife are joined as parties plaintiff or defendant they are competent witnesses for or against each other.[31] Where a wife does not offer herself as a witness in an action instituted by her, the husband may testify to any matter that she might have testified to.[32] The statutes of many states provide that either spouse

her, that it was wrong to tell a story, that she would be punished if she did, would be put in jail and would go to the "bad place" when she died, is a competent witness. Eatman v. State [Ala.] 36 So. 16. A boy of ten knew it was wrong to tell a falsehood, and that those who told them go to "hell," and that here they would go to the "pen," and evinced intelligence, though he did not fully comprehend the meaning of the words "hell" and "penitentiary." North Tex. Const. Co. v. Bostick [Tex. Civ. App.] 80 S. W. 109. A child a little over five. Trim v. State [Miss.] 33 So. 718. A child of seven. Reyna v. State [Tex. Cr. App.] 75 S. W. 25; Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869. A child of 8 years. Castleberry v. State, 135 Ala. 24. A boy 11 years. Howard v. Com., 24 Ky. L. R. 950, 70 S. W. 295. A boy of 12. White v. State, 136 Ala. 58.

Held incompetent: A child under 3 or 4 years of age should not be sworn unless it is shown that it has a due sense of the obligation of an oath. State v. Wilson, 109 La. 74. A boy under 12 not knowing his age, with no moral training and with imperfect knowledge as to the place of the crime about which he was to testify, was incompetent. White v. State, 136 Ala. 58.

24. State v. King, 117 Iowa, 484, 91 N. W. 768. The competency of a child as a witness is not affected by the fact that the attorney instructed him as to the nature and obligation of an oath. North Tex. Const. Co. v. Bostick [Tex. Civ. App.] 80 S. W. 109.

25. After instruction by attorney, the child said she did not know the meaning of being sworn or of "evidence" or "obligation," and was held incompetent. State v. King, 117 Iowa, 484, 91 N. W. 768.

26. Texas & P. R. Co. v. Reid [Tex. Civ. App.] 74 S. W. 99.

27. Statute permitting examination of parties by adverse party does not qualify the statute making husband and wife incompetent witnesses for or against each other. Lloyd v. Simons, 90 Minn. 237, 95 N. W. 903. Wife incompetent in suit against husband to set aside a conveyance to her. Multz v. Price, 82 App. Div. [N. Y.] 339. Wife incompetent in divorce proceedings brought by her. Boreing v. Boreing, 24 Ky. L. R. 1288, 71 S. W. 431. Evidence of wife in supplementary proceedings against husband incompetent and cannot be used to impeach her as witness in a subsequent action by her. Aldous v. Olverson [S. D.] 95 N. W. 917. A wife is not a proper witness for her husband in a replevin suit against him. Ginsburg v. Morrall, 105 Ill. App. 213. A husband is not a competent witness to prove mental incapacity of testator whose will his wife was contesting. Williams v. Williams, 24 Ky. L. R. 1326, 71 S. W. 505. In a suit by a married man against his wife to declare a trust in his favor in real estate of which she is in possession and to which she holds the legal title and to quiet the title thereto in himself, the husband is not a competent witness. Reed v. Reed [Neb.] 98 N. W. 76. The laws of Missouri enlarging the rights of a married woman does not make her a competent witness in husband's behalf where she is not a party to the suit against her husband and her interest in the subject of the action is merely collateral. Layson v. Cooper, 174 Mo. 211, 73 S. W. 472.

28. One named as executor who neglects to accept for the statutory time cannot thereafter act as executor and not being a party to proceedings on appeal from probate, his wife was not incompetent as a witness on such appeal. In re Hathaway's Will, 75 Vt. 137. The husband may prove marriage and incriminating circumstances against one prosecuted for adultery with the wife. State v. West, 118 Wis. 469, 95 N. W. 521.

29. Evans v. Staalle, 88 Minn. 253, 92 N. W. 951.

30. A husband is not disqualified on the ground of relation where his wife is sued as administratrix. Gordon v. Sullivan, 116 Wis. 543, 93 N. W. 457. Testimony of a husband as administrator on the hearing of a motion for a continuance is not testimony on the trial of the action for the negligent death of his infant daughter so as to render his wife incompetent as a witness. Board of Internal Improvement v. Moore's Adm'r, 25 Ky. L. R. 15, 74 S. W. 683.

31. Under Vermont statutes permitting husband and wife to testify when properly joined as plaintiffs or defendants in the suit, the wife was a competent witness in her own behalf, though husband was interested, both being joined as proponents of a will. In re Hathaway's Will, 75 Vt. 137. Where husband and wife are joined as plaintiffs enforcing separate interests, they may be witnesses for or against each other. Schoppel v. Daly [La.] 36 So. 322.

32. Swinebroad v. Bright, 25 Ky. L. R. 2253, 73 S. W. 1031.

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is a competent witness for the other in regard to transactions by one acting as agent for the other,[33] but such testimony must be confined to matters connected with the agency.[34] The husband may testify for the wife where the suit is connected with business had with the husband,[35] or where the litigation concerns her separate property.[36]

Neither spouse is competent to testify as to confidential communications between them while husband and wife,[37] but there is no disqualification as to communications which are not confidential,[38] as where shared by a third person.[39] But in Massachusetts, neither a wife nor a husband is incompetent to testify as to private conversations with each other except as to abusive language addressed to a wife.[40] Communications between husband and wife are inadmissible after death of either[41] unless they refer to nonconfidential matters.[42] But it has been

33. One spouse may prove his or her own agency for the other. Orchard v. Collier, 171 Mo. 390, 71 S. W. 677. Sand. & H. Dig. § 2916, subd. 4. But where the husband failed to transact the business which he was to transact as his wife's agent, he could not testify for her in an action brought on by his failure. Miss. River, H. & W. R. Co. v. Ford, 71 Ark. 192, 71 S. W. 947. Under laws allowing husband or wife to testify where either is acting as agent of the other where part of the facts connected with the agency are within the knowledge of one and part within the knowledge of the other exclusively each may testify to facts within his or her knowledge but both may not testify to the same facts [Ky. Civ. Code Prac. § 606, subd. 1]. Logsden v. Stern [Ky.] 77 S. W. 927. A wife writing letters at her husband's dictation and keeping his accounts is not his agent within laws allowing spouse acting as agent to testify [Mo. Rev. St. 1899, § 4656, cl. 3]. First Nat. Bank v. Wright [Mo. App.] 78 S W. 686. Statements of a wife as agent for her husband are admissible against her. Leyner v. Leyner [Iowa] 98 N. W. 628.

34. Miss. River, H. & W. R. Co. v. Ford, 71 Ark. 192, 71 S. W. 947. Mo. Rev. St. 1889, § 8922. Orchard v. Collier, 171 Mo. 390, 71 S. W. 677.

35. Where duress is alleged by the wife as inducing execution of a mortgage on her land to secure her husband's debt, the husband is a competent witness under laws allowing the husband to testify where suit is connected with any business had with the husband [Mo. Rev. St. 1899, § 4856]. Turner v. Overall, 172 Mo. 271, 72 S. W. 644.

36. 2 Starr & C. Ann. St. (2d Ed.) p. 1837. Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283. In an action concerning the wife's separate property, in which she, if unmarried, would be defendant, her husband, though a nominal co-defendant, is a competent witness under exceptions in 2 Starr & C. Ann. St. 1896, c. 51, par. 5. Booker v. Booker, 208 Ill. 529, 70 N. E. 709.

37. Reed v. Reed, 101 Mo. App. 176, 70 S. W. 505.

38. Statements by a wife not made to her husband nor in his presence are not privileged communications. Leyner v. Leyner [Iowa] 98 N. W. 628. Divorced wife not disqualified from testifying in a will contest case as to former husband's condition when under influence of liquor, this information being based on observation. In re Van Alstine's Estate, 26 Utah, 193, 72 Pac. 942. In an action by a woman to set aside a conveyance made by her, a deposition by her former husband, divorced from her at time of trial, and covering transactions between himself and the grantee, was admissible. Turner's Trustee v. Washburn [Ky.] 80 S. W. 460. A letter written by the wife to another is not a confidential communication and she may be contradicted by same in an action against addressee for alienation of affections, she testifying contradictorily in defendant's behalf. Weston v. Weston, 86 App. Div. [N. Y.] 159. The rule disqualifying a husband to testify to confidential communications will not prevent a husband, marrying a second time and conveying to the second wife community property of the first marriage, from testifying that before the conveyance he told his wife about the existence and interest of children of first marriage. Eddy v. Bosley [Tex. Civ. App.] 78 S. W. 565. Wife competent to testify as to what occurred when an officer took her acknowledgment of a deed from her and her husband, her husband not being present, and her testimony not relating to communications or transactions between husband and wife. Dillon v. Dillon, 24 Ky. L. R. 781, 69 S. W. 1099.

39. "The seal of confidence does not rest on declarations shared by a third party." Reed v. Reed, 101 Mo. App. 176, 70 S. W. 505.

40. Rev. Laws, c. 175, § 20, cl. 1. In a prosecution for assault with intent to kill defended on the ground of insanity caused by epilepsy, testimony of the wife that defendant two days before the assault on coming out of an attack of the disease declared that he would drown himself is inadmissible. Com. v. Cronin [Mass.] 69 N. E. 1065.

41. Sutcliffe v. Iowa State Traveling Men's Ass'n, 119 Iowa, 220, 93 N. W. 90. Wife competent to testify for an insurance company that her husband was suffering from consumption at time of issuance of policy, the information not having been acquired as a confidence. Hood v. Prudential Ins. Co., 22 Pa. Super. Ct. 244. Under provisions disqualifying husband or wife as to communications during the existence of the relation, a husband may not testify that his wife had agreed to reimburse him for money which he had paid for certain land conveyed to her, or to convey part of the land to him [Ky. Code Civ. Prac. § 606]. Clay v. Clay's Guardian, 24 Ky. L. R. 2016, 72 S. W. 810. Under laws providing that neither hus-

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held that a wife is competent to testify to her husband's dying declaration, in a prosecution for the homicide.[43]

In criminal prosecutions against one spouse, the other is not a competent witness,[44] though they are divorced at the time of trial.[45] But as to transactions subsequent to their divorce,[46] a woman is competent to testify as against her former husband. In Massachusetts, the spouse may testify but cannot be compelled to.[47] The wife of one jointly indicted with others is a competent witness for defendants other than her husband.[48] Where the wife is the person injured by the crime, and the facts are peculiarly within her knowledge, she may testify.[49] In some states, the statutes disqualify as a witness a party to an action instituted in consequence of adultery.[50] But under the New York Code, a husband is a com-

band nor wife shall testify, even after termination of marriage, concerning communications between them while the marriage tie existed, a widow of insured is disqualified [Ky. Civ. Code Prac. § 606]. N. Y. Life Ins. Co. v. Johnson's Adm'r, 24 Ky. L. R. 1867, 72 S. W. 762. After husband's death wife could not testify in her own behalf as to transactions between them. Dillon v. Dillon, 24 Ky. L. R. 781, 69 S. W. 1099.

42. In a suit by an administrator to foreclose a mortgage, the mortgagee being dead, his wife may testify as to nonconfidential matters. Dwinell v. Holt [Vt.] 56 Atl. 99.

43. Arnett v. Com., 24 Ky. L. R. 1440, 71 S. W. 635.

44. In a criminal case, a wife is not a competent witness for her husband (larceny). State v. Smith [Del.] 57 Atl. 368. A husband not a competent witness against wife on a prosecution for obtaining money by false pretenses. Baker v. State [Wis.] 97 N. W. 566. Where a married woman is jointly indicted with another and there is a joint trial, the husband is incompetent as a witness for or against her. Rivers v. State, 118 Ga. 42. In a prosecution for bigamy, the lawful wife is incompetent against defendant and thus incompetency cannot be waived. Barber v. People, 203 Ill. 543, 68 N. E. 93. An act making the wife a competent witness in case of seduction where there is an indictment and marriage for the purpose of suspending prosecution does not apply where the party was under arrest but not indicted. Barnett v. State, 117 Ga. 298. Violence before marriage is not within the exception of a statute providing that except in cases of criminal violence neither husband nor wife is a competent witness against each other in a criminal prosecution [Cal. Pen. Code, § 1322]. People v. Curiale, 137 Cal. 534, 70 Pac. 468, 59 L. R. A. 586. A wife may not testify in favor of her husband in a criminal prosecution against him for assault on another, there having been no offer to show that she had acted as his agent in any respect. Kraimer v. State, 117 Wis. 350, 93 N. W. 1097. The laws of South Dakota do not authorize a wife to testify against her husband over his objection in prosecution for incest [Comp. Laws Dak. § 5260]. State v. Burt [S. D.] 94 N. W. 409. A wife may not on trial of her husband for homicide testify as to his request that she testify to certain facts. Spivey v. State [Tex. Cr. App.] 77 S. W. 444. A wife cannot be a witness against her husband in a prosecution for rape committed before their marriage. State v. McKay [Iowa] 98 N. W. 510. Wife was incompetent to contradict her husband's testimony by identifying a letter from him under the Kentucky statute barring evidence of communications between husband and wife, made during marriage relation, and evidence of one against or for the other. Howard v. Com. [Ky.] 80 S. W. 211.

Not within the rule: The wife may testify against her husband on his prosecution for procuring one without authority to solemnize his marriage though the wife did not know of this want of authority. Barclay v. Com., 25 Ky. L. R. 463, 76 S. W. 4. One may not object to testimony as that of his wife where he had a wife living at the time of marriage to such witness. Crow v. State [Tex. Cr. App.] 72 S. W. 392. In a prosecution for perjury, defendant's mother was a competent witness against him though her husband had previously been convicted of the same offense. Stanley v. State [Tex. Cr. App.] 74 S. W. 320.

45. A divorced wife may not testify to threats made by her former husband before divorce against decedent for whose murder he was being prosecuted. Davis v. State [Tex. Cr. App.] 77 S. W. 451.

46. Tompkins v. Com., 25 Ky. L. R. 1254, 77 S. W. 712.

47. Under Rev. Laws, c. 175, § 20, subd. 2, a husband or wife cannot be compelled to testify in a criminal proceeding against the other but may if they are willing to do so. Com. v. Barker [Mass.] 70 N. E. 203.

48. State v. Smith [Del.] 57 Atl. 368. Ky. Code Prac. §§ 605, 606; Ky. St. 1899, § 12. Dovey v. Lam, 25 Ky. L. R. 1157, 77 S. W. 383. The wife of one jointly indicted with defendant, but who pleaded guilty before trial, is a competent witness. Graff v. People, 208 Ill. 312, 70 N. E. 299. Where a woman's husband is jointly indicted and tried with another, while she is not a competent witness for her husband, she is for the other defendant, and her testimony must be admitted and the jury instructed as to its exclusion as to her husband. Smartt v. State [Tenn.] 80 S. W. 586.

49. A wife is a competent witness against her husband in a prosecution for abandonment and may make affidavit in support of information. State v. Bean [Mo. App.] 78 S. W. 640.

50. The plaintiff in an action for alienating the affections of his wife and inducing her to commit adultery is incompetent. Graves v. Harris, 117 Ga. 817. Under a provision disqualifying a wife to testify against the husband on the trial of any action

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petent witness "to disprove the allegation of adultery" and he may deny the same specifically.[51] In an action for alienation of affections, the husband is competent to testify as to the value of the wife's services.[52]

A convict is not generally disqualified as a witness.[53] In Texas one convicted of a felony is incompetent[54] even after release from prison,[55] and the sentence of the court need not be produced to disqualify the witness.[56] But this disability may be removed by pardon.[57] A defendant may testify against a co-defendant.[58]

Persons acting in official capacity at trial.—A juror is not, by reason of his position, incompetent to testify in the trial in which he sits.[59] A former judge may testify in regard to a trial before him.[60] Where court is held by a single judge, he may not be called as a witness.[61] It was held in Oregon that the trial judge, clerk of the court and the bailiff were competent witnesses to testify to alleged inconsistencies between the testimony of a witness on the retrial of a case and that given by him on the first trial.[62] The provisions of the constitutions and statutes of the various states forbidding election judges from disclosing how any voter shall have voted does not prevent such officers from testifying, in an election contest, for whom illegal voters voted.[63] The prosecuting attorney is a competent witness for the state.[64] The right to object to the competency of a witness may be waived[65] and proper and timely objection must be made.[66]

§ 3. *Disqualification on ground of interest.*—Disqualification on sole ground of interest no longer exists.[67]

founded on allegations of adultery, a wife is incompetent to prove infidelity of her husband in a prosecution for abandonment [N. Y. Code Civ. Proc. § 831]. People v. Meyer, 79 N. Y. Supp. 367.

51. N. Y. Code Civ. Proc. § 831. Goldie v. Goldie, 39 Misc. [N. Y.] 389.

52. Rudd v. Dewey, 121 Iowa, 454, 96 N. W. 973.

53. Dixon v. State, 116 Ga. 186. Neither bad character nor conviction of crime renders a witness incompetent; his credibility is for the jury and a verdict may be founded solely on such testimony except in cases where corroboration is required by statute. Stone v. State, 118 Ga. 705.

54. Miller v. State [Tex. Cr. App.] 79 S. W. 567. But the declaration of an unpardoned convict is admissible when part of the res gestae. Flores v. State [Tex. Cr. App.] 79 S. W. 808; Gulf, C. & S. F. R. Co. v. Johnson [Tex. Civ. App.] 77 S. W. 648.

55. Miller v. State [Tex. Cr. App.] 79 S. W. 567.

56. Gulf, C. & S. F. R. Co. v. Johnson [Tex. Civ. App.] 77 S. W. 648.

57. Pardon in one case does not extend to others so as to restore his competency. Miller v. State [Tex. Cr. App.] 79 S. W. 567.

58. Barr v. People, 30 Colo. 522, 71 Pac. 392. One charged with the same offense committed at the same time could testify against defendant. Caudle v. State [Tex. Cr. App.] 74 S. W. 545. One jointly indicted with other defendants for murder is a competent witness for the state against them where he is not on trial at the time though the indictment is still pending. People v. Van Wormer, 175 N. Y. 188, 67 N. E. 299. Dismissal of charges against those indicted as accomplices with the defendant not necessary to render them competent witnesses against him. Powers v. Com., 24 Ky. L. R. 1007, 1186, 70 S. W. 644, 1050.

59. Chicago, R. I. & P. R. Co. v. Collier [Neb.] 95 N. W. 472.

60. A judge before whom a recognizance was forfeited was a competent witness in an action thereon to prove that the final adjournment was had before the defendant was called or the forfeiture taken. State v. Hindman, 159 Ind. 586, 65 N. E. 911.

61. State v. De Maio, 69 N. J. Law, 590.

62. Citing B. & B. Comp. St. § 856. State v. Houghton [Or.] 75 Pac. 887.

63. Const. art. 8, § 3 and Rev. St. 1899, § 6795. Montgomery v. Dormer [Mo.] 79 S. W. 913.

64. State v. Wilmbusse [Idaho] 70 Pac. 849.

65. Where plaintiff's husband is allowed to testify without objection, there can be no complaint of his incompetency. Curtis v. Tyler, 90 Mo. App. 345. A party cannot make an objection to the incompetency of a witness after drawing out facts on cross-examination, prejudicial to his interest. Ladd v. Williams [Mo. App.] 79 S. W. 511.

66. An objection to testimony does not raise the question of competency of witnesses. U. S. Leather Co. v. Aldrich, 75 App. Div. [N. Y.] 616. The motion to strike testimony on the ground that witness did not understand the nature of the oath is addressed to the discretion of the court. State v. Bailey, 31 Wash. 89, 71 Pac. 715. And see Saving Questions for Review, 2 Curr. Law. p 1590.

67. Rev. St. U. S. § 858. Kerr v. Modern Woodmen of America [C. C. A.] 117 Fed. 593; Gordon v. Funkhouser, 100 Va. 675. An attorney is not disqualified as a witness on the ground that his fee is contingent on the successful termination of contemplated litigation. Mott v. Bernard, 97 Mo. App. 265, 70 S. W. 1093.

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§ 4. *Disqualification on death or incompetency of party to communication or transaction. General rule.*[68]—A party to an action, interested in the event thereof, is incompetent to testify to personal transactions or conversations with a person, since deceased, relating to the subject of the action.[69] Insanity of a party has the same effect as death.[70] In Michigan, one cannot in his own behalf testify as to facts which if true were equally within the knowledge of a deceased, through whom the other party claims.[71] The design of statutes creating this disqualification is to prevent a living witness interested in the event of the action from taking advantage of the death of a person who cannot contradict a conversation or transaction had with him in his lifetime.[72] The rule is frequently applied in actions by or against a representative of a deceased person, a party interested in the event of such action being incompetent to testify as to personal

68. The rule is commonly a statutory exception to the modern rule that a party is not disqualified as a witness by reason of his interest in the event of the action. Thus the Washington statute reads (Ballinger's Ann. Codes & St. § 5991): "No person offered as a witness shall be excluded from giving testimony by reason of his interest in the event of the action or otherwise, but such interest may be shown to affect his credibility: Provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person * * * then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased person." Kline v. Stein, 30 Wash. 189, 70 Pac. 235.

69. United Loan & Deposit Bank v. Bitzer [Ky.] 78 S. W. 183; Boyd v. Daily, 85 App. Div. [N. Y.] 581. A defendant cannot testify for himself as to any transaction between himself and a person who is dead at the time of trial. Board of Park Com'rs of Louisville v. Marrett [Ky.] 80 S. W. 166. Neither the plaintiff nor a surety on the prosecution bond in an action to foreclose a trust deed is entitled to testify that the debt of decedent to plaintiff was not paid under § 590 of the Code, providing that no person interested in the event of an action shall testify as to transactions with deceased parties. McGowan v. Davenport [N. C.] 47 S. E. 27. A son of decedent, sued for money alleged to have been advanced by decedent, could not be asked whether he had ever given his father any written obligation, as that called for a transaction with one deceased. Garretson v. Kinkead, 118 Iowa, 383, 92 N. W. 55. Defendant, widow of testator, could not testify as to his declarations in his own interest, she having succeeded to his estate. Pym v. Pym, 118 Wis. 662, 96 N. W. 429. A contestant of a will cannot testify as to conversation with the deceased, in his presence, unless he did not participate therein and the conversation was not affected by his presence. In re Laugen's Will [Wis.] 99 N. W. 437. An interested party cannot testify as to payment of rent by a deceased ancestor of tenants [Code Civ. Proc. § 829]. Jones v. Reilly, 174 N. Y. 97, 66 N. E. 649. A daughter of testator contesting the will cannot testify as to an offer made her father to come home and care for her mother. In re Laugen's Will [Wis.] 99 N. W. 437. Deposition of plaintiff in her own interest concerning a transaction with a person deceased at time of giving deposition was properly excluded. Turner's Trustee v. Washburn [Ky.] 80 S. W. 460. Suit for services rendered by plaintiff to decedent, testimony of former that the latter intended to pay him otherwise than by the legacy given in the will is incompetent. Farrington v. Minturn [N. J. Law] 57 Atl. 269. A widow of insured suing on a policy is within statutes providing that a party shall not testify where the adverse party, claiming as heir, grantee, assignee, devisee or legatee of a deceased party, may not testify. Foxhever v. Order of Red Cross, 24 Ohio Cir. Ct. R. 56. Testimony as to declaration of an adversary in patent proceedings is inadmissible where such adversary had died meanwhile. Tyler v. Kelch, 19 App. D. C. 180. The written statement of a trustee made during the lifetime of both parties is admissible, though both trustee and beneficiary are dead at the time of its introduction, the receipt of the statement not "being examined as a witness." Putnam v. Lincoln Safe-Deposit Co., 39 Misc. [N. Y.] 738.

70. In an action to set aside deeds by plaintiffs to co-owner and a deed by him to defendant, the co-owner having since become insane, plaintiffs were incompetent under the laws of Illinois [Rev. St. Ill. c. 51, § 2]. Holton v. Dunker, 198 Ill. 407, 64 N. E. 1050.

71. Sparling v. Smeltzer [Mich.] 95 N. W. 571. Defendant in ejectment who claimed title by adverse possession, while plaintiff claimed by grant from one since deceased, is incompetent to testify as to intent in fencing land in controversy or any subsequent intention [Comp. Laws 1897, §§ 10, 212]. Miller v. Shumway [Mich.] 98 N. W. 385. Laws disqualifying as to matters equally within knowledge of deceased apply to a contest between beneficiaries under different life insurance policies of deceased and prevents testimony by widow as to transaction with deceased [Comp. Laws Mich. §§ 10, 212]. Great Camp Knights of Maccabees v. Savage [Mich.] 98 N. W. 26. A borrowing member of a loan association, in an action to cancel the mortgage, may not testify as to matters equally within the knowledge of a deceased agent of the association. Hoskins v. Rochester Sav. & Loan Ass'n [Mich.] 95 N. W. 566.

72. N. Y. Code, § 829. Freygang v. Train, 12 Misc. [N. Y.] 49.

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transactions or conversations with deceased,[73] and in actions by or against heirs, devisees or legatees,[74] and where party sues or defends as guardian.[75] The disqualification does not apply where the action is between the parties as individuals,[76] or where the recovery in the action by the executor is for the exclusive benefit of the widow and children or next of kin.[77]

Parties to contracts.—One party to a contract is incompetent to testify in regard thereto, in his own behalf, when the other party is dead.[78] A husband is

73. Reed v. Morgan, 100 Mo. App. 713, 73 S. W. 381. Under statutes providing that no person "having a direct legal interest in the result of a civil action when the adverse party is the representative of a deceased person" can testify as to any transaction or conversation with the deceased except in certain specified cases (Code Civ. Proc. § 329) in a proceeding for the distribution of an estate of an intestate, the administrator is an "adverse party." Sorensen v. Sorensen [Neb.] 98 N. W. 837. An executor in a proceeding in which he is acting as an individual and against the interest of the estate is within the prohibition against a party testifying to transaction in the lifetime of deceased. Bean v. Bean, 71 N. H. 538. Testimony of a party adverse to an administrator as to testator's susceptibility to influence is inadmissible under laws relating to evidence of facts during testator's life. Pattee v. Whitcomb [N. H.] 56 Atl. 459. Plaintiff in ejectment could not testify as to buying land of defendant's testate [Ballinger's Ann. Codes & St. § 5991]. Kline v. Stein, 30 Wash. 189, 70 Pac. 235.

74. Laws disqualifying party adverse to executors, heirs, legatees or devisees prevent the complainant in a will contest from testifying against the executor and legatee, though the contest is between heirs of testatrix. Waugh v. Moan, 200 Ill. 298, 65 N. E. 713. Under laws providing that in actions against the heirs of a decedent neither party shall be allowed to testify as to any transaction with decedent in trespass to try title by the heirs of one who had given a title bond against those claiming under the bond, declarations made by the obligor to one of plaintiffs were properly excluded [Tex. Rev. St. 1895, art. 2302]. Tenzler v. Tyrrell [Tex. Civ. App.] 75 S. W. 57. The wife of complainant in a bill against heirs of a decedent for the restoration of a lost deed or for specific performance, cannot testify as to conversation with the deceased grantor. Chaddock v. Chaddock [Mich.] 95 N. W. 972. Where a widow and widower each having children marry and both die, and a controversy arises between the two sets of children over the property, a child of the husband is a competent witness to support the claims of the husband's children under an antenuptial contract, Rev. St. 1892, § 1740, relating only to claims which originate in the lifetime of the deceased. Steen v. Kirkpatrick [Miss.] 36 So. 140. A legatee or her husband is incompetent in an action to recover legacy. Swinebroad v. Bright, 25 Ky. L. R. 742, 76 S. W. 365. A husband to whom his wife devised all her realty is a devisee within a disqualifying statute against whom witnesses were incompetent to testify to a personal transaction with the wife, by which she released certain of her estate [Iowa Code, § 4604]. Marshall v. Meyer, 118 Iowa, 508, 92 N. W. 693. One claiming as an heir is the representative of a deceased person within the meaning of a provision disqualifying a witness as to transactions with deceased, where adverse party is a representative of deceased [Neb. Code Civ. Proc. § 329]. Brown v. Forbes [Neb.] 96 N. W. 52. One suing in equity to establish rights in the estate of a deceased person as daughter and heir at law is incompetent to testify as to the relation which is denied by the defendant heir. Crumley v. Worden, 201 Ill. 105, 66 N. E. 318. Comp. Laws 1897, §§ 10, 212, relating to transactions with deceased persons, prevents the party opposed to the heir from testifying, but does not affect the heir. Tabor v. Tabor [Mich.] 99 N. W. 4.

75. Bridge v. Carter [Tex. Civ. App.] 77 S. W. 245.

76. A suit to establish a trust in lands which plaintiff claims that defendant holds as residuary legatee under a will and defendant denies plaintiff's title and claims that testator was absolute owner, is between the parties as individuals and a statute disqualifying parties to a cause to which an administrator is a party is inapplicable. Crowley v. Crowley [N. H.] 56 Atl. 190.

77. The recovery in an action for wrongful death is for the exclusive use of decedent's widow and children or next of kin, and the judgment is not for decedent's estate and hence defendant is a competent witness in his own behalf [Burns' Rev. St. 1901, § 283]. Lake Erie & W. R. Co. v. Charman, 161 Ind. 95, 67 N. E. 923.

78. Crosno v. J. W. Bowser Mill Co. [Mo. App.] 80 S. W. 275. A grantee under a deed from a deceased father could not show that the consideration was other than that expressed. Johnson v. Burks [Mo. App.] 77 S. W. 133. The fact that the grantor of one of the parties to a suit for land is dead does not bring the case within a statute affecting the competency of witnesses only as to contracts between a dead and living person. Golden v. Tyer [Mo.] 79 S. W. 143. A defendant in ejectment claiming under an alleged promise of his grandfather to convey the property to him by will is incompetent after the death of the grandfather to testify as to such agreement. Shroyer v. Smith, 204 Pa. 310. In a suit to determine boundaries to certain land, testimony by a grantee of conversations with his grantor, who died before suit was commenced, as to the boundaries, is incompetent. Elliott v. Campbell [Ky.] 78 S. W. 1122.

Parties to notes: Makers disqualified by death of payee. McAyeal v. Gullett, 105 Ill. App. 155. Maker and endorser disqualified [Code Civ. Proc. § 829]. Frey v. Horton, 85 N. Y. Supp. 402. Denial of consideration by defendants not permitted in suit by executor of payee. Luke v. Koenen, 120 Iowa, 103, 94 N. W. 278. Maker may not as against indorsee from one deceased show failure of considera-

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an incompetent witness in an action by the heirs of a deceased wife to enforce a resulting trust against the husband, arising from an investment of the funds of the wife's separate estate.[79] The grantor may not testify as against the husband and infant heir of deceased grantee that the property was to be held by the grantee in trust for the grantor.[80] In Maryland, the statute does not exclude testimony of a party to a contract after the death of the other party.[81]

Derivation of title from decedent.—A party cannot testify to transactions or conversations with a decedent from or through whom the opposite party derived title.[82]

Transactions with deceased agents or partners.—The rule applies to conversations or transactions with an agent, since deceased,[83] unless fraud of the deceased

tion [Code Ala. § 1794]. Deposit Bank of Frankfort v. Caffee, 135 Ala. 208. Words qualifying indorsement at time of signature could not be denied. Bay View Brewing Co. v. Grubb, 31 Wash. 34, 71 Pac. 553. An indorser on alleged accommodation note is interested in a suit by the administrator and may not testify as to usury. Frey v. Horton, 85 N. Y. Supp. 402. Parol agreement for a change in the rate of interest in note given to decedent. Carpenter v. Rice's Adm'x [Ky.] 78 S. W. 458. Wife may not testify that note was given for debt of her husband, payee being dead. Englehart v. Richter, 136 Ala. 562. Maker in an action by legatee incompetent to show that it was given in settlement of a gambling contract. McAyeal v. Gullett, 202 Ill. 214, 66 N. E. 1048. A witness, though not a party to the record, is incompetent to testify that by a contract between himself, the maker and the deceased payee, the note was made payable to decedent, but was in fact the property of the witness and represented a debt due him. Cleveland v. Coulson, 99 Mo. App. 468, 73 S. W. 1105. In Maryland, under Laws 1902, c. 495, parties payee in a note are competent witnesses in a suit to collect the note against the estate of the maker. Trustees St. Marks Evangelical Lutheran Church v. Miller [Md.] 57 Atl. 644.

Parties to mortgages: Under acts disqualifying parties adverse to executor a husband and wife in a suit by an executor of a deceased mortgagee to foreclose a mortgage given by a married woman to secure her husband's debt may not testify that the property was acquired as a gift; rendering the mortgage void under laws prohibiting a married woman from mortgaging separate property acquired by gift for husband's debt [Burns' Rev. St. 1901, c. 506]. Goodwin v. Bentley, 30 Ind. App. 477, 66 N. E. 496. Under laws denying a party a right to testify in his own behalf when sued by an administrator unless the contract in issue was made by a living person, and competent to testify, defendant in foreclosure may not testify as to declarations of deceased mortgagee in a suit for foreclosure by his administrator [V. S. 1238]. Dwinell v. Holt [Vt.] 56 Atl. 99. Mortgagor was incompetent to prove agreement that he was to pay interest during lifetime of his father, the mortgagee, and mortgage was to be canceled on the father's death. Sauer v. Nehls, 121 Iowa, 184, 96 N. W. 759. Under Rev. St. 1899, § 4652, providing that where one party to a contract is dead, the others are incompetent to testify to said contract in their own favor, a mortgagee in a chattel mortgage is incompetent after the mortgagor's death, and such disqualification is not removed by the fact that such mortgagee had been appointed in the mortgage as one of the persons to identify the mortgage. Ladd v. Williams [Mo. App.] 79 S. W. 511.

79. Rev. St. Mo. 1899, § 4652. Johnston v. Johnston, 173 Mo. 91, 73 S. W. 202.

80. Holtheide v. Smith, 24 Ky. L. R. 2535, 74 S. W. 689.

81. The laws of Maryland do not disqualify a claimant for services rendered deceased. Duckworth v. Duckworth [Md.] 56 Atl. 490. In some states an executor in a suit for the construction of a will is a competent witnes as to a transaction between himself and deceased [Laws 1902, p. 718, c. 495]. Justis v. Justis [Md.] 57 Atl. 23.

82. Paschall v. Fels, 207 Pa. 71. N. Y. Code Civ. Proc. § 829. Freygang v. Train, 42 Misc. [N. Y.] 49. A provision that a party to an action shall not be examined as a witness in his own behalf against a deriver from a deceased person, except where such person is examined in his own behalf, prevents admission where deriver's testimony has been improperly admitted [N. Y. Code Civ. Proc. § 829]. Griffin v. Train, 90 App. Div. [N. Y.] 16. The opposite party to the grantee of a deed from a deceased person is incompetent to testify in his own behalf to transaction with deceased, and this disqualification extends to the agent [Ga. Civ. Code, § 5269, par. 1]. Hendrick v. Daniel, 119 Ga. 358. Where plaintiff claims under unrecorded agreements and defendant claims title as an innocent purchaser without notice from plaintiff's vendor, plaintiff is incompetent to testify that defendant knew of the articles and had read them, his grantor being dead. Rudolph v. Rudolph, 207 Pa. 339.

83. One party to a contract, made with the agent of the other party, is disqualified to testify as to the making of the contract, in an action thereon, by the death of the agent. Crosno v. J. W. Bowser Mill. Co. [Mo. App.] 80 S. W. 275. An insured who was a party to an action to compel issuance of a paid up policy could not testify as to a conversation with an agent, since deceased. Mutual Life Ins. Co. v. O'Neil, 25 Ky. L. R. 983, 76 S. W. 839. A party may not testify as to conversations with the subsequently deceased agent of the adverse party, unless such conversations were had or made in the presence of surviving agents of such adverse party. Rothstein v. Siegel, Cooper & Co., 102 Ill. App. 600. Where the wife who was the agent of her husband in a transaction

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agent is the issue.[84] The disqualification applies where transaction was with decedent as a member of a firm, none of the other members being present.[85] But in an action on a note in which a surviving partner and the personal representatives of the deceased partner are joined as defendants, plaintiff may testify as to transactions with the deceased partner so far as necessary to show the firm liability.[86] No recovery being sought against the deceased partner's estate, the rule is different.[87]

The disqualifying interest and parties excluded.—The disqualifying interest must be certain and direct so that the judgment will charge the witness with a liability or exempt him from one.[88]

The general rule as to incompetency does not apply to a witness not interested in the event of the action,[89] or where, if interested, the interest is remote and un-

is dead, the other party to the suit is not a competent witness against the husband as to what was said or done, between himself and the wife as the husband's agent in respect to the transaction. Wilden v. McAllister, 91 Mo. App. 446.

84. Suits to recover premiums paid on a policy on the ground of fraud of a deceased agent. Gwaltney v. Provident Sav. Life Assur. Soc., 132 N. C. 925. Statute making parties to an action against a personal representative incompetent to testify as to acts before decedent's death, does not apply to an action by a principal against the estate of a deceased agent to set aside a deed procured by agent's fraud. Calmon v. Sarrailie, 142 Cal. 638, 76 Pac. 486.

85. Bay View Brewing Co. v. Grubb, 31 Wash. 34, 71 Pac. 553; Garnett v. Wills, 24 Ky. L. R. 617, 69 S. W. 695. In an action by surviving partner to reform a deed, the grantor therein is not a competent witness as to transactions between him and the deceased partner. Connolly v. Keenan, 42 Misc. [N. Y.] 589.

86. Lowry v. Tivy, 69 N. J. Law, 94.

87. Where an action was brought on the bond of a firm against the surviving partner and sureties on firm bond and no recovery was sought against the estate of the deceased partner, a party to the transaction was not an incompetent witness on the ground that the transaction was with a deceased person. Hines v. Consolidated Coal & Lime Co., 29 Ind. App. 563, 64 N. E. 886. In Georgia testimony as to transactions with a deceased partner is competent in an action not against the administrator, or the surviving partner. Hudson v. Hudson, 119 Ga. 637.

88. New York Life Ins. Co. v. Johnson's Adm'r, 24 Ky. L. R. 1867, 72 S. W. 762. And a party who claims as the decedent's common-law wife has a "direct legal interest in the result" in a suit for distribution of the intestate's estate. Sorensen v. Sorensen [Neb.] 98 N. W. 837. Conversations or admissions of a decedent cannot be proven by the wife of defendant whose interests were adverse to those of other defendants. Cady v. Cady [Minn.] 97 N. W. 580. A mother, who in the event of death of children before maturity, will receive property conveyed by deed reciting love and affection as the consideration, may not testify to transactions with the deceased grantor to show a valuable consideration as against creditors. Townsend v. Wilson, 24 Ky. L. R. 1276, 71 S. W. 440. A policy holder in a mutual insurance company is not disqualified by interest to testify for the insurer. New York Life Ins. Co. v. Johnson's Adm'r, 24 Ky. L. R. 1867, 72 S. W. 762. The executor and his surety are not incompetent to testify as to declarations of testator as to the purpose of a gift in an action against the executors refusing to pay a legacy on the ground that it had been adeemed by a gift. Swinebroad v. Bright, 24 Ky. L. R. 2253, 73 S. W. 1031; Id., 25 Ky. L. R. 742, 76 S. W. 365. A wife may testify in favor of her husband as to transactions and conversations with one since deceased, unless the suit, if favorable to the husband, would invest her with a direct legal interest in the subject matter. Parker v. Wells [Neb.] 94 N. W. 717. In an action against trustee the acting executor under whom the trust funds passed to the trustee and who was not a party was not disqualified as an interested party or as the person from, through or under whom the trustee derived title. Putnam v. Lincoln Safe Deposit Co., 87 App. Div. [N. Y.] 13. The mother of an illegitimate child is not an interested party in an action brought by child against executor of putative father and she is not made interested in event by fact of employment of child's attorney. Rosseau v. Rouss, 91 App. Div. [N. Y.] 230. Conversation with decedent. Motorman in a street-car accident not a party to suit nor notified to appear, held could testify. O'Toole v. Faulkner [Wash.] 75 Pac. 975. Where a widow is a party to an action between the heirs of her deceased husband and would be affected by a judgment for costs she is not competent to testify to conversations with deceased. McKnight v. Reed, 30 Tex. Civ. App. 204, 71 S. W. 318. Daughters incompetent to testify in suit by their deceased mother's administrator to recover amount of an insurance policy. Supreme Council Royal Arcanum v. Bevis [Mo. App.] 80 S. W. 739.

89. Dawson v. Wombles [Mo. App.] 78 S. W. 823. Executor held competent, not being interested. Farrar v. Farmers' L. & T. Co., 85 App. Div. [N. Y.] 367. The executor and proponent of a will, having no other interest in the estate is competent to testify in a will contest, to personal transactions with deceased since he does not testify "in his own behalf or interest." In re Laugen's Will [Wis.] 99 N. W. 437. A widow bringing action as next friend of her son, is a competent witness therein to show an equitable assignment of a life insurance policy from deceased husband to the son, during the lifetime of deceased. Cockrell v. Cockrell [Miss.] 36 So. 390. Under Rev. Code 1892, § 1740. A dis-

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defined.[90] It has been held that, in a will contest, devisees,[91] legatees,[92] or persons who would take as heirs or next of kin, in case of intestacy,[93] are not disqualified as interested parties.

The disqualification of interest is applicable to creditors seeking to establish claims against an estate,[94] to a surviving spouse,[95] to heirs,[96] to members of beneficial societies,[97] and stockholders of corporations.[98] Parties separately interested may testify for each other where the testimony is solely for that purpose.[99]

The agent of a party is not ordinarily disqualified to testify in behalf of his principal in regard to transactions with a person since deceased.[1] In Michigan,

qualifying interest is not shown by the fact that the witness had a demand which was not involved in the action. MacDonald v. Tittmann, 96 Mo. App. 536, 70 S. W. 502. One filing security for costs for minor which bond is superseded by bond of guardian ad litem is not interested in event. Rousseau v. Rouss, 91 App. Div. [N. Y.] 230. Where title is claimed as between alleged tenants in common by deed from a common deceased ancestor, the widow of said decedent not being a party to the action and being disinterested in the result is not disqualified to testify under Code, § 590. Wetherington v. Williams [N. C.] 46 S. E. 728. Where a mother gave notes to her husband as trustee to collect and pay the proceeds to children he was competent to testify after her death as to her statements when creating the trust; not being interested in event of the action. Jarrell v. Crow, 30 Tex. Civ. App. 629, 71 S. W. 397.

90. Farrar v. Farmers' L. & T. Co., 85 App. Div. [N. Y.] 367. An heir of disqualified party is competent. Harraway v. Harraway, 136 Ala. 439. A contingent liability for costs does not disqualify a guardian ad litem in a will contest in behalf of minor children of testator under a provision disqualifying persons "directly" interested [Rev. St. Utah 1898, § 3418, subd. 3]. In re Van Alstine's Estate, 26 Utah, 193, 72 Pac. 942. A provision disqualifying one interested in the event to testify as to transactions applies only to persons presently affected by the judgment, and fact of husband's contingent estate as tenant by curtesy in the event of his wife's success will not disqualify him in will contest. Spindler v. Gibson, 75 App. Div. [N. Y.] 444. Section 829 of the Code as to evidence of transactions with deceased persons does not refer to actions not against the estate of the said deceased party; nor does the mere possibility of inheriting the property make them parties interested in the result within the meaning of that section. In re Sproule's Estate, 42 Misc. [N. Y.] 448.

91. Swinebroad v. Bright, 24 Ky. L. R. 2253, 73 S. W. 1031.

92. In re Wheelock's Will [Vt.] 56 Atl. 1013.

93. Williams v. Miles [Neb.] 94 N. W. 705.

94. Action to recover for services as nurse. Baker v. Bancroft, 69 N. J. Law, 223. Rev. St. Mo. 1899, § 4652. Kersey v. O'Day, 173 Mo. 560, 73 S. W. 481; Hendrick v. Probate Court of East Greenwich [R. I.] 55 Atl. 881. A daughter may testify as to the rendition of services to decedent and their value but not as to an understanding with him as to the compensation. Tuohy v. Trail, 19 App. D. C. 79. An executor's verification of his claim against decedent not permitted, as calling for communication with decedent. [Code Civ. Proc. § 829]. In re Smith, 75 App. Div. [N. Y.] 339, 11 Ann. Cas. 427.

95. A widow seeking to annul deeds executed to her husband since deceased may not testify to the transaction. Gardiner v. Gardiner [Mich.] 95 N. W. 973. A widow suing the administrator of her deceased husband to recover rents collected by the administrator is incompetent to prove her marriage to deceased or any conversation with him or his treatment of her while they lived together as husband and wife. Lyons v. Lyons, 101 Mo. App. 494, 74 S. W. 467. In a suit for partition, intestate's widow, a party thereto, was incompetent to show that a transfer to a son was a gift and not an advancement, by testimony as to transactions and communications with her husband. Ellis v. Newell, 120 Iowa, 71, 94 N. W. 463. On the contest of a will, the widow is incompetent if her interest lies with the side offering her testimony whether she is made a party complainant or defendant. Baker v. Baker, 202 Ill. 595, 67 N. E. 410. A widow is not a competent witness to prove transactions between her deceased husband and his grantee leading up to the conveyance. Johnson v. Burks [Mo. App.] 77 S. W. 133. The widow of deceased and one claiming under her were incompetent to testify to a verbal agreement with deceased by which the widow was to become the sole owner of the homestead in consideration of joining in deeds to other lands to the husband's children. Huit v. Huit [Iowa] 98 N. W. 123.

96. Wehe v. Mood [Kan.] 75 Pac. 476; Warfield v. Hume, 91 Mo. App. 541; Coats v. Harris [Idaho] 75 Pac. 243.

97. Cronin v. Supreme Council Royal League, 199 Ill. 228, 65 N. E. 323.

98. Ky. Civ. Code Prac. § 606. Storey v. First Nat. Bank, 24 Ky. L. R. 1799, 72 S. W. 318; Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N. E. 1109.

99. Parties separately interested in a remainder are not disqualified, in a suit by an executor to determine whether decedent entitled to the life interest ever had actual possession, to testify that testator in her lifetime referred to the property as being in her possession, so long as the testimony was offered solely in behalf of co-defendants, not by either witness in his own behalf. Jones v. Thomas, 76 App. Div. [N. Y.] 596.

1. Parker's Adm'r v. Cumberland Tel. & T. Co., 25 Ky. L. R. 1391, 77 S. W. 1109; Holston v. Southern R. Co., 116 Ga. 656; Clark v. Thias, 173 Mo. 628, 73 S. W. 616; De Mary v. Burtenshaw's Estate, 131 Mich. 326, 91 N. W. 647. The law disqualifying a party suing representative of decedent does not prevent an agent of plaintiff, in a suit to enforce specific performance of a deceased party's oral contract to convey land, from testifying

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there is a statutory disqualification of agents unless called by heirs or representative of decedent.[2] The California statute does not include one who is neither party nor person in whose behalf an action is prosecuted though he has an interest in the outcome.[3]

Transactions and communications.—The disqualification extends only to evidence of personal transactions with deceased.[4] The word "transaction" embraces every variety of affairs the subject of negotiations, actions, or contracts between the parties,[5] includes written communications,[6] and must refer to the issue on trial.[7] The statute does not prevent introduction of original books of account of either party nor the necessary suppletory oath.[8]

There is no disqualification as to facts occurring after death of decedent.[9]

Personal transactions or communications not ordinarily being involved in testimony as to the mental condition,[10] or health[11] of the deceased, there is no disqualification as to such testimony. So an interested party may also testify as to the fact of execution of a will,[12] unfriendly relations between testator and members of family,[13] the genuineness of a signature,[14] the fact that suit had not been

as to the making of the contract as against defendant who was a mediate grantee of deceased. Grafton Dolomite Stone Co. v. St. Louis, C. & St. P. R. Co., 199 Ill. 458, 65 N. E. 424. The cashier of a bank having no interest in a claim is not incompetent in an action by the bank's assignee against decedent's estate. Lyon's Ex'x v. Logan County Bank's Assignee [Ky.] 78 S. W. 454.

2. Mich. Comp. Laws, § 10,212, as amended by Pub. Acts 1901, No. 239. A husband who has acted as manager for his wife in a store conducted by her cannot testify for her in a suit on a note by the legal representative of a decedent as to goods sold the decedent. Gustafson v. Eger [Mich.] 93 N. W. 893. Defendant's superintendent testifying as a mere spectator of the accident in which decedent lost his life, no act of agency being involved, is not disqualified on the ground that the circumstances were equally within the knowledge of deceased. Storrie v. Grand Trunk Elevator Co. [Mich.] 96 N. W. 569.

3. Cal. Code Civ. Proc. § 1880. Merriman v. Wickersham, 141 Cal. 567, 75 Pac. 180. A stockholder and officer of a corporation may testify as to claim against deceased in an action against the executor. Id.

4. Burdick v. Burdick, 86 App. Div. [N. Y.] 383. Testimony as to consideration of notes purchased by decedent is admissible, decedent not being present at the time of their execution. Crampton v. Newton's Estate [Mich.] 93 N. W. 250. Evidence by plaintiff in an action to establish a note signed by his father and step-mother as a claim against the latter estate, that he gave the father an order to obtain the note from the party in whose custody it was and that he afterwards saw it in his father's possession and evidence of the father to the same effect did not constitute "personal transactions" with deceased. Curd v. Wissler, 120 Iowa, 743, 95 N. W. 266. Answers of decedent's daughter as to what she did with her personal earnings during her father's life are not objectionable, not referring to personal transactions with him. Kirsher v. Kirsher, 120 Iowa, 337, 94 N. W. 846. A third person who entered credits on a note presented for allowance against decedent's estate at claimant's instance is competent to testify thereto, these endorsements being clerical performances not amounting to transactions. Woltemahr v. Doye [Mo. App.] 76 S. W. 1053.

5. Harte v. Reichenberg [Neb.] 92 N. W. 987; Chapin v. Mitchell [Fla.] 32 So. 875. The surviving party to an action or one interested in the event thereof is prohibited from giving conversations either directly carried on with a deceased party or from giving the results or inferences that might be derived from such conversation. In re Sawyer's Estate, 88 Minn. 218, 92 N. W. 962. On the question of delivery of a deed, a son is not competent to testify that he placed the deed where it was found after his father's death after it had been delivered to him. Parker v. Parsons, 79 App. Div. [N. Y.] 310.

6. The contents of letters and telegrams which pass between the parties in the course of a business transaction, not otherwise identified than by a witness who has a direct legal interest in the result of the suit are not competent evidence as against the personal representative of a deceased person. Harte v. Reichenberg [Nev.] 92 N. W. 987.

7. Tourtellotte v. Brown [Colo. App.] 71 Pac. 638.

8. Fla. Rev. St. § 1095. Chapin v. Mitchell [Fla.] 32 So. 875. Original books of account showing transactions with a deceased person to be admissible must be fairly kept and free from erasures and interlineations. Id.

9. In a suit against an executor for specific performance of a parol gift of land, plaintiff is not incompetent to testify to facts occurring after donor's death. Walker v. Neil, 117 Ga. 733.

10. Grimshaw v. Kent, 67 Kan. 463, 73 Pac. 92.

11. Acts disqualifying parties in suits by or against heirs or devisees affecting the property of their ancestor as to transactions occurring prior to his death do not disqualify heirs to testify as to their ancestor's health at the time of insurance in an action on the policy [Burns' Rev. St. 1901, § 507]. Supreme Lodge K. P. v. Andrews, 31 Ind. App. 422, 67 N. E. 1009.

12. But information imparted by decedent inadmissible. In re Townsend's Estate [Iowa] 97 N. W. 1108.

13. In re Townsend's Estate [Iowa] 97 N. W. 1108.

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instituted on an obligation,[15] the condition of paper at time of indorsement,[16] or the fact of the execution of a release.[17] The disqualifying rule does not apply to transactions or conversations between a decedent and a third party, in the presence of a party to the action, but in which he took no part.[18]

Removal of bar.[19]—The bar is removed where the party entitled to raise the objection has testified to the transaction[20] or where one interested in the estate of decedent has testified thereto,[21] or the disqualified party has been called by the executor.[22] The door is not opened by admission of testimony of persons not

14. Hong v. Wright, 174 N. Y. 36, 66 N. E. 579.

15. Laws disqualifying parties to suits by administrators, etc., do not prevent a witness' statement that no action had been had for the recovery of the debt secured by the mortgage, the foundation of the suit, though the mortgagor was dead. Alexander v. Ransom [S. D.] 92 N. W. 418.

16. The endorser of a note on which suit has been brought by the representative of a deceased person is a competent witness in his own behalf as to the condition of the note when it was indorsed by him. Harnett v. Holdrege [Neb.] 97 N. W. 443.

17. In an action on a note of decedent against his administrator, plaintiff may testify as to whether he ever gave decedent a release from liability. Adam v. Sanger [Tex. Civ. App.] 77 S. W. 954.

18. Wright v. Reed, 118 Iowa, 333, 92 N. W. 61; Hutton v. Smith, 175 N. Y. 375, 67 N. E. 633; Withers v. Sandlin [Fla.] 32 So. 829; McCall v. Burk, 25 Ky. L. R. 643, 76 S. W. 177; Farrar v. Farmers' L. & T. Co., 85 App. Div. [N. Y.] 367. An officer of a corporation is not prevented from testifying as to conversation overheard between the president of the corporation and one subsequently deceased, he taking no part in the conversation. Paul E. Wolff Shirt Co v. Frankenthal, 96 Mo. App. 307, 70 S. W. 378. The statute does not disqualify a person to testify as to a conversation he heard between intestate and a party's agent, though he accompanied the agent at his request and afterwards became an attorney of the party to the litigation. Alexander v. Ransom [S. D.] 92 N. W. 418. In an action against an executor, evidence as to conversations of testatrix with her husband, in the presence of a third party, and of her conduct, is admissible to show the improbability of an express promise by testatrix. Rev. Laws, c. 176, § 67. Cogswell v. Hall [Mass.] 70 N. E. 461.

19. Under the statute disqualifying a party as a witness as to transactions and conversations with the since-deceased agent of the adverse party, such party may be examined in regard thereto where the adverse party has been examined, or has examined other witnesses in his behalf, as to such transactions or conversations [Rev. St. 1898, § 4070]. Moore v. May, 117 Wis. 192, 94 N. W. 45.

20. Flick v. Penfield, 82 App. Div. [N. Y.] 610; Colston v. Olroyd, 204 Ill. 435, 68 N. E. 373; Booth v. Lenox [Fla.] 34 So. 566; Lodge v. Hulings, 64 N. J. Eq. 761; Wolfe v. Hampton, 131 N. C. 5; Dyson v. Jones, 65 S. C. 308; Mots v. Motz, 85 App. Div. [N. Y.] 4. Under statutes providing that when one party to a suit is an executor neither party shall testify, unless the executor elects to testify, one of the defendants may testify to a special defense set up by his co-defendant though the executor elects not to testify [Pub. St. 1901, c. 224, § 16]. Weston v. Elliott [N. H.] 57 Atl. 336. Where attorney drafting will is called by executor, there is a waiver of privilege. In re Cornell's Will, 89 App. Div. [N. Y.] 412. Where plaintiff calls disinterested witnesses to testify to matter occurring before death of decedent and defendant testifies as a witness for himself, plaintiff then becomes a competent witness [Pa. Act June 11, 1891]. Rudolph v. Rudolph, 207 Pa. 339. A recital in a will offered for probate is not evidence of the deceased so as to admit testimony of contesting parties as to transactions with deceased to contradict the recital. Davidson v. Davidson [Neb.] 96 N. W. 409. The administrator may call the son of decedent to testify as to transactions where he is sued by the administrator with others to have a debt due the son applied to the administrator's claim against the son. Md. Code Pub. Gen. Laws, art. 35, § 2, as amended by Acts 1902, p. 718, c. 495. Duvall v. Hambleton & Co. [Md.] 55 Atl. 431. But the bar will not be removed where no evidence has been offered by plaintiff as to the transaction. Meyer v. Hafemeister, 119 Wis. 539, 97 N. W. 165.

21. Rev. St. 1898, §§ 4068, 4069. Drinkwine v. Gruelle [Wis.] 98 N. W. 534. A person may testify for himself concerning a transaction where one interested in the estate of the decedent has testified as to the same transaction [Ky. Code, § 606]. Carpenter v. Rice's Adm'x [Ky.] 78 S. W. 458. Where administrator took deposition of others as to transactions, defendant could then testify to circumstances attending execution of deed. Kuhn's Adm'r v. Kuhn, 24 Ky. L. R. 787, 69 S. W. 1077. The bar of the statute is not removed by putting in evidence a letter written by defendant to intestate, so that defendant may testify as to matters referred to therein. Ross v. Kirkwold [Iowa] 99 N. W. 562. That persons were permitted to testify in behalf of an administrator does not entitle the adverse party, as a matter of right, to testify in rebuttal, under a statute excluding certain evidence unless the administrator elects so to testify [Pub. St. N. H. 1901, c. 224, § 16]. Pattee v. Whitcomb [N. H.] 56 Atl. 459.

22. Young v. Montgomery, 161 Ind. 68, 67 N. E. 684; In re Woodbury's Estate, 40 Misc. [N. Y.] 143; Moore v. May, 117 Wis. 192, 94 N. W. 45. Statutes in some states allow evidence of an interested party against the representative of a deceased person as to transactions with the deceased "in regard to the facts testified to" by the other parties' witness, but no "further" [Code Civ. Proc. § 329]. Under such a statute the representative of the deceased having introduced evidence of payments made to other party, the

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interested,[23] nor by testimony of executor drawn out on cross-examination.[24] The bar is not removed by assignment of the disqualifying interest.[25] The admission is not reversible error where the same facts were testified to by other parties.[26]

Against interest.—An interested party may testify where evidence is against his interest.[27]

Objections to the testimony must be made, otherwise the bar is waived.[28] In Indiana, the objection must go to the competency of the witness.[29] One asserting statutory incompetency has burden of proof of that fact.[30] The rule does not require striking of testimony already given where other party dies after testimony has been taken.[31]

§ 5. *Disqualification on account of privileged nature of communication. A. Attorney and client.*—An attorney may not be required to testify as to confidential communications of his client, in the course of his professional employment, without the client's consent.[32] Statutes in regard to such privileged communications are merely declaratory of the common law and do not affect the common-law exceptions thereto.[33] To bring communications within the rule, the relation of attorney and client must exist.[34] Where the attorney is consulted con-

latter may show to what applied but not an agreement that the items to which applied should constitute a lien prior to a mortgage. Dickenson v. Columbus State Bank [Neb.] 98 N. W. 813. Where a party incompetent because of the death of the other party is called for cross-examination by the adverse party and examined as to matters occurring in the lifetime of decedent, he is then a competent witness for himself on all relevant matters. Watkins v. Hughes, 206 Pa. 526. Where plaintiff makes defendant his witness, the whole transaction may be brought out. Lange v. Klatt [Mich.] 97 N. W. 708.

23. Pub. St. N. H. 1901, c. 224, § 16. Pattee v. Whitcomb [N. H.] 56 Atl. 459. Admission of testimony of a third party present does not make interested party competent. Swinebroad v. Bright, 25 Ky. L. R. 742, 76 S. W. 365. That a third party testified that plaintiff told her she was working for decedent for a stated compensation does not authorize plaintiff to deny the statement in an action against decedent's administrator. Stuart v. Lord, 138 Cal. 672, 72 Pac. 142. Testimony of agent of deceased under cross-examination as to a conversation with deceased did not render competent testimony of defendants as to such conversation. Loeb v. Stern, 198 Ill. 371, 64 N. E. 1043.

24. Motz v. Motz, 85 App. Div. [N. Y.] 4.

25. Huff v. Miniard, 24 Ky. L. R. 2272, 73 S. W. 1036.

26. Clarke v. Adam [Tex. Civ. App.] 69 S. W. 1016.

27. Sisters of a claimant against decedent's estate and heirs are competent witnesses for claimant; their testimony being against interest. Neish v. Gannon, 198 Ill. 219, 64 N. E. 1000. A son may testify as to matters occurring in his father's lifetime connected with an advancement [Pa. Act May 23, 1887, § 4]. In re Allen's Estate, 207 Pa. 325.

28. Shelton v. Northern Tex. Traction Co. [Tex. Civ. App.] 75 S. W. 338. The statute does not render the person adversely interested incompetent but only renders his testimony as to conversations and transactions with deceased inadmissible. Neb. Code, § 329, as amended in 1883. Riddell v. Riddell [Neb.] 97 N. W. 609.

29. Statutes relating to admissibility of communications or transactions with decedent do not prevent the introduction of relevant evidence and an objection going to the admissibility of testimony and not to the competency of the witness was properly overruled. Hines v. Consol. C. & L. Co., 29 Ind. App. 563, 64 N. E. 886.

30. Farrar v. Farmers' L. & T. Co., 85 App. Div. [N. Y.] 367.

31. Collins v. McGuire, 76 App. Div. [N. Y.] 443.

32. State v. Faulkner, 175 Mo. 546, 75 S. W. 116. Privileged communications cannot lawfully be divulged by the attorney or drawn from the client on cross-examination without his consent. Jahnke v. State [Neb.] 94 N. W. 158. An attorney may not be compelled to disclose who were represented by him in a certain transaction. In re Shawmut Min. Co., 87 N. Y. Supp. 1059.

33. State v. Faulkner, 175 Mo. 546, 75 S. W. 116.

34. Witness testified he was not the attorney of a party and party later testified he was. Held, the first witness' testimony being accepted by the court, it was not rendered incompetent as privileged by the conflict in the evidence. Reese v. Bell, 138 Cal. xix, 71 Pac. 87. In a suit against a building association by its attorney to cancel note and deed of trust executed by him to the association, the attorney may testify as the relation did not exist in the transaction. Arbuthnot v. Brookfield L. & B. Ass'n, 98 Mo. App. 382, 72 S. W. 132. In an action for false imprisonment, an assistant district attorney was allowed to testify that he had told the defendant the plaintiff's version of the trouble between them, on the ground that no relation of attorney and client existed and the communication was not privileged. Cobb v. Simon, 119 Wis. 597, 97 N. W. 276. A letter from a client to his attorney, transmitting a claim for collection and authorizing the acceptance of a certain sum in

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fidentially, the relation exists, though retainer is not paid.[35] Information acquired by an attorney, while professionally employed, is privileged, whether derived from the client's words, actions, or appearance.[36] Though the relation exists, the attorney may testify as to statements by the client not connected with professional services,[37] or as to information derived from observation open to others in a nonprofessional capacity,[38] or as to communications, where necessary to protect his own interests.[39] A communication in furtherance of a criminal purpose is not within the scope of professional employment.[40] Information is not privileged unless acquired in professional confidence.[41] A communication of defendant to the judge before indictment is confidential.[42] An attorney may testify as to the mental condition of a person at the time he drew up a contract for him,[43] or as to a conversation,[44] or attendant circumstances,[45] on an issue of capacity, when drafting a will. But privileged matter cannot be testified to as a basis for an opinion as to the sanity of the client.[46] Information acquired as agent and not as attorney at law is not privileged.[47] The prohibition of the statute may be waived by the party protected thereby.[48] An attorney who has offered himself as a witness may be required to testify as to his interest in the suit.[49] An admission by a party against his own interest made to counsel of the adverse party is admissible.[50]

Where no objection on the ground of privileged communication was made, it comes too late after answer given.[51]

payment, is not a privileged communication, but a conferring of authority. Bay v. Trusdell, 92 Mo. App. 377.

35. Sheehan v. Allen, 67 Kan. 712, 74 Pac. 245.

36. Amount received as retainer privileged because tending to show amount alleged to have been stolen by client. Holden v. State [Tex. Cr. App.] 71 S. W. 600.

37. Demunsio's Receiver v. Scholtz, 25 Ky. L. R. 1294, 77 S. W. 715; Sargent v. Johns, 206 Pa. 386.

38. Opinion as to sanity of client. Sheehan v. Allen, 67 Kan. 712, 74 Pac. 245.

39. Keck v. Bode, 23 Ohio Circ. R. 413.

40. A communication made by a client to his attorney in attempting to procure his services in securing a bribe, promised but withheld, is not privileged. State v. Faulkner, 175 Mo. 546, 75 S. W. 116.

41. State v. Faulkner, 175 Mo. 546, 75 S. W. 116. Communications made to an attorney who gave his advice gratuitously, it appearing that the party consulting him did not know he was an attorney and the communications not being made to him professionally, they are not privileged. Union Pac. R. Co. v. Day [Kan.] 75 Pac. 1021. Such confidence not violated by an attorney telling where he last saw securities of his client and what he did with them. Ex parte Speller [Mo.] 77 S. W. 552.

Held confidential: An instruction by a client to his attorney as to the amount to present as a claim against a carrier is privileged. Ft. Worth & D. C. R. Co. v. Lock, 30 Tex. Civ. App. 426, 70 S. W. 456. Under laws protecting communications between attorney and client, defendant in an action on a note, defended on the ground that plaintiff was not the owner thereof, cannot be compelled to testify where she told her attorney that the note belonged to another. George v. Hurst, 31 Ind. App. 660, 68 N. E. 1031. Letters between attorney and client. Rooney v. Maryland Casualty Co., 184 Mass. 26, 67 N. E. 882. Where the client consulted his attorney before testifying at the trial, the communication was privileged. State v. Gosey, 111 La. 616.

42. A confession to a judge to whom defendant had gone requesting advice held privileged. People v. Pratt [Mich.] 94 N. W. 752.

43. Grimshaw v. Kent, 67 Kan. 463, 73 Pac. 92.

44. Conversation with testator when attorney drafted a will and signed as a witness could be testified to by attorney. Elliott v. Elliott [Neb.] 92 N. W. 1006.

45. In re Downing's Will, 118 Wis. 581, 95 N. W. 376.

46. Sheehan v. Allen, 67 Kan. 712, 74 Pac. 245.

47. Whenever an attorney receives money or other property of his client, he becomes an agent and may be compelled to testify concerning his disposition of such property. Phoebus v. Webster, 40 Misc. [N. Y.] 528.

48. Suit by executor for discovery of assets in which an attorney is called as a witness constitutes a waiver of the privilege. Ex parte Gfeller [Mo.] 77 S. W. 552. Statements made by an agent to his principal's attorney are not privileged in a subsequent action against the agent where the principal expressly waives his privilege. Leyner v. Leyner [Iowa] 98 N. W. 628.

49. Rev. St. Mo. 1899, § 4652, removing disqualification for interest and allowing interest to be shown on question of credibility. Koenig v. Union Depot R. Co., 173 Mo. 698, 73 S. W. 637. Where an attorney offers himself as a witness and voluntarily gives testimony in which he admits having a contingent fee, he may be required to answer a question as to the amount of the fee. New Omaha T. H. E. L. Co. v. Johnson [Neb.] 93 N. W. 778.

50. Jolls v. Keegan [Del.] 55 Atl. 340.

51. Urdangen & Greenberg Bros. v. Doner [Iowa] 98 N. W. 317.

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(§ 5) *B. Physician and patient.*—A physician may not reveal information acquired from a patient while acting in a professional capacity.[52] The rule ordinarily renders the certificate of death inadmissible,[53] or if admitted, the signing physician cannot testify in support of it.[54] The act does not apply to druggists.[55] It is necessary that the relation of physician and patient exist between the parties,[56] or that the injured person regarded the attending physician as his physician.[57] The privilege extends to cases where physician professionally attends a patient who does not voluntarily require his services.[58] To be privileged, the communication must be connected with his professional duties.[59] A physician may not testify as to the sanity of a patient after the patient's death.[60] The privilege covers information inferred from silence.[61] There is a presumption in the absence of a contrary showing that conversations by a physician with a patient were necessary to enable him to prescribe.[62] The physician may testify as to the condition and state of health of his patient, as well as the treatment prescribed,[63] and the fact, place and length of time of treatment.[64] The statute as to privileged

52. Dubeich v. Grand Lodge A. O. U. W. [Wash.] 74 Pac. 832. Under acts disqualifying a physician as to matters communicated to him as such in the course of professional business, a witness cannot be compelled to testify on cross-examination as to communications made to a physician, not testified to on direct examination. Citizens' St. R. Co. v. Shepherd, 30 Ind. App. 193, 65 N. E. 765. Physicians treating a patient after discharge of former physician were incompetent to testify in an action for malpractice against such former physician over plaintiff's objection, defendant not being present at such examination or having knowledge of plaintiff's purpose in consulting other physicians. Aspy v. Botkins, 160 Ind. 170, 66 N. E. 462. Under a statute disqualifying a physician to testify over patient's objection as to knowledge acquired while treating such patient, defendant in an action for malpractice may not compel plaintiff to testify that another physician had taken an X ray photograph of the injury, which he had done for purposes of treatment. Id.

53. Rule not changed by statute applicable only to one city making surveys and official records in the departments receivable in evidence. Robinson v. Supreme Commandery, U. O. of G. C., 77 App. Div. [N. Y.] 215.

54. A physician is incompetent to testify in support of a certificate of death, in regard to information acquired in his professional capacity. Becker v. Metropolitan Life Ins. Co., 87 N. Y. Supp. 980.

55. The act prohibiting a physician from making a disclosure does not extend to a druggist, and he may testify as to prescriptions put up by him [Code Civ. Proc. § 834]. Deutschmann v. Third Ave. R. Co., 87 App. Div. [N. Y.] 503.

56. A physician directed by the court to examine a party as to whether he was affected by a certain disease testified to is not privileged. State v. McCoy, 109 La. 682. Physicians examining a party without his consent as to fact of disease alleged may testify. State v. Height, 117 Iowa, 650, 91 N. W. 935. A physician treating relatives of insured may testify as to what he observed as to the health of insured in an action on a benefit certificate. Jennings v. Supreme Council, L. A. B. Ass'n, 81 App. Div. [N. Y.] 76.

57. Patterson v. Cole, 67 Kan. 441, 73 Pac. 54.

58. Meyer v. Supreme Lodge, K. P., 83 App. Div. [N. Y.] 359. A physician sent by a street railroad company to examine an injured passenger may not testify as to information acquired while attending such person, and it will be presumed that the information acquired was to enable him to prescribe. Muns v. Salt Lake City R. Co., 25 Utah, 320, 70 Pac. 852. Information acquired by a physician in order to enable him to act while in attendance upon a patient against the latter's will is acquired in his professional capacity. Meyer v. Supreme Lodge K. P. [N. Y.] 70 N. E. 111.

59. Sutcliffe v. Iowa State Traveling Men's Ass'n, 119 Iowa, 220, 93 N. W. 90. In an action to establish a lost will, evidence of testatrix's physician that she sent for him and talked with him relative to making the will and asked him to get a lawyer to draw the will, which he did, is not privileged. Hamilton v. Crowe, 175 Mo. 634, 75 S. W. 389. Evidence of a physician that he asked testatrix if she had made a will and she replied that she had not was not privileged. Id. Acts privileging communications to physicians present no obstacle to evidence of physician to whom a woman applied to commit an abortion, that she stated that defendant by whom she was pregnant had advised against abortion and had agreed to marry where admitted to contradict a dying declaration that defendant had advised the abortion. Seifert v. State, 160 Ind. 464, 67 N. E. 100.

60. In will contest. In re Van Alstine's Estate, 26 Utah, 193, 72 Pac. 942.

61. In an action for personal injury, the physician of plaintiff cannot testify that the plaintiff did not communicate to him the accident as a cause of her ailments. Smart v. Kansas City, 91 Mo. App. 586.

62. State v. Kennedy, 177 Mo. 98, 75 S. W. 979.

63. Metropolitan Life Ins. Co. v. Howle [Ohio] 68 N. E. 4. It is not a breach of privilege to ask a witness in an action by claimant for board and nursing decedent as to what ailed deceased. Ellis v. Baird, 31 Ind. App. 295, 67 N. E. 960.

64. Deutschmann v. Third Ave. R. Co., 87 App. Div. [N. Y.] 503. A physician may be called upon to testify to the simple fact that

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communications does not prevent answer of physician based on hypothetical question as to cause of injury.[66]

The waiver of the physician's privilege cannot be made by the widow in New York, the statute giving that right only to the personal representative of deceased.[67] The calling of a physician does not waive the privilege as to an ambulance surgeon by whom party was taken to hospital.[67] Privilege is waived where patient takes the stand and testifies to what his physician found and said.[68] Fact of testimony as to injuries by the plaintiff and other physicians attending her does not waive privilege as to another physician.[69] A waiver of physician's privilege is binding on the party in a subsequent suit for same cause.[70]

A general objection is insufficient to raise question of violation of privileged communication.[71]

(§ 5) *C. Miscellaneous relations.*—Internal revenue officers cannot be compelled by state courts to disclose facts concerning the sale of intoxicants, learned while in the discharge of their duties,[72] nor may a collector of internal revenue be required to disclose names of persons in whose places of business special tax stamps are posted.[73] A postmaster may not be compelled to disclose information regarding a registered letter.[74] A witness may not be compelled to disclose contents of documents which are a part of the archives of a foreign consulate.[75] Transactions between a banker and a depositor are not privileged or confidential in a legal sense.[76]

§ 6. *Credibility, impeachment, and corroboration of witnesses.*[77] *A. Credibility in general.*—In determining the weight to be given to the testimony of each witness, the jury may take into consideration the reasonableness of the testimony and where they believe a witness has willfully sworn falsely to any material matter, they may disregard the whole testimony of the witness if they believe it untrue.[78] The maxim falsus in uno falsus in omnibus holds only when the false testimony has been given willfully[79] and relates to a material matter[80] of fact.[81] Such testimony

he has attended a certain person as his patient and as to the number of visits. Price v. Standard Life & Acc. Ins. Co. [Minn.] 95 N. W. 1118.

66. Code Iowa, § 4628. Crago v. Cedar Rapids [Iowa] 98 N. W. 354.

67. N. Y. Code Civ. Proc. §§ 834, 836. Beil v. Supreme Lodge K. of H., 80 App. Div. [N. Y.] 609; Meyer v. Supreme Lodge, K. of P., 82 App. Div. [N. Y.] 359. A waiver in an application for insurance of the right to exclude the testimony of the physician is ineffectual under the statutory provision that such waiver can only be by personal representatives of the deceased [Code Civ. Proc. §§ 834, 836]. Meyer v. Supreme Lodge, K. P. [N. Y.] 79 N. E. 111.

68. Duggan v. Phelps, 82 App. Div. [N. Y.] 509.

69. Highfill v. Missouri Pac. R. Co., 93 Mo. App. 219.

70. Citizens' St. R. Co. v. Shepherd, 80 Ind. App. 193, 65 N. E. 765.

71. Schlotterer v. Brooklyn & N. Y. Ferry Co., 89 App. Div. [N. Y.] 508.

72. Deutschmann v. Third Ave. R. Co., 87 App. Div. [N. Y.] 503.

72, 73. In re Lamberton, 124 Fed. 446.

74. Nye v. Daniels, 75 Vt. 81.

75. Kessler v. Best, 121 Fed. 439.

76. Required to disclose amount of depositor's balance on a certain day. In re Davies [Kan.] 75 Pac. 1048.

77. Cross-examination to affect credibility, see, also, Examination of Witnesses, 1 Curr. Law, p. 1165.

78. Miller v. State [Miss.] 35 So. 690; Ward v. Brown, 53 W. Va. 227. Even though corroborated by other circumstances or a credible witness. Contrary charge erroneous. Sumpter v. State [Fla.] 33 So. 981. Evidence of a witness who has contradicted himself is entitled to no weight, unless corroborated. Johnston v. Sochurek, 104 Ill. App. 350. If the guilt of defendant depends upon the testimony of a certain witness and the jury believe from the evidence that the testimony of said witness was willfully and maliciously false as to any material part thereof, they may disregard all of the testimony of the witness and find defendant not guilty. Jackson v. State, 136 Ala. 22. Where a witness willfully gives false testimony in regard to a material matter, the jury may—but is not bound to—reject all the testimony of such witness which is uncorroborated. Suckow v. State [Wis.] 99 N. W. 440.

Cal. Code Civ. Proc. § 3061, subd. 8, provides that it is jury's duty to "distrust" all the evidence of a witness when a part is shown to be false. People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014; People v. Stevens, 141 Cal. 488, 75 Pac. 62.

79. State v. Burns [Nev.] 74 Pac. 988; Beedle v. People, 204 Ill. 197, 68 N. E. 434. Applies only where a witness has knowingly and willfully testified falsely as to matters of

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may not be withdrawn from the jury, as they are the judges of the credibility of witnesses.[82]

A witness may be disbelieved though uncontradicted, the credibility being affected by circumstances of improbability or apparent lack of memory, accuracy, intelligence, or truthfulness of the witness.[83] So impairment of memory may be shown, as affecting credibility.[84] Evidence of financial circumstances is inadmissible as affecting the credibility of a witness.[85] A physician appointed by the court and testifying for one of the parties is not entitled to increased credibility by reason of his appointment by the court.[86] A witness may not be discredited by proof of impulsiveness when excited and the use of profane language under such circumstances.[87] A party having a legal right to refuse to submit to a physical examination may not be prejudiced by proof of that fact allowing inferences against credibility.[88]

Credibility of witnesses is a question for the jury,[89] and because the general character of a witness for veracity may have been impeached, it does not follow that the jury are required to disregard the witness' testimony, where impressed with its truth.[90]

The court should instruct as to effect of impeaching testimony,[91] but such instruction should not be applied, usually, to a particular witness.[92]

Whenever there is a direct conflict in the testimony of witnesses relevant to the issue, evidence is admissible of collateral facts which have a direct tendency to

fact. Nielsen v. Cedar County [Neb.] 98 N. W. 1090.

Before a witness is impeached in the sense that his evidence may be disregarded except where corroborated, the contradiction must go to the extent that the jury may believe that the impeached witness has willfully sworn falsely upon a material matter. Beedle v. People, 204 Ill. 197, 68 N. E. 434.

80. Some material issue or matter as to which he cannot be presumed liable to mistake. Holdredge v. Watson [Neb.] 96 N. W. 67.

81. Mere expressions of opinion are immaterial. Hendley v. Globe Refinery Co. [Mo. App.] 79 S. W. 1163.

82. Root v. Boston El. R. Co., 183 Mass. 418, 67 N. E. 865; Perkins v. Knisely, 102 Ill. App. 562.

83. Applied to case of Chinese witness in deportation proceedings. U. S. v. Lee Huen, 118 Fed. 442. Court charged jury that they could consider the relations, feelings, and prejudices of witnesses, as affecting credibility, only when such feeling of animosity appeared to have influenced the testimony. U. S. v. Post, 128 Fed. 950.

84. State v. Hall, 132 N. C. 1094. Evidence is admissible to show that the mental capacity and faculties of recollection of a witness testifying in a case as to remote events was greatly impaired. Wren v. Howland [Tex. Civ. App.] 75 S. W. 894.

85. A witness who invoiced goods for defendant and not a party to the suit is not to be discredited by a showing that he was financially embarrassed and could not get a favorable report from commercial agencies. Cooper Grocer Co. v. Britton [Tex. Civ. App.] 74 S. W. 91.

86. Smith v. Seattle, 33 Wash. 481, 74 Pac. 674.

87. Shaefer v. Mo. Pac. R. Co., 98 Mo. App. 445, 72 S. W. 154.

88. Personal injury action. Austin & N. W. R. Co. v. Cluck [Tex. Civ. App.] 73 S. W. 569. Refusal to submit to examination by defendant's physician could not be shown. Gulf, C. & S. F. R. Co. v. Brooks [Tex. Civ. App.] 78 S. W. 571.

89. People v. Boren, 139 Cal. 210, 72 Pac. 899; McCoy v. Munro, 76 App. Div. [N. Y.] 435; State v. Coats, 174 Mo. 396, 74 S. W. 864; Ky. Distilleries & Warehouse Co. v. Com., 24 Ky. L. R. 2154, 73 S. W. 746; Citizens' Nat. Bank v. Wilson, 121 Iowa, 156, 96 N. W. 727; Quincy G. & E. Co. v. Bauman, 104 Ill. App. 600; Suckow v. State [Wis.] 99 N. W. 440; U. S. v. Post, 128 Fed. 950. A trial judge, sitting as judge and jury, is the sole and exclusive judge of the credibility of the witnesses. Golden v. Tyer [Mo.] 79 S. W. 143. An instruction was properly refused which stated that the accomplice having admitted committing perjury on her own trial her testimony could only be considered where corroborated. Com. v. Greason, 204 Pa. 64.

90. Peaden v. State [Fla.] 35 So. 204. One defendant is affected by impeachment of his codefendant testifying for both. State v. Broadbent, 27 Mont. 342, 71 Pac. 1. A written statement signed by a witness, if submitted to the jury cannot be considered by it as affecting the credibility of any witness other than the subscriber. Field v. Del., L. & W. R. Co., 69 N. J. Law, 433. A complaining witness although the owner of property against which offense is committed is not a party to the record whose admissions are binding on the state and are not competent against the prosecution except for impeachment after proper foundation therefor is laid. Roesner v. Darrah, 65 Kan. 599, 70 Pac. 597.

91. Cox v. Com., 24 Ky. L. R. 680, 69 S. W. 799.

92. The refusal to instruct as to the impeachment of a particular witness is not error. Suckow v. State [Wis.] 99 N. W. 440.

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show that the testimony of the witnesses on one side of the issue is more reasonable than that for the other.[92]

Impeaching and discrediting in general.—The extent of cross-examination of a witness for the purpose of testing his credibility or showing bias rests in the sound discretion of the trial court.[93]

A witness may be discredited by the inherent improbability of his testimony,[94] or the fact that it is incorrect in part.[95]

One may not impeach his own witness[97] except in cases of surprise,[98] or as to defensive matter drawn out on cross-examination,[99] or in some instances where adverse.[1] The state may show hostility of a witness whom the law requires it to call, on the question of credibility.[2] The rule that one may not impeach his own

92. Phillips v. Mo [Minn.] 97 N. W. 969.

93. State v. King, 88 Minn. 175, 92 N. W. 965.

See numerous cases cited in Examination of Witnesses, 1 Curr. Law, p. 1165.

94. In re Leslie, 119 Fed. 406. Where a witness has testified to an occurrence at a given place and time, evidence is admissible to show the improbability of the witness being at the place at the time stated. Younger v. State [Wyo.] 78 Pac. 551. A witness using glasses to read and testifying to an occurrence he witnessed across the street may not be impeached by introduction of the glasses as fact of use of glasses for reading has no tendency to prove defective vision as to more distant objects. Com. v. Carter, 188 Mass. 221, 66 N. E. 716.

95. Persons testifying to the absence of certain equipments in factories in different parts of the country may be contradicted by evidence that such equipments were furnished in some of the factories referred to. Saucier v. N. H. Spinning Mills [N. H.] 56 Atl. 545.

97. Birmingham R. & E. Co. v. Ellard, 135 Ala. 433; Caldwell v. Farmers' & Merchants' Bank [Mo. App.] 71 S. W. 1093; Katafiasz v. Toledo Consol. Elec. Co., 24 Ohio Circ. R. 127; Smith v. State [Tex. Cr. App.] 74 S. W. 556; Dawson v. State [Tex. Cr. App.] 74 S. W. 913; Smith v. Lehigh Valley R. Co., 177 N. Y. 379, 69 N. E. 729; King v. Phoenix Ins. Co., 101 Mo. App. 163, 76 S. W. 55; Vollkommer v. Cody, 85 App. Div. [N. Y.] 57; Westphal v. St. Joseph & B. H. St. R. Co. [Mich.] 96 N. W. 19; Creighton v. Modern Woodmen of America, 90 Mo. App. 378; Deutschmann v. Third Ave. R. Co., 78 App. Div. [N. Y.] 413; Conklan v. Metropolitan St. R. Co., 40 Misc. [N. Y.] 619; Casey-Swasey Co. v. Va. State Ins. Co. [Tex. Civ. App.] 75 S. W. 911. One may not impeach his own witness by showing unsoundness of mind. Southern Bell Tel. & T. Co. v. Mayo, 134 Ala. 641. One cannot contradict his own witness as to collateral matters. Wimmer v. Metropolitan St. R. Co., 86 N. Y. Supp. 1052. One may not refute the testimony of his own witness offered to impeach character of his opponent's witness by proof of a collateral matter. Lankaster v. State [Tex. Cr. App.] 72 S. W. 888. State's witness denied making imputed statement, stating nothing adverse to the state. Held, state should not have been permitted to prove that she did make the statement. Hanna v. State [Tex. Cr. App.] 79 S. W. 544. While a party will not be permitted to impeach the general reputation of his own witness for truth, or to impugn their credibility by general evidence tending to show them unworthy of belief, yet he may prove the truth of any particular fact by any other competent testimony in direct contradiction to what the witness may have testified. Pitman v. Holmes [Tex. Civ. App.] 78 S. W. 961. The state cannot impeach its own witness for his mere denial or failure to testify to a certain fact. Error in this regard is not cured by an instruction that the jury should consider the contradictory testimony only on the issue of the witness' credibility. Owens v. State [Tex. Cr. App.] 79 S. W. 575.

98. Com. v. Wickett, 20 Pa. Super. Ct. 350. Where a witness has misled the prosecutor by denying statements which induced the prosecutor to offer him as a witness, the state may impeach him. The evidence must be limited to the purposes for which it was introduced. Sapp v. State [Tex. Cr. App.] 77 S. W. 456. Where defendant introduced plaintiff's witness and induced her to change evidence given by deposition, plaintiff was not open to the charge of attempting to impeach his own witness in introducing evidence of notary that the answers were correctly transcribed. Hord v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 76 S. W. 227. As a matter of explanation to show why witness was called, defendant could show that one of his witnesses had, before going on the stand, made a statement different from his testimony. People v. Payne, 131 Wash. 474, 91 N. W. 739. One may not impeach his witness as to a point on which he fails to testify; to authorize his impeachment the witness must testify to something injurious to the party calling him. Smith v. State [Tex. Cr. App.] 78 S. W. 519.

99. Hubner v. Metropolitan St. R. Co., 77 App. Div. [N. Y.] 290.

1. Bryan v. State [Fla.] 34 So. 243; Sylvester v. State [Fla.] 35 So. 142. Where the witness gives affirmative testimony injurious to the state's case, and which testimony is a surprise to the state, it can impeach him. Owens v. State [Tex. Cr. App.] 79 S. W. 575. A party may contradict his own witness when he testifies to a fact prejudicial to him. Com. v. Bavarian Brewing Co. [Ky.] 80 S. W. 772. But he cannot be contradicted by the introduction of testimony given on a former trial, if he merely failed to testify as he was expected to. Id.

2. People v. Elco, 131 Mich. 519, 94 N. W. 1069. A prosecutor is not required to call a witness whose name is indorsed where he doubts his veracity. Carle v. People, 200 Ill. 494, 66 N. E. 32.

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witness does not prevent inquiry as to previous contradictory statements for the purpose of refreshing the witness' memory,[3] nor will it prevent calling other witnesses to testify contradictorily to a prior witness, a party not being concluded by statements of a witness he has called.[4]

A witness may not be impeached as to irrelevant or collateral matters drawn out on cross-examination,[5] and hence may not be recalled for cross-examination on a collateral issue for the sole purpose of impeachment.[6]

(§ 6) *B. Character and conduct of witnesses.* 1. *In general.*—A witness cannot be impeached by proof of his general bad character, but the proof must be limited to his bad character for truth and veracity.[7] Thus it has been held that it cannot be shown, as affecting credibility, that a witness was a confirmed opium user,[8] that the character of the witness for chastity was bad,[9] or that witness was related to or associated with evil or notorious persons,[10] or had been disbarred as an attorney.[11] Evidence as to the occupation of the witness is sometimes ad-

3. Maloney v. Martin, 81 App. Div. [N. Y.] 432. Where a party is surprised by the unexpected testimony of his witness, he may interrogate him as to previous declarations inconsistent with the testimony given to test his recollection. State v. Williams, 111 La. 179.

4. U. S. Brew. Co. v. Ruddy, 104 Ill. App. 215. A party to a suit is not bound by the testimony of his witness so as to preclude him from relying on a different state of facts from those testified to. Holland v. St. Louis & S. F. R. Co. [Mo. App.] 79 S. W. 508. The rule as to impeachment of one's own witness does not prevent a showing by a third party that the witness had attempted to manufacture evidence as that could be proved as an independent fact. U. S. Brew. Co. v. Ruddy, 203 Ill. 306, 67 N. E. 799. Where witness states on cross-examination that he does not recollect a certain conversation and the cross-examiner asked him questions not the subject of the direct examination, he may show the conversation by another without impeaching his own witness. Kellum v. Mission of Immaculate Virgin, 82 App. Div. [N. Y.] 523.

5. Smye v. Groesbeck [Tex. Civ. App.] 78 S. W. 972; Goldberg v. Metropolitan St. R. Co., 84 N. Y. Supp. 211; Berry v. Safe Deposit & Trust Co., 96 Md. 45; Caskey v. La Belle, 101 Mo. App. 590, 74 S. W. 113; Chicago & E. I. R. Co. v. Stewart, 104 Ill. App. 37; Hutchins v. Mo. Pac. R. Co., 97 Mo. App. 548, 71 S. W. 473; Harrison v. Garrett, 132 N. C. 172; Lankaster v. State [Tex. Cr. App.] 72 S. W. 383; Com. v. Scouton, 20 Pa. Super. Ct. 503; Sheldon v. Bigelow, 118 Iowa, 586, 92 N. W. 701; Trussell v. Western Pa. Gas Co., 20 Pa. Super. Ct. 423; Fields v. State [Fla.] 35 So. 185; Bullard v. Smith, 28 Mont. 387, 72 Pac. 761; Bailey v. Seattle & R. R. Co., 32 Wash. 640, 73 Pac. 679; State v. Sheridan, 121 Iowa, 165, 96 N. W. 730; George Burke Co. v. Fowler [Neb.] 93 N. W. 760; Drumm-Flato Com. Co. v. Union Meat Co. [Tex. Civ. App.] 77 S. W. 634; Garcia v. State [Tex. Cr. App.] 74 S. W. 916; Baldridge v. State [Tex. Cr. App.] 74 S. W. 916; Vroman v. Kryn, 86 N. Y. Supp. 94. The state may not introduce evidence of other crimes as rebuttal having got a denial by cross-examining defendant. State v. Roscum, 119 Iowa, 330, 93 N. W. 295. A witness may not be impeached as to his statement of his belief as to who committed the crime. Jenkins v. State [Tex. Cr. App.] 75 S. W. 312. Where a physician, in a prosecution for rape, denied that he was treating defendant for paralysis, he may be impeached by showing that he had so stated to other persons and the evidence will not be inadmissible as impeachment on a collateral matter. People v. Row [Mich.] 98 N. W. 13. The answer of a witness as to whether he had ever been in the penitentiary may not be contradicted. Gulf, C. & S. F. R. Co. v. Johnson [Tex.] 78 S. W. 224.

6. State v. Caudle, 174 Mo. 333, 74 S. W. 621.

7. Belt v. State [Tex. Cr. App.] 78 S. W. 933; State v. Jones [Del.] 53 Atl. 853. A charge to the effect that the material question was not the character of complaining witness, but the guilt of defendant, was not in connection with other instructions, erroneous as leaving the jury to infer that the character of the witness for truth and veracity was immaterial. Suckow v. State [Wis.] 99 N. W. 440. Witness in criminal prosecutions may not be impeached by showing their reputation for morality and honesty. Locklin v. State [Tex. Cr. App.] 75 S. W. 305. In a prosecution for violating a certain law, defendant cannot prove that a witness for the state had the reputation of violating the same law. Smith v. State [Tex. Cr. App.] 77 S. W. 801.

8. State v. King, 88 Minn. 175, 92 N. W. 965.

9. Testimony of reputation for a want of chastity in prosecutrix is not admissible in bastardy proceedings on the question of the child's paternity, or to impeach the testimony of prosecutrix. People v. Wilson [Mich.] 99 N. W. 6. The character of a prosecutrix for chastity in a prosecution for incest is immaterial and she may not be impeached by admissions of intercourse with other men. Richardson v. State [Tex. Cr. App.] 70 S. W. 320.

10. It was improper to ask defendant if she was not the sister of a certain "notorious" person. Morgan v. Com., 24 Ky. L. R. 2117, 73 S. W. 1098. Impeaching evidence that defendant testifying in her own behalf was a notorious blackmailer and thief and the daughter of a named person and the sister of another and that all were bad and that her business was "doing" everybody she could is irrelevant. Id.

11. Record of disbarment excluded. O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788.

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mitted,[12] if it is shown that the occupation was vicious.[13] The occupation must have been followed recently.[14] Questions tending to show an abandoned life or want of moral sense are proper.[15] Questions propounded to a witness on cross-examination as to whether he had borne alias names, or had tried to induce a witness in the case to swear falsely are competent as affecting his credibility.[16] In impeaching the credit of a witness, the examination must be confined to his general reputation for truth and veracity and not be permitted as to particular facts.[17] The general reputation of a witness may not be shown, though an offer is made to show also the bad reputation for truth and veracity of the witness.[18] It is improper to ask a witness himself if he has ever been impeached, as this should be proved by other evidence.[19] The reputation of a prosecuting witness for truth cannot be questioned where he did not testify.[20] In Missouri, it is held that the general character or reputation of a witness may be shown,[21] and in Georgia, evidence of general bad character is admissible on the issue of credibility, and the statute prescribes the manner of so impeaching the witness.[22] A mere conflict of evidence does not warrant the putting of a witness' character in issue.[23] When a defendant takes the stand as a witness, he puts in issue his character for truth and veracity and is subject to cross-examination the same as other witnesses in regard thereto.[24]

12. Evidence that the witness owned a saloon and half interest in a gambling house, but that he never tended bar in the saloon is admissible to show character and credibility. Terry v. State [Tex. Cr. App.] 79 S. W. 319. Exclusion of evidence that prosecutrix was employed as bar maid in her father's saloon and associated with immoral characters assembled there was not reversible error in a prosecution for rape, her father having a right to command her services. Carter v. State [Tex. Cr. App.] 76 S. W. 437. In a prosecution for perjury, there was no error in allowing a witness, a gambler, to be asked what his occupation was. McLeod v. State [Tex. Cr. App.] 75 S. W. 522.

13. On the question of credibility, evidence is inadmissible that witness under guise of a messenger and insurance business man was conducting a negro club without proof that the club was vicious in its nature. Atchison, T. & S. F. R. Co. v. Keller [Tex. Civ. App.] 76 S. W. 801. That the witness was a saloonkeeper was inadmissible. Shaefer v. Mo. Pac. R. Co., 98 Mo. App. 445, 72 S. W. 154.

14. Bergstrand v. Townsend, 70 Ark. 600, 70 S. W. 307.

15. In an action for assault, plaintiff may be asked questions tending to show abandoned life and that she was devoid of moral sense. Osborne v. Seligman, 39 Misc. [N. Y.] 811. Evidence that a witness was the mistress of the accused is admissible as going to the credibility of the witness. Ivy v. State [Miss.] 36 So. 265. A witness may be asked as to her child being born out of wedlock. State v. Boyd [Mo.] 76 S. W. 979. A witness may be asked as to improper relations with a party to the action and as to her reasons for going under an assumed name as tending to impeach her credibility. McCarty v. Hartford Fire Ins. Co. [Tex. Civ. App.] 75 S. W. 934.

16. Carp v. Queen Ins. Co. [Mo. App.] 79 S. W. 757.

17. Question whether witness was the person indicted in another county, and the indictment, properly excluded. Houston & T. C. R. Co. v. Bulger [Tex. Civ. App.] 80 S. W. 557. Specific acts cannot be made the subject of inquiry for purposes of impeachment. Andrews v. State, 118 Ga. 1. It is never competent to impeach a defendant as a witness by proof of particular acts which have no connection with the offense for which he was on trial. Not competent to show an indictment in another county. Seaborn v. Com., 25 Ky. L. R. 2203, 80 S. W. 228.

18. Com. v. Payne, 205 Pa. 101.

19. Hall v. U. S. Radiator Co., 76 App. Div. [N. Y.] 504, 12 Ann. Cas. 109.

20. State v. Chenute, 65 Kan. 862, 70 Pac. 870.

21. A witness may be impeached by evidence of his general reputation for chastity and morality as well as for truth and veracity. State v. Pollard, 174 Mo. 607, 74 S. W. 969.

22. Civ. Code, § 5293. Atlantic & B. R. Co. v. Reynolds, 117 Ga. 47. General reputation in neighborhood of place of work, as well as where witness lives, can be shown where such a reputation has been established. Id.

23. So as to permit a number of witnesses to testify to his reputation for truth and veracity, honesty and integrity. Simmonds v. Simmonds [Tex. Civ. App.] 79 S. W. 630.

24. State v. Williamson, 65 S. C. 242; State v. McLain, 92 Mo. App. 456; State v. Melvern, 32 Wash. 7, 72 Pac. 489; People v. Walker, 140 Cal. 153, 73 Pac. 831. Accused testifying in his own behalf may be asked as to previous difficulties not to impeach character, but as affecting credibility. State v. Casey, 110 La. 712. Defendant testifying in his own behalf many be asked as to swearing falsely as to pecuniary responsibility when signing a bond. People v. Gray [Mich.] 98 N. W. 261. Where accused is a witness, he may be asked how many times he has been before the court to test his credibility. State v. Callian, 109 La. 682. Accused taking stand in his own behalf may be asked as to whether he had ever been in the penitentiary. State

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(§ 6B) 2. *Accusation and conviction of crime.*—Proof of conviction of a felony,[25] and in some states of a misdemeanor,[26] if it involves moral turpitude,[27] is admissible on the question of credibility, the record of the conviction being usually required for the purpose,[28] though it may be shown in some cases on cross-examination.[29] The record is not conclusive and witness may show his innocence of the charge,[30] or that his reputation for truth and veracity was good.[31] In some states former conviction of a crime may be shown as affecting the credibility of a witness, and the question need not specify a particular crime.[32] In Alabama, no objection is allowed to the competency of a witness because of conviction of any crime save perjury or subornation thereof, but conviction of any

v. McCoy, 109 La. 682. A party may be asked as to a plea of guilty to a charge of theft on the question of credibility. Pratt v. Wickham [Mich.] 94 N. W. 1059. The credibility of defendant taking the stand in his own behalf may be attacked by showing that he had been indicted for cattle stealing. Bearden v. State [Tex. Cr. App.] 73 S. W. 17.

25. Scoville v. State [Tex. Cr. App.] 77 S. W. 792. Ky. Civ. Code, § 597. Hensley v. Com., 25 Ky. L. R. 48, 74 S. W. 677; Powers v. Com., 24 Ky. L. R. 1007, 1186, 70 S. W. 644, 1050. A witness cannot be impeached by the testimony of an officer that he had arrested the witness for a criminal offense. Mullins v. Com., 25 Ky. L. R. 2044, 79 S. W. 258. Witness may be asked as to conviction and sentence to penitentiary for a similar offense. Morgan v. Com., 24 Ky. L. R. 2117, 72 S. W. 1093. For purposes of impeachment, it may be shown that a witness had been convicted in one county for complicity and that the case in another county had been dismissed. Kipper v. State [Tex. Cr. App.] 77 S. W. 611. In prosecution for homicide, the state could impeach defendant by showing that he had served a term in the penitentiary of another state. Elmore v. State [Tex. Cr. App.] 78 S. W. 520. Former conviction of felony admissible by statute in Washington [2 Ballinger's Ann. Codes & St. § 5992]. State v. Ripley, 32 Wash. 182, 72 Pac. 1036; State v. Champoux, 33 Wash. 339, 74 Pac. 557. In Massachusetts, the conviction of a witness of a crime may be shown to affect his credibility (O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788); but this does not apply to attesting witnesses to a will (Id.), and the statute is construed as leaving to the common law the competency of attesting witnesses and to the statutes the competency of such witnesses when placed on the stand [Rev. Laws, c. 175, § 23] (Id.). Where a proponent of a will had testified as a subscribing witness and had also given other testimony, the record of his conviction for being accessory to bribery was properly admitted. O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788. Under a provision allowing interrogation of witness as to previous conviction of felony, a witness may be asked as to whether he had been convicted of obtaining a signature to a note by false pretenses, that being a felony [Code Iowa, § 4613]. State v. Carter, 121 Iowa, 135, 96 N. W. 710. Fact of conviction being admissible, it was not prejudicial error to admit fact of his arrest on the charge for which he was convicted. Thornton v. State, 117 Wis. 338, 93 N. W. 1107. In California, records of former convictions of misdemeanors cannot be introduced or used for the purpose of impeachment. People v. White, 142 Cal. 292, 75 Pac. 828. Parol evidence that a witness had been convicted of petit larceny is not competent to impeach witness. Peoples v. State [Miss.] 33 So. 289.

26. Mo. Rev. St. 1899, § 4680. Chouteau L. & Lumber Co. v. Chrisman, 172 Mo. 610, 72 S. W. 1062. Mo. Rev. St. 1899, § 4680. State v. Blitz, 171 Mo. 530, 71 S. W. 1027. Under laws allowing proof of a commission of criminal offense to affect credibility, it may be proven in Missouri that the witness had been convicted of gambling, that offense being a misdemeanor. State v. Thornhill, 174 Mo. 364, 74 S. W. 832. In prosecution for burglary, a previous conviction for petit larceny is admissible to affect defendant's credibility. State v. Chappell [Mo.] 78 S. W. 535. But even though conviction of a misdemeanor may be shown, questions of a witness whether she had been arrested and tried in police court for whipping a person, and whether she had been fined in a police court, were properly excluded as not affecting the credibility of the witness. O'Connor v. St. Louis Transit Co. [Mo. App.] 80 S. W. 304.

27. A witness cannot be impeached by introducing a record of his conviction for misdemeanor, it not appearing that the offense was one involving moral turpitude. Andrews v. State, 118 Ga. 1. A statute allowing proof of conviction of a crime involving moral turpitude to affect credibility does not prevent asking a witness as to conviction of an offense, though such offense does not involve moral turpitude. (Selling intoxicating liquors.) McGovern v. Smith, 75 Vt. 104.

28. Reed v. State [Neb.] 93 N. W. 321. A witness denying a conviction may be impeached by a record of his conviction. O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788; Wilson v. State [Tex. Cr. App.] 78 S. W. 232. In impeaching a witness by proof of conviction, it is not necessary to produce the jail book, as that is not a record. Id. Impeachment by parol proof of conviction is harmless, where the record is afterwards introduced. Id.

29. McDonald v. State [Tex. Cr. App.] 72 S. W. 383. The credibility of a witness may be impeached by his own admission of conviction, on cross-examination. State v. Knowles [Me.] 57 Atl. 588. A witness may be asked as to confinement in the penitentiary, and if he answers that he has been, the record of the conviction is not necessary. State v. Hill, 52 W. Va. 296.

30. Reed v. State [Neb.] 93 N. W. 321.

31. Kraimer v. State, 117 Wis. 350, 93 N. W. 1097.

32. P. L. 1900, p. 362. State v. Fox [N. J. Law] 57 Atl. 270.

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other infamous crime goes to the credibility of the witness on a criminal prosecution.[33]

The conviction must not have been so remote as not to affect the present credibility of the witness.[34] That the witness has been arrested[35] or indicted[36] may be shown, but not that an indictment is pending.[37] A record of indictment on which the witness had not been tried was held properly excluded.[38]

(§ 6B) 3. *Competency of evidence as to reputation for veracity.*—Reputation for truth and veracity can only be proved by persons acquainted with such reputation.[39] Whether testimony as to the character of a witness for truth and veracity is or is not too remote to be competent evidence is to be determined by the trial judge in the exercise of reasonable discretion.[40] In some cases, evidence of the reputation of a witness for truth and veracity at a time remote from the time of trial will be admitted.[41] Reputation in vicinity of prior residence may be shown, though a subsequent residence and provable reputation there may be shown.[42] Though one witness is not sufficient to impeach another, yet his testimony may be received, leaving the question of credibility with the jury.[43]

The opinion of the supreme court in another case between the same par-

33. Code, § 1795. Castleberry v. State, 135 Ala. 24. The question, "Were you ever convicted of a crime?" is good as against a general objection, though it might elicit an answer of a conviction of an offense which would not go to credibility. Id. Under provision that conviction of infamous crime may be shown on question of credibility, a witness may be asked as to his conviction for arson [Ala. Code, § 1795]. Deal v. State, 136 Ala. 52. A judgment convicting defendant of an infamous crime from which an appeal had been taken is admissible on question of credibility. Viberg v. State, 138 Ala. 100.

34. Evidence of a crime committed some 17 years before not admissible as affecting credibility. Bowers v. State [Tex. Cr. App.] 71 S. W. 234. Evidence of a conviction of assault with intent to murder 20 years before too remote. Dyer v. State [Tex. Cr. App.] 77 S. W. 456. Indictment for violation of local option law nine years before too remote. Marks v. State [Tex. Cr. App.] 78 S. W. 512. Conviction of crime nine years before and subsequent indictment for another offense not too remote. Scoville v. State [Tex. Cr. App.] 77 S. W. 792.

35. Defendant testifying for himself may be asked as to the number of times he had been arrested and what for. Williams v. U. S. [Ind. T.] 69 S. W. 871. On cross-examination of defendant in prosecution for homicide, the state could show arrest for abduction of child to affect credibility. Jones v. State [Tex. Cr. App.] 71 S. W. 962. A witness may be asked as affecting credibility if he had not been brought back to the state to answer a criminal charge based on the same transaction as that in issue. Livingston v. Heck [Iowa] 94 N. W. 1098.

36. He may be examined as to indictment for perjury, without production of record. State v. Williamson, 65 S. C. 242. During a trial for murder, defendant may be asked on cross-examination, whether he had been indicted for assault with intent to commit murder. Powell v. State [Tex. Cr. App.] 70 S. W. 218. Where state's witness admitted confinement in jail on criminal charges, but refused answer as to the nature of the charges, the indictment against him is admissible to attack his credibility. Lee v. State [Tex. Cr. App.] 73 S. W. 407.

37. A witness cannot be impeached by showing pendency of indictments for perjury against him except on cross-examination. Casey-Swasey Co. v. Va. State Ins. Co. [Tex. Civ. App.] 75 S. W. 911.

38. Where a prisoner in a county jail testified as to conversations between defendant and third party, the record of indictment on which he had not been tried was properly excluded. State v. Ronk [Minn.] 98 N. W. 334.

39. Lamb v. Littman, 132 N. C. 978. An impeaching witness must testify from his own knowledge of witness' reputation and not from hearsay. Vickers v. People, 31 Colo. 491, 73 Pac. 845. A witness cannot testify to the bad reputation of another for truth and veracity when he has never heard that reputation called in question. This rule does not prevail in regard to the good repute of another. Tyler v. State [Tex. Cr. App.] 79 S. W. 553.

40. Alford v. State [Fla.] 36 So. 436.

41. Where a witness had nomadic habits, evidence as to his character by witnesses who had lived in neighborhoods where he had lived, and who had a reasonable acquaintance with his reputation there, some years before and up to the time of trial, was admissible. Alford v. State [Fla.] 36 So. 436. Evidence of reputation for truth and veracity nearly two years before is not too remote. State v. Knight, 118 Wis. 473, 95 N. W. 390. Evidence of the general reputation of a witness borne by him three years and two months before the trial is admissible when the witness has not during that time resided in any one place long enough to acquire a reputation. Douglass v. Agne [Iowa] 99 N. W. 550.

42. State v. Knight, 118 Wis. 473, 95 N. W. 390. That witness' reputation for truth and veracity in the community in which he lived up to within two months of the trial was bad, may be shown. State v. Pucca [Del.] 55 Atl. 831.

43. Bradshaw v. State [Tex. Cr. App.] 70 S. W. 215.

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ties cannot be read as bearing on the credit which should attach to the evidence of one of the parties for the purpose of discrediting him.[44]

(§ 6B) 4. *Examination of impeaching witness.*—Evidence that one hired a person to go to a neighboring town and examine into the credibility of a witness is admissible to show the credibility of testimony given.[45] The knowledge of the impeaching witness may be tested on cross-examination,[46] and the answers given on such cross-examination cannot be taken from the jury.[47]

(§ 6) *C. Interest and bias of witness.*—On the question of credibility of a witness his interest or bias is always a legitimate subject of inquiry[48] where not too remote,[49] and such impeachment is not objectionable as on a collateral issue.[50] The hostility of impeaching witnesses may be shown.[51] It is not essential that a predicate should be laid before testimony as to the bias, hostility, interest, or motives of a witness may be introduced.[52] The witness may be asked as to former troubles[53] and lawsuits with the opposite party,[54] improper relations with party to suit,[55] contribution to fund for litigation,[56] interest as taxpayer,[57] offer of re-

44. Anderson Carriage Co. v. Pungs [Mich.] 96 N. W. 563.

45. Terry v. State [Tex. Cr. App.] 79 S. W. 319.

46. Impeaching witness testifying as to having heard that the witness had been indicted may be asked in what court the indictment was. Bohlman v. State, 135 Ala. 45. Where a witness testifies to reputation and that it is good, he may be asked to test his credibility, as to having heard of specific acts of bad conduct on the part of defendant, but cannot be asked as to his knowledge of those acts. Cook v. State [Fla.] 35 So. 665. A question to an impeaching witness whether another witness used certain language out of court, "or words of like meaning," is proper. Wysocki v. Wis. Lakes L. & C. Co. [Wis.] 93 N. W. 950.

47. Answers given by impeaching witnesses that defendant has been accused of moral delinquencies and unneighborly conduct cannot be taken from the jury. Barnes v. Com., 24 Ky. L. R. 1143, 70 S. W. 827.

48. Enmity, bias, or hostility. Mackmasters v. State, 81 Miss. 374; Rarden v. Cunningham, 136 Ala. 263; Houston Biscuit Co. v. Dial, 135 Ala. 168; Purdee v. State, 118 Ga. 795. Partiality of witnesses may be shown by showing that defendant's president had tried to get statements from them. Houston Biscuit Co. v. Dial, 135 Ala. 168. Range of examination may be limited by trial judge. H. E. Taylor & Co. v. Metropolitan St. R. Co., 84 N. Y. Supp. 282. Where the witness testified to an unfriendly feeling for defendant, it was within the discretion of the trial judge to sustain an objection to a question as to whether witness desired defendant's conviction. State v. May, 172 Mo. 630, 72 S. W. 918. The amount of a recovery by a witness may not be shown on the question of bias in an action by another injured in the same accident. South Covington & C. St. R. Co. v. Constans, 25 Ky. L. R. 158, 74 S. W. 705. Defendants in a criminal case may show by cross-examination the relations and animus of a witness for the state. State v. Broadbent, 27 Mont. 342, 71 Pac. 1. On trial for rape, witness could be asked if she had not been trying to get girl away from accused. Shepherd v. State, 135 Ala. 9. Under Civ. Code 1895, § 5289, the state of a witness' feelings toward a party may always be shown for the consideration of the jury. Brown v. State, 119 Ga. 572. On cross-examination of one of defendant's witnesses, it was shown that he interested himself in behalf of defendant, endeavored to get prosecuting witness to drop the matter, and though an officer, and present at the time of the assault did not arrest defendant stating he had no warrant. Held, no error. Pace v. State [Tex. Cr. App.] 79 S. W. 531.

49. On question of hostility of witness, it may be shown that the party against whom he testified had sued him, but evidence of suits against other members of his family is too remote. Collins v. McGuire, 76 App. Div. [N. Y.] 443. In a prosecution for embezzlement, question asked of witness of ill feeling because of a proposed sale of land by witness' father to accused for a principal is too remote. Jackson v. State [Tex. Cr. App.] 70 S. W. 760. Bias may not be shown by proof that a witness for the state is the washerwoman of the deceased. Hall v. State, 127 Ala. 44.

50. The impeachment of a witness as to friendly relations between the parties to a homicide is not objectionable as on a collateral issue. Connell v. State [Tex. Cr. App.] 75 S. W. 512. Bias, prejudice, interest, etc., of a witness, may be shown by proof of collateral matter; but where the witness admits such state, then proof of collateral matter to show such state is immaterial. Hooks v. Pafford [Tex. Civ. App.] 73 S. W. 991.

51. Brink v. Stratton, 176 N. Y. 150, 68 N. E. 143.

52. Alford v. State [Fla.] 36 So. 436.

53. Loveman v. Brown, 138 Ala. 608. Question as to troubles must be definite. Hoover v. State, 161 Ind. 348, 68 N. E. 591.

54. Beal v. State, 138 Ala. 94. That witness had a suit pending against defendant similar to that of plaintiff, in which plaintiff was interested, was competent to show witness interested. Chicago, R. I. & G. R. Co. v. Longbottom [Tex. Civ. App.] 80 S. W. 542.

55. Evidence that witness had sustained improper relations with accused charged with the murder of her sister is admissible as showing interest of the witness. Morrison v. Com., 24 Ky. L. R. 2493, 74 S. W. 877.

56. Cobban v. Hecklen, 27 Mont. 345, 70

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ward,[58] inducements and promises of immunity,[59] money considerations for testimony,[60] attendance as witness on request without service of subpoena.[61] Fact of sustaining contractual relation may be shown.[62] Prejudice may be shown by excessive zeal to embarrass opposing party.[63] A witness in a criminal case may be asked as to increase in his bail by the prosecuting attorney to show duress and thereby affect his credibility.[64] Witness testifying to prejudice may not relate reasons therefor.[65]

(§ 6) *D. Proof of previous contradictory statements.*—Prior statements of witnesses inconsistent with their testimony upon material issues are always competent to impeach their credibility,[66] such evidence being admissible for purpose

Pac. 805. In a prosecution for murder, a contributor to a fund for prosecution may explain circumstances. Kipper v. State [Tex. Cr. App.] 77 S. W. 611.

57. Styles v. Decatur, 131 Mich. 443, 91 N. W. 622.

58. A witness may be asked whether the offer of a reward had influenced his testimony. State v. Analinger, 171 Mo. 600, 71 S. W. 1041. Where witness testifies fully as to interest dependent on reward, it was not error to sustain an objection to a question asking a witness whether he was after conviction or reward. Porter v. People, 31 Colo. 503, 74 Pac. 879.

59. Where one convicted of the same homicide testified for the state that he had not been offered inducements, it was error for the prosecutor to testify to the same effect. Owens v. State [Miss.] 33 So. 713. The fact that an accomplice had been offered his liberty in consideration of testimony may be considered on question of credibility. Barr v. People, 30 Colo. 522, 71 Pac. 392. In a prosecution for homicide, evidence of state's witness as to immunity to be given witnesses disclosing facts of crime. Kipper v. State [Tex. Cr. App.] 77 S. W. 611.

60. A witness may be asked as to a promise of prosecution to pay witness certain fees while in jail for the purpose of testifying in the case. State v. Mulch [S. D.] 96 N. W. 101. Where evidence is introduced that witness was paid a sum as expenses, it was allowable for the state to introduce evidence of citizens that they as citizens had paid such expenses. Mercer v. State [Tex. Cr. App.] 76 S. W. 469. Witness may not be asked as to relative proportions of income from private business and from investigations for city in special proceedings as that is an inquiry as to witness' private business. Gordon v. Chicago, 201 Ill. 623, 66 N. E. 822.

61. On question of bias of witness who had come from a distance at a party's request without subpoena, he may be asked if he would have come at defendant's request if plaintiff had not asked him. Wooley v. Bell [Tex. Civ. App.] 76 S. W. 797. As affecting credibility, it may be shown that witness attended from a distance without subpoena and his fare was paid by the party producing him. Sylvester v. State [Fla.] 35 So. 142. Witness may be asked questions as to their attendance without subpoena and fact of employment by party for whom testimony was given from whom compensation was expected. Mo., K. & T. R. Co. v. Smith, 31 Tex. Civ. App. 332, 72 S. W. 418.

62. Fact of employment may be shown on question of bias. Dina v. State [Tex. Cr. App.] 73 S. W. 289. A witness may be asked the rule of company discharging negligent employes and whether they were required to do their best as witnesses or leave employment. Mo., K. & T. R. Co. v. Smith, 31 Tex. Civ. App. 332, 72 S. W. 418. For the purposes of impeachment, it is proper to ask a physician participating in a release from liability for injuries if he had not witnessed other releases for the same defendant. Dorsett v. Clement-Ross Mfg. Co., 131 N. C. 254. Bias of witness, a physician, may be shown by fact that he made an examination of plaintiff as defendant's representative. Tex. & N. O. R. Co. v. Scott, 30 Tex. Civ. App. 496, 71 S. W. 26. A physician testifying in an action for injuries, as to a release admitting that he had been sent by defendant but denying that he is its physician may be asked if he had not as representative of the defendant frequently visited and examined persons hurt on defendant's line. Guckavan v. Lehigh Traction Co., 203 Pa. 521. As bearing on the credibility of a witness, it may be shown that a physician who testified for defendant as to plaintiff's condition was paid to make the examination to qualify as a witness. Allen B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818. It was proper to ask physicians, introduced by defendant, sued for injuries, by whom they were sent to examine plaintiff and by whom they were paid. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087.

63. Interference with witnesses. Sapp v. State [Tex. Cr. App.] 77 S. W. 456. Solicited persons not to go on defendant's bond. People v. Row [Mich.] 98 N. W. 13. It is proper, as indicating interest and affecting credibility, to ask a witness whether he contributed to the absence of witnesses who had previously testified for the state. Seaborn v. Com., 25 Ky. L. R. 2203, 80 S. W. 223.

64. People v. Glennon, 175 N. Y. 45, 67 N. E. 125.

65. State v. Stevens [S. D.] 92 N. W. 420.

66. Chicago & N. W. R. Co. v. De Clow [C. C. A.] 124 Fed. 142; Lowe v. State [Wis.] 96 N. W. 417; Schilling v. Smith, 76 App. Div. [N. Y.] 464, 12 N. Y. Ann. Cas. 99; Brunnemer v. Cook & Bernheimer Co., 89 App. Div. [N. Y.] 406; Powers v. Com., 24 Ky. L. R. 1007, 1186, 70 S. W. 644, 1050; Miller v. State [Tex. Cr. App.] 72 S. W. 996; Locklin v. State [Tex. Cr. App.] 75 S. W. 305; Jenkins v. State [Tex. Cr. App.] 75 S. W. 312; Shain Packing Co. v. Burrus [Tex. Civ. App.] 75 S. W. 838; State v. Blitz, 171 Mo. 530, 71 S. W. 1027; Hannon v. St. Louis Transit Co., 102 Mo. App. 216, 77 S. W. 158; Bernard v. Guidry, 109 La. 451; State v. Broadbent, 27 Mont. 342,

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of impeachment solely.[67] The laws of some states allow a party producing a witness to prove that he has made at other times statements inconsistent with his present testimony, but before doing so, the witness' attention must be called to such statements, and if he admits making them, he must be allowed to explain them.[68]

The statements admissible for this purpose include inconsistent written statements,[69] even unsigned[70] or signed with a reservation,[71] of which secondary proof is admitted as in other cases,[72] also testimony given on a previous trial[73] or on

71 Pac. 1; Black v. Rocky Mountain Bell Tel. Co., 26 Utah, 451, 73 Pac. 514; Michener v. Fransham [Mont.] 74 Pac. 448; Thomas v. Northwestern Mut. Life Ins. Co., 142 Cal. 79, 75 Pac. 665. Falsity of statement as to identity may be shown. People v. McDonald [Mich.] 94 N. W. 1064. A declaration of a voter as to his place of residence, made after the election, is admissible to impeach his testimony in an election contest. Bailey v. Fly [Tex. Civ. App.] 80 S. W. 675. Witness having testified that defendant had no interest in certain property, evidence of an attempted compromise with him in regard to such interest was admissible as going to the credibility of the witness. Hughes v. Rowan, 27 Mont. 500, 71 Pac. 764. Where a witness in an action for injuries caused by an alleged defect in the highway testified that he had driven slowly and carefully, it was proper to admit evidence that he had stated to others that he was driving fast. Guertin v. Hudson, 71 N. H. 505. Declarations of the maker of a note tending to support the defense of accommodation indorser are admissible to contradict the maker as a witness. Union Trust Co. v. Leighton, 83 App. Div. [N. Y.] 568. A witness stating on his direct examination that he had not sued for money lost in gambling could be asked if he had not stated to another person that he had been advised to wait for six months and then sue in plaintiff's name, as showing his interest and allowing contradiction if answered in the negative. Kizer v. Walden, 198 Ill. 274, 65 N. E. 116. On prosecution for sale of intoxicants to minor, the testimony of the father as to the age of his son may be impeached by showing that he had told others that his age was different from that testified to. People v. Werner, 174 N. Y. 132, 66 N. E. 667. A father testifying that his son accused of homicide was insane may be contradicted by evidence of statements to the mother of deceased at time of homicide that his son was a bad, unruly boy. Cox v. Com., 24 Ky. L. R. 680, 69 S. W. 799. As a contradiction of the engineer's evidence that he thought deceased was not on bridge, it may be proved that the next day after the accident he stated that he saw deceased in the perilous position, but thought he would get out of the way. Gulf, C. & S. F. R. Co. v. Brown [Tex. Civ. App.] 76 S. W. 794.

On failure of a witness to testify as expected, the party calling him may not prove by third persons that witness had told them that he would testify to such facts. Howe v. Skidmore, 24 Ky. L. R. 2043, 72 S. W. 792. Where a witness called by a party has simply failed to testify to all that the party expected, but has given no testimony against him, it is not permissible for the party calling him to prove that such witness had previously made statements which if sworn to at the trial would tend to make out his case. People v. Creeks, 141 Cal. 529, 75 Pac. 101.

67. Durham v. State [Tex. Cr. App.] 76 S. W. 563; Alabama Great Southern R. Co. v. Brooks, 135 Ala. 401. Not as substantive evidence of the facts. Fuqua v. Com., 24 Ky. L. R. 2204, 73 S. W. 782. Statements of an inculpatory character made by accused while under arrest are not admissible, not being offered for purposes of impeachment. Parks v. State [Tex. Cr. App.] 79 S. W. 301.

The jury should be so instructed. Owens v. Jenkins, 25 Ky. L. R. 1567, 78 S. W. 212.

68. Rev. St. 1899, § 3685. Horn v. State [Wyo.] 73 Pac. 705.

69. Hanlon v. Ehrich, 80 App. Div. [N. Y.] 359; Id., 86 App. Div. [N. Y.] 441; Deutschmann v. Third Ave. R. Co., 87 App. Div. [N. Y.] 503; Illinois Cent. R. Co. v. Wade, 206 Ill. 523, 69 N. E. 565. Letters. Brace v. St. Paul City R. Co., 87 Minn. 292, 91 N. W. 1099; Florida Cent. & P. R. Co. v. Mooney [Fla.] 33 So. 1010; St. Louis S. W. R. Co. v. Patterson [Tex. Civ. App.] 73 S. W. 937.

70. One denying that he had asked an extension of a note may be contradicted by a paper brought by him to the payee asking an extension, though not signed by any one. Faseler v. Kothman [Tex. Civ. App.] 70 S. W. 321.

71. A statement is not rendered inadmissible after admission as to signature by the fact that witness states that there was a mistake in the statement of which he spoke at the time of signing. Illinois Cent. R. Co. v. Wade, 206 Ill. 523, 69 N. E. 565.

72. On a prosecution for larceny, it may be shown as affecting credibility of prosecuting witness that he made a written statement to an insurance company that the articles charged as stolen were totally consumed by fire, where inability to procure the statement was shown. Lewandowski v. State [Tex. Cr. App.] 72 S. W. 594.

73. Willsen v. Metropolitan St. R. Co., 80 App. Div. [N. Y.] 93; State v. Simpson, 133 N. C. 676; Clogston v. Martin, 182 Mass. 469, 65 N. E. 839; Gilliland v. R. G. Dun & Co., 136 Ala. 327. Documentary evidence as to the age of prosecutrix given in another proceeding, though not under oath, is admissible on a trial for rape on rebuttal for purposes of impeachment. Fosha v. Prosser [Wis.] 97 N. W. 924. A prosecutrix could be asked why she had previously given admittedly false testimony. People v. Payne, 131 Mich. 474, 91 N. W. 739. That a purchaser, in a suit for goods alleged to have been bought by his agent, denies the agency which he admitted on a former trial, will not warrant a peremptory instruction against him, but affects only his credibility. Pacific Biscuit Co. v. Dugger, 42 Or. 513, 70 Pac. 523. Where testimony is offered tending to show that the statements of a witness on

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the preliminary examination[74] or before the grand jury[75] or coroner,[76] and statements made as a part of a confession[77] or in affidavits.[78] The fact that he formerly claimed privilege and now testifies fully does not admit the former testimony.[79] The contradiction must relate to a relevant matter,[80] and must be a substantial contradiction.[81] A party may not be impeached as to a statement made by his witness in his absence.[82] One partner cannot be contradicted by a statement of another.[83]

A witness may be asked as to contradictory statements without specification as to time, place and person, this being required only where a foundation for impeachment is being laid.[84]

Foundation for proof of contradictory statement.—A proper predicate must

the retrial of a case were inconsistent with those made on first trial, testimony of other witnesses that there was no inconsistency is admissible. Court reporter testified as to inconsistency, bailiff and judge in rebuttal. State v. Houghton [Or.] 75 Pac. 887.

74. People v. Adams, 137 Cal. 580, 70 Pac. 662; Angling v. State, 137 Ala. 17. It may be shown that a witness testifying that defendant did the killing stated on the examining trial that he did not know who did the killing. Cecil v. State [Tex. Cr. App.] 72 S. W. 197. A witness may be examined as to discrepancies between testimony on trial and that given on preliminary examination without regard to the validity of the preliminary examination. People v. Leung Ock, 141 Cal. 223, 74 Pac. 936. For the purpose of impeaching a witness, his testimony on the commitment trial of one accused of a felony may be proved as well by a person who heard it, as by the notes or memoranda of the evidence taken by the court. McKinney v. Carmack, 119 Ga. 467.

75. Gibson v. State [Tex. Cr. App.] 77 S. W. 813; People v. Salisbury [Mich.] 96 N. W. 936. Where the prosecuting witness admitted that she had testified differently before the grand jury, the state was entitled to introduce her testimony before that body. Barnard v. State [Tex. Cr. App.] 73 S. W. 957. Under Cr. Code, § 113, a member of the grand jury may testify as to the testimony of a witness before that body for the purpose of contradicting testimony given on trial. Held proper after obtaining a denial by witness of the statement alleged to have been made before the grand jury. Dean v. Com., 25 Ky. L. R. 1876, 78 S. W. 1112.

76. Coroner's report of the substance of the testimony delivered before him at an inquest. McKinney v. Carmack, 119 Ga. 467. Where one jointly indicted testifies for defendant in a prosecution for homicide, it is proper to admit his testimony before the coroner. State v. Gatlin, 170 Mo. 354, 70 S. W. 885. The statements of witnesses at a coroner's inquest are admissible for purposes of contradiction, though the coroner was not legally authorized to hold the inquest. State v. Dixon, 131 N. C. 808.

77. In a prosecution for homicide, the state may cross-examine defendant as to statements made by him as to shooting at another as part of his confession of his killing deceased and to contradict him for the purpose of affecting his credibility. Horn v. State [Wyo] 73 Pac. 705. Where defendant takes stand in his own behalf, he may be asked as to statements made by him, though the statement referred to is a confession not voluntarily made. Smith v. State, 137 Ala. 22.

78. Affidavit made by a party's attorney. In re Townsend's Estate [Iowa] 97 N. W. 1103. As testing credibility of a witness in bankruptcy proceedings, affidavits made by the party a short time before a preference are admissible. Benedict v. Deshel, 77 App. Div. [N. Y.] 276, 13 N. Y. Ann. Cas. 240. An affidavit made by plaintiff in another action, containing statements tending to contradict the testimony given by her on the trial of the case, are admissible. Yoki v. First State Bank, 87 Minn. 295, 91 N. W. 1101.

79. Where, in a former action, defendant refused to answer questions in a deposition on the ground that it might incriminate him, but on the trial of a later action testified fully and there was nothing in his evidence which would incriminate him in the slightest degree, the deposition was held inadmissible for the purposes of impeachment. Tennent Shoe Co. v. Birdseye [Mo. App.] 78 S. W. 1036.

80. Jennings v. Rooney, 183 Mass. 577, 67 N. E. 665; Barton v. Bruley, 119 Wis. 326, 96 N. W. 815. On question whether lessee after failure of lessor to repair had retained possession and he had denied putting up a "To let" card signed by his own name; it was proper to prove by other witnesses that he did put up such sign. Lurie v. Levy, 86 N. Y. Supp. 174.

81. State v. Gallehugh, 89 Minn. 212, 94 N. W. 723. That a witness stated that he was not "armed" with a pocket knife does not warrant impeachment by asking him as to an alleged remark made after an assault that if he had been armed with a gun instead of a knife he would have acted differently, as having a pocket knife in one's possession is not equivalent to being "armed" therewith. State v. McCann, 43 Or. 155, 72 Pac. 137. Where it is claimed that an affidavit made by a witness contained statements contradictory to his testimony, but such affidavit contains other statements by other witnesses and about which they are not examined, the affidavit is inadmissible. Leggett v. Watertown, 86 N. Y. Supp. 982.

82. Bailey v. Seattle & R. R. Co., 32 Wash. 640, 73 Pac. 679.

83. Where partner has given a construction of a written instrument, a letter of another partner expressing another view is inadmissible for purposes of contradiction. Owen v. Rothermel, 21 Pa. Super. Ct. 561.

84. State v. Burrell, 27 Mont. 282, 70 Pac. 982.

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be laid before testimony can be introduced impeaching a witness by showing previous contradictory or inconsistent statements,[85] unless the matter to be contradicted is contained in the affidavit of an absent witness.[86] The witness on cross-examination may be asked as to contradictory statements for the purpose of laying the foundation for introduction of the person whom the statement was made,[87] and may be recalled therefor.[88] The witness must have his attention particularly directed to the circumstances in such a way as to give him a full opportunity for explanation[89] by asking him whether he has not said or done what it is proposed to prove, specifying the particulars of time, place and person,[90] and he must be given an opportunity to explain.[91] This rule applies to witness whose testimony is taken by deposition.[92] Where a witness denied making statements in an alleged affidavit sworn to by him, the affidavit was not admissible without further proof that he made the statement.[93] Perfect precision as to the circumstances attending the former contradictory statement is not required.[94] The question must be calculated to elicit a clear contradiction.[95] In Pennsylvania[96] and

85. Alford v. State [Fla.] 36 So. 436.

86. Where a statute permits the use of affidavits as the testimony of an absent witness, and provides that the opposite party may prove any contradictory statements made by the witnesses in relation to the matter in issue, evidence of such contradictory statements is admissible, though no predicate for the impeachment of the absent witness can be laid [Rev. St. 1899, § 637]. Nagel v. St. Louis Transit Co. [Mo. App.] 79 S. W. 502.

87. Harris v. Com., 25 Ky. L. R. 297, 74 S. W. 1044; Cogdell v. State [Tex. Cr. App.] 74 S. W. 311; Montgomery St. Ry. v. Hastings, 138 Ala. 432. On cross-examination of defendant charged with larceny of cattle, his possession of which he explained by purchase for a large sum of money from a stranger, it was material on cross-examination to ask him for purposes of impeachment whether he had not stated on the evening in question that he only had 75 cents. State v. Carter, 121 Iowa, 135, 96 N. W. 710.

88. People v. Glover, 141 Cal. 233, 74 Pac. 745.

89. Kelly v. Stewart, 93 Mo. App. 47. In laying the foundation for impeachment by showing contradictory statement out of court, the witness may be asked whether in making the statement he did not detail a conversation with a third person by reason whereof he claimed to remember the facts stated; and if he denies the whole, proof may be made not only of the statement itself but of the reason he gave for remembering the fact in controversy. Barton v. Shull [Neb.] 97 N. W. 292.

90. Joy v. Liverpool, L. & G. Ins. Co. [Tex. Civ. App.] 74 S. W. 822; Nagel v. St Louis Transit Co. [Mo. App.] 79 S. W. 502; State v. Deal, 41 Or. 437, 70 Pac. 532; Houston & T. C. R. Co. v. Harris, 30 Tex. Civ. App. 179, 70 S. W. 235; Dunafon v. Barber [Neb.] 92 N. W. 198; Barclay v. Com., 25 Ky. L. R. 462, 76 S. W. 4; Culver v. Smith, 131 Mich. 359, 91 N. W. 608; People v. Glover, 141 Cal. 233, 74 Pac. 745. The question should fix the time of the alleged conversation and designate the persons present. Tague v. John Caplice Co., 28 Mont. 51, 72 Pac. 297.

91. Failure to testify as on a former trial. Merrell v. State [Tex. Cr. App.] 70 S. W. 979. A witness may be permitted to explain former contradictory statements, where the explanation does not involve a personal transaction with a decedent. Stirling v. Kelley, 77 App. Div. [N. Y.] 621. Where an affidavit concerning the falsity of his testimony is produced on cross-examination, the witness may explain the circumstances under which the affidavit was made. State v. Howard, 43 Or. 166, 72 Pac. 880. A witness confronted with a contradictory statement may on redirect testify that the statement was untrue. People v. Glover, 141 Cal. 233, 74 Pac. 745. In determining credibility of party suing for injuries on account of difference between story at hospital and testimony on trial, the jury may consider his mental condition at the hospital as affected by the pain he was enduring. Enright v. Pittsburg Junction R. Co., 204 Pa. 543. Where an affidavit made by a party's attorney is admitted to impeach the party, the court should allow evidence in rebuttal that the party did not know what was in the affidavit and that it was made in his absence. In re Townsend's Estate [Iowa] 97 N. W. 1103.

92. A witness testifying by deposition can be impeached by proof of contradictory statements only where attention is called thereto and an opportunity given for explanation. Brown v. Gillett, 38 Wash. 264, 74 Pac. 886.

93. Terry v. State [Tex. Cr. App.] 72 S. W. 382.

94. Brown v. State [Fla.] 35 So. 32; State v. Gray, 43 Or. 446, 74 Pac. 927; Morin v. Robarge [Mich.] 93 N. W. 886. Predicate sufficient where a witness in a prosecution having testified as to friendly relations between the parties was asked on cross-examination if she did not have a conversation with a named person, in which she stated that threats were made by accused, and answered "No." Connell v. State [Tex. Cr. App.] 75 S. W. 512.

95. McCoy v. Munro, 76 App. Div. [N. Y.] 435. Predicate insufficient where physician, asked as to an injury, stated that he could not state positively that a certain injury amounted to a fracture because he did not make a thorough examination, so as to allow proof of a statement of opinion at about the time of the examination. Missouri, K. & T. R. Co. v. Criswell [Tex. Civ. App.] 72 S. W. 388.

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Massachusetts, the practice allows evidence to contradict the testimony of a witness called by the adverse party as to a conversation without first calling the attention of the former to the conversation.[97] A party is not deprived of the right to impeach by reason of equivocal answers to questions,[98] or because the witness stated that there were more persons present than designated in the question,[99] or by slight difference as to date,[1] or by failure to recollect a statement.[2] In the latter case the question put to the witness to show such statement should be identical or at least substantially identical with the original question.[3] A witness may testify as to a contradictory conversation, though he did not hear all of the conversation.[4]

Where it is sought to prove testimony on former trial, witness may be asked if he has not on a previous trial of the same case made a particular statement as a witness contradictory to his present testimony.[5] The transcript of evidence on former trial introduced to contradict witness is not admissible where not certified to contain all the shorthand notes of the evidence of such witness as required by statute.[6] Statements of accused taken under oath contrary to statute may not be referred to by prosecutor on trial to impeach his testimony.[7] An affidavit made by a witness after testifying at a preliminary examination that material parts of his testimony were false is inadmissible to impeach his deposition taken at such preliminary examination.[8] The state may not read an affidavit for continuance to impeach one of affiant's witnesses.[9]

The rule requiring that the attention of the witness should be specially called to the inconsistent statement does not apply to written statements.[10] A sufficient foundation is laid by showing contradictory paper to witness allowing him to inspect it and proving by himself or others the genuineness of the signature.[11] The writing may be offered in evidence with other testimony in the same behalf.[12] Statement may be introduced entire, the offerer not being required to select the pertinent portions.[13]

97. Discretionary. Shannon v. Castner, 21 Pa. Super. Ct. 294.

98. Sirk v. Emery, 184 Mass. 22, 67 N. E. 662.

99. Sheldon v. Bigelow, 118 Iowa, 586, 92 N. W. 701.

1. State v. Gray, 43 Or. 446, 74 Pac. 927. Impeaching evidence is not inadmissible by reason of witness fixing the date of the conversations a little earlier than fixed in the question to the witness sought to be impeached. State v. Crook, 133 N. C. 672.

2. Newman v. State [Tex. Cr. App.] 70 S. W. 951. That a witness does not remember having made statements out of court contradictory to his testimony will not prevent the admission of his contradictory statements. Pitman v. Holmes [Tex. Civ. App.] 78 S. W. 961. In a prosecution for murder, evidence of contradictory statements made by defendant may be shown on rebuttal, though incidentally tending to impeach defendant without a foundation having been laid, he having denied recollection. Keffer v. State [Wyo.] 73 Pac. 556.

3. Gormley v. Hartray, 105 Ill. App. 625.

4. Kelly v. State [Tex. Cr. App.] 71 S. W. 756.

5. Palmer v. Burleigh [Neb.] 93 N. W. 1049; McKinstry v. Collins [Vt.] 56 Atl. 985; Buckman v. Missouri, K. & T. R. Co., 100 Mo. App. 30, 73 S. W. 270. A witness may not be impeached by showing discrepancies between his testimony and the signed minutes of his testimony before the grand jury, unless his attention has been called thereto. State v. Phillips, 118 Iowa, 660, 92 N. W. 876.

6. Acts Gen. Assem. c. 9. Connell v. Connell, 119 Iowa, 602, 93 N. W. 582.

7. Code N. C. § 1145. State v. Parker, 132 N. C. 1014.

8. People v. Witty, 138 Cal. 576, 72 Pac. 177.

9. Wilburn v. State [Tex. Cr. App.] 77 S. W. 3.

10. Hanlon v. Ehrich, 80 App. Div. [N. Y.] 359.

11. Illinois Cent. R. Co. v. Wade, 206 Ill. 523, 69 N. E. 565; Daum v. North Jersey St. R. Co., 69 N. J. Law, 1. For purposes of contradiction, a statement may be shown witnesses testifying as to the value of services, and they may be asked if they did state that the charges were reasonable and the statement may then be introduced. McKnight v. Detroit & M. R. Co. [Mich.] 97 N. W. 772.

12. Illinois Cent. R. Co. v. Wade, 206 Ill. 523, 69 N. E. 565.

13. Hanlon v. Ehrich, 80 App. Div. [N. Y.] 359. The entire statements may be put before the witness, though including obscene language. People v. Glaze, 139 Cal. 154, 72 Pac. 965.

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The declarations of a party to the action against interest may be shown without calling his attention to the time and place of such declarations or the party to whom they were supposed to be made.[14]

The objection to impeaching testimony must be specific; general objections will not suffice,[15] and must be made at time of offer.[16]

(§ 6) *E. Corroboration and sustentation of witness.*—Where witness' reputation for truth had been attacked, testimony supporting his character[17] and corroborative of his evidence is admissible,[18] but not before.[19] Mere contradiction is insufficient to authorize admission of corroborative testimony.[20] Declarations of a witness out of court are not generally admissible to corroborate his testimony,[21]

14. Dunafon v. Barber [Neb.] 93 N. W. 198. When a party to the suit testifies as a witness, it is competent to ask him on cross-examination if he has not on a specified previous occasion made a particular contradictory statement or admission against his own interest. Palmer v. Burleigh [Neb.] 93 N. W. 1049.

15. Union Trust Co. v. Leighton, 83 App. Div. [N. Y.] 568; Illinois Cent. R. Co. v. Wade, 206 Ill. 523, 69 N. E. 565.

16. Weeks v. Hutchinson [Mich.] 97 N. W. 695.

17. Sheppard v. Love [Tex. Civ. App.] 71 S. W. 67; Fox v. Robbins [Tex. Civ. App.] 70 S. W. 597. Where a witness has been attacked by showing contradictory statements, the good character of witness for truth and veracity may be proved. Runnels v. State [Tex. Cr. App.] 77 S. W. 458. A witness sought to be impeached by previous contradictory statements may be sustained by proof of general good character, the effect of the evidence to be determined by the jury. Clark v. State, 117 Ga. 254.

18. Kipper v. State [Tex. Cr. App.] 77 S. W. 611. After cross-examination as to a former statement, the party calling witness may re-examine him as to the matter and introduce rebuttal evidence to support him. Martin's Adm'r v. Richmond, F. & P. R. Co., 101 Va. 406. Where a white man, prosecuted for killing a negro, testified that he went into the game which resulted in the homicide at decedent's request, it was competent to show that he had a reputation in the community as a man that gambled with negroes, as corroborating his testimony. Rogers v. State [Tex. Cr. App.] 71 S. W. 18. Evidence that maker was without financial standing is admissible to corroborate testimony of pledgee of note that he asked pledgor as to maker's residence and was told that he did not know and that he intended to take up the note. Coleman v. Lewis, 183 Mass. 435, 67 N. E. 603.

19. Morton v. State [Tex. Cr. App.] 71 S. W. 281. Where credibility of impeaching witnesses has not been assailed, it is proper to refuse proof of reputation of such witnesses. Fox v. Robbins [Tex. Civ. App.] 70 S. W. 597. Witness testifying to fact of writing certain figures on a counter delivery sheet cannot be corroborated by admission of sheet. Western Union Tel. Co. v. Christensen [Tex. Civ. App.] 73 S. W. 744. An unimpeached witness may not be corroborated by showing that he made the same statements at other times. Davis v. State [Tex. Cr. App.] 77 S. W. 451. In trover for sugar stolen by a clerk and sold to defendant where the clerk admitted the theft and sale and there was nothing to induce the belief that it was the property of the clerk, evidence of the clerk's plea of guilty to other thefts was incompetent to strengthen his testimony. Ball-Barnhart-Putman Co. v. Lane [Mich.] 97 N. W. 727.

20. Kipper v. State [Tex. Cr. App.] 77 S. W. 611. Proof of good reputation is not to be allowed simply because there were circumstances tending to cast doubts on some of the party's statements before the court. McCowen v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 73 S. W. 46. That parties had been contradicted on material issues did not authorize introduction of evidence to support their reputation for truth and veracity. White v. Epperson [Tex. Civ. App.] 73 S. W. 851.

21. State v. Levy, 90 Mo. App. 643. Where evidence of contradictory statements is offered to impeach a witness, it is not competent to offer in reply evidence that the witness has on other occasions made statements similar to what he testified in the cause. State v. McDaniel [S. C.] 47 S. E. 334. The testimony of a witness that he did a certain thing cannot be corroborated by the testimony of another to whom he previously declared his intention of doing it. Lincoln Nat. Bank v. Fischer-Hansen, 86 N. Y. Supp. 1093. It is not competent, for the purpose of sustaining a witness and showing that he was present and saw an occurrence, to prove that he afterwards told different persons that he was present and witnessed the occurrence. Atlanta, K. & N. R. Co. v. Strickland, 116 Ga. 439. Where witness made prior statements contradictory to those given on the trial, he could not be corroborated by evidence of harmonious statements thereafter while negotiating for release in consideration of turning state's evidence. Legere v. State [Tenn.] 77 S. W. 1059.

But see following: Where a witness is contradicted, it is proper to show that he made similar statements recently after the transaction in order to corroborate her evidence. Homicide, statements made three days after killing were shown in order to corroborate testimony given on trial. Lounder v. State [Tex. Cr. App.] 79 S. W. 552. Testimony of a witness that he had made statements to others of the same matters testified to by him on the trial were competent to corroborate him. Ratliff v. Ratliff, 131 N. C. 425. In probate proceedings, where a subscribing witness testified that executor, after executing the will, had given it to him with instructions to deliver it to the executrix, and other witnesses having testified that the witness had made previous statements that he knew nothing of a will,

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and particularly where made long after the occurrence.[22] Memoranda made by a witness may be introduced to corroborate witness' testimony.[23] Permitting the deposition of a witness to be read in evidence after such witness has testified on the trial is left very largely to the discretion of the trial court.[24] Evidence of counsel is admissible to corroborate client cross-examined as to failure to include an important allegation in original petition to rebut presumption of fabrication of evidence.[25] Where witnesses for defendant have testified that witnesses for the state had made contradictory statements after indictment and before that, the county attorney may testify that there was no variance between their testimony at the trial and that given before the grand jury.[26] An accomplice is sufficiently corroborated if the corroboration goes to the main fact, though he may be contradicted as to some details.[27] Where evidence corroborative of the testimony of accomplices is necessarily circumstantial, such evidence should be allowed to take as wide a range as is consistent with justice and the well recognized rules.[28] Evidence taken at the inquest cannot be used by defendant to corroborate his witnesses.[29]

§ 7. *Privileges of witnesses.*—The privilege of a witness to refuse to answer questions tending to incriminate him is secured by the fifth amendment to the Federal constitution, which provides that no one shall be compelled in a criminal case to be a witness against himself. Though the provision in the Federal constitution applies only to the Federal courts,[30] the same provision has been embodied in many of the state constitutions.[31] This privilege, guaranteed by the constitution is one which the legislature cannot invade or set aside.[32] The privilege is not invaded, however, by statutes compelling witnesses to answer such questions, where complete protection against prosecution for the crime in regard to which the testimony is given is afforded.[33] The Illinois anti-trust law, granting

the testimony of a justice to whom the subscribing witness had given the will before proceedings were instituted thereon, as to such fact and as to statements made to him at the time, were admissible to corroborate the subscribing witness. Dolan v. Meehan [Tex. Civ. App.] 80 S. W. 99.

23. Stirn v. Nelson, 65 Kan. 419, 70 Pac. 355.

23. Gross v. Scheel [Neb.] 93 N. W. 418.

24. For the purpose of sustaining witness. Wilson v. Wilson [Tex. Civ. App.] 79 S. W. 839.

25. Gulf, C. & S. F. R. Co. v. Garren, 96 Tex. 605, 74 S. W. 897.

26. Lee v. State [Tex. Cr. App.] 72 S. W. 195.

27. Locklin v. State [Tex. Cr. App.] 75 S. W. 305.

28. Howard v. Com., 25 Ky. L. R. 2213, 80 S. W. 211. Where the only persons claiming to have personal knowledge of defendant's guilt were accomplices, and the corroborating testimony was therefore necessarily circumstantial, it was not error to admit remote and fragmentary evidence as to statements by the accused, when another witness had already testified to similar statements. Id.

29. State v. Gilliam, 66 S. C. 419.

30. People v. Wyatt, 39 Misc. [N. Y.] 456; In re Briggs [N. C.] 47 S. E. 403.

31. Const. N. Y., art. 1, § 6. People v. O'Brien, 176 N. Y. 253, 68 N. E. 353. Under the Constitution of the United States and of most of the states, the accused in a criminal action cannot be compelled to testify against himself. People v. Shuler [Mich.] 98 N. W. 986.

32. New York statute, providing that liquor tax certificates should be forfeited on failure of the holder to file a verified answer to allegations in a proceeding for revocation thereof, held unconstitutional. In re Cullinan, 82 App. Div. [N. Y.] 445; Id., 40 Misc. [N. Y.] 423.

33. A statute providing that a witness shall not be excused from testifying in regard to any gaming by himself or others, but that such testimony shall not be used against him in any prosecution, penal or criminal, and that he shall be altogether pardoned for the offense does not violate a state constitutional provision that no person shall be compelled to give evidence against himself. In re Briggs [N. C.] 47 S. E. 403; State v. Morgan, 133 N. C. 743. The compulsory production of contracts in a proceeding before the interstate commerce commission does not infringe the constitutional guaranty as to self-incriminating evidence, because the statute in regard to such proceedings provides complete immunity from prosecution or forfeiture of estate. Construing act of Feb. 4, 1887, U. S. Comp. St. 1901, p. 3154. Interstate Commerce Com. v. Baird, 194 U. S. 25, 48 Law Ed. —. Rev. St. Wis. 1898, § 3228, providing that in creditors' suits against a corporation, the officers thereof may be compelled to testify, creates a rule of evidence to the end that a party guilty of fraud on creditors of the insolvent corporation may, when called to testify, be incapable of shielding himself by pleading the ordinary privi-

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immunity to witnesses testifying truthfully as to transactions, is not unconstitutional because not covering prosecution by another state nor because not granting immunity from prosecution under Federal laws.[34] A legislature has power to grant a pardon to one compelled by statute to testify against himself.[35] But any statutory protection short of absolute immunity from prosecution is insufficient.[36] One cannot claim the constitutional privilege until he has been sworn as a witness.[37] But whenever a party is under arrest for a violation of the law or is held by the authorities investigating a charge against him, the constitutional inhibition is operative.[38] The witness may usually himself be the judge as to the incriminating effect of evidence called for,[39] but where it is clear to the court that such evidence cannot possibly injure him, the witness will not be permitted to claim the privilege.[40] The refusal to testify must be on the ground that the evidence will tend to incriminate, to amount to a claim of the privilege, and the claim that the information sought may lead to the establishment of any facts in a proceeding against him is insufficient.[41] Good practice requires that a witness be instructed as to his right to decline to answer a question tending to incriminate him.[42] The privilege is available to all witnesses, and is not limited to parties.[43] It is a privilege personal to the witness,[44] and may by him be waived.[45] So, the accused waives the privilege by voluntarily taking the stand in his own behalf,[46] and he thus becomes subject to the rules of law regarding cross-examination, the same as other witnesses.[47] Such cross-examination is proper, even though the answers to questions tend to prove defendant guilty of a crime other than that for which he is on trial.[48] The constitutional guaranty not only protects one from being compelled to give direct evidence, but also from giving any circumstance or link in the chain of evidence which may tend to convict him of a crime.[49] The constitutional guaranty is violated by compelling one to be a witness against him-

lege of witnesses as to self-incriminating matters. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

34. Hurd's Rev. St. 1899, pp. 616, 617. People v. Butler St. F. & I. Co., 201 Ill. 236, 66 N. E. 349.

35. In re Briggs [N. C.] 47 S. E. 403.

36. Statute merely provided that evidence so taken could not be received against witness in any criminal investigation or proceeding. Held insufficient. People v. O'Brien, 81 App. Div. [N. Y.] 51; People v. O'Brien, 176 N. Y. 253, 68 N. E. 353.

37. U. S. v. Kimball, 117 Fed. 156. The accused is not compelled to be a witness against himself where gambling apparatus, seized by officers, is received in evidence. People v. Adams, 176 N. Y. 351, 68 N. E. 636.

38. Ex parte Sauls [Tex. Cr. App.] 78 S. W. 1073.

39. In re Kanter, 117 Fed. 356. Where the accused calls as a witness one jointly indicted with himself, and the witness announces that he has been indicted but not tried and claims his privilege from being required to give incriminating evidence against himself, he is properly excused from testifying. Howard v. Com., 25 Ky. L. R. 2213, 80 S. W. 211.

40. In re Kanter, 117 Fed. 356. In cross-examination of accused, testifying in his own behalf, for the purpose of impeaching him, he may be compelled to answer, where the answer he may give will not directly and certainly show infamy, or the commission of a public offense. Seaborn v. Com., 25 Ky. L. R. 2203, 80 S. W. 223.

41. Witness was charged with embezzlement. Ex parte Gfeller [Mo.] 77 S. W. 552.

42. Ivy v. State [Miss.] 36 So. 265.

43. It differs herein from statutes permitting defendants to testify in their own behalf, but providing that failure to so testify creates no presumption against them. U. S. v. Kimball, 117 Fed. 156.

44. Its denial is not error available to the accused. State v. Morgan, 133 N. C. 743.

45. A witness indicted for two crimes may waive his privilege and testify in regard to one, and decline to testify as to the other. Witness indicted for robbery and concealment of goods testified as to robbery, but refused to testify as to concealment of goods. People v. Loomis, 76 App. Div. [N. Y.] 243. Where it appears that the witness had legal advice before testifying before the grand jury, and there was no duress, the mere fact that they were summoned and that they testified does not show that they were "compelled," within the meaning of the constitutional provision. U. S. v. Kimball, 117 Fed. 156.

46. People v. Dupounce [Mich.] 94 N. W. 388.

47. State v. Melvern, 32 Wash. 7, 72 Pac. 489.

48. People v. Dupounce [Mich.] 94 N. W. 388.

49. State v. Gardiner, 88 Minn. 130, 92 N. W. 529; People v. O'Brien, 81 App. Div. [N. Y.] 51.

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self before the grand jury,[50] or by compelling him to produce books or records in a bankruptcy proceeding,[51] but not by the introduction of private papers seized under a search warrant,[52] or by the use of property of the accused to identify him.[53] Evidence given by a witness before a grand jury, in an investigation not based on a formal complaint or accusation, is not used against him in violation of law, though he be subsequently indicted.[54] The proper method of claiming protection from prosecution on testimony given in a case is by motion to quash the indictment.[55] A witness may refuse to answer questions tending to degrade or disgrace, unless they relate to relevant or material matters.[56] The privilege is personal to the witness and cannot be used by a party.[57] If the witness does not refuse to give an answer which will degrade him, it is in the discretion of the court to allow or refuse to allow him to answer.[58]

50. State v. Gardiner, 88 Minn. 130, 92 N. W. 529. One called before the grand jury to testify as to gaming is protected from prosecution under the Alabama laws, although another witness had previously testified to the same offense [Ala. Cr. Code, § 4805]. Sandwich v. State, 137 Ala. 85.

51. A bankrupt charged with crimes in a state court, relating to matters involved in bankruptcy proceedings, will not be compelled to furnish books of account or schedules, where he deposes that to do so would tend to incriminate him and make him a witness against himself. In re Kanter, 117 Fed. 356.

52. Self-incrimination of the accused is not effected by the introduction of private papers seized under a search warrant, he not being compelled to testify in regard thereto. Adams v. New York, 192 U. S. 585, 48 Law. Ed. —.

53. Accused gave his shoe to deputy and comparison with tracks in the snow was made and evidence thereof admitted. Thornton v. State, 117 Wis. 338, 93 N. W. 1107.

54. Construing Rev. St. U. S. § 860, declaring that evidence voluntarily given cannot be used against the witness in any criminal prosecution. U. S. v. Kimball, 117 Fed. 156.

55. Sandwich v. State, 137 Ala. 85. The affidavit on motion to quash an indictment, on the ground that defendant was compelled to be a witness against himself, need only allege the fact of such compulsion, without setting forth the testimony in detail. State v. Gardiner, 88 Minn. 130, 92 N. W. 529.

56, 57. State v. Prater, 52 W. Va. 182; State v. Hill, 52 W. Va. 296.

58. State v. Hill, 52 W. Va. 296.

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